FIRE SERVICE LAWS OF THE STATE OF NEW YORK

2021 EDITION

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New York Consolidated Law Service

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Representing the Volunteer Fire Service, both active and exempt, since 1872

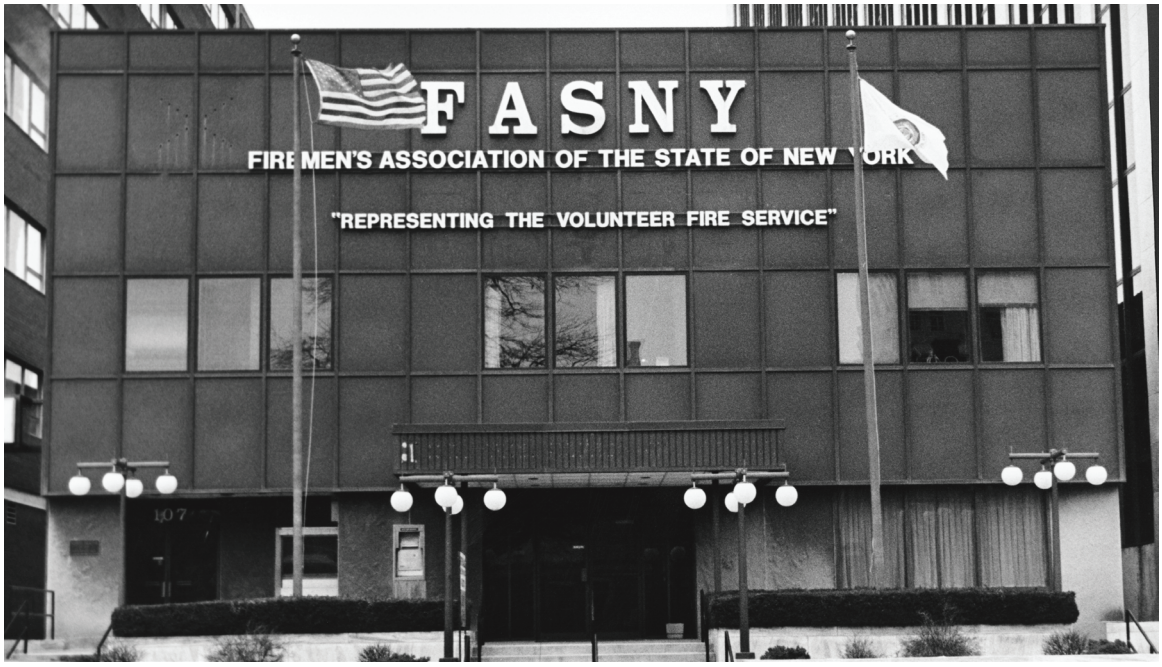

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PREFACE AND DEDICATION FOR 2021 EDITION

Dedication

This book is dedicated to the volunteer firefighters of New York State – past, present, and future – who unselfishly give of themselves in the service of others. The professionalism and unwavering commitment demonstrated by New York's volunteer firefighters in response to the COVID-19 pandemic is a model of selfless service to others worthy of admiration and emulation.

Preface

The 2021 edition of Fire Service Laws of the State of New York continues FASNY's longstanding commitment to educating and informing the volunteer fire service of New York State. We have added the following sections of law that volunteer firefighters and authorities having jurisdiction routinely encounter, including:

Executive Law § 159-d-1: Creation of a volunteer firefighter recruitment and retention task force.

General Municipal Law § 204-g: Restrictions on the use of firefighting foam containing PFAS chemicals.

General Municipal Law § 209-z: increased the revenue threshold triggering a mandatory independent audit of fire companies to $400,000.00 per year.

General Municipal Law § 217 (p): active firefighter can be credited with up to five points per month by the LOSAP plan sponsor as a result of the COVID-19 pandemic.

General Business Law § 391-u: Restrictions on the sale and use of firefighting equipment containing PFAS chemicals.

Labor Law § 27-c: Duty of public employers to develop operation plans in the event of certain declared public health emergencies ("Pandemic Preparedness Plan").

Labor Law § 740: Prohibition of retaliation by employer against an employee.

Town Law § 181-b: increased the revenue threshold triggering a mandatory independent audit of fire districts to $400,000.00 per year.

Volunteer Firefighters' Benefit Law § 11-c: extends presumptive coverage for lung illness through June 30, 2025.

Volunteer Firefighters' Benefit Law §61: extends presumptive coverage for heart illness through June 30, 2025.

Included with the 2021 edition of Fire Service Laws of the State of New York is a PDF format of the book with case notations. Please contact FASNY Member Services at (518) 434-0987 to obtain your PDF version if you did not obtain the PDF version at the time of purchase.

Please note that the information contained herein is a non-exhaustive compilation of New York statutes that generally apply to the volunteer fire service. This book does not establish an attorney-client relationship between the author and the reader. Matters addressed are for information purposes only and the reader should seek advice from competent local counsel in regard to taking action on any matters addressed herein.

On behalf of President John P. Farrell, First Vice President Edward Tase, Second Vice President Eugene Perry, and the Directors and Officers of the Firemen's Association of the State of New York, we trust that this edition of Fire Service Laws of the State of New York will help guide you in furtherance of your efforts to govern and deliver the high level of fire protection that New York has long enjoyed from its dedicated volunteers.

By: Timothy C. Hannigan, Esq., General Counsel
Firemen's Association of the State of New York, Inc.

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220, Amended	86	5

Local Finance Law	**Chap**	**Sec**
11.00 Amended	56	Part III, 1
23.00, Amended	157	1

Not-for-Profit Corporation Law	**Chap**	**Sec**
603, Amended	122	3
605, Amended	122	4

Penal Law	**Chap**	**Sec**
70.02, Amended	94	4
265.00, Amended	55	Part N, 1
265.00, Amended	150	1
265.00, Amended	150	3

Public Health Law	**Chap**	**Sec**
2782, Amended	312	2
2786, Amended	312	3

Public Officers Law	**Chap**	**Sec**
3, Amended	175	2
3, Amended	176	1
3, Amended	193	1
3, Amended	197	1
3, Amended	207	1
3, Amended	244	2
86, Amended	96	2
87, Amended	96	3
89, Amended	96	4

Tax Law	**Chap**	**Sec**
186-f, Amended	55	Part I, 1
606, Amended	59	Part B, 2
606, Amended	59	Part E, 1
606, Amended	59	Part F, 1

Town Law	**Chap**	**Sec**
91, Amended	128	1
181-b, Amended	262	2
202-c, Amended	291	4

Vehicle and Traffic Law	**Chap**	**Sec**
125, Amended	58	Part XX, 3
375, Amended	10	4
375, Amended	11	1
375, Amended	38	3
375, Amended	58	Part C, 1
375, Amended	58	Part C, 2
385, Amended	58	Part B, 2
385, Amended	58	Part E, 1
501, Amended	6	2
501, Amended	6	3
501-a, Amended	6	4
502, Amended	31	1
1144-a, Amended	58	Part C, 3
1202, Amended	206	1
1229-c, Amended	8	1
1229-c, Amended	8	2
1229-c, Amended	38	1
1229-c, Amended	38	2

Vehicle and Traffic Law	**Chap**	**Sec**
1229-c, Amended	136	1
1800, Amended	58	Part B, 1

Village Law	**Chap**	**Sec**
10-1006, Amended	185	1

AGRICULTURE AND MARKETS LAW

Article
24. Promotion of Agriculture and Domestic Arts; Agricultural Societies

HISTORY:
Add, L 1922, ch 48, eff April 1, 1922.

ARTICLE 24 Promotion of Agriculture and Domestic Arts; Agricultural Societies

Section
288. Gambling; obscene shows; state police enforcement

HISTORY:
Add, L 1922, ch 48, eff April 1, 1922.

§ 288. Gambling; obscene shows; state police enforcement

No immoral, lewd, obscene or indecent show or exhibition, and no gambling device or devices, instrument or contrivance in the operation of which bets are laid or wagers made, wheel of fortune, or game of chance, shall be permitted upon the grounds during the annual meeting, fair or exposition of any county agricultural society or town or other agricultural society, and it shall be the duty of the state police to enforce this prohibition. This prohibition shall not be construed to prohibit horse racing, tests or trials of skill, or raffles as defined in article nine-A of the general municipal law.

HISTORY:
Add, L 1928, ch 336, eff July 1, 1928; amd, L 1999, ch 233, § 1, eff July 13, 1999.

Prior Law: Former § 288, add, L 1922, ch 48; amd, L 1925, ch 40; repealed, L 1928, ch 336, eff July 1, 1928.

Agency Opinions

Analysis

1. In general
2. Horse races
3. Tests of skill

1. In general

Certificate that gambling devices or immoral shows have not knowingly been permitted at an agricultural fair is not conclusive upon commissioner, and that official may go behind such certificate to investigate and consider the facts. 1927 N.Y. Op. Att'y Gen. No. 183, 1927 N.Y. AG LEXIS 46.

2. Horse races

There is no provision in statutes of the state prohibiting the holding of horse races at which bookmaking and open betting are permitted at the state fair or at a county agricultural association fair. Provision in § 288 has no application to the registering or recording of bets on horse races. 1934 N.Y. Op. Att'y Gen. No. 324; 1934 N.Y. AG LEXIS 622.

3. Tests of skill

Games involving ring throwing at knives or canes are tests of skill. 1910 N.Y. Op. Att'y Gen. No. 754, 1910 N.Y. AG LEXIS 208.

ALCOHOLIC BEVERAGE CONTROL LAW

Article
8. General Provisions

HISTORY:
Add, L 1934, ch 478, eff July 1, 1934.

ARTICLE 8 General Provisions

Section
105. Provisions governing licensees to sell at retail for consumption off the premises
106. Provisions governing licensees to sell at retail for consumption on the premises.
128. Certain officials not to be interested in manufacture or sale of alcoholic beverages
128-a. Police officers allowed to work in licensed premises in certain cases
128-b. Police officers allowed to serve as an officer of a volunteer firefighters' organization

HISTORY:
Add, L 1934, ch 478, § 1, eff July 1, 1934.

§ 105. Provisions governing licensees to sell at retail for consumption off the premises

* * * * *

5. No retail licensee of liquor and/or wine for off-premises consumption shall keep upon the licensed premises any liquors and/or wines in any cask, barrel, keg, hogshead or other container, except in the original sealed package, as received from the manufacturer or wholesaler. Such containers shall have affixed thereto such labels as may be required by the rules of the liquor authority, together with all necessary federal revenue and New York state excise tax stamps, as required by law. Such containers shall not be opened nor its contents consumed on the premises where sold, except for the purpose of wine tasting or sampling by any person pursuant to authorization to conduct such a sampling or tasting pursuant to subdivision three of section seventy-six of this chapter except those to whom sales are prohibited in section sixty-five of this chapter. The provisions of this subdivision shall not prohibit a licensed winery or farm winery from selling or delivering wine to a consumer for off-premises consumption in a container not to exceed four liters in capacity that shall have a temporarily secured seal for purposes of removing the wine from the premises.

* * * * *

HISTORY:
Add, L 1934, ch 478, § 1, eff July 1, 1934; amd, L 1937, ch 518; L 1940, ch 72; L 1940, ch 551; L 1941, ch 113; L 1941, ch 393; L 1941, ch 566; L 1942, ch 591, eff April 30, 1942; L 1944, ch 205; L 1944, ch 621, eff April 7, 1944; L 1946, ch 261; L 1946, ch 549; L 1947, ch 440; L 1947, ch 520; L 1949, ch 563; L 1950, ch 462; L 1950, ch 679, eff April 15, 1950; L 1954, ch 235; L 1958, ch 927; L 1964, ch 531, §§ 13, 15, eff April 16, 1964; L 1966, ch 536, eff June 7, 1966; L 1968, ch 789, eff July 1, 1968; L 1969, ch 501, eff May 10, 1969; L 1969, ch 1155; L 1971, ch 220, eff June 3, 1971; L 1971, ch 235, eff May 11, 1971; L 1971, ch 781, eff June 25, 1971; L 1971, ch 985; L 1973, ch 793; L 1976, ch 415, eff June 21, 1976; L 1977, ch 605; L 1983, ch 819, § 4, eff Oct 28, 1983; L 1984, ch 500, §§ 2, 3; L 1984, ch 503, §§ 1, 2; L 1984, ch 628, § 3, eff Sept 1, 1984; L 1985, ch 48, § 2, eff June 16, 1985; L 1985, ch 662, § 1, eff July 28, 1985; L 1988, ch 64, § 19, eff April 24, 1988; L 1994, ch 491, § 1, eff Oct 24, 1994; L 2002, ch 85, § 1 (Part F), eff May 29, 2002; L 2003, ch 62, § 5 (Part W), eff May 15, 2003; L 2003, ch 63, § 1 (Part U), eff May 15, 2003; L 2004, ch 334, § 1, eff Sept 9, 2004; L 2007, ch 406, § 6, eff Nov 1, 2007; L 2011, ch 196, § 1, eff Jan 16, 2012; L 2016, ch 297, § 11, effective November 6, 2016.

Editor's Notes: Laws 1964, ch 531, § 14, provides as follows:

§ 14. Nothing contained in section thirteen of this act shall be construed as impairing or affecting the power of the state liquor authority to determine, in accordance with other provisions of the alcoholic beverage control law, whether public convenience and advantage will be promoted by the issuance of licenses to traffic in alcoholic beverages, the increase or decrease in the number thereof and the location of premises licensed thereby.

Laws 1988, ch 66, § 1, eff April 29, 1988, amended Laws 1984, ch 500, § 4, so as to delete an expiration date of May 1, 1988 previously applicable to the amendments of subs 5 and 11.

Laws 2003, ch 62, § 8 (Part W3), eff May 15, 2003, expires and repealed May 15, 2008, provides as follows:

§ 8. This act shall take effect immediately; provided, however, that section seven of this act shall expire and be deemed repealed 5 years after such date. (Amd, L 2008, ch 57, § 1 (Part NN-1), eff April 23, 2008.)

Laws 2004, ch 334, § 2, eff Sept 9, 2004, provides as follows:

§ 2. This act shall take effect on the thirtieth day after it shall have become a law, provided, however, that the amendments to subdivision 14 of section 105 of the alcoholic beverage control law made by section one of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith.

Laws 2008, ch 57, § 1 (Part NN-1), eff April 23, 2008, amended Laws 2003, ch 62, § 8 (Part W3), so as to delete an expiration provision applicable to the amendment of subdivision 14.

Laws 2011, ch 196, § 5, eff Jan 16, 2012 provides:

§ 5. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided that the state liquor authority may promulgate rules necessary for the implementation of this act immediately.

Amendment Notes The 2016 amendment by ch 297, § 11, substituted "subdivision three" for "subdivision two" in the third sentence of 5 and in the first sentence of 11; added the last sentence of 5; and added the second sentence of 11.

Repeal Notes: [1964, ch 531] Subdivisions four and four-a of section one hundred five of the alcoholic beverage control law, repealed by this act, prescribed the minimum distances between premises licensed to sell alcoholic beverages at retail for off-premises consumption.

[1976, ch 415] Subdivision nineteen of section one hundred five, repealed by this act, prohibited licensees authorized to sell liquor or beer at retail for consumption off the premises from advertising the price at which liquor or beer was sold or offered for sale.

[1983, ch 819] Subdivision thirteen of section one hundred five of the alcoholic beverage control law, which was repealed by this act, related to quantities of alcoholic beverages allowed to be sold by a licensee for off-premises consumption on any single occasion.

Notes to Decisions

Analysis

1. In general
2. Constitutional questions
3. Judicial review
4. Powers and duties of State Liquor Authority
5. —Discretionary powers
6. —Rational basis; "arbitrary and capricious"
4.5. — Inspections
7. Removal of licensed premises
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9. Entrances
10. Ownership interest
11. —Landlord and tenant
12. Prices
13. —Advertising prices
14. —Injunction of advertising
15. Location
16. —Measurement of distance
17. —"Same street"
18. —"In a business center on a main thoroughfare"
19. —Shopping malls
20. —Near other liquor stores
21. —Near schools
22. —Near places of worship
23. Punishment

1. In general

The term "premises," as used in § 105, subds 2 and 4, means a store and not a building. Pierse v Zimmerman, 255 A.D. 708, 5 N.Y.S.2d 703, 1938 N.Y. App. Div. LEXIS 4871 (N.Y. App. Div. 1938).

Plaintiff, on-premises licensee, had no standing to challenge validity of 9 NYCRR § 53.1(t), even though regulation impermissibly regulated off-premises licensees, since plaintiff was not aggrieved by regulation insofar as it affected off-premises licensees. Murray v State Liquor Authority, 139 A.D.2d 461, 527 N.Y.S.2d 384, 1988 N.Y. App. Div. LEXIS 4505 (N.Y. App. Div. 1st Dep't), app. dismissed, 72 N.Y.2d 951, 533 N.Y.S.2d 57, 529 N.E.2d 425, 1988 N.Y. LEXIS 2475 (N.Y. 1988), app. denied, 72 N.Y.2d 810, 534 N.Y.S.2d 938, 531 N.E.2d 658, 1988 N.Y. LEXIS 2919 (N.Y. 1988).

Suspension of off-premises liquor license for engaging in illegal wholesale transactions would be annulled and vacated where administrative law judge found that licensee had knowledge of illegal nature of sales on sole basis of fact that it sold much of its stock in case and multi-case lots to repeat customers and had at least one sales register specifically set aside for case lot sales; such evidence was insufficient to support finding of violation, and ignored fact that legislature had repealed former subdivision (13) of CLS Al Bev § 105, which had limited quantity of alcoholic beverages allowed to be sold by off-premises licensee on single occasion to 15 gallons or 5 cases. Merson v New York State Liquor Auth., 223 A.D.2d 436, 637 N.Y.S.2d 53, 1996 N.Y. App. Div. LEXIS 499 (N.Y. App. Div. 1st Dep't 1996).

2. Constitutional questions

The word "main" in the statute is not ambiguous and the statute is not unconstitutional. Evers v Dimino, 61 N.Y.S.2d 504, 186 Misc. 136, 1946 N.Y. Misc. LEXIS 2072 (N.Y. Sup. Ct. 1946).

Repeal of subd. 4 of this section by ch. 531 of the Laws of 1964 does not grant to the State Liquor Authority uncontrolled and unguided discretion in the licensing of retail liquor package stores, and such legislation is clearly constitutional. Martin v State Liquor Authority, 43 Misc. 2d 682, 252 N.Y.S.2d 365, 1964 N.Y. Misc. LEXIS 1528 (N.Y. Sup. Ct. 1964), aff'd, 15 N.Y.2d 707, 256 N.Y.S.2d 336, 204 N.E.2d 496, 1965 N.Y. LEXIS 1700 (N.Y. 1965).

3. Judicial review

On motion for reargument, appellate court would reverse its prior affirmance of judgment granted in favor of plaintiff, on-premises licensee, declaring that 9 NYCRR § 53.1(t) was invalid exercise of Liquor Authority's rule-making powers because Alcoholic Beverage Control Law does not delegate to Authority any power to regulate off-premises licensees, since court was unaware when appeal was heard that plaintiff had no standing to challenge rule as it applied to off-premises licensees; although Authority did not previously challenge plaintiff's standing, issue could be addressed for first time on appeal. Murray v State Liquor Authority, 139 A.D.2d 461, 527 N.Y.S.2d 384, 1988 N.Y. App. Div. LEXIS 4505 (N.Y. App. Div. 1st Dep't), app. dismissed, 72 N.Y.2d 951, 533 N.Y.S.2d 57, 529 N.E.2d 425, 1988 N.Y. LEXIS 2475 (N.Y. 1988), app. denied, 72 N.Y.2d 810, 534 N.Y.S.2d 938, 531 N.E.2d 658, 1988 N.Y. LEXIS 2919 (N.Y. 1988).

Substantial evidence standard of review in CLS CPLR § 7803(4) did not apply in proceeding to review denial of application for retail liquor license since administrative hearing required by CLS Al Bev § 54(3) merely affords applicant opportunity to submit evidence that it wishes State Liquor Authority to consider. Capizzi v New York State Div. of Alcoholic Bev. Control, 231 A.D.2d 881, 647 N.Y.S.2d 594, 1996 N.Y. App. Div. LEXIS 14299 (N.Y. App. Div. 4th Dep't 1996).

Substantial evidence supported determination that retail licensee violated CLS Al Bev §§ 100(1) and 105(12) by selling alcoholic beverages to other retail licensees for purpose of resale where receipts evidencing such sales were provided to investigator by 3 retail purchasers. 2 West 125th Liquors v New York State Liquor Auth., 217 A.D.2d 516, 630 N.Y.S.2d 299, 1995 N.Y. App. Div. LEXIS 8123 (N.Y. App. Div. 1st Dep't 1995).

The right to decide that a package store is on "main thoroughfare" is not confined exclusively to the State Liquor Authority but is also given to the Supreme Court. Evers v Dimino, 61 N.Y.S.2d 504, 186 Misc. 136, 1946 N.Y. Misc. LEXIS 2072 (N.Y. Sup. Ct. 1946).

License granted to a package liquor store on a street considered by the authority as "main thoroughfare," since there was basis for the authority's determination it was reasonable, and the court will not disturb same. Sussman v Nappy, 61 N.Y.S.2d 318, 186 Misc. 139, 1946 N.Y. Misc. LEXIS 2033 (N.Y. Sup. Ct. 1946).

A package liquor store operator has standing to attack the legality of a license issued to another operator on the ground that the issuance of the license to the second operator was in violation of sub 4 of this section. The Supreme Court has power to review the legality of the issuance of such a license. Reliable Wine & Liquor Shop, Inc. v Schimmelman, 115 N.Y.S.2d 474, 1952 N.Y. Misc. LEXIS 1697 (N.Y. Sup. Ct. 1952).

4. Powers and duties of State Liquor Authority

Where the State Liquor Authority denied an application to remove a licensed retail liquor package store from one location to another because the proposed new location was in a sparsely populated and undeveloped area and likewise because a modern shopping center was being constructed close to the proposed new location and the proposed removal would be to another borough, its determination should not have been annulled with a direction to approve the application, although some of the reasons stated for refusing it were untenable, and the matter was accordingly remitted to the authority for consideration of whether the application should be denied solely on the ground of public convenience. Kavanagh v Rohan, 13 A.D.2d 797, 215 N.Y.S.2d 639, 1961 N.Y. App. Div. LEXIS 11038 (N.Y. App. Div. 2d Dep't 1961).

In a proceeding for the review of a determination of the State Liquor Authority suspending a retail liquor license, it cannot justify its action on the ground of violations of subd 8 or 9 of the above statute where such violations were not relied upon until this appeal. Winfield Flynn, Ltd. v New York State Liquor Authority, 23 A.D.2d 745, 258 N.Y.S.2d 669, 1965 N.Y. App. Div. LEXIS 4392 (N.Y. App. Div. 1st Dep't 1965).

State Liquor Authority (SLA) did not have either express or implied authority to suspend license of small grocery store/newsstand to sell beer for off-premises consumption on basis that store housed electronic "Joker Poker" video game since (1) CLS Al Bev § 106(6) only prohibits gambling within premises licensed to sell alcoholic beverages for consumption on premises, and (2) CLS Al Bev §§ 2, 17, 114 and 118 did not confer implied authority on SLA to promulgate rules on its own. L. Newstand, Inc. v State Liquor Authority, 151 A.D.2d 483, 542 N.Y.S.2d 275, 1989 N.Y.

App. Div. LEXIS 7476 (N.Y. App. Div. 2d Dep't 1989), app. denied, 75 N.Y.2d 710, 556 N.Y.S.2d 532, 555 N.E.2d 929, 1990 N.Y. LEXIS 977 (N.Y. 1990).

Amendments to the ABC Law did not repeal, but on the contrary, reaffirmed "the power of the State Liquor Authority to determine, in accordance with other provisions of the Alcoholic Beverage Control Law, whether public convenience and advantage would well be promoted by the issuance of licenses to traffic in alcoholic beverages, the increase or decrease in the number thereof and the location of premises licensed thereby." McNulty v State Liquor Authority, 48 Misc. 2d 653, 266 N.Y.S.2d 32, 1965 N.Y. Misc. LEXIS 2042 (N.Y. Sup. Ct.), aff'd, 17 N.Y.2d 434, 266 N.Y.S.2d 522, 213 N.E.2d 802, 1965 N.Y. LEXIS 923 (N.Y. 1965).

Because the prize awarded by a game was selected at random by the machine, pursuant to N.Y. Penal Law § 225.00(1), the overall game was a mixed game of skill and chance; therefore, because the State Liquor Authority did not err in finding that the game was a gambling device under N.Y. Alco. Bev. Cont. Law §§ 105(22), 106(6), the developer was not entitled to N.Y. C.P.L.R. art. 78 relief. Matter of Pace-o-matic, Inc. v New York State Liq. Auth., 72 A.D.3d 1144, 898 N.Y.S.2d 295, 2010 N.Y. App. Div. LEXIS 2674 (N.Y. App. Div. 3d Dep't 2010).

5. —Discretionary powers

An application to the State Liquor Authority for transfer of a liquor store to a new location involves exercise of discretion, and the mere fact that petitioner cannot profitably conduct his business at the licensed premises is no ground for mandating the grant of such an application. Lenward Liquor Corp. v New York State Liquor Authority, 19 A.D.2d 612, 241 N.Y.S.2d 11, 1963 N.Y. App. Div. LEXIS 3524 (N.Y. App. Div. 1st Dep't 1963).

The crucial issue in a review of a determination of the authority is whether it acted arbitrarily and capriciously in disapproving the application for license for retail package liquor store. The finding of the authority was neither irrational or capacious where the evidence showed that the increase in the sales of the three nearby liquor stores amounted to five percent in the past year; that the area in question was not densely populated; that petitioner's business would have to draw from the same area; that the economy of the area was unlikely to be able to sustain an additional store, and that the area had a sufficient number of stores to serve the public. Hansen v State Liquor Authority, 77 A.D.2d 703, 430 N.Y.S.2d 395, 1980 N.Y. App. Div. LEXIS 12438 (N.Y. App. Div. 3d Dep't 1980), aff'd, 53 N.Y.2d 693, 439 N.Y.S.2d 109, 421 N.E.2d 504, 1981 N.Y. LEXIS 2342 (N.Y. 1981).

In considering an action to annul the determination of the Authority to issue licenses for three additional package stores in a town where petitioner presently operated his store, the petition will be dismissed where it does not spell out facts evidencing abuse of or failure to exercise discretion on the part of the Authority, and it is to be remembered that the statutory standard in considering applications for additional package liquor stores is that of "public convenience and advantage" and not "public necessity," and competition rather than monopoly is the present policy in retail liquor selling. C. Van Deusen, Inc. v New York State Liquor Authority, 47 Misc. 2d 1091, 263 N.Y.S.2d 980, 1965 N.Y. Misc. LEXIS 1505 (N.Y. Sup. Ct. 1965).

Though the liquor authorities are vested with considerable discretion and empowered to determine the location of premises licensed, their discretion is circumscribed by the law itself, viz., the 1500 foot provision. In re Greenfield, 32 N.Y.S.2d 471 (N.Y. Sup. Ct. 1941).

6. —Rational basis; "arbitrary and capricious"

The State Liquor Authority's "policy" of refusing every petition to remove a package liquor store to a "modern shopping center" was invalid for want of a definite meaning of "modern shopping center". And even if the term "modern shopping center" had a definite meaning, there was no warrant for a policy which flatly excluded liquor stores from all such centers without regard to the facts of each particular case. Swalbach v State Liquor Authority, 7 N.Y.2d 518, 200 N.Y.S.2d 1, 166 N.E.2d 811, 1960 N.Y. LEXIS 1361 (N.Y.), reh'g denied, 8 N.Y.2d 934, 1960 N.Y. LEXIS 1940 (N.Y. 1960).

The discretion of the state liquor authority in denying a new application for a license, or a renewal application, is broader than in revoking or suspending a license, and the court is limited to a determination of whether the record discloses circumstances which leave no possible scope for the reasonable exercise of that discretion, but even such broad discretion must rest on a foundation of rationality. Sled Hill Cafe, Inc. v Hostetter, 22 N.Y.2d 607, 294 N.Y.S.2d 497, 241 N.E.2d 714, 1968 N.Y. LEXIS 1096 (N.Y. 1968).

Denial of license by state liquor authority was arbitrary and capricious where based on no more than evidence that applicant knew three people who had police records concerning use of marijuana and there was no showing that applicant was a personal friend of either such persons but his association with them was solely that of a proprietor to a patron. Sled Hill Cafe, Inc. v Hostetter, 22 N.Y.2d 607, 294 N.Y.S.2d 497, 241 N.E.2d 714, 1968 N.Y. LEXIS 1096 (N.Y. 1968).

Where the holder of a retail store liquor license has been compelled to vacate the premises in which he has been doing business because of condemnation of the building and has been out of business for two years without being able to obtain a relocation permit, his petition for change of location for his licensed premises should be regarded as a hardship case and should not be denied except upon rational grounds. Camperlengo v State Liquor Authority, 16 A.D.2d 342, 228 N.Y.S.2d 115, 1962 N.Y. App. Div. LEXIS 9812 (N.Y. App. Div. 1st Dep't 1962).

The refusal of the State Liquor Authority to license a package store in an enclosed mall which contained 62 retail outlets selling merchandise of all descriptions was arbitrary and capricious, and its finding that the premises were not located on a public thoroughfare and that the physical layout of the proposed premises would not afford proper and adequate visibility for representatives of the Authority or enforcement authorities was without rational basis. Accordingly, an order instructing the Authority to grant the proposed license was affirmed. Alro Liquors, Inc. v New York State Liquor Authority, 29 A.D.2d 271, 288 N.Y.S.2d 179, 1968 N.Y. App. Div. LEXIS 4562 (N.Y. App. Div. 4th Dep't 1968), aff'd, 27 N.Y.2d 984, 318 N.Y.S.2d 742, 267 N.E.2d 478, 1970 N.Y. LEXIS 921 (N.Y. 1970).

It was neither arbitrary nor capricious to deny petitioner's application for retail liquor license on ground that premises were within 200 feet of building occupied exclusively as church (CLS Al Bev § 105(3)), even if bridal shower and birthday parties were held at church, since those secular activities were incidental and not inconsistent with use of building as church. Capizzi v New York State Div. of Alcoholic Bev. Control, 231 A.D.2d 881, 647 N.Y.S.2d 594, 1996 N.Y. App. Div. LEXIS 14299 (N.Y. App. Div. 4th Dep't 1996).

4.5. — Inspections

State Liquor Authority (SLA) properly found that a licensee violated the Alcoholic Beverage Control Law and Rules of State Liquor Authority by failing to permit an inspection and engaging in improper conduct because, while the SLA board erred in placing the case before a second ALJ rather than deciding the matter itself, the licensee could not limit the SLA's inspection of its books and records merely by unilaterally designating some of that material to be "personal" in nature, and there was substantial evidence in the record to support the board's determination sustaining the charges. Matter of Henry St. Liquors, Inc. v New York State Liq. Auth., 153 A.D.3d 1404, 62 N.Y.S.3d 417, 2017 N.Y. App. Div. LEXIS 6653 (N.Y. App. Div. 2d Dep't 2017).

7. Removal of licensed premises

Fact that the transfer of a liquor store license to a new location will increase competition is no ground for setting aside the Authority's decision to grant the removal application. Hub Wine & Liquor Co. v State Liquor Authority, 16 N.Y.2d 112, 262 N.Y.S.2d 457, 209 N.E.2d 788, 1965 N.Y. LEXIS 1189 (N.Y.), reh'g denied, 16 N.Y.2d 992, 1965 N.Y. LEXIS 2418 (N.Y. 1965).

Denial of petitioner's application to change location of his liquor store from a building in Manhattan which had been condemned by the city and must be vacated to a new location in Brooklyn on a predominantly business street, across from a public housing development, more than half a mile away from the nearest

existing liquor store and much more than 200 feet away from any church or school was so arbitrary and unreasonable as to require reversal with directions to grant the application. Camperlengo v State Liquor Authority, 16 A.D.2d 342, 228 N.Y.S.2d 115, 1962 N.Y. App. Div. LEXIS 9812 (N.Y. App. Div. 1st Dep't 1962).

To obtain permission for the removal of a package liquor store to a new location it must appear that public convenience and advantage will be promoted by the removal. Lenward Liquor Corp. v New York State Liquor Authority, 19 A.D.2d 612, 241 N.Y.S.2d 11, 1963 N.Y. App. Div. LEXIS 3524 (N.Y. App. Div. 1st Dep't 1963).

8. Transportation and delivery

A retailers license should not be revoked for failure to have his name, address and liquor license number on his vehicle where it fell off accidentally and caused no misunderstanding with third parties. 67 Liquor Shop, Inc. v O'Connell, 273 A.D. 68, 75 N.Y.S.2d 411, 1947 N.Y. App. Div. LEXIS 2931 (N.Y. App. Div. 1947).

Subds 8 and 9 of the above statute relate solely to the transportation of liquor in vehicles and hence would not apply to a single delivery of liquor by messenger. Winfield Flynn, Ltd. v New York State Liquor Authority, 23 A.D.2d 745, 258 N.Y.S.2d 669, 1965 N.Y. App. Div. LEXIS 4392 (N.Y. App. Div. 1st Dep't 1965).

Substantial evidence clearly supported State Liquor Authority's determination that liquor store violated CLS Al Bev § 105 in delivering alcoholic beverages for resale, despite less than compelling testimony, where it was fairly inferable that store owner knew that purchases by manager of nearby tavern under continuing arrangement with store owner were made for benefit of tavern, and that liquor was being provided for resale to tavern's patrons, given manager's testimony that purchases were made on those occasions when tavern did not have brands of alcohol on hand necessary to service its customers. Lane v State Liquor Authority, 127 A.D.2d 922, 511 N.Y.S.2d 978, 1987 N.Y. App. Div. LEXIS 43416 (N.Y. App. Div. 3d Dep't 1987).

9. Entrances

Package liquor store which faced the parking lot of a shopping center adjacent to a public thoroughfare, provided free access to the street and satisfied requirements of this section that the "principal entrance" of a package store should be from the street level and located on a public thoroughfare. Hardy v Meyer, 28 A.D.2d 587, 279 N.Y.S.2d 637, 1967 N.Y. App. Div. LEXIS 4201 (N.Y. App. Div. 3d Dep't 1967).

Under § 105, subd 2, it is unnecessary that the entrance be at actual street level if there is visibility into the store. Lipshitz v T & D Wine & Liquors, Inc., 75 N.Y.S.2d 321, 190 Misc. 261, 1947 N.Y. Misc. LEXIS 3397 (N.Y. Sup. Ct. 1947).

The provisions of this section requiring that retail liquor stores have an entrance from street level and be located on a public thoroughfare are irrelevant to a concern which sells liquor exclusively for delivery in a foreign country. Idlewild Bon-Voyage Liquor Corp. v Epstein, 212 F. Supp. 376, 1962 U.S. Dist. LEXIS 6027 (S.D.N.Y. 1962), aff'd, 377 U.S. 324, 84 S. Ct. 1293, 12 L. Ed. 2d 350, 1964 U.S. LEXIS 2170 (U.S. 1964).

10. Ownership interest

Determination which found petitioner guilty of permitting unauthorized person to have interest in petitioner annulled–petitioner's principal is sole officer, director, and shareholder of petitioner which is licensed to operate retail liquor store; State Liquor Authority (SLA) alleged that petitioner had violated Alcoholic Beverage Control Law § 105 (16) by permitting individual, although not officer, director or shareholder of petitioner, to hold interest in that licensee corporation–petitioner had employed subject individual as consultant concerning purchasing and merchandising of wine, and as salesperson; in exchange for working 8 to 10 hours per week, petitioner paid him $150 per week; while he worked for petitioner, individual held liquor license to operate his own retail store– Alcoholic Beverage Control Law § 105 (16) provides "No retail licensee to sell liquors and/or wines for off-premises consumption shall be interested . . . in any premises where liquors, wines or beer are manufactured or sold at wholesale or any other premises where liquor or wine is sold at retail for off-premises consumption"; mere evidence that individual worked as part-time employee of petitioner did not establish that he had direct or indirect interest in petitioner, so as to violate Alcoholic Beverage Control Law § 105 (16); there is no substantial evidence to support conclusion that principal of petitioner had any knowledge that while individual worked for petitioner he was principal in another licensed premises, and therefore, principal of petitioner did not abet violation of Alcoholic Beverage Control Law § 105 (16). Skies The Limit Spirits, Inc. v New York State Liquor Authority, 160 A.D.2d 534, 554 N.Y.S.2d 186, 1990 N.Y. App. Div. LEXIS 4542 (N.Y. App. Div. 1st Dep't), app. denied, 76 N.Y.2d 705, 559 N.Y.S.2d 984, 559 N.E.2d 678, 1990 N.Y. LEXIS 1961 (N.Y. 1990).

Evidence did not support Liquor Authority's determination that retail liquor store violated CLS Al Bev § 105(16) where store employed owner of another retail liquor store as part-time consultant and sales person; such employment did not constitute direct or indirect interest in employer store. Skies The Limit Spirits, Inc. v New York State Liquor Authority, 160 A.D.2d 534, 554 N.Y.S.2d 186, 1990 N.Y. App. Div. LEXIS 4542 (N.Y. App. Div. 1st Dep't), app. denied, 76 N.Y.2d 705, 559 N.Y.S.2d 984, 559 N.E.2d 678, 1990 N.Y. LEXIS 1961 (N.Y. 1990).

There is no prohibition, expressly or by application, in the Alcoholic Beverage Control Law regarding issuance of licenses to more than one member of a family, and the State Liquor Authority's refusal to grant a package store license on the ground that similar licenses had previously been granted to two other members of the same family was unjustified. Santillo v State Liquor Authority, 54 Misc. 2d 557, 283 N.Y.S.2d 151, 1967 N.Y. Misc. LEXIS 1378 (N.Y. Sup. Ct. 1967).

The fact that various otherwise independently owned and operated liquor package stores jointly placed newspaper advertising did not give any one of the stores any interest in the business or operations of any other joint advertiser in violation of subd 16 of this section. Rosenblum v State Liquor Authority, 54 Misc. 2d 617, 283 N.Y.S.2d 288, 1967 N.Y. Misc. LEXIS 1274 (N.Y. Sup. Ct. 1967).

11. —Landlord and tenant

The intent of the legislature, as gathered from the wording of this section, appears to be to prevent the concentration of revenues from retail liquor sales in a few hands, even though actual control of no one establishment might be involved, and where licensed petitioner owned 40 per cent of the voting stock and 38 per cent of the total outstanding stock in department store which owned all the stock in a licensed package store, and petitioner owned the same percentages of stock in a real estate corporation, the wholly owned subsidiary of which was the landlord of the licensed package store, such petitioner was properly denied a license to sell liquor for off-premises consumption, and the license was instead given to the package store. E. J. Korvette, Inc. v State Liquor Authority, 26 A.D.2d 439, 275 N.Y.S.2d 161, 1966 N.Y. App. Div. LEXIS 2929 (N.Y. App. Div. 1st Dep't 1966), aff'd, 21 N.Y.2d 766, 288 N.Y.S.2d 239, 235 N.E.2d 223, 1968 N.Y. LEXIS 1663 (N.Y. 1968).

The fact that a joint venturer having a one-fourth interest in the enterprise also had a one-fourth interest in land leased on a cash basis to a shopping plaza which had in turn leased one percent of the land area on a cash basis to a package liquor store, would not preclude the transfer of petitioner's retail off-premises liquor license to the joint venture. Jonas v New York State Liquor Authority, 29 A.D.2d 529, 285 N.Y.S.2d 641, 1967 N.Y. App. Div. LEXIS 2669 (N.Y. App. Div. 1st Dep't 1967).

Absent some clear showing to the contrary, the mere fact of a landlord-tenant relation does not suffice to establish that the landlord, who is a retail liquor store licensee, has a proscribed interest in the business of the tenant who also has, or seeks, a retail liquor store license. Tradesmen Wines & Liquors, Inc. v State Liquor Authority, 45 A.D.2d 1014, 358 N.Y.S.2d 76, 1974 N.Y. App. Div. LEXIS 4264 (N.Y. App. Div. 2d Dep't), aff'd, 35 N.Y.2d 824, 362 N.Y.S.2d 859, 321 N.E.2d 781, 1974 N.Y. LEXIS 1181 (N.Y. 1974).

Mere fact that landlord of applicant for retail liquor store license was a partnership, one of whose partners was an officer, director, and stockholder in corporation which held its own retail

liquor store license, was insufficient to show that landlord had a proscribed interest in the tenant's business, especially where rental payments were not to be based on percentage of sales. Tradesmen Wines & Liquors, Inc. v State Liquor Authority, 45 A.D.2d 1014, 358 N.Y.S.2d 76, 1974 N.Y. App. Div. LEXIS 4264 (N.Y. App. Div. 2d Dep't), aff'd, 35 N.Y.2d 824, 362 N.Y.S.2d 859, 321 N.E.2d 781, 1974 N.Y. LEXIS 1181 (N.Y. 1974).

Retail liquor store license could not be revoked on basis that one of the officers of corporation which held the license was a partner in partnership which was landlord of applicant for another liquor license. Tradesmen Wines & Liquors, Inc. v State Liquor Authority, 45 A.D.2d 1014, 358 N.Y.S.2d 76, 1974 N.Y. App. Div. LEXIS 4264 (N.Y. App. Div. 2d Dep't), aff'd, 35 N.Y.2d 824, 362 N.Y.S.2d 859, 321 N.E.2d 781, 1974 N.Y. LEXIS 1181 (N.Y. 1974).

Where the Alcoholic Beverage Control Board disapproved of petitioner's application for a "package store license" because petitioner's lease provided for a percentage of sales against a minimum rental and the landlord had leased another store to another applicant for a license upon a similar lease, the court held that petitioner's application should be remitted for further consideration since under such a lease arrangement, the landlord had no greater interest in the premises than if the lease had been on a monthly or yearly basis. The court noted that the landlord was not a "retail licensee" as referred to in § 105, nor was he a "person" having one or more licenses referred to in § 63 of the Alcoholic Beverage Control Law, and that the instant decision rendered it unnecessary to consider whether the refusal was arbitrary, capricious, or unreasonable. Fraser v Hostetter, 47 Misc. 2d 534, 262 N.Y.S.2d 891, 1965 N.Y. Misc. LEXIS 1646 (N.Y. Sup. Ct. 1965).

Fact that proposed landlord was also landlord of four other retail package liquor stores would not present grounds for denial of application to move retail liquor store license to new location where lease provided for a flat annual rental. Metcalf v State Liquor Authority, 57 Misc. 2d 476, 292 N.Y.S.2d 945, 1968 N.Y. Misc. LEXIS 1302 (N.Y. Sup. Ct. 1968), aff'd, 31 A.D.2d 890, 299 N.Y.S.2d 814, 1969 N.Y. App. Div. LEXIS 5109 (N.Y. App. Div. 4th Dep't 1969).

The fact that the landlord of an applicant for a restaurant liquor license was, at one time a licensee of a retail liquor store at a different location from the premises sought to be licensed and during the time of his ownership of that store he was warned of illegal practices and his license was suspended, has no relation whatsoever as to the merits of the petitioner's application and especially where no error in the answering papers nor the affidavits is there shown any proof that the relation between the landlord and the petitioner is other than that of landlord and tenant. Munoz v O'Connell, 107 N.Y.S.2d 345, 1951 N.Y. Misc. LEXIS 2354 (N.Y. Sup. Ct. 1951).

12. Prices

Evidence that sales were made above the OPA prices and entered on the books at the ceiling prices is sufficient to sustain a violation of this section. Glenram Wine & Liquor Corp. v O'Connell, 295 N.Y. 336, 67 N.E.2d 570, 295 N.Y. (N.Y.S.) 336, 1946 N.Y. LEXIS 823 (N.Y. 1946).

The state liquor authority is without power to cancel or refuse to renew the petitioner's license because of sales above prices fixed by OPA. Ilsa Wine & Liquor Corp. v O'Connell, 271 A.D. 58, 63 N.Y.S.2d 217, 1946 N.Y. App. Div. LEXIS 2693 (N.Y. App. Div. 1946).

Advertisements of the price of beer or liquor for consumption off the retail premises which recite that particular brands are "priced under" or "pay less than" a certain figure violate Alcoholic Beverage Control Law § 105(19). Rosenblum v Al's Liquors, Inc., 50 Misc. 2d 1036, 272 N.Y.S.2d 242, 1966 N.Y. Misc. LEXIS 1684 (N.Y. Sup. Ct.), aff'd, 27 A.D.2d 521, 276 N.Y.S.2d 846, 1966 N.Y. App. Div. LEXIS 2901 (N.Y. App. Div. 1st Dep't 1966).

13. —Advertising prices

The language of subdivision 19 of § 105 of the Alcoholic Beverage Law should not be read to impose greater restrictions on competition and on advertising of liquor than its words require. Its actual words prohibit advertising of "the price" and not comparative terms or selling arguments. Great Eastern Liquor Corp. v State Liquor Authority, 25 N.Y.2d 525, 307 N.Y.S.2d 441, 255 N.E.2d 704, 1969 N.Y. LEXIS 909 (N.Y. 1969).

Licensee did not publicize "the price" of liquor by newspaper advertisements relative to percentages off and to savings. Great Eastern Liquor Corp. v State Liquor Authority, 25 N.Y.2d 525, 307 N.Y.S.2d 441, 255 N.E.2d 704, 1969 N.Y. LEXIS 909 (N.Y. 1969).

The specific restriction on banners and signs on the licensed premises provided in Alcoholic Beverage Control Law § 105, subdivision 20 does not limit the unamended provisions of subdivision 19 as to advertising "by any other means", for example newspaper advertising which does not itself state "the price." Great Eastern Liquor Corp. v State Liquor Authority, 25 N.Y.2d 525, 307 N.Y.S.2d 441, 255 N.E.2d 704, 1969 N.Y. LEXIS 909 (N.Y. 1969).

Advertisement, by retail package liquor store, for sale of liquor "at wholesale" violated neither ABC Law § 105 nor ABC Law § 101-bb. Great Eastern Liquor Corp. v State Liquor Authority, 30 A.D.2d 307, 292 N.Y.S.2d 715, 1968 N.Y. App. Div. LEXIS 3456 (N.Y. App. Div. 2d Dep't 1968), aff'd, 25 N.Y.2d 525, 307 N.Y.S.2d 441, 255 N.E.2d 704, 1969 N.Y. LEXIS 909 (N.Y. 1969).

Newspaper advertisements by retail package store advertising liquor as "22 percent off," "save over 1.20 quart," "save more than 22 percent," did not violate provisions of ABC Law § 105, subd 19. Jacoves Liquors, Inc. v State Liquor Authority, 30 A.D.2d 820, 292 N.Y.S.2d 719, 1968 N.Y. App. Div. LEXIS 3463 (N.Y. App. Div. 2d Dep't 1968), aff'd, 25 N.Y.2d 525, 307 N.Y.S.2d 441, 255 N.E.2d 704, 1969 N.Y. LEXIS 909 (N.Y. 1969).

Advertisement of a whisky "at cost price" does not violate § 105 of the Alcoholic Beverage Law. Anchor Liquors, Inc. v State Liquor Authority, 31 A.D.2d 812, 297 N.Y.S.2d 805, 1969 N.Y. App. Div. LEXIS 4688 (N.Y. App. Div. 2d Dep't 1969), app. dismissed, 26 N.Y.2d 694, 308 N.Y.S.2d 861, 257 N.E.2d 43, 1970 N.Y. LEXIS 1643 (N.Y. 1970).

Advertisements as to savings without advertising actual price did not violate statute prohibiting the advertising of the price of liquor. Samjack Liquors, Inc. v New York State Liquor Authority, 32 A.D.2d 258, 301 N.Y.S.2d 101, 1969 N.Y. App. Div. LEXIS 3609 (N.Y. App. Div. 1st Dep't 1969).

The use of the words "the price" and "such price" in subd 19 of this section clearly indicates that it is the specific price of a liquor item which the licensee is prohibited from displaying or advertising except in the interior of the licensed premises, and before it can be found that advertising matter violates the provisions of subd 19 of this section it must be made to appear that by reading such matter the prospective retail purchaser is able to know the amount he will be required to pay for the particular item advertised. Where the most a prospective purchaser would know after reading advertising material was that he would have to pay a price below that mentioned in the advertisement, and that such undetermined amount was not less than the cost to the retailer, the advertising material did not violate subd 19 of this section. Cohen v State Liquor Authority, 52 Misc. 2d 111, 275 N.Y.S.2d 484, 1966 N.Y. Misc. LEXIS 1287 (N.Y. Sup. Ct. 1966).

The prohibitions of this section are confined and limited to and apply only on or adjacent to the licensed premises, so that respondent's advertisement of the price of liquor in local newspapers did not constitute a violation which could be enjoined. Retail Liquor Stores Ass'n v Hostetter, 52 Misc. 2d 947, 277 N.Y.S.2d 297, 1967 N.Y. Misc. LEXIS 1779 (N.Y. Sup. Ct. 1967).

14. —Injunction of advertising

Taxpayer who lived in town which was within the county in which newspapers containing advertising allegedly in violation of subd 19 of this section, circulated, together with non-newspaper advertising material allegedly also in violation of subd 19 of this section, was a resident taxpayer in the town in which the allegedly illegal activity was taking place in contravention of Alcoholic Beverage Control Law § 123. Cohen v State Liquor Authority, 52 Misc. 2d 111, 275 N.Y.S.2d 484, 1966 N.Y. Misc. LEXIS 1287 (N.Y. Sup. Ct. 1966).

Sections 123 and 124 do not provide for the granting of relief against the State Liquor Authority in a proceeding alleging

violation on the part of retailers of subd 19 of this section. Cohen v State Liquor Authority, 52 Misc. 2d 111, 275 N.Y.S.2d 484, 1966 N.Y. Misc. LEXIS 1287 (N.Y. Sup. Ct. 1966).

A retail liquor store association was "aggrieved party" entitled to seek a judgment directing the State Liquor Authority to enforce provisions of § 105(19) of the Alcoholic Beverage Control Law to prohibit respondent from advertising the price of liquor. Retail Liquor Stores Ass'n v Hostetter, 52 Misc. 2d 947, 277 N.Y.S.2d 297, 1967 N.Y. Misc. LEXIS 1779 (N.Y. Sup. Ct. 1967).

15. Location

Maintenance of required distances between licensed premises and churches and schools is mandatory, and the provisions relating thereto are to be liberally construed in favor of the schools and churches and strictly against license applicants. Tirdell v State Liquor Authority, 12 N.Y.2d 935, 238 N.Y.S.2d 513, 188 N.E.2d 788, 1963 N.Y. LEXIS 1454 (N.Y. 1963).

Though the liquor authorities are vested with considerable discretion and empowered to determine the location of premises licensed, their discretion is circumscribed by the law itself, viz., the 1500 foot provision. In re Greenfield, 32 N.Y.S.2d 471 (N.Y. Sup. Ct. 1941).

16. —Measurement of distance

In construing the provision prohibiting a liquor store within 200 feet of a school building, measurement must be made from the nearest entrance to building itself; gateway to playground is not "entrance." Thorne v Breese, 61 N.Y.S.2d 117, 186 Misc. 929, 1946 N.Y. Misc. LEXIS 1989 (N.Y. Sup. Ct. 1946).

Section 105, subd. 4 does not set out a definite method of measurement but it is reasonable that the measurement should be made in a straight line from store to store. In re Greenfield, 32 N.Y.S.2d 471 (N.Y. Sup. Ct. 1941).

The contention that only "safe-walking distances" should be used to measure the required 1500 foot distance would result in an inconclusive and unworkable procedure in the issuance of licenses. In re Greenfield, 32 N.Y.S.2d 471 (N.Y. Sup. Ct. 1941).

17. —"Same street"

Two premises located on a street which is known by different names at different places involved but is physically one thoroughfare are situated on the same street or avenue within the meaning of this section. Frank v Hub Liquors, Inc., 244 A.D. 496, 279 N.Y.S. 636, 1935 N.Y. App. Div. LEXIS 5856 (N.Y. App. Div.), aff'd, 268 N.Y. 688, 198 N.E. 559, 268 N.Y. (N.Y.S.) 688, 1935 N.Y. LEXIS 1153 (N.Y. 1935).

However where Park Avenue, by resolution of the board of aldermen of New York City, begins at Thirty-second street, No. 2 Park avenue is not "on the same street or avenue" as No. 398 Fourth avenue, which is between Twenty-seventh and Twenty-eighth streets, within the meaning of § 105, subd 4. The statute should be strictly construed since the penalties under §§ 112, 113, 126, 127 are severe for a violation thereof. Jacob Oberson, Inc. v Seyopp Corp., 251 A.D. 170, 295 N.Y.S. 346, 1937 N.Y. App. Div. LEXIS 6887 (N.Y. App. Div. 1937).

Statutory construction of § 105, subd 3, by Authority which viewed corner premises as being located on both of intersecting thoroughfares held reasonable. Motto v State Liquor Authority, 28 A.D.2d 1101, 284 N.Y.S.2d 323, 1967 N.Y. App. Div. LEXIS 3100 (N.Y. App. Div. 1st Dep't 1967).

The fact that two avenues intersect at place which, because of this and other geographical factors, was given the name of "square," does not change or obliterate either of the avenues which continue to run, as before, up to, through and beyond so-called "square," so that the premises of the respondent, which are operated as a retail liquor store and designated as No. 66 Westchester square but which are actually located on East Tremont avenue, are not "located within 1,500 feet of any premises holding a similar license on the same street or avenue," where the petitioner's premises, also operated as a liquor store and designated as No. 127a Westchester square are actually located on Westchester avenue. Weber v Chrisamalis, 30 N.Y.S.2d 874, 177 Misc. 772, 1941 N.Y. Misc. LEXIS 2333 (N.Y. Sup. Ct.), aff'd, 263 A.D. 806, 32 N.Y.S.2d 128, 1941 N.Y. App. Div. LEXIS 5057 (N.Y. App. Div. 1941).

Where the name of Woodlawn Road was changed so that one portion became Bainbridge Avenue and the other East 204th Street, said two portions became separate and distinct streets. Pincus v Kall, 29 N.Y.S.2d 586, 1941 N.Y. Misc. LEXIS 2121 (N.Y. Sup. Ct.), aff'd, 263 A.D. 807, 32 N.Y.S.2d 127, 1941 N.Y. App. Div. LEXIS 5063 (N.Y. App. Div. 1941).

The words "on the same street or avenue" as used in this subdivision cannot, as a result of its amendment, now be given their natural and logical meaning in the light of the express and specific provision that licensed premises "shall be deemed to be located solely on the street or avenue from which the public entrance to such premises is situated, notwithstanding that such premises are situated in a building at the intersection of two thoroughfares." Reliable Wine & Liquor Shop, Inc. v Schimmelman, 115 N.Y.S.2d 474, 1952 N.Y. Misc. LEXIS 1697 (N.Y. Sup. Ct. 1952).

18. —"In a business center on a main thoroughfare"

An order enjoining the operation of a liquor store and directing the liquor authority to cancel its license because the store was not located "in a business center on a main thoroughfare" must be reversed where the store is on a public thoroughfare as comprehended by the 1946 amendment of this section. Kramer v Pearson, 270 A.D. 908, 61 N.Y.S.2d 503, 1946 N.Y. App. Div. LEXIS 4591 (N.Y. App. Div. 1946).

The 1946 amendment of this section validates licenses previously issued, notwithstanding the provisions of Subdivision 2 of this section in effect prior to such amendment, inclusive of the phrase "in a business center on a main thoroughfare." The amendment therefore has rendered academic the construction of this latter phrase. Kramer v Pearson, 270 A.D. 908, 61 N.Y.S.2d 503, 1946 N.Y. App. Div. LEXIS 4591 (N.Y. App. Div. 1946).

The word "main" as used in this section is not mere surplusage and is used in its usual sense as defining a principal or chief thoroughfare and not as contended to distinguish between public streets and private ways or alleys. Evers v Flanagan, 61 N.Y.S.2d 496, 186 Misc. 101, 1945 N.Y. Misc. LEXIS 2730 (N.Y. Sup. Ct. 1945), rev'd, 270 A.D. 937, 62 N.Y.S.2d 591, 1946 N.Y. App. Div. LEXIS 4777 (N.Y. App. Div. 2d Dep't 1946).

Although the petitioner paid for a retail package liquor store license when the interpretation of "main thoroughfare" in the statute excluded side-street locations, he received the license subject to possible side-street competitors since the statutory language was unsettled. Santoro v Margolis, 61 N.Y.S.2d 320, 186 Misc. 169, 1946 N.Y. Misc. LEXIS 2034 (N.Y. Sup. Ct. 1946).

The term "business center" in the section which prohibits licensing of retail package liquor stores unless located "in a business center on a main thoroughfare" was construed by the State Liquor Authority to mean an area zoned for business; such practical construction was reasonable. Dobess Realty Corp. v Magid, 61 N.Y.S.2d 324, 186 Misc. 225, 1946 N.Y. Misc. LEXIS 2036 (N.Y. Sup. Ct. 1946).

"Main" as applied to thoroughfare was construed by the authority to mean a public passageway open at both ends; such construction was reasonable. Dobess Realty Corp. v Magid, 61 N.Y.S.2d 324, 186 Misc. 225, 1946 N.Y. Misc. LEXIS 2036 (N.Y. Sup. Ct. 1946).

A street need not be zoned entirely for business; it is sufficient if all side streets in this area are zoned for business for a short distance from the main thoroughfare. Dobess Realty Corp. v Magid, 61 N.Y.S.2d 324, 186 Misc. 225, 1946 N.Y. Misc. LEXIS 2036 (N.Y. Sup. Ct. 1946).

An application to restrain the State Liquor Authority from licensing a retail package liquor store denied where the authority properly found the store to be located "in a business center on a main thoroughfare;" a restrictive construction of the law is inconsistent with purpose thereof and with the practical construction by the authority. Platt v Shapiro, 61 N.Y.S.2d 323, 186 Misc. 297, 1946 N.Y. Misc. LEXIS 2035 (N.Y. Sup. Ct. 1946).

19. —Shopping malls

The State Liquor Authority's "policy" of refusing every petition to remove a package liquor store to a "modern shopping center" was invalid for want of a definite meaning of "modern shopping center". And even if the term "modern shopping center" had a

definite meaning, there was no warrant for a policy which flatly excluded liquor stores from all such centers without regard to the facts of each particular case. Swalbach v State Liquor Authority, 7 N.Y.2d 518, 200 N.Y.S.2d 1, 166 N.E.2d 811, 1960 N.Y. LEXIS 1361 (N.Y.), reh'g denied, 8 N.Y.2d 934, 1960 N.Y. LEXIS 1940 (N.Y. 1960).

Package liquor store which faced the parking lot of a shopping center adjacent to a public thoroughfare, provided free access to the street and satisfied requirements of this section that the "principal entrance" of a package store should be from the street level and located on a public thoroughfare. Hardy v Meyer, 28 A.D.2d 587, 279 N.Y.S.2d 637, 1967 N.Y. App. Div. LEXIS 4201 (N.Y. App. Div. 3d Dep't 1967).

The refusal of the State Liquor Authority to license a package store in an enclosed mall which contained 62 retail outlets selling merchandise of all descriptions was arbitrary and capricious, and its finding that the premises were not located on a public thoroughfare and that the physical layout of the proposed premises would not afford proper and adequate visibility for representatives of the Authority or enforcement authorities was without rational basis. Accordingly, an order instructing the Authority to grant the proposed license was affirmed. Alro Liquors, Inc. v New York State Liquor Authority, 29 A.D.2d 271, 288 N.Y.S.2d 179, 1968 N.Y. App. Div. LEXIS 4562 (N.Y. App. Div. 4th Dep't 1968), aff'd, 27 N.Y.2d 984, 318 N.Y.S.2d 742, 267 N.E.2d 478, 1970 N.Y. LEXIS 921 (N.Y. 1970).

An enclosed shopping center which is open to the general public between the hours of 6 a.m. and midnight is not materially different from an unenclosed shopping center and should be reasonably construed to be a "public thoroughfare" within the meaning of subdivision 2 of this section. Rochdale Mall Wines & Liquors, Inc. v State Liquor Authority, 29 A.D.2d 647, 286 N.Y.S.2d 559, 1968 N.Y. App. Div. LEXIS 4943 (N.Y. App. Div. 2d Dep't 1968), aff'd, 27 N.Y.2d 995, 318 N.Y.S.2d 747, 267 N.E.2d 482, 1970 N.Y. LEXIS 927 (N.Y. 1970).

Liquor store located in a fully enclosed mall shopping center which was locked between the hours of 12 midnight and 6 a.m. would nevertheless be considered to be located on a "public thoroughfare" within the meaning of subdivision 2 of this section since a shopping center which is open to the public between the hours of 6 a.m. and midnight is not materially different from an unenclosed shopping center. Rochdale Mall Wines & Liquors, Inc. v State Liquor Authority, 29 A.D.2d 647, 286 N.Y.S.2d 559, 1968 N.Y. App. Div. LEXIS 4943 (N.Y. App. Div. 2d Dep't 1968), aff'd, 27 N.Y.2d 995, 318 N.Y.S.2d 747, 267 N.E.2d 482, 1970 N.Y. LEXIS 927 (N.Y. 1970).

20. —Near other liquor stores

Issuance of licenses for the sale of liquor on premises one hundred and twenty-five feet apart was in violation of this section and may be enjoined in suit by taxpayer. O'Brien v Rozza, 271 N.Y. 545, 2 N.E.2d 687, 271 N.Y. (N.Y.S.) 545, 1936 N.Y. LEXIS 1276 (N.Y. 1936).

Section 105, subd. 4 prohibits the licensing of a store within 1,500 feet of a like store on the same street or avenue, but does not prohibit the licensing of a store within 1,500 feet of a like store on a different street or avenue. Pierse v Zimmerman, 255 A.D. 708, 5 N.Y.S.2d 703, 1938 N.Y. App. Div. LEXIS 4871 (N.Y. App. Div. 1938).

State Liquor Authority lacks jurisdiction to grant a license to a retail package liquor store which, but for an alteration placing the entrance on a side street, could not have been licensed since it was within 1,500 feet of an already licensed store situated on a main street; besides, a store, opening on a residential street, not "in a business center on a main thoroughfare." Kramer v Pearson, 61 N.Y.S.2d 501, 186 Misc. 134, 1946 N.Y. Misc. LEXIS 2071 (N.Y. Sup. Ct.), rev'd, 270 A.D. 908, 61 N.Y.S.2d 503, 1946 N.Y. App. Div. LEXIS 4591 (N.Y. App. Div. 1946).

Chapter 531, §§ 13 and 14 repealed § 105, subds 4 and 4[a], which had theretofore restricted the Authority from granting retail liquor store licenses within 1500 feet of each other in cities of one million or more. McNulty v State Liquor Authority, 48 Misc. 2d 653, 266 N.Y.S.2d 32, 1965 N.Y. Misc. LEXIS 2042 (N.Y. Sup. Ct.), aff'd, 17 N.Y.2d 434, 266 N.Y.S.2d 522, 213 N.E.2d 802, 1965 N.Y. LEXIS 923 (N.Y. 1965).

21. —Near schools

Where the State Liquor Authority was not advised at the time of granting a change of location permit to a liquor store to a place in the vicinity of a school building that certain exit doors of the school were located within the 200-foot limit, and granted the application because the main entrance to the school was more than 200 feet away, the transfer of location permit must be annulled when the true facts were brought to the attention of the Authority, the distance requirements being mandatory and not subject to exercise of administrative discretion. Tirdell v State Liquor Authority, 12 N.Y.2d 935, 238 N.Y.S.2d 513, 188 N.E.2d 788, 1963 N.Y. LEXIS 1454 (N.Y. 1963).

Subdivision 3 of this section, dealing with required distance between liquor stores and school buildings as measured in a straight line from the center of the "nearest entrance" to the school and the nearest entrance of the store premises, was intended to include exit doorways as well as entrance doorways of schools, where such exit doors are equipped with panic bolts and can be used at any time as an exit from the school. Tirdell v State Liquor Authority, 12 N.Y.2d 935, 238 N.Y.S.2d 513, 188 N.E.2d 788, 1963 N.Y. LEXIS 1454 (N.Y. 1963).

Refusal by the state liquor authority to grant petitioner a license for the operation of a liquor store within 200 feet from an entrance to a school does not entitle petitioner to a hearing as a matter of right. Millman v O'Connell, 275 A.D. 911, 90 N.Y.S.2d 277, 1949 N.Y. App. Div. LEXIS 5013 (N.Y. App. Div.), aff'd, 300 N.Y. 539, 89 N.E.2d 255, 300 N.Y. (N.Y.S.) 539, 1949 N.Y. LEXIS 1415 (N.Y. 1949).

Where, in connection with appellants' application for permission to move licensed premises to a new location, the State Liquor Authority was fully advised that the new location would be within the prohibited distance from two doors of a certain school, being so advised by the local board's recommendation for disapproval of the transfer, but nevertheless granted the application and permitted appellants to proceed with expensive alteration and improvement of the premises, the State Liquor Authority would not be permitted, thereafter, upon a false assertion that it was not aware of the situation, to reverse its determination. Tirdell v State Liquor Authority, 15 A.D.2d 773, 225 N.Y.S.2d 183, 1962 N.Y. App. Div. LEXIS 11208 (N.Y. App. Div. 1st Dep't 1962), aff'd, 12 N.Y.2d 935, 238 N.Y.S.2d 513, 188 N.E.2d 788, 1963 N.Y. LEXIS 1454 (N.Y. 1963).

A determination which disapproved petitioner's application for a retail liquor store license because the premises were within 200 feet of a school was reversed and the cause remanded for a determination de novo where the premises were not on the same street or avenue as the school, and the matter remitted to the Authority to hold a hearing on the question of whether public convenience and advantage would be served by approval of the application. Bubany v State Liquor Authority, 27 A.D.2d 752, 277 N.Y.S.2d 451, 1967 N.Y. App. Div. LEXIS 4755 (N.Y. App. Div. 2d Dep't 1967).

22. —Near places of worship

It did not violate equal protection to deny petitioner's application for retail liquor license on ground that premises were within 200 feet of building occupied exclusively as church (CLS Al Bev § 105(3)), even if there were other premises licensed to sell alcohol within proscribed area, since petitioner failed to show that those premises were licensed after date on which church acquired its building. Capizzi v New York State Div. of Alcoholic Bev. Control, 231 A.D.2d 881, 647 N.Y.S.2d 594, 1996 N.Y. App. Div. LEXIS 14299 (N.Y. App. Div. 4th Dep't 1996).

The State Liquor Authority was within its discretion in refusing to allow the relocation of a liquor license to a building within 200 feet of an empty lot on which a neighborhood church was in fact going to be constructed. Willmont Liquors, Inc. v Rohan, 2 Misc. 2d 768, 149 N.Y.S.2d 874, 1956 N.Y. Misc. LEXIS 2029 (N.Y. Sup. Ct. 1956).

State Liquor Authority's refusal to grant a package store license on the ground that its proposed location was approximately 450 feet distant from a church housed in a "store" mission,

without a congregation, and in a building used for other purposes and consequently not occupied exclusively as a school church was neither well founded nor reasonable. Santillo v State Liquor Authority, 54 Misc. 2d 557, 283 N.Y.S.2d 151, 1967 N.Y. Misc. LEXIS 1378 (N.Y. Sup. Ct. 1967).

23. Punishment

State Liquor Authority properly imposed penalties of (1) suspension of retail liquor store license for 40 days, 25 days to be served forthwith and 15 days to be deferred, (2) suspension of eating place beer license for 20 days, 15 days to be served forthwith and 5 days to be deferred, and (3) bond forfeiture of $1,000 each against store and eating place, following determination that owner of liquor store and fast food establishment had sold alcoholic beverages to minor, sold bottles of alcohol on credit, and delivered alcoholic beverages for resale; penalties were not excessive given breadth of violations and owner's record as licensee, which included several warnings and previously-imposed penalty for selling alcoholic beverages to minor. Lane v State Liquor Authority, 127 A.D.2d 922, 511 N.Y.S.2d 978, 1987 N.Y. App. Div. LEXIS 43416 (N.Y. App. Div. 3d Dep't 1987).

Penalty of license revocation and forfeiture of $1,000 bond, imposed on retail licensee that violated CLS Al Bev §§ 100(1) and 105(12) by selling alcoholic beverages to other retail licensees for purpose of resale, was excessive in view of technical nature of violation and fact that petitioner had never been charged with any other violation by any agency. 2 West 125th Liquors v New York State Liquor Auth., 217 A.D.2d 516, 630 N.Y.S.2d 299, 1995 N.Y. App. Div. LEXIS 8123 (N.Y. App. Div. 1st Dep't 1995).

Agency Opinions

Analysis

1. Days and hours
2. Entrances

1. Days and hours

The provision forbidding the sale of beverages when polls are open relates only to the two primary days and the day of general election and has no application to a town or village election. 1936 N.Y. Op. Att'y Gen. No. 147, 1936 N.Y. AG LEXIS 75.

The 1959 amendment of § 1 of Art. I of the Constitution, effective January 1, 1960, and implementing legislation (Chap. 684, Laws of 1959, and Chap. 1042, Laws of 1960), had no effect on the prohibitions found in §§ 105 and 106 of this law against sale of alcoholic beverages on primary day. 1960 N.Y. Op. Att'y Gen. No. 7, 1960 N.Y. AG LEXIS 1.

2. Entrances

The authority may require that the "entrances" to such premises must be from the street level. 1936 N.Y. Op. Att'y Gen. No. 144, 1936 N.Y. AG LEXIS 73.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 130.

Codes, Rules and Regulations:

Prohibited hours for retail sales. 9 NYCRR § 60.1.

Minimum consumer resale prices of wine. 9 NYCRR §§ 66.1–66.11.

Deliveries of alcoholic beverages. 9 NYCRR § 67.1, 67.2.

Brand signs and displays. 9 NYCRR §§ 83.1 et seq.

§ 106. Provisions governing licensees to sell at retail for consumption on the premises.

1. No retail license for on-premises consumption shall be granted for any premises, unless the applicant shall be the owner thereof, or shall be in possession of said premises under a lease, management agreement or other agreement giving the applicant control over the food and beverage at the premises, in writing, for a term not less than the license period except, however, that such license may thereafter be renewed without the requirement of a lease, management agreement or other agreement giving the applicant control over the food and beverage at the premises, as herein provided. This subdivision shall not apply to premises leased from government agencies, as defined under subdivision twelve-c of section three of this chapter; provided, however, that the appropriate administrator of such government agency provides some form of written documentation regarding the terms of occupancy under which the applicant is leasing said premises from the government agency for presentation to the state liquor authority at the time of the license application. Such documentation shall include the terms of occupancy between the applicant and the government agency, including, but not limited to, any short-term leasing agreements or written occupancy agreements.

2. (a) No retail licensee for on-premises consumption, except corporations operating railroad cars or aircraft being operated on regularly scheduled flights by a United States certificated airline or persons or corporations operating a hotel, as defined in subdivision fourteen of section three of this chapter, for exclusive use in the furnishing of room service in the manner prescribed by rule or regulation of the state liquor authority, shall keep upon the licensed premises any liquors and/or wines in any cask, barrel, keg, hogshead or other container, except in the original sealed package as received from the manufacturer or wholesaler. Such containers shall have affixed thereto such labels as may be required by the rules of the liquor authority, together with all necessary federal revenue and New York state excise stamps as required by law. No retail licensee for on-premises consumption shall reuse, refill, tamper with, intentionally adulterate, dilute or fortify the contents of any container of alcoholic beverages as received from the manufacturer or wholesaler.

(b) Notwithstanding the provisions of paragraph (a) of this subdivision, a retail licensee for on-premises consumption may prepare and keep drinks containing alcoholic beverages in dispensing machines, having capacities of not less than a gallon, which continually mix such drinks.

3. No retail licensee for on-premises consumption shall sell, deliver or give away, or cause or permit or procure to be sold, delivered or given away any liquors and/or wines for consumption off the premises where sold. The provisions of this subdivision shall not prohibit a licensed winery or farm winery from allowing a patron to leave the winery or farm winery with a partially consumed bottle of wine provided that the removal of the bottle is done in accordance with subdivision four of section eighty-one of this chapter.

4. (a) No liquors and/or wines shall be sold or served in premises licensed under section sixty-four or clause (a) of subdivision six of section sixty-four-a of this chapter, except at tables where food may be served and except as provided by subdivision four of section one hundred.

(b) No liquors and/or wines shall be sold or served in premises licensed under clause (b) of subdivision six of section sixty-four-a of this chapter, except at such times and upon such conditions and by the use of such facilities as the liquor authority, by regulation, may prescribe with due regard to the convenience of the public and the strict avoidance of sales prohibited by this chapter.

4-a. No beer shall be sold or served at a bar, counter or other similar contrivance unless a card, sign or plate, visible to the customer, upon which the name of the brewer is conspicuously and legibly displayed, is annexed or affixed to the tap or faucet from which the beer is drawn.

5. No alcoholic beverages shall be sold, offered for sale or given away upon any premises licensed to sell alcoholic beverages at retail for on-premises consumption, during the following hours:

(a) Except as provided in paragraph (c) of this subdivision, on Sunday, from four ante meridiem to ten o'clock a.m., except pursuant to a permit issued under section ninety-nine-h of this chapter.

(b) Except as provided in paragraph (c) of this subdivision, on any other day between four ante meridiem and eight ante meridiem.

(c) On any day between three ante meridian and six ante meridian, for a premises located within an international airport owned or operated by the Port Authority of New York and New Jersey. The provisions of this paragraph shall not be subject to change pursuant to subdivision eleven of section seventeen of this chapter.

Unless otherwise approved by the authority pursuant to subdivision eleven of section seventeen of this chapter, where any rule has been adopted in a county on or before April first, nineteen hundred ninety-five, further restricting the hours of sale for alcoholic beverages, such restricted hours shall be the hours, during which the sale of alcoholic beverages at retail for on-premises consumption shall not be permitted within such county.

Nor shall any person be permitted to consume any alcoholic beverages upon any such premises later than one-half hour after the start of the prohibited hours of sale provided for in this section.

6. No person licensed to sell alcoholic beverages shall suffer or permit any gambling on the licensed premises, or suffer or permit such premises to become disorderly. The use of the licensed premises, or any part thereof, for the sale of lottery tickets, playing of bingo or games of chance, or as a simulcast facility or simulcast theater pursuant to the racing, pari-mutuel wagering and breeding law, when duly authorized and lawfully conducted thereon, shall not constitute gambling within the meaning of this subdivision.

6-a. No retail licensee for on-premises consumption shall suffer or permit any person to appear on licensed premises in such manner or attire as to expose to view any portion of the pubic area, anus, vulva or genitals, or any simulation thereof, nor shall suffer or permit any female to appear on licensed premises in such manner or attire as to expose to view any portion of the breast below the top of the areola, or any simulation thereof.

6-b. No retail licensee for on-premises consumption shall suffer or permit any contest or promotion which endangers the health, safety, and welfare of any person with dwarfism. Any retail licensee in violation of this section shall be subject to the suspension or revocation of said licensee's license to sell alcoholic beverages for on-premises consumption. For the purposes of this section, the term "dwarfism" means a condition of being abnormally small which is caused by heredity, endocrine dysfunction, renal insufficiency or deficiency or skeletal diseases that result in disproportionate short stature and adult height of less than four feet ten inches.

6-c. (a) No retail licensee for on-premises consumption shall suffer, permit or promote an event on its premises wherein the contestants deliver, or are not forbidden by the applicable rules thereof from delivering kicks, punches or blows of any kind to the body of an opponent or opponents, whether or not the event consists of a professional match or exhibition, and whether or not the event or any such act, or both, is done for compensation.

(b) The prohibition contained in paragraph (a) of this subdivision, however, shall not be applied to any authorized combative sport.

(c) In addition to any other penalty provided by law, a violation of this subdivision shall constitute an adequate ground for instituting a proceeding to suspend, cancel or revoke the license of the violator in accordance with the applicable procedures specified in section one hundred nineteen of this article.

7. Except where a permit to do so is obtained pursuant to section 405.10 of the penal law, no retail licensee for on-premises consumption shall suffer, permit, or promote an event on its premises wherein any person shall use, explode, or cause to explode, any fireworks or other pyrotechnics in a building as defined in paragraph e of subdivision one of section 405.10 of the penal law, that is covered by such retail license or possess such fireworks or pyrotechnics for such purpose. In addition to any other penalty provided by law, a violation of this subdivision shall constitute an adequate ground for instituting a proceeding to suspend, cancel, or revoke the license of the violator in accordance with the applicable procedures specified in section one hundred nineteen of this article. Provided however, if more than one retail licensee is participating in a single event, upon approval by the authority, only one retail licensee must obtain such permit.

8. A club or a luncheon club licensed to sell alcoholic beverages for on-premises consumption shall be permitted to sell such beverages only to its members and to their guests accompanying them.

9. No restaurant and no premises licensed to sell liquors and/or wines for on-premises consumption under clause (a) of subdivision six of section sixty-

four-a of this chapter shall be permitted to have any opening or means of entrance or passageway for persons or things between the licensed premises and any other room or place in the building containing the licensed premises, or any adjoining or abutting premises, unless such licensed premises are in a building used as a hotel and serves as a dining room for guests of such hotel, or unless such premises are a bona fide restaurant with such access for patrons and guests from any part of such building or adjoining or abutting premises as shall serve public convenience in a reasonable and suitable manner; or unless such licensed premises are in a building owned or operated by any county, town, city, village or public authority or agency, in a park or other similar place of public accommodation. All glass in any window or door on said licensed premises shall be clear and shall not be opaque, colored, stained or frosted.

10. A vessel licensed to sell liquors and/or wines for on-premises consumption shall not be permitted to sell any liquors and/or wines, while said vessel is moored to a pier or dock, except that vessels sailing on established schedules shall be permitted to sell liquors and/or wines for a period of three hours prior to the regular advertised sailing time.

11. A railroad car or aircraft being operated on regularly scheduled flights by a United States certificated airline licensed to sell liquors and/or wines for on-premises consumption shall be permitted to sell liquors and/or wines only to passengers and while in actual transit, except that a railroad operating licensed cars shall be allowed to sell liquors and/or wines from portable carts located on station platforms located at Penn Station, Grand Central Station, Jamaica, Hunterspoint Avenue or Flatbush from which such licensed railroad cars depart.

12. Each retail licensee for on-premises consumption shall keep and maintain upon the licensed premises, adequate records of all transactions involving the business transacted by such licensee which shall show the amount of alcoholic beverages, in gallons, purchased by such licensee together with the names, license numbers and places of business of the persons from whom the same were purchased, the amount involved in such purchases, as well as the sales of alcoholic beverages made by such licensee. The liquor authority is hereby authorized to promulgate rules and regulations permitting an on-premises licensee operating two or more premises separately licensed to sell alcoholic beverages for on-premises consumption to inaugurate or retain in this state methods or practices of centralized accounting, bookkeeping, control records, reporting, billing, invoicing or payment respecting purchases, sales or deliveries of alcoholic beverages, or methods and practices of centralized receipt or storage of alcoholic beverages within this state without segregation or earmarking for any such separately licensed premises, wherever such methods and practices assure the availability, at such licensee's central or main office in this state, of data reasonably needed for the enforcement of this chapter. Such records shall be available for inspection by any authorized representative of the liquor authority.

13.

(a) No retail licensee for on-premises consumption shall be interested, directly or indirectly, in any premises where liquors, wines or beer are manufactured or sold at wholesale, by stock ownership, interlocking directors, mortgage or lien on any personal or real property or by any other means, except that liquors, wines or beer may be manufactured or sold wholesale by the person licensed as a manufacturer or wholesaler thereof:

(i) on real property owned by an interstate railroad corporation or a United States certificated airline with a retail license for on-premises consumption; or

(ii) on premises or with respect to a business constituting an overnight lodging and resort facility located wholly within the boundaries of the town of North Elba, county of Essex, township eleven, Richard's survey, great lot numbers two hundred seventy-eight, two hundred seventy-nine, two hundred eight, two hundred ninety-eight, two hundred ninety-nine, three hundred, three hundred eighteen, three hundred nineteen, three hundred twenty, three hundred thirty-five and three hundred thirty-six, and township twelve, Thorn's survey, great lot numbers one hundred six and one hundred thirteen, as shown on the Adirondack map, compiled by the conservation department of the state of New York - nineteen hundred sixty-four edition, in the Essex county atlas at page twenty-seven in the Essex county clerk's office, Elizabethtown, New York, provided that such facility maintains not less than two hundred fifty rooms and suites for overnight lodging; or

(iii) on premises or with respect to the operation of a restaurant in an office building located in a city having a population of five hundred thousand or more and in which is located the licensed premises of such manufacturer or wholesaler, provided that the building, the interior of the retail premise and the rental therefor fully comply with the criteria set forth in paragraph two of subdivision three of section one hundred one of this article; or

(iv) any such premises or business located on that tract or parcel of land, or any subdivision thereof, ("described in statute")

* * * * *

14. No retail licensee for on-premises consumption shall make or cause to be made any loan to any person engaged in the manufacture or sale of liquors, wines or beer at wholesale.

15. All retail licensed premises shall be subject to inspection by any peace officer, acting pursuant to his or her special duties, or police officer and by the duly authorized representatives of the liquor authority, during the hours when the said premises are open for the transaction of business.

16. [Repealed]

17. Notwithstanding any other provision of law, a retail licensee for on-premises consumption that is a person or corporation operating a hotel shall be permitted to sell liquors, beer, and/or wines through a mechanical device or vending machine placed in the lodger's rooms and to which access to such device or machine is restricted by means of a locking device which requires the use of a key, magnetic card or similar device provided, however, that no such key, card or similar device shall be provided to any person under the age of twenty-one or to any person who is visibly intoxicated.

HISTORY:

Add, L 1934, ch 478, § 1, eff July 1, 1934; amd, L 1936, ch 111; L 1936, ch 572, eff May 19, 1936; L 1937, ch 449; L 1940, ch 72; L 1940, ch 77; L 1940, ch 320; L 1940, ch 551; L 1941, ch 113; L 1941, ch 384; L 1941, ch 393; L 1941, ch 493; L 1944, ch 621; L 1950, ch 97, eff March 13, 1950; L 1950, ch 506, eff April 8, 1950; L 1955, ch 467; L 1958, ch 704; L 1964, ch 531, § 16, eff June 1, 1964; L 1965, ch 1016; L 1967, ch 632; L 1968, ch 789; L 1969, ch 673, eff May 21, 1969; L 1971, ch 36, eff March 16, 1971; L 1971, ch 235; L 1973, ch 372; L 1974, ch 76; L 1974, ch 466, eff May 23, 1974; L 1974, ch 1036, eff June 15, 1974; L 1977, ch 321, eff July 28, 1977; L 1978, ch 574, § 14; L 1980, ch 843, § 108, eff Sept 1, 1980; L 1983, ch 445, § 1; L 1985, ch 48, § 3, eff June 16, 1985; L 1985, ch 545, § 1, eff July 24, 1985; L 1986, ch 919, § 22, eff Dec 29, 1986; L 1988, ch 64, § 20, eff April 24, 1988; L 1988, ch 209, § 3, eff July 1, 1988; L 1989, ch 217, § 1, eff June 26, 1989; L 1990, ch 759, § 1, eff Aug 21, 1990; L 1995, ch 83, §§ 155, 156, eff June 20, 1995; L 1995, ch 185, § 2; L 1996, ch 675, § 2; L 1998, ch 40, §§ 1–5; L 2000, ch 512, § 1, eff Nov 3, 2000; L 2001, ch 254, § 1, eff Sept 5, 2001; L 2002, ch 105, § 2, eff June 28, 2002; L 2006, ch 655, § 1, eff Sept 13, 2006; L 2010, ch 390, § 2, eff Aug 13, 2010; L 2011, ch 22, § 2, eff May 17, 2011; L 2011, ch 196, § 2, eff Jan 16, 2012; L 2013, ch 224, § 1, eff July 31, 2013; L 2014, ch 282, § 1, effective August 11, 2014; L 2014, ch 301, § 2, effective August 11, 2014; L 2016, ch 32, § 9, effective September 1, 2016; L 2016, ch 297, § 12, effective September 7, 2016; L 2016, ch 303, § 2, effective September 9, 2016; L 2016, ch 318, § 3, effective September 9, 2016; L 2018, ch 453, § 3, effective December 21, 2018; L 2019, ch 429, § 2, effective October 29, 2019; L 2019, ch 549, § 1, effective November 25, 2019; L 2019, ch 611, § 3, effective December 6, 2019; L 2020, ch 55, § 1 (Part FF), effective April 3, 2020; L 2020, ch 218, §§ 2–4, effective October 7, 2020.

Editor's Notes See 1964 note under § 55.

See 1988 note under § 101.

By Laws 1965, ch 1029, the effective date of certain chapters of the Laws of 1965, approved by the Governor after June 30, 1965, and specifying an effective date of July 1, 1965, or a subsequent date prior to August 1, 1965, which forbid or require acts subject to penalty or liability for violation, or establish violations of law, was postponed to August 1, 1965.

Laws 2011, ch 196, § 5, eff Jan 16, 2012 provides:

§ 5. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided that the state liquor authority may promulgate rules necessary for the implementation of this act immediately.

Laws 2016, ch 32, § 11, eff Sept 1, 2016, provides:

§ 11. This act shall take effect on the first day of the first month next succeeding the one hundred twentieth day after it shall have become a law and shall apply to gross receipts from combative sports held on or after that date; provided, however, that:

(a) the addition, amendment and/or repeal of any rule or regulation of the state athletic commission necessary for the implementation of this act on its effective date is authorized to be made on or before such effective date;

(b) section 1003 of the general business law, as added by section two of this act, shall take effect immediately; and

(c) notwithstanding section 1003 of the general business law, as added by section two of this act, the commissioners appointed to the commission repealed by this act may continue to serve as commissioners on the commission created by this act, and their terms shall continue uninterrupted by such repeal. (Amd, L 2016, ch 58, § 2 (Part O), eff April 12, 2016.)

Amendment Notes The 2014 amendment by ch 282, § 1 rewrote 13.

The 2014 amendment by ch 301, § 2 added "or such premises or businesses located on that tract or parcel of land situate lying and being in the Town of Oneonta, County of Otsego. . . distance of 25.40 feet to a point to the point and place of beginning" in the third sentence of the last paragraph of 13.

2013. Chapter 224, § 1 amended:

Sub 2, par (a) by adding the matter in italics.

2011. Chapter 22, § 2 amended:

Sub 13, closing par by adding the matter in italics.

2011. Chapter 196, § 1 amended:

Sub 1 by deleting at fig 1 "twelve-b" and adding the matter in italics.

2006. Chapter 655, § 1 amended:

By adding sub 7.

2002. Chapter 105, § 2 amended:

Sub 13 by adding the matter in italics.

2001. Chapter 254, § 1 amended:

By adding sub 6-c.

2000. Chapter 512 § 1 amended:

By redesignated entire sub 2 as sub 2, par (a).

By adding sub 2, par (b).

1998. Chapter 40, § 3 amended:

By redesignating sub 9, opening par and par (d) as sub 9, by deleting at fig 1 a colon, at fig 2 "Any" and adding the matter in italics.

By deleting sub 9, par (a).

By deleting sub 9, par (b).

By deleting sub 9, par (c).

1998. Chapter 40, § 4 amended:

Sub 12 by deleting at figs 1 and 4 "books and", at figs 2 and 3 "daily" and adding the matter in italics.

1998. Chapter 40, § 5 amended:

By repealing sub 16.

1995. Chapter 83, § 155 amended:

Sub 5, par (a) by deleting at fig 1 "antemeridian" and adding the matter in italics.

Sub 5, par (b) by deleting at figs 1 and 2 "antemeridian" and adding the matter in italics.

Sub 5, second undesignated par by deleting at fig 1 "Where any local board has adopted any rule", at fig 2 "the jurisdiction of" , at fig 3 "board" and adding the matter in italics.

1995. Chapter 83, § 156 amended:

Sub 15 by deleting at fig 1 "or the appropriate board" and addng the matter in italics.

The 2016 amendment by ch 32, § 9, substituted "authorized combative sport" for "professional match or exhibition which consists of boxing, sparring, wrestling, or martial arts and which is excepted from the definition of the term 'combative sport' contained in subdivision one of section five-a of chapter nine hundred twelve of the laws of nineteen hundred twenty, as added by chapter fourteen of the laws of nineteen hundred ninety-seven" in 6-c(b).

The 2016 amendment by ch 297, § 12, added the second sentence of 3 and substituted "ten o'clock a.m., except pursuant to a permit issued under section ninety-nine-h of this chapter" for "twelve noon" in 5(a).

The 2016 amendment by ch 303, § 2, rewrote the last paragraph of 13.

The 2016 amendment by ch 318, § 3, rewrote the last paragraph of 13.

The 2018 amendment by ch 453, § 3, added the 13(a) through 13(a)(xi) designations; added 13(a)(xii); added the 13(b) designation; and made related changes.

The 2019 amendment by ch 429, § 2, rewrote the fourth paragraph of 13(a)(xii), which formerly read: "BEARINGS refer to the magnetic meridian of 1993. Said premises are also described as follows: Ward & Plate: 1005500 669 RIVER ST: frontage and depth 115.60 x 220.00 being the same premises described in Book 6534 of Deeds at Page 256 in the Rensselaer County Clerk's Office and being the same premises in the 2009 City of Troy Assessment Rolls and 90.78-3-2.1 In Rem Serial No. AY0054 (RIVERVIEW PROPERTIES INC; CORINA, ANGELO; MCLAUGHLIN, JOHN D & VASIL, SCOTT)"; and added 13(a)(xiii) and 13(a)(xiv).

The 2019 amendment by ch 549, § 1, added 13(a)(xiii); and made a related change.

The 2019 amendment by ch 611, § 3, added in 13(a-1).

The 2020 amendment by ch 55, § 1 (Part FF), added "Except as provided in paragraph (c) of this subdivision, on" at the beginning of 5(a) and 5(b); added 5(c); and made a related change.

The 2020 amendment by ch 218, §§ 2– 4, redesignated 13(a)(xiii) and 13(a)(xiv) as 13(a)(xiv) and 13(a)(xv); added 13(a)(xvi); and made related changes.

Repeal Notes: [1967, ch 632] The repeal of subdivision two of section one hundred six of the alcoholic beverage control law was necessary to obviate the confusion caused by several amendments previously made to such subdivision. Such subdivision has been re-enacted in the same form as existed prior to this act with provision made for the size of containers of liquor and wine on certain aircraft.

Notes to Decisions

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1. In general; construction

This section is penal in character, to be strictly construed, and every person is entitled to an unequivocal warning that the manner of conducting his licensed establishment seems to be in violation of the statute before proceeding to revoke his liquor license. Guerra v New York State Liquor Authority, 35 Misc. 2d 564, 231 N.Y.S.2d 214, 1962 N.Y. Misc. LEXIS 2845 (N.Y. Sup. Ct. 1962), rev'd, 18 A.D.2d 868, 237 N.Y.S.2d 56, 1963 N.Y. App. Div. LEXIS 4908 (N.Y. App. Div. 4th Dep't 1963).

This statute, being penal and dealing with a crime in the class of mala prohibita, must be strictly construed. People v Brasi, 118 N.Y.S.2d 608, 1953 N.Y. Misc. LEXIS 1470 (N.Y. Magis. Ct. 1953).

Establishment licensed to sell liquor at retail for consumption on premises is not required to procure liquor liability insurance. NY Ins Dep't Gen Counsel, Opinion No. 10-09-09, 2010 NY Insurance GC Opinions LEXIS 44.

2. Constitutional questions

Order of Commissioner of Human Rights requiring private club, "unless otherwise in violation of law," to cease and desist from refusing or withholding service to anyone because of race, color or creed, and to make the services, accommodations, privileges, and facilities of club equally available without regard to race, color or creed, did not require club to exceed its liquor license authority under Alcoholic Beverage Control Law § 106, subd 8. Batavia Lodge No. 196, L. O. M. v New York State Div. of Human Rights, 43 A.D.2d 807, 350 N.Y.S.2d 273, 1973 N.Y. App. Div. LEXIS 2914 (N.Y. App. Div. 4th Dep't 1973), rev'd, 35 N.Y.2d 143, 359 N.Y.S.2d 25, 316 N.E.2d 318, 1974 N.Y. LEXIS 1377 (N.Y. 1974).

Where bar patrons testified that police had restrained them from taking beer off premises of several beer bars at state fair, officers had not engaged in discriminatory enforcement of Alcoholic Beverage Control Laws against licensee. Naples v State Liquor Authority, 43 A.D.2d 801, 350 N.Y.S.2d 262, 1973 N.Y. App. Div. LEXIS 2909 (N.Y. App. Div. 4th Dep't 1973).

Regulation which authorized revocation, cancellation or suspension of a liquor license for permitting on the licensed premises any person to appear nude or attired in such a way as to expose to view the genital area was not unconstitutional since the state may constitutionally prohibit from licensed premises performances that partake more of gross sexuality than communication, and the regulation in question represented the state's continuing and legitimate effort to accomplish that goal. 92-07 Restaurant, Inc. v New York State Liquor Authority, 80 A.D.2d 603, 435 N.Y.S.2d 989, 1981 N.Y. App. Div. LEXIS 10295 (N.Y. App. Div. 2d Dep't 1981).

In an action challenging the constitutionality of the Al Bev Law § 106(6), wherein petitioner's liquor license had been suspended for allowing lewd and indecent dancing on its premises in contravention of the statute and regulations promulgated thereunder, such statute would be upheld on the basis that an outright prohibition of all topless dancing in establishments that sold alcoholic beverages does not violate the First Amendment; nor would the statute be found violative of the State Constitution, where previous decisions holding that an outright prohibition of nonobscene topless dancing violated the guaranty of free expression did not extend to nude dancing. Moreover, the statute would not be found violative of due process on the ground of vagueness, since "lewd and indecent" is synonymous with "obscene," and antiobscentity statutes need be no more precise in their language to withstand such a challenge. Blau-Par Corp. v New York State Liquor Authority, 106 A.D.2d 503, 482 N.Y.S.2d 841, 1984 N.Y. App. Div. LEXIS 21534 (N.Y. App. Div. 2d Dep't 1984).

NYC Admin Code § 20-367, as applied to establishments which are also licensed to sell alcoholic beverages for on-premises consumption, is preempted by CLS Al Bev § 106(5) since city ordinance directly affects sale and consumption of liquor by imposing restrictions on times when patrons may remain in cabarets which are regulated in this regard by state liquor laws, and matter is one within exclusive jurisdiction of state law. Lansdown Entertainment Corp. v New York City Dep't of Consumer Affairs, 141 A.D.2d 468, 530 N.Y.S.2d 574, 1988 N.Y. App. Div. LEXIS 7908 (N.Y. App. Div. 1st Dep't), app. dismissed, 72 N.Y.2d 1041, 534 N.Y.S.2d 939, 531 N.E.2d 659, 1988 N.Y. LEXIS 2946 (N.Y. 1988), aff'd, 74 N.Y.2d 761, 545 N.Y.S.2d 82, 543 N.E.2d 725, 1989 N.Y. LEXIS 885 (N.Y. 1989).

Statute providing that no retail licensee for on premises consumption of alcoholic beverages shall suffer or permit any person to appear in such manner as to expose any portion of pubic area, anus, vulva or genitals, or any simulation thereof, nor shall suffer or permit any female to appear in such manner as to expose any portion of the breast below the top of the areola, or any simulation thereof, was constitutional. New York Topless Bar & Dancers Ass'n v New York State Liquor Authority, 91 Misc. 2d 780, 398 N.Y.S.2d 637, 1977 N.Y. Misc. LEXIS 2413 (N.Y. Sup. Ct. 1977).

New-York statute prohibiting nude dancing in establishments licensed by state to sell liquor for on-premises consumption does not violate First Amendment since statute is within state's power conferred by Twenty-First Amendment to regulate sale of liquor within its boundries; state's power to ban sale of alcoholic beverages entirely includes lesser power to ban sale of liquor on premises where topless dancing occurs and whatever artistic or communicative value that might attach to topless dancing is overcome by state's exercise of its broad powers arising under Twenty-First Amendment. New York State Liquor Authority v Bellanca, 452 U.S. 714, 101 S. Ct. 2599, 69 L. Ed. 2d 357, 1981 U.S. LEXIS 119 (U.S. 1981), overruled in part, 44 Liquormart v Rhode Island, 517 U.S. 484, 116 S. Ct. 1495, 134 L. Ed. 2d 711, 1996 U.S. LEXIS 3020 (U.S. 1996).

Where officers stopped defendant on a road based on two 911 calls from an anonymous caller reporting that a man matching a certain description had a gun, the officers lacked reasonable suspicion to stop defendant because, inter alia, two 911 calls from an anonymous caller lacked any indicia of reliability, there was no report of an ongoing assault, and the fact that the encounter occurred late at night was a relatively weak and generic factor. United States v Freeman, 735 F.3d 92, 2013 U.S. App. LEXIS 22594 (2d Cir. N.Y. 2013).

3. Judicial review

A finding of the Liquor Authority, based on the testimony of two police officers, that horserace bets were taken in the presence of one of the owners of a bar, although disputed by him, may not be reversed by the court since, where the evidence is conflicting, it is for the administrative board to pass upon the credibility of the witnesses and to base its inferences on what it accepts as the truth. Avon Bar & Grill, Inc. v O'Connell, 301 N.Y. 150, 93 N.E.2d 573, 301 N.Y. (N.Y.S.) 150, 1950 N.Y. LEXIS 790 (N.Y. 1950).

Liquor licensee commenced Article 78 proceedings to annul order of State Liquor Authority suspending petitioner's license on grounds of various violations of the Alcoholic Beverage Control Law § 106, subd 6. McCarthy v New York State Liquor Authority, 43 A.D.2d 789, 349 N.Y.S.2d 876, 1973 N.Y. App. Div. LEXIS 2976 (N.Y. App. Div. 4th Dep't 1973).

Question whether licensed premises had been disorderly is factual and thus, if State Liquor Authority's determination is supported by substantial evidence, it must be affirmed. Peanut-butter Jam, Inc. v New York State Liquor Authority, 58 A.D.2d 703, 396 N.Y.S.2d 104, 1977 N.Y. App. Div. LEXIS 12808 (N.Y. App. Div. 3d Dep't 1977).

Proceeding against restaurant regarding gambling, disorderliness, and sale of liquor at unauthorized times would be remanded to State Liquor Authority for purpose of determining appropriate penalty where initial penalty was imposed that covered 4 violations of CLS Al Bev § 106 and only 3 violations were sustained on Article 78 review. O'Carroll Rest. Corp. v New York State Liquor Authority, 125 A.D.2d 212, 509 N.Y.S.2d 17, 1986 N.Y. App. Div. LEXIS 62485 (N.Y. App. Div. 1st Dep't 1986).

4. Private contracts

In a complaint by prospective purchasers for the return of a deposit paid on a contract for the purchase of a business for which the purchasers were to obtain a liquor license, it was contended that the plaintiffs never owned or held a lease of the premises and, therefore, by operation of law were estopped and prohibited from obtaining a license by reasons of the provisions of subdivision 1 of this section. Held: summary judgment denied where there were questions of fact: whether the application for license was a condition precedent to the contract becoming effective and, if it were so intended, whether purchasers were required to make an application or be guilty of a breach of the contract. Forgan v McKenzie, 12 Misc. 2d 508, 175 N.Y.S.2d 322, 1957 N.Y. Misc. LEXIS 1922 (N.Y. Sup. Ct. 1957).

The complaint was dismissed in an action for specific performance of a contract for sale of certain premises, where the contract was expressly made contingent upon the granting of a license by the alcoholic beverage control board to the defendant to sell beer, wine and liquor in the premises to be purchased by him under the contract and the defendant, after making due application was refused the license. Shea v Newkirk, 21 N.Y.S.2d 298, 1939 N.Y. Misc. LEXIS 2791 (N.Y. Sup. Ct. 1939), aff'd, 258 A.D. 1063, 18 N.Y.S.2d 1004, 1940 N.Y. App. Div. LEXIS 8900 (N.Y. App. Div. 1940).

5. Violations by non-licensees

A defendant, although pleading guilty, may not be convicted of a violation of this section where he was not a licensee, and was not charged as a licensee. People v Corie, 93 N.Y.S.2d 781, 196 Misc. 1029, 1949 N.Y. Misc. LEXIS 2992 (N.Y. County Ct. 1949).

The violation proscribed by Alcoholic Beverage Control Law § 106(8) refers to the licensee, and a defendant who was not the licensee could not be held criminally responsible for a violation of this section. People ex rel. Cucinatta v Burger, 54 Misc. 2d 92, 281 N.Y.S.2d 865, 1967 N.Y. Misc. LEXIS 1505 (N.Y. City Ct. 1967).

6. —After-hours sale

The uncontradicted admission by the president of a liquor licensee that an employee was having a drink after work was sufficient to support a finding of actual knowledge by a person in authority of after-hours consumption, and thus of a violation of Al Bev Law § 106(5). Elmarth Bar & Grill, Inc. v State Liquor Authority, 53 N.Y.2d 859, 440 N.Y.S.2d 181, 422 N.E.2d 826, 1981 N.Y. LEXIS 2436 (N.Y. 1981).

The prohibition against the sale of alcoholic beverages during certain hours does not apply exclusively to the licensee. Employees may be prosecuted thereunder (§ 106, subd 5). Since no specific punishment is contained in § 106, the words "any person" in subdivision 3 and subdivision 5 of § 130 include such employees and the offense is a misdemeanor. People v O'Neil, 280 A.D. 145, 112 N.Y.S.2d 756, 1952 N.Y. App. Div. LEXIS 3415 (N.Y. App. Div. 1952).

The section heading stating that the provisions govern "licensees" is not part of the Act, so that defendant charged with an after hours sale was responsible for his own acts, although not a licensee. People ex rel. Cucinatta v Burger, 54 Misc. 2d 92, 281 N.Y.S.2d 865, 1967 N.Y. Misc. LEXIS 1505 (N.Y. City Ct. 1967).

7. —Off-premises consumption

Subds. 2 and 3 apply only to those persons to whom licenses have been issued pursuant to § 3, subd. 18. People ex rel. O'Connell v Flanagan, 275 N.Y.S. 121, 152 Misc. 916, 1934 N.Y. Misc. LEXIS 1766 (N.Y. Magis. Ct. 1934).

Subd. 3 does not apply to a mere employee in licensed premises. People ex rel. O'Connell v Flanagan, 275 N.Y.S. 121, 152 Misc. 916, 1934 N.Y. Misc. LEXIS 1766 (N.Y. Magis. Ct. 1934).

8. —Gambling

Alcoholic Beverage Control L § 106, subd 6 is applicable only to license holders and has no application to bartenders or patrons of the establishment. People v Monahan, 69 Misc. 2d 273, 329 N.Y.S.2d 889, 1972 N.Y. Misc. LEXIS 2125 (N.Y. City Crim. Ct. 1972).

Because a company was licensed to sell alcoholic beverages, defendant, as the sole shareholder of the corporation and the manager of the premises, could not be held liable for permitting

gambling on licensed premises in violation of N.Y. Alco. Bev. Cont. Law § 106(6). People v Knox, 887 N.Y.S.2d 759, 25 Misc. 3d 34, 2009 N.Y. Misc. LEXIS 2205 (N.Y. App. Term 2009).

A bartender employed by the licensee is a mere employee of such licensee and could not be convicted of a violation of subdivision 6 of this section prohibiting a person licensed to sell alcoholic beverages from suffering or permitting gambling on the licensed premises. People v Digiulio, 122 N.Y.S.2d 473, 1953 N.Y. Misc. LEXIS 1856 (N.Y. Magis. Ct. 1953).

9. Enforcement proceedings

State Liquor Authority and its licensees may use "offer in compromise" procedure to bargain for reduced penalties in exchange for "no contest" pleas so long as penalties remain within classes of sanctions, such as suspensions and bond forfeitures, that are authorized in statutory scheme. Nostima Foods, Inc. v State Liquor Authority, 71 N.Y.2d 648, 529 N.Y.S.2d 270, 524 N.E.2d 871, 1988 N.Y. LEXIS 690 (N.Y. 1988).

State Liquor Authority lacked power to impose fines for violations of rules and regulations governing licensees, even though licensee invoked authority's "offer in compromise" procedure to plead "no contest" in exchange for particular penalty, since legislature expressly withheld from authority power to assess fine; furthermore, licensee was not estopped from challenging authority's power to impose fine, despite fact that licensee had itself proposed fine as offer in compromise. Nostima Foods, Inc. v State Liquor Authority, 71 N.Y.2d 648, 529 N.Y.S.2d 270, 524 N.E.2d 871, 1988 N.Y. LEXIS 690 (N.Y. 1988).

State Liquor Authority is not limited to compromise procedure suggested by its rules (9 NYCRR § 54.1[c][2]) in light of broad powers given it by CLS St Adm P Act § 301 to dispose of any adjudicative proceeding "by stipulation, agreed settlement . . . or other informal method." Nostima Foods, Inc. v State Liquor Authority, 71 N.Y.2d 648, 529 N.Y.S.2d 270, 524 N.E.2d 871, 1988 N.Y. LEXIS 690 (N.Y. 1988).

A determination by the State Liquor Authority suspending petitioner's license for 60 days after finding it guilty of permitting a female to solicit for immoral purposes and permitting the place to become disorderly was remitted for reconsideration of the punishment where it was not clear whether, in imposing the suspension, the authority had considered a prior "warning letter" not sufficiently shown by the record. Vedes Rest., Inc. v New York State Liquor Authority, 8 A.D.2d 278, 187 N.Y.S.2d 236, 1959 N.Y. App. Div. LEXIS 7910 (N.Y. App. Div. 1st Dep't 1959).

Petitioner, seeking review and annnulment by the State Liquor Authority of recommended suspension of petitioner's restaurant liquor license, should, upon its request, have been furnished with a copy of the hearing officer's report so as to be able to challenge it effectively prior to the Authority's determination. White House Restaurant, Inc. v Epstein, 19 A.D.2d 719, 242 N.Y.S.2d 438, 1963 N.Y. App. Div. LEXIS 3399 (N.Y. App. Div. 2d Dep't 1963).

Petitioner was entitled to annulment of determination which imposed suspension where (1) notice of pleading and hearing served by State Liquor Authority (SLA) stated that maximum penalty would be forfeiture of bond, (2) at commencement of hearing, SLA sought to amend notice to provide for maximum penalty of 30-day suspension, (3) petitioner objected to amendment, and administrative law judge (ALJ) gave petitioner chance to make offer in compromise, (4) SLA advised ALJ that any offer would be rejected, (5) amendment was permitted, and (6) 25-day suspension was imposed; SLA's failure to provide proper notice of maximum penalty and SLA's arbitrary decision that no compromise offer would be accepted represented material defect in proceeding that deprived petitioner of due process. Ginny Rest., Inc. v State Liquor Auth., 203 A.D.2d 973, 611 N.Y.S.2d 63, 1994 N.Y. App. Div. LEXIS 4382 (N.Y. App. Div. 4th Dep't 1994).

It was appropriate to impose 60-day liquor license suspension and $1,000 bond forfeiture where licensee had substantially altered premises without permission in violation of CLS Al Bev § 99-d(1), had effectuated corporate change in its stockholders in violation of CLS Al Bev § 99-d(2), had used trade name without Liquor Authority's permission in violation of 9 NYCRR § 53.1(p), had failed to maintain its books and records in violation of CLS Al Bev § 106(12), and had allowed premises to become disorderly in violation of CLS Al Bev § 106(6). La Trieste Restaurant & Cabaret v New York State Liquor Auth., 228 A.D.2d 172, 644 N.Y.S.2d 7, 1996 N.Y. App. Div. LEXIS 6295 (N.Y. App. Div. 1st Dep't 1996).

Revocation of petitioners' on-premises liquor license was appropriate sanction for their suffering or permitting narcotics sales to occur at licensed premises in violation of CLS Al Bev § 106(6). Petillo v State Liquor Auth., 248 A.D.2d 541, 670 N.Y.S.2d 209, 1998 N.Y. App. Div. LEXIS 2591 (N.Y. App. Div. 2d Dep't), app. denied, 92 N.Y.2d 814, 681 N.Y.S.2d 475, 704 N.E.2d 228, 1998 N.Y. LEXIS 3987 (N.Y. 1998).

Revocation of petitioner's on-premises liquor license, $1,000 bond forfeiture, and 2-year proscription on relicensing of premises was appropriate penalty for knowingly encouraging or permitting improper conduct, including threats against and harassment of legal demonstrators, in violation 9 NYCRR § 53.1(n), and noise, disturbance, misconduct, and disorder on or adjacent to licensed premises that adversely affected health, welfare, and safety of local residents and resulted in premises becoming focal point for police attention in violation of 9 NYCRR § 53.1(q). La Trieste Restaurant & Cabaret v New York State Liquor Auth., 249 A.D.2d 156, 671 N.Y.S.2d 250, 1998 N.Y. App. Div. LEXIS 4416 (N.Y. App. Div. 1st Dep't), app. denied, 92 N.Y.2d 809, 680 N.Y.S.2d 54, 702 N.E.2d 839, 1998 N.Y. LEXIS 3161 (N.Y. 1998).

Cafe owner was not prejudiced by 6-year delay between first sale of cocaine from cafe and revocation of his liquor license, even though he expended substantial funds to renovate premises during interim—ostensibly in reliance on license renewal in interim—where renewal inured to his benefit by enabling him to continue to operate his business, and there was no evidence that he suffered any economic loss from delay, that delay was deliberate, or that delay hampered his ability to prepare or present his case. Kelly v Casale, 263 A.D.2d 889, 695 N.Y.S.2d 184, 1999 N.Y. App. Div. LEXIS 8460 (N.Y. App. Div. 3d Dep't), app. denied, 94 N.Y.2d 754, 701 N.Y.S.2d 340, 723 N.E.2d 89, 1999 N.Y. LEXIS 3853 (N.Y. 1999).

A licensee charged with violation of this section is entitled to rely, at least to some extent, upon the promise of the commissioners of leniency in case he pleads "no contest" to the charges. Bomysoad v New York State Liquor Authority, 26 Misc. 2d 704, 204 N.Y.S.2d 325, 1960 N.Y. Misc. LEXIS 2548 (N.Y. Sup. Ct. 1960), rev'd, 13 A.D.2d 873, 215 N.Y.S.2d 199, 1961 N.Y. App. Div. LEXIS 10699 (N.Y. App. Div. 3d Dep't 1961).

In license revocation proceeding, State Liquor Authority exceeded its jurisdiction in accepting tavern's offer in compromise, because such offers are in violation of 9 NYCRR § 54.1 which provides for acceptance of compromise offers only in suspension proceedings; authority's construction of § 54.1 as extending routine use of offer and compromise procedure to revocation proceedings lacked rational basis, was not based on substantial evidence, and was arbitrary and capricious, and accordingly authority's determination with respect to tavern would be annulled. Nostima Foods, Inc. v State Liquor Authority, 133 Misc. 2d 729, 507 N.Y.S.2d 815, 1986 N.Y. Misc. LEXIS 2937 (N.Y. Sup. Ct. 1986), aff'd, 132 A.D.2d 452, 517 N.Y.S.2d 151, 1987 N.Y. App. Div. LEXIS 49018 (N.Y. App. Div. 1st Dep't 1987).

10. —Hearing

Where the president of a restaurant corporation was facing criminal charges for permitting gambling on the premises at the time a hearing before the State Liquor Authority on suspension or revocation of its restaurant liquor license on the same grounds came up, a request for adjournment of the hearing before the Authority pending disposition of the criminal charge should have been made, and any objection to proceeding with the matter of license suspension by the Authority under such circumstances was waived by failure to make such a request. White House Restaurant, Inc. v Epstein, 19 A.D.2d 719, 242 N.Y.S.2d 438, 1963 N.Y. App. Div. LEXIS 3399 (N.Y. App. Div. 2d Dep't 1963).

The State Liquor Authority would not be enjoined from proceeding with a hearing to revoke respondent's liquor license on charges alleging gambling and bribery on the premises, facts which also resulted in a criminal indictment presently pending against the respondent. Rejecting the contention that the licensee feared the loss of his constitutional rights and of prejudice if the

hearing were permitted, the court pointed out that since the gambling charge had been dismissed from the criminal action, there was no reason why the authority might not conduct a hearing in that respect; and as to the bribery charge, it was clearly within the scope of the Authority's duty to inquire as to whether it should temporarily suspend the license pending outcome of the indictment. Oleshko v New York State Liquor Authority, 29 A.D.2d 84, 285 N.Y.S.2d 696, 1967 N.Y. App. Div. LEXIS 2697 (N.Y. App. Div. 1st Dep't 1967), aff'd, 21 N.Y.2d 778, 288 N.Y.S.2d 474, 235 N.E.2d 447, 1968 N.Y. LEXIS 1632 (N.Y. 1968).

Licensee was entitled to examine reports of police officers relative to the alleged violation of the law by the licensee prior to the commencement of cross-examination of the police officer. Garabendian v New York State Liquor Authority, 33 A.D.2d 980, 307 N.Y.S.2d 270 (N.Y. App. Div. 4th Dep't), app. denied, 26 N.Y.2d 614, 1970 N.Y. LEXIS 1845 (N.Y. 1970).

In proceeding against licensee to enforce provisions of CLS Al Bev § 106, it was improper for secretary of State Liquor Authority's 5-member board to submit to other board members, after completion of hearings and without notice to licensee, memorandum recommending reversal of administrative law judge's finding in favor of licensee, and board improperly considered memorandum in its determination, since memorandum was not properly part of administrative record; at very least, if memorandum was to be considered, licensee should have been afforded opportunity to reply. Muidallap Corp. v State Liquor Authority, 143 A.D.2d 9, 532 N.Y.S.2d 1, 1988 N.Y. App. Div. LEXIS 8432 (N.Y. App. Div. 1st Dep't 1988).

Revocation of liquor license would be annulled, since notice of hearing was not properly served, where (1) notice prepared for licensee's principal was mailed to incorrect address, and (2) return receipt attached to notice mailed to licensee's place of business was not signed by licensee's principal. Zucco Grocery Corp. v New York State Liquor Auth., 203 A.D.2d 120, 610 N.Y.S.2d 45, 1994 N.Y. App. Div. LEXIS 3865 (N.Y. App. Div. 1st Dep't 1994).

Where the state liquor authority found a violation of § 106, subd. 6, and ordered the license suspended for a period, and petitioner's attorney later requested opportunity to produce additional testimony which was denied, petition dismissed in so far as petitioner contends that respondents erred in refusing to hear additional testimony, since application was not made prior to determination by state liquor authority (Al. Bev. Law, § 119; Liquor Authority Rules, rules 8, 13) and also because evidence was not newly discovered. Crean v Bruckman, 33 N.Y.S.2d 570, 178 Misc. 231, 1942 N.Y. Misc. LEXIS 1391 (N.Y. Sup. Ct. 1942).

Where the holder of a liquor license is merely notified by the State Liquor Authority that revocation of his license will be under consideration at a hearing to be held on a specified date for suffering or permitting the premises to become disorderly on a date stated, he has a right to demand a bill of particulars, and where he so demands and the bill is not furnished until the morning of the date of the hearing, it is unfair for the Authority to proceed with the hearing as against a request for continuance in order to have time to prepare to meet the charge. Belpe Rest., Inc. v New York State Liquor Authority, 42 Misc. 2d 374, 247 N.Y.S.2d 902, 1963 N.Y. Misc. LEXIS 1226 (N.Y. Sup. Ct. 1963).

11. —Proof

Substantial evidence supported a ten-day suspension of a restaurant's liquor license for violation of Al Bev Law § 106(6) where testimony indicated that a loaded shotgun, for which the owner's father possessed a permit, had been constantly on the premises for at least one year, despite a law against possession of loaded shotguns in public within the City of New York, and where the owner's knowledge of illegal presence of the weapon could reasonably be concluded since it had been in plain view when seized; however, revocation of the license based upon the owner's allegedly permitting drug trafficking on the premises was not supported by substantial evidence where there was no proof that the owner knew or should have known of the transactions or that the bartender in charge at the time of the transactions was a manager or corporate principal, so as to impute his activities to the corporate licensee. Richjen Restaurant, Inc. v State Liquor Authority, 51 N.Y.2d 847, 433 N.Y.S.2d 755, 413 N.E.2d 1170, 1980 N.Y. LEXIS 2697 (N.Y. 1980).

The State Liquor Authority properly revoked an on-premises liquor license and imposed a $1,000 bond forfeiture on the ground that the licensee had suffered or permitted females to solicit male patrons of the establishment for immoral purposes on an occasion when the bartender was in charge of the licensed premises where the licensee's testimony that the bartender left in charge was responsible for dealing with any disorder and for assuring that the premises were operating in an orderly fashion supported the hearing officer's determination that the bartender had been delegated sufficient managerial authority so as to impute his conduct to the licensee, and where the evidence also supported the hearing officer's determination that the licensee could have known of the events that gave rise to the violation through the exercise of due diligence and proper supervision. Awrich Rest., Inc. v N.Y. State Liquor Auth., 60 N.Y.2d 645, 467 N.Y.S.2d 564, 454 N.E.2d 1307, 1983 N.Y. LEXIS 3348 (N.Y. 1983).

Revocation of a hotel liquor license will be annulled where there is such a preponderance of proof against evidence of a violation of § 106, subd. 2, that the verdict of a jury finding such violation would be set aside as against the weight of the evidence. Lasher v State Liquor Authority, 245 A.D. 402, 284 N.Y.S. 643, 1935 N.Y. App. Div. LEXIS 10319 (N.Y. App. Div. 1935).

Determination revoking petitioner's hotel liquor license annulled and the matter remitted for further proceedings. The findings, on charges that petitioner kept liquor on premises in containers, contents of which were not represented on labels and that he failed to keep bona fide hotel, were so inadequate and incomplete that they could not be judicially reviewed. New findings of fact should be made showing actual grounds of decision. Goldfinger v State Liquor Authority, 8 A.D.2d 694, 186 N.Y.S.2d 221, 1959 N.Y. App. Div. LEXIS 8901 (N.Y. App. Div. 4th Dep't 1959).

Liquor licensee's mere absence from the premises is not a sufficient excuse for violation of the law when he could have discovered the violations by adequate supervision and inquiry. Cuti v Roth, 50 A.D.2d 1044, 377 N.Y.S.2d 738, 1975 N.Y. App. Div. LEXIS 12195 (N.Y. App. Div. 3d Dep't 1975).

Suspension of liquor license and imposition of fine pursuant to CLS Al Bev § 106 were supported by hearing officer's finding that patrons were physically and violently removed from licensed premises after having done no more than to utter expletive. Irvington Enterprises, Inc. v Duffy, 155 A.D.2d 335, 547 N.Y.S.2d 305, 1989 N.Y. App. Div. LEXIS 14332 (N.Y. App. Div. 1st Dep't 1989).

Substantial evidence supported determination of State Liquor Authority that petitioner had failed to maintain adequate books and records on premises, and had made substantial unauthorized alteration of premises which materially affected its character, where (1) petitioner's application for liquor license represented that premises would be full service restaurant and that there would be no "live entertainment," and diagram submitted showed large kitchen and dining area, (2) premises were in fact operated as bar with topless dancers on stage, kitchen was never operational, and kitchen area was converted into game room, and (3) petitioner admitted that he deliberately misled authority about his intentions and that books and records were never maintained on premises. Bull's Eye, Inc. v New York State Liquor Authority, 181 A.D.2d 676, 580 N.Y.S.2d 782, 1992 N.Y. App. Div. LEXIS 2986 (N.Y. App. Div. 2d Dep't), amended, 183 A.D.2d 822, 1992 N.Y. App. Div. LEXIS 9072 (N.Y. App. Div. 2d Dep't 1992).

Evidence did not support denial of liquor license to restaurant where (1) treasurer of restaurant testified that she and employee were working at restaurant when plain clothes officer searched refrigerator behind counter and found 2 cans or bottles of beer in refrigerator and, further, that beer was used for cooking and was located in bottom of refrigerator which also contained vegetables used for cooking, (2) summons showed that charge of unlicensed sale of alcohol was dismissed and matter was sealed, and (3) administrative law judge also relied on police report which alleged sale of beer to undercover officer, but report was not admitted into evidence. 705 Ninth Ave. Restaurant Corp. v State Liquor Auth., 187 A.D.2d 349, 589 N.Y.S.2d 466, 1992 N.Y. App.

Div. LEXIS 12942 (N.Y. App. Div. 1st Dep't 1992), app. denied, 81 N.Y.2d 707, 597 N.Y.S.2d 937, 613 N.E.2d 969, 1993 N.Y. LEXIS 724 (N.Y. 1993).

Structure built by petitioner to house large block of ice so patrons could consume alcoholic beverages poured by bartender down block constituted substantial evidence that petitioner constructed second bar, counter, or similar contrivance in its premises without requisite permission of State Liquor Authority. Oneshot, Inc. v New York State Liquor Auth., 214 A.D.2d 416, 625 N.Y.S.2d 185, 1995 N.Y. App. Div. LEXIS 4352 (N.Y. App. Div. 1st Dep't 1995).

Determination that licensee sold alcohol to intoxicated individual was supported by police officer's unequivocal testimony that, while he was standing in door frame at bar entrance, he saw, from distance of about 5 to 10 feet, and for about 15 minutes, extremely intoxicated man who had one drink in front of him and who was being served bottle of beer by bartender. T.K.O. Enters. v New York State Liquor Auth., 226 A.D.2d 646, 641 N.Y.S.2d 133, 1996 N.Y. App. Div. LEXIS 4422 (N.Y. App. Div. 2d Dep't 1996).

Substantial evidence did not support determination of state liquor authority which concluded that petitioner's president violated 9 NYCRR § 53.1(n) when, after robber was shot to death by off-duty police officer on petitioner's premises, he tried to enter premises "around the body," where police officer who was only witness at revocation hearing testified that petitioner's president did not come closer than 10 feet to body. Gregory St. Pub, Inc. v New York State Liquor Auth., 258 A.D.2d 937, 685 N.Y.S.2d 355, 1999 N.Y. App. Div. LEXIS 1630 (N.Y. App. Div. 4th Dep't 1999).

Substantial evidence that petitioner violated CLS Al Bev § 65(1) was provided by (1) undercover officer's testimony that underage auxiliary police officer who accompanied him was served 6 alcoholic beverages from 3 different bartenders without being asked for identification, and (2) auxiliary officer's driver's license and police identification card which showed that he was under age of 21 on date in question. H.C. Entertainment Corp. v New York State Liquor Auth., 270 A.D.2d 159, 704 N.Y.S.2d 589, 2000 N.Y. App. Div. LEXIS 3081 (N.Y. App. Div. 1st Dep't 2000).

Although a liquor license is referred to as a privilege and not a right, when it has been issued and acted upon by the licensee, it should not be revoked or suspended except on competent proof showing a clear violation of the statute involved. Guerra v New York State Liquor Authority, 35 Misc. 2d 564, 231 N.Y.S.2d 214, 1962 N.Y. Misc. LEXIS 2845 (N.Y. Sup. Ct. 1962), rev'd, 18 A.D.2d 868, 237 N.Y.S.2d 56, 1963 N.Y. App. Div. LEXIS 4908 (N.Y. App. Div. 4th Dep't 1963).

Sole evidence in support of the New York State Liquor Authority's finding that a bar owner violated N.Y. Alco. Bev. Cont. Law § 106(6) by permiting its premises to become disorderly was a hearsay statement. As that statement was seriously controverted by the sworn testimony of a bouncer, who was subject to cross-examination, the Authority's finding was not supported by substantial evidence. Matter of McGillicuddy's Tap House, Ltd. v New York State Liq. Auth., 57 A.D.3d 1052, 868 N.Y.S.2d 383, 2008 N.Y. App. Div. LEXIS 9227 (N.Y. App. Div. 3d Dep't 2008).

12. —Rational basis; "arbitrary and capricious"

The State Liquor Authority's decision denying the application of a motel restaurant lessee for a restaurant liquor license was not arbitrary or capricious, where prior lessees of the premises from the same landlord had used the premises for the purposes of prostitution. Moltzen v Hostetter, 24 A.D.2d 1018, 266 N.Y.S.2d 86, 1965 N.Y. App. Div. LEXIS 2732 (N.Y. App. Div. 2d Dep't 1965), aff'd, 18 N.Y.2d 629, 272 N.Y.S.2d 777, 219 N.E.2d 292, 1966 N.Y. LEXIS 1209 (N.Y. 1966).

Twelve-day deferred suspension imposed by State Liquor Authority on licensed premises, which permitted lewd or indecent conduct by allowing a female patron to expose her private parts while dancing and which permitted the premises to become disorderly by allowing the same female patron to become involved in an altercation with another patron, was not arbitrary and capricious or an abuse of discretion or so grave in its impact that it was disproportionate to the misconduct. MHC Airport Inn, Inc. v State Liquor Authority, 78 A.D.2d 770, 434 N.Y.S.2d 482, 1980 N.Y. App. Div. LEXIS 13326 (N.Y. App. Div. 4th Dep't 1980).

Penalty imposed by State Liquor Authority which suspended petitioner's on-premises liquor license for 15 days was not arbitrary or capricious or so disproportionate to offense as to shock one's sense of fairness where petitioner's owner had argument with his girlfriend which resulted in his hitting her and causing various injuries. Pappy Jack's Pub, Inc. v Duffy, 148 A.D.2d 870, 539 N.Y.S.2d 144, 1989 N.Y. App. Div. LEXIS 2811 (N.Y. App. Div. 3d Dep't 1989).

It was proper to require petitioner to either pay $2,000 civil penalty or suffer 10-day license revocation, and to forfeit its bond in amount of $1,000 for having violated CLS Al Bev § 106(6), by suffering and permitting its premises to become disorderly, and CLS Al Bev § 114(6), by failing to conspicuously post its liquor license. Warehouse Entertainment, Inc. v New York State Liquor Auth., 269 A.D.2d 278, 703 N.Y.S.2d 139, 2000 N.Y. App. Div. LEXIS 2022 (N.Y. App. Div. 1st Dep't), app. denied, 95 N.Y.2d 762, 715 N.Y.S.2d 215, 738 N.E.2d 363, 2000 N.Y. LEXIS 2324 (N.Y. 2000).

Since the penalties to be imposed by the State Liquor Authority for offenses under this section are not fixed by law and rest in the reasonable discretion of the Authority, the only test of whether action of the Authority in a particular case is so arbitrary and capricious as to be an abuse of discretion is by comparing the penalty imposed in the particular case with that imposed in the past under reasonably similar circumstances. Bomysoad v New York State Liquor Authority, 26 Misc. 2d 704, 204 N.Y.S.2d 325, 1960 N.Y. Misc. LEXIS 2548 (N.Y. Sup. Ct. 1960), rev'd, 13 A.D.2d 873, 215 N.Y.S.2d 199, 1961 N.Y. App. Div. LEXIS 10699 (N.Y. App. Div. 3d Dep't 1961).

13. Mitigation of punishment

Where violation of Alcoholic Beverage Control Law § 106, subd 3 was readily admitted, and was at best technical in that licensee failed to have oral permission of Alcoholic Beverage Control Board put in writing, 10 day license suspension and $1000 bond forfeiture was reduced to a letter of warning. Alvaro v State Liquor Authority, 43 A.D.2d 903, 351 N.Y.S.2d 248, 1974 N.Y. App. Div. LEXIS 5954 (N.Y. App. Div. 4th Dep't 1974).

Pursuant to an Article 78 proceeding, termination of state liquor authority cancelling license for violations of Alcoholic Beverage Control L §§ 65, subd 1 and 106 was modified to 6 months suspension of license. Danchak v State Liquor Authority, 44 A.D.2d 638, 353 N.Y.S.2d 833, 1974 N.Y. App. Div. LEXIS 5363 (N.Y. App. Div. 3d Dep't 1974).

Penalty of cancellation of on-premises liquor license and grocery store beer license was excessive and constituted abuse of discretion to extent it exceeded penalty of suspension of such licenses for period of approximately one year. Lopez v State Liquor Authority, 53 A.D.2d 1016, 386 N.Y.S.2d 487, 1976 N.Y. App. Div. LEXIS 15815 (N.Y. App. Div. 4th Dep't 1976).

Ten-day suspension of liquor license and $1,000 bond forfeiture (which would cost licensee some $300,000 in revenues and possibly force it out of business) would be disproportionate penalty where licensee allegedly violated CLS Al Bev § 106 by permitting illegal gambling on licensed premises, and by permitting premises to become disorderly by presence of gambling devices, since (1) licensee had unblemished record of compliance with applicable laws and regulations, (2) event at which alleged violations occurred was conducted as benefit for worthy cause and posed no danger to public health, safety, or welfare, and (3) liquor authority knew of planned event in advance and had registered no objection thereto. Muidallap Corp. v State Liquor Authority, 143 A.D.2d 9, 532 N.Y.S.2d 1, 1988 N.Y. App. Div. LEXIS 8432 (N.Y. App. Div. 1st Dep't 1988).

It was improper to revoke petitioner's on-premises liquor license for permitting overcrowding, extending license to separate unlicensed area, operating second stand-up bar, and allowing establishment to become disorderly by generating excessive noise where, inter alia, three quarters of complaints came from one person, petitioner had been very cooperative in attempting to resolve any problems, police had not received habitual complaints about disorderly conduct on petitioner's premises, petitioner had promised to take remedial steps to curtail noise, and there had been no prior warnings issued to petitioner. In re Verney, 254 A.D.2d 674, 679 N.Y.S.2d 198, 1998 N.Y. App. Div. LEXIS 11469

(N.Y. App. Div. 3d Dep't 1998), rev'd, 94 N.Y.2d 779, 699 N.Y.S.2d 696, 721 N.E.2d 946, 1999 N.Y. LEXIS 3431 (N.Y. 1999).

It was improper to revoke petitioner's liquor license, even though petitioner attempted to impede lawful investigation by Liquor Authority's representatives in violation of CLS Al Bev § 106(15) and kept contaminated alcoholic beverages on its promises in violation of CLS Al Bev § 106(2), where petitioner had unblemished record prior and subsequent to isolated incident. Oak Beach Inn Corp. v New York State Liquor Auth., 269 A.D.2d 191, 703 N.Y.S.2d 98, 2000 N.Y. App. Div. LEXIS 1322 (N.Y. App. Div. 1st Dep't 2000).

Where a licensee has his life's savings invested in a restaurant and bar business, power to revoke his license should be used with understanding discretion, particularly where he lacks experience in the business in which he has engaged. Guerra v New York State Liquor Authority, 35 Misc. 2d 564, 231 N.Y.S.2d 214, 1962 N.Y. Misc. LEXIS 2845 (N.Y. Sup. Ct. 1962), rev'd, 18 A.D.2d 868, 237 N.Y.S.2d 56, 1963 N.Y. App. Div. LEXIS 4908 (N.Y. App. Div. 4th Dep't 1963).

14. —Books and records

The State Liquor Authority revoked a liquor license for failure to keep adequate books. The Appellate Division annulled that determination on the ground that in the absence of more specific regulations or a warning or suggestion as to how books should be kept, it could not be said that the evidence supported the Authority's determination. The Court of Appeals modified by remitting the matter to the Authority because it thought the evidence was sufficient to sustain the Authority's finding in respect of books and records where the posting of the records was not current and, while books showed a breakdown of food and liquor sales, the cash register tape had only a single total for each day. Flo Inn, Inc. v O'Connell, 305 N.Y. 602, 111 N.E.2d 649, 305 N.Y. (N.Y.S.) 602, 1953 N.Y. LEXIS 1182 (N.Y. 1953).

Sanctions of cancellation of liquor license, $250 bond penalty, and disapproval of renewal application imposed upon licensee which violated record keeping and ownership certification requirements of Alcholic Beverage Control Act by failing to disclose presence of one partner and fact that two persons had become corporate officers was an abuse of discretion where none of the persons involved had any criminal record and where there was no evidence of willful deception or corruption or the likelihood of either. Shore Haven Lounge, Inc. v New York State Liquor Authority, 37 N.Y.2d 187, 371 N.Y.S.2d 710, 332 N.E.2d 883, 1975 N.Y. LEXIS 1946 (N.Y. 1975).

While the keeping of books at the central office of a chain of restaurants is a technical violation of this section it in no way impeded inspection by the Authority. Application of Restaurants & Patisseries Longchamps, Inc., 271 A.D. 641, 67 N.Y.S.2d 362, 1947 N.Y. App. Div. LEXIS 5110 (N.Y. App. Div.), app. dismissed, 296 N.Y. 239, 72 N.E.2d 174, 296 N.Y. (N.Y.S.) 239, 1947 N.Y. LEXIS 942 (N.Y. 1947).

Although petitioner was lax in the keeping of its books and records and in reporting changes of its stockholders and directors, which did not effect any change in management, and was chargeable with other technical violations, the penalty of cancellation of its license was excessive and modified to a 30-day suspension. L'Intrigue, Inc. v State Liquor Authority, 29 A.D.2d 854, 288 N.Y.S.2d 105, 1968 N.Y. App. Div. LEXIS 4433 (N.Y. App. Div. 1st Dep't 1968).

In light of fact that licensee's record was unblemished, penalty of cancellation and nonrenewal was so disproportionate to violations of Alcoholic Beverage Control Law § 106, subd 12 (failure to keep adequate records) and § 99-d, subd 2 (principal of record not sole and true party in interest) as to constitute an abuse of discretion, and penalty was accordingly reduced to 30-day suspension plus $250 bond claim. Shore Haven Lounge, Inc. v New York State Liquor Authority, 44 A.D.2d 593, 353 N.Y.S.2d 253, 1974 N.Y. App. Div. LEXIS 5474 (N.Y. App. Div. 2d Dep't 1974), aff'd, 37 N.Y.2d 187, 371 N.Y.S.2d 710, 332 N.E.2d 883, 1975 N.Y. LEXIS 1946 (N.Y. 1975).

Cancellation of petitioner's liquor license and forfeiture of $1,000 bond was proper penalty for petitioner's failure to keep and maintain adequate books and records on premises, and for making substantial unauthorized alterations of premises which materially affected its character, where (1) in his application for liquor license, petitioner represented that premises would be full service restaurant and that there would be no "live entertainment," and diagram submitted showed large kitchen and dining area, (2) premises were in fact operated as bar with topless dancers on stage, kitchen was never operational, and kitchen area was converted into game room, and (3) petitioner admitted that he deliberately misled authority about his intentions and that books and records were never maintained on premises. Bull's Eye, Inc. v New York State Liquor Authority, 181 A.D.2d 676, 580 N.Y.S.2d 782, 1992 N.Y. App. Div. LEXIS 2986 (N.Y. App. Div. 2d Dep't), amended, 183 A.D.2d 822, 1992 N.Y. App. Div. LEXIS 9072 (N.Y. App. Div. 2d Dep't 1992).

15. —Refusal to allow inspection

In Article 78 proceeding to review and annul a determination of State Liquor Authority which cancelled petitioner's restaurant liquor license on ground that petitioner had refused to permit inspection of the licensed premises by representatives of the authority, penalty of cancellation was so disproportionate to the technical violation disclosed by the record as to be shocking to one's sense of fairness and therefore determination would be modified by striking out the provision cancelling petitioner's license, by annulling such cancellation and by substituting therefor a provision suspending petitioner's license for 10 days. Club Illusion, Inc. v State Liquor Authority, 25 A.D.2d 865, 270 N.Y.S.2d 67, 1966 N.Y. App. Div. LEXIS 4241 (N.Y. App. Div. 2d Dep't 1966).

16. —Gambling

Joker Poker machine is gambling device prohibited under Alcoholic Beverage Control Law § 106 (6)–petitioner was found guilty of having suffered or permitted such gambling; penalty of 10-day deferred suspension of petitioner's liquor license plus $ 1,000 bond forfeiture was not disproportionate to offense. 2700 Tavern, Inc. v State Liquor Authority, 146 A.D.2d 552, 537 N.Y.S.2d 34, 1989 N.Y. App. Div. LEXIS 497 (N.Y. App. Div. 1st Dep't 1989).

Petitioner pleaded "no contest" to violation of Alcoholic Beverage Control Law § 106 (6) by maintaining Joker Poker machine in operation on licensed premises; only issue involved is whether penalty imposed by New York State Liquor Authority, 15-day suspension of petitioner's liquor license and $1,000 bond forfeiture, is reasonable exercise of discretion; in view of all circumstances, including petitioner's virtually unblemished record of compliance with law, Supreme Court properly vacated penalty as excessive. 3275 Byron Ave. Corp. v New York State Liquor Auth., 161 A.D.2d 600, 555 N.Y.S.2d 389, 1990 N.Y. App. Div. LEXIS 5319 (N.Y. App. Div. 2d Dep't 1990).

Cancellation of petitioner's restaurant liquor license for permitting gambling on the premises on three occasions was considered excessive and modified to license suspension for three months. Miller v New York State Liquor Authority, 20 A.D.2d 725, 248 N.Y.S.2d 91, 1964 N.Y. App. Div. LEXIS 4328 (N.Y. App. Div. 2d Dep't 1964).

Provision for payment of licensee's bond as an additional penalty for permitting gambling on licensed premises was excessive and an abuse of discretion and, thus, penalty for permitting or suffering gambling on licensed premises should have been limited to suspension of liquor license for period of ten days. McCoy v State Liquor Authority, 47 A.D.2d 670, 364 N.Y.S.2d 209, 1975 N.Y. App. Div. LEXIS 8881 (N.Y. App. Div. 2d Dep't 1975).

Suspension of special on-premises liquor license for ten days was appropriate punishment for suffering or permitting gambling on licensed premises, but forfeiture of licensees' $1,000 bond was not warranted where licensees had an otherwise unblemished record. Seminaro v State Liquor Authority, 51 A.D.2d 680, 378 N.Y.S.2d 151, 1976 N.Y. App. Div. LEXIS 11047 (N.Y. App. Div. 4th Dep't 1976).

Where one of four violations of Alcoholic Beverage Control Law upon which State Liquor Authority's penalty imposed on tavern operator was predicated was found to be unsupported, tavern had been operated for 41 years without prior violation, and, with exception of charge that gambling was permitted on premises,

nature of acts giving rise to violations were of relatively minor consequence, penalty of 40-day license suspension imposed on tavern operator would be reduced to ten-day suspension. Hristo v State Liquor Authority, 52 A.D.2d 741, 381 N.Y.S.2d 938, 1976 N.Y. App. Div. LEXIS 12438 (N.Y. App. Div. 4th Dep't 1976).

Penalty which included $500 bond forfeiture in connection with permitting gambling on the premises was too severe in light of all the circumstances; ten days' suspension without bond forfeiture was appropriate punishment. Flook v State Liquor Authority, 55 A.D.2d 1048, 391 N.Y.S.2d 238, 1977 N.Y. App. Div. LEXIS 10408 (N.Y. App. Div. 4th Dep't 1977).

It was unduly harsh to suspend petitioner's liquor license for 30 days and impose $1,000 bond forfeiture for having suffered or permitted gambling on licensed premises by maintaining video display game of type prohibited under rule 36.1(t) of Rules of State Liquor Authority (9 NYCRR § 53.1(t)) where (1) it was first time that "Big Apple" video game was considered to be "gambling device," (2) New York City Department of Consumer Affairs had reviewed and licensed "Big Apple" as approved common show game, and (3) prior cases involving "Joker Poker" machine had not imposed such severe penalties. Cos Dei San, Inc. v New York State Liquor Authority, 147 A.D.2d 370, 537 N.Y.S.2d 536, 1989 N.Y. App. Div. LEXIS 1280 (N.Y. App. Div. 1st Dep't), app. denied, 74 N.Y.2d 611, 546 N.Y.S.2d 556, 545 N.E.2d 870, 1989 N.Y. LEXIS 2883 (N.Y. 1989).

Penalty of 20-day suspension of petitioner's liquor license and $1,000 bond forfeiture was excessive for having allowed patrons to utilize Joker Poker video game with knowledge that they could receive extension of playing time or credits without being charged therefor; matter would be remitted for imposition of new penalty not to exceed suspension of petitioner's license for more than 10 days. PJP Tavern Corp. v New York State Liquor Authority, 152 A.D.2d 578, 543 N.Y.S.2d 499, 1989 N.Y. App. Div. LEXIS 9710 (N.Y. App. Div. 2d Dep't 1989), app. denied, 75 N.Y.2d 702, 552 N.Y.S.2d 108, 551 N.E.2d 601, 1990 N.Y. LEXIS 2 (N.Y. 1990).

Revocation of petitioner's on-premises liquor license was excessive punishment for single conviction of promoting gambling on premises where revocation would entail loss of petitioner's livelihood, and he had well-regarded stature in community and distinguished military career. Mahr v Duffy, 171 A.D.2d 984, 567 N.Y.S.2d 925, 1991 N.Y. App. Div. LEXIS 3849 (N.Y. App. Div. 3d Dep't), app. denied, 78 N.Y.2d 855, 573 N.Y.S.2d 645, 578 N.E.2d 443, 1991 N.Y. LEXIS 1886 (N.Y. 1991).

17. —Disorderly premises

Cancellation of license on grounds of disorderliness of premises because of homosexual activity held excessive and penalty reduced to suspension of license for 60 days. Sayville Coachman Inn, Inc. v New York State Liquor Authority, 27 N.Y.2d 607, 313 N.Y.S.2d 415, 261 N.E.2d 412, 1970 N.Y. LEXIS 1232 (N.Y. 1970).

Even if substantial evidence had supported finding that bar had permitted disorderly condition to exist on its premises, penalty of cancellation of liquor license would have been shocking to court's sense of fairness under circumstances. 4822 Bar & Grill, Inc. v New York State Liquor Authority, 50 A.D.2d 889, 377 N.Y.S.2d 525, 1975 N.Y. App. Div. LEXIS 11789 (N.Y. App. Div. 2d Dep't 1975), aff'd, 41 N.Y.2d 875, 393 N.Y.S.2d 993, 362 N.E.2d 623, 1977 N.Y. LEXIS 1920 (N.Y. 1977).

Penalty of cancellation plus $1,000 bond claim, imposed by state liquor authority for one violation of CLS Al Bev § 106 (disorderly premises), would have been remanded for reconsideration on grounds of excessiveness if court were not dismissing proceeding for lack of substantial evidence to support charge. La Bamba Bar, Inc. v New York State Liquor Authority, 141 A.D.2d 403, 530 N.Y.S.2d 2, 1988 N.Y. App. Div. LEXIS 6921 (N.Y. App. Div. 1st Dep't 1988).

Revocation of petitioners' liquor license for 2 years for allowing disorderly premises was inappropriate where bar in question had existed at same location for some 70 years without any serious transgressions, incident in question involved civic event where sheer number of crowd was out of ordinary to bar's usual operation, and effort to close bar was not result of enraged community but rather action of one neighbor who had recently moved to community. Bonhomme v New York State Liquor Auth., 221 A.D.2d 882, 634 N.Y.S.2d 241, 1995 N.Y. App. Div. LEXIS 12352 (N.Y. App. Div. 3d Dep't 1995).

Penalty of 20-day suspension and imposition of $1,000 bond forfeiture on licensee for permitting security guard to assault patron was shocking to court's sense of fairness where incident was isolated and brief; penalty would be reduced to 10-day deferred suspension and imposition of $500 bond forfeiture. Soca Paradise, Inc. v New York Liquor Auth., 232 A.D.2d 278, 649 N.Y.S.2d 9, 1996 N.Y. App. Div. LEXIS 10354 (N.Y. App. Div. 1st Dep't 1996).

Where a liquor licensee enters a plea of "no contest" to a charge of maintaining disorderly premises, by way of first offense, a short suspension of his license is reasonable, but suspension or revocation of his liquor license, without prior warning, is excessive and an abuse of discretion. Guerra v New York State Liquor Authority, 35 Misc. 2d 564, 231 N.Y.S.2d 214, 1962 N.Y. Misc. LEXIS 2845 (N.Y. Sup. Ct. 1962), rev'd, 18 A.D.2d 868, 237 N.Y.S.2d 56, 1963 N.Y. App. Div. LEXIS 4908 (N.Y. App. Div. 4th Dep't 1963).

18. —Lewd conduct

That employee engaged by beer licensee to close licensees' restaurant and clean had twice returned to restaurant with girls and had intercourse did not justify cancellation of license and warranted only 30 day suspension. Votsis v State Liquor Authority, 47 A.D.2d 802, 365 N.Y.S.2d 304, 1975 N.Y. App. Div. LEXIS 9122 (N.Y. App. Div. 4th Dep't 1975).

Conduct of liquor licensee in permitting lewdness or obscenity was not so heinous or dangerous to public as to justify cancellation of license, and penalty was reduced to suspension of license for three months and forfeiture of bond in the sum of $1,000. Rubinoff v State Liquor Authority, 53 A.D.2d 943, 385 N.Y.S.2d 212, 1976 N.Y. App. Div. LEXIS 15734 (N.Y. App. Div. 3d Dep't 1976).

19. —Fighting

Liquor license should not have been suspended on ground that licensee suffered or permitted its premises to become disorderly by virtue of incident in which bartender shot patron where licensee had had a license since 1950 and there had been no previous charges of disorderliness, the bartender had worked at the premises for only 3 weeks, on weekends, prior to the incident, with no acts of violence, the principal officer and stockholder of the licensed premises had been on the premises for 12 hours on the day in question and had left prior to the incident, and there was no evidence to impute the employee's illegal activities to the corporate licensee. Ivy Tavern, Inc. v State Liquor Authority, 44 A.D.2d 568, 353 N.Y.S.2d 43, 1974 N.Y. App. Div. LEXIS 5527 (N.Y. App. Div. 2d Dep't 1974).

Defendant's motion to dismiss the disorderly count of the information was granted because the physical altercation began suddenly and unexpectedly and ended fairly rapidly and nothing within the four corners of the information alleged or implied the existence of advance notice of the potentiality of the confrontation, or of events that could lead to it, that would have provided defendant with actual or constructive knowledge mandating his intercession. People v Salgado, 58 Misc. 3d 820, 69 N.Y.S.3d 785, 2018 N.Y. Misc. LEXIS 118 (N.Y. City Crim. Ct. 2018).

20. Advertising signs

Displaying two signs advertising dances to be held by certain organizations did not constitute a violation of § 106, subd 7. "No other sign" in the second sentence is construed with reference to the type of sign mentioned in the first sentence. The rule of ejusdem generis applies. People v Weinstein, 114 N.Y.S.2d 726, 202 Misc. 171, 1952 N.Y. Misc. LEXIS 2968 (N.Y. Magis. Ct. 1952).

The words "other sign" as used in sub 7 of this section refer to signs advertising alcoholic beverages only and do not prohibit the use of other signs such as those advertising dances to be held on certain dates at premises other than the licensed premises. People v Machalski, 115 N.Y.S.2d 28, 1952 N.Y. Misc. LEXIS 1601 (N.Y. Magis. Ct. 1952).

21. Containers

Where the State Liquor Authority suspended respondent's liquor license for 20 days upon its finding that a barrel of beer had been connected to a tap which did not bear the same name as the

beer, the Appellate Division had no authority to annul that determination on the law and remit the proceeding to the Authority "for further action and reconsideration of the extent of the punishment imposed," since there is no provision for judicial review of the measure of punishment imposed by the State Liquor Authority. Sagos v O'Connell, 301 N.Y. 212, 93 N.E.2d 644, 301 N.Y. (N.Y.S.) 212, 1950 N.Y. LEXIS 800 (N.Y. 1950).

In an Article 78 proceeding, a fine levied by the State Liquor Authority against a licensee for keeping liquor in mislabeled containers in violation of Al Bev Law § 106(2) was in excess of the Authority's jurisdiction and would be annuled; the provision in Al Bev Law § 112 that the bond furnished by a licensee shall be conditioned for payment of "all fines and penalties which shall accrue" refers to fines imposed by courts and does not furnish a basis for implying a power in the Authority to impose a fine. Dumbarton Oaks Restaurant & Bar, Inc. v New York State Liquor Authority, 58 N.Y.2d 89, 459 N.Y.S.2d 564, 446 N.E.2d 128, 1983 N.Y. LEXIS 2828 (N.Y. 1983).

An on-premises consumption license will be revoked, pursuant to § 118, where the petitioner had three partly filled bottles of whisky back of the bar along with other bottles of the same kind of whisky whose seals had not been broken, in violation of § 106, subd. 2, a proper hearing under § 119 having been held. Yates v Mulrooney, 245 A.D. 146, 281 N.Y.S. 216, 1935 N.Y. App. Div. LEXIS 10247 (N.Y. App. Div. 1935).

Even assuming constitutional reasonable search restrictions on administrative proceedings, state liquor authority had right to inspect tavern, pursuant to complaint, for violation of Alcoholic Beverage Control Law § 106, subd 2 where mislabeled bottles were owned by licensee and used in his business. Lacorazza v State Liquor Authority, 44 A.D.2d 555, 352 N.Y.S.2d 671, 1974 N.Y. App. Div. LEXIS 5569 (N.Y. App. Div. 2d Dep't 1974).

22. Windows

Glass panels, facing the street and flush with the face of the building and completely painted with an opaque substance, are not windows within the meaning of sub 6 of this section. People v Brasi, 118 N.Y.S.2d 608, 1953 N.Y. Misc. LEXIS 1470 (N.Y. Magis. Ct. 1953).

The test of whether an object covers a window is whether it acts as a screen or shield, or in some similar manner so that the interior is so hidden, shielded, cloaked or concealed from view, that clear and full view into the interior of the licensed premises cannot be had from the sidewalk at all times. People v Brasi, 118 N.Y.S.2d 608, 1953 N.Y. Misc. LEXIS 1470 (N.Y. Magis. Ct. 1953).

23. Books and records

Sanction of 30-day suspension of liquor license and $250 bond penalty imposed upon licensee which violated record keeping and ownership certification requirements of Alcoholic Beverage Control Act by failing to disclose existence of one partner and fact that two persons had become corporate officers was appropriate. Shore Haven Lounge, Inc. v New York State Liquor Authority, 37 N.Y.2d 187, 371 N.Y.S.2d 710, 332 N.E.2d 883, 1975 N.Y. LEXIS 1946 (N.Y. 1975).

The purpose of this provision is to assure convenient availability of books to the inspectors of the Authority. Application of Restaurants & Patisseries Longchamps, Inc., 271 A.D. 641, 67 N.Y.S.2d 362, 1947 N.Y. App. Div. LEXIS 5110 (N.Y. App. Div.), app. dismissed, 296 N.Y. 239, 72 N.E.2d 174, 296 N.Y. (N.Y.S.) 239, 1947 N.Y. LEXIS 942 (N.Y. 1947).

In proceeding to review determination of New York State Liquor Authority cancelling on-premises liquor license and imposing $1,000 bond claim, record supported findings that license holder permitted license to be availed of by two persons not named therein; that it failed to keep required books and records; and that it suppressed information as to loans; however, record did not support finding that license holder wrongfully permitted another to sign his name on two renewal applications. Cross County Lounge, Inc. v New York State Liquor Authority, 51 A.D.2d 999, 380 N.Y.S.2d 751, 1976 N.Y. App. Div. LEXIS 11753 (N.Y. App. Div. 2d Dep't 1976).

Although the State Liquor Authority may examine the books and records of a corporation possessing a liquor license, there is no provision for an indefinite surrender of these records to the Authority, and after making such copies of these records which it deems pertinent for its own proceedings, the Authority must immediately return said records to the licensee. Candlelight Lounge, Inc. v New York State Liquor Authority, 54 Misc. 2d 393, 282 N.Y.S.2d 876, 1967 N.Y. Misc. LEXIS 1338 (N.Y. Sup. Ct. 1967).

Reliance upon inspections by police officers of taverns is essential to effective enforcement of Alcoholic Beverage Control Law, and thus, defendant tavern owner's failure to make available to policemen records of his purchases and sales of alcohol, which were requested while inspecting tavern, was interference within meaning of CLS Penal Law § 195.05, since policemen were engaged in authorized government function and power to inspect licensed premises includes power to inspect books and records. People v Stumpp, 129 Misc. 2d 703, 493 N.Y.S.2d 679, 1985 N.Y. Misc. LEXIS 2722 (N.Y. Dist. Ct. 1985), aff'd, 132 Misc. 2d 3, 505 N.Y.S.2d 758, 1986 N.Y. Misc. LEXIS 2626 (N.Y. App. Term 1986).

24. Refusal to allow inspection

A 60-day suspension rather than cancellation of liquor license was appropriate penalty for licensee's refusal to allow inspection of licensed premises during business hours by police officers, which refusal constituted a violation of the law. Corey v State Liquor Authority, 34 A.D.2d 1094, 312 N.Y.S.2d 829, 1970 N.Y. App. Div. LEXIS 4389 (N.Y. App. Div. 4th Dep't 1970).

It was inappropriate to revoke petitioner's liquor license because petitioner's bartender improperly denied Liquor Authority's agents permission to inspect premises, given that petitioner had prior unblemished record. M.P.N. Inc. v New York State Liquor Auth., 206 A.D.2d 430, 614 N.Y.S.2d 540, 1994 N.Y. App. Div. LEXIS 7281 (N.Y. App. Div. 2d Dep't 1994).

Defendant-bar owner's guilt of the crime of "obstructing governmental administration" would be established, as alleged in the information, challenged as not alleging an offense, if proof later showed that, when police officers sought to make an inspection pursuant to statute of premises licensed to sell alcoholic beverages, defendant stood in officer's way and stated his bar was private and officer would have to lock him up if he wanted to check the bar. People v De Martino, 67 Misc. 2d 11, 323 N.Y.S.2d 297, 1971 N.Y. Misc. LEXIS 1521 (N.Y. Dist. Ct. 1971).

Owner of premises which sold liquor for on-premises consumption was properly convicted of obstructing governmental administration for refusing police officer access to books and records, since police officer is permitted to inspect premises selling liquor for on-premises consumption and such inspection includes right to inspect books and records. People v Stumpp, 132 Misc. 2d 3, 505 N.Y.S.2d 578 (1986).

Information sufficiently alleged the charge of obstructing governmental administration in the second degree based on factual questions existing whether the bar was open for business at the approximately 3:30 a.m.-or-later hour, and whether the employee roster was actually available upon the premises at that time—or, indeed, whether such a roster existed at all—when the police officer sought to inspect. People v Salgado, 58 Misc. 3d 820, 69 N.Y.S.3d 785, 2018 N.Y. Misc. LEXIS 118 (N.Y. City Crim. Ct. 2018).

25. Off-premises consumption

A charge that the licensee served drinks to customers at his bar and permitted them to walk out the front door of the premises between 1 o'clock a.m. and closing time, and stand on the sidewalk and engage in loud talk, yell and swear at passing motorists, and throwing their glasses and returning to the bar for further drinks, did not constitute a violation of Alcoholic Beverage Control Law § 106, subdivision 3. Italiano v State Liquor Authority, 35 A.D.2d 455, 317 N.Y.S.2d 441, 1971 N.Y. App. Div. LEXIS 4922 (N.Y. App. Div. 4th Dep't 1971).

Finding as to violation of CLS Al Bev § 106(3) was not supported by substantial evidence where civic benefit, run at licensee bar, brought out unexpectedly large and sympathetic crowd, exceedingly hot day and congestion of people in bar caused some customers to seek air outside bar during break in music, and several customers carried out their drinks to parking lot, through doors manned by volunteers who had been instructed not to allow anyone out carrying liquor; such circumstances indicated

general disorderliness of premises. Bonhomme v New York State Liquor Auth., 221 A.D.2d 882, 634 N.Y.S.2d 241, 1995 N.Y. App. Div. LEXIS 12352 (N.Y. App. Div. 3d Dep't 1995).

26. —Cider

The holder of a license to sell wine at retail for consumption on premises under § 81, by delivering cider at complainant's farm did not violate § 106, subd. 3, which prohibits a retail licensee for on-premises consumption from selling or delivering any "liquors" or "wines" for consumption off the premises where sold. People v Tretneck, 22 N.Y.S.2d 720, 175 Misc. 41, 1940 N.Y. Misc. LEXIS 2205 (N.Y. County Ct. 1940).

Cider is neither liquor nor wine. People v Tretneck, 22 N.Y.S.2d 720, 175 Misc. 41, 1940 N.Y. Misc. LEXIS 2205 (N.Y. County Ct. 1940).

An information which charged the defendant, who was licensed to sell wine at retail for consumption on premises, with the delivery of cider at complainant's farm on Sunday was insufficient to charge a violation of § 106, subd. 5. People v Tretneck, 22 N.Y.S.2d 720, 175 Misc. 41, 1940 N.Y. Misc. LEXIS 2205 (N.Y. County Ct. 1940).

27. —Knowledge

The State Liquor Authority could properly conclude that petitioner, a corporation, violated subd. 3 of this section by permitting liquor to be delivered for consumption off its premises by reason of acts of one of its officers who was managing the premises, notwithstanding the sole stockholder of the corporation lacked knowledge of them. Maine Maid, Inc. v State Liquor Authority, 18 A.D.2d 919, 238 N.Y.S.2d 184, 1963 N.Y. App. Div. LEXIS 4402 (N.Y. App. Div. 2d Dep't 1963).

The owner of inn, licensed to sell liquor for consumption on premises, may be convicted for selling and delivering or causing to be sold and delivered liquor for off-premises consumption, in violation of § 106, subd. 3, although the actual sale was made by a waiter of the defendant without his knowledge or consent. People v Hawk, 283 N.Y.S. 531, 156 Misc. 870, 1935 N.Y. Misc. LEXIS 1567 (N.Y. County Ct.), aff'd, 268 N.Y. 678, 198 N.E. 555, 268 N.Y. (N.Y.S.) 678, 1935 N.Y. LEXIS 1146 (N.Y. 1935).

28. Hours and days

State Liquor Authority's determination that petitioner violated CLS Al Bev § 106(5) by permitting sale of alcoholic beverage during prohibited hours was supported by testimony of investigator who purchased beverage after ascertaining correct time by comparing time on his watch with that of clock on wall of premises. Rontim Restaurant v New York State Liquor Auth., 206 A.D.2d 485, 614 N.Y.S.2d 749, 1994 N.Y. App. Div. LEXIS 7458 (N.Y. App. Div. 2d Dep't 1994).

Tavern owner's on-premises liquor license was properly cancelled pursuant to N.Y. Alco. Bev. Cont. Law §§ 106(5), 118(1) and (3), and N.Y. Comp. Codes R. & Regs. tit. 9, § 53.1(q) because the owner sold alcohol after hours, permitted the consumption of alcohol on its premises after hours, caused a continuing pattern of noise, disturbance, and misconduct that adversely affected the neighborhood, and operated its premises in such a manner that it became a focal point for police attention. Matter of Sherwyn Toppin Mktg. Consultants, Inc. v New York State Liq. Auth., 103 A.D.3d 648, 958 N.Y.S.2d 794, 2013 N.Y. App. Div. LEXIS 731 (N.Y. App. Div. 2d Dep't), app. denied, 21 N.Y.3d 858, 970 N.Y.S.2d 495, 992 N.E.2d 423, 2013 N.Y. LEXIS 1456 (N.Y. 2013).

A statute prohibiting the serving of an alcoholic beverage upon licensed premises after 4:30 A.M. (Alcoholic Beverage Control Law, § 106, subd 5, par [b]) applies to any person who violates the prohibition of the statute and is not limited to the licensee of the premises and, therefore, defendant, a barmaid, can properly be charged with a violation of this section for allegedly permitting the consumption of beer at 4:36 A.M.; since the trial court, in deciding the critical question of the time of the occurrence, improperly vouched for the integrity of the two police officers who testified on behalf of the People and gave their testimony credence based upon facts not disclosed by the evidence, a reversal of the judgment of conviction is warranted; in any event, the evidence adduced upon the trial that the officers relied upon the time announced by a radio station in making the arrest warrants a reversal in light of the fact that defendant's guilt hinges on a span of only a few minutes since, where conduct not otherwise criminal in nature becomes so by the mere passage of time, the shorter the elapsed time between the commencement of the alleged violation and the termination of the lawful conduct, the more precise the verification of the means used to ascertain the time required and, therefore, if the People intended to rely on the radio broadcast to verify the exact time, proof should have submitted as to accuracy of the station's time check. People v Shelley, 103 Misc. 2d 1087, 431 N.Y.S.2d 753, 1980 N.Y. Misc. LEXIS 2258 (N.Y. App. Term 1980).

29. —Regulation by municipalities

No town or municipality has the power to regulate hours for the sale of alcoholic beverages on Memorial Day so as to vary or conflict with the governing provisions of the Alcoholic Beverage Control Law or Rules of Local Alcoholic Beverage Control Boards. William Mullare, Inc. v Hempstead, 11 Misc. 2d 245, 176 N.Y.S.2d 55, 1958 N.Y. Misc. LEXIS 3215 (N.Y. Sup. Ct. 1958).

The policy of the Legislature was to pre-empt the field of regulation and control of manufacture, sale, etc., of alcoholic beverages, and since subd. 5 of this section restricts hours for sale of such beverages only to the extent therein stated, a municipality has no authority, under § 86 of the General Municipal Law, to further restrict hours for sale of such beverages on Memorial Day. Blumfield v Ramapo, 30 Misc. 2d 678, 222 N.Y.S.2d 939, 1961 N.Y. Misc. LEXIS 2157 (N.Y. Sup. Ct. 1961).

Provision of New York City Cabaret Law, regulating business hours of certain establishments, was not merely local law of general application but was improper intrusion into area which was exclusive province of state and was preempted by CLS Al Bev § 106; since local law rendered illegal what was specifically allowed by state law, it was invalid exercise of local authority and its enforcement would be enjoined. In re Landsdown Entertainment Corp., 133 Misc. 2d 206, 506 N.Y.S.2d 825, 1986 N.Y. Misc. LEXIS 2850 (N.Y. Sup. Ct. 1986), modified, 141 A.D.2d 468, 530 N.Y.S.2d 574, 1988 N.Y. App. Div. LEXIS 7908 (N.Y. App. Div. 1st Dep't 1988).

30. —Knowledge

Under the scheme of the Alcoholic Beverage Control Law, it is the licensee that is held exclusively liable with respect to consumption to alcoholic beverages on premises later than one-half hour after the start of prohibited hours of sale, but for violation to occur, licensee must know or should know that an alcoholic beverage is being consumed in the premises after the prescribed time. People v Stentella, 83 Misc. 2d 515, 373 N.Y.S.2d 278, 1975 N.Y. Misc. LEXIS 2932 (N.Y. City Crim. Ct. 1975).

A Licensee could not be held liable for consumption of beer on premises five minutes after prescribed hour in absence of evidence that licensee had knowledge or should have known that beer was being consumed at that time, that licensee was in the public part of the premises, or that he could have prevented the beer from being consumed. People v Stentella, 83 Misc. 2d 515, 373 N.Y.S.2d 278, 1975 N.Y. Misc. LEXIS 2932 (N.Y. City Crim. Ct. 1975).

31. Gambling

Subdivision 6 embraces both casual and professional betting and includes a social game of poker. Katz's Delicatessen, Inc. v O'Connell, 302 N.Y. 286, 97 N.E.2d 906, 302 N.Y. (N.Y.S.) 286, 1951 N.Y. LEXIS 752 (N.Y. 1951).

State Liquor Authority properly relied on definition of "gambling" in CLS Penal Law § 225.00 in determining that licensee violated CLS Al Bev Law § 106 by permitting on its premises "Joker Poker" machine which awarded free games to winning players. Plato's Cave Corp. v State Liquor Auth., 68 N.Y.2d 791, 506 N.Y.S.2d 856, 498 N.E.2d 420, 1986 N.Y. LEXIS 20104 (N.Y. 1986).

While Alcoholic Beverage Control Law § 106 (6) prohibits gambling within premises licensed to sell alcoholic beverages for consumption on premises, there is no similar legislative prohibition concerning licensees who hold licenses to sell alcoholic beverages for consumption off premises; accordingly, as State Liquor Authority had neither express nor implied authority to apply instant rule prohibiting gambling on premises licensed to sell alcoholic beverages to holder of license to sell alcoholic

beverages for consumption off premises, its determination was properly annulled. L. Newstand, Inc. v State Liquor Authority, 151 A.D.2d 483, 542 N.Y.S.2d 275, 1989 N.Y. App. Div. LEXIS 7476 (N.Y. App. Div. 2d Dep't 1989), app. denied, 75 N.Y.2d 710, 556 N.Y.S.2d 532, 555 N.E.2d 929, 1990 N.Y. LEXIS 977 (N.Y. 1990).

Uncontroverted testimony of undercover officers at statutory hearing furnished substantial evidence to support determination that petitioner suffered or permitted gambling on licensed premises, in violation of Alcoholic Beverage Control Law, and that petitioner permitted keeping or maintaining on licensed premises of video display game machine of type prohibited under rule 36.1 (t) of Rules of State Liquor Authority (9 NYCRR 53.1 [t]); illegality of "Trivia Whiz" video game machine is uncontested. Ebbetts Field Cafe, Inc. v Duffy, 168 A.D.2d 309, 562 N.Y.S.2d 940, 1990 N.Y. App. Div. LEXIS 15200 (N.Y. App. Div. 1st Dep't 1990).

A determination suspending petitioner's restaurant liquor license for 10 days for violation of subdivision 6 of this section was confirmed. Corcoran v New York State Liquor Authority, 5 A.D.2d 840, 171 N.Y.S.2d 798, 1958 N.Y. App. Div. LEXIS 6990 (N.Y. App. Div. 2d Dep't), aff'd, 5 N.Y.2d 813, 181 N.Y.S.2d 209, 155 N.E.2d 119, 1958 N.Y. LEXIS 715 (N.Y. 1958).

On the record, Special Term should not have annulled the determination of the state liquor authority which suspended the license of the petitioner for a period of 90 days less five days, 70 days to be served forthwith and 15 days deferred on the basis of petitioner's "no contest" plea to a charge of permitting gambling on the premises. Bomysoad v New York State Liquor Authority, 13 A.D.2d 873, 215 N.Y.S.2d 199, 1961 N.Y. App. Div. LEXIS 10699 (N.Y. App. Div. 3d Dep't 1961).

Penal Law § 225.00 definitions relating to gambling offenses are instructive in determining whether alcoholic beverage licensee has suffered or permitted gambling on premises in violation of Al Bev Law § 106. Re Plato's Cave Corp. v State Liquor Authority, 115 A.D.2d 426, 496 N.Y.S.2d 436, 1985 N.Y. App. Div. LEXIS 54818 (N.Y. App. Div. 1st Dep't 1985), aff'd, 68 N.Y.2d 791, 506 N.Y.S.2d 856, 498 N.E.2d 420, 1986 N.Y. LEXIS 20104 (N.Y. 1986).

Mere possession or use of gambling device, as defined in Penal Law § 225.00, on premises of alcoholic beverage licensee, in violation of Al Bev § 106, is not disorderly conduct, as set forth in Penal Law § 240.20 and accordingly does not constitute operation of disorderly premises in violation of Al Bev § 106. Re Plato's Cave Corp. v State Liquor Authority, 115 A.D.2d 426, 496 N.Y.S.2d 436, 1985 N.Y. App. Div. LEXIS 54818 (N.Y. App. Div. 1st Dep't 1985), aff'd, 68 N.Y.2d 791, 506 N.Y.S.2d 856, 498 N.E.2d 420, 1986 N.Y. LEXIS 20104 (N.Y. 1986).

State Liquor Authority properly determined that restaurant permitted gambling on its premises in violation of CLS Al Bev § 106 by maintaining "Joker Poker" video game machine, even though nothing of value could be won from playing game except free plays, since game is one of chance, not skill. O'Carroll Rest. Corp. v New York State Liquor Authority, 125 A.D.2d 212, 509 N.Y.S.2d 17, 1986 N.Y. App. Div. LEXIS 62485 (N.Y. App. Div. 1st Dep't 1986).

Substantial evidence supported determination that liquor licensee suffered or permitted gambling on licensed premises and permitted keeping or maintaining of video display game machine of type prohibited under rule 36.1(t) of Rules of State Liquor Authority (9 NYCRR § 53.1(t)) where "Big Apple" video game present on premises rewarded winning poker hand with opportunity to prolong initial play by means of playing high-low double-up feature, which was not available to person who drew losing poker hand; such extension of play was "something of value" within meaning of CLS Penal § 225.00(6) and, therefore, "gambling" within meaning of § 225.00(2). Cos Dei San, Inc. v New York State Liquor Authority, 147 A.D.2d 370, 537 N.Y.S.2d 536, 1989 N.Y. App. Div. LEXIS 1280 (N.Y. App. Div. 1st Dep't), app. denied, 74 N.Y.2d 611, 546 N.Y.S.2d 556, 545 N.E.2d 870, 1989 N.Y. LEXIS 2883 (N.Y. 1989).

Penalty consisting of 10-day deferred suspension of liquor license and forfeiture of $1,000 compliance bond was not excessive where State Liquor Control Authority found that tavern violated gambling prohibitions of CLS Al Bev § 106(6) and 9 NYCRR § 53.1(t) by having "Sureshot" video machine on premises licensed to sell alcoholic beverages. Guy's Tavern, Inc. v State Liquor Authority, 151 A.D.2d 365, 542 N.Y.S.2d 612, 1989 N.Y. App. Div. LEXIS 8113 (N.Y. App. Div. 1st Dep't 1989).

State Liquor Authority (SLA) did not have either express or implied authority to suspend license of small grocery store/newsstand to sell beer for off-premises consumption on basis that store housed electronic "Joker Poker" video game since (1) CLS Al Bev § 106(6) only prohibits gambling within premises licensed to sell alcoholic beverages for consumption on premises, and (2) CLS Al Bev §§ 2, 17, 114 and 118 did not confer implied authority on SLA to promulgate rules on its own. L. Newstand, Inc. v State Liquor Authority, 151 A.D.2d 483, 542 N.Y.S.2d 275, 1989 N.Y. App. Div. LEXIS 7476 (N.Y. App. Div. 2d Dep't 1989), app. denied, 75 N.Y.2d 710, 556 N.Y.S.2d 532, 555 N.E.2d 929, 1990 N.Y. LEXIS 977 (N.Y. 1990).

Ten-day suspension of license to sell liquor was not excessive on finding that licensee suffered or permitted gambling on its premises. Tom's Log Cabin, Inc. v New York State Liquor Authority, 186 A.D.2d 203, 587 N.Y.S.2d 1008, 1992 N.Y. App. Div. LEXIS 10663 (N.Y. App. Div. 2d Dep't 1992).

Penalty of 60 days' suspension of petitioner's liquor license and $1,000 bondforfeiture, upon finding that petitioner suffered or permitted gambling on licensedpremises, was so disproportionate to offense as to be shocking to one's sense offairness. Keenan v New York State Liquor Auth., 205 A.D.2d 359, 613 N.Y.S.2d 367, 1994 N.Y. App. Div. LEXIS 6221 (N.Y. App. Div. 1st Dep't 1994).

Suspension of petitioner's on-premises liquor license for 30 days and imposition of $1,000 bond forfeiture was inappropriate penalty for having "suffered or permitted" gambling on premises in violation of Liquor Authority Rule 36.1(t) (CLS Al Bev Appx § 53.1(t); 9 NYCRR § 53.1(t)); any penalty greater than 10-day suspension and $1,000 fine would be disproportionate to offense and excessive under circumstances involving presence of "Park Avenue" video display machine, which would award patrons who placed money into device with free "points" or "hands." Tom's Log Cabin, Inc. v New York State Liquor Auth., 214 A.D.2d 492, 625 N.Y.S.2d 544, 1995 N.Y. App. Div. LEXIS 4612 (N.Y. App. Div. 1st Dep't 1995).

Penalty proscribing relicensing of premises for 2 years was shocking to one's sense of fairness for petitioner's allowing video gambling and gambling in violation of CLS Al Bev § 106(6) and 9 NYCRR § 53.1(t) and allowing its premises to become disorderly in violation of CLS Al Bev § 106(6). J A J K, Inc. v Division of Alcoholic Bev. Control, 272 A.D.2d 963, 711 N.Y.S.2d 367, 2000 N.Y. App. Div. LEXIS 9927 (N.Y. App. Div. 4th Dep't 2000).

Although there was substantial evidence to support a determination that a restaurant violated N.Y. Alco. Bev. Cont. Law § 106(6) and Rule 54.2 of the Rules of the New York State Liquor Authority, there was insufficient evidence to support the charge that the restaurant failed to summon aid for an injured patron. Matter of Confetti, Inc. v New York State Liq. Auth., 44 A.D.3d 1041, 845 N.Y.S.2d 794, 2007 N.Y. App. Div. LEXIS 11074 (N.Y. App. Div. 2d Dep't 2007).

Because the prize awarded by a game was selected at random by the machine, pursuant to N.Y. Penal Law § 225.00(1), the overall game was a mixed game of skill and chance; therefore, because the State Liquor Authority did not err in finding that the game was a gambling device under N.Y. Alco. Bev. Cont. Law §§ 105(22), 106(6), the developer was not entitled to N.Y. C.P.L.R. art. 78 relief. Matter of Pace-o-matic, Inc. v New York State Liq. Auth., 72 A.D.3d 1144, 898 N.Y.S.2d 295, 2010 N.Y. App. Div. LEXIS 2674 (N.Y. App. Div. 3d Dep't 2010).

32. —Proof

Determination of State Liquor Authority suspending restaurant liquor license upon finding that licensee had suffered or permitted gambling on licensed premises in violation of Alcoholic Beverage Control Law (§ 106, subd 6) annulled; finding not supported by substantial evidence. Hoban & Sullivan, Inc. v New York State Liquor Authority, 304 N.Y. 712, 107 N.E.2d 656, 304 N.Y. (N.Y.S.) 712, 1952 N.Y. LEXIS 915 (N.Y. 1952).

Evidence sustained a finding that the licensee suffered and permitted gambling on his licensed premises and justified suspension of his restaurant liquor license for 10 days. Danzo Estate, Inc. v New York State Liquor Authority, 27 N.Y.2d 469, 318 N.Y.S.2d 736, 267 N.E.2d 474, 1971 N.Y. LEXIS 1673 (N.Y. 1971).

The testimony was insufficient to sustain suspension of petitioner's restaurant liquor license by the State Liquor Authority, on a charge of violating subd. 6 of this section by suffering or permitting gambling on the licensed premises, where it consisted merely of testimony of police officers who visited the premises once and observed two gambling transactions during a 50-minute stay, during which, however, no responsible agent or principal of petitioner was present. Conservative Grouping Corp. v Epstein, 13 A.D.2d 805, 215 N.Y.S.2d 777, 1961 N.Y. App. Div. LEXIS 10896 (N.Y. App. Div. 2d Dep't), aff'd, 10 N.Y.2d 956, 224 N.Y.S.2d 277, 180 N.E.2d 58, 1961 N.Y. LEXIS 903 (N.Y. 1961).

There being substantial evidence to warrant a determination by the State Liquor Authority that petitioner violated subd. 6 of this section by permitting gambling on the licensed premises, it was not an abuse of discretion to revoke his restaurant liquor license and direct that no new license be issued for two years. Mazurczak v New York State Liquor Authority, 18 A.D.2d 920, 238 N.Y.S.2d 151, 1963 N.Y. App. Div. LEXIS 4403 (N.Y. App. Div. 2d Dep't), app. dismissed, 13 N.Y.2d 672, 1963 N.Y. LEXIS 2096 (N.Y. 1963), app. denied, 13 N.Y.2d 595, 1963 N.Y. LEXIS 1932 (N.Y. 1963).

Where gambling evidence had been suppressed in a criminal court, such evidence could not form the basis for the cancellation of the petitioner's beer license. Gonzalez v State Liquor Authority, 36 A.D.2d 740, 320 N.Y.S.2d 490, 1971 N.Y. App. Div. LEXIS 4496 (N.Y. App. Div. 2d Dep't 1971), rev'd, 30 N.Y.2d 108, 331 N.Y.S.2d 6, 282 N.E.2d 101, 1972 N.Y. LEXIS 1448 (N.Y. 1972).

Suspension of on-premises liquor license and claim on bond annuled where finding that gambling was suffered or permitted on petitioner's premises was not supported by substantial evidence, and furthermore, it appeared that if gambling did in fact occur, it was not of sufficient duration to warrant the implication that petitioner suffered or permitted gambling within the meaning of Alcoholic Beverage Control Law § 106, subd 6. Kline v State Liquor Authority, 40 A.D.2d 855, 337 N.Y.S.2d 789, 1972 N.Y. App. Div. LEXIS 3371 (N.Y. App. Div. 2d Dep't 1972).

Presence of "Joker Poker" video game machine on premises licensed to serve alcoholic beverages, and testimony of State Liquor Authority investigator that he received cash from barmaid after winning games on machine, were sufficient to sustain authority's finding that licensee had violated CLS Al Bev § 106 in permitting gambling on licensed premises; however, mere permitting of gambling device did not support finding that licensee was also guilty of permitting premises to become disorderly in violation of § 106, absent independent evidence of disorderliness. Penoke Restaurant, Inc. v State Liquor Authority, 121 A.D.2d 921, 504 N.Y.S.2d 431, 1986 N.Y. App. Div. LEXIS 59036 (N.Y. App. Div. 1st Dep't 1986).

Determination by State Liquor Authority that "Joker-Poker" coin operated video game was gambling device and that its presence at petitioner's licensed restaurant constituted sufferance and permission of gambling therein was not arbitrary and capricious, especially since petitioner's managerial staff was fully aware that patrons who utilized game received extension of playtime or credits for sufficiently high score without being charged; however, requiring forfeiture of petitioner's $1,000 compliance bond was excessive and penalty would be limited to 10-day suspension of its liquor license. MNDN Restaurant, Inc. v Gazzara, 128 A.D.2d 781, 513 N.Y.S.2d 257, 1987 N.Y. App. Div. LEXIS 44466 (N.Y. App. Div. 2d Dep't), app. denied, 70 N.Y.2d 603, 518 N.Y.S.2d 1026, 512 N.E.2d 552, 1987 N.Y. LEXIS 17445 (N.Y. 1987).

State Liquor Authority improperly determined that licensee violated CLS Al Bev § 106 by permitting gambling on its premises at benefit for Actor's Studio, based solely on evidence of presence of "gambling devices" (such as baccarat, blackjack and craps tables, and wheels of fortune) since there was no evidence that anyone wagered anything where (1) guests paid $250 admission price and received gambling chips primarily to support Actor's Studio and secondarily to gain entry to festivities, and (2) there was no evidence that any guests paid additional sums for more chips; although movie memorabilia awarded as prizes were "things of value" within applicable definition of gambling, nothing of value was placed at risk by those who competed for prizes. Muidallap Corp. v State Liquor Authority, 143 A.D.2d 9, 532 N.Y.S.2d 1, 1988 N.Y. App. Div. LEXIS 8432 (N.Y. App. Div. 1st Dep't 1988).

Substantial evidence supported determination that petitioner violated CLS Al Bev § 106(6) and 9 NYCRR § 53.1(t) by having suffered or permitted gambling, and keeping "Joker Poker" machine on its premises, even though petitioner was licensed by city department of consumer affairs to maintain "Joker Poker" machine. Turkey's Nest, Inc. v New York State Liquor Authority, 151 A.D.2d 683, 542 N.Y.S.2d 741, 1989 N.Y. App. Div. LEXIS 8205 (N.Y. App. Div. 2d Dep't 1989).

Substantial evidence supported suspension of liquor license of tavern on basis of gambling on premises in violation of CLS Al Bev § 106(6) where investigator testified that tavern's principals were present on premises when video display game machines known as High-Low Joker Poker were being played by patrons, and that $6 payoffs were made to several unidentified patrons. Tego's Tavern, Inc. v New York State Liquor Authority, 158 A.D.2d 900, 551 N.Y.S.2d 697, 1990 N.Y. App. Div. LEXIS 1855 (N.Y. App. Div. 3d Dep't 1990).

Restaurant was properly found to have permitted gambling on premises in violation of CLS Al Bev § 106(6) on basis of maintenance of video display game machine which rewarded winning players with additional games free; however, 30-day suspension of liquor license and forfeiture of $1,000 bond was unduly harsh penalty and matter would be remitted for appropriate sanction. Bubba Restaurant, Inc. v New York State Liquor Authority, 160 A.D.2d 539, 554 N.Y.S.2d 189, 1990 N.Y. App. Div. LEXIS 4559 (N.Y. App. Div. 1st Dep't 1990).

Fact that free play was awarded in video poker game supported determination that holder of liquor license suffered or permitted gambling on its premises in violation of CLS Al Bev § 106(6). Tom's Log Cabin, Inc. v New York State Liquor Authority, 186 A.D.2d 203, 587 N.Y.S.2d 1008, 1992 N.Y. App. Div. LEXIS 10663 (N.Y. App. Div. 2d Dep't 1992).

Court would annul State Liquor Authority's decision which suspended petitioner's liquor license for 10-day period, since evidence did not support finding that "Broadway" video poker game in operation on licensed premises was gambling device where there was no proof that it awarded player anything of value for drawing winning hand, such as extension of playing time or free game. Shell Lounge v New York State Liquor Auth., 206 A.D.2d 536, 615 N.Y.S.2d 82, 1994 N.Y. App. Div. LEXIS 7586 (N.Y. App. Div. 2d Dep't), app. denied, 84 N.Y.2d 812, 622 N.Y.S.2d 914, 647 N.E.2d 120, 1994 N.Y. LEXIS 4568 (N.Y. 1994).

Presence of "Park Avenue" video display machine on licensed premises was substantial evidence of licensee having "suffered or permitted" gambling on premises in violation of Liquor Authority Rule 36.1(t) (CLS Al Bev Appx § 53.1(t); 9 NYCRR § 53.1(t)), since patrons who placed money into device could be awarded free "points" or "hands" for having done so. Tom's Log Cabin, Inc. v New York State Liquor Auth., 214 A.D.2d 492, 625 N.Y.S.2d 544, 1995 N.Y. App. Div. LEXIS 4612 (N.Y. App. Div. 1st Dep't 1995).

Substantial evidence supported administrative determination that bar operator allowed gambling on its premises in violation of CLS Al Bev § 106(6) and 9 NYCRR § 53.1(t) where (1) operator installed vending machine that dispensed pull-tabs labeled "Lucky Shamrock Sweepstakes" that could be purchased for $1, (2) inside each pull-tab was calling card and game piece, (3) card allowed holder to place 2-minute phone call anywhere in continental United States, (4) game piece displayed series of horizontal and vertical rows of numbers and symbols, (5) piece displaying certain combinations of numbers and symbols entitled holder to prize ranging from $1 to $500, and (6) winning game pieces were redeemed by operator, which retained them as receipts. Black North Assocs. v Kelly, 281 A.D.2d 974, 722 N.Y.S.2d 666, 2001 N.Y. App. Div. LEXIS 3046 (N.Y. App. Div. 4th Dep't 2001).

Fact that no purchase was necessary to participate in "Lucky Shamrock Sweepstakes" through vending machine at bar did not

prevent sweepstakes from being gambling activity in violation of CLS Al Bev § 106(6) and 9 NYCRR § 53.1(t) where distribution of free promotional game pieces was limited to one per person per day "while supplies last," players could increase their chances of winning by making multiple purchases, and machine was designed to encourage multiple purchases because it accepted bills ranging from $1 to $20 and did not give change. Black North Assocs. v Kelly, 281 A.D.2d 974, 722 N.Y.S.2d 666, 2001 N.Y. App. Div. LEXIS 3046 (N.Y. App. Div. 4th Dep't 2001).

There was no merit in bar operator's claim that "Lucky Shamrock Vending Machine" installed in bar was passive dispensing device rather than gambling device in violation of CLS Al Bev § 106(6) and 9 NYCRR § 53.1(t) where machine, which allowed player to watch game being played, know that he or she had winning ticket before opening it, and use it only as receipt for redemption, was designed to resemble slot machine and for all intents and purposes operated as such. Black North Assocs. v Kelly, 281 A.D.2d 974, 722 N.Y.S.2d 666, 2001 N.Y. App. Div. LEXIS 3046 (N.Y. App. Div. 4th Dep't 2001).

Fact that "Lucky Shamrock Vending Machine" installed in bar did not contain random number generator or other device to determine winners did not prevent it from being gambling device in violation of CLS Al Bev § 106(6) and 9 NYCRR § 53.1(t) where CLS Penal § 225.00(8) provides that "'[s]lot machine' means a gambling device which, as a result of the insertion of a coin or other object, operates, either completely automatically or with the aid of some physical act by the player, in such manner that, depending upon elements of chance, it may eject something of value" and that device is no "less a slot machine because, apart from its use or adaptability as such, it may also sell or deliver something of value on a basis other than chance." Black North Assocs. v Kelly, 281 A.D.2d 974, 722 N.Y.S.2d 666, 2001 N.Y. App. Div. LEXIS 3046 (N.Y. App. Div. 4th Dep't 2001).

An information charging a liquor licensee with violation of subd. 6 of this section as a misdemeanor must, to be sufficient, meet stricter requirements than would be required in proceedings before the Liquor Authority to cancel or suspend a license. People v Bart's Restaurant Corp., 42 Misc. 2d 1093, 249 N.Y.S.2d 344, 1964 N.Y. Misc. LEXIS 1790 (N.Y. City Crim. Ct. 1964).

33. —Knowledge

To sustain a showing of violation of statute proscribing person licensed to sell alcoholic beverages from suffering or permitting any gambling on licensed premises as ground for suspension of license, it must be demonstrated that licensee had a knowledge, or opportunity through reasonable diligence to acquire knowledge, of the gambling. Leake v Sarafan, 35 N.Y.2d 83, 358 N.Y.S.2d 749, 315 N.E.2d 796, 1974 N.Y. LEXIS 1395 (N.Y. 1974).

Suspension of on-premises liquor license for ten days for suffering or permitting gambling on premises was not justified, in absence of showing of knowledge on part of licensee, or even on part of barmaid, the only employee present, that patron was gambling. Leake v Sarafan, 35 N.Y.2d 83, 358 N.Y.S.2d 749, 315 N.E.2d 796, 1974 N.Y. LEXIS 1395 (N.Y. 1974).

Evidence supported finding that licensee "suffered or permitted" gambling by maintaining "Joker Poker" machine on premises where license had been issued for machine, it was present on premises, barmaid had quarters available for use in playing machine, machine had been on premises for 8 months, and machine had "credit light" which went on to indicate that player had won free play; it could reasonably be inferred that licensee's managerial personnel were aware that free plays were provided. Plato's Cave Corp. v State Liquor Auth., 68 N.Y.2d 791, 506 N.Y.S.2d 856, 498 N.E.2d 420, 1986 N.Y. LEXIS 20104 (N.Y. 1986).

The evidence was insufficient to sustain a State Liquor Authority's suspension of petitioner's restaurant license for permitting gambling on the licensed premises where it was too insubstantial to sustain a finding that he knew or should have known that the gambling was going on. Gerbino v New York State Liquor Authority, 16 A.D.2d 655, 226 N.Y.S.2d 633, 1962 N.Y. App. Div. LEXIS 10641 (N.Y. App. Div. 2d Dep't 1962), rev'd, 12 N.Y.2d 904, 237 N.Y.S.2d 1005, 188 N.E.2d 269, 1963 N.Y. LEXIS 1438 (N.Y. 1963).

Suspension of on premises liquor license for suffering gambling to be conducted on premises would be reversed where, although police officer saw woman take money and make notations on pieces of paper in tavern on three different occasions, owner of premises was only present during one of these periods and was during that time preoccupied with other matters; thus, evidence was insufficient to impute requisite knowledge on part of licensee. Leake v Sarafan, 42 A.D.2d 845, 346 N.Y.S.2d 593, 1973 N.Y. App. Div. LEXIS 3618 (N.Y. App. Div. 2d Dep't 1973), aff'd, 35 N.Y.2d 83, 358 N.Y.S.2d 749, 315 N.E.2d 796, 1974 N.Y. LEXIS 1395 (N.Y. 1974).

Where bartender was in effective charge of premises for bulk of period between 11:00 A.M. and 6:00 P.M. each day and had been so employed for approximately three years, bartender's knowledge that gambling was taking place on premises was chargeable to licensee and warranted suspension of liquor license, even though bartender did not have official managerial title. Falso v State Liquor Authority, 54 A.D.2d 817, 388 N.Y.S.2d 350, 1976 N.Y. App. Div. LEXIS 14515 (N.Y. App. Div. 3d Dep't 1976), aff'd, 43 N.Y.2d 721, 401 N.Y.S.2d 484, 372 N.E.2d 325, 1977 N.Y. LEXIS 2521 (N.Y. 1977).

Mere possession or use of gambling device, as defined in Penal Law § 225.00, on premises of alcoholic beverage licensee, in violation of Al Bev § 106, is not disorderly conduct, as set forth in Penal Law § 240.20 and accordingly does not constitute operation of disorderly premises in violation of Al Bev § 106. Re Plato's Cave Corp. v State Liquor Authority, 115 A.D.2d 426, 496 N.Y.S.2d 436, 1985 N.Y. App. Div. LEXIS 54818 (N.Y. App. Div. 1st Dep't 1985), aff'd, 68 N.Y.2d 791, 506 N.Y.S.2d 856, 498 N.E.2d 420, 1986 N.Y. LEXIS 20104 (N.Y. 1986).

Conduct of licensee's employee who is vested with managerial authority over licensed premises is properly considered in determining whether licensee has violated § 106 by permitting premises to become disorderly. Stonehedge Pub, Inc. v State Liquor Authority, Inc., 118 A.D.2d 559, 499 N.Y.S.2d 12, 1986 N.Y. App. Div. LEXIS 54420 (N.Y. App. Div. 2d Dep't 1986).

Presence of "Joker Poker" video game machine on premises licensed to serve alcoholic beverages, and testimony of State Liquor Authority investigator that he received cash from barmaid after winning games on machine, were sufficient to sustain authority's finding that licensee had violated CLS Al Bev § 106 in permitting gambling on licensed premises; however, mere permitting of gambling device did not support finding that licensee was also guilty of permitting premises to become disorderly in violation of § 106, absent independent evidence of disorderliness. Penoke Restaurant, Inc. v State Liquor Authority, 121 A.D.2d 921, 504 N.Y.S.2d 431, 1986 N.Y. App. Div. LEXIS 59036 (N.Y. App. Div. 1st Dep't 1986).

Where tavern was found to have suffered or permitted gambling on its premises with Joker Poker machine and was penalized by State Liquor Authority by 10-day deferred suspension of its liquor license and $1,000 bond forfeiture, it could not be said that penalty was disproportionate to offense. 2700 Tavern, Inc. v State Liquor Authority, 146 A.D.2d 552, 537 N.Y.S.2d 34, 1989 N.Y. App. Div. LEXIS 497 (N.Y. App. Div. 1st Dep't 1989).

The gravamen of a charge of suffering or permitting gambling on licensed premises must be supported by a showing of circumstances raising an inference that the licensee knowingly allowed gambling to occur or continue, or by showing that he demonstrated an attitude of acquiescence in connection with it. 2125 Barney's Inc. v New York State Liquor Authority, 16 A.D.2d 252, 226 N.Y.S.2d 921, 266 N.Y.S.2d 921, 1962 N.Y. App. Div. LEXIS 10250 (N.Y. App. Div. 1st Dep't 1962), aff'd, 13 N.Y.2d 662, 240 N.Y.S.2d 990, 191 N.E.2d 468, 1963 N.Y. LEXIS 1196 (N.Y. 1963).

34. —Acts by employees

The testimony of a detective that he made certain bets on horse races with an employee of the respondent when the president of the respondent was about eight feet away sorting and reading mail and conversing with various people in the restaurant was not sufficient to sustain a finding that the respondent permitted gambling on the premises within the meaning of subd. 6. Arnold Reuben, Inc. v State Liquor Authority, 294 N.Y. 730, 61 N.E.2d 456, 294 N.Y. (N.Y.S.) 730, 1945 N.Y. LEXIS 929 (N.Y. 1945).

State Liquor Authority's determination that licensee had suffered or permitted gambling on the licensed premises on six occasions within a month, based on her barmaid's acceptance of horse racing bets, was supported by insufficient evidence, as there was no evidence whatsoever that the licensee had actual knowledge of the gambling activity, as the barmaid did not have unequivocal supervisory responsibility and she therefore could not be deemed an agent whose knowledge was imputable to the licensee, and as the evidence was also insufficient to support a finding that, through due diligence, the licensee could have discovered and prevented the gambling activity. Martin v State Liquor Authority, 41 N.Y.2d 78, 390 N.Y.S.2d 880, 359 N.E.2d 389, 1976 N.Y. LEXIS 3209 (N.Y. 1976).

Where bartender accepted wagers on horse races and sold syndicated football tickets with the full knowledge and consent of licensee contrary to the provision of subd 6 of above statute, held that suspension of license for 10 days and forfeiture of $500 on bond did not constitute excessive penalty. Postiglione v State Liquor Authority, 23 A.D.2d 662, 256 N.Y.S.2d 919, 1965 N.Y. App. Div. LEXIS 4770 (N.Y. App. Div. 2d Dep't 1965).

Licensed tavern owner's failure to inquire whether a barmaid, who operated the tavern during brief absences by the owner and who during such absences and without the owner's knowledge accepted bets, had been engaged in previous gambling activities was not sufficient to sustain charges that the owner "suffered or permitted" gambling on the licensed premises within the meaning of the statute. Triple S. Tavern, Inc. v New York State Liquor Authority, 40 A.D.2d 522, 334 N.Y.S.2d 289, 1972 N.Y. App. Div. LEXIS 4042 (N.Y. App. Div. 2d Dep't 1972), aff'd, 31 N.Y.2d 1006, 341 N.Y.S.2d 615, 294 N.E.2d 204, 1973 N.Y. LEXIS 1489 (N.Y. 1973).

The evidence was sufficient to sustain finding that licensee had suffered or permitted gambling on the premises where it appeared that the bartender, as responsible agent or representative of the licensee, had participated in such gambling, and 10 days suspension of license and $500 bond claim was proper. Sheraton-Binghamton Corp. v New York State Liquor Authority, 40 A.D.2d 1048, 338 N.Y.S.2d 844, 1972 N.Y. App. Div. LEXIS 3096 (N.Y. App. Div. 3d Dep't 1972).

Where barmaid, who was allegedly at the center of violations of Alcoholic Beverage Control Law, was charged with the same responsibility of supervision and inquiry as to licensee, her violations were attributable to her employer. Cuti v Roth, 50 A.D.2d 1044, 377 N.Y.S.2d 738, 1975 N.Y. App. Div. LEXIS 12195 (N.Y. App. Div. 3d Dep't 1975).

Revocation of a liquor license could not be sustained on the basis alone of a police officer's testimony that, for a ten-minute period, he watched a customer at the bar hand out slips of paper to various persons who approached him and engaged him in conversation, that the bartender was within about two feet of this customer on the other side of the bar, that the officer then went up and arrested the customer and found a considerable number of policy slips with notations on them in his possession, but had seen no money change hands. 2125 Barney's Inc. v New York State Liquor Authority, 16 A.D.2d 252, 226 N.Y.S.2d 921, 266 N.Y.S.2d 921, 1962 N.Y. App. Div. LEXIS 10250 (N.Y. App. Div. 1st Dep't 1962), aff'd, 13 N.Y.2d 662, 240 N.Y.S.2d 990, 191 N.E.2d 468, 1963 N.Y. LEXIS 1196 (N.Y. 1963).

Mere proof of open incidents of gambling for a brief period in view of a bartender, though he is in apparent charge of the premises, is not sufficient to sustain a license revocation for permitting gambling on the premises, as a bartender is not expected to act with the alacrity and definiteness of a law enforcement officer in making an arrest or putting a halt to the gambling. 2125 Barney's Inc. v New York State Liquor Authority, 16 A.D.2d 252, 226 N.Y.S.2d 921, 266 N.Y.S.2d 921, 1962 N.Y. App. Div. LEXIS 10250 (N.Y. App. Div. 1st Dep't 1962), aff'd, 13 N.Y.2d 662, 240 N.Y.S.2d 990, 191 N.E.2d 468, 1963 N.Y. LEXIS 1196 (N.Y. 1963).

35. —Single incident or isolated events

That a bartender, on a single occasion, had two policy slips in his possession, for which he received a suspended sentence as a player, is not sufficient, standing alone, to sustain a charge that his employer, the licensee, had suffered or permitted gambling on the licensed premises, in violation of § 106, subd. 6. Abrams v Bruckman, 263 A.D. 593, 33 N.Y.S.2d 921, 1942 N.Y. App. Div. LEXIS 6954 (N.Y. App. Div. 1942).

A liquor license should not have been suspended for permitting gambling on proof that on a single occasion a policewoman saw a patron receive money from other men to whom he gave alleged betting slips in what appeared to be bookmaking on baseball games. Proof must show that the management allowed such things to happen on more than a single occasion to establish that it knowingly suffered or permitted gambling. O'Day v O'Connell, 283 A.D. 644, 129 N.Y.S.2d 193, 1954 N.Y. App. Div. LEXIS 4752 (N.Y. App. Div. 1954), aff'd, 308 N.Y. 769, 125 N.E.2d 116, 308 N.Y. (N.Y.S.) 769, 1955 N.Y. LEXIS 1043 (N.Y. 1955).

Supreme Court properly vacated penalty of 15-day suspension of liquor license and $1,000 bond forfeiture for violation of CLS Al Bev § 106(6) by maintaining "joker poker" machine in operation on premises where license-holder had virtually unblemished record of compliance with law. 3275 Byron Ave. Corp. v New York State Liquor Auth., 161 A.D.2d 600, 555 N.Y.S.2d 389, 1990 N.Y. App. Div. LEXIS 5319 (N.Y. App. Div. 2d Dep't 1990).

Penalty of liquor license suspension for 20 days and $1,000 bond forfeiture was excessive where licensee had unblemished record prior to its plea of no contest to violation of CLS Al Bev § 106(6) and 9 NYCRR 53.1 by maintaining "Joker Poker" machine on licensed premises; under circumstances, penalty in excess of license suspension for 10 days would be shocking to one's sense of fairness. Pyramid Lounge, Inc. v New York State Liquor Authority, 175 A.D.2d 131, 571 N.Y.S.2d 825, 1991 N.Y. App. Div. LEXIS 9785 (N.Y. App. Div. 2d Dep't 1991).

36. Disorderly premises

Denial of a liquor license by the State Liquor Authority on the speculation that the subject premises will be operated in violation of law is impermissible; the likelihood of future violations can furnish a basis for denial only when there are facts in the record which rationally support doing so. Accordingly, although noise generated by a licensed establishment may furnish a basis for suspending an issued license when its level is such as to affect adversely and unreasonably the repose of area residents (Alcoholic Beverage Control Law, § 106, subd 6), the authority's denial of a petitioner's license because of noise potential cannot be sustained where there is no evidence to support the authority's conclusion that adequate steps had not been taken to soundproof the premises. Circus Disco, Ltd. v New York State Liquor Authority, 51 N.Y.2d 24, 431 N.Y.S.2d 491, 409 N.E.2d 963, 1980 N.Y. LEXIS 2530 (N.Y. 1980).

The blanket proscription against topless dancing in premises licensed by the New York State Liquor Authority contained in Alcoholic Beverage Control Law § 106, sub 6-A, although valid under the United States Constitution, in consequence of the provisions of the Twenty-First Amendment, is invalid under the guarantee of freedom of expression declared in the New York State Constitution, Article I, § 8. Bellanca v New York State Liquor Authority, 54 N.Y.2d 228, 445 N.Y.S.2d 87, 429 N.E.2d 765, 1981 N.Y. LEXIS 3125 (N.Y. 1981), cert. denied, 456 U.S. 1006, 102 S. Ct. 2296, 73 L. Ed. 2d 1300, 1982 U.S. LEXIS 2333 (U.S. 1982).

Determination which suspended petitioner's liquor license for 15 days and imposed $1,000 penalty confirmed–challenge to applicability of Alcoholic Beverage Control Law § 106 (6) is rejected; while finding by Hearing Officer that security agents used unreasonable force in removing unruly patron does not violate section, finding that patron was not unruly and in fact was ousted for uttering expletive does; thus, since Hearing Officer's assessment of facts was that patrons were physically and violently removed from licensed premises after having done no more than uttering expletive, sanctions under section 106 of Alcoholic Beverage Control Law are completely supported, as is imposition of penalty and suspension of premises' liquor license. Irvington Enterprises, Inc. v Duffy, 155 A.D.2d 335, 547 N.Y.S.2d 305, 1989 N.Y. App. Div. LEXIS 14332 (N.Y. App. Div. 1st Dep't 1989).

Conviction of defendant for permitting licensed premises to become disorderly was not justified where the proof did not establish the kind of disorder contemplated by the statute. People

v Vassilakou, 9 A.D.2d 221, 192 N.Y.S.2d 665, 1959 N.Y. App. Div. LEXIS 5988 (N.Y. App. Div. 1st Dep't 1959).

A restaurant owner's liquor license was properly revoked and demand for the bond made for permitting premises to become disorderly when employee assaulted State employees there on official business, and for selling alcoholic beverages on credit, failing to keep adequate and accurate books and records on the premises, the punishment was not disproportionate. Margar Rest. Corp. v State Liquor Authority, 34 A.D.2d 828, 312 N.Y.S.2d 751, 1970 N.Y. App. Div. LEXIS 4707 (N.Y. App. Div. 2d Dep't 1970).

In Article 78 proceeding to review determination of State Liquor Authority issuing warning and imposing $100 bond claim on licensee, such action was supported by evidence that licensed premises was the scene of a brawl, that minors had purchased beer or had received it from patrons, that licensee personally interfered with and instigated harassment of officers, and that license was kept on shelf under bar. Naples v State Liquor Authority, 43 A.D.2d 801, 350 N.Y.S.2d 262, 1973 N.Y. App. Div. LEXIS 2909 (N.Y. App. Div. 4th Dep't 1973).

Evidence that two investigators visited liquor licensee's premises and, through the efforts of a barmaid, placed bets on harness races and made arrangements for female company for the night was sufficient to sustain finding that licensee permitted the premises to become disorderly. Cuti v Roth, 50 A.D.2d 1044, 377 N.Y.S.2d 738, 1975 N.Y. App. Div. LEXIS 12195 (N.Y. App. Div. 3d Dep't 1975).

Penalty in form of a 30-day suspension of petitioner's license imposed by State Liquor Authority with respect to lewd or indecent performance which occurred on premises and letter of warning with respect to altercation which thereafter took place on premises was appropriate and was not subject to being disturbed. Inside Straight, Inc. v State Liquor Authority, 56 A.D.2d 720, 392 N.Y.S.2d 770, 1977 N.Y. App. Div. LEXIS 10893 (N.Y. App. Div. 4th Dep't), app. denied, 41 N.Y.2d 806, 1977 N.Y. LEXIS 3096 (N.Y. 1977).

Al Bev Law § 106(6) was violated when a female dancer on licensed premises shouted obscenities at a crowd during an altercation in an apparent effort to incite further fighting while she waved a pool cue and threw a pool ball into the crowd, with no attempt made by the manager to stop the disturbance. Although the incident was spontaneous and not foreseeable, the manager had actual knowledge of what was going on and permitted it to continue. Highway Tavern Corp. v McLaughlin, 105 A.D.2d 122, 483 N.Y.S.2d 323, 1984 N.Y. App. Div. LEXIS 20682 (N.Y. App. Div. 2d Dep't 1984).

Licensee permitted its licensed premises to become disorderly, in violation of CLS Alcoholic Beverage Control Law § 106(6), when fight between 2 employees and patron resulted in serious injury to patron, where bartender, on night in question, would throw empty bottles from behind bar distance of 10 or 12 feet into garbage can in corner, and, on one such toss, bottle missed can, broke on floor and pieces of glass hit patron and his companion, leading to altercation, and where night manager in charge of promises was present throughout evening, even though during period that fit occurred he was in back room; conduct of bartender which gave rise to assault was not discrete, isolated incident, but was ongoing for period of 3 hours, and night manager knew or should have known that slip of hand could lead to broken glass and consequences of angry or injured patrons. P.M. Entertainment Industries, Inc. v State Liquor Authority, 114 A.D.2d 457, 494 N.Y.S.2d 368, 1985 N.Y. App. Div. LEXIS 53149 (N.Y. App. Div. 2d Dep't 1985), aff'd, 67 N.Y.2d 834, 501 N.Y.S.2d 659, 492 N.E.2d 787, 1986 N.Y. LEXIS 17585 (N.Y. 1986).

State Liquor Authority improperly determined that restaurant permitted premises to become disorderly, despite presence of one "Joker Poker" video game machine in violation of prohibition against gambling devices at licensed premises, since no independent evidence of disorderliness was presented and presence of one gambling machine did not ipso facto establish evidence of permitting premises to become disorderly. O'Carroll Rest. Corp. v New York State Liquor Authority, 125 A.D.2d 212, 509 N.Y.S.2d 17, 1986 N.Y. App. Div. LEXIS 62485 (N.Y. App. Div. 1st Dep't 1986).

Substantial evidence was lacking to find owners of bar guilty of suffering or permitting premises to become disorderly under CLS Al Bev § 106, even though, in course of investigation of complaints at bar, plain- clothed police officer had reached agreement with transvestite patron whereby patron would perform oral sex with officer for $20, and bartender had indicated to transvestite that officer was not policeman, where there was testimony of only one solicitation, no details were given about complaints of prostitution or arrests on previous occasions, there was no testimony that bartender had heard particular solicitation of sex, and owner-managers neither were at bar when solicitation occurred nor had knowledge of incident. La Bamba Bar, Inc. v New York State Liquor Authority, 141 A.D.2d 403, 530 N.Y.S.2d 2, 1988 N.Y. App. Div. LEXIS 6921 (N.Y. App. Div. 1st Dep't 1988).

State Liquor Authority improperly determined that licensee permitted its premises to become disorderly by permitting gambling devices to be kept there (in violation of CLS Al Bev § 106) since (1) mere possession of gambling device does not constitute disorderly conduct as defined in CLS Penal § 240.20, and (2) even if gambling devices on premises were used for gambling, presence of gambling does not ipso facto establish that premises were disorderly. Muidallap Corp. v State Liquor Authority, 143 A.D.2d 9, 532 N.Y.S.2d 1, 1988 N.Y. App. Div. LEXIS 8432 (N.Y. App. Div. 1st Dep't 1988).

It was not excessive to suspend petitioner's on-premises liquor license for 20 days and to direct $1,000 bond forfeiture for violating CLS Al Bev § 106(6) by suffering or permitting assault to occur on premises, especially given that several letters of warning had been issued by state liquor authority in past regarding violations of Alcoholic Beverage Control Law, including § 106(6). P.B.L. Entertainment, Inc. v New York State Liquor Authority, 149 A.D.2d 512, 539 N.Y.S.2d 990, 1989 N.Y. App. Div. LEXIS 4580 (N.Y. App. Div. 2d Dep't 1989).

Suspension of petitioner's liquor license for 30 days because noise, disturbance and disorder occurred on or adjacent to licensed premises was not so disproportionate to offense as to be shocking to one's sense of fairness particularly in view of prior warnings received by petitioner. Czora v New York State Liquor Authority, 149 A.D.2d 927, 543 N.Y.S.2d 339, 1989 N.Y. App. Div. LEXIS 5929 (N.Y. App. Div. 4th Dep't 1989).

In Article 78 proceeding, petitioner's request for statement of specific reasons for his disqualification as candidate for position of state trooper was properly denied since (1) he had already been provided with document stating that he failed to meet requirements for position, and (2) in-camera inspection disclosed no record in file which contained specific statement of reasons for his disqualification, and respondent Division of State Police was under no obligation to create such record. O'Shaughnessy v New York State Div. of State Police, 202 A.D.2d 508, 609 N.Y.S.2d 18, 1994 N.Y. App. Div. LEXIS 2584 (N.Y. App. Div. 2d Dep't), app. denied, 84 N.Y.2d 807, 621 N.Y.S.2d 516, 645 N.E.2d 1216, 1994 N.Y. LEXIS 3485 (N.Y. 1994).

Petitioner's violation of CLS Al Bev § 106(6) was supported by evidence that its security measures on certain date were inadequate and that premises was overcrowded and became scene of shooting and, in aftermath of shooting, premises became disorderly, and that premises had been overcrowded for sufficient length of time that petitioner's manager or owner should have known of condition and taken measures to ameliorate it so as to reduce considerable potential, subsequently realized, for disorder. Warehouse Entertainment, Inc. v New York State Liquor Auth., 269 A.D.2d 278, 703 N.Y.S.2d 139, 2000 N.Y. App. Div. LEXIS 2022 (N.Y. App. Div. 1st Dep't), app. denied, 95 N.Y.2d 762, 715 N.Y.S.2d 215, 738 N.E.2d 363, 2000 N.Y. LEXIS 2324 (N.Y. 2000).

Penalty proscribing relicensing of premises for 2 years was shocking to one's sense of fairness for petitioner's allowing video gambling and gambling in violation of CLS Al Bev § 106(6) and 9 NYCRR § 53.1(t) and allowing its premises to become disorderly in violation of CLS Al Bev § 106(6). J A J K, Inc. v Division of Alcoholic Bev. Control, 272 A.D.2d 963, 711 N.Y.S.2d 367, 2000 N.Y. App. Div. LEXIS 9927 (N.Y. App. Div. 4th Dep't 2000).

Substantial evidence of lewd or indecent conduct was provided by investigator's testimony that petitioner's employee removed her underpants and stuffed them in his mouth without first

asking his permission to do so; this act could be reasonably found to be lewd or indecent per se and thus constituted disorderly conduct in violation of CLS Al Bev § 106(6). La Maison De Sade, Inc. v New York State Liquor Auth., 276 A.D.2d 415, 714 N.Y.S.2d 295, 2000 N.Y. App. Div. LEXIS 10714 (N.Y. App. Div. 1st Dep't 2000).

Summons was dismissed as fatally defective where it failed to demonstrate reasonable cause to believe the defendant committed the offense charged; there was no information to suggest that this was anything other than a single, isolated occurrence that could not have been foreseen by the defendant. Without such information the court was unable to determine how the licensee suffered or permitted an assault, or any other disorder, to occur. People v 229 Rest., Inc., 195 Misc. 2d 747, 761 N.Y.S.2d 775, 2003 N.Y. Misc. LEXIS 382 (N.Y. City Crim. Ct. 2003).

37. —Knowledge

Knowledge of disorderly behavior in licensed premises sufficient in law to justify the revocation of a liquor license must be the subject of substantial evidence. It must have as its basis something more than suspicion. Migliaccio v O'Connell, 307 N.Y. 566, 122 N.E.2d 914, 307 N.Y. (N.Y.S.) 566, 1954 N.Y. LEXIS 951 (N.Y. 1954).

State Liquor Authority could not take refuge in general rule-making authority as means of circumventing specific legislative requirement in CLS Al Bev § 106(6) that licensee be aware of disorderly conduct before sanctions may be imposed, and thus 9 NYCRR § 36.1(q) (which establishes no-fault rule for disorderly conduct) was invalid as applied, where there was no evidence that licensee was made aware that premises had become "focal point" for police attention. Beer Garden, Inc. v New York State Liquor Authority, 79 N.Y.2d 266, 582 N.Y.S.2d 65, 590 N.E.2d 1193, 1992 N.Y. LEXIS 817 (N.Y. 1992).

Findings of Administrative Law Judge (ALJ) with regard to charge that licensed premises had become "focal point" of police attention, which were dispositive of revocation and nonrenewal proceedings, required dismissal, even though ALJ remarked that licensee obviously was aware of what was going on on his premises, where ALJ had previously (and erroneously) ruled that strict liability, not knowledge, was governing standard; in light of his ruling on governing standard, it was impossible to determine what degree of "awareness" ALJ had in mind. Beer Garden, Inc. v New York State Liquor Authority, 79 N.Y.2d 266, 582 N.Y.S.2d 65, 590 N.E.2d 1193, 1992 N.Y. LEXIS 817 (N.Y. 1992).

The test of whether a restaurant liquor license is subject to suspension for permitting disorderly conduct to go on is what a reasonably perceptive and alert management ought to know about actions and behavior of patrons. Gilmer v Hostetter, 20 A.D.2d 586, 245 N.Y.S.2d 252, 1963 N.Y. App. Div. LEXIS 2669 (N.Y. App. Div. 3d Dep't 1963).

The disorder involved need not have been known to the licensee to constitute a violation; it is sufficient if the licensee reasonably should have known of it. Show Boat of New Lebanon, Inc. v State Liquor Authority, 33 A.D.2d 954, 306 N.Y.S.2d 859, 1970 N.Y. App. Div. LEXIS 5694 (N.Y. App. Div. 3d Dep't), aff'd, 27 N.Y.2d 676, 314 N.Y.S.2d 2, 262 N.E.2d 211, 1970 N.Y. LEXIS 1166 (N.Y. 1970).

Licensee had not permitted premises to become disorderly within the meaning of Alcoholic Beverage Control Law § 106, subd 6 where there was no evidence that licensee knew her husband, the bartender, was committing oral sodomy in the basement, and where hearing officer concluded that basement was not part of licensed premises. Smith v State Liquor Authority, 43 A.D.2d 756, 350 N.Y.S.2d 28, 1973 N.Y. App. Div. LEXIS 2952 (N.Y. App. Div. 3d Dep't 1973).

Proof that liquor licensee has suffered or permitted premises to become disorderly need not show actual knowledge of the conduct charged to the licensee; it is sufficient if the licensee should have known of the alleged disorder. Chipman Associates, Inc. v New York State Liquor Authority, 47 A.D.2d 585, 363 N.Y.S.2d 162, 1975 N.Y. App. Div. LEXIS 8683 (N.Y. App. Div. 4th Dep't 1975).

Al Bev Law § 106(6) was violated when a female dancer on licensed premises shouted obscenities at a crowd during an altercation in an apparent effort to incite further fighting while she waved a pool cue and threw a pool ball into the crowd, with no attempt made by the manager to stop the disturbance. Although the incident was spontaneous and not foreseeable, the manager had actual knowledge of what was going on and permitted it to continue. Highway Tavern Corp. v McLaughlin, 105 A.D.2d 122, 483 N.Y.S.2d 323, 1984 N.Y. App. Div. LEXIS 20682 (N.Y. App. Div. 2d Dep't 1984).

Determination that licensees violated CLS Al Bev § 106 by permitting licensed premisses to become disorderly was not supported by evidence, and would be annulled, where charges were based on 3 sales of cocaine to undercover police officer by young bartender who was son of one licensee, but there was no evidence that licensees knew or should have known of sales, nor evidence that bartender was vested with managerial authority or unequivocal supervisory responsibility so as to impute his knowledge of disorderly conduct to licensees. JVC Tavern Corp. v New York State Liquor Authority, 123 A.D.2d 764, 507 N.Y.S.2d 237, 1986 N.Y. App. Div. LEXIS 60903 (N.Y. App. Div. 2d Dep't 1986), aff'd, 70 N.Y.2d 805, 522 N.Y.S.2d 108, 516 N.E.2d 1221, 1987 N.Y. LEXIS 19288 (N.Y. 1987).

Evidence that employee was acting with apparent authority of "head bouncer" when he assaulted patron both inside and outside of premises, and that he was operating under set procedure established by management to ensure that premises were operated in orderly fashion, was sufficient to support charge of violating CLS Al Bev § 106(6) by suffering or permitting assault to occur on licensed premises, notwithstanding that there was no conclusive evidence that club's manager had actual knowledge of disorder at time it was occurring. P.B.L. Entertainment, Inc. v New York State Liquor Authority, 149 A.D.2d 512, 539 N.Y.S.2d 990, 1989 N.Y. App. Div. LEXIS 4580 (N.Y. App. Div. 2d Dep't 1989).

Court would annul determination of State Liquor Authority which revoked petitioner's liquor license based on violation of CLS Al Bev Appx § 53.1(q) since charge did not refer to culpable mental state on part of petitioner, and administrative law judge made no findings as to petitioner's knowledge or fault; regulation may not be applied so as to subject licensee to strict liability, and administrative law judge's finding that licensee was aware of what was going on did not obviate erroneous application of strict liability standard to licensee's conduct. Cityworld Enterprises, Inc. v New York State Liquor Authority, 183 A.D.2d 402, 583 N.Y.S.2d 259, 1992 N.Y. App. Div. LEXIS 6561 (N.Y. App. Div. 1st Dep't 1992).

Evidence supported determination that petitioner suffered or permitted licensed premises to become disorderly in violation of CLS Al Bev § 106(6) by permitting sale and use of cocaine on premises where petitioner failed to exercise reasonable diligence in supervising premises, despite being advised by police that her bartenders were selling cocaine; petitioner was chargeable with knowledge she would have acquired if she had adequately supervised bar. Deane v New York State Liquor Auth., 212 A.D.2d 611, 622 N.Y.S.2d 543, 1995 N.Y. App. Div. LEXIS 1458 (N.Y. App. Div. 1st Dep't 1995).

Permitting immoral acts upon licensed premises implies knowledge or opportunity by reasonable diligence to acquire knowledge, more than a mere "suspicion," and also a fair measure of continuity and permanence. Guerra v New York State Liquor Authority, 35 Misc. 2d 564, 231 N.Y.S.2d 214, 1962 N.Y. Misc. LEXIS 2845 (N.Y. Sup. Ct. 1962), rev'd, 18 A.D.2d 868, 237 N.Y.S.2d 56, 1963 N.Y. App. Div. LEXIS 4908 (N.Y. App. Div. 4th Dep't 1963).

A liquor licensee should not be punished or have his license revoked on the ground that he has permitted his premises to become disorderly without proof that he was conscious of the violation and that such violation was not merely technical. Guerra v New York State Liquor Authority, 35 Misc. 2d 564, 231 N.Y.S.2d 214, 1962 N.Y. Misc. LEXIS 2845 (N.Y. Sup. Ct. 1962), rev'd, 18 A.D.2d 868, 237 N.Y.S.2d 56, 1963 N.Y. App. Div. LEXIS 4908 (N.Y. App. Div. 4th Dep't 1963).

38. —Knowledge; "suffer or permit"

The power of the liquor authority to revoke the licenses of persons or corporations who suffer or knowingly permit premises to become disorderly should be exercised only where there is

substantial evidence to sustain such a serious charge. Stanwood United, Inc. v O'Connell, 283 A.D. 79, 126 N.Y.S.2d 345, 1953 N.Y. App. Div. LEXIS 2983 (N.Y. App. Div. 1st Dep't 1953), aff'd, 306 N.Y. 749, 117 N.E.2d 921, 306 N.Y. (N.Y.S.) 749, 1954 N.Y. LEXIS 1104 (N.Y. 1954).

In a proceeding by liquor licensees to review a determination of the state liquor authority finding that the licensees had suffered or permitted their premises to become disorderly, revoking their license and imposing a bond claim in the amount of $12,000, the determination was not supported by substantial evidence where the licensees were not present on the premises at the time of the violative sale of cocaine, where the licensees did not have actual knowledge of the sale, and where it could not be concluded that they should have known of the sale in the exercise of reasonable diligence in that it constituted no more than a single, isolated incident that could not otherwise have been discovered; although it was beyond dispute that the licensees' bartender had actual knowledge of the sale, the licensees could not be charged with such knowledge where there was no evidence to support the liquor authority's finding that the bartender was a manager. De Palo v New York State Liquor Authority, 82 A.D.2d 831, 439 N.Y.S.2d 674, 1981 N.Y. App. Div. LEXIS 14501 (N.Y. App. Div. 2d Dep't), aff'd, 54 N.Y.2d 950, 445 N.Y.S.2d 154, 429 N.E.2d 833, 1981 N.Y. LEXIS 3151 (N.Y. 1981).

The fact that a bouncer had struck a patron did not support a finding that a tavern had suffered or permitted its licensed premises to become disorderly in violation of Al Bev Law § 106(6), where the patron had swung first, the bar was crowded, and the person in charge did not know of the incident until it was over. Doherty's New Dorp Tavern v New York State Liquor Authority, 82 A.D.2d 858, 440 N.Y.S.2d 268, 1981 N.Y. App. Div. LEXIS 14544 (N.Y. App. Div. 2d Dep't 1981), aff'd, 55 N.Y.2d 1007, 449 N.Y.S.2d 473, 434 N.E.2d 709, 1982 N.Y. LEXIS 3176 (N.Y. 1982).

A determination by the State Liquor Authority that a licensee of a bar had suffered or permitted the licensed premises to become disorderly when a combative patron had his nose broken by a bouncer who was employed by the licensee and who ejected the patron from the premises was not supported by sufficient evidence, where the evidence indicated that the patron swung at the bouncer first, that the bar was crowded and the person in charge did not know of the incident until it was over, and where there was insubstantial evidence to support the conclusion that the force used to eject the unruly patron was unnecessary. Doherty's New Dorp Tavern v New York State Liquor Authority, 82 A.D.2d 858, 440 N.Y.S.2d 268, 1981 N.Y. App. Div. LEXIS 14544 (N.Y. App. Div. 2d Dep't 1981), aff'd, 55 N.Y.2d 1007, 449 N.Y.S.2d 473, 434 N.E.2d 709, 1982 N.Y. LEXIS 3176 (N.Y. 1982).

Determination by State Liquor Authority that licensee suffered or permitted his premises to become disorderly would be annulled where no substantial evidence existed that licensee had failed to take appropriate action once assault occurred or had merely stood by and allowed disorderly conduct to continue. Jacobi v New York State Liquor Authority, 124 A.D.2d 1005, 508 N.Y.S.2d 782, 1986 N.Y. App. Div. LEXIS 62338 (N.Y. App. Div. 4th Dep't 1986).

Substantial evidence supported determination that owner suffered or permitted tavern to become disorderly in violation of CLS Al Bev § 106(6) where, on 2 occasions, undercover officer purchased what was believed to be cocaine at tavern from patron while bartender, with whom patron purportedly had some sort of relationship, was tending bar, even though none of principals of tavern were present on either occasion; although knowledge of cocaine sale could not be imputed to principals through bartender, principals could be charged with knowledge they would have obtained through reasonable diligence in supervising tavern. Mack Conroy, Inc. v Duffy, 155 A.D.2d 665, 548 N.Y.S.2d 54, 1989 N.Y. App. Div. LEXIS 15095 (N.Y. App. Div. 2d Dep't 1989).

Licensee cannot avoid consequences of violation of CLS Al Bev § 106(6) merely by not being present and failing to provide supervision for premises. B.C.D. & S. Enters. v New York State Liquor Auth., 202 A.D.2d 785, 608 N.Y.S.2d 728, 1994 N.Y. App. Div. LEXIS 2251 (N.Y. App. Div. 3d Dep't 1994).

Evidence supported determination that petitioner permitted licensed premises to become disorderly in violation of CLS Al Bev § 106(6) where confidential informant purchased drugs from bartender by first arranging sales in open areas of premises in normal tones of voice and then by entering men's room with bartender to consummate sales; under circumstances, it could be inferred that sales were part of continuous course of conduct in light of fact that sales were arranged in open areas and that they were arranged with relative ease. B.C.D. & S. Enters. v New York State Liquor Auth., 202 A.D.2d 785, 608 N.Y.S.2d 728, 1994 N.Y. App. Div. LEXIS 2251 (N.Y. App. Div. 3d Dep't 1994).

Evidence supported determination that petitioner engaged in improper conduct by permitting licensed premises to become disorderly in violation of CLS Al Bev § 106(6), notwithstanding that improper conduct (selling of cocaine) was actually conducted by employee, since definition of licensee includes employee of license (9 NYCRR § 53.2), and crime of which employee was actually convicted (seventh degree possession of controlled substance) is not enumerated in 9 NYCRR § 53.1(g). B.C.D. & S. Enters. v New York State Liquor Auth., 202 A.D.2d 785, 608 N.Y.S.2d 728, 1994 N.Y. App. Div. LEXIS 2251 (N.Y. App. Div. 3d Dep't 1994).

Court would annul revocation of liquor license where revocation was based on determination that tavern had become "focal point" of police activity, but there was no determination that owner had suffered or permitted activities which formed basis of focal point charge and, in fact, determination was made that evidence failed to show that owner suffered or permitted such activities. Dawson v New York State Liquor Auth., 202 A.D.2d 787, 608 N.Y.S.2d 730, 1994 N.Y. App. Div. LEXIS 2291 (N.Y. App. Div. 3d Dep't 1994).

Club's liquor license was properly suspended for 60 days and club was properly required to forfeit $1,000 bond where evidence supported determination that there was ongoing established pattern of conduct at club whereby female dancer would sit down next to male customer and female bartender would then ask customer if he wanted to buy drink for dancer. Club 44 v New York State Liquor Auth., 203 A.D.2d 185, 610 N.Y.S.2d 526, 1994 N.Y. App. Div. LEXIS 4245 (N.Y. App. Div. 1st Dep't 1994).

Evidence sustained finding by State Liquor Authority that licensee's manager "suffered or permitted" premises to become disorderly in violation of CLS Al Bev § 106(6) where (1) patron who had been barred from premises one year before for fighting was permitted to enter premises, (2) manager tolerated patron's continued presence when she engaged in conversation with her estranged husband, which eventually erupted into violence, and (3) manager failed to summon police when patron refused to leave and continued harassing her estranged husband. Franz, Inc. v New York State Liquor Auth., 207 A.D.2d 592, 615 N.Y.S.2d 504, 1994 N.Y. App. Div. LEXIS 8118 (N.Y. App. Div. 3d Dep't 1994).

Court would annul determination that petitioner suffered or permitted licensed premises to become disorderly when several bouncers at premises assaulted patron while ejecting him where (1) no principal of licensee was on premises at time of incident, (2) there was no evidence that bouncers were anything other than ordinary employees or that they had been involved in similar incidents in past, and (3) there was no evidence that manager was aware of conduct of bouncers at time when he could have intervened. S.B.C.L. v New York State Liquor Auth., 212 A.D.2d 797, 622 N.Y.S.2d 974, 1995 N.Y. App. Div. LEXIS 2154 (N.Y. App. Div. 1st Dep't), app. denied, 85 N.Y.2d 812, 631 N.Y.S.2d 289, 655 N.E.2d 402, 1995 N.Y. LEXIS 2220 (N.Y. 1995).

Evidence supported determination finding that petitioners violated CLS Al Bev § 106(6) where, over 6-month period, undercover officer made 10 purchases of narcotics from 3 bartenders and 2 patrons at petitioners' establishment, notwithstanding that there was no evidence that petitioner licensees had actual knowledge of drug sales or were on premises when they occurred. Petillo v State Liquor Auth., 248 A.D.2d 541, 670 N.Y.S.2d 209, 1998 N.Y. App. Div. LEXIS 2591 (N.Y. App. Div. 2d Dep't), app. denied, 92 N.Y.2d 814, 681 N.Y.S.2d 475, 704 N.E.2d 228, 1998 N.Y. LEXIS 3987 (N.Y. 1998).

Finding that petitioner suffered or permitted licensed premises to become disorderly was supported by substantial evidence where petitioner's principal, petitioner's bartender, and 3 patrons were arrested on licensed premises for sale of controlled sub-

stance and other drug related charges, warranting cancellation of liquor license and $1,000 bond forfeiture. Night Owl Lounge, Inc. v New York State Liquor Auth., 268 A.D.2d 277, 701 N.Y.S.2d 384, 2000 N.Y. App. Div. LEXIS 369 (N.Y. App. Div. 1st Dep't 2000).

Although the words "suffer or permit" in subd. 6 of this section are not defined, they have been given broader meanings in each case appearing before the courts as construed in light of the facts presented for consideration in the particular case. Guerra v New York State Liquor Authority, 35 Misc. 2d 564, 231 N.Y.S.2d 214, 1962 N.Y. Misc. LEXIS 2845 (N.Y. Sup. Ct. 1962), rev'd, 18 A.D.2d 868, 237 N.Y.S.2d 56, 1963 N.Y. App. Div. LEXIS 4908 (N.Y. App. Div. 4th Dep't 1963).

Because testimony that patrons were standing shoulder to shoulder was insufficient to support findings that a liquor licensee violated N.Y. Comp. Codes R. & Regs. tit. 9, §§ 48.2, 48.3, especially where the underlying charges were dismissed in criminal court, and because the Rules were ultra vires as applied and did not comply with N.Y. Alco. Bev. Cont. Law § 106(6), the licensee was entitled to N.Y. C.P.L.R. art. 78 relief. Matter of 47 Ave. B. E. v New York State Liq. Auth., 65 A.D.3d 33, 880 N.Y.S.2d 22, 2009 N.Y. App. Div. LEXIS 3818 (N.Y. App. Div. 1st Dep't), rev'd, 13 N.Y.3d 820, 890 N.Y.S.2d 435, 918 N.E.2d 949, 2009 N.Y. LEXIS 3951 (N.Y. 2009).

39. —Single incident or isolated events

Single act of child molestation by employee of which licensee had no knowledge and no opportunity to acquire knowledge and which act was concealed and committed at a time when the premises were not open to the public, was insufficient to support the finding of permitting or suffering premises to become disorderly. Missouri Realty Corp. v New York State Liquor Authority, 22 N.Y.2d 233, 292 N.Y.S.2d 423, 239 N.E.2d 356, 1968 N.Y. LEXIS 1318 (N.Y. 1968).

A liquor licensee does not suffer or permit the licensed premises to become disorderly, within the meaning of Al Bev Law § 106(6), simply by using force to eject an unruly patron; rather, a violation of such statute occurs only if the licensee employs unnecessary force or if other improper conduct occurs. Thus, in an Article 78 proceeding initiated by a liquor licensee, the lower court erred in failing to annul a determination of the New York State Liquor Authority that the licensee had violated Al Bev Law § 106(6) where the determination had been based merely on the licensee's having used force to remove from the licensed premises an obstreperous patron. L.B.R. Enterprises, Inc. v New York State Liquor Authority, 53 N.Y.2d 714, 439 N.Y.S.2d 331, 421 N.E.2d 823, 1981 N.Y. LEXIS 2357 (N.Y. 1981).

Suffering premises to become disorderly means something more than a mere happening on one occasion. A finding that the management knowingly allowed such things to occur and continue would have to be bottomed upon a showing either of more than a single event or a showing of a demonstrated attitude toward that happening indicating acquiescence. Stanwood United, Inc. v O'Connell, 283 A.D. 79, 126 N.Y.S.2d 345, 1953 N.Y. App. Div. LEXIS 2983 (N.Y. App. Div. 1st Dep't 1953), aff'd, 306 N.Y. 749, 117 N.E.2d 921, 306 N.Y. (N.Y.S.) 749, 1954 N.Y. LEXIS 1104 (N.Y. 1954).

There was rational basis to support respondent's determination sustaining charges 2 and 3 charging violations of Alcoholic Beverage Control Law § 106 (6-a) and certain rules of State Liquor Authority; there was unrefuted testimony that two of topless dancers exposed pubic hair to patrons and approached customers from within distance of less than six feet in violation of 9 NYCRR 53.1 (r), (s)–however, as to charge 1, alleging violation of Alcoholic Beverage Control Law § 106 (6) based upon performance of lewd acts by lone dancer on single occasion, it cannot be inferred that petitioner suffered or permitted premises to become disorderly; there is dearth of evidence that proprietor of establishment was aware of or should have had any knowledge that this dancer would engage in lewd conduct; respondent's determination as to this charge was not supported by substantial evidence. Richcar Tavern, Inc. v New York State Liquor Authority, 160 A.D.2d 881, 554 N.Y.S.2d 313, 1990 N.Y. App. Div. LEXIS 4494 (N.Y. App. Div. 2d Dep't 1990).

A liquor license is not subject to suspension upon a showing that disorderly conduct occurred on the premises on one or more isolated occasions in the absence of a showing that the licensee should have known that a disorderly condition prevailed. St. Albans Bowl, Inc. v New York State Liquor Authority, 20 A.D.2d 543, 245 N.Y.S.2d 111, 1963 N.Y. App. Div. LEXIS 2810 (N.Y. App. Div. 2d Dep't 1963).

The cancellation of petitioner's restaurant license was arbitrary and capricious, where the charges of improper supervision permitting the premises to become disorderly all were based upon one incident and the petitioner had been in business for 30 years without an adverse record. Therefore, the cancellation of the license was annulled and a 10 days' suspension imposed. Jeff's Bar & Restaurant, Inc. v State Liquor Authority, 27 A.D.2d 805, 277 N.Y.S.2d 479, 1967 N.Y. App. Div. LEXIS 4738 (N.Y. App. Div. 1st Dep't 1967).

Suffering premises to become disorderly means something more than a mere happening on one occasion. A finding that the management knowingly allowed such things to occur and to continue would have to be bottomed upon a showing either of more than a single event or the showing of a demonstrated attitude toward that happening which indicated acquiescence. Inner Circle Restaurant, Inc. v New York State Liquor Authority, 36 A.D.2d 585, 318 N.Y.S.2d 854, 1971 N.Y. App. Div. LEXIS 4758 (N.Y. App. Div. 1st Dep't 1971), rev'd, 30 N.Y.2d 541, 330 N.Y.S.2d 389, 281 N.E.2d 183, 1972 N.Y. LEXIS 1516 (N.Y. 1972).

There was no evidence to support determination of State Liquor Authority that licensee suffered or permitted his premises to become disorderly, but rather incident out of which charge grew occurred without warning and was isolated and spontaneous event which no amount of supervision was likely to prevent. Peanutbutter Jam, Inc. v New York State Liquor Authority, 58 A.D.2d 703, 396 N.Y.S.2d 104, 1977 N.Y. App. Div. LEXIS 12808 (N.Y. App. Div. 3d Dep't 1977).

Liquor license was improperly suspended on basis of single incident in which, while licensee was absent, female patron solicited for immoral purposes; licensee's bartender's awareness of incident was not imputable to licensee. Italiano v Liquor Authority of New York, 59 A.D.2d 820, 399 N.Y.S.2d 727, 1977 N.Y. App. Div. LEXIS 13909 (N.Y. App. Div. 4th Dep't 1977).

A determination by the State Liquor Authority that a licensee suffered or permitted the subject premises to become disorderly in violation of Al Bev § 106(6) was not supported by substantial evidence where the evidence showed only a single, isolated altercation between a patron and a waiter, and where there was no evidence that the principal was present or that he knew or should have known that it would occur. La Vigna Restaurant Corp. v New York State Liquor Authority, 83 A.D.2d 867, 442 N.Y.S.2d 22, 1981 N.Y. App. Div. LEXIS 15263 (N.Y. App. Div. 2d Dep't 1981).

In an Article 78 proceeding to review a determination of the State Liquor Authority finding that petitioner had permitted his premises to become disorderly and imposing a penalty, the determination was proper where the manager had engaged in an altercation with a patron using unreasonable force under the circumstances. Pro Ben Corp. v McLaughlin, 87 A.D.2d 871, 449 N.Y.S.2d 313, 1982 N.Y. App. Div. LEXIS 16359 (N.Y. App. Div. 2d Dep't 1982).

A penalty imposed by the New York State Liquor Authority consisting of the cancellation of petitioner's liquor license and a $1,000 bond forfeiture for allowing its premises to become disorderly by suffering or permitting a lewd and indecent show therein pursuant to Al Bev Law § 106 would be annulled and the cause remanded for reconsideration of the penalty, where in pleading "no contest", the licensee explained in mitigation that a video cassette movie showing explicit sexual acts between adult males was exhibited "without prior knowledge of the contents by him," that he was not present the first two nights that the video cassettes were shown, and on the third night, when he first saw them, he had them stopped. Eagle Open Kitchen, Inc. v New York State Liquor Authority, 88 A.D.2d 508, 449 N.Y.S.2d 731, 1982 N.Y. App. Div. LEXIS 16630 (N.Y. App. Div. 1st Dep't 1982).

In hearing on alleged violation of CLS Al Bev § 106(6) for permitting licensed premises to become disorderly, requirement that disorderly conduct be of continuous and permanent nature and not related to single incident only applies to incidents

involving ordinary employees and not to employees left in charge of premises; thus, State Liquor Authority properly determined that single incident involving owner of premises could provide sufficient basis to find violation of statute. Pappy Jack's Pub, Inc. v Duffy, 148 A.D.2d 870, 539 N.Y.S.2d 144, 1989 N.Y. App. Div. LEXIS 2811 (N.Y. App. Div. 3d Dep't 1989).

Performance of lewd acts by lone dancer on single occasion did not support inference that tavern owner suffered or permitted premises to become disorderly in violation of CLS Al Bev § 106(6), absent evidence that proprietor was aware of or should have known that dancer would engage in lewd conduct. Richcar Tavern, Inc. v New York State Liquor Authority, 160 A.D.2d 881, 554 N.Y.S.2d 313, 1990 N.Y. App. Div. LEXIS 4494 (N.Y. App. Div. 2d Dep't 1990).

Substantial evidence supported state liquor authority's determination that petitioner suffered or permitted licensed premises (disco club) to become disorderly, in violation of CLS Al Bev § 106(6), where police officers from 4 precincts were called to premises after patron who had been ejected began shooting at random, and one officer testified that on his arrival he saw numerous fights going on and large number of people inside premises, pushing, shoving, yelling, and striving to get outside. Hilly-Hand, Inc. v New York State Liquor Auth., 227 A.D.2d 996, 643 N.Y.S.2d 824, 1996 N.Y. App. Div. LEXIS 6753 (N.Y. App. Div. 4th Dep't 1996).

Substantial evidence supported finding that licensee's floor manager, who had managerial authority over licensed premises and whose actions were imputable to licensee, was instrumental in creating disorder on premises when one of licensee's security guards assaulted patron, in violation of CLS Al Bev § 106(6); although administrative law judge did not explicitly discredit floor manager's denial of involvement, his finding crediting patron's version of altercation implied that he did. Soca Paradise, Inc. v New York Liquor Auth., 232 A.D.2d 278, 649 N.Y.S.2d 9, 1996 N.Y. App. Div. LEXIS 10354 (N.Y. App. Div. 1st Dep't 1996).

Evidence did not support respondent's finding that petitioner violated CLS Al Bev § 106(6) where events that culminated in patron striking band member were unexpected and of such brief duration that petitioner could not have prevented them through reasonable supervision. Moonwalkers Restaurant Corp. v New York State Liquor Auth., 250 A.D.2d 428, 673 N.Y.S.2d 16, 1998 N.Y. App. Div. LEXIS 5600 (N.Y. App. Div. 1st Dep't 1998).

Evidence that a police officer saw a tavern patron smoking a marijuana cigarette on a single occasion did not constitute substantial evidence that the tavern owner "suffered or permitted its premises to become disorderly" within the meaning of N.Y. Alco. Bev. Cont. Law § 106(6); thus, the New York State Liquor Authority erred in revoking the owner's liquor license. Matter of Albany Manor Inc. v New York State Liq. Auth., 57 A.D.3d 142, 867 N.Y.S.2d 380, 2008 N.Y. App. Div. LEXIS 8047 (N.Y. App. Div. 1st Dep't 2008).

40. Prostitution

Evidence failed to show that the holder of a restaurant liquor license allowed premises to become disorderly within the meaning of this section, where there was no proof that the prostitute who testified in the proceeding solicited men or committed any act in the premises by which they tended to be disorderly. Olde Colony Restaurant Corp. v State Liquor Authority, 18 N.Y.2d 995, 278 N.Y.S.2d 228, 224 N.E.2d 732, 1966 N.Y. LEXIS 913 (N.Y. 1966).

Single instance of permitting prostitution on licensed premises would not warrant cancellation of on-premises license but would warrant suspension for period of four months. Dwyer's Inn, Inc. v State Liquor Authority, 30 A.D.2d 700, 291 N.Y.S.2d 877, 1968 N.Y. App. Div. LEXIS 3652 (N.Y. App. Div. 2d Dep't 1968).

Substantial evidence did not exist to support determination by State Liquor Authority that tavern suffered or permitted females on licensed premises to solicit male patrons for immoral purposes in violation of CLS Al Bev § 106(6) where (1) 2 undercover officers entered tavern, were joined by 2 females in tavern and drank and conversed for 2 hours, (2) females agreed to accompany officers "to have a good time," (3) subject and price of sexual activity were not discussed until officers and their companions were leaving tavern, and (4) there was no evidence that bartender or manager was aware of conversation of officers and their companions or that licensee or her employees were aware of any instance of solicitation on licensed premises. Lilpin Tavern, Inc. v New York State Liquor Authority, 146 A.D.2d 484, 536 N.Y.S.2d 80, 1989 N.Y. App. Div. LEXIS 96 (N.Y. App. Div. 1st Dep't), app. denied, 74 N.Y.2d 607, 545 N.Y.S.2d 103, 543 N.E.2d 746, 1989 N.Y. LEXIS 989 (N.Y. 1989).

It is to be remembered that a liquor licensee is inhibited by §§ 40 and 41 of the Civil Rights Law from evicting persons from his place of business, and is legally required by subd. 15 of this section to allow police officers to inspect them, and hence his liquor license should not be suspended on the basis of testimony showing that police officers solicited immoral activities on the part of female customers. Guerra v New York State Liquor Authority, 35 Misc. 2d 564, 231 N.Y.S.2d 214, 1962 N.Y. Misc. LEXIS 2845 (N.Y. Sup. Ct. 1962), rev'd, 18 A.D.2d 868, 237 N.Y.S.2d 56, 1963 N.Y. App. Div. LEXIS 4908 (N.Y. App. Div. 4th Dep't 1963).

41. —Proof

A determination of the State Liquor Authority revoking a restaurant liquor license upon a finding that the licensees had violated § 106, subd 6 by permitting females to solicit male patrons for immoral purposes was annulled for lack of substantial evidence. Mihale v O'Connell, 279 A.D. 651, 108 N.Y.S.2d 221, 1951 N.Y. App. Div. LEXIS 3335 (N.Y. App. Div. 1951), aff'd, 303 N.Y. 874, 105 N.E.2d 103, 303 N.Y. (N.Y.S.) 874, 1952 N.Y. LEXIS 1337 (N.Y. 1952).

In a proceeding to revoke petitioners liquor license for a violation of subdivision 6 of this section, the hearing commissioner found that, while in conversation with a police officer, a certain woman offered, within the hearing range of one of the petitioners, to commit prostitution and that said petitioner made no effort to stop such solicitation. This finding was insufficient to permit a revocation. Jackson v Rohan, 1 A.D.2d 89, 147 N.Y.S.2d 333, 1955 N.Y. App. Div. LEXIS 3634 (N.Y. App. Div. 4th Dep't 1955).

Evidence that plainclothes officer's proposition to woman in tavern was rejected and that it was not until persuasive conversation by the officer and an offer of $100 that she allegedly agreed to engage in sexual act was insufficient to support finding, in support of cancellation of tavern license, that licensee "suffered or permitted" prostitution on the premises. Streber v State Liquor Authority, 47 A.D.2d 808, 365 N.Y.S.2d 580, 1975 N.Y. App. Div. LEXIS 9134 (N.Y. App. Div. 4th Dep't 1975).

Suspension of petitioner's liquor license for permitting premises to become disorderly was not supported by substantial evidence, notwithstanding that two police officers had either solicited or were solicited by two females on premises, where conversations were not overheard by anyone connected with management, nor was there any circumstances shown to indicate that petitioner should have been aware of solicitation, and police officers left premises with females on both occasions without any action against or notice to petitioner. Pow Wow, Inc. v New York State Liquor Authority, 48 A.D.2d 612, 367 N.Y.S.2d 291, 1975 N.Y. App. Div. LEXIS 9590 (N.Y. App. Div. 1st Dep't 1975).

42. —Knowledge

The term "suffer or permit" implies that the licensee must have had knowledge or that he could by the exercise of reasonable diligence have acquired knowledge of the disorderliness of the premises. Proof that females solicited patrons of the licensed establishment for immoral purposes on a single occasion was not in itself sufficient to sustain a revocation. Migliaccio v O'Connell, 307 N.Y. 566, 122 N.E.2d 914, 307 N.Y. (N.Y.S.) 566, 1954 N.Y. LEXIS 951 (N.Y. 1954).

The State Liquor Authority properly revoked an on-premises liquor license and imposed a $1,000 bond forfeiture on the ground that the licensee had suffered or permitted females to solicit male patrons of the establishment for immoral purposes on an occasion when the bartender was in charge of the licensed premises where the licensee's testimony that the bartender left in charge was responsible for dealing with any disorder and for assuring that the premises were operating in an orderly fashion supported the

hearing officer's determination that the bartender had been delegated sufficient managerial authority so as to impute his conduct to the licensee, and where the evidence also supported the hearing officer's determination that the licensee could have known of the events that gave rise to the violation through the exercise of due diligence and proper supervision. Awrich Rest., Inc. v N.Y. State Liquor Auth., 60 N.Y.2d 645, 467 N.Y.S.2d 564, 454 N.E.2d 1307, 1983 N.Y. LEXIS 3348 (N.Y. 1983).

Evidence was insufficient to sustain charge that petitioner suffered licensed premises to become disorderly in that it allowed unescorted females to solicit male patrons. The only evidence was that on a single occasion, while on petitioner's premises, a female solicited a police officer during a conversation which could not be overheard by the bartender or anyone else present. Mur-Art-Sol, Inc. v State Liquor Authority, 6 A.D.2d 683, 174 N.Y.S.2d 333, 1958 N.Y. App. Div. LEXIS 5722 (N.Y. App. Div. 1st Dep't 1958).

Suspension of petitioner's restaurant liquor license for 20 days would not be allowed to stand where the evidence before the Liquor Authority showed only one instance of permitting the premises to become disorderly, in connection with alleged solicitation of a police officer by a woman patron, and there was nothing to indicate that petitioner's bartender had or should have had knowledge of this instance. Application of Ray's Tenderloin, Inc., 20 A.D.2d 695, 246 N.Y.S.2d 769, 1964 N.Y. App. Div. LEXIS 4416 (N.Y. App. Div. 1st Dep't 1964).

Evidence was insufficient to sustain determination of State Liquor Authority that petitioner licensee permitted his premises to become disorderly in permitting females on the premises to solicit male patrons for immoral purposes where the evidence, though contradictory, boiled down to a single occasion where a police officer, who had been there several times before, scraped up an acquaintance with a woman and did his own soliciting. Abatz v State Liquor Authority, 21 A.D.2d 658, 249 N.Y.S.2d 709, 1964 N.Y. App. Div. LEXIS 3771 (N.Y. App. Div. 1st Dep't), aff'd, 15 N.Y.2d 643, 255 N.Y.S.2d 865, 204 N.E.2d 198, 1964 N.Y. LEXIS 791 (N.Y. 1964).

Evidence that on a single occasion a female solicited a police officer for immoral purposes during a conversation conducted in a low tone where it did not appear that anyone conected with the licensee had knowledge of the occurrence was insufficient to support suspension of liquor license. Cat & Fiddle, Inc. v State Liquor Authority, 24 A.D.2d 753, 263 N.Y.S.2d 839, 1965 N.Y. App. Div. LEXIS 3173 (N.Y. App. Div. 1st Dep't 1965).

Suspension of liquor license for 10 days would be annulled in absence of evidence to establish knowledge of licensee of single alleged act of solicitation or evidence to show circumstances such that licensee should have known of the alleged occurrence. Application of A. & C. Enterprises, Inc., 31 A.D.2d 527, 294 N.Y.S.2d 857, 1968 N.Y. App. Div. LEXIS 2889 (N.Y. App. Div. 1st Dep't 1968).

There was insufficient basis for the suspension of a license for an alleged violation of § 106, subd 6 of the Alcoholic Beverage Control Law (permitting the premises to become disorderly) where it appeared that there was an alleged solicitation for immoral purposes of a police officer by an unescorted female on a single occasion, the alleged incident occurring in a very short space of time but it did not appear that any one concerned with the licensee had knowledge, or could reasonably have been expected to have knowledge of the occurrence. Baldwin Bar & Grill, Inc. v State Liquor Authority, 31 A.D.2d 618, 295 N.Y.S.2d 941, 1968 N.Y. App. Div. LEXIS 2711 (N.Y. App. Div. 1st Dep't 1968).

43. —Single incident or isolated events

A 30-day suspension of petitioner's restaurant liquor license was annulled for lack of substantial evidence to sustain the finding of the State Liquor Authority that petitioner "permitted and suffered" its premises to become disorderly and not properly supervised in violation of this section where the only evidence to support the charge was that of a policeman in plain clothes who claimed he was solicited for sexual intercourse by a woman who came into the restaurant, engaged in brief conversation with a man at the bar and three male patrons at a table, then sat down at the food counter where the policeman greeted her and finally bought her a drink, there being nothing to indicate that the manager heard any of the conversation or had reason to know or suspect that the woman was soliciting as a prostitute. Hotel Corp. of America v State Liquor Authority, 13 A.D.2d 733, 214 N.Y.S.2d 500, 1961 N.Y. App. Div. LEXIS 11022 (N.Y. App. Div. 1st Dep't 1961).

In order to suspend liquor licenses on basis of solicitation for immoral purposes, it is necessary that licensee knew or should have known the premises were disorderly in that respect. Cat & Fiddle, Inc. v State Liquor Authority, 24 A.D.2d 753, 263 N.Y.S.2d 839, 1965 N.Y. App. Div. LEXIS 3173 (N.Y. App. Div. 1st Dep't 1965).

The determination of the New York State Liquor Authority revoking the petitioner's on-premises liquor license on the ground that the petitioner suffered or permitted females on the licensed premises to solicit male patrons therein for immoral purposes would be affirmed, notwithstanding the absence of the petitioner from the premises at the time of the alleged incident, that there was no evidence in the record that the petitioner had actual knowledge of the disorder which occurred at his bar, and that it has been held that a single isolated act on the part of an employee will not ordinarily support a finding that the licensee suffered or permitted the premises to become disorderly, where the record indicated that the bartender involved in the instant disorder had been employed by the petitioner in a managerial capacity, and a licensee normally is chargable with the conduct of an employee who has been given managerial responsibility. Awrich Rest., Inc. v N.Y. State Liquor Auth., 92 A.D.2d 925, 460 N.Y.S.2d 347, 1983 N.Y. App. Div. LEXIS 17335 (N.Y. App. Div. 2d Dep't), aff'd, 60 N.Y.2d 645, 467 N.Y.S.2d 564, 454 N.E.2d 1307, 1983 N.Y. LEXIS 3348 (N.Y. 1983).

Evidence was sufficient to show that licensee's experienced bartender had requisite degree of control and managerial authority so as to impute to licensee liability for allowing premises to become disorderly where bartender overruled second, less experienced bartender and refused any further service to inebriated patron, and off-duty employee did not act to remove patron before conferring with bartender and obtaining his permission to try to remove patron; moreover, it was proper to conclude that bartender was instrumental in creating disturbance where, instead of calling police to assist in removing dangerous patron, bartender elected to have off-duty employee remove patron. Chestnut Tree of Ithaca, Inc. v Duffy, 140 A.D.2d 904, 528 N.Y.S.2d 723, 1988 N.Y. App. Div. LEXIS 5868 (N.Y. App. Div. 3d Dep't 1988).

The evidence was not sufficient to sustain revocation of petitioner's bar and restaurant license, where it merely appeared that different police officers, on three occasions, operating in plain clothes, had solicited, or been solicited by, female customers for purposes of prostitution, there being no proof that either the licensee himself or his employees were aware of what was happening. Guerra v New York State Liquor Authority, 35 Misc. 2d 564, 231 N.Y.S.2d 214, 1962 N.Y. Misc. LEXIS 2845 (N.Y. Sup. Ct. 1962), rev'd, 18 A.D.2d 868, 237 N.Y.S.2d 56, 1963 N.Y. App. Div. LEXIS 4908 (N.Y. App. Div. 4th Dep't 1963).

44. Homosexual activity

Fondling of the primary sexual organs in licensed premises on a public dance floor clearly constitutes disorder, whether the fondling occurs between heterosexuals or homosexuals. Where defendant's bartender could have observed sexual fondling while homosexuals were dancing slow dances together if he had glanced at the dance floor, his failure to do so is a failure to exercise reasonable supervision. Becker v New York State Liquor Authority, 21 N.Y.2d 289, 287 N.Y.S.2d 400, 234 N.E.2d 443, 1967 N.Y. LEXIS 982 (N.Y. 1967).

A determination of the State Liquor Authority revoking petitioner's liquor license and ordering that no new license be issued for 12 months was sustained by a finding, based upon evidence, that petitioner permitted the premises to become disorderly in violation of subd. 6 of this section, a witness having testified to having visited petitioner's place several times over a two-month period and on each occasion seeing males dancing with other males and kissing each other. De Simone v New York State Liquor Authority, 14 A.D.2d 508, 217 N.Y.S.2d 271, 1961 N.Y. App. Div. LEXIS 9724 (N.Y. App. Div. 4th Dep't), app. denied, 10 N.Y.2d 706, 1961 N.Y. LEXIS 2059 (N.Y. 1961).

The mere congregation of homosexuals, where there is no breach of the peace, does not make the premises disorderly within the meaning of this section. Kerma Restaurant Corp. v State Liquor Authority, 27 A.D.2d 918, 278 N.Y.S.2d 951, 1967 N.Y. App. Div. LEXIS 4416 (N.Y. App. Div. 1st Dep't), rev'd, 21 N.Y.2d 111, 286 N.Y.S.2d 822, 233 N.E.2d 833, 1967 N.Y. LEXIS 1048 (N.Y. 1967).

45. —Proof

Ample proof was adduced before the State Liquor Authority to warrant finding that licensee knew or should have known the homosexual activities were being carried on on its premises and conclusion that licensee had suffered or permitted premises to become "disorderly" in violation of subdivision 6 of § 106 of Alcoholic Beverage Control Law. The proof was not rendered less effective because the criminal charge based upon some of it had been dismissed. Lynch's Builders Restaurant, Inc. v O'Connell, 303 N.Y. 408, 103 N.E.2d 531, 303 N.Y. (N.Y.S.) 408, 1952 N.Y. LEXIS 803 (N.Y. 1952).

The mere congregation of homosexuals, where there is no breach of peace, does not make the premises disorderly within the meaning of this section. Where there was no evidence to attribute to the licensee knowledge that a police officer had been solicited by a customer for homosexual purposes, and the only other proof offered was based on the policeman's observations of the dress and appearance of several patrons, male customers wearing makeup, and "three instances" in which one male was sitting on another male's lap at the tables; the evidence was held insufficient to establish a finding of disorderly premises. Kerma Restaurant Corp. v State Liquor Authority, 21 N.Y.2d 111, 286 N.Y.S.2d 822, 233 N.E.2d 833, 1967 N.Y. LEXIS 1048 (N.Y. 1967).

Testimony of three different investigators for the Liquor Authority to observing on 12 different occasions over a six-months' period incidents in petitioner's restaurant between homosexuals was sufficient to sustain suspension of the restaurant liquor license. Gilmer v Hostetter, 20 A.D.2d 586, 245 N.Y.S.2d 252, 1963 N.Y. App. Div. LEXIS 2669 (N.Y. App. Div. 3d Dep't 1963).

46. —Knowledge

A retail liquor license may be cancelled if the licensee has knowledge of homosexual solicitation upon the premises. Kerma Restaurant Corp. v State Liquor Authority, 21 N.Y.2d 111, 286 N.Y.S.2d 822, 233 N.E.2d 833, 1967 N.Y. LEXIS 1048 (N.Y. 1967).

Upon consideration of the record, the evidence disclosed amply sufficient ground for a finding by the State Liquor Authority that petitioner, upon specified dates, suffered and permitted its premises to become disorderly in violation of subd. 6 of this section, by knowingly permitting the premises to be used as a gathering place for homosexuals and degenerates who conducted themselves in an offensive and indecent manner, warranting revocation of a restaurant liquor license. Fulton Bar & Grill, Inc. v State Liquor Authority, 11 A.D.2d 771, 205 N.Y.S.2d 37, 1960 N.Y. App. Div. LEXIS 8690 (N.Y. App. Div. 2d Dep't 1960).

Where there was no evidence that gay dancing was indecent or involved fondling, and where instances of homosexual touching were in isolated, concealed areas unperceived by licensee's employees, knowledge of those acts could not be attributed to licensee and the acts could not be considered in determining whether licensee had suffered or permitted premises to become disorderly. Chipman Associates, Inc. v New York State Liquor Authority, 47 A.D.2d 585, 363 N.Y.S.2d 162, 1975 N.Y. App. Div. LEXIS 8683 (N.Y. App. Div. 4th Dep't 1975).

A determination of the State Liquor Authority that a petitioner suffered and allowed its premises to become disorderly was not supported by substantial evidence where, even though the proof offered to substantiate the charge was that an employee of petitioner, at the request of an investigator, obtained for him the services of a male prostitute who, in turn, procured the services of a second male prostitute, there was no proof that the licensee or his manager knew or should have known of the asserted disorderly conduct on the premises. 8 Christopher Street Corp. v McLaughlin, 88 A.D.2d 515, 450 N.Y.S.2d 2, 1982 N.Y. App. Div. LEXIS 16648 (N.Y. App. Div. 1st Dep't 1982).

47. —Single incident or isolated events

The evidence was not sufficient to warrant a revocation of a restaurant liquor license where the only proof was the testimony of a police officer to the effect that on one occasion he saw 15 males at a bar acting in a female way, one of whom made him an indecent proposal. There was no proof that the management knew of or permitted such conduct. Stanwood United, Inc. v O'Connell, 283 A.D. 79, 126 N.Y.S.2d 345, 1953 N.Y. App. Div. LEXIS 2983 (N.Y. App. Div. 1st Dep't 1953), aff'd, 306 N.Y. 749, 117 N.E.2d 921, 306 N.Y. (N.Y.S.) 749, 1954 N.Y. LEXIS 1104 (N.Y. 1954).

Suspension of a bowling alley's liquor license by the State Liquor Authority was unwarranted where it was based on a single alleged occurrence taking place on the premises during a morning while the bar was closed and a junior bowling league supervised by adults was using the alleys, such instance being a sodomous occurrence in the relative privacy of the men's washroom and not shown to have been observed by the attendant in charge. St. Albans Bowl, Inc. v New York State Liquor Authority, 20 A.D.2d 543, 245 N.Y.S.2d 111, 1963 N.Y. App. Div. LEXIS 2810 (N.Y. App. Div. 2d Dep't 1963).

A single incident of alleged solicitation of a police officer by a homosexual "in a very low and subdued voice" which was not overheard by employees of the licensee, and the mere fact that another customer had warned the officer not to speak to the homosexual because "he may be a copy; we don't want any trouble here" would not support a determination that the premises had become disorderly, where the record indicated the premises had been operated for forty years without any adverse history. F & C Holding Corp. v State Liquor Authority, 27 A.D.2d 806, 277 N.Y.S.2d 759, 1967 N.Y. App. Div. LEXIS 4710 (N.Y. App. Div. 1st Dep't 1967).

Evidence that on a single occasion a female solicited a police officer for immoral purposes in a conversation which took approximately two or three minutes during a period when the bar was in charge of a temporary employee and the licensee had no knowledge of the occurrence, did not render said premises disorderly within the provisions of the Alcoholic Beverage Control Law so as to justify suspension of license, since a single occurrence, in the absence of knowledge on the part of management, is insufficient to establish the violations of suffering the premises to become disorderly. Perry's Rest. Corp. v New York State Liquor Authority, 27 A.D.2d 922, 279 N.Y.S.2d 379, 1967 N.Y. App. Div. LEXIS 4399 (N.Y. App. Div. 1st Dep't 1967).

In view of evidence that liquor licensee employed bouncers and security system to detect and discourage overt sexual fondling and ejected patrons for overt sexual fondling, evidence of single occasion on which licensee's bartender observed homosexual contact between day cook and patron near the bar and smilingly approved was insufficient to demonstrate that the licensee permitted its premises to become disorderly and did not justify license revocation. Chipman Associates, Inc. v New York State Liquor Authority, 47 A.D.2d 585, 363 N.Y.S.2d 162, 1975 N.Y. App. Div. LEXIS 8683 (N.Y. App. Div. 4th Dep't 1975).

The owner of a bar and grill was not guilty of a violation of this section where it appeared that a patrolman one night had entered defendant's premises and for a period of ten minutes had observed men who appeared to be homosexuals hugging and kissing each other. The defendant was in the kitchen, but his bartender was present. People ex rel. Fasone v Arenella, 139 N.Y.S.2d 186 (N.Y. Magis. Ct. 1954).

48. Narcotics

Substantial evidence supported a ten-day suspension of a restaurant's liquor license for violation of Al Bev Law § 106(6) where testimony indicated that a loaded shotgun, for which the owner's father possessed a permit, had been constantly on the premises for at least one year, despite a law against possession of loaded shotguns in public within the City of New York, and where the owner's knowledge of illegal presence of the weapon could reasonably be concluded since it had been in plain view when seized; however, revocation of the license based upon the owner's allegedly permitting drug trafficking on the premises was not supported by substantial evidence where there was no proof that the owner knew or should have known of the transactions or that the bartender in charge at the time of the transactions was a manager or corporate principal, so as to impute his activities to the corporate licensee. Richjen Restaurant, Inc. v State Liquor

Authority, 51 N.Y.2d 847, 433 N.Y.S.2d 755, 413 N.E.2d 1170, 1980 N.Y. LEXIS 2697 (N.Y. 1980).

A restaurant owner who permits persons known to be narcotic peddlers and dispensers of marijuana cigarettes, to frequent his place of business with knowledge of their character, is a violator of this section and will have his license revoked. Kormann's Hofbrau, Inc. v O'Connell, 275 A.D. 930, 90 N.Y.S.2d 797, 1949 N.Y. App. Div. LEXIS 5132 (N.Y. App. Div.), aff'd, 300 N.Y. 521, 89 N.E.2d 249, 300 N.Y. (N.Y.S.) 521, 1949 N.Y. LEXIS 1405 (N.Y. 1949).

Undercover police officer purchased what was believed to be cocaine at bar operated by petitioner licensee; it was purchased from patron while barmaid, with whom patron purportedly had some sort of relationship, was tending bar; on each occasion, none of principals of licensee corporation was present–respondents properly determined that petitioner suffered or permitted its premises to become disorderly–although barmaid did not hold position that would result in her knowledge being imputed to petitioner, petitioner may be charged with knowledge it would have obtained through exercise of reasonable diligence in supervising licensed premises; one of two principals of petitioner admitted that second principal of petitioner, who was supposed to be present at bar on nights in question, was not present and did not take measures to have someone take his place; licensee cannot avoid consequences of violating Alcoholic Beverage Control Law § 106 (6) merely by failing to provide supervision at its premises–revocation of petitioner's liquor license and imposition of $1,000 bond claim was not excessive penalty. Matter of Mack Conroy, Inc. v Duffy, 155 A.D.2d 665, 548 N.Y.S.2d 54, 1989 N.Y. App. Div. LEXIS 15095 (N.Y. App. Div. 2d Dep't 1989).

Cancellation of restaurant liquor license was proper under evidence that the person left in charge of the premises during the licensee's absence suffered the premises to become disorderly in that there was a sale of narcotics by the barmaid and porter, the proceeds thereof being rung up on the cash register. Rodriguez v New York State Liquor Authority, 36 A.D.2d 702, 318 N.Y.S.2d 753, 1971 N.Y. App. Div. LEXIS 4541 (N.Y. App. Div. 1st Dep't 1971).

Under Alcoholic Beverage Control Law § 106, subd 6, licensee who permitted open selling of drugs on premises was punished by 30-day suspension of license and $1000 bond forfeiture. Alvaro v State Liquor Authority, 43 A.D.2d 902, 351 N.Y.S.2d 246, 1974 N.Y. App. Div. LEXIS 5953 (N.Y. App. Div. 4th Dep't 1974).

Licensee could not be held responsible for sale of marijuana cigarette to undercover detective by bartender or by licensee's brother, who was a mere patron, where, at the time of the transactions, licensee was not present, time was one when he was regularly absent, and, though the bartender was "in charge," he did not possess managerial authority. Collins v State Liquor Authority, 48 A.D.2d 848, 368 N.Y.S.2d 859, 1975 N.Y. App. Div. LEXIS 10070 (N.Y. App. Div. 2d Dep't 1975).

Determination that licensees violated CLS Al Bev § 106 by permitting licensed premisses to become disorderly was not supported by evidence, and would be annulled, where charges were based on 3 sales of cocaine to undercover police officer by young bartender who was son of one licensee, but there was no evidence that licensees knew or should have known of sales, nor evidence that bartender was vested with managerial authority or unequivocal supervisory responsibility so as to impute his knowledge of disorderly conduct to licensees. JVC Tavern Corp. v New York State Liquor Authority, 123 A.D.2d 764, 507 N.Y.S.2d 237, 1986 N.Y. App. Div. LEXIS 60903 (N.Y. App. Div. 2d Dep't 1986), aff'd, 70 N.Y.2d 805, 522 N.Y.S.2d 108, 516 N.E.2d 1221, 1987 N.Y. LEXIS 19288 (N.Y. 1987).

Evidence supported determination finding that petitioners violated CLS Al Bev § 106(6) where, over 6-month period, undercover officer made 10 purchases of narcotics from 3 bartenders and 2 patrons at petitioners' establishment, notwithstanding that there was no evidence that petitioner licensees had actual knowledge of drug sales or were on premises when they occurred. Petillo v State Liquor Auth., 248 A.D.2d 541, 670 N.Y.S.2d 209, 1998 N.Y. App. Div. LEXIS 2591 (N.Y. App. Div. 2d Dep't), app. denied, 92 N.Y.2d 814, 681 N.Y.S.2d 475, 704 N.E.2d 228, 1998 N.Y. LEXIS 3987 (N.Y. 1998).

Substantial evidence supported State Liquor Authority's determination that cafe owner allowed premises to become disorderly where he was always on premises and opened and closed business each day, his son and girlfriend had ready and unfettered access to premises and were responsible for at least 5 drug sales consummated there, and owner should have known about illegal activity on premises and indicated to undercover investigator that he was aware of his son's activities. Kelly v Casale, 263 A.D.2d 889, 695 N.Y.S.2d 184, 1999 N.Y. App. Div. LEXIS 8460 (N.Y. App. Div. 3d Dep't), app. denied, 94 N.Y.2d 754, 701 N.Y.S.2d 340, 723 N.E.2d 89, 1999 N.Y. LEXIS 3853 (N.Y. 1999).

Penalty of revocation of cafe owner's liquor license did not shock one's sense of fairness where there were at least 7 instances of drug trafficking on premises, and owner assaulted intoxicated patron by pushing him out front door and over railing, with result that patron sustained broken arm. Kelly v Casale, 263 A.D.2d 889, 695 N.Y.S.2d 184, 1999 N.Y. App. Div. LEXIS 8460 (N.Y. App. Div. 3d Dep't), app. denied, 94 N.Y.2d 754, 701 N.Y.S.2d 340, 723 N.E.2d 89, 1999 N.Y. LEXIS 3853 (N.Y. 1999).

49. Lewd conduct

The liquor authority was justified in revoking a license for a violation of subdivision 6 of this section on the testimony of a police officer who testified that a female was singing lewd songs in the premises and that she had solicited him. The licensee, his wife and bartender all denied hearing the song or the solicitation. Cota v New York State Liquor Authority, 306 N.Y. 761, 118 N.E.2d 361, 306 N.Y. (N.Y.S.) 761, 1954 N.Y. LEXIS 1116 (N.Y. 1954).

Testimony of two investigators that in total viewing time of three hours, dancers performed actions which were allegedly lewd and indecent for a total of no more than one minute and perhaps as little as 12 seconds, and that there was no contact between performers and patrons of premises and no unusual conduct among patrons themselves are circumstances for consideration of factfinders, but do not render record insufficient to support determination that petitioner permitted or suffered licensed premises to become disorderly in violation of Alcoholic Beverage Control Law. Salem Inn, Inc. v New York State Liquor Authority, 43 N.Y.2d 713, 401 N.Y.S.2d 205, 372 N.E.2d 40, 1977 N.Y. LEXIS 2515 (N.Y. 1977).

Restaurant operator who employed waitresses attired in topless dresses, created a condition which tended the premises to become disorderly within the meaning of this section. J. D. H. Rest., Inc. v New York State Liquor Authority, 28 A.D.2d 521, 279 N.Y.S.2d 975, 1967 N.Y. App. Div. LEXIS 4143 (N.Y. App. Div. 1st Dep't 1967), aff'd, 21 N.Y.2d 846, 288 N.Y.S.2d 1003, 236 N.E.2d 159, 1968 N.Y. LEXIS 1592 (N.Y. 1968).

Two-year proscription against issuance of any liquor license for premises in question due to licensee's knowingly permitting lewd and indecent performance by entertainer in licensed premises was an abuse of discretion and punishment for such incident would be restricted to cancellation of licensee's on-premises liquor license and imposition of $1,000 bond claim where licensee had not, prior or subsequent to the incident, been involved in any violation of the Alcoholic Beverage Control Law or any rule or regulation of the State Liquor Authority and the members of the Authority had been closely divided in their vote concerning the two-year proscription. See v State Liquor Authority, 47 A.D.2d 672, 365 N.Y.S.2d 29, 1975 N.Y. App. Div. LEXIS 8888 (N.Y. App. Div. 2d Dep't 1975).

Evidence that entertainer at tavern was 17 years and three months old, that licensee permitted her to entertain, and that 45 seconds of a 15-minute performance by a dancer were lewd was sufficient to support finding that licensee suffered or permitted the premises to become disorderly, notwithstanding licensee's uncontradicted testimony that he did not know that entertainer was under 18 and his denial that he had any knowledge that dancer would exhibit herself as she did during dancing. Streber v State Liquor Authority, 47 A.D.2d 808, 365 N.Y.S.2d 580, 1975 N.Y. App. Div. LEXIS 9134 (N.Y. App. Div. 4th Dep't 1975).

In establishing that licensee violated Alcohol Beverage Control Law by permitting an obscene dance to be performed on the premises, liquor authority did not have burden of establishing a foreseeable pattern of conduct which would be actually known to the licensee. Streber v State Liquor Authority, 47 A.D.2d 808, 365

N.Y.S.2d 580, 1975 N.Y. App. Div. LEXIS 9134 (N.Y. App. Div. 4th Dep't 1975).

Evidence tending to establish lewdness or obscenity, rather than merely nude dancing, permitted State Liquor Authority to find that licensee had violated Alcoholic Beverage Control Law section governing licensee's selling at retail for consumption on premises. Rubinoff v State Liquor Authority, 53 A.D.2d 943, 385 N.Y.S.2d 212, 1976 N.Y. App. Div. LEXIS 15734 (N.Y. App. Div. 3d Dep't 1976).

Nude dancing by females on licensed premises was not enough to support State Liquor Authority's determinations of "lewd and indecent performances" within meaning of Alcoholic Beverage Control Law so as to sustain suspension of on-premise liquor licenses for 30 days, since nude dancing is not lewd or indecent per se and there had been no regulation by Authority giving notice to licensees that conduct not lewd or indecent per se was proscribed; mere fact that on one occasion a nude dancer assumed a supine position was inadequate for purpose of assigning to that posture a more lewd or indecent significance than mere nude dancing. Beal Properties, Inc. v State Liquor Authority, 56 A.D.2d 982, 393 N.Y.S.2d 121, 1977 N.Y. App. Div. LEXIS 11395 (N.Y. App. Div. 3d Dep't 1977).

A determination by the State Liquor Authority which found that petitioner had permitted licensed premises to become disorderly because female entertainers were allowed to dance in the nude (see Alcoholic Beverage Control Law, § 106, subd 6), but which conduct was not found to be lewd or indecent per se and occurred prior to the adoption of statutes specifying various types of prohibited performances, should be annulled in the absence of a regulation by the agency giving notice that conduct not lewd or indecent per se was proscribed. TJPC Restaurant Corp. v State Liquor Authority, 61 A.D.2d 441, 402 N.Y.S.2d 483, 1978 N.Y. App. Div. LEXIS 9758 (N.Y. App. Div. 4th Dep't 1978), aff'd, 48 N.Y.2d 884, 424 N.Y.S.2d 896, 400 N.E.2d 1348, 1979 N.Y. LEXIS 2506 (N.Y. 1979).

Al Bev Law § 106(6), which provides that no person licensed to sell alcoholic beverages shall suffer or permit the licensed premises to become disorderly, is constitutional as applied to a situation where a licensee permitted a lewd and indecent performance by a nude dancer on the licensed premises. Highway Tavern Corp. v McLaughlin, 105 A.D.2d 122, 483 N.Y.S.2d 323, 1984 N.Y. App. Div. LEXIS 20682 (N.Y. App. Div. 2d Dep't 1984).

In an action challenging the constitutionality of the Al Bev Law § 106(6), wherein petitioner's liquor license had been suspended for allowing lewd and indecent dancing on its premises in contravention of the statute and regulations promulgated thereunder, such statute would be upheld on the basis that an outright prohibition of all topless dancing in establishments that sold alcoholic beverages does not violate the First Amendment; nor would the statute be found violative of the State Constitution, where previous decisions holding that an outright prohibition of nonobscene topless dancing violated the guaranty of free expression did not extend to nude dancing. Moreover, the statute would not be found violative of due process on the ground of vagueness, since "lewd and indecent" is synonymous with "obscene," and antiobscentity statutes need be no more precise in their language to withstand such a challenge. Blau-Par Corp. v New York State Liquor Authority, 106 A.D.2d 503, 482 N.Y.S.2d 841, 1984 N.Y. App. Div. LEXIS 21534 (N.Y. App. Div. 2d Dep't 1984).

There was substantial evidence to support determination that corporate licensee suffered or permitted dancers to perform on licensed premises in such manner as to expose to view their genital area in violation of 9 NYCRR § 53.1(r), (s) where (1) several dancers were observed at premises on 3 separate occasions over 10-month period, dancing and soliciting tips in such manner as to expose their genital area, and (2) such activities were advertised in newspaper of general circulation. Southside Pub, Inc. v New York State Liquor Authority, 143 A.D.2d 899, 533 N.Y.S.2d 524, 1988 N.Y. App. Div. LEXIS 10316 (N.Y. App. Div. 2d Dep't 1988), app. denied, 73 N.Y.2d 706, 539 N.Y.S.2d 299, 536 N.E.2d 628, 1989 N.Y. LEXIS 187 (N.Y. 1989).

Court would vacate determination by State Liquor Authority (SLA) which found that licensee permitted person to appear unclothed or in manner so as to expose person's pubic hair, anus, vulva or genitals since (1) SLA found licensee guilty of such conduct on basis of lewd and indecent conduct which was not part of charge, and (2) licensee was not given notice that it was charged with lewd and indecent conduct. Ron Bob Pub, Inc. v New York State Liquor Authority, 150 A.D.2d 173, 540 N.Y.S.2d 786, 1989 N.Y. App. Div. LEXIS 5453 (N.Y. App. Div. 1st Dep't), app. denied, 74 N.Y.2d 610, 546 N.Y.S.2d 555, 545 N.E.2d 869, 1989 N.Y. LEXIS 2824 (N.Y. 1989), app. dismissed, 74 N.Y.2d 842, 546 N.Y.S.2d 558, 545 N.E.2d 872, 1989 N.Y. LEXIS 2825 (N.Y. 1989).

Unrefuted testimony that 2 topless dancers exposed pubic hair to patrons and approached customers from within distance of less than 6 feet in violation of 9 NYCRR § 53.1(r) and (s) supported charges of tavern owner's violations of CLS Al Bev § 106(6-a). Richcar Tavern, Inc. v New York State Liquor Authority, 160 A.D.2d 881, 554 N.Y.S.2d 313, 1990 N.Y. App. Div. LEXIS 4494 (N.Y. App. Div. 2d Dep't 1990).

A state statute prohibiting nude dancing in establishments licensed by the state to sell liquor for on-premises consumption, violation of which could cause an establishment to lose its liquor license, did not violate the First Amendment insofar as it prohibited all topless dancing on all licensed premises since the statute was within the state's power conferred by the Twenty-first Amendment to regulate the sale of liquor within its boundaries, since the state's power to ban the sale of alcoholic beverages entirely included the lesser power to ban the sale of liquor on premises where topless dancing occurs, and since whatever artistic or communicative value that may attach to topless dancing was overcome by the state's exercise of its broad powers arising under the Twenty-first Amendment. New York State Liquor Authority v Bellanca, 452 U.S. 714, 101 S. Ct. 2599, 69 L. Ed. 2d 357, 1981 U.S. LEXIS 119 (U.S. 1981), overruled in part, 44 Liquormart v Rhode Island, 517 U.S. 484, 116 S. Ct. 1495, 134 L. Ed. 2d 711, 1996 U.S. LEXIS 3020 (U.S. 1996).

50. Fighting

A finding that a licensee had permitted its premises to become disorderly was warranted by evidence that on a particular evening a bartender was accused by a drunken patron of having shortchanged him and after the patron left the barroom to call the police he returned, engaged in an altercation with another customer and was beaten in the presence of the bartender who did nothing to prevent the assault. Club 95, Inc. v New York State Liquor Authority, 23 N.Y.2d 784, 297 N.Y.S.2d 147, 244 N.E.2d 713, 1968 N.Y. LEXIS 934 (N.Y. 1968).

Although it is not necessary to find a foreseeable pattern of conduct where the disorder is initiated by an employee left in charge of the premises, a licensee cannot properly control—and is not to be held responsible for—every single act of all persons in his employ; thus, the suspension of a license is not justified where on a single occasion an employee allegedly assaulted a boisterous customer. Playboy Club of New York, Inc. v State Liquor Authority, 23 N.Y.2d 544, 297 N.Y.S.2d 926, 245 N.E.2d 697, 1969 N.Y. LEXIS 1608 (N.Y. 1969).

Restaurant liquor license properly revoked for permitting disorderliness consisting of altercations, brawls and fights, culminating in one instance in a stabbing and in another, a shooting affray. Tropical Bar & Grill, Inc. v O'Connell, 270 A.D. 865, 60 N.Y.S.2d 338, 1946 N.Y. App. Div. LEXIS 4347 (N.Y. App. Div. 1946).

A single instance in which a liquor licensee found it necessary to use force to evict two patrons, a husband and wife, would not support a finding of and consequent punishment for, suffering or permitting the premises to become disorderly, as subd. 6 of this section presupposes a fair measure of continuity and permanence in such matters. Copacabana, Inc. v State Liquor Authority, 20 A.D.2d 887, 249 N.Y.S.2d 151, 1964 N.Y. App. Div. LEXIS 3901 (N.Y. App. Div. 1st Dep't 1964).

The Alcoholic Beverage Control Board was not arbitrary or capricious in refusing to renew petitioner's license upon finding that he could not or would not operate the premises in accordance with the law, based on evidence of numerous altercations involving patrons and a large number of assaults, arrests, and police calls to the premises, although those same incidents were in a prior proceeding held insufficient to support revocation of the license on charges petitioner permitted the premises to become

disorderly. The court pointed out that in cases of revocation an element constituting or approaching wilfulness had to be shown, but that upon the renewal proceeding the proven acts, which did not denote wilfulness, could be found to be evidence of petitioner's unfitness or passive ineptitude in such degree as to warrant denial of renewal. Rose Garden Restaurant Corp. v Hostetter, 32 A.D.2d 301, 300 N.Y.S.2d 948, 1969 N.Y. App. Div. LEXIS 3613 (N.Y. App. Div. 3d Dep't 1969).

The disapproval of a renewal application for liquor license was a proper exercise of State Liquor Authority's discretion in view of the assault on the State employees as well as other prior incidents, which were properly taken into account in the nonrenewal proceedings, for selling liquor to a minor and police reports of assaults committed by president and employees. Margar Rest. Corp. v State Liquor Authority, 34 A.D.2d 828, 312 N.Y.S.2d 751, 1970 N.Y. App. Div. LEXIS 4707 (N.Y. App. Div. 2d Dep't 1970).

Evidence that bartender struck patron on the head with an ax handle after patron had been restrained by another bartender following fight did not sustain finding by the State Liquor Authority that licensee permitted the premises to become disorderly, in light of fact that bartender who assaulted patron had been employed on a part-time basis for approximately four months, and in absence of any showing of a similar occurrence or that licensee participated in or sanctioned the conduct or was even aware of it until it was too late. Collins v State Liquor Authority, 48 A.D.2d 848, 368 N.Y.S.2d 859, 1975 N.Y. App. Div. LEXIS 10070 (N.Y. App. Div. 2d Dep't 1975).

In proceeding in which State Liquor Authority suspended license, finding that licensee, whose bouncer dragged sleeping patron out of licensed premises and assaulted him, had suffered or permitted premises to become disorderly was not supported by substantial evidence. Segan Entertainment, Inc. v State Liquor Authority, 56 A.D.2d 602, 391 N.Y.S.2d 636, 1977 N.Y. App. Div. LEXIS 10680 (N.Y. App. Div. 2d Dep't 1977).

Universal summons was facially sufficient where it alleged that defendant violated CLS Al Bev § 106(6) by "fail[ing] to maintain adequate security resulting in a dispute where 2 participants received injuries"; duration of incident was factual issue to be resolved at trial. People v Serro, 179 Misc. 2d 54, 683 N.Y.S.2d 818, 1998 N.Y. Misc. LEXIS 586 (N.Y. City Crim. Ct. 1998).

51. Solicitation to buy drinks

The licensee violated § 106, subd. 6, by suffering or permitting the licensed premises to become disorderly, in that females induced male patrons to purchase alcoholic beverage upon the premises on various dates. Berlingieri v Bruckman, 256 A.D. 994, 11 N.Y.S.2d 367, 1939 N.Y. App. Div. LEXIS 5805 (N.Y. App. Div. 1939).

The word "disorderly" as used in subd. 6 of this section means something contrary to public order or morality and which is disreputable and constitutes a nuisance, implying a breach of the peace or violation of public morals, and premises cannot be considered disorderly, for purposes of convicting the proprietor or licensee of permitting the premises to become disorderly as a misdemeanor, by simply charging that he has permitted entertainers to mingle with patrons and solicit the purchasing of alcoholic beverages by them. People v Bart's Restaurant Corp., 42 Misc. 2d 1093, 249 N.Y.S.2d 344, 1964 N.Y. Misc. LEXIS 1790 (N.Y. City Crim. Ct. 1964).

An information charging violation of subd. 6 of this section as a misdemeanor in that the licensee permitted the premises to become disorderly by suffering and permitting entertainers to mingle with patrons soliciting their purchase of alcoholic beverages is insufficient to state a cause of action, as "disorderly conduct" is not defined in this section and solicitation of buying of drinks by entertainers is not, in and of itself, "disorderly conduct." People v Bart's Restaurant Corp., 42 Misc. 2d 1093, 249 N.Y.S.2d 344, 1964 N.Y. Misc. LEXIS 1790 (N.Y. City Crim. Ct. 1964).

Agency Opinions

Analysis

1. In general; construction
2. Hours and days
3. —Regulation by municipalities

1. In general; construction

A license may be issued to Bethpage Park Authority without payment of a license fee. 1934 N.Y. Op. Att'y Gen. No. 112.

A county is pre-empted from passing a local law that prohibits the sale of alcoholic beverages by vending machines in hotel/motel rooms, where CLS ABCL § 106(17) allows such activity. NY Ops Atty Gen 89-65 (informal).

2. Hours and days

3. —Regulation by municipalities

A village ordinance which would regulate hours of business of taverns and require them to close at 1 a.m. every day in the week would be illegal and void insofar as in conflict with the Alcoholic Beverage Control Law. 1962 NY Ops Atty Gen July 11.

A village cannot use its home rule powers to require closure of certain businesses between 2:00 a.m. and 6:00 a.m. where local law would impose unreasonable restrictions on private businesses and intrude on state preempted field of sale of alcoholic beverages. 1992 N.Y. Op. Att'y Gen. No. 92-43 (Informal), 1992 N.Y. AG LEXIS 43.

A village may not adopt a local law prohibiting the serving of alcoholic beverages after 2 a.m. 1975 Op St Compt No. 75–729.

The 1959 amendment of § 1 of Art. I of the Constitution, effective January 1, 1960, and implementing legislation (Chap. 684, Laws of 1959, and Chap. 1042, Laws of 1960), had no effect on the prohibitions found in §§ 105 and 106 of this law against sale of alcoholic beverages on primary day. 1960 N.Y. Op. Att'y Gen. No. 7, 1960 N.Y. AG LEXIS 1.

The prohibition of sale of liquor when polls are open relates only to the two primary days and the day of general election. 1936 N.Y. Op. Att'y Gen. No. 147.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 64-b, . 97., 98., 130.

CODES, RULES AND REGULATIONS:

Prohibited hours for retail sales. 9 NYCRR § 60.1.

Sale of alcoholic beverages at open stands or counters. 9 NYCRR §§ 62.1., 62.2.. For text of rule, see Appendix to Alcoholic Beverage Control Law, infra.

Centralized accounting and bookkeeping by on-premises retailer operating two or more separately licensed premises. 9 NYCRR §§ 69.0.– 69.9.. For text of rule, see Appendix to Alcoholic Beverage Control Law, infra.

Brand signs and displays. 9 NYCRR §§ 83.1 et seq.

Automatic and electronic liquor and wine dispensing systems. 9 NYCRR § 92.1.. For text of rule, see Appendix to Alcoholic Beverage Control Law, infra.

Room service. 9 NYCRR §§ 93.1.– 93.3.. For text of rule, see Appendix to Alcoholic Beverage Control Law, infra.

Jurisprudences:

45 Am Jur 2d, Intoxicating Liquors §§ 123., 130., 131., 276 et seq., 283., 285., 286., 294.

14A Am Jur Pl & Pr Forms (Rev ed), Intoxicating Liquors, Forms 21.— 44.

12 Am Jur Trials 729., Dram Shop Litigation.

Treatises

4 New York Practice Guide: Business and Commercial § 30.06.

§ 128. Certain officials not to be interested in manufacture or sale of alcoholic beverages

1. Except as otherwise provided in section one hundred twenty-eight-a and section one hundred twenty-eight-b of this article, it shall be unlawful for any police commissioner, police inspector, captain, sergeant, roundsman, patrolman or other police official or subordinate of any police department in the state, to be either directly or indirectly interested in the manufacture or sale of alcoholic beverages or to offer for sale, or recommend to any

licensee any alcoholic beverages. A person may not be denied any license granted under the provisions of sections fifty-four, fifty-five, fifty-nine, sixty-three, sixty-four, seventy-nine, eighty-one, or article seven of this chapter solely on the grounds of being the spouse of a public servant described in this subdivision. The solicitation or recommendation made to any licensee, to purchase any alcoholic beverages by any police official or subordinate as hereinabove described, shall be presumptive evidence of the interest of such official or subordinate in the manufacture or sale of alcoholic beverages.

2. No elective village officer shall be subject to the limitations set forth in subdivision one of this section unless such elective village officer shall be assigned duties directly relating to the operation or management of the police department.

HISTORY:

Add, L 1934, ch 478, § 1; amd, L 1975, ch 151, eff June 3, 1975; L 1977, ch 911; L 1985, ch 885, § 1, eff Aug 2, 1985; L 2014, ch 412, § 1, effective October 21, 2014.

Amendment Notes The 2014 amendment by ch 412, § 1 added "and section one hundred twenty-eight-b of this article" in the first sentence of 1.

Notes to Decisions

Analysis

1. Effect of marriage
2. Effect of violation
3. Police and sheriff subordinates
4. Town and village officials
5. —Town supervisors
6. —Village mayors
7. —Village trustees
8. —Justice of the peace
9. —Incidental police functions of officials

1. Effect of marriage

The refusal by the State Liquor Authority to permit a requested corporate change or to renew the present license unless and until the president of the corporation divested herself of a 50 percent interest she held prior to her marriage to her present husband, a police officer, was predicated on an arbitrary conclusion by the Authority—that the marriage between the licensee and her patrolman husband ipso facto bestowed an interest in the tavern business of the bridegroom. Sanspar Restaurant Corp. v Ring, 65 Misc. 2d 847, 319 N.Y.S.2d 230, 1971 N.Y. Misc. LEXIS 1822 (N.Y. Sup. Ct. 1971), aff'd, 39 A.D.2d 595, 332 N.Y.S.2d 608, 1972 N.Y. App. Div. LEXIS 4932 (N.Y. App. Div. 2d Dep't 1972).

2. Effect of violation

The mayor of a village was not holding his office illegally because at the time of his nomination to such office and his election thereto he was the owner of a business wherein alcoholic beverages were sold for off-premises consumption. Harrell v Goldin, 124 N.Y.S.2d 627, 1953 N.Y. Misc. LEXIS 2222 (N.Y. Sup. Ct. 1953).

It is a misdemeanor for a village trustee to sell or be interested in sale of beer or other alcoholic beverages, although he does not forfeit his office, and no official act on his part is invalidated, by procuring a beer or liquor license. 1964 Op St Compt #760.

3. Police and sheriff subordinates

The state liquor authority acted rationally in concluding that granting a grocery store beer license would give a police officer an indirect interest in the licensed sale of alcoholic beverages in violation of Al Bev Law § 128, where the applicant was married to a Deputy Sheriff who was a field officer performing criminal law enforcement duties. Wilson v New York State Liquor Authority, 52 N.Y.2d 741, 436 N.Y.S.2d 275, 417 N.E.2d 569, 1980 N.Y. LEXIS 2846 (N.Y. 1980), reh'g denied, 52 N.Y.2d 1073, 1981 N.Y. LEXIS 5953 (N.Y. 1981).

Police officers were entitled to permanent injunction against enforcement of local regulation prohibiting off duty employment by officers at places licensed to sell alcoholic beverages where city relied on state rule, promulgated by State Liquor Authority (SLA), permitting such local regulation, and SLA, in turn, lacked authority to make such state rule under either CLS Al Bev § 128 or § 128-a; § 128 only defines criminal offense of officer involved in sale of alcoholic beverages, and SLA has no authority to declare what facts shall constitute crime, while § 128-a specifically directs SLA to promulgate rules relating to circumstances under which offduty officers may be lawfully employed at places that sell alcoholic beverages, not to circumstances under which they may be prohibited. Rotunno v Rochester, 120 A.D.2d 160, 507 N.Y.S.2d 924, 1986 N.Y. App. Div. LEXIS 59229 (N.Y. App. Div. 4th Dep't 1986), aff'd, 71 N.Y.2d 995, 529 N.Y.S.2d 275, 524 N.E.2d 876, 1988 N.Y. LEXIS 717 (N.Y. 1988).

Al Bev Law § 128, which prohibits offices from being either directly or indirectly interested in the manufacture or sale of alcoholic beverages, does not prohibit the employment of off-duty police officers as guards or security personnel at establishments licensed to sell alcohol, since the statute's intent was to prevent police officer's from owning bars or establishments that serve liquor or working in those places as one who actually dispenses liquor, and therefore the regulation creating a blanket prohibition preventing the employment of off-duty police officers in any capacity went beyond the legislative mandate of the statute, was arbitrary and excess of statutory authority. Rotunno v Rochester (1984) 124 Misc 2d 448, 477 NYS2d 941, later proceeding (4th Dept) 120 AD1d 160, 507 NYS2d 924, app gr 70 NY2d 601, 518 NYS2d 1023, 512 NE2d 549 and affd 71 NY2d 995, 529 NYS2d 275, 524 NE2d 876.

4. Town and village officials

5. —Town supervisors

A supervisor of a town of the second class is not a police officer prohibited from having an interest in the sale of liquor. Robinson v O'Connell, 280 A.D. 270, 113 N.Y.S.2d 582, 1952 N.Y. App. Div. LEXIS 3451 (N.Y. App. Div. 1952).

6. —Village mayors

The mayor or trustee of a village which has established a village-manager form of government under art. 15-A of the Village Law is a police official within the meaning of this section. 1963 Op St Compt #153.

A village mayor or trustee is prohibited from holding a retail beer license, but he is not prohibited from continuing to hold office because he has obtained such a license prior to taking over office. 1963 Op St Compt #468.

7. —Village trustees

The employment of a village trustee as a clerk in a retail liquor store is prohibited. 1957 Op St Compt 57-66.

8. —Justice of the peace

This section, in prohibiting certain police officials and officers from being interested in manufacture and sale of alcoholic beverages, does not cover a justice of the peace. 1963 Op St Compt #697.

9. —Incidental police functions of officials

Where a town establishes a police department and either designates the supervisor as police commissioner, appoints him to the Board of Police Commissioners, or fails to establish a police commissioner, the supervisor is within the prohibition of this section, but not so if the supervisor is not a member of the Police Commission or none is established. 1964 Op St Compt #768.

Agency Opinions

Analysis

1. In general
2. Incidental employment
3. Effect of marriage
4. Interest outside political subdivision
5. Effect of violation

6. Police and sheriff subordinates
7. Correction officers
8. City officials
9. —Mayors and councilmen
10. —Public safety committee
11. Town and village officials
12. —Town supervisors
13. —Village mayors
14. —Village trustees
15. —Justice of the peace
16. —Incidental police functions of officials

1. In general

A village police commissioner is barred from having a direct or indirect interest in the manufacture or sale of alcoholic beverages. 1978 NY Ops Atty Gen May 5.

The same person simultaneously may be a political party county committee member or officer and a town tax receiver or collector. 1978 NY Ops Atty Gen Jan 20 (Informal), 1978 N.Y. AG LEXIS 193.

A county representative for the State Liquor Authority is not by reason thereof prohibited from being a political party county committee member or officer. 1978 NY Ops Atty Gen Jan 20 (Informal), 1978 N.Y. AG LEXIS 193.

2. Incidental employment

A mere clerk or employee in a grocery store licensed to sell beer, whose duties with respect to that item are only incidental to his general employment and who does not discharge any special or unusual duties in that connection, is not interested in the sale of alcoholic beverages within the contemplation of Alcoholic Beverage Control Law § 128. However, every case must be decided on own facts. 1950 NY Ops Atty Gen Aug 11.

An employee of a bottling company which sells beer may also be a village trustee where his duties with the company relate solely to supervising the loading of trucks, he is compensated on a fixed salary basis, and is not an officer or stockholder of the company. 1957 NY Ops Atty Gen Feb 19 (informal).

A village patrolman engaged when off duty as a member of an orchestra in a restaurant selling alcoholic beverages but whose employment as such musician is not conditioned in any way upon the sale of alcoholic beverages is not "interested" in such sale within the contemplation of Alcoholic Beverage Control Law, § 128. 1973 NY Ops Atty Gen Apr 9.

Part-time employment of a member of the police force of the City of Kingston would not conflict with the provisions of Alcoholic Beverage Control Law, § 128, where his work would be in a warehouse wherein alcoholic beverages are stored and loaded for delivery to retail establishments when in such capacity he would have no contact whatsoever with the public nor would any monies be transferred in his presence and provided that he is compensated on a salary basis only and is not an officer or stockholder in the company for which he works. 1976 NY Ops Atty Gen Dec 7 (Informal).

3. Effect of marriage

The wife of a stockholder in a corporation that holds a liquor license is not thereby disqualified from holding the office of town justice in the Town of Inlet. 1976 NY Ops Atty Gen Apr 20 (informal).

A police officer, otherwise qualified, may work in a grocery store licensed to sell beer at retail for off-premises consumption where the officer has no direct or indirect interest in the sale of the beer. The fact that the officer's wife owns the grocery store which sells the beer at retail for off-premises consumption is not, *per se,* conclusive that the officer has either a direct or indirect interest in its sale. 1978 NY Ops Atty Gen August 14.

4. Interest outside political subdivision

The prohibition that a village trustee may not be interested in the manufacture or sale of alcoholic beverages applies even though the source of such interest is outside the village limits. 1958 NY Ops Atty Gen Jun 9 (informal).

The prohibition of interest by police officials in the alcohol trade is not restricted to that trade in the same political subdivision of which the official is a member. 1963 NY Ops Atty Gen Jan 21.

Alcoholic Beverage Control Law, § 128(1) would not proscribe a village justice from being a licensee under the Alcoholic Beverage Control Law to operate a premises for trafficking in alcoholic beverages for on-premises consumption where such premises are not located within the jurisdiction of the court of the village justice. However, we do not pass on any ethical questions that may be involved; nor do we pass on the question of whether or not the State Liquor Authority may deny an application for such license in the exercise of its discretion. 1977 NY Ops Atty Gen Oct 18.

5. Effect of violation

A corporation may not be denied a grocery beer license merely because it appears that an officer, director, and stockholder of the corporation is a probation officer attached to the New York City Criminal Court, Queens County. 1963 NY Ops Atty Gen Mar 14.

The legality of the official acts of a village board of trustees is not affected by the fact that a member thereof violates the Alcoholic Beverage Law by being interested in the sale of alcoholic beverages. 1955 Op St Compt File # 7171.

A village trustee who applies for and receives a beer license commits a misdemeanor but does not forfeit his office. 1956 Op St Compt File #7964.

It is a misdemeanor for a member of a village board to sell or be interested in the sale of beer or other alcoholic beverage, although the holding of a license to sell same neither forfeits his office nor invalidates his official acts. 1964 Op St Compt File #921.

6. Police and sheriff subordinates

A deputy sheriff is not within the prohibition of this section. 1935 N.Y. Op. Att'y Gen. No. 133.

Alcoholic Beverage Control Law § 128 prohibits a Palisades Park patrolman from holding an eating place beer license. 1967 N.Y. Op. Att'y Gen. No. 7, 1967 N.Y. AG LEXIS 1.

A park patrolman is not prohibited by Alcoholic Beverage Control Law, § 128, from dispensing alcoholic beverages in a catering establishment. 1975 NY Ops Atty Gen Oct 3 (formal).

Sections 128 and 128-a of the Alcoholic Beverage Control Law apply to deputy sheriffs. 1980 NY Ops Atty Gen Dec. 3 (informal).

On-duty police officers may be assigned by their commanding officers to provide security, crown and traffic control at places licensed for on-premises consumption of alcoholic beverages. The city may not seek payments from the licensee for the costs of providing these services. N.Y. Op. Att'y Gen. No. 84-4.

Special policemen who regulate traffic at school crossings are subject to the provisions of this section. 1953 Op St Compt File #6336.

7. Correction officers

A Narcotic Correction Officer is not prohibited by Alcoholic Beverage Control Law, section 128, from receiving a retail liquor store license. 1972 NY Ops Atty Gen Jan 17.

Correction officers employed by the New York State Department of Correctional Services are not prohibited by Alcoholic Beverage Control Law, § 128, from being either directly or indirectly interested in the manufacture or sale of alcoholic beverages. 1973 N.Y. Op. Att'y Gen. No. 22, 1973 N.Y. AG LEXIS 8.

8. City officials

9. —Mayors and councilmen

Whether the mayor of the City of Ithaca is a "police official" who may not be interested in a retail liquor store is a question which would appear to require a judicial determination. 1955 NY Ops Atty Gen Aug 5.

A city mayor is not prohibited from continuing as a member of a partnership holding a retail on-premises license to sell liquors and wines. 1964 NY Ops Atty Gen Mar 13.

A councilman in the City of Glens Falls is not prohibited from dealing in alcoholic beverages by Alcoholic Beverage Control Law § 128. 1965 NY Ops Atty Gen June 8.

The mayor of the City of Auburn may own stock in a corporation which has a license issued by the State Liquor Authority to traffic in alcoholic beverages. 1973 NY Ops Atty Gen Mar 12.

The Mayor of the City of Oneida may hold a liquor license without violating § 128 of the Alcoholic Beverage Control Law. 1969 Op St Compt File #464.

10. —Public safety committee

A city councilman also a member of public safety committee is not disqualified under cited section from being an officer, director and stockholder of a licensee corporation. 1954 NY Ops Atty Gen Mar 5.

Deputy Commissioner of Public Safety ineligible to hold license under § 128. 1965 NY Ops Atty Gen Aug. 31.

The City Clerk of Dunkirk may hold a solicitor's permit and be employed by wholesale liquor licensee. 1954 NY Ops Atty Gen Mar 1.

There is no prohibition against the City Court Marshal of the City of Schenectady holding a retail liquor store license. 1957 NY Ops Atty Gen Sept 19.

The president of the common council of the City of Hudson is not disqualified from holding an off-premises beer license. 1958 NY Ops Atty Gen Feb 11.

An alderman may act as a salesman for a retail liquor or beer distributor. 1960 NY Ops Atty Gen Nov. 9 (informal).

A member of a city fire department having no police powers or duties is not forbidden by said section from having an interest in the manufacture or sale of alcoholic beverages. 1965 NY Ops Atty Gen Sept. 13.

11. Town and village officials

12. —Town supervisors

Town supervisor who also serves as town police commissioner should not be employed to supervise the operation of a bar in his capacity as house manager of a nonprofit corporation. 1957 NY Ops Atty Gen March 4 (informal).

A town supervisor is not prohibited from holding a liquor license unless he has been designated as a police commissioner under § 150 of the Town Law. 1963 NY Ops Atty Gen May 23.

Absent additional authority or powers of a nature making him ineligible for licensing under A. B. C. Law § 128, a supervisor of a suburban town is not barred from holding a liquor license. 1965 NY Ops Atty Gen Sept. 1.

13. —Village mayors

Village mayor by virtue of his office is a village policeman and may not have interest in sale of alcoholic beverages; having such an interest is a misdemeanor but does not disqualify him from election or service as mayor. 1955 NY Ops Atty Gen Mar 28 (informal).

The Mayor or a Trustee of the Village of Monticello is eligible, if otherwise qualified, to hold a restaurant liquor license, issued by the State Liquor Authority. 1974 NY Ops Atty Gen May 17.

14. —Village trustees

A village trustee who is a stockholder, officer and director of an incorporated restaurant licensed to sell alcoholic beverages is within the contemplation of this provision prohibiting certain police officials from trafficking in alcoholic beverages. 1953 NY Ops Atty Gen Dec 14.

A village trustee may be a clerk or employee in a grocery store licensed to sell beer. 1961 NY Ops Atty Gen Aug 9.

15. —Justice of the peace

A justice of the peace is not disqualified from holding a grocery beer license. 1964 NY Ops Atty Gen May 13.

16. —Incidental police functions of officials

Since, under the Suffolk County Charter, the Town Board of a town which has become part of the county police district has no police functions, a councilman in such a town is not disqualified from holding a wholesale beer license and the same is true of a corporation of which he is officer, director, and stockholder. 1963 NY Ops Atty Gen June 28.

The prohibition against interest of a police official in the manufacture or sale of alcoholic beverages is not restricted to premises in the same political subdivision in which he holds office; however, under the Suffolk County Charter, a village voting by referendum to transfer police functions to the county police district thereby abolishes police powers of village officials, including the mayor. 1964 NY Ops Atty Gen June 19.

There is no authority whereby the Village Board of the Village of Pawling is authorized to remove, by resolution, the *ex officio* police status conferred upon its Mayor by Village Law § 188 and thereby exempting such Mayor from the provisions of Alcoholic Beverage Control Law § 128, which provisions disqualify him from having a license issued to him by the State Liquor Authority to traffic in alcoholic beverages. 1970 NY Ops Atty Gen Oct 19.

A village trustee of the Village of Watkins Glen is authorized to have an interest in a license issued by the State Liquor Authority to traffic in alcoholic beverages provided that prior to such issuance, he renounces and resigns his ex officio police status for the balance of his term of office. Upon such renunciation and resignation, he may, nevertheless, continue to serve as village trustee. 1971 NY Ops Atty Gen Dec 15.

No conflict of interest or incompatibility arises when a member of a village zoning board of appeals also serves as an officer of a corporation which holds a New York State liquor license. 1976 NY Ops Atty Gen March 3 (informal).

A dog warden has the powers of a constable or other peace officer in executing the appropriate provisions of the Agriculture and Markets Law but is not a constable or peace officer. A constable is a peace officer but is not a police officer except that under the definitions contained in the Vehicle and Traffic Law, a constable is a police officer within the ambit of that statute. For the purposes contemplated in Alcoholic Beverage Control Law, § 128(1), prohibiting interest in manufacture or sale of alcoholic beverages by officials and subordinates in any police department, a town constable and a town dog warden are not police officers. 1976 NY Ops Atty Gen June 25.

A village police commissioner is barred from having a direct or indirect interest in the manufacture or sale of alcoholic beverages. 1978 NY Ops Atty Gen May 5.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:
67A NY Jur 2d Injunctions § 107.

Matthew Bender's New York Practice Guides: 4 New York Practice Guide: Business and Commercial § 30.06.

§ 128-a. Police officers allowed to work in licensed premises in certain cases

Notwithstanding any inconsistent provision of law to the contrary, the authority shall promulgate such rules and regulations as may be necessary to provide that it shall not be unlawful for a police officer employed in this state, having written permission and consent from his commanding officer, to work in a premises licensed to sell beer at retail for off-premises consumption under section fifty-four of this chapter or to work solely as a security guard or director of traffic on the premises of a volunteer firefighters' organization licensed to sell beer and wine at retail pursuant to a temporary permit for on-premises consumption under section ninety-seven of this chapter.

HISTORY:

Add, L 1977, ch 911, eff Aug 11, 1977; amd, L 2002, ch 678, § 1, eff Dec 20, 2002.

Notes to Decisions

Police officers were entitled to permanent injunction against enforcement of local regulation prohibiting off duty employment by officers at places licensed to sell alcoholic beverages where city relied on state rule, promulgated by State Liquor Authority (SLA), permitting such local regulation, and SLA, in turn, lacked authority to make such state rule under either CLS Al Bev § 128 or § 128-a; § 128 only defines criminal offense of officer involved in sale of alcoholic beverages, and SLA has no authority to declare what facts shall constitute crime, while § 128-a specifically directs SLA to promulgate rules relating to circumstances under which offduty officers may be lawfully employed at places that sell alcoholic beverages, not to circumstances under which they may be prohibited. Rotunno v Rochester, 120 A.D.2d 160, 507 N.Y.S.2d 924, 1986 N.Y. App. Div. LEXIS 59229 (N.Y. App. Div. 4th Dep't

1986), aff'd, 71 N.Y.2d 995, 529 N.Y.S.2d 275, 524 N.E.2d 876, 1988 N.Y. LEXIS 717 (N.Y. 1988).

Agency Opinions

A village police commissioner is barred from having a direct or indirect interest in the manufacture or sale of alcoholic beverages. 1978 NY Ops Atty Gen May 5.

A police officer, otherwise qualified, may work in a grocery store licensed to sell beer at retail for off-premises consumption where the officer has no direct or indirect interest in the sale of the beer. The fact that the officer's wife owns the grocery store which sells the beer at retail for off-premises consumption is not, *per se,* conclusive that the officer has either a direct or indirect interest in its sale. 1978 NY Ops Atty Gen August 14.

Sections 128 and 128-a of the Alcoholic Beverage Control Law apply to deputy sheriffs. 1980 NY Ops Atty Gen Dec. 3 (informal).

On-duty police officers may be assigned by their commanding officers to provide security, crowd and traffic control at places licensed for on-premises consumption of alcoholic beverages. The city may not seek payments from the licensee for the costs of providing these services. N.Y. Op. Att'y Gen. No. 84-4.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 128.

Codes, Rules and Regulations:

Employment of police officers in licensed premises. 9 NYCRR § 100.1.

Jurisprudences:

67A NY Jur 2d Injunctions § 107.

§ 128-b. Police officers allowed to serve as an officer of a volunteer firefighters' organization

Notwithstanding any inconsistent provision of law to the contrary, a volunteer firefighters' organization shall not be precluded from applying for an on-premises license or permit under the provisions of this chapter due to the presence of a police officer serving as an officer of such organization and the state liquor authority shall be authorized to issue such license or permit.

HISTORY:

L 2014, ch 412, § 2, effective October 21, 2014.

ARTS AND CULTURAL AFFAIRS LAW

Title
U. Divisions of History and Public Records

HISTORY:
Add, L 1983, ch 876, § 1, eff Dec 31, 1983.

TITLE U Divisions of History and Public Records

Article 57-A. Local Government Records Law

Section
57.35. Grants for local government records management improvement

HISTORY:
Add, L 1983, ch 876, § 1, eff Dec 31, 1983.

ARTICLE 57-A Local Government Records Law

HISTORY:
Add, L 1987, ch 737, § 3, eff Aug 5, 1988.

§ 57.35. Grants for local government records management improvement

1. The commissioner of education, upon consultation with the local government records advisory council, is authorized to award grants for records management improvement as specified in sections 57.19, 57.25, 57.29 and 57.31 of this article to individual local governments, groups of cooperating local governments and local governments that have custody of court records and for records management improvement for supreme court records in the custody of the counties of New York, Kings, Queens, Richmond, and Bronx and in accordance with subdivision two-a of this section, records under the jurisdiction of the department of records and information services of the city of New York or its successor agency and the city clerk of the city of New York, and to fire companies and voluntary ambulance services as such terms are defined in section one hundred of the general municipal law.

2. The commissioner of education shall promulgate rules and regulations setting forth criteria and procedures necessary to award grants for records management improvement from monies available for this purpose in the New York state local government records management improvement fund, established pursuant to section ninety-seven-i of the state finance law.

Such criteria shall include but not be limited to:

(a) the development by the applicant of a written plan for a records management program;

(b) the condition of the records of the applicant;

(c) the geographic location of the applicant so as to provide, to the extent practicable, equitable geographic distribution of the grants;

(d) the particular design of the applicant's records management program; and

(e) the applicant's arrangements for cooperative activities among local governments for a records management program.

2-a. (a) Notwithstanding the provision of paragraph (c) of subdivision two of this section, the commissioner of education may award grants totaling in the aggregate no more than one million dollars annually for records management improvement to the department of records and information services of the city of New York or its successor agency and the city clerk of the city of New York in accordance with the provisions of this subdivision.

(b) The department of records and information services or its successor agency and the city clerk of the city of New York shall submit applications to the commissioner of education at the same time as applications pursuant to subdivision two of this section are required to be submitted. The applications shall set forth the records management improvement projects proposed by the department of records and information services or its successor agency and the city clerk of the city of New York is priority order and the amount requested for each project. Priority assignment of each project shall be a factor taken into consideration in addition to those outlined in subdivision two of this section when making grant awards.

(c) Upon receipt of grant monies, the commissioner of the department of records and information services or its successor agency and the city clerk of the city of New York shall direct the disbursement of grant monies to each project for which a grant has been approved.

(d) The commissioner of the department of records and information services or its successor agency and the city clerk of the city of New York shall, in addition to monitoring the progress of and providing technical assistance to projects receiving awards pursuant to this subdivision, prepare and submit progress reports on such projects. Such reports shall be at the level of detail and frequency comparable to reports required of other local governments receiving awards pursuant to this section.

3. All monies received by the commissioner of education under the provisions of the third undesignated paragraph of subdivision (a) of section eight thousand eighteen, subparagraph b of paragraph four of subdivision (a) of section eight thousand twenty-one and subparagraph b of paragraph eleven of subdivision (b) of section eight thousand twenty-one of the civil practice law and rules, and subdivision a of section 7-604 of the administrative code of the city of New York, shall be deposited by the commissioner of education to the credit of the New York state local government records management improvement fund established pursuant to section

ninety-seven-i of the state finance law by the tenth day of the month following receipt of such monies.

4. Each year the New York state local government records advisory council shall review and make recommendations on a proposed operational and expenditure plan for the New York state local government records management improvement fund prior to its adoption by the commissioner of education. The annual expenditure plan shall be subject to the approval of the director of the division of the budget.

HISTORY:

Add, L 1989, ch 78, § 4, eff July 30, 1989; amd, L 1990, ch 53, § 65, eff June 6, 1990, deemed eff April 1, 1990 (see 1993 note below); L 1995, ch 203, §§ 3,4, eff July 26, 1995 (see 1995 note below); L 2014, ch 508, § 2, effective December 17, 2014.

Editor's Notes: Laws 1993, ch 57, § 412, eff July 1, 1993, amended Laws 1990, ch 53, § 112 (amd, L 1991, ch 53, § 83, L 1992, ch 53, § 81), so as to delete an expiration date of June 30, 1993, applicable to the amendment of subdivision 1.

Laws 1995, ch 203, § 6, eff July 26, 1995, provides as follows:

§ 6. This act shall take effect immediately provided, however, that the amendments made to subdivision 2 of section 57.33 and subdivision 1 of section 57.35 of the arts and cultural affairs law by this act shall not affect the expiration of certain provisions contained therein pursuant to section 31 of chapter 53 of the laws of 1992.

Laws 2014, ch 508, §§ 1 and 3, eff Dec 17, 2014, provide:

§ 1. The legislature hereby finds and declares that volunteer fire companies and volunteer ambulance companies perform vital services for the municipalities they serve. These not-for-profit volunteer emergency response organizations serve a meaningful public purpose by helping to ensure the health, safety, and welfare of our citizens. Further, these organizations work collaboratively with municipal officials in their respective localities and help to reduce the burdens on our local governments.

The records of volunteer fire companies and volunteer ambulance companies are important since they indicate the relationship, rights and responsibilities with respect to the communities they serve. And, proper records management assists municipalities and emergency response organizations with their legal obligations under the general municipal law. In addition, these records make appropriate information available to the public and to municipal officials with respect to fire and emergency services, and also reflect the historical development of the communities served by such volunteer fire and ambulance companies. For these reasons, the legislature hereby further finds and declares that not-for-profit volunteer fire companies and volunteer ambulance companies should be eligible for the records management improvement grant program in order to help them operate more effectively and efficiently in our local communities.

§ 3. The commissioner of education is hereby authorized and directed to promulgate any rules or regulations necessary to effectuate the provisions of this act.

Amendment Notes:

1995. Chapter 203, § 3 amended:

Sub 1, by deleting "records in the custody of the register of the city of New York".

The 2014 amendment by ch 508, in 1, substituted "article" for "chapter" and added "and to fire companies and voluntary ambulance services as such terms are defined in section one hundred of the general municipal law" at the end.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS St Fin § 87-i.

Index number fees of county clerks, CLS CPLR § 8018.

County clerks other than as clerks of court, CLS CPLR § 8021.

New York state local government records management improvement fund, CLS St Fin § 87-i.

CIVIL SERVICE LAW

Article
IV. Recruitment of Personnel
V. Personnel Changes
VI. Special Rights for Veterans and Exempt Volunteer Firefighters
XI. Health Benefits for State and Retired State Employees
XI-B. Medical Examination of Public Protection Officials to Detect and Identify the Human Immunodeficiency Virus (Hiv)

ARTICLE IV Recruitment of Personnel

Title A. Examinations and Eligible Lists

Section
58-a. Requirements for provisional or permanent appointment of certain fire fighters

HISTORY:
Add, L 1958, ch 790, § 1, eff April 1, 1959.

TITLE A Examinations and Eligible Lists

HISTORY:
Add, L 1958, ch 790, § 1, eff April 1, 1959.

§ 58-a. Requirements for provisional or permanent appointment of certain fire fighters

1. Notwithstanding any other provision of this law or any general, special or local law to the contrary, no person shall be eligible for provisional or permanent appointment in the competitive class of the civil service as a fire fighter unless he or she shall satisfy the basic requirements for education, health and physical fitness established by the state fire administrator pursuant to section one hundred fifty-eight of the executive law.

2. Notwithstanding the provisions of subdivision one of this section, upon the request of a municipal commission having jurisdiction over a fire department and upon a showing by such municipal commission and a determination by the state commission that aggravated recruitment difficulties are causing a serious shortage of fire fighters in such fire department and that such municipal commission and all appropriate authorities are making diligent efforts, including payment of adequate compensation, to overcome such recruitment difficulties, the state commission, with the approval of the state fire administrator, may change the educational, health and physical fitness requirements for provisional and permanent appointment as a fire fighter in such fire department for a period not exceeding two years from the date of such determination. Such changes may be authorized for an additional period not exceeding two years, upon a showing and a determination similar to that required hereunder for the original authorization.

3. The provisions of this section shall not prevent the establishment of more restrictive local requirements for eligibility for fire fighters.

4. For the purposes of this section fire fighter means a member of a fire department whose duties include fire service as the phrase fire service is defined in paragraph d of subdivision eleven of section three hundred two of the retirement and social security law.

5. Any person whose name was on an eligible list for appointment in the competitive class of the civil service as a fire fighter on the date educational, health and physical fitness requirements for fire fighters are promulgated by the state fire administrator pursuant to section one hundred fifty-eight of the executive law, shall continue to remain eligible for appointment from such list during the life of such list without satisfying such requirements provided he or she would otherwise have remained eligible for appointment from such list if this section had not been enacted.

6. The provisions of this section shall not apply to appointments made by any county, city, town, village or fire district which employs five or fewer fire fighters.

7. Notwithstanding any other provision of this law or any general, special or local law to the contrary, no person shall be eligible for provisional or permanent appointment as a fire chief other than those chiefs employed by a fire department of cities with a population of one million or more unless he or she shall:

(a) satisfy the basic requirements for education, health and physical fitness established by the state fire administrator pursuant to section one hundred fifty-eight of the executive law; and

(b) has successfully completed training and education requirements established by the state fire administrator.

HISTORY:
Add, L 1976, ch 369, § 2, eff Sept 1, 1976; amd, L 1979, ch 225, § 5, eff Sept 1, 1979; L 2013, ch 101, § 1 (Part A), eff July 11, 2013; L 2018, ch 406, §§ 1, 2, effective January 20, 2019; L 2019, ch 678, § 1, effective June 13, 2020.

Editor's Notes Laws 2018, ch 406, § 3, eff January 20, 2019, provides:

§ 3. This act shall take effect on the thirtieth day after it shall have become a law and shall apply to any appointment as a fire chief established on or after such date.

Laws 2019, ch 678, § 4, eff June 13, 2020, provides:

§ 4. This act shall take effect on the one hundred eightieth day after it shall have become a law. Effective immediately, the addition of any rule or regulation necessary for the implementation of this act on its effective date are authorized to be made and completed on or before such effective date.

Amendment Notes: 2013. Chapter 101, § 1 (Part A) amended:

Sub 1 by deleting at fig 1 "governor pursuant to section one hundred fifty-nine-d" and adding the matter in italics.

Sub 2 by deleting at fig 1 "fire fighting personnel standards and education commission" and adding the matter in italics.

Sub 5 by deleting at fig 1 "governor pursuant to section one hundred fifty-nine-d" and adding the matter in italics.

The 2018 amendment by ch 406, §§ 1, 2, substituted "fewer than five fire fighters" for "five or fewer fire fighters" in 6 and added 7.

The 2019 amendment by ch 678, § 1, substituted "five or fewer" for "fewer than five" in 6; and in 7(b), substituted "requirements established" for "courses of minimum contact hour criteria approved" and deleted "and received certification for supervisory level 1 or higher pursuant to 19 NYCRR 427.9" at the end.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Commission rules and regulations promulgated by governor, CLS Exec § 159-d.

Fire service, definition of, CLS Retire & SS § 302.

Jurisprudences:

19 NY Jur 2d Civil Servants and Other Public Officers and Employees §§ 350, 353 .

ARTICLE V Personnel Changes

Title B. Removal and Other Disciplinary Proceedings

Section
75. Removal and other disciplinary action
76. Appeals from determinations in disciplinary proceedings

Title D. Leaves of Absence

82-a. Authorized absence
82-b. Emergency service volunteers; paid leave

HISTORY:

Add, L 1958, ch 790, § 1, eff April 1, 1959.

TITLE B Removal and Other Disciplinary Proceedings

HISTORY:

Add, L 1958, ch 790, § 1, eff April 1, 1959.

§ 75. Removal and other disciplinary action

1. Removal and other disciplinary action. A person described in paragraph (a) or paragraph (b), or paragraph (c), or paragraph (d), or paragraph (e) of this subdivision shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section.

(a) A person holding a position by permanent appointment in the competitive class of the classified civil service, or

(b) a person holding a position by permanent appointment or employment in the classified service of the state or in the several cities, counties, towns, or villages thereof, or in any other political or civil division of the state or of a municipality, or in the public school service, or in any public or special district, or in the service of any authority, commission or board, or in any other branch of public service, who was honorably discharged or released under honorable circumstances from the armed forces of the United States including (i) having a qualifying condition as defined in section three hundred fifty of the executive law, and receiving a discharge other than bad conduct or dishonorable from such service, or (ii) being a discharged LGBT veteran, as defined in section three hundred fifty of the executive law, and receiving a discharge other than bad conduct or dishonorable from such service, having served therein as such member in time of war as defined in section eighty-five of this chapter, or who is an exempt volunteer firefighter as defined in the general municipal law, except when a person described in this paragraph holds the position of private secretary, cashier or deputy of any official or department, or

(c) an employee holding a position in the non-competitive or labor class other than a position designated in the rules of the state or municipal civil service commission as confidential or requiring the performance of functions influencing policy, who since his or her last entry into service has completed at least five years of continuous service in the non-competitive or labor class in a position or positions not so designated in the rules as confidential or requiring the performance of functions influencing policy, or

(d) an employee in the service of the City of New York holding a position as Homemaker or Home Aide in the non-competitive class, who since his last entry into city service has completed at least three years of continuous service in such position in the non-competitive class, or

(e) an employee in the service of a police department within the state of New York holding the position of detective for a period of three continuous years or more; provided, however, that a hearing shall not be required when reduction in rank from said position is based solely on reasons of the economy, consolidation or abolition of functions, curtailment of activities or otherwise.

2. Procedure. An employee who at the time of questioning appears to be a potential subject of disciplinary action shall have a right to representation by his or her certified or recognized employee organization under article fourteen of this chapter and shall be notified in advance, in writing, of such right. A state employee who is designated managerial or confidential under article fourteen of this chapter, shall, at the time of questioning, where it appears that such employee is a potential subject of disciplinary action, have a right to representation and shall be notified in advance, in writing, of such right. If representation is requested a reasonable period of time shall be afforded to obtain such representation. If the employee is unable to obtain representation within a reasonable period of time the employer has the right to then question the employee. A hearing officer under this section shall have the power to find that a reasonable period of time was or was not afforded. In the event the hearing officer finds that a reasonable period of time was not afforded then any and all statements obtained from said questioning as well as any evidence or information obtained as a result of said questioning shall be excluded, provided, however, that this subdivision shall not modify or replace any written collective agreement between a public employer and employee organization negotiated pursuant to ar-

ticle fourteen of this chapter. A person against whom removal or other disciplinary action is proposed shall have written notice thereof and of the reasons therefor, shall be furnished a copy of the charges preferred against him and shall be allowed at least eight days for answering the same in writing. The hearing upon such charges shall be held by the officer or body having the power to remove the person against whom such charges are preferred, or by a deputy or other person designated by such officer or body in writing for that purpose. In case a deputy or other person is so designated, he shall, for the purpose of such hearing, be vested with all the powers of such officer or body and shall make a record of such hearing which shall, with his recommendations, be referred to such officer or body for review and decision. The person or persons holding such hearing shall, upon the request of the person against whom charges are preferred, permit him to be represented by counsel, or by a representative of a recognized or certified employee organization, and shall allow him to summon witnesses in his behalf. The burden of proving incompetency or misconduct shall be upon the person alleging the same. Compliance with technical rules of evidence shall not be required.

3. Suspension pending determination of charges; penalties. Pending the hearing and determination of charges of incompetency or misconduct, the officer or employee against whom such charges have been preferred may be suspended without pay for a period not exceeding thirty days. If such officer or employee is found guilty of the charges, the penalty or punishment may consist of a reprimand, a fine not to exceed one hundred dollars to be deducted from the salary or wages of such officer or employee, suspension without pay for a period not exceeding two months, demotion in grade and title, or dismissal from the service; provided, however, that the time during which an officer or employee is suspended without pay may be considered as part of the penalty. If he is acquitted, he shall be restored to his position with full pay for the period of suspension less the amount of any unemployment insurance benefits he may have received during such period. If such officer or employee is found guilty, a copy of the charges, his written answer thereto, a transcript of the hearing, and the determination shall be filed in the office of the department or agency in which he has been employed, and a copy thereof shall be filed with the civil service commission having jurisdiction over such position. A copy of the transcript of the hearing shall, upon request of the officer or employee affected, be furnished to him without charge.

3-a. Suspension pending determination of charges and penalties relating to police officers of the police department of the city of New York. Pending the hearing and determination of charges of incompetency or misconduct, a police officer employed by the police department of the city of New York may be suspended without pay for a period not exceeding thirty days. If such officer is found guilty of the charges, the police commissioner of such department may punish the police officer pursuant to the provisions of sections 14-115 and 14-123 of the administrative code of the city of New York.

4. Notwithstanding any other provision of law, no removal or disciplinary proceeding shall be commenced more than eighteen months after the occurrence of the alleged incompetency or misconduct complained of and described in the charges or, in the case of a state employee who is designated managerial or confidential under article fourteen of this chapter, more than one year after the occurrence of the alleged incompetency or misconduct complained of and described in the charges, provided, however, that such limitations shall not apply where the incompetency or misconduct complained of and described in the charges would, if proved in a court of appropriate jurisdiction, constitute a crime.

HISTORY:

Add, L 1958, ch 790, § 1, eff April 1, 1959, with substance transferred from former § 22(1, 2, 3–a, 4); amd, L 1960, ch 312, § 1; L 1962, ch 645, § 1; L 1965, ch 738, § 1; L 1970, ch 942, § 1, eff Oct 1, 1970; L 1978, ch 240, § 1; L 1983, ch 774, § 1; L 1984, ch 710, § 1, eff Aug 3, 1984; L 1985, ch 842, §§ 1, 2, eff Sept 1, 1985; L 1986, ch 439, § 2, eff July 1, 1988; L 1989, ch 350, § 1, eff July 12, 1989; L 1990, ch 753, § 2, eff July 22, 1990; L 1993, ch 279, § 1; L 1994, ch 226, § 1, eff July 6, 1994; L 1995, ch 197, § 1, eff July 26, 1995; L 2018, ch 271, § 1, effective September 7, 2018; L 2019, ch 490, § 3, effective November 12, 2020.

Prior Law: Former § 75, add, L 1947, ch 841, with substance transferred from § 62; amd, L 1948, ch 503, L 1953, ch 325, § 1, L 1953, ch 745, § 8, L 1954, ch 200, § 4, L 1955, ch 513, L 1956, ch 757; repealed, L 1955, ch 687, eff July 1, 1956, with substance transferred to Retire & S S L § 70.

Prior § 75, add, L 1922, ch 591; repealed, L 1947, ch 841, eff July 1, 1948, with substance transferred to §§ 55, 60.

Editor's Notes: Laws 1990, ch 753, § 1, eff July 22, 1990, provides as follows:

Section 1. Notwithstanding any other provision of law to the contrary, police officers as defined in paragraph (d) of subdivision 34 of section 1.20 of the criminal procedure law and as designated members of the police department of the city of New York pursuant to section 431 of the New York city charter, pending the determination of charges of incompetency or misconduct may not be suspended for a period exceeding thirty days.

Laws 2019, ch 490, § 82, eff November 12, 2020, provides:

§ 82. This act shall take effect one year after it shall have become a law; provided, however that the amendments to subdivision 7 of section 369-h of the executive law made by section twenty-five of this act shall not affect the repeal of such section and shall be deemed repealed therewith. Effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized to be made and completed on or before such effective date.

Amendment Notes The 2018 amendment by ch 271, § 1, in 1(c), added "or labor" twice and substituted "his or her last entry" for "his last entry."

The 2019 amendment by ch 490, § 3, added "including (i) having a qualifying condition as defined in section three hundred fifty of the executive law, and receiving a discharge other than bad conduct or dishonorable from such service, or (ii) being a discharged LGBT veteran, as defined in section three hundred fifty of the executive law, and receiving a discharge other than bad conduct or dishonorable from such service" in 1(b).

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I. Generally

1. In general

This section has no application where removal is not sought. Tiernan v Walsh, 294 N.Y. 299, 62 N.E.2d 79, 294 N.Y. (N.Y.S.) 299, 1945 N.Y. LEXIS 806 (N.Y. 1945).

This section has no relation to a situation where there is no dismissal, but removal for reasons of economy. O'Donnell v Sinnott, 266 A.D. 176, 41 N.Y.S.2d 674, 1943 N.Y. App. Div. LEXIS 3514 (N.Y. App. Div. 1943), app. dismissed, 301 N.Y. 608, 93 N.E.2d 497, 301 N.Y. (N.Y.S.) 608, 1950 N.Y. LEXIS 937 (N.Y. 1950).

In a proceeding to review a determination by the commissioner of a county department of social services which found petitioner guilty of misconduct and terminated her employment with the county, in which petitioner objected to the introduction in evidence at her hearing of her personnel benefit record, the determination would be confirmed and the proceeding dismissed, since business summaries are independent from the writings or documents upon which they are drawn, since the rules of evidence are not binding in administrative proceedings, and since otherwise the determination as to petitioner's misconduct was supported by substantial evidence, and the penalty imposed was not so disproportionate to the offense as to be shocking to one's sense of fairness. Barrett v D'Elia, 102 A.D.2d 890, 477 N.Y.S.2d 62, 1984 N.Y. App. Div. LEXIS 19118 (N.Y. App. Div. 2d Dep't 1984).

In Civil Service disciplinary matter, vice-president of Police Benevolent Association (petitioner) was not entitled to First Amendment protection with respect to letter he wrote to mem-

bers of village board of trustees that was critical of chief of police, since close working relationship was mandated for efficient operation of small village police force, and village's interest in promoting efficiency of public services outweighed petitioner's interest in commenting on matter of public concern. MacFarlane v Village of Scotia, 241 A.D.2d 574, 659 N.Y.S.2d 351, 1997 N.Y. App. Div. LEXIS 7204 (N.Y. App. Div. 3d Dep't), app. dismissed, 90 N.Y.2d 1008, 666 N.Y.S.2d 102, 688 N.E.2d 1384, 1997 N.Y. LEXIS 3625 (N.Y. 1997).

Court annulled respondents' determination which confiscated badge and identification of village police officer for improperly using them while on "inactive status" due to disability because, regardless of whether officer was on "inactive status" due to disability at time of incident, respondents' decision constituted disciplinary action under auspices of CLS Civ S § 75 and CLS Vill § 8-804, entitling him to notice of charges and opportunity to be heard. Gore v Corwin, 185 Misc. 2d 825, 714 N.Y.S.2d 427, 2000 N.Y. Misc. LEXIS 408 (N.Y. Sup. Ct. 2000).

Decision dismissing proceedings initiated by a town against a police chief under N.Y. Civ. Rights Law § 75 was not construed as a dismissal of both the first set of charges and a second set of charges brought under N.Y. Town Law § 155; a disciplinary proceeding brought within about three weeks of the town acquiring knowledge of the factual basis underlying the charges through an independent investigation was timely. Rounds v Town of Vestal, 15 A.D.3d 819, 790 N.Y.S.2d 561, 2005 N.Y. App. Div. LEXIS 1953 (N.Y. App. Div. 3d Dep't 2005).

Petitioner brings the appeal complaining that the abolition of her position by the Board of Education is illegal and requests that the Board of Education continue her in the position of business manager at a salary no less than that which she received for the 1989-90 school year. The Board of Education abolished the business manager position, and later, amended the resolution not to fund the business manager's position which would necessitate laying off of the current incumbent, the petitioner. Petitioner contends that the reasons for the abolition, or decision not to fund a position, was retaliation for litigation which he commenced against the father of the president of the Board of Education. Petitioner was appointed pursuant to the provisions of Civil Service Law, and therefore her rights in that position are governed by the provisions of the Civil Service Law. The provisions of section 75 of the Civil Service Law prohibits termination of permanent employees for cause unless and until they are afforded an appropriate hearing. Section 75 would not, by its terms, apply to a discretionary decision to eliminate a position for budgetary reasons, and consequently terminate the employment of the incumbent. In view of the nature of the petitioner's claim and the central issue involved, the type of relief petitioner seeks should be obtained through commencement of a proceeding under Article 78 of the Civil Practice Law and Rules, or through an action for damages, and not through an appeal to the Commission of Education under Section 310 of the Education Law. Appeal of Cohen, 1991 Op Comr Educ No 12452.

2. Construction

In an article 78 proceeding, a determination reinstating a mental hygiene therapy aide trainee who was terminated during her probationary period by the deputy director of a developmental center would be affirmed, where under Men Hyg Law § 13.21 and Civ S Law § 75 only the director, not the deputy director, had the power to terminate an employee, and where even if the director had the authority to delegate to his deputy director his statutorily conferred power the record did not support the contention that he did so. Todriff v Shaw, 95 A.D.2d 775, 463 N.Y.S.2d 257, 1983 N.Y. App. Div. LEXIS 18685 (N.Y. App. Div. 2d Dep't 1983).

Although this section applies to civil service employees generally, it has been held that where specific provisions applicable to a different class of civil service employees are found elsewhere in the law, this section, subdivision 2 does not apply. Cugell v Monaghan, 107 N.Y.S.2d 117, 201 Misc. 607, 1951 N.Y. Misc. LEXIS 2291 (N.Y. Sup. Ct. 1951).

The expression of legislative will in this section is so specific that there is no room for doubt as to what is intended, and only a like expression of legislative will to show a reversal of policy could establish such a change. Steger v Farrell, 35 Misc. 2d 614, 231 N.Y.S.2d 298, 1962 N.Y. Misc. LEXIS 2812 (N.Y. Sup. Ct. 1962), rev'd, 22 A.D.2d 729, 253 N.Y.S.2d 181, 1964 N.Y. App. Div. LEXIS 2994 (N.Y. App. Div. 3d Dep't 1964).

Pretextual reassignment and then abolition of position held by public employee entitled, under CLS Civil Service Law § 75(1), not to be removed from position except for incompetence or misconduct impermissibly deprives employee of property interest protected by due process clause of Fourteenth Amendment to United States Constitution. Dwyer v Regan, 777 F.2d 825, 1985 U.S. App. LEXIS 25150 (2d Cir. N.Y. 1985), modified, reh'g denied, 793 F.2d 457, 1986 U.S. App. LEXIS 37371 (2d Cir. 1986).

Where county civil service commission failed to prescribe rules pertaining to jurisdictional and position classification of district employees as it was required to do under N.Y. Civ. Serv. Law § 20(1), employee was entitled to the protections of N.Y. Civ. Serv. Law § 75 and could not be terminated without a pre-termination hearing. Wheeler v Parker, 546 F. Supp. 2d 7, 2008 U.S. Dist. LEXIS 49694 (N.D.N.Y. 2008).

3. —With other legislation

The provisions of this section are not in derogation of the provisions of the Domestic Relations Court Act. O'Kelly v Hill, 283 N.Y. 78, 27 N.E.2d 509, 283 N.Y. (N.Y.S.) 78, 1940 N.Y. LEXIS 915 (N.Y. 1940).

New York Constitution, art 10, § 3 which provides that any office for which no duration is prescribed shall be deemed to be held at the pleasure of the appointing officer, must be read in connection with this section. Bramer v Board of Parole, 247 A.D. 414, 288 N.Y.S. 108, 1936 N.Y. App. Div. LEXIS 8281 (N.Y. App. Div. 1936).

Section 31 is not overridden by this section. Schottke v Jeacock, 269 A.D. 242, 55 N.Y.S.2d 186, 1945 N.Y. App. Div. LEXIS 2960 (N.Y. App. Div. 1945), aff'd, 295 N.Y. 812, 66 N.E.2d 586, 295 N.Y. (N.Y.S.) 812, 1946 N.Y. LEXIS 974 (N.Y. 1946).

The provisions of this section governing the procedure to be followed in removals for misconduct or incompetency were not applicable to a removal under the Security Risk Law for refusing to answer questions concerning Communist affiliations. Lerner v Casey, 2 A.D.2d 1, 154 N.Y.S.2d 461, 1956 N.Y. App. Div. LEXIS 4853 (N.Y. App. Div. 2d Dep't 1956), aff'd, 2 N.Y.2d 355, 161 N.Y.S.2d 7, 141 N.E.2d 533, 1957 N.Y. LEXIS 1210 (N.Y. 1957).

Whether position of civil defense safety representative was temporary or permanent, chapter 299 of the Laws of 1961 providing that at the election of the civil service commission the positions known as emergency defense positions could be made subject to civil service requirements for competitive permanent positions, abrogated any rights which the representative might have had under this section. Steger v Farrell, 22 A.D.2d 729, 253 N.Y.S.2d 181, 1964 N.Y. App. Div. LEXIS 2994 (N.Y. App. Div. 3d Dep't 1964), aff'd, 15 N.Y.2d 994, 260 N.Y.S.2d 13, 207 N.E.2d 608, 1965 N.Y. LEXIS 1457 (N.Y. 1965).

In a proceeding to review a determination that a police officer, who had been injured in the line of duty, was fit to return to duty, to compel restoration of his vacation time which he used while absent from work as the alleged result of the service-related injuries, and to restrain the police commissioner from ordering him to return to duty as a police officer, the trial court erred in finding that the policeman was entitled to an evidentiary hearing under Civ S Law § 75(2), where the policeman had not been removed from his civil service position as a police officer, and no other disciplinary action had been taken against him for failure to report to work; however, he was entitled to an evidentiary hearing under Gen Mun Law § 207-c, before a hearing officer appointed by the police commissioner, with counsel participating, cross-examination of the police commissioner's witnesses, and presentation of his own evidence as to his entitlement to full wages under § 207-c, at which time evidence could be adduced on the issues of whether the policeman's present disability resulted from occupational injuries, and whether he was capable of returning to work and performing light police duty as directed by his commanding officer. Curley v Dilworth, 96 A.D.2d 903, 466 N.Y.S.2d 79, 1983 N.Y. App. Div. LEXIS 19514 (N.Y. App. Div. 2d Dep't 1983), app. dismissed, 63 N.Y.2d 770, 1984 N.Y. LEXIS 5984 (N.Y. 1984).

Public employer, in seeking to terminate civil servant for misconduct, was entitled to proceed under CLS Civ S § 75, and was not limited to proceeding under CLS Civ S § 72 merely because misconduct was not shown to have been willful and intentional. Rao v Gunn, 121 A.D.2d 618, 503 N.Y.S.2d 646, 1986 N.Y. App. Div. LEXIS 58602 (N.Y. App. Div. 2d Dep't 1986), app. denied, 70 N.Y.2d 853, 523 N.Y.S.2d 492, 518 N.E.2d 4, 1987 N.Y. LEXIS 19063 (N.Y. 1987), rev'd, 73 N.Y.2d 759, 536 N.Y.S.2d 47, 532 N.E.2d 1275, 1988 N.Y. LEXIS 3360 (N.Y. 1988).

It was appropriate for county to proceed under CLS Civ S § 75, rather than CLS Civ S §§ 72 and 73, where petitioner had been charged with misconduct due to, inter alia, excessive absences from work; latter statutes provide, respectively, for leaves of absence and separation from service for employees found to be medically unable to perform their duties, and affords certain rights for return to work upon recovery from disability. Abdalla v Fulton County, 208 A.D.2d 1168, 617 N.Y.S.2d 587, 1994 N.Y. App. Div. LEXIS 10521 (N.Y. App. Div. 3d Dep't 1994), app. denied, 85 N.Y.2d 804, 626 N.Y.S.2d 755, 650 N.E.2d 414, 1995 N.Y. LEXIS 1259 (N.Y. 1995).

State Department of Labor's decision that probationary police officer did not commit misconduct disentitling him to unemployment insurance benefits had no collateral effect on officer's Article 78 proceeding challenging his discharge. People v Reynolds, 240 A.D.2d 210, 658 N.Y.S.2d 596, 1997 N.Y. App. Div. LEXIS 6177 (N.Y. App. Div. 1st Dep't), app. denied, 90 N.Y.2d 897, 662 N.Y.S.2d 440, 685 N.E.2d 221, 1997 N.Y. LEXIS 2866 (N.Y. 1997).

In Article 78 proceeding challenging summary termination of petitioner from her position as confidential secretary, Supreme Court properly found that respondent's classification of petitioner's position as "exempt" was ineffective for failure to comply with procedural requirements of CLS Civ S § 20, thus requiring position to be classified as "competitive" by default, but it was error to grant petitioner reinstatement with back pay pending proper classification or hearing under CLS Civ S § 75, because position could not be deemed "permanent" where petitioner never took civil service examination relative to confidential secretary position. Grosh v City of Troy, 246 A.D.2d 235, 675 N.Y.S.2d 416, 1998 N.Y. App. Div. LEXIS 8146 (N.Y. App. Div. 3d Dep't 1998).

Board did not err in giving collateral estoppel effect to arbitrator's factual finding that claimant was discharged from his employment as toll collector for being discourteous to customers, where claimant had full and fair opportunity to litigate issue at arbitration hearing under CLS Civ S § 75. In re Claim of Obafemi, 250 A.D.2d 905, 672 N.Y.S.2d 506, 1998 N.Y. App. Div. LEXIS 5385 (N.Y. App. Div. 3d Dep't 1998).

Section of Rockland County Police Act (L 1936, ch 524, as amended by L 1946, ch 940) which gives police chiefs authority to assign officers to detective duty and to revoke such assignments "at any time" conflicts with L 1997, ch 134, amending CLS Civ S § 58(4)(c), and CLS Civ S § 75(1)(e); however, as special act, Rockland County Police Act takes precedence over inconsistent provisions of Civil Service Law. Steinmann v Village of Spring Valley, 261 A.D.2d 548, 691 N.Y.S.2d 66, 1999 N.Y. App. Div. LEXIS 5389 (N.Y. App. Div. 2d Dep't 1999).

Hearing officer's finding, in CLS Civ S § 75 proceeding, that employer did not meet its burden of establishing that public health nurse cheated on competency examination, was not entitled to collateral estoppel effect in proceeding before Unemployment Insurance Appeal Board, as no factual findings were made specifically regarding whether she actually cheated on exam, and it was incumbent on board to draw its own conclusion as to whether claimant's behavior amounted to misconduct for purposes of qualifying for unemployment insurance benefits. In re Claim of Wachtmeister, 270 A.D.2d 556, 703 N.Y.S.2d 584, 2000 N.Y. App. Div. LEXIS 2365 (N.Y. App. Div. 3d Dep't 2000).

Prehearing suspension of town police chief was not limited to 30 days under CLS Civ S § 75(3) where CLS Civ S § 76(4) preserved inconsistent local laws enacted before 1941, and thus CLS Town § 155 was still valid and controlling. Coscette v Town of Wallkill, 281 A.D.2d 479, 721 N.Y.S.2d 784, 2001 N.Y. App. Div. LEXIS 2356 (N.Y. App. Div. 2d Dep't), app. denied, 97 N.Y.2d 602, 735 N.Y.S.2d 491, 760 N.E.2d 1287, 2001 N.Y. LEXIS 3276 (N.Y. 2001).

Although Workers' Compensation Board has continuing jurisdiction to end or diminish compensation previously awarded (CLS Work Comp §§ 22 and 123), such power does not preclude employer from preferring disciplinary charges against employee who has been found to have sustained work-related injury, but has allegedly been derelict in returning to work and resuming his or her duties. Hofsiss v Bd. of Educ., 287 A.D.2d 566, 732 N.Y.S.2d 14, 2001 N.Y. App. Div. LEXIS 9577 (N.Y. App. Div. 2d Dep't 2001).

The owner conferred by Sec. Class Cities Law, § 94, upon the commissioner of public works in Binghamton, to appoint a superintendent of water works to hold office during the pleasure of the commissioner is not limited by this section. People ex rel. Johnson v La Roche, 181 N.Y.S. 611, 111 Misc. 465, 1920 N.Y. Misc. LEXIS 1327 (N.Y. Sup. Ct. 1920).

Educ Law, § 312-a, which provides that a supervisor appointed for a probationary period may be dismissed at any time on the recommendation of the superintendent of schools, is not in conflict with this section. Bemis v Board of Education, 14 N.Y.S.2d 182, 171 Misc. 957, 1939 N.Y. Misc. LEXIS 2181 (N.Y. Sup. Ct.), rev'd, 258 A.D. 935, 16 N.Y.S.2d 553, 1939 N.Y. App. Div. LEXIS 7639 (N.Y. App. Div. 1939).

This section and Surrogate's Court Act, § 21, are not in conflict and where such analogous statutes come into apparent conflict, the power of removal or revocation of appointment is not abolished but the incumbent has the right to be heard before removal is made. Cappon v Cleere, 32 N.Y.S.2d 845, 177 Misc. 1027, 1942 N.Y. Misc. LEXIS 1294 (N.Y. Sup. Ct. 1942).

This section is to be construed with § 76, and a hearing held pursuant to it must be upon stated charges, fair, impartial, and free from prejudicial legal errors. Badrow v Common Council & City Clerk, 42 Misc. 2d 505, 248 N.Y.S.2d 615, 1964 N.Y. Misc. LEXIS 1890 (N.Y. Sup. Ct. 1964).

Where a permanent civil service employee is discharged by operation of Pub O Law § 30(1) as a result of a felony conviction and the conviction is subsequently reversed on the basis that no crime was in fact committed, the employee is entitled, as a matter of law, to a post-termination hearing under Civ S Law § 75 to determine whether the employee should be reinstated and the standards to be utilized in such determination are the same as those to determine if a civil service employee should be discharged in the first instance. Briggins v McGuire, 122 Misc. 2d 1026, 472 N.Y.S.2d 243, 1983 N.Y. Misc. LEXIS 4164 (N.Y. Sup. Ct. 1983), rev'd, 112 A.D.2d 827, 492 N.Y.S.2d 746, 1985 N.Y. App. Div. LEXIS 52078 (N.Y. App. Div. 1st Dep't 1985).

While federal case law governing the requirements for an actionable claim against an employer under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., was instructive, the coworker's failure to demonstrate those requirements did not preclude a finding that the former employee engaged in misconduct under N.Y. Civ. Serv. Law § 75 justifying disciplinary measures before an actionable claim for harassment arose. Matter of Bayer v New York State Dept. of Labor, 28 A.D.3d 865, 812 N.Y.S.2d 691, 2006 N.Y. App. Div. LEXIS 4106 (N.Y. App. Div. 3d Dep't 2006).

Arbitration of city police disciplinary disputes was required because the Taylor Law was applicable pursuant to a city charter provision that superseded the Second Class Cities Law (SCCL) and because the city's police manual expressly authorized arbitration of police disciplinary matters. Although municipalities can adopt police disciplinary procedures under the SCCL and under general laws enacted prior to this section allowing local control of police discipline, the city chose not to do so. City of Syracuse v Syracuse Police Benevolent Assn., Inc., 68 Misc. 3d 412, 124 N.Y.S.3d 523, 2020 N.Y. Misc. LEXIS 1926 (N.Y. Sup. Ct. 2020).

Hearing required before permanent civil service employee can be disciplined or terminated does not bar, on grounds of claim preclusion, federal civil rights action brought under 42 USCS § 1983, and while hearing afforded employee before his termination was quasi-judicial in nature, issues determined at hearing concerned employee's violation of chain of command by writing letter to county executive enumerating allegations of his supervisor's misconduct, while employee's federal claim is that he was

terminated from employment because of views he expressed in letter to county executive, such that issues to be determined in federal action are not material and essential to decision rendered in pre-termination hearing. O'Malley v Nassau County Medical Center, 686 F. Supp. 62, 1988 U.S. Dist. LEXIS 4844 (E.D.N.Y. 1988).

Tenured teacher's involuntary transfer was not disciplinary in nature because a transfer to another school within a school district was not a disciplinary penalty within the meaning of N.Y. Educ. Law § 3020-a(4), which governed the discipline of tenured teachers, and N.Y. Civ. Serv. Law § 75 did not apply to teachers who enjoyed the benefits of tenure. Rutherford v Katonah-Lewisboro Sch. Dist., 670 F. Supp. 2d 230, 2009 U.S. Dist. LEXIS 105872 (S.D.N.Y. 2009).

4. — —NYC provisions

Claimant, laborer employed by New York City Human Resources Administration, was properly disqualified from receiving unemployment insurance benefits after he was found guilty following hearing under CLS Civ S § 75 of submitting fraudulent overtime forms. In re Claim of Santiago, 224 A.D.2d 845, 637 N.Y.S.2d 813, 1996 N.Y. App. Div. LEXIS 1278 (N.Y. App. Div. 3d Dep't 1996).

Court properly determined that savings clause in CLS Civ S § 76(4), providing that nothing in CLS Civ S § 75 shall be construed to "repeal or modify" any local laws, was unambiguous grand-fathering provision that did not apply to subsequently enacted NYC Admin Code § 9-112, providing that members of Department of Corrections' uniform force charged with crime may be suspended without pay for as long as criminal charges remain pending. Meringolo v Jacobson, 256 A.D.2d 20, 680 N.Y.S.2d 521, 1998 N.Y. App. Div. LEXIS 12802 (N.Y. App. Div. 1st Dep't 1998), app. dismissed, 93 N.Y.2d 948, 694 N.Y.S.2d 342, 716 N.E.2d 177, 1999 N.Y. LEXIS 1364 (N.Y. 1999), app. denied, 93 N.Y.2d 948, 694 N.Y.S.2d 342, 716 N.E.2d 177, 1999 N.Y. LEXIS 1365 (N.Y. 1999).

Greater New York Charter, § 692, does not give a nurse at Bellevue Hospital a right to the protection of this section. Daly v Goldwater, 296 N.Y.S. 36, 163 Misc. 502, 1937 N.Y. Misc. LEXIS 1716 (N.Y. Sup. Ct. 1937).

The one-month suspension period pending determination of charges provided for by subd. (3) of this section and § 884-1.0 of the New York City Administrative Code is inapplicable to school teachers employed by the City Board of Education whose rights are governed by § 2566 of the Education Law. Nash v Board of Education, 26 Misc. 2d 46, 198 N.Y.S.2d 180, 1960 N.Y. Misc. LEXIS 3849 (N.Y. Sup. Ct. 1960).

New York City Administrative Code, and not Civil Service Law § 75, subd 3, governed permissible punishment of New York city policeman pursuant to disciplinary proceeding against officer for lying during course of official police investigation. Foran v Murphy, 73 Misc. 2d 486, 342 N.Y.S.2d 4, 1973 N.Y. Misc. LEXIS 2195 (N.Y. Sup. Ct. 1973).

Plaintiffs' contention that Manhattan and Bronx Surface Transit Operating Authority's (MABSTOA) failure to follow the provisions of Civ S Law §§ 75, 80 in filling employee positions as a result of its exemption under Pub A Law § 1203-a constituted a violation of the due process and equal protection clauses of the state and federal constitutions on the asserted ground that the Transit Authority (of which MABSTOA is a subsidiary) filled similar positions in accordance with the sections would be without merit since the two entities were created for substantially different purposes, which the Legislature took into account in making MABSTOA a subsidiary of the Transit Authority, so that for purposes of later sale or disposal the former would retain a separate identity, and there thus exists a reasonable relationship and basis for the Legislature's refusal to subject MABSTOA to the provisions of the Civil Service Law. Collins v Manhattan & Bronx Surface Transit Operating Auth., 116 Misc. 2d 6, 453 N.Y.S.2d 289, 1981 N.Y. Misc. LEXIS 3503 (N.Y. Sup. Ct. 1981).

Provisions of NYC Admin Code § 9-112, which authorize suspension without pay of members of uniformed forces charged with crime for so long as it takes to dispose of criminal charges, is invalid as violative of CLS Civ S § 75(3), which prohibits suspension without pay of civil service employee for more than 30 days. Meringolo ex rel. Members of the Correction Captains Ass'n v Jacobson, 173 Misc. 2d 650, 662 N.Y.S.2d 356, 1997 N.Y. Misc. LEXIS 370 (N.Y. Sup. Ct. 1997), aff'd, 256 A.D.2d 20, 680 N.Y.S.2d 521, 1998 N.Y. App. Div. LEXIS 12802 (N.Y. App. Div. 1st Dep't 1998).

Police officer was properly suspended without pay for 30 days pending a determination of the disciplinary charges preferred against him; New York City, N.Y., Admin. Code § 14-123 made no distinctions based on the seriousness of the charges or severity of the penalty, and entitled a police officer to full back pay from the date of suspension only if he was not convicted of the charges. Buric v Safir, 4 A.D.3d 160, 772 N.Y.S.2d 36, 2004 N.Y. App. Div. LEXIS 1649 (N.Y. App. Div. 1st Dep't), app. denied, 2 N.Y.3d 706, 781 N.Y.S.2d 287, 814 N.E.2d 459, 2004 N.Y. LEXIS 1061 (N.Y. 2004).

5. Constitutionality

The safeguards of sections 75 and 76 of the Civil Service Law, which set forth disciplinary procedures for certain classes of public employees and provide for appeals by employees from adverse determinations, may be waived by an employee without violating the constitutional safeguards of due process and equal protection of the laws. Auburn Police Local 195, Council 82, AFSCME v Helsby, 62 A.D.2d 12, 404 N.Y.S.2d 396, 1978 N.Y. App. Div. LEXIS 10411 (N.Y. App. Div. 3d Dep't 1978), aff'd, 46 N.Y.2d 1034, 416 N.Y.S.2d 586, 389 N.E.2d 1106, 1979 N.Y. LEXIS 1946 (N.Y. 1979).

In order to sustain constitutionality of arbitration provisions in collective bargaining agreement between the State and civil service employees association with respect to disciplining of employees, it would be necessary to read into the provisions the procedural safeguards of article governing arbitration generally, i. e., right to present evidence, right to cross-examine witnesses, right to have determination made on evidence produced, right to be represented by counsel, and right to have the award made in writing. Antinore v State, 49 A.D.2d 6, 371 N.Y.S.2d 213, 1975 N.Y. App. Div. LEXIS 10325 (N.Y. App. Div. 4th Dep't 1975), aff'd, 40 N.Y.2d 921, 389 N.Y.S.2d 576, 358 N.E.2d 268, 1976 N.Y. LEXIS 3090 (N.Y. 1976).

Procedure established by Civil Service Law for determining charges of misconduct affords individual opportunity to be heard a meaningful time and in meaningful manner and conforms to essentials of due process. Marsh v Hanley, 50 A.D.2d 687, 375 N.Y.S.2d 409, 1975 N.Y. App. Div. LEXIS 12530 (N.Y. App. Div. 3d Dep't 1975).

Mechanism set forth in 4 NYCRR 5.3(c), which provided that civil servant's resignation could not be withdrawn absent consent of appointing authority, was constitutional even though it did not permit permanent employee procedural safeguard of hearing prior to termination in cases where employee resigned rather than being terminated; moreover, voluntariness of resignation was not vitiated by employee's attempt to withdraw resignation prior to its effective date. Smith v Kunkel, 152 A.D.2d 893, 544 N.Y.S.2d 240, 1989 N.Y. App. Div. LEXIS 10286 (N.Y. App. Div. 3d Dep't), app. dismissed, 74 N.Y.2d 944, 550 N.Y.S.2d 277, 549 N.E.2d 480, 1989 N.Y. LEXIS 3317 (N.Y. 1989).

The constitutional right to due process requires a hearing prior to even a temporary suspension of a public employee unless some "valid governmental interest" overrides the employee's Fourteenth Amendment rights. Randall v Toll, 73 Misc. 2d 451, 341 N.Y.S.2d 994, 1973 N.Y. Misc. LEXIS 2311 (N.Y. Sup. Ct. 1973).

Provision of Civil Service Law calling for suspension without pay for a period not exceeding 30 days pending hearing and determination of charges of incompetency or misconduct reasonably accommodates competing interests involved and is not unconstitutional as depriving employee of property without due process. Palermo v Eisenberg, 81 Misc. 2d 1014, 367 N.Y.S.2d 378, 1975 N.Y. Misc. LEXIS 2517 (N.Y. Sup. Ct. 1975).

Procedures provided for in CLS Civ Serv § 75 satisfies requirement of due process in employment deprivation cases, and overlap of investigative and adjudicative functions alone, without further factual demonstration of bias or prejudice inherent in particular application of statutory scheme, does not violate due

process; mere appointment as hearing officer of attorney with some past or present connection to administrative agency in charge of investigating, charging, prosecuting, or disciplining employee, in and of itself, is not denial of due process. Anderson v Dolce, 653 F. Supp. 1556, 1987 U.S. Dist. LEXIS 1349 (S.D.N.Y. 1987).

Former employee, a school groundskeeper, charged N.Y. Civ. Serv. Law § 75 was unconstitutional, but, supplemented by by a CPLR art. 78 proceeding, the law was found constitutional and provided due process; thus groundskeeper did not state a claim under 42 U.S.C.S. § 1983. Chaffer v Bd. of Educ., 229 F. Supp. 2d 185, 2002 U.S. Dist. LEXIS 21736 (E.D.N.Y. 2002), aff'd, 75 Fed. Appx. 12, 2003 U.S. App. LEXIS 18391 (2d Cir. N.Y. 2003).

6. Inapplicability absent legal certification and appointment

A discharged employee's rights under this section depend upon whether his appointment in the first instance was in accordance with the Constitution and the Civil Service Law. Verweire v Finch, 274 A.D. 1026, 86 N.Y.S.2d 132, 1948 N.Y. App. Div. LEXIS 4527 (N.Y. App. Div. 1948).

Civil Service Commissioner's retroactive revocation of civil service employees' permanent status without adherence to provisional safeguards of CLS Civ S § 75 did not deprive employees of property interest without due process since, inasmuch as employees' appointments were constitutionally defective, due process standards of § 75 did not apply; it is beyond power and jurisdiction of commissioner or anyone else to confer on applicant eligibility for appointment which is illegal. Spring v Broadnax, 158 A.D.2d 240, 558 N.Y.S.2d 994, 1990 N.Y. App. Div. LEXIS 8405 (N.Y. App. Div. 3d Dep't), app. denied, 76 N.Y.2d 713, 563 N.Y.S.2d 769, 565 N.E.2d 518, 1990 N.Y. LEXIS 3744 (N.Y. 1990).

This section applies only after a legal appointment has been made and does not protect one who procured his appointment through fraud. Everhart v Robbins, 25 N.Y.S.2d 336, 1941 N.Y. Misc. LEXIS 1449 (N.Y. Sup. Ct. 1941).

Where a certification or appointment is void ab initio because the appointee was never eligible, the provisions of this section as to charges, notice and hearing, are inapplicable; they apply only when there has been valid certification and legal appointment. Ferdinand v Moses, 26 N.Y.S.2d 382, 1941 N.Y. Misc. LEXIS 1563 (N.Y. Sup. Ct.), aff'd, 262 A.D. 1001, 30 N.Y.S.2d 842, 1941 N.Y. App. Div. LEXIS 6931 (N.Y. App. Div. 1941).

This section applies only to case where there was a legal and valid appointment. Daly v School Dist., 31 N.Y.S.2d 207, 1941 N.Y. Misc. LEXIS 2379 (N.Y. Sup. Ct. 1941).

II. Hearings and Other Procedural Matters

A. Generally

7. In general

Statutes requiring hearings in civil service removals do not depend for their operative effect on good grounds shown to resist the removal, since they are operative without regard to the merit. Papasidero v Fasano, 19 N.Y.2d 440, 280 N.Y.S.2d 566, 227 N.E.2d 386, 1967 N.Y. LEXIS 1506 (N.Y. 1967).

This section, providing that an employee is entitled to notice of his proposed removal and the reasons therefor, and an opportunity to answer the same, means that there must be substance to the charges and that the explanation must be passed upon fairly and in good faith and not arbitrarily or from some ulterior motives. Application of Rox, 260 A.D. 260, 21 N.Y.S.2d 55, 1940 N.Y. App. Div. LEXIS 4573 (N.Y. App. Div.), app. dismissed, 284 N.Y. 550, 32 N.E.2d 549, 284 N.Y. (N.Y.S.) 550, 1940 N.Y. LEXIS 825 (N.Y. 1940).

A senior clerk stenographer was not entitled to a hearing under Civ S Law § 75 prior to inclusion of a letter in her personnel file which admonished her for insubordination. Tomaka v Evans-Brant Cent. School Dist., 107 A.D.2d 1078, 486 N.Y.S.2d 546, 1985 N.Y. App. Div. LEXIS 42900 (N.Y. App. Div. 4th Dep't), aff'd, 65 N.Y.2d 1048, 494 N.Y.S.2d 697, 484 N.E.2d 1049, 1985 N.Y. LEXIS 16106 (N.Y. 1985).

Civil servant who was dismissed from job as school custodian engineer prior to expiration of his probationary period without notice of charges, statement of reasons, or hearing, was not entitled to name-clearing hearing, as there was no evidence of public disclosure of allegations affecting his good name or reputation. Bonacci v Quinones, 124 A.D.2d 659, 508 N.Y.S.2d 42, 1986 N.Y. App. Div. LEXIS 61959 (N.Y. App. Div. 2d Dep't 1986).

County attorney was not entitled to name-clearing hearing where he failed to establish that his employer publicly disseminated charges against him. Testa v Valenza, 133 A.D.2d 540, 519 N.Y.S.2d 1012, 1987 N.Y. App. Div. LEXIS 50039 (N.Y. App. Div. 4th Dep't 1987).

County emergency services dispatchers were not improperly denied their right to hearing on issue of their removal for failure to acquire re-certification as emergency medical technicians, even though dispatchers were included in class of employees who were protected from being removed or disciplined without hearing, since, due to fact that dispatchers did not deny that their certification had lapsed, no factual issues existed, and thus hearing was not necessary. Naliboff v Davis, 133 A.D.2d 632, 519 N.Y.S.2d 740, 1987 N.Y. App. Div. LEXIS 51672 (N.Y. App. Div. 2d Dep't 1987), app. denied, 71 N.Y.2d 805, 529 N.Y.S.2d 76, 524 N.E.2d 430, 1988 N.Y. LEXIS 623 (N.Y. 1988).

Employee of Triborough Bridge and Tunnel Authority was not entitled to hearing on issue of whether he was, in fact, guilty of infractions for which he was terminated where, in exchange for having disciplinary charges dropped, he knowingly and voluntarily consented to be placed on probation for one-year period, during which time Authority had sole discretion to dismiss him "without the necessity of affording [employee] the right to a further hearing"; thus, it was error for Supreme Court to grant Article 78 petition to extent of remanding matter for hearing. Montiel v Kiley, 147 A.D.2d 402, 538 N.Y.S.2d 2, 1989 N.Y. App. Div. LEXIS 1883 (N.Y. App. Div. 1st Dep't 1989), aff'd, People v Vespucci, 75 N.Y.2d 434, 554 N.Y.S.2d 417, 553 N.E.2d 965, 1990 N.Y. LEXIS 229 (N.Y. 1990).

It was not improper for Deputy Commissioner of Department of Transportation (DOT), on behalf of Commissioner of DOT, to determine that DOT employee was guilty of disciplinary charges brought against him and to impose punishment since, pursuant to CLS Trans § 16, Commissioner had ability to delegate his powers. Pelham v White, 166 A.D.2d 824, 563 N.Y.S.2d 171, 1990 N.Y. App. Div. LEXIS 12819 (N.Y. App. Div. 3d Dep't 1990).

Proper termination of employment cannot be extended retroactively to cover prior period of termination annulled due to procedural failures. Ernst v Saratoga County, 251 A.D.2d 866, 674 N.Y.S.2d 487, 1998 N.Y. App. Div. LEXIS 7332 (N.Y. App. Div. 3d Dep't 1998).

In Article 78 proceeding to annul termination of petitioner's employment with village, village and its mayor violated CLS Civ S § 75(2), which provides that hearing on charges preferred against employee "shall be held by the officer or body having the power to remove the person against whom such charges are preferred, or by a deputy or other person designated by such officer or body in writing for that purpose," where letter sent to petitioner informing him of date, time, and location of hearing and name of hearing officer was not requisite written delegation of authority. Pieczonka v Jewett, 273 A.D.2d 842, 709 N.Y.S.2d 302, 2000 N.Y. App. Div. LEXIS 6835 (N.Y. App. Div. 4th Dep't), reh'g denied, 715 N.Y.S.2d 206, 2000 N.Y. App. Div. LEXIS 9575 (N.Y. App. Div. 4th Dep't 2000).

Workers' Compensation Board's termination of probationary civil service employment of claims referee without hearing was not in bad faith, unconstitutional, or otherwise improper where (1) board followed its established procedures by periodically advising referee of his progress, providing written evaluation at least 2 weeks before end of probationary period, and giving written notice at least one week before effective date of discharge, (2) bad faith was not shown by fact that earlier, more favorable progress reports were not furnished in writing before final, unfavorable written report, and (3) referee's dismissal was based on his inadequate understanding of workers' compensation law, his failure to respond to additional training to address that deficiency, and his improper conduct in requesting transportation from attorneys and posing inappropriate questions to witnesses. Scott v Workers' Compensation Bd., 275 A.D.2d 877, 713 N.Y.S.2d 571, 2000 N.Y. App. Div. LEXIS 9473 (N.Y. App. Div. 3d Dep't 2000).

Petitioner's "reassignment" from permanent position of assigned driver to that of unassigned driver, which resulted in diminution in benefits, was form of demotion or discipline requiring compliance with CLS Civ S § 75 notwithstanding respondent's assertion that petitioner was placed on "Unassigned Bus Driver" status because she was unable to meet minimum qualifications of assigned driver position after she allegedly accepted another part-time job which resulted in her being "unavailable" to perform her regularly assigned bus routes on numerous occasions. Bailey v Susquehanna Valley Cent. Sch. Dist. Bd. of Educ., 276 A.D.2d 963, 714 N.Y.S.2d 389, 2000 N.Y. App. Div. LEXIS 10809 (N.Y. App. Div. 3d Dep't 2000).

Terminated school bus driver was entitled to hearing before his Article 78 proceeding could be dismissed, and case would be remitted for that purpose, where triable issue of fact existed as to whether he was exempt volunteer firefighter under CLS Civ S § 75(1)(b). Wamsley v E. Ramapo Cent. Sch. Dist. Bd. of Educ., 281 A.D.2d 633, 723 N.Y.S.2d 53, 2001 N.Y. App. Div. LEXIS 3049 (N.Y. App. Div. 2d Dep't 2001).

Probationary correction officer in county sheriff's department was entitled to hearing on issue of whether his discharge was unrelated to work performance, motivated by constitutionally impermissible purpose, or made in bad faith where (1) evaluation reports were conflicting as to whether his performance was "successful" or only "fair" and whether he had potential to develop into good correction officer, (2) he alleged that he was not afforded academy training as other newly hired correction officers were, that he was kept on midnight shift for first 10 months of his employment, and that he received no in-house training or guidance, and (3) termination of his employment for failure to meet standards when he had been denied training concerning those standards suggested lack of rational basis for termination. Higgins v La Paglia, 281 A.D.2d 679, 722 N.Y.S.2d 592, 2001 N.Y. App. Div. LEXIS 2009 (N.Y. App. Div. 3d Dep't), app. dismissed, 96 N.Y.2d 854, 729 N.Y.S.2d 669, 754 N.E.2d 772, 2001 N.Y. LEXIS 1460 (N.Y. 2001).

Petitioner adequately stated claim for violation of her rights under CLS Civ S § 75 and her due process rights, on ground that county improperly terminated her employment without hearing, where she alleged that (1) parties agreed that hearing on pending disciplinary charges would be held in abeyance while she applied for disability retirement, and that charges could be reinstated if she was not granted disability retirement, (2) after she applied for disability retirement, county terminated her employment based on her physician's diagnosis of permanent disability, and (3) her application for retirement was subsequently denied because she did not have requisite years of total service credit. White v County of Jefferson, 285 A.D.2d 964, 727 N.Y.S.2d 677, 2001 N.Y. App. Div. LEXIS 6980 (N.Y. App. Div. 4th Dep't 2001).

Court annulled police commissioner's decision to terminate police officer's employment for using excessive force against prisoner and making false statement about incident where (1) hearing officer, in lauding credibility of allegedly beaten prisoner and 3 "corroborating" prisoner-witnesses, ignored facts that prisoner gave inconsistent stories to different people and prisoner-witnesses were not present in their cells when incident allegedly occurred, and (2) issues existed as to whether police officer's prior successful litigation to regain his position in unrelated matter was substantial or motivating factor in commissioner's decision to find him guilty of various charges and then terminate him. Buric v Safir, 285 A.D.2d 255, 736 N.Y.S.2d 342, 2002 N.Y. App. Div. LEXIS 458 (N.Y. App. Div. 1st Dep't), app. denied, 98 N.Y.2d 688, 746 N.Y.S.2d 689, 774 N.E.2d 754, 2002 N.Y. LEXIS 1937 (N.Y. 2002).

While former N.Y. Civ. Serv. Law § 22(2) only required that a town provide a transcript of a hearing after an official or employee was found guilty, N.Y. Civ. Serv. § 75(3) removed that limitation; respondents, a town, a town board, and its officials, were therefore to required to reimburse petitioner for obtaining the transcript prior to issuance of a determination on charges against him. Matter of Canna v Town of Amherst, 28 A.D.3d 1254, 816 N.Y.S.2d 629, 2006 N.Y. App. Div. LEXIS 5753 (N.Y. App. Div. 4th Dep't 2006).

Because there was no finding that an employee was medically incapable to perform her job functions, N.Y. Civ. Serv. Law § 72 was inapplicable to the employee's termination; a N.Y. Civ. Serv. Law § 75 hearing was proper to adjudicate incompetency charges based on the employee's excessive absences. The findings were supported by substantial evidence because, among other things, the employee never returned to work after her leave of absence ended, and she never informed her supervisor as to when she would return. Matter of Considine v Pirro, 38 A.D.3d 773, 832 N.Y.S.2d 620, 2007 N.Y. App. Div. LEXIS 3725 (N.Y. App. Div. 2d Dep't 2007).

Ruling that a former employee was disqualified from receiving unemployment benefits was proper because, although the former employee did not appear at her N.Y. Civ. Serv. Law § 75 disciplinary hearing, she had the opportunity to be heard and witnesses were presented on the issue of her insubordination; therefore, the board properly accorded collateral estoppel effect to the hearing officer's relevant factual findings, and to the extent that the former employee implied that the hearing officer's factual findings were not properly adopted by the commissioner of the city's human resources administration, nothing in the record indicated that they were ever invalidated, overturned, or otherwise set aside. After the administrative law judge credited the factual findings, the board properly reached its own conclusion that the former employee's behavior amounted to misconduct disqualifying her from receiving unemployment insurance benefits. Matter of Agran v Commissioner of Labor, 54 A.D.3d 479, 863 N.Y.S.2d 295, 2008 N.Y. App. Div. LEXIS 6386 (N.Y. App. Div. 3d Dep't 2008).

Assistant fire chief was entitled to his regular compensation until the ruling on the disciplinary charges since the 30-day period for suspension without pay under this section had passed; however, the issue of compensation could not be definitively resolved until the record was developed on to whom the delay was attributable. Matter of Rea v City of Kingston, 110 A.D.3d 1227, 973 N.Y.S.2d 395, 2013 N.Y. App. Div. LEXIS 6739 (N.Y. App. Div. 3d Dep't 2013).

Part-time firefighter's N.Y. C.P.L.R. art. 78 petition seeking an order directing a village to reinstate him with back pay and benefits was in the nature of mandamus to compel inasmuch as he was entitled to a hearing pursuant to N.Y. Civ. Serv. Law § 75, but no such hearing was held; although the firefighter allegedly lacked a qualification for his employment, a hearing was required as the missing qualification was not set forth in a rule, ordinance, or regulation, but was set forth in a collective bargaining agreement that applied only to full-time firefighters. Matter of Butkowski v Kiefer, 140 A.D.3d 1755, 34 N.Y.S.3d 312, 2016 N.Y. App. Div. LEXIS 4687 (N.Y. App. Div. 4th Dep't 2016).

Civil service employee has an absolute right to a hearing on charges upon being terminated. Van Buskirk v Bleiler, 77 Misc. 2d 273, 354 N.Y.S.2d 93, 1974 N.Y. Misc. LEXIS 1122 (N.Y. Sup. Ct.), aff'd, 46 A.D.2d 707, 360 N.Y.S.2d 88, 1974 N.Y. App. Div. LEXIS 3866 (N.Y. App. Div. 3d Dep't 1974).

Import of cases holding that a due process hearing is required prior to a non-final deprivation of property in absence of extraordinary circumstances has been limited to such an extent that focus of inquiry should now be on whether statutory procedures reasonably accommodate interests of all parties. Palermo v Eisenberg, 81 Misc. 2d 1014, 367 N.Y.S.2d 378, 1975 N.Y. Misc. LEXIS 2517 (N.Y. Sup. Ct. 1975).

The salary of a police officer who is a permanent civil service appointee may not be suspended without an evidentiary hearing on the ground of the officer's failure to report for regular duty after he has been ceritified as physically able to work, pursuant to Gen Mun Law § 207-c, following a period of disability. Goglia v Sardino, 119 Misc. 2d 907, 464 N.Y.S.2d 966, 1983 N.Y. Misc. LEXIS 3613 (N.Y. Sup. Ct. 1983), aff'd, 101 A.D.2d 1013, 476 N.Y.S.2d 268, 1984 N.Y. App. Div. LEXIS 18744 (N.Y. App. Div. 4th Dep't 1984).

Demoted county public works employee has no viable § 1983 procedural due process claim, even though he did not receive hearing generally required under Civ S § 75, where cause of demotion was prior promotion in violation of seniority provisions in collective bargaining agreement, because employee had no

legitimate claim of entitlement to promotion. Ciambriello v County of Nassau, 137 F. Supp. 2d 216, 2001 U.S. Dist. LEXIS 4281 (E.D.N.Y. 2001), aff'd in part, vacated in part, 292 F.3d 307, 2002 U.S. App. LEXIS 10722 (2d Cir. N.Y. 2002).

Former employee contended that her alleged constructive discharge violated the N.Y. Civ. Serv. Law § 75(1) because she was a covered civil service employee who was removed without being afforded a proper hearing; thus, the employee alleged facts sufficient to support this claim. Illiano v Mineola Union Free Sch. Dist., 585 F. Supp. 2d 341, 2008 U.S. Dist. LEXIS 91854 (E.D.N.Y. 2008).

8. Arbitration

Because the dismissals of two employees were plainly not disciplinary, but were for failure to meet qualifications of employment, the "reasonable relationship" test was not met; therefore, the employees were properly dismissed and not entitled to relief under N.Y. Civ. Serv. Law §§ 75, 76 or N.Y. C.P.L.R. art. 75. New York State Office of Children & Family Servs. v Lanterman, 14 N.Y.3d 275, 899 N.Y.S.2d 726, 926 N.E.2d 233, 2010 N.Y. LEXIS 48 (N.Y. 2010).

Submission to arbitration of disciplinary charges is contrary to both § 75 and to police department rules and regulations which state that resolution of disciplinary matters, except those warranting only minor penalties, must be in accordance with civil service rules and regulations. Niagara Falls Police Club, Inc. v Niagara Falls, 120 A.D.2d 963, 502 N.Y.S.2d 838, 1986 N.Y. App. Div. LEXIS 57062 (N.Y. App. Div. 4th Dep't 1986).

Arbitrator exceeded his authority, and his award would be vacated pursuant to CLS CPLR § 7511(b)(1)(iii), where arbitrator found that petitioner had violated collective bargaining agreement by imposing discipline without following procedure provided by CLS Civ S § 75, arbitrator reasoned that although agreement was silent as to discipline, provision on "fair working conditions" included, by virtue of past practice, compliance with § 75 in imposing discipline, but that provision was mere statement of purpose and did not by itself impose substantive obligations, and agreement contained neither express provision on discipline nor express provision allowing consideration of past practice. Canandaigua v Canandaigua Police Officers Ass'n, 174 A.D.2d 1048, 572 N.Y.S.2d 213, 1991 N.Y. App. Div. LEXIS 9009 (N.Y. App. Div. 4th Dep't 1991).

Issues of whether police officer remained disabled under CLS Gen Mun § 207-c and whether collective bargaining agreement required arbitration before termination of his disability benefits were for arbitrator to decide, and thus judicial relief in Article 78 proceeding was not warranted, where (1) collective bargaining agreement provided that "if the [Union] and the Chief of Police fail to agree on an on-the-job injury or continuation of, then both sides agree to send the issue to grievance arbitration," and (2) neither that agreement nor due process required evidentiary hearing as condition precedent to arbitration or gave parties right to judicial review as alternative to arbitration. Gamma v Bloom, 274 A.D.2d 14, 711 N.Y.S.2d 464, 2000 N.Y. App. Div. LEXIS 7859 (N.Y. App. Div. 2d Dep't 2000).

Confirmation of an arbitration award in an N.Y. C.P.L.R. 7510 proceeding was proper because the arbitrator correctly found that the decision to eliminate correction sergeants from the list of personnel who could take the exam for an assistant warden position ran afoul of the competitive process envisioned by the Civil Service Law and violated N.Y. Const. art. V, § 6; a county's personnel officer determinations were not immune from oversight or review. While N.Y. Civ. Serv. Law § 75 precluded removal of a person holding a position by permanent appointment in the competitive class except for cause, an employee may not have been removed when there was an illegality or irregularity in the examination process. Matter of Ulster County Sheriff's Empls. Assn., CWA Local 1105 (Ulster County Sheriff's Dept.), 100 A.D.3d 1327, 956 N.Y.S.2d 595, 2012 N.Y. App. Div. LEXIS 8176 (N.Y. App. Div. 3d Dep't 2012), app. denied, 20 N.Y.3d 859, 960 N.Y.S.2d 351, 984 N.E.2d 326, 2013 N.Y. LEXIS 286 (N.Y. 2013).

9. Collective bargaining agreements

Collective bargaining agreement between New York City Transit Authority and bus drivers did not purport to alter or supersede CLS Civ S § 75(3) pertaining to suspension without pay pending hearing and determination of charges against permanent civil service employees. Gellman v Gunn, 143 A.D.2d 628, 533 N.Y.S.2d 113, 1988 N.Y. App. Div. LEXIS 9497 (N.Y. App. Div. 2d Dep't 1988).

Arbitrator exceeded his authority, and his award would be vacated pursuant to CLS CPLR § 7511(b)(1)(iii), where arbitrator found that petitioner had violated collective bargaining agreement by imposing discipline without following procedure provided by CLS Civ S § 75, arbitrator reasoned that although agreement was silent as to discipline, provision on "fair working conditions" included, by virtue of past practice, compliance with § 75 in imposing discipline, but that provision was mere statement of purpose and did not by itself impose substantive obligations, and agreement contained neither express provision on discipline nor express provision allowing consideration of past practice. Canandaigua v Canandaigua Police Officers Ass'n, 174 A.D.2d 1048, 572 N.Y.S.2d 213, 1991 N.Y. App. Div. LEXIS 9009 (N.Y. App. Div. 4th Dep't 1991).

School district did not impermissibly terminate school bus driver's employment without hearing in violation of CLS Civ S § 75, and thus court erred in annulling school district's determination to accept driver's "resignation," reinstating her to her position, and granting her back pay and benefits; district's acceptance of driver's constructive resignation, as provided by parties' collective bargaining agreement, was not disciplinary action as would entitle driver to prior notice or hearing. Barrera v Frontier Cent. Sch. Dist., 249 A.D.2d 927, 672 N.Y.S.2d 218, 1998 N.Y. App. Div. LEXIS 5010 (N.Y. App. Div. 4th Dep't 1998).

Article 78 proceeding challenging city general services commissioner's ruling that petitioner was in violation of city code could not be transferred to Appellate Division where hearing was mandated by collective bargaining agreement and not by CLS Civ S § 75, and thus "arbitrary and capricious," rather than "substantial evidence," standard applied. Pierino v Brown, 281 A.D.2d 960, 722 N.Y.S.2d 845, 2001 N.Y. App. Div. LEXIS 2917 (N.Y. App. Div. 4th Dep't 2001).

Because the exclusionary language of the parties' collective bargaining agreement relegated them to the N.Y. Civ. Serv. Law § 75 procedure for reviewing an employee's alleged misconduct rather than the grievance/arbitration procedures provided by the agreement, the trial court properly dismissed the union's N.Y. C.P.L.R. 7503 application to compel arbitration. Matter of Oxford Empl. Support Personnel Assn. (Oxford Academy & Cent. School Dist.), 40 A.D.3d 1297, 836 N.Y.S.2d 355, 2007 N.Y. App. Div. LEXIS 6058 (N.Y. App. Div. 3d Dep't), app. denied, 9 N.Y.3d 807, 843 N.Y.S.2d 536, 875 N.E.2d 29, 2007 N.Y. LEXIS 2659 (N.Y. 2007).

Union was not entitled to arbitration of a dispute concerning a village's selection of disciplinary hearing officer because no reasonable relationship existed between the parties' collective bargaining agreement (CBA) and their dispute regarding the selection of a hearing officer and thus the CBA did not modify the village's N.Y. Civ. Serv. Law § 75(2) power to designate a hearing officer. Matter of Johnson City Professional Fire Fighters Local 921 v Village of Johnson City, 75 A.D.3d 805, 906 N.Y.S.2d 343, 2010 N.Y. App. Div. LEXIS 5909 (N.Y. App. Div. 3d Dep't 2010).

Public Employment Relations Board erred under N.Y. C.P.L.R. 7803(3) when it held that police disciplinary matters involving honorably discharged veterans and volunteer firefighters were an exception to the prohibition against bargaining for those subjects in a collective bargaining agreement, as the provisions regarding police discipline were enacted in the city charter prior to N.Y. Civ. Serv. Law §§ 75 and 76, such that they were preserved under § 76(4). Matter of City of Middletown v City of Middletown Police Benevolent Assn., 81 A.D.3d 1238, 917 N.Y.S.2d 389, 2011 N.Y. App. Div. LEXIS 1358 (N.Y. App. Div. 3d Dep't 2011).

School district's petition for a permanent stay of arbitration with respect to a grievance arising from its termination of an employee was properly dismissed because the provisions of the collective bargaining agreement did not violate public policy or provisions of the Civil Service Law. Matter of Kenmore-Town of Tonawanda Union Free Sch. Dist. (Ken-Ton Sch. Empls. Assn.),

110 A.D.3d 1494, 974 N.Y.S.2d 679, 2013 N.Y. App. Div. LEXIS 6452 (N.Y. App. Div. 4th Dep't 2013).

Trial court's judgment annulling the determination of the city's collective bargaining board (board), which compelled the city to disclose certain materials requested by a nurses association in connection with employee disciplinary proceedings was reversed because the board's decision could not be said to have been taken without sound basis in reason since the collective bargaining agreement granted the union a right to limited information in the context of disciplinary proceedings. Matter of City of New York v New York State Nurses Assn., 130 A.D.3d 28, 10 N.Y.S.3d 78, 2015 N.Y. App. Div. LEXIS 4360 (N.Y. App. Div. 1st Dep't 2015), aff'd, 29 N.Y.3d 546, 82 N.E.3d 441, 60 N.Y.S.3d 100, 2017 N.Y. LEXIS 1454 (N.Y. 2017).

Town improperly denied a police officer's request to arbitrate a disciplinary grievance pursuant to the terms of a collective bargaining agreement between the town and the officer's union, as such was authorized by the Taylor Law, N.Y. Civ. Serv. Law § 75(2), and that procedure was not precluded by N.Y. Town Law § 155. Elias v Town of Crawford, 840 N.Y.S.2d 705, 17 Misc. 3d 176, 2007 N.Y. Misc. LEXIS 5086 (N.Y. Sup. Ct. 2007).

10. Delays in hearings

If delay in discharge of permanent civil service city employee for misconduct was occasioned by his fault, he cannot be heard to complain nor be allowed recompense for the period in excess of 30 days. In ordinary situation, there is no burden upon suspended city employee to press for hearing on disciplinary charges, but if he makes attempt to impede administrative process for any significant period, as result of which prompt determination as statutorily intended has been prevented, he should be deemed to have abandoned both his position and any claim to back pay. Gerber v New York City Housing Authority, 42 N.Y.2d 162, 397 N.Y.S.2d 608, 366 N.E.2d 268, 1977 N.Y. LEXIS 2165 (N.Y. 1977).

Where delay in holding hearing which eventually resulted in discharge of village police department employee was due exclusively to employee's conduct in procuring repeated stays in his attempt to permanently enjoin hearing, employee was in no position to invoke statutory 30-day limit for suspension pending hearing. Brockman v Dordelman, 48 A.D.2d 670, 367 N.Y.S.2d 566, 1975 N.Y. App. Div. LEXIS 9687 (N.Y. App. Div. 2d Dep't 1975).

Article 78 proceeding brought by former deputy sheriff seeking to compel sheriff to hold hearing with respect to deputy's suspension, was in nature of mandamus, and was not barred by applicable four-month statute of limitations, in view of fact that deputy's initial demand of sheriff for hearing was timely, and Article 78 proceeding was commenced one month after sheriff's refusal of such demand. Durham v Amico, 52 A.D.2d 724, 382 N.Y.S.2d 169, 1976 N.Y. App. Div. LEXIS 12417 (N.Y. App. Div. 4th Dep't 1976).

Reviewing court would modify determination, which dismissed civil servant from his position, to add provision directing former employer to pay employee his salary for period beginning 30 days after commencement of his suspension and continuing until date of his dismissal less amount of compensation from other employment, since even if employee has been found guilty and later dismissed, employee is entitled, pursuant to Civ S Law § 75(3) to receive his full salary for any period of suspension in excess of $30 less sums earned elsewhere, especially in that no evidence existed that petitioner caused delay or contributed thereto. Horton v Kammerer, 84 A.D.2d 841, 444 N.Y.S.2d 176, 1981 N.Y. App. Div. LEXIS 16079 (N.Y. App. Div. 2d Dep't 1981).

A civil service employee would be entitled to back pay for the period beginning 30 days after his suspension until the date of the determination following the new hearing to which the employee was entitled, since Civ S Law § 75(3) permits suspension of an employee without pay for a period not to exceed 30 days. Chopay v Oyster Bay, 99 A.D.2d 810, 472 N.Y.S.2d 139, 1984 N.Y. App. Div. LEXIS 17199 (N.Y. App. Div. 2d Dep't 1984).

City firefighter discharged for misconduct was entitled to summary judgment in action seeking back pay and benefits due under CLS Civ S § 75 for period beginning 30 days from date of his initial suspension through date of his eventual dismissal since statute provides that civil service employee charged with misconduct may generally be suspended without pay for period not exceeding 30 days, and employee may be found to have waived his statutory claim only where he evaded service to delay hearing, requested repeated stays of hearing, or requested postponement of hearing, none of which occurred here. Hansen v Gloversville, 134 A.D.2d 657, 521 N.Y.S.2d 169, 1987 N.Y. App. Div. LEXIS 50875 (N.Y. App. Div. 3d Dep't 1987).

New York City Transit Authority bus operator was entitled to back pay for period beginning 30 days after his suspension and continuing until his subsequent dismissal, notwithstanding that his suspension was imposed pursuant to parties' collective bargaining agreement, since that agreement did not purport to alter or supersede CLS Civ S § 75(3) as to suspension without pay pending hearing and determination of charges against permanent civil service employees. Phifer v Gunn, 143 A.D.2d 992, 533 N.Y.S.2d 898, 1988 N.Y. App. Div. LEXIS 10782 (N.Y. App. Div. 2d Dep't 1988), app. denied, 74 N.Y.2d 608, 545 N.Y.S.2d 104, 543 N.E.2d 747, 1989 N.Y. LEXIS 2363 (N.Y. 1989).

City school district worker with permanent civil service status, who was dismissed for various instances of unauthorized tardiness and absence from work, was improperly denied back pay for period of delay in imposition of dismissal sanction from date of hearing under CLS Civ S § 75, during which period he remained under suspension without pay. Diehsner v Schenectady City School Dist., 152 A.D.2d 796, 543 N.Y.S.2d 576, 1989 N.Y. App. Div. LEXIS 9328 (N.Y. App. Div. 3d Dep't 1989).

City employees who were discharged for misconduct were entitled to recover their wages for period of delay in disciplinary proceeding that was attributable to their attorneys, who were engaged in hearing and deposition; activities of counsel for accused cannot be attributed to accused. Dunning v City of Newburgh, 210 A.D.2d 404, 620 N.Y.S.2d 105, 1994 N.Y. App. Div. LEXIS 12841 (N.Y. App. Div. 2d Dep't 1994).

Employee's right to be restored to payroll after 30 days of suspension was subject governed by collective bargaining agreement, not CLS Civ S § 75, where agreement stated that disciplinary grievance procedure "shall be in lieu of any other disciplinary procedure that may have previously applied to an employee covered by this Agreement including but not limited to the procedure specified in" CLS Civ S §§ 75 and 76. Robinson v New York City Transit Auth., 226 A.D.2d 467, 641 N.Y.S.2d 55, 1996 N.Y. App. Div. LEXIS 3538 (N.Y. App. Div. 2d Dep't 1996).

Petitioner was entitled to mandamus relief to compel town to pay him his salary for period beginning 30 days after commencement of his suspension until final determination of charges against him where town did not dispute that petitioner's suspension without pay extended beyond permissible 30-day period of CLS Civ S § 75(2), and delay in bringing matter to hearing was not attributable to any bad-faith conduct on his part. DiMattina v Town of Huntington, 233 A.D.2d 393, 650 N.Y.S.2d 744, 1996 N.Y. App. Div. LEXIS 11559 (N.Y. App. Div. 2d Dep't 1996).

Lapse of 3 months between administrative hearing, in which police officer was found guilty of violating departmental rules, and police commissioner's decision imposing penalties did not warrant vacatur of decision, even though collective bargaining agreement contained 60-day time limitation, where agreement did not contain specific language barring further action after 60 days, and there was no prejudice to officer. Covino v Kane, 273 A.D.2d 380, 710 N.Y.S.2d 600, 2000 N.Y. App. Div. LEXIS 7136 (N.Y. App. Div. 2d Dep't 2000), app. denied, 96 N.Y.2d 701, 722 N.Y.S.2d 793, 745 N.E.2d 1015, 2001 N.Y. LEXIS 29 (N.Y. 2001).

Where the employee commenced a N.Y. C.P.L.R. art. 78 proceeding more than two years after the employee was suspended without a hearing for more than 30 days allegedly in violation of N.Y. Village Law § 8-804 and N.Y. Civ. Serv. Law § 75, the proceeding was untimely under N.Y. C.P.L.R. 217, and the action was properly dismissed under N.Y. C.P.L.R. 7804(f); the four-month statute of limitations began to run 30 days after the suspension without a hearing became effective, and the employee's demand for a hearing did not toll the statute of limitations, nor did the actions taken by the Village of Red Hook in conducting a hearing to consider the charges against the employee. Matter of

Rapoli v Village of Red Hook, 29 A.D.3d 1007, 815 N.Y.S.2d 722, 2006 N.Y. App. Div. LEXIS 7168 (N.Y. App. Div. 2d Dep't 2006).

Although an employee sought a brief adjournment of the original hearing date, the employee did not openly and knowingly agree to waive all rights to back pay or to a timely resolution; therefore, the town could not delay the hearing for an indefinite period without paying the employee backpay under N.Y. Civ. Serv. Law § 75(3). Nabors v Town of Somers, 72 A.D.3d 769, 900 N.Y.S.2d 92, 2010 N.Y. App. Div. LEXIS 3053 (N.Y. App. Div. 2d Dep't 2010).

If delay in disciplinary proceedings against civil servant is occasioned by conduct of accused, he cannot justly be heard to complain nor be allowed a recompense for period involved. Shales v Rochester, 91 Misc. 2d 195, 397 N.Y.S.2d 566, 1977 N.Y. Misc. LEXIS 2272 (N.Y. Sup. Ct. 1977).

Transit authority employee is entitled to judgment for lost net wages for 26 day period in excess of 30 day suspension period without pay permitted by Civil Service Law § 75(3) even though employee invoked contractual grievance procedure prior to departmental trial of misconduct charges, as such action cannot be read as waiver of statutory 30 day limitation. Sanders v New York City Transit Authority, 130 Misc. 2d 719, 497 N.Y.S.2d 231, 1985 N.Y. Misc. LEXIS 3266 (N.Y. Civ. Ct. 1985), aff'd, 135 Misc. 2d 688, 517 N.Y.S.2d 854, 1987 N.Y. Misc. LEXIS 2290 (N.Y. App. Term 1987).

Supreme court erred in reinstating a state trooper with back pay based on a suspension that exceeded the 30-day time limit in N.Y. Civ. Serv. Law § 75(3). The trooper had precipitated the delay in his disciplinary hearing beyond 30 days by improperly refusing to authorize the release of certain medical records, and therefore, he was not entitled to back pay for the period of time between the expiration of the 30-day time limit and his eventual termination. Matter of Skrypek v Bennett, 31 A.D.3d 827, 817 N.Y.S.2d 452, 2006 N.Y. App. Div. LEXIS 8637 (N.Y. App. Div. 3d Dep't), rev'd, 7 N.Y.3d 919, 829 N.Y.S.2d 448, 861 N.E.2d 812, 2006 N.Y. LEXIS 3749 (N.Y. 2006).

Because there was an exception to the statute of limitations in Civil Service Law § 75 if an officer allegedly committed misconduct constituting a crime, New York City Civilian Complaint Review Board (CCRB) Revised Rule 1-15(a) was rational in that it allowed the CCRB to investigate a late complaint to determine whether the alleged misconduct constituted a crime. It was irrelevant that the CCRB could not investigate complaints of criminal conduct. Lynch v New York City Civilian Complaint Review Bd., 98 N.Y.S.3d 695, 2019 N.Y. Misc. LEXIS 1405 (N.Y. Sup. Ct. 2019).

11. —Criminal charges involved

Hearing officer, after granting 3 adjournments, did not violate employee's due process rights in proceeding with disciplinary proceeding in employee's absence while employee was in custody of Department of Mental Hygiene after having been found not responsible for stabbing death of his wife by reason of mental disease or defect, since employee's termination was based on same conduct that had been fully explored and established beyond reasonable doubt in criminal proceeding, and employee, although given opportunity to reopen hearing, never suggested what exculpatory evidence he might adduce if he were allowed to appear at hearing. Rao v Gunn, 73 N.Y.2d 759, 536 N.Y.S.2d 47, 532 N.E.2d 1275, 1988 N.Y. LEXIS 3360 (N.Y. 1988).

Where petitioner was suspended without pay on March 7, 1957, pending a hearing on charges of public intoxication, driving while intoxicated, striking an officer, etc., and his counsel requested a further 30-day leave of absence without pay and the withholding of formal filing of charges, then an extension of time to prepare for hearing and a change of venue which was agreed to if petitioner would take an additional leave of absence without pay, which petitioner refused to do, delay in the receipt of formal charges was attributable to petitioner or his attorney and the Commissioner was acting in manner warranted by the circumstances in proceeding with the hearing, sustaining the charges, and dismissing petitioner from his position as a game protector notwithstanding refusal of petitioner or his counsel to participate. Perry v Mauhs, 14 A.D.2d 624, 218 N.Y.S.2d 297, 1961 N.Y. App. Div. LEXIS 9399 (N.Y. App. Div. 3d Dep't), app. dismissed, 10 N.Y.2d 886, 1961 N.Y. LEXIS 2304 (N.Y. 1961).

Since acts involved in administrative disciplinary hearing would constitute crime of endangering welfare of an incompetent person, even though the civil servant was acquitted on such criminal charges, fact that the administrative charges were preferred more than one year after the incident did not bar disciplinary proceeding. Scales v Maxwell, 52 A.D.2d 719, 382 N.Y.S.2d 171, 1976 N.Y. App. Div. LEXIS 12410 (N.Y. App. Div. 4th Dep't 1976).

City firefighter, who was dismissed, in part, for failing to inform his superiors of earlier Florida criminal proceeding in which he pleaded nolo contendere to charge of driving while intoxicated, was estopped from asserting 18-month limitations period of CLS Civ Serv § 75(4) since it was his own wrongful concealment of incident which caused delay in administrative charge, and city commissioner of public safety promptly lodged charge on becoming aware of Florida prosecution. Longo v Dolce, 192 A.D.2d 157, 600 N.Y.S.2d 962, 1993 N.Y. App. Div. LEXIS 7665 (N.Y. App. Div. 2d Dep't), app. dismissed, app. denied, 82 N.Y.2d 836, 606 N.Y.S.2d 589, 627 N.E.2d 511, 1993 N.Y. LEXIS 4312 (N.Y. 1993).

Disciplinary proceeding with respect to fraud-related charges was not time-barred under CLS Civ S § 75(4) where facts alleged would, if proved in court, constitute larceny by false promise under CLS Penal § 155.05(2). Folborg v Bratton, 227 A.D.2d 108, 641 N.Y.S.2d 656, 1996 N.Y. App. Div. LEXIS 4773 (N.Y. App. Div. 1st Dep't), app. denied, 88 N.Y.2d 812, 649 N.Y.S.2d 379, 672 N.E.2d 605, 1996 N.Y. LEXIS 2964 (N.Y. 1996).

Charge specifying "unauthorized exercise of (police officer's) official functions," in violation of New York City Police Department Patrol Guide's prohibition against "conduct prejudicial to good order, efficiency or discipline of the department," was not barred by 18-month Statute of Limitations in CLS Civ S § 75(4) since misconduct charged also constituted crime of official misconduct under CLS Penal § 195.00(1), which is expressly excluded from time bar of CLS Civ S § 75(4). Mieles v Safir, 272 A.D.2d 199, 707 N.Y.S.2d 437, 2000 N.Y. App. Div. LEXIS 5660 (N.Y. App. Div. 1st Dep't 2000).

Hearing officer properly found that the charge against a building inspector was not time-barred because if proven, the allegations would constitute crimes. Matter of Snowden v Village of Monticello, 166 A.D.3d 1451, 89 N.Y.S.3d 366, 2018 N.Y. App. Div. LEXIS 8160 (N.Y. App. Div. 3d Dep't 2018).

Where hearing on suspension of police officer for alleged misconduct was delayed until disposition of criminal charges against him at request of police officer's own counsel, city was not responsible for delay and, lacking such responsibility, would not be forced to assume risk of liability for back pay. Shales v Rochester, 91 Misc. 2d 195, 397 N.Y.S.2d 566, 1977 N.Y. Misc. LEXIS 2272 (N.Y. Sup. Ct. 1977).

12. Effect of provisions imposing automatic sanctions or presumptions based on specified conduct

The provisions of this section against removal of persons in Classified Civil Service except after hearing upon stated charges are violated by a rule adopted by the State Civil Service Commission under § 6 making unexplained absence without leave for ten work days constitute an employee's resignation. Civil service regulation providing: "When an employee is absent without leave and without an explanation therefor for a period of 10 work days, such absence shall be deemed to constitute a resignation effective on the date of the commencement of such absence," was inconsistent with Civil Service Law requirement of notice prior to termination and was therefore invalid. Johnson v Director, Downstate Medical Center, State University of New York, 41 N.Y.2d 1061, 396 N.Y.S.2d 172, 364 N.E.2d 837, 1977 N.Y. LEXIS 2060 (N.Y. 1977).

The decision in Johnson v Director, Downstate Medical Center, State University of New York (1977) 41 NY2d 1061, 396 NYS2d 172, 364 NE2d 837, invalidating a rule of the State Department of Civil Service (4 NYCRR 5.3 [d]), which provided that an employee was deemed to have resigned his position when he was absent without leave and without an explanation for a period in excess of 10 working days, does not hold that an unexplained

absence may not be grounds for dismissal of an employee; the thrust of that decision is that the full panoply of procedural due process required by section 75 of the Civil Service Law may not be circumvented by an administrative rule creating an irrebuttable presumption of resignation. McGirr v Division of Veterans Affairs, Executive Dep't, 43 N.Y.2d 635, 403 N.Y.S.2d 212, 374 N.E.2d 123, 1978 N.Y. LEXIS 1781 (N.Y.), cert. denied, 439 U.S. 826, 99 S. Ct. 97, 58 L. Ed. 2d 119, 1978 U.S. LEXIS 2641 (U.S. 1978).

Criminal trespass is not sort of misdemeanor that can be construed facially as crime "involving violation of [the] oath of office" for purposes of CLS Pub O § 30(1)(e), and thus police officer convicted of second degree criminal trespass was entitled to hearing rather than summary dismissal from office, since lack of moral integrity is not implicit in elements of offense. Duffy v Ward, 81 N.Y.2d 127, 596 N.Y.S.2d 746, 612 N.E.2d 1213, 1993 N.Y. LEXIS 635 (N.Y. 1993).

Competitive permanent employee, who was terminated by industrial commissioner pursuant to invalid rule providing that classified civil service employee who is absent without leave and without explanation for period of ten working days shall be deemed to have automatically resigned, was, in accordance with policy adopted by state of reinstating all tenured civil service employees terminated pursuant to invalid rule, entitled to reinstatement with back pay as of date of her "resignation" under invalid rule. Bernstein v Industrial Comm'r of New York, 59 A.D.2d 678, 398 N.Y.S.2d 437, 1977 N.Y. App. Div. LEXIS 13611 (N.Y. App. Div. 1st Dep't 1977).

Employees protected under section 75 of the Civil Service Law may not be deprived of their section 75 rights by rules establishing that certain acts of misconduct during employment result in automatic sanctions. Mandelkern v Buffalo, 64 A.D.2d 279, 409 N.Y.S.2d 881, 1978 N.Y. App. Div. LEXIS 12254 (N.Y. App. Div. 4th Dep't 1978).

County Department of Public Works was not entitled to terminate sewage treatment plant operator without hearing where previous disciplinary charges against operator had resulted in stipulation in which he agreed to be placed on probation for 6 months and to be terminated without another hearing if, during probationary period, his job performance was adversely affected by his consumption of alcohol, but Department then terminated him for sleeping on job and "failing to give a fair day's work"; notice of infraction, letter of termination, and testimony of individuals involved all established that operator was terminated for reasons other than his consumption of alcohol, and thus stipulation permitting dismissal without hearing was inapplicable. Taylor v Cass, 122 A.D.2d 885, 505 N.Y.S.2d 929, 1986 N.Y. App. Div. LEXIS 59370 (N.Y. App. Div. 2d Dep't 1986).

Petitioner's employment as correction officer was properly terminated under automatic vacatur provision of CLS Pub O § 30 on his conviction of federal felony of mail fraud (18 USCS § 1341). Graham v Coughlin, 135 A.D.2d 1014, 522 N.Y.S.2d 738, 1987 N.Y. App. Div. LEXIS 52893 (N.Y. App. Div. 3d Dep't 1987), aff'd, 72 N.Y.2d 1014, 534 N.Y.S.2d 919, 531 N.E.2d 640, 1988 N.Y. LEXIS 2703 (N.Y. 1988).

Police officer, who lost his position automatically under CLS Pub O § 30(1)(e) following his conviction of second degree menacing, was not entitled to pretermination hearing pursuant to CLS Civ S § 75. Segars v City of Buffalo, 237 A.D.2d 910, 654 N.Y.S.2d 919, 1997 N.Y. App. Div. LEXIS 3505 (N.Y. App. Div. 4th Dep't 1997), app. denied, 1997 N.Y. App. Div. LEXIS 6453 (N.Y. App. Div. 4th Dep't May 30, 1997).

Town policy of terminating employee who tested positive for drug or alcohol use twice within 10-year period was not unconstitutional or violative of CLS Civ S § 75 by virtue of creating irrebuttable presumption of guilt without affording employee due process hearing, since town had negotiated with employee's union to enact policy, and employee received copy of it and agreed to its terms by signing it; termination was not arbitrary, capricious or unlawful. Grippo v Martin, 257 A.D.2d 952, 686 N.Y.S.2d 118, 1999 N.Y. App. Div. LEXIS 734 (N.Y. App. Div. 3d Dep't 1999).

Where one sentence of civil service rule provided for summary dismissal of both permanent and probationary civil service employees, but remainder of lengthy rule dealt entirely with probationary employees, rule did not apply to permanent employee so as to permit summary dismissal. Cornwall v Baxter, 46 Misc. 2d 769, 260 N.Y.S.2d 909, 1964 N.Y. Misc. LEXIS 1612 (N.Y. Sup. Ct. 1964), modified, 23 A.D.2d 815, 258 N.Y.S.2d 569, 1965 N.Y. App. Div. LEXIS 4499 (N.Y. App. Div. 4th Dep't 1965).

Because defendants, the department of corrections and its commissioner, and the city, did not invoke N.Y. Pub. Off. Law § 30(1)(e) until over two years after plaintiff former corrections officer's conviction for third degree sexual abuse, and instead elected a disciplinary process under N.Y. Civ. Serv. Law § 75, provided counseling, and then engaged in a lengthy negotiation process, defendants indicated that the offense was insufficient for automatic termination under § 30(1)(e), and that a factual hearing would be necessary; once deciding that the offense did not fall under the purview of § 30(1)(e) and that disciplinary proceedings would be more appropriate, defendants could not later seek to revoke that determination in order to avoid the procedural requirements of N.Y. Civ. Serv. Law § 75(1), and thus defendant's motion to dismiss under Fed. R. Civ. P. 12(b)(6) was denied. Whitfield v Fraser, 272 F. Supp. 2d 340, 2003 U.S. Dist. LEXIS 12292 (S.D.N.Y. 2003).

13. Hearings open to press and public

When a state or a subdivision thereof conducts a hearing which may result in deprivation of employment or in the imposition of a fine or other monetary penalty, affected employee is entitled to procedural due process; such procedural due process requires that the hearing be open to the press and the public when the employee so requests. While valid reasons may sometimes exist for denying an employee's request for an open or public hearing on charges of misconduct, where no reasons were set forth for denying employee's request for public hearing on charge that he neglected duty by allowing fire engine to be driven carelessly in violation of city fire department rules and where employee faced possible suspension, demotion, dismissal or monetary fine if he was found guilty of charge, denial of employee's request for public hearing violated his right to due process of law. Mosher v Hanley, 56 A.D.2d 141, 391 N.Y.S.2d 753, 1977 N.Y. App. Div. LEXIS 10032 (N.Y. App. Div. 3d Dep't 1977).

Determination that state trooper violated CLS Penal § 175.30 by filing false registration form for firearms was supported by his own admission that, although he acquired firearms in June 1986, he falsely indicated on registration form that he acquired them in March 1987; despite his argument that that falsity was insignificant detail of his request under amnesty program, intent to defraud is not element of second degree offering false instrument for filing. Hricik v McMahon, 247 A.D.2d 935, 668 N.Y.S.2d 295, 1998 N.Y. App. Div. LEXIS 1320 (N.Y. App. Div. 4th Dep't 1998).

Employment has been held to be "property" within meaning of due process clause of the Constitution, and where the state conducts a hearing which may result in deprivation of employment, the affected employee is entitled to due process of law, which further requires that hearing be open to press and public. Thus, civil service hearing officer exceeded jurisdiction in excluding public from hearing which could result in termination of employment in the absence of findings of exceptional circumstances justifying such exclusion. Randall v Toll, 74 Misc. 2d 315, 344 N.Y.S.2d 712, 1973 N.Y. Misc. LEXIS 2013 (N.Y. Sup. Ct. 1973).

A newspaper publisher and two reporters would be denied access to "use of force" forms filed in the internal investigation unit of the city police department, which forms are used to evaluate an officer's performance, and excessive force and harassment complaints filed against the county sheriff's department personnel, which are part of personnel records used for disciplinary purposes, since these records were not "relevant and material" in a proceeding brought to require compliance with the Freedom of Information Law, falling within the scope of Civ R Law § 50-a which exempts police personnel records from the Freedom of Information Law. Gannett Co. v James, 108 Misc. 2d 862, 438 N.Y.S.2d 901, 1981 N.Y. Misc. LEXIS 2304 (N.Y. Sup. Ct. 1981), aff'd, 86 A.D.2d 744, 447 N.Y.S.2d 781, 1982 N.Y. App. Div. LEXIS 15305 (N.Y. App. Div. 4th Dep't 1982).

14. Immunity

Substantial evidence supported Commissioner of Transportation's determination that civil servant willfully refused to answer

questions at misconduct hearing regarding performance of his official duties, notwithstanding his claim that he acted on counsel's advice, where he invoked his privilege against self-incrimination and refused to respond to questions or to produce work-related diary, even though he was automatically entitled to use immunity. Civil servant's dismissal for insubordination for refusing to answer questions at hearing on misconduct charges did not violate fundamental fairness or his privilege against self-incrimination, even though he was not explicitly advised that his constitutional right to immunity attached automatically by operation of law or that his answers would not be used against him in criminal prosecution, since hearing was civil proceeding convened to investigate disciplinary charges of work-related misconduct, he was not requested to waive privilege against self-incrimination, only sanction he faced was dismissal for refusal to testify, and he was assisted by counsel at hearing. Matt v Larocca, 71 N.Y.2d 154, 524 N.Y.S.2d 180, 518 N.E.2d 1172, 1987 N.Y. LEXIS 19884 (N.Y. 1987), cert. denied, 486 U.S. 1007, 108 S. Ct. 1734, 100 L. Ed. 2d 197, 1988 U.S. LEXIS 2267 (U.S. 1988).

15. Jury trials

Special Term erred in removing from the Jury to the Nonjury Trial Calendar a proceeding by petitioner challenging the termination of his public employment, since petitioner, as a provisional employee at the time of his discharge, was not entitled to a hearing in connection therewith, and any attempt to challenge his discharge would be in the nature of mandamus to review, and since petitioner seeking Article 78 relief in the nature of mandamus to review is entitled to a trial by jury. Preddice v Callanan, 96 A.D.2d 613, 464 N.Y.S.2d 598, 1983 N.Y. App. Div. LEXIS 19157 (N.Y. App. Div. 3d Dep't 1983).

A petition by a civil service employee alleging that his position was abolished in violation of his right to permanent employment and the prohibitions contained in this section against removal except as herein provided was sufficient to require a jury trial on the issue of whether abolition of the position was in good faith. Seidel v Gaynor, 26 Misc. 2d 140, 205 N.Y.S.2d 27, 1960 N.Y. Misc. LEXIS 2488 (N.Y. Sup. Ct. 1960).

Where there are conflicting allegations as to the good faith of the appointing officer in discharging a civil service employee at the end of his probationary period, an issue of fact is raised requiring a jury trial. Polsenski v Montgomery, 71 N.Y.S.2d 386, 1947 N.Y. Misc. LEXIS 2563 (N.Y. Sup. Ct. 1947), app. dismissed, 87 N.Y.S.2d 438 (N.Y. App. Div. 1949).

16. Nature of hearing; adequacy

An interview of petitioner, a war veteran lawfully appointed to a city civil service position, with the secretary of the municipal civil service commission, in which, it is alleged, the petitioner admitted that he had misstated his educational qualifications, does not constitute the kind of hearing to which he was entitled before he could be removed. Wolff v Hodson, 285 N.Y. 197, 33 N.E.2d 90, 285 N.Y. (N.Y.S.) 197, 1941 N.Y. LEXIS 1518 (N.Y. 1941).

Where discharged employee seeks only expungement of stigmatizing material in his personnel file, not reinstatement or damages, likelihood of dissemination is sufficient to trigger right to name-clearing hearing; actual dissemination is not essential. Swinton v Safir, 93 N.Y.2d 758, 697 N.Y.S.2d 869, 720 N.E.2d 89, 1999 N.Y. LEXIS 3433 (N.Y. 1999).

Where police officer received written notice of his alleged misconduct, was advised that he could be represented by counsel, and was allowed to testify, to produce witnesses, and to cross-examine witnesses, record was developed which assured meaningful judicial review of charges of misconduct against police officer, and such officer was not discharged from employment without due process of law. Marsh v Hanley, 50 A.D.2d 687, 375 N.Y.S.2d 409, 1975 N.Y. App. Div. LEXIS 12530 (N.Y. App. Div. 3d Dep't 1975).

Associate personnel administrator of developmental center, facility of Department of Mental Hygiene, was not accorded fair hearing in connection with determination by director of center finding him guilty of charges of misconduct and incompetence where it was admitted that there was contact by communication, between hearing officer and individual prosecuting the charges, which occurred after hearing was concluded and prior to making determination under review and where such communications, included discussions concerning evidence which had been adduced at hearing and certain additional information or evidence sought by hearing officer on disputed issue. Avery v Rechter, 56 A.D.2d 963, 392 N.Y.S.2d 714, 1977 N.Y. App. Div. LEXIS 11372 (N.Y. App. Div. 3d Dep't 1977).

Civil servant's constitutional rights were violated by termination hearing pursuant to CLS Civ S § 75 where he was given notice of charges against him and of his right to be heard, but at time of hearing he was involuntarily committed to custody of State Commissioner of Mental Hygiene who denied him permission to attend hearing, and hearing nevertheless proceeded in his absence. Rao v Gunn, 121 A.D.2d 618, 503 N.Y.S.2d 646, 1986 N.Y. App. Div. LEXIS 58602 (N.Y. App. Div. 2d Dep't 1986), app. denied, 70 N.Y.2d 853, 523 N.Y.S.2d 492, 518 N.E.2d 4, 1987 N.Y. LEXIS 19063 (N.Y. 1987), rev'd, 73 N.Y.2d 759, 536 N.Y.S.2d 47, 532 N.E.2d 1275, 1988 N.Y. LEXIS 3360 (N.Y. 1988).

In civil service disciplinary proceeding, prosecutor's private consultation with witness during brief break in cross-examination was highly improper but did not deprive petitioner of fair hearing since review of testimony did not indicate that witness was in any way affected by such action. Wayering v County of St. Lawrence, 140 A.D.2d 838, 528 N.Y.S.2d 223, 1988 N.Y. App. Div. LEXIS 5034 (N.Y. App. Div. 3d Dep't 1988).

In disciplinary proceeding against site manager for town landfill and recycling center, separate penalty phase of hearing was not required where (1) parties stipulated that manager had no prior disciplinary matters in his record, and parties were put on notice that separate penalty hearing might not be held in light of such stipulation, (2) manager never sought separate penalty hearing, (3) hearing officer gave manager post-hearing opportunity to submit additional materials, and (4) manager did not claim that something favorable in his record was not considered by hearing officer. Finigan v Lent, 189 A.D.2d 935, 592 N.Y.S.2d 818, 1993 N.Y. App. Div. LEXIS 82 (N.Y. App. Div. 3d Dep't), app. dismissed, 81 N.Y.2d 1067, 601 N.Y.S.2d 583, 619 N.E.2d 661, 1993 N.Y. LEXIS 1754 (N.Y. 1993), app. denied, 82 N.Y.2d 657, 604 N.Y.S.2d 47, 624 N.E.2d 177, 1993 N.Y. LEXIS 3294 (N.Y. 1993).

In employer's disciplinary proceeding against correction officer, due process was not violated by refusal to grant further adjournment where correction officer failed to appear on first 2 hearing dates, his absence could not be explained by his attorney, and there was no indication that he would appear at later hearing if adjournment were granted. Jackman v Schembri, 222 A.D.2d 293, 635 N.Y.S.2d 30, 1995 N.Y. App. Div. LEXIS 12865 (N.Y. App. Div. 1st Dep't 1995), app. denied, 88 N.Y.2d 807, 647 N.Y.S.2d 164, 670 N.E.2d 448, 1996 N.Y. LEXIS 1596 (N.Y. 1996).

Teacher's aide's allegations of due process errors in connection with his termination would be rejected since CLS Civ S § 75 hearing accorded him same opportunities that would have been provided by school district's adherence to its sexual harassment policies and resultant investigation. Burkes v Enlarged City Sch. Dist., 257 A.D.2d 891, 684 N.Y.S.2d 57, 1999 N.Y. App. Div. LEXIS 506 (N.Y. App. Div. 3d Dep't 1999).

Court erred in granting plaintiff name-clearing hearing, even if defamatory statements were made about him in investigator's report, where plaintiff had been retired for 2 years when stigmatizing allegations were made, and he was not fired, suspended, or demoted. Aquilone v City of New York, 262 A.D.2d 13, 690 N.Y.S.2d 558, 1999 N.Y. App. Div. LEXIS 6176 (N.Y. App. Div. 1st Dep't), app. denied, 93 N.Y.2d 819, 697 N.Y.S.2d 566, 719 N.E.2d 927, 1999 N.Y. LEXIS 2958 (N.Y. 1999).

City correction officers were not entitled to pretermination hearing where they necessarily admitted in connection with their guilty pleas that "with intent to evade any tax imposed under ... (an) income or earnings tax statute, or any requirement thereof or any lawful requirement of the tax commission thereunder," they either "fail(ed) to make, render, sign, certify or file any return, or to supply any information within the time required by or under the provisions of such article or any such statute," or "with like intent, (did) supply any false or fraudulent information" (CLS Tax § 1801(a)), their public offices were vacated automatically on

conviction, misdemeanors of which they were convicted having involved willful deceit or calculated disregard for honest dealings. Bowman v Kerik, 271 A.D.2d 225, 706 N.Y.S.2d 327, 2000 N.Y. App. Div. LEXIS 3838 (N.Y. App. Div. 1st Dep't 2000).

County social services department's termination of caseworker's employment was violation of lawful procedure where commissioner who reviewed hearing officer's report and made final termination decision also preferred charges, selected hearing officer, and testified at hearing, and thus was disqualified from acting on those charges; case would be remitted to department for de novo determination by person who was not involved in original hearing. Trahan v Jefferson County Dep't of Soc. Servs., 281 A.D.2d 984, 722 N.Y.S.2d 682, 2001 N.Y. App. Div. LEXIS 2913 (N.Y. App. Div. 4th Dep't), app. denied, 732 N.Y.S.2d 622, 2001 N.Y. App. Div. LEXIS 10707 (N.Y. App. Div. 4th Dep't 2001), app. denied, 97 N.Y.2d 610, 740 N.Y.S.2d 694, 767 N.E.2d 151, 2002 N.Y. LEXIS 174 (N.Y. 2002).

Petitioner was entitled to name-clearing hearing where he sufficiently raised issues of partial falsity and overall characterization of information included in his personnel file, dissemination of such information, both past and future, as well as presence of "stigma plus" (governmental defamatory action in conjunction with loss of employment). Umlauf v Safir, 286 A.D.2d 267, 730 N.Y.S.2d 218, 2001 N.Y. App. Div. LEXIS 8139 (N.Y. App. Div. 1st Dep't 2001).

Even if the officers were correct in their contention that Civil Service Law § 75(2) applied, they nonetheless lacked standing because they had not demonstrated that the Division of State Police's policy of not allowing counsel at a critical incident investigation, as presently configured, was reasonably certain to result in disciplinary charges being brought against a member based on statements given during the initial critical incident inquiry. Police Benevolent Assn. of N.Y. State Troopers, Inc. v Division of N.Y. State Police, 43 A.D.3d 125, 840 N.Y.S.2d 828, 2007 N.Y. App. Div. LEXIS 8725 (N.Y. App. Div. 3d Dep't 2007), aff'd, 11 N.Y.3d 96, 863 N.Y.S.2d 387, 893 N.E.2d 803, 2008 N.Y. LEXIS 1930 (N.Y. 2008), app. dismissed, 10 N.Y.3d 952, 862 N.Y.S.2d 464, 892 N.E.2d 858, 2008 N.Y. LEXIS 2165 (N.Y. 2008).

Although subd. 2 of this section provides that in case a deputy is designated to hold a hearing he shall make a "record" of the hearing to be referred to the Commissioner for review, there is no mandate that the Commissioner have before him a copy of the transcript of stenographic minutes before making his ultimate determination, and it is sufficient if the decision reached is a "considered" one on the basis of conferences with the hearing officer, study of such officer's report, and being well advised as to the facts. Warmack v Jacobs, 29 Misc. 2d 957, 213 N.Y.S.2d 683, 1961 N.Y. Misc. LEXIS 3238 (N.Y. Sup. Ct. 1961).

Findings adverse to a war veteran civil service employee resulting from his failure to appear at a hearing on charges against him will be set aside where it appears that he was present at his usual employment on the day of the hearing in the building occupied by the supervisory officer making the charges in an office adjoining that of such supervisory officer and connected therewith by a common door which was kept open, and no effort was made to call him to the hearing. Resler v Malone, 52 N.Y.S.2d 457, 1944 N.Y. Misc. LEXIS 2736 (N.Y. Sup. Ct. 1944).

17. —Medical hearings

Where petitioner had successfully served his one-year probationary period as a patrolman prior to discharge on ground of discovery of petitioner's history of mental illness, a matter which had been set forth in application to join force, and there was nothing in record to cast shadow on his ability to perform as police officer except the report of police surgeon, the circumstances mandated holding of plenary hearing in the interest of justice. McShane v City Civil Service Com., 51 A.D.2d 521, 378 N.Y.S.2d 706, 1976 N.Y. App. Div. LEXIS 10723 (N.Y. App. Div. 1st Dep't 1976).

Where permanent civil service employee had been granted leave of absence from his duties with pay, and doctor who conducted physical examination of employee before employee's return to duty informed employer that employee was not physically able to resume full duties of his position, but employee submitted statements from three other physicians indicating that he was able to return to duty without limitation, due process required that employee be given full adversary hearing on question of his physical disability, forum in which to offer his medical proof, and determination made thereof that could be reviewed on question of substantial evidence offered. Cooperman v Commissioner, Dep't of Correctional Services, 86 Misc. 2d 610, 382 N.Y.S.2d 700, 1976 N.Y. Misc. LEXIS 2494 (N.Y. Sup. Ct. 1976), aff'd, 57 A.D.2d 989, 394 N.Y.S.2d 324, 1977 N.Y. App. Div. LEXIS 12281 (N.Y. App. Div. 3d Dep't 1977).

Notwithstanding his failure to exhaust administrative remedies, petitioner, a retired State employee on ordinary disability retirement, who was offered the alternative of either a disability retirement or dismissal but mistakenly filed for ordinary disability retirement and then failed to timely file for reconsideration of the decision to grant him ordinary disability retirement because he was not fully informed of the legal effect of his filing an application for ordinary disability retirement, is entitled to a hearing to first demonstrate that his health has improved sufficiently to remove him from ordinary disability retirement and put him back to work (Retirement and Social Security Law, § 74, subd d) before gaining the right to a disciplinary hearing (Civil Service Law, § 75); the withdrawal of petitioner's original timely request for a hearing by his counsel based upon faulty advice given by an attorney of the Employee's Retirement System, is a nullity and does not prevent petitioner from seeking reinstatement and back pay. Hamill v Melton, 98 Misc. 2d 334, 413 N.Y.S.2d 876, 1979 N.Y. Misc. LEXIS 2076 (N.Y. Sup. Ct. 1979).

18. Notice of charges

A civil service employee may not be removed without compliance with statute requiring specific written charges of misconduct. Crosson v Golar, 45 A.D.2d 474, 359 N.Y.S.2d 301, 1974 N.Y. App. Div. LEXIS 4089 (N.Y. App. Div. 1st Dep't 1974).

Statutory right to fair hearing and due process require, among other things, that party whose rights are being determined be fully apprised of claims or charges by opposing party. Bateman v Ogdensburg, 55 A.D.2d 781, 389 N.Y.S.2d 486, 1976 N.Y. App. Div. LEXIS 15572 (N.Y. App. Div. 3d Dep't 1976).

Under section of Civil Service Law requiring that person suspected of misconduct be presented with stated charges, person suspected of misconduct must be sufficiently apprised of charges against him so as to enable him to prepare his defense; appropriate standard in determining whether charges are sufficiently specific is whether they are detailed enough to allow person charged to present a defense. Pachucki v Walters, 56 A.D.2d 677, 391 N.Y.S.2d 917, 1977 N.Y. App. Div. LEXIS 10831 (N.Y. App. Div. 3d Dep't 1977).

Civil Service Law does not require absolute specificity of charge of incompetence. Fitzgerald v Libous, 56 A.D.2d 981, 393 N.Y.S.2d 122, 1977 N.Y. App. Div. LEXIS 11394 (N.Y. App. Div. 3d Dep't 1977), aff'd, 44 N.Y.2d 660, 405 N.Y.S.2d 32, 376 N.E.2d 192, 1978 N.Y. LEXIS 1883 (N.Y. 1978).

In Article 78 proceeding, court erred in ordering reinstatement of state employee on ground that his employer originally terminated him after sending notices of possible termination to out-of-date address, since employer thereafter wrote to him at correct address and gave him opportunity to submit facts and explanations on appeal, and appeal hearing was held at which he and others submitted written materials and made presentations; result of appeal was that earlier termination was essentially transformed into suspension with pay and employee was terminated as of date shortly after appeal hearing. Richie v Coughlin, 148 A.D.2d 178, 544 N.Y.S.2d 230, 1989 N.Y. App. Div. LEXIS 10295 (N.Y. App. Div. 3d Dep't), app. dismissed, 75 N.Y.2d 765, 551 N.Y.S.2d 906, 551 N.E.2d 107, 1989 N.Y. LEXIS 4406 (N.Y. 1989), app. denied, 75 N.Y.2d 707, 554 N.Y.S.2d 833, 553 N.E.2d 1343, 1990 N.Y. LEXIS 600 (N.Y. 1990), cert. denied, 498 U.S. 824, 111 S. Ct. 76, 112 L. Ed. 2d 49, 1990 U.S. LEXIS 4341 (U.S. 1990).

Court properly annulled termination of petitioner from her employment where county failed to notify her that she would be terminated if she failed to return to work within one year after being placed on workers' compensation leave; such failure violated 4 NYCRR §§ 5.9(b) and 21.8(a)(2) and requirements of due process. La Joie v County of Niagara, 239 A.D.2d 908, 659

N.Y.S.2d 622, 1997 N.Y. App. Div. LEXIS 6269 (N.Y. App. Div. 4th Dep't 1997).

Court annulled decision of Superintendent of Department of Highways which terminated petitioner's employment for having struck fellow employee, as hearing officer's report was fatally defective where (1) petitioner objected, on second day of disciplinary hearing, to lack of proper written designation, whereupon superintendent provided hearing officer with new written designation and hearing continued, and (2) hearing officer specifically stated in his recommendations that he credited testimony of 2 witnesses who testified on first day of hearing. Stein v County of Rockland, 259 A.D.2d 552, 686 N.Y.S.2d 460, 1999 N.Y. App. Div. LEXIS 2319 (N.Y. App. Div. 2d Dep't 1999).

Although a police officer's termination pursuant to N.Y. Pub. Off. Law § 30(1)(d) did not entitle the officer to a pre-termination hearing under N.Y. Civ. Serv. Law § 75, because the officer was not given notice of, or an opportunity to respond to, an allegation, due process was not satisfied; therefore, the termination determination was properly annulled. Matter of Sorano v City of Yonkers, 37 A.D.3d 839, 830 N.Y.S.2d 590, 2007 N.Y. App. Div. LEXIS 2321 (N.Y. App. Div. 2d Dep't 2007).

Under Civil Service Law § 75, tenured employees have protected property interest in their continued employment and cannot be removed or subjected to any disciplinary penalty "except for incompetency or misconduct shown after hearing upon stated charges"; employees are entitled to written notice of charges against them and of date and time of evidentiary hearing, to be represented by counsel and to call witnesses on their behalf; where plaintiffs in suit for preliminary injunctive relief against imposition of disciplinary penalties were not accorded these rights, injunction could be granted. Ostrowski v New York, 601 F.2d 629, 1979 U.S. App. LEXIS 14262 (2d Cir. N.Y. 1979).

Petitioner brings the appeal complaining that the abolition of her position by the Board of Education is illegal and requests that the Board of Education continue her in the position of business manager at a salary no less than that which she received for the 1989-90 school year. The appeal was dismissed. The Board of Education abolished the business manager position, and later, amended the resolution not to fund the business manager's position which would necessitate laying off of the current incumbent, the petitioner. Petitioner contends that the reasons for the abolition, or decision not to fund a position, was retaliation for litigation which he commenced against the father of the president of the Board of Education. Petitioner was appointed pursuant to the provisions of Civil Service Law, and therefore her rights in that position are governed by the provisions of the Civil Service Law. The provisions of section 75 of the Civil Service Law prohibits termination of permanent employees for cause unless and until they are afforded an appropriate hearing. Section 75 would not, by its terms, apply to a discretionary decision to eliminate a position for budgetary reasons, and consequently terminate the employment of the incumbent. In view of the nature of the petitioner's claim and the central issue involved, the type of relief petitioner seeks should be obtained through commencement of a proceeding under Article 78 of the Civil Practice Law and Rules, or through an action for damages, and not through an appeal to the Commission of Education under Section 310 of the Education Law. Appeal of Cohen, 1991 Op Comr Educ No 12452.

19. —Sufficiency of particular notices

Service of written copy of specific charges upon a suspended civil service employee against whom removal proceedings were pending, and notification to him to make an explanation either in writing or orally or both and that he had the right to counsel is a sufficient notice to answer such charges to satisfy this section. Mullaney v Stebbins, 295 N.Y. 837, 66 N.E.2d 852, 295 N.Y. (N.Y.S.) 837, 1946 N.Y. LEXIS 1004 (N.Y. 1946).

A judgment of the Appellate Division sustaining the New York City Commissioner of Sanitation's dismissal of petitioner Sanitation Department Superintendent for facilitating the illegal dumping of liquid waste, but modifying the determination by directing that petitioner be granted a pension, would be affirmed where the hearing officer's findings of petitioner's misconduct were supported by substantial evidence, and where petitioner had sufficient notice to prepare an adequate defense despite respondent's failure to specify the dates of the transgressions with greater precision given the clandestine and protracted nature thereof. Cassiliano v Steisel, 64 N.Y.2d 674, 485 N.Y.S.2d 514, 474 N.E.2d 1182, 1984 N.Y. LEXIS 4907 (N.Y. 1984).

The state industrial commissioner is not required by this section in preferring charges against the assistant chief of claims in the bureau of workmen's compensation, a veteran, to specify charges or state specific acts or omissions; said section requires merely "stated charges." People ex rel. Davis v Sayer, 205 A.D. 562, 200 N.Y.S. 134, 1923 N.Y. App. Div. LEXIS 5082 (N.Y. App. Div. 1923).

Charges accusing deputy comptroller, one of five employees in city comptroller's office, of intentional and wilful disobedience of directives to cooperate with his fellow employees and intentional and wilful disobedience of directives to complete bank reconciliation statements, a duty he failed to perform until ordered to do so in writing, sufficiently informed deputy comptroller of nature of proof he could expect at hearing and were not so infirm that dismissal of charges was required. Bateman v Ogdensburg, 55 A.D.2d 781, 389 N.Y.S.2d 486, 1976 N.Y. App. Div. LEXIS 15572 (N.Y. App. Div. 3d Dep't 1976).

In view of facts that town police officer made no request for bill of particulars nor did he request additional time to prepare defense, charges brought against town police officer by town, which included charge that police officer had taken and removed quantity of town's motor oil for personal use, were sufficiently specific so as to enable police officer to present a defense. Pachucki v Walters, 56 A.D.2d 677, 391 N.Y.S.2d 917, 1977 N.Y. App. Div. LEXIS 10831 (N.Y. App. Div. 3d Dep't 1977).

Determination by board of education dismissing petitioner from his position as custodian would be annulled, charges dismissed, and petitioner restored to his position since petitioner was not afforded at least 8 days to answer charges as required by CLS Civ S § 75 and accusation which charged custodian only with "incompetence and misconduct" was patently insufficient to inform him of nature of charges and thus violated his due process rights. Rudy v Board of Education, 128 A.D.2d 881, 513 N.Y.S.2d 804, 1987 N.Y. App. Div. LEXIS 44556 (N.Y. App. Div. 2d Dep't), app. dismissed, 70 N.Y.2d 747, 519 N.Y.S.2d 1033, 514 N.E.2d 391, 1987 N.Y. LEXIS 18622 (N.Y. 1987).

Court properly vacated petitioner's dismissal from her position as New York City Transit Authority police officer and remitted matter for new determination of appropriate penalty where petitioner did not receive notice of hearing officer's intention to inspect her employment file prior to making his recommendation regarding appropriate penalty. Ferguson v Meehan, 141 A.D.2d 604, 529 N.Y.S.2d 525, 1988 N.Y. App. Div. LEXIS 6588 (N.Y. App. Div. 2d Dep't 1988).

Court correctly annulled determination by New York City Transit Authority terminating petitioner's employment on ground of misconduct where (1) all notices of hearing were sent to address from which petitioner had moved and were returned unopened with notation that petitioner had moved and left no new address, (2) it was uncontroverted that petitioner was never apprised of hearing, and (3) although petitioner was aware that transit authority could not notify him at address it had on record, transit authority undertook no other steps to notify petitioner of pending charges and hearing, and regarded petitioner's failure to receive notice as "his problem." Delbello v New York City Transit Authority, 151 A.D.2d 479, 542 N.Y.S.2d 270, 1989 N.Y. App. Div. LEXIS 7463 (N.Y. App. Div. 2d Dep't 1989).

Hearing officer's determination finding bus driver guilty of intentional misconduct would be annulled where formal charges against driver had alleged only negligent or incompetent conduct, in that she operated school bus "in an unsafe, uncontrolled, and negligent manner," and finding of misconduct would require showing of willfulness or intentional conduct. Benson v Board of Educ. of Washingtonville Cent. Sch. Dist., 183 A.D.2d 996, 583 N.Y.S.2d 594, 1992 N.Y. App. Div. LEXIS 6712 (N.Y. App. Div. 3d Dep't), app. denied, 80 N.Y.2d 756, 588 N.Y.S.2d 824, 602 N.E.2d 232, 1992 N.Y. LEXIS 3168 (N.Y. 1992).

This section was substantially complied with where employee was orally suspended and three days later received specifications

of charges and notice of hearing by registered mail. Verdolino v Triborough Bridge & Tunnel Authority, 4 Misc. 2d 130, 153 N.Y.S.2d 455, 1956 N.Y. Misc. LEXIS 1858 (N.Y. Sup. Ct. 1956).

Where accounting clerk in county department of public works, a civil servant, was not given written notice of charges filed against him until almost 15 months after his first suspension and five months after his second suspension, suspension was improperly imposed and unjustifiably prolonged and accounting clerk was entitled to be reinstated. Fegert v Mulroy, 80 Misc. 2d 236, 363 N.Y.S.2d 67, 1974 N.Y. Misc. LEXIS 1879 (N.Y. Sup. Ct. 1974).

In formulating a statement of charges in proceedings for the removal of a civil service employee, the time of the offense need be stated only within reasonable limits so that the party accused may be apprised with reasonable certainty of what he must be prepared to meet. Blum v Connelly, 24 N.Y.S.2d 175, 1940 N.Y. Misc. LEXIS 2449 (N.Y. Sup. Ct. 1940), aff'd, 262 A.D. 1056, 30 N.Y.S.2d 229, 1941 N.Y. App. Div. LEXIS 7199 (N.Y. App. Div. 1941).

There was sufficient compliance with this section where in connection with proceedings for the removal for use of excessive force of one as supervisor of boys at the state school at Industry, the supervisor was notified of the charges against him and had an opportunity to file an answer thereto, even though a letter offering him a chance to modify his answer, failed to reach him prior to his ultimate removal. Indermill v Areson, 31 N.Y.S.2d 886, 1941 N.Y. Misc. LEXIS 2469 (N.Y. Sup. Ct. 1941).

A notice of charges informing a civil service employee of the penalties, including dismissal, should the charges be sustained, although not stating that it was proposed to remove him, is sufficient to sustain his dismissal. Elwood v Department of Mental Hygiene, 72 N.Y.S.2d 648, 1947 N.Y. Misc. LEXIS 2830 (N.Y. Sup. Ct. 1947).

No reasonable juror could conclude that discharged employee was actually fired without a pre-termination under N.Y. Civ. Serv. Law § 75 hearing where the employee was not ignorant of the fact that her county employer had convened a § 75 hearing, her hearing officer advised the employee about the hearing date, and although the employee was given every opportunity to be heard and to present witnesses, she chose not to participate or attend the hearing. Pellegrino v County of Orange, 313 F. Supp. 2d 303, 2004 U.S. Dist. LEXIS 6565 (S.D.N.Y. 2004).

20. — —Notices of disciplinary proceedings

Notice of intention "to take disciplinary action" was notice of "proposed removal" within subd. 2. Strand Billiard Academy, Inc. v Moss, 294 N.Y. 865, 62 N.E.2d 490, 294 N.Y. (N.Y.S.) 865, 1945 N.Y. LEXIS 1050 (N.Y. 1945).

Notice to a civil service employee in writing of charges against him and that it was proposed that disciplinary action be taken against him held to be sufficient. Lanzer v Moran, 268 A.D. 947, 51 N.Y.S.2d 389, 1944 N.Y. App. Div. LEXIS 4350 (N.Y. App. Div.), app. dismissed, 293 N.Y. 759, 57 N.E.2d 838, 293 N.Y. (N.Y.S.) 759, 1944 N.Y. LEXIS 2181 (N.Y. 1944), aff'd, 294 N.Y. 864, 62 N.E.2d 489, 294 N.Y. (N.Y.S.) 864, 1945 N.Y. LEXIS 1049 (N.Y. 1945).

Thruway toll collector was not deprived due process on ground that hearing officer, in sustaining charge of incompetence, relied in part on evidence of cash variances in collector's toll receipts and on collector's third unsatisfactory performance rating, although neither factor was set forth in formal charges or specifications, since (1) cash variances were specifically referred to in 2 prior unsatisfactory performance ratings that were served on and accepted by collector without objection, and incompetence charge was expressly based on those 2 prior ratings, and (2) collector was told 4 months prior to disciplinary proceeding that his continued absences would result in both disciplinary charges and third unsatisfactory performance rating, and third rating was offered and received in evidence at hearing as joint exhibit of collector and thruway authority. Kieffer v New York State Thruway Authority, 135 A.D.2d 1017, 522 N.Y.S.2d 747, 1987 N.Y. App. Div. LEXIS 52895 (N.Y. App. Div. 3d Dep't 1987).

County employee was not prejudiced by his employer's failure to cite specific violations of rules or regulations in disciplinary proceeding against him where he was charged with "Poor Performance" and "Failure to Report an Accident" in connection with his alleged participation in off-duty "practical jokes" performed on fellow county employees, which resulted in collision between his vehicle and county vehicle, and his failure to report collision. Sguanci v Commissioner of Public Works, 158 A.D.2d 788, 550 N.Y.S.2d 950, 1990 N.Y. App. Div. LEXIS 891 (N.Y. App. Div. 3d Dep't 1990).

Police officer was accorded full and fair opportunity to address his service record at disciplinary hearing prior to imposition of penalty where, in accordance with proper procedure, police commissioner sent officer copy of report and recommendation, together with cover letter advising officer of opportunity to submit written comments, several weeks prior to commissioner's determination. Cocozzo v Ward, 162 A.D.2d 202, 556 N.Y.S.2d 328, 1990 N.Y. App. Div. LEXIS 7084 (N.Y. App. Div. 1st Dep't 1990).

Notice of discipline contained sufficient information to apprise county security guard of charges against him where subject notice charged him with 4 acts of misconduct—use of abusive language, excessive use of force, possession of noxious material, and carrying concealed weapon; failure to cite specific statutes, rules, or regulations was not, under circumstances, fatal to notice of discipline. Murphy v County of Ulster, 218 A.D.2d 832, 629 N.Y.S.2d 877, 1995 N.Y. App. Div. LEXIS 8260 (N.Y. App. Div. 3d Dep't), app. denied, 87 N.Y.2d 804, 639 N.Y.S.2d 782, 662 N.E.2d 1072, 1995 N.Y. LEXIS 5702 (N.Y. 1995).

Where a real property clerk was terminated for alleged misconduct and insubordination, the charges set forth in the notice of discipline were not so vague as to deny her due process, as she was afforded adequate notice of the misconduct alleged with respect to the sustained specifications. Matter of Zlotnick v City of Saratoga Springs, 122 A.D.3d 1210, 997 N.Y.S.2d 809, 2014 N.Y. App. Div. LEXIS 8228 (N.Y. App. Div. 3d Dep't 2014).

21. — —Notices of incompetence due to alcoholism

Charge against city fireman of incompetence due to alcoholism, with complete copy of personnel file offered in response to bill of particulars, gave fireman reasonable chance to meet charges and was sufficiently specific; evidence sustained determination to discharge city fireman for incompetence due to alcoholism. Fitzgerald v Libous, 56 A.D.2d 981, 393 N.Y.S.2d 122, 1977 N.Y. App. Div. LEXIS 11394 (N.Y. App. Div. 3d Dep't 1977), aff'd, 44 N.Y.2d 660, 405 N.Y.S.2d 32, 376 N.E.2d 192, 1978 N.Y. LEXIS 1883 (N.Y. 1978).

Notice charging employee with being under influence of alcohol on specific day while performing specific assignment sufficiently apprises employee of nature of misconduct as to allow adequate preparation of defense to charge of consuming alcohol on duty of which employee is ultimately found guilty. Gisbert v New York State Thruway Authority, 115 A.D.2d 934, 496 N.Y.S.2d 828, 1985 N.Y. App. Div. LEXIS 55292 (N.Y. App. Div. 3d Dep't 1985).

22. Scheduling of hearings

Sheriff abused his discretion by denying a deputy's request to withdraw his resignation because the deputy was covered by this statute, was not provided with the requisite predisciplinary hearing, and tendered his resignation under the threat of wrongful termination, and, thus, the sheriff had no legal right to terminate the deputy. Matter of Ortlieb v Lewis County Sheriff's Dept., 155 A.D.3d 1628, 65 N.Y.S.3d 390, 2017 N.Y. App. Div. LEXIS 8179 (N.Y. App. Div. 4th Dep't 2017).

Where attorney, who was member of the Jewish faith and observed its Sabbath, was retained prior to school board's decision to schedule Saturday hearing on charges of misconduct levied against permanent civil service employee and board, which scheduled Saturday meeting for its convenience, had available a number of alternatives, refusal of board to reschedule was arbitrary and capricious; decision to dismiss, which decision was reached at Saturday hearing and in absence of counsel, was a nullity. Romeo v Union Free School Dist., 82 Misc. 2d 336, 368 N.Y.S.2d 726, 1975 N.Y. Misc. LEXIS 2633 (N.Y. Sup. Ct. 1975).

B. Evidentiary Matters

23. In general

A determination of the President of the New York City Transit Authority, which dismissed petitioner after finding him guilty of

misconduct or incompetence concerning his role in the disappearance of a money bag, would be confirmed where the standard verification procedure used during collection assumed great significance in determining the instant issue, and a tally sheet together with the testimony concerning standard procedure provided sufficient evidence to support the determination of guilt, where the hearing referee was free to reject petitioner's testimony to the contrary, and where the penalty of dismissal did not shock the conscience, inasmuch as petitioner had already been given a last warning regarding a previous irregularity. Holmes v Simpson, 64 N.Y.2d 678, 485 N.Y.S.2d 516, 474 N.E.2d 1184, 1984 N.Y. LEXIS 4909 (N.Y. 1984).

Where persons in civil service are not entitled to trial but merely to notice of charges and an opportunity to make an explanation, the officer having power of removal may act upon his own knowledge or upon any information received from other sources. In re McGuire, 157 A.D. 351, 142 N.Y.S. 426, 1913 N.Y. App. Div. LEXIS 6576 (N.Y. App. Div.), aff'd, 209 N.Y. 597, 103 N.E. 1126, 209 N.Y. (N.Y.S.) 597, 1913 N.Y. LEXIS 986 (N.Y. 1913).

In an Article 78 proceeding to review a board of education's determination to dismiss a school-bus driver, after the board had overruled a hearing officer's recommendation to suspend him without pay for 45 days, the board properly determined that the driver be dismissed where, although there was a sharp conflict in the testimony, it could not be said that the board's decision rested on less than substantial evidence, where there was nothing in the record to support the driver's contention that the board had entertained matters outside the record, and where the driver's demonstrated refusal to cooperate with his superiors over an extended period of time supported the conclusion that his dismissal, although severe, was not a shockingly disproportionate penalty. Wood v Rice, 80 A.D.2d 973, 438 N.Y.S.2d 612, 1981 N.Y. App. Div. LEXIS 10882 (N.Y. App. Div. 3d Dep't 1981).

Evidence that truck-driver was assigned to operate snow plow at given section of highway during snowstorm, that supervisor found snow accumulating in all lanes of assigned area, that driver failed to respond to radio contact, that upon returning to garage area, supervisor confronted driver with discrepancies, noticed that driver's speech was slurred and observed several cans of beer in driver's vehicle, at least 3 of which were empty, supported by testimony of second supervisor that he smelled beer on driver's breath, provides ample basis for assessment of misconduct. Gisbert v New York State Thruway Authority, 115 A.D.2d 934, 496 N.Y.S.2d 828, 1985 N.Y. App. Div. LEXIS 55292 (N.Y. App. Div. 3d Dep't 1985).

Substantial evidence supported New York City Transit Authority's determination that token booth collector made unauthorized hand collections and converted $260 in agency funds to her own use where supervisors observed collector's actions and audited token booth funds. Brathwaite v Gunn, 125 A.D.2d 305, 508 N.Y.S.2d 589, 1986 N.Y. App. Div. LEXIS 62567 (N.Y. App. Div. 2d Dep't 1986).

There was substantial evidence to support determination finding city firefighter guilty of misconduct where, while on watch and responsible for receiving alarms and alerting other firefighters, he failed to answer initial call from dispatcher at emergency communications center regarding request for assistance to possible heart attack victim, and he only responded after dispatcher made additional telephone call, one 3-ring Centrex call, and 4 supplemental radio transmissions. Ross v Bringewatt, 134 A.D.2d 913, 522 N.Y.S.2d 68, 1987 N.Y. App. Div. LEXIS 51113 (N.Y. App. Div. 4th Dep't 1987), app. denied, 71 N.Y.2d 801, 527 N.Y.S.2d 767, 522 N.E.2d 1065, 1988 N.Y. LEXIS 231 (N.Y. 1988).

There was substantial evidence to support charge of incompetence against thruway toll collector where, despite repeated counseling concerning his excessive unscheduled and unsubstantiated absences, he received unsatisfactory performance ratings over 3 successive annual periods for his poor attendance record and other work deficiencies. Kieffer v New York State Thruway Authority, 135 A.D.2d 1017, 522 N.Y.S.2d 747, 1987 N.Y. App. Div. LEXIS 52895 (N.Y. App. Div. 3d Dep't 1987).

Court would annul determination terminating petitioner's employment with city for violating provision of city charter, even though he had violated such provision, since (1) city failed to consider his claim that charter provision in question was being selectively enforced, (2) he was prevented from introducing evidence to support his defenses, (3) he was prevented from presenting evidence in mitigation and from cross-examining witnesses regarding documentary evidence, (4) he was prohibited from submitting closing briefs, and (5) city deliberated for only short time despite significant amount of documentary evidence that it had to review. Girard v Glens Falls, 173 A.D.2d 113, 577 N.Y.S.2d 496, 1991 N.Y. App. Div. LEXIS 16338 (N.Y. App. Div. 3d Dep't 1991).

Food service supervisor at county medical center was properly found guilty of misconduct and demoted where 2 county employees testified regarding incidents in which supervisor confronted and verbally abused them; contrary evidence merely created factual issue for hearing officer. Roberts v Stolzenberg, 202 A.D.2d 854, 609 N.Y.S.2d 360, 1994 N.Y. App. Div. LEXIS 2550 (N.Y. App. Div. 3d Dep't 1994).

Evidence did not support finding that maintenance mechanic misrepresented himself as authority in asbestos matters where it was shown that he accurately stated that he was asbestos specialist or that he was experienced in asbestos matters. In re Christopher M., 218 A.D.2d 700, 630 N.Y.S.2d 940, 1995 N.Y. App. Div. LEXIS 8675 (N.Y. App. Div. 2d Dep't 1995).

In firefighters' and union's Article 78 proceeding against city to require reinstatement of 2 firefighters and filling of vacant positions, city's submissions could not be considered on its pre-answer motion to dismiss petition for failure to state cause of action. Zumpano v City of Utica, 245 A.D.2d 1022, 666 N.Y.S.2d 62, 1997 N.Y. App. Div. LEXIS 13763 (N.Y. App. Div. 4th Dep't 1997).

Admission of GPS evidence in an employee's misconduct hearing was not improper because neither the Office of the Inspector General nor the employer acted unreasonably in obtaining the evidence; the employer had reasonable grounds to suspect individual misconduct by the employee and traditional methods, such as tailing the employee, had been tried and had been thwarted. The standard for using or excluding evidence at administrative proceedings was not controlled by criminal law. Matter of Cunningham v New York State Dept. of Labor, 89 A.D.3d 1347, 933 N.Y.S.2d 432, 2011 N.Y. App. Div. LEXIS 8335 (N.Y. App. Div. 3d Dep't 2011), rev'd, 21 N.Y.3d 515, 974 N.Y.S.2d 896, 997 N.E.2d 468, 2013 N.Y. LEXIS 1729 (N.Y. 2013).

County department of emergency response erred in adopting the findings of a hearing officer that a public safety dispatcher was guilty of certain charges of misconduct and/or incompetence and in terminating his employment because the specifications—failing to obtain a caller's name and telephone number, failing to verify the cross streets of the caller's location, and failing to transfer the call to the police department—were unsupported by substantial evidence where the record demonstrated that the call was disconnected abruptly by the caller, and the determination finding the dispatcher guilty of another charge could not be sustained, since the charges brought against the dispatcher contained no such specification. Matter of Kelly v County of Dutchess, 176 A.D.3d 1060, 111 N.Y.S.3d 51, 2019 N.Y. App. Div. LEXIS 7644 (N.Y. App. Div. 2d Dep't 2019).

24. Accident reconstruction testimony

Evidence supported determination that petitioner acted improperly by operating his sheriff's department vehicle in unsafe and imprudent manner, resulting in accident and damage to vehicle, where accident reconstructionist testified that, based on, inter alia, his measurements of skid marks and calculations derived therefrom, petitioner had approached curve at 49 miles per hour, at least 9 miles per hour over legal speed limit and 19 miles per hour over recommended speed limit for that curve posted on warning sign. Barresi v Mahoney, 230 A.D.2d 906, 647 N.Y.S.2d 25, 1996 N.Y. App. Div. LEXIS 8672 (N.Y. App. Div. 2d Dep't), app. denied, 89 N.Y.2d 804, 653 N.Y.S.2d 917, 676 N.E.2d 499, 1996 N.Y. LEXIS 4308 (N.Y. 1996).

25. Admissions

Admissions made by correction officer to police during police investigation of criminal charges filed against her were properly

admitted into evidence during correction officer's administrative disciplinary hearing under CLS Civ S § 75. Dacey v County of Dutchess, 121 A.D.2d 536, 503 N.Y.S.2d 845, 1986 N.Y. App. Div. LEXIS 58514 (N.Y. App. Div. 2d Dep't 1986).

Evidence supported determination finding school building custodian guilty of misconduct where he admitted to investigators that he misappropriated various food items stored in locked area of cafeteria, and his admission was corroborated by testimony of several other witnesses. Sanchez v Board of Educ., 216 A.D.2d 303, 627 N.Y.S.2d 741, 1995 N.Y. App. Div. LEXIS 5923 (N.Y. App. Div. 2d Dep't 1995).

Determination finding transit police officer guilty of failing to timely report discharge of his weapon was supported by evidence including his own admission that he did not report discharge of his weapon during some 8 hours following incident while he was in precinct, and fact that he revealed information about incident when confronted by desk sergeant as he was on his way out door. Cerio v New York City Transit Auth., 228 A.D.2d 676, 645 N.Y.S.2d 822, 1996 N.Y. App. Div. LEXIS 7399 (N.Y. App. Div. 2d Dep't 1996).

Determination that firefighter used cocaine was supported by his admission to such use and positive results of EMIT and confirmatory GC/MS tests. EMIT test performed on August 4, 1994, which was direct result of firefighter's expulsion from compulsory drug counseling for "non-compliance," was sufficiently attenuated from suppressed April 18, 1994 test to withstand constitutional muster. Bassi v City of New York, 233 A.D.2d 269, 650 N.Y.S.2d 542, 1996 N.Y. App. Div. LEXIS 12127 (N.Y. App. Div. 1st Dep't 1996).

Determination that state trooper violated CLS Penal § 400.05(1) was supported by his own admission that he retained 3 handguns as his own after they were surrendered to him while he was at scene of domestic disturbance; despite his alleged ignorance of law, he was required to retain and secure surrendered weapons for their eventual destruction. Hricik v McMahon, 247 A.D.2d 935, 668 N.Y.S.2d 295, 1998 N.Y. App. Div. LEXIS 1320 (N.Y. App. Div. 4th Dep't 1998).

Charges against teacher's aide of inappropriate comments and physical contact with special education students was supported by testimony of students and eyewitnesses, documentary evidence, admission by aide, and testimony of Title XIV coordinator. Burkes v Enlarged City Sch. Dist., 257 A.D.2d 891, 684 N.Y.S.2d 57, 1999 N.Y. App. Div. LEXIS 506 (N.Y. App. Div. 3d Dep't 1999).

Determination finding that school district bus driver was under influence of alcohol at training workshop was supported by driver's concession that she consumed one 16-ounce can of light beer in bus garage before traveling to workshop, testimony that she actually may have consumed as many as 3 cans, witness' testimony that driver "was more giggly than usual" at workshop, and another witness' testimony that driver "might have been a little giggly or tee-hee type thing" at workshop. Collins v Parishville-Hopkinton Cent. Sch. Dist., 274 A.D.2d 732, 710 N.Y.S.2d 728, 2000 N.Y. App. Div. LEXIS 7819 (N.Y. App. Div. 3d Dep't 2000).

26. Alcohol test; breathalyzer

Alcohol technician was competent to perform breath alcohol screening tests, on which county highway department mechanic's suspension from employment was based, where technician successfully completed 3-day training program regarding use of approved "evidential breath testing device," she was familiar with pertinent regulatory requirements for breath alcohol testing procedures published in Federal Register, she had performed 478 breath alcohol tests, none of which had been questioned, and mechanic submitted no evidence that technician failed to comply with training or proficiency requirements of 49 CFR 40.51. Integrity of breath alcohol screening test results, on which county highway department mechanic's suspension from employment was based, was not impaired where (1) highway superintendent was entitled to believe technician who performed tests, rather than mechanic, as to whether mechanic was give fresh mouthpiece for second test, (2) although mechanic drank coffee during 15-minute waiting period between initial test and confirmatory test, there was no evidence that his ingestion of coffee increased his breath alcohol level, and (3) although unauthorized personnel had access to testing room, there was no evidence that any unauthorized person saw or heard results of either test. Aubin v County of Jefferson, 245 A.D.2d 1126, 667 N.Y.S.2d 530, 1997 N.Y. App. Div. LEXIS 13953 (N.Y. App. Div. 4th Dep't 1997).

27. —Refusal to take

Substantial evidence supported administrative determinations dismissing police and correction officers for their refusal to comply with orders to submit to urinalysis in connection with reported drug use where reliable confidential informants had reported officers' past drug use, there was partial verification of such information, and informants reported having seen officers use drugs just prior to urinalysis orders (however, court was not called upon to render opinion as to whether public agency may lawfully order employee to undergo urinalysis on reasonable suspicion of drug use). Perez v Ward, 69 N.Y.2d 840, 514 N.Y.S.2d 703, 507 N.E.2d 296, 1987 N.Y. LEXIS 15892 (N.Y.), app. denied, 69 N.Y.2d 985, 516 N.Y.S.2d 1028, 509 N.E.2d 363, 1987 N.Y. LEXIS 16780 (N.Y. 1987).

Court would affirm city's determination terminating petitioner's employment as parking lot attendant where he did not contest substantial evidence of his misconduct while on duty, including drinking and refusing to undergo breathalyzer test as directed by supervisor, and although he established prima facie case that conduct which formed basis for his discharge was causally related to his alcoholism, city showed that subsequent to his completion of alcohol treatment program, he had relapse while on duty and was immediately charged with misconduct. Myszczenko v City of Poughkeepsie, 239 A.D.2d 584, 657 N.Y.S.2d 455, 1997 N.Y. App. Div. LEXIS 5639 (N.Y. App. Div. 2d Dep't 1997).

28. Chain of custody of evidence

There was no need to show chain of custody for expense reports since those reports were not fungible evidence. Harlander-Insero v Glass, 228 A.D.2d 504, 643 N.Y.S.2d 684, 1996 N.Y. App. Div. LEXIS 6633 (N.Y. App. Div. 2d Dep't 1996).

29. Correction officer misconduct, evidence of

Determination by Department of Correctional Services that deputy superintendent of correctional facility sexually harassed several subordinate female employees was supported by substantial evidence where (1) woman testified that he put his arm around her and fondled her breasts on at least 10 occasions despite her protests, (2) another woman testified that he often put his hand on her leg while she worked and that on one occasion he pulled her onto his lap, (3) several other women testified that on numerous occasions he called them into his office and placed his hands on various parts of their bodies (including genital areas), made frequent comments to other female employees about their bodies, exposed his genitals and caused female subordinates to touch his genital area, and (4) several women expressed their fear of his violent temper and did not report many incidents sooner because of their fear of him. Oare v Coughlin, 133 A.D.2d 943, 520 N.Y.S.2d 658, 1987 N.Y. App. Div. LEXIS 51985 (N.Y. App. Div. 3d Dep't 1987), app. denied, 70 N.Y.2d 615, 526 N.Y.S.2d 436, 521 N.E.2d 443, 1988 N.Y. LEXIS 700 (N.Y. 1988).

There was substantial evidence to support suspicion of drug use by correction officer, justifying conduct of urinalysis test which yielded positive results for marihuana, based on officer's numerous absences from work within brief period, physician's opinion that her claimed asthmatic condition was not serious enough to explain absences, and observations of psychiatrist. Palmer v Koehler, 156 A.D.2d 242, 548 N.Y.S.2d 502, 1989 N.Y. App. Div. LEXIS 15505 (N.Y. App. Div. 1st Dep't 1989).

Substantial evidence supported Department of Correction's findings that correction officer was guilty of misconduct, and that termination of officer was not so disproportionate to offenses as to be shocking to one's sense of fairness, where (1) officer had left his fully loaded service revolver in bodega, thus failing to safeguard it, (2) he moonlighted at bodega without department's knowledge or authorization, which were required by agency rules and regulations, (3) he falsely stated that weapon was in his home, and (4) he refused to undergo urinalysis, which was properly requested because his appearance and behavior at department interview indicated drug use. Department of Correction's dis-

charge of correction officer for failure to take drug test would be upheld, even though he argued that his appearance and behavior were consistent with lack of sleep, not drug use, and that he would not have been discharged but for his refusal to take drug test, where acceptance of his argument would require court to substitute its judgment of evidence for that of department. Ryant v Commissioner of Dep't of Correction, 159 A.D.2d 224, 552 N.Y.S.2d 29, 1990 N.Y. App. Div. LEXIS 2190 (N.Y. App. Div. 1st Dep't 1990).

Substantial evidence supported determination that corrections officer refused to obey lawful order to submit to urinalysis examination where there was undisputed testimony from several correction officials as to officer's dilated eyes, perspiring forehead and irrational behavior, and it was undisputed that officer refused to submit to test. Rice v Seilaff, 181 A.D.2d 502, 581 N.Y.S.2d 311, 1992 N.Y. App. Div. LEXIS 3467 (N.Y. App. Div. 1st Dep't 1992).

Arbitrator's erroneous evidentiary ruling did not constitute misconduct sufficient to require vacatur of award finding correction officer guilty of kicking inmate in groin, even though arbitrator erroneously limited officer's evidence to those issues raised in opening statement and excluded evidence of inmate's suicide attempt (offered to prove that he was capable of self-inflicting injuries) where officer did not have any hard or conclusive evidence to support his contention that inmate's groin injury was self-inflicted, and fellow inmate testified that officer yelled "I will beat the shit out of you" before kicking injured inmate. In re New York State Inspection, Sec. & Law Enforcement Employees Dist. Council 82, etc., 183 A.D.2d 1034, 583 N.Y.S.2d 619, 1992 N.Y. App. Div. LEXIS 6879 (N.Y. App. Div. 3d Dep't 1992).

Dismissal of correction officers was supported by substantial evidence that they used unreasonable force against inmate, submitted false reports about incident, and gave false statements to investigators. Mansfield v Sielaff, 184 A.D.2d 477, 585 N.Y.S.2d 425, 1992 N.Y. App. Div. LEXIS 8631 (N.Y. App. Div. 1st Dep't), app. denied, 80 N.Y.2d 760, 591 N.Y.S.2d 138, 605 N.E.2d 874, 1992 N.Y. LEXIS 3839 (N.Y. 1992).

Court would affirm determination that correction officer violated department rules and regulations by unlawfully ingesting cocaine, notwithstanding contention that positive test results resulted from officer's unwitting drinking of liquor that had been spiked with cocaine at bachelor party 2 days prior to drug test, and despite testimony by bartender that he had spiked some bottles of liquor with cocaine and that he might have served officer from one of such bottles; under circumstances, officer established only possibility of unwitting ingestion. Green v Sielaff, 198 A.D.2d 113, 603 N.Y.S.2d 156, 1993 N.Y. App. Div. LEXIS 10635 (N.Y. App. Div. 1st Dep't 1993).

Determination that correction officer used marijuana was supported by results of EMIT drug test as confirmed by GC-MS test, testimony of 2 other correction officers and laboratory director describing chain of custody of urine sample, and latter's testimony explaining that certain irregularities in test readings were intended and had no impact on validity of results. Fulton v Jacobson, 226 A.D.2d 215, 641 N.Y.S.2d 16, 1996 N.Y. App. Div. LEXIS 3893 (N.Y. App. Div. 1st Dep't 1996).

Correction officer's guilt of conduct unbecoming correction officer and of failing to safeguard her shield was supported by evidence that officer and her companion refused to pay $10 fee, that companion then pulled silver shield from his pocket and stated that he was police officer and that attendant was in "trouble," that companion then forced his way into booth and retrieved keys, and that when another attendant tried to block officer's car from leaving lot, companion smashed windshield of attendant's car and then struck other attendant with club. Everett v Jacobson, 235 A.D.2d 279, 652 N.Y.S.2d 42, 1997 N.Y. App. Div. LEXIS 262 (N.Y. App. Div. 1st Dep't 1997).

Determination that correction officer (petitioner) used impermissible force against inmate and submitted false report about incident was supported by testimony of inmate, inmate's wife, and girlfriend of another inmate that, after inmate struck petitioner, he was restrained by other correction officers while petitioner repeatedly punched and kicked him in head and stomach, medical evidence detailing injuries consistent with type of beating described by witnesses, inconsistencies between written report submitted by petitioner and his hearing testimony as to how altercation with inmate started, and documentary evidence impeaching petitioner's testimony that he had never before submitted false report. Butler v New York City Dep't of Corrections, 254 A.D.2d 86, 678 N.Y.S.2d 617, 1998 N.Y. App. Div. LEXIS 10670 (N.Y. App. Div. 1st Dep't 1998).

Court would affirm city's dismissal of probationary correction officer who tested positive for cocaine in urinalysis test, for inasmuch as test was part of certain established medical standards, and officer was given notice regarding departmental policy of drug testing during probationary period, her rights against unreasonable search and seizure were not violated. Odon v Koehler, 138 Misc. 2d 553, 524 N.Y.S.2d 614, 1988 N.Y. Misc. LEXIS 59 (N.Y. Sup. Ct. 1988).

30. Credibility of witnesses, generally

Though a hearing officer's report is entitled to weight in determining existence of substantial evidence, particularly to extent that material facts in given case may depend on resolving credibility of witnesses as shown by their demeanor or conduct at hearing, findings of hearing officer are not conclusive and may be overruled by the official upon whom has been imposed power to remove or mete out discipline, provided, of course, that the latter's action is supported by substantial evidence. Simpson v Wolansky, 38 N.Y.2d 391, 380 N.Y.S.2d 630, 343 N.E.2d 274, 1975 N.Y. LEXIS 2359 (N.Y. 1975).

Hearing officer's determination finding an employee guilty of misconduct relating to insubordination and unauthorized absences, and recommending termination, was proper because the testimony of two witnesses, and other documents admitted into evidence, established the facts necessary to sustain the charges; the hearing officer, before whom all the witnesses appeared, credited the testimony of the employer's witnesses and not the testimony of the employee and his witness. The penalty imposed was not so disproportionate to the offenses committed as to be shocking to one's sense of fairness. Matter of Morris v Calderone, 49 A.D.3d 741, 854 N.Y.S.2d 189, 2008 N.Y. App. Div. LEXIS 2511 (N.Y. App. Div. 2d Dep't 2008).

31. —Impeaching credibility

This section prohibits removal of an honorably discharged soldier except for cause after a hearing even when he occupies an exempt position from which others could be removed at the pleasure of the department head. Meenagh v Dewey, 286 N.Y. 292, 36 N.E.2d 211, 286 N.Y. (N.Y.S.) 292, 1941 N.Y. LEXIS 1441 (N.Y.), reh'g denied, 286 N.Y. 707, 37 N.E.2d 147, 286 N.Y. (N.Y.S.) 707, 1941 N.Y. LEXIS 2272 (N.Y. 1941).

A determination dismissing petitioner from his position with a city police department after a finding that he had broken into a neighbor's window by hurling two object through them by the use of a slingshot would be annulled, where the transcript of a press conference held by the city's mayor, an ex officio member of the board and the hearing officer in this case, indicated that the board had considered unsubstantiated complaints against petitioner which were outside of the record in its decision, where the board failed to make any findings of fact, and where petitioner's right to a fair hearing was compromised when petitioner's counsel was not permitted to impeach the credibility of a witness whose testimony was crucial to linking petitioner to the breaking of the windows. Spetalieri v Quick, 96 A.D.2d 611, 464 N.Y.S.2d 601, 1983 N.Y. App. Div. LEXIS 19155 (N.Y. App. Div. 3d Dep't 1983).

Sanitation commissioner properly dismissed sanitation worker for solicitation and receipt of $20 bribe, even though worker argued that undercover investigator's credibility was undermined by videotape, where video was inconclusive except to establish that worker was standing within earshot of his partner when negotiation for money was commenced, and, in any event, sanitation department had prior disciplinary problems with worker. Cranford v Sexton, 159 A.D.2d 348, 552 N.Y.S.2d 626, 1990 N.Y. App. Div. LEXIS 2873 (N.Y. App. Div. 1st Dep't 1990).

Disciplinary hearing for state employee accused of assault at state hospital was not privileged, and although such statements taken under oath at said hearing may not be admissible in trial of claim for assault by attendant at state hospital, such statements

would be admissible for impeachment purposes and claimant was entitled to examine the record of the civil service disciplinary hearing at an examination before trial. Bennett v State, 53 Misc. 2d 1038, 280 N.Y.S.2d 294, 1967 N.Y. Misc. LEXIS 1483 (N.Y. Ct. Cl. 1967).

32. Deposition by third party

Finding that deputy sheriff court attendant committed misconduct by falling asleep in courtroom while on duty was supported by substantial evidence, although judge who witnessed him fall asleep did not testify at administrative hearing, where judge's written deposition memorandum fully describing incident was admitted in evidence and corroborated by other testimony adduced at hearing. Grossman v Kralik, 217 A.D.2d 625, 629 N.Y.S.2d 467, 1995 N.Y. App. Div. LEXIS 7795 (N.Y. App. Div. 2d Dep't 1995).

33. —By family member

Thirty-day suspension of probation officer, and requirement that he continue receiving professional help, was justified where probation officer was found to have threatened wife and children, which was job-related misconduct due to his law enforcement position; supporting deposition of wife was properly admitted into evidence because technical rules of evidence are not required in hearings such as one afforded defendant and where sufficient foundation for deposition was presented through testimony of investigating officer. Stiles v Phelan, 111 A.D.2d 591, 489 N.Y.S.2d 656, 1985 N.Y. App. Div. LEXIS 51623 (N.Y. App. Div. 3d Dep't 1985).

34. Drug tests

Evidence sustained discharge of firefighter where 2 samples of his urine taken 4 days apart showed presence of marihuana; Article 78 relief was not warranted on ground that such evidence constituted hearsay since (1) hearsay evidence is admissible in administrative proceedings, and findings of fact may be based on hearsay alone, and (2) in any event, laboratory records of urinalyses were within business records exception to hearsay rule. Lumsden v New York City Fire Dep't, 134 A.D.2d 595, 522 N.Y.S.2d 4, 1987 N.Y. App. Div. LEXIS 50803 (N.Y. App. Div. 2d Dep't 1987).

Compelling employees in titles in Groups I and II of Rapid Transit Railroad Service Classifications to submit to blood or urine test for purpose of detecting use of alcohol or drugs violates proscriptions against unreasonable searches and seizures unless predicated on reasonable suspicion with respect to particular employee; hearsay is admissible on issue of whether directive to submit to test is predicated on reasonable suspicion. Fiorenza v Gunn, 140 A.D.2d 295, 527 N.Y.S.2d 806, 1988 N.Y. App. Div. LEXIS 4636 (N.Y. App. Div. 2d Dep't 1988).

Finding that police officer was justifiably subjected to drug testing, on reasonable suspicion of drug abuse, was amply supported by substantial evidence that he had glassy, bloodshot and watery eyes, slurred speech, and history of suspicious mood swings, coupled with anonymous tips that he was one of several officers using drugs. Shepard v Ward, 155 A.D.2d 293, 547 N.Y.S.2d 57, 1989 N.Y. App. Div. LEXIS 14008 (N.Y. App. Div. 1st Dep't 1989).

There was substantial evidence to support suspicion of drug use by correction officer, justifying conduct of urinalysis test which yielded positive results for marihuana, based on officer's numerous absences from work within brief period, physician's opinion that her claimed asthmatic condition was not serious enough to explain absences, and observations of psychiatrist. Palmer v Koehler, 156 A.D.2d 242, 548 N.Y.S.2d 502, 1989 N.Y. App. Div. LEXIS 15505 (N.Y. App. Div. 1st Dep't 1989).

New York City Transit Authority was justified in ordering transit police officer to undergo drug testing after he was involved in automobile accident while on duty, although involvement in automobile accident did not by itself provide reasonable suspicion that he was unfit for duty on account of illegal drug use, since he was member of joint terrorist task force and thus his job was particularly sensitive; Fourth Amendment proscribes only unreasonable searches and seizures. Barretto v City of New York, 157 A.D.2d 116, 555 N.Y.S.2d 382, 1990 N.Y. App. Div. LEXIS 5354 (N.Y. App. Div. 2d Dep't 1990).

Substantial evidence supported housing authority's determination that housing officer was guilty of incompetency and misconduct, and should be dismissed, even though he claimed that there was no reasonable basis for suspecting him of drug use and that he had never knowingly used drugs, where (1) officer's handwritten, notarized letter together with his wife's allegation of drug use provided reasonable basis to order drug test, (2) officer tested positive for cocaine, and (3) trier of fact did not believe girlfriend's testimony that she slipped cocaine into officer's soft drink before drug test. Taylor v Raiford, 159 A.D.2d 309, 552 N.Y.S.2d 588, 1990 N.Y. App. Div. LEXIS 2688 (N.Y. App. Div. 1st Dep't 1990).

Police commissioner's determination that police officer wrongfully possessed and ingested quantity of marijuana was supported by evidence, including 2 EMIT tests performed on officer's urine samples and additional test known as bonded phase TLC. Trotta v Ward, 163 A.D.2d 182, 559 N.Y.S.2d 636, 1990 N.Y. App. Div. LEXIS 8365 (N.Y. App. Div. 1st Dep't 1990), rev'd, 77 N.Y.2d 827, 566 N.Y.S.2d 199, 567 N.E.2d 241, 1991 N.Y. LEXIS 70 (N.Y. 1991).

Court would affirm determination that correction officer violated department rules and regulations by unlawfully ingesting cocaine, notwithstanding contention that positive test results resulted from officer's unwitting drinking of liquor that had been spiked with cocaine at bachelor party 2 days prior to drug test, and despite testimony by bartender that he had spiked some bottles of liquor with cocaine and that he might have served officer from one of such bottles; under circumstances, officer established only possibility of unwitting ingestion. Green v Sielaff, 198 A.D.2d 113, 603 N.Y.S.2d 156, 1993 N.Y. App. Div. LEXIS 10635 (N.Y. App. Div. 1st Dep't 1993).

Determination that correction officer used marijuana was supported by results of EMIT drug test as confirmed by GC-MS test, testimony of 2 other correction officers and laboratory director describing chain of custody of urine sample, and latter's testimony explaining that certain irregularities in test readings were intended and had no impact on validity of results. Fulton v Jacobson, 226 A.D.2d 215, 641 N.Y.S.2d 16, 1996 N.Y. App. Div. LEXIS 3893 (N.Y. App. Div. 1st Dep't 1996).

Determination that firefighter used cocaine was supported by his admission to such use and positive results of EMIT and confirmatory GC/MS tests. EMIT test performed on August 4, 1994, which was direct result of firefighter's expulsion from compulsory drug counseling for "non-compliance," was sufficiently attenuated from suppressed April 18, 1994 test to withstand constitutional muster. Bassi v City of New York, 233 A.D.2d 269, 650 N.Y.S.2d 542, 1996 N.Y. App. Div. LEXIS 12127 (N.Y. App. Div. 1st Dep't 1996).

Police commissioner's finding that police officer was properly subjected to drug testing on reasonable suspicion of drug use would be upheld where commissioner rationally could have credited testimony concerning mistake in transcription of numbers for urine samples, absent other evidence of flawed chain of custody for such samples. Allen v Police Dep't, 240 A.D.2d 229, 658 N.Y.S.2d 610, 1997 N.Y. App. Div. LEXIS 6490 (N.Y. App. Div. 1st Dep't 1997).

Determination finding New York City Housing Authority officer guilty of ingesting illicit narcotics was supported by positive results of EMIT drug test as confirmed by GC-MS test. Casey v New York City Hous. Auth., 249 A.D.2d 230, 672 N.Y.S.2d 305, 1998 N.Y. App. Div. LEXIS 4758 (N.Y. App. Div. 1st Dep't 1998).

Court would affirm city's dismissal of probationary correction officer who tested positive for cocaine in urinalysis test, for inasmuch as test was part of certain established medical standards, and officer was given notice regarding departmental policy of drug testing during probationary period, her rights against unreasonable search and seizure were not violated. Odon v Koehler, 138 Misc. 2d 553, 524 N.Y.S.2d 614, 1988 N.Y. Misc. LEXIS 59 (N.Y. Sup. Ct. 1988).

35. —Refusal to take

Substantial evidence supported Department of Correction's findings that correction officer was guilty of misconduct, and that termination of officer was not so disproportionate to offenses as to be shocking to one's sense of fairness, where (1) officer had left his

fully loaded service revolver in bodega, thus failing to safeguard it, (2) he moonlighted at bodega without department's knowledge or authorization, which were required by agency rules and regulations, (3) he falsely stated that weapon was in his home, and (4) he refused to undergo urinalysis, which was properly requested because his appearance and behavior at department interview indicated drug use. Department of Correction's discharge of correction officer for failure to take drug test would be upheld, even though he argued that his appearance and behavior were consistent with lack of sleep, not drug use, and that he would not have been discharged but for his refusal to take drug test, where acceptance of his argument would require court to substitute its judgment of evidence for that of department. Ryant v Commissioner of Dep't of Correction, 159 A.D.2d 224, 552 N.Y.S.2d 29, 1990 N.Y. App. Div. LEXIS 2190 (N.Y. App. Div. 1st Dep't 1990).

Dismissal of police officer for attempting to purchase crack cocaine while off duty and refusing to submit to urinalysis was supported by substantial evidence, even though vial recovered from officer contained soap powder, where (1) narcotics officers observed officer receive vial from known drug dealer, shake hands with dealer, put vial in his pocket, enter his car and make U-turn across 3 lanes of traffic, (2) after arrest officer stated "This is going to mean my job," (3) officer was distant, disoriented and slow in responding to questions, and (4) he refused to undergo urinalysis after being advised twice that refusal would result in suspension. Gaul v Ward, 159 A.D.2d 380, 553 N.Y.S.2d 9, 1990 N.Y. App. Div. LEXIS 2913 (N.Y. App. Div. 1st Dep't 1990).

Substantial evidence supported determination that corrections officer refused to obey lawful order to submit to urinalysis examination where there was undisputed testimony from several correction officials as to officer's dilated eyes, perspiring forehead and irrational behavior, and it was undisputed that officer refused to submit to test. Rice v Seilaff, 181 A.D.2d 502, 581 N.Y.S.2d 311, 1992 N.Y. App. Div. LEXIS 3467 (N.Y. App. Div. 1st Dep't 1992).

Urine test yielding positive results for presence of marijuana, which was administered to city firefighter 2 days after his arrest for driving while intoxicated, did not constitute unreasonable search and seizure under New York or U.S. Constitution, and was therefore properly considered in administrative proceeding resulting in petitioner's dismissal, since (1) firefighter was involved in spectacular car accident after which he was observed to be incoherent and with smell of alcohol, (2) he refused to submit to blood test, and (3) even without individualized suspicion, governmental interest in testing firefighter was highly compelling given nature of his profession. Longo v Dolce, 192 A.D.2d 157, 600 N.Y.S.2d 962, 1993 N.Y. App. Div. LEXIS 7665 (N.Y. App. Div. 2d Dep't), app. dismissed, app. denied, 82 N.Y.2d 836, 606 N.Y.S.2d 589, 627 N.E.2d 511, 1993 N.Y. LEXIS 4312 (N.Y. 1993).

Determination that police officer failed to supply requested urine sample was supported by evidence of test results showing that specimen officer submitted for testing contained yellow food dye, not urine. Blount v Bratton, 216 A.D.2d 6, 627 N.Y.S.2d 375, 1995 N.Y. App. Div. LEXIS 5849 (N.Y. App. Div. 1st Dep't 1995).

36. Emergency vehicle involved

Evidence support city manager's determination that firefighter involved in collision while responding to first aid call in emergency vehicle failed to exercise reasonable care, and $100 fine was proportionate to offense, where firefighter had entered intersection controlled by stop signs at approximately 10 miles per hour with stopping or obtaining unobstructed view of oncoming traffic; fact that employer did not formally train firefighter in operation of emergency vehicles would not alleviate his failure to exercise due care. Remillard v Watervliet, 124 A.D.2d 912, 508 N.Y.S.2d 329, 1986 N.Y. App. Div. LEXIS 62233 (N.Y. App. Div. 3d Dep't 1986).

37. Eyewitness testimony

Eyewitness testimony was properly credited by hearing officer in disciplinary proceeding against police officers, despite fact that it conflicted with officers' testimony, since weighing of evidence and choosing between conflicting evidence is solely within province of administrative agency; thus, officers were properly found to have knowingly made false statements to their superiors, both at accident scene and at official department interview, regarding their chase of vehicle. Freeman v Ward, 162 A.D.2d 127, 556 N.Y.S.2d 563, 1990 N.Y. App. Div. LEXIS 6789 (N.Y. App. Div. 1st Dep't), app. denied, 76 N.Y.2d 706, 560 N.Y.S.2d 988, 561 N.E.2d 888, 1990 N.Y. LEXIS 3026 (N.Y. 1990).

Termination of petitioner's employment based on charges of physically attacking her supervisor and verbally yelling at her supervisor, using obscene language, was supported by supervisor's statement that petitioner "grabbed my neck and hit me" and called her "bitch," which was corroborated by eyewitness who indicated that petitioner told supervisor that she was "gonna f___ you up." Langhorne v Jackson, 213 A.D.2d 909, 623 N.Y.S.2d 962, 1995 N.Y. App. Div. LEXIS 3061 (N.Y. App. Div. 3d Dep't 1995).

Determination that petitioner abused his authority as police officer by falsely charging individual with assault, and that he made false memo book entry and false oral statement about incident to investigating sergeant, was supported by eyewitness testimony as well as sergeant's investigative report. Aliberti v O'Connor, 231 A.D.2d 472, 647 N.Y.S.2d 741, 1996 N.Y. App. Div. LEXIS 9505 (N.Y. App. Div. 1st Dep't 1996).

In Article 78 proceeding, police commissioner's determination that officer assaulted prisoner while in isolation cell was supported by substantial evidence where determination was supported by testimony of 2 eyewitnesses and corroborated in all major respects by testimony of medical technician and another officer. Clark v Bratton, 242 A.D.2d 486, 662 N.Y.S.2d 123, 1997 N.Y. App. Div. LEXIS 9121 (N.Y. App. Div. 1st Dep't 1997), app. denied, 91 N.Y.2d 810, 670 N.Y.S.2d 404, 693 N.E.2d 751, 1998 N.Y. LEXIS 880 (N.Y. 1998).

Charges against teacher's aide of inappropriate comments and physical contact with special education students was supported by testimony of students and eyewitnesses, documentary evidence, admission by aide, and testimony of Title XIV coordinator. Burkes v Enlarged City Sch. Dist., 257 A.D.2d 891, 684 N.Y.S.2d 57, 1999 N.Y. App. Div. LEXIS 506 (N.Y. App. Div. 3d Dep't 1999).

38. False statements

Eyewitness testimony was properly credited by hearing officer in disciplinary proceeding against police officers, despite fact that it conflicted with officers' testimony, since weighing of evidence and choosing between conflicting evidence is solely within province of administrative agency; thus, officers were properly found to have knowingly made false statements to their superiors, both at accident scene and at official department interview, regarding their chase of vehicle. Freeman v Ward, 162 A.D.2d 127, 556 N.Y.S.2d 563, 1990 N.Y. App. Div. LEXIS 6789 (N.Y. App. Div. 1st Dep't), app. denied, 76 N.Y.2d 706, 560 N.Y.S.2d 988, 561 N.E.2d 888, 1990 N.Y. LEXIS 3026 (N.Y. 1990).

Dismissal of correction officers was supported by substantial evidence that they used unreasonable force against inmate, submitted false reports about incident, and gave false statements to investigators. Mansfield v Sielaff, 184 A.D.2d 477, 585 N.Y.S.2d 425, 1992 N.Y. App. Div. LEXIS 8631 (N.Y. App. Div. 1st Dep't), app. denied, 80 N.Y.2d 760, 591 N.Y.S.2d 138, 605 N.E.2d 874, 1992 N.Y. LEXIS 3839 (N.Y. 1992).

Determination that petitioner abused his authority as police officer by falsely charging individual with assault, and that he made false memo book entry and false oral statement about incident to investigating sergeant, was supported by eyewitness testimony as well as sergeant's investigative report. Aliberti v O'Connor, 231 A.D.2d 472, 647 N.Y.S.2d 741, 1996 N.Y. App. Div. LEXIS 9505 (N.Y. App. Div. 1st Dep't 1996).

Determination that correction officer (petitioner) used impermissible force against inmate and submitted false report about incident was supported by testimony of inmate, inmate's wife, and girlfriend of another inmate that, after inmate struck petitioner, he was restrained by other correction officers while petitioner repeatedly punched and kicked him in head and stomach, medical evidence detailing injuries consistent with type of beating described by witnesses, inconsistencies between written report submitted by petitioner and his hearing testimony as to how altercation with inmate started, and documentary evidence impeaching petitioner's testimony that he had never before submit-

ted false report. Butler v New York City Dep't of Corrections, 254 A.D.2d 86, 678 N.Y.S.2d 617, 1998 N.Y. App. Div. LEXIS 10670 (N.Y. App. Div. 1st Dep't 1998).

County and a deputy commissioner properly terminated an employee for making false statements to a subordinate employee and to the commissioner about her friend's Medicaid application because the commissioner was careful to confine her findings of guilt and rationale for terminating the employee to the accusations as set forth in the notice of charges, and in light of the responsibilities inherent in the employee's high-level position in which she supervised approximately 45 employees, termination of her employment was not so disproportionate to the offenses as to be shocking to one's sense of fairness. Matter of Nitti v County of Tioga, 149 A.D.3d 1332, 53 N.Y.S.3d 378, 2017 N.Y. App. Div. LEXIS 2832 (N.Y. App. Div. 3d Dep't 2017).

A fireman who was dismissed from his position following his conviction on 10 felony counts of offering a false instrument for filing and two misdemeanor counts of violating the Tax Law with respect to sales taxes on the fireman's private business would not be entitled to annulment of his dismissal on the basis of a certificate of relief from disabilities that was issued to him pursuant to Correc Law § 701, since, though criminal activity may form the basis for disciplinary action under Civ S Law § 75, such dismissal is discretionary rather than mandatory, and Correc L § 701 specifically provides that certificates issued pursuant to its terms will not prevent any administrative board from relying on the underlying convictions as a basis for exercising its discretion; furthermore, the fireman would not be entitled to reinstatement under the terms of Correc Law § 752, since the statute applies only to applications for a license or employment by persons previously convicted of crimes, and has no bearing on persons who are already licensed or employed. Pisano v McKenna, 120 Misc. 2d 536, 466 N.Y.S.2d 231, 1983 N.Y. Misc. LEXIS 3755 (N.Y. Sup. Ct. 1983).

Appeals court affirmed town's termination of employee for fraudulent TTD claims (based on understating his other employment) and for getting benefits based on that claim and for his personal use of town vehicle; substantial evidence supported the disciplinary determinations. Tottey v Varvayanis, 307 A.D.2d 652, 762 N.Y.S.2d 543, 2003 N.Y. App. Div. LEXIS 8532 (N.Y. App. Div. 3d Dep't), app. denied, 1 N.Y.3d 501, 775 N.Y.S.2d 239, 807 N.E.2d 289, 2003 N.Y. LEXIS 3915 (N.Y. 2003).

Fact that the hearing officer recommended a penalty of only an unpaid suspension for the employee's fraudulent workers' compensation claims did not compel a different result; while the hearing officer's recommendation was entitled to deference, the town's highway department superintendent remained free to disregard the recommendation, to make new findings and to impose different discipline. Tottey v Varvayanis, 307 A.D.2d 652, 762 N.Y.S.2d 543, 2003 N.Y. App. Div. LEXIS 8532 (N.Y. App. Div. 3d Dep't), app. denied, 1 N.Y.3d 501, 775 N.Y.S.2d 239, 807 N.E.2d 289, 2003 N.Y. LEXIS 3915 (N.Y. 2003).

39. Hearsay statements

Hearsay testimony supported only by circumstantial evidence did not constitute substantial evidence sufficient to support a determination of the Commissioner of Social Services that petitioner, a nurse's aide, was guilty of inappropriate physical contact with a female patient causing injury to the patient's left thumb where careful examination of the testimony led to the inescapable conclusion that the patient suffered from mental disorders, that there were no witnesses present at the time of the alleged incident and that all of the testimony of each witness concerning the incident was based on pure hearsay and incompetent opinion testimony improperly solicited by the hearing officer as to how the injury could have occurred. Eppler v Van Alstyne, 93 A.D.2d 930, 462 N.Y.S.2d 320, 1983 N.Y. App. Div. LEXIS 17824 (N.Y. App. Div. 3d Dep't 1983).

At a hearing before the police commission regarding a police officer's suspension without pay following charges of insubordination for failure to return to work after an injury, it was reasonable to assume that the commission was materially influenced by testimony of the department's doctor as to hearsay statements of other doctors who did not testify and whose reports were not admitted into evidence, since the conclusions of the non-testifying doctors significantly strengthened the department's case, and, under the circumstances, receipt of the hearsay statements without the opportunity of cross-examining the other doctors deprived the police officer of a fair hearing. Multari v Stony Point, 99 A.D.2d 838, 472 N.Y.S.2d 439, 1984 N.Y. App. Div. LEXIS 17247 (N.Y. App. Div. 2d Dep't 1984).

Hearsay evidence of employee's refusal to work on particular occasion, which consisted of bare conclusory statement, was admissible in administrative hearing but was insufficient to support charge of misconduct where employee's own version of incident was otherwise uncontradicted. Drayton v Hasl, 121 A.D.2d 631, 503 N.Y.S.2d 869, 1986 N.Y. App. Div. LEXIS 58615 (N.Y. App. Div. 2d Dep't 1986).

Compelling employees in titles in Groups I and II of Rapid Transit Railroad Service Classifications to submit to blood or urine test for purpose of detecting use of alcohol or drugs violates proscriptions against unreasonable searches and seizures unless predicated on reasonable suspicion with respect to particular employee; hearsay is admissible on issue of whether directive to submit to test is predicated on reasonable suspicion. Fiorenza v Gunn, 140 A.D.2d 295, 527 N.Y.S.2d 806, 1988 N.Y. App. Div. LEXIS 4636 (N.Y. App. Div. 2d Dep't 1988).

In disciplinary proceeding under CLS Civ S § 75, substantial evidence supported dismissal of city school district worker with permanent civil service status for various instances of unauthorized tardiness and absence from work, although partially based on hearsay, where hearsay in question, consisting of oral reports from staff persons to assistant school superintendent, were fact specific, narrowly drawn to issues of petitioner's violations, and contemporaneously made, and there was no reason to doubt that staff members had duty to report accurately to assistant superintendent. Diehsner v Schenectady City School Dist., 152 A.D.2d 796, 543 N.Y.S.2d 576, 1989 N.Y. App. Div. LEXIS 9328 (N.Y. App. Div. 3d Dep't 1989).

Hearsay testimony of prisoner with whom complainant shared holding cell immediately after alleged assault by members of New York City Transit Police Department was properly admitted in department's disciplinary proceeding against them. Luciano v Brattan, 192 A.D.2d 658, 597 N.Y.S.2d 104, 1993 N.Y. App. Div. LEXIS 3873 (N.Y. App. Div. 2d Dep't 1993).

Transit authority officer was properly discharged for violation of departmental rules and regulations where testimony of eyewitness and hearsay testimony of store clerk and his assistant established that officer menaced clerk with his firearm and discharged firearm without authorization. Maloney v Suardy, 202 A.D.2d 297, 609 N.Y.S.2d 179, 1994 N.Y. App. Div. LEXIS 2522 (N.Y. App. Div. 1st Dep't 1994).

At police officer's dismissal hearing, commissioner properly accepted hearsay statements of 2 informants whose reliability was corroborated by police surveillance observations and investigation. Brinson v Safir, 255 A.D.2d 247, 680 N.Y.S.2d 500, 1998 N.Y. App. Div. LEXIS 12683 (N.Y. App. Div. 1st Dep't 1998), app. denied, 93 N.Y.2d 805, 689 N.Y.S.2d 707, 711 N.E.2d 983, 1999 N.Y. LEXIS 825 (N.Y. 1999).

Specifications against teacher's aide of inappropriate comments and physical contact with special education students were properly dismissed where they were either contradicted by students involved or were supported solely by hearsay testimony. Burkes v Enlarged City Sch. Dist., 257 A.D.2d 891, 684 N.Y.S.2d 57, 1999 N.Y. App. Div. LEXIS 506 (N.Y. App. Div. 3d Dep't 1999).

Admission and consideration of a written statement given by a custodian's girlfriend to police was not error in the custodian's disciplinary hearing; although the officer who took the statement from the girlfriend did not testify, the girlfriend testified at the hearing, admitted making the statement and offered an explanation as to why she gave the officer information that she now contended was not an accurate account of what transpired. Matter of James v Hoosick Falls Cent. School Dist., 93 A.D.3d 1131, 941 N.Y.S.2d 335, 2012 N.Y. App. Div. LEXIS 2367 (N.Y. App. Div. 3d Dep't 2012).

40. —Business records exception

Evidence sustained discharge of firefighter where 2 samples of his urine taken 4 days apart showed presence of marihuana;

Article 78 relief was not warranted on ground that such evidence constituted hearsay since (1) hearsay evidence is admissible in administrative proceedings, and findings of fact may be based on hearsay alone, and (2) in any event, laboratory records of urinalyses were within business records exception to hearsay rule. Lumsden v New York City Fire Dep't, 134 A.D.2d 595, 522 N.Y.S.2d 4, 1987 N.Y. App. Div. LEXIS 50803 (N.Y. App. Div. 2d Dep't 1987).

41. Illegally obtained evidence

Evidence of marihuana possession seized by city police officers from vehicle occupied by state trooper was properly admitted against trooper in state police administrative disciplinary proceeding, even though evidence was product of illegal search and required suppression in prior criminal prosecution, where city police could not have foreseen that trooper would be subject to disciplinary proceeding when they made seizure, they did not know of trooper's occupation prior to seizure, they did not act as agents of state police, and thus only negligible deterrence would result from exclusion of evidence; on other hand, suppression of such evidence would have significant adverse impact on truth-finding process in administrative proceedings concerning police officers involved in drug-related incidents. Boyd v Constantine, 81 N.Y.2d 189, 597 N.Y.S.2d 605, 613 N.E.2d 511, 1993 N.Y. LEXIS 697 (N.Y. 1993).

Illegally obtained evidence was inadmissible in proceeding before hearing officer on charges that patrolman employed by city housing authority illegally possessed dangerous drugs and hypodermic instruments. McPherson v New York City Housing Authority, 47 A.D.2d 828, 365 N.Y.S.2d 862, 1975 N.Y. App. Div. LEXIS 9168 (N.Y. App. Div. 1st Dep't 1975).

Police officer's dismissal was based on substantial evidence where officer violated Patrol Guide by (1) not requesting presence of sergeant before searching body and premises of dead person, (2) not properly safeguarding or vouchering currency found in deceased's pocket, (3) placing currency in another location, (4) knowingly and falsely telling sergeant that he had not recovered currency, and (5) not making proper activity log entries of his assignment. Ward v Ward, 159 A.D.2d 287, 552 N.Y.S.2d 292, 1990 N.Y. App. Div. LEXIS 2668 (N.Y. App. Div. 1st Dep't 1990).

42. Incompetent evidence

County police officer was not denied a fair hearing, on charges asserted as ground for dismissal, by the admission, over objection, of legally incompetent evidence. Buttacavoli v Guido, 59 A.D.2d 891, 399 N.Y.S.2d 47, 1977 N.Y. App. Div. LEXIS 14080 (N.Y. App. Div. 2d Dep't 1977), app. denied, 44 N.Y.2d 643, 1978 N.Y. LEXIS 4291 (N.Y. 1978).

43. Matters outside record

Where director of school for mentally retarded, in rendering account of his decision to discharge permanent employee who had been accused of sexual relations with a school resident, acknowledged that he had relied on matters not appearing in record of hearing at which hearing officer had concluded that employee was innocent of charge, director's action violated general proposition that it is not proper for an administrative agency to base an adjudicatory decision on evidence or information outside the record, where right to a hearing exists. Simpson v Wolansky, 38 N.Y.2d 391, 380 N.Y.S.2d 630, 343 N.E.2d 274, 1975 N.Y. LEXIS 2359 (N.Y. 1975).

While compliance with strict evidentiary standards is not required in administrative hearing, it is clearly improper for administrative agency to base decision of adjudicatory nature, where there is right to hearing, upon evidence or information outside record. Avery v Rechter, 56 A.D.2d 963, 392 N.Y.S.2d 714, 1977 N.Y. App. Div. LEXIS 11372 (N.Y. App. Div. 3d Dep't 1977).

A Board of Education erred in considering un-established allegations concerning a school custodian's employment history, which allegations were contained in a confidential memorandum prepared by the superintendent of schools, since even though a governmental body has the right to consider other instances of misconduct or incompetence revealed in the employee's record, it was improper to impose a penalty determined in whole or in part on the basis of un-established allegations, the error was compounded by the fact that custodian was not informed that the board was going to consider these old allegations and so had no opportunity to refute or explain them, and the employment file was not part of the proceeding record. Lee v Board of Education, 90 A.D.2d 775, 455 N.Y.S.2d 286, 1982 N.Y. App. Div. LEXIS 18980 (N.Y. App. Div. 2d Dep't 1982).

44. Newly discovered evidence

The Commissioner of Conservation was justified in denying a motion to reopen his decision discharging petitioner as a game protector on charges of intoxication, etc., for alleged newly discovered evidence not produced until nearly four years after the hearing and determination, and dubious in character. Perry v Mauhs, 14 A.D.2d 624, 218 N.Y.S.2d 297, 1961 N.Y. App. Div. LEXIS 9399 (N.Y. App. Div. 3d Dep't), app. dismissed, 10 N.Y.2d 886, 1961 N.Y. LEXIS 2304 (N.Y. 1961).

45. Personnel record of employee considered as evidence

In proceeding to review determination of New York City Housing Authority discharging officer for incompetence and misconduct, psychiatric report sought by officer's superiors in order to determine whether officer's condition warranted termination was part of officer's reviewable employment record, since employee counseling unit's confidentiality requirement attached only where counseling was for purposes of remedying personal employment problems; in any event, officer waived issue of lack of notice of use of his employment record by failing to raise issue in his initial petition. David v Christian, 134 A.D.2d 349, 520 N.Y.S.2d 826, 1987 N.Y. App. Div. LEXIS 50526 (N.Y. App. Div. 2d Dep't 1987).

Determination of city mayor dismissing petitioner from his city job was unreasonable where such penalty was determined in whole or in part on basis of unestablished allegations of unauthorized absences from work contained in memoranda in petitioner's personnel file; despite notice to petitioner that personnel file would be reviewed and inspected, mayor's reliance on file was improper and denied petitioner his due process rights. Segrue v Schenectady, 152 A.D.2d 826, 544 N.Y.S.2d 36, 1989 N.Y. App. Div. LEXIS 9417 (N.Y. App. Div. 3d Dep't 1989), rev'd, 76 N.Y.2d 758, 559 N.Y.S.2d 235, 558 N.E.2d 37, 1990 N.Y. LEXIS 1337 (N.Y. 1990).

Where a real property clerk was terminated for alleged misconduct and insubordination, there was no impropriety in the hearing officer's consideration of her overall employment record or a prior disciplinary proceeding in fashioning a penalty. Matter of Zlotnick v City of Saratoga Springs, 122 A.D.3d 1210, 997 N.Y.S.2d 809, 2014 N.Y. App. Div. LEXIS 8228 (N.Y. App. Div. 3d Dep't 2014).

In two civil actions relating to an alleged assault by a police officer against the plaintiff, the internal investigation file consisting of the officer's personnel record was confidential and protected from discovery by Civ R Law § 50-a since the purpose of an internal investigation is to gather all pertinent information relating to possible police misconduct to enable the police department to evaluate the conduct of the officer and to determine appropriate disciplinary action, and since the internal investigation file is used as the basis for the department's case if a departmental hearing is conducted against the officer pursuant to Civ Serv Law § 75. Wunsch v Rochester, 108 Misc. 2d 854, 438 N.Y.S.2d 896, 1981 N.Y. Misc. LEXIS 2303 (N.Y. Sup. Ct. 1981).

46. —Criminal matters

At disciplinary hearing wherein court officer was found guilty of misconduct and his employment was terminated, he was not denied due process when hearing officer conducted in camera review of Office of Court Administration's investigative file where file was subject of concurrent criminal investigation; in camera review protected both integrity of on-going criminal investigation and court officer's need to determine whether file contained any exculpatory material. Connolly v Williams, 210 A.D.2d 19, 618 N.Y.S.2d 808, 1994 N.Y. App. Div. LEXIS 11874 (N.Y. App. Div. 1st Dep't 1994).

47. Police misconduct, evidence of

A determination dismissing petitioner from his position with a city police department after a finding that he had broken into a neighbor's window by hurling two object through them by the use of a slingshot would be annulled, where the transcript of a press

conference held by the city's mayor, an ex officio member of the board and the hearing officer in this case, indicated that the board had considered unsubstantiated complaints against petitioner which were outside of the record in its decision, where the board failed to make any findings of fact, and where petitioner's right to a fair hearing was compromised when petitioner's counsel was not permitted to impeach the credibility of a witness whose testimony was crucial to linking petitioner to the breaking of the windows. Spetalieri v Quick, 96 A.D.2d 611, 464 N.Y.S.2d 601, 1983 N.Y. App. Div. LEXIS 19155 (N.Y. App. Div. 3d Dep't 1983).

Substantial evidence supported police commissioner's finding that police officer broke into store, stole food stamps, and failed to report fellow officers who performed same actions in his presence, despite officer's claim that evidentiary sources of questionable character were not corroborated by other reliable evidence, where hearing officer credited testimony of police department's sole eyewitness and its one informant, and testimony of department's witnesses was corroborated by tape-recorded conversation implicating police officer as participant in store break-in and theft. Scaturico v Ward, 159 A.D.2d 221, 552 N.Y.S.2d 24, 1990 N.Y. App. Div. LEXIS 2180 (N.Y. App. Div. 1st Dep't 1990).

Substantial evidence supported police commissioner's finding that police officer broke into store, stole coins, failed to properly supervise officers under his command, and failed to report other officers who broke into store and committed theft in his presence, despite officer's claim that evidentiary sources of questionable character were not corroborated by other reliable evidence, where hearing officer credited testimony of police department's sole eyewitness and its one informant, and testimony of department's witnesses was corroborated by tape recorded conversation implicating dismissed officer in store break-in and theft. Jervas v Ward, 159 A.D.2d 222, 552 N.Y.S.2d 25, 1990 N.Y. App. Div. LEXIS 2189 (N.Y. App. Div. 1st Dep't 1990).

Police officer's dismissal was based on substantial evidence where officer violated Patrol Guide by (1) not requesting presence of sergeant before searching body and premises of dead person, (2) not properly safeguarding or vouchering currency found in deceased's pocket, (3) placing currency in another location, (4) knowingly and falsely telling sergeant that he had not recovered currency, and (5) not making proper activity log entries of his assignment. Ward v Ward, 159 A.D.2d 287, 552 N.Y.S.2d 292, 1990 N.Y. App. Div. LEXIS 2668 (N.Y. App. Div. 1st Dep't 1990).

Substantial evidence supported police commissioner's finding that 2 police officers violated department rules of conduct and were subject to suspension, irrespective of who began altercation with complainant, where officers brushed complainant with their automobile, kicked complainant, beat him about head and face, "perhaps" pistol-whipped him, and failed to identify themselves as police officers until after altercation. Duncan v Ward, 159 A.D.2d 400, 553 N.Y.S.2d 99, 1990 N.Y. App. Div. LEXIS 3026 (N.Y. App. Div. 1st Dep't 1990).

Substantial evidence did not support determination that police officer (petitioner) violated department rule requiring filing of report whenever officer drew "his weapon" where there was evidence that petitioner's fellow officers had drawn their weapons, but there was no evidence that petitioner had drawn his weapon; rule did not require that petitioner file report that his subordinates drew their weapons. Ligreci v Honors, 171 A.D.2d 1058, 568 N.Y.S.2d 992, 1991 N.Y. App. Div. LEXIS 6801 (N.Y. App. Div. 4th Dep't), app. denied, 78 N.Y.2d 853, 573 N.Y.S.2d 466, 577 N.E.2d 1058, 1991 N.Y. LEXIS 904 (N.Y. 1991).

Substantial evidence supported determination that officers used unnecessary and excessive force while effectuating arrest, and thus suspension and disciplinary probation would be confirmed, where (1) complainant testified that he was held and struck with club, and (2) independent witness testified that he saw one officer hold complainant and another striking him on head with club, and witness then went to home of friend and called 911. Nunez v Ward, 172 A.D.2d 241, 567 N.Y.S.2d 735, 1991 N.Y. App. Div. LEXIS 4466 (N.Y. App. Div. 1st Dep't), app. denied, 78 N.Y.2d 855, 573 N.Y.S.2d 644, 578 N.E.2d 442, 1991 N.Y. LEXIS 1333 (N.Y. 1991).

Substantial evidence supported determination that petitioner was guilty of conduct unbecoming police officer where he needlessly broadcast name and address of certain lieutenant on primary band fifth precinct radio frequency and posted 2 copies of summonses issued to lieutenant on "PBA bulletin board" at fifth precinct, acts which served no legitimate purpose and were solely to harass, embarrass and annoy lieutenant. Gang v Guido, 185 A.D.2d 272, 586 N.Y.S.2d 22, 1992 N.Y. App. Div. LEXIS 8902 (N.Y. App. Div. 2d Dep't 1992).

Police officer's failure to remove his firearm in booking area did not, as matter of law, violate provision of police department code of ethics that "law enforcement officer shall conduct his official life in a manner such as will inspire confidence and trust"; hearing officer's contrary finding was clearly erroneous. Dicaprio v Trzaskos, 203 A.D.2d 759, 610 N.Y.S.2d 395, 1994 N.Y. App. Div. LEXIS 4082 (N.Y. App. Div. 3d Dep't 1994).

Determination that petitioner abused his authority as police officer by falsely charging individual with assault, and that he made false memo book entry and false oral statement about incident to investigating sergeant, was supported by eyewitness testimony as well as sergeant's investigative report. Aliberti v O'Connor, 231 A.D.2d 472, 647 N.Y.S.2d 741, 1996 N.Y. App. Div. LEXIS 9505 (N.Y. App. Div. 1st Dep't 1996).

Determination that state trooper violated CLS Penal § 400.05(1) was supported by his own admission that he retained 3 handguns as his own after they were surrendered to him while he was at scene of domestic disturbance; despite his alleged ignorance of law, he was required to retain and secure surrendered weapons for their eventual destruction. Hricik v McMahon, 247 A.D.2d 935, 668 N.Y.S.2d 295, 1998 N.Y. App. Div. LEXIS 1320 (N.Y. App. Div. 4th Dep't 1998).

Finding that police officer stole money seized at illegal gambling location during police raid was supported by videotape surveillance of location, officer's failure to report allegations of corruption that were made against her in integrity tests conducted by Internal Affairs, and her admittedly false statements as to integrity tests given in departmental interview. Renna v Safir, 256 A.D.2d 219, 683 N.Y.S.2d 18, 1998 N.Y. App. Div. LEXIS 13756 (N.Y. App. Div. 1st Dep't 1998).

In a hearing pursuant to N.Y. Civ. Serv. Law § 75, substantial evidence supported a hearing officer's findings of misconduct by a police officer because (1) the detailed sworn statement of the officer's 20-year-old girlfriend, prepared shortly after the alleged incident, related, among other things, that she and the officer drank alcoholic beverages at three bars that evening, they quarreled, the officer shoved her out the door, and he punched the right side of her chin; (2) the hearsay nature of the girlfriend's statement did not preclude it from being considered at the hearing; and (3) the officers who viewed the girlfriend's injuries, took her statement on the day of the incident, and photographed her injuries testified at the hearing. Correll v Bucci, 19 A.D.3d 919, 798 N.Y.S.2d 157, 2005 N.Y. App. Div. LEXIS 7110 (N.Y. App. Div. 3d Dep't 2005).

In two civil actions relating to an alleged assault by a police officer against the plaintiff, the internal investigation file consisting of the officer's personnel record was confidential and protected from discovery by Civ R Law § 50-a since the purpose of an internal investigation is to gather all pertinent information relating to possible police misconduct to enable the police department to evaluate the conduct of the officer and to determine appropriate disciplinary action, and since the internal investigation file is used as the basis for the department's case if a departmental hearing is conducted against the officer pursuant to Civ Serv Law § 75. Wunsch v Rochester, 108 Misc. 2d 854, 438 N.Y.S.2d 896, 1981 N.Y. Misc. LEXIS 2303 (N.Y. Sup. Ct. 1981).

In a suit challenging both the legality of a city's Police Accountability Board's (PAB's) role in police discipline and its affect on collective bargaining with the police union, the court held Local Law No. 2 was unlawful and invalid only for the purpose of conducting hearings and disciplining officers of the city because state law bound the city since 1985, and the Council therefore acted ultra vires when it enacted portions of Local Law No. 2 that contradicted state law. Matter of Rochester Police Locust Club Inc. v City of Rochester, 2020 N.Y. Misc. LEXIS 10983 (N.Y. Sup. Ct. 2020).

48. —Automobile involved

Substantial evidence supported police commissioner's finding that police officer wrongfully possessed 10 forged parking permits, threatened witness and her family, knowingly made inaccurate entries in his activity log regarding number of summonses he issued, and wrongfully drove his private automobile while in uniform, where, inter alia, (1) witness testified that officer possessed forged permits and threatened her and her family, (2) officer subsequently attempted to submit forged permit for renewal, (3) tape recording had been made of telephone call threatening witness, children and mother, (4) officer claimed 334 summonses served when, in fact, he had issued only 225, (5) expert testified that officer presented expired and forged permit for renewal, and (6) officer admitted that he wrongfully drove his private automobile while in uniform. Suggs v Ward, 159 A.D.2d 381, 552 N.Y.S.2d 636, 1990 N.Y. App. Div. LEXIS 2928 (N.Y. App. Div. 1st Dep't 1990).

Substantial evidence supported determination that police officer violated order of superior officer and willfully mistreated or assaulted another police officer where (1) petitioner, with permission of superior officer, placed bumper stickers on numerous police vehicles, (2) on next day, he found that about 20 such bumper stickers had been placed on bumpers, headlights, door handles and windows of his personal vehicle, (3) petitioner's superior officer said that he would take care of matter and that petitioner was not to get involved, and (4) petitioner confronted another police officer, had argument, and punched other police officer. Hammond v Amsterdam, 185 A.D.2d 495, 586 N.Y.S.2d 364, 1992 N.Y. App. Div. LEXIS 8945 (N.Y. App. Div. 3d Dep't 1992).

Evidence supported determination that police officer drove vehicle in improper, unsafe, reckless, careless, or negligent manner, endangered safety and welfare of himself and others, caused damage to police vehicle, and failed to follow proper police rules and regulations where, in response to emergency call that child was not breathing, officer created near head-on collision, went off roadway onto shoulder and hit no-parking sign, sheering it off and shattering windshield, and then continued to proceed to location with limited visibility out of windshield. Hoffman v Village of Sidney, 235 A.D.2d 698, 652 N.Y.S.2d 346, 1997 N.Y. App. Div. LEXIS 123 (N.Y. App. Div. 3d Dep't 1997).

49. —Drugs involved

Determination of Superintendent of State Police that state trooper knowingly possessed marihuana was supported by substantial evidence for purposes of disciplinary hearing where marihuana was found by city police on console between front seats of vehicle, and vehicle was occupied by trooper and another man sitting in back seat. Boyd v Constantine, 81 N.Y.2d 189, 597 N.Y.S.2d 605, 613 N.E.2d 511, 1993 N.Y. LEXIS 697 (N.Y. 1993).

Finding that police officer was justifiably subjected to drug testing, on reasonable suspicion of drug abuse, was amply supported by substantial evidence that he had glassy, bloodshot and watery eyes, slurred speech, and history of suspicious mood swings, coupled with anonymous tips that he was one of several officers using drugs. Shepard v Ward, 155 A.D.2d 293, 547 N.Y.S.2d 57, 1989 N.Y. App. Div. LEXIS 14008 (N.Y. App. Div. 1st Dep't 1989).

New York City Transit Authority was justified in ordering transit police officer to undergo drug testing after he was involved in automobile accident while on duty, although involvement in automobile accident did not by itself provide reasonable suspicion that he was unfit for duty on account of illegal drug use, since he was member of joint terrorist task force and thus his job was particularly sensitive; Fourth Amendment proscribes only unreasonable searches and seizures. Barretto v City of New York, 157 A.D.2d 116, 555 N.Y.S.2d 382, 1990 N.Y. App. Div. LEXIS 5354 (N.Y. App. Div. 2d Dep't 1990).

Dismissal of police officer for attempting to purchase crack cocaine while off duty and refusing to submit to urinalysis was supported by substantial evidence, even though vial recovered from officer contained soap powder, where (1) narcotics officers observed officer receive vial from known drug dealer, shake hands with dealer, put vial in his pocket, enter his car and make U-turn across 3 lanes of traffic, (2) after arrest officer stated "This is going to mean my job," (3) officer was distant, disoriented and slow in responding to questions, and (4) he refused to undergo urinalysis after being advised twice that refusal would result in suspension. Gaul v Ward, 159 A.D.2d 380, 553 N.Y.S.2d 9, 1990 N.Y. App. Div. LEXIS 2913 (N.Y. App. Div. 1st Dep't 1990).

Police commissioner's determination that police officer wrongfully possessed and ingested quantity of marijuana was supported by evidence, including 2 EMIT tests performed on officer's urine samples and additional test known as bonded phase TLC. Trotta v Ward, 163 A.D.2d 182, 559 N.Y.S.2d 636, 1990 N.Y. App. Div. LEXIS 8365 (N.Y. App. Div. 1st Dep't 1990), rev'd, 77 N.Y.2d 827, 566 N.Y.S.2d 199, 567 N.E.2d 241, 1991 N.Y. LEXIS 70 (N.Y. 1991).

Determination that police officer failed to supply requested urine sample was supported by evidence of test results showing that specimen officer submitted for testing contained yellow food dye, not urine. Blount v Bratton, 216 A.D.2d 6, 627 N.Y.S.2d 375, 1995 N.Y. App. Div. LEXIS 5849 (N.Y. App. Div. 1st Dep't 1995).

Police commissioner's finding that police officer was properly subjected to drug testing on reasonable suspicion of drug use would be upheld where commissioner rationally could have credited testimony concerning mistake in transcription of numbers for urine samples, absent other evidence of flawed chain of custody for such samples. Allen v Police Dep't, 240 A.D.2d 229, 658 N.Y.S.2d 610, 1997 N.Y. App. Div. LEXIS 6490 (N.Y. App. Div. 1st Dep't 1997).

50. —Insubordination

A county deputy police commissioner improperly dismissed an off-duty county police officer from his position based on reports from two psychiatrists who had concluded that the officer was not fit, since such finding was not the equivalent of a finding of guilt pursuant to Civ S Law § 75, and the deputy commissioner had failed to follow the procedures applicable to findings of unfitness specified in Civ S Law §§ 72, 73. A county police officer who had been dismissed from his position on the asserted ground that he had disobeyed an order by the police commissioner that he refrain absolutely from taking any official action while off duty against apparent violations of law in his neighborhood would be ordered reinstated where, though the commissioner's version of what had transpired during his meeting with the officer supported the charge that had led to the officer's dismissal, the commissioner had failed to record his conversation with the officer as required by the collective bargaining agreement between the county and the police officers' union in the case of investigation of citizen complaints, and where the fact that the commissioner had intervened in the investigation in the belief that he was doing so informally did not eliminate the need for compliance with such recording requirement, so that the allegation that the officer had disobeyed a lawful order was unsupported by substantial evidence in the record. Cymbalsky v Dilworth, 97 A.D.2d 543, 467 N.Y.S.2d 902, 1983 N.Y. App. Div. LEXIS 20152 (N.Y. App. Div. 2d Dep't 1983).

Evidence did not support determination finding police officer guilty of insubordination for using profanity while engaging in off-duty conversation with superior officer over private phone line where, inter alia, town code of rules and regulations stated that members of police department were to be courteous to superior officers "while on duty," and superior officer in question often heard such language used and he had never instructed any of his subordinates to desist from using such profanity unless it was being used in dealing with civilian complaint. Curley v Town Bd., 218 A.D.2d 799, 631 N.Y.S.2d 51, 1995 N.Y. App. Div. LEXIS 8951 (N.Y. App. Div. 2d Dep't 1995).

Substantial evidence supported a determination by a village board of trustees to terminate a police officer for insubordination under N.Y. Civ. Serv. Law § 75 because the officer, almost immediately after being given an order to discontinue an investigation of a restaurant owner, who allegedly touched the daughter of the officer's paramour inappropriately, went to a female employee and obtained a statement as to the owner's inappropriate touching of female employees. Matter of Longton v Village of Corinth, 57 A.D.3d 1273, 869 N.Y.S.2d 682, 2008 N.Y. App. Div. LEXIS 9799 (N.Y. App. Div. 3d Dep't 2008), app. denied, 13 N.Y.3d

709, 890 N.Y.S.2d 447, 918 N.E.2d 962, 2009 N.Y. LEXIS 3970 (N.Y. 2009).

51. —Off-duty misconduct

A county deputy police commissioner improperly dismissed an off-duty county police officer from his position based on reports from two psychiatrists who had concluded that the officer was not fit, since such finding was not the equivalent of a finding of guilt pursuant to Civ S Law § 75, and the deputy commissioner had failed to follow the procedures applicable to findings of unfitness specified in Civ S Law §§ 72, 73. A county police officer who had been dismissed from his position on the asserted ground that he had disobeyed an order by the police commissioner that he refrain absolutely from taking any official action while off duty against apparent violations of law in his neighborhood would be ordered reinstated where, though the commissioner's version of what had transpired during his meeting with the officer supported the charge that had led to the officer's dismissal, the commissioner had failed to record his conversation with the officer as required by the collective bargaining agreement between the county and the police officers' union in the case of investigation of citizen complaints, and where the fact that the commissioner had intervened in the investigation in the belief that he was doing so informally did not eliminate the need for compliance with such recording requirement, so that the allegation that the officer had disobeyed a lawful order was unsupported by substantial evidence in the record. Cymbalsky v Dilworth, 97 A.D.2d 543, 467 N.Y.S.2d 902, 1983 N.Y. App. Div. LEXIS 20152 (N.Y. App. Div. 2d Dep't 1983).

At a hearing before the police commission regarding a police officer's suspension without pay following charges of insubordination for failure to return to work after an injury, it was reasonable to assume that the commission was materially influenced by testimony of the department's doctor as to hearsay statements of other doctors who did not testify and whose reports were not admitted into evidence, since the conclusions of the non-testifying doctors significantly strengthened the department's case, and, under the circumstances, receipt of the hearsay statements without the opportunity of cross-examining the other doctors deprived the police officer of a fair hearing. Multari v Stony Point, 99 A.D.2d 838, 472 N.Y.S.2d 439, 1984 N.Y. App. Div. LEXIS 17247 (N.Y. App. Div. 2d Dep't 1984).

Dismissal of police officer for attempting to purchase crack cocaine while off duty and refusing to submit to urinalysis was supported by substantial evidence, even though vial recovered from officer contained soap powder, where (1) narcotics officers observed officer receive vial from known drug dealer, shake hands with dealer, put vial in his pocket, enter his car and make U-turn across 3 lanes of traffic, (2) after arrest officer stated "This is going to mean my job," (3) officer was distant, disoriented and slow in responding to questions, and (4) he refused to undergo urinalysis after being advised twice that refusal would result in suspension. Gaul v Ward, 159 A.D.2d 380, 553 N.Y.S.2d 9, 1990 N.Y. App. Div. LEXIS 2913 (N.Y. App. Div. 1st Dep't 1990).

Substantial evidence supported determination finding police officers guilty of misconduct while investigating accident by failing to report that off-duty officer was involved, failing to safeguard citizens involved in accidents who where assaulted and verbally abused by crowd of onlookers, and failing to properly investigate and document occurrence. McKean v Ward, 167 A.D.2d 117, 561 N.Y.S.2d 205, 1990 N.Y. App. Div. LEXIS 13016 (N.Y. App. Div. 1st Dep't 1990).

Evidence supported sheriff's determination that deputy was guilty of, inter alia, conduct bringing discredit on sheriff's department, notwithstanding deputy's argument that there had been no evidence of media coverage causing adverse publicity or discredit following his participation in off-duty assault on 2 persons, since victims of assault, their relatives, hospital employees, and members of sheriff's department were "certainly" aware of assault, and such awareness was sufficient to discredit department. Evidence supported sheriff's determination that deputy was equally responsible with his companion (city police officer) for off-duty assault on innocent pedestrian where it was shown that deputy participated in assault by restraining victim's girlfriend from assisting victim, by giving warnings to victim, by failing to obtain medical care, and by failing to report incident. Robertson v Eccleston, 183 A.D.2d 1045, 583 N.Y.S.2d 630, 1992 N.Y. App. Div. LEXIS 7165 (N.Y. App. Div. 3d Dep't 1992).

Police commissioner properly found that officer committed misconduct by obstructing traffic on bridge while he was off duty, and by participating in demonstration, where officer violated rules of city department of transportation prohibiting use of bridge by pedestrians. Loeffel v Kelly, 214 A.D.2d 431, 625 N.Y.S.2d 39, 1995 N.Y. App. Div. LEXIS 4362 (N.Y. App. Div. 1st Dep't), app. denied, 86 N.Y.2d 706, 632 N.Y.S.2d 499, 656 N.E.2d 598, 1995 N.Y. LEXIS 3436 (N.Y. 1995).

Evidence did not support determination finding police officer guilty of insubordination for using profanity while engaging in off-duty conversation with superior officer over private phone line where, inter alia, town code of rules and regulations stated that members of police department were to be courteous to superior officers "while on duty," and superior officer in question often heard such language used and he had never instructed any of his subordinates to desist from using such profanity unless it was being used in dealing with civilian complaint. Curley v Town Bd., 218 A.D.2d 799, 631 N.Y.S.2d 51, 1995 N.Y. App. Div. LEXIS 8951 (N.Y. App. Div. 2d Dep't 1995).

City police commissioner's accountability to public for integrity of police department justifies inquiries into inappropriate conduct of police officers while off duty and outside jurisdiction, particularly where alleged misconduct involves criminal acts. Martinez v Safir, 251 A.D.2d 62, 673 N.Y.S.2d 690, 1998 N.Y. App. Div. LEXIS 6521 (N.Y. App. Div. 1st Dep't 1998).

52. —Shooting involved

Substantial evidence supported police commissioner's finding that police officer violated department regulations by failing to safeguard revolver where (1) officer regularly left revolver unattended on bedroom nightstand, (2) shooting victim twice obtained possession of weapon and pointed it at officer, and (3) officer's conduct indirectly contributed to shooting incident in which victim was rendered paraplegic. Rinando v Ward, 159 A.D.2d 303, 552 N.Y.S.2d 581, 1990 N.Y. App. Div. LEXIS 2679 (N.Y. App. Div. 1st Dep't), app. denied, 76 N.Y.2d 709, 561 N.Y.S.2d 913, 563 N.E.2d 284, 1990 N.Y. LEXIS 3281 (N.Y. 1990).

Substantial evidence did not support determination that police officer attempted to cause physical injury to neighbor when he discharged round from shotgun where (1) officer discharged round as neighbor, who was drunk, attempted to enter officer's house, and (2) officer testified that he fired through top of screen door after giving neighbor time to duck and in order to scare him away. Evidence did not support determination that police officer (petitioner) "wrongfully engage(d) in a physical altercation with an individual known to this (police) department" where (1) during altercation with another police officer, who lived next door, petitioner responded to neighbor's call to approach him, and (2) neighbor punched petitioner in face without justification, and friend of neighbor then kicked petitioner in head while he was down. Eng v Brown, 196 A.D.2d 89, 608 N.Y.S.2d 636, 1994 N.Y. App. Div. LEXIS 2310 (N.Y. App. Div. 1st Dep't), app. denied, 83 N.Y.2d 758, 615 N.Y.S.2d 875, 639 N.E.2d 416, 1994 N.Y. LEXIS 1353 (N.Y. 1994).

Determination finding transit police officer guilty of failing to timely report discharge of his weapon was supported by evidence including his own admission that he did not report discharge of his weapon during some 8 hours following incident while he was in precinct, and fact that he revealed information about incident when confronted by desk sergeant as he was on his way out door. Cerio v New York City Transit Auth., 228 A.D.2d 676, 645 N.Y.S.2d 822, 1996 N.Y. App. Div. LEXIS 7399 (N.Y. App. Div. 2d Dep't 1996).

53. Polygraph test

Testimony regarding polygraph test of complainant was admissible at hearing on whether town police officer should be dismissed from his employment for, inter alia, allegedly subjecting complainant to unwanted sexual contact where such testimony was relevant, and there was substantial evidence of reliability of machine and qualifications of operator. Any error in receiving testimony regarding polygraph test of complainant at hearing on

whether town police officer should be dismissed from his employment for, inter alia, allegedly subjecting complainant to unwanted sexual contact was harmless where neither hearing officer nor town board relied on that testimony in deciding charges that formed basis for penalty imposed. Ost v Supervisor of Woodstock, 251 A.D.2d 724, 673 N.Y.S.2d 768, 1998 N.Y. App. Div. LEXIS 6464 (N.Y. App. Div. 3d Dep't), app. denied, 92 N.Y.2d 817, 684 N.Y.S.2d 488, 707 N.E.2d 443, 1998 N.Y. LEXIS 4260 (N.Y. 1998).

54. Prior proceedings, record of

After patrolman employed by city housing authority was found guilty of charges made against him, trial officer could properly consider patrolman's prior disciplinary record in determining whether to recommend that patrolman be dismissed. McPherson v New York City Housing Authority, 47 A.D.2d 828, 365 N.Y.S.2d 862, 1975 N.Y. App. Div. LEXIS 9168 (N.Y. App. Div. 1st Dep't 1975).

Although standard of proof necessary to support finding of guilt in a civil service employee disciplinary proceeding is clearly different from standard applicable in criminal proceeding, acquittal on criminal charges which arose out of same incident as led to disciplinary charges is some evidence as to seriousness of conduct complained of, even though such acquittal cannot be conclusive against determination of guilt on disciplinary charges. City Council of Watertown v Carbone, 54 A.D.2d 461, 389 N.Y.S.2d 678, 1976 N.Y. App. Div. LEXIS 14065 (N.Y. App. Div. 4th Dep't 1976).

Petitioner's plea allocution statements, when she pled guilty to attempted criminal possession of controlled substance, was substantial evidence supporting determination of serious misconduct during petitioner's tenure as civil servant within meaning of Civ Serv Law § 75, notwithstanding petitioner's testimony that she pled guilty to save her fiancee from jail sentence. Cromwell v Bates, 105 A.D.2d 699, 481 N.Y.S.2d 137, 1984 N.Y. App. Div. LEXIS 20809 (N.Y. App. Div. 2d Dep't 1984).

Transit authority was not precluded from discharging bus driver for making illegal sales of bus transfers to undercover agent on ground that he had been acquitted of criminal charges based on same sales transactions, since burden of proving guilt beyond reasonable doubt at criminal trial is inapplicable to administrative proceeding, wherein "substantial evidence" standard applies. Duran v Gunn, 135 A.D.2d 628, 522 N.Y.S.2d 207, 1987 N.Y. App. Div. LEXIS 52565 (N.Y. App. Div. 2d Dep't 1987).

Sanitation worker's conviction of attempted third degree sale of controlled substance constituted misconduct. Telesco v Village of Port Chester, 211 A.D.2d 723, 622 N.Y.S.2d 78, 1995 N.Y. App. Div. LEXIS 461 (N.Y. App. Div. 2d Dep't 1995).

Public employee's pre-rehabilitation dependency related misconduct and absenteeism should not have been considered in determining penalty for altercation he had with civilian. Hutchinson v Lloyd, 216 A.D.2d 3, 627 N.Y.S.2d 46, 1995 N.Y. App. Div. LEXIS 5877 (N.Y. App. Div. 1st Dep't), app. denied, 86 N.Y.2d 710, 635 N.Y.S.2d 947, 659 N.E.2d 770, 1995 N.Y. LEXIS 4389 (N.Y. 1995).

A fireman who was dismissed from his position following his conviction on 10 felony counts of offering a false instrument for filing and two misdemeanor counts of violating the Tax Law with respect to sales taxes on the fireman's private business would not be entitled to annulment of his dismissal on the basis of a certificate of relief from disabilities that was issued to him pursuant to Correc Law § 701, since, though criminal activity may form the basis for disciplinary action under Civ S Law § 75, such dismissal is discretionary rather than mandatory, and Correc L § 701 specifically provides that certificates issued pursuant to its terms will not prevent any administrative board from relying on the underlying convictions as a basis for exercising its discretion; furthermore, the fireman would not be entitled to reinstatement under the terms of Correc Law § 752, since the statute applies only to applications for a license or employment by persons previously convicted of crimes, and has no bearing on persons who are already licensed or employed. Pisano v McKenna, 120 Misc. 2d 536, 466 N.Y.S.2d 231, 1983 N.Y. Misc. LEXIS 3755 (N.Y. Sup. Ct. 1983).

55. —Sealed record

Prior Appellate Division determination that county erred in unsealing records of criminal proceeding did not compel conclusion that evidence thereby released could not be admitted at disciplinary hearing of police officer since evidence in question was lawfully obtained. Charles "Q" v Charles "Q" v Constantine, 204 A.D.2d 904, 612 N.Y.S.2d 687, 1994 N.Y. App. Div. LEXIS 5434 (N.Y. App. Div. 3d Dep't 1994), aff'd, 85 N.Y.2d 571, 626 N.Y.S.2d 992, 650 N.E.2d 839, 1995 N.Y. LEXIS 1031 (N.Y. 1995).

56. Privileged information

Disciplinary hearing for state employee accused of assault at state hospital was not privileged, and although such statements taken under oath at said hearing may not be admissible in trial of claim for assault by attendant at state hospital, such statements would be admissible for impeachment purposes and claimant was entitled to examine the record of the civil service disciplinary hearing at an examination before trial. Bennett v State, 53 Misc. 2d 1038, 280 N.Y.S.2d 294, 1967 N.Y. Misc. LEXIS 1483 (N.Y. Ct. Cl. 1967).

While New York City is not listed as a "competent authority" under CPL § 619-c, subd. 4, to grant transactional immunity, it could nonetheless grant an employee use immunity, since Civil Service Law § 75 provides for disciplinary proceedings against state and city employees. Since use and derivative use immunity, not transactional immunity, are the full extent of protection which is constitutionally required to compel testimony over a claim of privilege, the Police Department's offer of use immunity to two suspended officers at a departmental hearing regarding their official duties was sufficient to meet the constitutional requirements to overcome their assertion of Fifth Amendment privilege. Hank v Codd, 424 F. Supp. 1086, 1975 U.S. Dist. LEXIS 12636 (S.D.N.Y. 1975).

57. Sexual harassment, evidence of

Determination by Department of Correctional Services that deputy superintendent of correctional facility sexually harassed several subordinate female employees was supported by substantial evidence where (1) woman testified that he put his arm around her and fondled her breasts on at least 10 occasions despite her protests, (2) another woman testified that he often put his hand on her leg while she worked and that on one occasion he pulled her onto his lap, (3) several other women testified that on numerous occasions he called them into his office and placed his hands on various parts of their bodies (including genital areas), made frequent comments to other female employees about their bodies, exposed his genitals and caused female subordinates to touch his genital area, and (4) several women expressed their fear of his violent temper and did not report many incidents sooner because of their fear of him. Oare v Coughlin, 133 A.D.2d 943, 520 N.Y.S.2d 658, 1987 N.Y. App. Div. LEXIS 51985 (N.Y. App. Div. 3d Dep't 1987), app. denied, 70 N.Y.2d 615, 526 N.Y.S.2d 436, 521 N.E.2d 443, 1988 N.Y. LEXIS 700 (N.Y. 1988).

Employee was properly found to have violated county's sexual harassment policy as result of 2 incidents in which she and another female employee pulled down, or attempted to pull down, trousers of male co-workers; however, such facts did not furnish any grounds for concluding that employee violated county's ethics code, which consisted of guidelines and rules governing topics such as receipt of gifts, disclosure of confidential information, conflicts of interest, and financial disclosure, but which contained no provision as to type of behavior in which employee was found to have engaged. Richards v Stolzenberg, 226 A.D.2d 818, 640 N.Y.S.2d 352, 1996 N.Y. App. Div. LEXIS 3448 (N.Y. App. Div. 3d Dep't 1996).

Fact that county employee was found guilty of pulling down, or attempting to pull down, trousers of male coworkers did not thereby support conclusion that she violated County's Code of Employee Ethics and Standards of Conduct since Code contained no prohibition against type of conduct at issue. Davis v Stolzenberg, 228 A.D.2d 770, 643 N.Y.S.2d 712, 1996 N.Y. App. Div. LEXIS 6436 (N.Y. App. Div. 3d Dep't 1996).

In a proceeding pursuant to pursuant to N.Y. C.P.L.R. art. 78, it was determined that a school district erred in discharging a bus driver for sexual harassment pursuant to N.Y. Civ. Serv. Law

§ 75, because the bus driver's conduct was not so pervasive as to permeate the workplace and alter the conditions of employment for the two female complainants. Macksel v Riverhead Cent. Sch. Dist., 2 A.D.3d 731, 769 N.Y.S.2d 585, 2003 N.Y. App. Div. LEXIS 13874 (N.Y. App. Div. 2d Dep't 2003).

Where the former employee was discharged for sexual harassment under N.Y. Civ. Serv. Law § 75, substantial evidence supported the findings of guilty; the hearing testimony, including the former employee's own admissions, established that the former employee directed sexually-oriented comments to the coworker regarding the coworker's appearance, subjected the coworker to detailed conversations about the former employee's sex life, and demeaned the coworker in front of colleagues by making sexist and inappropriate statements about the coworker's work. Matter of Bayer v New York State Dept. of Labor, 28 A.D.3d 865, 812 N.Y.S.2d 691, 2006 N.Y. App. Div. LEXIS 4106 (N.Y. App. Div. 3d Dep't 2006).

58. Tapes as evidence; audio and video

In transit authority hearing on charge that bus driver illegally sold transfer books, it was not improper for audio and videotapes of illegal sale to be admitted into evidence since they contained relevant and reliable material which contributed to informed result. Gellman v Gunn, 143 A.D.2d 628, 533 N.Y.S.2d 113, 1988 N.Y. App. Div. LEXIS 9497 (N.Y. App. Div. 2d Dep't 1988).

Substantial evidence supported police commissioner's finding that police officer broke into store, stole food stamps, and failed to report fellow officers who performed same actions in his presence, despite officer's claim that evidentiary sources of questionable character were not corroborated by other reliable evidence, where hearing officer credited testimony of police department's sole eyewitness and its one informant, and testimony of department's witnesses was corroborated by tape-recorded conversation implicating police officer as participant in store break-in and theft. Scaturico v Ward, 159 A.D.2d 221, 552 N.Y.S.2d 24, 1990 N.Y. App. Div. LEXIS 2180 (N.Y. App. Div. 1st Dep't 1990).

Substantial evidence supported police commissioner's finding that police officer broke into store, stole coins, failed to properly supervise officers under his command, and failed to report other officers who broke into store and committed theft in his presence, despite officer's claim that evidentiary sources of questionable character were not corroborated by other reliable evidence, where hearing officer credited testimony of police department's sole eyewitness and its one informant, and testimony of department's witnesses was corroborated by tape recorded conversation implicating dismissed officer in store break-in and theft. Jervas v Ward, 159 A.D.2d 222, 552 N.Y.S.2d 25, 1990 N.Y. App. Div. LEXIS 2189 (N.Y. App. Div. 1st Dep't 1990).

Substantial evidence supported dismissal of city tow operator for violation of agency procedures designed to protect cars and other property where (1) he pleaded guilty to 5 specifications involving 2 charges, (2) evidence included vouchers which had been filled out improperly, videotapes of employee, and statements of various inspectors and fellow employees, (3) administrative law judge determined that employee's actions were not merely negligent but purposeful, and recommended termination, and (4) employee did not testify or present witnesses, although he was represented by counsel. Orkopoulos v Sandler, 159 A.D.2d 285, 552 N.Y.S.2d 290, 1990 N.Y. App. Div. LEXIS 2665 (N.Y. App. Div. 1st Dep't 1990).

Sanitation commissioner properly dismissed sanitation worker for solicitation and receipt of $20 bribe, even though worker argued that undercover investigator's credibility was undermined by videotape, where video was inconclusive except to establish that worker was standing within earshot of his partner when negotiation for money was commenced, and, in any event, sanitation department had prior disciplinary problems with worker. Cranford v Sexton, 159 A.D.2d 348, 552 N.Y.S.2d 626, 1990 N.Y. App. Div. LEXIS 2873 (N.Y. App. Div. 1st Dep't 1990).

Substantial evidence supported police commissioner's finding that police officer wrongfully possessed 10 forged parking permits, threatened witness and her family, knowingly made inaccurate entries in his activity log regarding number of summonses he issued, and wrongfully drove his private automobile while in uniform, where, inter alia, (1) witness testified that officer possessed forged permits and threatened her and her family, (2) officer subsequently attempted to submit forged permit for renewal, (3) tape recording had been made of telephone call threatening witness, children and mother, (4) officer claimed 334 summonses served when, in fact, he had issued only 225, (5) expert testified that officer presented expired and forged permit for renewal, and (6) officer admitted that he wrongfully drove his private automobile while in uniform. Suggs v Ward, 159 A.D.2d 381, 552 N.Y.S.2d 636, 1990 N.Y. App. Div. LEXIS 2928 (N.Y. App. Div. 1st Dep't 1990).

Finding that police officer stole money seized at illegal gambling location during police raid was supported by videotape surveillance of location, officer's failure to report allegations of corruption that were made against her in integrity tests conducted by Internal Affairs, and her admittedly false statements as to integrity tests given in departmental interview. Renna v Safir, 256 A.D.2d 219, 683 N.Y.S.2d 18, 1998 N.Y. App. Div. LEXIS 13756 (N.Y. App. Div. 1st Dep't 1998).

59. Uncontroverted testimony; uncontroverted evidence

Evidence, in hearing before city housing authority to dismiss housing fireman on the ground that he tampered with time clock on 66 occasions over a period of more than one year, was not sufficient to prove misconduct of the fireman who offered uncontradicted evidence that the time clock in question was malfunctioning during the relative time. Crosson v Golar, 45 A.D.2d 474, 359 N.Y.S.2d 301, 1974 N.Y. App. Div. LEXIS 4089 (N.Y. App. Div. 1st Dep't 1974).

A determination after a hearing of the Village of East Rochester terminating a police officer's employment based on the findings that he violated a General Order issued by the Police Chief prohibiting police personnel from taking calls out of the Village limits unless requested to do so by the dispatcher or unless "a state of emergency or a serious problem exists where life or property loss is at stake" was not supported by substantial evidence where the officer had left the village limits to pursue a speeding vehicle which had refused to pull over and was running in excess of the speed limit through stop signs and traffic signals at a time when bars were closing and people were on the streets, and where the evidence was uncontradicted that contrary to the Police Chief's contention there were no other police cars available to assist in the arrest. Bush v East Rochester, 80 A.D.2d 987, 437 N.Y.S.2d 472, 1981 N.Y. App. Div. LEXIS 10899 (N.Y. App. Div. 4th Dep't 1981).

Hearsay evidence of employee's refusal to work on particular occasion, which consisted of bare conclusory statement, was admissible in administrative hearing but was insufficient to support charge of misconduct where employee's own version of incident was otherwise uncontradicted. Drayton v Hasl, 121 A.D.2d 631, 503 N.Y.S.2d 869, 1986 N.Y. App. Div. LEXIS 58615 (N.Y. App. Div. 2d Dep't 1986).

Court would annul determination finding that petitioner, high school hall monitor, was not physically unable to perform his duties and that he should not have been absent from work due to severe ankle sprain where there was no support for hearing officer's implicit conclusion that, because petitioner "traveled outside the country on three separate occasions to perform services for a company owned or operated by his wife," he was physically capable of performing his assigned duties, hearing officer ignored uncontroverted evidence that "extensive" travel involved very little standing or walking, and petitioner's physician testified that little walking petitioner was required to do on his trips was actually beneficial, whereas demands of his work were too severe and could worsen his injury. Miller v Board of Educ., 239 A.D.2d 768, 657 N.Y.S.2d 252, 1997 N.Y. App. Div. LEXIS 5214 (N.Y. App. Div. 3d Dep't), app. denied, 90 N.Y.2d 808, 664 N.Y.S.2d 269, 686 N.E.2d 1364, 1997 N.Y. LEXIS 3098 (N.Y. 1997).

Because employee did not object to a supervisor's memorandum, produced after-the-fact, that she did not have permission to alter a time off slip or to take a different day off, there was sufficient evidence to support the hearing officer's determination of guilt and suspension without pay. King v State Dep't of Corr. Servs., 289 A.D.2d 824, 735 N.Y.S.2d 218, 2001 N.Y. App. Div. LEXIS 12331 (N.Y. App. Div. 3d Dep't 2001).

60. Unsworn testimony

In face of legislative direction that there is no necessity for imposition of technical rules of evidence in administrative proceeding involving discipline of government employees, there is no justification for imposing a more rigid standard as to admission of unsworn testimony in such cases than applies in civil cases generally. Although, given a proper foundation, unsworn testimony is admissible in administrative proceeding, such as proceedings involving discipline of a government employee, such fact does not obviate the requirement that there be substantial evidence in support of the administrative determination. Brown v Ristich, 36 N.Y.2d 183, 366 N.Y.S.2d 116, 325 N.E.2d 533, 1975 N.Y. LEXIS 1728 (N.Y. 1975).

C. Hearing Participants

i. Generally

61. Counsel

While the hearing may be more or less informal, the trial must be fair in all substantial respects. While some latitude is allowed as to rules of evidence, methods of examination and the like, no essential element of a fair trial—including the right to counsel and consultation with such counsel—can be dispensed with unless waived. Fusco v Moses, 304 N.Y. 424, 107 N.E.2d 581, 304 N.Y. (N.Y.S.) 424, 1952 N.Y. LEXIS 757 (N.Y. 1952).

N.Y. Civ. Serv. Law § 75(2) has established a kind of Weingarten (NLRB v J. Weingarten, Inc., 420 U.S. 251 (1975)), right for public employees to which it applies, but a violation does not result in an improper practice proceeding before the New York State Public Employment Relations Board but in an exclusion from a disciplinary hearing of statements made at a disciplinary interview with the employee without an union representative present and evidence obtained as a result. New York City Tr. Auth. v New York State Pub. Empl. Relations Bd., 8 N.Y.3d 226, 832 N.Y.S.2d 132, 864 N.E.2d 56, 2007 N.Y. LEXIS 163 (N.Y. 2007).

City and police lieutenant had standing to challenge an attorney's representation of an officer in a disciplinary proceeding pursuant to N.Y. Civ. Serv. Law § 75 because the lieutenant had previously consulted the attorney with respect to potential charges of insubordination against the same officer, creating an issue of a conflict of interest under N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.27(a). Falk v Chittenden, 11 N.Y.3d 73, 862 N.Y.S.2d 839, 893 N.E.2d 116, 2008 N.Y. LEXIS 1822 (N.Y. 2008).

Troopers were not entitled to representation during critical incident reviews under N.Y. Civ. Serv. Law § 75(2) or otherwise because such reviews did not relate to discipline, and, although the right to representation for administrative interrogations was included in the parties collective bargaining agreement (CBA), no such right was enumerated in CBA with regard to critical incident reviews. Police Benevolent Assn. of N.Y. State Troopers, Inc. v Division of N.Y. State Police, 11 N.Y.3d 96, 863 N.Y.S.2d 387, 893 N.E.2d 803, 2008 N.Y. LEXIS 1930 (N.Y. 2008).

Plea agreement between correction department and correction officer disposing of drug use charges was valid and enforceable, even though officer was not represented by counsel, where (1) departmental advocate advised officer of her right to adjournment of hearing to obtain counsel, or alternatively to consult with her union's attorney (who was present in building), (2) she refused these offers, and (3) she signed waiver of counsel and then entered plea agreement. Nedd v Koehler, 159 A.D.2d 344, 552 N.Y.S.2d 622, 1990 N.Y. App. Div. LEXIS 2870 (N.Y. App. Div. 1st Dep't 1990).

Nonappearance of correction officer's counsel on first day of hearing on charges of misconduct did not taint hearing where (1) when hearing resumed on subsequent date, counsel did not ask to cross examine lone witness who testified on first day, and (2) correction officer did not contradict any statements made by that witness. McDowell v Koehler, 159 A.D.2d 424, 553 N.Y.S.2d 116, 1990 N.Y. App. Div. LEXIS 3121 (N.Y. App. Div. 1st Dep't 1990).

Statement given by trooper during interview with police investigators was not inadmissible at disciplinary hearing, even though he was not represented by counsel at interview as required by collective bargaining agreement, since such interview constituted "ordinary supervisory inquiry," and thus was not governed by procedural requirements of collective bargaining agreement. Reid v State Executive Dep't, Div. of State Police, 208 A.D.2d 747, 617 N.Y.S.2d 510, 1994 N.Y. App. Div. LEXIS 9873 (N.Y. App. Div. 2d Dep't 1994).

The right of an employee against whom charges are preferred to be "represented by counsel" means by an attorney at law, not any person of his choosing. Manzi v Kaplan, 35 Misc. 2d 793, 231 N.Y.S.2d 161, 1962 N.Y. Misc. LEXIS 3068 (N.Y. Sup. Ct. 1962), aff'd, 20 A.D.2d 791, 248 N.Y.S.2d 390, 1964 N.Y. App. Div. LEXIS 4271 (N.Y. App. Div. 2d Dep't 1964).

Tenured school teacher was entitled to vacatur of arbitration award removing him from employment because his rights were prejudiced by arbitrator's interim decision which precluded him from speaking to his attorney about his testimony during lengthy delays in hearing that took place periodically over period of 10 weeks, interfering with his right to meaningful representation by counsel. Elmore v Plainview-Old Bethpage Cent. Sch. Dist., Bd. of Educ., 180 Misc. 2d 762, 690 N.Y.S.2d 842, 1999 N.Y. Misc. LEXIS 232 (N.Y. Sup. Ct. 1999), aff'd in part, modified, 273 A.D.2d 307, 708 N.Y.S.2d 713, 2000 N.Y. App. Div. LEXIS 6507 (N.Y. App. Div. 2d Dep't 2000).

Trial court erred in a N.Y. C.P.L.R. art. 78 proceeding in directing a town board to determine whether an officer was entitled to representation under N.Y. Civ. Serv. Law § 75(2) during certain questioning by his department because the Westchester County Police Act, N.Y. Laws 104, was a special law and provided that proceedings to discipline police officers in Westchester County, New York, be conducted by the boards of police commissioners; thus, under N.Y. Civ. Serv. Law § 76(4), police disciplinary procedures were not a proper subject of collective bargaining and N.Y. Civ. Serv. Law § 75 did not apply. Matter of Town of Harrison Police Benevolent Assn., Inc. v Town of Harrison Police Dept., 69 A.D.3d 639, 892 N.Y.S.2d 495, 2010 N.Y. App. Div. LEXIS 111 (N.Y. App. Div. 2d Dep't 2010).

62. Hearing officers

Although it was not necessary that director of school for mentally retarded personally conduct hearing on charge that permanent employee at school had been guilty of misconduct, it was essential that any determination as to misconduct and penalty be made by the director, as that function may not be delegated. Simpson v Wolansky, 38 N.Y.2d 391, 380 N.Y.S.2d 630, 343 N.E.2d 274, 1975 N.Y. LEXIS 2359 (N.Y. 1975).

A determination by an acting director of Pilgrim State Hospital, dismissing petitioner as staff attendant, was annulled on the law and the matter remitted for making written findings of fact as to grounds of decision and a written determination based upon such findings, and for admission in evidence of the written designation or authorization of the hearing officer. Klein v Department of Mental Hygiene, 15 A.D.2d 562, 222 N.Y.S.2d 1010, 1961 N.Y. App. Div. LEXIS 6877 (N.Y. App. Div. 2d Dep't 1961).

In an Article 78 proceeding to review a determination of the Commissioner of the Department of Buildings which found petitioner guilty of certain specified charges of misconduct and incompetency and dismissed him from his position as a plumbing code enforcement officer, the trial court properly affirmed the determination of the Commissioner since the determination was supported by substantial evidence on the record taken as a whole, it was neither arbitrary, capricious, nor affected by error of law, and the penalty of termination was not so disproportionate to the offenses in light of all the circumstances as to be shocking to one's sense of fairness; however, the petitioner would be entitled to back pay and benefits from the date that he was initially terminated under a prior determination until the date of the determination at issue herein. O'Reilly v White Plains, 92 A.D.2d 920, 460 N.Y.S.2d 816, 1983 N.Y. App. Div. LEXIS 17326 (N.Y. App. Div. 2d Dep't 1983).

In proceeding by which school district terminated employment of school custodian, requirement of CLS Civ S § 75 that hearing officer be designated in writing was satisfied by written record of school district's adoption of resolution appointing hearing officer. Salley v Hempstead School Dist., 121 A.D.2d 547, 504 N.Y.S.2d 30, 1986 N.Y. App. Div. LEXIS 58524 (N.Y. App. Div. 2d Dep't 1986).

City mayor had authority, without city council's authorization, to conduct disciplinary hearing and determine punishment of employee, even though city charter provided that mayor must have city council's consent to appoint such employees, since mayor possessed power of appointment and thus had power of removal, which was not subject to consent of council. Waters v Glen Cove, 181 A.D.2d 783, 580 N.Y.S.2d 796, 1992 N.Y. App. Div. LEXIS 3702 (N.Y. App. Div. 2d Dep't 1992).

Town highway superintendent should have disqualified himself from making final determination of misconduct charges against highway foreman (petitioner) where superintendent, who had previously attempted unsuccessfully to appoint his son to replace petitioner, conducted investigatory inspection, preferred charges against petitioner, designated hearing officer, presented evidence in support of charges, and testified against petitioner at hearing. Memmelaar v Straub, 181 A.D.2d 980, 581 N.Y.S.2d 455, 1992 N.Y. App. Div. LEXIS 4160 (N.Y. App. Div. 3d Dep't 1992).

Petitioner, who was charged with accepting $20 for removal of bulk waste, was deprived of fair hearing when hearing officer who heard primary witness against him was unable to complete hearing, and second hearing officer was assigned to complete hearing and render decision, as inability of hearing officer who rendered decision to actually view demeanor of witness and evaluate his credibility significantly undermined fairness of hearing, in light of discrepancies in witness' description of sanitation worker. Pesce v Commissioner of Sanitation, 234 A.D.2d 77, 650 N.Y.S.2d 700, 1996 N.Y. App. Div. LEXIS 12380 (N.Y. App. Div. 1st Dep't 1996).

Court would restore petitioner to his former position, together with back pay and benefits, where there was no record of written designation appointing hearing officer who presided over disciplinary hearing. Perez v New York State DOL, 244 A.D.2d 844, 665 N.Y.S.2d 714, 1997 N.Y. App. Div. LEXIS 11975 (N.Y. App. Div. 3d Dep't 1997).

Terminated village motor equipment operator was not denied independent appraisal of his disciplinary proceeding, even though village mayor, who testified against him, participated in review of hearing officer's recommendation, where mayor did not participate in review process conducted by village board of trustees. Hussey v Incorporated Village of Farmingdale, 251 A.D.2d 579, 674 N.Y.S.2d 757, 1998 N.Y. App. Div. LEXIS 7519 (N.Y. App. Div. 2d Dep't 1998).

Sheriff, alone, properly designated a hearing officer in a disciplinary hearing against a deputy sheriff filed under N.Y. Civ. Serv. Law § 75(2) as the sheriff was the officer with the power under N.Y. County Law § 652(2) to remove the deputy, even though the deputy was employed by both the sheriff and a county. Matter of Eck v County of Delaware, 36 A.D.3d 1180, 828 N.Y.S.2d 682, 2007 N.Y. App. Div. LEXIS 678 (N.Y. App. Div. 3d Dep't 2007).

Sheriff's appointment of hearing officer to preside over employee's disciplinary proceeding alleging, among other things, that the employee had threatened the sheriff, was proper; the conflict for the sheriff was self-evident and required that he disqualify himself from conducting the necessary review of the findings and recommendations made by the hearing officer, and, additionally, the only officers within the department, aside from the sheriff, who had command authority over the employee were disqualified because of his status as a material witness who testified at the hearing. The sheriff not only had the authority to deputize the administrator, and make him a member of the sheriff's department, but also had the right to delegate to him the authority to conduct the review. Matter of Guynup v County of Clinton, 74 A.D.3d 1552, 903 N.Y.S.2d 580, 2010 N.Y. App. Div. LEXIS 4810 (N.Y. App. Div. 3d Dep't 2010).

Hearing officer was validly appointed because (1) an employer's board of trustees' (board) minutes showed a resolution to appoint the officer, and (2) a letter to the officer from the board's president on the employer's letterhead said the officer was appointed. Matter of Tinter v Board of Trustees of the Pound Ridge Lib. Dist., 155 A.D.3d 1054, 66 N.Y.S.3d 526, 2017 N.Y. App. Div. LEXIS 8437 (N.Y. App. Div. 2d Dep't 2017).

Acting senior director of state mental hospital need not be designated in writing as hearing officer in order to hold a hearing on charges against an employee, and make his decision and determination in the matter. Manzi v Kaplan, 35 Misc. 2d 793, 231 N.Y.S.2d 161, 1962 N.Y. Misc. LEXIS 3068 (N.Y. Sup. Ct. 1962), aff'd, 20 A.D.2d 791, 248 N.Y.S.2d 390, 1964 N.Y. App. Div. LEXIS 4271 (N.Y. App. Div. 2d Dep't 1964).

Purpose of provision in Retirement and Social Security Law that service of any person retained after age 70 may be terminated at any time by the head of the department is to give a head of department absolute authority to dismiss such an employee without benefit of hearing provided by Civil Service Law. Nurenberg v Ward, 84 Misc. 2d 80, 375 N.Y.S.2d 785, 1975 N.Y. Misc. LEXIS 3054 (N.Y. Sup. Ct. 1975), rev'd, 51 A.D.2d 1022, 381 N.Y.S.2d 412, 1976 N.Y. App. Div. LEXIS 11806 (N.Y. App. Div. 2d Dep't 1976).

In a termination hearing concerning a city employee, the fact that the hearing officer had been employed by the city more than 15 years earlier did not create a due process violation or deprive the employee of a fair hearing. McLean v City of Albany, 13 A.D.3d 851, 785 N.Y.S.2d 801, 2004 N.Y. App. Div. LEXIS 15293 (N.Y. App. Div. 3d Dep't 2004).

Town justice may serve as hearing officer where such service is occasional, whether compensated or uncompensated, in disciplinary proceeding brought by county or county department against county employee pursuant to CLS Civil Service Law § 75, which requires hearing officer to make findings of fact, conclusions of law and recommendation to be submitted to appropriate county official. Op Adv Com Jud Ethics, Vol III, (/89) Op No. 89-40.

63. —Disqualification, generally

City commissioner of public safety was not obliged to disqualify himself as hearing officer in disciplinary proceeding against fireman where commissioner had no particular knowledge of material disputed facts, even though charges preferred against fireman chiefly concerned disobedience of commissioner's departmental policy; moreover, it was immaterial whether actual order fireman disobeyed originated from commissioner before being spoken by fireman's superior officer, since fireman remained bound to follow order. Dejnozka v Saratoga Springs, 68 N.Y.2d 947, 510 N.Y.S.2d 85, 502 N.E.2d 1000, 1986 N.Y. LEXIS 20890 (N.Y. 1986).

To establish bias of administrative hearing officer as matter of fact, there must be support for bias in record and proof that outcome of hearing flowed from bias; petitioner's unsworn memorandum asserting that civil service hearing officer was respondent's employee was insufficient. Hughes v Suffolk County Dep't of Civil Service, 74 N.Y.2d 833, 546 N.Y.S.2d 335, 545 N.E.2d 625, 1989 N.Y. LEXIS 2834 (N.Y. 1989).

Employee's termination was properly annulled in an N.Y. C.P.L.R. art. 78 proceeding because the parks commissioner, being conflicted due to testimony he and his family gave at the employee's disciplinary hearing, improperly designated the public works commissioner to review the record and render the final decision; under N.Y. Civ. Serv. Law § 75, the only individual authorized to act in the absence of the parks commissioner was his deputy commissioner. The employee was entitled to be reinstated with back pay and benefits. Matter of Gomez v Stout, 13 N.Y.3d 182, 889 N.Y.S.2d 509, 918 N.E.2d 99, 2009 N.Y. LEXIS 3867 (N.Y. 2009).

This section contemplates a hearing before the head of the department involved, and, therefore, there is no merit in the criticism that the industrial commissioner acted as accuser, prosecutor and judge in a hearing involving a member of his department. People ex rel. Davis v Sayer, 205 A.D. 562, 200 N.Y.S. 134, 1923 N.Y. App. Div. LEXIS 5082 (N.Y. App. Div. 1923).

In hearing on charges against employee of department of audit and control, employment of deputy comptroller as hearing officer when witnesses called on behalf of department were subordinates complied with statute and was not prejudicial. Greaney v Bahou, 57 A.D.2d 646, 393 N.Y.S.2d 211, 1977 N.Y. App. Div. LEXIS 11673 (N.Y. App. Div. 3d Dep't 1977).

Where referee at disciplinary hearing granted transit authority employee had been named a technical defendant in Article 78 proceeding by employee, referee was under obligation to grant motion to change hearing referee to avoid even the appearance of impropriety. Yeampierre v Gutman, 57 A.D.2d 898, 394 N.Y.S.2d

450, 1977 N.Y. App. Div. LEXIS 12137 (N.Y. App. Div. 2d Dep't 1977).

The fact that the hearing officer at the hearing at which petitioner was dismissed from her civil service position was the supervisor of petitioner's attorney did not deny her a fair and impartial hearing where the officer was properly appointed, and petitioner failed to show that the officer's supervisorial position gave him access to confidential information. Pollman v Fahey, 106 A.D.2d 771, 483 N.Y.S.2d 805, 1984 N.Y. App. Div. LEXIS 21698 (N.Y. App. Div. 3d Dep't 1984).

Individual dismissed from his position as maintainer was not denied his right to fair hearing and impartial hearing officer merely because hearing officer was attorney for respondent school district since there was nothing to indicate that officer became aware of any facts of case prior to hearing, nor was there evidence of bias or personal involvement on his part. Gioe v Board of Education, 126 A.D.2d 723, 511 N.Y.S.2d 129, 1987 N.Y. App. Div. LEXIS 41870 (N.Y. App. Div. 2d Dep't 1987).

In civil service disciplinary proceeding, fact that assistant commissioner of Department of Transportation signed statement of charges against department employee did not by itself mandate that she disqualify herself from reviewing hearing officer's findings and recommendations as to employee. Agugliaro v Commissioner of Dep't of Transp., 135 A.D.2d 711, 522 N.Y.S.2d 611, 1987 N.Y. App. Div. LEXIS 52649 (N.Y. App. Div. 2d Dep't 1987), app. denied, 72 N.Y.2d 801, 530 N.Y.S.2d 553, 526 N.E.2d 44, 1988 N.Y. LEXIS 1064 (N.Y. 1988).

City properly appointed retired county judge from another county to act as hearing officer at petitioner's disciplinary hearing even though judge was not employee of city department of public safety, as required by CLS Unconsol Ch 51 § 1, since (1) petitioner (city deputy chief of police) had close relationship with police chief, who thus could not act as hearing officer, (2) public safety commissioner had disqualified himself for bias, (3) only remaining candidates were subordinates, and (4) judge had background and ability to conduct fair hearing. Fraccola v Utica, 135 A.D.2d 1112, 523 N.Y.S.2d 292, 1987 N.Y. App. Div. LEXIS 52972 (N.Y. App. Div. 4th Dep't 1987), app. denied, 72 N.Y.2d 807, 533 N.Y.S.2d 56, 529 N.E.2d 424, 1988 N.Y. LEXIS 2614 (N.Y. 1988), cert. denied, 489 U.S. 1053, 109 S. Ct. 1313, 103 L. Ed. 2d 582, 1989 U.S. LEXIS 1054 (U.S. 1989).

Police officer's challenge to hearing officer's impartiality in dismissal hearing would be denied where police officer made no showing that hearing officer bore any animosity towards him or was personally involved in investigation. Jervas v Ward, 159 A.D.2d 222, 552 N.Y.S.2d 25, 1990 N.Y. App. Div. LEXIS 2189 (N.Y. App. Div. 1st Dep't 1990).

Mere fact that hearing officer had presided over prior disciplinary proceeding against county employee did not require that hearing officer recuse himself in later disciplinary proceeding. Roberts v Stolzenberg, 202 A.D.2d 854, 609 N.Y.S.2d 360, 1994 N.Y. App. Div. LEXIS 2550 (N.Y. App. Div. 3d Dep't 1994).

Mere fact that hearing officer was formerly employed as police officer by respondent village was not sufficient to disqualify him from presiding over disciplinary hearing involving village police officer; thus, where record as whole did not substantiate petitioner's claim of bias, Article 78 proceeding to review termination of his employment as police officer would be dismissed. Nichols v Village of Malone, 229 A.D.2d 721, 645 N.Y.S.2d 906, 1996 N.Y. App. Div. LEXIS 7818 (N.Y. App. Div. 3d Dep't 1996).

Authority to decide whether a city employee should be terminated in disciplinary proceedings was improperly delegated by a mayor to a decisionmaker who had no affiliation with the city; inherent in the requirement of N.Y. Civ. Serv. Law § 75(2) that such decisions are to be made by an official with authority to remove the employee is a requirement that there be some connection between the person by whom the employment decision is made and the governmental employment at issue. Matter of McComb v Reasoner, 29 A.D.3d 795, 815 N.Y.S.2d 665, 2006 N.Y. App. Div. LEXIS 6546 (N.Y. App. Div. 2d Dep't 2006).

An administrative official to whom the legislature has confided the power of removal may conduct a hearing where the charges are made or instigated by him, and even where it is clear that the accused cannot have a fair trial, the courts have no power to disqualify the officer the legislature has chosen from hearing the charges. Haskins v Warner, 46 N.Y.S.2d 400, 1944 N.Y. Misc. LEXIS 1640 (N.Y. Sup. Ct. 1944).

Hearing officer's recusal from a former employee's disciplinary hearing under N.Y. Civ. Serv. Law § 75 was not mandated because the employee made no factual showing that the hearing examiner was biased or that the outcome flowed from bias because of the hearing examiner's involvement in the employee's previous disciplinary hearing or his representation by the prosecuting attorney in a separate civil proceeding. Matter of Compasso v Sheriff of Sullivan County, 29 A.D.3d 1064, 814 N.Y.S.2d 773, 2006 N.Y. App. Div. LEXIS 5877 (N.Y. App. Div. 3d Dep't 2006).

64. — —Knowledge of information concerning charges

In hearing on charges of misconduct by town employee where deputy superintendent of highways who acted as hearing officer possessed vital information concerning the charges but refused to disqualify himself or to give testimony, petitioner was deprived of substantial right which invalidated the entire hearing. Cross v Pearsall, 29 A.D.2d 553, 286 N.Y.S.2d 136, 1967 N.Y. App. Div. LEXIS 2714 (N.Y. App. Div. 2d Dep't 1967).

Hearing conducted before warden, which resulted in the dismissal of prison guard, was invalid, where, prior to the hearing, warden had knowledge of most of the relevant facts, had caused the precipitating incident to be investigated and had caused the charges to be referred, and petitioner had made a formal request for the designation of a hearing officer other than the warden. Waters v McGinnis, 29 A.D.2d 969, 289 N.Y.S.2d 376, 1968 N.Y. App. Div. LEXIS 4245 (N.Y. App. Div. 2d Dep't 1968).

Under Civil Service Law § 75, subd 2, corporation counsel, an appointee of city manager, was properly designated hearing officer in proceedings for dismissal of chief building inspector for misconduct in office, absent a showing that such hearing officer possessed knowledge which would require him to disqualify himself, or that inspector was treated unfairly. O'Neil v De Santis, 40 A.D.2d 924, 338 N.Y.S.2d 153, 1972 N.Y. App. Div. LEXIS 3237 (N.Y. App. Div. 3d Dep't 1972).

Associate personnel administrator of developmental center, facility of Department of Mental Hygiene, who was found guilty following hearing of various charges of misconduct and incompetence, was not deprived of fair hearing on theory that officer who presided at hearing was deputy director of another facility within Department of Mental Hygiene and was personally acquainted with certain parties involved in proceeding where designation of hearing officer was properly made in accordance with Civil Service Law and where there was no indication that he was possessed with any vital information concerning charges against petitioner that would require him to disqualify himself. Avery v Rechter, 56 A.D.2d 963, 392 N.Y.S.2d 714, 1977 N.Y. App. Div. LEXIS 11372 (N.Y. App. Div. 3d Dep't 1977).

A county clerk who had formally charged an employee with misconduct and incompetency should have disqualified himself not only from acting as the hearing officer, as he did, but also from reviewing the hearing officer's recommendations. Sander v Owens, 82 A.D.2d 968, 440 N.Y.S.2d 489, 1981 N.Y. App. Div. LEXIS 14703 (N.Y. App. Div. 3d Dep't 1981).

Disciplinary charge against firefighter, alleging that he used listening device to eavesdrop on fellow firefighters, should not have been dismissed on ground that firefighter had previously been suspended with pay for same activity, since suspension with pay was not among prescribed penalties which could be imposed after civil service hearing, and thus consideration of charge was not barred. Schuttak v Board of Trustees, 187 A.D.2d 916, 590 N.Y.S.2d 544, 1992 N.Y. App. Div. LEXIS 13456 (N.Y. App. Div. 3d Dep't 1992).

In county administrative proceeding to determine whether senior nursing aide at county medical center had engaged in misconduct, hearing officer need not have disqualified himself as matter of due process because he had heard testimony concerning similar charges in prior proceeding where there was no indication that hearing officer had prejudged specific facts in dispute because of his involvement in prior proceeding. Joseph v Stolzen-

berg, 198 A.D.2d 506, 604 N.Y.S.2d 198, 1993 N.Y. App. Div. LEXIS 11051 (N.Y. App. Div. 2d Dep't 1993).

Disciplinary proceeding against plaintiff was not tainted on ground that hearing officer was improperly advised prior to hearing that police officer had been previously issued letter of reprimand where letter was not introduced either at hearing or prior to determination of discipline, hearing officer never saw letter or read its contents, and there was no suggestion that hearing officer, who made specific and detailed findings, impermissibly considered letter in reaching his determination. Hoffman v Village of Sidney, 235 A.D.2d 698, 652 N.Y.S.2d 346, 1997 N.Y. App. Div. LEXIS 123 (N.Y. App. Div. 3d Dep't 1997).

Despite substantial evidence of police officer's misconduct, penalty of dismissal from his employment would be annulled where 4 members of town board of trustees who voted for dismissal also preferred charges and testified against him at hearing. Norton v Village of Phoenix Bd. of Trustees, 245 A.D.2d 1143, 667 N.Y.S.2d 540, 1997 N.Y. App. Div. LEXIS 13995 (N.Y. App. Div. 4th Dep't 1997).

Order of Superintendent of Department of Highways, which terminated petitioner's employment after disciplinary hearing in which he was found to have struck fellow employee, was annulled on ground that superintendent should have disqualified himself from making final determination because of his personal involvement, where he was present when incident occurred, he made statements as to what he heard and saw, and he conducted initial investigation, preferred charges against petitioner and appointed hearing officer. Stein v County of Rockland, 259 A.D.2d 552, 686 N.Y.S.2d 460, 1999 N.Y. App. Div. LEXIS 2319 (N.Y. App. Div. 2d Dep't 1999).

65. —Jurisdiction

A hearing officer's failure to include recommendations as to discipline when preparing his or her report after a disciplinary hearing pursuant to Civil S Law § 75(2) does not strip the subject agency of jurisdiction to impose sanctions upon its employee, since the failure to recommend discipline is important only to the extent that it omits a suggested starting point from which the removing entity may begin to fashion the appropriate sanction, and since, though a disciplinary proceeding will be voided and the status quo ante restored when there has been some error that has tainted the entire proceeding, such situation simply does not arise when a hearing officer acts pursuant to a valid deligation, prepares a detailed report, and provides such report along with a transcript to the removing board or officer but omits to include recommendations as to discipline. Wiggins v Board of Education, 60 N.Y.2d 385, 469 N.Y.S.2d 652, 457 N.E.2d 758, 1983 N.Y. LEXIS 3457 (N.Y. 1983).

Requirements of this section, that the designation of a deputy for hearing of charges shall be "in writing," and that such deputy shall refer the record of the hearing to his superior "with his recommendations," are both jurisdictional, and failure to comply with either is fatal to the proceedings for the commissioner or his deputy, undertaking the trial of a subordinate on charges, constitutes a court of inferior jurisdiction, jurisdiction of which must be demonstrated when challenged. Blount v Forbes, 250 A.D. 15, 293 N.Y.S. 319, 1937 N.Y. App. Div. LEXIS 8253 (N.Y. App. Div. 1937).

There was entire absence of jurisdiction to conduct hearing or to discipline petitioner where (1) hearing officer designated in writing by village disqualified himself and orally designated as hearing officer another person who was seated in hearing room, and (2) there was no evidence that designation of second hearing officer was in writing in compliance with CLS Civ S § 75(2). Bozeman v Greenport, 154 A.D.2d 372, 545 N.Y.S.2d 849, 1989 N.Y. App. Div. LEXIS 12271 (N.Y. App. Div. 2d Dep't 1989), app. denied, 75 N.Y.2d 703, 552 N.Y.S.2d 108, 551 N.E.2d 601, 1990 N.Y. LEXIS 37 (N.Y. 1990).

Jurisdiction was not lacking in disciplinary proceedings against a city employee on the ground that the mayor was not the employee's appointing authority and therefore should not have preferred the charges against her; N.Y. Civ. Serv. Law § 75(2) requires only that the person faced with disciplinary action be provided with written notice of the charges and be given an opportunity to answer, and does not specify by whom charges are to be preferred. Matter of McComb v Reasoner, 29 A.D.3d 795, 815 N.Y.S.2d 665, 2006 N.Y. App. Div. LEXIS 6546 (N.Y. App. Div. 2d Dep't 2006).

Hearing examiner lacked jurisdiction to preside over disciplinary proceedings against a city employee because the hearing examiner was improperly designated by the mayor, who was neither a person with the authority to remove the employee nor a person designated in writing for that purpose as required by N.Y. Civ. Serv. Law § 75(2); although the city officials who did have that power testified as witnesses during the hearing, they were not unavailable to designate a hearing examiner. Matter of McComb v Reasoner, 29 A.D.3d 795, 815 N.Y.S.2d 665, 2006 N.Y. App. Div. LEXIS 6546 (N.Y. App. Div. 2d Dep't 2006).

Determination terminating an employee was annulled and the employee was reinstated because there was no evidence that the district attorney ever designated the hearing officer in a writing sufficient to satisfy the N.Y. Civ. Serv. Law § 75 statutory requirement; the employee's failure to object to the absence of such written designation was of no moment inasmuch as this jurisdictional defect could not have been waived. Matter of Arthur v Soares, 95 A.D.3d 1619, 945 N.Y.S.2d 782, 2012 N.Y. App. Div. LEXIS 5394 (N.Y. App. Div. 3d Dep't 2012).

66. Witnesses

For the purpose of a hearing under this section, no statutory authority exists for an order directing the issuance of an open commission to take the testimony of a nonresident witness. Corporation Counsel of New York v Smith, 1 N.Y.2d 813, 153 N.Y.S.2d 72, 135 N.E.2d 603, 1956 N.Y. LEXIS 855 (N.Y. 1956).

In an administrative proceeding, such as a proceeding involving discipline of a government employee, where the administration of an oath would be unavailing for the purpose for which an oath is normally administered, unsworn testimony may be received provided a sufficient foundation exists to support a hearing officer's determination that the witness possesses rudimentary testimonial capacity. Unsworn testimony of two patients at hospital for mentally retarded was properly received at hearing concerning discipline of hospital attendant for striking one of the patients where although patients had I.Q. levels of 43 and 50 the school psychologist testified that they were able to relate to reality, and could explain what was going on around them and understood the difference between telling the truth and telling a lie; reliance on unsworn testimony, which was consistent with circumstantial evidence indicating that injury resulted from a blow by a hard object, did not deprive attendant of a fair administrative hearing. Although attendant at state hospital for mentally retarded had right to a fair disciplinary hearing, the court, in determining whether unsworn testimony of the inmate could properly be received and considered in the administrative proceeding, could not overlook the rights of the institutional residents, especially those incapable of eloquent expression and abstract thought; such individuals also deserve a fair hearing. Brown v Ristich, 36 N.Y.2d 183, 366 N.Y.S.2d 116, 325 N.E.2d 533, 1975 N.Y. LEXIS 1728 (N.Y. 1975).

Due process did not require production of laboratory personnel at disciplinary hearing of police officer where (1) no question was raised as to general reliability of procedures used by personnel to test officer's urine for cocaine, (2) supervisor who did testify under direct and cross-examination was familiar with each step in procedure, and (3) no claim was made of any particular defect in testing. Gordon v Brown, 84 N.Y.2d 574, 620 N.Y.S.2d 749, 644 N.E.2d 1305, 1994 N.Y. LEXIS 4196 (N.Y. 1994).

Because the testimony of two board of education members, concerning the charges levied against an employee pursuant to N.Y. Civ. Serv. Law § 75, rendered them personally involved in the disciplinary process, the employee's N.Y. C.P.L.R. art. 78 petition was properly granted and the witnesses disqualified from subsequently acting upon any of the charges related to the hearing. Matter of Baker v Poughkeepsie City School Dist., 18 N.Y.3d 714, 945 N.Y.S.2d 589, 968 N.E.2d 943, 2012 N.Y. LEXIS 507 (N.Y. 2012).

Refusal of permission to call the wife of a veteran at a hearing in proceedings for his removal from his position as guard at Sing Sing prison on intoxication charges, does not violate his rights under this section, where he had full opportunity to testify in his own behalf and his wife, who was not a witness to the occurrence,

sought only to plead for leniency. Smith v Lyons, 262 A.D. 374, 29 N.Y.S.2d 574, 1941 N.Y. App. Div. LEXIS 5370 (N.Y. App. Div.), app. denied, 262 A.D. 976, 30 N.Y.S.2d 112, 1941 N.Y. App. Div. LEXIS 6750 (N.Y. App. Div. 1941).

In disciplinary proceeding instituted against patrolman employed by city housing authority, it was province of trial officer and administrative body to pass upon credibility of witnesses. McPherson v New York City Housing Authority, 47 A.D.2d 828, 365 N.Y.S.2d 862, 1975 N.Y. App. Div. LEXIS 9168 (N.Y. App. Div. 1st Dep't 1975).

Administrative law judge did not improperly admit testimony of 12-year-old and 6-year-old children without foundation as to their ability to understand meaning of oath where (1) there was nothing to indicate that children's testimony was unreliable, (2) both children testified with considerable clarity and detail, (3) employer's counsel specifically elicited from 6-year-old child prior to her unsworn testimony that she knew difference between truth and lie, and that she knew importance of telling truth at hearing, and (4) 12-year-old child's sworn testimony was clear and straightforward and was substantiated in great part by his mother's testimony. Heslop v Board of Educ., Newfield Cent. Sch. Dist., 191 A.D.2d 875, 594 N.Y.S.2d 871, 1993 N.Y. App. Div. LEXIS 2383 (N.Y. App. Div. 3d Dep't 1993).

67. Subpoenas

A petitioner, war veteran, was dismissed from his Civil Service position after a hearing by the Triborough Bridge and Tunnel Authority for misclassifying trucks. Where his dismissal resulted largely from hearsay testimony, and he was not granted the right of subpoena, the determination of the authority will be annulled and the petitioner is entitled to a new hearing with the right of subpoena. Reynolds v Triborough Bridge & Tunnel Authority, 276 A.D. 388, 94 N.Y.S.2d 841, 1950 N.Y. App. Div. LEXIS 4869 (N.Y. App. Div. 1950).

Although the evidence received at a hearing charging petitioner with incompetence and misconduct supported the determination of the industrial commissioner to discharge the petitioner, a new hearing was ordered where the hearing officer refused to sign subpoenas for certain persons requested by the petitioner. The requirements of subdivision 2 constitute a substantial right, and a refusal to issue subpoenas upon the request of a petitioner is sufficient to invalidate the entire hearing. Julien v Lubin, 8 A.D.2d 704, 185 N.Y.S.2d 627, 1959 N.Y. App. Div. LEXIS 8651 (N.Y. App. Div. 1st Dep't 1959).

At disciplinary hearing wherein court officer was found guilty of misconduct and his employment was terminated, he was not denied due process when hearing officer denied application for adjournment to subpoena additional witnesses where court officer was aware of existence of witnesses on first day of hearing but waited until next day to request adjournment, and he did not make sufficient showing that witnesses would provide relevant testimony. Connolly v Williams, 210 A.D.2d 19, 618 N.Y.S.2d 808, 1994 N.Y. App. Div. LEXIS 11874 (N.Y. App. Div. 1st Dep't 1994).

A civil service employee on a disciplinary trial was not entitled to an order directing a hearing officer to issue a subpoena for records on which she relied, since an Article 78 proceeding would protect her rights and said Article 78 proceeding prohibits a review where there has been no final determination of the rights of the parties. Schwartz v Naftalison, 11 Misc. 2d 439, 173 N.Y.S.2d 157, 1958 N.Y. Misc. LEXIS 3698 (N.Y. Sup. Ct. 1958).

A motion by a state agency to compel an employee to comply with a subpoena issued in connection with the agency's investigation into alleged mismanagement and misconduct would be granted, since the agency has broad power to issue subpoenas for the purpose of making inquiry as to the official conduct of any employee under Pub O Law § 61, and Civ S Law § 75 makes no mention of questioning the person against whom a disciplinary proceeding has been proposed previous to the commencement of the proceeding and after disciplinary charges are filed; due process does not require any investigation and questioning of an employee to be stayed until the § 75 hearing is complete. New York State Dep't of Transp. v Matt, 124 Misc. 2d 1080, 478 N.Y.S.2d 1007, 1984 N.Y. Misc. LEXIS 3311 (N.Y. Sup. Ct. 1984).

ii. Particular Employees

68. In general

In an Article 78 proceeding brought by a former associate counsel with the Temporary State Commission on Regulation of Lobbying to challenge his dismissal without a hearing, the former counsel demonstrated no procedural violation in the manner in which his employment was terminated, where he was not entitled to a due process hearing in that he never alleged that there was public dissemination of the reasons for his dismissal, and where reports of his active assistance to two public interest lobbying groups regulated by the commission were not improper bases for termination of employment. Thomas v New York Temporary State Com. on Regulation of Lobbying, 56 N.Y.2d 656, 451 N.Y.S.2d 708, 436 N.E.2d 1310, 1982 N.Y. LEXIS 3334 (N.Y. 1982).

A proceeding to annul a determination removing petitioner from a "functional title" (an intradepartmental non-civil service title established for administrative convenience) of "Division Head of Continuing Services" would be dismissed. Although petitioner lost some duties and responsibilities, he did not lose his civil service grade or title, nor was he subjected to any disciplinary penalty provided for in Civ S Law § 75; consequently, although petitioner may have been demoted in the sense of dismissal from his functional position, he was not demoted within the meaning of Civ S Law § 75(3), and thus was not entitled to a hearing. Galatti v County of Dutchess, 64 N.Y.2d 1163, 491 N.Y.S.2d 89, 480 N.E.2d 678, 1985 N.Y. LEXIS 14672 (N.Y.), reh'g denied, 65 N.Y.2d 924, 493 N.Y.S.2d 1030, 483 N.E.2d 136, 1985 N.Y. LEXIS 15219 (N.Y. 1985).

An allegation that petitioner held a position as investigator in the office of the district attorney for a period during which he was paid his salary by the county auditor upon certification by the commission does not as a matter of law constitute a permanent position from which he cannot be legally removed without charges under this section. Budd v Hill, 243 A.D. 735, 277 N.Y.S. 534, 1935 N.Y. App. Div. LEXIS 8011 (N.Y. App. Div. 1935).

Petitioners, employed in civilian capacities as National Guard technicians at a federal missile base, could not claim the protection of this section against discharge without a hearing, as they could not be considered state civil service employees. Application of Anselmo, 19 A.D.2d 761, 241 N.Y.S.2d 761, 1963 N.Y. App. Div. LEXIS 3284 (N.Y. App. Div. 3d Dep't), app. denied, 13 N.Y.2d 599, 1963 N.Y. LEXIS 2071 (N.Y. 1963).

Although provision of public employees' bargaining agreement was silent with regard to certain rights guaranteed by Civil Service Law, such as employee's right to be represented by counsel and to call witnesses in his own behalf, it was to be presumed that such basic rights would be accorded the employee; hence, it would have been premature for court to hold that subject article was violative of plaintiff's constitutional rights where no disciplinary proceedings had as yet been conducted. Hackett v State, 50 A.D.2d 80, 375 N.Y.S.2d 895, 1975 N.Y. App. Div. LEXIS 11442 (N.Y. App. Div. 3d Dep't 1975).

County medical center's dismissal of new resident without hearing was in violation of its own policies, and thus dismissal would be annulled and due-process hearing would be ordered, where resident became employee when he began his duties as resident in accordance with terms of his contract, and his contractual rights included right to due-process hearing as stated in center's policy manual. Adler v County of Nassau, 246 A.D.2d 542, 667 N.Y.S.2d 393, 1998 N.Y. App. Div. LEXIS 144 (N.Y. App. Div. 2d Dep't 1998).

Upon petitioner's appointment to permanent title of Staff Analyst, she was probationary employee who was not entitled to notice and hearing before she could be terminated, but respondent's refusal to reinstate her to her old position without notice and hearing, on ground that her leave from her old position had been canceled, violated CLS Civ S § 75(1); while petitioner was not "promoted" to her new position but voluntarily sought appointment to it, she never resigned from her old position and, while she did not object to cancellation of leave from her old position, it was unlikely that she was aware that cancellation would result in forfeiture of civil service protections afforded by her status as permanent employee. Bethel v McGrath-McKechnie, 258 A.D.2d 316, 685 N.Y.S.2d 211, 1999 N.Y. App. Div. LEXIS 1135 (N.Y. App. Div. 1st Dep't 1999), app. denied, 1999 N.Y. App. Div. LEXIS 7533 (N.Y. App. Div. 1st Dep't June 15, 1999), rev'd, 95

N.Y.2d 7, 709 N.Y.S.2d 888, 731 N.E.2d 604, 2000 N.Y. LEXIS 905 (N.Y. 2000).

Sheriff was a necessary party to the portion of the proceeding challenging his determination pursuant to N.Y. Civ. Serv. Law § 75 finding an officer guilty of misconduct; as a court was not allowed to adjudicate a dispute raised in an N.Y. C.P.L.R. art. 78 proceeding unless the governmental agency or official which performed the challenged action was a party thereto, the sheriff was joined as a party. Matter of White v County of Sullivan, 101 A.D.3d 1552, 957 N.Y.S.2d 468, 2012 N.Y. App. Div. LEXIS 9106 (N.Y. App. Div. 3d Dep't 2012).

An honorably discharged soldier appointed from a civil service list as special agent in the department of excise, who for fifteen years has faithfully discharged duties of position, no charge of misconduct having been preferred against him, cannot be summarily discharged from his position, even though it be a confidential one. In re Weaver, 131 N.Y.S. 144, 72 Misc. 438, 1911 N.Y. Misc. LEXIS 417 (N.Y. Sup. Ct. 1911).

Under the saving clause of § 376 of the charter of Lockport, the repeal by said charter of the provisions of this section, relative to removal of volunteer fireman, did not affect or impair the right to hearing before removal of one who before the charter by appointment of the water board held the position of chief electrical engineer. Murray v Water Board of Lockport, 151 N.Y.S. 419, 88 Misc. 625, 1915 N.Y. Misc. LEXIS 1180 (N.Y. Sup. Ct. 1915).

Civil service employee against whom quasi-criminal charges were brought involving financial mismanagement but who was not employed in connection with financial affairs of state institution at time charges were brought was improperly suspended pending determination of charges pursuant to Civil Service Law § 75, subd 3, without notice or hearing, as there was no valid governmental interest overriding the employee's constitutional rights of due process. Randall v Toll, 73 Misc. 2d 451, 341 N.Y.S.2d 994, 1973 N.Y. Misc. LEXIS 2311 (N.Y. Sup. Ct. 1973).

An employee of a regional off-track betting corporation, which corporation independently transacts its business and hires and compensates its personnel outside of the civil service system, is not within the classified service under the Civil Service Law and is not entitled to the protection of section 75 of the Civil Service Law, which provides that certain employees shall not be removed except for incompetency or misconduct shown after a hearing upon stated charges. Russell v Nassau Regional Off-Track Betting Corp., 94 Misc. 2d 774, 406 N.Y.S.2d 235, 1978 N.Y. Misc. LEXIS 2361 (N.Y. Sup. Ct. 1978), aff'd, 70 A.D.2d 790, 1979 N.Y. App. Div. LEXIS 17184 (N.Y. App. Div. 2d Dep't 1979).

Dismissal of an appeal of an armed service, firefighter, managerial employee's at will employment termination by the New York Division of Military and Naval Affairs with no hearing was proper as N.Y. Civ. Serv. Law § 75 and a state handbook did not apply to him since he was not a civil servant—he was a serviceman; regulations did not require hearing for termination of at will employment; and he was no longer in a union since he had previously been promoted to a managerial position. Le Brun v Maguire, 12 A.D.3d 1007, 785 N.Y.S.2d 563, 2004 N.Y. App. Div. LEXIS 14288 (N.Y. App. Div. 3d Dep't 2004).

When public employee entitled, under CLS Civil Service Law § 75(1), to retain position in absence of showing of incompetence or misconduct, receives notice of elimination of position, employee has due process right to pre-termination hearing on issue of whether elimination of position is sham and pretext for deprivation of employee's property right in position. Dwyer v Regan, 777 F.2d 825, 1985 U.S. App. LEXIS 25150 (2d Cir. N.Y. 1985), modified, reh'g denied, 793 F.2d 457, 1986 U.S. App. LEXIS 37371 (2d Cir. 1986).

69. Corrections officers

Negotiated plea agreement, by which correction officer accepted as disciplinary penalty 12-month probation limited to violations of internal rules concerning lateness, absence without leave and sick leave, and further agreed to waive his rights as tenured employee for probationary period and subject himself to "termination as any other probationary employee," only permitted his discharge without notice of charges and hearing as "probationary employee" if it were undisputed that he was absent without leave or late for work, or wrongfully absented himself from work claiming to be ill, or otherwise violated relevant sick leave directives during probationary term; there was no right to discharge officer as "any other probationary employee" for any other reasons. Tankard v Abate, 159 Misc. 2d 339, 603 N.Y.S.2d 951, 1993 N.Y. Misc. LEXIS 450 (N.Y. Sup. Ct. 1993).

Under a N.Y. C.P.L.R. art. 78 proceeding, petitioner was entitled to a hearing to contest an assertion by a corrections commissioner that an employee's reassignment was based on a violation of trust rather than misconduct, which required a hearing pursuant to N.Y. Civ. Serv. Law § 75(1) prior to such reassignment. Schwartzbaum v Horn, 233 N.Y.L.J. 125, 2005 N.Y. Misc. LEXIS 3390 (N.Y. Sup. Ct. June 30, 2005), app. dismissed, 2006 N.Y. App. Div. LEXIS 8590 (N.Y. App. Div. 1st Dep't June 29, 2006).

70. Employees of state hospital, training center and the like

In an Article 78 proceeding by a mental hygiene therapy aide, seeking to be rehired at a local developmental center, after resigning from his permanent tenured position at the center in expectation of being instated to the same position at a local psychiatric center on a promise of employment there, the developmental center would be directed to rehire the aide where the psychiatric center had withdrawn its offer of employment, and where the developmental center improperly refused to allow the aide to withdraw his resignation, on the ground of unproven allegations of patient abuse. Farrar v State, 92 A.D.2d 546, 459 N.Y.S.2d 114, 1983 N.Y. App. Div. LEXIS 16769 (N.Y. App. Div. 2d Dep't 1983).

Attendant in a state hospital for the criminally insane was not a "public officer" so that his commitment to a state mental hospital for observation and treatment would justify an order declaring his Civil Service position vacant without notice and hearing. Application of Sweeney, 1 Misc. 2d 125, 147 N.Y.S.2d 612, 1955 N.Y. Misc. LEXIS 2087 (N.Y. Sup. Ct. 1955).

Manager of state hospital community store, who had resigned civil service position with the hospital to take the managership, was not covered by civil service and thus was not entitled to a hearing prior to termination by hospital director who rather than leasing out the store operated it himself. O'Shea v Zwerling, 72 Misc. 2d 163, 338 N.Y.S.2d 846, 1969 N.Y. Misc. LEXIS 983 (N.Y. Sup. Ct. 1969), aff'd, 40 A.D.2d 628, 335 N.Y.S.2d 926, 1972 N.Y. App. Div. LEXIS 5784 (N.Y. App. Div. 1st Dep't 1972).

Petitioner's civil service employment as a hospital aide at county medical center was a property right which could not be taken from her without satisfying the dictates of due process. Palermo v Eisenberg, 81 Misc. 2d 1014, 367 N.Y.S.2d 378, 1975 N.Y. Misc. LEXIS 2517 (N.Y. Sup. Ct. 1975).

Due process required that probationary state employee receive hearing before his employment was terminated where charges against such employee, which involved brutality against resident of New York State's schools, were such as to stigmatize the employee so that he might not be able to find other employment. Hill v Edelman, 92 Misc. 2d 485, 399 N.Y.S.2d 565, 401 N.Y.S.2d 697, 1977 N.Y. Misc. LEXIS 2573 (N.Y. Sup. Ct. 1977).

71. —Law enforcement officers, generally

One who is appointed special policeman from an appropriate eligible list cannot be summarily removed since although the appointment purportedly was to "continue at the pleasure of the board of public safety" it was neither provisional nor temporary within the meaning of the civil service law and the appointee came within the protection of this section. Healey v Bazinet, 291 N.Y. 430, 52 N.E.2d 936, 291 N.Y. (N.Y.S.) 430, 1943 N.Y. LEXIS 1013 (N.Y. 1943).

Hearing officer's report to police commissioner recommending dismissal of police officer did not deny officer due process, even though it did not list each and every inconsistency in evidence, since commissioner is not required to make independent assessment of each witness' credibility; commissioner is entitled to rely on hearing officer who, as fact finder, is in best position to assess and evaluate evidence presented. Jervas v Ward, 159 A.D.2d 222, 552 N.Y.S.2d 25, 1990 N.Y. App. Div. LEXIS 2189 (N.Y. App. Div. 1st Dep't 1990).

Statement made by petitioner police officer to superior officer during noncustodial interview was not inadmissible on grounds that he was not given Miranda warnings and interview was not recorded, as allegedly required by § 16.2 of Police Benevolent Association (PBA) Agreement, since record established that interview was "ordinary supervisory inquir[y]" and was therefore not governed by procedural requirements of PBA Agreement § 16.2. Roman v Constantine, 185 A.D.2d 701, 587 N.Y.S.2d 885, 1992 N.Y. App. Div. LEXIS 9268 (N.Y. App. Div. 4th Dep't), app. dismissed, 80 N.Y.2d 971, 591 N.Y.S.2d 139, 605 N.E.2d 875, 1992 N.Y. LEXIS 3813 (N.Y. 1992), app. denied, 81 N.Y.2d 708, 598 N.Y.S.2d 767, 615 N.E.2d 224, 1993 N.Y. LEXIS 1208 (N.Y. 1993).

Hearing officer erred in denying police officer's application to suppress all evidence derived from viewing of subsequently altered portion of videotape that was alleged to have portrayed his alleged physical abuse of prisoner where (1) officer served notice to produce videotape and, upon police chief's noncompliance therewith, judicial subpoena duces tecum, (2) following chief's unsuccessful effort to quash subpoena, videotape was delivered to video store for copying, (3) during copying process (and for no compelling reason), video professional arbitrarily stopped lengthy tape at precise location portraying alleged physical abuse and then restarted it, inadvertently pressing record button instead of play button, and (4) following erasure of critical 50-second portion of videotape, video professional resumed copying process. Dicaprio v Trzaskos, 203 A.D.2d 759, 610 N.Y.S.2d 395, 1994 N.Y. App. Div. LEXIS 4082 (N.Y. App. Div. 3d Dep't 1994).

Petitioner was not entitled to pre-termination hearing under CLS Civ S § 75 where (1) he was hired for noncompetitive position of community service aide, (2) he thereafter took and passed competitive examination to become police officer, (3) he was appointed as police officer, and he signed letter of appointment specifying that his appointment was for 52-week probationary term, and (4) letter was sent to him stating that he would be terminated due to "unsatisfactory performance during [his] probationary period." Juan v County of Suffolk, 209 A.D.2d 523, 618 N.Y.S.2d 833, 1994 N.Y. App. Div. LEXIS 11173 (N.Y. App. Div. 2d Dep't 1994).

It was improper for county under sheriff to issue written reprimand to deputy sheriff without hearing where there was no language in collective bargaining agreement waiving deputy sheriff's right to hearing under CLS Civ S § 75; fact that sheriff's department had long-standing practice of issuing written reprimands without hearing was irrelevant. Delmage v Mahoney, 224 A.D.2d 688, 639 N.Y.S.2d 66, 1996 N.Y. App. Div. LEXIS 1996 (N.Y. App. Div. 2d Dep't), app. denied, 88 N.Y.2d 812, 649 N.Y.S.2d 379, 672 N.E.2d 605, 1996 N.Y. LEXIS 2957 (N.Y. 1996).

Court properly dismissed Article 78 proceeding in which petitioner sought reinstatement as police officer on ground that his resignation was involuntary, where settlement agreement resolving prior disciplinary proceeding (which petitioner voluntarily executed after consultation with union representative) expressly allowed for summary termination if he did not comply with its terms "to the satisfaction of the chief of police," and police chief's finding that he failed to satisfactorily carry out his obligations under agreement was not arbitrary or unreasonable, or product of bad faith; petitioner's resignation could not be considered involuntary merely because he was offered unpalatable choice of resigning or being discharged, unless respondents had no right to discharge him. Wolfe v Jurczynski, 241 A.D.2d 88, 671 N.Y.S.2d 864, 1998 N.Y. App. Div. LEXIS 4528 (N.Y. App. Div. 3d Dep't 1998).

Court erred in prohibiting District Attorney's representatives from attending Internal Affairs (IA) interviews of county police officers who were not represented by counsel or union official since subject collective bargaining agreement did not grant right to counsel to officer who was directed to appear before IA unit as witness, and did not prohibit member of DA's office from being present at witness interviews; further, use immunity afforded police officers at departmental interviews was sufficient to compel testimony over claim of privilege against self-incrimination, and police department was not prohibited from sharing information obtained from such interviews with DA's office. Court erred in directing county police department, in future cases, to formally advise police officers who were not represented by counsel at Internal Affairs (IA) interviews that they were entitled to use immunity; while officers compelled to appear at IA interviews were automatically afforded use immunity by operation of law, no due process right to formal notification of right was implied by 71 N.Y.2d 154.Cortes v County of Nassau, 248 A.D.2d 616, 670 N.Y.S.2d 509, 1998 N.Y. App. Div. LEXIS 2884 (N.Y. App. Div. 2d Dep't 1998).

The salary of a police officer who is a permanent civil service appointee may not be suspended without an evidentiary hearing on the ground of the officer's failure to report for regular duty after he has been ceritified as physically able to work, pursuant to Gen Mun Law § 207-c, following a period of disability. Goglia v Sardino, 119 Misc. 2d 907, 464 N.Y.S.2d 966, 1983 N.Y. Misc. LEXIS 3613 (N.Y. Sup. Ct. 1983), aff'd, 101 A.D.2d 1013, 476 N.Y.S.2d 268, 1984 N.Y. App. Div. LEXIS 18744 (N.Y. App. Div. 4th Dep't 1984).

As the conduct of the lieutenant, who worked for the Sheriff's Department, was clearly at odds with the strict discipline necessary to effectively operate a Sheriff's Department and supported the decision imposing termination as his penalty, the decision to terminate his employment was appropriate. Matter of Guynup v County of Clinton, 90 A.D.3d 1390, 935 N.Y.S.2d 681, 2011 N.Y. App. Div. LEXIS 9067 (N.Y. App. Div. 3d Dep't 2011).

A policeman who is neither a member of the Police Pension Fund nor entitled to benefits under the Retirement and Social Security Law cannot be removed from the force without written notice of charges and hearing. 1962 Op St Compt #668.

72. —Detectives

Court properly annulled determinations of police commissioner which summarily terminated detective status of petitioners who had served as detectives for at least 3 years, because their detective status could only be removed in cases of incompetency or misconduct shown after hearing even though they had been designated as detectives at discretion of prior police commissioner and not as result of competitive examination; CLS Civ S § 75(1)(e) applies to all detectives, no matter how they arrived at their detective status. Cave v Zaleski, 237 A.D.2d 517, 655 N.Y.S.2d 590, 1997 N.Y. App. Div. LEXIS 2854 (N.Y. App. Div. 2d Dep't 1997).

Article 78 petition to review determination removing petitioner as "lieutenant detective" and reassigning him to his former position as supervisor of village's uniformed patrol force, without any diminution of compensation, was properly denied as (1) "lieutenant detective" position was supervisory and did not involve investigative duties, and thus petitioner was not entitled to benefits of L 1997, ch 134, and (2) petitioner's reassignment was within hearing exception provisions of CLS Civ S § 75(1)(e). Steinmann v Village of Spring Valley, 261 A.D.2d 548, 691 N.Y.S.2d 66, 1999 N.Y. App. Div. LEXIS 5389 (N.Y. App. Div. 2d Dep't 1999).

73. —NYC police officers

New York City Police Commissioner had discretion to dismiss police officers without administrative hearing under NYC Admin Code § 14-115(a) where each had been convicted of crime following full trial. Griffin v Bratton, 248 A.D.2d 242, 670 N.Y.S.2d 34, 1998 N.Y. App. Div. LEXIS 2575 (N.Y. App. Div. 1st Dep't 1998), rev'd, 92 N.Y.2d 781, 686 N.Y.S.2d 359, 709 N.E.2d 100, 1999 N.Y. LEXIS 24 (N.Y. 1999).

Police officer was entitled to administrative hearing with regard to termination of her employment, pursuant solely to NYC Admin Code § 14-115, based on her conviction for failure to file federal income tax returns for 2 years. Farrell v Safir, 259 A.D.2d 328, 687 N.Y.S.2d 18, 1999 N.Y. App. Div. LEXIS 2768 (N.Y. App. Div. 1st Dep't 1999).

Petitioner could be terminated from his position as New York City police officer without hearing after he was convicted of second degree aggravated harassment arising from conduct committed in line of duty, which constituted violation of his oath of office. Pirozzi v Safir, 270 A.D.2d 2, 703 N.Y.S.2d 185, 2000 N.Y. App. Div. LEXIS 2263 (N.Y. App. Div. 1st Dep't), app. denied, 95

N.Y.2d 756, 712 N.Y.S.2d 448, 734 N.E.2d 760, 2000 N.Y. LEXIS 1713 (N.Y. 2000).

In an Article 78 proceeding, the court determined that petitioners, New York City police officers who were automatically dismissed from their permanent civil service positions by operation of law upon their felony convictions pursuant to Pub O Law § 30(1)(e), retained a property interest in their former positions upon their reversal of their convictions entitling them to due process protection and a post-termination hearing, but not to back pay for the period between conviction and reversal or automatic reinstatement by court order prior to a determination after hearing, since the operation of § 30 vacating the "office" of a "public officer" upon a felony conviction is subject to the condition that a "conviction" exists and, upon reversal of the convictions, petitioners should, so far as reasonably possible, be treated as though they had never been accused at all and given the same opportunity to be heard prior to termination as any other civil service employee who is charged with misconduct, under Civ S Law § 75; even if petitioners are not entitled to a full disciplinary hearing, they would be at least entitled to a name-clearing hearing. Briggins v McGuire, 118 Misc. 2d 964, 462 N.Y.S.2d 357, 1983 N.Y. Misc. LEXIS 3429 (N.Y. Sup. Ct. 1983).

74. —Parole officers

The discharge of a parole officer after written charges had been filed against him and he had been given an opportunity to answer the same in writing was proper although no hearing was held and parole board acted upon information before it as a result of its own investigation and the explanation of the petitioner as contained in his answer. Corgel v Loos, 286 A.D. 583, 146 N.Y.S.2d 116, 1955 N.Y. App. Div. LEXIS 4096 (N.Y. App. Div. 1955).

75. —Town or village police officers

Town policeman who was removed from his position by police commissioners for physical disability without notice or a hearing, was entitled to a hearing on the issue of the source and continuance of the disability before he could be removed. Papasidero v Fasano, 19 N.Y.2d 440, 280 N.Y.S.2d 566, 227 N.E.2d 386, 1967 N.Y. LEXIS 1506 (N.Y. 1967).

Village patrolman was improperly removed from police department for misconduct in a proceeding pursuant to Civil Service Law § 75, where evidence indicating that patrolman's acts of misconduct may have been the result of mental illness mandated a hearing pursuant to Civil Service Law §§ 72 and 73. Brockman v Skidmore, 43 A.D.2d 572, 349 N.Y.S.2d 120, 1973 N.Y. App. Div. LEXIS 3162 (N.Y. App. Div. 2d Dep't 1973), rev'd, 39 N.Y.2d 1045, 387 N.Y.S.2d 426, 355 N.E.2d 386, 1976 N.Y. LEXIS 2974 (N.Y. 1976).

In an Article 78 proceeding brought by part-time policemen seeking reinstatement to their positions with the combined police force of a town and village, the policemen were properly reinstated where they were terminated for misconduct without a hearing, where their right to a hearing was not waived under a collective bargaining agreement that did not cover part-time policemen, and where they were not "special policemen" in that they were employed on a regular, rather than temporary, basis. Goldfluss v Bonali, 89 A.D.2d 708, 453 N.Y.S.2d 832, 1982 N.Y. App. Div. LEXIS 17839 (N.Y. App. Div. 3d Dep't 1982).

Disciplinary proceeding against police officer employed by village in Rockland County was governed by Rockland County Police Act (L 1936, ch 524), which permits officer to be suspended without pay until completion of disciplinary hearing, and thus officer had no right to be paid during period of his suspension in excess of 30 days pursuant to CLS Vill § 8-804 and CLS Civ S § 75; county act was passed after village's police department was reformed under CLS Vill former § 188, and was controlling to extent that it conflicted with Village Law and Civil Service Law. Nieves v Haera, 165 A.D.2d 201, 566 N.Y.S.2d 731, 1991 N.Y. App. Div. LEXIS 2451 (N.Y. App. Div. 3d Dep't 1991).

"Letter of Reprimand" placed in police officer's personnel file was mere critical admonition and not so formal as to trigger hearing requirement of CLS Civ S § 75, especially since subject matter of letter dealt with minor infraction of village's rules of conduct, and no punishment was imposed. Hoffman v Village of Sidney, 235 A.D.2d 698, 652 N.Y.S.2d 346, 1997 N.Y. App. Div. LEXIS 123 (N.Y. App. Div. 3d Dep't 1997).

Although town supervisor nominally preferred charges against town police officer, who was dismissed from his employment, supervisor's participation in disciplinary process was not so pervasive as to require that he refrain from taking part in town board's review of hearing officer's decision. Ost v Supervisor of Woodstock, 251 A.D.2d 724, 673 N.Y.S.2d 768, 1998 N.Y. App. Div. LEXIS 6464 (N.Y. App. Div. 3d Dep't), app. denied, 92 N.Y.2d 817, 684 N.Y.S.2d 488, 707 N.E.2d 443, 1998 N.Y. LEXIS 4260 (N.Y. 1998).

Article 78 petition to review determination removing petitioner as "lieutenant detective" and reassigning him to his former position as supervisor of village's uniformed patrol force, without any diminution of compensation, was properly denied as (1) "lieutenant detective" position was supervisory and did not involve investigative duties, and thus petitioner was not entitled to benefits of L 1997, ch 134, and (2) petitioner's reassignment was within hearing exception provisions of CLS Civ S § 75(1)(e). Steinmann v Village of Spring Valley, 261 A.D.2d 548, 691 N.Y.S.2d 66, 1999 N.Y. App. Div. LEXIS 5389 (N.Y. App. Div. 2d Dep't 1999).

City did not violate CLS Civ S § 75(1)(e) where it did not act in bad faith in eliminating title/position of police detective. Moshier v City of Little Falls, 281 A.D.2d 913, 721 N.Y.S.2d 848, 2001 N.Y. App. Div. LEXIS 2696 (N.Y. App. Div. 4th Dep't 2001).

Petitioner, a civil service employee with permanent status employed by the respondent village as a police officer, who was injured in the performance of his duties and was subsequently ordered to report for limited duties although his physician stated that petitioner was unable to perform any sort of work, cannot be removed from the payroll without a hearing; he must first be afforded the full panoply of procedural due process rights under section 75 of the Civil Service Law. Fiorella v Scarsdale, 96 Misc. 2d 406, 409 N.Y.S.2d 489, 1978 N.Y. Misc. LEXIS 2616 (N.Y. Sup. Ct. 1978).

Officer was entitled to N.Y. C.P.L.R. art. 78 relief from a determination terminating his employment because, although the officer's driver's license had been revoked, possession of a valid driver's license was not an express condition or requirement of his employment, and the police chief erred in terminating the officer without a hearing; the failure to maintain a minimum qualification of employment was not an act of misconduct or one related to job performance that would have invoked the disciplinary procedures mandated by N.Y. Civ. Serv. Law § 75. Rather, an employee charged with failing to possess a minimum qualification of his or her position was only entitled to notice of the charge and the opportunity to contest it. Matter of Lutz v Krokoff, 102 A.D.3d 146, 954 N.Y.S.2d 658, 2012 N.Y. App. Div. LEXIS 7895 (N.Y. App. Div. 3d Dep't 2012), app. denied, 20 N.Y.3d 860, 961 N.Y.S.2d 378, 985 N.E.2d 143, 2013 N.Y. LEXIS 236 (N.Y. 2013).

76. NYC non-police employees

Since New York City, N.Y., Charter § 487(a) and New York City, N.Y., Admin. Code § 15-113, gave the city fire department commissioner exclusive power to discipline firefighters, the city's civil service commission erroneously ruled that it had jurisdiction to hear a firefighters appeal of his termination; the fire department's discipline was outside the scope of N.Y. Civ. Serv. Law §§ 75, 76, and, thus, was not subject to the jurisdiction of the commission. The fire commissioner's N.Y. art. 78 proceeding to annul the commission's determination that it had jurisdiction was improperly dismissed. Von Essen v N.Y. City Civ. Serv. Comm'n, 4 N.Y.3d 220, 791 N.Y.S.2d 887, 825 N.E.2d 128, 2005 N.Y. LEXIS 224 (N.Y. 2005).

A veteran of the world war, appointed to the position of "assistant commissioner of public works of Borough of Queens," may be removed, under § 383 of the Greater New York City Charter, without charges or a hearing as provided by this section. MacMaster v Harvey, 239 A.D. 553, 268 N.Y.S. 115, 1933 N.Y. App. Div. LEXIS 8095 (N.Y. App. Div. 1933), aff'd, 265 N.Y. 555, 193 N.E. 318, 265 N.Y. (N.Y.S.) 555, 1934 N.Y. LEXIS 1163 (N.Y. 1934).

A determination dismissing director of airports of the New York City Department of Marine and Aviation, for violation of the city

charter, examined and held to have been made after a fair trial in accordance with the requirements of this section. Haslett v Minetti, 274 A.D. 519, 84 N.Y.S.2d 468, 1948 N.Y. App. Div. LEXIS 3119 (N.Y. App. Div. 1948), app. denied, 275 A.D. 660, 86 N.Y.S.2d 667, 1949 N.Y. App. Div. LEXIS 3888 (N.Y. App. Div. 1949).

An employee of the N. Y. C. Transit Authority waived the procedure set forth in this section when after his removal from position of conductor on the ground of mental illness he failed to deny such disability until after he had accepted position as watchman. Jones v New York City Transit Authority, 285 A.D. 1054, 139 N.Y.S.2d 371, 1955 N.Y. App. Div. LEXIS 6656 (N.Y. App. Div. 1955).

Where a petition sought reinstatement of petitioner as permanent incumbent of the position of Metropolitan Realty Appraiser in the New York City office of the State Tax Commission, alleging that he was an honorably discharged veteran of World War I and was duly appointed April 1, 1955, exercising the duties of the position under direct supervision of the Estate Tax Appraiser and the Assistant Estate Tax Appraiser, etc., the test of whether he was protected from discharge without a hearing and notice was to be found in the precise nature of his duties under § 249-u of the Tax Law, which would require a hearing and could not be decided on the basis of motion papers. Morton v Murphy, 11 A.D.2d 880, 203 N.Y.S.2d 222, 1960 N.Y. App. Div. LEXIS 8414 (N.Y. App. Div. 3d Dep't 1960).

In an Article 78 proceeding brought by a former NYC bus operator who had been demoted to the position of railroad clerk, the petition would be dismissed where the clerk had waived his rights to a hearing and to any appeal when he elected to proceed to arbitration pursuant to the optional grievance provisions of his collective bargaining agreement. Dye v New York City Transit Authority, 88 A.D.2d 899, 450 N.Y.S.2d 587, 1982 N.Y. App. Div. LEXIS 17227 (N.Y. App. Div. 2d Dep't), aff'd, 57 N.Y.2d 917, 456 N.Y.S.2d 760, 442 N.E.2d 1271, 1982 N.Y. LEXIS 3792 (N.Y. 1982).

NYC Department of Health personnel bulletin, granting contractual disciplinary rights to part time employees if they had worked at least 35 hours per week for at least 2 years, applied only to employees who were authorized to work and compensated for at least 35 hours per week; thus, disciplinary rights did not apply to employee who was authorized to work only 30 hours per week but who asserted that she actually worked at least 35 hours per week in order to get her work done properly, even though she was not paid for her extra hours. Roy v City of New York Dep't of Health, 202 A.D.2d 294, 609 N.Y.S.2d 182, 1994 N.Y. App. Div. LEXIS 2538 (N.Y. App. Div. 1st Dep't 1994).

Hearing was not warranted by NYC Emergency Medical Service employee's unsupported claim that his misconduct, which otherwise was mostly left unexplained, was deliberately "set up" by New York City Health and Hospital Corporation in order to derail his reelection campaign for union president. Bernardo v New York City Health & Hosps. Corp., 240 A.D.2d 278, 659 N.Y.S.2d 7, 1997 N.Y. App. Div. LEXIS 6592 (N.Y. App. Div. 1st Dep't 1997).

Terminated provisional employee of NYC housing authority was not entitled to hearing under CLS Civ S § 75 where he was terminated for failing to report to work and thereafter failing to return, request leave, or provide sufficient explanation for his absence. Misir v New York City Hous. Auth., 245 A.D.2d 88, 666 N.Y.S.2d 132, 1997 N.Y. App. Div. LEXIS 12910 (N.Y. App. Div. 1st Dep't 1997), app. dismissed, 92 N.Y.2d 915, 680 N.Y.S.2d 53, 702 N.E.2d 838, 1998 N.Y. LEXIS 3083 (N.Y. 1998).

Judgment affirming determination reassigning petitioner from her position of NYC Transit Authority Supervisor (Stations) Level II to Supervisor (Stations) Level I would be reversed and matter remitted for hearing under CLS Civ S § 75 since petitioner was not transferred from Supervisor Level II to Supervisor Level I based on appraisal of her abilities and temperament in lieu of written examination, but rather based on specific misconduct, for which she incurred additional penalty of suspension and was reprimanded. Campbell v New York City Transit Auth., 253 A.D.2d 813, 677 N.Y.S.2d 632, 1998 N.Y. App. Div. LEXIS 9551 (N.Y. App. Div. 2d Dep't 1998), app. denied, 93 N.Y.2d 805, 689 N.Y.S.2d 707, 711 N.E.2d 983, 1999 N.Y. LEXIS 850 (N.Y. 1999).

77. School district employees

In an Article 78 proceeding by a school bus driver, challenging her dismissal by the school district after complaints were received from parents as to the driver's safety and disciplinary problems, dismissal without a hearing was proper since the driver, as a permanent employee of a school district in the noncompetitive class, was an "at will" employee who was not entitled to tenure protections under Civ S Law § 75. Voorhis v Warwick Valley Cent. School Dist., 92 A.D.2d 571, 459 N.Y.S.2d 325, 1983 N.Y. App. Div. LEXIS 16808 (N.Y. App. Div. 2d Dep't 1983).

School district did not impermissibly terminate school bus driver's employment without hearing in violation of CLS Civ S § 75, and thus court erred in annulling school district's determination to accept driver's "resignation," reinstating her to her position, and granting her back pay and benefits; district's acceptance of driver's constructive resignation, as provided by parties' collective bargaining agreement, was not disciplinary action as would entitle driver to prior notice or hearing. Barrera v Frontier Cent. Sch. Dist., 249 A.D.2d 927, 672 N.Y.S.2d 218, 1998 N.Y. App. Div. LEXIS 5010 (N.Y. App. Div. 4th Dep't 1998).

In Article 78 proceeding challenging termination of school bus driver's employment for misconduct, driver was improperly found guilty of having "prompted" removal of broom from its secure location on bus and having "engaged" one or more students to sweep bus while it was moving where evidence proved only that driver had "permitted" students to sweep bus while it was moving, there was no evidence that he "prompted" or "engaged" such conduct, and thus he was found guilty of acts not charged; however, other charges against driver were supported by substantial evidence, including his admissions, testimony of students and his supervisor, and documentary evidence. Brown v Saranac Lake Cent. Sch. Dist., 273 A.D.2d 785, 709 N.Y.S.2d 706, 2000 N.Y. App. Div. LEXIS 7452 (N.Y. App. Div. 3d Dep't 2000).

School district employee was properly required to participate in a disciplinary hearing pursuant to N.Y. Civ. Serv. Law § 75 because this was the proper vehicle to adjudicate a charge of incompetence against the employee. Matter of McVetty v Valley Stream Union Free Sch. Dist., 154 A.D.3d 764, 63 N.Y.S.3d 388, 2017 N.Y. App. Div. LEXIS 7147 (N.Y. App. Div. 2d Dep't 2017).

Substantial evidence supported the school district's determination finding a bus driver guilty of three disciplinary charges because the Hearing Officer was entitled to resolve any issues of credibility whether the driver deliberately slapped a special needs student, who lost control of his behavior and was significantly disrupting the other students on the bus, some of whom were also struggling to behave. Matter of Ansley v Jamesville-DeWitt Cent. Sch. Dist., 174 A.D.3d 1289, 103 N.Y.S.3d 735, 2019 N.Y. App. Div. LEXIS 5434 (N.Y. App. Div. 4th Dep't), app. dismissed, 34 N.Y.3d 942, 134 N.E.3d 135, 110 N.Y.S.3d 394, 2019 N.Y. LEXIS 2927 (N.Y. 2019).

A substitute teacher is not entitled to a hearing before termination of license under any provision of the Education Law or under this section, nor do the requirements of due process mandate a formal hearing for a substitute teacher. Council v Donovan, 40 Misc. 2d 744, 244 N.Y.S.2d 199, 1963 N.Y. Misc. LEXIS 1542 (N.Y. Sup. Ct. 1963).

Collective bargaining agreement which provides that "in case of employee release, at least one-day notice of release and reason for such action to incorporate evaluation reports will be given to employee, employee if he/she feels such reasons for release are inadequate or inaccurate, may request immediate audience with Chief School Administrator to explain his/her reasons for contradicting release order does not change discharged employee's status from employee who served at will to one who can be dismissed solely for cause; thus, probationary employee possesses no property interest in his continued employment as school cleaner under collective bargaining agreement and he is not denied due process of law for lack of hearing on termination of his employment. Goetz v Windsor Cent. School Dist., 698 F.2d 606, 1983 U.S. App. LEXIS 31123 (2d Cir. N.Y. 1983).

78. Town or village non-police employees

The phrase "any public or special district or . . . any authority, commission, or board" of cities, counties, towns or villages, within

Civil Service Law, although broad, does not include a public benefit corporation such as water commissioners of town, and thus former water treatment plant operator was not entitled to benefits of such law on his claim of improper dismissal without notice of charges and a hearing. Rogers v Water Comm'rs of Waterford, 58 A.D.2d 728, 396 N.Y.S.2d 298, 1977 N.Y. App. Div. LEXIS 12844 (N.Y. App. Div. 3d Dep't 1977).

Town employee could not be removed from his position without being afforded hearing under CLS Civ S § 75 where his position was not abolished for purposes of economy or efficiency, and he was separated or dismissed from service due to purported delays in receipt of funds from county. O'Reilly v Nedelka, 212 A.D.2d 714, 622 N.Y.S.2d 793, 1995 N.Y. App. Div. LEXIS 1667 (N.Y. App. Div. 1st Dep't 1995).

Petitioner's employment as town lifeguard was not continuous for 5 years, and thus he was not entitled to protection of CLS Civ S § 75(1)(c) since he filed new summer employment application and new tax forms each year, was required to elect whether to participate in retirement system each year, and each year town sent him letter of appointment which specified that he was employed for that season only. Igneri v Town of Brookhaven, 232 A.D.2d 638, 648 N.Y.S.2d 473, 1996 N.Y. App. Div. LEXIS 11337 (N.Y. App. Div. 2d Dep't 1996).

Town's mayor was authorized to review and overturn a hearing officer's recommendation that a firefighter not be found guilty of misconduct and be reinstated, as the department rules provided that the town's board was entitled to review departmental disciplinary actions, the mayor was a member of the board, and the board endorsed his decision. Matter of Rauschmeier v Village of Johnson City, 91 A.D.3d 1080, 937 N.Y.S.2d 373, 2012 N.Y. App. Div. LEXIS 139 (N.Y. App. Div. 3d Dep't), app. denied, 19 N.Y.3d 802, 946 N.Y.S.2d 104, 969 N.E.2d 221, 2012 N.Y. LEXIS 923 (N.Y. 2012).

In an action brought against a town by its former comptroller following his termination, the town was entitled to summary judgment because the comptroller was not a member of a collective bargaining unit, he did not have an employment contract with the town and, the town was free to terminate his employment, without a hearing. Phillips v Town of Glenville, 160 A.D.3d 1264, 75 N.Y.S.3d 629, 2018 N.Y. App. Div. LEXIS 2651 (N.Y. App. Div. 3d Dep't 2018).

Substantial evidence in the record sustained the charge that a building inspector committed acts constituting crimes, namely, endangering public health, safety or the environment in the fourth degree, official misconduct and criminal nuisance in the second degree; thus, the evidence supported the hearing officer's determination terminating the inspector's employment. Matter of Snowden v Village of Monticello, 166 A.D.3d 1451, 89 N.Y.S.3d 366, 2018 N.Y. App. Div. LEXIS 8160 (N.Y. App. Div. 3d Dep't 2018).

D. Appeal and Review

79. In general

A proceeding to review a determination of a local Commissioner of Social Services, finding petitioner employee guilty of negligent breach of security at a youth shelter, which resulted in the escape of a juvenile detainee, would be dismissed on the merits where petitioner's testimony by itself constituted substantial evidence to support the determination to affix blame on petitioner for her obvious carelessness and to find that such carelessness during the shift was a causative factor in the escape. McCaskill v D'Elia, 64 N.Y.2d 636, 485 N.Y.S.2d 41, 474 N.E.2d 249, 1984 N.Y. LEXIS 4965 (N.Y. 1984).

The refusal of a sheriff to remit a deputy's 30-day pre-hearing suspension without pay in connection with the disposition of disciplinary proceedings against the deputy in which he was found guilty of misconduct and reprimanded, could be considered a penalty or punishment within Civil Service Law § 76(1) for which judicial review could be sought. Civil Service Law § 75(3), permitting a 30-day pre-hearing suspension without pay, also provides that upon a finding of guilt a post-hearing penalty or punishment may include a suspension without pay, and the time during which an officer or employee had previously been suspended without pay could be considered as part of the penalty. Sinnott v Finnerty, 65 N.Y.2d 780, 492 N.Y.S.2d 945, 482 N.E.2d 563, 1985 N.Y. LEXIS 16192 (N.Y. 1985).

The court will not interfere with a determination of the fire commissioner imposing a fine for unauthorized absence upon a fireman who was an honorably discharged veteran even though no hearing was held, where the controversy involved merely a difference of opinion as to whether the fireman was properly absent for medical reasons. Tiernan v Walsh, 268 A.D. 962, 51 N.Y.S.2d 528, 1944 N.Y. App. Div. LEXIS 4415 (N.Y. App. Div. 1944), aff'd, 294 N.Y. 299, 62 N.E.2d 79, 294 N.Y. (N.Y.S.) 299, 1945 N.Y. LEXIS 806 (N.Y. 1945).

Where police officer, following termination of employment ordered by chief of police, elected to appeal the determination of penalty to the county civil service commission, court could not thereafter review the decision of the county civil service commission even to consider claim that action of the commission upholding the determination of employment was arbitrary. Schrader v Civil Service Comm'r, 53 A.D.2d 210, 385 N.Y.S.2d 644, 1976 N.Y. App. Div. LEXIS 12509 (N.Y. App. Div. 4th Dep't 1976).

In proceeding to review civil service commission's dismissal of state employee, scope of judicial review was limited to whether determination was "purely arbitrary." Greaney v Bahou, 57 A.D.2d 646, 393 N.Y.S.2d 211, 1977 N.Y. App. Div. LEXIS 11673 (N.Y. App. Div. 3d Dep't 1977).

A determination demoting petitioner from the position of automotive equipment operator to that of laborer with a reduction in pay would be annuled, where, in light of the minor nature of the offenses of which petitioner was found guilty, the penalty of demotion was so disproportionate as to shock one's sense of fairness; a suspension not to exceed 30 days would be the maximum penalty the evidence would support, and petitioner was entitled to be reinstated to his former position with back pay until such time as a new determination could be rendered. Farrell v Dowling, 90 A.D.2d 849, 456 N.Y.S.2d 97, 1982 N.Y. App. Div. LEXIS 19116 (N.Y. App. Div. 2d Dep't 1982), app. dismissed, 58 N.Y.2d 1113, 1983 N.Y. LEXIS 4325 (N.Y. 1983).

The penalty imposed by the Commissioner of Public Safety upon two police officers of suspension without pay for 60 days was not unduly harsh or disproportionate to the offense found, where the police officers were charged with enlarging and obliterating a bullet hole in the left rear fender of a vehicle with a halogen bar while the vehicle was in the custody of the county sheriff's department and being held for evidence following a high speed chase between its drivers and police officers from a number of surrounding towns and counties, where the officers made no report of their activity, and where the officers admitted probing the vehicle with the bar without permission or authority but denied knowing at the time that a shot had been fired or that the vehicle was impounded, in that their credibility was for the fact finders to determine, and it could not be said that other witnesses for the city were unworthy of belief or that the record lacked substantial evidence of the officers' misconduct. Nuttall v Troy, 99 A.D.2d 916, 473 N.Y.S.2d 38, 1984 N.Y. App. Div. LEXIS 17325 (N.Y. App. Div. 3d Dep't 1984).

Department commissioner who files charges and testifies at disciplinary proceeding must disqualify himself from reviewing recommendations of hearing officer and acting on charges; review and action must be taken by department official authorized to act during absence or inability of commissioner. Hicks v Fortier, 117 A.D.2d 930, 499 N.Y.S.2d 236, 1986 N.Y. App. Div. LEXIS 53182 (N.Y. App. Div. 3d Dep't 1986).

Supreme Court mistakenly applied arbitrary and capricious standard in proceeding to annul county's determination demoting county employee for misconduct since county's action was taken as result of adjudicatory hearing held under CLS Civ S § 75(2), and employee raised substantial evidence question by challenging hearing officer's factual assessment of misconduct. Secreto v County of Ulster, 228 A.D.2d 932, 644 N.Y.S.2d 439, 1996 N.Y. App. Div. LEXIS 7309 (N.Y. App. Div. 3d Dep't 1996).

Determination denying state trooper's application for reinstatement following leave of absence due to back injury was improperly annulled since most of medical evaluations made during 4-year period leading up to determination indicated that trooper suffered from mild partial disability, and many of those

reports concluded that trooper would only be able to perform light-duty work, regimen not available to state troopers; although trooper did not suffer from herniated disc, his MRI had been interpreted as indicating mild disc bulge at L4-5 and L5-S1, with some arthritic changes at L5-S1. Stitt v McMahon, 244 A.D.2d 811, 666 N.Y.S.2d 253, 1997 N.Y. App. Div. LEXIS 11970 (N.Y. App. Div. 3d Dep't 1997), app. denied, 91 N.Y.2d 813, 674 N.Y.S.2d 278, 697 N.E.2d 179, 1998 N.Y. LEXIS 1310 (N.Y. 1998).

Proper standard of review into charges of misconduct by school bus driver was substantial evidence, not fair preponderance evidence, since bus driver was not barred from seeking employment as bus driver in another school district or from trying to get another driving related job, he was not subject to registry and information about school district's charges, and disposition was not readily accessible to public at-large, and thus did not trigger "stigma plus" analysis. Malloch v Ballston Spa Cent. Sch. Dist., 249 A.D.2d 797, 671 N.Y.S.2d 845, 1998 N.Y. App. Div. LEXIS 4518 (N.Y. App. Div. 3d Dep't), app. denied, 92 N.Y.2d 810, 680 N.Y.S.2d 55, 702 N.E.2d 840, 1998 N.Y. LEXIS 3081 (N.Y. 1998).

In disciplinary proceeding against police department employee wherein Appellate Division dismissed police department's appeal from unfavorable ruling after employee unilaterally rendered matter academic by resigning from department, thereby preventing Appellate Division from reviewing order in his favor, Appellate Division vacated underlying order on which appeal was predicated (preliminary injunction suppressing eavesdropping evidence) where there was no indication that parties settled matter or that employee received any benefit from department in exchange for his resignation. Ruskin v Safir, 257 A.D.2d 268, 692 N.Y.S.2d 356, 1999 N.Y. App. Div. LEXIS 7434 (N.Y. App. Div. 1st Dep't 1999).

In Article 78 proceeding by petitioner who was terminated from his job as school bus driver for misconduct, fact that petitioner sought only reinstatement to his former position, as opposed to reinstatement coupled with back pay and benefits, did not exempt him from requirements of CLS Educ § 3813, because he was seeking primarily to enforce private right. Stevens v Board of Educ., 261 A.D.2d 698, 689 N.Y.S.2d 730, 1999 N.Y. App. Div. LEXIS 4666 (N.Y. App. Div. 3d Dep't), app. denied, 93 N.Y.2d 816, 697 N.Y.S.2d 563, 719 N.E.2d 924, 1999 N.Y. LEXIS 2804 (N.Y. 1999).

Police officer's Article 78 proceeding challenging his reassignment from investigator to patrolman as violative of CLS Civ S §§ 58(4)(c) and 75 was moot where (1) primary relief requested was reinstatement as investigator, which position was no longer available, (2) he retained rank of sergeant, and thus there was no indication that his salary or benefits were adversely affected, (3) to extent that he claimed deprivation of overtime, he declined overtime opportunities after his reassignment, (4) there was no evidence of duress or coercion making his retirement involuntary, and (5) there was no applicable exception to mootness doctrine. Cannon v City of Watervliet, 263 A.D.2d 920, 693 N.Y.S.2d 334, 1999 N.Y. App. Div. LEXIS 8465 (N.Y. App. Div. 3d Dep't), app. denied, 94 N.Y.2d 756, 703 N.Y.S.2d 73, 724 N.E.2d 769, 1999 N.Y. LEXIS 3975 (N.Y. 1999).

The clerk of a municipal civil service commission, under this section is entitled merely to service of charges and the opportunity to reply, but no right to appeal exists. People ex rel. Eberle v La Guardia, 21 N.Y.S.2d 239, 175 Misc. 272, 1940 N.Y. Misc. LEXIS 1907 (N.Y. Sup. Ct.), aff'd, 260 A.D. 856, 23 N.Y.S.2d 467, 1940 N.Y. App. Div. LEXIS 5047 (N.Y. App. Div. 1940).

Upon remand of civil service disciplinary proceedings for imposition of an appropriate penalty, no penalty in excess of that permitted by Civ S Law § 75 may be imposed. Lee v Board of Education, 120 Misc. 2d 809, 466 N.Y.S.2d 650, 1983 N.Y. Misc. LEXIS 3800 (N.Y. Sup. Ct. 1983).

Because N.Y. Civ. Serv. Law § 76(1) explicitly limits appeals pursuant to that section to penalties imposed pursuant to N.Y. Civ. Serv. Law § 75, the firefighter was limited, in seeking judicial review of any punishment imposed pursuant to New York City, N.Y., Admin. Code § 15-113, to the remedies provided by N.Y. C.P.L.R. art. 78. Von Essen v N.Y. City Civ. Serv. Comm'n, 3 A.D.3d 115, 769 N.Y.S.2d 260, 2003 N.Y. App. Div. LEXIS 13677 (N.Y. App. Div. 1st Dep't 2003), app. denied, 2004 N.Y. App. Div. LEXIS 4043 (N.Y. App. Div. 1st Dep't Apr. 6, 2004), aff'd, 4 N.Y.3d 220, 791 N.Y.S.2d 887, 825 N.E.2d 128, 2005 N.Y. LEXIS 224 (N.Y. 2005).

80. Article 78 proceeding, generally

Supreme Court, which upheld police department's discharge of probationary police officer, erred by dismissing discharged officer's Article 78 petition without giving parties opportunity to submit competent evidence on controverted allegations of likely dissemination of discharged officer's personnel file to other law enforcement agencies; matter was remitted to Supreme Court for further factual exploration of likelihood of dissemination of discharged officer's personnel file and any other issues pertinent to his entitlement to name-clearing hearing, including actual content of his file. Swinton v Safir, 93 N.Y.2d 758, 697 N.Y.S.2d 869, 720 N.E.2d 89, 1999 N.Y. LEXIS 3433 (N.Y. 1999).

Although Appellate Division in previous Article 78 proceeding annulled penalty of termination and remanded for imposition of new penalty after dismissing 4 charges against petitioner, standard of review based on charges sustained, not on those dismissed, applied in subsequent Article 78 proceeding challenging respondent's decision to impose same penalty based on 2 sustained charges. Gillen v Smithtown Library Bd. of Trustees, 94 N.Y.2d 776, 699 N.Y.S.2d 695, 721 N.E.2d 945, 1999 N.Y. LEXIS 3432 (N.Y. 1999).

In Article 78 proceeding to annul police commissioner's determination that petitioner engaged in unauthorized off-duty employment as New York State Certified Instructor for Security Guard Training and, in exchange for money, falsely certified that 2 armed security guards had completed required firearms training, court improperly disregarded principles enunciated in Matter of Pell v Board of Education, 34 NY2d 222, where it concluded that substantial evidence supported commissioner's determination but, relying on facts "outside the record," remanded matter for imposition of lesser penalty on grounds that both guards were licensed to carry firearms and were otherwise qualified for certificates, and petitioner (who had previously unblemished disciplinary record) would lose his pension as result of dismissal. Kelly v Safir, 96 N.Y.2d 32, 724 N.Y.S.2d 680, 747 N.E.2d 1280, 2001 N.Y. LEXIS 566 (N.Y. 2001).

Article 78 proceeding to review dismissal of school district custodian would be remitted to Supreme Court for trial where fact issue existed as to whether determination was ever referred to board of education for its approval or whether district superintendent alone made determination to terminate; since school district failed to demonstrate that its superintendent was authorized to make determination without board approval, fact question was crucial to resolution of proceeding. Smith v Greater Amsterdam School Dist., 128 A.D.2d 929, 512 N.Y.S.2d 584, 1987 N.Y. App. Div. LEXIS 44604 (N.Y. App. Div. 3d Dep't 1987).

Article 78 petition should have been dismissed for failure to exhaust administrative remedies where collective bargaining agreement which governed petitioner's civil service employment provided 4-step grievance procedure, petitioner participated in step I hearing and subsequently requested step II hearing but failed to appear at second hearing, and petitioner never requested that union initiate step III appeal. Cantres v Board of Education, 145 A.D.2d 359, 535 N.Y.S.2d 714, 1988 N.Y. App. Div. LEXIS 13338 (N.Y. App. Div. 1st Dep't 1988).

In Article 78 proceeding to review determination which discharged correctional employee for physically attacking her supervisor (specification 5) and verbally yelling at her supervisor (specification 6), case would be remitted for development of appropriate findings where only support for hearing officer's finding of guilt as to specification 5 was his conclusory statement that there was physical contact, and he did not refer to any testimony to substantiate finding of guilt as to specification 6. Langhorne v Jackson, 206 A.D.2d 666, 614 N.Y.S.2d 627, 1994 N.Y. App. Div. LEXIS 7338 (N.Y. App. Div. 3d Dep't 1994).

Article 78 proceeding for wrongful termination, commenced on October 7, 1994, was improperly dismissed as time barred on ground that claim accrued on August 25, 1993 when Administrative Law Judge determined that petitioner was eligible for unemployment benefits since NYC employer's earliest unequivocal oral notification of termination was given on June 10, 1994,

when petitioner reported for physical evaluation; determination that petitioner was entitled to unemployment benefits was collateral proceeding insufficient to satisfy employer's obligation to provide required notice of termination. Vadell v City of New York Health & Hosps. Corp., 233 A.D.2d 224, 649 N.Y.S.2d 714, 1996 N.Y. App. Div. LEXIS 11999 (N.Y. App. Div. 1st Dep't 1996).

In Article 78 proceeding arising from disciplinary discharge of county employee, record revealed that board of supervisors failed to conduct independent review before sustaining hearing officer's findings of fact and recommendations, where every board members did not receive complete copy of transcript before board rendered its decision, and there was no proof that each member had in fact reviewed full transcript. Ernst v Saratoga County, 234 A.D.2d 764, 651 N.Y.S.2d 209, 1996 N.Y. App. Div. LEXIS 12492 (N.Y. App. Div. 3d Dep't 1996).

In Article 78 proceeding by former data processing director to review termination of his employment with county, hearing officer's findings were sufficient for judicial review and for their acceptance without comment by county board of supervisors where hearing officer found that director's actions, including touching and comments to his subordinates, were "wholly inappropriate in the workplace" and constituted misconduct, and hearing officer linked employees' discomfort and stress under those conditions to director's inability to competently supervise them. Ernst v Saratoga County, 251 A.D.2d 866, 674 N.Y.S.2d 487, 1998 N.Y. App. Div. LEXIS 7332 (N.Y. App. Div. 3d Dep't 1998).

In Article 78 proceeding challenging termination of school bus driver's employment for misconduct, case would be remitted solely for reconsideration of penalty where Appellate Division upheld some charges of misconduct but not others, and penalty of termination was not assessed separately for each charge. Brown v Saranac Lake Cent. Sch. Dist., 273 A.D.2d 785, 709 N.Y.S.2d 706, 2000 N.Y. App. Div. LEXIS 7452 (N.Y. App. Div. 3d Dep't 2000).

Reversal a judgment upholding a school board's termination of an employee was not required on the ground that affidavits from the school board's superintendent and individual members of the school board were attached to the verified answer; the affidavits of the school board's members merely averred that the members had considered the administrative record and the hearing officer's recommendation and supported the termination, but the trial court made no reference to these documents, and the court's reference to the superintendent's affidavit concerned facts that were fully set forth in the hearing testimony and exhibits, pertaining to the timing of the charges against the employee and the contractual nature of her reassignment as a bus driver. As there was nothing in any of the affidavits that might have provided new reasons for the termination or otherwise attempted to correct deficiencies in the administrative record, which, as the employee conceded, contained substantial evidence supporting the hearing officer's determination, this claim was without merit. Matter of Thornton v Edwards-Knox Cent. Sch. Dist. Bd. of Educ., 105 A.D.3d 1206, 963 N.Y.S.2d 452, 2013 N.Y. App. Div. LEXIS 2384 (N.Y. App. Div. 3d Dep't 2013).

In a N.Y. C.P.L.R. art. 78 proceeding brought to review a determination to terminate an employee's employment as a social welfare examiner, substantial evidence supported the findings, and the termination was confirmed where, at the hearing conducted pursuant to N.Y. Civ. Serv. Law § 75, inter alia, the employee's supervisor testified regarding numerous deficiencies in the employee's work, the employee's failure to respond to training and repeated efforts at improvement, and the employee's inability to meet deadlines and issue benefits correctly and in compliance with known regulations and/or advisory reports and/or counseling memoranda, resulting in financial hardship to recipients. Phillips v Le Page, 4 A.D.3d 704, 772 N.Y.S.2d 422, 2004 N.Y. App. Div. LEXIS 2030 (N.Y. App. Div. 3d Dep't 2004).

Employee's breach of employment contract claim and N.Y. Civ. Serv. Law § 75 against her former employer were dismissed; the gravamen of the employee's complaint was a challenge of the employer's decision to terminate her employment and as a result, her claims should have been presented first by way of a N.Y. C.P.L.R. art. 78 proceeding for which the four-month statute of limitations in N.Y. C.P.L.R. § 217 had expired. Ingrassia v County of Sullivan, 262 F. Supp. 2d 116, 2003 U.S. Dist. LEXIS 7857 (S.D.N.Y. 2003).

81. —Collective bargaining agreement

Correction officer was barred from seeking Article 78 judicial review of dismissal where, through his own deliberate conduct, he failed to pursue the administrative remedy authorized in collective bargaining agreement. Merante v Burns, 47 A.D.2d 671, 365 N.Y.S.2d 27, 1975 N.Y. App. Div. LEXIS 8882 (N.Y. App. Div. 2d Dep't 1975).

State Department of Correctional Services was entitled to dismissal of Article 78 proceeding brought by correction officer seeking review of his dismissal from service as result of his excessive absenteeism since officer had knowingly and voluntarily entered into prior agreement whereby he could be "terminated without further appeal" if department determined his attendance to be unsatisfactory during disciplinary period; officer waived any right he may have had, at least in absence of actual bad faith, under either collective bargaining agreement or CLS Civ S §§ 75 and 76, to review termination decision. Miller v New York State Dep't of Corr. Servs., 126 A.D.2d 831, 510 N.Y.S.2d 745, 1987 N.Y. App. Div. LEXIS 41966 (N.Y. App. Div. 3d Dep't), aff'd, 69 N.Y.2d 970, 516 N.Y.S.2d 659, 509 N.E.2d 354, 1987 N.Y. LEXIS 16741 (N.Y. 1987).

Court properly ruled that petitioner's failure to utilize collective bargaining contract grievance procedure mandated dismissal of Article 78 petition to challenge termination of his employment by school district since substantive issue presented by petitioner was not beyond broad scope of grievance procedure set forth in contract and petitioner had not demonstrated that participation in grievance procedure would be futile. Elliott v Arlington Cent. School Dist., 143 A.D.2d 662, 532 N.Y.S.2d 876, 1988 N.Y. App. Div. LEXIS 10006 (N.Y. App. Div. 2d Dep't 1988).

Article 78 petition, alleging that police officer was summarily deprived of his rank of detective when he was transferred to patrol squad and another officer was assigned to his former position, should not have been dismissed based on petitioner's failure to invoke grievance arbitration procedures in parties' collective bargaining agreement since (1) grievance arbitration procedures of collective bargaining agreement were not intended to supersede police officer's statutory right to hearing under CLS Civ S § 75, and (2) petitioner did not assert that his demotion violated terms of collective bargaining agreement, and was not seeking judicial resolution of dispute over meaning of any of its provisions. Dombroski v Bloom, 170 A.D.2d 805, 565 N.Y.S.2d 907, 1991 N.Y. App. Div. LEXIS 1548 (N.Y. App. Div. 3d Dep't 1991).

Civil service employee's failure to exhaust administrative remedies provided by collective bargaining agreement precluded him from bringing Article 78 proceeding. Robinson v New York City Transit Auth., 226 A.D.2d 467, 641 N.Y.S.2d 55, 1996 N.Y. App. Div. LEXIS 3538 (N.Y. App. Div. 2d Dep't 1996).

Article 78 petition alleging that school district impermissibly terminated petitioner's employment without granting her hearing under CLS Civ S § 75 should not have been dismissed for failure to exhaust remedies under grievance procedures of collective bargaining agreement, because petitioner did not allege that district violated agreement but that it violated Civil Service Law. Barrera v Frontier Cent. Sch. Dist., 227 A.D.2d 890, 643 N.Y.S.2d 275, 1996 N.Y. App. Div. LEXIS 6779 (N.Y. App. Div. 4th Dep't 1996).

In Article 78 proceeding, court properly concluded that transfer of petitioner from position of plainclothes detective to uniformed lieutenant's position resulted in change in his compensation because he no longer received additional stipend for detectives detailed in collective bargaining agreement, and where court further determined that issue of fact remained as to whether such "reassignment" was retaliatory in nature, referee was properly appointed to determine whether provisions of collective bargaining agreement, mandating protections accorded by CLS Civ S § 75, were triggered. Whalen v Hogue, 276 A.D.2d 975, 714 N.Y.S.2d 577, 2000 N.Y. App. Div. LEXIS 10795 (N.Y. App. Div. 3d Dep't 2000).

Arbitrator's award finding the employee guilty of disciplinary charges and terminating the employee's employment was improperly vacated on the ground that the state agency failed to comply with the transcription requirement under N.Y. C.P.L.R. 7804(e); the collective bargaining agreement between the parties, which did not require the agency to provide a transcript of the arbitration hearing upon judicial review, replaced, pursuant to N.Y. Civ. Serv. Law § 76(4), the statutory provisions of N.Y. Civ. Serv. Law §§ 75, 76. Simon v N.Y. State Office of Parks, Rec. & Historic Pres., 303 A.D.2d 413, 755 N.Y.S.2d 858, 2003 N.Y. App. Div. LEXIS 2101 (N.Y. App. Div. 2d Dep't 2003).

82. —Jurisdiction

In Article 78 proceeding, Court of Appeals had jurisdiction to review Appellate Division's holding that municipal employer abused its discretion by failing to reinstate petitioner to her previous permanent position after she was fired from her probationary position, where appeal raised legal question of whether petitioner received "promotion" as that term is used in Civil Service Law. Bethel v McGrath-McKechnie, 95 N.Y.2d 7, 709 N.Y.S.2d 888, 731 N.E.2d 604, 2000 N.Y. LEXIS 905 (N.Y. 2000).

Court properly dismissed Article 78 petition seeking declaration that it was arbitrary, capricious, and contrary to law for Civil Service Commission (CSC) to decline jurisdiction of petitioner's probationary termination appeal, even though State Department of Civil Service Personnel Management Manual Advisory Memorandum, in reiterating that CSC does not accept appeals challenging accuracy of employer's evaluation of probationary performance, added that CSC "will, however, exercise jurisdiction to review in matters alleging procedural defects in an agency's administration of" 4 NYCRR 4.5(a)(5)(iii), since such language merely advised of CSC's existing discretion under CLS Civ Serv § 6(3) to exercise jurisdiction in appropriate cases, and did not give petitioner (who was terminated from probationary appointment as psychiatric social worker for State Office of Mental Health) right of appeal to CSC. Hawkes v Bennett, 155 A.D.2d 766, 547 N.Y.S.2d 704, 1989 N.Y. App. Div. LEXIS 13927 (N.Y. App. Div. 3d Dep't 1989).

In Article 78 proceeding to annul termination of petitioner's employment with village, Supreme Court erred in deciding whether village and its mayor violated CLS Civ S § 75(2) where resolution of that issue would not have terminated proceeding within meaning of CLS CPLR § 7804(g); however, Appellate Division would decide issue de novo where matter was presently before it. Pieczonka v Jewett, 273 A.D.2d 842, 709 N.Y.S.2d 302, 2000 N.Y. App. Div. LEXIS 6835 (N.Y. App. Div. 4th Dep't), reh'g denied, 715 N.Y.S.2d 206, 2000 N.Y. App. Div. LEXIS 9575 (N.Y. App. Div. 4th Dep't 2000).

Commissioner of Education lacked subject matter jurisdiction over appeal from 30-day suspension by school bus driver, who, in Article 78 proceeding, alleged that respondent central school district filed misconduct charges against him in retaliation for grievances and complaints he made against management practices; discipline of school employees in classified services is governed by CLS Civ S Art 5. 1996 Op Comm Ed No. 13571.

83. Constitutional considerations

Issue of whether police officer's right to due process was violated (because rule he was charged with violating was overbroad and vague) was not raised before administrative tribunal, and therefore was not properly before court in Article 78 proceeding. Turzyn v Rozzi, 134 A.D.2d 268, 520 N.Y.S.2d 601, 1987 N.Y. App. Div. LEXIS 50451 (N.Y. App. Div. 2d Dep't 1987).

Court would annul determination finding deputy sheriff guilty of violating departmental rule where rule itself was unconstitutional. Holland v Dillon, 140 Misc. 2d 667, 531 N.Y.S.2d 467, 1988 N.Y. Misc. LEXIS 486 (N.Y. Sup. Ct. 1988).

84. Pending arbitration proceedings

Pending arbitration proceeding on issue of which union represented petitioner did not toll limitations period for proceeding to challenge petitioner's discharge from her employment. Majka ex rel. Mungari v Utica City Sch. Dist., 247 A.D.2d 845, 668 N.Y.S.2d 831, 1998 N.Y. App. Div. LEXIS 1145 (N.Y. App. Div. 4th Dep't 1998).

85. Polygraph test at issue

Where petitioner, who was information aide at city airport, was accused of stealing money from wallet turned into him as lost property, hearing officer in disciplinary proceeding did not err in receiving results of polygraph examination to which petitioner voluntarily submitted since record contained substantial evidence of reliability of machine and qualifications of administrator. Motell v Napolitano, 186 A.D.2d 989, 588 N.Y.S.2d 452, 1992 N.Y. App. Div. LEXIS 11515 (N.Y. App. Div. 4th Dep't 1992).

Dismissed town police officer's complaint that he was not offered opportunity to take polygraph test similar to that taken by complainant, and results of which were admitted at officer's disciplinary hearing, would not be heard on appeal, even though he had mentioned that he would be willing to submit to such examination, where he never requested that one be scheduled for him, and he took no steps to arrange for one on his own. Ost v Supervisor of Woodstock, 251 A.D.2d 724, 673 N.Y.S.2d 768, 1998 N.Y. App. Div. LEXIS 6464 (N.Y. App. Div. 3d Dep't), app. denied, 92 N.Y.2d 817, 684 N.Y.S.2d 488, 707 N.E.2d 443, 1998 N.Y. LEXIS 4260 (N.Y. 1998).

86. Relationship to Civil Service Law § 76

CLS Civ S § 76 authorizes Civil Service Commission to hear appeals only in connection with disciplinary proceedings under CLS Civ S § 75, and thus commission had no jurisdiction to review petitioner's discharge which was effected without hearing pursuant to agreement settling prior disciplinary proceeding whereby petitioner waived hearing and appeal authorized by §§ 75 and 76 and agreed to probationary period of 12 months; petitioner could have brought Article 78 proceeding at time of his dismissal, challenging respondent's conclusion that he was probationary employee at that time. Johnson v Triborough Bridge & Tunnel Auth., 97 N.Y.2d 627, 735 N.Y.S.2d 861, 761 N.E.2d 553, 2001 N.Y. LEXIS 3310 (N.Y. 2001).

A NYC transit employee who, after a hearing pursuant to Civil Service Law § 75 has received a penalty or punishment of a reprimand is not within the class of aggrieved employees who may appeal pursuant to Civil Service Law § 76. Mercer v New York City Transit Authority, 56 Misc. 2d 974, 290 N.Y.S.2d 789, 1968 N.Y. Misc. LEXIS 1483 (N.Y. Sup. Ct. 1968).

Although the punishment of permanent demotion imposed by petitioner New York City Housing Authority on two long-time permanent competitive civil service employees found guilty of misconduct not involving serious misbehavior following disciplinary proceedings (Civil Service Law, § 75) was appropriate under the circumstances, the determination of respondent New York City Civil Service Commission on appeal by the aggrieved employees (Civil Service Law, § 76, subd 1) modifying the penalties imposed by petitioner by substituting temporary demotions in place of the permanent demotions ordered by the authority, cannot be set aside or disturbed since the commission's exercise of its discretion in modifying the penalties imposed by the authority cannot be said to be "purely arbitrary" and "shocking to one's sense of fairness". The focus of judicial review in the proceedings to set aside the commission's modifications of the authority's punishment is the penalty as modified by the commission rather than the original penalty imposed by the authority and the test to be applied is whether the commission's determination was "purely arbitrary". New York City Housing Authority v New York City Civil Service Com., 94 Misc. 2d 183, 403 N.Y.S.2d 966, 1978 N.Y. Misc. LEXIS 2214 (N.Y. Sup. Ct. 1978), aff'd, New York City Housing Auth. v New York City Civ. Serv. Comm., 72 A.D.2d 973, 1979 N.Y. App. Div. LEXIS 16249 (N.Y. App. Div. 1st Dep't 1979).

Since Civil Service Law § 76 provides the sole method of review of an employee dismissal pursuant to Civil Service Law § 75, school bus driver dismissed for misconduct under Civil Service Law § 75 could not bring an appeal to the Commissioner of Education. Re Marut, Op Comr Ed #9576.

87. Remit requirement

Where town board failed to set forth any findings of fact in dismissing town police officer and where it was impossible to determine if board found petitioner guilty of all the charges, some of them, or only one of them, failure to state findings of fact precluded adequate judicial review and required that matter be

remitted to town board for statement of factual grounds for the determination. Pachucki v Walters, 56 A.D.2d 677, 391 N.Y.S.2d 917, 1977 N.Y. App. Div. LEXIS 10831 (N.Y. App. Div. 3d Dep't 1977).

Penalty of dismissal of civil servant for misconduct would be vacated where it was based on 6 specifications of misconduct, but 3 specifications were not supported by evidence; matter would be remitted to Commissioner of County Department of Public Works for imposition of penalty appropriate to specifications sustained by evidence. Drayton v Hasl, 121 A.D.2d 631, 503 N.Y.S.2d 869, 1986 N.Y. App. Div. LEXIS 58615 (N.Y. App. Div. 2d Dep't 1986).

Article 78 proceeding to review dismissal of school district custodian would be remitted to Supreme Court for trial where fact issue existed as to whether determination was ever referred to board of education for its approval or whether district superintendent alone made determination to terminate; since school district failed to demonstrate that its superintendent was authorized to make determination without board approval, fact question was crucial to resolution of proceeding. Smith v Greater Amsterdam School Dist., 128 A.D.2d 929, 512 N.Y.S.2d 584, 1987 N.Y. App. Div. LEXIS 44604 (N.Y. App. Div. 3d Dep't 1987).

In civil service disciplinary proceeding, sheriff should have disqualified himself from reviewing hearing officer's determination based on his personal involvement in matter where he had preferred charges and appointed hearing officer, he was present throughout hearing, and he noticeably aligned himself with prosecution by consulting with county attorney on strategy and conduct of case; under circumstances, matter would be remitted to county for de novo determination by county official authorized to act on disqualification of sheriff. Wayering v County of St. Lawrence, 140 A.D.2d 838, 528 N.Y.S.2d 223, 1988 N.Y. App. Div. LEXIS 5034 (N.Y. App. Div. 3d Dep't 1988).

Outright annulment of public safety board's termination of petitioner, and reinstatement of petitioner to his former position, were appropriate relief, notwithstanding that usual procedure was to remit for new hearing, where provision of municipal charter which petitioner allegedly violated had been repealed, and case had been characterized by questionable hearing tactics and allegations of politically motivated revenge. Girard v Glens Falls, 173 A.D.2d 113, 577 N.Y.S.2d 496, 1991 N.Y. App. Div. LEXIS 16338 (N.Y. App. Div. 3d Dep't 1991).

County commissioner who preferred disciplinary charges against employee, and thereafter testified as witness at his hearing, should have disqualified himself as matter of propriety and because of his personal involvement, and court would remit matter for de novo determination by impartial decision-maker based on original hearing where he failed to do so; in reviewing hearing officer's determination, commissioner was in position of passing on his own credibility as witness. Lowy v Carter, 210 A.D.2d 408, 620 N.Y.S.2d 103, 1994 N.Y. App. Div. LEXIS 12847 (N.Y. App. Div. 2d Dep't 1994).

88. Review of NYC determination

Since New York City, N.Y., Charter § 487(a) and New York City, N.Y., Admin. Code § 15-113, gave the city fire department commissioner exclusive power to discipline firefighters, the city's civil service commission erroneously ruled that it had jurisdiction to hear a firefighters appeal of his termination; the fire department's discipline was outside the scope of N.Y. Civ. Serv. Law §§ 75, 76, and, thus, was not subject to the jurisdiction of the commission. The fire commissioner's N.Y. art. 78 proceeding to annul the commission's determination that it had jurisdiction was improperly dismissed. Von Essen v N.Y. City Civ. Serv. Comm'n, 4 N.Y.3d 220, 791 N.Y.S.2d 887, 825 N.E.2d 128, 2005 N.Y. LEXIS 224 (N.Y. 2005).

Forfeiture of 15 vacation days and $1,500 fine imposed on employee by New York City Department of Correction would be annulled and remanded, even though there was substantial evidence that, while on sick leave, employee left his residence without properly notifying his institution, where there was question regarding parties' consent to penalty, which was otherwise illegal; it would be preferable that department impose appropriate penalty rather than have court substitute hearing officer's original recommendation of 30-day suspension without pay. Cepeda v Koehler, 159 A.D.2d 290, 552 N.Y.S.2d 295, 1990 N.Y. App. Div. LEXIS 2658 (N.Y. App. Div. 1st Dep't 1990).

Where New York City Police Commissioner's dismissal of police officer for failure to take proper action to prevent sexual assault while off duty was necessarily based on determination that assault complainant's testimony was more credible than officer's testimony, Appellate Division could not find otherwise in officer's Article 78 proceeding. Sadler v Bratton, 219 A.D.2d 517, 631 N.Y.S.2d 664, 1995 N.Y. App. Div. LEXIS 9508 (N.Y. App. Div. 1st Dep't 1995).

Article 78 proceeding for wrongful termination, commenced on October 7, 1994, was improperly dismissed as time barred on ground that claim accrued on August 25, 1993 when Administrative Law Judge determined that petitioner was eligible for unemployment benefits since NYC employer's earliest unequivocal oral notification of termination was given on June 10, 1994, when petitioner reported for physical evaluation; determination that petitioner was entitled to unemployment benefits was collateral proceeding insufficient to satisfy employer's obligation to provide required notice of termination. Vadell v City of New York Health & Hosps. Corp., 233 A.D.2d 224, 649 N.Y.S.2d 714, 1996 N.Y. App. Div. LEXIS 11999 (N.Y. App. Div. 1st Dep't 1996).

New York City Civil Service Commission has subject matter jurisdiction to entertain appeals of disciplinary determinations made by Commissioner of New York City Police Department and taken by uniformed members of force. Montella v Bratton, 248 A.D.2d 134, 670 N.Y.S.2d 10, 1998 N.Y. App. Div. LEXIS 2077 (N.Y. App. Div. 1st Dep't), app. dismissed sub. nom., Muniz v Giuliani, 92 N.Y.2d 973, 683 N.Y.S.2d 757, 706 N.E.2d 745 (N.Y. 1998), rev'd, 93 N.Y.2d 424, 691 N.Y.S.2d 372, 713 N.E.2d 406, 1999 N.Y. LEXIS 1289 (N.Y. 1999).

A NYC transit employee who, after a hearing pursuant to Civil Service Law § 75 has received a penalty or punishment of a reprimand is not within the class of aggrieved employees who may appeal pursuant to Civil Service Law § 76. Mercer v New York City Transit Authority, 56 Misc. 2d 974, 290 N.Y.S.2d 789, 1968 N.Y. Misc. LEXIS 1483 (N.Y. Sup. Ct. 1968).

Although the punishment of permanent demotion imposed by petitioner New York City Housing Authority on two long-time permanent competitive civil service employees found guilty of misconduct not involving serious misbehavior following disciplinary proceedings (Civil Service Law, § 75) was appropriate under the circumstances, the determination of respondent New York City Civil Service Commission on appeal by the aggrieved employees (Civil Service Law, § 76, subd 1) modifying the penalties imposed by petitioner by substituting temporary demotions in place of the permanent demotions ordered by the authority, cannot be set aside or disturbed since the commission's exercise of its discretion in modifying the penalties imposed by the authority cannot be said to be "purely arbitrary" and "shocking to one's sense of fairness". The focus of judicial review in the proceedings to set aside the commission's modifications of the authority's punishment is the penalty as modified by the commission rather than the original penalty imposed by the authority and the test to be applied is whether the commission's determination was "purely arbitrary". New York City Housing Authority v New York City Civil Service Com., 94 Misc. 2d 183, 403 N.Y.S.2d 966, 1978 N.Y. Misc. LEXIS 2214 (N.Y. Sup. Ct. 1978), aff'd, New York City Housing Auth. v New York City Civ. Serv. Comm., 72 A.D.2d 973, 1979 N.Y. App. Div. LEXIS 16249 (N.Y. App. Div. 1st Dep't 1979).

89. Time limitations for appeal

Article 78 proceeding for wrongful termination, commenced on October 7, 1994, was improperly dismissed as time barred on ground that claim accrued on August 25, 1993 when Administrative Law Judge determined that petitioner was eligible for unemployment benefits since NYC employer's earliest unequivocal oral notification of termination was given on June 10, 1994, when petitioner reported for physical evaluation; determination that petitioner was entitled to unemployment benefits was collateral proceeding insufficient to satisfy employer's obligation to provide required notice of termination. Vadell v City of New York Health & Hosps. Corp., 233 A.D.2d 224, 649 N.Y.S.2d 714, 1996 N.Y. App. Div. LEXIS 11999 (N.Y. App. Div. 1st Dep't 1996).

Proceeding challenging change in police officer's shift without prior negotiation was time barred where officer took his grievance through steps one and 2 of grievance procedure, administrative determination was final on completion of step 2 on November 3, 1994, date village safety committee denied grievance, and petition was not brought until April 24, 1995. Hoffman v Village of Sidney, 235 A.D.2d 698, 652 N.Y.S.2d 346, 1997 N.Y. App. Div. LEXIS 123 (N.Y. App. Div. 3d Dep't 1997).

Invocation of administrative grievance procedure in accordance with petitioner's union's collective bargaining agreement did not toll statute limitations as to proceeding to review determination terminating petitioner from his position as laboratory specialist. Levine v Board of Educ., 272 A.D.2d 328, 707 N.Y.S.2d 475, 2000 N.Y. App. Div. LEXIS 4867 (N.Y. App. Div. 2d Dep't 2000).

E. Other Procedural Matters

90. In general

No person may lose substantial rights because of wrong doing proved at administrative hearing but not charged. Bateman v Ogdensburg, 55 A.D.2d 781, 389 N.Y.S.2d 486, 1976 N.Y. App. Div. LEXIS 15572 (N.Y. App. Div. 3d Dep't 1976).

Civil service employees of the Department of Sanitation of the City of New York were not entitled to an evidentiary hearing provided under § 75 of the Civ S Law, nor were they deprived of any statutory or constitutional rights thereby, on their claims that sick leave benefits were improperly withheld for noncompliance with the rules promulgated by the department where they had not contended they had complied with the regulations nor utilized the opportunity to present valid excuses for any such noncompliance, and where they had available a grievance procedure under their collective bargaining agreement as their exclusive remedy for such disputes. Ostrowski v New York, 80 A.D.2d 815, 437 N.Y.S.2d 318, 1981 N.Y. App. Div. LEXIS 10621 (N.Y. App. Div. 1st Dep't 1981).

A county deputy police commissioner improperly dismissed a county police officer from his position based on reports from two psychiatrists who had concluded that the officer was not fit, since such finding was not the equivalent of a finding of guilt pursuant to Civ S Law § 75, and the deputy commissioner had failed to follow the procedures applicable to findings of unfitness specified in Civ S Law §§ 72, 73. Cymbalsky v Dilworth, 97 A.D.2d 543, 467 N.Y.S.2d 902, 1983 N.Y. App. Div. LEXIS 20152 (N.Y. App. Div. 2d Dep't 1983).

Determination sustaining charge of insubordination for employee's failure to supply medical documentation to substantiate his absences was not invalid on ground that employer could not, under collective bargaining agreement, direct employee to furnish such documentation, since hearing officer ruled that contract authorized such direction to any employee who claimed sick leave for absences either before or after regular day off and for any absence once employee had been placed on restrictive leave, both of which applied here, and employee never resorted to contract's grievance procedure to dispute employer's interpretation of contract that it had right to make such direction. Kieffer v New York State Thruway Authority, 135 A.D.2d 1017, 522 N.Y.S.2d 747, 1987 N.Y. App. Div. LEXIS 52895 (N.Y. App. Div. 3d Dep't 1987).

Court would annul determination discharging petitioner from her position with State Thruway Authority where there was no evidence establishing that Authority's chairperson, who was officer with primary responsibility for discharge of Authority's administrative functions, personally made or approved determination to terminate petitioner, or that (if he could) he delegated power to do so. Sassone v New York State Thruway Authority, 171 A.D.2d 308, 576 N.Y.S.2d 384, 1991 N.Y. App. Div. LEXIS 14534 (N.Y. App. Div. 3d Dep't 1991).

County did not lack authority to discharge county employee for insubordination which violated county work rule, on ground that rule was not validly enacted or approved by county legislature, since insubordination is customarily recognized as providing basis to punish public employees under CLS Civ S § 75. Plante v Buono, 172 A.D.2d 81, 576 N.Y.S.2d 924, 1991 N.Y. App. Div. LEXIS 16063 (N.Y. App. Div. 3d Dep't 1991), app. denied, 79 N.Y.2d 756, 583 N.Y.S.2d 192, 592 N.E.2d 800, 1992 N.Y. LEXIS 1024 (N.Y. 1992).

It was not inconsistent to find police investigator guilty of acting in manner which tended to bring discredit on State Police in connection with his son's arrest at college for driving while intoxicated, while finding him not guilty in connection with charge that he sought special treatment for his son and violated CLS Pub O § 74. Brown v Constantine, 199 A.D.2d 912, 606 N.Y.S.2d 65, 1993 N.Y. App. Div. LEXIS 12385 (N.Y. App. Div. 3d Dep't 1993).

School district was not precluded from discharging petitioner from her employment as school bus driver on her conviction of violating CLS Veh & Tr § 1180(e) merely because she had earlier signed agreement consenting to 20-day suspension in connection with same incident, since suspension was authorized by administrative regulation contained in district's school bus drivers' handbook, based on petitioner's receipt of citation, while her termination was mandated by different section of same regulation, following her conviction for speeding. Herbison v Board of Educ., 224 A.D.2d 618, 638 N.Y.S.2d 678, 1996 N.Y. App. Div. LEXIS 1375 (N.Y. App. Div. 2d Dep't 1996).

Court properly granted respondents' motion for leave to renew prior judgment annulling respondents' termination of petitioner as probationary correction officer where ground on which determination was annulled—that petitioner was terminated after his period of probation had expired—was first raised by petitioner only in his reply papers, rendering excusable respondents' omission of facts relevant to reckoning of such period. McKenzie v Schembri, 235 A.D.2d 351, 653 N.Y.S.2d 545, 1997 N.Y. App. Div. LEXIS 615 (N.Y. App. Div. 1st Dep't 1997).

Claim by terminated counsel to New York State Crime Victims Board that board's chairperson lacked authority to terminate him was vitiated by board's ratification of chairperson's action. >Nothing in either former Governor Mario Cuomo's Executive Order No. 6 (9 NYCRR § 4.6) or New York State Crime Victims Board's affirmative action plan impinged on board's authority to terminate board counsel's employment. Oakley v New York State Crime Victims Bd., 245 A.D.2d 761, 665 N.Y.S.2d 463, 1997 N.Y. App. Div. LEXIS 12939 (N.Y. App. Div. 3d Dep't 1997).

Initial letter decision dismissing town police officer from his employment was not defective, even though it was written and signed by town supervisor alone, where it was intended to convey decision of entire town board after its independent review of record of disciplinary hearing before hearing officer. Ost v Supervisor of Woodstock, 251 A.D.2d 724, 673 N.Y.S.2d 768, 1998 N.Y. App. Div. LEXIS 6464 (N.Y. App. Div. 3d Dep't), app. denied, 92 N.Y.2d 817, 684 N.Y.S.2d 488, 707 N.E.2d 443, 1998 N.Y. LEXIS 4260 (N.Y. 1998).

Penalty of demotion of Assistant Director of Personal Tax Processing Bureau to lesser, nonsupervisory position would not be set aside, even though Commissioner of Taxation and Finance, without making findings, imposed harsher penalty than that recommended by hearing officer, where requirement that administrative official provide findings of fact when rejecting hearing officer's findings did not apply where commissioner adopted hearing officer's findings and, in valid exercise of discretion, merely deviated from hearing officer's recommendation as to discipline, and hearing officer's findings amply supported penalty imposed by commissioner. Miller v State Dep't of Taxation & Fin., 263 A.D.2d 604, 692 N.Y.S.2d 785, 1999 N.Y. App. Div. LEXIS 7704 (N.Y. App. Div. 3d Dep't 1999).

School employee who was terminated on very first day of 1998-1999 school year did not earn any vacation days for that school year, where his employment contract did not provide that vacation time would "fully" accrue at commencement of contract/school year. Gratto v Board of Educ., 271 A.D.2d 175, 711 N.Y.S.2d 574, 2000 N.Y. App. Div. LEXIS 8076 (N.Y. App. Div. 3d Dep't 2000).

County administrator erred in terminating a nurse's employment because the record did not support the conclusion that the supervising nurse had vested the county administrator with the power to remove the nurse from her employment at the time of the determination where the designation occurred seven days after the county administrator made the determination. Matter of Bruso v County of Clinton, 139 A.D.3d 1166, 31 N.Y.S.3d 281, 2016 N.Y. App. Div. LEXIS 3429 (N.Y. App. Div. 3d Dep't 2016).

Question of proper appointment to position could not be raised in action by a civil service laborer for reinstatement following wrongful discharge by city where court had previously determined that laborer had been wrongfully discharged and had ordered his reinstatement. Burke v Hayden, 2 Misc. 2d 1040, 158 N.Y.S.2d 81, 1956 N.Y. Misc. LEXIS 1682 (N.Y. Sup. Ct.), app. dismissed, 156 N.Y.S.2d 1021 (N.Y. App. Div. 1956).

City manager, as chief administrative officer of all departments of city government, was proper removing authority to initiate disciplinary hearing against city police officer, rather than city's governing body, which had sole authority to appoint police officers, notwithstanding that there was no explicit provision in city charter designating city manager as removing authority of member of police department; general rule that power to remove appointee is incident of power to appoint was superseded by provision of city charter granting manager general removal authority "except as herein provided" in absence of any other provision in charter limiting such authority. Rine v Sherrill, 152 Misc. 2d 19, 574 N.Y.S.2d 641, 1991 N.Y. Misc. LEXIS 570 (N.Y. Sup. Ct. 1991).

91. Arbitration

School district is not entitled to order pursuant to CPLR § 7503 staying arbitration between district and employee association regarding district's discharge of school bus driver after hearing pursuant to Civil Service Law § 75 in which it was found that evidence supported charges that busdriver had sexually molested young girls riding his bus, since employee association filed grievance pursuant to its collective bargaining agreement with district claiming that district lacked "just cause" to discharge busdriver; there is no merit to district's contention that driver's participation in Civil Service Law § 75 hearing and failure to appeal therefrom pursuant to § 76 constituted waiver of his right to arbitration, since collective bargaining agreement afforded additional remedy of pursuing to resolution by arbitration "just cause" grievances, in that such grievance provisions of collective bargaining agreement do not supplant, but rather augment, statutory methods of appeal detailed in Civil Service Law § 76. Granville Cent. School Dist. v Granville Non-Instructional Employee's Asso., 114 A.D.2d 626, 494 N.Y.S.2d 218, 1985 N.Y. App. Div. LEXIS 53315 (N.Y. App. Div. 3d Dep't 1985).

Court erred in refusing to confirm arbitration award on ground that arbitrators failed to make complete award by directing that petitioner be reinstated to his former position or awarded back pay since it was undisputed that arbitrators properly found that petitioner's discharge was without proper reason, and respondents failed to provide any legal basis for vacating or modifying award. Patry v Village of Tupper Lake, 262 A.D.2d 757, 691 N.Y.S.2d 611, 1999 N.Y. App. Div. LEXIS 6506 (N.Y. App. Div. 3d Dep't), app. denied, 94 N.Y.2d 753, 700 N.Y.S.2d 427, 722 N.E.2d 507, 1999 N.Y. LEXIS 3701 (N.Y. 1999).

Provision of labor contract that "No Board of Arbitrators shall have power or jurisdiction to modify the Board of Trustees' action" did not preclude arbitrators (and courts on judicial review) from restoring petitioner to his prior employment based on arbitrators' conclusion that his discharge was without proper reason, where prior 6 paragraphs of contract established hierarchy of penalties that might be imposed under varying circumstances; subject language merely precluded arbitrators's modification of penalty (e.g., reduction of penalty of discharge to one of suspension that had been permissibly imposed by Board). Patry v Village of Tupper Lake, 262 A.D.2d 757, 691 N.Y.S.2d 611, 1999 N.Y. App. Div. LEXIS 6506 (N.Y. App. Div. 3d Dep't), app. denied, 94 N.Y.2d 753, 700 N.Y.S.2d 427, 722 N.E.2d 507, 1999 N.Y. LEXIS 3701 (N.Y. 1999).

92. Burden of proof

In a proceeding to remove an executive officer of a county alcoholic beverage control board the burden of proving the officer's incompetency or misconduct rests upon the person alleging the same. Ryan v New York State Liquor Authority, 273 A.D. 576, 79 N.Y.S.2d 827, 1948 N.Y. App. Div. LEXIS 4640 (N.Y. App. Div. 1948).

In attorney's Article 78 proceeding for reinstatement to his prior employment as Community Development Attorney for city, attorney had burden of proving that abolition of his position was brought on by bad faith or in effort to circumvent Civil Service Law. In order to satisfy burden of proving that abolition of position was brought on by bad faith or in effort to circumvent Civil Service Law, Article 78 petitioner must eliminate bona fide reasons for elimination of his position and show either that no savings were accomplished or that someone was hired to replace him. Mucci v City of Binghamton, 245 A.D.2d 678, 664 N.Y.S.2d 396, 1997 N.Y. App. Div. LEXIS 12570 (N.Y. App. Div. 3d Dep't 1997), app. dismissed, 91 N.Y.2d 921, 669 N.Y.S.2d 262, 692 N.E.2d 131, 1998 N.Y. LEXIS 256 (N.Y. 1998), app. denied, 92 N.Y.2d 802, 677 N.Y.S.2d 72, 699 N.E.2d 432, 1998 N.Y. LEXIS 1770 (N.Y. 1998).

Teachers' association claiming, in Article 78 proceeding, that probationary teacher was unlawfully terminated by school district because of her protected union activity had burden of proving that (1) she was engaged in protected activity, (2) such activity was known to person making adverse employment decision, and (3) adverse action would not have been taken but for protected activity. Rockville Centre Teachers Ass'n v N.Y. State Pub. Empl. Rels. Bd., 281 A.D.2d 425, 721 N.Y.S.2d 112, 2001 N.Y. App. Div. LEXIS 2130 (N.Y. App. Div. 2d Dep't 2001).

Hearing officer properly based his determination in a custodian's disciplinary hearing upon substantial evidence rather than a preponderance of the evidence. Matter of James v Hoosick Falls Cent. School Dist., 93 A.D.3d 1131, 941 N.Y.S.2d 335, 2012 N.Y. App. Div. LEXIS 2367 (N.Y. App. Div. 3d Dep't 2012).

Pursuant to N.Y. Civ. Serv. Law § 75(2), the Jamestown Board of Public Utilities, in order to discharge the former employee for misconduct, was required to prove that the employee engaged in misconduct, but it did not have to prove the specific misconduct of criminal conspiracy to defraud, as the Board had initially alleged. Parla v Jamestown Bd. of Pub. Utils., 17 A.D.3d 1151, 793 N.Y.S.2d 854, 2005 N.Y. App. Div. LEXIS 4663 (N.Y. App. Div. 4th Dep't 2005).

93. Constitutional matters

Employee was not deprived due process of law on ground that Department of Correctional Services violated its own rules by allowing its Bureau of Labor Relations (Bureau), rather than its Affirmative Action Office (AAO), to process charges of sexual harassment against him, since language of regulation, stating that "affirmative action office shall have responsibility for processing complaints," was not meant to preclude Bureau from initiating disciplinary action for sexual harassment independent of AAO as it could under CLS Civ S § 75 prior to issuance of regulation, and even if matter had been referred to AAO, employee would have received same procedural protections afforded by Bureau. Oare v Coughlin, 133 A.D.2d 943, 520 N.Y.S.2d 658, 1987 N.Y. App. Div. LEXIS 51985 (N.Y. App. Div. 3d Dep't 1987), app. denied, 70 N.Y.2d 615, 526 N.Y.S.2d 436, 521 N.E.2d 443, 1988 N.Y. LEXIS 700 (N.Y. 1988).

Transit authority's requirement that subway car conductor submit to return-to-work drug test pursuant to collective bargaining agreement did not violate Fourth Amendment; in any event, drug testing in absence of individualized suspicion was reasonable because employee's position was safety sensitive. Briggs v Stangl, 222 A.D.2d 672, 635 N.Y.S.2d 687, 1995 N.Y. App. Div. LEXIS 13901 (N.Y. App. Div. 2d Dep't 1995).

In bus mechanic's Article 78 proceeding challenging termination of his employment with school district, due process required reconsideration of that penalty, imposed for misconduct and insubordination in violation of CLS Civ S § 75, where mechanic had been employed by district for 29 years with otherwise unblemished record, and penalty was based on finding of systematic fraud covering "period of months and possibly even years" even though mechanic was not so charged, and proof did not support that conclusion. Rice v Hilton Cent. Sch. Dist. Bd. of Educ., 245 A.D.2d 1104, 667 N.Y.S.2d 524, 1997 N.Y. App. Div. LEXIS 13901 (N.Y. App. Div. 4th Dep't 1997), modified, 258 A.D.2d 900, 685 N.Y.S.2d 364, 1999 N.Y. App. Div. LEXIS 1542 (N.Y. App. Div. 4th Dep't 1999).

In a hybrid proceeding, reimbursement of a corrections officer's improperly withheld disability benefits was just and proper relief because the sheriff terminated the officer's statutory benefits

during the pendency of the disciplinary hearing without a pretermination evidentiary hearing, and, as such, the officer was not provided due process; the unclean hands doctrine did not apply to the termination of benefits. 2015 N.Y. App. Div. LEXIS 8990.

School district's director of operations was deprived of constitutional liberty interest, and was entitled to name-clearing hearing, where he was terminated from his noncompetitive position after audit report identified him as having engaged in fiscal improprieties, gross mismanagement and theft; petitioner was not required to establish falsity of charges to be entitled to name-clearing hearing, as that was function of hearing itself. Okebiyi v Cortines, 167 Misc. 2d 1008, 641 N.Y.S.2d 791, 1996 N.Y. Misc. LEXIS 112 (N.Y. Sup. Ct. 1996), app. dismissed, 239 A.D.2d 421, 658 N.Y.S.2d 894, 1997 N.Y. App. Div. LEXIS 5084 (N.Y. App. Div. 2d Dep't 1997).

In action against county employer brought in federal court by former county employee who claimed that she was wrongfully discharged during her probationary term and sought to recover damages for deprivation of procedural due process under 42 USCS § 1983, court correctly dismissed pendent state claim for alleged breach of contract as such claim depended on whether plaintiff was entitled to reinstatement, which had to be addressed first in Article 78 proceeding, and such proceeding was time-barred. Finley v Giacobbe, 79 F.3d 1285, 1996 U.S. App. LEXIS 294 (2d Cir. N.Y. 1996).

94. —Double jeopardy

Subsequent administrative hearing does not violate constitutional prohibition against double jeopardy even though the civil servant has previously been acquitted on criminal charges arising out of the same incidents of alleged misconduct. Scales v Maxwell, 52 A.D.2d 719, 382 N.Y.S.2d 171, 1976 N.Y. App. Div. LEXIS 12410 (N.Y. App. Div. 4th Dep't 1976).

Fact that nurse's aide had been orally counseled for each act which formed basis of subsequent disciplinary proceeding did not constitute prior discipline within meaning of CLS Civ S § 75, and thus county's determination terminating her employment did not subject her to double jeopardy. Yerry v Ulster County, 128 A.D.2d 941, 512 N.Y.S.2d 592, 1987 N.Y. App. Div. LEXIS 44610 (N.Y. App. Div. 3d Dep't 1987).

95. Criminal case, effect of

Any hearing into the facts underlying a police officer's conviction of endangering the welfare of a child, N.Y. Penal Law § 260.10(1), was unnecessary prior to his termination pursuant to N.Y. Pub. Off. Law § 30(1)(e) because one who knowingly engaged in conduct likely to be injurious to a child's welfare was deemed wanting in moral integrity; dismissal of the police officer's N.Y. C.P.L.R. art. 78 proceeding against a city and a commissioner, seeking reinstatement and demanding a hearing pursuant to N.Y. Civ. Serv. Law § 75 was proper. Matter of Feola v Carroll, 10 N.Y.3d 569, 860 N.Y.S.2d 457, 890 N.E.2d 219, 2008 N.Y. LEXIS 1476 (N.Y. 2008).

Order denying petitioner reinstatement to her former position was affirmed because she was terminated for failing to maintain a minimum qualification of her employment, namely, continued eligibility for the Medicaid program and not the disposition of her pending criminal action, therefore, the disciplinary procedures mandated by the Civil Service Law and the collective bargaining agreement were not applicable. Matter of Crittenden v New York State Off. for People With Dev. Disabilities, 167 A.D.3d 1394, 92 N.Y.S.3d 159, 2018 N.Y. App. Div. LEXIS 8906 (N.Y. App. Div. 3d Dep't 2018).

Determination of a criminal charge by a court against an employee of New York city board of transportation is in no way controlling in disciplinary proceedings conducted by the board against the employee, under provisions of Rap. Tr. Law, § 14, subd. b, and this section, based on the same incident which gave rise to criminal charge. Application of Sheehan, 43 N.Y.S.2d 778, 182 Misc. 57, 1943 N.Y. Misc. LEXIS 2321 (N.Y. Sup. Ct. 1943).

Indefinite suspension of city corrections officers without pay pending resolution of criminal charges against them, pursuant to NYC Admin Code § 9-112, was not inconsistent with CLS Civ S §§ 75(3) and 76(4). Seabrook v Jacobson, 970 F. Supp. 252, 1997 U.S. Dist. LEXIS 9630 (S.D.N.Y. 1997), vacated, 153 F.3d 70, 1998 U.S. App. LEXIS 20509 (2d Cir. N.Y. 1998).

96. Drug testing

In Article 78 proceeding to annul discharge of firefighter after test revealed large quantities of cocaine metabolite in his urine, court erred in concluding that employer lacked objective evidence to justify compulsory drug testing where, in addition to anonymous letter stating that firefighter had been reporting to work under influence of alcohol, employer presented evidence of physical manifestations of substance abuse on day he was tested, his reputation for showing up at work under influence, his long record of excessive absences, his prior substance abuse problems, and his understanding that he could be tested if he showed any signs of recurring substance abuse. Wilson v City of White Plains, 95 N.Y.2d 783, 710 N.Y.S.2d 303, 731 N.E.2d 1111, 2000 N.Y. LEXIS 904 (N.Y. 2000).

Random drug testing procedures to which city housing police officers were subject were not unconstitutional given diminished expectation of privacy of public employees and more greatly diminished expectation of privacy of police officers. Clark v New York City Housing Authority, 168 A.D.2d 305, 562 N.Y.S.2d 637, 1990 N.Y. App. Div. LEXIS 15196 (N.Y. App. Div. 1st Dep't 1990), app. dismissed, 77 N.Y.2d 938, 569 N.Y.S.2d 611, 572 N.E.2d 52, 1991 N.Y. LEXIS 585 (N.Y. 1991).

It was reasonable for deputy fire chief to order firefighter to submit to urine test where, by all accounts, firefighter appeared to be impaired and unable to perform duties of his employment without risk of injury to himself and to those whose safety he was employed to safeguard; thus, firefighter's failure to comply with order properly served as ground for disciplinary action. Washington v Dolce, 208 A.D.2d 937, 617 N.Y.S.2d 533, 1994 N.Y. App. Div. LEXIS 10611 (N.Y. App. Div. 2d Dep't 1994).

Transit police officer was properly ordered to submit to urinalysis predicated on reasonable suspicion of his drug use, based on information supplied by 2 confidential informants, although neither informant had past history of supplying reliable information, where first informant's information was corroborated by other events observed by transit police investigators, and second informant's credibility was established by his relationship with petitioner. Canty v Spooner, 216 A.D.2d 463, 628 N.Y.S.2d 754, 1995 N.Y. App. Div. LEXIS 6393 (N.Y. App. Div. 2d Dep't 1995).

In disciplinary proceeding against police officer, administration of drug test was justified by reasonable suspicion on part of sergeant who observed police officer engaging in strange behavior suggestive of attempt to steal cocaine seized from drug suspect arrested by fellow officer. Cantwell v Bratton, 222 A.D.2d 281, 635 N.Y.S.2d 32, 1995 N.Y. App. Div. LEXIS 12852 (N.Y. App. Div. 1st Dep't 1995).

Substantial evidence supported employer's finding of reasonable suspicion justifying direction that employee undergo drug test where (1) employer's physician (to whom employee was told to report because of his complaint of inability to perform his normal job duties) testified that, on examining employee, he detected alcohol on employee's breath, nasal congestion, swollen glands, throat soreness, and eye condition called "nystagmus" which was known to be indicative of substance abuse, and (2) while in physician's waiting room, employee was agitated and hostile to clinic workers. Jackman v Schembri, 222 A.D.2d 293, 635 N.Y.S.2d 30, 1995 N.Y. App. Div. LEXIS 12865 (N.Y. App. Div. 1st Dep't 1995), app. denied, 88 N.Y.2d 807, 647 N.Y.S.2d 164, 670 N.E.2d 448, 1996 N.Y. LEXIS 1596 (N.Y. 1996).

Transit authority's requirement that subway car conductor submit to return-to-work drug test pursuant to collective bargaining agreement did not violate Fourth Amendment; in any event, drug testing in absence of individualized suspicion was reasonable because employee's position was safety sensitive. Briggs v Stangl, 222 A.D.2d 672, 635 N.Y.S.2d 687, 1995 N.Y. App. Div. LEXIS 13901 (N.Y. App. Div. 2d Dep't 1995).

In Article 78 proceeding by petitioner who was dismissed as correction officer for using cocaine, where petition alleged that respondent violated department directive requiring that initial positive urinalysis for drug use be confirmed by second, more sophisticated test, court properly upheld respondent's interpreta-

tion that directive was satisfied by positive EMIT test followed by positive GC/MS test of petitioner's first urine sample; respondent had rational basis to reject petitioner's claim that testing of second sample, which was negative, constituted "confirmatory" test where negative result of second test was accounted for by fact that second urine sample was produced 30 minutes after first sample and was diluted by water ingested by petitioner. Johnson v Schembri, 227 A.D.2d 179, 642 N.Y.S.2d 9, 1996 N.Y. App. Div. LEXIS 4818 (N.Y. App. Div. 1st Dep't 1996).

Respondents' use of hair analysis drug testing to support termination of employment of probationary police officer for illicit cocaine use, while tenured employees were tested for drugs by means of urinalysis, did not constitute evidence of bad faith or denial of due process or equal protection, because probationary and tenured employees are not similarly situated and therefore not entitled to equivalent protections. Brown v City of New York, 250 A.D.2d 546, 673 N.Y.S.2d 643, 1998 N.Y. App. Div. LEXIS 6159 (N.Y. App. Div. 1st Dep't), app. denied, 92 N.Y.2d 810, 680 N.Y.S.2d 54, 702 N.E.2d 839, 1998 N.Y. LEXIS 3204 (N.Y. 1998).

In Article 78 proceeding challenging police officer's dismissal, reasonable suspicion supported order requiring officer to undergo drug testing where statements of 2 informants were corroborated by police surveillance observations and investigation. There was no basis to disturb finding that hair analysis drug tests were accurate where reliability of such testing has been upheld, and neither mistake in transcribing identification number nor improper placement of test tubes in centrifuge, which resulted in retesting, affected accuracy of test results. Brinson v Safir, 255 A.D.2d 247, 680 N.Y.S.2d 500, 1998 N.Y. App. Div. LEXIS 12683 (N.Y. App. Div. 1st Dep't 1998), app. denied, 93 N.Y.2d 805, 689 N.Y.S.2d 707, 711 N.E.2d 983, 1999 N.Y. LEXIS 825 (N.Y. 1999).

Discharged highway maintenance equipment operator received adequate notice of consequences of county highway department's random drug test, and thus he was not denied due process, where he underwent prior mandatory training concerning county's drug and alcohol testing policy and was informed that positive drug test could result in loss of employment. Catlin v Orleans County Highway Dep't, 255 A.D.2d 966, 680 N.Y.S.2d 35, 1998 N.Y. App. Div. LEXIS 12228 (N.Y. App. Div. 4th Dep't 1998).

Informant's statement that she observed police officer using drugs on numerous occasions, which was reasonably detailed and included declaration against penal interest, constituted substantial evidence of reasonable suspicion required for order directing drug test for cause. Roy v City of New York, 258 A.D.2d 348, 685 N.Y.S.2d 668, 1999 N.Y. App. Div. LEXIS 1355 (N.Y. App. Div. 1st Dep't 1999).

97. Estoppel

Law enforcement officers were estopped from asserting limitations period of CLS Civ S § 75 as bar to disciplinary proceedings against them for their failure to report knowledge of crimes by fellow officers where accused officers' own concealment of such knowledge prevented filing of charges within statutory period. In re Steyer, 70 N.Y.2d 990, 526 N.Y.S.2d 422, 521 N.E.2d 429, 1988 N.Y. LEXIS 89 (N.Y. 1988).

Judgment of Supreme Court at Special Term granting motion to dismiss former State Department of Taxation and Finance estate tax attorneys' application for reinstatement and dismissing, as moot, motion for class action treatment, was affirmed, notwithstanding contention that cause of action was different from that in prior case and thus petitioners were only precluded, under principles of res judicata or collateral estoppel, from litigating issues which were actually determined in prior case. Gowan v Tully, 58 A.D.2d 936, 397 N.Y.S.2d 427, 1977 N.Y. App. Div. LEXIS 13137 (N.Y. App. Div. 3d Dep't 1977), aff'd, 45 N.Y.2d 32, 407 N.Y.S.2d 650, 379 N.E.2d 177, 1978 N.Y. LEXIS 2068 (N.Y. 1978).

Mayor properly refused to reopen fault phase of disciplinary proceeding brought against police officer where issue of fault had been litigated and decided at hearing 2 years earlier and determination had been confirmed on appeal, especially in absence of any newly discovered evidence. Smith v Tomlinson, 136 A.D.2d 646, 523 N.Y.S.2d 604, 1988 N.Y. App. Div. LEXIS 428 (N.Y. App. Div. 2d Dep't), app. denied, 72 N.Y.2d 802, 530 N.Y.S.2d 554, 526 N.E.2d 45, 1988 N.Y. LEXIS 1117 (N.Y. 1988).

Fact that employee was sent "counseling memorandum" from his supervisor (warning him that reporting of one or more incidents of violence would result in "further disciplinary action") did not preclude or estop institution of disciplinary proceedings based on same conduct; such letter constituted warning and admonishment to comply with employer's policy and was not form of punishment in and of itself. Heslop v Board of Educ., Newfield Cent. Sch. Dist., 191 A.D.2d 875, 594 N.Y.S.2d 871, 1993 N.Y. App. Div. LEXIS 2383 (N.Y. App. Div. 3d Dep't 1993).

Administrative law judge at unemployment insurance hearing properly accorded collateral estoppel effect as to factual findings of misconduct at CLS Civ S § 75 disciplinary hearing where claimant was given full and fair opportunity to litigate issue of misconduct at prior disciplinary hearing, during which she was represented by counsel, testified on her own behalf, cross-examined employer's witnesses, and had opportunity to present and examine relevant evidence. In re Claim of Dimps, 274 A.D.2d 625, 710 N.Y.S.2d 448, 2000 N.Y. App. Div. LEXIS 7604 (N.Y. App. Div. 3d Dep't 2000).

Correction officer, who unsuccessfully challenged Department of Correctional Services' enforcement of hair length policy directive and was dismissed in earlier grievance and arbitration hearings, was not barred by principles of res judicata and collateral estoppel from maintaining Article 78 proceeding, which did not seek to overturn or review arbitrator's decision or outcome of grievances, but merely sought determination that hair length policy violated his state and federal constitutional rights to free exercise of his religion, as well as reinstatement to his former position. Rourke v New York State Dep't of Correctional Servs., 159 Misc. 2d 324, 603 N.Y.S.2d 647, 1993 N.Y. Misc. LEXIS 417 (N.Y. Sup. Ct. 1993), aff'd, 201 A.D.2d 179, 615 N.Y.S.2d 470, 1994 N.Y. App. Div. LEXIS 8009 (N.Y. App. Div. 3d Dep't 1994).

Hearing officer's decision after a N.Y. Civ. Serv. Law § 75 hearing about a county employee's misconduct did not preclude a finding that the employee's termination was discriminatory in his later discrimination suit; the factual findings that the employee had committed misconduct, however, precluded the employee from arguing otherwise. The failure to instruct the jury on the preclusive effect of the § 75 hearing, however, was not materially prejudicial to the defendants. Matusick v Erie County Water Auth., 739 F.3d 51, 2014 U.S. App. LEXIS 192 (2d Cir. N.Y.), reprinted, 757 F.3d 31, 2014 U.S. App. LEXIS 3683 (2d Cir. N.Y. 2014).

98. Failure of hearing officer to make recommendations

A hearing officer's failure to include recommendations as to discipline when preparing his or her report after a disciplinary hearing pursuant to Civil S Law § 75(2) does not strip the subject agency of jurisdiction to impose sanctions upon its employee, since the failure to recommend discipline is important only to the extent that it omits a suggested starting point from which the removing entity may begin to fashion the appropriate sanction, and since, though a disciplinary proceeding will be voided and the status quo ante restored when there has been some error that has tainted the entire proceeding, such situation simply does not arise when a hearing officer acts pursuant to a valid deligation, prepares a detailed report, and provides such report along with a transcript to the removing board or officer but omits to include recommendations as to discipline. Wiggins v Board of Education, 60 N.Y.2d 385, 469 N.Y.S.2d 652, 457 N.E.2d 758, 1983 N.Y. LEXIS 3457 (N.Y. 1983).

99. Grand jury matters

Hearing officer's determination not to remove grand jury report from official record of disciplinary proceeding or to direct that testimony related thereto be stricken was abuse of discretion where Justice of Supreme Court had issued order sealing report, and hearing was thereafter terminated before any determination on disciplinary charges was reached. Walden v Village of Greenport, 235 A.D.2d 544, 653 N.Y.S.2d 32, 1997 N.Y. App. Div. LEXIS 719 (N.Y. App. Div. 2d Dep't 1997).

100. Harmless procedural error

Court would affirm determination removing petitioner from his position as deputy police chief even though mayor did not have copy of hearing transcript prior to rendering his determination,

since mayor's affidavit stated that he reviewed transcript on day after making determination and that it confirmed what he had already been advised by corporation counsel, who informed mayor daily of evidence introduced at hearing, and mayor further averred that he fully reviewed appropriate material, thus curing any error. Fraccola v Utica, 135 A.D.2d 1112, 523 N.Y.S.2d 292, 1987 N.Y. App. Div. LEXIS 52972 (N.Y. App. Div. 4th Dep't 1987), app. denied, 72 N.Y.2d 807, 533 N.Y.S.2d 56, 529 N.E.2d 424, 1988 N.Y. LEXIS 2614 (N.Y. 1988), cert. denied, 489 U.S. 1053, 109 S. Ct. 1313, 103 L. Ed. 2d 582, 1989 U.S. LEXIS 1054 (U.S. 1989).

101. Insubordination alleged

Disciplinary charges for misconduct and/or incompetence against police officer with New York City Transit Police Department were not time-barred by virtue of 18-month limitation provision of CLS Civ Serv § 75(4) since such limitation period is inapplicable where incompetence or misconduct complained of and described in charges would constitute crime if proven in court of competent jurisdiction, and instant allegations, if proven, would have constituted crime of petit larceny on basis of obtaining money by false pretenses (CLS Penal § 155.25). In re Sunja S., 175 A.D.2d 132, 571 N.Y.S.2d 826, 1991 N.Y. App. Div. LEXIS 9786 (N.Y. App. Div. 2d Dep't), app. denied, 78 N.Y.2d 861, 576 N.Y.S.2d 219, 582 N.E.2d 602, 1991 N.Y. LEXIS 4730 (N.Y. 1991).

In bus mechanic's Article 78 proceeding challenging termination of his employment with school district, due process required reconsideration of that penalty, imposed for misconduct and insubordination in violation of CLS Civ S § 75, where mechanic had been employed by district for 29 years with otherwise unblemished record, and penalty was based on finding of systematic fraud covering "period of months and possibly even years" even though mechanic was not so charged, and proof did not support that conclusion. Rice v Hilton Cent. Sch. Dist. Bd. of Educ., 245 A.D.2d 1104, 667 N.Y.S.2d 524, 1997 N.Y. App. Div. LEXIS 13901 (N.Y. App. Div. 4th Dep't 1997), modified, 258 A.D.2d 900, 685 N.Y.S.2d 364, 1999 N.Y. App. Div. LEXIS 1542 (N.Y. App. Div. 4th Dep't 1999).

102. Jurisdictional matters

The Police Department of the City of New York lacked jurisdiction to commence disciplinary proceedings against a police officer with regard to conduct that occurred prior to her appointment and at a time when she had been a civilian employee in the competitive civil service, a position from which she had resigned before disciplinary proceedings were commenced (Civ Serv Law § 75); authority to inquire into alleged misconduct attributed to the police officer prior to her appointment was vested in the Personnel Director of the City of New York (Civ Serv Law § 50(4)(h)). Borges v McGuire, 107 A.D.2d 492, 487 N.Y.S.2d 737, 1985 N.Y. App. Div. LEXIS 49770 (N.Y. App. Div. 1st Dep't 1985).

Disciplinary charges for misconduct and/or incompetence against police officer with New York City Transit Police Department were not time-barred by virtue of 18-month limitation provision of CLS Civ Serv § 75(4) since such limitation period is inapplicable where incompetence or misconduct complained of and described in charges would constitute crime if proven in court of competent jurisdiction, and instant allegations, if proven, would have constituted crime of petit larceny on basis of obtaining money by false pretenses (CLS Penal § 155.25). In re Sunja S., 175 A.D.2d 132, 571 N.Y.S.2d 826, 1991 N.Y. App. Div. LEXIS 9786 (N.Y. App. Div. 2d Dep't), app. denied, 78 N.Y.2d 861, 576 N.Y.S.2d 219, 582 N.E.2d 602, 1991 N.Y. LEXIS 4730 (N.Y. 1991).

State of New York Civil Service Commission acted in excess of its statutory authority and, thus, its jurisdiction by disciplining an employee in 2012 for charges based upon conduct occurring in 2007 and 2008 because the charges did not allege the employee acted with the mens rea requirements for the crime of official misconduct and, as such, the charges were time-barred. Matter of De Guzman v State of New York Civ. Serv. Commn., 129 A.D.3d 1189, 11 N.Y.S.3d 296, 2015 N.Y. App. Div. LEXIS 4634 (N.Y. App. Div. 3d Dep't), app. denied, 26 N.Y.3d 913, 43 N.E.3d 375, 22 N.Y.S.3d 165, 2015 N.Y. LEXIS 3709 (N.Y. 2015).

Trial court erred in adopting an administrative law judge's (ALJ's) recommendation to terminate a corrections officer because the former Department of Corrections (DOC) commissioner did not make a written designation of the ALJ as statutorily required, and, as such, the ALJ lacked authority and jurisdiction to conduct the disciplinary hearing involving the officer; the 1992 designation letter was outside the record and not relied upon by the DOC. Matter of Lindo v Ponte, 150 A.D.3d 1244, 57 N.Y.S.3d 163, 2017 N.Y. App. Div. LEXIS 4210 (N.Y. App. Div. 2d Dep't 2017).

103. Notice requirement

After a civil service employee has been found guilty of misconduct, the public employer may consider material included in his employment record in determining an appropriate sanction; however, the employee must first be given notice and an opportunity to submit a written response. Accordingly, the dismissal of a village police officer by the Village Board, after finding the officer guilty of a bad check charge, and after consideration of his employment record without notice to the officer, would be remitted for re-etermination of an appropriate sanction after giving the officer prior notice of the adverse employment record material to be considered and an opportunity for a written response. Bigelow v Board of Trustees, 63 N.Y.2d 470, 483 N.Y.S.2d 173, 472 N.E.2d 1001, 1984 N.Y. LEXIS 4680 (N.Y. 1984).

104. Preliminary injunction

Plaintiff seeking preliminary injunction prohibiting her continued suspension from employment failed to show clear likelihood of success on merits of underlying claim against employer where there was heavily contested issue as to whether plaintiff resigned as part of settlement agreement, in which case she would not be entitled to back pay. Plaintiff seeking preliminary injunction prohibiting her continued suspension from employment failed to show that irreparable injury would befall her without protection of injunction where her underlying claim against employer sought only monetary damages that could be readily computed and for which she would be fully compensated if she ultimately prevailed on merits. Plaintiff seeking preliminary injunction prohibiting her continued suspension from employment failed to show that balance of equities favored her where she would be fully compensated for her loss of back pay if she prevailed on merits of underlying claim against employer, but it was much less certain that employer would be able to recoup its payments if it were required to pay plaintiff's salary pending outcome of litigation, and plaintiff had not articulated any severe consequence that would result if injunction were denied. Winkler v Kingston Hous. Auth., 238 A.D.2d 711, 656 N.Y.S.2d 421, 1997 N.Y. App. Div. LEXIS 3736 (N.Y. App. Div. 3d Dep't 1997).

105. Recusal

"Rule of necessity" required town superintendent of highways to render final determination in disciplinary proceeding, despite his personal involvement in matter, where only individual authorized to act in his stead was deputy superintendent of highways, who had also testified against petitioner at hearing and was either present at or involved in many of incidents giving rise to misconduct charges. Martin v Platt, 191 A.D.2d 758, 594 N.Y.S.2d 398, 1993 N.Y. App. Div. LEXIS 2185 (N.Y. App. Div. 3d Dep't), app. denied, 82 N.Y.2d 652, 601 N.Y.S.2d 581, 619 N.E.2d 659, 1993 N.Y. LEXIS 2248 (N.Y. 1993).

County commissioner who preferred disciplinary charges against employee, and thereafter testified as witness at his hearing, should have disqualified himself as matter of propriety and because of his personal involvement, and court would remit matter for de novo determination by impartial decision-maker based on original hearing where he failed to do so; in reviewing hearing officer's determination, commissioner was in position of passing on his own credibility as witness. Lowy v Carter, 210 A.D.2d 408, 620 N.Y.S.2d 103, 1994 N.Y. App. Div. LEXIS 12847 (N.Y. App. Div. 2d Dep't 1994).

Member of county board of supervisors should have recused himself from participating in board's final determination in disciplinary proceeding, where he signed notice of charges against employee under CLS Civ S § 75, voted to prefer charges and to appoint hearing officer, and testified at hearing. Ernst v Saratoga County, 234 A.D.2d 764, 651 N.Y.S.2d 209, 1996 N.Y. App. Div. LEXIS 12492 (N.Y. App. Div. 3d Dep't 1996).

Commissioner of County Labor Department should have disqualified himself from reviewing recommendation of hearing officer and acting on any of charges where he had been involved in initial investigation, preferred charges, and testified at hearing. Pryor v O'Donnell, 262 A.D.2d 648, 693 N.Y.S.2d 187, 1999 N.Y. App. Div. LEXIS 7671 (N.Y. App. Div. 2d Dep't 1999).

City commissioner of accounts improperly terminated petitioner's employment as a real property clerk; as the commissioner investigated and deemed unfounded her allegations of preferential assessment treatment, brought the resulting misconduct charges against her, and testified against her at her disciplinary hearing, he should have disqualified himself from reviewing the hearing officer's recommendation and rendering a final determination in the matter. Matter of Zlotnick v City of Saratoga Springs, 122 A.D.3d 1210, 997 N.Y.S.2d 809, 2014 N.Y. App. Div. LEXIS 8228 (N.Y. App. Div. 3d Dep't 2014).

Recusal of members of an employer's board of trustees who reviewed a hearing officer's recommendation and acted on charges against an employee was not required because the members were not so personally or extensively involved in the disciplinary process as to compel a conclusion that the members could not fairly consider the evidence and recommendation resulting from a hearing. Matter of Tinter v Board of Trustees of the Pound Ridge Lib. Dist., 155 A.D.3d 1054, 66 N.Y.S.3d 526, 2017 N.Y. App. Div. LEXIS 8437 (N.Y. App. Div. 2d Dep't 2017).

106. Retroactivity

A school district erred in denying petitioner retroactive pay to the date of the district's first determination to terminate her employment as a clerk typist, which determination had been annulled by court order, since petitioner was entitled to maintain her position until the matter was finally decided by the district following remand by the court. McLaughlin v North Bellmore Union Free School Dist., 86 A.D.2d 870, 447 N.Y.S.2d 304, 1982 N.Y. App. Div. LEXIS 15505 (N.Y. App. Div. 2d Dep't 1982).

In law enforcement officer's Article 78 proceeding against officials of county civil service commission and county personnel department, period during which officer acted as investigator before effective date of CLS Civ S §§ 58(4)(c) and 59-a had to be included in 18-month period necessary for permanent designation as detective/investigator where language of CLS Civ S § 58(4)(c)(iv) shows that it applies retroactively to persons who were designated detectives during period between passage of § 58(4)(c) and decision in Matter of Wood v Irving, 85 NY2d 238, which struck down original statute as unconstitutional. Pleakis v Peterson, 281 A.D.2d 910, 722 N.Y.S.2d 458, 2001 N.Y. App. Div. LEXIS 2857 (N.Y. App. Div. 4th Dep't 2001).

107. Service of process

Show cause order obtained by employee of state university against whom charges pursuant to Civil Service Law § 75 had been levied containing a direction continuing him in his position without suspension would be dismissed where service of process was not made on state attorney general pursuant to requirements of CPLR 2214, subd d. Randall v Toll, 72 Misc. 2d 305, 339 N.Y.S.2d 72, 1972 N.Y. Misc. LEXIS 1285 (N.Y. Sup. Ct. 1972).

108. Settlement of claim

Court would enforce plea agreement by which correction officer settled disciplinary charges alleging violation of sick leave regulations, despite her claimed unawareness of terms of plea agreement, where officer executed agreement on advice of counsel. Simpson v Abate, 213 A.D.2d 190, 625 N.Y.S.2d 2, 1995 N.Y. App. Div. LEXIS 2522 (N.Y. App. Div. 1st Dep't 1995).

Stipulation of settlement, which disposed of charges against petitioner and terminated disciplinary hearing against her, was valid although its existence and terms were not placed on record despite presence of court reporter, as agreement on record or in writing was not required by CLS Civ S § 75, case law or statute of frauds, and parties' collective bargaining agreement did not require signed agreement. Winkler v Kingston Hous. Auth., 259 A.D.2d 819, 686 N.Y.S.2d 513, 1999 N.Y. App. Div. LEXIS 2108 (N.Y. App. Div. 3d Dep't 1999).

109. Temporary injunction; temporary restraining order

Corrections officer was not entitled to temporary restraining order barring implementation of disciplinary proceedings based on directive aimed at curbing sick leave abuses since he would be entitled to back pay and reinstatement if he were terminated for sick leave abuses and such termination was later annulled; furthermore, allegation that possible loss of health benefits constituted showing of irreparable harm was speculative and not supported. Valentine v Schembri, 212 A.D.2d 371, 622 N.Y.S.2d 257, 1995 N.Y. App. Div. LEXIS 1247 (N.Y. App. Div. 1st Dep't 1995).

In a disciplinary trial of an employee of the State, the employee was granted a temporary injunction directing the State Industrial Commissioner to preserve records needed for her defense which would otherwise be destroyed as obsolete. Schwartz v Lubin, 10 Misc. 2d 819, 173 N.Y.S.2d 548, 1958 N.Y. Misc. LEXIS 3608 (N.Y. Sup. Ct.), aff'd, 6 A.D.2d 108, 175 N.Y.S.2d 652, 1958 N.Y. App. Div. LEXIS 5286 (N.Y. App. Div. 1st Dep't 1958).

110. Time limitations

Language in a collective bargaining agreement making "final and binding" the final step of a grievance procedure did not preclude a nurse, charged in a disciplinary proceeding with abandoning a wheelchair patient in a bathroom, from pursuing judicial review of her right to a transcript of the grievance hearing (Civ S Law §§ 76[1], 75[3]); the words "final and binding" merely triggered the running of the four-month time limit within which proceeding must be brought. Stoker v Tarentino, 64 N.Y.2d 994, 489 N.Y.S.2d 43, 478 N.E.2d 184, 1985 N.Y. LEXIS 16685 (N.Y. 1985).

Disciplinary charges against state employee were not time-barred under CLS Civ S § 75(4), which requires that charges be brought within 18 months except where alleged misconduct would constitute crime, since employee's act of falsely representing that he had college degree on his employment application would constitute second degree offering false instrument for filing (CLS Penal § 175.30), and charge that he operated private business from his state workplace would constitute theft of services (CLS Penal § 165.15). Dean v Bradford, 158 A.D.2d 772, 551 N.Y.S.2d 364, 1990 N.Y. App. Div. LEXIS 911 (N.Y. App. Div. 3d Dep't 1990).

Disciplinary charges for misconduct and/or incompetence against police officer with New York City Transit Police Department were not time-barred by virtue of 18-month limitation provision of CLS Civ Serv § 75(4) since such limitation period is inapplicable where incompetence or misconduct complained of and described in charges would constitute crime if proven in court of competent jurisdiction, and instant allegations, if proven, would have constituted crime of petit larceny on basis of obtaining money by false pretenses (CLS Penal § 155.25). In re Sunja S., 175 A.D.2d 132, 571 N.Y.S.2d 826, 1991 N.Y. App. Div. LEXIS 9786 (N.Y. App. Div. 2d Dep't), app. denied, 78 N.Y.2d 861, 576 N.Y.S.2d 219, 582 N.E.2d 602, 1991 N.Y. LEXIS 4730 (N.Y. 1991).

Chief of town police force was not state employee for purposes of CLS Civ S § 75(4); thus, general 18-month statute of limitations would govern all disciplinary specifications against police chief except those which "if proved in a court of appropriate jurisdiction, (would) constitute a crime," in which case no limitations period would apply. No limitations period applied to disciplinary specifications against town chief of police alleging misconduct which, if established at trial, would have constituted third degree sexual abuse in violation of CLS Penal § 130.55 or second degree harassment in violation of CLS Penal § 240.30(1). Wade v Town of Ticonderoga Town Bd., 256 A.D.2d 860, 681 N.Y.S.2d 833, 1998 N.Y. App. Div. LEXIS 13566 (N.Y. App. Div. 3d Dep't 1998), app. denied, 93 N.Y.2d 804, 689 N.Y.S.2d 16, 711 N.E.2d 201, 1999 N.Y. LEXIS 742 (N.Y. 1999).

Petitioner's filing of second amended complaint in his federal discrimination action, which demanded reinstatement, constituted his demand, and his employer's answer thereto constituted refusal; as such, instant proceeding, claiming entitlement to pretermination hearing, was properly dismissed as time barred since it was commenced 11 months after second amended complaint was filed. Thomas v Stone, 284 A.D.2d 627, 725 N.Y.S.2d 749, 2001 N.Y. App. Div. LEXIS 5987 (N.Y. App. Div. 3d Dep't), app. dismissed, 96 N.Y.2d 935, 733 N.Y.S.2d 370, 759 N.E.2d 369, 2001 N.Y. LEXIS 3210 (N.Y. 2001), app. denied, 97 N.Y.2d 608, 739 N.Y.S.2d 98, 765 N.E.2d 301, 2002 N.Y. LEXIS 47 (N.Y. 2002),

cert. denied, 536 U.S. 960, 122 S. Ct. 2664, 153 L. Ed. 2d 839, 2002 U.S. LEXIS 4958 (U.S. 2002).

Suspended police officer could not pursue reinstatement of his position or a hearing under N.Y. Civ. Serv. Law § 75 because he was aggrieved when the 30-day period of unpaid suspension ended in January 2004; thus, his demand for reinstatement in November 2004 was outside the four-month limitations period in N.Y. C.P.L.R. 217. Matter of Dorsey v Coleman, 40 A.D.3d 1187, 834 N.Y.S.2d 743, 2007 N.Y. App. Div. LEXIS 5446 (N.Y. App. Div. 3d Dep't 2007).

Charge that a sheriff's department employee threatened the sheriff was properly dismissed because the alleged threat against the sheriff occurred more than two years before the charge was filed, beyond the N.Y. Civ. Serv. Law § 75(4) time period for bringing misconduct charges; there was insufficient evidenced that the employee committed the crimes of menacing in the third degree and reckless endangerment in the second degree, because no evidence was presented establishing that, during the struggle, the rifle held by the employee was loaded with ammunition or that he threatened his wife with it. What threats the employee was alleged to have made were directed at the sheriff, and, as a result, even if the wife's testimony regarding the threats and ensuing struggle were fully accepted, the crimes of reckless endangerment and menacing were not committed by the employee and the statutory exception to the 18-month rule did not apply. Matter of Guynup v County of Clinton, 74 A.D.3d 1552, 903 N.Y.S.2d 580, 2010 N.Y. App. Div. LEXIS 4810 (N.Y. App. Div. 3d Dep't 2010).

Where allegations in two sexual harassment specifications against the former employee of the New York State Labor Department contained conduct that occurred both during and before the statutory limitations period of N.Y. Civ. Serv. Law § 75(4) and where the hearing officer considered the untimely incidents, the matter had to be remitted because it could not be determined if the untimely allegations influenced the determination of guilt. Matter of Bayer v New York State Dept. of Labor, 28 A.D.3d 865, 812 N.Y.S.2d 691, 2006 N.Y. App. Div. LEXIS 4106 (N.Y. App. Div. 3d Dep't 2006).

Where the allegations against the former employee included incidents that took place within one year of the commencement of the disciplinary proceedings taken against the former employee by the New York State Department of Labor, which was the employer, those allegations fell within the one-year statute of limitations period under N.Y. Civ. Serv. Law § 75(4). Matter of Bayer v New York State Dept. of Labor, 28 A.D.3d 865, 812 N.Y.S.2d 691, 2006 N.Y. App. Div. LEXIS 4106 (N.Y. App. Div. 3d Dep't 2006).

Where some of the sexual harassment allegations occurred within a few days after the coworker began working for the New York State Department of Labor and years before the disciplinary action was brought by the Department against the former employee, those allegations were barred by the one-year limitations period under N.Y. Civ. Serv. Law § 75(4). Matter of Bayer v New York State Dept. of Labor, 28 A.D.3d 865, 812 N.Y.S.2d 691, 2006 N.Y. App. Div. LEXIS 4106 (N.Y. App. Div. 3d Dep't 2006).

Disciplinary charges against a police officer were not time-barred, as the violations concerned charges of sexually inappropriate conduct which, if proved, would have constituted the crime of sexual abuse in the third degree, in violation of N.Y. Penal Law § 130.55, and accordingly, the charge was within the statutory exception under N.Y. Civ. Serv. Law § 75(4). Matter of McKinney v Bennett, 31 A.D.3d 860, 817 N.Y.S.2d 767, 2006 N.Y. App. Div. LEXIS 8628 (N.Y. App. Div. 3d Dep't 2006).

Misconduct charge against an investigator was time-barred by N.Y. Civ. Serv. Law § 75(4) because the charges were brought more than 18 months after the alleged misconduct, and the statutory crime exception did not apply; the alleged misconduct did not allege that the investigator acted with the intent to gain a benefit, which was an essential element required for a conviction of official misconduct, N.Y. Penal Law § 195.00. Thus, since the conduct described in the charge would not have, if proven in court, constituted a crime, the 18-month statute of limitations governed and the charge should have been dismissed as untimely. Matter of Rodriguez v County of Albany, 105 A.D.3d 1124, 962 N.Y.S.2d 801, 2013 N.Y. App. Div. LEXIS 2247 (N.Y. App. Div. 3d Dep't 2013).

Misconduct disciplinary charge against an assistant fire chief was not time-barred as most of the specifications for that charge involved conduct that could be construed to constitute a crime, and other specifications were not clearly completed more that 18 months before the charges were filed as they appeared to be continuing in nature; however, two specifications under the incompetence and/or dereliction of duty charges were more than 18 months old and were time-barred. Matter of Rea v City of Kingston, 110 A.D.3d 1227, 973 N.Y.S.2d 395, 2013 N.Y. App. Div. LEXIS 6739 (N.Y. App. Div. 3d Dep't 2013).

111. Uncharged misconduct

Hearing officer erred in finding school bus driver guilty of 2 uncharged specifications of misconduct and basing his recommendation as to penalty thereon. Collins v Parishville-Hopkinton Cent. Sch. Dist., 256 A.D.2d 700, 681 N.Y.S.2d 132, 1998 N.Y. App. Div. LEXIS 12998 (N.Y. App. Div. 3d Dep't 1998).

112. Waiver

Resignation of affirmative action administrator for State Thruway Authority did not waive her claim for back wages, to which she would be entitled if she could prove her innocence of charges for which she was suspended without pay pending determination of those charges. Figueroa v New York Thruway Auth., 251 A.D.2d 773, 674 N.Y.S.2d 159, 1998 N.Y. App. Div. LEXIS 6780 (N.Y. App. Div. 3d Dep't 1998).

Provision of a collective bargaining agreement (CBA) containing the ostensible waiver of a predisciplinary hearing was ambiguous and thus unenforceable because it was impossible to provide the deputy with a predisciplinary hearing after he had already been disciplined, and, in any event, the CBA provision at issue appeared to preserve the deputy's rights, not waive them. Matter of Ortlieb v Lewis County Sheriff's Dept., 155 A.D.3d 1628, 65 N.Y.S.3d 390, 2017 N.Y. App. Div. LEXIS 8179 (N.Y. App. Div. 4th Dep't 2017).

In a proceeding by an employee of the city transit authority seeking an order reinstating him to a former position and directing payment by the authority to the employee for his loss of salary from the date of the motion to the day of reinstatement, the claim by the employee that his union breached its duty of fair representation by acting arbitrarily or in bad faith was not substantiated where, although the employee claimed that he was misled by his union representative as to the rate of pay he would receive in a new demoted position, the employee's "belief" that the new rate of pay would be slightly higher than what he actually received was not significant enough to invalidate the employee's written waiver of his right to a formal hearing in light of the fact that the schedule setting forth the actual rates of pay for the demoted position was equally available to all parties present at the hearing including the employee, who made no specific request for a review of the rate schedule before signing the waiver; likewise, the employee's allegation that the union further breached its duty of fair representation in misleading him as to the duration of his demotion was not substantiated by evidence where, although the employee testified that he believed that he would be reinstated to his former position in six months, it was established that the rule governing reinstatement was clearly presented to him during the disciplinary proceeding and that such a rule provided that a demotion was usually effective for a period of one year. Allen v New York City Transit Authority, 109 Misc. 2d 178, 439 N.Y.S.2d 811, 1981 N.Y. Misc. LEXIS 2373 (N.Y. Sup. Ct. 1981).

113. Writ of prohibition

Until civil servant, who had been suspended but whose reinstatement had been ordered by court, had exhausted administrative remedies with respect to his claim that he should not be disciplined on the basis of prior conduct because he had not been given a hearing within 30 days of his suspension, court would not issue writ of prohibition to enjoin servant's superiors from holding such a hearing and disciplining the civil servant. Fegert v Mulroy, 80 Misc. 2d 236, 363 N.Y.S.2d 67, 1974 N.Y. Misc. LEXIS 1879 (N.Y. Sup. Ct. 1974).

III. Applicability To Particular Classifications

114. In general

In an Article 78 proceeding brought by a former nontenured laborer in the Office of General Services, who sought reinstatement after being terminated as a result of an incident in which he used abusive language and made unsolicited advances toward a woman being interviewed with respect to unemployment compensation benefits, the Office of General Services was free to affect the termination without reasons and without a hearing due to the employee's nontenured status where the employee failed to demonstrate that the termination was for constitutionally impermissible reasons or prohibited by statute or policies established by decisional law. Stanziale v Executive Dep't of Office of General Services, 55 N.Y.2d 735, 447 N.Y.S.2d 150, 431 N.E.2d 635, 1981 N.Y. LEXIS 3273 (N.Y. 1981).

Rights of tenure to position in the civil service is not determined by the name given to the position; rather, it is the duties of the position that determine the status of the position. Nolan v Tully, 52 A.D.2d 295, 383 N.Y.S.2d 655, 1976 N.Y. App. Div. LEXIS 11999 (N.Y. App. Div. 3d Dep't), dismissed, 40 N.Y.2d 844, 356 N.E.2d 492, 1976 N.Y. LEXIS 5319 (N.Y. 1976).

In an Article 78 proceeding challenging a 60-day suspension of a sergeant in a police department jointly created and maintained by a town and a village, on the grounds of incompetency, improper conduct, and falsifying records, objections alleging that disciplinary charges were brought more than 60 days after the date of the incident on which the charges were based, and alleging that suspension of a disciplined officer should be limited to 20 days, were foreclosed by a collective bargaining agreement that provided for application of Civ S Law § 75 to disciplinary proceedings affecting members of the police department. Luedeke v Board of Police Comm'rs, 87 A.D.2d 669, 448 N.Y.S.2d 832, 1982 N.Y. App. Div. LEXIS 16010 (N.Y. App. Div. 3d Dep't 1982).

In an Article 78 proceeding brought by a city bus driver to review his two-months suspension without pay, the suspension was properly confirmed where the driver allowed his bus to run out of gas on five separate occasions, where he smoked while operating his bus in violation of rules and regulations, and where he knew of a defective gas gauge but failed to take precautionary measures. Bollin v Kingston, 89 A.D.2d 658, 453 N.Y.S.2d 113, 1982 N.Y. App. Div. LEXIS 17777 (N.Y. App. Div. 3d Dep't 1982).

In an Article 78 proceeding brought by a dog control officer to challenge his dismissal by the town board, the officer would be reinstated where charges had been brought against him after an election resulted in his party assuming a minority status on the board, and where the charges against him, including the police department's inability to contact him, his failure to respond to a call in a timely fashion, and his harboring unlicensed dogs, were not supported by "substantial evidence." Finch v Town Bd. of Webster, 89 A.D.2d 797, 453 N.Y.S.2d 506, 1982 N.Y. App. Div. LEXIS 17915 (N.Y. App. Div. 4th Dep't 1982).

An employee of the Facilities Development Corporation was an employee of a public benefit corporation and was not protected by the provisions of Civ S Law § 75. Razzano v Crook, 101 A.D.2d 625, 474 N.Y.S.2d 883, 1984 N.Y. App. Div. LEXIS 18166 (N.Y. App. Div. 3d Dep't 1984).

Special Term properly denied Article 78 petition brought by former state police "Sergeant-Station Commander" who sought review of State Police Superintendent's decision, made without hearing, to remove him from that post, where sergeant failed to exhaust his administrative remedies in that he did not seek timely fourth stage review of his grievance on issue; case was not governed by CLS Civ S § 75(1), which would not have required exhaustion of administrative remedies under these circumstances, but by CLS Exec § 215, which does require completion of grievance procedure before court review can be obtained. Ward v Chesworth, 125 A.D.2d 912, 510 N.Y.S.2d 273, 1986 N.Y. App. Div. LEXIS 63088 (N.Y. App. Div. 3d Dep't 1986), app. denied, 69 N.Y.2d 610, 516 N.Y.S.2d 1025, 509 N.E.2d 360, 1987 N.Y. LEXIS 16435 (N.Y. 1987).

The requirement of notice and hearing in subd. 1 of this section is limited to persons holding positions in the "competitive class of the Civil Service," and even war veterans are not entitled to notice of hearing unless holding positions in the classified service. Application of Lee, 32 Misc. 2d 114, 223 N.Y.S.2d 417, 1962 N.Y. Misc. LEXIS 4070 (N.Y. Sup. Ct. 1962).

Court would dismiss Article 78 proceeding to review discharge of petitioner from his position as legal counsel to county legislature since he was at-will employee subject to termination at any time for any reason or no reason at all, and no constitutionally impermissible purpose was shown. Parr v Onondaga County Legislature, 139 Misc. 2d 975, 529 N.Y.S.2d 672, 1988 N.Y. Misc. LEXIS 300 (N.Y. Sup. Ct. 1988), aff'd, 156 A.D.2d 985, 550 N.Y.S.2d 869, 1989 N.Y. App. Div. LEXIS 16168 (N.Y. App. Div. 4th Dep't 1989).

In the N.Y. C.P.L.R. art. 78, the New York City Health and Hospitals Corporation was properly directed to amend its policy under N.Y. Civ. Serv. Law § 75(1)(c) to include part-time employees among those protected by § 75(1), as the reference to continuous in N.Y. Civ. Serv. Law § 75(1)(c) did not limit the protections of that statute to full-time employees. Saunders v N.Y. City Health & Hosps. Corp., 6 A.D.3d 241, 774 N.Y.S.2d 330, 2004 N.Y. App. Div. LEXIS 4524 (N.Y. App. Div. 1st Dep't 2004).

Petition alleging that petitioner's position was classified, and that she was therefore entitled to pre-termination hearing under CLS Civ S § 75, was outside jurisdiction of Commissioner of Education; parties' dispute as to whether petitioner's position was classified or unclassified must be raised before local or state civil service commission and before Supreme Court in Article 78 proceeding. 1994 Op Comm Ed No. 13271.

115. Classified positions

Where a world war veteran was appointed "guard-county jail" and was later sworn in as a deputy sheriff, having taken no civil service examination, he cannot assert that he was under classified civil service, and consequently his removal without a hearing was not contrary to this section. Fuller v Walsh, 245 A.D. 797, 281 N.Y.S. 405, 1935 N.Y. App. Div. LEXIS 10926 (N.Y. App. Div. 3d Dep't 1935).

Public school bus driver was not member of classified civil service entitled to pre-termination hearing pursuant to section of Civil Service Law and fact that she was offered and granted pre-termination hearing which substantially afforded her protections of that statute could not serve as basis for valid complaint on her part that hearing was not in technical compliance with the statute. Brown v North Syracuse Cent. School Dist., 55 A.D.2d 813, 390 N.Y.S.2d 284, 1976 N.Y. App. Div. LEXIS 15618 (N.Y. App. Div. 4th Dep't 1976).

Decision to terminate Article 78 petitioner from his position as "Medical Specialist II (surgery)" for budgetary reasons based at least in part on that parenthetical designation was proper where Department of Civil Service had uniformly taken position that different parenthetical designations are different positions in lay-off situation, petitioner offered only conclusory allegations that he was targeted for termination because of his involvement in investigation of quality of care offered at facilities where he had worked, and he offered no concrete evidence that might be indicative of bad faith. Dos v Pataki, 238 A.D.2d 338, 655 N.Y.S.2d 652, 1997 N.Y. App. Div. LEXIS 3394 (N.Y. App. Div. 2d Dep't 1997).

An employee in the classified municipal civil service of New York city is not entitled, prior to his removal, to an oral hearing and to be confronted by the witnesses against him, but only to a written statement of the charges, the service of a notice of his proposed removal and the reasons therefor, with a copy of the charges, and a reasonable time to answer. Walsh v Goldwater, 12 N.Y.S.2d 908, 171 Misc. 463, 1939 N.Y. Misc. LEXIS 1968 (N.Y. Sup. Ct. 1939).

Appeal to Commissioner of Education, contending that petitioner was improperly terminated as school custodian and was entitled to whistle-blower protection, was dismissed for lack of subject matter jurisdiction, as CLS Civ S art 5 governs discipline of school employees in classified service. 1998 Op Comm Ed No. 14080.

116. Competitive positions

Removal of one from the position of deputy tax commissioner of New York city, to which position he had been regularly appointed

from a competitive civil service list, without giving him an opportunity of making an explanation, or entering grounds of his removal upon records of the department, is a violation of the city charter. People ex rel. Van Tine v Purdy, 221 N.Y. 396, 117 N.E. 609, 221 N.Y. (N.Y.S.) 396, 1917 N.Y. LEXIS 1313 (N.Y. 1917).

The tenure of office of an employee of New York city, legally appointed to position in exempt class, is not affected by a reclassification placing the position in competitive class. He is transferred without examination (New York City Charter, § 605-v; Local Laws of 1929, No. 13) and where, as a veteran of the world war, he was entitled to a hearing upon charges before removal, the fact that the civil service commission refused to classify the position in the exempt class does not warrant his summary discharge from office. Fornara v Schroeder, 261 N.Y. 363, 185 N.E. 498, 261 N.Y. (N.Y.S.) 363, 1933 N.Y. LEXIS 1295 (N.Y. 1933).

While all appointees of a sheriff whose duties are solely within realm of criminal matters are subject to civil service provisions of the constitution and related statutes, those employees whose duties include civil matters are employed by the sheriff personally and are not subject to civil service regulations. Sirles v Cordary, 49 A.D.2d 330, 374 N.Y.S.2d 793, 1975 N.Y. App. Div. LEXIS 10907 (N.Y. App. Div. 3d Dep't 1975), aff'd, 40 N.Y.2d 950, 390 N.Y.S.2d 413, 358 N.E.2d 1038, 1976 N.Y. LEXIS 3131 (N.Y. 1976).

Town should have granted employee hearing on stated charges before discharging him from his position as building inspector and code enforcement officer since employee held that position when he passed competitive examination and qualified for permanent employment, and, on reappointment by town board, acquired permanent status by operation of law. Seeley v Ellicottville, 132 A.D.2d 993, 518 N.Y.S.2d 521, 1987 N.Y. App. Div. LEXIS 49467 (N.Y. App. Div. 4th Dep't 1987).

The prohibition against removal without notice of the reasons therefor contained in this section applies only to those holding a position in the competitive class. Rohr v Kenngott, 29 N.Y.S.2d 988, 176 Misc. 838, 1940 N.Y. Misc. LEXIS 2645 (N.Y. Sup. Ct. 1940), aff'd, 262 A.D. 944, 29 N.Y.S.2d 992, 1941 N.Y. App. Div. LEXIS 6552 (N.Y. App. Div. 1941).

A typist for a Board of Education who held her position by appointment in a competitive class of the classified civil service was not subject to summary dismissal without complying with this section. Vanderbrook v Cooke, 40 Misc. 2d 81, 242 N.Y.S.2d 686, 1963 N.Y. Misc. LEXIS 2148 (N.Y. Sup. Ct. 1963).

117. —Deputies, generally

For a position to be deemed that of "deputy," it is sufficient, if a statute authorizes the delegation of such types of duties, as ordinarily would be exercised by one occupying a position of "deputy." Behringer v Parisi, 5 N.Y.2d 147, 182 N.Y.S.2d 365, 156 N.E.2d 71, 1959 N.Y. LEXIS 1629 (N.Y. 1959).

Petitioner, an honorably discharged veteran, is not entitled to a hearing prior to removal from office where subd. 1 of this section specifically excludes "deputies" from its protection. Nowicki v Heafy, 44 N.Y.S.2d 482, 180 Misc. 184, 1943 N.Y. Misc. LEXIS 2468 (N.Y. Sup. Ct. 1943).

Even though an employee may be called a deputy, he is not a deputy within the meaning of the exclusionary provision of this section unless he is authorized by statute to act for and on behalf of the principal officer or unless his duties are prescribed by statute in such a manner as to make him in legal effect a deputy. Heath v Creagh, 96 N.Y.S.2d 247, 197 Misc. 537, 1949 N.Y. Misc. LEXIS 3192 (N.Y. Sup. Ct. 1949), aff'd, 276 A.D. 948, 94 N.Y.S.2d 901, 1950 N.Y. App. Div. LEXIS 5255 (N.Y. App. Div. 1950).

In determining whether appointee is entitled to benefit of veteran's discharge statute, appointee's status as "deputy" is determined not by what appointee in fact does, but by what he is directed or authorized to do by statute, i. e., whether there is statute authorizing principal officer to delegate his duties to subordinate, and definition of "deputy" in context of veteran's discharge statute may be broader than definition used in jurisdictional classification sections. Clarke v O'Brien, 91 Misc. 2d 190, 397 N.Y.S.2d 509, 1975 N.Y. Misc. LEXIS 3389 (N.Y. Sup. Ct. 1975), aff'd, 56 A.D.2d 869, 392 N.Y.S.2d 383, 1977 N.Y. App. Div. LEXIS 11233 (N.Y. App. Div. 2d Dep't 1977).

118. — —Deputy attorneys

Under the charter of New York city an assistant corporation counsel is a deputy within exception of this section. An order of mandamus to compel reinstatement of petitioner, an honorably discharged sailor of the world war, in the position of assistant corporation counsel of New York city, from which he had been removed summarily, without cause, was, therefore, properly denied. Byrnes v Windels, 265 N.Y. 403, 193 N.E. 248, 265 N.Y. (N.Y.S.) 403, 1934 N.Y. LEXIS 1052 (N.Y. 1934).

An Assistant Attorney-General, who was suspended without pay following his indictment for perjury and bribe receiving and who was a veteran of the armed forces, is not entitled to a hearing pursuant to paragraph (b) of subdivision 1 of section 75 of the Civil Service Law for, while that statute requires that a veteran be given a hearing, it excepts a person who holds the position of "deputy" and Assistant Attorneys-General are deputies within the meaning of paragraph (b); sections 62 and 63 of the Executive Law contemplate delegation of the Attorney-General's authority to Assistant Attorneys-General. In addition, the general nature of the position—the responsibilities, duties and functions—dictates that Assistant Attorneys-General be held to be deputies of the Attorney-General. De Lucia v Lefkowitz, 62 A.D.2d 674, 406 N.Y.S.2d 150, 1978 N.Y. App. Div. LEXIS 10893 (N.Y. App. Div. 3d Dep't 1978), aff'd, 48 N.Y.2d 901, 424 N.Y.S.2d 897, 400 N.E.2d 1349, 1979 N.Y. LEXIS 2516 (N.Y. 1979).

The Secretary of the Investigation Department and Examining Attorneys are Deputies whose employment could be terminated without charges. Darcy v Fraiman, 49 Misc. 2d 319, 267 N.Y.S.2d 455, 1966 N.Y. Misc. LEXIS 2247 (N.Y. Sup. Ct.), aff'd, 25 A.D.2d 951, 270 N.Y.S.2d 374, 1966 N.Y. App. Div. LEXIS 7461 (N.Y. App. Div. 1st Dep't 1966).

Assistant district attorney was "deputy" and was not entitled to procedural safeguards of veteran's discharge statute. Clarke v O'Brien, 91 Misc. 2d 190, 397 N.Y.S.2d 509, 1975 N.Y. Misc. LEXIS 3389 (N.Y. Sup. Ct. 1975), aff'd, 56 A.D.2d 869, 392 N.Y.S.2d 383, 1977 N.Y. App. Div. LEXIS 11233 (N.Y. App. Div. 2d Dep't 1977).

Attorney was not protected from discharge by CLS Civ S Law § 75(1)(b), where attorney was discharged from his Deputy County Attorney position, but contended that, as a veteran, he was protected from discharge by the statute, but the issue was whether he was a "deputy" and therefore excluded from the statute's protection, because county attorney may delegate his duties to deputy attorneys and direct them to act in his absence. Tranello v Frey, 758 F. Supp. 841, 1991 U.S. Dist. LEXIS 3394 (W.D.N.Y. 1991), aff'd, 962 F.2d 244, 1992 U.S. App. LEXIS 27263 (2d Cir. N.Y. 1992).

119. — —Deputy sheriffs

Deputy sheriff was entitled to hearing with respect to his suspension prior to termination, in absence of proof that deputy's duties were related to noncriminal functions. Durham v Amico, 52 A.D.2d 724, 382 N.Y.S.2d 169, 1976 N.Y. App. Div. LEXIS 12417 (N.Y. App. Div. 4th Dep't 1976).

Article 78 petition for review of sheriff's action in terminating petitioner's employment as civil deputy sheriff without cause, in violation of collective bargaining agreement which afforded civil deputy sheriffs same rights and privileges as competitive class employees under CLS Civ S § 75, should not have been dismissed on ground that sheriff is not subject to contract provision limiting his power to discharge deputy sheriffs performing civil functions because he is personally responsible for their actions since (1) exception to this rule exists where, by legislative enactment, county has assumed liability for civil deputies, and (2) county had, by local law, assumed liability for county employees, including civil deputy sheriffs. Oneida County Deputy Sheriff's Benevolent Asso. v Hasenauer, 145 A.D.2d 984, 536 N.Y.S.2d 622, 1988 N.Y. App. Div. LEXIS 14087 (N.Y. App. Div. 4th Dep't 1988).

Penalty of dismissal of deputy sheriff was so disproportionate to his offense of failing to safeguard his privately owned weapon as to be shocking to one's sense of fairness, and thus would be reduced to suspension without pay for 18 months. Barresi v

Mahoney, 240 A.D.2d 570, 658 N.Y.S.2d 451, 1997 N.Y. App. Div. LEXIS 6598 (N.Y. App. Div. 2d Dep't), app. denied, 90 N.Y.2d 812, 666 N.Y.S.2d 100, 688 N.E.2d 1382, 1997 N.Y. LEXIS 3664 (N.Y. 1997).

120. — —Other specific deputies

The Workmen's Compensation Law § 141, by authorizing the Chairman to delegate her powers of administration to the heads of bureaus and sections, provided for the creation of deputies within the meaning of this section of the Civil Service Law. The question, as to whether a District Administrator appointed by the Chairman of the Workmen's Compensation Board was a deputy, could not be disposed of summarily, since there was an issue as to the actual exercise by the District Administrator of the powers and duties of the Chairman. Behringer v Parisi, 5 N.Y.2d 147, 182 N.Y.S.2d 365, 156 N.E.2d 71, 1959 N.Y. LEXIS 1629 (N.Y. 1959).

Petitioner, a deputy county clerk, comes within the exception noted in this section, and his duties, as defined by law, are conclusive that in supervising work of indexing and re-indexing conveyances, mortgages, etc., he acted within the scope of a deputy. WISNER v THORP, 243 A.D. 709, 243 A.D. 710, 277 N.Y.S. 2, 1935 N.Y. App. Div. LEXIS 7868 (N.Y. App. Div. 2d Dep't 1935).

Where duties of petitioner, a world war veteran, consisted solely of ministerial and subordinate acts, a title of "Deputy" did not bring him within exemption of this section, subd. 2, but petitioner is protected in his position by subd. 1 to extent that he may not be removed save upon proven charges of incompetence or misconduct. Petrillo v Lynn, 243 A.D. 796, 278 N.Y.S. 11, 1935 N.Y. App. Div. LEXIS 8348 (N.Y. App. Div.), aff'd, 268 N.Y. 673, 198 N.E. 552, 268 N.Y. (N.Y.S.) 673, 1935 N.Y. LEXIS 1142 (N.Y. 1935).

In creating the position of deputy commissioner of the state athletic commission and plainly designating the persons to be appointed thereto "deputies," the legislature must have intended the position to be excluded from the protection afforded by the Civil Service Law; The position of deputy commissioner of the State Athletic Commission is a deputy position within the meaning of this section. Hence, petitioner could be removed from that position without charges or a hearing. Erikson v Helfand, 1 A.D.2d 59, 147 N.Y.S.2d 157, 1955 N.Y. App. Div. LEXIS 3708 (N.Y. App. Div. 3d Dep't 1955), aff'd, 1 N.Y.2d 775, 153 N.Y.S.2d 48, 135 N.E.2d 586, 1956 N.Y. LEXIS 885 (N.Y. 1956).

A trial was properly ordered in an Art 78 proceeding brought by the former executive assistant for legislative affairs to the State Superintendent of Insurance, who challenged his removal from such position on the ground that, as a veteran, he could not be removed except for incompetency or misconduct after a hearing upon stated charges under Civ S Law § 75(1)(b), where an issue of fact existed as to whether petitioner was excepted as a deputy from the claimed protection; respondent superintendent was authorized to delegate his duties under Ins Law §§ 10, 11, 16, but, although petitioner had been empowered to represent respondent before various public and private organizations and committees, it was unclear from the record to what extent petitioner was authorized to so represent respondent, and much of the work he performed, such as tracking legislation and preparing testimony, was not of an administrative type and not particular to respondent given the closeness of the issue, the actual exercise of authority by petitioner would be ordered scrutinized in the trial and considered in resolving the question of deputyship. Sullivan v Superintendent of Ins., 103 A.D.2d 914, 478 N.Y.S.2d 153, 1984 N.Y. App. Div. LEXIS 19582 (N.Y. App. Div. 3d Dep't 1984), aff'd, 64 N.Y.2d 1074, 489 N.Y.S.2d 904, 479 N.E.2d 249, 1985 N.Y. LEXIS 14215 (N.Y. 1985).

Petitioner, whose duties consisted of inspecting properties, measuring plots, and miscellaneous assessing and clerical work, and who was not authorized to act in place of any of the members of the board of assessors in their absence or inability to act, was not a "deputy" within purview of statute. Steen v Nassau County, 38 N.Y.S.2d 496, 179 Misc. 821, 1942 N.Y. Misc. LEXIS 2210 (N.Y. Sup. Ct.), aff'd, 265 A.D. 858, 37 N.Y.S.2d 1023, 1942 N.Y. App. Div. LEXIS 6199 (N.Y. App. Div. 1942).

Petitioner, who was appointed Metropolitan Realty Appraiser, was discharged. He applied for exemption granted veterans under subsection 1(b) of this section, which subsection excludes deputies. Held: since there was another person in the same tax office with the title of Metropolitan Estate Tax Supervisor, the petitioner was a deputy appraiser, and could not qualify for exemption. Also, the petitioner was appointed under the provision in § 249-u of the Tax Law, providing for appointment of deputy appraisers, instead of under the phrase "other employees." Morton v Murphy, 19 Misc. 2d 272, 188 N.Y.S.2d 799, 1959 N.Y. Misc. LEXIS 3838 (N.Y. Sup. Ct. 1959), rev'd, 11 A.D.2d 880, 203 N.Y.S.2d 222, 1960 N.Y. App. Div. LEXIS 8414 (N.Y. App. Div. 3d Dep't 1960).

Whether a veteran who was discharged from a civil service position without filing of charges against him or being given a hearing, was a "deputy" of a borough president while acting as Superintendent of Sewers, so as to be subject to summary discharge, required further inquiry into the nature of his duties and the facts. Levy v Periconi, 35 Misc. 2d 1012, 231 N.Y.S.2d 924, 1962 N.Y. Misc. LEXIS 3022 (N.Y. Sup. Ct. 1962).

The duties of the petitioner as executive director and secretary of the Housing Authority in complete charge of the management of housing projects were neither as a private secretary nor a deputy within the exceptions of the statute but rather the incumbent by appointment of a position which was under the control of and subordinate to the Authority and therefore entitled to protection, notwithstanding the existence of an expired contract. McGarry v Syracuse Housing Authority, 64 Misc. 2d 578, 315 N.Y.S.2d 465, 1970 N.Y. Misc. LEXIS 1286 (N.Y. Sup. Ct. 1970).

121. Department heads, directors and the like

The chief examiner in the office of the president of the board of aldermen of New York city was a legislative employee, and removable by the president summarily without a hearing upon charges, notwithstanding that he was an honorably discharged soldier of U.S. McEneny v McKee, 262 N.Y. 494, 188 N.E. 35, 262 N.Y. (N.Y.S.) 494, 1933 N.Y. LEXIS 1010 (N.Y. 1933).

The City of New York had the right to fire a director of the City Veteran's Service Agency where the petitioner wholly failed to meet and overcome the documentary proof showing that he was the head of a department and not a subordinate employee. Hence, the provisions of this section [limiting the power to remove veterans and those in the classified civil service] do not apply. This section did not prohibit the Mayor of the City of New York from firing, without a hearing, the director of the City Veteran's Service Agency where the proof showed that petitioner was the head of a department and not a subordinate employee. Brickman v Wagner, 284 A.D. 942, 134 N.Y.S.2d 816, 1954 N.Y. App. Div. LEXIS 4140 (N.Y. App. Div. 1954), aff'd, 309 N.Y. 921, 131 N.E.2d 915, 309 N.Y. (N.Y.S.) 921, 1955 N.Y. LEXIS 1659 (N.Y. 1955).

In a proceeding against a county and certain of its officers in which the petitioner claimed that the respondents had taken part in a conspiracy, in a malicious attempt to force him to resign from his position as director of the county water agency, and that such actions resulted in a de facto suspension without pay and without any disciplinary proceeding having been held, such actions being allegedly in violation of Civ S Law § 75 and of the New York State Constitution, Art V, § 6, an order dismissing the petition on the ground that administrative remedies had not been exhausted under applicable local personnel rules would be reversed and the petition reinstated with the matter being remitted to Special Term for further proceedings, since the nature of petitioner's claim was such that it fit none of the categories specified in the local rules referred to as a basis for dismissal and since, inasmuch as the petitioner claimed that the county had violated his statutory and constitutional rights in its conduct toward him, the rule of exhaustion of administrative remedies was not applicable. Dineen v Borghard, 100 A.D.2d 547, 473 N.Y.S.2d 247, 1984 N.Y. App. Div. LEXIS 17519 (N.Y. App. Div. 2d Dep't 1984).

Determination by town board, reducing petitioner's salary grade as to his permanent appointment as Commissioner of Public Works, was improperly annulled on ground that there existed no allegations that his work performance was anything other than adequate since there was evidence indicating need to tend to budgetary concerns, coupled with changes noted in petitioner's responsibilities and his failure to show that action

was done in contravention or in attempt to circumvent protections afforded by CLS Civ S § 75. Kent v Town of Niskayuna, 244 A.D.2d 829, 665 N.Y.S.2d 718, 1997 N.Y. App. Div. LEXIS 12103 (N.Y. App. Div. 3d Dep't 1997).

Since, under § 9 of this law, a head of department receives no civil service protection, and, under this section (former § 22), a veteran is not entitled to any protection if he is a head of department, under the terms of the Charter of the City of North Tonawanda, a war veteran, appointed as Chief Engineer of the Fire Department, could be replaced by another appointee without filing of written charges against him or a hearing. Kropp v Common Council of North Tonawanda, 26 Misc. 2d 127, 207 N.Y.S.2d 411, 1960 N.Y. Misc. LEXIS 2199 (N.Y. Sup. Ct. 1960).

122. Exempt positions, generally

Positions in the exempt class are included in the protection afforded by this section. Fornara v Schroeder, 261 N.Y. 363, 185 N.E. 498, 261 N.Y. (N.Y.S.) 363, 1933 N.Y. LEXIS 1295 (N.Y. 1933).

Appellate Division lacked jurisdiction to review petitioner's termination as county attorney because, as exempt employee, he had no right to hearing under CLS Civ S § 75. Testa v Valenza, 133 A.D.2d 540, 519 N.Y.S.2d 1012, 1987 N.Y. App. Div. LEXIS 50039 (N.Y. App. Div. 4th Dep't 1987).

Court would dismiss Article 78 proceeding challenging petitioner's dismissal as executive director of thruway authority on ground that he could not be dismissed without charges and hearing as provided by CLS Civ S § 75 since (1) he was exempt employee not protected by § 75, (2) resolution approved by thruway authority, granting statutory protection to exempt employees, was void as attempt to reclassify exempt positions without following procedures of CLS Civ S § 20, and (3) resolution was also void as ultra vires attempt to bind future boards of authority. Martin v Hennessy, 147 A.D.2d 800, 537 N.Y.S.2d 676, 1989 N.Y. App. Div. LEXIS 1451 (N.Y. App. Div. 3d Dep't 1989).

Trial court properly remitted a disciplinary matter to a fire department for further proceedings because, while a volunteer firefighter's exempt status, standing alone, did not entitle him to the Civil Service Law protection where he was neither a permanent employee nor a permanent appointee, and the fire department officials were required to comply with the procedures set forth in the General Municipal Law. Matter of McEvoy v Oyster Bay Fire Co. No. 1, 117 A.D.3d 953, 986 N.Y.S.2d 187, 2014 N.Y. App. Div. LEXIS 3628 (N.Y. App. Div. 2d Dep't 2014).

Board of Elections had power to remove its administrative officer at will where all board positions were classified in the exempt class. Quinto v Havens, 6 Misc. 2d 639, 163 N.Y.S.2d 713, 1957 N.Y. Misc. LEXIS 3009 (N.Y. Sup. Ct. 1957).

123. —Secretaries

The provision "Nothing in this section shall be construed to apply to the position of private secretary of any official or department" contained in subd. 2, embraces every person holding the position of secretary under § 13 of this chapter. Glassman v Fries, 271 N.Y. 116, 2 N.E.2d 281, 271 N.Y. (N.Y.S.) 116, 1936 N.Y. LEXIS 1174 (N.Y. 1936), reh'g denied, 273 N.Y. 498, 6 N.E.2d 422, 273 N.Y. (N.Y.S.) 498, 1937 N.Y. LEXIS 1234 (N.Y. 1937).

Subd. 2 of this section does not apply to the position of executive secretary of the commissioners of Allegheny State Park, where such official, in addition to clerical work, had supervision of the work of all employees in three state parks, and his duties were those of a superintendent rather than of a secretary within the exceptions to be found in § 13, subd. 2. Mercer v Dowd, 288 N.Y. 381, 43 N.E.2d 452, 288 N.Y. (N.Y.S.) 381, 1942 N.Y. LEXIS 1001 (N.Y. 1942).

A veteran who is a secretary in the exempt class of civil service and who derives his duties and functions from his appointing board or commission is entitled to protection of Civil Service Law and, hence, to a hearing before he can be discharged. Switzer v Sanitary Dist. No. 7, 59 A.D.2d 889, 399 N.Y.S.2d 43, 1977 N.Y. App. Div. LEXIS 14076 (N.Y. App. Div. 2d Dep't 1977), app. dismissed, 43 N.Y.2d 845, 1978 N.Y. LEXIS 2671 (N.Y. 1978).

The secretary or assistant secretary of the state architect is not entitled to a writ of mandamus to compel his reinstatement after removal, though he be an exempt fireman and no charges were made against him. Willard v Pilcher, 155 N.Y.S. 913, 92 Misc. 30, 1915 N.Y. Misc. LEXIS 654 (N.Y. Sup. Ct. 1915).

An individual need not stand in a confidential relation to the appointing officer to come within the designation of a private secretary. Where the petitioner, a secretary to the Commissioner of the Department of Marine and Aviation of the City of New York, acted in conjunction with and under the immediate direction of the Commissioner and had activities which were elastic and varied according to the exigencies of the day-to-day operations of the department, he performed the normal functions of a private secretary and hence was not protected by this section. Schwartz v Board of Estimate, 118 N.Y.S.2d 364, 203 Misc. 701, 1953 N.Y. Misc. LEXIS 1447 (N.Y. Sup. Ct.), aff'd, 282 A.D. 663, 122 N.Y.S.2d 136, 1953 N.Y. App. Div. LEXIS 4575 (N.Y. App. Div. 1953).

124. —Veterans

The facts that a position in state civil service has been placed in the exempt class and that the appointing power is authorized by law to remove employees at pleasure do not preclude an honorably discharged soldier of the World War, when notified of his discharge from such a position, from assertion of his rights as a veteran under this section. Mercer v Dowd, 288 N.Y. 381, 43 N.E.2d 452, 288 N.Y. (N.Y.S.) 381, 1942 N.Y. LEXIS 1001 (N.Y. 1942).

A part-time lieutenant in a town's police department was entitled to the additional protection of the Civil Service Law pursuant to Civ S Law § 75 during a disciplinary hearing before the town board, where the lieutenant was an honorably discharged veteran who had served during time of war. Owen v Town Board of Wallkill, 94 A.D.2d 768, 462 N.Y.S.2d 715, 1983 N.Y. App. Div. LEXIS 18227 (N.Y. App. Div. 2d Dep't), app. denied, 60 N.Y.2d 560, 1983 N.Y. LEXIS 5745 (N.Y. 1983).

Positions of associate attorney in the Department of Taxation and Finance, were in the exempt class, not covered by the Civil Service Law prohibiting removal of veterans except for misconduct or incompetency after a hearing. Bass v Bragalini, 143 N.Y.S.2d 490, 207 Misc. 1055, 1955 N.Y. Misc. LEXIS 2865 (N.Y. Sup. Ct.), aff'd, 286 A.D. 944, 143 N.Y.S.2d 494, 1955 N.Y. App. Div. LEXIS 4557 (N.Y. App. Div. 1955), app. denied, 286 A.D. 979, 144 N.Y.S.2d 723, 1955 N.Y. App. Div. LEXIS 4771 (N.Y. App. Div. 1955).

The fact that petitioner was classified "exempt" does not prevent his assertion of rights as a veteran since that classification is subject to the Civil Service Law. Gellman v County of Nassau, 52 Misc. 2d 732, 276 N.Y.S.2d 703, 1967 N.Y. Misc. LEXIS 1857 (N.Y. Sup. Ct. 1967), aff'd, 29 A.D.2d 1049, 290 N.Y.S.2d 708, 1968 N.Y. App. Div. LEXIS 6025 (N.Y. App. Div. 2d Dep't 1968).

125. Independent officers, generally

A person holding a position in the noncompetitive class falls into the category of an "independent officer" and, hence, is not entitled to protection of Civil Service Law governing removal and other disciplinary action where his position is created and his powers and duties are prescribed by statute and he exercises a high degree of initiative and independent judgment. Nolan v Tully, 52 A.D.2d 295, 383 N.Y.S.2d 655, 1976 N.Y. App. Div. LEXIS 11999 (N.Y. App. Div. 3d Dep't), dismissed, 40 N.Y.2d 844, 356 N.E.2d 492, 1976 N.Y. LEXIS 5319 (N.Y. 1976).

Fact that duties of counsel to New York State Crime Victims Board were not statutorily defined, but were left to board to prescribe under CLS Exec § 623(2), was not determinative of whether counsel was independent officer for whom CLS Civ S § 75(1)(b) offered no protection from termination. Oakley v New York State Crime Victims Bd., 245 A.D.2d 761, 665 N.Y.S.2d 463, 1997 N.Y. App. Div. LEXIS 12939 (N.Y. App. Div. 3d Dep't 1997).

To the exceptions created by this section has been added another judicial interpretation, specifically, that of an "independent officer". Although the determination of whether a particular person is an independent officer or a subordinate employee must depend in each case upon its own facts, the following guidelines are to be used in making that determination: (1) was his office created by statute; (2) are his powers and duties defined by statute; (3) does he exercise a high degree of initiative and

independent judgment. Gellman v County of Nassau, 52 Misc. 2d 732, 276 N.Y.S.2d 703, 1967 N.Y. Misc. LEXIS 1857 (N.Y. Sup. Ct. 1967), aff'd, 29 A.D.2d 1049, 290 N.Y.S.2d 708, 1968 N.Y. App. Div. LEXIS 6025 (N.Y. App. Div. 2d Dep't 1968).

Exception to veteran's discharge statute for "independent officer" is applicable to those positions where appointee exercises independent judgment and discretion in discharge of his duties. Clarke v O'Brien, 91 Misc. 2d 190, 397 N.Y.S.2d 509, 1975 N.Y. Misc. LEXIS 3389 (N.Y. Sup. Ct. 1975), aff'd, 56 A.D.2d 869, 392 N.Y.S.2d 383, 1977 N.Y. App. Div. LEXIS 11233 (N.Y. App. Div. 2d Dep't 1977).

126. —Specific independent officers

A transfer tax appraiser, appointed pursuant to § 229 of this tax law, is an independent official and not a subordinate employee. He may, therefore, be removed from office without charges or a hearing even though he be a veteran of World War. Mylod v Graves, 274 N.Y. 381, 9 N.E.2d 18, 274 N.Y. (N.Y.S.) 381, 1937 N.Y. LEXIS 857 (N.Y. 1937).

A village attorney occupied an independent rather than a subordinate position and therefore, although a war veteran, was not entitled to protection from removal under this section. Pinkus v Hempstead, 294 N.Y. 719, 61 N.E.2d 453, 294 N.Y. (N.Y.S.) 719, 1945 N.Y. LEXIS 920 (N.Y. 1945).

The Clerk of the Surrogate's Court of Erie County is an independent officer and not a subordinate employee entitled to the protection of this section. O'Day v Yeager, 308 N.Y. 580, 127 N.E.2d 585, 308 N.Y. (N.Y.S.) 580, 1955 N.Y. LEXIS 965 (N.Y. 1955).

A compensation claims referee employed by the Workmen's Compensation Board was not entitled to the protection of subdivision 1 of this section. The referee's duties closely approached the judicial function and required a high degree of independent judgment. Elterman v Parisi, 7 A.D.2d 771, 180 N.Y.S.2d 78, 1958 N.Y. App. Div. LEXIS 4090 (N.Y. App. Div. 3d Dep't 1958).

Duties performed by petitioners, who were in positions in the noncompetitive class of the civil service as estate tax attorneys (part-time), were those of independent officers and, hence, petitioners were not protected by provision of Civil Service Law governing removal and other disciplinary action since decisions which petitions were called upon to make involved use of discretionary powers and independent determination; fact that some of their duties might be more or less than ministerial did not affect their status as an "independent officer" since, to fall into such category, it is only necessary that some sovereign power, whether great or small, be exercised. Nolan v Tully, 52 A.D.2d 295, 383 N.Y.S.2d 655, 1976 N.Y. App. Div. LEXIS 11999 (N.Y. App. Div. 3d Dep't), dismissed, 40 N.Y.2d 844, 356 N.E.2d 492, 1976 N.Y. LEXIS 5319 (N.Y. 1976).

Town's authority to terminate petitioner's service was not limited by CLS Civ S § 75 since, as town building inspector, petitioner was not public employee, but was public officer who held her position at pleasure of town board; further, town did not remove petitioner from office during her term, but instead declined to reappoint her to another term. Cathy v Prober, 195 A.D.2d 999, 600 N.Y.S.2d 561, 1993 N.Y. App. Div. LEXIS 7796 (N.Y. App. Div. 4th Dep't), app. denied, 82 N.Y.2d 660, 605 N.Y.S.2d 5, 625 N.E.2d 590, 1993 N.Y. LEXIS 4242 (N.Y. 1993).

City's elimination of position of Community Development Attorney was done in good faith in response to fiscal considerations, not as subterfuge for disciplinary action, where (1) city was faced with financial crisis in view of declining revenues, (2) although attorney's salary was paid by federal funds, its elimination allowed those funds to be used for other purposes, (3) city largely shifted attorney's work to either City Corporation Counsel or outside private counsel, (4) no one was hired in attorney's place, and no other position was created to perform his duties, (5) number of urban renewal projects had dropped sharply, (6) evaluation of attorney's position by outside source indicated that his position was not needed, and (7) city achieved savings in abolishing 20 positions, including attorney's, and thus was able to reduce its tax burden and make more efficient use of limited federal funding. Mucci v City of Binghamton, 245 A.D.2d 678, 664 N.Y.S.2d 396, 1997 N.Y. App. Div. LEXIS 12570 (N.Y. App. Div. 3d Dep't 1997), app. dismissed, 91 N.Y.2d 921, 669 N.Y.S.2d 262, 692 N.E.2d 131, 1998 N.Y. LEXIS 256 (N.Y. 1998), app. denied, 92 N.Y.2d 802, 677 N.Y.S.2d 72, 699 N.E.2d 432, 1998 N.Y. LEXIS 1770 (N.Y. 1998).

Permanent appointee to position of counsel to New York State Crime Victims Board was independent officer for whom CLS Civ S § 75(1)(b) offered no protection from termination, even though he performed some ministerial tasks and was required to follow board's rules and regulations, where he occupied policy making position that shaped and guided board's agenda and actions, so that board's full trust and confidence in him was essential, and his duties included providing legal assistance and advice to board, coordinating its response to its legal and administrative duties, developing, formulating, and finalizing adoption of rules and regulations, working with attorney general in handling litigation involving board, and developing and formulating policies and programs to promote rights and interests of crime victims. Oakley v New York State Crime Victims Bd., 245 A.D.2d 761, 665 N.Y.S.2d 463, 1997 N.Y. App. Div. LEXIS 12939 (N.Y. App. Div. 3d Dep't 1997).

Warden failed to prove that real reason for his demotion to assistant deputy warden was retaliation for his union activities and his filing of discrimination complaint where warden, after questioning policy concerning hospital visits to wounded correction officers, reacted with aggressive defiance to superior's attempt to "correct" his reluctance, twice failed to follow protocol of saluting superior officer, and was evaluated by psychologist as having questionable ability to follow authority. Meehan v Schembri, 251 A.D.2d 200, 675 N.Y.S.2d 858, 1998 N.Y. App. Div. LEXIS 7375 (N.Y. App. Div. 1st Dep't), app. denied, 92 N.Y.2d 809, 678 N.Y.S.2d 595, 700 N.E.2d 1231, 1998 N.Y. LEXIS 2872 (N.Y. 1998).

General Counsel for State Energy Office was independent officer in policy-making or advisory position, was not entitled to limited tenure protection afforded by CLS Civ S § 75(1)(b), and thus was disqualified by CLS Labor § 565(2)(e) from receiving unemployment insurance benefits when his position was abolished where (1) absence of statutory provision creating his position did not preclude finding that he was independent officer, (2) his position in organization of State Energy Office was not that of subordinate employee, and (3) all of his duties and responsibilities required high degree of initiative and independent judgment. In re Claim of Fromer, 286 A.D.2d 816, 730 N.Y.S.2d 365, 2001 N.Y. App. Div. LEXIS 8622 (N.Y. App. Div. 3d Dep't 2001).

The mere fact that petitioner actually hired and discharged employees and generally conducted affairs of two departments, does not warrant a determination that he was an officer of village. Naughton v Boyle, 223 N.Y.S. 432, 129 Misc. 867, 1927 N.Y. Misc. LEXIS 960 (N.Y. Sup. Ct. 1927).

Principal assistant district attorney did not come within "independent officer" exception to veteran's discharge statute. Clarke v O'Brien, 91 Misc. 2d 190, 397 N.Y.S.2d 509, 1975 N.Y. Misc. LEXIS 3389 (N.Y. Sup. Ct. 1975), aff'd, 56 A.D.2d 869, 392 N.Y.S.2d 383, 1977 N.Y. App. Div. LEXIS 11233 (N.Y. App. Div. 2d Dep't 1977).

A town comptroller, being an "independent officer" rather than a "subordinate employee," is not protected by the provisions of this section; however, he can be removed from office prior to expiration of his term only pursuant to § 36 of the Public Officers Law. 1961 Op St Compt #550.

127. Laborers

An honorably-discharged World War veteran employed as laborer in non-competitive class is not entitled, under subds. 1 or 2 of this section, to a hearing as a condition precedent to imposition of fine, inasmuch as fine of ten days' pay is not tantamount to removal within meaning of subd. 1 of this section. Greenfield v Moses, 7 N.Y.S.2d 356, 169 Misc. 389, 1938 N.Y. Misc. LEXIS 2051 (N.Y. Sup. Ct. 1938), aff'd, 257 A.D. 809, 12 N.Y.S.2d 585, 1939 N.Y. App. Div. LEXIS 7930 (N.Y. App. Div. 1939).

128. Non-competitive positions

In a proceeding under Civil Pr Act, Art 78, to compel reinstatement, on the ground that removal from a position was violative of Civ Ser Law, §§ 22 and 25, it is error for the court at special term

to dismiss a petition upon ground that § 22 is not applicable to position of cashier and that § 25 has no application to one in the exempt or noncompetitive class. Rohr v Kenngott, 288 N.Y. 97, 41 N.E.2d 905, 288 N.Y. (N.Y.S.) 97, 1942 N.Y. LEXIS 1061 (N.Y. 1942).

Petitioner, former Chief Cancer Research Clinician at Roswell Park Memorial Institute, a permanent noncompetitive civil service position, was not entitled to a hearing before termination of his services for shortcomings as a departmental administrator and his job performance in a supervisory position. He was not entitled to a hearing by § 75 of the Civil Service Law, and he could not establish a sufficient property interest in continued public employment deserving due process protection. Moreover, the reasons for his discharge were not so stigmatizing as to warrant a hearing to protect his good name and reputation. Carter v Murphy, 80 A.D.2d 960, 437 N.Y.S.2d 344, 1981 N.Y. App. Div. LEXIS 10860 (N.Y. App. Div. 3d Dep't 1981).

In an Article 78 proceeding by a school bus driver, challenging her dismissal by the school district after complaints were received from parents as to the driver's safety and disciplinary problems, dismissal without a hearing was proper since the driver, as a permanent employee of a school district in the noncompetitive class, was an "at will" employee who was not entitled to tenure protections under Civ S Law § 75. Voorhis v Warwick Valley Cent. School Dist., 92 A.D.2d 571, 459 N.Y.S.2d 325, 1983 N.Y. App. Div. LEXIS 16808 (N.Y. App. Div. 2d Dep't 1983).

Employment for indefinite term is presumed to be hiring at will which may be freely terminated by either party at anytime for any reason or even for no reason; employer, public or private has unqualified right to terminate at-will employee without any kind of hearing, absent constitutionally impermissible purpose, statutory proscription, or express limitation in individual contract of employment; unclassified civil service employee has no right to pre-termination hearing; public employees in noncompetitive class are protected from bad-faith discharge but remain "at will" employees subject to dismissal upon proper exercise of appointing authority's discretion; part-time school bus driver may be dismissed for dropping 4-year-old pre-kindergarten student approximately 2 miles away from designated drop-off point. Tyson v Hess, 109 A.D.2d 1068, 487 N.Y.S.2d 206, 1985 N.Y. App. Div. LEXIS 47559 (N.Y. App. Div. 4th Dep't), aff'd, 66 N.Y.2d 943, 498 N.Y.S.2d 778, 489 N.E.2d 747, 1985 N.Y. LEXIS 18246 (N.Y. 1985).

Employee discharged from his position as division engineer with New York City Transit Authority was not entitled to hearing under CLS Civ S § 75 since his status as noncompetitive employee did not afford him protections of that statute. Garner v Gunn, 131 A.D.2d 632, 516 N.Y.S.2d 718, 1987 N.Y. App. Div. LEXIS 48098 (N.Y. App. Div. 2d Dep't), app. denied, 70 N.Y.2d 608, 521 N.Y.S.2d 225, 515 N.E.2d 910, 1987 N.Y. LEXIS 18934 (N.Y. 1987).

Rights afforded to permanent, competitive employee under CLS Civ S § 75 did not extend to county Superintendent of Highways after expiration of his 4-year term of office pursuant to CLS High § 100. Wheeler v County of Wash., 259 A.D.2d 902, 686 N.Y.S.2d 531, 1999 N.Y. App. Div. LEXIS 2375 (N.Y. App. Div. 3d Dep't 1999).

If terminated school bus driver were not exempt volunteer firefighter, he would not be entitled to any rights under CLS Civ S § 75 where he had not completed at least 5 years of continuous service in his noncompetitive class position as required by CLS Civ S § 75(1)(c). Wamsley v E. Ramapo Cent. Sch. Dist. Bd. of Educ., 281 A.D.2d 633, 723 N.Y.S.2d 53, 2001 N.Y. App. Div. LEXIS 3049 (N.Y. App. Div. 2d Dep't 2001).

School bus driver's probationary term of employment expired long before he was discharged, and thus his employment had become permanent at time of discharge, where that term began on October 5, 1998, and ended 26 weeks later as permissibly extended by his 5 ½ days of absence, and his discharge was effective on August 25, 1999. Wamsley v E. Ramapo Cent. Sch. Dist. Bd. of Educ., 281 A.D.2d 633, 723 N.Y.S.2d 53, 2001 N.Y. App. Div. LEXIS 3049 (N.Y. App. Div. 2d Dep't 2001).

One who was appointed in 1928 as a nurse at Bellevue Hospital, which position is included within a non-competitive civil service class, is not entitled to receipt of charges in writing and opportunity to reply thereto, in writing, as provided by this section. Daly v Goldwater, 296 N.Y.S. 36, 163 Misc. 502, 1937 N.Y. Misc. LEXIS 1716 (N.Y. Sup. Ct. 1937).

Petitioner, whose noncompetitive position as secretary to a Judge of the Court of Claims was properly classified as confidential by the Administrative Board, is not entitled to a hearing upon her discharge since, under the rules of the Administrative Board (22 NYCRR 25.32 [a] [3]) only those noncompetitive employees in the unified court system holding positions other than those "designated by the administrative board as confidential" for five continuous years of service, are entitled to such a hearing prior to termination. In view of the long-standing concept that the relationship between Judge and secretary is confidential, the designation of petitioner's position as confidential is not arbitrary and capricious. Rodman v Bartlett, 93 Misc. 2d 292, 402 N.Y.S.2d 773, 1978 N.Y. Misc. LEXIS 2053 (N.Y. Sup. Ct. 1978), aff'd, 69 A.D.2d 1013, 415 N.Y.S.2d 1021, 1979 N.Y. App. Div. LEXIS 11795 (N.Y. App. Div. 4th Dep't 1979).

In Article 78 proceeding challenging termination of school district's director of operations from his noncompetitive position without duly noticed public meeting of community school board trustees, respondents' claim that district administrator had informally "conferred" with certain members of board of trustees before terminating petitioner, or that board members "proposed" that his services be terminated, did not satisfy CLS Educ § 2566(6), whose purpose is to protect persons from being discharged by unilateral action of superintendent without ratification of such action by board of education. Okebiyi v Cortines, 167 Misc. 2d 1008, 641 N.Y.S.2d 791, 1996 N.Y. Misc. LEXIS 112 (N.Y. Sup. Ct. 1996), app. dismissed, 239 A.D.2d 421, 658 N.Y.S.2d 894, 1997 N.Y. App. Div. LEXIS 5084 (N.Y. App. Div. 2d Dep't 1997).

Passage of Civil Service Law § 75, subd 1(c) reflects a laudable decision of the legislature that employees in the noncompetitive class should not be forever barred from the protection afforded persons in the competitive class merely because it was impracticable to devise an examination for their positions. The requirement of 5 years of service was intended to provide a probationary period to evaluate the performance of these employees. Russell v Hodges, 470 F.2d 212, 1972 U.S. App. LEXIS 6399 (2d Cir. N.Y. 1972).

129. Probationary employees, generally

City employee who accepted original appointment to position of Staff Analyst after passing open competitive examination effectively resigned her permanent position as Contract Specialist, and thus CLS Civ S § 75(1)(a) was inapplicable and she was not entitled to hearing before employer cancelled her leave of absence from her former position. Bethel v McGrath-McKechnie, 95 N.Y.2d 7, 709 N.Y.S.2d 888, 731 N.E.2d 604, 2000 N.Y. LEXIS 905 (N.Y. 2000).

A disabled veteran of Spanish American War, who passed a competitive examination conducted by the Nassau county civil service commission for the office of senior account clerk in the department of public welfare of Nassau county, was required to serve a probationary term to enable the appointing officer or commission to determine his merit and fitness. Losee v Wallace, 259 A.D. 722, 18 N.Y.S.2d 16, 1940 N.Y. App. Div. LEXIS 6410 (N.Y. App. Div.), app. denied, 259 A.D. 817, 19 N.Y.S.2d 771, 1940 N.Y. App. Div. LEXIS 6843 (N.Y. App. Div. 1940).

This section does not require that a probationary appointee, even a disabled veteran, be accorded a hearing on charges. Silverman v Taylor, 270 A.D. 1040, 63 N.Y.S.2d 193, 1946 N.Y. App. Div. LEXIS 5246 (N.Y. App. Div.), app. denied, 271 A.D. 827, 66 N.Y.S.2d 418, 1946 N.Y. App. Div. LEXIS 3310 (N.Y. App. Div. 1946), app. dismissed, 296 N.Y. 827, 72 N.E.2d 17, 296 N.Y. (N.Y.S.) 827, 1947 N.Y. LEXIS 1605 (N.Y. 1947).

The appointing authority has the discretion to dismiss a probationer without a hearing and without stating a reason therefor, so long as such discretion is exercised in good faith. Safran v Wallace, 41 A.D.2d 793, 341 N.Y.S.2d 326, 1973 N.Y. App. Div. LEXIS 4961 (N.Y. App. Div. 3d Dep't 1973).

Where employee was dismissed prior to expiration of probationary period of service, he was not entitled to benefit of termination

procedures set forth for permanent employees. Odenz v Director, Creedmoor Psychiatric Center, 51 A.D.2d 584, 378 N.Y.S.2d 755, 1976 N.Y. App. Div. LEXIS 10878 (N.Y. App. Div. 2d Dep't 1976).

Days of absence from employment in civil service shall not be considered as part of probationary period unless appointing authority exercises discretion to so consider them. Woltjen v Burke, 52 A.D.2d 679, 382 N.Y.S.2d 140, 1976 N.Y. App. Div. LEXIS 12349 (N.Y. App. Div. 3d Dep't 1976).

Written probation reports, which were received by petitioners within eight weeks of their appointment to permanent positions in Department of Social Services subject to probationary period of not less than eight weeks nor more than 26 weeks and which indicated that probation was being continued, were sufficient to constitute notice of extension of probation beyond the eight-week period, contrary to contention that reports were not sufficient notice because they were "recommendations" from the immediate supervisor of petitioners and the "bureau of office head" to someone else. Clark v Commissioner, New York State Dep't of Social Services, 53 A.D.2d 122, 385 N.Y.S.2d 206, 1976 N.Y. App. Div. LEXIS 12487 (N.Y. App. Div. 3d Dep't 1976), aff'd, 42 N.Y.2d 1054, 399 N.Y.S.2d 215, 369 N.E.2d 771, 1977 N.Y. LEXIS 2393 (N.Y. 1977).

A former public employee's petition for reinstatement to her former position with back pay was properly denied where it was undisputed that petitioner had been a probationary employee, so that she was subject to dismissal without the necessity of filing charges and conducting a hearing in light of the fact that the employer had acted in good faith in discharging her. Gray v Director, Bronx Developmental Services, 98 A.D.2d 631, 469 N.Y.S.2d 387, 1983 N.Y. App. Div. LEXIS 20918 (N.Y. App. Div. 1st Dep't 1983), aff'd, 62 N.Y.2d 729, 476 N.Y.S.2d 817, 465 N.E.2d 356, 1984 N.Y. LEXIS 4329 (N.Y. 1984).

Court properly dismissed, without hearing, Article 78 proceeding to challenge termination by county of petitioner's probationary employment as engineering aide where county submitted affidavit which indicated that decision to terminate was made after discussions with 3 of petitioner's supervisors who were apparently familiar with petitioner's work performance, and fact that petitioner's immediate supervisor favored his retention did not raise triable issue of fact as to county's bad faith. McCabe v County of Dutchess, 143 A.D.2d 670, 533 N.Y.S.2d 4, 1988 N.Y. App. Div. LEXIS 9321 (N.Y. App. Div. 2d Dep't 1988).

Termination of probationary city employee was not made in bad faith where (1) affidavits by petitioner's supervisors established that petitioner became disgruntled and uncooperative following transfer, and that his work performance slipped to unsatisfactory level, and (2) petitioner acknowledged that he objected to transfer because of resulting longer commute and its effect on his child care duties at home. Rivoli v Stern, 160 A.D.2d 601, 554 N.Y.S.2d 244, 1990 N.Y. App. Div. LEXIS 4621 (N.Y. App. Div. 1st Dep't 1990).

Determination dismissing probationary firefighter was improperly annulled since false representations by firefighter as to his residence at time of his employment with city provided sufficient basis for his termination. Munich v City of Lackawanna Dep't of Pub. Safety, 262 A.D.2d 959, 692 N.Y.S.2d 555, 1999 N.Y. App. Div. LEXIS 7123 (N.Y. App. Div. 4th Dep't 1999).

Absent bad faith, municipal agency may summarily terminate probationary employee for any reason, including lateness. Wilson v Bratton, 266 A.D.2d 140, 699 N.Y.S.2d 29, 1999 N.Y. App. Div. LEXIS 12325 (N.Y. App. Div. 1st Dep't 1999).

Probationary employee in Department of Motor Vehicles was properly discharged without hearing or statement of reasons, absent showing of discrimination or bad faith by competent evidence, not speculation. Negron v Jackson, 273 A.D.2d 241, 709 N.Y.S.2d 437, 2000 N.Y. App. Div. LEXIS 6246 (N.Y. App. Div. 2d Dep't 2000).

Caseworker's probationary employment with City Administration for Children's Services was properly terminated where her claim of retaliation for complaint about her supervisors' communication skills was speculative in light of her unacceptable work performance, and no issue of bad faith was raised by her claim that she never received written performance evaluations. Johnson v City of New York, 281 A.D.2d 322, 722 N.Y.S.2d 156, 2001 N.Y. App. Div. LEXIS 3035 (N.Y. App. Div. 1st Dep't 2001).

Trial court properly denied the petitioners' petition and dismissed the proceedings because their motion to discontinue was an apparent attempt to evade a determination on the merits in the proceeding adverse to a favorable determination obtained in arbitration inasmuch as termination of a firefighter's employment without notice of charges, a statement of reasons, or a hearing was proper where the firefighter's probationary period was properly extended to reflect the amount of time that he spent absent from performing the duties attendant to the position of firefighter and the termination of his employment occurred while he was a probationary employee. Matter of Yonkers Firefighters v City of Yonkers, 165 A.D.3d 816, 86 N.Y.S.3d 100, 2018 N.Y. App. Div. LEXIS 6713 (N.Y. App. Div. 2d Dep't), app. dismissed, 165 A.D.3d 815, 82 N.Y.S.3d 899, 2018 N.Y. App. Div. LEXIS 6698 (N.Y. App. Div. 2d Dep't 2018).

At the time of his termination, an employee was still a probationary employee and, therefore, had no right to challenge his termination by way of a hearing or otherwise because the employee did not request a determination as to whether his temporary or provisional service would be counted toward his probationary term and, therefore, he did not trigger the appointing authority's regulatory obligation to issue a written determination as to how it would exercise its discretion. Matter of Civil Serv. Employees Assn., Local 1000, AFSCME AFL-CIO v New York State Off. of Children & Family Servs., 174 A.D.3d 1206, 106 N.Y.S.3d 202, 2019 N.Y. App. Div. LEXIS 5732 (N.Y. App. Div. 3d Dep't 2019).

Probationary employee's unsupported allegations of bad faith and retaliation were insufficient to warrant an evidentiary hearing on his termination because there was no proof that the employee's supervisor or any other employee of the appointing authority was aware that the employee had in fact made a neglect report. Matter of Civil Serv. Employees Assn., Local 1000, AFSCME AFL-CIO v New York State Off. of Children & Family Servs., 174 A.D.3d 1206, 106 N.Y.S.3d 202, 2019 N.Y. App. Div. LEXIS 5732 (N.Y. App. Div. 3d Dep't 2019).

A civil service employee's probationary period had not expired at the time he was summarily discharged without compliance with this section where less than six months had elapsed since his appointment to the position, notwithstanding his earlier certification and eligibility for such appointment. Guiliano v Thomas, 36 Misc. 2d 338, 232 N.Y.S.2d 328, 1962 N.Y. Misc. LEXIS 2774 (N.Y. Sup. Ct. 1962).

Although the applicable county civil service rule provided that a probationer be notified "that his services will terminate on the last date of a given payroll period" and petitioner's termination did not coincide with that date, and was before the end of his probationary period, he was not entitled to a hearing pursuant to this section. Kreyer v Board of Trustees, 52 Misc. 2d 384, 275 N.Y.S.2d 921, 1966 N.Y. Misc. LEXIS 1186 (N.Y. Sup. Ct. 1966).

A probationary civil service employee may be removed without a hearing on charges. Polsenski v Montgomery, 71 N.Y.S.2d 386, 1947 N.Y. Misc. LEXIS 2563 (N.Y. Sup. Ct. 1947), app. dismissed, 87 N.Y.S.2d 438 (N.Y. App. Div. 1949).

Because an employee admitted to improperly gaining unauthorized entry to an agency's computer system while on a one-year probationary period following a promotion, the employee's dismissal following demotion was not so disproportionate to the offense as to be shocking to one's sense of fairness; the employee was not subjected to dual punishment in violation of N.Y. Civ. Serv. Law § 75(3). Matter of Patel v New York City Hous. Auth., 26 A.D.3d 172, 809 N.Y.S.2d 22, 2006 N.Y. App. Div. LEXIS 980 (N.Y. App. Div. 1st Dep't 2006).

Although probationary public employee may usually be discharged with or without cause, he or she may not be discharged in violation of his or her First Amendment rights, and will be entitled to redress for such violation. Sagendorf-Teal v County of Rensselaer, 100 F.3d 270, 1996 U.S. App. LEXIS 29349 (2d Cir. N.Y. 1996).

130. —Bridge construction worker as probationary employee

Triborough Bridge and Tunnel Authority (TBTA) properly terminated petitioner's probationary employment as tunnel officer

based on finding that he was occasionally late for second job at New York City Transit Authority (NYCTA) and that on 2 occasions his time card at NYCTA was punched to indicate purported arrival time which was earlier than time he punched out from TBTA; probationary employee may be discharged without hearing or statement of reasons in absence of demonstration that dismissal was for constitutionally impermissible purpose or in violation of statutory or decisional law. Moran v Triborough Bridge & Tunnel Auth., 188 A.D.2d 601, 591 N.Y.S.2d 201, 1992 N.Y. App. Div. LEXIS 14428 (N.Y. App. Div. 2d Dep't 1992).

Bridge authority properly terminated petitioner's employment without formal hearing pursuant to CLS Civ S § 75 where (1) petitioner was permanent civil service employee with another city agency, but was relegated to probationary status as result of stipulation which resolved disciplinary matter, (2) petitioner was laid off for economic reasons and thereafter transferred to bridge authority, and (3) petitioner was found guilty of disciplinary violations and terminated before end of probationary period. Bridge authority was not estopped from acting without formal hearing in terminating employment of petitioner, who had agreed with another city agency to return to probationary status as result of disciplinary proceeding, notwithstanding that bridge authority had mistakenly informed petitioner that he would have permanent civil service status on transfer, since (1) it was not alleged that petitioner relied on mistaken assurances by bridge authority, and (2) doctrine of equitable estoppel cannot be used to create right or to place petitioner in better position. Jackson v Triborough Bridge & Tunnel Auth., 155 Misc. 2d 715, 589 N.Y.S.2d 748, 1992 N.Y. Misc. LEXIS 481 (N.Y. Sup. Ct. 1992).

131. —Charges potentially damaging to reputation; destigmatizing or name-clearing charges

General rule is that whereas a permanent civil service employee must be given notice and afforded a hearing on specific charges prior to dismissal, no such hearing is required prior to dismissal of a probationer; such principles apply in case of a probationer when such dismissal is grounded on unsatisfactory performance of his duties; however, where dismissal is predicated on considerations reaching beyond the scope of his job performance and where such considerations affect his good name, reputation, honor or integrity, due process requires that he be afforded an opportunity to refute the allegations. Perry v Blair, 49 A.D.2d 309, 374 N.Y.S.2d 850, 1975 N.Y. App. Div. LEXIS 10902 (N.Y. App. Div. 4th Dep't 1975).

Where dismissed probationary employee's employment card simply stated that his employment was terminated during his probationary period, and such was only information which would be furnished to any prospective employer, governmental or otherwise, there was no serious stigma attached to his reputation by reason of dismissal, by reason of which procedures set forth for dismissal of permanent employees would be required as matter of due process. Odenz v Director, Creedmoor Psychiatric Center, 51 A.D.2d 584, 378 N.Y.S.2d 755, 1976 N.Y. App. Div. LEXIS 10878 (N.Y. App. Div. 2d Dep't 1976).

A terminated probationary employee was not entitled to a name-clearing hearing, where the employee had failed to establish that the charges against him had been made public or made available to potential future employers. Lentlie v Egan, 94 A.D.2d 839, 463 N.Y.S.2d 542, 1983 N.Y. App. Div. LEXIS 18313 (N.Y. App. Div. 3d Dep't), app. denied, 60 N.Y.2d 551 (N.Y. 1983), aff'd, 61 N.Y.2d 874, 474 N.Y.S.2d 467, 462 N.E.2d 1185, 1984 N.Y. LEXIS 4134 (N.Y. 1984).

In an Article 78 proceeding to review a determination of the Director of Personnel of the New York State Department of Correctional Services terminating a correctional facility employee's employment, the employee was not entitled to a so-called name-clearing hearing on the basis of the stigma attaching to his dismissal, where a review of the record indicated that the reasons articulated for the employee's discharge were not stigmatic, and where the employee failed to allege public dissemination of the reasons for his dismissal; further, the employee's argument that he had raised issues of fact entitling him to a trial was without merit, where, as a probationary employee, he could be terminated without a hearing and without specific reasons being stated, where a review of the record supported the conclusion that his performance was unsatisfactory and established that his discharge was made in good faith, and where, as a probationary employee, he failed to establish a property interest in continued public employment deserving of due process protection. Cardo v Murphy, 104 A.D.2d 884, 480 N.Y.S.2d 726, 1984 N.Y. App. Div. LEXIS 20344 (N.Y. App. Div. 2d Dep't 1984).

In article 78 proceeding to review petitioner's dismissal as safety and security officer with Developmental Disabilities Services Office and Developmental Center, Supreme Court erred in granting petition to extent of directing that destigmatization hearing be held since petitioner failed to allege that he had been openly defamed or in some manner held up to ridicule. Carrion v Webb, 131 A.D.2d 806, 517 N.Y.S.2d 171, 1987 N.Y. App. Div. LEXIS 48252 (N.Y. App. Div. 2d Dep't 1987).

Discharged employee was not entitled to destigmatization hearing where (1) only references to reasons for employee's discharge were contained in unofficial, confidential files kept by agency under lock and key, (2) future employers were not given access to these files nor information contained therein, (3) matters in these files were not contained in employee's personnel file and all internal memos were deliberately kept out of official channels, (4) no stigmatizing reasons for employee's termination were stated in his discharge letter, and (5) employee failed to show that agency publicly disseminated stigmatizing reasons for his termination. Ranus v Blum, 132 A.D.2d 983, 518 N.Y.S.2d 513, 1987 N.Y. App. Div. LEXIS 49457 (N.Y. App. Div. 4th Dep't), app. dismissed, 70 N.Y.2d 926, 524 N.Y.S.2d 433, 519 N.E.2d 344, 1987 N.Y. LEXIS 19967 (N.Y. 1987), app. denied, 71 N.Y.2d 802, 527 N.Y.S.2d 768, 522 N.E.2d 1066, 1988 N.Y. LEXIS 1185 (N.Y. 1988).

Court erred in ordering name-clearing hearing and directing agency to justify termination of petitioner's employment since petitioner was probationary employee, his discharge was result of unsatisfactory performance, and he did not show that agency disseminated false impression about reason for his termination. Miller v Siraguse, 134 A.D.2d 910, 522 N.Y.S.2d 66, 1987 N.Y. App. Div. LEXIS 51110 (N.Y. App. Div. 4th Dep't 1987).

Probationary police officers were not entitled to name-clearing hearings following their dismissals where there was no proof that police commissioner or department created and disseminated false and defamatory impression regarding reasons for terminations. Jessamy v Fernandes, 145 A.D.2d 486, 536 N.Y.S.2d 696, 1988 N.Y. App. Div. LEXIS 13271 (N.Y. App. Div. 2d Dep't 1988).

Petitioner entitled to reinstatement after wrongful discharge as probationary city police officer was not entitled to name-clearing hearing where statement employer disseminated in connection with his dismissal was neither stigmatizing nor substantially false. Pastore v Troy, 152 A.D.2d 808, 543 N.Y.S.2d 589, 1989 N.Y. App. Div. LEXIS 9357 (N.Y. App. Div. 3d Dep't 1989).

Probationary correction officer was not entitled to hearing before Department of Correction to determine whether her dismissal was in bad faith, even if her dismissal was predicated on considerations which would affect her reputation, since review of termination of probationary employee is limited to inquiry as to whether termination was made in bad faith, and officer failed to meet her burden of raising and proving bad faith since she admitted to having been off post and going to unauthorized section of prison in order to visit with inmate. Medina v Sielaff, 182 A.D.2d 424, 582 N.Y.S.2d 685, 1992 N.Y. App. Div. LEXIS 5643 (N.Y. App. Div. 1st Dep't 1992).

Discharged probationary employee failed to state cause of action for name-clearing hearing where complaint alleged only that "false and defamatory charges...are contained in plaintiff's personnel file and remain there today," with no allegation of public dissemination. Meyers v City of New York, 208 A.D.2d 258, 622 N.Y.S.2d 529, 1995 N.Y. App. Div. LEXIS 1101 (N.Y. App. Div. 2d Dep't 1995).

Petitioner was not entitled to name-clearing hearing where there had been no public disclosure of any allegations affecting his good name or reputation. Macina v North Salem Cent. Sch. Dist., 221 A.D.2d 538, 633 N.Y.S.2d 596, 1995 N.Y. App. Div. LEXIS 11858 (N.Y. App. Div. 2d Dep't 1995).

Police officer was not entitled to name-clearing hearing where he failed to show that city publicly disclosed false and stigmatiz-

ing reasons for his discharge. Green v New York City Police Dep't, 235 A.D.2d 475, 653 N.Y.S.2d 26, 1997 N.Y. App. Div. LEXIS 408 (N.Y. App. Div. 2d Dep't 1997).

Although, normally, probationary public employees are not deemed to have a sufficient "property" interest in their jobs to be entitled to due process protections prior to being relieved of their employment, such probationary employees must be afforded a due process hearing to clear their reputations when the charges which form the basis for employment termination could damage name and reputation thereby diminishing the possibility for obtaining future employment. Accordingly, petitioner, who was discharged from his noncompetitive Youth Division Aide position with the State Division for Youth because of his alleged involvement in incidents of brutality against residents in a State institution, is entitled to an opportunity to clear himself at a hearing since the brutality charges may leave a blot on petitioner's character which encompasses and transcends his job property interest. A probationary public employee terminated on the basis of stigmatizing charges which tend to impugn such employee's reputation, is only entitled to a due process hearing to clear his name and may not be reinstated with back pay pending such hearing (see *Codd v Velger,* 429 US 624). Accordingly, upon reargument, petitioner, who was discharged from his noncompetitive position with the State Division for Youth for his alleged involvement in incidents of brutality against residents in a State institution, is not entitled to reinstatement with back pay pending a due process hearing for the sole purpose of clearing his name. Hill v Edelman, 92 Misc. 2d 485, 399 N.Y.S.2d 565, 401 N.Y.S.2d 697, 1977 N.Y. Misc. LEXIS 2573 (N.Y. Sup. Ct. 1977).

Public employer would be directed to grant hearing to any discharged provisional employee, or any employee whose probationary period was extended, to determine whether such employee had valid excuse for not being present at work on day following issuance of temporary restraining order barring strike, work stoppage or "sickout" by employees represented by defendant union, even though names of discharged employees had not been publicly disseminated, since it was stigmatizing to have been discharged for violation of CLS Civ S Art 14 (Taylor Law), prohibiting strikes by public employees, and there had been sufficient publicity surrounding alleged sickout to find that liberty interest had been affected so as to require hearing; further, although Taylor Law limitations on right to terminate striking employees are not applicable to provisional employees, employer should consider immediate rehiring of any such employee found to have valid reason for absence, and if probationary employee was found to have had valid excuse for absence, extension of his or her probationary period would be in bad faith and thus should be rescinded. New York City Health & Hospitals Corp. v Local 2507 of Dist. Council 37 of American Federation of State, etc., 139 Misc. 2d 376, 526 N.Y.S.2d 1002, 1988 N.Y. Misc. LEXIS 103 (N.Y. Sup. Ct. 1988).

132. — —Criminal charges

Probationary police officer whose personnel file included findings of assault, attempted rape and dishonesty to department investigators made preliminary showing of his entitlement to name-clearing hearing; these findings of criminality and immoral and dishonest conduct were stigmatizing in constitutional sense because of their inevitable effect, if revealed, of foreclosing employment opportunities in field of law enforcement. Swinton v Safir, 93 N.Y.2d 758, 697 N.Y.S.2d 869, 720 N.E.2d 89, 1999 N.Y. LEXIS 3433 (N.Y. 1999).

Police officer stripped of position due to manslaughter conviction which was subsequently reversed would be denied name-clearing hearing, without prejudice to re-plead, where although petition alleged that police department issued press release and conducted press conference, there was no allegation that department created or disseminated false or defamatory impression about petitioner's termination. Hays v Ward, 144 Misc. 2d 227, 542 N.Y.S.2d 949, 1989 N.Y. Misc. LEXIS 339 (N.Y. Sup. Ct. 1989).

133. — —Ethical charges

Civil service employee was not deprived of due process on ground that he was not given posttermination opportunity to refute statements made during removal process charging him with unethical conduct and conflict of interest, where he had been afforded pretermination opportunity to refute charges, and since there was no evidence that he ever demanded postremoval opportunity to refute charges, there was no showing the employer refused to grant him such request. Parr v Onondaga County Legislature, 139 Misc. 2d 975, 529 N.Y.S.2d 672, 1988 N.Y. Misc. LEXIS 300 (N.Y. Sup. Ct. 1988), aff'd, 156 A.D.2d 985, 550 N.Y.S.2d 869, 1989 N.Y. App. Div. LEXIS 16168 (N.Y. App. Div. 4th Dep't 1989).

134. —Corrections officer as probationary employee

Court properly dismissed Article 78 petition alleging that employee was victim of anti-Semitism, and that he was demoted from rank of Correction Captain to Correction Officer in retaliation for filing discrimination complaint against his African-American supervisor, since (1) petitioner was probationary employee who could have been demoted without hearing unless he established that demotion was for improper reason or in bad faith, and (2) court's conclusion that petitioner's performance was unsatisfactory, and that his demotion was in good faith, was supported by evidence that he failed to inspect roll call, failed to respond to breach of security, disobeyed direct order, and sexually harassed subordinate. Cohen v Koehler, 82 N.Y.2d 882, 609 N.Y.S.2d 171, 631 N.E.2d 113, 1993 N.Y. LEXIS 4358 (N.Y. 1993).

Where the petitioner was summarily dismissed from his position as a prison guard during his probationary period and no charges had been filed against him, he was entitled to reinstatement from the date of his discharge to the expiration date of his probationary period; however, at the end of his probationary period the petitioner's discharge was within the discretionary power of the appointing authorities acting in good faith, and where their evidence sustains the conclusion that his conduct should not entitle him to a permanent appointment, the courts will decline to interfere. Wolf v Conway, 276 A.D. 798, 92 N.Y.S.2d 627, 1949 N.Y. App. Div. LEXIS 3352 (N.Y. App. Div. 1949).

Probation officer trainee who was discharged prior to completion of 24 month training/probation period required for such position was not entitled to reinstatement as a trainee under general provisions of civil service rules and regulations which set a maximum 1 year probationary period for either trainee appointment or promotion, where the obvious purpose of the 2 year probationary period was to allow a trainee appointee to complete the required training before serving his probationary term as trainee promotee. Safran v Wallace, 41 A.D.2d 793, 341 N.Y.S.2d 326, 1973 N.Y. App. Div. LEXIS 4961 (N.Y. App. Div. 3d Dep't 1973).

Petitioner was properly dismissed as probationary correction officer since record supported conclusion that neither disability nor injury was reason for dismissal, and that he was dismissed for misuse and evasion of liberal leave and restricted duty policies of Correction Department, where petitioner took advantage of 1986 knee injury to remain on restricted duty for excessively long time and then improperly sought full duty assignment at location with minimal, if any, inmate contact. De Sapio v Koehler, 158 A.D.2d 307, 551 N.Y.S.2d 1, 1990 N.Y. App. Div. LEXIS 1066 (N.Y. App. Div. 1st Dep't 1990).

It was improper to dismiss probationary correction officer without hearing where officer raised sufficient factual allegations to show that her discharge was attributable to sex discrimination and bad faith. Garrison v Koehler, 161 A.D.2d 322, 555 N.Y.S.2d 87, 1990 N.Y. App. Div. LEXIS 5300 (N.Y. App. Div. 1st Dep't 1990).

Court properly dismissed Article 78 proceeding to annul determination of city correction commissioner which terminated petitioner from his probationary employment without hearing after he was arrested for possession of controlled substance and weapon, since subsequent dismissal of criminal charges after petitioner successfully completed 12-week placement in diversionary program for first-time offenders did not raise issue of fact to support petitioner's claim that he was terminated in bad faith or for constitutionally impermissible purpose. Holder v Sielaff, 184 A.D.2d 228, 584 N.Y.S.2d 304, 1992 N.Y. App. Div. LEXIS 7663 (N.Y. App. Div. 1st Dep't 1992).

In Article 78 proceeding challenging county sheriff's termination of petitioner's employment as correction officer in sheriff's

department, petitioner's probationary status had not ended at time of his termination, even though county employees' handbook, which had been furnished to him on his employment, defined probationary term as being 8 to 26 weeks, where that provision had to yield to provision in county civil service rules defining probationary term as being 12 to 52 weeks. Higgins v La Paglia, 281 A.D.2d 679, 722 N.Y.S.2d 592, 2001 N.Y. App. Div. LEXIS 2009 (N.Y. App. Div. 3d Dep't), app. dismissed, 96 N.Y.2d 854, 729 N.Y.S.2d 669, 754 N.E.2d 772, 2001 N.Y. LEXIS 1460 (N.Y. 2001).

In Article 78 proceeding challenging county sheriff's termination of petitioner's employment as probationary correction officer in sheriff's department, petitioner's conclusory assertions were insufficient to prove prima facie case of age discrimination where he was hired at age 41 and terminated at age 42. Higgins v La Paglia, 281 A.D.2d 679, 722 N.Y.S.2d 592, 2001 N.Y. App. Div. LEXIS 2009 (N.Y. App. Div. 3d Dep't), app. dismissed, 96 N.Y.2d 854, 729 N.Y.S.2d 669, 754 N.E.2d 772, 2001 N.Y. LEXIS 1460 (N.Y. 2001).

In Article 78 proceeding challenging county sheriff's termination of petitioner's employment as probationary correction officer in sheriff's department, union did not breach its duty of fair representation, despite petitioner's claim that union knew or should have known that he was not afforded adequate training and failed to act to correct that problem, where (1) there was no evidence that union had such knowledge, (2) even if it did, its mere failure to act regarding petitioner's lack of training would not prove breach of its duty of fair representation, and (3) mere fact that senior rater who gave petitioner his only unfavorable evaluation was also president of union provided no support for petitioner's claim, because senior rater only reluctantly reached that evaluation and nevertheless preferred extension of petitioner's probationary term over termination of his employment. Higgins v La Paglia, 281 A.D.2d 679, 722 N.Y.S.2d 592, 2001 N.Y. App. Div. LEXIS 2009 (N.Y. App. Div. 3d Dep't), app. dismissed, 96 N.Y.2d 854, 729 N.Y.S.2d 669, 754 N.E.2d 772, 2001 N.Y. LEXIS 1460 (N.Y. 2001).

Correction officer was still probationary employee at time of his termination, and thus termination did not violate CLS Civ S § 75, where (1) officer was notified by letter in January 1997 that his probationary period had been extended until March 2, 1997, due to absences from work, (2) officer received no other notification that his probationary period had been extended, (3) January 1997 letter was incorrect because it did not comply with directive of State Department of Correctional Services requiring that probationary period be extended by one work day for each work day missed, (4) because January 1997 letter was based on administrative error, prison superintendent and other correctional authorities were not bound by it, (5) officer's continued absence from work even after issuance of January 1997 letter automatically extended his probationary period beyond June 17, 1997, date of his termination, and (6) no notice of that extension was required. Beck v Walker, 286 A.D.2d 996, 730 N.Y.S.2d 658, 2001 N.Y. App. Div. LEXIS 8925 (N.Y. App. Div. 4th Dep't 2001).

Personnel director established that respondent's discharge of petitioner from a probationary position was made in good faith and was based on an independent investigation of the inspector general (IG) into an incident in which petitioner either observed and/or participated in threatening an inmate and then denied such observation or participation, even though a separate investigative report conducted by a lieutenant reached a different conclusion; petitioner's bald speculation that the personnel director waited to demote him to his former position until just after he completed the eighth week of his probationary period to avoid having to establish under this section that the demotion was based on incompetence or misconduct was rejected. Matter of Messenger v State of New York Dept. of Corr. & Community Supervision, 151 A.D.3d 1433, 58 N.Y.S.3d 680, 2017 N.Y. App. Div. LEXIS 5087 (N.Y. App. Div. 3d Dep't 2017).

Termination of an employee's appointment as a corrections officer without notice of charges, a statement of reasons, or a hearing pursuant to this statute was proper because the termination occurred while he remained a probationary employee. Matter of Gagedeen v Ponte, 170 A.D.3d 1013, 96 N.Y.S.3d 349, 2019 N.Y. App. Div. LEXIS 2070 (N.Y. App. Div. 2d Dep't), app. dismissed, 34 N.Y.3d 948, 134 N.E.3d 1154, 110 N.Y.S.3d 860, 2019 N.Y. LEXIS 3214 (N.Y. 2019).

135. —Health services worker as probationary employee

Supreme Court erred in granting hearing to probationary employee who was discharged from her position as county nurse since employee had failed to allege that county acted in bad faith, and county adequately demonstrated that employee was discharged because of her inappropriate disruptive behavior and her failure to return to work following her suspension. Intemann v County of Hamilton, 132 A.D.2d 871, 518 N.Y.S.2d 70, 1987 N.Y. App. Div. LEXIS 49348 (N.Y. App. Div. 3d Dep't 1987).

New York City Health and Hospitals Corporation's decision not to terminate probationary status of Emergency Medical Service employee on receipt of Department of Vehicles' Notice of Restoration, indicating that suspension of employee's license had been "rescinded," was rationally based on agreement settling previous charges of misconduct, which required employee to show that license suspension was not his fault but solely result of error by DMV. Bernardo v New York City Health & Hosps. Corp., 240 A.D.2d 278, 659 N.Y.S.2d 7, 1997 N.Y. App. Div. LEXIS 6592 (N.Y. App. Div. 1st Dep't 1997).

136. —Police officer as probationary employee

Court dismissed Article 78 proceeding contending that, because tenure on modified duty was part of police officer's 2-year probationary period, she was not probationary employee at time of her termination and was therefore entitled to pre-termination hearing under CLS Civ S § 75; restrictions of modified duty deprive police department of reasonable opportunity to evaluate police officer's ability to perform complete range of duties of that office. Garcia v Bratton, 90 N.Y.2d 991, 665 N.Y.S.2d 621, 688 N.E.2d 495, 1997 N.Y. LEXIS 3225 (N.Y. 1997).

Probationary police officer did not demonstrate basis to annul police department's determination of his misconduct and discharge as (1) department's finding that he assaulted and attempted to rape his former girlfriend and was dishonest to investigators provided independent reason to discharge him notwithstanding former girlfriend's recantation, and (2) there was no proof of differential treatment of other probationary officers for same or similar misconduct. Swinton v Safir, 93 N.Y.2d 758, 697 N.Y.S.2d 869, 720 N.E.2d 89, 1999 N.Y. LEXIS 3433 (N.Y. 1999).

Where even if petitioner should have been appointed a patrolman following expiration of one-year probationary period as community law enforcement peace officer on December 16, 1972, such fact did not mean that petitioner, who had not been appointed patrolman as of his termination on April 10, 1973, was no longer a probationary employee and, hence, had right to hearing prior to discharge, since under city civil service rules he had become merely a probationary patrolman and would have had to face an additional probationary period from three to 12 months before achieving permanent status. Provision of municipal civil service rule that community peace officer would be appointed for probationary period until he completed at least one year of service was controlling over six-month probationary notice received from police department, for purpose of determining whether petitioner was a probationary employee and entitled to a hearing prior to being discharged. Although petitioner, a community peace officer, was only a probationary employee, he was entitled to a hearing in connection with his discharge following arrest on charge of rape and unlawful imprisonment since dismissal was predicated on considerations reaching beyond scope of his job performance and affected his good name, reputation, honor and integrity. Perry v Blair, 49 A.D.2d 309, 374 N.Y.S.2d 850, 1975 N.Y. App. Div. LEXIS 10902 (N.Y. App. Div. 4th Dep't 1975).

Termination of probationary New York City Transit Police Officer was permissible without hearing and without specific reasons being stated for dismissal, in absence of bad faith or other reasons prohibited by law. Caminiti v New York City Transit Authority Police Dep't, 125 A.D.2d 306, 508 N.Y.S.2d 590, 1986 N.Y. App. Div. LEXIS 62568 (N.Y. App. Div. 2d Dep't 1986).

Court properly dismissed Article 78 proceeding to review city police commissioner's decision to terminate employment of 2 probationary police officers, since termination of probationary employee without statement of reasons or hearing must be upheld in absence of demonstration that dismissal was violative of constitution, illegal, or made in bad faith, and petitioners' conclusory allegations did not sustain their burden of raising genuine factual issues as to unconstitutionality or arbitrariness of their terminations. Jessamy v Fernandes, 145 A.D.2d 486, 536 N.Y.S.2d 696, 1988 N.Y. App. Div. LEXIS 13271 (N.Y. App. Div. 2d Dep't 1988).

City's determination to discharge petitioner without cause as probationary police officer would be annulled due to noncompliance with procedural requirements where, inter alia, respondents conceded that petitioner was not advised periodically of his status and progress and was not given one week of notice prior to termination. Pastore v Troy, 152 A.D.2d 808, 543 N.Y.S.2d 589, 1989 N.Y. App. Div. LEXIS 9357 (N.Y. App. Div. 3d Dep't 1989).

There was rational basis to terminate employment of 2 probationary status police officers (one female and her male boyfriend) where evidence established that they had inflicted excessive corporal punishment on female officer's sons by handcuffing them and by repeatedly striking them with belt, and that each of them was present during punishment but neither attempted to stop other's actions. Dash v Brown, 199 A.D.2d 41, 604 N.Y.S.2d 108, 1993 N.Y. App. Div. LEXIS 11686 (N.Y. App. Div. 1st Dep't 1993), app. denied sub. nom., Patrick v Brown, 83 N.Y.2d 753, 612 N.Y.S.2d 107, 634 N.E.2d 603 (N.Y. 1994).

New York City police officer who, prior to expiration of her 2-year probationary term, was placed on modified duty for 14 months pending investigation of alleged misconduct, was still on probation when she was terminated at conclusion of investigation; department of personnel rules extend employee's probationary term "by the number of days when the probationer does not perform the duties of the position," and petitioner was not performing "police duties" when she was on modified leave because her weapon and shield had been removed and her merit and fitness as police officer could not be evaluated. Garcia v Bratton, 225 A.D.2d 123, 649 N.Y.S.2d 703, 1996 N.Y. App. Div. LEXIS 11981 (N.Y. App. Div. 1st Dep't 1996), aff'd, 90 N.Y.2d 991, 665 N.Y.S.2d 621, 688 N.E.2d 495, 1997 N.Y. LEXIS 3225 (N.Y. 1997).

Probationary police officers were properly dismissed without hearing where they refused to obey direct order by superior officer to answer questions at investigative hearing despite having been granted use immunity as to their answers, and there was no indication that police commissioner's determinations were made in bad faith. Martinez v Safir, 251 A.D.2d 62, 673 N.Y.S.2d 690, 1998 N.Y. App. Div. LEXIS 6521 (N.Y. App. Div. 1st Dep't 1998).

Substantial evidence supported good-faith termination of probationary city police officer's employment where she arrived one hour and 14 minutes late for appointment with Psychological Services Unit doctor, falsely signed in as having arrived earlier, previously was late for duty at least 15 times during last year of her probation, was warned by her commanding officer that continued tardiness could lead to her dismissal, and had signed probation agreement acknowledging that she could be fired "at any time without further proceedings, pursuant to Administrative Code Section 14-115(d)." Wilson v Bratton, 266 A.D.2d 140, 699 N.Y.S.2d 29, 1999 N.Y. App. Div. LEXIS 12325 (N.Y. App. Div. 1st Dep't 1999).

City police department was entitled to rely on probationary officer's history and her commanding officer's recommendation of termination, without conducting further investigation, where officer's history of at least 15 instances of lateness for duty and other disciplinary infractions gave credibility to her commanding officer's version of her latest tardiness, and she had signed probation agreement acknowledging that she could be fired "at any time without further proceedings, pursuant to Administrative Code Section 14-115(d)." Wilson v Bratton, 266 A.D.2d 140, 699 N.Y.S.2d 29, 1999 N.Y. App. Div. LEXIS 12325 (N.Y. App. Div. 1st Dep't 1999).

Police officer who was on one-year disciplinary probation under NYC Admin Code § 14-115(d) could be terminated summarily, without statement of reasons, following hearing on charges of excessive use of force because (1) CLS Unconsol Ch § 51 § 1 (L 1940, ch 834), which provides that police officers can be terminated only for incompetence or misconduct shown after hearing, does not apply to probationary officers, and (2) disciplinary record, showing problems other than his underlying probation, established that respondent's termination decision was made with good faith. Dillon v Safir, 270 A.D.2d 116, 704 N.Y.S.2d 568, 2000 N.Y. App. Div. LEXIS 2865 (N.Y. App. Div. 1st Dep't 2000).

Proceeding to annul city police commissioner's termination of probationary officer's employment was properly dismissed for failure to state cause of action where officer's failure to correct his report of loss of his shield and identification badge after learning that it was incorrect provided legitimate reason to question his honesty and candor. Morgan v Safir, 281 A.D.2d 376, 722 N.Y.S.2d 542, 2001 N.Y. App. Div. LEXIS 3193 (N.Y. App. Div. 1st Dep't 2001), app. denied, 2001 N.Y. App. Div. LEXIS 7152 (N.Y. App. Div. 1st Dep't June 14, 2001), app. dismissed, 97 N.Y.2d 601, 735 N.Y.S.2d 490, 760 N.E.2d 1286, 2001 N.Y. LEXIS 3249 (N.Y. 2001).

137. —School worker as probationary employee

An Article 78 proceeding brought by a former state university campus security officer who sought reinstatement to such position would be remanded to the trial court for a hearing and determination on the question of whether the director of the Department of Public Safety, upon whose direct order petitioner had been terminated, had acted in bad faith and had lacked a rational basis for the termination, where petitioner had been exonerated of any misconduct in both of the incidents relied upon by the director, and a third incident, which involved an alleged after-the-fact breach of a rule prohibiting possession of a firearm on campus, had not surfaced until after the date of petitioner's termination notice, where the director had ordered petitioner's immediate supervisor to change petitioner's job performance evaluation from "outstanding" to "excellent" without stated reasons, and where petitioner's supervisor had himself raised a question regarding the director's motivation in an affidavit which alleged that the supervisor had been retaliated against by the director for giving petitioner a favorable memorandum. Rollick v Ambach, 97 A.D.2d 637, 468 N.Y.S.2d 925, 1983 N.Y. App. Div. LEXIS 20267 (N.Y. App. Div. 3d Dep't 1983).

School custodian's one-year probationary period pursuant to CLS Educ § 2509 began on his appointment date and not upon declaration of civil service eligible list, as list was neither immediately exhausted nor inadequate, and probationary period was further extended by number of work days custodian was absent from job; consequently, termination of his employment without notice of charges, statement of reasons, or hearing pursuant to CLS Civ S § 75 was proper since it occurred within probationary period, and in absence of allegation that his dismissal was in bad faith his Article 78 petition would be dismissed. Bonacci v Quinones, 124 A.D.2d 659, 508 N.Y.S.2d 42, 1986 N.Y. App. Div. LEXIS 61959 (N.Y. App. Div. 2d Dep't 1986).

Civil servant within NYS Education Department was not entitled to hearing prior to discharge since termination took place within 2-year probationary term properly measured from time petitioner, who was sixth on eligible list, became entirely eligible for permanent appointment when third, fourth, and fifth candidates on eligible list opted for other positions. Van Dyke v New York State Dep't of Education, 144 A.D.2d 85, 537 N.Y.S.2d 332, 1989 N.Y. App. Div. LEXIS 480 (N.Y. App. Div. 3d Dep't), app. denied, 74 N.Y.2d 607, 545 N.Y.S.2d 103, 543 N.E.2d 746, 1989 N.Y. LEXIS 963 (N.Y. 1989).

Letter notifying probationary school employee of her termination, which cited her failure to resolve outstanding travel accounts, her improper conduct in attempting to claim compensatory time, and misstatements she had made as to her employment history, was sufficient to show employer's good faith in terminating her, despite her efforts to refute those allegations. Cleary v New York State Dep't of Educ., 239 A.D.2d 649, 656 N.Y.S.2d 573, 1997 N.Y. App. Div. LEXIS 4510 (N.Y. App. Div. 3d Dep't 1997).

Public employer substantially complied with 4 NYCRR § 4.5 (b) (5) (iii) where school employee was given oral notice of her discharge 5 business days prior to effective date of her discharge,

she subsequently received written confirmation of her termination prior to expiration of her probationary period, which had been extended additional 7 days under 4 NYCRR § 4.5 (g), and she had been previously notified orally and in writing of her unsatisfactory performance, and warned of possibility of termination. Glenn v State Univ. of N.Y., Purchase College, 243 A.D.2d 712, 663 N.Y.S.2d 633, 1997 N.Y. App. Div. LEXIS 10756 (N.Y. App. Div. 2d Dep't 1997).

Substantial evidence supported decision by State Public Employment Relations Board that probationary teacher was not unlawfully terminated by school district because of her protected union activity where (1) sufficient reasons for termination were teacher's failure to follow instructions and proper school procedures and to adequately protect safety of student who fell down flight of stairs, and (2) no nexus was proved between teacher's union activity and decision to terminate her employment. Rockville Centre Teachers Ass'n v N.Y. State Pub. Empl. Rels. Bd., 281 A.D.2d 425, 721 N.Y.S.2d 112, 2001 N.Y. App. Div. LEXIS 2130 (N.Y. App. Div. 2d Dep't 2001).

Collective bargaining agreement which provides that in case of employee release, at least one-day notice of release and reason will be given to employee, and employee may request immediate audience with Chief School Administrator to explain reasons for opposing release order, does not change discharged employee's status from employee who serves at will to one who can be dismissed solely for cause; thus, probationary employee possesses no property interest in continued employment as school cleaner under collective bargaining agreement and is not denied due process for lack of hearing on termination of his employment. Goetz v Windsor Cent. School Dist., 698 F.2d 606, 1983 U.S. App. LEXIS 31123 (2d Cir. N.Y. 1983).

138. —Termination of probationary period

A proceeding by former probationary employees challenging their termination was properly dismissed where there was evidence that their work performances were less than satisfactory and that the dismissals were for reasons relating to fitness rather than inadequate skills; the employment of a probationary appointee may be terminated at the end of the probationary term without a hearing and without specific reasons being stated. Sargeant v Director, Brooklyn Developmental Center, 56 N.Y.2d 628, 450 N.Y.S.2d 482, 435 N.E.2d 1097, 1982 N.Y. LEXIS 3294 (N.Y. 1982).

Probationary employee's termination without hearing was proper even though it occurred one year and 6 days after he began his employment, since his one-year probationary period was extended for 23 days he spent on jury during his first year of work; extension of probationary period, under circumstances, was not penalty as contemplated by Judiciary Law § 519. Tomlinson v Ward, 66 N.Y.2d 771, 497 N.Y.S.2d 368, 488 N.E.2d 114, 1985 N.Y. LEXIS 17913 (N.Y. 1985).

County caseworker, who served 16-week probationary period under terms of collective bargaining agreement that was in force on date he was hired, and who was given permanent employment after expiration of that agreement, could not be discharged without benefit of procedural protections guaranteed by CLS Civ S § 75 even though parties negotiated new agreement establishing longer probationary period and purporting to be effective retroactively to date on which previous agreement had expired, since new agreement applied only to employees who were still within their probationary period and could not be applied to one who had acquired permanent status before new agreement was executed. Harris v Nassau County Dep't of Social Services, 73 N.Y.2d 886, 538 N.Y.S.2d 241, 535 N.E.2d 294, 1988 N.Y. LEXIS 3356 (N.Y. 1988).

Civil service employee's probationary period commenced on date he was appointed permanent employee, not on earlier date when he passed qualifying examination; thus, he was not entitled to protection of CLS Civ S § 75 until one year after his permanent employment, and agency was entitled to remove him within that time without formal charges or hearing. Reis v New York State Housing Finance Agency, 74 N.Y.2d 724, 544 N.Y.S.2d 812, 543 N.E.2d 77, 1989 N.Y. LEXIS 834 (N.Y. 1989).

In a Article 78 proceeding brought by a police officer to challenge the termination of his probationary appointment to the position of police lieutenant and consequent demotion, the trial court erred in refusing to dismiss those aspects of the petition which alleged that the town had improperly failed to follow the procedural requirements of Civ S Law § 75 for the termination of permanent civil servants, and that the town had acted in bad faith in demoting petitioner, where the evidence showed that the town had properly extended petitioner's probationary appointment by 14 working days due to his absence on 14 working days during his probationary term, and had adopted the resolution terminating petitioner three days prior to such extended probationary term, and where petitioner's allegations that the police chief had not filled the lieutenant vacancy within the time required by the applicable labor contract, that the police chief had made it known that he would abolish the lieutenant position if compelled to appoint any of the top three individuals, including petitioner, on the eligibility list, that the police chief had filled the vacancy only after the police union had threatened to file a grievance, and that the police chief had made it known to the police club that he did not desire to appoint petitioner were irrelevant to the issue of whether the termination was in bad faith in that no nexus was pleaded between the filling of the vacancy, an event that occurred approximately six months prior to petitioner's discharge, and petitioner's termination, where petitioner's allegation that, prior to his appointment, a personality conflict had existed between himself and the police chief failed to specify what the conflict was, and where petitioner's allegation that the police chief did not personally counsel petitioner during his probationary term failed to specifically allege how such fact evidenced a bad faith termination. Mazur v Ryan, 98 A.D.2d 974, 470 N.Y.S.2d 237, 1983 N.Y. App. Div. LEXIS 21311 (N.Y. App. Div. 4th Dep't 1983), app. dismissed, 61 N.Y.2d 832, 473 N.Y.S.2d 974, 462 N.E.2d 151, 1984 N.Y. LEXIS 4094 (N.Y. 1984).

Petitioner's proceeding to compel his reinstatement to employment with the New York State Office of Parks and Recreation was properly dismissed, where petitioner was terminated at the end of his probationary term, which had been extended pursuant to regulatory authority to reflect his absence while on jury duty; such extension was not a "penalty" within the intendment of Jud Law § 519. Schwartz v Cuomo, 111 A.D.2d 759, 489 N.Y.S.2d 786, 1985 N.Y. App. Div. LEXIS 50003 (N.Y. App. Div. 2d Dep't), app. dismissed, 66 N.Y.2d 758, 497 N.Y.S.2d 1027, 488 N.E.2d 119, 1985 N.Y. LEXIS 17660 (N.Y. 1985), app. denied, 67 N.Y.2d 605, 501 N.Y.S.2d 1023, 492 N.E.2d 400, 1986 N.Y. LEXIS 17514 (N.Y. 1986).

Court properly dismissed Article 78 proceeding to review determination by commissioner of police terminating petitioner's employment as police officer at completion of his probationary term where petitioner conceded that he was never given reason for his termination and his testimony as to reasons was mere speculation. Whelan v Rozzi, 155 A.D.2d 603, 547 N.Y.S.2d 660, 1989 N.Y. App. Div. LEXIS 14386 (N.Y. App. Div. 2d Dep't 1989).

Police officer was still probationary officer at time he was terminated where (1) 4 days before end of probationary period, officer was arrested following altercation at discotheque and charged with, inter alia, assault and resisting arrest, and (2) officer was immediately suspended and was terminated 27 days later; officer's probationary period was extended by virtue of suspension pursuant to Rule 5.2.8(b) of Rules and Regulations of New York City Personnel Director. DiFiglia v Ward, 158 A.D.2d 411, 551 N.Y.S.2d 245, 1990 N.Y. App. Div. LEXIS 1869 (N.Y. App. Div. 1st Dep't), app. denied, 76 N.Y.2d 701, 557 N.Y.S.2d 878, 557 N.E.2d 114, 1990 N.Y. LEXIS 1247 (N.Y. 1990).

Termination of employee by county director of developmental disabilities services office fell within employee's probationary period, and thus hearing was not required, since probationary period was not extended by virtue of employee's absence on 3 days which she took off "in lieu of" 3 contractual holidays; agency rationally interpreted "workdays" as used in 4 NYCRR § 4.5(g) as including all days when employee's presence would normally have been required. Sheffield v Howe, 223 A.D.2d 544, 636 N.Y.S.2d 128, 1996 N.Y. App. Div. LEXIS 152 (N.Y. App. Div. 2d Dep't), app. denied, 88 N.Y.2d 806, 646 N.Y.S.2d 985, 670 N.E.2d 226, 1996 N.Y. LEXIS 1720 (N.Y. 1996).

Petitioner, who was terminated from his position beyond completion of 52-week maximum probationary term, was improperly denied reinstatement where there was no evidence that responsible administrator exercised any discretion in defining "different assignment" for purpose of fresh evaluation of petitioner during extension of probationary term, and petitioner was merely reassigned to same assignment that had produced unsatisfactory evaluations during initial 52-week term; since petitioner's probationary appointment ripened into permanent appointment, he could not be terminated without requirements of filing charges and holding hearing. Civil Serv. Emples. Ass'n v Venugopalan, 228 A.D.2d 767, 643 N.Y.S.2d 715, 1996 N.Y. App. Div. LEXIS 6419 (N.Y. App. Div. 3d Dep't 1996).

Petitioner, appointed by Department of Education to position of Associate in Education Improvement Services, did not attain permanent status when her immediate supervisor initially recommended probationary evaluation report that she be permanently retained since decision to permanently retain employee belonged to Associate Commissioner in New York City Office of School And Community Services, who personally reviewed petitioner's probationary evaluation report and notified petitioner that she would continue under probation. Cleary v New York State Dep't of Educ., 239 A.D.2d 649, 656 N.Y.S.2d 573, 1997 N.Y. App. Div. LEXIS 4510 (N.Y. App. Div. 3d Dep't 1997).

Where there was a question whether or not a municipal employee's employment was terminated after the expiration of his probationary period in violation of his rights under this section the issue should be tried. Edell v Municipal Broadcasting System, 9 Misc. 2d 220, 169 N.Y.S.2d 993, 1958 N.Y. Misc. LEXIS 4020 (N.Y. Sup. Ct. 1958).

A probationary appointee in the Classified Civil Service who was not given written notice that her services were unsatisfactory at least one week prior to termination of her probationary period, as required by Rule 24 of the Rules for Classified Civil Service as amended effective September 9, 1959, acquired permanent status and could not be removed except upon grounds and pursuant to procedure set forth in this section. Application of De Cecca, 25 Misc. 2d 425, 205 N.Y.S.2d 457, 1960 N.Y. Misc. LEXIS 2734 (N.Y. Sup. Ct. 1960).

Officer for New York City Transit Police Department did not become tenured at expiration of maximum 24-month probationary period since 109-day period in which officer was unable to perform his duties was automatically added to his probationary term under city rules, which extended probationary term to October 24, 1987; thus, officer was properly terminated without hearing on October 19, 1987. Cacamese v Del Castillo, 140 Misc. 2d 497, 531 N.Y.S.2d 471, 1988 N.Y. Misc. LEXIS 457 (N.Y. Sup. Ct. 1988).

Fact that appointment as special officer was allegedly a prerequisite to employment did not prevent security officers from obtaining status as permanent civil employees entitled to protection of a hearing upon written charges served in advance before they could be dismissed, where alleged failure of city security officers to fulfill conditions of employment concerning appointment as special officer did not take place until after the probationary period had expired and the officers had become permanent employees. Keyer v Civil Service Com., 397 F. Supp. 1362, 1975 U.S. Dist. LEXIS 11184 (E.D.N.Y. 1975).

139. —Waiver of permanent employee status

Petitioner, discharged for violation of terms of settlement agreement whereby he waived his right to disciplinary hearing and appeal authorized by CLS Civ S §§ 75 and 76 and agreed to probationary period of 12 months, could have brought Article 78 proceeding at time of his dismissal to challenge respondent's conclusion that he was probationary employee at that time, but Civil Service Commission had no jurisdiction to hear his appeal. Johnson v Triborough Bridge & Tunnel Auth., 97 N.Y.2d 627, 735 N.Y.S.2d 861, 761 N.E.2d 553, 2001 N.Y. LEXIS 3310 (N.Y. 2001).

Evidence supported finding that plumber and steam fitter had openly, knowingly, and voluntarily waived his permanent status as employee of Long Island State Park and Recreation Commission, and that commission was therefore entitled to terminate his employment without hearing, where dismissal occurred during probationary period which he had accepted in settlement of certain disciplinary charges against him, he was aware of ramifications of accepting probation as demonstrated by fact that he had served probationary term prior to achieving permanent position, and he did not allege that his signature was obtained on settlement agreement involuntarily, or that he was denied assistance of his union representative, whose signature also appeared on settlement agreement. Sepulveda v Long Island State Park & Recreation Com., 123 A.D.2d 703, 507 N.Y.S.2d 69, 1986 N.Y. App. Div. LEXIS 60844 (N.Y. App. Div. 2d Dep't 1986).

140. Provisional employees

A provisional employee does not come within the protection of this section and is therefore subject to summary removal. Benon v La Guardia, 285 N.Y. 560, 33 N.E.2d 243, 285 N.Y. (N.Y.S.) 560, 1941 N.Y. LEXIS 1591 (N.Y. 1941).

Where provisional employee qualified for permanent appointment by passing examination, he obtained permanent status on day he was notified that he was first on civil service list and was entitled to notice and hearing prior to dismissal three months after that date. Smith v Hoyt, 59 A.D.2d 1058, 399 N.Y.S.2d 818, 1977 N.Y. App. Div. LEXIS 14350 (N.Y. App. Div. 4th Dep't 1977).

A provisional employee cannot claim the protection of section 75 of the Civil Service Law which provides that certain employees can only be removed for incompetency or misconduct after a hearing. McBride v Griffin, 62 A.D.2d 520, 405 N.Y.S.2d 353, 1978 N.Y. App. Div. LEXIS 10871 (N.Y. App. Div. 4th Dep't 1978).

Reinstatement and back pay are not appropriate remedies for provisional employee whose services have been determined by jury to have been terminated in bad faith, since status of provisional employee is significantly different from that of probationary employee, and, additionally, remedies sought would produce anomalous result of awarding back pay for period of over 3 years to provisional employee who is expressly limited to appointment of 9 months. Preddice v Callanan, 114 A.D.2d 134, 498 N.Y.S.2d 533, 1986 N.Y. App. Div. LEXIS 49853 (N.Y. App. Div. 3d Dep't 1986), aff'd, 69 N.Y.2d 812, 513 N.Y.S.2d 958, 506 N.E.2d 529, 1987 N.Y. LEXIS 15448 (N.Y. 1987).

Since provisional employees may be discharged at any time without charges preferred, reinstatement is not remedy available to such employee absent violation of constitutional or statutory provision. Iritano v New York City Transit Authority, 175 A.D.2d 918, 573 N.Y.S.2d 756, 1991 N.Y. App. Div. LEXIS 11306 (N.Y. App. Div. 2d Dep't 1991).

Workers' Compensation Board's termination of probationary civil service employment of claims referee without hearing was not in bad faith, unconstitutional, or otherwise improper where (1) board followed its established procedures by periodically advising referee of his progress, providing written evaluation at least 2 weeks before end of probationary period, and giving written notice at least one week before effective date of discharge, (2) bad faith was not shown by fact that earlier, more favorable progress reports were not furnished in writing before final, unfavorable written report, and (3) referee's dismissal was based on his inadequate understanding of workers' compensation law, his failure to respond to additional training to address that deficiency, and his improper conduct in requesting transportation from attorneys and posing inappropriate questions to witnesses. Scott v Workers' Compensation Bd., 275 A.D.2d 877, 713 N.Y.S.2d 571, 2000 N.Y. App. Div. LEXIS 9473 (N.Y. App. Div. 3d Dep't 2000).

Petitioner who held provisional position of Assistant Architect for city's parks and recreation department for almost 9 months in 1985-1986 was not entitled to order compelling his reinstatement, despite 1990 Civil Service Commission order directing department to offer him first available provisional position of Assistant Architect "if that is consistent with the provisions of the Civil Service Law," where he no longer had minimum educational qualifications for position of Assistant Architect, which were raised in 1988, no other provisionals had been appointed since commission's orders, new eligible list established in 1999 precluded any provisional appointments, and thus his reinstatement would violate CLS Civ S § 65. Brown v City of New York Dep't of Parks & Rec., 281 A.D.2d 195, 721 N.Y.S.2d 354, 2001 N.Y. App. Div. LEXIS 2246 (N.Y. App. Div. 1st Dep't 2001).

Evidence that provisional employee had received only one performance evaluation, which was favorable, during his 1 ½ years of employment with city did not satisfy his burden of showing that his termination was in bad faith or arbitrary and capricious where there was evidence of his substandard performance and no evidence that city was required to give him periodic performance evaluations. Bynoe v City of New York, 281 A.D.2d 340, 722 N.Y.S.2d 517, 2001 N.Y. App. Div. LEXIS 3189 (N.Y. App. Div. 1st Dep't 2001).

Where provisional civil service employee was charged with misconduct in public office involving public funds, which charge might seriously damage his standing and associations in community and carry implication of guilt of either immorality or dishonesty, employee was entitled to hearing prior to dismissal. Mengrone v New York City Off-Track Betting Corp., 83 Misc. 2d 105, 371 N.Y.S.2d 525, 1974 N.Y. Misc. LEXIS 2047 (N.Y. Sup. Ct. 1974).

Petitioner, who was appointed on a provisional basis to position of principal psychologist-grade 27 in competitive class of classified civil service, was not protected by collective bargaining agreement between state and civil service employees association and, as such, derived no benefits guaranteed by grievance procedures of agreement and was subject to being removed from his provisional appointment and demoted to his former, permanent position of principal psychologist-grade 23 without a hearing or without a statement of reasons. Sirohi v Merges, 88 Misc. 2d 201, 387 N.Y.S.2d 375, 1976 N.Y. Misc. LEXIS 2649 (N.Y. Sup. Ct. 1976), aff'd, 58 A.D.2d 645, 396 N.Y.S.2d 58, 1977 N.Y. App. Div. LEXIS 12729 (N.Y. App. Div. 2d Dep't 1977).

Trial court properly dismiss a worker's petition pursuant to N.Y. C.P.L.R. art. 78 to compel a school district to reinstate the worker with back pay; the worker was terminated during his probationary period, and thus was not entitled to protections of N.Y. Civ. Serv. Law § 75. Easling v Odessa-Montour Cent. Sch. Dist., 10 A.D.3d 839, 782 N.Y.S.2d 144, 2004 N.Y. App. Div. LEXIS 11174 (N.Y. App. Div. 3d Dep't 2004).

141. Subordinate employees, generally

This section applies only to those holding positions of a subordinate nature. Fornara v Schroeder, 261 N.Y. 363, 185 N.E. 498, 261 N.Y. (N.Y.S.) 363, 1933 N.Y. LEXIS 1295 (N.Y. 1933).

A "deputy," like a cashier or a private secretary, holds a position of a subordinate nature. Behringer v Parisi, 5 N.Y.2d 147, 182 N.Y.S.2d 365, 156 N.E.2d 71, 1959 N.Y. LEXIS 1629 (N.Y. 1959).

This section, which was formerly subd. 1 of § 22, in protecting a state employee from removal from his position except for incompetency or misconduct after a hearing upon notice, does not apply to the position of private secretary, cashier, or deputy of an official or department, or to what certain decisions refer to as an "independent" officer, and is intended to apply only to persons holding positions of a subordinate nature. Morton v Murphy, 11 A.D.2d 880, 203 N.Y.S.2d 222, 1960 N.Y. App. Div. LEXIS 8414 (N.Y. App. Div. 3d Dep't 1960).

The test to determine whether an employee is a subordinate is whether, in the performance of his various duties, he is subject to the direction and control of a superior officer or whether he is an independent officer, subject only to such directions as the statute gives. The veteran's protection is not extended to all positions in the exempt class but only to those holding positions of a subordinate nature and not to independent officers. Heath v Creagh, 96 N.Y.S.2d 247, 197 Misc. 537, 1949 N.Y. Misc. LEXIS 3192 (N.Y. Sup. Ct. 1949), aff'd, 276 A.D. 948, 94 N.Y.S.2d 901, 1950 N.Y. App. Div. LEXIS 5255 (N.Y. App. Div. 1950).

142. —Specific subordinate employees

A police surgeon, an honorably discharged soldier of the World War, who rendered occasional and intermittent service to the police department whenever a prisoner or victim of accident might need speedy medical attention, was a subordinate employee in such department and could not be legally removed from office under this section except for incompetency or misconduct shown, after a hearing, upon stated charges. Johnson v Robbins, 259 A.D. 980, 20 N.Y.S.2d 520, 1940 N.Y. App. Div. LEXIS 7518 (N.Y. App. Div. 1940).

The duties of a physician seeking reinstatement as city physician and police surgeon were not indicative of those of a subordinate employee subject to the direction and control of a superior officer so as to entitle him to the protection against removal afforded under § 75 of the Civil Service Law. Wayne v Vogel, 24 A.D.2d 1001, 265 N.Y.S.2d 1013, 1965 N.Y. App. Div. LEXIS 2817 (N.Y. App. Div. 2d Dep't 1965), aff'd, 20 N.Y.2d 901, 285 N.Y.S.2d 869, 232 N.E.2d 863, 1967 N.Y. LEXIS 1104 (N.Y. 1967).

The Superintendent of State Police properly dismissed an officer where substantial evidence supported findings that a superior officer had given the officer a direct order not to become involved in a particular investigation and that the officer failed to obey this lawful order. Zeggert v Connelie, 86 A.D.2d 952, 448 N.Y.S.2d 588, 1982 N.Y. App. Div. LEXIS 15637 (N.Y. App. Div. 3d Dep't 1982).

A county map room supervisor was properly dismissed from his position pursuant to Civ S Law § 75, where he disregarded repeated warnings by his supervisors not to engage in specific acts of misconduct and demonstrated a persistent unwillingness to accept the directives of his superiors. Palmer v County of Oneida, 86 A.D.2d 957, 448 N.Y.S.2d 314, 1982 N.Y. App. Div. LEXIS 15649 (N.Y. App. Div. 4th Dep't), app. denied, 56 N.Y.2d 507, 1982 N.Y. LEXIS 5417 (N.Y. 1982).

Specifications of misconduct and insubordination were supported by testimony and numerous detailed memoranda advising sanitation worker of poor job performance and insubordination in failing to follow instructions as to waxing of floor and failing to exercise diligent care in moving equipment, causing chemical leakage and discoloration to floor. Fact that sanitation worker was authorized to take days off did not preclude finding that he was guilty of excessive absenteeism where he had been repeatedly informed by memoranda that his pattern of absences was disruptive and burdensome to his employer and co-workers. Gradel v Lilholt, 257 A.D.2d 972, 684 N.Y.S.2d 339, 1999 N.Y. App. Div. LEXIS 725 (N.Y. App. Div. 3d Dep't 1999).

The position of chief of police is a subordinate one and the holder thereof is entitled to the protection of this section, even though the village charter directly after making provision for the appointment of the police chief contains the words "the trustees may also create such subordinate offices as they shall deem necessary." Dickinson v Monroe, 44 N.Y.S.2d 86, 180 Misc. 714, 1943 N.Y. Misc. LEXIS 2392 (N.Y. Sup. Ct. 1943).

An honorably discharged veteran, formerly holding the position of director of the Buffalo stadium and memorial auditorium, is not entitled to an order reinstating him to his former position notwithstanding his removal without a hearing, since he was not a subordinate employee and thus is not protected by this section. Smith v Board of Stadium & Memorial Auditorium, 96 N.Y.S.2d 571, 197 Misc. 529, 1948 N.Y. Misc. LEXIS 3990 (N.Y. Sup. Ct. 1948).

143. Temporary employees

Where maintenance and supervision of a bridge and employees thereof are, by resolution of board of supervisors, made subject to the county superintendent of highways, and laborers are to perform their work under his direction and control "until further direction in the premises," and there is nothing in resolution to support a contention that appointment of a laborer or his continuance in the performance of his duties is to be dependent on further direction of the board, the appointment cannot be deemed a temporary one, and an honorably-discharged soldier so appointed cannot be removed, except as provided by this section. McNeles v Board of Sup'rs, 173 A.D. 411, 159 N.Y.S. 1009, 1916 N.Y. App. Div. LEXIS 6665 (N.Y. App. Div.), aff'd, 219 N.Y. 578, 114 N.E. 1071, 219 N.Y. (N.Y.S.) 578, 1916 N.Y. LEXIS 903 (N.Y. 1916).

On March 13th, 1958, the petitioner was given a temporary appointment as senior surplus food inspector. On July 10th, 1958, the petitioner was notified that his services would be terminated effective July 16th, 1958. The petitioner was not entitled to reinstatement, since the documentary evidence established conclusively that the appointment was temporary, that the petitioner knew it to be temporary, was never misled, and in fact so regarded it. Daub v Coupe, 9 A.D.2d 260, 193 N.Y.S.2d 47, 1959 N.Y. App. Div. LEXIS 5993 (N.Y. App. Div. 1st Dep't 1959).

Where Department of Civil Service properly rejected petitioner's initial appointment, he was temporary employee, rather than probationary employee, until appointment was accepted, and there was no occasion to send notice of extension of probationary period. Odenz v Director, Creedmoor Psychiatric Center, 51 A.D.2d 584, 378 N.Y.S.2d 755, 1976 N.Y. App. Div. LEXIS 10878 (N.Y. App. Div. 2d Dep't 1976).

Where position which had been held by petitioner for over eight years on temporary employment basis until he was dismissed as result of staff reduction was not named as noncompetitive position, position was in competitive class, temporary appointment to which may be made only in exceptional cases without examination and only on temporary basis for period not to exceed 18 months, and thus dismissal of petitioner, whose status was no more than that of temporary employee, was proper. Roberts v Parker, 52 A.D.2d 651, 381 N.Y.S.2d 556, 1976 N.Y. App. Div. LEXIS 12308 (N.Y. App. Div. 2d Dep't 1976).

County hospital superintendent, who was appointed by county executive during executive's first elected term but not re-appointed after commencement of executive's new term of office following reelection, was not entitled to protection afforded by provision of Civil Service Law to honorably discharged members of the armed forces holding positions by permanent appointment or employment in classified service, although his position was listed in noncompetitive class, in that, at end of term for which superintendent was appointed by county executive, superintendent had no more tenure than provisional or temporary appointee. Provisional or temporary county employees have no tenure of office and are not entitled to any review of their discharge under provisions of section of Civil Service Law providing protection to honorably discharged member of the armed forces holding position by permanent appointment or employment in classified service. Ause v Regan, 59 A.D.2d 317, 399 N.Y.S.2d 526, 1977 N.Y. App. Div. LEXIS 13569 (N.Y. App. Div. 4th Dep't 1977).

In a proceeding by a dismissed temporary civil service employee seeking reinstatement to his position with back pay from the date of discharge, the trial court erred in failing to remand the matter for the purpose of conducting a hearing at which the employee would be afforded an opportunity to clear his name where, although it is a general rule that a nontenured public employee may be discharged without a hearing, a temporary employee is entitled to a hearing where the discharge is for reasons that may cast a stigma upon the employee's good name, reputation, honor or integrity, and where the letter notifying the temporary employee of his discharge clearly attributed dishonesty to him. Salvatore v Nasser, 81 A.D.2d 1012, 440 N.Y.S.2d 92, 1981 N.Y. App. Div. LEXIS 11766 (N.Y. App. Div. 4th Dep't 1981).

Public Employment Relations Board (PERB) correctly found that employer discriminated against police officer when it demoted him from sergeant to patrolman in response to his exercise of protected Taylor Law rights, but PERB improperly ordered employer to restore officer to rank of sergeant where (1) officer's temporary appointment to sergeant position had not yet become permanent when he was demoted, (2) after he was demoted, another officer was appointed from new eligibility list to sergeant's position, and (3) demoted officer was not on new eligibility list; appointment of individual from constitutionally valid expired list would violate CLS NY Const Art V § 6, and matter was remitted to PERB for further consideration of that aspect of its remedial order. Village of Scotia v New York State Pub. Empl. Rels. Bd., 241 A.D.2d 29, 670 N.Y.S.2d 602, 1998 N.Y. App. Div. LEXIS 2818 (N.Y. App. Div. 3d Dep't 1998).

Temporary emergency employment of a veteran in a position declared to be permanent without attaining eligibility in a subsequent competitive examination does not entitle veteran to retain that position, since this section, protecting a veteran from discharge except on charges did not apply to one who had never been legally appointed after taking a competitive examination, and since "Three Year Fidelity" clause in § 14 was unavailable because it presupposes three years' service by an incumbent who has passed a competitive examination. Smith v Wynkoop, 25 N.Y.S.2d 452, 175 Misc. 645, 1940 N.Y. Misc. LEXIS 2589 (N.Y. Sup. Ct. 1940).

Only persons holding civil service positions permanently, whether by appointment or employment, are entitled to the protection of this section against discharge without filing of charges and a hearing. Villani v County of Nassau, 36 Misc. 2d 766, 233 N.Y.S.2d 667, 1962 N.Y. Misc. LEXIS 2342 (N.Y. Sup. Ct. 1962).

Temporary appointments to a civil service position, no matter how long continued, never ripen into permanent appointments and entitle the holders to none of the advantages secured by period of tenure under the civil service rules. Hennessey v Farrell, 43 Misc. 2d 1045, 252 N.Y.S.2d 699, 1962 N.Y. Misc. LEXIS 2077 (N.Y. Sup. Ct. 1962), aff'd, 19 A.D.2d 698, 242 N.Y.S.2d 192, 1963 N.Y. App. Div. LEXIS 5917 (N.Y. App. Div. 3d Dep't 1963).

Civil defense safety representatives who failed to qualify for permanent appointment were not entitled to the protection of this section against summary dismissal. O'Brien v Farrell, 44 Misc. 2d 438, 253 N.Y.S.2d 961, 1964 N.Y. Misc. LEXIS 1758 (N.Y. Sup. Ct.), aff'd, 22 A.D.2d 746, 253 N.Y.S.2d 534, 1964 N.Y. App. Div. LEXIS 2948 (N.Y. App. Div. 3d Dep't 1964).

Although a probationary employee may be terminated at any time without charges, hearing, or reasons stated if his conduct or performance is not satisfactory so long as the decision to dismiss is not arbitrary or capricious, where the dismissal of a permanent appointee on probationary status to the position of assistant building inspector was not due to unsatisfactory conduct or performance but due to residency, and where the appointee had become a resident prior to the time of his dismissal, the termination was ineffective and the appointee was to be reinstated to his former position with back pay. Winkler v Moore, 110 Misc. 2d 785, 442 N.Y.S.2d 937, 1981 N.Y. Misc. LEXIS 3160 (N.Y. Sup. Ct. 1981).

A war veteran who was released from his position was not deprived of any rights under this section where he was a temporary employee who had not been removed arbitrarily for personal or political reasons, and he had failed to establish the existence of a particular position to which his qualifications were suitable. Subd. 1 of this section does not apply to an honorably discharged soldier, who was appointed to the public service for a temporary purpose. Bentley v Jeacock, 14 N.Y.S.2d 366, 1939 N.Y. Misc. LEXIS 2229 (N.Y. Sup. Ct. 1939).

144. Unclassified positions

School busdriver whose annual salary notice specifies 10 month period of employment is unclassified employee who may be terminated at will without hearing; in any event, termination of employment when busdriver leaves 4 year old child at child's home, rather than at home of babysitter, some 2 miles distant, without checking either route sheet or tag worn by child, both of which indicate place where child is to be let off, is not so disproportionate to offense as to be shocking to sense of fairness. Tyson v Hess, 66 N.Y.2d 943, 498 N.Y.S.2d 778, 489 N.E.2d 747, 1985 N.Y. LEXIS 18246 (N.Y. 1985).

The provisions of this section granting veterans the privilege of a hearing in dismissal proceedings do not apply to a veteran in unclassified civil service. Bemis v Board of Education, 258 A.D. 935, 16 N.Y.S.2d 553, 1939 N.Y. App. Div. LEXIS 7639 (N.Y. App. Div. 1939).

Community college employee whose position was in the unclassified civil service had no right, either at law or by contract, to be dismissed solely for misconduct or incompetency shown after a hearing on stated charges pursuant to the Civil Service Law. Glazer v Hankin, 50 A.D.2d 924, 377 N.Y.S.2d 616, 1975 N.Y. App. Div. LEXIS 11850 (N.Y. App. Div. 2d Dep't 1975), app. dismissed, 39 N.Y.2d 743, 1976 N.Y. LEXIS 3486 (N.Y. 1976).

Employees of county boards of election are in unclassified civil service and are not subject to civil service laws and regulations, including CLS Civ Serv § 75, being removable at pleasure of board pursuant to CLS Elec § 3-300. County of Chautauqua v Chautauqua County Employees' Unit 6300 of Local 807, 181 A.D.2d 1052, 581 N.Y.S.2d 967, 1992 N.Y. App. Div. LEXIS 4665 (N.Y. App. Div. 4th Dep't 1992).

Petitioner, who held unclassified and at-will position, was not entitled to pre-termination or post-termination hearings under

CLS Civ S § 75. Macina v North Salem Cent. Sch. Dist., 221 A.D.2d 538, 633 N.Y.S.2d 596, 1995 N.Y. App. Div. LEXIS 11858 (N.Y. App. Div. 2d Dep't 1995).

In law enforcement officer's Article 78 proceeding against officials of county civil service commission and county personnel department, officer's reassignment from detective to uniform officer was demotion where his rate of pay was lower, and Court of Appeals had classified assignment of uniform officer to detective as promotion. Pleakis v Peterson, 281 A.D.2d 910, 722 N.Y.S.2d 458, 2001 N.Y. App. Div. LEXIS 2857 (N.Y. App. Div. 4th Dep't 2001).

In law enforcement officer's Article 78 proceeding against officials of county civil service commission and county personnel department, judgment would be modified by vacating portion that required respondents to reimburse petitioner for mileage expenses, even though petitioner lost use of county vehicle when respondents reassigned him from detective to uniform officer, where (1) respondents could have denied him use of county vehicle even while he acted as detective, and (2) under CLS CPLR § 7806, commuting mileage is not incidental expense that court may award as part of judgment in Article 78 proceeding. Pleakis v Peterson, 281 A.D.2d 910, 722 N.Y.S.2d 458, 2001 N.Y. App. Div. LEXIS 2857 (N.Y. App. Div. 4th Dep't 2001).

One who holds the position of President of the Long Island Center, which is a higher educational institution established and operated by the State University, is not, even though a war veteran, in the unclassified Civil Service and accordingly is not entitled to notice and hearing in connection with removal from office. Application of Lee, 32 Misc. 2d 114, 223 N.Y.S.2d 417, 1962 N.Y. Misc. LEXIS 4070 (N.Y. Sup. Ct. 1962).

IV. Veteran's And Volunteer Firemen's Rights

145. In general

Although military veteran, plaintiff was not entitled to protection of CLS Civ S § 75 where he was not employed within "classified service" under § 75. Bal v City of New York, 266 A.D.2d 79, 698 N.Y.S.2d 852, 1999 N.Y. App. Div. LEXIS 11603 (N.Y. App. Div. 1st Dep't 1999).

In unemployment insurance proceeding by claimant who was employed as general counsel for State Energy Office until agency was abolished and his position was terminated, nature or status of claimant's position as nontenured within meaning of CLS Labor § 565(2)(e) could not be determined without first determining whether, as veteran, he was entitled to limited tenure afforded by CLS Civ S § 75(1)(b). In re Claim of Fromer, 268 A.D.2d 707, 701 N.Y.S.2d 508, 2000 N.Y. App. Div. LEXIS 260 (N.Y. App. Div. 3d Dep't 2000).

This section protects honorably discharged soldiers from summary discharge from official positions as well as from positions of mere employment. In re Weaver, 131 N.Y.S. 144, 72 Misc. 438, 1911 N.Y. Misc. LEXIS 417 (N.Y. Sup. Ct. 1911).

Preferential employment created by this section has no regard to the duration, place, dangers, risks, or nature of the military service. Lore v Forbes, 19 N.Y.S.2d 631, 173 Misc. 1066, 1939 N.Y. Misc. LEXIS 2774 (N.Y. Sup. Ct. 1939), aff'd, 259 A.D. 806, 19 N.Y.S.2d 655, 1940 N.Y. App. Div. LEXIS 6754 (N.Y. App. Div. 1940).

Where no claim is made that an employee is a veteran or a volunteer fireman, the provisions of subd. 1 of § 22 of the Civil Service Law, which alone provide for hearings as a condition precedent of discharge or removal, are inapplicable. In re Costello's Will, 114 N.Y.S.2d 525, 1952 N.Y. Misc. LEXIS 2934 (N.Y. Sur. Ct. 1952).

For a disabled veteran to have rights of preference in case of a demotion he must be holding a permanent position according to the provisions of § 75 of the Civil Service Law. Application of Cuzzivoglio, 202 N.Y.S.2d 402 (N.Y. Sup. Ct. 1960), aff'd, 13 A.D.2d 614, 214 N.Y.S.2d 670, 1961 N.Y. App. Div. LEXIS 11738 (N.Y. App. Div. 4th Dep't 1961).

146. Constitutionality

Former subd. 1-a of this section was void because it granted a privilege to one class of veterans and volunteer firemen and discriminated arbitrarily and unreasonably against all other veterans and volunteer firemen. Former subd. 1-a of this section provided in substance that no person holding a provisional or temporary position, who was a veteran or exempt volunteer fireman and who was employed on or before December 31, 1937, in a position in a public welfare department or emergency relief bureau, and whose salary was being paid wholly or in part from special emergency relief taxes, should be removed from such position, except for incompetency or misconduct shown after a hearing upon due notice upon stated charges, was unconstitutional under NY Const. Art V. § 6. McCann v Kern, 262 A.D. 109, 28 N.Y.S.2d 321, 1941 N.Y. App. Div. LEXIS 5303 (N.Y. App. Div.), aff'd, 287 N.Y. 581, 38 N.E.2d 383, 287 N.Y. (N.Y.S.) 581, 1941 N.Y. LEXIS 2467 (N.Y. 1941).

Preference accorded honorably discharged members of the Armed Forces who served during time of war did not constitute denial of equal protection by virtue of fact that such preference was not extended to those persons who served in the Armed Forces in peacetime. Russell v Hodges, 470 F.2d 212, 1972 U.S. App. LEXIS 6399 (2d Cir. N.Y. 1972).

147. Construction; honorably discharged member of armed forces

A person, who was inducted into military service of the United States on September 3, 1918 and on the following day reported at a camp and received regular army equipment and thereafter drilled under the supervision of, and received military instructions and information from, duly commissioned officers of the United States army, and on September eleventh was honorably-discharged from the military service, was an honorably-discharged soldier and entitled to the benefits of subd. 1 of this section. Donohue v Huie, 259 A.D. 645, 20 N.Y.S.2d 347, 1940 N.Y. App. Div. LEXIS 6229 (N.Y. App. Div. 1940), aff'd, 285 N.Y. 557, 33 N.E.2d 241, 285 N.Y. (N.Y.S.) 557, 1941 N.Y. LEXIS 1589 (N.Y. 1941).

A nurse in the United States Army Nurse Corps, who served in the World war, was not "an honorably-discharged soldier, sailor or marine" within the meaning of former subd. 1 of this section. But see amendment of subd. 1 by L 1940 c 572 which negatives this decision. Hutton v Heitzmann, 14 N.Y.S.2d 234, 171 Misc. 1023, 1939 N.Y. Misc. LEXIS 2197 (N.Y. Sup. Ct. 1939).

To be "an honorably discharged soldier . . . having served in the army . . . of the United States . . . in the World War" was sole qualification for privilege of preference under former § 22. Lore v Forbes, 19 N.Y.S.2d 631, 173 Misc. 1066, 1939 N.Y. Misc. LEXIS 2774 (N.Y. Sup. Ct. 1939), aff'd, 259 A.D. 806, 19 N.Y.S.2d 655, 1940 N.Y. App. Div. LEXIS 6754 (N.Y. App. Div. 1940).

148. —Time of service

One who first became a member of the U. S. Army in May, 1919, is not a world war veteran entitled to the veterans' privileges granted by this section. Baade v Glen Cove, 263 A.D. 999, 33 N.Y.S.2d 421, 1942 N.Y. App. Div. LEXIS 7830 (N.Y. App. Div. 2d Dep't 1942).

A civil service employee who served in the United States armed forces from March, 1920 to March, 1921, was not in service "during the World War" within the meaning of former § 22 and not entitled to the benefits prescribed therein. Zinno v Marsh, 30 Misc. 2d 171, 36 N.Y.S.2d 866, 1942 N.Y. Misc. LEXIS 1226, 1942 N.Y. Misc. LEXIS 1905 (N.Y. Sup. Ct. 1942).

149. Effect of non-residence

The fact that petitioner was not a citizen of this country while he served as a member of the volunteer fire department, does not deprive him of the rights given to him by this section. Pettit v Boyle, 223 N.Y.S. 521, 129 Misc. 873, 1927 N.Y. Misc. LEXIS 1339 (N.Y. Sup. Ct. 1927).

A veteran employed as a civil servant was entitled to tenure benefits accorded to qualified war veterans under Civ S Law §§ 75, 86, even though he was not a resident of the state at the time he entered into military service, since although Civ S Law § 85 includes a residency requirement in its definition of veteran, the incorporation of the definition of veteran in § 85 into § 86 was meant only to include the reference in § 85 to veterans who had served in time of war. Mathiasen v Niagara County Legislature, 126 Misc. 2d 937, 484 N.Y.S.2d 397, 1984 N.Y. Misc. LEXIS 3730 (N.Y. Sup. Ct. 1984).

150. Particular positions

Director of security for neighborhood family care center operated by New York City Health and Hospitals Corporation (NYCHHC) was not entitled, on termination, to notice and hearing protections of CLS Civ S Law § 75, since he was managerial employee; although legislature did not expressly exempt NYCHHC from dictates of Civil Service Law, legislative intent to exclude managerial employees from rules "consistent with Civil Service Law" is implicit in CLS Unconsol Laws Chap 214-A §§ 5 and 9, which grant NYCHHC authority to make personnel rules and regulations with respect to employees other than managerial employees, as long as such rules are consistent with Civil Service Law. Burns v Quinones, 68 N.Y.2d 719, 506 N.Y.S.2d 316, 497 N.E.2d 683, 1986 N.Y. LEXIS 19489 (N.Y. 1986).

A veteran who is appointed as inspector of construction for a particular building, cannot upon the completion of the structure compel his appointment under this section to a like position as to other buildings currently under construction by the same department. People ex rel. Barton v Brannan, 141 A.D. 295, 126 N.Y.S. 47, 1910 N.Y. App. Div. LEXIS 3859 (N.Y. App. Div. 1910).

The provision of this section, providing for removal of veterans in civil employment only upon trial for incompetency and misconduct, is not applicable to appointees of the board of elections. Blondheim v Cohen, 248 A.D. 75, 288 N.Y.S. 984, 1936 N.Y. App. Div. LEXIS 6078 (N.Y. App. Div.), aff'd, 272 N.Y. 520, 4 N.E.2d 427, 272 N.Y. (N.Y.S.) 520, 1936 N.Y. LEXIS 1016 (N.Y. 1936).

A veteran who was appointed to fill a vacancy in the position of assistant attendance officer created when the previous holder of that position was erroneously promoted, has no right to retain the position where the appointing officer, upon learning of the invalidity of the promotion, restores the person thus promoted to his former status as an assistant attendance officer, thus displacing the veteran. Stryker v Board of Education, 250 A.D. 319, 294 N.Y.S. 66, 1937 N.Y. App. Div. LEXIS 8335 (N.Y. App. Div.), aff'd, 274 N.Y. 620, 10 N.E.2d 579, 274 N.Y. (N.Y.S.) 620, 1937 N.Y. LEXIS 1003 (N.Y. 1937).

A veteran validly appointed to a position in the labor class cannot be removed from his job except for incompetency or misconduct after a hearing even though his position is placed in the competitive class upon civil service commission reclassification. The preference given honorably discharged veterans applies to laborers. O'Brien v Hughes, 270 A.D. 1072, 63 N.Y.S.2d 780, 1946 N.Y. App. Div. LEXIS 5343 (N.Y. App. Div. 1946).

Where an honorably discharged war veteran had held a position as principal attorney at the Kingston office of the New York City Water Supply Service for five years, following his appointment under a rule exempting appointments for that position from examination, he could not be removed without filing charges of misconduct against him and being granted a hearing. Murphy v Larkin, 17 A.D.2d 87, 230 N.Y.S.2d 745, 1962 N.Y. App. Div. LEXIS 8457 (N.Y. App. Div. 3d Dep't 1962), cert. denied, 382 U.S. 903, 86 S. Ct. 237, 15 L. Ed. 2d 156, 1965 U.S. LEXIS 342 (U.S. 1965).

Petitioner, an honorably discharged World War veteran and an exempt volunteer fireman, was not subject to dismissal as clerk of surrogate's court by a newly appointed surrogate, except for incompetency or misconduct shown after a hearing pursuant to this section, notwithstanding that, under Surrogates' Court Act, § 21, a surrogate may "revoke at pleasure" the appointment of clerk. Cappon v Cleere, 32 N.Y.S.2d 845, 177 Misc. 1027, 1942 N.Y. Misc. LEXIS 1294 (N.Y. Sup. Ct. 1942).

Assistant superintendent of operations and maintenance, an honorably discharged veteran, could not be discharged from his position without a hearing and without charges of misconduct or incompetency. Walsh v Johnson, 5 Misc. 2d 744, 163 N.Y.S.2d 821, 1957 N.Y. Misc. LEXIS 2857 (N.Y. Sup. Ct. 1957), app. dismissed, 8 A.D.2d 664, 185 N.Y.S.2d 771, 1959 N.Y. App. Div. LEXIS 9039 (N.Y. App. Div. 3d Dep't 1959).

The fact that a tenured teacher is also a war veteran does not afford him any special rights as against removal on the basis of charges preferred against him and signed by all members of the Board of Education, upon a hearing before the same Board which preferred the charges, pursuant to § 3013 of the Education Law. Widger v Board of Education, 35 Misc. 2d 529, 230 N.Y.S.2d 973, 1962 N.Y. Misc. LEXIS 2877 (N.Y. Sup. Ct. 1962).

Petitioner, a veteran entitled to tenure benefits under Civ S Law §§ 75, 86 on abolishment of his job as a county Director of Economic Development and Planning, was not entitled to be transferred to the newly created position of Director of Planning and Industrial Development, since the new position was not a "similar position" in that it required duties over and above those performed by petitioner, nor was petitioner entitled to a transfer to the "similar" vacant position of chief planner, since that position was not funded; however, petitioner was entitled to a trial on his claim that his position was abolished for the "sole purpose" of hiring another to perform substantially the same work in violation of Civ S Law § 75. Mathiasen v Niagara County Legislature, 126 Misc. 2d 937, 484 N.Y.S.2d 397, 1984 N.Y. Misc. LEXIS 3730 (N.Y. Sup. Ct. 1984).

Where honorably discharged soldier, appointed a conductor in transit system, was instructed not to work until further notice following a physical examination, continuance of this status for six months was in effect a removal without a hearing, and illegal. Jones v New York City Transit Authority, 135 N.Y.S.2d 298, 1954 N.Y. Misc. LEXIS 2929 (N.Y. Sup. Ct. 1954), rev'd, 285 A.D. 1054, 139 N.Y.S.2d 371, 1955 N.Y. App. Div. LEXIS 6656 (N.Y. App. Div. 1955).

The town superintendent of highways may summarily dismiss highway employees under civil service, unless such employees are veterans (or volunteer firemen) or classified in the competitive class. 1947 Op St Compt 544. See also 1947 Op St Compt 532.

A town building inspector may not be summarily removed from office where he is an honorably discharged wartime veteran of the United States Armed Forces or an exempt volunteer fireman. 1961 Op St Compt #160.

151. —Law enforcement officers

A veteran, appointed to the office of county detective in the district attorney's office and entitled to the protection of this section, could be reclassified as a process server where he had been performing only process serving duties for 7 years and reclassification simply recognized specialization which had developed in the office. This section protected him only against removal and abolition of position. Here, a reclassification did not abolish the job but simply formalized its specialization. Under a reclassification survey conducted by the Civil Service Commission with respect to employees in a district attorney's office, petitioner, an honorably discharged veteran, was transferred from his position as county detective to that of process server, which in various respects constituted a demotion. The duties of eleven county detectives were substantially preserved under a new title, detective investigator. In practical effect, this constituted a summary removal of petitioner from his position of county detective, without charges of incompetency or misconduct, and was illegal. Clare v Silver, 4 N.Y.2d 107, 172 N.Y.S.2d 801, 149 N.E.2d 323, 1958 N.Y. LEXIS 1114 (N.Y. 1958).

A police officer, who was a Korean War veteran was entitled to receive formal charges and a hearing upon sworn testimony before his discharge for incompetency by reason of physical disability. Papasidero v Murphy, 38 A.D.2d 575, 328 N.Y.S.2d 558, 1971 N.Y. App. Div. LEXIS 2724 (N.Y. App. Div. 2d Dep't 1971), app. denied, 30 N.Y.2d 481, 1972 N.Y. LEXIS 1898 (N.Y. 1972).

In Article 78 proceeding to review termination of state police officer's employment, substantial evidence supported finding that he was guilty of fourth degree grand larceny where fellow officer, while responding to call at residence, was given .32-caliber semiautomatic pistol by resident who did not want it in house, gun was not registered to anyone in household and was nuisance weapon that should have been surrendered to police superintendent, fellow officer instead sold gun to accused officer, who attempted to convert it as his own property by filling out false form and thus was guilty of larceny by intending to appropriate gun from its original owner, who had superior right to its possession. Substantial evidence alsosupported finding that he was guilty of offering false instrument for filing, even though instrument might not have been filed personally by him, where fellow officer, while responding to call at residence, was given .32-caliber semiautomatic pistol by resident who did not want it

in house, gun was not registered to anyone in household and was nuisance weapon that should have been surrendered to police superintendent, fellow officer instead sold gun to accused officer, who attempted to convert it as his own property by filling out false form stating that he had acquired gun directly from resident. Further, substantial evidence supported finding that he was guilty of knowingly engaging in official misconduct by buying .32-caliber semiautomatic pistol from fellow officer while knowing that fellow officer did not lawfully possess it and that gun was nuisance weapon that should have been surrendered to police superintendent. Penalty of dismissal from employment as state police officer was not so disproportionate as to shock one's sense of fairness where officer committed crimes of fourth degree grand larceny, offering false instrument for filing, and official misconduct by purchasing .32-caliber semiautomatic pistol from fellow officer, while knowing that fellow officer did not lawfully possess it and that gun was nuisance weapon that should have been surrendered to police superintendent, and by attempting to convert it as his own property by filling out false form. Doolittle v McMahon, 245 A.D.2d 736, 665 N.Y.S.2d 739, 1997 N.Y. App. Div. LEXIS 12957 (N.Y. App. Div. 3d Dep't 1997).

A court officer, appointed by the sheriff, is exempt from civil service regulations, and may be removed at will as provided in the act pursuant to which he was appointed and is not protected by this section on the ground that he is an honorably discharged soldier of Spanish-American war. Connery v Sewell, 213 N.Y.S. 602, 126 Misc. 418, 1926 N.Y. Misc. LEXIS 577 (N.Y. Sup. Ct. 1926).

Deputies of the sheriff of Erie County, who are subject to be called on by the sheriff to perform any of the civil or criminal duties of his office, must be regarded as employees of sheriff and not as employees of county. Accordingly, a petition on behalf of such deputies, who were displaced by appointees of a new incumbent in the office of sheriff, for an order of mandamus directing their reinstatement and certification of a payroll containing their names on the ground that as war veterans and volunteer firemen they are protected against removal by this section is dismissed. Bates v Offerman, 264 N.Y.S. 547, 147 Misc. 800, 1933 N.Y. Misc. LEXIS 1538 (N.Y. Sup. Ct. 1933).

152. Purpose

The purpose of this section is to prevent summary removal of a veteran who is holding under an appointment for an indefinite term. Williams v Darling, 122 N.Y.S. 534, 67 Misc. 205, 1910 N.Y. Misc. LEXIS 226 (N.Y. Sup. Ct. 1910).

The principal object of this statute is to protect a veteran from arbitrary removal by requiring notice and a hearing where it is sought to oust him from his position for personal or political reasons, but every separation from service is not tantamount to a removal. Bentley v Jeacock, 14 N.Y.S.2d 366, 1939 N.Y. Misc. LEXIS 2229 (N.Y. Sup. Ct. 1939).

153. Veterans; hearing rights

In the case of an honorably-discharged soldier, if the position held by him was of a permanent character, he could not be removed therefrom except after presentment of charges of incompetency or misconduct and their determination against him after a hearing thereupon. Buehler v Board of Sup'rs, 260 N.Y. 268, 183 N.E. 384, 260 N.Y. (N.Y.S.) 268, 1932 N.Y. LEXIS 687 (N.Y. 1932).

Power to appoint carried with it power to remove, and a veteran removed by the body which appointed him was removed properly "by the officer or body having the power to remove" after due notice and a full opportunity to be heard, as required by this section. Shatter v Moses, 266 N.Y. 413, 195 N.E. 132, 266 N.Y. (N.Y.S.) 413, 1934 N.Y. LEXIS 916 (N.Y. 1934).

Under this section, forbidding removal from the civil service of an honorably discharged soldier of the World War except for incompetency or misconduct shown after a hearing upon stated charges, the burden of proving incompetency or misconduct rests upon the person alleging it. Meyer v Goldwater, 286 N.Y. 461, 36 N.E.2d 663, 286 N.Y. (N.Y.S.) 461, 1941 N.Y. LEXIS 1462 (N.Y.), reh'g denied, 286 N.Y. 697, 37 N.E.2d 139, 286 N.Y. (N.Y.S.) 697, 1941 N.Y. LEXIS 2249 (N.Y. 1941).

The right accorded to petitioners (war veterans employed in the competitive class of civil service), to be represented by counsel at hearings on formal charges of misconduct involved more than the mere privilege of being accompanied by an attorney. It included the right of private consultation with an attorney of their own choice. Deprivation of such right to counsel and to a fair trial is in itself a basis for annulment of a determination resulting therefrom. Fusco v Moses, 304 N.Y. 424, 107 N.E.2d 581, 304 N.Y. (N.Y.S.) 424, 1952 N.Y. LEXIS 757 (N.Y. 1952).

A rule of the New York City Civil Service Commission exempting from competitive examination any person appointed for service in a locality outside the city who was a resident of such locality, when appointment from an eligible list was found to be not practicable, was not in conflict with former § 15, and, under this section, the appointee, if a war veteran who has been employed in classified service for several years, cannot be removed except upon charges of misconduct and following a hearing upon such charges. Murphy v Larkin, 17 A.D.2d 87, 230 N.Y.S.2d 745, 1962 N.Y. App. Div. LEXIS 8457 (N.Y. App. Div. 3d Dep't 1962), cert. denied, 382 U.S. 903, 86 S. Ct. 237, 15 L. Ed. 2d 156, 1965 U.S. LEXIS 342 (U.S. 1965).

In an Art 78 proceeding, the state Civil Service Commissioner did not act arbitrarily or capriciously in terminating a veteran's appointment without a hearing, even though under Civ S Law § 75 a veteran who holds a permanent civil service appointment cannot be discharged except for incompetence or misconduct after a hearing pursuant to that section, where the veteran was first given a temporary appointment, where that appointment was later made permanent but subject to a probationary term, where representations as to the permanency of the veteran's appointment, made by a deputy director of the veteran's department, exceeded the deputy director's authority, and where the veteran's termination from his probationary period was timely, even though the actual termination date fell after the expiration of the probationary term, in that the letter of termination was both dated and received before the end of the term and it was permissible to serve a period of short duration past the end of a probationary term. Further, the trial court properly refused the veteran's request for a rehearing where allegedly new evidence presented by the veteran did not indicate any bad faith on his employer's part that could justify a change in the determination. Mendez v Valenti, 101 A.D.2d 612, 474 N.Y.S.2d 868, 1984 N.Y. App. Div. LEXIS 18152 (N.Y. App. Div. 3d Dep't), app. denied, 62 N.Y.2d 606, 1984 N.Y. LEXIS 7763 (N.Y. 1984).

Although CLS Civ S § 75(1) provides that person holding position in certain employment categories may not be terminated "except for incompetency or misconduct shown after a hearing upon stated charges," and CLS Civ S & 75(1)(b) extends such protection to employees in competitive class who are honorably discharged veterans, statute does not abrogate provisions of CLS Civ S § 63 requiring completion of probationary term, nor well-established judicial authority denying right to pretermination hearing even to veteran in probationary status. Vaillancourt v New York State Liquor Authority, 153 A.D.2d 531, 544 N.Y.S.2d 609, 1989 N.Y. App. Div. LEXIS 10996 (N.Y. App. Div. 1st Dep't 1989), aff'd, 75 N.Y.2d 889, 554 N.Y.S.2d 474, 553 N.E.2d 1022, 1990 N.Y. LEXIS 612 (N.Y. 1990).

Petitioner, appointed to permanent position as civil service employee, was not, by virtue of his status as honorably discharged veteran who served in time of war, entitled to notice and hearing prior to his termination for unsatisfactory work performance after 18 weeks on probation. Fox v New York State Dep't of Vehicles, 161 A.D.2d 346, 554 N.Y.S.2d 921, 1990 N.Y. App. Div. LEXIS 5294 (N.Y. App. Div. 1st Dep't 1990).

Court rule permitting removal of honorably discharged veteran from his nonjudicial position without hearing if he holds position designated as "confidential or requiring the performance of functions influencing policy" (CLS Stds & Adm Policies § 25.29 (22 NYCRR § 25.29)) is consistent with general principles of Civil Service Law, even though CLS Civ S § 75 provides that honorably discharged veteran may not be removed without hearing unless he holds position of "private secretary, cashier or deputy of any official or department," since CLS Jud § 211 gives Chief Judge discretion and power to adapt general principles of Civil Service Law to needs of court system. Dismissal of honorably discharged veteran from his position as associate law assistant

with Supreme Court without hearing did not violate his right to due process of law since he did not have property right to continued employment. Conigland v Rosenblatt, 171 A.D.2d 864, 567 N.Y.S.2d 544, 1991 N.Y. App. Div. LEXIS 3908 (N.Y. App. Div. 2d Dep't 1991).

A petition alleging that petitioner is an honorably discharged war veteran in exempt classification for civil service employment and was dismissed on November 18, 1946, without preferment of charges against him or a hearing, was barred by laches where a demand for preferment of charges and a hearing was not made until April 1, 1960, where it must have been evident to petitioner, as early as June 25, 1959, that respondent had taken a final and nonyielding position regarding his discharge. Weeden v Senior, 24 Misc. 2d 333, 203 N.Y.S.2d 188, 1960 N.Y. Misc. LEXIS 3023 (N.Y. Sup. Ct. 1960), aff'd, 12 A.D.2d 906, 212 N.Y.S.2d 998, 1961 N.Y. App. Div. LEXIS 12702 (N.Y. App. Div. 1st Dep't 1961).

An instrument notifying a war veteran civil service employee of the termination of his services and giving him the right to make a reply to charges stated therein within five days indicates a pre-judgment inconsistent with the spirit of this section which requires a fair hearing or trial and a dismissal pursuant to such a notice will be set aside. Resler v Malone, 52 N.Y.S.2d 457, 1944 N.Y. Misc. LEXIS 2736 (N.Y. Sup. Ct. 1944).

A civil service employee who is neither a veteran nor volunteer fireman is not entitled to a hearing or to confront or cross examine witnesses against him. Elwood v Department of Mental Hygiene, 72 N.Y.S.2d 648, 1947 N.Y. Misc. LEXIS 2830 (N.Y. Sup. Ct. 1947).

154. Volunteer firemen

The board of fire and police commissioners should not be allowed to so construe this section as to permit it to summarily discharge relator, without a hearing, from his office in the police department, while he has in his possession an honorable discharge from the fire department of the city signed by said board and recommended by the chief engineer of the fire department. People ex rel. Conley v Beach, 203 N.Y. 620, 97 N.E. 39, 203 N.Y. (N.Y.S.) 620, 1911 N.Y. LEXIS 1502 (N.Y. 1911).

Where a veteran volunteer fireman has been appointed to the position of chief probation officer of the court of special sessions in Yonkers, as said position is classified in the competitive class by the municipal commission with the approval of the mayor and of the state commission, said probation officer cannot be removed without charges and without a hearing at the pleasure of the city judge under this law. People ex rel. Garrity v Walsh, 181 A.D. 118, 168 N.Y.S. 440, 1917 N.Y. App. Div. LEXIS 9144 (N.Y. App. Div. 1917).

A laborer appointed by the board of supervisors of Rensselaer county as a bridge tender is in classified civil service, and, being an exempt volunteer fireman, is entitled to the protection of this section. Stowe v Board of Sup'rs, 236 A.D. 212, 259 N.Y.S. 503, 1932 N.Y. App. Div. LEXIS 5936 (N.Y. App. Div.), rev'd, 260 N.Y. 662, 184 N.E. 136, 260 N.Y. (N.Y.S.) 662, 1932 N.Y. LEXIS 858 (N.Y. 1932).

Volunteer fireman qualifies for exemptions. Brown v Stephan, 245 A.D. 588, 283 N.Y.S. 31, 1935 N.Y. App. Div. LEXIS 10363 (N.Y. App. Div. 1935).

A civil service employee, an exempt volunteer fireman, who was a clerk in the county treasurer's office, was held not within the protection of this section. Penny v Kirk, 260 A.D. 886, 22 N.Y.S.2d 996, 1940 N.Y. App. Div. LEXIS 5227 (N.Y. App. Div. 1940).

Petitioner was reinstated to the position of Principal Park Superintendent and should not have been dismissed from employment except for incompetency or misconduct found after a hearing where evidence showed that he secured a certificate after his dismissal that he was an exempt volunteer fireman and the affidavits of the fire company's officers past and present left no room for triable issue of fact as to whether he was honorably discharged or whether he was not in good standing at the time he applied for his certificate. Badman v Falk, 4 A.D.2d 149, 163 N.Y.S.2d 570, 1957 N.Y. App. Div. LEXIS 5112 (N.Y. App. Div. 3d Dep't 1957), aff'd, 4 N.Y.2d 839, 173 N.Y.S.2d 813, 150 N.E.2d 240, 1958 N.Y. LEXIS 1080 (N.Y. 1958).

Chapter 299 of the Laws of 1961 abrogates any rights which a previously exempt volunteer fireman previously had under this section to hold a position as civil defense safety representative with the status of permanent employee. Steger v Farrell, 22 A.D.2d 729, 253 N.Y.S.2d 181, 1964 N.Y. App. Div. LEXIS 2994 (N.Y. App. Div. 3d Dep't 1964), aff'd, 15 N.Y.2d 994, 260 N.Y.S.2d 13, 207 N.E.2d 608, 1965 N.Y. LEXIS 1457 (N.Y. 1965).

Volunteer firefighters were denied due process in connection with charges that they improperly conducted live-burn training exercise where charges did not specify rule, regulation, bylaw, or policy that they allegedly breached. Ritz v Board of Fire Comm'rs, 212 A.D.2d 949, 622 N.Y.S.2d 830, 1995 N.Y. App. Div. LEXIS 2117 (N.Y. App. Div. 3d Dep't 1995).

Court dismissed Article 78 petition by volunteer firefighter who was found guilty of misconduct and suspended for one year based on his refusal to participate in sexual harassment training provided by fire district, where he conceded that he was aware of training requirement and district's position that training was mandatory for all firefighters, but he maintained that he was not made aware of district's formal adoption of special rule or regulation which mandated training; record provided rational basis for respondent's determination that mandatory sexual harassment training had been established by district rule or regulation and that petitioner knowingly violated such requirement, and penalty imposed was not disproportionate to offense. Crawford v Jonesville Bd. of Fire Comm'rs, 229 A.D.2d 773, 645 N.Y.S.2d 586, 1996 N.Y. App. Div. LEXIS 7866 (N.Y. App. Div. 3d Dep't 1996).

Under this section a veteran volunteer fireman has the right to a hearing before removal, but, upon completion of the work he was employed to do, he may be dismissed. Cottam v New York, 131 N.Y.S. 617, 74 Misc. 67, 1911 N.Y. Misc. LEXIS 589 (N.Y. App. Term 1911).

An exempt volunteer fireman who was temporarily employed as a fireman and later as an assistant engineer in the power plant of the court-house building, a position in competitive class of classified service, before an eligible list was made, is not entitled to protection of this section and may be displaced by appointment of another from an eligible list thereafter furnished. Faulkner v Board of Sup'rs, 131 N.Y.S. 998, 74 Misc. 502, 1911 N.Y. Misc. LEXIS 687 (N.Y. Sup. Ct. 1911).

This section protects an exempt fireman against removal without cause from the office of the commissioner of public safety of a municipality. People ex rel. Kennedy v Foley, 172 N.Y.S. 279, 104 Misc. 684, 1918 N.Y. Misc. LEXIS 893 (N.Y. Sup. Ct. 1918).

An appointee to the position of special police officer in the town of Gates without examination does not gain the benefits of this section by virtue of being an exempt fireman since this section is applicable only if the appointment is made in conformity with § 6 of Art. V of the Constitution. Ver Weire v Finch, 93 N.Y.S.2d 743, 198 Misc. 424, 1949 N.Y. Misc. LEXIS 2986 (N.Y. Sup. Ct. 1949).

A shop foreman employed in the Conservation Department garage should not have been discharged where he was a volunteer fireman, not engaged as a temporary or provisional employee and was removed for reasons other than incompetency or misconduct. Berry v Conservation Dep't, 11 Misc. 2d 686, 175 N.Y.S.2d 198, 1957 N.Y. Misc. LEXIS 1887 (N.Y. Sup. Ct. 1957).

Fire district board's failure to provide exempt volunteer firemen with pre-termination hearing constitutes deprivation of property interest without due process of law guaranteed by Fourteenth Amendment; however, fire district board is subject to liability only from date of termination to date decision was handed down in firemen's state court actions brought pursuant to CLS CPLR Article 78, as such proceeding provided firemen with requirements of due process. Leonardi v Board of Fire Comm'rs, 643 F. Supp. 610, 1986 U.S. Dist. LEXIS 20291 (E.D.N.Y. 1986).

155. —Recordation requirement

Petitioner should not have been discharged from his civil service job where no charges were filed against him and he was not accorded a hearing, since there is no mandate in the statute that requires a civil service employee to record a certificate of exemption as a volunteer fireman as a prerequisite for his protection against removal under this section. Stark v McHugh, 4

A.D.2d 738, 164 N.Y.S.2d 121, 1957 N.Y. App. Div. LEXIS 5154 (N.Y. App. Div. 3d Dep't), app. denied, 4 A.D.2d 843, 168 N.Y.S.2d 929, 1957 N.Y. App. Div. LEXIS 4607 (N.Y. App. Div. 3d Dep't 1957), app. denied, 4 N.Y.2d 676, 1958 N.Y. LEXIS 1423 (N.Y. 1958).

156. —Time of service

Summary dismissal of a laborer in the light department of the village of Solvay, was illegal, under this section, and he is entitled to be reinstated, where it appears that he was a member of the volunteer fire department of the village of Solvay from 1895 to 1905, and has received from the village an exemption certificate based on five years' service, as provided by § 209 of the Village Law of 1897. Pettit v Boyle, 223 N.Y.S. 521, 129 Misc. 873, 1927 N.Y. Misc. LEXIS 1339 (N.Y. Sup. Ct. 1927).

This section applies to the janitor of a building owned by a village, who has served the term required by law in the volunteer fire department of a village. Goold v Vosburg, 273 N.Y.S. 918, 152 Misc. 599, 1934 N.Y. Misc. LEXIS 1587 (N.Y. Sup. Ct. 1934), aff'd, 243 A.D. 679, 277 N.Y.S. 932, 1935 N.Y. App. Div. LEXIS 7624 (N.Y. App. Div. 1935).

An exempt volunteer fireman who has been annually appointed chief of police for a one year term for seventeen consecutive years may not be removed without a hearing even though in accordance with the village charter each appointment was made "during the pleasure of the board." Dickinson v Monroe, 44 N.Y.S.2d 86, 180 Misc. 714, 1943 N.Y. Misc. LEXIS 2392 (N.Y. Sup. Ct. 1943).

V. Sanctions

A. Generally

157. In general

A hearing officer's failure to include recommendations as to discipline when preparing his or her report after a disciplinary hearing pursuant to Civil S Law § 75(2) does not strip the subject agency of jurisdiction to impose sanctions upon its employee, since the failure to recommend discipline is important only to the extent that it omits a suggested starting point from which the removing entity may begin to fashion the appropriate sanction, and since, though a disciplinary proceeding will be voided and the status quo ante restored when there has been some error that has tainted the entire proceeding, such situation simply does not arise when a hearing officer acts pursuant to a valid delegation, prepares a detailed report, and provides such report along with a transcript to the removing board or officer but omits to include recommendations as to discipline. Wiggins v Board of Education, 60 N.Y.2d 385, 469 N.Y.S.2d 652, 457 N.E.2d 758, 1983 N.Y. LEXIS 3457 (N.Y. 1983).

The refusal of a sheriff to remit a deputy's 30-day pre-hearing suspension without pay in connection with the disposition of disciplinary proceedings against the deputy in which he was found guilty of misconduct and reprimanded, could be considered a penalty or punishment within Civil Service Law § 76(1) for which judicial review could be sought. Civil Service Law § 75(3), permitting a 30-day pre-hearing suspension without pay, also provides that upon a finding of guilt a post-hearing penalty or punishment may include a suspension without pay, and the time during which an officer or employee had previously been suspended without pay could be considered as part of the penalty. Sinnott v Finnerty, 65 N.Y.2d 780, 492 N.Y.S.2d 945, 482 N.E.2d 563, 1985 N.Y. LEXIS 16192 (N.Y. 1985).

Disciplinary determinations by police commissioner are entitled to substantial deference because commissioner, and not courts, is accountable to public for integrity of police department. Trotta v Ward, 77 N.Y.2d 827, 566 N.Y.S.2d 199, 567 N.E.2d 241, 1991 N.Y. LEXIS 70 (N.Y. 1991).

Where a correctional officer was found guilty of certain misconduct that involved his being intoxicated while in possession of a loaded pistol, the penalty imposed by the sheriff, dismissal from employment, was so disproportionate to his misconduct in light of all the circumstances, including the fact that the officer never displayed the weapon and that it was never a factor in the incident, as to shock one's sense of fairness; thus the penalty of dismissal would be reversed. Fox v Finnerty, 96 A.D.2d 905, 466 N.Y.S.2d 83, 1983 N.Y. App. Div. LEXIS 19516 (N.Y. App. Div. 2d Dep't), app. dismissed, 60 N.Y.2d 860, 1983 N.Y. LEXIS 6534 (N.Y. 1983), rev'd, 62 N.Y.2d 796, 477 N.Y.S.2d 324, 465 N.E.2d 1259, 1984 N.Y. LEXIS 4372 (N.Y. 1984).

Demotion in rank was proper penalty for city employee who wrongfully appropriated property of city Christmas Bureau to himself and to third parties who were not intended recipients thereof. Schmidt v Ryan, 133 A.D.2d 536, 519 N.Y.S.2d 907, 1987 N.Y. App. Div. LEXIS 50024 (N.Y. App. Div. 4th Dep't 1987).

Penalty imposed on police officer who failed to safeguard her revolver was not so disproportionate to offense as to shock one's sense of fairness where officer was suspended without pay and benefits for 3 years, and was required to be on disciplinary probation for one year on reinstatement. Rinando v Ward, 159 A.D.2d 303, 552 N.Y.S.2d 581, 1990 N.Y. App. Div. LEXIS 2679 (N.Y. App. Div. 1st Dep't), app. denied, 76 N.Y.2d 709, 561 N.Y.S.2d 913, 563 N.E.2d 284, 1990 N.Y. LEXIS 3281 (N.Y. 1990).

Formal reprimand placed in school custodian's personnel file was disciplinary reprimand within meaning of CLS Civ S § 75, not mere warning, and thus court would annul school district's determination to reprimand custodian without statutory due process protections, where (1) reprimand referred to investigation of serious charge, findings of fact, and ultimate decision that custodian should be reprimanded for misconduct, and (2) reprimand also stated that matter would be resolved by placement of formal reprimand in file. Civil Serv. Employees Ass'n v Southold Union Free Sch. Dist., 204 A.D.2d 445, 611 N.Y.S.2d 895, 1994 N.Y. App. Div. LEXIS 4757 (N.Y. App. Div. 2d Dep't 1994).

County sheriff should be disqualified from determining appropriate penalty following imposition of excessive punishment on correction officer where sheriff had been involved in bringing charges against officer. Stapleton v LaPaglia, 207 A.D.2d 945, 616 N.Y.S.2d 679, 1994 N.Y. App. Div. LEXIS 8949 (N.Y. App. Div. 3d Dep't 1994).

Penalty of probationary dismissal was appropriate where police officer was absent without leave for her scheduled tour of duty, she failed to perform her assigned duties despite several directives, and she engaged in verbal altercation and was discourteous to superior officer. Police officer's termination within probationary period was validly premised on misconduct predating commencement of probationary period. Garrett v Safir, 253 A.D.2d 700, 677 N.Y.S.2d 570, 1998 N.Y. App. Div. LEXIS 9695 (N.Y. App. Div. 1st Dep't), app. denied, 92 N.Y.2d 817, 684 N.Y.S.2d 489, 707 N.E.2d 444, 1998 N.Y. LEXIS 4330 (N.Y. 1998).

Substantial evidence, including primarily testimony of complainant and his wife, supported findings that first officer used excessive force in arresting complainant and that second officer addressed complainant inappropriately during same arrest. Nicastro v Safir, 266 A.D.2d 167, 698 N.Y.S.2d 481, 1999 N.Y. App. Div. LEXIS 12357 (N.Y. App. Div. 1st Dep't 1999).

Penalty of 10-day loss of vacation time was not disproportionate to offense where police officer used excessive force to effect arrest. Nicastro v Safir, 266 A.D.2d 167, 698 N.Y.S.2d 481, 1999 N.Y. App. Div. LEXIS 12357 (N.Y. App. Div. 1st Dep't 1999).

Penalty of 15-day loss of vacation time was not disproportionate to offense where police officer, while participating in arrest made with excessive force, addressed arrestee inappropriately. Nicastro v Safir, 266 A.D.2d 167, 698 N.Y.S.2d 481, 1999 N.Y. App. Div. LEXIS 12357 (N.Y. App. Div. 1st Dep't 1999).

Forfeiture of 15 vacation days was appropriate sanction for police officer's discourteous behavior toward police sergeant. Sanders v Safir, 284 A.D.2d 163, 726 N.Y.S.2d 844, 2001 N.Y. App. Div. LEXIS 6148 (N.Y. App. Div. 1st Dep't 2001).

There was no violation of N.Y. Civ. Serv. Law § 75(2) where: (1) the police chief delegated the authority to conduct a hearing on disciplinary charges against a police officer; (2) the hearing transcript and the hearing officer's recommendations were forwarded to the chief for his review; and (3) there was no clear revelation that the chief made no independent appraisal and reached no independent conclusion. Pignato v City of Rochester, 288 A.D.2d 825, 732 N.Y.S.2d 302, 2001 N.Y. App. Div. LEXIS 10518 (N.Y. App. Div. 4th Dep't 2001), app. dismissed, 97 N.Y.2d 725, 740 N.Y.S.2d 696, 767 N.E.2d 153, 2002 N.Y. LEXIS 219 (N.Y. 2002), app. denied, 98 N.Y.2d 604, 746 N.Y.S.2d 278, 773 N.E.2d 1016, 2002 N.Y. LEXIS 1492 (N.Y. 2002).

The Civil Service Law confers on an employee a vested right in his position of which he cannot be deprived except in conformity with its provisions, but the statute gives no one a vested interest in an office which he cannot fill with competency, dignity or humanity. Insley v Shanahan, 17 N.Y.S.2d 25, 173 Misc. 33, 1940 N.Y. Misc. LEXIS 1380 (N.Y. Sup. Ct. 1940).

Civil Service Law § 75, subd 4 does not require a conviction on the acts of misconduct charged to the officer to make the exception operative. Dati v Gallagher, 68 Misc. 2d 692, 327 N.Y.S.2d 472, 1971 N.Y. Misc. LEXIS 999 (N.Y. Sup. Ct. 1971).

Disciplinary proceedings initiated pursuant to section 75 of the Civil Service Law and section 155 of the Town Law are administrative in nature carrying the loss of employment as their harshest sanction, and are not the type of proceedings upon which an action for malicious prosecution can be based, since such an action requires a proceeding before a court or a Judge that is either a civil action that interferes with one's property or person by way of a provisional remedy, or a criminal action containing the threat of incarceration. Groat v Town Board of Glenville, 100 Misc. 2d 326, 418 N.Y.S.2d 842, 1979 N.Y. Misc. LEXIS 2461 (N.Y. Sup. Ct. 1979).

The salary of a police officer who is a permanent civil service appointee may not be suspended without an evidentiary hearing on the ground of the officer's failure to report for regular duty after he has been certified as physically able to work, pursuant to Gen Mun Law § 207-c, following a period of disability. Goglia v Sardino, 119 Misc. 2d 907, 464 N.Y.S.2d 966, 1983 N.Y. Misc. LEXIS 3613 (N.Y. Sup. Ct. 1983), aff'd, 101 A.D.2d 1013, 476 N.Y.S.2d 268, 1984 N.Y. App. Div. LEXIS 18744 (N.Y. App. Div. 4th Dep't 1984).

Discharged worker's N.Y. C.P.L.R. art. 78 action challenging the trial court's denial of a motion seeking back wages and benefits was granted, and the worker was granted back wages for the periods of time which the worker was eligible for such wages pursuant to N.Y. Civ. Serv. Law § 75(3). Trahan v Jefferson County Dep't of Soc. Servs., 2 A.D.3d 1309, 768 N.Y.S.2d 893, 2003 N.Y. App. Div. LEXIS 14169 (N.Y. App. Div. 4th Dep't 2003).

Public employee does not have property right under CLS Civ S § 75 with respect to discretionary benefits such as preference as to when she can take her vacation time, her preference as to what holidays she can take, her assignment to steady tour and post, and access to voluntary overtime. McNill v New York City Dep't of Correction, 950 F. Supp. 564, 1996 U.S. Dist. LEXIS 17739 (S.D.N.Y. 1996).

158. Admissions; self-incriminating statements

Corrections officer was entitled to reinstatement where he was discharged for his self-incriminating testimony at trial of suspected murderer after Correction Department officials had agreed to impose certain limited disciplinary measures not involving loss of employment if he testified fully; although officer may have deserved more severe penalties for his egregious conduct, department officials were bound, as state agents, to fulfill their promises. Rahilly v Coughlin, 134 A.D.2d 353, 520 N.Y.S.2d 831, 1987 N.Y. App. Div. LEXIS 50532 (N.Y. App. Div. 2d Dep't 1987), app. denied, 70 N.Y.2d 616, 526 N.Y.S.2d 437, 521 N.E.2d 444, 1988 N.Y. LEXIS 174 (N.Y. 1988).

Twenty-day suspension without pay and demotion of building maintenance foreman for using employer's vehicles for his own personal purposes was not disproportionate to offense, although foreman had 20-year employment record without prior disciplinary action, other employees used such vehicles for personal purposes, and no rule or regulation specifically proscribed what he had done, where foreman admitted in statement made to sheriff that he knew he was not authorized to take vehicles off of employer's premises. Howland v Schuyler-Chemung-Tioga Bd. of Coop. Educational Services, 179 A.D.2d 955, 578 N.Y.S.2d 723, 1992 N.Y. App. Div. LEXIS 894 (N.Y. App. Div. 3d Dep't), app. denied, 80 N.Y.2d 756, 588 N.Y.S.2d 825, 602 N.E.2d 233, 1992 N.Y. LEXIS 3188 (N.Y. 1992).

Discharge of probationary correction officer was rationally based, despite officer's conclusory allegations that her discharge was based on sex discrimination, and regardless of whether she was in fact engaged in improper personal relationship with inmate, where she admitted that she was away from her post in violation of department rules and regulations when she went to unauthorized section of prison in order to visit with inmate. Medina v Sielaff, 182 A.D.2d 424, 582 N.Y.S.2d 685, 1992 N.Y. App. Div. LEXIS 5643 (N.Y. App. Div. 1st Dep't 1992).

Dismissal from employment with county vocational education agency was justified where employee admitted that she met with client to conduct mortgage business on agency property and on agency time, and 2 coworkers testified that she typed mortgage documents on agency property during agency time. Ficken v Vocational Educ. & Extension Bd., 238 A.D.2d 589, 656 N.Y.S.2d 390, 1997 N.Y. App. Div. LEXIS 4424 (N.Y. App. Div. 2d Dep't), app. denied, 90 N.Y.2d 809, 664 N.Y.S.2d 270, 686 N.E.2d 1365, 1997 N.Y. LEXIS 3183 (N.Y. 1997).

159. Article 78 proceedings

In an Article 78 proceeding brought by a fireman to review his demotion after being found guilty of having knowingly submitting false reports and neglect of duty, the City Fire Commissioner acted in excess of his authority when he imposed a penalty authorized by Civ S Law § 75 but not by the city's administrative code. Wein v New York, 56 N.Y.2d 758, 452 N.Y.S.2d 16, 437 N.E.2d 275, 1982 N.Y. LEXIS 3407 (N.Y. 1982).

In an Article 78 proceeding brought by a laundry worker who was employed by the county and who was suspended for taking an unauthorized leave of absence, reimbursement of back pay and benefits was properly denied where the worker was not acquitted of the charges against him. Hernandez v County of Sullivan, 87 A.D.2d 702, 448 N.Y.S.2d 858, 1982 N.Y. App. Div. LEXIS 16037 (N.Y. App. Div. 3d Dep't), app. denied, 56 N.Y.2d 652, 1982 N.Y. LEXIS 5806 (N.Y. 1982).

In an Article 78 proceeding challenging the dismissal of petitioner from the police department, the penalty imposed would be vacated and the matter remitted for the imposition of a new penalty since the penalty of dismissal had been so disproportionate to the offenses as to be shocking to one's sense of fairness, and since the trial commissioner had incorrectly believed that he was bound to impose one of the limited penalties listed in the city's charter rather than in the general state statute that took precedence over the inconsistent local charter. Dillon v City Manager of Yonkers, 87 A.D.2d 890, 449 N.Y.S.2d 530, 1982 N.Y. App. Div. LEXIS 16399 (N.Y. App. Div. 2d Dep't 1982).

In an Article 78 proceeding to review the dismissal of an employee of a county social services department, the employee would be entitled to full reimbursement of salary and benefits for the period of time between the initial annulment of the determination of dismissal and the subsequent redetermination of dismissal where the employee had been suspended without pay for 30 days prior to the initial determination of dismissal, and where he should have been reinstated to his position after annulment of the initial determination inasmuch as he had not been legally determined to have been guilty of misconduct until the matter had been remitted and a redetermination made, despite the fact that dismissal had been proper in view of the employee's fight with a coemployee in front of patients in the department's infirmary. Ortiz v Lesser, 88 A.D.2d 1105, 453 N.Y.S.2d 63, 1982 N.Y. App. Div. LEXIS 17519 (N.Y. App. Div. 3d Dep't 1982).

In an Article 78 proceeding to review the suspension and demotion of a psychiatric aide on finding of misconduct, the penalty imposed would be either suspension or demotion, but not both, where Civ S Law § 75(3) indicated an alternative of penalties by the use of the word "or." Brabham v Weinstein, 89 A.D.2d 566, 452 N.Y.S.2d 103, 1982 N.Y. App. Div. LEXIS 17620 (N.Y. App. Div. 2d Dep't 1982).

An Article 78 proceeding brought by a police officer to challenge a police commissioner's determination that had required the officer to forfeit six days' vacation pay due to his unjustified violation of a reasonable order would be dismissed where the evidence showed that the officer, due to his knowledge of English and Spanish, had been instructed to report to the detective room to aid in a homicide investigation by interpreting at the interview of a Spanish-speaking witness, that the officer had failed to do so and had failed to notify his superior officer that he had not done so, that the officer had previously interpreted on approximately 40 ocassions in police situations, and that the officer's motivation

in failing to obey the order had apparently been based upon his desire to be compensated or to be recognized with a detective designation for what he felt was a special skill, and where the penalty imposed upon the officer for his acts was not so disproportionate to the offense as to be shocking to one's sense of fairness. Yanis v McGuire, 98 A.D.2d 669, 469 N.Y.S.2d 736, 1983 N.Y. App. Div. LEXIS 20961 (N.Y. App. Div. 1st Dep't 1983), aff'd, 62 N.Y.2d 723, 476 N.Y.S.2d 828, 465 N.E.2d 367, 1984 N.Y. LEXIS 4325 (N.Y. 1984).

Although a petitioner in an Article 78 proceeding was entitled under Civ S Law § 75(3) to back pay for the period in excess of the initial 30 days after his suspension, he could only recover wages to the extent that any delay beyond the 30-day period was not attributable to him. Thus, where petitioner's attorney sought a more than one month adjournment of the disciplinary hearing after petitioner was suspended from duty without pay, petitioner could not be recompensed for the delay which he caused. Valerio v Scannell, 105 A.D.2d 791, 481 N.Y.S.2d 733, 1984 N.Y. App. Div. LEXIS 20911 (N.Y. App. Div. 2d Dep't 1984).

In Article 78 proceeding to review determination that petitioner committed misconduct while employed by city, court would vacate penalties imposed and would remit for further proceedings where multiple penalties were imposed on petitioner in violation of CLS Civ S § 75(3), which provided for choice of penalties and thus prohibited imposition of restitution and demotion in addition to suspension without pay. Matteson v Oswego, 186 A.D.2d 1017, 588 N.Y.S.2d 472, 1992 N.Y. App. Div. LEXIS 11569 (N.Y. App. Div. 4th Dep't 1992).

Petitioner in Article 78 proceeding, who was suspended without pay from his position as village police officer retroactive to August 28, 1992 following his indictment on criminal charges, was entitled to recover his full salary and benefits retroactive to September 29, 1992 and until determination of charges against him, since respondents could not suspend his pay for more than 30 days pursuant to CLS Civ S § 75(3) and CLS Vill § 8-804; fact that evidence necessary for final disposition of disciplinary charges was in exclusive control of district attorney was not relevant, nor was it relevant that petitioner requested extension of time to answer charges against him, since respondents had burden of scheduling hearing. Conde v Aiello, 204 A.D.2d 1029, 613 N.Y.S.2d 94, 1994 N.Y. App. Div. LEXIS 6857 (N.Y. App. Div. 4th Dep't 1994).

School district's discharge of custodian was so disproportionate to his offenses as to shock one's sense of fairness, and penalty would be reduced to suspension for one year, where (1) custodian's 3 offenses were failing to clean his assigned rooms adequately, sweeping orange peels from side of cafeteria for which he was responsible to side for which coworker was responsible, and leaving work 20 minutes early, (2) each offense involved single occurrence on separate date, and (3) custodian was 12-year employee of district. Brown v Murphy, 275 A.D.2d 931, 713 N.Y.S.2d 798, 2000 N.Y. App. Div. LEXIS 9579 (N.Y. App. Div. 4th Dep't 2000).

Termination of certified occupational therapy assistant's employment with multicounty cooperative educational services board was not so disproportionate to her offenses as to shock one's sense of fairness where she abused her sick and personal leave several times in violation of employer-employee professional agreement, and she submitted false claim for reimbursement. Knight v Board of Coop. Educ. Servs., 275 A.D.2d 1038, 714 N.Y.S.2d 166, 2000 N.Y. App. Div. LEXIS 9540 (N.Y. App. Div. 4th Dep't 2000).

Penalties of suspension without pay for 15 days and forfeiture of 25 vacation days did not shock Appellate Division's sense of justice where police officer was found guilty of 3 counts of improper searches, one count of failing to give his shield number when requested to do so, and one count of use of excessive force. Schaefer v Safir, 281 A.D.2d 163, 721 N.Y.S.2d 231, 2001 N.Y. App. Div. LEXIS 1924 (N.Y. App. Div. 1st Dep't 2001).

Penalty of dismissal of 14-year employee from his position as Supervisor II with city's Administration for Children's Services did not shock Appellate Division's sense of fairness where employee had committed repeated acts of insubordination and disrespectful behavior over period of more than one year, including incident that occurred after employee was already under first set of disciplinary charges. Martinez v City of New York, 281 A.D.2d 187, 721 N.Y.S.2d 235, 2001 N.Y. App. Div. LEXIS 2196 (N.Y. App. Div. 1st Dep't 2001).

Penalty of dismissal of Supervisor of Housing Caretakers by city housing authority did not shock Appellate Division's sense of fairness where supervisor possessed and used illicit drugs and knowingly allowed her son to use apartment, leased to her by authority, to sell drugs. Fuller v N.Y. City Hous. Auth., 281 A.D.2d 231, 721 N.Y.S.2d 768, 2001 N.Y. App. Div. LEXIS 2439 (N.Y. App. Div. 1st Dep't 2001).

While substantial evidence under N.Y. C.P.L.R. § 7803(4) supported a finding that petitioner committed misconduct in her position as a teacher's aide pursuant to N.Y. Civ. Serv. Law § 75, petitioner was improperly terminated from her position as that sanction was disproportionate to her misconduct Matter of DeStefano v Board of Coop. Educ. Servs. of Nassau County, 50 A.D.3d 898, 857 N.Y.S.2d 174, 2008 N.Y. App. Div. LEXIS 3422 (N.Y. App. Div. 2d Dep't 2008).

Because a hearing officer was properly appointed by a village board of trustees in executive session to investigate a N.Y. Civ. Serv. Law § 75(2) disciplinary matter against a police chief, because the none of the board's actions taken violated N.Y. Pub. Off. Law art. 7, and because there was substantial evidence supporting the hearing officer's report and recommendations, the chief was not entitled to N.Y. C.P.L.R. art. 78 relief. Matter of Perryman v Saranac Lake, 64 A.D.3d 830, 881 N.Y.S.2d 693, 2009 N.Y. App. Div. LEXIS 5362 (N.Y. App. Div. 3d Dep't 2009).

160. Burden of proof

The trial court improperly granted respondent's petition seeking reinstatement to the position of police sergeant after respondent's probationary appointment was revoked, where at the time the Police Department revoked respondent's appointment, it had ample reasonable grounds to believe that respondent was engaged in unauthorized and prohibited employment, had lied at an interview when he was advised of the investigation against him, and had conducted himself in an unprofessional manner by shouting an obscenity in front of the Internal Affairs Division building while on duty, and thus respondent failed to bear the burden of showing that the demotion was made in bad faith. Rainey v McGuire, 111 A.D.2d 616, 490 N.Y.S.2d 4, 1985 N.Y. App. Div. LEXIS 49882 (N.Y. App. Div. 1st Dep't 1985).

Plaintiff's first and second causes of action, which alleged that his due process rights were violated when he was terminated from his position as fire chief based upon a quantum of proof lower than preponderance of the evidence, was barred by collateral estoppel. While plaintiff's "property interest" in the fire chief position was not expressly discussed by the state court in the Article 78 proceeding, it plainly held that the substantial evidence standard applied to any decision to terminate his employment under New York Civil Service Law. Marentette v City of Canandaigua, 351 F. Supp. 3d 410, 2019 U.S. Dist. LEXIS 3383 (W.D.N.Y. 2019), app. dismissed, 799 Fed. Appx. 48, 2020 U.S. App. LEXIS 3328 (2d Cir. N.Y. 2020).

All three of the U.S. Supreme Court's Matthews factors favored the application of a substantial evidence standard of proof rather than a preponderance of the evidence standard at a pre-termination hearing under N.Y. Civ. Serv. Law § 75 where, while the loss of a protected position of public employment implicated a property interest, any such deprivation did not rise to the level, in and of itself, of impacting a protected liberty interest; the pre-termination hearing was not intended to be the final adjudication on the merits; and the government clearly had an interest in quickly removing from service an unsatisfactory employee. Marentette v City of Canandaigua, 351 F. Supp. 3d 410, 2019 U.S. Dist. LEXIS 3383 (W.D.N.Y. 2019), app. dismissed, 799 Fed. Appx. 48, 2020 U.S. App. LEXIS 3328 (2d Cir. N.Y. 2020).

161. Collective bargaining agreement

Appellate court properly affirmed the trial court's finding that police discipline could not be a subject of collective bargaining under the Taylor Law when the legislature had expressly committed disciplinary authority over a police department, as was true in the present cases involving the city and the city police

officers' union, and the town and the town police officers' union; while statutory law expressed a strong presumption that the terms and conditions of employment were subject to mandatory bargaining, that presumption could be overcome by evidence that the legislature had given local officials the authority to discipline police, and, in each case, the evidence showed that the local officials had expressly been given such authority. Matter of Patrolmen's Benevolent Assn. of City of N.Y., Inc. v New York State Pub. Empl. Relations Bd., 6 N.Y.3d 563, 815 N.Y.S.2d 1, 848 N.E.2d 448, 2006 N.Y. LEXIS 584 (N.Y. 2006).

New York State Public Employment Relations Board erred in finding a city's improper employer practice for adopting police disciplinary procedures other than those in a collective bargaining agreement with police officers because (1) the more general N.Y. Civ. Serv. Law art. 14, on public employees' collective bargaining, was superseded by the more specific N.Y. Second Class Cities Law §§ 131 and 133, providing detailed police discipline procedures, so police discipline was not a collective bargaining subject, and (2) N.Y. Second Class Cities Law § 4's supersession clause showed no legislative intent for that Law to expire. Matter of City of Schenectady v New York State Pub. Empl. Relations Bd., 30 N.Y.3d 109, 86 N.E.3d 536, 64 N.Y.S.3d 644, 2017 N.Y. LEXIS 3074 (N.Y. 2017).

Court would affirm determination finding petitioner guilty of misconduct and terminating him from his employment with New York City Transit Authority (TA), but matter would be remanded for computation as to amount of back pay owed to petitioner for approximate 18-month period while he was suspended without pay prior to his dismissal, less 30 days authorized under CLS Civ S § 75(3) and any periods of delay attributable to him; existence of "substitute disciplinary procedure" in collective bargaining agreement between Transit Workers Union and TA, which petitioner was required to follow until he was permitted to elect hearing under CLS Civ S § 75, did not serve to forestall TA's obligation as to back pay, since collective bargaining agreement contained no provision relating to that obligation. Kemp v Gunn, 143 A.D.2d 915, 533 N.Y.S.2d 513, 1988 N.Y. App. Div. LEXIS 10288 (N.Y. App. Div. 2d Dep't 1988).

Provisions of CLS Vill § 8-804, limiting suspension of disciplined police officer to 20 days, did not apply where agreement executed by officer's union representative and village required that disciplinary action be administered under CLS Civ S § 75, allowing for 30-day suspension without pay pending hearing and determination of charges, and permitting suspension without pay for period not exceeding 2 months if such officer was found guilty of charges. Hoffman v Village of Sidney, 235 A.D.2d 698, 652 N.Y.S.2d 346, 1997 N.Y. App. Div. LEXIS 123 (N.Y. App. Div. 3d Dep't 1997).

Where petitioners were indicted for an alleged ticket-fixing scheme, the trial court erred by granting petitioners a preliminary injunction enjoining the city from denying or revoking release time pending resolution of arbitration proceedings as they failed to make the requisite showing of a likelihood of success on the merits on their claim that the sanction violated the collective bargaining agreement. An executive order required all employees on leave conduct themselves in a responsible manner, and the only reasonable inference was that there were consequences for non-compliance. Matter of Patrolmen's Benevolent Assn. of the City of New York, Inc. v City of New York, 119 A.D.3d 1, 987 N.Y.S.2d 308, 2014 N.Y. App. Div. LEXIS 3405 (N.Y. App. Div. 1st Dep't 2014), rev'd, 26 N.Y.3d 1044, 43 N.E.3d 765, 22 N.Y.S.3d 408, 2015 N.Y. LEXIS 3551 (N.Y. 2015), in part, 25 N.Y.3d 982, 31 N.E.3d 591, 9 N.Y.S.3d 175, 2015 N.Y. LEXIS 970 (N.Y. 2015).

A city transit employee would not be entitled to back wages for the period of suspension he incurred for electing a hearing pursuant to Civ S Law § 75 to review a determination terminating his employment following a bargaining agreement disciplinary proceedings during which he also was suspended without pay, where the employee was a union member and was bound by a provision of a collective bargaining agreement that permitted the suspension period provided for by § 75 to be imposed upon an employee who was the subject of a disciplinary action in addition to the suspension period provided for by the agreement when the employee sought review under § 75 of the results of a disciplinary action conducted in accordance with the agreement, where § 75 was silent as to the relation of its own suspension provisions on any independent and prior suspension provided for by collective bargaining agreements, and where the union was free to bargain away certain statutory rights in disciplinary actions and the members of the union were bound by the terms of any such agreement. Ferro v New York City Transit Authority, 121 Misc. 2d 716, 468 N.Y.S.2d 812, 1983 N.Y. Misc. LEXIS 3988 (N.Y. Civ. Ct. 1983).

162. Dual penalties

Civil Service Law § 75(3) provides choice of penalties: reprimand, fine, suspension without pay, demotion in grade and title, or dismissal from service, and thus, prohibits imposition of dual penalties such as reprimand as well as suspension without pay. Sinnott v Finnerty, 113 A.D.2d 836, 493 N.Y.S.2d 504, 1985 N.Y. App. Div. LEXIS 52479 (N.Y. App. Div. 2d Dep't 1985).

163. Duplicative charges

Two charges against fireman for disobeying orders and violating his oath of office, covering identical conduct, were duplicative and, upon remittal for new penalty determination, fireman would not be subject to enhanced punishment because he was separately charged for same offense. Donofrio v Spinnato, 144 A.D.2d 672, 534 N.Y.S.2d 705, 1988 N.Y. App. Div. LEXIS 12436 (N.Y. App. Div. 2d Dep't 1988).

164. Effect of money received from other sources

Police officer, who was dismissed from his position for attempting to fix traffic ticket, was entitled to back pay for period of his second suspension, less any earnings he might have received from other sources during period. Cohen v Bratton, 232 A.D.2d 304, 648 N.Y.S.2d 588, 1996 N.Y. App. Div. LEXIS 10579 (N.Y. App. Div. 1st Dep't 1996).

165. —Disability benefits

Correction officer's entitlement to disability benefits under CLS Gen Mun § 207-c prior to her termination constituted property right protected by constitutional guarantees of due process and could not be summarily discontinued or suspended without prior evidentiary hearing, notice, and opportunity to be heard, and correction officer was therefore entitled to receive uninterrupted disability benefits pending hearing and final determination of charges of misconduct justifying her termination; however, there was no merit to correction officer's contention that she could not be divested of disability benefits on termination of her employment after disciplinary hearing and determination that she was guilty of misconduct, since disability benefit provisions of CLS Gen Mun § 207-c do not limit sanctions authorized to be imposed in disciplinary proceedings under CLS Civ S § 75. Dacey v County of Dutchess, 121 A.D.2d 536, 503 N.Y.S.2d 845, 1986 N.Y. App. Div. LEXIS 58514 (N.Y. App. Div. 2d Dep't 1986).

Police department acted in bad faith by terminating probationary police officer after he suffered permanent injuries in line of duty, thereby frustrating officer's application for disability retirement benefits, despite department's assertion that it was already considering terminating officer due to preexisting knee injury prior to accident, since (1) department continued officer on full active duty, with all risks and hazards incidental to that status, for substantial period of time after department was supposedly concerned about his physical unfitness, (2) officer did not deceitfully withhold any material facts from department on his employment applications, and (3) even after disabling accident, department failed to act on its alleged recommendation to dismiss officer until officer submitted his application for accident disability retirement. Bellman v McGuire, 140 A.D.2d 262, 528 N.Y.S.2d 834, 1988 N.Y. App. Div. LEXIS 5591 (N.Y. App. Div. 1st Dep't 1988).

City's failure to inform police officer that his "line-of-duty" injury was so severe that he would be unable to return to full duty status amounted to bad faith termination, since officer was thereby precluded from applying for disability retirement benefits. Connolly v Kelly, 213 A.D.2d 272, 624 N.Y.S.2d 24, 1995 N.Y. App. Div. LEXIS 2974 (N.Y. App. Div. 1st Dep't), app. denied, 86 N.Y.2d 702, 631 N.Y.S.2d 606, 655 N.E.2d 703, 1995 N.Y. LEXIS 2598 (N.Y. 1995).

166. —Unemployment benefits

Although court properly ordered employer to reinstate petitioner in his job, award of back pay should have been reduced by amount of unemployment insurance benefits received by petitioner. Walker v Roach, 195 A.D.2d 563, 600 N.Y.S.2d 485, 1993 N.Y. App. Div. LEXIS 7357 (N.Y. App. Div. 2d Dep't 1993).

167. False statements

In view of strong public policy in favor of effectuating mandate of CLS Pub O § 30(1)(e), automatic termination is not waived by commencement of disciplinary proceedings; thus, city was entitled to summary judgment dismissing action by police officer seeking back pay for period in which disciplinary proceedings were conducted following his conviction of perjury for making false statements in affidavit submitted in support of search warrant application. Lemieux v Niagara Falls, 138 A.D.2d 945, 526 N.Y.S.2d 281, 1988 N.Y. App. Div. LEXIS 2752 (N.Y. App. Div. 4th Dep't), app. denied, 72 N.Y.2d 806, 532 N.Y.S.2d 847, 529 N.E.2d 177, 1988 N.Y. LEXIS 2468 (N.Y. 1988).

Substantial evidence supported city police department's decision that police captain violated its rules by failing to answer truthfully questions posed to him during internal investigation, refusing to cooperate fully in that investigation, and refusing to comply with police chief's orders, including order to provide statement under oath, where (1) during internal investigation of allegations of bribes by police officers to political officials, captain was ordered by police chief to appear and testify under oath, (2) after being interviewed on 2 occasions and being offered immunity from administrative action, captain refused to answer questions under oath, and (3) his statements during interviews denying knowledge of bribery schemes were contradicted by testimony and tape-recorded conversations introduced at CLS Civ S § 75 hearing. Sanction of demoting police captain to lieutenant and discharging him from city police department was not shocking to one's conscience where he violated department's rules by failing to answer truthfully questions posed to him during internal investigation, refusing to cooperate fully in that investigation, and refusing to comply with police chief's orders, including order to provide statement under oath Rotolo v City of N. Tonawanda, 251 A.D.2d 1044, 674 N.Y.S.2d 190, 1998 N.Y. App. Div. LEXIS 7118 (N.Y. App. Div. 4th Dep't 1998).

168. Intentional acts

Building inspector who intentionally violates building department's policy of prohibiting use of plastic pipe for certain plumbing uses by informing homeowners, contractors and members of general public that it is legally permissible to install plastic pipe in various buildings has committed misconduct for which penalty of demotion may be imposed. Ehmann v Whalen, 118 A.D.2d 1023, 500 N.Y.S.2d 400, 1986 N.Y. App. Div. LEXIS 54818 (N.Y. App. Div. 3d Dep't), app. dismissed, 68 N.Y.2d 663, 505 N.Y.S.2d 1027, 496 N.E.2d 240, 1986 N.Y. LEXIS 19058 (N.Y. 1986), app. denied, 68 N.Y.2d 607, 506 N.Y.S.2d 1032, 498 N.E.2d 433, 1986 N.Y. LEXIS 20053 (N.Y. 1986).

Penalty of dismissal imposed on city tow operator was not excessive where operator violated agency procedures designed to protect cars and other property, and his actions were found to be purposeful. Orkopoulos v Sandler, 159 A.D.2d 285, 552 N.Y.S.2d 290, 1990 N.Y. App. Div. LEXIS 2665 (N.Y. App. Div. 1st Dep't 1990).

169. —Assault

Suspension of public works employee for 75 days without pay was not excessive penalty where evidence supported finding that employee put fellow worker in fear of bodily harm and carried out violent attack on him. Sangiorgi v Hasl, 123 A.D.2d 434, 506 N.Y.S.2d 563, 1986 N.Y. App. Div. LEXIS 60191 (N.Y. App. Div. 2d Dep't 1986).

It was neither harsh nor excessive to suspend police officer for 30 days and place him on one-year probation for striking civilian and wrongfully issuing summonses for disorderly conduct and harassment; sanction was extremely lenient compared to penalties meted out for less serious infractions. Flowers v Ward, 138 A.D.2d 242, 525 N.Y.S.2d 207, 1988 N.Y. App. Div. LEXIS 2042 (N.Y. App. Div. 1st Dep't 1988).

Substantial evidence supported determination of city police commissioner finding police officer guilty of addressing woman in discourteous and disrespectful manner and imposing sanction of written reprimand where (1) officer responded to radio call of man with gun, who was complainant's husband, and found himself thrust into volatile and disorderly situation created by complainant who, screaming and flailing her arms wildly, physically assaulted him on at least 2 separate occasions, (2) complainant also struck and kicked other officers that were present at time, (3) when complainant came back again and slapped officer in face, he pushed her to ground and eventually had to punch her to subdue her, and (4) officer then handcuffed complainant and placed her in patrol car; although officer was injured in incident and was truly victim, it was administrative agency's duty to weigh evidence and court had no choice but to confirm determination. Bravakos v Ward, 146 A.D.2d 504, 537 N.Y.S.2d 29, 1989 N.Y. App. Div. LEXIS 332 (N.Y. App. Div. 1st Dep't), app. denied, 74 N.Y.2d 601, 541 N.Y.S.2d 984, 539 N.E.2d 1112, 1989 N.Y. LEXIS 533 (N.Y. 1989).

Substantial evidence supported dismissal of officer by New York City Transit Police Department for striking civilian; police force is quasi-military organization demanding strict discipline, and great deference is to be accorded determinations regarding internal discipline of members. Hickey v Bratton, 180 A.D.2d 682, 579 N.Y.S.2d 724, 1992 N.Y. App. Div. LEXIS 1455 (N.Y. App. Div. 2d Dep't), app. denied, 80 N.Y.2d 756, 588 N.Y.S.2d 824, 602 N.E.2d 232, 1992 N.Y. LEXIS 3187 (N.Y. 1992).

It was proper to suspend New York City police officer for 12 days for having punched civilian without just cause and using discourteous language. Altreche v Safir, 287 A.D.2d 409, 732 N.Y.S.2d 332, 2001 N.Y. App. Div. LEXIS 10182 (N.Y. App. Div. 1st Dep't 2001).

170. —Theft

School district's termination of account clerk for her unauthorized transfer of public monies to herself was not harsh and excessive since clerk held position of trust and district could rationally determine that she was unfit for further employment. Van Gorder v Board of Education, 140 A.D.2d 774, 527 N.Y.S.2d 654, 1988 N.Y. App. Div. LEXIS 4670 (N.Y. App. Div. 3d Dep't 1988).

Demotion of petitioner from his position of grade IV head cleaner to grade II head cleaner was appropriate sanction for his guilt to charge of theft on job. Secreto v County of Ulster, 228 A.D.2d 932, 644 N.Y.S.2d 439, 1996 N.Y. App. Div. LEXIS 7309 (N.Y. App. Div. 3d Dep't 1996).

171. No sanctions in excess of statute

Imposition of a "one-year leave without pay because of an ordinary disability not work related" would be reversed following a disciplinary action under Civ S Law § 75, since this section enumerates the authorized penalties following a determination of guilt and the imposition of a one year's leave without pay is not among them. Hermance v Pritchard, 87 A.D.2d 962, 451 N.Y.S.2d 210, 1982 N.Y. App. Div. LEXIS 16493 (N.Y. App. Div. 3d Dep't 1982).

Upon remand of civil service disciplinary proceedings for imposition of an appropriate penalty, no penalty in excess of that permitted by Civ S Law § 75 may be imposed. Lee v Board of Education, 120 Misc. 2d 809, 466 N.Y.S.2d 650, 1983 N.Y. Misc. LEXIS 3800 (N.Y. Sup. Ct. 1983).

School custodian was entitled to N.Y. C.P.L.R. art. 78 relief because, absent a directive from the Appellate Division, the school board, school district, and superintendent of schools had no authority on remand to depart from the provisions of N.Y. Civ. Serv. Law § 75(3) and impose a suspension against the custodian in excess of two months. Matter of James v Hoosick Falls Cent. Sch. Dist., 950 N.Y.S.2d 897, 37 Misc. 3d 635, 2012 N.Y. Misc. LEXIS 4464 (N.Y. Sup. Ct. 2012).

172. Notice requirement

After a civil service employee has been found guilty of misconduct, the public employer may consider material included in his employment record in determining an appropriate sanction; however, the employee must first be given notice and an opportunity to submit a written response. Accordingly, the dismissal of a

village police officer by the Village Board, after finding the officer guilty of a bad check charge, and after consideration of his employment record without notice to the officer, would be remitted for redetermination of an appropriate sanction after giving the officer prior notice of the adverse employment record material to be considered and an opportunity for a written response. Bigelow v Board of Trustees, 63 N.Y.2d 470, 483 N.Y.S.2d 173, 472 N.E.2d 1001, 1984 N.Y. LEXIS 4680 (N.Y. 1984).

173. Prior misconduct

In an Article 78 proceeding brought to review a mayor's decision dismissing petitioner from his position with the city's department of public works, the court improperly annulled the mayor's determination and ordered petitioner reinstated to his former position where the record indicated that the penalty of dismissal imposed by the mayor was "fair" in that petitioner had received two prior suspensions without pay and had been warned that any further violations of department policies and work rules would result in his termination. Dismissal is not an excessive penalty where an employee's record reveals a consistent pattern of misconduct. Gunther v Cahill, 90 A.D.2d 995, 456 N.Y.S.2d 908, 1982 N.Y. App. Div. LEXIS 19286 (N.Y. App. Div. 4th Dep't 1982).

A police officer was properly disciplined for conduct unbecoming a police officer where the evidence showed that the officer had, on three prior occasions, written derogatory remarks with sexual or ethnic connotations about two fellow police officers on the door of a stall located in the men's room of a precinct. The sanction imposed (a fine of 10 days' pay for each charge and specification of which petitioner was found guilty) was not so disproportionate to the offenses as to shock one's sense of fairness. Meyer v Rozzi, 108 A.D.2d 859, 485 N.Y.S.2d 363, 1985 N.Y. App. Div. LEXIS 43187 (N.Y. App. Div. 2d Dep't 1985).

Dismissal was appropriate sanction against firefighter who, while on watch and responsible for receiving alarms and alerting other firefighters, failed to answer emergency call and only responded after numerous further attempts were made to contact him, resulting in significant delay in responding to request for assistance to heart attack victim; serious nature of such misconduct and firefighter's prior history of disciplinary violations warranted such sanction. Ross v Bringewatt, 134 A.D.2d 913, 522 N.Y.S.2d 68, 1987 N.Y. App. Div. LEXIS 51113 (N.Y. App. Div. 4th Dep't 1987), app. denied, 71 N.Y.2d 801, 527 N.Y.S.2d 767, 522 N.E.2d 1065, 1988 N.Y. LEXIS 231 (N.Y. 1988).

Dismissal of police officer was not inappropriate where misconduct charge was third such incident involving officer which impaired good order and efficiency of police department. Smith v Tomlinson, 136 A.D.2d 646, 523 N.Y.S.2d 604, 1988 N.Y. App. Div. LEXIS 428 (N.Y. App. Div. 2d Dep't), app. denied, 72 N.Y.2d 802, 530 N.Y.S.2d 554, 526 N.E.2d 45, 1988 N.Y. LEXIS 1117 (N.Y. 1988).

Penalty of suspension from position as correction officer for 60 days was not disproportionate to offense where officer filed false report of inmate possessing razor, and he had been found guilty of filing false reports twice before. Winslow v Sielaff, 179 A.D.2d 523, 579 N.Y.S.2d 20, 1992 N.Y. App. Div. LEXIS 496 (N.Y. App. Div. 1st Dep't 1992).

Correction corporal's demotion to correction officer was excessive punishment, and lesser penalty should be imposed, even though he was found guilty of sleeping while on duty on 2 occasions, where his supervisor had condoned such conduct. Stapleton v LaPaglia, 207 A.D.2d 945, 616 N.Y.S.2d 679, 1994 N.Y. App. Div. LEXIS 8949 (N.Y. App. Div. 3d Dep't 1994).

Affirmative action administrator for State Thruway Authority was properly suspended for 30 days without pay on each of 4 separate occasions where second, third, and fourth sets of charges were each based on events that occurred after administrator had returned to work from previous suspension, and employer did not deliberately sever charges for sole purpose of imposing multiple suspensions. Figueroa v New York Thruway Auth., 251 A.D.2d 773, 674 N.Y.S.2d 159, 1998 N.Y. App. Div. LEXIS 6780 (N.Y. App. Div. 3d Dep't 1998).

174. Remand for reconsideration

Demotion from relatively high managerial position of warden to non-nmanagerial position of assistant deputy warden was so disproportionate to his conduct as to shock one's sense of fairness, and matter would be remanded for reconsideration of proper penalty, where warden, after questioning policy concerning hospital visits to wounded correction officers, reacted with aggressive defiance to superior's attempt to "correct" his reluctance, twice failed to follow protocol of saluting superior officer, and was evaluated by psychologist as having questionable ability to follow authority. Meehan v Schembri, 251 A.D.2d 200, 675 N.Y.S.2d 858, 1998 N.Y. App. Div. LEXIS 7375 (N.Y. App. Div. 1st Dep't), app. denied, 92 N.Y.2d 809, 678 N.Y.S.2d 595, 700 N.E.2d 1231, 1998 N.Y. LEXIS 2872 (N.Y. 1998).

Article 78 proceeding by terminated town employee would be remitted for imposition of appropriate penalty not to exceed 6-month suspension without pay, even though employee failed to complete his road plowing route after dinner break during severe snowstorm and lied to his supervisor regarding completion of his duties, where penalty of termination was so disproportionate to misconduct as to shock one's sense of fairness. Johnson v Town of Arcade, 281 A.D.2d 894, 721 N.Y.S.2d 888, 2001 N.Y. App. Div. LEXIS 2916 (N.Y. App. Div. 4th Dep't 2001).

Penalty of termination for school teacher's failure to protect student from harm was so disproportionate to offense as to be shocking to one's sense of fairness, and thus case would be remitted for imposition of appropriate penalty not to exceed one-year suspension without pay, where incident was isolated one in teacher's 22 years of service, and she took steps to follow return-to-duty procedures. Will v Frontier Cent. Sch. Dist. Bd. of Educ., 281 A.D.2d 902, 722 N.Y.S.2d 201, 2001 N.Y. App. Div. LEXIS 2854 (N.Y. App. Div. 4th Dep't), app. denied, 284 A.D.2d 1018, 730 N.Y.S.2d 888, 2001 N.Y. App. Div. LEXIS 5787 (N.Y. App. Div. 4th Dep't 2001), modified, 97 N.Y.2d 690, 739 N.Y.S.2d 90, 765 N.E.2d 293, 2002 N.Y. LEXIS 32 (N.Y. 2002).

Dismissal of police officer was excessive sanction for improperly issuing summonses for parking violations and for unauthorized use of department scooter where officer's sergeant testified that she never noticed deficiencies in summonses officer wrote, nor did she speak to him as to same, although she spoke to 30 to 40 other officers about their deficiencies, officer's performance evaluation rated him between competent and highly competent, and officer could not have taken scooter without having obtained supervisor's consent Lagala v N.Y. City Police Dep't, 286 A.D.2d 205, 729 N.Y.S.2d 31, 2001 N.Y. App. Div. LEXIS 7744 (N.Y. App. Div. 1st Dep't), app. denied, 97 N.Y.2d 605, 737 N.Y.S.2d 52, 762 N.E.2d 930, 2001 N.Y. LEXIS 3434 (N.Y. 2001).

Employee's termination had to be reconsidered because, compared to charges and specifications supported by substantial evidence, termination was so disproportionate to the offense as to be shocking to one's sense of fairness. Matter of Tinter v Board of Trustees of the Pound Ridge Lib. Dist., 155 A.D.3d 1054, 66 N.Y.S.3d 526, 2017 N.Y. App. Div. LEXIS 8437 (N.Y. App. Div. 2d Dep't 2017).

175. —Retaliatory discharge defense

Defense of retaliatory discharge under CLS Civ S § 75-b cannot be sustained when public employer has independent basis for action taken. Brey v Board of Educ., 245 A.D.2d 613, 664 N.Y.S.2d 496, 1997 N.Y. App. Div. LEXIS 12575 (N.Y. App. Div. 3d Dep't 1997).

School district business manager did not sufficiently prove defense of retaliatory discharge, because district board had independent basis for its action, where manager was guilty of a number of incidents of incompetence and misconduct in form of insubordination. Brey v Board of Educ., 245 A.D.2d 613, 664 N.Y.S.2d 496, 1997 N.Y. App. Div. LEXIS 12575 (N.Y. App. Div. 3d Dep't 1997).

176. Settlement; plea bargain

Plea agreement between correction department and correction officer disposing of drug use charges was not void for indefiniteness, even though it did not specify commencement date of one-year probationary period; where time for performance is unstated in agreement, the law supplies missing term and imposes what is reasonable. Nedd v Koehler, 159 A.D.2d 344, 552 N.Y.S.2d 622, 1990 N.Y. App. Div. LEXIS 2870 (N.Y. App. Div. 1st Dep't 1990).

In action alleging that defendant employer deprived plaintiff civil service employee of her due compensation by not paying her after her 30-day disciplinary suspension ended, testimony of all 5 witnesses who participated in negotiations (including plaintiff and her attorneys) supported court's finding, after non-jury trial, that plaintiff verbally consented to settlement fully aware of its material terms, including requirement that she would resign her position in exchange for dismissal of disciplinary charges and other inducements; conclusion that parties entered into binding verbal agreement was not precluded by their subsequent failure to execute contemplated written agreement, plaintiff's refusal to tender letter of resignation did not entitle her to renegotiate verbal agreement, and she effectively resigned by never trying to return to work. Winkler v Kingston Hous. Auth., 259 A.D.2d 819, 686 N.Y.S.2d 513, 1999 N.Y. App. Div. LEXIS 2108 (N.Y. App. Div. 3d Dep't 1999).

177. Zero tolerance drug policy

County's zero tolerance drug policy for its employees was not arbitrary. Catlin v Orleans County Highway Dep't, 255 A.D.2d 966, 680 N.Y.S.2d 35, 1998 N.Y. App. Div. LEXIS 12228 (N.Y. App. Div. 4th Dep't 1998).

B. Grounds For Dismissal

i. Generally

178. In general

A tenured county employee who was dismissed for cause was properly held entitled to her salary between the date of an initial invalid dismissal and a subsequent valid dismissal, since the employer's determination to terminate the employee was supported by substantial evidence and did not constitute a disproportionate penalty, but the employee was not entitled to termination pay, since the collective bargaining agreement between the employer and the employee's union, which was binding on the employee, provided that termination pay would not be awarded if termination of an employee was for cause. Sinicropi v Bennett, 60 N.Y.2d 918, 470 N.Y.S.2d 580, 458 N.E.2d 1257, 1983 N.Y. LEXIS 3559 (N.Y. 1983).

Section of Town Law providing that "the town engineer . . . whenever appointed, shall hold [his] respective offices until the first day of January next succeeding the first biennial town election held after the time of . . . appointment" is not in conflict with provision of Civil Service Law enumerating sole grounds for dismissal of permanent civil service employees since it is entirely practicable to select appointee after competitive civil service examination whether term of office is for fixed period or for indefinite one. Berg v Gerber, 59 A.D.2d 906, 399 N.Y.S.2d 244, 1977 N.Y. App. Div. LEXIS 14109 (N.Y. App. Div. 2d Dep't 1977).

Evidence was insufficient to establish that employee obtained position by fraud where letter offering position did not specify any information which would have alerted employee to fact that letter was intended for father, who had same name and did not identify Social Security Number of person for whom it was intended, and employee was reasonable in assuming that he qualified for position as result of having presumptively qualified on other examinations he had previously taken, such that determination finding that employee had assumed position fraudulently was arbitrary and capricious and must be annulled. D'Ornellas v Ortiz, 119 A.D.2d 459, 500 N.Y.S.2d 671, 1986 N.Y. App. Div. LEXIS 55411 (N.Y. App. Div. 1st Dep't), app. dismissed, 68 N.Y.2d 805, 506 N.Y.S.2d 868, 498 N.E.2d 432, 1986 N.Y. LEXIS 20122 (N.Y. 1986), app. dismissed, 70 N.Y.2d 694, 518 N.Y.S.2d 1031, 512 N.E.2d 557, 1987 N.Y. LEXIS 17990 (N.Y. 1987).

Court would annul determination terminating petitioner's employment as city firefighter for violating city charter where other firefighters had engaged in same conduct with city's knowledge, yet petitioner was only person to be prosecuted under charter provision in question. Court would annul determination terminating petitioner's employment as city firefighter for engaging in allegedly proscribed political activity in violation of CLS Gen Mun § 801, CLS Gen City § 3, and unnamed "common-law rules" since (1) it was conceded that literal terms of statutes were not violated, (2) petitioner fell within exception to CLS Gen Mun § 801 provided by CLS Gen Mun § 802, (3) petitioner was appointed as firefighter not by common council, as described in CLS Gen City § 3, but by municipal board of public safety, and (4) there was no satisfactory explanation of what was meant by claim that petitioner violated "common-law rules." Girard v Glens Falls, 173 A.D.2d 113, 577 N.Y.S.2d 496, 1991 N.Y. App. Div. LEXIS 16338 (N.Y. App. Div. 3d Dep't 1991).

City mayor properly terminated petitioner's employment as city engineer due to petitioner's failure to obtain state engineering license for more than 3 ½ years after his appointment, in violation of sole condition of his employment, especially given mayor's generous allowance of 9-month period to permit petitioner to obtain license after mayor learned that petitioner did not have such license; doctrine of laches did not apply, since establishing and ensuring level of professional competence for city engineer exercising duties is governmental, not propriety, function. Fowler v City of Saratoga Springs, 215 A.D.2d 819, 626 N.Y.S.2d 306, 1995 N.Y. App. Div. LEXIS 4799 (N.Y. App. Div. 3d Dep't 1995).

Penalty of forfeiture of 10 days' pay was appropriate sanction for petitioner's violation of Regulations of Uniformed Force of Fire Department of City of New York §§ PA/ID 1-77R, 25.1.1, and 25.1.10. Kolanik v Safir, 231 A.D.2d 720, 647 N.Y.S.2d 995, 1996 N.Y. App. Div. LEXIS 9684 (N.Y. App. Div. 2d Dep't 1996).

It was appropriate to dismiss police officer for posing nude, using her position, uniform, and police equipment, without authorization, for her personal commercial benefit, and actively promoting commercial product in manner likely to hold department up to public ridicule. Shaya-Castro v New York City Police Dep't, 233 A.D.2d 233, 649 N.Y.S.2d 711, 1996 N.Y. App. Div. LEXIS 11992 (N.Y. App. Div. 1st Dep't 1996).

Indisputable evidence that probationary police officer failed to meet academic standards required of police recruits proved that his discharge was in good faith where nothing was alleged to justify judicial interference with city personnel department's evaluation of officer's academic performance, despite his allegations that academic standards were revised after he began training and that he should have been held to standards applicable to prior classes for which he claimed to be eligible but to which he was not admitted. Guida v New York City Dep't of Personnel, 238 A.D.2d 170, 672 N.Y.S.2d 1, 1997 N.Y. App. Div. LEXIS 3213 (N.Y. App. Div. 1st Dep't 1997).

County's former director of data processing failed to establish that abolition of his position was subterfuge to avoid civil service law where record indicated that county legislature had relied on consultant's reports in finding that expansion of operation was needed and in creating new, noncompetitive position with higher salary, requiring certain qualifications of education and experience and entailing greater responsibilities. Belvey v Tioga County Legislature, 257 A.D.2d 967, 684 N.Y.S.2d 341, 1999 N.Y. App. Div. LEXIS 777 (N.Y. App. Div. 3d Dep't 1999).

It was proper to terminate petitioner from his position with city department of sanitation (DOS), even if DOS employee had promised petitioner reinstatement on his completion of drug treatment program, since such promise was unauthorized and DOS was not bound by it, particularly given petitioner's prior execution and violation of final termination agreement, which agreement was concealed from DOS employee. Carson v New York City Dep't of Sanitation, 271 A.D.2d 380, 707 N.Y.S.2d 93, 2000 N.Y. App. Div. LEXIS 4613 (N.Y. App. Div. 1st Dep't 2000).

Although school custodian was guilty of misconduct, penalty of dismissal was so disproportionate to his offense as to shock one's sense of fairness where he had received "outstanding" rating in his 7-year service with school district, and his misconduct, although serious, was isolated event; thus, case would be remitted for imposition of less severe penalty. Rapkiewicz v Middle Country Sch. Dist., 273 A.D.2d 392, 711 N.Y.S.2d 326, 2000 N.Y. App. Div. LEXIS 7087 (N.Y. App. Div. 2d Dep't), app. denied, 95 N.Y.2d 765, 716 N.Y.S.2d 640, 739 N.E.2d 1145, 2000 N.Y. LEXIS 3788 (N.Y. 2000).

Although school custodian was guilty of misconduct, penalty of dismissal was so disproportionate to his offense as to shock one's sense of fairness where he had over 10 years of satisfactory service with school district, and his misconduct, although serious, was isolated event; thus, case would be remitted for imposition of less severe penalty. Tiano v Middle Country Sch. Dist., 273 A.D.2d

396, 710 N.Y.S.2d 923, 2000 N.Y. App. Div. LEXIS 7097 (N.Y. App. Div. 2d Dep't), app. denied, 95 N.Y.2d 766, 716 N.Y.S.2d 640, 739 N.E.2d 1145, 2000 N.Y. LEXIS 3795 (N.Y. 2000).

Penalty of dismissal from police force was justified where officer associated with criminal, failed to safeguard his weapon, and failed to comply with orders on 5 separate occasions in 8 months. O'Keefe v Safir, 275 A.D.2d 684, 713 N.Y.S.2d 525, 2000 N.Y. App. Div. LEXIS 10057 (N.Y. App. Div. 1st Dep't 2000), app. denied, 96 N.Y.2d 716, 730 N.Y.S.2d 31, 754 N.E.2d 1114, 2001 N.Y. LEXIS 1882 (N.Y. 2001).

Imposition of the sanction of dismissal of a policeman based on charges of the untimely filing of incident reports was an abuse of discretion since it was so disproportionate to the offense as to shock the court's sense of fairness where the incidents underlying the charges were minor, there had been no prior discipline of the policeman during his 25 years of service, his employment record since the initiation of the charges was unblemished, and he did not refuse to complete the reports but simply failed to meet the deadline. Sickler v Town of Hunter, 3 A.D.3d 727, 769 N.Y.S.2d 662, 2004 N.Y. App. Div. LEXIS 307 (N.Y. App. Div. 3d Dep't 2004).

A member of a board of assessment review may be removed from office pursuant to section 36 of the Public Officers Law and section 75 of the Civil Service Law. 4 Op Counsel, SBEA #27.

179. Absences, generally

Dismissal was not excessive punishment for attendant at children's psychiatric hospital who pursuant to a hearing was found guilty of 4 specifications of misconduct which included numerous absences and striking a boy patient. Hayes v Mashikian, 40 A.D.2d 521, 333 N.Y.S.2d 862, 1972 N.Y. App. Div. LEXIS 4041 (N.Y. App. Div. 2d Dep't 1972).

Dismissal of municipal employee was warranted where he, while on call list for emergency service, could not be located and when found was in no condition to carry on his duties, and employee had earlier spent time in bar while on regular duty and had been warned that another such offense would bring about discharge. Donovan v Cronin, 46 A.D.2d 976, 362 N.Y.S.2d 43, 1974 N.Y. App. Div. LEXIS 3326 (N.Y. App. Div. 3d Dep't 1974).

Since there was no question as to admitted facts pertaining to police officer's nine day absence from duty, there could be no finding that decision of county civil service commission upholding termination of the police officer's employment which had been ordered by the chief of police was either arbitrary or purely arbitrary, even if such a characterization of the decision of the civil service commission would provide the basis for court review of the decision. Schrader v Civil Service Comm'r, 53 A.D.2d 210, 385 N.Y.S.2d 644, 1976 N.Y. App. Div. LEXIS 12509 (N.Y. App. Div. 4th Dep't 1976).

In proceeding to review determination of town board that employee had absented himself from work, without explanation, for a period in excess of ten working days and was thus deemed to have resigned his position, determination was supported by substantial evidence, despite employee's explanation that he had been absent because he thought he had been fired. Record established that employee had been accorded all procedural and substantive rights guaranteed by Civil Service Law, notwithstanding that charges never used the word "misconduct" as such, since allegations of unauthorized absence from work constituted charges of misconduct. Koch v Bulson, 57 A.D.2d 625, 394 N.Y.S.2d 25, 1977 N.Y. App. Div. LEXIS 11638 (N.Y. App. Div. 2d Dep't 1977).

In an Article 78 proceeding challenging the discharge of petitioner from her position as a nurse's aide due to incompetence, the discharge was proper where petitioner was absent over 50 percent of the time for the nine-month period immediately prior to her discharge. Graham v Sands, 87 A.D.2d 912, 449 N.Y.S.2d 353, 1982 N.Y. App. Div. LEXIS 16435 (N.Y. App. Div. 3d Dep't 1982).

Dismissal of thruway toll collector was appropriate sanction based on incompetence and misconduct consisting of poor attendance and work performance over 3-year period, failure to provide medical documentation to substantiate absences as requested by thruway authority, and extending his time off without authorization on at least 12 separate occasions. Kieffer v New York State Thruway Authority, 135 A.D.2d 1017, 522 N.Y.S.2d 747, 1987 N.Y. App. Div. LEXIS 52895 (N.Y. App. Div. 3d Dep't 1987).

Termination of sewer treatment plant operator was properly annulled, notwithstanding fact that he had received 3 warning letters relating to absenteeism, where he had been terminated solely for being absent without leave on December 5-7 but he presented compelling evidence in form of written statements from his physician and hospital attesting to his in-patient care from December 7-10, and he had informed his supervisor of his illness and inability to work on December 4. Gryska v Chemung County Elmira Sewer Dist., 149 A.D.2d 849, 540 N.Y.S.2d 39, 1989 N.Y. App. Div. LEXIS 4848 (N.Y. App. Div. 3d Dep't 1989).

Summary termination of probationary civil service employee within 3 weeks of his successful completion of employer's alcohol abuse program, based partly on his "unauthorized" absences, was unwarranted since (1) employee was not AWOL when he was absent in order to seek help for his alcoholism problem from employer's Employees' Assistance Unit, and (2) only other instance of his being AWOL was sufficiently disciplined by warning letter and was not sufficient predicate for termination. Kroboth v Sexton, 160 A.D.2d 126, 560 N.Y.S.2d 6, 1990 N.Y. App. Div. LEXIS 10157 (N.Y. App. Div. 1st Dep't 1990).

Petitioner failed to establish prima facie case of either quid pro quo sexual harassment or harassment based on existence of hostile work environment where her claims were supported only by bald conclusory statements; thus, she was properly terminated by city transit authority for excessive absences, inability to get along with her subordinates and fellow managers, and poor job performance. Watts v New York City Transit Auth., 213 A.D.2d 253, 624 N.Y.S.2d 124, 1995 N.Y. App. Div. LEXIS 2796 (N.Y. App. Div. 1st Dep't 1995).

It was abuse of discretion to dismiss heavy equipment operator who voluntarily reported for work on Saturday morning due to snowstorm and then left work within minutes after punching in on learning that he had not been assigned to his normal snow removal duties since he had nearly three decades of service to County which included only one prior incident of misconduct. Lane v County of Fulton, 249 A.D.2d 750, 672 N.Y.S.2d 144, 1998 N.Y. App. Div. LEXIS 4114 (N.Y. App. Div. 3d Dep't 1998).

Police officer's termination was justified by incident during probationary period in which she was late in relieving another officer of her post. Garrett v Safir, 253 A.D.2d 700, 677 N.Y.S.2d 570, 1998 N.Y. App. Div. LEXIS 9695 (N.Y. App. Div. 1st Dep't), app. denied, 92 N.Y.2d 817, 684 N.Y.S.2d 489, 707 N.E.2d 444, 1998 N.Y. LEXIS 4330 (N.Y. 1998).

Substantial evidence supported misconduct charge against discharged employee of school district where he did not comply with established call-in procedure to report his absences. McKinnon v Board of Educ., 273 A.D.2d 240, 709 N.Y.S.2d 104, 2000 N.Y. App. Div. LEXIS 6293 (N.Y. App. Div. 2d Dep't 2000).

Substantial evidence supported incompetence charge against discharged employee of school district where his absences were excessive, even though validity of reasons for absences was not contested. McKinnon v Board of Educ., 273 A.D.2d 240, 709 N.Y.S.2d 104, 2000 N.Y. App. Div. LEXIS 6293 (N.Y. App. Div. 2d Dep't 2000).

Penalty of dismissal of school district employee was not so disproportionate to his misconduct as to be shocking to one's sense of fairness where his absences were excessive, and he did not comply with established call-in procedure for reporting them. McKinnon v Board of Educ., 273 A.D.2d 240, 709 N.Y.S.2d 104, 2000 N.Y. App. Div. LEXIS 6293 (N.Y. App. Div. 2d Dep't 2000).

180. —Absences "without leave"

The determination of the commissioners of taxes and assessments removing a veteran from his position as deputy commissioner of taxes will be sustained where the employee was admittedly absent without leave and apparently reported for work after indulging in liquor and to some extent under its effect, even though a notice of hearing was "exceedingly short" and the hearing was not entirely confined to the stated charges. Shanley v Miller, 277 N.Y. 704, 14 N.E.2d 635, 277 N.Y. (N.Y.S.) 704, 1938 N.Y. LEXIS 1161 (N.Y. 1938).

An arbitrary and capricious dismissal of a recording clerk in the county clerk's office is a violation of subd. 2, where it appears that the grounds state for dismissal was absence without leave of said recording clerk when said absence was caused by illness and notice of said illness was phoned to the county clerk's office but was not given to him personally because of his absence on personal business. Crowley v Fowler, 217 A.D. 16, 215 N.Y.S. 690, 1926 N.Y. App. Div. LEXIS 7730 (N.Y. App. Div. 1926).

In determining whether city employee, whose "resignation" was "accepted" by city manager on grounds that employee had been absent without leave for period in excess of ten consecutive work days without explanation, notified department that he was unable to work on certain dates due to illness, inquiry into bona fides of employee's "explanation" was neither necessary nor proper. Horne v Scher, 47 A.D.2d 943, 367 N.Y.S.2d 318, 1975 N.Y. App. Div. LEXIS 9413 (N.Y. App. Div. 2d Dep't 1975).

Evidence supported finding of misconduct and justified dismissal where Social Services Department employee failed to report to her new assignment and remained absent without leave for more than 10 days, despite personnel officer's warnings that she would be subject to discipline if she did not report to work within 10 days. Collins v Amrhein, 134 A.D.2d 346, 520 N.Y.S.2d 823, 1987 N.Y. App. Div. LEXIS 50524 (N.Y. App. Div. 2d Dep't 1987).

Correction officer was properly terminated where (1) he agreed to probationary period as part of plea agreement arising from charges based on excessive lateness, absence without leave, and sick leave, as well as other disciplinary problems, and (2) while on probation, officer forgot to attend scheduled appointment at health management division, and instead went to work and worked full tour, and failed to call to reschedule appointment. Tankard v Abate, 213 A.D.2d 320, 624 N.Y.S.2d 161, 1995 N.Y. App. Div. LEXIS 3277 (N.Y. App. Div. 1st Dep't), app. denied, 86 N.Y.2d 702, 631 N.Y.S.2d 606, 655 N.E.2d 703, 1995 N.Y. LEXIS 2741 (N.Y. 1995).

It was proper to dismiss New York City Transit Authority police officer for failing to report for medical examination on time, failing to take required urinalysis, and failing to report for duty for approximately one month without leave. Morales v New York City Transit Auth., 230 A.D.2d 859, 646 N.Y.S.2d 571, 1996 N.Y. App. Div. LEXIS 8544 (N.Y. App. Div. 2d Dep't 1996).

New York City properly terminated petitioner from her employment as Houseparent in Administration for Children's services based on her 3-month absence without leave that was in flagrant violation of City's time and leave rules. Renaud v City of New York, 269 A.D.2d 283, 703 N.Y.S.2d 136, 2000 N.Y. App. Div. LEXIS 2016 (N.Y. App. Div. 1st Dep't 2000).

Petitioner is not entitled to an order of peremptory mandamus directing the city manager of the city of Niagara Falls to reinstate him to the position of engineer's helper in the bureau of water in the department of public service of said city, where it appears that petitioner absented himself from duty for three days without notice, in violation of a reasonable rule of the department, and that charges against him were reduced to writing, and he was given an opportunity to explain his actions as required by this section. O'Malley v Robbins, 255 N.Y.S. 161, 142 Misc. 305, 1931 N.Y. Misc. LEXIS 1766 (N.Y. Sup. Ct. 1931).

As the absence of an employee of a city sanitation department had been involuntary based on his arrest and did not constitute misconduct due to his acquittal of the charge, the department commissioner's refusal to reinstate him was tantamount to a discharge unsupported by misconduct in violation of N.Y. Civ. Serv. Law § 75 and New York City, N.Y., Admin. Code § 16-106; thus, the commissioner's decision to deny reinstatement was arbitrary and capricious. Silberzweig v Doherty, 873 N.Y.S.2d 461, 23 Misc. 3d 618, 241 N.Y.L.J. 50, 2009 N.Y. Misc. LEXIS 271 (N.Y. Sup. Ct. 2009).

Because plaintiff was away without leave for more than five working days, and her collective bargaining agreement precluded her employer from initiating proceedings under N.Y. Civ. Serv. Law § 72 (placing her on involuntary medical leave), no reasonable trier of fact could conclude that her employer's decision to charge plaintiff under N.Y. Civ. Serv. Law § 75 (incompetency or misconduct), instead of N.Y. Civ. Serv. Law § 72 (medical leave), was evidence of the employer's discriminatory intent under the Pregnancy Discrimination Act, 42 U.S.C.S. § 2000e(k). Pellegrino v County of Orange, 313 F. Supp. 2d 303, 2004 U.S. Dist. LEXIS 6565 (S.D.N.Y. 2004).

181. —Disability-related absences

Statute authorizing termination of employment status of employee who has been continuously absent for one year or more by reason of disability did not authorize thruway authority to discontinue employment status of tenured employee whose continuous one-year absence was forced upon him by authority which denied him permission to return to work, although his physician stated that he could return to work, and which refused to conduct a demanded physical examination of employee after unilaterally determining that such examination would be fruitless. Bodnar v New York State Thruway Authority, 52 A.D.2d 345, 383 N.Y.S.2d 923, 1976 N.Y. App. Div. LEXIS 12027 (N.Y. App. Div. 3d Dep't 1976).

It was appropriate to terminate petitioner's employment as food service worker where (1) through use of leave accruals, disability leave, and unpaid leave of absence for medical reasons, she was absent continuously for nearly 10 months, and (2) it was undisputed that she failed to comply with notification and documentation requirements of collective bargaining agreement during such period. Abdalla v Fulton County, 208 A.D.2d 1168, 617 N.Y.S.2d 587, 1994 N.Y. App. Div. LEXIS 10521 (N.Y. App. Div. 3d Dep't 1994), app. denied, 85 N.Y.2d 804, 626 N.Y.S.2d 755, 650 N.E.2d 414, 1995 N.Y. LEXIS 1259 (N.Y. 1995).

Determination terminating petitioner's employment due to her cumulative absences would be annulled where there was no indication exactly when, without counting designated leave under Family and Medical Leave Act (29 USCS § 2601 et seq.), 365-day cumulative leave under CLS Civ S § 71 was reached as to October 29, 1991 work-related injury. Jacobsen v New York State DOL, 274 A.D.2d 809, 711 N.Y.S.2d 61, 2000 N.Y. App. Div. LEXIS 8059 (N.Y. App. Div. 3d Dep't 2000).

182. —Intended absences

In an Article 78 proceeding, a library clerk was improperly dismissed from her position in which she had been employed for 18 years, where her dismissal stemmed from isolated conduct involving her failure to call in and report her intended absences from work in a timely fashion on only two occasions, and where the maximum sanction supportable by the record would be a suspension without pay for a period of two weeks. Rathburn v Kinchen, 90 A.D.2d 971, 456 N.Y.S.2d 900, 1982 N.Y. App. Div. LEXIS 19248 (N.Y. App. Div. 4th Dep't 1982).

183. —Previous absences

Where relator, a Spanish War veteran, was discharged for failing to appear for duty for several successive days and for failing to notify the office of an alleged illness, and he had been previously warned to report to the office if he were unable to attend, relator was properly dismissed. People ex rel. Lenahan v Griffenhagen, 164 A.D. 180, 149 N.Y.S. 636, 1914 N.Y. App. Div. LEXIS 7740 (N.Y. App. Div. 1914), app. dismissed, 214 N.Y. 652, 108 N.E. 1104, 214 N.Y. (N.Y.S.) 652, 1915 N.Y. LEXIS 1345 (N.Y. 1915).

Termination of petitioner's employment as licensed practical nurse at facility operated by Department of Mental Hygiene was not arbitrary and capricious where petitioner had assumed probationary status with regard to her time and attendance as result of settlement of previous disciplinary proceeding, and evidence supported finding by director of facility that her attendance and punctuality were unsatisfactory. Clayton v Dominguez, 134 A.D.2d 345, 520 N.Y.S.2d 822, 1987 N.Y. App. Div. LEXIS 50523 (N.Y. App. Div. 2d Dep't 1987).

Termination of sewer treatment plant operator was properly annulled, notwithstanding fact that he had received 3 warning letters relating to absenteeism, where he had been terminated solely for being absent without leave on December 5-7 but he presented compelling evidence in form of written statements from his physician and hospital attesting to his in-patient care from December 7-10, and he had informed his supervisor of his illness and inability to work on December 4. Gryska v Chemung County

Elmira Sewer Dist., 149 A.D.2d 849, 540 N.Y.S.2d 39, 1989 N.Y. App. Div. LEXIS 4848 (N.Y. App. Div. 3d Dep't 1989).

Summary termination of probationary civil service employee within 3 weeks of his successful completion of employer's alcohol abuse program, based partly on his "unauthorized" absences, was unwarranted since (1) employee was not AWOL when he was absent in order to seek help for his alcoholism problem from employer's Employees' Assistance Unit, and (2) only other instance of his being AWOL was sufficiently disciplined by warning letter and was not sufficient predicate for termination. Kroboth v Sexton, 160 A.D.2d 126, 560 N.Y.S.2d 6, 1990 N.Y. App. Div. LEXIS 10157 (N.Y. App. Div. 1st Dep't 1990).

New York City Transportation Authority properly dismissed employee who failed to report for duty as directed, failed to report his absence from duty, and submitted false reports in connection with such failures, especially since he had disciplinary history that included prior false report for which he was suspended. Rodriguez v New York City Transit Auth., 247 A.D.2d 250, 668 N.Y.S.2d 603, 1998 N.Y. App. Div. LEXIS 1045 (N.Y. App. Div. 1st Dep't 1998).

184. —Sick leave-related absences

Penalty of dismissal imposed on public school custodian was not so disproportionate to charges as to be shocking to one's sense of fairness where substantial evidence supported determination that custodian had failed to maintain 2 boilers, misused his sick leave on 2 occasions, and unnecessarily disrupted kindergarten orientation program. Cirillo v Board of Education, 124 A.D.2d 1003, 508 N.Y.S.2d 784, 1986 N.Y. App. Div. LEXIS 62333 (N.Y. App. Div. 4th Dep't 1986).

Fact that village employee had used all of his sick days did not, ipso facto, establish that he abused his sick leave; thus, substantial evidence did not support determination that village employee was guilty of misconduct. Auer v Village of Westbury, 202 A.D.2d 1059, 609 N.Y.S.2d 133, 1994 N.Y. App. Div. LEXIS 3547 (N.Y. App. Div. 4th Dep't 1994).

Police officer's employment with city was properly terminated where, although he was notified on 20 separate occasions that he was prohibited from performing outside work because of his excessive use of sick days, he nevertheless admittedly engaged in outside employment, both before and after his suspension, without receiving permission to do so. Lugo v City of Newburgh, 209 A.D.2d 414, 618 N.Y.S.2d 420, 1994 N.Y. App. Div. LEXIS 10939 (N.Y. App. Div. 2d Dep't 1994).

It was improper for employer to find employee guilty of misconduct for altering dates in doctor's certificate submitted to substantiate his use of sick leave where it was undisputed that alteration was made only after consultation with doctor's office, and that employee acted in good-faith belief that alteration was authorized. Town employee was improperly found guilty of misconduct for failing to substantiate his use of sick leave with doctor's certificate where he submitted doctor's certificate stating that he should be excused from work "due to illness in the family," even though sickness in family did not justify use of sick leave. Town employee was properly found guilty of unauthorized absence from his job based on his use of sick leave to care for his sick girlfriend, even if he had never been told that he could not use sick leave to care for his girlfriend, since employer could rationally conclude that such absence was unauthorized given fact that sick leave provisions of parties' collective bargaining agreement contained no reference to use of sick leave to care for others who were sick. Glinka v Town of Poughkeepsie, 209 A.D.2d 773, 618 N.Y.S.2d 131, 1994 N.Y. App. Div. LEXIS 10864 (N.Y. App. Div. 3d Dep't 1994).

Penalty of dismissal was not disproportionate where probation officer was absent 72 times which had disruptive and burdensome effects on functioning of probation department, and he failed to show that all of his absences were due to illness. Macy v Suffolk County Probation Dep't, 234 A.D.2d 298, 651 N.Y.S.2d 63, 1996 N.Y. App. Div. LEXIS 12840 (N.Y. App. Div. 2d Dep't 1996).

New York City Commissioner of Department of Sanitation improperly dismissed petitioner in light of numerous instances cited by administrative law judge in which Commissioner imposed penalties less severe than termination for violations of Department's sick leave policy similar to that for which petitioner was disciplined. Kinlock v Doherty, 256 A.D.2d 93, 681 N.Y.S.2d 264, 1998 N.Y. App. Div. LEXIS 13255 (N.Y. App. Div. 1st Dep't 1998).

It was error to annul determination terminating petitioner's employment as bridge and tunnel officer on ground that he was not given notice that his approved absences could ultimately be considered "excessive," and thus misconduct, where Triborough Bridge and Tunnel Authority's rules clearly stated that "excessive absence ... will be cause for dismissal," governing collective bargaining agreement guaranteed employees only 12 days sick leave per year, termination letter specifically noted serious negative impact petitioner's absences had on budgetary and personnel matters, as well as employee morale, and petitioner's 80 percent absentee rate over 19-month period, albeit approved and medically justified, was excessive under any standard. Cicero v Triborough Bridge & Tunnel Auth., 264 A.D.2d 334, 694 N.Y.S.2d 51, 1999 N.Y. App. Div. LEXIS 8660 (N.Y. App. Div. 1st Dep't 1999), app. dismissed, 94 N.Y.2d 931, 708 N.Y.S.2d 350, 729 N.E.2d 1149, 2000 N.Y. LEXIS 533 (N.Y. 2000).

185. —Unauthorized absences

The commissioner of the department of public markets, weights and measures of New York city did not sustain the burden of proving misconduct of an inspector in being absent from his position without authorization where employee showed that his leaving his post and remaining away were justified upon the grounds of "Assigned lunch hour" and "Personal necessity." In re Walsh's Estate, 256 A.D. 164, 9 N.Y.S.2d 50, 1939 N.Y. App. Div. LEXIS 4667 (N.Y. App. Div. 1939).

Imposition of penalty of dismissal on car maintainer for New York City Transit Authority would be so disproportionate to offense as to be shocking to one's sense of fairness where only sustainable charges against him in 4 years were one official caution and charge of being away from his work station without authorization for approximately 30 minutes. Fiorenza v Gunn, 140 A.D.2d 295, 527 N.Y.S.2d 806, 1988 N.Y. App. Div. LEXIS 4636 (N.Y. App. Div. 2d Dep't 1988).

In disciplinary proceeding under CLS Civ S § 75 resulting in finding that city school district worker with permanent civil service status had engaged in various instances of unauthorized tardiness and absence from work, imposition of sanction of dismissal was justified by worker's prior record of similar unauthorized absences and tardinesses, for which he had been warned and suspended. Diehsner v Schenectady City School Dist., 152 A.D.2d 796, 543 N.Y.S.2d 576, 1989 N.Y. App. Div. LEXIS 9328 (N.Y. App. Div. 3d Dep't 1989).

Penalty of dismissal was not so disproportionate to offense as to shock one's conscience where petitioner absented herself from her duties as parks maintenance crew member for about ½ of work days during 1984, and continuously from November 1984 through February 1985, without having requested or obtained permission. Baugh v Stern, 160 A.D.2d 617, 559 N.Y.S.2d 243, 1990 N.Y. App. Div. LEXIS 4679 (N.Y. App. Div. 1st Dep't), app. denied, 76 N.Y.2d 709, 561 N.Y.S.2d 913, 563 N.E.2d 284, 1990 N.Y. LEXIS 3271 (N.Y. 1990).

Substantial evidence supported city board of education's discharge of purchasing agent where agent had been absent from work without authorization for nearly one year, he failed to tender any acceptable excuse, and he failed to attend hearing or offer any proof, even though he was aware of time and place of hearing. Clarke v New York City Bd. of Educ., 251 A.D.2d 403, 674 N.Y.S.2d 105, 1998 N.Y. App. Div. LEXIS 6572 (N.Y. App. Div. 2d Dep't 1998).

Substantial evidence supported termination of village motor equipment officer for misconduct and incompetence where he committed criminal offense of driving while intoxicated as felony, drove village-owned vehicles with revoked license, and took unauthorized leave of absence. Hussey v Incorporated Village of Farmingdale, 251 A.D.2d 579, 674 N.Y.S.2d 757, 1998 N.Y. App. Div. LEXIS 7519 (N.Y. App. Div. 2d Dep't 1998).

Court upheld termination of petitioner's employment in noncompetitive, nontenured position of Houseparent with Administration for Children's Services, where petitioner claimed that it

was bad faith for employer to involuntarily transfer her to night shift without giving her reasonable opportunity to arrange for child care, but she did not seek accommodation or invoke hardship provisions of collective bargaining agreement, instead she absented herself from work while she pursued unsuccessful grievance asserting that more junior employees should have been made to work night shift, and her unauthorized absence negated any inference of employer's bad faith. Kennedy v City of New York, 270 A.D.2d 93, 704 N.Y.S.2d 248, 2000 N.Y. App. Div. LEXIS 2810 (N.Y. App. Div. 1st Dep't 2000).

Substantial evidence supported hearing officer's finding of misconduct by town employee where employee failed to complete his road plowing route after dinner break during severe snowstorm and lied to his supervisor regarding completion of his duties. Johnson v Town of Arcade, 281 A.D.2d 894, 721 N.Y.S.2d 888, 2001 N.Y. App. Div. LEXIS 2916 (N.Y. App. Div. 4th Dep't 2001).

Article 78 proceeding by terminated town employee would be remitted for imposition of appropriate penalty not to exceed 6-month suspension without pay, even though employee failed to complete his road plowing route after dinner break during severe snowstorm and lied to his supervisor regarding completion of his duties, where penalty of termination was so disproportionate to misconduct as to shock one's sense of fairness. Johnson v Town of Arcade, 281 A.D.2d 894, 721 N.Y.S.2d 888, 2001 N.Y. App. Div. LEXIS 2916 (N.Y. App. Div. 4th Dep't 2001).

186. —Vacation-related absences

Charges that one holding a position in the county clerk's office as supervisor of motor vehicles overstayed his vacation without permission; made errors in scheduling appointments for applicants' tests; left his office and stayed home without permission; was guilty of insubordination; and did not handle his mail efficiently, are sufficiently substantial to justify the removal of the employee from his position. Miller v Kling, 291 N.Y. 65, 50 N.E.2d 546, 291 N.Y. (N.Y.S.) 65, 1943 N.Y. LEXIS 1064 (N.Y. 1943).

187. Attitude problem; conduct toward others

In an Article 78 proceeding brought by an elementary school custodian challenging his dismissal, the dismissal would be appropriate where the custodian, who had been otherwise a satisfactory worker, had a long-standing attitude problem that caused him to be abusive and intimidating to others, where he had interfered with the teaching staff in the performance of their duties, and where the principal had been required to spend substantial time resolving personnel problems arising from the custodian's attitude and conduct. Koch v Webster Cent. School Dist. Bd. of Education, 89 A.D.2d 778, 453 N.Y.S.2d 491, 1982 N.Y. App. Div. LEXIS 17892 (N.Y. App. Div. 4th Dep't), aff'd, 57 N.Y.2d 1028, 457 N.Y.S.2d 477, 443 N.E.2d 951, 1982 N.Y. LEXIS 3859 (N.Y. 1982).

Dismissal was not shockingly unfair in view of village superintendent of public works' rude and abusive conduct toward citizens and fellow employees, his professional incompetence, and his pervasive departure from established village policies (including allowing unlicensed, uninsured minor to drive village-owned truck); individually, charges did not appear serious, but cumulatively they confirmed that superintendent lacked requisite leadership ability. Logan v New Paltz, 129 A.D.2d 935, 514 N.Y.S.2d 573, 1987 N.Y. App. Div. LEXIS 45597 (N.Y. App. Div. 3d Dep't 1987).

Evidence sustained dismissal of thruway authority supervisor for misconduct where he enlisted aid of his subordinates in plot to trick toll workers into believing that asbestos removal had commenced without appropriate precautions, when in fact it had not yet started, since toll workers were thereby caused to believe that their health was in danger, producing panic and threats by union to pull workers off job, and such conduct caused authority to be placed in position whereby toll lanes would be unmanned. Keith v New York State Thruway Authority, 132 A.D.2d 785, 517 N.Y.S.2d 334, 1987 N.Y. App. Div. LEXIS 49293 (N.Y. App. Div. 3d Dep't 1987).

Clerk employed by respondent school district was properly found guilty of misconduct on ground that she intentionally harassed and annoyed assistant to superintendent of schools by making numerous annoyance telephone calls to his home during early morning hours without legitimate communication purpose, although there was no direct evidence that she made calls herself, since evidence supported hearing officer's finding that calls emanated from her household and it was reasonable to infer that she made calls herself, or that she consented to another member of her family making them. Schuster v Babylon Union Free School Dist., 138 A.D.2d 608, 526 N.Y.S.2d 191, 1988 N.Y. App. Div. LEXIS 3162 (N.Y. App. Div. 2d Dep't 1988).

Substantial evidence supported determination of county commissioner of hospitals finding county medical center laundry employee guilty of misconduct where 3 witnesses testified that employee and co-worker were involved in argument over use of particular "hot-head presser," and that employee activated presser, which caused it to descend, preventing co-worker from placing shirt inside machine, thus resulting in burn to arm of co-worker. Torres v County of Westchester, 182 A.D.2d 689, 582 N.Y.S.2d 451, 1992 N.Y. App. Div. LEXIS 6018 (N.Y. App. Div. 2d Dep't 1992).

Substantial evidence supported a hearing officer's recommendation of termination of employment for a police department electrician who aggressively threatened and used profanity toward a member of the public. McLean v City of Albany, 13 A.D.3d 851, 785 N.Y.S.2d 801, 2004 N.Y. App. Div. LEXIS 15293 (N.Y. App. Div. 3d Dep't 2004).

188. —Anger mismanagement

Substantial evidence supported determination to suspend police officer without pay for 9 days where, while safeguarding injured prisoner in hospital emergency room, officer wrongfully jeopardized prisoner's health by failing to comply with medical instructions of X-ray technician, engaging in verbal altercation with physician, and unjustifiably grabbing physician's smock. Carmody v Ward, 165 A.D.2d 687, 564 N.Y.S.2d 252, 1990 N.Y. App. Div. LEXIS 11039 (N.Y. App. Div. 1st Dep't 1990).

New York City Transit Authority properly dismissed police officer where (1) officer met with his commanding officer to discuss negative evaluation report, (2) during course of discussion, officer became angry and upset and twice threatened to kill commanding officer, and (3) officer then reached for his service revolver and had to be physically restrained and disarmed by several other officers. Moorehead v New York City Transit Auth., 190 A.D.2d 674, 593 N.Y.S.2d 263, 1993 N.Y. App. Div. LEXIS 800 (N.Y. App. Div. 2d Dep't 1993).

School district properly terminated petitioner's employment as part-time school bus driver based on 2 separate, but similar, incidents of overreaction and loss of control when he used physical force against 5- and 12-year-old children. Heslop v Board of Educ., Newfield Cent. Sch. Dist., 191 A.D.2d 875, 594 N.Y.S.2d 871, 1993 N.Y. App. Div. LEXIS 2383 (N.Y. App. Div. 3d Dep't 1993).

It was appropriate to dismiss petitioner from his position as senior psychiatric aide for acts including punching and kicking patient. Gonzalez v Carter, 208 A.D.2d 924, 617 N.Y.S.2d 869, 1994 N.Y. App. Div. LEXIS 10593 (N.Y. App. Div. 2d Dep't 1994).

Termination of sanitation department employee for altercation with civilian was improper where incident was precipitated by civilian's conduct. Hutchinson v Lloyd, 216 A.D.2d 3, 627 N.Y.S.2d 46, 1995 N.Y. App. Div. LEXIS 5877 (N.Y. App. Div. 1st Dep't), app. denied, 86 N.Y.2d 710, 635 N.Y.S.2d 947, 659 N.E.2d 770, 1995 N.Y. LEXIS 4389 (N.Y. 1995).

Dismissal of licensed practical nurse was appropriate sanction stemming from her abuse of 2 patients, one who was mentally retarded and other who suffered from Alzheimer's disease. Marrello v Carter, 226 A.D.2d 911, 640 N.Y.S.2d 679, 1996 N.Y. App. Div. LEXIS 3722 (N.Y. App. Div. 3d Dep't 1996).

Police Commissioner's determination that petitioner wrongfully kicked civilian was supported by videotape showing petitioner raising his foot and bringing it forward and back while standing inches from civilian's torso, even though tape did not show petitioner's foot hitting civilian, where motion of petitioner's foot was perceived by administrative law judge as "completely consistent with a kick, and completely inconsistent with a step."

Gatto v Brown, 234 A.D.2d 22, 650 N.Y.S.2d 162, 1996 N.Y. App. Div. LEXIS 12254 (N.Y. App. Div. 1st Dep't 1996).

It was proper to dismiss police officer who initiated physical altercation with his captain in course of which officer struck captain several times. Palumbo v New York City Police Dep't, 247 A.D.2d 348, 669 N.Y.S.2d 206, 1998 N.Y. App. Div. LEXIS 1848 (N.Y. App. Div. 1st Dep't 1998).

189. Drug test

Penalty of discharge was not excessive where urine samples, taken from firefighter while he was serving 90-day suspension for stealing and cashing paycheck of fellow firefighter, indicated presence of marijuana. Lumsden v New York City Fire Dep't, 134 A.D.2d 595, 522 N.Y.S.2d 4, 1987 N.Y. App. Div. LEXIS 50803 (N.Y. App. Div. 2d Dep't 1987).

Dismissal of New York City Transit Authority bus driver, based on positive result for marijuana in urine test administered on day following his completion of 30-day drug rehabilitation program, was not supported by substantial evidence and would be annulled where (1) driver testified that he stopped using marijuana immediately after receiving positive result in first drug test on same day he entered drug program, (2) toxicology expert, who supervised transit authority's drug testing program, testified that it was possible for marijuana to remain in urine for considerable length of time which could vary widely from person to person, and (3) there was no evidence of driver's continued use of marijuana other than doubtful results of second test. Hall on behalf of Canty v New York City Transit Authority, 138 A.D.2d 350, 525 N.Y.S.2d 643, 1988 N.Y. App. Div. LEXIS 2126 (N.Y. App. Div. 2d Dep't), app. denied, 72 N.Y.2d 810, 534 N.Y.S.2d 938, 531 N.E.2d 658, 1988 N.Y. LEXIS 2944 (N.Y. 1988).

It was not unduly harsh to dismiss petitioner from his position as bus operator for New York City Transit Authority based on his use of controlled substances without authorization, in violation of authority's regulations. Phifer v Gunn, 143 A.D.2d 992, 533 N.Y.S.2d 898, 1988 N.Y. App. Div. LEXIS 10782 (N.Y. App. Div. 2d Dep't 1988), app. denied, 74 N.Y.2d 608, 545 N.Y.S.2d 104, 543 N.E.2d 747, 1989 N.Y. LEXIS 2363 (N.Y. 1989).

Correction officer's supervisors were justified in directing him to submit to drug test, and in dismissing him when test result was positive, where (1) officer had tested positive for drug use in past, (2) officer was absent without explanation for 2-hour period, (3) officer could not determine reason for his prisoner miscount or explain why 2 prisoners were not readied for their court appearances, and (4) officer's appearance was disheveled and his behavior was erratic; while supervisors' suspicion was partly based on past drug test which had been declared invalid, exclusionary rule did not preclude such reliance. Gibson v Koehler, 165 A.D.2d 768, 564 N.Y.S.2d 265, 1990 N.Y. App. Div. LEXIS 11245 (N.Y. App. Div. 1st Dep't 1990).

Petitioner's dismissal from his position as police officer was supported by substantial evidence where (1) petitioner's urine sample tested positive for presence of cocaine and urine test was confirmed by 2 additional test procedures, and (2) there was no support for petitioner's explanation that positive EMIT test results could have been caused by ingestion of cough medication or cocaine dust during drug arrest. Jones v Ward, 166 A.D.2d 323, 560 N.Y.S.2d 781, 1990 N.Y. App. Div. LEXIS 12753 (N.Y. App. Div. 1st Dep't 1990).

Penalty of dismissal, although severe, was not so disproportionate to offense as to be shocking to one's sense of fairness where highway maintenance equipment operator tested positive for marijuana during county highway department's random drug test, and his duties included operation of heavy equipment in excess of 75,000 pounds in proximity to other employees and general public. Catlin v Orleans County Highway Dep't, 255 A.D.2d 966, 680 N.Y.S.2d 35, 1998 N.Y. App. Div. LEXIS 12228 (N.Y. App. Div. 4th Dep't 1998).

Dismissal of police officer was properly based on random drug test results showing officer had ingested cocaine. Seeley v City of New York, 269 A.D.2d 205, 702 N.Y.S.2d 299, 2000 N.Y. App. Div. LEXIS 1307 (N.Y. App. Div. 1st Dep't 2000).

Report from random drug test performed by outside agency, notifying that petitioner tested positive for cocaine, supported determination terminating his employment as city Motor Equipment Operator. Powell v City of Newburgh, 284 A.D.2d 334, 725 N.Y.S.2d 883, 2001 N.Y. App. Div. LEXIS 5609 (N.Y. App. Div. 2d Dep't), app. denied, 96 N.Y.2d 720, 733 N.Y.S.2d 372, 759 N.E.2d 371, 2001 N.Y. LEXIS 3146 (N.Y. 2001).

190. —Refusal to take

Substantial evidence supported administrative determinations dismissing police and correction officers for their refusal to comply with orders to submit to urinalysis in connection with reported drug use where reliable confidential informants had reported officers' past drug use, there was partial verification of such information, and informants reported having seen officers use drugs just prior to urinalysis orders (however, court was not called upon to render opinion as to whether public agency may lawfully order employee to undergo urinalysis on reasonable suspicion of drug use). Perez v Ward, 69 N.Y.2d 840, 514 N.Y.S.2d 703, 507 N.E.2d 296, 1987 N.Y. LEXIS 15892 (N.Y.), app. denied, 69 N.Y.2d 985, 516 N.Y.S.2d 1028, 509 N.E.2d 363, 1987 N.Y. LEXIS 16780 (N.Y. 1987).

Corrections officers who refuse to comply with order to submit urine samples after confidential informant has alleged involvement of officers in illegal drug activities are properly dismissed. King v McMickens, 120 A.D.2d 351, 501 N.Y.S.2d 679, 1986 N.Y. App. Div. LEXIS 56484 (N.Y. App. Div. 1st Dep't 1986), aff'd, 69 N.Y.2d 840, 514 N.Y.S.2d 703, 507 N.E.2d 296, 1987 N.Y. LEXIS 15892 (N.Y. 1987).

Substantial evidence supported city police commissioner's dismissal of petitioner from position as police sergeant where record showed that petitioner had (1) failed to comply with lieutenant's order to submit to drug test, (2) failed to safeguard department property, (3) wrongfully possessed bogus sergeant's shield, and (4) knowingly associated with known criminal. Giannelli v Ward, 156 A.D.2d 136, 548 N.Y.S.2d 182, 1989 N.Y. App. Div. LEXIS 15208 (N.Y. App. Div. 1st Dep't 1989), app. dismissed, 75 N.Y.2d 946, 555 N.Y.S.2d 692, 554 N.E.2d 1280, 1990 N.Y. LEXIS 733 (N.Y. 1990), app. denied, 76 N.Y.2d 702, 559 N.Y.S.2d 239, 558 N.E.2d 41, 1990 N.Y. LEXIS 1351 (N.Y. 1990).

Court would annul that part of determination finding Department of Correction employee guilty of refusing lawful order to submit to urinalysis where department had no reasonable suspicion to afford basis on which to order employee to submit to such test, and employee was not being tested under random drug testing program; mere absence of any medical explanation for employee's absenteeism did not warrant department in requiring test to rule out involvement of drugs as contributing factor. Wilder v Koehler, 161 A.D.2d 331, 556 N.Y.S.2d 28, 1990 N.Y. App. Div. LEXIS 5273 (N.Y. App. Div. 1st Dep't), app. dismissed, app. denied, 76 N.Y.2d 887, 561 N.Y.S.2d 547, 562 N.E.2d 872, 1990 N.Y. LEXIS 3195 (N.Y. 1990), app. dismissed, 77 N.Y.2d 858, 568 N.Y.S.2d 14, 569 N.E.2d 873, 1991 N.Y. LEXIS 205 (N.Y. 1991).

Evidence supported determination that police officer engaged in conduct unbecoming officer where he refused to comply with order to submit to drug test on day that his eyes were bloodshot and after confidential informant and 2 anonymous telephone callers provided specific objective facts that created reasonable inference of officer's involvement in narcotics. Liska v Ward, 170 A.D.2d 412, 566 N.Y.S.2d 621, 1991 N.Y. App. Div. LEXIS 2423 (N.Y. App. Div. 1st Dep't 1991).

Correction officer was properly dismissed for refusing direct order by superior officer to submit to urinalysis examination after being observed behaving irrationally, with dilated eyes and perspiring forehead, especially in view of officer's unsatisfactory employment record and psychological problems. Rice v Seilaff, 181 A.D.2d 502, 581 N.Y.S.2d 311, 1992 N.Y. App. Div. LEXIS 3467 (N.Y. App. Div. 1st Dep't 1992).

Dismissal of firefighter was appropriate sanction for his refusal to obey legitimate command to submit to urine test after he appeared to be impaired and unable to perform duties of his employment without risk of injury to himself and to those whose safety he was employed to safeguard. Washington v Dolce, 208 A.D.2d 937, 617 N.Y.S.2d 533, 1994 N.Y. App. Div. LEXIS 10611 (N.Y. App. Div. 2d Dep't 1994).

Dismissal was appropriate sanction for police officer's refusal to supply requested urine sample. Blount v Bratton, 216 A.D.2d 6,

627 N.Y.S.2d 375, 1995 N.Y. App. Div. LEXIS 5849 (N.Y. App. Div. 1st Dep't 1995).

It was proper to dismiss New York City Transit Authority police officer for failing to report for medical examination on time, failing to take required urinalysis, and failing to report for duty for approximately one month without leave. Morales v New York City Transit Auth., 230 A.D.2d 859, 646 N.Y.S.2d 571, 1996 N.Y. App. Div. LEXIS 8544 (N.Y. App. Div. 2d Dep't 1996).

191. Economic reasons; staff reduction

Petitioner was entitled to an order reinstating him to the position of assistant comparer in the office of the register of Kings county at the salary to which he was entitled at the time of his discharge, where it appeared that petitioner was discharged because the appropriation by the board of estimate for the fiscal year beginning July 1, 1939, was for two assistant comparers instead of three; that the action of the board was an abortive attempt to abolish one of the positions; that the position continued to exist and that the register acted illegally in discharging petitioner in the absence of charges and an opportunity to answer in writing. Burke v McGoldrick, 260 A.D. 505, 23 N.Y.S.2d 123, 1940 N.Y. App. Div. LEXIS 4640 (N.Y. App. Div. 1940), reh'g denied, 261 A.D. 836, 25 N.Y.S.2d 999, 1941 N.Y. App. Div. LEXIS 7689 (N.Y. App. Div. 1941).

Record, in proceeding to compel reinstatement of petitioner to position of town engineer with back pay, contained no support for finding that town's actions in discharging petitioner were motivated by anything other than sincere desire to economize. Berg v Gerber, 59 A.D.2d 906, 399 N.Y.S.2d 244, 1977 N.Y. App. Div. LEXIS 14109 (N.Y. App. Div. 2d Dep't 1977).

Although public employer has inherent right to abolish positions in good faith for economic reasons labor class employees who are veterans or exempt volunteer firemen cannot be terminated when their positions are abolished if there are vacancies in similar positions. Jones v Carey, 84 Misc. 2d 505, 377 N.Y.S.2d 378, 1975 N.Y. Misc. LEXIS 3163 (N.Y. Sup. Ct. 1975), rev'd, 55 A.D.2d 260, 389 N.Y.S.2d 921, 1976 N.Y. App. Div. LEXIS 14559 (N.Y. App. Div. 3d Dep't 1976).

In spite of N.Y. Civ. Serv. Law § 75, public employers are entitled to eliminate competitive civil service positions for reasons having nothing to do with discipline or job performance, such as for fiscal reasons. Brennan v Straub, 246 F. Supp. 2d 360, 2003 U.S. Dist. LEXIS 2728 (S.D.N.Y. 2003).

Where an employee alleged that there was a denial of due process in violation of N.Y. Civ. Serv. Law § 75 when the employee was terminated and defendants asserted that the employee was terminated because the position was eliminated for budgetary concerns, the court denied defendants' Fed. R. Civ. P. 12(b)(6) motion because the employee was terminated four days before the decision was made to eliminate the employee's position. Brennan v Straub, 246 F. Supp. 2d 360, 2003 U.S. Dist. LEXIS 2728 (S.D.N.Y. 2003).

192. Failure to inform employer of change in status

Evidence was insufficient to support finding that city's water maintenance supervisor was guilty of grossly endangering the life and property of persons and of causing great possible liability to the board of water supply by failing to notify superior of suspension of his driver's license. Bernhard v Board of Water Supply, 50 A.D.2d 1061, 376 N.Y.S.2d 279, 1975 N.Y. App. Div. LEXIS 12072 (N.Y. App. Div. 4th Dep't 1975).

Evidence on charge of failure to promptly notify county police department of change of status was inconclusive and thus insufficient to support a determination sustaining the charge and dismissal from county police department. Buttacavoli v Guido, 59 A.D.2d 891, 399 N.Y.S.2d 47, 1977 N.Y. App. Div. LEXIS 14080 (N.Y. App. Div. 2d Dep't 1977), app. denied, 44 N.Y.2d 643, 1978 N.Y. LEXIS 4291 (N.Y. 1978).

Penalty of termination of civil servant's employment was neither abuse of discretion nor shocking to one's sense of fairness where he was properly found guilty, at discipinary hearing, of (1) falsely reporting that he was struck by vehicle when he never came in contact with it, and (2) filing false police report based on that incident. Catalano v Village of Kenmore, 255 A.D.2d 948, 680 N.Y.S.2d 375, 1998 N.Y. App. Div. LEXIS 12193 (N.Y. App. Div. 4th Dep't 1998).

193. False claim, report or statement

Courts properly upheld penalty of dismissal where petitioner was found guilty of 2 charges of submitting reports to Department of Civil Service, falsely indicating that several employees were working at lower titles after he had temporarily promoted them and paid them at higher title rate, which violated CLS Civ S §§ 97(1) and 100(1) because those employees were not on civil service eligible list. Gillen v Smithtown Library Bd. of Trustees, 94 N.Y.2d 776, 699 N.Y.S.2d 695, 721 N.E.2d 945, 1999 N.Y. LEXIS 3432 (N.Y. 1999).

Penalty of dismissal from New York City police department's office of Internal affairs was not so disproportionate as to be shocking to one's sense of fairness, where petitioner wrongfully made false and misleading statements while under oath at official interview regarding his activities in connection with matter under Internal Affairs investigation. Harp v N.Y. City Police Dep't, 96 N.Y.2d 892, 730 N.Y.S.2d 786, 756 N.E.2d 74, 2001 N.Y. LEXIS 1984 (N.Y. 2001).

Civ S Law § 75 does not preclude the imposition of discipline on a civil service employee for misconduct during off-duty hours; thus a fire department's civilian employee was properly discharged, where while serving as a part-time police officer he executed a complaint falsely accusing a citizen of a crime. Zazycki v Albany, 94 A.D.2d 925, 463 N.Y.S.2d 614, 1983 N.Y. App. Div. LEXIS 18376 (N.Y. App. Div. 3d Dep't), app. denied, 60 N.Y.2d 558, 469 N.Y.S.2d 1026, 1983 N.Y. LEXIS 5696 (N.Y. 1983).

Dismissal of New York City Department of Consumer Affairs inspector for making false statements to department and failing to comply with department regulations involving outside employment was not shocking to one's sense of fairness and would be affirmed considering impact of petitioner's dishonesty on performance of his duties as inspector, his short length of employment at department, his relatively young age, and his alternate skill as X-ray technologist. Wickert v Aponte, 129 A.D.2d 803, 514 N.Y.S.2d 794, 1987 N.Y. App. Div. LEXIS 45492 (N.Y. App. Div. 2d Dep't 1987).

Dismissal was excessive penalty, even though town investigator misused his position on one occasion by falsely representing that he was on official business in order to avoid paying $10 boat ramp usage charge; matter would be remitted for imposition of new penalty which should not exceed 2-month suspension without pay, and for calculation of award of back pay consisting of salary investigator would have earned had he not been dismissed, less amount of compensation which he might have earned in any other employment, and any unemployment benefits he might have received during such period. RRI Realty Corp. v Hattrick, 132 A.D.2d 558, 517 N.Y.S.2d 284, 1987 N.Y. App. Div. LEXIS 49081 (N.Y. App. Div. 2d Dep't 1987).

Penalty of dismissal was not excessive where transit authority employee filed fraudulent claims for overtime and meal allowances, in view of employee's supervisory position, his careful plan to defraud, and transit authority's need to deter similar false claims. Antignano v Gunn, 134 A.D.2d 344, 520 N.Y.S.2d 820, 1987 N.Y. App. Div. LEXIS 50521 (N.Y. App. Div. 2d Dep't 1987), app. denied, 71 N.Y.2d 804, 528 N.Y.S.2d 829, 524 N.E.2d 149, 1988 N.Y. LEXIS 685 (N.Y. 1988).

Dismissal of county employee was appropriate for having prepared and filed false insurance document with county and lying to his superiors when first questioned about origin of certificate. Winn v Eschweiler, 149 A.D.2d 716, 540 N.Y.S.2d 509, 1989 N.Y. App. Div. LEXIS 5407 (N.Y. App. Div. 2d Dep't 1989).

Substantial evidence supported determination of correction commissioner that petitioner filed false report of inmate possessing razor where various officers testified that after diligent search they found no razor, petitioner did not warn other officers already in room that inmate was armed with razor, and finding that there was no razor undermined petitioner's rationale that threat of weapon justified allowing unauthorized officers onto his post. Winslow v Sielaff, 179 A.D.2d 523, 579 N.Y.S.2d 20, 1992 N.Y. App. Div. LEXIS 496 (N.Y. App. Div. 1st Dep't 1992).

Evidence supported respondent school district's determination that senior custodian at district's primary building engaged in misconduct by falsely reporting and verifying time sheets for himself and another employee, and reentering building and removing folder of documents, and penalty of dismissal was not excessive in light of custodian's supervisory position, fact that he had falsified records for some time, and respondent's need to deter similar false reporting in future. Clark v Canandaigua City School Dist., 179 A.D.2d 1006, 579 N.Y.S.2d 275, 1992 N.Y. App. Div. LEXIS 2337 (N.Y. App. Div. 4th Dep't), aff'd, 80 N.Y.2d 912, 588 N.Y.S.2d 820, 602 N.E.2d 228, 1992 N.Y. LEXIS 3162 (N.Y. 1992).

Petitioner was properly dismissed from position as police officer, despite previously unblemished record, where substantial evidence supported determination that he participated in attempt to defraud auto insurance carrier by making false statements to insurance carrier. Giordano v Brown, 182 A.D.2d 582, 585 N.Y.S.2d 702, 1992 N.Y. App. Div. LEXIS 6334 (N.Y. App. Div. 1st Dep't 1992).

Substantial evidence supported determination that county employee made false claim that he was injured when he fell from ladder in county clerk's office where (1) co-worker testified that he saw employee trip and fall in front of delicatessen, that employee appeared to hurt his shoulder or arm, and that employee approached him later that day and asked him not to say anything about fall because he was going to claim work-related injury, and (2) second co-worker testified that employee told him that he had hurt himself in fall in front of delicatessen but that he was going to claim that he had done it in county clerk's office. Riley v Schles, 185 A.D.2d 437, 585 N.Y.S.2d 627, 1992 N.Y. App. Div. LEXIS 8886 (N.Y. App. Div. 3d Dep't 1992).

Dismissal of police officer did not shock court's sense of fairness, because officer lied with respect to matters of self-identification particularly important to police work and integrity, where officer, in filing petition with American Society for Prevention of Cruelty to Animals, used false name, badge number, and precinct and lied concerning origin of dog he brought there to avoid potential unpleasantness concerning fellow officer who owned and cared for dog, which was precinct mascot. Ildefonso v Bratton, 238 A.D.2d 142, 655 N.Y.S.2d 507, 1997 N.Y. App. Div. LEXIS 3104 (N.Y. App. Div. 1st Dep't), app. denied, 90 N.Y.2d 810, 665 N.Y.S.2d 401, 688 N.E.2d 257, 1997 N.Y. LEXIS 3253 (N.Y. 1997).

Substantial evidence supported hearing officer's finding of misconduct by town employee where employee failed to complete his road plowing route after dinner break during severe snowstorm and lied to his supervisor regarding completion of his duties. Johnson v Town of Arcade, 281 A.D.2d 894, 721 N.Y.S.2d 888, 2001 N.Y. App. Div. LEXIS 2916 (N.Y. App. Div. 4th Dep't 2001).

Article 78 proceeding by terminated town employee would be remitted for imposition of appropriate penalty not to exceed 6-month suspension without pay, even though employee failed to complete his road plowing route after dinner break during severe snowstorm and lied to his supervisor regarding completion of his duties, where penalty of termination was so disproportionate to misconduct as to shock one's sense of fairness. Johnson v Town of Arcade, 281 A.D.2d 894, 721 N.Y.S.2d 888, 2001 N.Y. App. Div. LEXIS 2916 (N.Y. App. Div. 4th Dep't 2001).

194. —Job application

In disciplinary proceeding, administrative finding that petitioner falsely stated on his application for state employment that he had received bachelor's degree from Morgan State College was sustained by letter from director of office of records and registration of Morgan State University (formerly Morgan State College) stating that there was no record of petitioner being registered as student, or of his graduation from that institution. Dean v Bradford, 158 A.D.2d 772, 551 N.Y.S.2d 364, 1990 N.Y. App. Div. LEXIS 911 (N.Y. App. Div. 3d Dep't 1990).

IAS court erred in determining that respondent acted arbitrarily and capriciously in deciding to dismiss petitioner as director of hospital's audio-visual department in 1989 because of material misrepresentations he had made regarding criminal history and educational qualifications on both original employment application in 1977 and 1983 application for director position, where although respondent retained petitioner notwithstanding knowledge of his misrepresentations on 1977 application, it promptly terminated him on discovering that he repeated misrepresentations on application for director position, petitioner's deceit on latter application not having been discovered until anonymous letter complaint prompted investigation 6 years later. Moran v Baxter, 193 A.D.2d 460, 597 N.Y.S.2d 688, 1993 N.Y. App. Div. LEXIS 4831 (N.Y. App. Div. 1st Dep't 1993).

It was proper to dismiss police officer based on undisputed evidence, obtained during investigation following his appointment, that he had committed fraud on his employment application to conceal his fraudulent use of Social Security number not his own to obtain second New York State driver's license after his first license had been revoked. Martin v Marchiselli, 262 A.D.2d 171, 691 N.Y.S.2d 528, 1999 N.Y. App. Div. LEXIS 6752 (N.Y. App. Div. 1st Dep't 1999).

195. —Omissions

Police commissioner did not act in bad faith in terminating officer's probationary employment on basis of recommendation of medical experts who examined officer; moreover, independent basis for termination was provided by officer's failure to mention material incident in application which was later discovered during background check. Lukas v Brown, 181 A.D.2d 612, 581 N.Y.S.2d 333, 1992 N.Y. App. Div. LEXIS 4129 (N.Y. App. Div. 1st Dep't 1992).

It was neither arbitrary nor capricious to terminate petitioner's employment as city police officer where he did not answer questions about his psychological history on original employment application forms but admitted when questioned by staff psychologist 3 years later that he had been seeing psychologists since he was youth; truthful responses to questions relating to petitioner's psychological history had direct bearing on his ability to perform duties as police officer. Gray v Department of Personnel, 189 A.D.2d 682, 592 N.Y.S.2d 376, 1993 N.Y. App. Div. LEXIS 356 (N.Y. App. Div. 1st Dep't 1993).

Penalty of dismissal was not disproportionate penalty where transit authority police officer struck civilian and improperly displayed his weapon in off-duty incident, he made false denials to his superiors about details of incident, and he failed to disclose that his driver's license had been suspended, thereby posing threat to public confidence and evincing willingness to deceive. Dabulis v New York City Transit Auth., 222 A.D.2d 433, 634 N.Y.S.2d 529, 1995 N.Y. App. Div. LEXIS 12494 (N.Y. App. Div. 2d Dep't 1995).

Court denied Article 78 petition to annul determination of respondent police commissioner which dismissed petitioner from his position as police officer as (1) substantial evidence, including testimony of other police officers, supported findings that petitioner removed vest from suspect, failed to turn it over to arresting officers, and gave false and misleading statements at official interviews concerning incident, and (2) penalty was not unfair. Botte v Safir, 261 A.D.2d 315, 691 N.Y.S.2d 415, 1999 N.Y. App. Div. LEXIS 5824 (N.Y. App. Div. 1st Dep't 1999).

196. —Time records

It was proper to dismiss stenographic secretary for making false entries on her time sheets. Roach v Plainedge Union Free Sch. Dist., 230 A.D.2d 861, 646 N.Y.S.2d 704, 1996 N.Y. App. Div. LEXIS 8560 (N.Y. App. Div. 2d Dep't 1996).

197. Incompetence, generally

The power of the board of police and fire commissioners of a city to remove a patrolman in the police department is limited by provisions of this section, but it may be assumed that a charge of inefficiency and neglect of duty means same as incompetency or misconduct, as those words are used in this section. Eisle v Woodin, 205 A.D. 452, 199 N.Y.S. 559, 1923 N.Y. App. Div. LEXIS 5050 (N.Y. App. Div. 1923), aff'd, 238 N.Y. 551, 144 N.E. 887, 238 N.Y. (N.Y.S.) 551, 1924 N.Y. LEXIS 718 (N.Y. 1924).

198. —Supported by record

Evidence supported conclusion that job performance of treatment team leader at psychiatric center was unsatisfactory, and that her discharge was in good faith, where affidavits of her supervisors detailed continuing problems concerning her relationships with other staff members, as well as meeting with her

at which such problems were discussed, and where Special Term also had before it performance appraisal of employee prepared 2 months before her termination showing comparatively low rating regarding her ability to communicate, and record also included employee's own lengthy correspondence explaining various problems she had with fellow employees; no material issue of fact was raised by employee's disputed assertion that facility deputy director told her she was being discharged to protect other employees from scheduled layoffs. Johnson v Katz, 68 N.Y.2d 649, 505 N.Y.S.2d 64, 496 N.E.2d 223, 1986 N.Y. LEXIS 19041 (N.Y. 1986).

Findings of incompetency supported family court psychologist's dismissal from employment. Messing v Bartlett, 58 A.D.2d 709, 395 N.Y.S.2d 979, 1977 N.Y. App. Div. LEXIS 12818 (N.Y. App. Div. 3d Dep't), app. denied, 43 N.Y.2d 643, 1977 N.Y. LEXIS 4947 (N.Y. 1977).

Evidence supported board of education's finding that janitor was incompetent in performance of his duties and should therefore be dismissed. Gibson v Board of Education, 59 A.D.2d 963, 399 N.Y.S.2d 296, 1977 N.Y. App. Div. LEXIS 14221 (N.Y. App. Div. 3d Dep't 1977), app. dismissed, 43 N.Y.2d 925, 403 N.Y.S.2d 736, 374 N.E.2d 629, 1978 N.Y. LEXIS 1830 (N.Y. 1978), aff'd, 45 N.Y.2d 884, 410 N.Y.S.2d 811, 383 N.E.2d 113, 1978 N.Y. LEXIS 2308 (N.Y. 1978).

In a disciplinary hearing before a board of education, the record supported the board's termination of a bus driver's employment on the basis of unsafe driving where the record contained testimony from bus driver's supervisor and several other witnesses concerning the driver's unsafe driving, and where the driver had been found guilty of seven incidents of unsafe driving. Ronkese v Board of Education, 82 A.D.2d 1011, 442 N.Y.S.2d 176, 1981 N.Y. App. Div. LEXIS 14745 (N.Y. App. Div. 3d Dep't 1981).

Nurse's aide employed at county infirmary was properly discharged in light of substantiated charges of misconduct whereby she (1)bumped resident's leg and failed to timely report injury, (2)inserted rectal thermometer improperly into patient's vagina, (3) did not use syringe pursuant to doctor's standing order and thus failed to properly feed patient, and (4) fed resident food which she failed to cool causing burns to patient's mouth. Yerry v Ulster County, 128 A.D.2d 941, 512 N.Y.S.2d 592, 1987 N.Y. App. Div. LEXIS 44610 (N.Y. App. Div. 3d Dep't 1987).

City transit authority's dismissal of train operator was not so disproportionate to 2 specifications of charges of "misconduct and/or incompetence" as to be shocking to one's sense of fairness where operator had extensive prior disciplinary record. Taylor v New York City Transit Authority, 133 A.D.2d 635, 519 N.Y.S.2d 637, 1987 N.Y. App. Div. LEXIS 51674 (N.Y. App. Div. 2d Dep't 1987).

School district's decision to terminate account clerk for incompetence or misconduct based on her unauthorized transfer of public monies to herself was supported by substantial evidence where clerk had prepared, and obtained signatures on, certain budget amendments which resulted in money from federal programs being paid to her as compensation for work she did on the programs, although no budget funds had been approved for that purpose. Van Gorder v Board of Education, 140 A.D.2d 774, 527 N.Y.S.2d 654, 1988 N.Y. App. Div. LEXIS 4670 (N.Y. App. Div. 3d Dep't 1988).

Penalty of dismissal was not so disproportionate to offense as to be shocking to one's sense of fairness where there was evidence that principal account clerk with county highway department was incompetent in performing his duties. Tuller v Clinton County Highway Dep't, 207 A.D.2d 926, 616 N.Y.S.2d 262, 1994 N.Y. App. Div. LEXIS 8837 (N.Y. App. Div. 3d Dep't 1994).

Petitioner, supervisor of child protective services within county department of social services, was properly demoted and relieved of her supervisory duties after being found guilty of misconduct and incompetence arising from her approval and preparation of falsified expense receipts. Harlander-Insero v Glass, 228 A.D.2d 504, 643 N.Y.S.2d 684, 1996 N.Y. App. Div. LEXIS 6633 (N.Y. App. Div. 2d Dep't 1996).

Dismissal of school bus driver was appropriate penalty where his personnel records were replete with numerous incidents of traffic infractions and accidents, and he was found guilty of 6 separately charged safety violations based on observations of his driving on six separate occasions within short period of time. Malloch v Ballston Spa Cent. Sch. Dist., 249 A.D.2d 797, 671 N.Y.S.2d 845, 1998 N.Y. App. Div. LEXIS 4518 (N.Y. App. Div. 3d Dep't), app. denied, 92 N.Y.2d 810, 680 N.Y.S.2d 55, 702 N.E.2d 840, 1998 N.Y. LEXIS 3081 (N.Y. 1998).

Substantial evidence supported termination of petitioner's employment as licensed practical nurse at county nursing home where (1) it was established through testimony of several registered nurses employed at nursing home that she failed to perform required fasting blood sugar test on diabetic resident, failed to prepare chart renewals on 2 residents, and failed to orally report condition of residents assigned to her care to oncoming day-shift nurses, and (2) hearing officer found her testimony and explanations for her inactions to be incredible. Williams v County of Fulton, 270 A.D.2d 613, 704 N.Y.S.2d 349, 2000 N.Y. App. Div. LEXIS 2620 (N.Y. App. Div. 3d Dep't 2000).

Workers' Compensation Board's termination of probationary civil service employment of claims referee without hearing was not in bad faith, unconstitutional, or otherwise improper where (1) board followed its established procedures by periodically advising referee of his progress, providing written evaluation at least 2 weeks before end of probationary period, and giving written notice at least one week before effective date of discharge, (2) bad faith was not shown by fact that earlier, more favorable progress reports were not furnished in writing before final, unfavorable written report, and (3) referee's dismissal was based on his inadequate understanding of workers' compensation law, his failure to respond to additional training to address that deficiency, and his improper conduct in requesting transportation from attorneys and posing inappropriate questions to witnesses. Scott v Workers' Compensation Bd., 275 A.D.2d 877, 713 N.Y.S.2d 571, 2000 N.Y. App. Div. LEXIS 9473 (N.Y. App. Div. 3d Dep't 2000).

199. — —Failure or refusal to act as incompetence

A determination by a library's board of trustees dismissing the director of the library on the grounds of misconduct and incompetency would be upheld where the hearing officer's determinations that the director had persistently failed to comply with appropriate civil service procedures in connection with the promotion of one of his subordinates based simply on his disagreement with such procedures and despite his knowledge of the applicable regulations, and that he had deliberately engaged in other acts of misconduct despite being aware of his wrongdoing, were supported by substantial evidence. Johnson v Board of Trustees, 97 A.D.2d 413, 467 N.Y.S.2d 247, 1983 N.Y. App. Div. LEXIS 19991 (N.Y. App. Div. 2d Dep't 1983), modified, 61 N.Y.2d 1014, 475 N.Y.S.2d 372, 463 N.E.2d 1224, 1984 N.Y. LEXIS 4232 (N.Y. 1984).

Substantial evidence supported administrative determination that petitioner was incompetent in performance and execution of his supervisory duties where petitioner was given assignment to prepare training program for one of his assistants, he was offered guidance to assist him in completing his task, and he refused to carry out assignment. Dean v Bradford, 158 A.D.2d 772, 551 N.Y.S.2d 364, 1990 N.Y. App. Div. LEXIS 911 (N.Y. App. Div. 3d Dep't 1990).

Sheriff's termination of deputy sheriff's employment was neither arbitrary nor capricious where, regarding deputy's handling of violent disturbance by jail inmates, available medical staff was not called, proper riot gear was available but not used, inmate property and evidence were improperly identified and preserved, dry inmate clothing was not distributed, temperature of jail after disturbance was not properly maintained, and source of needed ventilation was not used despite request by inmate and direction by acting correctional administrator, all of which supported sheriff's conclusion that deputy could not be trusted to act properly in sensitive supervisory capacity. Christopher v Phillips, 160 A.D.2d 1165, 554 N.Y.S.2d 370, 1990 N.Y. App. Div. LEXIS 4523 (N.Y. App. Div. 3d Dep't), app. denied, 76 N.Y.2d 706, 560 N.Y.S.2d 988, 561 N.E.2d 888, 1990 N.Y. LEXIS 2992 (N.Y. 1990).

Substantial evidence supported determination that petitioner was guilty of incompetence in discharge of his duties as supervisor within Department of Transportation where (1) testimony

established that drug usage was widespread in petitioner's section, that petitioner was at least somewhat aware of possible drug problem, and that he was specifically informed by one employee that another employee had drug problem and that drugs were being sold at work, and (2) petitioner failed to request more specific information from employee that gave him such information, and failed to follow up on her information. Pelham v White, 166 A.D.2d 824, 563 N.Y.S.2d 171, 1990 N.Y. App. Div. LEXIS 12819 (N.Y. App. Div. 3d Dep't 1990).

Substantial evidence supported termination of school custodian where (1) his immediate supervisor testified as to various deficiencies in his work, including failure to properly clean areas, and his apparent inability to improve his performance after deficiencies were called to his attention, (2) principal of school testified to his poor performance, (3) his performance evaluations were received in evidence, and (4) he was advised through numerous memoranda and direct conversations of deficiencies in his performance; custodian's claim that he was fired due to personality conflict with his supervisor merely presented credibility issue for hearing officer to resolve. Rowley v Board of Educ. of Gloversville Enlarged City Sch. Dist., 192 A.D.2d 814, 596 N.Y.S.2d 561, 1993 N.Y. App. Div. LEXIS 3782 (N.Y. App. Div. 3d Dep't 1993).

Dismissal of petitioner from his position as account clerk was appropriate for his failure to initially report automobile accident in which he had been involved while he was purportedly on county business, his completion and submission of misleading accident reports, and his substandard job performance for 3-month period. Smith v Delaney, 208 A.D.2d 932, 617 N.Y.S.2d 896, 1994 N.Y. App. Div. LEXIS 10608 (N.Y. App. Div. 2d Dep't 1994).

Dismissal of school district custodial employee was appropriate where his performance was poor, he failed to improve his work despite oral and written warnings, and he had excessive absences. Smith v Board of Educ., 231 A.D.2d 528, 647 N.Y.S.2d 99, 1996 N.Y. App. Div. LEXIS 8847 (N.Y. App. Div. 2d Dep't 1996), app. denied, 89 N.Y.2d 811, 657 N.Y.S.2d 404, 679 N.E.2d 643, 1997 N.Y. LEXIS 370 (N.Y. 1997).

Complaint alleging that plaintiff was denied appointment to permanent status, and was terminated from his employment with county agency as result of race discrimination, was properly dismissed where (1) several agency employees who had frequent contact with plaintiff testified that he was ill-prepared for meetings, failed to participate in discussions, had difficulty communicating and sharing information, and was generally unable to function as team member of work force, and (2) plaintiff failed to show that stated reason for his discharge was pretextual based on 3 witnesses' general testimony about his efficient and professional managerial style, and unsubstantiated assertions of animus toward him because of his race. Broome v Keener, 236 A.D.2d 498, 654 N.Y.S.2d 618, 1997 N.Y. App. Div. LEXIS 1343 (N.Y. App. Div. 2d Dep't 1997).

Substantial evidence supported determination that business administrator employed by school district was guilty of incompetence in failing to report ongoing misuse of school district credit card, in authorizing payment of school board president's personal expenses with school district funds, and in failing to take necessary steps to stop school board president's misuse of school district credit card. Weatherlow v Board of Educ., 236 A.D.2d 855, 653 N.Y.S.2d 778, 1997 N.Y. App. Div. LEXIS 1791 (N.Y. App. Div. 4th Dep't 1997).

School district's termination of cashier for misconduct and incompetence was supported by substantial evidence that she failed to record numerous purchases of milk and juice by kindergarten class, to record adult food purchases on numerous occasions, and to account for preidentified bills, where cashier's coworkers, at instruction of their supervisor, had recorded their observations of cashier's cash transactions for period of time, and documentary evidence was presented in addition to testimony of coworkers and supervisor. Penalty of termination, on grounds of misconduct and incompetence, was not shocking or disproportionate to school cashier's offenses where she violated position as employee entrusted with school district's money by failing to record numerous purchases of milk and juice by kindergarten class, to record adult food purchases on numerous occasions, and to account for preidentified bills. Stewart v Board of Educ., 238 A.D.2d 838, 656 N.Y.S.2d 541, 1997 N.Y. App. Div. LEXIS 4129 (N.Y. App. Div. 3d Dep't 1997).

Dismissal of security guard was appropriate sanction for his numerous acts of misconduct, which included refusing to assist fellow security guards and Social Services employees on 3 occasions when threatening situations arose. Schurr v Wingate, 243 A.D.2d 571, 663 N.Y.S.2d 116, 1997 N.Y. App. Div. LEXIS 9821 (N.Y. App. Div. 2d Dep't 1997).

Substantial evidence supported finding that school district business manager incompetently failed to timely file state aid forms with state education department where manager's duties included preparing all state and federal fiscal reports and forms, she knew filing deadlines, she failed to timely submit district's SA-100/19, SA-129B, and ST-3 reports for school year, numerous letters from education department and state comptroller confirmed that district's state aid had been frozen pending receipt of overdue forms, and district superintendent testified that he gave manager copies of those letters and directed her to complete and forward those forms, that he suggested persons who could offer assistance, and that he offered to allow manager to work different hours when there would be fewer interruptions. Substantial evidence supported finding that school district business manager incompetently failed to timely file reports necessary to obtain federal and state grants in contradiction of district superintendent's directives to do so where state education department notified superintendent that grant forms were overdue and that failure to submit them within 30 days would result in stop payment on all grants, superintendent thereafter directed manager, on more than one occasion, to complete those forms, and manager's failure to do so caused district to hire temporary employee to do so. Substantial evidence supported finding that school district business manager incompetently failed to make timely interest payment of $145,000 on district's serial bonds where district superintendent testified, and there was documentary evidence, that trust company demanded $667.38 as additional interest compensation because manager's payment was 54 days late. Brey v Board of Educ., 245 A.D.2d 613, 664 N.Y.S.2d 496, 1997 N.Y. App. Div. LEXIS 12575 (N.Y. App. Div. 3d Dep't 1997).

Court upheld discharge of school custodian for misconduct and incompetence as (1) substantial evidence supported hearing officer's finding that waste paper in trash pail which had not been emptied was ignited by cigarettes, causing fire in custodian's area and necessitating evacuation of students, and (2) termination was not disproportionate to offense. Russo v Board of Educ., 259 A.D.2d 703, 686 N.Y.S.2d 836, 1999 N.Y. App. Div. LEXIS 2721 (N.Y. App. Div. 2d Dep't 1999).

200. —Not supported by record

Authority to remove magistrates for cause does not warrant removal of a magistrate for a single act of negligence, particularly where he is a veteran protected by this section. People ex rel. Long v Whitney, 143 A.D. 17, 127 N.Y.S. 554, 1911 N.Y. App. Div. LEXIS 755 (N.Y. App. Div. 1911).

Failure of a veteran, serving as prison storekeeper, to keep his purchases for the warden's table within an alleged monthly allowance was not sustained by the evidence. People ex rel. Kelly v Kirchwey, 177 A.D. 706, 164 N.Y.S. 511, 1917 N.Y. App. Div. LEXIS 5762 (N.Y. App. Div. 1917).

Charges that the commissioner of public markets failed to properly supervise the operation of a market area under this supervision, permitted several floaters to operate in the market contrary to the rules of the department, and absented himself from the market, were trivial in character and did not indicate that the petitioner should be removed for incompetency or misconduct, within meaning of subd. 1 of this section. Joyce v Morgan, 259 A.D. 630, 20 N.Y.S.2d 354, 1940 N.Y. App. Div. LEXIS 6224 (N.Y. App. Div. 1940).

Where record established that for 13 years petitioner was an exemplary police officer, that his behavior altered markedly within six months preceding the making of disciplinary charges against him, and that he became depressed and inattentive, disciplinary charges for incompetence or misconduct seemed misplaced under the circumstances, although the evidence war-

ranted proceedings under those sections of the Civil Service Law pertaining to an inquiry into mental health issues. Penebre v Dzaluk, 51 A.D.2d 574, 378 N.Y.S.2d 767, 1976 N.Y. App. Div. LEXIS 10856 (N.Y. App. Div. 2d Dep't 1976).

Discharge of city employee, subsequent to a fire in basement of pumping station where he was working night shift as sole relief operator, on the two grounds that he had either committed arson or was grossly negligent in maintaining building's security, and that, in connection with an investigation into the fire's cause, he had wrongfully refused to submit to a lie detector examination, was not supported by substantial evidence, since firemen had to be let into the building and the employee thus did properly maintain its security, since a finding, even circumstantially, that he was an arsonist lacked substantial evidence on the record, and since he was justified in refusing to be tested on B & W psychometer, a machine of highly questionable reliability. McGinigle v Greenburgh, 59 A.D.2d 908, 399 N.Y.S.2d 250, 1977 N.Y. App. Div. LEXIS 14112 (N.Y. App. Div. 2d Dep't 1977), app. dismissed, 43 N.Y.2d 949, 1978 N.Y. LEXIS 2887 (N.Y. 1978), rev'd, 48 N.Y.2d 949, 425 N.Y.S.2d 61, 401 N.E.2d 184, 1979 N.Y. LEXIS 2551 (N.Y. 1979).

The determination of a board of education finding a stenographer guilty of charges of incompetence and misconduct and dismissing her from her employment was annulled, the charges dismissed and the board of education directed to reinstate the stenographer to her position with back pay, where the sole witness testifying that the stenographer's job performance had been unsatisfactory was the school principal for whom she worked, he produced memoranda he had written to the stenographer in which recorded her errors, the stenographer testified that the principal was upset that she had through seniority replaced the secretary with whom he had been perfectly satisfied that he was not at all pleased to have her placed in the school as his secretary, and that his attitude towards her was so difficult and abusive that she complained about it to higher officials following which the principal began to record every typographic error and other mistake he could find, the record did not contain substantial evidence to support the findings of incompetence and misconduct in that the errors complained of were essentially trivial and had to be evaluated in light of the inherent nature of typographical errors in a typed product, and what emerged from the record as a whole was a retaliatory effort by the principal to have the stenographer dismissed after she complained about him, as well as a clash of personalities between the stenographer and the principal from their first contact. Silberfarb v Bd. of Coop. Educ. Servs., 92 A.D.2d 921, 460 N.Y.S.2d 138, 1983 N.Y. App. Div. LEXIS 17327 (N.Y. App. Div. 2d Dep't), app. dismissed, 59 N.Y.2d 970, 1983 N.Y. LEXIS 5279 (N.Y. 1983), rev'd, 60 N.Y.2d 979, 471 N.Y.S.2d 257, 459 N.E.2d 482, 1983 N.Y. LEXIS 3594 (N.Y. 1983).

Penalty was disproportionate to offense where petitioner was discharged from her job as school bus driver after she was involved in accident that occurred when her foot slipped off brake pedal and onto gas pedal as she was backing up and parking school bus in bus garage where petitioner had been employed as school bus driver for 5 years with clean record, no schoolchildren were involved in accident, and petitioner was operating 44-passenger bus with express approval of her superiors despite fact that she had not been formally trained or tested on large bus (of which her superiors were aware); furthermore, while not determinative, other school bus drivers involved in similar mishaps or misconduct had received suspension rather than discharge. Benson v Board of Educ., 209 A.D.2d 693, 619 N.Y.S.2d 153, 1994 N.Y. App. Div. LEXIS 11672 (N.Y. App. Div. 2d Dep't 1994), app. dismissed, 85 N.Y.2d 847, 624 N.Y.S.2d 366, 648 N.E.2d 785, 1995 N.Y. LEXIS 251 (N.Y. 1995), app. denied, 85 N.Y.2d 809, 628 N.Y.S.2d 51, 651 N.E.2d 919, 1995 N.Y. LEXIS 1490 (N.Y. 1995).

A physician duly certified and appointed police surgeon cannot be removed by the city manager upon the charge that he is not qualified to perform major surgical operations. Polsenski v Montgomery, 71 N.Y.S.2d 386, 1947 N.Y. Misc. LEXIS 2563 (N.Y. Sup. Ct. 1947), app. dismissed, 87 N.Y.S.2d 438 (N.Y. App. Div. 1949).

201. Insubordination, generally

A charge that a clerk in the district attorney's office is arrogant, dictatorial and offensive to his fellow-employees and superiors, if established, shows insubordination, which justifies his removal. People ex rel. Rudd v Cropsey, 173 A.D. 714, 159 N.Y.S. 641, 1916 N.Y. App. Div. LEXIS 10396 (N.Y. App. Div.), aff'd, 219 N.Y. 641, 114 N.E. 1080, 219 N.Y. (N.Y.S.) 641, 1916 N.Y. LEXIS 984 (N.Y. 1916).

County's decision to discharge clerk-typist was supported by substantial evidence where clerk-typist failed to complete priority work assignment, delayed performance of priority work assignment, and was excessively absent without prior permission and in violation of county civil service rules. Neira v Sgroi, 132 A.D.2d 703, 518 N.Y.S.2d 355, 1987 N.Y. App. Div. LEXIS 49244 (N.Y. App. Div. 2d Dep't 1987).

Termination of petitioner's employment as correction officer did not violate CLS Exec §§ 291 and 296, which prohibit discharge of employee due to marital status, although petitioner's undisclosed marriage to inmate and parolee was mentioned in notice of discipline, where basis for her termination was violation of Employees' Manual rules prohibiting employees from engaging in relationship with any inmate in manner or form not necessary or proper for discharge of duties, and requiring that any such relationship be reported. Vega v Department of Correctional Services, 186 A.D.2d 340, 588 N.Y.S.2d 202, 1992 N.Y. App. Div. LEXIS 10816 (N.Y. App. Div. 3d Dep't 1992), app. dismissed, 81 N.Y.2d 782, 594 N.Y.S.2d 718, 610 N.E.2d 391 (N.Y. 1993).

Despite firefighter's 13-year unblemished record, there was no basis to interfere with respondent's decision to terminate his employment, in light of substantial evidence that he violated departmental rules and regulations by operating outside pool maintenance business for 3 years without seeking necessary department approval, and by engaging in outside employment while on medical leave on 4 separate dates. Cook v Von Essen, 283 A.D.2d 214, 724 N.Y.S.2d 841, 2001 N.Y. App. Div. LEXIS 4806 (N.Y. App. Div. 1st Dep't 2001).

On appeal under § 76 from the decision of the director of a state school under the jurisdiction of the Department of Mental Hygiene removing the petitioner from his position in such school, it was held that where the worker's work record has been basically good and the matter of which he is found guilty is not of such a nature that the operation and function of the institution is totally disrupted, is not of a repetitive nature, and a number of serious breaches of conduct have not occurred after full and adequate warning, dismissal from the service is an excessive penalty. Consequently the court annulled the respondent's determination in respect to the punishment imposed for three specific acts of disobedience and insubordination and returned the matter to him for reconsideration and imposition of an appropriate lesser penalty in accordance with the above statute. Wansart v Feinstein, 48 Misc. 2d 12, 264 N.Y.S.2d 30, 1965 N.Y. Misc. LEXIS 1421 (N.Y. Sup. Ct. 1965).

202. —Supported by record

Determination of the commissioner of the department of welfare of New York city, removing a social investigator in the department on charges of insubordination and unsatisfactory work was sustained, where there had been no evidence of bad faith on the part of the commissioner and there was a full compliance with the provisions of subd. 2 of this section. Scheiber v Hodson, 259 A.D. 1073, 21 N.Y.S.2d 610, 1940 N.Y. App. Div. LEXIS 8034 (N.Y. App. Div. 1st Dep't 1940).

Penalty of dismissal following finding that teacher, who admitted underlying acts, was guilty of conduct unbecoming a teacher, insubordination and neglect of duty was not shockingly disproportionate to offense. Feldman v Board of Education, 55 A.D.2d 619, 389 N.Y.S.2d 409, 1976 N.Y. App. Div. LEXIS 15345 (N.Y. App. Div. 2d Dep't 1976).

A police officer was properly dismissed from his position, where he had an opportunity to prepare a defense, prepare evidence, and there was substantial evidence that he had been derelict in his duty, insubordinate and disobedient. Francis v West, 81 A.D.2d 714, 439 N.Y.S.2d 471, 1981 N.Y. App. Div. LEXIS 11266 (N.Y. App. Div. 3d Dep't 1981).

Police officer was properly demoted in rank from detective to patrolman as penalty for insubordination, since police force is quasi-military organization demanding strict discipline, and offi-

cer's showing of disrespect to his superiors posed serious threat to discipline and efficiency of agency's operation. Richichi v Galligan, 136 A.D.2d 616, 523 N.Y.S.2d 862, 1988 N.Y. App. Div. LEXIS 407 (N.Y. App. Div. 2d Dep't 1988).

Determination of New York City Transit Authority to terminate employment of porter was not shockingly unfair where porter's disciplinary record revealed that, over 15-year period of employment, he had received 87 cautions, 4 suspensions and 2 "final warnings." Copelin v New York City Transit Authority, 184 A.D.2d 698, 585 N.Y.S.2d 89, 1992 N.Y. App. Div. LEXIS 8467 (N.Y. App. Div. 2d Dep't 1992).

It was appropriate to demote petitioner from his position as car appearance supervisor to his former position of cleaner based on his insubordination and attempts to shirk work, which set poor example for employees under his supervision. DiPalma v Suardy, 207 A.D.2d 397, 615 N.Y.S.2d 719, 1994 N.Y. App. Div. LEXIS 8233 (N.Y. App. Div. 2d Dep't 1994).

In bus mechanic's Article 78 proceeding challenging termination of his employment with school district, substantial evidence supported charges of misconduct and insubordination in violation of CLS Civ S § 75 where mechanic had been reassigned to light duty because of alleged chronic tendonitis in his right arm, and district's private investigator videotaped mechanic performing yard work at his home without apparent discomfort. Rice v Hilton Cent. Sch. Dist. Bd. of Educ., 245 A.D.2d 1104, 667 N.Y.S.2d 524, 1997 N.Y. App. Div. LEXIS 13901 (N.Y. App. Div. 4th Dep't 1997), modified, 258 A.D.2d 900, 685 N.Y.S.2d 364, 1999 N.Y. App. Div. LEXIS 1542 (N.Y. App. Div. 4th Dep't 1999).

It was proper to dismiss police officer for threatening one or more persons, insubordination, and disrespect toward superior officer. Hoffman v Village of Sidney, 252 A.D.2d 844, 675 N.Y.S.2d 448, 1998 N.Y. App. Div. LEXIS 8618 (N.Y. App. Div. 3d Dep't 1998).

Termination was not disproportionate penalty for sanitation worker in light of his misconduct and insubordination demonstrating pattern of poor work performance and disruptive behavior burdening both employer and co-workers. Gradel v Lilholt, 257 A.D.2d 972, 684 N.Y.S.2d 339, 1999 N.Y. App. Div. LEXIS 725 (N.Y. App. Div. 3d Dep't 1999).

Substantial evidence supported termination of police officer's employment for misconduct where he wrongfully discharged his firearm and then lied about it and tried to conceal evidence of his misconduct. Gonzalez v Safir, 273 A.D.2d 140, 710 N.Y.S.2d 898, 2000 N.Y. App. Div. LEXIS 7156 (N.Y. App. Div. 1st Dep't 2000).

203. — —Abusive or obscene language

Petitioner, veteran, was properly removed from his position as custodian in school system following public hearing on charges of using abusive language and causing personal injuries to assistant principal, failing to keep school in clean and proper condition, and having insubordinate attitude towards those in authority. Attitude of petitioner was prejudicial to orderly conduct of school. Catone v Hopkins, 6 A.D.2d 972, 176 N.Y.S.2d 738, 1958 N.Y. App. Div. LEXIS 5037 (N.Y. App. Div. 3d Dep't 1958).

Termination of employment of maintenance mechanic at school district would be confirmed where mechanic engaged in course of misconduct over 3-month period during which he used obscene language to fellow employee before district assemblage of custodians and 2 local vendors, refused to obey supervisor's orders on various occasions, and was dilatory in his assigned duties; penalty imposed was logical result of mechanic's behavior and was not so disproportionate to his offenses so as to shock conscience. Secor v Hyde Park Cent. School Dist., 142 A.D.2d 682, 530 N.Y.S.2d 599, 1988 N.Y. App. Div. LEXIS 7932 (N.Y. App. Div. 2d Dep't 1988).

Petitioner, who was probationary correction officer, failed to satisfy his burden to show that he was discharged in bad faith or for constitutionally impermissible reasons where it was clearly established that he was discharged for excessive absences, lengthy periods of restricted duty, and insubordination consisting of violent outbursts and use of abusive and profane language in dealing with superiors. Dolcemaschio v New York, 180 A.D.2d 573, 580 N.Y.S.2d 289, 1992 N.Y. App. Div. LEXIS 2926 (N.Y. App. Div. 1st Dep't 1992).

It was proper to dismiss police officer who parked illegally and refused to move when asked to do so by another city's police officer, acted in rude and aggressive manner, made racial remarks about second officer, and thereafter lied about his conduct during departmental investigation and trial, and in separate incident, officer in question made threatening remarks at neighborhood meeting and thereafter lied about his conduct during departmental investigation and trial. Cannata v Safir, 269 A.D.2d 327, 703 N.Y.S.2d 177, 2000 N.Y. App. Div. LEXIS 2212 (N.Y. App. Div. 1st Dep't 2000).

Board of fire commissioners properly adopted the findings of a hearing officer and terminated an employee's employment as a firehouse maintainer because any credibility issues were resolved by the hearing officer, substantial evidence in the record supported the determination that the employee was guilty of the alleged misconduct and/or incompetence, and the penalty of termination was not so disproportionate to the offense so as to be shocking to one's sense of fairness especially in light of the disturbing nature of the employee's statement about "going postal."Matter of Cupo v Uniondale Fire Dist, 2020 N.Y. App. Div. LEXIS 1546 (March 4, 2020).

204. — —Assault on superior

Dismissal of police officer was appropriate sanction for having struck another officer despite direct order from superior officer to stay out of matter which led to altercation. Hammond v Amsterdam, 185 A.D.2d 495, 586 N.Y.S.2d 364, 1992 N.Y. App. Div. LEXIS 8945 (N.Y. App. Div. 3d Dep't 1992).

Dismissal of employee for physically attacking her supervisor was not shocking to one's sense of fairness. Langhorne v Jackson, 213 A.D.2d 909, 623 N.Y.S.2d 962, 1995 N.Y. App. Div. LEXIS 3061 (N.Y. App. Div. 3d Dep't 1995).

205. — —Insubordination at misconduct hearing

Civil servant was properly dismissed for insubordination for failure to respond to questions or to produce work-related diary at misconduct hearing, even though he had served 34 years and hearing officer recommended only 2-month suspension without pay, where Commissioner of Transportation found that civil servant had benefit of constitutionally sufficient use immunity and his actions had thwarted orderly process of investigation and administration; penalty was not so disproportionate to offense as to be shocking to one's sense of fairness. Matt v Larocca, 71 N.Y.2d 154, 524 N.Y.S.2d 180, 518 N.E.2d 1172, 1987 N.Y. LEXIS 19884 (N.Y. 1987), cert. denied, 486 U.S. 1007, 108 S. Ct. 1734, 100 L. Ed. 2d 197, 1988 U.S. LEXIS 2267 (U.S. 1988).

For insubordination amounting to misconduct, in refusing to attend meeting with school board to attempt to stabilize her status, dismissal of school district employee from service was an abuse of discretion as a measure of discipline, and was modified to suspension without pay for six months. Where prior to time for meeting with school board no formal charges of misconduct had been made or contemplated against school district employee, but rather meeting was scheduled in effort to stabilize her status without requiring her to transfer to another position, her refusal to attend meeting, being intentional, deliberate and willful, was insubordination amounting to misconduct, even though she received mistaken advice not to attend the meeting. Ector v Salzmann, 54 A.D.2d 1017, 388 N.Y.S.2d 363, 1976 N.Y. App. Div. LEXIS 14981 (N.Y. App. Div. 3d Dep't 1976).

Police department, as quasi-military organization, demands strict discipline, and commissioner of public safety and chief of police would be severely hampered in performing their obligation to maintain effective and disciplined police force if they could not terminate police officers who deliberately make false statements during course of formal investigations. Donofrio v Rochester, 144 A.D.2d 1027, 534 N.Y.S.2d 630, 1988 N.Y. App. Div. LEXIS 14594 (N.Y. App. Div. 4th Dep't 1988), app. denied, 73 N.Y.2d 708, 540 N.Y.S.2d 1003, 538 N.E.2d 355, 1989 N.Y. LEXIS 320 (N.Y. 1989).

Probationary police officers were properly dismissed without hearing where they refused to obey direct order by superior officer to answer questions at investigative hearing despite having been granted use immunity as to their answers, and there was no indication that police commissioner's determinations were made

in bad faith. Martinez v Safir, 251 A.D.2d 62, 673 N.Y.S.2d 690, 1998 N.Y. App. Div. LEXIS 6521 (N.Y. App. Div. 1st Dep't 1998).

206. — —Insubordination in dealing with media

County properly terminated petitioner's employment as associate public health engineer on grounds of insubordination where petitioner refused in writing to conform to county policy pertaining to media requests for information, he refused to comply with his supervisor's requests to furnish certain technical information, and he failed to respond to official requests to substantiate his charge that his supervisor and former county engineers had committed errors which undermined integrity of county's environmental health programs. Plante v Buono, 172 A.D.2d 81, 576 N.Y.S.2d 924, 1991 N.Y. App. Div. LEXIS 16063 (N.Y. App. Div. 3d Dep't 1991), app. denied, 79 N.Y.2d 756, 583 N.Y.S.2d 192, 592 N.E.2d 800, 1992 N.Y. LEXIS 1024 (N.Y. 1992).

207. — —Refusal or failure to complete required forms

Employee who is absent from work on number of days due to illness, who has no sick leave available, who refuses to co-operate with county's request to charge absences to accrued vacation time in accordance with collective bargaining agreement, and insists instead that absences be considered as "no pay" days is properly fined $100 for misconduct. Haney v County of Sullivan, 118 A.D.2d 896, 499 N.Y.S.2d 460, 1986 N.Y. App. Div. LEXIS 54747 (N.Y. App. Div. 3d Dep't), app. denied, 68 N.Y.2d 601, 505 N.Y.S.2d 1025, 496 N.E.2d 238, 1986 N.Y. LEXIS 18959 (N.Y. 1986).

Transit Authority's dismissal of railroad clerk for refusing to obey supervisor's order was supported by substantial evidence where clerk admitted that he had refused to obey order to provide written statement concerning prior incident, and penalty did not shock one's sense of fairness in view of clerk's extensive prior disciplinary record. Linzy v New York City Transit Authority, 125 A.D.2d 571, 510 N.Y.S.2d 2, 1986 N.Y. App. Div. LEXIS 62862 (N.Y. App. Div. 2d Dep't 1986).

County security officer was properly found guilty of misconduct where (1) he participated in off-duty "practical jokes" performed on fellow security officers, undertaken with other off-duty security officers, which included entering county parks, turning certain park lights on and other lights off, and moving park vehicle, resulting in collision between his vehicle and county vehicle driven by on-duty security officer who was following him, and (2) he subsequently failed to report incident. Sguanci v Commissioner of Public Works, 158 A.D.2d 788, 550 N.Y.S.2d 950, 1990 N.Y. App. Div. LEXIS 891 (N.Y. App. Div. 3d Dep't 1990).

Petitioner was properly terminated from probationary appointment as correction sergeant and returned to his position as correction officer where (1) he received 2 formal counseling sessions, one following repeated errors despite interim retraining after original errors were brought to his personal attention by his supervisor, and second, 5 days later, after he misplaced pair of handcuffs, (2) he refused to sign either counseling memorandum despite fact that his signature was merely acknowledgement of receipt of document and did not indicate that he agreed with contents, and (3) he was unable to provide supervisor with current address and telephone number as required by employer. Tyner v Harvey, 191 A.D.2d 924, 594 N.Y.S.2d 916, 1993 N.Y. App. Div. LEXIS 2466 (N.Y. App. Div. 3d Dep't 1993).

It was proper to discharge transit police officer for failing to timely report discharge of his weapon in view of nature of charge, seriousness with which transit authority police department treated occurrence of discharge of officer's weapon, and officer's poor disciplinary record. Cerio v New York City Transit Auth., 228 A.D.2d 676, 645 N.Y.S.2d 822, 1996 N.Y. App. Div. LEXIS 7399 (N.Y. App. Div. 2d Dep't 1996).

Substantial evidence supported finding that school district business manager was guilty of 4 charges of insubordination where she failed to comply with district superintendent's repeated directives to complete fiscal form SA-100/19 and to file it with state education department. School district business manager did not sufficiently prove defense of retaliatory discharge, because district board had independent basis for its action, where manager was guilty of a number of incidents of incompetence and misconduct in form of insubordination. Penalty of discharge was not so disproportionate to offenses as to shock one's sense of fairness, even though school district business manager claimed that her failure to timely file reports and make interest payment was unintentional, where she was guilty of a number of incidents of incompetence and misconduct in form of insubordination. Brey v Board of Educ., 245 A.D.2d 613, 664 N.Y.S.2d 496, 1997 N.Y. App. Div. LEXIS 12575 (N.Y. App. Div. 3d Dep't 1997).

Dismissal of police chief was appropriate sanction for his insubordination in willfully refusing to comply with proper directives to provide town supervisor with investigative report into allegations of police misconduct. Marden v Town Bd., 249 A.D.2d 547, 672 N.Y.S.2d 371, 1998 N.Y. App. Div. LEXIS 4602 (N.Y. App. Div. 2d Dep't 1998).

208. — —Refusal or failure to obey direct order

Evidence was sufficient to support finding that water maintenance supervisor of city was guilty of charges dealing with unauthorized use of his assigned vehicle, with refusing to obey orders concerning vacation and compensatory time and sick leave, with repeated failure to report for work, and with negligence in operation of the vehicle and in reporting improperly the consequence of accidents. Penalty of dismissal was not disproportionate to the proven offense nor shocking to one's sense of fairness. Bernhard v Board of Water Supply, 50 A.D.2d 1061, 376 N.Y.S.2d 279, 1975 N.Y. App. Div. LEXIS 12072 (N.Y. App. Div. 4th Dep't 1975).

The Commissioner of the Department of Transportation properly dismissed a Transportation Safety Director who was responsible for the health and safety of many employees in the department who failed to carry out satisfactorily complete reasonable directions given by the assistant commissioner, including a direction to warn and instruct employees on the use of a highly toxic chemical. The director had not absolved himself from blame by delegating tasks to his assistants. Dougherty v Hennessy, 82 A.D.2d 967, 440 N.Y.S.2d 363, 1981 N.Y. App. Div. LEXIS 14702 (N.Y. App. Div. 3d Dep't 1981).

A city employee was properly dismissed from his employment on the basis of misconduct constituting insubordination arising out of the employee's refusal for ten successive working days to drive the dump truck to which he was assigned at the employer's landfill, notwithstanding that the employee contended that the dump truck when fully loaded weighed in excess of that permitted under his vehicle driver's license, where there was evidence that the employee was to operate the dump truck on the landfill site and not on a public highway except when the truck was not loaded and therefore was within his license restrictions, and where the employee testified that he had operated dumptrucks in his own excavation business for 20 years. Strokes v Albany, 101 A.D.2d 944, 475 N.Y.S.2d 635, 1984 N.Y. App. Div. LEXIS 18672 (N.Y. App. Div. 3d Dep't 1984).

Penalty of dismissal was not excessive where superintendent of maintenance and inspection for city was found guilty of 16 charges of misconduct, including charge that he repeatedly ignored his superior's directions to perform specific duties. Felski v Larson, 139 A.D.2d 967, 527 N.Y.S.2d 1018, 1988 N.Y. App. Div. LEXIS 4203 (N.Y. App. Div. 4th Dep't), app. denied, 72 N.Y.2d 804, 532 N.Y.S.2d 755, 528 N.E.2d 1228, 1988 N.Y. LEXIS 2771 (N.Y. 1988).

Evidence supported determination of Division of State Police which terminated petitioner's employment as state trooper based on 5 incidents of misconduct and violation of state police regulations, including recklessness while driving off duty in his private vehicle, leaving his assigned revolver in unsecured locker at police station, patrolling outside his assigned area, driving while off duty in uninsured and unregistered vehicle bearing unauthorized dealer plates, and showing reluctance to perform his assigned desk duties; petitioner failed to show that charges were unsupported by evidence based on his contention that they stemmed from misunderstandings between him and his fellow officers. Novotny v Constantine, 150 A.D.2d 852, 540 N.Y.S.2d 605, 1989 N.Y. App. Div. LEXIS 5472 (N.Y. App. Div. 3d Dep't 1989).

Transit authority police officer was properly discharged for failing to comply with order to undergo drug screening test and disobeying orders of superior officer, since he had been advised that he was required to submit to test and would be subject to

disciplinary sanctions if he failed to do so, and his actions in leaving health center after being told to stay, without informing clinic personnel, further supported conclusion that he was intentionally seeking to avoid submitting to test. Barretto v City of New York, 157 A.D.2d 116, 555 N.Y.S.2d 382, 1990 N.Y. App. Div. LEXIS 5354 (N.Y. App. Div. 2d Dep't 1990).

It was not excessive for board of education to dismiss clerical employee with 20 years of service where (1) she had serious difficulties in accepting authority and in responding to her supervisor's directives, (2) she had refused to perform certain tasks, had processed purchase orders without authority, and had failed to follow school district's policies and practices, and (3) she had written hostile and threatening letters to her supervisor in which she described her as incompetent, incapable of giving direction concerning work, like 6-year-old child who tattled to her mother whenever something disagreeable occurs, and like dictator. Case v Fleming, 189 A.D.2d 1070, 593 N.Y.S.2d 108, 1993 N.Y. App. Div. LEXIS 754 (N.Y. App. Div. 3d Dep't 1993).

Evidence supported determination of county sheriff dismissing petitioner from her position as correction officer for misconduct where testimony established that petitioner violated sheriff's department operations and procedures guide by fraternizing with inmate and continuing that relationship after inmate's release. Laspisa v Mahoney, 198 A.D.2d 279, 603 N.Y.S.2d 536, 1993 N.Y. App. Div. LEXIS 10357 (N.Y. App. Div. 2d Dep't 1993).

Police officer properly received 5-day suspension since evidence supported finding that he left his assigned sector for "personal necessity," rather than "police necessity," to try to locate another police officer at request of third police officer, without first obtaining supervisor's approval and making entry in his memo book as required by departmental rule, where third police officer was neither his supervisor nor in same chain of command. Colotti v Armiento, 206 A.D.2d 474, 614 N.Y.S.2d 574, 1994 N.Y. App. Div. LEXIS 7446 (N.Y. App. Div. 2d Dep't 1994).

Determination that firefighter was guilty of subordination was sustained by substantial evidence where (1) he initiated argument with superior officer, refused to cease arguing when ordered to do so by 2 superior officers, repeatedly shouted expletives at officer and made threatening hand gestures, and stated that he refused to accept punishment of suspension, and (2) after suspension was lifted, he disobeyed orders to refrain from responding to alarms on fire department apparatus and to remain at firehouse to monitor radio until further notice. Parker v Blauvelt Volunteer Fire Co., 222 A.D.2d 437, 634 N.Y.S.2d 524, 1995 N.Y. App. Div. LEXIS 12498 (N.Y. App. Div. 2d Dep't 1995), app. denied, 87 N.Y.2d 812, 644 N.Y.S.2d 145, 666 N.E.2d 1059, 1996 N.Y. LEXIS 1152 (N.Y. 1996).

Dismissal was not disproportionate sanction for insubordination where volunteer firefighter repeatedly refused to accept directives from superior officers, and disobeyed direct order regarding his assigned duty post during emergency. Parker v Blauvelt Volunteer Fire Co., 222 A.D.2d 437, 634 N.Y.S.2d 524, 1995 N.Y. App. Div. LEXIS 12498 (N.Y. App. Div. 2d Dep't 1995), app. denied, 87 N.Y.2d 812, 644 N.Y.S.2d 145, 666 N.E.2d 1059, 1996 N.Y. LEXIS 1152 (N.Y. 1996).

It was proper to dismiss court assistant for insubordination consisting of verbal abuse of her supervisors, refusal to obey direct order, and defiance of authority, and for misconduct involving unauthorized activity, altercations with other employees, unauthorized absences, and abuse of leave time. Crossman-Battisti v Traficanti, 235 A.D.2d 566, 651 N.Y.S.2d 698, 1997 N.Y. App. Div. LEXIS 23 (N.Y. App. Div. 3d Dep't 1997).

Substantial evidence supported finding that affirmative action administrator for State Thruway Authority was guilty of misconduct, despite her claim that her supervisors engaged in pattern of harassment and discrimination, where, inter alia, she admitted reading confidential material despite having been told not to do so, and multiple instances of her insubordination were supported by proof that she engaged in conduct ranging from explicit refusal to obey orders to verbal abuse of supervisors in front of other workers, displaying defiance of authority. Figueroa v New York Thruway Auth., 251 A.D.2d 773, 674 N.Y.S.2d 159, 1998 N.Y. App. Div. LEXIS 6780 (N.Y. App. Div. 3d Dep't 1998).

County office for aging properly terminated petitioner's employment as site manager for failing and refusing to perform numerous client assessments and reassessments, and her repeated and unequivocal refusal to ever again perform such job function. Lassiter v County of Dutchess, 256 A.D.2d 578, 683 N.Y.S.2d 103, 1998 N.Y. App. Div. LEXIS 14021 (N.Y. App. Div. 2d Dep't 1998).

It was appropriate to dismiss New York City Police officer who refused to answer questions directly and narrowly relating to his official duties, although duly called upon to do so under mandate of Patrol Guide § 118-9. Dombrowski v Safir, 269 A.D.2d 161, 701 N.Y.S.2d 906, 2000 N.Y. App. Div. LEXIS 1043 (N.Y. App. Div. 1st Dep't 2000).

209. — —Refusal or failure to take medical examination or treatment

In a proceeding by a deputy sheriff seeking to review a determination by the county sheriff dismissing the deputy from service for misconduct, there was substantial evidence to support the county sheriff's determination where the record revealed that the deputy had been guilty of insubordination in refusing to comply with the direct order of his superior officer to undergo a mental examination, that the deputy had previously been disciplined for abuse of sick leave, that the deputy had previously refused to obey other direct orders, and that the deputy had neglected the duties and responsibilities of his job. Lucheso v Dillon, 80 A.D.2d 988, 439 N.Y.S.2d 783, 1981 N.Y. App. Div. LEXIS 10900 (N.Y. App. Div. 4th Dep't), app. denied, 54 N.Y.2d 601, 1981 N.Y. LEXIS 4332 (N.Y. 1981).

In an Article 78 action brought by a fire department lieutenant challenging his disciplinary action and suspension for 60 days in addition to a previous 30-day suspension after the commissioner had found him guilty of charges of engaging in conduct tending to bring reproach on the department by gross disrespect for a superior officer, refusing to explain his absence from post, and refusing to obey orders relieving him of duty and directing him to report to the medical division would be confirmed where department findings were based on substantial evidence, and where the directive that petitioner report to the medical division was reasonable in light of the petitioner's outburst of emotional and disparaging remarks about his superior officer and did not violate petitioner's constitutional rights in that it had not required a psychiatric examination in the formal sense. Rivera v Beekman, 86 A.D.2d 1, 448 N.Y.S.2d 492, 1982 N.Y. App. Div. LEXIS 14993 (N.Y. App. Div. 1st Dep't 1982).

A penalty of three weeks suspension without pay for an eight-year veteran of the fire department, who was placed on sick leave and failed to report for the second of two medical examinations he had been ordered to appear for, was not so disproportionate to the offense so as to be shocking to one's sense of fairness, particularly in light of the need to deter others from similar misconduct. Driscoll v Department of Fire, 89 A.D.2d 1056, 454 N.Y.S.2d 562, 1982 N.Y. App. Div. LEXIS 18346 (N.Y. App. Div. 4th Dep't 1982).

Dismissal of Department of Mental Health social worker was appropriate sanction where she admittedly elected to miss psychiatric evaluation despite likely consequences, and she had been subject of other disciplinary charges that culminated in stipulation of settlement wherein parties acknowledged, inter alia, that settlement would constitute her "last chance." Lago v County of Ulster, 228 A.D.2d 905, 644 N.Y.S.2d 418, 1996 N.Y. App. Div. LEXIS 7280 (N.Y. App. Div. 3d Dep't), app. denied, 88 N.Y.2d 815, 651 N.Y.S.2d 17, 673 N.E.2d 1244, 1996 N.Y. LEXIS 3301 (N.Y. 1996).

It was proper to suspend police officer for 28 days based on facts that he was intoxicated and unfit for duty on particular night, and that he failed to comply with direct order to attend alcohol rehabilitation program. Roberts v Bratton, 233 A.D.2d 102, 649 N.Y.S.2d 137, 1996 N.Y. App. Div. LEXIS 11422 (N.Y. App. Div. 1st Dep't 1996), app. denied, 89 N.Y.2d 815, 659 N.Y.S.2d 856, 681 N.E.2d 1303, 1997 N.Y. LEXIS 1247 (N.Y. 1997).

Petitioner was properly discharged from his position as police officer for refusing to enter departmental counseling program in disobedience of 4 direct orders, notwithstanding his alleged good faith reliance on private psychiatrist's advice that such would be

harmful to his mental health, and his claim that respondent never explicitly warned him that he faced termination if he continued to disobey orders, as (1) proof concerning his precarious mental condition tended to support rather than undermine his unfitness to serve, (2) each infraction resulted in suspension that should have made it clear that disobedience would not be tolerated indefinitely, and (3) charges were serious, involving respondent's requirements for order, authority and discipline. Siciliano v Safir, 259 A.D.2d 366, 687 N.Y.S.2d 61, 1999 N.Y. App. Div. LEXIS 2773 (N.Y. App. Div. 1st Dep't 1999).

210. — —Secret taping of meeting

In hearing under CLS Civ S § 75, determination of misconduct on part of assistant hospital administrator was supported by evidence that he secretly taped meeting after hospital's chief executive officer told him not to; such insubordination was willful, intentional, and deliberate. O'Malley v Nassau County Medical Center, 143 A.D.2d 426, 532 N.Y.S.2d 578, 1988 N.Y. App. Div. LEXIS 9282 (N.Y. App. Div. 2d Dep't 1988).

211. — —Wearing offensive clothing

City's determination finding firefighter guilty of disruption of company harmony and insubordination was not arbitrary, capricious, and abuse of discretion, nor was it affected by error of law because charges allegedly were brought in violation of firefighter's constitutional right of freedom of expression, where he displayed in firehouse T-shirt containing racial message that was offensive to number of his fellow firefighters and he refused to obey direct orders from his superiors to remove shirt; even assuming that message on T-shirt was expression of opinion protected by First Amendment, firefighter was not disciplined for message expressed on shirt, but rather was disciplined for misconduct in refusing direct orders of his superiors. Nelson v City of Buffalo Fire Dep't, 254 A.D.2d 761, 678 N.Y.S.2d 209, 1998 N.Y. App. Div. LEXIS 10463 (N.Y. App. Div. 4th Dep't 1998).

212. —Not supported by record

A Spanish War veteran, a storekeeper in Sing Sing prison, was charged with making an authorized offer to trade a calf belonging to prison, and with speaking disrespectfully of the warden. Charges were trivial and insufficient to justify removal, and relator should be reinstated. People ex rel. Kelly v Kirchwey, 177 A.D. 706, 164 N.Y.S. 511, 1917 N.Y. App. Div. LEXIS 5762 (N.Y. App. Div. 1917).

In an Article 78 proceeding reviewing the dismissal of a senior stenographer in the Saratoga County Clerk's office, where offending conduct, although repetitive, was essentially of a technical nature and not deliberately disruptive of the office and not insubordinate, dismissal of the employee was too severe a punishment in view of the nature of the offenses and the employee's prior satisfactory 14-year record; suspension of 6 months without pay was sufficient. Escher v Hall, 37 A.D.2d 1013, 325 N.Y.S.2d 511, 1971 N.Y. App. Div. LEXIS 3095 (N.Y. App. Div. 3d Dep't 1971).

Civil service executive's issuing memorandum which could properly be described as overzealous and broad application of judicial decision, and dropping the matter when his memorandum was countermanded, did not constitute insubordination or dereliction of duty, nor was such conduct shown to have prejudiced discipline, good order and efficiency of his department or his employment so as to authorize dismissal. Short v Nassau County Civil Service Com., 59 A.D.2d 157, 398 N.Y.S.2d 540, 1977 N.Y. App. Div. LEXIS 13280 (N.Y. App. Div. 2d Dep't 1977), app. dismissed, 43 N.Y.2d 843, 402 N.Y.S.2d 812, 373 N.E.2d 992, 1978 N.Y. LEXIS 1761 (N.Y. 1978), rev'd, 45 N.Y.2d 721, 408 N.Y.S.2d 471, 380 N.E.2d 298, 1978 N.Y. LEXIS 2183 (N.Y. 1978).

An allegedly scurrilous letter written by petitioner, an employee of a city, to his manager does not constitute insubordination as a matter of law, inasmuch as insubordination implies intentional and willful disobedience in the performance of duty. Pilawa v Utica, 76 A.D.2d 103, 429 N.Y.S.2d 959, 1980 N.Y. App. Div. LEXIS 11733 (N.Y. App. Div. 4th Dep't 1980).

A determination that petitioner was guilty of the charge of gross insubordination was not supported by substantial evidence and would be annulled, where there was no showing of wilful disobedience of an order, directive, rule, regulation, policy or law and where the evidence did not relate to the charge. Herod v Board of Education, 90 A.D.2d 841, 456 N.Y.S.2d 84, 1982 N.Y. App. Div. LEXIS 19100 (N.Y. App. Div. 2d Dep't 1982).

Determination of commissioner of fire department that fireman feigned illness was not supported by evidence, and fireman was justified in refusing to comply with captain's order to take detail, where only expert medical evidence demonstrated that fire department's medical officer found fireman unfit for duty on his scheduled tour due to stomach ailment. Donofrio v Spinnato, 144 A.D.2d 672, 534 N.Y.S.2d 705, 1988 N.Y. App. Div. LEXIS 12436 (N.Y. App. Div. 2d Dep't 1988).

Supervisor's peremptory attempt to verify police officer's presence at his assigned post did not provide substantial evidence to uphold respondent's finding of guilt as to dereliction of duty charge arising from officer's purported absence from his assignment to patrol subway station, where supervisor did not look very far in contrast with prior instances that day, but only walked along southbound platform without physically checking northbound platform or mezzanine level that bridged platforms, parts of which were not visible from southbound platform. Cotterel v City of New York, 258 A.D.2d 396, 685 N.Y.S.2d 712, 1999 N.Y. App. Div. LEXIS 1890 (N.Y. App. Div. 1st Dep't 1999).

An employee cannot be charged with intentional and wilful disobedience where she was physically unable to respond to an order directing her to return to work on the date specified and consequently her failure to do so fell far short of stating a case of insubordination and consequent misconduct such as would justify her discharge. Reisig v Kirby, 62 Misc. 2d 632, 309 N.Y.S.2d 55, 1968 N.Y. Misc. LEXIS 1404 (N.Y. Sup. Ct. 1968), aff'd, 31 A.D.2d 1008, 299 N.Y.S.2d 398, 1969 N.Y. App. Div. LEXIS 5390 (N.Y. App. Div. 2d Dep't 1969).

213. Intoxication

Where a patrolman was charged with neglect of duty in failing to patrol the street, drinking intoxicating liquors while on patrol, and associating with a married woman the order of dismissal was not disturbed where there was substantial evidence before the village board. Even though there was some conflict as to the evidence, it was for the board to determine its weight. Mack v Cramer, 285 A.D. 925, 137 N.Y.S.2d 435, 1955 N.Y. App. Div. LEXIS 6116 (N.Y. App. Div. 1955).

Penalty of discharge of deputy sheriff for violation of rules against drinking on duty and requiring that deputy give number where he can be reached when "out of service" was not excessive. Deputy sheriff who was discharged for violation of rules against drinking on duty and requiring that deputy give number where he can be reached when "out of service" was not denied due process on ground that rules were not written where the rules were well known by all the deputies and understood by petitioner. Suchocki v Amico, 55 A.D.2d 814, 390 N.Y.S.2d 286, 1976 N.Y. App. Div. LEXIS 15619 (N.Y. App. Div. 4th Dep't 1976).

In an Article 78 proceeding, a determination of a city's mayor dismissing plaintiff from his position of assistant chief of the city's fire department would be confirmed where termination was not so disproportionate to the offenses of which plaintiff had been found guilty in a hearing, namely failing to respond to an alarm, failing to provide the fire department with his telephone number, and reporting to work while intoxicated, as to be shocking to one's sense of fairness. Moreover, the appointment of the city's Corporation Counsel as the hearing officer for plaintiff's hearing was proper where there was nothing in the record to indicate that the counsel had any prior knowledge of the charges against plaintiff. Foley v Plattsburgh, 81 A.D.2d 677, 437 N.Y.S.2d 798, 1981 N.Y. App. Div. LEXIS 11220 (N.Y. App. Div. 3d Dep't 1981).

Directive to car maintainer for New York City Transit Authority to submit to blood and urine test was not predicated on reasonable suspicion, and thus his failure to comply did not constitute grounds for disciplinary action, where no witness had seen him drinking although superintendent had been observing him for 30 minutes, there was no evidence to link car maintainer with tool locker in which vodka bottle was found, and there was no evidence that car maintainer had been in accident, had bloodshot eyes, alcoholic breath or incoherent speech, or that he was staggering; car maintainer's mere presence in area allegedly used by employees for alcohol consumption did not establish reason-

able suspicion. Fiorenza v Gunn, 140 A.D.2d 295, 527 N.Y.S.2d 806, 1988 N.Y. App. Div. LEXIS 4636 (N.Y. App. Div. 2d Dep't 1988).

In proceeding to discipline deputy sheriff for conduct unbecoming police officer, determination of guilt was amply supported by record showing that deputy purchased alcoholic beverages for 18-year-old and witnessed others purchasing alcoholic beverages for same youth, who was seriously injured in fight on night in question, and that other alcohol-related complaints had been lodged against deputy in past. Wayering v County of St. Lawrence, 154 A.D.2d 824, 546 N.Y.S.2d 258, 1989 N.Y. App. Div. LEXIS 12686 (N.Y. App. Div. 3d Dep't 1989).

While laborer could not be discharged solely because of his alleged alcoholism, his employment was properly terminated when his alcoholism prevented him from coming to work on inordinate number of occasions, since Human Rights Law does not bar dismissal of one whose disability prevents him from performing his assigned duties. McEniry v Landi, 198 A.D.2d 417, 604 N.Y.S.2d 124, 1993 N.Y. App. Div. LEXIS 10864 (N.Y. App. Div. 2d Dep't 1993), rev'd, 84 N.Y.2d 554, 620 N.Y.S.2d 328, 644 N.E.2d 1019, 1994 N.Y. LEXIS 4122 (N.Y. 1994).

Penalty of dismissal was not disproportionate to offense where city employees were drinking beer while on duty after they had notice that employees found drinking alcohol while on duty were subject to immediate dismissal. Dunning v City of Newburgh, 210 A.D.2d 404, 620 N.Y.S.2d 105, 1994 N.Y. App. Div. LEXIS 12841 (N.Y. App. Div. 2d Dep't 1994).

City manager's determination, which rejected hearing officer's recommendation and dismissed petitioner from his position as police officer for violation of department rules and regulations re alcohol, was supported by substantial evidence (including state trooper's testimony as to his observations and results of scientific tests he performed, testimony of city police sergeant, testimony of individual whose vehicle was hit by vehicle driven by petitioner, and petitioner's admissions). Corcoran v City of Newburgh, 237 A.D.2d 518, 656 N.Y.S.2d 884, 1997 N.Y. App. Div. LEXIS 2841 (N.Y. App. Div. 2d Dep't 1997).

Court properly dismissed Article 78 proceeding in which petitioner alleged that he was discriminated based on his alcoholism when, following second incident in which he caused disturbance while intoxicated, he was given choice of resigning or being discharged without any proof that he would be unable to perform his job after completing alcohol abuse treatment program, as discipline which resulted in petitioner's eventual loss of his job was imposed prior to second incident, 6 weeks before he even entered treatment, when he agreed to be bound by conditions of settlement agreement resolving first incident, including enrollment in treatment program, and to accept consequences outlined in agreement, including summary discharge for failure to comply with terms of agreement as alternative to ordinary disciplinary process. Wolfe v Jurczynski, 241 A.D.2d 88, 671 N.Y.S.2d 864, 1998 N.Y. App. Div. LEXIS 4528 (N.Y. App. Div. 3d Dep't 1998).

Termination of petitioner's employment as school district bus driver was appropriate on finding that she was under influence of alcohol at safety workshop, and that on her return to school district property, she drove out of parking lot at high rate of speed, spinning her tires, and performing "doughnut" and "fishtailing" in parking lot. Collins v Parishville-Hopkinton Cent. Sch. Dist., 274 A.D.2d 732, 710 N.Y.S.2d 728, 2000 N.Y. App. Div. LEXIS 7819 (N.Y. App. Div. 3d Dep't 2000).

214. —Participation in treatment program

The dismissal of a former employee of a city transit authority would be affirmed, where the employee had an extensive prior disciplinary record, where under Civ S L § 75 the employee's employer was not bound by the recommendations of an advisory board concerning the employee's fate, and where the employee's participation in an alcohol treatment program was not grounds for disturbing his employer's determination, in that Men Hyg Law § 19.01, though declaring that state and local governments have a responsibility to detect and prevent alcohol abuse problems and treat individuals who have them, does not guarantee continued public employment. Turner v Simpson, 60 N.Y.2d 959, 471 N.Y.S.2d 56, 459 N.E.2d 165, 1983 N.Y. LEXIS 3583 (N.Y. 1983).

215. Non-residency

Determination terminating petitioner from her employment with city because she failed to maintain her permanent residence within city as required under city code would be annulled since she had been city employee for over 20 years and she was city resident at time of her employment; in absence of fraud, municipal civil service commission was not authorized to direct petitioner's termination for non-residence more than 3 years after her employment. Harvey v Rubino, 252 A.D.2d 981, 676 N.Y.S.2d 360, 1998 N.Y. App. Div. LEXIS 8496 (N.Y. App. Div. 4th Dep't 1998).

216. Off-duty misconduct

A mere technical breach of the rules without wrongful intent on part of a world war veteran protected by this law, employed in the county treasurer's office, is not sufficient to warrant his dismissal. People ex rel. Rigby v Anderson, 198 A.D. 283, 190 N.Y.S. 300, 1921 N.Y. App. Div. LEXIS 8078 (N.Y. App. Div. 1921).

Fact that patrolman employed by city housing authority was off duty at time of alleged acts giving rise to disciplinary proceeding did not preclude dismissal of the patrolman in light of nature and character of his employment. McPherson v New York City Housing Authority, 47 A.D.2d 828, 365 N.Y.S.2d 862, 1975 N.Y. App. Div. LEXIS 9168 (N.Y. App. Div. 1st Dep't 1975).

Under CLS Civ S § 75, village superintendent of public works was subject to discipline for off-duty misconduct, and his apology did not excuse abusive conduct in after-hours, work-related phone call to fellow employee. Logan v New Paltz, 129 A.D.2d 935, 514 N.Y.S.2d 573, 1987 N.Y. App. Div. LEXIS 45597 (N.Y. App. Div. 3d Dep't 1987).

Determination finding 3 city police officers guilty of misconduct was supported by facts that 2 officers, at behest of third officer, engaged in off-duty employment without seeking and obtaining permission therefor as required by police department's rules and regulations, and third officer failed to make certain that officers he solicited had followed proper procedures as he was affirmatively obligated to do. Forfeiture of 15 vacation days imposed against 2 police officers found guilty of misconduct for engaging in off-duty employment without seeking and obtaining required permission therefor was not authorized under CLS Civ S § 75(3) and thus would be vacated and matter remitted for appropriate penalty; further, it was excessive to impose 60-day suspension on third police officer, who solicited other officers to engage in off-duty employment without making certain that those officers had followed proper procedures, and such penalty would be vacated and remanded for imposition of appropriate sanction. Geberth v Augustine, 143 A.D.2d 910, 533 N.Y.S.2d 504, 1988 N.Y. App. Div. LEXIS 10287 (N.Y. App. Div. 2d Dep't 1988), app. denied, 74 N.Y.2d 601, 541 N.Y.S.2d 984, 539 N.E.2d 1112, 1989 N.Y. LEXIS 565 (N.Y. 1989).

Penalty imposed was not disproportionate to correction officer's misconduct where sheriff suspended him without pay for 10 days and suspended his right to carry weapon for one year as penalty for having drawn his weapon, while off duty, and pointing at 4 teenagers after one of them had thrown package of lighted firecrackers in his direction; sheriff did not abuse his discretion in imposing greater penalty than $100 fine recommended by hearing officer. Reynolds v Dooley, 146 A.D.2d 575, 536 N.Y.S.2d 499 (N.Y. App. Div. 2d Dep't 1989).

Substantial evidence supported determination that correction officer was guilty of misconduct where it was shown that, while off duty, he drew his weapon and pointed it at 4 teenagers after one of them threw package of lighted firecrackers in his direction. Reynolds v Dooley, 146 A.D.2d 575, 536 N.Y.S.2d 499 (N.Y. App. Div. 2d Dep't 1989).

Suspension without pay for 2 weeks was unduly harsh in case of vice-president of police benevolent association (petitioner) who wrote letter to members of village board of trustees that was critical of chief of police and mayor where petitioner had performed 16 years of exemplary, unblemished public service, letter did not flow from his performance of his police responsibilities but rather was attributable to his efforts to advance agenda of police benevolent association, and he did not publish letter or attempt to foment dissension within police force; simple reprimand should have sufficed. MacFarlane v Village of Scotia, 241 A.D.2d 574, 659

N.Y.S.2d 351, 1997 N.Y. App. Div. LEXIS 7204 (N.Y. App. Div. 3d Dep't), app. dismissed, 90 N.Y.2d 1008, 666 N.Y.S.2d 102, 688 N.E.2d 1384, 1997 N.Y. LEXIS 3625 (N.Y. 1997).

Penalty of dismissal of petitioner as police officer, and denial of his application for disability retirement based on his dismissal, was not excessive where he engaged in prohibited off-duty employment while on sick report, possessed blackjack, had unauthorized ammunition in his firearm, and attempted to facilitate sale of steroids. Ranalli v Safir, 250 A.D.2d 507, 672 N.Y.S.2d 872, 1998 N.Y. App. Div. LEXIS 5862 (N.Y. App. Div. 1st Dep't 1998).

It was proper to dismiss New York City Housing Authority police officer who acted unlawfully and in manner unacceptable for police officer in off-duty encounter with civilian motorist, knowingly and inappropriately associated with individual reasonably believed to have been, or likely to be, engaged in criminal activity, and made false and misleading statements to Housing Authority investigator. Saliba v New York City Hous. Auth., 254 A.D.2d 202, 679 N.Y.S.2d 121, 1998 N.Y. App. Div. LEXIS 11407 (N.Y. App. Div. 1st Dep't 1998).

Court would annul determination that petitioner, school custodian, committed misconduct by improperly failing to return to work after his accident although physically capable of resuming his duties where only medical evidence consisted of testimony of petitioner's treating neurologist, who concluded that petitioner was suffering from post concussion syndrome, which was consistent with his complaints of dizziness, weakness, and fatigue, and surveillance videotape on which hearing officer relied in sustaining charge did not show that petitioner was indeed capable of fully resuming his duties during 8-hour shift. Hofsiss v Bd. of Educ., 287 A.D.2d 566, 732 N.Y.S.2d 14, 2001 N.Y. App. Div. LEXIS 9577 (N.Y. App. Div. 2d Dep't 2001).

Although substantial evidence supported the hearing officer's determination of a custodian's misconduct in a domestic incident with his girlfriend, termination was improper because the custodian had been employed by the district for 20 years without any prior incidents of misconduct, the misconduct in question occurred off premises, it did not involve anyone associated with the school, and the custodian did not hold a high profile job at the school; moreover, even under the version of events found credible by the hearing officer, it was apparent that the girlfriend was intoxicated, she instigated the physical conduct during their fight and struck the custodian before he pushed her to the floor, and the prosecutor determined not to pursue any criminal charges for the incident. There was no legal basis for making discipline more severe based on the size of the community. Matter of James v Hoosick Falls Cent. School Dist., 93 A.D.3d 1131, 941 N.Y.S.2d 335, 2012 N.Y. App. Div. LEXIS 2367 (N.Y. App. Div. 3d Dep't 2012).

217. Unauthorized on-job acts

Penalty of dismissal was not disproportionate where correction officer engaged in unauthorized procurement and sale of reproduced shields of county department of correction to fellow officer, in contravention of department policy which warned that violation "may result in...forfeiture of employment," and where he was further derelict in his duties in engaging in business unrelated to his responsibilities while on duty. Roberti v Maffucci, 135 A.D.2d 821, 522 N.Y.S.2d 925, 1987 N.Y. App. Div. LEXIS 52751 (N.Y. App. Div. 2d Dep't 1987), app. denied, 72 N.Y.2d 808, 533 N.Y.S.2d 57, 529 N.E.2d 425, 1988 N.Y. LEXIS 2668 (N.Y. 1988).

Substantial evidence supported determination of New York City Transit Authority which dismissed petitioner from his position as bus driver for illegal sale of transfer books where evidence adduced at hearing included audio and videotape of sale made by transit authority officer who personally observed sale and who testified at hearing. Penalty of dismissal of bus driver for illegal sale of transfer books was not so disproportionate as to shock one's sense of fairness. Gellman v Gunn, 143 A.D.2d 628, 533 N.Y.S.2d 113, 1988 N.Y. App. Div. LEXIS 9497 (N.Y. App. Div. 2d Dep't 1988).

It was arbitrary and capricious for police commissioner to discharge police officers who were found guilty of wrongfully repossessing automobile since conclusion that officers participated in wrongdoing for money, rather than out of their friendship with employee of bank that was endeavoring to repossess automobile, was unsupported by evidence in record that they had asked for or received any fee; additionally, penalty was disproportionate, inasmuch as neither officer had prior disciplinary record. McAvoy v Ward, 145 A.D.2d 378, 535 N.Y.S.2d 721, 1988 N.Y. App. Div. LEXIS 13465 (N.Y. App. Div. 1st Dep't 1988), app. denied, 74 N.Y.2d 606, 544 N.Y.S.2d 820, 543 N.E.2d 85, 1989 N.Y. LEXIS 931 (N.Y. 1989), app. denied, 74 N.Y.2d 607, 544 N.Y.S.2d 820, 543 N.E.2d 85, 1989 N.Y. LEXIS 943 (N.Y. 1989).

Substantial evidence supported termination of petitioner's employment for misconduct where testimony and other evidence established that petitioner improperly transferred bus passes and retained proceeds therefrom. Termination of petitioner's employment for improperly transferring bus passes and retaining proceedings therefrom was not excessive punishment, even in light of petitioner's years of service and lack of prior disciplinary charges, since his acts were properly characterized as breach of trust and moral turpitude, and termination was not so disproportionate to offense so as to shock one's sense of fairness. Moorehead v Langloh, 146 A.D.2d 777, 537 N.Y.S.2d 258, 1989 N.Y. App. Div. LEXIS 864 (N.Y. App. Div. 2d Dep't 1989).

It was not improper to dismiss petitioner from his position as town housing inspector for failing to issue 2 summonses for violations of town code with respect to outstanding violations at 2 sites that he purportedly visited, for issuing summons to individual who was not in fact owner of record of premises in question, and for using town car as transportation to court on personal matter; town appropriately considered petitioner's incompetence and misconduct as evidencing indifference to his public trust and responsibilities. Amato v Babylon, 151 A.D.2d 662, 543 N.Y.S.2d 99, 1989 N.Y. App. Div. LEXIS 8126 (N.Y. App. Div. 2d Dep't 1989).

In disciplinary proceeding, administrative finding that employee of Department of Public Service (DPS) operated private business from his state workplace was sustained by hearsay evidence that he managed private business venture from his office at DPS, and documentary evidence that he made numerous local and long-distance phone calls to persons having no apparent connection with DPS. Dean v Bradford, 158 A.D.2d 772, 551 N.Y.S.2d 364, 1990 N.Y. App. Div. LEXIS 911 (N.Y. App. Div. 3d Dep't 1990).

Dismissal of police officer was not disproportionate to offenses where officer failed to safeguard his police department shield and identification card in that he handed them over to unauthorized individual, failed to take proper action despite knowledge of illegal drug activity by 2 individuals, and failed to cooperate with police department by refusing to answer questions at official departmental interview. Turkoanje v Ward, 160 A.D.2d 534, 554 N.Y.S.2d 185, 1990 N.Y. App. Div. LEXIS 4568 (N.Y. App. Div. 1st Dep't 1990).

Dismissal of police officer was warranted by fact that, while engaging in horseplay with fellow officer, he placed his gun in fellow officer's mouth, and thereafter, withdrawing unholstered gun from his waistband, caused it discharge, injuring fellow officer. Villarini v Safir, 247 A.D.2d 247, 669 N.Y.S.2d 21, 1998 N.Y. App. Div. LEXIS 1041 (N.Y. App. Div. 1st Dep't 1998).

Penalty of dismissal of teacher's aide would not be disturbed since allegations of his inappropriate comments and physical contact were particularly egregious in light of special education population on which his infractions were targeted. Burkes v Enlarged City Sch. Dist., 257 A.D.2d 891, 684 N.Y.S.2d 57, 1999 N.Y. App. Div. LEXIS 506 (N.Y. App. Div. 3d Dep't 1999).

Sanitation worker was properly dismissed for violating general order prohibiting loading of more than 3 cans, bags, bundles, or boxes for collection service of trade waste where he participated in loading renovation debris far in excess of 3-bag limit with assistance of persons who were not occupants of residence he was servicing under circumstances that should have at least caused doubt as to nature of material he was loading, especially since general order provided that its violation was ground for termination regardless of whether violator received any payment. Mallon v Doherty, 269 A.D.2d 282, 703 N.Y.S.2d 137, 2000 N.Y. App. Div. LEXIS 2014 (N.Y. App. Div. 1st Dep't 2000).

Termination of a typist's employment was upheld because there was sufficient evidence of the typist's misconduct to support the

hearing officer's determination in a N.Y. Civ. Serv. Law § 75 proceeding sustaining the charges pursuant to N.Y. C.P.L.R. 7803(4); despite the typist's allegations that an altercation with the coworker was not her fault, the typist admitted that she participated in such an exchange, and also admitted the factual allegations of other charges, such as keeping a calendar of the coworker's late arrivals and early departures from work, and being a member of the hate club directed at the coworker. The typist was also charged with making threatening comments to certain other employees who testified that they were concerned about their physical safety and the safety of their personal property as a result of speaking out against typist. Matter of Sindoni v County of Tioga, 67 A.D.3d 1183, 889 N.Y.S.2d 285, 2009 N.Y. App. Div. LEXIS 7974 (N.Y. App. Div. 3d Dep't 2009).

County administrator properly terminated a nurse's employment because the administrator's determination was independent and fully informed, the administrator was not required to read the entirety of the hearing transcript, the nurse knowingly possessed an internal quality assurance form and the attached prescription—containing confidential information relating to one of the nursing home's residents—without permission and in violation of the nursing home's policies, and termination of the nurse's employment was not so disproportionate to the offense as to be shocking to one's sense of fairness. Matter of Bruso v Clinton County, 139 A.D.3d 1169, 31 N.Y.S.3d 277, 2016 N.Y. App. Div. LEXIS 3423 (N.Y. App. Div. 3d Dep't 2016).

218. —Automobile involved

It was appropriate to suspend police officer for 5 days without pay for operating police vehicle at excessive rate of speed and failing to exercise due care. Dwyer v City of White Plains Dep't of Pub. Safety, 205 A.D.2d 534, 613 N.Y.S.2d 44, 1994 N.Y. App. Div. LEXIS 6001 (N.Y. App. Div. 2d Dep't 1994).

Suspension of police officer for 60 days without pay was appropriate sanction based on his driving police vehicle in improper, unsafe, reckless, careless, or negligent manner, endangering safety and welfare of himself and others, causing damage to police vehicle, and failing to follow proper police rules and regulations. Hoffman v Village of Sidney, 235 A.D.2d 698, 652 N.Y.S.2d 346, 1997 N.Y. App. Div. LEXIS 123 (N.Y. App. Div. 3d Dep't 1997).

It was improper to dismiss petitioner from his employment as school district bus driver merely based on one instance of speeding in fast-moving section of highway with no students in vehicle, especially since he had been licensed driver for about 43 years and received prior traffic ticket, and he was employed with district for 14 years with good disciplinary record. Smith v Board of Educ., 235 A.D.2d 912, 652 N.Y.S.2d 666, 1997 N.Y. App. Div. LEXIS 586 (N.Y. App. Div. 3d Dep't 1997).

219. —Breach of trust

Penalty of dismissal imposed on city architect for using his position, in return for payment of fee, to assist community organization in obtaining grant moneys was not excessive since infraction, which violated NYC Charter § 2604(C)(1) and (2), involved breach of trust for which termination is appropriate. Sullivan v New York Dep't of Housing Preservation & Dev., 162 A.D.2d 147, 556 N.Y.S.2d 568, 1990 N.Y. App. Div. LEXIS 6998 (N.Y. App. Div. 1st Dep't), app. denied, 76 N.Y.2d 715, 565 N.Y.S.2d 766, 566 N.E.2d 1171, 1990 N.Y. LEXIS 4471 (N.Y. 1990).

220. —Failure to act

School busdriver whose annual salary notice specifies 10 month period of employment is unclassified employee who may be terminated at will without hearing; in any event, termination of employment when busdriver leaves 4 year old child at child's home, rather than at home of babysitter, some 2 miles distant, without checking either route sheet or tag worn by child, both of which indicate place where child is to be let off, is not so disproportionate to offense as to be shocking to sense of fairness. Tyson v Hess, 66 N.Y.2d 943, 498 N.Y.S.2d 778, 489 N.E.2d 747, 1985 N.Y. LEXIS 18246 (N.Y. 1985).

Dismissal was appropriate sanction against firefighter who, while on watch and responsible for receiving alarms and alerting other firefighters, failed to answer emergency call and only responded after numerous further attempts were made to contact him, resulting in significant delay in responding to request for assistance to heart attack victim; serious nature of such misconduct and firefighter's prior history of disciplinary violations warranted such sanction. Ross v Bringewatt, 134 A.D.2d 913, 522 N.Y.S.2d 68, 1987 N.Y. App. Div. LEXIS 51113 (N.Y. App. Div. 4th Dep't 1987), app. denied, 71 N.Y.2d 801, 527 N.Y.S.2d 767, 522 N.E.2d 1065, 1988 N.Y. LEXIS 231 (N.Y. 1988).

State police officer was properly dismissed from employment where (1) while he and 2 other officers were at topless bar while off duty, employee of bar observed concealed weapon on one of them and reported such fact to local police officers, (2) not knowing that respondent and his companions were state police officers, local officers approached them and asked companion who carried gun to accompany him outside, (3) scuffle ensued and state police officers were ultimately taken to police headquarters, and (4) state police officers were violent and abusive at police headquarters and threatened local officers with future retribution when they used highways. Petry v Constantine, 210 A.D.2d 866, 621 N.Y.S.2d 131, 1994 N.Y. App. Div. LEXIS 13254 (N.Y. App. Div. 3d Dep't 1994).

It was inappropriate to dismiss maintenance mechanic for failing to turn in his keys on particular day and for disobeying written directive prohibiting use of elevator manual override key during business hours, especially considering his 8-year unblemished disciplinary record; under circumstances, penalty should not exceed 30-day suspension. In re Christopher M., 218 A.D.2d 700, 630 N.Y.S.2d 940, 1995 N.Y. App. Div. LEXIS 8675 (N.Y. App. Div. 2d Dep't 1995).

Dismissal is entirely appropriate penalty for police officer who allows friend to commit what officer knows to be rape. Sadler v Bratton, 219 A.D.2d 517, 631 N.Y.S.2d 664, 1995 N.Y. App. Div. LEXIS 9508 (N.Y. App. Div. 1st Dep't 1995).

Penalty of termination for school teacher's failure to protect student from harm was so disproportionate to offense as to be shocking to one's sense of fairness, and thus case would be remitted for imposition of appropriate penalty not to exceed one-year suspension without pay, where incident was isolated one in teacher's 22 years of service, and she took steps to follow return-to-duty procedures. Will v Frontier Cent. Sch. Dist. Bd. of Educ., 281 A.D.2d 902, 722 N.Y.S.2d 201, 2001 N.Y. App. Div. LEXIS 2854 (N.Y. App. Div. 4th Dep't), app. denied, 284 A.D.2d 1018, 730 N.Y.S.2d 888, 2001 N.Y. App. Div. LEXIS 5787 (N.Y. App. Div. 4th Dep't 2001), modified, 97 N.Y.2d 690, 739 N.Y.S.2d 90, 765 N.E.2d 293, 2002 N.Y. LEXIS 32 (N.Y. 2002).

In an action pursuant to N.Y. C.P.L.R. art. 78, it was determined that an agency erred in terminating a worker upon a finding of misconduct in a hearing pursuant to N.Y. Civ. Serv. Law § 75; the misconduct, in which the worker made an error with respect to the chemical solutions used in a water treatment plant and intentionally withheld the information from his supervisor until the next day, did not warrant such a penalty, and in consideration of the worker's length of service and other factors, a one year suspension was the maximum penalty. Murray v Ilion Water Comm'n, 9 A.D.3d 903, 780 N.Y.S.2d 262, 2004 N.Y. App. Div. LEXIS 9570 (N.Y. App. Div. 4th Dep't 2004).

221. —Sexual harassment

In an Article 78 proceeding by a school custodian to review his termination on charges of harassment of a female teacher, termination was proper where, as part of a recurring course of misconduct, the custodian telephoned the teacher in order to arrange a rendezvous for the purpose of having sex, after the school district had ordered him to refrain from further contact with the teacher. Brais v Board of Education, 92 A.D.2d 706, 460 N.Y.S.2d 387, 1983 N.Y. App. Div. LEXIS 16992 (N.Y. App. Div. 3d Dep't 1983).

A determination of the Commissioner of Mental Retardation and Developmental Disabilities, which terminated petitioner's employment as a chief of services at a particular development center following a hearing during which petitioner was found guilty of 22 specifications of sexual harassment against six women complainants, all of whom were dependent upon petitioner's recommendation to either retain their jobs or gain promotion, would be affirmed where there was no error in the fact that the

commissioner disagreed with the lesser recommended penalty of the hearing officer. Petties v New York State Dep't of Mental Retardation & Developmental Disabilities, 93 A.D.2d 960, 463 N.Y.S.2d 284, 1983 N.Y. App. Div. LEXIS 17859 (N.Y. App. Div. 3d Dep't 1983).

Evidence supported finding that building maintenance foreman committed sexual harassment of 2 female employees where (1) employees, who were dependent on his recommendation to either retain their jobs or gain promotion, recounted many instances when he engaged them in sexually oriented conversations to which they objected, including detailed narratives about his vasectomy, and (2) there was ample proof that he kissed one employee against her will and offered to falsify her attendance record in return for sexual favors, and that he expressed sexual desire to other employee while touching her in suggestive manner. Crookston v Brown, 140 A.D.2d 868, 528 N.Y.S.2d 908, 1988 N.Y. App. Div. LEXIS 5332 (N.Y. App. Div. 3d Dep't 1988).

School transportation supervisor was properly discharged for sexually harassing several female subordinate employees by kissing them and patting their buttocks on several occasions without their consent, on one occasion squeezing complainant's breast, and repeatedly using vulgar language despite warnings to stop. Comeau v Board of Educ. of Ballston Spa Cent. School Dist., 160 A.D.2d 1150, 554 N.Y.S.2d 359, 1990 N.Y. App. Div. LEXIS 4518 (N.Y. App. Div. 3d Dep't 1990).

It was proper to dismiss police officer who sexually harassed fellow officer over lengthy time period and, on one occasion, threatened to throw her off roof of building for lodging complaints against him. Daly v Bratton, 243 A.D.2d 367, 663 N.Y.S.2d 182, 1997 N.Y. App. Div. LEXIS 10314 (N.Y. App. Div. 1st Dep't 1997).

Town board acted reasonably in dismissing town police officer from his employment, despite officer's denial of having subjected complainant to unwanted sexual contact, where (1) board was justified in crediting, instead, testimony of complainant and other witnesses, which was essentially consistent, and (2) even if officer's denial of that charge were believed, his termination was necessitated by his later act of informing complainant that she was subject of narcotics investigation, thus compromising safety and operations of police department. Ost v Supervisor of Woodstock, 251 A.D.2d 724, 673 N.Y.S.2d 768, 1998 N.Y. App. Div. LEXIS 6464 (N.Y. App. Div. 3d Dep't), app. denied, 92 N.Y.2d 817, 684 N.Y.S.2d 488, 707 N.E.2d 443, 1998 N.Y. LEXIS 4260 (N.Y. 1998).

Substantial evidence supported termination of county data processing director for misconduct and lack of competence in supervising his employees where (1) one female employee testified that director gave her $50 gift certificate to Victoria's Secret, kissed her on lips, asked her clothing and underwear sizes, gave her gifts of clothing and perfume, touched her on hip/thigh area, asked her to rub his neck, pulled her onto his lap, and inappropriately touched or grabbed her almost daily, (2) second female employee testified that director called her his "sexretary" and inappropriately touched her, and (3) those allegations were corroborated by testimony by director or other employees. Termination of county data processing director for misconduct and lack of competence in supervising his employees was not so disproportionate to his offense as to shock one's sense of fairness where, over extended period, he clearly exhibited great disregard for female employees under his direct supervision by subjecting them to wholly inappropriate touching and sexual comments. Ernst v Saratoga County, 251 A.D.2d 866, 674 N.Y.S.2d 487, 1998 N.Y. App. Div. LEXIS 7332 (N.Y. App. Div. 3d Dep't 1998).

222. —Smoking

Dismissal of court officer did not shock one's sense of fairness where he committed acts of misconduct directed against 3 female co-workers, including unwanted physical contact and sexually suggestive remarks. Connolly v Williams, 210 A.D.2d 19, 618 N.Y.S.2d 808, 1994 N.Y. App. Div. LEXIS 11874 (N.Y. App. Div. 1st Dep't 1994).

Court upheld discharge of elementary school custodian for misconduct in that (1) substantial evidence supported finding that he was guilty of smoking on school grounds, and (2) termination was not disproportionate to offense where cigarettes igniting waste paper in plastic trash pail near his desk, causing fire in school basement and necessitating evacuation of students. Smith v Board of Educ., 259 A.D.2d 704, 686 N.Y.S.2d 835, 1999 N.Y. App. Div. LEXIS 2722 (N.Y. App. Div. 2d Dep't 1999).

223. —Use of excessive force by officer-employee

New York City Civil Service Commission properly dismissed correction officer for use of excessive force against inmates and failure to make proper notification regarding use of force against inmate, notwithstanding officer's lack of disciplinary record. Perez v New York Civil Service Com., 140 A.D.2d 224, 528 N.Y.S.2d 73, 1988 N.Y. App. Div. LEXIS 5279 (N.Y. App. Div. 1st Dep't), app. denied, 72 N.Y.2d 807, 533 N.Y.S.2d 56, 529 N.E.2d 424, 1988 N.Y. LEXIS 2564 (N.Y. 1988).

It was not excessive to dismiss correction officers who used unreasonable force against inmate, submitted false reports of incident, and gave false statements to investigators. Mansfield v Sielaff, 184 A.D.2d 477, 585 N.Y.S.2d 425, 1992 N.Y. App. Div. LEXIS 8631 (N.Y. App. Div. 1st Dep't), app. denied, 80 N.Y.2d 760, 591 N.Y.S.2d 138, 605 N.E.2d 874, 1992 N.Y. LEXIS 3839 (N.Y. 1992).

It was appropriate to dismiss police officer who, in course of integrity test, performed illegal search and used excessive force in assault on undercover police officer. Kennedy v Safir, 254 A.D.2d 61, 679 N.Y.S.2d 279, 1998 N.Y. App. Div. LEXIS 10162 (N.Y. App. Div. 1st Dep't 1998).

It was proper to dismiss police officer who instigated altercation with complainants and used excessive and unjustified force both before and after illegally arresting them. Morrissey v Safir, 254 A.D.2d 150, 679 N.Y.S.2d 293, 1998 N.Y. App. Div. LEXIS 10995 (N.Y. App. Div. 1st Dep't 1998).

It was improper to require police officer (petitioner) to forfeit 10 vacation days as penalty for using excess of force in making arrest where there was no basis for differential penalties imposed on 2 police officers involved in incident, other officer was penalized with loss of only 5 vacation days, Administrative Law Judge attributed administrative penalty imposed on other officer to petitioner, who had prior unblemished disciplinary record, and First Deputy Commissioner improperly cited petitioner's election to pursue administrative trial as justification for higher penalty; thus, penalty would be reduced to forfeiture of 5 vacation days. Meagher v Safir, 272 A.D.2d 114, 707 N.Y.S.2d 422, 2000 N.Y. App. Div. LEXIS 5409 (N.Y. App. Div. 1st Dep't 2000), modified, 96 N.Y.2d 32, 724 N.Y.S.2d 680, 747 N.E.2d 1280, 2001 N.Y. LEXIS 566 (N.Y. 2001).

It was proper for police commissioner to direct that petitioner forfeit 15 vacation days for having attempted to coerce detainee not to file complaint with Civilian Complaint Review Board. Driscoll v Safir, 284 A.D.2d 106, 725 N.Y.S.2d 546, 2001 N.Y. App. Div. LEXIS 5658 (N.Y. App. Div. 1st Dep't 2001).

ii. Criminal Misconduct

224. In general

A determination of commissioner of hospitals of New York city removing an honorably discharged soldier of the World war from a position in the department of hospitals on a charge that he had received from a contracting company or the president thereof sums of money at a time when he had been inspecting work done by that company, must be annulled, where no evidence was offered that he had inspected any work done by such contracting company or that he was an inspector or that the city had suffered injury or damage. Meyer v Goldwater, 286 N.Y. 461, 36 N.E.2d 663, 286 N.Y. (N.Y.S.) 461, 1941 N.Y. LEXIS 1462 (N.Y.), reh'g denied, 286 N.Y. 697, 37 N.E.2d 139, 286 N.Y. (N.Y.S.) 697, 1941 N.Y. LEXIS 2249 (N.Y. 1941).

Evidence sustained administrative finding that correction officer was guilty of misconduct stemming from charge that he delivered tobacco to inmate in demeaning fashion, causing disturbance in cell block, where several inmates testified that they saw him unzip his pants, put tobacco in his pants, and then offer it to inmate; further, there was sufficient basis for to discredit portions of officer's testimony and to determine that he had lied about incident during ensuing investigation, where he initially did not deny incident but stated that tobacco was in his pants pocket, and later stated that he could not specifically recall incident. Billings v County of St. Lawrence, 139 A.D.2d 809, 526

N.Y.S.2d 677, 1988 N.Y. App. Div. LEXIS 3639 (N.Y. App. Div. 3d Dep't 1988).

Sanction of dismissal imposed on police officer was not so disproportionate to offense as to be shocking to one's sense of fairness where officer violated Patrol Guide by (1) not requesting presence of sergeant before searching body and premises of dead person, (2) not properly safeguarding or vouchering currency found in deceased's pocket, (3) placing currency in another location, (4) knowingly and falsely telling sergeant that he had not recovered currency, and (5) not making proper activity log entries of his assignment; officer's conduct was similar to that of thief and was not in conformity with responsibilities of police officer. Ward v Ward, 159 A.D.2d 287, 552 N.Y.S.2d 292, 1990 N.Y. App. Div. LEXIS 2668 (N.Y. App. Div. 1st Dep't 1990).

Substantial evidence supported determination that police officer wrongfully made use of police department's computer system, and failed to safeguard computer printout of license plate number assigned to confidential automobile used by organized crime investigation division, where (1) computer memory records and precinct computer logbook placed police officer at exact place and time that printout was generated, and (2) printout was found in possession of reputed organized crime figure. Tuzzio v Ward, 160 A.D.2d 583, 554 N.Y.S.2d 227, 1990 N.Y. App. Div. LEXIS 4613 (N.Y. App. Div. 1st Dep't 1990).

Determination that county employee obstructed governmental administration lacked rational basis where (1) charge arose from allegations concerning telephone conversation employee had with his wife and subsequent conversation wife had with co-worker, (2) wife and co-worker both denied that conversation had occurred, (3) only contrary evidence was contained in police investigation report concerning conversation between wife and co-worker, which was overheard by third party, (4) neither officer who prepared report nor third party testified at hearing, (5) there was no evidence from which it could be concluded that third party was actually in position to overhear conversation between people who denied that conversation took place, and (6) there was no evidence concerning either reliability of third person or statement made to police. Riley v Schles, 185 A.D.2d 437, 585 N.Y.S.2d 627, 1992 N.Y. App. Div. LEXIS 8886 (N.Y. App. Div. 3d Dep't 1992).

State Police investigator was properly found guilty of acting in manner which tended to bring discredit on State Police in connection with his son's arrest at college for driving while intoxicated where investigator telephoned sergeant of campus police and stated that he sought some "slack" with regard to charge because of his position. Brown v Constantine, 199 A.D.2d 912, 606 N.Y.S.2d 65, 1993 N.Y. App. Div. LEXIS 12385 (N.Y. App. Div. 3d Dep't 1993).

Respondent police commissioner's determination that petitioner was unfit for position of special patrolman was supported by substantial evidence, including testimony concerning petitioner's history of harassment and assault which culminated in incidents that resulted in his arrest for violating order of protection and aggravated harassment, and police detective's testimony that petitioner had lied when he denied making threatening phone call to his children's mother; petitioner's acquittal of criminal charges did not preclude respondent's finding of guilt and revocation of "special patrolman" designation. Gonzalez v Police Comm'r, 227 A.D.2d 287, 642 N.Y.S.2d 671, 1996 N.Y. App. Div. LEXIS 5379 (N.Y. App. Div. 1st Dep't 1996).

Penalty of dismissal imposed on police officer who attempted to fix traffic ticket by harassing and intimidating fellow officer into making false statements was not so disproportionate to offense as to be shocking to court's sense of fairness. Cohen v Bratton, 232 A.D.2d 304, 648 N.Y.S.2d 588, 1996 N.Y. App. Div. LEXIS 10579 (N.Y. App. Div. 1st Dep't 1996).

It was proper to dismiss of correction officer on basis of single incident of bringing dangerous contraband into facility, particularly since his misconduct endangered safety of others. Collins v Jacobson, 247 A.D.2d 269, 667 N.Y.S.2d 903, 1998 N.Y. App. Div. LEXIS 1422 (N.Y. App. Div. 1st Dep't 1998).

It was appropriate to dismiss police officer who utilized various improper tactics to enable his uncle to monopolize corner where he operated his food cart and who provided false testimony at departmental interview. Spiratos v Safir, 249 A.D.2d 240, 672 N.Y.S.2d 311, 1998 N.Y. App. Div. LEXIS 4754 (N.Y. App. Div. 1st Dep't 1998).

Penalty of termination of police officer's employment was not shockingly unfair and disproportionate to his misconduct where (1) he participated in what he knew to be illegal search, seizure, and arrest, and (2) he consistently lied to superior officers, prosecutors, and other officials concerning circumstances of that arrest. McDonough v Bratton, 251 A.D.2d 51, 674 N.Y.S.2d 292, 1998 N.Y. App. Div. LEXIS 6418 (N.Y. App. Div. 1st Dep't 1998).

Arbitrator, in upholding discharge of police officer, did not err by giving collateral estoppel effect to judgment in criminal matter, convicting officer of various offenses arising from same conduct at issue in arbitration, even though criminal judgment was still under appeal at time award was made; however, court properly vacated arbitration award and directed new hearing of issues before arbitrator based on subsequent reversal of criminal judgment, which was sole factual basis for award. Beard v Town of Newburgh, 259 A.D.2d 613, 686 N.Y.S.2d 809, 1999 N.Y. App. Div. LEXIS 2467 (N.Y. App. Div. 2d Dep't), app. dismissed, 93 N.Y.2d 958, 694 N.Y.S.2d 635, 716 N.E.2d 700, 1999 N.Y. LEXIS 1388 (N.Y. 1999).

225. Assault

The registrar in the department of health of New York city may be removed after trial and upon proof of an indecent assault upon a woman whom he was treating as a physician in private practice and while acting outside his official duties, although he has been previously indicted and acquitted upon a criminal charge of rape founded upon same assault. People ex rel. Wood v Department of Health, 144 A.D. 628, 129 N.Y.S. 255, 1911 N.Y. App. Div. LEXIS 4204 (N.Y. App. Div.), aff'd, 202 N.Y. 610, 95 N.E. 823, 202 N.Y. (N.Y.S.) 610, 1911 N.Y. LEXIS 1183 (N.Y. 1911).

Petitioner's dismissal as a clerk typist for a county social services department was justified where she had pled guilty to assaulting a security officer at her workplace, and had demonstrated an uncontrollable and violent temper. Pollman v Fahey, 106 A.D.2d 771, 483 N.Y.S.2d 805, 1984 N.Y. App. Div. LEXIS 21698 (N.Y. App. Div. 3d Dep't 1984).

Department of Correction's decision to discharge correction officer was supported by substantial evidence and was proper sanction where officer used knife to stab prisoner in buttock following prisoner's trivial and short-lived failure to follow rules, even where administrative law judge had recommended only suspension; even if officer's allegations that stabbing was accidental had not been incredible, proper sanction would still have been discharge, since even inadvertent wielding of knife while initiating coercive physical contact would evidence grave failure of judgment. Johnson v Ward, 124 A.D.2d 466, 507 N.Y.S.2d 852, 1986 N.Y. App. Div. LEXIS 61798 (N.Y. App. Div. 1st Dep't 1986).

Court would annul determination of police commissioner which dismissed officer from police department since dismissal was arbitrary, capricious and irrational, and shocked conscience, where misconduct of officer consisted of wrongfully striking woman in face with his fist while off duty and in civilian clothes, and wrongfully submitting altered sick return slip and being absent from duty for 3 days without leave; police commissioner's disciplinary determinations showed disturbing pattern of inconsistency of punishment where 2 other officers who had committed much more violent assaults on civilians had been punished by minor suspensions. In re Application of Trotman, 146 A.D.2d 236, 540 N.Y.S.2d 774, 1989 N.Y. App. Div. LEXIS 4882 (N.Y. App. Div. 1st Dep't), app. denied, 74 N.Y.2d 609, 545 N.Y.S.2d 105, 543 N.E.2d 748, 1989 N.Y. LEXIS 1040 (N.Y. 1989).

Evidence did not support mayor's determination that petitioner was guilty of misconduct, warranting his dismissal as city police officer, for allegedly having assaulted his girlfriend, where girlfriend had recanted accusations and hearing officer recommended dismissal of charges, although he found "faint suspicion" that recantation was not credible, and there was nothing in record to indicate that girlfriend was lying in connection with recantation other than fact that she and petitioner had recommenced dating. Pocengal v Crabb, 154 A.D.2d 772, 546 N.Y.S.2d 225, 1989 N.Y. App. Div. LEXIS 12386 (N.Y. App. Div. 3d Dep't 1989).

Court would dismiss Article 78 proceedings brought by police officers to review determinations finding them guilty of miscon-

duct and imposing forfeiture of 20 days' vacation time each where determinations were supported by evidence that (1) first officer physically assaulted individual outside school in presence of 2 students and one teacher, and then arrested individual without cause, and (2) second officer was present during incident and gave false description of events to investigating officer. Evans v Ward, 155 A.D.2d 249, 546 N.Y.S.2d 624, 1989 N.Y. App. Div. LEXIS 13699 (N.Y. App. Div. 1st Dep't 1989).

In Article 78 proceeding to review determination by police commissioner that officer was guilty of charges and specifications lodged against him for assaulting his former girlfriend, court would reject officer's argument that testimony of witnesses was incredible where testimony was supported by medical evidence to effect that girlfriend could not have sustained her injuries if officer had only sought to defend himself. Cosentino v Ward, 155 A.D.2d 362, 547 N.Y.S.2d 331, 1989 N.Y. App. Div. LEXIS 14328 (N.Y. App. Div. 1st Dep't 1989).

Dismissal of correction officer did not shock one's sense of fairness where correction officer, who had recently completed his probationary training, engaged in unprovoked physical attack on individual, causing serious injury to individual, and following attack, offered physical resistance and threats against uniformed arresting officers who responded to scene. Islar v Koehler, 160 A.D.2d 575, 554 N.Y.S.2d 219, 1990 N.Y. App. Div. LEXIS 4611 (N.Y. App. Div. 1st Dep't 1990).

Penalty of dismissal imposed on deputy sheriff was not disproportionate to his offense where he had participated, after night of drinking, in off-duty interdiction of 2 innocent persons lawfully on public highway, had given no reason or cause for vicious, callous assault on them, and had tried to conceal offense. Robertson v Eccleston, 183 A.D.2d 1045, 583 N.Y.S.2d 630, 1992 N.Y. App. Div. LEXIS 7165 (N.Y. App. Div. 3d Dep't 1992).

Substantial evidence supported termination of police officer's employment, and penalty of dismissal did not shock Appellate Division's sense of fairness, where officer verbally and physically assaulted detective, causing injuries to his groin, without provocation and as result of officer's belief that detective was involved in undercover Internal Affairs investigations. McGaughey v Safir, 266 A.D.2d 100, 698 N.Y.S.2d 471, 1999 N.Y. App. Div. LEXIS 11650 (N.Y. App. Div. 1st Dep't 1999), app. denied, 94 N.Y.2d 760, 706 N.Y.S.2d 80, 727 N.E.2d 577, 2000 N.Y. LEXIS 107 (N.Y. 2000).

It was proper to impose forfeiture of 20 vacation days on finding that police officer unjustifiably and without provocation struck individual with nightstick during course of arrest. Potter v Safir, 284 A.D.2d 156, 728 N.Y.S.2d 428, 2001 N.Y. App. Div. LEXIS 6151 (N.Y. App. Div. 1st Dep't 2001).

In a hearing pursuant to N.Y. Civ. Serv. Law § 75, the police officer was on suspension for excessive use of force on the job when he engaged in the physically abusive conduct toward his 20-year-old girlfriend; that, alone, was sufficient to sustain the penalty of termination even without considering his additional misconduct of providing alcohol to and using the influence of his position to get alcohol served to an individual under the age of 21. Correll v Bucci, 19 A.D.3d 919, 798 N.Y.S.2d 157, 2005 N.Y. App. Div. LEXIS 7110 (N.Y. App. Div. 3d Dep't 2005).

226. Automobile involved

In a proceeding by an employee seeking to review a determination of a town superintendent of highways dismissing the employee after making a finding that the employee drove with a suspended license and failed to notify the highway department about the suspension, the determination of guilty on the charges could not be sustained where, although a police department computer print-out indicated that the employee's license was suspended twice for failure to answer a summons, nothing in the record demonstrated that the employee knew that his license had been suspended; the employee's dismissal, likewise, could not be sustained where his termination was recommended by the hearing officer and affirmed by the superintendent because of the seriousness of the charges involving driving without a license. Farrell v Dowling, 82 A.D.2d 918, 440 N.Y.S.2d 685, 1981 N.Y. App. Div. LEXIS 14638 (N.Y. App. Div. 2d Dep't 1981).

Determination dismissing petitioner from his position as firefighter would be modified to extent of annulling determinations of guilt on charges and specifications involving petitioner's plea of nolo contendere to charge of driving while intoxicated in Florida since nolo contendere plea in criminal proceeding cannot be relied on in subsequent civil or administrative action as proof of facts alleged in indictment. Longo v Dolce, 192 A.D.2d 157, 600 N.Y.S.2d 962, 1993 N.Y. App. Div. LEXIS 7665 (N.Y. App. Div. 2d Dep't), app. dismissed, app. denied, 82 N.Y.2d 836, 606 N.Y.S.2d 589, 627 N.E.2d 511, 1993 N.Y. LEXIS 4312 (N.Y. 1993).

Substantial evidence supported termination of village motor equipment officer for misconduct and incompetence where he committed criminal offense of driving while intoxicated as felony, drove village-owned vehicles with revoked license, and took unauthorized leave of absence. Hussey v Incorporated Village of Farmingdale, 251 A.D.2d 579, 674 N.Y.S.2d 757, 1998 N.Y. App. Div. LEXIS 7519 (N.Y. App. Div. 2d Dep't 1998).

227. —Leaving scene of accident

Substantial evidence supported dismissal of police department employee on finding that she was guilty of wrongfully leaving scene of accident, failing to report accident, and knowingly filing false report that her vehicle had been stolen, where employee's vehicle struck motorcycle driven by complainant, employee denied charges at hearing and claimed that her vehicle had been stolen and that someone who resembled her had driven vehicle which struck motorcycle, and eyewitness identified employee at hearing as person who operated vehicle. Homenick v Ward, 162 A.D.2d 135, 556 N.Y.S.2d 81, 1990 N.Y. App. Div. LEXIS 6802 (N.Y. App. Div. 1st Dep't), app. denied, 76 N.Y.2d 706, 560 N.Y.S.2d 988, 561 N.E.2d 888, 1990 N.Y. LEXIS 3044 (N.Y. 1990).

Police officer was not entitled to annulment of police commissioner's termination of officer's probationary employment, despite his subsequent acquittal on charges of violating Vehicle and Traffic Law, where officer had left scene of accident and refused to take breathalyzer test when ordered to do so by superior officer; acquittal did not satisfy officer's burden of establishing that he was terminated in bad faith. Brown v Condon, 186 A.D.2d 43, 587 N.Y.S.2d 648, 1992 N.Y. App. Div. LEXIS 10585 (N.Y. App. Div. 1st Dep't 1992).

Dismissal of police officer was appropriate penalty for his reckless driving, his involvement in accident, and his leaving scene. Kidney v Bratton, 224 A.D.2d 226, 637 N.Y.S.2d 152, 1996 N.Y. App. Div. LEXIS 948 (N.Y. App. Div. 1st Dep't 1996).

228. Bribery

Dismissal of sanitation worker for solicitation and receipt of $20 bribe was not so disproportionate as to shock sense of fairness where worker had prior disciplinary problems. Cranford v Sexton, 159 A.D.2d 348, 552 N.Y.S.2d 626, 1990 N.Y. App. Div. LEXIS 2873 (N.Y. App. Div. 1st Dep't 1990).

229. Check involved

A village police officer was properly dismissed from his position based on a finding that he was guilty of the crime of issuing a bad check where, though the decision by the village board of trustees was based in part on the officer's employment record, which was not introduced at his hearing and to which he had had no opportunity to respond, so that such decision was based in part on evidence that was outside the record, the officer's issuance of a bad check indicated moral turpitude in that he had obtained property when he issued the bad check, so that the officer's conduct tended to have a destructive impact on the confidence the public must have in its police force, and dismissal was thus not so disproportionate to the charged violation as to shock one's conscience. Bigelow v Board of Trustees, 98 A.D.2d 933, 470 N.Y.S.2d 925, 1983 N.Y. App. Div. LEXIS 21253 (N.Y. App. Div. 3d Dep't 1983), rev'd, 63 N.Y.2d 470, 483 N.Y.S.2d 173, 472 N.E.2d 1001, 1984 N.Y. LEXIS 4680 (N.Y. 1984).

Dismissal of police officer for misconduct was not so disproportionate to offense as to be shocking to one's sense of fairness where officer (1) forged endorsement on and cashed check belonging to fellow officer, and (2) took unauthorized leave and made false entry as to time he reported for work. Mamarella v Ward, 155 A.D.2d 372, 548 N.Y.S.2d 159, 1989 N.Y. App. Div. LEXIS 14581 (N.Y. App. Div. 1st Dep't 1989).

Petitioner was properly dismissed from her position as police officer where substantial evidence supported determination that

she passed 41 bad checks to 2 supermarkets, and in light of her previous disciplinary record and destructive impact that her conduct had on confidence of public in police officers. Marhold v Brown, 189 A.D.2d 573, 592 N.Y.S.2d 28, 1993 N.Y. App. Div. LEXIS 48 (N.Y. App. Div. 1st Dep't 1993).

230. Credit car crime

It was not inappropriate to dismiss petitioner from her employment as typist with Department of Social Services based on her guilty pleas to 2 counts of second degree possession of forged instrument arising from incident in which she drove co-worker in her car to certain business and accompanied co-worker while co-worker made purchases with credit card stolen from another co-worker. Calloway v Glass, 203 A.D.2d 800, 610 N.Y.S.2d 973, 1994 N.Y. App. Div. LEXIS 4101 (N.Y. App. Div. 3d Dep't 1994).

231. Domestic violence

Thirty-day suspension of probation officer, and requirement that he continue receiving professional help, was justified where probation officer was found to have threatened wife and children, which was job-related misconduct due to his law enforcement position; supporting deposition of wife was properly admitted into evidence because technical rules of evidence are not required in hearings such as one afforded defendant and where sufficient foundation for deposition was presented through testimony of investigating officer. Stiles v Phelan, 111 A.D.2d 591, 489 N.Y.S.2d 656, 1985 N.Y. App. Div. LEXIS 51623 (N.Y. App. Div. 3d Dep't 1985).

232. Drugs

Police commissioner's dismissal of police officer for using illegal drugs was not so disproportionate to offense as to be shocking to one's sense of fairness. Trotta v Ward, 77 N.Y.2d 827, 566 N.Y.S.2d 199, 567 N.E.2d 241, 1991 N.Y. LEXIS 70 (N.Y. 1991).

Penalty of dismissal imposed by Superintendent of State Police was not so disproportionate to state trooper's offense of marihuana possession as to be shocking to one's sense of fairness. Boyd v Constantine, 81 N.Y.2d 189, 597 N.Y.S.2d 605, 613 N.E.2d 511, 1993 N.Y. LEXIS 697 (N.Y. 1993).

Though charge that patrolman employed by city housing authority had illegally possessed dangerous drugs and hypodermic instruments was dismissed because it was based on illegally obtained evidence, finding of guilt with respect to remaining charges was supported by substantial evidence and would not be disturbed. McPherson v New York City Housing Authority, 47 A.D.2d 828, 365 N.Y.S.2d 862, 1975 N.Y. App. Div. LEXIS 9168 (N.Y. App. Div. 1st Dep't 1975).

It was not improper for transit authority to discharge assistant train dispatcher as result of his conviction of third degree sale of controlled substance, based on its finding that his criminal conduct violated transit authority rules, since (1) relationship between drug conviction and job performance was readily inferable, (2) there was no evidence that he was dismissed solely because of his conviction, and (3) certificate of relief from disabilities granted to him under CLS Correc § 701 did not prohibit employer from relying on his conviction as basis for exercising its discretionary power to dismiss him. Barreto v Gunn, 134 A.D.2d 495, 521 N.Y.S.2d 448, 1987 N.Y. App. Div. LEXIS 50690 (N.Y. App. Div. 2d Dep't 1987).

Substantial evidence supported discharge of police officer where (1) he was absent from duty without leave for 3 hours and, on same date, he failed to obey lawful order to submit to urinalysis examination, (2) 6 weeks before drug test order, vial was found on driver's side of patrol car assigned to him, (3) he was observed several times, on and off duty, in known drug area, (4) his behavior was noticeably erratic during prior 6-month period, and (5) several anonymous reports received by precinct provided information consistent with his suspected drug activity. Martinez v Ward, 166 A.D.2d 392, 561 N.Y.S.2d 195, 1990 N.Y. App. Div. LEXIS 12993 (N.Y. App. Div. 1st Dep't 1990).

Court would affirm dismissal of police officers, despite hearing officer's refusal to allow further cross-examination as to one complainant's drug and weapon conviction, and despite inconsistencies in testimony of both complaining witnesses, where substantial evidence supported determination that officers, having responded to radio run of drugs being sold, encountered complainants who were engaged in gambling activity and took money from them at gunpoint. Diaz v Ward, 181 A.D.2d 594, 581 N.Y.S.2d 1000, 1992 N.Y. App. Div. LEXIS 4021 (N.Y. App. Div. 1st Dep't 1992).

Finding of misconduct on part of transit authority police officer was supported by evidence that he was seen in parked automobile, holding pistol in his lap, accompanied by target of undercover narcotics investigation just before target left car to discuss drug transaction with undercover officer, at time when he was aware of impending drug transaction. Russell v Del Castillo, 181 A.D.2d 680, 580 N.Y.S.2d 788, 1992 N.Y. App. Div. LEXIS 2992 (N.Y. App. Div. 2d Dep't 1992).

Termination of petitioner's employment as transit patrol officer was appropriate sanction for his use of controlled substance. Murphy v New York City Transit Auth., 205 A.D.2d 634, 613 N.Y.S.2d 268, 1994 N.Y. App. Div. LEXIS 6139 (N.Y. App. Div. 2d Dep't 1994).

Police detective was properly dismissed where (1) her police identification card was once found at known drug location, and controlled substance was found in her bedroom, (2) she had history of absence and lateness, and (3) she was ordered to submit to drug testing, but she refused. Felder v Kelly, 210 A.D.2d 78, 619 N.Y.S.2d 45, 1994 N.Y. App. Div. LEXIS 12403 (N.Y. App. Div. 1st Dep't 1994).

Village sanitation worker was properly dismissed where he was convicted of attempted third degree sale of controlled substance in 1990, and he failed to report for work on 2 days in March, 1993, and also failed to report for work on third day in same month after having been directed to report for work. Telesco v Village of Port Chester, 211 A.D.2d 723, 622 N.Y.S.2d 78, 1995 N.Y. App. Div. LEXIS 461 (N.Y. App. Div. 2d Dep't 1995).

In Article 78 proceeding, court confirmed petitioner's dismissal from his position as police officer where (1) substantial evidence supported respondent's finding that petitioner had telephone conversations with police informant who said he was interested in purchasing drugs from petitioner's wife, and that petitioner gave this message to his wife who later sold drugs to informant in petitioner's home, and (2) petitioner admitted separate charge that he failed to report his conversation with informant. Schneider v Bratton, 237 A.D.2d 155, 655 N.Y.S.2d 360, 1997 N.Y. App. Div. LEXIS 2416 (N.Y. App. Div. 1st Dep't), app. denied, 90 N.Y.2d 807, 664 N.Y.S.2d 269, 686 N.E.2d 1364, 1997 N.Y. LEXIS 3041 (N.Y. 1997).

Dismissal of New York City Housing Authority police officer was appropriate sanction for his use of illicit narcotics. Casey v New York City Hous. Auth., 249 A.D.2d 230, 672 N.Y.S.2d 305, 1998 N.Y. App. Div. LEXIS 4758 (N.Y. App. Div. 1st Dep't 1998).

233. —Cocaine

Police officer was properly terminated on finding at administrative hearing that he had tested positive, following random urine test, for ingestion of cocaine. Gordon v Brown, 84 N.Y.2d 574, 620 N.Y.S.2d 749, 644 N.E.2d 1305, 1994 N.Y. LEXIS 4196 (N.Y. 1994).

Petitioner's plea allocution statements, when she pled guilty to attempted criminal possession of a controlled substance, was substantial evidence supporting a determination of serious misconduct during petitioner's tenure as a civil servant within the meaning of Civ Serv Law § 75, notwithstanding petitioner's present testimony, in an Article 78 proceeding to reverse the determination of misconduct, that she pled guilty to save her fiancee from a jail sentence. However, the plea alone, without independent evidence, did not support a second determination of misconduct (that petitioner had lied when she denied having witnessed her fiancee possess cocaine in his apartment or make a sale); the penalty of dismissal from employment would be deleted from the determination and the matter remitted for penalty as to the first specified instance of misconduct only. Cromwell v Bates, 105 A.D.2d 699, 481 N.Y.S.2d 137, 1984 N.Y. App. Div. LEXIS 20809 (N.Y. App. Div. 2d Dep't 1984).

Petitioner was properly dismissed from police force for use of cocaine where 2 enzyme multiplied immunoassay technique tests and one gas chromatography mass spectrometry test were used, and all 3 resulted in positive finding for cocaine ingestion.

Gregory v New York City Police Dep't, 155 A.D.2d 382, 548 N.Y.S.2d 12, 1989 N.Y. App. Div. LEXIS 15073 (N.Y. App. Div. 1st Dep't 1989).

Substantial evidence supported determination terminating petitioner's employment as state trooper where (1) 2 plain clothes housing authority police officers observed petitioner, who was off-duty State Trooper, seated in passenger seat of parked vehicle with piece of paper containing white powder cupped in his left hand and small straw being brought up to his nose with his right hand, (2) as officers approached petitioner, he passed paper and straw to driver, who surrendered them to officers, (3) search of vehicle produced drug paraphernalia and cocaine-laced cigarette, (4) white substance in paper was found to be cocaine, and (5) petitioner and driver were charged with drug and other offenses, but were acquitted. Garnes v New York State Police, 156 A.D.2d 907, 549 N.Y.S.2d 876, 1989 N.Y. App. Div. LEXIS 16409 (N.Y. App. Div. 3d Dep't 1989).

Correction officer was properly discharged on basis of urinalysis which proved positive for cocaine, since substantial evidence supported reasonable suspicion of drug usage sufficient to sustain testing order where (1) her eyes were glassy and bloodshot, (2) she was hyperactive, sweating, speaking loudly, slurring her words, and waving her arms, (3) she was not in regulation dress and was unresponsive when questioned about her appearance, and (4) her time sheet reflected lateness and absences. Jeffrey v Koehler, 166 A.D.2d 356, 561 N.Y.S.2d 417, 1990 N.Y. App. Div. LEXIS 12776 (N.Y. App. Div. 1st Dep't 1990).

It was reasonable for correction department to order correction officer to take drug test, and to discharge him when he tested positive for cocaine, where he had been arrested in apparent drug-related incident and investigators, who observed correction officer at precinct, noted that he appeared to be under influence "of something" due to his unsteadiness, slurred speech and red, glassy eyes. Torres v Koehler, 168 A.D.2d 362, 562 N.Y.S.2d 696, 1990 N.Y. App. Div. LEXIS 15502 (N.Y. App. Div. 1st Dep't 1990).

Police officer's employment was properly terminated where (1) despite indicating that she would respond to her tour of duty but would be late, officer never appeared, (2) after numerous telephone calls from friends, co-workers and supervisors, and attempt to enter apartment by friend, police were given key to apartment by building manager and gained entry, (3) officer conceded that police were beneficially motivated in entering apartment, (4) on entry, police saw officer unconscious on couch, apparently intoxicated, and bottle of rum on floor, (5) after regaining consciousness, officer went to change, leaving fellow officers in living room, where they observed cocaine residue and straw in plain view, and (6) urine test yielded positive result. Roman v New York City Police Dep't, 198 A.D.2d 143, 603 N.Y.S.2d 856, 1993 N.Y. App. Div. LEXIS 10828 (N.Y. App. Div. 1st Dep't 1993).

Evidence sustained dismissal of correction officer, on ground that she knowingly ingested cocaine, where (1) officer was randomly chosen to submit to drug testing and was asked to provide urine samples, (2) she personally sealed and initialed 2 vials of urine, (3) technician thought that specimens appeared suspicious and required officer to provide another specimen under observation, (4) all samples tested positive, (5) officer claimed that latter specimen was not sealed by her or in front of her, and (6) concerned over what she perceived to be irregularities, officer went to hospital emergency room for toxicology screening and presented evidence that those tests had negative results, but there was no evidence of chain of custody in regard to those tests. Joyner v Abate, 199 A.D.2d 56, 605 N.Y.S.2d 32, 1993 N.Y. App. Div. LEXIS 11720 (N.Y. App. Div. 1st Dep't 1993).

It was appropriate to dismiss New York City Transit Authority police officer for having ingested cocaine. Danese v New York City Transit Auth., 256 A.D.2d 464, 683 N.Y.S.2d 860, 1998 N.Y. App. Div. LEXIS 13490 (N.Y. App. Div. 2d Dep't 1998), app. denied, 93 N.Y.2d 811, 695 N.Y.S.2d 540, 717 N.E.2d 699, 1999 N.Y. LEXIS 1899 (N.Y. 1999).

Dismissal of police officer was appropriate based on officer's possession and use of cocaine. Davis v Safir, 262 A.D.2d 107, 691 N.Y.S.2d 487, 1999 N.Y. App. Div. LEXIS 6437 (N.Y. App. Div. 1st Dep't 1999).

234. —Marijuana

Evidence supported hearing officer's finding that school employee had engaged in misconduct where employee was found in enclosed area near his residence where marihuana was being grown, and he admitted to arresting officer that he was in control of area. Penalty of dismissal was not excessive where school custodian-bus driver was found to be in control of enclosed area near his residence where marihuana was being grown, in view of his sensitive position as school employee and his duty as school bus driver. Holsapple v Arlington Cent. School Dist., 136 A.D.2d 639, 523 N.Y.S.2d 600, 1988 N.Y. App. Div. LEXIS 444 (N.Y. App. Div. 2d Dep't), app. denied, 71 N.Y.2d 805, 529 N.Y.S.2d 76, 524 N.E.2d 430, 1988 N.Y. LEXIS 632 (N.Y. 1988).

Determination of New York City Transit Authority, finding that bus driver used controlled substance in violation of Authority's regulations, was supported by substantial evidence where medical exam revealed driver's marihuana use, he was suspended without pay for 30 days and entered counseling program, his urine test at conclusion of program showed negative and he was reinstated, and on next day he was again tested and urine showed positive for marihuana. McCoy v Gunn, 153 A.D.2d 863, 545 N.Y.S.2d 583, 1989 N.Y. App. Div. LEXIS 11554 (N.Y. App. Div. 2d Dep't 1989).

Dismissal of New York City Police officer for using marihuana was proper where reasonable suspicion for drug test was established by testimony of several medical experts that officer's delusions, severe mood swings, and tendency toward violence could have been caused either by drug use or mental illness, or by both. Baldini v Ward, 157 A.D.2d 627, 550 N.Y.S.2d 645, 1990 N.Y. App. Div. LEXIS 816 (N.Y. App. Div. 1st Dep't 1990).

Dismissal of city firefighter was appropriate where urine test administered to him yielded positive results for presence of marijuana. Longo v Dolce, 192 A.D.2d 157, 600 N.Y.S.2d 962, 1993 N.Y. App. Div. LEXIS 7665 (N.Y. App. Div. 2d Dep't), app. dismissed, app. denied, 82 N.Y.2d 836, 606 N.Y.S.2d 589, 627 N.E.2d 511, 1993 N.Y. LEXIS 4312 (N.Y. 1993).

Use of marijuana by correction officer warranted his dismissal. Fulton v Jacobson, 226 A.D.2d 215, 641 N.Y.S.2d 16, 1996 N.Y. App. Div. LEXIS 3893 (N.Y. App. Div. 1st Dep't 1996).

Determination that petitioner purchased and possessed marijuana while on meal break, within few blocks of his work location, was supported by substantial evidence where police officer testified that he received radio transmission from officer who saw described individual purchase marijuana, and that petitioner matched description and, when approached by several officers, admitted to having marijuana in his possession and was arrested after giving it to police. Garrison v New York City Hous. Auth., 234 A.D.2d 150, 650 N.Y.S.2d 735, 1996 N.Y. App. Div. LEXIS 12529 (N.Y. App. Div. 1st Dep't 1996).

It was proper to dismiss police officer for his possession and ingestion of marijuana. Adams v Police Dep't, 256 A.D.2d 28, 680 N.Y.S.2d 508, 1998 N.Y. App. Div. LEXIS 12915 (N.Y. App. Div. 1st Dep't 1998), app. denied, 93 N.Y.2d 818, 697 N.Y.S.2d 565, 719 N.E.2d 926, 1999 N.Y. LEXIS 2890 (N.Y. 1999).

Substantial evidence supported termination of police officer's employment, and penalty of dismissal did not shock Appellate Division's sense of fairness, where officer tested positive for marijuana, and there was no basis for his claim that his ingestion of marijuana was unknowing and involuntary. McGovern v Safir, 266 A.D.2d 107, 698 N.Y.S.2d 477, 1999 N.Y. App. Div. LEXIS 11680 (N.Y. App. Div. 1st Dep't 1999).

235. Extortion

Dismissal of police officers was appropriate sanction for extorting money from complainant by instilling fear that criminal charges for gun possession would be instituted should complainant not comply. Sangiuolo v Kelly, 221 A.D.2d 191, 633 N.Y.S.2d 162, 1995 N.Y. App. Div. LEXIS 11565 (N.Y. App. Div. 1st Dep't 1995), app. denied, 87 N.Y.2d 811, 644 N.Y.S.2d 144, 666 N.E.2d 1058, 1996 N.Y. LEXIS 642 (N.Y. 1996).

Dismissal of state trooper was appropriate sanction for his failing to surrender weapons for destruction (CLS Penal § 400.05(1)), committing larceny by extortion by using intimidation to obtain firearms (CLS Penal § 155.30(7)), and committing

second degree offering false instrument for filing (CLS Penal § 175.30), especially in light of his conflicting statements and conduct during investigation. Hricik v McMahon, 247 A.D.2d 935, 668 N.Y.S.2d 295, 1998 N.Y. App. Div. LEXIS 1320 (N.Y. App. Div. 4th Dep't 1998).

Police officer was properly dismissed for knowingly accepting cash payments representing proceeds of brothel business on behalf of his incarcerated brother, notwithstanding officer's prior unblemished record. Tsang v Safir, 256 A.D.2d 7, 680 N.Y.S.2d 518, 1998 N.Y. App. Div. LEXIS 12804 (N.Y. App. Div. 1st Dep't 1998).

236. Fraud; deceit

Punishment of dismissal was not so disproportionate as to be shocking to one's sense of fairness where petitioner was found guilty of charges involving deceitful actions that had negative impact on integrity of police department. Ruggio v Hammill, 207 A.D.2d 991, 616 N.Y.S.2d 842, 1994 N.Y. App. Div. LEXIS 10207 (N.Y. App. Div. 4th Dep't 1994).

Petitioner was properly discharged from his position as police officer based on evidence that, while off-duty, he violated department rules and regulations by engaging in scheme to defraud complainant by falsely representing that he would provide her with diamonds from Africa for manufacture and resale for profit, and in doing so he misappropriated $67,000 and assisted his girlfriend defraud complainant of $8,000. Folborg v Bratton, 227 A.D.2d 108, 641 N.Y.S.2d 656, 1996 N.Y. App. Div. LEXIS 4773 (N.Y. App. Div. 1st Dep't), app. denied, 88 N.Y.2d 812, 649 N.Y.S.2d 379, 672 N.E.2d 605, 1996 N.Y. LEXIS 2964 (N.Y. 1996).

Dismissal from service of a social investigator employed by the New York City Welfare Department was sustained for admitted violation of the Code of Ethics provisions of the Administrative Code in subleasing an unoccupied four-room apartment to tenants who were recipients of public assistance and one of whom was his own client and thereby receiving aggregate rent in better than double the maximum fixed by the State Rent Commission. Dover v Dumpson, 220 N.Y.S.2d 102 (N.Y. Sup. Ct. 1961).

237. Harboring fugitive

Petitioner was properly terminated from her employment as correction officer for city department of corrections based on evidence showing that she harbored fugitive wanted by New Jersey for 2 shotgun robberies and lied about her knowledge of fugitive's presence in her apartment when confronted by police seeking to execute arrest warrants for him there, notwithstanding fact that fugitive was petitioner's estranged husband and father of her 2 daughters, since if fugitive had in fact committed offenses with which he was charged, petitioner's actions would at least facially constitute crime of hindering prosecution, either Class A misdemeanor under CLS Penal § 205.55 or Class E felony under CLS Penal § 205.60. Fludd v Sielaff, 184 A.D.2d 362, 584 N.Y.S.2d 841, 1992 N.Y. App. Div. LEXIS 8149 (N.Y. App. Div. 1st Dep't 1992).

238. Perjury

Substantial evidence supported police commissioner's dismissal of police officer for knowingly giving false testimony to grand jury, even though officer argued that false testimony was not material to function of grand jury and should not have been considered perjurious, where officer had falsely testified that he saw suspect sell drugs in order to legitimize his search and arrest for drug possession and sale; officer's testimony was material to element of intent to sell, and met patrol guide's requirement that it be "knowingly" given. Police commissioner's dismissal of police officer for giving false testimony before grand jury (which led to a defendant's indictment) was not "so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness" since officer's offense clearly diminished his credibility and reflected on his integrity as police officer. Richardson v Ward, 159 A.D.2d 277, 552 N.Y.S.2d 279, 1990 N.Y. App. Div. LEXIS 2637 (N.Y. App. Div. 1st Dep't 1990).

Dismissal of police officer was appropriate sanction for having lied while under oath at judicial proceeding regarding suppression hearing to determine reasonableness of arresting officer's conduct, and for knowingly filing false statement with department to obtain merit award based on that arrest. Freyre v Ward, 161 A.D.2d 349, 555 N.Y.S.2d 102, 1990 N.Y. App. Div. LEXIS 5284 (N.Y. App. Div. 1st Dep't 1990).

Police officer was properly dismissed for knowingly making false statements, in police reports and grand jury testimony, that he was victim of gunpoint robbery of his fiancee's car when, in fact, car was simply stolen from street when officer left it double-parked with keys in ignition and engine running. Sweeney v Safir, 267 A.D.2d 99, 700 N.Y.S.2d 4, 1999 N.Y. App. Div. LEXIS 13026 (N.Y. App. Div. 1st Dep't 1999), app. denied, 95 N.Y.2d 753, 711 N.Y.S.2d 155, 733 N.E.2d 227, 2000 N.Y. LEXIS 1009 (N.Y. 2000).

Policeman's contention that disciplinary proceeding was not "criminal in nature" due to grand jury's failure to return indictment against him for lying during official police investigation, and thus that said disciplinary proceeding was barred by 3-year limitation prescribed by Civil Service Law § 75, subd 4, was without merit where facts alleged, if proven, would have established crime of perjury. Foran v Murphy, 73 Misc. 2d 486, 342 N.Y.S.2d 4, 1973 N.Y. Misc. LEXIS 2195 (N.Y. Sup. Ct. 1973).

239. Tax crime

Substantial evidence supported demotion of Assistant Director of Personal Tax Processing Bureau to lesser, nonsupervisory position where he was guilty of misconduct in willfully failing to timely file state personal income tax returns for 1993 and 1994 and federal personal income tax return for 1994, his conduct would be crime if proved in court, and to allow him to remain in his position after engaging in such conduct would undermine public's confidence in its officials. Miller v State Dep't of Taxation & Fin., 263 A.D.2d 604, 692 N.Y.S.2d 785, 1999 N.Y. App. Div. LEXIS 7704 (N.Y. App. Div. 3d Dep't 1999).

A fireman who was dismissed from his position following his conviction on 10 felony counts of offering a false instrument for filing and two misdemeanor counts of violating the Tax Law with respect to sales taxes on the fireman's private business would not be entitled to annulment of his dismissal on the basis of a certificate of relief from disabilities that was issued to him pursuant to Correc Law § 701, since, though criminal activity may form the basis for disciplinary action under Civ S Law § 75, such dismissal is discretionary rather than mandatory, and Correc L § 701 specifically provides that certificates issued pursuant to its terms will not prevent any administrative board from relying on the underlying convictions as a basis for exercising its discretion; furthermore, the fireman would not be entitled to reinstatement under the terms of Correc Law § 752, since the statute applies only to applications for a license or employment by persons previously convicted of crimes, and has no bearing on persons who are already licensed or employed. Pisano v McKenna, 120 Misc. 2d 536, 466 N.Y.S.2d 231, 1983 N.Y. Misc. LEXIS 3755 (N.Y. Sup. Ct. 1983).

240. Theft

Removal of a guard at an institution for defective delinquents on charges that he conspired with an inmate to steal property belonging to the institution must be set aside as against the weight of credible evidence, where the only testimony against the guard was that of one characterized as "a high grade moron" and this evidence was corroborated only indirectly by testimony of other mental defectives. Charles v Lyons, 263 A.D. 1027, 33 N.Y.S.2d 472, 1942 N.Y. App. Div. LEXIS 7944 (N.Y. App. Div. 1942).

Correction officer was properly dismissed where (1) she was arrested for, and convicted of, petit larceny, (2) she did not notify department of correction of arrest, and (3) on 3 separate occasions while on sick leave, she left her residence without permission and without notifying department. McDowell v Koehler, 159 A.D.2d 424, 553 N.Y.S.2d 116, 1990 N.Y. App. Div. LEXIS 3121 (N.Y. App. Div. 1st Dep't 1990).

Substantial evidence supported termination of petitioner's employment as site manager for town landfill and recycling center, on ground that he sold camper trailer from landfill for $90 and kept money for personal use, where (1) consent of town board for removal of trailer from landfill was never given, (2) petitioner admitted selling trailer but claimed that it was his property, (3) petitioner admitted that he never paid for trailer and that he

charged person who had dumped trailer for recycling, and (4) testimony of other witnesses supported determination that trailer was town property. Finigan v Lent, 189 A.D.2d 935, 592 N.Y.S.2d 818, 1993 N.Y. App. Div. LEXIS 82 (N.Y. App. Div. 3d Dep't), app. dismissed, 81 N.Y.2d 1067, 601 N.Y.S.2d 583, 619 N.E.2d 661, 1993 N.Y. LEXIS 1754 (N.Y. 1993), app. denied, 82 N.Y.2d 657, 604 N.Y.S.2d 47, 624 N.E.2d 177, 1993 N.Y. LEXIS 3294 (N.Y. 1993).

Dismissal of state trooper was appropriate sanction for violating state police regulation by committing petit larceny in violation of CLS Penal § 155.25. Moore v Constantine, 191 A.D.2d 769, 594 N.Y.S.2d 395, 1993 N.Y. App. Div. LEXIS 2120 (N.Y. App. Div. 3d Dep't 1993).

School district properly terminated petitioner's employment as maintainer for stealing video cassette recorder. Pesantes v Freund, 247 A.D.2d 391, 667 N.Y.S.2d 919, 1998 N.Y. App. Div. LEXIS 861 (N.Y. App. Div. 2d Dep't 1998).

241. —Food; food stamps

Dismissal of police officer found guilty of breaking into store, stealing food stamps, and failing to report fellow officers who did same in his presence was not sanction so disproportionate as to be shocking to sense of fairness. Scaturico v Ward, 159 A.D.2d 221, 552 N.Y.S.2d 24, 1990 N.Y. App. Div. LEXIS 2180 (N.Y. App. Div. 1st Dep't 1990).

It was proper to dismiss school custodian, whose position placed him in charge of night cleaning crew, where he aided and abetted another employee's theft of food from storage room, and he entered without authorization or permission into area of school not within his job possibilities (food storage room) on more than one occasion. Breu v Board of Educ., 215 A.D.2d 969, 627 N.Y.S.2d 165, 1995 N.Y. App. Div. LEXIS 5621 (N.Y. App. Div. 3d Dep't), app. denied, 86 N.Y.2d 708, 634 N.Y.S.2d 442, 658 N.E.2d 220, 1995 N.Y. LEXIS 3682 (N.Y. 1995).

Dismissal of school building custodian was appropriate sanction for his participation in theft of food items from locked area of school cafeteria. Sanchez v Board of Educ., 216 A.D.2d 303, 627 N.Y.S.2d 741, 1995 N.Y. App. Div. LEXIS 5923 (N.Y. App. Div. 2d Dep't 1995).

242. —Money

Evidence given by an informer that bridge officers (veterans) employed by the Triborough Bridge and Tunnel Authority had bought unused and misappropriated toll tickets at half price and substituted them for money due for collections was sufficient to sustain finding of misconduct but the petitioners were entitled to a new hearing where they had been denied right of counsel. Fusco v Moses, 304 N.Y. 424, 107 N.E.2d 581, 304 N.Y. (N.Y.S.) 424, 1952 N.Y. LEXIS 757 (N.Y. 1952).

Penalty of dismissal was not abuse of transit authority's discretion in view of determination that token booth collector had made unauthorized hand collections and converted $260 in transit authority funds to her own use. Brathwaite v Gunn, 125 A.D.2d 305, 508 N.Y.S.2d 589, 1986 N.Y. App. Div. LEXIS 62567 (N.Y. App. Div. 2d Dep't 1986).

Evidence supported transit authority's finding that bus driver made illegal sales of bus transfers to paid informant where transit police officer testified that she observed informant converse with driver, enter bus after all passengers had disembarked, and give money to driver in exchange for tickets that looked like bus transfers, and that, on exiting bus, informant gave her 3 books of bus transfers whose serial numbers matched those specifically issued to driver; although informant did not testify at administrative hearing, testimony corroborated informant's prior inculpatory testimony at bus driver's criminal trial based on same sales transactions. It was not abuse of discretion for transit authority to discharge bus driver who made illegal sales of bus transfers to paid informant. Duran v Gunn, 135 A.D.2d 628, 522 N.Y.S.2d 207, 1987 N.Y. App. Div. LEXIS 52565 (N.Y. App. Div. 2d Dep't 1987).

Court would dismiss Article 78 petition to review fire commissioner's finding that fire prevention inspector was guilty of misconduct since determination was supported by inspector's plea of guilty to criminal charge of attempted receipt of unlawful gratuities and by his admission at his plea allocution that he was in fact guilty; inspector's guilty plea was properly given collateral estoppel effect, and thus administrative law judge properly refused to receive evidence offered by him to show that he did not receive any unlawful gratuity. Meades v Spinnato, 138 A.D.2d 579, 526 N.Y.S.2d 161, 1988 N.Y. App. Div. LEXIS 3136 (N.Y. App. Div. 2d Dep't 1988).

Police officers were properly dismissed for failing to conduct proper investigation following reported disturbance at apartment where (1) on entering apartment, officers met unidentified male, whom they allowed to leave, (2) search of apartment produced drugs and unaccounted amount of money, (3) officers allowed other tenants and building superintendent to take some money, and (4) officers also pocketed money found in apartment. Eberhart v Ward, 161 A.D.2d 396, 555 N.Y.S.2d 329, 1990 N.Y. App. Div. LEXIS 5564 (N.Y. App. Div. 1st Dep't 1990).

Court would affirm dismissal of police officers, despite hearing officer's refusal to allow further cross-examination as to one complainant's drug and weapon conviction, and despite inconsistencies in testimony of both complaining witnesses, where substantial evidence supported determination that officers, having responded to radio run of drugs being sold, encountered complainants who were engaged in gambling activity and took money from them at gunpoint. Diaz v Ward, 181 A.D.2d 594, 581 N.Y.S.2d 1000, 1992 N.Y. App. Div. LEXIS 4021 (N.Y. App. Div. 1st Dep't 1992).

Substantial evidence supported New York City Housing Authority's finding that petitioner stole money from suspected drug dealers on 2 occasions and committed 4 other internal regulation violations, where victims testified that petitioner took their money while holding gun to them, investigating officer testified that petitioner failed to make required memo book recordings of incidents, and petitioner admitted facts establishing internal regulation violations; penalty of dismissal was not disproportionate. Acosta v New York City Hous. Auth., 236 A.D.2d 337, 655 N.Y.S.2d 333, 1997 N.Y. App. Div. LEXIS 1666 (N.Y. App. Div. 1st Dep't), app. denied, 90 N.Y.2d 808, 664 N.Y.S.2d 270, 686 N.E.2d 1365, 1997 N.Y. LEXIS 3126 (N.Y. 1997).

It was proper to dismiss police officer who wrongfully solicited money from 2 rabbis for engaging in required official conduct, failed to voucher money thus obtained, and who had information relative to corruption involving member of police force and failed to report it. Brovakos v Bratton, 254 A.D.2d 32, 678 N.Y.S.2d 21, 1998 N.Y. App. Div. LEXIS 9935 (N.Y. App. Div. 1st Dep't 1998).

Dismissal of police officer was appropriate based on her having stolen money seized at illegal gambling location during police raid. Renna v Safir, 256 A.D.2d 219, 683 N.Y.S.2d 18, 1998 N.Y. App. Div. LEXIS 13756 (N.Y. App. Div. 1st Dep't 1998).

243. Sex crime

Police officer was properly dismissed on finding that he patronized prostitute in violation of police department patrol guide. McDonald v Safir, 254 A.D.2d 234, 679 N.Y.S.2d 60, 1998 N.Y. App. Div. LEXIS 11401 (N.Y. App. Div. 1st Dep't 1998), app. denied, 92 N.Y.2d 819, 685 N.Y.S.2d 421, 708 N.E.2d 178, 1999 N.Y. LEXIS 2059 (N.Y. 1999).

It was appropriate to dismiss town chief of police for conduct unbecoming police officer involving his unprovoked, unwelcome, and unwarranted sexual advances, sexual contact, and demeaning comments of sexual nature directed at 2 present or former town employees and against 2 female town residents. Wade v Town of Ticonderoga Town Bd., 256 A.D.2d 860, 681 N.Y.S.2d 833, 1998 N.Y. App. Div. LEXIS 13566 (N.Y. App. Div. 3d Dep't 1998), app. denied, 93 N.Y.2d 804, 689 N.Y.S.2d 16, 711 N.E.2d 201, 1999 N.Y. LEXIS 742 (N.Y. 1999).

Court upheld dismissal of petitioner from his employment as New York City police officer based on gravity of his offense of soliciting sex for money from person he believed to be prostitute, and his prior disciplinary history. Di Giovanni v Safir, 277 A.D.2d 36, 715 N.Y.S.2d 312, 2000 N.Y. App. Div. LEXIS 11297 (N.Y. App. Div. 1st Dep't 2000).

Although the conduct that led to a police officer's conviction of endangering the welfare of a child, a misdemeanor, involved sex with a 16-year-old, the offense could be committed without the commission of any sexual or violent acts, so the offense was not a

misdemeanor that resulted in the automatic termination of public employment; therefore, the officer was to be reinstated, with back pay, pending the holding of a due process hearing. Feola v Carroll, 25 A.D.3d 697, 810 N.Y.S.2d 92, 2006 N.Y. App. Div. LEXIS 719 (N.Y. App. Div. 2d Dep't), app. dismissed, 6 N.Y.3d 891, 817 N.Y.S.2d 625, 850 N.E.2d 672, 2006 N.Y. LEXIS 1352 (N.Y. 2006), rev'd, 10 N.Y.3d 569, 860 N.Y.S.2d 457, 890 N.E.2d 219, 2008 N.Y. LEXIS 1476 (N.Y. 2008).

Termination of a therapist after a finding of misconduct was proper, and was supported by substantial evidence which included the therapist's admission that he had been arrested for soliciting a minor, and plea minutes from a court hearing during which the therapist admitted that he had offered to engage in sexual intercourse and sexual activity with a 13-year-old girl for money; the hearing officer sustained the charge and recommended that the therapist be terminated from his employment, noting, inter alia, that his duties could bring him into unsupervised contact with minors. Matter of Furtado v Israel, 49 A.D.3d 644, 854 N.Y.S.2d 434, 2008 N.Y. App. Div. LEXIS 2159 (N.Y. App. Div. 2d Dep't 2008).

Mayor erred in terminating a firefighter for masturbating before an open window in his apartment, as he could be found guilty of misconduct only if he engaged in lewd conduct with the intent to be seen by members of the public (N.Y. Penal Law § 245.00), and he denied without contradiction that he intended to be witnessed by others. Matter of Rauschmeier v Village of Johnson City, 91 A.D.3d 1080, 937 N.Y.S.2d 373, 2012 N.Y. App. Div. LEXIS 139 (N.Y. App. Div. 3d Dep't), app. denied, 19 N.Y.3d 802, 946 N.Y.S.2d 104, 969 N.E.2d 221, 2012 N.Y. LEXIS 923 (N.Y. 2012).

244. —Sodomy

A nonveteran city civil engineer was properly dismissed on charges (1) that he had committed crime of sodomy and (2) that he had been late and absent. The lower courts had refused to disturb dismissal although sodomy indictment was dismissed (278 AD 907, 105 S2d 902). The dismissal was affirmed over a claim that the hearing officer was prejudiced and prejudged petitioner's case. Lateness charge was sustained by evidence of tardiness on 28 days out of four months. Berman v Gillroy, 305 N.Y. 688, 112 N.E.2d 771, 305 N.Y. (N.Y.S.) 688, 1953 N.Y. LEXIS 1229 (N.Y.), reh'g denied, 305 N.Y. 797, 113 N.E.2d 305, 305 N.Y. (N.Y.S.) 797, 1953 N.Y. LEXIS 1303 (N.Y. 1953), cert. denied, 347 U.S. 921, 74 S. Ct. 521, 98 L. Ed. 1076, 1954 U.S. LEXIS 2396 (U.S. 1954).

Substantial evidence supported determination that police officer was guilty of various charges and specifications where eyewitness testified that officer attempted to utilize his position as officer to solicit oral sex at massage parlor and, when rebuffed, had gone on drunken rampage with his companions, which included urinating on table containing food, and damaging walls, doors and light fixtures. Boyce v Ward, 158 A.D.2d 319, 551 N.Y.S.2d 7, 1990 N.Y. App. Div. LEXIS 1227 (N.Y. App. Div. 1st Dep't 1990).

Substantial evidence supported determination of police commissioner dismissing petitioner from force where petitioner's handgun was stolen from his apartment and used in subsequent bank robberies, petitioner engaged prostitute to perform oral sex and then consummated transaction, and petitioner failed to take action against prostitute; hearing officer properly found petitioner's claims—that he and prostitute were friends and that he made payments solely out of friendship—were incredible. Ruiz v Brown, 179 A.D.2d 543, 579 N.Y.S.2d 47, 1992 N.Y. App. Div. LEXIS 662 (N.Y. App. Div. 1st Dep't 1992).

245. Threatening witnesses

Dismissal of police officer found guilty of possessing forged parking permits, threatening witness and her family, knowingly making inaccurate entries in his activity log regarding number of summonses he had issued, and wrongfully driving his private automobile while in uniform, was not sanction so disproportionate to offense as to be shocking to sense of fairness. Suggs v Ward, 159 A.D.2d 381, 552 N.Y.S.2d 636, 1990 N.Y. App. Div. LEXIS 2928 (N.Y. App. Div. 1st Dep't 1990).

246. Trespass

Substantial evidence supported determination by commissioner of public safety and chief of police that police officer had unlawfully attempted to gain entrance to apartment in Florida with lock picks, and that he possessed lock picks with intention to use them to commit trespass, even though occupant of apartment testified that officer had permission to enter apartment, since police recording of her telephone complaint and testimony of Florida police indicated otherwise. Substantial evidence supported determination by commissioner of public safety and chief of police that police officer lied to professional standards section of police department during formal investigation of his arrest in Florida for unlawfully attempting to gain entry to apartment where (1) record showed that officer told police investigator that he did not possess lock picks on day of arrest and had not previously secluded himself in closet of complainant, but (2) record showed that Florida police saw officer attempt to gain entry to apartment with lock picks and took lock picks from officer, and that officer admitted to 2 witnesses that he had entered complainant's apartment without her knowledge and secluded himself in her closet. Donofrio v Rochester, 144 A.D.2d 1027, 534 N.Y.S.2d 630, 1988 N.Y. App. Div. LEXIS 14594 (N.Y. App. Div. 4th Dep't 1988), app. denied, 73 N.Y.2d 708, 540 N.Y.S.2d 1003, 538 N.E.2d 355, 1989 N.Y. LEXIS 320 (N.Y. 1989).

247. Wagering

Commissioner of New York City Department of Environmental Protection acted reasonably within scope of his authority in terminating employee from city service for illegally collecting football bets while on duty at sewage treatment plant outside city, despite severity of penalty in light of his length of service and effect of losing his accumulated pension benefits, since penalty was not disproportionate to offense given notoriety of employee's activities in small community, their independent illegality, and their tendency to bring disrepute to agency. Ivory v New York, Dep't of Envtl. Prot., 125 A.D.2d 217, 509 N.Y.S.2d 25, 1986 N.Y. App. Div. LEXIS 62492 (N.Y. App. Div. 1st Dep't 1986), app. denied, 70 N.Y.2d 602, 518 N.Y.S.2d 1024, 512 N.E.2d 550, 1987 N.Y. LEXIS 17395 (N.Y. 1987).

Court would affirm dismissal of police officers, despite hearing officer's refusal to allow further cross-examination as to one complainant's drug and weapon conviction, and despite inconsistencies in testimony of both complaining witnesses, where substantial evidence supported determination that officers, having responded to radio run of drugs being sold, encountered complainants who were engaged in gambling activity and took money from them at gunpoint. Diaz v Ward, 181 A.D.2d 594, 581 N.Y.S.2d 1000, 1992 N.Y. App. Div. LEXIS 4021 (N.Y. App. Div. 1st Dep't 1992).

248. Weapon-related crime

Penalty of dismissal was not so disproportionate to police officer's offenses as to be shocking to one's sense of fairness where officer, while off duty, wrongfully carried .45 caliber automatic firearm and threatened individual therewith, and officer had unsatisfactory employment record. Cocozzo v Ward, 162 A.D.2d 202, 556 N.Y.S.2d 328, 1990 N.Y. App. Div. LEXIS 7084 (N.Y. App. Div. 1st Dep't 1990).

Deputy sheriff should not be dismissed, but rather should be subject to maximum allowable penalty short of dismissal, on findings that he pointed unloaded service revolver at fellow officer's stomach, left his assigned post unattended, violated written directive not to leave one's post, and exercised inappropriate behavior and judgment; although deputy's transgressions were serious and full of potential for harm, they did not warrant dismissal given facts that it quickly became apparent that gun was empty and that deputy's actions were ill-advised horseplay, there were no negative ramifications from his leaving post, and deputy had prior clean record. Blatt v Wasser, 172 A.D.2d 971, 568 N.Y.S.2d 488, 1991 N.Y. App. Div. LEXIS 4585 (N.Y. App. Div. 3d Dep't 1991).

Court would affirm dismissal of police officers, despite hearing officer's refusal to allow further cross-examination as to one complainant's drug and weapon conviction, and despite inconsistencies in testimony of both complaining witnesses, where substantial evidence supported determination that officers, having responded to radio run of drugs being sold, encountered complainants who were engaged in gambling activity and took money from them at gunpoint. Diaz v Ward, 181 A.D.2d 594, 581 N.Y.S.2d

1000, 1992 N.Y. App. Div. LEXIS 4021 (N.Y. App. Div. 1st Dep't 1992).

Substantial evidence supported determination that petitioner violated rules and regulations of county police department by engaging in "conduct unbecoming an officer" and "illegal conduct" warranting his dismissal from force where he created grave risk of serious bodily injury or death by instigating confrontation at bar, drawing loaded weapon and pointing it at one or more persons while threatening to shoot. Diaz v Rozzi, 199 A.D.2d 1081, 607 N.Y.S.2d 503 (N.Y. App. Div. 4th Dep't 1993).

Suspension of police officer for 30 days and placing him on disciplinary probation for one year was appropriate sanction for wrongfully pointing his firearm at 2 civilians without just cause. McKernan v Kelly, 216 A.D.2d 17, 627 N.Y.S.2d 634, 1995 N.Y. App. Div. LEXIS 6027 (N.Y. App. Div. 1st Dep't 1995).

Dismissal of transit authority police officer was not disproportionate penalty, although he had no prior disciplinary record, where he threatened to kill civilian while off-duty and improperly pointed his off-duty handgun at another civilian, he possessed unregistered handgun, he left both handguns in trunk of his car, he was convicted of menacing and fined $500, and he made false statements about incident to Internal Affairs Unit. Brooks v Suardy, 222 A.D.2d 502, 635 N.Y.S.2d 74, 1995 N.Y. App. Div. LEXIS 12731 (N.Y. App. Div. 2d Dep't 1995).

It was excessive to dismiss police sergeant on ground that he twice sold and registered false firearms training certificates while engaged in unauthorized off-duty employment where he was 29-year veteran with unblemished disciplinary record, he had been awarded numerous exemplary service medals, individuals to whom training certificates were sold were all then currently licensed to carry firearms, as well as qualified for certificates in all other respects, and dismissal would result in complete divestiture of sergeant's pension. Kelly v Safir, 271 A.D.2d 326, 706 N.Y.S.2d 113, 2000 N.Y. App. Div. LEXIS 4396 (N.Y. App. Div. 1st Dep't 2000), modified, 96 N.Y.2d 32, 724 N.Y.S.2d 680, 747 N.E.2d 1280, 2001 N.Y. LEXIS 566 (N.Y. 2001).

Substantial evidence supported dismissal of police officer where, in course of traffic-related altercation while off duty, he deliberately aimed and fired his weapon at complainant's vehicle. Kissoon v Safir, 273 A.D.2d 180, 711 N.Y.S.2d 722, 2000 N.Y. App. Div. LEXIS 7474 (N.Y. App. Div. 1st Dep't 2000).

Notes to Unpublished Decisions

Analysis

I. Hearings and Other Procedural Matters
A. Hearing Participants
1. Town or village police officers

I. Hearings and Other Procedural Matters

A. Hearing Participants

1. Town or village police officers

Unpublished decision: Because no plaintiff seasonal police officer was employed "continuously" for a five year period, N.Y. Civ. Serv. Law § 75(1)(c) provided no support for claims that plaintiffs were entitled to due process. Carter v Inc. Vill. of Ocean Beach, 415 Fed. Appx. 290, 2011 U.S. App. LEXIS 5464 (2d Cir. N.Y. 2011), cert. denied, 566 U.S. 1034, 132 S. Ct. 2710, 183 L. Ed. 2d 68, 2012 U.S. LEXIS 4282 (U.S. 2012).

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I. Generally

1. Construction

2. —With other legislation

A Village Board of Trustees may establish a village manager form of government under §§ 18-1820 et seq. of the Village Law or under § 10 of the Municipal Home Rule Law. Questions such as permissive or mandatory referendum, civil service status of manager, and delegation of authority by Village Board of Trustees, may arise under either method depending upon procedure selected. 1990 N.Y. Op. Att'y Gen. No. I90-25.

A village may not adopt a local law, ordinance or other rule which will vary provisions of Section 75 of the Civil Service Law, or Sections 70 and 84 of the Retirement and Social Security Law, relating to the retirement or termination of service of its employees. 1964 Op St Compt File #836.

II. Hearings and Other Procedural Matters

A. Hearing Participants

3. Hearing officers

4. —Disqualification, generally

In a disciplinary proceeding brought before the Common Council of the City on complaint of the Mayor against a City employee where hearings on the charges were held by the Common Council, with the Alderman-at-Large acting as presiding officer, the fact that one or two members of the Council did not attend all the hearings, does not in and of itself disqualify the Council from

making a decision based on sufficient proof. 1965 NY Ops Atty Gen Aug 25.

Board of Municipal Housing Authority may not pay one of its members to conduct hearing under CLS Civ S § 75 if payment, when added to other compensation, exceeds statutory compensation limit. 1998 NY Ops Atty Gen I 98-31.

2. Particular Employees

5. In general

Transfer tax appraisers appointed by the comptroller may be removed by him at his pleasure. 1915 N.Y. Op. Att'y Gen. No. 8.

6. Employees of state hospital, training center and the like

7. —Town or village police officers

Village in Westchester County could amend provisions of Unconsolidated Laws governing discipline of police officers to transfer responsibility for making disciplinary determinations from board of trustees to some other officer; local law was subject to mandatory referendum. 1998 NY Ops Atty Gen I 98-7.

Discussion of applicability of Civil Service Law, § 75 and Town Law, § 155 to a disciplinary hearing involving a town police officer who has competitive civil service status. 1978 Op St Compt File #1003.

8. Town or village non-police employees

An employee of a town highway department, to whom section 75 of the Civil Service Law is applicable, may not be summarily dismissed from his employment by the highway superintendent. 1969 Op St Compt File #230.

B. Other Procedural Matters

9. In general

The mayor of a village appoints the village attorney subject to the approval of the board of trustees. Upon a failure to appoint a village attorney, the incumbent continues to carry out the duties of the position. N.Y. Op. Att'y Gen. No. 83-31.

10. Settlement of claim

There is no prohibition against a village board of trustees removing a reprimand from an employee's personnel file that had been placed there in settlement of charges against the employee. 1981 NY Ops Atty Gen Feb 24 (informal).

III. Applicability To Particular Classifications

11. Competitive positions

The purchasing agent of a city who occupies his office as the result of a competitive civil service examination, and is not a term appointee, can be removed only pursuant to the procedure prescribed in this section, notwithstanding the adoption of a new city charter. 1960 NY Ops Atty Gen Jan 18 (informal).

A police officer holding a position by permanent appointment in the competitive class of the civil service may not be denied an automatic pay increment except after notice of charges and a hearing in accordance with section 75 of the Civil Service Law. The penalties which may be assessed upon a finding of guilt are those specified in section 75. 1981 NY Ops Atty Gen March 12 (informal).

A physician employed by a county hospital who occupies a position in the competitive class of the civil service may be removed or disciplined only in accordance with the provisions of sections 75 and 76 of the Civil Service Law, or in accordance with an alternate procedure provided by an agreement between the employees' union and management under the Taylor Law. 1981 NY Ops Atty Gen Aug 26 (Informal).

Deputy sheriffs who are in the competitive class of the civil service are not required to file successive oaths of office subsequent to each election of a sheriff. N.Y. Op. Att'y Gen. No. 84-2.

An employee carried under the competitive class of civil service may be suspended without pay for a period of thirty days. If the suspension continues beyond thirty days and the employee is ready, willing and able to work the employer must pay the employee's salary. If the charges are dismissed, the employee is entitled to payment of his salary during the thirty-day suspension. 1967 Op St Compt File #851.

12. Independent officers, generally

A Village Board of Trustees may establish a village manager form of government under §§ 18-1820 et seq. of the Village Law or under § 10 of the Municipal Home Rule Law. Questions such as permissive or mandatory referendum, civil service status of manager, and delegation of authority by Village Board of Trustees, may arise under either method depending upon procedure selected. 1990 N.Y. Op. Att'y Gen. No. I90-25.

13. Laborers

With the exception of laborers, outside of city service, persons in exempt positions may be summarily removed without preferring charges or holding a hearing, even where they are veterans. 1923 N.Y. Op. Att'y Gen. No. 216.

The provisions of par. (b) of this section apply to the position of "laborer," and a person described in either par. (a) or (b) may not ordinarily be suspended before receiving written notice thereof stating the reasons and giving the charges preferred against him. 1964 NY Ops Atty Gen Mar 18.

14. Non-competitive positions

Subd. 2 of this section does not give the power to a superintendent of an institution under the control of the mental hygiene department to fine, suspend or demote a non-competitive employee who has been in the service six months. 1941 NY Ops Atty Gen Oct. 24.

County Veterans' Service Agency Directors are appointed and removed in accordance with the provisions of Executive Law, § 357(1). The director in each county of the state has been classified as a non-competitive service with the exception of the County of Erie, where the director is unclassified, and Westchester, where the director is in the exempt service. Each Director of a County Veterans' Service Agency is an independent officer and is not protected against removal pursuant to Civil Service Law, § 75 even though he be an honorably discharged veteran or an exempt volunteer fireman. To the extent that County Veterans' Service Agency Directors are classified in non-competitive service, the inquiry is academic. 1974 NY Ops Atty Gen Nov 29.

15. Probationary employees, generally

A probationary employee may be dismissed during his probation period without a hearing on stated charges, provided written notice of at least one week is given prior to expiration of termination of the probationary term. 1964 NY Ops Atty Gen Jan 17.

A county board of supervisors may appoint a county superintendent of highways on a probationary basis. 1982 NY Ops Atty Gen No. 82–55 (Informal), 1982 N.Y. AG LEXIS 46.

16. Subordinate employees, generally

17. —Specific subordinate employees

A town board may establish the specific responsibilities of town constables. The board may set the conditions and procedures for the dismissal or discipline of town constables, subject to the possible applicability of provisions of the Civil Service Law and collective bargaining agreements negotiated under the Taylor Law. 1982 NY Ops Atty Gen Sept. 7 (informal).

18. Unclassified positions

A Village Board of Trustees may establish a village manager form of government under §§ 18-1820 et seq. of the Village Law or under § 10 of the Municipal Home Rule Law. Questions such as permissive or mandatory referendum, civil service status of manager, and delegation of authority by Village Board of Trustees, may arise under either method depending upon procedure selected. 1990 N.Y. Op. Att'y Gen. No. I90-25.

A fire chief who is in the unclassified service is not entitled to the protection afforded by section 75(1)(b) of the Civil Service Law. N.Y. Op. Att'y Gen. No. 85-18.

IV. Veteran's And Volunteer Firemen's Rights

19. In general

Applicability of provision, protecting veterans and exempt volunteer firemen against removal from their positions without hearings based on charges discussed. 1955 NY Ops Atty Gen Jan 31.

20. Construction; honorably discharged member of armed forces

An honorably discharged member of National Guard, who was in service under call of the President during the world war, is

entitled to the protection of this section. 1920 N.Y. Op. Att'y Gen. No. 131.

21. Effect of non-residence

Nonresidence of a veteran in New York State at the time of entering military service does not preclude him from the protection afforded veterans under § 75. 1962 NY Ops Atty Gen May 31.

22. Particular positions

23. —Law enforcement officers

A constable serves during the pleasure of the town board by which he is appointed. Town board's power to remove constables in exempt class, who are veterans or exempt volunteer firemen, is limited by this section. 1953 Op St Compt File #6079.

24. Veterans; hearing rights

The retention of veterans after the expiration of the probationary term is not required and no hearing is necessary. 1921 N.Y. Op. Att'y Gen. No. 64.

25. Volunteer firemen

The superintendent of an asylum, having served a term in a volunteer fire department, cannot be discharged by the board except after a hearing. 1909 N.Y. Op. Att'y Gen. No. 852.

V. Sanctions

A. Generally

26. In general

A Village Board of Trustees may establish a village manager form of government under §§ 18-1820 et seq. of the Village Law or under § 10 of the Municipal Home Rule Law. Questions such as permissive or mandatory referendum, civil service status of manager, and delegation of authority by Village Board of Trustees, may arise under either method depending upon procedure selected. 1990 N.Y. Op. Att'y Gen. No. I90-25.

27. Collective bargaining agreement

28. —Taylor Law

An agreement between a local government and an employee organization under the Taylor Law may include provisions on discipline and removal that supplement, modify or replace sections 75 and 76 of the Civil Service Law. An employee represented by such an employee organization would, through the organization's assent to the agreement, waive his rights under sections 75 and 76. 1981 NY Ops Atty Gen Dec. 31.

B. Grounds For Dismissal

i. Generally

29. Age

Persons continued in service after attaining age seventy may be removed during such continuance only in accordance with § 22. Approval of continuance by State Commission on Pensions must be for a definite period. 1954 NY Ops Atty Gen Dec 7.

In the absence of a local regulation mandating retirement of public employees at age 70, the assistance chief of the City of Fulton fire department cannot be summarily retired, terminated or discharged upon his reaching age 70, and may be removed from his position only upon a showing of incompetence or misconduct under sections 75 and 76 of the Civil Service Law. N.Y. Op. Att'y Gen. No. 83-70.

30. Incompetence, generally

Village may require its police officers to obtain certification in breathalyzer or radar testing, even though those certifications were not part of job description at time officers obtained permanent civil service status. 1986 N.Y. Op. Att'y Gen. No. 86-25.

ii. Criminal Misconduct

31. In general

If the employee is convicted of a crime, the employer may summarily discharge the employee. 1967 Op St Compt File #851.

While a public officer, including one who may otherwise be removed only pursuant to the Civil Service Law, automatically forfeits his office upon conviction of a felony, or a crime involving a violation of his oath of office, a municipal employee may not be similarly dismissed upon such a conviction, but, rather, may be removed only pursuant to a hearing under the Civil Service Law. 1975 Op St Compt File #643.

32. Bribery

This section governs procedure to be used for removal of an employee who was convicted of bribery for acts committed before he became an employee in the competitive service. 1960 NY Ops Atty Gen Aug 23 (informal).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 76., 80-a., 131.

Former section 22 from which this section derived referred to in CLS Rap Tr § 14.; CLS Unconsol ch 47 § 2, ch 80, § 15.

Federal Aspects:

Actions based on unacceptible performance, 5 USCS § 4303.

Management Rights concerning discipline of federal competitive service employees, 5 USCS § 7106.

Jurisprudences:

15A Am Jur 2d, Civil Service §§ 24.– 30., 32 et seq.

63C Am Jur 2d, Public Officers and Employees § 442.

4 Am Jur Legal Forms 2d, Civil Service, Forms 57:11.– 57:13.

15 Am Jur Legal Forms 2d, Public Employees, Forms 210:41.– 210:48.

5B Am Jur Pl & Pr Forms (Rev), Civil Service, Forms 11.– 19.

Law Reviews:

Osterman & Austin, New York State's disciplinary arbitration procedure. 47 NYSBJ 181.

Mann, The Taylor Law: strike penalties and strikes. 51 NYSBJ 118., 191.

Treatises

Matthew Bender's New York Civil Practice: 6 Cox, Arenson, Medina, New York Civil Practice: SCPA ¶¶ 2604.04., 2605.01.

Matthew Bender's New York Practice Guides: 4 New York Practice Guide: Business and Commercial §§ 25.05., 25.22., 26.05., 26.20., 26.21.

Annotations:

Removing or discharging public officer or employee for assertion of privilege against self-incrimination as violation of his federal constitutional rights—federal cases. 17 L Ed 2d 1131.

Texts: New York Insurance Law (Matthew Bender's New York Practice Series) § 2.01[2], [3][a].

§ 76. Appeals from determinations in disciplinary proceedings

1. Appeals. Any officer or employee believing himself aggrieved by a penalty or punishment of demotion in or dismissal from the service, or suspension without pay, or a fine, or an official reprimand, unaccompanied by a remittance of said officer or employee's prehearing suspension without pay, imposed pursuant to the provisions of section seventy-five of this chapter, may appeal from such determination either by an application to the state or municipal commission having jurisdiction, or by an application to the court in accordance with the provisions of article seventy-eight of the civil practice law and rules. If such person elects to appeal to such civil service commission, he shall file such appeal in writing within twenty days after service of written notice of the determination to be reviewed, such written notice to be delivered personally or by registered mail to the last known address of such person and when notice is given by registered mail,

such person shall be allowed an additional three days in which to file such appeal.

2. Procedure on appeal. Where appeal is taken to the state or municipal commission having jurisdiction, such commission shall review the record of the disciplinary proceeding and the transcript of the hearing, and shall determine such appeal on the basis of such record and transcript and such oral or written argument as the commission may determine. The commission may direct that such appeal shall be heard by one or more members of the commission or by a person or persons designated by the commission to hear such appeal on its behalf, who shall report thereon with recommendations to the commission. Upon such appeal the commission shall permit the employee to be represented by counsel.

3. Determination on appeal. The determination appealed from may be affirmed, reversed, or modified, and the state or municipal commission having jurisdiction may, in its discretion, direct the reinstatement of the appellant or permit the transfer of such appellant to a vacancy in a similar position in another division or department, or direct that his name be placed upon a preferred list pursuant to section eighty-one of this chapter. In the event that a transfer is not effected, the commission is empowered to direct the reinstatement of such officer or employee. An employee reinstated pursuant to this subdivision shall receive the salary or compensation he would have been entitled by law to have received in his position for the period of removal including any prior period of suspension without pay, less the amount of any unemployment insurance benefits he may have received during such period. The decision of such civil service commission shall be final and conclusive, and not subject to further review in any court.

4. Nothing contained in section seventy-five or seventy-six of this chapter shall be construed to repeal or modify any general, special or local law or charter provision relating to the removal or suspension of officers or employees in the competitive class of the civil service of the state or any civil division. Such sections may be supplemented, modified or replaced by agreements negotiated between the state and an employee organization pursuant to article fourteen of this chapter. Where such sections are so supplemented, modified or replaced, any employee against whom charges have been preferred prior to the effective date of such supplementation, modification or replacement shall continue to be subject to the provisions of such sections as in effect on the date such charges were preferred.

HISTORY:

Add, L 1958, ch 790, § 1, eff April 1, 1959, with substance transferred from former § 22(3); amd, L 1962, ch 310, § 68; L 1964, ch 626, § 1; L 1969, ch 721, § 1; L 1970, ch 458, § 1; L 1972, ch 283, § 1, eff May 15, 1972; L 1985, ch 851, § 1, eff Aug 2, 1985; L 1985, ch 852, § 1, eff Aug 2, 1985.

Prior Law: Former § 76, add, L 1947, ch 841, with substance transferred from §§ 63, 68-a; amd, L 1948, ch 503, L 1950, ch 734, § 6, L 1954, ch 118, §§ 6, 7, 8; repealed, L 1955, ch 687, eff July 1, 1956, with substance transferred to Retire. & SS L § 75.

Prior § 76, add, L 1922, ch 591; amd, L 1938, ch 722, L 1942, ch 891; repealed, L 1947, ch 841, eff July 1, 1948, with substance transferred to §§ 54, 55, 60.

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I. Generally

1. In general

The New York City Personnel Director had standing to maintain an Article 78 proceeding challenging decisions of the New York City Civil Service Commission awarding veterans' preference credits to police officers who, as Armed Forces reservists, were summoned to active duty to help maintain mail service during a postal workers' strike that occurred during the Vietnam hostilities, but were released a few hours later because of their essential civilian occupations, since the Personnel Director has both policy-making authority and functional responsibility for civil service matters in New York City under Civ S Law § 15(4), since the only powers reserved to the Commission are those of an appeals board under Civ S Law § 76, and since the fact that the Commission may serve as an appeals board for the Personnel Director's determinations did not preclude him from seeking review of those decisions by which he was aggrieved. New York v City Civil Service Com., 60 N.Y.2d 436, 470 N.Y.S.2d 113, 458 N.E.2d 354, 1983 N.Y. LEXIS 3504 (N.Y. 1983), reh'g denied, 61 N.Y.2d 759, 472 N.Y.S.2d 1029, 1984 N.Y. LEXIS 7233 (N.Y. 1984).

CLS Civ S § 76 deals exclusively with appeals and has no relevance to effective date of termination from employment for purpose of determining whether pension has vested under NYC Admin Code § 13-173.1; date of effectiveness of determination is distinct from date on which determination becomes final for purposes of statute of limitations or appeal. Waldeck v New York City Employees' Retirement Sys., 81 N.Y.2d 804, 595 N.Y.S.2d 374, 611 N.E.2d 275, 1993 N.Y. LEXIS 83 (N.Y. 1993).

An award of a public arbitration panel which, inter alia, granted a police association's demand as to disciplinary procedures was in excess of its power and was properly vacated where, while under the Taylor law discipline is a permissible subject of negotiation between public employers and employee associations, the Taylor law was inapplicable pursuant to Civ S Law § 76, since local law provided that the town board's authority to suspend an officer without pay and its obligation to try disciplinary charges were not subject to collective bargaining. In re Greenburgh, 94 A.D.2d 771, 462 N.Y.S.2d 718, 1983 N.Y. App. Div. LEXIS 18229 (N.Y. App. Div. 2d Dep't), app. denied, 60 N.Y.2d 551, 1983 N.Y. LEXIS 5495 (N.Y. 1983).

Public employee who initially files notice of appeal under CLS Civ Serv § 76, but shortly thereafter commences Article 78 proceeding has not irrevocably elected to pursue administrative appeal process and may be allowed to withdraw notice of administrative appeal where no steps have been taken to pursue administrative appeal other than filing of letter of intent to appeal. Haney v County of Sullivan, 118 A.D.2d 896, 499 N.Y.S.2d 460, 1986 N.Y. App. Div. LEXIS 54747 (N.Y. App. Div. 3d Dep't), app. denied, 68 N.Y.2d 601, 505 N.Y.S.2d 1025, 496 N.E.2d 238, 1986 N.Y. LEXIS 18959 (N.Y. 1986).

Court properly determined that savings clause in CLS Civ S § 76(4), providing that nothing in CLS Civ S § 75 shall be construed to "repeal or modify" any local laws, was unambiguous grandfathering provision that did not apply to subsequently enacted NYC Admin Code § 9-112, providing that members of Department of Corrections's uniform force charged with crime may be suspended without pay for as long as criminal charges remain pending. Meringolo v Jacobson, 256 A.D.2d 20, 680 N.Y.S.2d 521, 1998 N.Y. App. Div. LEXIS 12802 (N.Y. App. Div. 1st Dep't 1998), app. dismissed, 93 N.Y.2d 948, 694 N.Y.S.2d 342, 716 N.E.2d 177, 1999 N.Y. LEXIS 1364 (N.Y. 1999), app. denied, 93 N.Y.2d 948, 694 N.Y.S.2d 342, 716 N.E.2d 177, 1999 N.Y. LEXIS 1365 (N.Y. 1999).

Under this section, a civil service employee suspended following a determination by department head that charges against her were sustained, in order to test the validity of the suspension must either appeal to the Civil Service Commission or proceed under art. 78 of the Civil Practice Act. Paris v New York, 74 N.Y.S.2d 584, 189 Misc. 445, 1947 N.Y. Misc. LEXIS 3288 (N.Y. App. Term 1947), disapproved, Sinicropi v Bennett, 92 A.D.2d 309, 460 N.Y.S.2d 809, 1983 N.Y. App. Div. LEXIS 16623 (N.Y. App. Div. 2d Dep't 1983).

The common-law rule of damages recognized in this section is not supplanted by anything contained herein or in the Administrative Code of New York City. La Forge v New York, 36 Misc. 2d 130, 231 N.Y.S.2d 830, 1962 N.Y. Misc. LEXIS 3101 (N.Y. Sup. Ct. 1962), rev'd, 20 A.D.2d 693, 246 N.Y.S.2d 1012, 1964 N.Y. App. Div. LEXIS 4410 (N.Y. App. Div. 1st Dep't 1964), rev'd, Kaminsky v New York, 15 N.Y.2d 500, 254 N.Y.S.2d 110, 202 N.E.2d 557, 1964 N.Y. LEXIS 892 (N.Y. 1964).

There is nothing unconstitutional in the Legislature excluding from review the punishment of a reprimand. Mercer v New York City Transit Authority, 56 Misc. 2d 974, 290 N.Y.S.2d 789, 1968 N.Y. Misc. LEXIS 1483 (N.Y. Sup. Ct. 1968).

2. Power of removal, generally

Where the power to appoint probation officers is placed in the hands of the judges of the county court (§ 938, Code of Criminal Procedure) and there are two such judges in the county involved, such probation officers can be removed only by the joint action of both judges. Kreppein v Downs, 272 A.D. 452, 72 N.Y.S.2d 150, 1947 N.Y. App. Div. LEXIS 3319 (N.Y. App. Div. 1947).

CLS Pub O § 36 was not exclusive procedural vehicle for removal of village superintendent of public works on misconduct charges and, in any event, court was foreclosed from considering whether charges under CLS Civ S § 75 were improper since issue had been raised and rejected in prior Article 78 proceeding from which no appeal was perfected. Logan v New Paltz, 129 A.D.2d 935, 514 N.Y.S.2d 573, 1987 N.Y. App. Div. LEXIS 45597 (N.Y. App. Div. 3d Dep't 1987).

New York City Police Commissioner had discretion to dismiss police officers without administrative hearing under NYC Admin Code § 14-115(a) where each had been convicted of crime following full trial. Griffin v Bratton, 248 A.D.2d 242, 670 N.Y.S.2d 34, 1998 N.Y. App. Div. LEXIS 2575 (N.Y. App. Div. 1st Dep't 1998), rev'd, 92 N.Y.2d 781, 686 N.Y.S.2d 359, 709 N.E.2d 100, 1999 N.Y. LEXIS 24 (N.Y. 1999).

An honorably-discharged World War veteran was improperly dismissed from his position in the department of parks of New York city, where proof shows that the dismissal was ordered by the consulting park engineer rather than by the park commissioner, because only the power to hear charges, and not the power of dismissal itself, is capable of delegation by the removing power. Morrison v Moses, 14 N.Y.S.2d 67, 172 Misc. 129, 1939 N.Y. Misc. LEXIS 2160 (N.Y. Sup. Ct. 1939), aff'd, 258 A.D. 955, 17 N.Y.S.2d 997, 1940 N.Y. App. Div. LEXIS 8403 (N.Y. App. Div. 1940).

City manager lacks authority to remove employees appointed by city judge where such appointment has been duly approved by the city manager, where budgetary approval exists and where the proper civil service line has been designated. Petrone v Miller, 77 Misc. 2d 1028, 355 N.Y.S.2d 287, 1974 N.Y. Misc. LEXIS 1293 (N.Y. Sup. Ct. 1974).

3. Exhaustion of remedies requirement

City police officers could not maintain an action to stay a departmental hearing to be held on charges filed against them since they had made no effort to exhaust their administrative remedies prior to the institution of the action and had failed to show that they would suffer irreparable injury unless the court entertained the action or that they had no adequate remedy, and the right of judicial review of the final action taken in the disciplinary proceeding would be a sufficient procedural safeguard of their rights. Sardino v Finch, 35 A.D.2d 686, 314 N.Y.S.2d 690, 1970 N.Y. App. Div. LEXIS 3892 (N.Y. App. Div. 4th Dep't 1970).

Probationary employees' suspensions were not "final" for purposes of rule requiring exhaustion of administrative remedies since administrative appeals to Civil Service Commissioner (available under NY City Charter § 812) were unresolved at time Article 78 proceeding was commenced; thus, court properly dismissed employees' non-constitutional claims. Court properly refused to dismiss Article 78 petition to review drug-testing procedures conducted as part of New York City Transit Authority's pre-employment medical exam, despite petitioners' failure to exhaust their administrative remedies, since valid and reviewable constitutional issue was raised; civil service commissioner lacks power to decide constitutional questions. Dozier v New York City, 130 A.D.2d 128, 519 N.Y.S.2d 135, 1987 N.Y. App. Div. LEXIS 45074 (N.Y. App. Div. 2d Dep't 1987).

Court would dismiss, for failure to exhaust administrative remedies, Article 78 petition for review of sheriff's action in discharging civil deputy sheriff without cause in violation of collective bargaining agreement which afforded him same rights and privileges as competitive class employees under CLS Civ S § 75, where collective bargaining agreement entered into between sheriff and deputy sheriffs during pendency of proceeding contained grievance procedure covering dispute in issue. Oneida County Deputy Sheriff's Benevolent Asso. v Hasenauer, 145 A.D.2d 984, 536 N.Y.S.2d 622, 1988 N.Y. App. Div. LEXIS 14087 (N.Y. App. Div. 4th Dep't 1988).

Court erred in concluding that public employee was required to exhaust her administrative remedies by submitting matter to arbitration under grievance procedure in parties' collective bargaining agreement where employee's application did not constitute "grievance" as defined in agreement. Van Tassel v County of Orange, 204 A.D.2d 560, 614 N.Y.S.2d 193, 1994 N.Y. App. Div. LEXIS 5243 (N.Y. App. Div. 2d Dep't 1994).

Employee's failure to file specific grievance with regard to second notice of discipline did not bar his Article 78 petition to annul respondent's determination denying his request for reinstatement and related relief, where employee timely grieved first notice of discipline which included proposed penalty of termination, he received second notice of discipline at time when hearing had already been scheduled on first notice of discipline, and it was undisputed that all of his absences during period encompassed by 2 notices of discipline arose out of same psychiatric condition. West v New York State DOT, 229 A.D.2d 730, 645 N.Y.S.2d 619, 1996 N.Y. App. Div. LEXIS 7843 (N.Y. App. Div. 3d Dep't 1996).

4. Effect of collective bargaining provisions

The New York State Thruway Authority properly found petitioner guilty of failing to comply with his supervisor's instructions to perform an overtime assignment, and properly suspended him for two days without pay, where nothing in the contract provisions so explicitly limited the Authority's power to order mandatory overtime as to make indisputably clear that it had no such power and, thus, to excuse petitioner's failure to accept the assignment. Ferreri v New York State Thruway Authority, 62 N.Y.2d 855, 477 N.Y.S.2d 616, 466 N.E.2d 156, 1984 N.Y. LEXIS 4398 (N.Y. 1984).

Petitioner, who was discharged from his position as correction officer based on arbitrator's finding that he violated 2 departmental rules, was not entitled to vacatur of arbitration award on basis that charges against him had been initiated in retaliation for his having testified in federal court action regarding pervasive racial bias at Department of Correctional Services facility, in violation of CLS Civ S § 75-b, where such argument was not raised in arbitration proceeding (allegedly because petitioner's union attorney refused to pursue it); contention that arbitration award violated public policy rested on unproven premise that employer had retaliatory motive, which was factual matter that bore directly on validity of charges, and thus was issue for arbitrator to resolve. Even assuming that petitioner had viable claim for violation of union's duty of fair representation, proceeding to vacate arbitration award was not proper forum for asserting it. Obot v New York State Dep't of Correctional Servs., 89 N.Y.2d 883, 653 N.Y.S.2d 245, 675 N.E.2d 1197, 1996 N.Y. LEXIS 3591 (N.Y. 1996).

New York State Public Employment Relations Board erred in finding a city's improper employer practice for adopting police disciplinary procedures other than those in a collective bargaining agreement with police officers because (1) the more general N.Y. Civ. Serv. Law art. 14, on public employees' collective bargaining, was superseded by the more specific N.Y. Second Class Cities Law §§ 131 and 133, providing detailed police discipline procedures, so police discipline was not a collective bargaining subject, and (2) N.Y. Second Class Cities Law § 4's supersession clause showed no legislative intent for that Law to expire. Matter of City of Schenectady v New York State Pub. Empl. Relations Bd., 30 N.Y.3d 109, 86 N.E.3d 536, 64 N.Y.S.3d 644, 2017 N.Y. LEXIS 3074 (N.Y. 2017).

There was no reasonable basis for a determination by the Public Employment Relations Board that disciplinary procedures were prohibited subjects of collective bargaining negotiations except as to negotiations involving the State, which determination was based on what the board erroneously believed to be an implicit prohibition in subdivision 4 of section 76 of the Civil Service Law, providing that sections 75 and 76 of that law, which set forth disciplinary procedures for certain classes of public employees and provided for appeals by employees from adverse determinations, might be supplemented, modified or replaced by agreements "negotiated between the state and an employee organization". Auburn Police Local 195, Council 82, AFSCME v Helsby, 62 A.D.2d 12, 404 N.Y.S.2d 396, 1978 N.Y. App. Div. LEXIS 10411 (N.Y. App. Div. 3d Dep't 1978), aff'd, 46 N.Y.2d 1034, 416 N.Y.S.2d 586, 389 N.E.2d 1106, 1979 N.Y. LEXIS 1946 (N.Y. 1979).

Public employee who sought to challenge constitutionality of arbitration provisions governing disciplining of employees had waived his right to assert unconstitutionality by virtue of fact that he belonged to the civil service employees association which had, after arms' length negotiation, entered into contract which contained the binding arbitration provisions; fact that individual employee did not himself approve the agreement negotiated by his representative did not make it any less binding upon him. Where Civil Service Employees Association had entered collective bargaining agreement with state providing for binding arbitration of disciplinary disputes to the exclusion of administrative and judicial remedies, civil service employee was precluded from challenging constitutionality of arbitration agreement and statute permitting such agreement, notwithstanding employee's objection to the collective bargaining agreement. In order to sustain constitutionality of arbitration provisions in collective bargaining agreement between the State and civil service employees association with respect to disciplining of employees, it would be necessary to read into the provisions the procedural safeguards of article governing arbitration generally, i.e., right to present evidence, right to cross-examine witnesses, right to have determination made on evidence produced, right to be represented by counsel, and right to have the award made in writing. Antinore v State, 49 A.D.2d 6, 371 N.Y.S.2d 213, 1975 N.Y. App. Div. LEXIS 10325 (N.Y. App. Div. 4th Dep't 1975), aff'd, 40 N.Y.2d 921, 389 N.Y.S.2d 576, 358 N.E.2d 268, 1976 N.Y. LEXIS 3090 (N.Y. 1976).

In regard to discharge of deputy who was appointed by sheriff's predecessor, whose duties included civil matters and for whose acts and omissions sheriff was liable, newly elected sheriff was not subject to collective bargaining agreement provision that Civil Service Law requiring a pre-removal hearing was applicable to discharge of any county employee. Although county sheriff may be a public employer required to negotiate with and enter into written agreements with recognized employee organization representing his staff as to terms and conditions of employment, he is not, absent a contrary legislative expression, subject to contractual provision limiting his power to terminate employment of employees and deputies performing civil functions. Sirles v Cordary, 49 A.D.2d 330, 374 N.Y.S.2d 793, 1975 N.Y. App. Div. LEXIS 10907 (N.Y. App. Div. 3d Dep't 1975), aff'd, 40 N.Y.2d 950, 390 N.Y.S.2d 413, 358 N.E.2d 1038, 1976 N.Y. LEXIS 3131 (N.Y. 1976).

Where, at time that notice of discipline was given, new collective bargaining agreement was in force which provided for grievance procedure designed to operate in lieu of Civil Service Law provisions, notice of discipline should have conformed to mandates of that agreement; failure to do so did not require

dismissal of the charges but did require that further proceedings be in accordance with the collective bargaining agreement. Scales v Maxwell, 52 A.D.2d 719, 382 N.Y.S.2d 171, 1976 N.Y. App. Div. LEXIS 12410 (N.Y. App. Div. 4th Dep't 1976).

Termination of teacher employed by Department of Correctional Services was proper where she was terminated pursuant to prior disciplinary settlement which specified that she could be terminated during 12-month disciplinary evaluation period if her time and attendance record was unsatisfactory, notwithstanding contention that settlement agreement was void and unenforceable because it denied her due process, since (1) teacher's collective bargaining agreement allowed for disciplinary matters to be resolved by written agreement instead of procedures in CLS Civ S §§ 75 and 76, and (2) agreement was made with participation of teacher's union. Millon v Coughlin, 147 A.D.2d 765, 537 N.Y.S.2d 645, 1989 N.Y. App. Div. LEXIS 774 (N.Y. App. Div. 3d Dep't), app. denied, 74 N.Y.2d 602, 541 N.Y.S.2d 985, 539 N.E.2d 1113, 1989 N.Y. LEXIS 572 (N.Y. 1989).

School district's petition for a permanent stay of arbitration with respect to a grievance arising from its termination of an employee was properly dismissed because the provisions of the collective bargaining agreement did not violate public policy or provisions of the Civil Service Law. Matter of Kenmore-Town of Tonawanda Union Free Sch. Dist. (Ken-Ton Sch. Empls. Assn.), 110 A.D.3d 1494, 974 N.Y.S.2d 679, 2013 N.Y. App. Div. LEXIS 6452 (N.Y. App. Div. 4th Dep't 2013).

Trial court's judgment annulling the determination of the city's collective bargaining board (board), which compelled the city to disclose certain materials requested by a nurses association in connection with employee disciplinary proceedings was reversed because the board's decision could not be said to have been taken without sound basis in reason since the collective bargaining agreement granted the union a right to limited information in the context of disciplinary proceedings. Matter of City of New York v New York State Nurses Assn., 130 A.D.3d 28, 10 N.Y.S.3d 78, 2015 N.Y. App. Div. LEXIS 4360 (N.Y. App. Div. 1st Dep't 2015), aff'd, 29 N.Y.3d 546, 82 N.E.3d 441, 60 N.Y.S.3d 100, 2017 N.Y. LEXIS 1454 (N.Y. 2017).

In referring to sections of Civil Service Law regarding disciplinary procedures, amended section providing that such sections may be supplemented, modified or replaced by agreements negotiated between state and employee organization does not prohibit negotiations between a municipal employer and an employee organization on issues relating to disciplinary proceedings, and thus prior determinations of Public Employment Relations Board that discipline is mandatory subject of negotiation between a municipal employer and employee organization should not be disturbed. Auburn Police Local 195, etc. v Helsby, 91 Misc. 2d 909, 398 N.Y.S.2d 934, 1977 N.Y. Misc. LEXIS 2446 (N.Y. Sup. Ct. 1977), aff'd, 62 A.D.2d 12, 404 N.Y.S.2d 396, 1978 N.Y. App. Div. LEXIS 10411 (N.Y. App. Div. 3d Dep't 1978).

Trial court erred in a N.Y. C.P.L.R. art. 78 proceeding in directing a town board to determine whether an officer was entitled to representation under N.Y. Civ. Serv. Law § 75(2) during certain questioning by his department because the Westchester County Police Act, N.Y. Laws 104, was a special law and provided that proceedings to discipline police officers in Westchester County, New York, be conducted by the boards of police commissioners; thus, under N.Y. Civ. Serv. Law § 76(4), police disciplinary procedures were not a proper subject of collective bargaining and N.Y. Civ. Serv. Law § 75 did not apply. Matter of Town of Harrison Police Benevolent Assn., Inc. v Town of Harrison Police Dept., 69 A.D.3d 639, 892 N.Y.S.2d 495, 2010 N.Y. App. Div. LEXIS 111 (N.Y. App. Div. 2d Dep't 2010).

Appellate court properly affirmed the trial court's finding that police discipline could not be a subject of collective bargaining under the Taylor Law when the legislature had expressly committed disciplinary authority over a police department, as was true in the present cases involving the city and the city police officers' union, and the town and the town police officers' union; while statutory law expressed a strong presumption that the terms and conditions of employment were subject to mandatory bargaining, that presumption could be overcome by evidence that the legislature had given local officials the authority to discipline police, and, in each case, the evidence showed that the local officials had expressly been given such authority. Matter of Patrolmen's Benevolent Assn. of City of N.Y., Inc. v New York State Pub. Empl. Relations Bd., 6 N.Y.3d 563, 815 N.Y.S.2d 1, 848 N.E.2d 448, 2006 N.Y. LEXIS 584 (N.Y. 2006).

Although collective bargaining agreement limits suspension of civil service employees charged with criminal acts to those situations where there is probable cause to believe that employee's continued presence on job represents potential danger to persons or properties or would severely interfere with operations, less protective subsection 3 of Civil Service Law § 75 permits suspension without pay for 30 days pending hearing and determination of charges of misconduct, far broader "cause" for suspension than collective bargaining agreement and lacks collective bargaining agreement's "probability" safeguard; § 75(3) is not unconstitutional since it is reasonable for agency charged with management of prisons and prisoners to be able to suspend corrections officer who has been charged with crime, crime that perhaps is more serious than conduct of prisoners he attends. Smith v Carey, 473 F. Supp. 268, 1979 U.S. Dist. LEXIS 11144 (S.D.N.Y. 1979).

5. —Article 78 proceedings

Where the Drug Abuse Control Commission, in Article 78 proceeding brought to compel the reinstatement of petitioner to his position of Vocational Instructor IV in the Brooklyn Central Community Rehabilitation Center operated by the Commission, affirmatively asserted that collective bargaining agreement was not applicable to petitioner, it could not thereafter attempt to argue that petitioner should have sought relief pursuant to the provisions of that agreement. Flomenbaum v Drug Abuse Control Com., 50 A.D.2d 20, 377 N.Y.S.2d 211, 1975 N.Y. App. Div. LEXIS 11420 (N.Y. App. Div. 3d Dep't 1975).

In an Article 78 proceeding brought by a former bus operator who had been demoted to the position of railroad clerk, the petition would be dismissed where the clerk had waived his rights to a hearing and to any appeal when he elected to proceed to arbitration pursuant to the optional grievance provisions of his collective bargaining agreement. Dye v New York City Transit Authority, 88 A.D.2d 899, 450 N.Y.S.2d 587, 1982 N.Y. App. Div. LEXIS 17227 (N.Y. App. Div. 2d Dep't), aff'd, 57 N.Y.2d 917, 456 N.Y.S.2d 760, 442 N.E.2d 1271, 1982 N.Y. LEXIS 3792 (N.Y. 1982).

Article 78 proceeding to review determination of grievance committee which upheld dismissal of county employee was governed by arbitrary and capricious standard, not by substantial evidence standard, since grievance committee hearing was held pursuant to parties' collective bargaining agreement, which modified and superseded conflicting provisions of CLS Civ S § 75; grievance committe hearing was not equivalent to hearing under § 75 inasmuch as it was held after penalty was imposed, whereas § 75 requires hearing before penalty can be imposed. Marin v Benson, 131 A.D.2d 100, 520 N.Y.S.2d 642, 1987 N.Y. App. Div. LEXIS 48575 (N.Y. App. Div. 3d Dep't 1987).

Correction officer was not entitled to judicial review of department's decision to terminate him after he was arrested for driving while intoxicated, and his Article 78 petition was properly dismissed in absence of showing that department acted in bad faith, since his conduct fell within provisions of parties' prior disciplinary settlement agreement whereby he could be terminated without appeal if he engaged in conduct which discredited department or its personnel, or which constituted misdemeanor or felony; under parties' collective bargaining agreement, disciplinary settlement agreement constituted enforceable contract. Shannon v State Dep't of Corr. Servs., 131 A.D.2d 915, 516 N.Y.S.2d 518, 1987 N.Y. App. Div. LEXIS 48346 (N.Y. App. Div. 3d Dep't), app. denied, 70 N.Y.2d 607, 521 N.Y.S.2d 224, 515 N.E.2d 909, 1987 N.Y. LEXIS 18916 (N.Y. 1987).

Disciplinary procedures establshed in city charter many years before the Civil Service Law mandated subjects for collective bargaining were protected from inclusion in mandatory subjects for bargaining. City of Mt. Vernon v Cuevas, 289 A.D.2d 674, 733 N.Y.S.2d 793, 2001 N.Y. App. Div. LEXIS 11678 (N.Y. App. Div. 3d Dep't 2001), app. denied, 97 N.Y.2d 613, 742 N.Y.S.2d 606, 769 N.E.2d 353, 2002 N.Y. LEXIS 874 (N.Y. 2002).

Where contract of employment between employee and school district provided that employee dissatisfied with employer's imposition of discipline could file grievance and thus obtain hearing as to fairness, employee was not entitled to complain in Article 78 proceeding to review such determination that he was not afforded notice and hearing pursuant to Civil Service Law § 75, as contract of employment grievance procedure constituted replacement for such hearing. Green v Board of Education, 75 Misc. 2d 64, 347 N.Y.S.2d 342, 1973 N.Y. Misc. LEXIS 1651 (N.Y. Sup. Ct. 1973).

6. Individual liability for dismissing official

A former volunteer fireman wrongfully discharged from his position in civil service and reinstated in his position pursuant to peremptory writ of mandamus, under this section, may maintain an action against the officer who removed him for the amount of salary of which plaintiff has been deprived by defendant's wrongful act. McGraw v Gresser, 226 N.Y. 57, 123 N.E. 84, 226 N.Y. (N.Y.S.) 57, 1919 N.Y. LEXIS 832 (N.Y. 1919).

Where school board members who wrongfully discharged employee were acting in their official capacity, they could not be held individually liable for mental distress, loss of business, or legal expenses incurred as result of discharge by employee even if charged with malicious intent. Van Buskirk v Bleiler, 46 A.D.2d 707, 360 N.Y.S.2d 88, 1974 N.Y. App. Div. LEXIS 3866 (N.Y. App. Div. 3d Dep't 1974).

7. Effect of employee resignation or retirement

A motion to vacate a subpoena duces tecum, served in a proceeding under this section for removal of a civil service employee from office on charges, was properly denied where based upon the resignation of said employee from office. Such resignation, during the pendency of charges, does not terminate the proceeding. Brooklyn Audit Co. v Department of Taxation & Finance, 275 N.Y. 284, 9 N.E.2d 930, 275 N.Y. (N.Y.S.) 284, 1937 N.Y. LEXIS 1429 (N.Y. 1937).

State troopers who retired from service when misconduct charges were pending against them were entitled to be compensated for up to 30 days accrued annual leave, although regulation of Superintendent of State Police disqualified member who resigns from receiving maximum of 30 days of accrued annual leave provided for in regulations, since distinct and disparate regulation unconditionally granted such annual leave to member who separates from service by retirement or death. Degnan v Constantine, 189 A.D.2d 423, 596 N.Y.S.2d 867, 1993 N.Y. App. Div. LEXIS 4008 (N.Y. App. Div. 3d Dep't 1993).

Probationary police officer who was given choice of resigning or being discharged was not entitled to annulment of his resignation, as threat of termination did not constitute duress or coercion which rendered his resignation involuntary where employer had legal right to discharge him based on his unsatisfactory performance. Manel v Mosca, 216 A.D.2d 468, 628 N.Y.S.2d 188, 1995 N.Y. App. Div. LEXIS 6402 (N.Y. App. Div. 2d Dep't 1995).

Employer's refusal to reinstate petitioner was not arbitrary and capricious or abuse of discretion where petitioner resigned after being told that disciplinary charges would be brought against him based on internal investigation; threat to do that which one has legal right to do does not constitute duress. Hopkins v Governale, 222 A.D.2d 435, 634 N.Y.S.2d 526, 1995 N.Y. App. Div. LEXIS 12496 (N.Y. App. Div. 2d Dep't 1995).

Article 78 proceeding, challenging termination of petitioner's employment as New York City correction officer, was properly dismissed for lack of subject matter jurisdiction where petitioner, as part of his agreement to plead guilty in New Jersey to unlawful weapon possession, consented to forfeit his job and thereafter tendered his resignation; furthermore, petitioner was collaterally estopped from claiming that his resignation was involuntary where his criminal conviction was affirmed on ground that he voluntarily entered into plea agreement requiring his resignation. Quaranta v Jacobson, 250 A.D.2d 544, 675 N.Y.S.2d 4, 1998 N.Y. App. Div. LEXIS 6158 (N.Y. App. Div. 1st Dep't 1998).

The right to automatic retirement does not give a member of a police department immunity from a departmental disciplinary proceeding which was commenced while he was a member and which was pending when he retired. Flood v Monaghan, 108 N.Y.S.2d 414, 201 Misc. 560, 1951 N.Y. Misc. LEXIS 2517 (N.Y. Sup. Ct. 1951).

Police commissioner could try suspended officer on charges and specifications filed against him, though such officer had retired from the force while criminal proceedings, based on the same incident, were pending. Baker v Kennedy, 6 Misc. 2d 589, 161 N.Y.S.2d 720, 1957 N.Y. Misc. LEXIS 3340 (N.Y. Sup. Ct. 1957).

8. Interrogation of employees

Even though city police officer's failure to respond to his superior in departmental inquiry concerning altercation with fellow officer may have resulted in disciplinary action affecting officer's status in the department, officer still had no constitutional right to counsel during preliminary investigation. Donofrio v Hastings, 54 A.D.2d 1110, 388 N.Y.S.2d 779, 1976 N.Y. App. Div. LEXIS 15090 (N.Y. App. Div. 4th Dep't 1976), app. dismissed, 40 N.Y.2d 1087, 392 N.Y.S.2d 422, 360 N.E.2d 1104, 1977 N.Y. LEXIS 1821 (N.Y. 1977).

Provisions of this section did not apply to questioning of hospital employee as to alleged theft of property, where the employee was not removed from his position at the hospital. Hook v State, 15 Misc. 2d 672, 181 N.Y.S.2d 621, 1958 N.Y. Misc. LEXIS 2986 (N.Y. Ct. Cl. 1958).

Where petitioner was deprived of due process of law when he was effectively denied his right to advice of counsel before interrogation by city police department officials, invalidity of interrogation, insubordination at which formed basis for petitioner's dismissal from police department, tainted and rendered invalid decision reached at subsequent administrative hearing and petitioner was therefore ordered reinstated. May v Shaw, 87 Misc. 2d 808, 386 N.Y.S.2d 625, 1976 N.Y. Misc. LEXIS 2310 (N.Y. Sup. Ct. 1976), aff'd, 58 A.D.2d 807, 396 N.Y.S.2d 258, 1977 N.Y. App. Div. LEXIS 12971 (N.Y. App. Div. 2d Dep't 1977).

Where subject matter of investigation was of some four to five years' vintage and had been subject of discussion with prior district attorney well before petitioner's initial suspension from city police department, purpose of interrogation was to obtain evidence to bolster pending charges against petitioner or, if he refused to answer, to bring new charges based on insubordination, and it would not have burdened investigation, commenced without notice late one afternoon, to permit petitioner reasonable time to seek advice of counsel, petitioner was deprived of due process of law when he was effectively denied his right to advice of counsel before interrogation. May v Shaw, 87 Misc. 2d 808, 386 N.Y.S.2d 625, 1976 N.Y. Misc. LEXIS 2310 (N.Y. Sup. Ct. 1976), aff'd, 58 A.D.2d 807, 396 N.Y.S.2d 258, 1977 N.Y. App. Div. LEXIS 12971 (N.Y. App. Div. 2d Dep't 1977).

9. Waiver of rights

Petitioner seeking reinstatement as village plumbing inspector is not entitled to benefits of this section where it appears that he failed to inform the village trustees that he was an exempt volunteer fireman, and in interviews with trustees in connection with seeking "reappointment" for the following year, made no assertion that he was entitled to the privileges of an exempt volunteer fireman and where petitioner has not shown that his employment was legal in its inception. Place v Estabrook, 278 N.Y. 728, 17 N.E.2d 143, 278 N.Y. (N.Y.S.) 728, 1938 N.Y. LEXIS 1546 (N.Y. 1938).

Petitioner, discharged for violation of terms of settlement agreement whereby he waived his right to disciplinary hearing and appeal authorized by CLS Civ S §§ 75 and 76 and agreed to probationary period of 12 months, could have brought Article 78 proceeding at time of his dismissal to challenge respondent's conclusion that he was probationary employee at that time, but Civil Service Commission had no jurisdiction to hear his appeal. Johnson v Triborough Bridge & Tunnel Auth., 97 N.Y.2d 627, 735 N.Y.S.2d 861, 761 N.E.2d 553, 2001 N.Y. LEXIS 3310 (N.Y. 2001).

Acceptance of another civil service job by one unlawfully discharged from a previous civil service appointment does not prejudice his right to reinstatement in his original position, but serves only to reduce his claim to damages arising from his discharge. People ex rel. Barton v Brannan, 141 A.D. 295, 126 N.Y.S. 47, 1910 N.Y. App. Div. LEXIS 3859 (N.Y. App. Div. 1910).

Petitioner's application for refund of salary deductions paid into a city retirement system, was a waiver of whatever invalidity attended his dismissal from service. He also was at liberty to and did waive any question of whether he could be dismissed from the department upon the ground of insanity, and, if so, whether he was entitled to notice and a hearing upon specified charges, as provided in this section. Piani v Davidson, 240 A.D. 383, 270 N.Y.S. 44, 1934 N.Y. App. Div. LEXIS 10656 (N.Y. App. Div. 1934).

Petitioner, who failed to claim prior to or upon a hearing before the commissioner his status as a veteran, waived such status and is not entitled to the benefit of this section. In re Sullivan, 248 A.D. 779, 289 N.Y.S. 225, 1936 N.Y. App. Div. LEXIS 7295 (N.Y. App. Div. 1936).

A laborer in employ of New York city by failure to claim, prior to or upon a hearing before the commissioner of the fire department, his veteran's status as an honorably-discharged soldier who served in the world war, thereby waived that status and was not entitled to the benefits thereof under this section. Wallace v McElligott, 249 A.D. 753, 291 N.Y.S. 866, 1936 N.Y. App. Div. LEXIS 5872 (N.Y. App. Div. 1936), app. dismissed, 273 N.Y. 635, 7 N.E.2d 731, 273 N.Y. (N.Y.S.) 635, 1937 N.Y. LEXIS 1358 (N.Y. 1937).

Petitioner, a conductor, had been removed in 1953 because of mental illness. In 1954, his condition improved and his request to be assigned as railroad watchman (at lesser pay) was granted. Petitioner's subsequent action to be restored to his former position on the ground that he had never been served with formal charges nor had he been granted a hearing pursuant to this section was dismissed because petitioner never denied the finding of unfitness nor did he claim that a hearing would have caused a different result. Further, petitioner waived his rights hereunder. Jones v New York City Transit Authority, 285 A.D. 1054, 139 N.Y.S.2d 371, 1955 N.Y. App. Div. LEXIS 6656 (N.Y. App. Div. 1955).

The safeguards of sections 75 and 76 of the Civil Service Law, which set forth disciplinary procedures for certain classes of public employees and provide for appeals by employees from adverse determinations, may be waived by an employee without violating the constitutional safeguards of due process and equal protection of the laws. Auburn Police Local 195, Council 82, AFSCME v Helsby, 62 A.D.2d 12, 404 N.Y.S.2d 396, 1978 N.Y. App. Div. LEXIS 10411 (N.Y. App. Div. 3d Dep't 1978), aff'd, 46 N.Y.2d 1034, 416 N.Y.S.2d 586, 389 N.E.2d 1106, 1979 N.Y. LEXIS 1946 (N.Y. 1979).

State Department of Correctional Services was entitled to dismissal of Article 78 proceeding brought by correction officer seeking review of his dismissal from service as result of his excessive absenteeism since officer had knowingly and voluntarily entered into prior agreement whereby he could be "terminated without further appeal" if department determined his attendance to be unsatisfactory during disciplinary period; officer waived any right he may have had, at least in absence of actual bad faith, under either collective bargaining agreement or CLS Civ S §§ 75 and 76, to review termination decision. Miller v New York State Dep't of Corr. Servs., 126 A.D.2d 831, 510 N.Y.S.2d 745, 1987 N.Y. App. Div. LEXIS 41966 (N.Y. App. Div. 3d Dep't), aff'd, 69 N.Y.2d 970, 516 N.Y.S.2d 659, 509 N.E.2d 354, 1987 N.Y. LEXIS 16741 (N.Y. 1987).

Exempt fireman who had been annually appointed for an indefinite term as an engineer of municipal water works, which officer village trustees are authorized to appoint and remove at pleasure, by requesting village clerk to present his application for reappointment to the trustees did not waive his right to continue in the occupation of his office under this section. People ex rel. McBride v Atchinson, 123 N.Y.S. 577, 68 Misc. 115, 1910 N.Y. Misc. LEXIS 362 (N.Y. Sup. Ct. 1910), aff'd, 142 A.D. 927, 126 N.Y.S. 1142, 1911 N.Y. App. Div. LEXIS 503 (N.Y. App. Div. 1911).

Where an honorably discharged veteran of the Civil War, occupying a position classified as competitive in the civil service of a municipality, is so injured in performance of his duties as to be disabled; and where after having been carried on the pay-roll for six months his salary is discontinued and, after having filed a claim for compensation for the injuries he has received, his name is restored to the pay-roll for a period of six months, upon his executing a formal release to city from all causes of action by reason of such injuries, such release does not constitute a bar to his claim to be reinstated in his position after he has recovered from effect of his injuries. People ex rel. Williams v Ward, 130 N.Y.S. 290, 72 Misc. 446, 1911 N.Y. Misc. LEXIS 419 (N.Y. Sup. Ct.), app. dismissed, 146 A.D. 901, 133 N.Y.S. 1140, 1911 N.Y. App. Div. LEXIS 3642 (N.Y. App. Div. 1911).

The consent by the motorman of a subway train to demotion to the rank of conductor for being responsible for two subway accidents amounts to a waiver of any rights conferable upon him under this section. Quinlan v Reid, 91 N.Y.S.2d 441, 195 Misc. 970, 1949 N.Y. Misc. LEXIS 2623 (N.Y. Sup. Ct.), aff'd, 275 A.D. 1034, 92 N.Y.S.2d 401, 1949 N.Y. App. Div. LEXIS 5658 (N.Y. App. Div. 1949).

Where public works employee failed to give the department notice of his claim to status as an exempt fireman prior to his dismissal, he waived all rights to benefits accorded exempt firemen. Chichisola v Johnson, 149 N.Y.S.2d 192, 208 Misc. 441, 1955 N.Y. Misc. LEXIS 3935 (N.Y. Sup. Ct. 1955), app. dismissed, 1 A.D.2d 908, 150 N.Y.S.2d 560, 1956 N.Y. App. Div. LEXIS 5940 (N.Y. App. Div. 3d Dep't 1956).

Civil service provisions with regard to retention rights of city employees are for benefit of employees and employees may waive such rights or lose them by laches or by the running of statute of limitations. Brayer v Lapple, 80 Misc. 2d 159, 362 N.Y.S.2d 961, 1974 N.Y. Misc. LEXIS 1864 (N.Y. Sup. Ct. 1974), rev'd, 52 A.D.2d 1034, 384 N.Y.S.2d 584, 1976 N.Y. App. Div. LEXIS 12940 (N.Y. App. Div. 4th Dep't 1976).

10. Veterans and volunteer firemen

Under this section an honorably discharged soldier of the world war is entitled to review by certiorari of a determination of the presiding justice of domestic relations court of New York city, removing him from the position of probation officer, after a hearing, upon charges of misconduct. O'Kelly v Hill, 283 N.Y. 78, 27 N.E.2d 509, 283 N.Y. (N.Y.S.) 78, 1940 N.Y. LEXIS 915 (N.Y. 1940).

A veteran is expressly given the right by this section to a review of the action of the state industrial commissioner by certiorari and he is entitled to the judgment of the court as to the sufficiency of the charges made and whether there was evidence justifying his dismissal. People ex rel. Davis v Sayer, 205 A.D. 562, 200 N.Y.S. 134, 1923 N.Y. App. Div. LEXIS 5082 (N.Y. App. Div. 1923).

A world war veteran, under this section, was entitled to "a hearing upon due notice upon stated charges, and with the right to a review by writ of certiorari. . . . Burden of proving incompetency or misconduct shall be upon the person alleging the same." In re Application of Thiel, 243 A.D. 787, 278 N.Y.S. 127, 1935 N.Y. App. Div. LEXIS 8310 (N.Y. App. Div. 1935).

Public Employment Relations Board erred under N.Y. C.P.L.R. 7803(3) when it held that police disciplinary matters involving honorably discharged veterans and volunteer firefighters were an exception to the prohibition against bargaining for those subjects in a collective bargaining agreement, as the provisions regarding police discipline were enacted in the city charter prior to N.Y. Civ. Serv. Law §§ 75 and 76, such that they were preserved under § 76(4). Matter of City of Middletown v City of Middletown Police Benevolent Assn., 81 A.D.3d 1238, 917 N.Y.S.2d 389, 2011 N.Y. App. Div. LEXIS 1358 (N.Y. App. Div. 3d Dep't 2011).

It is not necessary for the protection of an exempt fireman's rights that he should have made a formal claim of his rights and privileges under this section, where the board of trustees knew or was in position to ascertain his qualifications for enjoyment of such rights and privileges. People ex rel. McBride v Atchinson, 123 N.Y.S. 577, 68 Misc. 115, 1910 N.Y. Misc. LEXIS 362 (N.Y. Sup. Ct. 1910), aff'd, 142 A.D. 927, 126 N.Y.S. 1142, 1911 N.Y. App. Div. LEXIS 503 (N.Y. App. Div. 1911).

It is immaterial whether or not village authorities knew that petitioner was an honorably discharged soldier, for it was their duty to know of his service. Warner v Hall, 252 N.Y.S. 451, 141 Misc. 294, 1931 N.Y. Misc. LEXIS 1664 (N.Y. Sup. Ct. 1931).

An administrative trial prior to removal need not be afforded a civil service employee unless he be a veteran or volunteer fireman; and the court will not interfere with the exercise of

discretion on the part of the removing authority where all the formalities of subd. 2 of this section have been complied with and there is substantial evidence to sustain the removal. Plunkett v Wilson, 37 N.Y.S.2d 959, 179 Misc. 149, 1942 N.Y. Misc. LEXIS 2124 (N.Y. Sup. Ct. 1942), aff'd, 269 A.D. 743, 54 N.Y.S.2d 706, 1945 N.Y. App. Div. LEXIS 3567 (N.Y. App. Div. 1945).

Where charges are brought against a veteran which may result in his removal, he is given the right under this section to a statutory hearing, and if found guilty is entitled to a review of the evidence directly by the Appellate Division, although the punishment inflicted consisted merely of reprimands and a two months' suspension. Brown v Moses, 77 N.Y.S.2d 680, 191 Misc. 360, 1948 N.Y. Misc. LEXIS 2180 (N.Y. Sup. Ct. 1948), aff'd, 275 A.D. 834, 89 N.Y.S.2d 922, 1949 N.Y. App. Div. LEXIS 4700 (N.Y. App. Div. 1949).

11. Review rights of particular employees

Language in a collective bargaining agreement making "final and binding" the final step of a grievance procedure did not preclude a nurse, charged in a disciplinary proceeding with abandoning a wheelchair patient in a bathroom, from pursuing judicial review of her right to a transcript of the grievance hearing (Civ S Law §§ 75, 76; the words "final and binding" merely triggered the running of the four-month time limit within which an Article 78 proceeding must be brought. Stoker v Tarentino, 64 N.Y.2d 994, 489 N.Y.S.2d 43, 478 N.E.2d 184, 1985 N.Y. LEXIS 16685 (N.Y. 1985).

The refusal of a sheriff to remit a deputy's 30-day pre-hearing suspension without pay in connection with the disposition of disciplinary proceedings against the deputy in which he was found guilty of misconduct and reprimanded, could be considered a penalty or punishment within Civil Service Law § 76(1) for which judicial review could be sought. Civil Service Law § 75(3), permitting a 30-day pre-hearing suspension without pay, also provides that upon a finding of guilt a post-hearing penalty or punishment may include a suspension without pay, and the time during which an officer or employee had previously been suspended without pay could be considered as part of the penalty. Sinnott v Finnerty, 65 N.Y.2d 780, 492 N.Y.S.2d 945, 482 N.E.2d 563, 1985 N.Y. LEXIS 16192 (N.Y. 1985).

The chief of police of the city of Geneva, an honorably-discharged World War veteran, holds a position subordinate in nature and is entitled, under subd. 1 of this section to a review of the determination of the mayor of the city dismissing him from the force on charges of selling equipment and retaining the money received therefor, notwithstanding the provisions of the Geneva City Charter, § 90, which states that the decision of the mayor shall be final and conclusive and not subject to review by any court. Morris v Neider, 259 A.D. 49, 18 N.Y.S.2d 207, 1940 N.Y. App. Div. LEXIS 6046 (N.Y. App. Div. 1940).

A policeman disciplined for violation of departmental regulation had the right to appeal from the determination of the acting police commissioner, and the county civil service commission was ordered to hear the action on its merits. Proverb v Niesley, 32 A.D.2d 657, 300 N.Y.S.2d 780, 1969 N.Y. App. Div. LEXIS 3941 (N.Y. App. Div. 2d Dep't 1969), aff'd, 26 N.Y.2d 875, 309 N.Y.S.2d 608, 258 N.E.2d 101, 1970 N.Y. LEXIS 1471 (N.Y. 1970).

Proper standard of review into charges of misconduct by school bus driver was substantial evidence, not fair preponderance evidence, since bus driver was not barred from seeking employment as bus driver in another school district or from trying to get another driving related job, he was not subject to registry and information about school district's charges, and disposition was not readily accessible to public at-large, and thus did not trigger "stigma plus" analysis. Malloch v Ballston Spa Cent. Sch. Dist., 249 A.D.2d 797, 671 N.Y.S.2d 845, 1998 N.Y. App. Div. LEXIS 4518 (N.Y. App. Div. 3d Dep't), app. denied, 92 N.Y.2d 810, 680 N.Y.S.2d 55, 702 N.E.2d 840, 1998 N.Y. LEXIS 3081 (N.Y. 1998).

A clerk of a Municipal Civil Service Commission is entitled to service of charges and opportunity to reply, but has no right of appeal. People ex rel. Eberle v La Guardia, 21 N.Y.S.2d 239, 175 Misc. 272, 1940 N.Y. Misc. LEXIS 1907 (N.Y. Sup. Ct.), aff'd, 260 A.D. 856, 23 N.Y.S.2d 467, 1940 N.Y. App. Div. LEXIS 5047 (N.Y. App. Div. 1940).

Since New York City, N.Y., Charter § 487(a) and New York City, N.Y., Admin. Code § 15-113, gave the city fire department commissioner exclusive power to discipline firefighters, the city's civil service commission erroneously ruled that it had jurisdiction to hear a firefighters appeal of his termination; the fire department's discipline was outside the scope of N.Y. Civ. Serv. Law §§ 75, 76, and, thus, was not subject to the jurisdiction of the commission. The fire commissioner's N.Y. art. 78 proceeding to annul the commission's determination that it had jurisdiction was improperly dismissed. Von Essen v N.Y. City Civ. Serv. Comm'n, 4 N.Y.3d 220, 791 N.Y.S.2d 887, 825 N.E.2d 128, 2005 N.Y. LEXIS 224 (N.Y. 2005).

In a suit challenging both the legality of a city's Police Accountability Board's (PAB's) role in police discipline and its affect on collective bargaining with the police union, the court held Local Law No. 2 was unlawful and invalid only for the purpose of conducting hearings and disciplining officers of the city because state law bound the city since 1985, and the Council therefore acted ultra vires when it enacted portions of Local Law No. 2 that contradicted state law. Matter of Rochester Police Locust Club Inc. v City of Rochester, 2020 N.Y. Misc. LEXIS 10983 (N.Y. Sup. Ct. 2020).

12. Miscellaneous

If subd. 2 has been complied with and charges of substance have been duly served and the employee afforded an opportunity to explain them, a jury may not be called upon to determine an alleged issue of fact involving the sufficiency of charges or the motives of the removing officer. Rosengarten v Knapp, 236 A.D. 743, 258 N.Y.S. 585, 1932 N.Y. App. Div. LEXIS 6589 (N.Y. App. Div.), reh'g denied, 236 A.D. 757, 258 N.Y.S. 1039, 1932 N.Y. App. Div. LEXIS 6695 (N.Y. App. Div. 1932).

Petitioner did not suffer damages to his property rights by virtue of his discharge from his probationary status with state in absence of evidence that discharge imposed a stigma of immorality or dishonesty or other disability that operated to foreclose freedom of petitioner from obtaining other employment. Quraishi v Nyquist, 55 A.D.2d 775, 389 N.Y.S.2d 649, 1976 N.Y. App. Div. LEXIS 15561 (N.Y. App. Div. 3d Dep't 1976), app. dismissed, 41 N.Y.2d 1008, 1977 N.Y. LEXIS 3422 (N.Y. 1977), app. denied, 42 N.Y.2d 801, 1977 N.Y. LEXIS 3646 (N.Y. 1977).

Court properly dismissed proceeding by town board seeking to prohibit administrative appeal by discharged police officer for his failure to serve and file notice of appeal pursuant to CLS Civ S § 76, and to prohibit county commissioner of personnel from hearing such appeal, since prohibition did not lie where town board could seek review of its claim of jurisdictional defects through administrative appeal process before county commissioner of personnel. Town Bd. of Wallkill v Owen, 127 A.D.2d 589, 511 N.Y.S.2d 390, 1987 N.Y. App. Div. LEXIS 43058 (N.Y. App. Div. 2d Dep't 1987).

Petitioners' action seeking declaration that Transit Authority's preemployment drug tests were unconstitutional was ripe for review, although proceeding was commenced prior to agency's issuance of final termination notices and agency could have ultimately decided to vacate petitioners' suspensions, since petitioners suffered actual injury by virtue of their suspensions without pay before proceeding was commenced, it was unlikely that they would be reinstated, and harm sought to be enjoined was not contingent on future developments or resolution of facts at administrative level, but involved purely legal issues; even if case were not fully ripe when proceeding was commenced, it ripened when petitioners were terminated prior to Special Term's consideration of case. Dozier v New York City, 130 A.D.2d 128, 519 N.Y.S.2d 135, 1987 N.Y. App. Div. LEXIS 45074 (N.Y. App. Div. 2d Dep't 1987).

Court should have dismissed Article 78 proceeding against school district, challenging termination of petitioner's employment as typist, since (1) petitioner's failure to serve notice of claim on board of education within 3 months of her discharge, as required by CLS Educ § 3813, meant that personal jurisdiction was not obtained over board, and (2) petitioner's failure to timely include return date on notice of petition constituted jurisdictional defect under CLS CPLR § 403(a). Harder v Board of Educ.,

Binghamton City Sch. Dist., 188 A.D.2d 783, 591 N.Y.S.2d 230, 1992 N.Y. App. Div. LEXIS 13879 (N.Y. App. Div. 3d Dep't 1992).

In Article 78 proceeding to review determination which discharged correctional employee for physically attacking her supervisor (specification 5) and verbally yelling at her supervisor (specification 6), case would be remitted for development of appropriate findings where only support for hearing officer's finding of guilt as to specification 5 was his conclusory statement that there was physical contact, and he did not refer to any testimony to substantiate finding of guilt as to specification 6. Langhorne v Jackson, 206 A.D.2d 666, 614 N.Y.S.2d 627, 1994 N.Y. App. Div. LEXIS 7338 (N.Y. App. Div. 3d Dep't 1994).

Supreme Court properly denied motion to hold police commissioner and other city respondents in contempt for failing to comply with Appellate Division order which, after invalidating respondents' waiver program, allegedly directed them to award retroactive credit toward detective status for time between petitioners' loss of temporary detective assignments until their court-ordered reinstatement, as (1) remedy for lost opportunity was restoration of opportunity, not retroactive credit for service petitioners never performed, and (2) in any case, claimed directive to award retroactive credit was hardly so clear and unequivocal as to warrant holding respondents in contempt. Scotto v Giuliani, 259 A.D.2d 412, 687 N.Y.S.2d 142, 1999 N.Y. App. Div. LEXIS 2849 (N.Y. App. Div. 1st Dep't 1999).

In Article 78 proceeding to review decision which denied reinstatement to petitioner discharged from his position as state trooper for making material misrepresentations on his employment application, court properly denied petitioner's request for disclosure of background investigation file consisting entirely of evaluative documents gathered by state police in conjunction with their investigation into his background and qualifications, in view of prejudice to respondents if records containing information imparted by interviewees under promise of confidentiality were disclosed. Grossman v McMahon, 261 A.D.2d 54, 699 N.Y.S.2d 582, 1999 N.Y. App. Div. LEXIS 12730 (N.Y. App. Div. 3d Dep't 1999).

Public employee who was involuntarily terminated was not entitled to cash value of 45 unpaid vacation days which accrued during his final year of employment, notwithstanding his claim that he could not use all of his vacation days because of his heavy work load, where he failed to show that any superior or supervisor induced him to forego any vacation time during that year for any reason, or that he refrained from using vacation time that entire year because of "noncontractual" duties. Gratto v Board of Educ., 271 A.D.2d 175, 711 N.Y.S.2d 574, 2000 N.Y. App. Div. LEXIS 8076 (N.Y. App. Div. 3d Dep't 2000).

Court improperly dismissed Article 78 proceeding alleging that county violated petitioner's due process rights and rights under CLS Civ S § 75 by terminating her employment without hearing, where petitioner alleged that county had agreed to hold hearing on pending disciplinary charges against her in abeyance while she applied for disability retirement, she further alleged that parties agreed that charges could be reinstated if she did not receive disability retirement, county terminated her employment after she applied for disability retirement based on her physician's diagnosis of permanent disability, and her application for retirement was denied because she did not have requisite years of total service credit. White v County of Jefferson, 285 A.D.2d 964, 727 N.Y.S.2d 677, 2001 N.Y. App. Div. LEXIS 6980 (N.Y. App. Div. 4th Dep't 2001).

Court annulled police commissioner's decision to terminate police officer's employment for using excessive force against prisoner and making false statement about incident where (1) hearing officer, in lauding credibility of allegedly beaten prisoner and 3 "corroborating" prisoner-witnesses, ignored facts that prisoner gave inconsistent stories to different people and prisoner-witnesses were not present in their cells when incident allegedly occurred, and (2) issues existed as to whether police officer's prior successful litigation to regain his position in unrelated matter was substantial or motivating factor in commissioner's decision to find him guilty of various charges and then terminate him. Buric v Safir, 285 A.D.2d 255, 736 N.Y.S.2d 342, 2002 N.Y. App. Div. LEXIS 458 (N.Y. App. Div. 1st Dep't), app. denied, 98 N.Y.2d 688, 746 N.Y.S.2d 689, 774 N.E.2d 754, 2002 N.Y. LEXIS 1937 (N.Y. 2002).

Arbitration of city police disciplinary disputes was required because the Taylor Law was applicable pursuant to a city charter provision that superseded the Second Class Cities Law (SCCL) and because the city's police manual expressly authorized arbitration of police disciplinary matters. Although municipalities can adopt police disciplinary procedures under the SCCL and under general laws enacted prior to this section allowing local control of police discipline, the city chose not to do so. City of Syracuse v Syracuse Police Benevolent Assn., Inc., 68 Misc. 3d 412, 124 N.Y.S.3d 523, 2020 N.Y. Misc. LEXIS 1926 (N.Y. Sup. Ct. 2020).

Article 78 proceeding was sufficient to provide constitutional due process for municipal employee who alleged denial of her procedural due process under Fourteenth Amendment in connection with termination and denial of her retirement benefits; thus, employee failed to state due process claim under 42 USCS § 1983. Julian v New York City Transit Auth., 857 F. Supp. 242, 1994 U.S. Dist. LEXIS 9601 (E.D.N.Y. 1994), aff'd, 52 F.3d 312, 1995 U.S. App. LEXIS 9349 (2d Cir. N.Y. 1995).

Applicant for public employment had private right of action under CLS Civ S § 61 where she alleged that town officials unlawfully manipulated hiring process by dismissing top scorer on civil service exam from pool of top 3 scorers without his declining job, and by bribing fourth highest scorer to decline job so that fifth highest scorer could be appointed; however, sole relief available to plaintiff was to have her application reconsidered, which was properly sought by Article 78 proceeding in New York Supreme Court. Eisert v Town of Hempstead, 918 F. Supp. 601, 1996 U.S. Dist. LEXIS 2657 (E.D.N.Y. 1996).

Public employees have right, albeit not unqualified one, to speak on matters of public concern; government has discretion to limit speech of its employees in certain instances. Walsh v City of Auburn, 942 F. Supp. 788, 1996 U.S. Dist. LEXIS 15335 (N.D.N.Y. 1996).

Former police officer had protected property interest in his position for due process purposes, where his initial dismissal (arising from alleged wrongful discharge of firearm) was overturned in Article 78 proceeding and he was found legally entitled to reinstatement, but police commissioner placed him on probation pending psychological evaluation. Eng v New York City Police Dep't, 977 F. Supp. 668, 1997 U.S. Dist. LEXIS 15503 (S.D.N.Y. 1997).

II. Review Of Particular Actions

13. Demotion

Demotion of town Superintendent of Water and Sewer Department to water and sewer department laborer for accepting gift from chemical supplier in return for using that supplier's chemicals and for being derelict and incompetent in performance of official duties in failing to notify appropriate officials that malfunctioning pumping station was causing raw sewage to be dumped into river was not arbitrary or capricious. Merrin v Town Board of Kirkwood, 48 A.D.2d 992, 369 N.Y.S.2d 878, 1975 N.Y. App. Div. LEXIS 10299 (N.Y. App. Div. 3d Dep't 1975).

Substantial evidence supported action of New York City Transit System in demoting employee to position of railroad clerk after finding that he had violated system's rules and regulations; demotion was not sanction which was shocking to one's sense of fairness. Shipman v New York City Transit Authority, 56 A.D.2d 934, 392 N.Y.S.2d 706, 1977 N.Y. App. Div. LEXIS 11335 (N.Y. App. Div. 2d Dep't 1977).

Statute prohibiting, inter alia, removal of person holding position by permanent appointment in competitive class, except for incompetency or misconduct shown after hearing upon stated charges, was not applicable to prohibit summary demotion of psychologist from position of principal psychologist, to which he had been promoted by way of provisional appointment to his permanently appointed position of associate psychologist; provisional appointee may be discharged from such position without hearing or cause shown. Sirohi v Merges, 58 A.D.2d 645, 396 N.Y.S.2d 58, 1977 N.Y. App. Div. LEXIS 12729 (N.Y. App. Div. 2d Dep't 1977).

Penalties imposed upon a school custodian in civil service of demotion to watchman and suspension without pay for two months, because of his purchase and retention of pornographic material, were not excessive under this section. The course of conduct by a school employee over a period of several years involving purchase and retention of possession of pornographic materials bears upon his individual fitness to hold the position of a school custodian during hours when students are in attendance, and will sustain his suspension pending trial, and, if established, his demotion to a lower grade of service. Demotion of petitioner, a school employee, to a lower grade of service wherein he would not so frequently come in contact with pupils, was permissible upon charges and findings that he had become possessed of a large amount of pornographic material, some of it purchased from a fellow employee, notwithstanding he had already been acquitted of a charge of violation of § 1141 of the Penal Law in possessing such material with attempt to sell, etc., it. Petition of Rice, 40 Misc. 2d 1092, 244 N.Y.S.2d 536, 1963 N.Y. Misc. LEXIS 1396 (N.Y. Sup. Ct. 1963).

In an Article 78 proceeding by a probationary city employee challenging his demotion in rank, the employer's determination that the employee's job performance was unsatisfactory was neither arbitrary nor capricious, and would be upheld, where the mere unsubstantiated claim that the employee was a scapegoat for unsatisfactory office performance and religious prejudice was insufficient as a matter of law to raise an issue of bad faith unrelated to job performance, where there was no indication that the employer acted arbitrarily in failing to furnish periodic evaluations to the employee, and where the fact that the employee did not receive an evaluation for his performance every three months during the probationary period, in accordance with the rules and regulations of the city personnel department, did not prevent the employer from terminating the employee, in that the employee, as a probationer, could have terminated at any time after four months. Smith v New York, 118 Misc. 2d 227, 459 N.Y.S.2d 1007, 1983 N.Y. Misc. LEXIS 3297 (N.Y. Sup. Ct. 1983).

Employee was not entitled to reinstatement to his former position; pursuant to N.Y. Civ. Serv. Law § 76(1), there was no penalty or punishment imposed by a city on the employee, but instead, the actions of the employee were the cause of his demotion, as the employee's actions of being arrested for felony driving while intoxicated and his subsequent loss of his driver's license was the cause of his demotion, and the employee thus failed to demonstrate a clear legal right to the relief demanded. Ramsey v Town of Hempstead, 193 Misc. 2d 278, 750 N.Y.S.2d 439, 2002 N.Y. Misc. LEXIS 1294 (N.Y. Sup. Ct. 2002).

14. Transfer or reassignment

The reassignment of an individual entails a demotion in grade and title and constitutes a disciplinary action requiring compliance with section 75 of the Civil Service Law where the effect of the action taken by a county civil service commission was a retroactive demotion from his position of investigator to the position of Deputy Sheriff, the latter position having a lower salary and involving the possibility of being assigned by the Sheriff to the duties of an investigator at the higher salary, inasmuch as the commission's action, although not purporting to be a reclassification, resulted in a *de facto* reclassification of the individual's position, thereby accomplishing indirectly what could not be done directly; furthermore, the commission's actions caused a reduction on the annual salary grade of persons having tenure in the position of investigator and would, therefore, offend section 121 (subd 2, par [a]) of the Civil Service Law. Borrell v County of Genesee, 73 A.D.2d 386, 426 N.Y.S.2d 361, 1980 N.Y. App. Div. LEXIS 10061 (N.Y. App. Div. 4th Dep't 1980).

Transfer of housing police officer from office work back to field work was management decision, not disciplinary action, and thus housing authority was not required to conduct hearing before effecting transfer. Pelt v New York City Hous. Auth., 199 A.D.2d 26, 605 N.Y.S.2d 11, 1993 N.Y. App. Div. LEXIS 11693 (N.Y. App. Div. 1st Dep't 1993).

In Article 78 proceeding, court properly concluded that transfer of petitioner from position of plainclothes detective to uniformed lieutenant's position resulted in change in his compensation because he no longer received additional stipend for detectives detailed in collective bargaining agreement, and where court further determined that issue of fact remained as to whether such "reassignment" was retaliatory in nature, referee was properly appointed to determine whether provisions of collective bargaining agreement, mandating protections accorded by CLS Civ S § 75, were triggered. Whalen v Hogue, 276 A.D.2d 975, 714 N.Y.S.2d 577, 2000 N.Y. App. Div. LEXIS 10795 (N.Y. App. Div. 3d Dep't 2000).

Where a civil service employee was transferred to a different position with her written consent, this transfer did not violate the civil service law as a demotion or removal. Papert v Conway, 107 N.Y.S.2d 638, 1951 N.Y. Misc. LEXIS 2401 (N.Y. Sup. Ct. 1951), aff'd, 279 A.D. 892, 111 N.Y.S.2d 605, 1952 N.Y. App. Div. LEXIS 5212 (N.Y. App. Div. 1952).

15. Suspension, generally

Mere suspension of a civil service hospital employee by the New York City Hospital Commissioner for five days without pay, as punishment for lateness in reporting for duty on ten different days, is not subject to review under this section and by art. 78 proceeding. Winn v Department of Hospitals, 20 A.D.2d 856, 248 N.Y.S.2d 184, 1964 N.Y. App. Div. LEXIS 4101 (N.Y. App. Div. 1st Dep't 1964).

An order which dismissed a petition for judicial review of a ten-day suspension of civil service city employees on the theory that at the time the charges were filed against the employees and the determination made there was no authority to review punishments which did not exceed ten days was reversed, where the statute had been amended to authorize a proceeding to review regardless of the penalty imposed. Badrow v Common Council & City Clerk of Tonawanda, 26 A.D.2d 611, 271 N.Y.S.2d 57, 1966 N.Y. App. Div. LEXIS 3978 (N.Y. App. Div. 4th Dep't 1966).

Where misconduct which led to disciplinary action against city fire captain occurred during his off-duty hours and where the motivation of misconduct was legitimately subject to variety of interpretations, penalty of 30-day suspension without pay and two-month demotion in rank and pay was not so insubstantial as to shock the sense of fairness. City Council of Watertown v Carbone, 54 A.D.2d 461, 389 N.Y.S.2d 678, 1976 N.Y. App. Div. LEXIS 14065 (N.Y. App. Div. 4th Dep't 1976).

Although there was substantial evidence to support determination that county employee engaged in misconduct resulting in safety hazard, 30-day suspension imposed by county was improper since (1) county rules of conduct provided that oral warning was appropriate sanction for first offense of engaging in conduct which may result in safety hazard, and (2) even if rules were merely intended as guidelines, sanction was so disproportionate as to shock one's sense of fairness. Smith v Hager, 185 A.D.2d 612, 586 N.Y.S.2d 41, 1992 N.Y. App. Div. LEXIS 9123 (N.Y. App. Div. 4th Dep't 1992).

Where substantial evidence did not support respondents' finding of guilt as to all 4 disciplinary charges against police officer, court annulled 3 unsupported charges, vacated penalty of 40 days' suspension without pay, and remanded matter for imposition of appropriate penalty. Cotterel v City of New York, 258 A.D.2d 396, 685 N.Y.S.2d 712, 1999 N.Y. App. Div. LEXIS 1890 (N.Y. App. Div. 1st Dep't 1999).

Where a petitioner seeks to enjoin the entry of a sub-standard rating on records by reason of suspension, the petition is insufficient where there is no allegation that such action was threatened by the commission. Storrier v Moses, 102 N.Y.S.2d 987, 199 Misc. 718, 1951 N.Y. Misc. LEXIS 1582 (N.Y. Sup. Ct. 1951).

A petition by subway operators which alleged that they had been suspended for from five to seven days and subjected to probation for six months for reporting "sick" and paralyzing the transit system on a certain date, stated a cause of action against the transit authority. Horvath v Patterson, 3 Misc. 2d 960, 151 N.Y.S.2d 183, 1956 N.Y. Misc. LEXIS 2069 (N.Y. Sup. Ct. 1956), aff'd, 3 A.D.2d 730, 160 N.Y.S.2d 816, 1957 N.Y. App. Div. LEXIS 6402 (N.Y. App. Div. 2d Dep't 1957).

The purpose of the provision in this section, that an employee may be suspended without pay for a period of 30 days pending hearing and determination of charges against him, is to assure that the matter be promptly disposed of, but the fact that the

employee filed an answer which required investigation by the municipality does not constitute a delay occasioned by the employee and he is not deprived of compensation to which he would otherwise be entitled. Schmidt v MacEdonio, 47 Misc. 2d 889, 263 N.Y.S.2d 434, 1965 N.Y. Misc. LEXIS 1509 (N.Y. Sup. Ct. 1965).

A municipal employee may be suspended pending a hearing and, if he is suspended, his pay can be cut off immediately only if there is an enabling statute. Gould v Looney, 60 Misc. 2d 973, 304 N.Y.S.2d 537, 1969 N.Y. Misc. LEXIS 1155 (N.Y. Sup. Ct. 1969), modified, 34 A.D.2d 807, 311 N.Y.S.2d 695, 1970 N.Y. App. Div. LEXIS 4827 (N.Y. App. Div. 2d Dep't 1970).

One of purposes of legislature in enacting section of Civil Service Law providing that officer or employee against whom charges have been preferred may be suspended without pay for period not exceeding 30 days was to afford some protection to property rights of its civil servants and those protections are clearly specified in the statutes and should not be enlarged upon. Shales v Rochester, 91 Misc. 2d 195, 397 N.Y.S.2d 566, 1977 N.Y. Misc. LEXIS 2272 (N.Y. Sup. Ct. 1977).

16. —Suspension pending hearing and determination of charges

Although Civil Service Law § 75, subd 3 limits suspension without pay for a period not exceeding 30 days pending hearing and determination of charges of incompetency or misconduct, it does not prohibit suspension for a longer period nor require reinstatement after such period if the charges have not been determined. Prezio v De Santis, 38 A.D.2d 772, 328 N.Y.S.2d 32, 1972 N.Y. App. Div. LEXIS 5561 (N.Y. App. Div. 3d Dep't 1972).

State police officer was improperly suspended without pay for over 2 years pending a hearing on departmental charges, even though delay in bringing said charges was occasioned by pendency of criminal prosecution in federal court. Sabatini v Kirwan, 42 A.D.2d 1004, 348 N.Y.S.2d 377, 1973 N.Y. App. Div. LEXIS 3395 (N.Y. App. Div. 3d Dep't 1973).

With respect to suspension without pay imposed on police officer by city pending hearing, failure of city commissioner of public safety to remit such suspension when he gave notice of his final determination to impose 2-month post-hearing suspension penalty permitted court to review both pre-hearing and post-hearing suspensions. Panella v Dolce, 203 A.D.2d 465, 610 N.Y.S.2d 860, 1994 N.Y. App. Div. LEXIS 3924 (N.Y. App. Div. 2d Dep't 1994).

Court properly determined that savings clause in CLS Civ S § 76(4), providing that nothing in CLS Civ S § 75 shall be construed to "repeal or modify" any local laws, was unambiguous grand-fathering provision that did not apply to subsequently enacted NYC Admin Code § 9-112, providing that members of Department of Corrections' uniform force charged with crime may be suspended without pay for as long as criminal charges remain pending. In proceeding brought by petitioners, Correction Captains Association and correction captain, challenging Department of Correction's suspension of individual petitioner for more than 30 days pending disposition of administrative charges against him, court properly denied Correction Officers' Benevolent Association's motion to intervene, notwithstanding correction officers' interest in matter, since purported collective bargaining agreement that correction officers wished to challenge as ineffective to bring them within savings clause of CLS Civ S § 76(4) affected only Department's rank and file, not its captains, such as individual petitioner, and its adjudication in instant proceeding would have prejudicially delayed determination as to individual petitioner, who had already been suspended without pay for over year. Meringolo v Jacobson, 256 A.D.2d 20, 680 N.Y.S.2d 521, 1998 N.Y. App. Div. LEXIS 12802 (N.Y. App. Div. 1st Dep't 1998), app. dismissed, 93 N.Y.2d 948, 694 N.Y.S.2d 342, 716 N.E.2d 177, 1999 N.Y. LEXIS 1364 (N.Y. 1999), app. denied, 93 N.Y.2d 948, 694 N.Y.S.2d 342, 716 N.E.2d 177, 1999 N.Y. LEXIS 1365 (N.Y. 1999).

The Chief of Police of the Village of Hasting-on-Hudson, can suspend a policeman, without pay, for a period of 30 days, pending the filing of formal charges. McElroy v Trojak, 21 Misc. 2d 145, 189 N.Y.S.2d 824, 1959 N.Y. Misc. LEXIS 3512 (N.Y. Sup. Ct. 1959).

The 30-day limit on suspension of civil service employees pending hearing and determination of charges against them is mandatory, in the absence of a showing of special circumstances, and where charges have not been preferred within such time the employee has a mandatory right to reinstatement. Morris v Reid, 210 N.Y.S.2d 868, 1960 N.Y. Misc. LEXIS 3922 (N.Y. Sup. Ct. 1960).

17. — —Effect of delay in hearing

Even if a civil service employee is found guilty and ultimately dismissed, he must be paid his salary during any period of suspension, except to extent of imposition of a 30-day suspension without pay pending the determination of the charges; however, where the delay in proceeding is occasioned by the conduct of the employee, he will be denied the right to recover wages for the period involved. Lytle v Christian, 47 A.D.2d 824, 365 N.Y.S.2d 865, 1975 N.Y. App. Div. LEXIS 9162 (N.Y. App. Div. 1st Dep't 1975).

Where New York City transit authority employee, who had been suspended following his arrest and charge of criminal sale of controlled substance in the first degree, was ready to proceed with administrative hearing but the respondents, on their own initiative, chose to delay the proceedings, the employee was entitled to receive his full salary during any period of suspension in excess of the initial 30 days; however, reduction was to be had for such sums as he may have earned from other employments during the subject period. Delays in disciplinary hearing against transit authority employee who had been suspended without pay after arrest on criminal charge were not ground for offset against award of back pay where one delay was properly occasioned by motion to change hearing referee and other delays were occasioned by counsel's actual engagement at trial. If transit authority could have demonstrated that petitioner who was suspended without pay after arrest on criminal charge obtained adjournments of criminal proceeding for frivolous reasons, or in bad faith merely to increase his award of back pay, an offset against the award would have been justified. Yeampierre v Gutman, 57 A.D.2d 898, 394 N.Y.S.2d 450, 1977 N.Y. App. Div. LEXIS 12137 (N.Y. App. Div. 2d Dep't 1977).

Suspension of petitioner in excess of 30 days without pay, pending hearing and investigation of charges of possession of pornographic material, was not unwarranted where part of a delay in filing and hearing the charges had been at petitioner's own request. Petition of Rice, 40 Misc. 2d 1092, 244 N.Y.S.2d 536, 1963 N.Y. Misc. LEXIS 1396 (N.Y. Sup. Ct. 1963).

18. —Duration of suspension

Although subd. 3 of this section authorizes only, in the event a penalty of suspension is imposed on a civil service employee for misconduct, suspension for a period not exceeding two months, in view of subd. 5-a of § 1296 of the Civil Practice Act, added in 1955, the Appellate Division, in modifying an order of dismissal for misconduct, had discretion to order suspension for a longer period. Mitthauer v Patterson, 8 N.Y.2d 37, 201 N.Y.S.2d 321, 167 N.E.2d 731, 1960 N.Y. LEXIS 1223 (N.Y. 1960).

Where Article 78 proceeding is brought to review punishment imposed on fireman by fire commissioner, court, on finding that such punishment was abuse of discretion and was excessive, could assess suspension for the period it deemed appropriate without being limited by the 2 month period specified in Civil Service Law § 75, subd 3. Lo Bello v McLaughlin, 31 N.Y.2d 782, 339 N.Y.S.2d 108, 291 N.E.2d 388, 1972 N.Y. LEXIS 1031 (N.Y. 1972).

Under subdivision 2 of this section the maximum suspension without pay pending determination of charges is 30 days. Loos v New York City Transit Authority, 4 A.D.2d 751, 164 N.Y.S.2d 884, 1957 N.Y. App. Div. LEXIS 4865 (N.Y. App. Div. 2d Dep't 1957).

Where court finds punishment of dismissal to be excessive and orders suspension, it is not limited in assessing the length of such suspension to the 2 month period specified in Civil Service Law § 75, subd 3. Boddie v County of Westchester, 41 A.D.2d 546, 339 N.Y.S.2d 692, 1973 N.Y. App. Div. LEXIS 5346 (N.Y. App. Div. 2d Dep't), aff'd, 33 N.Y.2d 835, 351 N.Y.S.2d 975, 307 N.E.2d 47, 1973 N.Y. LEXIS 878 (N.Y. 1973).

Civil Service Law § 75, subd 3 purporting to limit the length of suspension of a civil service employee found guilty of charges to a period of not exceeding 2 months is no longer valid. Court in Article 78 proceeding to review determination of commissioner of corrections dismissing corrections officer could, on finding that such punishment was excessive and an abuse of discretion, impose suspension from March 21, 1972 through January 10, 1973 despite 2 month limit on length of suspension proscribed in Civil Service Law § 75, subd 3. Boddie v County of Westchester, 41 A.D.2d 546, 339 N.Y.S.2d 692, 1973 N.Y. App. Div. LEXIS 5346 (N.Y. App. Div. 2d Dep't), aff'd, 33 N.Y.2d 835, 351 N.Y.S.2d 975, 307 N.E.2d 47, 1973 N.Y. LEXIS 878 (N.Y. 1973).

Where Civil Service Law section provided that officer or employee found guilty of charges might be penalized by suspension without pay for period not exceeding two months, suspension for period of 180 working days, with credit for those working days which accrued during 30-day suspension period immediately prior to hearing, was in violation of statute. Carlstrom v Hauser, 54 A.D.2d 705, 387 N.Y.S.2d 447, 1976 N.Y. App. Div. LEXIS 14283 (N.Y. App. Div. 2d Dep't 1976).

Court will affirm 44 day suspension imposed by New York City Civil Service Commission upon sanitation man found guilty of violations of Department of Sanitation's rules governing sick leave, as result of his activities at bar in which he had one-half interest, where commission reduced penalty of dismissal to suspension in light of person's "commendable" work record and fact that he was never seen working in bar but merely on premises. New York City Dep't of Sanitation v New York City Civil Service Com., 114 A.D.2d 320, 494 N.Y.S.2d 312, 1985 N.Y. App. Div. LEXIS 52998 (N.Y. App. Div. 1st Dep't 1985), rev'd, 68 N.Y.2d 978, 510 N.Y.S.2d 551, 503 N.E.2d 107, 1986 N.Y. LEXIS 20936 (N.Y. 1986).

Prehearing suspension of town police chief was not limited to 30 days under CLS Civ S § 75(3) where CLS Civ S § 76(4) preserved inconsistent local laws enacted before 1941, and thus CLS Town § 155 was still valid and controlling. Coscette v Town of Wallkill, 281 A.D.2d 479, 721 N.Y.S.2d 784, 2001 N.Y. App. Div. LEXIS 2356 (N.Y. App. Div. 2d Dep't), app. denied, 97 N.Y.2d 602, 735 N.Y.S.2d 491, 760 N.E.2d 1287, 2001 N.Y. LEXIS 3276 (N.Y. 2001).

It was proper for police commissioner to direct that petitioner forfeit 15 vacation days for having attempted to coerce detainee not to file complaint with Civilian Complaint Review Board. Driscoll v Safir, 284 A.D.2d 106, 725 N.Y.S.2d 546, 2001 N.Y. App. Div. LEXIS 5658 (N.Y. App. Div. 1st Dep't 2001).

The inherent right of the Board of Police Commissioners to remove a member of the Police Department after sustained charges does not give it the right to suspend a police officer for a period in excess of thirty days and the reinstatement of such an officer with back pay will be ordered retroactively as of a date thirty days after his original suspension. Webber v Tunney, 59 N.Y.S.2d 455, 186 Misc. 270, 1945 N.Y. Misc. LEXIS 2593 (N.Y. Sup. Ct. 1945).

Where the Appellate Division, in reviewing a civil service determination dismissing an employee for misconduct, decides that the penalty is too severe and remits the matter for imposition of a lesser penalty, it must be assumed that the Appellate Division had in mind the provisions of subd. 3 of this section, which would permit only a two-months' suspension without pay, and, in view of imposition of such a lesser punishment by the director, petitioner's pay should not have been withheld for a longer period. Application of Fuller, 33 Misc. 2d 708, 230 N.Y.S.2d 943, 1961 N.Y. Misc. LEXIS 1924 (N.Y. Sup. Ct. 1961).

Subdivision 3 of this section limiting the fine which may be imposed upon a civil service employee to $100, is not a limitation upon the hearing officer's power to suspend him without pay for a period during which his salary would exceed $100. Manzi v Kaplan, 35 Misc. 2d 793, 231 N.Y.S.2d 161, 1962 N.Y. Misc. LEXIS 3068 (N.Y. Sup. Ct. 1962), aff'd, 20 A.D.2d 791, 248 N.Y.S.2d 390, 1964 N.Y. App. Div. LEXIS 4271 (N.Y. App. Div. 2d Dep't 1964).

A state trooper cannot be suspended more than thirty days and is entitled to reinstatement with back pay for the period in excess of the term of lawful suspension, even though the determination of charges against him was delayed and the suspension accordingly prolonged in part because of legal action instituted by him. Haskins v Warner, 46 N.Y.S.2d 400, 1944 N.Y. Misc. LEXIS 1640 (N.Y. Sup. Ct. 1944).

An employee of the Board of Education may be suspended for a period in excess of thirty days notwithstanding the provisions of this section under §§ 870 and 872 of the Education Law. Baker v Board of Education, 62 N.Y.S.2d 372, 1946 N.Y. Misc. LEXIS 2242 (N.Y. Sup. Ct. 1946).

New York City Administrative Code § 434a-2.0, which gives New York City Police Commissioner power to suspend police officers without pay and for indefinite period pending hearing of charges against them is rationally related to legitimate legislative aim of insuring integrity and appearance of integrity of New York City Police Department; power of indefinite suspension does not offend equal protection clause, notwithstanding fact that all civil service employees except for New York City police officers are protected from payless suspensions for more than 30 days by Civil Service Law § 75, subd 3. Baker v Cawley, 459 F. Supp. 1301, 1978 U.S. Dist. LEXIS 14639 (S.D.N.Y. 1978), aff'd, 607 F.2d 994, 1979 U.S. App. LEXIS 14767 (2d Cir. N.Y. 1979).

19. —Entitlement to pay for period of suspension exceeding 30 days, generally

While section (former § 22) only provides for suspension of a civil service employee, without pay, for 30 days pending determination of charges, if a suspended employee claims back pay by reason of suspension pending hearing of charges for more than that length of time, his remedy is by independent action or proceeding, not upon court review of propriety of the decision on the charges. Bentley v Henninger, 10 A.D.2d 900, 200 N.Y.S.2d 117, 1960 N.Y. App. Div. LEXIS 10421 (N.Y. App. Div. 4th Dep't), app. denied, 11 A.D.2d 974, 209 N.Y.S.2d 541, 1960 N.Y. App. Div. LEXIS 8158 (N.Y. App. Div. 4th Dep't 1960).

Where a civil service employee is suspended without pay for a period in excess of 30 days, and eventually discharged, he is entitled to recover wages for excess period when delay in disposition of the charges is not occasioned by his fault. Amkraut v Hults, 21 A.D.2d 260, 250 N.Y.S.2d 171, 1964 N.Y. App. Div. LEXIS 3617 (N.Y. App. Div. 1st Dep't), aff'd, 15 N.Y.2d 627, 255 N.Y.S.2d 672, 203 N.E.2d 923, 1964 N.Y. LEXIS 821 (N.Y. 1964).

Under Civil Service L § 75, subd 3, petitioner who was suspended without pay in excess of 30 days was entitled to pay from end of 30-day period to date of final discharge less outside earnings, if any. Mason v Perrotta, 41 A.D.2d 916, 343 N.Y.S.2d 748, 1973 N.Y. App. Div. LEXIS 4469 (N.Y. App. Div. 1st Dep't 1973).

In Article 78 proceeding to compel town to pay petitioner's salary and fringe benefits pending determination of disciplinary charges, town bore burden of proof on affirmative defense that petitioner's position was abolished, but petitioner then bore burden of proof to show that abolition was not undertaken in good faith. Young v Supervisor of Lloyd, 159 A.D.2d 828, 552 N.Y.S.2d 981, 1990 N.Y. App. Div. LEXIS 2935 (N.Y. App. Div. 3d Dep't), app. dismissed, 76 N.Y.2d 761, 559 N.Y.S.2d 237, 558 N.E.2d 39, 1990 N.Y. LEXIS 1343 (N.Y. 1990).

Where an employee has been lawfully dismissed, he is not entitled to any pay for the period of his suspension pending preferment of charges and an opportunity to make answer thereto before dismissal. Whalen v Corsi, 105 N.Y.S.2d 30, 201 Misc. 39, 1951 N.Y. Misc. LEXIS 1858 (N.Y. Sup. Ct. 1951), aff'd, 279 A.D. 1113, 112 N.Y.S.2d 499, 1952 N.Y. App. Div. LEXIS 6010 (N.Y. App. Div. 1952), disapproved, Sinicropi v Bennett, 92 A.D.2d 309, 460 N.Y.S.2d 809, 1983 N.Y. App. Div. LEXIS 16623 (N.Y. App. Div. 2d Dep't 1983).

The provision in subd. 3 of this section that an employee may be suspended for not more than one month without pay pending hearing and determination of charges against him, but, if removed, shall not be entitled to salary or compensation after suspension, will not entitle an employee to pay where he was removed by order of the commissioner following a hearing, the commissioner's order was remanded for further consideration upon court review, but the Commissioner reaffirmed the order of removal nunc pro tunc. Phinn v Kross, 26 Misc. 2d 889, 205

N.Y.S.2d 692, 1960 N.Y. Misc. LEXIS 2529 (N.Y. Sup. Ct. 1960), aff'd, 15 A.D.2d 641, 223 N.Y.S.2d 855, 1962 N.Y. App. Div. LEXIS 11947 (N.Y. App. Div. 1st Dep't 1962), disapproved, Sinicropi v Bennett, 92 A.D.2d 309, 460 N.Y.S.2d 809, 1983 N.Y. App. Div. LEXIS 16623 (N.Y. App. Div. 2d Dep't 1983).

20. — —Particular non-NYC cases

Where commissioner of police had power to suspend patrolman without pay for a period not exceeding 30 days, and patrolman was subsequently dismissed, patrolman was entitled to full pay from end of 30-day period to date of dismissal. Gould v Looney, 34 A.D.2d 807, 311 N.Y.S.2d 695, 1970 N.Y. App. Div. LEXIS 4827 (N.Y. App. Div. 2d Dep't 1970).

Where a senior stenographer in the county clerk's office was dismissed after the hearing officer found that she failed to "tumble" deeds as instructed, failed to prepare bank deposits as instructed, and that she failed to take any steps to correct her poor typing, the penalty was reduced from dismissal to a suspension of 6 months considering the nature of the offenses and the prior satisfactory record of the employee, and the respondent was directed to reinstate the petitioner and to compensate her for the amount she would have earned but for her dismissal, less 6 months and less such amounts as petitioner may have otherwise earned in any other employment, and any unemployment insurance benefits she may have received during such period. Escher v Hall, 37 A.D.2d 1013, 325 N.Y.S.2d 511, 1971 N.Y. App. Div. LEXIS 3095 (N.Y. App. Div. 3d Dep't 1971).

Chief of police suspended pursuant to charges was entitled to resumption of pay starting 30 days after such suspension if hearing had not been held and he was entitled to receive his salary until final determination of the charges against him, even if he was not then reinstated. Maurer v Cappelli, 42 A.D.2d 758, 346 N.Y.S.2d 154, 1973 N.Y. App. Div. LEXIS 3753 (N.Y. App. Div. 2d Dep't 1973).

Tenured civil servant who had been suspended without pay on stated charges was entitled to payment of salary pending determination of administrative charges despite fact that 30-day suspension had been ended and servant had been directed to report for work, but had refused to do so. Damino v Shapiro, 50 A.D.2d 888, 377 N.Y.S.2d 925, 1975 N.Y. App. Div. LEXIS 11787 (N.Y. App. Div. 2d Dep't 1975), aff'd, 40 N.Y.2d 1056, 392 N.Y.S.2d 283, 360 N.E.2d 960, 1976 N.Y. LEXIS 3236 (N.Y. 1976).

Railroad clerk who was not afforded timely disciplinary hearing prior to his discharge was entitled to back pay for period of suspension in excess of 30 days. Koegan v Yunich, 51 A.D.2d 744, 379 N.Y.S.2d 468, 1976 N.Y. App. Div. LEXIS 11268 (N.Y. App. Div. 2d Dep't 1976).

Even though police officer was found guilty of charges and ultimately dismissed, he was entitled to receive full salary for any period of suspension in excess of 30 days, less sums he had earned from other employment and any unemployment benefits he had received during subject period; and his recovery could not be defeated absent evidence that he caused delay or contributed thereto. Cassidy v Police Dept., County of Nassau, 54 A.D.2d 682, 387 N.Y.S.2d 266, 1976 N.Y. App. Div. LEXIS 14225 (N.Y. App. Div. 2d Dep't 1976).

Even if police officer's suspension without pay prior to determination of town board to take disciplinary action unlawfully exceeded 30 days, court would nonetheless hold that his suspension without pay for six months, the punishment which the court had ruled was reasonable, would be applied to a period subsequent to the town board's determination. Yodice v Shaw, 58 A.D.2d 730, 395 N.Y.S.2d 869, 1977 N.Y. App. Div. LEXIS 12847 (N.Y. App. Div. 4th Dep't 1977).

Where school janitor had already obtained permanent civil service status when charges of incompetence were brought against him, it was error to attempt to deny him salary for period of more than 30 days pending final determination of such charges. Gibson v Board of Education, 59 A.D.2d 963, 399 N.Y.S.2d 296, 1977 N.Y. App. Div. LEXIS 14221 (N.Y. App. Div. 3d Dep't 1977), app. dismissed, 43 N.Y.2d 925, 403 N.Y.S.2d 736, 374 N.E.2d 629, 1978 N.Y. LEXIS 1830 (N.Y. 1978), aff'd, 45 N.Y.2d 884, 410 N.Y.S.2d 811, 383 N.E.2d 113, 1978 N.Y. LEXIS 2308 (N.Y. 1978).

A public employee who was dismissed from her tenured position with the Nassau County Department of Probation was entitled to be paid her salary for the 37-month period between the county's initial determination dismissing her from her position, which termination was annulled by the Appellate Division for procedural error, and a subsequent determination, made upon remittitur, which also dismissed the employee and which was properly made, notwithstanding that the employee performed no services and was guilty of the misconduct causing her suspension and eventual dismissal, since a public employee suspended for a period in excess of 30 days who is thereafter dismissed can recover wages or salary for the excess period if the delay in reaching the dismissal determination is not caused by the fault of the employee, the public employee was entitled to continue to receive her salary pending a prompt disciplinary determination, and the substantive right to confrontation could not be limited or defeated by affording the employee an initial quick but sham hearing and determination. Sinicropi v Bennett, 92 A.D.2d 309, 460 N.Y.S.2d 809, 1983 N.Y. App. Div. LEXIS 16623 (N.Y. App. Div. 2d Dep't), app. dismissed, 59 N.Y.2d 967, 1983 N.Y. LEXIS 5235 (N.Y. 1983), aff'd, 60 N.Y.2d 918, 470 N.Y.S.2d 580, 458 N.E.2d 1257, 1983 N.Y. LEXIS 3559 (N.Y. 1983).

City school district worker with permanent civil service status, who was dismissed for various instances of unauthorized tardiness and absence from work, was improperly denied back pay for period of delay in imposition of dismissal sanction from date of hearing under CLS Civ S § 75, during which period he remained under suspension without pay. Diehsner v Schenectady City School Dist., 152 A.D.2d 796, 543 N.Y.S.2d 576, 1989 N.Y. App. Div. LEXIS 9328 (N.Y. App. Div. 3d Dep't 1989).

Petitioner in Article 78 proceeding, who was suspended without pay from his position as village police officer retroactive to August 28, 1992 following his indictment on criminal charges, was entitled to recover his full salary and benefits retroactive to September 29, 1992 and until determination of charges against him, since respondents could not suspend his pay for more than 30 days pursuant to CLS Civ S § 75(3) and CLS Vill § 8-804; fact that evidence necessary for final disposition of disciplinary charges was in exclusive control of district attorney was not relevant, nor was it relevant that petitioner requested extension of time to answer charges against him, since respondents had burden of scheduling hearing. Conde v Aiello, 204 A.D.2d 1029, 613 N.Y.S.2d 94, 1994 N.Y. App. Div. LEXIS 6857 (N.Y. App. Div. 4th Dep't 1994).

City employees who were discharged for misconduct were entitled to recover their wages for period of delay in disciplinary proceeding that was attributable to their attorneys, who were engaged in hearing and deposition; activities of counsel for accused cannot be attributed to accused. Dunning v City of Newburgh, 210 A.D.2d 404, 620 N.Y.S.2d 105, 1994 N.Y. App. Div. LEXIS 12841 (N.Y. App. Div. 2d Dep't 1994).

Where, following employee's suspension from police department, employee notified department, upon request that he appear regarding disciplinary proceedings, that there were criminal proceedings pending which precluded proceeding on departmental charges, and employee subsequently pleaded guilty to reduced criminal charge and agreed to resign and release city and police department of any civil liability, employee was not entitled to back pay for period between suspension and final termination on theory that suspension had not been invoked pursuant to departmental disciplinary proceedings. Smith v New York, 84 Misc. 2d 51, 374 N.Y.S.2d 89, 1975 N.Y. Misc. LEXIS 3090 (N.Y. App. Term 1975).

21. — —Particular NYC cases

Even though permanent NYC civil service employee suspended for period in excess of 30 days is eventually discharged for misconduct, he may recover wages for such excess period, provided that delay in disposition of charges was not occasioned by his fault, and he may make the claim for accrued salary by way of action at law; it is not necessary to commence Article 78 proceeding. Gerber v New York City Housing Authority, 42 N.Y.2d 162, 397 N.Y.S.2d 608, 366 N.E.2d 268, 1977 N.Y. LEXIS 2165 (N.Y. 1977).

Where bus driver for the New York City Transit Authority was suspended following filing of murder charge against him and disciplinary hearing was adjourned sine die pending disposition of the criminal charge, he was entitled under the Civil Service Law to his full wages and benefits from date 30 days after his suspension until date when he pleaded guilty to manslaughter. Coping v New York City Transit Authority, 57 A.D.2d 621, 393 N.Y.S.2d 763, 1977 N.Y. App. Div. LEXIS 11633 (N.Y. App. Div. 2d Dep't 1977).

Court improperly granted application by New York City Transit Authority (NYCTA) police officer for back pay for period between original effective date of his dismissal and date when NYCTA's vice-president for labor relations approved hearing referee's adherence to his original recommendation of dismissal since matter had been remitted to referee solely for redetermination of penalty, which was not reduced. De Martino v Meehan, 149 A.D.2d 703, 540 N.Y.S.2d 500, 1989 N.Y. App. Div. LEXIS 5354 (N.Y. App. Div. 2d Dep't 1989).

It was proper to suspend New York City police officer for 12 days for having punched civilian without just cause and using discourteous language. Altreche v Safir, 287 A.D.2d 409, 732 N.Y.S.2d 332, 2001 N.Y. App. Div. LEXIS 10182 (N.Y. App. Div. 1st Dep't 2001).

22. —Reinstatement and back pay following suspension

Court of Appeals would annul determination of New York City Civil Service Commission insofar as it awarded back pay to probationary police officer who had been terminated, since commission has power only to hear and decide appeals by aggrieved persons, and to hear and decide appeals in disciplinary proceedings, and may only "affirm, modify or reverse" determinations; power to award back pay is not expressly given, nor may it necessarily be implied as part of commission's delegated powers. Department of Personnel v New York City Civil Service Com., 79 N.Y.2d 806, 580 N.Y.S.2d 173, 588 N.E.2d 71, 1991 N.Y. LEXIS 5158 (N.Y. 1991).

Where an employee in the highway department was discharged after having been given an opportunity to explain an allegedly false expense voucher filed by him, the highway commissioner being at time ignorant of the fact that the employee was a Spanish war veteran and entitled to preferential consideration, and the commissioner reinstated him after learning that he was a veteran, but employee, who had been idle for four months, delayed another twenty days, and then applied for a writ of mandamus requiring payment of his salary during time of his discharge, the writ should be denied. Knapp v Duffey, 169 A.D. 794, 155 N.Y.S. 818, 1915 N.Y. App. Div. LEXIS 5087 (N.Y. App. Div. 1915).

Whether a civil service employee is entitled, upon re-employment in a lower category, to recover pay loss for a period in excess of the 30-day suspension pending hearing and determination of charges against him, depends upon whether delay in re-employing him was attributable to any extent to his own fault. Carville v Board of Education, 11 A.D.2d 1092, 206 N.Y.S.2d 868, 1960 N.Y. App. Div. LEXIS 7459 (N.Y. App. Div. 4th Dep't 1960).

Although probationary community peace officer was entitled to a hearing in connection with his discharge because basis for dismissal went beyond scope of his public performance and affected his good name and reputation, petitioner was not required to be reinstated with back pay pending a hearing. Perry v Blair, 49 A.D.2d 309, 374 N.Y.S.2d 850, 1975 N.Y. App. Div. LEXIS 10902 (N.Y. App. Div. 4th Dep't 1975).

A youth group worker aide in a county children's shelter who had been suspended without pay based on her alleged incompetency in leaving a set of keys unattended on a table in the staff lounge at the end of her shift due to the fact that her replacement had arrived late, which act had allegedly enabled a juvenile who had been confined in the shelter to abscond, would be ordered reinstated and would be entitled to back pay for the period of her suspension where the record showed that, at the time of the juvenile's escape, the employee's replacement had already taken responsibility for her shift so that she, rather than the suspended employee, had been on duty at the time of the escape, where, though the employee had acted improperly in leaving the keys on the staff lounge table, her replacement had also been negligent in failing to count the keys upon her arrival, and no actual rule forbade such action by the employee, where testimony at the suspension hearing indicated that workers had previously left their keys on the staff lounge table on occasion when shift changes had occurred in that room, where there was no conclusive testimony that could support a finding that any door other than the staff lounge door had been open at the time of the escape, and the record further indicated that such door had usually been open during shift changes and had additionally been known to malfunction, where the record contained no credible evidence to show that the escaping juvenile had been "wandering the hallways" as alleged, or that there was a specific rule that had required that the juvenile be locked in her room at the time of her escape, where the employee's actions had not been the proximate cause of the escape in that, despite the employee's improper actions, her replacement had also been negligent and could have prevented the escape had she attended to her duty, and where the employee had never before had any complaints made against her, no previous escape had ever resulted in any disciplinary action against an employee of the facility, and several other employees who had arguably been at least equally responsible for the escape had not been charged. McCaskill v D'Elia, 97 A.D.2d 436, 467 N.Y.S.2d 404, 1983 N.Y. App. Div. LEXIS 20022 (N.Y. App. Div. 2d Dep't), app. dismissed, 61 N.Y.2d 669, 1983 N.Y. LEXIS 6831 (N.Y. 1983), rev'd, 64 N.Y.2d 636, 485 N.Y.S.2d 41, 474 N.E.2d 249, 1984 N.Y. LEXIS 4965 (N.Y. 1984).

Petitioner is entitled to a peremptory order of mandamus compelling the village of Solvay to pay him wages for the period between the time he was unlawfully discharged from his employment by said village and his reinstatement, where it appears that petitioner, who is an honorably discharged veteran of the world war, was voluntarily reinstated by village board after it was convinced that he was an honorably discharged soldier and entitled to preference as such, under this section. Warner v Hall, 252 N.Y.S. 451, 141 Misc. 294, 1931 N.Y. Misc. LEXIS 1664 (N.Y. Sup. Ct. 1931).

Plaintiff, suspended after being found guilty of charges, is not entitled to salary for the period of suspension exceeding two months. Paris v New York, 74 N.Y.S.2d 584, 189 Misc. 445, 1947 N.Y. Misc. LEXIS 3288 (N.Y. App. Term 1947), disapproved, Sinicropi v Bennett, 92 A.D.2d 309, 460 N.Y.S.2d 809, 1983 N.Y. App. Div. LEXIS 16623 (N.Y. App. Div. 2d Dep't 1983).

Where a fire captain, a veteran of both world wars, was suspended in accordance with the statute and, on hearing, found guilty of intoxication and insubordination while on duty, but upon review by the Appellate Division it was determined that while the evidence sustained the charge of insubordination it did not sustain the charge of intoxication, and the case was sent back for rehearing but the fire captain was not reinstated, it was held that he was not entitled to back salary unless the charges were dismissed upon rehearing. Application of Lindquist, 81 N.Y.S.2d 12, 192 Misc. 906, 1948 N.Y. Misc. LEXIS 2689 (N.Y. Sup. Ct. 1948), disapproved, Sinicropi v Bennett, 92 A.D.2d 309, 460 N.Y.S.2d 809, 1983 N.Y. App. Div. LEXIS 16623 (N.Y. App. Div. 2d Dep't 1983).

Dismissal under sub 2 of § 22 of the Civil Service Law, of an employee in municipal civil service, is affirmed by the decision of the commission on appeal although as a matter of discretion the transfer of the employee to a vacancy in a similar title in another department is permitted, and the employee is not entitled to pay pending appointment to such other position. Meade v New York, 83 N.Y.S.2d 324, 193 Misc. 82, 1948 N.Y. Misc. LEXIS 3337 (N.Y. City Ct. 1948).

Where, if policemen had not procured order to show cause why they should not be paid back salary, which order stayed proceedings against them, they would have been re-instated with right to back pay, or dismissed, as the case might be, court dismissed the application in the exercise of sound discretion. Finck v Bliss, 129 N.Y.S.2d 64, 205 Misc. 775, 1954 N.Y. Misc. LEXIS 2353 (N.Y. Sup. Ct. 1954).

A civil service employee of the Board of Education waives his rights to salary during the period of his suspension where he returns to his employment upon the condition that he seek retirement in order to save his pension rights, there being no

reversal of the findings of the Board of Education but rather a modification of punishment. Baker v Board of Education, 62 N.Y.S.2d 372, 1946 N.Y. Misc. LEXIS 2242 (N.Y. Sup. Ct. 1946).

23. — —Back pay offset for other earnings

Where it not only appeared that housing authority patrolman, who was arrested and charged with the crime of murder, was suspended from his position, and continued under suspension without pay for a period in excess of two and one-half years, was ready to proceed with hearing on departmental charges, but that housing authority officials on their own initiative chose to delay the proceedings, patrolman was entitled to accumulated salary for the period involved, less sums earned from other employment during such period. Lytle v Christian, 47 A.D.2d 824, 365 N.Y.S.2d 865, 1975 N.Y. App. Div. LEXIS 9162 (N.Y. App. Div. 1st Dep't 1975).

Any sums earned by patrolman during period between his suspension without pay from his employment with city housing authority and determination of housing authority dismissing him from his employment would be deducted from amount of any compensation which might be due patrolman for period between his suspension and the determination. McPherson v New York City Housing Authority, 47 A.D.2d 828, 365 N.Y.S.2d 862, 1975 N.Y. App. Div. LEXIS 9168 (N.Y. App. Div. 1st Dep't 1975).

Award of back pay to terminated State Thruway Authority toll collector, based on her having been suspended more than 30 days pending determination of disciplinary charges, was properly reduced by aggregate of wages earned and any unemployment insurance benefits received during such period. Sassone v New York State Thruway Auth., 189 A.D.2d 86, 594 N.Y.S.2d 882, 1993 N.Y. App. Div. LEXIS 2377 (N.Y. App. Div. 3d Dep't), app. denied, 82 N.Y.2d 658, 604 N.Y.S.2d 557, 624 N.E.2d 695, 1993 N.Y. LEXIS 3809 (N.Y. 1993).

Where charges upon which petitioner's first suspension from city police department was based were dismissed, petitioner was entitled to recoupment of salary which was withheld from that date until date of his second suspension, less any compensation from outside employment received for that period. May v Shaw, 87 Misc. 2d 808, 386 N.Y.S.2d 625, 1976 N.Y. Misc. LEXIS 2310 (N.Y. Sup. Ct. 1976), aff'd, 58 A.D.2d 807, 396 N.Y.S.2d 258, 1977 N.Y. App. Div. LEXIS 12971 (N.Y. App. Div. 2d Dep't 1977).

24. — —Backpay offset for vacation days, maintenance payment and other benefits

Supreme Court erred in determining that petitioner was entitled to night differential pay during period he was wrongfully dismissed from his employment with respondent New York City Transit Authority, since applicable collective bargaining agreement provided that if charges preferred against employee were not sustained employee would be paid at regular rate of pay for time lost by reason of charges, and that night differential pay was available only "for hours worked" after 6:00 p.m. Campbell v Kiley, 162 A.D.2d 685, 557 N.Y.S.2d 399, 1990 N.Y. App. Div. LEXIS 8223 (N.Y. App. Div. 2d Dep't 1990).

Plaintiff, upon his reinstatement to the police force, is only entitled to receive the full salary he would have earned during the period of his suspension and not an additional cash equivalency payment for vacation days and personal leave days he allegedly lost during the period of his suspension since neither the statutes which authorize the payment of full salary to a reinstated employee (Civil Service Law, §§ 77, 75, subd 3; Administrative Code of City of New York, § 434a-20) nor the collective bargaining agreement authorize a cash equivalency payment for vacation days and personal leave days allegedly lost during a period of suspension. Alongi v New York, 92 Misc. 2d 1082, 402 N.Y.S.2d 99, 1977 N.Y. Misc. LEXIS 2637 (N.Y. App. Term 1977).

A state trooper, unlawfully suspended, is entitled upon reinstatement to have the sum of $50 per month added in the computation of the back pay due him since this sum is received by troopers on active duty in the form of free uniforms, room and board, medical care, and allowances. Haskins v Warner, 47 N.Y.S.2d 793, 1944 N.Y. Misc. LEXIS 1855 (N.Y. Sup. Ct. 1944).

25. —Other particular suspension matters

Where there was an honest difference of opinion between a civil service employee and a transit authority as to whether his physical disability was due to a spinal injury and as to whether such disability justified his absence from duty for some 14 months, and employee's opinion was supported by the decision and award of the workmen's compensation board but the court of appeals held that the board's decision and award were not controlling upon the transit authority, a six year suspension would be entered. Gormley v New York City Transit Authority, 23 A.D.2d 880, 259 N.Y.S.2d 665, 1965 N.Y. App. Div. LEXIS 4172 (N.Y. App. Div. 2d Dep't 1965).

Court reporter of the Family Court would be required to reimburse the county for improper telephone toll calls and for overcharges for transcripts and would be suspended for 60 days without pay, in addition to the 30 days' suspension without pay imposed upon him by the court clerk of the Family Court, for making improper toll charges to county, for incorrect computations of number of folios in his transcript, for charges for transcripts which he was required to furnish to judge without charge, but for which he billed the county and accepted payments, and for his false answers and misrepresentations to the court clerk and to the administrative judge when confronted with said charges. In re Miceli, 55 A.D.2d 96, 389 N.Y.S.2d 714, 1976 N.Y. App. Div. LEXIS 14549 (N.Y. App. Div. 4th Dep't 1976).

In view of petitioner's 26 years of service and prior unblemished record, penalty of two-month suspension without pay, imposed by city comptroller for insubordination, was disproportionate, and would be reduced to suspension without pay for 15 days. Silverstein v Goldin, 55 A.D.2d 561, 389 N.Y.S.2d 609, 1976 N.Y. App. Div. LEXIS 15243 (N.Y. App. Div. 1st Dep't 1976).

Five-day working suspension without pay imposed upon deputy city comptroller, who had been found to have intentionally and wilfully disobeyed directives of his superior, was wholly reasonable and would not be disturbed. Bateman v Ogdensburg, 55 A.D.2d 781, 389 N.Y.S.2d 486, 1976 N.Y. App. Div. LEXIS 15572 (N.Y. App. Div. 3d Dep't 1976).

After court annulled discharge of police officer due to lack of substantial evidence for several charges, and remanded to respondent for redetermination of penalty on confirmed charge of wrongfully discharging firearm and failing to report discharge, respondent had discretion to condition officer's reinstatement on result of psychological evaluation; however, reinstated officer was entitled to restoration to duty with back pay, retroactive to his dismissal date, upon final judicial determination annulling his dismissal. Eng v Bratton, 236 A.D.2d 234, 653 N.Y.S.2d 333, 1997 N.Y. App. Div. LEXIS 893 (N.Y. App. Div. 1st Dep't 1997), modified, app. denied, 1997 N.Y. App. Div. LEXIS 5956 (N.Y. App. Div. 1st Dep't May 13, 1997).

Penalty of probationary dismissal was appropriate where police officer was absent without leave for her scheduled tour of duty, she failed to perform her assigned duties despite several directives, and she engaged in verbal altercation and was discourteous to superior officer. Garrett v Safir, 253 A.D.2d 700, 677 N.Y.S.2d 570, 1998 N.Y. App. Div. LEXIS 9695 (N.Y. App. Div. 1st Dep't), app. denied, 92 N.Y.2d 817, 684 N.Y.S.2d 489, 707 N.E.2d 444, 1998 N.Y. LEXIS 4330 (N.Y. 1998).

It was appropriate to suspend firefighter for 2 months without pay where he chose to continue challenging his employer's policy against further display of T-shirts at firehouse after he was specifically ordered to take T-shirts down. Nelson v City of Buffalo Fire Dep't, 254 A.D.2d 761, 678 N.Y.S.2d 209, 1998 N.Y. App. Div. LEXIS 10463 (N.Y. App. Div. 4th Dep't 1998).

New York City Transit Authority could not place conductor on sick leave without pay, without suspending him, and without serving written charges of incompetency or misconduct upon him. O'Connor v New York City Transit Authority, 144 N.Y.S.2d 409, 1955 N.Y. Misc. LEXIS 3757 (N.Y. Sup. Ct. 1955), dismissed, 4 N.Y.2d 850, 173 N.Y.S.2d 818, 150 N.E.2d 244, 1958 N.Y. LEXIS 1085 (N.Y. 1958).

Indefinite suspension of city corrections officers without pay pending resolution of criminal charges against them, pursuant to NYC Admin Code § 9-112, was not inconsistent with CLS Civ S §§ 75(3) and 76(4). Seabrook v Jacobson, 970 F. Supp. 252, 1997 U.S. Dist. LEXIS 9630 (S.D.N.Y. 1997), vacated, 153 F.3d 70, 1998 U.S. App. LEXIS 20509 (2d Cir. N.Y. 1998).

26. Reinstatement, generally

City employer's decision not to reinstate petitioner to her former permanent position, after she was fired from probationary position to which she had been appointed through open competitive examination, was not abuse of discretion under New York City Personnel Rule (55 RCNY Appendix A) 6.2.7. Bethel v McGrath-McKechnie, 95 N.Y.2d 7, 709 N.Y.S.2d 888, 731 N.E.2d 604, 2000 N.Y. LEXIS 905 (N.Y. 2000).

Where plaintiff, a world war veteran, was appointed a cook in a former sheriff's office, without reference to civil service, and was later sworn in as a deputy, and where the present sheriff summarily dismissed him without preferring charges, plaintiff cannot claim reinstatement under this section. Nerling v Walsh, 245 A.D. 796, 281 N.Y.S. 427, 1935 N.Y. App. Div. LEXIS 10924 (N.Y. App. Div. 1935).

A discharged civil service employee cannot compel his reinstatement as a laborer in a city water department where it does not appear that a labor list was kept for the position as required by this section and there is no evidence that the employee ever asked to have his name placed on such a list, if one existed. Walsh v Patterson, 257 A.D. 917, 12 N.Y.S.2d 259, 1939 N.Y. App. Div. LEXIS 8391 (N.Y. App. Div. 1939).

Petitioner was entitled to an order directing the commissioner of public welfare to cause her to be reinstated in the permanent position of case supervisor in the bureau of old age assistance, where she was originally appointed on May 19, 1937, after having been offered the position "for a period of six months," and after serving in the position until December 15, 1937, commissioner requested the department of civil service to consider her appointment as permanent and thereafter dismissed her on May 14, 1938. Graae v Ahern, 258 A.D. 686, 18 N.Y.S.2d 907, 1940 N.Y. App. Div. LEXIS 8272 (N.Y. App. Div. 1940).

Where some of the charges were not substantial and other charges were not proved by the evidence, a determination discharging the petitioner was annulled, and petitioner was reinstated in his former position. Dunning v Turner, 285 A.D. 742, 140 N.Y.S.2d 481, 1955 N.Y. App. Div. LEXIS 5575 (N.Y. App. Div.), aff'd, 309 N.Y. 933, 132 N.E.2d 311, 309 N.Y. (N.Y.S.) 933, 1955 N.Y. LEXIS 1666 (N.Y. 1955).

Court was without authority to order reinstatement of improperly dismissed railroad clerk who had retired. Koegan v Yunich, 51 A.D.2d 744, 379 N.Y.S.2d 468, 1976 N.Y. App. Div. LEXIS 11268 (N.Y. App. Div. 2d Dep't 1976).

Petitioner was not entitled to reinstatement to her permanent position of county probation officer after she resigned her position to accept employment with county department of social services as child care social worker and was subsequently terminated for unsatisfactory performance, notwithstanding her contention that she was probationary employee entitled to reinstatement to her permanent position pursuant to Article 9 of collective bargaining agreement, since Article 1 of that agreement unambiguously stated that it covered permanent employees, and county personnel records showed that she was employed as child care social worker on provisional basis; by law, she could not be permanent employee because she had not been appointed as result of competitive exam. Thrasher v Genesee County Civil Service Com., 156 A.D.2d 966, 549 N.Y.S.2d 258, 1989 N.Y. App. Div. LEXIS 16130 (N.Y. App. Div. 4th Dep't 1989).

Court erroneously ordered fire district commissioners to readmit firefighters as members of fire department where commissioners' denial of firefighters' applications for readmission was based on their undisputed failure to meet requirements of district's newly amended by-laws; fact that commissioners had previously granted applications for readmission of candidates who did not meet requirements of old by-laws did not establish that determination was arbitrary and capricious. Kammerer v Crouchley, 205 A.D.2d 629, 613 N.Y.S.2d 263, 1994 N.Y. App. Div. LEXIS 6135 (N.Y. App. Div. 2d Dep't 1994).

Public Employment Relations Board (PERB) correctly found that employer discriminated against police officer when it demoted him from sergeant to patrolman in response to his exercise of protected Taylor Law rights, but PERB improperly ordered employer to restore officer to rank of sergeant where (1) officer's temporary appointment to sergeant position had not yet become permanent when he was demoted, (2) after he was demoted, another officer was appointed from new eligibility list to sergeant's position, and (3) demoted officer was not on new eligibility list; appointment of individual from constitutionally valid expired list would violate CLS NY Const Art V § 6, and matter was remitted to PERB for further consideration of that aspect of its remedial order. Village of Scotia v New York State Pub. Empl. Rels. Bd., 241 A.D.2d 29, 670 N.Y.S.2d 602, 1998 N.Y. App. Div. LEXIS 2818 (N.Y. App. Div. 3d Dep't 1998).

Where it appeared that petitioner, a competitive civil service employee, was suspended from his position because of his participation in a felony and that he was subsequently indicted for grand larceny and pleaded guilty to petit larceny, petitioner's application to be restored to his position should be denied notwithstanding that he was never formally removed from his position and was not accorded a hearing or given notice. Fiorini v Parkhurst, 100 N.Y.S.2d 569, 198 Misc. 796, 1950 N.Y. Misc. LEXIS 2158 (N.Y. Sup. Ct. 1950).

Where the statutory requirements are fulfilled in dismissing the employee, the Supreme Court may not issue a mandate for his reinstatement merely because there may be disagreement between the appointing officer and the employee as to the justification or wisdom of the dismissal. Whalen v Corsi, 105 N.Y.S.2d 30, 201 Misc. 39, 1951 N.Y. Misc. LEXIS 1858 (N.Y. Sup. Ct. 1951), aff'd, 279 A.D. 1113, 112 N.Y.S.2d 499, 1952 N.Y. App. Div. LEXIS 6010 (N.Y. App. Div. 1952), disapproved, Sinicropi v Bennett, 92 A.D.2d 309, 460 N.Y.S.2d 809, 1983 N.Y. App. Div. LEXIS 16623 (N.Y. App. Div. 2d Dep't 1983).

A petition which states that a civil service employee was removed when "by reason of departmental interference he [the appointing officer] was denied the right to act upon his judgment and experience" is not a sufficient allegation of bad faith to state a cause of action to compel reinstatement. Marasco v Morse, 9 Misc. 2d 296, 22 N.Y.S.2d 315, 1940 N.Y. Misc. LEXIS 1348 (N.Y. Sup. Ct. 1940), aff'd, 263 A.D. 1063, 34 N.Y.S.2d 823, 1942 N.Y. App. Div. LEXIS 8057 (N.Y. App. Div. 1942).

Civil service commission has no authority to direct reinstatement of municipal employee where no appeal from suspension has been taken. Brayer v Lapple, 80 Misc. 2d 159, 362 N.Y.S.2d 961, 1974 N.Y. Misc. LEXIS 1864 (N.Y. Sup. Ct. 1974), rev'd, 52 A.D.2d 1034, 384 N.Y.S.2d 584, 1976 N.Y. App. Div. LEXIS 12940 (N.Y. App. Div. 4th Dep't 1976).

A civil service employee is entitled to maintain an action to compel his reinstatement under this section where his position was abolished not for purposes of economy but in bad faith as a device to eliminate him. Graef v Maltbie, 49 N.Y.S.2d 102, 1944 N.Y. Misc. LEXIS 2064 (N.Y. Sup. Ct. 1944).

Attempted discharge of school district employee whose appointment was on a permanent basis in the competitive class of civil service warranted the institution of proceedings to compel reinstatement. However, an order requiring reinstatement was unnecessary where the board admitted the discharge was invalid. Cantilli v Giblyn, 157 N.Y.S.2d 766 (N.Y. Sup. Ct. 1956).

27. —After dismissal or suspension without hearing

A civil service employee charged with submitting false reports as to working hours and false claims as to meals, is not entitled to reinstatement because he was removed without a hearing. Lanzer v Moran, 268 A.D. 948, 51 N.Y.S.2d 390, 1944 N.Y. App. Div. LEXIS 4351 (N.Y. App. Div.), app. dismissed, 293 N.Y. 759, 57 N.E.2d 838, 293 N.Y. (N.Y.S.) 759, 1944 N.Y. LEXIS 2181 (N.Y. 1944).

Although civil service employee who resigns generally has no right to reinstatement, court properly reinstated petitioner so that he could defend against disciplinary charges at hearing, particularly since he had been summarily denied opportunity to prove his contentions at trial. Davila v New York City Hous. Auth., 190 A.D.2d 511, 593 N.Y.S.2d 12, 1993 N.Y. App. Div. LEXIS 887 (N.Y. App. Div. 1st Dep't 1993), app. denied, 87 N.Y.2d 801, 637 N.Y.S.2d 688, 661 N.E.2d 160, 1995 N.Y. LEXIS 4925 (N.Y. 1995).

Probationary New York City police officer was not entitled to hearing before she was discharged as result of police department investigation into allegations that she failed to take proper police

action and to cooperate in investigation of double homicide, and thus her Article 78 proceeding seeking reinstatement was properly dismissed where it was not shown that she was discharged in bad faith. Garcia v Bratton, 225 A.D.2d 123, 649 N.Y.S.2d 703, 1996 N.Y. App. Div. LEXIS 11981 (N.Y. App. Div. 1st Dep't 1996), aff'd, 90 N.Y.2d 991, 665 N.Y.S.2d 621, 688 N.E.2d 495, 1997 N.Y. LEXIS 3225 (N.Y. 1997).

Though relator was not de jure removed from his position, having had no hearing before the officer, board or body having power of removal under this section, he was de facto separated from his position, and it was proper to consider his application for reinstatement as if he had in terms been removed from office. Burke v Connolly, 135 N.Y.S. 179, 76 Misc. 337, 1912 N.Y. Misc. LEXIS 819 (N.Y. Sup. Ct. 1912).

A veteran who was removed from office as deputy director of public works without any charges having been preferred against him and without a hearing, in contravention of this section, was ordered reinstated. Heath v Creagh, 96 N.Y.S.2d 247, 197 Misc. 537, 1949 N.Y. Misc. LEXIS 3192 (N.Y. Sup. Ct. 1949), aff'd, 276 A.D. 948, 94 N.Y.S.2d 901, 1950 N.Y. App. Div. LEXIS 5255 (N.Y. App. Div. 1950).

28. —Article 78 proceedings

In Article 78 proceeding for reinstatement as probationary employee, court erred in ordering reinstatement for period of 5 weeks, which was equivalent to remainder of petitioner's minimum 8-week probationary period, since local civil service rule required that probationary employee be given 2 weeks' written notice of termination and right to hearing, and therefore 2 weeks was minimum period by law to which petitioner was entitled to reinstatement. Saulpaugh v Diehl, 148 A.D.2d 928, 539 N.Y.S.2d 165, 1989 N.Y. App. Div. LEXIS 2558 (N.Y. App. Div. 4th Dep't 1989).

In Article 78 proceeding in which former fire dispatcher, who was charged with misconduct by wrongfully retaining firearm found at scene of fire, sought to compel fire department to reinstate him to his former employment, court properly concluded that grand jury's return of "no bill" in connection with decision not to indict petitioner was equivalent to "not guilty" verdict (as opposed to mere decision not to prosecute) within meaning of hearing officer's penalty recommendation, as adopted by respondent, that reinstatement should be allowed if there was "not guilty verdict or judgment." Greiner v Greene County Dep't of Fire Prevention & Control, 188 A.D.2d 880, 591 N.Y.S.2d 864, 1992 N.Y. App. Div. LEXIS 14374 (N.Y. App. Div. 3d Dep't 1992).

29. —Mandamus proceedings

Petitioner is not entitled to a peremptory mandamus order compelling his reinstatement to position of senior income tax examiner, where the record shows that he was directed to make a field audit in order to ascertain facts as to taxable income of a certain taxpayer, and that from his own statement he not only failed to ascertain true situation as to taxpayer's income, but made a report which did not state facts which should have been included in it, namely, that information which he provided came from a fellow examiner. Singer v Graves, 254 A.D. 37, 4 N.Y.S.2d 318, 1938 N.Y. App. Div. LEXIS 6333 (N.Y. App. Div.), aff'd, 279 N.Y. 573, 17 N.E.2d 445, 279 N.Y. (N.Y.S.) 573, 1938 N.Y. LEXIS 837 (N.Y. 1938).

Petitioner, who, until directed to report to a superior officer as a patrolman in the department of police of Saratoga Springs, held position of "sergeant of police," is not entitled to a peremptory order of mandamus directing his reinstatement as sergeant, in the absence of anything to show his clear legal right to the protection of this law. Dorsey v Sweeney, 228 N.Y.S. 277, 131 Misc. 784, 1928 N.Y. Misc. LEXIS 802 (N.Y. Sup. Ct. 1928).

Where a veteran was removed from his civil service post summarily and charges were mailed to him thereafter, the fact that these charges were dismissed and the veteran reinstated when he commenced mandamus proceedings to compel his reinstatement, does not prevent the appointing officer from thereafter removing the veteran in compliance with subdivision 1 of this section on the same charges, where the original dismissal was not on the merits and the veteran accepted reinstatement on that basis. MacCready v Fagal, 285 N.Y.S. 852, 158 Misc. 462, 1936 N.Y. Misc. LEXIS 972 (N.Y. Sup. Ct. 1936).

30. —Necessary parties

Failure to join state comptroller as a party in Article 78 proceeding against the civil service commission by discharged attorney seeking reinstatement to former position with the Department of Audit and Control would be excused so as not to require dismissal of petition in that interests of the comptroller would be protected by the Commission, any possible prejudice to comptroller could be avoided by his intervention in the proceeding and an effective order could be rendered in absence of the comptroller. Greaney v Poston, 50 A.D.2d 653, 374 N.Y.S.2d 815, 1975 N.Y. App. Div. LEXIS 12480 (N.Y. App. Div. 3d Dep't 1975).

In a proceeding by mandamus under this section to compel reinstatement of an officer or employee protected by law and illegally removed, the person appointed in place of the relator is a necessary party to the proceeding. Cooper v Paris, 130 N.Y.S. 1043, 73 Misc. 244, 1911 N.Y. Misc. LEXIS 505 (N.Y. Sup. Ct. 1911).

31. Dismissal on particular grounds, generally

In view of the consistent pattern of misconduct which was found by the hearing officer, the penalty of dismissal was not so disproportionate to petitioner's offenses as to mandate modification of the determination of the Commissioner of Correction, even though the necessary aims of departmental discipline could have been achieved by a less severe sanction. Santarella v New York City Dep't of Correction, 53 N.Y.2d 948, 441 N.Y.S.2d 444, 424 N.E.2d 278, 1981 N.Y. LEXIS 2500 (N.Y. 1981).

Dismissal of New York City Department of Social Services employee who had been with the department for eight years and who engaged in one act of misconduct not involving venality, corruption or moral turpitude was an unreasonably harsh and excessive sanction and was shocking to one's sense of fairness and justified modification to suspension without pay for a period of approximately eighteen months from date of dismissal to five days after modification. Pauling v Smith, 46 A.D.2d 759, 361 N.Y.S.2d 16, 1974 N.Y. App. Div. LEXIS 3600 (N.Y. App. Div. 1st Dep't 1974).

Civil service commission's dismissal of petitioner from his position in department of audit and control was not purely arbitrary and was supported by substantial evidence. Greaney v Bahou, 57 A.D.2d 646, 393 N.Y.S.2d 211, 1977 N.Y. App. Div. LEXIS 11673 (N.Y. App. Div. 3d Dep't 1977).

Punishment of dismissal of county police officer, although harsh, was not shocking to one's sense of fairness, where officer's conduct, while perhaps understandable, was inconsistent with overriding public interest of maintaining an efficient and honest police force deserving of public's trust and confidence. Buttacavoli v Guido, 59 A.D.2d 891, 399 N.Y.S.2d 47, 1977 N.Y. App. Div. LEXIS 14080 (N.Y. App. Div. 2d Dep't 1977), app. denied, 44 N.Y.2d 643, 1978 N.Y. LEXIS 4291 (N.Y. 1978).

In an Art 78 proceeding, a determination of a city manager who, after a hearing, found a police sergeant guilty of certain charges of misconduct and dismissed him would be confirmed, where the record of the hearing held pursuant to Civ S Law § 75 contained substantial evidence to support the finding that the police sergeant had committed various acts of misconduct, and where the penalty of dismissal was not so disproportionate to the misconduct as to shock the conscience of the court. Budnik v Culross, 104 A.D.2d 988, 481 N.Y.S.2d 2, 1984 N.Y. App. Div. LEXIS 20420 (N.Y. App. Div. 2d Dep't 1984), app. denied, 65 N.Y.2d 606, 493 N.Y.S.2d 1028, 483 N.E.2d 134, 1985 N.Y. LEXIS 15160 (N.Y. 1985).

It was not arbitrary or unreasonable to dismiss New York City sanitation worker in light of worker's record of 9 prior violations, including one for same infraction. Morlano v New York, 133 A.D.2d 829, 520 N.Y.S.2d 201, 1987 N.Y. App. Div. LEXIS 51865 (N.Y. App. Div. 2d Dep't 1987).

Termination of employment of school bus driver was so disproportionate to offense as to be shocking to one's sense of fairness, although substantial evidence supported determination that she was guilty of 3 charges of misconduct, where she had excellent driving record for 20 years and had received awards and com-

mendations for her work. Borkhuis v Quinn, 158 A.D.2d 917, 551 N.Y.S.2d 82, 1990 N.Y. App. Div. LEXIS 1410 (N.Y. App. Div. 4th Dep't 1990).

Discharge of water authority employee was clearly disproportionate to offense and inequitable where (1) employee was found to be guilty of malingering, and failing (in his supervisory capacity) to prevent similar malingering by his crew, (2) malingering was for only short period of time and was in response to harassment by supervisory personnel to expedite completion of job, (3) job was completed well within time guidelines for such work, and (4) incident was first instance of misconduct by employee. Burgwardt v Erie County Water Authority, 158 A.D.2d 998, 551 N.Y.S.2d 724, 1990 N.Y. App. Div. LEXIS 1560 (N.Y. App. Div. 4th Dep't 1990).

Police officer's termination within probationary period was validly premised on misconduct predating commencement of probationary period. Garrett v Safir, 253 A.D.2d 700, 677 N.Y.S.2d 570, 1998 N.Y. App. Div. LEXIS 9695 (N.Y. App. Div. 1st Dep't), app. denied, 92 N.Y.2d 817, 684 N.Y.S.2d 489, 707 N.E.2d 444, 1998 N.Y. LEXIS 4330 (N.Y. 1998).

New York City Commissioner of Department of Sanitation improperly dismissed petitioner in light of numerous instances cited by administrative law judge in which Commissioner imposed penalties less severe than termination for violations of Department's sick leave policy similar to that for which petitioner was disciplined. Kinlock v Doherty, 256 A.D.2d 93, 681 N.Y.S.2d 264, 1998 N.Y. App. Div. LEXIS 13255 (N.Y. App. Div. 1st Dep't 1998).

Respondent's determination that petitioner was unfit for position of special patrolman was supported by substantial evidence, including petitioner's own admission that he knocked down complainant's door and assaulted her, which supported hearing officer's conclusion that his threshold for violence was unacceptably low. Miller v Safir, 259 A.D.2d 337, 687 N.Y.S.2d 28, 1999 N.Y. App. Div. LEXIS 3043 (N.Y. App. Div. 1st Dep't 1999).

Sanitation worker was properly dismissed for violating general order prohibiting loading of more than 3 cans, bags, bundles, or boxes for collection service of trade waste where he participated in loading renovation debris far in excess of 3-bag limit with assistance of persons who were not occupants of residence he was servicing under circumstances that should have at least caused doubt as to nature of material he was loading, especially since general order provided that its violation was ground for termination regardless of whether violator received any payment. Mallon v Doherty, 269 A.D.2d 282, 703 N.Y.S.2d 137, 2000 N.Y. App. Div. LEXIS 2014 (N.Y. App. Div. 1st Dep't 2000).

Termination of petitioner's employment as licensed practical nurse at county nursing home was not disproportionate where (1) she previously was found guilty of several charges of misconduct and suspended without pay, (2) 1*r1/2#-year period of retraining and supervision imposed as result of previous discipline had just ended when subject acts of incompetence and misconduct took place, and (3) subject acts placed at least one patient's health in serious jeopardy. Williams v County of Fulton, 270 A.D.2d 613, 704 N.Y.S.2d 349, 2000 N.Y. App. Div. LEXIS 2620 (N.Y. App. Div. 3d Dep't 2000).

It was excessive to dismiss police sergeant on ground that he twice sold and registered false firearms training certificates while engaged in unauthorized off-duty employment where he was 29-year veteran with unblemished disciplinary record, he had been awarded numerous exemplary service medals, individuals to whom training certificates were sold were all then currently licensed to carry firearms, as well as qualified for certificates in all other respects, and dismissal would result in complete divestiture of sergeant's pension. Kelly v Safir, 271 A.D.2d 326, 706 N.Y.S.2d 113, 2000 N.Y. App. Div. LEXIS 4396 (N.Y. App. Div. 1st Dep't 2000), modified, 96 N.Y.2d 32, 724 N.Y.S.2d 680, 747 N.E.2d 1280, 2001 N.Y. LEXIS 566 (N.Y. 2001).

Court upheld dismissal of police officer for being discourteous to point of being threatening to his sergeant when discussing reprimand against him, and for failing to safeguard firearm recovered at crime scene and note recovery of firearm in his log, which was "extraordinarily irresponsible" and resulted in evidence of crime being lost and weapon remaining in public domain. Bonifacio v Safir, 277 A.D.2d 8, 715 N.Y.S.2d 244, 2000 N.Y. App. Div. LEXIS 11042 (N.Y. App. Div. 1st Dep't 2000), app. denied, 96 N.Y.2d 706, 725 N.Y.S.2d 277, 748 N.E.2d 1073, 2001 N.Y. LEXIS 1838 (N.Y. 2001).

Dismissal of police officer was excessive sanction for improperly issuing summonses for parking violations and for unauthorized use of department scooter where officer's sergeant testified that she never noticed deficiencies in summonses officer wrote, nor did she speak to him as to same, although she spoke to 30 to 40 other officers about their deficiencies, officer's performance evaluation rated him between competent and highly competent, and officer could not have taken scooter without having obtained supervisor's consent Lagala v N.Y. City Police Dep't, 286 A.D.2d 205, 729 N.Y.S.2d 31, 2001 N.Y. App. Div. LEXIS 7744 (N.Y. App. Div. 1st Dep't), app. denied, 97 N.Y.2d 605, 737 N.Y.S.2d 52, 762 N.E.2d 930, 2001 N.Y. LEXIS 3434 (N.Y. 2001).

Police officers who refused to sign waivers of immunity from prosecution could not be summarily dismissed under Article I § 6 of the New York Constitution and § 1123 of the New York City Charter, but those provisions must be read together with this section and would be construed to afford police officers a hearing and an opportunity to explain. Gardner v Murphy, 46 Misc. 2d 728, 260 N.Y.S.2d 739, 1965 N.Y. Misc. LEXIS 1780 (N.Y. Sup. Ct. 1965), rev'd, Koutnik v Murphy, 25 A.D.2d 197, 268 N.Y.S.2d 265, 1966 N.Y. App. Div. LEXIS 4654 (N.Y. App. Div. 1st Dep't 1966).

Where petitioner had been continuously and satisfactorily employed by school district for period of almost eight years, it would be gross miscarriage of justice to terminate her employment on mere technicality or clerical error, and where petitioner had been number one on civil service list but through "oversight" had never been appointed, county personnel office would be directed to certify payroll of district and petitioner's appointment and continuation in her employment. Hansen v Three Village Cent. School Dist., 87 Misc. 2d 1077, 387 N.Y.S.2d 45, 1976 N.Y. Misc. LEXIS 2364 (N.Y. Sup. Ct. 1976).

Arbitrator's award finding the employee guilty of disciplinary charges and terminating the employee's employment was improperly vacated on the ground that the state agency failed to comply with the transcription requirement under N.Y. C.P.L.R. 7804(e); the collective bargaining agreement between the parties, which did not require the agency to provide a transcript of the arbitration hearing upon judicial review, replaced, pursuant to N.Y. Civ. Serv. Law § 76(4), the statutory provisions of N.Y. Civ. Serv. Law §§ 75, 76. Simon v N.Y. State Office of Parks, Rec. & Historic Pres., 303 A.D.2d 413, 755 N.Y.S.2d 858, 2003 N.Y. App. Div. LEXIS 2101 (N.Y. App. Div. 2d Dep't 2003).

32. —Absences

Penalty of dismissal of police officer was not so disproportionate to offenses as to be shocking to one's sense of fairness, particularly in light of officer's prior discipline for loss of his service revolver, where officer failed to report for work for 5 consecutive duty days, he failed to report to his resident precinct after being suspended, he was not present at his residence after calling in sick, and he failed to report loss of his off-duty revolver and similarly failed to safeguard it. Mellette v Ward, 155 A.D.2d 272, 547 N.Y.S.2d 35, 1989 N.Y. App. Div. LEXIS 13859 (N.Y. App. Div. 1st Dep't 1989).

Penalty of dismissal was not disproportionate to offense, where police officer was found guilty of taking possession of property that did not belong to him under circumstances evidencing knowledge that he had no right to items taken, and of abusing sick leave by being absent from his residence without permission while on sick report, and where he had previously been disciplined for abusing sick leave regulations and making false statement. Morocco v Kelly, 205 A.D.2d 401, 613 N.Y.S.2d 611, 1994 N.Y. App. Div. LEXIS 6372 (N.Y. App. Div. 1st Dep't 1994).

It was abuse of discretion to dismiss heavy equipment operator who voluntarily reported for work on Saturday morning due to snowstorm and then left work within minutes after punching in on learning that he had not been assigned to his normal snow removal duties since he had nearly three decades of service to County which included only one prior incident of misconduct. Lane v County of Fulton, 249 A.D.2d 750, 672 N.Y.S.2d 144, 1998 N.Y. App. Div. LEXIS 4114 (N.Y. App. Div. 3d Dep't 1998).

Court properly dismissed Article 78 proceeding in which petitioner alleged that his probationary employment was terminated based on perceived disability in violation of anti-discrimination laws where (1) in order to settle disciplinary charges relating to extensive history of absenteeism, petitioner agreed that, during stipulated probationary period, he could be terminated "without recourse to Article 33 of the State-CSEA Agreement or any other provision or law," and (2) during next 6 months, he was absent from work 7 times. Williams v Commissioner of the Office of Mental Health, 259 A.D.2d 623, 686 N.Y.S.2d 788, 1999 N.Y. App. Div. LEXIS 2496 (N.Y. App. Div. 2d Dep't 1999).

It was error to annul determination terminating petitioner's employment as bridge and tunnel officer on ground that he was not given notice that his approved absences could ultimately be considered "excessive," and thus misconduct, where Triborough Bridge and Tunnel Authority's rules clearly stated that "excessive absence ... will be cause for dismissal," governing collective bargaining agreement guaranteed employees only 12 days sick leave per year, termination letter specifically noted serious negative impact petitioner's absences had on budgetary and personnel matters, as well as employee morale, and petitioner's 80 percent absentee rate over 19-month period, albeit approved and medically justified, was excessive under any standard. Cicero v Triborough Bridge & Tunnel Auth., 264 A.D.2d 334, 694 N.Y.S.2d 51, 1999 N.Y. App. Div. LEXIS 8660 (N.Y. App. Div. 1st Dep't 1999), app. dismissed, 94 N.Y.2d 931, 708 N.Y.S.2d 350, 729 N.E.2d 1149, 2000 N.Y. LEXIS 533 (N.Y. 2000).

New York City properly terminated petitioner from her employment as Houseparent in Administration for Children's services based on her 3-month absence without leave that was in flagrant violation of City's time and leave rules. Renaud v City of New York, 269 A.D.2d 283, 703 N.Y.S.2d 136, 2000 N.Y. App. Div. LEXIS 2016 (N.Y. App. Div. 1st Dep't 2000).

Determination terminating petitioner's employment due to her cumulative absences would be annulled where there was no indication exactly when, without counting designated leave under Family and Medical Leave Act (29 USCS § 2601 et seq.), 365-day cumulative leave under CLS Civ S § 71 was reached as to October 29, 1991 work-related injury. Jacobsen v New York State DOL, 274 A.D.2d 809, 711 N.Y.S.2d 61, 2000 N.Y. App. Div. LEXIS 8059 (N.Y. App. Div. 3d Dep't 2000).

Where classified civil servant had been absent from work for total of more than one year because of occupational injury, her employment should not have been terminated, but medical examination should have been administered to determine her fitness to perform duties of former position. Crestwood v Director, Creedmoor Psychiatric Center, 88 Misc. 2d 492, 388 N.Y.S.2d 546, 1976 N.Y. Misc. LEXIS 2691 (N.Y. Sup. Ct. 1976).

33. —Alcohol-related

Imposition of penalty of termination on deputy sheriff found guilty of conduct unbecoming police officer was not so disproportionate to offense as to shock conscience, although hearing officer recommended lesser punishment, where record showed that deputy purchased alcoholic beverages for 18-year-old and witnessed others purchasing alcoholic beverages for same youth, who was seriously injured in fight on night in question, and that other alcohol-related complaints had been lodged against deputy in past. Wayering v County of St. Lawrence, 154 A.D.2d 824, 546 N.Y.S.2d 258, 1989 N.Y. App. Div. LEXIS 12686 (N.Y. App. Div. 3d Dep't 1989).

Termination of petitioner's employment as school district bus driver was appropriate on finding that she was under influence of alcohol at safety workshop, and that on her return to school district property, she drove out of parking lot at high rate of speed, spinning her tires, and performing "doughnut" and "fishtailing" in parking lot. Collins v Parishville-Hopkinton Cent. Sch. Dist., 274 A.D.2d 732, 710 N.Y.S.2d 728, 2000 N.Y. App. Div. LEXIS 7819 (N.Y. App. Div. 3d Dep't 2000).

34. —Automobile involved

Discharge of state trooper was not disproportionate, in light of high profile nature of his violations and seriousness and repetitiveness of his offenses, where 5 charges of misconduct and violation of various state police regulations were sustained against him, including recklessness while driving off duty in his private vehicle, leaving his assigned revolver in unsecured locker at police station, patrolling outside his assigned area, driving while off duty in uninsured and unregistered vehicle bearing unauthorized dealer plates, and showing reluctance to perform his assigned desk duties. Novotny v Constantine, 150 A.D.2d 852, 540 N.Y.S.2d 605, 1989 N.Y. App. Div. LEXIS 5472 (N.Y. App. Div. 3d Dep't 1989).

Dismissal of school bus driver was appropriate penalty where his personnel records were replete with numerous incidents of traffic infractions and accidents, and he was found guilty of 6 separately charged safety violations based on observations of his driving on six separate occasions within short period of time. Malloch v Ballston Spa Cent. Sch. Dist., 249 A.D.2d 797, 671 N.Y.S.2d 845, 1998 N.Y. App. Div. LEXIS 4518 (N.Y. App. Div. 3d Dep't), app. denied, 92 N.Y.2d 810, 680 N.Y.S.2d 55, 702 N.E.2d 840, 1998 N.Y. LEXIS 3081 (N.Y. 1998).

Court upheld dismissal of police officer who, among other things, operated unregistered, uninspected and uninsured car with suspended driver's license and stole registration and inspection stickers from vouchered and abandoned cars to replace his own expired stickers. Costa v Police Dep't, 277 A.D.2d 81, 715 N.Y.S.2d 65, 2000 N.Y. App. Div. LEXIS 12007 (N.Y. App. Div. 1st Dep't 2000).

35. —Credit card matter

Dismissal of petitioner from his position as school district's business administrator was disproportionate to his offense of failing to exercise good business judgment in connection with isolated series of events involving school board president's misuse of district credit card, where he had relied on school board president's explanation and had no reason to believe at outset that he was being misled, and he had sterling record as business administrator; 2 months' suspension without pay was maximum sanction supported by record. Weatherlow v Board of Educ., 236 A.D.2d 855, 653 N.Y.S.2d 778, 1997 N.Y. App. Div. LEXIS 1791 (N.Y. App. Div. 4th Dep't 1997).

36. —Domestic dispute

Penalty of dismissal was not unduly harsh where correction officer had been involved in "domestic dispute" to which police were called, he knowingly and willingly entered false and inaccurate information in official records during subsequent investigation of incident, and this was not first time disciplinary charges had been sustained against him; offenses in question manifested unwillingness or inability to adapt to discipline required of law enforcement officer, both on and off duty. Williams v Dooley, 148 A.D.2d 541, 538 N.Y.S.2d 871, 1989 N.Y. App. Div. LEXIS 2746 (N.Y. App. Div. 2d Dep't 1989).

37. —Drugs

In Article 78 proceeding, court erred in vacating penalty of automatic dismissal imposed on employee pursuant to transit authority's then-operative policy respecting employees with less than 2 years of service who tested positive for marihuana use, on ground that policy was not uniformly applied, since less severe punishment imposed on fellow worker whose urine tested positive for marihuana when he had less than 2 years of service occurred after transit authority promulgated more lenient policy regarding punishment for employees with between one and 2 years of service at time they tested positive for marihuana use. Gray v New York City Transit Auth., 128 A.D.2d 528, 512 N.Y.S.2d 461, 1987 N.Y. App. Div. LEXIS 44219 (N.Y. App. Div. 2d Dep't 1987).

Discharge of transit police officer, for using cocaine and failing to adequately perform his duties, was not disproportionate to offense. Canty v Spooner, 216 A.D.2d 463, 628 N.Y.S.2d 754, 1995 N.Y. App. Div. LEXIS 6393 (N.Y. App. Div. 2d Dep't 1995).

Termination of petitioner's employment, which was to provide after-school activities for children and teenagers in housing authority community center, was not disproportionate where petitioner, who had unsatisfactory work record, was found to have purchased and possessed marijuana while on meal break, within few blocks of his work location. Garrison v New York City Hous. Auth., 234 A.D.2d 150, 650 N.Y.S.2d 735, 1996 N.Y. App. Div. LEXIS 12529 (N.Y. App. Div. 1st Dep't 1996).

Court properly dismissed Article 78 proceeding to annul discharge of correction officer for use of marihuana, where record did not support petitioner's contentions that delay in conducting drug test following his random selection for testing violated departmental policy, or that his supervisor targeted test day to coincide with his return from vacation. Binnie v City of New York Dep't of Correction, 236 A.D.2d 264, 654 N.Y.S.2d 297, 1997 N.Y. App. Div. LEXIS 1272 (N.Y. App. Div. 1st Dep't 1997).

Dismissal of New York City Housing Authority police officer was appropriate sanction for his use of illicit narcotics. Casey v New York City Hous. Auth., 249 A.D.2d 230, 672 N.Y.S.2d 305, 1998 N.Y. App. Div. LEXIS 4758 (N.Y. App. Div. 1st Dep't 1998).

It was proper to dismiss police officer for his possession and ingestion of marijuana. Adams v Police Dep't, 256 A.D.2d 28, 680 N.Y.S.2d 508, 1998 N.Y. App. Div. LEXIS 12915 (N.Y. App. Div. 1st Dep't 1998), app. denied, 93 N.Y.2d 818, 697 N.Y.S.2d 565, 719 N.E.2d 926, 1999 N.Y. LEXIS 2890 (N.Y. 1999).

It was appropriate to dismiss New York City Transit Authority police officer for having ingested cocaine. Danese v New York City Transit Auth., 256 A.D.2d 464, 683 N.Y.S.2d 860, 1998 N.Y. App. Div. LEXIS 13490 (N.Y. App. Div. 2d Dep't 1998), app. denied, 93 N.Y.2d 811, 695 N.Y.S.2d 540, 717 N.E.2d 699, 1999 N.Y. LEXIS 1899 (N.Y. 1999).

Dismissal of police officer was appropriate based on officer's possession and use of cocaine. Davis v Safir, 262 A.D.2d 107, 691 N.Y.S.2d 487, 1999 N.Y. App. Div. LEXIS 6437 (N.Y. App. Div. 1st Dep't 1999).

Dismissal of police officer was properly based on random drug test results showing officer had ingested cocaine. Seeley v City of New York, 269 A.D.2d 205, 702 N.Y.S.2d 299, 2000 N.Y. App. Div. LEXIS 1307 (N.Y. App. Div. 1st Dep't 2000).

It was proper to terminate petitioner from his position with city department of sanitation (DOS), even if DOS employee had promised petitioner reinstatement on his completion of drug treatment program, since such promise was unauthorized and DOS was not bound by it, particularly given petitioner's prior execution and violation of final termination agreement, which agreement was concealed from DOS employee. Carson v New York City Dep't of Sanitation, 271 A.D.2d 380, 707 N.Y.S.2d 93, 2000 N.Y. App. Div. LEXIS 4613 (N.Y. App. Div. 1st Dep't 2000).

Report from random drug test performed by outside agency, notifying that petitioner tested positive for cocaine, supported determination terminating his employment as city Motor Equipment Operator. Powell v City of Newburgh, 284 A.D.2d 334, 725 N.Y.S.2d 883, 2001 N.Y. App. Div. LEXIS 5609 (N.Y. App. Div. 2d Dep't), app. denied, 96 N.Y.2d 720, 733 N.Y.S.2d 372, 759 N.E.2d 371, 2001 N.Y. LEXIS 3146 (N.Y. 2001).

38. —Illegal appointment

Where a veteran serving as a laborer in the public works department of Yonkers was dismissed without charges or a hearing as required by this section, his service in the position to which he sought reinstatement did not cure an illegal appointment. De Salvo v Murray, 262 N.Y. 573, 188 N.E. 70, 262 N.Y. (N.Y.S.) 573, 1933 N.Y. LEXIS 1097 (N.Y. 1933).

Evidence was insufficient to establish that employee obtained position by fraud where letter offering position did not specify any information which would have alerted employee to fact that letter was intended for father, who had same name and did not identify Social Security Number of person for whom it was intended, and employee was reasonable in assuming that he qualified for position as result of having presumptively qualified on other examinations he had previously taken, such that determination finding that employee had assumed position fraudulently was arbitrary and capricious and must be annulled. D'Ornellas v Ortiz, 119 A.D.2d 459, 500 N.Y.S.2d 671, 1986 N.Y. App. Div. LEXIS 55411 (N.Y. App. Div. 1st Dep't), app. dismissed, 68 N.Y.2d 805, 506 N.Y.S.2d 868, 498 N.E.2d 432, 1986 N.Y. LEXIS 20122 (N.Y. 1986), app. dismissed, 70 N.Y.2d 694, 518 N.Y.S.2d 1031, 512 N.E.2d 557, 1987 N.Y. LEXIS 17990 (N.Y. 1987).

Where relator, a veteran fireman, was appointed by the city engineer to a subordinate position neither named nor provided for by the charter governing the city, and it does not appear that the board of estimate and apportionment took action looking to the creation of such position, or with reference to fixing salary thereof, such appointment is illegal and relator is not protected from removal by this chapter. People ex rel. Keenan v Schultze, 143 N.Y.S. 303, 81 Misc. 287, 1913 N.Y. Misc. LEXIS 965 (N.Y. Sup. Ct. 1913).

Petitioner was not entitled to invoke the protection of this section where it appeared that at the time of his dismissal he was not in the exempt class of the civil service and that his appointment without competitive examination was illegal. Neary v O'Connor, 18 N.Y.S.2d 634, 173 Misc. 696, 1940 N.Y. Misc. LEXIS 1547 (N.Y. Sup. Ct.), aff'd, 260 A.D. 986, 24 N.Y.S.2d 134, 1940 N.Y. App. Div. LEXIS 5697 (N.Y. App. Div. 1940).

This section affords no protection to an individual who has been illegally appointed. Romanchuk v Murphy, 103 N.Y.S.2d 704, 200 Misc. 987, 1951 N.Y. Misc. LEXIS 1666 (N.Y. Sup. Ct. 1951).

Petitioner was subject to removal without a hearing where he never participated in a competitive test and was not appointed from an eligible list. Mercado v New York City Youth Board, 21 Misc. 2d 228, 195 N.Y.S.2d 969, 1959 N.Y. Misc. LEXIS 3587 (N.Y. Sup. Ct. 1959).

Where no civil service line was created when petitioner was appointed accounts clerk in December to replace a clerk who was expected to leave in April because of childbirth and no civil service line or certification had been granted for legal intern to assist court with legal research, jobs of petitioner and intern were not validly created and there was no restraint on their removal by city manager. Petrone v Miller, 77 Misc. 2d 1028, 355 N.Y.S.2d 287, 1974 N.Y. Misc. LEXIS 1293 (N.Y. Sup. Ct. 1974).

A holder of a civil service position who was illegally appointed cannot take advantage of the provisions of chapter 885 of the Laws of 1941, which continued in office incumbents in positions to which civil service was extended and gave them civil service status as of July 1st, 1942, where he was removed from the position in June of 1942. Application of Maier, 37 N.Y.S.2d 454, 1942 N.Y. Misc. LEXIS 2043 (N.Y. Sup. Ct. 1942), aff'd, 266 A.D. 747, 41 N.Y.S.2d 953, 1943 N.Y. App. Div. LEXIS 4249 (N.Y. App. Div. 1943).

39. —Insubordination

Dismissal of assistant hospital administrator for gross insubordination was warranted by evidence that he secretly taped certain hospital meeting after hospital's chief executive officer told him not to, since such obduracy cast serious doubt over his ability to hold managerial position at hospital; additionally, record demonstrated that assistant was upset with being transferred to another position, which supported conclusion that his disruptive attitude would not change. O'Malley v Nassau County Medical Center, 143 A.D.2d 426, 532 N.Y.S.2d 578, 1988 N.Y. App. Div. LEXIS 9282 (N.Y. App. Div. 2d Dep't 1988).

Penalty of dismissal was not disproportionate where associate public health engineer was found guilty of insubordination for failing to comply with direct requests of his supervisors; in cases involving internal discipline, as distinct from external regulation, administrative agency has broader discretion because of complexity and sensitiveness of personnel administration in continuing intraorganizational relationships. Plante v Buono, 172 A.D.2d 81, 576 N.Y.S.2d 924, 1991 N.Y. App. Div. LEXIS 16063 (N.Y. App. Div. 3d Dep't 1991), app. denied, 79 N.Y.2d 756, 583 N.Y.S.2d 192, 592 N.E.2d 800, 1992 N.Y. LEXIS 1024 (N.Y. 1992).

Penalty of termination was not shocking to one's sense of fairness where senior personnel analyst with county department of civil service was found guilty of misconduct and incompetence in connection with 35 instances of shoddy work, insubordination, tardiness, failure to follow directives, and inability to perform adequately. Tinney v Schneider, 216 A.D.2d 474, 628 N.Y.S.2d 385, 1995 N.Y. App. Div. LEXIS 6408 (N.Y. App. Div. 2d Dep't 1995).

County office for aging properly terminated petitioner's employment as site manager for failing and refusing to perform numerous client assessments and reassessments, and her repeated and unequivocal refusal to ever again perform such job function. Lassiter v County of Dutchess, 256 A.D.2d 578, 683 N.Y.S.2d 103, 1998 N.Y. App. Div. LEXIS 14021 (N.Y. App. Div. 2d Dep't 1998).

It was appropriate to dismiss New York City Police officer who refused to answer questions directly and narrowly relating to his official duties, although duly called upon to do so under mandate of Patrol Guide § 118-9. Dombrowski v Safir, 269 A.D.2d 161, 701 N.Y.S.2d 906, 2000 N.Y. App. Div. LEXIS 1043 (N.Y. App. Div. 1st Dep't 2000).

It was proper to dismiss police officer who parked illegally and refused to move when asked to do so by another city's police officer, acted in rude and aggressive manner, made racial remarks about second officer, and thereafter lied about his conduct during departmental investigation and trial, and in separate incident, officer in question made threatening remarks at neighborhood meeting and thereafter lied about his conduct during departmental investigation and trial. Cannata v Safir, 269 A.D.2d 327, 703 N.Y.S.2d 177, 2000 N.Y. App. Div. LEXIS 2212 (N.Y. App. Div. 1st Dep't 2000).

Court upheld penalty of dismissal based on substantial evidence that petitioner violated supervisory instructions and police department's rules and regulations by leaving his duty post without approval of superior in his chain of command. Gamma v City of Newburgh, 277 A.D.2d 236, 716 N.Y.S.2d 684, 2000 N.Y. App. Div. LEXIS 11242 (N.Y. App. Div. 2d Dep't 2000).

Court upheld discharge of county employee for incompetence, insubordination, serious misconduct and unauthorized use of facility property, although hearing officer recommended demotion rather than discharge, where employee had already received progressive discipline, adequate notice of problems with her job performance, and sufficient opportunity to take corrective action. Spry v Delaware County, 277 A.D.2d 779, 716 N.Y.S.2d 728, 2000 N.Y. App. Div. LEXIS 12243 (N.Y. App. Div. 3d Dep't 2000).

Despite firefighter's 13-year unblemished record, there was no basis to interfere with respondent's decision to terminate his employment, in light of substantial evidence that he violated departmental rules and regulations by operating outside pool maintenance business for 3 years without seeking necessary department approval, and by engaging in outside employment while on medical leave on 4 separate dates. Cook v Von Essen, 283 A.D.2d 214, 724 N.Y.S.2d 841, 2001 N.Y. App. Div. LEXIS 4806 (N.Y. App. Div. 1st Dep't 2001).

On appeal under the above statute from the decision of the director of a state school under the jurisdiction of the Department of Mental Hygiene removing the petitioner from his position in such school, it was held that where the worker's work record has been basically good and the matter of which he is found guilty is not of such a nature that the operation and function of the institution is totally disrupted, or is not of a repetitive nature, and a number of serious breaches of conduct have not occurred after full and adequate warning, dismissal from the service is an excessive penalty. Consequently the court annulled the respondent's determination in respect to the punishment imposed for three specific acts of disobedience and insubordination and returned the matter to him for reconsideration and imposition of an appropriate lesser penalty in accordance with § 75. Wansart v Feinstein, 48 Misc. 2d 12, 264 N.Y.S.2d 30, 1965 N.Y. Misc. LEXIS 1421 (N.Y. Sup. Ct. 1965).

40. —Irregularity in examination or eligibility test

The State Civil Service Commission had no power to cancel a municipal civil service appointment on the ground that the examinations given therefor were not practical and were insufficient tests for capacity and fitness for particular positions, unless the examinations were so obviously inadequate and so completely unrelated to the duties of the positions as to be on their face a nullity. Ebling v New York State Civil Service Com., 305 N.Y. 221, 112 N.E.2d 203, 305 N.Y. (N.Y.S.) 221, 1953 N.Y. LEXIS 827 (N.Y. 1953).

Where a petitioner's certification and appointment were founded on a promotional examination rendered invalid by a decision of the Court of Appeals in a case involving another employee, the petitioner could not invoke the provisions of subdivision 2 of this section and his summary removal by the municipal civil service commission was a valid and lawful termination of his appointment. McCully v Brennan, 121 N.Y.S.2d 549, 1953 N.Y. Misc. LEXIS 1762 (N.Y. Sup. Ct. 1953).

41. —Lying

Penalty of dismissal from New York City police department's office of Internal affairs was not so disproportionate as to be shocking to one's sense of fairness, where petitioner wrongfully made false and misleading statements while under oath at official interview regarding his activities in connection with matter under Internal Affairs investigation. Harp v N.Y. City Police Dep't, 96 N.Y.2d 892, 730 N.Y.S.2d 786, 756 N.E.2d 74, 2001 N.Y. LEXIS 1984 (N.Y. 2001).

Penalty of termination was not excessive where correction officer was found guilty of charges that he offered tobacco to inmate in demeaning fashion by unzipping his pants, putting tobacco in pants, and offering it to inmate, and that he lied during ensuing investigation, since (1) officer's record was not unblemished, although he had been employed for less than 3 years, and (2) his actions were totally inconsistent with goals of treating inmates with respect and discipline, and dealing with co-workers in cooperative and straightforward way. Billings v County of St. Lawrence, 139 A.D.2d 809, 526 N.Y.S.2d 677, 1988 N.Y. App. Div. LEXIS 3639 (N.Y. App. Div. 3d Dep't 1988).

Penalty of dismissal was not disproportionate to offense, where police officer was found guilty of taking possession of property that did not belong to him under circumstances evidencing knowledge that he had no right to items taken, and of abusing sick leave by being absent from his residence without permission while on sick report, and where he had previously been disciplined for abusing sick leave regulations and making false statement. Morocco v Kelly, 205 A.D.2d 401, 613 N.Y.S.2d 611, 1994 N.Y. App. Div. LEXIS 6372 (N.Y. App. Div. 1st Dep't 1994).

It was appropriate to dismiss police officer who utilized various improper tactics to enable his uncle to monopolize corner where he operated his food cart and who provided false testimony at departmental interview. Spiratos v Safir, 249 A.D.2d 240, 672 N.Y.S.2d 311, 1998 N.Y. App. Div. LEXIS 4754 (N.Y. App. Div. 1st Dep't 1998).

Penalty of termination of police officer's employment was not shockingly unfair and disproportionate to his misconduct where (1) he participated in what he knew to be illegal search, seizure, and arrest, and (2) he consistently lied to superior officers, prosecutors, and other officials concerning circumstances of that arrest. McDonough v Bratton, 251 A.D.2d 51, 674 N.Y.S.2d 292, 1998 N.Y. App. Div. LEXIS 6418 (N.Y. App. Div. 1st Dep't 1998).

Police officer was properly dismissed for knowingly making false statements, in police reports and grand jury testimony, that he was victim of gunpoint robbery of his fiancee's car when, in fact, car was simply stolen from street when officer left it double-parked with keys in ignition and engine running. Sweeney v Safir, 267 A.D.2d 99, 700 N.Y.S.2d 4, 1999 N.Y. App. Div. LEXIS 13026 (N.Y. App. Div. 1st Dep't 1999), app. denied, 95 N.Y.2d 753, 711 N.Y.S.2d 155, 733 N.E.2d 227, 2000 N.Y. LEXIS 1009 (N.Y. 2000).

Penalty of dismissal and forfeiture of petitioner's pension rights, for making false or misleading statement in context of investigation of fellow police officer's alleged use of police department computer program, was shockingly excessive where false statement given by petitioner (that he had no contact with fellow officer after learning that she was subject of internal investigation) was of relatively minor significance, and petitioner had 15 years of excellent service with no prior disciplinary record and "Exceeds Standards" rating. Harp v New York City Police Dep't, 277 A.D.2d 147, 717 N.Y.S.2d 108, 2000 N.Y. App. Div. LEXIS 12429 (N.Y. App. Div. 1st Dep't 2000), rev'd, 96 N.Y.2d 892, 730 N.Y.S.2d 786, 756 N.E.2d 74, 2001 N.Y. LEXIS 1984 (N.Y. 2001).

Notwithstanding petitioner's otherwise unblemished record as police officer, penalty of dismissal was not shockingly unfair where substantial evidence supported finding that he gave false information to another police officer, knowing that other officer would rely on it and incorporate it in felony complaint. Foy v Safir, 277 A.D.2d 169, 717 N.Y.S.2d 126, 2000 N.Y. App. Div. LEXIS 12403 (N.Y. App. Div. 1st Dep't 2000).

42. —Malingering

Court would annul determination that petitioner, school custodian, committed misconduct by improperly failing to return to

work after his accident although physically capable of resuming his duties where only medical evidence consisted of testimony of petitioner's treating neurologist, who concluded that petitioner was suffering from post concussion syndrome, which was consistent with his complaints of dizziness, weakness, and fatigue, and surveillance videotape on which hearing officer relied in sustaining charge did not show that petitioner was indeed capable of fully resuming his duties during 8-hour shift. Hofsiss v Bd. of Educ., 287 A.D.2d 566, 732 N.Y.S.2d 14, 2001 N.Y. App. Div. LEXIS 9577 (N.Y. App. Div. 2d Dep't 2001).

43. —Medical condition; physical or mental

In a proceeding to annul a determination of the Commissioner of Education dismissing a tenured kindergarten teacher from her position after she had been found guilty of misconduct since the commissioner is empowered to substitute his judgment of the proper penalty for that of the hearing panel whose action he was reviewing, in fixing dismissal as the appropriate penalty, his decision to disregard the testimony of petitioner's psychiatrist, who concluded that petitioner had been suffering from involuntary depression which may have led to her aberrant conduct and that with proper treatment the depression would not interfere with her future work, was not arbitrary or capricious in that the psychiatrist had commenced treatment after the events in question and had refused to express any opinion as to petitioner's functions as a teacher. Levyn v Ambach, 56 N.Y.2d 912, 453 N.Y.S.2d 410, 438 N.E.2d 1125, 1982 N.Y. LEXIS 3507 (N.Y. 1982).

Dismissal of a fireman was considered too drastic action, although it was shown that he was physically incompetent by reason of a heart condition and had violated certain fire department rules, where he had been employed for over 18 years with an otherwise good record and dismissal would deprive him of his retirement rights under § 62 of the Retirement and Social Security Law. McCurdy v Cade, 19 A.D.2d 627, 241 N.Y.S.2d 473, 1963 N.Y. App. Div. LEXIS 3635 (N.Y. App. Div. 2d Dep't 1963).

Probationary New York City Transit Police Officer who was unable to reasonably do what position required because of disability was not improperly terminated pursuant to CLS Exec § 296; under CLS Exec § 292 term "disability" is limited to disabilities which do not prevent complainant from performing in reasonable manner activities involved in job or occupation, and since officer could not be placed on patrol duty (his most important function as police officer), termination of his employment was proper. Caminiti v New York City Transit Authority Police Dep't, 125 A.D.2d 306, 508 N.Y.S.2d 590, 1986 N.Y. App. Div. LEXIS 62568 (N.Y. App. Div. 2d Dep't 1986).

Where classified civil servant had been absent from work for total of more than one year because of occupational injury, her employment should not have been terminated, but medical examination should have been administered to determine her fitness to perform duties of former position. Crestwood v Director, Creedmoor Psychiatric Center, 88 Misc. 2d 492, 388 N.Y.S.2d 546, 1976 N.Y. Misc. LEXIS 2691 (N.Y. Sup. Ct. 1976).

Petitioner, a civil service employee with permanent status employed by the respondent village as a police officer, who was injured in the performance of his duties and was subsequently ordered to report for limited duties although his physician stated that petitioner was unable to perform any sort of work, cannot be removed from the payroll without a hearing; he must first be afforded the full panoply of procedural due process rights under section 75 of the Civil Service Law. Fiorella v Scarsdale, 96 Misc. 2d 406, 409 N.Y.S.2d 489, 1978 N.Y. Misc. LEXIS 2616 (N.Y. Sup. Ct. 1978).

44. —Misrepresentation

An honorably discharged soldier of the United States in the World War, who has been appointed to a position in the civil service of New York city from an eligible list furnished by the municipal civil service commission after he had passed a competitive examination held by the commission, may not be discharged without a hearing upon charges, upon the ground that he had misstated his prior education, at least where such misstatements are not material and did not induce the commission to admit the applicant to the examination. Wolff v Hodson, 285 N.Y. 197, 33 N.E.2d 90, 285 N.Y. (N.Y.S.) 197, 1941 N.Y. LEXIS 1518 (N.Y. 1941).

A civil service employee whose appointment resulted from erroneous statements contained in her application and who was in fact ineligible may be summarily removed, even though the incorrect representations were made in good faith and without fraudulent intent. One who was ineligible to take a civil service examination but who was admitted to the examination upon reliance upon misstatements in her application, may be summarily removed upon discovery of the misstatement subsequent to appointment. Katz v Goldwater, 285 N.Y. 830, 35 N.E.2d 500, 285 N.Y. (N.Y.S.) 830, 1941 N.Y. LEXIS 1798 (N.Y. 1941).

One who was appointed to a civil service position in reliance upon a material misrepresentation in his original application may be summarily removed. The Municipal Civil Service Commission must rescind a certification when the applicant has made a material misstatement of fact upon which the commission has relied in concluding that the applicant was eligible to take an examination, and the absence of fraudulent intent on the part of the applicant is immaterial. Shraeder v Kern, 287 N.Y. 13, 38 N.E.2d 110, 287 N.Y. (N.Y.S.) 13, 1941 N.Y. LEXIS 1405 (N.Y. 1941), reh'g denied, 287 N.Y. 760, 40 N.E.2d 44, 287 N.Y. (N.Y.S.) 760, 1942 N.Y. LEXIS 1776 (N.Y. 1942).

Courts properly upheld penalty of dismissal where petitioner was found guilty of 2 charges of submitting reports to Department of Civil Service, falsely indicating that several employees were working at lower titles after he had temporarily promoted them and paid them at higher title rate, which violated CLS Civ S §§ 97(1) and 100(1) because those employees were not on civil service eligible list. Gillen v Smithtown Library Bd. of Trustees, 94 N.Y.2d 776, 699 N.Y.S.2d 695, 721 N.E.2d 945, 1999 N.Y. LEXIS 3432 (N.Y. 1999).

Where evidence supported police commissioner's determination that petitioner engaged in unauthorized off-duty employment as New York State Certified Instructor for Security Guard Training and, in exchange for money, falsely certified that 2 armed security guards had completed required firearms training, penalty of dismissal did not shock "one's sense of fairness," notwithstanding petitioner's commendations, prior exemplary service, fact that 2 guards involved were licensed to carry firearms and were otherwise qualified for certificates, and fact that petitioner would lose his pension as result of dismissal. Kelly v Safir, 96 N.Y.2d 32, 724 N.Y.S.2d 680, 747 N.E.2d 1280, 2001 N.Y. LEXIS 566 (N.Y. 2001).

Petitioner was not entitled to an order directing the commissioner of the department of hospitals of New York city to reinstate her to the position of stenographer-typist, grade 1, where the record showed that while she had completed her six months' probationary period in the position, it appeared that at a hearing before the municipal civil service commission, of which she had notice, it was conceded that petitioner falsely stated in the application for the examination for the position in question that she was eighteen years of age, which was the minimum age permitted, and did not deny the statement by the commission that she was sixteen years of age at the time she filed the application. Application of Katz, 260 A.D. 495, 23 N.Y.S.2d 150, 1940 N.Y. App. Div. LEXIS 4637 (N.Y. App. Div. 1940), aff'd, 285 N.Y. 830, 35 N.E.2d 500, 285 N.Y. (N.Y.S.) 830, 1941 N.Y. LEXIS 1798 (N.Y. 1941).

Charges that a civil service employee made false reports as to working hours and false claims for meals are sufficiently substantial to justify dismissal if proved. Lanzer v Moran, 268 A.D. 947, 51 N.Y.S.2d 389, 1944 N.Y. App. Div. LEXIS 4350 (N.Y. App. Div.), app. dismissed, 293 N.Y. 759, 57 N.E.2d 838, 293 N.Y. (N.Y.S.) 759, 1944 N.Y. LEXIS 2181 (N.Y. 1944), aff'd, 294 N.Y. 864, 62 N.E.2d 489, 294 N.Y. (N.Y.S.) 864, 1945 N.Y. LEXIS 1049 (N.Y. 1945).

Civil Service Law § 50, and not Civil Service Law § 75, was proper section under which to disqualify permanent civil service appointee for alleged false statements concerning 20-year old criminal record, and thus such false statements could not properly form basis for disqualification of village building inspector over 3 years following date of appointment where inspector was not guilty of misconduct or incompetence in office. Giangiacomo v Village of Liberty, 50 A.D.2d 666, 375 N.Y.S.2d 223, 1975 N.Y.

App. Div. LEXIS 12503 (N.Y. App. Div. 3d Dep't 1975), aff'd, 40 N.Y.2d 957, 390 N.Y.S.2d 918, 359 N.E.2d 426, 1976 N.Y. LEXIS 3161 (N.Y. 1976).

Dismissal was excessive penalty, even though town investigator misused his position on one occasion by falsely representing that he was on official business in order to avoid paying $10 boat ramp usage charge; matter would be remitted for imposition of new penalty which should not exceed 2-month suspension without pay, and for calculation of award of back pay consisting of salary investigator would have earned had he not been dismissed, less amount of compensation which he might have earned in any other employment, and any unemployment benefits he might have received during such period. RRI Realty Corp. v Hattrick, 132 A.D.2d 558, 517 N.Y.S.2d 284, 1987 N.Y. App. Div. LEXIS 49081 (N.Y. App. Div. 2d Dep't 1987).

Superintendent of State Police had rational basis to deny petitioner's application for reinstatement where, after accepting conditional offer of employment which was dependent on his satisfactory completion of remaining phases of application process, including medical examination and background investigation, he made material misrepresentations on form which explicitly stated that willful failure to supply complete information, or any false statement, could result in disqualification for employment. Grossman v McMahon, 261 A.D.2d 54, 699 N.Y.S.2d 582, 1999 N.Y. App. Div. LEXIS 12730 (N.Y. App. Div. 3d Dep't 1999).

It was proper to dismiss police officer based on undisputed evidence, obtained during investigation following his appointment, that he had committed fraud on his employment application to conceal his fraudulent use of Social Security number not his own to obtain second New York State driver's license after his first license had been revoked. Martin v Marchiselli, 262 A.D.2d 171, 691 N.Y.S.2d 528, 1999 N.Y. App. Div. LEXIS 6752 (N.Y. App. Div. 1st Dep't 1999).

Where a petitioner was not eligible to take an examination for police patrolman because he had mistakenly misstated his age, all subsequent acts on his part or on the part of the civil service commission and the police commissioner in relying on the premise that he was eligible were null and void and no rights accrued therefrom. Walden-El v Brennan, 125 N.Y.S.2d 95, 205 Misc. 351, 1953 N.Y. Misc. LEXIS 2286 (N.Y. Sup. Ct. 1953), aff'd, 283 A.D. 771, 128 N.Y.S.2d 578, 1954 N.Y. App. Div. LEXIS 5214 (N.Y. App. Div. 1954).

45. —Racial matter

Commissioner of Division of Human Rights finding that black policeman's dismissal from city police force was not the result of unlawful discrimination but based on proven acts of misconduct and finding that such penalty was appropriate to the misconduct charged and was not discriminatory were supported by substantial evidence. State Div. of Human Rights v Syracuse, 57 A.D.2d 452, 394 N.Y.S.2d 948, 1977 N.Y. App. Div. LEXIS 11822 (N.Y. App. Div. 4th Dep't 1977), aff'd, 43 N.Y.2d 958, 404 N.Y.S.2d 343, 375 N.E.2d 409, 1978 N.Y. LEXIS 1857 (N.Y. 1978).

The dismissal of petitioner from his position as a stationary engineer with respondent City was grossly excessive, and admonition, reprimand or some other penalty is more appropriate, where the only supportable charges against petitioner were that he was critical of the allegedly slow work of laborers at his job and that he uttered a racial slur to a coemployee; accordingly, the dismissal of petitioner should be annulled and the matter should be remitted to respondent to reconsider the penalty, if any, which it may properly administer to petitioner by reason of the supportable charges. Pilawa v Utica, 76 A.D.2d 103, 429 N.Y.S.2d 959, 1980 N.Y. App. Div. LEXIS 11733 (N.Y. App. Div. 4th Dep't 1980).

46. —Refusal to take examination

Where the civil service position or watchman, a noncompetitive class, was abolished under the direction of the civil service system, and was expanded by reclassification, to the position of building guard, a competitive position requiring written examination and appointment pursuant to and from an approved civil service list, dismissal of watchman was authorized upon his failure to take the examination under the new classification. Szewczuk v Moore, 53 Misc. 2d 940, 280 N.Y.S.2d 284, 1967 N.Y. Misc. LEXIS 1501 (N.Y. Sup. Ct. 1967), aff'd, 31 A.D.2d 1008, 300 N.Y.S.2d 544, 1969 N.Y. App. Div. LEXIS 5392 (N.Y. App. Div. 4th Dep't 1969).

47. —Residency requirements

City ordinance if interpreted as mandating automatic removal of city employee, for "misconduct", upon finding of non-residency would be invalid as in conflict with Civil Service Law provisions setting forth lawful procedure to be followed when charges of incompetence or misconduct are raised, and in view of actual language of ordinance, it would be interpreted as providing that non-residency, absent more, might be grounds for removal. Commissioner of department of inspections and licenses of city acted well within his authority as established by Civil Service Law, in laying off plumbing inspector in course of overall reduction in city's work force, though certain other employees were allegedly nonresidents of the city. Giliforte v Buffalo, 54 A.D.2d 170, 388 N.Y.S.2d 392, 1976 N.Y. App. Div. LEXIS 13746 (N.Y. App. Div. 4th Dep't 1976).

A city ordinance which provides that employees of the city who fail to reside in the city shall forfeit their employment is valid and does not conflict with section 75 of the Civil Service Law which provides that certain civil service employees may not be removed except for misconduct or incompetence, inasmuch as residency is unrelated to job performance, misconduct or competency, and section 75 has nothing to do with eligibility for employment; there is nothing unlawful about a local government requiring that its employees reside within its territorial limits. A city ordinance which provides that employees of the city who fail to reside in the city shall forfeit their employment is valid and does not conflict with section 75 of the Civil Service Law which provides that certain civil service employees may not be removed except for misconduct or incompetence, inasmuch as residency is unrelated to job performance, misconduct or competency, and section 75 has nothing to do with eligibility for employment; there is nothing unlawful about a local government requiring that its employees reside within its territorial limits. Mandelkern v Buffalo, 64 A.D.2d 279, 409 N.Y.S.2d 881, 1978 N.Y. App. Div. LEXIS 12254 (N.Y. App. Div. 4th Dep't 1978).

In Article 78 proceeding to compel town to pay petitioner's salary and fringe benefits pending determination of disciplinary charges, town was estopped from raising affirmative defense that petitioner failed to meet residency requirement where town originally acquiesced in her employment as nonresident. Young v Supervisor of Lloyd, 159 A.D.2d 828, 552 N.Y.S.2d 981, 1990 N.Y. App. Div. LEXIS 2935 (N.Y. App. Div. 3d Dep't), app. dismissed, 76 N.Y.2d 761, 559 N.Y.S.2d 237, 558 N.E.2d 39, 1990 N.Y. LEXIS 1343 (N.Y. 1990).

Court confirmed determination of county department of civil service which revoked petitioner's certification and appointment as village police officer on ground that he perpetrated fraud by claiming residency in village, where petitioner presented driver's license, voter registration cards and hearing testimony by owner of property on which he allegedly resided, but hearing officer chose to credit conflicting documentary evidence which supported finding that petitioner did not in fact reside in village during 6-month period in question. Schindlar v Incorporated Village of Lloyd Harbor, 261 A.D.2d 626, 690 N.Y.S.2d 673, 1999 N.Y. App. Div. LEXIS 5708 (N.Y. App. Div. 2d Dep't 1999).

48. —Sexual misconduct, including harassment

School district is not entitled to order pursuant to CPLR § 7503 staying arbitration between district and employee association regarding district's discharge of school bus driver after hearing pursuant to Civil Service Law § 75 in which it was found that evidence supported charges that busdriver had sexually molested young girls riding his bus, since employee association filed grievance pursuant to its collective bargaining agreement with district claiming that district lacked "just cause" to discharge busdriver; there is no merit to district's contention that driver's participation in Civil Service Law § 75 hearing and failure to appeal therefrom pursuant to § 76 constituted waiver of his right to arbitration, since collective bargaining agreement afforded additional remedy of pursuing to resolution by arbitration "just cause" grievances, in that such grievance provisions of collective bargaining agreement do not supplant, but rather augment, statutory methods of appeal detailed in Civil Service Law § 76.

Granville Cent. School Dist. v Granville Non-Instructional Employee's Asso., 114 A.D.2d 626, 494 N.Y.S.2d 218, 1985 N.Y. App. Div. LEXIS 53315 (N.Y. App. Div. 3d Dep't 1985).

Despite employee's unblemished 22-year record with Department of Correctional Services, punishment of dismissal was not so disproportionate as to shock one's sense of fairness given evidence of his long and consistent pattern of grievous sexual harassment against subordinate female employees. Oare v Coughlin, 133 A.D.2d 943, 520 N.Y.S.2d 658, 1987 N.Y. App. Div. LEXIS 51985 (N.Y. App. Div. 3d Dep't 1987), app. denied, 70 N.Y.2d 615, 526 N.Y.S.2d 436, 521 N.E.2d 443, 1988 N.Y. LEXIS 700 (N.Y. 1988).

Petitioner was properly discharged from his position as building maintenance foreman where he exploited his capacity as supervisor by sexual harassment of 2 female employees; sexual harassment in work place is among most offensive and demeaning torments employee can undergo. Crookston v Brown, 140 A.D.2d 868, 528 N.Y.S.2d 908, 1988 N.Y. App. Div. LEXIS 5332 (N.Y. App. Div. 3d Dep't 1988).

It was appropriate to dismiss town chief of police for conduct unbecoming police officer involving his unprovoked, unwelcome, and unwarranted sexual advances, sexual contact, and demeaning comments of sexual nature directed at 2 present or former town employees and against 2 female town residents. Wade v Town of Ticonderoga Town Bd., 256 A.D.2d 860, 681 N.Y.S.2d 833, 1998 N.Y. App. Div. LEXIS 13566 (N.Y. App. Div. 3d Dep't 1998), app. denied, 93 N.Y.2d 804, 689 N.Y.S.2d 16, 711 N.E.2d 201, 1999 N.Y. LEXIS 742 (N.Y. 1999).

49. —Sleeping on job

Evidence supported school district's finding that head custodian was guilty of sleeping on duty, although custodian was not scheduled to be on duty at time of incident, where 2 police officers testified that they entered school room to investigate setting off of school's burglar alarm and found custodian asleep on table, and second custodian, who had been scheduled to be on duty at that time, testified that he had switched shifts with discharged custodian at discharged custodian's request; penalty was not shockingly disproportionate to offense. Smith v Board of Education, 125 A.D.2d 813, 510 N.Y.S.2d 29, 1986 N.Y. App. Div. LEXIS 63020 (N.Y. App. Div. 3d Dep't 1986).

Penalty of dismissal was not excessive where deputy sheriff court attendant was derelict in his duties, in that he fell asleep in courtroom while on duty, and where record indicated that he had been repeatedly disciplined in past for same conduct. Grossman v Kralik, 217 A.D.2d 625, 629 N.Y.S.2d 467, 1995 N.Y. App. Div. LEXIS 7795 (N.Y. App. Div. 2d Dep't 1995).

Court upheld dismissal of city firefighter who, within relatively short period of being hired, violated department rules by sleeping on duty during day shift, by failing to conduct himself in manner that reflected favorably on department, and by engaging in behavior that brought discredit or disgrace upon department. Dewey v Powley, 261 A.D.2d 901, 690 N.Y.S.2d 365, 1999 N.Y. App. Div. LEXIS 4956 (N.Y. App. Div. 4th Dep't 1999).

50. —Tardiness

Penalty of termination was not shocking to one's sense of fairness where senior personnel analyst with county department of civil service was found guilty of misconduct and incompetence in connection with 35 instances of shoddy work, insubordination, tardiness, failure to follow directives, and inability to perform adequately. Tinney v Schneider, 216 A.D.2d 474, 628 N.Y.S.2d 385, 1995 N.Y. App. Div. LEXIS 6408 (N.Y. App. Div. 2d Dep't 1995).

Police officer's termination was justified by incident during probationary period in which she was late in relieving another officer of her post. Garrett v Safir, 253 A.D.2d 700, 677 N.Y.S.2d 570, 1998 N.Y. App. Div. LEXIS 9695 (N.Y. App. Div. 1st Dep't), app. denied, 92 N.Y.2d 817, 684 N.Y.S.2d 489, 707 N.E.2d 444, 1998 N.Y. LEXIS 4330 (N.Y. 1998).

51. —Theft

Penalty of dismissal was not abuse of transit authority's discretion in view of determination that token booth collector had made unauthorized hand collections and converted $260 in transit authority funds to her own use. Brathwaite v Gunn, 125 A.D.2d 305, 508 N.Y.S.2d 589, 1986 N.Y. App. Div. LEXIS 62567 (N.Y. App. Div. 2d Dep't 1986).

Punishment of dismissal was not excessive where fire prevention inspector pleaded guilty to crime of attempted receipt of unlawful gratuity in amount of $45, in view of nature of fire inspector's job of insuring fire safety. Meades v Spinnato, 138 A.D.2d 579, 526 N.Y.S.2d 161, 1988 N.Y. App. Div. LEXIS 3136 (N.Y. App. Div. 2d Dep't 1988).

Penalty of termination imposed on State Thruway Authority toll collector was not excessive where evidence showed that, seemingly for her own financial benefit, she processed tickets with punch holes that did not correlate to vehicles exiting through her lane, and that leather punch was found in her car, supporting reasonable inference that she punched extra holes herself. Sassone v New York State Thruway Auth., 189 A.D.2d 86, 594 N.Y.S.2d 882, 1993 N.Y. App. Div. LEXIS 2377 (N.Y. App. Div. 3d Dep't), app. denied, 82 N.Y.2d 658, 604 N.Y.S.2d 557, 624 N.E.2d 695, 1993 N.Y. LEXIS 3809 (N.Y. 1993).

Penalty of dismissal was not disproportionate to offense, where police officer was found guilty of taking possession of property that did not belong to him under circumstances evidencing knowledge that he had no right to items taken, and of abusing sick leave by being absent from his residence without permission while on sick report, and where he had previously been disciplined for abusing sick leave regulations and making false statement. Morocco v Kelly, 205 A.D.2d 401, 613 N.Y.S.2d 611, 1994 N.Y. App. Div. LEXIS 6372 (N.Y. App. Div. 1st Dep't 1994).

Dismissal of police officer was appropriate for his having conspired with tow truck driver to steal battery from towed car and attempting to facilitate scheme by indicating in his paperwork that he found car without its battery. Perez v Safir, 249 A.D.2d 176, 672 N.Y.S.2d 677, 1998 N.Y. App. Div. LEXIS 4404 (N.Y. App. Div. 1st Dep't 1998).

It was proper to dismiss police officer who wrongfully solicited money from 2 rabbis for engaging in required official conduct, failed to voucher money thus obtained, and who had information relative to corruption involving member of police force and failed to report it. Brovakos v Bratton, 254 A.D.2d 32, 678 N.Y.S.2d 21, 1998 N.Y. App. Div. LEXIS 9935 (N.Y. App. Div. 1st Dep't 1998).

Police officer was properly dismissed for knowingly accepting cash payments representing proceeds of brothel business on behalf of his incarcerated brother, notwithstanding officer's prior unblemished record. Tsang v Safir, 256 A.D.2d 7, 680 N.Y.S.2d 518, 1998 N.Y. App. Div. LEXIS 12804 (N.Y. App. Div. 1st Dep't 1998).

Dismissal of police officer was appropriate based on her having stolen money seized at illegal gambling location during police raid. Renna v Safir, 256 A.D.2d 219, 683 N.Y.S.2d 18, 1998 N.Y. App. Div. LEXIS 13756 (N.Y. App. Div. 1st Dep't 1998).

52. —Use of excessive force

In an Article 78 proceeding by a former senior special officer of the Human Resources Administration seeking review of his dismissal from employment, the determination of the commissioner of the Human Resources Administration would be affirmed where the petitioner was charged with using excessive force on a disruptive client of the center, engaging in actions that endangered persons at the Center and interfered with the maintenance of the public peace, and setting a bad example for his subordinates, there was substantial evidence that petitioner was guilty of the charges, a finding of excessive use of force against a client is among the most serious offenses that can be committed by a special officer whose job is to protect clients, and in light of the seriousness of the offense committed the penalty imposed upon the petitioner was neither irrational nor shocking to the conscience of the court. Rothstein v Brezenoff, 92 A.D.2d 808, 460 N.Y.S.2d 542, 1983 N.Y. App. Div. LEXIS 17190 (N.Y. App. Div. 1st Dep't), aff'd, 59 N.Y.2d 1003, 466 N.Y.S.2d 965, 453 N.E.2d 1254, 1983 N.Y. LEXIS 3277 (N.Y. 1983).

New York City Civil Service Commission properly dismissed correction officer for use of excessive force against inmates and failure to make proper notification regarding use of force against inmate, notwithstanding officer's lack of disciplinary record. Perez v New York Civil Service Com., 140 A.D.2d 224, 528

N.Y.S.2d 73, 1988 N.Y. App. Div. LEXIS 5279 (N.Y. App. Div. 1st Dep't), app. denied, 72 N.Y.2d 807, 533 N.Y.S.2d 56, 529 N.E.2d 424, 1988 N.Y. LEXIS 2564 (N.Y. 1988).

53. Abolition of position

After abolishment by the board of estimate and apportionment of New York city, under authority of the Economy Act, of the position of "nurse's assistant" in the bureau of child hygiene of the department of health, the assignment, with consent of department, of three workers from emergency relief rolls, and the performance by them of all of the work of the former incumbent of the abolished position, constitute a violation of this section. Danker v Department of Health, 266 N.Y. 365, 194 N.E. 857, 266 N.Y. (N.Y.S.) 365, 1935 N.Y. LEXIS 1383 (N.Y. 1935).

Where seasonal holders of position of pari-mutuel examiner were in the classified service at the time state decided that no further seasonal appointments were to be made for the positions they held, but instead full-time positions were to be utilized having exactly the same "requirements for entrance," they were entitled to be placed on a preferred list for appointment. Application of Apsel, 12 A.D.2d 220, 209 N.Y.S.2d 890, 1961 N.Y. App. Div. LEXIS 13020 (N.Y. App. Div. 3d Dep't 1961).

It was error to dismiss Article 78 petition to review administrative determination abolishing petitioner's job, on basis that there was no evidence that respondents had acted in bad faith, in light of evidence of respondents' treatment of petitioner before her job was abolished, fact that she was discharged just prior to vesting in state retirement system, fact that there did not appear to be any urgent need to automate her job, and evidence that person hired for newly titled position performed substantially same duties as she did. Rosenthal v Gilroy, 208 A.D.2d 748, 617 N.Y.S.2d 509, 1994 N.Y. App. Div. LEXIS 9875 (N.Y. App. Div. 2d Dep't 1994).

An art. 78 proceeding would not lie where the petition merely alleged abolition of the position of senior clerk to the Town Board of Assessors but failed to allege taking over of the duties of the position by another, it appearing merely that a different office with different standards of qualifications was set up. McCanless v Brieant, 35 Misc. 2d 1018, 231 N.Y.S.2d 995, 1962 N.Y. Misc. LEXIS 3189 (N.Y. Sup. Ct. 1962), modified, 19 A.D.2d 736, 242 N.Y.S.2d 841, 1963 N.Y. App. Div. LEXIS 3323 (N.Y. App. Div. 2d Dep't 1963).

54. Salary reduction

Provisions of this section protecting war veterans from removal from civil service positions without trial or an opportunity to be heard, do not apply to a reduction of salary made in good faith. Newell v City of Buffalo, 261 N.Y. 369, 185 N.E. 499, 261 N.Y. (N.Y.S.) 369, 1933 N.Y. LEXIS 1296 (N.Y. 1933).

This law does not prevent the board of aldermen from reducing the salary to be paid for a certain position. Brigham v New York, 191 A.D. 866, 182 N.Y.S. 145, 1920 N.Y. App. Div. LEXIS 4822 (N.Y. App. Div. 1920).

Where relator, a Spanish War veteran, withdrew from his position as mortgage tax appraiser, when his salary was reduced from $1800 to $900 a year, and salary of other tax appraisers was not reduced, he was entitled to restoration of salary to $1800 and reinstatement. People ex rel. Jones v Saxe, 156 N.Y.S. 975, 92 Misc. 409, 1915 N.Y. Misc. LEXIS 1012 (N.Y. Sup. Ct. 1915).

Reduction of the salary of a war veteran civil service employee from $4000 to $3300 per annum did not constitute a dismissal, which under this section could have been brought about only after a hearing on charges. Gerard v McDonald, 66 N.Y.S.2d 882, 188 Misc. 749, 1946 N.Y. Misc. LEXIS 3163 (N.Y. Sup. Ct. 1946).

55. Change in mode of payment

Changing the mode of payment of employees from a "per annum" basis to a "per session" basis does not amount to an abolition of the original positions of such employees thereby contravening the provisions of this section and § 31. Lewin v La Guardia, 22 N.Y.S.2d 409, 175 Misc. 165, 1940 N.Y. Misc. LEXIS 2142 (N.Y. Sup. Ct. 1940), aff'd, 261 A.D. 940, 26 N.Y.S.2d 493, 1941 N.Y. App. Div. LEXIS 8176 (N.Y. App. Div. 1941).

56. Other sanctions

Forfeiture of 10 vacation days was not so disproportionate as to shock "one's sense of fairness," where New York City police officer with previously unblemished disciplinary record used excessive force in arrest of complainant. Kelly v Safir, 96 N.Y.2d 32, 724 N.Y.S.2d 680, 747 N.E.2d 1280, 2001 N.Y. LEXIS 566 (N.Y. 2001).

Subdivision 3 of this section, in specifying the penalties which may be imposed on a civil service employee found guilty of charges filed against him, among others, a fine not to exceed $100 to be deducted from his salary or wages, was not intended to make possible the confiscation of earnings of an offending officer or employee and does not authorize accumulation of fines for multiple offenses, each in amount not exceeding $100, to permit a salary deduction in excess of that amount. Fitzmaurice v Moses, 12 A.D.2d 304, 210 N.Y.S.2d 938, 1961 N.Y. App. Div. LEXIS 12524 (N.Y. App. Div. 1st Dep't 1961), app. dismissed, 12 N.Y.2d 884, 237 N.Y.S.2d 995, 188 N.E.2d 262, 1963 N.Y. LEXIS 1477 (N.Y. 1963).

A determination resulting in a mere reprimand is not reviewable under Civ S Law § 76(1). In providing for the imposition of a pre-hearing payless suspension, Civ S Law § 75(3) does not mandate that the suspension be remitted after a hearing if the employee is found guilty of disciplinary charges. Accordingly, a decision not to remit the pre-hearing payless suspension did not constitute post-hearing penalty entitling a petitioner to an Article 78 proceeding reviewing respondents' determination that petitioner was guilty of misconduct. Sinnott v Finnerty, 105 A.D.2d 790, 481 N.Y.S.2d 429, 1984 N.Y. App. Div. LEXIS 20908 (N.Y. App. Div. 2d Dep't 1984), rev'd, 65 N.Y.2d 780, 492 N.Y.S.2d 945, 482 N.E.2d 563, 1985 N.Y. LEXIS 16192 (N.Y. 1985).

Fine of 3 days' pay and 2 days' suspension without pay was not excessive as against police officer who violated departmental rules and regulations by operating his patrol car in careless and negligent manner, resulting in collision with another vehicle. Spillman v Ramapo, 134 A.D.2d 266, 520 N.Y.S.2d 598, 1987 N.Y. App. Div. LEXIS 50449 (N.Y. App. Div. 2d Dep't 1987).

Fine of 5 days' pay was not excessive as against police officer who violated departmental rules and regulations by failing to immediately report damage to his patrol car sustained during his tour of duty. Turzyn v Rozzi, 134 A.D.2d 268, 520 N.Y.S.2d 601, 1987 N.Y. App. Div. LEXIS 50451 (N.Y. App. Div. 2d Dep't 1987).

Penalty of demotion from laborer II to laborer I, imposed by county department of public works, was not excessive where employee had pattern of continuing improper behavior and persistent lack of respect for supervisors; department did not have duty to warn employee that his conduct was improper before commencing disciplinary proceeding. Leotta v Hasl, 134 A.D.2d 429, 521 N.Y.S.2d 52, 1987 N.Y. App. Div. LEXIS 50614 (N.Y. App. Div. 2d Dep't 1987).

Penalty of 30-day suspension and demotion, with 6-month probationary period, was not disproportionately harsh where county security officer participated in off-duty "practical jokes" performed on fellow county employees, undertaken with other off-duty county employees, which resulted in collision between his vehicle and county vehicle, and failed to report collision; petitioner was not erroneously singled out for harsher punishment, given his position as supervisor and nature of his misconduct. Sguanci v Commissioner of Public Works, 158 A.D.2d 788, 550 N.Y.S.2d 950, 1990 N.Y. App. Div. LEXIS 891 (N.Y. App. Div. 3d Dep't 1990).

Forfeiture of 15 vacation days and $1,500 fine imposed on employee by New York City Department of Correction would be annulled and remanded, even though there was substantial evidence that, while on sick leave, employee left his residence without properly notifying his institution, where there was question regarding parties' consent to penalty, which was otherwise illegal; it would be preferable that department impose appropriate penalty rather than have court substitute hearing officer's original recommendation of 30-day suspension without pay. Cepeda v Koehler, 159 A.D.2d 290, 552 N.Y.S.2d 295, 1990 N.Y. App. Div. LEXIS 2658 (N.Y. App. Div. 1st Dep't 1990).

Although supervisor employed by Department of Transportation was properly found to have been guilty of incompetence in discharge of his duties on basis that he failed to follow up on information regarding widespread drug use in his section, penalty imposed was so disproportionate to offense as to shock one's sense of fairness where (1) petitioner had unblemished 24-year

record, (2) petitioner's conduct was of unwillful nature, (3) penalty included demotion in position and salary loss of about $11,000 per year, and (4) those who admitted to drug use were given less severe penalties. Pelham v White, 166 A.D.2d 824, 563 N.Y.S.2d 171, 1990 N.Y. App. Div. LEXIS 12819 (N.Y. App. Div. 3d Dep't 1990).

Imposition of 60-day suspension for deputy sheriff's refusal to answer and untruthful answers to questions posed to him during official investigation of internal affairs unit was not so disproportionate to offense so as to shock one's sense of fairness since his behavior posed serious threat to discipline and efficiency of sheriff's department. Steinberg v Dooley, 168 A.D.2d 499, 562 N.Y.S.2d 742, 1990 N.Y. App. Div. LEXIS 15339 (N.Y. App. Div. 2d Dep't 1990).

Formal reprimand placed in school custodian's personnel file was disciplinary reprimand within meaning of CLS Civ S § 75, not mere warning, and thus court would annul school district's determination to reprimand custodian without statutory due process protections, where (1) reprimand referred to investigation of serious charge, findings of fact, and ultimate decision that custodian should be reprimanded for misconduct, and (2) reprimand also stated that matter would be resolved by placement of formal reprimand in file. Civil Serv. Employees Ass'n v Southold Union Free Sch. Dist., 204 A.D.2d 445, 611 N.Y.S.2d 895, 1994 N.Y. App. Div. LEXIS 4757 (N.Y. App. Div. 2d Dep't 1994).

It was improper to require police officer (petitioner) to forfeit 10 vacation days as penalty for using excess of force in making arrest where there was no basis for differential penalties imposed on 2 police officers involved in incident, other officer was penalized with loss of only 5 vacation days, Administrative Law Judge attributed administrative penalty imposed on other officer to petitioner, who had prior unblemished disciplinary record, and First Deputy Commissioner improperly cited petitioner's election to pursue administrative trial as justification for higher penalty; thus, penalty would be reduced to forfeiture of 5 vacation days. Meagher v Safir, 272 A.D.2d 114, 707 N.Y.S.2d 422, 2000 N.Y. App. Div. LEXIS 5409 (N.Y. App. Div. 1st Dep't 2000), modified, 96 N.Y.2d 32, 724 N.Y.S.2d 680, 747 N.E.2d 1280, 2001 N.Y. LEXIS 566 (N.Y. 2001).

It was proper to impose forfeiture of 20 vacation days on finding that police officer unjustifiably and without provocation struck individual with nightstick during course of arrest. Potter v Safir, 284 A.D.2d 156, 728 N.Y.S.2d 428, 2001 N.Y. App. Div. LEXIS 6151 (N.Y. App. Div. 1st Dep't 2001).

Forfeiture of 15 vacation days was appropriate sanction for police officer's discourteous behavior toward police sergeant. Sanders v Safir, 284 A.D.2d 163, 726 N.Y.S.2d 844, 2001 N.Y. App. Div. LEXIS 6148 (N.Y. App. Div. 1st Dep't 2001).

The words "except as otherwise provided by law," contained in New York City Administrative Code § 1103-1.0(2) with reference to a fine for delinquency or misconduct of employees, renders the provision by its own terms inapplicable to permanent competitive Civil Service employees, because Civil Service Law § 75 does provide otherwise as to such employees. Coleman v Ginsberg, 66 Misc. 2d 46, 319 N.Y.S.2d 338, 1971 N.Y. Misc. LEXIS 1870 (N.Y. Sup. Ct. 1971).

Superiors of members of capitol police did not abuse their discretion or act unreasonably or arbitrarily in awarding unsatisfactory performance ratings on basis of excessive tardiness and excessive amount of sick leave used, with result that salary increments or other benefits were withheld. Watson v Wilson, 80 Misc. 2d 822, 364 N.Y.S.2d 348, 1975 N.Y. Misc. LEXIS 2270 (N.Y. Sup. Ct. 1975).

Where civil service employee's violation of work rule regarding time clock had been found not to be incompetence or misconduct in hearing conducted pursuant to Civil Service Law, deduction of two hours pay for such violation was contrary to Civil Service Law provision prohibiting any disciplinary penalty except for incompetency or misconduct shown after hearing on stated charges and was therefore vacated and annulled. Sette v McCambridge, 84 Misc. 2d 591, 377 N.Y.S.2d 923, 1975 N.Y. Misc. LEXIS 3182 (N.Y. Sup. Ct. 1975).

Petition to review respondents' determination which confiscated badge and identification of police officer for improperly using them while on "inactive status" due to disability, and to compel respondents to comply with CLS Civ S § 75 and CLS Vill § 8-804, was within parameters of Article 78. Gore v Corwin, 185 Misc. 2d 825, 714 N.Y.S.2d 427, 2000 N.Y. Misc. LEXIS 408 (N.Y. Sup. Ct. 2000).

III. Procedure On Appeal

57. Procedure for initiating appeal

Relator, under this section, should have proceeded by mandamus for reinstatement, unless he was entitled to hearing on ground that he was an exempt volunteer fireman, in which case, he could have proceeded by certiorari. Morgan v Smith, 224 A.D. 203, 230 N.Y.S. 97, 1928 N.Y. App. Div. LEXIS 9963 (N.Y. App. Div. 1928).

Grant of a peremptory writ of mandamus is discretionary with the court and such a writ will not be granted where its effect would be contrary to the public interest. A veteran volunteer fireman "suspended" from his position pending the outcome of criminal charges against him, cannot compel his reinstatement by mandamus, where the uncontroverted evidence indicates clearly his unfitness for civil service employment, and if the writ were granted, it is obvious that the employee would be removed after a hearing. Burke v Connolly, 135 N.Y.S. 179, 76 Misc. 337, 1912 N.Y. Misc. LEXIS 819 (N.Y. Sup. Ct. 1912).

A proceeding under article 78 of the Civil Practice Act takes the place of mandamus as the appropriate remedy prescribed by this section. Moreland v Areson, 19 Misc. 2d 385, 22 N.Y.S.2d 309, 1940 N.Y. Misc. LEXIS 1349, 1940 N.Y. Misc. LEXIS 2125 (N.Y. Sup. Ct. 1940).

58. Review jurisdiction

The refusal of a sheriff to remit a deputy's 30-day pre-hearing suspension without pay in connection with the disposition of disciplinary proceedings against the deputy in which he was found guilty of misconduct and reprimanded, could be considered a penalty or punishment within Civil Service Law § 76(1) for which judicial review could be sought. Civil Service Law § 75(3), permitting a 30-day pre-hearing suspension without pay, also provides that upon a finding of guilt a post-hearing penalty or punishment may include a suspension without pay, and the time during which an officer or employee had previously been suspended without pay could be considered as part of the penalty. Sinnott v Finnerty, 65 N.Y.2d 780, 492 N.Y.S.2d 945, 482 N.E.2d 563, 1985 N.Y. LEXIS 16192 (N.Y. 1985).

In Article 78 proceeding, Court of Appeals had jurisdiction to review Appellate Division's holding that municipal employer abused its discretion by failing to reinstate petitioner to her previous permanent position after she was fired from her probationary position, where appeal raised legal question of whether petitioner received "promotion" as that term is used in Civil Service Law. Bethel v McGrath-McKechnie, 95 N.Y.2d 7, 709 N.Y.S.2d 888, 731 N.E.2d 604, 2000 N.Y. LEXIS 905 (N.Y. 2000).

Court has no discretionary authority or interest of justice jurisdiction when reviewing disciplinary determinations by New York City Police Commissioner, and great leeway must be accorded to commissioner's determination concerning punishment, as it is commissioner, not court, who is accountable to public for integrity of police department. Kelly v Safir, 96 N.Y.2d 32, 724 N.Y.S.2d 680, 747 N.E.2d 1280, 2001 N.Y. LEXIS 566 (N.Y. 2001).

CLS Civ S § 76 authorizes Civil Service Commission to hear appeals only in connection with disciplinary proceedings under CLS Civ S § 75, and thus commission had no jurisdiction to review petitioner's discharge which was effected without hearing pursuant to agreement settling prior disciplinary proceeding whereby petitioner waived hearing and appeal authorized by §§ 75 and 76 and agreed to probationary period of 12 months; petitioner could have brought Article 78 proceeding at time of his dismissal, challenging respondent's conclusion that he was probationary employee at that time. Johnson v Triborough Bridge & Tunnel Auth., 97 N.Y.2d 627, 735 N.Y.S.2d 861, 761 N.E.2d 553, 2001 N.Y. LEXIS 3310 (N.Y. 2001).

The supreme court has jurisdiction under the general jurisdiction of that court and also under subd. 2 to hear mandamus proceedings resorted to by a discharged state employee to remedy

his wrongful discharge. Whaley v Perkins, 231 A.D. 502, 248 N.Y.S. 64, 1931 N.Y. App. Div. LEXIS 16087 (N.Y. App. Div. 1931).

Where a proceeding before a county judge was of no effect, the Appellate Division is not limited in its right of review by provisions of subd. 3 of this section. Kreppein v Downs, 272 A.D. 452, 72 N.Y.S.2d 150, 1947 N.Y. App. Div. LEXIS 3319 (N.Y. App. Div. 1947).

Petition to review action of New York City's Civil Service Commission, which affirmed the dismissal of petitioner from Department of Social Services, should have been heard and determined by Supreme Court at Special Term, as opposed to Appellate Division, since the test of the decision was that of arbitrariness rather than substantial evidence. Pauling v Smith, 46 A.D.2d 759, 361 N.Y.S.2d 16, 1974 N.Y. App. Div. LEXIS 3600 (N.Y. App. Div. 1st Dep't 1974).

Human Rights Appeal Board had jurisdiction of complaint by former employee of city housing authority charging racial discrimination even after determination of the Civil Service Commission of no discrimination in that no court action based upon alleged grievance had been instituted nor was there any action pending before any state administrative agency. New York City Housing Authority v State Div. on Human Rights, 53 A.D.2d 844, 385 N.Y.S.2d 785, 1976 N.Y. App. Div. LEXIS 13674 (N.Y. App. Div. 1st Dep't 1976).

Appellate Division, as well as the Court of Appeals, is vested with power to deal as a matter of law with the measure of discipline imposed on a civil service employee. City Council of Watertown v Carbone, 54 A.D.2d 461, 389 N.Y.S.2d 678, 1976 N.Y. App. Div. LEXIS 14065 (N.Y. App. Div. 4th Dep't 1976).

In a proceeding brought by a police officer to review a determination of an acting city manager finding the officer guilty of violating certain rules and regulations of the police department but assessing no penalty for such violations, the proceeding would be dismissed since, in the absence of the imposition of any penalty and despite the officer's allegation that the failure to impose any penalty constituted a deliberate effort to deny him judicial review, the court was not empowered to review the determination of the acting city manager. Wohlrab v Miles, 82 A.D.2d 836, 439 N.Y.S.2d 666, 1981 N.Y. App. Div. LEXIS 14509 (N.Y. App. Div. 2d Dep't 1981).

In an action brought by a former employee against a county hospital, the employee's contention that the hearing officer conducted the proceeding upon which his termination was based in an arbitrary and capricious manner by it when the employee was "not ready" to proceed did not state a cause of action, since such contentions regarding the actual propriety of hearings must be presented to the courts in the context of a CPLR Article 78 proceeding pursuant to Civil Service Law § 73(1). Carney v Memorial Hospital & Nursing Home, 101 A.D.2d 990, 477 N.Y.S.2d 735, 1984 N.Y. App. Div. LEXIS 18706 (N.Y. App. Div. 3d Dep't), app. dismissed, 63 N.Y.2d 770, 1984 N.Y. LEXIS 5973 (N.Y. 1984).

Article 78 petition, alleging that police officer was summarily deprived of his rank of detective when he was transferred to patrol squad and another officer was assigned to his former position, should not have been dismissed based on petitioner's failure to invoke grievance arbitration procedures in parties' collective bargaining agreement since (1) grievance arbitration procedures of collective bargaining agreement were not intended to supersede police officer's statutory right to hearing under CLS Civ S § 75, and (2) petitioner did not assert that his demotion violated terms of collective bargaining agreement, and was not seeking judicial resolution of dispute over meaning of any of its provisions. Dombroski v Bloom, 170 A.D.2d 805, 565 N.Y.S.2d 907, 1991 N.Y. App. Div. LEXIS 1548 (N.Y. App. Div. 3d Dep't 1991).

New York City Civil Service Commission has subject matter jurisdiction to entertain appeals of disciplinary determinations made by Commissioner of New York City Police Department and taken by uniformed members of force. Montella v Bratton, 248 A.D.2d 134, 670 N.Y.S.2d 10, 1998 N.Y. App. Div. LEXIS 2077 (N.Y. App. Div. 1st Dep't), app. dismissed sub. nom., Muniz v Giuliani, 92 N.Y.2d 973, 683 N.Y.S.2d 757, 706 N.E.2d 745 (N.Y. 1998), rev'd, 93 N.Y.2d 424, 691 N.Y.S.2d 372, 713 N.E.2d 406, 1999 N.Y. LEXIS 1289 (N.Y. 1999).

The Security Risk Law, being a special law within a specific field, modifies the provisions of subd. 2 of this section in regard to judicial review of an administrative determination, and where the petitioner was dismissed under the Security Risk Law the Supreme Court has no jurisdiction to review the determination. Lerner v Casey, 138 N.Y.S.2d 777, 1955 N.Y. Misc. LEXIS 2681 (N.Y. Sup. Ct. 1955), aff'd, 2 A.D.2d 1, 154 N.Y.S.2d 461, 1956 N.Y. App. Div. LEXIS 4853 (N.Y. App. Div. 2d Dep't 1956).

Since New York City, N.Y., Charter § 487(a) and New York City, N.Y., Admin. Code § 15-113, gave the city fire department commissioner exclusive power to discipline firefighters, the city's civil service commission erroneously ruled that it had jurisdiction to hear a firefighters appeal of his termination; the fire department's discipline was outside the scope of N.Y. Civ. Serv. Law §§ 75, 76, and, thus, was not subject to the jurisdiction of the commission. The fire commissioner's N.Y. art. 78 proceeding to annul the commission's determination that it had jurisdiction was improperly dismissed. Von Essen v N.Y. City Civ. Serv. Comm'n, 4 N.Y.3d 220, 791 N.Y.S.2d 887, 825 N.E.2d 128, 2005 N.Y. LEXIS 224 (N.Y. 2005).

Civil Service Law § 76 provides that employee may appeal determination of Commissioner either to New York City Civil Service Commission or to New York Supreme Court; in either type of appeal transcript of hearing is prepared and submitted to reviewing body. Ostrowski v New York, 601 F.2d 629, 1979 U.S. App. LEXIS 14262 (2d Cir. N.Y. 1979).

Since Civil Service Law § 76 provides the sole method of review of an employee dismissal pursuant to Civil Service Law § 75, school bus driver dismissed for misconduct under Civil Service Law § 75 could not bring an appeal to the Commissioner of Education. Re Marut, Op Comr Ed #9576.

Because N.Y. Civ. Serv. Law § 76(1) explicitly limits appeals pursuant to that section to penalties imposed pursuant to N.Y. Civ. Serv. Law § 75, the firefighter was limited, in seeking judicial review of any punishment imposed pursuant to New York City, N.Y., Admin. Code § 15-113, to the remedies provided by N.Y. C.P.L.R. art. 78. Von Essen v N.Y. City Civ. Serv. Comm'n, 3 A.D.3d 115, 769 N.Y.S.2d 260, 2003 N.Y. App. Div. LEXIS 13677 (N.Y. App. Div. 1st Dep't 2003), app. denied, 2004 N.Y. App. Div. LEXIS 4043 (N.Y. App. Div. 1st Dep't Apr. 6, 2004), aff'd, 4 N.Y.3d 220, 791 N.Y.S.2d 887, 825 N.E.2d 128, 2005 N.Y. LEXIS 224 (N.Y. 2005).

59. —After appeal to Civil Service Commission

If aggrieved employee chooses to appeal disciplinary decision to Civil Service Commission rather than seeking review in courts through Article 78 proceeding, CLS Civ S § 76(3) clearly precludes judicial review of commission's decision; however, judicial review of commission's decision must be afforded aggrieved party if constitutional right is implicated or when agency has acted illegally, unconstitutionally or in excess of its jurisdiction. Substance of Civil Service Commission's determination in disciplinary proceeding was unreviewable in courts, even though commission disregarded credibility determinations of administrative law judge, where there was no showing that commission's actions were unconstitutional, illegal or outside commissioner's jurisdiction. N.Y. City Dep't of Envtl. Prot. v N.Y. City Civil Serv. Comm'n, 78 N.Y.2d 318, 574 N.Y.S.2d 664, 579 N.E.2d 1385, 1991 N.Y. LEXIS 3914 (N.Y. 1991).

Although it is provided in subdivision 3 of this section that a determination on appeal of an allegedly aggrieved employee shall not be subject to court review, there remains for court determination the question of a disposition by the commission which is "purely arbitrary". Santella v Hoberman, 29 A.D.2d 655, 286 N.Y.S.2d 647, 1968 N.Y. App. Div. LEXIS 4926 (N.Y. App. Div. 2d Dep't 1968).

If an appeal in a disciplinary proceeding is taken to the Civil Service Commission for the City of New York, review of the decision is permitted if it is claimed that the action of the Commission was purely arbitrary, notwithstanding statutory provision that the decision of the Commission shall be final and

conclusive. Pauling v Smith, 46 A.D.2d 759, 361 N.Y.S.2d 16, 1974 N.Y. App. Div. LEXIS 3600 (N.Y. App. Div. 1st Dep't 1974).

Where police officer, following termination of employment ordered by chief of police, elected to appeal the determination of penalty to the county civil service commission, court could not thereafter review the decision of the county civil service commission even to consider claim that action of the commission upholding the determination of employment was arbitrary. Schrader v Civil Service Comm'r, 53 A.D.2d 210, 385 N.Y.S.2d 644, 1976 N.Y. App. Div. LEXIS 12509 (N.Y. App. Div. 4th Dep't 1976).

In an Article 78 proceeding to review municipal civil service commission's modification of penalty imposed on city fire captain, question for court is not whether original penalty is shocking to the sense of fairness but rather whether commission's modification of penalty shocks the sense of fairness. City Council of Watertown v Carbone, 54 A.D.2d 461, 389 N.Y.S.2d 678, 1976 N.Y. App. Div. LEXIS 14065 (N.Y. App. Div. 4th Dep't 1976).

Penalty imposed upon state employee by civil service commission can only be set aside where as matter of law it is so harsh and excessive and so disproportionate to offense as to be shocking to one's conscience. Greaney v Bahou, 57 A.D.2d 646, 393 N.Y.S.2d 211, 1977 N.Y. App. Div. LEXIS 11673 (N.Y. App. Div. 3d Dep't 1977).

Result in an administrative personnel disciplinary proceeding is "shocking to one's sense of fairness" and hence reviewable by court if sanction imposed is so grave in its impact on individual subjected to it that it is disproportionate to misconduct, incompetence, failure or turpitude of the individual, or to the harm or risk of harm to agency or institution, or to public generally visited or threatened by derelictions of the individual. There is judicial review of decisions of civil service commission confirming dismissal, though review is limited to determining whether dismissal was purely arbitrary. Short v Nassau County Civil Service Com., 59 A.D.2d 157, 398 N.Y.S.2d 540, 1977 N.Y. App. Div. LEXIS 13280 (N.Y. App. Div. 2d Dep't 1977), app. dismissed, 43 N.Y.2d 843, 402 N.Y.S.2d 812, 373 N.E.2d 992, 1978 N.Y. LEXIS 1761 (N.Y. 1978), rev'd, 45 N.Y.2d 721, 408 N.Y.S.2d 471, 380 N.E.2d 298, 1978 N.Y. LEXIS 2183 (N.Y. 1978).

Appeal of Civil Service Commission finding affirming Personnel Director's determination to dismiss employee from position for fraud was improperly transferred to appellate division, as hearing before Civil Service Commission must be reviewed by lower court, and direct appeal from determination of commission to this court is unavailable under CLS CPLR 7804(g), however, once proceeding is improperly transferred to this court, court is required to determine all issues. D'Ornellas v Ortiz, 119 A.D.2d 459, 500 N.Y.S.2d 671, 1986 N.Y. App. Div. LEXIS 55411 (N.Y. App. Div. 1st Dep't), app. dismissed, 68 N.Y.2d 805, 506 N.Y.S.2d 868, 498 N.E.2d 432, 1986 N.Y. LEXIS 20122 (N.Y. 1986), app. dismissed, 70 N.Y.2d 694, 518 N.Y.S.2d 1031, 512 N.E.2d 557, 1987 N.Y. LEXIS 17990 (N.Y. 1987).

Proceeding by Department of Correction employee, seeking review of disciplinary determination, would be dismissed by Appellate Division where she had chosen to appeal to Civil Service Commission pursuant to CLS Civ S § 76, making judicial review available only if constitutional right is implicated, or if agency has acted illegally, unconstitutionally, or in excess of its jurisdiction. Griffin v New York City Dep't of Correction, 179 A.D.2d 585, 579 N.Y.S.2d 350, 1992 N.Y. App. Div. LEXIS 914 (N.Y. App. Div. 1st Dep't 1992).

State of New York Civil Service Commission acted in excess of its statutory authority and, thus, its jurisdiction by disciplining an employee in 2012 for charges based upon conduct occurring in 2007 and 2008 because the charges did not allege the employee acted with the mens rea requirements for the crime of official misconduct and, as such, the charges were time-barred. Matter of De Guzman v State of New York Civ. Serv. Commn., 129 A.D.3d 1189, 11 N.Y.S.3d 296, 2015 N.Y. App. Div. LEXIS 4634 (N.Y. App. Div. 3d Dep't), app. denied, 26 N.Y.3d 913, 43 N.E.3d 375, 22 N.Y.S.3d 165, 2015 N.Y. LEXIS 3709 (N.Y. 2015).

A petition seeking judicial review of a determination of a Civil Service Commission which states that the local authority whose decision was affirmed by the Commission acted in violation of § 75, without authority in writing to act as a hearing officer, and imposed an excessive fine, sufficiently indicates that the affirmance of his determination by the State Civil Service Commission was arbitrary and therefor open to judicial review. The prohibition is subd. 3 of this section against judicial review of a determination of a Civil Service Commission does not preclude judicial review of decisions which are purely arbitrary. Manzi v Kaplan, 34 Misc. 2d 468, 226 N.Y.S.2d 167, 1962 N.Y. Misc. LEXIS 3713 (N.Y. Sup. Ct. 1962).

Under subd. 3 of this section, a determination on appeal to the Civil Service Commission is final and conclusive and not subject to judicial review even though it is contended that such determination was arbitrary. Mancuso v Mauriello, 41 Misc. 2d 385, 246 N.Y.S.2d 122, 1963 N.Y. Misc. LEXIS 1513 (N.Y. Sup. Ct. 1963).

Where the claim was made that a determination of the Civil Service Commission is arbitrary, the Supreme Court has jurisdiction to review notwithstanding provisions of Civil Service Law § 76 that the decision of such commission shall be final and conclusive and not subject to further review in any court. Trotman v Hoberman, 56 Misc. 2d 915, 290 N.Y.S.2d 680, 1968 N.Y. Misc. LEXIS 1524 (N.Y. Sup. Ct. 1968).

Although the punishment of permanent demotion imposed by petitioner New York City Housing Authority on two long-time permanent competitive civil service employees found guilty of misconduct not involving serious misbehavior following disciplinary proceedings (Civil Service Law, § 75) was appropriate under the circumstances, the determination of respondent New York City Civil Service Commission on appeal by the aggrieved employees (Civil Service Law, § 76, subd 1) modifying the penalties imposed by petitioner by substituting temporary demotions in place of the permanent demotions ordered by the authority, cannot be set aside or disturbed since the commission's exercise of its discretion in modifying the penalties imposed by the authority cannot be said to be "purely arbitrary" and "shocking to one's sense of fairness". The focus of judicial review in the proceedings to set aside the commission's modifications of the authority's punishment is the penalty as modified by the commission rather than the original penalty imposed by the authority and the test to be applied is whether the commission's determination was "purely arbitrary". Although the decision of the Civil Service Commission in a disciplinary proceeding is "final and conclusive, and not subject to further review in any court" (Civil Service Law, § 76, subd 3), appeals to the courts are permissible in the form of an article 78 proceeding where it is alleged that the commission's decision was "purely arbitrary". New York City Housing Authority v New York City Civil Service Com., 94 Misc. 2d 183, 403 N.Y.S.2d 966, 1978 N.Y. Misc. LEXIS 2214 (N.Y. Sup. Ct. 1978), aff'd, New York City Housing Auth. v New York City Civ. Serv. Comm., 72 A.D.2d 973, 1979 N.Y. App. Div. LEXIS 16249 (N.Y. App. Div. 1st Dep't 1979).

60. Res judicata effect

In an Article 78 proceeding to review a police officer's dismissal, the court erroneously held that the police commission was bound by a plea bargain that had been negotiated by the trial commissioner, and the officer, and that provided for the officer's forfeiture of 30 days' pay and his placement on probation for one year since no authority had been delegated to the trial commissioner to enter into a binding plea arrangement, and the Administrative Code made no reference to the extent to which a trial commissioner could make an agreement binding in the police commissioner; CPLR § 2104, which makes an oral stipulation in open court binding, does not apply to police department disciplinary proceedings; furthermore, the police commissioner was not estopped by the plea arrangement since the officer had suffered no detriment through the loss of a witness or otherwise. Silverman v McGuire, 51 N.Y.2d 228, 433 N.Y.S.2d 1002, 414 N.E.2d 383, 1980 N.Y. LEXIS 2702 (N.Y. 1980).

Petitioner's motion for summary judgment in an article 78 proceeding to compel reinstatement was denied and his petition dismissed. On appeal, petitioner urged that his motion for summary judgment was improper and that he should have moved under section 1293 and 1295 of the former Civil Practice Act. The Appellate Division held that he could not assert such a position after an adverse decision. Though his procedure was incorrect, petitioner adopted it by making such a motion. Whalen v Corsi,

279 A.D. 1113, 112 N.Y.S.2d 499, 1952 N.Y. App. Div. LEXIS 6010 (N.Y. App. Div.), reh'g denied, 280 A.D. 901, 115 N.Y.S.2d 312, 1952 N.Y. App. Div. LEXIS 4101 (N.Y. App. Div. 1952).

Where minutes of criminal proceeding against transit authority employee were before Appellate Division and were the subject of argument in earlier appeal from judgment awarding employee back pay, the "law of the case" operated to foreclose reexamination of question whether petitioner had wrongfully delayed his criminal proceeding in order to effect a greater award. Yeampierre v Gutman, 57 A.D.2d 898, 394 N.Y.S.2d 450, 1977 N.Y. App. Div. LEXIS 12137 (N.Y. App. Div. 2d Dep't 1977).

Employer was not collaterally estopped from opposing civil service employee's Article 78 petition for reinstatement by Administrative Law Judge's determination that conduct for which employee was discharged did not amount to misconduct for purposes of unemployment insurance benefits eligibility, in view of lack of issue identity. Clayton v Dominguez, 134 A.D.2d 345, 520 N.Y.S.2d 822, 1987 N.Y. App. Div. LEXIS 50523 (N.Y. App. Div. 2d Dep't 1987).

Transit authority was entitled to dismissal of Article 78 proceeding for review of its decision to summarily discharge petitioner from his position as car inspector for unsatisfactory performance during his probation period, where petitioner claimed that he was entitled to hearing prior to being discharged because he was permanent employee, since identical claim had been presented to and argued before arbitrator pursuant to grievance procedure under petitioner's collective bargaining agreement and had been resolved by arbitrator in favor of transit authority, and thus Article 78 proceeding was barred by doctrines of res judicata and collateral estoppel. Sharp v Kiley, 136 A.D.2d 644, 523 N.Y.S.2d 603, 1988 N.Y. App. Div. LEXIS 427 (N.Y. App. Div. 2d Dep't 1988).

Outcome of unemployment compensation proceeding was irrelevant in Article 78 proceeding challenging termination of petitioner's employment by city correction commissioner. Gault v Abate, 210 A.D.2d 56, 620 N.Y.S.2d 943, 1994 N.Y. App. Div. LEXIS 12414 (N.Y. App. Div. 1st Dep't 1994), app. denied, 85 N.Y.2d 803, 624 N.Y.S.2d 373, 648 N.E.2d 793, 1995 N.Y. LEXIS 325 (N.Y. 1995).

61. Time limitations, generally

Where a civil service employee takes an administrative appeal to the Civil Service Commission from a determination of his employing agency, as provided for in section 76 of the Civil Service Law, but fails to take it within the 20-day period of limitation prescribed by that section, administrative review of the merits of the agency's determination by the commission is time-barred, and the employee may not resurrect the same question by means of an article 78 proceeding for judicial review of the commission's dismissal of his belated appeal. McGirr v Division of Veterans Affairs, Executive Dep't, 43 N.Y.2d 635, 403 N.Y.S.2d 212, 374 N.E.2d 123, 1978 N.Y. LEXIS 1781 (N.Y.), cert. denied, 439 U.S. 826, 99 S. Ct. 97, 58 L. Ed. 2d 119, 1978 U.S. LEXIS 2641 (U.S. 1978).

Invocation of administrative grievance procedure in accordance with petitioner's union's collective bargaining agreement did not toll statute limitations as to proceeding to review determination terminating petitioner from his position as laboratory specialist. Levine v Board of Educ., 272 A.D.2d 328, 707 N.Y.S.2d 475, 2000 N.Y. App. Div. LEXIS 4867 (N.Y. App. Div. 2d Dep't 2000).

An action to review the dismissal of a civil service employee is not barred by the four month statute of limitations upon such actions established by § 1286 of the former Civil Practice Act where the action is commenced more than four months after the employee's suspension, but less than four months after her dismissal. Bohan v Corsi, 77 N.Y.S.2d 706, 1948 N.Y. Misc. LEXIS 2183 (N.Y. Sup. Ct. 1948).

62. —Accrual of action

In an action by petitioners, who were exempt volunteer firemen, to compel their reinstatement on the ground that they were illegally dismissed the four months' period of limitation did not accrue on the dates of their dismissal, but rather after a written demand for reinstatement, this being made within reasonable time. Wilsey v Johnson, 4 A.D.2d 734, 163 N.Y.S.2d 544, 1957 N.Y. App. Div. LEXIS 5148 (N.Y. App. Div. 3d Dep't 1957).

Petitioner, volunteer fireman, was dismissed from position in village because his duties had become unnecessary. If dismissal was result of determination made in exercise of judicial or quasi-judicial discretion, 4-month period commenced to run at time of dismissal. However, if he was denied any rights under this section, it might be found there had been continuing failure of duty specifically enjoined by law in which event 4-month period was to run from time of refusal of demand for performance of duty. Cowper v Lynbrook, 5 A.D.2d 851, 171 N.Y.S.2d 528, 1958 N.Y. App. Div. LEXIS 6885 (N.Y. App. Div. 2d Dep't), reh'g denied, 5 A.D.2d 1007, 174 N.Y.S.2d 883, 1958 N.Y. App. Div. LEXIS 6150 (N.Y. App. Div. 2d Dep't 1958), app. denied, 5 N.Y.2d 705, 1958 N.Y. LEXIS 1548 (N.Y. 1958).

Petitioner's properly converted Article 78 proceeding in nature of mandamus to compel her reinstatement was not barred by 4-month limitations period of CLS CPLR § 217 since limitations period did not begin to run until demand for reinstatement was refused and letter from county attorney to petitioner's attorney did not evidence refusal or demand for reinstatement because letter did not constitute clear and explicit refusal. Saulpaugh v Diehl, 148 A.D.2d 928, 539 N.Y.S.2d 165, 1989 N.Y. App. Div. LEXIS 2558 (N.Y. App. Div. 4th Dep't 1989).

In Article 78 proceeding by petitioner who alleged that he resigned under duress and challenged respondent's denial of his application for reinstatement, 4-month statute of limitations began to run when petitioner received notice of denial of his application for reinstatement, not on date of his resignation. Hopkins v Governale, 222 A.D.2d 435, 634 N.Y.S.2d 526, 1995 N.Y. App. Div. LEXIS 12496 (N.Y. App. Div. 2d Dep't 1995).

63. —Time for seeking reinstatement or back pay

Where discharged employee took no proceeding to secure his reinstatement for two years and two months after his dismissal, laches barred the granting of a peremptory writ of mandamus to compel his reinstatement. On application for an alternative order of mandamus directing the commissioner of agriculture and markets to reinstate petitioner to a competitive civil service position, laches of petitioner in failing to make application for two years and two months after his dismissal, without reason or excuse, bars any relief, under this section. Williams v Pyrke, 233 A.D. 345, 252 N.Y.S. 801, 1931 N.Y. App. Div. LEXIS 11288 (N.Y. App. Div. 1931).

A state civil servant employed as a foreman in the Correction Department was not entitled to an order directing the Civil Service Commission to reinstate him where he had been suspended for conniving with a fellow employee on the audit of an unlawful claim against the state although charges of misconduct and incompetency were not served until three years after his suspension. While subdivision 2 of this section requires that charges be preferred and determined promptly, Special Term had the power to deny a mandatory order of reinstatement in the light of the employee's laches in moving for reinstatement and his conceded misconduct. Fay v Lyons, 282 A.D. 90, 121 N.Y.S.2d 878, 1953 N.Y. App. Div. LEXIS 4402 (N.Y. App. Div. 1953).

Where civil servant was wrongfully dismissed without hearing on finding that he had been absent from his employment without authorization, he was not required to seek reinstatement within four months from discharge but could delay until such time as he demanded reinstatement and had been refused; his Article 78 proceeding to review his discharge was therefore timely where, although it was instituted more than four months after his dismissal, it was filed ten days prior to expiration of four months from date of his demand for reinstatement. State civil servant's delay of some two months in demanding reinstatement after allegedly wrongful discharge did not constitute laches sufficient to deny him relief in action to review such discharge. Johnson v Director, Downstate Medical Center, State University of New York, 52 A.D.2d 357, 384 N.Y.S.2d 189, 1976 N.Y. App. Div. LEXIS 12030 (N.Y. App. Div. 2d Dep't 1976), aff'd, 41 N.Y.2d 1061, 396 N.Y.S.2d 172, 364 N.E.2d 837, 1977 N.Y. LEXIS 2060 (N.Y. 1977).

Application for an order for the reinstatement of petitioner as a registered nurse in the noncompetitive class of civil service in a state hospital was denied, where petitioner failed to assert his

rights from the time of his dismissal on January 14, 1939, until September 15, 1939, although the superintendent of the hospital in dismissing petitioner failed to obey the express provisions of Civ. Ser. Law, subd. 2, of this section, which applies to petitioner by virtue of Men Hyg. Law, § 34, subd. 2. Insley v Shanahan, 17 N.Y.S.2d 25, 173 Misc. 33, 1940 N.Y. Misc. LEXIS 1380 (N.Y. Sup. Ct. 1940).

A civil service employee may not waive his rights to back pay and reinstatement after a period of suspension in excess of thirty days by failure to bring an action promptly under this section where the employee was ignorant of his rights and was not informed thereof. Webber v Tunney, 59 N.Y.S.2d 455, 186 Misc. 270, 1945 N.Y. Misc. LEXIS 2593 (N.Y. Sup. Ct. 1945).

64. Scope of review, generally

In proceedings for dismissal the determination upon the facts is for the agency upon which the duty of supervising the position involved is placed and such determination will not be set aside by the courts unless it is unsupported by proof sufficient to satisfy a reasonable man of all the facts necessary to be proved in order to authorize the determination, or unless there is such a preponderance of proof against the existence of any of the facts necessary to be proved as would require the setting aside of the verdict of a jury. Weber v Cheektowaga, 284 N.Y. 377, 31 N.E.2d 495, 284 N.Y. (N.Y.S.) 377, 1940 N.Y. LEXIS 800 (N.Y. 1940).

In reviewing the removal of a civil service employee after a duly conducted hearing the court has no power to review the facts except to discover whether the administrative determination is supported by substantial evidence. Miller v Kling, 291 N.Y. 65, 50 N.E.2d 546, 291 N.Y. (N.Y.S.) 65, 1943 N.Y. LEXIS 1064 (N.Y. 1943).

Although Appellate Division in previous Article 78 proceeding annulled penalty of termination and remanded for imposition of new penalty after dismissing 4 charges against petitioner, standard of review based on charges sustained, not on those dismissed, applied in subsequent Article 78 proceeding challenging respondent's decision to impose same penalty based on 2 sustained charges. Gillen v Smithtown Library Bd. of Trustees, 94 N.Y.2d 776, 699 N.Y.S.2d 695, 721 N.E.2d 945, 1999 N.Y. LEXIS 3432 (N.Y. 1999).

In Article 78 proceeding to annul police commissioner's determination that petitioner engaged in unauthorized off-duty employment as New York State Certified Instructor for Security Guard Training and, in exchange for money, falsely certified that 2 armed security guards had completed required firearms training, court improperly disregarded principles enunciated in Matter of Pell v Board of Education, 34 NY2d 222, where it concluded that substantial evidence supported commissioner's determination but, relying on facts "outside the record," remanded matter for imposition of lesser penalty on grounds that both guards were licensed to carry firearms and were otherwise qualified for certificates, and petitioner (who had previously unblemished disciplinary record) would lose his pension as result of dismissal. Kelly v Safir, 96 N.Y.2d 32, 724 N.Y.S.2d 680, 747 N.E.2d 1280, 2001 N.Y. LEXIS 566 (N.Y. 2001).

Where civil service employee aggrieved by a penalty elects to appeal to a civil service commission rather than to a court, scope of judicial review in subsequent attack on commission's determination must focus on the actions of the commission. Where appeal before city civil service commission was largely focused on appropriateness of penalty which city manager imposed on fire captain, seriousness of conduct which gave rise to disciplinary charges was legitimate issue on which civil service commission could exercise its discretion. City Council of Watertown v Carbone, 54 A.D.2d 461, 389 N.Y.S.2d 678, 1976 N.Y. App. Div. LEXIS 14065 (N.Y. App. Div. 4th Dep't 1976).

Court dismissed Article 78 proceeding challenging termination of petitioner from his employment as police officer as (1) police commissioner's finding that petitioner, on 3 occasions, engaged in unlawful searches in violation of Fourth Amendment, was supported by substantial evidence notwithstanding that 3 witnesses against him were corrupt former police officers, and (2) penalty did not shock one's sense of fairness. Goodman v Safir, 259 A.D.2d 344, 687 N.Y.S.2d 36, 1999 N.Y. App. Div. LEXIS 2997 (N.Y. App. Div. 1st Dep't 1999).

In Article 78 proceeding alleging that "reassignment" of employee violated CLS Civ S § 75(1)(e), court did not err in addressing issue of retaliatory transfer first detailed in employee's reply affidavit, as Supreme Court has discretion under CLS CPLR § 7804(d) to permit further pleadings and, moreover, employer's answer asserting that § 75(1)(e) was not implicated because no disciplinary action occurred triggered employee's response directly addressing issue of retaliatory transfer. Whalen v Hogue, 276 A.D.2d 975, 714 N.Y.S.2d 577, 2000 N.Y. App. Div. LEXIS 10795 (N.Y. App. Div. 3d Dep't 2000).

Where the requirements of this section are complied with in the removal of a person holding a position in the competitive class of civil service on charges of willful disobedience of department orders, the court will not, on an application for an order of mandamus to compel the reinstatement of the employee, consider the charges on the merits. MacMillan v Morgenthau, 263 N.Y.S. 568, 146 Misc. 588, 1933 N.Y. Misc. LEXIS 1053 (N.Y. Sup. Ct. 1933).

Courts will not interfere with the exercise of discretion by the removing authority where procedure outlined in subd. 2 of this section has been followed. Jennings v Wilson, 40 N.Y.S.2d 400, 179 Misc. 358, 1942 N.Y. Misc. LEXIS 2380 (N.Y. Sup. Ct. 1942), app. dismissed, 74 N.Y.S.2d 418 (N.Y. App. Div. 1947).

Review by the court is restricted to a determination as to whether statutory procedure has been followed and whether the charges were substantial. Blum v Connelly, 24 N.Y.S.2d 175, 1940 N.Y. Misc. LEXIS 2449 (N.Y. Sup. Ct. 1940), aff'd, 262 A.D. 1056, 30 N.Y.S.2d 229, 1941 N.Y. App. Div. LEXIS 7199 (N.Y. App. Div. 1941).

65. —Reversal of arbitrary or unreasonable actions

The criterion for determining whether punishment administratively imposed upon civil servant is to be disturbed by reviewing court is whether the punishment is so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness, and is based upon a test of arbitrariness rather than substantial evidence. Pauling v Smith, 46 A.D.2d 759, 361 N.Y.S.2d 16, 1974 N.Y. App. Div. LEXIS 3600 (N.Y. App. Div. 1st Dep't 1974).

Since there was no question as to admitted facts pertaining to police officer's nine day absence from duty, there could be no finding that decision of county civil service commission upholding termination of the police officer's employment which had been ordered by the chief of police was either arbitrary or purely arbitrary, even if such a characterization of the decision of the civil service commission would provide the basis for court review of the decision. Schrader v Civil Service Comm'r, 53 A.D.2d 210, 385 N.Y.S.2d 644, 1976 N.Y. App. Div. LEXIS 12509 (N.Y. App. Div. 4th Dep't 1976).

Correction Department's conclusion that officer violated rule against leaving post without prior authorization by briefly leaving his post to help less experienced officer deal with disobedient inmate was based on arbitrary and capricious interpretation and application of rule, and matter would be remanded for further consideration, where (1) head of facility had issued oral directive for senior officers to assist junior officers in handling minor matters, (2) supervisor stated that there was "no real violation" if officer had good cause for temporarily leaving his post, and (3) officer's job description indicated that his official duties may have conflicted with rule which he allegedly violated. Rosenkrantz v McMickens, 131 A.D.2d 389, 517 N.Y.S.2d 501, 1987 N.Y. App. Div. LEXIS 47870 (N.Y. App. Div. 1st Dep't 1987).

Provision of CLS Civ S § 76(3) that determination of Civil Service Commission is "final and conclusive, and not subject to further review in any court" does not bar judicial review of commission action which is alleged to be purely arbitrary. New York City Dep't of Environmental Protection v New York City Civil Service Com., 164 A.D.2d 834, 560 N.Y.S.2d 137, 1990 N.Y. App. Div. LEXIS 10818 (N.Y. App. Div. 1st Dep't 1990), aff'd, 78 N.Y.2d 318, 574 N.Y.S.2d 664, 579 N.E.2d 1385, 1991 N.Y. LEXIS 3914 (N.Y. 1991).

New York City Housing Authority's finding that maintenance worker improperly solicited money from tenant to do repair work in tenant's apartment was supported by substantial evidence, but

penalty of dismissal was disproportionate and matter was remanded for imposition of lesser penalty, where worker had 17-year record of employment with only 2 minor infractions. Zirino v Diamond, 259 A.D.2d 443, 687 N.Y.S.2d 349, 1999 N.Y. App. Div. LEXIS 3235 (N.Y. App. Div. 1st Dep't 1999).

Court would not substitute its judgment for that of medical examiner, who dismissed petitioner from his office, though punishment of petitioner was drastic, in the absence of proof that action of medical examiner was arbitrary, capricious, unreasonable or unlawful. Shapiro v Helpern, 14 Misc. 2d 757, 180 N.Y.S.2d 47, 1958 N.Y. Misc. LEXIS 2602 (N.Y. Sup. Ct. 1958).

A city council may not arbitrarily impose a penalty or punishment of demotion, dismissal, suspension or fine, no matter how temporary or modest, upon a civil service employee, without such action being subject to review in an art. 78 proceeding, if the action taken is alleged to have been arbitrary, unreasonable and unlawful. Badrow v Common Council & City Clerk, 42 Misc. 2d 505, 248 N.Y.S.2d 615, 1964 N.Y. Misc. LEXIS 1890 (N.Y. Sup. Ct. 1964).

Dismissal of a civil service employee will not be set aside except when the removing authority has acted unreasonably or arbitrarily. Elwood v Department of Mental Hygiene, 72 N.Y.S.2d 648, 1947 N.Y. Misc. LEXIS 2830 (N.Y. Sup. Ct. 1947).

66. Evaluation of evidence and witnesses

Since hearing examiner saw and heard witnesses, observed their intelligence range and their comprehension of questions and nature of their responses, his assessment of such matters was entitled to considerable deference on judicial review of dismissal of attendant at hospital for the mentally retarded. Brown v Ristich, 36 N.Y.2d 183, 366 N.Y.S.2d 116, 325 N.E.2d 533, 1975 N.Y. LEXIS 1728 (N.Y. 1975).

Supreme Court, which upheld police department's discharge of probationary police officer, erred by dismissing discharged officer's Article 78 petition without giving parties opportunity to submit competent evidence on controverted allegations of likely dissemination of discharged officer's personnel file to other law enforcement agencies; matter was remitted to Supreme Court for further factual exploration of likelihood of dissemination of discharged officer's personnel file and any other issues pertinent to his entitlement to name-clearing hearing, including actual content of his file. Swinton v Safir, 93 N.Y.2d 758, 697 N.Y.S.2d 869, 720 N.E.2d 89, 1999 N.Y. LEXIS 3433 (N.Y. 1999).

The sufficiency of an employee's explanation in his answer to charges by the parole board to remove him as a member thereof was a question for the parole board alone to determine and the court will not interfere with its discretion in this regard. Jerum v Moore, 267 A.D. 931, 46 N.Y.S.2d 885, 1944 N.Y. App. Div. LEXIS 5569 (N.Y. App. Div.), app. denied, 267 A.D. 1017, 48 N.Y.S.2d 810, 1944 N.Y. App. Div. LEXIS 6051 (N.Y. App. Div. 1944).

Where there has been no hearing in connection with the removal of a civil service employee the court upon review cannot pass generally on the weight of evidence but only upon whether or not the charges are substantial and whether there is any evidence to support them. Harvey v Catherwood, 268 A.D. 1016, 52 N.Y.S.2d 264, 1944 N.Y. App. Div. LEXIS 4681 (N.Y. App. Div. 1944), aff'd, 295 N.Y. 843, 66 N.E.2d 854, 295 N.Y. (N.Y.S.) 843, 1946 N.Y. LEXIS 1008 (N.Y. 1946).

Determination of Civil Service Commission, reversing administrative law judge's conclusion that employee was guilty of misconduct, could not be said to be arbitrary as matter of law where contradictory testimony had been given by employee and his accuser, and commission decided that inconsistencies in testimony should be resolved in employee's favor. New York City Dep't of Environmental Protection v New York City Civil Service Com., 164 A.D.2d 834, 560 N.Y.S.2d 137, 1990 N.Y. App. Div. LEXIS 10818 (N.Y. App. Div. 1st Dep't 1990), aff'd, 78 N.Y.2d 318, 574 N.Y.S.2d 664, 579 N.E.2d 1385, 1991 N.Y. LEXIS 3914 (N.Y. 1991).

In Article 78 proceeding to annul termination of petitioner's employment as probationary police officer following positive hair sample drug test for cocaine, negative second hair drug analysis proffered by petitioner was of minimal probative value where it was not certified and was unsupported by evidence documenting test procedures, controls or chain of custody of hair sample used. Brown v City of New York, 250 A.D.2d 546, 673 N.Y.S.2d 643, 1998 N.Y. App. Div. LEXIS 6159 (N.Y. App. Div. 1st Dep't), app. denied, 92 N.Y.2d 810, 680 N.Y.S.2d 54, 702 N.E.2d 839, 1998 N.Y. LEXIS 3204 (N.Y. 1998).

67. —Evidence limited to that which employee had opportunity to hear and explain

Where director of school for mentally retarded, in rendering account of his decision to discharge permanent employee who had been accused of sexual relations with a school resident, acknowledged that he had relied on matters not appearing in record of hearing at which hearing officer had concluded that employee was innocent of charge, director's action violated general proposition that it is not proper for an administrative agency to base an adjudicatory decision on evidence or information outside the record, where right to a hearing exists. Simpson v Wolansky, 38 N.Y.2d 391, 380 N.Y.S.2d 630, 343 N.E.2d 274, 1975 N.Y. LEXIS 2359 (N.Y. 1975).

Evidence which may be considered in determining whether or not the removal of a civil service employee is supported by "substantial evidence" is limited to that with which the employee was confronted at the hearing and had an opportunity to deny or explain. Lindquist v Swanson, 273 A.D. 802, 76 N.Y.S.2d 431, 1947 N.Y. App. Div. LEXIS 3191 (N.Y. App. Div. 1947), reh'g denied, 273 A.D. 941, 78 N.Y.S.2d 557, 1948 N.Y. App. Div. LEXIS 5370 (N.Y. App. Div. 1948).

City civil service commission acted in excess of its authority by soliciting information and evidence not included in record of disciplinary proceeding. DeMuro v Board of Educ., 219 A.D.2d 716, 631 N.Y.S.2d 749, 1995 N.Y. App. Div. LEXIS 9538 (N.Y. App. Div. 2d Dep't 1995).

68. —Admissibility of evidence

While generally all relevant, material, and reliable evidence which will contribute to an informed result should be admissible in disciplinary proceedings, no essential element of a fair trial can be dispensed with, unless waived, without rendering administrative determination subject to annulment upon review. Simpson v Wolansky, 38 N.Y.2d 391, 380 N.Y.S.2d 630, 343 N.E.2d 274, 1975 N.Y. LEXIS 2359 (N.Y. 1975).

It was not such an abuse of discretion as to be "purely arbitrary" for city civil service commission, in considering city fire captain's appeal from penalty imposed by city manager in disciplinary proceeding, to consider fact that fire captain had been acquitted of criminal charges which arose out of the same incident as led to the disciplinary proceeding. City Council of Watertown v Carbone, 54 A.D.2d 461, 389 N.Y.S.2d 678, 1976 N.Y. App. Div. LEXIS 14065 (N.Y. App. Div. 4th Dep't 1976).

69. Standard of proof

Although standard of proof necessary to support finding of guilt in a civil service employee disciplinary proceeding is clearly different from standard applicable in criminal proceeding, acquittal on criminal charges which arose out of same incident as led to disciplinary charges is some evidence as to seriousness of conduct complained of, even though such acquittal cannot be conclusive against determination of guilt on disciplinary charges. City Council of Watertown v Carbone, 54 A.D.2d 461, 389 N.Y.S.2d 678, 1976 N.Y. App. Div. LEXIS 14065 (N.Y. App. Div. 4th Dep't 1976).

70. Representation of parties by counsel

The statute (Civil Practice Act § 1296) providing that one of the questions to be determined in an article 78 proceeding is whether any rule of law has been violated to prejudice of petitioner, does not change the fundamental rule that any deprivation of the right to counsel and to a fair trial is, in itself, a basis for annulment of the determination resulting therefrom. Fusco v Moses, 304 N.Y. 424, 107 N.E.2d 581, 304 N.Y. (N.Y.S.) 424, 1952 N.Y. LEXIS 757 (N.Y. 1952).

Agency Opinions

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17. Representation of parties by counsel

I. Generally

1. Power of removal, generally

Every public officer having power of appointment has power of removal, unrestricted except for express restrictions on that power imposed by this section consistent with N. Y. Const., Art V, § 9. 1913 N.Y. Op. Att'y Gen. No. 65.

The appointment of a village attorney is a mayor's appointment, subject only to approval by the board of trustees, but the village mayor alone has the power to remove the village attorney and this power is not subject to consent or approval by the board of trustees. 1974 NY Ops Atty Gen Aug 6 (informal).

In the absence of a local regulation mandating retirement of public employees at age 70, the assistant chief of the City of Fulton fire department cannot be summarily retired, terminated or discharged upon his reaching age 70, and may be removed from his position only upon a showing of incompetence or misconduct under sections 75 and 76 of the Civil Service Law. N.Y. Op. Att'y Gen. No. 83-70.

2. Effect of collective bargaining provisions

A physician employed by a county hospital who occupies a position in the competitive class of the civil service may be removed or disciplined only in accordance with the provisions of sections 75 and 76 of the Civil Service Law, or in accordance with an alternate procedure provided by an agreement between the employees' union and management under the Taylor Law. 1981 NY Ops Atty Gen Aug 26 (Informal).

A town board may establish the specific responsibilities of town constables. The board may set the conditions and procedures for the dismissal or discipline of town constables, subject to the possible applicability of provisions of the Civil Service Law and collective bargaining agreements negotiated under the Taylor Law. 1982 NY Ops Atty Gen Sept. 7 (informal).

3. Waiver of rights

An agreement between a local government and an employee organization under the Taylor Law may include provisions on discipline and removal that supplement, modify or replace sections 75 and 76 of the Civil Service Law. An employee represented by such an employee organization would, through the organization's assent to the agreement, waive his rights under sections 75 and 76. 1981 NY Ops Atty Gen Dec 31.

4. Review rights of particular employees

No right of appeal is granted by this section, to a non-competitive employee of the mental hygiene department. 1941 NY Ops Atty Gen Oct. 24.

5. Miscellaneous

The State is an employer subject to the Human Rights Law. The Commissioner of Human Rights may award compensatory damages in cases of discrimination by the State as employer. A person awarded damages does not have to sue in the Court of Claims in order to enforce the award. 1980 NY Ops Atty Gen Feb 28 (formal).

Deputy sheriffs who are in the competitive class of the civil service are not required to file successive oaths of office subsequent to each election of a sheriff. N.Y. Op. Att'y Gen. No. 84-2.

II. Review Of Particular Actions

6. Demotion

Police Sergeant may be demoted to Patrolman pursuant to Civil Service Law § 75 or if he accepts demotion voluntarily. 1967 NY Ops Atty Gen Apr 27.

7. Suspension, generally

8. —Suspension pending hearing and determination of charges

A police officer may be suspended before receiving written notice and a copy of the charges preferred against him, provided they are furnished to him within a reasonable time thereafter. 1964 NY Ops Atty Gen Mar 18.

9. —Entitlement to pay for period of suspension exceeding 30 days, generally

10. — —Particular non-NYC cases

Where a county highway superintendent has suspended a highway employee without pay, pending a civil service hearing, the county board may not provide for payment of salary to such employee during the first 30 days of such suspension, but it must pay him his salary for any period in excess of 30 days. 1976 Op St Compt File #351.

11. —Reinstatement and back pay following suspension

12. — —Back pay offset for other earnings

Compensation earned by a police officer from other employment while under suspension pending departmental hearings, must be deducted from his police pay upon reinstatement. 1953 Op St Compt File #6028.

Where village policemen have been suspended pending a hearing on charges, the village may deduct from wages paid to them, subsequent to the initial thirty day suspension period, such amounts as they earn in outside employment. 1975 Op St Compt File #154.

13. Dismissal on particular grounds, generally

14. —Medical condition; physical or mental

Physical incapacity on account of tuberculosis may warrant discharge of civil service employees in the mental hygiene department. 1941 NY Ops Atty Gen July 31.

15. —Refusal to take examination

The health department may prescribe compulsory examinations for tuberculosis by X-rays for mental hygiene department employees in state hospitals, and refusal to submit to examination will have no effect upon subsequent compensation awards for disability, but the facts may justify removal for cause. 1941 NY Ops Atty Gen July 31.

16. Change in mode of payment

Board of estimate and apportionment of New York City has power to change the rate of compensation of the position of foreman in the park department, occupied by a veteran, from yearly salary, payable monthly, to a per diem basis. 1913 N.Y. Op. Att'y Gen. No. 280.

III. Procedure On Appeal

17. Representation of parties by counsel

The Corporation Counsel of the City of Binghamton is the legal adviser to the city's civil service commission and there is no statutory authority for such commission to retain its own counsel to advise it on an appeal before it. 1966 NY Ops Atty Gen Oct 17.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Proceeding against body or officer, CLS CPLR §§ 7801 et seq.

This section referred to in CLS Unconsol ch 306 § 3.

Federal Aspects:

Grievances, appeals and review by federal competitive service employees, 5 USCS §§ 7121 et seq.

Jurisprudences:
15A Am Jur 2d, Civil Service §§ 39., 43.
63C Am Jur 2d, Public Officers and Employees § 218 et seq.
5B Am Jur Pl & Pr Forms (Rev), Civil Service, Forms 31.– 40.
16 Am Jur Pl & Pr Forms (Rev), Labor and Labor Relations, Form 153.
20B Am Jur Pl & Pr Forms (Rev), Public Officers and Employees, Forms 49.– 54.

TITLE D Leaves of Absence

HISTORY:
Add, L 1994, ch 547, § 1, eff July 26, 1994.

§ 82-a. Authorized absence

1. During the time that a state emergency exists following a declaration of such emergency pursuant to section twenty-eight of the executive law, every public officer or employee of this state may request an authorized absence from his or her duties or service as such public officer or employee while engaged in the actual performance of his or her duties as, (a) a volunteer firefighter, or (b) an enrolled member of a volunteer ambulance service pursuant to article thirty of the public health law.

2. Requests for such authorized absence shall be approved by the appropriate supervisor to the extent that such absence would not interfere with proper conduct of governmental functions.

3. As used in this section, the term public officer or employee shall not include officers or employees of municipalities or other political subdivisions of the state.

4. The entire period of the authorized absence granted pursuant to this section shall be excused leave and shall not be charged against any other leave such public officer or employee is otherwise entitled to, and such authorized absence shall include travel both to and from such duties performed in his or her capacity as a volunteer.

5. As used in this section, the term agency shall mean any department, board, bureau, commission, division, office, council, committee or office of the state, a public benefit corporation or public authority at least one of whose members is appointed by the governor.

HISTORY:
Add, L 1994, ch 547, § 1, eff July 26, 1994.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:
19 NY Jur 2d Civil Servants and Other Public Officers and Employees § 427 .

§ 82-b. Emergency service volunteers; paid leave

Notwithstanding any other provisions of law to the contrary, public officers and employees of the state who are certified by the American Red Cross as disaster volunteers shall be granted leave from work with pay to participate in specialized disaster relief operations upon written request for such services by the American Red Cross and upon the approval of the chief administrative officer of the state agency, department or bureau for which the public officer or employee serves. The public officer or employee shall be compensated at his or her regular rate of pay for those regular work hours during which the public officer or employee is absent from work while participating in authorized specialized disaster relief operations. Such leave shall be provided without loss of seniority, compensation, sick leave, vacation leave or other overtime compensation to which the volunteer is otherwise entitled and shall not exceed twenty days in any calendar year.

HISTORY:
Add, L 2001, ch 358, § 2, eff Sept 25, 2001, deemed eff on and after Sept 11, 2001.

ARTICLE VI Special Rights for Veterans and Exempt Volunteer Firefighters

Section
85-a. Additional credits allowed children and siblings of firefighters, police officers, emergency medical technicians and paramedics killed in the line of duty
85-b. Additional credits allowed children and siblings of firefighters and police officers killed in the line of duty
85-c. Additional credits allowed the children and siblings of emergency medical technicians and paramedics killed in the line of duty
86. Transfer of veterans or exempt volunteer firefighters upon abolition of positions.

HISTORY:
Add, L 1958, ch 790, § 1, eff April 1, 1959; L 2018, ch 476, § 1, effective December 28, 2018.

§ 85-a. Additional credits allowed children and siblings of firefighters, police officers, emergency medical technicians and paramedics killed in the line of duty

1. Additional credit authorized. Additional credits shall be allowed children and siblings of firefighters, police officers, emergency medical technicians and paramedics killed in the line of duty, as "child" and "sibling" in this section in competitive examinations for original appointment. (a) On all eligible lists resulting from competitive examinations, the names of eligible persons shall be entered in the order of their respective final earned ratings on examinations, with the name of the eligible person with the highest final earned ratings at the head of such list, provided, however, that for the purpose of determining final earned ratings, children and siblings of firefighters, police officers, emergency medical technicians and paramedics killed in the line of duty shall be entitled to receive an additional ten points in a competitive examination for original appointment in the same municipality in which his or her parent or sibling has served. For the purposes of this paragraph, a police officer or firefighter shall be deemed to have "served" in a municipality if he or she was employed by, or worked primarily in, that municipality.

(b) Such additional credit shall be added to the final earned rating of such child or sibling, as the case may be, after he or she has qualified in the competitive examination and shall be granted only at the time of establishment of the resulting eligible list.

2. Application for additional credit; proof of eligibility; establishment of eligible list. Any candidate, believing himself or herself entitled to additional credit in a competitive examination as provided in this section, may make application for such additional credit at any time between the date of his or her application for examination and the date of the establishment of the resulting eligible list. Such candidates shall be allowed a period of not less than two months from the date of the filing of his or her application for examination in which to establish by appropriate documentary proof his or her eligibility to receive additional credit under this section. At any time after two months have elapsed since the final date for filing applications for a competitive examination for original appointment, the eligible list resulting from such examination may be established, notwithstanding the fact that a child or sibling who has applied for additional credit has failed to establish his or her eligibility to receive such additional credit. A candidate who fails to establish, by appropriate documentary proof, his or her eligibility to receive additional credit by the time an eligible list is established shall not thereafter be granted additional credit on such eligible list.

3. Use of additional credit. (a) Except as otherwise provided in this subdivision, no person who has received a permanent original appointment in the civil service of the state or of any city or civil division thereof from an eligible list on which he or she was allowed the additional credit granted by this section as a child or sibling, shall thereafter be entitled to any additional credit under this section as a child or sibling.

(b) Where, at the time of establishment of an eligible list, the position of a child or sibling on such list has not been affected by the addition of credits granted under this section, the appointment of such child or sibling from such eligible list shall not be deemed to have been made from an eligible list on which he or she was allowed the additional credit granted by this section.

(c) If, at the time of appointment from an eligible list, a child or sibling is in the same relative standing among the eligible persons who are willing to accept appointment as if he or she had not been granted the additional credits as provided by this section, his or her appointment from such eligible persons shall not be deemed to have been made from an eligible list on which he or she was allowed such additional credits.

(d) Where a child or sibling has been originally appointed from an eligible list on which he or she was allowed such additional credit, but such appointment is thereafter terminated either at the end of the probationary term or by resignation at or before the end of the probationary term, he or she shall not be deemed to have been appointed, as the case may be, from an eligible list on which he or she is allowed additional credit, and such appointment shall not affect his or her eligibility for additional credit in other examinations.

4. Withdrawal of application; election to relinquish additional credit. An application for additional credit in a competitive examination under this section may be withdrawn by the applicant at any time prior to the establishment of the resulting eligible list. At any time during the term of existence of an eligible list resulting from a competitive examination in which a child or sibling has received the additional credit granted by this section, such child or sibling may elect, prior to permanent original appointment, to relinquish the additional credit theretofore granted to him or her and accept the lower position on such eligible list to which he or she would otherwise have been entitled; provided, however, that such election shall thereafter be irrevocable. Such election shall be in writing and signed by the child or sibling, and transmitted to the department or the appropriate municipal civil service commission.

5. Roster. The department and each municipal commission shall establish and maintain in its office a roster of all such children or siblings appointed as a result of additional credits granted by this section to positions under its jurisdiction. The appointment of a child or sibling as a result of additional credits shall be void if such child or sibling, prior to such appointment, had been appointed as a result of additional credits granted by this section.

HISTORY:

Add, L 2002, ch 495, § 1, eff Sept 17, 2002; amd, L 2007, ch 545, § 1, eff Aug 15, 2007 (see 2007 note below); L 2008, ch 75, § 1, eff Aug 15, 2007; L 2013, ch 376, § 1, eff Sept 27, 2013.

Editor's Notes: Laws 2007, ch 545, § 2, eff Aug 15, 2007, provides as follows:

§ 2. This act shall take effect immediately and shall apply to all eligible lists on or after such date.

Amendment Notes: 2013. Chapter 376, § 1 amended:

Section heading by deleting at fig 1 "and" and adding the matter in italics.

Sub 1, opening par by deleting at fig 1 "and" and adding the matter in italics.

Sub 1, par (a) by deleting at fig 1 "and" and adding the matter in italics.

Sub 1, par (b) by adding the matter in italics.

Sub 2 by adding the matter in italics.

Sub 3, par (a) by adding the matter in italics.

Sub 3, par (b) by adding the matter in italics.

Sub 3, par (c) by adding the matter in italics.

Sub 3, par (d) by adding the matter in italics.

Sub 4 by deleting at fig 1 "except" and adding the matter in italics.

Sub 5 by adding the matter in italics.

§ 85-b. Additional credits allowed children and siblings of firefighters and police officers killed in the line of duty

1. Definition. As used in this section, "killed in the line of duty" shall mean having died in the perfor-

mance of duty as the natural and proximate result of the World Trade Center attack on September eleventh, two thousand one or as the natural and proximate result of participation in the rescue effort that was conducted in response to such attack.

2. Additional credit authorized. Additional credits shall be allowed children and siblings of firefighters and police officers killed in the line of duty in competitive examinations for original appointment.

(a) On all eligible lists resulting from competitive examinations, the names of eligible persons shall be entered in the order of their respective final earned ratings on examinations, with the name of the eligible person with the highest final earned ratings at the head of such list, provided, however, that for the purpose of determining final earned ratings, children and siblings of firefighters and police officers killed in the line of duty shall be entitled to receive an additional ten points in a competitive examination for original appointment in the same municipality in which his or her parent or sibling has served.

(b) Such additional credit shall be added to the final earned rating of such child or sibling, as the case may be, after he or she has qualified in the competitive examination and shall be granted only at the time of establishment of the resulting eligible list.

3. Application for additional credit; proof of eligibility; establishment of eligible list. Any candidate, believing himself or herself entitled to additional credit in a competitive examination as provided in this section, may make application for such additional credit at any time between the date of his or her application for examination and the date of the establishment of the resulting eligible list. Such candidates shall be allowed a period of not less than two months from the date of the filing of his or her application for examination in which to establish by appropriate documentary proof his or her eligibility to receive additional credit under this section. At any time after two months have elapsed since the final date for filing applications for a competitive examination for original appointment, the eligible list resulting from such examination may be established, notwithstanding the fact that a child or sibling who has applied for additional credit has failed to establish his or her eligibility to receive such additional credit. A candidate who fails to establish, by appropriate documentary proof, his or her eligibility to receive additional credit by the time an eligible list is established shall not thereafter be granted additional credit on such eligible list.

4. Use of additional credit. (a) Except as otherwise provided in this subdivision, no person who has received a permanent original appointment in the civil service of the state or of any city or civil division thereof from an eligible list on which he or she was allowed the additional credit granted by this section as a child or sibling, shall thereafter be entitled to any additional credit under this section as a child or sibling.

(b) Where, at the time of establishment of an eligible list, the position of a child or sibling on such list has not been affected by the addition of credits granted under this section, the appointment of such child or sibling from such eligible list shall not be deemed to have been made from an eligible list on which he or she was allowed the additional credit granted by this section.

(c) If, at the time of appointment from an eligible list, a child or sibling is in the same relative standing among the eligible persons who are willing to accept appointment as if he or she had not been granted the additional credits as provided by this section, his or her appointment from such eligible persons shall not be deemed to have been made from an eligible list on which he or she was allowed such additional credits.

(d) Where a child or sibling has been originally appointed from an eligible list on which he or she was allowed such additional credit, but such appointment is thereafter terminated either at the end of the probationary term or by resignation at or before the end of the probationary term, he or she shall not be deemed to have been appointed, as the case may be, from an eligible list on which he or she is allowed additional credit, and such appointment shall not affect his or her eligibility for additional credit in other examinations.

5. Withdrawal of application; election to relinquish additional credit. An application for additional credit in a competitive examination under this section may be withdrawn by the applicant at any time prior to the establishment of the resulting eligible list. At any time during the term of existence of an eligible list resulting from a competitive examination in which a child or sibling has received the additional credit granted by this section, such child or sibling may elect, prior to permanent original appointment, to relinquish the additional credit theretofore granted to him or her and accept the lower position on such eligible list to which he or she would otherwise have been entitled; provided, however, that such election shall thereafter be irrevocable. Such election shall be in writing and signed by the child or sibling, and transmitted to the department or the appropriate municipal civil service commission.

6. Roster. The department and each municipal commission shall establish and maintain in its office a roster of all such children and siblings appointed as a result of additional credits granted by this section to positions under its jurisdiction. The appointment of a child or sibling as a result of additional credits shall be void if such child or sibling, prior to such appointment, had been appointed as a result of additional credits granted by this section.

HISTORY:

Add, L 2003, ch 500, § 1, eff Sept 9, 2003; amd, L 2013, ch 376, § 2, eff Sept 27, 2013.

Amendment Notes: 2013. Chapter 376, § 2 amended: Section heading by adding the matter in italics.

Sub 2, opening par by adding the matter in italics.
Sub 2, par (a) by adding the matter in italics.
Sub 2, par (b) by adding the matter in italics.
Sub 3 by adding the matter in italics.
Sub 4, par (a) by adding the matter in italics.
Sub 4, par (b) by adding the matter in italics.
Sub 4, par (c) by adding the matter in italics.
Sub 4, par (d) by adding the matter in italics.
Sub 5 by deleting at fig 1 "except" and adding the matter in italics.
Sub 6 by adding the matter in italics.

§ 85-c. Additional credits allowed the children and siblings of emergency medical technicians and paramedics killed in the line of duty

1. Definitions. (a) As used in this section, "killed in the line of duty" shall mean having died in the performance of duty as the natural and proximate result of the World Trade Center attack on September eleventh, two thousand one or as the natural and proximate result of participation in the rescue effort that was conducted in response to such attack.

(b) As used in this section "emergency medical technician" shall mean a person who was employed by the city of New York or by the New York city health and hospitals corporation in a title whose duties are those of an emergency medical technician or advanced emergency medical technician (as those terms are defined in section three thousand one of the public health law), or in a title whose duties require the supervision of employees whose duties are those of an emergency medical technician or advanced emergency medical technician (as those terms are defined in section three thousand one of the public health law).

2. Additional credit authorized. Additional credits shall be allowed children and siblings of emergency medical technicians killed in the line of duty in competitive examinations for original appointment.

(a) On all eligible lists resulting from competitive examinations, the names of eligible persons shall be entered in the order of their respective final earned ratings on examinations, with the name of the eligible person with the highest final earned ratings at the head of such list; provided, however, that for the purpose of determining final earned ratings, children and siblings of emergency medical technicians killed in the line of duty shall be entitled to receive an additional ten points in a competitive examination for original appointment in the same municipality in which his or her parent or sibling has served.

(b) Such additional credit shall be added to the final earned rating of such child or sibling, as the case may be, after he or she has qualified in the competitive examination and shall be granted only at the time of establishment of the resulting eligible list.

3. Application for additional credit; proof of eligibility; establishment of eligible list. Any candidate, believing himself or herself entitled to additional credit in a competitive examination as provided in this section, may make application for such additional credit at any time between the date of his or her application for examination and the date of the establishment of the resulting eligible list. Such candidates shall be allowed a period of not less than two months from the date of the filing of his or her application for examination in which to establish by appropriate documentary proof his or her eligibility to receive additional credit under this section. At any time after two months have elapsed since the final date for filing applications for a competitive examination for original appointment, the eligible list resulting from such examination may be established, notwithstanding the fact that a child or sibling who has applied for additional credit has failed to establish his or her eligibility to receive such additional credit. A candidate who fails to establish, by appropriate documentary proof, his or her eligibility to receive additional credit by the time an eligible list is established shall not thereafter be granted additional credit on such eligible list.

4. Use of additional credit. (a) Except as otherwise provided in this subdivision, no person who has received a permanent original appointment in the civil service of the state or of any city or civil division thereof from an eligible list on which he or she was allowed the additional credit granted by this section as a child or sibling, shall thereafter be entitled to any additional credit under this section as a child or sibling.

(b) Where, at the time of establishment of an eligible list, the position of a child or sibling on such list has not been affected by the addition of credits granted under this section, the appointment of such child or sibling from such eligible list shall not be deemed to have been made from an eligible list on which he or she was allowed the additional credit granted by this section.

(c) If, at the time of appointment from an eligible list, a child or sibling is in the same relative standing among the eligible persons who are willing to accept appointment as if he or she had not been granted the additional credits as provided by this section, his or her appointment from such eligible persons shall not be deemed to have been made from an eligible list on which he or she was allowed such additional credits.

(d) Where a child or sibling has been originally appointed from an eligible list on which he or she was allowed such additional credit, but such appointment is thereafter terminated either at the end of the probationary term or by resignation at or before the end of the probationary term, he or she shall not be deemed to have been appointed, as the case may be, from an eligible list on which he or she is allowed additional credit, and such appointment shall not affect his or her eligibility for additional credit in other examinations.

5. Withdrawal of application; election to relinquish additional credit. An application for additional credit in a competitive examination under this section may be withdrawn by the applicant at any time

prior to the establishment of the resulting eligible list. At any time during the term of existence of an eligible list resulting from a competitive examination in which a child or sibling has received the additional credit granted by this section, such child or sibling may elect, prior to permanent original appointment, to relinquish the additional credit theretofore granted to him or her and accept the lower position on such eligible list to which he or she would otherwise have been entitled; provided, however, that such election shall thereafter be irrevocable. Such election shall be in writing and signed by the child or sibling, and transmitted to the department or the appropriate municipal civil service commission.

6. Roster. The department and each municipal commission shall establish and maintain in its office a roster of all such children and siblings appointed as a result of additional credits granted by this section to positions under its jurisdiction. The appointment of a child or sibling as a result of additional credits shall be void if such child or sibling, prior to such appointment, had been appointed as a result of additional credits granted by this section.

HISTORY:

Add, L 2010, ch 555, § 1, eff Oct 20, 2010; amd, L 2013, ch 376, § 3, eff Sept 27, 2013.

Amendment Notes: 2013. Chapter 376, § 3 amended:
Section heading by adding the matter in italics.
Sub 2, opening par by adding the matter in italics.
Sub 2, par (a) by adding the matter in italics.
Sub 2, par (b) by adding the matter in italics.
Sub 3 by adding the matter in italics.
Sub 4, par (a) by adding the matter in italics.
Sub 4, par (b) by adding the matter in italics.
Sub 4, par (c) by adding the matter in italics.
Sub 4, par (d) by adding the matter in italics.
Sub 5 by deleting at fig 1 "except" and adding the matter in italics.
Sub 6 by adding the matter in italics.

§ 86. Transfer of veterans or exempt volunteer firefighters upon abolition of positions.

If the position in the non-competitive or in the labor class held by any honorably discharged veteran of the armed forces of the United States or by any veteran of the armed forces of the United States released under honorable circumstances from such service including (i) having a qualifying condition as defined in section three hundred fifty of the executive law, and receiving a discharge other than bad conduct or dishonorable from such service, or (ii) being a discharged LGBT veteran, as defined in section three hundred fifty of the executive law, and receiving a discharge other than bad conduct or dishonorable from such service, who served therein in time of war as defined in section eighty-five of this chapter, or by an exempt volunteer firefighter as defined in the general municipal law, shall become unnecessary or be abolished for reasons of economy or otherwise, the honorably discharged veteran or exempt volunteer firefighter holding such position shall not be discharged from the public service but shall be transferred to a similar position wherein a vacancy exists, and shall receive the same compensation therein. It is hereby made the duty of all persons clothed with the power of appointment to make such transfer effective. The right to transfer herein conferred shall continue for a period of one year following the date of abolition of the position, and may be exercised only where a vacancy exists in an appropriate position to which transfer may be made at the time of demand for transfer. Where the positions of more than one such veteran or exempt volunteer firefighter are abolished and a lesser number of vacancies in similar positions exist to which transfer may be made, the veterans or exempt volunteer firefighters whose positions are abolished shall be entitled to transfer to such vacancies in the order of their original appointment in the service. Nothing in this section shall be construed to apply to the position of private secretary, cashier or deputy of any official or department. This section shall have no application to persons encompassed by section eighty-a of this chapter.

HISTORY:

Add, L 1958, ch 790, § 1, with substance transferred from former § 22(1); amd, L 1972, ch 283, § 10, eff Oct 1, 1972; L 2018, ch 476, § 3, effective December 28, 2018; L 2019, ch 490, § 6, effective November 12, 2020.

Prior Law: Former § 86, add, L 1947, ch 841, with substance transferred from § 68-a; amd, L 1950, ch 734, §§ 7, 8; repealed, L 1955, ch 687, eff July 1, 1956, with substance transferred to Retire & SS § 72.

Prior § 86, add, L 1932, ch 66, § 1; renumbered § 98, L 1947, ch 841, eff July 1, 1948.

Editor's Notes Laws 2019, ch 490, § 82, eff November 12, 2020, provides:

§ 82. This act shall take effect one year after it shall have become a law; provided, however that the amendments to subdivision 7 of section 369-h of the executive law made by section twenty-five of this act shall not affect the repeal of such section and shall be deemed repealed therewith. Effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized to be made and completed on or before such effective date.

Amendment Notes The 2018 amendment by ch 476, § 3, substituted "firefighters" for "firemen" in the section heading; and substituted "firefighter" for "fireman" or variants wherever it appears in the section.

The 2019 amendment by ch 490, § 6, added "or by any veteran of the armed forces of the United States released under honorable circumstances from such service including (i) having a qualifying condition as defined in section three hundred fifty of the executive law, and receiving a discharge other than bad conduct or dishonorable from such service, or (ii) being a discharged LGBT veteran, as defined in section three hundred fifty of the executive law, and receiving a discharge other than bad conduct or dishonorable from such service" in the first sentence.

Notes to Decisions

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1. In general

1. The right given a veteran by this section to be transferred to such other position as he may be fit to fill if his job is abolished is not a right to preference to appointment in a different position but a right of tenure and there is no violation of the constitutional requirements regarding civil service appointment and promotion. Meenagh v Dewey, 286 N.Y. 292, 36 N.E.2d 211, 286 N.Y. (N.Y.S.) 292, 1941 N.Y. LEXIS 1441 (N.Y.), reh'g denied, 286 N.Y. 707, 37 N.E.2d 147, 286 N.Y. (N.Y.S.) 707, 1941 N.Y. LEXIS 2272 (N.Y. 1941).

Determination by Superintendent of State Police that state park police officer was unfit for service as state trooper did not violate CLS Civ S §§ 80, 81 or 86, which apply when existing position is abolished, since officer was entitled to retain his current position under authority of office of Parks and Recreation. Zigarelli v New York State Police, 126 A.D.2d 822, 510 N.Y.S.2d 740, 1987 N.Y. App. Div. LEXIS 41962 (N.Y. App. Div. 3d Dep't), app. denied, 69 N.Y.2d 611, 517 N.Y.S.2d 1026, 511 N.E.2d 85, 1987 N.Y. LEXIS 16866 (N.Y. 1987).

Word "held" referring to an abolished position in this section includes probationary as well as permanent occupancy of the position. People ex rel. Zeiger v Whitehead, 164 N.Y.S. 663, 99 Misc. 578, 1917 N.Y. Misc. LEXIS 820 (N.Y. Sup. Ct. 1917).

Failure of State Department of Transportation to provide honorably discharged veterans employed by it notice of statutory rights upon discharge did not constitute adequate reason for reinstatement. Jones v Carey, 84 Misc. 2d 505, 377 N.Y.S.2d 378, 1975 N.Y. Misc. LEXIS 3163 (N.Y. Sup. Ct. 1975), rev'd, 55 A.D.2d 260, 389 N.Y.S.2d 921, 1976 N.Y. App. Div. LEXIS 14559 (N.Y. App. Div. 3d Dep't 1976).

A veteran employed as a civil servant was entitled to tenure benefits accorded to qualified war veterans under Civ S Law §§ 75, 86, even though he was not a resident of the state at the time he entered into military service, since although Civ S Law § 85 includes a residency requirement in its definition of veteran, the incorporation of the definition of veteran in § 85 into § 86 was meant only to include the reference in § 85 to veterans who had served in time of war. Mathiasen v Niagara County Legislature, 126 Misc. 2d 937, 484 N.Y.S.2d 397, 1984 N.Y. Misc. LEXIS 3730 (N.Y. Sup. Ct. 1984).

Veterans and exempt volunteer firemen who are separated from service when their positions are abolished or made unnecessary must be given other comparable positions. 1946 Op St Compt 8.

2. Grounds for abolition of position

A position created by the city council and made subject to the civil service law cannot be abolished by the city commissioner of public works, and the holder of such position is entitled to reinstatement since he can be removed only in accordance with the provisions of this section. O'Rourke v Graul, 261 A.D. 87, 24 N.Y.S.2d 819, 1941 N.Y. App. Div. LEXIS 7257 (N.Y. App. Div.), aff'd, 285 N.Y. 755, 34 N.E.2d 908, 285 N.Y. (N.Y.S.) 755, 1941 N.Y. LEXIS 1743 (N.Y. 1941).

The action of the commissioner of the department of water supply, in reducing the number of employees in the department in the interest of economy will not be interfered with by the court. People ex rel. Osterhout v Williams, 154 N.Y.S. 331, 91 Misc. 95, 1915 N.Y. Misc. LEXIS 776 (N.Y. Sup. Ct. 1915), aff'd, 173 A.D. 981, 158 N.Y.S. 1127, 1916 N.Y. App. Div. LEXIS 6371 (N.Y. App. Div. 1916).

Relator is entitled to an alternative writ of mandamus to determine whether the position held by him became unnecessary or was abolished for reasons of economy. In re Delahunt, 160 N.Y.S. 900, 96 Misc. 548, 1916 N.Y. Misc. LEXIS 1134 (N.Y. Sup. Ct. 1916).

3. —Good faith requirement

A civil service employee who was suspended and whose name was placed on a preferred list pursuant to § 31, ostensibly for reasons of economy, is entitled to reinstatement if his position was not in fact abolished but rather was filled by civil service employees transferred from other departments. Schottke v Jeacock, 295 N.Y. 812, 66 N.E.2d 586, 295 N.Y. (N.Y.S.) 812, 1946 N.Y. LEXIS 974 (N.Y. 1946).

Where it is admitted that the state superintendent of public works, by abolishing the position of one of three reservoir tenders and placing his duties upon the other two employees, saved $300 a year to the state, the good faith of superintendent in abolishing the position is established, and indicates that the discharge of the employee was not made because of political bias. Edkins v Wotherspoon, 173 A.D. 330, 158 N.Y.S. 710, 1916 N.Y. App. Div. LEXIS 5996 (N.Y. App. Div. 1916).

Petitioner, a disabled veteran, is not entitled to a peremptory order of mandamus requiring the defendant board of supervisors to reinstate him to the position of assistant engineer, where it appears that the position has been abolished and no appropriation to cover the salary has been made; that the duties which he formerly performed have been absorbed by an employee holding the position of secretary, and there is no claim that the board acted in bad faith. Alexander v McLaughlin, 246 A.D. 189, 285 N.Y.S. 261, 1935 N.Y. App. Div. LEXIS 8690 (N.Y. App. Div. 1935).

Where there is an issue as to the good faith of the state superintendent of public buildings in abolishing the position of paymaster in the department of public buildings, held by a veteran fireman, an alternative writ of mandamus may properly be granted on application of the veteran. Where a position held by a veteran fireman is abolished in bad faith and not in the interest of economy, and fireman is entitled to be restored; if the position is abolished in good faith and the duties created are similar to those of the position abolished, the veteran is entitled to transfer to such position. In re Hay, 130 N.Y.S. 337, 72 Misc. 434, 1911 N.Y. Misc. LEXIS 416 (N.Y. Sup. Ct. 1911).

Petitioner, a veteran entitled to tenure benefits under Civ S Law §§ 75, 86 on abolishment of his job as a county Director of Economic Development and Planning, was not entitled to be transferred to the newly created position of Director of Planning and Industrial Development, since the new position was not a "similar position" in that it required duties over and above those performed by petitioner, nor was petitioner entitled to a transfer to the "similar" vacant position of chief planner, since that position was not funded; however, petitioner was entitled to a trial on his claim that his position was abolished for the "sole purpose" of hiring another to perform substantially the same work in violation of Civ S Law § 75. Mathiasen v Niagara County Legislature, 126 Misc. 2d 937, 484 N.Y.S.2d 397, 1984 N.Y. Misc. LEXIS 3730 (N.Y. Sup. Ct. 1984).

4. Reclassification of positions

Tenure of office of New York City employee in exempt class is not affected by reclassification of his position as competitive; he is transferred without examination. Fornara v Schroeder, 261 N.Y. 363, 185 N.E. 498, 261 N.Y. (N.Y.S.) 363, 1933 N.Y. LEXIS 1295 (N.Y. 1933).

Where, by order of the civil service commission, with the approval of the governor, a position which had been in the exempt class, was reclassified and placed in competitive class, the incumbent became entitled to the same security of tenure he would have had if he had been appointed after a competitive examination. Rohr v Kenngott, 288 N.Y. 97, 41 N.E.2d 905, 288 N.Y. (N.Y.S.) 97, 1942 N.Y. LEXIS 1061 (N.Y. 1942).

An employee of New York City, cannot be deprived of the position to which he has been appointed by a subsequent resolution of the municipal civil service commission which transfers his position to the competitive class. Wolfson v Cruise, 15 N.Y.S.2d 787, 172 Misc. 577, 1939 N.Y. Misc. LEXIS 2452 (N.Y. Sup. Ct.), aff'd, 258 A.D. 790, 15 N.Y.S.2d 788, 1939 N.Y. App. Div. LEXIS 6934 (N.Y. App. Div. 1939).

5. Transfers

Under this section, an honorably discharged soldier of U. S. who served in the war of the rebellion, the war with Spain or the World War, may not be removed from a civil service position in this state except for incompetency or misconduct. If his work be no longer needed in the department to which he had been appointed, he must be transferred to any branch of civil service for duty in such position as he may be able to fill. Dorsa v Forbes, 270 N.Y. 443, 1 N.E.2d 841, 270 N.Y. (N.Y.S.) 443, 1936 N.Y. LEXIS 1567 (N.Y. 1936).

The right of a veteran, whose position in the public service has been abolished, to be transferred to any branch of the service for duty in such position as he may be able to fill, receiving the same compensation therefor, is not conditioned upon the immediate existence of a vacancy but continues for a reasonable time after it accrues. McNamara v Holling, 282 N.Y. 109, 25 N.E.2d 867, 282 N.Y. (N.Y.S.) 109, 1940 N.Y. LEXIS 980 (N.Y. 1940).

Under this section a veteran should have been transferred to any vacant position which he was fit to fill that existed at time the office which he occupied was abolished. White v Harrell, 236 A.D. 206, 259 N.Y.S. 1, 1932 N.Y. App. Div. LEXIS 5934 (N.Y. App. Div. 1932).

This section must be read in connection with §§ 14 and 16 and the position of fireman is not "a similar position," within the meaning of this section to that of pumping engineer. In re Owens, 137 N.Y.S. 308, 76 Misc. 610, 1912 N.Y. Misc. LEXIS 897 (N.Y. Sup. Ct. 1912).

All that a veteran who loses his position through its abolishment can demand, under this section, is that he shall not be discharged from public service if there is in any branch of that service a vacant position with equal emolument which he is qualified to fill. Pettis v Brearton, 261 N.Y.S. 55, 145 Misc. 913, 1932 N.Y. Misc. LEXIS 1668 (N.Y. Sup. Ct. 1932).

When the duty is imposed by this section upon the commissioner to transfer a veteran to another position and he has neglected, or refused, to perform that duty, the burden is upon the veteran to establish the commissioner's failure, by showing that a particular position did exist and that he is fitted to fill it. Bentley v Jeacock, 14 N.Y.S.2d 366, 1939 N.Y. Misc. LEXIS 2229 (N.Y. Sup. Ct. 1939).

6. —Compensation

An honorably discharged soldier of U. S., whose position in a municipal department has been abolished for economic reasons, and who is thereafter transferred at his own request to a different position carrying a lower emolument, is not entitled under this section to receive for his services in second position the emolument carried by the original position. Pettis v Brearton, 261 N.Y.S. 55, 145 Misc. 913, 1932 N.Y. Misc. LEXIS 1668 (N.Y. Sup. Ct. 1932).

Under this section a veteran was entitled only to be offered any position having the same or similar requirements for entrance as that from which he was discharged and was not entitled also to receive the same salary he had received at the time he was separated from service. Brizzolara v McKenzie, 2 N.Y.S.2d 455, 166 Misc. 282, 1937 N.Y. Misc. LEXIS 1187 (N.Y. Sup. Ct. 1937), modified, 253 A.D. 886, 2 N.Y.S.2d 460, 1938 N.Y. App. Div. LEXIS 9093 (N.Y. App. Div. 1938).

A world war veteran who, on reorganization made in district attorney's office, was placed as a messenger at $840 per annum, whereas he previously held the position of process server at $2,940 per annum, is entitled to a hearing on his rights, since the phrase "receiving the same compensation therefor," as used in this section, is somewhat obscure and there is a contention that the veteran is filling a position of lower rank and emolument. Meenagh v Dewey, 11 N.Y.S.2d 858, 9 N.Y.S.2d 97, 170 Misc. 192, 1938 N.Y. Misc. LEXIS 2270 (N.Y. Sup. Ct. 1938), rev'd, 286 N.Y. 292, 36 N.E.2d 211, 286 N.Y. (N.Y.S.) 292, 1941 N.Y. LEXIS 1441 (N.Y. 1941).

7. —Necessity of demand for transfer

If veteran or exempt volunteer fireman terminated from labor class position has found other employment because no vacancy existed in similar position at time of termination, employee must demand transfer to such similar position if it opens up after he has found other employment to be entitled to such position. Veterans or exempt volunteer firemen were not to be terminated when their labor class positions were abolished if there were vacancies open in similar positions; and such employees had no duty to demand transfer upon termination, but it was duty of persons clothed with responsibility of appointment to effectuate such transfer. Jones v Carey, 55 A.D.2d 260, 389 N.Y.S.2d 921, 1976 N.Y. App. Div. LEXIS 14559 (N.Y. App. Div. 3d Dep't 1976).

8. —Exempt or noncompetitive positions

A veteran whose position has been abolished cannot compel his appointment to a vacancy in a noncompetitive position, since such a position must be filled on the basis of personal qualities and fitness is a matter for the determination of the department head, who has been given a broad discretion. A veteran whose civil service job has been abolished is entitled under this section to appointment in such other vacancy as he may be fitted to fill, even though the abolished position was in the exempt class and the veteran was appointed thereto without an examination. Meenagh v Dewey, 286 N.Y. 292, 36 N.E.2d 211, 286 N.Y. (N.Y.S.) 292, 1941 N.Y. LEXIS 1441 (N.Y.), reh'g denied, 286 N.Y. 707, 37 N.E.2d 147, 286 N.Y. (N.Y.S.) 707, 1941 N.Y. LEXIS 2272 (N.Y. 1941).

A war veteran is not entitled to appointment to the position of a secretary assistant to the city manager under this section, since said position is confidential in nature and should be deemed in the exempt class. Mancuso v Harrell, 296 N.Y.S. 723, 163 Misc. 270, 1937 N.Y. Misc. LEXIS 1324 (N.Y. Sup. Ct. 1937).

9. —Newly created positions

A veteran whose position is abolished must be appointed under this section to a newly created position embracing the same duties as those formerly performed by the veteran. Powers v Dahl, 219 N.Y. 578, 114 N.E. 1079, 219 N.Y. (N.Y.S.) 578, 1916 N.Y. LEXIS 904 (N.Y. 1916).

A world war veteran, discharged from his position in the conservation department bureau of state publicity because of a reduction in the bureau's appropriation, is entitled to maintain an action under the section to compel his transfer to an allegedly similar position available in a newly created publicity bureau in the division of commerce. Thacher v Catherwood, 263 A.D. 484, 33 N.Y.S.2d 503, 1942 N.Y. App. Div. LEXIS 6922 (N.Y. App. Div. 1942).

In an Article 78 proceeding seeking a judgment reinstating petitioners to their former employment positions with the New York Transit Authority or transfers to similar positions with back pay and benefits, petitioners would be entitled to transfers where the newly created position of special investigator with the Authority is a "similar position" to that of special inspector, within the meaning of Civ S Law § 86 and the respondent violated such section by failing to transfer petitioners, all veterans of the armed forces, to vacancies which existed in the new title at the time of the abolition of the 23 special inspector positions held by petitioners. The specifications for each job title indicated essentially similar duties including investigation of employee misconduct or violation of rules, preparation of reports, and testifying at hearings. Laverpool v New York City Transit Authority, 114 Misc. 2d 1051, 453 N.Y.S.2d 323, 1982 N.Y. Misc. LEXIS 3610 (N.Y. Sup. Ct. 1982).

10. —Qualifications

Where an honorably-discharged veteran held the position of deputy sealer of weights and measures, which position was abolished, and vacancies thereafter occurred in the position of assistant deputy assessor, the veteran's fitness to fill the position of assistant deputy assessor could not be attested by the fact that his name was on an expired civil service list for a similar position, since the expired list was without significance, and inasmuch as the position formerly held and the position sought were essentially different, the veteran could not be shifted from one position to the other without violation of the provisions of N. Y. Const., Art. V, § 6. McNamara v Holling, 282 N.Y. 109, 25 N.E.2d 867, 282 N.Y. (N.Y.S.) 109, 1940 N.Y. LEXIS 980 (N.Y. 1940).

An honorably-discharged soldier whose position has been abolished, though entitled to be transferred to any branch of the civil service for duty in such position as he may be fitted to fill, is not entitled to transfer or appointment to such a position unless, in

the manner authorized by the constitution, he has shown his fitness to fill the position. A veteran appointed to the position of process server has no right to be transferred to a new position upon the abolition of his former job, which involves duties different than those appropriate to the title of process server. An honorably-discharged soldier, appointed to a position under a given title, regardless of whether such position was in the exempt or in the competitive class, has no right to be transferred to a new position which involves duties different from those which the honorably-discharged soldier could lawfully perform under his original appointment, and, therefore, evidence that the incumbent of a position is fitted by experience and training to perform duties not appropriate to the title of his position would not provide ground for sanctioning the employment of the incumbent in such duties. A veteran appointed to the position of process server has no right under this section upon abolition of his position to compel his appointment to a new position on the ground that he is fitted for the new job because while serving as process server he performed duties "far beyond and not related" to that title but rather carried out duties similar to those of the new position. Meenagh v Dewey, 286 N.Y. 292, 36 N.E.2d 211, 286 N.Y. (N.Y.S.) 292, 1941 N.Y. LEXIS 1441 (N.Y.), reh'g denied, 286 N.Y. 707, 37 N.E.2d 147, 286 N.Y. (N.Y.S.) 707, 1941 N.Y. LEXIS 2272 (N.Y. 1941).

County did not violate CLS Civ S § 86 by refusing to transfer veterans, whose positions as Senior Motor Equipment Operator I had been abolished, to "similar position" of Laborer since latter position was entry level requiring only willingness "to perform routine manual work" and necessary physical capabilities, whereas motor equipment operator was one of highest graded positions requiring "knowledge of the operation of tractors, power shovels, cranes and other automotive equipment...mechanical aptitude [and] ability to operate complex automotive equipment." Bartholomew v Columbia County, 191 A.D.2d 881, 594 N.Y.S.2d 878, 1993 N.Y. App. Div. LEXIS 2373 (N.Y. App. Div. 3d Dep't 1993).

Relator, an honorably discharged veteran, who, having passed the required examination was certified from an eligible list and appointed engineer at a pumping station of a municipal water plant, was not entitled under this section to a transfer to the position of fireman without having first passed the examination therefor. In re Owens, 137 N.Y.S. 308, 76 Misc. 610, 1912 N.Y. Misc. LEXIS 897 (N.Y. Sup. Ct. 1912).

An employee in classified civil service, an honorably discharged veteran, who was removed on abolition of his position for reasons of economy, is not entitled, under this section, to be transferred to a vacancy in a permanent position which he is not in fact fitted to fill, though he is as well qualified as the person provisionally appointed thereto. Friedman v Delaney, 263 N.Y.S. 502, 147 Misc. 154, 1933 N.Y. Misc. LEXIS 1041 (N.Y. Sup. Ct. 1933), aff'd, 241 A.D. 711, 269 N.Y.S. 995, 1934 N.Y. App. Div. LEXIS 9065 (N.Y. App. Div. 1934).

A world war veteran, whose position was abolished by the repeal of an ordinance creating said position, is not entitled to order of peremptory mandamus directing his appointment, under this section to the position of assessor, which was vacant, where there is an issue presented as to his qualifications for said position. Mancuso v Harrell, 296 N.Y.S. 723, 163 Misc. 270, 1937 N.Y. Misc. LEXIS 1324 (N.Y. Sup. Ct. 1937).

11. —Existance of vacancy

Although this section requires that upon abolishment of a place or position in civil service, held by an honorably-discharged soldier, sailor or marine, he "shall be transferred to any branch of said service for duty in such position as he may be fitted to fill, receiving same compensation therefor," there must be another position vacant, to entitle him to a transfer and the burden of proving that a vacancy in another position exists, which he is competent to fill, rests upon him. A public official is not obliged to discharge another employee in order to open a position for a veteran. Clancy v Halleran, 263 N.Y. 258, 188 N.E. 746, 263 N.Y. (N.Y.S.) 258, 1934 N.Y. LEXIS 1269 (N.Y.), reh'g denied, 264 N.Y. 670, 191 N.E. 618, 264 N.Y. (N.Y.S.) 670, 1934 N.Y. LEXIS 1704 (N.Y. 1934).

Although this section requires a veteran employee to be transferred for duty in such position as he may be fitted to fill, there must be another position vacant to entitle him to transfer, and a public official is not obliged to discharge other employees to open a position for a veteran. Edkins v Wotherspoon, 173 A.D. 330, 158 N.Y.S. 710, 1916 N.Y. App. Div. LEXIS 5996 (N.Y. App. Div. 1916).

Where a veteran of U. S. navy had been demoted from his position as lieutenant in the police department by reason of abolition of the position, he was entitled to be transferred to a vacancy occurring in the position of lieutenant. Tierney v Wynne, 209 A.D. 401, 204 N.Y.S. 836, 1924 N.Y. App. Div. LEXIS 8642 (N.Y. App. Div. 1924).

A veteran, a civil service employee, whose particular position in the county clerk's office, bearing the title of "laborer" was abolished by amendment to law, could not require that the county clerk discharge another laborer in his office and retain the veteran, since a public official is not obliged to discharge other employees to open a position for veterans. Pielsticker v Livoti, 24 N.Y.S.2d 195, 175 Misc. 592, 1940 N.Y. Misc. LEXIS 2459 (N.Y. Sup. Ct.), aff'd, 260 A.D. 1043, 24 N.Y.S.2d 1016, 1940 N.Y. App. Div. LEXIS 5992 (N.Y. App. Div. 1940).

An exempt volunteer fireman, whose position is abolished for reasons of economy, has the right to be appointed to any vacancy existing within a reasonable time after he makes demand therefor, but the village employing him is not required to discharge other employees in order that a vacancy be created. Loefler v Power, 96 N.Y.S.2d 578, 198 Misc. 585, 1950 N.Y. Misc. LEXIS 1572 (N.Y. Sup. Ct. 1950).

12. Retention and reinstatement

This section gives a veteran no right to be retained in preference to non-veterans doing the same work when his position is abolished for reasons of economy. Devins v Sayer, 233 N.Y. 690, 135 N.E. 972, 233 N.Y. (N.Y.S.) 690, 1922 N.Y. LEXIS 1118 (N.Y.), reh'g denied, 234 N.Y. 531, 138 N.E. 434, 234 N.Y. (N.Y.S.) 531, 1922 N.Y. LEXIS 698 (N.Y. 1922).

A nondisabled veteran is not given an implied right of preference in retention by $22. O'Donnell v Sinnott, 266 A.D. 176, 41 N.Y.S.2d 674, 1943 N.Y. App. Div. LEXIS 3514 (N.Y. App. Div. 1943), app. dismissed, 301 N.Y. 608, 93 N.E.2d 497, 301 N.Y. (N.Y.S.) 608, 1950 N.Y. LEXIS 937 (N.Y. 1950).

Petitioners are not entitled to a peremptory mandamus order to compel their reinstatement to the position of engineer and bridge operator in the service of Buffalo, on the ground that they are honorably discharged soldiers, where it appears that they were part of a group of the seven youngest bridge tenders in point of service who were relieved of their positions on completion of a new bridge. Franklin v Rathmann, 258 N.Y.S. 351, 143 Misc. 786, 1932 N.Y. Misc. LEXIS 1446 (N.Y. Sup. Ct. 1932).

An honorably discharged soldier of the World War is entitled to a peremptory order of mandamus reinstating him as a laborer in employ of the superintendent of highways where superintendent discharged him because, on account of the general business depression, he gave preference to married over single men, and petitioner is unmarried. Ziolkowski v Holstein, 257 N.Y.S. 559, 143 Misc. 819, 1932 N.Y. Misc. LEXIS 1104 (N.Y. Sup. Ct. 1932).

This section does not require the retention of veterans in case of lay-offs in preference to others having seniority in service. Smith v Board of Education, 36 N.Y.S.2d 968, 178 Misc. 988, 1942 N.Y. Misc. LEXIS 1930 (N.Y. Sup. Ct.), aff'd, 265 A.D. 917, 39 N.Y.S.2d 352, 1942 N.Y. App. Div. LEXIS 6506 (N.Y. App. Div. 1942).

13. —Formation of preferred list for reinstatement

This section does not give veterans preference in the forumulation of a preferred list after the suspension of employees for reasons of economy. Smith v Board of Education, 36 N.Y.S.2d 968, 178 Misc. 988, 1942 N.Y. Misc. LEXIS 1930 (N.Y. Sup. Ct.), aff'd, 265 A.D. 917, 39 N.Y.S.2d 352, 1942 N.Y. App. Div. LEXIS 6506 (N.Y. App. Div. 1942).

A veteran whose position was abolished for reasons of economy and who failed to show the existence of a vacant position to which he could be transferred, was only entitled to have his name placed on the preferred list. Bateman v Fullen, 28 N.Y.S.2d 230, 1941 N.Y. Misc. LEXIS 1878 (N.Y. Sup. Ct. 1941).

14. Firemen

While there is nothing in this law which prevents abolishment of a position in the civil service of the state held by a veteran fireman who has properly and satisfactorily discharged his duties, he must be provided with a similar position. In re Hay, 130 N.Y.S. 337, 72 Misc. 434, 1911 N.Y. Misc. LEXIS 416 (N.Y. Sup. Ct. 1911).

The provisions of this section are to be taken as intending service in a volunteer fire department for five consecutive years, and do not protect an engineer of a steam fire engine employed by board of trustees of a village, where the employment or position is not a position created by statute, but is created by the board, and the term of employment is at the pleasure of the board. Cooper v Paris, 130 N.Y.S. 1043, 73 Misc. 244, 1911 N.Y. Misc. LEXIS 505 (N.Y. Sup. Ct. 1911).

A volunteer fireman is in "the public service" and a public servant, despite the fact that he receives no salary, in view of the fact that he is entitled to certain statutory benefits and exemptions, and an applicant to membership in a volunteer fire company may not be denied employment solely on racial grounds. Everett v Riverside Hose Co., 261 F. Supp. 463, 1966 U.S. Dist. LEXIS 10491 (S.D.N.Y. 1966).

15. —Preference in retention; particular applications

Where the number of laborers in the department of water supply of New York city was reduced on account of a lack of appropriations, a volunteer fireman is not entitled to be retained in preference to other laborers, but where it appears that, at the time of the reduction, two other city employees, under the same appropriation were demoted from another department, reclassified as laborers and retained as such, a laborer is entitled to preference and should be reinstated. People ex rel. Davison v Williams, 213 N.Y. 130, 107 N.E. 49, 213 N.Y. (N.Y.S.) 130, 1914 N.Y. LEXIS 739 (N.Y. 1914).

A veteran volunteer fireman holding the position of assistant engineer in the department of water supply of New York city, was not entitled, upon a reduction of the force, to be retained until all non-veterans holding positions similar to his had been dismissed. People ex rel. Osterhout v Williams, 154 N.Y.S. 331, 91 Misc. 95, 1915 N.Y. Misc. LEXIS 776 (N.Y. Sup. Ct. 1915), aff'd, 173 A.D. 981, 158 N.Y.S. 1127, 1916 N.Y. App. Div. LEXIS 6371 (N.Y. App. Div. 1916).

A veteran fireman is not entitled to be retained in the service of New York city as a captain in department of docks and ferries in preference to others who are neither veterans nor firemen when it becomes necessary to reduce the number of persons in that position. Randolph v Smith, 155 N.Y.S. 991, 92 Misc. 291, 1915 N.Y. Misc. LEXIS 907 (N.Y. Sup. Ct. 1915).

16. —Hearing prior to discharge

Where there is no proof that a city employee had, upon his dismissal May 15, 1935, qualified as an exempt volunteer fireman under Gen. Mun. Law, § 200, he cannot claim the benefits of this section, and his discharge without a hearing was legal. Brown v Stephan, 245 A.D. 552, 284 N.Y.S. 403, 1935 N.Y. App. Div. LEXIS 10355 (N.Y. App. Div. 1935).

A village employee dismissed April 2, 1935, was entitled to hearing under this section where he had qualified as an exempt volunteer fireman under Mem. Corp. Law, § 114, although he had not so qualified under Gen. Mun. Law, § 200. Brown v Stephan, 245 A.D. 552, 284 N.Y.S. 403, 1935 N.Y. App. Div. LEXIS 10355 (N.Y. App. Div. 1935).

The right to a hearing given by this section does not extend to a volunteer fireman who has not served the required five-year period under Gen. Mun. Law, § 200, or who is not a member of a fire company subject to Mem. Corp. Law, § 114. Mahan v Bacon, 277 N.Y.S. 390, 154 Misc. 291, 1934 N.Y. Misc. LEXIS 2008 (N.Y. Sup. Ct. 1934), aff'd, 277 N.Y.S. 393, 154 Misc. 535, 1935 N.Y. Misc. LEXIS 958 (N.Y. App. Term 1935).

17. Particular positions

A veteran whose position as cashier was abolished has no right under this section to compel his transfer to a similar position in a new office, since the position of cashier is expressly exempted from the scope of subdiv. 1 of this section. Walsh v Marsh, 292 N.Y. 515, 54 N.E.2d 204, 292 N.Y. (N.Y.S.) 515, 1944 N.Y. LEXIS 1678 (N.Y. 1944).

The office of superintendent of water works of Binghamton is not a "position" within the meaning of this section. People ex rel. Johnson v La Roche, 181 N.Y.S. 611, 111 Misc. 465, 1920 N.Y. Misc. LEXIS 1327 (N.Y. Sup. Ct. 1920).

The superintendent of light and water held a "position" within the meaning of this section, where village trustees administered the affairs of both departments, under Vil. Law, § 89. Naughton v Boyle, 223 N.Y.S. 432, 129 Misc. 867, 1927 N.Y. Misc. LEXIS 960 (N.Y. Sup. Ct. 1927).

The office of assessor is not a subordinate one in the city government of Schenectady, and a change in the form of city government to the city manager plan has not effected a change in the function of such office, entitling a war veteran whose position was abolished to appointment under this section. Mancuso v Harrell, 296 N.Y.S. 723, 163 Misc. 270, 1937 N.Y. Misc. LEXIS 1324 (N.Y. Sup. Ct. 1937).

Agency Opinions

Analysis

1. In general
2. Transfers
3. Firemen

1. In general

The order of preference given by the commission should have some weight with officers having the power of removal. 1913 N.Y. Op. Att'y Gen. No. 76.

Applicability and scope of Civil Service Law provision, protecting veterans and exempt volunteer firemen against removal from their positions without hearings based on charges, outlined and discussed. 1954 NY Ops Atty Gen Jan 31.

2. Transfers

An exempt fireman or veteran, dismissed from service, owing to abolishment of his position for reasons of economy, cannot demand transfer to another position in the same department unless he can show there is a vacancy in that other position, that the position draws the same compensation and that he is fitted to fill it. 1915 N.Y. Op. Att'y Gen. No. 15.

A veteran whose position has been abolished "for reasons of economy or otherwise" must be transferred, appointed to or reinstated in any existing vacancy which he is "fitted to fill." 1933 N.Y. Op. Att'y Gen. No. 563.

3. Firemen

Service in a volunteer fire company, duly incorporated but not formed as regular department in a fire district of a city, village or town, does not entitle its members to exemptions. 1912 N.Y. Op. Att'y Gen. No. 193.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Defining qualifications of exempt volunteer firemen, CLS Gen Mun § 200.

Jurisprudences:

15A Am Jur 2d, Civil Service §§ 21., 22., 37., 39 et seq.

ARTICLE XI Health Benefits for State and Retired State Employees

Section
163. Eligibility for benefits

HISTORY:

Formerly Art VII, add, L 1956, ch 461, § 1; renumbered Art XI, L 1958, ch 790, § 6, eff April 1, 1959; L 2010, ch 56, § 14 (Part T), eff June 22, 2010, deemed eff on and after April 1, 2010.

§ 163. Eligibility for benefits

1. All persons in the service of the state, whether elected, appointed or employed, who elect to partici-

pate in such health benefit plan shall be eligible to participate therein, provided, however, that the president may adopt such regulations as he or she may deem appropriate excluding temporary, part time or intermittent employment.

2. The contract or contracts shall provide for health benefits for retired employees of the state and of the state colleges of agriculture, home economics, industrial labor relations and veterinary medicine, the state agricultural experiment station at Geneva, and any other institution or agency under the management and control of Cornell university as the representative of the board of trustees of the state university of New York, and the state college of ceramics under the management and control of Alfred university as the representative of the board of trustees of the state university of New York, and their spouses and dependent children as defined by the regulations of the president, on such terms as the president may deem appropriate, and the president may authorize the inclusion in the plan of the employees and retired employees of public authorities, public benefit corporations, school districts, special districts, district corporations, municipal corporations excluding active employees and retired employees of cities having a population of one million or more inhabitants whose compensation is or was before retirement paid out of the city treasury, or other appropriate agencies, subdivisions or quasi-public organizations of the state, including active members of volunteer fire and volunteer ambulance companies serving one or more municipal corporations pursuant to subdivision seven of section ninety-two-a of the general municipal law, and their spouses and dependent children as defined by the regulations of the president. Any such corporation, district, agency or organization electing to participate in the plan shall be required to pay its proportionate share of the expenses of administration of the plan in such amounts and at such times as determined and fixed by the president. All amounts payable for such expenses of administration shall be paid to the commissioner of taxation and finance and shall be applied to the reimbursement of funds previously advanced for such purposes. Neither the state nor any other participant in the plan shall be charged with the particular experience attributable to the employees of the participant, and all dividends or retroactive rate credits shall be distributed pro-rata based upon the number of employees of such participant covered by the plan.

3. The president shall adopt regulations prescribing the conditions under which an employee or retired employee may elect to participate in or withdraw from the plan. Such regulations may also prescribe conditions under which an employee whose service terminates and who is entitled to a vested retirement allowance may continue to participate in the plan; such condition shall include a requirement that such person pay the full cost of such coverage following termination of his employment and prior to commencement of the payment of his retirement allowance, unless such person becomes currently entitled to, but defers receipt of, a retirement allowance or pension from a retirement or pension plan or system administered and operated by the state of New York, or a civil division thereof, including the New York state teachers' retirement system and the optional retirement programs established under article three, part V, and article eight-B of the education law.

4. Any public authority, public benefit corporation, school district, special district, district corporation, municipal corporation, or other agency, subdivision or quasi-public organization of the state, whose employees and retired employees are authorized to be included in the plan as provided by subdivision two, may elect to participate in such plan. Any such election shall be exercised by the adoption of a resolution by its governing body and, in the case of any municipal corporation where a resolution of its governing body is required by law to be approved by any other body or officer, such resolution shall also be approved by such other body or officer. Any such election may be made with respect to inclusion in the plan of both its employees and its retired employees at the same time, or may be made only with respect to its employees alone and at another time with respect to its retired employees. Any such authority, corporation, district, agency, subdivision or organization making such election shall become a participating employer under such plan, subject to and in accordance with the regulations of the president relating thereto.

5. The chief fiscal officer of any such participating employer shall be authorized to deduct from the wages or salary paid to its employees who are participants in such health benefit plan the sums required to be paid by them under such plan. Each such participating employer is authorized to appropriate such sums as are required to be paid by it as its share in connection with the operation of such plan.

6. The president shall have power and authority to make such inspection of the employment and payroll records of any participating employer concerning any of its employees who are participants in the health insurance fund as he may deem necessary.

7. For purposes of eligibility for participation in the health benefit plan no person shall be deemed to be a state officer or employee or to be in the service of the state unless his salary or compensation is paid directly by the state, and no person shall be deemed to be a retired officer or employee of the state unless his salary or compensation immediately preceding his retirement was paid directly by the state; provided, however, that all active and retired justices, judges, officers and employees of the supreme court, surrogate's court, county court, family court, civil court of the city of New York, criminal court of the city of New York and district court in any county,

officers and employees of the office of probation for the courts of New York city shall be eligible for participation in the health benefit plan whether or not their salaries are paid or before retirement were paid directly by the state.

8. Notwithstanding any other law, rule or regulation to the contrary, where the state and an employee organization representing state officers and employees who are in positions which are in the collective negotiating unit established by chapter four hundred three of the laws of nineteen hundred eighty-three enter into a collectively negotiated agreement pursuant to article fourteen of this chapter providing that officers and employees who hold positions in such unit on or after April first, nineteen hundred eighty-four and who immediately upon termination from such position are eligible to receive a retirement benefit from either the New York state or New York city retirement systems shall continue to be eligible to participate in the employee benefit fund established by section two hundred six-a of the state finance law, such officers and employees upon retirement shall continue to participate in and receive the benefits of such fund as provided in such collectively negotiated agreement and shall not be eligible to receive and shall not receive from the statewide health benefit plan established pursuant to this article coverage for benefits covered by such employee benefit fund.

HISTORY:

Formerly § 123, add, L 1956, ch 461, § 1; renumbered § 163, L 1958, ch 790, § 6; L 1958, ch 950, §§ 1, 2 (for effectiveness as an amendment of this section, see § 185); amd, L 1959, ch 209, § 1; L 1960, ch 329, § 4, eff April 1, 1960; L 1961, ch 230, § 1; L 1964, ch 657, § 1; L 1966, ch 27, § 1; L 1966, ch 198, § 1, eff June 1, 1966; L 1967, ch 617, § 2, eff June 1, 1967; L 1969, ch 36, § 1, eff July 1, 1969; L 1984, ch 394, § 2, eff July 18, 1984, deemed eff April 1, 1984; L 2010, ch 56 § 4 (Part T), eff June 22, 2010, deemed eff on and after April 1, 2010; L 2010, ch 71, § 2, eff May 5, 2010.

Editor's Notes: See 1960 note under § 160.

Amendment Notes: 2010. Chapter 56, § 4 (Part T) amended:

Sub 1 by deleting at fig 1 "insurance" and adding the matter in italics.

Sub 2 by deleting at fig 1 "insurance" and adding the matter in italics.

Sub 5 by deleting at fig 1 "insurance" and adding the matter in italics.

Sub 7 by deleting at figs 1 and 2 "insurance" and adding the matter in italics.

Sub 8 by deleting at fig 1 "insurance" and adding the matter in italics.

Notes to Decisions

Analysis

1. In general
2. Retirees

1. In general

Employees of the Supreme Court in New York City, though their salaries were paid by the city, were nonetheless "persons in the service of the state" under subd. 1 of this section so as to be eligible to participate in the health insurance plan set up for such employees. Shea v Falk, 8 N.Y.2d 1071, 207 N.Y.S.2d 285, 170 N.E.2d 415, 1960 N.Y. LEXIS 950 (N.Y. 1960).

An action involving the recovery from the State Employees Health Insurance Program of a sum which a former member agency alleged was due it as its pro rata share of a distribution of unused insurance premium monies returned to the State by health insurance carriers was properly brought in the Court of Claims, since the language of Civ S Law § 163(2) makes any distribution mandatory on a pro rata basis; the State's argument that the claim should have been dismissed on the basis that the actions of the officer in charge of the distribution were discretionary and reviewable only in an Article 78 proceeding would be unavailing, since the only possible discretion vested in the officer was the timing of distributions to meet adverse fluctuations in premium charges. A former member agency of the State Employees Health Insurance Program would not be able to recover its pro rata share of accumulated dividends which were distributed to the State by health insurance carriers after the agency's withdrawal from the program, since moneys received from the insurance carriers in the form of "dividends, and retroactive rate credits," would have to be, pursuant to Civ S Law § 163(2), used for payment of premiums for all members in the ensuing years, and moneys received by the insurance fund called "income from investments and made by the fund with the monies in its control" would have to be credited to and retained by the fund, pursuant to Civ S Law § 167(6), as a special reserve for adverse premium fluctuations in future years, and in neither instance could cash refunds be distributed to contributing employers. Syracuse Urban Renewal Agency v State, 106 A.D.2d 23, 484 N.Y.S.2d 688, 1985 N.Y. App. Div. LEXIS 42494 (N.Y. App. Div. 3d Dep't 1985).

A member of a board of fire commissioners of a fire district may not be provided health insurance through the state health insurance plan at the expense of the district. 1991 Op St Compt No. 91-44.

2. Retirees

Administrative denial of retirement credit in New York City Employees' Retirement System for time worked by employee for private employer before her appointment to civil service title was not arbitrary where NYC Admin Code § 13-101(3)(a) defines "city-service" as "service, whether appointive or elective, as an officer or employee of the city or state of New York1/4so far as such service is paid for by the city," and thus employee was not city employee before her appointment from open competitive list. Eastman v Department of Citywide Admin. Servs., 266 A.D.2d 53, 698 N.Y.S.2d 456, 1999 N.Y. App. Div. LEXIS 11591 (N.Y. App. Div. 1st Dep't 1999).

Former employee of a school district who had been fired for cause but who eventually received a retirement benefit after a settlement had a protected due process interest in receiving a retirement health insurance benefit under N.Y. Civ. Serv. Law § 163(4), N.Y. Comp. Codes R. & Regs. tit. 4, § 73.2(a)(3)(iv)-(vii), and Ch. 729, 1994 N.Y. Laws, as amended by Ch. 43, 2008 N.Y. Laws, S. 6650. Jackson v Roslyn Bd. of Educ., 652 F. Supp. 2d 332, 2009 U.S. Dist. LEXIS 80962 (E.D.N.Y. 2009).

City is not responsible for paying cost of health care benefits to retirees of city urban renewal agency; however, city may determine to provide city funds to agency to cover costs of such benefits. 1995 Op St Compt No. 95-1.

Agency Opinions

Analysis

1. In general
2. Retirees
3. Dependents of deceased government employees

1. In general

The amendments made by ch 230 Laws of 1961 in §§ 163 and 168 of the Civil Service Law abrogated the Attorney General's Opinion of January 17, 1961 except as to officers and employees insured under the State Health Insurance Plan on or before April 1, 1961, and the county treasurer is required to pay the employer's share of premium charge for coverage for Supreme and Surrogate Court officers and employees whose salary or compensation is not paid in whole or in part from the State Treasury. 1961 NY Ops Atty Gen Oct 10.

Surrogates and their employees, district attorneys and their assistants, county judges, judges of the Court of General Sessions, county clerks and their employees, justices of the peace and employees of election boards are all "in the service of the state" and, as such, eligible to participate in the State Health Insurance Plan. 1961 NY Ops Atty Gen Jan 17.

Village may join State Health Plan during fiscal year although annual budget contained no provision for expense of participating. 1964 Op St Compt File #1097.

Employees of a municipality which participates in the State health insurance program may not, with certain exceptions, participate in such program unless they are employed at least twenty hours per week. There is no such restriction in health insurance programs contracted for by a municipality pursuant to General Municipal Law, § 92-a. 1966 Op St Compt File #156.

Ordinarily, a State employee who enlists or is inducted into the armed services would have no interest in continuing in the State Employees Health Insurance Plan; however, if the employee chooses to do so, the policy and Civil Service Regulations provide that he pay the entire premium during his leave of absence without pay. 1968 Op St Compt File #142.

A school district is authorized to purchase group life, accident or health insurance for its teachers but may not purchase group income protection insurance. Any dividends received by the school district, where it pays the full premium, belongs to the district and may not be paid to the treasury of the teacher's association. 1969 Op St Compt File #39.

Where the salary of a town justice is withheld for his failure to file a monthly report, he may not continue to be covered under the State health insurance plan during the period of such withholding. 1969 Op St Compt File #569.

A fire district may purchase group hospital and medical insurance for its prior retired employees and their dependents. 1972 Op St Compt File #846.

The commissioners of an improvement district which provides health insurance through the State Health Plan may be included in such plan. 1980 Op St Compt File #576.

2. Retirees

A municipality may undertake the payment of the full cost of Blue Cross and Blue Shield health insurance for its retired employees, under a plan entered into pursuant to section 92-a of the General Municipal Law or section 163(2) of the Civil Service Law, provided such retired employees retire subsequent to the adoption of such increased benefit plan. 1969 Op St Compt File #431.

A village board may discontinue its policy of paying the premiums for health insurance covering retired employees and, therefore, terminate such payments upon giving reasonable notice to those employees affected. General Municipal Law § 92-a authorizes expenditure of village funds to pay health insurance premiums for retired employees. A village may cease paying premiums for health insurance providing benefits for retirees who have not as yet retired, although contractual obligations should be taken into consideration. 1978 Op St Compt File #826.

3. Dependents of deceased government employees

Section 92-a of the General Municipal Law does not authorize the provision of health insurance for dependents of deceased retired local government employees. Such coverage is available if a local government participates in the State health insurance plan. A local government, through agreement with an employee organization authorized by the Taylor Law, may provide health insurance coverage to dependents of deceased retired employees. N.Y. Op. Att'y Gen. No. 85-19.

Medical, surgical and hospital insurance for surviving dependents of deceased retired municipal employees may not be provided by a municipality which carries such insurance for officers and employees and retired officers and employees and their families under the authority of General Municipal Law, § 92-a. 1975 NY Ops Atty Gen June 6.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Education department optional retirement program, CLS Educ §§ 180 et seq.

State university optional retirement program, CLS Educ §§ 390 et seq.

Employee benefit fund, etc., CLS St Fin § 206-a.

Federal Aspects:

Health insurance for federal employees, 5 USCS §§ 8901 et seq.

Jurisprudences:

19 NY Jur 2d Civil Servants and Other Public Officers and Employees § 407.

Annotations:

Validity and effect of retroactive change in rate of employee's contribution to public pension fund. 78 ALR2d 1197.

Texts: New York Insurance Law (Matthew Bender's New York Practice Series) § 35.04[14][a][i], [ii].

ARTICLE XI-B Medical Examination of Public Protection Officials to Detect and Identify the Human Immunodeficiency Virus (Hiv)

Section
178. Medical examination of public protection officials to detect and identify the human immunodeficiency virus (HIV)

HISTORY:

Add, L 2005, ch 390, § 1, eff Jan 29, 2006 (see 2005 note below).

§ 178. Medical examination of public protection officials to detect and identify the human immunodeficiency virus (HIV)

1. Definitions. For the purposes of this section:

(a) "Assailant" means a person arrested and charged with a crime, as defined in section 10.00 of the penal law, or a person committed to, certified to, or placed in the custody of the department of corrections and community supervision or any other correctional facility or county jail.

(b) "Medical examination" includes a physical examination or test performed by a physician or other appropriate health care worker to determine if a public protection official has been exposed to or infected by the human immunodeficiency virus (HIV). Tests may include, but need not be limited to, the most accurate, sensitive, and timely tests available used for the early identification of the human immunodeficiency virus (HIV).

(c) "Public protection official" means any state, county or municipal police officer, peace officer, firefighter, emergency medical technician, corrections officer, or sheriff who is acting under the scope of authority of his or her official position.

(d) "Significant risk of transmission" means the alleged conduct of or actions taken by an assailant or any other action, situation or event that occurs while a public protection official is performing his or her official duties that has created a recognized and significant risk of infection of a public protection official with the human immunodeficiency virus (HIV), as determined by the commissioner of health, consistent with guidelines, protocols, and findings of the United States centers for disease control and prevention.

2. Examination of public protection officials. (a) Whenever a public protection official has been

exposed to a significant risk of transmission of the human immunodeficiency virus (HIV) while performing his or her official duties, the employer of such official shall provide to such public protection official an appropriate medical examination to determine if such official has been exposed to or infected with the human immunodeficiency virus (HIV). Such medical examination of a public protection official should be provided within eight hours of notification to the employer or designated agent of the employer of an incident that has created an exposure risk to the official.

(b) Should it be determined by the examining physician or other attending health care worker that a significant risk of transmission has occurred, or should any medical examination conclude that a public protection official has been exposed to or infected with the human immunodeficiency virus (HIV), then such official shall be offered counseling and additional testing, as appropriate and consistent with treatment guidelines issued by the commissioner of health. Such counseling may include a discussion of the risk of the transmission of the human immunodeficiency virus (HIV) from the exposure he or she may have experienced and the spectrum of tests commercially available for the prompt and reliable diagnosis of such infection. Information from any such medical examination of a public protection official shall be confidential information pursuant to article twenty-seven-F of the public health law and shall not be made available to the employer without the written authorization of the affected public protection official.

3. Payment for medical examinations. Payment for medical examinations, additional testing, treatment services, counseling services, and any other additional services provided pursuant to subdivision two of this section shall be covered by subdivision three of section ten of the workers' compensation law; provided that any employer which is not required to and does not provide coverage pursuant to subdivision three of section ten of the workers' compensation law may finance such payments for all of the foregoing services provided for by this section from municipal funding sources, including, but not limited to, employee accident and disability benefit programs, workers' compensation funds, health insurance benefits, accident and disability retirement plans, or any other source of funds that the municipal employer deems appropriate.

4. Guidelines. The commissioner of health shall issue guidelines to facilitate the identification of circumstances potentially exposing a public protection official to a significant risk of transmission of the human immunodeficiency virus (HIV). Such guidelines shall be consistent with criteria accepted by the federal centers for disease control and prevention. Such guidelines shall also provide information regarding related counseling and testing procedures available to such individuals.

5. Confidentiality. Any information gathered pursuant to the provisions of this article which is deemed confidential under any other provision of law shall be treated in a confidential manner and shall not be distributed, be made available or be disclosed by the employer.

HISTORY:

Add, L 2005, ch 390, § 1, eff Jan 29, 2006 (see 2005 note below); amd, L 2011, ch 62, § 63 (Part C, Subpart B), eff March 31, 2011.

Editor's Notes: Laws 2005, ch 390, § 2, eff Jan 29, 2006, provides as follows:

§ 2. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided that any and all rules and regulations and any other measures necessary to implement any provision of this act on its effective date may be promulgated and taken, respectively, on or before the effective date of such provision.

Amendment Notes: 2011. Chapter 62, § 63 (Part C, Subpart B) amended:

Sub 1, par (a) by deleting at fig 1 "corrections" and adding the matter in italics.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

Annotations:

Validity, and propriety under circumstances, of court-ordered hiv testing. 87 ALR5th 631.

THE CONSTITUTION OF THE STATE OF NEW YORK

Article
I. Bill of Rights

ARTICLE I
BILL OF RIGHTS

Section
9. [Right to assemble and petition; divorce; lotteries; pool-selling and gambling; laws to prevent]

History:
Add, 1846, continued 1894 and 1938.

§ 9. [Right to assemble and petition; divorce; lotteries; pool-selling and gambling; laws to prevent]

1. No law shall be passed abridging the rights of the people peaceably to assemble and to petition the government, or any department thereof; nor shall any divorce be granted otherwise than by due judicial proceedings; except as hereinafter provided, no lottery or the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling, except lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature, the net proceeds of which shall be applied exclusively to or in aid or support of education in this state as the legislature may prescribe, except pari-mutuel betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government, and except casino gambling at no more than seven facilities as authorized and prescribed by the legislature shall hereafter be authorized or allowed within this state; and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section.

2. Notwithstanding the foregoing provisions of this section, any city, town or village within the state may by an approving vote of the majority of the qualified electors in such municipality voting on a proposition therefor submitted at a general or special election authorize, subject to state legislative supervision and control, the conduct of one or both of the following categories of games of chance commonly known as: (a) bingo or lotto, in which prizes are awarded on the basis of designated numbers or symbols on a card conforming to numbers or symbols selected at random; (b) games in which prizes are awarded on the basis of a winning number or numbers, color or colors, or symbol or symbols determined by chance from among those previously selected or played, whether determined as the result of the spinning of a wheel, a drawing or otherwise by chance. If authorized, such games shall be subject to the following restrictions, among others which may be prescribed by the legislature: (1) only bona fide religious, charitable or non-profit organizations of veterans, volunteer firefighter and similar non-profit organizations shall be permitted to conduct such games; (2) the entire net proceeds of any game shall be exclusively devoted to the lawful purposes of such organizations; (3) no person except a bona fide member of any such organization shall participate in the management or operation of such game; and (4) no person shall receive any remuneration for participating in the management or operation of any such game. Unless otherwise provided by law, no single prize shall exceed two hundred fifty dollars, nor shall any series of prizes on one occasion aggregate more than one thousand dollars. The legislature shall pass appropriate laws to effectuate the purposes of this subdivision, ensure that such games are rigidly regulated to prevent commercialized gambling, prevent participation by criminal and other undesirable elements and the diversion of funds from the purposes authorized hereunder and establish a method by which a municipality which has authorized such games may rescind or revoke such authorization. Unless permitted by the legislature, no municipality shall have the power to pass local laws or ordinances relating to such games. Nothing in this section shall prevent the legislature from passing laws more restrictive than any of the provisions of this section.

HISTORY:
Add, 1894, continued 1938; amd, 1939, 1957, eff Jan 1, 1958; amd, 1966, eff Jan 1, 1967; amd, 1975, 1984, 2001, 2013.

Amendment Notes: 2013. amended sub 1 by deleting at fig 1 "and" and adding the matter in italics.

2001. amended sub 2 by deleting at fig 1 "firemen" and adding the matter in italics.

Derivation Notes: Source: 1846, art 1, § 10.

Editor's Notes: A proposed amendment to this section was adopted a first time in 1995 by the 218th Session of the Legislature (S 5557) but was not adopted by the 220th Session of the Legislature.

A proposed amendment to this section was adopted a first time in 2000 by the 223rd Session of the Legislature (S-3340-B), a second time in 2001 by the 224th Session of the Legislature (A-3960), and passed by the electorate at the general election held in November 2001.

A proposed amendment to this section was adopted a first time in 2012 by the 235th Session of the Legislature (A 9556), a second time in 2013 by the 236th Session of the Legislature (S-5898) and passed by the electorate at the general election held in November 2013.

Notes to Decisions

Analysis

1. Right of assembly
2. —Disorderly conduct
3. —Picketing or demonstrating
4. Right to petition government
5. Requirement of judicial proceedings to grant of divorce
6. —Divorce obtained by false evidence
7. Prohibition against lotteries, pool-selling, book-making, etc.
8. Regulation of pari-mutuel betting on horse races
9. —Effect of town ordinances on horse race tracks
10. —Off-track betting
11. Authorization of games of chance by localities
12. —Organizations which may conduct such games
13. Standing to challenge statutes or regulations governing betting, book-making or the like
14. Taxation of betting or gambling
15. Recovery of money illegally gambled; enforcement of gambling debts
16. Miscellaneous
23. Commercial speech

1. Right of assembly

NYC Charter § 2604(b)(15), which requires high city officers to forego certain political offices as qualification for holding public office, does not impair state constitutional rights of association and free speech of political parties, and thus city need not demonstrate compelling necessity for adopting provision, since it does not deprive political parties or their members of right to associate with individuals of their own choosing or right to identify people who constitute political party, and it does not

prohibit political parties from expressing their opinions or selecting their own style of political organization. Golden v Clark, 76 N.Y.2d 618, 563 N.Y.S.2d 1, 564 N.E.2d 611, 1990 N.Y. LEXIS 3411 (N.Y. 1990).

NYC Charter § 2604(b)(15), which requires high city officers to forego certain political offices as qualification for holding public office, does not impair state constitutional rights of association and free speech of individual officers since provision is much less restrictive than those governing political activities by civil servants, and it permits officers to engage in broad range of personal or financial activity in support of candidate or cause. Golden v Clark, 76 N.Y.2d 618, 563 N.Y.S.2d 1, 564 N.E.2d 611, 1990 N.Y. LEXIS 3411 (N.Y. 1990).

Where publicly owned auditorium and park facility have been opened to general public use by all kinds of organizations, including political ones, it has become "public forum" and all persons and groups have constitutional right of access; accordingly, village may not preclude political groups from using facilities to conduct meetings or to gather informally to hold discussions pertaining to their respective organizations. Hempstead Democratic Club v Hempstead, 112 A.D.2d 428, 492 N.Y.S.2d 89, 1985 N.Y. App. Div. LEXIS 56175 (N.Y. App. Div. 2d Dep't 1985).

Fire district officials have the right to limit, by regulation, the use of the fire house auditorium to residents and non-profit organizations of the district for social and recreational purposes, and a refusal to issue a permit to a political organization for a public meeting, to be "educational for public interest," was not a deprivation of the rights of free speech and assembly or of equal protection of the laws. Hooker v Conte, 143 N.Y.S.2d 750, 208 Misc. 188, 1955 N.Y. Misc. LEXIS 2901 (N.Y. Sup. Ct. 1955).

In order to preserve constitutionality of unlawful assembly statute, CLS Penal § 240.10, court would read into statute requirement that individual's actions must constitute incitement which is both directed towards and likely to produce imminent violent and tumultuous conduct. People v Biltsted, 150 Misc. 2d 872, 574 N.Y.S.2d 272, 1991 N.Y. Misc. LEXIS 441 (N.Y. City Crim. Ct. 1991).

Subpoenas issued for union membership lists were not overbroad under First Amendment right of association, despite primary focus of grand jury investigation on illegal activities of union leaders and stewards, where information was required to identify and locate potential witnesses, only alternative sources would be more intrusive search through personal records, random selection of names would not serve grand jury's purpose, and it was not demonstrated that organizational activity would be curtailed by delivery of lists. In re Grand Jury Subpoenas for Locals 17, 135, 257 & 608 of United Brotherhood of Carpenters & Joiners, 72 N.Y.2d 307, 532 N.Y.S.2d 722, 528 N.E.2d 1195, 1988 N.Y. LEXIS 1659 (N.Y.), cert. denied, 488 U.S. 966, 109 S. Ct. 492, 102 L. Ed. 2d 529, 1988 U.S. LEXIS 5200 (U.S. 1988).

2. —Disorderly conduct

Where it was shown that the defendant addressed a crowd of between 75 and 80 people, both colored and white, which blocked the sidewalk forcing pedestrians to walk in the street, making disparaging remarks about the Mayor of the city, the President of the United States and the American Legion, that he urged the colored people to rise up and fight for equal rights which caused excitement and angry mutterings, that the crowd was restless and getting to a point where it would be unruly, that one of the officers present asked the defendant twice to stop and finally arrested him for violating former § 722 subsection 2 of the Penal Law, dealing with disorderly conduct the defendant's conviction was not an unconstitutional suppression of the right to free speech. People v Feiner, 300 N.Y. 391, 91 N.E.2d 316, 300 N.Y. (N.Y.S.) 391, 1950 N.Y. LEXIS 859 (N.Y. 1950), aff'd, 340 U.S. 315, 71 S. Ct. 303, 95 L. Ed. 295, 1951 U.S. LEXIS 2249 (U.S. 1951).

Where defendants were charged with violating Penal Law former § 722, subd 2 and 3, providing that any person who acts in such manner as to annoy, disturb, interfere with, obstruct, or be offensive to others, or who congregates with others on a public street and refuses to move on when ordered by the police, is guilty of disorderly conduct, and there was evidence that the defendants with the purpose of protesting against alleged racial discrimination in building trades unions at a housing project, engaged in picketing, placed themselves on the ground in the path of oncoming cement trucks, and refused to move when they were informed by police officers that they were blocking the lawful delivery of concrete to the construction site, and that at the time of such occurrence the number of pedestrians in the area increased from about 100 to about 200, a conviction under such statute was sustained by the Court of Appeals which held: (1) that the rights of the defendants were not violated as against their contention that their conduct was protected as acts of free expression, and (2) that Penal Law former § 722 was not unconstitutional as applied to them. People v Penn, 16 N.Y.2d 581, 260 N.Y.S.2d 847, 208 N.E.2d 789, 1965 N.Y. LEXIS 1374 (N.Y.), reh'g denied, 16 N.Y.2d 883, 1965 N.Y. LEXIS 2364 (N.Y. 1965), cert. denied, 383 U.S. 969, 86 S. Ct. 1275, 16 L. Ed. 2d 309, 1966 U.S. LEXIS 2895 (U.S. 1966).

Former section 722 of the Penal Law, relating to disorderly conduct, is not unconstitutional in that it deprives the defendant of his liberty of assembly, freedom of speech and of the press, and his liberty to worship according to the dictates of his conscience. People v Hussock, 6 Misc. 2d 182, 23 N.Y.S.2d 520, 1940 N.Y. Misc. LEXIS 1346 (N.Y. Spec. Sess. 1940), cert. denied, 312 U.S. 659, 61 S. Ct. 733, 85 L. Ed. 1107, 1941 U.S. LEXIS 887 (U.S. 1941).

3. —Picketing or demonstrating

New York City charter provisions prohibiting the carrying of placards in city parks without a permit, are permissible minor infringement of constitutional provisions in art 1 § 8 and this section and a conviction for carrying without permit the placards criticizing a former British premier upon the occasion of his visit to such park, is upheld. People v Nahman, 298 N.Y. 95, 81 N.E.2d 36, 298 N.Y. (N.Y.S.) 95, 1948 N.Y. LEXIS 806 (N.Y. 1948).

Peaceful picketing cannot be dogmatically equated with the constitutionally protected freedom of speech. Lewis v American Federation of Television & Radio Artists, 34 N.Y.2d 265, 357 N.Y.S.2d 419, 313 N.E.2d 735, 1974 N.Y. LEXIS 1507 (N.Y.), cert. denied, 419 U.S. 1093, 95 S. Ct. 688, 42 L. Ed. 2d 687 (U.S. 1974).

Court properly granted injunction limiting teachers' union from picketing annual "Work Appreciation for Youth" dinners where interest in plaintiff organization in protecting its residents, emotionally-disturbed boys, from exposure to conflict which could cause them emotional harm was significant and unrelated to content of speech. Children's Village v Greenburgh Eleven Teachers' Union Fed'n of Teachers, Local 1532, 249 A.D.2d 433, 671 N.Y.S.2d 504, 1998 N.Y. App. Div. LEXIS 4250 (N.Y. App. Div. 2d Dep't 1998).

Defendant union had the right to picket peacefully at plaintiff's place of business for organizational purposes, even though it did not represent plaintiff's employees: but it was enjoined from representing that plaintiff's employees were on strike. Cornell Beverages, Inc. v Engar, 3 Misc. 2d 526, 150 N.Y.S.2d 497, 1956 N.Y. Misc. LEXIS 2080 (N.Y. Sup. Ct. 1956).

Temporary restraining order issued to protect public from threatened massive demonstration intended to shut down airport to protest supersonic aircraft landings at airport would include injunction against one of the architects of the demonstration, despite such individual's assertion that his presence at demonstration was necessary to insure that demonstration proceeded reasonably and properly. Port Authority of New York & New Jersey v SST Concorde Alert Program, 90 Misc. 2d 295, 394 N.Y.S.2d 364, 1977 N.Y. Misc. LEXIS 2044 (N.Y. Sup. Ct. 1977).

Temporary restraining order would be issued to protect public from threatened massive demonstration which was intended to shut down airport to protest supersonic aircraft landings at such airport, in view of facts that airport was one of the largest international airports in the world, that threatened demonstration would have severe impact upon air traffic safety and emergency vehicle access to airport, and that planned demonstration would create massive safety and traffic problems for innocent residents of surrounding community. Port Authority of New York & New Jersey v SST Concorde Alert Program, 90 Misc. 2d 295, 394 N.Y.S.2d 364, 1977 N.Y. Misc. LEXIS 2044 (N.Y. Sup. Ct. 1977).

Manifestation and physical projection of widespread feeling within community opposed to supersonic aircraft landings at

airport was protected under First Amendment of United States Constitution, but such right was not absolute. Port Authority of New York & New Jersey v SST Concorde Alert Program, 90 Misc. 2d 295, 394 N.Y.S.2d 364, 1977 N.Y. Misc. LEXIS 2044 (N.Y. Sup. Ct. 1977).

Defendants, members of an organization of militant homosexuals dedicated to the advancement of homosexual interests, are permanently enjoined from picketing at the residential home of plaintiff in protest over newspaper opinion article written by plaintiff opposing the enactment of a "gay-rights" bill, since, where picketing of a residential home of a private citizen occurs to advance a social goal as opposed to picketing in a labor dispute or picketing of a public official, the private homeowner's right of privacy, to keep the family home peaceful and free of unwanted disturbance, must prevail over the rights of the picketers in exercising free speech. The fact that the public streets have traditionally been used as a public forum does not grant residential picketers the right to violate the sanctity of the private home, which can be protected from threatening picketers and demonstrators. Walinsky v Kennedy, 94 Misc. 2d 121, 404 N.Y.S.2d 491, 1977 N.Y. Misc. LEXIS 2678 (N.Y. Sup. Ct. 1977).

Defendants, members of an organization of militant homosexuals dedicated to the advancement of homosexual interests, are permanently enjoined from picketing at the residential home of plaintiff in protest over a newspaper opinion article written by plaintiff opposing the enactment of a "gay-rights" bill, since the coercive pressures brought against a private individual such as plaintiff near his family home by social protestors attempting to change his views on an important social issue by intimidation involving an emotional confrontation rather than "pure speech", fraught with danger and threatening the peace and tranquility of the entire neighborhoods, cannot be sanctioned. Walinsky v Kennedy, 94 Misc. 2d 121, 404 N.Y.S.2d 491, 1977 N.Y. Misc. LEXIS 2678 (N.Y. Sup. Ct. 1977).

Defendants, members of an organization of militant homosexuals dedicated to the advancement of homosexual interests, are permanently enjoined from picketing at the residential home of plaintiff in protest over a newspaper opinion article written by plaintiff opposinging the enactment of a "gay-rights" bill, since more appropriate alternative demonstration sites such as plaintiff's law office or the newspaper offices are available and would provide a greater public forum for defendants. Only by prohibition can plaintiff's right to privacy be protected. The fact that defendants sought picket at plaintiff's home rather than at alternate sites is evidence of the impermissible attempt to force him to change his views rather than to persuade him by force of logic to do so. Walinsky v Kennedy, 94 Misc. 2d 121, 404 N.Y.S.2d 491, 1977 N.Y. Misc. LEXIS 2678 (N.Y. Sup. Ct. 1977).

4. Right to petition government

In an action challenging the state's provisions for financing public schools set forth in Educ Law § 2022 (provision for local district financing), and Educ Law § 3602 (apportionment of state aid) as violating the equal protection clause of the Constitution and the education clause of the State Constitution in that the system results in grossly disparate financial support in the school districts, the present statutory provisions for allocation of state aid to local school districts for the maintenance and support of public elementary and secondary education would be declared not violative of the equal protection clause of either the Federal or State Constitution, and would be declared constitutional under the education article of the State Constitution, notwithstanding disparities in per pupil expenditures among the state's school districts resulting largely from the differences in the revenue available for educational purposes in consequence of unequal real property tax bases or unequal demands on local revenue. Applying the rational basis standard of equal protection review, no impermissible discrimination against pupils in the less property-wealthy districts was found, there being a rational relationship to a legitimate state purpose, (the permission and encouragement of participation in and control of public schools at the local district level), nor did the present school finance system discriminate against large city school districts, since any inequalities existing in cities are the product of demographic, economic and political factors intrinsic to the cities themselves, and cannot be attributed to legislative action or inaction. Bd. of Educ. v Nyquist, 57 N.Y.2d 27, 453 N.Y.S.2d 643, 439 N.E.2d 359, 1982 N.Y. LEXIS 3535 (N.Y. 1982), app. dismissed, 459 U.S. 1138, 103 S. Ct. 775, 74 L. Ed. 2d 986, 1983 U.S. LEXIS 3048 (U.S. 1983).

The exercise of the right to petition the governor under this section, to reopen a criminal case, and the printing of a part of such petition in a newspaper, is not a basis for a libel suit against the newspaper, by the district attorney who tried the case. Tracy v Wm. J. Kline & Son, Inc., 274 A.D. 149, 81 N.Y.S.2d 1, 1948 N.Y. App. Div. LEXIS 3030 (N.Y. App. Div. 1948).

CLS Town § 81 does not unconstitutionally abridge people's right to petition government for redress of grievances. Greene v Town Bd., Warrensburg, 159 A.D.2d 781, 552 N.Y.S.2d 62, 1990 N.Y. App. Div. LEXIS 2201 (N.Y. App. Div. 3d Dep't), app. dismissed, 76 N.Y.2d 771, 559 N.Y.S.2d 984, 559 N.E.2d 678, 1990 N.Y. LEXIS 1336 (N.Y. 1990), cert. denied, 498 U.S. 941, 111 S. Ct. 348, 112 L. Ed. 2d 313, 1990 U.S. LEXIS 5430 (U.S. 1990).

Plaintiffs, challenging validity of legislation (L 1995 ch 119 §§ 13 and 16) affecting retirement benefits to be paid to former public employees under CLS Retire & S S §§ 78 and 378, were not entitled to preliminary injunction on basis of their contention that legislation improperly conditioned receipt of benefits on wavier of their constitutional right to petition courts for redress, since legislation merely required, as condition of plaintiffs' exercise of right to bring suit, that they forfeit certain monetary benefits, and such detriment could be fully redressed by monetary award. McCall v State, 215 A.D.2d 1, 632 N.Y.S.2d 725, 1995 N.Y. App. Div. LEXIS 10677 (N.Y. App. Div. 3d Dep't 1995).

Liberal interpretation is to be given to all laws passed in furtherance of this section in order to preserve the rights of people to petition the government. Potash v Molik, 35 Misc. 2d 1, 230 N.Y.S.2d 544, 1962 N.Y. Misc. LEXIS 2913 (N.Y. Sup. Ct.), aff'd, 17 A.D.2d 111, 232 N.Y.S.2d 993, 1962 N.Y. App. Div. LEXIS 7911 (N.Y. App. Div. 4th Dep't 1962).

A guideline issued by the Administrative Judge of the Civil Court of the City of New York, created and prescribed for the court without legislative sanction, which requires a tenant to make a deposit of rents as a condition to the signing of an order to show cause to open a default judgment against him, is a denial of defendant's right to be heard in defense of the claim made against him in violation of his right to peacefully petition the government and to due process and equal protection of the laws under the United States and New York Constitutions (US Const, 5th, 14th Amdts; NY Const, art I, §§ 6, 9, 11) and, notwithstanding the fact that the guideline specifically excludes deposits into court in matters where the tenant alleges lack of service of process or payment of rent, is illegal in any situation, since the court becomes a rent collector, even before it is determined whether or not the rent is due and whether or not there was jurisidiction in the first instance. Parkway Co. v Washington, 97 Misc. 2d 881, 412 N.Y.S.2d 757, 1979 N.Y. Misc. LEXIS 2013 (N.Y. Civ. Ct. 1979).

A petition served upon the State by certified mail would be dismissed without prejudice to the re-serving of the petition in accordance with CPLR §§ 403(c), 307, where the requirement that the notice of petition be delivered in person to an Assistant Attorney General at an office of the Attorney General or to the Attorney General within the State in order to effect service upon the State properly did not unconstitutionally infringe upon the citizen's right to petition the government for a redress of grievances inasmuch as the requirement, although regulating the right of the citizen to institute a lawsuit against the State, was minimal in comparison to the important governmental interest which was protected by insuring that the State, through its counsel, be notified of lawsuits brought against it, and where the sending of the petition by certified mail was insufficient to effect service upon the State respondents. Pickering v Flacke, 115 Misc. 2d 264, 453 N.Y.S.2d 1016, 1982 N.Y. Misc. LEXIS 3671 (N.Y. Sup. Ct. 1982).

5. Requirement of judicial proceedings to grant of divorce

Indigent parties in divorce proceedings had no constitutional due process or equal protection right to appointed counsel. Menin v Menin, 79 Misc. 2d 285, 359 N.Y.S.2d 721, 1974 N.Y. Misc. LEXIS 1647 (N.Y. Sup. Ct. 1974), aff'd, 48 A.D.2d 904, 372

N.Y.S.2d 985, 1975 N.Y. App. Div. LEXIS 10171 (N.Y. App. Div. 2d Dep't 1975).

In view of this section rabbinical divorce granted by rabbi in this state was void and second marriage contracted after such divorce was bigamous. In re Spiegel, 24 F.2d 605, 1928 U.S. Dist. LEXIS 1003 (D.N.Y. 1928).

6. —Divorce obtained by false evidence

The public policy expressed in this section that no divorce should be granted otherwise than by judicial proceedings is paramount to the interests of an innocent second wife who marries a party to a prior fraudulent divorce, obtained upon collusive and false evidence of the wife's misconduct, and there being children of the first marriage. Furst v Furst, 78 N.Y.S.2d 608, 191 Misc. 699, 1948 N.Y. Misc. LEXIS 2285 (N.Y. Sup. Ct. 1948), aff'd in part and rev'd in part, 275 A.D. 991, 91 N.Y.S.2d 202, 1949 N.Y. App. Div. LEXIS 5359 (N.Y. App. Div. 1949).

7. Prohibition against lotteries, pool-selling, book-making, etc.

General public policy against wagering would not overcome incontestability provision of life insurance policy, so as to permit insurer to avoid liability on ground that beneficiary had no insurable interest in insured's life at time policy was issued, since such policy is not void ab initio and beneficiary could justifiably believe that, if he paid premiums and incontestability period elapsed without challenge to his insurable interest, policy would be enforced; if insurer doubts beneficiary's interest, burden rests on it to investigate in timely manner or ignore matter at its peril. New England Mut. Life Ins. Co. v Caruso, 73 N.Y.2d 74, 538 N.Y.S.2d 217, 535 N.E.2d 270, 1989 N.Y. LEXIS 193 (N.Y. 1989).

Former section 53 of the Village Law, requiring the trustees of a village to proceed by lot in choice of a candidate to fill a vacancy on the board as between candidates receiving the greatest number of votes and tied for election, does not contravene Art. I § 9 of the State Constitution as resulting in a lottery, nor does it conflict with Art. IX § 9 respecting election or appointment of local officers. Petition of Devoe, 11 A.D.2d 602, 200 N.Y.S.2d 610, 1960 N.Y. App. Div. LEXIS 9966 (N.Y. App. Div. 3d Dep't 1960).

Charitable organization which sponsored raffle could not be compelled to award winning prize or value thereof where it was uncontroverted that raffle of new car did not fall within exceptions to prohibitions against illegal gambling under CLS NY Const Art I § 9(2), and raffle, in which "contribution" of $10 purchased 5 chances to win car, constituted lottery proscribed by CLS Penal § 225.00(10); under circumstances, raffle constituted illegal contract in violation of CLS Gen Oblig § 5-417 and was void and unenforceable. Harris v Economic Opportunity Comm'n, Inc., 171 A.D.2d 223, 575 N.Y.S.2d 672, 1991 N.Y. App. Div. LEXIS 13739 (N.Y. App. Div. 2d Dep't 1991).

State was entitled to summary judgment in action alleging breach of contract and negligence brought by claimant, who maintained that he won $10 million dollar prize for "pick six" lottery held on July 17, 1993, even though he filled out and mailed to Division of Lottery application to participate in Division's subscription program, since it was undisputed that he did not receive his confirmation notice until after July 17, 1993 drawing, there was no record of his subscription in Division's computer files immediately subscription application was date-stamped as received by Division 4 days after drawing in question. Ramesar v State, 224 A.D.2d 757, 636 N.Y.S.2d 950, 1996 N.Y. App. Div. LEXIS 810 (N.Y. App. Div. 3d Dep't), app. denied, 88 N.Y.2d 811, 649 N.Y.S.2d 378, 672 N.E.2d 604, 1996 N.Y. LEXIS 3037 (N.Y. 1996).

As commercialized Las Vegas-style gambling authorized by the 1993 tribal-state compact and the 1999 amendment to it was inconsistent with New York's constitutional and statutory restrictions on gambling, the governor violated the separation of powers doctrine in executing the compact. Saratoga County Chamber of Commerce Inc. v Pataki, 293 A.D.2d 20, 740 N.Y.S.2d 733, 2002 N.Y. App. Div. LEXIS 4215 (N.Y. App. Div. 3d Dep't 2002), aff'd in part, modified, 100 N.Y.2d 801, 766 N.Y.S.2d 654, 798 N.E.2d 1047, 2003 N.Y. LEXIS 1470 (N.Y. 2003).

Lottery provision of above section does not forbid drawing to determine order of granting liquor license applications or position of candidates on ballot where such drawing is authorized by statute, since there is no element of gambling in connection therewith. Daub v New York State Liquor Authority, 45 Misc. 2d 833, 257 N.Y.S.2d 655, 1965 N.Y. Misc. LEXIS 2233 (N.Y. Sup. Ct. 1965).

State-operated lottery exception contained in CLS NY Const Art I § 9 sanctions only lotteries operated by New York State and does not sanction sale of tickets for lotteries operated by sister states. People v Kim, 154 Misc. 2d 346, 585 N.Y.S.2d 310, 1992 N.Y. Misc. LEXIS 261 (N.Y. City Crim. Ct. 1992).

Attorney General had authority to bring proceeding under CLS Exec § 63(12) to enjoin foreign corporation legally licensed to operate casino offshore from offering gambling to Internet users in New York in violation of CLS NY Const Art I § 9(1), which expressly prohibits any gambling not authorized by legislature. People v World Interactive Gaming Corp., 185 Misc. 2d 852, 714 N.Y.S.2d 844, 1999 N.Y. Misc. LEXIS 425 (N.Y. Sup. Ct. 1999).

Video lottery gaming, as implemented by the Division of Lottery, constitutes a valid, state-operated lottery and, thus, falls within the exception of such lotteries from the general ban on gambling in N.Y. Const. art. I, § 9(1); however, the requirement in 2001 N.Y. Laws 383, pt. C that a portion of video lottery terminal (VLT) vendor fees be dedicated to breeding funds and enhanced purses violates the constitutional mandate that "the net proceeds" of state-operated lotteries be applied exclusively to or in aid or support of education in this state as the Legislature may prescribe. N.Y. Const. art. I, § 9(1). Moreover, severing the portion of part C directing reinvestment does not cure the constitutional defect because severance would result only in an inflated vendor fee; thus, while video lottery gaming itself is a "lottery" within the meaning of N.Y. Const. art. I, § 9, the entirety of 2001 N.Y. Laws 383, pt. C is unconstitutional due to the impermissible revenue distribution scheme set forth therein. Dalton v Pataki, 11 A.D.3d 62, 780 N.Y.S.2d 47, 2004 N.Y. App. Div. LEXIS 9338 (N.Y. App. Div. 3d Dep't 2004), aff'd in part, modified, 5 N.Y.3d 243, 802 N.Y.S.2d 72, 835 N.E.2d 1180, 2005 N.Y. LEXIS 1059 (N.Y. 2005).

2001 N.Y. Laws 383, pt. D is constitutional because New York retains sufficient control over the operation of the multistate lottery within its borders to meet the constitutional requirement that lotteries be "operated by the state," N.Y. Const. art. I, § 9(1); the net proceeds generated by the multistate lottery remain in New York and are dedicated "exclusively to or in aid or support of education in this state" as required by N.Y. Const. art. I, § 9(1). Dalton v Pataki, 11 A.D.3d 62, 780 N.Y.S.2d 47, 2004 N.Y. App. Div. LEXIS 9338 (N.Y. App. Div. 3d Dep't 2004), aff'd in part, modified, 5 N.Y.3d 243, 802 N.Y.S.2d 72, 835 N.E.2d 1180, 2005 N.Y. LEXIS 1059 (N.Y. 2005).

Fantasy sports contests (IFS) were games determined by skill and chance, and IFS therefore constituted gambling within the prohibition in N.Y. Const. art. I, § 9; N.Y. Racing, Pari-Mutuel Wagering and Breeding Law § 1400 et seq., was unconstitutional to the extent that it authorized IFS, but not to the extent it defined gambling in the penal law. White v Cuomo, 62 Misc. 3d 877, 87 N.Y.S.3d 805, 2018 N.Y. Misc. LEXIS 5158 (N.Y. Sup. Ct. 2018), reh'g denied, 2019 N.Y. Misc. LEXIS 4811 (N.Y. Sup. Ct. Mar. 5, 2019), rev'd, in part, modified, 181 A.D.3d 76, 118 N.Y.S.3d 775, 2020 N.Y. App. Div. LEXIS 956 (N.Y. App. Div. 3d Dep't 2020).

The policy of the New York gambling laws is that the mere player or bettor is not criminally liable but anyone, who, in some capacity other than that of a player, operates, promotes or advances any gambling activity is guilty of a crime and such is in accord with Federal Code § 1084 making it unlawful to use a telephone to transmit wagering information. United States v Borgese, 235 F. Supp. 286, 1964 U.S. Dist. LEXIS 9598 (S.D.N.Y. 1964), vacated, 372 F.2d 950, 1967 U.S. App. LEXIS 7329 (2d Cir. N.Y. 1967).

8. Regulation of pari-mutuel betting on horse races

A law, enacted in 1940 permitting the selling of "daily-double" tickets on horse races without the use of mechanical or electrical vending devices or without requiring the computation of pool totals by a totalizer, is not a violation of this section. Mellman v

Metropolitan Jockey Club, Inc., 89 N.Y.S.2d 64, 195 Misc. 121, 1949 N.Y. Misc. LEXIS 2220 (N.Y. Sup. Ct. 1949).

9. —Effect of town ordinances on horse race tracks

Neither lessor of land on which quarter horse racing track was to be constructed, nor party having license from state racing board, were required to obtain building permit and certificate of occupancy pursuant to town zoning ordinance. Brookhaven v Parr Co. of Suffolk, Inc., 76 Misc. 2d 378, 350 N.Y.S.2d 529, 1973 N.Y. Misc. LEXIS 1492 (N.Y. Sup. Ct. 1973), modified, 47 A.D.2d 554, 363 N.Y.S.2d 640, 1975 N.Y. App. Div. LEXIS 8625 (N.Y. App. Div. 2d Dep't 1975).

10. —Off-track betting

Penal Law, former § 986 continues in effect outside of race tracks and operates to render transmission of bets to a race track unlawful, notwithstanding amendment to this section effective January 1, 1940, which excepts "pari-mutuel betting on horse races as may be prescribed by legislature" from general constitutional prohibition against gambling, and L 1940 c 254, § 2, enacted pursuant thereto, which permits pari-mutuel betting only at a race track. Application of Stewart, 22 N.Y.S.2d 164, 174 Misc. 902, 1940 N.Y. Misc. LEXIS 2090 (N.Y. Sup. Ct.), aff'd, 260 A.D. 979, 23 N.Y.S.2d 226, 1940 N.Y. App. Div. LEXIS 5677 (N.Y. App. Div. 1940).

Former section 986 of the Penal Law prohibiting receipt of money for bets does not apply to pari-mutuel betting at a race track, but the forwarding of bets to the pari-mutuel machines from outside the track by those who are not patrons is illegal. People v Hebert, 117 N.Y.S.2d 415, 203 Misc. 173, 1952 N.Y. Misc. LEXIS 2031 (N.Y. Magis. Ct. 1952).

The fact that, under this section, only the State Legislature may authorize pari-mutuel betting on horse races does not make it illegal or unconstitutional to submit to the voters of New York City a proposed local law for appointment of a committee to formulate a plan for conducting off-track pari-mutuel betting on horse races and report its recommendations for enactment of such legislation. Young v Wagner, 41 Misc. 2d 230, 245 N.Y.S.2d 180, 1963 N.Y. Misc. LEXIS 1502 (N.Y. Sup. Ct.), aff'd, 19 A.D.2d 825, 243 N.Y.S.2d 1014, 1963 N.Y. App. Div. LEXIS 3044 (N.Y. App. Div. 1st Dep't 1963).

A scheme of reasonable revenue return provided to the state in the off-track betting laws, and the fact that distribution to other entities are provided for, does not constitute a violation of New York Constitution Article 1, § 9. Finger Lakes Racing Ass'n v New York State Off-Track Pari-Mutuel Betting Comm'n, 65 Misc. 2d 946, 320 N.Y.S.2d 801, 1971 N.Y. Misc. LEXIS 1656 (N.Y. Sup. Ct. 1971), aff'd, 30 N.Y.2d 207, 331 N.Y.S.2d 625, 282 N.E.2d 592, 1972 N.Y. LEXIS 1394 (N.Y. 1972).

11. Authorization of games of chance by localities

This section specifically authorizes the submission of the question of bingo games "at a general or special election." Hence, an ordinance providing for the conduct of such games could be passed upon in an even-numbered year. Buffalo v Lawley, 6 A.D.2d 66, 175 N.Y.S.2d 547, 1958 N.Y. App. Div. LEXIS 5469 (N.Y. App. Div. 4th Dep't 1958).

Under the January 1, 1958, amendment of this section, and implementing legislation, no bingo, free or otherwise, is legally permissible unless the local area votes its approval. Fedin v Hanifin, 22 Misc. 2d 570, 198 N.Y.S.2d 453, 1959 N.Y. Misc. LEXIS 3287 (N.Y. Sup. Ct. 1959).

In addition to the elements of consideration, chance, and prize traditionally employed by New York's case law in defining the term "lottery" for law enforcement purposes, N.Y. Const. art. I, § 9(1) sanctions only those state-run lotteries that involve tickets and multiple participation. Dalton v Pataki, 11 A.D.3d 62, 780 N.Y.S.2d 47, 2004 N.Y. App. Div. LEXIS 9338 (N.Y. App. Div. 3d Dep't 2004), aff'd in part, modified, 5 N.Y.3d 243, 802 N.Y.S.2d 72, 835 N.E.2d 1180, 2005 N.Y. LEXIS 1059 (N.Y. 2005).

Where an Indian tribe argued that it had sovereign immunity with respect to state anti-gaming and environmental laws that would have otherwise applied to the tribe's construction and operation of a casino on a parcel of nonreservation property, the tribe was permanently enjoined from developing a casino that did not comply with New York law because (1) the tribe had not obtained authority to conduct gaming, had not applied for permits required under N.Y. Envtl. Conserv. Law § 17-0807(4) and other environmental laws, and had not commenced an environmental review that was necessary under N.Y. Envtl. Conserv. Law § 8-0109(2) to obtain the required permits; (2) the aboriginal title held by the tribe to the land at issue had been extinguished; (3) the tribe could not conduct gaming pursuant to 18 U.S.C.S. § 1166(c) insofar as the tribe was not recognized by the Bureau of Indian Affairs as required by 25 U.S.C.S. § 2703(5)(A) of the Indian Gaming Regulatory Act and the property at issue did not constitute Indian land within the meaning of 25 U.S.C.S. §§ 2703(4) and 2710(d)(1); and (4) the construction and operation of the proposed casino would have had severe disruptive consequences to the administration of governmental affairs and the health, safety, and long-settled expectations of the residents of the town. New York v Shinnecock Indian Nation, 523 F. Supp. 2d 185, 2007 U.S. Dist. LEXIS 80443 (E.D.N.Y. 2007), vacated, 686 F.3d 133, 2012 U.S. App. LEXIS 12948 (2d Cir. N.Y. 2012).

12. —Organizations which may conduct such games

Those holding a license to conduct bingo games are cast in the role of trustees and must be held to strict accountability for all funds taken in. In re Disabled American Veterans, 41 Misc. 2d 206, 246 N.Y.S.2d 234, 1963 N.Y. Misc. LEXIS 1804 (N.Y. Sup. Ct. 1963).

In a small claims action in which plaintiff sought to recover the winning prize money of $1,400 awarded by a military veteran's organization to a non-party, the court found that the organization's raffle was permitted under N.Y. Const. art. I, § 9. Paz v Goldstein, 961 N.Y.S.2d 913, 39 Misc. 3d 764, 2013 N.Y. Misc. LEXIS 1090 (N.Y. Dist. Ct. 2013).

13. Standing to challenge statutes or regulations governing betting, book-making or the like

Individual residents' challenges to the fiscal consequences of State actions involving an agreement that, inter alia, allowed gambling at certain facilities lacked merit because the towns' constitutional home rule authority was not violated, the provision was not an illegal vote-buying agreement, and the legislation was not invalid. Matter of Town of Verona v Cuomo, 136 A.D.3d 36, 22 N.Y.S.3d 241, 2015 N.Y. App. Div. LEXIS 9341 (N.Y. App. Div. 3d Dep't 2015), app. denied, 27 N.Y.3d 908, 56 N.E.3d 902, 36 N.Y.S.3d 622, 2016 N.Y. LEXIS 1671 (N.Y. 2016).

Trustee in bankruptcy of a bookmaker and betting commissioner cannot invoke question of the constitutionality of penal statutes where neither he nor his bankrupt is a person whose rights have been prejudiced or impaired thereby. Andrews v Empire City Racing Ass'n, 9 N.Y.S.2d 987, 170 Misc. 338, 1939 N.Y. Misc. LEXIS 1540 (N.Y. Sup. Ct. 1939).

Constitutionality of former § 986 of the Penal Law dealing with pool-selling, book-making, bets and wagers et cetera limiting penalty for its violation to civil action can be raised only by one who has sustained a loss or has a fundamental right violated, and so city police department may not raise constitutionality of section. People v Mumford, 12 N.Y.S.2d 925, 171 Misc. 397, 1939 N.Y. Misc. LEXIS 1973 (N.Y. Magis. Ct. 1939).

14. Taxation of betting or gambling

A tax on admissions to any race track is not a tax on betting, and is not affected by Article 1, § 9 of the State Constitution. Roosevelt Raceway, Inc. v County of Nassau, 18 N.Y.2d 30, 271 N.Y.S.2d 662, 218 N.E.2d 539, 1966 N.Y. LEXIS 1275 (N.Y. 1966), app. dismissed, 385 U.S. 453, 87 S. Ct. 614, 17 L. Ed. 2d 510, 1967 U.S. LEXIS 2586 (U.S. 1967).

While State of New York enjoys privilege of taxing incomes from whatever source derived, whether legal or illegal, there is no clear language used to delegate such power to New York City, or to allow municipal corporations to share in proceeds of illegal and immoral businesses by levying gross business taxes. Application of Bromberger, 62 N.Y.S.2d 47, 187 Misc. 593, 1946 N.Y. Misc. LEXIS 2180 (N.Y. Sup. Ct. 1946).

15. Recovery of money illegally gambled; enforcement of gambling debts

Omission of seized moneys from forfeiture provisions of Penal Law, former §§ 977, 978 and 979 does not make gamblers' possession lawful. Hofferman v Simmons, 290 N.Y. 449, 49

N.E.2d 523, 290 N.Y. (N.Y.S.) 449, 1943 N.Y. LEXIS 1083 (N.Y. 1943).

The general prohibition against gambling found in this section does not prevent enforcement in New York of a gambling debt validly contracted and enforceable in the jurisdiction where it arose. Intercontinental Hotels Corp. v Golden, 15 N.Y.2d 9, 254 N.Y.S.2d 527, 203 N.E.2d 210, 1964 N.Y. LEXIS 831 (N.Y. 1964).

In action by trustee in bankruptcy of a bookmaker and betting commissioner at race track of defendant association to recover a sum of money allegedly received by the association from the bankrupt in violation of this section and Penal Law, former §§ 973 and 986, against bookmaking, bookmaker and defendant association were in pari delicto and plaintiff was not entitled to restitution under Penal Law, former § 986, as it existed prior to amendment by L 1934 c 233. Andrews v Empire City Racing Ass'n, 9 N.Y.S.2d 987, 170 Misc. 338, 1939 N.Y. Misc. LEXIS 1540 (N.Y. Sup. Ct. 1939).

16. Miscellaneous

By failure to pass legislation explicitly abolishing the Bingo Control Commission or to specifically provide therefor in budget, though not specifically appropriating any funds for the Commission, the legislature could be deemed to have expressed an intent not to eliminate the Commission or the office of chairman, and chairman was entitled to his salary. Ball v State, 41 N.Y.2d 617, 394 N.Y.S.2d 597, 363 N.E.2d 323, 1977 N.Y. LEXIS 1971 (N.Y. 1977).

The assessment of a percentage of "breakage" at racetracks to finance operations of the Agriculture and New York State Horse Breeding Development Fund is levied ostensibly to achieve a public purpose and it could not be said that "government" was not being supported by the assessment. Saratoga Harness Racing Ass'n v Agric. & New York State Horse Breeding Dev. Fund, 27 A.D.2d 631, 276 N.Y.S.2d 52, 1966 N.Y. App. Div. LEXIS 2710 (N.Y. App. Div. 3d Dep't 1966), aff'd, 22 N.Y.2d 119, 291 N.Y.S.2d 335, 238 N.E.2d 730, 1968 N.Y. LEXIS 1366 (N.Y. 1968).

Governor's distribution of form letters to individuals who volunteered in relief efforts, thanking them for their assistance in emergency situation, did not violate right to free election under CLS US Const Amend 1 and CLS NY Const Art I § 9. Schulz v Pataki, 272 A.D.2d 758, 708 N.Y.S.2d 177, 2000 N.Y. App. Div. LEXIS 5698 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 769, 722 N.Y.S.2d 473, 745 N.E.2d 393, 2000 N.Y. LEXIS 3805 (N.Y. 2000).

To the extent that it authorizes interactive fantasy sports contests, N.Y. Rac. Pari-Mut. Wag. & Breed. Law art. 14 permits gambling in violation of N.Y. Const. art. I, § 9. White v Cuomo, 181 A.D.3d 76, 118 N.Y.S.3d 775, 2020 N.Y. App. Div. LEXIS 956 (N.Y. App. Div. 3d Dep't 2020).

This section is not violated by creation of Agriculture and New York State Horse Breeding Development Fund in Chapter 103 Unconsolidated Laws § 55, Laws 1965, Ch 567 subd 2, since the State should derive additional revenue from the administration of that section. Saratoga Harness Racing Ass'n v Agric. & New York State Horse Breeding Dev. Fund, 51 Misc. 2d 591, 273 N.Y.S.2d 611, 1966 N.Y. Misc. LEXIS 1542 (N.Y. Sup. Ct.), modified, 27 A.D.2d 631, 276 N.Y.S.2d 52, 1966 N.Y. App. Div. LEXIS 2710 (N.Y. App. Div. 3d Dep't 1966).

CLS Unconsolidated Laws Ch 103 § 67, providing that no license shall be granted to any quarter horse track located within 50 miles of any existing track for any type of racing, except in Suffolk and Albany Counties where such license may be granted to any quarter horse track located more than 35 miles from any other existing track, does not deny equal protection to tracks located in Suffolk and Albany Counties, and passage of such statute was a valid exercise of the police power and of the power and authority of taxation given to the legislature by New York Constitution Article 1 § 9. Saratoga Harness Racing, Inc. v New York State Quarter Horse Racing Com., 74 Misc. 2d 1096, 347 N.Y.S.2d 613, 1972 N.Y. Misc. LEXIS 1261 (N.Y. Sup. Ct. 1972), aff'd, 42 A.D.2d 3, 344 N.Y.S.2d 95, 1973 N.Y. App. Div. LEXIS 4294 (N.Y. App. Div. 3d Dep't 1973).

Under Laws 1973 Ch 346, § 121, subd 4, racetrack which had interfacing agreement with regional off-track betting office prior to effective date of Laws 1973 Ch 346 § 24 was not entitled to accept interfacing with said office while another racetrack in same betting region was conducting a pari-mutuel race meeting within the region, nor to retain 4 percent of gross receipts of such interfacing pursuant to Laws 1972 Ch 534 § 3. Sullivan County Harness Racing Ass'n v Schenectady Off--Track Betting Com., 76 Misc. 2d 558, 351 N.Y.S.2d 56, 1973 N.Y. Misc. LEXIS 1533 (N.Y. Sup. Ct. 1973).

Symbiosis between state and racing association, a nonprofit corporation created by statute for the acquisition and operation of racetracks to enable state to derive reasonable revenue for support of government did not require the termination of state action relationship between state and association but only that the association refrain from acting in ways barred to state, that is, from denying those with whom it dealt that fair play and equality of opportunity encompassed in due process of law. Halpern v Lomenzo, 81 Misc. 2d 467, 367 N.Y.S.2d 653, 1975 N.Y. Misc. LEXIS 2408 (N.Y. Sup. Ct. 1975).

Emergency resolution of commissioner of health authorizing local officials to close any facilities in which high risk sexual activity takes place was not unconstitutional as applied to defendant in view of proof that high risk sexual activity connected with transmission of AIDS was taking place at defendant's bathhouse, and plaintiffs demonstrated compelling state interest in acting to preserve health of population that takes precedence over any constitutional rights of privacy and free association; remedy adopted by plaintiffs is least intrusive reasonably available remedy and privacy protection of sexual activity conducted in private home does not extend to commercial establishment. New York v New St. Mark's Baths, 130 Misc. 2d 911, 497 N.Y.S.2d 979, 1986 N.Y. Misc. LEXIS 2444 (N.Y. Sup. Ct.), aff'd, 122 A.D.2d 747, 505 N.Y.S.2d 1015, 1986 N.Y. App. Div. LEXIS 59275 (N.Y. App. Div. 1st Dep't 1986).

Oral agreement between plaintiff and defendant, relating to temporary transfer of plaintiff's lottery license, was against public policy and thus was unenforceable. Alsaedi v Alsaedi, 177 Misc. 2d 440, 676 N.Y.S.2d 778, 1998 N.Y. Misc. LEXIS 307 (N.Y. Civ. Ct. 1998).

Child has "freedom of association" right to maintain personal relations with nonbiologically related person with whom child has developed parent-like relationship. Webster v Ryan, 189 Misc. 2d 86, 729 N.Y.S.2d 315, 2001 N.Y. Misc. LEXIS 264 (N.Y. Fam. Ct. 2001).

2001 N.Y. Laws ch. 383, Parts B, C, and D were declared to be constitutional as casino gaming permitted by tribal-state compacts, video lottery gaming, and a multi-state lottery did not violate N.Y. Const. art. I, § 9, and the Indian Gaming Regulatory Act of 1988, 25 U.S.C.S. §§ 2701-2721; 18 U.S.C.S. §§ 1166-1168, did not preempt the area. Dalton v Pataki, 5 N.Y.3d 243, 802 N.Y.S.2d 72, 835 N.E.2d 1180, 2005 N.Y. LEXIS 1059 (N.Y.), cert. denied, 546 U.S. 1032, 126 S. Ct. 739, 163 L. Ed. 2d 571, 2005 U.S. LEXIS 8606 (U.S. 2005), cert. denied, 546 U.S. 1032, 126 S. Ct. 742, 163 L. Ed. 2d 571, 2005 U.S. LEXIS 8607 (U.S. 2005).

Town may establish safety award program for its employees but may not chose recipients by random drawing. Prior inconsistent opinions are superseded. 1986 Op State Compt No. 86-11.

Where plaintiffs sought to build a rabbinical college, to include on-campus housing for rabbinical students and their families, they established a violation of the free association clause of the New York Constitution where the challenged ordinances directly and substantially interfered with their associational rights because the laws completely barred the rabbinical college from the village by requiring that the college be accredited before it could obtain a special use permit, which could not happen under the challenged laws and where, even if it could be accredited, the prohibition on student family housing represented a substantial burden to plaintiffs' sincere religious beliefs. Congregation Rabbinical Coll. of Tartikov, Inc. v Vill. of Pomona, 280 F. Supp. 3d 426, 2017 U.S. Dist. LEXIS 201456 (S.D.N.Y. 2017), vacated, in part, rev'd, aff'd, 945 F.3d 83, 2019 U.S. App. LEXIS 37957 (2d Cir. 2019).

23. Commercial speech

Trial court erred in granting the State Land Title Association's petition to annul Insurance Regulation 208 because it had a

rational basis of clarifying a statute intended to prevent consumers from being required to subsidize unscrupulous exchanges of valuable things for real estate professionals, and that interest was unrelated to the suppression of free expression. Matter of New York State Land Tit. Assn., Inc. v New York State Dept. of Fin. Servs., 178 A.D.3d 611, 117 N.Y.S.3d 16, 2019 N.Y. App. Div. LEXIS 9413 (N.Y. App. Div. 1st Dep't 2019).

Agency Opinions

Analysis

1. Prohibition against lotteries, pool-selling, book-making, etc.
2. Regulation of pari-mutuel betting on horse races
3. —Effect of town ordinances on horse race tracks
4. —Off-track betting
5. Authorization of games of chance by localities
6. —Organizations which may conduct such games
7. Miscellaneous

1. Prohibition against lotteries, pool-selling, book-making, etc.

So-called option system of betting constitutes pool-selling and is violation of Penal Law, former § 986. 1934 N.Y. Op. Att'y Gen. No. 244.

The free distribution by a business corporation of Olympic Lottery tickets to promote sales or services may be subject to the provisions of General Business Law, § 369-e. 1978 NY Ops Atty Gen July 31.

All gambling is illegal in New York except as expressly authorized by the Constitution and statutes enacted thereunder. The proposed computer games are not lotteries within the constitutional and statutory definitions and would constitute illegal gambling activity. 1981 NY Ops Atty Gen Sept 8 (Formal).

Machine which dispenses lottery ticket only after insertion of money to pay for heart and stress test is illegal gambling scheme, notwithstanding fact that at one time purchase was not necessary to obtain lottery ticket. 1986 N.Y. Op. Att'y Gen. No. 86-27.

A proposal authorizing the Division of the Lottery to conduct a game in which bets are placed on the outcome of pro sports events would require an amendment to the State Constitution in order to be implemented. The Constitution, both through its specific bans on bookmaking and pool-selling and through its general ban on all forms of gambling not expressly authorized, forbids the kinds of gambling involved in the proposed sports betting game. N.Y. Op. Att'y Gen. No. 84-F1.

2. Regulation of pari-mutuel betting on horse races

3. —Effect of town ordinances on horse race tracks

Town zoning ordinances do not apply to the construction and location of a quarter horse race track under the jurisdiction of the New York State Racing and Wagering Board. 1973 NY Ops Atty Gen Sept 21 (formal).

4. —Off-track betting

Off-track betting corporation may not conduct harness race meeting. 1999 NY Ops Atty Gen F 99-1.

Betting on race tracks is illegal, penalty civil forfeiture. 1936 N.Y. Op. Att'y Gen. No. 331.

The New York State Racing and Wagering Board may approve a contract between New York State race tracks and the Connecticut Commission on Special Revenue providing for the closed circuit televising of races run in this State to off-track betting locations in Connecticut and the transmittal of information for betting purposes. Such approval must be conditioned on provision to New York State of reasonable revenue for the support of government as required by the State Constitution and as implemented by the Off-Track Pari-Mutuel Betting Law. 1974 NY Ops Atty Gen Aug 6 (formal).

5. Authorization of games of chance by localities

6. —Organizations which may conduct such games

The Dante Alighiere Lodge No. 436, Sons of Italy, an unincorporated association, non-profit in nature, which provides sickness, funeral, and death benefits for its members could apply for a license to conduct bingo. 1958 NY Ops Atty Gen June 17 (informal).

The Buffalo Convention Center Management Corporation is an authorized games of chance lessor under General Municipal Law, § 186(4)(8). 1980 NY Ops Atty Gen Dec. 29 (Formal).

A negative vote by the town electors on a townwide referendum regarding the conduct of bingo would have no effect upon the approval of the conduct of bingo by the village electors. 1958 NY Ops Atty Gen Mar 6 (informal).

The word "town," as used in subdivision 2 of this section means a "municipal corporation comprising the inhabitants within its boundaries," as defined in Town Law § 2. The Legislature may not define the term to mean less than the entire area of the town. 1958 NY Ops Atty Gen Jan 21.

A town ordinance permitting the playing of bingo would not affect the playing of bingo under an ordinance legally adopted by a village wholly within the town (General Municipal Law, § 477; Town Law, § 132); electors of the entire town are authorized to vote on a proposed town bingo ordinance (New York State Constitution, Art. I, § 9; General Municipal Law, § 478[2]). 1974 NY Ops Atty Gen May 22.

A town in which the licensing of games of chance has been authorized pursuant to General Municipal Law, § 188, may not delegate to a village within the town the enforcement duties of the chief legal officer of the town with respect to games of chance conducted in the village. 1980 NY Ops Atty Gen Sept 10 (formal).

Article 9-A of the General Municipal Law dealing with games of chance, does not permit the utilization of vending machines to dispense bell jar type gambling tickets or cards. 1990 N.Y. Op. Att'y Gen. No. F90-5.

Racing and Wagering Board may authorize use and distribution of electronic computer aide to assist in play of bingo, provided that game is played as described in proposal. 1999 NY Ops Atty Gen F 99-2.

7. Miscellaneous

A municipality may enact a local law or ordinance authorizing qualified organizations to conduct "limited period Bingo" without thereby authorizing the conduct of other forms of the game. NY Ops Atty Gen 85-F 17.

It is unlawful in the State of New York to raffle off a parcel of real estate. 1981 NY Ops Atty Gen Nov 13 (Formal).

The proposed Bingo Bucks advertising program is outside the scope of existing statutory authority. 1981 NY Ops Atty Gen Sept 21 (Formal).

The operation of video games that electronically simulate the play of card and dice games involving a material element of chance, with a pay-off consisting of extended play, constitutes gambling as defined under section 225.00 of the Penal Law. N.Y. Op. Att'y Gen. No. 85-12.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS Exec § 431; CLS Gen Mun §§ 185, 475, 477; CLS Tax § 1601.

Federal Aspects:

Right of the people peaceably to assemble and to petition the government for a redress of grievances, USCS Constitution, Amendment 1.

Lotteries, 18 USCS §§ 1301 et seq.

Obstruction of justice, 18 USCS § 1511.

Racketeer Influenced and Corrupt Organizations Act, 18 USCS §§ 1961 et seq.

Jurisprudences:

18 NY Jur 2d Charities § 86.

20 NY Jur 2d Constitutional Law §§ 3, 242, 269.

15 Am Jur 2d, Civil Rights § 19.

16 Am Jur 2d, Constitutional Law §§ 294, 323, 325, 353–355.

16A Am Jur 2d, Constitutional Law §§ 526-532.

24 Am Jur 2d, Divorce and Separation §§ 5, 6.

38 Am Jur 2d, Gambling §§ 10, 17.

7 Am Jur Legal Forms 2d, Constitutional Law § 27.

12 Am Jur Pl & Pr Forms (Rev ed), Gambling, Form 8.

8A Am Jur Pl & Pr Forms (Rev ed), Divorce and Separation, Forms 471 et seq.

19 Am Jur Proof of Facts 647, Unlawful Gambling Games.

Law Reviews:

Samuels, Legalization of gambling on sports events. 18 NY L F 897.

2 Federal Procedure, L Ed, Appeal, Certiorari and Review § 3:620.

6 Federal Procedure, L Ed, Civil Rights §§ 11:13, 11:70.

8 Federal Procedure, L Ed, Criminal Procedure §§ 22:17-22:20.

Annotations:

Public regulation and prohibition of sound amplifiers or loud speaker broadcasts in streets and other public places. 10 ALR2d 627.

Validity of government requirement of oath of allegiance of loyalty. 18 ALR2d 268.

Participation of student in demonstration on or near campus as warranting imposition or criminal liability for breach of peace, disorderly conduct, trespass, unlawful assembly, or similar offense. 32 ALR3d 551.

Propriety of conditioning probation or suspended sentence on defendant's refraining from political activity, protest, or the like. 45 ALR3d 1022.

Criminal liability of member or agent of private club or association, or of owner or lessor of its premises, for violation of state or local liquor or gambling laws thereon. 98 ALR3d 694.

Exclusion or expulsion from association or club as violation of state civil rights act. 38 ALR4th 628.

State lotteries: actions by ticketholders against state or contractor for state. 40 ALR4th 662.

State Lotteries: Actions by ticketholders or other claimants against state or contractor for state. 48 ALR6th 243.

Validity of adverse personnel action or adverse action affecting student's academic standing based on internet posting or expression, including social networking. 49 ALR6th 115.

Challenges to regulation of balloon signs or other inflated signs. 49 ALR6th 153.

Constitutionality, construction, and application of statute or regulatory action respecting political advertising—print media cases. 51 ALR6th 359.

Restrictive Covenants or Homeowners' Association Regulations restricting or prohibiting flags, signage, or the like on homeowner's property as restraint on free speech. 51 ALR6th 533.

Application, Recognition, or Consideration of Jewish Law by Courts in United States. 81 ALR6th 1.

Application, Recognition, or Consideration of Jewish Law by Courts in United States. 81 ALR6th 1.

Application, Recognition, or Consideration of Jewish Law by Courts in United States. 81 ALR6th 1.

Application, Recognition, or Consideration of Islamic Law by Courts in United States. 82 ALR6th 1.

Civil action for damages under 18 USCS § 1964(c) of the Racketeer Influenced and Corrupt Organizations Act (RICO, 18 USCS §§ 1961 et seq.) for injuries sustained by reason of racketeering activity. 70 ALR Fed 538.

The Supreme Court and the First Amendment right of association. 33 L Ed 2d 865.

Right of petition and assembly under Federal Constitution's First Amendment— Supreme Court cases. 86 L Ed 2d 758.

NYCRR Reference:

New York State racing and wagering board. 9 NYCRR §§ 4000.1 et seq.

Games of chance. 9 NYCRR §§ 5600.1 et seq.

Bingo. 9 NYCRR §§ 5800.1 et seq.

New York State lottery. 21 NYCRR §§ 2800.1 et seq.

CORRECTION LAW

Article
2. Department of Corrections and Community Supervision
6-C. Sex Offender Registration Act
23-A. Licensure and Employment of Persons Previously Convicted of One or More Criminal Offenses

HISTORY:
Add, Law, L 1909, ch 47, amd generally; amd, L 1929, ch 243, § 2, eff April 2, 1929; L 1929, ch 243, eff April 2, 1929.

ARTICLE 2 Department of Corrections and Community Supervision

Section
25. Mutual assistance by institutional and local fire fighting facilities.

HISTORY:
Add, L 1929, ch 243, § 4, eff April 2, 1929; amd, L 1970, ch 475, § 2, eff Jan 1, 1971; L 2011, ch 62, § 3 (Part C, Subpart A), eff March 31, 2011.

§ 25. Mutual assistance by institutional and local fire fighting facilities.

In cooperation with the development and operation of plans for mutual aid in cases of fire and other public emergencies, the warden or superintendent of any state institution in the department, with the approval of the commissioner, may authorize the fire department of the institution to furnish aid to such territory surrounding the institution as may be practical in cases of fire and such emergencies, having due regard to the safety of the inmates and property of the institution and to engage in practice and training programs in connection with the development and operation of such mutual aid plans. Any lawfully organized fire-fighting forces or firefighters from such surrounding territory may enter upon the grounds of the institution to furnish aid in cases of fire and such emergencies.

HISTORY:
Formerly § 6–c, add, L 1947, ch 589, § 1; renumbered § 25, L 1970, ch 475, § 5, eff Jan 1, 1971; amd, L 1952, ch 396, § 1; § 245.

Prior Law: Former § 25, add, L 1926, ch 702; renumbered § 615 and amd, L 1929, ch 243, § 23, eff April 2, 1929.

Amendment Notes The 2018 amendment by ch 476, § 245, substituted "fire-fighting forces or firefighters" for "fire-fighting forces or firemen" in the second sentence.

Agency Opinions
Employees in the fire department of institutions under the jurisdiction of the department of correction who are directed to fight fires, pursuant to arrangement for mutual assistance made as provided in § 6-c, are functioning in the course of employment, and in the line of duty and, if injured, are covered by workmen's compensation. 1947 NY Ops Atty Gen Apr 21.

ARTICLE 6-C Sex Offender Registration Act

Section
168-q. Subdirectory; internet posting

HISTORY:
Add, L 1995, ch 192, § 2, eff Jan 21, 1996 (see 1995 note below).

§ 168-q. Subdirectory; internet posting

1. The division shall maintain a subdirectory of level two and three sex offenders. The subdirectory shall include the exact address, address of the offender's place of employment and photograph of the sex offender along with the following information, if available: name, physical description, age and distinctive markings. Background information including all of the sex offender's crimes of conviction that require him or her to register pursuant to this article, modus of operation, type of victim targeted, the name and address of any institution of higher education at which the sex offender is enrolled, attends, is employed or resides and a description of special conditions imposed on the sex offender shall also be included. The subdirectory shall have sex offender listings categorized by county and zip code. Such subdirectory shall be made available at all times on the internet via the division homepage. Any person may apply to the division to receive automated e-mail notifications whenever a new or updated subdirectory registration occurs in a geographic area specified by such person. The division shall furnish such service at no charge to such person, who shall request e-mail notification by county and/or zip code on forms developed and provided by the division. E-mail notification is limited to three geographic areas per e-mail account.

2. Any person who uses information disclosed pursuant to this section in violation of the law shall in addition to any other penalty or fine imposed, be subject to a fine of not less than five hundred dollars and not more than one thousand dollars. Unauthorized removal or duplication of the subdirectory from the offices of local, village or city police department shall be punishable by a fine not to exceed one thousand dollars. In addition, the attorney general, any district attorney, or any person aggrieved is authorized to bring a civil action in the appropriate court requesting preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or group of persons responsible for such action. The foregoing remedies shall be independent of any other remedies or procedures that may be available to an aggrieved party under other provisions of law.

HISTORY:
Add, L 1995, ch 192, § 2, eff Jan 21, 1996 (see 1995 note below); amd, L 1999, ch 113, § 1; L 1999, ch 453, § 19; L 2000, ch 490, § 1; L 2002, ch 11, § 23, eff July 1, 2002 (see 2002 note below); L 2002, ch 694, § 4 (repealed L 2003, ch 10, § 5, eff May 30, 2003) (see 2003 notes below); L 2006, ch 106, § 2, eff June 23, 2006; L 2009, ch 478, § 1, eff March 15, 2010; L 2011, ch 532, § 3, eff Sept 23, 2011; L 2014, ch 462, § 1, effective March 21, 2015.

Editor's Notes: Laws 1995, ch 192, §§ 1, 3, eff Jan 21, 1996, provide as follows:

Section 1. Legislative purpose or findings: The legislature finds that the danger of recidivism posed by sex offenders,

especially those sexually violent offenders who commit predatory acts characterized by repetitive and compulsive behavior, and that the protection of the public from these offenders is of paramount concern or interest to government. The legislature further finds that law enforcement agencies' efforts to protect their communities, conduct investigations and quickly apprehend sex offenders are impaired by the lack of information about sex offenders who live within their jurisdiction and that the lack of information shared with the public may result in the failure of the criminal justice system to identify, investigate, apprehend and prosecute sex offenders.

The system of registering sex offenders is a proper exercise of the state's police power regulating present and ongoing conduct. Registration will provide law enforcement with additional information critical to preventing sexual victimization and to resolving incidents involving sexual abuse and exploitation promptly. It will allow them to alert the public when necessary for the continued protection of the community.

Persons found to have committed a sex offense have a reduced expectation of privacy because of the public's interest in safety and in the effective operation of government. In balancing offenders due process and other rights, and the interests of public security, the legislature finds that releasing information about sex offenders to law enforcement agencies and, under certain circumstances, providing access to limited information about certain sex offenders to the general public, will further the primary government interest of protecting vulnerable populations and in some instances the public, from potential harm.

Therefore, this state's policy, which will bring the state into compliance with the federal crime control act 42 U.S.C. 170101, is to assist local law enforcement agencies' efforts to protect their communities by requiring sex offenders to register and to authorize the release of necessary and relevant information about certain sex offenders to the public as provided in this act.

§ 3. This act shall take effect 180 days after the date on which it shall have become a law, provided, however, that any rules and regulations necessary for the timely implementation of this act on such date shall be promulgated immediately.

Laws 2002, ch 11, § 24, sub (c), eff March 11, 2002, provides as follows:

§ 24. This act shall take effect immediately provided, however, that:

(c) the provisions of sections four, fifteen, nineteen, twenty and twenty-one of this act and subdivision 3 of section 168-d of the correction law, as amended by section eight of this act and the opening paragraph of subdivision 6 of section 168-l of the correction law, as amended by section seventeen of this act shall apply to sex offenders for whom an initial risk level determination has not been made prior to such effective date or who, on the effective date of this act, are not members of the plaintiff class in the U.S. District Court, Southern District of New York case entitled Doe v. Pataki, Index Number 96 CIV 1657 (DC).

Laws 2003, ch 10, § 6, eff May 30, 2003, repealed L 2002, ch 694, § 4 which amended sub 1 of this section.

Amendment Notes: 2011. Chapter 532, § 3 amended:

Sub 1 by deleting at fig 1 "A copy of the subdirectory shall annually be distributed to the offices of local village, town, city, county or state law enforcement agencies for purposes of public access. The division shall distribute monthly updates to the offices of local village, town, city, county or state law enforcement agencies for purposes of public access. Such departments shall require that a person in writing provide their name and address prior to viewing the subdirectory. Any information identifying the victim by name, birth date, address or relation to the sex offender shall be excluded from the subdirectory distributed for purposes of public access. The subdirectory provided for herein shall be updated monthly to maintain its efficiency and usefulness and shall be computer accessible."

2006. Chapter 106, § 2 amended:

Section heading by deleting at fig 1 "of level three sex offenders" and adding the matter in italics.

The 2014 amendment by ch 462, § 1 substituted "including all of the sex offender's crimes of conviction that require him or her to register pursuant to this article" for "including the sex offender's crime of conviction" in the third sentence of 1.

Notes to Decisions

Designation of defendant as a level two sex offender under the Sex Offender Registration Act, N.Y. Correct. Law art. 6-C, based on his conviction for attempted promoting of a sexual performance by a child was proper because the Risk Assessment Guidelines Factor 7 (Factor 7) correctly tracked the N.Y. Correct. Law § 168-a(9) definition of "predatory" and applied to defendant; although it did not seem that Factor 7 was written with individuals, like defendant, who possessed child pornography in mind, it was not possible to read Factor 7 in a way that excluded defendant from its coverage. Defendant's crime was unquestionably directed at strangers. People v Johnson, 11 N.Y.3d 416, 872 N.Y.S.2d 379, 900 N.E.2d 930, 2008 N.Y. LEXIS 3397 (N.Y. 2008).

Trial court properly exercised its discretion in granting the People's application for an upward departure because the record demonstrated that defendant's underlying sex offense was particularly violent and of a prolonged nature and the People provided clear and convincing evidence of an aggravating factor that was not adequately taken into account by the Sex Offender Registration Act, N.Y. Correct. Law § 168-n(3), Guidelines. People v Shim, 139 A.D.3d 68, 28 N.Y.S.3d 87, 2016 N.Y. App. Div. LEXIS 1817 (N.Y. App. Div. 2d Dep't), app. denied, 27 N.Y.3d 910, 62 N.E.3d 118, 39 N.Y.S.3d 378, 2016 N.Y. LEXIS 1784 (N.Y. 2016).

Appeal should not be dismissed on the ground that defendant has been deported because the People failed to show how defendant's involuntary absence from New York rendered review of the order designating him a level two sex offender academic since his designation required his identifying information to be placed on the internet. People v Shim, 139 A.D.3d 68, 28 N.Y.S.3d 87, 2016 N.Y. App. Div. LEXIS 1817 (N.Y. App. Div. 2d Dep't), app. denied, 27 N.Y.3d 910, 62 N.E.3d 118, 39 N.Y.S.3d 378, 2016 N.Y. LEXIS 1784 (N.Y. 2016).

Classification and registration provisions of Sex Offender Registration Act (CLS Correc §§ 168 et seq.) do not violate prohibition against enactment of ex post facto laws, as applied to convicted sex offenders whose criminal conduct occurred prior to effective date of statute; challenged provisions are not punitive but remedial, and involve ministerial acts that do not constitute punishment. People v Cropper, 170 Misc. 2d 631, 651 N.Y.S.2d 1019, 1996 N.Y. Misc. LEXIS 469 (N.Y. County Ct. 1996).

Petitioner, convicted sex offender on probation, was not denied due process when he was designated risk level 3, or sexually violent predator, under Sex Offender Registration Act (CLS Correc § 168 et seq.) since he was notified of his classification and reasons therefore, Division of Probation and Correction Alternatives had established administrative review process, petitioner could seek judicial review of administrative decision through CLS CPLR Article 78 proceeding, and he could bring petition for relief in sentencing court, as provided under CLS Correc § 168-o. Doe v Division of Probation & Correction Alternatives, 171 Misc. 2d 210, 654 N.Y.S.2d 268, 1997 N.Y. Misc. LEXIS 7 (N.Y. Sup. Ct. 1997).

Petitioner, convicted sex offender on probation, was not denied equal protection because he was designated risk level 3 under Sex Offender Registration Act (CLS Correc § 168 et seq.) by Division of Probation and Correction Alternatives (DPCA), rather than court, which classifies sex offenders who were incarcerated or institutionalized at time Act was enacted; there was rational basis for statutory requirement that individual who was already under DPCA supervision be classified by that agency. Doe v Division of Probation & Correction Alternatives, 171 Misc. 2d

210, 654 N.Y.S.2d 268, 1997 N.Y. Misc. LEXIS 7 (N.Y. Sup. Ct. 1997).

It was proper to classify petitioner probationer as level 3, sexually violent predator, since he met one of child victims when victim participated in residential camp at which petitioner was employed, second child victim was cousin of first victim, and petitioner did not show that Board of Examiners of Sex Offender's inclusion of history of drug or alcohol abuse as factor was arbitrary and capricious. Doe v Division of Probation & Correction Alternatives, 171 Misc. 2d 210, 654 N.Y.S.2d 268, 1997 N.Y. Misc. LEXIS 7 (N.Y. Sup. Ct. 1997).

New York Division of Criminal Justice Services is required to distribute a subdirectory of all Risk Level Three sex offenders to local law enforcement agencies, where it is to be made available for public inspection through the internet. People v Ramos, 889 N.Y.S.2d 402, 25 Misc. 3d 533, 2009 N.Y. Misc. LEXIS 1955 (N.Y. Sup. Ct. 2009).

Court overruled defendant's argument the classification of risk level one was for all purposes, including the personal validation of defendant's address and therefore that requirement did not apply to defendant until after his reclassification hearing and defendant could not be charged with a violation, because the injunction in U.S. District Court case of Doe v Pataki related only to the community notification provisions of the Sex Offender Registration Act. People v Welch, 809 N.Y.S.2d 882, 11 Misc. 3d 794, 2006 N.Y. Misc. LEXIS 299 (N.Y. County Ct. 2006).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 168-n.

Federal Aspects:

Megan's Law, 42 USCS § 14071(d).

Protection of children from sexual predators act of 1998, P. L. 105-314.

Jurisprudences:

Law Reviews:

Feldman, The "scarlet letter laws" of the 1990s: a response to critics. 60 Alb. L. Rev. 1081.

ARTICLE 23-A Licensure and Employment of Persons Previously Convicted of One or More Criminal Offenses

Section

751. Applicability

752. Unfair discrimination against persons previously convicted of one or more criminal offenses prohibited

753. Factors to be considered concerning a previous criminal conviction; presumption

754. Written statement upon denial of license or employment

HISTORY:

Add, L 1976, ch 931, § 5, eff Jan 1, 1977.

§ 751. Applicability

The provisions of this article shall apply to any application by any person for a license or employment at any public or private employer, who has previously been convicted of one or more criminal offenses in this state or in any other jurisdiction, and to any license or employment held by any person whose conviction of one or more criminal offenses in this state or in any other jurisdiction preceded such employment or granting of a license, except where a mandatory forfeiture, disability or bar to employment is imposed by law, and has not been removed by an executive pardon, certificate of relief from disabilities or certificate of good conduct. Nothing in this article shall be construed to affect any right an employer may have with respect to an intentional misrepresentation in connection with an application for employment made by a prospective employee or previously made by a current employee.

HISTORY:

Add, L 1976, ch 931, § 5, eff Jan 1, 1977; amd, L 2007, ch 284, § 2, eff July 18, 2007.

Amendment Notes:

2007. Chapter 284, § 2 amended:

Par by deleting a comma and at and "to any public agency or private employer for a license or employment".

Notes to Decisions

In denying convicted felon's application for restoration to longshoremen's register as checker, Waterfront Commission of New York Harbor did not err in failing to apply relevant provisions of CLS Correc Art 23-A, since Article 23-A contains no reference to Waterfront Commission nor any express statement that legislature intended to amend or supplement interstate compact by which Waterfront Commission was established, and thus Article 23-A does not apply to Waterfront Commission. Malverty v Waterfront Comm'n, 71 N.Y.2d 977, 529 N.Y.S.2d 67, 524 N.E.2d 421, 1988 N.Y. LEXIS 689 (N.Y. 1988).

When legislature enacted provisions, effective January 1, 1977, of Correction Law entitled "Licensure and Employment of Persons Previously Convicted of One or More Criminal Offenses," aimed at removing senseless discrimination regarding criminal offenders, it was deemed to have notice of its own prior enactment of Judiciary Law provisions requiring automatic disbarment upon conviction and empowering Appellate Division to vacate or modify order or debarment upon reversal of felony conviction or pardon by designated officials, and there was nothing to warrant conclusion that latter provisions of Judiciary Law were superseded or ameliorated in any way. In re Glucksman, 57 A.D.2d 205, 394 N.Y.S.2d 191, 1977 N.Y. App. Div. LEXIS 10950 (N.Y. App. Div. 1st Dep't), app. denied, 42 N.Y.2d 804, 1977 N.Y. LEXIS 3722 (N.Y. 1977).

Commissioner's determination to suspend license of practical nurse for three years, with the execution of the last two years stayed, was supported by substantial evidence and was not shocking to one's sense of fairness or unreasonably harsh and excessive and was not disturbed where the nurse had been convicted of possession of gambling records, even though a certificate of relief from disabilities had been issued pursuant to Article 23-A of the Correction Law, since the Article applies only to the "application" for a license and has no bearing on disciplinary proceedings against persons already licensed. Pietranico v Ambach, 82 A.D.2d 625, 442 N.Y.S.2d 827, 1981 N.Y. App. Div. LEXIS 11842 (N.Y. App. Div. 3d Dep't 1981), aff'd, 55 N.Y.2d 861, 447 N.Y.S.2d 924, 432 N.E.2d 796, 1982 N.Y. LEXIS 3081 (N.Y. 1982).

Prospective employee who had previously been dismissed from tenured position with county probation department after determination in civil forum that she was guilty of certain specifications of misconduct had not been convicted of "criminal offenses" within meaning of CLS Correc § 751, and thus was not entitled to compel production of written statement delineating reasons for denial of her employment application under provisions of CLS Correc § 754. Sinicropi v McCabe, 123 A.D.2d 756, 507 N.Y.S.2d 229, 1986 N.Y. App. Div. LEXIS 60897 (N.Y. App. Div. 2d Dep't 1986), app. dismissed, 69 N.Y.2d 821, 513 N.Y.S.2d 964, 506 N.E.2d 535, 1987 N.Y. LEXIS 15453 (N.Y. 1987), app. denied, 70 N.Y.2d 728, 519 N.Y.S.2d 644, 513 N.E.2d 1305, 1987 N.Y. LEXIS 18182 (N.Y. 1987).

Committee on Professions did not violate CLS Correc Art 23-A by denying petitioner's application for license to practice dentistry because of his prior record of professional misconduct in Missouri; Article 23-A prohibition of unfair discrimination against applicants previously convicted of crimes was inapplicable, since petitioner's acts did not trigger criminal prosecution and resulting conviction. Markman v New York State Dep't of Education, 131 A.D.2d 908, 516 N.Y.S.2d 359, 1987 N.Y. App. Div. LEXIS 48342 (N.Y. App. Div. 3d Dep't 1987).

CLS Correc Art 23-A, establishing standards for public agencies and private employers to use in appraising fitness of former criminal offender for particular job or license, does not apply to prison training programs. Brown v Berry, 151 A.D.2d 882, 543 N.Y.S.2d 179, 1989 N.Y. App. Div. LEXIS 8123 (N.Y. App. Div. 3d Dep't), app. dismissed, 74 N.Y.2d 944, 550 N.Y.S.2d 277, 549 N.E.2d 479, 1989 N.Y. LEXIS 3264 (N.Y. 1989).

Purpose of CLS Correc Art 23-A was not to give ex-convicts preferred treatment but to try to remove prejudice against former criminals obtainingjobs or licenses, since such prejudice was not only widespread but was also unfair and counterproductive. Peluso v Smith, 142 Misc. 2d 642, 540 N.Y.S.2d 631, 1989 N.Y. Misc. LEXIS 100 (N.Y. Sup. Ct. 1989).

With regard to "1033 waiver" (under 18 USCS § 1033), Insurance Department makes determination as to trustworthiness and competence of applicant in view of specific circumstances of crime committed by individual; in event applicant is also applying for license, provisions of CLS Correc §§ 750-753 also must be satisfied. Insurance Department, Opinions of General Counsel, Opinion Number 09-08-05.

Agency Opinions

The Police Department of the Village of Malone may request the transfer of a CETA employee who is assigned to work as a dispatcher in the Police Department upon discovering that he has been convicted of a felony even though the employee had obtained a certificate of relief from disabilities. 1981 NY Ops Atty Gen 81–7 (informal), 1981 N.Y. AG LEXIS 152.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Certificate of good conduct, § 703-a.

Jurisprudences:

13 NY Jur 2d Businesses and Occupations § 39 .

Texts: New York Employee Discrimination Handbook (1998 ed, Matthew Bender).

§ 752. Unfair discrimination against persons previously convicted of one or more criminal offenses prohibited

No application for any license or employment, and no employment or license held by an individual, to which the provisions of this article are applicable, shall be denied or acted upon adversely by reason of the individual's having been previously convicted of one or more criminal offenses, or by reason of a finding of lack of "good moral character" when such finding is based upon the fact that the individual has previously been convicted of one or more criminal offenses, unless:

(1) there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought or held by the individual; or

(2) the issuance or continuation of the license or the granting or continuation of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

HISTORY:

Add, L 1976, ch 931, § 5, eff Jan 1, 1977; amd, L 2007, ch 284, § 3, eff July 18, 2007.

Amendment Notes:

2007. Chapter 284, § 3 amended:
Par by deleting "applicant's" and at and "applicant".

Notes to Decisions

Analysis

1. Generally
2. Jurisdiction, procedure and remedies
3. Presumption of rehabilitation
4. "Reasonable risk"
5. Effect on local laws and administrative regulations
6. Application to particular persons, licenses and employment
7. —Civil service positions
8. —Professions

1. Generally

Agency or private employer must consider factors in CLS Correc § 753 to determine whether employment or license should issue, notwithstanding existence of "direct relationship" under CLS Correc § 752(1) between applicant's criminal offense and specific employment or license sought. Bonacorsa v Van Lindt, 71 N.Y.2d 605, 528 N.Y.S.2d 519, 523 N.E.2d 806, 1988 N.Y. LEXIS 691 (N.Y. 1988).

Denial of a corporation's landfill expansion permit was supported by substantial evidence and was affirmed where the corporation and its principals had pled guilty to tax related crimes spanning several years. Al Turi Landfill, Inc. v N.Y. State Dep't of Envtl. Conservation, 98 N.Y.2d 758, 751 N.Y.S.2d 827, 781 N.E.2d 892, 2002 N.Y. LEXIS 3399 (N.Y. 2002).

Defendant, not-for-profit youth organization, should not have been granted summary judgment in action for negligent hiring and retention of custodian, who sexually assaulted plaintiff's daughter at defendant's center, where defendant had actual knowledge that custodian had criminal conviction and that he would be working as such in place crowded with children; under circumstances, jury could reasonably conclude that defendant had duty to conduct investigation of custodian's background and consider factors under CLS Correc § 753. T. W. v City of New York, 286 A.D.2d 243, 729 N.Y.S.2d 96, 2001 N.Y. App. Div. LEXIS 7930 (N.Y. App. Div. 1st Dep't 2001).

Correc Law § 752, applies only to applications for a license or employment by persons previously convicted of crimes, and has no bearing on persons who are already licensed or employed. Pisano v McKenna, 120 Misc. 2d 536, 466 N.Y.S.2d 231, 1983 N.Y. Misc. LEXIS 3755 (N.Y. Sup. Ct. 1983).

Purpose of CLS Correc Art 23-A was not to give ex-convicts preferred treatment but to try to remove prejudice against former criminals obtainingjobs or licenses, since such prejudice was not only widespread but was also unfair and counterproductive. Peluso v Smith, 142 Misc. 2d 642, 540 N.Y.S.2d 631, 1989 N.Y. Misc. LEXIS 100 (N.Y. Sup. Ct. 1989).

Former employee's discrimination complaint against a utility company was dismissed for failure to state a cause of action because the amended complaint acknowledged that the utility company terminated plaintiff based on other employees' and potential customers' reaction to his reputation as one of the police officers involved in the notorious assault and there was no indication that plaintiff's perjury conviction was a factor in the decision to terminate him. Schwarz v Consolidated Edison, Inc., 49 Misc. 3d 832, 13 N.Y.S.3d 884, 2015 N.Y. Misc. LEXIS 2784 (N.Y. Sup. Ct. 2015), aff'd, 147 A.D.3d 447, 47 N.Y.S.3d 9, 2017 N.Y. App. Div. LEXIS 924 (N.Y. App. Div. 1st Dep't 2017).

Statutory protection contemplated by N.Y. Exec. Law § 296(15) and N.Y. Correct. Law § 752 are for people convicted of a criminal offense and is not intended to give rights to those discriminated against based on their reputations. Schwarz v Consolidated Edison, Inc., 49 Misc. 3d 832, 13 N.Y.S.3d 884, 2015 N.Y. Misc. LEXIS 2784 (N.Y. Sup. Ct. 2015), aff'd, 147 A.D.3d 447, 47 N.Y.S.3d 9, 2017 N.Y. App. Div. LEXIS 924 (N.Y. App. Div. 1st Dep't 2017).

2. Jurisdiction, procedure and remedies

A complaint charging a public agency with an unfair discriminatory practice based upon a person's prior criminal convictions was properly dismissed by the State Division of Human Rights for lack of subject matter jurisdiction, since an Article 78 proceeding is the exclusive remedy available to remedy such a wrong. New York City Transit Authority v State Human Rights Appeal Bd., 97 A.D.2d 825, 468 N.Y.S.2d 708, 1983 N.Y. App. Div. LEXIS 20604 (N.Y. App. Div. 2d Dep't 1983), app. dismissed, 62 N.Y.2d 646, 1984 N.Y. LEXIS 8025 (N.Y. 1984).

Petitioner, as designer and marketer of "Stanton Survey" used by prospective employers to screen job applicants, had standing to seek judicial determination that Department of Labor (DOL) acted outside its authority in denying targeted jobs tax credits to employers using Stanton Survey on ground that use of survey would violate Ex-Offenders Law, since interests espoused by petitioner fell within "zone of interest" protected by statute, which requires final determination by appropriate agency before DOL may take action to deny services to offending employers. Stanton Corp. v Department of Labor, 166 A.D.2d 331, 561 N.Y.S.2d 6, 1990 N.Y. App. Div. LEXIS 12748 (N.Y. App. Div. 1st Dep't 1990).

Department of Labor (DOL) acted arbitrarily in denying targeted jobs tax credits to employers using survey designed and marketed by petitioner ("Stanton Survey") to screen job applicants, on ground that survey questions dealing with theft of cash or merchandise violated Ex-Offender Law, in absence of final determination to that effect by Division of Human Rights, which was only agency vested with authority to make such determination, which would authorize DOL to discontinue services. Stanton Corp. v Department of Labor, 166 A.D.2d 331, 561 N.Y.S.2d 6, 1990 N.Y. App. Div. LEXIS 12748 (N.Y. App. Div. 1st Dep't 1990).

Jury verdict holding New York City Housing Authority liable for not terminating employee after learning of his undisclosed convictions was properly set aside since 3 nonviolent convictions that employee did not disclose in his employment application, in conjunction with robbery conviction that he did disclose, did not, as matter of law, give Authority reason to know that employee had propensity for violence, or was otherwise unsuited for employment as caretaker. Givens v New York City Hous. Auth., 249 A.D.2d 133, 671 N.Y.S.2d 479, 1998 N.Y. App. Div. LEXIS 4342 (N.Y. App. Div. 1st Dep't 1998).

As a civilian who sought a job as a police communications technician had a prior criminal conviction, and such position was expressly exempted from the statutory definition of "employment," her application was properly denied and the statutory factors did not have to be considered. Matter of Belgrave v City of New York, 137 A.D.3d 439, 27 N.Y.S.3d 2, 2016 N.Y. App. Div. LEXIS 1532 (N.Y. App. Div. 1st Dep't), app. denied, 27 N.Y.3d 909, 60 N.E.3d 1201, 38 N.Y.S.3d 835, 2016 N.Y. LEXIS 1695 (N.Y. 2016).

3. Presumption of rehabilitation

Presumption of rehabilitation created by certificate of good conduct or certificate of relief from civil disabilities by CLS Correc § 753 applies even where there is direct relationship between criminal offense and specific license or employment sought under CLS Correc § 752; thus, agency or employer must consider factors mentioned in CLS Correc § 753 to determine whether, in fact, direct relationship is sufficiently attenuated to warrant issuance of license. Bonacorsa v Van Lindt, 71 N.Y.2d 605, 528 N.Y.S.2d 519, 523 N.E.2d 806, 1988 N.Y. LEXIS 691 (N.Y. 1988).

Presumption of rehabilitation arising from petitioner's certificate of relief from disabilities did not preclude board of education from denying his application for teaching license based on statutory factors unrelated to rehabilitation. Arrocha v Board of Educ., 93 N.Y.2d 361, 690 N.Y.S.2d 503, 712 N.E.2d 669, 1999 N.Y. LEXIS 820 (N.Y. 1999).

The trial court improperly dismissed an Article 78 proceeding by an ex-offender against a city building commissioner and others to review the commissioner's determination denying petitioner's application for a license to operate a rooming house, since, though conviction of a criminal offense can be the basis for denial of a license pursuant to Correc Law § 752(1) if there is a direct relationship between the offense and the specific license sought, and though petitioner's conviction for third degree burglary could arguably have a direct bearing on his responsibility as a rooming house operator to safeguard the facility's occupants and their possessions, respondents failed to produce any evidence to rebut the statutory presumption of rehabilitation that arose from the certificate of good conduct that petitioner had received pursuant to Correc Law § 753(2), since the commissioner's reliance on Correc Law § 753(1)(h), which requires that licensing agencies consider the legitimate interest of the agency in protecting property and the safety and welfare of specific individuals or the general public, was undermined by the fact that petitioner had obtained a license to drive a taxi from the public safety commissioner, and since, though petitioner's conviction could be the basis for a license denial pursuant to Correc Law § 752(2) if the issuance of the license would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public, there were no facts to support the commissioner's contention that petitioner, by virtue of his association with a program for ex-offenders, would show a predilection for renting to such persons and that this would create a security risk to the surrounding community. Marra v White Plains, 96 A.D.2d 17, 467 N.Y.S.2d 865, 1983 N.Y. App. Div. LEXIS 19872 (N.Y. App. Div. 2d Dep't), cert. denied, Weber v Stony Brook Hospital, 464 U.S. 1026, 104 S. Ct. 560, 78 L. Ed. 2d 732, 1983 U.S. LEXIS 2777 (U.S. 1983).

Without an evaluation of the statutory factors, the administrative agencies failed to meet their burden of demonstrating that applicant's criminal history would pose a direct relationship to her duties as a special officer or that qualifying her as such would create an unreasonable risk to the public. Because they did not satisfy their statutory responsibilities and because they improperly based their decision on the original crime for which the applicant was charged, rather than the charge to which she pled, and failed to mention her certification of relief, their determination had to be annulled. Matter of McMillan v Department of Citywide Admin. Servs., 48 Misc. 3d 394, 9 N.Y.S.3d 791, 2015 N.Y. Misc. LEXIS 1158 (N.Y. Sup. Ct. 2015).

4. "Reasonable risk"

When employer or agency relies on unreasonable risk exception of CLS Correc § 752(2), factors in CLS Correc § 753(1) should be considered and applied to determine if unreasonable risk exists, and employer or agency may not assume that exception applies and then consider factors to determine whether employment should be offered or whether license should nevertheless be granted; however, having once considered factors and determined that unreasonable risk exists, employer or agency need not go further and consider same factors to determine whether license or employment opportunity should be granted. Bonacorsa v Van Lindt, 71 N.Y.2d 605, 528 N.Y.S.2d 519, 523 N.E.2d 806, 1988 N.Y. LEXIS 691 (N.Y. 1988).

City civil service commission did not violate CLS Correc § 752 in basing petitioner's disqualification for service as firefighter on record of past criminal convictions, since prior criminal convictions involving drunken driving were such that they involved unreasonable risk to property, and to safety and welfare of general public. Grafer v New York City Civil Service Com., 181 A.D.2d 614, 581 N.Y.S.2d 337, 1992 N.Y. App. Div. LEXIS 4123 (N.Y. App. Div. 1st Dep't), app. denied, 80 N.Y.2d 752, 587 N.Y.S.2d 904, 600 N.E.2d 631, 1992 N.Y. LEXIS 1713 (N.Y. 1992).

5. Effect on local laws and administrative regulations

A city building commissioner improperly denied an application for a license to operate a rooming house on the asserted ground that the applicant had previously been convicted and fined for violations of the municipal building code and of the city's rooming house licensing and regulatory ordinance, since municipalities may not deny such a license based upon an applicant's past violations of local zoning ordinances in that adequate civil and criminal sanctions exist for enforcement of such ordinances, and since the record did not reveal whether there were any outstanding violations that the applicant had failed to correct or was unwilling to correct within a reasonable period of time. Marra v White Plains, 96 A.D.2d 17, 467 N.Y.S.2d 865, 1983 N.Y. App. Div. LEXIS 19872 (N.Y. App. Div. 2d Dep't), cert. denied, Weber v Stony Brook Hospital, 464 U.S. 1026, 104 S. Ct. 560, 78 L. Ed. 2d 732, 1983 U.S. LEXIS 2777 (U.S. 1983).

Providing live dance entertainment in a cabaret is an activity included within the protective umbrella of the First Amendment and a licensing statute which attempts to regulate protected expression and provides for prior restraint must be precisely drawn and is subject to a strong presumption that it is constitutionally invalid; accordingly, a licensing ordinance which authorizes the New York City Commissioner of Consumer Affairs to deny or refuse to renew a cabaret license based upon a broad general listing of various types of criminal convictions, many of

which are unrelated to the use of the premises and/or the qualification for operating them (Administrative Code of City of New York, § B32-297.1), invalidly acts as a prior restraint and unconstitutionally vests overbroad discretion in an administrator; statutes which pertain to unfair discrimination against persons previously convicted of a crime (Correction Law, §§ 752, 753) do not remedy any of the constitutional deficiencies of the ordinance. Club Winks, Inc. v New York, 99 Misc. 2d 787, 417 N.Y.S.2d 178, 1979 N.Y. Misc. LEXIS 2335 (N.Y. Sup. Ct. 1979).

New York City Administrative Code §§ B32-22.0 through B32-26.0, subd a(5), under which license to operate motion picture theater may be denied if applicant or one of its officers, principals, directors or 10 percent stockholders has been convicted of any of a host of criminal offenses, both related and unrelated to operation of movie theater, constitutes system of prior restraint in violation of First Amendment; even if licensing law were read in pari materia with Correction Law §§ 752 and 753, so that license could not be denied because of prior conviction unless there were direct relationship between offense and license sought, or if issuing license would pose risk to public health, safety or welfare, ordinance would still constitute such prior restraint. Natco Theatres, Inc. v Ratner, 463 F. Supp. 1124, 1979 U.S. Dist. LEXIS 15121 (S.D.N.Y. 1979).

6. Application to particular persons, licenses and employment

The State Liquor Authority did not abuse its discretion in disapproving an application for a license in light of a relationship between misdemeanor convictions and the license sought; furthermore, Correc Law § 752, which was enacted to prevent unfair discrimination against persons convicted of criminal offenses, expressly excepts cases in which "there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought." The authority did not abuse its discretion in adhering to its original determination, even though the applicant submitted additional information as part of a request for reconsideration. Nor was the applicant denied due process when the authority considered information received by its investigators but never made available to the applicant. C. Schmidt & Sons, Inc. v New York State Liquor Authority, 52 N.Y.2d 751, 436 N.Y.S.2d 276, 417 N.E.2d 570, 1980 N.Y. LEXIS 2852 (N.Y. 1980).

In denying convicted felon's application for restoration to longshoremen's register as checker, Waterfront Commission of New York Harbor did not err in failing to apply relevant provisions of CLS Correc Art 23-A, since Article 23-A contains no reference to Waterfront Commission nor any express statement that legislature intended to amend or supplement interstate compact by which Waterfront Commission was established, and thus Article 23-A does not apply to Waterfront Commission. Malverty v Waterfront Comm'n, 71 N.Y.2d 977, 529 N.Y.S.2d 67, 524 N.E.2d 421, 1988 N.Y. LEXIS 689 (N.Y. 1988).

Department of education's denial of petitioner's application for certification as a school bus driver, despite a certificate of relief from disabilities, was not arbitrary and capricious, as he had felony convictions for possession and attempted sale of drugs, as well as well as multiple misdemeanor convictions, and he was of mature age at the time of his more recent offenses. Matter of Dempsey v New York City Dept. of Educ., 25 N.Y.3d 291, 33 N.E.3d 485, 11 N.Y.S.3d 529, 2015 N.Y. LEXIS 1033 (N.Y. 2015).

In a case wherein the United States Court of Appeals for the Second Circuit certified three questions to the Court of Appeals of New York, the Court held that N.Y. Exec. Law § 296(6) extends liability to an out-of-state non-employer who aids or abets employment discrimination against individuals with a prior criminal conviction. Griffin v Sirva, Inc., 29 N.Y.3d 174, 76 N.E.3d 1063, 54 N.Y.S.3d 360, 2017 N.Y. LEXIS 1244 (N.Y. 2017).

A petition to annul a decision denying an application for a civil service position as a traffic enforcement agent, which decision was based solely on the ground that the applicant intentionally made a false statement of a material fact on the application by denying that he had ever been convicted of a crime, was properly dismissed where there was no evidence to indicate that the applicant was penalized because of his prior criminal record in contravention of either Exec Law § 296 or Correc Law § 752. Stewart v Civil Service Com., 84 A.D.2d 491, 446 N.Y.S.2d 948, 1982 N.Y. App. Div. LEXIS 14946 (N.Y. App. Div. 1st Dep't 1982).

CLS Correc Art 23-A, establishing standards for public agencies and private employers to use in appraising fitness of former criminal offender for particular job or license, does not apply to prison training programs. Brown v Berry, 151 A.D.2d 882, 543 N.Y.S.2d 179, 1989 N.Y. App. Div. LEXIS 8123 (N.Y. App. Div. 3d Dep't), app. dismissed, 74 N.Y.2d 944, 550 N.Y.S.2d 277, 549 N.E.2d 479, 1989 N.Y. LEXIS 3264 (N.Y. 1989).

Determination of New York City Human Resources Administration terminating petitioner's provisional appointment as child caseworker was supported by evidence that petitioner misrepresented to parole authorities that his violation of curfew provisions of his work-release program was due to his employment with agency; failure to be reliable and truthful demonstrated petitioner's unfitness for position of child caseworker. Okoro v City of New York Human Resources Admin., 219 A.D.2d 506, 631 N.Y.S.2d 342, 1995 N.Y. App. Div. LEXIS 9457 (N.Y. App. Div. 1st Dep't 1995).

No violation of N.Y. Correct. Law § 752 was found in New York Department of Environmental Conservation's decision to deny landfill company an expansion permit in light of the direct relationship between one or more of the landfill company's previous criminal offenses and the specific license of employment sought; the elements inherent in the criminal conduct for which the landfill company and its principals were convicted, to wit, dishonesty, lack of integrity in conducting business, and a willingness to mislead the government, had a direct relationship to the duties and responsibilities inherent in the license sought, including accurate record keeping, effective self-policing, and honest self-reporting to the government. Al Turi Landfill, Inc. v N.Y. State Dep't of Envtl. Conservation, 289 A.D.2d 231, 735 N.Y.S.2d 61, 2001 N.Y. App. Div. LEXIS 11794 (N.Y. App. Div. 2d Dep't 2001), aff'd, 98 N.Y.2d 758, 751 N.Y.S.2d 827, 781 N.E.2d 892, 2002 N.Y. LEXIS 3399 (N.Y. 2002).

Although the New York City Department of Consumer Affairs (DCA) failed to consider all of the factors in N.Y. Correct. Law § 753(1) in denying a contractor's application to renew its home improvement contractors license, the trial court erred in directing the DCA to grant the application pursuant to N.Y. Correct. Law § 752. Matter of Formica Constr. v Mintz, 65 A.D.3d 686, 885 N.Y.S.2d 298, 2009 N.Y. App. Div. LEXIS 6187 (N.Y. App. Div. 2d Dep't 2009).

Trial court erred in vacating a determination by the New York City Taxi and Limousine Commission denying a former attorney's application for a license to operate a for-hire vehicle because the determination was not arbitrary or capricious or irrational where attorney's crimes were recent and serious and bore a direct relationship to how he dealt with persons who hired him for service, and he minimized his culpability at his fitness interview, he minimized his culpability. Matter of Levine v N.Y.C. Taxi & Limousine Commn., 136 A.D.3d 1037, 26 N.Y.S.3d 180, 2016 N.Y. App. Div. LEXIS 1322 (N.Y. App. Div. 2d Dep't 2016).

Trial court properly granted a motion by an employer to dismiss an employee's discrimination complaint because he failed to state an employment discrimination claim where the complaint contained no allegations that the employee was terminated under circumstances giving rise to an inference of discrimination based on his perjury conviction, rather than due to the disruption of the employer's workplace and its employee and customers relations stemming from his perceived involvement in an underlying assault, the vacatur of the employee's prior assault convictions rendered those convictions nullities inasmuch as the proceeding did not otherwise result in acquittal or dismissal of all charges against him. Schwarz v Consolidated Edison, Inc., 147 A.D.3d 447, 47 N.Y.S.3d 9, 2017 N.Y. App. Div. LEXIS 924 (N.Y. App. Div. 1st Dep't 2017).

Article 23-A of the Correction Law and section 2A:168A of the New Jersey statutes, which prohibit discrimination in employment against rehabilitated convicted offenders and provide a presumption of rehabilitation where a certificate of relief from civil disabilities has been issued by a court of competent jurisdiction, are applicable to the Waterfront Commission of New York Harbor, created by interstate compact between New York and

New Jersey for the purpose of protecting labor from criminal elements and other evil conditions in the Port of New York, so that the commission is bound to consider and apply the salutary public policy of both States prohibiting such discrimination by employers and licensing authorities in making its determinations. Accordingly, the commission's failure to consider such clearly enunciated public policy before denying petitioner's application for reinstatement to the register of longshoremen (21 NYCRR 8.3) solely on the basis of petitioner's criminal conviction, was arbitrary and capricious warranting a remand to the commission for further consideration. Maloney v Waterfront Com. of New York Harbor, 96 Misc. 2d 688, 409 N.Y.S.2d 573, 1978 N.Y. Misc. LEXIS 2664 (N.Y. Sup. Ct. 1978).

Notwithstanding the earlier enacted provisions of N.Y. Correct. Law §§ 752 and 753 regarding certificates of relief from disabilities, an applicant with an unpardoned felony conviction involving fraud, dishonesty, or a breach of trust, as of the effective date of N.Y. Banking Law § 599-e, cannot be licensed as a mortgage loan originator in New York State. Rampolla v Banking Dept. of the State of New York, 916 N.Y.S.2d 492, 31 Misc. 3d 161, 2010 N.Y. Misc. LEXIS 6366 (N.Y. Sup. Ct. 2010), aff'd, 93 A.D.3d 526, 940 N.Y.S.2d 257, 2012 N.Y. App. Div. LEXIS 2045 (N.Y. App. Div. 1st Dep't 2012).

In an Article 78 proceeding brought by a New York City marshal who was suspended from office after being charged with various crimes relating to his office, a directive issued by respondent officials of the Department of Investigation of the City of New York which provided that "any former Marshal who has been convicted of a crime related to the performance of his/her official duties may not be employed by any present City Marshal when such employment bears a direct relationship to the criminal offense for which the former Marshal was convicted" was constitutional on its face and as applied to petitioner and did not violate Correc Law § 752 or Exec Law § 290 where petitioner was an ex-city marshal currently employed in a marshal's office and was convicted of racketeering-based crimes said to have been committed while he was employed as a City marshal and in connection with his official duties. Ribotsky v Lupkin, 114 Misc. 2d 913, 452 N.Y.S.2d 806, 1982 N.Y. Misc. LEXIS 3586 (N.Y. Sup. Ct. 1982).

Determination terminating a court reporter's employment was proper because, inter alia, N.Y. Correct. Law §§ 752, 753 permitted adverse employment action under circumstances in which there was direct relationship between the court reporter's criminal offense involving identity theft and credit card fraud, and her employment, in which, as an officer of the court, she was charged with producing a true, accurate, and complete record of court proceedings. Matter of Association of Surrogates, & Supreme Ct. Reporters v State of New York Unified Ct. Sys., 48 A.D.3d 228, 851 N.Y.S.2d 170, 2008 N.Y. App. Div. LEXIS 946 (N.Y. App. Div. 1st Dep't 2008).

Department of Education (DOE) arbitrarily and capriciously concluded that the crime and facts surrounding petitioner's plea bore a direct relationship, for purposes of N.Y. Correct. Law § 752(1), to the license's requirement of working with children; DOE proffered no evidence demonstrating how stealing merchandise while employed at a business would be relevant to petitioner's potential employment as a school bus attendant, where she would not be in charge of sales or handling cash or orders. Matter of Boone v New York City Dept. of Educ., 53 Misc. 3d 380, 38 N.Y.S.3d 711, 2016 N.Y. Misc. LEXIS 2769 (N.Y. Sup. Ct. 2016).

Department of Education (DOE) arbitrarily and capriciously found that permitting petitioner to serve as a school bus attendant would pose an unreasonable risk, for purposes of N.Y. Correct. Law § 752(2); with the exception of her sole conviction for petit larceny, petitioner lived a crime-free life, and her conviction did not involve any neglect or compromise to the safety and well-being of children. Matter of Boone v New York City Dept. of Educ., 53 Misc. 3d 380, 38 N.Y.S.3d 711, 2016 N.Y. Misc. LEXIS 2769 (N.Y. Sup. Ct. 2016).

In an Article 78 proceeding, the statute did not apply to the New York City Department of Correction's (DOC) revocation of petitioner's security clearance to work at a correction facility, as although petitioner did not seek employment with DOC, petitioner's application for a license to work within the confines of the facility rendered him an applicant for membership with DOC, the purpose of the security clearance was to grant him the same access to the facility afforded to DOC employees, and petitioner was engaged in providing services to prisoners on behalf of DOC. Matter of Graves v City of New York, 53 Misc. 3d 895, 38 N.Y.S.3d 741, 2016 N.Y. Misc. LEXIS 3304 (N.Y. Sup. Ct. 2016), app. dismissed, 175 A.D.3d 418, 104 N.Y.S.3d 541, 2019 N.Y. App. Div. LEXIS 6147 (N.Y. App. Div. 1st Dep't 2019).

Department of Correction's (DOC) revocation of petitioner's license to work in a correctional facility was arbitrary and capricious as the DOC failed to consider all the requisite factors and the decision was initially based solely on the results of a criminal background check and prior conviction, without any determination as to whether there was a direct relationship between petitioner's misdemeanor conviction and license. Matter of Dudley v City of New York, 56 Misc. 3d 448, 50 N.Y.S.3d 856, 2017 N.Y. Misc. LEXIS 1449 (N.Y. Sup. Ct. 2017).

Employee of a car service did not establish a discrimination claim under N.Y. Exec. Law § 296(15), as the service's temporary suspension of the employee after a background check revealed criminal convictions did not constitute an adverse employment action. The suspension was justified by the need to investigate the employee's past convictions, which was anticipated by N.Y. Correct. Law § 752. Fox v Commonwealth Worldwide Chauffeured Transp. of Ny, 865 F. Supp. 2d 257, 2012 U.S. Dist. LEXIS 45675 (E.D.N.Y. 2012).

There is nothing in New York Insurance Law that would prevent Superintendent of Insurance from issuing insurance agent's license to individual with prior misdemeanor conviction of third degree forgery; Superintendent may issue license if, in his judgment, he finds individual to be trustworthy and competent to act as insurance agent and individual has met prerequisites for licensing. Insurance Department, Opinions of General Counsel, Opinion Number 05-02-17.

Insurer that employs person who has been convicted of felony involving dishonesty or breach of trust, or of offense under 18 USCS § 1033, runs afoul of The Violent Crime Control and Law Enforcement Act of 1994, 18 USCS § 1033(e), unless person has obtained written consent from insurance regulatory official authorized to regulate insurer, such as state Superintendent of Insurance. Insurance Department, Opinions of General Counsel, Opinion Number 08-04-31.

7. —Civil service positions

Federal mail fraud conviction, which involved petitioner's submission of false car service vouchers in connection with his employment as New York City Human Resources Administration caseworker, raised legitimate issues about his fitness for supervisory position, warranting dismissal of his Article 78 petition to compel city to promote him to supervisory position on basis that denial of promotion violated CLS Exec § 296(15). Alston v City of New York, 270 A.D.2d 3, 703 N.Y.S.2d 186, 2000 N.Y. App. Div. LEXIS 2231 (N.Y. App. Div. 1st Dep't 2000).

Trial court properly granted a civil employee's petition to restore his eligibility certification and appointment, his employment and to restore the him to an eligible list for a another position because the record did not reveal the existence of fraud of a substantial nature in connection with employee's application, it was undisputed that the employee disclosed his prior convictions when seeking the position, the record provided no sound basis to conclude that the employee failed to cooperate with the investigation or to disclose material facts, and there was no indication that the Civil Service Commission determined that a statutory exception was applicable or considered the factors to be applied in terminating the employee. Matter of Espinal v County of Nassau, 172 A.D.3d 1064, 100 N.Y.S.3d 380, 2019 N.Y. App. Div. LEXIS 3820 (N.Y. App. Div. 2d Dep't 2019).

Court would dismiss Article 78 proceeding to annul city civil service commission's determination that respondent was not disqualified for position of provisional eligibility specialist by her criminal record since (1) commission properly found that respondent's fitness was not affected by her prior criminal record based on evidence that she was not disqualified by city personnel department when she was hired as typist in 1977 despite her convictions for prostitution and drug possession, that judge who

sentenced her in 1981 manslaughter case expressly intended not to deprive her of chance to earn livelihood, and that she was skilled eligibility specialist, and (2) commission's finding was made in full compliance with CLS Correc Art 23-A, which was enacted to prevent unfair discrimination in licensure and employment of persons convicted of crimes. New York v City Civil Service Com., 141 Misc. 2d 276, 532 N.Y.S.2d 626, 1988 N.Y. Misc. LEXIS 610 (N.Y. Sup. Ct. 1988).

While the state office of mental retardation and developmental disabilities (OMRDD) noted the factors set forth in N.Y. Correct. Law § 753 in making a determination under N.Y. Correct. Law § 752 concerning the applicant's employment with a county agency, the OMRDD's determination was arbitrary and capricious as the specific employment duties in the position applied for were not set out and the OMRDD failed to specify the bearing, if any, that the applicant's convictions would have on her fitness or ability to perform such duties or responsibilities; the determination also failed to articulate in any meaningful way the positive factors, such as the applicant's graduation from community college with distinction. Black v New York State Off. of Mental Retardation & Dev. Disabilities, 858 N.Y.S.2d 859, 20 Misc. 3d 581, 239 N.Y.L.J. 77, 2008 N.Y. Misc. LEXIS 3113 (N.Y. Sup. Ct. 2008).

New York City Civil Service Commission was not irrational or arbitrary in concluding that the disqualification of a city department employee based on his prior convictions failed to comply with N.Y. Correct. Law § 752. The Commission rationally concluded, based on a consideration of the factors enumerated in N.Y. Correct. Law § 753, that there was no direct relationship between the employee's past offenses and his position; further, it was also rational for the Commission to conclude that it was not a threat to public safety for the employee to hold his position, which was performed under supervision and did not involve dealing with the public. Matter of City of New York v New York City Civ. Serv. Commn., 30 A.D.3d 227, 817 N.Y.S.2d 254, 2006 N.Y. App. Div. LEXIS 8035 (N.Y. App. Div. 1st Dep't 2006).

Civil service applicant, otherwise qualified for position as housing caretaker for New York City Housing Authority, may not be denied position based solely on prior manslaughter conviction where tasks of position are not shown to be directly related to conviction or to present unreasonable risk to persons or property, and where statutory policy favors employment of ex-offenders. Soto-Lopez v New York City Civil Service Com., 713 F. Supp. 677, 1989 U.S. Dist. LEXIS 5548 (S.D.N.Y. 1989).

8. —Professions

It was not arbitrary and capricious or violative of CLS Correc Art 23-A for New York City Board of Education to rely on 9-year-old drug sale conviction in denying petitioner's application for teaching license, despite petitioner's certificate of relief from disabilities and positive references submitted on his behalf, where board considered factors favorable to petitioner but gave greater weight to facts that high school teacher must be role model to students and is held to high ethical standard, that petitioner was mature adult when he sold drugs, and that his offense was serious felony conviction. Arrocha v Board of Educ., 93 N.Y.2d 361, 690 N.Y.S.2d 503, 712 N.E.2d 669, 1999 N.Y. LEXIS 820 (N.Y. 1999).

Denial by the department of education (DOE) of an application for a security clearance was improper because the "closer review" purportedly applied by the DOE amounted to nothing more than a pro forma denial of the application on the basis of the applicant's prior criminal conviction and such a denial, without consideration of the N.Y. Correct. Law § 753 factors, was precisely what the statute prohibited and was arbitrary and capricious; among the considerations listed in an affidavit of the DOE's director for employee relations was that the applicant did not provide references from prior employers, but the interview notice did not state that the applicant should provide such references, and her interviewer did not ask her for those references. Further, other than her personal statement, the DOE did not consider the documentation that the applicant submitted. Matter of Acosta v New York City Dept. of Educ., 16 N.Y.3d 309, 921 N.Y.S.2d 633, 946 N.E.2d 731, 2011 N.Y. LEXIS 437 (N.Y. 2011).

When legislature enacted provisions, effective January 1, 1977, of Correction Law entitled "Licensure and Employment of Persons Previously Convicted of One or More Criminal Offenses," aimed at removing senseless discrimination regarding criminal offenders, it was deemed to have notice of its own prior enactment of Judiciary Law provisions requiring automatic disbarment upon conviction and empowering Appellate Division to vacate or modify order or debarment upon reversal of felony conviction or pardon by designated officials, and there was nothing to warrant conclusion that latter provisions of Judiciary Law were superseded or ameliorated in any way. In re Glucksman, 57 A.D.2d 205, 394 N.Y.S.2d 191, 1977 N.Y. App. Div. LEXIS 10950 (N.Y. App. Div. 1st Dep't), app. denied, 42 N.Y.2d 804, 1977 N.Y. LEXIS 3722 (N.Y. 1977).

Commissioner of Education properly denied petitioner's application for license to practice medicine for failure to fulfill moral character prerequisite for licensure, since petitioner did not clearly show that his patients would not be exposed to unreasonable risk of harm if he were licensed, where he had been convicted of federal offense of knowingly receiving hardcore child pornography (18 USCS § 2252) less than one year before his application, he was not involved in therapy or planning to recommence therapy at time of hearing despite recommendation of 2 of 3 psychiatrists he saw, and he had not yet explored conflict underlying his conduct. Bevacqua v Sobol, 176 A.D.2d 1, 579 N.Y.S.2d 243, 1992 N.Y. App. Div. LEXIS 1146 (N.Y. App. Div. 3d Dep't 1992).

It was arbitrary and capricious for Board of Education to deny petitioner's application for teaching license on ground that particular crime committed by petitioner—isolated incident of criminal sale of $10 worth of cocaine committed almost 10 years prior to his application for license— made him unfit to perform duties and responsibilities of high school teacher since petitioner had obtained certificate of relief from disabilities, and Board virtually ignored his extensive and unblemished record as student tutor. Arrocha v Board of Educ., 253 A.D.2d 758, 677 N.Y.S.2d 584, 1998 N.Y. App. Div. LEXIS 9408 (N.Y. App. Div. 2d Dep't 1998), rev'd, 93 N.Y.2d 361, 690 N.Y.S.2d 503, 712 N.E.2d 669, 1999 N.Y. LEXIS 820 (N.Y. 1999).

Where the collective bargaining agreement provided that an employee convicted of a felony could be suspended with pay for 60 days after which, in the event there had been no resolution of the disciplinary charges, the suspension was without pay, the agreement did not unlawfully discriminate against felons in violation of N.Y. Correct. Law §§ 752(1), 753, as those statutes expressly permitted employment discrimination against felons where there was a direct relationship between the criminal offense and the specific employment. Rosa v City Univ., 13 A.D.3d 162, 789 N.Y.S.2d 4, 2004 N.Y. App. Div. LEXIS 15116 (N.Y. App. Div. 1st Dep't 2004), app. denied, 5 N.Y.3d 705, 801 N.Y.S.2d 252, 834 N.E.2d 1262, 2005 N.Y. LEXIS 1524 (N.Y. 2005).

With regard to "1033 waiver" (under 18 USCS § 1033), Insurance Department makes determination as to trustworthiness and competence of applicant in view of specific circumstances of crime committed by individual; in event applicant is also applying for license, provisions of CLS Correc §§ 750-753 also must be satisfied. Insurance Department, Opinions of General Counsel, Opinion Number 09-08-05.

Notes to Unpublished Decisions

1. Application to particular persons, licenses and employment

Unpublished decision: Version of N.Y. Correct. Law § 752 that was in effect in 2004 did not provide a former employee with a wrongful termination claim, as former § 752 prohibited denial of applications for employment based on prior convictions and did not extend to terminations. A 2007 amendment to § 752 that extended the statute's reach to terminations was intended to provide new protections that were lacking from the original language. Noble v Career Educ. Corp., 375 Fed. Appx. 102, 2010 U.S. App. LEXIS 8875 (2d Cir. N.Y. 2010).

Agency Opinions

Analysis

1. Jurisdiction, procedure and remedies

2. Application to particular persons, licenses and employment
3. —Civil service positions

1. Jurisdiction, procedure and remedies

Licensing officials are authorized to consider the fitness of an applicant. In considering the effect of a prior conviction, the licensing officer may deny a license only after making the determinations required by the Legislature. No public hearing is required in making such a licensing determination. N.Y. Op. Att'y Gen. No. 84-37.

2. Application to particular persons, licenses and employment

3. —Civil service positions

Analysis of whether persons convicted of state felonies or misdemeanor crimes of domestic violence may be appointed as peace officers or whether their convictions preclude such appointments because they are prohibited from possessing firearms under Federal Gun Control Act or state law. 1998 N.Y. Op. Att'y Gen. No. 98-F8, 1998 N.Y. AG LEXIS 41.

Denial of an application for a license to sell New York State lottery tickets because of a criminal conviction is permitted under section 752 of the Correction Law, dependent on a finding by the Division of the State Lottery that there is a direct relationship between the previous criminal offense and the specific license sought. Denial of sales licenses or revocation of sales licenses as to franchisees of a franchisor who was convicted of a crime is permissible under certain circumstances. N.Y. Op. Att'y Gen. No. 85-F2.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 753.

Jurisprudences:

18 NY Jur 2d Civil Rights § 55.

18A NY Jur 2d Civil Rights § 139.

18A NY Jur 2d Civil Servants and Other Public Officers and Employees § 56.

19 NY Jur 2d Civil Servants and Other Public Officers and Employees § 371.

13 NY Jur 2d Businesses and Occupations §§ 39, 40, 42, 866.

Matthew Bender's New York Practice Guides: 4 New York Practice Guide: Business and Commercial §§ 25.12, 25.22, 26.05, 26.06, 26.21.

Texts: Frumer & Biskind, Bender's New York Evidence § 6.06.

New York Employee Discrimination Handbook (1998 ed, Matthew Bender).

§ 753. Factors to be considered concerning a previous criminal conviction; presumption

1. In making a determination pursuant to section seven hundred fifty-two of this chapter, the public agency or private employer shall consider the following factors:

(a) The public policy of this state, as expressed in this act, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.

(b) The specific duties and responsibilities necessarily related to the license or employment sought or held by the person.

(c) The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities.

(d) The time which has elapsed since the occurrence of the criminal offense or offenses.

(e) The age of the person at the time of occurrence of the criminal offense or offenses.

(f) The seriousness of the offense or offenses.

(g) Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.

(h) The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.

2. In making a determination pursuant to section seven hundred fifty-two of this chapter, the public agency or private employer shall also give consideration to a certificate of relief from disabilities or a certificate of good conduct issued to the applicant, which certificate shall create a presumption of rehabilitation in regard to the offense or offenses specified therein.

HISTORY:

Add, L 1976, ch 931, § 5, eff Jan 1, 1977; amd, L 2007, ch 284, § 4, eff July 18, 2007.

Notes to Decisions

Analysis

1. Generally, presumption of rehabilitation
2. —Certificate of relief or good conduct
3. Effect on local laws and administrative regulations
4. Application to particular licenses
5. Application to particular employment

1. Generally, presumption of rehabilitation

If employer or agency considers all 8 factors listed in CLS Correc § 753, it need not in every case produce independent evidence to rebut presumption of rehabilitation before denying license or employment; consideration of other factors such as severity of criminal offenses, age of offender at time of offenses, passage of time between offenses, and nature of license or employment sought can warrant denial of license notwithstanding absence of new evidence specifically addressed to overcoming presumption. Bonacorsa v Van Lindt, 71 N.Y.2d 605, 528 N.Y.S.2d 519, 523 N.E.2d 806, 1988 N.Y. LEXIS 691 (N.Y. 1988).

Agency or private employer must consider factors in CLS Correc § 753 to determine whether employment or license should issue, notwithstanding existence of "direct relationship" under CLS Correc § 752(1) between applicant's criminal offense and specific employment or license sought. Bonacorsa v Van Lindt, 71 N.Y.2d 605, 528 N.Y.S.2d 519, 523 N.E.2d 806, 1988 N.Y. LEXIS 691 (N.Y. 1988).

When employer or agency relies on unreasonable risk exception of CLS Correc § 752(2), factors in CLS Correc § 753(1) should be considered and applied to determine if unreasonable risk exists, and employer or agency may not assume that exception applies and then consider factors to determine whether employment should be offered or whether license should nevertheless be granted; however, having once considered factors and determined that unreasonable risk exists, employer or agency need not go further and consider same factors to determine whether license or employment opportunity should be granted. Bonacorsa v Van Lindt, 71 N.Y.2d 605, 528 N.Y.S.2d 519, 523 N.E.2d 806, 1988 N.Y. LEXIS 691 (N.Y. 1988).

Presumption of rehabilitation arising from petitioner's certificate of relief from disabilities did not preclude board of education from denying his application for teaching license based on statutory factors unrelated to rehabilitation. Arrocha v Board of Educ., 93 N.Y.2d 361, 690 N.Y.S.2d 503, 712 N.E.2d 669, 1999 N.Y. LEXIS 820 (N.Y. 1999).

In a case wherein the United States Court of Appeals for the Second Circuit certified three questions to the Court of Appeals of New York, the Court held that N.Y. Exec. Law § 296(6) extends liability to an out-of-state non-employer who aids or abets employment discrimination against individuals with a prior crimi-

nal conviction. Griffin v Sirva, Inc., 29 N.Y.3d 174, 76 N.E.3d 1063, 54 N.Y.S.3d 360, 2017 N.Y. LEXIS 1244 (N.Y. 2017).

Inmate or former inmate is entitled to have institutional record free from improperly obtained findings of disciplinary rule violations since his prison disciplinary record might be considered by future employer in reaching employment decision. Grant v Senkowski, 146 A.D.2d 948, 537 N.Y.S.2d 323, 1989 N.Y. App. Div. LEXIS 514 (N.Y. App. Div. 3d Dep't 1989).

Jury verdict holding New York City Housing Authority liable for not terminating employee after learning of his undisclosed convictions was properly set aside since 3 nonviolent convictions that employee did not disclose in his employment application, in conjunction with robbery conviction that he did disclose, did not, as matter of law, give Authority reason to know that employee had propensity for violence, or was otherwise unsuited for employment as caretaker. Givens v New York City Hous. Auth., 249 A.D.2d 133, 671 N.Y.S.2d 479, 1998 N.Y. App. Div. LEXIS 4342 (N.Y. App. Div. 1st Dep't 1998).

Defendant, not-for-profit youth organization, should not have been granted summary judgment in action for negligent hiring and retention of custodian, who sexually assaulted plaintiff's daughter at defendant's center, where defendant had actual knowledge that custodian had criminal conviction and that he would be working as such in place crowded with children; under circumstances, jury could reasonably conclude that defendant had duty to conduct investigation of custodian's background and consider factors under CLS Correc § 753. T. W. v City of New York, 286 A.D.2d 243, 729 N.Y.S.2d 96, 2001 N.Y. App. Div. LEXIS 7930 (N.Y. App. Div. 1st Dep't 2001).

2. —Certificate of relief or good conduct

Presumption of rehabilitation created by certificate of good conduct or certificate of relief from civil disabilities by CLS Correc § 753 applies even where there is direct relationship between criminal offense and specific license or employment sought under CLS Correc § 752; thus, agency or employer must consider factors mentioned in CLS Correc § 753 to determine whether, in fact, direct relationship is sufficiently attenuated to warrant issuance of license. Bonacorsa v Van Lindt, 71 N.Y.2d 605, 528 N.Y.S.2d 519, 523 N.E.2d 806, 1988 N.Y. LEXIS 691 (N.Y. 1988).

An arbitrator's decision to rescind the termination of employment of a village employee, who pleaded guilty to the charge of unlawful imprisonment in the first degree, but who had received a certificate of relief from disabilities by the sentencing court, did not contravene public policy, since the arbitrator was required to give consideration to the certificate, which created a presumption of rehabilitation. Valley Stream v Local 342, 89 A.D.2d 1016, 454 N.Y.S.2d 461, 1982 N.Y. App. Div. LEXIS 18273 (N.Y. App. Div. 2d Dep't 1982).

Letters of recommendation submitted by applicant for dental license did not constitute certificates of relief from disability or certificates of good conduct (with respect to petitioner's prior record of drug abuse and professional misconduct) within meaning of CLS Correc § 753; such certificates must be issued by court or parole board. Markman v New York State Dep't of Education, 131 A.D.2d 908, 516 N.Y.S.2d 359, 1987 N.Y. App. Div. LEXIS 48342 (N.Y. App. Div. 3d Dep't 1987).

Because an applicant for a custodial position in a middle school failed to submit any information regarding all of the applicant's prior convictions, and thereafter failed to respond to the state department of education's notice of intent to deny clearance, and because the department addressed and weighed the appropriate factors set forth in N.Y. Correct. Law §§ 752, 753 and N.Y. Educ. Law § 3035(3)(a), denial of clearance was mandated by N.Y. Comp. Codes R. & Regs. tit. 8, § 87.5(a)(4)(v), (vii). Matter of Boatman v New York State Dept. of Educ., 72 A.D.3d 1467, 900 N.Y.S.2d 174, 2010 N.Y. App. Div. LEXIS 3462 (N.Y. App. Div. 3d Dep't 2010).

Without an evaluation of the statutory factors, the administrative agencies failed to meet their burden of demonstrating that applicant's criminal history would pose a direct relationship to her duties as a special officer or that qualifying her as such would create an unreasonable risk to the public. Because they did not satisfy their statutory responsibilities and because they improperly based their decision on the original crime for which the applicant was charged, rather than the charge to which she pled, and failed to mention her certification of relief, their determination had to be annulled. Matter of McMillan v Department of Citywide Admin. Servs., 48 Misc. 3d 394, 9 N.Y.S.3d 791, 2015 N.Y. Misc. LEXIS 1158 (N.Y. Sup. Ct. 2015).

3. Effect on local laws and administrative regulations

Providing live dance entertainment in a cabaret is an activity included within the protective umbrella of the First Amendment and a licensing statute which attempts to regulate protected expression and provides for prior restraint must be precisely drawn and is subject to a strong presumption that it is constitutionally invalid; accordingly, a licensing ordinance which authorizes the New York City Commissioner of Consumer Affairs to deny or refuse to renew a cabaret license based upon a broad general listing of various types of criminal convictions, many of which are unrelated to the use of the premises and/or the qualification for operating them (Administrative Code of City of New York, § B32-297.1), invalidly acts as a prior restraint and unconstitutionally vests overbroad discretion in an administrator; statutes which pertain to unfair discrimination against persons previously convicted of a crime (Correction Law, §§ 752, 753) do not remedy any of the constitutional deficiencies of the ordinance. Club Winks, Inc. v New York, 99 Misc. 2d 787, 417 N.Y.S.2d 178, 1979 N.Y. Misc. LEXIS 2335 (N.Y. Sup. Ct. 1979).

ALJ's decision denying an application for a license to operate a taxi or vehicle-for-hire was arbitrary and capricious where not only did the ALJ incorrectly note that the applicant, in 1986, caused serious injury to another person, she, otherwise, failed fully to consult, balance, and weigh all of the eight factors in Correction Law § 753(1). Significantly, the ALJ failed to consider documents offered by the applicant that would have had an effect on the balancing and weighing of such factors. Matter of Tinsley v Taxi & Limousine Commn., 58 Misc. 3d 941, 62 N.Y.S.3d 769, 2017 N.Y. Misc. LEXIS 3863 (N.Y. Sup. Ct. 2017).

New York City Administrative Code §§ B32-22.0 through B32-26.0, subd a(5), under which license to operate motion picture theater may be denied if applicant or one of its officers, principals, directors or 10 percent stockholders has been convicted of any of a host of criminal offenses, both related and unrelated to operation of movie theater, constitutes system of prior restraint in violation of First Amendment; even if licensing law were read in pari materia with Correction Law §§ 752 and 753, so that license could not be denied because of prior conviction unless there were direct relationship between offense and license sought, or if issuing license would pose risk to public health, safety or welfare, ordinance would still constitute such prior restraint. Natco Theatres, Inc. v Ratner, 463 F. Supp. 1124, 1979 U.S. Dist. LEXIS 15121 (S.D.N.Y. 1979).

4. Application to particular licenses

Racing and Wagering Board did not act arbitrarily or capriciously in denying owner-trainer-driver harness racing license to former licensee who was convicted of federal crimes in connection with race fixing investigation, even though former licensee raised presumption of rehabilitation with certificate of good conduct from parole board, where hearing officer considered legitimate interest of racing board in protecting safety and welfare of general public by preventing appearance or fact of impropriety in heavily-regulated sport, and weighed former licensee's experience, violation of board rules, and seriousness of offenses. Bonacorsa v Van Lindt, 71 N.Y.2d 605, 528 N.Y.S.2d 519, 523 N.E.2d 806, 1988 N.Y. LEXIS 691 (N.Y. 1988).

It was not arbitrary and capricious or violative of CLS Correc Art 23-A for New York City Board of Education to rely on 9-year-old drug sale conviction in denying petitioner's application for teaching license, despite petitioner's certificate of relief from disabilities and positive references submitted on his behalf, where board considered factors favorable to petitioner but gave greater weight to facts that high school teacher must be role model to students and is held to high ethical standard, that petitioner was mature adult when he sold drugs, and that his offense was serious felony conviction. Arrocha v Board of Educ., 93 N.Y.2d 361, 690 N.Y.S.2d 503, 712 N.E.2d 669, 1999 N.Y. LEXIS 820 (N.Y. 1999).

Denial of a corporation's landfill expansion permit was supported by substantial evidence and was affirmed where the corporation and its principals had pled guilty to tax related crimes spanning several years. Al Turi Landfill, Inc. v N.Y. State Dep't of Envtl. Conservation, 98 N.Y.2d 758, 751 N.Y.S.2d 827, 781 N.E.2d 892, 2002 N.Y. LEXIS 3399 (N.Y. 2002).

The trial court improperly dismissed an Article 78 proceeding by an ex-offender against a city building commissioner and others to review the commissioner's determination denying petitioner's application for a license to operate a rooming house, since, though conviction of a criminal offense can be the basis for denial of a license pursuant to Correc Law § 752(1) if there is a direct relationship between the offense and the specific license sought, and though petitioner's conviction for third degree burglary could arguably have a direct bearing on his responsibility as a rooming house operator to safeguard the facility's occupants and their possessions, respondents failed to produce any evidence to rebut the statutory presumption of rehabilitation that arose from the certificate of good conduct that petitioner had received pursuant to Correc Law § 753(2), since the commissioner's reliance on Correc Law § 753(1)(h), which requires that licensing agencies consider the legitimate interest of the agency in protecting property and the safety and welfare of specific individuals or the general public, was undermined by the fact that petitioner had obtained a license to drive a taxi from the public safety commissioner, and since, though petitioner's conviction could be the basis for a license denial pursuant to Correc Law § 752(2) if the issuance of the license would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public, there were no facts to support the commissioner's contention that petitioner, by virtue of his association with a program for ex-offenders, would show a predilection for renting to such persons and that this would create a security risk to the surrounding community. Marra v White Plains, 96 A.D.2d 17, 467 N.Y.S.2d 865, 1983 N.Y. App. Div. LEXIS 19872 (N.Y. App. Div. 2d Dep't), cert. denied, Weber v Stony Brook Hospital, 464 U.S. 1026, 104 S. Ct. 560, 78 L. Ed. 2d 732, 1983 U.S. LEXIS 2777 (U.S. 1983).

A city building commissioner improperly denied an application for a license to operate a rooming house on the asserted ground that the applicant had previously been convicted and fined for violations of the municipal building code and of the city's rooming house licensing and regulatory ordinance, since municipalities may not deny such a license based upon an applicant's past violations of local zoning ordinances in that adequate civil and criminal sanctions exist for enforcement of such ordinances, and since the record did not reveal whether there were any outstanding violations that the applicant had failed to correct or was unwilling to correct within a reasonable period of time. Marra v White Plains, 96 A.D.2d 17, 467 N.Y.S.2d 865, 1983 N.Y. App. Div. LEXIS 19872 (N.Y. App. Div. 2d Dep't), cert. denied, Weber v Stony Brook Hospital, 464 U.S. 1026, 104 S. Ct. 560, 78 L. Ed. 2d 732, 1983 U.S. LEXIS 2777 (U.S. 1983).

Racing and Wagering Board was not arbitrary or capricious in considering petitioner's prior convictions in refusing him harness owner-trainer-driver license, despite presumption of rehabilitation created by certificate of good conduct which he received from Board of Parole, since petitioner's convictions of falsely testifying before grand jury and soliciting another to testify falsely regarding true ownership of certain racehorses were of serious crimes directly impugning integrity of racing. Bonacorsa v Van Lindt, 129 A.D.2d 518, 514 N.Y.S.2d 370, 1987 N.Y. App. Div. LEXIS 45198 (N.Y. App. Div. 1st Dep't 1987), aff'd, 71 N.Y.2d 605, 528 N.Y.S.2d 519, 523 N.E.2d 806, 1988 N.Y. LEXIS 691 (N.Y. 1988).

Commissioner of Education properly denied petitioner's application for license to practice medicine for failure to fulfill moral character prerequisite for licensure, since petitioner did not clearly show that his patients would not be exposed to unreasonable risk of harm if he were licensed, where he had been convicted of federal offense of knowingly receiving hardcore child pornography (18 USCS § 2252) less than one year before his application, he was not involved in therapy or planning to recommence therapy at time of hearing despite recommendation of 2 of 3 psychiatrists he saw, and he had not yet explored conflict underlying his conduct. Bevacqua v Sobol, 176 A.D.2d 1, 579 N.Y.S.2d 243, 1992 N.Y. App. Div. LEXIS 1146 (N.Y. App. Div. 3d Dep't 1992).

It was arbitrary and capricious for Board of Education to deny petitioner's application for teaching license on ground that particular crime committed by petitioner—isolated incident of criminal sale of $10 worth of cocaine committed almost 10 years prior to his application for license— made him unfit to perform duties and responsibilities of high school teacher since petitioner had obtained certificate of relief from disabilities, and Board virtually ignored his extensive and unblemished record as student tutor. Arrocha v Board of Educ., 253 A.D.2d 758, 677 N.Y.S.2d 584, 1998 N.Y. App. Div. LEXIS 9408 (N.Y. App. Div. 2d Dep't 1998), rev'd, 93 N.Y.2d 361, 690 N.Y.S.2d 503, 712 N.E.2d 669, 1999 N.Y. LEXIS 820 (N.Y. 1999).

Superintendent of insurance's decision denying the application of an individual who had been involved in an insurance fraud scheme to be a public adjuster was arbitrary and capricious as the facts surrounding the individual's application were virtually indistinguishable from another case in which an application was granted, the superintendent gave no adequate explanation for reaching a different decision on virtually identical facts, and the applicant had received a certificate of good conduct from the division of parole specifically removing the bar to the public office of public adjuster under N.Y. Ins. Law § 2108(d)(3), which certificate created a presumption of rehabilitation, under N.Y. Correct. Law § 753(2). Klein v Levin, 305 A.D.2d 316, 760 N.Y.S.2d 462, 2003 N.Y. App. Div. LEXIS 6121 (N.Y. App. Div. 1st Dep't), app. denied, 100 N.Y.2d 514, 769 N.Y.S.2d 200, 801 N.E.2d 421, 2003 N.Y. LEXIS 3296 (N.Y. 2003).

Although the New York City Department of Consumer Affairs (DCA) failed to consider all of the factors in N.Y. Correct. Law § 753(1) in denying a contractor's application to renew its home improvement contractors license, the trial court erred in directing the DCA to grant the application pursuant to N.Y. Correct. Law § 752. Matter of Formica Constr. v Mintz, 65 A.D.3d 686, 885 N.Y.S.2d 298, 2009 N.Y. App. Div. LEXIS 6187 (N.Y. App. Div. 2d Dep't 2009).

Petitioner (former construction inspector for New York City Department of Buildings), who was convicted of bribe receiving, was denied procedural due process when department rejected his application for license as site safety manager because of his actions relating to bribe receiving since department did not refer to, or give any evidentiary findings to rebut, certificate of relief from disabilities received by petitioner which created presumption of rehabilitation. Peluso v Smith, 142 Misc. 2d 642, 540 N.Y.S.2d 631, 1989 N.Y. Misc. LEXIS 100 (N.Y. Sup. Ct. 1989).

Denial of petitioner's application for permit to expand its solid waste disposal facility was not irrational or violative of CLS Correc Art 23-A where (1) petitioner and its principals had been convicted of criminal offenses under CLS Correc § 752, (2) Department of Environmental Conservation (DEC) concluded that direct relationship existed between those offenses and permit sought, and that issuance of permit to petitioner would pose unreasonable risk to general public, and (3) petitioner failed to sustain its burden of proving that DEC's determination was unlawful on ground that permits had been granted to applicants with like records, or that trust agreement like one which petitioner proposed had been accepted when proposed by prior successful candidate for like permit. Al Turi Landfill, Inc. v New York State Dep't of Envtl. Conservation, 183 Misc. 2d 787, 705 N.Y.S.2d 839, 2000 N.Y. Misc. LEXIS 74 (N.Y. Sup. Ct. 2000).

Notwithstanding the earlier enacted provisions of N.Y. Correct. Law §§ 752 and 753 regarding certificates of relief from disabilities, an applicant with an unpardoned felony conviction involving fraud, dishonesty, or a breach of trust, as of the effective date of N.Y. Banking Law § 599-e, cannot be licensed as a mortgage loan originator in New York State. Rampolla v Banking Dept. of the State of New York, 916 N.Y.S.2d 492, 31 Misc. 3d 161, 2010 N.Y. Misc. LEXIS 6366 (N.Y. Sup. Ct. 2010), aff'd, 93 A.D.3d 526, 940 N.Y.S.2d 257, 2012 N.Y. App. Div. LEXIS 2045 (N.Y. App. Div. 1st Dep't 2012).

Without a reasoned evaluation of the factors enumerated in N.Y. Correct. Law § 753, the Department of Education failed to

demonstrate that petitioner's criminal history for larceny bore a direct relationship to her duties as a school bus attendant or that qualifying her as such would create an unreasonable risk to the public. Matter of Boone v New York City Dept. of Educ., 53 Misc. 3d 380, 38 N.Y.S.3d 711, 2016 N.Y. Misc. LEXIS 2769 (N.Y. Sup. Ct. 2016).

Department of Correction's (DOC) revocation of petitioner's license to work in a correctional facility was arbitrary and capricious as the DOC failed to consider all the requisite factors and the decision was initially based solely on the results of a criminal background check and prior conviction, without any determination as to whether there was a direct relationship between petitioner's misdemeanor conviction and license. Matter of Dudley v City of New York, 56 Misc. 3d 448, 50 N.Y.S.3d 856, 2017 N.Y. Misc. LEXIS 1449 (N.Y. Sup. Ct. 2017).

5. Application to particular employment

Denial by the department of education (DOE) of an application for a security clearance was improper because the "closer review" purportedly applied by the DOE amounted to nothing more than a pro forma denial of the application on the basis of the applicant's prior criminal conviction and such a denial, without consideration of the N.Y. Correct. Law § 753 factors, was precisely what the statute prohibited and was arbitrary and capricious; among the considerations listed in an affidavit of the DOE's director for employee relations was that the applicant did not provide references from prior employers, but the interview notice did not state that the applicant should provide such references, and her interviewer did not ask her for those references. Further, other than her personal statement, the DOE did not consider the documentation that the applicant submitted. Matter of Acosta v New York City Dept. of Educ., 16 N.Y.3d 309, 921 N.Y.S.2d 633, 946 N.E.2d 731, 2011 N.Y. LEXIS 437 (N.Y. 2011).

Department of education's denial of petitioner's application for certification as a school bus driver, despite a certificate of relief from disabilities, was not arbitrary and capricious, as he had felony convictions for possession and attempted sale of drugs, as well as well as multiple misdemeanor convictions, and he was of mature age at the time of his more recent offenses. Matter of Dempsey v New York City Dept. of Educ., 25 N.Y.3d 291, 33 N.E.3d 485, 11 N.Y.S.3d 529, 2015 N.Y. LEXIS 1033 (N.Y. 2015).

Petitioner was entitled to be considered for employment as bus driver with Manhattan and Bronx Surface Transit Operating Authority (MBSTOA), despite his prior conviction of second degree bribe taking, where he presented certificate of relief from disabilities, since MBSTOA failed to meet its statutory burden of rebutting presumption of rehabilitation arising from issuance of such certificate under CLS Correc Art 23-A in absence of direct relationship between bus driving and bribe receiving conviction, or showing that petitioner would pose unreasonable risk to public; hearing was not required to determine whether presumption was rebutted since MBSTOA was not being ordered to hire petitioner but only to reconsider his application. Meth v Manhattan & Bronx Surface Transit Operating Authority, 134 A.D.2d 431, 521 N.Y.S.2d 54, 1987 N.Y. App. Div. LEXIS 50616 (N.Y. App. Div. 2d Dep't 1987).

Where the collective bargaining agreement provided that an employee convicted of a felony could be suspended with pay for 60 days after which, in the event there had been no resolution of the disciplinary charges, the suspension was without pay, the agreement did not unlawfully discriminate against felons in violation of N.Y. Correct. Law §§ 752(1), 753, as those statutes expressly permitted employment discrimination against felons where there was a direct relationship between the criminal offense and the specific employment. Rosa v City Univ., 13 A.D.3d 162, 789 N.Y.S.2d 4, 2004 N.Y. App. Div. LEXIS 15116 (N.Y. App. Div. 1st Dep't 2004), app. denied, 5 N.Y.3d 705, 801 N.Y.S.2d 252, 834 N.E.2d 1262, 2005 N.Y. LEXIS 1524 (N.Y. 2005).

Regarding the denial of an application for employment as a bus driver with a voluntary corporation based on the applicant's 1988 conviction for assault, a state agency improperly failed to consider the public policy factor in N.Y. Correct. Law § 753(1)(a) and the presumption of rehabilitation in N.Y. Correct. Law § 753(2). Matter of Gallo v State of N.Y., Off. of Mental Retardation & Dev. Disabilities, 37 A.D.3d 984, 830 N.Y.S.2d 796, 2007 N.Y. App. Div. LEXIS 1965 (N.Y. App. Div. 3d Dep't 2007).

Because there was no showing that the crimes for which an employee was convicted were relevant to the employee's duties or posed an unreasonable danger to those involved in a preschool program, pursuant to N.Y. Correct. Law § 753(1)(b), the denial of the employee's application for employment was arbitrary and capricious; therefore, the employee was entitled to N.Y. C.P.L.R. art. 78 relief. Matter of Acosta v New York City Dept. of Educ., 62 A.D.3d 455, 878 N.Y.S.2d 337, 2009 N.Y. App. Div. LEXIS 3552 (N.Y. App. Div. 1st Dep't 2009), aff'd in part, modified, 16 N.Y.3d 309, 921 N.Y.S.2d 633, 946 N.E.2d 731, 2011 N.Y. LEXIS 437 (N.Y. 2011).

As a civilian who sought a job as a police communications technician had a prior criminal conviction, and such position was expressly exempted from the statutory definition of "employment," her application was properly denied and the statutory factors did not have to be considered. Matter of Belgrave v City of New York, 137 A.D.3d 439, 27 N.Y.S.3d 2, 2016 N.Y. App. Div. LEXIS 1532 (N.Y. App. Div. 1st Dep't), app. denied, 27 N.Y.3d 909, 60 N.E.3d 1201, 38 N.Y.S.3d 835, 2016 N.Y. LEXIS 1695 (N.Y. 2016).

While the state office of mental retardation and developmental disabilities (OMRDD) noted the factors set forth in N.Y. Correct. Law § 753 in making a determination under N.Y. Correct. Law § 752 concerning the applicant's employment with a county agency, the OMRDD's determination was arbitrary and capricious as the specific employment duties in the position applied for were not set out and the OMRDD failed to specify the bearing, if any, that the applicant's convictions would have on her fitness or ability to perform such duties or responsibilities; the determination also failed to articulate in any meaningful way the positive factors, such as the applicant's graduation from community college with distinction. Black v New York State Off. of Mental Retardation & Dev. Disabilities, 858 N.Y.S.2d 859, 20 Misc. 3d 581, 239 N.Y.L.J. 77, 2008 N.Y. Misc. LEXIS 3113 (N.Y. Sup. Ct. 2008).

New York City Civil Service Commission was not irrational or arbitrary in concluding that the disqualification of a city department employee based on his prior convictions failed to comply with N.Y. Correct. Law § 752. The Commission rationally concluded, based on a consideration of the factors enumerated in N.Y. Correct. Law § 753, that there was no direct relationship between the employee's past offenses and his position; further, it was also rational for the Commission to conclude that it was not a threat to public safety for the employee to hold his position, which was performed under supervision and did not involve dealing with the public. Matter of City of New York v New York City Civ. Serv. Commn., 30 A.D.3d 227, 817 N.Y.S.2d 254, 2006 N.Y. App. Div. LEXIS 8035 (N.Y. App. Div. 1st Dep't 2006).

Determination terminating a court reporter's employment was proper because, inter alia, N.Y. Correct. Law §§ 752, 753 permitted adverse employment action under circumstances in which there was direct relationship between the court reporter's criminal offense involving identity theft and credit card fraud, and her employment, in which, as an officer of the court, she was charged with producing a true, accurate, and complete record of court proceedings. Matter of Association of Surrogates, & Supreme Ct. Reporters v State of New York Unified Ct. Sys., 48 A.D.3d 228, 851 N.Y.S.2d 170, 2008 N.Y. App. Div. LEXIS 946 (N.Y. App. Div. 1st Dep't 2008).

In an Article 78 proceeding, the statute did not apply to the New York City Department of Correction's (DOC) revocation of petitioner's security clearance to work at a correction facility, as although petitioner did not seek employment with DOC, petitioner's application for a license to work within the confines of the facility rendered him an applicant for membership with DOC, the purpose of the security clearance was to grant him the same access to the facility afforded to DOC employees, and petitioner was engaged in providing services to prisoners on behalf of DOC. Matter of Graves v City of New York, 53 Misc. 3d 895, 38 N.Y.S.3d 741, 2016 N.Y. Misc. LEXIS 3304 (N.Y. Sup. Ct. 2016), app. dismissed, 175 A.D.3d 418, 104 N.Y.S.3d 541, 2019 N.Y. App. Div. LEXIS 6147 (N.Y. App. Div. 1st Dep't 2019).

Civil service applicant, otherwise qualified for position as housing caretaker for New York City Housing Authority, may not be denied position based solely on prior manslaughter conviction where tasks of position are not shown to be directly related to conviction or to present unreasonable risk to persons or property, and where statutory policy favors employment of ex-offenders. Soto-Lopez v New York City Civil Service Com., 713 F. Supp. 677, 1989 U.S. Dist. LEXIS 5548 (S.D.N.Y. 1989).

There is nothing in New York Insurance Law that would prevent Superintendent of Insurance from issuing insurance agent's license to individual with prior misdemeanor conviction of third degree forgery; Superintendent may issue license if, in his judgment, he finds individual to be trustworthy and competent to act as insurance agent and individual has met prerequisites for licensing. Insurance Department, Opinions of General Counsel, Opinion Number 05-02-17.

With regard to "1033 waiver" (under 18 USCS § 1033), Insurance Department makes determination as to trustworthiness and competence of applicant in view of specific circumstances of crime committed by individual; in event applicant is also applying for license, provisions of CLS Correc §§ 750-753 also must be satisfied. Insurance Department, Opinions of General Counsel, Opinion Number 09-08-05.

Agency Opinions

Analysis

1. Generally, presumption of rehabilitation
2. Application to particular employment

1. Generally, presumption of rehabilitation

Licensing officials are authorized to consider the fitness of an applicant. In considering the effect of a prior conviction, the licensing officer may deny a license only after making the determinations required by the Legislature. No public hearing is required in making such a licensing determination. N.Y. Op. Att'y Gen. No. 84-37.

2. Application to particular employment

The Police Department of the Village of Malone may request the transfer of a CETA employee who is assigned to work as a dispatcher in the Police Department upon discovering that he has been convicted of a felony even though the employee had obtained a certificate of relief from disabilities. 1981 NY Ops Atty Gen 81–7 (informal), 1981 N.Y. AG LEXIS 152.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS Educ § 5001.

Jurisprudences:

18 NY Jur 2d Civil Rights § 55.
18A NY Jur 2d Civil Rights § 139.
57 NY Jur 2d Evidence and Witnesses § 108.
13 NY Jur 2d Businesses and Occupations §§ 39, 40.

Matthew Bender's New York Practice Guides: 4 New York Practice Guide: Business and Commercial § 26.06.

§ 754. Written statement upon denial of license or employment

At the request of any person previously convicted of one or more criminal offenses who has been denied a license or employment, a public agency or private employer shall provide, within thirty days of a request, a written statement setting forth the reasons for such denial.

HISTORY:

Add, L 1976, ch 931, § 5, eff Jan 1, 1977.

Notes to Decisions

Prospective employee who had previously been dismissed from tenured position with county probation department after determination in civil forum that she was guilty of certain specifications of misconduct had not been convicted of "criminal offenses" within meaning of CLS Correc § 751, and thus was not entitled to compel production of written statement delineating reasons for denial of her employment application under provisions of CLS Correc § 754. Sinicropi v McCabe, 123 A.D.2d 756, 507 N.Y.S.2d 229, 1986 N.Y. App. Div. LEXIS 60897 (N.Y. App. Div. 2d Dep't 1986), app. dismissed, 69 N.Y.2d 821, 513 N.Y.S.2d 964, 506 N.E.2d 535, 1987 N.Y. LEXIS 15453 (N.Y. 1987), app. denied, 70 N.Y.2d 728, 519 N.Y.S.2d 644, 513 N.E.2d 1305, 1987 N.Y. LEXIS 18182 (N.Y. 1987).

N.Y. C.P.L.R. art. 78 proceeding challenging a determination by the state officer of mental retardation and developmental disabilities that a job applicant could not work for a county agency due to her criminal convictions was not premature because N.Y. Correct. Law §§ 754 and 755 did not require that a petitioner request a written statement setting forth the reasons for such a denial. Black v New York State Off. of Mental Retardation & Dev. Disabilities, 858 N.Y.S.2d 859, 20 Misc. 3d 581, 239 N.Y.L.J. 77, 2008 N.Y. Misc. LEXIS 3113 (N.Y. Sup. Ct. 2008).

Agency Opinions

Licensing officials are authorized to consider the fitness of an applicant. In considering the effect of a prior conviction, the licensing officer may deny a license only after making the determinations required by the Legislature. No public hearing is required in making such a licensing determination. N.Y. Op. Att'y Gen. No. 84-37.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

18 NY Jur 2d Civil Rights § 55.
18A NY Jur 2d Civil Rights § 139.
13 NY Jur 2d Businesses and Occupations §§ 39, 41.

Texts: New York Employee Discrimination Handbook (1998 ed, Matthew Bender).

COUNTY LAW

Article
5. General Powers of Board of Supervisors
6. Enhanced Emergency Telephone System Surcharge
6-A. Local Enhanced Wireless 911 Program
7. Finance
8. Officers; General Provisions
21. County Sealer

HISTORY:
Add, L 1950, ch 691, eff Jan 1, 1951.

ARTICLE 5 General Powers of Board of Supervisors

Section
224. Optional appropriations and contracts for public benefit services
225. Optional appropriations for public benefit services administered by the board
225-a. Fire training and mutual aid programs

HISTORY:
Add, L 1950, ch 691.

§ 224. Optional appropriations and contracts for public benefit services

The board of supervisors shall have power to contract with non-profit organizations and other corporations, associations and agencies within the county formed for the purposes hereinafter enumerated; and the board of supervisors shall also have power to contract with non-profit organizations and other corporations, associations and agencies formed for such purposes within an adjoining county provided the services which are the subject of the contract are to be rendered within the county of such board. The resolution of such board shall name the organization, the amount and manner of payment for the service to be rendered, nature of such service, the rendering of a verified account of the disbursements with verified or certified vouchers therefor attached, a refund of any unused amount, and such other conditions upon the use thereof as the board may deem proper, including the power to require a bond of the disbursing officer thereof. Except as hereinafter mentioned, no county money shall be paid to such organization until a memorandum receipt, signed by the principal officer and disbursing officer of such organization, agreeing to comply with the terms of the resolution, is delivered to the county treasurer. Such appropriations and payments may be made for the following objects and purposes:

* * * * *

(9) Fire training schools for training firefighters, including the power to pay to a city within or without the county for services in the training of firefighters of such county.

* * * * *

HISTORY:
Add, L 1950, ch 691, eff Jan 1, 1951, with substance transferred from § 12; amd, L 1951, ch 652, § 8; L 1951, ch 798; L 1952, ch 297, § 1, eff March 27, 1952; L 1952, ch 648, eff April 12, 1952; L 1952, ch 676; L 1953, ch 319; L 1954, ch 439; L 1954, ch 692, § 2; L 1955, ch 365; L 1955, ch 367, eff April 15, 1955; L 1955, ch 732, §§ 1–4; L 1959, ch 207; L 1960, ch 635, § 1; L 1961, ch 365, § 1; L 1961, ch 847, eff April 22, 1961; L 1961, ch 937, eff April 24, 1961; L 1962, ch 670, eff April 19, 1962; L 1962, ch 881, § 1, eff July 1, 1962; L 1963, ch 873, eff April 26, 1963; L 1963, ch 939, eff April 30, 1963; L 1963, ch 967; L 1964, ch 913.; L 1964, ch 921; L 1965, ch 358, §§ 1–4, eff April 1, 1965; L 1966, ch 677; L 1968, ch 420, §§ 87, 88; L 1969, ch 811, eff May 22, 1969; L 1969, ch 826, eff May 22, 1969; L 1972, ch 744, § 1; L 1973, ch 270, § 1, eff April 1, 1973; L 1973, ch 534, eff June 5, 1973; L 1973, ch 848, § 1, eff June 22, 1973; L 1974, ch 38, § 1, eff April 1, 1974; L 1974, ch 201, § 1; L 1975, ch 584, § 1; L 1975, ch 711, § 1; L 1976, ch 229, § 1; L 1977, ch 190, § 1, eff June 1, 1977; L 1977, ch 957, § 1, eff Aug 11, 1977; L 1978, ch 325, § 2, eff June 19, 1978; L 1979, ch 26, § 1; L 1979, ch 30, § 2; L 1979, ch 575, § 1, eff July 10, 1979; L 1983, ch 157, § 1, eff May 31, 1983; L 1983, ch 421, § 1; L 1983, ch 796, § 1, eff July 30, 1983; L 1984, ch 60, §§ 1, 2; L 1985, ch 2, §§ 1, 2, eff Feb 26, 1985; L 1985, ch 651, §§ 1, 2, eff July 28, 1985; L 1988, ch 647, § 1, eff Sept 1, 1988; L 1997, ch 621, § 1, eff Sept 17, 1997; L 2007, ch 453, § 1, eff Aug 1, 2007; L 2011, ch 569, § 1, eff Sept 23, 2011; L 2012, ch 26, § 1, eff April 27, 2012; L 2013, ch 190, § 1, eff July 31, 2013; L 2015, ch 298, §§ 1–3, effective September 25, 2015; L 2018, ch 370, §§ 1–2, effective December 7, 2018; L 2018, ch 476, § 104, effective December 28, 2018.

Revision Notes: [1951, ch 798] Par (10). The purpose of this act is to restore in part the provisions of subdivision 44 of § 12 of the county law as in force on December 31st, 1950.

Editor's Notes Laws 1979, ch 30, § 1, provides as follows:

Section 1. The legislature hereby recognizes the unique purposes and functions of the county cooperative extension associations. These associations have made and continue to make an indispensable contribution to the people of the state of New York.

In recognition of this continued outstanding effort, the legislature hereby declares that it is both equitable and desirable to provide increases in compensation for professional employees of such associations at regular intervals and in a manner which is consistent with increases afforded professional employees of comparable educational programs within the state and therefore makes the following provision.

Laws 1979, ch 575, § 2, provides as follows:

§ 2.1. Clinton county may accept from the proper authorities of the United States a grant of the privilege of establishing, operating and maintaining foreign trade zones and foreign trade subzones under the provisions of the act of congress and may establish, operate and maintain such foreign trade zones and foreign trade subzones and do all things necessary and proper to carry into effect the establishment, operation and maintenance of such zones, all in accordance with the act of congress and other applicable law and rules and regulations.

2. Such county may select and describe the location of the foreign trade zones or foreign trade subzones for which an application is made, and make such rules and regulations concerning the establishment, operation and maintenance of the foreign trade zones or foreign trade subzones as may be necessary to comply with the act of congress or as may be necessary to comply with the rules and regulations made in accordance with the act of congress.

3. For the purposes of this act, an act of congress shall mean the act of congress approved June eighteenth, nineteen hundred thirty-four, entitled "An act to provide for the establishment, operation, and maintenance of foreign trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes, as

amended", and commonly known as the foreign trade zone act of 1934.

Laws 1983, ch 421, § 2, eff July 8, 1983, provides as follows:

§ 2. This act shall take effect immediately and shall be deemed to have ratified, confirmed and validated any acts taken by the county of Erie with respect to sub-zones outside of the county of Erie which were approved by the governing body of such other county in conformance with the terms of this act.

Laws 1985, ch 651, § 3, provides as follows:

§ 3. 1. Chautauqua county may accept from the proper authorities of the United States a grant of the privilege of establishing, operating and maintaining foreign trade zones and foreign trade sub-zones under the provisions of the act of Congress and may establish, operate and maintain such foreign trade zones and foreign trade sub-zones and do all things necessary and proper to carry into effect the establishment, operation and maintenance of such zones, all in accordance with the act of Congress and other applicable law and rules and regulations.

2. Such county may select and describe the location of the foreign trade zones or foreign trade sub-zones for which an application is made, and make such rules and regulations concerning the establishment, operation and maintenance of the foreign trade zones or foreign trade sub-zones as may be necessary to comply with the act of Congress or as may be necessary to comply with the rules and regulations made in accordance with the act of Congress.

3. For the purposes of this section, an act of Congress shall mean the act of Congress approved June eighteenth, nineteen hundred thirty-four, entitled "An act to provide for the establishment, operation, and maintenance of foreign trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes", as amended, and commonly known as the foreign trade zone act of 1934.

4. Pursuant to the authorization provided for in subdivision twenty-five of section two hundred twenty-four of the county law, as added by section two of this act, such county may contract with any public corporation or private corporation as defined in the act of Congress described in subdivision three of this section to operate and maintain any foreign trade zone or zones established in such county.

Amendment Notes 2013. Chapter 190, § 1 amended:

By adding sub 28.

2012. Chapter 26, § 1 amended:

Sub 23 by deleting at fig 1 "a sub-zone to be located in Cortland county which has the authority to create said sub-zone pursuant to subdivision twenty-three-a of this section", at fig 2 "Said sub-zone may only be created with the approval of the governing body of Cortland county." and adding the matter in italics.

2011. Chapter 569, § 1 amended:

By adding sub 27.

The 2015 amendment by ch 298, §§ 1-3, in 8(b), substituted "community and economic vitality, environment and energy, nutrition and healthy families, and youth development" for "home economics and community betterment" in the first sentence and "substituted community and economic vitality, environment and energy, nutrition, healthy families and youth development" for "home economics, 4-H and community betterment" in the third sentence; added the last sentence of the first paragraph of 8(d); added the second sentence of 8(d)1; added 8(e)(7); and made a stylistic change.

The 2018 amendment by ch 370, §§ 1, 2, added "and a sub-zone to be located in Wyoming county which has the authority to create said sub-zone pursuant to subdivision twenty-nine of this section" in the first sentence of 17; added 29; and made a stylistic change.

The 2018 amendment by ch 476, § 104, substituted "firefighters" for "firemen" twice in (9).

Revision Commission Notes: Par. 1 is derived from former Section 12, Subds. 49-b, 49-c and 49-d which only related to certain counties; Par. 2 is new; Par. 3 is derived from former Section 12, Subds. 16-a, 16-b, 16-c, 16-d, 16-e, 16-f and 16-g, which only applied to certain counties; Par. 4 is derived from former Section 12, Subd. 28-b; Par. 5 is derived from former Section 12, Subd. 48; Par. 6 is derived from former Section 12, Subds. 43 and 44; Par. 7 is new; Par. 8 is former Section 12, Subd. 28-a without change in substance and without revision to avoid conflict with existing Federal statutes; Par. 9 is derived from former Section 12, Subd. 62 as last amended by Chapter 456 of the Laws of 1947.

Repeal Notes: [1952, ch 676] The effect of the repeal of existing paragraph d of subdivision 8 of section 224 of the county law is to remove the existing provisions governing the allocation and payment of state assistance to County Farm and Home Bureau and 4-H Club Associations, and to replace it with a new paragraph increasing the basic amounts of assistance and providing for an additional allowance in direct proportion to the percentage that the farm population bears to the total population.

[1974, ch 38] Paragraph (d) of subdivision eight of § 224 of the County Law, repealed by this act, related to the formula by which state support for county cooperative extension associations was computed and the purposes for which such appropriations were used.

Notes to Decisions

Analysis

1. In general
2. Historical matters
3. Relief for indigent blind
4. Vocational education and extension board
5. Agricultural matters, generally
6. —County extension service associations
7. —Home and farm bureaus and 4-H clubs
8. Museums
9. Arts; educational television
10. Publicizing advantages of county or region
11. Miscellaneous organizations and activities

1. In general

A county appropriation to a particular society or organization under this section can only be made after presentation, to the Board of Supervisors, of a certificate from the State Board of Social Welfare certifying that such society or organization has complied with all rules and regulations and pursuant to resolution of the board as specified in this section, and the original filing of such a certificate will not suffice for subsequent appropriations. 1963 Ops St Compt #92.

A county extension service may take back a purchase money mortgage for part of the purchase price of real property which it sells. 1979 Op St Comp File #764.

2. Historical matters

A county may contract with a county historical society for the latter to provide specified services for an agreed consideration. 1972 Ops St Compt File #1022.

3. Relief for indigent blind

A Board of Supervisors may contract with a non-profit corporation rendering a service, training or aid to the indigent blind only if the corporation has its headquarters or principal office in the county. 1961 Ops St Compt #735.

4. Vocational education and extension board

Funds appropriated by a board of supervisors to a county vocational education and extension board should be paid out by the county treasurer or county auditor and should not be turned over to the board and expended by it. 1945 Ops St Compt 389.

A county may undertake the management of the funds of a county soil and water conservation district but may not be the financial agent for an economic opportunity council, vocational education and extension board, or legal aid society. 1973 Ops St Compt File #794.

5. Agricultural matters, generally

Town board may no longer appropriate town moneys to maintain a food canning project. 1945 Ops St Compt 186.

Cortland County Agricultural Society may not apply to Post-War Planning Commission for assistance in the preparation of plans for the construction of a building for the use of 4-H Boys and Girls; however, the county of Cortland may apply for assistance in the preparation of such plans. 1945 Ops St Compt 584.

6. —County extension service associations

Payments by a county of wages of a record keeper in a county extension service which contracted with the county for the control of infectious bovine diseases should be made from budgetary item 250-711 which authorized payments to such associations. 1955 Ops St Compt File #7331.

Since the officers, directors, and employees of a county cooperative extension association are not subject to the conflict of interest statutes, there is no illegality where an association leases land from a director thereof. 1972 Ops St Compt File #930.

A member of a county board of supervisors who is employed by the county extension service association does not have a prohibited interest in contracts between the county and the association. 1975 Ops St Compt File #736.

7. —Home and farm bureaus and 4-H clubs

A farm bureau organized under former subd. 28-a of § 12 was a "public county association." State Bank of Commerce v Stone, 258 N.Y.S. 717, 144 Misc. 393, 1932 N.Y. Misc. LEXIS 1499 (N.Y. Sup. Ct.), aff'd, 236 A.D. 883, 260 N.Y.S. 940, 1932 N.Y. App. Div. LEXIS 7800 (N.Y. App. Div. 1932).

Cornell University is not liable for the negligence of a County Farm and Home Bureau or 4-H Club Association occurring on premises leased by the university pursuant to this section. Artz v Todd, 77 N.Y.S.2d 836, 191 Misc. 497, 1948 N.Y. Misc. LEXIS 2203 (N.Y. Sup. Ct. 1948).

A County Farm and Home Bureau is not liable for injuries received by an employee while riding to work gratuitously and on her own time in a vehicle owned by the association and operated by another of its employees. Arnold v Wright, 79 N.Y.S.2d 720, 1948 N.Y. Misc. LEXIS 2460 (N.Y. Sup. Ct. 1948).

A county farm bureau, 4-H club or similar groups created under County Law § 224(8) are not subject to the public bidding requirements of the General Municipal Law. 1955 Ops St Compt File #7146.

8. Museums

County funds may be made available to a "junior museum" which is a non-profit organization incorporated pursuant to the provisions of the Education Law. 1956 Ops St Compt File #7915.

Pursuant to contract, county funds may be paid to an organization operating a public museum and to an educational television station. 1972 Ops St Compt File #1022.

9. Arts; educational television

County supervisors may not appropriate money to aid a nonprofit organization in securing performances by lecturers, musicians, and other artists. 1961 Ops St Compt #620.

Pursuant to contract, county funds may be paid to an organization operating a public museum and to an educational television station. 1972 Ops St Compt File #1022.

10. Publicizing advantages of county or region

In conjunction with interested citizens and private organizations throughout the county, a county may participate in a publicity program and expend funds therefor in accordance with the applicable statutes. 1972 Ops St Compt File #138.

Where a county enters a contract with a private organization pursuant to section 224(14) of the County Law for the purpose of publicizing the advantages of the county, the county may make advance payments for such services if required by the contract and provided that there will be a refund of any moneys which are unused. 1984 Op St Comp File #84-41.

11. Miscellaneous organizations and activities

A balance remaining in a reforestation fund should be reappropriated for the purposes set forth in subdivision 8 of this section. 1946 Ops St Compt 660.

A town may not appropriate or expend town funds for a fire training program. 1947 Ops St Compt 501.

Delaware County may not grant moneys to a nonprofit organization so that the organization might sponsor scholarships to the State University of New York Agricultural and Technical Institute at Delhi, New York. 1958 Ops St Compt File #861.

The authority conferred upon a county by subd. 3 of this section to contract with nonprofit corporations for propagation of game, game birds and fish is limited to entering into a contract and does not authorize a grant of lump-sum payments to such an organization for expenses incurred by the latter for such purposes. 1961 Ops St Compt File #103.

A county may undertake the management of the funds of a county soil and water conservation district but may not be the financial agent for an economic opportunity council, vocational education and extension board, or legal aid society. 1973 Ops St Compt File #794.

Agency Opinions

Analysis

1. In general
2. Historical matters
3. Relief of poor persons; day care
4. Relief for indigent blind
5. Agricultural matters, generally
6. —County extension service associations
7. —Home and farm bureaus and 4-H clubs
8. Museums
9. Publicizing advantages of county or region
10. Miscellaneous organizations and activities

1. In general

The duty of the board of social welfare in passing on applications of a society or organization for appropriations of county funds includes both certification that it has complied with the board's rules and regulations and approval of the amount requested in the application. 1944 NY Ops Atty Gen Mar 15.

The Orange County Board of Supervisors cannot delegate the power granted to it by the State Legislature to establish and operate a foreign trade zone when the legislation granting this power does not expressly authorize such delegation. 1976 NY Ops Atty Gen Oct 13.

2. Historical matters

The county board of supervisors can authorize and contract with a corporation, which is formed for commemorative programs of historical events of county-wide interest and concern, to reproduce the seal of said county for said commemorative purposes. 1975 NY Ops Atty Gen March 7.

3. Relief of poor persons; day care

Supervisors may appropriate a lump sum for a hospital, if the money will be expended only for patients who are municipal charges. 1921 N.Y. Op. Att'y Gen. No. 306.

The county board of supervisors may appropriate funds for the relief of poor persons in a children's health camp conducted by private persons under supervision of county tuberculosis hospital, provided such camp is duly incorporated and presents a certificate of approval from the state board of charities. 1927 N.Y. Op. Att'y Gen. No. 283.

The board of supervisors has authority to make appropriation to any corporation the purposes of which include aid and relief of poor persons. 1939 N.Y. Op. Att'y Gen. No. 279.

There is no present authority for a county to create a Day Care council and to pay private citizens for their services in staffing same. A county may, however, make funds available to its social services official to provide day care at public expense for children residing in the county who are eligible therefor pursuant to Title 5 of the Social Services Law. 1970 NY Ops Atty Gen Oct 5.

4. Relief for indigent blind

Authority of the board of supervisors to levy taxes and appropriate money for the relief and education of the blind is intended to benefit all blind persons who are indigent regardless of whether some one is liable for support of such blind person. 1923 N.Y. Op. Att'y Gen. No. 287.

Appropriations by the board of supervisors for the relief of the blind are a county charge, and there is no authority for charging them against a particular town. 1928 N.Y. Op. Att'y Gen. No. 191.

5. Agricultural matters, generally

6. —County extension service associations

County extension service should have contract with Cornell University. Contract may not provide for appointment as agents of only those persons satisfactory to Cornell. 1960 NY Ops Atty Gen March 1 (informal).

Oneida County Cooperative Extension is "agency" required to comply with Freedom of Information Law, for it performs governmental function for state and Oneida County. Comm on Open Gov't FOIL-AO-9940.

7. —Home and farm bureaus and 4-H clubs

County farm and home bureau associations are public bodies supported from public funds, and the motor fuel tax law should not be deemed applicable to gasoline used in their motor vehicles. 1929 N.Y. Op. Att'y Gen. No. 239.

Statutory provision for free registration of motor vehicles owned or controlled by county farm or home bureaus extends to cars owned and used in various branches of such county extension work. 1930 N.Y. Op. Att'y Gen. No. 179.

Home and farm bureau associations which qualified under former § 12, subd. 28-a, are associations formed for the mental improvement of men and women and for educational purposes and their real property is exempt from taxation to the extent provided in Tax Law, § 4, subd. 6. 1941 NY Ops Atty Gen July 8.

A city home bureau can function as a division or arm of a county association so long as that form of organization is approved by the local agencies involved and continues to have the approval of Cornell University under its power of general supervision. 1944 NY Ops Atty Gen Feb 26.

Farm bureaus and 4-H clubs are not entitled to participate in state purchase contracts. 1947 NY Ops Atty Gen Dec 12.

Boards of supervisors may appropriate funds in aid of county agricultural societies. 1930 N.Y. Op. Att'y Gen. No. 441.

Appointment of Agricultural Extension Agents is to be made by County Association. 1960 NY Ops Atty Gen Jan 27 (informal).

Although section 224 of the County Law authorizes a county to appropriate moneys to an agricultural society for the purchase of necessary lands and buildings, it does not authorize a county to give land to an agricultural society in lieu of money. Rather, a county may by local law, authorize itself to contract with an agricultural society whereby it would convey property to the society in consideration for the services rendered to the county. As part of the local law the county could exempt itself from the competitive bidding requirements of section 215(6) of the County Law. Such a local law would be subject to a permissive referendum. 1980 Op St Compt File #190.

8. Museums

Suffolk County may permit its county attorney to represent officer and employees of the Suffolk County Vanderbilt Museum Commission. By contract with the Museum the County may provide funds for the purchase of insurance and to pay the County for legal, financial and other services. 1980 NY Ops Atty Gen April 4 (informal).

9. Publicizing advantages of county or region

A municipal government may contract with a local development corporation for publicity service, and services rendered may be paid for upon vouchers properly audited. 1964 NY Ops Atty Gen July 15.

A contract between the County of Warren and a non-profit membership corporation for the distributing of county brochures and advertising, publicizing the advantages of the county or region, is authorized, provided that the contract contains a provision that payment of county funds must be for services actually performed and made after the rendering of a verified account and audit of vouchers attached thereto. 1968 NY Ops Atty Gen Aug 26.

A contract between a county and a chamber of commerce for publicity purposes may not contain provisions which authorize the use of county funds which benefit the chamber, directly or indirectly. 1981 Op St Compt File #80-600.

10. Miscellaneous organizations and activities

A county may adopt a local law authorizing contracts with corporations and associations for the organizing and promoting of sports and cultural events within the county, and pay to the organization a consideration for its services. 1980 Op St Compt File #690.

A county may not give public moneys to a private charitable organization nor may it contract for services with such an organization in the absence of statutory authority. 1982 Op St Compt File #82-262.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 223, 225, 943; CLS Gen Mun §§ 892-e, 975.

Representation of indigent persons accused of crime, § 943.

County awards for professional education in nursing, medicine, dentistry, optometry or veterinary medicine, CLS Educ § 606.

State aid to counties participating in control of rabies in wildlife, CLS ECL § 11-0527.

Municipal assistance to public authorities furnishing transportation services, CLS Gen Mun § 98-b.

Jefferson county industrial development agency, CLS Gen Mun § 892-e.

Limitations of amounts to be raised, CLS High § 271.

Federal Aspects:

Co-operation of the Department of Agriculture with counties and other local agencies, 7 USCS § 450b.

The act of Congress, approved June eighteenth, nineteen hundred thirty-four, entitled "An act to provide for the establishment, operation and maintenance of foreign trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes," cited in statutory text, appears as 19 USCS §§ 81a et seq.

Public Law 89-749, cited in statutory text, appears generally as 42 USCS § 246.

Jurisprudences:

25 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 104, 200, 230.

43 NY Jur 2d Declaratory Judgments and Agreed Case §§ 85, 151.

62 NY Jur 2d Government Tort Liability § 4.

64 NY Jur 2d Health and Sanitation § 38.

3 Am Jur 2d, Agriculture §§ 27, 46.

Annotations:

Tort liability of municipality or other governmental unit in connection with destruction of weeds and the like. 34 ALR2d 1210.

§ 225. Optional appropriations for public benefit services administered by the board

1. The board of supervisors shall have power to appropriate county funds and to permit the use of county property of all kinds for the following public benefit, objects and purposes:

(a) Propagation of game, game birds and fish. The amount appropriated under this paragraph for any fiscal year may equal but not exceed in any county one-half of one per centum of the total amount of the last preceding annual budget for county purposes, but in no event an amount in excess of ten thousand dollars;

(b) Eradication or prevention of bovine tuberculosis or other infectious or communicable diseases affecting domestic animals and fowls;

(c) Publicizing the advantages of the county or region, or for commemoration programs of historical events;

(d) Care of burial lots of deceased members of the armed forces of the United States located in a cemetery within the county and owned and maintained by an incorporated cemetery association;

(e) Suppression or control of white pine blister rust and other forest tree diseases and forest insects under the direction and supervision of the state conservation department. Employees engaged in such work upon public or private lands shall not be liable for trespass and no action shall lie therefor;

(f) Suppression or control of the Japanese beetle infestation under the direction and supervision of the state department of agriculture and markets. Employees engaged in such work upon public or private lands shall not be liable for trespass and no action shall lie therefor; and

(g) Establishment and maintenance of fire training schools for training firefighters.

(h) Establishment and maintenance of a central fire alarm system.

(i) In the county of Washington for the destruction of bobcats, porcupines, wolves, coyotes, coydogs and rattlesnakes, and in the county of Hamilton for the destruction of bobcats, porcupines, wolves, and coyotes, the funds appropriated therefor to be expended in payment of bounties to be established by the board of supervisors.

(j) In the counties of Essex, Saratoga, St. Lawrence and Warren for the destruction of bobcats, wolves, coyotes, coydogs, foxes, porcupines and rattlesnakes, the funds appropriated therefor to be expended in payment of bounties to be established by the board of supervisors.

(k) Conservation education, including the promotion of better public understanding of problems and desirable practices in conservation of natural resources.

(*l*) Establishment and maintenance of a county zoo, or the expenditure of county funds for the support, in whole or in part, of an existing zoo in the county, owned by a municipal corporation.

(m) Eradication or control of the golden nematode infestation under the direction and supervision of the state department of agriculture and markets. Employees engaged in such work upon public or private lands shall not be liable for trespass and no action shall lie therefor.

(n) Without limitation of the foregoing for any of the public benefits, objects and purposes which are set forth in section two hundred twenty-four of this county law as amended.

2. The board shall provide for the expenditure for wages, equipment and supplies, under the direction of a committee from its membership. Authority may be granted to the chairman of such committee to issue orders upon the county treasurer for such expenditures. The board shall require a report of such expenditures with verified or certified vouchers attached. The board of supervisors may adopt such rules as it may deem necessary governing the expenditure of such moneys and may require a bond in such amount as it shall determine.

3. The board may authorize the expenditure of county funds for any or all of such public benefit objects and purposes jointly with another county or counties. The board of each participating county shall appoint a committee to act for it in connection with such project. Such committees in joint sessions shall select one of their members to be chairman and shall designate the county treasurer of one of the participating counties to be custodian of the project fund. Each county treasurer shall pay to the designated county treasurer whatever portion of the total estimated cost of the project its board of supervisors has determined to contribute. Such joint fund shall be deemed the fund of all participating counties in proportion to the contribution made by each. Orders upon the fund shall be signed by the chairman. Reports of expenditures with verified or certified vouchers attached shall be made annually to the board of supervisors of each participating county.

HISTORY:

Add, L 1950, ch 691, eff Jan 1, 1951, with substance transferred from § 12 and Town L §§ 40–a, 40–b; amd, L 1952, ch 297, § 2, eff March 27, 1952; L 1954, ch 477, eff April 6, 1954; L 1956, ch 89; L 1956, ch 607; L 1957, ch 43, eff July 1, 1957; L 1957, ch 402; L 1958, ch 187, eff March 14, 1958; L 1958, ch 679, eff April 12, 1958; L 1959, ch 54; L 1959, ch 145, eff April 1, 1959; L 1960, ch 129; L 1960, ch 570, eff July 1, 1960; L 1963, ch 467, eff April 16, 1963; L 1963, ch 986, § 1, eff May 3, 1963,1, eff July 31, 2013; L 1964, ch 327, eff April 3, 1964; L 1982, ch 194, § 1, eff June 15, 1982; L 2018, ch 476, § 105, effective December 28, 2018.

Editor's Notes: Laws 1963, ch 986, § 2, did not designate the subdivision of § 225 under which par (n) was to be placed; the Publisher has placed it under sub 1 as the probable intent of the Legislature.

Revision Commission Notes: Par. (a) is derived from former Section 12, Subds. 8, 16-a, 16-b, 16-c, 16-d; Par. (b) is derived from former Section 12, Subd. 28-c; Par. (c) is derived from former Section 12, Subd. 28-d; Par. (d) is new and is based on Sections 40-a, 40-b, Par. 2 of the Town Law; Par. (e) is derived from former Section 12, Subd. 52; Par. (f) is derived from former Section 12, Subd. 52-b; Par (g) is derived from former Section 12, Subd. 62. Subdivisions 2 and 3 are new.

Amendment Notes The 2018 amendment by ch 476, § 105, substituted "firefighters" for "firemen" in 1(g).

Notes to Decisions

Analysis

1. In general
2. Propagation of game, etc.
3. Publicity services; commemorative programs
4. Miscellaneous county expenditures
5. Town expenditures

1. In general

Payments by a county of wages of a record keeper in a county extension service contracting with the county for the control of infectious bovine diseases should be made from budgetary item 250-711 which authorized payments to such associations. 1955 Ops St Compt File #7331.

Particular proposed contract between Adirondack Park Association, Inc. and county located in Adirondack region thought to be valid. 1960 Ops St Compt File #567.

2. Propagation of game, etc.

Under subd. 1(a) of this section, the Board of Supervisors of a county may appropriate funds for propagation of game, game birds and fish, but the statute does not state, nor can it be interpreted as stating, that the board may reimburse a private

concern for monies expended in furtherance of such a public benefit project. 1961 Ops St Compt File #103.

3. Publicity services; commemorative programs

The authorization in subd. 1 of this section for appropriating county funds to publicize advantages of the county or region and for commemorative programs will not sustain a grant of monies to an author who has written a book concerning the history of the county, to subsidize its printing. 1961 Ops St Compt File #118.

A contract for publicity services should be in writing and should detail the services to be performed and the compensation to be paid therefor. 1968 Ops St Compt File #428.

In conjunction with interested citizens and private organizations throughout the county, a county may participate in a publicity program and expend funds therefor in accordance with the applicable statutes. 1972 Ops St Compt File #138.

4. Miscellaneous county expenditures

This section does not authorize a Board of Supervisors to contract with a school district to defray a portion of expense of sending the school band to attend and participate in the Annual Cherry Blossom Festival at Washington, D. C., 1964 Ops St Compt #726.

5. Town expenditures

A town may pay the claim of a health officer for the purchase of vaccine for persons bitten by rabid dogs in certain cases. The County board of supervisors may appropriate money for eradication of rabies. 1946 Ops St Compt 133. See also 1946 Ops St Compt 462.

A town may not appropriate or expend town funds for a fire training program. 1947 Ops St Compt 501.

Agency Opinions

Analysis

1. Publicity services; commemorative programs
2. Miscellaneous county expenditures

1. Publicity services; commemorative programs

A contract between the County of Warren and a non-profit membership corporation for the distribution of county brochures and advertising, publicizing the advantages of the county or region, is authorized, provided that the contract contains a provision that payment of county fund must be for services actually performed and made after the rendering of a verified account and audit of vouchers attached thereto. 1968 NY Ops Atty Gen Aug 26.

A contract between a county and a city under which the city will promote the advantages of the county through promotion and operation of the city's civic center is legal. 1979 Op St Compt No. 79–256.

The City of Saratoga Springs may expend moneys from its publicity fund to pay for actual and necessary expenses incurred in connection with a "Legislators' Day" held for the benefit of the members of the New York Legislature if such expenditures serve the purpose of promoting the general commercial and industrial welfare of the City. Whether an expenditure is for such a purpose is a question of fact to be determined in the first instance by local officials. To the extent Opns St Comp, 1965, No. 65-315, unreported, or other opinions of this Department are inconsistent with this opinion, they are superseded. 1979 Op St Compt No. 79-655, 1979, 1979 N.Y. Comp. LEXIS 164.

A county may sell advertising space in a directory of restaurants in the county so long as the advertising is incidental to the publicity purpose of the directory. 1981 Op St Compt File #80-600.

2. Miscellaneous county expenditures

A board of supervisors has no authority to appropriate money for the suppression of the mosquito nuisance. 1916 N.Y. Op. Att'y Gen. No. 333.

There is no present authority for a county to create a Day Care council and to pay private citizens for their services in staffing same. A county may, however, make funds available to its social services official to provide day care at public expense for children residing in the county who are eligible therefor pursuant to Title 5 of the Social Services Law. 1970 NY Ops Atty Gen Oct 5.

Suffolk County may permit its county attorney to represent officer and employees of the Suffolk County Vanderbilt Museum Commission. By contract with the Museum the County may provide funds for the purchase of insurance and to pay the County for legal, financial and other services. 1980 NY Ops Atty Gen April 4 (informal).

A county may not give public moneys to a private charitable organization nor may it contract for services with such an organization in the absence of statutory authority. 1982 Op St Compt File #82-262.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 827; CLS Town § 277; CLS Vill § 7-730.

State aid to counties participating in control of rabies in wildlife, CLS ECL § 11-0527.

Bounties prohibited, CLS ECL § 11-0531.

Federal Aspects:

Co-operation of the Department of Agriculture with counties and other local agencies, 7 USCS § 450b.

Jurisprudences:

3 NY Jur 2d Animals § 99 .

25 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 200, 230, 246 .

55 NY Jur 2d Environmental Rights and Remedies § 283 .

3 Am Jur 2d, Agriculture § 27.

3B Am Jur Legal Forms 2d, Bounties, Forms 45:1–45:7.

5 Am Jur Pl & Pr Forms (Rev ed), Bounties, Forms 1 et seq.

Annotations:

Tort liability of governmental unit for injury or damage resulting from insecticide and vermin eradication operations. 25 ALR2d 1057.

Zoo as nuisance. 58 ALR3d 1126.

Governmental liability from operation of zoo. 92 ALR3d 832.

§ 225-a. Fire training and mutual aid programs

1. In order to develop and maintain programs for fire training, fire service-related activities and mutual aid in cases of fire and other emergencies in which the services of firefighters would be used and to cooperate with the office of fire prevention and control in furthering such programs, the board of supervisors of any county may create a county fire advisory board and may establish the office of county fire coordinator.

2. A county fire advisory board shall consist of not less than five nor more than twenty-one members, each of whom shall be appointed by the board of supervisors for a term of not to exceed one year, two years or three years. Such terms of office need not be the same for all members. It shall be the duty of such board to cooperate with the office of fire prevention and control in relation to such programs for fire training, fire service-related activities and mutual aid; to act as an advisory body to the board of supervisors and to the county fire coordinator, if any, in connection with the county participation in such programs for fire training, fire service-related activities and mutual aid and in connection with the county establishment and maintenance of a county fire training school and mutual aid programs in cases of fire and other emergencies in which the services of firefighters would be used; to perform such other duties as the board of supervisors may prescribe in relation to fire training, fire service-related activities and mutual aid in cases of fire and

other emergencies in which the services of firefighters would be used. The members of such board shall be county officers, and shall serve without compensation.

3. If the office of county fire coordinator is created in any county, the board of supervisors thereof shall appoint a county fire coordinator. It shall be his or her duty to administer the county programs for fire training and mutual aid in cases of fire and other emergencies in which the services of firefighters would be used; to act as a liaison officer between the board of supervisors and the county fire advisory board and the fire fighting forces in the county and the officers and governing boards or bodies thereof; and to perform such other duties as the board of supervisors shall prescribe. The county fire coordinator shall be a county officer and the amount of his or her compensation, if any, shall be fixed by the board of supervisors.

4. A member of the board of supervisors, the county fire coordinator, or a deputy county fire coordinator appointed pursuant to the provisions of section four hundred one of this chapter, may be appointed as a member of the county fire advisory board, but shall receive no additional compensation for services performed as a member of such advisory board.

5. Where, pursuant to section one hundred eighty-four of the town law, a town has contracted with an incorporated fire company to furnish fire protection within a fire protection district, the respective county may acquire by gift or purchase suitable apparatus and appliances for use in such district and in conjunction with the county mutual aid program and may contract with said incorporated fire company for operation, maintenance, and repair of same and for the furnishing of fire protection in such district.

HISTORY:

Add, L 1952, ch 297, § 3; amd, L 1957, ch 53, § 1, eff March 12, 1957; L 1957, ch 348, § 1, eff April 11, 1957; L 1979, ch 225, § 7, eff Sept 1, 1979; L 1994, ch 599, § 3, eff July 26, 1994; L 2010, ch 56, § 42 (Part B), eff July 1, 2010; L 2018, ch 476, § 106, effective December 28, 2018.

Revision Notes: [1952, ch 297] Section 4 of this act repealed section 209-k of the general municipal law, the provisions of this section being transferred to a new section 225-a of the county law.

Amendment Notes 2010. Chapter 56, § 42 (Part B) amended:

Sub 1 by deleting at fig 1 "in the department of state".

2010. Chapter 56, § 42 (Part B) amended:

Sub 2 by deleting at fig 1 "in the department of state".

The 2018 amendment by ch 476, § 106, substituted "firefighters" for "firemen" in 1, twice in the third sentence of 2, and in the second sentence of 3; and made stylistic changes.

Notes to Decisions

Analysis

1. In general
2. County fire coordinator
3. —Compatibility of office
4. —Powers and duties
5. Deputy county fire coordinator

1. In general

A member of the board of fire commissioners may serve as secretary of the board and receive compensation for such service. 1957 Ops St Compt File # 57-732.

2. County fire coordinator

Under subds. 1 and 3 of this section, the county fire coordinator has unfettered authority to direct and control an independent county department, and is in unclassified service, but his deputy is exempt. Neff v Falk, 10 A.D.2d 789, 198 N.Y.S.2d 986, 1960 N.Y. App. Div. LEXIS 10950 (N.Y. App. Div. 3d Dep't 1960), aff'd, 9 N.Y.2d 1004, 218 N.Y.S.2d 72, 176 N.E.2d 519, 1961 N.Y. LEXIS 1175 (N.Y. 1961).

After Suffolk County named a county fire coordinator under this section but later established a department of fire safety and named the coordinator "Director of Fire Safety" with that office to be in the unclassified civil service, pursuant to § 10 of the Municipal Home Rule Law, such officer's designation as head of department was illegal under prior court decisions. Suffolk County v New York State Civil Service Com., 44 Misc. 2d 557, 253 N.Y.S.2d 861, 1964 N.Y. Misc. LEXIS 1323 (N.Y. Sup. Ct. 1964), aff'd, 31 A.D.2d 549, 296 N.Y.S.2d 534, 1968 N.Y. App. Div. LEXIS 2834 (N.Y. App. Div. 2d Dep't 1968).

This law does not authorize the appointment of a county fire coordinator in the City of New York. It does authorize the creation of the office in Nassau County, but does not govern the method of appointment. 1955 Ops St Compt File #7604.

A person who is both a regional fire administrator and a county fire coordinator, who performs services pursuant to the state fire mobilization and mutual aid plan in either capacity, is not entitled to reimbursement, from the State, the county, or the municipality or fire district requesting assistance for salary lost because of his absence from his regular employment. 1957 Ops St Compt File #520.

3. —Compatibility of office

The county sheriff may not hold the office of county fire coordinator. 1956 Ops St Compt File #7927.

The same person may hold the positions of county fire coordinator and director of civil defense. 1959 Ops St Compt File #603.

4. —Powers and duties

Under subds. 1 and 3 of this section, the county fire coordinator has unfettered authority to direct and control an independent county department, and is in unclassified service, but his deputy is exempt. Neff v Falk, 10 A.D.2d 789, 198 N.Y.S.2d 986, 1960 N.Y. App. Div. LEXIS 10950 (N.Y. App. Div. 3d Dep't 1960), aff'd, 9 N.Y.2d 1004, 218 N.Y.S.2d 72, 176 N.E.2d 519, 1961 N.Y. LEXIS 1175 (N.Y. 1961).

A board of fire commissioners of a fire district may purchase equipment from a county fire co-ordinator. 1957 Ops St Compt File #57-732.

A part-time judge may serve as chairman or as a member of the county's fire advisory board, the judge however should disqualify himself in any cases involving the fire department. Advisory Committee on Judicial Ethics, Op 89-156 (1990).

5. Deputy county fire coordinator

Under subds. 1 and 3 of this section, the county fire coordinator has unfettered authority to direct and control an independent county department, and is in unclassified service, but his deputy is exempt. Neff v Falk, 10 A.D.2d 789, 198 N.Y.S.2d 986, 1960 N.Y. App. Div. LEXIS 10950 (N.Y. App. Div. 3d Dep't 1960), aff'd, 9 N.Y.2d 1004, 218 N.Y.S.2d 72, 176 N.E.2d 519, 1961 N.Y. LEXIS 1175 (N.Y. 1961).

Deputy fire coordinator may be appointed even though fire coordinator does not receive compensation. 1953 Ops St Compt File #6322.

The position of deputy county fire coordinator may be established by a board of supervisors. 1953 Ops St Compt File #6424.

A volunteer fireman designated a battalion or assistant battalion fire coordinator of a county mutual aid system should be formally appointed a deputy county fire coordinator, if qualified, so that he will be entitled to Workmen's Compensation Law

benefits in the event of injury while acting in such capacity. 1969 Ops St Compt File #55.

Agency Opinions

Analysis

1. In general
2. County fire advisory board
3. County fire coordinator
4. —Compatibility of office
5. —Powers and duties

1. In general

The village board of trustees, on the recommendation of the council of a fire department in a village having no board of fire commissioners, determines the style of uniforms and the type of equipment to be purchased for use by members of the fire department. The procedures for receiving calls for assistance and responding to such calls by participants in a county mutual aid plan would be those described in the plan. Section 10-1006(16) of the Village Law does not affect the limitation under section 10-1006(7) that not more than thirty percent of the members of a fire company may be non-residents of the village or of the area served by the fire department or a fire company. 1981 NY Ops Atty Gen March 5 (informal).

Transaction in which municipality would apply for loan from emergency services revolving loan account as "surrogate" for private fire company or ambulance service is not authorized under CLS St Fin § 97-pp. 1999 NY Ops Atty Gen F 99-3.

When a county has formally adopted a mutual aid plan for fire and other public emergencies, it may pay for the cost of replacing radios in the various ambulances and emergency vehicles of local volunteer fire departments participating in the mutual aid plan, in order to make a required frequency change in the radio system. 1978 Op St Compt File #343.

A county may not own, maintain and operate a cascade vehicle which is to be used at the scene of a fire to replenish the oxygen supply in the firefighter's oxygen tanks since the county would then be actively engaging in fire prevention and protection. 1982 Op St Compt File #82-280.

2. County fire advisory board

County Fire Coordinator while not a member of County Fire Advisory Board, may be appointed a member. The Chairman of the County Fire Advisory Board is member of the Board. 1955 NY Ops Atty Gen Oct 7 (informal).

Members of the County Fire Safety Advisory Board are public officers who must comply with statutory requirements for holding public office. It is against public policy for an appointing board to appoint one of its own members to a public office. 1983 NY Ops Atty Gen Feb 10 (Informal).

One person may hold positions of dispatcher in Dutchess County Department of Emergency Response as well as member of Dutchess County Fire and Safety Advisory Board; dispatcher may also serve as volunteer firefighter. 2001 NY Ops Atty Gen I 2001-5.

3. County fire coordinator

4. —Compatibility of office

County Legislator and County (or Deputy) Fire Coordinator are incompatible offices and cannot be held at the same time by the same individual. 1977 NY Ops Atty Gen Sept 29.

One person may serve simultaneously as a county fire coordinator and a town highway superintendent. 1982 NY Ops Atty Gen March 22 (informal).

A person may serve simultaneously as a county fire coordinator and as a member of a town board. 1991 NY Ops Atty Gen I 91-55.

5. —Powers and duties

County Fire Coordinator while not a member of County Fire Advisory Board, may be appointed a member. The Chairman of the County Fire Advisory Board is member of the Board. 1955 NY Ops Atty Gen Oct 7 (informal).

County fire coordinators are not empowered to enter into fire mutual aid agreements with federal agencies charged with the duty of providing fire protection for property of the United States. 1955 NY Ops Atty Gen Sept 30.

A county fire coordinator, although prohibited from contracting with the county, is not an officer or employee of a fire district and hence is not prohibited from having an interest in contracts with the district, unless he is empowered in his official capacity to set standards or specifications for equipment so contracted for. 1961 NY Ops Atty Gen Aug 29.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS Work Comp § 3.

Office of fire prevention and control, CLS Exec §§ 155 et seq.

Permanent appointment of fire fighters; completion of training program, CLS Gen Mun § 209-w.

Jurisprudences:

111 NY Jur 2d Workers' Compensation § 286.

25 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 220, 230.

ARTICLE 6 Enhanced Emergency Telephone System Surcharge

Section
307. System revenues; adjustment of surcharge

HISTORY:

Add, L 1989, ch 756, § 1, eff July 25, 1989.

§ 307. System revenues; adjustment of surcharge

All surcharge monies remitted to the municipality by a service supplier and all other monies dedicated to the payment of system costs from whatever source derived or received by the municipality shall be expended only upon authorization of the board and only for payment of system costs as permitted by this article. The municipality shall separately account for and keep adequate books and records of the amount and source of all such revenues and of the amount and object or purpose of all expenditures thereof. If at the end of any fiscal year the total amount of all such revenues exceeds the amount necessary for payment of system costs in such fiscal year, such excess shall be reserved and carried over for the payment of system costs in the following fiscal year. However, if at the end of any fiscal year such E911 reserved fund balance exceeds an amount equal to five percent of that necessary for the payment of system costs in such fiscal year, the board shall by local law reduce the surcharge for the following fiscal year to a level which more adequately reflects the system cost requirements of its E911 system. The board may also by local law reestablish or increase such surcharge, subject to the provisions of section three hundred three of this article, if the revenues generated by such surcharge and by any other source are not adequate to pay for system costs.

HISTORY:

Add, L 1989, ch 756, § 1; amd, L 1989, ch 757, § 1; L 2000, ch 528, § 1, eff Oct 4, 2000 (see 2000 note below).

Prior Law: Former § 307, add, L 1950, ch 691; repealed, L 1962, ch 310, § 97, eff Sept 1, 1963 (see now Mun HR Law § 52).

Editor's Notes: Laws 2000, ch 528, § 19, eff Oct 4, 2000, provides as follows:

§ 19. This act shall take effect immediately and shall apply to budgets for fiscal years commencing on or after January 1, 2001.

Notes to Decisions

Surcharges imposed on customers within a municipality to pay for the establishment of an enhanced emergency telephone system may be expended only for "begin system costs", i.e., costs associated with obtaining and maintaining the telecommunication equipment and the telephone services necessary to establish and provide an enhanced 911 emergency telephone system. Other expenses related to the establishment and maintenance of such system are a municipal expense and may not be paid for with surcharge funds. 1990 Op St Compt No. 90-51.

Surplus surcharge revenues collected under CLS County Art 6 may be used to pay debt service on serial bonds to extent that proceeds of those bonds were used to pay for acquisition of telecommunication equipment and costs necessarily incidental thereto. 1995 Op St Compt No. 95-5.

Cost of constructing addition to house enhanced emergency telephone (E911) system which is determined by county governing board to be necessary to properly house system and to assure effective operation and maintenance of system is "system cost" within meaning of CLS County § 301(8); further, services of architect and construction manager incidental to construction project also are "system costs." 1997 Op St Compt No. 97-6.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

25 NY Jur 2d Counties, Towns, and Municipal Corporations § 230 .

ARTICLE 6-A Local Enhanced Wireless 911 Program

Section
326. New York state interoperable and emergency communication board
327. New York state interoperable and emergency communication board membership
328. Powers and duties of the board
328-b. Powers and duties of the chairperson

HISTORY:

Add, L 2002, ch 81, § 1 (Part G), eff May 29, 2002.

§ 326. New York state interoperable and emergency communication board

The "New York state interoperable and emergency communication board" is hereby established within the division of homeland security and emergency services. The board shall assist local governments, service suppliers, wireless telephone service suppliers and appropriate state agencies by facilitating the most efficient and effective routing of 911 emergency calls; developing minimum standards for public safety answering points; promoting the exchange of information, including emerging technologies; and encouraging the use of best practice standards among the public safety answering point community.

HISTORY:

Add, L 2002, ch 81, § 1 (Part G), eff May 29, 2002; amd, L 2010, ch 56, § 31 (Part B), eff July 1, 2010.

Amendment Notes: 2010. Chapter 56, § 31 (Part B) amended:

By deleting at fig 1 "911", at fig 2 "department of state" and adding the matter in italics.

Section heading by deleting "911" and adding the matter in italics.

§ 327. New York state interoperable and emergency communication board membership

1. The board shall consist of twenty-five members who shall be selected as follows:

(a) one shall be the statewide interoperable and emergency communication coordinator, or his or her designee, who shall be the chairperson of the board;

(b) one shall be the commissioner of criminal justice services, or his or her designee;

(c) one shall be the superintendent of the state police, or his or her designee;

(d) one shall be the adjutant general of the division of military and naval affairs, or his or her designee;

(e) one shall be the commissioner of the division of homeland security and emergency services, or his or her designee;

(f) one shall be the commissioner of the department of transportation, or his or her designee;

(g) one shall be the commissioner of the department of health, or his or her designee;

(h) one shall be the director of the office of information technology services, or his or her designee;

(i) seven shall be appointed by the governor; provided, however, that no more than two such appointments made pursuant to this paragraph shall be from the same category of members as provided for in subdivision two of this section;

(j) five shall be appointed by the governor upon the recommendation of the temporary president of the senate; provided, however, that no more than one such appointment made pursuant to this paragraph shall be from the same category of members as provided for in subdivision two of this section; and

(k) five shall be appointed by the governor upon the recommendation of the speaker of the assembly; provided, however, that no more than one such appointment made pursuant to this paragraph shall be from the same category of members as provided for in subdivision two of this section.

2. The members appointed upon the recommendation of the temporary president of the senate and the speaker of the assembly, and the members appointed by the governor pursuant to paragraph (c) of subdivision one of this section, shall have experience with interoperable and emergency communication issues, and shall be representative of chiefs of police, sheriffs, fire chiefs and departments, ambulance service providers, including proprietary or volunteer ambulance services, county 911 coordinators, emergency managers, local elected officials, non-governmental organizations specializing in disaster relief, tribal nation representation, and statewide first responder associations, or representatives of consumer interests.

3. Each board member shall be appointed for a term of four years. Vacancies in the board occurring otherwise than by expiration of a term shall be filled for the unexpired term in the same manner as the

original appointment. The board shall meet as frequently as it may deem necessary and at least four times each year on such dates as agreed upon by the board. The board may approve and from time to time amend bylaws in relation to its meetings and the transaction of its business. A majority of the members of the board then in office shall constitute a quorum for the transaction of any business or the exercise of any power by the board.

4. Members of the board shall receive no compensation for their services, but shall be reimbursed for actual and necessary expenses incurred by them in the performance of their duties. Notwithstanding any inconsistent provisions of law, no officer or employee of the state or any political subdivision of the state shall forfeit such office or employment by reason of acceptance or appointment as a member of the board. For purposes of section thirteen of article thirteen of the state constitution, membership on the board by a sheriff shall not constitute public office.

5. Article two of the state administrative procedure act shall not apply, provided, however, that the board shall publicly post the standards proposed pursuant to section three hundred twenty-eight of this article no later than forty-five days prior to their adoption. Such standards shall be posted in appropriate publications, the state register and on the division of homeland security and emergency services' website. During such forty-five day period, the board shall receive and consider public comment on the proposed standards before adopting final standards. Upon final adoption, those standards adopted pursuant to section three hundred twenty-eight of this article shall be posted in appropriate publications, the state register and on the division of homeland security and emergency services' website.

6. The board shall be subject to articles six and seven of the public officers law.

HISTORY:

Add, L 2002, ch 81, § 1 (Part G), eff May 29, 2002; amd, L 2003, ch 62, § 2 (Part Y), eff May 15, 2003; L 2010, ch 56, § 33 (Part B), eff July 1, 2010; L 2012, ch 55, § 13 (Part O), eff May 29, 2012.

Amendment Notes: 2012. Chapter 55, § 13 (Part O) amended:

Sub 1, par (h) by deleting at fig 1 "for technology" and adding the matter in italics.

2010. Chapter 56, § 33 (Part B) amended:

Section heading by deleting at fig 1 "911" and adding the matter in italics.

Sub 1, opening par by deleting at fig 1 "thirteen" and adding the matter in italics.

Sub 1, par (a) by deleting at fig 1 "secretary of state" and adding the matter in italics.

Sub 1 by adding par (c) and former sub 1, par (c) designated sub 1, par (i).

Sub 1 by adding pars (d)–(g).

Sub 1 by designating sub 1, pars (d) and (e) as sub 1, pars (j) and (k), respectively.

Sub 1, par (i) by deleting at fig 1 "five" and adding the matter in italics.

Sub 1, par (j); and deleting at fig 1 "three" and adding the matter in italics.

Sub 1, par (k); and deleting at fig 1 "three" and adding the matter in italics.

Sub 2 by deleting at fig 1 "wireless telephone service suppliers, service suppliers" and adding the matter in italics.

Sub 5 by deleting at figs 1 and 2 "department of state's" and adding the matter in italics.

§ 328. Powers and duties of the board

1. The board shall serve as a resource center for the gathering and dissemination of information and provide other assistance relating to 911 services and technologies.

2. The board shall monitor and periodically review the provision of 911 services throughout the state, including but not limited to, conformance with applicable standards.

3. The board shall assist municipalities in developing plans to establish and implement enhanced 911 services utilizing state-of-the-art technologies and management systems.

4. (a) The board shall promulgate minimum standards for the operation of public safety answering points, which shall include, but not be limited to, minimum staffing requirements, minimum educational qualifications for 911 call-takers and dispatchers, and minimum training requirements for 911 call-takers and dispatchers, but which shall not include those standards required by paragraph (b) of this subdivision. In promulgating such standards, the board shall examine national models of best practice. Such standards shall be promulgated no later than October first, two thousand three.

(b) In addition, the board shall promulgate minimum standards regarding direct dispatch of all emergency services and jurisdictional protocols. Such standards shall be promulgated no later than April first, two thousand three.

5. The board shall adopt standards governing reasonable eligible wireless 911 service costs for expedited deployment funding of enhanced wireless 911 service, repayment provisions, and the criteria for approval of priority enhanced wireless 911 plans for expedited deployment funding. Standards for expedited deployment funding shall consider whether the projected costs are reasonably necessary for the provision of enhanced wireless 911 service and whether the priority enhanced wireless plan conforms to the FCC order.

6. The board shall review the certification and information submitted by a local public safety answering point, local governmental entity or the division of state police to ensure the public safety answering points are in compliance with the applicable standards that the board has promulgated pursuant to subdivision four of this section. Where the board determines that a local or state public safety answering point is not in compliance with the applicable standards promulgated pursuant to subdivision four of this section, the board shall follow the procedures outlined in section three hundred twenty-nine of this article.

7. The board shall develop procedures for a local government to terminate the routing of wireless 911 service calls to a local public safety answering point for such local government.

8. The board shall develop and implement an educational plan for informing the public about the enhanced wireless 911 service in New York state. This plan shall include, but not be limited to, an explanation of the enhanced wireless 911 system and a progress report on the county-by-county implementation of the statewide system. This information shall be provided via electronic, paper and telephonic means. Access to such information shall be made available for remote computer users through the internet or via telephone calls through a toll-free hotline number. This plan shall be updated as new information becomes available to the board not less than four times per year.

9. The board shall issue an annual report to the governor, the temporary president of the senate, the minority leader of the senate, the speaker of the assembly, and the minority leader of the assembly, on or before March first of each year, regarding the board's activities in the previous calendar year, including but not limited to, the status of 911 services across the state, including the extent to which public safety answering points across the state are equipped to receive enhanced wireless 911 calls, the allocation of moneys from the fund including allocations made and not disbursed, and the disbursements of moneys from the fund.

10. a. The New York state interoperable and emergency communication board shall make recommendations to the commissioner of the division of homeland security and emergency services on the expenditure of grants and other funding programs related to interoperable and emergency communications. In carrying out this responsibility, and consistent with the mission of the division of homeland security and emergency services, the board will make recommendations related to the development, coordination and implementation of policies, plans, standards, programs and services related to interoperable and emergency communications, including but not limited to ensuring compliance with federal mandates for interoperable communications and compatibility with the National Incident Management System.

b. The board, in fulfilling its role to provide ongoing guidance regarding policies, plans, standards, programs and services related to interoperable and emergency communications, shall:

(1) establish structures and guidelines to maintain interoperable communications planning and coordination at the statewide level;

(2) establish, promulgate and revise standards for the operation of public safety answering points; and

(3) establish guidelines regarding the creation of regionally based radio communications systems compatible with the structures and guidelines created under subparagraph one of this paragraph and with federal mandates and best practices.

HISTORY:

Add, L 2002, ch 81, § 1 (Part G), eff May 29, 2002; amd, L 2003, ch 62, § 3 (Part Y), eff May 15, 2003; L 2004, ch 292, § 1, eff Aug 3, 2004; L 2010, ch 56, § 32 (Part B), eff July 1, 2010.

Amendment Notes: 2010. Chapter 56, § 32 (Part B) amended:

By adding sub 10.

§ 328-b. Powers and duties of the chairperson

1. The chairperson of the board shall coordinate efforts among other executive agencies having an interest in the duties of the board, and shall consult with such agencies in carrying out the duties of the board.

2. The chairperson shall receive such assistance as required to carry out its duties from staff of the division of homeland security and emergency services designated for such purposes, as well as staff members recommended by other state agencies to the chairperson.

3. The board may request and receive from any department, division, board, bureau, commission, or other agency of the state or any political subdivision thereof such assistance, information, and data as will enable the board to properly carry out its functions, powers, and duties under this article.

HISTORY:

Add, L 2002, ch 81, § 1 (Part G), eff May 29, 2002; amd, L 2010, ch 56, § 35 (Part B), eff July 1, 2010.

Amendment Notes: 2010. Chapter 56, § 35 (Part B) amended:

Sub 2 by deleting at fig 1 "department of state" and adding the matter in italics.

ARTICLE 7 Finance

Section

351. Definitions
355. Contents of tentative budget
363. Supplemental appropriations
366. Unanticipated revenues; unappropriated cash surplus

HISTORY:

Add, L 1950, ch 691.

§ 351. Definitions

For the purposes of this article the following terms are defined as follows:

1. "Administrative unit" shall mean an office, department, division, bureau, board or commission, or any other agency of county government.

2. "Authorized agency" shall mean a corporation, association, institution or agency authorized to receive and expend county moneys.

3. "Budget officer" shall mean the chief fiscal officer; provided that the board of supervisors may appoint a person other than the chief fiscal officer as budget officer, who shall serve during the pleasure of the board appointing him. The person so appointed may be another county officer, except that no member of the board of supervisors may be appointed budget officer other than the chairman of the board of supervisors or the chairman of the committee of the board of supervisors designated or created to review the tentative budget. The budget officer may

receive, in addition to any other compensation which may be paid to him by the county as chief fiscal officer or otherwise, a salary as budget officer to be fixed by the board of supervisors pursuant to section two hundred one of this chapter. When a person other than the chief fiscal officer has been appointed as budget officer, the chief fiscal officer thereafter shall, in the event of a vacancy in the office of budget officer, including a vacancy by reason of the expiration of the term of the person appointed thereto, serve as budget officer unless and until another person shall be appointed as such officer as provided in this subdivision.

4. "Capital project" shall mean: (a) any physical public betterment or improvement or any preliminary studies and surveys relative thereto, or (b) land or rights in land, or (c) any furnishings, machinery, apparatus or equipment for any physical betterment or improvement when such betterment or improvement is first constructed or acquired, or (d) any combination of items (a), (b) and (c).

5. "Chief fiscal officer" shall mean the county treasurer, except:

(a) In the case of those counties having a comptroller, the comptroller; and

(b) In the case of the county of Onondaga, the county auditor.

6. "Receipts from delinquent taxes" shall mean the proceeds of (a) the collection of all unpaid taxes, assessments or other charges levied or relevied, by the board of supervisors including interest and penalties thereon, (b) the sale of tax liens or of the property for such unpaid taxes, assessments or other charges, and (c) the redemption of such property where the lien or the property was sold to the county for such unpaid taxes, assessments or other charges, but shall not include the proceeds of any such collection, sale or redemption occurring during the fiscal year for which such taxes were originally levied or relevied by the board of supervisors.

7. "Sinking fund" shall mean a fund authorized or required by law to be established and maintained for the purpose of amortizing bonded indebtedness of a county.

8. "Unappropriated unreserved fund balance" shall mean the difference between the total assets for a fund and the total liabilities, deferred revenues, encumbered appropriations, amounts appropriated for the ensuing fiscal year's budget, and amounts reserved for stated purposes pursuant to law, including reserve funds established pursuant to the general municipal law for the fund, as determined through application of the system of accounts prescribed by the state comptroller pursuant to section thirty-six of the general municipal law.

HISTORY:

Add, L 1950, ch 691, eff July 1, 1950; amd, L 1951, ch 240, eff March 24, 1951; L 1959, ch 96; L 1960, ch 392, eff April 7, 1960; L 2000, ch 528, § 2, eff Oct 4, 2000 (see 2000 note below).

Editor's Notes: Laws 2000, ch 528, § 19, eff Oct 4, 2000, provides as follows:

§ 19. This act shall take effect immediately and shall apply to budgets for fiscal years commencing on or after January 1, 2001.

Notes to Decisions

Chairman of committee of county board of supervisors appointed to review county budget, which chairman acts as county budget officer, may receive compensation as such budget officer over and above his compensation as supervisor. 1953 Ops St Compt File #6206.

There is no incompatibility between serving both as county budget officer and special deputy sheriff. 1963 Ops St Compt #669.

Agency Opinions

Person may simultaneously hold offices of county treasurer and village trustee, village mayor or village budget officer. 1986 NY Ops Atty Gen No. 86-63 (informal).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 1003.

Jurisprudences:

26 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 661, 674, 676 .

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1544, 1563 .

§ 355. Contents of tentative budget

1. The tentative budget as submitted to the board of supervisors shall contain the following:

(a) A statement of the several amounts recommended as necessary to be appropriated for conducting the business of the county and for other purposes contemplated by this chapter and otherwise by law for the ensuing fiscal year. Such statement shall be classified by funds and administrative units which shall be subdivided according to units of organization and shall itemize the character and object of expenditure.

(b) A statement of the several amounts recommended to be appropriated for authorized agencies.

(c) A statement of the amount required for payment of interest on and amortization of or redemption of indebtedness of the county during the ensuing fiscal year.

(d) A statement of the amount recommended as necessary to be appropriated for the payment of judgments against the county payable during the ensuing fiscal year.

(e) A statement of the amounts needed to provide for uncollectible and uncollected real property taxes.

(f) A statement of the estimated amount of revenues to be received by the county during the ensuing fiscal year, other than the proceeds of the tax on real estate levied for such fiscal year. Such statement shall be classified to show receipts by funds, administrative units and sources of revenue.

(g) A statement of the fund balance for each fund estimated to be on hand at the close of the current fiscal year, together with a breakdown of such fund balance estimated for encumbrances, amounts appropriated for the ensuing fiscal year's budget, amounts reserved for stated purposes pursuant to law, including reserve funds established pursuant to the general municipal law, and the remaining estimated unappropriated unreserved fund balance for

each fund, provided that the remaining estimated unappropriated unreserved fund balance for each fund shall not exceed a reasonable amount, consistent with prudent budgeting practices, necessary to ensure the orderly operation of county government and the continued provision of services, taking into account factors including, but not limited to, the size of the fund, cash flows, the certainty with which the amounts of revenues and expenditures can be estimated, and the county's experience in prior fiscal years.

(h) A statement of the amount of any sinking fund which is available and which is required to be applied to the payment of the principal of and interest on any indebtedness of the county falling due during the ensuing fiscal year.

(i) A statement for each reserve fund established pursuant to article two of the general municipal law, showing the amount therein, the purpose for which established and the amounts, if any, recommended to be spent therefrom during the ensuing fiscal year to meet appropriations for such fiscal year. A requirement of law that an expenditure from any such reserve fund be subject to a permissive or mandatory referendum shall not prevent the inclusion of a recommendation for such expenditure in the tentative budget.

2. The tentative budget shall not include moneys received or estimated to be received by the county and held by it as agent or trustee for payment to the state or to any political subdivision, provided, however, that such moneys shall be included in the tentative budget if they are to be raised by tax levied by the board of supervisors.

3. The tentative budget shall be subdivided into the following:

(a) A schedule of recommended appropriations, containing the statements required by paragraphs (a) to (e), inclusive, of subdivision one of this section, so arranged as to show in parallel columns the following comparative information: (1) expenditures for the last completed fiscal year; (2) appropriations for the current fiscal year, reflecting supplemental appropriations to a date not more than forty-five days prior to the filing of the tentative budget with the clerk of the board of supervisors; (3) the amounts requested to be appropriated by administrative units and authorized agencies for the ensuing fiscal year; and (4) the budget officer's recommended appropriations for the ensuing fiscal year.

(b) A schedule of estimated revenues other than real estate taxes to be levied, containing the statements required by paragraph (f) of subdivision one of this section, so arranged as to show in parallel columns the following comparative information: (1) revenues for the last completed fiscal year; (2) estimated revenues for the current fiscal year as modified to a date not more than forty-five days prior to the filing of the tentative budget with the clerk of the board of supervisors; and (3) the budget officer's estimate of revenues for the ensuing fiscal year.

(c) A schedule of estimated fund balances and the amounts thereof to be appropriated in the ensuing fiscal year's budget.

(d) A schedule of reserve funds containing the statements required by paragraph (i) of subdivision one of this section.

(e) An exhibit showing the computation of the amount or amounts to be levied on real estate.

4. A supplemental statement shall be included at the end of the tentative budget which shall set forth the indebtedness of the county evidenced by bonds and notes, including indebtedness authorized and unissued, as of a date not more than forty-five days prior to the filing of the tentative budget with the clerk of the board of supervisors.

5. The tentative budget shall include any other matter which the board of supervisors by resolution or by action taken pursuant to section three hundred seventy-six may require or which the budget officer deems advisable.

HISTORY:

Add, L 1950, ch 691, eff July 1, 1950; L 1952, ch 509, § 1,2,3,4, eff April 4, 1952,5, eff April 4, 1952; L 1978, ch 350, § 1,2, eff Oct 1, 1978,3, eff Oct 1, 1978,4, eff Oct 1, 1978; L 1981, ch 531, § 1, eff Sept 1, 1981; L 1985, ch 828, § 2; L 1985, ch 914, § 2, eff Dec 13, 1985, and deemed eff on and after June 6, 1985; L 2000, ch 528, § 3, eff Oct 4, 2000 (see 2000 note below),4, eff Oct 4, 2000 (see 2000 note below).

Editor's Notes: Laws 2000, ch 528, § 19, eff Oct 4, 2000, provides as follows:

§ 19. This act shall take effect immediately and shall apply to budgets for fiscal years commencing on or after January 1, 2001.

Revision Commission Notes: Nothing in paragraph f of this section is intended to relieve the county from any existing liability relative to payment of deficits in taxes and assessments payable to the supervisor under the warrant.

Repeal Notes: [1978, ch 350] Former paragraph (e) of subdivision one, of the county law, repealed by this act, related to statements of appropriations and estimated revenues required to be contained in the tentative budget as submitted to the county legislative body, relating to payments to non-city school districts on account of delinquent school taxes.

Former paragraph (h) of subdivision one of section three hundred fifty-five of the county law, repealed by this act, related to the statement of estimated receipts from delinquent taxes.

Notes to Decisions

Taxpayer's Article 78 proceeding to compel invalidation of county budget, on ground that county executive unlawfully kept revenues off-budget in violation of county charter, raised justiciable controversy, despite principle that courts cannot and will not intervene in budget process if doing so requires them to substitute their judgment on matters of discretion, since taxpayer did not question executive's discretionary power to estimate surplus funds, or even to spread them over several years, if some legal method of doing so could be found. Korn v Gulotta, 72 N.Y.2d 363, 534 N.Y.S.2d 108, 530 N.E.2d 816, 1988 N.Y. LEXIS 2686 (N.Y. 1988).

Action by city to recover an excessive real estate tax paid to the county, on the ground that budget contained excessive appropriations and surpluses, was dismissed, because the city should have objected at the public hearing required by § 359 to be held before the budget was adopted, and because this section required only that the estimated surpluses, rather than the actual surpluses, in the various funds be applied to the reduction of the real estate tax levy, and because the unappropriated cash surplus, being the

difference between the actual surplus and the estimated surplus, might be appropriated for any lawful purpose, and therefore could not be required to be appropriated for the reduction of the real estate tax. Beacon v County of Dutchess, 285 A.D. 1050, 139 N.Y.S.2d 462, 1955 N.Y. App. Div. LEXIS 6650 (N.Y. App. Div. 1955).

Blank spaces left in 4 places on proposed fiscal year county budget, where any deficits for 4 funds in question would otherwise be stated, did not render budget violative of county charter provision requiring proposed budget to state any estimated deficit in any fund to be made up in ensuing fiscal year, even though use of "0" in lieu of blank space was preferable, since use of blank space to mean "0" had been acceptable format for budgets of county since 1943. Cioci v Mondello, 153 Misc. 2d 312, 581 N.Y.S.2d 703, 1992 N.Y. Misc. LEXIS 60 (N.Y. Sup. Ct. 1992).

County board of supervisors' reductions in amounts allocated for various departments in proposed fiscal year county budget did not improperly convert line-by-line proposed budget into lump-sum budget where board was authorized to reduce any item of appropriation, and board was not required to invade prerogatives of department heads by selecting employees to be laid off or whose salaries were to be reduced, or equipment, materials or supplies to be dispensed with. Cioci v Mondello, 153 Misc. 2d 312, 581 N.Y.S.2d 703, 1992 N.Y. Misc. LEXIS 60 (N.Y. Sup. Ct. 1992).

One person may simultaneously serve as a member of the board of education of a central school district and as a member of the county legislative body in which the school district is located. 1968 NY Ops Atty Gen (Inf) 27 is superseded. p Atty Gen Jan 14 (informal).

Moneys in the county road fund may not be temporarily diverted to finance construction of a county highway for which a bond issue is proposed. 1957 Ops St Compt File #243.

A county board of supervisors may authorize the issuance of a budget note to finance an additional appropriation for a particular purpose even though there are unappropriated surplus moneys available for transfer. 1957 Ops St Compt File #511.

A budget note issued by a county may not be purchased with unappropriated cash surplus in either the general fund or the county road machinery fund. 1957 Ops St Compt File #511.

Agency Opinions

A county participating in the operation of a regional off-track betting corporation may provide that some of the revenue received by the county be distributed in part to municipalities in which betting parlors are located and in part to all municipalities in the county. 1981 NY Ops Atty Gen April 6 (informal).

Where unpaid school district taxes are returned to the county for enforcement of the collection thereof, and the county subsequently compromises its claims for such taxes with a railroad corporation, there is no authority for the county to charge back the loss resulting from the compromise to the school district involved. 1980 Op St Compt File #9.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 1003.

Fire moneys and accounts, CLS ECL § 9-1121.

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations § 1544, 1564 .

87 NY Jur 2d Public Securities § 138 .

§ 363. Supplemental appropriations

The board of supervisors, during a fiscal year, by resolution, may make additional appropriations or increase existing appropriations, the funds therefor to be provided from any unencumbered balances in appropriations pursuant to section three hundred sixty-four of this article, the contingent funds pursuant to section three hundred sixty-five of this article, or unanticipated revenues and unappropriated unreserved fund balance pursuant to section three hundred sixty-six of this article, or pursuant to the local finance law.

HISTORY:

Add, L 1950, ch 691; amd, L 1951, ch 198, § 1; L 1952, ch 509, § 7; L 2000, ch 528, § 5, eff Oct 4, 2000 (see 2000 note below).

Editor's Notes: Laws 2000, ch 528, § 19, eff Oct 4, 2000, provides as follows:

§ 19. This act shall take effect immediately and shall apply to budgets for fiscal years commencing on or after January 1, 2001.

Notes to Decisions

Even though collective bargaining agreement contained neither "job security" clause nor a "just cause" dismissal clause, where sections of County Law provided that county board of supervisors could not reappropriate funds from existing appropriations which were fully encumbered, and where, after execution of agreement between employee and community college, board of supervisors passed resolution which purportedly deleted employee's new position and reinstated employee's former position, arbitrator could properly find that county was without authority to pass resolution and was obligated to adhere to terms of agreement with employee. County of Ontario v Faculty Asso. of Community College of Finger Lakes, 56 A.D.2d 189, 392 N.Y.S.2d 111, 1977 N.Y. App. Div. LEXIS 10044 (N.Y. App. Div. 4th Dep't 1977).

Under sections of County Law, county board of supervisors may not reappropriate funds from existing appropriations which are fully encumbered. County of Ontario v Faculty Asso. of Community College of Finger Lakes, 56 A.D.2d 189, 392 N.Y.S.2d 111, 1977 N.Y. App. Div. LEXIS 10044 (N.Y. App. Div. 4th Dep't 1977).

A supplemental appropriation from unanticipated revenues may be made only to the extent that such revenues have been actually realized, and may not be made in advance of the actual realization of unanticipated revenues. 1955 Ops St Compt File #7682.

Moneys in the county road fund may not be temporarily diverted to finance construction of a county highway for which a bond issue is proposed. 1957 Ops St Compt File #243.

A budget note issued by a county may not be purchased with unappropriated cash surplus in either the general fund or the county road machinery fund. 1957 Ops St Compt File #511.

A county board of supervisors may authorize the issuance of a budget note to finance an additional appropriation for a particular purpose even though there are unappropriated surplus moneys available for transfer. 1957 Ops St Compt File #511.

Subsequent to the adoption of the budget for 1975, a county may, by resolution adopted in December, 1974, to become effective January 1, 1975, increase the salaries of certain elective officers whose terms commence on January 1, 1975, and related budget transfers may be made on or after January 1, 1975. 1974 Ops St Compt File #1257.

Agency Opinions

Where a county does not submit a capital program each year with the tentative budget, it may make an appropriation for a capital improvement after the budget has been adopted by vote of the majority of the total membership of the board of supervisors. 1980 Op St Compt File #254.

Although a county is not legally required to adopt a budget note resolution as a condition precedent to making a supplemental appropriation which it intends to finance from unappropriated fund balance, as a matter of sound fiscal policy it is advisable to do so whenever the amount of fund balance cannot be determined with exact certainty. 1984 Op St Compt File #84-9.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 364, 365, 366.

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1544, 1567 .

87 NY Jur 2d Public Funds § 10 .

§ 366. Unanticipated revenues; unappropriated cash surplus

1. The board of supervisors by resolution pursuant to section three hundred sixty-three may at any time appropriate for any lawful purpose the unanticipated revenues or unappropriated unreserved fund balance within a particular fund, but only to the extent, in each case, that the total of all revenues of such fund recognized or reasonably expected to be recognized in the fiscal year, together with unappropriated unreserved fund balance, exceeds the total of all revenues of such fund as estimated in the budget, including appropriated fund balance.

2. Notwithstanding the provisions of subdivision one of this section, grants in aid from the state and federal governments, other gifts which are required to be expended for particular objects or purposes and insurance proceeds for the loss, theft, damage or destruction of real or personal property, when proposed to be used or applied to repair or replace such property, may be appropriated by resolution of the board of supervisors at any time for such objects or purposes.

HISTORY:

Add, L 1952, ch 509, § 12, eff April 4, 1952; amd, L 1960, ch 540, § 1; L 1970, ch 421, § 1; L 2000, ch 528, § 6, eff Oct 4, 2000 (see 2000 note below).

Editor's Notes: Laws 2000, ch 528, § 19, eff Oct 4, 2000, provides as follows:

§ 19. This act shall take effect immediately and shall apply to budgets for fiscal years commencing on or after January 1, 2001.

Notes to Decisions

Action by city to recover an excessive real estate tax paid to the county, on the ground that the budget contained excessive appropriations and surpluses, was dismissed, because the city should have objected at the public hearing required by § 359 to be held before the budget was adopted, and because § 355 required only that the estimated surpluses, rather than the actual surpluses, in the various funds be applied to the reduction of the real estate tax levy, and because the unappropriated cash surplus, being the difference between the actual surplus and the estimated surplus, might be appropriated for any lawful purpose, and therefore could not be required to be appropriated for the reduction of the real estate tax. Beacon v County of Dutchess, 285 A.D. 1050, 139 N.Y.S.2d 462, 1955 N.Y. App. Div. LEXIS 6650 (N.Y. App. Div. 1955).

A supplemental appropriation from unanticipated revenues may be made only to the extent that such revenues have been actually realized, and may not be made in advance of the actual realization of unanticipated revenues. 1955 Ops St Compt File #7682.

Moneys in the county road fund may not be temporarily diverted to finance construction of a county highway for which a bond issue is proposed. 1957 Ops St Compt File #243.

A county board of supervisors may authorize the issuance of a budget note to finance an additional appropriation for a particular purpose even though there are unappropriated surplus moneys available for transfer. 1957 Ops St Compt File #511.

A budget note issued by a county may not be purchased with unappropriated cash surplus in either the general fund or the county road machinery fund. 1957 Ops St Compt File #511.

Agency Opinions

Although a county is not legally required to adopt a budget note resolution as a condition precedent to making a supplemental appropriation which it intends to finance from unappropriated fund balance, as a matter of sound fiscal policy it is advisable to do so whenever the amount of fund balance cannot be determined with exact certainty. 1984 Op St Compt File #84-9.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 363.

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1544, 1567 .

87 NY Jur 2d Public Funds § 10 .

ARTICLE 8 Officers; General Provisions

Section

401. Deputies
408-a. Advertising for bids; letting of contracts.

HISTORY:

Add, L 1950, ch 691, eff Jan 1, 1951.

§ 401. Deputies

1. Except as otherwise provided in this chapter, the board of supervisors may authorize any officer of the county paid from county funds or the head of any department to appoint one or more deputies, who shall perform such duties not inconsistent with law as shall be assigned to them by the appointing officer. In the event an authorized officer or department head fails to appoint one or more deputies and the authorized officer or department head is disabled for a period greater than thirty days, the board of supervisors may appoint such a deputy who shall possess the powers and perform the duties of the principal until the disability is removed or until a successor is elected or appointed and has qualified.

2. If there be but one deputy, he shall possess the powers and perform the duties of his principal during the absence or inability of his principal to act. If there be more than one deputy, the principal shall designate in writing and file in the office of the county clerk and of the clerk of the board of supervisors the order in which they are to serve during his absence or inability to act.

3. In the event of a vacancy in the office of the principal, such deputy, or the deputy so designated, shall possess the powers and perform the duties of his principal until the disability is removed, or, in case of a vacancy, until a successor is elected or appointed and has qualified. If no designation shall have been made and filed, the senior deputy shall act.

4. In the event of a vacancy in the office of the principal, the board of supervisors may require such deputy to furnish an official undertaking in an amount fixed by such board and approved as provided in this chapter, and upon default thereof, said board of supervisors shall have the power to designate another employee in such office or department as the acting principal officer, who upon executing and filing such undertaking shall have and exercise the powers and duties of the office until a successor is elected or appointed and has qualified.

5. The provisions of this section shall not apply to the office of undersheriff, or to the office of coroner or to the office of coroner's physician.

6. The provisions of this section shall supersede inconsistent provisions of section nine of the public officers law.

HISTORY:

Add, L 1950, ch 691, eff Jan 1, 1951, with substance transferred from §§ 12 (sub 40), 141; amd, L 1951, ch 109, § 1; L 1962, ch 897, § 4, eff Sept 1, 1962; L 1994, ch 490, § 1, eff July 26, 1994.

Editor's Notes: See 1962 note under § 400.

Revision Notes: [1951, ch 109] Section 526, subdivision 1 of the county law provides that the county clerk shall appoint one deputy who shall, during the temporary absence or inability of the county clerk, have and exercise all of the powers and duties of the office; and in case of a vacancy perform the duties of the clerk until the vacancy is filled. Section 526, subdivision 2 of the county law authorizes the county clerk to designate employees of the office as deputy county clerks. Many of the larger counties currently have more than one deputy county clerk. This act is intended to authorize the continuance of that practice and, in addition, to authorize boards of supervisors of other counties to provide for the appointment of additional deputy county clerks.

Revision Commission Notes: The provision as to deputy county treasurer was former Section 12, Subd. 40. This section is intended to modify the provisions of Section 9 of the Public Officers Law in the number that may be appointed and the power to require an undertaking.

Notes to Decisions

Analysis

1. In general
2. Deputy county clerk
3. Deputy county treasurer
4. Deputy county fire coordinator

1. In general

The power of the county clerk to select and appoint his own subordinates may be reasonably controlled in the interests of economy and governmental efficiency, so that a local law which requires the county clerk to certify that certain non-Civil Service officials whose positions were abolished as part of a governmental reorganization are necessary to the efficient conduct of his office in order to retain their services and which makes their retention subject to approval by the board of estimate does not conflict with this section. Volpe v New York, 264 A.D. 289, 35 N.Y.S.2d 233, 1942 N.Y. App. Div. LEXIS 4133 (N.Y. App. Div. 1942).

County social services department's termination of caseworker's employment was violation of lawful procedure where commissioner who reviewed hearing officer's report and made final termination decision also preferred charges, selected hearing officer, and testified at hearing, and thus was disqualified from acting on those charges; case would be remitted to department for de novo determination by person who was not involved in original hearing. Trahan v Jefferson County Dep't of Soc. Servs., 281 A.D.2d 984, 722 N.Y.S.2d 682, 2001 N.Y. App. Div. LEXIS 2913 (N.Y. App. Div. 4th Dep't), app. denied, 732 N.Y.S.2d 622, 2001 N.Y. App. Div. LEXIS 10707 (N.Y. App. Div. 4th Dep't 2001), app. denied, 97 N.Y.2d 610, 740 N.Y.S.2d 694, 767 N.E.2d 151, 2002 N.Y. LEXIS 174 (N.Y. 2002).

2. Deputy county clerk

Assistant county attorney or deputy county clerk, treasurer or commissioner of public works is entitled to salary fixed for office of principal when acting in case of vacancy in office of principal. 1993 Op St Compt No. 93-1.

3. Deputy county treasurer

A deputy treasurer must execute and file an individual undertaking when required to do so either by the treasurer or by the board of supervisors. 1956 Ops St Compt File #7919.

4. Deputy county fire coordinator

A deputy fire coordinator may be appointed even though fire coordinator does not receive compensation. 1953 Ops St Compt File #6322.

The position of a deputy county fire coordinator may be established by a board of supervisors. 1953 Ops St Compt File #6424.

A volunteer fireman designated a battalion or assistant battalion fire coordinator of a county mutual aid system should be formally appointed a deputy county fire coordinator, if qualified, so that he will be entitled to Workmen's Compensation Law benefits in the event of injury while acting in such capacity. 1969 Ops St Compt File #55.

Agency Opinions

Analysis

1. In general
2. Deputy county clerk
3. Deputy county treasurer
4. Deputy county fire coordinator
5. Deputy election commissioner
6. Assistant district attorney

1. In general

A county director of probation and his deputies are public officers and, therefore, must file an oath of office with the county clerk. 1981 NY Ops Atty Gen March 30 (informal).

2. Deputy county clerk

The county clerk has sole and exclusive power and authority to appoint a deputy clerk, and the county clerk is not required personally to attend and perform the duties of clerk of the county court. 1937 N.Y. Op. Att'y Gen. No. 320.

The county clerk of Richmond county is clerk of the county court of that county, with authority to appoint necessary deputy clerks for that court. 1939 NY Ops Atty Gen Jan 24.

Fact that County Clerk is elected official and has authority under state law to appoint deputies does not prevent application of valid county anti-nepotism policy to her appointment of deputies. 2005 NY Ops Atty Gen I 05-8.

County Board of Supervisors may challenge appointment in violation of county anti-nepotism policy through Article 78 proceeding or declaratory judgment action in its official capacity; members of board may also be able to bring taxpayer action in their individual capacities under CLS Gen Mun § 51 if they satisfy standing requirements of that statute. 2005 NY Ops Atty Gen I 05-8.

3. Deputy county treasurer

The offices of town supervisor and deputy county treasurer are incompatible, and acceptance by a supervisor of the office of deputy county treasurer constitutes a vacation of the office of supervisor. 1939 NY Ops Atty Gen Jan 20.

A deputy county treasurer may be employed in the office of the clerk of the Board of Supervisors as a tax clerk on his own time in the evenings and on holidays. 1962 NY Ops Atty Gen Aug 20.

4. Deputy county fire coordinator

County Legislator and County (or Deputy) Fire Coordinator are incompatible offices and cannot be held at the same time by the same individual. 1977 NY Ops Atty Gen Sept 29.

5. Deputy election commissioner

A deputy election commissioner shall possess the powers and perform the duties of his principal during the absence or inability of his principal to act. 1966 NY Ops Atty Gen Sept 30.

6. Assistant district attorney

An assistant district attorney must be a resident of the county in which his official functions are required to be exercised. 1965 NY Ops Atty Gen Mar 29.

An acting district attorney is authorized to make appointments of assistant district attorneys and stenographic personnel. 1966 NY Ops Atty Gen Jan 10.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 225-a; CLS Pub Health § 353; CLS Work Comp § 3.

Deputy county clerk, § 526.

Undersheriff and staff of sheriff, § 652.

Part time deputy sheriffs, § 653.

Deputy comptroller in Oneida county, § 839.

Jurisprudences:

26 NY Jur 2d Counties, Towns, and Municipal Corporations § 631.

28 NY Jur 2d Courts and Judges § 481 .

111 NY Jur 2d Workers' Compensation § 286.

63C Am Jur 2d, Prosecuting Attorneys § 10.

63C Am Jur 2d, Public Officers and Employees §§ 37 et seq.

70 Am Jur 2d, Sheriffs, Police, and Constables § 32.

§ 408-a. Advertising for bids; letting of contracts.

1. Every officer, board or agency of the county shall let all contracts for public work and all purchase contracts to the lowest responsible bidder after advertisement for bids where so required by section one hundred three of the general municipal law. The board of supervisors may require contracts involving an expenditure of less than the amount specified in such section to be let in the manner provided therein. The term "officer" as used in this section shall mean and include any officer paid compensation from county funds.

2. [Until July 31, 2024] The board of supervisors may, in the case of any purchase contract or any contract for services, other than services subject to article nine of the labor law, of the county to be awarded to the lowest responsible bidder after advertisement for bids, authorize the inclusion of a provision whereby purchases may be made or such services may be obtained under such contract by any political subdivision or fire company (as both are defined in section one hundred of the general municipal law) or district. In such event, the board shall adopt rules prescribing the conditions under which, and the manner in which, purchases may be made or services may be obtained by such political subdivision, fire company or district.

2. [Eff July 31, 2024] The board of supervisors may, in the case of any purchase contract or any contract for services, other than services subject to article eight or nine of the labor law, of the county to be awarded to the lowest responsible bidder after advertisement for bids, authorize the inclusion of a provision whereby purchases may be made or such services may be obtained under such contract by any political subdivision or fire company (as both are defined in section one hundred of the general municipal law) or district. In such event, the board shall adopt rules prescribing the conditions under which, and the manner in which, purchases may be made or services may be obtained by such political subdivision, fire company or district.

HISTORY:

Add, L 1953, ch 861, § 7; amd, L 1955, ch 669, § 2, eff April 25, 1955; L 1961, ch 114, § 1; L 1996, ch 620, § 6; L 1998, ch 469, § 8; L 2003, ch 62, § 2 (Part X), eff May 15, 2003; L 2011, ch 97, § 6 (Part C, Subpart A), eff June 24, 2011.

Revision Notes: [1961, ch 114] The purpose of this act is to empower county boards of supervisors to permit fire companies in the county to make purchases of materials, equipment and supplies under county purchase contracts. Items so purchased would, of course, be paid for by the fire companies.

At the 1960 session of the Legislature, Chapter 104 was enacted to authorize fire companies to make purchases under state contracts. This act would provide such companies with an alternative procedure under which they might make purchases under county contracts. See Gen Mun Law §§ 100, 104.

Editor's Notes: Laws 2011, ch 97, § 9 (Part C, Subpart A), eff June 24, 2011, provides as follows:

§ 9. This act shall take effect immediately, provided, however that:

1. sections four, five, six and seven of this act shall expire and be deemed repealed July 31, 2024 (Amd, L 2014, ch 55, § 2 (Part G), eff March 31, 2014; deemed eff on and after April 1, 2014; L 2019, ch 55 § 3 (Part GG), eff April 12, 2019);

2. the amendments to subdivision 4 of section 97-g of the state finance law made by section two of this act shall survive the expiration and reversion of such subdivision as provided in section 3 of chapter 410 of the laws of 2009, as amended;

3. sections four, five, six and seven of this act shall apply to any contract let or awarded on or after such effective date;

4. section one of this act shall expire and be deemed repealed July 31, 2029 (Add, L 2019, ch 55, § 3 (Part GG), eff April 12, 2019).

3. sections four, five, six and seven of this act shall apply to any contract let or awarded on or after such effective date.

Amendment Notes: 2011. Chapter 97, § 6 (Part C, Subpart A) amended:

Sub 2 by deleting at fig 1 "eight or".

Notes to Decisions

Analysis

1. In general
2. No bidding required
3. Contract values triggering competitive bidding requirement
4. Equal opportunity to compete
5. Bidders entitled to favored consideration
6. Rejecting bids
7. Attempt to manipulate bidding
8. Terms allowed in public contracts

1. In general

Successful bid on contract for collection of delinquent patient accounts at county medical center did not violate bid specifications on ground that it proposed higher rate than rate contained in another contract with state university because subject matter of state contract, collection of delinquent student accounts, was not same or similar to subject matter of instant contract. Amana Credit Services, Inc. v Erie County Medical Center, 148 A.D.2d 1006, 539 N.Y.S.2d 237, 1989 N.Y. App. Div. LEXIS 2574 (N.Y. App. Div. 4th Dep't 1989).

Petitioners lacked standing to challenge determination accepting bids of highest bidders to provide towing services on county-owned property and facilities, despite argument that cost of contracts would create illegal tax, since there was no allegation that alleged tax created by bidding process would be imposed on petitioners. Dun-Rite Towing v County of Westchester, 221 A.D.2d 628, 634 N.Y.S.2d 173, 1995 N.Y. App. Div. LEXIS 12374 (N.Y. App. Div. 2d Dep't 1995).

County Superintendent of Highways is an officer subject to the provisions of Gen Mun Law § 103. Contract let in violation of such section is void and payments thereunder should be withheld. 1954 Ops St Compt File #6575.

Discussion of form of resolution pertaining to purchases by municipalities under county contracts. 1960 Ops St Compt File #427.

While there are statutory and common law exceptions to § 103 of the General Municipal Law, there is no exception to competitive bidding requirements of this section based solely on the fact that the commodities purchased are medical supplies. Also, it should be noted that §§ 103-a and 103-b of the General Municipal Law relating to disqualification from contracting with municipal corporations for refusal to testify or waive immunity from pros-

ecution have been declared unconstitutional as violation of the privilege against self-incrimination. 1990 Op St Compt 90-18.

2. No bidding required

An off-track betting corporation, a public benefit corporation, could properly execute contract for computer data processing services without competitive bidding. American Totalisator Co. v Western Regional Off-Track Betting Corp., 44 A.D.2d 750, 396 N.Y.S.2d 301, 1974 N.Y. App. Div. LEXIS 5334 (N.Y. App. Div. 4th Dep't 1974).

CLS County § 408-a was inapplicable to solicitation of bids by Oswego County Opportunities, Inc. (OCO) for construction of its new facility because OCO is not agency of Oswego County or any other municipality and, since it did not receive municipal funding for project, contract was not one for "public work" governed by CLS Gen Mun § 103; in any event, because project was entirely funded by bonds issued by County Industrial Development Agency, it was exempt from requirements of public bidding pursuant to CLS Gen Mun § 884. B. Milligan Contr., Inc. v Oswego County Opportunities, Inc., 258 A.D.2d 931, 685 N.Y.S.2d 359, 1999 N.Y. App. Div. LEXIS 1613 (N.Y. App. Div. 4th Dep't 1999).

Contract for supplying unit dosage medication to two extended care nursing facilities called for professional knowledge and skill and, as a matter of law, was not subject to the requirement of competitive bidding for public contracts. Goldwin-Kent, Inc. v County of Broome, 107 Misc. 2d 722, 435 N.Y.S.2d 1011, 1981 N.Y. Misc. LEXIS 2090 (N.Y. Sup. Ct. 1981).

A town may purchase gasoline and fuel oil either under State contract or through the facilities of the county (when authorized by the county legislative body) without the necessity of advertising for bids. 1968 Ops St Compt File #490.

3. Contract values triggering competitive bidding requirement

Purchases chargeable to county road machinery fund which involve an expenditure of more than $1,000 must be made after competitive bidding in compliance with Gen Mun Law § 103. 1954 Ops St Compt File #6491.

A county contract for the printing of town assessment rolls is subject to competitive bidding if the price exceeds $1,000. 1959 Ops St Compt File #26.

All purchase contracts involving an expenditure of more than one thousand dollars shall be awarded to the lowest possible bidder. Purchases of items in this category may also be made through the county or the state, eliminating the need for advertisement for bids. 1967 Ops St Compt File #615.

A contract for the printing of the proceedings of a board of supervisors may be effectuated without competitive bidding if it involves an expenditure of $2500 or less. 1969 Ops St Compt File #735.

4. Equal opportunity to compete

County's use of penalty points in evaluating bids on contract for collection of delinquent patient accounts at county medical center did not constitute recomputation of bids and did not deny petitioner equal opportunity to compete and to make intelligent bid. Amana Credit Services, Inc. v Erie County Medical Center, 148 A.D.2d 1006, 539 N.Y.S.2d 237, 1989 N.Y. App. Div. LEXIS 2574 (N.Y. App. Div. 4th Dep't 1989).

5. Bidders entitled to favored consideration

Owner of trucking business was deprived of her constitutional right to due process by county's decertification of her status as Women's Business Enterprise (which entitled her to favored consideration in awarding of county contracts), where no notice was given that her certification was in jeopardy prior to decertification, and no opportunity to submit evidence on her own behalf was given until after decertification; however, owner was not entitled to full evidentiary hearing before independent referee. Chrisley v Morin, 126 A.D.2d 977, 511 N.Y.S.2d 753, 1987 N.Y. App. Div. LEXIS 42098 (N.Y. App. Div. 4th Dep't), app. dismissed, 69 N.Y.2d 1037, 517 N.Y.S.2d 1030, 511 N.E.2d 89, 1987 N.Y. LEXIS 17249 (N.Y. 1987).

6. Rejecting bids

County did not abuse its discretion in rejecting bid on contract for collection of delinquent patient accounts at county medical center since bid substantially and materially varied from bid specifications where bid was expressed as flat dollar amount rather than as percentage of delinquent amount. Amana Credit Services, Inc. v Erie County Medical Center, 148 A.D.2d 1006, 539 N.Y.S.2d 237, 1989 N.Y. App. Div. LEXIS 2574 (N.Y. App. Div. 4th Dep't 1989).

County properly rejected petitioner's bid on sewage sludge disposal contract where county's instructions to bidders expressly stated that conditional bids would not be accepted, but petitioner's bid stated that petitioner reserved right to terminate agreement if revision of standards of U.S. Environmental Protection Agency prevented discharge of volume of sludge required by contract within available dumping time; conditional language of bid did not constitute simple statement of black letter law as to impossibility of performance since petitioner clearly reserved right to decide when it considered performance to be impossible. A&S Transp. Co. v County of Nassau, 154 A.D.2d 456, 546 N.Y.S.2d 109, 1989 N.Y. App. Div. LEXIS 12463 (N.Y. App. Div. 2d Dep't 1989).

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County's refusal to award contract for transportation services for disabled children to petitioner, as lowest bidder, was not arbitrary and capricious where fulfilling contract would have required petitioner to rapidly increase size of its operation, and deficiencies in its explanatory submissions raised substantial doubt as to its ability to meet demands of contract. Donson Transp. Servs. v County of Broome, 257 A.D.2d 825, 683 N.Y.S.2d 642, 1999 N.Y. App. Div. LEXIS 366 (N.Y. App. Div. 3d Dep't 1999).

7. Attempt to manipulate bidding

County did not improperly waive requirement that bidder comply with special instructions by allowing bidder to comply 2 to 5 days after bid opening where late submission did not impair county's interests nor did it place any other bidders at competitive disadvantage. Diamond "D" Constr. Corp. v County of Erie, 209 A.D.2d 922, 619 N.Y.S.2d 413, 1994 N.Y. App. Div. LEXIS 11903 (N.Y. App. Div. 4th Dep't 1994).

8. Terms allowed in public contracts

A county may enter into an elevator maintenance contract for a term longer than those of its elected legislators. 1974 Ops St Compt File #650.

Agency Opinions

Analysis

1. In general
2. Contract values triggering competitive bidding requirement
3. Attempt to manipulate bidding
4. Terms allowed in public contracts

1. In general

Where equipment is purchased pursuant to competitive bidding requirements, specifications may not be drawn in such a way nor, for purposes of determining the lowest responsible bidder, may bids be weighted in such a way as will reflect the cost and/or incidence of repairs as well as the purchase price. 1978 Op St Compt File #628.

2. Contract values triggering competitive bidding requirement

A County Superintendent of Highways is an officer, as defined in County Law, § 408(a)(1), and must therefore award contracts

in accordance with the procedures outlined in General Municipal Law, § 103. Such contracts must be competitively bid, if the value exceeds $1,000.00 for purchase contracts or $2,500.00 for public works contracts, and the award must be made to the lowest responsible bidder. 1972 NY Ops Atty Gen June 23.

A county may not enter into a purchase contract for equipment in excess of three thousand dollars without competitive bidding. 1979 NY Ops Atty Gen July 2 (Informal).

3. Attempt to manipulate bidding

A county and a vendor may not agree to extend the term of a county purchase contract, which by its own terms has expired, so that municipalities may make purchases thereunder without competitive bidding. 1979 Op St Compt File #297.

4. Terms allowed in public contracts

A choice of law clause within a public contract would be permissible so long as there is authorization to enter into the underlying contract. 1983 Op St Compt File #83-178.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 408; CLS Gen Mun § 103.

Conspiracies to prevent competitive bidding on public contracts, CLS Gen Mun § 103-e.

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1327, 1343.

64 Am Jur 2d, Public Works and Contracts §§ 29 et seq.

ARTICLE 21 County Sealer

Section

775. Director of weights and measures; duties

HISTORY:

Add, L 1950, ch 691, eff Jan 1, 1951.

§ 775. Director of weights and measures; duties

The director of weights and measures shall perform the duties prescribed by law for the enforcement of honest weights and measures. He shall perform such additional and related duties as may be prescribed by law and directed by the board of supervisors.

HISTORY:

Add, L 1950, ch 691, eff Jan 1, 1951; amd, L 2010, ch 56, § 2 (Part EE), eff June 22, 2010.

Revision Commission Notes: New. Provisions governing the office are found in the Agriculture and Markets Law.

Amendment Notes: 2010. Chapter 56, § 2 (Part EE) amended:

By deleting at fig 1 "county sealer" and aadding the matter in italics.

Section heading by deleting at fig 1 "Count sealer" and adding the matter in italics.

Notes to Decisions

State Civil Service Commission did not act arbitrarily in refusing to classify Broome County sealer of weights and measures in the unclassified service where the sealer had supervision over one deputy and an exceedingly small budget for other subordinates, his discretion was limited by statute, his duties were more ministerial than administerial, his powers were more in the nature of a peace officer in a specialized field, there were no large policy matters for him to decide nor a division of government for him to supervise, and he was under the direct supervision of the director of civil services who was in turn a subordinate of the county executive. Broome County v New York State Civil Service Com., 73 Misc. 2d 408, 342 N.Y.S.2d 111, 1973 N.Y. Misc. LEXIS 2104 (N.Y. Sup. Ct. 1973), aff'd, 43 A.D.2d 995, 353 N.Y.S.2d 941, 1974 N.Y. App. Div. LEXIS 5752 (N.Y. App. Div. 3d Dep't 1974).

Agency Opinions

The office of Sealer of Weights and Measures in Westchester County may be removed from the supervision and control of the Sheriff of said County by enactment of another local law, amending Westchester County Local Law No. 3 of 1955, without a referendum, either permissive or mandatory. 1974 NY Ops Atty Gen Nov 13.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Weights and measures, CLS Agr & M §§ 176 et seq.

Notification and use of weighing and measuring devices, CLS Agr & M § 182.

CRIMINAL PROCEDURE LAW

Part
ONE. General Provisions

HISTORY:
Add, L 1970, ch 996, § 1, eff Sept 1, 1971.

PART ONE General Provisions

Title
A. Short Title, Applicability and Definitions

HISTORY:
Add, L 1970, ch 996, § 1, eff Sept 1, 1971.

TITLE A Short Title, Applicability and Definitions

Article 2. Peace Officers

Section
2.10. Persons designated as peace officers
2.20. Powers of peace officers
2.30. Training requirements for peace officers

HISTORY:
Add, L 1970, ch 996, § 1, eff Sept 1, 1971.

ARTICLE 2

PEACE OFFICERS

HISTORY:
Add, L 1980, ch 843, § 2, eff Sept 1, 1980.

§ 2.10. Persons designated as peace officers

Notwithstanding the provisions of any general, special or local law or charter to the contrary, only the following persons shall have the powers of, and shall be peace officers:

1. Constables or police constables of a town or village, provided such designation is not inconsistent with local law.

2. The sheriff, undersheriff and deputy sheriffs of New York city and sworn officers of the Westchester county department of public safety services appointed after January thirty-first, nineteen hundred eighty-three to the title of public safety officer and who perform the functions previously performed by a Westchester county deputy sheriff on or prior to such date.

3. Investigators of the office of the state commission of investigation.

4. Employees of the department of taxation and finance designated by the commissioner of taxation and finance as peace officers and assigned by the commissioner of taxation and finance

(a) to the enforcement of any of the criminal or seizure and forfeiture provisions of the tax law relating to (i) taxes imposed under or pursuant to the authority of article twelve-A of the tax law and administered by the commissioner, (ii) taxes imposed under or pursuant to the authority of article eighteen of the tax law and administered by the commissioner, (iii) taxes imposed under article twenty of the tax law, or (iv) sales or compensating use taxes relating to petroleum products or cigarettes imposed under article twenty-eight or pursuant to the authority of article twenty-nine of the tax law and administered by the commissioner or

(b) to the enforcement of any provision of the penal law relating to any of the taxes described in paragraph (a) of this subdivision and relating to crimes effected through the use of a statement or document filed with the department in connection with the administration of such taxes or

(c) as revenue crimes specialist and assigned to the enforcement of any of the criminal provisions of the tax law relating to taxes administered by the commissioner of taxation and finance other than those taxes set forth in paragraph (a) of this subdivision or any provision of the penal law relating to such taxes, and those provisions of the penal law (i) relating to any of the foregoing taxes and (ii) relating to crimes effected through the use of a statement or document filed with the department in connection with the administration of such foregoing taxes or

(d) to the enforcement of any provision of law which is subject to enforcement by criminal penalties and which relates to the performance by persons employed by the department of taxation and finance of the duties of their employment.

Provided, however, that nothing in this subdivision shall be deemed to authorize any such employee designated as a peace officer after November first, nineteen hundred eighty-five to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law, and further provided that, prior to such designation by the commissioner each such employee shall have successfully completed the training requirements specified in section 2.30 of this article. Provided, further, that any license issued to such employee pursuant to such peace officer designation by the commissioner shall relate only to the firearm issued to such employee by the department of taxation and finance and such permit shall not cover any other firearms. The foregoing sentence shall not be deemed to prohibit such peace officer from applying for a separate permit relating to non-departmental firearms.

5. Employees of the New York city department of finance assigned to enforcement of the tax on cigarettes imposed by title D of chapter forty-six of the administrative code of the city of New York by the commissioner of finance.

6. Confidential investigators and inspectors, as designated by the commissioner, of the department

of agriculture and markets, pursuant to rules of the department.

7. Officers or agents of a duly incorporated society for the prevention of cruelty to animals.

7-a. [Expires and repealed Aug 11, 2021] Officers or agents of a duly incorporated society for the prevention of cruelty to children in Rockland county; provided, however, that nothing in this subdivision shall be deemed to authorize such officer or agent to carry, possess, repair, or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law; and provided further that such officer or agent shall exercise the powers of a peace officer only when he is acting pursuant to his special duties.

8. Inspectors and officers of the New York city department of health when acting pursuant to their special duties as set forth in section 564-11.0 of the administrative code of the city of New York; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

9. Park rangers in Suffolk county, who shall be authorized to issue appearance tickets, simplified traffic informations, simplified parks informations and simplified environmental conservation informations.

10. Broome county park rangers who shall be authorized to issue appearance tickets, simplified traffic informations, simplified parks informations, and simplified environmental conservation informations; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

11. Park rangers in Onondaga and Cayuga counties, who shall be authorized to issue appearance tickets, simplified traffic informations, simplified parks informations and simplified environmental conservation informations, within the respective counties of Onondaga and Cayuga.

12. Special police officers designated by the commissioner and the directors of in-patient facilities in the office of mental health pursuant to section 7.25 of the mental hygiene law, and special police officers designated by the commissioner and the directors of facilities under his or her jurisdiction in the office for people with developmental disabilities pursuant to section 13.25 of the mental hygiene law; provided, however, that nothing in this subdivision shall be deemed to authorize such officers to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

13. Persons designated as special police officers by the director of a hospital in the department of health pursuant to section four hundred fifty-five of the public health law; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

14. [Repealed]

15. Uniformed enforcement forces of the New York state thruway authority, when acting pursuant to subdivision two of section three hundred sixty-one of the public authorities law; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

16. Employees of the department of health designated pursuant to section thirty-three hundred eighty-five of the public health law; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

17. Uniformed housing guards of the Buffalo municipal housing authority.

18. Bay constable of the city of Rye, the villages of Mamaroneck, South Nyack and bay constables of the towns of East Hampton, Hempstead, Oyster Bay, Riverhead, Southampton, Southold, Islip, Shelter Island, Brookhaven, Babylon, Smithtown, Huntington and North Hempstead; provided, however, that nothing in this subdivision shall be deemed to authorize the bay constables in the city of Rye, the village of South Nyack or the towns of Brookhaven, Babylon, Southold, East Hampton, Riverhead, Islip, other than a bay constable of the town of Islip who prior to April third, nineteen hundred ninety-eight served as harbormaster for such town and whose position was reclassified as bay constable for such town prior to such date, Smithtown, Huntington and Shelter Island to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

19. Harbor masters appointed by a county, city, town or village.

20. Bridge and tunnel officers, sergeants and lieutenants of the Triborough bridge and tunnel authority.

21. a. Uniformed court officers of the unified court system.

b. Court clerks of the unified court system in the first and second departments.

c. Marshall, deputy marshall, clerk or uniformed court officer of a district court.

(d)* Marshalls or deputy marshalls of a city court, provided, however, that nothing in this subdivision

*So in original.

shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

e. Uniformed court officers of the city of Mount Vernon.

f. Uniformed court officers of the city of Jamestown.

22. Patrolmen appointed by the Lake George park commission; provided however that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

23. Parole officers or warrant officers in the department of corrections and community supervision.

23-a. Parole revocation specialists in the department of corrections and community supervision; provided, however, that nothing in this subdivision shall be deemed to authorize such employee to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

24. Probation officers.

25. Officials, as designated by the commissioner of the department of corrections and community supervision pursuant to rules of the department, and correction officers of any state correctional facility or of any penal correctional institution.

26. Peace officers designated pursuant to the provisions of the New York state defense emergency act, as set forth in chapter seven hundred eighty-four of the laws of nineteen hundred fifty-one, as amended, when acting pursuant to their special duties during a period of attack or imminent attack by enemy forces, or during official drills called to combat natural or man-made disasters, or during official drills in preparation for an attack by enemy forces or in preparation for a natural or man-made disaster; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law; and provided further, that such officer shall have the powers set forth in section 2.20 of this article only during a period of imminent or actual attack by enemy forces and during drills authorized under section twenty-nine-b of article two-B of the executive law, providing for the use of civil defense forces in disasters. Notwithstanding any other provision of law, such officers shall have the power to direct and control traffic during official drills in preparation for an attack by enemy forces or in preparation for combating natural or man-made disasters; however, this grant does not include any of the other powers set forth in section 2.20 of this article.

27. New York city special patrolmen appointed by the police commissioner pursuant to subdivision c or e of section 434a-7.0 or subdivision c or e of section 14-106 of the administrative code of the city of New York; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law and the employer has authorized such officer to possess a firearm during any phase of the officers on-duty employment. Special patrolmen shall have the powers set forth in section 2.20 of this article only when they are acting pursuant to their special duties; provided, however, that the following categories of New York city special patrolmen shall have such powers whether or not they are acting pursuant to their special duties: school safety officers employed by the board of education of the city of New York; parking control specialists, taxi and limousine inspectors, urban park rangers and evidence and property control specialists employed by the city of New York; and further provided that, with respect to the aforementioned categories of New York city special patrolmen, where such a special patrolman has been appointed by the police commissioner and, upon the expiration of such appointment the police commissioner has neither renewed such appointment nor explicitly determined that such appointment shall not be renewed, such appointment shall remain in full force and effect indefinitely, until such time as the police commissioner expressly determines to either renew or terminate such appointment.

28. All officers and members of the uniformed force of the New York city fire department as set forth and subject to the limitations contained in section 487a-15.0 of the administrative code of the city of New York; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

29. Special police officers for horse racing, appointed pursuant to the provisions of the parimutuel revenue law as set forth in chapter two hundred fifty-four of the laws of nineteen hundred forty, as amended; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

30. Supervising fire inspectors, fire inspectors, the fire marshal and assistant fire marshals, all of whom are full-time employees of the county of Nassau fire marshal's office.

31. [Repealed]

32. Investigators of the department of motor vehicles, pursuant to section three hundred ninety-two-b of the vehicle and traffic law; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

33. A city marshall of the city of New York who has received training in firearms handling from the federal bureau of investigation or in the New York city police academy, or in the absence of the available training programs from the federal bureau of investigation and the New York city police academy, from another law enforcement agency located in the state of New York, and who has received a firearms permit from the license division of the New York city police department.

34. Waterfront and airport investigators, pursuant to subdivision four of section ninety-nine hundred six of the unconsolidated laws; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

35. Special investigators appointed by the state board of elections, pursuant to section 3-107 of the election law.

36. Investigators appointed by the state liquor authority, pursuant to section fifteen of the alcoholic beverage control law; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

37. Special patrolmen of a political subdivision, appointed pursuant to section two hundred nine-v of the general municipal law; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

38. A special investigator of the New York city department of investigation who has received training in firearms handling in the New York police academy and has received a firearms permit from the license division of the New York city police department.

39. Broome county special patrolman, appointed by the Broome county attorney; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

40. Special officers employed by the city of New York or by the New York city health and hospitals corporation; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law. The New York city health and hospitals corporation shall employ peace officers appointed pursuant to this subdivision to perform the patrol, investigation, and maintenance of the peace duties of special officer, senior special officer and hospital security officer, provided however that nothing in this subdivision shall prohibit managerial, supervisory, or state licensed or certified professional employees of the corporation from performing such duties where they are incidental to their usual duties, or shall prohibit police officers employed by the city of New York from performing these duties.

41. Fire police squads organized pursuant to section two hundred nine-c of the general municipal law, at such times as the fire department, fire company or an emergency rescue and first aid squad of the fire department or fire company are on duty, or when, on orders of the chief of the fire department or fire company of which they are members, they are separately engaged in response to a call for assistance pursuant to the provisions of section two hundred nine of the general municipal law; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

42. Special deputy sheriffs appointed by the sheriff of a county within which any part of the grounds of Cornell university or the grounds of any state institution constituting a part of the educational and research plants owned or under the supervision, administration or control of said university are located pursuant to section fifty-seven hundred nine of the education law; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

43. Housing patrolmen of the Mount Vernon housing authority, acting pursuant to rules of the Mount Vernon housing authority; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

44. The officers, employees and members of the New York city division of fire prevention, in the bureau of fire, as set forth and subject to the limitations contained in subdivision one of section 487a-1.0 of the administrative code of the city of New York; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

45. Persons appointed and designated as peace officers by the Niagara frontier transportation authority, pursuant to subdivision thirteen of section twelve hundred ninety-nine-e of the public authorities law.

46. Persons appointed as peace officers by the Sea Gate Association pursuant to the provisions of chap-

ter three hundred ninety-one of the laws of nineteen hundred forty, provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

47. Employees of the department of financial services when designated as peace officers by the superintendent of financial services and acting pursuant to their special duties as set forth in article four of the financial services law; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

48. New York state air base security guards when they are designated as peace officers under military regulations promulgated by the chief of staff to the governor and when performing their duties as air base security guards pursuant to orders issued by appropriate military authority; provided, however, that nothing in this subdivision shall be deemed to authorize such guards to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

49. Members of the army national guard military police and air national guard security personnel belonging to the organized militia of the state of New York when they are designated as peace officers under military regulations promulgated by the adjutant general and when performing their duties as military police officers or air security personnel pursuant to orders issued by appropriate military authority; provided, however, that nothing in this subdivision shall be deemed to authorize such military police or air security personnel to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

50. Transportation supervisors in the city of White Plains appointed by the commissioner of public safety in the city of White Plains; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

51. Officers and members of the fire investigation division of the fire department of the city of Rochester, the city of Binghamton and the city of Utica, when acting pursuant to their special duties in matters arising under the laws relating to fires, the extinguishment thereof and fire perils; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

52. Security hospital treatment assistants, as so designated by the commissioner of the office of mental health while performing duties in or arising out of the course of their employment; provided, however, that nothing in this subdivision shall be deemed to authorize such employee to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

53. Authorized agents of the municipal directors of weights and measures in the counties of Suffolk, Nassau and Westchester when acting pursuant to their special duties as set forth in section one hundred eighty-one of the agriculture and markets law; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

54. Special police officers appointed pursuant to section one hundred fifty-eight of the town law; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

55. [Expired July 1, 1993]

56. Dog control officers of the town of Brookhaven, who at the discretion of the town board may be designated as constables for the purpose of enforcing article twenty-six of the agriculture and markets law and for the purpose of issuing appearance tickets permitted under article seven of such law; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

57. Harbor Park rangers employed by the Snug Harbor cultural center in Richmond county and appointed as New York city special patrolmen by the police commissioner pursuant to subdivision c of section 14-106 of the administrative code of the city of New York. Notwithstanding any provision of law, rule or regulation, such officers shall be authorized to issue appearance tickets pursuant to section 150.20 of this chapter, and shall have such other powers as are specified in section 2.20 of this article only when acting pursuant to their special duties. Nothing in this subdivision shall be deemed to authorize such officers to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law and the employer has authorized such officer to possess a firearm during any phase of the officer's on-duty employment.

57-a. [There are two subdivisions 57-a] Seasonal park rangers of the Westchester county department of public safety while employed as authorized by the commissioner of public safety/sheriff of the county of Westchester; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm

unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

57-a. [There are two subdivisions 57-a] Officers of the Westchester county public safety emergency force, when activated by the commissioner of public safety/sheriff of the county of Westchester; provided, however that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

58. Uniformed members of the security force of the Troy housing authority provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

59. Officers and members of the sanitation police of the department of sanitation of the city of New York, duly appointed and designated as peace officers by such department; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law. Provided, further, that nothing in this subdivision shall be deemed to apply to officers and members of the sanitation police regularly and exclusively assigned to enforcement of such city's residential recycling laws.

60. [Repealed]

61. Chief fire marshall, assistant chief fire marshall, fire marshall II and fire marshall I, all of whom are full-time employees of the Suffolk county department of fire, rescue and emergency services, when acting pursuant to their special duties in matters arising under the laws relating to fires, the extinguishment thereof and fire perils; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

62. [There are two subdivisions 62] Chief fire marshall, assistant chief fire marshall, fire marshall II and fire marshall I, all of whom are full-time employees of the town of Babylon, when acting pursuant to their special duties in matters arising under the laws relating to fires, the extinguishment thereof and fire perils; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

62. [There are two subdivisions 62] Employees of the division for youth assigned to transport and warrants units who are specifically designated by the director in accordance with section five hundred four-b of the executive law, provided, however, that nothing in this subdivision shall be deemed to authorize such employees to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

63. [There are two subdivisions 63] Uniformed members of the fire marshal's office in the town of Southampton and the town of Riverhead, when acting pursuant to their special duties in matters arising under the laws relating to fires, the extinguishment thereof and fire perils; provided, however that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

63. [There are two subdivisions 63] Employees of the town court of the town of Greenburgh serving as a security officer; provided, however, that nothing in this subdivision will be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law or to authorize such officer to carry or possess a firearm except while on duty.

64. Cell block attendants employed by the city of Buffalo police department; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

65. Chief fire marshall, assistant chief fire marshall, fire marshall II and fire marshall I, all of whom are full-time employees of the town of Brookhaven, when acting pursuant to their special duties in matters arising under the laws relating to fires, the extinguishment thereof and fire perils; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license thereof has been issued pursuant to section 400.00 of the penal law.

66. Employees of the village court of the village of Spring Valley serving as security officers at such village court; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

67. Employees of the town court of the town of Putnam Valley serving as a security officer; provided, however, that nothing in this subdivision will be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law or to authorize such officer to carry or possess a firearm except while on duty.

68. [There are five subdivisions 68] Employees of the town court of the town of Southampton serving as uniformed court officers at such town court;

provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

68. [There are five subdivisions 68] The state inspector general and investigators designated by the state inspector general; provided, however, that nothing in this subdivision shall be deemed to authorize the state inspector general or such investigators to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

68. [There are five subdivisions 68] Dog control officers of the town of Arcadia, who at the discretion of the town board may be designated as constables for the purpose of enforcing article twenty-six of the agriculture and markets law and for the purpose of issuing appearance tickets permitted under article seven of such law; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

68. [There are five subdivisions 68] Employees appointed by the sheriff of Livingston county, when acting pursuant to their special duties serving as uniformed marine patrol officers; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license has been issued pursuant to section 400.00 of the penal law or to authorize such officer to carry or possess a firearm except while on duty.

68. [There are five subdivisions 68] Persons employed by the Chautauqua county sheriff's office serving as court security officers; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

69. Employees of the village court of the village of Amityville serving as uniformed court officers at such village court; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

70. Employees appointed by the sheriff of Yates county, pursuant to their special duties serving as uniformed marine patrol officers; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license has been issued pursuant to section 400.00 of the penal law or to authorize such officer to carry or possess a firearm except while on duty.

71. Town of Smithtown fire marshalls when acting pursuant to their special duties in matters arising under the laws relating to fires, the extinguishment thereof and fire perils; provided, however, that nothing in this subdivision shall be deemed to authorize such officers to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

72. Persons employed by Canisius college as members of the security force of such college; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

73. Employees of the town court of the town of Newburgh serving as uniformed court officers at such town court; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

74. [There are four subdivisions 74] a. Special deputy sheriffs appointed by the sheriff of Tompkins county pursuant to paragraphs b and c of this subdivision; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

b. For the protection of the grounds, buildings and property of Ithaca college the prevention of crime and the enforcement of law and order, and for the enforcement of such rules and regulations as the board of trustees of Ithaca college shall from time to time make, the sheriff of Tompkins county may appoint and remove following consultation with Ithaca college such number of special deputy sheriffs as is determined by the sheriff to be necessary for the maintenance of public order at Ithaca college, such appointments to be made from persons nominated by the president of Ithaca college. Such special deputy sheriffs shall comply with requirements as established by the sheriff and shall act only within Tompkins county. Such special deputy sheriffs so appointed shall be employees of the college and subject to its supervision and control as outlined in the terms and conditions to be mutually agreed upon between the sheriff and Ithaca college. Such special deputy sheriffs shall have the powers of peace officers and shall act solely within the said grounds or premises owned or administered by Ithaca college, except in those rare and special situations when requested by the sheriff to provide assistance on any public highway which crosses or adjoins such property. Ithaca college will provide legal defense and indemnification, and hold harmless the county of Tompkins, its officers and employees and the Tompkins county sheriff, its officers and employees, from all claims arising out of conduct by or injury to, such personnel while carrying out their law enforcement functions except in those situations when they are acting under the direct supervision and control of the county or sheriff's department.

c. Every special deputy sheriff so appointed shall, before entering upon the duties of his or her office, take and subscribe the oath of office prescribed by article thirteen of the constitution of the state of New York which oath shall be filed in the office of the county clerk of Tompkins county. Every special deputy sheriff appointed under this subdivision when on regular duty shall wear conspicuously a metallic shield with a designating number and the words "Special Deputy Sheriff Ithaca College" thereon.

74. [There are four subdivisions 74] Parks and recreation forest rangers employed by the office of parks, recreation and historic preservation; provided, however, that nothing in this subdivision shall be deemed to authorize such individuals to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

74. [There are four subdivisions 74] Employees of the village court of the village of Quogue, town of Southampton serving as uniformed court officers at such village court; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

74. [There are four subdivisions 74] Employees of the town court of the town of East Hampton serving as uniformed court officers at such town court; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

75. [There are three subdivisions 75] Dog control officers of the town of Clarence, who at the discretion of the town board may be designated as constables for the purpose of enforcing article twenty-six of the agriculture and markets law and for the purpose of issuing appearance tickets permitted under article seven of the agriculture and markets law; provided, however, that nothing in this subdivision shall be deemed to authorize such officers to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

75. [There are three subdivisions 75] Airport security guards, senior airport security guards, airport security supervisors, retired police officers, and supervisors of same, who are designated by resolution of the town board of the town of Islip to provide security at Long Island MacArthur Airport when acting pursuant to their duties as such, and such authority being specifically limited to the grounds of the said airport. However, nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

75. [There are three subdivisions 75] Officers and members of the fire investigation unit of the fire department of the city of Buffalo when acting pursuant to their special duties in matters arising under the laws relating to fires, the extinguishment thereof and fire perils; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

76. [There are two subdivisions 76] Employees of the village court of the village of Southampton, town of Southampton serving as uniformed court officers at such village court; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

76. [There are two subdivisions 76] Animal control officers employed by the city of Peekskill; provided, however, that nothing in this subdivision shall be deemed to authorize such individuals to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

77. [There are two subdivisions 77] (a) Syracuse University peace officers appointed by the chief law enforcement officer of the city of Syracuse pursuant to paragraphs (b), (c) and (d) of this subdivision, who shall be authorized to issue appearance tickets and simplified traffic informations; provided, however, that nothing in this subdivision shall be deemed to authorize any such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

(b) For the protection of the grounds, buildings and property of Syracuse University, the prevention of crime and the enforcement of law and order, and for the enforcement of such rules and regulations as Syracuse University shall from time to time establish, the chief law enforcement officer of the city of Syracuse may appoint and remove, following consultations with Syracuse University; such number of Syracuse University peace officers as is determined by the chief law enforcement officer of the city of Syracuse to be necessary for the maintenance of public order at such university, such appointments to be made from persons nominated by the chancellor of Syracuse University. Such peace officers shall comply with such requirements as shall be established by the chief law enforcement officer of the city of Syracuse. Such Syracuse University peace officers so appointed shall be employees of such university, and subject to its supervision and control and the terms and conditions to be mutually agreed upon between the chief law enforcement officer of the city of Syracuse and Syracuse University. Nothing in this paragraph shall limit the authority of Syracuse University to remove such peace officers. Such Syracuse University peace officers shall have the powers

of peace officers within the geographical area of employment of the grounds or premises owned, controlled or administrated by Syracuse University within the county of Onondaga, except in those situations when requested by the chief law enforcement officer of the city of Syracuse or his or her designee, including by means of written protocols agreed to by the chief law enforcement officer of the city of Syracuse and Syracuse University, to provide assistance on any public highway which crosses or adjoins such grounds or premises. Syracuse University shall provide legal defense and indemnification, and hold harmless the city of Syracuse, and its officers and employees from all claims arising out of conduct by or injury to, such peace officers while carrying out their law enforcement functions, except in those situations when they are acting under the direct supervision and control of the chief law enforcement officer of the city of Syracuse, or his or her designee.

(c) Every Syracuse University peace officer so appointed shall, before entering upon the duties of his or her office, take and subscribe the oath of office prescribed by article thirteen of the state constitution, which oath shall be filed in the office of the county clerk of the county of Onondaga. Every such peace officer appointed pursuant to this subdivision when on regular duty shall conspicuously wear a metallic shield with a designating number and the words "Syracuse University Peace Officer" engraved thereon.

(d) To become eligible for appointment as a Syracuse University peace officer a candidate shall, in addition to the training requirements as set forth in section 2.30 of this article, complete the course of instruction in public and private law enforcement established pursuant to paragraph (c) of subdivision five of section sixty-four hundred fifty of the education law.

77. [There are two subdivisions 77] Chief fire marshal, assistant chief fire marshal, and fire marshals, all of whom are full-time employees of the town of East Hampton, when acting pursuant to their special duties in matters arising under the laws relating to fires, the extinguishment thereof and fire perils; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

78. A security officer employed by a community college who is specifically designated as a peace officer by the board of trustees of a community college pursuant to subdivision five-a of section sixty-three hundred six of the education law, or by a community college regional board of trustees pursuant to subdivision four-a of section sixty-three hundred ten of the education law; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

79. [There are four subdivisions 79] Court security officers employed by the Wayne county sheriff's office; provided however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

79. [There are four subdivisions 79] Supervisors and members of the arson investigation bureau and fire inspection bureau of the office of fire prevention and control when acting pursuant to their special duties in matters arising under the laws relating to fires, their prevention, extinguishment, investigation thereof, and fire perils; provided, however, that nothing in this subdivision shall be deemed to authorize such employees to carry, possess, repair, or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

79. [There are four subdivisions 79] Peace officers appointed by the city university of New York pursuant to subdivision sixteen of section sixty-two hundred six of the education law, who shall have the powers set forth in section 2.20 of this article whether or not they are acting pursuant to their special duties; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

79. [There are four subdivisions 79] Animal control officers of the city of Elmira, who at the discretion of the city council of the city of Elmira may be designated as constables for the purpose of enforcing article twenty-six of the agriculture and markets law, and for the purpose of issuing appearance tickets permitted under article seven of such law; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

80. Employees of the Onondaga county sheriff's department serving as uniformed court security officers at Onondaga county court facilities; provided, however, that nothing in this subdivision shall be deemed to authorize such officers to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

81. [There are six subdivisions 81] Members of the security force employed by Erie County Medical Center; provided however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

81. [There are six subdivisions 81] Employees of the town of Riverhead serving as court officers at

town of Riverhead court facilities; provided, however, that nothing in this subdivision shall be deemed to authorize such officers to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

81. [There are six subdivisions 81] Employees of the town court of the town of Southold serving as uniformed court officers at such town court; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

81. [There are six subdivisions 81] Commissioners of and court officers in the department of public safety for the town of Rye when acting pursuant to their special duties in matters arising under the laws relating to maintaining the safety and security of citizens, judges and court personnel in the town court, and effecting the safe and secure transport of persons under the custody of said department; provided, however, that nothing in this subdivision shall be deemed to authorize such employees to carry, possess, repair, or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

81. [There are six subdivisions 81] Employees of the town of Yorktown serving as court attendants at town of Yorktown court facilities; provided, however, that nothing in this subdivision shall be deemed to authorize such employees to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

81. [There are six subdivisions 81] Employees of the Lewis county sheriff's department serving as uniformed court security officers at Lewis county court facilities; provided, however, that nothing in this subdivision shall be deemed to authorize such officers to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

82. Employees of the New York city business integrity commission designated as peace officers by the chairperson of such commission; provided, however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

83. Members of the security force employed by Kaleida Health within and directly adjacent to the hospital buildings on the medical campus located between East North Street, Goodell Street, Main Street and Michigan Avenue. These officers shall only have the powers listed in paragraph (c) of subdivision one of section 2.20 of this article, as well as the power to detain an individual for a reasonable period of time while awaiting the arrival of law enforcement, provided that the officer has actual knowledge, or probable cause to believe, that such individual has committed an offense; provided however, that nothing in this subdivision shall be deemed to authorize such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

84.

(a) Public safety officers employed by the University of Rochester who are designated as peace officers by the board of trustees of the University of Rochester pursuant to paragraphs (b), (c), and (d) of this subdivision; provided, however, that nothing in this subdivision shall be deemed to authorize any such officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

(b) For the protection of the grounds, buildings and property of the University of Rochester, the prevention of crime and the enforcement of law and order, the board of trustees of the University of Rochester may appoint and remove such number of public safety officers designated as peace officers as is determined by the board of trustees to be necessary for the maintenance of public order consistent with this subdivision. Such peace officers shall comply with such requirements as shall be mutually agreed upon between the chief law enforcement officers of the applicable local law enforcement jurisdictions and the University of Rochester. Such University of Rochester peace officers so appointed shall be employees of the University of Rochester and subject to its supervision and control. Such University of Rochester peace officers shall have the powers of peace officers within the geographic area of employment of the grounds or premises owned, controlled or administered by the University of Rochester within the county of Monroe, on any public street and sidewalk that abuts the grounds, buildings or property of such university, and beyond such geographic area upon the request of the chief law enforcement officer of the local law enforcement jurisdiction or his or her designee, for the purpose of transporting an individual who has been arrested in accordance with section 140.27 of this chapter and when no local law enforcement officer is available for transporting such individual in a timely manner.

(c) The University of Rochester shall provide legal defense and indemnification to applicable municipality and its officers and employees, and hold them harmless, against all claims arising out of conduct by or injury to such peace officers while carrying out their special duties, except in those situations when they are acting as agents of the chief law enforcement officer of the applicable local law enforcement jurisdiction or his or her designee.

(d) To become eligible for designation as a University of Rochester peace officer, a candidate shall, in addition to the training requirements as set forth in

section 2.30 of this article, complete the course of instruction in public and private law enforcement established pursuant to subdivision three of section sixty-four hundred thirty-five of the education law.

85. Uniformed members of the bureau of fire prevention of the town of Islip, when acting pursuant to their special duties in matters arising under laws relating to fires, the extinguishment thereof and fire perils; provided, however, that nothing in this subdivision shall be deemed to authorize such members to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

HISTORY:

Add, L 1980, ch 843, § 2, eff Sept 1, 1980; amd, L 1981, ch 175, §§ 6–8, 9, eff July 2, 1981 and applicable to offenses committed on or after such date; L 1981, ch 462, § 1; L 1981, ch 470, § 1; L 1981, ch 523, § 1; L 1981, ch 720, § 5, eff Nov 1, 1981; L 1982, ch 658, § 2, retroactive to and deemed to have been in full force and effect on and after July 1, 1979; L 1983, ch 969, §§ 3–6, 9, eff Aug 8, 1983; L 1984, ch 740, § 1; L 1985, ch 65, § 4, eff April 17, 1985; L 1985, ch 266, § 1; L 1986, ch 318, § 2, eff July 17, 1986; L 1986, ch 364, § 1; L 1987, ch 617, § 11, eff Jan 1, 1988; L 1987, ch 734, §§ 1, 2, eff Nov 1, 1987; L 1988, ch 141, § 70, eff June 20, 1988; L 1988, ch 274, § 1; L 1988, ch 438, § 1, eff July 29, 1988; L 1988, ch 695, § 3, eff Jan 1, 1989; L 1989, ch 188, § 1, eff June 24, 1989; L 1989, ch 189, § 1; L 1989, ch 285, § 1; L 1989, ch 426, § 1; L 1990, ch 931, § 1, eff Oct 15, 1990; L 1991, ch 166, § 341, eff June 12, 1991, expired Nov 1, 1993; L 1992, ch 93, § 1, eff May 17, 1992; L 1992, ch 257, § 1, eff June 30, 1992; L 1992, ch 294, § 1, eff June 30, 1992; L 1992, ch 321, § 4, eff July 17, 1992; L 1992, ch 487, § 1, eff July 17, 1992; L 1992, ch 858, § 1, eff Dec 23, 1992; L 1993, ch 157, § 1, eff July 28, 1993; L 1993, ch 204, § 1, eff July 6, 1993; L 1993, ch 508, § 12; L 1993, ch 687, § 9, eff Dec 2, 1993; L 1994, ch 466, § 1, eff July 20, 1994, expired and repealed Jan 31, 1995; L 1994, ch 519, § 1, eff July 26, 1994; L 1994, ch 620, § 1, eff July 26, 1994; L 1994, ch 665, § 1, eff Aug 2, 1994; L 1994, ch 668, § 1; L 1995, ch 2, §§ 70 and 71, eff Sept 1, 1995; L 1995, ch 206, § 1, eff Sept 24, 1995; L 1995, ch 457, § 1, eff Aug 2, 1995; L 1995, ch 462, § 1, eff Aug 2, 1995; L 1995, ch 521, § 1, eff Aug 2, 1995; L 1995, ch 658, § 1, eff Aug 8, 1995; L 1996, ch 314, § 1, eff July 17, 1996; L 1996, ch 379, § 1, eff July 30, 1996; L 1997, ch 378, § 1, eff Aug 5, 1997; L 1997, ch 555, § 1, eff Sept 10, 1997; L 1997, ch 562, § 1, eff Sept 10, 1997; L 1998, ch 224, § 1, eff July 7, 1998; L 1998, ch 424, § 3, eff Jan 1, 1999; L 1999, ch 212, § 2, eff July 6, 1999; L 1999, ch 584, § 1, eff Nov 1, 1999; L 2000, ch 168, § 1, eff July 18, 2000; L 2000, ch 227, § 1, eff Aug 16, 2000; L 2000, ch 385, § 1, eff Aug 30, 2000; L 2000, ch 393, § 1, Aug 30, 2000; L 2000, ch 404, § 1, eff Aug 30, 2000; L 2001, ch 120, § 1, eff Aug 6, 2001; L 2001, ch 481, § 1, eff Nov 21, 2001; L 2001, ch 548, § 1, eff Dec 12, 2001; L 2002, ch 260, § 1, eff July 30, 2002; L 2002, ch 261, § 1, eff July 30, 2002; L 2002, ch 318, §§ 3, 4, eff Aug 6, 2002; L 2002, ch 320, § 1, Aug 6, 2002; L 2002, ch 321, § 1, Aug 6, 2002; L 2002, ch 623, § 1, eff Oct 2, 2002; L 2003, ch 626, § 1, eff Sept 30, 2003; L 2003, ch 638, § 1, eff Oct 7; L 2003, ch 654, § 1, eff Oct 7, 2003; L 2003, ch 665, § 1, eff Oct 15, 2003; L 2003, ch 671, § 1, eff Oct 15, 2003; L 2003, ch 689, § 3, eff Oct 21, 2003; L 2004, ch 17, § 1, eff March 23, 2004; L 2004, ch 24, § 3, eff April 6, 2004; L 2004, ch 235, § 1, eff July 27, 2004; L 2004, ch 241, § 1, eff July 27, 2004; L 2004, ch 367, § 1, Aug 17, 2004; L 2004, ch 664, §§ 2, 3, eff Oct 26, 2004; L 2004, ch 752, § 1, eff Jan 28, 2005; L 2005, ch 557, § 1, eff Aug 23, 2005; L 2006, ch 438, § 1, eff July 26, 2006, expired and repealed Dec 31, 2006; L 2006, ch 467, § 1, eff Feb 12, 2007; L 2006, ch 482, § 1, eff Aug 16, 2006; L 2006, ch 501, § 1, eff Aug 16, 2006; L 2006, ch 581, § 1, eff Aug 16, 2006; L 2006, ch 584, § 1, eff Aug 16, 2006; L 2006, ch 653, § 1, eff Sept 13, 2006; L 2006, ch 693, § 2, eff Sept 13, 2006; L 2008, ch 564, § 1, eff Sept 4, 2008; L 2009, ch 329, § 7, eff Aug 8, 2009; L 2009, ch 329, § 8, eff Aug 11, 2009; L 2010, ch 56, § 50 (Part B), eff July 1, 2010; L 2011, ch 61, § 56 (Part K), eff Sept 1, 2011; L 2011, ch 62, §§ 78, 78–a (Part A), eff Oct 3, 2011; L 2011, ch 62, § 70 (Part C, Subpart B), eff March 31, 2011; L 2012, ch 502, § 1, eff June 15, 2013; L 2012, ch 504, § 1, eff Dec 17, 2012; L 2014, ch 484, § 1, effective November 1, 2015; L 2017, ch 494, § 1, effective December 18, 2017; L 2018, ch 476, § 247, effective December 28, 2018; L 2019, ch 632, § 1, effective December 12, 2019.

Editor's Notes Laws 1988, ch 694, § 4, eff Jan 1, 1989, provides as follows:

§ 4. This act shall take effect on the first day of January next succeeding the date on which it shall have become a law, and shall expire the first day of July, nineteen hundred ninety-three.

Laws 1991, ch 166, § 406(p), eff June 12, 1991, provides as follows:

(p) The amendments to section 1809 of the vehicle and traffic law made by sections three hundred thirty-seven and three hundred thirty-eight of this act shall not apply to any offense committed prior to such effective date; provided, further, that section three hundred forty-one of this act shall take effect immediately and shall expire November 1, 1993 at which time it shall be deemed repealed; sections three hundred forty-five and three hundred forty-six of this act shall take effect July 1, 1991; sections three hundred fifty-five, three hundred fifty-six, three hundred fifty-seven and three hundred fifty-nine of this act shall take effect immediately and shall expire June 30, 1995 and shall revert to and be read as if this act had not been enacted; section three hundred fifty-eight of this act shall take effect immediately and shall expire June 30, 1998 and shall revert to and be read as if this act had not been enacted; section three hundred sixty-four through three hundred sixty-seven of this act shall apply to claims filed on or after such effective date; sections three hundred sixty-nine, three hundred seventy-two, three hundred seventy-three, three hundred seventy-four, three hundred seventy-five and three hundred seventy-six of this act shall remain in effect until September 1, 2021, at which time they shall be deemed repealed; provided, however, that the mandatory surcharge provided in section three hundred seventy-four of this act shall apply to parking violations occurring on or after said effective date; and provided further that the amendments made to section 235 of the vehicle and traffic law by section three hundred seventy-two of this act, the amendments made to section 1809 of the vehicle and traffic law by sections three hundred thirty-seven and three hundred thirty-eight of this act and the amendments made to section 215-a of the labor law by section three hundred seventy-five of this act shall expire on September 1, 2021 and upon such date the provisions of such subdivisions and sections shall revert to and be read as if the provisions of this act had not been enacted; the amendments to subdivisions 2 and 3 of section 400.05 of the penal law made by sections three hundred seventy-seven and three hundred seventy-eight of this act shall expire on July 1, 1992 and upon such date the provisions of such subdivisions shall revert and shall be read as if the provisions of this act had not been enacted; the state board of law examiners shall take such action as is necessary to assure that all applicants for examination for admission to practice as an attorney and counsellor at law shall pay the increased examination fee provided for by the amendment made to section 465 of the judiciary law by section three hundred eighty of this act for any examination given on or after the effective date of this act notwithstanding that an applicant for such examination may have prepaid a lesser fee for such examination as required by the provisions of such section 465 as of the date prior to the effective date of this act; the provisions of section 306-a of the civil practice law and rules as added by section three hundred eighty-one of this act shall apply to all actions pending on or commenced on or after September 1, 1991, provided, however, that for the purposes of this section service of such summons made prior to such date shall be deemed to have been completed on September 1, 1991; the provisions of section three hundred

eighty-three of this act shall apply to all money deposited in connection with a cash bail or a partially secured bail bond on or after such effective date; and the provisions of sections three hundred eighty-four and three hundred eighty-five of this act shall apply only to jury service commenced during a judicial term beginning on or after the effective date of this act; provided, however, that nothing contained herein shall be deemed to affect the application, qualification, expiration or repeal of any provision of law amended by any section of this act and such provisions shall be applied or qualified or shall expire or be deemed repealed in the same manner, to the same extent and on the same date as the case may be as otherwise provided by law (Amd, L 1993, ch 187, § 1, eff June 30, 1993; L 1994, ch 61, § 11, eff April 18, 1994, deemed eff April 1, 1994; L 1995, ch 83, § 40, eff July 20, 1995 and deemed eff on and after April 1, 1995; L 1997, ch 435, § 64, eff Aug 20, 1997; L 1999, ch 452, § 12, eff Sept 1, 1999; deemed eff on and after April 1, 1999; L 2001, ch 95, § 16, eff July 13, 2001; L 2003, ch 16, § 14, eff March 31, 2003, deemed eff on and after March 31, 2003; L 2005, ch 56, § 13 (Part D), eff April 12, 2005, deemed eff on and after April 1, 2005; L 2007, ch 56, § 13 (Part C), eff April 9, 2007, deemed eff on and after March 31, 2007; L 2009, ch 56, § 13 (Part U), eff April 7, 2009; L 2011, ch 57, § 13 (Part A), eff March 31, 2011; L 2013, ch 55, § 12 (Part E), eff March 28, 2013; L 2015, ch 55, § 12 (Part B), eff April 13, 2015; L 2017, ch 55, § 12 (Part A), eff April 20, 2017; L 2019, ch 55, § 12 (Part O), eff April 12, 2019, deemed eff on and after March 31, 2019; L 2020, ch 55, § 12 (Part A), eff April 3, 2020).

Laws 1993, ch 508, § 16, eff Nov 1, 1993, provides as follows:

§ 16. This act shall take effect on the first day of the first month beginning more than 90 days after this act shall become a law; provided, however, that any rules or regulations necessary to implement the provisions of this act may be promulgated and any procedures, forms, or instructions necessary for such implementation may be adopted and issued on or after the date this act shall have become a law. (Amd, L 1997, ch 389, § 103 (Part A), eff Aug 7, 1997, L 2002, ch 85, § 2 (Part F), eff May 29, 2002, L 2007, ch 60, § 1 (Part D), eff April 9, 2007, L 2008, ch 57, § 1 (Part TT-1), eff April 23, 2008.).

Laws 1993, ch 729, § 17-b, eff Dec 27, 1993, amended Laws 1981, ch 720, § 8 (amd, L 1983, ch 399, § 3, L 1987, ch 24, § 1, L 1987, ch 325, § 2, L 1991, ch 371, § 2), so as to delete an expiration date of January 1, 1997, applicable to the addition of subdivision 47.

Laws 1994, ch 466, § 2, eff July 20, 1994, provides as follows:

§ 2. This act shall take effect immediately and shall expire and be deemed repealed January 31, 1995.

Laws 1995, ch 2, § 152, sub 5, eff June 7, 1995, provides as follows:

§ 152. This act shall take effect immediately, provided, however:

5. (a) Sections forty-seven through sixty-eight and section seventy of this act shall take effect September 1, 1995, and shall apply to all taxable events respecting cigarettes as such events are described in section 1103 of the tax law, as added by section forty-nine of this act, occurring on or after such date.

(b) The amendments to paragraph (q) of subdivision 34 of section 1.20 and to paragraph (a) of subdivision 4 of section 2.10 of the criminal procedure law made by sections sixty-eight and seventy of this act shall be subject to the expiration and reversion of such paragraphs pursuant to section 16 of chapter 508 of the laws of 1993, when upon such date the provisions of sections sixty-nine and seventy-one of this act shall take effect.

(c) The commissioner of taxation and finance may take any action with respect to the adoption, amendment, suspension or repeal of any rule or regulation relating to sections forty-seven through seventy-three of this act, and may establish any procedure necessary for the timely implementation of sections forty-seven through seventy-three of this act, on or after the date it shall have become a law;.

Laws 2002, ch 318, § 7, eff Aug 6, 2002, provides as follows:

§ This act shall take effect immediately; provided, however, that the amendments to paragraph (q) of subdivision 34 of section 1.20 of the criminal procedure law made by section one of this act shall be subject to the expiration and reversion of such paragraph pursuant to section 16 of chapter 508 of the laws of 1993, when upon such date the provisions of section two of this act shall take effect; and provided, further that the amendments to paragraph (c) of subdivision 4 of section 2.10 of the criminal procedure law, made by section three of this act, shall not affect the expiration of such paragraph and shall be deemed expired therewith.

Laws 2006, ch 438, § 2, eff July 26, 2006, provides as follows:

§ 2. This act shall take effect immediately, and shall expire and be deemed repealed December 31, 2006.

Laws 2008, ch 57, § 1 (Part TT-1), eff April 23, 2008, amended L 1993, ch 508, § 16 (amd, L 1997, ch 389, § 103 (Part A), eff Aug 7, 1997, L 2002, ch 85, § 2 (Part F), eff May 29, 2002, L 2007, ch 60, § 1 (Part D), eff April 9, 2007), so as to delete an expiration provision applicable to the amendment of subdivision 4, paragraphs (a) and (c).

Laws 2009, ch 329, § 14, provides:

§ 14. This act shall take effect immediately; provided that the provisions of sections eight and ten of this act shall expire August 11, 2021 and section thirteen of this act shall expire December 31, 2017, when upon such date the provisions of such sections shall be deemed repealed (Amd, L 2015, ch 146, § 1, eff Aug 13, 2015; L 2017, ch 97, § 1, eff July 24, 2017; L 2019, ch 155, § 1, eff Aug 9, 2019).

Laws 2011, ch 62, § 114(i) (Part A), eff April 1, 2011, provides as follows:

§ 114. This act shall take effect April 1, 2011; provided, however, that:

(i) whenever the term "superintendent of financial services" appears in any provision of this act effective before October 3, 2011, it shall refer to the superintendent of banks.

Laws 2011, ch 61, § 58 intro par (Part K), eff Sept 1, 2011, provides as follows:

§ 58. This act shall take effect September 1, 2011 and shall apply to sales or uses occurring on or after such date in accordance with the applicable transitional provisions in sections 1106 and 1217 of the tax law; provided, however, that:

Amendment Notes: 2012. Chapter 502, § 1 amended:

By adding sub 83 [first setout].

2012. Chapter 504, § 1 amended:

By adding sub 83 [second setout].

2011. Chapter 61, § 56 (Part K) amended:

Sub 4, par (a) by deleting at fig 1 "automotive fuel" and adding the matter in italics.

2011. Chapter 62, § 78 (Part A) amended:

Sub 47 by deleting at fig 1 "insurance frauds bureau of the state", at figs 2 and 3 "insurance" and adding the matter in italics.

2011. Chapter 62, § 70 (Part C, Subpart B) amended:

Sub 23 by deleting at fig 1 "division of parole" and adding the matter in italics.

Sub 23-a by deleting at fig 1 "division of parole" and adding the matter in italics.

Sub 25 by deleting at fig 1 "correctional services" and adding the matter in italics.

2011. Chapter 62, § 78-a (Part A) amended:

By repealing sub 61.

2010. Chapter 56, § 50 (Part B) amended:

Sub 79 by deleting at fig 1 "department of state's".

2009. Chapter 329, § 7 amended:

By repealing sub 7-a.

2009. Chapter 329, § 8 amended:

By adding sub 7-a.

2008. Chapter 565, § 1 amended:

By adding sub 82.
2005. Chapter 557, § 1 amended:
By adding sub 80.
2006. Chapter 467, § 1 amended:
By adding sub 81 [first setout].
2006. Chapter 482, § 1 amended:
By adding sub 81 [second setout].
2006. Chapter 501, § 1 amended:
By adding sub 81 [third setout].
2006. Chapter 581, § 1 amended:
By adding sub 81 [fourth setout].
2006. Chapter 584, § 1 amended:
By adding sub 81 [fifth setout].
2006. Chapter 653, § 1 amended:
By adding sub 81 [sixth setout].
2006. Chapter 693, § 2 amended by repealing sub 31.
2004. Chapter 17, § 1 amended:
Sub 77 [first setout], par (a) redesignated from sub 76 [second setout]; by deleting at fig 1 "Persons employed by Syracuse University who have been authorized by such university to serve as peace officers and who have completed all training and met all other qualifications required by law to be a peace officer; provided, however, that nothing in this subdivision shall be deemed to authorize such peace officer to carry, possess, repair or dispose of a firearm unless the appropriate license therefore has been issued pursuant to section 400.00 of the penal law or unless acting pursuant to paragraph (h) of subdivision one of section 2.20 of this title. Syracuse University shall have the power and authority to adopt policies, rules, and regulations governing the conduct of such peace officers while employed by such university; provided, however, that all such policies, rules, and regulations shall be consistent with the provisions of the penal law and this chapter." and adding the matter in italics.
Sub 77 [first setout] by adding pars (b)–(d).
2004. Chapter 24, § 3 amended:
Sub 78 redesiganted from sub 76 [third setout].
2004. Chapter 235, § 1 amended:
By adding sub 79 [first setout].
2004. Chapter 367, § 1 amended:
By adding sub 77 [second setout].
2004. Chapter 664, § 1 amended:
By adding sub 79 [third setout].
2004. Chapter 752, § 1 amended:
By adding sub 79 [fourth setout].
2003. Chapter 626, § 1 amended:
By adding sub 76 [first setout].
2003. Chapter 664, § 3 amended:
Sub 27 by deleting at fig 1 "campus peace officers-level I, level II and level III and campus public safety officers employed by the city university of New York;".
2003. Chapter 665, § 1 amended:
By adding sub 76 [second setout].
2003. Chapter 638, § 1 amended:
Sub 63 [first setout]by deleting at fig 1 "Southhampton"and adding the matter in italics.
2003. Chapter 671, § 1 amended:
Sub 40 by adding the matter in italics.
2002. Chapter 260, § 1 amended:
By adding sub 74 [third setout].
2002. Chapter 261, § 1 amended:
By adding sub 74 [fourth setout].
2002. Chapter 318, § 3 amended:
Sub 4, par (b) by adding the matter in italics.
Sub 4, par (c) by deleting at fig 1 "imposed under article twenty-eight or pursuant to the authority of article twenty-nine of the tax law and administered by the commissioner" and adding the matter in italics.
2002. Chapter 318, § 4 amended:
Sub 4, closing par by deleting at fig 1 "chapter" and adding the matter in italics.
2002. Chapter 320, § 1 amended:
By adding sub 75 [first setout].
2002. Chapter 321, § 1 amended:
By adding sub 75 [second setout].
2002. Chapter 623, § 1 amended:
By adding sub 75 [third setout].
2001. Chapter 120, § 1 amended:
By adding sub 74 [first setout].
2001. Chapter 481, § 1 amended:
Sub 30 by deleting at fig 1 ", when acting pursuant to their special duties".
2001. Chapter 548, § 1 amended:
By adding sub 74 [second setout].
2000. Chapter 168, § 1 amended:
By adding sub 68 [second setout].
2000. Chapter 227, § 1 amended:
By adding sub 68 [third setout].
2000. Chapter 381, § 1 amended:
By adding sub 68 [fourth setout].
2000. Chapter 385, § 1 amended:
Sub 65 redesignated from another sub 64.
Sub 66 redesignated from another sub 64.
Sub 67 redesignated from another sub 64.
Sub 68 [first setout] designated from sub 65.
Sub 69 redesignated from another sub 66.
Sub 70 redesignated from another sub 66.
Sub 71 redesignated from another sub 66.
Sub 72 redesignated from sub 67.
By adding sub 73.
2000. Chapter 393, § 1 amended:
By adding sub 68 [fifth setout].
1998. Chapter 224, § 1 amended:
Sub 18 by adding the matter in italics.
1998. Chapter 424, § 3 amended by repealing sub 14.
1995. amended by adding sub 64.

The 2014 amendment by ch 484, § 1, in 52, substituted "performing duties in or arising out of the course of their employment" for "transporting persons convicted of a crime to court, to other facilities within the jurisdiction of the office of mental health, or to any state or local correctional facility" and "section 400.00 of the penal law" for "section 400.00 of penal law" at the end.

The 2017 amendment by ch 494, § 1, redesignated 83 as 84; in 84(a), substituted "Public safety" for "Security services" and "paragraphs (b), (c), and (d) of" for "paragraphs (b), (c), (d) and (e) of"; in 84(b), substituted "public safety" for "security services" in the first sentence and "on any public street and sidewalk that abuts the grounds, buildings or property of such university, and" for "except as provided in paragraph (c) of this subdivision; provided, however, such peace officers shall have the powers of peace officers" in the last sentence; deleted former 84(c); and redesignated former 84(d) and 84(e) as 84(c) and 84(d).

The 2018 amendment by ch 476, § 247, substituted "police officers" for "policemen" wherever it appears in 12, 13, 29, 49, 54; and substituted "his or her jurisdiction in the office for people with developmental disabilities" for "his jurisdiction in the office of mental retardation and developmental disabilities" in 12.

The 2019 amendment by ch 632, § 1, added 85.

Notes to Decisions

Analysis

1. Generally
2. Local special police
3. Town or village constables
4. Correction officers
5. Probation officer or trainee
6. Border patrol agent

1. Generally

New Jersey police officers were not authorized to execute federal arrest warrant in New York, and resulting evidence was subject to suppression, where case did not involve hot pursuit. People v LaFontaine, 92 N.Y.2d 470, 682 N.Y.S.2d 671, 705 N.E.2d 663, 1998 N.Y. LEXIS 4047 (N.Y. 1998).

Sixth Amendment right to counsel did not entitle wife, who was accused of murdering her terminally ill husband, to have her

pathologist present at autopsy of husband's body conducted by county medical examiner at request of district attorney under CLS Pub Health § 4210(4) where mere fact that examiner's determination might be critical element of prosecution's case did not make autopsy critical stage of criminal proceeding; examiner, as independently appointed physician, was not under district attorney's control, was not peace officer, and had no law enforcement powers. Scheufler v Bruno, 250 A.D.2d 268, 684 N.Y.S.2d 305, 1999 N.Y. App. Div. LEXIS 523 (N.Y. App. Div. 3d Dep't 1999).

Division of Criminal Justice Services does not have authority to unilaterally determine peace officer's status or to remove individual's name from registry; accordingly, division's unilateral decision to remove defendant's name from peace officer's registry, which led to his indictment for criminal possession of weapon in third degree, is ineffective and thus indictment is dismissed. People v Ferrara, 128 Misc. 2d 687, 490 N.Y.S.2d 462, 1985 N.Y. Misc. LEXIS 2979 (N.Y. Sup. Ct. 1985).

Defendant was not entitled to dismissal of those counts charging him with aggravated assault on police officer or peace officer under CLS Penal § 120.11 for shooting at federal agents from Alcohol, Tobacco and Firearms Bureau, Drug Enforcement Agency and United States Customs Bureau, notwithstanding that federal law enforcement officers are not listed as police or peace officers in CLS CPL §§ 1.20 and 2.10, since CLS CPL § 2.15 confers peace officer powers on such federal officers, and intent of § 2.15 was to create another, viable law enforcement force with most of peace officer powers of state law enforcement officers. People v Nezaj, 139 Misc. 2d 366, 528 N.Y.S.2d 491, 1988 N.Y. Misc. LEXIS 96 (N.Y. Sup. Ct. 1988).

Where deputy director of security for county interviewed former employee of county nursing home in relation to misappropriation of funds, deputy director was peace officer within meaning of CLS CPL § 2.10. People v Knapp, 141 Misc. 2d 517, 533 N.Y.S.2d 413, 1988 N.Y. Misc. LEXIS 544 (N.Y. County Ct. 1988).

New York City Marshal who worked with tow truck operator in enforcing parking laws and towing cars of scofflaws was not "peace officer" charged with duties under CLS CPL § 2.20, although New York City Marshals trained in firearms handling who have firearms permit from city's police department license division are designated as "peace officers" under CLS CPL § 2.10(33), as CLS CPL § 2.30 requires all peace officers to receive certification as such, and city had not sought state certification of city marshals as peace officers. Gonzalez v City of New York, 167 Misc. 2d 577, 638 N.Y.S.2d 286, 1996 N.Y. Misc. LEXIS 28 (N.Y. Sup. Ct. 1996).

There was a rational basis for eliminating the position of Senior Court Clerk in the Third and Fourth Judicial Departments while retaining it in the First and Second Judicial Departments, as there was a difference between the duties of Court Clerks upstate and Court Clerks downstate. Under CPL 2.10(21)(b), Court Clerks in the First and Second Judicial Departments were designated as peace officers and were required to attend firearms training for security backup purposes; a union's claim that the reclassification violated N.Y. Civ. Serv. Law § 115 was based on its mistaken belief that the peace officer status for Senior Court Clerks was meaningless and that the clerical duties of both titles were identical. Matter of Civil Serv. Empls. Assn., Inc., Local 1000, AFSCME, AFL-CIO v State of N.Y. Unified Ct. Sys., 35 A.D.3d 1008, 825 N.Y.S.2d 822, 2006 N.Y. App. Div. LEXIS 14797 (N.Y. App. Div. 3d Dep't 2006).

Superintendent of Insurance is authorized to establish insurance frauds bureau and designate its employees as peace officers as defined in CLS CPL § 2.10 who are vested with authority to conduct searches and make arrests. Insurance Department, Opinions of General Counsel, Opinion Number 03-10-32.

Since Deputy Commissioner does not have peace officer status, holding that position would not expressly violate rules or statutes prohibiting part-time judge from employment as police or peace officer. Ops Adv Comm Jud Ethics No. 05-50.

Town justice may accept employment as Security Officer at community college where he/she would not be peace officer, would not have powers of arrest beyond that of private citizen, and college is not located within his/her jurisdiction. Ops Adv Comm Jud Ethics No. 05-73.

2. Local special police

Petitioner, who did not meet age requirements for appointment as city police officer, was not entitled to appointment on basis of his permanent appointment as security officer of Buffalo Municipal Housing Authority since he was designated only as peace officer under CLS CPL § 2.10(17) and was not police officer within meaning of CLS Civ S § 58. Mulhern v Vossler, 151 A.D.2d 1022, 542 N.Y.S.2d 86, 1989 N.Y. App. Div. LEXIS 8366 (N.Y. App. Div. 4th Dep't 1989).

Prosecution was properly allowed to reopen its case to present additional evidence that assault victim was peace officer under CLS Penal § 120.05(3) where (1) on direct examination, victim offered competent evidence that he qualified as peace officer under 2 categories in CLS CPL § 2.10 (uniformed court officer of Unified Court System and special patrolman of political subdivision appointed under CLS Gen Mun § 209-v), (2) defense counsel, instead of cross-examining victim on such status, made tactical decision to await close of prosecution's case and then move to dismiss indictment for failure to prove prima facie case, (3) prosecution, when first alerted to claim that its evidence was deficient, offered to submit additional evidence on status issue, and (4) defendant's sole claim of prejudice was that prosecution's additional evidence compelled finding that victim was peace officer. People v Hollis, 255 A.D.2d 615, 680 N.Y.S.2d 678, 1998 N.Y. App. Div. LEXIS 11691 (N.Y. App. Div. 3d Dep't), app. denied, 92 N.Y.2d 1033, 684 N.Y.S.2d 498, 707 N.E.2d 453, 1998 N.Y. LEXIS 4648 (N.Y. 1998).

In prosecution for second degree assault on peace officer, court properly charged jury that it could find defendant guilty only if it found that victim was court security officer and was acting in that capacity when assaulted where sole trial evidence on issue proved that if victim qualified as peace officer, it was as court security officer under either CLS CPL § 2.10(21)(a) or CLS CPL § 2.10(37) and CLS Gen Mun § 209-v(1), and court chose to tailor its instructions to evidence rather than remove "peace officer" element from crime. People v Hollis, 255 A.D.2d 615, 680 N.Y.S.2d 678, 1998 N.Y. App. Div. LEXIS 11691 (N.Y. App. Div. 3d Dep't), app. denied, 92 N.Y.2d 1033, 684 N.Y.S.2d 498, 707 N.E.2d 453, 1998 N.Y. LEXIS 4648 (N.Y. 1998).

In a prosecution for resisting arrest and other offenses, the charge of resisting arrest would be dismissed where defendant was arrested by a sergeant who was neither a police officer nor peace officer in that he was merely a special patrolman in a private hospital who was appointed on the application of a corporation pursuant to a city administrative code provision. People v Kapuano, 109 Misc. 2d 295, 440 N.Y.S.2d 162, 1981 N.Y. Misc. LEXIS 2394 (N.Y. City Crim. Ct. 1981).

Trial court improperly dismissed counts charging defendants with resisting arrest on the ground that the arresting officers were not peace officers within the meaning of CPL § 2.10 and that therefore defendants could not be guilty of violating Penal Law § 205.30 which is limited to resistance directed against a police officer or peace officer where the arresting officers had been appointed special patrolmen by the New York City Health and Hospitals Corporation, which was an "agency" within the meaning of a city charter, and the appointment under the city administrative code conferred peace officer status. People v Butt, 113 Misc. 2d 538, 453 N.Y.S.2d 128, 1981 N.Y. Misc. LEXIS 3466 (N.Y. App. Term 1981), aff'd, 58 N.Y.2d 846, 460 N.Y.S.2d 22, 446 N.E.2d 778, 1983 N.Y. LEXIS 2843 (N.Y. 1983).

Humane society volunteer investigator was a peace officer under N.Y. Crim. Proc. Law 2.10(7) and N.Y. Agric. & Mkts. Law § 371 to enforce N.Y. Agric. & Mkts. Law art. 26. The investigator did not trespass as he was authorized by law to go on the owners' land to investigate the animals and to make warrantless arrests of the owners under N.Y. Crim. Proc. Law § 2.20(1)(a) since under N.Y. Crim. Proc. Law § 140.25(1)(b), (2), there was reasonable cause a crime was committed. Hand v Stray Haven Humane Soc'y, 21 A.D.3d 626, 799 N.Y.S.2d 628, 2005 N.Y. App. Div. LEXIS 8279 (N.Y. App. Div. 3d Dep't 2005).

3. Town or village constables

Town could not successfully defend against Freedom of Information Law (FOIL) requests by newspaper and radio station,

asking for town records pertaining to constables suspected of sleeping on duty, by claiming that such information was rendered exempt by CLS Civ R § 50-a, since (1) § 50-a applies only to police officers and correction officers, whereas constables are not defined as police officers by CLS CPL § 1.20, and are considered to be peace officers as defined by CLS CPL § 2.10, and (2) when nonlitigating member of media seeks personnel records through FOIL requests, CLS Civ R § 50-a does not create blanket exemption from disclosure. Woodstock v Goodson-Todman Enterprises, Ltd., 133 Misc. 2d 12, 505 N.Y.S.2d 540, 1986 N.Y. Misc. LEXIS 2959 (N.Y. Sup. Ct. 1986).

Motion to suppress evidence was properly denied because the application for the search warrant was proper, as the applicant, who was appointed as a town constable, under N.Y. Crim. Proc. Law § 2.10(1), and who had completed the training required by N.Y. Crim. Proc. Law § 2.30, was not required to repeat the training when he was appointed as an officer for the Finger Lakes Society for the Prevention of Cruelty to Animals of Central New York, N.Y. Crim. Proc. Law §§ 2.10(7), 2.30(6)(a). People v Gilfus, 4 A.D.3d 788, 772 N.Y.S.2d 164, 2004 N.Y. App. Div. LEXIS 1499 (N.Y. App. Div. 4th Dep't), app. denied, 1 N.Y.3d 628, 777 N.Y.S.2d 26, 808 N.E.2d 1285, 2004 N.Y. LEXIS 749 (N.Y. 2004).

Opn No. 80-328 is hereby amended. Town constables are required to attend training programs. 1980 Op St. Compt File #328-A.

4. Correction officers

Term "penal correctional institution" is sufficiently broad to include county jails, and therefore correction officer at Schenectady County Jail was "peace officer" within meaning of CLS Penal § 120.05(3). People v Holloway, 261 A.D.2d 658, 691 N.Y.S.2d 583, 1999 N.Y. App. Div. LEXIS 4679 (N.Y. App. Div. 3d Dep't), app. denied, 93 N.Y.2d 972, 695 N.Y.S.2d 58, 716 N.E.2d 1103, 1999 N.Y. LEXIS 2524 (N.Y. 1999).

Although a search warrant was improperly addressed in part to a special operations group that included corrections officers, suppression of evidence was not required because the warrant was otherwise properly addressed to sworn police officers; also, participation by members of the special operations group in the execution of the warrant did not invalidate the search, as members of the group merely secured entry for the benefit of the police officers who conducted the search. People v Ward, 183 A.D.3d 845, 123 N.Y.S.3d 634, 2020 N.Y. App. Div. LEXIS 3016 (N.Y. App. Div. 2d Dep't 2020).

In an Article 78 proceeding petitioner, a Federal correction officer, would be held not to qualify for the peace officer exemption of Penal Law § 400.00 which dispenses with the license requirement for the purchase of a firearm by "correction officers of any state correctional facility or of any penal correctional institution", since identical language in the predecessor statute was construed as not including Federal correction officers and the Legislature has not altered the language in the present statute or in any manner demonstrated an intent to include such Federal officers in the definition of peace officer. Vasquez v Connelie, 116 Misc. 2d 29, 455 N.Y.S.2d 76, 1982 N.Y. Misc. LEXIS 3822 (N.Y. Sup. Ct. 1982).

5. Probation officer or trainee

Trial court held that N.Y. Crim. Proc. Law § 2.30(1) required Orange County (New York) to provide weapons training to probation officers employed by the County even if the County did not require or permit its probation officers to carry or use a weapon during the course of their official duties, and the court dismissed the County's action against the New York State Division of Criminal Justice Services seeking an order overturning the Division's decision not to issue peace officer certificates to County probation officers until they had firearms training. County of Orange v N.Y. State Div. of Crim. Justice Servs., 194 Misc. 2d 438, 755 N.Y.S.2d 560, 2003 N.Y. Misc. LEXIS 32 (N.Y. Sup. Ct. 2003).

6. Border patrol agent

Because the federal marine interdiction agent with the United States Customs and Border Protection (CBP) who stopped defendant was not considered a federal law enforcement officer with peace officer powers, he could not have improperly circumvented the jurisdictional limitations on the powers reserved for those members of law enforcement. Therefore, the trial court should have denied defendant's motion to suppress and the appellate court erred by affirming suppression of the evidence. People v Page, 35 N.Y.3d 199, 149 N.E.3d 905, 126 N.Y.S.3d 67, 2020 N.Y. LEXIS 1084 (N.Y.), cert. denied, 141 S. Ct. 601, 208 L. Ed. 2d 192, 2020 U.S. LEXIS 5033 (U.S. 2020).

Agency Opinions

Analysis

1. Generally
2. Deputy sheriffs
3. Dog control officers
4. Local special police
5. Town or village constables
6. Correction officers
7. Probation officer or trainee

1. Generally

A peace officer may not serve simultaneously as a town or village justice. 1981 NY Ops Atty Gen Nov 9 (informal).

Civil defense auxiliary police may not operate vehicles owned by a police department unless the insignia on such vehicles unmistakenably indicate from a distance that such vehicles are being operated by auxiliary police and not by members of the police department. 1981 NY Ops Atty Gen Dec 22.

Auxiliary police must be trained in accordance with the training requirements for part-time peace officers in section 2.30(4) of the Criminal Procedure Law. 1981 NY Ops Atty Gen July 27.

Police officer employed by Buffalo Municipal Housing Authority is within his general area of employment when in transit between housing developments of authority. 1988 NY Ops Atty Gen No. 88-15, 1988 N.Y. AG LEXIS 16.

Parole officers, senior parole officers, and supervising parole officers in the division of parole are public officers subject to the provisions of CLS Public Officers Law § 3. 1990 NY Ops Atty Gen F 90-8.

The geographical jurisdiction of employment of a peace officer of the State University of New York does not include the off-campus public streets and public thoroughfares that the officer may traverse while in transit from one separate part of a University Campus to another separate part of a University campus nor does such jurisdiction include the off-campus public streets and thoroughfares that the officer may traverse while in transit from one university campus to another; a peace officer possesses limited law enforcement powers when outside his geographical area of employment. 1990 NY Ops Atty Gen F 90-10.

Town of Putnam Valley could appoint harbor masters to enforce Navigation Law on Lake Oscawana, provided that lake met definition of navigable waters under CLS Nav § 2(4). 1995 NY Ops Atty Gen I 95-39.

Analysis of whether persons convicted of state felonies or misdemeanor crimes of domestic violence may be appointed as peace officers or whether their convictions preclude such appointments because they are prohibited from possessing firearms under Federal Gun Control Act or state law. 1998 N.Y. Op. Att'y Gen. No. 98-F8, 1998 N.Y. AG LEXIS 41.

Peace officers of Unified Court System whose duties, as determined by Office of Court Administration, include delegation of portion of sovereign powers of government are public officers subject to provisions of CLS Pub Off Law § 3, imposing State residency requirement. N.Y. Op. Att'y Gen. No. 89-F4.

A uniformed court officer of a city court is a peace officer who, if authorized by his employer, may carry weapons while on duty. A peace officer authorized to carry weapons while on duty may carry them off duty absent employer rules or regulations prohibiting or restricting the carrying of a weapon while off duty. N.Y. Op. Att'y Gen. No. 84-40.

Town harbor masters, as peace officers, may enforce those provisions of the Environmental Conservation Law which are consistent with their specific duties when authorized or required to do so by their employers. N.Y. Op. Att'y Gen. No. 83-55.

The possession and rehabilitation of wildlife, as well as the restoration of wildlife to their natural habitat, are governed exclusively by the Environmental Conservation Law. Agents or

officers of an incorporated society for the prevention of cruelty to animals or other humane societies may not engage in such activities, except in accordance with the procedures set forth in that statute. N.Y. Op. Att'y Gen. No. 82-78, 1982 N.Y. AG LEXIS 22.

Town harbor masters, as peace officers, may enforce those provisions of Environmental Conservation Law which are consistent with their specific duties when authorized or required to do so by their employees. 1995 NY Ops Atty Gen I 95-39.

The Village's park rangers may issue uniform traffic tickets for violations of the Vehicle and Traffic Law within village parks. They may not issue tickets for violations they observe on public streets while traveling between parks. N.Y. Op. Att'y Gen. No. 2012-7, 2012 N.Y. AG LEXIS 8.

2. Deputy sheriffs

There is no authority under the County Law for a sheriff to appoint regular deputy sheriffs to be employed by and under the supervision and control of a university. A sheriff may appoint special deputy sheriffs under Educational Law, § 5709. These special deputy sheriffs are peace officers and not police officers. 1980 NY Ops Atty Gen Dec. 3 (informal).

As police officers who commonly provide general law enforcement, sheriffs and deputy sheriffs are subject to CLS Elec § 17-110. 1998 NY Ops Atty Gen I 98-57.

3. Dog control officers

A dog control officer does not have the status or powers of a peace officer. A peace officer listed in section 2.10 of the Criminal Procedure Law and having the duty to enforce dog control, may exercise his peace officer powers to enforce the provisions of Article 7 of the Agriculture and Markets Law. 1981 NY Ops Atty Gen April 30 (Informal), 1981 N.Y. AG LEXIS 87.

A town may designate its dog control officer as constable for purposes of enforcing those provisions of Article 26 of the Agriculture and Markets Law dealing with cruelty to dogs. As a peace officer, the constable would have to be trained in accordance with the requirements of State Law. 1990 N.Y. Op. Att'y Gen. No. I90-28, 1990 N.Y. AG LEXIS 49.

4. Local special police

A city, by local law, may establish a special police department. Since the Glen Cove special police are subordinate to the regular police, are not sworn officers and do not have general criminal law enforcement responsibilities, they do not have police officer status. Since the special police are not included in section 2.10 of the Criminal Procedure Law, they are not peace officers. 1980 NY Ops Atty Gen Dec. 24 (Informal), 1980 N.Y. AG LEXIS 10.

A town may prohibit special policemen from wearing their uniforms when they are engaged in private employment. The town might, under certain circumstances, be held liable for the tortious acts of a special policeman if he is wearing his police uniform while he is engaged in private employment. 1980 NY Ops Atty Gen Dec. 30 (informal).

Special patrolmen in villages in Westchester County are neither police officers nor peace officers. They may not exercise the powers of police officers or peace officers. 1981 NY Ops Atty Gen No. 81–83, 1981 N.Y. AG LEXIS 70.

Special police officers appointed under the White Plains City Charter are neither police officers nor peace officers. Auxiliary police appointed under the State Defense Emergency Act are peace officers during official drills but may not exercise the powers of peace officers. 1981 NY Ops Atty Gen April 7 (informal).

Newburgh city marshals are authorized to execute all processes and mandates of Newburgh City Court within Orange County; however, Court may at times require that police officer serve particular criminal process. 1998 NY Ops Atty Gen I 98-40.

5. Town or village constables

A town which has not established a police department does not have the authority to designate motor vehicles used by town constables as police vehicles. 1980 NY Ops Atty Gen Dec. 9 (informal).

Town constables may not affix a red light or use a siren on a motor vehicle. Nor may they exceed speed limits and violate other traffic rules. Town constables may affix emblems to town vehicles identifying them as constable vehicles. Town constables may not be used to assist other local governments requesting aid. 1981 NY Ops Atty Gen Feb 23 (informal).

A village by local law may establish the position of constable. Village constables have the status and powers of peace officers. Peace officers must be trained in accordance with the provisions of section 2.30 of the Criminal Procedure Law. 1982 N.Y. Op. Att'y Gen. No. 82-2, 1982 N.Y. AG LEXIS 109.

A town constable may provide dog control services under Article 7 of the Agriculture and Markets Law for his own town and by municipal contract for other towns. As peace officers, town constables must be trained in accordance with the provisions of section 2.30 of the Criminal Procedure Law. 1982 NY Ops Atty Gen May 27 (informal).

Vehicles operated by village constables cannot be considered vehicles "operated by the police department or law enforcement agency of such governmental unit," and thus do not constitute "police vehicles," since village constables do not constitute "police department." 2005 NY Ops Atty Gen I 05-6.

Town constables may be authorized to direct traffic and enforce traffic regulations. N.Y. Op. Att'y Gen. No. 83-64.

This Department will not determine whether section 2.10 of the CPL would subordinate any provision in the Suffolk County Charter, restricting creation of a village constable force, since this question is currently being considered by the court in Nassau County. 1980 Op St Compt File #642.

6. Correction officers

Persons who perform duties of correction officers at county jail are peace officers within meaning of CLS Criminal Procedure Law; employees of county who perform duties of correction officers are covered by CLS General Municipal Law § 207-c. 1985 NY Ops Atty Gen No. 85-49 (Informal).

Certain correction officers employed by the Department of Correctional Services and certain other persons in the Department who have been designated as peace officers by rules of the Department are public officers subject to the provisions of the Public Officers Law. N.Y. Op. Att'y Gen. No. 83-74.

7. Probation officer or trainee

A probation officer trainee is not a peace officer. 1980 NY Ops Atty Gen Aug 12 (Informal).

A probation officer must be a United States citizen. 1983 NY Ops Atty Gen Feb 10 (Formal).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 1.20, 2.20, 690.25; CLS Exec § 835; CLS Ins § 402; CLS Mil § 131.7; CLS Penal § 265.20; CLS Tax §§ 1815, 1846—1848; CLS Unconsol Ch 131 § 105.

Officers, employees, offices, CLS Al Bev § 15.

Provisions for governing sports facilities operators and retail licenses to sell at certain sporting events for consumption on premises, CLS Al Bev § 106-b.

Powers and duties of trustees—administrative and fiscal functions, CLS Educ § 355.

Special deputy sheriffs; powers and duties, CLS Educ § 5709.

Powers and duties of the state board of elections respecting elections and crimes against the elective franchise, CLS Elec § 3-107.

Use of civil defense forces in disasters, CLS Exec § 29-b.

Fire police squads of fire departments and fire companies, CLS Gen Mun § 209-c.

Employment of retired persons as special patrolmen for publicly owned property, CLS Gen Mun § 209-v.

Outside service by local fire departments, companies ambulance districts and airport crash-fire-rescue units, CLS Gen Mun § 209.

Safety, CLS Men Hyg §§ 7.25, 13.25.

Licenses to carry, possess, repair and dispose of firearms, CLS Penal § 400.00.

Traffic control, CLS Pub A § 361.

General powers of the authority, CLS Pub A § 1299-e.

Hospitals, special policemen; powers and duties, CLS Pub Health § 455.

Enforcement, CLS Pub Health § 3385.

Tax on cigarettes and tobacco products, CLS Tax §§ 470 et seq.

Powers of motor vehicle investigators, CLS Veh & Tr § 392-b.

Additional powers of the commission, CLS Unconsol Ch 307 § 5-b.

When railroads may designate policemen, CLS RR § 88.

Codes, Rules and Regulations:

Department of agriculture and markets employees designated as peace officers. 1 NYCRR § 366.1.

Firearms. 7 NYCRR §§ 57.1 et seq.

Jurisprudences:

35 NY Jur 2d Criminal Law Substantive Principles and Offenses § 490.

35C NY Jur 2d Criminal Law Substantive Principles and Offenses §§ 1918, 1937.

70 Am Jur 2d, Sheriffs, Police, and Constables §§ 2–8.

6 Cox, Arenson, Medina, New York Civil Practice: SCPA ¶2605.05.

Matthew Bender's New York Civil Practice:

4 Carrieri, Lansner, New York Civil Practice: Family Court Proceedings § 62.01.

Texts: New York Insurance Law (Matthew Bender's New York Practice Series) § 2.02[4].

§ 2.20. Powers of peace officers

1. The persons designated in section 2.10 of this article shall have the following powers:

(a) The power to make warrantless arrests pursuant to section 140.25 of this chapter.

(b) The power to use physical force and deadly physical force in making an arrest or preventing an escape pursuant to section 35.30 of the penal law.

(c) The power to carry out warrantless searches whenever such searches are constitutionally permissible and acting pursuant to their special duties.

(d) The power to issue appearance tickets pursuant to subdivision three of section 150.20 of this chapter, when acting pursuant to their special duties. New York city special patrolmen shall have the power to issue an appearance ticket only when it is pursuant to rules and regulations of the police commissioner of the city of New York.

(e) The power to issue uniform appearance tickets pursuant to article twenty-seven of the parks, recreation and historic preservation law and to issue simplified traffic informations pursuant to section 100.25 of this chapter and section two hundred seven of the vehicle and traffic law whenever acting pursuant to their special duties.

(f) The power to issue a uniform navigation summons and/or complaint pursuant to section nineteen of the navigation law whenever acting pursuant to their special duties.

(g) The power to issue uniform appearance tickets pursuant to article seventy-one of the environmental conservation law, whenever acting pursuant to their special duties.

(h) The power to possess and take custody of firearms not owned by the peace officer, for the purpose of disposing, guarding, or any other lawful purpose, consistent with his duties as a peace officer.

(i) Any other power which a particular peace officer is otherwise authorized to exercise by any general, special or local law or charter whenever acting pursuant to his special duties, provided such power is not inconsistent with the provisions of the penal law or this chapter.

(j) Uniformed court officers shall have the power to issue traffic summonses and complaints for parking, standing, or stopping violations pursuant to the vehicle and traffic law whenever acting pursuant to their special duties.

2. For the purposes of this section a peace officer acts pursuant to his special duties when he performs the duties of his office, pursuant to the specialized nature of his particular employment, whereby he is required or authorized to enforce any general, special or local law or charter, rule, regulation, judgment or order.

3. A peace officer, whether or not acting pursuant to his special duties, who lawfully exercises any of the powers conferred upon him pursuant to this section, shall be deemed to be acting within the scope of his public employment for purposes of defense and indemnification rights and benefits that he may be otherwise entitled to under the provisions of section fifty-k of the general municipal law, section seventeen or eighteen of the public officers law, or any other applicable section of law.

HISTORY:

Add, L 1980, ch 843, § 2, eff Sept 1, 1980; amd, L 1985, ch 722, § 1, eff Aug 1, 1985; L 2005, ch 685, § 1, eff Oct 4, 2005.

Notes to Decisions

Analysis

1. Generally
2. Warrantless searches

1. Generally

New York City Marshal who worked with tow truck operator in enforcing parking laws and towing cars of scofflaws was not "peace officer" charged with duties under CLS CPL § 2.20, although New York City Marshals trained in firearms handling who have firearms permit from city's police department license division are designated as "peace officers" under CLS CPL § 2.10(33), as CLS CPL § 2.30 requires all peace officers to receive certification as such, and city had not sought state certification of city marshals as peace officers. Gonzalez v City of New York, 167 Misc. 2d 577, 638 N.Y.S.2d 286, 1996 N.Y. Misc. LEXIS 28 (N.Y. Sup. Ct. 1996).

Humane society volunteer investigator was a peace officer under N.Y. Crim. Proc. Law 2.10(7) and N.Y. Agric. & Mkts. Law § 371 to enforce N.Y. Agric. & Mkts. Law art. 26. The investigator did not trespass as he was authorized by law to go on the owners' land to investigate the animals and to make warrantless arrests of the owners under N.Y. Crim. Proc. Law § 2.20(1)(a) since under N.Y. Crim. Proc. Law § 140.25(1)(b), (2), there was reasonable cause a crime was committed. Hand v Stray Haven Humane Soc'y, 21 A.D.3d 626, 799 N.Y.S.2d 628, 2005 N.Y. App. Div. LEXIS 8279 (N.Y. App. Div. 3d Dep't 2005).

Opn No. 80-328 is hereby amended; town constables are required to attend training programs. 1980 Op St. Compt File #328-A.

2. Warrantless searches

Warrantless search of defendant's locker at post office where he worked as postal service officer following his shooting of individual outside of post office, based merely on postal inspector's hunch and his belief that according to "regulations" he could search lockers at will, was invalid since there was no apparent connection between shooting and defendant's locker, and People failed to show any other facts to make search "reasonable";

provision in postal service's employee manual regarding warrantless locker searches did not constitute "unequivocal" blanket consent by postal employees to otherwise baseless searches of their private lockers. People v Postall, 153 Misc. 2d 167, 580 N.Y.S.2d 975, 1992 N.Y. Misc. LEXIS 35 (N.Y. Sup. Ct. 1992).

Defendant was not entitled to suppress evidence in his prosecution for criminal possession of marihuana in the first degree because a United States Border Patrol agent was entitled under N.Y. Crim. Proc. Law §§ 2.15(7) and 2.20(1)(a), (c) to conduct a warrantless search of defendant's truck as defendant admitted evasion of a checkpoint and smoking marihuana. People v Boyea, 44 A.D.3d 1093, 844 N.Y.S.2d 156, 2007 N.Y. App. Div. LEXIS 10707 (N.Y. App. Div. 3d Dep't 2007).

Agency Opinions

Analysis

1. Generally
2. Dog control services
3. Firearm possession
4. Traffic control; tickets

1. Generally

There is no authority under the County Law for a sheriff to appoint regular deputy sheriffs to be employed by and under the supervision and control of a university; a sheriff may appoint special deputy sheriffs under Education Law, § 5709; these special deputy sheriffs are peace officers and not police officers. 1980 NY Ops Atty Gen Dec. 3 (informal).

Special police officers appointed under the White Plains City Charter are neither police officers nor peace officers; auxiliary police appointed under the State Defense Emergency Act are peace officers during official drills but may not exercise the powers of peace officers. 1981 NY Ops Atty Gen April 7 (informal).

Civil defense auxiliary police may not operate vehicles owned by a police department unless the insignia on such vehicles unmistakenably indicate from a distance that such vehicles are being operated by auxiliary police and not by members of the police department. 1981 NY Ops Atty Gen Dec 22.

Auxiliary police must be trained in accordance with the training requirements for part-time peace officers in section 2.30(4) of the Criminal Procedure Law. 1981 NY Ops Atty Gen July 27.

Parole officers, senior parole officers, and supervising parole officers in the division of parole are public officers subject to the provisions of CLS Public Officers Law § 3. 1990 NY Ops Atty Gen F 90-8.

The geographical jurisdiction of employment of a peace officer of the State University of New York does not include the off-campus public streets and public thoroughfares that the officer may traverse while in transit from one separate part of a University Campus to another separate part of a University campus nor does such jurisdiction include the off-campus public streets and thoroughfares that the officer may traverse while in transit from one university campus to another; a peace officer possesses limited law enforcement powers when outside his geographical area of employment. 1990 NY Ops Atty Gen F 90-10.

Peace officers who are privately employed while off-duty are not entitled to representation and indemnification under Criminal Procedure Law § 2.20(3) unless their acts do not arise from their responsibilities to private employers, and are in all other respects a lawful exercise of peace officer powers. 1990 NY Ops Atty Gen F 90-14.

Uniformed court officer of Unified Court System acting pursuant to his special duties may issue appearance ticket to person when he has reasonable cause to believe that person has committed offense or has committed petty offense in his presence. 1993 N.Y. Op. Att'y Gen. No. 93-F2, 1993 N.Y. AG LEXIS 28.

As police officers who commonly provide general law enforcement, sheriffs and deputy sheriffs are subject to CLS Elec § 17-110. 1998 NY Ops Atty Gen I 98-57.

Peace officers of Unified Court System whose duties, as determined by Office of Court Administration, include delegation of portion of sovereign powers of government are public officers subject to provisions of CLS Pub Off Law § 3, imposing State residency requirement. N.Y. Op. Att'y Gen. No. 89-F4.

One person may not hold simultaneously the two positions of town constable and member of the town board. N.Y. Op. Att'y Gen. No. 84-22.

Town harbor masters, as peace officers, may enforce those provisions of the Environmental Conservation Law which are consistent with their specific duties when authorized or required to do so by their employers. N.Y. Op. Att'y Gen. No. 83-55.

Certain correction officers employed by the Department of Correctional Services and certain other persons in the Department who have been designated as peace officers by rules of the Department are public officers subject to the provisions of the Public Officers Law. N.Y. Op. Att'y Gen. No. 83-74.

The possession and rehabilitation of wildlife, as well as the restoration of wildlife to their natural habitat, are governed exclusively by the Environmental Conservation Law; agents or officers of an incorporated society for the prevention of cruelty to animals or other humane societies may not engage in such activities, except in accordance with the procedures set forth in that statute. N.Y. Op. Att'y Gen. No. 82-78.

The Village's park rangers may issue uniform traffic tickets for violations of the Vehicle and Traffic Law within village parks. They may not issue tickets for violations they observe on public streets while traveling between parks. N.Y. Op. Att'y Gen. No. 2012-7, 2012 N.Y. AG LEXIS 8.

2. Dog control services

A dog control officer does not have the status or powers of a peace officer; a peace officer listed in section 2.10 of the Criminal Procedure Law and having the duty to enforce dog control, may exercise his peace officer powers to enforce the provisions of Article 7 of the Agriculture and Markets Law. 1981 NY Ops Atty Gen April 30 (Informal).

A town constable may provide dog control services under Article 7 of the Agriculture and Markets Law for his own town and by municipal contract for other towns; as peace officers, town constables must be trained in accordance with the provisions of section 2.30 of the Criminal Procedure Law. 1982 NY Ops Atty Gen May 27 (informal).

A town may designate its dog control officer as constable for purposes of enforcing those provisions of Article 26 of the Agriculture and Markets Law dealing with cruelty to dogs. As a peace officer, the constable would have to be trained in accordance with the requirements of State Law. 1990 N.Y. Op. Att'y Gen. No. I90-28, 1990 N.Y. AG LEXIS 49.

3. Firearm possession

Counties may form auxiliary police units on behalf of towns; the powers of auxiliary police officers are defined under the provisions of the Defense Emergency Act and the Criminal Procedure Law; auxiliary police officers designated as peace officers may possess a firearm only if licensed under Penal Law § 400.00. 1991 NY Ops Atty Gen I 91-36.

4. Traffic control; tickets

Auxiliary police officers may direct and control traffic during official drills and in connection with such drills may be given the authority to issue simplified traffic informations. 1990 NY Ops Atty Gen I 90-75.

Park rangers employed by the Town of Smithtown, Suffolk County, are authorized, as peace officers, to issue uniform traffic tickets under the Vehicle and Traffic Law, and also to impound motor vehicles pursuant to Vehicle and Traffic Law § 511-b; code enforcement inspectors employed by the town are not authorized to issue uniform traffic tickets for moving violations or impound motor vehicles under Vehicle and Traffic Law § 511-b. 1991 N.Y. Op. Att'y Gen. No. 91-28, 1991 N.Y. AG LEXIS 37.

Village's park rangers may issue uniform traffic tickets for violations of Vehicle and Traffic Law within village parks; they may not issue tickets for violations they observe on public streets while traveling between parks. 2012 N.Y. Op. Att'y Gen..No. 2012-7, 2012 N.Y. AG LEXIS 8.

Auxiliary police may be authorized to direct and control traffic as a component of official drills in preparation for an attack or in preparation for combating natural or man-made disasters; in undertaking this role, auxiliary police possess those powers of peace officers under section 2.20 of the Criminal Procedure Law

that are necessary for such purposes. N.Y. Op. Att'y Gen. No. 84-28.

Town constables may be authorized to direct traffic and enforce traffic regulations. N.Y. Op. Att'y Gen. No. 83-64.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 2.10, 2.15; CLS Al Bev § 15; CLS Educ §§ 355, 5709; CLS Elec § 3-107; CLS Gen Mun § 209-v; CLS Men Hyg §§ 7.25, 13.25; CLS Pub Health §§ 455, 3385; CLS Racing & Wagering §§ 215, 312, 412, 504; CLS Unconsol Ch 131 §§ 104, 105; CLS Veh & Tr §§ 132, 392-b.

Officers, employees, offices, CLS Al Bev § 15.

Enforcement, CLS ECL §§ 71-0101 et seq.

Uniform navigation summons and complaint, CLS Nav § 19.

Enforcement; penalties; state aid, CLS PRHPL §§ 27.01 et seq.

Justification; use of physical force in making an arrest or in preventing an escape, CLS Penal § 35.30.

Uniform traffic summons and complaint, CLS Veh & Tr § 207.

Jurisprudences:

26 NY Jur 2d Counties, Towns, and Municipal Corporations § 856.

50 NY Jur 2d Elections § 871.

65 NY Jur 2d Highways, Streets, and Bridges § 594.

65 NY Jur 2d Hospitals and Related Health Care Facilities §§ 93, 155.

85 NY Jur 2d Police Sheriffs, and Related Officers §§ 2, 18, 19.

96 NY Jur 2d State of New York § 78.

70 Am Jur 2d, Sheriffs, Police and Constables §§ 2–8, 46 et seq.

Matthew Bender's New York Civil Practice:

6 Cox, Arenson, Medina, New York Civil Practice: SCPA ¶¶ 2605.05, 2606.05.

Annotations:

When does police officer's use of force during arrest become so excessive as to constitute violation of constitutional rights, imposing liability under Federal Civil Rights Act of 1871 (42 USCS § 1983). 60 ALR Fed 204.

Matthew Bender's New York Practice Guides: 3 New York Practice Guide: Domestic Relations §§ 36.05, 36.06.

Texts: New York Criminal Practice Ch. 19.

New York Criminal Practice Ch. 71.

New York Insurance Law (Matthew Bender's New York Practice Series) § 2.02[4].

§ 2.30. Training requirements for peace officers

1. Every peace officer in the state of New York must successfully complete a training program, a portion of which shall be prescribed by the municipal police training council and a portion of which shall be prescribed by his or her employer. The portion prescribed by the municipal police training council shall be comprised of subjects, and the hours each is to be taught, that shall be required of all types or classes of peace officers. The hours of instruction required by the municipal police training council shall not exceed one hundred eighty, unless a greater amount is either required by law or regulation, or is requested by the employer.

The segment prescribed by the employer for its employees shall be comprised of subjects, and the hours each is to be taught, relating to the special nature of the duties of the peace officers employed by it provided, however, that when the subjects prescribed by the employer are identical to the subjects in the training program required by the municipal police training council, the employer shall not be required to provide duplicate training for those subjects.

2. Each state or local agency, unit of local government, state or local commission, or public authority, or public or private organization which employs peace officers shall provide the training mandated by this section, the cost of which will be borne by the employer. Each peace officer satisfactorily completing the course prescribed by the municipal police training council shall be awarded a certificate by the division of criminal justice services attesting to that effect, and no person appointed as a peace officer shall exercise the powers of a peace officer, unless he or she has received such certification within twelve months of appointment.

3. No employer shall allow any peace officer it employs to carry or use a weapon during any phase of the officer's official duties, which constitutes on-duty employment, unless the officer has satisfactorily completed a course of training approved by the municipal police training council in the use of deadly physical force and firearms and other weapons, and annually receives instruction in deadly physical force and the use of firearms and other weapons as approved by the municipal police training council.

4. Upon the failure or refusal to comply with the requirements of this section, the commissioner of the division of criminal justice services shall apply to the supreme court for an order directed to the person responsible requiring compliance. Upon such application, the court may issue such order as may be just, and a failure to comply with the order of the court shall be a contempt of court and punishable as such.

5. Every employer of peace officers shall report to the division of criminal justice services, in such form and at such time as the division may by regulation require, the names of all peace officers who have satisfactorily completed any of the training requirements prescribed by this section.

6. A certificate attesting to satisfactory completion of the training requirements imposed under this section awarded to any peace officer by the executive director of the municipal police training council pursuant to this section shall remain valid:

(a) during the holder's continuous service as a peace officer; and

(b) for two years after the date of the commencement of an interruption in such service where the holder had, immediately prior to such interruption, served as a peace officer for less than two consecutive years; or

(c) for four years after the date of the commencement of an interruption in such service where the holder had, immediately prior to such interruption, served as a peace officer for two consecutive years or longer.

As used in this subdivision, the term "interruption" shall mean a period of separation from employ-

ment as a peace officer by reason of such officer's leave of absence, resignation or removal, other than removal for cause.

HISTORY:

Add, L 1980, ch 843, § 2, eff Sept 1, 1980; amd, L 1987, ch 543, § 1, eff Nov 1, 1987; L 1988, ch 735, § 2, eff Jan 1, 1989; L 1989, ch 766, § 1, eff Sept 9, 1989; L 1991, ch 219, § 1; L 1991, ch 474, § 1, eff Nov 1, 1991; L 2010, ch 491, § 3, eff Jan 1, 2011 (see 2010 note below).

Editor's Notes: Laws 2010, ch 491, § 6, eff Jan 1, 2011, provides as follows:

§ 6. This act shall take effect on the first of January next succeeding the date on which it shall have become a law, provided, however, that completion of the training program required by subdivision 1 of section 2.30 of the criminal procedure law as amended by section three of this act shall apply only to peace officers appointed on or after the effective date of this act, and provided further that peace officers appointed prior to the effective date of this act shall be subject to the training requirements in place at the time of their appointment.

Amendment Notes: 2010. Chapter 491, § 3 amended:

Sub 1, first undesignated par by deleting at fig 1 ", appointed after the effective date of this article, who works a full complement of hours which constitutes full-time employment for the officer's employer,", at fig 2 ", the state or local agency, unit of local government, state or local commission, or public authority or private organization that employs him", at fig 3 "thirty-five" and adding the matter in italics.

Sub 1, second undesignated par by deleting at fig 1 "his", at fig 2 "him" and adding the matter in italics.

Sub 2 redesignated from part of sub 1, second undesignated par and entire sub 1, third undesignated par.

Sub 2 by deleting at fig 1 "and transmit to the municipal police training council within six months after the effective date of this article the proposed training program for peace officers, comprised of subjects required by the employer,", at fig 2 "The program shall: (a) List the subjects comprising the proposed curriculum and the number of hours each is to be taught; (b) List the proposed instructors for each subject with their qualifications; and (c) Indicate the proposed location of the school. In the reviewing of the employer's submission, the instructors must be found qualified by background and experience, and if so found, the course shall be certified by the municipal police training council. When the subjects prescribed by the employer are identical to the subjects in the training program required by the municipal police training council, the officer shall not be required to take duplicate training for those subjects. It is the responsibility of every employer to provide the training program certified by the municipal police training council.", at fig 3 "after the effective date of this article" and adding the matter in italics.

Subs 3 and 4 redesignated from former subs 2 and 3, respectively.

Sub 3 by deleting at fig 1 "Where an employer has authorized a peace officer to carry or use a weapon during any phase of the officer's official duties, which constitutes on-duty employment, the program shall include the same number of hours of instruction in deadly physical force and the use of firearms and other weapons as is required in the basic training program for police officers by the municipal police training council. The program shall include the information set forth in subdivision seven of section 265.10 of the penal law.", at fig 2 ", notwithstanding when the office was appointed,", at fig 3 "The course of training in the use of deadly physical force and firearms and other weapons shall be provided by the officer's employer, not later than six months from the date on which the officer was appointed, where the officer is authorized to carry a weapon pursuant to law." and adding the matter in italics.

Sub 4 by deleting at fig 1 "subdivision one of".

By deleting former subs 3 and 4.

Sub 5 by deleting at fig 1 "annually", at fig 2 "municipal police training council", at fig 3 "council", at fig 4 "and addresses", at fig 5 ", during the course of the year," and adding the matter in italics.

Notes to Decisions

Security guard employed as special police officer by racing association pursuant to CLS Rac and Wag § 215 is police officer within meaning of CPL 1.20 and 2.10 for purposes of prosecution for resisting arrest, notwithstanding guard's failure to complete training program pursuant to CPL 2.30 where guard has been continuously employed since appointment prior to September 1, 1980, effective date of CLS CPL 2.30. People v Seaman, 132 Misc. 2d 336, 504 N.Y.S.2d 603, 1986 N.Y. Misc. LEXIS 2692 (N.Y. Dist. Ct. 1986).

Special police officer appointed pursuant to CLS Rac and Wag § 215 who meets or is exempt from training requirements of CLS CPL 2.30 need not be recertified each year merely because racing association employing officer reappoints officer on annual basis. People v Seaman, 132 Misc. 2d 336, 504 N.Y.S.2d 603, 1986 N.Y. Misc. LEXIS 2692 (N.Y. Dist. Ct. 1986).

New York City Marshal who worked with tow truck operator in enforcing parking laws and towing cars of scofflaws was not "peace officer" charged with duties under CLS CPL § 2.20, although New York City Marshals trained in firearms handling who have firearms permit from city's police department license division are designated as "peace officers" under CLS CPL § 2.10(33), as CLS CPL § 2.30 requires all peace officers to receive certification as such, and city had not sought state certification of city marshals as peace officers. Gonzalez v City of New York, 167 Misc. 2d 577, 638 N.Y.S.2d 286, 1996 N.Y. Misc. LEXIS 28 (N.Y. Sup. Ct. 1996).

Trial court held that N.Y. Crim. Proc. Law § 2.30(1) required Orange County (New York) to provide weapons training to probation officers employed by the County even if the County did not require or permit its probation officers to carry or use a weapon during the course of their official duties, and the court dismissed the County's action against the New York State Division of Criminal Justice Services seeking an order overturning the Division's decision not to issue peace officer certificates to County probation officers until they had firearms training. County of Orange v N.Y. State Div. of Crim. Justice Servs., 194 Misc. 2d 438, 755 N.Y.S.2d 560, 2003 N.Y. Misc. LEXIS 32 (N.Y. Sup. Ct. 2003).

Both the language of N.Y. Crim. Proc. Law 2.30 and the legislative history supported the Division of Criminal Justice Services' (DCJS)argument that the statutory weapons training requirement applied to all peace officers regardless of their employer's policies with respect to the use of weapons. Accordingly, DCJS's refusal to issue the peace officer certificates was not arbitrary and capricious. County of Orange v New York State Div. of Crim. Justice Servs., 3 A.D.3d 206, 770 N.Y.S.2d 180, 2003 N.Y. App. Div. LEXIS 13908 (N.Y. App. Div. 3d Dep't 2003).

Motion to suppress evidence was properly denied because the application for the search warrant was proper, as the applicant, who was appointed as a town constable, under N.Y. Crim. Proc. Law § 2.10(1), and who had completed the training required by N.Y. Crim. Proc. Law § 2.30, was not required to repeat the training when he was appointed as an officer for the Finger Lakes Society for the Prevention of Cruelty to Animals of Central New York, N.Y. Crim. Proc. Law §§ 2.10(7), 2.30(6)(a). People v Gilfus, 4 A.D.3d 788, 772 N.Y.S.2d 164, 2004 N.Y. App. Div. LEXIS 1499 (N.Y. App. Div. 4th Dep't), app. denied, 1 N.Y.3d 628, 777 N.Y.S.2d 26, 808 N.E.2d 1285, 2004 N.Y. LEXIS 749 (N.Y. 2004).

Opn No. 80-328 is hereby amended. Town constables are required to attend training programs. 1980 Op St. Compt File #328-A.

Agency Opinions

Auxiliary police must be trained in accordance with the training requirements for part-time peace officers in section 2.30(4) of the Criminal Procedure Law. 1981 NY Ops Atty Gen July 27.

A village by local law may establish the position of constable. Village constables have the status and powers of peace officers. Peace officers must be trained in accordance with the provisions

of section 2.30 of the Criminal Procedure Law. 1982 N.Y. Op. Att'y Gen. No. 82-2, 1982 N.Y. AG LEXIS 109.

A town constable may provide dog control services under Article 7 of the Agriculture and Markets Law for his own town and by municipal contract for other towns. As peace officers, town constables must be trained in accordance with the provisions of section 2.30 of the Criminal Procedure Law. 1982 NY Ops Atty Gen May 27 (informal).

City marshals are not employees of the Unified Court System, and, therefore, the unified court system is not liable for the cost of their training under CLS Crim Procedure Law § 2.30. 1990 NY Ops Atty Gen F 90-11.

A town may designate its dog control officer as constable for purposes of enforcing those provisions of Article 26 of the Agriculture and Markets Law dealing with cruelty to dogs. As a peace officer, the constable would have to be trained in accordance with the requirements of State Law. 1990 N.Y. Op. Att'y Gen. No. I90-28, 1990 N.Y. AG LEXIS 49.

A uniformed court officer of a city court is a peace officer who, if authorized by his employer, may carry weapons while on duty. A peace officer authorized to carry weapons while on duty may carry them off duty absent employer rules or regulations prohibiting or restricting the carrying of a weapon while off duty. N.Y. Op. Att'y Gen. No. 84-40.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS Exec § 840.

Manufacture, transport, disposition and defacement of weapons and dangerous instruments and applicances, CLS Penal § 265.10.

Jurisprudences:

Texts: New York Criminal Practice Ch. 19.

New York Criminal Practice Ch. 71.

EDUCATION LAW

Title
1. General Provisions
II. School District Organization
V. Taxation and Financial Administration
VII. State and City Colleges and Institutions—Cornell University
VIII. The Professions

HISTORY:
Add, L 1909, ch 21; amd, L 1910, ch 140; L 1947, ch 820, eff July 1, 1947.

TITLE 1 General Provisions

Article
7. Commissioner of Education
9. School Buildings and Sites
13. Higher Education Student Financial Aid Programs
14. New York State Higher Education Services Corporation
17. Instruction in Certain Subjects

HISTORY:
Add, L 1947, ch 820, eff July 1, 1947.

ARTICLE 7 Commissioner of Education

Section
305. General powers and duties.

HISTORY:
Add, L 1947, ch 820, eff July 1, 1947, with substance transferred from former Articles 4, 34.

§ 305. General powers and duties.

The commissioner of education is hereby charged with the following powers and duties:

* * * * *

16. The commissioner shall cooperate with the commissioner of health to facilitate the timely establishment and maintenance of current records of courses in advanced emergency medical technology.

* * * * *

19. The commissioner is authorized and directed to require all elementary and secondary schools to store all chemicals present in their science facilities in locked and secure storage rooms and cabinets. The schools shall provide for the placement, spacing, arrangement, ventilation and fire protection of such stored chemicals in accordance with guidelines promulgated by the commissioner of education. The commissioner shall also require all elementary and secondary schools to prepare at least annually an inventory of such chemicals, including the chemical's name, the chemical abstracts service registry number, a hazard warning code, the generally accepted method or methods of disposal, a compatible storage code, the date received, the scheduled date of disposal, the quantity received, the quantity remaining and its location. The inventory must be kept in a secure location and be available for inspection by the commissioner.

* * * * *

30. (a) The commissioner, in cooperation with the division of criminal justice services and in accordance with all applicable provisions of law, shall promulgate rules and regulations to require the fingerprinting of prospective employees, as defined in section eleven hundred twenty-five of this chapter, of school districts, charter schools and boards of cooperative educational services and authorizing the fingerprinting of prospective employees of nonpublic and private elementary and secondary schools, and for the use of information derived from searches of the records of the division of criminal justice services and the federal bureau of investigation based on the use of such fingerprints. The commissioner shall also develop a form for use by school districts, charter schools, boards of cooperative educational services, and nonpublic and private elementary and secondary schools in connection with the submission of fingerprints that contains the specific job title sought and any other information that may be relevant to consideration of the applicant. The commissioner shall also establish a form for the recordation of allegations of child abuse in an educational setting, as required pursuant to section eleven hundred twenty-six of this chapter. No person who has been fingerprinted pursuant to section three thousand four-b of this chapter or pursuant to section five hundred nine-cc or twelve hundred twenty-nine-d of the vehicle and traffic law and whose fingerprints remain on file with the division of criminal justice services shall be required to undergo fingerprinting for purposes of a new criminal history record check. This subdivision and the rules and regulations promulgated pursuant thereto shall not apply to a school district within a city with a population of one million or more.

* * * * *

(d) [Expires and repealed July 1, 2021] The commissioner shall develop forms to be provided to all school districts, charter schools, boards of cooperative educational services, and to all nonpublic and private elementary and secondary schools that elect to fingerprint their prospective employees, to be completed and signed by prospective employees when conditional appointment or emergency conditional appointment is offered.

(e) [Expires and repealed July 1, 2021] The commissioner may promulgate rules and regulations regarding the conditional appointment and emergency conditional appointment of a prospective employee.

* * * * *

32. [Repealed]

33. [Repealed]

* * * * *

34. The commissioner is hereby authorized and directed to apply school bus safety practices instruction and retraining requirements prescribed pursuant to the provisions of section thirty-six hundred twenty-four of this chapter to drivers who operate transportation which is owned, leased or contracted for by private and parochial schools to the same extent as such requirements shall apply to drivers who operate transportation which is owned, leased or contracted for by public school districts. The chief school administrator of every private and parochial school shall approve the employment of each driver for each school bus operated for such private or parochial school and shall ensure that each such driver shall meet the school bus safety practices instruction and retraining requirements prescribed pursuant to section thirty-six hundred twenty-four of this chapter. Nothing in this subdivision shall be construed to apply such provisions to volunteer drivers who transport pupils on other than a regularly established route on an occasional basis.

35. [There are two subdivisions 35] The commissioner shall develop guidelines by which school districts may establish a program to make available to parents or persons in parental relation of children attending schools in such districts, an internet based electronic communications system to provide for the transmission of individual personalized messages or group communication over the internet, to communicate with the teachers of such children.

35. [There are two subdivisions 35] The commissioner shall, in cooperation with the commissioner of mental health, develop guidelines for voluntary implementation by school districts, that incorporate social and emotional development into elementary and secondary school educational programs as prescribed in paragraph (b) of subdivision one of section three of the children's mental health act of 2006.

36. The commissioner shall ensure that by July first, two thousand eight, a student progress report, written in plain English and in a form prescribed by the commissioner, is prepared for all students. Such progress report shall provide parents or persons in parental relation with information on their child's performance on state assessments over multiple years of testing and shall also explain the process by which parents or persons in parental relation may inquire further about their child's progress. All school districts and charter schools shall prepare and disseminate the student progress report to parents or persons in parental relation in a timely manner.

37. The commissioner shall develop methods to support educators in the use of performance data to assist in student learning, which shall be periodically improved based on feedback from educators.

38. The commissioner shall develop informational materials to assist parents or persons in parental relation and teachers in understanding the regents learning standards and the results of state assessments.

39. The commissioner shall develop a school leadership report card and a separate school progress report card to assist boards of education, the state and the public in assessing the performance of school leaders, including superintendents of schools and building principals, and the schools that they lead. The report cards shall include an assessment of the school's progress in achieving standards of excellence. By January first, two thousand nine, the commissioner shall develop such standards of excellence which shall include, but not be limited to, parent involvement, curriculum, teacher quality, and accountability measures as set forth in section two hundred eleven-a of this title. The commissioner shall promulgate regulations requiring the trustees or boards of education of every common, union free, central, central high school and city school district, and the chancellor of a city school district in a city of one million or more inhabitants, to attach copies of such report cards to the statement of estimated expenditures pursuant to section sixteen hundred eight or seventeen hundred sixteen of this chapter, where applicable, and to otherwise make the report cards publicly available in the same manner as a school district report card.

40. The board of regents shall explore the development of a prekindergarten through postsecondary (P-16) data system that tracks student performance from prekindergarten through attendance at public colleges in this state and links students to teachers or instructors. The commissioner shall consult with other relevant state departments, agencies and instrumentalities of the state about the feasibility of linking the system to other data collection systems containing information relevant to the education of children, including but not limited to social services information; and to identify barriers to the exchange of data between the P-16 system and social services and other systems under their control and collaborate to facilitate the free exchange of data. Such data system shall be maintained consistent with applicable confidentiality requirements, so as to prevent disclosures that would constitute an unwarranted invasion of personal privacy. The commissioner shall report to the board of regents on activities conducted pursuant to this subdivision.

* * * * *

HISTORY:

Add, L 1947, ch 820, eff July 1, 1947, with substance transferred from former § 94; amd, L 1948, ch 22, eff Feb 26, 1948; L 1950, ch 29; L 1950, ch 113, § 3; L 1951, ch 533; L 1952, ch 744, § 2, eff April 15, 1952; L 1960, ch 121; L 1964, ch 721; L 1971, ch 43; L 1971, ch 1089; L 1974, ch 690, § 1; L 1974, ch 1065, § 1; L 1976, ch 863, § 1; L 1977, ch 794, §§ 1, 2; L 1982, ch 742, § 1; L 1983, ch 121, § 1; L 1983, ch 914, § 1; L 1984, ch 1008, § 6, eff Dec 21, 1984; L 1985, ch 53, § 10; L 1985, ch 618, § 1, eff Sept 1, 1985; L 1985, ch 619, § 1; L 1987, ch 66, § 1, eff Aug 14, 1987; L 1988, ch 262, § 11; L 1989, ch 627, § 1, eff July 1, 1991; L 1990, ch 173, § 80; L 1992, ch 120, § 1; L 1992, ch 515, § 7, eff July 1, 1992; L 1994, ch 497, § 1; L 1995, ch 542, § 1; L 1995, ch 552, § 1, eff Jan 1, 1996; L 1996, ch 474, §§ 1–4, 108; L 1996, ch 698, §§ 1, 2; L 1997, ch 436, § 1 (Part A), eff Aug 20, 1997; L 1997, ch 464, §§ 1, 2; L 1999, ch 273, §§ 1, 2; L 1999, ch 405, § 3–a (Part L), eff

Aug 6, 1999, deemed eff on and after July 1, 1999; L 2000, ch 40, § 1, eff May 24, 2000; L 2000, ch 180, § 2, eff July 1, 2001; L 2000, ch 181, § 12, eff Nov 1, 2000; L 2000, ch 182, § 1, eff July 1, 2001; L 2001, ch 2, § 2, eff June 8, 2002; L 2001, ch 147, § 1; L 2001, ch 284, § 1, eff Sept 5, 2001; L 2001, ch 380, § 6, eff Oct 23, 2001, deemed eff on and after Nov 1, 2000; L 2002, ch 83, § 1 (Part H), eff May 29, 2002; L 2002, ch 425, § 1; L 2003, ch 270, § 1, eff July 1, 2004; L 2003, ch 621, § 1; L 2005, ch 15, §§ 1, 2, eff April 12, 2005; L 2005, ch 652, § 1, eff Sept 16, 2005; L 2006, ch 160, § 1, eff Nov 23, 2006; L 2006, ch 630, §§ 1–4, eff July 1, 2007; L 2006, ch 667, § 4, eff Sept 13, 2006; L 2007, ch 57, §§ 2, 4 (Part A), eff April 9, 2007; L 2007, ch 220, § 1, eff July 3, 2007, deemed eff on and after June 30, 2007; L 2008, ch 57, § 3 (Part A), eff April 23, 2008; L 2008, ch 172, § 1, eff July 7, 2008; L 2008, ch 296, § 1, eff July 21, 2008; L 2008, ch 325, § 1, eff July 21, 2008; L 2010, ch 378, § 2, eff Aug 13, 2010; L 2011, ch 62, § 104 (Part A), eff Oct 3, 2011; L 2011, ch 496, § 2, eff July 1, 2012; L 2013, ch 551, § 2, eff Aug 1, 2014; L 2014, ch 56, § 2 (Part AA, Subpart A), eff March 31, 2014; L 2014, ch 56, § 1 (Part AA, Subpart B), eff March 31, 2014; L 2014, ch 56, § 1 (Part AA, Subpart C), eff March 31, 2014; L 2014, ch 56, § 1 (Part AA, Subpart D); L 2014, ch 56, § 1 (Part AA, Subpart E), eff July 1, 2014; L 2014, ch 56, § 1 (Part AA, Subpart I), eff March 31, 2014; L 2014, ch 146, § 2, effective July 22, 2014; L 2014, ch 417, § 1, effective October 21, 2014; L 2015, ch 20, § 1 (Part B, Subpart C), effective June 26, 2015; L 2015, ch 20, § 4 (Part B, Subpart C), effective December 1, 2015; L 2015, ch 56, § 1 (Part EE, Subpart G), effective July 1, 2015; L 2016, ch 109, § 1, effective July 21, 2016; L 2017, ch 59, § 7 (Part YYY), effective April 10, 2017; L 2017, ch 59, §§ 32, 61 (Part YYY), effective July 1, 2017; L 2017, ch 216, § 1, effective August 21, 2017; L 2017, ch 316, § 2, effective March 12, 2018; L 2017, ch 347, § 2, effective July 1, 2018; L 2017, ch 424, § 4, effective February 27, 2018; L 2018, ch 34, § 3, effective February 27, 2018; L 2018, ch 59, § 2 (Part CCC), effective April 12, 2018; L 2018, ch 460, § 1, effective December 21, 2018; L 2019, ch 59, § 12-a (Part YYY), effective April 12, 2019; L 2019, ch 67, § 2, effective July 3, 2019; L 2019, ch 196, § 1, effective December 21, 2018; L 2019, ch 477, § 1, effective November 11, 2019; L 2019, ch 672, § 32, effective December 16, 2019.

Editor's Notes Laws 1984, ch 1008, §§ 1, 2, provide as follows:

Section 1. Short title. This act shall be known and may be cited as the "New York state export finance awareness program act".

§ 2. Legislative intent. The legislature hereby finds and declares that the promotion, attraction, stimulation, development and expansion of the export trade sector of the New York state economy is vital and necessary to the people of this state. It is further found and declared that export trade is a specialty with a high concentration of resources in the city of New York and that these resources are unique among the United States. However, the export of products and services manufactured and provided by smaller firms doing business in New York state has been impeded to a great extent by the unavailability of financing of small and medium-size export trade transactions. Therefore, it is hereby determined that a program authorizing the regional and local development of export finance awareness in the banking community of the state of New York is necessary and important to the commerce and well being of the citizenry of this state. To stimulate and increase the volume of such export trade, the departments of commerce, education and banking working together shall create a program whereby the expertise and knowledge necessary to make available monies for the financing of small and medium-size transactions is conveyed to the banking community on a regional basis throughout the state of New York.

Laws 1990, ch 53, § 95, eff July 1, 1990, amended Laws 1985, ch 53, § 65 (amd, L 1986, ch 53, § 1, L 1987, ch 53, § 10, L 1988, ch 53, § 10 1, 1988, L 1989, ch 53, § 13, eff May 2, 1989 and deemed eff April 1, 1989), so as to delete an expiration date of June 30, 1991 applicable to the addition of sub 21.

Laws 1990, ch 53, § 101, eff July 1, 1990, amended Laws 1988, ch 262, § 19 (amd, L 1989, ch 53, § 19, L 1989, ch 391, § 27, eff July 13, 1989, deemed eff April 1, 1989), so as to delete an expiration date of June 30, 1990, applicable to the addition of sub 22.

Laws 1992, ch 515, §§ 15, 16, eff July 1, 1992, provide as follows:

§ 15. Nothing in this act shall be construed as limiting in any manner the power, duties or authority of the commissioner of the office of mental health or the office of mental retardation and developmental disabilities.

§ 16. This act shall take effect on the first day of July in the year in which it shall have become a law; provided that the authority of the commissioner of education to promulgate rules and regulations as required by this act shall take effect immediately.

Laws 1995, ch 552, § 2, provides:

§ 2. This act shall take effect on the first day of January next succeeding the date on which it shall have become a law and shall remain in full force and effect until January 1, 2023, when upon such date the provisions of this act shall be deemed repealed (Amd, L 1998, ch 356, § 1; L 2001, ch 573, § 1; L 2004, ch 57, § 64 (Part C); L 2007, ch 267, § 1, eff July 18, 2007; L 2010, ch 201, § 1, eff July 15, 2010; L 2013, ch 116, § 1, eff July 12, 2013; L 2016, ch 54, § 25 (Part A), eff April 4, 2016; L 2019, ch 59, § 45 (Part YYY), eff April 12, 2019, deemed eff on and after April 1, 2019).

Laws 1996, ch 698, § 4, eff Oct 9, 1996, provides as follows:

§ 4. This act shall take effect immediately, and shall expire and be deemed repealed on and after June 30, 2017. (Amd, L 1996, ch 474, § 121, L 2002, ch 104, § 1, L 2007, ch 165, § 1, eff July 3, 2007, L 2012, ch 57, § 19 (Part A), eff March 30, 2012, deemed eff on and after April 1, 2012.).

Laws 1997, ch 436, § 119(1) and (20) (Part A), eff Aug 20, 1997, deemed eff July 1, 1997, provides as follows :

§ 119. This act shall take effect immediately and shall be deemed to have been in full force and effect on and after July 1, 1997, except that:

(1) sections one and seventy-eight of this act shall take effect immediately, and the commissioner of education is authorized and directed to promulgate the regulations necessary to implement the provisions of such sections within 180 days of such effective date;.

(20) provided, however, that nothing contained herein shall be deemed to affect the application, qualification, expiration, reversion or repeal of any provision of law amended by any section of this act and the provisions of this act shall be applied or qualified or shall expire or revert or be deemed repealed in the same manner, to the same extent and on the same date as the case may be as otherwise provided by law.

Laws 1997, ch 464, § 5, eff Aug 26, 1997, provides as follows:

§ 5. This act shall take effect immediately; provided, however, that the amendments to paragraphs a, e and f of subdivision 14 of section 305 of the education law made by sections one, two and three of this act and the amendments to subdivision a of section 3 of chapter 698 of the laws of 1996 made by section four of this act shall not affect the expiration and/or repeal of such paragraphs and chapter and shall expire or be deemed repealed therewith.

Laws 1999, ch 273, § 3, eff July 20, 1999, provides as follows:

§ 3. This act shall take effect immediately; provided, however, that the amendments to paragraph a of subdivision 14 of section 305 of the education law made by section one of this act shall be subject to the expiration and reversion of such paragraph pursuant to section 4 of chapter 698 of the laws of 1996, as amended when upon such date the provisions of section two of this act shall take effect.

Laws 2000, ch 180, §§ 1 and 14, eff July 1, 2001, provide as follows:

Section 1. Legislative findings and intent. The legislature finds and declares that the overwhelming majority of teachers and school personnel provide a skilled, safe and appro-

priate learning environment for New York's schoolchildren. Notwithstanding the commitment and dedication of these individuals, the abuse of children when they are in educational settings by persons in a position of trust is an ongoing and persistent problem. This problem is largely unaddressed in state statute or regulation. No standard statewide policy exists for the reporting, investigation or identification of this form of child abuse. Standardization and consistency are necessary and appropriate for the protection of the school children of New York state.

Laws 2000, ch 180, §§ 1, 14, eff July 1, 2001, provide as follows:

Section 1. Legislative findings and intent. The legislature finds and declares that the overwhelming majority of teachers and school personnel provide a skilled, safe and appropriate learning environment for New York's schoolchildren. Notwithstanding the commitment and dedication of these individuals, the abuse of children when they are in educational settings by persons in a position of trust is an ongoing and persistent problem. This problem is largely unaddressed in state statute or regulation. No standard statewide policy exists for the reporting, investigation or identification of this form of child abuse. Standardization and consistency are necessary and appropriate for the protection of the school children of New York state.

The legislature further finds that the reporting of allegations of child abuse in an educational setting must be formal, consistent and well documented. The investigation of such allegations of criminal conduct must not be undertaken by school personnel but must be the responsibility of law enforcement agencies who are trained and qualified to conduct such investigations. The "arms length" character of a law enforcement investigation of allegations of child abuse in an educational setting will promote the objectivity of such investigation and will protect the rights and interests of the alleged victim, the accused and the school community.

Other than in the city of New York, New York state is without legal authority to fingerprint and conduct state and federal criminal records checks of individuals seeking employment in a public school district, nor is there authority to conduct such criminal records checks of individuals seeking state certification as teachers in our public schools. This glaring weakness in our laws to protect the children of our state continues despite the existence of fingerprint and criminal record check requirements for many other professions and licenses in New York.

The legislature further finds that the practice of "quiet resignations" whereby an employee is allowed to resign his or her position in a school district in lieu of an investigation of child abuse allegations permits and perpetuates an abuser's ability to harm children in multiple school districts of subsequent employment. The acceptance of a "quiet resignation" impermissibly denies subsequent school district employers critical information necessary to protect their school children from exposure to a high risk of harm from an employee with a prior history of child abuse in an educational setting. It is the intention of the legislature that acceptance of a "quiet resignation" be unlawful and violative of the public policy of New York state.

Therefore, the legislature finds that enactment of this legislation is necessary and appropriate to make certain that school employment not be a point of access for the abuse of our state's school children.

§ 14. This act shall take effect July 1, 2001; provided, however, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized and directed to be made and completed on or before such effective date.

Laws 2000, ch 181, §§ 1 and 24, eff Nov 1, 2000, provide as follows:

Section 1. This act shall be known and may be cited as "Project SAVE, Safe Schools Against Violence in Education Act".

§ 24. This act shall take effect November 1, 2000 provided that school districts shall be in full compliance with the provisions of this act by July 1, 2001, except that section seven of this act shall take effect July 1, 2001; section eight of this act shall take effect September 1, 2000; section twelve of this act shall apply to proceedings on or after such effective date; and sections nineteen through twenty-two of this act shall take effect on the first day of January next succeeding the date on which this act shall have become a law; provided, however that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for implementation of this act on its effective date are authorized and directed to be made and completed on or before such effective date.

Laws 2001, ch 1, § 3, eff June 8, 2002, provides as follows:

§ 3. This act shall take effect on the one hundred twentieth day after it shall have become a law, provided, however, that the commissioner of agriculture and markets and the commissioner of education are authorized to promulgate any and all rules and regulations necessary to implement the provisions of this act on its effective date on or before such date.

Laws 2001, ch 147, § 12, eff July 1, 2001, provides as follows:

§ 12. This act shall take effect on the same date as chapter 180 of the laws of 2000 takes effect, and shall expire July 1, 2021 when upon such date the provisions of this act shall be deemed repealed (Amd, L 2003, ch 100, § 1; L 2005, ch 127, § 1; L 2007, ch 90, § 1, eff July 1, 2007; L 2009, ch 179, § 8, eff July 1, 2009; L 2011, ch 2, § 7 (Part A), eff Feb 14, 2011, deemed eff on and after April 1, 2010; L 2011, ch 58, § 72 (Part A), eff March 31, 2011, deemed eff on and after June 30, 2011; L 2012, ch 57, § 20 (Part A), eff March 30, 2012, deemed eff on and after April 1, 2012; L 2013, ch 57, § 32 (Part A), eff March 29, 2013, deemed eff on and after April 1, 2013; L 2014, ch 56, § 18 (Part A), eff March 31, 2014, deemed eff on and after April 1, 2014; L 2015, ch 56, § 19 (Part A), eff April 13, 2015; L 2016, ch 54, § 34 (Part A), eff April 4, 2016; L 2017, ch 59, § 50 (Part YYY), eff April 10, 2017, deemed eff on and after April 1, 2017; L 2018, ch 59, § 31 (Part CCC), eff April 12, 2018, deemed eff on and after April 1, 2018; L 2019, ch 59, § 39 (Part YYY), eff April 12, 2019, deemed eff on and after April 1, 2019; L 2020, ch 56, § 34 (Part A), eff April 3, 2020, deemed eff on and after April 1, 2020).

Laws 2002, ch 425, § 4, eff July 1, 2002, provides as follows:

§ 4. This act shall take effect July 1, 2002 and section one of this act shall expire and be deemed repealed June 30, 2019, and sections two and three of this act shall expire and be deemed repealed on June 30, 2021 (Amd, L 2003, ch 101, § 4; L 2005, ch 129, § 1; L 2006, ch 153, § 1, L 2008, ch 126, eff June 30, 2008; L 2009, ch 158, § 1, eff July 11, 2009, deemed eff on and after June 30, 2009; L 2011, ch 2, § 5 (Part A), eff Feb 14, 2011, deemed eff on and after April 1, 2010; L 2011, ch 58, § 73 (Part A), eff March 31, 2011, deemed eff on and after June 30, 2011; L 2012, ch 57, § 21 (Part A), eff March 30, 2012, deemed eff on and after April 1, 2012; L 2013, ch 57, § 33 (Part A), eff March 29, 2013, deemed eff on and after April 1, 2013; L 2015, ch 56, § 20 (Part A), eff April 13, 2015; L 2016, ch 54, § 35 (Part A), eff April 4, 2016; L 2017, ch 59, § 12 (Part YYY), eff April 10, 2017, deemed eff on and after April 1, 2017; L 2018, ch 59, § 33 (Part CCC), eff April 12, 2018, deemed eff on and after April 1, 2018; L 2019, ch 59, § 40 (Part YYY), eff April 12, 2019, deemed eff on and after April 1, 2019; L 2020, ch 56, § 35 (Part A), eff April 3, 2020, deemed eff on and after April 1, 2020).

Laws 2003, ch 270, § 2, eff July 1, 2004, provides as follows:

§ 2. This act shall take effect on the first of July next succeeding the date on which it shall have become a law; provided, however, that the addition, amendment and/or repeal of any rules or regulations necessary for the implementation of the provisions of this act on its effective date are authorized and directed to be made and completed on or before such effective date.

Laws 2003, ch 621, § 2, eff Sept 30, 2003, provides as follows:

§ 2. This act shall take effect immediately; provided, however, that the amendments to subdivision 33 of section 305 of the education law made by section one of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith.

Laws 2005, ch 15, § 3, eff April 12, 2005, provides as follows:

§ 3. This act shall take effect immediately and shall apply to contracts extended on or after July 1, 2005, provided that the amendments to paragraph a of subdivision 14 of section 305 of the education law made by section one of this act shall expire and be deemed repealed on and after June 30, 2007. (Amd, L 2007, ch 165, § 2, eff July 3, 2007.).

Laws 2006, ch 160, § 2, eff Nov 23, 2006, provides as follows:

§ 2. This act shall take effect on the one hundred twentieth day after it shall have become a law; provided, however, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date is authorized and directed to be made and completed on or before such effective date.

Laws 2006, ch 630, § 9, eff July 1, 2007, provides as follows:

§ 9. This act shall take effect on the first of July next succeeding the date on which it shall have become a law, provided that the amendments to paragraph (d) of subdivision 30 of section 305 of the education law, made by section four of this act shall not affect the expiration and repeal of such paragraph, and shall expire and be deemed repealed therewith, provided, further that the amendments to subdivision 3 of section 3035 of the education law, made by section seven of this act, shall not affect the expiration and reversion of such subdivision and shall expire therewith, when upon such date section eight of this act shall take effect.

Laws 2008, ch 296, § 4, eff July 21, 2008, provides as follows:

§ 4. This act shall take effect immediately and shall apply to convictions of teachers occurring on or after such date.

Laws 2008, ch 325, § 4, eff July 21, 2008, provides as follows:

§ 4. This act shall take effect immediately and shall apply to convictions of school administrators or supervisors occurring on or after such date.

Laws 2010, ch 378, § 11, eff Aug 14, 2010, provides as follows:

§ 11. This act shall take effect immediately; provided, however, that the commissioner of education shall promulgate any rules or regulations necessary to implement the provisions of this act on or before July 1, 2010; provided, further that if section ten of this act shall take effect after July 1, 2010 it shall be deemed to have been in full force and effect on and after July 1, 2010; and provided further that section ten of this act shall expire and be deemed repealed on June 30, 2025 (Amd, L 2015, ch 49, § 1, eff June 30, 2015; L 2020, ch 58, § 1 (Part XXX, Subpart B, Item FF), eff April 3, 2020).

Laws 2011, ch 496, §§ 1 and 4, eff July 1, 2012, provide:

Section 1. Short title. This act shall be known and may be cited as the "concussion management and awareness act".

§ 4. This act shall take effect on the first of July next succeeding the date on which it shall have become a law; provided, that, effective immediately, any rules and regulations necessary to implement the provisions of this act on its effective date are authorized and directed to be completed on or before such date.

Laws 2014, ch 56, § 2 (Part AA), eff March 31, 2014, provides as follows:

§ 2. This act shall be known and may be cited as the "common core implementation reform act."

Laws 2014, ch 56, § 3 (Part AA, Subpart A), eff March 31, 2014, provides as follows:

§ 3. This act shall take effect immediately; provided that the commissioner of education is authorized to promulgate any and all rules and regulations and take any other measures necessary to implement this act on its effective date; and provided further that the provisions of this act shall not apply to any annual professional performance review agreement entered into pursuant to a collective bargaining agreement or by decision of the commissioner of education prior to the effective date of this act, which shall remain in effect in accordance with paragraph l of subdivision 2 of section 3012-c of the education law until a subsequent plan or amendment is agreed to by the parties and approved by the commissioner of education in accordance with section 3012-c of the education law.

Laws 2014, ch 56, § 2 (Part AA, Subpart B), eff March 31, 2014, provides as follows:

§ 2. This act shall take effect immediately (Amd, L 2018, ch 59, § 35 (Part CCC), eff April 12, deemed eff on and after April 1, 2018; L 2019, ch 59, § 30 (Part YYY), eff April 12, 2019, deemed eff on and after April 1, 2019).

Laws 2014, ch 56, § 2 (Part AA, Subpart D), effective upon and to the extent allowed by a federal waiver issued by the U.S. department of education, provides as follows:

§ 2. This act shall take effect upon and to the extent allowed by a federal waiver issued by the United States Department of Education; provided that the commissioner of education shall notify the legislative bill drafting commission upon the occurrence of the issuance of such waiver in order that the commission may maintain an accurate and timely effective data base of the official text of the laws of the state of New York in furtherance of effectuating the provisions of section 44 of the legislative law and section 70-b of the public officers law.

Laws 2014, ch 56, § 2 (Part AA, Subpart E), eff July 1, 2014, provides as follows:

§ 2. This act shall take effect July 1, 2014, provided that the provisions of this act shall not apply to any annual professional performance review agreement entered into pursuant to a collective bargaining agreement or by decision of the commissioner of education prior to the effective date of this act, which shall remain in effect in accordance with paragraph l of subdivision 2 of section 3012-c of the education law until a subsequent plan or amendment is agreed to by the parties and approved by the commissioner of education in accordance with section 3012-c of the education law.

Laws 2014, ch 56, § 1 (Part AA, Subpart F), eff March 31, 2014, provides as follows:

Section 1. The commissioner of education shall provide guidance and advice to every school district and board of cooperative educational services in order to assist school districts and boards of cooperative educational services to reduce and eliminate traditional standardized tests that are not required under state or federal law. The commissioner of education shall prepare, for each school district, a testing transparency report listing all standardized assessments administered to students within such school district for which the department has record. The testing transparency report shall list each standardized test that is administered, by grade and subject, and shall note whether such assessment is required by federal law, required by state law, or given at local discretion. The testing transparency report provided to each school district shall include a user-friendly plain language summary designed for distribution to parents and the community, both of which shall be supplemented by each school district to include any standardized tests not specified by the department of education. The commissioner of education shall provide the testing transparency report to each school district by July 1, 2014. Each school district shall promptly supplement and post the testing transparency report on the school district website, if one exists, and shall ensure public discussion of the results of the testing transparency report, in a manner as the district sees fit, including the extent to which those standardized tests not mandated by federal or state law are beneficial to the educational process or may be eliminated in order to reduce over-testing.

Laws 2015, ch 56, §§ 2 (Part EE) and 5 (Part EE, Subpart G), eff Dec 19, 2015, provide:

§ 2. This act shall be known as the "education transformation act of 2015".

§ 5. This act shall take effect July 1, 2015 and shall apply to hearings commenced by the filing or service of charges on or after July 1, 2015, provided that effective immediately, the commissioner of education shall be authorized to promulgate any regulations needed to implement the provisions of this act on such effective date.

Laws 2016, ch 54, § 25 (Part A), eff April 4, 2016, provides as follows:

§ 25. This act shall take effect on the first day of January next succeeding the date on which it shall have become a law and shall remain in full force and effect until January 1, 2020, when upon such date the provisions of this act shall be deemed repealed.

Laws 2016, ch 54, § 34 (Part A), eff April 4, 2016, provides as follows:

§ 34. This act shall take effect on the same date as chapter 180 of the laws of 2000 takes effect, and shall expire July 1, 2017 when upon such date the provisions of this act shall be deemed repealed.

Laws 2016, ch 54, § 35 (Part A), eff April 4, 2016, provides as follows:

§ 35. This act shall take effect July 1, 2002 and shall expire and be deemed repealed June 30, 2017.

Laws 2017, ch 59, § 63 (Part YYY), eff April 10, 2017, provides:

§ 63. This act shall take effect immediately, and shall be deemed to have been in full force and effect on and after April 1, 2017, provided, however, that:

1. sections one, two, five, sixteen, sixteen-a, twenty-two, twenty-three, twenty-four, twenty-five, twenty-six, twenty-seven, twenty-eight, twenty-nine, thirty, thirty-one, thirty-one-a, thirty-one-b, thirty-two, thirty-three, thirty-four, thirty-five, thirty-eight, forty-eight, fifty-one, fifty-five, fifty-six, sixty and sixty-one of this act shall take effect July 1, 2017;

2. the amendments to chapter 756 of the laws of 1992, relating to funding a program for work force education conducted by a consortium for worker education in New York City, made by sections forty-four and forty-five of this act, shall not affect the repeal of such chapter and shall be deemed repealed therewith;

3. the amendments to chapter 89 of the laws of 2016, relating to supplementary funding for dedicated programs for public school students in the East Ramapo central school district, made by section forty-eight of this act shall not affect the repeal of such chapter and shall be deemed repealed therewith;

4. the amendments to subdivision 33 of section 305 of the education law, made by section seven of this act, shall not affect the repeal of such subdivision and shall be deemed repealed therewith;

5. the amendments to subdivision 7 of section 2802 of the education law, made by section eight of this act, shall not affect the repeal of such subdivision and shall be deemed repealed therewith;

6. the amendments to subdivision 7 of section 3214 of the education law, made by section nine of this act, shall not affect the repeal of such subdivision and shall be deemed repealed therewith;

7. the amendments to section 2590-c of the education law made by section nineteen of this act shall not affect the repeal of such section and shall be deemed repealed therewith;

8. the amendments to subdivision 1 of section 2856 of the education law made by section four of this act shall be subject to the expiration and reversion of such subdivision pursuant to subdivision d of section 27 of chapter 378 of the laws of 2007, as amended, when upon such date the provisions of section four-a of this act shall take effect;

9. the amendments to paragraphs d-1 and d-2 of subdivision 12 of section 3602-e of the education law made by section twenty-eight-a of this act shall not affect the repeal of such paragraphs and shall be deemed repealed therewith; and

10. the amendments to paragraph b-1 of subdivision 4 of section 3602 of the education law made by section sixteen-a of this act shall not affect the expiration of such paragraph and shall expire therewith.

Laws 2017, ch 216, § 2, eff Aug 21, 2017, provides:

§ 2. This act shall take effect immediately; provided, however the guidance memorandum required pursuant to section one of this act shall be issued no later than one year after this act shall have become a law.

Laws 2017, ch 316, § 2, eff Mar 12, 2018, provides:

§ 3. This act shall take effect on the one hundred eightieth day after it shall have become a law.

Laws 2017, ch 347, §§ 1, 6, eff July 1, 2018, provide:

Section 1. This act shall be known and may be cited as "Rory Staunton's law."

§ 6. This act shall take effect on the first of July next succeeding the date on which it shall have become a law; provided, however, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized to be made or completed on or before such effective date.

Laws 2017, ch 424, § 6, eff February 27, 2018, provides:

§ 6. This act shall take effect on the ninetieth day after it shall have become a law; provided that the amendments to subdivisions (i) and (j) of section 17 of the social services law made by section three of this act shall not affect the repeal of such subdivisions and shall be deemed repealed therewith.

Laws 2018, ch 34, § 5, eff February 27, 2018, provides:

§ 5. This act shall take effect on the same date and in the same manner as a chapter of the laws of 2017, amending the social services law and the education law relating to directing the council on children and families to establish an online listing and map of publicly funded or registered afterschool and school age child care programs and to expand the duties of the commissioner of social services and the commissioner of education, as proposed in legislative bills numbers S. 683 and A. 2183, takes effect; provided that the amendments to subdivision (i) of section 17 of the social services law made by section two of this act shall not affect the repeal of such subdivision and shall be deemed repealed therewith.

Laws 2018, ch 59, § 44 (Part CCC), eff April 12, 2018, provides:

§ 44. This act shall take effect immediately, and shall be deemed to have been in full force and effect on and after April 1, 2018; provided, however, that:

1. Sections one, nine, nine-a, nine-b, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, twenty-one, twenty-two, twenty-three, thirty-six, forty and forty-one of this act shall take effect July 1, 2018; and

2. Sections four and four-a of this act shall expire and be deemed repealed June 30, 2023; and

3. The amendments to chapter 756 of the laws of 1992, relating to funding a program for work force education conducted by the consortium for worker education in New York city made by sections twenty-five and twenty-six of this act shall not affect the repeal of such chapter and shall be deemed repealed therewith; and

4. Section twenty-eight of this act shall be deemed to have been in full force and effect on and after the effective date of section 140 of chapter 82 of the laws of 1995; and

5. The amendments to paragraph b-1 of subdivision 4 of section 3602 of the education law made by section nine-b of this act shall not affect the expiration of such paragraph and shall expire therewith.

Laws 2019, ch 59, § 54 (Part YYY), eff April 12, 2019, provides:

§ 54. This act shall take effect immediately, and shall be deemed to have been in full force and effect on and after April 1, 2019, provided, however, that:

1. Sections one, three, four, five, five-a, five-b, five-c, five-d, six, seven, eight, nine, ten, sixteen, seventeen, eighteen, nineteen, twenty-one, twenty-two, twenty-three, thirty-two, thirty-four, thirty-seven-a, forty-seven, fifty, fifty-one and fifty-two-a of this act shall take effect July 1, 2019;

2. Sections eleven, twelve, thirteen and fourteen of this act shall take effect July 1, 2020;

3. Paragraph (a) of subdivision 7-a of section 804 of the education law, as added by section thirty-three of this act, shall take effect July 1, 2019;

4. The amendments to section 3614 of the education law made by section two of this act shall not affect the repeal of such section and shall be deemed repealed therewith;

5. The amendments to chapter 756 of the laws of 1992, relating to funding a program for work force education conducted by the consortium for worker education in New York City made by sections thirty-five and thirty-six of this act shall not affect the repeal of such chapter and shall be deemed repealed therewith;

6. The amendments to sections 2590-b, 2590-c, 2590-e, 2590-h and 2590-g of the education law made by sections forty-three-a, forty-three-b, forty-three-c, forty-three-d, forty-three-e and forty-three-f of this act shall not affect the expiration or repeal of such provisions and shall expire and be deemed repealed therewith; and

7. Section fifty-two-f of this act shall take effect on the same date as the reversion of subdivision 1 of section 409-d of the education law as provided in section 3 of chapter 437 of the laws of 2014.

Laws 2019, ch 196, § 3, eff December 21, 2018, provides:

§ 3. This act shall take effect on the same date and in the same manner as a chapter of the laws of 2018, amending the education law relating to authorizing and directing the commissioner of education to conduct a study on the effects of trauma on child development and learning, as proposed in legislative bills numbers S.8000-B and A.10063-B, takes effect.

Amendment Notes The 2014 amendment by ch 146, § 2 rewrote 43, which formerly read: "The commissioner shall make available, on the department internet website, the curriculum of the course of instruction in adolescent problem gambling established pursuant to subdivision (i) of section 19.07 of the mental hygiene law."

The 2014 amendment by ch 417, § 1 added 52.

2014. Chapter 56, § 2 (Part AA, Subpart A) amended:
By adding sub 44.

2014. Chapter 56, § 1 (Part AA, Subpart B) amended:
By adding sub 45.
By adding sub 46.

2014. Chapter 56, § 1 (Part AA, Subpart C) amended:
By adding sub 47.

2014. Chapter 56, § 1 (Part AA, Subpart D) amended:
By adding sub 48.

2014. Chapter 56, § 1 (Part AA, Subpart E) amended:
By adding sub 49.

2014. Chapter 56, § 1 (Part AA, Subpart I) amended:
By adding sub 50.

2014. Chapter 56, § 1 (Part AA, Subpart J) amended:
By adding sub 51.

2013. Chapter 551, § 2 amended:
By adding sub 43.

2011. Chapter 62, § 104 (Part A) amended:
Sub 18 at figs 1, 3 and 4 by substituting "superintendent of financial services" for "superintendent of banks" and at fig 2 substituting "department of financial services" for "department of banks".

2011. Chapter 496, § 2 amended:
By adding sub 42.

2010. Chapter 378, § 2 amended:
By repealing sub 32.

2007. Chapter 220, § 1 amended:
Sub 33, par a, by adding the matter in italics.

2006. Chapter 630, § 4 amended:
Sub 30, par (d) by adding the matter in italics.

2001. Chapter 147, § 1 amended:
By adding sub 30, par (e).

The 2015 amendment by ch 56, § 1 (Part EE, Subpart G), added "or of any other violent felony offense or offenses committed against a child when such child was the intended victim of such offense" in 7-a a; added 7-a b(5); added "or a violent felony offense or offenses committed against a child when such child was the intended victim of such offense" in the first sentence of 7-a c; added "or violent felony offense or offenses committed against a child when such child was the intended victim of such offense" in the third sentence of 7-a c, in the first sentence of 7-a d, and in 7-a f(ii); added "or conviction of a violent felony offense or offenses committed against a child when such child was the intended victim of such offense" in 7-a f(i); and added "or three thousand twenty-b" in 7-a h.

The 2016 amendment by ch 109, § 1, added 55.

The 2017 amendment by ch 59, §§ 7, 32, 61 (Part YYY), substituted "thirty-eight of section eight thousand one hundred one of the Elementary and Secondary Education Act of nineteen hundred sixty-five, as amended" for "thirty-one of section nine thousand one hundred one of the No Child Left Behind Act of 2001" in the second sentence of 33(a); added the second sentence of 21b; and added 21d.

The 2017 amendment by ch 216, § 1, added 56 [first setout].

The 2017 amendment by ch 316, § 2, added 56 [second setout].

The 2017 amendment by ch 347, § 2, added 56 [third setout].

The 2017 amendment by ch 424, § 4, added 56 [fourth setout].

The 2018 amendment by ch 34, § 3, in the first sentence of 56 [fourth setout], substituted "department" for "state" and "afterschool programs, or extended learning time" for "afterschool or summer programs as defined in section two of the social services law, extended learning time," and deleted "or community schools, including but not limited to grants for such purposes awarded under section thirty-six hundred forty-one of this chapter" at the end; and rewrote the second sentence of 56, which formerly read: "For each grant recipient or provider the recipient's or provider's name, the address at which the program is offered, and the name and phone number of an individual who is authorized to answer questions regarding the program will be provided to the council no less than once a year and within ninety days of the date of execution or expiration of contracts with grant recipients when all such contracts are executing or expiring for a particular competitive grant."

The 2018 amendment by ch 59, § 2 (Part CCC), added 58.

The 2018 amendment by ch 460, § 1, added 59.

The 2019 amendment by ch 59, § 12-a (Part YYY), added 14g.

The 2019 amendment by ch 67, § 2, substituted "next generation" for "common core" in the first sentence of 50 and five times in 51.

The 2019 amendment by ch 196, § 1, deleted former 59.

The 2019 amendment by ch 477, § 1, added 29-c.

The 2019 amendment by ch 672 § 32, substituted "the office for people with developmental disabilities" for "the office of mental retardation and developmental disabilities" in 23.

NOTES TO DECISIONS

Analysis

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2. General supervisory powers; implementation of policy and statutory directives
3. Commissioner's delegation of authority
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5. Quality and quantity of instruction
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16. Rules and regulations

1. In general

In an Article 78 proceeding brought by a school district to challenge the Commissioner of Education's award of permanent certification to a tenured teacher, the award was proper where the school district had unreasonably withheld recommendation to substitute one year of paid full-time teaching experience for student teaching experience. Bradford Cent. School Dist. v Ambach, 56 N.Y.2d 158, 451 N.Y.S.2d 654, 436 N.E.2d 1256, 1982 N.Y. LEXIS 3325 (N.Y. 1982).

In Article 78 proceeding commenced by school district against Commissioner of Education to challenge order which required school district to offer former tenured employee position as principal, commissioner and employee, who was not joined as party, were not united in interest and did not stand or fall together, as commissioner did not have authority over employee. Mt. Pleasant Cottage School Union Free School Dist. v Sobol, 163 A.D.2d 715, 558 N.Y.S.2d 713, 1990 N.Y. App. Div. LEXIS 8437 (N.Y. App. Div. 3d Dep't 1990), aff'd, 78 N.Y.2d 935, 573 N.Y.S.2d 639, 578 N.E.2d 437, 1991 N.Y. LEXIS 1008 (N.Y. 1991).

The plaintiff has no cause of action against the state under this section (formerly § 94, subd. 3) where he was injured while attending a wartime class in food production conducted in a school owned by a union free school district and governed by a local board of education, which was financed by Federal funds sent to the state treasurer and transferred by him to the local Board of Education, since there was no duty or obligation on the part of the state to supervise the course of instruction or to assure to pupils reasonable safeguards. Buck v State, 96 N.Y.S.2d 667, 198 Misc. 575, 1950 N.Y. Misc. LEXIS 1588 (N.Y. Ct. Cl. 1950).

Where school transportation contracts, which provided that the contract price would be adjusted during each extention year by the percentage by which the "National consumer price index" increased over the index of the preceding year, were signed before the effective date of an amendment to Educ Law § 305(14)(a), which changed the definition of the term "consumer price index," but the contracts did not become effective until after the enactment of the amendment, the amendment did not apply to extention years subsequent to its effective date. Pioneer Transp. Corp. v Kalajian, 122 Misc. 2d 412, 471 N.Y.S.2d 518, 1984 N.Y. Misc. LEXIS 2856 (N.Y. Sup. Ct.), aff'd, Pioneer Transp. Corp. v Kaladjian, 105 A.D.2d 698, 481 N.Y.S.2d 136, 1984 N.Y. App. Div. LEXIS 20806 (N.Y. App. Div. 2d Dep't 1984).

Issue as to whether petitioner could withdraw her resignation as probationary school teacher was not solely within special competence of Commissioner of Education, and thus motion to dismiss Article 78 petition to annul determination of board of education which accepted petitioner's resignation, on ground that commissioner had exclusive jurisdiction under doctrine of primary jurisdiction, was denied. Totevski v Board of Educ., 178 Misc. 2d 758, 680 N.Y.S.2d 824, 1998 N.Y. Misc. LEXIS 543 (N.Y. Sup. Ct. 1998).

Provisions of CLS Educ Law § 305(14) do not apply to approval of contract to operate flea market on public school property. 1989 Op Comr Ed No. 12199.

Commissioner of Education has no authority to determine method of selection of teacher representatives for site-based management teams once shared decisionmaking plan is in place. 1995 Op Comm Ed No. 13442.

Commissioner had authority to review determination of union free school district which rejected petitioner's bid to provide food service to district for that school year and awarded contract to another bidder. 1998 Op Comm Ed No. 14087.

United States Secretary of Education, not Commissioner of Education, has jurisdiction over alleged violations of Family Educational Rights and Privacy Act, 20 USCS §§ 1232g et seq. 1999 Op Comm Ed No. 14124.

Commissioner of Education will not substitute his judgment for that of a board of education in determining responsibility where there is substantial evidence upon which board could base its determination. Re Dileo, 74 St Dept 83 (1953).

2. General supervisory powers; implementation of policy and statutory directives

Where the Board of Regents has declared racially imbalanced schools to be educationally inadequate, and the Commissioner has implemented this policy by directing local boards to take steps to eliminate racial imbalance, he may substitute his judgment for that of the local board and his decisions are final and not subject to judicial review absent a showing of pure arbitrariness. Vetere v Allen, 15 N.Y.2d 259, 258 N.Y.S.2d 77, 206 N.E.2d 174, 1965 N.Y. LEXIS 1494 (N.Y.), cert. denied, 382 U.S. 825, 86 S. Ct. 60, 15 L. Ed. 2d 71, 1965 U.S. LEXIS 655 (U.S. 1965).

Where the Board of Regents under the authority of § 207 had declared racially imbalanced schools to be educationally inadequate and the Commissioner of Education under § 301 and the above statute had implemented this policy by directing local boards to take steps to eliminate racial imbalance, his decision was final in the absence of a showing of pure arbitrariness. Since his decision rested squarely on his finding of the inadequacy of such schools from the viewpoint of educational soundness, and since it has been held that the Commissioner may substitute his judgment for that of the local board even where its action is not arbitrary, his decision in regard to racial balance was conclusive. Vetere v Allen, 15 N.Y.2d 259, 258 N.Y.S.2d 77, 206 N.E.2d 174, 1965 N.Y. LEXIS 1494 (N.Y.), cert. denied, 382 U.S. 825, 86 S. Ct. 60, 15 L. Ed. 2d 71, 1965 U.S. LEXIS 655 (U.S. 1965).

Purpose of provisions of general legislative and constitutional system for maintenance of public schools securing review by board of education and, on state level, by Commissioner of Education, is to make all matters pertaining to general school system of state within authority and control of department of education and to remove same so far as practicable and possible from controversies in courts. James v Board of Education, 42 N.Y.2d 357, 397 N.Y.S.2d 934, 366 N.E.2d 1291, 1977 N.Y. LEXIS 2213 (N.Y. 1977).

The votes of one of 28 school districts which voted for centralization of their districts having done so on the representation that after the central district was formed their district would be taken away and attached to another educational division of the State, the Commissioner of Education was within his wide powers in calling for a vote of the qualified voters of the one district to ascertain their sentiment before deciding to exercise his power to alter the boundaries. Board of Education v Spaulding, 272 A.D. 677, 75 N.Y.S.2d 583, 1947 N.Y. App. Div. LEXIS 3374 (N.Y. App. Div. 1947).

The Board of Education has standing to maintain action to declare unconstitutional statute requiring Board to purchase text books for parochial pupils. Board of Education v Allen, 27 A.D.2d 69, 276 N.Y.S.2d 234, 1966 N.Y. App. Div. LEXIS 2693 (N.Y. App. Div. 3d Dep't 1966), aff'd, 20 N.Y.2d 109, 281 N.Y.S.2d 799, 228 N.E.2d 791, 1967 N.Y. LEXIS 1388 (N.Y. 1967).

The Commissioner and the Deputy Commissioner of Education of the State of New York had absolute immunity in actions to recover damages suffered as a result of a regulation promulgated by respondents which was allegedly in violation of a federal statute, and, as government officials performing discretionary functions, respondents acted as administrative officers in acting to enforce the regulation and were shielded from liability for civil damages to those affected thereby by a qualified immunity as long as their conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have been aware. Board of Education v Ambach, 90 A.D.2d 227, 458 N.Y.S.2d 680, 1982 N.Y. App. Div. LEXIS 18831 (N.Y. App. Div. 3d Dep't 1982), aff'd, 60 N.Y.2d 758, 469 N.Y.S.2d 669, 457 N.E.2d 775, 1983 N.Y. LEXIS 3444 (N.Y. 1983).

Commissioner of education had general supervision over all schools and institutions which were subject to the provisions of the chapter, or of any statute relating to education, and the commissioner was directed to cause the same to be examined and inspected; the state department of education was authorized to conduct an audit relating to Employment Preparation Education

(EPE) funds received, and, because a school district failed to maintain records in accordance with basic standards of record-keeping and reporting systems, which left the auditors unable to verify that aid received for EPE was expended on eligible programs or students, disallowance of funds pursuant to N.Y. Educ. Law § 3604(5)(a) was proper. Matter of Rochester City School Dist. v New York State Educ. Dept., 31 A.D.3d 993, 819 N.Y.S.2d 190, 2006 N.Y. App. Div. LEXIS 9462 (N.Y. App. Div. 3d Dep't 2006), app. denied, 8 N.Y.3d 805, 831 N.Y.S.2d 107, 863 N.E.2d 112, 2007 N.Y. LEXIS 128 (N.Y. 2007).

Sections 301 and 305 of the Education Law give the Commissioner the authority to implement policy established by the Board of Regents, and therefore, he was authorized to direct local school boards to take steps to eliminate racial imbalance. Etter v Littwitz, 47 Misc. 2d 473, 262 N.Y.S.2d 924, 1965 N.Y. Misc. LEXIS 1534 (N.Y. Sup. Ct. 1965).

Under statutes, commissioner of education and board of regents are given wide latitude to implement statutory directives and assure their effective execution. Hodgkins v Central School Dist., 78 Misc. 2d 91, 355 N.Y.S.2d 932, 1974 N.Y. Misc. LEXIS 1337 (N.Y. Sup. Ct. 1974), aff'd, 48 A.D.2d 302, 368 N.Y.S.2d 891, 1975 N.Y. App. Div. LEXIS 9885 (N.Y. App. Div. 3d Dep't 1975).

In an employment discrimination action, a local board of education was not entitled to Eleventh Amendment immunity as an arm of the state because (1) N.Y. Educ. Law §§ 1701 and 1709, N.Y. Gen. Constr. Law § 66(1) and (2), and N.Y. Const. art. X, § 5 could be construed to identify boards of education as municipal corporations; (2) board members were elected locally pursuant to N.Y. Educ. Law § 1804(2); (3) under N.Y. Educ. Law § 1709(20), school districts were funded by state appropriations and local property taxes; (4) education was a shared state and local responsibility even though N.Y. Const. art. XI, § 1 imposed upon the legislature the duty of providing a system of free common schools; (5) N.Y. Educ. Law §§ 305(2), 306(1) and (2), 308, 309, 310, and 1706 did not provide the New York State Commissioner of Education with veto power over the board's actions, and (6) N.Y. Educ. Law § 1709(8-c) and (26) required that any judgment against the board be paid from the board's funds rather than from the state treasury. Woods v Rondout Valley Cent. Sch. Dist. Bd. of Educ., 466 F.3d 232, 2006 U.S. App. LEXIS 25333 (2d Cir. N.Y. 2006).

Education Law § 3020-a must be read with § 305(1) and § 310(7) to create a consistent and cohesive statutory pattern to permit commissioner to review full determination of hearing panel both as to questions of guilt and appropriate remedy and to prescribe different and more onerous penalty than that imposed by hearing panel. Re Community School Board No. 2 of the City of New York, 1979 Op Comr Ed #10099.

Respondent would be removed as impartial hearing officer from proceeding concerning student with disability where he admitted that he had become too familiar with underlying facts and dispute to act impartially, but he declined to recuse himself on motion by petitioner; respondent's statements concerning his lack of impartiality were sufficient to threaten integrity of hearing process, and fact that he was challenged at later date, rather than at commencement of hearing when conflicts of interest are typically disclosed, was of no consequence. 1996 Op Comm Ed No. 13536.

3. Commissioner's delegation of authority

Education Commissioner's appointment of overseer to advise local school board, without whose prior written approval no official action could be taken, was an egregious usurpation of power totally transcending the Commissioner's authority, and was not authorized either in law or in logic. Verbanic v Nyquist, 41 A.D.2d 466, 344 N.Y.S.2d 406, 1973 N.Y. App. Div. LEXIS 4301 (N.Y. App. Div. 3d Dep't 1973).

Privately endowed colleges in this State are part and parcel of the State system of education. Board of Education v Pace College, 50 Misc. 2d 806, 271 N.Y.S.2d 773, 1966 N.Y. Misc. LEXIS 1777 (N.Y. Sup. Ct.), rev'd, 27 A.D.2d 87, 276 N.Y.S.2d 162, 1966 N.Y. App. Div. LEXIS 2716 (N.Y. App. Div. 2d Dep't 1966).

Appointment by state commissioner of education of an overseer in whom he vested power to advise school district was a proper exercise of authority under Education L § 305, subd 2, as commissioner was simply lending a hand to the members of the board in what he deemed was an extreme situation by putting on the scene a representative who could keep him in close contact with the problems at hand and the actions of the board, as an incident of his power to advise and guide or to remove. Verbanic v Nyquist, 73 Misc. 2d 458, 341 N.Y.S.2d 949, 1972 N.Y. Misc. LEXIS 1492 (N.Y. Sup. Ct. 1972), aff'd, 41 A.D.2d 466, 344 N.Y.S.2d 406, 1973 N.Y. App. Div. LEXIS 4301 (N.Y. App. Div. 3d Dep't 1973).

State commissioner of education exceeded his statutory authority to advise and guide or remove members of local school board when he appointed an overseer and granted such overseer absolute power over scheduling and the agenda of every meeting and forbade action upon any transaction without the overseer's prior written approval, thereby completely and totally invading and usurping the area which by statute belonged exclusively to the board. Verbanic v Nyquist, 73 Misc. 2d 458, 341 N.Y.S.2d 949, 1972 N.Y. Misc. LEXIS 1492 (N.Y. Sup. Ct. 1972), aff'd, 41 A.D.2d 466, 344 N.Y.S.2d 406, 1973 N.Y. App. Div. LEXIS 4301 (N.Y. App. Div. 3d Dep't 1973).

4. Private schools and colleges

As commissioner of education has the right and duty to concern himself with the quality of any faculty under his supervision together with its higher educational pursuits to the extent that those pursuits add to or detract from the quality of its performance and its resulting impact upon a student body, and considering the fact that a large portion of faculty and student body of Laurence University, a corporation for profit incorporated in the State of Florida, were from New York State and thesis advisors actually met with students on a teacher-student level within the state, commissioner had authority to make qualitative comments in regard to the institution, and thus was privileged from libel and slander action arising out of such comments. Laurence University v State, 41 A.D.2d 463, 344 N.Y.S.2d 183, 1973 N.Y. App. Div. LEXIS 4300 (N.Y. App. Div. 3d Dep't 1973).

Appeal by petitioner following his dismissal from university doctoral program, alleging that university's grading decision led to his dismissal and requesting that he be permitted to withdraw voluntarily with unblemished record, was dismissed for lack of jurisdiction; CLS Educ § 310 limits commissioner's appellate jurisdiction to matters involving public school systems and does not provide for appeals from actions of postsecondary institutions. 2007 Op Comm Ed No. 15,665.

While CLS Educ § 310 generally limits jurisdiction of Commissioner of Education to appeals involving public schools, commissioner has jurisdiction to review any immunization decision that prohibits any child from attending school, whether public, private, parochial or otherwise. 2008 Op Comm Ed No. 15,758.

5. Quality and quantity of instruction

It is within the power of the board of regents and the commissioner of education to determine the appropriate hours of instruction in the schools. New York City School Boards Ass'n v Board of Education, 39 N.Y.2d 111, 383 N.Y.S.2d 208, 347 N.E.2d 568, 1976 N.Y. LEXIS 2388 (N.Y. 1976).

Commissioner of Education acted properly in refusing to reregister English and history Ph.D. programs at State University of New York and Albany on grounds that such programs fell below acceptable Ph.D. standards. Moore v Board of Regents, 59 A.D.2d 44, 397 N.Y.S.2d 449, 1977 N.Y. App. Div. LEXIS 12449 (N.Y. App. Div. 3d Dep't 1977), aff'd, 44 N.Y.2d 593, 407 N.Y.S.2d 452, 378 N.E.2d 1022, 1978 N.Y. LEXIS 2051 (N.Y. 1978).

The adoption of regulations with respect to graduation requirements, including basic competency examinations, to establish a standard that would make a local high school diploma in New York a meaningful credential of the graduate was within the authority and power of the Commissioner of Education of the State of New York, the control and management of educational affairs were vested in the Board of Regents and the Commissioner of Education, and determinations of the Commissioner, unless patently violative of statutory or constitutional mandate, and were beyond the range of judicial oversight. Board of Education v Ambach, 90 A.D.2d 227, 458 N.Y.S.2d 680, 1982 N.Y. App. Div. LEXIS 18831 (N.Y. App. Div. 3d Dep't 1982), aff'd, 60 N.Y.2d 758,

469 N.Y.S.2d 669, 457 N.E.2d 775, 1983 N.Y. LEXIS 3444 (N.Y. 1983).

Grant of special use permit to college to renovate buildings and lease them to not-for-profit corporation for purposes of offering community instruction in art courses was proper under zoning ordinance authorizing use for bona fide educational purposes despite fact that school would not be approved by board of regents. Imbergamo v Barclay, 77 Misc. 2d 188, 352 N.Y.S.2d 337, 1973 N.Y. Misc. LEXIS 1215 (N.Y. Sup. Ct. 1973).

The Education Law gives Commissioner of Education authority and responsibility to assist local school districts and Family Court in locating educational placement for brain-damaged children diagnosed as moderately mentally retarded, especially since failing to provide educational opportunity for such children would constitute violation of both State and Federal Constitutions. In re Lofft, 86 Misc. 2d 431, 383 N.Y.S.2d 142, 1976 N.Y. Misc. LEXIS 2462 (N.Y. Fam. Ct. 1976).

Petitioner failed to establish that her daughter's daily 20-30 minute sessions with classroom teacher in minigroup of 2-3 students was part of regular reading program, and not academic intervention services (AIS), where (1) petition contained only conclusory allegations and another student's AIS report, (2) respondent submitted affidavits from classroom teacher and school principal stating that daily minigroup sessions were AIS, were remedial and were in addition to regular and special education services, and (3) placing petitioner's daughter in AIS in classroom, rather than in pull-out session, was consistent with her individualized education plan, which limited amount of time spent out of general education setting to no more than 20 percent. 2007 Op Comm Ed No. 15,548.

Petitioner failed to show that alternative instruction provided to her son while he was suspended was inadequate and constituted little more than delivery and retrieval of homework assignments where respondent provided student with one-on-one tutor who was scheduled to spend 2 hours per day with him, tutor routinely consulted with classroom teachers regarding student's progress, record revealed that student was often uncooperative and sometimes absented himself from scheduled instruction, and tutor arranged to make up missed instruction when student did not cooperate. 1994 Op Comm Ed No. 13210.

Board of education did not abuse its discretion with respect to its program for gifted students, which was operated by full-time teacher who served students in district's 3 elementary schools, provided projects and activities stressing higher level analytical skills, was integrated into classroom instruction, and was continued at middle school and high school level in which acceleration and enrichment opportunities were available in foreign languages, math, science and English; under CLS Educ § 3602-c, board was not obligated to offer gifted program. 1994 Op Comm Ed No. 13239.

Two-hour evening alternative education program provided for suspended student was substantially equivalent to 5 ½ -hours of classroom instruction where certified teachers conducted program, student-to-teacher ratio was no more than 4-to-one, lead teacher collected daily assignments from student's regular teachers and returned her completed assignments to those teachers for review and grading, and there was regular communication between teachers and student's guidance counselor. 2000 Op Comm Ed No. 14316.

6. Revocation of teacher's license

Commissioner of Education has sufficient authority under Education Law §§ 308, 305 [7] to direct Board of Education not to reinstate payment of teacher until hearing concerning fitness to possess teaching certificate had concluded; authority was not an abuse of discretion; since commissioner's conduct was proper, claimant had no cause of action in tort, and since there was no employment relationship with the State, claimant had no claim to backpay base on contract. Pordum v State, 67 N.Y.2d 770, 500 N.Y.S.2d 506, 491 N.E.2d 679, 1986 N.Y. LEXIS 17410 (N.Y. 1986).

Commissioner of Education had authority to promulgate regulations requiring a board of education to base its decision in teacher disciplinary proceeding solely on record before hearing panel, to set forth the results and factual basis for the determination and to forward hearing transcript to Commissioner. Hodgkins v Central School Dist., 48 A.D.2d 302, 368 N.Y.S.2d 891, 1975 N.Y. App. Div. LEXIS 9885 (N.Y. App. Div. 3d Dep't 1975), app. denied, 42 N.Y.2d 807, 1977 N.Y. LEXIS 3809 (N.Y. 1977).

Where teacher had been on leave of absence for five years when he sought reemployment with school district, whereupon commissioner of education enjoined school district from reemploying him pending outcome of hearing as to why teacher's teaching certificate should not be annulled because of criminal conviction, teacher was not suspended and was not entitled to back pay for period prior to hearing. Pordum v Nyquist, 53 A.D.2d 804, 385 N.Y.S.2d 163, 1976 N.Y. App. Div. LEXIS 13603 (N.Y. App. Div. 3d Dep't 1976), aff'd, 42 N.Y.2d 958, 398 N.Y.S.2d 140, 367 N.E.2d 647, 1977 N.Y. LEXIS 2278 (N.Y. 1977).

Commissioner of education's new regulations concerning revocation of teaching certificates were applicable to proceedings pending when regulations became effective, but only to parts of those pending proceedings which had not yet taken place. Pordum v Nyquist, 53 A.D.2d 804, 385 N.Y.S.2d 163, 1976 N.Y. App. Div. LEXIS 13603 (N.Y. App. Div. 3d Dep't 1976), aff'd, 42 N.Y.2d 958, 398 N.Y.S.2d 140, 367 N.E.2d 647, 1977 N.Y. LEXIS 2278 (N.Y. 1977).

Commissioner of Education has sufficient authority to direct city school board not to reinstate teacher until hearing concerning fitness to possess teaching certificate has been concluded; teacher has no tort claim since commissioner's action is proper, and teacher has no claim for back pay based on contract since there is no employment relationship with state. Pordum v State, 112 A.D.2d 717, 492 N.Y.S.2d 204, 1985 N.Y. App. Div. LEXIS 56224 (N.Y. App. Div. 4th Dep't 1985), aff'd, 67 N.Y.2d 770, 500 N.Y.S.2d 506, 491 N.E.2d 679, 1986 N.Y. LEXIS 17410 (N.Y. 1986).

Probationary teacher discharged for excessive tardiness was not entitled to declaration of his rights under his teaching license where license itself had not been revoked, and teacher was not entitled to name-clearing hearing on his assertion that he had been stigmatized by charge of his excessive tardiness since he failed to submit any evidence of having been stigmatized. Blum v Quinones, 139 A.D.2d 509, 526 N.Y.S.2d 611, 1988 N.Y. App. Div. LEXIS 3749 (N.Y. App. Div. 2d Dep't), app. dismissed, 72 N.Y.2d 908, 532 N.Y.S.2d 756, 528 N.E.2d 1229, 1988 N.Y. LEXIS 2794 (N.Y. 1988).

On plaintiff's motion to stay enforcement of administrative order which revoked his teaching certificate pursuant to CLS Educ § 305(7) after he was found to have sexually molested his 2 young nieces, plaintiff was unable to show that equities balanced in his favor in that his occupation involved contact with children and, based on his past conduct, he could be found to pose threat to health, safety or welfare of children. Welcher v Sobol, 222 A.D.2d 1001, 636 N.Y.S.2d 421, 1995 N.Y. App. Div. LEXIS 13754 (N.Y. App. Div. 3d Dep't 1995).

Declaratory judgment action by plaintiff whose teaching certificate was revoked by Commissioner of Education, alleging that CLS Educ § 305(7) was unconstitutional delegation of legislative power, was properly stayed pending decision in Article 78 proceeding because plaintiff could obtain relief sought (return of his certification) via Article 78 proceeding and, in view of principle of judicial restraint, there was no compelling reason why his constitutional claim should proceed. Welcher v Sobol, 222 A.D.2d 1001, 636 N.Y.S.2d 421, 1995 N.Y. App. Div. LEXIS 13754 (N.Y. App. Div. 3d Dep't 1995).

Defendant was not entitled to enter judicial diversion into drug treatment without entry of guilty plea because suspension or revocation of his teaching license was not presumptively mandatory or automatic, but was rather possible and uncertain with intervening circumstances and thus was not an exception circumstance under N.Y. Crim. Proc. Law § 216.05(4)(b); under N.Y. Educ. Law § 3020-a(2)c, defendant was afforded the right to a hearing by the Department of Education. To permit a teacher, entrusted with the safety of children to enter Judicial Diversion without taking a plea of guilty, would have permitted defendant to circumvent the purpose of the Education Law, which was to review each case individually and entrust the Commissioner of the Department of Education with the duties and responsibilities

under N.Y. Educ. Law §§ 305, 3020. People v Duffy, 902 N.Y.S.2d 805, 28 Misc. 3d 718, 2010 N.Y. Misc. LEXIS 1523 (N.Y. Sup. Ct. 2010).

A principal who falsely represented that he was instructed by his Board of Education not to employ as a teacher one who was of the Catholic faith was deprived of his teacher's license under this section. 39 St Dept 346 (1930).

The fact that a teacher inflicted corporal punishment upon a child is not cause for revocation of her license. The evidence must be conclusive that the corporal punishment inflicted was unreasonable and immoderate. 62 St Dept 172 (1940).

Any person interested in the welfare of the schools in the community in which a teacher is employed has the legal right under subd. 7 of this section to present charges before the Commissioner of Education seeking a determination as to the right of the teacher to continue to teach under her license. 67 St Dept 7 (1946).

7. —Constitutional questions

Permanently certified teacher is entitled to procedural protection of due process before a teaching certificate is revoked. Pordum v Nyquist, 53 A.D.2d 804, 385 N.Y.S.2d 163, 1976 N.Y. App. Div. LEXIS 13603 (N.Y. App. Div. 3d Dep't 1976), aff'd, 42 N.Y.2d 958, 398 N.Y.S.2d 140, 367 N.E.2d 647, 1977 N.Y. LEXIS 2278 (N.Y. 1977).

CLS Educ § 305(7), vesting Commissioner of Education with power to revoke teaching certificates, was not shown to be unconstitutional delegation of legislative power due to its alleged failure to provide standards or guidance for exercising power granted, as limiting words, "upon cause shown to his satisfaction," provided adequate standard. Welcher v Sobol, 222 A.D.2d 1001, 636 N.Y.S.2d 421, 1995 N.Y. App. Div. LEXIS 13754 (N.Y. App. Div. 3d Dep't 1995).

In declaratory judgment action by plaintiff whose teaching certificate was revoked by Commissioner of Education, constitutional challenge to CLS Educ § 305(7) was not waived by plaintiff's failure to raise issue at his administrative proceeding where plaintiff challenged statute itself, not merely its application to him; Article 78 proceeding is not proper method for testing constitutional validity of legislative enactment. Welcher v Sobol, 222 A.D.2d 1001, 636 N.Y.S.2d 421, 1995 N.Y. App. Div. LEXIS 13754 (N.Y. App. Div. 3d Dep't 1995).

In challenge to constitutionality of Education Law § 305 brought by teacher who was convicted felon, statute did not violate due process by suspending teacher prior to hearing, was not void for vagueness on theory that he was surprised to learn that felony conviction might bar him from teaching in public schools of New York and did not deny equal protection on theory that it was vague in defining misconduct whereas Education Law § 6509 which provides for regulation of other professions establishes clear and detailed procedures. Pordum v Board of Regents, 491 F.2d 1281, 1974 U.S. App. LEXIS 9978 (2d Cir. N.Y.), cert. denied, 419 U.S. 843, 95 S. Ct. 74, 42 L. Ed. 2d 71, 1974 U.S. LEXIS 2463 (U.S. 1974).

Education Law § 305, subd 7 giving Commissioner of Education power to annul certificate of qualification of school teacher upon cause shown to his satisfaction is not unconstitutionally vague. Pordum v Board of Regents, 357 F. Supp. 222, 1973 U.S. Dist. LEXIS 13872 (N.D.N.Y. 1973), aff'd, 491 F.2d 1281, 1974 U.S. App. LEXIS 9978 (2d Cir. N.Y. 1974).

Where commissioner after ordering petitioner to show cause why his teaching certificate should not be canceled set out procedures which would be valid at a hearing of the charges and notified plaintiff of availability of such hearing, petitioner was not denied due process by reason of fact that Education Law § 305, subdivision 7 does not specifically denote due process procedures concerning notice of charges, availability of a hearing, etc. Pordum v Board of Regents, 357 F. Supp. 222, 1973 U.S. Dist. LEXIS 13872 (N.D.N.Y. 1973), aff'd, 491 F.2d 1281, 1974 U.S. App. LEXIS 9978 (2d Cir. N.Y. 1974).

8. Transportation contracts

Where, prior to commencement of performance under a public contract awarded by a board of education for transportation of handicapped children, the disqualification of two of the original seven successful bidders had caused a shortfall in the number of vehicles available to fill the original contract requirements, the board was required to make the award for additional vehicles to the next lowest responsible bidders or to reject all bids and consider new proposals or re-bid the contract. Tufaro Transit Co. v Board of Education, 79 A.D.2d 376, 436 N.Y.S.2d 886, 1981 N.Y. App. Div. LEXIS 9717 (N.Y. App. Div. 2d Dep't 1981).

A Board of Education usurped the spirit of competitive bidding when it awarded a 100 percent increase to a school bus contractor for provision of transportation services for students, where the requirements contract with the school bus contractor merely contemplated a modest increase in the amount of service. Staten Island Bus, Inc. v Board of Education, 82 A.D.2d 891, 440 N.Y.S.2d 293, 1981 N.Y. App. Div. LEXIS 14596 (N.Y. App. Div. 2d Dep't), aff'd, 54 N.Y.2d 705, 442 N.Y.S.2d 989, 426 N.E.2d 483, 1981 N.Y. LEXIS 2634 (N.Y. 1981).

In an Article 78 proceeding to compel application of Educ Law § 305(14)(a), as amended, to contracts which were extended by agreement prior to the effective date of the amendment, the court correctly refused to modify the agreement under the subsequent statutory enactment where there was no clear expression in the contract that such was the parties' intention. Pioneer Transp. Corp. v Kaladjian, 105 A.D.2d 698, 481 N.Y.S.2d 136, 1984 N.Y. App. Div. LEXIS 20806 (N.Y. App. Div. 2d Dep't 1984).

In actions brought by public school transportation contractors to prohibit board of education from recouping overpayments under annually extended student transportation contracts, court properly denied board's motion to dismiss complaints predicated on failure to submit notice of claim and on one-year statute of limitations under CLS Educ § 3813(2-b) since board informed plaintiffs by letter that it intended to recoup any overpayments of funds, but went on to state that plaintiffs could still present documentation to substantiate any increase in their operating costs; under circumstances, there was no indication that board had made final determination as to amount of overpayments. A.C. Transp., Inc. v Board of Educ., 253 A.D.2d 330, 687 N.Y.S.2d 1, 1999 N.Y. App. Div. LEXIS 710 (N.Y. App. Div. 1st Dep't 1999), app. denied, 1999 N.Y. LEXIS 1225 (N.Y. May 13, 1999).

Prior contractual practice does not estop the Board of Education of the City of New York from changing requirements in its new proposed contract specifications for the transportation of handicapped children in an effort to reduce school transportation costs as mandated by the Legislature (Education Law, § 305, subd 14, par c) since the city is not required to remain constant in its contract work offering despite changing times and changing needs and it cannot be tied into old contracts simply because "that is the way it used to be done". Varsity Transit, Inc. v Saporita, 98 Misc. 2d 255, 413 N.Y.S.2d 868, 1979 N.Y. Misc. LEXIS 2071 (N.Y. Sup. Ct.), aff'd, 71 A.D.2d 643, 418 N.Y.S.2d 667, 1979 N.Y. App. Div. LEXIS 12868 (N.Y. App. Div. 2d Dep't 1979).

When two transportation contracts, each for a separate route, are let to the same individual and neither of such contracts so let is in excess of $1,000, though the total for both exceeds such sum, such contracts need not necessarily be let at public bid. 1946 Ops St Compt 308.

9. —Bidding process

New York City Board of Education could properly waive bidder's noncompliance with bidding process for school busing contract where instances of noncompliance were mere irregularities of either form or technical nature and almost all instances were "cured" shortly after bids were submitted, so that no bidder was placed at competitive or economic disadvantage at time award was made. Varsity Transit, Inc. v Board of Education, 130 A.D.2d 581, 515 N.Y.S.2d 520, 1987 N.Y. App. Div. LEXIS 46582 (N.Y. App. Div. 2d Dep't), app. denied, 70 N.Y.2d 605, 519 N.Y.S.2d 1029, 513 N.E.2d 1309, 1987 N.Y. LEXIS 18238 (N.Y. 1987).

Bid specifications requiring certification by an acceptable insurer of low bidder's ability to secure a performance bond was substantially met where low bidder had submitted a "bid bond" which as a practical matter of customary procedure was issued by the same insurer who would issue the performance bond, and on the same information. Harran Transp. Co. v Board of Education, 71 Misc. 2d 143, 335 N.Y.S.2d 971, 1972 N.Y. Misc. LEXIS 1579 (N.Y. Sup. Ct. 1972).

Statutes requiring that contract be awarded to lowest bidder provide no range within which close bids are to be considered identical; absent such provision, board of education lacks authority to deem that bids of $1,800 per bus per year and $1,799.99 per bus per year are identical. Re Brookset Bus Corp., Op Comr Ed No. 10328.

It is within discretionary power of board of education to waive what it considers minor formalities in bidding procedures; board may waive timely filing of bid security and accept certified check in lieu of bid bond when so authorized by bidding specifications. Re Acme Bus Corp., Op Comr Ed No. 10375.

Proposal by bidder on a transportation contract containing statement that transportation service would be contingent upon availability of equipment and that bidder reserved right to cancel operations if it deemed them extremely hazardous to passengers, are reservations giving bidder advantage over other bidders, such bid cannot be properly considered and rejection of bid was proper. In addition bid may not provide contract will be subject to renegotiation if change occurs in number of pupils permitted on busses, or increase in pupils causing revisions of transportation schedules. If additional services are required causing annual expenditure of more than $1,500. new bids must be sought through advertisement. Re Rubinstein, 74 St Dept 93 (1953).

A contract for the transportation of school children involving an annual expenditure in excess of $1500 must be awarded to lowest responsible bidder and an unsuccessful bidder cannot lower his bid after the bids are opened. The lowest responsible bidder is to be determined as of the time of the opening of the bids. Re Ecker, – St Dept —, Dec #5960 (1954).

10. — —Advertising for bids

Where a school district enters into a transportation contract in excess of $1,000 without advertising or taking bids as specified in subd. 15 [now subd. 14] of this section, the Comptroller may not audit and authorize the payment of State money based upon such expenditure notwithstanding that such claim and contract has received the approval of the Commissioner of Education. 1946 Ops St Compt 380.

Advertisement for bids is not an offer but constitutes an invitation to the public to make offers. Prior to acceptance of bid, Board of Education, for a sufficient reason, may correct errors or omissions in original advertisement and reject all bids. Original advertisement did not include transportation for kindergarten pupils from the school to the home nor for certain other transportation to school sponsored after-school activities and Board authorized by law to reject all bids and seek new proposals to correct omission. Board of Education, after voters appropriate funds for transportation, determines details of administration such as establishment of routes, bus schedules, making of contracts and these matters are not within province of voters to determine. Re Zeh, 74 St Dept 137 (1953).

11. — —Specifications

Bid specification in a department's solicitation for pupil transportation services which included employee protection provisions (EPPs) was improper because the department failed to refute the facially anticompetitive features of the EPPs, which invited cost-inflation and discouraged new bidders from trying to compete with long-term contract holders; the EPPs required contractors to give priority in hiring to employees who became unemployed because of reassignment of busing contracts. However, the department's decisions to include a per rider per day pricing scheme and certain payment discounts in the bid specifications were upheld. Matter of L&M Bus Corp. v New York City Dept. of Educ., 17 N.Y.3d 149, 927 N.Y.S.2d 311, 950 N.E.2d 915, 2011 N.Y. LEXIS 1453 (N.Y. 2011).

Unsuccessful bidder for food services contract failed to demonstrate that bid specifications contained in Request for Proposals (RFP) required staffing and/or hour requirements with which successful bid was noncompliant, even if it was common for new food service companies to continue existing staff and match existing hours and benefits, where there was no indication that list of then-current collective bargaining agreement and staffing schedule contained in attachment to RFP was intended to be "mandatory" or "required," and assistant superintendent asserted that he had informed all prospective bidders during mandatory walk-through of district facilities that no stipulations regarding benefits, salary or hours were being made, that staffing levels were to be determined by each bidder, and that district was not opposed to individual vendors lowering labor costs "as long as the School District received quality service." 2010 Op Comm Ed No. 16,100, 2010 NY Educ. Dept. LEXIS 94.

"Required Minimum Labor Schedule" contained in district's Request for Proposals, which listed staff positions and hours per day and hourly rates for each position, required bidders to use hourly rate or daily hours listed; commissioner rejected successful bidder's argument that labor schedule in question represented mere staffing schedule of food service workers by job classification, rather than bid specification, since information labeled as "minimum" and "required" did not appear to serve any purpose other than requirements for bids. 2009 Op Comm Ed No. 15,977.

Board is obligated to provide prospective bidders with sufficient information concerning alternatives under consideration and method of determining low bidder to permit intelligent bidding; failure to specify number of buses needed in particular time slots is insufficient since it is unreasonable to expect prospective bidder to calculate responsive bid given on certainty; board may properly solicit alternative bid for seatbelts and award regular transportation contract based on its selection of that alternative. Re Coram Bus Service, Inc., 1984 Op Comr of Education No 11292.

In writing specifications for bids for a contract for the transportation of school children a board of education may specify that it would like the contractor to have a new vehicle, might prefer to have the engine in back rather than front, might prefer certain type of brakes, might prefer certain type of transmission, but any breakdown beyond the general specifications of this type could well become unreasonable. Requirement that bus be new must be considered on an equivalency basis. Where bus has been approved by Public Service Commission, meets requirements of Vehicle and Traffic Law and rules and regulations of Motor Vehicle Bureau, and is in substantially new condition, the owner would not be estopped from bidding even though bus not new. Assuming that Board of Education could specify the gross vehicle rating in the specifications, if a vehicle presented approximated this figure it would have to be considered as equivalent. Re Setter, – St Dept —, Dec #5937 (1954).

12. — —Determining responsible bidder

The lowest bidder on a school transportation contract was disqualified for failing to meet the "responsible bidder" requirements of Gen Mun L § 103 (1) by not filing current financial data along with its bid as required by the school board's specifications where, although the bidder had data on file from previous bids, this information could not compensate for the lack of adequate current records. Harran Transp. Co. v Board of Education, 71 Misc. 2d 139, 335 N.Y.S.2d 465, 1972 N.Y. Misc. LEXIS 1612 (N.Y. Sup. Ct.), reh'g denied, 71 Misc. 2d 143, 335 N.Y.S.2d 971, 1972 N.Y. Misc. LEXIS 1579 (N.Y. Sup. Ct. 1972).

Where bid specification stated neither a specific time nor a specific form in which to file certain required information, low bidder's submission at "eleventh hour" of balance sheet, statements of expenses, statements of income, projected sales and income and historical reports supplied sufficient detail in aggregate so as to "operating statement" as required by bid specifications, and to meet the "responsible bidder" requirements of General Municipal Law § 103, subd 1. NYS2d 971 (1972). Harran Transp. Co. v Board of Education, 71 Misc. 2d 143, 335 N.Y.S.2d 971, 1972 N.Y. Misc. LEXIS 1579 (N.Y. Sup. Ct. 1972).

Commissioner will not overturn finding of board of education that low bidder is responsible bidder unless it can be shown that there is no substantial basis for board's determination. Re Pic Management Services, Inc., 1984 Op Comr Ed No 11368.

In determining whether a bidder, a bus company for transportation of students, is a responsible bidder, the bidder's criminal record, a criminal investigation of, or an indictment against, the bidder, can be taken into account. When the determination of non-responsibility would adversely affect a bidder's ability to carry on his business, the bidder has a cognizable due process liberty interest and is entitled to notice of the reasons for the

municipality's concern over his responsibility and an opportunity to rebut the charges. 1990 Op St Compt 90-48.

Fact that several officers of bidder, bus corporation, are also officers of other bus corporation which board of education has determined to be irresponsible does not justify actions of board of education in denying contract to such bidder in absence of investigation by board of bidder's responsibility and opportunity for bidder to address board's reservations and to demonstrate that it is responsible bidder. Re Brookset Bus Corp., Op Comr Ed No. 10328.

The term "responsibility" in subd. 15 [now subd. 14] is not limited in its meaning to mere financial responsibility but includes within its purview the general ability and capacity of the bidder to perform the work, his facilities and suitability for the task, and those qualities which he must necessarily have in order that he be able to perform the contract in accordance with its terms. 69 St Dept 18 (1948).

Where record shows a history of labor difficulties which caused transportation contractor to be unable to perform a prior contract together with current labor difficulties, the board of education was not arbitrary in determining low bidder not sufficiently responsible and rejecting his bid. Re Dileo, 74 St Dept 83 (1953).

Board of education must determine responsibility of lowest bidder and should not attempt to determine relative responsibility of the bidders. Re Sattig, 74 St Dept 91 (1953).

On basis of record, the age and physical condition of bidder, a past incident involving a driver employed by bidder "approximately a couple of years ago" and use of unsuitable language by bidder were held not sufficient grounds upon which to base a finding of lack of responsibility. District superintendent under Education Law § 3624 approves drivers of school busses and is empowered in a proper case to withhold his approval as to fitness of any driver. Re Sattig, 74 St Dept 91 (1953).

All contracts for the transportation of pupils involving annual expenditure in excess of $1,500, must be awarded to lowest responsible bidder. Responsibility is to be determined by trustee of the district and not by the voters of the district. Mere fact bidder at time of submitting bid does not have equipment to perform contract is immaterial. Determination of responsibility must be based on evidence sufficiently strong to be upheld upon an appeal. Re Scott, 74 St Dept 135 (1953).

13. — —Aggregate amount of bid

Board of education had rational basis to award transportation contracts to lowest responsible bidders on aggregate cost basis rather than individual route cost basis, and unsuccessful bidder's Article 78 petition to annul respondent's determination was therefore properly denied. Acme Bus Corp. v Board of Educ., 236 A.D.2d 535, 653 N.Y.S.2d 684, 1997 N.Y. App. Div. LEXIS 1376 (N.Y. App. Div. 2d Dep't), aff'd, 91 N.Y.2d 51, 666 N.Y.S.2d 996, 689 N.E.2d 890, 1997 N.Y. LEXIS 3705 (N.Y. 1997).

Appeal by unsuccessful bidder for transportation contracts, alleging that bid specifications required respondent to use aggregate base price to determine lowest bidder and that respondent exercised favoritism and manipulated public bidding process by awarding contracts on basis of individual or unit prices, was dismissed where bid specification was not unambiguous and petitioner (and all other bidders) had fair opportunity to submit bids containing their lowest per unit and aggregate prices. 1997 Op Comm Ed No. 13848.

14. — —Extension of existing contracts

Court cannot compel board of education to reject all bids for provision of transportation services and to continue with existing carrier which, having been underbid, unilaterally insists on extension of existing contract at below-bid figure. Baumann & Sons Buses, Inc. v Board of Education, 46 N.Y.2d 1061, 416 N.Y.S.2d 788, 390 N.E.2d 295, 1979 N.Y. LEXIS 1974 (N.Y. 1979).

Board of education's use of "base plus one" method to fix compensation during student transportation contract extension period (i.e., increase in consumer price index during first year of contract extension period) rather than "base minus one" method (i.e., rise in consumer price index in year preceding expiration of contract) was not improper under CLS Educ § 305(14)(a) and implementing regulation (8 NYCRR § 156.5). A.C. Transp., Inc. v Board of Educ., 253 A.D.2d 330, 687 N.Y.S.2d 1, 1999 N.Y. App. Div. LEXIS 710 (N.Y. App. Div. 1st Dep't 1999), app. denied, 1999 N.Y. LEXIS 1225 (N.Y. May 13, 1999).

Education Law § 305(14) authorizes a consumer price index increase on an extension of a transportation contract only if it has been established that there has been at least an equivalent increase in the cost of operation of the contractor providing the service; in a situation in which a contract is assigned during the course of a year, it is necessary to compare to the preceding year's cost with the combined cost of the original contractor and the assignee in providing the transportation pursuant to the assigned contract during the most recent year. Re Pupil Transp. Systems, Inc., 1986 Op Comm Ed No. 11586.

Board of education's decision to extend existing transportation contract rather than soliciting new bids was lawful notwithstanding a competing transportation company's notification that it could provide the service for $15,000 less than under the existing contract. In the Matter of Scarsdale Bus Corp., Ops Comr Ed No. 9395.

15. —Challenges by unsuccessful bidders

Court properly dismissed Article 78 petition in which unsuccessful bidder challenged school board's award of 2 pupil transportation contracts as violative of public bidding statutes, on ground that board solicited bids in 2 alternative categories but awarded contracts to lowest responsible bidders in second category and then sought to obtain further price concessions through postbid negotiations, absent showing of "actual" impropriety, unfair dealing, or some other violation of statutory requirements; laws requiring competitive bidding were designed to benefit taxpayers rather than corporate bidders, and thus should be construed with sole reference to public interest. Acme Bus Corp. v Board of Educ., 91 N.Y.2d 51, 666 N.Y.S.2d 996, 689 N.E.2d 890, 1997 N.Y. LEXIS 3705 (N.Y. 1997).

In actions brought by public school transportation contractors to prohibit Board of Education from recouping overpayments under annually extended student transportation contracts, court properly dismissed board's cross claims predicated on equitable grounds of waiver and estoppel seeking to prevent Education Department from recouping overpayments made to board; defense of estoppel cannot ordinarily be invoked against governmental agency to prevent it from discharging its statutory duties. A.C. Transp., Inc. v Board of Educ., 253 A.D.2d 330, 687 N.Y.S.2d 1, 1999 N.Y. App. Div. LEXIS 710 (N.Y. App. Div. 1st Dep't 1999), app. denied, 1999 N.Y. LEXIS 1225 (N.Y. May 13, 1999).

Commissioner dismissed appeal in which petitioner, as former provider of transportation and vehicular maintenance services for city school district, challenged respondent's award of contracts to another bus company as (1) respondent had no legal obligation to accept petitioner's contract renewal offer, (2) petitioner was not lowest responsible bidder, (3) respondent's bid specifications were not ambiguous, and (4) respondent complied with its own specifications in awarding contracts. 1999 Op Comm Ed No. 14,170.

Unsuccessful bidder's petition challenging award of competitively bid contract failed to state claim as against corporation that bore same name as limited liability company which was awarded contract, where there was no showing that respondent corporation was party to or in any way involved with contract at issue. 2009 Op Comm Ed No. 15,977.

16. Rules and regulations

A regulation prohibiting teachers from wearing a distinctly religious garb is a reasonable and valid exercise of the power conferred upon the Commissioner. O'Connor v Hendrick, 109 A.D. 361, 96 N.Y.S. 161, 1905 N.Y. App. Div. LEXIS 3560 (N.Y. App. Div. 1905), aff'd, 184 N.Y. 421, 77 N.E. 612, 184 N.Y. (N.Y.S.) 421, 1906 N.Y. LEXIS 1382 (N.Y. 1906).

Commissioner of Education had authority to promulgate regulations requiring a board of education to base its decision in teacher disciplinary proceeding solely on record before hearing panel, to set forth the results and factual basis for the determination and to forward hearing transcript to Commissioner. Hodgkins v Central School Dist., 48 A.D.2d 302, 368 N.Y.S.2d 891, 1975 N.Y. App. Div. LEXIS 9885 (N.Y. App. Div. 3d Dep't 1975), app. denied, 42 N.Y.2d 807, 1977 N.Y. LEXIS 3809 (N.Y. 1977).

Commissioner of education's new regulations concerning revocation of teaching certificates were applicable to proceedings pending when regulations became effective, but only to parts of those pending proceedings which had not yet taken place. Pordum v Nyquist, 53 A.D.2d 804, 385 N.Y.S.2d 163, 1976 N.Y. App. Div. LEXIS 13603 (N.Y. App. Div. 3d Dep't 1976), aff'd, 42 N.Y.2d 958, 398 N.Y.S.2d 140, 367 N.E.2d 647, 1977 N.Y. LEXIS 2278 (N.Y. 1977).

The Commissioner of Education has the implied power to make rules within the limits fixed by the Board of Regents. Jokinen v Allen, 15 Misc. 2d 124, 182 N.Y.S.2d 166, 1958 N.Y. Misc. LEXIS 2088 (N.Y. Sup. Ct. 1958).

Regulations of the Commissioner of Education are construed as quasi-legislative acts which are for the regulation of all future cases and for guidance of all administrative officers whose acts are subordinate to the regulatory authority. Van Allen v McCleary, 27 Misc. 2d 81, 211 N.Y.S.2d 501, 1961 N.Y. Misc. LEXIS 3539 (N.Y. Sup. Ct. 1961).

The Commissioner of Education not having issued anything which can be considered as a regulation concerning the right of parents of school children to examine all school records pertaining to their children, existence of such a right must be determined under the common law, pursuant to which the interest which a parent has in the school records of his child is sufficient to sustain his right to inspect the records. Van Allen v McCleary, 27 Misc. 2d 81, 211 N.Y.S.2d 501, 1961 N.Y. Misc. LEXIS 3539 (N.Y. Sup. Ct. 1961).

While the Commissioner of Education has the power to adopt regulations binding upon all school boards, quasi-judicial decisions are binding only on the parties to the appeal decided by him. Scott v Board of Education, 61 Misc. 2d 333, 305 N.Y.S.2d 601, 1969 N.Y. Misc. LEXIS 1063 (N.Y. Sup. Ct. 1969).

Professional development team formed by respondent board of education, which consisted of school counselor, one teacher designated by teachers' association, and 3 teachers designated by superintendent, failed to comply with 8 NYCRR § 100.2(dd)(3)(i)(a) where there was no parent representative on team, teachers designated by superintendent were not eligible for membership because they were not curriculum specialists, and board admittedly did not undertake reasonable search for qualified candidates from higher education institution. 2006 Op Comm Ed No. 15,381.

Respondent's policy of excluding courses taken at other schools in calculating cumulative GPAs, and only ranking students who attended its schools for 2 years before their senior year, was not arbitrary or capricious, where this policy was chosen to ensure that class ranking was based on students' performance in "a common academic experience"; respondent used weighted grading system and concluded that it could not accurately assess and compare academic rigor of programs at many schools previously attended by students who transferred to its high school. 2003 Op Comm Ed No. 14,892.

Liberal interpretation of regulations of Commissioner of Education is appropriate in appeals when petitioner is not represented by counsel. 1995 Op Comm Ed No. 13298.

8 NYCRR § 135.4(c)(7)(ii)(b)(1), establishing maximum age for participation in interscholastic sports, is absolute and contains no provision for waiver of age limitation by either school district or Commissioner of Education; thus, student whose 19th birthday was August 29, 1996 was ineligible for interscholastic sports during 1996-1997 school year. 1996 Op Comm Ed No. 13655.

Maximum age restriction for participation in interscholastic sports (8 NYCRR § 135.4(c)(7)(ii)(b)(1)) applies to all students, whether disabled or not. 1996 Op Comm Ed No. 13655.

Agency Opinions

1. In general

The date of filing with the Department of Education rather than of approval by the Commissioners determines the effectiveness of a contract as an "existing obligation" under § 3625 and former § 110-j; an extension after the date for "existing obligations" does not make the contract such an obligation for the extended period. 1946 NY Ops Atty Gen Oct 28.

A member of the board of education of a central school district is not disqualified under Judiciary Law, § 511(2) or (3) from serving as a juror. N.Y. Op. Att'y Gen. No. 83-40.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 1950.

Commissioner; powers, § 563.

Approvals and consents, CLS N-PCL § 404.

Codes, Rules and Regulations:

Teaching certificates for public school service. 8 NYCRR §§ 7.1 et seq.

Higher and professional education. 8 NYCRR §§ 50.1 et seq.

Registration of curricula . 8 NYCRR §§ 52.1 et seq.

Limited permits. 8 NYCRR § 70.7.

Teachers. 8 NYCRR § 80-2.

Employment of retired public employees. 8 NYCRR § 80-5.5.

Transitional E certificate for teaching specific occupational subjects. 8 NYCRR § 80-5.16.

Supplementary certificate. 8 NYCRR § 80-5.18.

Teachers of adult, community and continuing education. 8 NYCRR § 80-5.19.

Criminal history record check. 8 NYCRR § 80-1.11.

Determination of good moral character. 8 NYCRR §§ 83.1 et seq.

Criminal history record check for prospective school employees and applicants for certification. 8 NYCRR §§ 87.1 et seq.

Participation of parents and teachers in school-based planning and shared decisionmaking. 8 NYCRR § 100.11.

Excelsior scholars programs for grade seven mathematics and science students. 8 NYCRR § 100.14.

Summer institutes for mathematics and science teachers in middle grades five through eight. 8 NYCRR § 100.15.

Elementary and secondary school program. 8 NYCRR §§ 100.1 et seq.

Pupil records. 8 NYCRR §§ 104.1 et seq.

Certification of supervised hours in driver education courses pursuant to Education Law section 806-a(2). 8 NYCRR § 107.2.

Food service management contracts. 8 NYCRR § 114.2.

Regulations of the commissioner: elementary and secondary education: school food service programs. 8 NYCRR §§ 114.1 et seq.

Qualifications for teachers and paraprofessionals. 8 NYCRR § 120.6.

Apportionment for asbestos projects. 8 NYCRR § 155.13.

School asbestos hazard grant program. 8 NYCRR § 155.16.

School safety plans. 8 NYCRR § 155.17.

Qualified zone academy bonds. 8 NYCRR § 155.22.

School pesticide neighbor notification. 8 NYCRR § 155.24.

Safety requirements for electrically operated partitions. 8 NYCRR § 155.25.

Qualified public educational facility bonds. 8 NYCRR § 155.26.

Home study courses. 8 NYCRR § 163.1.

School district budgets and financial reports. 8 NYCRR § 170.9.

School district financial accountability. 8 NYCRR § 170.12.

Appeals to commissioner pursuant to Education Law section 3020(3). 8 NYCRR §§ 281.1 et seq.

Hearings prior to the issuance, revision, or renewal of a charter school pursuant to Education Law section 2857(1). 8 NYCRR 119.4.

No Child Left Behind Act of 2001. 8 NYCRR Part 120.

Appointment of public members of boards of education of special act school district. 8 NYCRR Part 105.

Requirements for course work or training in the needs of students with autism. 8 NYCRR Subpart 57-3.

Federal Aspects:

Title I of the Elementary and Secondary Education Act of 1965, cited in statutory text, appears as 20 USCS §§ 6301 et seq.

The Child Nutrition Act of 1966, cited in statutory text, appears as 42 USCS §§ 171 et seq.

The National School Lunch Act, cited in statutory text, appears as 42 USCS § 1758.

Jurisprudences:

63 Am Jur 2d, Public Officers and Employees §§ 261–283.

68 Am Jur 2d, Schools §§ 235 et seq., 256 et seq.

ARTICLE 9 School Buildings and Sites

Section

408-b. Submitting plans and specifications of school buildings with local fire and law enforcement officials

409. School building regulations in relation to health and safety

414. Use of schoolhouse and grounds.

HISTORY:

Add, L 1947, ch 820, eff July 1, 1947, with substance transferred from Article 16.

§ 408-b. Submitting plans and specifications of school buildings with local fire and law enforcement officials

The appropriate authorities for each public and private school building in the state shall submit the most current plans and specifications for each school building under their responsibility to the fire and law enforcement officials in the city, towns or village where the school building is located. The commissioner may adopt such rules and regulations as are necessary and appropriate to implement the provisions of this section to facilitate its purpose of providing quick and easy access to and passage through school buildings should it be necessary for fire or law enforcement reasons. Such regulations shall authorize submittal of simplified plans showing access and passage ways for older schools where original plans or blueprints may not exist or where the school authorities can justify a claim of hardship in meeting the requirements of this section.

HISTORY:

Add, L 2000, ch 478, § 1, eff March 19, 2001 (see 2000 note below).

Editor's Notes: Laws 2000, ch 478, § 2, eff March 19, 2001, provides as follows:

§ 2. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided, however, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized and directed to be made and completed on or before such effective date.

§ 409. School building regulations in relation to health and safety

1. All school buildings of common, union free, central, central high school and city school districts other than city school districts of cities having one hundred twenty-five thousand inhabitants or more and boards of cooperative educational services shall comply with such regulations as the commissioner shall adopt from time to time for the purpose of insuring the health and safety of pupils and staff in relation to proper heating, lighting, ventilation, sanitation and health, fire and accident protection.

2. Notwithstanding the provisions of any other law, rule or regulation, tobacco use shall not be permitted and no person shall use tobacco on school grounds. "School grounds" means any building, structure and surrounding outdoor grounds, including entrances or exits, contained within a public or private pre-school, nursery school, elementary or secondary school's legally defined property boundaries as registered in a county clerk's office.

HISTORY:

Add, L 1951, ch 801; amd, L 1952, ch 443; L 1962, ch 124, eff March 6, 1962; L 1994, ch 565, § 4 (see 1994 note below); L 1999, ch 405, § 4 (Part L), eff Jan 1, 2000; L 2003, ch 13, § 15, eff July 24, 2003; L 2012, ch 449, § 2, eff Sept 5, 2012.

Prior Law: Former § 409, add, L 1947, ch 820, with substance transferred from former § 452; repealed, L 1951, ch 801, § 3, eff April 13, 1951.

Revision Notes: [1962, ch 124] The Joint Legislative Committee on Fire Laws recommended the amendment of Education Law, § 409, to conform with Education Law, § 807-a. Section 807-a requires annual fire safety inspections of public school buildings in all school districts except in cities having one hundred twenty-five thousand or more inhabitants. The Education Department recently adopted new regulations pursuant to section 409 which were filed with the Department of State on December 27, 1961.

Governor Nelson A. Rockefeller has said, "The new regulations, closing loopholes and strengthening the rules for protection of school children against the dangers of fire, will apply to all public schools in the State in communities of less than 70,000 population. In general the Education Department does not have jurisdiction in this respect in cities over 70,000."

It is important that the power and responsibility of the Commissioner of Education under section 409 be extended to all school districts to which section 807-a applies.

Amendment Notes: 2012. Chapter 449, § 2 amended: Sub 2 by adding the matter in italics .

Notes to Decisions

In the absence of a specific grant of power, a village cannot, by a zoning regulation, prevent the location of a school within its borders and thereby prohibit the performance by the school district of the duties imposed upon it by law. Union Free School Dist. v Hewlett Bay Park, 279 A.D. 618, 107 N.Y.S.2d 858, 1951 N.Y. App. Div. LEXIS 3212 (N.Y. App. Div.), app. denied, 279 A.D. 746, 109 N.Y.S.2d 175, 1951 N.Y. App. Div. LEXIS 3632 (N.Y. App. Div. 1951).

There was no conflict between provisions of above statute as it existed before 1962 amendment and Art. 4 of the General City Law (§§ 40–57) regulating plumbing. Kingston v Bank, 45 Misc. 2d 176, 256 N.Y.S.2d 276, 1962 N.Y. Misc. LEXIS 3645 (N.Y. Sup. Ct. 1962).

All school buildings must comply with such regulations as the Commissioner of Education shall adopt from time to time. Radford v Gage, 59 Misc. 2d 948, 301 N.Y.S.2d 282, 1969 N.Y. Misc. LEXIS 1485 (N.Y. Sup. Ct. 1969).

County ordinance which prohibits smoking in public meeting place is constitutional as applied to public school used as meeting place after school hours, despite CLS Mun H R § 11 prohibition against local legislation affecting "maintenance, support or administration of educational system" and CLS Educ § 409 provision giving state Commissioner of Education authority to regulate safety and education of students, since local ordinance regulates only activities of general public in noneducational setting; furthermore, non-smoking provisions of CLS Pub Health § 1399-o do not preempt local ordinance since statute was intended by legislature to apply only to buildings available for public use throughout entirety of their business hours. Board of

Education v Cohalan, 135 Misc. 2d 358, 515 N.Y.S.2d 691, 1987 N.Y. Misc. LEXIS 2227 (N.Y. Sup. Ct. 1987).

School district need not obtain building permit and certificate of occupancy required under town zoning ordinance. 1951 Ops St Compt File 341.

School districts are not subject to town zoning provisions regulating setback, selection of school building site, school building construction and the size of open area surrounding school buildings. School districts are also relieved of compliance with the provisions of the Town Building Code. 1952 Ops St Compt 285.

In the absence of a special act, a central school district is not required to obtain a building permit provided for under a town building code. 1953 Ops St Compt 220.

School district is not required to obtain municipal building permit. 1968 Ops St Compt File #426.

A local municipal unit may not require a building permit or enforce zoning ordinances in relation to school district building programs which represent local exercise of a state function. 1952 Ops Counsel Educ Dept #74.

Expenditure of money needed to render a school building safe from fire hazards and to comply with regulations of the Commissioner of Education becomes an ordinary contingent expense and the fact that the voters fail to appropriate the money does not prohibit the board of education from proceeding with the necessary construction. 1 Op Counsel Educ Dept No. 118 (1954).

Agency Opinions

Cost of installation of fire alarm boxes in a school building of a union free district connected with the system of the fire district is a proper school district expenditure. 1954 NY Ops Atty Gen May 19 (informal).

In spite of the repeal of Public Health Law, § 334-A effective June 1, 1954, even after that date, school district funds may properly be expended to install fire alarm boxes and to connect such boxes with the fire alarm system of the fire district. 1954 NY Ops Atty Gen May 19 (informal).

State Education Department retained authority to administer and enforce Uniform Fire Prevention and Building Code as to construction of school building that would be owned by private developer, leased to school district, and built on land leased from city by school district, as authorized by L 1996, ch 562. 1998 NY Ops Atty Gen I 98-1.

Plans and specifications for school building heating equipment and facilities were subject to review by Department of Environmental Conservation in accordance with its jurisdiction under CLS ECL Art 19; county's air quality regulations were not applicable. 1999 N.Y. Op. Att'y Gen. No. 99-5, 1999 N.Y. AG LEXIS 4.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

School pesticide neighbor notification. 8 NYCRR § 155.24.

Jurisprudences:

68 Am Jur 2d, Schools § 79.

Annotations:

Tort liability of public schools and institutions of higher learning for accidents due to condition of buildings or equipment. 34 ALR3d 1166.

Tort liability of public schools and institutions of higher learning for injuries resulting from lack or insufficiency of supervision. 38 ALR3d 830.

§ 414. Use of schoolhouse and grounds.

1. Schoolhouses and the grounds connected therewith and all property belonging to the district shall be in the custody and under the control and supervision of the trustees or board of education of the district. The trustees or board of education may adopt reasonable regulations for the use of such schoolhouses, grounds or other property, all portions thereof, when not in use for school purposes or when the school is in use for school purposes if in the opinion of the trustees or board of education use will not be disruptive of normal school operations, for such other public purposes as are herein provided; except, however, in the city of New York each community school board shall be authorized to prohibit any use of schoolhouses and school grounds within its district which would otherwise be permitted under the provisions of this section. Such regulations shall provide for the safety and security of the pupils and shall not conflict with the provisions of this chapter and shall conform to the purposes and intent of this section and shall be subject to review on appeal to the commissioner of education as provided by law. The trustees or board of education of each district may, subject to regulations adopted as above provided, permit the use of the schoolhouse and rooms therein, and the grounds and other property of the district, when not in use for school purposes or when the school is in use for school purposes if in the opinion of the trustees or board of education use will not be disruptive of normal school operations, for any of the following purposes:

(a) For the purpose of instruction in any branch of education, learning or the arts.

(b) For public library purposes, subject to the provisions of this chapter, or as stations of public libraries.

(c) For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public. Civic meetings shall include, but not be limited to, meetings of parent associations and parent-teacher associations.

(d) For meetings, entertainments and occasions where admission fees are charged, when the proceeds thereof are to be expended for an educational or charitable purpose; but such use shall not be permitted if such meetings, entertainments and occasions are under the exclusive control, and the said proceeds are to be applied for the benefit of a society, association or organization of a religious sect or denomination, or of a fraternal, secret or exclusive society or organization other than organizations of veterans of the military, naval and marine service of the United States and organizations of volunteer firefighters or volunteer ambulance workers.

(e) For polling places for holding primaries and elections and for the registration of voters and for holding political meetings. But no meetings sponsored by political organizations shall be permitted unless authorized by a vote of a district meeting, held as provided by law, or, in cities by the board of education thereof. Except in cities, it shall be the duty of the trustees or board of education to call a special meeting for such purpose upon the petition of at least ten per centum of the qualified electors of the district. Authority so granted shall continue until revoked in like manner and by the same body as granted.

(f) For civic forums and community centers. Upon the petition of at least twenty-five citizens residing

within the district or city, the trustees or board of education in each school district or city shall organize and conduct community centers for civic purposes, and civic forums in the several school districts and cities, to promote and advance principles of Americanism among the residents of the state. The trustees or board of education in each school district or city, when organizing such community centers or civic forums, shall provide funds for the maintenance and support of such community centers and civic forums, and shall prescribe regulations for their conduct and supervision, provided that nothing herein contained shall prohibit the trustees of such school district or the board of education to prescribe and adopt rules and regulations to make such community centers or civic forums self-supporting as far as practicable. Such community centers and civic forums shall be at all times under the control of the trustees or board of education in each school district or city, and shall be non-exclusive and open to the general public.

(g) For classes of instruction for mentally retarded minors operated by a private organization approved by the commissioner of education.

(h) For recreation, physical training and athletics, including competitive athletic contests of children attending a private, nonprofit school.

(i) To provide child care services during non-school hours, or to provide child care services during school hours for the children of pupils attending the schools of the district and, if there is additional space available, for children of employees of the district, and, if there is further additional space available, the Cobleskill-Richmondville school district shall provide child care services for children ages three and four who need child care assistance due to lack of sufficient child care spaces. Such determination shall be made by each district's board of education, provided that the cost of such care shall not be a school district charge but shall be paid by the person responsible for the support of such child; the local social services district as authorized by law; or by any other public or private voluntary source or any combination thereof.

(j) For licensed school-based health, dental or mental health clinics. (i) For the purposes of this subdivision, the term "licensed school-based health, dental or mental health clinic" means a clinic that is located in a school facility of a school district or board of cooperative educational services, is operated by an entity other than the school district or board of cooperative educational services and will provide health, dental or mental health services during school hours and/or non-school hours to school-age and preschool children, and that is: (1) a health clinic approved under the provisions of chapter one hundred ninety-eight of the laws of nineteen hundred seventy-eight; or (2) another school-based health or dental clinic licensed by the department of health pursuant to article twenty-eight of the public health law; or (3) a school-based mental health clinic licensed or approved by the office of mental health pursuant to article thirty-one of the mental hygiene law; or (4) a school-based mental health clinic licensed by the office for people with developmental disabilities pursuant to article sixteen of the mental hygiene law.

(ii) Health professionals who provide services in licensed school-based health, dental or mental health clinics shall be duly licensed pursuant to the provisions of title eight of this chapter unless otherwise exempted by law and shall be authorized to provide such services to the extent permitted by their respective practice acts.

(iii) Except where otherwise authorized by law, the cost of providing health, dental or mental health services shall not be a charge upon the school district or board of cooperative educational services, and shall be paid from federal, state or other local funds available for such purpose. Building space used for such a clinic shall be excluded from the rated capacity of the school building for the purpose of computing building aid pursuant to subdivision six of section thirty-six hundred two of this chapter or aid pursuant to subdivision five of section nineteen hundred fifty of this chapter.

(iv) Nothing in this paragraph shall be construed to justify a cause of action for damages against a school district or a board of cooperative educational services by reason of acts of negligence or misconduct by a school-based health, dental or mental health clinic or such clinic's officers or employees.

(k) For graduation exercises held by not-for-profit elementary and secondary schools, provided that no religious service is performed.

The board of education in the city of New York may delegate the authority to judge the appropriateness for uses other than school purposes to community school boards.

2. The trustees or board of education shall determine the terms and conditions for such use which may include rental at least in an amount sufficient to cover all resulting expenses for the purposes of paragraphs (a), (b), (c), (d), (e), (g), (i), (j) and (k) of subdivision one of this section. Any such use, pursuant to paragraphs (a), (c), (d), (h) and (j) of subdivision one of this section, shall not allow the exclusion of any district child solely because said child is not attending a district school or not attending the district school which is sponsoring such use or on which grounds the use is to occur.

HISTORY:

Add, L 1947, ch 820, eff July 1, 1947, with substance transferred from former § 455; amd, L 1956, ch 810, § 1, 2; L 1962, ch 127, § 1; L 1975, ch 722, § 1; L 1976, ch 257, § 1, eff July 1, 1976; L 1977, ch 369, § 1, eff Aug 5, 1977; L 1984, ch 460, § 3,4; L 1988, ch 24, § 6, eff Jan 1, 1989; L 1991, ch 536, § 1, 2; L 1992, ch 706, § 1; L 1993, ch 148, § 1; L 2000, ch 106, § 1, eff July 1, 2000; L 2005, ch 513, § 1, eff Aug 16, 2005,2, eff Aug 16, 2005; L 2009, ch 345, § 12, eff June 30, 2009; L 2019, ch 672, § 33, effective December 16, 2019.

Editor's Notes Laws 2009, ch 345, § 17, eff Aug 11, 2009, deemed eff on and after June 30, 2009, provides as follows:

§ 17. This act shall take effect immediately, except that if this act shall have become a law on or after June 30, 2009, this act shall take effect immediately and shall be deemed to have been in full force and effect on and after June 30, 2009; provided that:

1. sections one, two, three, four, five, six, seven, eight, nine, ten, eleven and twelve of this act shall take effect June 30, 2009;

2. the amendments to section 2590-b of the education law made by section one of this act shall not affect the expiration or repeal of certain provisions of such section and shall expire and be deemed repealed therewith;

3. the amendments to section 2590-c of the education law made by section two of this act shall not affect the repeal of such section and shall be deemed repealed therewith;

4. the amendments to subdivision 1 of section 2590-d of the education law made by section three of this act shall not affect the expiration of such section and shall be deemed to expire therewith;

5. the amendments to section 2590-e of the education law made by section four of this act shall not affect the repeal of such section and shall expire and be deemed repealed therewith;

6. the amendments to paragraphs (s) and (t) of subdivision 1 and subdivisions 2 and 3 of section 2590-f of the education law made by section five of this act shall not affect the expiration and reversion of such provisions and shall expire and be deemed repealed therewith; provided further that the amendments to paragraph (u) of subdivision 1 of section 2590-f of the education law made by section five of this act shall not affect the repeal of such paragraph and shall expire and be deemed repealed therewith;

7. the amendments to section 2590-g of the education law made by section six of this act shall not affect the expiration and reversion of such section and shall expire and be deemed repealed therewith;

8. the amendments to section 2590-h of the education law made by section seven of this act shall not affect the expiration and repeal of certain provisions of such section and shall expire and be deemed repealed therewith;

9. the amendments to paragraph (c) of subdivision 2 of section 2590-i of the education law made by section eight of this act shall not affect the expiration and reversion of such paragraph and shall expire and be deemed repealed therewith;

10. the amendments to subdivision 3 of section 2590-p of the education law made by section nine of this act shall not affect the expiration and reversion of such subdivision and shall expire and be deemed repealed therewith;

11. the amendments to section 1735 of the public authorities law made by section thirteen of this act shall not affect the repeal of such section and shall be deemed repealed therewith; and

12. any provision in sections one, two, three, four, five, six, seven, eight, nine, ten and eleven of this act not otherwise set to expire pursuant to section 34 of chapter 91 of the laws of 2002, as amended, or section 17 of chapter 123 of the laws of 2003, as amended, shall expire and be deemed repealed June 30, 2022 (Amd, L 2015, ch 20, § 2 (Part B, Subpart D), eff June 26, 2015; L 2016, ch 73, § 2 (Part O), eff June 23, 2016; L 2017, ch 61, § 2 (Part G), eff June 29, 2017; L 2019, ch 59, § 43 (Part YYY), eff April 12, 2019, deemed eff on and after April 1, 2019).

Amendment Notes The 2019 amendment by ch 672 § 33, substituted "for people with developmental disabilities" for "of mental retardation and developmental disabilities" in 1(j)(i).

Notes to Decisions

Analysis

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1. In general

Since this section places title to school property under the custody and control of the Board of Education in the trustees, the trustees can satisfy the requirements of § 348 of the Village Law by signing a petition for annexation of part of the school property, lying in an adjoining town, to the village wherein the remaining part of the school property is already situated. Union Free School Dist. v Town Board of Greenburgh, 36 Misc. 2d 223, 232 N.Y.S.2d 456, 1962 N.Y. Misc. LEXIS 2760 (N.Y. Sup. Ct. 1962), aff'd, 19 A.D.2d 864, 245 N.Y.S.2d 314, 1963 N.Y. App. Div. LEXIS 6370 (N.Y. App. Div. 2d Dep't 1963).

On appeal for alleged violations of CLS Educ § 414 and district policy, fact that individual respondents and board of education permitted nonschool organization to use school facilities for one day, without formal board approval, was de minimus and inconsequential. 2009 Op Comm Ed No. 15,898.

An appeal to the Commissioner of Education on the issue of whether the holding of an election of members to a Citizen's Nominating Committee, a community based organization, at the same place and time as the annual district meeting is a form of electioneering, is dismissed for the failure to name the board of education of the school district as a party in the appeal, as it is their function to determine how and when school district property should be used. Petitioner also was in error in naming the Commissioner of Education as a defendant in the action, as it is the function of the school board, not the Commissioner of Education, to adopt a policy for the school district's use of school buildings. Appeal of Fitzpatrick, 1990 Op Comr Educ No. 12408.

2. Discretion and authority of board

Inasmuch as a board of education has discretionary power to control the use of schoolrooms within its district, it has concomitant power to make reasonable classifications concerning the extent to which schools will be available for nonschool purposes; where petitioners wish to establish bible clubs in public high schools, it is their burden to show that the board of education, by its determination to exclude petitioners' religious activities from the schools, has exercised its discretion differently from the requests of other organizations of a similar character, and where petitioners have neither alleged nor shown that any other organization similar in character to their proposed bible clubs has been granted permission to use public school facilities for religious purposes, the determination of the board of education was neither arbitrary nor capricious. Trietley v Board of Education, 65 A.D.2d 1, 409 N.Y.S.2d 912, 1978 N.Y. App. Div. LEXIS 12880 (N.Y. App. Div. 4th Dep't 1978).

A court cannot substitute its judgment or discretion for that of a Board of Education in permitting or denying use of school buildings for meetings at which admission is to be charged, if permitting a particular meeting seems to be within the power of the board under this section. Dohrenwend v Board of Education, 227 N.Y.S.2d 505, 1962 N.Y. Misc. LEXIS 4119 (N.Y. Sup. Ct. 1962).

CLS Educ § 414 does not vest unbridled discretion in school board or in Commissioner of Education to grant or deny permits for use of school facilities by religious organizations where organizations' activities are primarily for their own benefit; instead, statute grants no discretion since such permits may simply not be

issued. Deeper Life Christian Fellowship, Inc. v Sobol, 948 F.2d 79, 1991 U.S. App. LEXIS 25390 (2d Cir. N.Y. 1991).

Decisions by the board of education concerning the use of the district's buildings and the assignment of pupils which are reasonable will not be reversed by the Commissioner of Education. Re Spinowitz, Op Comr Ed No. 9719.

Decisions to discontinue use of school building or to create new attendance zones are within discretion of board of education as long as decision has rational basis. Re Austerlitz, Op Comr Ed No. 10215.

Decisions concerning use of school facilities lie within discretion of board of education and will be sustained if they have rational basis. Re DiPeppi, Op Comr Ed No. 10222.

Where board of education makes determination of criteria to be applied in use of school buildings, it is duty and responsibility of board to formally adopt policy reflecting such criteria pursuant to legislative mandate contained in CLS Educ § 414(1); where board determines not to allow Sunday use of school buildings where requested use involves activity in school building, board should deny all such requests, and its failure to do so can only be viewed as arbitrary, as board of education should administer its policy in consistent manner. Re Appeal of Shakow, 1987 Op Comm Ed No. 11839.

An appeal to the Commissioner of Education on the issue of whether the holding of an election of members to a Citizen's Nominating Committee, a community based organization, at the same place and time as the annual district meeting is a form of electioneering, is dismissed for the failure to name the board of education of the school district as a party in the appeal, as it is their function to determine how and when school district property should be used. Petitioner also was in error in naming the Commissioner of Education as a defendant in the action, as it is the function of the school board, not the Commissioner of Education, to adopt a policy for the school district's use of school buildings. Appeal of Fitzpatrick, 1990 Op Comr Educ No. 12408.

Respondent board of education did not violate 8 NYCRR § 100.11 by voting to establish day care center at high school over opposition from school-based planning team; § 100.11, which requires board to consult certain individuals when developing plan for school-based planning and shared decisionmaking, does not require board to obtain approval of school-based planning team before implementing decisions, and mere fact that many students and faculty members opposed opening of center was not basis for Commissioner of Education to overturn respondent's decision. 1995 Op Comm Ed No. 13295.

The control and custody of public school buildings is vested by law in the board of education and applications for use of such buildings outside of school hours should be made to such board. 1 Op Counsel Educ Dept No. 58 (1952).

Even where the proposed use is sanctioned by this section a Board of Education is vested with discretionary powers to withhold its consent, and unless there is convincing proof of an abuse of discretion the decision of the Board will not be set aside. 43 St Dept 168 (1933).

Within the limits prescribed by this section, a Board of Education has discretion in granting the use of buildings for civic purposes. No organization is entitled to use the buildings merely because it requests it for it is always discretionary with the Board whether or not the use is to be granted. Re Teachers' Union, Local 555 (UPW), 73 St Dept 41 (1952).

3. Scope of statute

CLS Educ § 414 is applicable when school is either not in use for school purposes or when school is in use for school purposes but its use for any of categorized purposes will not be disruptive of normal school operations; statute does not govern use of school property for school uses. Jacobson by Jacobson v East Williston Union Free Sch. Dist., 170 Misc. 2d 93, 649 N.Y.S.2d 1002, 1996 N.Y. Misc. LEXIS 405 (N.Y. Sup. Ct. 1996).

§ 414 does not confer authority to lease real property of a school district; real property of a school district may be leased only as permitted by § 402 subd 2. 1960 Ops St Compt File #927.

This section does not authorize a school district to lease some of its property to a town or anyone else except under stated circumstances and for specified purposes. 1961 Ops St Compt #607.

4. Constitutional questions

Plaintiff qualified under this section of the Education Law as an organization entitled to use school facilities out of school hours and it was unconstitutional and improper for the defendant to deny the use of the facilities to the plaintiff solely because of the controversial views that had previously been expressed by the scheduled performer. East Meadow Community Concerts Ass'n v Board of Education, 19 N.Y.2d 605, 278 N.Y.S.2d 393, 224 N.E.2d 888, 1967 N.Y. LEXIS 1785 (N.Y. 1967).

A school district cannot permit the use of school buildings by certain organizations and deny such use to other similar organizations and hence, a trial of factual issues was ordered in a proceeding to review a decision of the Commissioner of Education which upheld the right of the school district to deny use of school buildings to an organization which was of a communistic nature. Ellis v Allen, 4 A.D.2d 343, 165 N.Y.S.2d 624, 1957 N.Y. App. Div. LEXIS 4707 (N.Y. App. Div. 3d Dep't 1957), app. dismissed, 4 N.Y.2d 693, 171 N.Y.S.2d 86, 148 N.E.2d 302, 1958 N.Y. LEXIS 1291 (N.Y. 1958), app. denied, 4 N.Y.2d 674, 1958 N.Y. LEXIS 1374 (N.Y. 1958).

School board superintendent acting as a receiver for a high scholl and junior high school violated N.Y. Educ. Law §§ 414(1)(c) and 211-f(1)(b)(iv) by excluding reporters' cameras from a public meeting held at a school because she opened that non-public forum to the public to discuss a matter of public interest, and although the schools were the subject of the meeting, the property was not being used for school purposes. News 12 Co. v Hempstead Pub. Schs. Bd. of Educ., 52 Misc. 3d 479, 31 N.Y.S.3d 788, 2016 N.Y. Misc. LEXIS 1411 (N.Y. Sup. Ct. 2016).

Where a school board superintendent acting as a receiver for a high school and junior high school violated the law by excluding reporters' cameras from a public meeting held at a school, petitioner newspapers were not entitled to relief with respect to the board because the superintendent, as receiver, had the authority to call the meeting without the board's consent. News 12 Co. v Hempstead Pub. Schs. Bd. of Educ., 52 Misc. 3d 479, 31 N.Y.S.3d 788, 2016 N.Y. Misc. LEXIS 1411 (N.Y. Sup. Ct. 2016).

School board's rule that school premises should not be used by any group for religious purposes was unconstitutionally applied to deny church access to school premises, when not in use for school purposes, to exhibit film dealing with family and child-rearing issues where (1) school board permitted use of school property for social or civic purposes, (2) there was no suggestion that film would not constitute such use, and (3) stated reason for denial of permission was that film appeared to be church related; board's denial could not be justified on grounds that church use of school property would lead to threats of public unrest and violence, or that purpose of board's rules was to promote interest of public in general rather than sectarian or other private interests. Lamb's Chapel v Center Moriches Union Free Sch. Dist., 508 U.S. 384, 113 S. Ct. 2141, 124 L. Ed. 2d 352, 1993 U.S. LEXIS 4019 (U.S. 1993).

For purposes of free speech guarantee of First Amendment, school district may legally preserve property under its control for use to which property is dedicated, and district need not permit use of its property outside school hours for any after-hours uses that are permitted on such property by CLS Educ § 414. Lamb's Chapel v Center Moriches Union Free Sch. Dist., 508 U.S. 384, 113 S. Ct. 2141, 124 L. Ed. 2d 352, 1993 U.S. LEXIS 4019 (U.S. 1993).

For school board to permit its school property to be used by church to exhibit film dealing with family and child-rearing issues is not violation of establishment of religion clause of First Amendment—that is, such action has secular purpose, does not have principal or primary effect of advancing or inhibiting religion, and does not foster excessive entanglement with religion—where (1) showing of film would not be during school hours nor sponsored by school, and would be open to public, and (2) school board's school property had repeatedly been used by wide variety of private organizations. Lamb's Chapel v Center Moriches Union Free Sch. Dist., 508 U.S. 384, 113 S. Ct. 2141, 124 L. Ed. 2d 352, 1993 U.S. LEXIS 4019 (U.S. 1993).

School district could not rely on CLS Educ § 414, its own community use policy, and past practice to bar use of school auditorium for religious fund-raising event where district had, through past practice, permitted different, allegedly less "controversial," but openly religious fund- raising event; district's denial violated free speech clause and equal protection clause. Travis v Owego-Apalachin School Dist., 927 F.2d 688, 1991 U.S. App. LEXIS 3502 (2d Cir. N.Y. 1991).

In church's action against school board over board's refusal to allow church to use school facilities during nonschool hours for performance of magic show which was to include religious service, church's claim that CLS Educ Law § 414 is unconstitutionally void for vagueness is denied summarily, where church argued that statute vests school officials with subjective ad hoc authority to determine what constitutes "religious purpose" and "religious services and religious instruction," because those terms have common meaning such that people of ordinary intelligence can understand what conduct is prohibited Trinity United Methodist Parish v Board of Educ., 907 F. Supp. 707, 1995 U.S. Dist. LEXIS 17245 (S.D.N.Y. 1995).

CLS Educ § 414(1)(a)-(j) creates limited public forum in public school facilities for First Amendment purposes. Full Gospel Tabernacle v Community Sch. Dist. 27, 979 F. Supp. 214, 1997 U.S. Dist. LEXIS 14522 (S.D.N.Y. 1997), aff'd, 164 F.3d 829, 1999 U.S. App. LEXIS 885 (2d Cir. 1999).

5. Sale or lease of property

This section, in authorizing the trustees of a board of education to allow school property to be used for certain specified purposes out of school hours, confers no authority to lease or rent out a school building or school property, and real property of a school district may be leased only as permitted by § 402 subd. 2. 1960 Ops St Compt File #927.

6. Revocation of permission

School boards's revocation of teachers association's right to use office space in school buildings is subject to arbitration, since arbitration sought lies within permissible scope of Taylor Law (Civ. S., art. 14) and issue tendered falls within ambit of broad arbitration clause contained in collective bargaining agreement between parties. Board of Education v Connetquot Teachers Asso., 60 N.Y.2d 840, 470 N.Y.S.2d 132, 458 N.E.2d 373, 1983 N.Y. LEXIS 3514 (N.Y. 1983).

While the Legislature did not confer upon the Board the power to revoke a permit once issued, save in the single instance of the use of schoolhouses for certain political purposes under sub. 5 [now sub (e)] nevertheless, the Board has the power to reserve to itself the right of revocation by its regulations and by an express reservation in the permit issued, subject only to a judicial review of the reasonableness of its exercise of such reservation. Cannon v Towner, 70 N.Y.S.2d 303, 188 Misc. 955, 1947 N.Y. Misc. LEXIS 2388 (N.Y. Sup. Ct. 1947).

The Board of Education has no power, express or implied, to revoke a license granted under sub. 4 [now sub (d)] of this section and, therefore, without express authority or at the very least a reservation of a right or power to cancel or revoke attached as a condition to the original permit, cannot revoke a license to use a public school auditorium for a musical concert to be given by an artist on the ground that the artist is a Communist. Cannon v Towner, 70 N.Y.S.2d 303, 188 Misc. 955, 1947 N.Y. Misc. LEXIS 2388 (N.Y. Sup. Ct. 1947).

Where teachers' union had sought and been granted permission for use of school building for various meetings for ensuing year and then Board of Education revoked such permit, teachers' union would not be prohibited from holding first meeting where meeting had been advertised and a monetary consideration contracted for. Re Teachers' Union, Local 555 (UPW), 73 St Dept 41 (1952).

7. Particular uses and organizations

City school board resolution barring employers who discriminate on basis of sexual orientation or other reasons from school site student recruitment was not overridden by CLS Educ § 2-a, even though statute specially protects military recruiters by granting them equal access to such recruitment, and resolution was directed largely at military's open, long-standing and uncontroverted discriminatory policies, since statute was not intended to divest local school boards of their traditional discretionary powers to adopt protocols barring stated discriminatory policies and practices; use of phrase "on the same basis" in statute is synonymous with "equal access," not unqualified access. Lloyd v Grella, 83 N.Y.2d 537, 611 N.Y.S.2d 799, 634 N.E.2d 171, 1994 N.Y. LEXIS 705 (N.Y. 1994).

Plaintiffs, parents of infant who resided within school district but who attended private school, were not entitled to preliminary injunction directing school district to allow infant to attend district school's Halloween party; fact that party might fall within one or more of listed categories under CLS Educ § 414 for which school property may be used did not preclude gathering from being held exclusively as school function or program limited to students of district or to students of particular district school. Jacobson by Jacobson v East Williston Union Free Sch. Dist., 170 Misc. 2d 93, 649 N.Y.S.2d 1002, 1996 N.Y. Misc. LEXIS 405 (N.Y. Sup. Ct. 1996).

Commissioner of Education dismissed allegation that public statements made by principal and superintendent, on behalf of village school district and police chief, violated district policy regarding use of school facilities and personnel for political activity, where petitioners did not submit reliable evidence to support their claims but relied solely on newspaper articles, which are not proof of facts stated therein, and it was not shown that alleged statements had any detrimental impact or were not protected speech. 2001 Op Comm Ed No. 14,739ec.

Board of education did not violate Establishment Clause by permitting school personnel to play song "Where Were You When the World Stopped Turning?" over school's public address system as part of September 11 commemorative events which included moments of silence coinciding with times that planes hit World Trade Center and towers collapsed; song in question was neither benediction nor religious exercise, objective observer would view it as expressing wide range of emotions experienced on September 11, 2001 and, while songwriter may have professed his own religious belief, his lyrics did not suggest that his belief was or should be universal. 2005 Op Comm Ed No. 15,159.

Incidental benefit to private interests does not invalidate contractual provisions that are otherwise public in nature, and use of school district property to store buses owned by private corporation did not violate State Constitution Article 8, § 1, where buses were used solely to transport schoolchildren within district, and where storage of buses elsewhere would have resulted in greater cost to district. Re Weiss, 1979 Op Comr Ed #10142.

Valid school purpose for taking of student photographs was not found where photographs taken on school premises were not limited to students in attendance at schools of the district but open to family, friends and relatives. Re Fusare, Op Comr Ed No. 10244.

Although teacher had permission of building principal to use school premises and equipment to produce film for commercial purposes, such use violates Art VIII, § 1 of Const. and Educ. § 414 and teacher may not estop school board for disclaiming principal's unauthorized and illegal approval for such use. Re Application of Board of Education, 1982 Op Comr Ed #10799.

Appeal which challenged respondent's decision to establish day care center at its high school pursuant to CLS Educ § 414(1) would be dismissed where, contrary to petitioners' contentions, housing day care center at school would not diminish space available for classes and day care was needed, and where center was being funded by 2 granted received by respondent. 1995 Op Comm Ed No. 13295.

Board of education's resolution allowing "peer" presentations about acquired immune deficiency syndrome (AIDS) outside regular school day with parental permission did not violate 8 NYCRR § 135.3 since there was no indication that such presentations replaced district's regular AIDS instruction or did anything more than augment district's AIDS curriculum. 1996 Op Comm Ed No. 13590.

The use of school buildings may be granted to the American Legion but upon such terms, including the presence of a janitor,

which the Board of Education may impose. 1 Op Counsel Educ Dep't No 42 (1951).

School districts have power to assist in the effectuation of matters undertaken by the Defense Council by permitting use of facilities and school buildings may be used outside of school hours for activities of a local Civil Defense Council. It seems advisable that a contract be made between the school district and the defense council with reference to additional costs of maintenance and providing additional public liability insurance protection, where required. 1 Op Counsel Educ Dept No. 58 (1952).

8. —Concerts

This section charges the Board of Education with the duty of managing and caring for the property of the school district, and the Board may in its discretion allow the use of school buildings for concert purposes and may adopt reasonable rules and regulations in connection therewith. East Meadow Community Concerts Ass'n v Board of Education, 49 Misc. 2d 643, 268 N.Y.S.2d 221, 1966 N.Y. Misc. LEXIS 2153 (N.Y. Sup. Ct.), app. dismissed, 25 A.D.2d 850, 269 N.Y.S.2d 542, 1966 N.Y. App. Div. LEXIS 4365 (N.Y. App. Div. 2d Dep't 1966).

9. —Dances

The use of State school property for a school dance for the students at said school was proper. Trent v International R. Co., 249 A.D. 17, 290 N.Y.S. 915, 1936 N.Y. App. Div. LEXIS 5022 (N.Y. App. Div. 1936), aff'd, 273 N.Y. 622, 7 N.E.2d 725, 273 N.Y. (N.Y.S.) 622, 1937 N.Y. LEXIS 1348 (N.Y. 1937).

The Board of Education of Rochester, in permitting the use of public schools for private dancing lessons, is performing a state function and such action cannot be enjoined under § 51 of the General Municipal Law. Schnepel v Board of Education, 89 N.Y.S.2d 793, 195 Misc. 371, 1949 N.Y. Misc. LEXIS 2341 (N.Y. Sup. Ct. 1949), aff'd, 276 A.D. 943, 94 N.Y.S.2d 838, 1950 N.Y. App. Div. LEXIS 5225 (N.Y. App. Div. 1950).

10. —Elections

Custodians of New York City's schools could not recover from the city for extra services performed by them when the schools were used as polling places on registration, primary, and general election days. No contract could be implied for the payment of such services where the custodians knew of the Board of Education resolutions making the schools available without any compensation therefor. Alves v New York, 306 N.Y. 813, 118 N.E.2d 822, 306 N.Y. (N.Y.S.) 813, 1954 N.Y. LEXIS 1145 (N.Y. 1954).

It is not compulsory that a board of education permit the use of a school as a polling place for election purposes. 1968 Ops St Compt File #1037.

Reasonable expenses incurred by a school district attributable to the use of school property for election purposes may (in the County of Nassau) be charged to and paid by the county, pursuant to a prior agreement with the board of elections. 1968 Ops St Compt File #1037.

An appeal to the Commissioner of Education on the issue of whether the holding of the election of members to a Citizen's Nominating Committee, a community based organization, at the same place and time as the annual district meeting is a form of electioneering, is dismissed, not only on the grounds that the petitioner failed to name the board of education as a party, but also on the merits. Petitioner does not raise any evidence to support the claim that the holding of the election by the Citizen's Nominating Committee for the annual meeting is a form of electioneering. There is no indication in the record that members of the committee conducting the election displayed placards, buttons, or flyers concerning candidates or propositions being voted upon at the district meeting or in any way attempting to influence votes with respect to the school district's annual meeting. Only this type of action by a member of the committee occurring within 100 feet of a polling place would constitute prohibitive electioneering. Neither the mere presence of members of a nominating committee on school property during the school election, nor the simultaneous conduct of an election of members of a nominating committee constitutes prohibited electioneering. Appeal of Fitzpatrick, 1990 Op Comr Educ No. 12408.

11. —Fraternal, secret or exclusive societies

There being no persuasive evidence that a County Committee for Freedom Riders was a "fraternal, secret, or exclusive society or organization," it could not properly be denied use of a school building for a fund raising meeting on that ground. Dohrenwend v Board of Education, 227 N.Y.S.2d 505, 1962 N.Y. Misc. LEXIS 4119 (N.Y. Sup. Ct. 1962).

12. —Funds disbursed for educational or charitable purpose

The test prescribed in subd. 4 [now sub (d)] of this section, with respect to permitting use of school buildings for meetings to which admission fees will be charged, is not whether the licensee itself is an educational or charitable organization, but whether the funds will be disbursed for an educational or charitable purpose. Dohrenwend v Board of Education, 227 N.Y.S.2d 505, 1962 N.Y. Misc. LEXIS 4119 (N.Y. Sup. Ct. 1962).

Admission fees charged those attending a meeting in a school building were to be used for a "charitable" purpose, so that the Board of Education could permit use of the school building for such meeting, where they were to be used for defense of persons facing criminal charges as the result of taking part in so-called "freedom rides." Dohrenwend v Board of Education, 227 N.Y.S.2d 505, 1962 N.Y. Misc. LEXIS 4119 (N.Y. Sup. Ct. 1962).

School district may properly permit operation of flea market on school grounds on Saturdays, where flea market is operated by professional management company which pays Parent-Teacher Association 25 percent of gross income received from fees paid by vendors of merchandise for stall space in school yard, and where non-profit organizations and local charities are permitted to participate in flea market without payment of fee, and as school in whose yard flea market takes place received substantial sum of money for use of yard. Re Appeal of Erdberg, 1987 Op. Comm. Ed. No. 11822.

Board of education policy allowing outside organization to charge admission fee during use of school facilities, with fees collected to be used for educational or charitable purposes, was not improper where there was no evidence of any specific incident wherein such policy was not followed. 1996 Op Comm Ed No. 13643.

13. —Private corporations

"Pouring rights" contract between respondent board of education and Coca-Cola Company violated CLS NY Const Art VIII § 1 to extent it required school district personnel to act as agents of Coca-Cola by distributing Coca-Cola products free of charge to students, or permitted redemption of receipts for pre-sold beverage products on school property or by school staff for fundraising groups; such contractual provisions promoted private benefit without proper school district purpose or legislative authorization. 2000 Op Comm Ed No. 14,489.

Where photographs are taken for school purpose such as yearbook or student record, they may be taken on school premises during school hours, and school personnel may assist in process, but though commercial photographer taking such photographs may advise students of availability of copies for purchase, school personnel may not participate during school hours or on school grounds in handling any orders or collecting any charges. In re Richard A. Puls, Sr., Op Comr Ed #9627.

Education Law § 414 is not applicable to contract between board of education and school bus company providing for storage of buses and fuel on unused school property. Re Weiss, 1979 Op Comr Ed #10142.

School district facilities may be used for uses pertaining to welfare of community, and under such provision facilities may be made available to private corporation which operates nuclear power facility for training sessions concerning safety at nuclear plant which pertained to welfare of community as whole and are held to disseminate information about plans for dealing with emergency at power plant where such sessions are non-exclusive and open to public. Re Alcorn, 1984 Op Comr Ed No 11365.

School district may properly permit operation of flea market on school grounds on Saturdays, where flea market is operated by professional management company which pays Parent-Teacher Association 25 percent of gross income received from fees paid by vendors of merchandise for stall space in school yard, and where non-profit organizations and local charities are permitted to participate in flea market without payment of fee, and as school

in whose yard flea market takes place received substantial sum of money for use of yard. Re Appeal of Erdberg, 1987 Op. Comm. Ed. No. 11822.

While a school district may purchase and install a coin-operated photocopy machine for use in the school library, it may not permit the installation of such machine by an outside commercial enterprise. 1964 Ops St Compt #202.

It would not be permissible to establish office facilities within a school building for a teachers' credit union. 1969 Ops St Compt File #58.

A school district may not lease or license unused real property to a private corporation for the purposes of a boys' club. 1969 Ops St Compt File #657.

The purposes for which a Board of Education is authorized to use the school building outside of school hours do not include the leasing of an unused school building and grounds to a private corporation. 64 St Dept 222 (1942).

14. Recreation programs

Commissioner dismissed an appeal alleging that individual respondents and board of education violated CLS Educ § 414 and district policy by permitting amateur athletic organization to use district facilities because organization engaged in discriminatory practices with respect to its selection practices, where petitioners claimed that organization selected players for its club based on prior year's participation rather than performance at tryouts but they did not state or establish that this practice resulted in discrimination based on age, color, creed, sex, religion or any other protected basis, while respondents submitted email from coach of organization, who stated that out of 45 prospective players who tried out for club, all were placed on team and some teams were not able to fill their rosters. 2009 Op Comm Ed No. 15,898.

A municipality which is operating a recreation project in a public school and receiving state aid therefor under the provisions of the so-called State Youth Commission Act may not require the payment of a fee as a condition to the enjoyment of or participation in the facilities or activities of the project. 1952 Ops St Compt 266.

A school district, jointly with a village, may equip, operate and maintain a joint playground or recreation center upon unneeded real property of the school district and apportion the cost as desired, provided that a lease of the school district real property is neither expressly nor impliedly involved. There is no requirement that such proposition be submitted to referendum. 1965 Ops St Compt File #216.

Such residents may not be excluded from a municipal recreation program which uses school facilities permissively. 1967 Ops St Compt File #233.

A school district board of education may not charge a rental for the use of school playground facilities by a town recreation commission during out of school hours. The granting of permission to so use school property is discretionary with the board. A fee may be charged to cover out-of-pocket expenses attributable to such use. 1974 Ops St Compt File #1104.

Residents of a school district living in a municipality other than the one with which the school district has an agreement to operate a recreational program for the benefit thereof may be excluded from participation in such program even though school district facilities are utilized. 1967 Ops St Compt File #233.

15. —Religious activities

In a taxpayer's action to restrain the Board of Education of New York City from permitting school buildings to be used as assembly places for racial and religious groups and to restrain the reading of passages from the Bible in public schools, a defense is not insufficient in law which states in substance that the assailed gatherings of denominational groups are not permitted for the inculcation of any of the tenets of any religious denomination but solely for the purpose of conducting ethical, educational, and cultural discourses and lectures for the moral uplift of the pupils in the public schools connected with such groups. Lewis v Board of Education, 285 N.Y.S. 164, 157 Misc. 520, 1935 N.Y. Misc. LEXIS 1698 (N.Y. Sup. Ct. 1935), modified, 247 A.D. 106, 286 N.Y.S. 174, 1936 N.Y. App. Div. LEXIS 8193 (N.Y. App. Div. 1936).

Subd. 4 of this section [now sub (d)] is not applicable to an action by an individual and a corporation for an injunction restraining the State Commissioner of Education from permitting a private religious educational institution, conducted under the direction and control of a denominational religious organization in which denominational doctrines are taught, to use the auditorium of a State education building for an illustrated lecture to be delivered by a Jesuit missionary and to charge admission fees to be applied for the benefit of said institution. New York League for Separation, etc. v Graves, 10 N.Y.S.2d 142, 170 Misc. 196, 1939 N.Y. Misc. LEXIS 1556 (N.Y. Sup. Ct. 1939).

Where no direct individual injury peculiar to plaintiff is shown, no action against the Commissioner of Education can be maintained for permitting a lecture to be delivered by a Jesuit missionary in a state education building. New York League for Separation, etc. v Graves, 10 N.Y.S.2d 142, 170 Misc. 196, 1939 N.Y. Misc. LEXIS 1556 (N.Y. Sup. Ct. 1939).

School board's rule that school premises should not be used by any group for religious purposes was unconstitutionally applied to deny church access to school premises, when not in use for school purposes, to exhibit film dealing with family and child-rearing issues where (1) school board permitted use of school property for social or civic purposes, (2) there was no suggestion that film would not constitute such use, and (3) stated reason for denial of permission was that film appeared to be church related; board's denial could not be justified on grounds that church use of school property would lead to threats of public unrest and violence, or that purpose of board's rules was to promote interest of public in general rather than sectarian or other private interests. Lamb's Chapel v Center Moriches Union Free Sch. Dist., 508 U.S. 384, 113 S. Ct. 2141, 124 L. Ed. 2d 352, 1993 U.S. LEXIS 4019 (U.S. 1993).

For school board to permit its school property to be used by church to exhibit film dealing with family and child-rearing issues is not violation of establishment of religion clause of First Amendment—that is, such action has secular purpose, does not have principal or primary effect of advancing or inhibiting religion, and does not foster excessive entanglement with religion—where (1) showing of film would not be during school hours nor sponsored by school, and would be open to public, and (2) school board's school property had repeatedly been used by wide variety of private organizations. Lamb's Chapel v Center Moriches Union Free Sch. Dist., 508 U.S. 384, 113 S. Ct. 2141, 124 L. Ed. 2d 352, 1993 U.S. LEXIS 4019 (U.S. 1993).

School district discriminated against private Christian organization that operated club for children ages 6 to 12, in violation of Free Speech Clause, where its policy of opening its school building to public use for various purposes excluded club from meeting after hours at school because club was religious in nature; court rejected district's argument that elementary school children might perceive that school was endorsing club and feel coerced to participate because club's activities took place on school grounds. Good News Club v Milford Cent. Sch., 533 U.S. 98, 121 S. Ct. 2093, 150 L. Ed. 2d 151, 2001 U.S. LEXIS 4312 (U.S. 2001).

Church's free speech rights were not violated by school district's denial of their application for permit to hold religious worship services in public school auditorium, even though CLS Educ Law § 414 allows auditorium to be used for "instruction in any branch of education, learning, or arts" or for "social, civic, and recreational meetings . . . and other uses pertaining to welfare of community," where district policy implementing § 414 allows discussion and distribution of material which contains religious viewpoint but prohibits religious worship services, because exclusion of religious worship services does not amount to unconstitutional viewpoint discrimination. Full Gospel Tabernacle v Community Sch. Dist. 27, 979 F. Supp. 214, 1997 U.S. Dist. LEXIS 14522 (S.D.N.Y. 1997), aff'd, 164 F.3d 829, 1999 U.S. App. LEXIS 885 (2d Cir. 1999).

Refusal of board of education to allow distribution of religious literature on school grounds was not improper. Re Rathjen, Op Comr Ed No. 11085.

It is improper for school district to ban use of its facilities for permitted topics merely because presentation would be from religious perspective. 1996 Op Comm Ed No. 13643.

The use of a school building by church societies and denominational organizations for entertainment and occasions where admission fees are charged and used for the benefit of such churches or organizations is clearly a violation of this section. 41 St Dept 423 (1931).

A public school may not be used for a baccalaureate exercise service which has a program following a general pattern of a religious service. The fact that more than one religious denomination was represented on the program would not change its religious character. Re Dargin, 72 St Dept 27 (1952).

16. — —Prayer meetings and Bible study

Inasmuch as section 414 of the Education Law provides that schoolhouses, the grounds connected therewith, and all property belonging to a school district shall be in the custody and under the control and supervision of the board of education of the district, and the board may adopt reasonable regulations and permit the use of schoolhouses and schoolrooms for enumerated purposes if, in the opinion of the board, such use will not be disruptive of normal school operations, a board of education has no authority to grant a request by high school students and a member of the clergy to form bible clubs in public high schools since the express purpose of the clubs is the accommodation of the religious interests of its members and the provision of moral and spiritual assistance to them and religious purposes are not included in the enumerated purposes for which a school may be used under section 414. Trietley v Board of Education, 65 A.D.2d 1, 409 N.Y.S.2d 912, 1978 N.Y. App. Div. LEXIS 12880 (N.Y. App. Div. 4th Dep't 1978).

There is no violation of constitutional rights of free exercise of religion, freedom of speech, freedom of association, or equal protection where board of education denied request of student group to conduct voluntary communal prayer meetings in classroom immediately before school-day commenced. Brandon v Board of Educ., 635 F.2d 971, 1980 U.S. App. LEXIS 12201 (2d Cir. N.Y. 1980), cert. denied, 454 U.S. 1123, 102 S. Ct. 970, 71 L. Ed. 2d 109, 1981 U.S. LEXIS 2953 (U.S. 1981).

17. — —Holiday displays and celebrations

Commissioner dismissed claim that display of candles in high school windows promoted Christianity in violation of First and Fourteenth Amendments, where petitioners merely conjectured that candle placed in window at Christmas constitutes religious symbol, and evidence established that candles displayed in high school windows were part of nonreligious fundraising event in which monetary donors to scholarship fund sponsored candles in memory of family members, students, teachers or other loved ones. 2005 Op Comm Ed No. 15,164.

The presentation of Handel's Messiah and two religious plays or pageants at Christmas time does not necessarily constitute such religious instruction as would bar the use of public school buildings. Re Cromwell, 72 St Dept 166 (1952).

18. —Political meetings

Political committee was entitled to an order permitting its use of a municipal center for its regular meetings and for attorney's fees and costs after the town supervisor instituted a town policy prohibiting "political parties from having meetings on town-owned property" as prohibited by the Education Law because the supervisor's content-based reasons for restricting the committee's speech, to wit, his disagreement with the committee's decision to expel disloyal members, rendered it an unconstitutional limitation on the latter's exercise of its First Amendment rights, and the supervisor's restriction was patently unreasonable as it sought to suppress expression merely because he opposed the committee's view. Marbletown Democratic Comm. v Parete, 69 Misc. 3d 836, 132 N.Y.S.3d 269, 2020 N.Y. Misc. LEXIS 6392 (N.Y. Sup. Ct. 2020).

Agency Opinions

Analysis

1. In general
2. Property subject to control
3. Sale or lease of property
4. Particular uses and organizations
5. Recreation programs

1. In general

Meetings of ad hoc citizens' advisory committee, held on school property for purpose of addressing concerns regarding proposed zoning variance, were meetings for "civic" purpose or purpose pertaining to "welfare" of community, and thus were required to be open to public under CLS Educ § 414 even though they did not involve public body or Open Meetings Law. Comm on Open Gov't OML-AO-2180.

2. Property subject to control

A building rented by the public school authorities for use as a public school auditorium in which educational and other motion pictures are shown pupils at a charge of 10 cents is not a place of public assembly and is under the control and supervision of the trustees or Board of Education of the school district rather than of the Industrial Commissioner. 1936 N.Y. Op. Att'y Gen. No. 133.

3. Sale or lease of property

A school district may enter into a contract for the sale of reproductions of a painting owned by the district, provided the contract serves a school purpose and is supported by adequate consideration. 1983 NY Ops Atty Gen April 14 (informal).

4. Particular uses and organizations

If entity meets on school property for social or civic purpose, or for purpose pertaining to welfare of community, its meetings would be open to public under CLS Educ § 414(1)(c), even if Open Meetings Law does not apply. Comm on Open Gov't OML-AO-4025.

Soccer association meeting in high school auditorium must be held open to public under CLS Educ § 414(1)(c) as social or civic purpose, even though such association clearly falls beyond coverage of Open Meetings Law. Comm on Open Gov't OML-AO-4025.

5. Recreation programs

Several towns and a village may agree to provide landfill for school district land which is to be developed into athletic fields, in exchange for reasonable use of such fields and conveyance of other athletic fields if unneeded for school purposes. 1978 Op St Compt File #420.

It would appear that a school district may charge a town or village recreation commission a reasonable rental in excess of the district's tangible out-of-pocket expenses for use of a school district swimming pool. 1981 Op St Compt File #81-46.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 402-a; CLS Soc Serv § 410-c.

Codes, Rules and Regulations:

Commercialism in public schools. 8 NYCRR §§ 23.1, 23.2.

Jurisprudences:

68 Am Jur 2d, Schools §§ 60–62, 84–86.

12 Am Jur Proof of Facts 611, Trampolines.

Annotations:

Use of public school premises for religious purposes during nonschool time. 79 ALR2d 1148.

Use of school property for other than public school or religious purposes. 94 ALR2d 1274.

Regulations as to fraternities and similar associations connected with educational institution. 10 ALR3d 389.

Tort liability of public schools and institutions of higher learning for accidents occurring during school athletic events. 35 ALR3d 725.

Tort liability of public schools and institutions of higher learning for accidents occurring during use of premises and equipment for other than school purposes. 37 ALR3d 712.

ARTICLE 13 Higher Education Student Financial Aid Programs

Section

601. Definitions
604. General awards
608. World trade center memorial scholarships

HISTORY:
Add, L 1974, ch 942, § 16, eff July 1, 1975.

§ 601. Definitions

As used in this article, the following terms shall have the following meanings unless otherwise specified:

1. "President" shall mean the president of the New York state higher education services corporation.

2. "College" shall mean any institution of higher education, recognized and approved by the regents of the university of the state of New York, which provides a course of study leading to the granting of a post-secondary degree or diploma.

3. "Vocational institution" shall mean a business, trade, technical or other occupational school approved as such by the regents of the university of the state of New York or accredited by a nationally recognized accrediting agency or association accepted as such by the regents of the state of New York.

4. "Approved program", for the purpose of determining a student's eligibility for awards provided in articles thirteen and fourteen of this chapter and subject to specific modification by sections of such articles, shall mean the following programs of study approved by the commissioner pursuant to this article in accordance with rules of the board of regents and registered by the state education department in accordance with regulations of the commissioner or, where applicable, registered by the state department of health and forwarded to the state education department: (1) collegiate level programs leading to a degree, or programs leading to a diploma or certificate that are fully creditable towards a degree program in that institution; (2) study and training programs offered by a hospital school, a community college, a unit of the state university of New York, a unit of the city university of New York, or an institution chartered by the regents or by the legislature for the purpose of granting degrees, leading to licensure as a professional registered or practical nurse or to certification in an area of medical or health technology; and (3) two-year programs offered in a registered private business school.

5. "Children" as referenced in subdivision four of section six hundred four and sections six hundred eight, six hundred eight-a, six hundred sixty-eight-a, six hundred sixty-eight-b, six hundred sixty-eight-d and six hundred sixty-eight-e of this title shall mean: (a) birth children, adopted children, stepchildren who survive an individual, or children for whom an individual was a legal guardian, and (b) other children related by blood, adoption or marriage to an individual for whom such individual had assumed and was exercising custody and care as of the date of such individual's death.

6. "Impact area" as referenced in sections six hundred eight and six hundred sixty-eight-d of this title shall mean the secure zone established by the city of New York surrounding the world trade center and the crash sites during the period that disasters were declared or rescue and recovery efforts were underway.

7. "Financial dependent" as referenced in sections six hundred four, six hundred eight, six hundred eight-a, six hundred sixty-eight-b, six hundred sixty-eight-d and six hundred sixty-eight-e of this title shall mean a person who is dependent for his or her support upon an individual, other than one who was involved in, supported, or was responsible for the act or acts of terrorism or other intentional act or acts that caused such death, injury or illness, who has died or become severely and permanently disabled as described in such sections, provided that a person shall be considered a financial dependent and shall be eligible for awards pursuant to these sections upon a showing of unilateral dependence or mutual interdependence upon such individual, which may be evidenced by a nexus of factors, including but not limited to common ownership of property, common householding, shared budgeting and the length of the relationship between the financial dependent and such individual.

HISTORY:
Add, L 1974, ch 942, § 16, eff July 1, 1975; amd, L 1975, ch 844, § 1; L 1977, ch 466, § 1, eff August 1, 1977; L 2002, ch 176, § 7, eff July 23, 2002, deemed eff April 1, 2001; L 2003, ch 106, § 5, eff July 1, 2003; L 2004, ch 418, § 1, eff Sept 7, 2004; L 2008, ch 305, § 6, eff July 21, 2008.

Prior Law: Former § 601, add, L 1969, ch 1154, § 1; amd, L 1974, ch 942, §§ 1, 2; repealed, L 1974, ch 942, § 14, eff July 1, 1975.

Prior § 601, add, L 1947, ch 820, with substance transferred from § 70; amd, L 1949, ch 687, § 11, L 1949, ch 819, § 2, L 1955, ch 339, § 15, L 1957, ch 756, § 1, L 1958, ch 856, § 1, L 1960, ch 236, § 1, L 1961, ch 389, § 3, L 1961, ch 391, § 1, L 1961, ch 577, §§ 1, 2, L 1961, ch 973, § 2, L 1962, ch 898, § 1, L 1965, ch 85, § 1, L 1965, ch 259, § 1, L 1965, ch 845, § 77, L 1966, ch 818, § 1, L 1967, ch 755, § 1, L 1967, ch 804, § 1, L 1968, ch 643, § 1; repealed, L 1969, ch 1154, § 1, eff July 1, 1969.

Editor's Notes Laws 2002, ch 176, §§ 1 and 8, eff July 23, 2002, deemed eff April 1, 2001, provides as follows:

Section 1. Legislative intent. The legislature hereby finds that the heinous acts of terrorism of September 11, 2001, perpetrated on the citizens of New York state, the United States of America and eighty other Nations, shall not stand as an obstacle to the health, welfare and future success of the families of these innocent victims, and those victims who survived the attack. In honor of these heroic individuals, especially the firefighters, police officers, peace officers, and emergency medical service workers, the legislature hereby creates the world trade center memorial scholarships. The legislature further finds that these scholarships will not only serve as a fitting tribute to those who have made the supreme sacrifice, or have become severely disabled, but will also serve to extend the hand of opportunity to spouses, children, financial dependents and surviving victims. This act shall provide recipients with undergraduate awards covering the cost of attending institutions of the state university and the city university as defined in this act, or a commensurate amount to attend a private college or university in New York state.

§ 8. This act shall take effect immediately and shall be deemed to have been in full force and effect on and after April 1, 2001, and shall be applicable for awards made for the 2001-2002 academic year.

Laws 2003, ch 106, §§ 1 and 1-a, eff July 1, 2003, provide as follows:

Section 1. Legislative findings and intent. The legislature recognizes that the individuals who are members of the military make a tremendous sacrifice, especially in times like these when our military personnel are in many locations throughout the world and here in New York fighting against terrorism. This sacrifice is just as real for the men and women who comprise our reserve armed forces and state organized militia. For those who are not full-time active duty in the military, but instead are called to active duty as a member of the reserve armed forces or state organized militia, the rest of their lives must be put on hold to accommodate that service. However, such military personnel continue to be responsible for their own well-being and the well-being of their families and they must still face the obligations that exist in their everyday lives. Steps have been taken to ease some of the burdens that these brave men and women encounter, to allow them to focus their full energy on defending our country; however, the legislature recognizes that more must be done to ensure that military personnel engaged in active duty are not troubled by their obligations at home. In addition, the legislature recognizes that members of the military should not be discriminated against based upon their military status in areas such as housing, employment and education.

§ 1-a. Short title. This act shall be known as the "Patriot Plan".

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

Method of award. 8 NYCRR § 9.1.

Regents scholarship and fellowship competitions. 8 NYCRR §§ 145-1.1 et seq.

Educational requirements for awards and loans. 8 NYCRR §§ 145-2.1 et seq.

General provisions. 8 NYCRR §§ 145-3.1 et seq.

Public librarianship training grants. 8 NYCRR §§ 146.1 et seq.

Grants for deaf and blind students. 8 NYCRR §§ 147.1 et seq.

Supplemental tuition awards. 8 NYCRR § 301.1.

Definitions. 8 NYCRR § 2001.1.

§ 604. General awards

1. Tuition assistance program awards are available for all students who are enrolled in approved programs and who demonstrate the ability to complete such courses, in accordance with standards established by the commissioner.

2. Regents awards for children of deceased and disabled veterans are available for eligible students in an approved program.

3. Regents awards for children of deceased state correction officers and state civilian employees of a correctional facility are available for eligible students in an approved program pursuant to section six hundred sixty-nine of this chapter.

4. Regents awards for children of deceased police officers, firefighters, volunteer firefighters and correction officers are available for eligible students in an approved program pursuant to section six hundred sixty-four of this chapter.

5. Veterans tuition awards are available for eligible students enrolled in approved undergraduate or graduate programs at degree granting institutions and approved vocational training programs pursuant to section six hundred sixty-nine-a of this title.

6. Tuition awards for part-time undergraduate students enrolled in approved programs in degree-granting institutions.

7. [Expires and repealed Sept 1, 2021] Tuition benefit for active members of the New York army national guard, New York air national guard and naval militia members enrolled in approved post-secondary degree programs in degree-granting institutions.

8. [Repealed]

9. Memorial scholarships for children, spouses and financial dependents of deceased firefighters, volunteer firefighters, police officers, peace officers, and emergency medical service workers.

10. World trade center memorial scholarships.

11. American Airlines flight 587 memorial scholarships pursuant to section six hundred sixty-eight-f of this title.

12. Continental Airlines flight 3407 memorial scholarships pursuant to section six hundred sixty-eight-g of this title.

HISTORY:

Add, L 1974, ch 942, § 16, eff July 1, 1975; amd, L 1975, ch 844, § 3, eff July 1, 1975; L 1981, ch 887, § 1, eff July 1, 1982; L 1984, ch 90, § 1, eff April 20, 1984; L 1984, ch 110, § 1, eff July 1, 1984; L 1985, ch 624, § 1, eff July 28, 1985; L 1986, ch 284, § 1, eff July 17, 1986; L 1987, ch 335, § 1, eff July 1, 1988; L 1996, ch 230, § 1, eff June 26, 1996; L 1996, ch 268, § 2, eff Jan 1, 1997; L 1996, ch 603, § 1, eff Sept 4, 1996; L 2002, ch 83, § 2 (Part G), eff May 29, 2002, expires and repealed June 30, 2010; L 2002, ch 176, § 4, eff July 23, 2002, deemed eff April 1, 2001; L 2005, ch 412, § 1, eff Aug 2, 2005, deemed eff April 1, 2001; L 2008, ch 57, § 5 (Part N), eff July 1, 2008; L 2009, ch 57, § 1 (Part EE), eff April 7, 2009, deemed eff on and after April 1, 2009; L 2018, ch 476, § 114, effective December 28, 2018.

Prior Law: Former § 604, add, L 1969, ch 1154, deriving from § 603; repealed, L 1974, ch 942, § 14, eff July 1, 1975.

Prior § 604, add, L 1947, ch 820, with substance transferred from § 73; amd, L 1949, ch 687, § 12, L 1957, ch 756, L 1959, ch 479, L 1961, ch 391; repealed, L 1969, ch 1154, eff July 1, 1969. See former § 605.

Editor's Notes Laws 1996, ch 268, § 5, eff Jan 1, 1997, provides as follows:

§ 5. This act shall take effect January 1, 1997 and shall expire and be deemed repealed September 1, 2021; provided that any person who has begun to receive the benefits of this act prior to its expiration and repeal shall be entitled to continue to receive the benefits of this act after its expiration and repeal until completion of a baccalaureate degree or cessation of status as an active member, whichever occurs first. (Amd, L 2001, ch 63, § 1 (Part F); L 2005, ch 56, § 1 (Part B), eff April 12, 2005, deemed eff on and after April 1, 2005; L 2011, ch 57, § 24 (Part A), eff March 31, 2011; L 2016, ch 57, § 1 (Part E), eff April 13, 2016.).

Laws 2002, ch 83, § 5 (Part G), eff May 29, 2002, provides as follows:

§ 5. This act shall take effect immediately and shall be applicable for awards made for the 2002-2003 academic year and shall expire on June 30, 2010, when upon such date the provisions of this act shall be deemed repealed, except that any rules and regulations necessary for the timely implementation of this act on its effective date shall be promulgated on or before such date. (Amd, L 2006, ch 125, § 2, eff July 5, 2006.).

Laws 2002, ch 176, §§ 1 and 8, eff July 23, 2002, deemed eff April 1, 2001, provides as follows:

Section 1. Legislative intent. The legislature hereby finds that the heinous acts of terrorism of September 11, 2001,

perpetrated on the citizens of New York state, the United States of America and eighty other Nations, shall not stand as an obstacle to the health, welfare and future success of the families of these innocent victims, and those victims who survived the attack. In honor of these heroic individuals, especially the firefighters, police officers, peace officers, and emergency medical service workers, the legislature hereby creates the world trade center memorial scholarships. The legislature further finds that these scholarships will not only serve as a fitting tribute to those who have made the supreme sacrifice, or have become severely disabled, but will also serve to extend the hand of opportunity to spouses, children, financial dependents and surviving victims. This act shall provide recipients with undergraduate awards covering the cost of attending institutions of the state university and the city university as defined in this act, or a commensurate amount to attend a private college or university in New York state.

§ 8. This act shall take effect immediately and shall be deemed to have been in full force and effect on and after April 1, 2001, and shall be applicable for awards made for the 2001-2002 academic year.

Laws 2005, ch 412, § 3, eff Aug 2, 2005, deemed eff on and after April 1, 2001, provides as follows:

§ 3. This act shall take effect immediately and shall be deemed to have been in full force and effect on and after April 1, 2001, and shall be applicable for awards made for the 2001-02 academic year and each following academic year.

Laws 2009, ch 57, § 3, eff April 7, 2009, deemed eff on and after April 1, 2009, provides as follows:

§ 3. This act shall take effect immediately and shall be deemed to have been in full force and effect on and after April 1, 2009, and shall be applicable for awards made for the 2009-10 academic year and each following academic year.

Amendment Notes The 2018 amendment by ch 476, § 114, substituted "firefighters" for "firemen" in 4.

Notes to Decisions

Analysis

1. In general
2. Under former § 604

1. In general

It was neither arbitrary nor capricious for Department of Audit and Control to disallow certain tuition assistance program awards and demand recoupment thereof on ground that students at private business school were taught by unlicensed and unlicensable faculty members since school had been advised of relevant licensing regulations, agency's interpretation of regulations was reasonable, and, despite receiving opportunity to obtain after-the-fact licensure of its instructors, school failed to show that faculty members in question were licensed or licensable. Royal Business School, Inc. v New York State Dep't of Education, 141 A.D.2d 170, 534 N.Y.S.2d 489, 1988 N.Y. App. Div. LEXIS 10106 (N.Y. App. Div. 3d Dep't 1988).

It was neither arbitrary nor capricious for Department of Audit and Control to disallow certain tuition assistance program awards and demand recoupment thereof on ground that students who had taken leave of absence for full term of school year were not pursuing programs in which they had enrolled as provided by 8 NYCRR § 145-2.2(b)(3), which requires students to receive passing or failing grade in at least ½ of minimum amount of full-time study "during each term of study"; despite school's assertion, regulation could not be satisfied when student missed entire term but completed all course work in another term of same school year, with net rate of completion being required 50 percent. Royal Business School, Inc. v New York State Dep't of Education, 141 A.D.2d 170, 534 N.Y.S.2d 489, 1988 N.Y. App. Div. LEXIS 10106 (N.Y. App. Div. 3d Dep't 1988).

Where students enrolled in institutions for higher education are receiving both public assistance and state funded educational grants, portion of state educational grant allocated to maintenance and living expenses rather than to actual educational expenses may be considered as income thereby reducing eligibility for public assistance funds; federally funded educational grants may not be used to reduce public assistance eligibility but students receiving both state and federal educational assistance may have public assistance eligibility reduced by amount by which state educational funds added to federal funds exceed actual educational expenses. Hayes v City University of New York, 454 F. Supp. 1118, 1978 U.S. Dist. LEXIS 16800 (S.D.N.Y. 1978).

2. Under former § 604

This section prescribes the manner in which the Commissioner shall exercise the powers conferred on him and perform the duties imposed, and in the exercise of these functions the action of the Commissioner is properly reviewable by certiorari. People ex rel. Anthony v Graves, 244 A.D. 860, 279 N.Y.S. 847, 1935 N.Y. App. Div. LEXIS 6853 (N.Y. App. Div. 1935).

Under this section Commissioner is given power to select soldiers, sailors, marines, and trained nurses who served in the World War, or their children, and award them certain scholarships in colleges in New York State, and to hold examinations for that purpose. People ex rel. Anthony v Graves, 244 A.D. 860, 279 N.Y.S. 847, 1935 N.Y. App. Div. LEXIS 6853 (N.Y. App. Div. 1935).

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

15A Am Jur 2d (Rev ed), Colleges and Universities § 20.

§ 608. World trade center memorial scholarships

1. Notwithstanding subdivisions three and five of section six hundred sixty-one of this title, children, spouses and financial dependents of innocent victims who have died or have been severely and permanently disabled, or those innocent victims who have become severely and permanently disabled as a direct result of an injury sustained in the impact area of the September eleventh, two thousand one attack on the United States of America, shall be eligible to receive a scholarship in an annual amount determined pursuant to subdivision two of section six hundred sixty-eight-d of this title. The attack on the United States of America shall consist of the attack on the world trade center, the attack on the Pentagon and the hijackings and crashes of United Airlines flights 93 and 175 and American Airlines flights 11 and 77.

2. Awards under this section shall be payable for each of not more than four academic years of undergraduate study or five academic years if a program normally requires five years, as defined by the commissioner pursuant to this article.

HISTORY:

Add, L 2002, ch 176, § 2, eff July 23, 2002, deemed eff April 1, 2001.

Prior Law: Former § 608, add, L 1969, ch 1154, § 1; repealed, L 1974, ch 942, § 14, eff July 1, 1975.

Prior § 608, add, L 1947, ch 820, with substance transferred from § 78; amd, L 1948, ch 587, § 1, L 1949, ch 379, § 1, L 1949, ch 687, § 13, L 1949, ch 721, § 1, L 1950, ch 547, § 2, L 1951, ch 491, § 1, L 1951, ch 495, § 1, L 1952, ch 11, § 1, L 1953, ch 66, § 1, L 1953, ch 448, § 2, L 1954, ch 11, § 1, L 1955, ch 140, § 1, L 1956, ch 111, § 1, L 1957 ch 842, § 1, L 1959, ch 308, § 1, L 1961, ch 391, § 5, L 1966, ch 358, § 1, L 1968, ch 651, §§ 1, 2; repealed, L 1969, ch 1154, § 1, eff July 1, 1969.

Editor's Notes Laws 2002, ch 176, §§ 1 and 8, eff July 23, 2002, deemed eff April 1, 2001, provides as follows:

Section 1. Legislative intent. The legislature hereby finds that the heinous acts of terrorism of September 11, 2001,

perpetrated on the citizens of New York state, the United States of America and eighty other Nations, shall not stand as an obstacle to the health, welfare and future success of the families of these innocent victims, and those victims who survived the attack. In honor of these heroic individuals, especially the firefighters, police officers, peace officers, and emergency medical service workers, the legislature hereby creates the world trade center memorial scholarships. The legislature further finds that these scholarships will not only serve as a fitting tribute to those who have made the supreme sacrifice, or have become severely disabled, but will also serve to extend the hand of opportunity to spouses, children, financial dependents and surviving victims. This act shall provide recipients with undergraduate awards covering the cost of attending institutions of the state university and the city university as defined in this act, or a commensurate amount to attend a private college or university in New York state.

§ 8. This act shall take effect immediately and shall be deemed to have been in full force and effect on and after April 1, 2001, and shall be applicable for awards made for the 2001-2002 academic year.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

World Trade Center Memorial Scholarships. 8 NYCRR § 2201.2.

ARTICLE 14 New York State Higher Education Services Corporation

Part

II. Student Financial Aid

HISTORY:

Add, L 1974, ch 942, § 16, eff July 1, 1975.

PART II

STUDENT FINANCIAL AID

SUBPART II. General Awards

Section

668-a. Regents awards for children of deceased police officers, peace officers, firefighters and volunteer firefighters
668-b. Memorial scholarships for children, spouses and financial dependents of deceased firefighters, volunteer firefighters, police officers, peace officers, and emergency medical service workers
668-d. World trade center memorial scholarships
669-d. New York state math and science teaching incentive program

HISTORY:

Add, L 1974, ch 942, § 16, eff July 1, 1975.

SUBPART II General Awards

HISTORY:

Add, L 1974, ch 942, § 16, eff July 1, 1975.

§ 668-a. Regents awards for children of deceased police officers, peace officers, firefighters and volunteer firefighters

1. Eligible students. Awards shall be made to resident children of police officers and peace officers as defined in the criminal procedure law, firefighters and volunteer firefighters and correction officers of the state or any political subdivision thereof, or volunteer firefighters of fire departments or companies under contract to provide fire protection to a municipality or fire district who have died as a result of an injury sustained in the line of duty.

2. Amount and duration. Every recipient shall receive an annual award of four hundred fifty dollars for each of not more than four academic years of undergraduate study or five academic years if a program normally requires five years, as defined by the commissioner pursuant to article thirteen of this chapter.

3. Notwithstanding any inconsistent provision of this chapter, no child of a correction officer of the state who is receiving an award under the provisions of section six hundred sixty-nine of this article shall receive an award under the provisions of this section.

HISTORY:

Add, L 1981, ch 887, § 3, eff July 1, 1982; amd, L 1982, ch 762, § 1, eff July 27, 1982; L 1983, ch 320, § 1, eff July 1, 1983; L 1984, ch 432, § 1, eff July 1, 1985; L 1987, ch 335, §§ 3, 4, eff July 1, 1988; L 1999, ch 568, § 1, eff April 1, 2000 (see 1999 note below).

Editor's Notes: Laws 1999, ch 568, § 3, eff April 1, 2000, provides as follows:

§ 3. This act shall take effect April 1, 2000 and shall be first effective for awards made for the 2000–2001 academic year.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 610, 668-b.

§ 668-b. Memorial scholarships for children, spouses and financial dependents of deceased firefighters, volunteer firefighters, police officers, peace officers, and emergency medical service workers

1. Notwithstanding subdivision five of section six hundred sixty-one of this article, children, spouses or the financial dependents of firefighters, volunteer firefighters, police officers, peace officers, and emergency medical service workers who have died as a result of an injury sustained in the line of duty, in service to the state of New York shall be eligible to receive an annual amount determined pursuant to subdivision two of section six hundred sixty-eight-d of this article. Any award pursuant to this section shall be inclusive of any amount the student would otherwise be eligible for pursuant to section six hundred sixty-eight-a or six hundred sixty-eight-d of this article.

2. Awards under this section shall be payable for each of not more than four academic years of undergraduate study or five academic years if a program normally requires five years, as defined by the commissioner pursuant to article thirteen of this title.

HISTORY:

Add, L 1989, ch 349, § 1, eff July 12, 1989 (see 1989 note below); amd, L 1992, ch 314, § 2, eff July 17, 1992 (see 1992 note below); L 1995, ch 83, § 360, eff June 20, 1995, deemed eff April 1, 1995 (see 1995 note below); L 1999, ch 568, § 2, eff April 1, 2000 (see 1999 note below); L 2002, ch 176, § 5, eff July 23, 2002, deemed eff April 1, 2001 (see 2002 note below).

Editor's Notes: Laws 1989, ch 349, § 2, eff July 12, 1989, provides as follows:

§ 2. This act shall take effect immediately; provided, however, that any awards payable hereunder shall first become available in the 1991–1992 academic yar.

Laws 1992, ch 314, § 3, eff July 17, 1992, provides as follows:

§ 3. This act shall take effect immediately; provided, however, that any awards payable hereunder shall first become available in the 1993–1994 academic year.

Laws 1995, ch 83, § 362, sub 27, eff June 20, 1995, provides as follows:

§ 362. This act shall take effect immediately provided however:

27. Sections three hundred fifty-four through three hundred sixty of this act shall take effect immediately and shall be deemed to have been in full force and effect on and after April 1, 1995 and shall be first effective for awards made for the 1995–1996 academic year.

Laws 1999, ch 568, § 3, eff April 1, 2000, provides as follows:

§ 3. This act shall take effect April 1, 2000 and shall be first effective for awards made for the 2000–2001 academic year.

Laws 2002, ch 176, §§ 1 and 8, eff July 23, 2002, deemed eff April 1, 2001, provides as follows:

Section 1. Legislative intent. The legislature hereby finds that the heinous acts of terrorism of September 11, 2001, perpetrated on the citizens of New York state, the United States of America and eighty other Nations, shall not stand as an obstacle to the health, welfare and future success of the families of these innocent victims, and those victims who survived the attack. In honor of these heroic individuals, especially the firefighters, police officers, peace officers, and emergency medical service workers, the legislature hereby creates the world trade center memorial scholarships. The legislature further finds that these scholarships will not only serve as a fitting tribute to those who have made the supreme sacrifice, or have become severely disabled, but will also serve to extend the hand of opportunity to spouses, children, financial dependents and surviving victims. This act shall provide recipients with undergraduate awards covering the cost of attending institutions of the state university and the city university as defined in this act, or a commensurate amount to attend a private college or university in New York state.

§ 8. This act shall take effect immediately and shall be deemed to have been in full force and effect on and after April 1, 2001, and shall be applicable for awards made for the 2001-2002 academic year.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Regents awards for children of deceased police officers, peace officers, firefighters and volunteer firefighters, § 668-a.

§ 668-d. World trade center memorial scholarships

1. Eligible groups. Notwithstanding subdivisions three and five of section six hundred sixty-one of this article, children, spouses and financial dependents of innocent victims who have died or have been severely and permanently disabled, or those innocent victims who have become severely and permanently disabled as a direct result of an injury sustained in the impact area of the September eleventh, two thousand one attack on the United States of America, shall be eligible to receive a memorial scholarship. The attack on the United States of America shall consist of the attack on the world trade center, the attack on the Pentagon and the hijackings and crashes of United Airlines flights 93 and 175 and American Airlines flights 11 and 77.

2. Amount. (a) The president shall grant annual scholarships in the following amounts:

(1) If the recipient attends an institution of the city university of New York or an institution of the state university of New York other than the statutory colleges at Cornell, the college of environmental science and forestry at Syracuse and the college of ceramics at Alfred, the annual award shall be an amount equal to: the tuition charged at such institution provided that, notwithstanding any provision of law to the contrary, the tuition charged to award recipients shall not exceed that charged to state resident students attending such institution; the mandatory fees charged at such institution; and the non-tuition cost of attendance at such institution or college, provided that the scholarship shall not exceed an amount that is equal to the total cost of attendance determined for federal Title IV student financial aid purposes, less all other scholarships and grants provided by New York state, other states, the federal government, or other governments, and the amount of educational benefits paid under any program that would duplicate the purposes of this program, provided that any scholarships or grants provided to a recipient by the institution which are intended to fund any portion of the difference between the annual state award and the actual costs of attendance at any such institution shall not be considered to duplicate the purposes of this program; or

(2) If the recipient attends any other approved program within New York state, the annual award shall be based upon an amount equal to: the tuition charged to state resident students attending a four-year college of the state university of New York; the average mandatory fees charged at four-year colleges of the state university of New York, or the actual tuition and fees charged to the recipient, whichever is less; and the average non-tuition cost of attendance, as determined by the president and as approved by the director of the budget, for a student at the state university of New York or actual non-tuition cost of attendance at such institution, whichever is less, provided that the scholarship shall not exceed an amount that is equal to the total cost of attendance determined for federal Title IV student financial aid purposes, less all other scholarships and grants provided by New York state, other states, the federal government, or other governments, and the amount of educational benefits paid under any program that would duplicate the purposes of this program, provided that any scholarships or grants provided to a recipient by the institution which are intended to fund any portion of the difference between the annual state award and the actual costs of attendance at any such institution shall not be considered to duplicate the purposes of this program.

(3) Notwithstanding paragraph a of subdivision four of section six hundred sixty-one of this article, if the recipient is a New York state resident and, on

September eleventh, two thousand one, was matriculated and in attendance in an institution of higher education that provides a two-year or four-year program of instruction for which the institution awards an associate or baccalaureate degree and which is eligible to participate in a program under Title IV of the Higher Education Act of 1965, as amended or any successor statutes located outside of New York state, the annual award shall be based upon an amount equal to: the tuition charged to state resident students attending a four-year college of the state university of New York; the average mandatory fees charged at four-year colleges of the state university of New York or the actual tuition and fees charged to the recipient, whichever is less; and the average non-tuition cost of attendance, as determined, by the president and as approved by the director of the budget, for a student at the state university of New York or actual non-tuition cost of attendance at such institution, whichever is less, provided that the scholarship shall not exceed an amount that is equal to the total cost of attendance determined for federal Title IV student financial aid proposes, less all other scholarships and grants provided by New York state, other states, the federal government, or other governments, and the amount of educational benefits paid under any program that would duplicate the purposes of this program, provided that any scholarships or grants provided to a recipient by the institution which are intended to fund any portion of the difference between the annual state award and the actual annual costs of attendance at any such institution shall not be considered to duplicate the purposes of this program.

(4) "Non-tuition cost of attendance", as used in this subdivision, shall mean: (i) the actual amount charged by the institution for room and board, and (ii) an allowance for transportation, books and supplies as determined by the president and as approved by the director of the budget, provided that such determination shall be made no later than December first of each year for use in the succeeding academic year. In the event a student does not incur room or board charges at the institution, "non-tuition cost of attendance" shall mean an allowance for room and board as determined by the president and approved by the director of the budget. In determining allowances pursuant to this subparagraph, the president may take into consideration the allowances provided for in the Pell grant program.

(b) In no event shall the combination of all student financial aid received by a student exceed a recipient's total cost of attendance at the institution being attended.

3. Duration. Awards under this section shall be payable for each of not more than four academic years of undergraduate study or five academic years if a program normally requires five years, as defined by the commissioner pursuant to article thirteen of this title.

HISTORY:

Add, L 2002, ch 176, § 3, eff July 23, 2002, deemed eff April 1, 2001 (see 2002 note below).

Editor's Notes: Laws 2002, ch 176, §§ 1 and 8, eff July 23, 2002, deemed eff April 1, 2001, provides as follows:

Section 1. Legislative intent. The legislature hereby finds that the heinous acts of terrorism of September 11, 2001, perpetrated on the citizens of New York state, the United States of America and eighty other Nations, shall not stand as an obstacle to the health, welfare and future success of the families of these innocent victims, and those victims who survived the attack. In honor of these heroic individuals, especially the firefighters, police officers, peace officers, and emergency medical service workers, the legislature hereby creates the world trade center memorial scholarships. The legislature further finds that these scholarships will not only serve as a fitting tribute to those who have made the supreme sacrifice, or have become severely disabled, but will also serve to extend the hand of opportunity to spouses, children, financial dependents and surviving victims. This act shall provide recipients with undergraduate awards covering the cost of attending institutions of the state university and the city university as defined in this act, or a commensurate amount to attend a private college or university in New York state.

§ 8. This act shall take effect immediately and shall be deemed to have been in full force and effect on and after April 1, 2001, and shall be applicable for awards made for the 2001-2002 academic year.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

World Trade Center Memorial Scholarships. 8 NYCRR § 2201.2.

Federal Aspects:

Title IV of the Higher Education Act of 1965, cited in statutory text, appears as 20 USCS §§ 1070 et seq.

§ 669-d. New York state math and science teaching incentive program

1. Eligibility. Notwithstanding subdivision five of section six hundred sixty-one of this part, undergraduate and/or graduate students who are matriculated in an approved undergraduate or graduate program at degree granting institutions leading to a career as a math or science teacher in secondary education shall be eligible for an award under this section, provided the applicant: (a) signs a contract with the corporation agreeing to teach in the classroom on a full-time basis for five years in the field of math or science in a school located within New York state providing secondary education recognized by the board of regents or the university of the state of New York; and (b) complies with the applicable provisions of this article and all requirements promulgated by the corporation for the administration of the program.

2. Within amounts appropriated therefor, awards shall be granted to applicants that the corporation has certified are eligible to receive such awards. Up to five hundred awards may be made to new recipients annually. Such awards shall be made to recipients after the successful completion of each academic year, as defined by the corporation.

3. An award shall entitle the recipient to annual payments for not more than four academic years of full-time undergraduate study and one academic year of full-time graduate study leading to certifica-

tion as a classroom teacher in mathematics or science.

4. Recipients shall receive an annual payment for the successful completion of an academic year, equal to the annual tuition charged to state resident students attending an undergraduate program full-time at the state university of New York, or actual tuition charged, whichever is less.

5. The corporation shall convert to a student loan the full amount of the award given pursuant to this section, plus interest, according to a schedule to be determined by the corporation if: (a) two years after the completion of the degree program and receipt of initial certification it is found that a recipient is not teaching in the field of math or science in a school located within New York state providing secondary education recognized by the board of regents or the university of the state of New York; or (b) a recipient has not taught in the field of math or science in a school located within New York state providing secondary education recognized by the board of regents or the university of the state of New York for five of the seven years after the completion of the degree program and receipt of initial certification; or (c) a recipient fails to complete their degree program or changes majors to an undergraduate degree program other than in science or math; or (d) a recipient fails to receive or maintain their teaching certificate or license in New York state; or (e) a recipient fails to respond to requests by the corporation for the status of his or her academic or professional progress. The terms and conditions of this subdivision shall be deferred for any interruption in undergraduate or graduate study or employment as established by the rules and regulations of the corporation. Any obligation to comply with such provisions as outlined in this section shall be cancelled upon the death of the recipient. Notwithstanding any provisions of this subdivision to the contrary, the corporation is authorized to promulgate rules and regulations to provide for the waiver or suspension of any financial obligation which would involve extreme hardship.

6. The corporation is authorized to promulgate rules and regulations necessary for the implementation of the provisions of this section, including the criteria for the provision of awards on a competitive basis and the rate of interest charged for repayment of the student loan.

HISTORY:

Add, L 2006, ch 58, § 2 (Part P), eff April 12, 2006, deemed eff on and after July 1, 2006 (see 2006 note below); amd, L 2006, ch 109, § 1 (Part H-1), eff June 23, 2006; L 2016, ch 54, § 5 (Part G), effective April 4, 2016.

Editor's Notes: Laws 2006, ch 58, § 3 (Part P), eff April 12, 2006, deemed eff on and after July 1, 2006, provides as follows:

§ 3. This act shall take effect immediately and shall be deemed to have been in full force and effect on and after July 1, 2006, and the payment of tuition reimbursement for study in the 2006-07 academic year shall first be made in the 2007-08 academic year.

Amendment Notes The 2016 amendment by ch 54, § 5 (Part G), added the last two sentences of 5.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

New York State math and science teaching incentive program. 8 NYCRR § 2201.10.

ARTICLE 17 Instruction in Certain Subjects

Section

804-c. Cardiopulmonary resuscitation instruction
804-d. Automated external defibrillator instruction
807. Fire and emergency drills
807-a. Fire inspections.
807-b. College fire inspections
807-c. Transmission of fire alarm to fire department
807-d. Locating source of fires in schools
808. Instruction in fire and arson prevention

HISTORY:

Add, L 1947, ch 820, eff July 1, 1947, with substance transferred from former Articles 26–29.

§ 804-c. Cardiopulmonary resuscitation instruction

1. Instructions regarding cardiopulmonary resuscitation may be offered for voluntary admission as a part of the health education curriculum in all senior high schools. In addition to the requirement that all teachers of health education shall be certified to teach health, persons instructing pupils in cardiopulmonary resuscitation shall possess valid certification by an agency offering such certification in the performance of cardiopulmonary resuscitation and in its instruction.

2. The commissioner may prescribe regulations governing such health education courses which shall include instruction in cardiopulmonary resuscitation. Such regulations shall in no event prescribe a course of study in cardiopulmonary resuscitation which sets forth standards for instruction of a lesser quality than the requirements of the programs adopted by the American Heart Association or the American Red Cross.

3. School authorities that choose to offer such course shall provide the needed facilities, time and place for the instruction set forth herein and shall provide learning aids and curriculum resource materials to support such course of study.

HISTORY:

Add, L 1999, ch 269, § 1, eff Aug 1, 1999 (see 1999 note below).

Editor's Notes: Laws 1999, ch 269, § 2, eff Aug 1, 1999, provides as follows:

§ 2. This act shall take effect on the first day of August next succeeding the date on which it shall have become a law; provided, however, that any rules or regulations necessary for the timely implementation of this act on its effective date shall be promulgated on or before such date.

§ 804-d. Automated external defibrillator instruction

Instructions regarding the correct use of an automated external defibrillator shall be included as a part of the health education curriculum in all senior high schools when cardiopulmonary resuscitation instruction is being provided as authorized by sec-

tion eight hundred four-c of this article. In addition to the requirement that all teachers of health education shall be certified to teach health, persons instructing pupils in the correct use of automated external defibrillators shall possess valid certification by a nationally recognized organization or the state emergency medical services council offering certification in the operation of an automated external defibrillator and in its instruction.

HISTORY:

Add, L 2005, ch 315, § 1, eff Jan 22, 2006 (see 2005 note below).

Editor's Notes: Laws 2005, ch 315, § 2, eff Jan 22, 2006, provides as follows:

§ 2. This act shall take effect on the one hundred eightieth day after it shall have become a law and shall apply to any school year commencing on or after such effective date.

§ 807. Fire and emergency drills

1. It shall be the duty of the principal or other person in charge of every public or private school or educational institution within the state, other than colleges or universities, to instruct and train the pupils by means of drills, so that they may in a sudden emergency be able to respond appropriately in the shortest possible time and without confusion or panic. Such drills shall be held at least twelve times in each school year, eight of which required drills shall be held between September first and December thirty-first of each such year. Eight of all such drills shall be evacuation drills, four of which shall be through use of the fire escapes on buildings where fire escapes are provided or through the use of identified secondary means of egress. Four of all such required drills shall be lock-down drills. Drills shall be conducted at different times of the school day. Pupils shall be instructed in the procedure to be followed in the event that a fire occurs during the lunch period or assembly, provided however, that such additional instruction may be waived where a drill is held during the regular school lunch period or assembly. Four additional drills shall be held in each school year during the hours after sunset and before sunrise in school buildings in which students are provided with sleeping accommodations. At least two additional drills shall be held during summer school in buildings where summer school is conducted, and one of such drills shall be held during the first week of summer school.

1-a. In the case of after-school programs, events or performances which are conducted within a school building and which include persons who do not regularly attend classes in such school building, the principal or other person in charge of the building shall require the teacher or person in charge of such after-school program, event or performance to notify persons in attendance at the beginning of each such program, event or performance, of the procedures to be followed in the event of an emergency so that they may be able to respond in a timely, orderly manner.

2. It shall be the duty of the board of education or school board or other body having control of the schools in any district or city to cause a copy of this section to be printed in the manual or handbook prepared for the guidance of teachers, where such manual or handbook is in use or may hereafter come into use.

3. It shall be the duty of the person in charge of every public or private college or university within the state, to instruct and train the students by means of drills, so that they may in a sudden emergency be able to leave the college or university building in the shortest possible time and without confusion or panic. Such drills shall be held at least three times in each year, one of which required drills shall be held between September first and December first of each such year. In buildings where summer sessions are conducted, one of such required drills shall be held during the first week of such summer session. At least one of such required drills shall be through use of the fire escapes on buildings where fire escapes are provided. At least one additional drill shall be held in each year during the hours after sunset and before sunrise in college or university buildings in which students are provided with sleeping accommodations.

4. Neglect by any principal or other person in charge of any public or private school or educational institution to comply with the provisions of this section shall be a misdemeanor punishable at the discretion of the court by a fine not exceeding fifty dollars; such fine to be paid to the pension fund of the local fire department where there is such a fund.

HISTORY:

Add, L 1947, ch 820, with substance transferred from former §§ 730–733; amd, L 1953, ch 604; L 1954, ch 443; L 1955, ch 871, § 1; L 1960, ch 277; L 1961, ch 10, eff June 1, 1961; L 1964, ch 765, eff Jan 1, 1965; L 1979, ch 392, § 1, eff July 29, 1979; L 1985, ch 143, § 1, eff June 4, 1985; L 1991, ch 9, § 1, eff Sept 1, 1991; L 2016, ch 54, § 2 (Part B), effective July 1, 2016.

Amendment Notes The 2016 amendment by ch 54, § 2 (Part B), added "and emergency" in the section heading; in 1, substituted "respond appropriately" for "leave the school building" in the first sentence, in the second sentence, deleted "or rapid dismissals" following "Such drills" and substituted "thirty-first" for "first," rewrote the third and fourth sentences, added the fifth sentence, and substituted "Four" for "At least four" in the sixth sentence; and substituted "respond" for "leave the building" in 1-a.

Notes to Decisions

A city ordinance purporting to expand the duties of the board of education of an independent city school district, in relation to fire drills, is without force. 1969 Ops St Compt No. 69-186.

Agency Opinions

There is no statutory authority for a fire company in a district to conduct fire drills in either a public or private school. 1961 NY Ops Atty Gen 119, June 23, 1961 N.Y. AG LEXIS 110 (Informal).

School authorities have a duty to evacuate a school promptly upon receipt of a bomb threat. 1980 NY Ops Atty Gen 99, Jan 2, 1980 N.Y. AG LEXIS 161 (Informal).

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

15 Am Jur Proof of Facts 485, School Fires.

Annotations:

Tort liability of private schools and institutions of higher learning for accidents due to condition of buildings, equipment, or outside premises. 35 ALR3d 975.

Tort liability of private schools and institutions of higher learning for negligence of, or lack of supervision by, teachers and other employees or agents. 38 ALR3d 908.

§ 807-a. Fire inspections.

1. It shall be the duty of the school authorities in general charge of the operation of any public or private school to cause the buildings of such school containing classroom, dormitory, laboratory, physical education, dining or recreational facilities for student use to be inspected at least annually for fire hazards which might endanger the lives of students, teachers and employees therein.

2. The annual fire inspection shall be made prior to the first day of December of every school year and the report thereof shall be filed by the school authorities in the places required by subdivision five of this section no later than the sixteenth day of December of every such year.

3.

a. The school authorities shall cause any fire inspection pursuant to this section to be made by one of the following methods, or any combination of such methods:

(1) Requesting inspection by the fire department of any city, town, village or fire district in which the building is located.

(2) Requesting inspection by a fire corporation which is subject to the provisions of section fourteen hundred two of the not-for-profit corporation law, if such building is located within the area described in the certificate of incorporation of any such corporation.

(3) Requesting inspection by the county fire coordinator, or the officer performing the powers and duties of a county fire coordinator pursuant to a local law, of the county in which the building is located, or by any deputy county fire coordinator or deputy of such other officer so performing the powers and duties of a county fire coordinator designated to make the inspection by the county fire coordinator or such other officer so performing the powers and duties of a county fire coordinator, if the building is located outside a city, town, village, or fire district, which has its own fire department and outside the area described in the certificate of incorporation of any fire corporation which is subject to the provisions of section fourteen hundred two of the not-for-profit corporation law.

(4) Requesting inspection by a fire inspector, who holds a valid certification.

b. If any fire department, certified fire inspector or fire corporation described in subparagraphs one, two, and four of paragraph a of this subdivision shall fail or refuse to make a fire inspection promptly after having been requested to do so by the school authorities, the request shall be denied in writing to the school authorities with an explanation of why such request was denied. In no event may an authority who is otherwise required by law to conduct fire inspections in such municipality or a county fire coordinator refuse a request by a school authority for such inspection.

c. Regardless of the method or methods used to accomplish the inspection required by this section, the authority making the inspection shall file the report thereof with the school authorities no later than the first day of December.

4. The state fire administrator shall prescribe the form of the fire inspection report and the commissioner shall furnish a supply of such form to school authorities annually, either by mail or electronically. In prescribing such form the state fire administrator shall consider standards for fire safety set forth in the state building construction code, the state building conservation and fire prevention code, the regulations of the commissioner and other safety standards.

5. a. The report of any fire inspection shall be filed in the office of the school authorities and with the commissioner. All such reports filed in any public office shall be kept as public records for at least three years after which period they may be destroyed.

b. Within twenty days after the report is filed with the school authorities, the school authorities shall cause public notice of the filing of such report to be given in substantially the following form: "Notice is hereby given that the annual inspection for (year) of the school building (or of the and school buildings) of (name of school district or private school) for fire hazards which might endanger the lives of students, teachers and employees therein, has been completed and the report thereof is available at the office of (school district or private school) at for inspection by all interested persons". If the inspection was not made for the school authorities by the fire department or fire company responsible for fire protection of the building, such authorities shall cause a copy of such notice to be mailed or electronically transmitted to the chief of such fire department or company.

c. The school authorities of public schools shall cause such notice to be published on the school's website or at least once in the official newspaper, or if there is no official newspaper, in a newspaper having general circulation in the school district, and if there is no newspaper having general circulation in the district, shall cause such notice to be posted in ten conspicuous places in the district. Proof of publication or posting of such notice and of the mailing of a copy of such notice to the fire chief shall be filed in the office of the district.

d. The school authorities of private schools shall cause such notice to be published on the school's website or at least once in a newspaper having general circulation in the postal area in which the school building is located, and if there is no newspaper having general circulation in such postal area, shall cause such notice to be posted in ten conspicuous places in such postal area. Proof of posting or

publication of such notice and of the mailing of a copy of such notice to the fire chief shall be filed in the school office.

e. If the report shows any alleged deficiencies, the school authorities shall provide the details of such deficiencies and the proposed actions to be taken to correct such deficiencies to the local government that administers and enforces the uniform fire prevention and building code for the municipality in which the building is located.

6. a. It shall be the duty of the commissioner to ascertain annually whether the inspections of school buildings required by this section have been made and the reports of the inspection have been filed in their respective offices. The commissioner shall review the reports of inspection filed pursuant to this section and may make recommendations to the school authorities with respect to any problems relating to school fire safety noted in such reports. The commissioner shall require a re-inspection of school buildings where a report of inspection identified violations until it is demonstrated to the satisfaction of the commissioner that said violations have been corrected. In the event that a public school fails to correct violations following a re-inspection, the commissioner may deny an annual certificate of occupancy to such school building. The commissioner may inspect or cause to be inspected at any reasonable time for fire prevention and fire protection purposes the school buildings required to be inspected by this section.

b. In the event a private school has failed to file an annual fire safety report with the department within ninety days of the sixteenth of December, the commissioner shall inspect or request an appropriate local authority, described in subdivision seven of this section, to inspect the school. If a private school either refuses access for an inspection pursuant to this paragraph, or does not correct violations identified in such report in a timely manner, the commissioner shall immediately notify, in writing, the local government who issues the certificate of occupancy for the school of their failure to file a fire safety report.

7. a. Every public or private school required to be inspected as hereinabove provided may be inspected for fire prevention and fire protection purposes at any reasonable time by:

(1) the chief of the fire department of the city, town, village or fire district in which the school is located,

(2) the chief of a fire corporation having its headquarters outside a village or fire district, if the school is located in the area described in the certificate of incorporation of such company,

(3) the chief of the fire department or fire company affording fire protection to a fire district, fire protection district, or fire alarm district pursuant to a contract, if the school is located in any such district,

(4) the member of any fire department or fire company listed in subparagraph one, two or three of this paragraph assigned by the chief thereof the duty of inspecting school buildings

(5) the fire inspector, who holds a valid certification, of any city, town, village or fire district in which the building is located.

b. In no event shall the school authorities of any public or private school, required to be inspected as hereinabove provided, refuse access at any reasonable time to any person described in subparagraphs one, two, three, four or five of paragraph a of this subdivision, who appears for the purpose of conducting an inspection for fire prevention or fire protection purposes; provided, however, that the administrator or the designee of the administrator of the school to be inspected shall be given the opportunity to be present during the inspection.

8. The term "school authorities", as used in this section, means, in relation to public schools, the trustees, or board of education, or corresponding officers, whether one or more, and by whatever name known of a city school district, or other school district however created, or, in relation to private schools, the board of trustees, board of directors, or other governing board in general charge of the operation of any such school.

9. The term "private school", as used in this section, means:

a. Any nursery school or kindergarten attended by six or more pupils three years of age or older which may apply for registration by the New York state education department pursuant to part one hundred twenty-five of title eight of the official compilation of codes, rules and regulations of the state of New York; provided, however, that this section shall not apply to day care facilities possessing a valid permit as required by section three hundred ninety of the social services law; or

b. Any establishment, other than a public school, attended by twenty-five or more pupils for the purpose of receiving the instruction of academic grade at the elementary or secondary level required by part one of article sixty-five of this chapter.

10. This section shall not apply to the school authorities in the cities of New York, Buffalo, Rochester, Syracuse and Yonkers or to colleges and universities.

HISTORY:

Add, L 1955, ch 871, § 2, eff April 29, 1955; amd, L 1956, ch 36; L 1962, ch 279; L 1963, ch 981, §§ 1–4, eff July 1, 1963; L 1964, ch 607, §§ 1–3, eff July 1, 1964; L 1965, ch 40, eff April 13, 1965; L 1971, ch 284, §§ 1–3, eff May 18, 197; L 1971, ch 700, eff June 22, 1971; L 1974, ch 511, § 5, eff May 23, 1974; L 1975, ch 464, § 8; L 1976, ch 212, § 1, eff May 25, 1976; L 1976, ch 380, eff July 1, 1976; L 1979, ch 225, § 11, eff Sept 1, 1979; L 1981, ch 536, § 1, eff July 15, 1981; L 2006, ch 165, § 1, eff July 26, 2006; L 2019, ch 679, § 1, effective February 15, 2020.

Editor's Notes Laws 2019, ch 679, § 3, eff February 15, 2020, provides:

§ 3. This act shall take effect on the sixtieth day after it shall have become a law.

Amendment Notes The 2019 amendment by ch 679, § 1, rewrote the section.

Notes to Decisions

Division of Homeland Security and Emergency Services properly denied a request by an employee of the Office of Fire Prevention and Control (OFPC) for approval of activities outside his employment, as the Division had a rational basis to conclude that a potential conflict of interest existed because the Commissioner of Education could request the OFPC to inspect the same school buildings. Matter of Mallick v New York State Div. of Homeland Sec. & Emergency Servs., 145 A.D.3d 1172, 43 N.Y.S.3d 183, 2016 N.Y. App. Div. LEXIS 7990 (N.Y. App. Div. 3d Dep't 2016).

A fire district is not required to inspect school buildings located within the fire district but may enter into a contract with the school authorities of the school district (or of a private school) to perform fire inspection services. 1983 Op St Compt No. 83-188, 1983 N.Y. Comp. LEXIS 298.

Agency Opinions

Fire district commissioners of fire districts created under Town Law Article 11 have no authority to use the position title "Fire Marshal", which appears in a general law and several special laws applicable to specific positions in the fire service of particular cities. 1976 NY Ops Atty Gen 189, May 5, 1976 N.Y. AG LEXIS 109 (Informal).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 807-c; CLS Town §§ 176, 184; CLS Vill § 4-412; CLS Vol Fire Ben § 30; CLS Work Comp § 3.

New York State Uniform Fire Prevention and Building Code Act, CLS Exec §§ 370 et seq.

Fire corporations, CLS N-PCL § 1402.

Powers and duties of fire district commissioners, CLS Town § 176.

Fire protection districts, CLS Town § 184.

The board of trustees, CLS Vill § 4-412.

Liability for and payment of benefits, CLS Vol Fire Ben § 30.

Application, CLS Work Comp § 3.

Jurisprudences:

67 Am Jur 2d, Schools § 356.

§ 807-b. College fire inspections

1. It shall be the duty of the college authorities in general charge of the operation of any public or independent college to cause the buildings under the jurisdiction of such college containing classroom, dormitory, fraternities, sororities, laboratory, physical education, dining or recreational facilities for student use to be inspected at least annually for fire hazards which might endanger the lives of students, teachers and employees therein. Inspections of all public and independent college buildings, with the exception of those within a city having a population of one million or more, shall be conducted by the state office of fire prevention and control or a designee of the state fire administrator. An inspection report shall be produced by the inspecting agency for each building inspected.

2. The annual fire inspection for public and independent colleges shall be made when the college is in session.

3. The office of fire prevention and control is authorized to adopt rules and regulations establishing minimum standards for the content and frequency of such inspections in order to ensure compliance with applicable fire safety standards. In the event violations of applicable codes, rules and regulations pertaining to fire safety are found during inspections, the office of fire prevention and control is authorized to take appropriate actions to ensure that violations are promptly remedied.

4. The state fire administrator shall prescribe the format of the fire inspection report. In prescribing such format the state fire administrator shall consider standards for fire safety set forth in the uniform fire prevention and building code and other applicable fire safety standards.

5. Within ninety days of completing such inspection, the office of fire prevention and control or its designee shall file a copy of the report with the office of the college authorities and with the commissioner. All such reports so filed shall be kept as records for at least three years after which period they may be destroyed. A copy of such report shall also be filed with the chief, or other comparable officer, of any fire department or fire corporation which has the regular duty of fighting fire in the building inspected.

6. The office of fire prevention and control or its designee shall make recommendations to the college authorities with respect to any problems relating to building fire safety noted in such reports. The commissioner may inspect or cause to be inspected at any reasonable time for fire prevention and fire protection purposes the buildings required to be inspected by this section. The commissioner may impose a fine of up to five hundred dollars per day upon any public or independent college which fails to remedy, to the satisfaction of the office of fire prevention and control, any violation noted in a report within thirty days of receiving a copy of such report.

7. Every public or independent college building required to be inspected by the office of fire prevention and control or its designee may also be examined for fire protection purposes at any reasonable time by

a. the chief of the fire department of the city, town, village or fire district in which the college building is located,

b. the chief of a fire corporation having its headquarters outside a village or fire district, if the college building is located in the area described in the certificate of incorporation of such company,

c. the chief of the fire department or fire company affording fire protection to a fire district, fire protection district, or fire alarm district pursuant to a contract, if the college building is located in any such district,

d. the member of any fire department or fire company listed in paragraphs a, b or c of this subdivision assigned by the chief.

8. Any person, or any public or other corporation for which any such persons acts, shall not be liable for any error, omission or lack of thoroughness in the making of the inspection and report required or permitted by this section.

9. The term "college authorities", as used in this section, means the board of trustees, board of directors, or other governing board in general charge of the operation of any such college.

10. The term "public college" shall mean and include "state-operated institutions", "statutory or contract colleges" and "community colleges" as defined in section three hundred fifty of this chapter.

11. The term "independent college" shall mean colleges other than those included within subdivision ten of this section.

HISTORY:

Add, L 1964, ch 766, eff Jan 1, 1965; amd, L 1965, ch 40, § 3; L 1968, ch 195, eff April 11, 1968; L 1970, ch 16, § 1, eff Jan 1, 1971; L 1971, ch 264, §§ 1–4; L 1974, ch 511, § 6, eff May 23, 1974; L 1975, ch 464, § 9, eff July 24, 1975, as to retroactive application to April 1, 1975; L 1976, ch 212, eff May 25, 1976; L 1979, ch 225, § 12, eff Sept 1, 1979; L 1979, ch 465, §§ 1–3, eff Sept 1, 1979; L 1983, ch 258, § 1, eff June 8, 1983; L 2002, ch 81, § 1 (Part A), eff Jan 1, 2003 (see 2002 note below).

Editor's Notes: See 1975 note under § 807-a.

Laws 2002, ch 81, § 3 (Part A), eff Jan 1, 2003, provides as follows:

§ This act shall take effect January 1, 2003, provided that the office of fire prevention and control shall have the authority to adopt such rules and regulations and take any actions in advance of such date which are necessary to implement the provisions of this act.

Agency Opinions

Fire district commissioners of fire districts created under Town Law Article 11 have no authority to use the position title "Fire Marshal", which appears in a general law and several special laws applicable to specific positions in the fire service of particular cities. 1976 NY Ops Atty Gen 189, May 5, 1976 N.Y. AG LEXIS 109 (Informal).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS Town § 184; CLS Vill § 4-412; CLS Work Comp § 3.

New York State Uniform Fire Prevention and Building Code Act, CLS Exec §§ 370 et seq.

Fire corporations, CLS N-PCL § 1402.

Fire protection districts, CLS Town § 184.

The board of trustees, CLS Vill § 4-412.

Application, CLS Work Comp § 3.

Codes, Rules and Regulations:

Campus fire safety. 19 NYCRR §§ 500.1 et seq.

Jurisprudences:

26 NY Jur 2d Counties, Towns, and Municipal Corporations § 1093.

27 NY Jur 2d Counties, Towns, and Municipal Corporations § 1166.

5B Am Jur Pl & Pr Forms (Rev ed), Colleges and Universities, Forms 1 et seq.

§ 807-c. Transmission of fire alarm to fire department

1. The school authorities designated in subdivision eight of section eight hundred seven-a of this article in charge of the operation of any public school or of any private school designated in subdivision nine of such section, located in an area within which a fire department or fire company is responsible for fire protection and within which there is no electrically or electronically operated fire alarm reporting system provided for public use may cause the internal fire alarm, fire detection, or fire extinguishing system of each building in which is contained classroom, dormitory, laboratory, physical education, dining or recreational facilities for student use to be interconnected with the fire alarm reporting location or system which is provided for such fire department or fire company to receive alarms from the public so that upon activation of such internal fire alarm, fire detection, or fire extinguishing system a signal will be automatically transmitted to such fire alarm reporting location or system.

2. School authorities and the governing body having jurisdiction of any fire department or fire company are hereby authorized, by agreement between them, to apportion the costs of installing and maintaining any such interconnection, and such costs are hereby deemed appropriate expenditures from the funds of such school authorities and governing bodies.

HISTORY:

Add, L 1970, ch 922, § 1; amd, L 1974, ch 1015, § 1, eff Sept 1, 1974; L 2019, ch 679, § 2, effective February 15, 2020.

Editor's Notes Laws 2019, ch 679, § 3, eff February 15, 2020, provides:

§ 3. This act shall take effect on the sixtieth day after it shall have become a law.

Amendment Notes The 2019 amendment by ch 679, § 2, in 1, substituted "subdivision eight" for "subdivision nine," "this article" for "this chapter" and "subdivision nine" for "subdivision ten."

Agency Opinions

Legislature has authorized agreements between school districts and governing bodies of local fire departments and other emergency service providers that include provision relating to costs of alarm interconnections, including costs associated with false alarms; thus, village by contract may provide for expense of false alarms. 1997 NY Ops Atty Gen 97-26 (Informal), June 13, 1997 NY AG LEXIS 120.

§ 807-d. Locating source of fires in schools

1. In all public and private school buildings having a central annunciator panel or fire alarm cabinet which displays a visual signal identifying any heat detector, smoke detector, or manually operated fire alarm box within the building which has been activated, there shall be provided as a part of or immediately adjacent to such panel or cabinet a chart or plan showing the specific location within the building of each such device.

2. In the case of school buildings and additions to existing school buildings, the construction of which is commenced after September first, nineteen hundred seventy-three, any such panel or cabinet and such chart or plan within such building or addition shall be so located that the same may be read without entering the building.

HISTORY:

Add, L 1973, ch 695, § 1, eff June 11, 1973.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

5B Am Jur Pl & Pr Forms (Rev ed), Colleges and Universities, Forms 1 et seq.

§ 808. Instruction in fire and arson prevention

1. The commissioner is hereby directed to provide and prescribe a course of instruction in fire and arson prevention, injury prevention and life safety education relating to the protection against injury or death and protection of property against loss or

damage as a result of criminally initiated or other preventable fire, for use in the schools of the state, as prescribed by this section. Such course of instruction shall include materials to educate children on the dangers of falsely reporting a criminal incident, an impending explosion or fire emergency involving danger to life or property, an impending catastrophe, or a life safety emergency.

2. The board of education, trustees, principal or other person in charge of every public, private and parochial school in the state shall arrange for giving such course of instruction in every school under its or his control or direction. Such instruction shall be given to all of the pupils in every such school for a period of not less than forty-five minutes in each month during which such school is in session.

HISTORY:

Add, L 1947, ch 820, eff July 1, 1947, with substance transferred from former §§ 735, 736; amd, L 1979, ch 225, § 13, eff Sept 1, 1979; L 1980, ch 581, § 1, eff Sept 1, 1980; L 1999, ch 207, § 4, eff July 6, 1999 (see 1999 note below); L 2005, ch 242, § 1, eff Sept 1, 2005.

Editor's Notes: Laws 1999, ch 207, § 1, eff July 6, 1999, provides as follows:

Section 1. Short title. This act shall be known and may be cited as the "false reporting act of 1999".

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

67 Am Jur 2d, Schools § 297.

Law Reviews:

1982 Survey of New York Law. 34 Syracuse L. Rev. 230.

TITLE II School District Organization

Article 31. School Districts

Section
1501-b. Additional power of boards of education

HISTORY:

Add, L 1947, ch 820, eff July 1, 1947; amd, L 1953, ch 878, § 15, eff April 20, 1953. Articles 51, 52 and 53, contained in former Title III, transferred to and made a part of Title II. Although the 1953 act repealing the title heading and schedule of Articles of Title III made no reference to Articles 40 and 54, formerly contained in Title III, they are also necessarily carried herein as a part of Title II.

ARTICLE 31 School Districts

HISTORY:

Add, L 1947, ch 820, eff July 1, 1947, with substance transferred from former Article 25; amd, L 1953, ch 801, § 50, eff June 1, 1953.

§ 1501-b. Additional power of boards of education

1. The board of education of any school district is hereby authorized and empowered to rent or lease for such consideration as may be determined by such board, a motor vehicle or vehicles owned by the respective school district during any time when such vehicle or vehicles are not needed for the transportation of such children, which are otherwise used for the transportation of the school children of such district to:

(a) any senior citizens center or organization that is recognized and funded by the office for the aging;

(b) any non-profit incorporated organization serving senior citizens;

(c) any non-profit incorporated organization serving the physically or mentally handicapped;

(d) any not-for-profit organization that provides recreation, youth services, or the operation of playgrounds or neighborhood recreation centers;

(e) any municipal corporation, as defined in the general construction law;

(f) any not-for-profit organization providing transportation services in rural counties as defined in section seventy-three-c of the transportation law for children participating in the agricultural child care program authorized by the agriculture and markets law; and

(g) an operator of a coordinated public transportation service, as defined by section seventy-three-c of the transportation law, for the purpose of providing a portion of a coordinated public transportation service plan as authorized by article two-F of the transportation law.

(h) any not-for-profit organization, community based organization, or educational or employment and training agency which provides education or employment and training services for youths and adults in a rural county, as defined by section seventy-three-c of the transportation law.

(i) any fire company as defined in subdivision two of section three of the volunteer firefighters' benefit law, or an ambulance company as defined in subdivision two of section three of the volunteer ambulance workers' benefit law.

2. In the event a school district is wholly or partially located in a county which has appointed a services coordinator as defined in section seventy-three-c of the transportation law, the board of education of such school district is authorized and empowered to contract, for such consideration as it shall determine, to store, maintain and repair any motor vehicle of and provide driver training for the operator of any motor vehicle used to provide a portion of a coordinated public transportation service as authorized by article two-F of the transportation law and owned by any municipal corporation as defined by the general construction law or any not-for-profit incorporated organization providing a portion of a coordinated public transportation services plan as authorized by article two-F of the transportation law. The board of education of such school district shall not enter into such contract until it is determined that it presently has the capability and facilities necessary for provision of such services and that provision of such services will not adversely affect the ability of the district to provide educational services to the children of such school district.

3. The board of education of any school district is also authorized and empowered to contract with an operator of a coordinated public transportation ser-

vice for the purpose of providing any other portion of a coordinated public transportation services plan as authorized by article two-F of the transportation law, provided that such board of education of such school district has determined that it presently has the capability and facilities necessary for provision of such services and that provision of such services will not adversely affect the ability of the district to provide educational services to the school children of such district.

4. In any case where such motor vehicle is leased pursuant to subdivision one of this section or where any services are contracted for pursuant to subdivision two or three of this section, the consideration to be received for such lease or contract shall not be less than the full amount of the costs and expenses resulting from such lease or contract.

(a) For the purposes of this section, the full amount of the costs and expenses resulting from any lease of any vehicle pursuant to subdivision one of this section shall include but not be limited to the costs of operation, maintenance and repair of such vehicle, the current fair market value of the purchase price of the vehicle annualized for the vehicle's remaining useful life, the cost of public liability and property damage insurance, fire insurance and compensation insurance of drivers and the cost of collision insurance in the amount of the value of the vehicle to protect the lessor.

(b) For the purposes of this section, the full amount of the costs and expenses resulting from any contract for services pursuant to subdivision two or three of this section shall include but not be limited to that portion of the costs of any employees, equipment or facilities which can be attributed to the provision of such services.

HISTORY:
Formerly § 1502, add, L 1973, ch 531; amd, L 1974, ch 983, § 1, eff June 13, 1974; L 1979, ch 393, § 1, eff June 29, 1979; L 1988, ch 528, § 1, eff Aug 1, 1988; L 1989, ch 598, § 1, eff July 21, 1989; L 1996, ch 474, § 78, eff Aug 8, 1996, deemed eff July 1, 1996; L 1999, ch 274, § 1, eff July 20, 1999.

Notes to Decisions

Analysis

1. In general
2. Constitutionality

1. In general

Board of education and church provided justiciable controversy in action for declaratory judgment where board of education ended practice of leasing its buses to church for provision of transportation between released-time religious education site and school on basis of board's interpretation of CLS Educ § 1501-b(1)(h). St. James Church v Board of Educ., 163 Misc. 2d 471, 621 N.Y.S.2d 486, 1994 N.Y. Misc. LEXIS 587 (N.Y. Sup. Ct. 1994).

CLS Educ § 1501-b(1)(h) permits board of education to lease its buses to church for transportation between released-time religious education site and school since religious instruction constitutes "education" within meaning of statute. St. James Church v Board of Educ., 163 Misc. 2d 471, 621 N.Y.S.2d 486, 1994 N.Y. Misc. LEXIS 587 (N.Y. Sup. Ct. 1994).

Permissive use of district-owned bus driven by district employee to transport senior citizens to polls was improper, in absence of any statutory provisions which would allow use of school bus in this manner; at minimum, such use presented appearance of impropriety, where senior citizens resided in housing facility managed by incumbent member of board of education. 2000 Op Comm Ed No. 14,308, 2000 NY Educ. Dept. LEXIS 106.

2. Constitutionality

Leasing of buses by board of education to church for transportation between released-time religious education site and school does not violate First Amendment since leasing of buses is straight financial transaction and does not advance any religious purpose. St. James Church v Board of Educ., 163 Misc. 2d 471, 621 N.Y.S.2d 486, 1994 N.Y. Misc. LEXIS 587 (N.Y. Sup. Ct. 1994).

Leasing of buses by board of education to church for transportation between released-time religious education site and school does not violate CLS NY Const Art XI § 3 since leasing of buses is straight financial transaction and does not advance any religious purpose. St. James Church v Board of Educ., 163 Misc. 2d 471, 621 N.Y.S.2d 486, 1994 N.Y. Misc. LEXIS 587 (N.Y. Sup. Ct. 1994).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:
Definitions, CLS Trans § 73-c.

TITLE V Taxation and Financial Administration

Article
73. Apportionment of Public Moneys

HISTORY:
Add, L 1947, ch 820, eff July 1, 1947.

ARTICLE 73 Apportionment of Public Moneys

Part
II. Aidable Transportation Expense

3621. Definitions
3623-a. Allowable transportation expense

HISTORY:
Add, L 1947, ch 820, eff July 1, 1947, with substance transferred from Arts 4–A, 18.

PART II

AIDABLE TRANSPORTATION EXPENSE

HISTORY:
Add, L 1947, ch 820, eff July 1, 1947; amd, L 1996, ch 474, § 81, eff Aug 8, 1996, deemed eff July 1, 1996.

§ 3621. Definitions

As used in this part and subdivision seven of section thirty-six hundred two of this article:

1. "School district" means common school districts, to the extent that they provide transportation of students in grades seven through twelve to a school outside the district, consolidated school districts, central school districts, central high school districts, union free school districts, except special act school districts as defined in section four thousand one of this chapter, and city school districts. Notwithstanding any provision contained in this chapter to the contrary, the transportation aid provided, pursuant to subdivision seven of section thirty-six hundred two of this article and this part

shall not be apportioned and paid to any school district not maintaining a home school, or to a common school for pupils in kindergarten through grade six.

2. a. "Pupil" means a child for whom transportation aid is paid and who lives more than one and one-half miles from the school which he or she attends, measured by the nearest available road to such school, or a child who lives more than one mile from an approved route, measured by the nearest available road to such route, and also lives more than one and one-half miles from the school which he or she attends. Nothing contained in this subdivision shall be deemed to require a school district to furnish transportation to a child who, if a student in an elementary grade, lives less than two miles or, if a student in an academic grade, lives less than three miles from the school which he or she attends, measured by the nearest available road. "Pupil" also means a child living more than one and one-half miles from the school which he or she attends who is transported between home and school by a regional or joint transportation system. "Pupil" also means a child of a pupil legally attending an elementary or secondary school who receives transportation pursuant to paragraph f of subdivision one of section thirty-six hundred thirty-five of this article and who lives more than one and one-half miles from the school which his or her parent attends, measured by the nearest available road to such school, or such a child who lives more than one mile from an approved route, measured by the nearest available road to such route, and also lives more than one and one-half miles from the school which his or her parent legally attends.

b. Notwithstanding the provisions of paragraph a of this subdivision, any school district which provides transportation pursuant to an order of the commissioner, dated the fourth day of August, nineteen hundred seventy-eight, for pupils attending grades kindergarten through four who live more than eight-tenths of a mile but less than one and one-half miles from the school they legally attend shall be entitled to an apportionment on the cost of such transportation pursuant to subdivision seven of section thirty-six hundred two of this article.

c. Notwithstanding the provisions of paragraph a of this subdivision, any school district which provides transportation pursuant to an order of the commissioner, dated the nineteenth day of August, nineteen hundred seventy-seven, for elementary pupils who live more than eight-tenths of a mile but less than one and one-half miles from the school they legally attend, or such other distance as the board of education may establish with the prior approval of the commissioner, shall be entitled to an apportionment on the cost of such transportation pursuant to subdivision seven of section thirty-six hundred two of this article.

3. "Route" means a highway or highways over and upon which a school bus regularly travels in accordance with a schedule maintained for the transportation of pupils from their homes to school.

4. "Total annual mileage" means the actual mileage for all purposes attributable to district-owned school buses for the school year period of July first through June thirtieth, based on odometer readings, including mileage for school buses disposed of during the July first through June thirtieth period.

5. "Total annual allowable mileage" means the actual mileage for transporting pupils to and from school once daily over scheduled routes attributable to district-owned or leased school buses for the school year period of July first through June thirtieth, based [on]* odometer readings, including mileage for school buses disposed of during the July first through June thirtieth period.

6. "School bus" means any vehicle or other means of conveyance used for the purpose of transporting pupils.

7. "Storage" means any school bus garage facilities or sites which may be approved by the commissioner.

8. "Regional or joint transportation system" means a transportation system in which a school district participates pursuant to a contract executed in accordance with paragraph h of subdivision twenty-five of section seventeen hundred nine of this chapter.

9. "District share of the cost of regional or joint transportation systems" shall mean the share of the cost of such transportation prorated among all the school district or districts and board or boards of cooperative educational services participating in the regional or joint transportation, as determined in accordance with regulations promulgated by the commissioner, provided that in no case shall there be any deduction made in determining transportation aid on the basis of bus mileage travelled in transporting children pursuant to a contract executed in accordance with paragraph h of subdivision twenty-five of section seventeen hundred nine of this chapter and provided that transportation aid for [a]* jointly operated transportation system shall be determined in the same manner as for individual school districts.

10. School bus stop-arm. The term "school bus stop-arm" means an auxiliary device conforming to the standards established by the commissioner pursuant to subdivision twenty-one-c of section three hundred seventy-five of the vehicle and traffic law.

11. School bus back up beeper. The term "school bus back up beeper" means an auxiliary device conforming to the standards established by the commissioner pursuant to subdivision twenty-one-d of section three hundred seventy-five of the vehicle and traffic law.

*The bracketed word was inadvertently omitted.

12. School bus front crossing arm. The term "school bus front crossing arm" means an auxiliary device conforming to the standards established by the commissioner pursuant to subdivision twenty-one-e of section three hundred seventy-five of the vehicle and traffic law.

13. School bus safety sensor device. The term "school bus safety sensor device" means an auxiliary device conforming to the standards established by the commissioner pursuant to subdivision twenty-one-f of section three hundred seventy-five of the vehicle and traffic law.

14. "Exterior reflective markings" shall mean the exterior reflective marking required to be attached to school buses pursuant to subdivision twenty-one-h of section three hundred seventy-five of the vehicle and traffic law.

15. School bus engine fire suppression system. The term "school bus engine fire suppression system" shall mean an auxiliary device required to be installed pursuant to subdivision twenty-one-i of section three hundred seventy-five of the vehicle and traffic law and which conforms to standards established by the commissioner of transportation pursuant to such subdivision.

HISTORY:

Add, L 1947, ch 820, with substance transferred from § 110–a; amd, L 1958, ch 714; L 1962, ch 657, § 7; L 1970, ch 122, § 18; L 1972, ch 553, §§ 12, 13, eff May 24, 1972; L 1979, ch 367, § 2, eff July 1, 1979; L 1989, ch 653, § 2; L 1996, ch 474, § 85, eff Aug 8, 1996, deemed eff July 1, 1996; L 1996, ch 476, § 85, eff Aug 8, 1996, deemed eff July 1, 1996; L 1999, ch 525, § 2, eff Sept 28, 1999; L 2005, ch 453, § 2, eff Sept 1, 2006; L 2006, ch 203, § 2, eff Sept 1, 2006.

Editor's Notes: As to repeal and reinstatement of the present section, see 1972 note under Part II.

Laws 2005, ch 453, § 4, eff Sept 1, 2006, provides as follows:

§ 4. This act shall take effect Sept 1, 2006; provided that the department of transportation is authorized to promulgate any and all rules and regulations and take any other measures necessary to implement this act on its effective date on or before such date. (Amd, L 2006, ch 203, § 3, eff Sept 1, 2006).

Amendment Notes:

2006. Chapter 203, § 2 amended:

Sub 15, by deleting "automatic" and "extinguishing" and "extinguishing".

Notes to Decisions

Trial court's summary judgment rulings were proper because an automatic renewal provision in the parties' contract did not violate the term limits rule in N.Y. Educ. Law § 2554(19), and a charter school's location outside a school district did not provide a basis for a cause of action against the school board under N.Y. Educ. Law §§ 3621(2)(a) and 3635(1)(c). Charter Sch. for Applied Tech. v Board of Educ. for City Sch. Dist. of City of Buffalo, 105 A.D.3d 1460, 964 N.Y.S.2d 366, 2013 N.Y. App. Div. LEXIS 2940 (N.Y. App. Div. 4th Dep't 2013).

The legislature intended to give a school district the right to deny public transportation to a parochial school pupil who had a choice of more than one such school and who desired to attend the more distant school. Wenner v Board of Education, 71 Misc. 2d 978, 337 N.Y.S.2d 733, 1972 N.Y. Misc. LEXIS 1421 (N.Y. Sup. Ct. 1972).

Definition of "route" in CLS Educ § 3621(3) is meant to identify regularly scheduled bus route with student pickup points, mileage of which is used in calculating state aid. Arlyn Oaks Civic Ass'n v Brucia, 171 Misc. 2d 634, 654 N.Y.S.2d 1016, 1997 N.Y. Misc. LEXIS 33 (N.Y. Sup. Ct. 1997).

Legislature intended definition of "route" in CLS Educ § 3621(3) to apply only to part II of article 73, and such definition cannot be relied on in applying CLS Educ § 3635. Arlyn Oaks Civic Ass'n v Brucia, 171 Misc. 2d 634, 654 N.Y.S.2d 1016, 1997 N.Y. Misc. LEXIS 33 (N.Y. Sup. Ct. 1997).

Father may not keep children from school one and eight-tenths miles away, notwithstanding school board refuses transportation and unguarded railroad crossing must be traversed. Parent held to be neglecting children. In re Conlin, 130 N.Y.S.2d 811, 1954 N.Y. Misc. LEXIS 2093 (N.Y. Child. Ct. 1954).

Pupil's request for transportation to parochial school is denied because it is beyond approved transportation distance of 15 miles, notwithstanding pupil's contention that measurements were inaccurate because school vehicle's odometer was not calibrated at end of 15 mile interval; there is no requirement in statute, regulation or prior decision of commissioner of board of education that board of education employ particular method of calibration. Re Taylor, 1987 Op Comm Ed No. 11912.

Parent's request to establish new transportation pick-up point for child is denied because icy conditions of area between parent's home and current pick-up point has been corrected by highway department and because parent is responsible for safety of child while traveling to and from school when child is not actually receiving transportation from school district. Re Stroub, 1988 Op Comm Ed No 11944.

Although there may be bus stop in close proximity to student's home, school board lacks authority to pick children up at that stop who live too close to school to be eligible for transportation, even though there may be room on bus for children; eligibility for transportation between home and school must be determined on basis of distance between home and school. Re Pavony, et al., 1988 Op Comm Ed No 11951.

School district is not required to provide transportation to nonpublic school children who are too young to attend public schools of district, even if provision of such transportation would result in no additional cost to district. Re Meyers, 1988 Op Comm Ed No 11961.

Boards of education are not required to provide transportation to nonpublic schools under any and all circumstances; once students arrive at nonpublic school, responsibility for safety and supervision of students is that of nonpublic school authorities; therefore, boards of education should contact private school administrators and obtain co-operation necessary to assure that children are not required to remain on idling school bus for protracted periods. Re Stickley, 1988 Op Comm Ed No 11963.

Rejected was petitioners' position that their children were entitled to transportation between home and school because they resided more than one mile from the entrance of the school they attend, and that the school district's practice of determining eligibility for transportation by measuring from the student's driveway to a side entrance of the elementary school rather than the front entrance of the elementary school was improper and against district policy. A board of education may exercise reasonable discretion in determining the points in which to measure for purposes of determining eligibility for transportation. Such measurements will not be set aside unless the board has been arbitrary, capricious or unreasonable. The record indicates that the school district's practice of measuring from the side rather than the front entrance of the school is consistent with its general practice and with its written policy. Appeal of Mermelstein, 1990 Op Comr Educ No. 12406.

Rejected was petitioners' contention that the manner in which the school district measured the distance to school was improper because it required their children to traverse a walkway across district property. It was their position that the distance from a student's home must be measured by the shortest route along public streets or thoroughfares. It was not unreasonable for the board of education to measure a distance between home and school by including a short cut across the property of a school maintained by the district. The board of education has submitted affidavits that the walkway in question was maintained by the district and cleared debris, ice and snow. Petitioners have, there-

fore, failed to establish that the Board of Education abused its discretion in delineating the route in question. Appeal of Mermelstein, 1990 Op Comr Educ No 12406.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 1604, 1709, 3602.

"Nonpublic school operator", definition in tax refund provision, CLS Tax § 282(11).

Jurisprudences:

94 NY Jur 2d Schools, Universities, and Colleges §§ 317, 320, 324 .

Annotations:

Relief against school board's "busing" plan to promote desegregation. 50 ALR3d 1089.

§ 3623-a. Allowable transportation expense

For the computation of transportation aid pursuant to the requirements of subdivision seven of section thirty-six hundred two of this article and this part, allowable transportation expense shall include expenditures for aidable regular transportation as defined in section thirty-six hundred twenty-two-a of this part, provided that such expense shall be limited to expenditure items listed in subdivision one of this section as transportation operating expense and in subdivision two of this section as transportation capital, debt service and lease expense.

1. Transportation operating expense shall include base year expenditures for the following, provided that such transportation operating expense shall meet the requirements set forth in subdivision three of this section:

a. Computerized bus routing services;

b. Contracting for the transportation of any or all of the pupils attending school in such school district, other than a contract with a public service facility for such transportation operated on routes under franchise;

c. The use of public service facilities on routes operated under franchise or by a municipality or public authority for any or all of the pupils in the district, provided that the allowance for each pupil using such facilities shall not exceed two single fares a day for such pupil multiplied by the number of days which such pupil attends school;

d. The school district's share of the cost of a regional or joint transportation system;

e. The following expenses for district operated transportation systems, including operation of district owned or district leased school buses:

(1) salaries and retirement benefits related to transportation, except salaries and retirement benefits for assistant drivers on buses transporting nondisabled pupils;

(2) employers' social security contributions for transportation personnel for whom salaries are allowable;

(3) health, life and other insurance premiums for transportation personnel for whom salaries are allowable;

(4) premiums for collision and other insurance coverage for school buses;

(5) uniforms for transportation personnel for whom salaries are allowable;

(6) costs incurred by the employer for qualifying criminal history, drivers license, or other required testing attributable to special requirements for drivers of school buses pursuant to state or federal law including pre-employment and random drug and alcohol testing as required under subdivision six of section five hundred nine-g of the vehicle and traffic law;

(7) fuel, oil, tires, chains, maintenance and repairs for school buses;

(8) bridge tolls;

(9) transportation by boat or airplane, because of the location of the school district in relation to the school which the children of the district attend, or required room and board in connection therewith necessitated because of impassable waters or adverse weather conditions, which has been approved by the commissioner;

(10) the consideration for the contract or contracts made for the purpose of providing transportation by horse-drawn vehicle or vehicles, if any school district shall be required to provide such transportation; and

(11) other expenses for district operated transportation systems, as approved pursuant to regulations of the commissioner.

f. Other transportation operating expenses as approved pursuant to regulations of the commissioner.

2. Allowable transportation capital, debt service and lease expense shall include base year expenditures for:

a. The purchase of school buses as approved by the commissioner;

b. The lease, as approved by the commissioner, of a school bus by a school district from another school district, board of cooperative educational services or a county vocational education and extension board, or any school bus leased by a school district from any other source under emergency conditions, as determined by the commissioner, or any school bus leased by a school district from any other source as otherwise authorized by this chapter;

c. The purchase of equipment deemed a proper school district expense, including: (i) the purchase of two-way radios to be used on old and new school buses, (ii) the purchase of stop-arms, to be used on old and new school buses, (iii) the purchase and installation of seat safety belts on school buses in accordance with the provisions of section thirty-six hundred thirty-five-a of this article, (iv) the purchase of school bus back up beepers, (v) the purchase of school bus front crossing arms, (vi) the purchase of school bus safety sensor devices, (vii) the purchase and installation of exterior reflective marking on school buses, (viii) the purchase of automatic engine fire extinguishing systems for school buses used to transport students who use wheelchairs or other assistive mobility devices, and (ix) the purchase of other equipment as prescribed in the regulations of the commissioner; and

d. Other transportation capital, debt service and lease expense, as approved pursuant to regulations of the commissioner.

e. Any approved cost of construction, reconstruction, lease or purchase of a transportation storage facility or site in the amount of ten thousand dollars or more shall be aidable in accordance with subdivision six of section thirty-six hundred two of this article and shall not be aidable as transportation expense.

3. a. The transportation operating expense for any school district furnishing transportation for pupils attending a school within such district shall be reduced by any moneys received for transportation.

b. If a district transports nonresident pupils, moneys received for such transportation shall also be deducted in calculating transportation aid, provided that in no case shall there be any deduction made in determining transportation aid on the basis of bus mileage travelled in transporting children pursuant to a contract executed in accordance with paragraph h of subdivision twenty-five of section seventeen hundred nine of this chapter.

c. Where a school district contracts for the transportation of its pupils with a contractor and such contract results in the joint use of one or more school buses with another district or districts contracting, independently, with the same contractor, the transportation operating expense applicable to such bus or buses for such route or routes shall be prorated to each district. The total transportation operating expense for all districts that are parties to such contract shall not exceed the consideration of the contract.

HISTORY:

Add, L 1996, ch 474, § 86, eff Aug 8, 1996, deemed eff July 1, 1996; amd, L 1997, ch 436, § 68 (Part A), eff Aug 8, 1996, deemed eff July 1, 1996; L 1998, ch 472, § 5, eff Sept 1, 1998; L 1999, ch 525, § 3, eff Sept 28, 1999; L 2005, ch 453, § 3, eff Sept 1, 2006; L 2018, ch 207, § 3, effective December 22, 2018.

Editor's Notes: Laws 1997, ch 436, § 119(20) (Part A), eff Aug 20, 1997, deemed eff July 1, 1997, provides as follows :

§ 119. This act shall take effect immediately and shall be deemed to have been in full force and effect on and after July 1, 1997, except that:

(20) provided, however, that nothing contained herein shall be deemed to affect the application, qualification, expiration, reversion or repeal of any provision of law amended by any section of this act and the provisions of this act shall be applied or qualified or shall expire or revert or be deemed repealed in the same manner, to the same extent and on the same date as the case may be as otherwise provided by law.

Laws 1998, ch 472, § 7, eff Sept 1, 1998, provides as follows:

§ 7. This act shall take effect September 1, 1998 (Amd, L 2004, ch 57, § 67 (Part C), eff Aug 20, 2004, deemed eff on and after July 1, 2004; L 2005, ch 57, § 28 (Part L), eff July 1, 2005; L 2006, ch 58, § 39 (Part A-1), eff July 1, 2006, L 2007, ch 57, § 53 (Part B), eff July 1, 2007; L 2009, ch 57, § 46 (Part A), eff July 1, 2009; L 2011, ch 58, § 71 (Part A), eff March 31, 2011, deemed eff on and after April 1, 2011; L 2013, ch 57, § 26 (Part A), eff March 29, 2013, deemed eff on and after April 1, 2013; L 2015, ch 56, § 18 (Part A), eff April 13, 2015; L 2017, ch 59, § 40 (Part YYY), eff April 10, 2017, deemed eff on and after April 1, 2017; L 2019, ch 59, § 44 (Part YYY), eff April 12, 2019, deemed eff on and after April 1, 2019).

Laws 2005, ch 453, § 4, eff Aug 9, 2005, provides as follows:

§ 4. This act shall take effect Sept 1, 2006; provided that the department of transportation is authorized to promulgate any and all rules and regulations and take any other measures necessary to implement this act on its effective date on or before such date. (Amd, L 2006, ch 203, § 3, eff Sept 1, 2006).

Laws 2018, ch 207, § 4, eff December 22, 2018, provides:

§ 4. This act shall take effect on the one hundred twentieth day after it shall have become a law. Effective immediately, the commissioner of motor vehicles may add, amend, or repeal any rule or regulation necessary to timely implement the provisions of this act on its effective date.

Amendment Notes: 2005. Chapter 453, § 3 amended:

Sub 2, par c by deleting at fig 1 "and" and adding the matter in italics.

The 2018 amendment by ch 207, § 3, added "including pre-employment and random drug and alcohol testing as required under subdivision six of section five hundred nine-g of the vehicle and traffic law" in 1(e)(6).

Notes to Decisions

Education Law does not limit number of public transportation transfers that can be required of students since CLS Educ § 3623-a(1)(c) defines transportation expenses eligible for state transportation aid for school districts, not student transportation requirements. 2004 Op Comm Ed No. 15062.

TITLE VII State and City Colleges and Institutions—Cornell University

Article 129-A. Regulation by Colleges of Conduct on Campuses and Other College Property Used for Educational Purposes

Section
6438. Notification of fire safety standards and measures in all college-owned or college-operated housing

HISTORY:

Add, L 1947, ch 820, eff July 1, 1947.

ARTICLE 129-A Regulation by Colleges of Conduct on Campuses and Other College Property Used for Educational Purposes

HISTORY:

Add, L 2003, ch 597 § 2, eff July 1, 2004.

§ 6438. Notification of fire safety standards and measures in all college-owned or college-operated housing

Each college shall provide written notification to students residing in college-owned or college-operated housing with regard to a description of such housing facility's fire safety system, including whether the housing is or is not equipped with a sprinkler system. Each college shall also indicate, within such written notification, how to access the campus fire safety report on student housing as required under Title 20 of the U.S. Code Section 1092(i). For the purposes of this section, "sprinkler system" shall have the same meaning as in section one hundred fifty-five-a of the executive law.

HISTORY:

Add, L 2013, ch 168, § 1, eff July 25, 2013.

TITLE VIII The Professions

Article 145. Engineering, Land Surveying and Geology

Section
7209. Special provisions

HISTORY:
Add, L 1971, ch 987, § 2, eff Sept 1, 1971.

ARTICLE 145 Engineering, Land Surveying and Geology

HISTORY:
Add, L 1971, ch 987, § 2, eff Sept 1, 1971; L 2014, ch 475, § 1, effective November 21, 2016.

§ 7209. Special provisions

* * * * *

3. No county, city, town or village or other political subdivision of this state shall engage in the construction or maintenance of any public work involving engineering or land surveying for which plans, specifications and estimates have not been made by, and the construction and maintenance supervised by, a professional engineer or land surveyor; provided that this section shall not apply to the construction, improvement or maintenance of county roads or town highways, nor to any other public works wherein the contemplated expenditure for the completed project does not exceed five thousand dollars. This section shall not be construed as affecting or preventing any county, city, town or village or other political subdivision of this state from engaging an architect licensed in this state for the preparation of plans, specifications and estimates for and the supervision of construction or maintenance of public works.

* * * * *

HISTORY:
Add, L 1971, ch 987, § 2, eff Sept 1, 1971; amd, L 1971, ch 994 § 18, eff Sept 1, 1971; L 1976, ch 77, § 28; L 1987, ch 43, § 40; L 1989, ch 62, § 46, eff April 19, 1989; L 2005, ch 730, § 1, eff Oct 11, 2005; L 2011, ch 550, § 13, eff Jan 1, 2012; L 2014, ch 475, § 9, effective November 21, 2016.

Prior Law: Former § 7209, add, L 1947, ch 820, with substance transferred from § 1461; amd, L 1951, ch 92, § 1; repealed, L 1971, ch 987, § 1, eff Sept 1, 1971.

Editor's Notes: Laws 1987, ch 43, § 62, provides as follows:

§ 62. This act shall take effect May first, nineteen hundred eighty-seven and shall apply to fees received on or after that date.

Laws 1989, ch 62, § 101(c), eff April 19, 1989, provides as follows:

(c) Sections fifteen through sixty-five of this act shall apply to fees received on or after such effective date.

Laws 2011, ch 550, § 17, eff Jan 1, 2011, provides as follows:

§ 17. This act shall take effect January 1, 2012. Provided, however, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized and directed to be made and completed on or before such effective date.

Laws 2014, ch 475, § 28, eff Nov 21, 2016, provides:

§ 28. This act shall take effect two years after the date on which it shall have become a law; provided however that:

a. the authority of the commissioner to promulgate regulations and the board of regents to appoint board members, and take any other action necessary for the implementation of this act shall take effect immediately; and

b. provided further that section ten of this act and section 7204-b of the education law as added by section three of this act shall take effect March 1, 2018 (Amd, L 2015, ch 9, § 3, eff March 13, 2015; L 2016, ch 260, § 3, eff Aug 19, 2016.).

Amendment Notes: 2011. Chapter 550, § 13 amended:
Sub 4 by adding the matter in italics.
2005. Chapter 730, § 1 amended:
By adding sub 9.
The 2014 amendment by ch 475, § 9, in 1, in the first sentence, substituted "engineer, land surveyor and professional geologist" for "engineer and every land surveyor", added "the name of the professional geologist and the words 'Licensed Professional Geologist'", in the second sentence, added "or geologic drawings and reports", "all geologic drawings and reports prepared by such professional geologist", "or her", and "professional geologist", and in the last sentence, added "geologic drawings or reports"; added "or professional geologist" twice in 1a; in 1b, added "or professional geologist", "or her", and "geologic drawings or reports"; added the 2a designation; in 2a, in the first sentence, substituted "article" for "law" and added "or she", and in the second sentence, added "or her" twice; added 2b; added "geologists" in the first sentence of 4; and made related changes.

NOTES TO DECISIONS

Analysis

1. In general
2. Under former § 7203

1. In general

Property owners were not entitled to declaration that their construction contract with building contractor (a corporation) was against public policy and therefore invalid on ground that it violated CLS Educ §§ 7202 and 7209 by permitting contractor to engage in unauthorized practice of engineering without license where contract expressly required contractor to engage specified licensed engineer to perform those tasks for which license was required, and engineer fulfilled contract by exercising his judgment in capacity of licensed professional rather than in his capacity as president of contractor corporation. Charlebois v J.M. Weller Associates, Inc., 72 N.Y.2d 587, 535 N.Y.S.2d 356, 531 N.E.2d 1288, 1988 N.Y. LEXIS 3361 (N.Y. 1988).

Article 78 petition to compel village board of trustees and building inspector to issue building permit in accordance with Supreme Court order was properly granted, despite contention of village that petitioner failed to comply with requirement of CLS Educ § 7209(1)(a) and (2) that plans contain seal of architect or engineer licensed in state, since plans were stamped with seal of individual who was duly registered architect at time they were drawn up but had since retired to distant location, and in view of inordinate lapse of time which ensued prior to petitioner's submission of plans to village board of trustees, which was attributable to village's dilatory tactics, village was barred by laches from contesting validity of architect's seal. Briedis v Tuxedo Park, 156 A.D.2d 744, 549 N.Y.S.2d 500, 1989 N.Y. App. Div. LEXIS 16561 (N.Y. App. Div. 2d Dep't 1989), app. denied, 78 N.Y.2d 852, 573 N.Y.S.2d 466, 577 N.E.2d 1058, 1991 N.Y. LEXIS 886 (N.Y. 1991).

In action arising out of construction contract wherein defendant had knowledge that plaintiff was not New York State licensed engineer, defendant was not entitled to summary judgment on ground that contract was illegal where fact issues existed as to whether that part of plaintiff's work which required licensed engineer was merely incidental to larger work he provided, or whether plaintiff primarily provided defendant with engineering services and merely hired licensed engineers to seal designs, which is violation of Education Law. Lombardo v Sagistano, 184

Misc. 2d 301, 708 N.Y.S.2d 241, 2000 N.Y. Misc. LEXIS 174 (N.Y. App. Term 2000).

2. Under former § 7203

In view of this section and §§ 1709(6), 1804, and 1805, Education Law, and §§ 101 and 103, General Municipal Law, the legislature pre-empted not only the area of plans and specifications in the building of schools, but also the field of actual construction, and vested such power in the commissioner of education, so that a school board was not subject to local municipal building or plumbing codes in building schools. Poughkeepsie v Hopper Plumbing & Heating Corp., 46 Misc. 2d 761, 260 N.Y.S.2d 901, 1965 N.Y. Misc. LEXIS 1741 (N.Y. Sup. Ct. 1965), aff'd, 26 A.D.2d 772, 272 N.Y.S.2d 974, 1966 N.Y. App. Div. LEXIS 6124 (N.Y. App. Div. 2d Dep't 1966).

In a taxpayer's action to have a contract for a public improvement declared illegal and void, the fact that specifications were not drawn by a professional engineer did not necessarily require that the work be halted, the penalties for unlawful practice of a profession being aimed at the persons who performed such unlawful acts. Shaw v Topping, 142 N.Y.S.2d 490, 1955 N.Y. Misc. LEXIS 2820 (N.Y. Sup. Ct. 1955).

In a taxpayer's action alleging the illegality of a contract for a public improvement because the specifications were not prepared by a professional engineer and because of certain changes, where the issues of fact could not be resolved without a trial, and the work had been half completed, the contractor was not temporarily restrained but could proceed at his peril, and upon plaintiff's posting a bond, the town was temporarily enjoined from making any payments until the determination of the issues. Shaw v Topping, 142 N.Y.S.2d 490, 1955 N.Y. Misc. LEXIS 2820 (N.Y. Sup. Ct. 1955).

There is no requirement that an architect be employed to prepare plans for a fire house but it is required that a professional engineer be employed in certain cases. 1952 Ops St Compt #137.

Services of a professional engineer must be employed where public work involves professional engineering and cost of public work is over $5,000.00. 1953 Ops St Compt #87.

It is not necessary to employ an architect to prepare plans for a town garage. However, if the cost is estimated to exceed $5,000 and if the work involves professional engineering, the services of either a professional engineer or an architect must be employed. 1956 Ops St Compt File #8045.

The seal of a licensed architect or a licensed professional engineer is not required on plans for (1) construction of buildings or structures when such construction will cost ten thousand dollars or less and where such building or structure will not exceed thirty thousand cubic feet, and (2) alterations to any building or structure where such alteration will cost ten thousand dollars or less and will not involve changes affecting the structural safety of such building or structure. 1958 Ops St Compt File #301.

The awarding of a contract by a town board is an improper act where the services of a professional engineer or land surveyor are not employed in the preparation of plans and specifications for the public work which involves professional engineering and the cost of the work exceeds $5,000.00. 1968 Ops St Compt File #45.

A person who is not a licensed professional engineer may render engineering services (as defined in § 7201(4)) only under the supervision and direction of an individual so licensed, unless otherwise provided by statute. 1968 Ops St Compt File #294.

A licensed professional engineer need not be retained by a town to provide services relative to the installation of a new heating system in a town building, where the estimated cost of the project does not exceed $5,000. 1968 Ops St Compt File #416.

The construction of a village fire house estimated to cost more than $5000 is a public work involving the services of a professional engineer. 1968 Ops St Compt File #447.

Agency Opinions

1. In general

Section 7209 of the Education Law requires certain public and private construction plans and specifications to be under the seal of an engineer or surveyor licensed or authorized to practice in the State. A municipality may require the same seal on plans and specifications for its own public works notwithstanding the exceptions in section 7209. 1981 NY Ops Atty Gen April 27 (Informal).

A joint fire district, in constructing a firehouse, is exempt from the application of site plan approval requirements contained in Town Law, § 274-a. 1978 Op St Compt File #886.

Town of Manlius does not require the services of an architect to prepare, approve and stamp plans for a pre-cut town garage since those services may be performed by a professional engineer. The Town Engineer, if he is a professional engineer, may perform those services for the Town required of a professional engineer in connection with the construction of the garage. He may not be paid additional compensation in addition to his salary for such extra services unless a local law is adopted superseding Town Law, § 27(1). 1980 Op St Compt File #217.

(1) Off-Track Betting Corporations are to let contracts, procedurally, in the same manner as counties and, therefore, they are subject to the competitive bidding requirements of General Municipal Law, §§ 101 and 103, but not the requirements of Education Law, § 7209(3); (2) Both purchase and public works contracts of Off-Track Betting Corporations are subject to bidding where the estimated expense exceeds $10,000; (3) Off-Track Betting Corporations are governed by the principles relating to aggregate purchases; (4) A firm which aids in preparing bid specifications for a project is not precluded from submitting a bid on the project. 1980 Op St Compt File #503.

Any plans or plats submitted by a homeowner to a town in connection with an application for a variance or building permit must be stamped with the seal of a professional engineer or a licensed surveyor; a homeowner cannot utilize surveys prepared at a former time and altered by them for purposes of the application. 1982 Op St Compt File #88.

Regarding access to plans, drawings and surveys that are marked with seal of architect, land surveyor or engineer, seal does not serve as copyright, nor does it restrict right to inspect and copy under Freedom of Information Law; it merely indicates that person is qualified as licensee. Comm on Open Gov't FOIL-AO-12830.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS Pub B § 3.

Jurisprudences:

12 NY Jur 2d Buildings, Zoning, and Land Controls § 38.

13 NY Jur 2d Businesses and Occupations §§ 317, 337–339.

43 NY Jur 2d Declaratory Judgments and Agreed Case § 92 .

Matthew Bender's New York Practice Guides: 1 New York Practice Guide: Business and Commercial §§ 6.02, 6.27.

ELECTION LAW

Article
3. Election Officials
5. Registration and Enrollment of Voters

HISTORY:
Add, L 1976, ch 233, § 1, eff Dec 1, 1977; amd, Law Chapter 17, add, L 1949, ch 100; L 1976, ch 233, § 1, eff Dec 1, 1977.

ARTICLE 3 Election Officials

Title II. Board of Elections

Section
3-224. Voting machines; use of by other than the board of elections

HISTORY:
Add, L 1976, ch 233, § 1, eff Dec 1, 1977; amd, L 1978, ch 373, § 19, eff June 19, 1978.

TITLE II Board of Elections

HISTORY:
Add, L 1976, ch 233, § 1, eff Dec 1, 1977; amd, L 1978, ch 373, § 2, eff June 19, 1978.

§ 3-224. Voting machines; use of by other than the board of elections

The board of elections may permit towns, villages, school districts, fire, ambulance, water, sanitation, police and other special districts within the county to use voting machines and other equipment owned by it and used for the conduct of elections or for educational and instructional purposes, upon such rental and other terms and conditions as shall be fixed by it. Such board may similarly permit the use of such machines by associations and organizations for the conduct of elections where it judges the use of such machines for elections conducted by such associations and organizations will be in the public interest.

HISTORY:
Add, L 1976, ch 233, § 1, with substance derived from former §§ 53, 246; amd, L 1988, ch 24, § 7; L 2005, ch 180, § 2, eff Nov 15, 2005 (see 2005 note below).

Memorandum in Support Comments: Change in law. Old law permitted towns and cities to rent voting machines to villages and fire districts. New provision permits board of elections and town and cities to rent voting machines to other special districts, other towns and to private organizations. (Old § 246).

Editor's Notes: Laws 2005, ch 180, §§ 1 and 17, eff Nov 15, 2005, provide as follows:

Section 1. Short title. This act shall be known and may be cited as the "election consolidation and improvement act of 2005".

§ 17. This act shall take effect on the fifteenth of November next succeeding the date on which it shall have become a law; provided however that within sixty days of such effective date, all voting machines, and all appliances, equipment and supplies relating to the use of such machines, which are in the care, custody, control or ownership of a city or town, outside of the city of New York, shall be placed under the care, custody, control and ownership of the appropriate board of elections for the county in which such city or town is located.

Notes to Decisions

1. Under former § 53

A county may not charge a school district, wholly or partly within the county, a rental for the use of its voting machines at a school district meeting or election. 1968 Ops St Compt File #734.

A county may not charge a school district rental for the use of county voting machines at a school district meeting. 1968 Ops St Compt File #855.

Agency Opinions

Analysis

1. Generally
2. Under former § 53

1. Generally

The terms "special district" and "improvement district" are synonymous and are used interchangeably in the statutes. The provisions of Public Officers Law § 36 for removal of town, village, improvement district or fire district officers are applicable to officers of what the Nassau County Civil Divisions Act refers to as "special districts" including removal of a commissioner of the Port Washington Police District. 1980 NY Ops Atty Gen April 14 (Informal), 1980 N.Y. AG LEXIS 134.

2. Under former § 53

Except in Nassau County, a board of elections may not permit the rental of voting machines by a private organization or association. 1957 NY Ops Atty Gen April 27 (informal).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Voting machines; requirement of use, § 7-203.

Authorization by fire district commissioners of use of voting machines, CLS Town § 176(29).

Jurisprudences:

26 Am Jur 2d, Elections § 303.

ARTICLE 5 Registration and Enrollment of Voters

Title VI. Filing and Custody of Registration Records

Section
5-612. Registration records; use by town or village clerks and for school district, improvement district and fire district elections

HISTORY:
Add, L 1976, ch 233, § 1; amd, L 1978, ch 9, § 24, eff March 7, 1978.

TITLE VI Filing and Custody of Registration Records

HISTORY:
Add, L 1976, ch 233, § 1, eff Dec 1, 1977.

§ 5-612. Registration records; use by town or village clerks and for school district, improvement district and fire district elections

1. The board of elections shall, not later than the twentieth day before a special town election and not later than the seventh day before a village election conducted by the village clerk, provide a list of registered voters or shall place registration poll

records in properly locked ledgers in the temporary custody of the town or village clerk for the purpose of permitting him to copy such records or to deliver such records for village election purposes to the board of inspectors of the several polling places in the election districts as provided by this chapter. The board of elections shall indicate on such list, or on a separate accompanying list, the names of those voters whose registration records have been marked "permanently disabled". The names of voters in inactive status shall appear on a separate accompanying list. Voters listed in inactive status who appear at the polls to vote shall be challenged in the manner provided by section 8-504 of this chapter.

2. Notwithstanding the provisions of sections nineteen hundred six, twenty hundred fourteen and twenty-six hundred six of the education law with respect to registration of voters, any person, otherwise qualified to vote who is registered under the provisions of this article shall be entitled to vote at all school district meetings or elections without further registration.

3. Whenever a school district meeting or election is scheduled, the board of elections for the appropriate county or counties shall deliver the registration lists, indicating on such list, or on a separate accompanying list, the names of those voters whose registration record has been marked "permanently disabled", and, on a separate accompanying list, the names of voters in inactive status who shall be challenged if they appear at the polls to vote, for the appropriate election districts or those portions of the election districts encompassing the school district to the appropriate officials of such school district as soon as possible upon request of the appropriate officials, but no later than the thirty days immediately prior to the regularly scheduled school district election, provided further, that such board of elections shall deliver no later than ten days prior to each such special or regular school district election supplemental registration lists containing the names of those voters who have registered after delivery of the first registration lists and who are eligible to vote in such elections, indicating on such list or on a separate accompanying list the names of those voters whose registration record has been marked "permanently disabled".

4. Within five days of the adoption by a board of education of a resolution in accordance with subdivisions one and three of section two thousand fourteen of the education law, such board of education shall notify the appropriate board of elections of such adoption.

5. The board of education of a school district which has adopted such a resolution shall, not less than forty-five days before each regularly scheduled school district meeting or election and fourteen days before any such special meeting or election notify the board of elections of the date of such meeting or election.

6. The board of elections, upon the request of the board of commissioners of an improvement district which elects commissioners or a fire district shall, not later than the twenty-first day before each election in such district, deliver to the secretary of such district a list of persons registered to vote as of the twenty-third day before such election in the election districts contained in such district, indicating on such list the names of the voters in inactive status, or shall place the registration poll records for such election districts in properly locked ledgers in the temporary custody of such district secretary for the purpose of permitting him to copy such records. Any voter listed in inactive status who appears at the polls to vote, shall be challenged.

7. The appropriate official of each town, village, school district, improvement district or fire district which obtains a list of registered voters from the board of elections pursuant to the provisions of this section shall deliver the list containing the names of the voters in inactive status or, at the discretion of such official, a photocopy of such list to the board of elections not later than one week after the election at which the list was used with an indication of which voters listed in inactive status on such list voted at the election for which the list was prepared. If such official delivered the original list, the board of elections shall return such list to the official from whom it was received within three weeks thereafter.

HISTORY:

Add, L 1976, ch 233, § 1, with substance derived from former §§ 352, 381; amd, L 1978, ch 8, § 12; L 1978, ch 9, § 41, eff March 7, 1978; L 1981, ch 117, § 2; L 1982, ch 702, § 1; L 1984, ch 58, § 1; L 1984, ch 202, § 3,4; L 1985, ch 400, § 5,6; L 1988, ch 396, § 1, eff Dec 1, 1988; L 1989, ch 359, § 14, eff Nov 15, 1989; L 1990, ch 67, § 2; L 1992, ch 217, § 1; L 1996, ch 200, § 14, eff June 25, 1996,15, eff June 25, 1996.

Notes to Decisions

1. Generally

Petitioners failed to meet burden of proof in establishing valid basis for setting aside results of vote at annual district meeting because ballots in question complied with CLS Educ § 2019-a and were not opened until board decided to accept them. Re Shortell, et al., 1987 Op Comm Ed No. 11915.

Fact that individuals registered in general election, whose names did not appeal on registration list of board of education, were probably allowed to vote in election of school board members in city of Mount Vernon did not provide basis for overturning election, because CLS Elec § 5-612(2) requires that such individuals be allowed to vote. 1993 Op Comm Ed No. 13055.

Fact that district resident was improperly denied opportunity to vote because her name could not be found on registration list and she was not offered opportunity to vote by affidavit in accordance with CLS Educ § 2019-a was insufficient to overturn election, as record failed to establish whether outcome of election was affected in that her affidavit did not identify candidate for whom she would have voted; moreover, one vote would not have been enough to overcome 2-vote margin. 1994 Op Comm Ed No. 13232.

Where voters were registered with county board of elections and thus were otherwise eligible to vote in school district election pursuant to CLS Elec § 5-612(2), their failure to register with school district was of no consequence. 1995 Op Comm Ed No. 13282.

Any school district resident who is registered to vote with county board of elections is entitled to vote at all school district meetings and elections, even if individual's name is not otherwise listed on school district register. 1995 Op Comm Ed No. 13486.

Where voter is registered only with county board of elections and not with school district, voter would be allowed to vote in district elections. 1993 Op Com Ed No. 13042.

Agency Opinions

Analysis

1. Generally
2. Under former § 381

1. Generally

Only upon the adoption by the board of education of certain school districts of a resolution providing for absentee balloting at school board elections are absentee ballots to be sent to "permanently disabled" voters. 1982 NY Ops Atty Gen May 21 (informal).

2. Under former § 381

At a special town or city election held at a time other than the date of the general election, the registration poll records maintained by the county board of elections must be used. 1974 NY Ops Atty Gen May 10.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 5-213, CLS Educ § 2018-b.

Registration; required, § 5-100.

District meetings; vote upon school taxes, CLS Educ § 1906.

Registration of voters, CLS Educ §§ 2014, 2606.

ENVIRONMENTAL CONSERVATION LAW

Article
9. Land and Forests

HISTORY:
Add, L 1972, ch 664, § 2, eff Sept 1, 1972.

ARTICLE 9 Land and Forests

Title 11. Forest Fire Control

Section
9-1101. Proclamation by Governor
9-1103. Additional powers of the department
9-1105. General prohibitions
9-1111. Forest fire protection
9-1121. Fire moneys and accounts

HISTORY:
Add, L 1972, ch 664, § 2, eff Sept 1, 1972, with substance deriving from former Conserv Law Article 3.

TITLE 11 Forest Fire Control

HISTORY:
Add, L 1972, ch 664, § 2, eff Sept 1, 1972, with substance transferred in part from former Conserv Law Article 3, Title 19.

§ 9-1101. Proclamation by Governor

Whenever the forests of the state are in danger of fire, the Governor by proclamation may (a) prohibit any person or persons from entering forests, woodlands, waters and open lands; (b) prohibit the starting of fires in the out-of-doors; (c) prohibit the smoking of tobacco in forests, woodlands and open lands and (d) suspend any open season for, or prohibit the taking of, fish, birds and quadrupeds. Such proclamation may contain exceptions to the activities prohibited, and may apply to all or a portion of the state. Such proclamation shall be in full force and effect at the expiration of 24 hours after notice is given in such manner as the Governor may determine and shall remain in full force until rescinded by the Governor.

HISTORY:
Add, L 1972, ch 664, § 2, eff Sept 1, 1972, with substance transferred from former Conserv Law § 3–1903.

NOTES TO DECISIONS

1. Under former Conservation Law § 3-1903

The words "open lands", when read in connection and conjunction with the words "forests, woodlands", must be limited to that type of land which is, first, mainly rural in character, and, second, which is unoccupied in the sense of having no permanent habitation, and, third, to land of such character that entry thereon, either through its proximity to forests or woodlands or through the nature of its growth, would be likely to endanger forests or woodlands of the state. People v Mayerson, 31 N.Y.S.2d 555, 177 Misc. 724, 1941 N.Y. Misc. LEXIS 2421 (N.Y. County Ct. 1941).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 11-0103, 11-0309, 71-0703. Penalties, § 71-0703.

§ 9-1103. Additional powers of the department

In addition to the powers provided in section 9-0105 and in connection with the control of fire, the department shall have the power to:

1. Maintain a system of forest fire protection in such areas of the state as the department determines necessary.

2. Purchase necessary equipment, tools or supplies, employ men or incur other expenses as may be necessary to furnish adequate forest fire protection.

3. Establish, maintain, equip and operate forest fire observation stations, telephone lines or other structures therefor as the public interest requires.

4. Make contracts, agreements or purchases either for construction, operation or maintenance of telephone lines for fire protection purposes. Any telephone company may grant the state a preferred rate.

5. With consent of owner build or improve fire roads, ditches, trails or fire lines. No action for trespass shall lie on account of injury to private property on such account, if the act is performed in the protection of the forests from fire.

6. Appoint necessary employees to perform such duties as are required by this title 11.

7. Order removed from service, on forty-eight hours' notice, any railroad locomotive, operating in the fire towns, not properly equipped with fire protection devices.

8. Grant an extension of time in which owners may comply with section 9-1113 when the department is satisfied that such an extension of time will not endanger the forests to fire, but in no case shall an extension be granted for a period of more than six weeks from the time of cutting, except in connection with operations for the clearing of a reservoir site under the authority of section 15-1507.

9. Relieve railroads from maintaining railroad fire patrol, or clearing right of way when in the judgment of the department the absence of such patrol or clearing will not subject the forests to fire menace.

10. Request the Public Service Commission to hear and determine whether any railroad, person or company operating railroad locomotives through forest land is using such devices and precautions against the setting of forest fires, as the public interest requires.

11. Designate persons who shall have authority to issue permits as required by subdivision 5 of section 9-1105.

12. Enter into working agreements with land owners for the purpose of securing better forest fire protection in the fire towns.

13. Make rules and regulations to secure better fire protection within all or any portion of those areas designated as fire districts under subdivision 2 of section 9-1109 or defined as fire towns by section 9-1107.

HISTORY:

Add, L 1972, ch 664, § 2, eff Sept 1, 1972, with substance transferred from former Conserv Law § 3–1905.

Agency Opinions

6. Under former Conservation Law

The board of supervisors of a county may appropriate and contribute money to aid in construction of forest fire protective system in fire district where such county comprises or is included within said fire district. 1930 N.Y. Op. Att'y Gen. No. 183.

The Shinnecock Indians reside upon a reservation owned by them in fee in common, and save for the federal government's implied sovereign protectorate which has never been actively asserted, their relations with said government are simply historical, and in the absence of federal regulation the state, through its conservation department, has authority to enforce its police regulations with regard to fire control. 1934 N.Y. Op. Att'y Gen. No. 285.

The Commissioner has authority to construct dirt roads or truck trails in a forest preserve for the purpose of aiding and protecting it from fire hazards. Such roads are not public highways; public use thereof is not allowable, and, where necessary, barriers may be erected to prevent it. 1935 N.Y. Op. Att'y Gen. No. 300.

The conservation department may permit an old logging road through forest preserve lands to be improved for use by trucks if such improvement is considered necessary for fire protection purposes. While such improvement does not make the road a public highway, a revocable permit for its temporary use by a private corporation may be granted, provided such use will not damage the road or interfere with its use by the conservation department, or destroy the wild forest character of the preserve. 1949 NY Ops Atty Gen Apr. 29.

In connection with the mutual aid program of fire protection, and under proper restrictions and safeguards, the Conservation Department may grant revocable permits to county authorities for the construction, maintenance, and operation of radio towers on state lands acquired for reforestation purposes within the forest preserve, provided, however, that if such construction is to be on forest preserve lands within the Adirondack and Catskill parks there may be no interference with the wild forest character of the land. 1950 NY Ops Atty Gen May 2.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS Town § 29.

Codes, Rules and Regulations:

Payment for forest fire fighters and equipment. 6 NYCRR § 191.4.

Federal Aspects:

Cooperation with States for fire protection on private or State forest lands upon the watersheds of navigable rivers, 16 USCS § 563.

§ 9-1105. General prohibitions

1. The following are prohibited:

(a) setting of fires on or near forest land and leaving such fires unattended and unquenched;

(b) setting of a fire which will endanger the property of another;

(c) setting of forest land on fire except where necessary to implement any provision of this chapter, including, but not limited to, paragraph v of subdivision two of section 3-0301 of this chapter; provided, however, that nothing contained in this paragraph shall permit the setting on fire of any land constituting the forest preserve or of any state land within the Adirondack Park or the Catskill Park for any purpose other than fire suppression. The department shall promulgate regulations governing the use of fire which shall include provisions for notification of, or waiver of notification by, local fire officials;

(d) setting of a permitted fire in or near forest land without all inflammable material having first been removed for a distance of 3 feet around the fire;

(e) the dropping, throwing or otherwise scattering of lighted matches, burning cigars, cigarettes or tobacco on forest land;

(f) the defacing, destruction or removal of any posted notice containing forest fire warnings, laws or rules and regulations.

2. It shall be unlawful to deposit, and leave in any of the fire towns, or in any town included in a fire district as defined in subdivision 2 of section 9-1109 of this title, brush or inflammable material upon the right of way of highways.

3. No device for generating power which burns wood, coke, lignite or coal shall be operated in, through or near forest land, unless the escape of sparks, cinders or coals shall be prevented in such manner as may be required by the department.

4. In any of the fire towns, or in any town included in a fire district as defined in subdivision 2 of section 9-1109, brush, logs, slash or other inflammable material shall not be left or allowed to remain on land within 25 feet of the right of way of a railroad or within 20 feet of the right of way of a public highway.

5. It shall be unlawful to set or cause to be set or sustain any open fire for purpose of burning logs, leaves, sawdust, slabs, brush, stumps, dry grass or other debris, in any of the fire towns, without first having obtained from the department a written permit so to do.

6. Prescribed burns. (a) For the purposes of this subdivision, the term "prescribed burn" shall mean the intentional setting of forest land on fire, under carefully controlled conditions, in order to manage, enhance, or restore populations of plants or animal species or natural communities on such land.

(b) Notwithstanding the provisions of this section or any other provision of law, the department may authorize a landowner to conduct prescribed burn activities pursuant to a written prescribed burn management plan prepared by or for such landowner. The prescribed burn management plan shall include, but not be limited to, the following elements:

(i) a discussion of the landowner's training and expertise in conducting prescribed burn activities;

(ii) a map and narrative description identifying the area or areas on which prescribed burn activities will be undertaken;

(iii) a description of the ecological purposes and objectives of the prescribed burn, including an identification of the specific species or natural communities that are intended to be impacted by the burn;

(iv) a description of the vegetative cover and fuel loads on each area to be subjected to prescribed burning;

(v) a description of physical parameters, such as time of year, wind speed and direction, and air

temperature and humidity, which must be met before a prescribed burn is initiated;

(vi) a description of the anticipated intensity and duration of the prescribed burn given the fuel loads and physical prescriptions established in subparagraphs (iv) and (v) of this paragraph;

(vii) a description of the logistics of the prescribed burn operation, number of personnel, and fire management equipment that will be deployed to assure that the burn is restricted to the area or areas identified for prescribed burn management;

(viii) a description of fire suppression activities to be immediately implemented should the prescribed burn threaten to escape, or actually escape, beyond the boundaries identified for such burn;

(ix) a procedure for notifying appropriate local fire officials and law enforcement personnel of the actual date, time, and estimated duration of any prescribed burn;

(x) a procedure for notifying adjacent landowners prior to the undertaking of a prescribed burn;

(xi) a description of the procedures that will be undertaken to assure that the prescribed burn is fully extinguished at the conclusion of the burn.

(c) The department shall promulgate regulations implementing this subdivision prior to authorizing any landowner to undertake prescribed burn activities. Such regulations shall include, but not be limited to, a listing of the necessary elements of the prescribed burn management plan, and standards for determining whether a request for authorization to conduct prescribed burn activities should be granted.

(d) The department shall reject any application for authorization to conduct a prescribed burn pursuant to this subdivision if the department determines that the landowner has not demonstrated the necessary expertise to properly implement the prescribed burn plan.

(e) Before granting a landowner authorization to conduct prescribed burn activities, the department shall give the chief or other official in charge of the fire department or company within whose territorial jurisdiction the proposed prescribed burn is located an opportunity to review and comment on the written prescribed burn management plan.

(f) No burning shall be prescribed under this subdivision within seventy-five feet of the boundary of a landowner's property without the written approval of the adjacent landowner. In addition, the department may prohibit burning in a buffer zone in excess of seventy-five feet from the boundary of an adjacent property owner if specific conditions at the site warrant such buffer.

HISTORY:

Add, L 1972, ch 664, § 2, eff Sept 1, 1972, with substance transferred from former Conserv Law §§ 3–1923, 3–1925, 3–1927, 3–1928, 3–1929; amd, L 1986, ch 298, § 2, eff Aug 16, 1986, L 1989. ch 775, § 2; L 1990, ch 15, § 2, eff Feb 26, 1990; L 1991, ch 102, § 1, eff Feb 14, 1992.

Agency Opinions

6. Under former Conservation Law § 3-1925

A town ordinance relating to the burning of refuse and the setting of bonfires may be considered by the conservation department in granting a permit to burn sawdust and slabs in a fire town. 1953 NY Ops Atty Gen Dec. 14.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 9-1103, 46-0109, 71-0703, 71-0715.

Penalties, § 71-0703.

Injury to state lands, § 71-0709.

Injury to municipal or private lands, § 71-0711.

Recovery for damages from fires, § 71-0713.

Rules of evidence applicable to forest fire cases, § 71-0715.

Reckless endangerment of property, CLS Penal § 145.25.

Codes, Rules and Regulations:

Forest fire prevention. 6 NYCRR §§ 191.1 et seq.

§ 9-1111. Forest fire protection

1. Towns adjacent to fire towns and fire districts. The department may when necessary in its judgment, in order to protect the forests in the fire towns and fire districts from fire, take steps to extinguish fires actually burning in any town adjacent to a fire town or district.

2. Impressing fire fighting assistance. Any department employee or any other officer charged by the department with the duty of fire fighting shall, notwithstanding the provisions of any other law to the contrary or in conflict herewith, have the power to summon and hire for the purpose of fighting fires any person who shall have attained sixteen years of age, and to incur other expenses deemed necessary to the extinguishment of particular fires.

3. Additional protection by towns in Suffolk county. Any town in the county of Suffolk may appropriate not exceeding the sum of one thousand dollars in any one year without the vote of town meeting for the purpose of purchasing equipment and establishing fire patrols for the prevention of forest fires within any such town. The patrols and equipment shall be under the direction and supervision of the town board. Moneys appropriated pursuant to this subdivision shall be assessed, levied and collected in the same manner as moneys for other town charges are assessed, levied and collected.

HISTORY:

Add, L 1972, ch 664, § 2, eff Sept 1, 1972, with substance transferred from former Conserv Law § 3–1913; amd, L 1976, ch 72, § 4, eff Sept 1, 1976.

NOTES TO DECISIONS

1. Under former Conservation Law § 3-1913

The town board of a town which is neither a "fire town" nor a "fire district", both as defined by the Conservation Law, may fix the salaries of persons employed to fight forest or muck fires. 1960 Ops St Compt File #437.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS Town § 29.

§ 9-1121. Fire moneys and accounts

In order to carry into effect the provisions of this title the following is prescribed:

1. Temporary loan. The State Comptroller shall have, subject to the approval of the Governor, the

authority to make, on behalf of the state a temporary loan not exceeding one hundred thousand dollars in any fiscal year, for the use of the department in protecting the forests and extinguishing fires as provided by title 11 of this article upon the certification of the department that any emergency exists whereby through insufficiency of appropriations it is found to be impossible to protect the forests from fire. The Comptroller shall thereupon borrow such sums as may be directed by the Governor for such purposes and shall report such transactions to the legislature which shall thereupon appropriate the moneys borrowed. Section 41 of the State Finance Law shall not apply to any indebtedness so incurred.

2. Payment of fire bills. All salaries and other expenses incurred by the department and its employees in protecting the forests from fire shall be paid by the state.

3. Rebate by counties. The full expense incurred by a town supervisor acting as superintendent of fires as provided in subdivision twelve of section twenty-nine of the town law and paid by the town in extinguishing fires actually burning except salaries and expenses of regular employees shall be a charge upon the county in which the fire burned provided that the county has within its borders any fire town or fire district as provided in subdivision 1 or 2 of section 9-1109 of this title and provided that no part of the expenses incurred in extinguishing fires on Indian reservations located in Cattaraugus or Suffolk county shall be a charge upon or payable by such counties. The supervisors acting as superintendents of fires shall on or before September first, of each year, transmit to the clerk of the board of supervisors or county legislative body of each county in which such expense of extinguishing fires was incurred, a summary statement of expenses incurred together with the amount charged against the county, except that a detailed statement of expenses shall be furnished for any designated fire or fires when so requested by a county. The clerk shall thereupon cause the amount due to the town to be included in the budget and levied upon the taxable property of such county at the same time and in the same manner as other county charges, and the amount due the town so levied shall be paid by the County Treasurer, on or before May first following the levy thereof to the town supervisor according to such claim.

4. May pay accounts. If any person incurs expenses fighting forest fires in a fire town, or in a town included in a fire district as defined in subdivision 2 of section 9-1109, the department may upon the receipt of satisfactory proof and accounts filed in its offices within sixty days from the time the expense was incurred audit and pay all or such portion thereof as in its judgment the public interest requires.

5. Recovery of expenses. Any moneys necessarily expended by the state, a municipality, or any person in fighting forest fires may be sued for by the state, municipality or person expending the same and recovered from the person causing the fire. Such actions may be maintained in addition to other actions for damages or penalties and may be demanded in the same or separate actions.

6. Certain towns raise fire fund. Towns other than fire towns may raise necessary funds for prevention and extinguishment of forest fires in their towns either by levy or pursuant to the Local Finance Law.

7. Advance by Comptroller. Upon request of the department, the Comptroller may advance a sum, not to exceed five thousand dollars at any time, to the department for the purpose of facilitating payment of fire accounts.

HISTORY:

Add, L 1972, ch 664, § 2, eff Sept 1, 1972, with substance transferred from former Conserv Law § 3–1971; amd, L 2007, ch 426, § 1, eff Aug 1, 2007.

NOTES TO DECISIONS

1. Under former Conservation Law

Where the board of supervisors proceeding under this section has levied the sum claimed by the conservation commission to be due from a town for expenditures made by the commission in fighting fires in said town, and such money has been duly collected and paid over to the supervisor, he may be compelled by mandamus on the application of the attorney general to pay over such monies to the conservation commission. Attorney Gen. v Taubenheimer, 178 A.D. 321, 164 N.Y.S. 904, 1917 N.Y. App. Div. LEXIS 9373 (N.Y. App. Div. 1917).

The town of Mohawk may not purchase a fire truck for the prevention and extinguishment of forest fires within such town unless a fire district is formed. 1946 Ops St Compt 288.

One-half the cost of fighting forest fires in a fire town is chargeable to the town. The amount should be levied in the same manner as the state and county tax. 1947 Ops St Compt 476.

A town which is not a fire town or adjacent to a fire town, and which is not a part of a fire district, may not be reimbursed for expenses of fighting a forest fire in the town. 1947 Ops St Compt 514.

Agency Opinions

1. Under former Conservation Law

A loan approved by the governor June 30, 1930, made subsequently by the state comptroller, pursuant to this section and available for use by the Conservation department on July 12, 1930, should be credited to the maximum amount which the comptroller was authorized to borrow within the fiscal year. 1930 N.Y. Op. Att'y Gen. No. 378.

A town, neither a fire town nor a fire district, having incurred expense in the extinguishment of a forest fire, and the conservation department having collected such expense from the person causing the fire, and paid same into the state treasury, the department may properly approve a claim by the town for reimbursement, and the department of audit and control may properly audit and direct the payment of the same, charging it against appropriation for "Conservation Department, Division of Lands and Forests, expenses of maintenance and operation, Special supplies and expense," as described in L. 1943, ch 50, Pt 1. 1943 N.Y. Op. Att'y Gen. No. 217.

Notwithstanding the 1948 amendment, which makes one-half of the expense of extinguishing fires a charge upon the county in which the fire burned, one-half of such expense incurred prior to March 27, 1948, the effective date of the amendment, is a charge against the town in which the fire burned, as provided before the amendment. 1948 N.Y. Op. Att'y Gen. No. 170, 1948 N.Y. AG LEXIS 62.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

35A Am Jur 2d, Fires §§ 1–4.

ESTATES, POWERS AND TRUSTS LAW

Article
8. Charitable Trusts

HISTORY:
Add, L 1966, ch 952, eff Sept 1, 1967.

ARTICLE 8 Charitable Trusts

Part
1. Rules Governing Charitable Trusts

8-1.4. Supervision of trustees for charitable purposes

HISTORY:
Add, L 1966, ch 952, eff Sept. 1, 1967; amd, L 1967, ch 686, §§ 78, 79, eff Sept 1, 1967.

PART 1 Rules Governing Charitable Trusts

HISTORY:
Add, L 1966, ch 952, eff Sept 1, 1967.

§ 8-1.4. Supervision of trustees for charitable purposes

(a) For the purposes of this section, "trustee" means (1) any individual, group of individuals, executor, trustee, corporation or other legal entity holding and administering property for charitable purposes, whether pursuant to any will, trust, other instrument or agreement, court appointment, or otherwise pursuant to law, over which the attorney general has enforcement or supervisory powers, (2) any non-profit corporation organized under the laws of this state for charitable purposes and (3) any non-profit foreign corporation organized for charitable purposes, doing business or holding property in this state. Neither a foreign corporation nor a trustee acting under the will of, or an agreement executed by, a non-resident of this state shall become subject to the provisions of this section merely by reason of maintaining a bank, custody, investment or similar account in this state.

(b) The registration and reporting provisions of this section do not apply to (1) the United States, any state, territory or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico or to any of their agencies or governmental subdivisions, (2) any trustee which is required by any other provision of law to render a full, complete and itemized annual financial report to the congress of the United States or to the legislature of this state, provided that such report contains the information required of trustees pursuant to this article, (3) corporations organized under the religious corporations law and other religious agencies and organizations, and charities, agencies and organizations operated, supervised or controlled by or in connection with a religious organization, (4) educational institutions incorporated under the education law or by special act, (5) any hospital, (6) fraternal, patriotic, veterans, volunteer firefighters, volunteer ambulance workers, social, student or alumni organizations and historical societies chartered by the New York state board of regents, (7) a trust for which there is a corporate trustee acting as sole trustee or co-trustee under the terms of a will of a decedent who died domiciled in a state other than New York or a trust instrument executed by a non-resident of the state of New York, (8) any trust in which and so long as the charitable interest is deferred or contingent, (9) any person who, in his or her capacity as an officer, director or trustee of any corporation or organization mentioned in this paragraph, holds property for the religious, educational or charitable purposes of such corporation or organization so long as such corporation or organization is registered with the attorney general pursuant to this section, (10) any cemetery corporation subject to the provisions of article fifteen of the not-for-profit corporation law, (11) the state parent teachers association and any parent teachers association affiliated with an educational institution that is subject to the jurisdiction of the state education department, (12) any corporation organized under article forty-three of the insurance law. The provisions of this subdivision shall apply only to the registration and reporting requirements of this section and shall not limit, impair, change or alter any other provision of this article, the not-for-profit corporation law or any other provision of law.

(c) The attorney general shall establish and maintain a register of all trustees containing such information as the attorney general deems appropriate, and to that end may conduct such investigations as he or she deems necessary and shall obtain from public records, court officers, taxing authorities, trustees and other sources without the payment of any fee or charge, whatever information, copies of instruments, reports and records are needed for the establishment and maintenance of the register.

(d) Every trustee shall file with the attorney general, within six months after any property held by him or her or any income therefrom is required to be applied to charitable purposes, a copy of the instrument providing for his or her title, powers and duties; provided, however, that any trustee currently registered with the department of law pursuant to article 7-A of the executive law shall be deemed to have complied with this paragraph. If any property held by a trustee or any income therefrom is required to be applied to charitable purposes at the time this section becomes effective, the filing shall be made within six months thereafter.

(e) (1) Whenever any trustee or other person, holding property or any income therefrom, which may be required at any time to be devoted to

charitable purposes, shall file in any court in this state (A) any petition for instructions relating to the administration or use of such property or income, (B) any petition for the construction of the instrument under which such property or income is held, (C) any petition respecting the disposition or distribution of such property or income or (D) any accounting, due notice of the action or proceeding shall be served by the petitioner upon the attorney general together with a copy of any petition, accounting, will or trust instrument.

(2) Whenever any instrument of a testamentary nature which provides for a disposition for charitable purposes is the subject of (A) an application for denial of probate, (B) objections to probate or (C) an application for approval of a compromise agreement in respect of probate, due notice of the action or proceeding shall be served by the petitioner upon the attorney general together with a copy of the instrument and of any such application, objections or agreement.

(f) (1) Every trustee shall, in addition to filing copies of any instrument required under paragraph (d) of this section, file with the attorney general and all identified current charitable beneficiaries written annual financial reports, under penalties for perjury, on forms prescribed by the attorney general, setting forth information as to the nature of the assets held for charitable purposes and the administration thereof by the trustee, and shall, file with the attorney general and all identified current charitable beneficiaries a notice of the termination of the interest of any party in a trust that would cause all or part of the trust assets to be applied to charitable purposes or to have the income therefrom so applied, in accordance with rules and regulations of the attorney general.

(2) Trustees required to report to the attorney general under article 7-A of the executive law shall comply with this paragraph by filing with the attorney general in addition to any other reports required herein, copies of the financial reports required by section 172-b of the executive law unless such reports have been filed previously.

(g) Unless the filing of reports is suspended as herein provided, the first report of any trustee shall be filed no later than six months after the end of the fiscal year of the trustee during which he or she becomes subject to this section.

(h) The attorney general shall make rules and regulations necessary for the administration of this section, including rules and regulations as to the time for filing reports, the contents thereof, and any manner of executing and filing them, including but not limited to allowing or requiring any submission to the attorney general to be effected by electronic means and electronic signatures. He or she may classify trusts, estates, corporations and other trustees as to purpose, nature of assets, duration, amount of assets, amounts to be devoted to charitable purposes, or otherwise, and may establish different rules for different classes as to time and nature of the reports required, to the ends that he or she shall receive current financial reports as to all such trusts, estates, corporations or other trustees which will enable him or her to ascertain whether they are being properly administered. The attorney general may suspend the filing of financial reports as to a particular trustee for a reasonable, specifically designated time upon written application of the trustee, signed under penalties for perjury, and filed with the attorney general and after the attorney general has filed in the register of trustees a written statement that the interests of the beneficiaries will not be prejudiced thereby and that periodic reports during the term of such suspension are not required for proper supervision by his or her office. The filing of the financial reports required by this section, or the exemption from such filing or the suspension therefrom, shall not have the effect of absolving trustees from any responsibility for accounting for property or income held by them for charitable purposes. A copy of an account or other financial report filed by a trustee in any court in this state, if the account or other financial report substantially complies with the rules and regulations of the attorney general, may be filed as a financial report under this section.

(i) The attorney general may investigate transactions and relationships of trustees for the purpose of determining whether or not property held for charitable purposes has been and is being properly administered. The attorney general, his or her assistants, deputies or such other officers as may be designated by him or her, are empowered to subpoena any trustee, agent, fiduciary, beneficiary, institution, association or corporation or other witness, examine any such witness under oath and, for this purpose, administer the necessary oaths, and require the production of any books or papers which they deem relevant to the inquiry.

(j) No person shall be excused from attending such inquiry pursuant to the mandate of a subpoena, or from producing a paper or book, or from being examined or required to answer a question on the ground of failure of tender or payment of a witness fee or mileage, unless at the time of such appearance or production, as the case may be, such witness makes a demand for such payment as a condition precedent to the offering of the testimony or production required by the subpoena and such payment is not thereupon made. The provisions for payment of a witness fee or mileage do not apply to any trustee or other person holding funds for charitable purposes, or to any person in the employ of any such person, whose conduct or practices are being investigated.

(k) If a person subpoenaed to attend such inquiry fails to obey the mandate of a subpoena without reasonable cause, or if a person in attendance upon such inquiry shall without reasonable cause refuse to be sworn or to be examined or to answer a question or to produce a paper or book when ordered

so to do by the officer conducting such inquiry, he or she shall be subject to proceedings under subdivision (b) of section 2308 of the civil practice law and rules.

(*l*) The register, copies of the instruments and the reports filed with the attorney general shall be open to public inspection, subject to reasonable rules and regulations adopted by the attorney general, which may include such limitations as to type of information subject to inspection or purpose of inspection as the attorney general shall deem to be in the public interest. The attorney general shall withhold from public inspection copies of any report filed with any other governmental agency of this state or of the United States and required by law to be kept confidential by such agency, and shall, upon request of the trustee, withhold from public inspection that portion of any instrument filed which does not relate to charitable purposes and which is not otherwise of public record.

(m) The attorney general may institute appropriate proceedings to secure compliance with this section and to secure the proper administration of any trust, corporation or other relationship to which this section applies. The powers and duties of the attorney general provided in this section are in addition to all other powers and duties he or she may have. No court shall modify or terminate the powers and responsibilities of any trust, corporation or other trustee unless the attorney general is a party to the proceeding, but nothing in this section shall otherwise impair or restrict the jurisdiction of any court with respect to the matters covered by it. The failure of any trustee to register or to file reports as required by this section may be ground for judicial removal of any person responsible for such failure.

(n) This section shall apply regardless of any contrary provisions of any instrument and shall be liberally construed so as to effectuate its general purpose of protecting the public interest in charitable uses, purposes and dispositions.

(o) Every officer, agency, board or commission of this state or political subdivisions of this state or agencies thereof receiving applications for exemption from taxation of any trustee subject to this section shall annually file with the attorney general a list of all applications received during the year and shall notify the attorney general of any suspension or revocation of a tax exempt status previously granted.

(p) The attorney general shall collect from each trustee at the time of filing of the periodic reports required by this section a fee for the filing of such reports as follows:

(1) Twenty-five dollars, if the net worth of the property held by such trustee for charitable purposes is less than fifty thousand dollars,

(2) Fifty dollars if such net worth is fifty thousand dollars or more but less than two hundred and fifty thousand dollars,

(3) One hundred dollars if such net worth is two hundred and fifty thousand dollars or more but less than one million dollars,

(4) Two hundred fifty dollars if such net worth is one million dollars or more but less than ten million dollars,

(5) Seven hundred and fifty dollars if such net worth is ten million dollars or more but less than fifty million dollars, and

(6) One thousand five hundred dollars if such net worth is fifty million dollars or more.

(q) Any trustee shall be exempt from the annual reporting requirements of this section by filing each year with the attorney general a verified statement executed by such trustee attesting that during the annual reporting period (1) the gross receipts received by said trustee during such annual reporting period were less than twenty-five thousand dollars and that (2) the total assets held by such trustee at no time during such annual reporting period exceeded twenty-five thousand dollars. For the purposes of this paragraph, gross receipts mean the total received during the financial reporting period of (A) gifts, grants, and contributions; (B) gross income and revenue from all sources; and (C) gross amounts from sales of assets, other than inventory; and total assets mean the total principal and the accumulated income, if any, held by such trustee for purposes of charitable distribution on any day during such annual reporting period.

(r) A trustee who fails to comply with paragraph (d), (f) or (g) of this section shall, after notice of said failure served upon him or her by the attorney general by certified mail, return receipt requested, be liable to the state of New York for a fine of ten dollars a day not to exceed one thousand dollars for each failure to comply after the expiration of the thirty day period following the receipt of the notice from the attorney general, except that the time to comply may be extended by the attorney general. Where the attorney general, after such thirty day period has expired, finds that the failure to comply with paragraph (d), (f) or (g) of this section is due to excusable ignorance or inadvertence or other reasonable cause, the attorney general shall waive the fine imposed by this paragraph.

(s) A trustee shall not be qualified to make application for funds or grants or to receive such funds from any department or agency of the state without certifying compliance with paragraphs (d), (f) and (g) of this section and all applicable registration and reporting requirements of article seven-A of the executive law.

HISTORY:

Add, L 1967, ch 686, § 87, with substance deriving from Pers P Law § 12–b and Real P Law § 113–a; amd, L 1968, ch 263; L 1969, ch 504, § 1; L 1978, ch 555, § 48; L 1978, ch 610, § 1; L 1982, ch 504, § 1; L 1983, ch 209, § 1; L 1987, ch 571, §§ 1, 2 (see 1987 note below); L 1988, ch 24, § 10; L 1989, ch 61, § 34, eff April 19, 1989, deemed eff on and after April 1, 1989; L 1995, ch 83, § 111; L 1997, ch 329, § 2; L 1999, ch 424, § 1; L 2002, ch 43, § 17, eff Aug 1, 2002; L 2013, ch 549, § 129, eff July 1, 2014.

Prior Law: Former § 8-1.4, add, L 1966, ch 952, with substance deriving from Pers P Law § 13-a and Real P Law § 114-a; renumbered § 8-1.5, L 1967, ch 686, § 88, eff Sept 1, 1967.

Editor's Notes: Laws 1987, ch 571, § 3, provides as follows:

§ 3. This act shall take effect immediately, and shall apply to fiscal years beginning on or after the first day of January next succeeding the date on which it shall have become a law.

Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

Revision Notes: Source: PPL § 12-b; RPL § 113-a.

Changes: None.

Comments: This section combines and re-enacts PPL § 12-b and RPL § 113-a without change.

Amendment Notes: 2013. Chapter 549, § 129 amended:

Par (h) by deleting at fig 1 "the" and adding the matter in italics.

NOTES TO DECISIONS

Analysis

1. Generally
2. Constitutional issues
3. Procedural matters
4. Cy pres

1. Generally

Westchester County Society for Prevention of Cruelty to Children, which was incorporated under not-for-profit corporation law for purpose of operating to prevent cruelty to children, was subject to registration with and reporting to Attorney General pursuant to CLS EPTL § 8-1.4(a)(1), which requires any "trustee" to so register and report, and defines term trustee to include any non-profit corporation organized under New York laws for charitable purposes. *People by Abrams v Westchester County S.P.C.C., 198 A.D.2d 484, 604 N.Y.S.2d 579, 1993 N.Y. App. Div. LEXIS 11056 (N.Y. App. Div. 2d Dep't 1993).

The word "trustee" as defined in the statute includes executors. In re Estate of Stanley, 59 Misc. 2d 232, 299 N.Y.S.2d 47, 1969 N.Y. Misc. LEXIS 1703 (N.Y. Sur. Ct. 1969).

That a charitable beneficiary, where individual or corporate, is represented in the accounting by its own attorney does not affect the provisions of the statute requiring notice to the Attorney General, nor affect the right and status of the Attorney General to appear or file objections under his first duty to protect dispositions for charitable purposes. In re Lown, 59 Misc. 2d 987, 301 N.Y.S.2d 746, 1969 N.Y. Misc. LEXIS 1382 (N.Y. Sur. Ct. 1969).

In action under CLS N-PCL § 112(a) and CLS EPTL Art 8 to obtain injunctive relief against Long Island Society for the Prevention of Cruelty to Children (LISPCC), Attorney-General established that LISPCC misrepresented that it was state or police agency where (1) LISPCC offices and vehicles displayed state shield and used word "Police," (2) LISPCC vehicles used red bar and flashing lights in plain violation of provisions of Vehicle and Traffic Law which limit such items to emergency vehicles, and (3) LISPCC agents used official license plates that were not authorized for use by private not-for-profit corporation vehicles. Koppell ex rel. People v Long Island Soc'y for the Prevention of Cruelty to Children, 163 Misc. 2d 654, 621 N.Y.S.2d 762, 1994 N.Y. Misc. LEXIS 600 (N.Y. Sup. Ct. 1994).

Judge, who witnessed execution of will in which judge was named co-trustee of charitable trust, should notify Attorney General on death of testator, once judge received information suggesting that attorney who drafted will was denying that will had been executed by decedent. Ops Adv Comm Jud Ethics No. 98-28.

2. Constitutional issues

Mere fact that charitable group claims First Amendment privileges cannot shield it from scrutiny of Attorney General, who is empowered by CLS EPTL § 8-1.4 to supervise charitable corporations and to enjoin them from soliciting funds improperly. Abrams v New York Foundation for Homeless, Inc., 148 Misc. 2d 791, 562 N.Y.S.2d 325, 1990 N.Y. Misc. LEXIS 558 (N.Y. Sup. Ct. 1990).

Soc Serv Law § 461-b, subd 5(a) does not deny equal protection because it requires reports only from private proprietary homes and not from not-for-profit homes; profit motive of owners of private homes provides rational basis for such discrimination, and § 461-b, subd 5(a) simply requires that private proprietary homes submit information similar to that already required from not-for-profit homes under EPTL § 8-1.4 and Exec Law §§ 171–176. Katz v Blum, 460 F. Supp. 1222, 1978 U.S. Dist. LEXIS 14099 (S.D.N.Y. 1978), aff'd, 603 F.2d 213, 1979 U.S. App. LEXIS 16524 (2d Cir. N.Y. 1979).

3. Procedural matters

Proceeding commenced in 1995, to compel intermediate accounting and direct respondent community foundation to distribute designated fund income to petitioner, was barred by applicable 6-year statute of limitations where respondent notified petitioner in 1971 that designated automatic payments would be terminated, and petitioner engaged in subsequent grant application process for more than 20 years, indicating that it clearly was aware of its change of status. Community Serv. Soc'y v New York Community Trust (In re Preiskel), 275 A.D.2d 171, 713 N.Y.S.2d 712, 2000 N.Y. App. Div. LEXIS 9291 (N.Y. App. Div. 1st Dep't 2000).

The purpose of any examination under provisions of SCPA § 2211 is to enable the examining party to ascertain facts in order to determine whether he is going to file objections to the account, and where the executors have received gifts during decedent's lifetime the court will not limit the examination of the Attorney General, charged with representation of charitable interests, only to such matters relating to the administration of the estate as shown in the account. In re Estate of Stanley, 59 Misc. 2d 232, 299 N.Y.S.2d 47, 1969 N.Y. Misc. LEXIS 1703 (N.Y. Sur. Ct. 1969).

In a proceeding involving the accounting of an executrix involving charitable beneficiaries, the Attorney General is a necessary and proper party. In re Lown, 59 Misc. 2d 987, 301 N.Y.S.2d 746, 1969 N.Y. Misc. LEXIS 1382 (N.Y. Sur. Ct. 1969).

Where corporation was organized and operated exclusively for charitable, educational and scientific purposes, but held and administered property for charitable purposes, it was required to register with and report to the Attorney General pursuant to the provisions of Estates, Powers and Trust Law § 8-1.4. Lefkowitz v United States Institute for Theatre Technology, Inc., 64 Misc. 2d 973, 316 N.Y.S.2d 549, 1970 N.Y. Misc. LEXIS 1097 (N.Y. Sup. Ct. 1970).

A complaint by the Attorney General seeking dissolution of the Richmond County Society for the Prevention of Cruelty to Children on the grounds that it had not engaged in any activity since 1977 and was no longer able to carry out the purpose for which it was formed (N-PCL § 1102(a)(2)(E)) stated a cause of action, since public policy dictates that such a society, vested with extraordinary powers, (see N-PCL § 1403), be effective and active, and the Attorney-General had standing to maintain this action (N-PCL § 112(a)(7)); in addition, the allegation that defendant had failed to file the financial reports required of a charitable organization (EPTL § 8-1.4) stated a cause of action, since defendant obtained a Federal income tax exemption as a charitable organization and it could not now refute its status as such, nor did the fact that defendant became statutorily exempt from filing requirements in 1982 release defendant from its culpability for failing to file the requisite reports from 1976 to 1982. Abrams v Richmond County S.P.C.C., 125 Misc. 2d 530, 479 N.Y.S.2d 624, 1984 N.Y. Misc. LEXIS 3442 (N.Y. Sup. Ct. 1984).

Witnesses subpoenaed in connection with investigation into charitable corporation's possible misuse of funds were not entitled to transcript of their testimony prior to termination of investigation since Attorney General's investigation (under CLS EPTL § 8-1.4) was not adjudicatory in nature, and witnesses could not condition their compliance with subpoena on receiving transcript of testimony in view of Attorney General's concern that witnesses' testimony might then be tailored. Abrams v Alliance

for Progress, Inc., 136 Misc. 2d 1022, 519 N.Y.S.2d 533, 1987 N.Y. Misc. LEXIS 2541 (N.Y. Sup. Ct. 1987).

Witnesses subpoenaed in connection with Attorney General's investigation into charitable corporation's possible misuse of funds were not entitled to receive copies of their testimony prior to termination of hearing, pursuant to CLS Civ R § 73, since requested testimony was not to be given at public hearing and thus statute did not apply. Abrams v Alliance for Progress, Inc., 136 Misc. 2d 1022, 519 N.Y.S.2d 533, 1987 N.Y. Misc. LEXIS 2541 (N.Y. Sup. Ct. 1987).

In action by Attorney-General under CLS N-PCL § 112(a)(1) and CLS EPTL Art 8 to obtain injunctive relief against Long Island Society for the Prevention of Cruelty to Children (LISPCC), venue was properly in New York County where Charities Bureau of Attorney-General was located, and where LISPCC was required to annually file its financial reports or exemptions from filing. Koppell ex rel. People v Long Island Soc'y for the Prevention of Cruelty to Children, 163 Misc. 2d 654, 621 N.Y.S.2d 762, 1994 N.Y. Misc. LEXIS 600 (N.Y. Sup. Ct. 1994).

4. Cy pres

Attorney general should have been party to litigation on question of whether doctrine of cy pres operated to continue charitable trust following cessation of educational use of property. De Pew v Union Free School Dist., 41 A.D.2d 308, 342 N.Y.S.2d 560, 1973 N.Y. App. Div. LEXIS 4705 (N.Y. App. Div. 2d Dep't 1973).

Where private money was donated to a village fire department for the purpose of sending the fire department band to the 1984 Winter Olympics, the moneys may be required to be used for the purposes for which it was given unless a court, applying the doctrine of cy pres, permits the gift to be used for a different purpose. However, since Article 8 of EPTL confers upon the Attorney General the duty and responsibility to represent beneficiaries of charitable dispositions, that office should be consulted. 1985 Op St Compt No. 85-26, 1985 N.Y. Comp. LEXIS 115.

Court awarded attorney general damages on the breach of fiduciary duty/waste claim against the foundation's officer/director in the amount of $2,000,000 because although the $2,823,000 raised at a fundraiser was used for the officer's political campaign and disbursed by his campaign staff, rather than by the foundation, in violation of N.Y. Not-for-Profit Corp. Law §§ 717 and 720 and N.Y. Est. Powers & Trusts Law §§ 8-1.4 and 8-1.8, the funds ultimately reached their intended destinations. People v Trump, 66 Misc. 3d 200, 112 N.Y.S.3d 467, 2019 N.Y. Misc. LEXIS 5936 (N.Y. Sup. Ct. 2019).

Agency Opinions

1. Procedural matters

If internal review, by Charities Bureau of Office of Attorney General (OAG), of Attorney General's family charitable trust's IRS Form 990 identifies question or issue, Attorney General's recusal policy must be invoked: (1) Attorney General must not participate in matter or be advised, directly or indirectly, that trust is under review, (2) if further action is required, OAG must refer matter to IRS and, if criminal violation is involved, to Governor for appointment of special prosecutor, and (3) similarly, if OAG receives credible, bona fide complaint alleging violation of law involving trust, OAG must refer complaint to IRS and, if situation raises possible criminal violation, to Governor for appointment of special prosecutor. State Ethics Comm Adv Op No. 06-06.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 8-1.8.; CLS Exec § 172.; CLS N-PCL § 520.

Special proceeding relating to express trust, CLS CPLR § 7701.

Solicitation and collection of funds for charitable purposes, CLS Exec §§ 171-a et seq.

Fire corporations, CLS N-PCL § 1402.

Commissions of trustees under wills of persons dying, or under lifetime trusts created on or before August 31, 1956, CLS SCPA § 2308.

CODES, RULES AND REGULATIONS:

Charitable uses and purposes. 13 NYCRR Parts 90.– 99.

Federal References:

Charitable Donation Antitrust Immunity Act of 1997, P. L. 105-26.

Jurisprudences:

18 NY Jur 2d Cemeteries and Dead Bodies § 36.

18 NY Jur 2d Charities §§ 3., 25., 28., 42., 43., 50., 62.– 68., 80., 83., 85.

88 NY Jur 2d Public Welfare and Old Age Assistance § 186.

15 Am Jur 2d, Charities §§ 109., 114.

Law Reviews:

Arenson, Restrictions on testamentary gifts to charities in New York—a revisit. 23 N.Y.L. Sch. L. Rev. 21.

Treatise References

Matthew Bender's New York Civil Practice: 1 Cox, Arenson, Medina, New York Civil Practice: SCPA ¶¶ 315.16., 316.01.; 2 Cox, Arenson, Medina, New York Civil Practice: SCPA ¶¶ 402.04., 403.11.; 4 Cox, Arenson, Medina, New York Civil Practice: SCPA ¶¶ 1812.04., 1813.01.; 5 Cox, Arenson, Medina, New York Civil Practice: SCPA ¶¶ 2209.03., 2210.10., 2210.12., 2211.09.

Matthew Bender's New York Civil Practice: 5 Rohan, New York Civil Practice: EPTL ¶¶ 8-1.4[1] et seq.

New York Practice Guide: Probate and Estate Administration § 40.04. Voluntary Judicial Accountings.

New York Practice Guide: Probate and Estate Administration § 40.07. Proceedings to Compel an Accounting.

Matthew Bender's New York Practice Guides: New York Practice Guide: Probate and Estate Administration § 40.08.Voluntary Judicial Accountings.

Warren's Heaton on Surrogate's Court Practice: Warren's Heaton on Surrogates' Court § 209.01.Definition and Nature of Trusts .

Warren's Weed New York Real Property: Warren's Weed: New York Real Property § 22.40.

Annotations:

Duty of trustees of charitable trust to furnish information and records to attorney general relating to trust administration. 86 ALR2d 1375.

Eligibility of foreign corporation to appointment as executor, administrator, or testamentary trustee. 26 ALR3d 1019.

Charitable Trusts: elimination or modification, by court, of restrictions on amount of donation or expenditure which trustee may make for purposes of trust. 50 ALR3d 1116.

FORMS: Bender's Forms for the Civil Practice Form No. EPTL 8-1.4 et seq.

Texts: Bjorklund, Fishman & Kurtz, New York Nonprofit Law and Practice with Tax Analysis §§ 1-3(b)., 5-4(b)., 6-2(e)., 7-2(a), 7-2(b)(1), 7-2(b)(2), 7-2(b)(4), 7-2(b)(6)–7-2(b)(8)., 10-4(a)., 11-3(b)(7)., 11-4(d)., 11-5(b)(2),.

EXECUTIVE LAW

Article

2-B. State and Local Natural and Man-Made Disaster Preparedness
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ARTICLE 2-B State and Local Natural and Man-Made Disaster Preparedness

Section

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HISTORY:
Add, L 1978, ch 640, § 3, eff April 1, 1979.

§ 20. Natural and man-made disasters; policy; definitions

1. It shall be the policy of the state that:

a. local government and emergency service organizations continue their essential role as the first line of defense in times of disaster, and that the state provide appropriate supportive services to the extent necessary;

b. local chief executives take an active and personal role in the development and implementation of disaster preparedness programs and be vested with authority and responsibility in order to insure the success of such programs;

c. state and local natural disaster and emergency response functions be coordinated using recognized practices in incident management in order to bring the fullest protection and benefit to the people;

d. state resources be organized and prepared for immediate effective response to disasters which are beyond the capability of local governments and emergency service organizations; and

e. state and local plans, organizational arrangements, and response capability required to execute the provisions of this article shall at all times be the most effective that current circumstances and existing resources allow.

2. As used in this article the following terms shall have the following meanings:

a. [Eff until April 30, 2021] "disaster" means occurrence or imminent, impending or urgent threat of wide spread or severe damage, injury, or loss of life or property resulting from any natural or man-made causes, including, but not limited to, fire, flood, earthquake, hurricane, tornado, high water, landslide, mudslide, wind, storm, wave action, volcanic activity, epidemic, disease outbreak, air contamination, terrorism, cyber event, blight, drought, infestation, explosion, radiological accident, nuclear, chemical, biological, or bacteriological release, water contamination, bridge failure or bridge collapse.

a. [Eff April 30, 2021] "disaster" means occurrence or imminent threat of wide spread or severe damage, injury, or loss of life or property resulting from any natural or man-made causes, including, but not limited to, fire, flood, earthquake, hurricane, tornado, high water, landslide, mudslide, wind, storm, wave action, volcanic activity, epidemic, air contamination, terrorism, cyber event, blight, drought, infestation, explosion, radiological accident, nuclear, chemical, biological, or bacteriological release, water contamination, bridge failure or bridge collapse.

b. "state disaster emergency" means a period beginning with a declaration by the governor that a disaster exists and ending upon the termination thereof.

c. "municipality" means a public corporation as defined in subdivision one of section sixty-six of the general construction law and a special district as defined in subdivision sixteen of section one hundred two of the real property tax law.

d. "commission" means the disaster preparedness commission created pursuant to section twenty-one of this article.

e. "emergency services organization" means a public or private agency, voluntary organization or group organized and functioning for the purpose of providing fire, medical, ambulance, rescue, housing, food or other services directed toward relieving human suffering, injury or loss of life or damage to property as a result of an emergency, including non-profit and governmentally-supported organizations, but excluding governmental agencies.

f. "chief executive" means:

(1) a county executive or manager of a county;

(2) in a county not having a county executive or manager, the chairman or other presiding officer of the county legislative body;

(3) a mayor of a city or village, except where a city or village has a manager, it shall mean such manager; and

(4) a supervisor of a town, except where a town has a manager, it shall mean such manager.

g. "Disaster emergency response personnel" means agencies, public officers, employees, or affiliated volunteers having duties and responsibilities under or pursuant to a comprehensive emergency management plan.

h. "Emergency management director" means the government official responsible for emergency preparedness, response and recovery for a county, city, town, or village.

i. "incident management team" means a state certified team of trained personnel from different departments, organizations, agencies, and jurisdictions within the state, or a region of the state, activated to support and manage major and/or complex incidents requiring a significant number of local, regional, and state resources.

j. "executive level officer" means a state agency officer with the authority to deploy agency assets and resources and make decisions binding a state agency.

k. "third party non-state resources" means any contracted resource that is not owned or controlled by the state or a political subdivision including, but not limited to, ambulances, construction crews, or contractors.

HISTORY:

Add, L 1978, ch 640, § 3, eff April 1, 1979; amd, L 1988, ch 781, § 6, eff June 1, 1989; L 2010, ch 56, § 1 (Part B), eff July 1, 2010; L 2012, ch 55, § 1 (Part G), eff March 30, 2012; L 2020, ch 23, § 1, effective March 3, 2020.

Editor's Notes Laws 1978, ch 640, § 1, eff April 1, 1979, provides as follows:

Section 1. The legislature hereby finds and declares that a wide variety of disasters, often caused or compounded by mankind's own acts, cause loss of life, property and income, disrupt the normal function of government, communities and families, and cause great human suffering. The legislature further finds that it must provide for preparations to prevent, meet, defend against and recover from, dangers and problems arising from these emergencies with the least possible interference with the existing division of the powers of the government.

The legislature finds that a joint effort, public and private, is needed to mobilize the resources of individuals, business, labor, agriculture, and government at every level—federal, state and local–for effective organization to prepare for and meet natural and man-made disasters of all kinds.

The legislature finds that the state must give leadership and direction to this important task of establishing an emergency disaster preparedness program for the protection of each person in the state.

The legislature finds that a mutual benefit can be derived by the state and its political subdivisions by the integration of their natural disaster and peacetime emergency response functions with the civil defense program, thus utilizing local government and emergency services organizations for response to both natural and man-made disaster and to attack.

The legislature finds that local disaster preparedness plans are essential in order to minimize potential disasters and their effects, provide for effective local responses when disasters occur and facilitate local recovery. The legislature further finds that local plans constitute an essential part of the statewide disaster preparedness program and that without local disaster planning, no state disaster program can be fully effective.

Laws 1988, ch 781, § 11, eff June 1, 1989, provides as follows:

§ 11. This act shall take effect on the first day of June next succeeding the date on which it shall have become a law, provided however, that section seven of this act shall take effect upon the enactment into law by the state of New Jersey of legislation having an identical effect with section seven of this act, but, if the state of New Jersey shall have already enacted such legislation, section seven of this act shall take effect immediately, provided however, that effective immediately, the addition, amendment or repeal of any rule or regulation necessary for the implementation of the foregoing sections of this act on their effective date are authorized to be made on or before such effective date. (Amd, L 1989, ch 46, § 1, eff April 14, 1989.).

Laws 2020, ch 23, § 4, eff March 3, 2020, provides:

§ 4. This act shall take effect immediately and sections one and two of this act shall expire and be deemed repealed April 30, 2021.

Amendment Notes 2012. Chapter 55, § 1 (Part G) amended:

Sub 2 by adding pars i–k.

2010. Chapter 56, § 1 (Part B) amended:

Sub 1, par c by adding the matter in italics.

Sub 2, par a by adding the matter in italics.

Sub 2, par e by adding the matter in italics.

Sub 2 by adding pars g and h.

The 2020 amendment by ch 23, § 1, added "impending or urgent" and "disease outbreak" in 2(a).

Notes to Decisions

Suffolk County Executive Order 1-1985, which seeks to require county agents to develop emergency preparedness plan for local nuclear power plant, and which was issued in response to county legislature's refusal to develop or approve any plan, represents first step toward implementation of plan, rather than mere vehicle for gathering information to enable county executive to perform statutory functions, and is therefore usurpation of legislative function. Prospect v Cohalan, 65 N.Y.2d 867, 493 N.Y.S.2d 293, 482 N.E.2d 1209, 1985 N.Y. LEXIS 15826 (N.Y. 1985).

The Suffolk County Executive did not have the authority to issue an executive order directing a Commissioner of the County Police and Planning Department to test a local radiological emergency response plan (RERP) presently before the United States Nuclear Regulatory Commission and the Federal Emer-

gency Management Agency in connection with the operation of a nuclear power facility. While the general policy considerations contained in Exec Law § 20 (1)(b) encourage the chief executives of local governments within the state to take an active role in developing disaster preparedness, the specific powers conferred on local chief executives under Executive Law article 2-B are limited to instances in which a disaster has occurred or there exists an immediate threat thereof and the power to plan and prepare for a disaster is exclusively the province of local legislative bodies (Exec L § 23(1)). Prospect v Cohalan, 109 A.D.2d 210, 490 N.Y.S.2d 795, 1985 N.Y. App. Div. LEXIS 49740 (N.Y. App. Div. 2d Dep't), app. dismissed, 65 N.Y.2d 922, 493 N.Y.S.2d 1031, 483 N.E.2d 135, 1985 N.Y. LEXIS 15189 (N.Y. 1985), app. dismissed, 65 N.Y.2d 922, 493 N.Y.S.2d 1031, 483 N.E.2d 135, 1985 N.Y. LEXIS 15190 (N.Y. 1985), aff'd, 65 N.Y.2d 867, 493 N.Y.S.2d 293, 482 N.E.2d 1209, 1985 N.Y. LEXIS 15826 (N.Y. 1985).

Agency Opinions

Section 201(1) of the Public Health Law gives neither the State Health Commissioner nor the County Health Commissioner sole legal responsibility to initiate action at the county level during a nuclear disaster. 1980 NY Ops Atty Gen Dec 30 (Formal).

Under Article 2-B of the Executive Law, local chief executives and officers are immune from liability for the acts or omissions of disaster preparedness and civil defense forces. Local chief executives, officers and employees are immune from liability when performing disaster assistance pursuant to a civil defense plan, drill or test. Employees may be entitled to indemnification under the General Municipal Law if they are not granted immunity by Article 2-B. Where the immunity provisions of Article 2-B do not apply, local executives, officers and employees may raise the defense of governmental immunity. 1980 NY Ops Atty Gen Dec 31 (Formal).

The county's role in dealing with local disasters is defined by State law and includes authority to provide assistance to political subdivisions within the county. There is no authority, however, for a county to require that a municipality prepare a disaster preparedness plan. Except in the case of a transfer of functions under the Constitution or under an alternative form of county government, a local government may not adopt local laws which impair the powers of any other public corporation. 1990 N.Y. Op. Att'y Gen. No. I90-58.

Auxiliary police officers may direct and control traffic during official drills and in connection with such drills may be given the authority to issue simplified traffic informations. 1990 NY Ops Atty Gen I 90-75.

Chief executive of municipality may develop plan dealing with declaration of local state of emergency. 1993 NY Ops Atty Gen I 93-46.

Town supervisor may declare state of emergency over and promulgate orders with respect to property owned by another municipality that lies within town's boundaries. 2005 NY Ops Atty Gen I 05-5.

Town Supervisor may not direct use of resources of another municipality in emergency without that municipality's consent. 2005 NY Ops Atty Gen I 05-5.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Public corporation, definition of, CLS Gen Const § 66.

Special district, definition of, CLS RPTL § 102.

Federal Aspects:

Federal Disaster Relief Act of 1974, 42 USCS §§ 5121 et seq.

Jurisprudences:

96 NY Jur 2d State of New York § 15.

54 Am Jur 2d, Military, and Civil Defense §§ 354–361.

§ 21. Disaster preparedness commission established; meetings; powers and duties

1. There is hereby created in the executive department a disaster preparedness commission consisting of the commissioners of transportation, health, division of criminal justice services, education, economic development, agriculture and markets, housing and community renewal, general services, labor, environmental conservation, mental health, addiction services and supports, parks, recreation and historic preservation, corrections and community supervision, children and family services, homeland security and emergency services, and people with developmental disabilities, the president of the New York state energy research and development authority, the superintendents of state police and financial services, the secretary of state, the state fire administrator, the chair of the public service commission, the adjutant general, the office of information technology services, and the office of victim services, the chairs of the thruway authority, the office for the aging, the metropolitan transportation authority, the port authority of New York and New Jersey, the chief professional officer of the state coordinating chapter of the American Red Cross and three additional members, to be appointed by the governor, two of whom shall be chief executives. Each member agency may designate an executive level officer of that agency, with responsibility for disaster preparedness matters, who may represent that agency on the commission. The commissioner of the division of homeland security and emergency services shall serve as chair of the commission, and the governor shall designate the vice chair of the commission. The members of the commission, except those who serve ex officio, shall be allowed their actual and necessary expenses incurred in the performance of their duties under this article but shall receive no additional compensation for services rendered pursuant to this article.

2. The commission, on call of the chairperson, shall meet at least twice each year and at such other times as may be necessary. The agenda and meeting place of all regular meetings shall be made available to the public in advance of such meetings and all such meetings shall be open to the public. The commission shall establish quorum requirements and other rules and procedures regarding conduct of its meetings and other affairs.

3. The commission shall have the following powers and responsibilities:

a. study all aspects of man-made or natural disaster prevention, response and recovery;

b. request and obtain from any state or local officer or agency any information necessary to the commission for the exercise of its responsibilities;

c. prepare and, as appropriate, revise a state comprehensive emergency management plan. The commission shall report all revisions to such plan by March thirty-first of each year to the governor, the legislature and the chief judge of the state, unless a current version of the plan is available to the public on the website of the division of homeland security and emergency services. In preparing such plans, the commission shall consult with federal and local officials, emergency service organizations including

both volunteer and commercial emergency response organizations, and the public as it deems appropriate. To the extent such plans impact upon administration of the civil and criminal justice systems of the state, including their operational and fiscal needs in times of disaster emergency, the commission, its staff and any working group, task force, agency or other instrumentality to which it may delegate responsibility to assist it in its duties shall consult with the chief administrator of the courts and coordinate their preparation with him or her or with his or her representatives;

d. prepare, keep current and distribute to chief executives and others an inventory of programs directly relevant to prevention, minimization of damage, readiness, operations during disasters, and recovery following disasters;

e. direct state disaster operations and coordinate state disaster operations with local disaster operations following the declaration of a state disaster emergency;

f. (1) unless it deems it unnecessary, create, following the declaration of a state disaster emergency, a temporary organization in the disaster area to provide for integration and coordination of efforts among the various federal, state, municipal and private agencies involved. The commission, upon a request from a municipality and with the approval of the governor, shall direct the temporary organization to assume direction of the local disaster operations of such municipality, for a specified period of time not to exceed thirty days, and in such cases such temporary organization shall assume direction of such local disaster operations, subject to the supervision of the commission. Upon the expiration of the thirty day period the commission, at the request of the municipality, may extend the temporary organization's direction of such local disaster operations for additional periods not to exceed thirty days. The commission, upon a finding that a municipality is unable to manage local disaster operations, may, with the approval of the governor, direct the temporary organization to assume direction of the local disaster operations of such municipality, for a specified period of time not to exceed thirty days, and in such cases such temporary organization shall assume direction of such local disaster operations, subject to the supervision of the commission. Upon expiration of the thirty day period the commission, after consultation with the municipality, and with the approval of the governor, may extend the temporary organization's direction of such local disaster operations for additional periods not to exceed thirty days. In such event, such temporary organization may utilize such municipality's local resources, provided, however, that the state shall not be liable for any expenses incurred in using such municipality's resources. The state shall not be liable for the expenses incurred in using third party, non-state resources deployed to the affected area by the temporary organization, which are necessary to protect life and safety;

(2) The state incident management team shall have the authority to act as the operational arm of the temporary organization. When called to duty and deployed by the state, members of any state or local incident management team shall be deemed temporary employees of the state and shall have the same privileges and immunities afforded to regular state employees, subject to the rules and regulations promulgated by the president of the state civil service commission pursuant to section one hundred sixty-three of the civil service law;

g. assist in the coordination of federal recovery efforts and coordinate recovery assistance by state and private agencies;

h. provide for periodic briefings, drills, exercises or other means to assure that all state personnel with direct responsibilities in the event of a disaster are fully familiar with response and recovery plans and the manner in which they shall carry out their responsibilities, and coordinate with federal, local or other state personnel. Such activities may take place on a regional or county basis, and local and federal participation shall be invited and encouraged;

i. submit to the governor, the legislature and the chief judge of the state by March thirty-first of each year an annual report which shall include but need not be limited to:

(1) a summary of commission and state agency activities for the year and plans for the ensuing year with respect to the duties and responsibilities of the commission;

(2) recommendations on ways to improve state and local capability to prevent, prepare for, respond to and recover from disasters;

(3) the status of the state and local plans for disaster preparedness and response, including the name of any locality which has failed or refused to develop and implement its own disaster preparedness plan and program; and the extent to which all forms of local emergency response assets have been included, and accounted for in planning and preparation for disaster preparedness and response; and

j. develop public service announcements to be distributed to television and radio stations and other media throughout the state informing the public how to prepare and respond to disasters. Such public service announcements shall be distributed in English and such other languages as such commission deems appropriate.

k. [Redesignated]

4. All powers of the state civil defense commission are assigned to the commission.

5. The state office of emergency management within the division of homeland security and emergency services shall serve as the operational arm of the commission and shall be responsible for implementing provisions of this article and the rules and policies adopted by the commission. The director of the state office of emergency management within the division of homeland security and emergency services shall exercise the authority given to the

disaster preparedness commission in section twenty-nine of this article, to coordinate and direct state agencies and assets in response to a state disaster emergency, through their respective agency heads, on behalf of the governor and the chair of the disaster preparedness commission, when the governor, the lieutenant governor, and the chair of the disaster preparedness commission are incapacitated or without an available means of reliable communication with the state office of emergency management. If the director of the state office of emergency management is unable to exercise this authority, then the executive deputy commissioner of the division of homeland security and emergency services shall act in this capacity. In the event that the executive deputy commissioner is unable to exercise this authority, then such authority shall be exercised by the official willing and able to do so in the following order: the superintendent of the division of state police; the state fire administrator; or the director of the office of counterterrorism within the division of homeland security and emergency services. Nothing in this subdivision shall be construed to limit the authority of the governor, lieutenant governor, or the chair of the disaster preparedness commission to oversee the director of the state office of emergency management within the division of homeland security and emergency services or any official exercising authority given to the disaster preparedness commission in section twenty-nine of this article.

HISTORY:

Add, L 1978, ch 640, § 3, eff April 1, 1979; amd, L 1979, ch 225, § 8; L 1988, ch 141, § 65; L 1994, ch 158, § 1, eff June 7, 1994; L 1995, ch 83, § 55, eff June 20, 1995; L 1998, ch 274, § 1, eff July 10, 1998; L 2002, ch 346, § 1, eff Aug 6, 2002; L 2004, ch 42, § 1, eff April 20, 2004; L 2006, ch 171, § 2, eff July 26, 2006; L 2010, ch 56, § 2 (Part B), eff July 1, 2010; L 2011, ch 62, § 93 (Part C, Subpart B), eff March 31, 2011; L 2012, ch 55, §§ 2–4 (Part G), eff March 30, 2012; L 2012, ch 55, § 7 (Part O), eff May 29, 2012; L 2013, ch 176, § 1, eff July 31, 2013; L 2020, ch 116, § 1, effective June 17, 2020.

Editor's Notes: Laws 2006, ch 171, § 1, eff July 26, 2006, provides as follows:

Section 1. Statement of legislative intent. The legislature hereby finds and declares that it is important to provide information to the public to minimize the impact of disasters. Whether a disaster occurs as a result of extreme weather conditions or other natural forces, or through an act of terrorism or other man-made cause, the provision of information on measures that people should take to protect themselves and their families improves preparedness, alleviates panic and confusion and prevents causalities. The legislature finds and declares that the development and distribution of public service announcements are appropriate and effective uses of public resources, and further declares that there are many New York residents whose primary language is not English and that failing to provide disaster-related communications in the languages understood by the intended audiences complicates the process of evacuation and disaster response. Therefore, it is appropriate that disaster-related public service announcements be produced in multiple languages to reach the greatest number of New Yorkers.

2004 Legislative Agenda of the New York State Judiciary: With the tragedy of September 11th never far from our minds, we recognize that, in today's world, the possibility of disaster and dislocation cannot be ignored. The court system was able to surmount the loss of its facilities in the Court of Claims in lower Manhattan, and other operational obstacles resulting from the catastrophe, only through the extraordinary ingenuity and dedication of judges and other public officials, nonjudicial personnel and members of the Bar. The experience shook us all, however, and we have resolved to insure that, in the future, we must be prepared as possible to insure the uninterrupted operation of the courts. To this end, in the coming session we will ask the Legislature to approve several changes in law, first, we are proposing that provisions be made to assure Judiciary participation in the ongoing deliberations of the State's Disaster Preparedness Commission, established under section 21 of the Executive Law. This participation on this Commission is vital to insure that the needs of the courts are considered in the State's comprehensive efforts to plan for future disasters, and that there can be a fully coordinated response to such disasters by all agencies, executive and judicial, that comprise our system of justice.

Amendment Notes: 2013. Chapter 176, § 1 amended:

Sub 1 by adding the matter in italics.

2012. Chapter 55, § 3 (Part G) amended:

By redesignating sub 3, par f as sub 3, par f, subpar (1).

Sub 3, par f, subpar (1) by adding the matter in italics.

By adding sub 3, par f, subpar (2).

2012. Chapter 55, § 4 (Part G) amended:

Sub 5 by deleting at fig 1 "staff" and adding the matter in italics.

2010. Chapter 56, § 2 (Part B) amended:

Sub 2 by deleting at fig 1 "The adjutant general shall serve as secretary to the commission and provide staff services as may be necessary through the state emergency management office."

Sub 3, par b, subpar i, cl (3) by adding the matter in italics.

Sub 3, par b by designating sub 3, par b, subpar k as sub 3, par b, subpar j and deleting former par j.

Sub 3, par c by deleting at fig 1 "state disaster preparedness plans, to be approved by the governor, and review such plans and report thereon" and adding the matter in italics.

Sub 3, par i, subpar (3) by adding the matter in italics.

By adding subs 4 and 5.

The 2020 amendment by ch 116, § 1, added "addiction services and supports" in the first sentence of 1.

Notes to Decisions

Suffolk County Executive Order 1-1985, which seeks to require county agents to develop emergency preparedness plan for local nuclear power plant, and which was issued in response to county legislature's refusal to develop or approve any plan, represents first step toward implementation of plan, rather than mere vehicle for gathering information to enable county executive to perform statutory functions, and is therefore usurpation of legislative function. Prospect v Cohalan, 65 N.Y.2d 867, 493 N.Y.S.2d 293, 482 N.E.2d 1209, 1985 N.Y. LEXIS 15826 (N.Y. 1985).

Agency Opinions

Members of local emergency planning committees established pursuant to Federal Superfund Amendments and Reauthorization Act of 1986 (42 USCS §§ 11001 et seq.) are state employees for purposes of defense and indemnification under CLS Pub Off L § 17. NY Ops Atty Gen 89-F 2.

After declaration of state disaster emergency, Governor, acting through Disaster Preparedness Commission, may create temporary disaster relief organization under CLS Exec § 21(3)(f); such organization has authority to assume control over local disaster relief efforts, and may exercise command over any local resources and emergency service organizations available under local disaster preparedness plan, with such authority extending to local paid and volunteer fire companies. 1996 NY Ops Atty Gen F 96-12.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 20.

Federal Aspects:
Federal Disaster Relief Act of 1974, 42 USCS §§ 5121 et seq.

Jurisprudences:
85 NY Jur 2d Police Sheriffs, and Related Officers § 21.
96 NY Jur 2d State of New York §§ 15, 86.
54 Am Jur 2d, Military, and Civil Defense §§ 354–361.

Matthew Bender's New York Practice Guides: 3 New York Practice Guide: Domestic Relations § 36.02.

§ 22. State disaster preparedness plans

1. The commission shall prepare a state disaster preparedness plan and submit such plan to the governor for approval no later than one year following the effective date of this act. The governor shall act upon such plan by July first of that year. The commission shall review such plans annually.

2. The purpose of such plans shall be to minimize the effects of disasters by: (i) identifying appropriate measures to prevent disasters, (ii) developing mechanisms to coordinate the use of resources and manpower for service during and after disaster emergencies and the delivery of services to aid citizens and reduce human suffering resulting from a disaster, and (iii) provide for recovery and redevelopment after disaster emergencies.

3. Such plans shall be prepared with such assistance from other agencies as the commission deems necessary, and shall include, but not be limited to:

a. Disaster prevention and mitigation. Plans to prevent and minimize the effects of disasters shall include, but not be limited to:

(1) identification of hazards and assessment of risk;

(2) recommended disaster prevention and mitigation projects, policies, priorities and programs, with suggested implementation schedules, which outline federal, state and local roles;

(3) suggested revisions and additions to building and safety codes, and zoning and other land use programs;

(4) suggested ways in which state agencies can provide technical assistance to municipalities in the development of local disaster prevention and mitigation plans and programs;

(5) such other measures as reasonably can be taken to protect lives, prevent disasters, and reduce the impact of disasters.

b. Disaster response. Plans to coordinate the use of resources and manpower for service during and after disaster emergencies and to deliver services to aid citizens and reduce human suffering resulting from a disaster emergency shall include, but not be limited to:

(1) coordination of resources, manpower and services, using recognized practices in incident management and utilizing existing organizations and lines of authority and centralized direction of requests for assistance;

(2) the location, procurement, construction, processing, transportation, storing, maintenance, renovation, distribution, disposal or use of materials, including those donated, and facilities and services;

(3) a system for warning populations who are or may be endangered;

(4) arrangements for activating state, municipal and volunteer forces, through normal chains of command so far as possible and for continued communication and reporting;

(5) a specific plan for rapid and efficient communication, and for the integration of state communication facilities during a state disaster emergency, including the assignment of responsibilities and the establishment of communication priorities, and liaison with municipal, private and federal communication facilities;

(6) a plan for coordinated evacuation procedures, including the establishment of temporary housing and other necessary facilities;

(7) criteria for establishing priorities with respect to the restoration of vital services and debris removal;

(8) plans for the continued effective operation of the civil and criminal justice systems;

(9) provisions for training state and local government personnel and volunteers in disaster response operations;

(10) providing information to the public;

(11) care for the injured and needy and identification and disposition of the dead;

(12) utilization and coordination of programs to assist victims of disasters, with particular attention to the needs of the poor, the elderly, individuals with disabilities and other groups which may be especially affected;

(13) control of ingress and egress to and from a disaster area;

(14) arrangements to administer federal disaster assistance;

(15) a system for obtaining and coordinating situational awareness including the centralized assessment of disaster effects and resultant needs; and

(16) utilization and coordination of programs to assist individuals with household pets and service animals following a disaster, with particular attention to means of evacuation, shelter and transportation options.

c. Recovery. Plans to provide for recovery and redevelopment after disaster emergencies shall include, but not be limited to:

(1) measures to coordinate state agency assistance in recovery efforts;

(2) arrangements to administer federal recovery assistance; and

(3) such other measures as reasonably can be taken to assist in the development and implementation of local disaster recovery plans.

HISTORY:
Add, L 1978, ch 640, § 3, eff April 1, 1979; amd, L 2004, ch 42, § 2, eff April 20, 2004; L 2006, ch 677, § 2, eff Jan 1, 2007 (see 2006 note below); L 2010, ch 56, § 3 (Part B), eff July 1, 2010.

Editor's Notes: Laws 2006, ch 677, § 1, eff Jan 1, 2007, provides as follows:

Section 1. Short title. This act shall be known and may be cited as the "Pets evacuation and transportation standards act of 2006".

Amendment Notes: 2010. Chapter 56, § 3 (Part B) amended:

Sub 3, par a, opening par by adding the matter in italics.

Sub 3, par a, subpar (1) by deleting at fig 1 "potential disasters and disaster sites" and adding the matter in italics.

Sub 3, par a, subpar (2) added the matter in italics.

Sub 3, par a, subpar (4) added the matter in italics.

Sub 3, par a, subpar (5) by deleting at fig 1 "potential disasters and disaster sites" and adding the matter in italics.

Sub 3, par b, subpar (1) by deleting "centralized" and adding the matter in italics.

Sub 3, par b, subpar (2) by adding the matter in italics.

Sub 3, par b, subpar (12) deleted at fig 1 "the handicapped" and adding the matter in italics.

Sub 3, par b, subpar (15) deleted at fig 1 "disaster information" and adding the matter in italics.

Notes to Decisions

Suffolk County Executive Order 1-1985, which seeks to require county agents to develop emergency preparedness plan for local nuclear power plant, and which was issued in response to county legislature's refusal to develop or approve any plan, represents first step toward implementation of plan, rather than mere vehicle for gathering information to enable county executive to perform statutory functions, and is therefore usurpation of legislative function. Prospect v Cohalan, 65 N.Y.2d 867, 493 N.Y.S.2d 293, 482 N.E.2d 1209, 1985 N.Y. LEXIS 15826 (N.Y. 1985).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 28.

Federal Aspects:

Federal Disaster Relief Act of 1974, 42 USCS §§ 5121 et seq.

Jurisprudences:

96 NY Jur 2d State of New York §§ 15, 86.

54 Am Jur 2d, Military, and Civil Defense §§ 354–361.

§ 23. Local comprehensive emergency management plans

1. Each county, except those contained within the city of New York, and each city with a population of one million or more, shall prepare a comprehensive emergency management plan. Each city with a population of less than one million, town and village is authorized to prepare a comprehensive emergency management plan. The disaster preparedness commission shall provide assistance and advice for the development of such plans. Each city with a population of less than one million, town and village plan shall be coordinated with the county plan.

2. The purpose of such plans shall be to minimize the effect of disasters by (i) identifying appropriate local measures to prevent disasters, (ii) developing mechanisms to coordinate the use of local resources and manpower for service during and after disasters and the delivery of services to aid citizens and reduce human suffering resulting from a disaster, and (iii) providing for recovery and redevelopment after disasters.

3. Plans for coordination of resources, manpower and services shall provide for a centralized coordination and direction of requests for assistance.

4. Plans for coordination of assistance shall provide for utilization of existing organizations and lines of authority.

5. In preparing such plans, cooperation, advice and assistance shall be sought from local government officials, regional and local planning agencies, police agencies, fire departments and fire companies, local emergency management agencies, commercial and volunteer ambulance services, health and social services officials, community action agencies, the chief administrator of the courts, organizations for the elderly and the handicapped, agencies and organizations that provide home health care services, agencies and organizations that provide hospice services, other interested groups and the general public. Such advice and assistance may be obtained through public hearings held on public notice, or through other appropriate and practical methods, through which such aforementioned groups may offer their input for consideration on issues that support the effective preparation and execution of the plan. In addition, in the case of home care and hospice, such input may address procedures by which such providers may be granted essential access to care for such patients during an emergency.

6. All plans for comprehensive emergency management developed by local governments or any revisions thereto shall be submitted to the commission by December thirty-first of each year to facilitate state coordination of disaster operations.

7. Such plans shall include, but not be limited to:

a. Disaster prevention and mitigation. Plans to prevent and minimize the effects of disasters shall include, but not be limited to:

(1) identification of hazards and assessment of risk;

(2) recommended disaster prevention and mitigation projects, policies, priorities and programs, with suggested implementation schedules, which outline federal, state and local roles;

(3) suggested revisions and additions to building and safety codes and zoning and other land use programs;

(4) such other measures as reasonably can be taken to protect lives, prevent disasters, and reduce their impact.

b. Disaster response. Plans to coordinate the use of resources and manpower for service during and after disasters and to deliver services to aid citizens and reduce human suffering resulting from a disaster shall include, but not be limited to:

(1) coordination of resources, manpower and services, using recognized practices in incident management, utilizing existing organizations and lines of authority and centralized direction of requests for assistance;

(2) the location, procurement, construction, processing, transportation, storing, maintenance, renovation, distribution, disposal or use of materials, including those donated, and facilities and services which may be required in time of disaster;

(3) a system for warning populations who are or may be endangered;

(4) arrangements for activating municipal and volunteer forces, through normal chains of command so far as possible, and for continued communication and reporting;

(5) a specific plan for rapid and efficient communication and for the integration of local communication facilities during a disaster including the assignment of responsibilities and the establishment of communication priorities and liaison with municipal, private, state and federal communication facilities;

(6) a plan for coordination evacuation procedures including the establishment of temporary housing and other necessary facilities;

(7) criteria for establishing priorities with respect to the restoration of vital services and debris removal;

(8) plans for the continued effective operation of the civil and criminal justice systems;

(9) provisions for training local government personnel and volunteers in disaster response operations;

(10) providing information to the public;

(11) care for the injured and needy and identification and disposition of the dead;

(12) utilization and coordination of programs to assist victims of disasters, with particular attention to the needs of the poor, the elderly, individuals with disabilities and other groups which may be especially affected;

(13) control of ingress and egress to and from a disaster area;

(14) arrangements to administer state and federal disaster assistance;

(15) procedures under which the county, city, town, village or other political subdivision and emergency organization personnel and resources will be used in the event of a disaster;

(16) a system for obtaining and coordinating disaster information including the centralized assessment of local disaster effects and resultant needs;

(17) continued operation of governments of political subdivisions; and

(18) utilization and coordination of programs to assist individuals with household pets and service animals following a disaster, with particular attention to means of evacuation, shelter and transportation options.

c. Recovery. Local plans to provide for recovery and redevelopment after disasters shall include, but not be limited to:

(1) recommendations for replacement, reconstruction, removal or relocation of damaged or destroyed public or private facilities, proposed new or amendments to zoning, subdivision, building, sanitary or fire prevention regulations and recommendations for economic development and community development in order to minimize the impact of any potential future disasters on the community.

(2) provision for cooperation with state and federal agencies in recovery efforts.

(3) provisions for training and educating local disaster officials or organizations in the preparation of applications for federal and state disaster recovery assistance.

HISTORY:

Add, L 1978, ch 640, § 3, eff April 1, 1979; amd, L 1993, ch 603, § 1, eff Aug 4, 1993; L 2004, ch 42, §§ 3, 4, eff April 20, 2004; L 2006, ch 677, § 3, eff Jan 1, 2007 (see 2006 note below); L 2010, ch 56, § 4 (Part B), eff July 1, 2010; L 2017, ch 385, § 1, effective October 23, 2017.

Editor's Notes: Laws 2006, ch 677, § 1, eff Jan 1, 2007, provides as follows:

Section 1. Short title. This act shall be known and may be cited as the "Pets evacuation and transportation standards act of 2006".

Amendment Notes: 2010. Chapter 56, § 4 (Part B) amended:

Section heading by deleting at fig 1 "disaster preparedness" and adding the matter in italics.

Sub 1 by deleting at fig 1 "disaster preparedness" and adding the matter in italics.

Sub 5 by deleting at fig 1 "civil defense" and adding the matter in italics.

Sub 6 by deleting at fig 1 "disaster preparedness" and adding the matter in italics.

Sub 7, par a, opening par by adding the matter in italics.

Sub 7, par a, subpar (1) by deleting at fig 1 "identification of potential disasters and disaster sites" and adding the matter in italics.

Sub 7, par a, subpar (2) by adding the matter in italics.

Sub 7, par a, subpar (4) by deleting at fig 1 "prevent disasters or mitigate their impact" and adding the matter in italics.

Sub 7, par b, subpar (1) by deleting at fig 1 "centralized" and adding the matter in italics.

Sub 7, par b, subpar (2) by adding the matter in italics.

Sub 7, par b, subpar (12) by deleting at fig 1 "the handicapped" and adding the matter in italics.

The 2017 amendment by ch 385, § 1, in 1, rewrote the former first sentence as the first and second sentences, which formerly read: "Each county, except those contained within the city of New York, and each city, town and village is authorized to prepare comprehensive emergency management plans"; and substituted "Each city with a population of less than one million, town and village plan" for "City, town and village plans" in the last sentence; and in 5, added "agencies and organizations that provide home health care services, agencies and organizations that provide hospice services" in the first sentence, in the second sentence, added "and practical" and added the phrase beginning "through which such aforementioned..." and added the last sentence.

Notes to Decisions

Suffolk County Executive Order 1-1985, which seeks to require county agents to develop emergency preparedness plan for local nuclear power plant, and which was issued in response to county legislature's refusal to develop or approve any plan, represents first step toward implementation of plan, rather than mere vehicle for gathering information to enable county executive to perform statutory functions, and is therefore usurpation of legislative function. Prospect v Cohalan, 65 N.Y.2d 867, 493 N.Y.S.2d 293, 482 N.E.2d 1209, 1985 N.Y. LEXIS 15826 (N.Y. 1985).

The Suffolk County Executive did not have the authority to issue an executive order directing a Commissioner of the County Police and Planning Department to test a local radiological emergency response plan (RERP) presently before the United States Nuclear Regulatory Commission and the Federal Emergency Management Agency in connection with the operation of a nuclear power facility. While the general policy considerations contained in Exec Law § 20 (1)(b) encourage the chief executives of local governments within the state to take an active role in developing disaster preparedness, the specific powers conferred on local chief executives under Executive Law article 2-B are limited to instances in which a disaster has occurred or there exists an immediate threat thereof and the power to plan and prepare for a disaster is exclusively the province of local legislative bodies (Exec L § 23(1)). Prospect v Cohalan, 109 A.D.2d 210, 490 N.Y.S.2d 795, 1985 N.Y. App. Div. LEXIS 49740 (N.Y. App.

Div. 2d Dep't), app. dismissed, 65 N.Y.2d 922, 493 N.Y.S.2d 1031, 483 N.E.2d 135, 1985 N.Y. LEXIS 15189 (N.Y. 1985), app. dismissed, 65 N.Y.2d 922, 493 N.Y.S.2d 1031, 483 N.E.2d 135, 1985 N.Y. LEXIS 15190 (N.Y. 1985), aff'd, 65 N.Y.2d 867, 493 N.Y.S.2d 293, 482 N.E.2d 1209, 1985 N.Y. LEXIS 15826 (N.Y. 1985).

County was entitled to dismissal of complaints brought on behalf of students injured when their cafeteria wall collapsed when struck by tornado or high wind, even though emergency preparedness plan which provided for direct notification of schools failed to inform school of issuance of tornado watch, since plan provided that schools would be notified "as conditions warrant," and thus notification was discretionary act for which county was immune. Litchhult v Reiss, 183 A.D.2d 1067, 583 N.Y.S.2d 671, 1992 N.Y. App. Div. LEXIS 7172 (N.Y. App. Div. 3d Dep't), app. dismissed, app. denied, 81 N.Y.2d 737, 594 N.Y.S.2d 708, 610 N.E.2d 381, 1992 N.Y. LEXIS 4393 (N.Y. 1992).

Special relationship was not established between students, injured when cafeteria wall collapsed when struck by tornado or high wind, and county, whose emergency preparedness plan provided for direct notification of schools in emergencies "as conditions warrant," but which failed to notify schools of tornado watch, since there was no suggestion in plan's statement of purpose that special protection of students individually, or even of schools generally, was intended. Litchhult v Reiss, 183 A.D.2d 1067, 583 N.Y.S.2d 671, 1992 N.Y. App. Div. LEXIS 7172 (N.Y. App. Div. 3d Dep't), app. dismissed, app. denied, 81 N.Y.2d 737, 594 N.Y.S.2d 708, 610 N.E.2d 381, 1992 N.Y. LEXIS 4393 (N.Y. 1992).

Agency Opinions

The county's role in dealing with local disasters is defined by State law and includes authority to provide assistance to political subdivisions within the county. There is no authority, however, for a county to require that a municipality prepare a disaster preparedness plan. Except in the case of a transfer of functions under the Constitution or under an alternative form of county government, a local government may not adopt local laws which impair the powers of any other public corporation. 1990 N.Y. Op. Att'y Gen. No. I90-58.

Chief executive of municipality may develop plan dealing with declaration of local state of emergency. 1993 NY Ops Atty Gen I 93-46.

The positions of assistant fire chief of a joint fire district and county director of emergency services are compatible. 2017 N.Y. Op. Att'y Gen. No. 2017-2, 2017 N.Y. AG LEXIS 2.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 28.

Codes, Rules and Regulations:

Education department: school district and BOCES disaster emergency planning. 8 NYCRR § 155.13.

Federal Aspects:

Federal Disaster Relief Act of 1974, 42 USCS §§ 5121 et seq.

Jurisprudences:

96 NY Jur 2d State of New York § 15.

54 Am Jur 2d, Military, and Civil Defense §§ 354–361.

§ 23-a. County registry of disabled persons; notice

1. In each county having a local disaster preparedness plan pursuant to section twenty-three of this article, in order to meet the special needs of persons who would need assistance during evacuations and sheltering because of physical or mental handicaps, it is recommended that each chief executive maintain a registry of disabled persons located within the county. The registration shall identify those persons in need of assistance and plan for resource allocation to meet those identified needs. To assist the chief executive in identifying such persons, the county department of health, or such other county department or agency as designated by the chief executive, shall provide voluntary registration information to all of its special needs clients and to all incoming clients as part of the intake process. The registry shall be updated annually. The registration program shall give disabled persons the option of pre-authorizing emergency response personnel to enter their homes during search and rescue operations if necessary to assure their safety and welfare during disasters.

2. Upon the establishment of a voluntary registry of disabled persons as provided in subdivision one of this section, the chief executive shall make such registry available to the appropriate county, state and federal agencies for their use in delivering services in the event of a local or state disaster. The chief executive shall, upon the request of the state emergency management office, provide such registry information to such office. The chief executive may, at his discretion, use the registry information for local disaster preparedness only in coordination with other political subdivisions of the state.

3. Upon the establishment of a voluntary registry of disabled persons as provided in subdivision one of this section, at least semi-annually, each chief executive shall cause to be published in a newspaper of general circulation within the county a notice of the availability of the voluntary registration program.

4. All records, data, information, correspondence and communications relating to the registration of disabled persons as provided in subdivision one of this section are confidential, except that such information shall be available to other county chief executives for local disaster preparedness only as the chief executive of the county maintaining such registry deems necessary. Provided, however, the individual file of a person having registered with the registry of disabled persons shall be made available to that person upon request.

5. All community-based services providers, including home health care providers, shall assist the chief executive by collecting registration information for people with special needs as part of program intake processes, establishing programs to increase the awareness of the registration process, and educating clients about the procedures that may be necessary for their safety during disasters.

6. A county shall not be liable for any claim based upon the good faith exercise or performance or the good faith failure to exercise or perform a function or duty on the part of any officer or employee in carrying out a local disaster preparedness plan.

HISTORY:

Add, L 1996, ch 658, § 1, eff Dec 24, 1996.

§ 23-b. Nursing home and assisted living facility plans

1. After consultation with the commissioner of health, the director of the office for the aging, and the director of the state office of homeland security,

the commission shall establish standards for nursing homes, adult homes, enriched housing programs and assisted living residences regarding disaster preparedness.

2. Each such facility shall be assisted in the establishment of a disaster preparedness plan. The plan shall include, but not be limited to, the following:

(a) Maintaining a supply of food, water and to the extent deemed necessary and feasible in the reasonable judgment of the operator of the facility, medication in reserve in the event that obtaining such items should become difficult or impossible.

(b) In the reasonable judgment of the facility, having access to a generator or generators sufficient to supply electrical power to the facility.

(c) Establishing an evacuation plan for residents including an alternative site suitable for temporary use.

(d) Establishing staffing plans during a disaster.

3. Such plans shall be made available to the county emergency management office.

4. Nothing in this section shall be deemed to modify or override any requirements in regulations duly promulgated by a state agency, or to limit any lawful authority of a state agency to promulgate regulations, with respect to disaster preparedness of such facilities, the contents of their disaster preparedness plans or the process for approval of those plans.

HISTORY:

Add, L 2008, ch 589, § 1, eff Sept 25, 2008; amd, L 2010, ch 115, § 1, eff June 15, 2010, deemed eff on and after Sept 25, 2008.

Amendment Notes: 2010. Chapter 115, § 1 amended: By adding sub 4.

§ 23-c. Consistency among local disaster preparedness plans

1. The local disaster preparedness plans for each county, city, town, or village shall be so developed that no part of the local disaster preparedness plan of any county or any city, town, or village within such county conflicts with any part of the local disaster preparedness plan of any of the other said entities within such county or such county itself. In the event of any such conflict, such conflict shall be resolved by such county. The provisions of this subdivision shall not apply to a city wholly containing more than one county or to any county wholly contained within any such city.

2. In the event that any part of the local disaster preparedness plan of any county or any city, town, or village within such county conflicts with any part of the local disaster preparedness plan of any other county or any city, town, or village within any such other county, such conflict shall be resolved by the state emergency management office, as defined in paragraph (e) of subdivision one of section twenty-nine-e of this article. The provisions of this subdivision shall not apply to any county wholly contained within a city wholly containing more than one county. Any city wholly containing more than one county shall be subject to the provisions of this subdivision as if it were a county.

3. Said state emergency management office is hereby authorized and directed to promulgate any rules or regulations or take any other measures necessary to effectuate the provisions of this section.

HISTORY:

Add, L 2009, ch 415, § 1, eff Feb 22, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 415, § 2, eff Feb 22, 2010, provides as follows:

§ 2. This act shall take effect on the one hundred eightieth day after it shall have become a law. Effective immediately the state emergency management office, as defined in paragraph (e) of subdivision 1 of section 29-e of the executive law, is authorized to promulgate any and all rules and regulations and take any other measures necessary for the timely implementation of this act on its effective date on or before such date.

§ 24. Local state of emergency; local emergency orders by chief executive

1. Notwithstanding any inconsistent provision of law, general or special, in the event of a disaster, rioting, catastrophe, or similar public emergency within the territorial limits of any county, city, town or village, or in the event of reasonable apprehension of immediate danger thereof, and upon a finding by the chief executive thereof that the public safety is imperiled thereby, such chief executive may proclaim a local state of emergency within any part or all of the territorial limits of such local government; provided, however, that in the event of a radiological accident as defined in section twenty-nine-c of this article, such chief executive may request of the governor a declaration of disaster emergency. Such proclamation shall remain in effect for a period not to exceed thirty days or until rescinded by the chief executive, whichever occurs first. The chief executive may issue additional proclamations to extend the state of emergency for additional periods not to exceed thirty days. Following such proclamation and during the continuance of such local state of emergency, the chief executive may promulgate local emergency orders to protect life and property or to bring the emergency situation under control. As illustration, such orders may, within any part or all of the territorial limits of such local government, provide for:

a. the establishment of a curfew and the prohibition and control of pedestrian and vehicular traffic, except essential emergency vehicles and personnel;

b. the designation of specific zones within which the occupancy and use of buildings and the ingress and egress of vehicles and persons may be prohibited or regulated;

c. the regulation and closing of places of amusement and assembly;

d. the suspension or limitation of the sale, dispensing, use or transportation of alcoholic beverages, firearms, explosives, and flammable materials and liquids;

e. the prohibition and control of the presence of persons on public streets and places;

f. the establishment or designation of emergency shelters, emergency medical shelters, and in consultation with the state commissioner of health, community based care centers;

g. the suspension within any part or all of its territorial limits of any of its local laws, ordinances or regulations, or parts thereof subject to federal and state constitutional, statutory and regulatory limitations, which may prevent, hinder, or delay necessary action in coping with a disaster or recovery therefrom whenever (1) a request has been made pursuant to subdivision seven of this section, or (2) whenever the governor has declared a state disaster emergency pursuant to section twenty-eight of this article. Suspension of any local law, ordinance or regulation pursuant to this paragraph shall be subject to the following standards and limits:

(i) no suspension shall be made for a period in excess of five days, provided, however, that upon reconsideration of all the relevant facts and circumstances, a suspension may be extended for additional periods not to exceed five days each during the pendency of the state of emergency;

(ii) no suspension shall be made which does not safeguard the health and welfare of the public and which is not reasonably necessary to the disaster effort;

(iii) any such suspension order shall specify the local law, ordinance or regulation, or part thereof suspended and the terms and conditions of the suspension;

(iv) the order may provide for such suspension only under particular circumstances, and may provide for the alteration or modification of the requirements of such local law, ordinance or regulation suspended, and may include other terms and conditions;

(v) any such suspension order shall provide for the minimum deviation from the requirements of the local law, ordinance or regulation suspended consistent with the disaster action deemed necessary; and

(vi) when practicable, specialists shall be assigned to assist with the related emergency actions to avoid adverse effects resulting from such suspension.

2. A local emergency order shall be effective from the time and in the manner prescribed in the order and shall be published as soon as practicable in a newspaper of general circulation in the area affected by such order and transmitted to the radio and television media for publication and broadcast. Such orders may be amended, modified and rescinded by the chief executive during the pendency or existence of the state of emergency. Such orders shall cease to be in effect five days after promulgation or upon declaration by the chief executive that the state of emergency no longer exists, whichever occurs sooner. The chief executive nevertheless, may extend such orders for additional periods not to exceed five days each during the pendency of the local state of emergency.

3. The proclamation of a local state of emergency and local emergency orders of a chief executive of a county shall be executed in quadruplicate and shall be filed within seventy-two hours or as soon thereafter as practicable in the office of the clerk of the governing board of the county, the office of the county clerk, the office of the secretary of state and the state office of emergency management within the division of homeland security and emergency services. The proclamation of a local state of emergency and local emergency orders of a chief executive of a city, town or village shall be executed in quadruplicate and shall be filed within seventy-two hours or as soon thereafter as practicable in the office of the clerk of such municipal corporation, the office of the county clerk, the office of the secretary of state and the state office of emergency management within the division of homeland security and emergency services.

4. Nothing in this section shall be deemed to limit the power of any local government to confer upon its chief executive any additional duties or responsibilities deemed appropriate.

5. Any person who knowingly violates any local emergency order of a chief executive promulgated pursuant to this section is guilty of a class B misdemeanor.

6. Whenever a local state of emergency is declared by the chief executive of a local government pursuant to this section, the chief executive of the county in which such local state of emergency is declared, or where a county is wholly contained within a city, the mayor of such city, may request the governor to remove all or any number of sentenced inmates from institutions maintained by such county in accordance with section ninety-three of the correction law.

7. Whenever a local state of emergency has been declared pursuant to this section, the chief executive of the county in which the local state of emergency has been declared, or where a county is wholly contained within a city, the chief executive of the city, may request the governor to provide assistance under this chapter, provided that such chief executive determines that the disaster is beyond the capacity of local government to meet adequately and state assistance is necessary to supplement local efforts to save lives and to protect property, public health and safety, or to avert or lessen the threat of a disaster.

8. The legislature may terminate by concurrent resolution, such emergency orders at any time.

HISTORY:

Add, L 1978, ch 640, § 3, eff April 1, 1979; amd, L 1981, ch 708, § 1; L 1994, ch 158, §§ 2, 3, eff June 7, 1994; L 2010, ch 56, § 5 (Part B), eff July 1, 2010; L 2012, ch 55, §§ 5, 6 (Part G), eff March 30, 2012.

Amendment Notes: 2012. Chapter 55, § 5 (Part G) amended:

Opening par by adding the matter in italics.

Sub 1, par f by deleting at fig 1 "alternate medical care sites" and adding the matter in italics.

2012. Chapter 55, § 6 (Part G) amended:

Sub 3 by deleting at figs 1 and 3 "triplicate", at figs 2 and 4 "and" and adding the matter in italics.

Notes to Decisions

Suffolk County Executive Order 1-1985, which seeks to require county agents to develop emergency preparedness plan for local nuclear power plant, and which was issued in response to county legislature's refusal to develop or approve any plan, represents first step toward implementation of plan, rather than mere vehicle for gathering information to enable county executive to perform statutory functions, and is therefore usurpation of legislative function. Prospect v Cohalan, 65 N.Y.2d 867, 493 N.Y.S.2d 293, 482 N.E.2d 1209, 1985 N.Y. LEXIS 15826 (N.Y. 1985).

The Suffolk County Executive did not have the authority to issue an executive order directing a Commissioner of the County Police and Planning Department to test a local radiological emergency response plan (RERP) presently before the United States Nuclear Regulatory Commission and the Federal Emergency Management Agency in connection with the operation of a nuclear power facility. While the general policy considerations contained in Exec Law § 20 (1)(b) encourage the chief executives of local governments within the state to take an active role in developing disaster preparedness, the specific powers conferred on local chief executives under Executive Law article 2-B are limited to instances in which a disaster has occurred or there exists an immediate threat thereof and the power to plan and prepare for a disaster is exclusively the province of local legislative bodies (Exec L § 23(1)). Prospect v Cohalan, 109 A.D.2d 210, 490 N.Y.S.2d 795, 1985 N.Y. App. Div. LEXIS 49740 (N.Y. App. Div. 2d Dep't), app. dismissed, 65 N.Y.2d 922, 493 N.Y.S.2d 1031, 483 N.E.2d 135, 1985 N.Y. LEXIS 15189 (N.Y. 1985), app. dismissed, 65 N.Y.2d 922, 493 N.Y.S.2d 1031, 483 N.E.2d 135, 1985 N.Y. LEXIS 15190 (N.Y. 1985), aff'd, 65 N.Y.2d 867, 493 N.Y.S.2d 293, 482 N.E.2d 1209, 1985 N.Y. LEXIS 15826 (N.Y. 1985).

Orders by a town's supervisor and board for certain work to be performed to stabilize a slope behind a condominium during a period when there had been declared a local state of emergency under N.Y. Exec. Law §§ 24, 25, was a proper exercise of discretion under New York Executive Law and was not an unconstitutional exercise of authority in violation of N.Y. Const. art. 8, § 1. Sluys v Holbrook, 292 A.D.2d 371, 739 N.Y.S.2d 173, 2002 N.Y. App. Div. LEXIS 2240 (N.Y. App. Div. 2d Dep't 2002).

N.Y. Exec. Law § 25 was not subject to the temporal limitations set forth in N.Y. Exec. Law § 24. Thus, a municipality's powers under N.Y. Exec. Law § 25 could not only be exercised during a declared state of emergency or in conjunction with a local emergency order. Pierce v Hickey, 129 A.D.3d 1287, 11 N.Y.S.3d 321, 2015 N.Y. App. Div. LEXIS 4816 (N.Y. App. Div. 3d Dep't 2015).

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Agency Opinions

The chief executive of a county may unilaterally declare a local state of emergency in a city, town or village within the territorial limits of the county without the prior concurrence of the chief executive of such city, town or village. 1979 NY Ops Atty Gen Aug 24 (formal).

A town has no authority to enact a juvenile curfew that holds parents responsible for their children's violation of the curfew. A town does have authority to enact a juvenile curfew under its police power if the curfew is necessary for the protection or preservation of the public health, safety and welfare. However, such curfew must be reasonable in relation to the ends sought to be achieved and should be narrowly drawn to avoid infringing on the fundamental rights of juveniles. 1980 NY Ops Atty Gen Dec. 15 (informal).

The chief executive of a local government may declare a state of emergency with respect to state-owned property in his locality. He is also authorized to use school buses to cope with a disaster as long as the school district agrees. 1980 NY Ops Atty Gen Dec 30 (Formal).

Under Article 2-B of the Executive Law, local chief executives and officers are immune from liability for the acts or omissions of disaster preparedness and civil defense forces. Local chief executives, officers and employees are immune from liability when performing disaster assistance pursuant to a civil defense plan, drill or test. Employees may be entitled to indemnification under the General Municipal Law if they are not granted immunity by Article 2-B. Where the immunity provisions of Article 2-B do not apply, local executives, officers and employees may raise the defense of governmental immunity. 1980 NY Ops Atty Gen Dec 31 (Formal).

The county's role in dealing with local disasters is defined by State law and includes authority to provide assistance to political subdivisions within the county. There is no authority, however, for a county to require that a municipality prepare a disaster preparedness plan. Except in the case of a transfer of functions under the Constitution or under an alternative form of county government, a local government may not adopt local laws which impair the powers of any other public corporation. 1990 N.Y. Op. Att'y Gen. No. I90-58.

Auxiliary police officers may direct and control traffic during official drills and in connection with such drills may be given the authority to issue simplified traffic informations. 1990 NY Ops Atty Gen I 90-75.

Chief executive of municipality may develop plan dealing with declaration of local state of emergency. 1993 NY Ops Atty Gen I 93-46.

Town supervisor may declare state of emergency over and promulgate orders with respect to property owned by another municipality that lies within town's boundaries. 2005 NY Ops Atty Gen I 05-5.

Town Supervisor may not direct use of resources of another municipality in emergency without that municipality's consent. 2005 NY Ops Atty Gen I 05-5.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 28.

Temporary custody of sentenced inmates in emergencies, CLS Correc § 93.

Federal Aspects:

Federal Disaster Relief Act of 1974, 42 USCS §§ 5121 et seq.

Jurisprudences:

96 NY Jur 2d State of New York § 15.

35C NY Jur 2d Criminal Law Substantive Principles and Offenses § 1849.

54 Am Jur 2d, Military, and Civil Defense §§ 354–361.

§ 25. Use of local government resources in a disaster

1. Upon the threat or occurrence of a disaster, the chief executive of any political subdivision is hereby authorized and empowered to and shall use any and all facilities, equipment, supplies, personnel and other resources of his political subdivision in such manner as may be necessary or appropriate to cope with the disaster or any emergency resulting therefrom.

2. Upon the threat or occurrence of a disaster, a chief executive may request and accept assistance which is coordinated and directed by the county chief executive as provided in section twenty-six of this article.

3. A chief executive may also request and accept assistance from any other political subdivision and

may receive therefrom and utilize any real or personal property or the service of any personnel thereof on such terms and conditions as may be mutually agreed to by the chief executives of the requesting and assisting political subdivisions.

4. Upon the receipt of a request for assistance made pursuant to subdivision two or three of this section, the chief executive of any political subdivision may give, lend or lease, on such terms and conditions as he may deem necessary to promote the public welfare and protect the interests of such political subdivision, any services, equipment, facilities, supplies or other resources of his political subdivision. Any lease or loan of real or personal property pursuant to this subdivision, or any transfer of personnel pursuant hereto, shall be only for the purpose of assisting a political subdivision in emergency relief, reconstruction, or rehabilitation made necessary by the disaster.

5. A political subdivision shall not be liable for any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of any officer or employee in carrying out the provisions of this section.

6. The chief executive, when requesting assistance pursuant to this section may request assistance from the civil defense and disaster preparedness forces of any other political subdivision, but only if the civil defense and disaster preparedness forces of the type being requested have already been activated within the political subdivisions requesting assistance. The chief executive of any political subdivision receiving such a request is hereby authorized and empowered, subject to the provisions of section twenty-six of this article, to respond thereto.

7. Any power or authority conferred upon any political subdivision by this section shall be in addition to and not in substitution for or limitation of any powers or authority otherwise vested in such subdivision or any officer thereof.

HISTORY:

Add, L 1978, ch 640, § 3, eff April 1, 1979.

Notes to Decisions

County was entitled to dismissal of complaints brought on behalf of students injured when their cafeteria wall collapsed when struck by tornado or high wind, even though emergency preparedness plan which provided for direct notification of schools failed to inform school of issuance of tornado watch, since plan provided that schools would be notified "as conditions warrant," and thus notification was discretionary act for which county was immune. Litchhult v Reiss, 183 A.D.2d 1067, 583 N.Y.S.2d 671, 1992 N.Y. App. Div. LEXIS 7172 (N.Y. App. Div. 3d Dep't), app. dismissed, app. denied, 81 N.Y.2d 737, 594 N.Y.S.2d 708, 610 N.E.2d 381, 1992 N.Y. LEXIS 4393 (N.Y. 1992).

Special relationship was not established between students, injured when cafeteria wall collapsed when struck by tornado or high wind, and county, whose emergency preparedness plan provided for direct notification of schools in emergencies "as conditions warrant," but which failed to notify schools of tornado watch, since there was no suggestion in plan's statement of purpose that special protection of students individually, or even of schools generally, was intended. Litchhult v Reiss, 183 A.D.2d 1067, 583 N.Y.S.2d 671, 1992 N.Y. App. Div. LEXIS 7172 (N.Y. App. Div. 3d Dep't), app. dismissed, app. denied, 81 N.Y.2d 737, 594 N.Y.S.2d 708, 610 N.E.2d 381, 1992 N.Y. LEXIS 4393 (N.Y. 1992).

Orders by a town's supervisor and board for certain work to be performed to stabilize a slope behind a condominium during a period when there had been declared a local state of emergency under N.Y. Exec. Law §§ 24, 25, was a proper exercise of discretion under New York Executive Law and was not an unconstitutional exercise of authority in violation of N.Y. Const. art. 8, § 1. Sluys v Holbrook, 292 A.D.2d 371, 739 N.Y.S.2d 173, 2002 N.Y. App. Div. LEXIS 2240 (N.Y. App. Div. 2d Dep't 2002).

While a city, unlike a port authority and a transit authority, clearly was a political subdivision within the meaning of N.Y. Exec. Law § 25(5), the city did not demonstrate that § 25(5) automatically conferred immunity upon it for demolition workers' claims of injuries that occurred at the World Trade Center, following the terrorist attack of September 11, 2002, after the search for survivors at the site ended. Daly v Port Auth. of N.Y. & N.J., 793 N.Y.S.2d 712, 7 Misc. 3d 299, 233 N.Y.L.J. 8, 2005 N.Y. Misc. LEXIS 13 (N.Y. Sup. Ct. 2005).

Neither the New York City Transit Authority nor the Port Authority is a political subdivision within the meaning of N.Y. Exec. Law § 25; therefore neither is immune under § 25(5). Daly v Port Auth. of N.Y. & N.J., 793 N.Y.S.2d 712, 7 Misc. 3d 299, 233 N.Y.L.J. 8, 2005 N.Y. Misc. LEXIS 13 (N.Y. Sup. Ct. 2005).

In an action in which workers alleged that they suffered respiratory injuries due to exposure to hazardous conditions during the cleanup of the World Trade Center after terrorist attacks, the district court's denial of state immunity defenses asserted by a city and a port authority was not subject to interlocutory appeal under the collateral order doctrine because the plain language of the New York State Defense Emergency Act and the New York State and Local Natural Disaster and Man-Made Disaster Preparedness Law, N.Y. Exec. Law § 25(5), demonstrated that immunity under those statutes was limited to immunity from liability. Because the language of the statutes was clear, N.Y. C.P.L.R. § 5701's liberal policy of appealability was entitled to little, if any, weight in determining whether the district court's order was appealable under 28 U.S.C.S. § 1291. McCue v City of New York (In re World Trade Ctr. Disaster Site, Litig.), 521 F.3d 169, 2008 U.S. App. LEXIS 6222 (2d Cir. N.Y. 2008).

Immunity conferred by N.Y. Exec. Law § 25 was not applicable when a motorist contended that the motorist was struck by building debris from the back of a truck when a county and its employee, who was driving the truck in the aftermath of storms, failed to secure the top of an open container on the back of the truck with some type of cover as required by statute. Pierce v Hickey, 129 A.D.3d 1287, 11 N.Y.S.3d 321, 2015 N.Y. App. Div. LEXIS 4816 (N.Y. App. Div. 3d Dep't 2015).

Federal district court court rejected pesticide manufacturers' claim that the government emergency doctrine, pursuant to N.Y. Exec. Law § 25, did not shield the manufacturers from liability for the use oftheir products to combat the West Nile Virus in the New York City area, which resulted in a die-off of lobsters in Long Island Sound. Fox v Cheminova, Inc., 387 F. Supp. 2d 160, 2005 U.S. Dist. LEXIS 19915 (E.D.N.Y. 2005).

N.Y. Exec. Law § 25 was not subject to the temporal limitations set forth in N.Y. Exec. Law § 24. Thus, a municipality's powers under N.Y. Exec. Law § 25 could not only be exercised during a declared state of emergency or in conjunction with a local emergency order. Pierce v Hickey, 129 A.D.3d 1287, 11 N.Y.S.3d 321, 2015 N.Y. App. Div. LEXIS 4816 (N.Y. App. Div. 3d Dep't 2015).

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Hickey, 129 A.D.3d 1287, 11 N.Y.S.3d 321, 2015 N.Y. App. Div. LEXIS 4816 (N.Y. App. Div. 3d Dep't 2015).

Agency Opinions

The chief executive of a local government may declare a state of emergency with respect to state-owned property in his locality. He is also authorized to use school buses to cope with a disaster as long as the school district agrees. 1980 NY Ops Atty Gen Dec 30 (Formal).

Under Article 2-B of the Executive Law, local chief executives and officers are immune from liability for the acts or omissions of disaster preparedness and civil defense forces. Local chief executives, officers and employees are immune from liability when performing disaster assistance pursuant to a civil defense plan, drill or test. Employees may be entitled to indemnification under the General Municipal Law if they are not granted immunity by Article 2-B. Where the immunity provisions of Article 2-B do not apply, local executives, officers and employees may raise the defense of governmental immunity. 1980 NY Ops Atty Gen Dec 31 (Formal).

Civil defense auxiliary police may not operate vehicles owned by a police department unless the insignia on such vehicles unmistakably indicate from a distance that such vehicles are being operated by auxiliary police and not by members of the police department. 1981 NY Ops Atty Gen Dec 22.

Provisions of CLS Gen Mun § 209-m governing requests for police assistance between local governments is not applicable to requests involving State law enforcement entities. 1987 NY Ops Atty Gen No. 87-49 (Informal).

The county's role in dealing with local disasters is defined by State law and includes authority to provide assistance to political subdivisions within the county. There is no authority, however, for a county to require that a municipality prepare a disaster preparedness plan. Except in the case of a transfer of functions under the Constitution or under an alternative form of county government, a local government may not adopt local laws which impair the powers of any other public corporation. 1990 N.Y. Op. Att'y Gen. No. I90-58.

Counties may form auxiliary police units on behalf of towns; the powers of auxiliary police officers are defined under the provisions of the Defense Emergency Act and the Criminal Procedure Law; auxiliary police officers designated as peace officers may possess a firearm only if licensed under Penal Law § 400.00. 1991 NY Ops Atty Gen I 91-36.

Town Supervisor may not direct use of resources of another municipality in emergency without that municipality's consent. 2005 NY Ops Atty Gen I 05-5.

When a local disaster emergency is declared, a municipality is responsible for its own costs incurred within its own jurisdiction. Where supplies, manpower or other aid is provided to a municipality by another municipality, it is done so pursuant to whatever arrangements are made and agreed upon by the requesting and providing municipalities. Assistance may be in the form of a gift, a loan or a lease. Where supplies, manpower or other aid is provided by the State, it does so at its own expense, since such aid is provided only when a State disaster emergency is declared and a State disaster is declared only when local governments may be unable to respond adequately. Where a State disaster emergency is declared, the local governments are to bear the costs incurred to the extent possible, pending any funds which may become available under State and Federal disaster relief programs. 1982 Op St Compt File #82-203.

RESEARCH REFERENCES AND PRACTICE AIDS

Federal Aspects:

Federal Disaster Relief Act of 1974, 42 USCS §§ 5121 et seq.

Jurisprudences:

62A NY Jur 2d Government Tort Liability § 63 .

54 Am Jur 2d, Military, and Civil Defense §§ 354–361.

§ 26. Coordination of local disaster preparedness forces and local civil defense forces in disasters

1. Upon the threat or occurrence of a disaster, the chief executive of a county may coordinate responses for requests for assistance made by the chief executive of any political subdivision within the county.

2. Coordination of assistance shall utilize existing organizations and lines of authority and shall utilize any comprehensive emergency management plans prepared by the affected municipality.

3. A chief executive or any elected or appointed county, city, town or village official shall not be held responsible for acts or omissions of municipal employees, disaster preparedness forces or civil defense forces when performing disaster assistance pursuant to a declared disaster emergency or when exercising comprehensive emergency management plans.

HISTORY:

Add, L 1978, ch 640, § 3, eff April 1, 1979; amd, L 1978, ch 641, § 1, eff April 1, 1979; L 1994, ch 158, § 4, eff June 7, 1994; L 2010, ch 56, § 6 (Part B), eff July 1, 2010.

Amendment Notes: 2010. Chapter 56, § 6 (Part B) amended:

Sub 2 by deleting at fig 1 "disaster preparedness or civil defense plans" and adding the matter in italics.

Sub 3 by deleting at fig 1 "disaster preparedness" and adding the matter in italics.

Notes to Decisions

Suffolk County Executive Order 1-1985, which seeks to require county agents to develop emergency preparedness plan for local nuclear power plant, and which was issued in response to county legislature's refusal to develop or approve any plan, represents first step toward implementation of plan, rather than mere vehicle for gathering information to enable county executive to perform statutory functions, and is therefore usurpation of legislative function. Prospect v Cohalan, 65 N.Y.2d 867, 493 N.Y.S.2d 293, 482 N.E.2d 1209, 1985 N.Y. LEXIS 15826 (N.Y. 1985).

An order finding that a county sheriff was guilty of an unlawful discriminatory practice based on national origin with respect to his discharge of one of his deputies would be modified by annulling that portion that directed the complainant be offered a position as a deputy with the current sheriff, where the current sheriff had not committed any discriminatory acts and thus an order forcing him to hire a deputy not of his own choosing, but for whose acts he would nevertheless be personally liable, would deprive him of the power to select his own duties and was thus beyond the division's power to fashion remedies. County of Clinton v Kramarsky, 90 A.D.2d 649, 456 N.Y.S.2d 264, 1982 N.Y. App. Div. LEXIS 18726 (N.Y. App. Div. 3d Dep't 1982).

Agency Opinions

Under Article 2-B of the Executive Law, local chief executives and officers are immune from liability for the acts or omissions of disaster preparedness and civil defense forces. Local chief executives, officers and employees are immune from liability when performing disaster assistance pursuant to a civil defense plan, drill or test. Employees may be entitled to indemnification under the General Municipal Law if they are not granted immunity by Article 2-B. Where the immunity provisions of Article 2-B do not apply, local executives, officers and employees may raise the defense of governmental immunity. 1980 NY Ops Atty Gen Dec 31 (Formal).

The county's role in dealing with local disasters is defined by State law and includes authority to provide assistance to political subdivisions within the county. There is no authority, however, for a county to require that a municipality prepare a disaster preparedness plan. Except in the case of a transfer of functions under the Constitution or under an alternative form of county government, a local government may not adopt local laws which impair the powers of any other public corporation. 1990 N.Y. Op. Att'y Gen. No. I90-58.

When a local disaster emergency is declared, a municipality is responsible for its own costs incurred within its own jurisdiction.

Where supplies, manpower or other aid is provided to a municipality by another municipality, it is done so pursuant to whatever arrangements are made and agreed upon by the requesting and providing municipalities. Assistance may be in the form of a gift, a loan or a lease. Where supplies, manpower or other aid is provided by the State, it does so at its own expense, since such aid is provided only when a State disaster emergency is declared and a State disaster is declared only when local governments may be unable to respond adequately. Where a State disaster emergency is declared, the local governments are to bear the costs incurred to the extent possible, pending any funds which may become available under State and Federal disaster relief programs. 1982 Op St Compt File #82-203.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 25.

Federal Aspects:

Federal Disaster Relief Act of 1974, 42 USCS §§ 5121 et seq.

Jurisprudences:

54 Am Jur 2d, Military, and Civil Defense §§ 354–361.

§ 27. Continuity of local governments

1. Every county, except those wholly contained within a city, every city, every town and every village shall have power to provide by local law, and every other public corporation, district corporation or public benefit corporation shall have power to provide by resolution, for its continuity and that of its elective and appointive officers, including members of its legislative or governing body when, in the event of a disaster and the emergency conditions caused thereby, any of such officers is unable to discharge the powers and duties of his office or is absent from the political subdivision. In any such local law or resolution, provision may be made that the removal of a disability or the termination of an absence from the political subdivision of an officer higher on a list or order of succession provided therein to an office shall not terminate the service in such office of an individual lower on such list or order of succession who is temporarily filling such office. Notwithstanding the provisions of any general or special law or city or village charter, a local law or resolution adopted pursuant to this section may be made effective without approval at a mandatory or permissive referendum but in no case shall such local law or resolution become effective until one certified copy thereof has been filed with the clerk of the political subdivision or other appropriate official designated for such purpose by the respective legislative or governing body, one certified copy thereof has been filed in the office of the state comptroller and three certified copies thereof have been filed in the office of the secretary of state.

No provision of this subdivision shall be construed or interpreted as affecting the validity of any ordinance, local law or resolution enacted prior to April first, nineteen hundred seventy-nine or actions taken thereunder by the government of any county, city, town or village.

2. The provisions of this section shall not be applicable in any case where the continuity of the government of a political subdivision or that of any of its elective or appointive officers is otherwise provided for by or pursuant to law.

3. This section shall be construed liberally. The powers herein granted shall be in addition to and not in substitution of any power granted, procedure provided or provision made in any other law.

HISTORY:

Add, L 1978, ch 640, § 3, eff April 1, 1979.

Notes to Decisions

Suffolk County Executive Order 1-1985, which seeks to require county agents to develop emergency preparedness plan for local nuclear power plant, and which was issued in response to county legislature's refusal to develop or approve any plan, represents first step toward implementation of plan, rather than mere vehicle for gathering information to enable county executive to perform statutory functions, and is therefore usurpation of legislative function. Prospect v Cohalan, 65 N.Y.2d 867, 493 N.Y.S.2d 293, 482 N.E.2d 1209, 1985 N.Y. LEXIS 15826 (N.Y. 1985).

RESEARCH REFERENCES AND PRACTICE AIDS

Federal Aspects:

Federal Disaster Relief Act of 1974, 42 USCS §§ 5121 et seq.

Jurisprudences:

54 Am Jur 2d, Military, and Civil Defense §§ 354–361.

§ 28. State declaration of disaster emergency

1. Whenever the governor, on his own initiative or pursuant to a request from one or more chief executives, finds that a disaster has occurred or may be imminent for which local governments are unable to respond adequately, he shall declare a disaster emergency by executive order.

2. Upon declaration of a disaster arising from a radiological accident, the governor or his designee, shall direct one or more chief executives and emergency services organizations to:

(a) notify the public that an emergency exists; and

(b) take appropriate protective actions pursuant to the radiological emergency preparedness plan approved pursuant to sections twenty-two and twenty-three of this article. The governor, or his designee, shall also have authority to direct that other actions be taken by such chief executives pursuant to their authority under section twenty-four of this article.

3. The executive order shall include a description of the disaster, and the affected area. Such order or orders shall remain in effect for a period not to exceed six months or until rescinded by the governor, whichever occurs first. The governor may issue additional orders to extend the state disaster emergency for additional periods not to exceed six months.

4. Whenever the governor shall find that a disaster is of such severity and magnitude that effective response is beyond the capabilities of the state and the affected jurisdictions, he shall make an appropriate request for federal assistance available under federal law, and may make available out of any funds provided under the governmental emergency fund or such other funds as may be available, sufficient funds to provide the required state share

of grants made under any federal program for meeting disaster related expenses including those available to individuals and families.

HISTORY:

Add, L 1978, ch 640, § 3, eff April 1, 1979; amd, L 1981, ch 708, § 2, eff July 21, 1981.

Notes to Decisions

Suffolk County Executive Order 1-1985, which seeks to require county agents to develop emergency preparedness plan for local nuclear power plant, and which was issued in response to county legislature's refusal to develop or approve any plan, represents first step toward implementation of plan, rather than mere vehicle for gathering information to enable county executive to perform statutory functions, and is therefore usurpation of legislative function. Prospect v Cohalan, 65 N.Y.2d 867, 493 N.Y.S.2d 293, 482 N.E.2d 1209, 1985 N.Y. LEXIS 15826 (N.Y. 1985).

Governor's distribution of form letters to individuals who volunteered in relief efforts, thanking them for their assistance in emergency situation, did not violate right to free election under CLS US Const Amend 1 and CLS NY Const Art I § 9. Schulz v Pataki, 272 A.D.2d 758, 708 N.Y.S.2d 177, 2000 N.Y. App. Div. LEXIS 5698 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 769, 722 N.Y.S.2d 473, 745 N.E.2d 393, 2000 N.Y. LEXIS 3805 (N.Y. 2000).

Free food, T-shirts and entertainment furnished at picnics held in honor of individuals who came forward and rendered assistance during emergency situation did not constitute unconstitutional gifts in violation of CLS NY Const Art VII § 8(1) where there was no proof that such items were purchased with public funds. Schulz v Pataki, 272 A.D.2d 758, 708 N.Y.S.2d 177, 2000 N.Y. App. Div. LEXIS 5698 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 769, 722 N.Y.S.2d 473, 745 N.E.2d 393, 2000 N.Y. LEXIS 3805 (N.Y. 2000).

Complimentary ski lift tickets, included with letters from Governor to individuals who came forward and rendered assistance during emergency situation, did not constitute unconstitutional gifts in violation of CLS NY Const Art VII § 8(1) since lift tickets were furnished by Olympic Regional Development Authority (ORDA), public benefit corporation and independent entity which obtains its funding from Legislature and not from state treasury or state property, ORDA had occasionally provided complementary tickets to public to promote tourism, and redemption of such tickets is without expense to state. Schulz v Pataki, 272 A.D.2d 758, 708 N.Y.S.2d 177, 2000 N.Y. App. Div. LEXIS 5698 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 769, 722 N.Y.S.2d 473, 745 N.E.2d 393, 2000 N.Y. LEXIS 3805 (N.Y. 2000).

Complimentary tickets for admission to State Fair, included with letters from Governor to individuals who came forward and rendered assistance during emergency situation, did not constitute unconstitutional gifts in violation of CLS NY Const Art VII § 8(1) since State Fair, during year at issue, was completely self-funded and no tax monies were appropriated for operating costs, and entity which operates State Fair, part of Department of Agriculture and Markets, has broad authority to regulate admission and had in past provided free admission to certain patrons for purpose of promoting attendance at fair. Schulz v Pataki, 272 A.D.2d 758, 708 N.Y.S.2d 177, 2000 N.Y. App. Div. LEXIS 5698 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 769, 722 N.Y.S.2d 473, 745 N.E.2d 393, 2000 N.Y. LEXIS 3805 (N.Y. 2000).

Furnishing of complimentary tickets to State Fair, included with letters from Governor to individuals who came forward and rendered assistance during emergency situation, and printing and mailing expenses associated therewith did not violate CLS NY Const Art VII § 7, which requires there to be specific legislative appropriation each time that monies in state treasury are spent, since tickets did not entail any expenditure of monies derived from state treasury, and majority of printing and mailing expenses were financed by Department of Economic Development from appropriations by Legislature for business development and promotion of tourism; although Executive Chamber picked up small portion of postage expenses, such was reasonable expenditure consistent with goal of disaster preparedness. Schulz v Pataki, 272 A.D.2d 758, 708 N.Y.S.2d 177, 2000 N.Y. App. Div. LEXIS 5698 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 769, 722 N.Y.S.2d 473, 745 N.E.2d 393, 2000 N.Y. LEXIS 3805 (N.Y. 2000).

Furnishing of complimentary ski lift tickets by Olympic Regional Development Authority, included with letters from Governor to individuals who came forward and rendered assistance during emergency situation, and printing and mailing expenses associated therewith did not violate CLS NY Const Art VII § 7, which requires there to be specific legislative appropriation each time that monies in state treasury are spent, since tickets did not entail any expenditure of monies derived from state treasury, and majority of printing and mailing expenses were financed by Department of Economic Development from appropriations by Legislature for business development and promotion of tourism; although Executive Chamber picked up small portion of postage expenses, such was reasonable expenditure consistent with goal of disaster preparedness. Schulz v Pataki, 272 A.D.2d 758, 708 N.Y.S.2d 177, 2000 N.Y. App. Div. LEXIS 5698 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 769, 722 N.Y.S.2d 473, 745 N.E.2d 393, 2000 N.Y. LEXIS 3805 (N.Y. 2000).

Agency Opinions

When a local disaster emergency is declared, a municipality is responsible for its own costs incurred within its own jurisdiction. Where supplies, manpower or other aid is provided to a municipality by another municipality, it is done so pursuant to whatever arrangements are made and agreed upon by the requesting and providing municipalities. Assistance may be in the form of a gift, a loan or a lease. Where supplies, manpower or other aid is provided by the State, it does so at its own expense, since such aid is provided only when a State disaster emergency is declared and a State disaster is declared only when local governments may be unable to respond adequately. Where a State disaster emergency is declared, the local governments are to bear the costs incurred to the extent possible, pending any funds which may become available under State and Federal disaster relief programs. 1982 Op St Compt File #82-203.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 24.

Federal Aspects:

Federal Disaster Relief Act of 1974, 42 USCS §§ 5121 et seq.

Jurisprudences:

96 NY Jur 2d State of New York § 15.

54 Am Jur 2d, Military, and Civil Defense §§ 354–361.

§ 28-a. Post disaster recovery planning

1. Whenever a state disaster emergency has been declared any county, city, town or village included in such disaster area shall prepare a local recovery and redevelopment plan, unless the legislative body of the municipality shall determine such plan to be unnecessary or impractical. Prior to making such determination, the municipality shall notify the commission of its intent to forego preparation and provide an opportunity to comment to the commission. Within fifteen days after the declaration of a state disaster, any county, city, town or village included in such disaster area shall report to the commission whether the preparation of a recovery and redevelopment plan has been commenced, and if not, the reasons for not preparing such plan. Within sixty days after the declaration of a state disaster, the commission shall report to the governor and the legislature the status of local recovery and redevelopment plans, including the name of any municipality which has failed or refused to commence the development of a recovery and redevelopment plan.

2. The commission shall provide technical assistance in the development of such plans upon the request of such county, city, town or village.

3. A local recovery and redevelopment plan shall include, but need not be limited to: plans for replacement, reconstruction, removal or relocation of damaged or destroyed facilities; proposed new or amended regulations such as zoning, subdivision, building or sanitary ordinances and codes; and plans for economic recovery and community development. Such plans shall take into account and to the extent practicable incorporate relevant existing plans and policies and such plans shall take into account the need to minimize the potential impact of any future disasters on the community.

4. Proposed plans shall be presented at a public hearing upon five days notice published in a newspaper of general circulation in the area affected and transmitted to the radio and television media for publication and broadcast. Such notice shall state the time and place of the hearing and indicate where copies of the proposed plan may be inspected or obtained. Any county, city, town, or village preparing a recovery and redevelopment plan pursuant to this subdivision may, upon mutual agreement with any other such county, city, town or village, hold a joint hearing to consider such recovery and redevelopment plan.

5. Such plans shall be prepared within forty-five days after the declaration of a state disaster and shall be transmitted to the commission. The commission shall provide its comments on the plan within ten days after receiving such plan.

6. A plan shall be adopted by such county, city, town or village within ten days after receiving the comments of the commission. The adopted plan may be amended at any time in the same manner as originally prepared, revised and adopted.

7. The adopted plan shall be the official policy for recovery and redevelopment within the municipality.

8. Nothing in this section shall preclude any municipality from applying for or accepting and receiving any federal funds.

HISTORY:

Add, L 1978, ch 640, § 3; amd, L 1978, ch 641, § 2, eff April 1, 1979.

RESEARCH REFERENCES AND PRACTICE AIDS

Federal Aspects:

Economic recovery for disaster areas, 42 USCS §§ 3231 et seq.

Federal Disaster Relief Act of 1974, 42 USCS §§ 5121 et seq.

Jurisprudences:

54 Am Jur 2d, Military, and Civil Defense §§ 354–361.

§ 29. Direction of state agency assistance in a disaster emergency

Upon the declaration of a state disaster emergency the governor may direct any and all agencies of the state government to provide assistance under the coordination of the disaster preparedness commission. Such state assistance may include: (1) utilizing, lending, or giving to political subdivisions, with or without compensation therefor, equipment, supplies, facilities, services of state personnel, and other resources, other than the extension of credit; (2) distributing medicine, medical supplies, food and other consumable supplies through any public or private agency authorized to distribute the same; (3) performing on public or private lands temporary emergency work essential for the protection of public health and safety, clearing debris and wreckage, making emergency repairs to and temporary replacements of public facilities of political subdivisions damaged or destroyed as a result of such disaster; and (4) making such other use of their facilities, equipment, supplies and personnel as may be necessary to assist in coping with the disaster or any emergency resulting therefrom.

HISTORY:

Add, L 1978, ch 640, § 3, eff April 1, 1979.

Notes to Decisions

1. Generally

Suffolk County Executive Order 1-1985, which seeks to require county agents to develop emergency preparedness plan for local nuclear power plant, and which was issued in response to county legislature's refusal to develop or approve any plan, represents first step toward implementation of plan, rather than mere vehicle for gathering information to enable county executive to perform statutory functions, and is therefore usurpation of legislative function. Prospect v Cohalan, 65 N.Y.2d 867, 493 N.Y.S.2d 293, 482 N.E.2d 1209, 1985 N.Y. LEXIS 15826 (N.Y. 1985).

Agency Opinions

Analysis

1. Generally
2. Under former § 10

1. Generally

Under Article 2-B of the Executive Law, local chief executives and officers are immune from liability for the acts or omissions of disaster preparedness and civil defense forces. Local chief executives, officers and employees are immune from liability when performing disaster assistance pursuant to a civil defense plan, drill or test. Employees may be entitled to indemnification under the General Municipal Law if they are not granted immunity by Article 2-B. Where the immunity provisions of Article 2-B do not apply, local executives, officers and employees may raise the defense of governmental immunity. 1980 NY Ops Atty Gen Dec 31 (Formal).

When a local disaster emergency is declared, a municipality is responsible for its own costs incurred within its own jurisdiction. Where supplies, manpower or other aid is provided to a municipality by another municipality, it is done so pursuant to whatever arrangements are made and agreed upon by the requesting and providing municipalities. Assistance may be in the form of a gift, a loan or a lease. Where supplies, manpower or other aid is provided by the State, it does so at its own expense, since such aid is provided only when a State disaster emergency is declared and a State disaster is declared only when local governments may be unable to respond adequately. Where a State disaster emergency is declared, the local governments are to bear the costs incurred to the extent possible, pending any funds which may become available under State and Federal disaster relief programs. 1982 Op St Compt File #82-203.

2. Under former § 10

The authority to cope with a natural disaster in a county not having a county executive or manager rests in the chairman of

the board of supervisors, or, in his absence or incapacity, in the governing board of the county. 1965 NY Ops Atty Gen June 9.

The term "political subdivision" as used in the Public Officers Law means the area from which an officer is selected and in the case of an elective officer, the area in which the people who elect him reside. 1977 NY Ops Atty Gen Aug 18 (Informal), 1977 N.Y. AG LEXIS 64.

An elected commissioner of Sanitary District No. 2 in the Town of Hempstead in the County of Nassau is a public officer of a political subdivision and not of a municipality; such a commissioner must be a resident of the sanitary district at the time of election; and if the sanitary district commissioner moves from that district to a new residence outside of the district, even though in the same town, the office becomes vacant under Public Officers Law § 30 (1)(d); provision of Public Officers Law § 30 (4-a), by its own terms, is confined in its operation to members of the department of sanitation of a municipality so it is not applicable to an officer of this political subdivision. 1977 NY Ops Atty Gen Aug 18 (Informal).

New York State Urban Development Corporation and its subsidiary have the power to acquire, for their corporate purposes, properties contaminated by chemical wastes and, while it is not entirely free from doubt, such properties may be acquired and paid for at their market value unaffected by the contamination. 1978 NY Ops Atty Gen Sept 19.

Town board has no authority to designate the existence of a specific snow accumulation depth as a state of emergency at which point the removal of snow from private roads and driveways by the town may be authorized. 1968 Op St Compt File #1054.

RESEARCH REFERENCES AND PRACTICE AIDS

Federal Aspects:

Economic recovery for disaster areas, 42 USCS §§ 3231 et seq.

Federal Disaster Relief Act of 1974, 42 USCS §§ 5121 et seq.

Jurisprudences:

96 NY Jur 2d State of New York § 15.

54 Am Jur 2d, Military, and Civil Defense §§ 354–361.

§ 29-a. Suspension of other laws [Effective until April 30, 2021]

1. Subject to the state constitution, the federal constitution and federal statutes and regulations, the governor may by executive order temporarily suspend any statute, local law, ordinance, or orders, rules or regulations, or parts thereof, of any agency during a state disaster emergency, if compliance with such provisions would prevent, hinder, or delay action necessary to cope with the disaster or if necessary to assist or aid in coping with such disaster. The governor, by executive order, may issue any directive during a state disaster emergency declared in the following instances: fire, flood, earthquake, hurricane, tornado, high water, landslide, mudslide, wind, storm, wave action, volcanic activity, epidemic, disease outbreak, air contamination, terrorism, cyber event, blight, drought, infestation, explosion, radiological accident, nuclear, chemical, biological, or bacteriological release, water contamination, bridge failure or bridge collapse. Any such directive must be necessary to cope with the disaster and may provide for procedures reasonably necessary to enforce such directive.

2. Suspensions pursuant to subdivision one of this section shall be subject to the following standards and limits, which shall apply to any directive where specifically indicated:

a. no suspension or directive shall be made for a period in excess of thirty days, provided, however, that upon reconsideration of all of the relevant facts and circumstances, the governor may extend the suspension for additional periods not to exceed thirty days each;

b. no suspension or directive shall be made which is not in the interest of the health or welfare of the public and which is not reasonably necessary to aid the disaster effort;

c. any such suspension order shall specify the statute, local law, ordinance, order, rule or regulation or part thereof to be suspended and the terms and conditions of the suspension;

d. the order may provide for such suspension only under particular circumstances, and may provide for the alteration or modification of the requirements of such statute, local law, ordinance, order, rule or regulation suspended, and may include other terms and conditions;

e. any such suspension order or directive shall provide for the minimum deviation from the requirements of the statute, local law, ordinance, order, rule or regulation suspended consistent with the goals of the disaster action deemed necessary; and

f. when practicable, specialists shall be assigned to assist with the related emergency actions to avoid needless adverse effects resulting from such suspension.

3. Such suspensions or directives shall be effective from the time and in the manner prescribed in such orders and shall be published as soon as practicable in the state bulletin.

4. The legislature may terminate by concurrent resolution executive orders issued under this section at any time.

HISTORY:

Add, L 1978, ch 640, § 3, eff April 1, 1979; amd, L 2012, ch 55, § 7 (Part G), eff March 30, 2012; L 2020, ch 23, § 2, effective March 3, 2020.

Editor's Notes Laws 2020, ch 23, § 4, eff March 3, 2020, provides:

§ 4. This act shall take effect immediately and sections one and two of this act shall expire and be deemed repealed April 30, 2021.

Amendment Notes 2012. Chapter 55, § 7 (Part G) amended:

Sub 1 by deleting at fig 1 "and after seeking the advice of the commission," and adding the matter in italics.

The 2020 amendment by ch 23, § 2, in 1, in the first sentence, deleted "specific provisions of" preceding "any statute", and added the second and third sentence; added "which shall apply to any directive where specifically indicated" in the introductory language of 2; added "or directive" in 2a; rewrote 2b, which formerly read: "no suspension shall be made which does not safeguard the health and welfare of the public and which is not reasonably necessary to the disaster effort"; added "or directive" and "goals of the" in 2e; and added "or directives" in 3.

Notes to Decisions

Under 29 U.S.C.S. § 623(j), N.Y. Retire. & Soc. Sec. Law § 381-b(e), which subjects state police members to mandatory retirement, is exempt from the Age Discrimination in Employment Act (ADEA), 29 U.S.C.S. §§ 621- 34, because (1) 29 U.S.C.S. § 623(j)'s exemption has legal force even if the U.S. Department

of Health and Human Services (HHS) fails to issue regulations identifying job performance tests that are to be used for purposes of 29 U.S.C.S. § 623(j); (2) state officials are not required to provide state police members an opportunity to demonstrate physical and mental fitness until after the HHS issues regulations under 29 U.S.C.S. § 623(j); and (3) N.Y. Retire. & Soc. Sec. Law § 381-b(e) became a bona fide retirement plan under 29 U.S.C.S. § 623(j) when the executive order suspending N.Y. Retire. & Soc. Sec. Law § 381-b(e) was not renewed under N.Y. Exec. Law § 29-a(2)(a). Accordingly, state police members' claim that N.Y. Retire. & Soc. Sec. Law § 381-b(e) violated the ADEA was dismissed. Police Benevolent Ass'n of the N.Y. State Troopers v Bennett, 477 F. Supp. 2d 534, 2007 U.S. Dist. LEXIS 21911 (N.D.N.Y. 2007).

Executive Order No. 52 (EO52), N.Y. Comp. Codes R. & Regs. tit. 9, § 8.52, was effective on October 26, 2012, and a town's claim that the effective date of EO52 was October 31, 2012 was rejected as it would undermine EO52's purpose as those individuals who were unable to initiate actions on the day Hurricane Sandy struck in New York would be unable to benefit from the suspension; further, in Executive Order No. 81, the New York State Governor recognized the 30-day limit in this section and commented that EO52 would expire on November 25, 2012, which was exactly 30 days after the October 26, 2012, effective date. Matter of Parietti v Sampson, 117 A.D.3d 830, 986 N.Y.S.2d 160, 2014 N.Y. App. Div. LEXIS 3456 (N.Y. App. Div. 2d Dep't 2014).

Trial court properly denied a candidate's motion for summary judgment on his claim that so much of Executive Order No. 202.23 that canceled a special election was invalid because the Governor and the State Board of Elections demonstrated, prima facie, that the canceling of the special election was the minimum deviation necessary to assist or aid in coping with the COVID-19 pandemic, and was authorized pursuant to the emergency powers granted to the Governor by the Executive Law, in addition, the doctrine of laches applied due to the candidate's 14-day delay between the issuance of the Executive Order and the filing of the petition. Matter of Quinn v Cuomo, 183 A.D.3d 928, 125 N.Y.S.3d 120, 2020 N.Y. App. Div. LEXIS 3146 (N.Y. App. Div. 2d Dep't 2020).

Fact that the order did not specifically name CPL 180.80 was of no significance because the order specified the statute, local law, ordinance, order, rule, or regulation or part thereof to be suspended and the terms and conditions of the suspension by specifying the types of provisions that were the subject of the order; the order was specific enough since anyone involved in the practice of law would understand which statutory provisions had been tolled by the order. People of State of N.Y. ex rel. Nevins v Brann, 67 Misc. 3d 638, 122 N.Y.S.3d 874, 2020 N.Y. Misc. LEXIS 1431 (N.Y. Sup. Ct. 2020).

There is no particular formula that the Governor must follow when he or she suspends laws under the statute; he or she he simply must indicate with specificity which laws are being suspended. People of State of N.Y. ex rel. Nevins v Brann, 67 Misc. 3d 638, 122 N.Y.S.3d 874, 2020 N.Y. Misc. LEXIS 1431 (N.Y. Sup. Ct. 2020).

Respondent's motion to dismiss the filing of a juvenile delinquency petition against him was denied because Family Ct Act § 302.2 was clearly within the scope of the Executive Order signed by the Governor, which tolled the statute of limitations for initiating legal proceedings during the COVID-19 pandemic. Matter of M.R., 69 Misc. 3d 368, 130 N.Y.S.3d 252, 2020 N.Y. Misc. LEXIS 4225 (N.Y. Fam. Ct. Aug. 10, 2020).

Although respondent turned 18 years of age in June 2020, under the Executive Orders issued, the period by which the Presentment Agency had to file the juvenile delinquency petition against him was extended due to the COVID-19 pandemic and, thus, the petition, filed on July 17, 2020, before the expiration date of September 4, 2020 under the Executive Order, made the petition timely filed. Matter of M.R., 69 Misc. 3d 368, 130 N.Y.S.3d 252, 2020 N.Y. Misc. LEXIS 4225 (N.Y. Fam. Ct. Aug. 10, 2020).

To the extent that petitioner challenged the Governor's authority to issue the Executive Orders suspending or modifying the election law regarding absentee ballots and permitting electronic application for an absentee ballot where a state disaster had been declared, that claim was rejected because not only were the Governor's actions reasonable and necessary in response to the COVID-19 pandemic, they were well founded in the law. Matter of Forman v Haight, 69 Misc. 3d 803, 132 N.Y.S.3d 531, 2020 N.Y. Misc. LEXIS 5618 (N.Y. Sup. Ct. 2020).

Governor's executive orders, starting with EO 202.8, issued March 20, 2020, were reasonable under the circumstances during the onset of the pandemic. The executive orders since July 6, 2020 (the date of EO 202.48) do not pertain to ACOD's (adjournments in contemplation of dismissal. People v Zeolli, 69 Misc. 3d 927, 133 N.Y.S.3d 772, 2020 N.Y. Misc. LEXIS 7039 (N.Y. City Ct. 2020).

Order to Show Cause filed by restaurant owners, seeking to prevent enforcement of COVID dining restrictions limiting New York City restaurants to 25% indoor capacity, while restaurants elsewhere in the State could open at 50% capacity, was denied because the owners' allegations of economic loss did not constitute irreparable harm, the restriction had a substantial relation to public health and safety in the City, and less densely populated areas did not present the same risk of harm. Bocelli Ristorante Inc. v Cuomo, 2020 N.Y. Misc. LEXIS 10213 (N.Y. Sup. Ct. 2020).

Plaintiff's motion for a preliminary injunction seeking to be permitted to seat more than 50 people for wedding gatherings was denied because the Court could not conclude that the restrictions that defendants implemented in Executive Order 202.45 and the rules and regulations that implemented that Executive Order were arbitrary or oppressive or bore no substantial relationship to the public safety concerns, namely the spread of COVID-19, that they were intended to address. Bill & Ted's Riviera, Inc. v Cuomo, 2020 U.S. Dist. LEXIS 188763 (N.D.N.Y. Oct. 13, 2020).

RESEARCH REFERENCES AND PRACTICE AIDS

Federal Aspects:

Federal Disaster Relief Act of 1974, 42 USCS §§ 5121 et seq.

Jurisprudences:

96 NY Jur 2d State of New York § 15.

54 Am Jur 2d, Military, and Civil Defense §§ 354–361.

§ 29-a. Suspension of other laws. [Effective April 30, 2021]

1. Subject to the state constitution, the federal constitution and federal statutes and regulations, the governor may by executive order temporarily suspend specific provisions of any statute, local law, ordinance, or orders, rules or regulations, or parts thereof, of any agency during a state disaster emergency, if compliance with such provisions would prevent, hinder, or delay action necessary to cope with the disaster.

2. Suspensions pursuant to subdivision one of this section shall be subject to the following standards and limits:

a. no suspension shall be made for a period in excess of thirty days, provided, however, that upon reconsideration of all of the relevant facts and circumstances, the governor may extend the suspension for additional periods not to exceed thirty days each;

b. no suspension shall be made which does not safeguard the health and welfare of the public and which is not reasonably necessary to the disaster effort;

c. any such suspension order shall specify the statute, local law, ordinance, order, rule or regulation or part thereof to be suspended and the terms and conditions of the suspension;

d. the order may provide for such suspension only under particular circumstances, and may provide for the alteration or modification of the requirements of such statute, local law, ordinance, order, rule or regulation suspended, and may include other terms and conditions;

e. any such suspension order shall provide for the minimum deviation from the requirements of the statute, local law, ordinance, order, rule or regulation suspended consistent with the disaster action deemed necessary; and

f. when practicable, specialists shall be assigned to assist with the related emergency actions to avoid needless adverse effects resulting from such suspension.

3. Such suspensions shall be effective from the time and in the manner prescribed in such orders and shall be published as soon as practicable in the state bulletin.

4. The legislature may terminate by concurrent resolution executive orders issued under this section at any time.

HISTORY:

Add, L 1978, ch 640, § 3, eff April 1, 1979; amd, L 2012, ch 55, § 7 (Part G), eff March 30, 2012; L 2020, ch 23, § 2, effective March 3, 2020.

§ 29-b. Use of disaster emergency response personnel in disasters

1. The governor may, in his or her discretion, direct the state disaster preparedness commission to conduct an emergency exercise or drill, under its direction, in which all or any of the personnel and resources of the agencies of the commission of the state may be utilized to perform the duties assigned to them in a disaster, for the purpose of protecting and preserving human life or property in a disaster. During a disaster or such drill or exercise, disaster emergency response personnel in the state shall operate under the direction and command of the chair of such commission, and shall possess the same powers, duties, rights, privileges and immunities as are applicable in a civil defense drill held at the direction of the state civil defense commission under the provisions of the New York state defense emergency act.

2. Local use of disaster emergency response personnel. a. Upon the threat or occurrence of a disaster, and during and immediately following the same, and except as otherwise provided in paragraph d of this subdivision, the county chief executive may direct the emergency management director of a county to assist in the protection and preservation of human life or property by calling upon disaster emergency response personnel employed by or supporting that county, as specified in the county comprehensive emergency management plan, to perform the emergency response duties assigned to them.

b. The disaster emergency response personnel of the county shall be regarded as a reserve disaster force to be activated, in whole or in part, by the county emergency management director upon the direction of the county chief executive when the county chief executive, in his or her discretion, is convinced that the personnel and resources of local municipal and private agencies normally available for disaster assistance are insufficient adequately to cope with the disaster.

c. Except as provided in paragraph d of this subdivision, the county chief executive may exercise the power conferred upon him in paragraph a of this subdivision, or may deactivate the disaster emergency response personnel of the county in whole or in part, on his own motion or upon the request of the chief executive officer of a village, town or city located within the county of which he is an officer.

d. Where the local office of public safety or emergency management in a city is independent of the county office of public safety or emergency management and is not consolidated therewith, the county chief executive may direct the emergency management director of the county to render assistance within such city only when the chief executive officer of such city has certified to him that the disaster emergency response personnel of the city have been activated pursuant to the provisions of subdivision three of this section and that all resources available locally are insufficient adequately to cope with the disaster.

e. When performing disaster assistance pursuant to this section, county disaster emergency response personnel shall operate under the direction and command of the county emergency management director and his or her duly authorized deputies, and shall possess the same powers, duties, rights, privileges and immunities they would possess when performing their duties in a locally sponsored civil defense drill or training exercise in the civil or political subdivision in which they are enrolled, employed or assigned emergency response responsibilities.

f. The chief executive officer of a city shall be responsible for the conduct of disaster operations within the city, including the operations directed by the county emergency management director when rendering disaster assistance within a city pursuant to this section.

g. Outside of a city, the sheriff of the county, and in Nassau county the commissioner of police of the county of Nassau, shall supervise the operations of the emergency management director when rendering peace officer duties incident to disaster assistance. The sheriff and such commissioner may delegate such supervisory power to an elected or appointed town or village official in the area affected.

h. Neither the chief executive officer of a city, nor the county chief executive, nor any elected or appointed town or village official to whom the county chief executive has delegated supervisory power as aforesaid shall be held responsible for acts or omis-

sions of disaster emergency response personnel when performing disaster assistance.

3. City use of disaster emergency response personnel. a. Upon the threat or occurrence of a disaster, and during and immediately following the same, and except as otherwise provided in paragraph d of this subdivision, the chief executive of a city may direct the emergency management director of the city to assist in the protection and preservation of human life or property by calling upon city disaster emergency response personnel to perform the emergency response duties assigned to them.

b. The disaster emergency response personnel of the city shall be regarded as a reserve disaster force to be activated, in whole or in part, by the city emergency management director upon the direction of the chief executive officer of the city when the latter, in his or her discretion, is convinced that the personnel and resources of local municipal and private agencies normally available for disaster assistance are insufficient adequately to cope with the disaster.

c. Except as provided in paragraph d of this subdivision, the chief executive officer of a city may exercise the power conferred upon him in paragraph a of this subdivision, or may deactivate the disaster emergency response personnel of the city in whole or in part, on his own motion or upon the request of the head of the city police force.

d. Where the local office of emergency management in a city is under the jurisdiction of a consolidated county office of civil defense as provided in the New York state defense emergency act, the chief executive officer of such city seeking the assistance of disaster emergency response personnel in the protection and preservation of human life or property within such city because of such disaster, must request the same from the county chief executive in which such city is located, in the same manner as provided for assistance to towns and villages in subdivision two of this section.

e. When performing disaster assistance pursuant to this subdivision, disaster emergency response personnel shall operate under the direction and command of the city emergency management director and his or her duly authorized deputies, and shall possess the same powers, duties, rights, privileges, and immunities they would possess when performing their duties in a locally sponsored civil defense drill or training exercise in the city in which they are enrolled, employed or assigned emergency response responsibilities.

f. Where the city disaster emergency response personnel have been directed to assist in local disaster operations pursuant to paragraph a of this subdivision, and the chief executive officer of the city is convinced that the personnel and resources of local municipal and private agencies normally available for disaster assistance, including local disaster emergency response personnel, are insufficient adequately to cope with the disaster, he or she may certify the fact to the county chief executive and request the county chief executive to direct the county emergency management director to render assistance in the city, as provided in subdivision two of this section.

g. The chief executive officer of a city shall be responsible for the conduct of disaster operations within the city, including the operations directed by the county emergency management director, when rendering disaster assistance within a city pursuant to this subdivision.

h. Neither the chief executive officer of a city, nor the county chief executive, shall be held responsible for acts or omissions of disaster emergency response personnel when performing disaster assistance.

HISTORY:

Add, L 1978, ch 640, § 3, eff April 1, 1979; amd, L 2010, ch 56, § 7 (Part B), eff July 1, 2010.

Amendment Notes: 2010. Chapter 56, § 7 (Part B) amended:

Section heading by deleting at fig 1 “civil defense forces” and adding the matter in italics.

Sub 1 by deleting at fig 1 “civil defense commission”, at fig 2 “a civil defense drill”, at fig 3 “cvil defense forces”, at fig 4 “civil defense emergency”, at fig 5 “In such event, civil defense forces”, at fig 6 “state director of civil defense” and adding the matter in italics.

Sub 2, subsect heading by deleting at fig 1 “civil defense forces” and adding the matter in italics.

Sub 2, par a by deleting at fig 1 “civil defense director”, at fig 2 “holding a civil defense drill and training exercise at the scene of the disaster and at any other appropriate places within the county, in which all or any civil defense forces may be called upon”, at fig 3 “civil defense” and adding the matter in italics.

Sub 2, par b by deleting at fig 1 “civil defense forces” , at fig 2 “in”, at fig 3 “civil defense director” and adding the matter in italics.

Sub 2, par c by deleting at fig 1 “civil defense forces” and adding the matter in italics.

Sub 2, par d by deleting at figs 1 and 2 “civil defense”, at fig 3 “civil defense director”, at fig 4 “civil defense forces” and adding the matter in italics.

Sub 2, par e by deleting at fig 1 “civil defense forces”, at figs 2 and 3 “civil defense”, at fig and adding the matter in italics.

Sub 2, par f by deleting at fig 1 “civil defense” and adding the matter in italics.

Sub 2, par g by deleting at fig 1 “civil defense director” and adding the matter in italics.

Sub 2, par h by deleting at fig 1 “civil defense forces” and adding the matter in italics.

Sub 3, subsect heading by deleting at fig 1 “civil defense forces” and adding the matter in italics.

Sub 3, par a by deleting at figs 1 and 3 “civil defense”, at fig 2 “holding a civil defense drill and training exercise at the scene of the disaster and at any other appropriate places within the city, in which all or any civil defense forces may be called upon” and adding the matter in italics.

Sub 3, par b by deleting at fig 1 “civil defense forces”, at fig 2 “civil defense” and adding the matter in italics.

Sub 3, par c by deleting at fig 1 “civil defense forces” and adding the matter in italics.

Sub 3, par d by deleting at figs 1 and 2 “civil defense” and adding the matter in italics.

Sub 3, par e by deleting at fig 1 “city civil defense forces”, at fig 2 “civil defense director”, at fig 3 “civil defense” and adding the matter in italics:

Sub 3, par f by deleting at figs 1 and 2 “civil defense forces”, at fig 3 “civil defense” and adding the matter in italics:

Sub 3, par g by deleting at fig 1 "civil defense" and adding the matter in italics:

Sub 3, par h by deleting at fig 1 "civil defense forces" and adding the matter in italics.

Notes to Decisions

Suffolk County Executive Order 1-1985, which seeks to require county agents to develop emergency preparedness plan for local nuclear power plant, and which was issued in response to county legislature's refusal to develop or approve any plan, represents first step toward implementation of plan, rather than mere vehicle for gathering information to enable county executive to perform statutory functions, and is therefore usurpation of legislative function. Prospect v Cohalan, 65 N.Y.2d 867, 493 N.Y.S.2d 293, 482 N.E.2d 1209, 1985 N.Y. LEXIS 15826 (N.Y. 1985).

Agency Opinions

Special police officers appointed under the White Plains City Charter are neither police officers nor peace officers. Auxiliary police appointed under the State Defense Emergency Act are peace officers during official drills but may not exercise the powers of peace officers. 1981 NY Ops Atty Gen April 7 (informal).

Auxiliary police may be authorized to direct and control traffic as a component of official drills in preparation for an attack or in preparation for combating natural or man-made disasters. In undertaking this rule, auxiliary police possess those powers of peace officers under section 2.20 of the Criminal Procedure Law that are necessary for such purposes. N.Y. Op. Att'y Gen. No. 84-28.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS CPL § 2.10.

Federal Aspects:

Federal Disaster Relief Act of 1974, 42 USCS §§ 5121 et seq.

Jurisprudences:

96 NY Jur 2d State of New York § 15.

54 Am Jur 2d, Military, and Civil Defense §§ 354–361.

§ 29-c. HERERadiological preparedness

1. The commission:

(a) may monitor directly and record the off-site presence of radioactive material in the vicinity of nuclear electric generating facilities located in the state of New York;

(b) shall obtain from the licensees, United States nuclear regulatory commission-required high range radiation, temperature and pressure levels in the containment buildings and in the containment building vents of nuclear electric generating facilities located in the state of New York; and,

(c) shall obtain, subject to the approval of the United States nuclear regulatory commission, any reactor data provided by the licensee to the United States nuclear regulatory commission, which the disaster preparedness commission determines, as a result of the report issued pursuant to section twenty-nine-d of this article, to be a reliable indicator of a possible radiological accident.

Upon the occurrence of a radiological accident, the commission shall promptly provide appropriate and available radioactivity monitoring data to any chief executive who requests it. For the purposes of this section, the term "radiological accident" shall be limited to a radiological accident occurring at a nuclear electric generating facility.

2. (a) Any licensee of the United States nuclear regulatory commission for a nuclear electric generating facility shall be liable for an annual fee to support state and local governmental responsibilities under accepted radiological emergency preparedness plans related to the facility operated by such licensee.

(b) The amount of such fee shall be one million dollars. Such fee, which shall be payable to the commission on or before December first, shall be expended or distributed only by appropriation.

3. Such fees shall be expended by the commission for purposes of supporting state and local government responsibilities under accepted radiological emergency preparedness plans, including:

(a) purchase, installation, maintenance and operation of equipment used by the commission and local governments to monitor and record the potential and actual presence of radioactive materials within the appropriate planning radius from a nuclear electric generating facility;

(b) purchase, storage and distribution by the commission of equipment, drugs or other material for the purpose of protecting public health and safety;

(c) personal service, administrative costs and contractual services;

(d) emergency services personnel training and the plans, development, implementation, testing and revisions; and,

(e) the state or local share when applying for matching funds.

3-a. (a) Notwithstanding the provisions of subdivision three of this section, the New York state emergency management office (SEMO) and the coalition of nuclear counties, which constitutes the counties of Monroe, Wayne, Oswego, Orange, Putnam, Rockland and Westchester, shall each receive an equal one-half portion of the total amount of proceeds resulting from the total assessments and contributions made pursuant to this section.

(b) The one-half portion of the proceeds resulting from the total assessments and contributions made pursuant to this section received by the coalition of nuclear counties shall be distributed pursuant to the following formula:

Monroe county 12.3%
Orange county 10%
Oswego county 12.5%
Putnam county 9.8%
Rockland county 18%
Wayne county 12.4%
Westchester county 25%

4. [Repealed]

HISTORY:

Add, L 1981, ch 708, § 3, eff July 21, 1981; amd, L 1992, ch 728, § 1, eff July 31, 1992; L 1994, ch 169, § 91, eff June 9, 1994, deemed eff April 1, 1994; L 2009, ch 56, § 1 (Part R), eff April 7, 2009, deemed eff on and after April 1, 2009 (see 2009 note below),2 (Part R), eff April 7, 2009, deemed eff on and after April 1, 2009 (see 2009 note below).

Editor's Notes: Laws 2009, ch 56, § 3 (Part R), eff April 7, deemed eff on and after April 1, 2009, provides as follows:

§ 3. This act shall take effect immediately and shall be deemed to have been in full force and effect on and after April

1, 2009, provided, however, this act shall not affect obligations or amounts with respect to fees payable on or before April 1, 2009.

Amendment Notes:

2009. Chapter 56, § 1 (part r) amended:

Sub 2, par (b), by deleting "determined annually by the commission taking into account the costs of such responsibilities not otherwise provided for and unexpended amounts of previous fees paid by any such licensee. In no event shall an annual fee for any facility exceed five hundred fifty thousand" and "April".

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 24; CLS Pub Ser § 66.

Federal Aspects:

Federal Disaster Relief Act of 1974, 42 USCS §§ 5121 et seq.

Jurisprudences:

54 Am Jur 2d, Military, and Civil Defense §§ 354–361.

§ 29-d. Reports

In order to assess the present preparedness in the state for any radiological accident and to determine the need for, and appropriateness of, any additional specific steps by state government, the commission shall report to the governor and the legislature by January first, nineteen hundred eighty-two, its findings, recommendations and proposed legislation where appropriate concerning:

1. The need for and appropriateness of additional specific state activities or programs beyond those required by the accepted radiological emergency preparedness plans or provided for under existing law, including but not limited to:

(a) radiological monitoring equipment;

(b) warning systems and equipment;

(c) medical technologies and equipment;

(d) plume transport and dose assessment models; and

(e) nuclear fuel cycle and materials licensees other than electric generating facilities.

2. Any such recommendations shall be developed in consultation with all concerned public and private parties and shall:

(a) take into account proven safety effectiveness;

(b) outline any proposed costs and the means for meeting such costs;

(c) consider related activities of the United States nuclear regulatory commission or others; and

(d) when appropriate, discuss alternatives and various implementation stages.

HISTORY:

Add, L 1981, ch 708, § 3, eff July 21, 1981.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 29-c.

Federal Aspects:

Federal Disaster Relief Act of 1974, 42 USCS §§ 5121 et seq.

Jurisprudences:

54 Am Jur 2d, Military, and Civil Defense §§ 354–361.

§ 29-e. New York state emergency assistance program

1. For purposes of this section the following terms shall have the following meanings:

(a) "Infrastructure" shall mean and include publicly owned storm and sanitary sewers, water supply systems, drainage systems, transportation systems, roads and bridges.

(b) "Municipality" shall mean any county, city, village, or town of the state.

(c) "Public facilities" shall mean and include publicly owned buildings, including traditional government buildings, such as courthouses, firehouses, police stations, parks, recreational facilities, and correctional facilities.

(d) "Fund" shall mean the state's contingency reserve fund established by law.

(e) "The office of emergency management " shall mean the office within the division of homeland security and emergency services.

2. The governor may, upon a finding that a municipality in the state has suffered substantial damage by an unanticipated natural disaster which has resulted in significant economic distress within such municipality, issue a declaration of significant economic distress in accordance with the provisions herein. In determining whether such significant economic distress exists, the governor shall consider whether the following criteria have been met:

(a) the municipality suffered a substantial loss of assessed value;

(b) substantial damage has occurred to municipal buildings, facilities and infrastructure;

(c) the cost incurred by the municipality for clean-up operations is significant;

(d) businesses within the municipality have experienced significant economic loss due to the inability to conduct normal business due to the disaster;

(e) a significant increase in unemployment claims filed by persons employed within the municipality has occurred; and

(f) the county or the county within which the municipality is located has been declared eligible by the United States small business administration for physical disaster and economic injury disaster loans. In addition, the governor shall also consider the extent that other financial resources, including federal assistance and insurance, are available to assist the municipality to repair damage caused by the disaster.

3. (a) Upon the issuance of a declaration of significant economic distress due to unanticipated natural disaster by the governor, a municipality recognized by the governor as being affected by such disaster which occurred on or after December first, nineteen hundred ninety-two, may apply to the division of homeland security and emergency services on a form prescribed by such office, for reimbursement from the state's contingency reserve fund for reimbursement of extraordinary and unanticipated costs associated with the reconstruction or repair of public buildings, facilities or infrastructure.

(b) Where the municipality applying for assistance authorized pursuant to this section is a city,

and such application pertains to a county wholly contained within such city, such city may submit separate applications for such assistance for each such county.

(c) Such municipality shall be granted the assistance provided pursuant to this section, within the amounts made available by appropriation from the fund, upon approval of such application, provided that such municipality agrees to have a local disaster preparedness plan pursuant to section twenty-three of this article in effect by December thirty-first, nineteen hundred ninety-three. On or after December thirty-first, nineteen hundred ninety-three, no municipality shall be eligible for reimbursement of such expenses unless such plan is in effect.

(d) Municipalities which have received assistance pursuant to this section shall, as soon thereafter as may be possible, amend their respective local disaster preparedness plans to include corrective measures that must be taken in order to avoid, to the extent possible, similar emergencies in the future.

(e) Municipalities applying for assistance pursuant to this section shall accurately describe the emergency conditions which necessitate the expenditure of funds for which reimbursement is being sought pursuant to this section.

(f) In providing assistance pursuant to this section, the division of homeland security and emergency services may give preference to applicants which demonstrate the greatest need or which document that such assistance will be utilized to bring the applicant into compliance with federal or state law.

(g) In the event that amounts appropriated are insufficient to provide for full reimbursement of all extraordinary and unanticipated costs incurred by such municipality approved for reimbursement pursuant to this section, the division of homeland security and emergency services is authorized to provide a pro rata share of the appropriations, appropriated herein, to such municipality.

4. (a) The commissioner of the division of homeland security and emergency services as defined in article twenty-six of this chapter with the advice and consent of the disaster preparedness commission created pursuant to this article, shall have the power to make such rules and regulations as may be necessary and proper to effectuate the purposes of this section.

(b) The commissioner of the division of homeland security and emergency services shall by March fifteenth of each year report to the governor and the legislature describing the activities and operation of the program authorized by this section. Such report shall set forth the number of reimbursement applications received and approved; the identities of the counties, cities, towns and villages receiving reimbursement together with the amount and purpose of the reimbursement.

HISTORY:

Add, L 1993, ch 603, § 2, eff Aug 4, 1993; amd, L 2010, ch 56, §§ 8–10 (Part B), eff July 1, 2010.

Amendment Notes: 2010. Chapter 56, § 8 (Part B) amended:

Sub 1, par (e) by deleting at fig 1 "state", at fig 2 "office", at fig 3 "office of military and naval affairs that assists the disaster preparedness commission in implementing the powers and duties of the disaster preparedness commission" and adding the matter in italics.

2010. Chapter 56, § 9 (Part B) amended:

Sub 3, par (a) by deleting at fig 1 "state emergency management office" and adding the matter in italics.

Sub 3, par (f) by deleting at fig 1 "state emergency management office" and adding the matter in italics.

Sub 3, par (g) by deleting at fig 1 "state emergency management office" and adding the matter in italics.

2010. Chapter 56, § 10 (Part B) amended:

Sub 4, par (a) by deleting at fig 1 "adjutant general", at fig 2 "nine", at fig 3 "adivise" and adding the matter in italics.

Sub 4, par (b) by deleting at fig 1 "adjutant general" and adding the matter in italics.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

96 NY Jur 2d State of New York § 15.

§ 29-g. Emergency management assistance compact

1. The emergency management assistance compact is made and entered into by and between the participating member states which enact this compact, hereinafter called party states. For the purposes of this agreement, the term "states" is taken to mean the several states, the commonwealth of Puerto Rico, the District of Columbia, and all United States territorial possessions.

The purpose of this compact is to provide for mutual assistance between the states entering into this compact in managing any emergency or disaster that is duly declared by the governor of the affected state or states, whether arising from natural disaster, technological hazard, man-made disaster, civil emergency aspects of resource shortages, community disorders, insurgency or enemy attack.

This compact shall also provide for mutual cooperation in emergency related exercises, testing or other training activities using equipment and personnel simulating performance of any aspect of the giving and receiving of aid by party states or subdivisions of party states during emergencies, such actions occurring outside actual declared emergency periods. Mutual assistance in this compact may include the use of the states' national guard forces, either in accordance with the national guard mutual assistance compact or by mutual agreement between states.

2. Each party state entering into this compact recognizes that many emergencies transcend political jurisdictional boundaries and that intergovernmental coordination is essential in managing these and other emergencies under this compact. Each state further recognizes that there will be emergencies which require immediate access and present procedures to apply outside resources to make a

prompt and effective response to such an emergency. This is because few, if any, individual states have all the resources they may need in all types of emergencies or the capability of delivering resources to areas where emergencies exist.

The prompt, full and effective utilization of resources of the participating states, including any resources on hand or available from the federal government or any other source, that are essential to the safety, care and welfare of the people in the event of any emergency or disaster declared by a party state, shall be the underlying principle on which all provisions of this compact shall be understood.

On behalf of the governor of each state participating in the compact, the legally designated state official who is assigned responsibility for emergency management will be responsible for formulation of the appropriate interstate mutual aid plans and procedures necessary to implement this compact.

3. (a) It shall be the responsibility of each party state to formulate procedural plans and programs for interstate cooperation in the performance of the responsibilities listed in this section. In formulating such plans, and in carrying them out, the party states, insofar as practical, shall:

(1) Review individual state hazard analysis and, to the extent reasonably possible, determine all those potential emergencies the party states might jointly suffer, whether due to natural disaster, technological hazard, man-made disaster, emergency aspects or resource shortages, civil disorders, insurgency or enemy attack.

(2) Review party states' individual emergency plans and develop a plan which will determine the mechanism for the interstate management and provision of assistance concerning any potential emergency.

(3) Develop interstate procedures to fill any identified gaps and to resolve any identified inconsistencies or overlaps in existing or developed plans.

(4) Assist in warning communities adjacent to or crossing the state boundaries.

(5) Protect and assure uninterrupted delivery of services, medicines, water, food, energy and fuel, search and rescue and critical lifeline equipment, services and resources, both human and material.

(6) Inventory and set procedures for the interstate loan and delivery of human material resources, together with procedures for reimbursement or forgiveness.

(7) Provide, to the extent authorized by law, for temporary suspension of any statutes or ordinances that restrict the implementation of the above responsibilities.

(b) The authorized representative of a party state may request assistance of another party state by contacting the authorized representative of that state. The provisions of this agreement shall only apply to requests for assistance made by and to authorized representatives. Requests may be verbal or in writing. If verbal, the request shall be confirmed in writing within thirty days of the verbal request. Requests shall provide the following information:

(1) A description of the emergency service function for which assistance is needed, such as, but not limited to, fire services, law enforcement, emergency medical, transportation, communications, public works and engineering, building inspection, planning and information assistance, mass care, resource support, health and medical services, and search and rescue.

(2) The amount and type of personnel, equipment, materials and supplies needed, and a reasonable estimate of the length of time that they will be needed.

(3) The specific place and time for staging of the assisting party's response and a point of contact at that location.

(c) There shall be frequent consultation between state officials who have assigned emergency management responsibilities and other appropriate representatives of the party states with affected jurisdictions and the United States government, with free exchange of information, plans and resource records relating to emergency capabilities.

4. Any party state requested to render mutual aid or conduct exercises and training for mutual aid shall take such action as is necessary to provide and make available the resources covered by this compact in accordance with the terms hereof provided, that it is understood that the state rendering aid may withhold resources to the extent necessary to provide reasonable protection for such state.

Each party state shall afford to the emergency forces of any party state, while operating within its state limits under the terms and conditions of this compact, the same powers (except that of arrest unless specifically authorized by the receiving state), duties, rights and privileges as are afforded forces of the state in which they are performing emergency services. Emergency forces will continue under the command and control of their regular leaders, but the organizational units will come under the operational control of the emergency services authorities of the state receiving assistance. These conditions may be activated, as needed, only subsequent to a declaration of a state of emergency or disaster by the governor of the party state that is to receive assistance or commencement of exercises or training for mutual aid and shall continue so long as the exercises or training for mutual aid are in progress, the state, or states, of emergency or disaster remains in effect or loaned resources remain in the receiving states, whichever is longer.

5. Whenever any person holds a license, certificate or other permit issued by any state party to the compact evidencing the meeting of qualifications for professional, mechanical or other skills, and when such assistance is requested by the receiving party state, such person shall be deemed licensed, certi-

fied, or permitted by the state requesting assistance to render aid involving such skill to meet a declared emergency or disaster, subject to such limitations and conditions as the governor of the requesting state may prescribe by executive order or otherwise.

6. Officers or employees of a party state rendering aid in another state pursuant to this compact shall be considered agents of the requesting state for tort liability and immunity purposes and no party state or its officers or employees rendering aid in another state pursuant to this compact shall be liable on account or any act or omission in good faith on the part of such forces while so engaged or on account of the maintenance or use of any equipment or supplies in connection therewith. Good faith shall not include willful misconduct, gross negligence or recklessness.

7. Inasmuch as it is probable that the pattern and detail of the machinery for mutual aid among two or more states may differ from that among the states that are parties hereto, this instrument contains elements of a broad base common to all states, and nothing contained herein shall preclude any state from entering into supplementary agreements with another state or affect any other agreements already in force between states. Supplementary agreements may comprehend, but shall not be limited to, provisions for evacuation and reception of injured and other persons and the exchange of medical, fire, police, public utility, reconnaissance, welfare, transportation and communications personnel, and equipment and supplies.

8. Each party state shall provide for the payment of compensation and death benefits to injured members of the emergency forces of that state and representatives of deceased members of such forces in case such members sustain injuries or are killed while rendering aid pursuant to this compact, in the same manner and on the same terms as if the injury or death were sustained within their own state.

9. Any party state rendering aid in another state pursuant to this compact shall be reimbursed by the party state receiving such aid for any loss or damage to or expense incurred in the operation of any equipment and the provision of any service in answering a request for aid and for the costs incurred in connection with such requests provided, that any aiding party state may assume, in whole or in part, such loss, damage, expense or other cost, or may loan such equipment or donate such services to the receiving party state without charge or cost provided, however, that any two or more party states may enter into supplementary agreements establishing a different allocation of costs among those states. Expenses under subdivision eight of this section shall not be reimbursable under this provision.

10. Plans for the orderly evacuation and interstate reception of portions of the civilian population as the result of any emergency or disaster of sufficient proportions to so warrant, shall be worked out and maintained between the party states and the emergency management/services directors of the various jurisdictions where any type of incident requiring evacuations might occur. Such plans shall be put into effect by request of the state from which evacuees come and shall include the manner of transporting such evacuees, the number of evacuees to be received in different areas, the manner in which food, clothing, housing and medical care will be provided, the registration of the evacuees, the providing of facilities for the notification of relatives or friends, and the forwarding of such evacuees to other areas or the bringing in of additional materials, supplies and all other relevant factors. Such plans shall provide that the party state receiving evacuees and the party state from which the evacuees come shall mutually agree as to reimbursement of out-of-pocket expenses incurred in receiving and caring for such evacuees, for expenditures for transportation, food, clothing, medicines and medical care, and like items. Such expenditures shall be reimbursed as agreed by the party state from which the evacuees come. After the termination of the emergency or disaster, the party state from which the evacuees come shall assume the responsibility for the ultimate support of repatriation of such evacuees.

11. (a) This compact shall become operative immediately upon its enactment into law by any two states; thereafter, this compact shall become effective as to any other state upon its enactment by such state.

(b) Any party state may withdraw from this compact by enacting a statute repealing the same, but no such withdrawal shall take effect until thirty days after the governor of the withdrawing state has given notice in writing of such withdrawal to the governors of all other party states. Such action shall not relieve the withdrawing state from obligations assumed hereunder prior to the effective date of withdrawal.

(c) Duly authenticated copies of this compact and of such supplementary agreements as may be entered into shall, at the time of their approval be deposited with each of the party states and with the federal emergency management agency and other appropriate agencies of the United States government.

12. This compact shall be construed to effectuate the purposes stated in subdivision one of this section. If any provision of this compact is declared unconstitutional, or the applicability thereof to any person or circumstances is held invalid, the constitutionality of the remainder of this compact and the applicability thereof to other persons and circumstances shall not be affected thereby.

13. Nothing in this compact shall authorize or permit the use of military forces by the National Guard of a state at any place outside the state in any emergency for which the president is authorized by law to call into federal service the militia, or for any purposes for which the use of the army or the air

force would in the absence of express statutory authorization be prohibited under section 1385 of title 18, United States code.

14. The legally designated state official who is assigned responsibility for emergency management shall not offer resources to, or request resources from, another compact member state, without prior discussion with and concurrence from the state agency, department, office, division, board, bureau, commission or authority that may be asked to provide resources or that may utilize resources from another compact member state.

15. The director of the state emergency management office shall, on or before the first day of January, two thousand two, provide to the legislature and the governor copies of all mutual aid plans and procedures promulgated, developed or entered into after the effective date of this section. The director of the state emergency management office shall annually hereafter provide the legislature and governor with copies of all new or amended mutual aid plans and procedures on or before the first day of January of each year.

HISTORY:

Add, L 2001, ch 299, § 1, eff Sept 17, 2001.

Editor's Notes: The following jurisdictions have adopted the Emergency Management Assistance Compact as of January 2005, according to the website of the Council of State Governments (http://www.csg.org/): Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; District of Columbia; Florida; Georgia; Idaho; Illinois; Indiana; Iowa; Kentucky; Louisiana; Maine; Maryland; Massachusetts; Michigan; Missouri; Montana; Nebraska; Nevada; New Hampshire; New Jersey; New Mexico; New York; North Dakota; Ohio; Oklahoma; Oregon; Pennsylvania; Rhode Island; South Carolina; South Dakota; Tennessee; Texas; Utah; Vermont; Virginia; Washington; West Virginia; Wisconsin.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

96 NY Jur 2d State of New York § 15.

§ 29-h. Intrastate mutual aid program

1. Creation. There is hereby created the intrastate mutual aid program to complement existing mutual aid agreements in the event of a disaster that results in a formal declaration of an emergency by a participating local government. All local governments within the state, excepting those which affirmatively choose not to participate in accordance with subdivision four of this section, are deemed to be participants in the program; provided, however, with respect to school districts and boards of cooperative educational services, such participation shall be limited to the sharing of facilities management and administrative personnel and equipment.

2. Definitions. As used in this section, the following terms shall have the following meanings:

a. "Employee" means any person holding a position by election, appointment, or employment by a local government;

b. "Local government" means any county, city, town, village, school district or board of cooperative educational services of the state;

c. "Local emergency management director" means the local government official responsible for emergency preparedness, response and recovery;

d. "Requesting local government" means the local government that asks another local government for assistance during a declared emergency, or for the purposes of conducting training, or undertaking a drill or exercise;

e. "Assisting local government" means one or more local governments that provide assistance pursuant to a request for assistance from a requesting local government during a declared emergency, or for the purposes of conducting training, or undertaking a drill or exercise;

f. "Disaster" shall have the same meaning as in section twenty of this article;

g. "School district" shall have the same meaning as in title two of the education law, including any public school district and any special act school district as defined in section four thousand one of the education law; and

h. "Board of cooperative educational services" shall have the same meaning as in section nineteen hundred fifty of the education law.

3. Intrastate mutual aid program committee established; meetings; powers and duties. a. There is hereby created within the disaster preparedness commission an intrastate mutual aid program committee, for purposes of this section to be referred to as the committee, which shall be chaired by the commissioner of the division of homeland security and emergency services, and shall include the state fire administrator, the commissioner of health, the commissioner of education and the commissioner of agriculture and markets, provided that each such official may appoint a designee to serve in his or her place on the committee. The committee shall also include five representatives from local public safety or emergency response agencies and one representative from a school district or board of cooperative educational services. Such representatives, who shall serve a maximum two-year term, shall be appointed by the commissioner of the division of homeland security and emergency services, with regard to a balance of geographic representation and discipline expertise.

b. The committee, on the call of the chairperson, shall meet at least twice each year and at such other times as may be necessary. The agenda and meeting place of all regular meetings shall be made available to the public in advance of such meetings and all such meetings shall be open to the public.

c. The committee shall have the following powers and responsibilities:

(1) to promulgate rules and regulations, acting through the division of homeland security and emergency services, to implement the intrastate mutual aid program as described in this section;

(2) to develop policies, procedures and guidelines associated with the program, including a process for the reimbursement of assisting local governments by requesting local governments;

(3) to evaluate the use of the intrastate mutual aid program;

(4) to examine issues facing participating local governments regarding the implementation of the intrastate mutual aid program; and

(5) to prepare reports to the disaster preparedness commission discussing the effectiveness of mutual aid in the state and making recommendations for improving the efficacy of the system, if appropriate.

4. Local government participation in the intrastate mutual aid program. a. A local government may elect not to participate in the intrastate mutual aid program, or to withdraw from the program, by its governing body enacting a resolution declaring that it elects not to participate in the program and providing such resolution to the division of homeland security and emergency services. Participation in the program will continue until a copy of such resolution is received and confirmed by the division of homeland security and emergency services.

b. A local government that has declined to participate in the program may, acting by resolution through its governing body and providing a copy of the resolution to the division of homeland security and emergency services, elect to participate in the program.

c. Nothing in this section shall preclude a local government from entering into mutual aid agreements with other local governments or other entities with terms that supplement or differ from the provisions of this section.

d. Nothing in this section shall affect any other agreement to which a local government may currently be a party, or later enter into, including, but not limited to, the state fire mobilization and mutual aid plan.

5. Fire related resources. Notwithstanding the authority vested pursuant to this section, all fire related resources shall be administered pursuant to section two hundred nine-e of the general municipal law.

6. Requesting assistance under the intrastate mutual aid program. a. Subject to the restrictions on school districts and boards of cooperative educational services set forth in subdivision one of this section, the state or a participating local government may request assistance of other participating local governments in preventing, mitigating, responding to and recovering from disasters that result in the declaration of a state disaster emergency or locally-declared emergencies, or for the purpose of conducting multi-jurisdictional or regional training, drills or exercises. Requests for assistance may be made verbally or in writing; verbal requests shall be memorialized in writing as soon thereafter as is practicable. Notwithstanding the provisions of section twenty-five of this article, the local emergency management director shall have the authority to request and accept assistance and deploy the local resources of his or her jurisdiction under the intrastate mutual aid program. The director of the state office of emergency management is authorized to request and accept assistance pursuant to this section.

b. Once an emergency is declared at the county level, all requests and offers for assistance, to the extent practical, shall be made through the county emergency management office, or in the case of the city of New York, through the city emergency management office. All requests for assistance should include:

(1) a description of the disaster;

(2) a description of the assistance needed;

(3) a description of the mission for which assistance is requested;

(4) an estimate of the length of time the assistance will be needed;

(5) the specific place and time for staging of the assistance and a point of contact at that location; and

(6) any other information that will enable an assisting local government to respond appropriately to the request.

c. Assisting local governments shall submit to the state or requesting local government an inventory of the resources being deployed.

d. The written request for assistance and all inventories of resources being deployed shall be submitted to the division of homeland security and emergency services within three calendar days of the request for or deployment of such resources.

7. Division of homeland security and emergency services responsibilities under the intrastate mutual aid program. The division of homeland security and emergency services shall provide notification by mail to each local government with a comprehensive description of the intrastate mutual aid program, including a statement that all local governments are participants of the program unless they expressly opt out pursuant to subdivision four of this section; maintain a current list of participating local governments with their authorized representatives and contact information, and provide a copy of the list to each of the participating local governments on an annual basis during the second quarter of each calendar year; monitor and report to the intrastate mutual aid program committee on the use of the intrastate mutual aid program; coordinate the provision of mutual aid resources in accordance with the comprehensive emergency management plan and supporting protocols; identify mutual aid best practices; when practical, provide the committee with statistical information related to the use of mutual aid during recent regional disaster responses; and assist with the development, implementation and management of a state-wide resource typing system.

8. Reimbursement of assisting local government by the state or requesting local government; resolving disputes regarding reimbursement. a. Any assisting local government requesting reimbursement

under this program for loss, damage or expenses incurred in connection with the provision of assistance that seeks reimbursement by the state or requesting local government shall make such request in accordance with procedures developed by the intrastate mutual aid committee.

b. Notwithstanding the provisions of section twenty-five of this article or any inconsistent provision of law to the contrary, the state or any requesting local government requesting assistance under this program shall be liable and responsible to the assisting local government for any loss or damage to equipment or supplies and shall bear and pay the expense incurred in the operation and maintenance of any equipment and the cost of materials and supplies used in rendering assistance under this section.

c. The assisting local government shall be liable for salaries or other compensation for its employees deployed to the state or a requesting local government during the time they are not rendering assistance pursuant to such request, and shall defray the actual traveling and maintenance expense of its employees and equipment while they are rendering assistance under this section. The state or requesting local government shall reimburse the assisting local government for any moneys paid for such salaries or other compensation and traveling and maintenance expenses incurred from activities performed while rendering assistance under this program.

d. Notwithstanding paragraph c of this subdivision, any voluntary ambulance service rendered pursuant to a request for assistance under this program that affects a volunteer ambulance workers service award or supplemental service award from a service award program or a supplemental service award program established pursuant to article eleven-aa, article eleven-aaa, or article eleven-aaaa of the general municipal law shall be the responsibility of the political subdivision which adopted the service award program or supplemental service award program and not the responsibility of the state or requesting local government.

e. Where a dispute arises between an assisting local government and the state or a requesting local government regarding reimbursement for loss, damages or expenses incurred in connection with the provision of aid, the parties will make every effort to resolve the dispute within thirty business days of written notice of the dispute by the party asserting noncompliance.

9. Performance of services. a. (1) Employees of an assisting local government shall continue under the administrative control of their home jurisdiction. However, in all other cases where not prohibited by general, special or local law, rule or regulation, employees of an assisting local government shall be under the direction and control of the director of the state office of emergency management, local emergency management director or other official charged with performing emergency management functions for the state or requesting local government;

(2) Performance by employees of an assisting local government of services for the state or a requesting local government pursuant to this section shall have no impact upon whether negotiating unit employees represented by an employee organization, recognized or certified pursuant to section two hundred six or two hundred seven of the civil service law, exclusively perform such services, as that phrase is used by the public employment relations board, on behalf of the state or requesting local government;

b. Assets and equipment of an assisting local government shall continue under the ownership of the assisting local government, but shall be under the direction and control of the director of the state office of emergency management, local emergency management director or other official charged with performing emergency management functions for the state or requesting local government.

10. Liability. a. Each local government is responsible for procuring and maintaining insurance or other coverage as it deems appropriate.

b. While rendering assistance under the intrastate mutual aid program, employees of the assisting local government shall have the same immunities and privileges as if such duties were performed within their home jurisdiction. An assisting local government providing assistance pursuant to the intrastate mutual aid program shall be liable for the negligence of its employees, which occurs in the performance of their duties in the same manner and to the same extent as if such negligence occurred in the performance of their duties in their home jurisdiction.

c. Employees of an assisting local government responding to or rendering assistance pursuant to a request for assistance who sustain injury or death in the course of, and arising out of, their response are entitled to all applicable benefits as if they were responding in their home jurisdiction. The assisting local government shall be liable for all costs or payments for such benefits as required by law.

d. Nothing in this section shall be construed to prevent the assisting and requesting local governments from agreeing to other terms related to liability and compensation. Local governments may choose to enter into an agreement, at any time, to alter these terms as they deem necessary.

e. Nothing in this section shall be construed to provide any protection against liability, or to create any liability, for an individual who responds to a state of emergency where aid has not been requested, or where aid has not been authorized by the individual's home jurisdiction.

11. Obligation of insurers. Nothing in this section shall impair, alter, limit or modify the rights or obligations of any insurer under any policy of insurance.

12. License, certificate and permit portability. a. State certified emergency medical services provid-

ers who respond outside of their normal jurisdiction pursuant to a request for assistance under this program shall follow their normal operating protocols as if they were responding and rendering services in their home jurisdiction.

b. Any other individual authorized and deployed by a participating local government when responding pursuant to a request for assistance under this program shall have the same powers and duties as if they were responding in their home jurisdiction.

HISTORY:

Add, L 2010, ch 56, § 10–a (Part B), eff July 1, 2010; amd, L 2012, ch 55, §§ 8–13 (Part G), eff March 30, 2012; L 2013, ch 55, § 1 (Part Q), eff March 28, 2013; L 2015, ch 227, §§ 1, 2, effective August 13, 2015.

Amendment Notes: 2013. Chapter 55, § 1 (Part Q) amended:

Sub 1 by adding the matter in italics.

Sub 2, par b by deleting at fig 1 "or" and adding the matter in italics.

Sub 2, par e by deleting at fig 1 "and".

Sub 2, par f by adding the matter in italics.

By adding sub 2, par g.

By adding sub 2, par h.

Sub 3, par a by deleting at fig 1 "to be" and adding the matter in italics.

Sub 6, par a by deleting at fig 1 "A" and adding the matter in italics.

2012. Chapter 55, § 10 (Part G) amended:

By redesignating sub 8, par b as sub 8 par e.

By adding sub 8, par b.

By adding sub 8, par c.

By adding sub 8, par d.

2012. Chapter 55, § 11 (Part G) amended:

By redesignating subs 9 and 10 as subs 10 and 11, respectively.

By redesignating sub 10, par b as sub 10, par e.

By adding sub 10, par b.

By adding sub 10, par c.

By adding sub 10, par d.

Sub 10, par e by deleting at fig 1 "local government" and adding the matter in italics.

2012. Chapter 55, § 12 (Part G) amended:

By adding sub 9.

By adding sub 12.

2012. Chapter 55, § 13 (Part G) amended:

Sub 8, par a by deleting at figs 1 and 2 "aid".

The 2015 amendment by ch 227, §§ 1, 2, in 6a, in the first sentence, added "the state or" and "the declaration of a state disaster emergency or" and added the last sentence; added "state or" in 6c; substituted "local government by the state or requesting local government" for "jurisdiction by requesting jurisdiction" in the first sentence of 8; added "state or" in 8a, in the second sentence of 8c, in 8d, in the second sentence of 9a(1), in 9a(2), and in 9b; added "the state or" in 8b, in the second sentence of 8c, and in 8e; added "director of the state office of emergency management" in the second sentence of 9a(1) and in 9b; and added "the state or" following "services for" in 9a(2).

§ 29-i. Immunity from liability for emergency alerts

Any provider of mobile services, as defined in 47 U.S.C. 153, including its officers, directors, employees, affiliates, vendors and agents, acting on behalf of the state, and any third-party intermediary transmission service provider, including such third-party intermediary transmission service provider's affiliates, officers, directors, employees, vendors and agents, acting directly or indirectly on behalf of the state or on behalf of any such provider of mobile services, that transmits emergency alerts similar to those described in 47 CFR 10.10 and 10.400, or that transmits any other type or form of emergency alert messages, shall not be liable for any act or omission related to or any harm resulting from the transmission of, or failure to transmit, an emergency alert, provided that such provider, officer, director, employee, affiliate, vendor or agent acted reasonably and in good faith.

HISTORY:

Add, L 2013, ch 55, § 1 (Part V), eff March 28, 2013; amd, L 2013, ch 101, § 1 (Part C), July 11, 2013.

Amendment Notes: 2013. Chapter 101, § 1 (Part C), eff July 11, 2013.

Section by adding the matter in italics.

§ 29-j. Acceptance of gifts

1. The state office of emergency management within the division of homeland security and emergency services may accept any assistance, including but not limited to gifts or grants of real or personal property, but not including money, from any public or private source for the purpose of preparing for, responding to, or recovering from a state disaster emergency. Such assistance may be used to support state and local disaster operations or distributed to disaster response organizations supporting local disaster response operations. To the extent practicable, the office of emergency management shall distribute such assistance in consultation with local governments, not-for-profit organizations, and other disaster response organizations that have experience responding to state disaster emergencies.

2. The state office of emergency management shall maintain a database of all assistance accepted during the state disaster emergency and shall make such information available to the public on its website. The database shall include, but is not limited to, the name of the donor, type of assistance provided, value of the assistance, recipient of the assistance (if available), date of the donation and date of distribution.

3. The director of the office of emergency management, in consultation with the commissioner of the division of homeland security and emergency services, may promulgate rules and regulations necessary to implement this section.

HISTORY:

Add, L 2013, ch 101, § 1 (Part B), eff July 11, 2013.

§ 29-k. Quarterly claim reports. [Expires and repealed Dec 2, 2023]

The governor's office of storm recovery, shall produce a quarterly report, which shall provide the number of all active single family housing applicants by county that have received partial or full payments; the number of all eligible, active single family housing applicants by county who have not yet received any payments; the number of active single family housing applicants by county who have

not received payment and are pending an eligibility review; the number of all active single family housing applicants by county whose application status has not been closed out; the number of all single family housing applicants by county that have been closed out; the number of all single family housing applicants by county that have not received payment because they have been determined to have no unmet need or have been determined ineligible to receive assistance; the number of all active small business applicants by county that have received partial or full payments; the number of all eligible, active small business applicants by county who have not yet received any payments; the number of active small business applicants by county who have not received payment and are pending an eligibility review; the number of all active small business applicants by county whose application status has not been closed out; the number of all small business applicants by county that have been closed out; the number of all small business applicants by county that have not received payment because they have been determined to have no unmet need or have been determined ineligible to receive assistance; the total number of subrecipient agreements by county for the New York rising community reconstruction program, and the status of all community reconstruction projects by county that are in the design or construction phases. The report shall provide the same information cumulatively for the previous reporting periods. The first report required under this subdivision shall be delivered by February fifteenth, two thousand sixteen, with new, updated reports being delivered on each first day of every third month thereafter. The report shall be provided to the temporary president of the senate, and the speaker of the assembly and shall be posted on the governor's office of storm recovery's public website.

HISTORY:

L 2015, ch 413, § 1, effective November 10, 2015; L 2016, ch 3, § 1, effective November 10, 2015.

Editor's Notes Laws 2015, ch 413, § 2, eff November 10, 2015, provides:

§ 2. This act shall take effect immediately and shall expire and be deemed repealed December 2, 2023 (Amd, L 2019, ch 713, § 1, eff Dec 20, 2019).

Amendment Notes The 2016 amendment by ch 3, § 1, rewrote the section.

ARTICLE 3 Executive Department

Section
31. Divisions

HISTORY:

Add, L 1951, ch 800, § 1, eff July 1, 1951, with substance transferred from Art 2–A.

§ 31. Divisions

There shall be in the executive department the following divisions:

1. The division of the budget.
2. The division of military and naval affairs.
3. The office of general services.
4. The division of state police.
5. The division of housing.
6. The division of alcoholic beverage control.
7. The division of human rights.
8. The division of veterans' services.
9. The division of homeland security and emergency services.
10. Office of information technology services.
11. [Redesignated]
12. [Deleted]
13. [Redesignated]

The governor may establish, consolidate, or abolish additional divisions and bureaus.

HISTORY:

Add, L 1951, ch 800, § 1, with substance transferred from § 13; amd, L1966, ch 528, § 2; L 1962, ch 37, § 10, eff Feb 20, 1962; L 1972, ch 827, § 1, eff June 2, 1972; L 1997, ch 430, § 29, eff Aug 20, 1997 (see 1997 note below); L 2010, ch 56, § 11 (Part B), eff July 1, 2010; L 2011, ch 62, § 106 (Part C, Subpart B), eff March 31, 2011; L 2012, ch 55, § 8 (Part O), eff May 29, 2012; L 2019, ch 56, § 2 (Part AA), effective April 12, 2019.

Editor's Notes: Laws 1997, ch 430, § 33, sub 8, eff Aug 20, 1997, provides as follows:

§ 33. This act shall take effect immediately provided, that:

8. Sections twenty-eight through thirty-one of this act shall apply to all contracts awarded on or after such effective date.

Amendment Notes: 2012. Chapter 55, § 8 (Part O) amended:

Sub 10 by deleting at fig 1 "for technology and adding the matter in italics.

2011. Chapter 62, § 106 (Part C, Subpart B) amended:

By deleting sub 5.

By redesignating former subs 6–11 as subs 5–10, respectively.

The 2019 amendment by ch 56, § 2 (Part AA), substituted "services" for "affairs" in 8.

Notes to Decisions

With regard to agreement, which was prepared by Division of Military and Naval Affairs and which, in response to application for use of state armory for rock music concert, provided in effect that armory was not to be used unless the agreement "shall have been approved and executed by the Officer in Charge & Control of said Armory and shall have been approved by his military superiors as prescribed by regulations issued pursuant to the Military Law of the State," the required approval by military superiors need not have been acquired in writing. Zayciek v State, 86 Misc. 2d 701, 382 N.Y.S.2d 867, 1976 N.Y. Misc. LEXIS 2132 (N.Y. Ct. Cl. 1976).

Agency Opinions

Agencies of the State may not enter into formal contracts with each other but may execute interagency memoranda of understanding limited to matters of substance and omitting standard provisions normally included in formal contracts. 1980 NY Ops Atty Gen June 9 (formal).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Council of Environmental Advisers continued in Executive Department, CLS ECL § 7-0101.

Creation of office of parks, recreation and historic preservation, CLS PRHPL § 3.03.

Jurisprudences:

85 NY Jur 2d Police Sheriffs, and Related Officers § 20.

96 NY Jur 2d State of New York §§ 77, 78, 175.

107 NY Jur 2d Veterans § 22.

ARTICLE 6-C Office of Fire Prevention and Control

Section

155. Office of fire prevention and control; creation; state fire administrator; employees
155-a. Definitions
156. Functions, powers and duties of the office
156-a. Establishment of a specialized hazardous materials emergency response training program
156-b. Permanent marking indicating location of fire hydrants
156-c. Fire safety standards for cigarettes
156-d. Thermal imaging camera grant program
156-e. College fire safety
156-f. Evacuation drills
156-g. Establishment of teams for urban search and rescue, specialty rescue and incident support
156-h. Registration and fees for manufacturers, distributors, wholesalers, and retailers of sparkling devices
157. Granting authority
158. Firefighting training
159. Advisory council for fire prevention and control
159-a. Inclusion on the fallen firefighters memorial
159-c-1. Training; live fire conditions
159-d. Training for fire chiefs.

HISTORY:
Add, L 1979, ch 225, § 3, eff Sept 1, 1979.

§ 155. Office of fire prevention and control; creation; state fire administrator; employees

There is hereby created in the division of homeland security and emergency services an office of fire prevention and control. The head of such office shall be the state fire administrator, who shall be appointed by the governor and shall hold office during the pleasure of the governor. He shall receive an annual salary to be fixed by the commissioner of the division of homeland security and emergency services within the amount available by appropriation. He shall also be entitled to receive reimbursement for expenses actually and necessarily incurred by him in the performance of his duties within the amount available by appropriation.

HISTORY:
Add, L 1979, ch 225, § 3, eff Sept 1, 1979; amd, L 2010, ch 56, § 23 (Part B), eff July 1, 2010.

Prior Law: Former § 155, add, L 1975, ch 464, § 1; repealed, L 1979, ch 225, § 2, eff Sept 1, 1979.

Amendment Notes: 2010. Chapter 56, § 23 (Part B) amended:

By deleting at fig 1 "department of state", at figs 2–4 "secretary of state", at fig 5 "The state fire administrator may, from time to time, with the approval of the secretary of state, create, abolish, transfer and consolidate divisions, bureaus, and other units within the office of fire prevention and control as he may determine necessary for the efficient operation of such office. The state fire administrator may, with the approval of the secretary of state, appoint such deputies, directors and others within the office as he may deem necessary to the proper implementation of this article, prescribe their duties, fix their compensation and provide for reimbursement of their actual and necessary expenses within the amounts available by appropriation." and adding the matter in italics.

Repeal Notes: [1979, ch 225] Former section one hundred fifty-five of the executive law, repealed by this act, related to the fire services advisory board.

RESEARCH REFERENCES AND PRACTICE AIDS

Federal Aspects:
Federal Fire Prevention and Control Act, 15 USCS §§ 2201 et seq.

Jurisprudences:
35 Am Jur 2d, Fires §§ 2, 4.

§ 155-a. Definitions

When used in this article:

1. "Districts" shall mean fire districts created pursuant to article eleven of the town law.

2. "Fire companies" shall mean fire companies governed by the not-for-profit corporation law.

3. "Municipal corporations" shall mean a county, city, town and village.

4. "Municipalities" shall mean municipal corporations.

5. "Sprinkler system" shall mean a system of piping and appurtenances designed and installed in accordance with generally accepted standards so that heat from a fire will automatically cause water to be discharged over the fire area to extinguish it or prevent its further spread.

HISTORY:
Add, L 1979, ch 225, § 3, eff Sept 1, 1979; amd, L 1990, ch 258, § 1, eff June 24, 1990.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:
Fire, fire alarm and fire protection districts, CLS Town §§ 170 et seq.

Federal Aspects:
Definitions under Federal Fire Prevention and Control Act, 15 USCS § 2203.

Jurisprudences:
35 Am Jur 2d, Fires §§ 2, 4.

§ 156. Functions, powers and duties of the office

The office of fire prevention and control, by and through the state fire administrator or his duly authorized officer or employee, shall be empowered to:

1. Advise and assist in coordinating and strengthening the activities, programs and services, and rules and regulations of those departments and agencies of the state which have functions, powers and duties relating to (a) arson suppression, detection, investigation and prosecution, (b) fire prevention and control, and (c) fire service-related problems, to the end of providing more effective services to the public and strengthening governmental programs relating to such matters.

1-a. Advise and assist the state education department in the development of a specialized course of study for teachers of fire and arson prevention.

2. Advise and assist fire companies, municipal corporations and districts, including agencies and departments thereof in developing measures for more effective fire and arson prevention and control;

to assist and encourage cooperative efforts to solve common problems relating to fire and arson prevention and control and to serve as a clearinghouse of information about fire and arson prevention and control, about reported cases of burn injuries or wounds sustained, and about state and federal services available to assist in solving such problems.

3. Employ or contract with individuals, agencies or corporations to assist fire companies, municipal corporations and districts in the development of an arson investigation program or in the investigation of cases of suspected arson or cases of burn injuries or wounds sustained upon the request of such an entity. However, nothing in this provision shall be construed to remove the primary responsibility for arson investigations from appropriate local jurisdictions or agencies.

4. Improve arson evidence analysis and testing at existing facilities and periodically recommend to the governor and the legislature methods to improve such services.

5. Collect, compile and disseminate information relating to fire and arson prevention and control, reported cases of burn injuries or wounds sustained,the use of sprinkler systems, and to operate a state fire reporting system. The state fire reporting system shall include a procedure for the identification of patterns of suspicious or criminal fires and for alerting appropriate state and local authorities. The fire reporting system shall also include fire incident data supplied by local fire agencies in a manner and on forms prescribed by the state fire administrator. To the extent practicable, the data shall be collected and maintained in a form compatible with information collected by other states and the federal government. The state fire administrator shall cooperate with the division of state police, division of criminal justice services, department of financial services, local police and fire agencies, the insurance industry and other appropriate organizations in maintaining such system. The provisions of section three hundred eighteen of the insurance law shall apply to any organization supplying information pursuant to this subdivision.

6. Plan, coordinate and provide training for firefighters, both paid and volunteer, and related governmental officers and employees, relating to fire and arson prevention and control, and encourage expansion and improvement of local training facilities in cooperation with fire companies, municipal corporations and districts. Such training shall be made available by video or computer to the maximum extent possible. The office shall adopt rules and regulations relating to such training, including but not limited to training standards used and the process by which training hours are allocated to counties as well as a uniform procedure for requesting and providing additional training hours.

7. Operate the New York state academy of fire science.

8. Consult with and cooperate with state departments and agencies, and universities, colleges and institutions in the state for the development of specialized courses of study for public officers and employees, including paid and volunteer firefighters, in fire science and administration. As part of the development of a training program for firefighters, the office shall collect, compile, and disseminate information regarding training needs based on the data provided pursuant to section seventy-two-g of the general municipal law. Such information shall be compiled annually and, once compiled, a copy of such information shall be submitted to the governor, the temporary president of the senate, and the speaker of the assembly.

9. Coordinate and support arson training programs conducted by the division of criminal justice services and the division of state police.

10. Provide such public education and information programs, studies and reports as the state fire administrator may determine in furtherance of the provisions of this article and to coordinate and assist other state agencies, municipal corporations and districts and fire companies in such matters.

11. Provide management advice and technical assistance to municipal corporations and districts and fire companies relating to fire and arson prevention and control, including recommendations relating to organizations and structure of fire companies, municipal corporations and districts, allocations of powers and functions, cooperation and intergovernmental organizational and fiscal relationships, federal and state aid programs; to provide legal advice and technical services to state and local officials and agencies with respect to powers, duties and functions of municipal corporations and districts and fire companies relating to fire and arson prevention and control.

12. Prepare and recommend revisions, consolidations or compilations of statutes relating to arson, fire prevention and control.

13. Upon request of the appropriate state agency, provide for the fire safety inspection of state or state-regulated facilities with the cooperation and assistance of local fire inspection personnel. The completed fire inspection form shall be filed with the requesting agency and contain recommendations as may be appropriate and a copy filed with the office of fire prevention and control.

14. Act as the official agent of the state for the purpose of administering, carrying out and otherwise cooperating with the federal government in connection with the provisions of the federal fire prevention and control act of nineteen hundred seventy-four and any federal laws amendatory or supplemental to such act heretofore or hereafter enacted; to apply for, accept, and expend funds made available by the federal government pursuant to such act; and to enter into any necessary contracts or compacts pursuant to such federal acts in connection therewith and to take any further action which may be required under the terms of any such federal act.

15. Enter into contracts with any person, firm, corporation or governmental agency to do all things necessary and convenient to carry out the functions, powers and duties expressly set forth in this article.

16. Accept and administer as agent of the state any gift, grant, devise or bequest, including federal grants for any of the purposes of this article. Any moneys so received may be expended subject to the same limitations as to approval of expenditures and audits as are prescribed for state moneys.

17. Issue a written report to the governor and legislature, on or before February fifteenth of each year, on firefighter training activities. Such report shall include at least the following information: the minimum training hours allocated on a county-by-county basis, the training hours requested by each county, any unfulfilled training hour requests, and the number of hours used by each county on a county-by-county basis.

18. Establish rules and regulations as to the location and design of a delineator used to mark the location of fire hydrants.

19. Issue permits and enforce the provisions of article four hundred five of the penal law for the public displays of fireworks and indoor pyrotechnics on or within state property, unless such authority has been delegated pursuant to the rules and regulations promulgated by the office of fire prevention and control.

20. Register the manufacturers, distributors, wholesalers, retailers and seasonal retailers of sparkling devices who wish to do business within the state.

21. [There are 2 subs 21] Adopt, amend or rescind such rules, regulations or orders as may be necessary or convenient to the performance of the functions, powers and duties set forth in this article.

21. [There are 2 subs 21] Provide written materials to consumers and builders which detail the benefits of and include the factors that can affect costs associated with the installation and maintenance of an automatic fire sprinkler system for a one- or two-family residential dwelling.

22. In coordination with the commissioner of the office for people with developmental disabilities, provide the training program relating to handling emergency situations involving individuals with autism spectrum disorder and other developmental disabilities and associated training materials pursuant to section 13.43 of the mental hygiene law to all firefighters, both paid and volunteer. The office shall adopt all necessary rules and regulations relating to such training, including the process by which training hours are allocated to counties as well as a uniform procedure for requesting and providing additional training hours.

HISTORY:

Add, L 1979, ch 225, § 3, eff Sept 1, 1979; amd, L 1983, ch 543, § 1, eff July 20, 1983; L 1984, ch 805, § 22; L 1985, ch 201, § 3, eff Nov 1, 1985; L 1990, ch 258, § 2, eff June 24, 1990; L 1990, ch 921, § 1, eff April 1, 1991, expired and repealed eff April 1, 1996 (see 1990 note below); L 1998, ch 365, § 1, eff July 14, 1998; L 2006, ch 236, § 2, eff Oct 24, 2006; L 2006, ch 615, §§ 1, 2, eff Feb 12, 2007 (see 2006 note below); L 2007, ch 580, § 2, eff Aug 15, 2007; L 2011, ch 62, § 104 (Part A), eff Oct 3, 2011; L 2013, ch 127, § 1, eff July 12, 2013; L 2014, ch 201, § 2, effective December 3, 2014; L 2014, ch 477, § 3, effective December 21, 2014; L 2018, ch 57, § 3 (Part JJ), effective October 9, 2018.

Prior Law: Former § 156, add, L 1976, ch 369, § 1; renumbered § 159-a, L 1979, ch 225, § 4, eff Sept 1, 1979.

Editor's Notes Laws 1990, ch 921, § 3, eff April 1, 1996, expires and repealed eff April 1, 1996, provides as follows:

§ 3. This act shall take effect April 1, 1991 and shall expire and be deemed repealed on and after April 1, 1996.

Laws 2006, ch 615, § 3, eff Feb 12, 2007, provides as follows:

§ 3. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided, however, that effective immediately the office of fire prevention and control is authorized and directed to promulgate any rule or regulation necessary for the timely implementation of this act on its effective date.

Laws 2014, ch 201, § 3, eff Dec 3, 2014, provides:

§ 3. This act shall take effect on the one hundred twentieth day after it shall have become a law; provided that, effective immediately, the office of fire prevention and control is authorized and directed to prepare the materials required by subdivision 21 of section 156 of the executive law, as added by section two of this act, on or before such effective date; and provided, further, that this act shall expire and be deemed repealed upon the effective date of provisions of the New York state uniform fire prevention and building code which are equivalent to the terms of section 313.2 (relating to automatic fire sprinkler systems in oneor two-family dwellings under three stories) of the International Residential Code (2009 edition) or any successor reversions thereof requiring fire sprinklers for one or two-family dwellings under three stories; provided that the state fire administrator shall notify the legislative bill drafting commission upon the adoption of such provisions of the New York state uniform fire prevention and building code in order that the commission may maintain an accurate and timely effective data base of the official text of the laws of the state of New York in furtherance of effectuating the provisions of section 44 of the legislative law and section 70-b of the public officers law.

Laws 2018, ch 57, § 6 (Part JJ), eff October 9, 2018, provides:

§ 6. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided, however, that the commissioner of the office for people with developmental disabilities may promulgate any rules and regulations necessary for the implementation of this act on or before such effective date.

Amendment Notes: The 2014 amendment by ch 201, § 2 added 21 [second setout].

The 2014 amendment by ch 477, § 3 added 20; and redesignated former 20 as 21 [first setout].

2013. Chapter 127, § 1 amended:

By redesignating former sub 19 as sub 20.

By adding sub 19.

2011. Chapter 62, § 104 (Part A) amended:

Sub 5 by substituting at fig 1 "department of financial services" for "insurance department:".

2007. Chapter 580, § 2 amended:

Sub 6 by adding the matter in italics.

2006. Chapter 236, § 2 amended:

Sub 8 by deleting at fig 1 "firemen" and adding the matter in italics.

2006. Chapter 615, § 1 amended:

By adding sub sub 17.

By redesignating former subs 17 as sub 18.

1998. Chapter 365, § 1 amended:

By adding sub 1-a, add, L 1998, ch 365, § 1, eff July 14, 1998.

The 2018 amendment by ch 57, § 3 (Part JJ), added 22.

Notes to Decisions

State was immune from suit under CLS Vol Fire Ben § 19(3), and thus entitled to summary judgment in negligence action premised on respondeat superior and seeking damages for injuries to member of village volunteer fire department who fell while participating in fire training program sponsored by Department of State and supervised by instructor retained by state; state qualified for immunity because it was carrying out its statutory duty under CLS Exec § 156 to plan, coordinate and provide training for volunteer firefighters. Lima v State, 74 N.Y.2d 694, 543 N.Y.S.2d 378, 541 N.E.2d 407, 1989 N.Y. LEXIS 656 (N.Y. 1989).

Division of Homeland Security and Emergency Services properly denied a request by an employee of the Office of Fire Prevention and Control (OFPC) for approval of activities outside his employment, as the Division had a rational basis to conclude that a potential conflict of interest existed because the Commissioner of Education could request the OFPC to inspect the same school buildings. Matter of Mallick v New York State Div. of Homeland Sec. & Emergency Servs., 145 A.D.3d 1172, 43 N.Y.S.3d 183, 2016 N.Y. App. Div. LEXIS 7990 (N.Y. App. Div. 3d Dep't 2016).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS Gen Mun § 209-z.

Codes, Rules and Regulations:

Department of state: personal alert safety system devices. 19 NYCRR §§ 438.1 et seq.

Department of state: fee regulations of the New York State Academy of Fire Science. 19 NYCRR § 452.1.

Department of state: inspection of college buildings for fire safety compliance. 19 NYCRR §§ 500.1 et seq.

Federal Aspects:

Federal Fire Prevention and Control Act, 15 USCS §§ 2201 et seq.

Rehabilitation of victims of fire, 42 USCS § 290a.

Jurisprudences:

109 New York Jur 2d, Workers' Compensation § 95.

35 Am Jur 2d, Fires §§ 2, 4.

§ 156-a. Establishment of a specialized hazardous materials emergency response training program

1. The state fire administrator shall establish a specialized hazardous materials emergency response training program for individuals responsible for providing emergency response recovery following incidents involving hazardous materials as such term is defined in regulations promulgated by the commissioner of transportation pursuant to section fourteen-f of the transportation law. The state fire administrator shall inform all fire companies, municipal corporations and districts, including agencies and departments thereof and all firefighters, both paid and volunteer, and related officers and employees and police officers of the implementation and availability of the hazardous materials emergency response training program and shall, subject to the availability of an appropriation, conduct such training with sufficient frequency to assure adequate response to incidents involving hazardous materials and protection of responders in all geographic areas of the state.

2. The state fire administrator shall prescribe the curriculum of the hazardous materials emergency response training program, which shall include, but shall not be limited to:

(a) hands-on training, including information in regard to leak and spill control, product neutralization, pickup and disposal, fire control, decontamination procedures and use and application of foam agents;

(b) hazard assessment with emphasis on incident scene decision-making, including: potential threat to public safety and need for evacuation, calculation of the effect of weather on certain chemicals and evaluation of the result of chemical exposures to air, water, soil, vegetation, lives and property and impact on the personal safety of those working in the accident area;

(c) calibration and use of emergency equipment;

(d) chemical and biological properties of various classes of chemicals, for example, flammables, oxidizers, corrosives, poisons; and

(e) weapons of mass destruction and response to terrorism.

3. The state fire administrator is hereby directed to issue a report to the governor, speaker of the assembly, temporary president of the senate, chairman of the assembly transportation committee and the chairman of the senate transportation committee by February fifteenth of each year on the operations of the program set forth in this section.

4. The state fire administrator shall promulgate such rules and regulations as are necessary to carry out the provisions of this section.

HISTORY:

Add, L 1982, ch 793, § 1, eff April 1, 1983; amd, L 2004, ch 1, § 1 (Part D), eff July 23, 2004; L 2012, ch 58, § 23 (Part G), eff March 30, 2012; L 2013, ch 101, § 3 (Part A), eff July 11, 2013.

Editor's Notes: Laws 2004, ch 1, § 1 (Part A), eff July 23, 2004, provides as follows:

Section 1. Legislative intent. The tragic events of the September 11, 2001 attack, together with the more recent arrests of members of alleged terrorist cells in Erie county and elsewhere throughout the world, underscore the compelling need for further anti-terror measures to enhance public safety. It is our nation's profound commitment to the principles of democracy and the rule of law that enables us to respond efficiently and effectively to the outrageous criminal acts of terrorists. Creating new criminal offenses and increasing penalties to enhance the powers of law enforcement are necessary to combat their cowardly and inhumane acts of terror.

A chemical or biological attack against a civilian population or the threat of such an attack, however unimaginable before September 11, 2001, has become a stark and disturbing reality. The subsequent outbreaks of anthrax, a deadly disease that caused death and illness across our nation, awakened us to a new type of crime, a crime so indecent that it threatens our values as well as our lives. Terrorists committed to causing death and destruction with deadly or incapacitating chemicals or biological weapons must be brought to justice and punished severely. Although federal law explicitly proscribes such monstrous conduct, state law does not. This act, modeled on federal law, punishes those who criminally use or possess chemical or biological weapons and imposes the penalty of life imprisonment without parole in appropriate cases.

The images of the savage attack on the World Trade Center and the Pentagon on September 11, 2001 will be forever emblazoned on the psyches of all Americans. The slaughter of innocent civilians, and the sacrifice of selfless police officers, brave firefighters, and other heroic emergency services per-

sonnel, will never be forgotten. A crime of unimaginable horror, terrorism tears at the very fabric of our society, threatening to rob us of our commitment to freedom, justice, and democracy. This act protects that commitment by providing law enforcement officials with appropriate and effective tools to investigate, prosecute, and punish terrorists.

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Amendment Notes: 2013. Chapter 101, § 3 (Part A) amended:

Sub 2, opening par by deleting at fig 1 ", in consultation with the aforementioned commission".

Sub 3 by deleting at fig 1 "April first" and adding the matter in italics.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Transportation of hazardous materials, CLS Trans § 14-f.

Jurisprudences:

35 Am Jur 2d, Fires §§ 2, 4.

§ 156-b. Permanent marking indicating location of fire hydrants

A municipality or fire district may mark the location of any fire hydrant within its jurisdiction by means of a reflective delineator of a uniform type and color approved by the office of fire prevention and control.

HISTORY:

Add, L 1983, ch 543, § 2, eff July 20, 1983.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

35 Am Jur 2d, Fires §§ 2, 4.

§ 156-c. Fire safety standards for cigarettes

1. a. When used in this section, the word "cigarette" shall mean any roll for smoking made wholly or in part of tobacco or of any other substance, irrespective of size or shape and whether or not such tobacco or substance is flavored, adulterated or mixed with any other ingredient, the wrapper or cover of which is made of paper or any other substance or material except tobacco.

b. When used in this section, the word "sell" shall mean to sell, or to offer or agree to do the same.

2. a. Within two years after this section takes effect, the office of fire prevention and control shall promulgate fire safety standards for cigarettes sold or offered for sale in this state. Such standards shall take effect as provided in subdivision four of this section and shall insure either:

(1) That such cigarettes, if ignited, will stop burning within a time period specified by the standards if the cigarettes are not smoked during that period; or

(2) That such cigarettes meet performance standards prescribed by the office of fire prevention and control to limit the risk that such cigarettes will ignite upholstered furniture, mattresses or other household furnishings.

b. In promulgating fire safety standards for cigarettes pursuant to this section, the office of fire prevention and control, in consultation with the department of health, shall consider whether cigarettes manufactured in accordance with such standards may reasonably result in increased health risks to consumers.

c. The office of fire prevention and control shall be responsible for administering the provisions of this section.

d. The office of fire prevention and control shall report to the governor and the legislature no later than eighteen months after this section takes effect on the status of its work in promulgating the fire safety standards required by this subdivision.

e. When a cigarette is suspected of having ignited a fire, and the office of fire prevention and control receives information regarding the brand and style of such cigarette pursuant to section two hundred four-d or ninety-one-a of the general municipal law, and where such brand and style had been previously certified pursuant to subdivision three of this section and the package has been marked as required by subdivision six of this section, the office of fire prevention and control shall conduct random testing on cigarettes of the same brand and style in order to determine whether such cigarettes meet the fire safety standards mandated by this section; provided however that such testing shall not be required if the office of fire prevention and control has tested such brand and style within the preceding three months.

3. On and after the date the fire safety standards take effect in accordance with subdivision four of this section, no cigarettes shall be sold or offered for sale in this state unless the manufacturer thereof has certified in writing to the office of fire prevention and control that such cigarettes meet the performance standards prescribed by the office of fire prevention and control pursuant to subdivision two of this section.

(a) Such certifications must be based upon testing conducted by a laboratory that has been accredited pursuant to Standard ISO/IEC 17025 of the international organization for standardization, or such other comparable accreditation standard as the office of fire prevention and control shall require by regulation.

(b) Such certification shall be signed by an officer of the manufacturer and shall contain for each cigarette brand style such information as shall be deemed necessary by the office of fire prevention and control, including but not limited to: (i) the brand and style; (ii) length in millimeters; (iii) circumference in millimeters; (iv) flavor, if applicable; (v) filter or non-filter; (vi) package description; (vii) the name, address and telephone number of the laboratory, if different than the manufacturer that conducted the test; (viii) the date that the testing occurred; and (ix) a notarized statement from an officer or director of the laboratory certifying that the cigarette meets the performance standards prescribed by the office of fire prevention and control.

(c) If a manufacturer has certified a cigarette pursuant to this subdivision, and thereafter makes any change to such cigarette that is likely to alter its compliance with the fire safety standards mandated by this section, then before such cigarette may be sold or offered for sale in this state such manufacturer shall retest such cigarette in accordance with the testing standards prescribed by the office of fire prevention and control and maintain records of such retesting as required by subdivision seven of this section. Any such altered cigarette which does not meet the performance standard prescribed by the office of fire prevention and control may not be sold in the state. Copies of such written certifications shall be provided by the certifying manufacturer to all wholesale dealers, as defined in subdivision eight of section four hundred seventy of the tax law, and all agents, as defined in subdivision eleven of section four hundred seventy of the tax law. The office of fire prevention and control shall prescribe procedures by which stamping agents, wholesale dealers or retail dealers are notified of which cigarettes have been certified by manufacturers as meeting the performance standards prescribed by the office of fire prevention and control, which may include the maintenance of a website listing certified cigarette brands and styles.

4. The fire safety standards required pursuant to subdivision two of this section shall take effect on such date as the office of fire prevention and control shall specify in promulgating such standards and such date shall be the earliest practicable date by which manufacturers of cigarettes can comply with such standards; provided, however, that such date shall not be later than one hundred eighty days after such standards are promulgated. On and after such date, no person or entity shall sell in this state cigarettes that have not been certified by the manufacturer in accordance with subdivision three of this section or that have not been marked in the manner required by subdivision six of this section; provided, however, that nothing in this subdivision shall be construed to prohibit any person or entity from sellingor offering for sale cigarettes that have not been certified by the manufacturer in accordance with subdivision three of this section and have not been marked in the manner required by subdivision six of this section if such cigarettes are or will be stamped for sale in another state or are packaged for sale outside the United States.

5. a. Any wholesale dealer, as defined in subdivision eight of section four hundred seventy of the tax law, or any agent, as defined in subdivision eleven of section four hundred seventy of the tax law, or any other person or entity who knowingly sells or offers to sell cigarettes in violation of subdivision four of this section shall be subject to a civil penalty not to exceed one hundred dollars for each pack of such cigarettes sold or offered for sale provided that in no case shall the penalty against any wholesale dealer exceed one hundred thousand dollars for sales or offers to sell during any thirty day period. Any retail dealer, as defined in subdivision nine of section four hundred seventy of the tax law, who knowingly sells or offers to sell cigarettes in violation of subdivision four of this section shall be subject to a civil penalty not to exceed one hundred dollars for each pack of such cigarettes sold or offered for sale, provided that in no case shall the penalty against any retail dealer exceed twenty-five thousand dollars for sales or offers to sell during any thirty day period. Any person engaged in the business of selling cigarettes in or for shipment into New York who possesses cigarettes that have not been certified or marked in accordance with the requirements of this section shall be deemed to be offering such cigarettes for sale in New York. An agent licensed in more than one state may rebut such presumption by establishing: (i) that such cigarettes have been physically segregated from cigarettes offered for sale in New York; and (ii) no New York tax stamps have been placed on any cigarettes that have not been certified or marked in accordance with this section. In addition to any penalties imposed by this section the commissioner of taxation and finance, after an opportunity for a hearing has been afforded pursuant to subdivision five of section four hundred eighty of the tax law, shall suspend for six months the license of any agent issued pursuant to section four hundred seventy-two of the tax law, the license of any wholesale dealer issued pursuant to section four hundred eighty of the tax law, or the registration of any retail dealer issued pursuant to section four hundred eighty-a of the tax law, when such agent, wholesale dealer or retail dealer violates this section three or more times within a three year period, provided such violations occurred on at least three separate calendar days.

b. In addition to any penalty prescribed by law, any corporation, partnership, sole proprietor, limited partnership, association or any other business entity engaged in the manufacture of cigarettes that knowingly makes a false certification pursuant to subdivision three of this section shall be subject to a civil penalty of at least seventy-five thousand dollars and not to exceed two hundred fifty thousand dollars for each such false certification, and any entity that

fails to pay a civil penalty imposed pursuant to this paragraph within thirty days after such penalty is imposed, shall be subject to a bar from selling cigarettes covered by that false certification in this state until the state receives full payment of such penalty.

c. There is hereby established in the custody of the state comptroller a special fund to be known as the "Cigarette Fire Safety Act Fund". Such fund shall consist of all moneys recovered from the assessment of civil penalties authorized by this subdivision. Such monies shall be deposited to the credit of the fund and shall, in addition to any other moneys made available for such purpose, be available to the office of fire prevention and control for the purpose of fire safety and prevention programs. All payments from the cigarette fire safety act fund shall be made on the audit and warrant of the state comptroller on vouchers certified and submitted by the state fire administrator.

6. No cigarettes shall be distributed, sold or offered for sale in this state unless the manufacturer has placed on each individual package the letters "FSC" which signifies Fire Standards Compliant. Such letters shall appear in eight point type and be permanently printed, stamped, engraved or embossed on the package at or near the UPC Code, if present. Any package containing such symbol is deemed to be in compliance with the office of fire prevention and control regulations set forth in 19 NYCRR 429.8.

7. a. Each manufacturer shall maintain copies of the reports of all tests conducted on all cigarettes for a period of three years, and shall make copies of such reports available to the office of fire prevention and control and the attorney general upon written request; provided, however, that any manufacturer that fails to make copies of such reports available within sixty days of receiving such a written request shall be subject to a civil penalty not to exceed ten thousand dollars for each day after the sixtieth day that such manufacturer does not make such copies available and shall be subject to a bar from selling or offering to sell cigarettes in New York until such copies are made available.

b. Testing performed or sponsored by the office of fire prevention and control in order to determine a cigarette's compliance with the fire safety standards mandated by this section shall be conducted (i) in accordance with the requirements applicable to manufacturers pursuant to the regulations of the office of fire prevention and control, and (ii) by a laboratory that has been accredited pursuant to Standard ISO/IEC 17025 of the international organization for standardization or such other comparable accreditation standard as the office of fire prevention and control shall require by regulation.

8. a. To enforce the provisions of this section, the commissioner of taxation and finance and the state fire administrator may take administrative action imposing the civil penalties and suspensions authorized by subdivision five of this section. In addition, the attorney general may bring an action on behalf of the people of the state of New York to enjoin acts in violation of this section and to recover any civil penalties unless civil penalties have been previously recovered in such administrative proceedings.

b. Any enforcement officer as defined in section thirteen hundred ninety-nine-t of the public health law shall have the power to impose upon any retail dealer the civil penalties authorized by subdivision five of this section, following a hearing conducted in the same manner as hearings conducted under article thirteen-E of the public health law.

c. To enforce the provisions of this section, the commissioner of taxation and finance and the state fire administrator, or their duly authorized representatives, are hereby authorized to examine the books, papers, invoices and other records of any person in possession, control or occupancy of any premises where cigarettes are placed, stored, sold or offered for sale, as well as the stock of cigarettes in any such premises. Every person in the possession, control or occupancy of any premises where cigarettes are placed, sold or offered for sale, is hereby directed and required to give the commissioner of taxation and finance and the state fire administrator, and their duly authorized representatives, the means, facilities and opportunity for such examinations as are herein provided for and required.

d. Whenever any police officer designated in section 1.20 of the criminal procedure law or a peace officer designated in subdivision four and subdivision seventy-nine pertaining to the Office of Fire Prevention and Control, of section 2.10 of such law, acting pursuant to his or her special duties, shall discover any cigarettes which have not been marked in the manner required by subdivision six of this section, such officer is hereby authorized and empowered to seize and take possession of such cigarettes. Such seized cigarettes shall be turned over to the commissioner of taxation and finance, and shall be forfeited to the state. Cigarettes seized pursuant to this section shall be destroyed.

e. The commissioner of the division of homeland security and emergency services, in consultation with the state fire administrator, and the commissioner of taxation and finance are hereby authorized to promulgate such regulations as are deemed necessary to implement the provisions of this section.

HISTORY:

Add, L 2000, ch 284, § 1, effective as stated in 2000 note below; amd, L 2006, ch 583, §§ 3, 4, eff Dec 14, 2006 (see 2006 note below); L 2013, ch 101, § 4 (Part A), eff July 11, 2013.

Editor's Notes: Laws 2000, ch 284, § 2, eff Jan 1, 2001, provides as follows:

§ 2. This act shall take effect on the first day of January next succeeding the date on which it shall have become a law; except that (a) this act shall not take effect if federal fire safety standards for cigarettes that preempt this act are enacted before such first day of January and the state fire administrator shall notify the Legislative Bill Drafting Commission upon the enactment of such federal cigarette safety

standards prior to the effective date of this act, and (b) this act shall be deemed repealed if federal fire safety standards for cigarettes that preempt this act are enacted subsequent to the effective date of this act and the state fire administrator shall notify the Legislative Bill Drafting Commission upon the enactment of such federal cigarette safety standards. If such federal safety standards are enacted, the state fire administrator shall so notify the Legislative Bill Drafting Commission. Such notification is necessary in order that the commission may maintain an accurate and timely effective data base of the official text of the laws of the state of New York in furtherance of effecting the provisions of section 44 of the legislative law and section 70-b of the public officers law.

Laws 2006, ch 583, § 7, eff Dec 14, 2006, provides as follows:

§ 7. This act shall take effect on the one hundred twentieth day after it shall have become a law; provided, however, that the prohibition against the distribution, sale or offering for sale of any package of cigarettes unless the manufacturer has placed the letters "FSC" as required by subdivision 6 of section 156-c of the executive law on such package; and the testing requirements set forth in paragraph a of subdivision 3 of section 156-c of the executive law as amended by section four of this act shall take effect twelve months after this act shall have become a law. Nothing in this act shall prohibit wholesale dealers or retail dealers from selling their inventory of cigarettes existing on the date that is 12 months after this act takes effect; provided that such cigarettes contain a marking in compliance with section 8 of the office of fire prevention and control regulations at Title 19 NYCRR Part 429, as in existence as of the date this act becomes a law; provided, further, that such wholesale dealer or retail dealer can establish that New York state cigarette tax stamps were affixed to such cigarettes prior to the date that is 12 months after this act takes effect, and provided further that such wholesale dealer or retail dealer can establish that such inventory was purchased prior to such date in comparable quantity to the inventory purchased during the same period in the preceding year.

Amendment Notes: 2013. Chapter 101, § 4 (Part A) amended:

Sub 8, par a by deleting at fig 1 "secretary of state" and adding the matter in italics.

Sub 8, par c by deleting at figs 1 and 2 "secretary of state" and adding the matter in italics.

Sub 8, par d by deleting at fig 1 "Department of State's" and adding the matter in italics.

Sub 8, par e by deleting at fig 2 "secretary of state" and adding the matter in italics.

2006. Chapter 583, § 3 amended:

By adding sub 2, par e.

2006. Chapter 583, § 4 amended:

By redesignating entire sub 3 as sub 3 opening par and sub 3, par (c).

Sub 3, opening par by deleting at fig 1 "and the attorney general" and adding the matter in italics.

By adding sub 3, par (a).

By adding sub 3, par (b).

Sub 3, par (c) by adding the matter in italics.

Sub 4 by adding the matter in italics.

Sub 5, par a by deleting at fig 1 "wholesale", at fig 2 "ten thousand", at fig 3 "per each such sale of such cigarettes", at fig 4 "the following: (i)", at fig 5 "five", at fig 6 "per each such sale or offer for sale of", at fig 7", provided that the total number of cigarettes sold or offered for sale in such sale does not exceed one thousand cigarettes; (ii) a civil penalty not to exceed one thousand dollars per each such sale or offer for sale of such cigarettes, provided that the total number of cigarettes sold or offered for sale in such sale exceeds one thousand cigarettes" and adding the matter in italics.

Sub 5, par b by deleting at fig 1 "or", at fig 2 "not to exceed ten" and adding the matter in italics.

Sub 5, par c by deleting at fig 1 "by the attorney general" and adding the matter in italics.

By adding sub 6.

By adding sub 7.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

Department of state: fire safety standards for cigarettes. 19 NYCRR Part 429.

§ 156-d. Thermal imaging camera grant program

1. Subject to available appropriation, there is hereby established in the office of fire prevention and control a thermal imaging camera grant program, under which grants shall be made available to fire organizations for the purchase of one thermal imaging camera each or for reimbursement to such fire organizations for public funds, other than state or federal funds, that have been expended by such fire organizations on or after April first, two thousand for the purchase of a thermal imaging camera, provided, however, no reimbursement, when combined with any required match, shall exceed the office of general services contract price per camera. Such grants shall be made available upon application by such fire organizations. Fire organizations that are without a thermal imaging camera shall receive priority from the office of fire prevention and control for grants made pursuant to this section. The office of fire prevention and control may require, pursuant to such uniform standards as such office may prescribe, that applicants for such grants or reimbursement provide matching funds of up to, but not more than, the amount awarded; provided, however, that a fire organization having an annual operating budget of one hundred fifty thousand dollars or less shall not be required to provide matching funds. The office of fire prevention and control shall promulgate such rules and regulations as are necessary to advance the purposes of this section. Such regulations shall establish, among other things, training requirements for the use of thermal imaging cameras by fire organizations.

2. As used in this section, "fire organizations" means a board of fire commissioners, which operates a fire department pursuant to the town law, a fire department established pursuant to the village law or general city law or a fire company located within a fire protection district pursuant to the town law.

HISTORY:

Add, L 2001, ch 469, § 1, eff Nov 13, 2001; amd, L 2002, ch 660, § 1, eff Dec 3, 2002 (see 2002 note below).

Editor's Notes: Laws 2002, ch 660, § 2, eff Dec 3, 2002, provides as follows:

§ 2. This act shall take effect immediately provided that applications for grants or reimbursements pursuant to this act shall not be accepted by the office of fire prevention and control prior to June 1, 2002.

Amendment Notes:

2002. Chapter 660, § 1 amended:

Sub 1, by deleting "There" and "cameras" and "cameras" and "governing" and "The office of general services shall contract with a manufacturer to obtain the best price available" and "of the grant".

2002. Chapter 660, § 1 amended:

Sub 2, by deleting "municipality, fire district, fire company or" and "responsible for providing fire protection in any given municipality".

§ 156-e. College fire safety

1. Notwithstanding the provisions of any law to the contrary, the office of fire prevention and control of the division of homeland security and emergency services, by and through the state fire administrator or their duly authorized officers and employees, shall have the responsibility to annually inspect buildings under the jurisdiction of public colleges and independent colleges, as these terms are defined in section eight hundred seven-b of the education law, for compliance with and violations of the uniform fire prevention and building code; or any other applicable code, rule or regulation pertaining to fire safety. Buildings subject to inspection are all buildings under the jurisdiction of such colleges used for classroom, dormitory, fraternity, sorority, laboratory, physical education, dining, recreational or other purposes.

2. a. The office of fire prevention and control shall have the power to issue a notice of violation and orders requiring the remedying of any condition found to exist in, on or about any such building which violates the uniform fire prevention and building code, or any other code, rule or regulation pertaining to fire safety, fire safety equipment and fire safety devices. Such office is further authorized to promulgate regulations regarding the issuance of violations, compliance with orders, and providing for time for compliance, reinspection procedures, and issuance of certificates of conformance.

b. Where any college authority in general charge of the operation of any public or independent college buildings is served personally or by registered or certified mail with an order of the office of fire prevention and control to remedy any violation and fails to comply with such order immediately or within such other time as specified in the order, the office of fire prevention and control may avail itself of any or all of the following remedies: (1) assess a civil penalty of up to five hundred dollars per day until the violation is corrected; (2) order immediate closure of the building, buildings or parts thereof where a violation exists that poses an imminent threat to public health and safety; (3) refer violations to the appropriate local government authorities for enforcement pursuant to article eighteen of this chapter.

c. The office of fire prevention and control is authorized to commence necessary proceedings in a court of competent jurisdiction seeking enforcement of any of its orders and payment of assessed penalties.

3. a. Except as provided herein, any county, city, town or village, pursuant to resolution of their respective legislative bodies, may apply to the office of fire prevention and control for delegation of all or part of the duties, rights and powers conferred upon the office of fire prevention and control by this section and section eight hundred seven-b of the education law. Upon acceptable demonstration of adequate capability, resources and commitment on the part of the applicant local government, the office of fire prevention and control may make such delegation, in which case the local government shall also have all of the rights, duties and powers provided to local governments in article eighteen of this chapter and in any city charter or code. The authority granted in this section to assess civil penalties and order closure of buildings shall not be delegated to the local government. Such powers shall continue in the office of fire prevention and control which may exercise them in the case of violations, on its own volition or at the request of the delegee local government. The delegation shall expire after three years, and may be renewed at the discretion of the office of fire prevention and control. All inspection reports conducted pursuant to a delegation of authority shall be promptly filed with the office of fire prevention and control. In the event any such report is not filed or reasonable grounds exist to believe that inspections or enforcement are inadequate or ineffective, the office of fire prevention and control may revoke the delegation or continue it subject to terms and conditions specified by the office of fire prevention and control.

b. The authorities in a city having a population of one million or more shall exercise all of the rights, powers and duties pertaining to inspection of independent and public college buildings and enforcement provided in this section and section eight hundred seven-b of the education law, without impairing any existing authority of such city. A copy of all inspection reports shall be filed with the office of fire prevention and control by the authorities conducting inspections.

HISTORY:

Add, L 2002, ch 81, § 2 (Part A), eff Jan 1, 2003 (see 2002 note below); amd, L 2010, ch 56, § 40 (Part B), eff July 1, 2010.

Editor's Notes: Laws 2002, ch 81, § 3 (Part A), eff Jan 1, 2003, provides as follows:

§ This act shall take effect January 1, 2003, provided that the office of fire prevention and control shall have the authority to adopt such rules and regulations and take any actions in advance of such date which are necessary to implement the provisions of this act.

Amendment Notes: 2010. Chapter 56, § 42 (Part B) amended:

Sub 1 by adding the matter in italics.

Sub 2, par b, deleted at fig 1 "exercise all of the authority conferred upon the secretary of state pursuant to article eighteen of this chapter to obtain compliance with its orders; or (4)".

Sub 2, par c by deleting at fig 1 "by and through the secretary of state".

Sub 3, par a by deleting at fig 1 a comma, at fig 2 "and take action possessed by the secretary of state under article eighteen of this chapter," and adding the matter in italics.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

Department of state: inspection of college buildings for fire safety compliance. 19 NYCRR §§ 500.1 et seq.

§ 156-f. Evacuation drills

Except as may be otherwise provided in rules and regulations promulgated by the department of state pursuant to article eighteen of this chapter, in any

building owned or leased in whole by the state or any agency thereof, an evacuation drill shall be conducted at least twice each year in which all of the occupants of the buildings shall participate simultaneously and which shall conduct all such occupants to a place of safety. In New York city, the state fire administrator shall make rules, regulations and special orders necessary and suitable to each situation, as appropriate.

HISTORY:
Add, L 2006, ch 21, § 2, eff Nov 9, 2005.

§ 156-g. Establishment of teams for urban search and rescue, specialty rescue and incident support

1. Authorization to establish urban search and rescue task force teams, specialty rescue teams, and incident support teams. The commissioner of the division of homeland security and emergency services after consultation with the state fire administrator shall have the authority to establish, organize, administer, support, train, and fund urban search and rescue task force teams, specialty rescue teams, and incident support teams created pursuant to this section.

2. Definitions. For the purposes of this section, the following terms shall have the following meanings:

(a) "urban search and rescue task force team" shall mean a specialized team or group of teams, formed pursuant to this section, organized with capabilities equivalent to urban search and rescue task force teams established under the federal emergency management agency in order to assist in the removal of trapped victims in emergency situations including, but not limited to, collapsed structures, trench excavations, elevated locations, and other technical rescue situations.

(b) "specialty rescue team" shall mean a specialized team, formed pursuant to this section, organized to provide technical rescue assistance to first responders including, but not limited to, canine search and rescue/disaster response, cave search and rescue, collapse search and rescue, mine and tunnel search and rescue, and swift water/flood search and rescue teams. Such teams shall be aligned with one or more of the search and rescue categories within the federal emergency management agency's national resource typing system.

(c) "incident support team" shall mean a team of trained response personnel, formed pursuant to this section, organized to provide coordination with governmental agencies and non-governmental organizations as well as technical, and logistical support to urban search and rescue task force teams and specialty rescue teams.

3. Appointment and training of team members; equipment. (a) The commissioner of the division of homeland security and emergency services is hereby authorized to appoint members to any team created pursuant to this section. Team membership shall consist of local emergency response personnel, state agency personnel and specialty personnel as required.

(b) The commissioner of the division of homeland security and emergency services shall be responsible for training and equipping the teams established pursuant to this section and for training such other teams located within the state for response to man-made or natural disasters to the extent appropriations are provided. The commissioner of the division of homeland security and emergency services shall support the capabilities of each team established pursuant to this section with the necessary training and equipment to ensure mobilization and deployment for rapid response to emergencies and disasters to the extent appropriations are provided.

4. Accreditation of teams. The commissioner of the division of homeland security and emergency services shall have the authority to establish an accreditation program to review and evaluate new and existing local and regional technical rescue capabilities, and provide recommendations for capability enhancement in accordance with the national incident management system, the national response plan, and nationally recognized standards.

5. Defense, indemnification and insurance coverage of team members. Members of the teams formed pursuant to this section who are volunteer firefighters, volunteer ambulance workers, municipal or state employees, or employees of a non-governmental entity shall be provided coverage by their respective municipalities, organizations, and entities for purposes of sections seventeen and eighteen of the public officers law and/or other defense and indemnification coverage and workers' compensation coverage pursuant to applicable provisions of the workers' compensation law or benefits pursuant to applicable provisions of the volunteer firefighters' benefit law or the volunteer ambulance workers' benefit law. Individuals appointed to an urban search and rescue task force team, a specialty rescue team or an incident support team, for which such coverage is not available, shall be deemed volunteer state employees for purposes of section seventeen of the public officers law and section three of the workers' compensation law.

6. Rules and regulations. The commissioner of the division of homeland security and emergency services after consultation with the state fire administrator shall have the authority to promulgate rules and regulations as deemed necessary relating to the accreditation of urban search and rescue task force teams, specialty rescue teams, and incident support teams and to the formation and operation of all teams established pursuant to this section.

7. Funding. The division of homeland security and emergency services shall expend the necessary monies for training, equipment, and other items necessary to support the operations of urban search and rescue task force teams, specialty rescue teams and incident support teams within appropriations

provided. The division of homeland security and emergency services also may, pursuant to applicable rules and regulations approved by the director of the division of the budget, approve grants of funds from monies allocated and appropriated for any or all such teams.

HISTORY:

Add, L 2007, ch 303, § 1, eff July 18, 2007; amd, L 2010, ch 56, § 26 (Part B), eff July 1, 2010.

Amendment Notes: 2010. Chapter 56, § 27 (Part B) amended:

Sub 1 by deleting at fig 1 "benefits" and adding the matter in italics.

Sub 3, par (a) by deleting at fig 1 "state fire administrator" and adding the matter in italics.

Sub 3, par (b) by deleting at figs 1 and 2 "state fire administrator" and adding the matter in italics.

Sub 4 by deleting at fig 1 "state fire administrator" and adding the matter in italics.

Sub 5 by deleting at fig 1 "benefits" and adding the matter in italics.

Sub 6 by deleting at fig 1 "state fire administrator" and adding the matter in italics.

Sub 7 by deleting at figs 1 and 2 "secretary of state and the state fire administrator" and adding the matter in italics.

§ 156-h. Registration and fees for manufacturers, distributors, wholesalers, and retailers of sparkling devices

1. Definitions. As used in this section, the term:

(a) "Distributor" means any person or entity engaged in the business of selling sparkling devices to wholesalers, specialty retailers, permanent retailers or temporary seasonal retailers for resale.

(b) "Manufacturer" means any person or entity engaged in the manufacture or construction of sparkling devices.

(c) "Specialty retailer" means any person or entity who, at a fixed place of business, is engaged solely in selling sparkling devices at retail. For purposes of this section, a person or entity is engaged solely in selling sparkling devices if fifty-one percent or more of such person's or entity's annual gross sales are from the sale of sparkling devices.

(d) "Permanent retailer" means any person or entity who, at a fixed place of business, is engaged in selling sparkling devices at retail.

(e) "Sparkling devices" means any item defined in subparagraph (vi) of paragraph (a) of subdivision one of section 270.00 of the penal law.

(f) "Temporary seasonal retailer" means any person or entity who, at a temporary stand or tent, is engaged in selling sparkling devices from June twentieth through July fifth or from December tenth through January second of each year at retail.

(g) "Wholesaler" means any person or entity engaged in the business of selling sparkling devices to specialty retailers, permanent retailers or temporary seasonal retailers at wholesale.

2. Registration requirements. Any manufacturer, distributor, wholesaler, specialty retailer, permanent retailer or temporary seasonal retailer of sparkling devices who wishes to do business in this state or to otherwise sell, ship, or assign for sale its products in this state must register annually with the office of fire prevention and control on forms prescribed by such office. Any specialty retailer, permanent retailer or temporary seasonal retailer that sells sparkling devices at more than one retail location may submit one registration form for all such locations but must provide the address of each location with the registration form; however, any retailer may submit multiple registration forms.

3. Registration form. The registration form filed with the office of fire prevention and control must be notarized and must include the following information: business name; address; telephone number; officers, if the business is a corporation; and an individual designated as a contact person.

4. Fees.

(a) Each manufacturer, distributor or wholesaler must pay an annual registration fee to be set by the office of fire prevention and control not to exceed five thousand dollars. Each specialty retailer must pay an annual registration fee to be set by such office not to exceed two thousand five hundred dollars. Each permanent retailer shall pay an annual registration fee to be set by such office not to exceed two hundred dollars for each retail location registered. Each temporary seasonal retailer must pay a registration fee to be set by such office not to exceed two hundred fifty dollars per season. Each certificateholder wishing to have a duplicate certificate issued for one which is lost or to reflect a change of address shall request such duplicate in writing and shall pay a fee of five dollars.

(b) Revenue from registration fee payments shall be used for the purposes of implementing firefighter safety and training programs as well as registration and testing provisions of this chapter.

(c) No city, municipality or other local jurisdiction shall charge any fee or require any permit whatsoever for the sale and use of sparkling devices.

5. Record and reports. Each manufacturer, distributor and wholesaler shall maintain and make available to the state fire administrator, upon the state fire administrator's reasonable request, full and complete, true, and accurate records showing the name and quantity of any sparkling device produced in, imported to, exported from, or sold in this state.

6. Rules. The state fire administrator shall promulgate rules prescribing registration forms required by this section.

HISTORY:

L 2014, ch 477, § 4, effective December 21, 2014.

§ 157. Granting authority

The division of homeland security and emergency services by and through the commissioner of the division of homeland security and emergency services or his duly authorized officers and employees, shall administer, carry out and approve grants of funds from moneys allocated and appropriated therefor, for authorized arson, fire prevention and

control expenditures as defined herein, that are conducted by municipal corporations. "Authorized arson, fire prevention and control expenditures" shall mean those expenditures utilized by a municipal corporation for fire or arson prevention, fire or arson investigation and arson prosecution. No expenditure which has not been specifically designated by the local legislative body for arson, fire prevention and control and approved by the office of fire prevention and control pursuant to rules and regulations promulgated thereby shall be considered an "authorized arson, fire prevention and control expenditure." The division of homeland security and emergency services shall adopt, amend and rescind such rules, regulations and guidelines as may be necessary for the performance of its functions, powers and duties under this section. The division of homeland security and emergency services shall allocate grants under this article among the municipalities whose applications have been approved in such a manner as will most nearly provide an equitable distribution of the grants among municipalities, taking into consideration such factors as the level of suspected arson activity, population and population density, the need for state funding to carry out local programs, and the potential of the municipalities to effectively employ such grants.

HISTORY:

Add, L 1979, ch 225, § 3, eff Sept 1, 1979; amd, L 2010, ch 56, § 27 (Part B), eff July 1, 2010.

Prior Law: Former § 157, add, L 1976, ch 369, § 1; renumbered § 159-b, L 1979, ch 225, § 4, eff Sept 1, 1979.

Amendment Notes: 2010. Chapter 56, § 27 (Part B) amended:

By deleting at fig 1 "office of fire prevention and control, by and through the state fire administrator", at figs 2 and 3 "office of fire prevention and control" and adding the matter in italics.

RESEARCH REFERENCES AND PRACTICE AIDS

Federal Aspects:

Federal Fire Prevention and Control Act, 15 USCS §§ 2201 et seq.

Jurisprudences:

35 Am Jur 2d, Fires §§ 2, 4.

§ 158. Firefighting training

1. For the purpose of this section, the term fire fighter shall mean a member of a fire department whose duties include fire service as defined in paragraph d of subdivision eleven of section three hundred two of the retirement and social security law.

2. In addition to the functions, powers and duties otherwise provided by this article, the state fire administrator may promulgate rules and regulations with respect to:

(a) The approval, or revocation thereof, of fire training programs for fire fighters;

(b) Minimum courses of study, attendance requirements, and equipment and facilities to be required for approved fire training programs for fire fighters;

(c) Minimum qualifications for instructors for approved fire training programs for fire fighters;

(d) The requirements of minimum basic training which fire fighters appointed to probationary terms shall complete before being eligible for permanent appointment, and the time within which such basic training must be completed following such appointment to a probationary term;

(e) The requirements of minimum basic training which fire fighters not appointed for probationary terms but appointed on other than a permanent basis shall complete in order to be eligible for continued employment or permanent appointment, and the time within which such basic training must be completed following such appointment on a non-permanent basis;

(f) The requirements for in-service training programs designed to assist fire fighters in maintaining skills and being informed of technological advances;

(g) Categories or classifications of advanced in-service training programs and minimum courses of study and attendance requirements with respect to such categories or classifications;

(h) Exemptions from particular provisions of this article in the case of any county, city, town, village or fire district, if in the opinion of the state fire administrator the standards of fire training established and maintained by such county, city, town, village or fire district are equal to or higher than those established pursuant to this article; or revocation in whole or in part of such exemption, if in his or her opinion the standards of fire training established and maintained by such county, city, town, village or fire district are lower than those established pursuant to this article; and

(i) Education, health and physical fitness requirements for eligibility of persons for provisional or permanent appointment in the competitive class of the civil service as fire fighters as it deems necessary and proper for the efficient performance of such duties;

3. In furtherance of his or her functions, powers and duties as set forth in this section, the state fire administrator may:

(a) Recommend studies, surveys and reports to be made by the state fire administrator regarding the carrying out of the objectives and purposes of this section;

(b) Visit and inspect any fire training programs approved by the state fire administrator or for which application for such approval has been made; and

(c) Recommend standards for promotion to supervisory positions.

4. In addition to the functions, powers and duties otherwise provided by this section, the state fire administrator shall:

(a) Approve fire training programs for fire fighters and issue certificates of approval to such programs, and revoke such approval or certificate;

(b) Certify, as qualified, instructors for approved fire training programs for fire fighters and issue appropriate certificates to such instructors;

(c) Certify fire fighters who have satisfactorily completed basic training programs and in-service

training programs, and issue appropriate certificates to such fire fighters and revoke such certificates;

(d) Cause studies and surveys to be made relating to the establishment, operation, effectiveness and approval of fire training programs;

(e) Cause studies and surveys to be made relating to the completion or partial completion of training programs by video or computer to the maximum extent practicable; and

(f) Consult with and cooperate with the state university of New York and private universities, colleges and institutes in the state for the development of specialized courses of study for fire fighters in fire science and fire administration.

HISTORY:

Add, L 2010, ch 56, § 28 (Part B), eff July 1, 2010.

Prior Law: Former § 158, add, L 1979, ch 225, § 3, eff Sept 1, 1979; repealed, L 2010, ch 56, § 28 (Part B), eff July 1, 2010.

Prior § 158, add, L 1976, ch 369, § 1; renumbered § 159-c, L 1978, ch 225, § 4, eff Sept 1, 1979 .

RESEARCH REFERENCES AND PRACTICE AIDS

Federal Aspects:

Federal Fire Prevention and Control Act, 15 USCS §§ 2201 et seq.

Jurisprudences:

35 Am Jur 2d, Fires §§ 2, 4.

§ 159. Advisory council for fire prevention and control

1. There is hereby created within the division of homeland security and emergency services an advisory council for fire prevention and control for the purpose of advising the commissioner and the state fire administrator with regard to: (a) execution of the functions, powers and duties of the office with respect to fire and arson prevention and control services, policies and programs; (b) recommendations on courses of instruction and standards for training of firefighters of fire departments, fire companies, municipal corporations, districts, and private industry of the state; (c) recommendations on federal and state legislation and programs relating to fire and arson prevention services, policies and programs; and (d) recommendations upon such other matters as the commissioner and the state fire administrator may request.

2. The council shall be composed of the state fire administrator, as chair, or his or her designee, and twelve other members appointed as follows: six members appointed by the governor; two members appointed by the temporary president of the senate; one member appointed by the minority leader of the senate; two members appointed by the speaker of the assembly; one member appointed by the minority leader of the assembly.

3. Membership of such council shall consist of representatives from the volunteer and career fire service, at least half of which shall serve at the municipal level.

4. Members of the council, other than the state fire administrator, shall serve for terms of three years, with such terms to commence on April first and expire on March thirty-first.

5. No member of the council shall be disqualified from holding any other public office or employment, nor shall he or she forfeit any such office or employment by reason of the appointment hereunder, notwithstanding the provisions of any general, special or local law, ordinance or city charter.

6. The council shall meet at least twice a year. Special meetings may be called by the chairperson. The agenda and meeting place of all regular or special meetings shall be made available to the public in advance of such meeting.

7. Members of the council shall serve without salary or per diem allowance, but shall be entitled to reimbursement for actual and necessary expenses incurred in the performance of official duties under this section, provided, however, that such members are not, at the time such expenses are incurred, public employees otherwise entitled to such reimbursement.

8. The chairperson may create subcommittees as he or she may from time to time deem appropriate to provide the council with advice and recommendations. Members of such subcommittees shall be entitled to reimbursement for actual and necessary expenses incurred in the performance of official duties under this section, provided, however, that such members are not, at the time such expenses are incurred, public employees otherwise entitled to such reimbursement.

HISTORY:

Add, L 2010, ch 56, § 29–b (Part B), eff July 1, 2010; amd, L 2013, ch 101, § 5 (Part A), eff July 11, 2013.

Prior Law: Former § 159, add, L 1979, ch 225, § 3, eff Sept 1, 1979; repealed, L 2010, ch 56, § 29-a (Part B), eff July 1, 2010.

Prior § 159, add, L 1976, ch 369, § 1; renumbered § 159-d, L 1979, ch 225, § 4, eff Sept 1, 1979.

Amendment Notes: 2013. Chapter 101, § 5 (Part A) amended:

Sub 2 by deleting at fig 1 "Members of the fire safety advisory board, the arson board and the firefighting and code enforcement personnel standard and education commission may be appointed to this advisory council."

§ 159-a. Inclusion on the fallen firefighters memorial

In the case of a death of a firefighter, regardless of whether such death occurred before, on, or after the effective date of this section, that results from services performed in the line of duty, as determined by an authoritative agency including, but not limited to, the workers' compensation board, the federal Department of Justice, or the office of fire prevention and control, the name of that firefighter shall be inscribed upon the New York state fallen firefighters memorial on the Capitol Mall in Albany. The fallen firefighters memorial selection committee shall amend its election criteria so that it is not in conflict with the provisions of this section.

HISTORY:

Add, L 2012, ch 104, § 1, eff July 12, 2012.

Prior Law Formerly § 156, add, L 1976, ch 369, § 1; renumbered § 159-a and amd, L 1979, ch 225, § 4; amd, L 1981, ch 707, § 3, eff July 21, 1981, L 1996, ch 309, § 148, eff July 13, 1996; repealed, L 2010, ch 56, § 29-a (Part B), eff July 1, 2010.

§ 159-c-1. Training; live fire conditions

1. In the training of firefighters under live fire conditions no person or persons shall play the role of a victim.

2. For purposes of this section, a live fire condition is any unconfined open flame or device that can propagate fire to a building, a training tower, an acquired structure or other combustible material.

3. A violation of this section shall be punishable by a civil penalty not to exceed one thousand dollars paid for by the fire department conducting such training.

HISTORY:

Add, L 2003, ch 125, § 1, eff July 17, 2003.

§ 159-d. Training for fire chiefs.

The state fire administrator may conduct the training and education required for fire chiefs pursuant to subdivision seven of section fifty-eight-a of the civil service law and section two hundred four-dd of the general municipal law with sufficient frequency to enable individuals to satisfy the necessary qualifications for a fire chief pursuant to such section. To the extent practicable, such training and education may be made available in all geographic regions of the state. Such regions may be determined by the state fire administrator.

HISTORY:

L 2019, ch 678, § 3, effective June 13, 2020.

Editor's Notes Laws 2019, ch 678, § 4, eff June 13, 2020, provides:

§ 4. This act shall take effect on the one hundred eightieth day after it shall have become a law. Effective immediately, the addition of any rule or regulation necessary for the implementation of this act on its effective date are authorized to be made and completed on or before such effective date.

ARTICLE 7 Miscellaneous Provisions

Section

169. Salaries of certain state officers

HISTORY:

Add, L 1951, ch 800, § 1, eff July 1, 1951, with substance transferred from Art 8.

§ 169. Salaries of certain state officers

1. Salaries of certain state officers holding the positions indicated hereinbelow shall be as set forth in subdivision two of this section:

(a) commissioner of corrections and community supervision, commissioner of education, commissioner of health, commissioner of mental health, commissioner of developmental disabilities, commissioner of children and family services, commissioner of temporary and disability assistance, chancellor of the state university of New York, commissioner of transportation, commissioner of environmental conservation, superintendent of state police, commissioner of general services, commissioner of the division of homeland security and emergency services and the executive director of the state gaming commission;

(b) commissioner of labor, chairman of public service commission, commissioner of taxation and finance, superintendent of financial services, commissioner of criminal justice services, and commissioner of parks, recreation and historic preservation;

(c) commissioner of agriculture and markets, commissioner of alcoholism and substance abuse services, adjutant general, commissioner and president of state civil service commission, commissioner of economic development, chair of the energy research and development authority, president of higher education services corporation, commissioner of motor vehicles, member-chair of board of parole, chair of public employment relations board, secretary of state, commissioner of alcoholism and substance abuse services, executive director of the housing finance agency, commissioner of housing and community renewal, executive director of state insurance fund, commissioner-chair of state liquor authority, chair of the workers' compensation board;

(d) director of office for the aging, commissioner of human rights, commissioners of the department of public service, chairman of state commission on quality of care for the mentally disabled, chairman of commission on alcoholism and substance abuse prevention and education, executive director of the council on the arts and executive director of the board of social welfare;

(e) chairperson of state athletic commission, director of the office of victim services, chairperson of human rights appeal board, chairperson of the industrial board of appeals, chairperson of the state commission of correction, members of the board of parole, member-chairperson of unemployment insurance appeal board, director of veterans' services, and vice-chairperson of the workers' compensation board;

(f) executive director of adirondack park agency, members of state commission of correction, members of unemployment insurance appeal board, and members of the workers' compensation board.

2. (a) Effective January first, nineteen hundred ninety-nine, the annual salaries of the officers holding the positions indicated in subdivision one of this section shall be as follows: for the positions listed in paragraph (a), $136,000; in paragraph (b), $127,000; in paragraph (c), $120,800; in paragraph (d), $109,800; in paragraph (e), $101,600; and in paragraph (f), $90,800.

(b) Notwithstanding any of the foregoing provisions of this section to the contrary, an incumbent in a position (i) listed in former section one hundred sixty-nine of the executive law in effect on the day prior to the effective date of this subdivision, or (ii) listed in this section, or (iii) covered by a provision of law other than such section, shall not receive com-

pensation in an amount less than such person received on the effective date of this section.

3. Notwithstanding any other provision of this section or any other provision of law, the boards of trustees of the state university of New York and the city university of New York shall each establish and implement salary plans for the chancellors, presidents and senior staffs of such state and city universities, respectively. The board of regents shall establish and implement a separate salary plan for the president of the university of the state of New York, setting forth the compensation to be received by the president for performing the duties of that office assigned by the rules of the regents or statute, which shall be in addition to the compensation received by such person pursuant to the provisions of subdivisions one and two of this section. Such salary plans shall be developed after consultation with the governor's office of employee relations and the division of the budget. Any increase in compensation for the positions set forth in this subdivision, not otherwise funded from any appropriation, shall be funded from reallocations of funds within the appropriations specifically identified by the aforementioned boards. Each board of trustees and the board of regents shall file a proposed salary plan report with the chairs of the senate finance committee and the assembly ways and means committee and the director of the budget at least sixty days prior to the effective date of such salary plan. Each salary plan report shall set forth the salary schedule, the dollar value of additional public compensation and other employment benefits that such positions would receive, the specific sources of funding to be reallocated for salary increases, the amount of increase to be provided to each position, the comparison salary data on which the plan is based, and such other information as the boards of trustees and the board of regents deem appropriate.

HISTORY:

Add, L 1984, ch 986, § 21, eff Dec 7, 1984; amd, L 1985, ch 134, § 1; L 1986, ch 282, § 15; L 1986, ch 766, § 1; L 1987, ch 263, §§ 18(a), 18(b), 19–22; L 1988, ch 141, §§ 66, 67; L 1991, ch 166, § 252–a; L 1992, ch 55, § 146, eff May 10, 1992; L 1993, ch 60, § 14, eff April 15, 1993, deemed eff April 1, 1993; L 1993, ch 260, § 47, eff July 13, 1993, deemed eff July 1, 1993; L 1994, ch 385, § 34, eff Jan 1, 1995; L 1995, ch 83, § 56, eff June 20, 1995; L 1997, ch 436, § 127 (Part B), eff Aug 20, 1997; L 1998, ch 630, § 6, eff Jan 1, 1999; L 1998, ch 634, §§ 1, 2, eff Jan 1, 1999; L 2005, ch 56, § 1 (Part F), eff April 12, 2005, deemed eff on and after April 1, 2005; L 2005, ch 220, § 1, eff July 12, 2005; L 2010, ch 56, § 66 (Part A), eff June 22, 2010; L 2010, ch 56, § 11 (Part A–1), eff June 22, 2010; L 2010, ch 56, § 20 (Part B), eff July 1, 2010; L 2010, ch 56, § 2 (Part W), eff June 22, 2010 (see 2010 note below),10 (Part O), eff June 22, 2010 (see 2010 note below); L 2010, ch 56, §10 (Part O), eff June 22, 2010; L 2010, ch 56, § 2 (Part W), eff June 22, 2010; L 2011, ch 57, § 1 (Part E), eff April 13, 2011; L 2011, ch 57, §1 (Part H), eff March 31, 2011; L 2011, ch 62, § 14 (Part A), eff Oct 3, 2011; L 2011, ch 62, § 94 (Part C, Subpart B), eff March 31, 2011; L 2012, ch 60, § 9 (Part A), eff Feb 1, 2013; L 2019, ch 56, § 2-a (Part AA), effective April 12, 2019.

Prior Law: Former § 169, add, L 1979, ch 55, § 4; amd, L 1979, ch 262, § 1, L 1979, ch 307, § 32, L 1980, ch 881, § 1; repealed, L 1984, ch 986, § 21, eff Dec 7, 1984.

Prior § 169, add, L 1972, ch 283, § 27; amd, L 1974, ch 660, § 5, L 1974, ch 992, § 6; L 1975, ch 667, § 16, L 1975, ch 865, § 15, L 1977, ch 46, § 1; repealed, L 1979, ch 55, § 4, eff April 6, 1979.

Earlier § 169, add, L 1961, ch 350, § 14; amd, L 1962, ch 165, § 45, L 1963, ch 274, § 1, L 1966, ch 63, § 8, L 1967, ch 486, § 15, L 1968, ch 128, § 8, L 1968, ch 420, §§ 105, 106, L 1968, ch 947, § 1, L 1968, ch 958, § 1, L 1969, ch 333, § 7, L 1970, ch 158, § 8, L 1970, ch 317, § 2, L 1970, ch 1023, §§ 3, 4, L 1972, ch 827, § 2; repealed, L 1972, ch 283, § 27, eff April 1, 1973.

Editor's Notes: Laws 1986, ch 282, § 32, eff Sept 1, 1987, provides as follows:

§ 32. This act shall take effect September first, nineteen hundred eighty-seven and shall apply to all proceedings commenced in the division of tax appeals on or after such date and shall apply to all proceedings commenced prior to such date which have not been the subject of a final and irrevocable administrative action as of such effective date to the extent this act can be made applicable, except that the provision in section thirty of this act which provides for the appointment of members of the tax appeals tribunal and the designation of one such member to serve as president shall take effect on April first, nineteen hundred eighty-seven. Any proceeding for which a hearing has commenced prior to the effective date of this act shall be subject to automatic review by the tax appeals tribunal which shall render the decision in such proceeding unless there is a prior settlement.

Laws 1991, ch 166, § 406(r), eff June 12, 1991, provides as follows:

(r) The provisions of sections two hundred forty-two through two hundred fifty-three of this act shall take effect July 1, 1991, provided, however, that the governor shall immediately convene a transition task force to be comprised of one representative each of the counsel to the governor, the director of state operations, the director of management and productivity, the director of the budget , the state labor relations board, the state mediation board, the public employment relations board, the governor's office of employee relations and the department of labor. This task force shall take all necessary steps, including but not limited to the development of policies and procedures and outreach to affected constituencies, to prepare for the consolidation to be effective July 1, 1991.

Laws 1994, ch 385, §§ 70 and 71, eff Jan 1, 1995, provide as follows:

§ 70. The provisions of this act shall supersede any inconsistent provision of law to the contrary.

§ 71. This act shall take effect January 1, 1995 except that section fifty-six of this act shall take effect immediately; provided further that nothing contained herein shall be deemed to affect the application, qualification, expiration or repeal of any provision of law amended by any section of this act and such provisions shall be applied or qualified, or shall expire or be deemed repealed, in the same manner, to the same extent and on the same date as the case may be as otherwise provided by law.

Laws 1995, ch 83, § 362 (in part), eff June 20, 1995, provides as follows:

§ 362. This act shall take effect immediately provided however:

8. Sections one hundred twenty through one hundred forty-two of this act shall take effect January 1, 1996, provided however, that the chairman of the department of public service is hereby authorized to take such actions as may be necessary and proper to prepare for any orderly transition of the functions, process and duties as herein provided including the preparation [preparation] * and submission of budget requests for the functions transferred pursuant to sections one hundred twenty through one hundred forty-two of this act;

*The bracketed word has been inserted by the Publisher.

Laws 1997, ch 436, § 1 (Part B), eff Aug 20, 1997, provides as follows:

Section 1. Short title. This act shall be known and may be cited as "The Welfare Reform Act of 1997". (Amd, L 1998, ch 214, § 1, eff July 7, 1998, deemed eff Aug 20, 1997.)

Laws 1997, ch 436, § 143 (Part B), eff Aug 20, 1997, provides as follows:

§ 143. Notwithstanding any provision of law to the contrary, the attorney general and the commissioners of social services, taxation and finance, health, and labor, and the chair of the workers' compensation board, and any appropriate entity of the state, shall be authorized to promulgate regulations on an emergency basis to ensure the implementation of this act and may take any steps necessary to implement this act prior to its effective date.

Laws 2010, ch 56, §§ 11, 12 (Part O), eff July 22, 2010, provide as follows:

§ 11. This act shall not revoke or rescind any regulations or opinions issued by the state employment relations board in effect upon the effective date of this act, to the extent that such regulations or opinions are not inconsistent with any law of the state of New York. The public employment relations board shall undertake a comprehensive review of all such regulations and opinions, which will address the consistency of such regulations and opinions among each other and will propose any regulatory changes necessitated by such review.

§ 12. This act shall take effect on the thirtieth day after it shall have become a law; provided, however, that effective immediately, the chair of the public employment relations board and the chair of the state employment relations board are hereby authorized to take such actions as are necessary and proper to prepare for an orderly transition of the functions, powers and duties as herein provided.

Laws 2010, ch 56, § 1 (Part W), eff June 22, 2010, provides as follows:

Section 1. (a) The purpose of this act is to provide for an orderly transfer of responsibilities relating to real property tax administration to the commissioner of taxation and finance and the department of taxation and finance, from the state board of real property services and the state office of real property services.

(b) Wherever the terms "state board of real property services," "state board" or "state office of real property services" appear in the real property tax law, such terms are hereby changed to "commissioner", provided that in sections 204, 206, 208, 614, 816, 818, 1253 and 1263 of the real property tax law, such terms shall be changed to "state board of real property tax services," and provided further that the text of sections 200, 202, 216, 489-o, 489-ll, 1210 and 1218 of the real property tax law shall be changed only as provided by the ensuing provisions of this act, and provided further that the provisions of this subdivision shall not apply to the text of sections 200-a, 201 and 203 of the real property tax law as added by sections five and seven of this act.

(c) Wherever the terms "state board of real property services," "state board" or "state office of real property services" appear in the tax law, such terms are hereby changed to "commissioner", provided further that the text of subdivision (e) of section 15, paragraph 5 of subdivision (b) of section 22, subdivision 25th of section 171 and sections 171-o, 697, and 1564 of the tax law shall only be changed to the extent provided by the ensuing provisions of this act.

(d) Wherever the term "state board of real property services" or "state office of real property services" appears in the consolidated or unconsolidated laws of this state other than the real property tax law or the tax law, such term is hereby changed to "commissioner of taxation and finance". Wherever the term "state board of real property services" is followed by the term "state board" in such a statute, such term is hereby changed to "commissioner".

(e) The legislative bill drafting commission is hereby directed to effectuate this provision, and shall be guided by a memorandum of instruction setting forth the specific provisions of law to be amended. Such memorandum shall be transmitted to the legislative bill drafting commission within sixty days of enactment of this provision. Such memorandum shall be issued jointly by the governor, the temporary president of the senate, and the speaker of the assembly, or by the delegate of each.

Laws 2011, ch 57, § 3 (Part H), eff March 31, 2011, provides as follows:

§ 3. This act shall take effect immediately, and shall apply to current members of the civil service commission.

Laws 2012, ch 60, § 14 (Part A), eff Feb 1, 2013, provides as follows:

§ 14. This act shall take effect February 1, 2013; provided, however that effective immediately, the addition, amendment and/or repeal of any rules or regulations necessary for the implementation of the foregoing provisions of this act on its effective date are authorized and directed to be made and completed on or before such effective date (Amd, L 2012, ch 457, § 7, eff Sept 28, 2012.).

Laws 2012, ch 457, § 7, eff Sept 28, 2012 amended L 2012, ch 60, § 9 (Part A), so as to change the effective date October 1, 2012 to February 1, 2013.

Amendment Notes: 2012. Chapter 60, § 9 (Part A) amended:

Sub 1, par (a) by deleting at fig 1 "and" and adding the matter in italics.

Sub 1, par (c) by deleting at fig 1 "chair of the state racing and wagering board,".

Sub 1, par (e) by deleting at fig 1 ", members of the state racing and wagering board".

1998. Chapter 634, § 2 amended:

Sub 2, par (a) by deleting at fig 1 "$115,500", at fig 2 "$108,000", at fig 3 "$102,500", at fig 4 "$93,000", at fig 5 "$86,000", at fig 6 "$77,000" and adding the matter in italics.

The 2019 amendment by ch 56, § 2-a (Part AA), in 1(e), substituted "chairperson" for "chairman" wherever it appears and "services" for "affairs"; and made stylistic changes.

Repeal Notes: [1979, ch 55] Former section one hundred sixty-nine of the executive law, repealed by this act, listed positions and salaries for commissioners and related positions and is replaced by a revised list of positions and salaries.

[1980, ch 881] Former subdivision two of section one hundred sixty-nine of the Executive Law repealed by section one of this act provided the salary rates for state commissioners and agency heads and was replaced by a new rate schedule.

[1984, ch 986] Section one hundred sixty-nine of the executive law providing for the salary of certain state officers was repealed by section twenty-one of this act and was replaced by a new section one hundred sixty-nine of such law relating thereto.

Notes to Decisions

By failure to pass legislation explicitly abolishing the Bingo Control Commission or to specifically provide therefor in budget, though not specifically appropriating any funds for the Commission, the legislature could be deemed to have expressed an intent not to eliminate the Commission or the office of chairman, and chairman was entitled to his salary. Ball v State, 41 N.Y.2d 617, 394 N.Y.S.2d 597, 363 N.E.2d 323, 1977 N.Y. LEXIS 1971 (N.Y. 1977).

Where legislature which enacted budget in which no funds were specially appropriated for the Bingo Control Commission or the salary of its chairman also amended section of the Executive Law without deleting therefrom express provision for chairman's salary, budget did not operate as a repeal by implication of the salary provisions. Ball v State, 41 N.Y.2d 617, 394 N.Y.S.2d 597, 363 N.E.2d 323, 1977 N.Y. LEXIS 1971 (N.Y. 1977).

Budget bill which was a general statute establishing a lump-sum appropriation for regulation of wagering, but contained no specific appropriation for the Bingo Control Commission, did not supersede the specific, detailed statutory provisions creating the Commission and its operations. Ball v State, 41 N.Y.2d 617, 394 N.Y.S.2d 597, 363 N.E.2d 323, 1977 N.Y. LEXIS 1971 (N.Y. 1977).

Where position of chairman of State Bingo Control Commission was statutorily created and its term of office, salary and duties statutorily prescribed, passage of state budget which provided no funds for such Commission did not demonstrate required legislative intent to abolish chairman's position, and State could not deprive chairman of salary for his fixed term position by refusing to appropriate funds therefor. Ball v State, 52 A.D.2d 47, 382 N.Y.S.2d 835, 1976 N.Y. App. Div. LEXIS 11527 (N.Y. App. Div. 3d Dep't 1976), aff'd, 41 N.Y.2d 617, 394 N.Y.S.2d 597, 363 N.E.2d 323, 1977 N.Y. LEXIS 1971 (N.Y. 1977).

By virtue of administrative practice, salary of chairman of state Bingo Control Commission is fixed by statute rather than by governor. Ball v State, 83 Misc. 2d 903, 373 N.Y.S.2d 761, 1975 N.Y. Misc. LEXIS 3013 (N.Y. Ct. Cl. 1975), aff'd, 52 A.D.2d 47, 382 N.Y.S.2d 835, 1976 N.Y. App. Div. LEXIS 11527 (N.Y. App. Div. 3d Dep't 1976).

Position of chairman of state Bingo Control Commission was not eliminated by virtue of fact that budget was adopted which did not contain provision for chairman's salary; chairman was therefore entitled to recover such salary plus appropriate interest. Ball v State, 83 Misc. 2d 903, 373 N.Y.S.2d 761, 1975 N.Y. Misc. LEXIS 3013 (N.Y. Ct. Cl. 1975), aff'd, 52 A.D.2d 47, 382 N.Y.S.2d 835, 1976 N.Y. App. Div. LEXIS 11527 (N.Y. App. Div. 3d Dep't 1976).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS Educ § 355; CLS Pub A § 1003; CLS St Fin § 109; CLS Unconsol Ch 44-A § 13, Ch 44-B §§ 14–17.

Public Employees' Fair Employment Act, CLS Civ S §§ 200 et seq.

Compensation of certain state officers and employees, CLS Unconsol Ch 44-C §§ 1 et seq.

Salary adjustments in certain positions in state service, CLS Unconsol Ch 44-A §§ 13 et seq.

Jurisprudences:

96 NY Jur 2d State of New York § 9.

109 NY Jur 2d Workers' Compensation § 142.

63A Am Jur 2d, Public Officers and Employees §§ 431–486.

Texts: New York Insurance Law (Matthew Bender's New York Practice Series) § 48.06[2].

ARTICLE 7-A Solicitation and Collection of Funds for Charitable Purposes

Section

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175. Enforcement by attorney general
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177. Administration and enforcement by attorney general

HISTORY:

Add, L 1977, ch 669, § 5, eff Oct 1, 1977.

§ 171-a. Definitions

The following words and phrases as used in this article shall have the following meanings unless a different meaning is required by the context.

1. "Charitable organizations." Any benevolent, philanthropic, patriotic, or eleemosynary person or one purporting to be such or law enforcement support organization as defined in subdivision eleven of this section.

2. "Contribution." The promise or grant of any money or property of any kind or value, whether or not in combination with the sale of goods, services, entertainment or any other thing of value, including a grant or other financial assistance from any agency of government, except payments by members of any organization for membership, for services or other benefit, other than the right to vote for directors or trustees, elect officers, or hold offices.

3. "Person." Any individual, organization, group, association, partnership, corporation, or any combination of them.

4. "Professional fund raiser." Any person who directly or indirectly, by contract, including but not limited to sub-contract, letter or other agreement or other engagement on any basis, for compensation or other consideration (a) plans, manages, conducts, carries on, or assists in connection with a charitable solicitation or who employs or otherwise engages on any basis another person to solicit from persons in this state for or on behalf of any charitable organization or any other person, or who engages in the business of, or holds himself out to persons in this state as independently engaged in the business of soliciting for such purpose; (b) solicits on behalf of a charitable organization or any other person; or (c) who advertises that the purchase or use of goods, services, entertainment or any other thing of value will benefit a charitable organization but is not a commercial co-venturer. A bona fide director, trustee, officer, volunteer or employee of a charitable organization or fund raising counsel shall not be deemed a professional fund raiser.

5. "Professional solicitor." Any person who is employed or retained for compensation by a professional fund raiser to solicit contributions for charitable purposes or for the purposes of any law enforcement support organization from persons in this state.

6. "Commercial co-venturer." Any person who for profit is regularly and primarily engaged in trade or

commerce other than in connection with the raising of funds or any other thing of value for a charitable organization and who advertises that the purchase or use of goods, services, entertainment, or any other thing of value will benefit a charitable organization.

7. "Secretary." The secretary of state.

8. "Membership." The collective body of any charitable organization comprised of persons having voting rights and other powers of governance.

9. "Fund raising counsel." Any person who for compensation consults with a charitable organization or who plans, manages, advises, or assists with respect to the solicitation in this state of contributions for or on behalf of a charitable organization, but who does not have access to contributions or other receipts from a solicitation or authority to pay expenses associated with a solicitation and who does not solicit. A bona fide officer, volunteer, or employee of a charitable organization or an attorney at law retained by a charitable organization or an individual engaged solely to draft applications for funding from a governmental agency or an entity exempt from taxation pursuant to section 501(c)(3) of the internal revenue code, shall not be deemed a fund raising counsel.

10. "Solicit." To directly or indirectly make a request for a contribution, whether express or implied, through any medium. A "solicitation" shall be deemed to have taken place whether or not a contribution is made. For purposes of this article, a "solicitation" or a "solicitation of contributions" includes any advertising which represents that the purchase or use of goods, services, entertainment or any other thing of value will benefit a charitable organization. Provided, however, that the printing and the mailing of a written solicitation for funds or any other thing of value to benefit a charitable organization shall not alone constitute soliciting on the part of persons who printed and mailed such solicitation if such persons do nototherwise solicit, receive or have access to contributions.

11. "Law enforcement support organization." Any organization, association, union or conference of or purporting to be of current or former law enforcement officers, including, without limitation, peace officers and police officers as defined in subdivisions thirty-three and thirty-four of section 1.20 of the criminal procedure law, sheriffs, deputy sheriffs, detectives, investigators or constables or any auxiliary or affiliate of such an organization, association, union or conference composed of one or more such organizations.

12. "Attorney general". The attorney general of the state of New York.

HISTORY:

Formerly § 171, add, L 1977, ch 669, § 5; renumbered § 171–a and amd, L 1986, ch 440, §§ 1–3, eff July 1, 1987; L 1987, ch 353, §§ 1, 2, eff July 1, 1987; L 1989, ch 489, §§ 1, 2, eff July 16, 1989; L 1995, ch 83, § 96, eff June 20, 1995, deemed eff April 1, 1995; L 2002, ch 43, § 1, eff Aug 1, 2002; L 2013, ch 549, § 2, eff July 1, 2014.

Editor's Notes: Laws 1986, ch 440, § 19, eff July 1, 1987, provides as follows:

§ 19. This act shall take effect on July first, nineteen hundred eighty-seven, except that any rules and regulations necessary for the timely implementation of this act on its effective date shall be promulgated on or before such date and shall apply to written reports filed pursuant to section one hundred seventy-two-b of the executive law for fiscal years ending on or after December thirty-first, nineteen hundred eighty-seven.

Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

Amendment Notes: 2013. Chapter 549, § 2 amended:

Sub 9 by adding the matter in italics.

2002. Chapter 2002, § 43, § 1 amended:

Sub 2 by deleting at fig 1 "but", at fig 2 "fees, dues, fines or assessments, or", at fig 3 "rendered to individual members, if membership in such organization confers a bona fide right, privilege, professional standing, honor", at fig 4 "direct" and adding the matter in italics.

Sub 4 by deleting at fig 1 ": (a)", at fig 2 "individually solicits or", at fig 3 "by telephone or door-to-door and advertises a sale, performance, or event will benefit a charitable organization", at fig 4 "a sale, performance, or event" and adding the matter in italics.

Sub 8 by deleting at fig 1 "and who derive a direct benefit or privilege as a member thereof" and adding the matter in italics.

Sub 10 by deleting at fig 1 "the solicitor receives", at fig 2 "preparation", at fig 3 "prepared", at fig 4 "person does", at fig 5 "such" and adding the matter in italics.

1995. Chapter 83, § 96 amended:

By adding sub 12.

Notes to Decisions

It was not unheard of for 501(c)(3)s and 501(c)(4)s to work in tandem and even to have nearly identical names; if the latter were able to avoid supervision, such organizations could serve as shells to keep donors anonymous to the former, and the Attorney General's regulations were thus well within his powers. Citizens United v Schneiderman, 882 F.3d 374, 2018 U.S. App. LEXIS 3516 (2d Cir. N.Y. 2018).

Soc Serv Law § 461-b (5(a)) does not deny equal protection because it requires reports only from private proprietary homes and not from not-for-profit homes; profit motive of owners of private homes provides rational basis for such discrimination, and § 461-b (5(a)) simply requires that private proprietary homes submit information similar to that already required from not-for-profit homes under EPTL § 8-1.4 and Exec Law §§ 171–176. Katz v Blum, 460 F. Supp. 1222, 1978 U.S. Dist. LEXIS 14099 (S.D.N.Y. 1978), aff'd, 603 F.2d 213, 1979 U.S. App. LEXIS 16524 (2d Cir. N.Y. 1979).

Agency Opinions

Registration with the Department of State is required of police organizations that can be classified as "benevolent, philanthropic, patriotic or eleemosynary" based on the organization's stated purposes or activities and its use of professional fund raisers. 1980 N.Y. Op. Att'y Gen. No. 74, 1980 N.Y. AG LEXIS 12.

Registration and reporting requirements of CLS Exec Law Art. VII-A apply to organizations that receive State grants in excess of $25,000 for training and education of both members and nonmembers of organization, however, registration with Department of State is not required of organization that receives State grants in excess of $25,000 for training and education of only its members. N.Y. Op. Att'y Gen. No. 89-F3.

An organization that provides all the services necessary to conduct a fund-raising drive is a professional fund raiser. N.Y. Op. Att'y Gen. No. 83-F7.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

Department of law: charitable entities and fundraising professionals. 13 NYCRR Parts 90–99.

Jurisprudences:
18 NY Jur 2d Charities §§ 2, 63, 86, 91, 94, 95 .
75 NY Jur 2d Libraries § 12.
60 Am Jur 2d, Peddlers, Solicitors, and Transient Dealers § 23.

Annotations:
Validity and application of governmental limitation on permissible amount or proportion of fund-raising expenses or administrative costs of charitable organizations. 15 ALR4th 1163.

Texts: Bjorklund, Fishman & Kurtz, New York Nonprofit Law and Practice with Tax Analysis §§ 5-7(d), 6-2(b), 6-2(c), 6-2(d)(1), 6-3(b), 6-3(g), 7-2(b)(2).

§ 172. Registration of charitable organizations

1. Every charitable organization, and any charitable organization registered or required to be registered pursuant to article eight of the estates, powers and trusts law, except as otherwise provided in section one hundred seventy-two-a of this article, which intends to solicit contributions from persons in this state or from any governmental agency shall, prior to any solicitation, file with the attorney general a prescribed registration form that includes, but is not limited to, the following information:

(a) The name of the organization and the name or names under which it intends to solicit contributions.

(b) The names and business, residence, or other addresses where each can regularly be found of the officers, directors, trustees, and executive personnel of the organization.

(c) The addresses of the organization and the addresses of any offices in this state. If the organization does not maintain an office, the name and address of the person having custody of its financial records.

(d) Where and when the organization was established, the form of its organization, its tax exempt status together with a copy of the most recent letter of exemption, if any, issued by the internal revenue service, the most recent communication from the internal revenue service regarding any audit thereby, if any, and a copy of any certificate of incorporation, by-laws, amendments and other operative organizational documents.

(e) A clear description of the specific programs stating whether in existence or planned for which the contributions to be solicited will be used.

(f) The date on which the fiscal year of the organization ends.

(g) Whether the organization is authorized by any other governmental authority to solicit contributions and whether it or any of its present officers, directors, executive personnel or trustees are or have ever been fined or otherwise penalized or enjoined from soliciting contributions or have been found to have engaged in unlawful practices regarding solicitation of contributions or administration of charitable assets and whether its registration or license has been suspended or cancelled by any court or other governmental agency together with the identity of such courts or governmental agencies and the reasons for such fine, penalty, injunction, suspension or cancellation.

(h) The names and addresses of any professional fund raisers, fund raising counsels and commercial co-venturers who are acting or have agreed to act on behalf of the organization.

(i) A copy of its annual report, if any, for the immediately preceding fiscal year in accordance with the requirements of section one hundred seventy-two-b of this article.

(j) The names and addresses of any chapters, branches, affiliates or organizations that share in the contributions or other revenue raised in this state.

2. The registration form shall be signed under penalties for perjury by the president or other authorized officer and the chief fiscal officer of the organization.

3. At the time of filing such registration, each charitable organization shall pay to the attorney general a fee of twenty-five dollars.

4. Any charitable organization required to register with the attorney general pursuant to this article and properly registered pursuant to article eight of the estates, powers and trusts law that has not previously registered pursuant to this article shall not be required to register separately, but shall file with the attorney general a statement that it is registered pursuant to article eight of the estates, powers and trusts law. Such statement shall be accompanied by all additional documents required to complete registration pursuant to this article, including any additional financial filings required by this article.

5. Registration pursuant to this article shall remain in effect unless it is either cancelled as provided in this article, withdrawn by the organization or the organization has failed to file the required financial report and such failure has not been remedied pursuant to subdivision seven of this section.

6. Every registered organization shall file with the attorney general within thirty days of any material change in the information required to be furnished by such organization under subdivision one of this section a prescribed form stating any such changes and signed under penalties for perjury by the president or other authorized officer of the organization.

7. In no event shall a registration of a charitable organization to solicit contributions in New York pursuant to this article continue, or be continued, in effect after the date such organization should have filed, but failed to file, a financial report in accordance with the requirements of section one hundred seventy-two-b of this article, and such organization shall not be eligible to file a new registration pursuant to this article until it shall have filed the required financial report or reports with the attorney general. If any such report is subsequently filed such organization shall file a new registration pursuant to this article, upon the payment of a re-

registration fee of one hundred fifty dollars to the attorney general.

8. Forms, financial reports, professional fund raisers' contracts, and other documents required to be filed pursuant to this article become public records of the attorney general.

9. No charitable organization, professional fund raiser, fund raising counsel or commercial co-venturer shall use or exploit the fact of its registration or the registration of any other registrant under this article or article eight of the estates, powers and trusts law so as to lead the public to believe that registration in any manner constitutes an endorsement or approval by the state.

10. To the extent practicable, the attorney general shall develop a single registration and uniform set of reporting forms to be filed in accordance with the requirements of this subdivision and those of section 8-1.4 of the estates, powers and trusts law. These forms shall avoid duplication with and make maximum use of information required in federal reporting forms filed with the attorney general.

HISTORY:

Add, L 1977, ch 669, § 5; amd, L 1986, ch 440, § 4, eff July 1, 1987 (see 1986 note below); L 1995, ch 83, § 97, eff June 20, 1995, deemed eff April 1, 1995, L 2002; L 2002, ch 43, § 2, eff Aug 1, 2002.

Editor's Notes: Laws 1986, ch 440, § 19, eff July 1, 1987, provides as follows:

§ 19. This act shall take effect on July first, nineteen hundred eighty-seven, except that any rules and regulations necessary for the timely implementation of this act on its effective date shall be promulgated on or before such date and shall apply to written reports filed pursuant to section one hundred seventy-two-b of the executive law for fiscal years ending on or after December thirty-first, nineteen hundred eighty-seven.

Laws 1995, ch 83, §§ 112–119, eff June 20, 1995, deemed eff on and after April 1, 1995, provide as follows:

§ 112. Transfer of records. The office of charities registration shall deliver to the attorney general all books, papers, records and property of such entities.

§ 113. Continuity of authority. For the purpose of succession to all functions, powers, duties and obligations of the office of charities registration transferred and assigned to, devolved upon and assumed by the department of law, such department and attorney general shall be deemed and held to constitute the continuation of the office of charities registration.

§ 114. Completion of unfinished business. Any business or other matter undertaken or commenced by the office of charities registration pertaining to or connected with the functions, powers, obligations and duties hereby transferred and assigned to the department of law and attorney general, and pending on the effective date of sections ninety-six through one hundred nineteen of this act, may be conducted and completed by such department and the attorney general in the same manner and under the same terms and conditions and with the same effect as if conducted and completed by the office of charities registration.

§ 115. Continuation of rules and regulations. All rules, regulations, acts, orders, determinations, and decisions of the office of charities registration pertaining to the functions and powers herein transferred and assigned, in force at the time of such transfer, assignment, assumption or devolution, shall continue in force and effect as rules, regulations, acts, orders, determinations and decisions of the office of charities registration as continued in the department of law until duly modified or abrogated by the department or by the office of charities registration.

§ 116. Terms occurring in laws, contracts and other documents. Whenever the office of charities registration is referred to or designated in any law, contract or document pertaining to the functions, powers, obligations and duties hereby transferred and assigned, such reference or designation shall be deemed to refer to the office of charities registration as continued in the department of law.

§ 117. Existing rights and remedies preserved. No existing right or remedy or any character shall be lost, impaired or affected by reason of sections ninety-six through one hundred nineteen of this act.

§ 118. Pending actions and proceedings. No action or proceeding pending at the time when this act shall take effect, brought by or against the office of charities registration shall be affected by sections ninety-six through one hundred nineteen of this act, but the same may be prosecuted or defended in the name of the attorney general or department of law. In all such actions and proceedings, the department or attorney general upon application to the court, shall be substituted as a party.

§ 119. Transfer of appropriations heretofore made. All appropriations or reappropriations heretofore made to the office of charities registration for the functions and purposes herein transferred to the department of law, or segregated pursuant to law, to the extent of remaining unexpended or unencumbered balances thereof, whether allocated or unallocated and whether obligated or unobligated, are transferred to and made available for use and expenditure by the department of law for the same purposes for which originally appropriated or reappropriated and shall be payable on vouchers certified or approved by the attorney general or his duly authorized representative on audit and warrant of the comptroller.

Amendment Notes:

2002. Chapter 43, § 2 amended:
Sub 1, by deleting "by any means whatsoever" and "upon forms prescribed by it".
2002. Chapter 43, § 2 amended:
Sub 1, par (g), by deleting "by any court".
2002. Chapter 43, § 2 amended:
Sub 2, by deleting "and shall be verified under oath".
2002. Chapter 43, § 2 amended:
Sub 3, by deleting "For" and "the attorney general" and "receive" and ", to be paid at the time of registration".
2002. Chapter 43, § 2 amended:
Sub 5, by deleting "Such registration" and "or".
2002. Chapter 43, § 2 amended:
Sub 6, by deleting "notify".
2002. Chapter 43, § 2 amended:
Sub 7, by deleting "an annual" and "annual" and "may".
2002. Chapter 43, § 2 amended:
Sub 8, by deleting "Registration statements" and "in the office".
2002. Chapter 43, § 2 amended:
Sub 10, by deleting ", which are".

Notes to Decisions

Not-for-profit charitable foundation serving homeless would be preliminarily enjoined from soliciting charitable contributions until it complied with registration and reporting requirements of CLS Exec § 172 since foundation never sought exempt status from Office of Charities Registration pursuant to 19 NYCRR part 800. Abrams v New York Foundation for Homeless, Inc., 148 Misc. 2d 791, 562 N.Y.S.2d 325, 1990 N.Y. Misc. LEXIS 558 (N.Y. Sup. Ct. 1990).

Not-for-profit charitable foundation serving homeless would be preliminarily enjoined from soliciting charitable contributions until it complied with registration and reporting requirements of CLS Exec § 172, despite its affiliation with religious organization, since by engaging in secular activities such as fund raising and sheltering homeless it was not itself operating as religious organization entitled to exemption from initial filing require-

ments under CLS Exec § 172-a. Abrams v New York Foundation for Homeless, Inc., 148 Misc. 2d 791, 562 N.Y.S.2d 325, 1990 N.Y. Misc. LEXIS 558 (N.Y. Sup. Ct. 1990).

Agency Opinions

The provisions of § 263 of the Education Law do not relieve libraries and museums of the obligation of financial reporting to the Office of Charities Registration of the Department of State under Article 7-A of the Executive Law. 1980 NY Ops Atty Gen June 9 (formal).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 172-a, 172-b, 172-c.

Supervision of trustees for charitable purposes, CLS EPTL § 8-1.4.

Codes, Rules and Regulations:

Department of law: charitable entities and fundraising professionals. 13 NYCRR Parts 90–99.

Jurisprudences:

18 NY Jur 2d Charities §§ 63, 86, 88–90, 92, 94, 95 .

75 NY Jur 2d Libraries § 12.

60 Am Jur 2d, Peddlers, Solicitors, and Transient Dealers § 23.

Texts: Bjorklund, Fishman & Kurtz, New York Nonprofit Law and Practice with Tax Analysis §§ 5-7(d), 6-2(c), 6-2(e), 6-5(b), 7-2(b)(2), 10-4(a).

§ 172-a. Certain persons exempted

1. This article shall not apply to corporations organized under the religious corporations law, and other religious agencies and organizations, and charities, agencies, and organizations operated, supervised, or controlled by or in connection with a religious organization.

2. The following persons shall not be required to register with the attorney general:

(a) An educational institution confining its solicitation of contributions to its student body, alumni, faculty and trustees, and their families.

(b) Fraternal, patriotic, social, alumni, law enforcement support organizations and historical societies chartered by the New York state board of regents when solicitation of contributions is confined to their membership.

(c) Persons requesting any contributions for the relief of any individual, specified by name at the time of the solicitation, if all of the contributions collected, without any deductions whatsoever, are paid to or for the benefit of the named beneficiary. Prior to the commencement of any such solicitation, the principal person requesting contributions may file with the attorney general a form, provided by the attorney general, which shall read as follows:

CHARITABLE SOLICITATION FOR THE RELIEF OF AN INDIVIDUAL

NAME AND ADDRESS OF THE PRINCIPAL PERSON REQUESTING CONTRIBUTIONS

PURPOSE OF THE SOLICITATION

NAME AND ADDRESS OF THE PRIMARY INDIVIDUAL BENEFICIARY

NAME AND ADDRESS OF SECONDARY BENEFICIARY (IF ANY)
LIST NO MORE THAN THREE SECONDARY BENEFICIARIES

The principal person requesting contributions may, on such form designate up to three secondary individuals or charitable organizations as charitable beneficiaries who shall be entitled to such contributions in the event circumstances change rendering it impossible or impracticable to use any or all of the money collected for the primary beneficiary. The designation of one or more secondary beneficiaries shall be ineffective unless such form has been filed with the attorney general and all persons requesting contributions shall have informed any person solicited at the time of any solicitation of such filing. In the event that it is or may be impossible or impracticable to use any or all of the money collected for the benefit of the primary beneficiary, and (i) no secondary beneficiary has been properly designated pursuant to this paragraph, or (ii) no secondary beneficiary exists, then the attorney general, the primary beneficiary, or any person who requested contributions may petition the supreme court, on notice to the attorney general, the primary beneficiary if living, any secondary beneficiaries, and the principal person who requested the contributions for an order directing that any moneys remaining shall be transferred to a charitable organization with purposes similar to those for which such contributions were collected. In the event that money collected for the relief of any individual, without any deductions whatsoever, is paid to or for the benefit of the primary beneficiary within sixty days of its receipt, then all requirements of this paragraph shall be deemed to have been complied with. For the purposes of this section, the term "principal person requesting the contributions" shall mean any person who is primarily responsible for soliciting funds for the relief of an individual, but shall not include any person who solicits funds when all such funds are subsequently transferred over to a principal person requesting contributions.

(d) Any charitable organization which solicits or receives gross contributions of less than twenty-five thousand dollars during a fiscal year of such organization, provided none of its fund raising is carried on by professional fund raisers or fund raising counsel. However, if the gross contributions received by such charitable organization during any fiscal year of such organization shall be in excess of twenty-five thousand dollars, it shall within thirty days after the date it shall have received gross contributions in excess of twenty-five thousand dollars register with the attorney general as required by section one hundred seventy-two of this article.

(e) Any charitable organization receiving an allocation from a federated fund, incorporated community appeal or a united way, provided such fund, appeal or united way is complying with the provisions of this article relating to registration and filing of financial reports with the attorney general, and provided such organization does not receive, in addition to such allocation, gross contributions in excess of twenty-five thousand dollars during the fiscal

year, and provided further that all the fund-raising functions of such organizations are carried on by persons who are unpaid for such services. However, if the gross contributions other than such allocation received by such charitable organization during any fiscal year of such organization shall be in excess of twenty-five thousand dollars, it shall within thirty days after the date it shall have received such contributions in excess of twenty-five thousand dollars register with the attorney general as required by section one hundred seventy-two of this article.

(f) A local post, camp, chapter or similarly designated element, or a county unit of such elements, of a bona fide veterans' organization which issues charters to such local elements throughout this state, a bona fide organization of volunteer firefighters, an organization providing volunteer ambulance service (as defined in section three thousand one of the public health law) or a bona fide auxiliary or affiliate of such organizations, provided all its fund-raising activities are carried on by members of such an organization or an affiliate thereof and such members receive no compensation, directly or indirectly, therefor.

(g) An educational institution which files annual financial reports with the regents of the university of the state of New York as required by the education law or with an agency having similar jurisdiction in another state or a library which files annual financial reports as required by the state education department.

(h) A charitable organization which receives all or substantially all of its funds from a single governmental agency and reports annually to that agency provided such reports contain financial information substantially similar in content to that required by subdivision one of section one hundred seventy-two-b of this article; provided, however, that such organization may receive no more than twenty-five thousand dollars from sources other than the government agency to which it reports.

(i) Any police department, sheriff's department or other governmental law enforcement agency.

(j) The state parent teachers association and any parent teachers association affiliated with an educational institution that is subject to the jurisdiction of the state education department.

HISTORY:

Add, L 1977, ch 669, § 5; amd, L 1986, ch 440, § 5, eff July 1, 1987; L 1989, ch 489, §§ 3, 4, eff July 16, 1989; L 1990, ch 474, § 1, eff Nov 8, 1990; L 1995, ch 83, § 98, eff June 20, 1995, deemed eff April 1, 1995; L 1997, ch 329, § 1, eff Aug 5, 1997; L 2002, ch 43, § 3, eff Aug 1, 2002; L 2018, ch 476, § 4, effective December 28, 2018.

Editor's Notes: Laws 1986, ch 440, § 19, eff July 1, 1987, provides as follows:

§ 19. This act shall take effect on July first, nineteen hundred eighty-seven, except that any rules and regulations necessary for the timely implementation of this act on its effective date shall be promulgated on or before such date and shall apply to written reports filed pursuant to section one hundred seventy-two-b of the executive law for fiscal years ending on or after December thirty-first, nineteen hundred eighty-seven.

Laws 1990, ch 474, § 2, eff Nov 8, 1990, provides as follows:

§ 2. This act shall take effect on the one hundred twentieth day after it shall have become a law; provided, however, that effective immediately, the forms necessary for the implementation of the foregoing section of this act on its effective date are authorized and directed to be made and completed on or before such effective date.

Amendment Notes:

2002. Chapter 43, § 3 amended:

Sub 2, par (d), by deleting "does not intend to solicit and receive and does not actually receive" and "in excess" and "functions are" and "commercial co-venturers" and "total".

2002. Chapter 43, § 3 amended:

Sub 2, par (e), by deleting "annual" and "actually".

The 2018 amendment by ch 476, § 4, substituted "firefighter" for "firemen" in 2(f).

Notes to Decisions

Not-for-profit charitable foundation serving homeless would be preliminarily enjoined from soliciting charitable contributions until it complied with registration and reporting requirements of CLS Exec § 172, despite its affiliation with religious organization, since by engaging in secular activities such as fund raising and sheltering homeless it was not itself operating as religious organization entitled to exemption from initial filing requirements under CLS Exec § 172-a. Abrams v New York Foundation for Homeless, Inc., 148 Misc. 2d 791, 562 N.Y.S.2d 325, 1990 N.Y. Misc. LEXIS 558 (N.Y. Sup. Ct. 1990).

Agency Opinions

Registration with the Department of State is required of police organizations that can be classified as "benevolent, philanthropic, patriotic or eleemosynary" based on the organization's stated purposes or activities and its use of professional fund raisers. 1980 N.Y. Op. Att'y Gen. No. 74, 1980 N.Y. AG LEXIS 12.

Registration and reporting requirements of CLS Exec Law Art. VII-A apply to organizations that receive State grants in excess of $25,000 for training and education of both members and nonmembers of organization, however, registration with Department of State is not required of organization that receives State grants in excess of $25,000 for training and education of only its members. N.Y. Op. Att'y Gen. No. 89-F3.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 172, 172-d, 175; CLS N-PCL § 115; CLS Pub Health § 2801-a.

"Voluntary ambulance service", defined, CLS Pub Health § 3001.

Codes, Rules and Regulations:

Department of law: charitable entities and fundraising professionals. 13 NYCRR Parts 90–99.

Jurisprudences:

18 NY Jur 2d Charities §§ 63, 86, 88, 92, 94, 95 .

65 NY Jur 2d Hospitals and Releated Health Care Facilities §§ 81, 84 .

75 NY Jur 2d Libraries § 12.

60 Am Jur 2d, Peddlers, Solicitors, and Transient Dealers § 23.

Texts: Bjorklund, Fishman & Kurtz, New York Nonprofit Law and Practice with Tax Analysis §§ 6-2(d)(1), 7-2(b)(2), 13-4(p).

§ 172-b. Reports by registered charitable organizations; registration to be cancelled for failure to file

1. [Eff until June 30, 2021] Every charitable organization registered or required to be registered pursuant to section one hundred seventy-two of this article which shall receive in any fiscal year gross revenue and support in excess of seven hundred fifty

thousand dollars shall file with the attorney general an annual written financial report, on forms prescribed by the attorney general, on or before the fifteenth day of the fifth calendar month after the close of such fiscal year. The annual financial report shall be accompanied by an annual financial statement which includes an independent certified public accountant's audit report containing an opinion that the financial statements are presented fairly in all material respects and in conformity with generally accepted accounting principles, including compliance with all pronouncements of the financial accounting standards board and the American Institute of Certified Public Accountants that establish accounting principles relevant to not-for-profit organizations. Such financial report shall include a statement of any changes in the information required to be contained in the registration form filed on behalf of such organization. The financial report shall be signed by the president or other authorized officer and the chief fiscal officer of the organization who shall certify under penalties for perjury that the statements therein are true and correct to the best of their knowledge, and shall be accompanied by an opinion signed by an independent public accountant that the financial statement and balance sheet therein present fairly the financial operations and position of the organization. A fee of twenty-five dollars payable to the attorney general shall accompany such financial report at the time of filing, provided however, that any such organization that is registered with the attorney general pursuant to article eight of the estates, powers and trusts law is required to file only one annual financial report which meets the filing requirements of this article and section 8-1.4 of the estates, powers and trusts law.

1. [Eff July 1, 2021] Every charitable organization registered or required to be registered pursuant to section one hundred seventy-two of this article which shall receive in any fiscal year gross revenue and support in excess of one million dollars shall file with the attorney general an annual written financial report, on forms prescribed by the attorney general, on or before the fifteenth day of the fifth calendar month after the close of such fiscal year. The annual financial report shall be accompanied by an annual financial statement which includes an independent certified public accountant's audit report containing an opinion that the financial statements are presented fairly in all material respects and in conformity with generally accepted accounting principles, including compliance with all pronouncements of the financial accounting standards board and the American Institute of Certified Public Accountants that establish accounting principles relevant to not-for-profit organizations. Such financial report shall include a statement of any changes in the information required to be contained in the registration form filed on behalf of such organization. The financial report shall be signed by the president or other authorized officer and the chief fiscal officer of the organization who shall certify under penalties for perjury that the statements therein are true and correct to the best of their knowledge, and shall be accompanied by an opinion signed by an independent public accountant that the financial statement and balance sheet therein present fairly the financial operations and position of the organization. A fee of twenty-five dollars payable to the attorney general shall accompany such financial report at the time of filing, provided however, that any such organization that is registered with the attorney general pursuant to article eight of the estates, powers and trusts law is required to file only one annual financial report which meets the filing requirements of this article and section 8-1.4 of the estates, powers and trusts law.

2. [Eff until June 30, 2021] Every charitable organization registered or required to be registered pursuant to section one hundred seventy-two of this article which shall receive in gross revenue and support in any fiscal year at least two hundred fifty thousand dollars but not more than seven hundred fifty thousand dollars shall file an annual financial report. The annual financial report shall be accompanied by an annual financial statement which includes an independent certified public accountant's review report in accordance with "statements on standards for accounting and review services" issued by the American Institute of Certified Public Accountants. The annual financial statement shall be prepared in conformity with generally accepted accounting principles, including compliance with all pronouncements of the financial accounting standards board and the American Institute of Certified Public Accountants that establish accounting principles relevant to not-for-profit organizations. Such financial report shall be filed with the attorney general, upon forms prescribed by the attorney general on an annual basis on or before the fifteenth day of the fifth calendar month after the close of such fiscal year, which shall include a financial report covering such fiscal year in accordance with such requirements as the attorney general may prescribe. Such financial report shall include a statement of any changes in the information required to be contained in the registration form filed on behalf of such organization. The financial report shall be signed by the president or other authorized officer and the chief fiscal officer of the organization who shall certify under penalties for perjury that the statements therein are true and correct to the best of their knowledge. A fee of twenty-five dollars payable to the attorney general shall accompany such financial report at the time of filing, provided, however, that any such organization that is registered with the attorney general pursuant to article eight of the estates, powers and trusts law is required to file only one annual financial report which meets the filing requirements of this article and section 8-1.4 of the estates, powers and trusts law. Notwithstanding the

requirements of this section, if upon review of an independent certified public accountant's review report filed pursuant to this subdivision, the attorney general determines that a charitable organization should obtain an independent certified public accountant's audit report, such organization shall obtain and file with the attorney general an audit report that meets the requirements of subdivision one of this section within one hundred twenty days of the attorney general's request for such report.

2. [Eff July 1, 2021] Every charitable organization registered or required to be registered pursuant to section one hundred seventy-two of this article which shall receive in gross revenue and support in any fiscal year at least two hundred fifty thousand dollars but not more than one million dollars shall file an annual financial report. The annual financial report shall be accompanied by an annual financial statement which includes an independent certified public accountant's review report in accordance with "statements on standards for accounting and review services" issued by the American Institute of Certified Public Accountants. The annual financial statement shall be prepared in conformity with generally accepted accounting principles, including compliance with all pronouncements of the financial accounting standards board and the American Institute of Certified Public Accountants that establish accounting principles relevant to not-for-profit organizations. Such financial report shall be filed with the attorney general, upon forms prescribed by the attorney general on an annual basis on or before the fifteenth day of the fifth calendar month after the close of such fiscal year, which shall include a financial report covering such fiscal year in accordance with such requirements as the attorney general may prescribe. Such financial report shall include a statement of any changes in the information required to be contained in the registration form filed on behalf of such organization. The financial report shall be signed by the president or other authorized officer and the chief fiscal officer of the organization who shall certify under penalties for perjury that the statements therein are true and correct to the best of their knowledge. A fee of twenty-five dollars payable to the attorney general shall accompany such financial report at the time of filing, provided, however, that any such organization that is registered with the attorney general pursuant to article eight of the estates, powers and trusts law is required to file only one annual financial report which meets the filing requirements of this article and section 8-1.4 of the estates, powers and trusts law. Notwithstanding the requirements of this section, if upon review of an independent certified public accountant's review report filed pursuant to this subdivision, the attorney general determines that a charitable organization should obtain an independent certified public accountant's audit report, such organization shall obtain and file with the attorney general an audit report that meets the requirements of subdivision one of this section within one hundred twenty days of the attorney general's request for such report.

2-a. Every charitable organization registered or required to be registered pursuant to section one hundred seventy-two of this article which shall receive in any fiscal year of such organization gross revenue and support not in excess of two hundred fifty thousand dollars shall file with the attorney general an unaudited financial report on forms prescribed by the attorney general, on or before the fifteenth day of the fifth calendar month after the close of such fiscal year. Such financial report shall include a statement of any changes in the information required to be contained in the registration form filed on behalf of such organization. The financial report shall be signed by the president or other authorized officer and the chief fiscal officer of the organization who shall certify under penalties for perjury that the statements therein are true and correct to the best of their knowledge. A fee of twenty-five dollars payable to the attorney general shall accompany such financial report at the time of filing. Provided, however, that any such organization that is registered with the attorney general pursuant to article eight of the estates, powers and trusts law is required to file only one annual financial report which meets the filing requirements of this article and section 8-1.4 of the estates, powers and trusts law.

3. For any fiscal year of any organization registered pursuant to section one hundred seventy-two of this article in which such organization would have been exempt from registration pursuant to section one hundred seventy-two of this article if it had not been so registered, or in which it did not solicit or receive contributions, such organization shall file, instead of the financial reports required by subdivision one, two or two-a of this section, a report, signed under penalties for perjury by the president or other authorized officer and the chief fiscal officer, in the form prescribed by the attorney general stating the nature of the exemption and the facts upon which it is based or that such organization did not solicit or receive contributions in such fiscal year. The report shall include a statement of any changes in the information required to be contained in the registration form filed on behalf of such organization and may include a notice, signed under penalties for perjury by the president or other authorized officer, on a form prescribed by the attorney general, that such organization's registration is being withdrawn.

4. (a) Upon prior written authorization by the attorney general any charitable organization registered pursuant to section one hundred seventy-two of this article, which is the parent organization of one or more affiliates thereof, and such affiliates, may comply with the reporting requirements of subdivision one, two, two-a or three of this section, by filing a combined written annual financial report upon forms prescribed by the attorney general.

(b) As used in this subdivision the term "affiliate" shall include any chapter, branch, auxiliary, or other subordinate unit of any registered charitable organization, howsoever designated, whose policies, fund raising activities, and expenditures are supervised or controlled by such parent organization.

(c) There shall be appended to each combined annual financial report a schedule, containing such information as may be prescribed by the attorney general, reflecting the activities of each affiliate, which shall contain a statement signed under penalties for perjury, by the president or other authorized officer certifying that the information contained therein is true.

(d) The failure of a parent organization to file a combined annual financial written report shall not excuse either the parent organization or its affiliates from complying with the provisions of subdivision one, two, two-a or three of this section.

(e) A combined annual financial report filed pursuant to this subdivision shall be accompanied by a fee, paid to the attorney general, of twenty-five dollars plus ten dollars for each organization included in such annual financial report, but the aggregate fee shall not exceed five hundred dollars.

5. The attorney general shall cancel the registration of any organization which fails to comply with subdivision one, two, two-a or three of this section within the time therein prescribed, or fails to furnish such additional information as is requested by the attorney general within the required time; except that the time may be extended by the attorney general for a period not to exceed one hundred eighty days. Notice of such cancellation shall be mailed to the registrant at least twenty days before the effective date thereof.

6. Every charitable organization registered or required to register pursuant to section one hundred seventy-two of this article shall keep and maintain records, books and reports for at least three years after the end of the period of registration to which they relate which shall at all times be available for inspection, by the attorney general, or any duly authorized representatives at the principal office of such organization.

7. The attorney general may accept a copy of a current financial report previously filed by a charitable organization with any other governmental agency in compliance with the provisions of this article provided that the report filed with such other governmental agency shall be substantially similar in content to the financial report required by this section.

8. Any financial report filed by any charitable organization required to be registered but which has not previously registered pursuant to this article or article eight of the estates, powers and trusts law must be accompanied by all registration material required to be filed by this article.

9. Any registered charitable organization that is required to file an annual financial report pursuant to subdivision one or two of this section, or that is required to file a funding disclosure report pursuant to section one hundred seventy-two-e of this article, and/or a financial disclosure report pursuant to section one hundred seventy-two-f of this article for a reporting period during the applicable fiscal year shall also be required to file such annual financial report, including all required forms and attachments, with the department of state.

HISTORY:

Add, L 1977, ch 669, § 5; amd, L 1982, ch 359, § 1; L 1986, ch 440, § 6, eff July 1, 1987; L 1987, ch 353, § 3, eff July 1, 1987; L 1995, ch 83, § 99, eff June 20, 1995, deemed eff April 1, 1995; L 2002, ch 43, § 4, eff Aug 1, 2002; L 2013, ch 549, § 3, eff July 1, 2014; L 2013, ch 549, § 3–a, eff July 1, 2017; L 2013, ch 549, § 3–b, eff July 1, 2021; L 2020, ch 55, § 1 (Part UU), effective January 1, 2021.

Editor's Notes: Laws 1986, ch 440, § 19, eff July 1, 1987, provides as follows:

§ 19. This act shall take effect on July first, nineteen hundred eighty-seven, except that any rules and regulations necessary for the timely implementation of this act on its effective date shall be promulgated on or before such date and shall apply to written reports filed pursuant to section one hundred seventy-two-b of the executive law for fiscal years ending on or after December thirty-first, nineteen hundred eighty-seven.

Laws 2013, ch 549, §§ 1, 132, eff July 1, 2014, provide as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

§ 132. This act shall take effect July 1, 2014, provided, however, that the amendments to subdivisions 1 and 2 of section 172-b of the executive law made by section three of this act shall expire and be deemed repealed June 30, 2017; provided further that the amendments to section 172-b of the executive law made by section three-a of this act shall take effect July 1, 2017 and shall expire and be deemed repealed June 30, 2021; provided further that the amendments to section 172-b of the executive law made by section three-b of this act shall take effect July 1, 2021; provided further that the amendments to paragraph (a) of section 713 of the not-for-profit corporation law made by section seventy-three of this act shall take effect January 1, 2015; provided further that paragraph (f) of section 713 of the not-for-profit corporation law added by section seventy-three of this act shall take effect January 1, 2017; provided further that section seventy-two of this act and paragraph (b) of section 8-1.9 of the estates, powers and trusts law as added by section one hundred thirty of this act shall not be applicable until January 1, 2015 for any corporation or trust that had annual revenues of less than 10,000,000 dollars in the last fiscal year ending prior to January 1, 2014 (Amd, L 2014, ch 81, § 1, eff June 30, 2014; L 2015, ch 388, § 1, eff Oct 26, 2015; L 2017, ch 78, § 1, eff June 29, 2017).

Laws 2020, ch 55, § 7 (Part UU), eff January 1, 2021, provides:

§ 7. This act shall take effect January 1, 2021. Effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized to be made and completed on or before such effective date.

Amendment Notes: 2013. Chapter 549, § 3 amended:

Sub 1 [second setout] by deleting at fig 1 "two hundred fifty", at fig 2 "and every charitable organization whose fund-raising functions are not carried on solely by persons who are unpaid for such services" and adding the matter in italics.

Sub 2 [second setout] by deleting at fig 1 "one hundred", at fig 2 "two hundred fifty", at fig 3 "ten" and adding the matter in italics.

Sub 2-a [second setout] by deleting at fig 1 "one hundred thousand", at fig 2 "ten" and adding the matter in italics.

2013. Chapter 549, § 3-a amended:

Sub 1 [third setout] by deleting at fig 1 "two hundred fifty", at fig 2 "and every charitable organization whose fund-raising functions are not carried on solely by persons who are unpaid for such services" and adding the matter in italics.

Sub 2 [third setout] by deleting at fig 1 "one hundred", at fig 2 "two hundred fifty", at fig 3 "ten" and adding the matter in italics.

2013. Chapter 549, § 3-b amended:

Sub 1 [fourth setout] by deleting at fig 1 "two hundred fifty thousand", at fig 2 "and every charitable organization whose fund-raising functions are not carried on solely by persons who are unpaid for such services" and adding the matter in italics.

Sub 2 [fourth setout] by deleting at fig 1 "one hundred", at fig 2 "two hundred fifty thousand", at fig 3 "ten" and adding the matter in italics.

2002. Chapter 43, § 4 amended:

Sub 3 by deleting at fig 1 "subdivisions", at fig 2 "or", at fig 3 "also" and adding the matter in italics.

Sub 4, par (a) by deleting at fig 1 "Any", at fig 2 "within the state" and adding the matter in italics.

Sub 4, par (b) by deleting at fig 1 "fundraising" and adding the matter in italics.

Sub 4, par (c) by deleting at fig 1 "penalty of", at fig 2 "certification,", at fig 3 "an official of the organization," and adding the matter in italics.

Sub 4, par (d) by deleting at fig 1 "an appropriate" and adding the matter in italics.

Sub 4, par (e) by adding the matter in italics.

Sub 6 by deleting at fig 1 "at the principal office of such organization", at fig 2 "his or her" and adding the matter in italics.

Sub 7 by deleting at fig 1 "annual" and adding the matter in italics.

By adding sub 8.

1995. Chapter 83, § 99 amended:

Sub 5 by adding the matter in italics.

The 2020 amendment by ch 55, § 1 (Part UU), added 9.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 172, 172-a, 174-b, 177.

Codes, Rules and Regulations:

Department of law: charitable entities and fundraising professionals. 13 NYCRR Parts 90–99.

Jurisprudences:

18 NY Jur 2d Charities §§ 63, 86, 88, 89, 92, 94, 95 .

60 Am Jur 2d, Peddlers, Solicitors, and Transient Dealers § 23.

Texts: Bjorklund, Fishman & Kurtz, New York Nonprofit Law and Practice with Tax Analysis §§ 6-2(f), 6-3(f)(1), 6-5(a), 6-5(b), 6-6(c), 11-3(b)(7).

§ 172-d. Prohibited activity

Except as exempted pursuant to subdivision one of section one hundred seventy-two-a of this article, in addition to other violations of this article no person shall:

1. Make any material statement which is untrue in an application for registration, registration statement, a claim of exemption, financial report or any other forms or documents required to be filed or filed pursuant to this article; or fail to disclose a material fact in an application for registration, registration statement, claim of exemption, financial report or any other forms or documents required to be filed or filed pursuant to this article; or

2. Engage in any fraudulent or illegal act, device, scheme, artifice to defraud or for obtaining money or property by means of a false pretense, representation or promise, transaction or enterprise in connection with any solicitation or with the registration, reporting and disclosure provisions of this article. The term "fraud" or "fraudulent" as used herein shall include those acts which may be characterized as misleading or deceptive including but not limited to those acts covered by the term "fraud" or "fraudulent" under subdivision twelve of section sixty-three of this chapter. To establish fraud neither intent to defraud nor injury need to be shown; or

3. Use or intend to use false or materially misleading advertising or promotional material in connection with any solicitation; or

4. Fail to apply contributions in a manner substantially consistent with the solicitation or the registration statement of the charitable organization or the purposes expressed therein; or

5. Enter into any contract or agreement with or otherwise employ or engage any professional fund raiser, fund raising counsel or professional solicitor required to be registered pursuant to this article unless such professional fund raiser, fund raising counsel or professional solicitor has provided to such person a statement, signed under penalties for perjury, that it is registered and in compliance with all filing requirements of this article; or

6. Enter into any contract or agreement, employment or engagement to raise funds or conduct any fund raising activities for any charitable organization required to be registered pursuant to this article unless such charitable organization is registered and in compliance with all filing requirements of this article; or

7. Repeatedly and wilfully fail to file as required by this article any fund-raising contract, closing statement or report or other form or document; or

8. Fail to respond or comply within sixty days with any cease and desist order of the attorney general; or

9. Represent in any manner that registration constitutes an endorsement or approval by the state or the attorney general; or

10. Solicit for a charitable purpose or engage in any other fund raising activities without being a registered charitable organization in compliance with all filing requirements of this article, if required to be registered, or having a written contract or agreement with a charitable organization or registered charitable organization if required to be registered, authorizing solicitation on its behalf; or

11. Continue soliciting on behalf of a charitable organization more than fifteen days after the cancellation in accordance with subdivision six of section one hundred seventy-four-a of this article; or

12. Act as or enter any contract or other agreement with a charitable organization as a professional fund raiser, fund raising counsel, or professional solicitor without having registered and being in compliance with all filing and disclosure requirements of this article; or

13. Fail to maintain books and records as required by this article or fail to produce to the attorney general any such books and records within fifteen days of receiving, by certified mail, a request for such books and records; or

14. Fail to discontinue solicitation immediately or to register pursuant to this article within fifteen days after the attorney general has given notice pursuant to subdivision two of section one hundred seventy-five of this article of violation of subdivision one, two, or three of section one hundred seventy-four of this article; or

15. Fail to provide a charitable organization with an accurate accounting of a sale advertised for its benefit as prescribed by subdivision three of section one hundred seventy-three-a of this article; or

16. Knowingly use in the course of soliciting contributions for or on behalf of a charitable organization a name, symbol, or other mark so closely related or similar to that used by another established charitable organization that the use thereof would tend to confuse or mislead the public; or

17. Solicit contributions in a manner or with words which are coercive as such term is defined pursuant to section 135.65 of the penal law; or

18. Vote or use personal influence as an officer or member of the board of directors of a charitable organization, a majority of whose members are professional fund raisers or their designees on matters on which such officer or member has a financial or material conflicting interest; or

19. Include in any solicitation a statement that the financial report of a charitable organization or professional fund raiser is on file with the attorney general unless the charitable organization or professional fund raiser has complied with all filing requirements pursuant to this article and article eight of the estates, powers and trusts law, to the extent also applicable; or

20. Use in any solicitation a New York state address, including a New York state return address unless:

(a) the charitable organization maintains and staffs an office at that address; or

(b) immediately proximate to the New York address, both the address of the charitable organization's actual headquarters and the fact that the New York address is a "mail drop", using this or a substantially similar term that clearly conveys the message that the New York address is that of a mail handling facility; or

21. State or imply that a charitable organization conducts any activities in New York and/or benefits New York state residents unless it conducts such activities and/or provides such benefits.

HISTORY:

Add, L 1986, ch 440, § 7, eff July 1, 1987 (see 1986 note below); amd, L 1986, ch 441, § 1, eff July 1, 1987; L 1987, ch 353, § 4, eff July 1, 1987; L 1989, ch 489, § 5, eff July 16, 1989; L 1995, ch 83, § 100, eff June 20, 1995, deemed eff on and after April 1, 1995; L 2002, ch 43, § 6, eff Aug 1, 2002.

Editor's Notes: Laws 1986, ch 440, § 19, eff July 1, 1987, provides as follows:

§ 19. This act shall take effect on July first, nineteen hundred eighty-seven, except that any rules and regulations necessary for the timely implementation of this act on its effective date shall be promulgated on or before such date and shall apply to written reports filed pursuant to section one hundred seventy-two-b of the executive law for fiscal years ending on or after December thirty-first, nineteen hundred eighty-seven.

Amendment Notes:

2002. Chapter 43, § 6 amended:
Sub 1, by deleting "or written annual".

2002. Chapter 43, § 6 amended:
Sub 2, by deleting "for charitable purposes or on behalf of any law enforcement support organization, any solicitation or collection of funds or other property for a charitable organization, any commercial co-venture,".

2002. Chapter 43, § 6 amended:
Sub 3, by deleting "for charitable purposes or for the purposes of any law enforcement support organization or with any commercial co-venture".

2002. Chapter 43, § 6 amended:
Sub 4, by deleting "for charitable purposes or for the purposes of any law enforcement support organization".

2002. Chapter 43, § 6 amended:
Sub 5, by deleting "unregistered and at and "fund-raiser".

2002. Chapter 43, § 6 amended:
Sub 6, by deleting "with" and "any" and a comma and at.

2002. Chapter 43, § 6 amended:
Sub 7, by deleting "written" and "any documents".

2002. Chapter 43, § 6 amended:
Sub 8, by deleting a comma.

2002. Chapter 43, § 6 amended:
Sub 10, by deleting "contributions" and "or for the purposes of any law enforcement support organization" and "either.

2002. Chapter 43, § 6 amended:
Sub 11, by deleting "of a contract between the person soliciting and the charitable organization".

2002. Chapter 43, § 6 amended:
Sub 13, by deleting "refuse or" and "within fifteen days after receiving written notice by certified mail," and ", as required by this article".

2002. Chapter 43, § 6 amended:
Sub 14, by deleting "in accordance with the provisions of".

2002. Chapter 43, § 6 amended:
Sub 16, by deleting "service.

2002. Chapter 43, § 6 amended:
Sub 18, by deleting a period.

NOTES TO DECISIONS

1. Generally

Where the Attorney General sued a professional fundraiser and its president to permanently enjoin them from soliciting and collecting charitable contributions from the public, he was properly granted summary judgment on the issue of liability, as he established that the fundraiser's solicitation of charitable funds on behalf of a cancer prevention organization was fraudulent and deceptive because the fundraiser misrepresented the extent of the organization's actions in helping women survive breast cancer. People v Coalition Against Breast Cancer, Inc., 134 A.D.3d 1081, 22 N.Y.S.3d 562, 2015 N.Y. App. Div. LEXIS 9661 (N.Y. App. Div. 2d Dep't 2015), app. denied, 28 N.Y.3d 901, 63 N.E.3d 69, 40 N.Y.S.3d 349, 2016 N.Y. LEXIS 2717 (N.Y. 2016).

Where the Attorney General established that a professional fundraiser's solicitation of charitable funds on behalf of a cancer prevention organization was fraudulent and deceptive, the trial court properly pierced the corporate veil to hold the fundraiser's president personally liable, as an officer of a corporation could be held liable for fraud if he participated in it or had actual knowledge of it. People v Coalition Against Breast Cancer, Inc., 134 A.D.3d 1081, 22 N.Y.S.3d 562, 2015 N.Y. App. Div. LEXIS 9661 (N.Y. App. Div. 2d Dep't 2015), app. denied, 28 N.Y.3d 901, 63 N.E.3d 69, 40 N.Y.S.3d 349, 2016 N.Y. LEXIS 2717 (N.Y. 2016).

It was not unheard of for 501(c)(3)s and 501(c)(4)s to work in tandem and even to have nearly identical names; if the latter were able to avoid supervision, such organizations could serve as shells to keep donors anonymous to the former, and the Attorney General's regulations were thus well within his powers. Citizens United v Schneiderman, 882 F.3d 374, 2018 U.S. App. LEXIS 3516 (2d Cir. N.Y. 2018).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 177.

Coercion in the first degree, CLS Penal § 135.65.

Codes, Rules and Regulations:

Department of law: charitable entities and fundraising professionals. 13 NYCRR Parts 90–99.

Jurisprudences:

18 NY Jur 2d Charities §§ 63, 86, 94, 95 .

75 NY Jur 2d Libraries § 12.

60 Am Jur 2d, Peddlers, Solicitors, and Transient Dealers § 23.

Annotations:

Criminal offenses under statutes and ordinances regulating charitable solicitations. 76 ALR3d 924.

Texts: Bjorklund, Fishman & Kurtz, New York Nonprofit Law and Practice with Tax Analysis §§ 6-1, 6-2(e), 6-2(f), 6-3(b), 6-3(e)(1), 6-3(g), 6-4, 6-5(a).

§ 173. Professional fund-raisers, commercial co-venturers and fund raising counsel

1. Registration and bond required. No person shall act as a professional fund raiser or fund raising counsel on behalf of a charitable organization required to be registered pursuant to this article before registering with the attorney general or after the expiration or cancellation of such registration or any renewal thereof. Applications for registration and re-registration shall be in writing, under oath, in the form prescribed by the attorney general and shall be accompanied by an annual fee in the sum of eight hundred dollars. A professional fund raiser shall at the time of filing each application for registration or re-registration, file with, and have approved by, the attorney general a bond. In said bond, the filer shall be the principal obligor, in the sum of ten thousand dollars, with one or more sureties whose liability in the aggregate as such sureties will at least equal the said sum.The bond which may be in the form of a rider to a larger blanket liability bond shall run to the attorney general for the use of the state and to any person who may have a cause of action against the obligor of said bond for any malfeasance or misfeasance in the conduct of such solicitation. Registration or re-registration when effected shall be for a period of one year, expiring one year from the date of registration or re-registration and may be renewed upon written application, under penalties for perjury, in the form prescribed by the attorney general and the filing of the bond and the fee prescribed herein for each additional one year period. Applications for registration and re-registration and bonds, when filed with the attorney general, shall become public records of the attorney general. If there is any material change in the information provided in any such application for registration or re-registration, the applicant or registrant shall notify the attorney general, under penalties for perjury, in writing within twenty days of such change.

2. Books and records. A professional fund raiser, commercial co-venturer and fund raising counsel shall maintain accurate and current books and records of all activities conducted pursuant to contracts required under section one hundred seventy-three-a of this article; which, until at least three years shall have elapsed after the end of the effective period of the contract to which they relate, shall be kept in such person's office available for inspection and examination and/or audit by the charitable organization and/or attorney general or any duly authorized representative. Provided, however, that any such books and records obtained by the attorney general shall not be available to the public for inspection. A professional fund raiser, commercial co-venturer and fund raising counsel shall, within seven days of a request of any charitable organization with which it has contracted, provide copies of such records to the charitable organization.

3. Violations. Any person who wilfully violates the provisions of this section is guilty of a misdemeanor.

HISTORY:

Add, L 1977, ch 669, § 5; amd, L 1986, ch 440, § 8, eff July 1, 1987; L 1987, ch 353, § 5; L 1989, ch 61, § 29, eff April 19, 1989, and deemed eff on and after April 1, 1989; L 1995, ch 83, § 101, eff June 20, 1995, deemed eff on and after April 1, 1995; L 2002, ch 43, § 7, eff Aug 1, 2002.

Editor's Notes: Laws 1986, ch 440, § 19, eff July 1, 1987, provides as follows:

§ 19. This act shall take effect on July first, nineteen hundred eighty-seven, except that any rules and regulations necessary for the timely implementation of this act on its effective date shall be promulgated on or before such date and shall apply to written reports filed pursuant to section one hundred seventy-two-b of the executive law for fiscal years ending on or after December thirty-first, nineteen hundred eighty-seven.

Amendment Notes:

2002. Chapter 43, § 7 amended:

Sub 1, by deleting "fund-raiser" and "he has registered" and "making application" and "said" and "or a part thereof, expiring on the thirty-first day of August," and "oath" and "periods" and "in the office" and "and".

2002. Chapter 43, § 7 amended:

Sub 2, by deleting "fund-raiser" and "and" and "he or she" and "keep such books and records" and "his" and "his or her".

Notes to Decisions

The statutory requirement that a professional fund raiser fully complete a registration statement by disclosing the names and addresses of clients that were charitable, religious, or other nonprofit organizations (other than political parties, political organizations, candidates, or committees and their support) was neither unreasonable, arbitrary nor capricious, and was founded upon a rational basis. Viguerie Co. v Paterson, 94 A.D.2d 672, 462 N.Y.S.2d 669, 1983 N.Y. App. Div. LEXIS 18085 (N.Y. App. Div. 1st Dep't 1983), aff'd, 62 N.Y.2d 871, 478 N.Y.S.2d 864, 467 N.E.2d 528, 1984 N.Y. LEXIS 4416 (N.Y. 1984).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 173-b, 173-c.

Codes, Rules and Regulations:

Department of law: charitable entities and fundraising professionals. 13 NYCRR Parts 90–99.

Jurisprudences:
18 NY Jur 2d Charities §§ 63, 86, 94, 95 .
75 NY Jur 2d Libraries § 12.
60 Am Jur 2d, Peddlers, Solicitors, and Transient Dealers § 23.

Texts: Bjorklund, Fishman & Kurtz, New York Nonprofit Law and Practice with Tax Analysis §§ 6-2(e), 6-3(c), 6-3(d), 6-5(a), 6-5(b), 6-6(a).

§ 173-a. Contracts of professional fund raisers, fund raising counsel and commercial co-venturers; closing statements; final accountings

1. No person shall act as a professional fund raiser, fund raising counsel or commercial co-venturer before he has a written contract with the charitable organization or other person benefitting from his services. A professional fund raiser or fund raising counsel shall within ten days after its execution by the parties thereto file with the attorney general a copy of each contract entered into between such professional fund raiser or fund raising counsel and a charitable organization required to be registered pursuant to this article, certified under penalties for perjury by said professional fund raiser or fund raising counsel to be a true and correct copy of such contract. When the services to be performed under such contracts include the oral solicitation of funds from the public, such oral presentations shall be deemed to be part of the contract and shall be reduced to a writing which in the case of a professional fund raiser shall be filed with the attorney general by the registrant at the time such contracts are filed. If there is any change in the presentation filed with the attorney general, the registrant shall notify the attorney general in writing within five days of such change. No services shall be performed under such a contract until the professional fundraiser shall have received an acknowledgement from the attorney general of the receipt of a copy of such contract or such contract shall have been on file with the attorney general for at least fifteen days, whichever is shorter. Provided, however, that no services shall be performed pursuant to such contract if, within fifteen days of filing, the attorney general has notified the professional fund raiser or fund raising counsel and the charitable organization of any deficiencies in the contract and/or the registration and filing under this article. True and correct copies of such contracts shall be kept on file in the offices of the charitable organization and the professional fund raiser, fund raising counsel or commercial co-venturer during the term thereof and until the expiration of a period of three years subsequent to the date the solicitation of contributions provided for therein actually terminates. Within ninety days after the termination of any such contract, the professional fund raiser shall file with the attorney general a closing statement, signed under penalties for perjury by all parties to the contract on forms prescribed by the attorney general. Such statement shall disclose gross revenue, all expenditures incurred in the performance of the contract, and all funds paid to the professional fund raiser and charitable organization. In the event that a contract term is longer than a one year period, the professional fund raiser shall file an interim statement, at least annually. No person shall act as a sub-contractor on behalf of another professional fund raiser prior to obtaining a written contract with such professional fund raiser and written consent from the charity on whose behalf fundraising activities are to be conducted pursuant to such contract, and such written consent shall have been attached to such contract and filed with the attorney general pursuant to subdivision one of this section. Willful violation of this section shall be a misdemeanor.

2. Every contract between a professional fund raiser and a charitable organization shall contain or shall be deemed to contain a provision that within five days of receipt by the professional fund raiser or any other person the gross revenue received from any solicitation shall be deposited in a bank account under the exclusive control of the charity.

3. Within ninety days after the termination of a sales promotion advertised to benefit a charitable organization, a commercial co-venturer shall provide such organization with an accounting stating the number of items sold, the dollar amount of each sale and the amount paid or to be paid to the charitable organization.In the event that any such sales promotion is longer than a one year period, the commercial co-venturer shall provide the charitable organization with an interim report, at least annually.

4. A charitable organization which enters into a contract with a commercial co-venturer shall file with the attorney general on the date that the next financial report is due to be filed the following information on forms prescribed by the attorney general and signed under penalties for perjury by an officer:(a) a list of the names and addresses of all commercial co-venturers authorized by the charitable organization to use its name during the year covered by that financial report and, if known, during the year following the year covered by the financial report, (b) a statement of the financial terms and any conditions of each co-venture contract, and (c) a statement whether each commercial co-venturer has provided the charitable organization with an accounting as prescribed by subdivision three of this section.

HISTORY:
Add, L 1977, ch 669, § 5, eff October 1, 1977; amd, L 1986, ch 440, § 9, eff July 1, 1987; L 1987, ch 353, § 6, eff July 1, 1987; L 1989, ch 61, § 30, eff April 19, 1989, and deemed eff on and after April 1, 1989; L 1995, ch 83, § 102, eff June 20, 1995, deemed eff on and after April 1, 1995; L 2002, ch 43, § 8, eff Aug 1, 2002.

Editor's Notes: Laws 1986, ch 440, § 19, eff July 1, 987, provides as follows:

§ 19. This act shall take effect on July first, nineteen hundred eighty-seven, except that any rules and regulations necessary for the timely implementation of this act on its effective date shall be promulgated on or before such date and shall apply to written reports filed pursuant to section one hundred seventy-two-b of the executive law for fiscal

years ending on or after December thirty-first, nineteen hundred eighty-seven.

Amendment Notes:

2002. Chapter 43, § 8 amended:

Sub 1, by deleting "true and correct" and "a" and "shall be filed by the professional fund-raiser or fund raising counsel who is a party thereto with the attorney general within ten days after it is made" and "and" and "and" and "fund-raiser" and "fund-raiser" and "a closing statement" and "disclosing" and "receipts" and "fundraiser".

2002. Chapter 43, § 8 amended:

Sub 2, by deleting "fund-raiser" and "all funds".

2002. Chapter 43, § 8 amended:

Sub 3, by deleting "A commercial co-venturer, within" and "which it has" and "will" and "interim report showing" and "and" and "a final accounting at least once a year for all sales promotions during the year. In the event that such sales promotion is longer than a one year period, the commercial co-venturer shall provide an interim statement, at least annually".

2002. Chapter 43, § 8 amended:

Sub 4, by deleting "annual" and "co-ventures" and "preceeding".

Notes to Decisions

Analysis

1. Generally
2. Under former Social Service Law § 482-g

1. Generally

The state made a prima facie showing sufficient to justify entry of an order enjoining defendant, a nonresident co-venturer with various charitable organizations for fund raising purposes, from conducting any solicitations in the state, where it showed that defendant had violated prior consent decrees by using unauthorized sales pitches, and by failing to file contracts with the charitable organizations with the Secretary of State. People v United Funding, Inc., 106 A.D.2d 846, 484 N.Y.S.2d 245, 1984 N.Y. App. Div. LEXIS 21748 (N.Y. App. Div. 3d Dep't 1984), app. denied, 64 N.Y.2d 609, 489 N.Y.S.2d 1026, 1985 N.Y. LEXIS 18846 (N.Y. 1985).

2. Under former Social Service Law § 482-g

While the purpose of statute requiring the filing of contracts entered into between professional fund raisers and charitable or religious organizations, and barring the performance of services under such a contract until the fund raiser has received an acknowledgment from the State Board of Social Welfare of the receipt of a copy of such contract, is to meet the problem posed by unprincipled and unscrupulous charity promoters, the statute confers no power upon the Board to approve or disapprove a fund raising contract. Sport Celebrities, Inc. v Maull, 56 A.D.2d 849, 392 N.Y.S.2d 315, 1977 N.Y. App. Div. LEXIS 11190 (N.Y. App. Div. 2d Dep't), app. denied, 42 N.Y.2d 803, 1977 N.Y. LEXIS 3695 (N.Y. 1977).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 172-d.

Codes, Rules and Regulations:

Department of law: charitable entities and fundraising professionals. 13 NYCRR Parts 90–99.

Jurisprudences:

18 NY Jur 2d Charities §§ 63, 86, 89, 90, 94, 95 .

75 NY Jur 2d Libraries § 12.

60 Am Jur 2d, Peddlers, Solicitors, and Transient Dealers § 23.

Texts: Bjorklund, Fishman & Kurtz, New York Nonprofit Law and Practice with Tax Analysis §§ 6-2(b), 6-2(f), 6-3(b), 6-3(e)(1), 6-3(e)(2), 6-3(e)(4), 6-5(a), 6-6(a).

§ 173-b. Professional solicitor

1. Registration required. No person shall act as a professional solicitor in the employ of a professional fund raiser required to register pursuant to section one hundred seventy-three of this article before he or she has registered with the attorney general or after the expiration or cancellation of such registration or any renewal thereof. Application for registration or re-registration shall be in writing and signed under penalties for perjury in the form prescribed by the attorney general and shall be accompanied by a fee in the sum of eighty dollars. Such registration or re-registration when effected shall be for a period of one year, expiring one year from the date of such registration or re-registration, and may be renewed upon written application, signed under penalties for perjury, in the form prescribed by the attorney general and the payment of the fee prescribed herein, for additional one year periods. Applications for registration and re-registration, when filed with the attorney general, shall become public records in the office of the attorney general.

2. Limitations upon professional solicitors for law enforcement support organizations. No person or professional solicitor, in the course of soliciting or collecting funds on behalf of any law enforcement support organization, shall engage in any acts prohibited by subdivision seventeen of section one hundred seventy-two-d of this article, or by paragraph (h) of subdivision two of section one hundred seventy-five of this article, provided, however, that no criminal liability shall attach to any law enforcement support organization or its officers because of the activities of any professional solicitor employed on behalf of such organization.

3. Violations. Any person who wilfully violates the provisions of this section is guilty of a misdemeanor.

HISTORY:

Add, L 1977, ch 669, § 5; amd, L 1986, ch 440, § 10, eff July 1, 1987 (see 1986 note below); L 1989, ch 61, § 31, eff April 19, 1989, and deemed eff on and after April 1, 1989; L 1989, ch 489, § 6, eff July 16, 1989; L 1995, ch 83, § 103, eff June 20, 1995, deemed eff on and after April 1, 1995; L 2002, ch 43, § 9, eff Aug 1, 2002.

Editor's Notes: Laws 1986, ch 440, § 19, eff July 1, 1987, provides as follows:

§ 19. This act shall take effect on July first, nineteen hundred eighty-seven, except that any rules and regulations necessary for the timely implementation of this act on its effective date shall be promulgated on or before such date and shall apply to written reports filed pursuant to section one hundred seventy-two-b of the executive law for fiscal years ending on or after December thirty-first, nineteen hundred eighty-seven.

Amendment Notes:

2002. Chapter 43, § 9 amended:

Sub 1, by deleting "fund-raiser" and ", under oath," and "or a part thereof, expiring on the thirty-first day of August," and "oath".

Notes to Decisions

CLS Exec § 173-b did not impermissibly discriminate against professional solicitors employed by professional fundraisers, who were required to register and pay $80 fee, on basis that volunteers and employees of charitable organizations were excluded from definition of "professional fundraiser" and thus were not subject to fee, since all charitable organizations soliciting in New York were required to register and pay registration fees, all professional solicitors not working in-house for any charitable

organization were charged fee without regard to their viewpoints, and § 173-b was merely designed to regulate independent professional solicitors who were not otherwise regulated. National Awareness Found. v Abrams, 50 F.3d 1159, 1995 U.S. App. LEXIS 6272 (2d Cir. N.Y. 1995).

Statute requiring professional fundraisers to register and pay $80 fee (CLS Exec § 173-b) did not violate First Amendment, since it served legitimate governmental purpose of defraying expenses incident to regulating charitable solicitations by professional solicitors, fee was not imposed on basis of speech content, and all professional solicitors were charged fee without regard to nature of cause espoused. National Awareness Found. v Abrams, 50 F.3d 1159, 1995 U.S. App. LEXIS 6272 (2d Cir. N.Y. 1995).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 173-c.

Codes, Rules and Regulations:

Department of law: charitable entities and fundraising professionals. 13 NYCRR Parts 90–99.

Jurisprudences:

18 NY Jur 2d Charities § 90 .

60 Am Jur 2d, Peddlers, Solicitors, and Transient Dealers § 23.

Texts: Bjorklund, Fishman & Kurtz, New York Nonprofit Law and Practice with Tax Analysis §§ 6-2(e), 6-3(c), 6-3(g), 6-5(b), 6-6(a).

§ 173-c. Non-resident professional fund raisers, fund raising counsel, professional solicitors and commercial co-venturers; designation of secretary of state as agent for service of process; service of process

1. Any professional fund raiser, fund raising counsel, professional solicitor or commercial co-venturer resident or whose principal place of business is without the state or organized under and by virtue of the laws of another or foreign state, who or which has been engaged by or on behalf of any charitable organization to conduct any fund raising activities in this state and/or solicit contributions from people in this state shall be deemed to have irrevocably appointed the secretary of state as the agent upon whom may be served any summons, subpoena, subpoena duces tecum, other process or notice directed to such professional fund raiser, fund raising counsel, professional solicitor, commercial co-venturer or any partner, principal, officer, or director thereof, in any action or proceeding brought by the attorney general or any other party under the provisions of this section. Any such professional fund raiser, fund raising counsel, professional solicitor or commercial co-venturer may file with the secretary of state a designation, in terms complying herewith, duly acknowledged, irrevocably appointing the secretary of state as the agent upon whom may be served any such process; provided, however, that a designation filed with the secretary of state pursuant to section three hundred fifty-two-a of the general business law, section thirteen hundred four of the not-for-profit corporation law, or section thirteen hundred four of the business corporation law shall serve also as such designation.

2. Service of such process or notice upon the secretary of state shall be made by personally delivering to and leaving with the secretary of state or any person authorized by the secretary of state to accept such service a copy thereof at the office of the department of state in the city of Albany, and such service shall be sufficient service provided that notice of such service and a copy of such process are forthwith sent by the attorney general or other party as the case may be to such professional fund raiser, fund raising counsel, professional solicitor or commercial co-venturer by certified mail with return receipt requested, at the office address as set forth in the registration form required to be filed with the attorney general pursuant to sections one hundred seventy-three and one hundred seventy-three-b of this article, or in default of the filing of such form, at the last address known to the attorney general or other party. Service of such process shall be complete ten days after the receipt by the attorney general or other party of a return receipt purporting to be signed by the addressee or a person qualified to receive the addressee's certified mail, in accordance with the rules and customs of the post office department, or, if acceptance was refused by the addressee or the agent, ten days after the return to the attorney general or other party of the original envelope bearing a notation by the postal authorities that receipt thereof was refused.

HISTORY:

Add, L 1977, ch 669, § 5; amd, L 1986, ch 440, § 11, eff July 1, 1987 (see 1986 note below); L 1995, ch 83, § 104, eff June 20, 1995, deemed eff on and after April 1, 1995; L 2002, ch 43, § 10, eff Aug 1, 2002.

Editor's Notes: Laws 1986, ch 440, § 19, eff July 1, 1987, provides as follows:

§ 19. This act shall take effect on July first, nineteen hundred eighty-seven, except that any rules and regulations necessary for the timely implementation of this act on its effective date shall be promulgated on or before such date and shall apply to written reports filed pursuant to section one hundred seventy-two-b of the executive law for fiscal years ending on or after December thirty-first, nineteen hundred eighty-seven.

Notes to Decisions

Service upon the "principal, officer, or director" of a non-resident professional fund raiser through service upon the Secretary of State was expressly permitted. Spitzer v All-Pro Telemarketing Assocs. Corp., 195 Misc. 2d 245, 758 N.Y.S.2d 775, 2003 N.Y. Misc. LEXIS 242 (N.Y. Sup. Ct. 2003).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Application for authority; contents, CLS Bus Corp § 1304.

Foreign corporation to make designation, CLS Gen Bus § 352-a.

Application for authority; contents, CLS N-PCL 1304.

Codes, Rules and Regulations:

Department of law: charitable entities and fundraising professionals. 13 NYCRR Parts 90–99.

Jurisprudences:

18 NY Jur 2d Charities § 90 .

60 Am Jur 2d, Peddlers, Solicitors, and Transient Dealers § 23.

Texts: Bjorklund, Fishman & Kurtz, New York Nonprofit Law and Practice with Tax Analysis § 6-6(a).

§ 174. Solicitation by unregistered charitable organizations, professional fund-raisers or commercial co-venturers a fraud upon the people of the state

1. No charitable organization shall employ any

professional fund raiser or commercial co-venturer unless and until such fund raiser or commercial co-venturer is registered pursuant to this article. Any such contract of employment shall be voidable at the option of the charitable organization.

2. No professional fund raiser or commercial co-venturer shall enter into any contract or raise any funds for any organization required to be registered pursuant to this article unless such charitable organization actually so registered.

3. No professional fund raiser required to be registered under this article shall employ any professional solicitor who is not registered in accordance with this article.

4. In addition to all other remedies provided by law the attorney general may bring an action to enjoin the violation of the provisions of this section. The attorney general may give notice of at least fifteen days in writing by registered or certified mail to the organization, person or persons violating the provisions hereof, requiring that registration be accomplished or that the solicitation funds be immediately terminated. The failure to immediately discontinue solicitation or to register in accordance with the provisions of this article within fifteen days of service of such notice shall be deemed to be a continuing fraud upon the people of the state of New York.

HISTORY:

Add, L 1977, ch 669, § 5; amd, L 1985, ch 347, § 1, eff Nov 13, 1985 (see 1985 note below); L 2002, ch 43, § 11, eff Aug 1, 2002.

Editor's Notes: Laws 1985, ch 347, § 3, eff Nov 13, 1985, provides as follows:

§ 3. This act shall take effect on the one hundred twentieth day after it shall have become a law, provided however, that effective immediately the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of the foregoing sections of this act on their effective date are authorized and directed to be made and completed on or before such effective date.

Amendment Notes:

2002. Chapter 43, § 11 amended:
Sub 1, by deleting "fund-raiser".
2002. Chapter 43, § 11 amended:
Sub 2, by deleting "fund-raiser".
2002. Chapter 43, § 11 amended:
Sub 3, by deleting "fund-raiser".

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

Department of law: charitable entities and fundraising professionals. 13 NYCRR Parts 90–99.

Jurisprudences:

18 NY Jur 2d Charities §§ 90, 94 .

60 Am Jur 2d, Peddlers, Solicitors, and Transient Dealers § 23.

Annotations:

Criminal offenses under statutes and ordinances regulating charitable solicitations. 76 ALR3d 924.

Texts: Bjorklund, Fishman & Kurtz, New York Nonprofit Law and Practice with Tax Analysis §§ 6-2(e), 6-3(c), 6-3(e)(1), 6-3(e)(3), 6-4, 6-6(a).

§ 174-a. Contracts with charitable organizations

1. Whenever a charitable organization contracts with a professional fund raiser or fund raising counsel or commercial co-venturer, the charitable organization shall have the right to cancel the contract without cost, penalty, or liability for a period of fifteen days following the date on which said contract is filed with the attorney general pursuant to the provisions of this article, regardless of the date of execution of said contract. Any provision in the contract that is intended to waive this right of cancellation shall be void and unenforceable.

2. A charitable organization may cancel a contract signed pursuant to subdivision one of this section by a written notice of cancellation. If given by mail, cancellation shall be deemed effective when deposited in a mailbox, properly addressed and postage prepaid. The notice shall be sufficient if it states that the charitable organization does not intend to be bound by the contract.

3. Whenever a charitable organization cancels a contract pursuant to the provisions of this section, it shall mail a duplicate copy of the notice of cancellation to the attorney general, at the address designated for that purpose.

4. Every contract entered into pursuant to subdivision one of this section shall contain, in a conspicuous typeface:

(a) a concise, accurate statement of the charitable organization's right to cancel;

(b) a concise, accurate statement of the period during which the contract may be cancelled;

(c) the address to which the notice of cancellation is to be sent;

(d) the address of the attorney general to which a duplicate of the notice of cancellation is to be sent; and

(e) a clear statement of the financial arrangement including, if applicable, a statement of the percentage of the total funds collected on behalf of the charitable organization which shall be paid to the professional fund raiser or any other person for purposes other than the exclusive benefit of the charitable organization.

5. Any funds collected by any professional fund raiser, fund raising counsel, professional solicitor, commercial co-venturer, charitable organization or any other person in violation of this section shall be deemed to be held in trust for the benefit of the charitable organization without deduction for costs or expenses of any nature. A charitable organization shall be entitled to recover all funds collected in violation of this section together with costs, disbursements and allowances.

6. The failure of a professional fund raiser, fund raising counsel or commercial co-venturer to immediately discontinue solicitation or any other fund raising activity upon receipt of a notice of cancellation in accordance with the provisions of this article within fifteen days of the cancellation of the contract shall be deemed to be a continuing fraud upon the people of the state of New York.

7. In addition to all other remedies provided by law the attorney general may bring an action to

enjoin the violation of the provisions of this section and to recover restitution, damages, costs and attorneys fees.

HISTORY:

Add, L 1985, ch 347, § 2, eff Nov 13, 1985; amd, L 1986, ch 440, § 12, eff July 1, 1987; L 1989, ch 61, §§ 32, 33, eff April 19, 1989, and deemed eff on and after April 1, 1989; L 1995, ch 83, § 105, eff June 20, 1995, deemed eff on and after April 1, 1995; L 2002, ch 43, § 12, eff Aug 1, 2002.

Prior Law: Former § 174–a, add, L 1977, ch 669, § 5; renumbered § 174–d, L 1985, ch 347, § 2, eff Nov 13, 1985.

Editor's Notes: Laws 1985, ch 347, § 3, eff Nov 13, 1985, provides as follows:

§ 3. This act shall take effect on the one hundred twentieth day after it shall have become a law, provided however, that effective immediately the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of the foregoing sections of this act on their effective date are authorized and directed to be made and completed on or before such effective date.

Laws 1986, ch 440, § 19, eff July 1, 1987, provides as follows:

§ 19. This act shall take effect on July first, nineteen hundred eighty-seven, except that any rules and regulations necessary for the timely implementation of this act on its effective date shall be promulgated on or before such date and shall apply to written reports filed pursuant to section one hundred seventy-two-b of the executive law for fiscal years ending on or after December thirty-first, nineteen hundred eighty-seven.

Amendment Notes:

2002. Chapter 43, § 12 amended:
Sub 1, by deleting a comma.
2002. Chapter 43, § 12 amended:
Sub 2, by deleting "indicates".
2002. Chapter 43, § 12 amended:
Sub 4, par (e), by deleting "retained by" and "rund-raiser".

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 172-d.

Codes, Rules and Regulations:

Department of law: charitable entities and fundraising professionals. 13 NYCRR Parts 90–99.

Jurisprudences:

18 NY Jur 2d Charities § 94.

60 Am Jur 2d, Peddlers, Solicitors, and Transient Dealers § 23.

Texts: Bjorklund, Fishman & Kurtz, New York Nonprofit Law and Practice with Tax Analysis §§ 6-3(e)(1)–6-3(e)(3), 6-6(a).

§ 174-b. Solicitation

1. Any solicitation, by any means, including but not limited to oral solicitation, by or on behalf of a registered charitable organization which is required to file financial reports pursuant to this article and has filed all such reports, shall include therein a statement that upon request, a person may obtain from the organization or from the charities registry on the attorney general's website, a copy of the last financial report filed by the organization with the attorney general. Such statement shall specify the address of the organization and the address of the attorney general, to which such request should be addressed and in the case of a written solicitation, must be placed conspicuously in the material with print no smaller than ten point bold face type or, alternatively, no smaller than the size print used for the most number of words in the statements. Provided, however, such statement need not be made where the space for a printed advertisement or promotional time in any media has been donated or made available to the charitable organization at no cost and such space or time does not reasonably permit inclusion of such statement.

2. Any solicitation used by or on behalf of any charitable organization shall include:

(a) a clear description of the programs and activities for which it has requested and has expended or will expend contributions or shall include therein a statement that, upon request, a person may obtain from the organization such a description; and

(b) a statement identifying the website and telephone number of the New York state office of the attorney general where an individual can receive information on charitable organizations.

(c) If the solicitation is by an institution subject to article five-A of the not-for-profit corporation law, and is for an endowment fund, the solicitation must include a statement that, unless otherwise restricted by the gift instrument pursuant to paragraph (b) of section five hundred fifty-three of the not-for-profit corporation law, the institution may expend so much of an endowment fund as it deems prudent after considering the factors set forth in paragraph (a) of section five hundred fifty-three of the not-for-profit corporation law.

3. In addition to any other disclosure required by law, any solicitation by any means by a professional fund raiser or professional solicitor on behalf of a charitable organization required to be registered pursuant to this article shall clearly and unambiguously disclose:

(a) the name of the professional fund raiser as on file with the attorney general and that the solicitation is being conducted by a professional fund raiser;

(b) the name of the individual professional solicitor as on file with the attorney general and that the individual is receiving compensation for conducting the solicitation; and

(c) a statement identifying the website and telephone number of the office of the attorney general where an individual can receive information on charitable organizations.

4. If any charitable organization makes contributions to another organization which is not its affiliate as defined by paragraph (b) of subdivision four of section one hundred seventy-two-b of this article, such solicitation shall include a statement that such contributions have been made and that a list of all organizations which have received contributions during the past twelve months from the soliciting organization may be obtained from that organization provided, however, a united way, federated fund or incorporated community appeal, by or through which a donation is merely transferred to a charity selected by the donor, need not include such donor selected organizations in the list.

5. A charitable organization shall comply with all requests made pursuant to subdivisions two and four of this section within fifteen days of their receipt. In the event that a charitable organization required to register pursuant to this article has not previously been required to file an annual report with the attorney general, the solicitation shall state the date when such report will be filed. Provided, however, that no additional solicitation shall be permitted by charitable organizations until an annual report is filed, if the report is delayed beyond one year.

HISTORY:

Add, L 1977, ch 669, § 5, eff Oct 1, 1977; amd, L 1986, ch 440, § 13, eff July 1, 1986 (see 1986 note below); L 1987, ch 353, § 7, eff July 1, 1987; L 1994, ch 150, § 1, eff Sept 5, 1994; L 1995, ch 83, § 106, eff June 20, 1995, deemed eff on and after April 1, 1995; L 2002, ch 43, § 13, eff Aug 1, 2002; L 2010, ch 490, § 14, eff Sept 17, 2010; L 2018, ch 373, § 1, effective March 21, 2019.

Editor's Notes: Laws 1986, ch 440, § 19, eff July 1, 1987, provides as follows:

§ 19. This act shall take effect on July first, nineteen hundred eighty-seven, except that any rules and regulations necessary for the timely implementation of this act on its effective date shall be promulgated on or before such date and shall apply to written reports filed pursuant to section one hundred seventy-two-b of the executive law for fiscal years ending on or after December thirty-first, nineteen hundred eighty-seven.

Laws 2018, ch 373, § 2, eff March 21, 2019, provides:

§ 2. This act shall take effect on the ninetieth day after it shall have become a law and shall apply to all solicitation used by or on behalf of any charitable organization on and after such effective date.

Amendment Notes: 2010. Chapter 490, § 14 amended:

Sub 2 by adding the matter in italics.

2002. Chapter 43, § 13 amended:

Sub 1 by deleting at fig 1 "used", at fig 2 "have previously filed an annual report", at fig 3 "annual", at fig 4 "the broadcast" and adding the matter in italics.

Sub 2 by adding the matter in italics.

Sub 2-a designated as sub 3.

Sub 3, par (a) by deleting at fig 1 "and".

By designating former subs 3 and 4 as subs 4 and 5, respectively.

Sub 4 by deleitng at fig 1 "one," at fig 2 a comma, at fig 3 "three" and adding the matter in italics.

Sub 5 by adding the matter in italics.

The 2018 amendment by ch 373, § 1, substituted "the charities registry on the attorney general's website" for "the attorney general" in the first sentence of 1; redesignated and renumbered former 2 as the introductory language of 2, 2(a) and 2(c) and added 2(b); and added 3(c).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 175.

Codes, Rules and Regulations:

Department of law: charitable entities and fundraising professionals. 13 NYCRR Parts 90–99.

Jurisprudences:

18 NY Jur 2d Charities § 92.

60 Am Jur 2d, Peddlers, Solicitors, and Transient Dealers § 23.

Texts: Bjorklund, Fishman & Kurtz, New York Nonprofit Law and Practice with Tax Analysis §§ 6-2(f), 6-3(f)(1), 6-5(b), 6-6(a).

§ 174-c. Sales advertised to benefit a charitable organization

All advertising, of every kind and nature, that a sale of goods, services, entertainment or any other thing of value will benefit a charitable organization shall set forth the anticipated portion of the sales price, anticipated percentage of the gross proceeds, anticipated dollar amount per purchase, or other consideration or benefit the charitable organization is to receive. Provided, however, that advertising for sales by a charitable organization that has not used the services of a professional fund raiser or commercial co-venturer in any way for the sale shall not be subject to the requirement of this section.

HISTORY:

Add, L 1977, ch 669, § 5; amd, L 1986, ch 440, § 14, eff July 1, 1987 (see 1986 note below).

Editor's Notes: Laws 1986, ch 440, § 19, eff July 1, 1987, provides as follows:

§ 19. This act shall take effect on July first, nineteen hundred eighty-seven, except that any rules and regulations necessary for the timely implementation of this act on its effective date shall be promulgated on or before such date and shall apply to written reports filed pursuant to section one hundred seventy-two-b of the executive law for fiscal years ending on or after December thirty-first, nineteen hundred eighty-seven.

Notes to Decisions

The state made a prima facie showing sufficient to justify entry of an order enjoining defendant, a nonresident co-venturer with various charitable organizations for fund raising purposes, from conducting any solicitations in the state, where it showed that defendant had violated prior consent decrees by using unauthorized sales pitches, and by failing to file contracts with the charitable organizations with the Secretary of State. People v United Funding, Inc., 106 A.D.2d 846, 484 N.Y.S.2d 245, 1984 N.Y. App. Div. LEXIS 21748 (N.Y. App. Div. 3d Dep't 1984), app. denied, 64 N.Y.2d 609, 489 N.Y.S.2d 1026, 1985 N.Y. LEXIS 18846 (N.Y. 1985).

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

Department of law: charitable entities and fundraising professionals. 13 NYCRR Parts 90–99.

Jurisprudences:

18 NY Jur 2d Charities § 92.

60 Am Jur 2d, Peddlers, Solicitors, and Transient Dealers § 23.

Texts: Bjorklund, Fishman & Kurtz, New York Nonprofit Law and Practice with Tax Analysis §§ 6-1, 6-3(f)(1).

§ 174-d. Unauthorized use of names when soliciting or collecting contributions

1. No person shall, for the purpose of soliciting contributions from persons in this state, use the name of any other person, except that of an officer, director or trustee of the charitable organization by or for which contributions are solicited, without the written consent of such other person.

2. A person shall be deemed to have used the name of another person for the purpose of soliciting contributions if such latter person's name is listed on any stationery, advertisement, brochure or correspondence in or by which a contribution is solicited by or on behalf of a charitable organization or his name is listed or referred to in connection with a request for a contribution as one who has contributed to, sponsored or endorsed the charitable organization or its activities.

3. Nothing contained in this section shall prevent the publication of names of contributors without

their written consents, in an annual or other periodic report issued by a charitable organization for the purpose of reporting on its operations and affairs to its membership or for the purpose of reporting contributions to contributors.

4. A violation of this section shall be a misdemeanor.

HISTORY:

Formerly § 174–a, add, L 1977, ch 669, § 5; renumbered § 174–d, L 1985, ch 347, § 2, eff Nov 13, 1985 (see 1985 note below).

Editor's Notes: Laws 1985, ch 347, § 3, eff Nov 13, 1985, provides as follows:

§ 3. This act shall take effect on the one hundred twentieth day after it shall have become a law, provided however, that effective immediately the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of the foregoing sections of this act on their effective date are authorized and directed to be made and completed on or before such effective date.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

Department of law: charitable entities and fundraising professionals. 13 NYCRR Parts 90–99.

Jurisprudences:

18 NY Jur 2d Charities § 93 .

35B NY Jur 2d Criminal Law Substantive Principles and Offenses § 1256.

60 Am Jur 2d, Peddlers, Solicitors, and Transient Dealers § 23.

Texts: Bjorklund, Fishman & Kurtz, New York Nonprofit Law and Practice with Tax Analysis §§ 6-4, 6-6(a).

§ 175. Enforcement by attorney general

1. An action for violation of this article may be prosecuted by the attorney general, or his deputy, in the name of the people of the state, and in any such action, the attorney general or his deputy, shall exercise all the powers and perform all duties which the district attorney would otherwise be authorized to exercise or to perform therein.

2. In addition to any other action or proceeding authorized by law and any action or proceeding by the attorney general, the attorney general may bring an action or special proceeding in the supreme court, in the name and in behalf of the people of the state of New York, against a charitable organization and any other persons acting for it or in its behalf to enjoin such organization and/or persons from continuing the solicitation or collection of funds or property or engaging therein or doing any acts in furtherance thereof, and to cancel any registration statement previously filed with the attorney general pursuant to this article and for an order awarding restitution and damages, penalties and costs; and removing any director or other person responsible for the violation of this article; dissolving a corporation and other relief which the court may deem proper, whenever the attorney general shall have reason to believe that the charitable organization or other person:

(a) is violating or has violated any of the provisions of this article;

(b) has refused or failed, or any of its principal officers has refused or failed, after notice, to produce any records of such organizations;

(c) is employing or about to employ, or there is employed or about to be employed, in any solicitation or collection of funds or other property for such organization, any device, scheme or artifice to defraud or for obtaining money or property by means of a false pretense, representation or promise;

(d) has made a material false statement in an application, registration or statement required to be filed pursuant to this article;

(e) (i) has failed or is failing to apply the funds solicited from the public in a manner substantially consistent with its charitable purposes or solicitation or has engaged in repeated fraudulent or illegal activities, acts or conduct in connection with the solicitation for charitable purposes; (ii) or, in the case of a law enforcement support organization, has failed or is failing to apply the funds solicited from the public in a manner substantially consistent with the purposes of the solicitation or has engaged in repeated fraudulent or illegal activities, acts or conduct in connection with the solicitation for purposes of the law enforcement support organization;

(f) violates any order or determination made by the attorney general pursuant to the provisions of this article;

(g) has used or intends to use false or materially misleading advertising or promotional material in connection with any solicitation or with any commercial co-venture or fails to disclose the information required to be disclosed pursuant to section one hundred seventy-four-b of this article; or

(h) is a law enforcement support organization and is employing or about to employ, or there is employed or about to be employed, in any solicitation or collection of funds or other property for such organization, any device, scheme or artifice to defraud or for obtaining money or property by means of a false pretense, representation or promise which shall include, without limitation, making any of the following representations: (i) that professional fund raisers or solicitors are police officers or employees of any law enforcement agency, (ii) that funds collected will be used to aid widows and children of police officers slain in the line of duty or for any other charitable program unless the organization is actually engaged in such a program, (iii) that contributors will receive special benefits from police officers, and (iv) that contributions are tax deductible as a charitable contribution or as a business expense unless they so qualify under the applicable provisions of the internal revenue code.

In connection with such proposed action or proceeding the attorney general is authorized to take proof, issue subpoenas and administer oaths in the manner provided in the civil practice law and rules.

3. Upon a showing by the attorney general in an application for an injunction that any person engaged in solicitation has been convicted in this state or elsewhere of a felony or of a misdemeanor involving the misappropriation, misapplication or misuse of the money or property of another, and who has

not, subsequent to such conviction, received executive pardon therefor or a certificate of relief from disabilities or a certificate of good conduct pursuant to article twenty-three of the correction law, the supreme court, after a hearing, may enjoin such person from engaging in any solicitation.

4. The attorney general may exercise the authority granted in this section against any charitable organization which operates under the guise or pretense of being an organization exempted by the provisions of section one hundred seventy-two-a of this article and is not in fact an organization entitled to such an exemption.

5. Whenever the attorney general shall have reason to believe that any professional fund-raiser, fund raising counsel, professional solicitor or commercial co-venturer is operating in violation of the provisions of this article, or has made any false statement in any application, registration or statement required to be filed pursuant to this article, or if any professional fund-raiser, fund raising counsel, or commercial co-venturer has refused or failed, after notice, to produce any records demanded of him, or there is employed or is about to be employed in any solicitation or collection of contributions for a charitable or religious organization any device, scheme or artifice to defraud or for obtaining money or property by means of any false pretense, representation or promise, in addition to any other action or proceeding authorized by law, he may bring in the supreme court an action or proceeding in the name, and on behalf, of the people of the state of New York against such professional fund-raiser, fund raising counsel, commercial co-venturer, professional solicitor, and any other person who has participated or is about to participate in such solicitation or collection by employing such device, scheme, artifice, false representation or promise, to enjoin such professional fund-raiser, fund raising counsel, commercial co-venturer, professional solicitor, or other person from continuing such solicitation or collection or engaging therein or doing any acts in furtherance thereof, or to cancel any registration statement previously filed with the attorney general.

6. Whenever the attorney general has determined to commence an action under this article, he may present to any justice of the supreme court, before beginning such action, an application in writing for an order directing the person or persons mentioned in the application to appear before the justice of the supreme court or referee designated in such order and answer such questions as may be put to them or to any of them, or to produce such papers, documents and books concerning the practices to which the action which he has determined to bring relates, and it shall be the duty of the justice of the supreme court to whom such application for the order is made to grant such application. The application for such order made by the attorney general may simply show upon his information and belief that the testimony of such person or persons is material and necessary. The provisions of the civil practice law and rules relating to an application for an order for the examination of witnesses before the commencement of an action and the method of proceeding on such examination, shall not apply except as herein prescribed. The order shall be granted by the justice of the supreme court to whom the application has been made with such preliminary injunction or stay as may appear to such justice to be proper and expedient and shall specify the time when and place where the witnesses are required to appear. The justice or referee may adjourn such examination from time to time and witnesses must attend accordingly. The testimony of each witness must be subscribed by him and all must be filed in the office of the clerk of the county in which such order for examination is filed. The order for such examination must be signed by the justice making it and service of a copy thereof with an endorsement by the attorney general signed by him or his deputy, to the effect that the person named therein is required to appear and be examined at the time and place and before the justice or referee specified in such endorsement, shall be sufficient notice for the attendance of witnesses. Such endorsement may contain a clause requiring such person to produce at such examination all books, papers and documents in his possession or under his control relating to the subject of such examination. The order shall be served upon the person named in the endorsement aforesaid by showing him the original order and delivering to and leaving with him at the same time a copy thereof, endorsed as above provided, and by paying or tendering to him the fee allowed by law to witnesses subpoenaed to attend trials of civil actions in any court of record in this state.

7. In addition to any other action authorized by law, the attorney general may bring an action or special proceeding in the supreme court to recover any civil penalties assessed by the attorney general.

8. Nothing contained in section one hundred seventy-seven of this article shall prevent, limit, restrict, impede or delay the attorney general from instituting, at any time, any action or proceeding authorized by the provisions of this article or any other appropriate law, as he may deem necessary.

HISTORY:

Add, L 1977, ch 669, § 5, eff Oct 1, 1977; amd, L 1986, ch 440, §§ 15, 16, eff July 1, 1987 (see 1986 note below); L 1989, ch 489, §§ 7, 8, eff July 16, 1989, 1995, ch 83, § 107, eff June 20, 1995, deemed eff on and after April 1, 1995; L 2002, ch 43, § 14, eff Aug 1, 2002; L 2010, ch 56, § 2 (Part LL), eff June 22, 2010.

Editor's Notes: Laws 1986, ch 440, § 19, eff July 1, 1987, provides as follows:

§ 19. This act shall take effect on July first, nineteen hundred eighty-seven, except that any rules and regulations necessary for the timely implementation of this act on its effective date shall be promulgated on or before such date and shall apply to written reports filed pursuant to section one hundred seventy-two-b of the executive law for fiscal years ending on or after December thirty-first, nineteen hundred eighty-seven.

Amendment Notes: 2010. Chapter 56, § 2 (Part LL) amended:

Sub 3 by deleting at fig 1 "from the parole board" and adding the matter in italics.

2002. Chapter 43, § 14 amended:

Sub 2, opening par by deleting at fig 1 "he or she", at fig 2 "and" and adding the matter in italics.

Sub 2, par (a) by deleting at fig 1 "operating in violation" and adding the matter initalics.

Sub 2, par (e) by deleting at fig 1 "the" and at fig 2 "for charitable purposes".

Sub 2, par (g) by deleting at fig 1 "for charitable purposes or for the purposes of any law enforcement support organization".

Sub 2, closing par by adding the matter in italics.

Sub 3 by deleting at fig 1 "the", at fig 2 "or collection of funds for charitable purposes or for the purposes of any law enforcement support organization, either as an individual or as a member of a copartnership, or as an officer of a corporation or as an agent for some other person, or copartnership or corporation,", at fig 3 "or collection of funds for charitable purposes or for the purposes of any law enforcement support organization" and adding the matter in italics.

1995. Chapter 83, § 107 amended:

Sub 5 by deleting at fig 1 "secretary" and adding the matter in italics.

Sub 7 by deleting at fig 1 "on behalf of the secretary", at fig 2 "secretary" and adding the matter in italics.

Notes to Decisions

Analysis

1. Under former Social Service Law §§ 482-c, 482-i
2. Illustrative cases

1. Under former Social Service Law §§ 482-c, 482-i

Responsibility to enjoin frauds upon the public in the solicitation of funds, and in other ways to prevent unscrupulous fund raising schemes, lies with the Attorney General. Sport Celebrities, Inc. v Maull, 56 A.D.2d 849, 392 N.Y.S.2d 315, 1977 N.Y. App. Div. LEXIS 11190 (N.Y. App. Div. 2d Dep't), app. denied, 42 N.Y.2d 803, 1977 N.Y. LEXIS 3695 (N.Y. 1977).

2. Illustrative cases

Where the Attorney General sued a professional fundraiser and its president to permanently enjoin them from soliciting and collecting charitable contributions from the public, he was properly granted summary judgment on the issue of liability, as he established that the fundraiser's solicitation of charitable funds on behalf of a cancer prevention organization was fraudulent and deceptive because the fundraiser misrepresented the extent of the organization's actions in helping women survive breast cancer. People v Coalition Against Breast Cancer, Inc., 134 A.D.3d 1081, 22 N.Y.S.3d 562, 2015 N.Y. App. Div. LEXIS 9661 (N.Y. App. Div. 2d Dep't 2015), app. denied, 28 N.Y.3d 901, 63 N.E.3d 69, 40 N.Y.S.3d 349, 2016 N.Y. LEXIS 2717 (N.Y. 2016).

Where the Attorney General established that a professional fundraiser's solicitation of charitable funds on behalf of a cancer prevention organization was fraudulent and deceptive, the trial court properly pierced the corporate veil to hold the fundraiser's president personally liable, as an officer of a corporation could be held liable for fraud if he participated in it or had actual knowledge of it. People v Coalition Against Breast Cancer, Inc., 134 A.D.3d 1081, 22 N.Y.S.3d 562, 2015 N.Y. App. Div. LEXIS 9661 (N.Y. App. Div. 2d Dep't 2015), app. denied, 28 N.Y.3d 901, 63 N.E.3d 69, 40 N.Y.S.3d 349, 2016 N.Y. LEXIS 2717 (N.Y. 2016).

Agency Opinions

1. In General

Attorney General's office, through written service agreement, could partner with 2 non-profit corporations to modernize its registry of not-for-profit corporations, charitable trusts, and fundraising professionals where such arrangement was part of agreement for consideration and did not constitute gifts to individual employees or to office. State Ethics Comm Adv Op No. 03-5.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 172-d.

Codes, Rules and Regulations:

Department of law: charitable entities and fundraising professionals. 13 NYCRR Parts 90–99.

Jurisprudences:

18 NY Jur 2d Charities §§ 94, 95 .

96 NY Jur 2d State of New York § 34 .

60 Am Jur 2d, Peddlers, Solicitors, and Transient Dealers § 23.

Annotations:

Criminal offenses under statutes and ordinances regulating charitable solicitations. 76 ALR3d 924.

Texts: Bjorklund, Fishman & Kurtz, New York Nonprofit Law and Practice with Tax Analysis §§ 6-1, 6-6(a), 6-6(c), 6-2(e), 6-2(f), 6-3(f)(1), 6-3(g).

§ 175-a. Application of article

This article shall not be construed to limit or restrict the exercise of the powers or the performance of the duties of the attorney general or district attorney which they otherwise are authorized to exercise or perform under any other provision of law.

HISTORY:

Add, L 1977, ch 669, § 5, eff Oct 1, 1977.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

Department of law: charitable entities and fundraising professionals. 13 NYCRR Parts 90–99.

Jurisprudences:

18 NY Jur 2d Charities § 94.

60 Am Jur 2d, Peddlers, Solicitors, and Transient Dealers § 23.

Texts: Bjorklund, Fishman & Kurtz, New York Nonprofit Law and Practice with Tax Analysis § 6-6(a).

§ 175-b. Municipal option

Nothing contained in this article shall be construed to prevent any municipality from adopting or enacting any local law, ordinance or regulation imposing more restrictive requirements for the solicitation of contributions for law enforcement support organizations, provided, however, that nothing permitted by this section shall be construed to modify or be inconsistent with the legal standards in this article that are applicable to individuals and organizations other than law enforcement support organizations and professional fund raisers and solicitors which are employed by such law enforcement support organizations even when such other individuals and organizations act jointly and together with such law enforcement support organizations.

HISTORY:

Add, L 1989, ch 489, § 9, eff July 16, 1989.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

Department of law: charitable entities and fundraising professionals. 13 NYCRR Parts 90–99.

Jurisprudences:

60 Am Jur 2d, Peddlers, Solicitors, and Transient Dealers § 23.

Texts: Bjorklund, Fishman & Kurtz, New York Nonprofit Law and Practice with Tax Analysis § 6-3(g).

§ 176. Advisory council

The advisory council on charities registration is continued. It shall advise the attorney general and make recommendations with respect to the operation and administration of this article with the objective of assuring maximum simplicity in the conformance of charitable organizations with the provisions of this article. The council shall consist of not fewer than five nor more than ten members. The members of the advisory council now in office shall continue to hold office for the remainder of the terms to which they were appointed and thereafter until their successors are appointed. The attorney general shall designate the chairman of the council and may appoint additional and successor members and fix their terms of office. The members shall serve without compensation but shall be allowed their actual and necessary expenses incurred in the performance of their duties hereunder.

HISTORY:

Add, L 1977, ch 669, § 5, eff Oct 1, 1977; amd, L 1995, ch 83, § 108, eff June 20, 1995, deemed eff on and after April 1, 1995; L 2002, ch 43, § 15, eff Aug 1, 2002.

Amendment Notes:

2002. Chapter 43, § 15 amended:
Par by deleting "or".

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

Department of law: charitable entities and fundraising professionals. 13 NYCRR Parts 90–99.

Jurisprudences:

18 NY Jur 2d Charities § 86 .

60 Am Jur 2d, Peddlers, Solicitors, and Transient Dealers § 23.

§ 177. Administration and enforcement by attorney general

1. The attorney general shall make rules and regulations necessary for the administration of this article including, but not limited to regulations and waiver procedures that will ensure that charitable organizations do not have to register twice in relation to the solicitation and administration of assets, and rules or regulations allowing or requiring any submission to the attorney general to be effected by electronic means.

2. Upon a finding by the attorney general that any person has committed or is committing a violation of any provision of this article, the attorney general may:

(a) revoke, suspend or deny a registration of a charitable organization, professional fund raiser, professional solicitor or fund raising counsel or deny or revoke a claim of exemption or issue an order directing a charitable organization, professional fund raiser, professional solicitor, fund raising counsel or commercial co-venturer to cease and desist specified fund raising activities; and

(b) assess a civil penalty against the violator of not more than one thousand dollars for each act or omission constituting a violation and an additional penalty of not more than one hundred dollars for each day during which such violation continues. Prior to assessing a civil penalty, the attorney general shall notify the violator in writing by certified mail to its last known business address that a civil penalty will be assessed pursuant to this section unless the violation is cured within thirty days of the date of the mailing of the notice.

3. The attorney general shall, before denying, revoking or suspending any registration or exemption, or issuing a cease and desist order or assessing a civil penalty, notify the applicant or registrant in writing and provide an opportunity for a hearing on a record in reference thereto in accordance with such rules as the attorney general may promulgate to effectuate the purposes of this article. Such written notice may be served by personal delivery to the applicant or registrant or by registered or certified mail to its last known business address. Hearings must be requested within twenty days of receipt of the notice from the attorney general. Any hearing shall be held within thirty days of the receipt of the request by the attorney general, at such time and place as the attorney general shall prescribe. The attorney general, or his or her designee may issue subpoenas in accordance with the civil practice law and rules, compel the attendance of witnesses at the hearing, administer oaths, take proof and make determinations of relevant facts. The respondent may appear at the hearing and may cross-examine all witnesses and produce evidence on his or her behalf. The attorney general or his or her designee shall not be bound by the rules of evidence during the conduct of the hearing. A final determination shall be made by the attorney general or his or her designee within ten days of the conclusion of the hearing. The attorney general shall serve a copy of such determination or order upon the registrant or applicant personally or by registered or certified mail at his or her last known business address.

4. The administrative remedies provided by this article shall not be applicable to any violation of this article which is or was the subject of any action or proceeding brought by the attorney general.

HISTORY:

Add, L 1986, ch 440, § 17, eff July 1, 1987; amd, L 1987, ch 353, § 8, eff July 1, 1987; L 1995, ch 83, § 109, eff June 20, 1995, deemed eff on and after April 1, 1995; L 2002, ch 43, § 16, eff Aug 1, 2002; L 2013, ch 549, § 4. eff July 1, 2014.

Editor's Notes: Laws 1986, ch 440, § 19, eff July 1, 1987, provides as follows:

§ 19. This act shall take effect on July first, nineteen hundred eighty-seven, except that any rules and regulations necessary for the timely implementation of this act on its effective date shall be promulgated on or before such date and shall apply to written reports filed pursuant to section one hundred seventy-two-b of the executive law for fiscal years ending on or after December thirty-first, nineteen hundred eighty-seven.

Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

Amendment Notes: 2013. Chapter 549, § 4 amended:
Sub 1 by adding the matter in italics.

2002. Chapter 43, § 16 amended:

Sub 2, opening par by deleting at fig 1 "subdivision one, two, five, six, seven, or eight of section one hundred seventy-two-d", at fig 2 "or has failed or is failing to comply with section one hundred seventy-two-b of this article," and adding the matter in italics.

Sub 2, par (a) by deleting at figs 1, 3 and 5 "or", at figs 2 and 4 "fund-raiser or", at fig 6 "fund-raiser" and adding the matter in italics.

Sub 4 by adding the matter in italics.

1995. Chapter 83, § 109 amended:

Section heading by deleting at fig 1 "secretary of state" and adding the matter in italics.

Sub 2, par (b) by adding the matter in italics.

Sub 3 by deleting at figs 1–6, 8, 10 and 12 "secretary", at figs 7, 9 and 11 "the secretary's" and adding the matter in italics.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

Department of law: charitable entities and fundraising professionals. 13 NYCRR Parts 90–99.

Jurisprudences:

18 NY Jur 2d Charities § 95 .

60 Am Jur 2d, Peddlers, Solicitors, and Transient Dealers § 23.

Texts: Bjorklund, Fishman & Kurtz, New York Nonprofit Law and Practice with Tax Analysis §§ 6-1, 6-2(e), 6-2(f), 6-3(f)(1), 6-6(a), 6-6(c).

ARTICLE 15 Human Rights Law

Section

292. Definitions.
296. Unlawful discriminatory practices.
296-a. Unlawful discriminatory practices in relation to credit.
296-b. Unlawful discriminatory practices relating to domestic workers
296-c. Unlawful discriminatory practices relating to interns
297. Procedure.
298. Judicial review and enforcement.

HISTORY:

Add, L 1951, ch 800, § 1, eff July 1, 1951, with substance transferred from Art 12; amd, L 1952, ch 285, § 1; L 1969, ch 359, § 2, eff May 2, 1969.

§ 292. Definitions.

When used in this article:

1. The term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

2. The term "employment agency" includes any person undertaking to procure employees or opportunities to work.

3. The term "labor organization" includes any organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment, or of other mutual aid or protection in connection with employment.

4. The term "unlawful discriminatory practice" includes only those practices specified in sections two hundred ninety-six, two hundred ninety-six-a, two hundred ninety-six-c and two hundred ninety-six-d of this article.

5. The term "employer" shall include all employers within the state.

6. The term "employee" in this article does not include any individual employed by his or her parents, spouse or child, or in the domestic service of any person except as set forth in section two hundred ninety-six-b of this title.

7. The term "commissioner", unless a different meaning clearly appears from the context, means the state commissioner of human rights; and the term "division" means the state division of human rights created by this article.

8. The term "national origin" shall, for the purposes of this article, include "ancestry."

9. The term "place of public accommodation, resort or amusement" shall include, regardless of whether the owner or operator of such place is a state or local government entity or a private individual or entity, except as hereinafter specified, all places included in the meaning of such terms as: inns, taverns, road houses, hotels, motels, whether conducted for the entertainment of transient guests or for the accommodation of those seeking health, recreation or rest, or restaurants, or eating houses, or any place where food is sold for consumption on the premises; buffets, saloons, barrooms, or any store, park or enclosure where spirituous or malt liquors are sold; ice cream parlors, confectionaries, soda fountains, and all stores where ice cream, ice and fruit preparations or their derivatives, or where beverages of any kind are retailed for consumption on the premises; wholesale and retail stores and establishments dealing with goods or services of any kind, dispensaries, clinics, hospitals, bath-houses, swimming pools, laundries and all other cleaning establishments, barber shops, beauty parlors, theatres, motion picture houses, airdromes, roof gardens, music halls, race courses, skating rinks, amusement and recreation parks, trailer camps, resort camps, fairs, bowling alleys, golf courses, gymnasiums, shooting galleries, billiard and pool parlors; garages, all public conveyances operated on land or water or in the air, as well as the stations and terminals thereof; travel or tour advisory services, agencies or bureaus; public halls, public rooms, public elevators, and any public areas of any building or structure. Such term shall not include kindergartens, primary and secondary schools, high schools, academies, colleges and universities, extension courses, and all educational institutions under the supervision of the regents of the state of New York; any such kindergarten, primary and secondary school, academy, college, university, professional school, extension course or other education facility, supported in whole or in part by public funds or by contributions solicited from the general public; or any institution, club or place of accommodation which proves that it is in its nature distinctly private. In no event shall an institution, club or place of accommodation be considered in its nature distinctly private if it has more than one hundred

members, provides regular meal service and regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of a nonmember for the furtherance of trade or business. An institution, club, or place of accommodation which is not deemed distinctly private pursuant to this subdivision may nevertheless apply such selective criteria as it chooses in the use of its facilities, in evaluating applicants for membership and in the conduct of its activities, so long as such selective criteria do not constitute discriminatory practices under this article or any other provision of law. For the purposes of this section, a corporation incorporated under the benevolent orders law or described in the benevolent orders law but formed under any other law of this state or a religious corporation incorporated under the education law or the religious corporations law shall be deemed to be in its nature distinctly private.

No institution, club, organization or place of accommodation which sponsors or conducts any amateur athletic contest or sparring exhibition and advertises or bills such contest or exhibition as a New York state championship contest or uses the words "New York state" in its announcements shall be deemed a private exhibition within the meaning of this section.

10. The term "housing accommodation" includes any building, structure, or portion thereof which is used or occupied or is intended, arranged or designed to be used or occupied, as the home, residence or sleeping place of one or more human beings.

11. The term "publicly-assisted housing accommodations" shall include all housing accommodations within the state of New York in

(a) public housing,

(b) housing operated by housing companies under the supervision of the commissioner of housing,

(c) housing constructed after July first, nineteen hundred fifty, within the state of New York[,]*

(1) which is exempt in whole or in part from taxes levied by the state or any of its political subdivisions,

(2) which is constructed on land sold below cost by the state or any of its political subdivisions or any agency thereof, pursuant to the federal housing act of nineteen hundred forty-nine,

(3) which is constructed in whole or in part on property acquired or assembled by the state or any of its political subdivisions or any agency thereof through the power of condemnation or otherwise for the purpose of such construction, or

(4) for the acquisition, construction, repair or maintenance of which the state or any of its political subdivisions or any agency thereof supplies funds or other financial assistance,

(d) housing which is located in a multiple dwelling, the acquisition, construction, rehabilitation, repair or maintenance of which is, after July first, nineteen hundred fifty-five, financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof, or the state or any of its political subdivisions or any agency thereof, provided that such a housing accommodation shall be deemed to be publicly assisted only during the life of such loan and such guaranty or insurance; and

(e) housing which is offered for sale by a person who owns or otherwise controls the sale of ten or more housing accommodations located on land that is contiguous (exclusive of public streets), if (1) the acquisition, construction, rehabilitation, repair or maintenance of such housing accommodations is, after July first, nineteen hundred fifty-five, financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof, or the state or any of its political subdivisions or any agency thereof, provided that such a housing accommodation shall be deemed to be publicly assisted only during the life of such loan and guaranty or insurance, or (2) a commitment, issued by a government agency after July first, nineteen hundred fifty-five, is outstanding that acquisition of such housing accommodations may be financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof, or the state or any of its political subdivisions or any agency thereof.

12. The term "multiple dwelling", as herein used, means a dwelling which is occupied, as a rule, for permanent residence purposes and which is either sold, rented, leased, let or hired out, to be occupied as the residence or home of three or more families living independently of each other. A "multiple dwelling" shall not be deemed to include a hospital, convent, monastery, asylum or public institution, or a fireproof building used wholly for commercial purposes except for not more than one janitor's apartment and not more than one penthouse occupied by not more than two families. The term "family," as used herein, means either a person occupying a dwelling and maintaining a household, with not more than four boarders, roomers or lodgers, or two or more persons occupying a dwelling, living together and maintaining a common household, with not more than four boarders, roomers or lodgers. A "boarder," "roomer" or "lodger" residing with a family means a person living within the household who pays a consideration for such residence and does not occupy such space within the household as an incident of employment therein. Within the context of this definition, the terms "multiple dwelling" and "multi-family dwelling" are interchangeable.

13. The term "commercial space" means any space in a building, structure, or portion thereof

*The bracketed punctuation has been inserted by the Publisher.

which is used or occupied or is intended, arranged or designed to be used or occupied for the manufacture, sale, resale, processing, reprocessing, displaying, storing, handling, garaging or distribution of personal property; and any space which is used or occupied, or is intended, arranged or designed to be used or occupied as a separate business or professional unit or office in any building, structure or portion thereof.

14. The term "real estate broker" means any person, firm or corporation who, for another and for a fee, commission or other valuable consideration, lists for sale, sells, at auction or otherwise, exchanges, buys or rents, or offers or attempts to negotiate a sale, at auction or otherwise, exchange, purchase or rental of an estate or interest in real estate, or collects or offers or attempts to collect rent for the use of real estate, or negotiates, or offers or attempts to negotiate, a loan secured or to be secured by a mortgage or other incumbrance upon or transfer of real estate. In the sale of lots pursuant to the provisions of article nine-a of the real property law, the term "real estate broker" shall also include any person, partnership, association or corporation employed by or on behalf of the owner or owners of lots or other parcels of real estate, at a stated salary, or upon a commission, or upon a salary and commission, or otherwise, to sell such real estate, or any parts thereof, in lots or other parcels, and who shall sell or exchange, or offer or attempt or agree to negotiate the sale or exchange, of any such lot or parcel of real estate.

15. The term "real estate salesperson" means a person employed by a licensed real estate broker to list for sale, sell or offer for sale, at auction or otherwise, to buy or offer to buy or to negotiate the purchase or sale or exchange of real estate, or to negotiate a loan on real estate, or to lease or rent or offer to lease, rent or place for rent any real estate, or who collects or offers or attempts to collect rent for the use of real estate for or in behalf of such real estate broker.

16. The term "necessary party" means any person who has such an interest in the subject matter of a proceeding under this article, or whose rights are so involved, that no complete and effective disposition can be made without his or her participation in the proceeding.

17. The term "parties to the proceeding" means the complainant, respondent, necessary parties and persons permitted to intervene as parties in a proceeding with respect to a complaint filed under this article .

18. The term "hearing examiner" means an employee of the division who shall be assigned for stated periods to no other work than the conduct of hearings under this article;

19. The term "discrimination" shall include segregation and separation.

20. The term "credit", when used in this article means the right conferred upon a person by a creditor to incur debt and defer its payment, whether or not any interest or finance charge is made for the exercise of this right.

21. The term "disability" means (a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or (b) a record of such an impairment or (c) a condition regarded by others as such an impairment, provided, however, that in all provisions of this article dealing with employment, the term shall be limited to disabilities which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held.

21-a. "Predisposing genetic characteristic" shall mean any inherited gene or chromosome, or alteration thereof, and determined by a genetic test or inferred from information derived from an individual or family member that is scientifically or medically believed to predispose an individual or the offspring of that individual to a disease or disability, or to be associated with a statistically significant increased risk of development of a physical or mental disease or disability.

21-b. "Genetic test" shall mean a test for determining the presence or absence of an inherited genetic characteristic in an individual, including tests of nucleic acids such as DNA, RNA and mitochondrial DNA, chromosomes or proteins in order to identify a predisposing genetic characteristic.

21-c. [Repealed]

21-d. [Repealed]

21-e. The term "reasonable accommodation" means actions taken which permit an employee, prospective employee or member with a disability, or a pregnancy-related condition, to perform in a reasonable manner the activities involved in the job or occupation sought or held and include, but are not limited to, provision of an accessible worksite, acquisition or modification of equipment, support services for persons with impaired hearing or vision, job restructuring and modified work schedules; provided, however, that such actions do not impose an undue hardship on the business, program or enterprise of the entity from which action is requested.

21-f. The term "pregnancy-related condition" means a medical condition related to pregnancy or childbirth that inhibits the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques, including but not limited to lactation; provided, however, that in all provisions of this article dealing with employment, the term shall be limited to conditions which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or

held; and provided further, however, that pregnancy-related conditions shall be treated as temporary disabilities for the purposes of this article.

22. The term "creditor", when used in this article, means any person or financial institution which does business in this state and which extends credit or arranges for the extension of credit by others. The term creditor includes, but is not limited to, banks and trust companies, private bankers, foreign banking corporations and national banks, savings banks, licensed lenders, savings and loan associations, credit unions, sales finance companies, insurance premium finance agencies, insurers, credit card issuers, mortgage brokers, mortgage companies, mortgage insurance corporations, wholesale and retail merchants and factors.

23. The term "credit reporting bureau", when used in this article, means any person doing business in this state who regularly makes credit reports, as such term is defined by subdivision e of section three hundred seventy-one of the general business law.

24. The term "regulated creditor", when used in this article, means any creditor, as herein defined, which has received its charter, license, or organization certificate, as the case may be, from the department of financial services or which is otherwise subject to the supervision of the department of financial services.

25. The term "superintendent", when used in this article, means the head of the department of financial services appointed pursuant to section two hundred two of the financial services law.

26. The term "familial status", when used in this article, means:

(a) any person who is pregnant or has a child or is in the process of securing legal custody of any individual who has not attained the age of eighteen years, or

(b) one or more individuals (who have not attained the age of eighteen years) being domiciled with:

(1) a parent or another person having legal custody of such individual or individuals, or

(2) the designee of such parent.

27. The term "sexual orientation" means heterosexuality, homosexuality, bisexuality or asexuality, whether actual or perceived. However, nothing contained herein shall be construed to protect conduct otherwise proscribed by law.

28. The term "military status" when used in this article means a person's participation in the military service of the United States or the military service of the state, including but not limited to, the armed forces of the United States, the army national guard, the air national guard, the New York naval militia, the New York guard, and such additional forces as may be created by the federal or state government as authorized by law.

29. The term "reserve armed forces", when used in this article, means service other than permanent, full-time service in the military forces of the United States including but not limited to service in the United States Army Reserve, the United States Naval Reserve, the United States Marine Corps Reserve, the United States Air Force Reserve, or the United States Coast Guard Reserve.

30. The term "organized militia of the state", when used in this article, means service other than permanent, full-time service in the military forces of the state of New York including but not limited to the New York army national guard, the New York air national guard, the New York naval militia and the New York guard.

31. [Repealed]

32. [Repealed]

33. [Repealed]

34. The term "victim of domestic violence" shall have the same meaning as is ascribed to such term by section four hundred fifty-nine-a of the social services law.

35. The term "gender identity or expression" means a person's actual or perceived gender-related identity, appearance, behavior, expression, or other gender-related characteristic regardless of the sex assigned to that person at birth, including, but not limited to, the status of being transgender.

36. The term "lawful source of income" shall include, but not be limited to, child support, alimony, foster care subsidies, income derived from social security, or any form of federal, state, or local public assistance or housing assistance including, but not limited to, section 8 vouchers, or any other form of housing assistance payment or credit whether or not such income or credit is paid or attributed directly to a landlord, and any other forms of lawful income. The provisions of this subdivision shall not be construed to prohibit the use of criteria or qualifications of eligibility for the sale, rental, leasing or occupancy of publicly-assisted housing accommodations where such criteria or qualifications are required to comply with federal or state law, or are necessary to obtain the benefits of a federal or state program. A publicly assisted housing accommodation may include eligibility criteria in statements, advertisements, publications or applications, and may make inquiry or request information to the extent necessary to determine eligibility.

37. [There are three subs 37] The term "race" shall, for the purposes of this article include traits historically associated with race, including but not limited to, hair texture and protective hairstyles.

37. [There are three subs 37] The term "educational institution" shall mean:

(a) any education corporation or association which holds itself out to the public to be nonsectarian and exempt from taxation pursuant to the provisions of article four of the real property tax law; or

(b) any public school, including any school district, board of cooperative educational services, public college or public university.

37. [There are three subs 37] The term "private employer" as used in section two hundred ninety-seven of this article shall include any person, company, corporation, labor organization or association. It shall not include the state or any local subdivision thereof, or any state or local department, agency, board or commission.

38. The term "protective hairstyles" shall include, but not be limited to, such hairstyles as braids, locks, and twists.

HISTORY:

Add, L 1951, ch 800, § 1, eff July 1, 1951, with substance transferred from § 127; amd, L 1952, ch 285, §§ 1, 3, 4; L 1955, ch 340, § 2, eff July 1, 1955; L 1956, ch 563, §§ 1, 2, eff July 1, 1956; L 1960, ch 779, § 1; L 1961, ch 414, §§ 2, 3; L 1962, ch 165, § 1; L 1962, ch 370; L 1963, ch 481, § 1, eff Sept 1, 1963; L 1965, ch 851, § 2, eff Sept 1, 1965; L 1968, ch 958, § 3, eff July 1, 1968; L 1969, ch 359, §§ 3, 4, eff May 2, 1969; L 1969, ch 388, § 1; L 1974, ch 173, §§ 3, 4, eff July 15, 1974; L 1974, ch 565, § 1; L 1974, ch 988, § 1; L 1976, ch 632, § 1, eff July 21, 1976; L 1979, ch 594, § 1; L 1983, ch 902, § 1, eff Aug 8, 1983; L 1991, ch 368, § 2, eff July 15, 1991; L 1994, ch 262, § 1, eff Nov 3, 1994; L 1996, ch 204, §§ 2, 3, eff Sept 23, 1996; L 1997, ch 269, §§ 1, 2, eff Jan 1, 1998; L 1999, ch 405, § 1 (Part D), eff Aug 6, 1999; L 2000, ch 166, §§ 1–6, eff July 18, 2000; L 2002, ch 2, § 3, eff Jan 16, 2003; L 2003, ch 106, § 11, eff July 1, 2003; L 2005, ch 75, § 1, eff Aug 29, 2005; L 2007, ch 133, § 1, eff Oct 1, 2007; L 2009, ch 80, § 2, eff July 7, 2009; L 2010, ch 481, § 4, eff Nov 29, 2010; L 2011, ch 62, § 104 (Part A), eff Oct 3, 2011; L 2012, ch 155, § 51, eff July 18, 2012; L 2014, ch 97, § 2, effective July 22, 2014; L 2014, ch 536, § 1, effective December 29, 2014; L 2015, ch 89, § 1, effective November 22, 2015; L 2015, ch 141, § 1, effective August 13, 2015; L 2015, ch 363, § 1, effective January 19, 2016; L 2015, ch 369, § 1, effective January 19, 2016; L 2018, ch 57, § 2 (Part KK, Subpart F), effective April 12, 2018; L 2019, ch 8, § 3, effective February 24, 2019; L 2019, ch 56, § 2 (Part T), effective April 12, 2019; L 2019, ch 95, § 1, effective July 12, 2019; L 2019, ch 116, § 1, effective July 25, 2019; L 2019, ch 118, § 1, effective July 25, 2019; L 2019, ch 160, § 1, effective February 8, 2020; L 2019, ch 160, § 1-a, effective October 11, 2019; L 2019, ch 161, § 1, effective February 8, 2020; L 2019, ch 176, § 1, effective November 18, 2019; L 2019, ch 271, § 1, effective September 13, 2019.

Editor's Notes See 1968 note under § 290.

Laws 1996, ch 204, § 1, eff Sept 23, 1996, provides as follows:

Section 1. Legislative findings and intent. The legislature hereby finds and declares that advances in the science of human genetics are rapidly expanding the ability to directly test DNA to determine genetic predispositions to an ever-increasing number of genetically influenced health conditions, and to determine whether an individual who has no predisposition to such disease may nevertheless be a carrier of a genetic anomaly, able to pass a genetic predisposition to offspring.

The legislature further finds and declares, that while advances in the ability to develop tests are proceeding at a fast pace, the knowledge of how genes produce diseases is limited, and, as a result, there is a limited possibility of predicting whether a particular genetic predisposition will result in disease or disability, when the onset of such disease or disability may occur, or how severely the individual may be affected by the disease or disability.

The legislature further finds and declares, that advances in genetic testing for disease, predisposition to disease or carrier status raises the possibility that even otherwise healthy individuals will be labeled genetically "defective" and will form a growing "genetic underclass" of society. The fact that not all such testing is currently regulated, and thus not subject to quality control or proficiency testing, invites the danger of error or misinterpretation of genetic tests.

The legislature further finds and declares, that employers attempting to control health insurance costs may seek to have their prospective employees tested for a range of genetically influenced health conditions including genetic predisposition to disease or disability and carrier status for such. The knowledge gained from DNA-based genetic tests could be used to discriminate against individuals in various employment contexts.

It is therefore declared to be the policy of this state that, in order to preclude unfair discrimination, employers have no legitimate interest in requiring or requesting a genetic test or test results from an employee or applicant and should be prohibited from requiring or requesting such test except where such a test is shown to be directly related to the occupational environment, such that the employee or applicant with a particular genetic anomaly might be at an increased risk of disease as a result of working in said environment.

Laws 2002, ch 2, § 1, eff Jan 16, 2003, provides as follows:

Section 1. Legislative findings and intent. The legislature reaffirms that the state has the responsibility to act to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life, and that the failure to provide such equal opportunity, whether because of discrimination, prejudice, intolerance or inadequate education, training, housing or health care not only threatens the rights and proper privileges of its inhabitants, but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants.

The legislature further finds that many residents of this state have encountered prejudice on account of their sexual orientation, and that this prejudice has severely limited or actually prevented access to employment, housing and other basic necessities of life, leading to deprivation and suffering. The legislature further recognizes that this prejudice has fostered a general climate of hostility and distrust, leading in some instances to physical violence against those perceived to be homosexual or bisexual.

In so doing, the legislature makes clear its action is not intended to promote any particular attitude, course of conduct or way of life. Rather its purpose is to ensure that individuals who live in our free society have the capacity to make their own choices, follow their own beliefs and conduct their own lives as they see fit, consistent with existing law.

Nothing in this legislation should be construed to create, add, alter or abolish any right to marry that may exist under the constitution of the United States, or this state and/or the laws of this state.

Laws 2003, ch 106, §§ 1 and 1-a, eff July 1, 2003, provide as follows:

Section 1. Legislative findings and intent. The legislature recognizes that the individuals who are members of the military make a tremendous sacrifice, especially in times like these when our military personnel are in many locations throughout the world and here in New York fighting against terrorism. This sacrifice is just as real for the men and women who comprise our reserve armed forces and state organized militia. For those who are not full-time active duty in the military, but instead are called to active duty as a member of the reserve armed forces or state organized militia, the rest of their lives must be put on hold to accommodate that service. However, such military personnel continue to be responsible for their own well-being and the well-being of their families and they must still face the obligations that exist in their everyday lives. Steps have been taken to ease some of the burdens that these brave men and women encounter, to allow them to focus their full energy on defending our country; however, the legislature recognizes that more must be done to ensure that military personnel engaged in active duty are not troubled by their obligations at home. In addition, the legislature recognizes that members of the military should not be discriminated against based upon their military status in areas such as housing, employment and education.

§ 1-a. Short title. This act shall be known as the "Patriot Plan".

Laws 2010, ch 481, § 1, eff Nov 29, 2010, provides as follows:

Section 1. Legislative findings and intent. Many thousands of domestic workers are employed in New York state as housekeepers, nannies, and companions to the elderly. The labor of domestic workers is central to the ongoing prosperity that the state enjoys, and yet, despite the value of their work, domestic workers do not receive the same protection of many state laws as do workers in other industries. Domestic workers often labor under harsh conditions, work long hours for low wages without benefits or job security, are isolated in their workplaces, and are endangered by sexual harassment and assault, as well as verbal, emotional and psychological abuse. Moreover, many domestic workers in the state of New York are women of color who, because of race and sex discrimination, are particularly vulnerable to unfair labor practices. Additionally, domestic workers are not afforded by law the right to organize labor unions for the purpose of collective bargaining.

The legislature finds that because domestic workers care for the most important elements of their employers' lives, their families and homes, it is in the interest of employees, employers, and the people of the state of New York to ensure that the rights of domestic workers are respected, protected, and enforced.

Laws 2015, ch 141, § 5, eff August 13, 2015, provides:

§ 5. This act shall take effect immediately and shall be deemed to have been in full force and effect on the same date chapter 536 of the laws of 2014 took effect.

Laws 2019, ch 8, §§ 1, 25, provide:

Section 1. The legislature reaffirms that the state has the responsibility to act to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life, and that the failure to provide such equal opportunity, whether because of discrimination, prejudice, intolerance or inadequate education, training, housing or health care not only threatens the rights and proper privileges of its inhabitants, but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants.

The legislature further finds that many residents of this state have encountered prejudice on account of their gender identity or expression, and that this prejudice has severely limited or actually prevented access to employment, housing and other basic necessities of life, leading to deprivation and suffering. The legislature further recognizes that this prejudice has fostered a general climate of hostility and distrust, leading in some instances to physical violence against those perceived to live in a gender identity or expression which is different from that traditionally associated with the sex assigned to that person at birth.

In so doing, the legislature makes clear its action is not intended to promote any particular attitude, course of conduct or way of life. Rather its purpose is to ensure that individuals who live in our free society have the capacity to make their own choices, follow their own beliefs and conduct their own lives as they see fit, consistent with existing law.

The legislature further finds that, as court decisions have properly held, New York's sex discrimination laws prohibit discrimination based on gender stereotypes or because an individual has transitioned or intends to transition from one gender to another. This legislation is intended to codify this principle and to ensure that the public understands that discrimination on the basis of gender identity and expression is prohibited.

§ 25. This act shall take effect on the thirtieth day after it shall have become a law; provided, however, that sections nineteen through twenty-four of this act shall take effect on the first of November next succeeding the date on which it shall have become a law.

Laws 2019, ch 56, § 1 (Part T), eff April 12, 2019, provides:

Section 1. This act shall be known and may be cited as the "Lawful Source of Income Non-Discrimination Act of 2019 ".

Laws 2019, ch 56, § 7 (Part T), eff April 12, 2019, provides:

§ 7. This act shall take effect immediately and shall apply to all causes of action filed on or after such effective date.

Laws 2019, ch 118, 2, eff July 25, 2019, provides:

§ 2. This act shall take effect on the same date and in the same manner as a chapter of the laws of 2019, amending the executive law relating to expanding the scope of unlawful discriminatory practices to include public education institutions, as proposed in legislative bills numbers A. 3425 and S. 4901, takes effect.

Laws 2019, ch 160, § 16, eff August 12, 2019, provides:

§ 16. This act shall take effect immediately, provided, however:

(a) Sections one of this act shall take effect on the one hundred eightieth day after it shall have become a law.

(b) Sections one-a, two, three, four, five, seven, eight and nine of this act shall take effect on the sixtieth day after it shall have become a law.

(c) Section thirteen of this act shall take effect one year after it shall have become a law.

(d) Sections one, one-a, two, three, four, five, six and thirteen shall only apply to claims filed under such sections on or after the effective date of such sections.

(e) Effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized and directed to be made and completed on or before such effective date.

Laws 2019, ch 161, § 5, eff August 12, 2019, provides:

§ 5. This act shall take effect on the same date and in the same manner as a chapter of the laws of 2019 amending the executive law and other laws relating to increased protections for protected classes and special protections for employees who have been sexually harassed, as proposed in legislative bills numbers S. 6577 and A. 8421, takes effect.

Laws 2019, ch 176, § 4, eff November 18, 2019, provides:

§ 4. This act shall take effect on the ninetieth day after it shall have become a law.

Amendment Notes: The 2015 amendment by ch 89, § 1, in 9, in the first sentence, added "regardless of whether the owner or operator of such place is a state or local government entity or a private individual or entity" and substituted "public rooms, public elevators, and any public areas of any building or structure" for "and public elevators of buildings and structures occupied by two or more tenants, or by the owner and one or more tenants" and in the second sentence, deleted "public libraries" following "shall not include" and "public libraries" following "New York; any such."

The 2015 amendment by ch 141, § 1, repealed 31, which read: "The term 'guide dog' 'hearing dog' or 'service dog' shall have the same meaning as those terms are defined in section forty-seven-b of the civil rights law."

The 2015 amendment by ch 363, § 1, substituted "article, provided, however, that in the case of an action for discrimination based on sex pursuant to subdivision one of section two hundred ninety-six of this article, with respect to sexual harassment only, the term 'employer' shall include all employers within the state" for "title" in 5.

The 2015 amendment by ch 369, § 1, added "or pregnancy-related condition" in 21-e and added 21-f.

The 2014 amendment by ch 97, § 2, added "two hundred ninety-six-c" in 4; and made a related change.

The 2014 amendment by ch 536, § 1, rewrote 31, which formerly read: "The term 'guide dog' means any dog that is trained to aid a person who is blind by a recognized guide dog training center or professional guide dog trainer, and is actually used for such purpose"; deleted 32, which read: "The term 'hearing dog' means any dog that is trained to aid a person with a hearing impairment by a recognized hearing dog training center or professional hearing dog trainer, and is actually used for such purpose"; and deleted 33, which read:

"The term 'service dog' means any dog that is trained to work or perform specific tasks for the benefit of a person with a disability by a recognized service dog training center or professional service dog trainer, and is actually used for such purpose."

2012. Chapter 155, § 51 amended:

Sub 25 by deleting at fig 1 "twelve", at fig 2 "banking" and adding the matter in italics.

2011. Chapter 62, § 104 (Part A) amended:

Sub 24 at figs 1 and 2 by substituting "department of financial services" for "banking department".

2010. Chapter 481, § 4 amended:

Sub 5 by adding the matter in italics.

Sub 6 by adding the matter in italics.

2009. Chapter 80, § 2 amended:

By adding sub 34.

2007. Chapter 133, § 1 amended:

By adding sub 31.

By adding sub 32.

By adding sub 33.

2005. Chapter 75, § 1 amended".

By adding sub 21-a and repealing former sub 21-a.

By adding sub 21-b and repealing former sub 21-b.

By repealing sub 21-c.

By repealing sub 21-d.

2003. Chapter 106, § 11 amended:

By adding sub 28.

By adding sub 29.

By adding sub 30.

2002. Chapter 2, § 3 amended:

By adding sub 27.

2000. Chapter 166, § 2 amended:

Sub 7 by adding the matter in italics.

2000. Chapter 166, § 3 amended:

Sub 15 by deleting at fig 1 "salesman" and adding the matter in italics.

2000. Chapter 166, § 4 amended:

Sub 16 by deleting at fig 1 a semi-colon and adding the matter in italics.

2000. Chapter 166, § 5 amended:

Sub 17 by deleting at fig 1 a semi-colon and adding the matter in italics.

2000. Chapter 166, § 6 amended:

Sub 26, par (b), subpar 1 by deleting at fig 1 a semi-colon and adding the matter in italics.

1999. Chapter 405, § 1 (Part D) amended:

Sub 12 by adding the matter in italics.

1997. Chapter 269, § 1 amended:

Sub 21, by adding the matter in italics.

1997. Chapter 269, § 2 amended:

By adding sub 21-e.

The 2018 amendment by ch 57, § 2 (Part KK, Subpart F), added "and two hundred ninety-six-d" in 4; and made a stylistic change.

The 2019 amendment by ch 8, § 3, added 35.

The 2019 amendment by ch 56, § 2 (Part T), added 36.

The 2019 amendment by ch 95, § 1, added 37 and 38.

The 2019 amendment by ch 116, § 1, added 35.

The 2019 amendment by ch 118, § 1, redesignated former 35 as 37; substituted "non-sectarian" for "non-secretarian" in 37(a); and substituted "educational" for "education" in (b).

The 2019 amendments by ch 160 §§ 1–2, rewrote 5, which formerly read: "The term 'employer' does not include any employer with fewer than four persons in his or her employ except as set forth in section two hundred ninety-six-b of this article, provided, however, that in the case of an action for discrimination based on sex pursuant to subdivision one of section two hundred ninety-six of this article, with respect to sexual harassment only, the term 'employer' shall include all employers within the state"; added 37; and added 1(h).

The 2019 amendment by ch 161, § 1, deleted "including the state and all political subdivisions thereof" following "within the state" in 5.

The 2019 amendments by ch 176, § 1, added 34.

The 2019 amendment by ch 271, § 1, added "including but not limited to lactation" in 21-f.

Repeal Notes: [1969, ch 359] Subdivision 20 of § 292 of the executive law, repealed by this act, defined the term "deliberate discriminatory practice", a term which appears in no other section. Section 293-a of such law, also repealed by this act, related to the powers of the chairman of the former state commission for human rights.

Notes to Decisions

Analysis

1. In general
2. Employment agency
3. Employer
4. Places of public accommodation
5. Disabilities
6. —Physical disabilities, generally
7. — —Alcoholism
8. — —Confinement to wheelchair
9. — —Dermatitis
10. — —Drug use
11. — —Epilepsy
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13. — —Heart condition
14. — —High blood pressure
15. — —Multiple sclerosis
16. — —Obesity
17. — —Spinal condition
18. — —Urinary tract infection
19. — —Vision impairment
20. —Mental disabilities
21. Reasonable accommodation

1. In general

Denial of sick leave benefits for pregnancy-related disabilities, when they are provided for other forms of disability, constitutes impermissible discrimination under the Human Rights Law. Brooklyn Union Gas Co. v New York State Human Rights Appeal Bd., 41 N.Y.2d 84, 390 N.Y.S.2d 884, 359 N.E.2d 393, 1976 N.Y. LEXIS 3253 (N.Y. 1976), reh'g denied, 42 N.Y.2d 824, 1977 N.Y. LEXIS 3961 (N.Y. 1977).

Neither the wide statement of the purposes of the Human Rights Law, nor the definition of terms used, nor the provisions of the Constitution which the Human Rights Law fulfills, indicates an intent to exclude public employers from the sanctions directed toward discriminatory practices under the Act, and thus public school teacher who felt that school's maternity leave policy was discriminatory was entitled to carry her grievance to the State Division of Human Rights. Board of Education v New York State Div. of Human Rights, 42 A.D.2d 49, 345 N.Y.S.2d 93, 1973 N.Y. App. Div. LEXIS 4062 (N.Y. App. Div. 2d Dep't 1973), aff'd, 35 N.Y.2d 673, 360 N.Y.S.2d 887, 319 N.E.2d 202, 1974 N.Y. LEXIS 1326 (N.Y. 1974).

In action for retaliation under CLS Exec § 296(7) brought against Board of Trustees of divinity school (defendant), court should have granted defendant's motion to dismiss complaint where there were no allegations that defendant fell within ambit of CLS Exec § 292(1), nor was it alleged that activity or activities in which defendant engaged were allegedly prohibited under Human Rights Law; although plaintiff alleged that defendant violated general duty to accommodate her disability under CLS Exec § 296(3)(a), that section applied to employers, licensing agencies, employment agencies, and labor organizations and did not apply here. Edwards v Board of Trustees of Colgate Rochester Divinity Sch., 254 A.D.2d 709, 677 N.Y.S.2d 868, 1998 N.Y. App. Div. LEXIS 10379 (N.Y. App. Div. 4th Dep't 1998).

Defendants were entitled to summary judgment dismissing employee's action alleging that they unlawfully discriminated against her by discharging her because of her disability in violation of CLS Exec § 296(1)(a) where (1) within a few days after employee was fired for poor work performance, she applied for workers' compensation benefits, claiming that she was totally

disabled and unable to work as result of back injury sustained during course of her employment, (2) CLS Exec § 292(21) limits Human Rights Law recovery to disabilities that "do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held," and (3) employee could not claim that she was entitled to workers' compensation benefits on ground that she was totally disabled and, at same time, claim that her "disability" was within protection of § 292(21). Sherman v Kang, 275 A.D.2d 1016, 713 N.Y.S.2d 597, 2000 N.Y. App. Div. LEXIS 9602 (N.Y. App. Div. 4th Dep't 2000).

Summary judgment dismissing an employee's discrimination claim against a county was proper; the employee failed to make a prima facie showing of either disability or age discrimination in the county's failure to promote him to police sergeant because the employee failed to establish that he could perform the essential functions of the position of police sergeant. The employee also failed to make a prima facie showing of retaliation because he failed to establish a causal connection between the protected activity and the adverse action. Simeone v County of Suffolk, 36 A.D.3d 890, 828 N.Y.S.2d 560, 2007 N.Y. App. Div. LEXIS 966 (N.Y. App. Div. 2d Dep't 2007).

Sua sponte dismissal of a former employee's claim of disability discrimination in violation of N.Y. Exec. Law § 296 was error because, although the former employee failed to comply with the grievance procedure set forth in the parties' collective bargaining agreement (CBA), the CBA contained no provisions for resolution of employment discrimination disputes, let alone any clear and unmistakable language waiving the right to judicial forum for such claims; although the former employer and the superintendent asserted a failure to exhaust administrative remedies in support of their motion to dismiss the former employee's separate cause of action alleging breach of contract, the former employer and the superintendent never set forth the failure to exhaust administrative remedies in support of their motion to dismiss the employment discrimination claim, and thus the former employee was deprived of an opportunity to submit additional proof in opposition. Ambrosino v Village of Bronxville, 58 A.D.3d 649, 873 N.Y.S.2d 312, 2009 N.Y. App. Div. LEXIS 372 (N.Y. App. Div. 2d Dep't 2009).

Terminated employee's New York State Human Rights Law, N.Y. Exec. Law § 296(1)(a), and the New York City Human Rights Law, New York City, N.Y., Admin. Code § 8-107(1)(a), claim failed as the employer engaged in an interactive process for purposes of N.Y. Exec. Law § 292 and New York City, N.Y., Admin. Code § 8-107(15) by: (1) seeking clarification from the employee's doctor, keeping the employee's job open during two separate medical leaves, and communicating with the employee and his doctor; and (2) it was only after it was confirmed that the employee could not work at construction sites that he was terminated. Jacobsen v New York City Health & Hosps. Corp., 97 A.D.3d 428, 948 N.Y.S.2d 586, 2012 N.Y. App. Div. LEXIS 5386 (N.Y. App. Div. 1st Dep't 2012), aff'd in part, modified, 22 N.Y.3d 824, 988 N.Y.S.2d 86, 11 N.E.3d 159, 2014 N.Y. LEXIS 570 (N.Y. 2014).

Attorney general was entitled to a permanent injunction prohibiting the landlord from violating West Seneca Fair Housing Code § 71-3 (A) because the landlord had engaged in discrimination based on a person's source of income by refusing to accept housing vouchers under § 8 of the United States Housing Act of 1937. Section 8 vouchers constituted a "source of income" because they were a recurrent benefit, measured in terms of money, that constituted financial gain to the recipient. People v Ivybrooke Equity Enters., LLC, 175 A.D.3d 1000, 107 N.Y.S.3d 248, 2019 N.Y. App. Div. LEXIS 6345 (N.Y. App. Div. 4th Dep't 2019).

Plaintiff's discharge from his employment with a town highway department solely because he was the son of the former town supervisor, a political adversary of the successor supervisor, did not state a cause of action for unlawful discriminatory practice under Exec Law § 296(1) as a discharge based on national origin; although Exec Law § 292(8) provides that the term national origin includes ancestry, the legislative intent of the statute was to prohibit discrimination based upon the country in which an individual was born, as well as the country in which an individual's ancestors were born; the discharge of an employee based on political differences with the employee's father is not prohibited. Ingalls v Lyndon, 127 Misc. 2d 442, 486 N.Y.S.2d 659, 1985 N.Y. Misc. LEXIS 2614 (N.Y. Sup. Ct. 1985).

Co-op resident could bring discrimination and retaliation claims against a co-op director; N.Y. Exec. Law § 296 and New York City, N.Y., Admin. Code § 8-107 provided for individual liability without an exemption for corporate directors, and discriminatory conduct was not protected by the business judgment rule. Fletcher v Dakota, Inc., 99 A.D.3d 43, 948 N.Y.S.2d 263, 2012 N.Y. App. Div. LEXIS 5245 (N.Y. App. Div. 1st Dep't 2012).

Not-for-profit religious corporation may maintain action under Human Rights Law. Jews for Jesus, Inc. v Jewish Community Relations Council, Inc., 968 F.2d 286, 1992 U.S. App. LEXIS 15614 (2d Cir. N.Y. 1992).

Black shoppers could not maintain action against town for violation of CLS Exec § 296(2)(a) based on town police officers' conduct in removing them from department store at request of store manager, who suspected them of shoplifting, since town defendants did not fall within definition of persons liable under § 296(2)(a), and plaintiffs failed to set forth any facts that would support finding that agency relationship existed between town defendants and store. Robinson v Town of Colonie, 878 F. Supp. 387, 1995 U.S. Dist. LEXIS 2849 (N.D.N.Y. 1995).

2. Employment agency

Newspaper which contained separate help wanted columns for female and male help was not an "employer" nor an "employment agency" within meaning of law which prohibits discrimination on basis of sex. NOW v State Div. of Human Rights, 34 N.Y.2d 416, 358 N.Y.S.2d 124, 314 N.E.2d 867, 1974 N.Y. LEXIS 1480 (N.Y. 1974).

A complaint which stated that the defendant newspaper published employment opportunities under separate headings for help wanted—male, help wanted—female and help wanted—male or female, without regard as to whether or not sex constituted a bona fide qualification for the employment opportunities so listed, and charging discrimination because of sex, failed to state a cause of action, the legislature not intending to include newspapers within the definition of the term "employment agency" as contained in Executive Law § 292, subd 2. National Organization for Women v Buffalo Courier-Express, Inc., 71 Misc. 2d 917, 337 N.Y.S.2d 608, 1972 N.Y. Misc. LEXIS 1706 (N.Y. Sup. Ct. 1972).

When the attorney general sought to subpoena records of a domestic worker placement agency, to determine if the agency was violating N.Y. Exec. Law § 296 et seq., N.Y. Civ. Rights Law § 40-c, and New York City, N.Y., Admin. Code § 8-107(a), by asking job applicants about their national origin, age, and marital status and accommodating employer preferences as to a worker's national origin and age, the attorney general could subpoena agency documents used to record information about job applicants, fees the agency earned for placing applicants, and applicants' hiring rates, but, as to information about agency clients, the attorney general was only entitled to agency intake forms used to register clients, and documents showing job characteristics, requirements, and/or employer preferences, but could not know who the prospective employers were, as this would interfere with the personal employment relationships between the employers and the workers they hired, which would be contrary to the intention of the legislature when it enacted N.Y. Exec. Law § 292(6). Matter of Pavillion Agency Inc v Spitzer, 802 N.Y.S.2d 879, 9 Misc. 3d 626, 234 N.Y.L.J. 28, 2005 N.Y. Misc. LEXIS 1613 (N.Y. Sup. Ct. 2005).

3. Employer

The definitions set up by subd 5 of this section do not effectively take the New York City Board of Higher Education away from the general jurisdiction of the Commission or leave the Commission without power to control instances of discrimination in the employment policies of educational institutions the same as in other areas of public employment. Board of Higher Education v Carter, 14 N.Y.2d 138, 250 N.Y.S.2d 33, 199 N.E.2d 141, 1964 N.Y. LEXIS 1228 (N.Y. 1964).

Provision of the Disability Benefits Law which excepts disabilities caused by or arising in connection with pregnancy from the minimum benefits mandated by that law does not excuse private employers with more than three employees from the necessity of complying with provision of the Human Rights Law which prohibits discrimination in employment based on sex and which has been held to prohibit employment personnel policies which single out pregnancy and child birth for treatment different from that accorded other instances of physical or medical impairment or disability. Brooklyn Union Gas Co. v New York State Human Rights Appeal Bd., 41 N.Y.2d 84, 390 N.Y.S.2d 884, 359 N.E.2d 393, 1976 N.Y. LEXIS 3253 (N.Y. 1976), reh'g denied, 42 N.Y.2d 824, 1977 N.Y. LEXIS 3961 (N.Y. 1977).

The Disability Benefits Law, which excepts disabilities caused by or arising in connection with pregnancy from the minimum benefits mandated by that law, and the Human Rights Law, which prohibits discrimination in employment based on sex, impose two concurrent independent minimum standards; for employers with three or fewer employees, the operative minimum is only that of the Disability Benefits Law; but for all others, within the reach of both statutes, the operative standard which imposes the greater obligation is controlling. Brooklyn Union Gas Co. v New York State Human Rights Appeal Bd., 41 N.Y.2d 84, 390 N.Y.S.2d 884, 359 N.E.2d 393, 1976 N.Y. LEXIS 3253 (N.Y. 1976), reh'g denied, 42 N.Y.2d 824, 1977 N.Y. LEXIS 3961 (N.Y. 1977).

Corporate employee, even though officer and manager of division, is not individually subject to action under § 6(d) of Fair Labor Standards Act (29 USCS § 206(d)) or New York's Human Rights Law (Executive Law, Article 15) if he is not shown to have ownership interest or power to do more than carry out personnel decisions made by others. Patrowich v Chemical Bank, 63 N.Y.2d 541, 483 N.Y.S.2d 659, 473 N.E.2d 11, 1984 N.Y. LEXIS 4717 (N.Y. 1984).

In an employment discrimination action, the complaint was properly dismissed as to an individual defendant who was one of approximately 800 vice-presidents of the corporate defendant and was not shown to have any ownership interest or power to do more than carry out personnel decisions made by others, since a corporate employee, even if he has a title as an officer and is the manager or supervisor of a corporate division, is not individually subject to suit with respect to discrimination based on age or sex under New York's Human Rights Law (Exec Law Art 15), Labor Law § 194, or the Federal Age Discrimination In Employment Act (29 USCS § 623) or Equal Pay Act (29 USCS § 206(d)), if he is not shown to have any ownership interest or any power to do more than carry out personnel decisions made by others. Patrowich v Chemical Bank, 63 N.Y.2d 541, 483 N.Y.S.2d 659, 473 N.E.2d 11, 1984 N.Y. LEXIS 4717 (N.Y. 1984).

In a case wherein the United States Court of Appeals for the Second Circuit certified three questions to the Court of Appeals of New York, the Court held that N.Y. Exec. Law § 296(6) extends liability to an out-of-state non-employer who aids or abets employment discrimination against individuals with a prior criminal conviction. Griffin v Sirva, Inc., 29 N.Y.3d 174, 76 N.E.3d 1063, 54 N.Y.S.3d 360, 2017 N.Y. LEXIS 1244 (N.Y. 2017).

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Defendant's motion for summary judgment should have been granted in action for unlawful discrimination based on disability–defendant is close corporation in which husband and wife are principals; they employ one full-time person and one part-time person; plaintiff, defendant's full-time employee, was terminated following surgery for breast cancer; Executive Law § 296, which prohibits discriminatory practices based on disability, is inapplicable because of number of persons employed by defendant; Executive Law § 292 (5) provides that "employer" does not include any employer with fewer than four persons in his employ, and while plaintiff contends that defendant employed at least four persons, this figure is reached only by including principals husband and wife as employees; statute envisions situation where employer engages four persons other than himself or herself. Germakian v Kenny International Corp., 151 A.D.2d 342, 543 N.Y.S.2d 66, 1989 N.Y. App. Div. LEXIS 7998 (N.Y. App. Div. 1st Dep't), app. denied, 74 N.Y.2d 615, 549 N.Y.S.2d 960, 549 N.E.2d 151, 1989 N.Y. LEXIS 3205 (N.Y. 1989).

In employment discrimination action against condominium which employed plaintiff as concierge and whose superintendent allegedly harassed her, condominium's managing agent was not entitled to summary judgment on ground that it was neither plaintiff's nor superintendent's employer where plaintiff, although paid by condominium, was hired, supervised and fired by managing agent, and managing agent's day-to-day control over plaintiff and superintendent was substantial; furthermore, issue of fact existed as to whether managing agent, even if not plaintiff's employer, aided and abetted superintendent's harassment of her, which would render it liable under CLS Exec § 296(6). Sanchez v Brown, Harris, Stevens, Inc., 234 A.D.2d 170, 651 N.Y.S.2d 477, 1996 N.Y. App. Div. LEXIS 12551 (N.Y. App. Div. 1st Dep't 1996).

Cause of action for employment discrimination based on age was properly dismissed as against one of 2 corporate defendants where unrefuted documentary evidence, including W-2 forms, showed that plaintiff was employed by, and received salary only from, other corporate defendant. Brady v Helmsley, 246 A.D.2d 486, 668 N.Y.S.2d 198, 1998 N.Y. App. Div. LEXIS 705 (N.Y. App. Div. 1st Dep't 1998).

Cause of action for employment discrimination based on age was properly sustained as against individual defendant who directed plaintiff's hours of employment, ordered his termination and later reinstatement, and otherwise controlled his employment in business organization that defendant controlled where that organization had more than 4 employees, as required by CLS Exec § 292(5), as did defendant's household staff. Brady v Helmsley, 246 A.D.2d 486, 668 N.Y.S.2d 198, 1998 N.Y. App. Div. LEXIS 705 (N.Y. App. Div. 1st Dep't 1998).

New York State Division of Human Rights properly dismissed, for lack of jurisdiction, claim of racial discrimination brought by certified home health care aide, who was employed by 93-year-old quadriplegic to provide 24-hour care to attend to his health and personal hygiene needs, to cook for him, to transport him, and otherwise to care for him. Thomas v Dosberg, 249 A.D.2d 999, 672 N.Y.S.2d 164, 1998 N.Y. App. Div. LEXIS 5177 (N.Y. App. Div. 4th Dep't 1998).

Employer who did not employ 4 or more persons during period in which alleged discrimination based on sexual harassment took place was entitled to summary judgment dismissing plaintiff's claim under CLS Exec § 296(1)(a). DeStefano v Kopelman, 265 A.D.2d 446, 697 N.Y.S.2d 111, 1999 N.Y. App. Div. LEXIS 10609 (N.Y. App. Div. 2d Dep't 1999).

In action seeking money damages for employment discrimination, assault and battery and intentional infliction of emotional distress, corporate defendants were not entitled to dismissal of claims predicated on their failure to remedy plaintiff's work environment and acquiescence in acts of assault and harassment committed by coworkers and managerial employees over 12-year period, in view of lengthy history of alleged abuse, record made when incidents were reported by plaintiff, and alleged complicity of managerial personnel. Acosta v Loews Corp., 276 A.D.2d 214, 717 N.Y.S.2d 47, 2000 N.Y. App. Div. LEXIS 12405 (N.Y. App. Div. 1st Dep't 2000).

Since, under subd. 5 of this section, the term "employer" does not apply to a nonprofit educational corporation, the investigative powers of the State Commission Against Discrimination do not extend to practices of the New York City Board of Higher Education. Board of Higher Education v Carter, 26 Misc. 2d 989, 213 N.Y.S.2d 132, 1961 N.Y. Misc. LEXIS 3313 (N.Y. Sup. Ct. 1961), modified, 16 A.D.2d 443, 228 N.Y.S.2d 704, 1962 N.Y. App. Div. LEXIS 9402 (N.Y. App. Div. 1st Dep't 1962).

Due to the common management, ownership, and financial control of an employer and its interrelated entities, their employees were properly aggregated to satisfy N.Y. Exec. Law § 292(5); in addition, since the employer violated N.Y. Exec. Law § 296(1)

by discriminating against an employee based on her pregnancy, it was not entitled to N.Y. Exec. Law § 298 relief. Matter of Argyle Realty Assocs. v New York State Div. of Human Rights, 65 A.D.3d 273, 882 N.Y.S.2d 458, 2009 N.Y. App. Div. LEXIS 5399 (N.Y. App. Div. 2d Dep't 2009).

Former legislative aides adequately pled that the State of New York was their employer because the State paid their salary and benefits and represented that it was their employer on tax forms, and the employee manual advised that they must abide by State personnel policies. Burhans v State, 2015 N.Y. Misc. LEXIS 9641 (N.Y. Sup. Ct. Jan. 7, 2015).

Chauffeur/driver's (CD) claim against a law firm, alleging that it terminated him after he was hospitalized in violation of, inter alia, the New York State and New York City Human Rights Laws, lacked merit because the evidence clearly indicated that he was employed by a member of the firm personally and that the CD performed the type of domestic service that was excluded from the definition of employee. Jackson v Abrams, Fensterman, Fensterman, Flowers, Greenberg & Eisman, LLP, 52 Misc. 3d 183, 29 N.Y.S.3d 91, 2016 N.Y. Misc. LEXIS 172 (N.Y. Civ. Ct. 2016).

Former bus driver did not have a claim for disability discrimination under the Americans with Disabilities Act, 42 U.S.C.S. § 12101 et seq., or under the corresponding state and city laws set forth in N.Y. Exec. Law §§ 292, 296, and N.Y. City Admin. Code § 8-107, because the employee could not show that he was qualified for the job when the employee was not able to meet a reasonable job requirement of obtaining a medical certificate of fitness when the employee could not pass a test for colorblindness. Shannon v N.Y. City Transit Auth., 332 F.3d 95, 2003 U.S. App. LEXIS 11717 (2d Cir. N.Y. 2003).

Individual employees could not be held liable for age discrimination in violation of Human Rights Law where they were not shown to have any ownership interest or power to do more than carry out personnel decisions made by others, and plaintiffs failed to identify specific discriminatory employment decisions made by any particular defendant with respect to particular plaintiffs other than conclusory allegations of generalized "conspiracy" involving all defendants; "person" under CLS Exec § 292(1) should be interpreted to exclude individuals in common employment relationship. Falbaum v Pomerantz, 891 F. Supp. 986, 1995 U.S. Dist. LEXIS 10370 (S.D.N.Y. 1995).

Medical school that provided medical services at city hospital was not entitled to dismissal of discrimination claim asserted by hospital employee on ground that it was not plaintiff's "employer"; although medical school did not have ultimate authority to hire or fire plaintiff and it did not pay her wages, its employees exercised significant influence and control over conditions of plaintiff's employment and her "fate" at hospital. Dortz v City of New York, 904 F. Supp. 127, 1995 U.S. Dist. LEXIS 14438 (S.D.N.Y. 1995).

Foreign parent corporation was not "employer" for purposes of New York Human Rights Law or New York City Human Rights Law where there was no claim that it had power to select, hire or dismiss subsidiary's employees, and plaintiff employee failed to show that it paid any salary or wages to him. Robins v Max Mara, U.S.A., 923 F. Supp. 460, 1996 U.S. Dist. LEXIS 1295 (S.D.N.Y. 1996).

Plaintiff's supervisors were not liable for damages under CLS Exec § 296 where they did not learn of alleged discriminatory acts until just prior to and when plaintiff first resigned, significant steps were taken at that time to remedy those acts, and there was no evidence that they knew or should have known of discriminatory acts alleged by plaintiff that occurred after he returned to work on new shift assignment. Amin v Quad/Graphics, 929 F. Supp. 73, 1996 U.S. Dist. LEXIS 12262 (N.D.N.Y. 1996).

For purposes of action under Human Rights Law by clerical employee of Kings County public administrator, New York City was plaintiff's employer as matter of law even though it was not involved in public administrator's hiring decisions, where it paid plaintiff's wages and benefits, it controlled her conduct as far as setting permissible holidays and docking her pay when she was late for work, and it had authority to fire her. Gryga v Ganzman, 991 F. Supp. 105, 1998 U.S. Dist. LEXIS 262 (E.D.N.Y. 1998).

Employee's New York State Human Rights Law (CLS Exec Law §§ 290 et seq.) cause of action may proceed against both public administrator and city, even though city is not involved in administrator's hiring decisions, where city can exercise its authority to fire employee, pays her wages and benefits, and controls her conduct as far as setting forth permissible holidays and docking her pay when she is late, because city can be deemed her "employer" under § 292(5) for purposes of liability. Gryga v Ganzman, 991 F. Supp. 105, 1998 U.S. Dist. LEXIS 262 (E.D.N.Y. 1998).

Electrical worker's age discrimination claim against trade association must fail, even though association negotiated collective bargaining agreement with worker's union under which he obtains employment with electrical contractors, where trade association that represents its employer members in negotiations with labor unions is neither employer of unions' workers nor agent of its employer members, because association cannot be sued as "employer" under New York Human Rights Law (Exec §§ 290 et seq.). Gallagher v IBEW, 130 F. Supp. 2d 359, 2001 U.S. Dist. LEXIS 1677 (N.D.N.Y. 2001).

4. Places of public accommodation

In proceedings based upon an order of the State Commission against discrimination the evidence established that the premises occupied by a beach club which were leased from the former operator, a commercial corporation, and which had extensive facilities, was a place of public accommodation, resort, or amusement; that the beach club was never a bona fide membership corporation; and that the real parties in interest employed the device of such corporation to facilitate the exclusion of Negroes so as to continue a discriminatory practice in a place of public accommodation. Castle Hill Beach Club, Inc. v Arbury, 2 N.Y.2d 596, 162 N.Y.S.2d 1, 142 N.E.2d 186, 1957 N.Y. LEXIS 1091 (N.Y. 1957).

A non-profit, tax-exempt foreign corporation and three of its local charter organizations located in New York, which systematically offered a service or accommodation to the public through their boating courses and promotional activities, were owners of places of public accommodation, resort or amusement, notwithstanding that the place of such public accommodation was not of fixed location, and the corporation and its charter organizations failed to establish that they were distinctively private clubs within the statutory exclusion. United States Power Squadrons v State Human Rights Appeal Bd., 59 N.Y.2d 401, 465 N.Y.S.2d 871, 452 N.E.2d 1199, 1983 N.Y. LEXIS 3181 (N.Y. 1983).

Police power delegated to municipalities under State Constitution's home rule provision permits City of New York to define for itself when club loses its "distinctly private" nature so as to subject it to antidiscrimination provision of City Human Rights Law, despite use of term "distinctly private" without further definition in CLS Exec § 292(9), since no evidence exists of legislature's preemption of antidiscrimination legislation and city's more specific definition merely established criteria of selectivity and privateness based on size and amount of business-related income from nonmembers. N.Y. State Club Ass'n v City of New York, 69 N.Y.2d 211, 513 N.Y.S.2d 349, 505 N.E.2d 915, 1987 N.Y. LEXIS 15359 (N.Y. 1987), aff'd, 487 U.S. 1, 108 S. Ct. 2225, 101 L. Ed. 2d 1, 1988 U.S. LEXIS 2861 (U.S. 1988).

CLS Exec § 292(9), in reciting list of places that fall within term "place of public accommodation, resort or amusement," provides list that is illustrative, not specific. Cahill v Rosa, 89 N.Y.2d 14, 651 N.Y.S.2d 344, 674 N.E.2d 274, 1996 N.Y. LEXIS 3056 (N.Y. 1996).

Dentists' offices come within term "place of public accommodation, resort or amusement" because they provide services to public, even though such services may be conducted on private premises and by appointment. Cahill v Rosa, 89 N.Y.2d 14, 651 N.Y.S.2d 344, 674 N.E.2d 274, 1996 N.Y. LEXIS 3056 (N.Y. 1996).

Hallmark of "private" place within meaning of Human Rights Law is its selectivity or exclusivity, and persons seeking benefit of exemption have burden of establishing that their place of accom-

modation is "distinctly" private. Cahill v Rosa, 89 N.Y.2d 14, 651 N.Y.S.2d 344, 674 N.E.2d 274, 1996 N.Y. LEXIS 3056 (N.Y. 1996).

Dentists failed to sustain their burden of proving that their offices were "distinctly private" and therefore exempt from Human Rights Law under provisions of CLS Exec § 292(9) where one dentist established only that premises in which his office was located were privately owned and that patients were generally required to make appointments to be seen, other dentist offered no relevant evidence, and neither dentist offered evidence that his patient roster was selective or exclusive, or that his practice was not generally held open to public. Cahill v Rosa, 89 N.Y.2d 14, 651 N.Y.S.2d 344, 674 N.E.2d 274, 1996 N.Y. LEXIS 3056 (N.Y. 1996).

Evidence that private club had permitted its premises to be used for a fashion show, that tickets to such event were sold to general public without restriction and without limitation thereon as to facilities of club which would be open during show, and that there was a free flow of guests from banquet room to bar room with no attempt to restrict any except blacks, was ample to support determination that club was a place of public accommodation during show and that blacks had been refused service because of race or color. Batavia Lodge No. 196, L. O. M. v New York State Div. of Human Rights, 43 A.D.2d 807, 350 N.Y.S.2d 273, 1973 N.Y. App. Div. LEXIS 2914 (N.Y. App. Div. 4th Dep't 1973), rev'd, 35 N.Y.2d 143, 359 N.Y.S.2d 25, 316 N.E.2d 318, 1974 N.Y. LEXIS 1377 (N.Y. 1974).

Airline travel club open only to professional travel counselors and travel agents was not place of public accommodation within meaning of CLS Exec §§ 296(2)(a) and 292(9) since travel club was not available to general public but was merely incentive program for travel agents. Ness v Pan American World Airways, 142 A.D.2d 233, 535 N.Y.S.2d 371, 1988 N.Y. App. Div. LEXIS 12457 (N.Y. App. Div. 2d Dep't 1988).

Petitioner, orthopedic surgeon in private practice, upon being informed that patient contracted AIDS, advised patient he would no longer treat him and that he should seek treatment at AIDS clinic; patient filed complaint with respondent, State Division of Human Rights (SDHR), alleging petitioner had discriminated against him on basis of his disability and SDHR made preliminary finding it had jurisdiction and found probable cause to believe petitioner had engaged in unlawful discriminatory practice; petitioner's proceeding seeking to prohibit SDHR from holding hearing on ground that private physician's office is not "place of public accommodation" within meaning of Human Rights Law (Executive Law § 292 [9]) is dismissed; inasmuch as no administrative hearing has yet been held to allow SDHR to determine whether petitioner's medical office is "place of public accommodation" and because agency's final determination is subject to judicial review (Executive Law § 298), relief by way of writ of prohibition is not appropriate remedy. Elstein v State Div. of Human Rights, 161 A.D.2d 1157, 555 N.Y.S.2d 516, 1990 N.Y. App. Div. LEXIS 9153 (N.Y. App. Div. 4th Dep't), app. denied, 76 N.Y.2d 710, 563 N.Y.S.2d 61, 564 N.E.2d 671, 1990 N.Y. LEXIS 3354 (N.Y. 1990).

Judgment which granted petition to annul determination of State Division of Human Rights (SDHR) dismissing petitioner's claim that respondents were guilty of unlawful discriminatory practice based on creed affirmed–petitioner contracted with respondents to lease space in respondents' shopping center for purpose of displaying nativity scene and fireplace promotion; respondents decided to discontinue leasing space to petitioner as part of efforts "too keep the commercial aspects of Christmas out of religion"–Supreme Court correctly concluded that rental space at issue within respondents' mall was commercial space according to Human Rights Law (see, Executive Law § 292 [13]); fireplace display is not merely incidental but clearly brings intended use within statutory definition of commercial space; accordingly, given SDHR's irrational and unreasonable interpretation of term "commercial space", as envisioned by Human Rights Law, Supreme Court properly vacated and remitted matter of SDHR for consideration of merits. Bruno v Pembrooke Management, 167 A.D.2d 754, 563 N.Y.S.2d 317, 1990 N.Y. App. Div. LEXIS 13977 (N.Y. App. Div. 3d Dep't 1990).

Trading floor of Commodities Exchange, Inc. (COMEX) was place of public accommodation under CLS Exec § 296(2)(a) since COMEX's trading floor supplied public service by enabling commodities to be traded, routinely accepted qualified applicants, and placed no subjective limits on number of persons eligible for membership. D'Amico v Commodities Exch., 235 A.D.2d 313, 652 N.Y.S.2d 294, 1997 N.Y. App. Div. LEXIS 506 (N.Y. App. Div. 1st Dep't 1997).

Elks Lodge was not place of public accommodation, but rather was distinctly private for purposes of CLS Exec § 292(9). Cummings v Watertown Lodge No. 496 Benevolent & Protective Order of Elks, Inc., 262 A.D.2d 1007, 693 N.Y.S.2d 786, 1999 N.Y. App. Div. LEXIS 7207 (N.Y. App. Div. 4th Dep't 1999).

"Elks Club" lodge was entitled to summary judgment dismissing claim that it discharged plaintiff in retaliation for filing lawsuit after her application for membership in lodge was denied by reason of gender, allegedly in violation of CLS Exec § 296(2), as there was no reasonable basis for plaintiff to have believed that defendant engaged in any discriminatory practice when it denied her membership application, given that CLS Exec § 292(9) explicitly excludes benevolent organization such as Elks Club from mandate of § 296(2) and, since plaintiff was not even "colorably aggrieved" under § 296(2), there was no basis for claim of retaliatory discharge under § 296(1). Dodd v Middletown Lodge (Elks Club) No. 1097, 264 A.D.2d 706, 695 N.Y.S.2d 115, 1999 N.Y. App. Div. LEXIS 9066 (N.Y. App. Div. 2d Dep't 1999), app. denied, 96 N.Y.2d 707, 725 N.Y.S.2d 637, 749 N.E.2d 206, 2001 N.Y. LEXIS 1517 (N.Y. 2001).

Commissioner of the New York State Division of Human Rights, properly found that a country club's membership admissions policy discriminated against applicants on the basis of creed, in violation of N.Y. Executive Law § 296(2)(a), as the club was properly determined to be a place of public accommodation, and did not fall within the distinctly private exception under N.Y. Executive Law § 292(9) since it had over 100 members and provided regular meals and services to non-members, thus, the club's religious quota system to admit new members was violative of N.Y. Executive Law § 296(2)(a). Further, a current member of the club had standing to file the discrimination complaint as his hearing testimony demonstrated that he was deprived of the associational benefits of interacting with at least two potential members who were placed on a waiting list because there were no available openings for members of their religion. Matter of Mill Riv. Club, Inc. v New York State Div. of Human Rights, 59 A.D.3d 549, 873 N.Y.S.2d 167, 2009 N.Y. App. Div. LEXIS 1108 (N.Y. App. Div. 2d Dep't), app. dismissed, 12 N.Y.3d 871, 882 N.Y.S.2d 679, 910 N.E.2d 428, 2009 N.Y. LEXIS 1779 (N.Y. 2009).

State Division of Human Rights properly determined that the owners of a farm were subject to the Human Rights Law because the farm's wedding facilities fell within the broad definition of "place of public accommodation"; the owners opened the farm to the public as a venue for wedding ceremonies and receptions and offered several wedding-related event services. Matter of Gifford v Mccarthy, 137 A.D.3d 30, 23 N.Y.S.3d 422, 2016 N.Y. App. Div. LEXIS 238 (N.Y. App. Div. 3d Dep't 2016).

Respondent State Division of Human Rights does not have concurrent jurisdiction with the Insurance Department over petitioners' alleged discriminatory practice of refusing to issue complainant, a married woman, a Blue Cross and Blue Shield health insurance policy for single persons because of her marital status since insurance carriers are not places of "public accommodation" (Executive Law, § 296, subd 2, par [a]) over which respondent has jurisdiction. Places of "public accommodation" include "wholesale and retail stores and establishments dealing with goods or services of any kind" (Executive Law, § 292, subd 9). While an insurance carrier may be an establishment providing services, it is not a "wholesale and retail" establishment within the meaning of the statute. The Insurance Department has exclusive jurisdiction over questions concerning "unfairly discriminatory" rates (Insurance Law, § 255, subd 2). In any event, under subdivision 40 of the Insurance Law, rates which take into account an applicant's marital status are not "unfairly discriminatory". Rochester Hospital Service Corp. v Division of Human

Rights of Executive Dep't, 92 Misc. 2d 705, 401 N.Y.S.2d 413, 1977 N.Y. Misc. LEXIS 2608 (N.Y. Sup. Ct. 1977).

A complaint which alleges that defendants have illegally used public funds in the purchase of buses and in the construction of transportation facilities which are inaccessible to wheelchair bound and semiambular persons in violation of statutes making it an unlawful discriminatory practice to deny to disabled persons the facilities of "any place of public accommodation" (Executive Law, § 292, subd 9; § 296, subd 2, par [a]), states a cause of action since the disabled require more than equal treatment to insure them the same rights in the utilization of mass transportation as other persons and defendants have not demonstrated on the motion for summary judgment that any of the required "special efforts" have been made; Federal law requires local transportation authorities receiving Federal funds to make special efforts in making facilities accessible to the disabled (US Code, tit 49, § 1612, subd [a]; tit 23, § 142) and affirmative action is imposed on the Secretary of Transportation not merely to refrain from discrimination against handicapped persons but to provide directly for them. Eastern Paralyzed Veteran's Ass'n v Metropolitan Transp. Authority, 103 Misc. 2d 933, 426 N.Y.S.2d 406, 1980 N.Y. Misc. LEXIS 2225 (N.Y. Sup. Ct.), modified, 79 A.D.2d 516, 433 N.Y.S.2d 461, 1980 N.Y. App. Div. LEXIS 13832 (N.Y. App. Div. 1st Dep't 1980).

New York City Commission on Human Rights erred in finding that office of petitioner dentist, who took patients only by referral and did not advertise through telephone directory or otherwise, was "place of public accommodation" within meaning of City's Human Rights Law, NYC Admin Code § 8-102(9); thus, finding that petitioner engaged in discriminatory practice under law by refusing to provide dental services to AIDS patient would be vacated. Sattler v New York Com. on Human Rights, 147 Misc. 2d 189, 554 N.Y.S.2d 763, 1990 N.Y. Misc. LEXIS 149 (N.Y. Sup. Ct. 1990), aff'd, 180 A.D.2d 644, 580 N.Y.S.2d 35, 1992 N.Y. App. Div. LEXIS 1262 (N.Y. App. Div. 2d Dep't 1992).

Local Elks lodge was not place of public accommodation under CLS Exec § 292(9), warranting dismissal of claims against lodge and lodge officials for alleged violations of CLS Exec § 296(2)(a) relative to denial of plaintiff's application for membership. Gifford v Guilderland Lodge, No. 2480, 178 Misc. 2d 707, 681 N.Y.S.2d 194, 1998 N.Y. Misc. LEXIS 530 (N.Y. Sup. Ct. 1998), aff'd, 272 A.D.2d 721, 707 N.Y.S.2d 722, 2000 N.Y. App. Div. LEXIS 5710 (N.Y. App. Div. 3d Dep't 2000).

Since a lodge of a benevolent order was not a place of public accommodation, New York's Division of Human Rights could dismiss a woman's challenge to the denial of her application to join the lodge for lack of jurisdiction; however, it was arbitrary and capricious for the Division to have indicated in its dismissal that it was dismissing her action on the merits, because this deprived her of the opportunity to annul her election of remedies and pursue relief through a court action. Orendorff v B.P.O.E. Lodge No. 96, 195 Misc. 2d 53, 753 N.Y.S.2d 703, 2003 N.Y. Misc. LEXIS 40 (N.Y. Sup. Ct. 2003).

Trial court properly dismissed a claim by a law client against a law firm, alleging a violation of N.Y. Exec. Law § 296, as, even if it were assumed that a law firm or an attorney's office was considered a "place of public accommodation" as defined by N.Y. Exec. Law § 292(9), the client failed to state a cause of action because she was not denied any "accommodations, advantages, facilities, or privileges" by the law firm under N.Y. Exec. Law § 296(2)(a). Ferdinand v Crecca & Blair, 5 A.D.3d 538, 774 N.Y.S.2d 714, 2004 N.Y. App. Div. LEXIS 2740 (N.Y. App. Div. 2d Dep't), app. denied, 3 N.Y.3d 609, 786 N.Y.S.2d 812, 820 N.E.2d 291, 2004 N.Y. LEXIS 2495 (N.Y. 2004).

Plaintiff's allegations against a hotel under § 1981 were sufficient to state a claim of discriminatory treatment under New York's unlawful discriminatory practices statute where she alleged, inter alia, an employee's use of a racial epithet in connection with her exclusion from a hotel room that she had reserved and paid for. She also satisfied the additional requirement of the New York law by alleging facts that supported an inference that the hotel's calculated inaction in response to discriminatory conduct by its employee indicated that it condoned his conduct. Clark v City of New York, 2014 U.S. Dist. LEXIS 136363 (E.D.N.Y. Sept. 19, 2014).

5. Disabilities

Alcohol dependency qualifies as disability within meaning of Human Rights Law. McEniry v Landi, 84 N.Y.2d 554, 620 N.Y.S.2d 328, 644 N.E.2d 1019, 1994 N.Y. LEXIS 4122 (N.Y. 1994).

It is an unlawful discriminatory practice for an employer, because of a disability of any individual, to refuse to employ or to discharge such individual or to discriminate against him in compensation or in the terms, conditions or privileges of employment, disability being limited to physical, mental or medical conditions which are unrelated to the ability to engage in the activities involved in the job or occupation. Arnot Ogden Memorial Hospital v State Div. of Human Rights, 67 A.D.2d 543, 416 N.Y.S.2d 372, 1979 N.Y. App. Div. LEXIS 10500 (N.Y. App. Div. 3d Dep't 1979).

The mandate of Exec Law § 292(21), as it existed in 1975, excluded as a basis for a finding of discrimination in employment any disability related to the ability to engage in a particular job. Although this section was later amended to broaden the class sought to be protected, the amended section is not of retroactive application. Therefore, the trial court improperly denied employer's motion for summary judgment where former employee conceded her inability, due to her disability, to undertake the new duties required of a receptionist after an office reorganization. Pugach v Liggett Group, Inc., 81 A.D.2d 552, 438 N.Y.S.2d 307, 1981 N.Y. App. Div. LEXIS 11020 (N.Y. App. Div. 1st Dep't 1981), aff'd, 55 N.Y.2d 922, 449 N.Y.S.2d 172, 434 N.E.2d 241, 1982 N.Y. LEXIS 3116 (N.Y. 1982).

Prior to statute's amendment in 1979, to be disabled within meaning and, therefore, protection of Executive Law, one's disability had to be entirely unrelated to ability to engage in particular job or profession; legislative desire to bring state law into conformity with stricter federal provisions proscribing improper discrimination against handicapped prompted amendment bringing within law's protection anyone whose disability did not prevent reasonable performance of his or her job or profession. Carrero v New York City Housing Authority, 116 A.D.2d 141, 500 N.Y.S.2d 246, 1986 N.Y. App. Div. LEXIS 50373 (N.Y. App. Div. 1st Dep't 1986).

Nonjob-related auto accident injury which precludes injured worker from working is not disability within §§ 292, 296. McAuliffe v Taft Furniture Warehouse & Showroom, Ltd., 116 A.D.2d 774, 497 N.Y.S.2d 170, 1986 N.Y. App. Div. LEXIS 51621 (N.Y. App. Div. 3d Dep't), app. denied, 67 N.Y.2d 609, 503 N.Y.S.2d 1025, 494 N.E.2d 458, 1986 N.Y. LEXIS 18621 (N.Y. 1986).

Employer was entitled to summary judgment dismissing employee's action alleging discrimination due to disability under CLS Exec § 296 where it was undisputed that employee's excessive absences were caused by various illnesses requiring hospitalization and employer's absence control plan required good employee attendance to effectively provide its communication services 24 hours per day, 365 days per year; since employee's condition was preventing her from reasonably performing her tasks, employee's decision to dismiss her was not unlawful discrimination. Giaquinto v New York Tel. Co., 135 A.D.2d 928, 522 N.Y.S.2d 329, 1987 N.Y. App. Div. LEXIS 52841 (N.Y. App. Div. 3d Dep't 1987), app. denied, 73 N.Y.2d 701, 535 N.Y.S.2d 595, 532 N.E.2d 101, 1988 N.Y. LEXIS 3347 (N.Y. 1988).

Medical student failed to state cause of action for discrimination by medical college where he alleged that college discriminated against him on basis of illness when it dismissed him purportedly because of poor academic performance since student's illness was not disability within meaning of CLS Exec § 292(21) as he did not dispute that illness was cause of his poor performance. Lowinger v State University of New York Health Science Center, 180 A.D.2d 606, 580 N.Y.S.2d 316, 1992 N.Y. App. Div. LEXIS 2860 (N.Y. App. Div. 1st Dep't), app. denied, 80 N.Y.2d 753, 587 N.Y.S.2d 904, 600 N.E.2d 631, 1992 N.Y. LEXIS 1733 (N.Y. 1992).

Employee's absence from work due to injury did not necessarily mean that injury was not "disability" as defined in CLS Exec

§ 292(21). Harbas v Gilmore, 193 A.D.2d 553, 597 N.Y.S.2d 704, 1993 N.Y. App. Div. LEXIS 5260 (N.Y. App. Div. 1st Dep't 1993).

New York Transit Authority employee did not qualify as disabled person within purview of Human Rights Law, CLS Exec § 292(21)(c), since he was capable of performing certain tasks required of other employees assigned overtime work, but his medical condition prevented him from performing important function of patrol duty; under circumstances, failure to assign overtime work to employee did not violate antidiscrimination provisions of Human Rights Law. Yasinosky v New York City Transit Auth., 193 A.D.2d 731, 598 N.Y.S.2d 52, 1993 N.Y. App. Div. LEXIS 4951 (N.Y. App. Div. 2d Dep't 1993).

Physical condition that prevents employee from reporting to work and requires employee to miss unacceptably high number of days of work is not "disability" within meaning of CLS Exec § 292(21). Clark v Cargill, Inc., Flour Milling Div., 206 A.D.2d 870, 615 N.Y.S.2d 210, 1994 N.Y. App. Div. LEXIS 7782 (N.Y. App. Div. 4th Dep't 1994).

Even if plaintiff was disabled by her cancers and attendant surgeries, her chronic absenteeism, tardiness and unsatisfactory performance evaluations established that she was unable to perform essential functions of her job as special education teacher, and thus she was not "otherwise qualified" for her job as required by discrimination statutes. Sirota v N.Y. City Bd. of Educ., 283 A.D.2d 369, 725 N.Y.S.2d 332, 2001 N.Y. App. Div. LEXIS 6583 (N.Y. App. Div. 1st Dep't 2001).

Determination that an employer violated N.Y. Exec. Law § 292(21-e) by failing to provide reasonable accommodations for the complainant's disability, which was a sensitivity to an ingredient in a cleaning solution used in her work, was supported by substantial evidence because, although the employer had protective equipment at the work site that may have alleviated the complainant's adverse reaction to the ingredient at issue, at no time before her termination from employment did the employer advise the complainant that the protective equipment was available for her use. Neither of the complainant's supervisors addressed the medical issues raised by the complainant and her physician before terminating her. Matter of New Venture Gear, Inc. v New York State Div. of Human Rights, 41 A.D.3d 1265, 839 N.Y.S.2d 375, 2007 N.Y. App. Div. LEXIS 7165 (N.Y. App. Div. 4th Dep't 2007).

Trial court properly concluded that an employee failed to state a cause of action for employment discrimination on the basis of disability as the employee failed to set forth factual allegations sufficient to show that, upon the provision of reasonable accommodations, she could perform the essential functions of her job. Staskowski v Nassau Community Coll., 53 A.D.3d 611, 862 N.Y.S.2d 544, 2008 N.Y. App. Div. LEXIS 6202 (N.Y. App. Div. 2d Dep't 2008).

While Human Rights Law is generally construed in accordance with federal employment discrimination law, employer is not required to affirmatively provide reasonable accommodation for employee's disability. Hendler v Intelecom USA, 963 F. Supp. 200, 1997 U.S. Dist. LEXIS 7057 (E.D.N.Y. 1997).

Employee's status as breast-feeding mother does not render her "disabled" under Human Rights Law; to extent that plaintiff argues that her child must breast-feed as matter of medical necessity, any disability is that of child alone. Bond v Sterling, Inc., 997 F. Supp. 306, 1998 U.S. Dist. LEXIS 3103 (N.D.N.Y. 1998).

Prima facie case of failure to provide an accommodation pursuant to New York's Human Rights Law, N.Y. Exec. Law § 292(21), requires the same showing as under the Americans with Disabilities Act (ADA), 42 U.S.C.S. § 12101 et seq., a plaintiff was disabled within the terms of the statute, his employer had notice of his disability, he could perform the essential functions of the job, with reasonable accommodation, and the employer failed to make such accommodations. Shannon v Verizon N.Y., Inc., 519 F. Supp. 2d 304, 2007 U.S. Dist. LEXIS 81888 (N.D.N.Y. 2007).

New York Human Rights Law (NYHRL), N.Y. Exec. Law § 292(21), does not protect an employee who, even upon the provision of a reasonable accommodation, is physically unable to perform her duties; therefore, a former teachers' aides discrimination claim under the NYHRL against a school district and others failed because she admitted that she was totally disabled and unable to work. Casale v Reo, 522 F. Supp. 2d 420, 2007 U.S. Dist. LEXIS 83611 (N.D.N.Y. 2007).

New York's definition of disability under N.Y. Exec. Law § 292 is more expansive than the Americans with Disabilities Act definition, and includes no requirement that the alleged disability restrict performance of a major life activity. Falso v Ablest Staffing Servs., 533 F. Supp. 2d 332, 2008 U.S. Dist. LEXIS 9956 (W.D.N.Y. 2008), aff'd, 328 Fed. Appx. 54, 2009 U.S. App. LEXIS 13378 (2d Cir. N.Y. 2009).

Where an employee moved for summary judgment on her disability employment discrimination claims, she had not established, as a matter of law, that she was disabled. She had not presented any medical evidence, such as physician's diagnosis, showing the nature and extent of her alleged disability, and her lack of independent medical evidence rendered summary judgment in her favor inappropriate. Montesano v Westgate Nursing Home, Inc., 956 F. Supp. 2d 417, 2013 U.S. Dist. LEXIS 105688 (W.D.N.Y. 2013).

Where an employee moved for summary judgment on her disability employment discrimination claims, the record was insufficient to show that the employer regarded her as having an impairment. Montesano v Westgate Nursing Home, Inc., 956 F. Supp. 2d 417, 2013 U.S. Dist. LEXIS 105688 (W.D.N.Y. 2013).

6. —Physical disabilities, generally

Under the former provisions of the Human Rights Law, which limited the term "disability" to physical, mental or medical conditions which were unrelated to the ability to engage in the activities involved in the job or occupation which a person claiming protection was seeking (Executive Law, former § 292, subd 21), it was not an unlawful discriminatory practice to deny an applicant employment because of a physical disability which was related to the ability to engage in the activities of the job or occupation, even though it was not demonstrated that the degree or extent of the disability of the particular applicant was such as would interfere with his ability to engage in such activities; accordingly, where it was shown that the complainant suffered from dermatitis which in an exacerbated state would interfere with the performance of duties in the employment sought by him, it was not an unlawful discriminatory practice to deny the complainant employment, even though it was not shown that the condition had progressed to the point where there was such interference. Westinghouse Electric Corp. v State Div. of Human Rights, 49 N.Y.2d 234, 425 N.Y.S.2d 74, 401 N.E.2d 196, 1980 N.Y. LEXIS 2036 (N.Y. 1980).

Test as to whether "disability" within meaning of CLS Exec § 292 permits discharge of employee or refusal to hire prospective employee is "individualized" one pursuant to which it must appear that employee's physical condition precludes being reasonably able to perform duties and activities that position requires; otherwise, disability is irrelevant tojob and can form no basis for denying employee position. Antonsen v Ward, 77 N.Y.2d 506, 569 N.Y.S.2d 328, 571 N.E.2d 636, 1991 N.Y. LEXIS 364 (N.Y. 1991).

Petitioner was not the subject of unlawful discriminatory practices based on physical disability by his employer due to his dismissal from his job as a custodian where petitioner's physician stated that petitioner could do no ladder climbing and no repetitive lifting, and the record contained evidence that the duties of a custodian included numerous tasks requiring either ladder climbing or repetitive lifting. Lamarre v Granville Cent. School, 106 A.D.2d 838, 484 N.Y.S.2d 236, 1984 N.Y. App. Div. LEXIS 21743 (N.Y. App. Div. 3d Dep't 1984), app. denied, 64 N.Y.2d 608, 1985 N.Y. LEXIS 16640 (N.Y. 1985).

CLS Executive § 296, making it unlawful discriminatory practice for employer to discharge employee because of disability, is limited under CLS Executive § 292 for disabilities which do not prevent employee from performing activities involved in job or occupation in reasonable manner; where record discloses that employee's physical disability prevented her from doing job in reasonable manner since it caused her to miss unacceptably high number of days of work in job that required consistently good attendance, complaint of unlawful discriminatory practice based

on physical disability is dismissed. Silk v Huck Installation & Equipment Div., 109 A.D.2d 930, 486 N.Y.S.2d 406, 1985 N.Y. App. Div. LEXIS 47452 (N.Y. App. Div. 3d Dep't 1985).

Transit authority's denial of promotion to employee in favor of applicant who scored below him on civil service test, based on employee's significantly poorer attendance record resulting from physical illness, was not discrimination on basis of disability in violation of CLS Exec § 296, since employee's illness prevented him from coming to work and thus was not disability as defined in CLS Exec § 292. Schmitt v Kiley, 124 A.D.2d 661, 507 N.Y.S.2d 907, 1986 N.Y. App. Div. LEXIS 61962 (N.Y. App. Div. 2d Dep't 1986), app. denied, 69 N.Y.2d 612, 517 N.Y.S.2d 1027, 511 N.E.2d 86, 1987 N.Y. LEXIS 16891 (N.Y. 1987).

Judgment which dismissed Article 78 proceeding affirmed–petitioner, probationary police officer, was injured in off-duty automobile accident; his injury consisted of compound fracture of left femur, which necessitated two surgeries and implantation of steel rod and pins into his leg; two police doctors expressed opinion that petitioner's leg will never heal completely and petitioner will never be able to fully perform his duties as police officer; petitioner's employment as probationary police officer was thereafter terminated–petitioner asserts he was terminated in violation of Executive Law § 296 (1) (a), which states that it is unlawful to discharge individual from employment on basis of disability; definition of "disability" (Executive Law § 292 [21]) states that term shall be limited to disabilities which do not prevent complainant from performing in reasonable manner activities involved in job or occupation sought or held–record clearly demonstrates that petitioner's disability does not fall within definition of term "disability" as contemplated by Executive Law and, accordingly, termination of petitioner did not constitute unlawful discrimination on part of respondent–additionally, where there is dispute among several doctors regarding petitioner's prognosis, it is not for courts to choose between diverse professional opinions–moreover, as probationary employee, petitioner could have been terminated at any time without hearing or statement of reasons for discharge; absent proof that discharge was in bad faith or for improper reason, probationary employees may be dismissed without hearing; there is no evidence in record which supports conclusory allegations of bad faith contained in petition. O'Hare v New York City Police Dep't, 161 A.D.2d 487, 555 N.Y.S.2d 753, 1990 N.Y. App. Div. LEXIS 6223 (N.Y. App. Div. 1st Dep't 1990).

Employer was entitled to summary judgment in action alleging that it violated CLS Exec § 296 by discharging plaintiff from his position as store manager, where plaintiff sustained foot injury that prevented him from performing his duties, which required much standing, bending, lifting, and walking around store to supervise other employees and where, upon his return to work after second surgical procedure, plaintiff admittedly only walked around store for about "an hour a day" and spent rest of his time sitting. Lawson v High Bar Wholesale Food Distribs., 217 A.D.2d 646, 629 N.Y.S.2d 807, 1995 N.Y. App. Div. LEXIS 8104 (N.Y. App. Div. 2d Dep't 1995).

In action alleging that plaintiff was discharged from her job as receptionist and clerical worker, in violation of state and city Human Rights Laws, after it was discovered that she had condition similar to carpal tunnel syndrome ("bilateral ulnar nerve entrapment"), defendants were not entitled to summary judgment on ground that plaintiff's employment was terminated solely because of her poor job performance, as triable issues existed as to whether her disability prevented her from performing her job in reasonable manner and/or whether her termination was motivated by legitimate non-discriminatory reason. Umansky v Masterpiece Int'l Ltd., 276 A.D.2d 691, 714 N.Y.S.2d 735, 2000 N.Y. App. Div. LEXIS 10772 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff's cancers and attendant surgeries did not constitute disability under discrimination statutes where they did not substantially limit her in "a major life activity," as evidenced by her physician's letters affirming her ability to work on regular full-time basis. Sirota v N.Y. City Bd. of Educ., 283 A.D.2d 369, 725 N.Y.S.2d 332, 2001 N.Y. App. Div. LEXIS 6583 (N.Y. App. Div. 1st Dep't 2001).

Employee's showing of a disability under N.Y. Exec. Law § 292(21)(a) failed to defeat summary judgment as: (1) neither a doctor's note nor the complaint identified any medically diagnosed condition, (2) the employee submitted two unsworn medical reports of her treating physicians that were inadmissible hearsay, and (3) the employee neither proffered an excuse for her failure to tender proof in admissible form, nor other objective factual evidence to support her claim. Tibbits v Verizon N.Y., Inc., 40 A.D.3d 1300, 836 N.Y.S.2d 727, 2007 N.Y. App. Div. LEXIS 6061 (N.Y. App. Div. 3d Dep't 2007).

Terminated employee's New York State Human Rights Law, N.Y. Exec. Law § 296(1)(a), and the New York City Human Rights Law, New York City, N.Y., Admin. Code § 8-107(1)(a), claim failed where: (1) employee was unable to perform the duties of his job as a construction inspector because of his lung condition, and no reasonable accommodation was available under N.Y. Exec. Law § 292(21) and New York City, N.Y., Admin. Code § 8-107(15) as the only way the employee was able to report on construction progress was to be at the site; (2) the employee could not complete his duties from the central office; and (3) the employee's doctor and the employee stated that the employee could not visit construction sites. Jacobsen v New York City Health & Hosps. Corp., 97 A.D.3d 428, 948 N.Y.S.2d 586, 2012 N.Y. App. Div. LEXIS 5386 (N.Y. App. Div. 1st Dep't 2012), aff'd in part, modified, 22 N.Y.3d 824, 988 N.Y.S.2d 86, 11 N.E.3d 159, 2014 N.Y. LEXIS 570 (N.Y. 2014).

Where the drafters of the N.Y. Comp. Codes R. & Regs. tit. 9, § 2204.6(d)(3)(iii) definition of disabled person adopted a restrictive threshold that eschews the broader definition of disability under N.Y. Exec. Law § 292(21), this supports an inference that the drafters intend the rent control disability definition under N.Y. Comp. Codes R. & Regs. tit. 9, § 2204.6(d)(3)(iii) to be narrower in scope than the definition in its antidiscrimination counterpart. Belnord Realty Assoc., L.P. v Joseph, 809 N.Y.S.2d 383, 10 Misc. 3d 43, 2005 N.Y. Misc. LEXIS 2512 (N.Y. App. Term 2005).

Plaintiff's disability discrimination claim under the New York State Human Rights Law, N.Y. Exec. Law § 290 et seq., failed to state a claim as plaintiff failed to allege that her pregnancy impaired her in exercising a normal bodily function, or that she had any complications in connection with her pregnancy, which prevented her from normal life activity under N.Y. Exec. Law 292(21). Krause v Lancer & Loader Group, LLC, 965 N.Y.S.2d 312, 40 Misc. 3d 385, 2013 N.Y. Misc. LEXIS 1815 (N.Y. Sup. Ct. 2013).

Prior to 1998, N.Y. Exec. Law § 292(21) defined "disability" in relation to employment discrimination as a disability which did not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held; since an employee's claimed disability prevented him from reasonably performing his duties, any inference of discrimination occurring before 1998 was refuted Kwarren v Am. Airlines, 303 A.D.2d 722, 757 N.Y.S.2d 105, 2003 N.Y. App. Div. LEXIS 3487 (N.Y. App. Div. 2d Dep't 2003).

Department of Correctional Services (Department) did not illegally discriminate against an applicant for a job as a correctional officer by disqualifying him because he could not lift one arm above his chest as his disability prevented him from performing the activities involved in the job in a reasonable manner, so the Department could refuse to hire him, under N.Y. Exec. Law § 292(21). Pageau v Tolbert, 304 A.D.2d 1067, 758 N.Y.S.2d 712, 2003 N.Y. App. Div. LEXIS 4224 (N.Y. App. Div. 3d Dep't 2003).

When determining that the Department of Correctional Services did not illegally discriminate, under N.Y. Exec. Law § 292(21), against an applicant for the job of correctional officer by disqualifying him because he could not raise one arm above his chest, the Commissioner of Human Rights could accept medical opinions that the applicant could not perform the job's duties, despite a conflicting medical opinion that the applicant could do the job, where the conflicting opinion showed no familiarity with the job's duties. Pageau v Tolbert, 304 A.D.2d 1067, 758 N.Y.S.2d 712, 2003 N.Y. App. Div. LEXIS 4224 (N.Y. App. Div. 3d Dep't 2003).

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Trial court properly granted summary judgment pursuant to N.Y. C.P.L.R. 3212 to an agency in an employee's disability discrimination action; under the version of N.Y. Exec. Law § 292 (effective 1995) in effect at the time of the alleged discrimination, the term "disability" was limited to physical, medical, or mental impairments that did not prevent the complainant from performing in a reasonable manner the activities involved in the job, and a state agency proved that the employee was unable to perform his duties in a reasonable manner. Pembroke v N.Y. State Office of Court Admin., 306 A.D.2d 185, 761 N.Y.S.2d 214, 2003 N.Y. App. Div. LEXIS 7301 (N.Y. App. Div. 1st Dep't 2003).

Trial court erred by dismissing a worker's complaint alleging employment discrimination based on a disability, in violation of N.Y. Exec. Law § 296 and the New York City, N.Y., Admin. Code § 8-107, since the employer (the City of New York), failed to engage in the required individualized process when considering the worker's request for extended medical leave, namely whether it was a reasonable accommodation, and the City's denial of such a request on the basis that extended medical leave was only for permanent civil service employees was a violation of both statutes. Separate and apart from the City's failure to engage in an individualized interactive process in evaluating the worker's request for accommodation, the worker had sufficiently pled causes of actions for disability discrimination under both statutes by establishing that her employment was terminated, that she requested leave to be able to have and recover from cancer surgery, and the accommodation she sought (extended medical leave) was not excluded by the definition of reasonable accommodation under the New York City Human Rights Law. Phillips v City of New York, 66 A.D.3d 170, 884 N.Y.S.2d 369, 2009 N.Y. App. Div. LEXIS 5834 (N.Y. App. Div. 1st Dep't 2009), overruled in part, Jacobsen v New York City Health & Hosps. Corp., 22 N.Y.3d 824, 988 N.Y.S.2d 86, 11 N.E.3d 159, 2014 N.Y. LEXIS 570 (N.Y. 2014).

Railroad employee who lost his hand and lower arm in railroad accident established prima facie case of unlawful discrimination based on physical disability where he showed that railroad refused to allow him to "bump" into bargaining unit position of trainman/freight conductor after his management position was eliminated, that railroad did not evaluate his ability to do tasks necessary for position or give him opportunity to show that he was qualified, that examining physician found him to be medically qualified for position, that his management position had periodically required him to perform duties of trainman/freight conductor, and that he was capable of performing those duties. Jefferlone v Canadian Pac. (U.S.), 887 F. Supp. 487, 1995 U.S. Dist. LEXIS 7802 (W.D.N.Y. 1995).

Diabetic firefighter's disability discrimination claim may proceed, where he contends fire department violated Human Rights Law (Exec §§ 291 et seq.) by precluding him from engaging in active firefighting duties, because he has shown that he was clearly disabled within definition of § 292(21), and that he suffered adverse employment action, and now must prove at trial that he is qualified to engage in active duty firefighting. Simms v City of New York, 160 F. Supp. 2d 398, 2001 U.S. Dist. LEXIS 17921 (E.D.N.Y. 2001).

Although insurance salesman's diabetic condition, even as treated, constituted a medical disability under N.Y. Exec. Law § 292(21), the disability discrimination claims failed where the salesman did not produce any evidence that the insurance company knew of the disability or that the salesman was discharged because of the diabetic condition and the insurance company presented substantial uncontested evidence that the salesman repeatedly failed to meet production standards. Anyan v N.Y. Life Ins. Co., 192 F. Supp. 2d 228, 2002 U.S. Dist. LEXIS 5724 (S.D.N.Y. 2002), aff'd, 68 Fed. Appx. 260, 2003 U.S. App. LEXIS 13786 (2d Cir. N.Y. 2003).

While there was a triable issue of fact as to whether an employee's diabetes was a cognizable disability under the New York Human Rights Law, N.Y. Exec. Law § 296, an offer of accommodation by defendants, an employer and a manager, was reasonable as a matter of law because, while the employee produced a note saying that she needed to be able to eat at 6 p.m., defendants offered the employee accommodation by allowing her to eat while on the food line, and the employee did not produce anything to dispute the reasonableness of the accommodation. Krikelis v Vassar College, 581 F. Supp. 2d 476, 2008 U.S. Dist. LEXIS 61543 (S.D.N.Y. 2008).

Discharged employee presented sufficient evidence to defeat defendant employer's summary judgment motion on his claim of disability discrimination under the New York State Human Rights Law (NYSHRL), N.Y. Exec. Law § 296 et seq., because, due to the broader definition of "disability" in NY. Exec. Law § 292(21), a triable issue of fact was raised regarding whether the employee's diabetes constituted a disability under the NYSHRL. Penberg v HealthBridge Mgmt., 823 F. Supp. 2d 166, 2011 U.S. Dist. LEXIS 119564 (E.D.N.Y. 2011).

7. — —Alcoholism

Firefighter's alcoholism, although it might have impaired his judgment, did not render improper penalty of termination where there was no direct causal connection between his status as alcoholic and his deliberate and calculated act of calling in false fire alarm in order to commit theft at his own firehouse. Murolo v Safir, 246 A.D.2d 653, 668 N.Y.S.2d 229, 1998 N.Y. App. Div. LEXIS 583 (N.Y. App. Div. 2d Dep't), app. denied, 91 N.Y.2d 813, 674 N.Y.S.2d 278, 697 N.E.2d 179, 1998 N.Y. LEXIS 1304 (N.Y. 1998).

Police officer was properly dismissed from force because of his refusal to acknowledge and accept treatment for alcoholism, even though Human Rights Law and Federal Rehabilitation Act prohibit employment discrimination on basis of disability which does not impede employee's performance of job-related activities in reasonable manner, since exclusion from employment is legally permissible where there exists rationally-based expectation that physical or psychological condition will result in future disability and it was reasonable to conclude that long-term effects of

officer's alcoholism would result in diminished capacity to perform police functions and exercise judgment required of police officer. Smith v Ortiz, 136 Misc. 2d 110, 517 N.Y.S.2d 352, 1987 N.Y. Misc. LEXIS 2391 (N.Y. Sup. Ct. 1987).

Employee was not required to prove, in establishing prima facie case of disability discrimination, that his alcoholism adversely manifested itself in some significant way in his work, such that his performance at work would be "impaired" thereby. Grullon v South Bronx Overall Economic Dev. Corp., 185 Misc. 2d 645, 712 N.Y.S.2d 911, 2000 N.Y. Misc. LEXIS 350 (N.Y. Civ. Ct. 2000).

Court would dismiss recovering alcoholic's claim under CLS Exec § 296 for not being reinstated to his former position as hospital medical director after he completed alcohol treatment program; although alcoholism is "disability" under statute, plaintiff could not establish that, if he had been reinstated, he could have performed his duties in manner that involved "reasonably" limited risk of harm to third parties. Altman v New York City Health & Hosps. Corp., 903 F. Supp. 503, 1995 U.S. Dist. LEXIS 14114 (S.D.N.Y. 1995), aff'd, 100 F.3d 1054, 1996 U.S. App. LEXIS 30112 (2d Cir. N.Y. 1996).

8. — —Confinement to wheelchair

Although the Commissioner of the State Division of Human Rights properly found that the 1978 New York City Marathon course was a "place of public accommodation" within the meaning of Exec Law § 292(9), the commissioner erred in determining that the running club which organized the marathon had engaged in an unlawful discriminatory practice by not permitting disabled individuals in wheelchairs to participate in the marathon since a marathon had historically been a foot race and since the running club had not excluded other disabled individuals who could compete on foot. New York Roadrunners Club v State Div. of Human Rights, 81 A.D.2d 519, 437 N.Y.S.2d 681, 1981 N.Y. App. Div. LEXIS 10976 (N.Y. App. Div. 1st Dep't 1981), aff'd, 55 N.Y.2d 122, 447 N.Y.S.2d 908, 432 N.E.2d 780, 1982 N.Y. LEXIS 3076 (N.Y. 1982).

9. — —Dermatitis

A determination of the State Human Rights Appeal Board affirming an order of the State Division of Human Rights finding that petitioner employer and its personnel director had discriminated against the complainant by refusing to employ him because of his disability is annulled; the record establishes by clear, convincing and uncontradicted medical evidence that the complainant suffered from dermatitis which would be exacerbated by direct or indirect exposure to the chemicals present in the employer's plant and, therefore, the disability was related to complainant's ability to engage in the activities involved in the job and to hold that the fact that he could physically perform the job duties at the time of his physical examination means that the disability is "unrelated" to his ability to engage in the activities involved is contrary to the clear intent of the statute and the law of reason. Westinghouse Electric Corp. v State Div. of Human Rights, 63 A.D.2d 170, 406 N.Y.S.2d 912, 1978 N.Y. App. Div. LEXIS 11327 (N.Y. App. Div. 3d Dep't 1978), aff'd, 49 N.Y.2d 234, 425 N.Y.S.2d 74, 401 N.E.2d 196, 1980 N.Y. LEXIS 2036 (N.Y. 1980).

10. — —Drug use

Order which denied defendant's motion to dismiss complaint for failure to state cause of action affirmed–allegations in complaint are sufficient to state cause of action for unlawful discrimination under Human Rights Law; plaintiff contends that metabolites found in his urine specimen resulted from his consumption of health food bread containing poppy seeds and not from unlawful opiate abuse; although urine sample was subjected to two different testing methods, both of which revealed positive results, it is alleged that there is third testing method which would definitely distinguish metabolites resulting from opiate use; while defendant may be legitimately entitled to discriminate against users of controlled narcotic substances, when challenged it must come forward with evidence establishing that its testing method accurately distinguishes between opiate users and consumers of lawful foodstuffs or medications–definition of disability in Human Rights Law (Executive Law § 292 [21] [c]) is broad enough to embrace persons who, like plaintiff, contend they are not disabled but whom potential employer perceives (wrongfully) to be disabled; Human Rights Law forbids discrimination against disabled persons, including drug abusers, who are able to perform their jobs; it also protects persons who are erroneously believed to be drug abusers, as may happen when someone is labeled drug abuser based upon false test result. Doe v Roe, Inc., 160 A.D.2d 255, 553 N.Y.S.2d 364, 1990 N.Y. App. Div. LEXIS 3749 (N.Y. App. Div. 1st Dep't 1990).

Employer was properly granted summary judgment in action by plaintiff who alleged that his termination as at-will employee was pretext for discrimination based on disability; even if legitimate connection existed between plaintiff's history of excessive absenteeism and his narcotic dependency and depression disorder, Human Rights Law did not bar his dismissal because his purported disability actually prevented him from reporting to work and performing his job in reasonable manner. Tracy v City of New York, 211 A.D.2d 529, 630 N.Y.S.2d 4, 1995 N.Y. App. Div. LEXIS 386 (N.Y. App. Div. 1st Dep't 1995).

11. — —Epilepsy

New York City Transit Authority did not illegally discriminate on basis of disability (CLS Exec § 296) in firing probationary police officer who suffered from epileptic seizures where (1) department's policy stated that presence of seizure disorder was sufficient cause for disqualification of candidate, and that candidate must be seizure-free for 2 years to qualify for permanent appointment, and (2) medical evidence showed that officer suffered from seizure disorder which would interfere with her duties until long after her probationary status expired; since petitioner was legally excluded from permanent appointment, she was not protected by Human Rights Law. LaMotta v New York City Transit Authority, 165 A.D.2d 875, 560 N.Y.S.2d 346, 1990 N.Y. App. Div. LEXIS 11511 (N.Y. App. Div. 2d Dep't 1990).

12. — —Hearing disorder

Human Rights Appeal Board had no authority to determine whether school bus driver's hearing was sufficient inasmuch as that was a defect related to driver's ability to perform his job and thus did not qualify as a "disability" which was unrelated to ability to engage in occupation and for which refusal to hire constitutes unlawful discriminatory practice. State Div. of Human Rights v Averill Park Cent. School Dist., 59 A.D.2d 449, 399 N.Y.S.2d 926, 1977 N.Y. App. Div. LEXIS 13946 (N.Y. App. Div. 3d Dep't 1977), aff'd, 46 N.Y.2d 950, 415 N.Y.S.2d 405, 388 N.E.2d 729, 1979 N.Y. LEXIS 1868 (N.Y. 1979).

It was error to grant a hospital summary judgment on claims for monetary damages under the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355, codified in part at 29 U.S.C.S. §§ 794-794a, and the New York State Human Rights Law, N.Y. Exec. Law § 292, because there was a genuine issue of material fact as to whether the hospital acted with deliberate indifference in failing to secure an interpreter for plaintiffs, a patient, his wife, children, and relatives, because a reasonable jury could have concluded that persons at the hospital had actual knowledge of discrimination against plaintiffs, had authority to correct the discrimination, and failed to respond adequately because (1) plaintiffs alleged that the hospital failed to provide interpreting services to the patient and his wife (both deaf), so that their two children (of normal hearing) had to act as interpreters for their parents; (2) according to plaintiffs, they made at least four separate attempts to secure an interpreter in the days and weeks leading up to the patient's surgery, all unheeded, and they made continual requests after the day of the surgery and the patient's stroke; and (3) plaintiffs made several requests for a TTY device, also unheeded. Loeffler v Staten Island Univ. Hosp., 582 F.3d 268, 2009 U.S. App. LEXIS 22015 (2d Cir. N.Y. 2009).

13. — —Heart condition

Employee's demotion from probationary assistant station supervisor to railroad clerk did not violate antidiscrimination proscriptions of Human Rights Law where his heart condition prevented him from engaging in excessive stair climbing or other types of physical exertion required by his probationary position, so that he could not perform his duties in reasonable manner; thus, employee was not disabled within meaning of statute and was not protected by its provisions. Miller v Ravitch, 130 A.D.2d

579, 515 N.Y.S.2d 518, 1987 N.Y. App. Div. LEXIS 46579 (N.Y. App. Div. 2d Dep't), app. denied, 70 N.Y.2d 610, 522 N.Y.S.2d 110, 516 N.E.2d 1223, 1987 N.Y. LEXIS 19330 (N.Y. 1987).

Trial court erred by dismissing an employee's discrimination claim that the employer failed to accommodate his disability by refusing to transfer him to another position after his immediate supervisor assaulted him on the job as he sufficiently alleged a life-threatening heart condition that was beyond mere workplace stress. However, the trial court properly dismissed the employee's retaliation claim as the complaint included no allegation that the employee was assaulted because of any qualifying impairment or disability. Horgan v Whitaker, 57 A.D.3d 1345, 871 N.Y.S.2d 443, 2008 N.Y. App. Div. LEXIS 9981 (N.Y. App. Div. 3d Dep't 2008).

Discharged sales representative has disability discrimination claim under New York State Human Rights Law (CLS Exec Law §§ 290 et seq.) denied summarily, where court has already determined that her heart condition was not severe enough to render her "disabled" within meaning of Americans with Disabilities Act (ADA) (42 USCS §§ 12101 et seq.) at time of her discharge, because, if anything, CLS Exec Law § 292(21) definition of "disability" is even more restrictive than that of ADA, since it requires complete rather than substantial impairment. Thomas v Flaghouse Inc., 980 F. Supp. 731, 1997 U.S. Dist. LEXIS 16264 (S.D.N.Y. 1997), vacated without op., 159 F.3d 1348, 1998 U.S. App. LEXIS 32106 (2d Cir. N.Y. 1998).

Employee did not show that she was "disabled" within meaning of Human Rights Law where (1) physician stated that her heart condition ("mitral valve prolapse"), which caused irregular heartbeat, was benign and did not limit her daily or work-related activities, and (2) even assuming she could show that her supervisors were aware that she had heart condition, she provided no evidence that they considered her unable to work or perform any other life function. Thomas v Flaghouse Inc., 980 F. Supp. 731, 1997 U.S. Dist. LEXIS 16264 (S.D.N.Y. 1997), vacated without op., 159 F.3d 1348, 1998 U.S. App. LEXIS 32106 (2d Cir. N.Y. 1998).

Former employee's federal disability discrimination claim is denied summarily, but his state claim may proceed, where he asserts disability based on type 2 diabetes and heart disease, because impairments do not amount to finding of "disability" under ADA (42 USCS §§ 12101 et seq.), but do qualify as disabilities under broader definition of Exec § 292(21). Epstein v Kalvin-Miller Int'l, Inc., 100 F. Supp. 2d 222, 2000 U.S. Dist. LEXIS 8677 (S.D.N.Y. 2000).

Where a city bus driver was terminated after having a mechanical heart valve implanted and starting a life-long anticoagulant regimen, the driver's disability discrimination claims failed to survive summary judgment because the employers did not perceive the driver as disabled and the driver was not qualified to perform the essential functions of the position. Burton v Metro. Transp. Auth., 244 F. Supp. 2d 252, 2003 U.S. Dist. LEXIS 2314 (S.D.N.Y. 2003).

14. — —High blood pressure

Department of civil service did not violate CLS Exec § 296 in denying appointment as police officer to petitioner on basis of disability because of his high blood pressure where it was demonstrated that condition would prevent petitioner from performing duties of police officer in reasonable manner. Connolly v Suffolk County Dep't of Civil Service, 150 A.D.2d 373, 540 N.Y.S.2d 821, 1989 N.Y. App. Div. LEXIS 5632 (N.Y. App. Div. 2d Dep't), app. denied, 74 N.Y.2d 611, 546 N.Y.S.2d 555, 545 N.E.2d 869, 1989 N.Y. LEXIS 2843 (N.Y. 1989).

15. — —Multiple sclerosis

Teacher was properly denied extension of his provisional license on ground that he had multiple sclerosis, even though disease might not have rendered him unable to perform teaching duties, where denial occurred prior to 1979 amendment to CLS Exec § 292(12) and medical evidence indicated that disease was related to teacher's ability to perform duties of position he sought. In determining that teacher had suffered discrimination by denial of extension of his provisional license for having multiple sclerosis, Commissioner of Human Rights erroneously applied standard under CLS Exec § 292(21), as enacted by L 1979, ch 594, when he acknowledged that disability was related to teacher's occupation but nonetheless found insufficient evidence that disability would interfere with teaching duties; instead, application of pre-1979 standard (which permitted claim of employment discrimination only for disabilities which were unrelated to claimant's occupational performance) would be correct since termination occurred prior to effective date of 1979 standard and amendment was not retroactive. Board of Education v State Div. of Human Rights, 130 A.D.2d 614, 515 N.Y.S.2d 543, 1987 N.Y. App. Div. LEXIS 46627 (N.Y. App. Div. 2d Dep't 1987).

16. — —Obesity

If a person suffers an impairment, employment may not be denied based on the actual or perceived undesirable effect the person's employment may have on disability or life insurance programs; thus, since under (former Exec Law § 292 (20) employment could only have been refused to plaintiff if her condition of obesity was related to the performance of the duties of the position, and the Commissioner of Human Rights found that there was no relationship between complainant's condition and her ability to perform the job she sought, the company could not refuse to hire her because of the collateral effect her purported impairment might have on existing disability and life insurance programs. A complaint that a company had unlawfully discriminated against plaintiff due to a disability by refusing to hire her due to her obesity was properly sustained. Disabilities, particularly those resulting from disease, often develop gradually, and under the statutory definition of disability (Exec Law § 292[21]), an employer cannot deny employment simply because the condition was detected before it has actually begun to produce deleterious effects; thus, the Commissioner could find that the complainant's condition itself, which was clinically diagnosed and found to render her medically unsuitable by her own physician, constituted an impairment and, therefore, a disability within the statute's contemplation. Further, the court found neither the statute nor its legislative history indicate a legislative intent to permit employers to refuse to hire persons who are able to do the job simply because they have a possibly treatable condition of excessive weight; the statute protects all persons with disabilities and not just those with hopeless conditions. State Div. of Human Rights ex rel. McDermott v Xerox Corp., 65 N.Y.2d 213, 491 N.Y.S.2d 106, 480 N.E.2d 695, 1985 N.Y. LEXIS 14676 (N.Y. 1985), limited, In re State Di v of Human Rights ex rel. Granelle, 118 A.D.2d 3, 504 N.Y.S.2d 92, 1986 N.Y. App. Div. LEXIS 53584 (N.Y. App. Div. 1st Dep't 1986).

Former flight attendants who were not hired because of successor airline's use of weight standards in its hiring decisions failed to establish that they were medically impaired members of protected class defined under Human Rights Law, where they did not proffer evidence establishing that they were medically incapable of meeting airline's weight standards due to some cognizable medical condition; weight, in and of itself, does not constitute disability for discrimination qualification purposes. Delta Air Lines v New York State Div. of Human Rights, 91 N.Y.2d 65, 666 N.Y.S.2d 1004, 689 N.E.2d 898, 1997 N.Y. LEXIS 3710 (N.Y. 1997).

Dismissal of hazardous waste investigator who is unable to perform during training period as result of obesity does not constitute unlawful discrimination against person with physical impairment. Velger v Williams, 118 A.D.2d 1037, 500 N.Y.S.2d 411, 1986 N.Y. App. Div. LEXIS 54823 (N.Y. App. Div. 3d Dep't 1986).

Disability discrimination claims filed against airline, based on airline's use of weight standards in hiring flight attendants, were properly dismissed where, inter alia, petitioners failed to show that they fell within class of persons protected by Human Rights Law and that airline intended to discriminate against older women, they did not claim that their weight limited their actions or abilities nor did they allege conditions which amounted to obesity, and they submitted no proof that they had been clinically observed as having "abnormal medical condition" or that they were medically incapable of meeting airline's weight requirements due to underlying medical problem. Delta Air Lines v New York State Div. of Human Rights, 229 A.D.2d 132, 652 N.Y.S.2d 253, 1996 N.Y. App. Div. LEXIS 12963 (N.Y. App. Div. 1st Dep't

1996), app. dismissed, 90 N.Y.2d 882, 661 N.Y.S.2d 825, 684 N.E.2d 274, 1997 N.Y. LEXIS 2331 (N.Y. 1997), aff'd, 91 N.Y.2d 65, 666 N.Y.S.2d 1004, 689 N.E.2d 898, 1997 N.Y. LEXIS 3710 (N.Y. 1997).

Employee's clinically diagnosed morbid obesity rendered her disabled under Human Rights Law. Hazeldine v Beverage Media, 954 F. Supp. 697, 1997 U.S. Dist. LEXIS 736 (S.D.N.Y. 1997).

17. — —Spinal condition

Spinal condition known as spondylolisthesis constitutes disability within purview of Human Rights Law. In re State Di v of Human Rights, 70 N.Y.2d 100, 517 N.Y.S.2d 715, 510 N.E.2d 799, 1987 N.Y. LEXIS 16800 (N.Y. 1987).

18. — —Urinary tract infection

In action by probationary police officer terminated for failure to meet medical standards for permanent employment, wherein employer's position was that officer suffers from untreatable disease of urinary tract, termination of officer may not rest legally on unsupported hypothesis that officer suffers from mysterious renal disease which may or may not become symptomatic at some unspecified future time; respondent's interpretation of phrase "untreatable disease of the urinary tract" to encompass any condition of unknown etiology, however quiescent, forces otherwise unobjectionable regulation in which language is found to run afoul of Executive Law §§ 296 and 292(21); when petitioner has made prima facie showing of improper discrimination based on physical disability, or as in present case, the history therefore, respondent must come forward with competent evidence showing that its decision to terminate the petitioner's services was rationally based, which means that respondent must demonstrate that there are rational grounds for determining that petitioner's disability renders him unfit to reasonably discharge tasks of his employment. Carrero v New York City Housing Authority, 116 A.D.2d 141, 500 N.Y.S.2d 246, 1986 N.Y. App. Div. LEXIS 50373 (N.Y. App. Div. 1st Dep't 1986).

19. — —Vision impairment

In an action by an employee with severe vision impairment who was discharged as part of a job reorganization, there could be no finding of discrimination where former subd. 21 of Exec Law § 292, in effect at the time plaintiff was discharged, excluded as a basis for a finding of discrimination in employment any disability related to the ability to engage in a particular job and employee conceded her inability to perform her new duties. Pugach v Liggett Group, Inc., 81 A.D.2d 552, 438 N.Y.S.2d 307, 1981 N.Y. App. Div. LEXIS 11020 (N.Y. App. Div. 1st Dep't 1981), aff'd, 55 N.Y.2d 922, 449 N.Y.S.2d 172, 434 N.E.2d 241, 1982 N.Y. LEXIS 3116 (N.Y. 1982).

20. —Mental disabilities

Though, under the Executive Law provision prohibiting the managing agent of a publicly assisted housing accommodation from denying public housing to an applicant because such person suffers a disability, a determination of ineligibility for public housing accommodations grounded solely on mental disability would constitute an unlawful discriminatory practice, statute did not mean that a mentally disabled person could under no circumstances be denied eligibility; statute could not be used to insulate such an applicant from disqualification for public housing based on a valid reason. New York City Housing Authority Tenant Selection Div. v State Human Rights Appeal Board, 59 A.D.2d 742, 398 N.Y.S.2d 562, 1977 N.Y. App. Div. LEXIS 13750 (N.Y. App. Div. 2d Dep't 1977).

Discharged bank employee failed to state cause of action for employment discrimination since contention that she was discharged because she suffered from nervous condition was entirely unfounded and conflicted with her acknowledgement that her dismissal resulted from inability to pass 2 polygraph tests administered to all employees following discovery of sizable cash shortage at branch; additionally, contention that her nervous condition constituted "disability" within meaning of CLS Exec § 292 was unsupported. Buffolino v Long Island Sav. Bank, FSB, 126 A.D.2d 508, 510 N.Y.S.2d 628, 1987 N.Y. App. Div. LEXIS 41650 (N.Y. App. Div. 2d Dep't 1987).

Finding of employment discrimination was error because there was no evidence that the employer knew, before it fired the employee, that the employee was disabled or how that disorder limited his work performance; until the employer requested that the employee account for his credit card expenses, there was no indication that the employee was suffering from a mental illness, and, once the employee alluded to an "emotional illness," the employer requested the details of the condition, and the employee refused to provide any information. There was no communication to the employer showing an impairment under N.Y. Exec. Law § 292(21)(a). Hazen v Hill Betts & Nash, LLP, 92 A.D.3d 162, 936 N.Y.S.2d 164, 2012 N.Y. App. Div. LEXIS 30 (N.Y. App. Div. 1st Dep't), app. denied, 19 N.Y.3d 812, 951 N.Y.S.2d 723, 976 N.E.2d 252, 2012 N.Y. LEXIS 2172 (N.Y. 2012).

Court erred in granting the landlords' motion for summary judgment dismissing the tenant's claim for housing discrimination based on disability; collateral estoppel did not apply because the prior summary proceeding did not decide whether the tenant was subjected to harassment based on his mental illness or whether such harassment affected a term, condition, or privilege of his housing. Curley v Bon Aire Props., Inc., 124 A.D.3d 820, 2 N.Y.S.3d 571, 2015 N.Y. App. Div. LEXIS 730 (N.Y. App. Div. 2d Dep't 2015).

Commissioner of the New York State Division of Human Rights properly determined that a co-op unlawfully discriminated against a tenant on the basis of disability when it would not allow her to keep an emotional support dog in her apartment because there was substantial evidence to conclude that the tenant suffered from generalized anxiety disorder, an impairment demonstrable by medically accepted clinical or laboratory diagnostic techniques, and that she required the use of a companion dog to use and enjoy her apartment; there was sufficient evidence that having a dog would affirmatively enhance her quality of life by ameliorating the effects of her disability, thus demonstrating necessity within the meaning of the state human rights law. Matter of 1 Toms Point Lane Corp. v New York State Div. of Human Rights, 176 A.D.3d 930, 112 N.Y.S.3d 250, 2019 N.Y. App. Div. LEXIS 7404 (N.Y. App. Div. 2d Dep't 2019).

Gender identity disorder is a disability under the New York State Human Rights Law, N.Y. Exec. Law § 291 et seq. Doe v Bell, 194 Misc. 2d 774, 754 N.Y.S.2d 846, 2003 N.Y. Misc. LEXIS 95 (N.Y. Sup. Ct. 2003).

In petitioner's racial discrimination suit against the operator of a shelter serving mentally ill residents, the agency's decision that petitioner, whose Caucasian race was the minority race among both residents and staff in the shelter, did not establish that the shelter responded to her complaints differently than complaints by other residents was unsupported and arbitrary. The shelter's failure to address any of her complaints about harassment and racial slurs created the inference that it did not treat grievances by whites and African Americans equally. Matter of Prodan v New York State Div. of Human Rights, 52 Misc. 3d 446, 31 N.Y.S.3d 741, 2015 N.Y. Misc. LEXIS 4963 (N.Y. Sup. Ct. 2015).

Medically diagnosed panic disorder with agoraphobia constitutes "disability" for purposes of Human Rights Law. Reeves v Johnson Controls World Servs., 140 F.3d 144, 1998 U.S. App. LEXIS 5368 (2d Cir. N.Y. 1998).

Employee with bipolar affective disorder, who admitted striking coworker, did not establish that employer's reasons for discharging her were pretext for discrimination in violation of CLS Exec § 296(1)(a). Glowacki v Buffalo Gen. Hosp., 2 F. Supp. 2d 346, 1998 U.S. Dist. LEXIS 6241 (W.D.N.Y. 1998).

In an employee's suit against her former employer alleging employment discrimination in violation of the Americans with Disabilities Act (ADA), 42 U.S.C.S. § 12101 et seq., and the New York State Human Rights Law (NYSHRL), N.Y. Exec. Law § 296 et seq., wherein the employee asserted that the employer discriminated against her by terminating her from her employment due to her depression, that the employer retaliated against her by terminating her for expressing her intention to file a formal complaint against her supervisor, and that she was subjected to a hostile work environment based upon her disability, the employee set forth sufficient facts to defeat the employer's motion for summary judgment on her claims for actual disability under the NYSHRL, record of disability under the ADA and NYSHRL, perceived disability under the ADA and NYSHRL, her claim of a

hostile work environment under the NYSHRL, and her claim for retaliation, since there were disputed issues of material fact as to those claims. However, the court found that there was insufficient evidence to raise genuine issues of fact regarding the employee's discrimination claim upon actual disability under the ADA since the evidence showed that, at the time she was denied a pay increase/bonus and was terminated (the adverse employment actions she alleged), she was not suffering from a disability that substantially limited a major life activity since she admittedly was not experiencing any symptoms of depression at that time. McCowan v HSBC Bank USA, 689 F. Supp. 2d 390, 2010 U.S. Dist. LEXIS 12289 (E.D.N.Y. 2010).

21. Reasonable accommodation

Division of Human Rights properly concluded that a hearing-impaired court interpreter established a prima facie case of disability discrimination because permitting the interpreter to wear a hearing aid was a reasonable accommodation and would not pose a significant risk of substantial harm where the employer failed to provide any legitimate non-discriminatory reason for its decision, no sufficiently individualized assessment occurred, and, given the employer's blanket policy barring hearing-impaired persons from employment as court officers and its failure to accommodate the employee who had an asymmetric hearing loss, the civil penalty of $ 30,000 was correctly assessed. Matter of New York State Unified Ct. Sys. v New York State Div. of Human Rights, 180 A.D.3d 555, 120 N.Y.S.3d 292, 2020 N.Y. App. Div. LEXIS 1244 (N.Y. App. Div. 1st Dep't), app. denied, 35 N.Y.3d 916, 157 N.E.3d 141, 2020 N.Y. LEXIS 2545 (N.Y. 2020).

Denial of summary judgment to employer on claims for disability discrimination under the State and City Human Rights Laws was affirmed because there were issues of fact as to whether the employer engaged the employee in a good faith interactive process to ascertain the viability of an appropriate accommodation. Hosking v Memorial Sloan-Kettering Cancer Ctr., 186 A.D.3d 58, 126 N.Y.S.3d 98, 2020 N.Y. App. Div. LEXIS 3557 (N.Y. App. Div. 1st Dep't 2020).

In an employment discrimination case, the federal district court properly granted summary judgment because plaintiff was collaterally estopped from asserting claims under ADA and the New York State Human Rights Law that he raised in a N.Y. C.P.L.R. art. 78 proceeding before the New York Supreme Court; plaintiff's state petition specifically asserted that his disqualification violated N.Y. Exec. Law § 296 and could be actionable pursuant to the ADA. The state supreme court reasonably concluded it would have been impossible to provide any reasonable accommodations for the essential functions of a police officer, because plaintiff could become mentally or physically incapacitated during bursts of severe exertion. Roth v Cty. of Nassau, 747 Fed. Appx. 891, 2019 U.S. App. LEXIS 1526 (2d Cir. N.Y.), cert. denied, 139 S. Ct. 2674, 204 L. Ed. 2d 1070, 2019 U.S. LEXIS 3756 (U.S. 2019).

Notes to Unpublished Decisions

1. In general

Unpublished decision: Former employee's Title VII of Civil Rights Act of 1964 hostile work environment claim based on his perceived sexual orientation was properly dismissed because such claims were not cognizable under Title VII; district court did not address viability of any such claim under New York State Human Rights Law and New York City Human Rights Law, both of which expressly protected against discrimination based on both perceived sexual orientation, or of any retaliation claim based on complaints about such hostile work environment, so action was remanded. Dingle v Bimbo Bakeries USA/Entenmann's, 624 Fed. Appx. 57, 2015 U.S. App. LEXIS 21787 (2d Cir. N.Y. 2015).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 374; CLS Civ R § 40-c; CLS Ins § 3434; CLS Pub Health § 1310; CLS Soc Serv § 326-b; CLS Trans § 147; CLS NYC Civil Ct Act § 1815.

Superintendent of banks, CLS Bank § 12.

Intermediate care facility, definition, CLS Soc Serv § 2.

Definitions in the Division of Human Rights Rules of Practice, CLS Exec Appx, Human R Rules §§ 465.1–465.20.

Codes, Rules and Regulations:

Rules of Practice, Division of Human Rights. 9 NYCRR §§ 465.1–465.20 (CLS Exec Appx, Human R Rules §§ 465.1–465.20).

General Regulations, Division of Human Rights. 9 NYCRR §§ 466.1–466.10 (CLS Exec Appx, Human R Rules §§ 466.1–466.10).

State division of human rights: reasonable accommodation of the disabilities of employees and applicants for employment. 9 NYCRR § 466.11.

Federal Aspects:

Definitions under Age Discrimination in Employment Act, 29 USCS § 630.

The Housing Act of 1949, cited in statutory text, appears generally as 42 USCS §§ 1441 et seq.

Definitions under Equal Employment Opportunity Act, 42 USCS § 2000e.

Jurisprudences:

7 Medina's Bostwick Practice Manual (Matthew Bender), Forms HR 101 et seq. (actions and proceedings relating to the Human Rights Law).

Annotations:

Visual impairment as handicap or disability under state employment discrimination law. 77 ALR5th 595.

When is work environment intimidating, hostile or offensive, so as to constitute sexual harassment under state law. 93 ALR5th 47.

When is supervisor's or coemployee's hostile environment sexual harassment imputable to employer under state law. 94 ALR5th 1.

Discrimination against pregnant employee as violation of state fair employment laws. 99 ALR5th 1.

Racial discrimination involving recreational facilities–Supreme Court cases. 29 L Ed 2d 1028.

Matthew Bender's New York Practice Guides: 4 New York Practice Guide: Business and Commercial §§ 25.22, 26.05, 26.06, 26.21.

Texts: Bjorklund, Fishman & Kurtz, New York Nonprofit Law and Practice with Tax Analysis § 4-2(c)(2)(ii).

Liddle & Marino, Labor and Employment in New York (Michie) pp 16-5.3.

New York Employee Discrimination Handbook (1998 ed, Matthew Bender).

New York Insurance Law (Matthew Bender's New York Practice Series) §§ 11.12[6][f], 49.11[1].

§ 296. Unlawful discriminatory practices.

1. It shall be an unlawful discriminatory practice:

(a) For an employer or licensing agency, because of an individual's age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, or status as a victim of domestic violence , to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

(b) For an employment agency to discriminate against any individual because of age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, or marital status, in receiving, classifying, disposing or otherwise acting upon applications for its services or in referring an applicant or applicants to an employer or employers.

(c) For a labor organization, because of the age, race, creed, color, national origin, sexual orientation,

gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, or marital status of any individual, to exclude or to expel from its membership such individual or to discriminate in any way against any of its members or against any employer or any individual employed by an employer.

(d) For any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses directly or indirectly, any limitation, specification or discrimination as to age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, or marital status, or any intent to make any such limitation, specification or discrimination, unless based upon a bona fide occupational qualification; provided, however, that neither this paragraph nor any provision of this chapter or other law shall be construed to prohibit the department of civil service or the department of personnel of any city containing more than one county from requesting information from applicants for civil service examinations concerning any of the aforementioned characteristics, other than sexual orientation, for the purpose of conducting studies to identify and resolve possible problems in recruitment and testing of members of minority groups to insure the fairest possible and equal opportunities for employment in the civil service for all persons, regardless of age, race, creed, color, national origin, sexual orientation or gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, or marital status.

* * * * *

1-a. It shall be an unlawful discriminatory practice for an employer, labor organization, employment agency or any joint labor-management committee controlling apprentice training programs:

(a) To select persons for an apprentice training program registered with the state of New York on any basis other than their qualifications, as determined by objective criteria which permit review;

(b) To deny to or withhold from any person because of race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, familial status, or marital status, the right to be admitted to or participate in a guidance program, an apprenticeship training program, on-the-job training program, executive training program, or other occupational training or retraining program;

(c) To discriminate against any person in his or her pursuit of such programs or to discriminate against such a person in the terms, conditions or privileges of such programs because of race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, familial status or marital status;

(d) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for such programs or to make any inquiry in connection with such program which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, familial status or marital status, or any intention to make any such limitation, specification or discrimination, unless based on a bona fide occupational qualification.

* * * * *

3-b. It shall be an unlawful discriminatory practice for any real estate broker, real estate salesperson or employee or agent thereof or any other individual, corporation, partnership or organization for the purpose of inducing a real estate transaction from which any such person or any of its stockholders or members may benefit financially, to represent that a change has occurred or will or may occur in the composition with respect to race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, marital status, or familial status of the owners or occupants in the block, neighborhood or area in which the real property is located, and to represent, directly or indirectly, that this change will or may result in undesirable consequences in the block, neighborhood or area in which the real property is located, including but not limited to the lowering of property values, an increase in criminal or antisocial behavior, or a decline in the quality of schools or other facilities.

4. It shall be an unlawful discriminatory practice for an educational institution to deny the use of its facilities to any person otherwise qualified, or to permit the harassment of any student or applicant, by reason of his race, color, religion, disability, national origin, sexual orientation, gender identity or expression, military status, sex, age or marital status, except that any such institution which establishes or maintains a policy of educating persons of one sex exclusively may admit students of only one sex.

5.

(a) It shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, assignee, or managing agent of, or other person having the right to sell, rent or lease a housing accommodation, constructed or to be constructed, or any agent or employee thereof:

(1) To refuse to sell, rent, lease or otherwise to deny to or withhold from any person or group of persons such a housing accommodation because of the race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, marital status, lawful source of income or familial status of such person or persons, or to represent that any housing accommodation or land is not available for inspection, sale, rental or lease when in fact it is so available.

(2) To discriminate against any person because of race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, marital status, lawful source of income or familial status in the terms, conditions or privileges of the sale, rental or lease of any such housing accommodation or in the furnishing of facilities or services in connection therewith.

(3) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for the purchase, rental or lease of such housing accommodation or to make any record or inquiry in connection with the prospective purchase, rental or lease of such a housing accommodation which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, marital status, lawful source of income or familial status, or any intent to make any such limitation, specification or discrimination.

The provisions of this paragraph (a) shall not apply (1) to the rental of a housing accommodation in a building which contains housing accommodations for not more than two families living independently of each other, if the owner resides in one of such housing accommodations, (2) to the restriction of the rental of all rooms in a housing accommodation to individuals of the same sex or (3) to the rental of a room or rooms in a housing accommodation, if such rental is by the occupant of the housing accommodation or by the owner of the housing accommodation and the owner resides in such housing accommodation or (4) solely with respect to age and familial status to the restriction of the sale, rental or lease of housing accommodations exclusively to persons sixty-two years of age or older and the spouse of any such person, or for housing intended and operated for occupancy by at least one person fifty-five years of age or older per unit. In determining whether housing is intended and operated for occupancy by persons fifty-five years of age or older, Sec. 807(b) (2) (c) (42 U.S.C. 3607 (b) (2) (c)) of the federal Fair Housing Act of 1988, as amended, shall apply.

(b) It shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, or managing agent of, or other person having the right of ownership or possession of or the right to sell, rent or lease, land or commercial space:

(1) To refuse to sell, rent, lease or otherwise deny to or withhold from any person or group of persons land or commercial space because of the race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, marital status, or familial status of such person or persons, or to represent that any housing accommodation or land is not available for inspection, sale, rental or lease when in fact it is so available;

(2) To discriminate against any person because of race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, marital status, or familial status in the terms, conditions or privileges of the sale, rental or lease of any such land or commercial space; or in the furnishing of facilities or services in connection therewith;

(3) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for the purchase, rental or lease of such land or commercial space or to make any record or inquiry in connection with the prospective purchase, rental or lease of such land or commercial space which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, marital status, or familial status; or any intent to make any such limitation, specification or discrimination.

(4) With respect to age and familial status, the provisions of this paragraph shall not apply to the restriction of the sale, rental or lease of land or commercial space exclusively to persons fifty-five years of age or older and the spouse of any such person, or to the restriction of the sale, rental or lease of land to be used for the construction, or location of housing accommodations exclusively for persons sixty-two years of age or older, or intended and operated for occupancy by at least one person fifty-five years of age or older per unit. In determining whether housing is intended and operated for occupancy by persons fifty-five years of age or older, Sec. 807(b) (2) (c) (42 U.S.C. 3607(b) (2) (c)) of the federal Fair Housing Act of 1988, as amended, shall apply.

(c) It shall be an unlawful discriminatory practice for any real estate broker, real estate salesperson or employee or agent thereof:

(1) To refuse to sell, rent or lease any housing accommodation, land or commercial space to any person or group of persons or to refuse to negotiate for the sale, rental or lease, of any housing accommodation, land or commercial space to any person or group of persons because of the race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, marital status, lawful source of income or familial status of such person or persons, or to represent that any housing accommodation, land or commercial space is not available for inspection, sale, rental or lease when in fact it is so available, or otherwise to deny or withhold any housing accommodation, land or commercial space or any facilities of any housing accommodation, land or commercial space from any person or group of persons because of the race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, marital status, lawful source of income or familial status of such person or persons.

(2) To print or circulate or cause to be printed or circulated any statement, advertisement or publica-

tion, or to use any form of application for the purchase, rental or lease of any housing accommodation, land or commercial space or to make any record or inquiry in connection with the prospective purchase, rental or lease of any housing accommodation, land or commercial space which expresses, directly or indirectly, any limitation, specification, or discrimination as to race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, marital status, lawful source of income or familial status; or any intent to make any such limitation, specification or discrimination.

(3) With respect to age and familial status, the provisions of this paragraph shall not apply to the restriction of the sale, rental or lease of any housing accommodation, land or commercial space exclusively to persons fifty-five years of age or older and the spouse of any such person, or to the restriction of the sale, rental or lease of any housing accommodation or land to be used for the construction or location of housing accommodations for persons sixty-two years of age or older, or intended and operated for occupancy by at least one person fifty-five years of age or older per unit. In determining whether housing is intended and operated for occupancy by persons fifty-five years of age or older, Sec. 807 (b) (2) (c) (42 U.S.C. 3607 (b) (2) (c)) of the federal Fair Housing Act of 1988, as amended, shall apply.

(d) It shall be an unlawful discriminatory practice for any real estate board, because of the race, creed, color, national origin, sexual orientation, gender identity or expression, military status, age, sex, disability, marital status, lawful source of income or familial status of any individual who is otherwise qualified for membership, to exclude or expel such individual from membership, or to discriminate against such individual in the terms, conditions and privileges of membership in such board.

(e) It shall be an unlawful discriminatory practice for the owner, proprietor or managing agent of, or other person having the right to provide care and services in, a private proprietary nursing home, convalescent home, or home for adults, or an intermediate care facility, as defined in section two of the social services law, heretofore constructed, or to be constructed, or any agent or employee thereof, to refuse to provide services and care in such home or facility to any individual or to discriminate against any individual in the terms, conditions, and privileges of such services and care solely because such individual is a blind person. For purposes of this paragraph, a "blind person" shall mean a person who is registered as a blind person with the commission for the visually handicapped and who meets the definition of a "blind person" pursuant to section three of chapter four hundred fifteen of the laws of nineteen hundred thirteen entitled "An act to establish a state commission for improving the condition of the blind of the state of New York, and making an appropriation therefor".

(f) The provisions of this subdivision, as they relate to age, shall not apply to persons under the age of eighteen years.

(g) It shall be an unlawful discriminatory practice for any person offering or providing housing accommodations, land or commercial space as described in paragraphs (a), (b), and (c) of this subdivision to make or cause to be made any written or oral inquiry or record concerning membership of any person in the state organized militia in relation to the purchase, rental or lease of such housing accommodation, land, or commercial space, provided, however, that nothing in this subdivision shall prohibit a member of the state organized militia from voluntarily disclosing such membership.

* * * * *

9.

(a) It shall be an unlawful discriminatory practice for any fire department or fire company therein, through any member or members thereof, officers, board of fire commissioners or other body or office having power of appointment of volunteer firefighters, directly or indirectly, by ritualistic practice, constitutional or by-law prescription, by tacit agreement among its members, or otherwise, to deny to any individual membership in any volunteer fire department or fire company therein, or to expel or discriminate against any volunteer member of a fire department or fire company therein, because of the race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, marital status, or familial status, of such individual.

(b) Upon a complaint to the division, as provided for under subdivision one of section two hundred ninety-seven of this article, and in the event the commissioner finds that an unlawful discriminatory practice has been engaged in, the board of fire commissioners or other body or office having power of appointment of volunteer firefighters shall be served with any order required, under subdivision four of section two hundred ninety-seven of this article, to be served on any or all respondents requiring such respondent or respondents to cease and desist from such unlawful discriminatory practice and to take affirmative action. Such board shall have the duty and power to appoint as a volunteer firefighter, notwithstanding any other statute or provision of law or by-law of any volunteer fire company, any individual whom the commissioner has determined to be the subject of an unlawful discriminatory practice under this subdivision. Unless such board has been found to have engaged in an unlawful discriminatory practice, service upon such board of such order shall not constitute such board or its members as a respondent nor constitute a finding of an unlawful discriminatory practice against such board or its members.

10. (a) It shall be an unlawful discriminatory practice for any employer, or an employee or agent thereof, to impose upon a person as a condition of obtaining or retaining employment, including oppor-

tunities for promotion, advancement or transfers, any terms or conditions that would require such person to violate or forego a sincerely held practice of his or her religion, including but not limited to the observance of any particular day or days or any portion thereof as a sabbath or other holy day in accordance with the requirements of his or her religion or the wearing of any attire, clothing, or facial hair in accordance with the requirements of his or her religion, unless, after engaging in a bona fide effort, the employer demonstrates that it is unable to reasonably accommodate the employee's or prospective employee's sincerely held religious observance or practice without undue hardship on the conduct of the employer's business. Notwithstanding any other provision of law to the contrary, an employee shall not be entitled to premium wages or premium benefits for work performed during hours to which such premium wages or premium benefits would ordinarily be applicable, if the employee is working during such hours only as an accommodation to his or her sincerely held religious requirements. Nothing in this paragraph or paragraph (b) of this subdivision shall alter or abridge the rights granted to an employee concerning the payment of wages or privileges of seniority accruing to that employee.

(b) Except where it would cause an employer to incur an undue hardship, no person shall be required to remain at his or her place of employment during any day or days or portion thereof that, as a requirement of his or her religion, he or she observes as his or her sabbath or other holy day, including a reasonable time prior and subsequent thereto for travel between his or her place of employment and his or her home, provided however, that any such absence from work shall, wherever practicable in the reasonable judgment of the employer, be made up by an equivalent amount of time and work at some other mutually convenient time, or shall be charged against any leave with pay ordinarily granted, other than sick leave, provided further, however, that any such absence not so made up or charged, may be treated by the employer of such person as leave taken without pay.

(c) It shall be an unlawful discriminatory practice for an employer to refuse to permit an employee to utilize leave, as provided in paragraph (b) of this subdivision, solely because the leave will be used for absence from work to accommodate the employee's sincerely held religious observance or practice.

(d) As used in this subdivision:

(1) "undue hardship" shall mean an accommodation requiring significant expense or difficulty (including a significant interference with the safe or efficient operation of the workplace or a violation of a bona fide seniority system). Factors to be considered in determining whether the accommodation constitutes an undue economic hardship shall include, but not be limited to:

(i) the identifiable cost of the accommodation, including the costs of loss of productivity and of retaining or hiring employees or transferring employees from one facility to another, in relation to the size and operating cost of the employer;

(ii) the number of individuals who will need the particular accommodation to a sincerely held religious observance or practice; and

(iii) for an employer with multiple facilities, the degree to which the geographic separateness or administrative or fiscal relationship of the facilities will make the accommodation more difficult or expensive.

Provided, however, an accommodation shall be considered to constitute an undue hardship if it will result in the inability of an employee to perform the essential functions of the position in which he or she is employed.

(2) "premium wages" shall include overtime pay and compensatory time off, and additional remuneration for night, weekend or holiday work, or for standby or irregular duty.

(3) "premium benefit" shall mean an employment benefit, such as seniority, group life insurance, health insurance, disability insurance, sick leave, annual leave, or an educational or pension benefit that is greater than the employment benefit due the employee for an equivalent period of work performed during the regular work schedule of the employee.

* * * * *

13. It shall be an unlawful discriminatory practice (i) for any person to boycott or blacklist, or to refuse to buy from, sell to or trade with, or otherwise discriminate against any person, because of the race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, or familial status, of such person, or of such person's partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers or customers, or (ii) for any person wilfully to do any act or refrain from doing any act which enables any such person to take such action. This subdivision shall not apply to:

(a) Boycotts connected with labor disputes; or

(b) Boycotts to protest unlawful discriminatory practices.

* * * * *

HISTORY:

Add, L 1951, ch 800, § 1, with substance transferred from § 131; amd, L 1952, ch 284, § 2; L 1952, ch 285, § 6; L 1955, ch 340, § 3; L 1958, ch 738, § 1; L 1958, ch 960, § 23, eff Oct 1, 1959; L 1961, ch 414, § 4; L 1961, ch 609, § 1; L 1962, ch 164, § 1; L 1963, ch 480, § 1, eff Sept 1, 1963; L 1963, ch 481, § 2; L 1964, ch 948, § 1; L 1965, ch 506, § 1; L 1965, ch 516, §§ 1, 2, eff Sept 1, 1965; L 1965, ch 851, § 3, eff Sept 1, 1965; L 1967, ch 202, § 1, eff Sept 1, 1967; L 1967, ch 298, § 1, eff June 1, 1967; L 1967, ch 628, § 1, eff Sept 1, 1967; L 1967, ch 667, § 2; L 1968, ch 10, § 1, eff Feb 27, 1968; L 1968, ch 577, § 1; L 1969, ch 359, §§ 7, 8; L 1969, ch 443, § 1, eff June 8, 1969; L 1969, ch 458, § 1, eff May 9, 1969; L 1969, ch 1070, § 1; L 1970, ch 807, § 1; L 1971, ch 299, § 1; L 1971, ch 461, § 1; L 1971, ch 674, § 1, eff Sept 1, 1971; L 1971, ch 1194, § 1; L 1973, ch 656, § 1; L 1974, ch 27, § 1; L 1974, ch 550, § 1; L 1974, ch 988, §§ 1–7; L 1975, ch 662, § 1, eff Jan 1, 1976; L 1975, ch 803, §§ 3–10, eff Oct 8, 1975; L 1976, ch 177, § 1; L

1976, ch 632, § 2, eff July 21, 1976; L 1976, ch 877, § 4; L 1976, ch 931, § 6, eff Jan 1, 1977; L 1977, ch 730, §§ 1–3, eff Oct 11, 1977; L 1978, ch 204, §§ 1, 2, eff Sept 1, 1978; L 1978, ch 215, § 1, eff Sept 1, 1978; L 1980, ch 689, §§ 1, 2; L 1980, ch 830, § 1, eff July 1, 1980; L 1983, ch 657, § 1; L 1984, ch 98, § 2, eff April 24, 1984; L 1984, ch 296, §§ 1, 2, eff Jan 1, 1986; L 1984, ch 414, § 1, eff Jan 1, 1985; L 1985, ch 208, § 2, eff Nov 1, 1985; L 1985, ch 527, § 1, eff Jan 1, 1986; L 1986, ch 404, § 11, eff July 21, 1986; L 1989, ch 298, § 1; L 1991, ch 74, §§ 1, 2, eff April 26, 1991; L 1991, ch 368, §§ 3–5, eff July 15, 1991; L 1993, ch 478, § 1, eff July 26, 1993; L 1994, ch 593, §§ 1, 2, eff July 26, 1994; L 1996, ch 204, §§ 4, 5, eff Sept 23, 1996; L 1997, ch 269, §§ 3, 4, eff Jan 1, 1998; L 1999, ch 405, §§ 2–8 (Part D), eff Aug 6, 1999; L 2000, ch 166, §§ 12–26, eff July 18, 2000; L 2002, ch 2, §§ 5–13, eff Jan 16, 2003; L 2002, ch 539, §§ 1, 2, eff Nov 16, 2002; L 2003, ch 106, §§ 13–19, eff July 1, 2003; L 2005, ch 75, §§ 2, 3, eff Aug 29, 2005; L 2007, ch 133, § 2, eff Oct 1, 2007; L 2007, ch 394, § 1, eff Jan 1, 2008; L 2007, ch 639, § 1, eff Nov 1, 2007; L 2008, ch 534, § 1, eff Sept 4, 2008; L 2009, ch 56, § 3 (Part N), eff April 7, 2009, deemed eff on and after March 1, 2009; L 2009, ch 56, § 14 (Part AAA), eff April 7, 2009; L 2009, ch 80, § 1, eff July 7, 2009; L 2010, ch 196, §§ 2–4, eff July 15, 2010; L 2010, ch 536, § 6, eff Oct 31, 2010; L 2010, ch 565, § 2, eff Oct 31, 2010; L 2014, ch 536, § 2, effective December 29, 2014; L 2015, ch 89, § 2, effective November 22, 2015; L 2015, ch 141, §§ 2, 3, effective August 13, 2015; L 2015, ch 365, §§ 1–4, effective January 19, 2016; L 2015, ch 369, § 2, effective January 19, 2016; L 2017, ch 59, § 48-a (Part WWW), effective October 7, 2017; L 2018, ch 221, § 1, effective August 24, 2018; L 2019, ch 8, §§ 5-13, effective February 24, 2019; L 2019, ch 55, § 2 (Part II, Subpart O), effective July 11, 2019; L 2019, ch 56, §§ 3–6 (Part T), effective April 12, 2019; L 2019, ch 116, § 2, effective July 25, 2019; L 2019, ch 154, § 1, effective October 8, 2019; L 2019, ch 160, § 2, effective October 11, 2019; L 2019, ch 161, § 2, effective October 11, 2019; L 2019, ch 176, §§ 2, 3, effective November 18, 2019; L 2020, ch 137, §§ 1, 2, effective August 11, 2020; L 2020, ch 311, §§ 1, 2, effective March 2, 2021.

Editor's Notes Laws 1958, ch 960, § 31, eff Oct 1, 1959, provides as follows:

§ 31. Reference in any general, special or local law, county, city or village charter or other special form of government, ordinance, resolution, rule, regulation or document to any provision of law amended or repealed by this act, in force at the time this shall take effect, shall be deemed and construed to refer to the corresponding provision of law, as re-enacted or amended by this act.

Laws 1967, ch 667, § 1, eff Sept 1, 1967, provides as follows:

Section 1. Statement of legislative purpose. It has long been the policy of this state that every individual is guaranteed the right to obtain employment free from discrimination because of his religion. It is the finding of the legislature that, in accordance with this policy, no individual should be prohibited, prevented or disqualified from, or discriminated against in obtaining or holding public employment because of his observance of any particular day or days or portion thereof as his sabbath or other holy day as a requirement of his religion. Questions have recently been raised, however, as to whether the provisions of the law against discrimination and other laws are sufficiently clear to protect the interests of individuals holding or seeking public employment who observe any particular day or days or portion thereof as a sabbath or other holy day as a requirement of their religion. This act is therefore enacted to clarify the existence of this right and to provide specific assurance of it, and should in no way be construed to limit the rights assured by the provisions of the law against discrimination or any other law, rule or regulation. It is the intention of the legislature that this act shall be construed liberally to effectuate the purposes for which it is enacted.

Laws 1969, ch 1070, § 2-a, eff June 25, 1969, provides as follows:

§ 2-a. None of the amendments made by this act shall apply to the city of New York. (Amended by L 1970, ch 493, § 2, eff Sept 1, 1970, by adding § 2-a to Laws 1969, ch 1070.).

Laws 1984, ch 98, § 1, eff April 24, 1984, provides as follows:

It is the intent of the legislature to clarify and codify the law of this state with regard to the employment practices applicable to employees who are pregnant. Because such employees in increasing numbers hold jobs of considerable responsibility and their income is essential to the well-being of their families, no one should be compelled to take a leave of absence for reasons of pregnancy unless it is clear that she can no longer perform the job in a reasonable manner. In addition, when such an employee does take a leave of absence for reasons of pregnancy, payments of wages or benefits to such employee must be made on the same basis as payments to other employees who are off the job due to a temporary non-occupational injury or illness not arising out of and in the course of employment. It is the intent of the legislature to eliminate by statute all unreasonable and unlawful discrimination with regard to employees who are pregnant.

Laws 1984, ch 296, § 12, eff Jan 1, 1986, provides as follows:

This act shall take effect January first, nineteen hundred eighty-six, except that it shall take effect January first, nineteen hundred eighty-five with respect to (i) the state of New York, (ii) a county, city, town, village or any other political subdivision or civil division of the state, (iii) a school district or any other governmental entity operating a public school, college or university, (iv) a public improvement or special district, (v) a public authority, commission or public benefit corporation, or (vi) any other public corporation, agency, instrumentality or unit of government which exercises governmental power under the laws of the state.

Laws 1984, ch 405, § 1, eff July 19, 1984, amended Laws 1984, ch 414, § 3, so as to change the effective date of the amendments to sub 1-a, pars (b), (c) and (d) from Sept 17, 1984 to Jan 1, 1985.

Laws 1996, ch 204, § 1, eff Sept 23, 1996, provides as follows:

Section 1. Legislative findings and intent. The legislature hereby finds and declares that advances in the science of human genetics are rapidly expanding the ability to directly test DNA to determine genetic predispositions to an ever-increasing number of genetically influenced health conditions, and to determine whether an individual who has no predisposition to such disease may nevertheless be a carrier of a genetic anomaly, able to pass a genetic predisposition to offspring.

The legislature further finds and declares, that while advances in the ability to develop tests are proceeding at a fast pace, the knowledge of how genes produce diseases is limited, and, as a result, there is a limited possibility of predicting whether a particular genetic predisposition will result in disease or disability, when the onset of such disease or disability may occur, or how severely the individual may be affected by the disease or disability.

The legislature further finds and declares, that advances in genetic testing for disease, predisposition to disease or carrier status raises the possibility that even otherwise healthy individuals will be labeled genetically "defective" and will form a growing "genetic underclass" of society. The fact that not all such testing is currently regulated, and thus not subject to quality control or proficiency testing, invites the danger of error or misinterpretation of genetic tests.

The legislature further finds and declares, that employers attempting to control health insurance costs may seek to have their prospective employees tested for a range of genetically influenced health conditions including genetic predisposition to disease or disability and carrier status for such. The knowledge gained from DNA-based genetic tests could be used to discriminate against individuals in various employment contexts.

It is therefore declared to be the policy of this state that, in order to preclude unfair discrimination, employers have no legitimate interest in requiring or requesting a genetic test or test results from an employee or applicant and should be prohibited from requiring or requesting such test except

where such a test is shown to be directly related to the occupational environment, such that the employee or applicant with a particular genetic anomaly might be at an increased risk of disease as a result of working in said environment.

Laws 2002, ch 2, § 1, eff Jan 16, 2003, provides as follows:

Section 1. Legislative findings and intent. The legislature reaffirms that the state has the responsibility to act to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life, and that the failure to provide such equal opportunity, whether because of discrimination, prejudice, intolerance or inadequate education, training, housing or health care not only threatens the rights and proper privileges of its inhabitants, but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants.

The legislature further finds that many residents of this state have encountered prejudice on account of their sexual orientation, and that this prejudice has severely limited or actually prevented access to employment, housing and other basic necessities of life, leading to deprivation and suffering. The legislature further recognizes that this prejudice has fostered a general climate of hostility and distrust, leading in some instances to physical violence against those perceived to be homosexual or bisexual.

In so doing, the legislature makes clear its action is not intended to promote any particular attitude, course of conduct or way of life. Rather its purpose is to ensure that individuals who live in our free society have the capacity to make their own choices, follow their own beliefs and conduct their own lives as they see fit, consistent with existing law.

Nothing in this legislation should be construed to create, add, alter or abolish any right to marry that may exist under the constitution of the United States, or this state and/or the laws of this state.

Laws 2003, ch 106, §§ 1 and 1-a, eff July 1, 2003, provide as follows:

Section 1. Legislative findings and intent. The legislature recognizes that the individuals who are members of the military make a tremendous sacrifice, especially in times like these when our military personnel are in many locations throughout the world and here in New York fighting against terrorism. This sacrifice is just as real for the men and women who comprise our reserve armed forces and state organized militia. For those who are not full-time active duty in the military, but instead are called to active duty as a member of the reserve armed forces or state organized militia, the rest of their lives must be put on hold to accommodate that service. However, such military personnel continue to be responsible for their own well-being and the well-being of their families and they must still face the obligations that exist in their everyday lives. Steps have been taken to ease some of the burdens that these brave men and women encounter, to allow them to focus their full energy on defending our country; however, the legislature recognizes that more must be done to ensure that military personnel engaged in active duty are not troubled by their obligations at home. In addition, the legislature recognizes that members of the military should not be discriminated against based upon their military status in areas such as housing, employment and education.

§ 1-a. Short title. This act shall be known as the "Patriot Plan".

Laws 2007, ch 394, § 2, eff Jan 1, 2008, provides as follows:

§ 2. This act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to acts or refusals to act alleged to have occurred on and after such effective date.

Laws 2009, ch 476, § 14, eff Dec 15, 2009, provides as follows:

§ 14. Consistent with available resources, the division of human rights, in conjunction with the office for the prevention of domestic violence, shall develop training programs where necessary to implement subdivision 20 of section 296 of the executive law, as added by a chapter of the laws of 2009.

Laws 2010, ch 536, § 1, eff Oct 31, 2010, provides as follows:

Section 1. Legislative findings. The cost-sharing, deductibles and co-insurance obligations for certain drugs are becoming cost prohibitive for persons trying to overcome serious and often life-threatening diseases and conditions such as cancer, multiple sclerosis, rheumatoid arthritis, hepatitis C, hemophilia and psoriasis. These drugs are typically new, produced in lesser quantities than other drugs, and not available as less expensive brand name or generic prescription drugs. Some health insurance plans and policies in other states as well as some self-insured plans in New York have established unique categories or specialty tiers for these drugs, sometimes referred to as Tier IV or Tier V. Patients under these plans are required to pay a percentage of the cost of these high-priced drugs, rather than the traditional co-payment amounts for generic, preferred brand, and non-preferred brand prescription drugs, often covered by Tier I, Tier II, and Tier III plans and policies, respectively. As a result, patients covered under plans with specialty tiers must pay thousands of dollars in out-of-pocket costs for drugs critical for their treatment.

It is in the public interest to help patients to afford necessary prescription drugs by prohibiting cost-sharing, deductibles and co-insurance obligations by patients that exceed payments for non-preferred brand prescription drugs or the equivalent thereof. It is not the intent of this legislation to preclude plans or policies from categorizing drugs used in the treatment of these common diseases as brand name prescription drugs or generic prescription drug equivalents.

The extraordinary disparity in cost-sharing, deductible and co-insurance burdens imposed on patients whose life and health depend on these drugs places serious and unjustified hardships on individuals based on their disease or disability.

This legislation is intended to provide patients more affordable access to prescription drugs essential for their treatment of cancer, multiple sclerosis, rheumatoid arthritis, hepatitis C, hemophilia, psoriasis, and other diseases (Amd, L 2010, ch 565, § 1, eff Oct 31, 2010.).

Laws 2015, ch 141, § 5, eff August 13, 2015, provides:

§ 5. This act shall take effect immediately and shall be deemed to have been in full force and effect on the same date chapter 536 of the laws of 2014 took effect.

Laws 2019, ch 8, §§ 1, 25, provide:

Section 1. The legislature reaffirms that the state has the responsibility to act to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life, and that the failure to provide such equal opportunity, whether because of discrimination, prejudice, intolerance or inadequate education, training, housing or health care not only threatens the rights and proper privileges of its inhabitants, but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants.

The legislature further finds that many residents of this state have encountered prejudice on account of their gender identity or expression, and that this prejudice has severely limited or actually prevented access to employment, housing and other basic necessities of life, leading to deprivation and suffering. The legislature further recognizes that this prejudice has fostered a general climate of hostility and distrust, leading in some instances to physical violence against those perceived to live in a gender identity or expression which is different from that traditionally associated with the sex assigned to that person at birth.

In so doing, the legislature makes clear its action is not intended to promote any particular attitude, course of conduct or way of life. Rather its purpose is to ensure that individuals who live in our free society have the capacity to

make their own choices, follow their own beliefs and conduct their own lives as they see fit, consistent with existing law.

The legislature further finds that, as court decisions have properly held, New York's sex discrimination laws prohibit discrimination based on gender stereotypes or because an individual has transitioned or intends to transition from one gender to another. This legislation is intended to codify this principle and to ensure that the public understands that discrimination on the basis of gender identity and expression is prohibited.

§ 25. This act shall take effect on the thirtieth day after it shall have become a law; provided, however, that sections nineteen through twenty-four of this act shall take effect on the first of November next succeeding the date on which it shall have become a law.

Laws 2019, ch 55, § 3 (Part II, Subpart O), eff July 11, 2019, provides:

§ 3. This act shall take effect on the ninetieth day after it shall have become a law.

Laws 2019, ch 154, § 2, eff October 8, 2019, provides:

§ 2. This act shall take effect on the sixtieth day after it shall have become a law.

Laws 2019, ch 160, § 16, eff August 12, 2019, provides:

§ 16. This act shall take effect immediately, provided, however:

(a) Sections one of this act shall take effect on the one hundred eightieth day after it shall have become a law.

(b) Sections one-a, two, three, four, five, seven, eight and nine of this act shall take effect on the sixtieth day after it shall have become a law.

(c) Section thirteen of this act shall take effect one year after it shall have become a law.

(d) Sections one, one-a, two, three, four, five, six and thirteen shall only apply to claims filed under such sections on or after the effective date of such sections.

(e) Effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized and directed to be made and completed on or before such effective date.

Laws 2019, ch 161, § 5, eff August 12, 2019, provides:

§ 5. This act shall take effect on the same date and in the same manner as a chapter of the laws of 2019 amending the executive law and other laws relating to increased protections for protected classes and special protections for employees who have been sexually harassed, as proposed in legislative bills numbers S. 6577 and A. 8421, takes effect.

Laws 2019, ch 176, § 4, eff November 18, 2019, provides:

§ 4. This act shall take effect on the ninetieth day after it shall have become a law.

Amendment Notes The 2014 amendment by ch 536, § 2, substituted "another disability" for "a disability" in 14.

The 2015 amendment by ch 89, § 2, added 2(c)(iv); redesignated former 2(c)(iv) as 2(c)(v); and made related changes.

The 2015 amendment by ch 141, §§ 2, 3, rewrote 14; and added 2(d)(iv).

The 2015 amendment by ch 365, §§ 1-4, added "familial status" wherever it appears in 1 and 1-a; added 3(c); added "or familial status" in 9(a) and the first sentence of the introductory language of 13; and made related changes.

The 2015 amendment by ch 369, § 2, added "or pregnancy-related conditions" in 3(a) and added 3(c).

The 2018 amendment by ch 221, § 1, substituted "a person who is deaf or hard of hearing" for "a hearing impaired person" in 14.

The 2019 amendment by ch 8, §§ 5-13, added "gender identity or expression" wherever it appears; and added "housing accommodation" in the first sentence of 5(c)(3).

The 2019 amendment by ch 55, § 2 (Part II, Subpart O), in 16, in the first sentence, added "or by an order adjourning the criminal action in contemplation of dismissal, pursuant to section 170.55, 170.56, 210.46, 210.47, or 215.10 of the criminal procedure law," substituted "licensing, housing, employment, including volunteer positions" for "licensing, employment" and added "or by an order adjourning the criminal action in contemplation of dismissal, pursuant to section 170.55 or 170.56, 210.46, 210.47 or 215.10 of the criminal procedure law" and added the second and the last sentences.

The 2019 amendments by ch 56, §§ 3-6 (Part T), in 2-a, added "lawful source of income" in (a), (b), (c) and (c-1); and in 5, added "lawful source of income" in (a)(1), (a)(2), (a)(3), twice in (c)(1), in (c)(2) and (d).

The 2019 amendment by ch 116, § 2, substituted "educational institution" for "education corporation or association which holds itself out to the public to be non-sectarian and exempt from taxation pursuant to the provisions of article four of the real property tax law" in 4.

The 2019 amendment by ch 154, § 1, added "or the wearing of any attire, clothing, or facial hair in accordance with the requirements of his or her religion" in the first sentence of 10(a).

The 2019 amendment by ch 161, § 2, added "or characteristics" in the last sentence of 1(h).

The 2019 amendments by ch 176, §§ 2, 3, substituted "marital status, or status as a victim of domestic violence, to" for "marital status, or domestic violence victim status, to" in 1(a); and added 22.

The 2020 amendment by ch 137, §§ 1, 2, added "including the use of an animal as a reasonable accommodation to alleviate symptoms or effects of a disability, and" in 2-a(d)(2); and added "including the use of an animal as a reasonable accommodation to alleviate symptoms or effects of a disability, and" in 18(2).

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I. Generally

1. In general

Nonjob-related auto accident injury which precludes injured worker from working is not disability within §§ 292, 296. McAuliffe v Taft Furniture Warehouse & Showroom, Ltd., 116 A.D.2d 774, 497 N.Y.S.2d 170, 1986 N.Y. App. Div. LEXIS 51621 (N.Y. App. Div. 3d Dep't), app. denied, 67 N.Y.2d 609, 503 N.Y.S.2d 1025, 494 N.E.2d 458, 1986 N.Y. LEXIS 18621 (N.Y. 1986).

Where plaintiffs alleged sufficient facts to sustain cause of action under Human Rights Law (CLS Exec § 296(1)(a)), cause of action alleging discrimination under CLS Civ R §§ 40-c and 40-d was also sustained and court erred in dismissing latter cause of action. Samper v Univ. of Rochester, 144 A.D.2d 940, 535 N.Y.S.2d 281, 1988 N.Y. App. Div. LEXIS 14409 (N.Y. App. Div. 4th Dep't 1988), app. dismissed, 74 N.Y.2d 642, 541 N.Y.S.2d 983, 539 N.E.2d 1111, 1989 N.Y. LEXIS 614 (N.Y. 1989).

Sex, age, and disability discrimination claims filed against airline under CLS Exec § 296(1)(a) were not preempted by Federal Airlines Deregulation Act of 1978. Delta Air Lines v New York State Div. of Human Rights, 229 A.D.2d 132, 652 N.Y.S.2d 253, 1996 N.Y. App. Div. LEXIS 12963 (N.Y. App. Div. 1st Dep't 1996), app. dismissed, 90 N.Y.2d 882, 661 N.Y.S.2d 825, 684 N.E.2d 274, 1997 N.Y. LEXIS 2331 (N.Y. 1997), aff'd, 91 N.Y.2d 65, 666 N.Y.S.2d 1004, 689 N.E.2d 898, 1997 N.Y. LEXIS 3710 (N.Y. 1997).

Recovery under CLS Exec § 296(1)(a) requires affirmative proof of mental anguish or humiliation or other personal or monetary damage; any doubt that monetary award is essential element is dispelled by CLS Exec § 297(9), which provides that aggrieved party may maintain action "for damages and such other remedies as may be appropriate." Mizrahi v Taic, 266 A.D.2d 59, 698 N.Y.S.2d 635, 1999 N.Y. App. Div. LEXIS 11631 (N.Y. App. Div. 1st Dep't 1999).

Plaintiff was not entitled to judgment in her favor in action for gender discrimination under CLS Exec § 296(1)(a), despite jury's finding that plaintiff's human rights were violated, where she received no award of monetary damages or other remedy. Mizrahi v Taic, 266 A.D.2d 59, 698 N.Y.S.2d 635, 1999 N.Y. App. Div. LEXIS 11631 (N.Y. App. Div. 1st Dep't 1999).

Scope of CLS Exec § 296 did not extend to threats and vandalism such as plaintiff's allegations that defendant dumped pile of cement on sidewalk in front of plaintiff's house, tossed lighted cigarettes into his backyard, threw eggs on his front steps, and threatened once to paint swastika on his house. Seltzer v Bayer, 272 A.D.2d 263, 709 N.Y.S.2d 21, 2000 N.Y. App. Div. LEXIS 6107 (N.Y. App. Div. 1st Dep't 2000).

New York State Teachers' Retirement System is exempt from provision of Human Rights Law setting forth discriminatory practices by employers, employment agencies, and labor organizations unless it can be shown that the System is a mere subterfuge to defeat the Law. New York State Teachers' Retirement System v New York State Div. of Human Rights, 83 Misc. 2d 993, 373 N.Y.S.2d 964, 1975 N.Y. Misc. LEXIS 3027 (N.Y. Sup. Ct. 1975).

Corporations which determined eligibility for nomination for annual "Tony" awards concerning excellence in theatre could not be held liable in discrimination claim for refusing to categorize comedian's one-man theatrical comedy show as "play" eligible for award since "one-man show" does not fall within any protected category enumerated in Human Rights Law, it was not alleged that any particular corporation had employed, lodged, or financed comedian, and corporations showed that they did not discriminate against one-person shows so long as they qualified as plays.

Mason v American Theatre Wing, 165 Misc. 2d 432, 627 N.Y.S.2d 539, 1995 N.Y. Misc. LEXIS 241 (N.Y. Sup. Ct. 1995).

Claim for negligent infliction of emotional distress based on plaintiff's allegations of sex discrimination by defendant employer and its president was barred by CLS Work Comp § 29(6). Gerson v Giorgio Sant'Angelo Collectibles, 176 Misc. 2d 388, 671 N.Y.S.2d 958, 1998 N.Y. Misc. LEXIS 114 (N.Y. Sup. Ct. 1998).

State has compelling interest in combatting invidious discrimination. N.Y. State Club Ass'n v City of New York, 487 U.S. 1, 108 S. Ct. 2225, 101 L. Ed. 2d 1, 1988 U.S. LEXIS 2861 (U.S. 1988).

Statutes making "direct" discrimination unlawful (CLS Civ R § 40 and CLS Exec § 296) are constitutional, even though they can be violated by speech or other expressive conduct, since governmental interest is aimed at conduct (i.e., discrimination) and not suppression of free speech, and statutes are no broader than necessary to further legitimate goal of eradicating discrimination. Jews for Jesus, Inc. v Jewish Community Relations Council, Inc., 968 F.2d 286, 1992 U.S. App. LEXIS 15614 (2d Cir. N.Y. 1992).

Federal employee could not bring action against his supervisors individually alleging violations of state Human Rights Laws (NYC Admin Code § 8-107 and CLS Exec § 296) since allowing such claims would easily circumvent holding in Brown v General Services Administration, 425 US 820, 96 S Ct 1961, that federal Title VII remedies were exclusive judicial remedy for claims of discrimination in federal employment. Rivera v Heyman, 157 F.3d 101, 1998 U.S. App. LEXIS 22598 (2d Cir. N.Y. 1998).

New York Human Rights Law (NYHRL), N.Y. Exec. Law § 290 et seq., by its terms, applied to the case, and no New York authority suggested that the impact of a discriminatory act had to be felt within New York for the NYHRL to apply. Absent a contrary interpretation by the New York Court of Appeals or the U.S. Court of Appeals for the Second Circuit, the court concluded that in addition to satisfying 29 U.S.C.S. § 633(b)'s deferral state filing requirement via the District of Columbia worksharing agreement, plaintiff adequately sought a state administrative remedy in New York by having his charge cross-filed with the New York State Division of Human Rights. Schuler v Pricewaterhousecoopers, LLP, 514 F.3d 1365, 379 U.S. App. D.C. 456, 2008 U.S. App. LEXIS 3150 (D.C. Cir. 2008).

Exec § 296 could be enforced against a multi-state hockey league. Neeld v American Hockey League, 439 F. Supp. 459, 1977 U.S. Dist. LEXIS 13309 (W.D.N.Y. 1977).

New York Human Rights Law claim is dismissed with leave to amend, where woman-run company alleges IBM terminated its business relationship with company because it is owned, managed, and operated by women, because complaint must be expanded to specify nature of conduct allegedly in violation of CLS Exec Law § 296(13), since statute itself is ambiguous as to what constitutes violation. IBM Corp. v Jennifer-Ashley Co., 872 F. Supp. 1256, 1995 U.S. Dist. LEXIS 439 (S.D.N.Y. 1995).

CLS Exec § 298-a did not provide Ohio resident with remedy for alleged sexual harassment by foreign defendants in Ohio; it was not harsh to dismiss plaintiff's claims since plaintiff could have brought her claims in proper forum (Ohio) but chose not to do so. Beckett v Prudential Ins. Co. of Am., 893 F. Supp. 234, 1995 U.S. Dist. LEXIS 6513 (S.D.N.Y. 1995).

Once an employer has been found not to have discriminated, there is no predicate for imposing liability on supervisors based on Exec § 296 under an aiding and abetting theory. Yerry v Pizza Hut, 186 F. Supp. 2d 178, 2002 U.S. Dist. LEXIS 1976 (N.D.N.Y. 2002).

Former host of telemarketing television network, claiming the network's violations of Exec § 296 and New York City, N.Y., Admin. Code § 8-107, did not actually work New York; but even if a reasonable jury found that she auditioned and was hired in New York, the discriminatory acts she complained of occurred in Pennsylvania and had no effect on New York. Velez v QVC, Inc., 227 F. Supp. 2d 384, 2002 U.S. Dist. LEXIS 18776 (E.D. Pa. 2002).

Employee was denied leave to serve a late notice of claim under N.Y. Educ. Law § 3813(1) on his N.Y. Exec. Law § 296 gender discrimination claim against a school district, its superintendent, and a high school principal because the employee failed to show a sufficient basis to support his request to serve a late notice of claim based on the factors set forth in N.Y. Educ. Law. § 3813(2-a) where he had previously presented a charge of age discrimination to the Equal Employment Opportunity Commission but had not alleged gender discrimination before commencing this action. Kushner v Valenti, 285 F. Supp. 2d 314, 2003 U.S. Dist. LEXIS 17637 (E.D.N.Y. 2003), abrogated, Brtalik v S. Huntington Union Free Sch. Dist., 2010 U.S. Dist. LEXIS 107373 (E.D.N.Y. Oct. 6, 2010).

Discrimination claims brought under the New York Human Rights Law (NYHRL), N.Y. Exec. Law § 296 are analytically identical to claims brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., and are therefore reviewed under the same standard. Since the employee's federal claims of retaliation failed under the McDonnell Douglas framework, her state law claims were also dismissed. Ghirardelli v McAvey Sales & Serv., 287 F. Supp. 2d 379, 2003 U.S. Dist. LEXIS 17952 (S.D.N.Y. 2003), aff'd, 98 Fed. Appx. 909, 2004 U.S. App. LEXIS 11100 (2d Cir. N.Y. 2004).

Claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., and the New York Human Rights Law, N.Y. Exec. Law § 296, are analyzed under the same legal standards. Pfeiffer v Lewis County, 308 F. Supp. 2d 88, 2004 U.S. Dist. LEXIS 4126 (N.D.N.Y. 2004).

In deciding a motion to dismiss, the district court considers claims under the New York Human Rights Law, N.Y. Exec. Law § 296, in tandem with claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq. Gad-Tadros v Bessemer Venture Partners, 326 F. Supp. 2d 417, 2004 U.S. Dist. LEXIS 14165 (E.D.N.Y. 2004).

Because it is binding precedent, the U.S. District Court for the Southern District of New York deems it prudent to follow the ruling of the U.S. Court of Appeals for the Second Circuit that under the "aiding and abetting" language of N.Y. Exec. Law § 296(6), a defendant who actually participates in the conduct giving rise to a discrimination claim may be held personally liable under the New York Human Rights Law, N.Y. Exec. Law § 296. Patane v Clark, 435 F. Supp. 2d 306, 2006 U.S. Dist. LEXIS 42581 (S.D.N.Y. 2006), aff'd in part and rev'd in part, 508 F.3d 106, 2007 U.S. App. LEXIS 27391 (2d Cir. N.Y. 2007).

Although a former employee could not maintain a sexual harassment and hostile work environment lawsuit against individuals under federal law, she could proceed on these claims against individuals under the New York Human Rights Law, N.Y. Exec. Law § 296. Pasqualini v MortgageIT, Inc., 498 F. Supp. 2d 659, 2007 U.S. Dist. LEXIS 54519 (S.D.N.Y. 2007).

Division of Human Rights is not barred from undertaking any of its procedures or enforcing any of its policies against respondent who is actively under jurisdiction of Bankruptcy Court, or one who filed for bankruptcy protection after cause of action arose. 1999 Order Comm HR No. 4-E-A-91-1400339A.

2. Election of remedies

A plaintiff, who is suing for damages arising out of the allegedly wrongful termination of his employment, may not combine in the same cause of action an allegation that he was dismissed solely because of his age, in violation of section 296 (subd 1, par [a]) of the Executive Law, along with the inconsistent claim that his discharge was intended to deprive him of salary and commissions inasmuch as these additional allegations, while properly included in other causes of action, have no place in the age discrimination cause of action which is otherwise legally sufficient; accordingly, the age discrimination should be dismissed with leave to replead. Manley v Pandick Press, Inc., 72 A.D.2d 452, 424 N.Y.S.2d 902, 1980 N.Y. App. Div. LEXIS 9702 (N.Y. App. Div. 1st Dep't), app. dismissed, 49 N.Y.2d 1046, 1980 N.Y. LEXIS 5780 (N.Y. 1980).

New York City had authority to create private cause of action for unlawful discrimination with punitive damages as remedy, and ordinance enacted by city (NYC Admin Code § 8-502) was not inconsistent with CLS Exec Art 15; authority specifically conferred on municipalities under CLS NY Const Art IX § 2(c)(ii)(10) to enact laws whether or not related to "property, affairs, or government" of local government is to be liberally construed and is broad enough to include creation of private cause

of action. Bracker v Cohen, 204 A.D.2d 115, 612 N.Y.S.2d 113, 1994 N.Y. App. Div. LEXIS 5216 (N.Y. App. Div. 1st Dep't 1994).

Administrative convenience dismissal of complaint with State Division of Human Rights alleging discriminatory discharge from employment on bases of race and physical disability was arbitrary where there was nothing in record to suggest that complainant intended to pursue his federal remedy before filing his administrative complaint or that he filed such complaint as prerequisite to commencing federal action, fact that over one year elapsed between filing of administrative complaint and commencement of federal action indicated that complainant initially intended to elect administrative remedy, and thus dismissal violated CLS Exec § 297(9) and CLS Div Hum Rts R § 465.5(e)(2) (9 NYCRR § 465.5(e)(2)). Wegmans Food Mkts. v New York State Div. of Human Rights, 245 A.D.2d 685, 664 N.Y.S.2d 685, 1997 N.Y. App. Div. LEXIS 12602 (N.Y. App. Div. 3d Dep't 1997).

Employee was not barred by Workers' Compensation Law from receiving lost wages under State Division of Human Rights' decision that employer was liable for age and sex discrimination where employee's monetary recovery for intentional acts of discrimination in human rights proceeding was offset by amount of workers' compensation benefits paid to her, and thus CLS Work Comp § 29, which was designed to prevent double recovery, was not frustrated. Grand Union Co. v Mercado, 263 A.D.2d 923, 694 N.Y.S.2d 524, 1999 N.Y. App. Div. LEXIS 8451 (N.Y. App. Div. 3d Dep't 1999).

In civil action alleging employment discrimination based on sexual orientation, defendants were not entitled to dismissal of claims grounded in New York City Human Rights Law on basis that plaintiff elected his remedies under NYC Admin Code § 8-502(d) by filing complaint with New York City Human Rights Commission, as prior complaint was properly dismissed for "administrative convenience" under NYC Admin Code § 8-113(a)(5) to conserve city resources and allow joinder with state law claims in state court in that city commission has limited jurisdiction extending only to claims arising under administrative code, whereas Supreme Court has exclusive jurisdiction over pendent civil claims arising under state law. Acosta v Loews Corp., 276 A.D.2d 214, 717 N.Y.S.2d 47, 2000 N.Y. App. Div. LEXIS 12405 (N.Y. App. Div. 1st Dep't 2000).

Trial court should have dismissed a physician's claim that an employer and supervisors violated N.Y. Exec. Law § 296 and the New York City, N.Y., Admin. Code § 8-107 by terminating him in retaliation for his complaints about the favoritism shown towards other employees because, by commencing an action under N.Y. Lab. Law § 740(4), the physcian's elected remedies, waiving other causes of action relating to the alleged retaliatory discharge, irrespective of the disposition of such claims. Deshpande v TJH Med. Servs., P.C., 52 A.D.3d 648, 861 N.Y.S.2d 697, 2008 N.Y. App. Div. LEXIS 5563 (N.Y. App. Div. 2d Dep't 2008), app. denied, 12 N.Y.3d 704, 879 N.Y.S.2d 50, 906 N.E.2d 1084, 2009 N.Y. LEXIS 293 (N.Y. 2009), overruled in part, Webb-Weber v Community Action for Human Servs., Inc., 23 N.Y.3d 448, 992 N.Y.S.2d 163, 15 N.E.3d 1172, 2014 N.Y. LEXIS 1049 (N.Y. 2014).

State cause of action under Human Rights Law are not barred by filing of complaint with Division of Human Rights on grounds of election of remedies doctrine, as plaintiffs' Title VII (42 USCS § 2000e et seq.) and Age Discrimination in Employment Act (29 USCS § 621 et seq.) discrimination charges were filed initially with EEOC as prerequisite to commencement of court action and subsequent decision by EEOC to refer such charges to Division of Human Rights cannot serve to bar plaintiffs' assertion of their rights under state law; further, even had plaintiffs initially invoked administrative proceedings before Division of Human Rights, such actions would only preclude filing of complaint in District Court while resolution of matters remained undecided by agency. People by Abrams v Holiday Inns, 656 F. Supp. 675, 1984 U.S. Dist. LEXIS 24071 (W.D.N.Y. 1984).

Former assistant vice-president and loan officer of bank is barred by doctrine of election of remedies from bringing action under CLS Exec L § 296(1)(a) for age discrimination, where claim was also filed with appropriate state agency, which rejected it. Moylan v National Westminster Bank, 687 F. Supp. 54, 1988 U.S. Dist. LEXIS 5130 (E.D.N.Y. 1988).

Claim by disabled person that hospital discriminated against him on basis of his disability in violation of CLS Exec L § 296 must be dismissed under doctrine of election of remedies, where claim was addressed and decided by Division of Human Rights and matter was not dismissed for administrative convenience so as to provide exception under § 297(9). Leake v Long Island Jewish Medical Center, 695 F. Supp. 1414, 1988 U.S. Dist. LEXIS 8361 (E.D.N.Y. 1988), aff'd, 869 F.2d 130, 1989 U.S. App. LEXIS 2447 (2d Cir. N.Y. 1989).

Former employee's state claims against union under Human Rights Law, alleging discriminatory refusal to follow up on grievance arising from her termination, were preempted by section of Labor Management Relations Act governing suits by and against labor organizations, and thus were properly removed to federal court under 28 USCS § 1441. Hess v B & B Plastics Div. of Metal Cladding, 862 F. Supp. 31, 1994 U.S. Dist. LEXIS 12743 (W.D.N.Y. 1994).

Former employee's age discrimination claim against former employer under CLS Exec Law §§ 296 et seq. is not dismissed, where employee alleges he served state and local human rights agencies with copies of complaint solely to meet jurisdicitonal requirement for filing action in court and did not file charges of discrimination with either agency, because complaint is unclear as to whether charges were filed with agencies or not, but viewing allegations in light most favorable to employee, nonmoving party, employer's motion to dismiss under election-of-remedies doctrine must be denied Gerzog v London Fog Corp., 907 F. Supp. 590, 1995 U.S. Dist. LEXIS 17432 (E.D.N.Y. 1995).

Employee's administrative complaint, asserted before City Commission of Human Rights that lacked subject matter jurisdiction, was not binding election not to sue. Pierre v Chemical Bank, 960 F. Supp. 21, 1997 U.S. Dist. LEXIS 3032 (E.D.N.Y. 1997).

Successful sexual harassment plaintiff is entitled to award totaling $91,230.15, even though, where employer has 20 employees as hers does, aggregate total of compensatory and punitive damages, under Title VII (42 USCS §§ 2000e et seq.) and 42 USCS § 1981a(b)(3)(A), may not exceed $50,000, because plaintiff is not precluded from also seeking additional compensatory damages under Exec § 296. Walia v Vivek Purmasir & Assocs., 160 F. Supp. 2d 380, 2000 U.S. Dist. LEXIS 19076 (E.D.N.Y. 2000).

Detective's claim that a village's sick leave policy was enforced in a discriminatory manner on the basis of gender, race, and disability in violation of the New York Human Rights Law, N.Y. Exec. Law § 296, was barred by the election of remedies provision of N.Y. Exec. Law § 297(9) because the detective had filed a discrimination complaint with the New York State Division of Human Rights and the detective's present claims of gender, race, and disability discrimination arose out of the same incident forming the basis of her claim before the Division even though the administrative complaint alleged only discrimination on the basis of creed. Borum v Village of Hempstead, 590 F. Supp. 2d 376, 2008 U.S. Dist. LEXIS 103891 (E.D.N.Y. 2008).

3. Immunity from suit

Court properly dismissed cause of action for breach of employment contract, whileallowing cause of action for statutory retaliatory discharge under CLS Exec § 296, since statutory restriction on right to discharge may provide statutory right torelief for discharged employees as alternative to unviable contract and tort claims. Fisher v Maxwell Communications Corp., 205 A.D.2d 356, 613 N.Y.S.2d 369, 1994 N.Y. App. Div. LEXIS 6242 (N.Y. App. Div. 1st Dep't 1994).

Plaintiffs, licensed practical nurses, lacked standing to assert claim that medical center's per se policy contravened CLS Civ R § 79-i and CLS Exec § 296 by punishing employees who had asserted their intention to refrain from participating in abortive procedures by requiring them to participate in emergency situations involving abortions since no emergency was implicated in instant circumstances nor did plaintiffs allege that they were forced to perform abortive procedure. Larson v Albany Med. Ctr.,

252 A.D.2d 936, 676 N.Y.S.2d 293, 1998 N.Y. App. Div. LEXIS 8687 (N.Y. App. Div. 3d Dep't 1998).

Immunity from suit granted to physicians or review committees for evaluations of other physicians done without malicious intent, as provided by CLS Educ § 6527 and Pub Health §§ 2805-j and 2805-m(3), was no defense in sex discrimination action brought against physicians under CLS Exec § 296; relevant sections of Education Law and Public Health Law are not blanket authorizations to discriminate against other physicians but were enacted to encourage frank discussion of physician's performance and credentials. Samper v Univ. of Rochester Strong Mem'l Hosp., 139 Misc. 2d 580, 528 N.Y.S.2d 958, 1987 N.Y. Misc. LEXIS 2830 (N.Y. Sup. Ct. 1987), modified, 144 A.D.2d 940, 535 N.Y.S.2d 281, 1988 N.Y. App. Div. LEXIS 14409 (N.Y. App. Div. 4th Dep't 1988).

Plaintiff real estate salesperson was independent contractor, not employee, and thus could not bring action against brokerage firm under CLS Exec § 296 although she was given office space, was scheduled for floor time by firm's manager, and was required to attend sales meetings and spend 2 to 4 hours per week in office, where (1) she scheduled her own hours, marketed her own listings, and was expected to develop her own business leads, (2) she was paid on commission basis and received no commission until property was sold, (3) no taxes were deducted from her gross commission payment, and she was not covered by workers' compensation or state unemployment insurance, and (4) she paid self-employment social security tax, as well as her own state licensing fees and fee to obtain multiple listing services. Stetka v Hunt Real Estate Corp., 859 F. Supp. 661, 1994 U.S. Dist. LEXIS 12292 (W.D.N.Y. 1994).

Discrimination plaintiff's allegations that, after she complained of sexual harassment, her former employer took no action to correct situation, and instead initiated course of retribution and retaliation, were sufficient to invoke intentional tort exception to exclusive remedy under CLS Work Comp § 11. Walker v Weight Watchers Int'l, 961 F. Supp. 32, 1997 U.S. Dist. LEXIS 4542 (E.D.N.Y. 1997).

CLS Work Comp § 11 barred discrimination plaintiff's claim that, after she had complained of sexual harassment, her former employer negligently retained harassing employee. Walker v Weight Watchers Int'l, 961 F. Supp. 32, 1997 U.S. Dist. LEXIS 4542 (E.D.N.Y. 1997).

Jurisdiction cannot be exercised with respect to employees' Human Rights Law (CLS Exec Law §§ 290 et seq.) claim against state asserting age discrimination, because defendants did not consent to suit in federal District Court, and their Eleventh Amendment immunity has not been waived by any language in Law. Mete v New York State Office of Mental Retardation & Developmental Disabilities, 984 F. Supp. 125, 1997 U.S. Dist. LEXIS 17762 (N.D.N.Y. 1997), aff'd sub. nom., Cooper v New York State Office of Mental Health, 162 F.3d 770, 1998 U.S. App. LEXIS 31725 (2d Cir. N.Y. 1998).

Summary judgment is appropriate dismissing CLS Exec Law § 296 discriminatory termination claim of discharged laborer, where there is no suggestion in record that New York has waived its immunity or otherwise consented to be sued in federal court, because defendant State University of New York at Buffalo is arm of state, and Eleventh Amendment bars this suit against it. Stephens v State Univ. of N.Y., 11 F. Supp. 2d 242, 1998 U.S. Dist. LEXIS 10125 (W.D.N.Y. 1998).

African-American employee's Exec § 296 racial discrimination and common-law claims are barred by Eleventh Amendment, where employer is state department of labor, and nothing in Human Rights Law (Exec §§ 290 et seq.) provides any basis for finding that New York has waived its Eleventh Amendment immunity, because Eleventh Amendment bars suits against states—and state agencies—by their own citizens in federal court in absence of waiver by state or abrogation by Congress. Phipps v New York State DOL, 53 F. Supp. 2d 551, 1999 U.S. Dist. LEXIS 9584 (N.D.N.Y. 1999).

Employee's sexual harassment claim brought under Human Rights Law (Exec § 296) is denied summarily, where employer qualifies as state entity based on its enabling statute and extensive nexus between itself and state illustrated therein, because nothing in Human Rights Law indicates New York has waived Eleventh Amendment immunity thereunder. Turner v Olympic Regional Dev. Auth., 89 F. Supp. 2d 241, 2000 U.S. Dist. LEXIS 1401 (N.D.N.Y. 2000).

Racial discrimination claims under federal law and Exec § 296 against Developmental Disabilities Services Office and supervisors in their official capacities are dismissed, even though claims against individual defendants in their personal capacities remain, where Office is subdivision of New York Office of Mental Retardation and Developmental Disabilities, which is state agency, because Eleventh Amendment immunity extends to state and its agencies. Hill v Taconic Developmental Disabilities Servs. Office, 181 F. Supp. 2d 303, 2002 U.S. Dist. LEXIS 779 (S.D.N.Y. 2002), vacated, in part, 57 Fed. Appx. 9, 2003 U.S. App. LEXIS 11 (2d Cir. N.Y. 2003).

Former employee's claims for money damages against the State of New York and its Department of Transportation (her former employer) and individual defendants in their official capacities was dismissed where the State of New York had not consented to suit in federal court. Briggs v New York State DOT, 233 F. Supp. 2d 367, 2002 U.S. Dist. LEXIS 22436 (N.D.N.Y. 2002).

Former university employee's race discrimination claims against state university officials in their official capacities under the New York State Human Rights Law, N.Y. Exec. Law § 296, were dismissed on Eleventh Amendment grounds since the district court was precluded from granting prospective relief against the officials based on violations of state law. Ghent v Moore, 519 F. Supp. 2d 328, 2007 U.S. Dist. LEXIS 78357 (W.D.N.Y. 2007), aff'd, 324 Fed. Appx. 55, 2009 U.S. App. LEXIS 8949 (2d Cir. 2009).

Employee's discrimination claim against a state agency employer was barred by Eleventh Amendment immunity, which was not waived by the New York State Human Rights Law. Hamzik v Office for People with Developmental Disabilities, 859 F. Supp. 2d 265, 2012 U.S. Dist. LEXIS 68400 (N.D.N.Y. 2012).

4. Arbitration

Claims of race and gender-based discrimination brought under Human Rights Law by employees of investment firms should be submitted to arbitration under terms of Uniform Application for Securities Industry Registration or Transfer (U-4 form), which apply Federal Arbitration Act (9 USCS § 1 et seq.) to such disputes, where employees executed form as part of their application for registration with various securities exchanges; to extent that Wertheim & Co. v Halpert, 48 N.Y.2d 681, 421 N.Y.S.2d 876, 397 N.E.2d 386, 1979 N.Y. LEXIS 2337 (N.Y. 1979).

Television network was entitled to summary judgment dismissing age discrimination action where employee admitted that network had planned to rehire him prior to his well-publicized comments about black athletes, and it was undisputed that network had been planning his continued employment until he made offending comments. Snyder v CBS, 204 A.D.2d 252, 612 N.Y.S.2d 147, 1994 N.Y. App. Div. LEXIS 5797 (N.Y. App. Div. 1st Dep't 1994).

County department of corrections was entitled to dismissal of petitioner's age discrimination claim where (1) during his period as probationary correction officer, petitioner failed to qualify in firearm training/unsafe procedures course, was failing course in defensive tactics, and had missed other required courses due to several absences, (2) petitioner was notified that he was discharged for unsatisfactory performance, and (3) petitioner thereafter wrote letters to Commissioner of Corrections in which he made no claim of age discrimination and admitted that he failed required courses. Pantaleone v Jackson, 204 A.D.2d 458, 611 N.Y.S.2d 631, 1994 N.Y. App. Div. LEXIS 4768 (N.Y. App. Div. 2d Dep't), app. denied, 84 N.Y.2d 806, 618 N.Y.S.2d 7, 642 N.E.2d 326, 1994 N.Y. LEXIS 3363 (N.Y. 1994).

Employee was not entitled to permanent stay of arbitration of claims predicated on Human Rights Law, on ground that arbitration would violate her constitutional right to jury trial, as she waived her right to jury trial by her conscious and deliberate decision to accept employee manual which provided for arbitration of employment-related claims. Ball v SFX Broadcasting, 236 A.D.2d 158, 665 N.Y.S.2d 444, 1997 N.Y. App. Div. LEXIS 12613

(N.Y. App. Div. 3d Dep't 1997), app. dismissed, 91 N.Y.2d 921, 669 N.Y.S.2d 262, 692 N.E.2d 131, 1998 N.Y. LEXIS 293 (N.Y. 1998), app. denied, 92 N.Y.2d 803, 677 N.Y.S.2d 73, 699 N.E.2d 433, 1998 N.Y. LEXIS 1792 (N.Y. 1998).

Age discrimination lawsuit, arising from plaintiff's termination as superintendent of defendants' apartment complex, was not barred by mandatory arbitration clause of collective bargaining agreement between defendants and plaintiff's union, where agreement contained no clear and unequivocal agreement to arbitrate statutory age discrimination claims; nor was lawsuit precluded because arbitrator in plaintiff's grievance proceeding had determined that plaintiff was terminated for just cause, where age discrimination claim was not considered by arbitrator. Crespo v 160 West End Ave. Owners Corp., 253 A.D.2d 28, 687 N.Y.S.2d 79, 1999 N.Y. App. Div. LEXIS 870 (N.Y. App. Div. 1st Dep't 1999).

Employee could maintain action against her employer under Human Rights Law despite her failure to utilize grievance and arbitration process of collective bargaining agreement where agreement excluded several types of disputes from arbitration, and specifically acknowledged that working environment "should be characterized by mutual respect for the dignity of every employee (and that n)othing contained in this paragraph shall be subject to Step 3 of the grievance procedure." Grovesteen v New York State Pub. Emples. Fed'n, 265 A.D.2d 784, 697 N.Y.S.2d 392, 1999 N.Y. App. Div. LEXIS 10943 (N.Y. App. Div. 3d Dep't 1999).

There are no public policy reasons for not enforcing anticipatory agreements to arbitrate statutory employment discrimination claims arising under CLS Exec § 296(1)(a). S. Huntington Jewish Ctr. v Heyman, 282 A.D.2d 684, 723 N.Y.S.2d 511, 2001 N.Y. App. Div. LEXIS 5166 (N.Y. App. Div. 2d Dep't 2001).

Plaintiff's claim of age discrimination under CLS Exec § 296, arising from his termination as superintendent of defendants' cooperative apartment building, was not subject to arbitration under parties' collective bargaining agreement since there was clear state policy against resolution of discrimination claims through arbitration, and operation of single apartment building could not be said to affect or involve interstate commerce. Crespo v Kreisel Co., 172 Misc. 2d 182, 657 N.Y.S.2d 321, 1997 N.Y. Misc. LEXIS 127 (N.Y. Sup. Ct. 1997).

Plaintiff, initially hired under employment contract that contained arbitration clause, was entitled to stay of arbitration of dispute arising from defendant employer's alleged violation of Human Rights Law where defendant, after terminating plaintiff at conclusion of initial contract term, subsequently rehired him as at-will employee under new contract without arbitration clause, and lawsuit pertained to period of time when plaintiff worked under employment contract that did not have arbitration clause. Hamilton v Cantor Fitzgerald Sec., 177 Misc. 2d 1010, 677 N.Y.S.2d 688, 1998 N.Y. Misc. LEXIS 395 (N.Y. Sup. Ct. 1998).

Arbitration clause that covered any dispute or controversy arising out of or relating to an employment agreement, the interpretation thereof, and/or the employment relationship between an employer and an employee was valid under N.Y. C.P.L.R. 7501 and 7503(a) and covered the employee's claims of discrimination, harassment, and retaliation under the New York State Human Rights Law, N.Y. Exec. Law § 296(6) and the New York City Human Rights Law, N.Y., Admin. Code § 8-107(6), breach of contract, promissory estoppel, fraudulent inducement, defamation, and intentional torts arising out of the same alleged conduct as: (1) the employee was recruited while the employee was an out-of-state resident, and hired to work in New York trading stock indexes, currencies, and interest rates, (2) a punitive damages claim was arbitrable as the job that was the subject of the agreement plainly concerned a "transaction involving commerce" under the Federal Arbitration Agreement, 9 U.S.C.S. § 2, (3) the employee did not allege specific conduct that substantiated the employee's characterizations of fraud, duress, coercion, or adhesion in the execution of the agreement, and (4) the employee failed to show why the agreement was not binding on the employee's mentor, who was also an employee of the employer, and on an affiliated entity of the employer. Tong v S.A.C. Capital Mgt., LLC, 835 N.Y.S.2d 881, 16 Misc. 3d 401, 237 N.Y.L.J. 116, 2007 N.Y. Misc. LEXIS 3663 (N.Y. Sup. Ct. 2007), aff'd in part, modified, 52 A.D.3d 386, 860 N.Y.S.2d 84, 2008 N.Y. App. Div. LEXIS 5490 (N.Y. App. Div. 1st Dep't 2008).

New York City Human Rights Law, New York City, N.Y., Admin. Code § 8-107(1)(a), while omitting reference to genetic or carrier-based discrimination, otherwise generally tracks the New York State Human Rights Law, N.Y. Exec. Law § 296, with the notable exception that only the City statute makes it unlawful to discriminate, in the area of employment, based upon an individual's "sexual orientation," as the catalog of prohibited acts in § 296, does not include this element; the New York City Council has created a private civil right of action for persons in the City who are aggrieved by unlawful discriminatory practices, New York City, N.Y., Admin. Code § 8-502, but such an ordinance cannot, of course, be inconsistent with State law, under N.Y. Mun. Home Rule Law § 10(1)(i). Priore v N.Y. Yankees, 307 A.D.2d 67, 761 N.Y.S.2d 608, 2003 N.Y. App. Div. LEXIS 6119 (N.Y. App. Div. 1st Dep't), app. denied, 1 N.Y.3d 504, 775 N.Y.S.2d 781, 807 N.E.2d 894, 2003 N.Y. LEXIS 4134 (N.Y. 2003).

Where the radio station owner and manager entered into an employment contract that contained an arbitration clause, the enforceability of the arbitration clause was not affected by the statutory nature of the former employee's discrimination claims against the owner and manager under the New York State Human Rights Law, N.Y. Exec. Law § 290 et seq. DiBello v Salkowitz, 4 A.D.3d 230, 772 N.Y.S.2d 663, 2004 N.Y. App. Div. LEXIS 1847 (N.Y. App. Div. 1st Dep't 2004).

Employer and employee embroiled in termination/sexual harassment dispute shall submit all claims to arbitration in accordance with terms of employment agreement, except for employee's claims for punitive damages under CLS Exec Law § 296, because arbitrator has no power to award punitive damages on claims brought under New York law, but prohibition concerning one claim does not bar arbitration of other claims, as court may simply sever and stay further proceedings on nonarbitrable claim. DiCrisci v Lyndon Guaranty Bank, 807 F. Supp. 947, 1992 U.S. Dist. LEXIS 18937 (W.D.N.Y. 1992).

Arbitration is compelled under 9 USCS § 3, where young African-American male employees assert sexual harassment claims under CLS Exec Law § 296(1), but employees' signatures appear on "Principles of Employment" which expressly and unambiguously obligate them to arbitrate employment disputes, even though they both allege they signed documents at orientation meetings which were "intimidating, hurried, and tense" and did not even know meaning of word "arbitration" until they consulted with their attorneys, because argument that they did not have time to read agreement before signing must fail in light of strong federal policy favoring arbitration. Maye v Smith Barney Inc., 897 F. Supp. 100, 1995 U.S. Dist. LEXIS 11881 (S.D.N.Y.), app. denied, 903 F. Supp. 570, 1995 U.S. Dist. LEXIS 16774 (S.D.N.Y. 1995).

In granting an employer's motion to dismiss an employee's discrimination claims without prejudice subject to resolution through arbitration, the court concluded that although the contracts at issue were exempt under § 1 of the Federal Arbitration Act (FAA), 9 U.S.C.S. § 1 et seq., i.e. transportation workers' employment contracts, they were not unenforceable where state law provided otherwise; New York law required enforcement of the provisions to arbitrate the employee's claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., and the New York State Human Rights Law, N.Y. Exec. Law § 296 et seq. Valdes v Swift Transp. Co., 292 F. Supp. 2d 524, 2003 U.S. Dist. LEXIS 21348 (S.D.N.Y. 2003).

Employee's state law claims for overtime pay and alleged retaliatory conduct were dismissed and arbitration was compelled because nothing in N.Y. Labor Law § 663 or N.Y. Exec. Law § 296 indicates that the state legislature intended to preclude compulsory arbitration of claims under those provisions. Ciago v Ameriquest Mortg. Co., 295 F. Supp. 2d 324, 2003 U.S. Dist. LEXIS 22852 (S.D.N.Y. 2003).

Police officer did not establish a prima facie case of gender discrimination with regards to the assignment of overtime because the police officer did not cite instances where she sought overtime work and that work was denied and the police officer was not entitled to secondary work permits while she was on

medical leave. Lee v City of Syracuse, 603 F. Supp. 2d 417, 2009 U.S. Dist. LEXIS 24966 (N.D.N.Y. 2009), overruled in part, Widomski v State Univ. of N.Y., 748 F.3d 471, 2014 U.S. App. LEXIS 6466 (2d Cir. N.Y. 2014).

II. Employment Discrimination

A. Generally

5. In general

Amendment of the Human Rights Law in 1965 to prohibit discrimination in employment based on sex was intended as a blanket proscription, and it was not necessary that each discriminatory practice in use in 1965, whether existing by legislative grace or in consequence of employment custom or usage, should have been marked for explicit demise in order to be prohibited. Brooklyn Union Gas Co. v New York State Human Rights Appeal Bd., 41 N.Y.2d 84, 390 N.Y.S.2d 884, 359 N.E.2d 393, 1976 N.Y. LEXIS 3253 (N.Y. 1976), reh'g denied, 42 N.Y.2d 824, 1977 N.Y. LEXIS 3961 (N.Y. 1977).

Evidence showing, inter alia, city employee's chronic lateness, absenteeism, insubordination and poor work performance supported finding of division of human rights of no probable cause to believe that employee was victim of discrimination so that Human Rights Appeal Board exceeded its limited scope of review in determining that division's order dismissing employee's complaint was arbitrary, capricious and an abuse of discretion. New York City Housing Authority v State Div. on Human Rights, 53 A.D.2d 844, 385 N.Y.S.2d 785, 1976 N.Y. App. Div. LEXIS 13674 (N.Y. App. Div. 1st Dep't 1976).

That a job is too dangerous for women, without more, is an insufficient basis for the "bona fide occupational qualification" exception, in view of the statutory rationale that the individual woman be allowed to choose whether to accept the risk. Sexual identity is not a "bona fide occupational qualification" for the position of cook in a minimum security correctional facility for males. State Div. of Human Rights v New York State Dep't of Correctional Services, 61 A.D.2d 25, 401 N.Y.S.2d 619, 1978 N.Y. App. Div. LEXIS 9698 (N.Y. App. Div. 4th Dep't 1978).

It is an unlawful discriminatory practice for an employer, because of a disability of any individual, to refuse to employ or to discharge such individual or to discriminate against him in compensation or in the terms, conditions or privileges of employment. Westinghouse Electric Corp. v State Div. of Human Rights, 63 A.D.2d 170, 406 N.Y.S.2d 912, 1978 N.Y. App. Div. LEXIS 11327 (N.Y. App. Div. 3d Dep't 1978), aff'd, 49 N.Y.2d 234, 425 N.Y.S.2d 74, 401 N.E.2d 196, 1980 N.Y. LEXIS 2036 (N.Y. 1980).

It is an unlawful discriminatory practice for an employer, because of a disability of any individual, to refuse to employ or to discharge such individual or to discriminate against him in compensation or in the terms, conditions or privileges of employment, disability being limited to physical, mental or medical conditions which are unrelated to the ability to engage in the activities involved in the job or occupation. Arnot Ogden Memorial Hospital v State Div. of Human Rights, 67 A.D.2d 543, 416 N.Y.S.2d 372, 1979 N.Y. App. Div. LEXIS 10500 (N.Y. App. Div. 3d Dep't 1979).

The decision of the Human Rights Appeals Board finding the employer guilty of an unlawful discriminatory practice by discriminating against a female employee because she had opposed practices which were forbidden by the Human Rights Law could not stand where the employer did not discriminate against the complaining employee and other female office workers on the basis of sex and thus the employer could not be found to have retaliated against the complaining employee for having opposed an unlawful practice; however, employees who feel victimized by unlawful discrimination do not act at their peril in trying to expose such practices, since absolute protection is afforded those who seek redress by the commencement of an administrative proceeding. Mohawk Finishing Products, Inc. v State Div. of Human Rights, 83 A.D.2d 970, 442 N.Y.S.2d 816, 1981 N.Y. App. Div. LEXIS 15431 (N.Y. App. Div. 3d Dep't 1981), aff'd, 57 N.Y.2d 892, 456 N.Y.S.2d 749, 442 N.E.2d 1260, 1982 N.Y. LEXIS 3772 (N.Y. 1982).

Retaliation complaint alleging that the employer failed to promote complainant during the pendency of an earlier-filed sex discrimination complaint was properly dismissed where complainant had not taken the required competitive examination needed to qualify for one position in question and where the person promoted to the other position in question had three months actual work experience in that specific position, which experience complainant lacked. Engel v New York State Human Rights Appeal Bd., 84 A.D.2d 640, 444 N.Y.S.2d 288, 1981 N.Y. App. Div. LEXIS 15761 (N.Y. App. Div. 3d Dep't 1981).

In an action arising out of alleged discrimination against an employee by defendant bank and an individual defendant, her supervisor, the employee's claim against said individual defendant would be dismissed where he was not shown to be either an employer or high-ranking executive, in that the Human Rights Law (Executive Law, § 290 et seq.) and the Federal Equal Pay Act (29 USCS § 206) are designed to prohibit an employer or high-ranking senior executive from committing unlawful discriminatory practices. Patrowich v Chemical Bank, 98 A.D.2d 318, 470 N.Y.S.2d 599, 1984 N.Y. App. Div. LEXIS 16482 (N.Y. App. Div. 1st Dep't), app. dismissed, 62 N.Y.2d 801 (N.Y. 1984), aff'd, 63 N.Y.2d 541, 483 N.Y.S.2d 659, 473 N.E.2d 11, 1984 N.Y. LEXIS 4717 (N.Y. 1984).

Protection of Executive Law § 296 does not extend to unpaid voluntary relationship in which resident of group home for those with history of psychiatric disability performed volunteer work at school; although Executive Law § 296 expressly covers volunteer firemen, legislature's failure to include other voluntary unpaid positions evidences its intent not to extend protection of statute to all voluntary positions. Sweeney v Board of Education, 112 A.D.2d 240, 491 N.Y.S.2d 455, 1985 N.Y. App. Div. LEXIS 55984 (N.Y. App. Div. 2d Dep't 1985).

CLS Exec § 296 does not exclude public officers from its coverage. Scopelliti v Town of New Castle, 210 A.D.2d 339, 620 N.Y.S.2d 407, 1994 N.Y. App. Div. LEXIS 12522 (N.Y. App. Div. 2d Dep't 1994).

Real estate broker suing for employment discrimination under CLS Exec § 296(1)(a) failed to raise triable issue of fact as to liability of her coemployees of realty company, absent showing that coemployees had any ownership interest in company or had power to do more than carry out personnel decisions made by others. Murphy v ERA United Realty, 251 A.D.2d 469, 674 N.Y.S.2d 415, 1998 N.Y. App. Div. LEXIS 6829 (N.Y. App. Div. 2d Dep't 1998).

Real estate broker suing for employment discrimination had cause of action against both her employer and her coemployees under NYC Admin Code § 8-107(1)(a), which, unlike CLS Exec § 296(1)(a), expressly provides that it is unlawful for "an employer or an employee or an agent thereof" to engage in discriminatory employment practices. Murphy v ERA United Realty, 251 A.D.2d 469, 674 N.Y.S.2d 415, 1998 N.Y. App. Div. LEXIS 6829 (N.Y. App. Div. 2d Dep't 1998).

Real estate broker suing for employment discrimination had cause of action against employer under CLS Exec § 296(1)(a) and against her coemployees for aiding and abetting under CLS Exec § 296(6) where she alleged that 3 individuals—owner/employer and 2 coemployees—engaged in pervasive and repugnant pattern of discriminatory employment practices, based on both sex and national origin, including unwanted physical advances and denigrating comments about her Irish ancestry, that created hostile working environment. Murphy v ERA United Realty, 251 A.D.2d 469, 674 N.Y.S.2d 415, 1998 N.Y. App. Div. LEXIS 6829 (N.Y. App. Div. 2d Dep't 1998).

It is employer's participation in discriminatory practice that serves as predicate for imposition of liability on others for aiding and abetting under CLS Exec § 296(6). Murphy v ERA United Realty, 251 A.D.2d 469, 674 N.Y.S.2d 415, 1998 N.Y. App. Div. LEXIS 6829 (N.Y. App. Div. 2d Dep't 1998)).

Under N.Y. Exec. Law § 296, there is no controlling or persuasive authority holding that an employer may be held liable based solely on its failure to engage in an interactive process with an employee, absent a showing that the breakdown of the interactive process led to the employer's failure to provide a reasonable accommodation, and thus, when the employee failed to prove that the employer failed to provide reasonable accommodations for the employee's disability, and the trial court properly charged the

jury on the essential elements of a claim of discrimination based on disability, the employer was entitled to judgment on the issue of liability. Hayes v Estee Lauder Cos., Inc., 34 A.D.3d 735, 825 N.Y.S.2d 237, 2006 N.Y. App. Div. LEXIS 14363 (N.Y. App. Div. 2d Dep't 2006).

Downsizing of a company's employment rolls, due to business failings and economic setbacks, constituted a sustainable rebuttal of a prima facie case of discrimination and explanation for the decision to terminate a particular employee, when demonstrated virtually without contradiction. Bailey v New York Westchester Sq. Med. Ctr., 38 A.D.3d 119, 829 N.Y.S.2d 30, 2007 N.Y. App. Div. LEXIS 72 (N.Y. App. Div. 1st Dep't 2007).

Aiders and abettors provision of CLS Exec § 296(6) applies only to parties outside employment relationship who may assist in employment discrimination. Foley v Mobil Chem. Co., 170 Misc. 2d 1, 647 N.Y.S.2d 374, 1996 N.Y. Misc. LEXIS 302 (N.Y. Sup. Ct. 1996).

Because a Governor's Directive, requiring all state agencies to recognize same-sex marriages, was consistent with New York's common law, N.Y. State Fin. Law § 123-b, N.Y. Dom. Rel. Law §§ 12, 15(1)(a), N.Y. Exec. Law § 296, and the separation of powers in N.Y. Const. arts. III, IV, VI regarding recognition of marriages legally solemnized outside New York, the Governor did nothing to declare unlawful or to enjoin. Golden v Paterson, 877 N.Y.S.2d 822, 23 Misc. 3d 641, 2008 N.Y. Misc. LEXIS 7457 (N.Y. Sup. Ct. 2008).

Employee stated a claim against her employer's owner for pregnancy discrimination under the New York State Human Rights Law, N.Y. Exec. Law § 290 et seq., where she alleged that: (1) he was her employer's owner, and that he hired her; (2) after she announced her pregnancy to her supervisor, who regularly apprised the owner of all company matters, the owner fired her. (3) the owner could be held individually liable as an employer under N.Y. Exec. Law § 296(1) as there were sufficient allegations that he actually participated in the alleged discriminatory conduct; and (4) since the owner's alleged actions gave rise to the discrimination claim, he could not be held liable for aiding and abetting under § 296(6). Krause v Lancer & Loader Group, LLC, 965 N.Y.S.2d 312, 40 Misc. 3d 385, 2013 N.Y. Misc. LEXIS 1815 (N.Y. Sup. Ct. 2013).

Employee's claim of discrimination due to his sexual orientation in violation of the New York State Human Rights Law, N.Y. Exec. Law § 296 against other employees failed because the New York City Human Rights Law, N.Y., N.Y., Admin. Code § 8-107, and the New York State Human Rights Law, N.Y. Exec. Law § 296, were addressed to unlawfully discriminatory practices in the hiring, retention, or firing of employees, and were not intended to target fellow employees acting without the knowledge or consent of the employer. Priore v N.Y. Yankees, 307 A.D.2d 67, 761 N.Y.S.2d 608, 2003 N.Y. App. Div. LEXIS 6119 (N.Y. App. Div. 1st Dep't), app. denied, 1 N.Y.3d 504, 775 N.Y.S.2d 781, 807 N.E.2d 894, 2003 N.Y. LEXIS 4134 (N.Y. 2003).

Employee's claim of a violation of the New York State Human Rights Law, N.Y. Exec. Law § 296 against another employee failed as the allegations ran afoul of the one-year statute of limitations under N.Y. C.P.L.R. art. 215(3). Priore v N.Y. Yankees, 307 A.D.2d 67, 761 N.Y.S.2d 608, 2003 N.Y. App. Div. LEXIS 6119 (N.Y. App. Div. 1st Dep't), app. denied, 1 N.Y.3d 504, 775 N.Y.S.2d 781, 807 N.E.2d 894, 2003 N.Y. LEXIS 4134 (N.Y. 2003).

Neither Age Discrimination in Employment Act (ADEA; 29 USCS §§ 621 et seq.) nor New York Human Rights Law (CLS Exec §§ 290 et seq.) affords direct cause of action to non-employee due to discrimination against spouse; moreover, neither statute provides for claim for loss of consortium. Moss v Stinnes Corp., 169 F.3d 784, 1999 U.S. App. LEXIS 3586 (2d Cir. N.Y.), cert. denied, 528 U.S. 879, 120 S. Ct. 189, 145 L. Ed. 2d 159, 1999 U.S. LEXIS 5913 (U.S. 1999).

Although the prior opinion did not directly address the state-law claims against the individual defendants, the opinion discussed the facts relevant to those claims at length, making defendants' argument that the prior court overlooked critical matters unpersuasive; implicit in the prior court's refusal to dismiss the claims against the individuals was a finding that the employee produced sufficient evidence of their actual participation in discriminatory or retaliatory acts. Defendants offered no controlling precedent or other overlooked matter that would require the instant court to disturb that finding. Henry v Wyeth Pharms., Inc., 2007 U.S. Dist. LEXIS 93694 (S.D.N.Y. Dec. 19, 2007).

Former employee's claims under the New York State Human Rights Law, N.Y. Exec. Law § 296 et seq., and the New York City Human Rights Law, New York City, N.Y., Admin. Code § 8-107, failed because defendants, a city and others, could not have violated state or local discrimination laws by implementing federal regulations that determined whether the employee was eligible to serve as a captain. Kinneary v City of New York, 601 F.3d 151, 2010 U.S. App. LEXIS 5688 (2d Cir. N.Y. 2010).

Executive Law § 296(16) does not prevent employer from acting adversely with respect to employee if such action is motivated by bona fide business reasons not otherwise proscribed by § 296(16). Salanger v U.S. Air, 560 F. Supp. 202, 1983 U.S. Dist. LEXIS 20195 (N.D.N.Y. 1983).

New York's human rights law (CLS Exec § 296) extends protection to rehabilitated and rehabilitating drug abusers, but does not protect alcohol or illegal narcotics abusers who have not sought or are not seeking treatment for their condition, as such persons are not "handicapped". Burka v New York City Transit Authority, 680 F. Supp. 590, 1988 U.S. Dist. LEXIS 747 (S.D.N.Y. 1988).

Plaintiff could assert claim of post-employment retaliation against her former employer under CLS Exec § 296. Beckett v Prudential Ins. Co. of Am., 893 F. Supp. 234, 1995 U.S. Dist. LEXIS 6513 (S.D.N.Y. 1995).

Motion to dismiss was denied because the complaint stated a claim of hostile work environment sexual harassment against the supervisor under the and New York State Human Rights Law (NYHRL), N.Y. Exec. Law § 290 et seq., because the employee alleged that the supervisor actually created the hostile work environment. Horvath v Am. Tissue Corp., 210 F. Supp. 2d 189, 2002 U.S. Dist. LEXIS 12963 (E.D.N.Y. 2002).

With regard to imposing liability on employers for sexual harassment, the United States Supreme Court's Burlington/Farager framework was applied to an employee's claim pursuant to the New York Human Rights Law, N.Y. Exec. Law § 296 et seq., as well as his claim pursuant to Title VII of the Civil Rights Act of 1964. Perks v Town of Huntington, 251 F. Supp. 2d 1143, 2003 U.S. Dist. LEXIS 9918 (E.D.N.Y. 2003).

Summary judgment on the grounds that liability for any sexual harassment under New York Human Rights Act, N.Y. Exec. Law § 296 et seq., could not be imputed to defendant employer was denied where factual questions existed as to whether the two named individual male employees of defendant were plaintiff's supervisors such that they could be deemed to have acted on defendant's behalf and if so, whether both would be deemed as knowing of and approving or condoning, the harassment alleged. EEOC v Rotary Corp., 297 F. Supp. 2d 643, 2003 U.S. Dist. LEXIS 23225 (N.D.N.Y. 2003).

Because the sexual harassment was claimed to have been perpetrated by plaintiff sheriff's office employee's supervisor and there was evidence supporting a finding that the supervisor was, in fact, the employee's supervisor, defendant employer county was presumed to be liable therefor; thus, the court declined to grant summary judgment to the county on that ground. Pfeiffer v Lewis County, 308 F. Supp. 2d 88, 2004 U.S. Dist. LEXIS 4126 (N.D.N.Y. 2004).

Where plaintiff sheriff's office employee sought seeks to hold the sheriff liable under N.Y. Exec. Law § 296(1) on the theory that the sheriff and the county were her "joint employers," the undisputed evidence in the record is that the employee was an employee of the county because she was part of the civil service system and, in fact, the employee specifically admitted to being employed at all times by the county, and not by the sheriff; although the sheriff necessarily had some authority over the employee as her supervisor, he was not her employer, so the employee was not entitled to argue in her memorandum of law against those facts that she admitted in her statement of material facts. The employee also failed to demonstrate that the sheriff participated in the creation of a hostile work environment; having

failed to demonstrate any basis for imposing liability against the sheriff under the New York Human Rights Law, that claim was dismissed. Pfeiffer v Lewis County, 308 F. Supp. 2d 88, 2004 U.S. Dist. LEXIS 4126 (N.D.N.Y. 2004).

In an action in which a former employee former employee filed suit against his former employer et al. alleging violations of the Americans with Disabilities Act (ADA) and New York Human Rights Law (NYHRL), the court found that the employee had established as a matter of law that at all relevant times he was a disabled individual with a disability within the meaning of the ADA and NYHRL where (1) it was indisputable, based on the evidence submitted to the court, that the employee had a condition which affected his musculoskeletal system during the relevant period; (2) a doctor indicated that from January 2000 until at least May 2001, the employee was limited in the following areas: walking, standing, lifting, sitting, reaching and working; and (3) according to the doctor, at all relevant times the employee was unable to stand, sit, or walk for, at most, 30 minutes at a time. Picinich v UPS, 321 F. Supp. 2d 485, 2004 U.S. Dist. LEXIS 11323 (N.D.N.Y. 2004).

N.Y. Exec. Law § 296(6) imposes individual liability on a defendant who actually participates in the conduct giving rise to a discrimination claim, even though the employee is not alleged to have any power to do more than carry out personnel decisions made by others; where a former employee claimed in an action under § 296(6) that she reported discriminatory conduct to defendant supervisors and they failed to remedy or prevent the alleged discrimination, and that she was constructively discharged because she continued to complain about the alleged discriminatory conduct, the allegations were sufficient to survive a motion to dismiss for failure to state a cause of action. Gad-Tadros v Bessemer Venture Partners, 326 F. Supp. 2d 417, 2004 U.S. Dist. LEXIS 14165 (E.D.N.Y. 2004).

In an action for, inter alia, violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., and New York State Human Rights Law (NYSHRL), N.Y. Exec. Law § 296 et seq., slander per se, and intentional infliction of emotional distress, although the plaintiff in Wilcox did not work at a home office as the instant plaintiff did, there was no language in that case to suggest that its reasoning would not apply to the instant case where the plaintiff similarly alleged that defendants' harassing and discriminatory conduct made her job in New York more difficult to perform; moreover, defendants cited no precedent for their proposition that just because plaintiff worked out of her home in New York, her work conditions were not affected within the ambit of the NYSHRL. Curto v Med. World Communs., Inc., 388 F. Supp. 2d 101, 2005 U.S. Dist. LEXIS 27088 (E.D.N.Y. 2005).

In an action against defendants, a parent company, a subsidiary, and corporate officers for, inter alia, violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., and New York State Human Rights Law (NYSHRL), N.Y. Exec. Law § 296 et seq., slander per se, and intentional infliction of emotional distress, the conduct giving rise to the plaintiff's claims stemmed from a purported systematic effort by defendants during the course of almost one and a half years to criticize the plaintiff and make her working conditions increasingly difficult in retaliation against the plaintiff's report of the sexual harassment of a co-worker by a supervisor as well as in discrimination against her because of her gender; the complaint alleged numerous examples of this conduct, committed by various defendants, all of which were allegedly perpetrated under the direction of the chief executive officer (CEO). This allegation, together with a memorandum written by the CEO, sufficiently alleged that the CEO actually participated in the conduct giving rise to the plaintiff's claims; from these allegations, a trier of fact could infer that the CEO was part of the systematic discriminatory effort by defendants to terminate the plaintiff's employment. Curto v Med. World Communs., Inc., 388 F. Supp. 2d 101, 2005 U.S. Dist. LEXIS 27088 (E.D.N.Y. 2005).

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Independent contractor failed to allege valid claims for individual liability under New York State Human Rights Law; the subsidiary's president was the owner of the subsidiary and therefore had the authority to hire and fire the contractor, nevertheless, the contractor was terminated by the subsidiary after the president sold his interest in the company. Further, the contractor did not allege any facts which would support the allegation that the president aided or abetted the subsidiary in terminating the contractor's employment—in fact, the contractor did not allege that the president actually participated in any of the allegedly discriminatory conduct. Banks v Corr. Servs. Corp., 475 F. Supp. 2d 189, 2007 U.S. Dist. LEXIS 13092 (E.D.N.Y. 2007).

Police chief did not violate N.Y. Exec. Law § 296(6) by aiding and abetting a village, which was an employee's employer, in discriminatory practices where the employee's complaint failed to allege any conduct by the police chief that amounted to aiding and abetting. The actions were those of the village as an employer, acting through its elected trustees, who were entitled to seek advice from their chief if they wished. Blanco v Brogan, 2007 U.S. Dist. LEXIS 86890 (S.D.N.Y. Nov. 20, 2007).

There were two problems with the employees' argument that the consent decree was not viable in 2004 and 2005: first, the consent decree was never dissolved by the parties, the court, or any other entity with the authority to do so—nor did the consent decree dissolve by operation of its own terms—second, even assuming the consent decree automatically dissolved or otherwise was rendered unviable upon the satisfaction of its goals, its goals were not been met. Therefore the employees' race-based employment discrimination claims failed. Vivenzio v City of Syracuse, 545 F. Supp. 2d 241, 2008 U.S. Dist. LEXIS 31874 (N.D.N.Y. 2008), vacated, in part, 611 F.3d 98, 2010 U.S. App. LEXIS 13464 (2d Cir. N.Y. 2010).

Individual may be liable under N.Y. Exec. Law § 296(6) for aiding and abetting an unlawful discriminatory practice of an employer even if the individual's conduct serves as the sole predicate for the employer's liability. Maher v Alliance Mortg. Banking Corp., 650 F. Supp. 2d 249, 2009 U.S. Dist. LEXIS 79486 (E.D.N.Y. 2009).

In a case where a teacher sued a school district and her superior alleging that she was sexually harassed by the superior

at her school, the teacher's state law claim against the superior under N.Y. Exec. Law § 296(6) failed because there was no liability on the employer district's part. Thus, the superior could not be liable for aiding and abetting. Alexander v Westbury Union Free Sch. Dist., 829 F. Supp. 2d 89, 2011 U.S. Dist. LEXIS 127738 (E.D.N.Y. 2011).

6. "Employer" defined

Recovering alcoholic was terminated from his employment in violation of Human Rights Law, despite history of alcohol-related chronic absenteeism, where he had entered rehabilitation program and was performing his job satisfactorily, without relapse, at time of termination; legislative purpose of preventing discrimination against employees with disabilities is best served by pinpointing time of actual termination as relevant time for assessing employee's ability to perform. McEniry v Landi, 84 N.Y.2d 554, 620 N.Y.S.2d 328, 644 N.E.2d 1019, 1994 N.Y. LEXIS 4122 (N.Y. 1994).

Insurance company was properly granted summary judgment in discrimination action brought by insurance agent under CLS Exec § 296(1)(a) where company's submissions showed that agent was responsible for financing her own operating expenses and support staff, she was paid by performance rather than salary, she did not have federal, state or local taxes withheld from her pay, she could sell competitors' products, and she had agreed by contract to operate as independent contractor; facts that agent was compelled to attend regular company meetings and was asked to draw up job description for her position were not inconsistent with her status as independent contractor. Scott v Massachusetts Mut. Life Ins. Co., 86 N.Y.2d 429, 633 N.Y.S.2d 754, 657 N.E.2d 769, 1995 N.Y. LEXIS 3548 (N.Y. 1995).

Labor union, as employee's collective bargaining agent, was not "employer" within meaning of CLS Exec § 296(10)(a), and thus was not proper party to discrimination complaint filed with State Human Rights Division. New York City Transit Auth. v Executive Dep't, Div. of Human Rights, 89 N.Y.2d 79, 651 N.Y.S.2d 375, 674 N.E.2d 305, 1996 N.Y. LEXIS 3162 (N.Y. 1996).

Sections 296 and 297 of this law do not render the New York City Board of Higher Education subject to the powers and duties of the Commission therein enumerated, since that Board is not "an employer" within the definition of that term in subd 5 of § 292. Board of Higher Education v Carter, 16 A.D.2d 443, 228 N.Y.S.2d 704, 1962 N.Y. App. Div. LEXIS 9402 (N.Y. App. Div. 1st Dep't 1962), rev'd, 14 N.Y.2d 138, 250 N.Y.S.2d 33, 199 N.E.2d 141, 1964 N.Y. LEXIS 1228 (N.Y. 1964).

Complainant, a licensed practical nurse who was accepted for employment subject to passing a physical examination and was found to have high blood pressure at the examination, consulted her personal physician and was put on medication resulting in her blood pressure returning to acceptable limits, following which she was again rejected for employment, although two months later she was found qualified for employment and subsequently began working; a determination of the Division of Human Rights that the employer had engaged in an unlawful discriminatory act related to employment is confirmed since there was no evidence that complainant could not properly perform all of the activities of the job she was seeking and all of the medical evidence was to the effect that high blood pressure, by itself, would not interfere with her performance or likely result in harm to one under her care. Arnot Ogden Memorial Hospital v State Div. of Human Rights, 67 A.D.2d 543, 416 N.Y.S.2d 372, 1979 N.Y. App. Div. LEXIS 10500 (N.Y. App. Div. 3d Dep't 1979).

A complaint charging the state Department of Labor with discriminatory practices in violation of Exec Law § 296, based upon the agency's dismissal of a claim for unemployment insurance benefits, was properly dismissed since § 296 was inapplicable in that the Department of Labor was not the claimant's employer, nor was it an employment agency or a labor organization. State Div. of Human Rights v N.Y. State Dep't of Labor, Unemployment Ins. Div., 84 A.D.2d 961, 447 N.Y.S.2d 73, 1981 N.Y. App. Div. LEXIS 16238 (N.Y. App. Div. 4th Dep't 1981).

Physical condition that prevents employee from reporting to work and requires employee to miss unacceptably high number of days of work is not "disability" within meaning of CLS Exec § 292(21). Clark v Cargill, Inc., Flour Milling Div., 206 A.D.2d 870, 615 N.Y.S.2d 210, 1994 N.Y. App. Div. LEXIS 7782 (N.Y. App. Div. 4th Dep't 1994).

Court erred in denying county's motion for summary judgment in action seeking declaration that county illegally discriminated against plaintiff when it rejected his application for employment as county police officer where medical evidence established that upon repeated testing plaintiff's ability to hear in his right ear fell below acceptable limits set by New York State Municipal Police Training Council, and it was also established that his hearing loss would impair his ability to perform particular police duties in reasonable manner; fact that plaintiff had in interim obtained employment as New York City Police Officer and, according to his own self-serving statement, was performing police duties adequately, was insufficient to raise fact issue. McCarthy v Nassau County, 208 A.D.2d 810, 617 N.Y.S.2d 860, 1994 N.Y. App. Div. LEXIS 10065 (N.Y. App. Div. 2d Dep't 1994).

In employment discrimination action against condominium which employed plaintiff as concierge and whose superintendent allegedly harassed her, condominium's managing agent was not entitled to summary judgment on ground that it was neither plaintiff's nor superintendent's employer where plaintiff, although paid by condominium, was hired, supervised and fired by managing agent, and managing agent's day-to-day control over plaintiff and superintendent was substantial; furthermore, issue of fact existed as to whether managing agent, even if not plaintiff's employer, aided and abetted superintendent's harassment of her, which would render it liable under CLS Exec § 296(6). Sanchez v Brown, Harris, Stevens, Inc., 234 A.D.2d 170, 651 N.Y.S.2d 477, 1996 N.Y. App. Div. LEXIS 12551 (N.Y. App. Div. 1st Dep't 1996).

Evidence supported determination that petitioner was employee, despite commission-based nature of her pay, where employer, through its president, hired her, controlled her hours, established days that she worked, and provided her with office, supplies, and support staff; moreover, she worked exclusively for employer, which had right to dismiss her and make sole determination as to which products she was to sell and at what prices. Bartle v Mercado, 235 A.D.2d 651, 652 N.Y.S.2d 139, 1997 N.Y. App. Div. LEXIS 95 (N.Y. App. Div. 3d Dep't), app. denied, 89 N.Y.2d 815, 659 N.Y.S.2d 855, 681 N.E.2d 1302, 1997 N.Y. LEXIS 1219 (N.Y. 1997), app. denied, 89 N.Y.2d 815, 659 N.Y.S.2d 855, 681 N.E.2d 1302 (N.Y. 1997).

Cause of action against plaintiff's coworkers as individuals for sex discrimination in violation of CLS Exec § 296 was properly dismissed, absent evidence that those coworkers had any ownership interest in corporate defendant or any authority to make personnel decisions. Trovato v Air Express Int'l, 238 A.D.2d 333, 655 N.Y.S.2d 656, 1997 N.Y. App. Div. LEXIS 3422 (N.Y. App. Div. 2d Dep't 1997).

Student and part-time employee of college had no cause of action against college for sex discrimination under CLS Exec § 296 where college placed its basketball coach on leave immediately after plaintiff informed it of coach's discriminatory conduct, and thus it did not acquiesce in or condone that conduct. Sormani v Orange County Community College, 240 A.D.2d 724, 659 N.Y.S.2d 507, 1997 N.Y. App. Div. LEXIS 7119 (N.Y. App. Div. 2d Dep't 1997).

Cause of action for employment discrimination based on age was properly dismissed as against one of 2 corporate defendants where unrefuted documentary evidence, including W-2 forms, showed that plaintiff was employed by, and received salary only from, other corporate defendant. Brady v Helmsley, 246 A.D.2d 486, 668 N.Y.S.2d 198, 1998 N.Y. App. Div. LEXIS 705 (N.Y. App. Div. 1st Dep't 1998).

Cause of action for employment discrimination based on age was properly sustained as against individual defendant who directed plaintiff's hours of employment, ordered his termination and later reinstatement, and otherwise controlled his employment in business organization that defendant controlled where that organization had more than 4 employees, as required by CLS Exec § 292(5), as did defendant's household staff. Brady v Helmsley, 246 A.D.2d 486, 668 N.Y.S.2d 198, 1998 N.Y. App. Div. LEXIS 705 (N.Y. App. Div. 1st Dep't 1998).

Real estate broker suing for employment discrimination under CLS Exec § 296(1)(a) raised triable issue of fact as to whether she was employee of realty company, even though she signed agreement stating that she was independent contractor, and company did not withhold taxes from her commissions or provide employment benefits, where (1) agreement required her to work at least 40 hours per week, answer company telephones, wear company uniform, follow company procedures, use company forms, attend sales and training meetings, sign in and out of office, and coordinate vacation time with supervising broker, (2) company reserved right to set sales quotas, distribute listings, reassign clients, and split commissions, and (3) broker was not allowed to work for any other real estate company and was required to share all of her leads, listings, and commissions with company. Murphy v ERA United Realty, 251 A.D.2d 469, 674 N.Y.S.2d 415, 1998 N.Y. App. Div. LEXIS 6829 (N.Y. App. Div. 2d Dep't 1998).

Employer who did not employ 4 or more persons during period in which alleged discrimination based on sexual harassment took place was entitled to summary judgment dismissing plaintiff's claim under CLS Exec § 296(1)(a). DeStefano v Kopelman, 265 A.D.2d 446, 697 N.Y.S.2d 111, 1999 N.Y. App. Div. LEXIS 10609 (N.Y. App. Div. 2d Dep't 1999).

Conclusive finding by police department doctors that a police candidate, who was born with a congenital deformity of his lower right leg which necessitated surgery and the use of a prosthetic limb, was incapable of performing the essential duties of a police officer meant that he was not disabled within the meaning of N.Y. Exec. Law § 292(21). O'Sullivan v City of New York, 38 A.D.3d 467, 834 N.Y.S.2d 30, 2007 N.Y. App. Div. LEXIS 3903 (N.Y. App. Div. 1st Dep't), app. denied, 9 N.Y.3d 804, 840 N.Y.S.2d 764, 872 N.E.2d 877, 2007 N.Y. LEXIS 1756 (N.Y. 2007).

Since New York State Teachers' Retirement System, in awarding pension benefits to male retiree with a female beneficiary in an amount less than would have been granted to a female retiree of the same age whose beneficiary was either male or female was merely following statutory direction and since the system was neither an "employer," an "employment agency" nor a "labor organization," the retirement system was not subject to investigation by the Human Rights Division with respect to its award of retirement benefits. New York State Teachers' Retirement System v New York State Div. of Human Rights, 83 Misc. 2d 993, 373 N.Y.S.2d 964, 1975 N.Y. Misc. LEXIS 3027 (N.Y. Sup. Ct. 1975).

Hospital, its anesthesiology department, and certain of its physicians (defendants) were "employers" of plaintiff, resident physician in anesthesiology department, for purposes of coverage under CLS Exec § 296 since defendants (1) selected plaintiff based on her prior qualifications, (2) paid her wages, (2) controlled her hours and length of residency, and (4) had power to dismiss her. Samper v Univ. of Rochester Strong Mem'l Hosp., 139 Misc. 2d 580, 528 N.Y.S.2d 958, 1987 N.Y. Misc. LEXIS 2830 (N.Y. Sup. Ct. 1987), modified, 144 A.D.2d 940, 535 N.Y.S.2d 281, 1988 N.Y. App. Div. LEXIS 14409 (N.Y. App. Div. 4th Dep't 1988).

Individual supervisor of corporate employer may not be held personally liable for sexual harassment in workplace as "employer" under CLS Exec § 296(1)(a) unless "economic reality" of relationship between supervisor and entity employer is such that it might fairly be said that supervisor was for all intents and purposes actual employer. Foley v Mobil Chem. Co., 170 Misc. 2d 1, 647 N.Y.S.2d 374, 1996 N.Y. Misc. LEXIS 302 (N.Y. Sup. Ct. 1996).

Because a managing member of an employer had the power to hire and fire, he was amenable to liability as "an employer" under Executive Law § 296(1)(a) upon proof that the member became a party to the another member's discriminatory termination of a disabled employee by encouraging, condoning, or approving it. Pepler v Coyne, 33 A.D.3d 434, 822 N.Y.S.2d 516, 2006 N.Y. App. Div. LEXIS 12385 (N.Y. App. Div. 1st Dep't 2006).

Where a former employee asserted disability discrimination and hostile working environment claims against defendants, a county park superintendent, an assistant park superintendent, and a supervisor, the employee sufficiently stated a claim against all three defendants because the employee alleged that all three defendants had the authority to hire and fire employees of the county's parks department. Furthermore, even if the assistant park superintendent and the supervisor were not employers under N.Y. Exec. Law § 296(1)(a), they were subject to liability under § 296(6) because the employee alleged that all three defendants were personally involved in the alleged harassment and the employee's discharge; therefore, the park superintendent's alleged wrongful acts served as the predicate for claims of aiding and abetting against the assistant park superintendent and the supervisor. Costabile v County of Westchester, 2007 U.S. Dist. LEXIS 29787 (S.D.N.Y. Apr. 20, 2007), amended, 485 F. Supp. 2d 424, 2007 U.S. Dist. LEXIS 33484 (S.D.N.Y. 2007).

In an appeal of a grant of summary judgment to a medical group, which was a professional corporation, on a physician's claim of employment discrimination under the Americans with Disabilities Act (ADA), specifically 42 U.S.C.S. § 12112(a), and New York's Human Rights Law, N.Y. Exec. Law § 296, it was unclear whether the physician, who was a shareholder of the group, was an employee under 42 U.S.C.S. § 12111(4). Thus, a determination had to be made of whether the physician was an employee of the group entitled to the protections of the ADA. Rodal v Anesthesia Group of Onondaga, P.C., 369 F.3d 113, 2004 U.S. App. LEXIS 10170 (2d Cir. N.Y. 2004).

Claimant was entitled to an opportunity to demonstrate that corporation's president was an employer within the meaning of NY Exec Law § 296(1), where employee brought a sex discrimination action against corporation but president argued that he individually was not an employer, because under the New York test of economic reality, employee might be able to show that president had some ownership interest in corporation or had the power to do more than simply carry out personnel decisions. Giuntoli v Garvin Guybutler Corp., 726 F. Supp. 494, 1989 U.S. Dist. LEXIS 14710 (S.D.N.Y. 1989).

Female employees' sexual harassment claims will not be dismissed, where they allege that defendant was regional sales manager of New York office and direct supervisor of themselves and other account representatives, because allegations are sufficient at this state of litigation to demonstrate that defendant had power to make personnel decisions regarding employees and was subject to suit as "employer" under NYCLS Exec Law § 296(1)(a). Bridges v Eastman Kodak Co., 822 F. Supp. 1020, 1993 U.S. Dist. LEXIS 6642 (S.D.N.Y. 1993).

Complaint alleging that discharge of plaintiff violated federal Rehabilitation Act and New York State Human Rights Law was not precluded by fact that plaintiff's employment application and application for promotion had omitted reference to 2 prior employers by whom he had been employed, since there was no evidence that plaintiff would have been discharged had those omissions been discovered while he was employed. Jones v Associated Univs., 870 F. Supp. 1180, 1994 U.S. Dist. LEXIS 17920 (E.D.N.Y. 1994), aff'd, 71 F.3d 406, 1995 U.S. App. LEXIS 33395 (2d Cir. N.Y. 1995).

President of defendant corporation could be considered plaintiffs' "employer" under CLS Exec § 296, and thus he could be held individually liable to plaintiffs for alleged sexual harassment, where he apparently had sufficient ownership interest in corporation, or power to do more than carry out personnel decisions made by others; however, final determination of issue should be based on evidence submitted at trial. Bridges v Eastman Kodak Co., 885 F. Supp. 495, 1995 U.S. Dist. LEXIS 534 (S.D.N.Y. 1995).

Individual employees could not be held liable for age discrimination in violation of Human Rights Law where they were not shown to have any ownership interest or power to do more than carry out personnel decisions made by others, and plaintiffs failed to identify specific discriminatory employment decisions made by any particular defendant with respect to particular plaintiffs other than conclusory allegations of generalized "conspiracy" involving all defendants; "person" under CLS Exec § 292(1) should be interpreted to exclude individuals in common employment relationship. Falbaum v Pomerantz, 891 F. Supp. 986, 1995 U.S. Dist. LEXIS 10370 (S.D.N.Y. 1995).

State age-discrimination claims brought by former employees against current employees of women's clothing manufacturer in bankruptcy must fail, where it is clear that agents are not "employers" under CLS Exec Law § 296, even though § 296(6), (7) prohibits "aiding and abetting" and "retaliation", because term

"person" in those subsections should be interpreted to exclude individuals in situations in which parties stand within scope of common employment relationship. Falbaum v Pomerantz, 891 F. Supp. 986, 1995 U.S. Dist. LEXIS 10370 (S.D.N.Y. 1995).

Medical school that provided medical services at city hospital was not entitled to dismissal of discrimination claim asserted by hospital employee on ground that it was not plaintiff's "employer"; although medical school did not have ultimate authority to hire or fire plaintiff and it did not pay her wages, its employees exercised significant influence and control over conditions of plaintiff's employment and her "fate" at hospital. Dortz v City of New York, 904 F. Supp. 127, 1995 U.S. Dist. LEXIS 14438 (S.D.N.Y. 1995).

Foreign parent corporation was not "employer" for purposes of New York Human Rights Law or New York City Human Rights Law where there was no claim that it had power to select, hire or dismiss subsidiary's employees, and plaintiff employee failed to show that it paid any salary or wages to him. Robins v Max Mara, U.S.A., 923 F. Supp. 460, 1996 U.S. Dist. LEXIS 1295 (S.D.N.Y. 1996).

Plaintiff's supervisors were not liable for damages under CLS Exec § 296 where they did not learn of alleged discriminatory acts until just prior to and when plaintiff first resigned, significant steps were taken at that time to remedy those acts, and there was no evidence that they knew or should have known of discriminatory acts alleged by plaintiff that occurred after he returned to work on new shift assignment. Amin v Quad/Graphics, 929 F. Supp. 73, 1996 U.S. Dist. LEXIS 12262 (N.D.N.Y. 1996).

Some state-law employment discrimination claims asserted against individual defendants are retained, although court has dismissed many for failure to exhaust administrative remedies or for untimeliness, because, although individual defendants may not be held liable under Title VII (42 USCS §§ 2000e et seq.), they may be held liable under CLS Exec Law § 296(6). McNight v Dormitory Auth., 995 F. Supp. 70, 1998 U.S. Dist. LEXIS 1902 (N.D.N.Y. 1998).

Terminated hospital worker may proceed with New York Human Rights Law (CLS Exec Law §§ 290 et seq.) claim against individual who is CEO and president of hospital, even though CEO claims he played no role in discriminatory conduct and has no independent personal knowledge of worker's termination, where CEO had power to do more than carry out personnel decisions made by others and was complained to directly by worker, because he is "employer" subject to liability within meaning of § 296(1). Graaf v North Shore Univ. Hosp., 1 F. Supp. 2d 318, 1998 U.S. Dist. LEXIS 4600 (S.D.N.Y. 1998).

Terminated hospital worker may proceed with New York Human Rights Law (CLS Exec Law §§ 290 et seq.) claim against individual who is CEO and president of hospital, even though CEO claims he played no role in discriminatory conduct and has no independent personal knowledge of worker's termination, where CEO had power to do more than carry out personnel decisions made by others and was complained to directly by worker, because he is "employer" subject to liability within meaning of § 296(1). Graaf v North Shore Univ. Hosp., 1 F. Supp. 2d 318, 1998 U.S. Dist. LEXIS 4600 (S.D.N.Y. 1998).

Disability discrimination claim against supervisor under CLS Exec Law § 296 may proceed, where supervisor, as senior officer at bank, had power to do more than carry out personnel decisions made by others, because he can be held individually liable under Human Rights Law as employer. Harrison v Banque Indosuez, 6 F. Supp. 2d 224, 1998 U.S. Dist. LEXIS 7498 (S.D.N.Y. 1998).

Disability discrimination claim may be added but only against medical center that employed plaintiff, even though he alleges insurers are "employers" within meaning of CLS Exec Law § 298, where he fails to allege that they are his employers, because it is clear that plaintiff is insured and not employee of insurers. Muller v First Unum Life Ins. Co., 23 F. Supp. 2d 231, 1998 U.S. Dist. LEXIS 17380 (N.D.N.Y. 1998).

Terminated administrative assistant may amend her complaint to plead disability discrimination claims against director and assistant dean under state but not federal law, where she must do more, upon repleading, than merely identify every medical condition she has ever experienced, because individuals cannot be "employer" for purposes of ADA (42 USCS §§ 12101 et seq.) liability but can be held accountable for discriminatory acts under Exec § 296(6). Sacay v Research Found., 44 F. Supp. 2d 496, 1999 U.S. Dist. LEXIS 6314 (E.D.N.Y. 1999).

Lab technician's Exec § 296 claim against lab engineer, lab manager, and 2 vice-presidents may proceed, even though defendants argue that § 296 does not give rise to claim against individual as opposed to contracting party, because defendants are either technician's supervisors or principal agents of employer who have authority to terminate her and they may be held liable under statute. Hicks v IBM, 44 F. Supp. 2d 593, 1999 U.S. Dist. LEXIS 5608 (S.D.N.Y. 1999).

Under Exec § 296, employer cannot be held liable for employee's discriminatory act unless employer became party to it by encouraging, condoning, or approving it. DeWitt v Lieberman, 48 F. Supp. 2d 280, 1999 U.S. Dist. LEXIS 159 (S.D.N.Y. 1999).

Supervisor could be held individually liable under Exec § 296(6) for his alleged participation in harassment of former employee, despite fact that there was no evidence that supervisor had authority to fire employee or had ownership interest in company. Hasbrouck v BankAmerica Hous. Servs., 105 F. Supp. 2d 31, 2000 U.S. Dist. LEXIS 10941 (N.D.N.Y. 2000).

Since claim for aiding and abetting under Exec § 296(6) may be made against defendant who has no control or authority over plaintiff, even defendant that is independent contractor for employer may be held liable, as long as there is direct participation in discriminatory acts that violate Human Rights Law. Dunson v Tri-Maintenance & Contrs., Inc., 171 F. Supp. 2d 103, 2001 U.S. Dist. LEXIS 17833 (E.D.N.Y. 2001).

Individuals on the committee, which they admitted made all personnel decisions, acted in effect, as the employer, committed the discriminatory acts which gave rise to the employee's claim and, accordingly the employee's discrimination claim survived summary judgment. Heinemann v Howe & Rusling, 260 F. Supp. 2d 592, 2003 U.S. Dist. LEXIS 7599 (W.D.N.Y. 2003).

Law firm employee failed to state a cause of action against individual attorneys under the New York Human Rights Law, N.Y. Exec. Law § 296(1)(a), because the employee did not allege that the attorneys had an ownership interest in the firm, had the authority to terminate her employment, participated in racially discriminatory conduct, or displayed any racial animus toward her. Evans-Gadsden v Bernstein Litowitz Berger & Grossman, LLP, 332 F. Supp. 2d 592, 2004 U.S. Dist. LEXIS 17710 (S.D.N.Y. 2004).

Where a law firm employee alleged that individual attorneys retaliated against her by sabotaging her computer and documents in order to make her look incompetent, the employee failed to state a cause of action against the attorneys under N.Y. Exec. Law § 296(6) because the employee did not allege that the attorneys' conduct was racially motivated. Evans-Gadsden v Bernstein Litowitz Berger & Grossman, LLP, 332 F. Supp. 2d 592, 2004 U.S. Dist. LEXIS 17710 (S.D.N.Y. 2004).

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Professional skater's amended complaint in her action based on sexual harassment and retaliation was sufficient to withstand a Fed. R. Civ. P. 12(b)(6) motion on her claim that her supervisor

was liable as an employer under N.Y. Exec. Law § 296(1). In addition to alleging, upon information and belief, that the supervisor had the power to hire and fire her, the amended complaint also specifically alleged that he participated in discharging her. Prince v Madison Square Garden, 427 F. Supp. 2d 372, 2006 U.S. Dist. LEXIS 17562 (S.D.N.Y. 2006).

Under N.Y. Educ. Law § 2254(2), only a board of education has the power to hire and fire teachers, and a school district superintendent and a principal within a school district, while they could advise a board of education in its personnel decisions, did not have power to hire and fire teachers such that they were not directly liable for such decisions in a former student's sexual harassment discrimination claim under the New York Human Rights Law, N.Y. Exec. Law § 296(1), although liability could be asserted against these persons under the aiding and abetting provisions of § 296(6) Miotto v Yonkers Pub. Schs., 534 F. Supp. 2d 422, 2008 U.S. Dist. LEXIS 4614 (S.D.N.Y. 2008).

Former employee's race discrimination suit against a metropolitan transit authority and two of its employees failed because the authority was not the employer under the New York State Human Rights Law, N.Y. Exec. Law § 296, and it was not related to a city transportation authority, which was the employer, in any way that imposed liability on it as the employer. Hargett v Metro. Transit Auth., 552 F. Supp. 2d 393, 2008 U.S. Dist. LEXIS 30599 (S.D.N.Y. 2008).

Claims raised by a former employee, who was an office manager for a state university, alleging race discrimination, a racially hostile work environment, and retaliation, failed to allege sufficient personal involvement by a university chancellor to establish liability against the chancellor under the New York State Human Rights Law, N.Y. Exec. Law § 296 et seq. Westbrook v City Univ. of N.Y., 591 F. Supp. 2d 207, 2008 U.S. Dist. LEXIS 102765 (E.D.N.Y. 2008).

School principal's N.Y. Exec. Law § 296(1)(a) claim did not survive the motion to dismiss because there was no allegation that the union was the principal's employer, and because New York state law made an unincorporated association liable for the torts of its members only where the unlawful acts were authorized or ratified by each member of the association. McIntyre v Longwood Cent. Sch. Dist., 2008 U.S. Dist. LEXIS 59590 (E.D.N.Y. Mar. 27, 2008), aff'd, 380 Fed. Appx. 44, 2010 U.S. App. LEXIS 11393 (2d Cir. N.Y. 2010).

Sales manager of a mortgage banking company who was accused of sexually harassing an employee who worked in the accounting department could not be held liable under N.Y. Exec. Law § 296(6)(1) as the employee's employer because the manager was not the employee's supervisor, the manager did not have an ownership interest in the mortgage banking company, and the manager did not have power to make personnel decisions concerning the employee. The fact that the manager might have had supervisory control over the employee's father and other workers at the company was insufficient to subject the manager to liability under § 296(6). Maher v Alliance Mortg. Banking Corp., 650 F. Supp. 2d 249, 2009 U.S. Dist. LEXIS 79486 (E.D.N.Y. 2009).

Under N.Y. Exec. Law § 296 and New York City code, individual defendants who worked for an employer could be held liable, unlike under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e-2, but a plaintiff was required to show that the individual actually participated in the conduct from which the claim arose. Drew v Plaza Constr. Corp., 688 F. Supp. 2d 270, 2010 U.S. Dist. LEXIS 8699 (S.D.N.Y. 2010).

It was unclear from the evidence adduced by the parties whether corporation one had power over the hiring and firing of corporation two's employees, had any role in the payment of salary or wages to corporation two's employees or had the power to control the conduct of corporation two's employees; accordingly, there remained a genuine issue of material fact concerning whether the corporation were joint employers, and the corporations' motion to dismiss corporation one failed. Voltaire v Home Servs. Sys., 823 F. Supp. 2d 77, 2011 U.S. Dist. LEXIS 115081 (E.D.N.Y. 2011).

7. Constitutional matters

Human Rights Law as applied to employer whose subjective intent to discriminate was not established was not violative of due process. State Div. of Human Rights v Kilian Mfg. Corp., 35 N.Y.2d 201, 360 N.Y.S.2d 603, 318 N.E.2d 770, 1974 N.Y. LEXIS 1309 (N.Y. 1974), app. dismissed, 420 U.S. 915, 95 S. Ct. 1108, 43 L. Ed. 2d 387, 1975 U.S. LEXIS 506 (U.S. 1975).

Section 296 of the Executive Law substantially extends to the employment relation the equal protection clause of the New York State Constitution. American Airlines, Inc. v State Com. for Human Rights, 29 A.D.2d 178, 286 N.Y.S.2d 493, 1968 N.Y. App. Div. LEXIS 4784 (N.Y. App. Div. 1st Dep't 1968).

There is a distinction between Fourteenth Amendment, which permits rational basis for discrimination between classes of individuals, and statutory standard of Human Rights Law, which reflects a more positive and direct focus through the use of sanctions of a practice of employers which because of the sex of any individual discriminates against such individuals in compensation or in terms, conditions or privileges of employment. Div. of Human Rights ex rel. Schwabenbauer v Bd. of Educ., 46 A.D.2d 483, 363 N.Y.S.2d 370, 1975 N.Y. App. Div. LEXIS 8524 (N.Y. App. Div. 4th Dep't 1975).

Determination by Commissioner of Division of Human Rights that employer did not unlawfully discriminate against employee on basis of her pregnancy was supported by evidence that employee misrepresented her hours on time card, that she refused to assist her coworkers in answering telephones, and that she kept irregular work hours. Resnik v New York State Div. of Human Rights, 204 A.D.2d 330, 611 N.Y.S.2d 270, 1994 N.Y. App. Div. LEXIS 4511 (N.Y. App. Div. 2d Dep't 1994).

Electrician employed by city met his burden of presenting legally admissible proof that he was treated detrimentally for constitutionally impermissible reason of his off-duty political activities where, shortly after he was directed to refrain from wearing campaign sticker supporting political opponent of city public works commissioner, and while city and commissioner knew that he continued to express his opposing political views on his own time, his job duties were adjusted—including reduction in responsibility—in way that was calculated to, and did, lead to his being denied promotion and concomitant salary increase. Richardson v City of Saratoga Springs, 246 A.D.2d 900, 667 N.Y.S.2d 995, 1998 N.Y. App. Div. LEXIS 524 (N.Y. App. Div. 3d Dep't 1998).

In Article 78 proceeding by city electrician, in which he presented prima facie proof that he was unconstitutionally denied promotion and concomitant salary increase because of his expression of political views opposing city public works commissioner, fact that job reclassification that led to his nonpromotion was recommended by independent consultant and approved by city council was of little significance in rebutting prima facie case where those actions were direct result of changes in electrician's work duties effected by commissioner. Richardson v City of Saratoga Springs, 246 A.D.2d 900, 667 N.Y.S.2d 995, 1998 N.Y. App. Div. LEXIS 524 (N.Y. App. Div. 3d Dep't 1998).

Selection of number of members of minority groups for position of state trooper for purpose of obtaining more minority representation in state police, without regard to their standing on eligibility list based on competitive examination for such position, would violate state constitutional provision that "Appointments . . . in the civil service . . . shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive." Ruddy v Connelie, 89 Misc. 2d 413, 391 N.Y.S.2d 819, 1977 N.Y. Misc. LEXIS 1880 (N.Y. Sup. Ct. 1977), aff'd, 61 A.D.2d 372, 402 N.Y.S.2d 245, 1978 N.Y. App. Div. LEXIS 9748 (N.Y. App. Div. 3d Dep't 1978).

Executive Order requiring contractors to undertake programs of affirmative action to insure equal employment opportunity was unconstitutional as unwarranted exercise of legislative power. Fullilove v Carey, 91 Misc. 2d 531, 398 N.Y.S.2d 226, 1977 N.Y. Misc. LEXIS 2350 (N.Y. Sup. Ct. 1977), aff'd, 62 A.D.2d 798, 406 N.Y.S.2d 888, 1978 N.Y. App. Div. LEXIS 10909 (N.Y. App. Div. 3d Dep't 1978).

8. Physical fitness standards

Federal Airline Deregulation Act of 1978 (49 USCS § 41713) does not preempt employees' state discrimination claims against

airline under Human Rights Law, because Congress intended only to restrict state regulation of airline fares, routes and services, not state regulation of employment practices. Delta Air Lines v New York State Div. of Human Rights, 91 N.Y.2d 65, 666 N.Y.S.2d 1004, 689 N.E.2d 898, 1997 N.Y. LEXIS 3710 (N.Y. 1997).

Valid job-related physical fitness standards promulgated by Municipal Police Training Council under CLS Civ S § 58 are enforceable legislative exceptions to application of Human Rights Law, since such legislation, passed to insure that those employed to perform demanding duties needed to protect public safety are physically capable, would otherwise be rendered ineffective. Rice v Schuyler County Civil Service Com., 137 A.D.2d 359, 528 N.Y.S.2d 944, 1988 N.Y. App. Div. LEXIS 6071 (N.Y. App. Div. 3d Dep't), app. dismissed, 72 N.Y.2d 1003, 534 N.Y.S.2d 665, 531 N.E.2d 297, 1988 N.Y. LEXIS 2756 (N.Y. 1988).

9. Job training

While discrimination against Negroes in formulating apprentice lists and admission to membership in certain labor unions, so that they were practically excluded from work on public works projects, would not be immune from attack in a proper proceeding, it could not be made the basis of attack and ground for seeking an injunction against such discrimination in a class action seeking declaratory judgment in a taxpayer's suit which failed to join necessary parties defendants. Gaynor v Rockefeller, 21 A.D.2d 92, 248 N.Y.S.2d 792, 1964 N.Y. App. Div. LEXIS 3971 (N.Y. App. Div. 1st Dep't 1964), aff'd, 15 N.Y.2d 120, 256 N.Y.S.2d 584, 204 N.E.2d 627, 1965 N.Y. LEXIS 1651 (N.Y. 1965).

In a civil rights proceeding brought by an epileptic nurse trainee who had been barred from a nurses' training program based on the dissatisfaction of the Board of Cooperative Education Services by which she was being trained with her physicians' attestations that her grand mal epilepsy was controlled by medication and that she was able to properly function as a licensed practical nurse, the Commissioner of Human Rights properly determined that the subject board was not an "employer" as defined in Exec Law § 296, since such board existed "for the purpose of carrying out a program of shared educational services in the schools of the supervisory district and for providing instruction in such special subjects as the [education] commissioner may approve" pursuant to Educ Law § 1950(1), so that the trainee's relationship to the board was educational in nature and lacked the mutually beneficial economic substance that is the touchstone of an employer-employee relationship; however, the commissioner erred in ruling that, due to the fact that the board was a public educational institution, it was not an "education corporation or association" within the meaning of Exec Law § 296(4) so as to be subject to the jurisdiction of the Division of Human Rights, since the board was an education corporation organized and existing under Educ Law § 1950, was nonsectarian, and was exempt from real property taxes under Real P Tax Law § 408, and so fell within the definition of the statute, and since the fact that the board was also subject to Educ Law § 313 did not affect the jurisdiction of the Human Rights Division, in that the division exercises concurrent jurisdiction over discrimination claims. State Div. of Human Rights v Board of Coop. Educ. Services, 98 A.D.2d 958, 470 N.Y.S.2d 209, 1983 N.Y. App. Div. LEXIS 21283 (N.Y. App. Div. 4th Dep't 1983), app. dismissed, 62 N.Y.2d 645 (N.Y. 1984).

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A union unlawfully discriminated against its minority trainees through various means which resulted in blocking their attainment of class "A" journeyman status with the union on the basis of statistics, since a statistical showing of discrimination constitutes substantial evidence of a violation of the Human Rights Law, and the relative absence of any minority trainees in a program truly comparable to the apprenticeship training program and the absence of any procedure to permit qualified minority trainees to cross over to the faster apprenticeship training program constituted substantial evidence of a pattern of discrimination. Schuck v State Div. of Human Rights, 102 A.D.2d 673, 478 N.Y.S.2d 279, 1984 N.Y. App. Div. LEXIS 18838 (N.Y. App. Div. 1st Dep't 1984).

Dismissal of hazardous waste investigator who is unable to perform during training period as result of obesity does not constitute unlawful discrimination against person with physical impairment. Velger v Williams, 118 A.D.2d 1037, 500 N.Y.S.2d 411, 1986 N.Y. App. Div. LEXIS 54823 (N.Y. App. Div. 3d Dep't 1986).

A court will not countenance discrimination in job training programs which exclude the victimized minority from employment in industry, equal opportunity in job training and apprenticeship opportunities being essential for achievement of full equality as required in our democracy. State Comm'n for Human Rights v Farrell, 43 Misc. 2d 958, 252 N.Y.S.2d 649, 1964 N.Y. Misc. LEXIS 1486 (N.Y. Sup. Ct. 1964).

Denial of the right to be trained is, in many industries, tantamount to denial of employment, and discrimination based upon race which effectively excludes a minority from right to be employed in a particular industry is subject to condemnation. State Comm'n for Human Rights v Farrell, 43 Misc. 2d 958, 252 N.Y.S.2d 649, 1964 N.Y. Misc. LEXIS 1486 (N.Y. Sup. Ct. 1964).

10. Labor unions

Provisions of subdivisions 1 and 1-a of above statute give full and adequate remedy for discrimination by either a labor organization, an employer, or any joint labor-management committee. There is therefore no warrant for invocation of aid of equity or for granting of declaratory relief in the case of any such discrimination. Gaynor v Rockefeller, 15 N.Y.2d 120, 256 N.Y.S.2d 584, 204 N.E.2d 627, 1965 N.Y. LEXIS 1651 (N.Y. 1965).

Above provision is not enforceable in class action by Negro plaintiffs on behalf of themselves and all other Negro citizens of New York similarly situated for injunctive and declaratory relief against certain labor unions and various officials of State and city therein, challenging expenditure of public funds on public works projects in such city on ground that qualified Negroes are unlawfully denied employment and opportunity therefor because contractors on such projects obtain virtually all their labor from defendant unions who exclude Negroes from membership and apprenticeship programs solely on basis of race and color. Gaynor v Rockefeller, 15 N.Y.2d 120, 256 N.Y.S.2d 584, 204 N.E.2d 627, 1965 N.Y. LEXIS 1651 (N.Y. 1965).

While discrimination against Negroes in formulating apprentice lists and admission to membership in certain labor unions, so that they were practically excluded from work on public works projects, would not be immune from attack in a proper proceeding, it could not be made the basis of attack and ground for seeking an injunction against such discrimination in a class

action seeking declaratory judgment in a taxpayer's suit which failed to join necessary parties defendants. Gaynor v Rockefeller, 21 A.D.2d 92, 248 N.Y.S.2d 792, 1964 N.Y. App. Div. LEXIS 3971 (N.Y. App. Div. 1st Dep't 1964), aff'd, 15 N.Y.2d 120, 256 N.Y.S.2d 584, 204 N.E.2d 627, 1965 N.Y. LEXIS 1651 (N.Y. 1965).

A person has the right not to be excluded from a labor union because of race, creed, color or religious persuasion under the above statute but there is no right thereunder to have such a union take affirmative steps looking toward integration. And an order of the Commission which does not exceed the above limitation will be enforced by the courts. State Com. for Human Rights v Farrell, 24 A.D.2d 128, 264 N.Y.S.2d 489, 1965 N.Y. App. Div. LEXIS 2993 (N.Y. App. Div. 1st Dep't 1965), app. denied, 17 N.Y.2d 418, 1966 N.Y. LEXIS 1711 (N.Y. 1966).

Although there was substantial evidence to support the determination of the New York City Commission on Human Rights that a union had discriminated against an employee on the basis of sex in denying severance pay, the commission and Special Term both miscalculated the amount of severance pay due, and the judgment of Special Term would be modified to the extent of reducing such amount in light of the fact that the employee had not been a union official during her 31 years of employment. Silverman v New York Com. on Human Rights, 84 A.D.2d 504, 443 N.Y.S.2d 155, 1981 N.Y. App. Div. LEXIS 15520 (N.Y. App. Div. 1st Dep't 1981), rev'd, 56 N.Y.2d 608, 450 N.Y.S.2d 480, 435 N.E.2d 1095, 1982 N.Y. LEXIS 3280 (N.Y. 1982).

A claim by a person suffering from amyatonia conginita that she had been passed over for promotion would be remitted for further investigation, where after a conference with the petitioner and her employer, a field representative of the state Division of Human Rights instructed her employer to submit further documentation with respect to every person employed in the position to which the petitioner was denied promotion, where that documentation was forwarded to the petitioner, who had appeared pro se, but without the information that the petitioner had the right to respond to the information contained in the documents, and where it thus was an abuse of discretion for the division to make its determination of no probable cause of a discriminatory action without insuring that the petitioner had a right to respond to all the information on which the determination was based. Soellner v State Div. of Human Rights, 100 A.D.2d 876, 474 N.Y.S.2d 135, 1984 N.Y. App. Div. LEXIS 17992 (N.Y. App. Div. 2d Dep't 1984).

A union unlawfully discriminated against its minority trainees through various means which resulted in blocking their attainment of class "A" journeyman status with the union on the basis of statistics, since a statistical showing of discrimination constitutes substantial evidence of a violation of the Human Rights Law, and the relative absence of any minority trainees in a program truly comparable to the apprenticeship training program and the absence of any procedure to permit qualified minority trainees to cross over to the faster apprenticeship training program constituted substantial evidence of a pattern of discrimination. Schuck v State Div. of Human Rights, 102 A.D.2d 673, 478 N.Y.S.2d 279, 1984 N.Y. App. Div. LEXIS 18838 (N.Y. App. Div. 1st Dep't 1984).

Provision of collective bargaining agreement barring arbitration in discrimination cases if grievant filed or prosecuted a claim in any court or governmental agency was valid and enforceable. Board of Higher Education v Professional Staff Congress/CUNY, 80 Misc. 2d 297, 362 N.Y.S.2d 985, 1975 N.Y. Misc. LEXIS 2180 (N.Y. Sup. Ct. 1975).

Employer's third-party claim for contribution under Exec § 296 is preempted by federal law, where employees sued employer for age discrimination, which employer blames partly on union for its actions leading to performance appraisal system and its agreement to 3-tiered, weighted seniority system, because union's federal duty of fair representation forbids it from discriminating against its members in its representative capacity, and contribution claim is subsumed by duty of fair representation. Rodolico v Unisys Corp., 96 F. Supp. 2d 184, 2000 U.S. Dist. LEXIS 6048 (E.D.N.Y. 2000).

Homosexual correctional officer established indirect causal connection between his sexual orientation and adverse employment actions he allegedly suffered, as required for making prima facie case of retaliation against union under Exec § 296(1)(e) and Title VII, where officer sought union's assistance with harassment by co-workers, but union told him to stop complaining, did not draft grievances for officer as it did for other members, and neglected officer's grievances, which led to dismissal of grievances. Martin v New York State Dep't of Correctional Servs., 115 F. Supp. 2d 307, 2000 U.S. Dist. LEXIS 18956 (N.D.N.Y. 2000).

There was no evidence that anything the local union did or did not do was even remotely arbitrary, discriminatory, or tinged with bad faith. The employee's bare, conclusory assertion that the local's representation was perfunctory was unsupported by any evidence and even assuming the local breached its duty of fair representation, the employee presented no evidence that would give rise to an inference of discriminatory motivations. Bryant v Verizon Communs., Inc., 550 F. Supp. 2d 513, 2008 U.S. Dist. LEXIS 35916 (S.D.N.Y. 2008).

Even if the employee presented a prima facie case of discrimination, she did nothing to show that the national union's proffered reason for its decision—that her case was weak—was a pretext for discrimination. Bryant v Verizon Communs., Inc., 550 F. Supp. 2d 513, 2008 U.S. Dist. LEXIS 35916 (S.D.N.Y. 2008).

11. Employment agencies

Absent any indication that employment agency restricted its employment to females only or that males were denied opportunity for employment because of their sex, use of word "girls" in name of employment agency was not in violation of Human Rights Law. Phillips v State Human Rights Appeal Bd., 41 A.D.2d 710, 341 N.Y.S.2d 454, 1973 N.Y. App. Div. LEXIS 4949 (N.Y. App. Div. 1st Dep't 1973).

When the attorney general sought to subpoena records of a domestic worker placement agency, to determine if the agency was violating N.Y. Exec. Law § 296 et seq., N.Y. Civ. Rights Law § 40-c, and New York City, N.Y., Admin. Code § 8-107(a), by asking job applicants about their national origin, age, and marital status and accommodating employer preferences as to a worker's national origin and age, the attorney general could subpoena agency documents used to record information about job applicants, fees the agency earned for placing applicants, and applicants' hiring rates, but, as to information about agency clients, the attorney general was only entitled to agency intake forms used to register clients, and documents showing job characteristics, requirements, and/or employer preferences, but could not know who the prospective employers were, as this would interfere with the personal employment relationships between the employers and the workers they hired, which would be contrary to the intention of the legislature when it enacted N.Y. Exec. Law § 292(6). Matter of Pavillion Agency Inc v Spitzer, 802 N.Y.S.2d 879, 9 Misc. 3d 626, 234 N.Y.L.J. 28, 2005 N.Y. Misc. LEXIS 1613 (N.Y. Sup. Ct. 2005).

Where an application used by an employment agency contained the question from which an applicant's racial origin or religious belief or his original or prior religious belief might be readily established by any person reasonably familiar with the names common to those racial and religious groups, the solicitation of such data was in clear conflict with sub c of this section. Holland v Edwards, 116 N.Y.S.2d 264, 1952 N.Y. Misc. LEXIS 1859 (N.Y. Sup. Ct. 1952), aff'd, 282 A.D. 353, 122 N.Y.S.2d 721, 1953 N.Y. App. Div. LEXIS 4474 (N.Y. App. Div. 1953).

B. Hiring/Failure to Hire

12. In general

In absence of conduct from which employer's willful intent might be presumed, question of discrimination in hiring, under Human Rights Law, is whether employer knows or should know the ultimate result or effect of its hiring practice. Statistical predicate is not necessarily alone sufficient to establish discrimination in hiring; in addition there should be proof of recruitment or employment practices in individual case which in actual operation warrant conclusion, based on direct evidence or rational inference, or both, that there is constructive, even if unintended, discriminatory practice. Under evidence, including statistics as to members of minority groups resident in area which was largest source of employer's employees and as to percentage

of minority workers employed by employer, State Division of Human Rights was warranted in concluding that there was constructive discrimination in hiring practices of employer, notwithstanding an absence of any proof of subjective motive on part of employer to produce such result. State Div. of Human Rights v Kilian Mfg. Corp., 35 N.Y.2d 201, 360 N.Y.S.2d 603, 318 N.E.2d 770, 1974 N.Y. LEXIS 1309 (N.Y. 1974), app. dismissed, 420 U.S. 915, 95 S. Ct. 1108, 43 L. Ed. 2d 387, 1975 U.S. LEXIS 506 (U.S. 1975).

When a hiring standard adversely affects equal employment opportunity for protected class of persons, judicial scrutiny is warranted and it is incumbent upon the employer to show that the standard bears a rational relationship to, and is a valid predictor of, employee job performance and does not create an arbitrary, artificial and unnecessary barrier to employment operating invidiously to discriminate on the basis of an impermissible classification. Schenectady v State Div. of Human Rights, 37 N.Y.2d 421, 373 N.Y.S.2d 59, 335 N.E.2d 290, 1975 N.Y. LEXIS 2042 (N.Y. 1975).

Employer's pre-employment inquiries regarding age, disabilities and physical impairments, family relations, marital status, roommates and prior treatment for drug or alcohol abuse did not constitute discrimination under Human Rights Law, in absence of any evidence or inference that such inquiries reflected "limitation, specification or discrimination" within meaning of CLS Exec § 296(1)(d). Delta Air Lines v New York State Div. of Human Rights, 91 N.Y.2d 65, 666 N.Y.S.2d 1004, 689 N.E.2d 898, 1997 N.Y. LEXIS 3710 (N.Y. 1997).

Where there is no evidence of discrimination and the employment application contains misstatements of fact which form the basis of rejection of the application for employment, there can be no finding of discrimination. New York Stock Exchange, Inc. v New York State Div. of Human Rights, 37 A.D.2d 941, 325 N.Y.S.2d 778, 1971 N.Y. App. Div. LEXIS 3026 (N.Y. App. Div. 1st Dep't 1971).

A hospital's decision not to hire a certain employee was a business decision unrelated to her human rights complaint against another hospital, and did not therefore constitute unlawful retaliation for having filed an earlier complaint alleging discrimination. State Div. of Human Rights v Genesee Hospital, 85 A.D.2d 899, 446 N.Y.S.2d 735, 1981 N.Y. App. Div. LEXIS 16741 (N.Y. App. Div. 4th Dep't 1981).

Commissioner of Human Rights may not substitute her judgment as to qualifications for hiring and promotion for that of employer. City of New York v New York State Div. of Human Rights, 225 A.D.2d 421, 638 N.Y.S.2d 957, 1996 N.Y. App. Div. LEXIS 2800 (N.Y. App. Div. 1st Dep't 1996).

Contention by clerk employed by correctional facility that facility's Deputy Superintendent of Administration had unlawfully prevented clerk from obtaining certain promotions was refuted by proof that Deputy lacked authority to influence those decisions. New York State Dep't of Correctional Servs. v State Div. of Human Rights, 238 A.D.2d 704, 656 N.Y.S.2d 78, 1997 N.Y. App. Div. LEXIS 3750 (N.Y. App. Div. 3d Dep't 1997).

Applicant for public employment who alleged that town did not hire her due to her political affiliation did not thereby state claim under CLS Exec §§ 290 et seq. and CLS Civ R § 40-c(2), since statutes do not cover political association. Eisert v Town of Hempstead, 918 F. Supp. 601, 1996 U.S. Dist. LEXIS 2657 (E.D.N.Y. 1996).

County police cadet program, which excluded non-minorities in favor of black and Hispanic applicants, violated CLS Exec § 296 because it constituted de jure discrimination and was not narrowly tailored to achieve asserted compelling governmental interest of remedying past discrimination. Hiller v County of Suffolk, 977 F. Supp. 202, 1997 U.S. Dist. LEXIS 17534 (E.D.N.Y. 1997).

Even though there is no specific provision of Insurance Law regarding unlawful discrimination in employment of insurance agents, Superintendent of Insurance can and will take appropriate disciplinary action against licensee that engages in unlawful discrimination in hiring. Insurance Department, Opinions of General Counsel, Opinion Number 07-03-15.

13. Coercion of employer hiring practices

Although the executive clearly has the power and obligation to implement programs designed to prohibit discriminatory hiring practices, and, indeed, the State Legislature has stated that voluntary use of a State-approved affirmative action plan by private employers shall not be an unlawful discriminatory practice (Executive Law, § 296, subd 2), there is a vast difference between permitting employers to voluntarily adopt an affirmative action program and mandating by executive order that this be done involuntarily under threat of legal sanctions, and there is also a distinction between executive affirmative action which would merely enlarge the pool of persons eligible for employment based on discrimination-free selection and affirmative action in hiring practices; under our governmental system, the central feature of which is distribution of powers, the executive does not have the authority to initiate such affirmative action without legislative authorization. Fullilove v Beame, 48 N.Y.2d 376, 423 N.Y.S.2d 144, 398 N.E.2d 765, 1979 N.Y. LEXIS 2407 (N.Y. 1979).

An attempt to control the employment practices of an employer solely on the basis of race or color is unlawful racial discrimination. Under the provisions of this section making it unlawful for an employer to refuse to employ or to discharge anyone because of race, creed, color, or national origin, or to try to compel or coerce any discrimination in employment, it is illegal for a racial group to try to coerce an employer into hiring and retaining a specific percentage of members of that race, without regard to their individual qualifications, and by displacing existing employees of different racial background if necessary to that end. In re Young, 29 Misc. 2d 817, 211 N.Y.S.2d 621, 1961 N.Y. Misc. LEXIS 3495 (N.Y. Sup. Ct. 1961).

14. Age discrimination

Former airline flight attendants who were not hired by successor airline because of its use of weight standards in hiring decisions failed to establish that they were victims of age discrimination on ground that weight charts did not make appropriate adjustments for age, where there was no evidence establishing disparate treatment of relatively older flight attendants, airline submitted substantial evidence that it relied heavily on seniority in employing former flight attendants, and its flight attendants averaged over 40 years of age. Delta Air Lines v New York State Div. of Human Rights, 91 N.Y.2d 65, 666 N.Y.S.2d 1004, 689 N.E.2d 898, 1997 N.Y. LEXIS 3710 (N.Y. 1997).

There was no substantial evidence supporting a finding that prospective employer had rejected a work applicant solely on the basis of age where, from the evidence available, it appeared that said employer never saw either the applicant nor his application. State Div. of Human Rights v Service Systems Corp., Vending Div., 40 A.D.2d 1075, 339 N.Y.S.2d 232, 1972 N.Y. App. Div. LEXIS 3124 (N.Y. App. Div. 4th Dep't 1972).

Record supported finding of Commissioner of State Division of Human Rights that New York City Department of Personnel committed unlawful age discrimination by establishing maximum age of 40 years for position of parking enforcement agent and by rejecting applicant on basis that she was 54 years old; Department failed to establish its affirmative defense that age restriction was bona fide occupational qualification. New York City Dep't of Personnel v New York State Div. of Human Rights, 56 A.D.2d 795, 392 N.Y.S.2d 641, 1977 N.Y. App. Div. LEXIS 11090 (N.Y. App. Div. 1st Dep't 1977).

In age discrimination proceeding, order requiring New York City Department of Personnel to offer complainant next available position of parking enforcement agent could not stand where list of eligibles established from results of examination which complainant passed had expired; direction that Department pay complainant compensatory damages for period from date she would have been appointed likewise could not stand for same reason, but Commissioner of State Division of Human Rights would be required to fashion award of compensatory damages with due regard to unusual circumstances of case. New York City Dep't of Personnel v New York State Div. of Human Rights, 58 A.D.2d 787, 396 N.Y.S.2d 845, 1977 N.Y. App. Div. LEXIS 12946 (N.Y. App. Div. 1st Dep't 1977), aff'd, 44 N.Y.2d 904, 407 N.Y.S.2d 637, 379 N.E.2d 165, 1978 N.Y. LEXIS 2094 (N.Y. 1978).

A provision of the Civil Service Law prohibiting the original appointment of police officers over 29 years of age did not violate the equal protection requirements of the United States and New York State constitutions, did not contravene the prohibition against age discrimination contained in a provision of the Human Rights Law, and was not superseded by that provision which operated on a separate and unrelated category of employers. Knapp v Monroe County Civil Service Com., 77 A.D.2d 817, 437 N.Y.S.2d 136, 1980 N.Y. App. Div. LEXIS 12602 (N.Y. App. Div. 4th Dep't), app. denied, 51 N.Y.2d 708, 1980 N.Y. LEXIS 3830 (N.Y. 1980).

A provision of the Civil Service Law prohibiting the original appointment of police officers over 29 years of age did not violate the equal protection requirements of the United States and New York State constitutions, did not contravene the prohibition against age discrimination contained in a provision of the Human Rights Law, and was not superseded by that provision which operated on a separate and unrelated category of employers. Mullen v Harris, 80 A.D.2d 981, 437 N.Y.S.2d 135, 1981 N.Y. App. Div. LEXIS 10892 (N.Y. App. Div. 3d Dep't 1981).

In an age discrimination case, the complaint was properly dismissed where the employer hired a different job applicant, who was better qualified than petitioner, and who was 50 years of age, rather than the 60-year-old petitioner who had applied for positions with the employer for seven years. Auchenpaugh v General Electric Co., 92 A.D.2d 680, 460 N.Y.S.2d 200, 1983 N.Y. App. Div. LEXIS 16955 (N.Y. App. Div. 3d Dep't 1983).

There was substantial evidence to support a finding that the Lottery Division had not discriminated against a job applicant based on age or disability where two previous holders of the position had been over 50, the ultimate appointee was over 50 and the interviewer did not recall any disclosure of disability. Reiniger v New York State Div. of Lottery, 105 A.D.2d 902, 482 N.Y.S.2d 60, 1984 N.Y. App. Div. LEXIS 21021 (N.Y. App. Div. 3d Dep't 1984), app. denied, 64 N.Y.2d 609, 1985 N.Y. LEXIS 18863 (N.Y. 1985).

In regard to claim that employer committed unlawful age discrimination in decision not to hire complainants and that reasons articulated for employer's decisions were pretext, it was not necessary for complainants to show that age was the only factor in decision not to hire them or that employer's proffered reason was false; complainants were only required to show that employer's stated reason was not the only reason and that age made difference. Substantial evidence supported determination that age-neutral reasons offered by employer for not hiring complainants were pretext for age discrimination where (1) general manager of employer testified that his hiring criteria was to select aggressive merchandisers who had demonstrated their ability to merchandise in 12 to 14 months before closing of predeces sor corporation, (2) all but one of former corporation's employees selected by him were under 50, and all but one had performed few or no merchandising duties, (3) complainants had all been sales persons with extensive merchandising duties during period in question, and (4) sales manager for employer stated that employer was youth-oriented company, and described good merchandisers as "young guys" with strong legs who could "pack out a lot of stuff." Miller Brewing Co. v State Div. of Human Rights, 166 A.D.2d 705, 561 N.Y.S.2d 288, 1990 N.Y. App. Div. LEXIS 13204 (N.Y. App. Div. 2d Dep't 1990), app. denied, 77 N.Y.2d 805, 568 N.Y.S.2d 912, 571 N.E.2d 82, 1991 N.Y. LEXIS 328 (N.Y. 1991).

Justiciable controversy appropriate for declaratory relief existed in action by Superintendent of State Police for declaration as to whether hiring practices of Division of State Police were governed by CLS Exec § 215(3), which provided that applicants must be between 21 and 29 years of age, or by CLS Exec § 296(3-a)(a), which prohibited age discrimination, since (1) superintendent asserted that former statute applied and State Commissioner of Human Rights asserted that he could order superintendent to comply with latter statute, (2) commissioner had, on at least 4 occasions, sought injunctive relief directed at examinations scheduled by superintendent, and (3) controversy presented question of law with no disputed facts, and adjudication would likely render later litigation unnecessary. Declaratory judgment action by Superintendent of State Police for declaration as to whether hiring practices of Division of State Police were governed by CLS Exec § 215(3), which provided that applicants must be between 21 and 29 years of age, or by CLS Exec § 296(3-a)(a), which prohibited age discrimination, was not subject to exhaustion of administrative remedies doctrine since it would have been futile to await final determinations by Commissioner of Human Rights in various age discrimination complaints filed against superintendent where (1) protracted delays in proceedings on complaints lent air of uncertainty to superintendent's hiring practices, and (2) superintendent could not obtain adequate relief in administrative process as final determinations in favor of superintendent would not prevent further disruption of hiring practices. Hiring practices of Division of State Police were governed by CLS Exec § 215(3), which provides that applicants must be between 21 and 29 years of age, rather than by CLS Exec § 296(3-a)(a), which prohibits age discrimination, since general provisions must generally yield to specific provisions and there was no indication that latter statute, which was enacted after former statute, was intended to repeal age limitations in former statute. Constantine v White, 166 A.D.2d 59, 569 N.Y.S.2d 765, 1991 N.Y. App. Div. LEXIS 5328 (N.Y. App. Div. 3d Dep't 1991).

Age discrimination claims filed against airline based on airline's use of weight standards in hiring flight attendants, which allegedly discriminated against women with "large framed bodies," as well as older women, was properly dismissed where petitioners failed to show that age was major factor in weight gain, that airline's weight restrictions had had disparate impact on older employees, or that airline had used its restrictions to avoid hiring older individuals. Delta Air Lines v New York State Div. of Human Rights, 229 A.D.2d 132, 652 N.Y.S.2d 253, 1996 N.Y. App. Div. LEXIS 12963 (N.Y. App. Div. 1st Dep't 1996), app. dismissed, 90 N.Y.2d 882, 661 N.Y.S.2d 825, 684 N.E.2d 274, 1997 N.Y. LEXIS 2331 (N.Y. 1997), aff'd, 91 N.Y.2d 65, 666 N.Y.S.2d 1004, 689 N.E.2d 898, 1997 N.Y. LEXIS 3710 (N.Y. 1997).

Maximum age limitation for appointment of New York City police officers (NYC Admin Code § 14-109) has not been impliedly repealed by general city and state Human Rights Laws (NYC Admin Code § 8-107(a), CLS Exec § 296(1)(a)). Walter v City of New York Police Dep't, 244 A.D.2d 205, 664 N.Y.S.2d 21, 1997 N.Y. App. Div. LEXIS 11387 (N.Y. App. Div. 1st Dep't 1997).

There was sufficient unrebutted evidence in record to warrant public hearing on complaint that Delta Airlines discriminated on basis of age against 57-year-old automotive mechanic with 19 years of service with Pan American Airways when it did not hire him as part of its 1991 purchase of Pan Am's assets, where complaint alleged that specifically identified younger Pan Am mechanics with less seniority were hired in his stead. Sauer v N.Y. State Div. of Human Rights, 285 A.D.2d 372, 727 N.Y.S.2d 113, 2001 N.Y. App. Div. LEXIS 7370 (N.Y. App. Div. 1st Dep't 2001).

Because an employee failed to dispute an employer's non-age-discriminatory related reasons for the employee's termination and because the employer established that the employee was an administrative employee exempt from overtime, the employer was entitled to summary judgment in the employee's actions under N.Y. Exec. Law § 296, the Age Discrimination in Employment Act, 29 U.S.C.S. § 621, et seq., and the Fair Labor Standards Act of 1938, 29 U.S.C.S. § 201, et seq. Lichtman v Martin's News Shops Mgt., Inc., 81 A.D.3d 696, 917 N.Y.S.2d 222, 2011 N.Y. App. Div. LEXIS 963 (N.Y. App. Div. 2d Dep't 2011).

The age limitation restricting appointment for the position of police officer in New York City to those under age of 29 at the time of filing an application for the civil service examination does not constitute unlawful age discrimination, since the age limitation is a bona fide occupational qualification rationally related to the ability to perform the job. Feimer v Ward, 127 Misc. 2d 853, 487 N.Y.S.2d 458, 1984 N.Y. Misc. LEXIS 3765 (N.Y. Sup. Ct. 1984).

County was granted summary judgment dismissing age discrimination complaint by 75-year-old plaintiff who unsuccessfully applied for 3 civil service positions where it submitted affidavits and depositions from interviewers in all 3 jobs, presenting facially valid and convincing nondiscriminatory reasons for hiring other candidates, and plaintiff failed to provide evidentiary showing that county's explanations were false. Dunadee v County of

Monroe, 188 Misc. 2d 605, 729 N.Y.S.2d 605, 2001 N.Y. Misc. LEXIS 258 (N.Y. Sup. Ct. 2001).

Motion by an employer, a city transit authority, for summary judgment dismissing an employee's age discrimination complaint was properly denied where (1) the employee adequately pleaded a cognizable claim of age discrimination by alleging that the employee, under the employer's policy, had been denied a starting salary increase above the employee's former civil service salary with another city agency, but that younger, comparable, employees had received such salary increases, and (2) the employer failed to demonstrate its prima facie entitlement to summary judgment because it (a) failed to offer any proof as to why one such comparable employee had received a starting salary increase in contravention of the employer's alleged no-raise policy, and (b) failed to offer any proof regarding alleged disparate treatment between the employee and younger persons who allegedly received starting salary increases which were denied to the employee. Peskin v N.Y. City Transit Auth., 304 A.D.2d 634, 757 N.Y.S.2d 594, 2003 N.Y. App. Div. LEXIS 3941 (N.Y. App. Div. 2d Dep't 2003).

No portion of New York State Human Rights Law—as it relates to age discrimination claims—will be preempted by Employee Retirement Income Security Act of 1974 (ERISA; 29 USCS § 1144), since age discrimination claims brought under Human Rights Law are governed by same standards as those brought under Age Discrimination in Employment Act (ADEA; 29 USCS §§ 621 et seq.) and both federal statutes rely on "joint state/federal enforcement" scheme. Devlin v Transportation Communs. Int'l Union, 173 F.3d 94, 1999 U.S. App. LEXIS 6969 (2d Cir. N.Y. 1999).

Age discrimination claim of applicant for teaching position survives summary judgment, where plaintiff, 51, was one of top 2 candidates but was shunned in favor of 23-year-old student teacher, and there were several discrepancies in interpretation of interview scores, because triable issue of fact exists as to whether school district has refuted prima facie case of discrimination. Eastmer v Williamsville Cent. Sch. Dist., 977 F. Supp. 207, 977 F. Supp. 209, 1997 U.S. Dist. LEXIS 13921 (W.D.N.Y. 1997).

Age discrimination claim of rejected applicant for full-time social studies teaching position must fail, where he relies heavily on facts that (1) out of field of 6 candidates, 3 youngest were hired, and (2) he was oldest in field, because this is insufficient to overcome school district's nondiscriminatory explanation for hiring decision, and this is simply case of person who, after interviewing along with many other teachers in competitive school district, disagrees with reasons articulated for his rejection. Richane v Fairport Cent. Sch. Dist., 179 F. Supp. 2d 81, 2001 U.S. Dist. LEXIS 21133 (W.D.N.Y. 2001).

No reasonable trier of fact could find that age played role in employer's decision to repudiate employment contract with prospective employee, so as to support employee's action under Exec § 296, where employer repudiated employment agreement 16 days after entering into it, so that employee was almost same age on both days. Posner v Marcus & Millichap Corp. Real Estate Servs., 180 F. Supp. 2d 529, 2002 U.S. Dist. LEXIS 626 (S.D.N.Y. 2002).

Employee failed to establish a prima facie claim of age discrimination under the New York State Human Rights Law, N.Y. Exec. Law § 296(1) (2005), against his employer and two of its officers because a single disputed comment about the employee's age, even if taken as true, was insufficient to establish such a claim. Russo v Sysco Food Servs. of Albany, L.L.C., 488 F. Supp. 2d 228, 2007 U.S. Dist. LEXIS 36939 (N.D.N.Y. 2007).

Coach's age discrimination claim under the New York Human Rights Law, N.Y. Exec. Law § 290 et seq., failed because the claim was based only on the fact that the replacement coach was under age 40 and on inadmissible hearsay comments related to the coach's age, and the evidence showed that the coach had in fact been allowed to work as a coach for three years after her retirement from the school's physical education department, thus belying an inference of age discrimination regarding the school's failure to reappoint the coach to a fourth term. Stouter v Smithtown Cent. Sch. Dist., 687 F. Supp. 2d 224, 2010 U.S. Dist. LEXIS 12279 (E.D.N.Y. 2010).

15. Discrimination based on disability

Former flight attendants who were not hired because of successor airline's use of weight standards in its hiring decisions failed to establish that they were medically impaired members of protected class defined under Human Rights Law, where they did not proffer evidence establishing that they were medically incapable of meeting airline's weight standards due to some cognizable medical condition; weight, in and of itself, does not constitute disability for discrimination qualification purposes. Delta Air Lines v New York State Div. of Human Rights, 91 N.Y.2d 65, 666 N.Y.S.2d 1004, 689 N.E.2d 898, 1997 N.Y. LEXIS 3710 (N.Y. 1997).

Human Rights Appeal Board had no authority to determine whether school bus driver's hearing was sufficient inasmuch as that was a defect related to driver's ability to perform his job and thus did not qualify as a "disability" which was unrelated to ability to engage in occupation and for which refusal to hire constitutes unlawful discriminatory practice. State Div. of Human Rights v Averill Park Cent. School Dist., 59 A.D.2d 449, 399 N.Y.S.2d 926, 1977 N.Y. App. Div. LEXIS 13946 (N.Y. App. Div. 3d Dep't 1977), aff'd, 46 N.Y.2d 950, 415 N.Y.S.2d 405, 388 N.E.2d 729, 1979 N.Y. LEXIS 1868 (N.Y. 1979).

Respondent was properly found to have violated Exec Law § 296(1)(a) by unlawfully refusing to hire complainant on the basis of a disability described as "active gross obesity," where complainant's obesity, without more, constituted a physical or medical impairment within the meaning of Exec Law § 292(21). State Div. of Human Rights ex rel. McDermott v Xerox Corp., 102 A.D.2d 543, 478 N.Y.S.2d 982, 1984 N.Y. App. Div. LEXIS 18819 (N.Y. App. Div. 4th Dep't 1984), aff'd, 65 N.Y.2d 213, 491 N.Y.S.2d 106, 480 N.E.2d 695, 1985 N.Y. LEXIS 14676 (N.Y. 1985).

A public employee would be found to have been unlawfully discriminated against in her employment by reason of a medical disability where the employee was to be given a permanent position subject to her passing of physical examination, as a result of which the examining physician reported that she suffered from certain ailments which he concluded would adversely affect her ability to perform her duties, and where defendants failed to meet their burden to justify the non-hiring of plaintiff by failing to produce record proof as to whether plaintiff's diabetes increased her urination and drinking needs and therefore her absenteeism. Kelly v North Hempstead, 103 A.D.2d 767, 477 N.Y.S.2d 396, 1984 N.Y. App. Div. LEXIS 19382 (N.Y. App. Div. 2d Dep't 1984).

There was substantial evidence to support a finding that the Lottery Division had not discriminated against a job applicant based on age or disability where two previous holders of the position had been over 50, the ultimate appointee was over 50 and the interviewer did not recall any disclosure of disability. Reiniger v New York State Div. of Lottery, 105 A.D.2d 902, 482 N.Y.S.2d 60, 1984 N.Y. App. Div. LEXIS 21021 (N.Y. App. Div. 3d Dep't 1984), app. denied, 64 N.Y.2d 609, 1985 N.Y. LEXIS 18863 (N.Y. 1985).

A regulation promulgated by the Commissioner of Education, which precludes the employment as a school bus driver of anyone who has any physical or mental condition which "might impede" the ability to operate a bus safely, was invalid to the extent that it conflicted with portions of the Human Rights Law (Exec Law §§ 292, 296) barring discrimination against the disabled, and the Commissioner of the State Division of Human Rights properly determined that a school district had improperly discriminated by refusing to hire as a substitute school bus driver a woman whose need to take medication due to the removal of her adrenal glands did not prevent her from performing the job in a reasonable manner. State Div. of Human Rights ex rel. Giannavola v Le Roy Cent. School Dist., 107 A.D.2d 153, 485 N.Y.S.2d 907, 1985 N.Y. App. Div. LEXIS 48407 (N.Y. App. Div. 4th Dep't), app. denied, 65 N.Y.2d 610 (N.Y. 1985).

There was substantial evidence to support the determination of the Division of Human Rights that there was no probable cause to believe that respondent hospital engaged in an unlawful discriminatory practice in rejecting petitioner's employment application, where the nursing duties of the position sought by petitioner required heavy lifting, and petitioner admitted that her disability made her unable to lift more than 15 pounds. Schor v St. Francis

Hospital, 111 A.D.2d 852, 490 N.Y.S.2d 785, 1985 N.Y. App. Div. LEXIS 50106 (N.Y. App. Div. 2d Dep't 1985).

To extent that rejection of request by disabled professional basketball referee is based upon determination that referee's style and manner of officiating does not conform to current standards, in absence of affirmative proof of discrimination, it is improper for commissioner of state division of human rights to substitute commissioner's judgment for that of employer as to qualifications for particular position. National Basketball Asso. v New York State Div. of Human Rights, 115 A.D.2d 365, 495 N.Y.S.2d 904, 1985 N.Y. App. Div. LEXIS 54768 (N.Y. App. Div. 1st Dep't 1985), aff'd, 68 N.Y.2d 644, 505 N.Y.S.2d 63, 496 N.E.2d 222, 1986 N.Y. LEXIS 19039 (N.Y. 1986).

Finding that school district had not discriminated (on basis of disability) against applicant for position as school bus driver lacked support in record where district had rejected applicant on strength of medical report in which doctor stated only that applicant should not operate bus until checked by cardiologist, and did not make final determination that applicant was unfit; accordingly, on applicant's Article 78 petition, decision of State Division of Human Rights, which had found no probable cause to believe that district had engaged in unlawful discriminatory practice, should be annulled. Sitler v New York State Div. of Human Rights, 133 A.D.2d 938, 520 N.Y.S.2d 653, 1987 N.Y. App. Div. LEXIS 51983 (N.Y. App. Div. 3d Dep't 1987).

Determination that employer unlawfully discriminated against complainant by failing to hire him because of disability was supported by fact that he was denied employment as kitchen helper simply because he had high blood pressure, with no evaluation done as to whether such condition would prevent him from reasonably performing his job activities. Trans World Airlines, Inc. v New York Executive Dept., State Div. of Human Rights, 147 A.D.2d 575, 537 N.Y.S.2d 868, 1989 N.Y. App. Div. LEXIS 1605 (N.Y. App. Div. 2d Dep't 1989).

Employment applicant stated cause of action against prospective employer for unlawful discrimination under New York State Human Rights Law by alleging that metabolites found in his urine specimen resulted from his consumption of health food bread containing poppy seeds and not from unlawful opiate abuse, although his urine sample was subjected to 2 different testing methods which revealed positive results, where employer refused to use third testing method which would definitely distinguish metabolites resulting from opiate use; employer may be legitimately entitled to discriminate against users of controlled narcotic substances, but it must, when challenged, come forward with evidence establishing that its testing method accurately distinguishes between opiate users and consumers of lawful foodstuffs or medications. Doe v Roe, Inc., 160 A.D.2d 255, 553 N.Y.S.2d 364, 1990 N.Y. App. Div. LEXIS 3749 (N.Y. App. Div. 1st Dep't 1990).

Court should have dismissed action brought by Orthodox Jewish tenants alleging that apartment building owners violated CLS Exec § 296(5)(a)(2) by installing electric locks in doors of front entrances to buildings, thereby requiring individual tenants either to turn key or press button to break electric circuit, causing electromagnet to be released, procedure which was prohibited by Jewish religious law ("Halacha") on their Sabbath and on certain religious holidays, since (1) mere act of installing electric locks, while burdensome to Jewish tenants, did not constitute discriminatory act, (2) it was reasonable to assume that installation of electronic locks was for sole purpose of deterring crime, (3) there was no allegation from which it could be reasonably inferred that installation was done with discriminatory intent, and (4) inconvenience placed on Jewish tenants was not of such nature as to be deemed discriminatory. Siegel v Blair Hall, Inc., 207 A.D.2d 539, 615 N.Y.S.2d 937, 1994 N.Y. App. Div. LEXIS 8608 (N.Y. App. Div. 2d Dep't 1994), app. denied, 86 N.Y.2d 709, 634 N.Y.S.2d 443, 658 N.E.2d 221, 1995 N.Y. LEXIS 3717 (N.Y. 1995).

Employer could not be held to have discriminated against prospective employee by failing to offer him immediate employment because of his disability where, at time he applied for employment, he was on disability leave from his then-current employer; employee could not claim both that he was unable to perform his duties for his then-current employer because of serious back problems and that he was discriminated against by prospective employer. AT & T Bell Lab. v New York State Div. of Human Rights, 213 A.D.2d 230, 624 N.Y.S.2d 9, 1995 N.Y. App. Div. LEXIS 2742 (N.Y. App. Div. 1st Dep't 1995).

Disability discrimination claims filed against airline, based on airline's use of weight standards in hiring flight attendants, were properly dismissed where, inter alia, petitioners failed to show that they fell within class of persons protected by Human Rights Law and that airline intended to discriminate against older women, they did not claim that their weight limited their actions or abilities nor did they allege conditions which amounted to obesity, and they submitted no proof that they had been clinically observed as having "abnormal medical condition" or that they were medically incapable of meeting airline's weight requirements due to underlying medical problem. Delta Air Lines v New York State Div. of Human Rights, 229 A.D.2d 132, 652 N.Y.S.2d 253, 1996 N.Y. App. Div. LEXIS 12963 (N.Y. App. Div. 1st Dep't 1996), app. dismissed, 90 N.Y.2d 882, 661 N.Y.S.2d 825, 684 N.E.2d 274, 1997 N.Y. LEXIS 2331 (N.Y. 1997), aff'd, 91 N.Y.2d 65, 666 N.Y.S.2d 1004, 689 N.E.2d 898, 1997 N.Y. LEXIS 3710 (N.Y. 1997).

Because the individuals responsible for hiring teachers at a school district were unaware that a teacher was disabled, the human rights commission properly found no discriminatory practice under N.Y. Exec. Law § 296(a)(1) and dismissed the teacher's administrative complaint against the district; consequently, the teacher was not entitled to N.Y. C.P.L.R. art. 78 relief. Matter of Isaksson-Wilder v New York State Div. of Human Rights, 43 A.D.3d 921, 841 N.Y.S.2d 658, 2007 N.Y. App. Div. LEXIS 9635 (N.Y. App. Div. 2d Dep't 2007).

Trial court erred by dismissing an employee's discrimination claim that the employer failed to accommodate his disability by refusing to transfer him to another position after his immediate supervisor assaulted him on the job as he sufficiently alleged a life-threatening heart condition that was beyond mere workplace stress. However, the trial court properly dismissed the employee's retaliation claim as the complaint included no allegation that the employee was assaulted because of any qualifying impairment or disability. Horgan v Whitaker, 57 A.D.3d 1345, 871 N.Y.S.2d 443, 2008 N.Y. App. Div. LEXIS 9981 (N.Y. App. Div. 3d Dep't 2008).

In Article 78 proceeding to set aside and annul determination of fire district which denied application of petitioner to become volunteer fireman but failed to determine extent of his hearing impairment, court would remand matter for hearing specifically on issue of extent of hearing impairment, and would direct fire district to grant application if it found that petitioner's hearing impairment did not rise to level described in CLS Exec § 296(14). Waskewicz v Guy, 141 Misc. 2d 983, 535 N.Y.S.2d 345, 1988 N.Y. Misc. LEXIS 732 (N.Y. Sup. Ct. 1988).

Job applicant stated cause of action for employment discrimination based on disability in violation of CLS Exec § 296(1)(a) by alleging that employer subjected him to urinalysis test as condition of employment without demonstrating that such test was job related and that employer refused to hire applicant on basis of such test result (which revealed presence of opiates) without evaluating his capacity to reasonably perform in position sought. Doe v Roe, Inc., 143 Misc. 2d 156, 539 N.Y.S.2d 876, 1989 N.Y. Misc. LEXIS 187 (N.Y. Sup. Ct. 1989), aff'd, 160 A.D.2d 255, 553 N.Y.S.2d 364, 1990 N.Y. App. Div. LEXIS 3749 (N.Y. App. Div. 1st Dep't 1990).

When an employee sued her former employer for employment discrimination based on a disability, because she was terminated for not returning to work when her recovery from a back injury took longer than expected, her testimony that her resulting disability prevented her from performing her job in a reasonable manner was fatal to her discrimination claim under N.Y. Exec. Law § 296, and summary judgment dismissing that claim was properly granted. Fama v Am. Int'l Group, Inc., 306 A.D.2d 310, 760 N.Y.S.2d 534, 2003 N.Y. App. Div. LEXIS 6591 (N.Y. App. Div. 2d Dep't 2003), app. denied, 1 N.Y.3d 508, 777 N.Y.S.2d 17, 808 N.E.2d 1276, 2004 N.Y. LEXIS 166 (N.Y. 2004).

Former bus driver did not have a claim for disability discrimination under the Americans with Disabilities Act, 42 U.S.C.S. § 12101 et seq., or under the corresponding state and city laws

set forth in N.Y. Exec. Law §§ 292, 296, and N.Y. City Admin. Code § 8-107, because the employee could not show that he was qualified for the job when the employee was not able to meet a reasonable job requirement of obtaining a medical certificate of fitness when the employee could not pass a test for colorblindness. Shannon v N.Y. City Transit Auth., 332 F.3d 95, 2003 U.S. App. LEXIS 11717 (2d Cir. N.Y. 2003).

A hockey league bylaw, which provided that a person with sight in only one eye could not play for a member club, was invalid, as the hockey league did not justify the rule as being a bona fide occupational qualification, plaintiff represented that his handicap did not substantially detract from his ability to play hockey, and a partially blind person has a constitutional right not to be discriminated against by an employer or prevented from participating in sports. Neeld v American Hockey League, 439 F. Supp. 459, 1977 U.S. Dist. LEXIS 13309 (W.D.N.Y. 1977).

Employee's clinically diagnosed morbid obesity rendered her disabled under Human Rights Law. Hazeldine v Beverage Media, 954 F. Supp. 697, 1997 U.S. Dist. LEXIS 736 (S.D.N.Y. 1997).

Employee was unable to proceed on a claim of disability discrimination in violation of the New York State Human Rights Law, N.Y. Exec. Law § 296(a), against his employers, a county, its recreation and parks department, and its public works department (defendants), because he did not file a required notice of claim against defendants prior to commencing litigation. Liss v Nassau County, 425 F. Supp. 2d 335, 2006 U.S. Dist. LEXIS 16088 (E.D.N.Y. 2006).

Former employee's claim that a university violated N.Y. Exec. Law § 296 in failing to rehire the employee after she was discharged for underperformance, using profane language, and excessive tardiness failed because although the employee underwent treatment for the drug addiction that allegedly caused her performance problems, there was no evidence that the university's failure to rehire the employee was due to her alleged disability of drug addiction, and instead, the evidence showed that the university had a policy of rehiring employees who were discharged for cause only when they demonstrated an intervening positive work history, which the employee had not done. Gilmore v Univ. of Rochester Strong Mem'l Div., 654 F. Supp. 2d 141, 2009 U.S. Dist. LEXIS 79219 (W.D.N.Y. 2009).

16. —Disability for police work

City's disqualification of individual from employment as police officer based on asymptomatic back condition (spondylolisthesis) constituted unlawful discrimination because of disability in violation of CLS Exec § 296 since (1) individual established his present ability to perform police duties by satisfactory performance of agility test and prior employment as laborer without significant back problems, and (2) city failed to establish reasonable expectation that individual would be unable to perform his duties in future, in absence of reliable statistics or other medical evidence concerning incidence of disability resulting from asymptomatic spondylolisthesis; employment may not be denied based on mere possibilities, especially when disqualification is premised solely on fact of applicant's inclusion in class of persons with particular disability rather than on individualized assessment. In re State Di v of Human Rights, 70 N.Y.2d 100, 517 N.Y.S.2d 715, 510 N.E.2d 799, 1987 N.Y. LEXIS 16800 (N.Y. 1987).

Provision requiring 20 years of accredited service in order to be eligible for additional retirement benefits from variable supplements funds did not improperly exclude officers who had retired as result of disabilities in violation of Human Rights Law (CLS Exec § 296(1)(a)), given different needs of service and disability retirees and unique benefits offered to each retirement classification. Gagliardo v Dinkins, 89 N.Y.2d 62, 651 N.Y.S.2d 368, 674 N.E.2d 298, 1996 N.Y. LEXIS 3161 (N.Y.), reh'g denied, 89 N.Y.2d 917, 653 N.Y.S.2d 921, 676 N.E.2d 503, 1996 N.Y. LEXIS 4428 (N.Y. 1996), reh'g denied, 89 N.Y.2d 917, 653 N.Y.S.2d 920, 676 N.E.2d 502, 1996 N.Y. LEXIS 4466 (N.Y. 1996).

Wounded veteran who sought appointment as a police officer upon application therefor filed prior to his army induction, although found qualified for limited duties by the Civil Service Commission as to return from military service, had no vested rights under Military Law, Civil Service Law or Executive Law. Messina v Codd, 52 A.D.2d 784, 383 N.Y.S.2d 321, 1976 N.Y. App. Div. LEXIS 12566 (N.Y. App. Div. 1st Dep't 1976).

Fact that veteran with physical limitation comparable to that of petitioner held position of patrolman did not support charge of discrimination in denial of petitioner's application inasmuch as the patrolman was a member of the department prior to his induction into the armed services, and petitioner sought appointment upon application filed prior to his army induction. Messina v Codd, 52 A.D.2d 784, 383 N.Y.S.2d 321, 1976 N.Y. App. Div. LEXIS 12566 (N.Y. App. Div. 1st Dep't 1976).

Rejection of applicant for position with state police on basis of conclusion that applicant is physically unfit to become member of state police is not unlawful discriminatory practice based on disability where applicant is on accidental disability retirement status from employment with state parkway police. Kash v New York State Executive Dept., Div. of Human Rights, 115 A.D.2d 928, 496 N.Y.S.2d 823, 1985 N.Y. App. Div. LEXIS 55287 (N.Y. App. Div. 3d Dep't 1985).

Statistical probability of future disability is properly considered in determining qualification for employment as police officer; accordingly, applicant for employment as police officer may be denied employment on basis of conclusion that there is statistically higher than normal probability that sudden movement involved in police service will aggravate applicant's presently asymptomatic disability of spondylolisthesis. In re State Div. In re State Di v of Human Rights ex rel. Granelle, 118 A.D.2d 3, 504 N.Y.S.2d 92, 1986 N.Y. App. Div. LEXIS 53584 (N.Y. App. Div. 1st Dep't 1986), rev'd, 70 N.Y.2d 100, 517 N.Y.S.2d 715, 510 N.E.2d 799, 1987 N.Y. LEXIS 16800 (N.Y. 1987).

Petitioner who was denied appointment as police officer on basis of his elevated blood pressure was not entitled to protection under CLS Exec § 296 since Department of Civil Service sufficiently demonstrated that petitioner's elevated blood pressure could prevent him from performing activities involved in being police officer. Seitz v Suffolk County Dep't of Civil Service, 146 A.D.2d 631, 536 N.Y.S.2d 536, 1989 N.Y. App. Div. LEXIS 429 (N.Y. App. Div. 2d Dep't 1989).

Determination which found petitioner ineligible for appointment as county police officer should have been confirmed–petitioner suffers from elevated blood pressure so that he does not satisfy standard for physical fitness established by Municipal Police Training Council (MPTC) (9 NYCRR 6000.3); petitioner's blood pressure was taken approximately 15 times, and almost every time readings were over acceptable level; regulations promulgated by MPTC also provide that candidate who otherwise is not qualified because of high blood pressure can be found qualified if he presents evidence from cardiologist that hypertension and medication used to control it will not interfere with performance of physical duties of police officer (9 NYCRR 6000.3 [j] [4]); although petitioner did submit letter from cardiologist, it nowhere indicated that petitioner's high blood pressure would not interfere with his duties as police officer–contention that County Department of Civil Service violated Executive Law § 296 in denying petitioner appointment by reason of "disability" is without merit; it was sufficiently demonstrated that petitioner's elevated blood pressure condition may prevent him from performing in reasonable manner activities involved in job. Connolly v Suffolk County Dep't of Civil Service, 150 A.D.2d 373, 540 N.Y.S.2d 821, 1989 N.Y. App. Div. LEXIS 5632 (N.Y. App. Div. 2d Dep't), app. denied, 74 N.Y.2d 611, 546 N.Y.S.2d 555, 545 N.E.2d 869, 1989 N.Y. LEXIS 2843 (N.Y. 1989).

Department of civil service did not violate CLS Exec § 296 in denying appointment as police officer to petitioner on basis of disability because of his high blood pressure where it was demonstrated that condition would prevent petitioner from performing duties of police officer in reasonable manner. Connolly v Suffolk County Dep't of Civil Service, 150 A.D.2d 373, 540 N.Y.S.2d 821, 1989 N.Y. App. Div. LEXIS 5632 (N.Y. App. Div. 2d Dep't), app. denied, 74 N.Y.2d 611, 546 N.Y.S.2d 555, 545 N.E.2d 869, 1989 N.Y. LEXIS 2843 (N.Y. 1989).

New York State Department of Civil Service did not violate CLS Exec § 296, which makes it unlawful discriminatory practice to reject job applicant due to disability not affecting ability to perform duties of position sought, when it removed applicant's

name from eligible list for position of correction officer after it was discovered that he suffered from high blood pressure and lesion on right lung, where uncontradicted testimony of one of applicant's witnesses established that his medical conditions would prevent him from performing duties of correction officer. Tyson v New York State Dep't of Correctional Serv., 198 A.D.2d 408, 604 N.Y.S.2d 130, 1993 N.Y. App. Div. LEXIS 10917 (N.Y. App. Div. 2d Dep't 1993).

Conclusive finding by police department doctors that a police candidate, who was born with a congenital deformity of his lower right leg which necessitated surgery and the use of a prosthetic limb, was incapable of performing the essential duties of a police officer meant that there was no violation of N.Y. Exec. Law § 296(1)(a) inasmuch as he was not disabled within the meaning of N.Y. Exec. Law § 292(21). O'Sullivan v City of New York, 38 A.D.3d 467, 834 N.Y.S.2d 30, 2007 N.Y. App. Div. LEXIS 3903 (N.Y. App. Div. 1st Dep't), app. denied, 9 N.Y.3d 804, 840 N.Y.S.2d 764, 872 N.E.2d 877, 2007 N.Y. LEXIS 1756 (N.Y. 2007).

Retaliation claim pursuant to Exec § 296 is denied summarily, even though town police officer maintains he was treated differently and unfairly upon his return to work after suffering 2 seizures, where police department continues to employ officer and offers reasonable explanations for its treatment of him, because alleged continuing retaliatory actions appear to be nothing more than decisions concerning work assignments, administrative matters, and departmental procedures. Treglia v Town of Manlius, 181 F. Supp. 2d 83, 2001 U.S. Dist. LEXIS 18398 (N.D.N.Y. 2001), vacated, 313 F.3d 713, 2002 U.S. App. LEXIS 26120 (2d Cir. N.Y. 2002).

17. Discrimination based on marital status

In a proceeding by a married female job applicant who alleged that she had been discriminated against because of her marital status, the trial court erred in affirming a determination ordering an employer to hire the applicant where it was obvious that the applicant was denied employment not because of her marital status but, rather, because of the additional fact that her husband already worked for the employer; such a refusal to hire is lawful and does not constitute discrimination based upon marital status. Campbell Plastics, Inc. v New York State Human Rights Appeal Bd., 81 A.D.2d 991, 440 N.Y.S.2d 73, 1981 N.Y. App. Div. LEXIS 11735 (N.Y. App. Div. 3d Dep't 1981).

18. Discrimination based on arrest and/or conviction of crime

Denial by the department of education (DOE) of an application for a security clearance was improper because the "closer review" purportedly applied by the DOE amounted to nothing more than a pro forma denial of the application on the basis of the applicant's prior criminal conviction and such a denial, without consideration of the N.Y. Correct. Law § 753 factors, was precisely what the statute prohibited and was arbitrary and capricious; among the considerations listed in an affidavit of the DOE's director for employee relations was that the applicant did not provide references from prior employers, but the interview notice did not state that the applicant should provide such references, and her interviewer did not ask her for those references. Further, other than her personal statement, the DOE did not consider the documentation that the applicant submitted. Matter of Acosta v New York City Dept. of Educ., 16 N.Y.3d 309, 921 N.Y.S.2d 633, 946 N.E.2d 731, 2011 N.Y. LEXIS 437 (N.Y. 2011).

A petition to annul a decision denying an application for a civil service position as a traffic enforcement agent, which decision was based solely on the ground that the applicant intentionally made a false statement of a material fact on the application by denying that he had ever been convicted of a crime, was properly dismissed where there was no evidence to indicate that the applicant was penalized because of his prior criminal record in contravention of either Exec Law § 296 or Correc Law § 752. Stewart v Civil Service Com., 84 A.D.2d 491, 446 N.Y.S.2d 948, 1982 N.Y. App. Div. LEXIS 14946 (N.Y. App. Div. 1st Dep't 1982).

Where, during the course of an interview for a civil service position, complainant admitted to the personnel committee of the state agency involved that he had been arrested for petty larceny and had received an adjournment in contemplation of dismissal, Exec Law § 296(16), making it an unlawful discriminatory practice to inquire about an arrest of an individual not then pending which was terminated in favor of the individual, did not preclude the interviewer from requesting that the complainant verify the disposition of the charges against him, since the inquiry was in good faith and for the complainant's protection and since the legislature never intended employers to be foreclosed from requiring verification of the disposition of criminal charges that had been legally and properly discovered. New York State Dep't of Mental Hygiene v State Div. of Human Rights, 103 A.D.2d 546, 481 N.Y.S.2d 371, 1984 N.Y. App. Div. LEXIS 19972 (N.Y. App. Div. 2d Dep't 1984), aff'd, 66 N.Y.2d 752, 497 N.Y.S.2d 361, 488 N.E.2d 107, 1985 N.Y. LEXIS 17645 (N.Y. 1985).

Questioning of an applicant for a civil service position during an interview by a state agency's personnel committee about his arrest for petty larceny, for which complainant reportedly received an adjournment in contemplation of dismissal, did not constitute a violation of Exec Law § 296(16), making it an unlawful discriminatory practice to inquire about or to act upon adversely to the individual involved any arrest not then pending which was terminated in favor of the individual, where the initial interview of the complainant took place prior to the effective date of the statute, and the provisions of the Human Rights Law may not be applied retroactively. New York State Dep't of Mental Hygiene v State Div. of Human Rights, 103 A.D.2d 546, 481 N.Y.S.2d 371, 1984 N.Y. App. Div. LEXIS 19972 (N.Y. App. Div. 2d Dep't 1984), aff'd, 66 N.Y.2d 752, 497 N.Y.S.2d 361, 488 N.E.2d 107, 1985 N.Y. LEXIS 17645 (N.Y. 1985).

Although State Division of Human Rights correctly determined that sheriff's department discriminated against applicant by inquiring about prior arrests on application for employment in 1981, court would reverse those portions of division's order directing sheriff to hire applicant as mounted patrolmen and awarding back pay; inasmuch as applicant was never sworn in, or paid, as mounted patrolman, division lacked power to direct sheriff, public employer, to hire applicant since such direction would in effect deprive appointing authority of power of selection. Sheriff's Dep't v State Div. of Human Rights, 129 A.D.2d 789, 514 N.Y.S.2d 779, 1987 N.Y. App. Div. LEXIS 45479 (N.Y. App. Div. 2d Dep't 1987).

Office of Court Administration was entitled to reject employment application of prospective court officer who had once been arrested for criminal impersonation of public servant, notwithstanding provisions of CLS Exec § 296(16) prohibiting inquiry or adverse action based on arrest or criminal accusation which is terminated favorably to accused; rejection was authorized under language of § 296(16) even before 1985 amendment excluded peace officers from its terms. Bellacosa v White, 145 A.D.2d 342, 535 N.Y.S.2d 706, 1988 N.Y. App. Div. LEXIS 13281 (N.Y. App. Div. 1st Dep't 1988).

Inmate or former inmate is entitled to have institutional record free from improperly obtained findings of disciplinary rule violations since his prison disciplinary record might be considered by future employer in reaching employment decision. Grant v Senkowski, 146 A.D.2d 948, 537 N.Y.S.2d 323, 1989 N.Y. App. Div. LEXIS 514 (N.Y. App. Div. 3d Dep't 1989).

Although it has since been amended to permit inquiry regarding any arrest or criminal accusation not then pending, which was terminated in favor of applicant for employment as police officer or peace officer, Executive Law § 296 (16), in effect at time, prohibited such inquiry and there is substantial evidence in record that complainant's arrest record and petitioner's misconception that he had been convicted were primary reasons for petitioner's nonselection of complainant for position of correction officer; however, civil service eligibility list in question expired almost one year prior to respondent's determination–civil service applicant cannot be hired from expired list unless applicant commences judicial or administrative proceeding prior to expiration of list and also challenges list itself; complainant here has made no such challenge; there is also insufficient basis for respondent's award of compensatory damages for hurt, humiliation and mental anguish, since there was no evidence supporting complainant's claims of mental anguish other than his statement he was upset; cease and desist order should be annulled in light

of 1985 amendment to section 296 (16), which permits such inquiry of applicants for employment as peace officers, which includes correction officers. New York City Dep't of Correction v White, 163 A.D.2d 250, 558 N.Y.S.2d 71, 1990 N.Y. App. Div. LEXIS 8581 (N.Y. App. Div. 1st Dep't 1990).

Court reversed human rights commission's finding of lack of probable cause to believe that corrections department refused to employ petitioner because of his Maryland arrest record, in violation of NYC Admin Code § 107(11), where (1) Maryland court documents indicated that criminal proceeding against petitioner was disposed of in manner analogous to New York's adjournment in contemplation of dismissal, which was consistent with questionnaire on which petitioner forthrightly disclosed that he had been arrested in Maryland but charge did not result in "conviction," and (2) fact that department failed to appreciate essential truth of petitioner's representations because it incorrectly interpreted Maryland court documents did not excuse its resulting unlawful discrimination. Johnson v New York City Comm'n of Human Rights, 270 A.D.2d 186, 706 N.Y.S.2d 18, 2000 N.Y. App. Div. LEXIS 3297 (N.Y. App. Div. 1st Dep't 2000).

CLS Executive Law § 296(16) prohibits corporate entity from denying employment to applicant on basis of arrest which is followed by termination of criminal action or proceeding in favor of such individual; section does not prevent employer from acting adversely with respect to employee of such actions are motivated by bona fide business reasons and otherwise proscribed by statute; employer does not violate section by decision not to reinstate employee which is motivated not by employee's arrest but rather by employer's own investigation which produced evidence that employee had misappropriated company funds. Salanger v U.S. Air, 611 F. Supp. 427, 1985 U.S. Dist. LEXIS 21119 (N.D.N.Y. 1985).

Employment applicant's Exec § 296(15) and (16) claims against employer that withdrew conditional offer must fail, even though withdrawal was based upon discovery of applicant's past conviction for welfare fraud, because employer proffers nondiscriminatory reason that applicant lied on security data sheet, and vacated and dismissed conviction nevertheless could not be deemed criminal accusation terminated in applicant's favor. Obabueki v IBM, 137 F. Supp. 2d 320, 2001 U.S. Dist. LEXIS 4092 (S.D.N.Y.), amended, 145 F. Supp. 2d 371, 2001 U.S. Dist. LEXIS 8166 (S.D.N.Y. 2001).

Disgruntled applicant's Exec § 296(16) claim against potential employer must be dismissed, even though applicant argues offer of employment was withdrawn on basis of his prior conviction of welfare fraud that was vacated and dismissed pursuant to California statute, where dismissal under that statute applies to guilty plea convictions after specified period of probation has been served, because criminal proceedings against applicant were not "terminated in his favor" within meaning of CPL § 160.50. Obabueki v IBM, 145 F. Supp. 2d 371, 2001 U.S. Dist. LEXIS 8166 (S.D.N.Y. 2001), aff'd, 319 F.3d 87, 2003 U.S. App. LEXIS 1781 (2d Cir. N.Y. 2003).

Where a securities dealer denied a prospective employee broker supposed promised employment, allegedly because the broker had been (mistakenly) arrested for petit larceny, there could be no violation of Exec § 296, subd. 16 because 17 C.F.R. § 240.17a-3(a) required businesses such as the dealer to maintain arrest records among employee records, and thus the dealer's obtaining such records was excepted from coverage under the statute. Shapira v Charles Schwab & Co., 225 F. Supp. 2d 414, 2002 U.S. Dist. LEXIS 18665 (S.D.N.Y. 2002).

19. National origin discrimination

The Division of Human Rights and the Human Rights Appeal Board properly exercised subject matter jurisdiction, pursuant to Exec Law §§ 296, 297-a, over a complaint by an applicant for a State Trooper position who had been disqualified by the State Police Division from its Hispanic-American/Spanish-surnamed minority hiring program, where the complaint effectively alleged that the State Police had discriminated against the applicant by refusing to treat him in the same manner that it treated others of Hispanic national origin or ancestry in considering him for employment, and where, though the Appeal Board specifically referred in its decision to an order by the United States District Court that had established guidelines for the State Police Division to follow in order to achieve a long-term goal of acquiring personnel comprised of women, blacks, and Spanish-surnamed Americans, there was uncontradicted documentary proof in the record, apart from the reference to the court order, to support the appeal board's conclusion that the applicant was of Hispanic origin, so that the appeal board did not base its decision solely on an interpretation of the Federal court order, and, therefore, did not exceed its jurisdiction. New York State Div. of State Police v McCall, 98 A.D.2d 921, 470 N.Y.S.2d 916, 1983 N.Y. App. Div. LEXIS 21243 (N.Y. App. Div. 3d Dep't 1983).

The State Division of Human Rights did not act arbitrarily or capriciously in dismissing a college faculty member's complaint alleging unlawful discriminatory practice based on national origin, where the investigation report confirmed that each allegation in the complaint had been thoroughly reviewed, that the faculty member had been given a full opportunity to present his case, and that there had been no discrimination against the faculty member, who had received regular promotions, had been granted a sabbatical leave during a past academic year, had been elected to a three-year term as chair person of the engineering department, and had apparently been promoted to the rank of full professor. Gajjar v Union College, 107 A.D.2d 917, 483 N.Y.S.2d 857, 1985 N.Y. App. Div. LEXIS 49840 (N.Y. App. Div. 3d Dep't 1985).

Airline did not engage in unlawful discrimination based on its preemployment questions as to petitioners' national origin and gender where there was nothing to support conclusion that those questions, either expressly or intentionally, led to petitioners not being hired; rather, petitioners received good reviews from airline's interviewers and were not hired due to their failure to meet airline's weight guidelines or hiring eligibility deadline. Delta Air Lines v New York State Div. of Human Rights, 229 A.D.2d 132, 652 N.Y.S.2d 253, 1996 N.Y. App. Div. LEXIS 12963 (N.Y. App. Div. 1st Dep't 1996), app. dismissed, 90 N.Y.2d 882, 661 N.Y.S.2d 825, 684 N.E.2d 274, 1997 N.Y. LEXIS 2331 (N.Y. 1997), aff'd, 91 N.Y.2d 65, 666 N.Y.S.2d 1004, 689 N.E.2d 898, 1997 N.Y. LEXIS 3710 (N.Y. 1997).

20. Racial discrimination

A determination that probable cause did not exist to credit the allegation of petitioner's complaint that he was not engaged as an airline flight steward because of his race and color was not arbitrary or capricious. Jeanpierre v Arbury, 4 N.Y.2d 238, 173 N.Y.S.2d 597, 149 N.E.2d 882, 1958 N.Y. LEXIS 1072 (N.Y. 1958).

City's decision not to hire the black complainant as an administrative aide at its convention center was not motivated by racial prejudice, where the record disclosed that the reason complainant was not hired was because, while his application was pending, he made unfounded remarks before the city council that no black had been appointed to a supervisory position at the convention center and that no black entertainer had been scheduled to appear at the facility; under the facts, there was no prima facie case of retaliatory discrimination in violation of the Executive Law. State Div. of Human Rights ex rel. Bradberry v Niagara Falls, 52 A.D.2d 1065, 384 N.Y.S.2d 326, 397 N.Y.S.2d 791, 1976 N.Y. App. Div. LEXIS 12988 (N.Y. App. Div. 4th Dep't 1976), aff'd, 42 N.Y.2d 875, 397 N.Y.S.2d 791, 366 N.E.2d 878, 1977 N.Y. LEXIS 2217 (N.Y. 1977).

Inquiry as to race made by screening interviewer to employment applicant is not indirect expression of racial limitation where interviewer is black, interviewer finds complainant's job experience qualifying, and where out of 10 applicants interviewed, interviewer approves and passes along only applicant and one other for further interview by superior, screening manager, who finds applicant well qualified and who sends applicant's application and resume to other departments for consideration. Alexander's, Inc. v White, 115 A.D.2d 424, 496 N.Y.S.2d 227, 1985 N.Y. App. Div. LEXIS 54817 (N.Y. App. Div. 1st Dep't 1985).

Substantial evidence supported Division of Human Rights' determination that hospital refused to hire petitioner as surgeon based on legitimate nondiscriminatory criteria in that petitioner's many affiliations with other hospitals and demands of his research projects would conflict with his duties at hospital; moreover, statistical evidence, which showed that hospital hired many surgeons from minority groups, belied petitioner's claim

that denial of his employment application was racially motivated. Davidson v Medical Associates of Woodhull, P. C., 132 A.D.2d 609, 517 N.Y.S.2d 769, 1987 N.Y. App. Div. LEXIS 49145 (N.Y. App. Div. 2d Dep't 1987).

Supreme Court properly granted summary judgment to defendant company in action alleging racial discrimination in hiring where plaintiff's allegations merely showed that he submitted unspecified number of unsolicited applications to defendant seeking unspecified permanent position, and record supported defendant's contention that plaintiff had checkered job history and lacked verbal and technical skills, as well as professional demeanor, required even for entry level position. Stewart v International Business Machines Corp., 156 A.D.2d 128, 548 N.Y.S.2d 174, 1989 N.Y. App. Div. LEXIS 15211 (N.Y. App. Div. 1st Dep't 1989), app. denied, 76 N.Y.2d 701, 557 N.Y.S.2d 878, 557 N.E.2d 114, 1990 N.Y. LEXIS 1277 (N.Y. 1990).

African-American woman did not prove that Niagara Frontier Transportation Authority unlawfully discriminated against her in denying her application for employment as Secretary to Transportation Superintendents where person who made hiring decision for that position also was African-American, and person hired had almost 20 years more experience than complainant and greater knowledge of computers. Niagara Frontier Transp. Auth. v New York State Div. of Human Rights, 275 A.D.2d 922, 713 N.Y.S.2d 631, 2000 N.Y. App. Div. LEXIS 9577 (N.Y. App. Div. 4th Dep't 2000).

Niagara Frontier Transportation Authority unlawfully discriminated against African-American woman in denying her application for employment as Secretary to General Manager where she raised inference of discrimination by proving that she was better qualified candidate than person hired and that persons responsible for hiring were informed of race of applicants before hiring decision was made, and authority did not rebut presumption of discrimination by proving, through admissible evidence, legitimate nondiscriminatory reason for its decision. Niagara Frontier Transp. Auth. v New York State Div. of Human Rights, 275 A.D.2d 922, 713 N.Y.S.2d 631, 2000 N.Y. App. Div. LEXIS 9577 (N.Y. App. Div. 4th Dep't 2000).

Assuming that actions by a doctor's former colleague could have been attributed to either the clinic or its principal, both former employers of the doctor, the doctor failed to allege that the colleague's actions and the principal hospital's practices, other than those concerning his pay, were related to his race; accordingly, the doctor did not demonstrate that any adverse employment actions occurred under circumstances raising the inference of unlawful discrimination. Pacheco v United Med. Assocs., P.C., 305 A.D.2d 711, 759 N.Y.S.2d 556, 2003 N.Y. App. Div. LEXIS 4586 (N.Y. App. Div. 3d Dep't 2003).

Trial court erred in dismissing two minority employees' discrimination causes of action under the State and City Human Rights Law because they were both members of a protected class, were well qualified for their respective positions, were adversely or differently treated, and sufficiently alleged discriminatory animus by the employer Matter of Local 621 v New York City Dept. of Transp., 2019 N.Y. App. Div. LEXIS 7981 (November 7, 2019).

Grant of summary judgment to defendants in an employment discrimination case was upheld because defendants were legally entitled to condition plaintiff's continued employment on his execution of the promissory note and its timely payment, the promissory note for reimbursement of the tuition expense was not unconscionable, and it was not procured by duress. Ellison v Chartis Claims, Inc., 178 A.D.3d 665, 115 N.Y.S.3d 53, 2019 N.Y. App. Div. LEXIS 8747 (N.Y. App. Div. 2d Dep't 2019).

Termination of 8 temporary social welfare eligibility examiners —one Hispanic and 7 African-American—as result of their failing scores on competitive examinations was unlawful under CLS Exec Law § 296, where disparate impact of testing was readily apparent from results, and examinations tested only 13 of 49 skills identified by job analysis, because officials failed to offer credible evidence that examinations served legitimate business goal of fair competition in civil service employment Fickling v New York State Dep't of Civil Serv., 909 F. Supp. 185, 1995 U.S. Dist. LEXIS 19235 (S.D.N.Y. 1995).

County police department's cadet program is struck down as discriminatory hiring practice in violation of CLS Exec Law § 296, even though consent decree settling federal employment discrimination case was in place and program was designed to combat continuing underrepresentation of blacks and Hispanics in department, because program indisputably rejected white applicants based solely on color of their skin and was not narrowly tailored remedy. Hiller v County of Suffolk, 977 F. Supp. 202, 1997 U.S. Dist. LEXIS 17534 (E.D.N.Y. 1997).

Employer articulated legitimate, nondiscriminatory reasons for applicant's rejection, sufficient to rebut applicant's prima facie case of racial discrimination under CLS Exec Law § 296 and federal law, where employer asserted that applicant was not hired initially because he could not work required hours, he did not want to be trained, he did not show legitimate commitment to working with severely disabled individuals, and he exhibited poor attitude and poor communication skills; employer asserted that applicant was not hired in response to second advertisement because he already had been rejected and it was hiring only female counselors at that time. Haywood v Heritage Christian Home, 977 F. Supp. 611, 1997 U.S. Dist. LEXIS 14347 (W.D.N.Y. 1997).

Former host of a telemarketing television network claimed that the network violated Exec § 296 and New York City, N.Y., Admin. Code § 8-107 by its of discrimination in hiring, i.e., token hiring, in New York; however, the act of being hired as a token in New York did not alone constitute an adverse employment action and could not be the basis of a claim of discrimination occurring in New York. Velez v QVC, Inc., 227 F. Supp. 2d 384, 2002 U.S. Dist. LEXIS 18776 (E.D. Pa. 2002).

Defendant employer's and union's motions for summary judgment were denied because material issues of fact existed as to whether the employer's reason, that plaintiff employee violated a last chance agreement, was a pretext for discrimination and because issues of material fact existed as to whether the union was motivated by discriminatory animus when it failed to arbitrate the employee's grievance. Estate of Lee v ITT Std., 268 F. Supp. 2d 356, 2003 U.S. Dist. LEXIS 7421 (W.D.N.Y. 2003).

City's use of written examinations to screen and rank applicants for entry-level firefighter positions constituted a pattern or practice of discriminating against black applicants in violation of N.Y. Exec. Law § 296(1)(a) because the pass rates for white candidates were 89.9% and 97.2% while the pass rates for black applicants were 60.3% and 85.4%, black applicants were ranked an average of 630 or 974 places lower than white candidates, the calculated standard deviations ranged from 6.5 to 33.9 units, and the city failed to present evidence demonstrating that the applicants' proof was inaccurate or insignificant. United States v City of New York, 683 F. Supp. 2d 225, 2010 U.S. Dist. LEXIS 2506 (E.D.N.Y. 2010), vacated, 717 F.3d 72, 2013 U.S. App. LEXIS 9671 (2d Cir. N.Y. 2013).

Although a city's use of written examinations to screen and rank applicants for entry-level firefighter positions constituted a pattern or practice of discriminating against black applicants in violation of N.Y. Exec. Law § 296(1)(a), city officials were entitled to official immunity because their actions in setting and approving firefighter hiring policies were exercises of their discretionary functions and the exercise of their discretion was not conditioned on compliance with municipal procedures that were allegedly ignored. United States v City of New York, 683 F. Supp. 2d 225, 2010 U.S. Dist. LEXIS 2506 (E.D.N.Y. 2010), vacated, 717 F.3d 72, 2013 U.S. App. LEXIS 9671 (2d Cir. N.Y. 2013).

City engaged in a prohibited employment practice that had a disparate impact on racial minorities by using non-validated written examinations to screen and rank black applicants for the job of entry-level firefighter. United States v City of New York, 683 F. Supp. 2d 225, 2010 U.S. Dist. LEXIS 2506 (E.D.N.Y. 2010), vacated, 717 F.3d 72, 2013 U.S. App. LEXIS 9671 (2d Cir. N.Y. 2013).

No reasonable jury could have concluded that an employee met her burden of proving employment discrimination because (1) the employee made, at best, a weak prima facie case of discrimination because the employee's evidentiary showing rested almost entirely on the regional superintendent's comment that it was time

for a minority to run a school; and (2) defendants, the New York City Department of Education and the superintendent, provided ample evidence that the successful candidate was chosen over the employee for the legitimate reason that defendants believed that she was better suited to help turn around a school in need of improvement. Wolf v N.Y. City Dep't of Educ., 708 F. Supp. 2d 327, 2010 U.S. Dist. LEXIS 37358 (S.D.N.Y. 2010), aff'd, 421 Fed. Appx. 8, 2011 U.S. App. LEXIS 8688 (2d Cir. N.Y. 2011).

Type of crediting and discrediting of evidence that defendants sought was not appropriate in the context of a motion under Fed. R. Civ. P. 50(b); viewing the evidence in the light most favorable to plaintiff, plaintiff submitted evidence acceptable to a reasonable jury that defendants—directly or by aiding and abetting—terminated plaintiff and disciplined him more harshly than they would have otherwise because of animosity toward his interracial relationship. Matusick v Erie County Water Auth., 774 F. Supp. 2d 514, 2011 U.S. Dist. LEXIS 20049 (W.D.N.Y. 2011), aff'd in part and rev'd in part, 757 F.3d 31, 2014 U.S. App. LEXIS 3683 (2d Cir. N.Y. 2014), aff'd in part and rev'd in part, 739 F.3d 51, 2014 U.S. App. LEXIS 192 (2d Cir. N.Y. 2014).

21. Religious discrimination

An employer failed to sustain its burden of proof in a proceeding before the State Division of Human Rights where it was shown that the employer's determination not to employ the complainant, a Seventh Day Adventist, was made solely on the basis of the judgment of its own officers and employees that accommodation of his sabbath problem was not feasible and that the employer did not make a good faith effort, through inquiry addressed to other employees or negotiation with the union, to seek accommodation, since section 296 (subd 10, par [c]) of the Executive Law proscribes discrimination in employment because of sabbath observance, but excepts from its proscription a private employer if the uniform application of terms and conditions of attendance to employees is essential to prevent undue economic hardship to the employer, and the employer has the burden of proof in any proceeding in which applicability of the proscription is in issue. Schweizer Aircraft Corp. v State Div. of Human Rights, 48 N.Y.2d 294, 422 N.Y.S.2d 656, 397 N.E.2d 1323, 1979 N.Y. LEXIS 2383 (N.Y. 1979).

A determination by the State Commission for Discrimination permitting a corporation to inquire into the religion of job applicants as a "bona fide occupational qualification" and, further authorizing the corporation to have applicants for employment fill out a visa application for travel in Saudi Arabia containing an inquiry into the applicant's religion, was annulled, since the determination, in effect, violated the 5th Amendment of the Constitution of the U. S. and ran counter to sound public policy of New York State and the U. S. American Jewish Congress v Carter, 23 Misc. 2d 446, 190 N.Y.S.2d 218, 1959 N.Y. Misc. LEXIS 3297 (N.Y. Sup. Ct. 1959), modified, 10 A.D.2d 833, 199 N.Y.S.2d 157 (N.Y. App. Div. 1st Dep't 1960).

22. Sex discrimination

In Article 78 proceeding to annul that portion of civil service exam for audio-visual technician which required candidate to lift a 25 pound dumbbell with one hand, and then lift a 20 pound dumbbell with the other, it was reversible error not to hold hearing on whether such test bore a reasonable relationship to job requirements, and whether such test adversely affected equal employment opportunity for women as a class. Sontag v Bronstein, 33 N.Y.2d 197, 351 N.Y.S.2d 389, 306 N.E.2d 405, 1973 N.Y. LEXIS 950 (N.Y. 1973).

Former airline flight attendants who were not hired by successor airline due to its use of weight standards in hiring decisions failed to establish that they were victims of sex discrimination because weight charts permitted male applicants of given height and age to weigh more than female applicants of same height and age, given real physiological differences between males and females; airline's standards recognized statistically established norms that males tend to weigh more than females of same height, and there was no disparate impact therefrom in that approximately 90 percent of its flight attendants were female. Delta Air Lines v New York State Div. of Human Rights, 91 N.Y.2d 65, 666 N.Y.S.2d 1004, 689 N.E.2d 898, 1997 N.Y. LEXIS 3710 (N.Y. 1997).

City department which had established height and weight requirements for lifeguards which excluded virtually all female applicants ordered to take steps to insure that any such standards bear proper and real relation to the job functions, although there was no evidence of intent to discriminate against females. State Div. of Human Rights ex rel. Callery v New York City Dep't of Parks & Recreation, 38 A.D.2d 25, 326 N.Y.S.2d 640, 1971 N.Y. App. Div. LEXIS 2743 (N.Y. App. Div. 1st Dep't 1971).

In a proceeding against a county alleging unlawful discrimination on the basis of sex, the county was properly directed to place complainant's name on the list of eligibles for employment as a police officer where, when the administrative complaint was filed, the complainant's name appeared on the outstanding eligibility list and the complainant was within the age group eligible for appointment as an officer, where the county failed to prosecute an appeal from the administrative review board's affirmance of the original order directing reinstatement to the eligibility list, and where, due to the county's discriminatory practices and the necessity for administrative enforcement of the reinstatement order, the eligibility list expired before complainant's name could be placed thereon; where it is demonstrated that errors have rendered an eligibility list in derogation of the merit and fitness standards and candidates have demonstrated that they were aggrieved by those errors, the statutory durational period does not begin to run until the list is corrected, and Civ S Law § 58 does not provide an absolute bar to eligibility of persons over 29 in such circumstances. State Div. of Human Rights ex rel. Farella v County of Onondaga, 84 A.D.2d 931, 447 N.Y.S.2d 61, 1981 N.Y. App. Div. LEXIS 16194 (N.Y. App. Div. 4th Dep't 1981).

A finding that a resort had unlawfully discriminated against a female applicant for employment as a cabana attendant and then denied a second application by her in retaliation for her filing a complaint with the State Division of Human Rights was supported by evidence, where the applicant's first complaint was settled when the resort agreed to consider her on an equal basis with other applicants, the resort then hired a private investigator to investigate the applicant and used the results of that investigation to deny her employment, and the resort had never before used a private investigator to investigate an applicant. Catalina Beach Club v State Div. of Human Rights, 95 A.D.2d 766, 463 N.Y.S.2d 244, 1983 N.Y. App. Div. LEXIS 18674 (N.Y. App. Div. 2d Dep't 1983).

Complaint was sufficient to hold employer liable for sexual harassment under CLS Exec § 296(1)(a) where plaintiff alleged that (1) supervisor, over period of many months, repeatedly made offensive sexual remarks, inquired about her sexual preferences and touched her without permission, (2) supervisor used his authority over her to direct her attendance at out-of-town training program where he allegedly raped her, and (3) president of company impliedly tolerated such misbehavior by warning her that her job was at stake if she refused to be "more understanding" of supervisor. Espaillat v Breli Originals, 227 A.D.2d 266, 642 N.Y.S.2d 875, 1996 N.Y. App. Div. LEXIS 5395 (N.Y. App. Div. 1st Dep't 1996).

Airline did not engage in sex discrimination based on its use of weight standards in hiring flight attendants where there was no evidence that it intended to deprive one sex of equal opportunity or treatment, or that weight requirements were applied in discriminatory manner, and airline showed that approximately 90 percent of its flight attendants were female, thereby negating claim that weight charts were somehow utilized to discriminate against women. Delta Air Lines v New York State Div. of Human Rights, 229 A.D.2d 132, 652 N.Y.S.2d 253, 1996 N.Y. App. Div. LEXIS 12963 (N.Y. App. Div. 1st Dep't 1996), app. dismissed, 90 N.Y.2d 882, 661 N.Y.S.2d 825, 684 N.E.2d 274, 1997 N.Y. LEXIS 2331 (N.Y. 1997), aff'd, 91 N.Y.2d 65, 666 N.Y.S.2d 1004, 689 N.E.2d 898, 1997 N.Y. LEXIS 3710 (N.Y. 1997).

Sex discrimination in selection of female over male applicant for position of Principal Clerk in Head's Clerk's office at women's correctional facility was not proved where (1) facility's Head Clerk and Deputy Superintendent, both of whom had interviewed applicants, testified convincingly that they were familiar with female applicant's work and found her to be the most desirable candidate because of her demonstrated ability, attitude, and

initiative, (2) Deputy Superintendent further testified that he had been concerned about male applicant's attendance record, which left much to be desired, and (3) there was no evidence that interviewers' reasons did not represent true basis for their decision to choose female applicant. New York State Dep't of Correctional Servs. v State Div. of Human Rights, 238 A.D.2d 704, 656 N.Y.S.2d 78, 1997 N.Y. App. Div. LEXIS 3750 (N.Y. App. Div. 3d Dep't 1997).

Clerk employed by correctional facility failed to prove that facility's Deputy Superintendent of Administration (Taylor) harassed or threatened him in retaliation for his having lodged discrimination complaint where (1) although Taylor apparently did not hesitate to make his unfavorable opinion of clerk known to others at facility, there was no evidence that this behavior was prompted by retaliatory motive, (2) Taylor, who was familiar with clerk's abysmal time and attendance record, stated that he simply did not like clerk, because of his belief that clerk had abused his sick time and manipulated system to his advantage, and because clerk had made remark that Taylor considered to be ethnic slur, and (3) Taylor's abrasive and contentious personality indicated that he did not single out clerk for hostile treatment and that altercations complained of were not related to clerk's filing of complaint. New York State Dep't of Correctional Servs. v State Div. of Human Rights, 238 A.D.2d 704, 656 N.Y.S.2d 78, 1997 N.Y. App. Div. LEXIS 3750 (N.Y. App. Div. 3d Dep't 1997).

A demand of a petitioner that the Municipal Police Training Council promulgate a rule, pursuant to subdivision 2 of section 840 of the Executive Law, reinstating a minimum height requirement for eligibility as a police officer is denied since it would violate the State Human Rights Law (Exec § 296) and the supremacy clause of the United States Constitution, as such a rule would conflict with title VII of the Civil Rights Act of 1964. Police Conference of New York, Inc. v Municipal Police Training Council, 96 Misc. 2d 315, 409 N.Y.S.2d 100, 1978 N.Y. Misc. LEXIS 2599 (N.Y. Sup. Ct. 1978), rev'd, 73 A.D.2d 712, 422 N.Y.S.2d 776, 1979 N.Y. App. Div. LEXIS 14591 (N.Y. App. Div. 3d Dep't 1979).

Trial court properly granted summary judgment pursuant to N.Y. C.P.L.R. 3212 to defendants in a former employee's discrimination action pursuant to N.Y. Exec. Law § 296, because the employee failed to either plead or prove that she was a member of a particular protected class and she did not prove that she was terminated from her employment under circumstances giving rise to an inference of discrimination, and moreover, defendants sustained their burden of establishing their entitlement to judgment as a matter of law by demonstrating the absence of a prima facie case of discrimination under N.Y. Exec. Law § 296, and that they had a facially valid, independent, and nondiscriminatory reason for the termination of employment. King v Brooklyn Sports Club, 305 A.D.2d 465, 759 N.Y.S.2d 339, 2003 N.Y. App. Div. LEXIS 5413 (N.Y. App. Div. 2d Dep't 2003).

For purposes of a sex discrimination claim by former legislative aides, an adverse employment action was not adequately pled because being moved laterally did not cause a change in wages or any less distinguished title. Burhans v State, 2015 N.Y. Misc. LEXIS 9641 (N.Y. Sup. Ct. Jan. 7, 2015).

Correctional officer who filed suit challenging the correctional facility's same-gender special and suicide watch policy could not prevail because the same-gender special and suicide watch requirement qualified as a bona fide occupational qualification defense since gender discrimination in assignments to special and suicide watches was reasonably necessary to the normal operation of the correctional facilities. The New York State Division of Human Rights' application of the bona fide occupational qualification defense was not arbitrary and capricious or irrational. Malinowski v New York State Div. of Human Rights, 58 Misc. 3d 926, 67 N.Y.S.3d 382, 2016 N.Y. Misc. LEXIS 5204 (N.Y. Sup. Ct. 2016), aff'd, 157 A.D.3d 1093, 66 N.Y.S.3d 650, 2018 N.Y. App. Div. LEXIS 192 (N.Y. App. Div. 3d Dep't 2018).

Employer's repeated threats to fire employee and her coworkers and replace them with "young and sexy" hires was sufficient to show "an environment that is hostile to a person because of her sex." Leopold v Baccarat, Inc., 174 F.3d 261, 1999 U.S. App. LEXIS 7672 (2d Cir. N.Y. 1999).

However benign mere use of word "sexy" might seem, its incorporation into threat of employment termination could reasonably be viewed as form of discriminatory intimidation. Leopold v Baccarat, Inc., 174 F.3d 261, 1999 U.S. App. LEXIS 7672 (2d Cir. N.Y. 1999).

Employee's contention that her supervisor threatened to give her poor performance review if she would not engage in sexual relationship with him was insufficient to state claim that she was subjected to quid pro quo sexual harassment under CLS Exec Law § 296, where employee neither submitted to alleged sexual advance nor was she denied tangible benefit because of her rejection. Ponticelli v Zurich Am. Ins. Group, 16 F. Supp. 2d 414, 1998 U.S. Dist. LEXIS 13767 (S.D.N.Y. 1998).

New trial is denied on emotional damages provided that gender-discrimination plaintiff accepts remitted award of $20,000, where frustrated female basketball referee presented evidence of continuous policy barring women from employment as NBA referees but little evidence of her emotional suffering other than self-serving testimony that she felt ignored and that her "dreams and goals" were crushed, because jury's $750,000 award is unreasonable given dearth of evidence regarding extent of her emotional damages. Ortiz-Del Valle v NBA, 42 F. Supp. 2d 334, 1999 U.S. Dist. LEXIS 4615 (S.D.N.Y.), app. dismissed, 190 F.3d 598, 1999 U.S. App. LEXIS 21019 (2d Cir. N.Y. 1999).

Gender discrimination claim of overweight female police officer applicant must fail, even though her suspicions were reasonably aroused when overweight men—one exceeding weight requirements by almost 90 pounds—were certified and appointed, because evidence revealed options for getting around weight requirement—passing stress test or getting designation of "lean body mass" from physician—were not purposely concealed from applicant because she was female. Jones v City of Mt. Vernon, 114 F. Supp. 2d 274, 2000 U.S. Dist. LEXIS 14812 (S.D.N.Y. 2000).

Pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., and New York Human Rights Law, in order to state a case for gender discrimination, among other things, a plaintiff must show that the circumstances support an inference of discrimination; a professor denied tenure failed to show how her employer college based its decision to deny tenure was based on gender when the decision was based largely on gender neutral comments from students. Byerly v Ithaca College, 290 F. Supp. 2d 301, 2003 U.S. Dist. LEXIS 20090 (N.D.N.Y. 2003), aff'd, 113 Fed. Appx. 418, 2004 U.S. App. LEXIS 21484 (2d Cir. N.Y. 2004).

Because there was sufficient evidence upon which a fair-minded trier of fact could reasonably conclude that defendant sheriff's deputy actually participated in the conduct giving rise to a hostile work environment, under New York law, he was subject to personal liability. Pfeiffer v Lewis County, 308 F. Supp. 2d 88, 2004 U.S. Dist. LEXIS 4126 (N.D.N.Y. 2004).

Where plaintiff sheriff's office employee contended that she and the other dispatcher/corrections officers were subjected to malicious comments about their appearance and condescending remarks about the employee and her office on a daily basis, although defendants' actions were not physically threatening, they could be considered offensive and humiliating, so there was sufficient evidence to satisfy the objective test, it also was clear that the subjective test was satisfied because, although the employee was not offended initially, there became a point in time when her feelings changed and she began to feel that the comments were malicious. Thus, there was sufficient evidence upon which a fair-minded trier of fact could reasonably conclude that the employee was subjected to a hostile work environment and defendants' motion for summary judgment on that count was denied. Pfeiffer v Lewis County, 308 F. Supp. 2d 88, 2004 U.S. Dist. LEXIS 4126 (N.D.N.Y. 2004).

Coach's disparate impact gender discrimination claim under the New York Human Rights Law, N.Y. Exec. Law § 290 et seq., failed because a school district's refusal to reappoint the coach as the varsity girls volleyball coach did not occur under circumstances giving rise to an inference of gender discrimination where the replacement coach was also female, and the same manager who declined to reappoint the coach was the person who hired her three years earlier. Stouter v Smithtown Cent. Sch. Dist., 687 F. Supp. 2d 224, 2010 U.S. Dist. LEXIS 12279 (E.D.N.Y. 2010).

Employee alleged that the supervisor and the general manager both changed the qualifications for the position of kids klub supervisor, and that she complained of the supervisor's post-employment harassment and that the general manager and the services manager refused to take remedial measures. Accordingly, the employee pled facts sufficient to support a plausible hostile work environment claim for individual liability under N.Y. Exec. Law § 296 against the supervisor and the services manager. Atkinson v New York State Olympic Reg'l Dev. Auth., 822 F. Supp. 2d 182, 2011 U.S. Dist. LEXIS 112796 (N.D.N.Y. 2011).

Because the employee's hostile work environment claim under N.Y. Exec. Law § 296 persisted as against the general manager and the services manager, the employee pled facts sufficient to support a plausible claim that her supervisor's alleged unwelcome and offensive sexual behavior constituted aiding and abetting pursuant to N.Y. Exec. Law § 296(6), and thus, the supervisor's motion to dismiss the employee's discrimination and hostile work environment claim under N.Y. Exec. Law § 296 was denied. Atkinson v New York State Olympic Reg'l Dev. Auth., 822 F. Supp. 2d 182, 2011 U.S. Dist. LEXIS 112796 (N.D.N.Y. 2011).

In this Title VII of the Civil Rights Act of 1964 and New York State Human Rights Law action, the employer was granted summary judgment because the employee could not show that alleged hostile environment she experienced was related to her gender; the employee did not identify any sex-based comments or conduct by the managing director over the entire course of her employment. Bundschuh v Inn on the Lake Hudson Hotels, LLC, 914 F. Supp. 2d 395, 2012 U.S. Dist. LEXIS 158443 (W.D.N.Y. 2012).

C. Termination/Discharge from Employment

23. In general

Provisions of Human Rights Law barring employment discrimination would apply to one who was employed as at will, Flaherty employee by county sheriff, since such employee can lawfully be discharged for any reason or for no reason, but not for statutorily impermissible reason, even though such employee is not protected by Civil Service Law. State Div. of Human Rights ex rel. Cottongim v County of Onondaga Sheriff's Dep't, 71 N.Y.2d 623, 528 N.Y.S.2d 802, 524 N.E.2d 123, 1988 N.Y. LEXIS 603 (N.Y. 1988).

CLS Exec § 296(13) does not apply to cancellation of employment contract or discharge of employee where alleged act of discrimination does not occur in course of organized boycott or blacklisting. Mehtani v New York Life Ins. Co., 145 A.D.2d 90, 537 N.Y.S.2d 800, 1989 N.Y. App. Div. LEXIS 1552 (N.Y. App. Div. 1st Dep't), app. denied, app. dismissed, 74 N.Y.2d 835, 546 N.Y.S.2d 341, 545 N.E.2d 631, 1989 N.Y. LEXIS 2897 (N.Y. 1989), app. denied, 85 N.Y.2d 806, 627 N.Y.S.2d 323, 650 N.E.2d 1325, 1995 N.Y. LEXIS 1227 (N.Y. 1995).

In action for discriminatory termination of employment, spouse's action for loss of consortium was derivative and fell with dismissal of employee's causes of action. Mehtani v New York Life Ins. Co., 145 A.D.2d 90, 537 N.Y.S.2d 800, 1989 N.Y. App. Div. LEXIS 1552 (N.Y. App. Div. 1st Dep't), app. denied, app. dismissed, 74 N.Y.2d 835, 546 N.Y.S.2d 341, 545 N.E.2d 631, 1989 N.Y. LEXIS 2897 (N.Y. 1989), app. denied, 85 N.Y.2d 806, 627 N.Y.S.2d 323, 650 N.E.2d 1325, 1995 N.Y. LEXIS 1227 (N.Y. 1995).

Cause of action concerning employer's alleged retaliatory conduct in response to employee's retention of legal counsel was not rendered unavailable by fact that employee had already been discharged at time when he retained counsel; there is no requirement that retaliatory conduct occur against current employee. Landwehr v Grey Advertising, 211 A.D.2d 583, 622 N.Y.S.2d 17, 1995 N.Y. App. Div. LEXIS 850 (N.Y. App. Div. 1st Dep't 1995).

Terminated employees' complaint alleging discrimination under CLS Exec § 296(1)(a) was properly dismissed where employees failed to allege that they were qualified for positions from which they were terminated. Stephenson v Hotel Emples. & Restaurant Emples. Union Local 100, 246 A.D.2d 457, 668 N.Y.S.2d 193, 1998 N.Y. App. Div. LEXIS 626 (N.Y. App. Div. 1st Dep't 1998).

Plaintiff could not meet her burden on employer's summary judgment motion in age discrimination case by simply refuting employer's articulated nondiscriminatory reasons for terminating her, and thus employer was entitled to summary judgment where plaintiff's professed evidence of discrimination lacked probative value. Hirschfeld v Institutional Investor, Inc., 260 A.D.2d 171, 688 N.Y.S.2d 31, 1999 N.Y. App. Div. LEXIS 3610 (N.Y. App. Div. 1st Dep't), app. denied, 93 N.Y.2d 814, 697 N.Y.S.2d 561, 719 N.E.2d 922, 1999 N.Y. LEXIS 2166 (N.Y. 1999).

Summary judgment was properly granted to certain defendants in age discrimination case where plaintiff failed to demonstrate that they had control over her as an employee or were involved in decision to terminate her. Hirschfeld v Institutional Investor, Inc., 260 A.D.2d 171, 688 N.Y.S.2d 31, 1999 N.Y. App. Div. LEXIS 3610 (N.Y. App. Div. 1st Dep't), app. denied, 93 N.Y.2d 814, 697 N.Y.S.2d 561, 719 N.E.2d 922, 1999 N.Y. LEXIS 2166 (N.Y. 1999).

Actions of plaintiff, chief operating officer and president of defendant corporation, in encouraging employee to bring her sexual harassment claim to company, and his subsequent statements relaying what he knew of claim, constituted "opposition" to practices forbidden by state and city human rights laws, and were therefore protected against retaliatory employment practices. Sorrentino v Bohbot Entertainment & Media, Inc., 265 A.D.2d 245, 697 N.Y.S.2d 263, 1999 N.Y. App. Div. LEXIS 10875 (N.Y. App. Div. 1st Dep't 1999).

Employer was entitled to summary judgment dismissing allegation that plaintiffs were discharged because, as local residents hired in America rather than Pakistan-based employees, they were American rather than Pakistani citizens, because there is no legally cognizable discrimination cause of action based on citizenship. Sheikh v Habib Bank Ltd., 270 A.D.2d 107, 704 N.Y.S.2d 75, 2000 N.Y. App. Div. LEXIS 2851 (N.Y. App. Div. 1st Dep't 2000).

College history professor did not prove retaliatory discharge, even though her comments regarding "glass ceiling" for tenured female professors in history department could be protected activity under CLS Exec § 296(1)(a) and (e), where (1) there was no showing that comment caused discharge from her employment, which terminated at end of academic year by express terms of one-year, nonrenewable appointment, (2) she rejected offer of part-time adjunct position for ensuing academic year, and (3) even if she proved prima facie case of retaliatory discharge, college articulated legitimate, nondiscriminatory reasons for nonrenewal of her contract, and she did not show that those reasons were pretexts for discrimination. Grafe v Iona College, 281 A.D.2d 347, 722 N.Y.S.2d 162, 2001 N.Y. App. Div. LEXIS 3138 (N.Y. App. Div. 1st Dep't 2001).

Substantial evidence supported decision by State Public Employment Relations Board that probationary teacher was not unlawfully terminated by school district because of her protected union activity where (1) sufficient reasons for termination were teacher's failure to follow instructions and proper school procedures and to adequately protect safety of student who fell down flight of stairs, and (2) no nexus was proved between teacher's union activity and decision to terminate her employment. Rockville Centre Teachers Ass'n v N.Y. State Pub. Empl. Rels. Bd., 281 A.D.2d 425, 721 N.Y.S.2d 112, 2001 N.Y. App. Div. LEXIS 2130 (N.Y. App. Div. 2d Dep't 2001).

Plaintiff, who allegedly was discharged from defendant's employ for having extramarital affair with coworker, failed to state cause of action for any form of discrimination where (1) his claim of religious discrimination was irrelevantly based on his supervisor's religious beliefs rather than his own, (2) his claim of sexual orientation discrimination was based on pure speculation that he would not have been terminated had affair been homosexual rather than heterosexual, and (3) his female paramour, who was single, was also terminated, undermining any claim of discrimination based on sex or marital status. Hudson v Goldman Sachs & Co., 283 A.D.2d 246, 725 N.Y.S.2d 318, 2001 N.Y. App. Div. LEXIS 5075 (N.Y. App. Div. 1st Dep't 2001).

Employee did not meet her burden of showing the termination of her employment was due to age, race, or gender discrimination because (1) her job was eliminated and she was not replaced, so she could not claim age discrimination, (2) her termination was

part of a company-wide layoff of male and female employees of mixed races and ages, (3) the reduction in the employer's work force was due to a need to reduce expenses, (4) she did not show her job was like a retained position, so her termination raised no inference of discrimination, as she was not qualified for the retained position, (5) her questioning of the business judgment of the layoffs created no inference that her discharge was due to discrimination, (6) her employer had valid rather than pretextual reasons to retain another employee, and (7) the employee did not show the legitimate reasons the employer offered for her termination were a pretext for discrimination. Bailey v New York Westchester Sq. Med. Ctr., 38 A.D.3d 119, 829 N.Y.S.2d 30, 2007 N.Y. App. Div. LEXIS 72 (N.Y. App. Div. 1st Dep't 2007).

Because the employers proffered sufficient evidence that an employee was terminated for legitimate, nonretaliatory reasons, the employers were entitled to summary judgment in the employee's action for retaliation and discrimination under N.Y. Exec. Law § 296, New York City, N.Y., Admin. Code §§ 8-107(7), 8-130. Johnson v NYU Hosps. Ctr., 39 A.D.3d 817, 835 N.Y.S.2d 340, 2007 N.Y. App. Div. LEXIS 5218 (N.Y. App. Div. 2d Dep't), app. denied, 9 N.Y.3d 805, 842 N.Y.S.2d 781, 874 N.E.2d 748, 2007 N.Y. LEXIS 2350 (N.Y. 2007).

Order denying petitioner reinstatement to her former position was affirmed because she was terminated for failing to maintain a minimum qualification of her employment, namely, continued eligibility for the Medicaid program and not the disposition of her pending criminal action, therefore, the disciplinary procedures mandated by the Civil Service Law and the collective bargaining agreement were not applicable. Matter of Crittenden v New York State Off. for People With Dev. Disabilities, 167 A.D.3d 1394, 92 N.Y.S.3d 159, 2018 N.Y. App. Div. LEXIS 8906 (N.Y. App. Div. 3d Dep't 2018).

Employer's discharge of plaintiff, for cooperating in purely internal investigation conducted by employer, was not protected by anti-retaliation provision of CLS Exec § 296(1)(e), warranting dismissal of complaint under CLS CPLR § 3211(a)(7). Unotti v ABC, 180 Misc. 2d 543, 689 N.Y.S.2d 870, 1999 N.Y. Misc. LEXIS 174 (N.Y. Sup. Ct. 1999), aff'd, 273 A.D.2d 68, 710 N.Y.S.2d 822, 2000 N.Y. App. Div. LEXIS 6339 (N.Y. App. Div. 1st Dep't 2000).

Employee who alleged she was discriminated against based on her gender and age, when the company that acquired her employer did not retain her, did not show a prima facie case under N.Y. Exec. Law § 296(1)(a) or New York City, N.Y., Admin. Code § 8-107(1)(a) when she only proved she was a member of a protected class, by virtue of her gender and age, and that she was the subject of an adverse employment action, when she was not retained, so summary judgment dismissing her claims against her employer and against the company which acquired her employer should have been granted. Kent v Papert Cos., 309 A.D.2d 234, 764 N.Y.S.2d 675, 2003 N.Y. App. Div. LEXIS 9571 (N.Y. App. Div. 1st Dep't 2003).

Fact that employee's supervisors told him that they could not guarantee his future at company did not establish threat sufficient to constitute duress for purposes of his claim that he accepted early retirement plan under duress such that he was constructively discharged for purposes of establishing prima facie case of race discrimination. Parker v Chrysler Corp., 929 F. Supp. 162, 1996 U.S. Dist. LEXIS 8758 (S.D.N.Y. 1996), aff'd, 1997 U.S. App. LEXIS 6021 (2d Cir. N.Y. Mar. 27, 1997).

Employee who alleged that human resources manager terminated her and thereby discriminated against her stated claim under CLS Exec § 296 against manager in her individual capacity. Johnson v A.P. Prods., 934 F. Supp. 625, 1996 U.S. Dist. LEXIS 11593 (S.D.N.Y. 1996).

Failure of employees to tender back severance payments made to them at time they signed termination agreements did not provide support for releases contained in termination agreements, where they allegedly were terminated as result of defendant employer's age discrimination. Clark v Buffalo Wire Works, Co., 3 F. Supp. 2d 366, 1998 U.S. Dist. LEXIS 6240 (W.D.N.Y.), aff'd, 3 F. Supp. 2d 366, 1998 U.S. Dist. LEXIS 6081 (W.D.N.Y. 1998).

Black female employee was not constructively discharged under Exec § 296, where employee believed that positions offered her were step down from previous position after she was not selected for new position, but her working conditions were not so intolerable that she was forced to resign. Gumbs v Hall, 51 F. Supp. 2d 275, 1999 U.S. Dist. LEXIS 8409 (W.D.N.Y. 1999), aff'd, 205 F.3d 1323, 2000 U.S. App. LEXIS 8324 (2d Cir. N.Y. 2000).

Billing clerk cannot establish prima facie case for discriminatory discharge, where her department was completely disbanded following merger but company clearly sought to retain her as employee and specifically directed that new position be created for her offering same compensation and benefits, even though she did not like her new job description, because her disappointment did not make her continued employment so intolerable that reasonable person would have felt compelled to resign. Viera v Olsten/Kimberly Quality Care, 63 F. Supp. 2d 413, 1999 U.S. Dist. LEXIS 13740 (S.D.N.Y. 1999).

Retaliation claim of laid off maintenance assistant is denied summarily, even though he alleges his layoff, ostensibly due to reduction in force, was really in retaliation for previous lawsuit filed against employer, where he was terminated more than 9 months after termination of his prior lawsuit, because that long time between suit and layoff does not raise inference of retaliation, and he has presented no other evidence linking 2 events. Fields v New York State Office of Mental Retardation & Developmental Disabilities, 88 F. Supp. 2d 4, 2000 U.S. Dist. LEXIS 4025 (N.D.N.Y. 2000).

Trial court granted an employer's motion for summary judgment on an employee's claims alleging that it violated Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., the Age Discrimination in Employment Act of 1967, 29 U.S.C.S. § 621 et. seq., 42 U.S.C.S. §§ 1981, 1983, 1985, and 1986, N.Y. Exec. Law § 296, and New York City, N.Y. Admin. Code §§ 8-107 through 8-131 when it decided not to promote him and subsequently terminated his employment because the employee did not refute non-discriminatory reasons which the employer offered for terminating his employment, namely, that his performance was not at the level expected of an experienced senior manager and that the company was losing money in his division. Monte v Ernst & Young LLP, 330 F. Supp. 2d 350, 2004 U.S. Dist. LEXIS 15594 (S.D.N.Y. 2004), aff'd, 148 Fed. Appx. 43, 2005 U.S. App. LEXIS 19528 (2d Cir. N.Y. 2005).

Court rejected the employee's discrimination claims that the employer violated the New York State Human Rights Law (NYSHRL), N.Y. Exec. Law § 296 et seq., by terminating her employment in June 2003 as the employee offered no evidence that she could have performed the essential duties of her position as of that date or by denying her request for an indefinite period of leave at that time; however, there was a genuine issue of material fact as to whether the employer's failure to reinstate her in April 2003 was discriminatory and in violation of the statute. Roberts v Ground Handling, Inc., 499 F. Supp. 2d 340, 2007 U.S. Dist. LEXIS 23441 (S.D.N.Y. 2007).

There is no legally cognizable cause of action under the New York State Human Rights Law, N.Y. Exec. Law § 296(a)(1) based on citizenship; accordingly, a former employee was unable to pursue a claim under the NYSHRL against his former employer for discrimination due to his citizenship, although such a claim might have been actionable under the New York City Human Rights Law, New York City, N.Y., Admin. Code § 8-107(1)(a). Gallo v Alitalia - Linee Aeree Italiane - Societa Per Azioni, 585 F. Supp. 2d 520, 2008 U.S. Dist. LEXIS 94195 (S.D.N.Y. 2008)).

Even assuming the former employee established a prima facie case of age, national origin, or disability discrimination, the employer established, through admissible evidence, that it terminated the employee because of her violation of the employer's policy against structuring banking transactions, in violation of the Bank Secrecy Act of 1970; contrary to the employee's contention, there was no evidence to indicate that the employer's stated reason for its action was false, nor was there any evidence to indicate that unlawful discrimination was the real reason for the employee's termination. Vinokur v Sovereign Bank, 701 F. Supp. 2d 276, 2010 U.S. Dist. LEXIS 26854 (E.D.N.Y. 2010).

24. Age discrimination, generally

Prima facie case of age discrimination was sufficiently rebutted with nondiscriminatory, nonpretextual reasons for employee's

termination where employer showed that termination was caused by downsizing of its operations throughout state based on severe economic downturns in its business, both employee's job and his entire job category were eliminated in all branch offices, and employee was not replaced by younger person or by anyone at all; employer was under no legal obligation to create new or additional job or to bump or displace lower classified employees as way to forestall or obviate unlawful age discrimination complaint. Laverack & Haines v New York State Div. of Human Rights, 88 N.Y.2d 734, 650 N.Y.S.2d 76, 673 N.E.2d 586, 1996 N.Y. LEXIS 3057 (N.Y. 1996).

Appellate division properly granted two employers' motions to set aside a jury verdict pursuant to N.Y. C.P.L.R. 4404 because the employers claimed that the employees were fired for illicit union activities, and the employees did not meet their burden under N.Y. Exec. Law § 296 that the employers' reasons for firing them were pretextual. Stephenson v Hotel Emples. & Rest. Emples. Union Local 100 of AFL-CIO, 6 N.Y.3d 265, 811 N.Y.S.2d 633, 844 N.E.2d 1155, 2006 N.Y. LEXIS 157 (N.Y. 2006).

Age is not a "suspect" criterion but rather old age or senior citizenship merely marks stage that each of us will reach if we live out our normal span, and thus differences in treatment on basis of age will be sustained so long as classification rationally furthers a legitimate state objective. Campbell v Barraud, 58 A.D.2d 570, 394 N.Y.S.2d 909, 1977 N.Y. App. Div. LEXIS 12589 (N.Y. App. Div. 2d Dep't 1977).

A plaintiff, who is suing for damages arising out of the allegedly wrongful termination of his employment, may not combine in the same cause of action an allegation that he was dismissed solely because of his age, in violation of section 296 (subd 1, par [a]) of the Executive Law, along with the inconsistent claim that his discharge was intended to deprive him of salary and commissions inasmuch as these additional allegations, while properly included in other causes of action, have no place in the age discrimination cause of action which is otherwise legally sufficient; accordingly, the age discrimination should be dismissed with leave to replead. Manley v Pandick Press, Inc., 72 A.D.2d 452, 424 N.Y.S.2d 902, 1980 N.Y. App. Div. LEXIS 9702 (N.Y. App. Div. 1st Dep't), app. dismissed, 49 N.Y.2d 1046, 1980 N.Y. LEXIS 5780 (N.Y. 1980).

Employees' pending class action alleging that they were unlawfully discharged based upon an employer's wilful program of age discrimination in violation of Exec L § 296, would not be superseded or pre-empted by an action subsequently commenced by the Equal Employment Opportunity Commission (EEOC) in Federal District Court under the Age Discrimination in Employment Act (ADEA) (US Code, Title 29, § 621 et seq.); the ADEA provision that "such action shall supersede any State action" pre-empts a duplicative State action by a State agency, but was not designed to supplant the rights of private individuals in continuing either State or Federal actions commenced prior to EEOC intervention. However, inasmuch as the Federal action commenced by the EEOC constituted the superior method of fairly and efficiently adjudicating the controversy, the State class action would be decertified, which determination in no way would affect the rights of individuals named in the State action to continue the same as individually named plaintiffs. Cannon v Equitable Life Assurance Soc., 87 A.D.2d 403, 451 N.Y.S.2d 817, 1982 N.Y. App. Div. LEXIS 16566 (N.Y. App. Div. 2d Dep't), app. dismissed, 57 N.Y.2d 956, 1982 N.Y. LEXIS 4570 (N.Y. 1982).

Where plaintiff merely alleges that he was "born on December 28, 1930" and that his dismissal from employment was based on age discrimination in violation of CLS Exec Law § 296, and where defendants make factual assertions as to cause for plaintiff's dismissal and assert that 6 of 22 employees were plaintiff's age or older, unsubstantiated allegation of discrimination is insufficient to defeat motion for summary judgment. Hill v Westchester Aeronautical Corp., 112 A.D.2d 977, 492 N.Y.S.2d 789, 1985 N.Y. App. Div. LEXIS 52191 (N.Y. App. Div. 2d Dep't 1985).

Former employee may maintain action under CLS Exec Law § 296 where complaint alleges that employer wrongfully denied access to grievance procedures for assertion of claim that age was the motivating factor for discharge. Oakley v St. Joseph's Hospital, 116 A.D.2d 911, 498 N.Y.S.2d 218, 1986 N.Y. App. Div. LEXIS 51705 (N.Y. App. Div. 3d Dep't 1986).

Corporate officer who is personally charged with hiring and firing and who thus does more than carry out personnel decisions made by others may be sued individually for unlawful age discrimination. Lapidus v New York City Chapter of New York State Asso. for Retarded Children, Inc., 118 A.D.2d 122, 504 N.Y.S.2d 629, 1986 N.Y. App. Div. LEXIS 53980 (N.Y. App. Div. 1st Dep't 1986).

In age discrimination action, affidavit by officer of corporate employer claiming that employee was discharged because of economic slowdown and uncooperative behavior did not entitle employer to summary judgment but merely created factual issue as to existence of valid nondiscriminatory reason for discharging employee, especially in view of facts that employee had been employed for 13 years and had previously received high praise from affiant. Mayer v Manton Cork Corp., 126 A.D.2d 526, 510 N.Y.S.2d 649, 1987 N.Y. App. Div. LEXIS 41663 (N.Y. App. Div. 2d Dep't 1987).

Court should have granted employer's motion for summary judgment to dismiss age discrimination suit alleging that employee was forced to resign by employer's actions where (1) there was no direct or statistical evidence supporting inference of age discrimination, (2) employee had not lost any commissions from employer's actions, (3) employee's transfer did not involve change in title or reduce either his salary or benefits and, in fact, increased his earnings, and (4) employee was asked to stay after he gave notice of resignation; employee did not raise fact issue merely by showing that employer's decision to transfer him was arbitrary, since it must be demonstrated that employer would not have made that decision but for discriminatory motive, and employer sustained burden of articulating business rationale for transfer. Ioele v Alden Press, Inc., 145 A.D.2d 29, 536 N.Y.S.2d 1000, 1989 N.Y. App. Div. LEXIS 339 (N.Y. App. Div. 1st Dep't 1989).

Employer was entitled to summary judgment dismissing action alleging age discrimination and wrongful discharge since employer's "bumping rules" did not constitute limitation on right to discharge plaintiff, and plaintiff failed to refute affidavit of director of plant engineering and maintenance that plaintiff was not offered position for which he was presumptively eligible due to legitimate business reasons, including negative work attitude, reluctance to work on holidays, and reluctance to work in response to emergency call-ins. Tennant v Bristol Laboratories, Div. of Bristol-Myers Co., 155 A.D.2d 936, 547 N.Y.S.2d 757, 1989 N.Y. App. Div. LEXIS 14795 (N.Y. App. Div. 4th Dep't 1989).

Court erred in invoking CLS CPLR § 3211(a)(4) to dismiss complaint alleging wrongful employment termination in violation of CLS Exec § 296 because of pendency of plaintiff's federal court action against defendant alleging violation of Age Discrimination in Employment Act, since causes of action were not same although they involved common issue of age discrimination. Walsh v Goldman Sachs & Co., 185 A.D.2d 748, 586 N.Y.S.2d 608, 1992 N.Y. App. Div. LEXIS 9865 (N.Y. App. Div. 1st Dep't 1992).

Defendant was entitled to summary judgment in action alleging that plaintiff's termination was based on age discrimination since defendant established legitimate, independent and nondiscriminatory reasons to support decision to terminate plaintiff's employment where (1) plaintiff was employed in processing of customer complaints, (2) defendant showed that plaintiff's position was eliminated as result of decentralization of complaint handling process, which in turn was part of defendant's company-wide reduction in work force, (3) plaintiff claimed that it was common knowledge that older employees were being pressured to retire, although he had no first hand knowledge of any such pressure, and (4) defendant showed that average age of employees laid off was younger than average age of employees at facility prior to work force reductions. Manning v Norton Co., 189 A.D.2d 971, 592 N.Y.S.2d 154, 1993 N.Y. App. Div. LEXIS 92 (N.Y. App. Div. 3d Dep't 1993).

Employer was entitled to summary judgment in action alleging age discrimination where documentation and deposition testimony submitted by way of affirmation showed that 20 months after his hiring, and after receiving numerous consistently nega-

tive performance memos and corrective measures demanded by his superiors as to his accounts, plaintiff's employment as sales representative was ended based on his unsatisfactory job performance. Naturman v Crain Communications, 216 A.D.2d 150, 628 N.Y.S.2d 281, 1995 N.Y. App. Div. LEXIS 6576 (N.Y. App. Div. 1st Dep't 1995).

Court properly dismissed age discrimination claims under CLS Exec § 296 alleging that employer's severance pay plan (following closure of its plant in 1982 due to economic hardship) discriminated against employees who qualified for retirement by requiring them to choose between severance pay and enhanced retirement benefits, as employer's severance plan constituted employee welfare benefit plan covered by Employee Retirement Income Security Act (ERISA) and thus it was governed by federal Age Discrimination in Employment Act (ADEA), not state antidiscrimination laws; moreover, petitioners did not state grounds for relief under ADEA, as severance plan that denies severance pay to laid-off employees who are eligible for retirement does not violate ADEA. Brayley v Doehler-Jarvis Castings Div., 218 A.D.2d 393, 637 N.Y.S.2d 909, 1996 N.Y. App. Div. LEXIS 1565 (N.Y. App. Div. 4th Dep't 1996).

To make out prima facie case of age discrimination in employment, plaintiff must show that he or she was member of protected class, prove that he or she was discharged, prove that he or she was qualified for position, and either show that he or she was replaced by younger person, produce direct evidence of discriminatory intent, or produce statistical evidence of discriminatory conduct. Bockino v Metropolitan Transp. Auth., 224 A.D.2d 471, 638 N.Y.S.2d 137, 1996 N.Y. App. Div. LEXIS 1204 (N.Y. App. Div. 2d Dep't), app. denied, 87 N.Y.2d 1017, 644 N.Y.S.2d 150, 666 N.E.2d 1064, 1996 N.Y. LEXIS 1204 (N.Y. 1996), app. denied, 88 N.Y.2d 805, 646 N.Y.S.2d 985, 670 N.E.2d 226, 1996 N.Y. LEXIS 1688 (N.Y. 1996).

To defeat employer's motion for summary judgment on employee's age discrimination claim, which was based on proffer of nondiscriminatory reason for terminating employee's employment, employee who had established prima facie case of age discrimination under CLS Exec § 296 was only required to identify disputed material issue of fact with respect to whether or not employer's articulated basis for dismissal was merely pretext for discriminatory action. People v Cooks, 230 A.D.2d 683, 646 N.Y.S.2d 803, 1996 N.Y. App. Div. LEXIS 8718 (N.Y. App. Div. 1st Dep't 1996).

Employee raised triable material issue of fact as to whether reason proffered by employer for his discharge was pretext for age discrimination where evidence showed that another employee disparaged him and other persons in his department over age of 50 by referring to them as "old men" and to his secretary as "old Marge," all 3 employees over age of 50 were fired for "poor job performance" during period employer allegedly started campaign to eliminate elderly employees, employer did not follow its own internal procedures in evaluating employee's performance, and employee had previously received high performance ratings. People v Cooks, 230 A.D.2d 683, 646 N.Y.S.2d 803, 1996 N.Y. App. Div. LEXIS 8718 (N.Y. App. Div. 1st Dep't 1996).

Employer's submission of affidavit alleging legitimate, nondiscriminatory reason for terminating employee's employment did not entitle employer to summary judgment dismissing employee's age discrimination claim, since employer's affidavit merely dispelled inference created by employee's prima facie case of age discrimination under CLS Exec § 296, and shifted burden of proof back to employee to show that legitimate nondiscriminatory reasons offered by employer were not its true reasons, but were merely pretext for illegal age discrimination. Ferrante v American Lung Ass'n, 230 A.D.2d 685, 646 N.Y.S.2d 808, 1996 N.Y. App. Div. LEXIS 8719 (N.Y. App. Div. 1st Dep't 1996), aff'd, 90 N.Y.2d 623, 665 N.Y.S.2d 25, 687 N.E.2d 1308, 1997 N.Y. LEXIS 3218 (N.Y. 1997).

State Division of Human Rights' finding that there was no probable cause to believe that physician's employment with hospital was terminated because of age discrimination was supported by substantial evidence where reconsideration of physician's continued retention was justified by hospital's decision to switch emphasis of its radiology department's technology from research uses to clinical uses, as well as its need to adjust to budget constraints in manner that was consistent with its emerging clinical focus. Albert v Beth Israel Medical Ctr., 230 A.D.2d 695, 646 N.Y.S.2d 688, 646 N.Y.S.2d 695, 1996 N.Y. App. Div. LEXIS 8726 (N.Y. App. Div. 1st Dep't 1996).

Human Rights Specialist's investigation regarding physician's complaint alleging that his employment with hospital was terminated because of age discrimination afforded physician full and fair opportunity to rebut evidence submitted by hospital where Specialist made field trip to hospital and interviewed 2 other physicians, reviewed these interviews with physician in telephone conference, subsequently met with physician for approximately 2 ½ hours to discuss all documents in investigative file and allow physician to detail all factors he believed were relevant to his claim, made another field trip to hospital to review physician's personnel file, visited EEOC to review its files, and notified physician when her investigation was nearing completion and told him he should submit anything else he thought should be considered. Albert v Beth Israel Medical Ctr., 230 A.D.2d 695, 646 N.Y.S.2d 688, 646 N.Y.S.2d 695, 1996 N.Y. App. Div. LEXIS 8726 (N.Y. App. Div. 1st Dep't 1996).

Court would annul determination finding discrimination on basis of age where, at relevant times, there was controlling statutory authority to establish reasonable minimum and maximum age limits for firefighters (CLS Civ S former § 54). Buffalo Mun. Civil Serv. Comm'n v Mercado, 233 A.D.2d 877, 649 N.Y.S.2d 860, 1996 N.Y. App. Div. LEXIS 13359 (N.Y. App. Div. 4th Dep't 1996).

Employer's motion, under CLS CPLR § 4404(a), to set aside jury verdict for plaintiff in action for retaliatory discharge was properly granted where (1) evidence supported jury's finding that employee's transfer was not in retaliation for her complaint of age and racial discrimination in denial of promotion, (2) employee's discrimination complaint preceded her termination by 2 years, during which she received salary increases, and (3) there was ample evidence of employee's insubordination after her transfer. Budzanoski v Pfizer, Inc., 245 A.D.2d 72, 664 N.Y.S.2d 796, 1997 N.Y. App. Div. LEXIS 12836 (N.Y. App. Div. 1st Dep't 1997).

Terminated employee, whose complaint alleging discrimination under CLS Exec § 296(1)(a) had been dismissed, would be allowed to replead where he submitted affidavit alleging that he was 64 years old when discharged and that he was replaced by 25-year-old woman. Stephenson v Hotel Emples. & Restaurant Emples. Union Local 100, 246 A.D.2d 457, 668 N.Y.S.2d 193, 1998 N.Y. App. Div. LEXIS 626 (N.Y. App. Div. 1st Dep't 1998).

Cause of action for employment discrimination based on age was properly dismissed as against one of 2 corporate defendants where unrefuted documentary evidence, including W-2 forms, showed that plaintiff was employed by, and received salary only from, other corporate defendant. Brady v Helmsley, 246 A.D.2d 486, 668 N.Y.S.2d 198, 1998 N.Y. App. Div. LEXIS 705 (N.Y. App. Div. 1st Dep't 1998).

Cause of action for employment discrimination based on age was properly sustained as against individual defendant who directed plaintiff's hours of employment, ordered his termination and later reinstatement, and otherwise controlled his employment in business organization that defendant controlled where that organization had more than 4 employees, as required by CLS Exec § 292(5), as did defendant's household staff. Brady v Helmsley, 246 A.D.2d 486, 668 N.Y.S.2d 198, 1998 N.Y. App. Div. LEXIS 705 (N.Y. App. Div. 1st Dep't 1998).

Defendants were not entitled to summary judgment in employee's action for age discrimination where there were triable issues of fact as to whether employee was replaced by younger person and whether reason advanced by defendants was pretext. Dolgon v Standard Motor Prods., Inc., 251 A.D.2d 281, 671 N.Y.S.2d 1023, 1998 N.Y. App. Div. LEXIS 6360 (N.Y. App. Div. 2d Dep't 1998).

Employer was entitled to summary judgment dismissing action for age discrimination where deposition testimony of plaintiff's friend and coworker that their supervisor told him, one week after plaintiff was terminated, that supervisor was "going to try to get somebody younger to work that job" was merely isolated and ambiguous statement that did not directly state or imply that plaintiff was terminated for discriminatory reason, and coworker

acknowledged that supervisor did not disclose to him reasons for plaintiff's termination. Almanzar v Collegiate Church Corp., 255 A.D.2d 230, 681 N.Y.S.2d 240, 1998 N.Y. App. Div. LEXIS 12445 (N.Y. App. Div. 1st Dep't 1998).

Employer was entitled to directed verdict dismissing former employee's age discrimination action where (1) there was conflicting evidence as to whether employee, who was tailor in men's clothing store, was laid off or resigned to open his own business, (2) tailoring business was cyclical, (3) before union was voted out, layoffs were made during slow periods on basis of seniority, (4) after union was voted out, employees were given opportunity to avoid layoffs by taking one day off per week, (5) although employees voted for that plan, which affected all employees equally, plaintiff expressed his dissatisfaction with it, and (5) fact that newly hired tailor earned much less than plaintiff earned did not prove discrimination in light of evidence that new tailor was hired to fill in while plaintiff was on vacation and to replace another tailor who had health problems. Orlando v Rubersi Sales, Inc., 255 A.D.2d 802, 680 N.Y.S.2d 310, 1998 N.Y. App. Div. LEXIS 12499 (N.Y. App. Div. 3d Dep't 1998).

Employer was entitled to summary judgment dismissing age discrimination claim by plaintiff who was discharged at age 56 for falsifying his time sheets, and was replaced by younger less-experienced person, where plaintiff merely denied falsifying his time sheets and challenged correctness of employer's decision to discharge him for cause. Kelderhouse v St. Cabrini Home, 259 A.D.2d 938, 686 N.Y.S.2d 914, 1999 N.Y. App. Div. LEXIS 2534 (N.Y. App. Div. 3d Dep't 1999).

Substantial, if not overwhelming, evidence supported employer's failure to take proper measures to halt male employees' increasingly aggressive verbal and physical harassment of sole female employee in frozen food warehouse, constituting condonation of gender and age discrimination and hostile work environment, where (1) taunts included remarks that she was too old and slow, was taking man's job away, and was "biggest whore" in town, (2) physical abuse culminated in her being picked up by legs, turned upside down, carried in attempt to place her head-first in garbage receptacle, and slammed into door of men's room, which caused disabling injuries, and (3) although principal perpetrator was warned that he would be fired if he did not refrain from such conduct, he was merely suspended for 3 days and continued to taunt complainant after suspension. Grand Union Co. v Mercado, 263 A.D.2d 923, 694 N.Y.S.2d 524, 1999 N.Y. App. Div. LEXIS 8451 (N.Y. App. Div. 3d Dep't 1999).

At-will employee failed to demonstrate prima facie case of age discrimination where she failed to show that she had been replaced by younger person, produce direct evidence of discriminatory intent, or produce statistical evidence of discriminatory conduct. Kelly v Poughkeepsie Area Chamber of Commerce, 265 A.D.2d 307, 696 N.Y.S.2d 215, 1999 N.Y. App. Div. LEXIS 9674 (N.Y. App. Div. 2d Dep't 1999).

Plaintiff was not barred from alleging age discrimination because he was less than 30 years old. Shaffer v Victory Van Lines, Inc., 265 A.D.2d 543, 697 N.Y.S.2d 166, 1999 N.Y. App. Div. LEXIS 10780 (N.Y. App. Div. 2d Dep't 1999).

In action for age discrimination in violation of CLS Exec § 296, validity of release signed by plaintiff on termination of his employment was governed by principles of contract law rather than federal antidiscrimination law. Goode v Drew Bldg. Supply, Inc., 266 A.D.2d 925, 697 N.Y.S.2d 417, 1999 N.Y. App. Div. LEXIS 11890 (N.Y. App. Div. 4th Dep't 1999).

Release signed by plaintiff on termination of his employment barred his action for age discrimination in violation of CLS Exec § 296 where (1) language employed released defendants from all causes of action arising out of or related to plaintiff's employment, including any arising from Executive Law, (2) plaintiff could not avoid unambiguous release on ground that he did not understand its terms or that he did not consult attorney before signing it, and (3) alleged breach of defendants' duty to provide outplacement services under terms of release did not invalidate release. Goode v Drew Bldg. Supply, Inc., 266 A.D.2d 925, 697 N.Y.S.2d 417, 1999 N.Y. App. Div. LEXIS 11890 (N.Y. App. Div. 4th Dep't 1999).

Evidence supported employer's assertion that 54-year-old plaintiff was terminated for failure to meet employer's reasonable expectations, not due to age discrimination, where she was hired at age 53 to replace 40-year-old man who was discharged for unsatisfactory performance, she performed significantly worse than her predecessor, and she admittedly failed to meet sales quotas, lost or failed to regain key accounts, failed to comply with supervisor's reasonable recommendations for improving her sales performance, and created problems by informing coworker of supervisor's negative comments about him. Times Mirror Magazines, Inc. v Houghton, 268 A.D.2d 355, 702 N.Y.S.2d 265, 2000 N.Y. App. Div. LEXIS 715 (N.Y. App. Div. 1st Dep't 2000).

Employer was entitled to summary judgment dismissing 58-year-old plaintiff's age discrimination claim where (1) it submitted evidence that its workforce reduction was justified for economic reasons, and that plaintiff's termination in particular was based on his relative worth in recent annual rating, which constituted legitimate and nondiscriminatory reasons for his termination, and (2) plaintiff failed to establish that employer's reasons were pretextual based on remarks made 4 years before his termination and subsequent to his termination by department manager who purportedly had "a problem with age," or by his assertion that he was replaced by 56-year-old employee. Hardy v GE, 270 A.D.2d 700, 705 N.Y.S.2d 97, 2000 N.Y. App. Div. LEXIS 2921 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 765, 716 N.Y.S.2d 39, 739 N.E.2d 295, 2000 N.Y. LEXIS 2886 (N.Y. 2000).

Judgment entered on jury verdict finding that employee was unlawfully discharged because of his age would not be disturbed, despite employer's claim that employee did not prove that employer's stated reasons for discharge were pretextual, where case was not tried on pretext theory but on mixed-motives theory, and thus when employee presented sufficient evidence to support inference of impermissible discrimination, burden shifted to employer to show that employment decision would have been reached in absence of impermissible motive. Allen v Domus Dev. Corp., 273 A.D.2d 891, 709 N.Y.S.2d 776, 2000 N.Y. App. Div. LEXIS 6963 (N.Y. App. Div. 4th Dep't 2000).

In Article 78 proceeding challenging county sheriff's termination of petitioner's employment as probationary correction officer in sheriff's department, petitioner's conclusory assertions were insufficient to prove prima facie case of age discrimination where he was hired at age 41 and terminated at age 42. Higgins v La Paglia, 281 A.D.2d 679, 722 N.Y.S.2d 592, 2001 N.Y. App. Div. LEXIS 2009 (N.Y. App. Div. 3d Dep't), app. dismissed, 96 N.Y.2d 854, 729 N.Y.S.2d 669, 754 N.E.2d 772, 2001 N.Y. LEXIS 1460 (N.Y. 2001).

Plaintiff's cause of action for age discrimination arose from injury he suffered when defendant employer discharged him, and thus his Age Discrimination in Employment Act claim was not barred on ground that his underlying Equal Employment Opportunity Commission (EEOC) charge was not timely filed, where he filed EEOC charge within 300 days after he was discharged; although events asserted in connection with EEOC charge, that defendant repeatedly reassigned or terminated plaintiff's staff, occurred before 300-day limitation period, this prior conduct was mentioned in EEOC filing only for its relevance with respect to motive for discharge. Chefalas v Taylor Clark Architects, Inc., 283 A.D.2d 174, 724 N.Y.S.2d 153, 2001 N.Y. App. Div. LEXIS 4334 (N.Y. App. Div. 1st Dep't 2001).

Park maintenance mechanic employed by county failed to establish prim facie case of age discrimination where termination of his employment was in response to budgetary constraints, his position was not filled by younger person but was left vacant for 2 years after his termination, and older person was hired when position was restored to county budget. Genesky v Local 1000, AFSCME, AFL-CIO, CSEA, 287 A.D.2d 594, 731 N.Y.S.2d 758, 2001 N.Y. App. Div. LEXIS 9864 (N.Y. App. Div. 2d Dep't 2001).

Trial court properly granted summary judgment dismissal to an agency in a class action by former employees of the agency, alleging age discrimination based on disparate impact and disparate treatment, as the elimination of the employees' management positions due to a reduction in force was based on a legitimate, nondiscriminatory reason pursuant to budget constraints; although the former employees established a prima facie case of discrimination, they were unable to prove that the legitimate reason proffered by the defendant was merely a pretext for

discrimination. Mete v N.Y. State Office of Mental Retardation & Developmental Disabilities, 21 A.D.3d 288, 800 N.Y.S.2d 161, 2005 N.Y. App. Div. LEXIS 8647 (N.Y. App. Div. 1st Dep't 2005).

Trial court properly granted summary judgment to a medical company as to a workers' claim of age discrimination under N.Y. Exec. Law § 296 and 29 U.S.C.S. § 621 et seq., as the company presented evidence that the worker's performance of his job as an anesthesiologist was not adequate and presented potential danger to patients, and the worker failed to show that this was a pretext for discrimination. Ospina v Susquehanna Anesthesia Affiliates, P.C., 23 A.D.3d 797, 803 N.Y.S.2d 751, 2005 N.Y. App. Div. LEXIS 12427 (N.Y. App. Div. 3d Dep't 2005), app. denied, 6 N.Y.3d 705, 812 N.Y.S.2d 34, 845 N.E.2d 466, 2006 N.Y. LEXIS 121 (N.Y. 2006).

Trial court erred in denying an employer's motion to dismiss as an employee's age discrimination claim was barred under the doctrine of collateral estoppel where a federal court had found that the employee's inadequate job performance provided the employer with a legitimate, nondiscriminatory reason for the adverse employment actions it took against the employee. Peterkin v Episcopal Social Servs. of N. Y., Inc., 24 A.D.3d 306, 808 N.Y.S.2d 31, 2005 N.Y. App. Div. LEXIS 14673 (N.Y. App. Div. 1st Dep't 2005).

Plaintiff could only meet her initial burden of establishing a prima facie case of age discrimination if she could demonstrate that (1) she was in a protected age group, (2) she was terminated, and (3) she was sufficiently qualified to hold her position, and, if she did not produce direct or statistical evidence that would logically support an inference of discrimination, she had to show her position was subsequently filled by a younger person or held open for a younger person. Bailey v New York Westchester Sq. Med. Ctr., 38 A.D.3d 119, 829 N.Y.S.2d 30, 2007 N.Y. App. Div. LEXIS 72 (N.Y. App. Div. 1st Dep't 2007).

Employees' complaint stated a claim under the New York State Human Rights Law, N.Y. Exec. Law § 296, and the New York City Human Rights Law, Administrative Code of City of NY § 8-107 et seq., because the claims alleged related to nonacademic matters, and while administrative decisions of educational institutions involved the exercise of highly specialized professional judgment and these institutions were, for the most part, better suited to make relatively final decisions concerning wholly internal matters, the fact that an employer was an educational institution did not permit it to discriminate against its employees on the basis of age, or otherwise insulate it from liability for violations of the New York State Human Rights Law or the New York City Human Rights Law. Wander v St. John's Univ., 99 A.D.3d 891, 953 N.Y.S.2d 68, 2012 N.Y. App. Div. LEXIS 6892 (N.Y. App. Div. 2d Dep't 2012).

Because all of the employer's employees were over the age of 18, the former employees could not show disparate impact; their complaint impermissibly attempted to create a subgroup within the protected class. Bohlke v GE, 293 A.D.2d 198, 742 N.Y.S.2d 131, 2002 N.Y. App. Div. LEXIS 3598 (N.Y. App. Div. 3d Dep't), app. denied, 98 N.Y.2d 693, 747 N.Y.S.2d 410, 775 N.E.2d 1289, 2002 N.Y. LEXIS 1962 (N.Y. 2002).

Where the employee alleged that the manager unlawfully discriminated against the employee by terminating the employee's employment based on age, the trial court properly granted summary judgment dismissing the complaint against the manager, as a claim of discrimination did not lie against a corporate employee where the corporate employee was not shown to have any ownership interest or any power to do more than carry out personnel decisions made by others. Layaou v Xerox Corp., 298 A.D.2d 921, 748 N.Y.S.2d 85, 2002 N.Y. App. Div. LEXIS 9087 (N.Y. App. Div. 4th Dep't 2002).

Trial court properly denied defendants' summary judgment motion pursuant to N.Y. C.P.L.R. 3212 in an age discrimination action under N.Y. Exec. Law § 296; a former employee rebutted a valid nondiscriminatory reason for his termination presented by defendants and created a factual issue for trial. Listemann v Philips Components, 13 A.D.3d 494, 787 N.Y.S.2d 354, 2004 N.Y. App. Div. LEXIS 15584 (N.Y. App. Div. 2d Dep't 2004).

Trial court erred in dismissing a teacher's claims of age discrimination and breach of a duty of fair representation against a school district and a union, as the discrimination claim, even if met the standards of N.Y. Exec. Law § 296, was abandoned, and the claim for breach of a duty of fair representation by the union was time barred pursuant to N.Y. C.P.L.R. 217(2)(a), as the teacher failed to bring the action within four months of the district's action of refusing to rescind the teacher's retirement after a new collective bargaining agreement was implemented, and after the union failed to file a grievance. Blumberg v Patchogue-Medford Union Free School Dist., 18 A.D.3d 486, 795 N.Y.S.2d 81, 2005 N.Y. App. Div. LEXIS 5049 (N.Y. App. Div. 2d Dep't 2005).

In this NYCHRL and NYSHRL action, because the employee failed to provide even one statement indicative of age discrimination, the employee's attempt to correlate age discrimination and her termination were not supported by the facts as alleged. Palmer v Cook, 65 Misc. 3d 374, 108 N.Y.S.3d 297, 2019 N.Y. Misc. LEXIS 4283 (N.Y. Sup. Ct.), dismissed, in part, 64 Misc. 3d 1222(A), 117 N.Y.S.3d 469, 2019 N.Y. Misc. LEXIS 4286 (N.Y. Sup. Ct. 2019), dismissed, in part, 64 Misc. 3d 1222(A), 117 N.Y.S.3d 469, 2019 N.Y. Misc. LEXIS 4301 (N.Y. Sup. Ct. 2019).

Evidence supported jury's conclusion that age was motivating factor in employer's decision to fire 48-year-old salesman and not transfer him where employer's own witness testified that its sales force was getting too old, salesman's layoff helped decrease average age of sales force, internal memorandum recommending layoff listed salesman's age and years of service, position which salesman filled on part-time basis was left unfilled until 26-year-old salesman could fill it, and employer's performance evaluations had category of employees known as "young tigers" from which older employees were necessarily excluded. Tyler v Bethlehem Steel Corp., 958 F.2d 1176, 1992 U.S. App. LEXIS 4161 (2d Cir. N.Y.), cert. denied, 506 U.S. 826, 113 S. Ct. 82, 121 L. Ed. 2d 46, 1992 U.S. LEXIS 5704 (U.S. 1992).

Terminated sales representative's age discrimination claim under CLS Exec Law § 296 must be denied summarily, where she was hired at age 39, fired at age 43, and replaced by younger person, because prima facie case here is extremely weak and support consisting of one alleged statement by district manager to pharmacist that company was looking for "young and energetic" sales representative to take control of territory is insufficient to defeat summary judgment motion of former employer. Melnyk v Adria Labs., Div. of Erbamont, Inc., 799 F. Supp. 301, 1992 U.S. Dist. LEXIS 10584 (W.D.N.Y. 1992).

Summary judgment for employer in employee's age discrimination action is denied, where former officer stated that employer wanted to focus more on youth in structure of company, other management testified that age was considered in determining which employees were to be laid off, and majority of laid-off employees were over 40, because employee has presented evidence to show that employer's reasons for discharging him, i.e., reduction in force brought about by company restructuring and his lack of qualifications for job, were pretextual. Babcock v CAE-Link Corp., 878 F. Supp. 377, 1995 U.S. Dist. LEXIS 7860 (N.D.N.Y. 1995).

Terminated vice-president's CLS Exec Law § 296 age discrimination claim survives summary judgment, where record creates material issue of fact as to credibility of restaurant corporation's firing of plaintiff for conflict of interest more than year after he extricated himself from interest in sandwich shop, because he also presents several statements allegedly made by corporation executives indicating "age bias" and examples of other employees being replaced by younger workers. Eymer v Ground Round, 913 F. Supp. 693, 1996 U.S. Dist. LEXIS 1752 (N.D.N.Y. 1996).

Jury award in employment discrimination will be reviewed for excessiveness under CLS Exec Law §§ 296-298, where plaintiff won verdict under both that law and federal Age Discrimination in Employment Act (ADA), and where although jury found that plaintiff had been demoted for discriminatory reasons, his damages were attributable not to any loss in compensation but rather to fact that he suffered physically and emotionally, because plaintiff is not entitled to damages for pain and suffering under ADA and jury award was therefore necessarily rendered pursuant to state law. Shea v Icelandair, 925 F. Supp. 1014, 1996 U.S. Dist. LEXIS 5530 (S.D.N.Y. 1996).

Airline Deregulation Act (49 USCS § 41713(b)(1)) preempted pilots' age discrimination claims under CLS Exec § 296 and NYC Admin Code §§ 8-107(1)(a) and (c) and 8-107(17). Abdu-Brisson v Delta Air Lines, Inc., 927 F. Supp. 109, 1996 U.S. Dist. LEXIS 6844 (S.D.N.Y. 1996), rev'd, 128 F.3d 77, 1997 U.S. App. LEXIS 28555 (2d Cir. N.Y. 1997).

Plaintiff failed to prove that employer's legitimate nondiscriminatory reason for discharging him (payroll reduction) was pretext for age discrimination where ageist statements that created inference of discrimination were mostly made by supervisors not involved in discharge decision, plaintiff was not replaced by younger employee, and statistics indicated increase in number of employees over age 40. Boyle v McCann-Erickson, Inc., 949 F. Supp. 1095, 1997 U.S. Dist. LEXIS 43 (S.D.N.Y. 1997).

Defendant employer that terminated age discrimination plaintiff as part of reduction in force, allegedly due to his performance and lack of experience in his area, failed to offer legitimate nondiscriminatory reason under Human Rights Law where branch in which plaintiff worked was not closed, plaintiff's position was not eliminated, he was only branch manager of 19 to be fired, he was given good performance reviews prior to termination, and he had 6 years of experience in his area. Tanzini v Marine Midland Bank, N.A., 952 F. Supp. 937, 1997 U.S. Dist. LEXIS 933 (N.D.N.Y. 1997).

Plaintiff's allegation that he was performing his job satisfactorily, and that defendants never mentioned any deficiencies until after his termination, was not in itself probative of age discrimination, although it might tend to put at issue what real reason for termination actually was. Thomson v Saatchi & Saatchi Holdings, 958 F. Supp. 808, 1997 U.S. Dist. LEXIS 4300 (W.D.N.Y. 1997), aff'd, 159 F.3d 1348, 1998 U.S. App. LEXIS 32113 (2d Cir. N.Y. 1998).

Plaintiff, who was hired at age 52 and terminated 4 years later, failed to come forward with any evidence that defendant employer's legitimate nondiscriminatory reason for termination (his poor performance during financially troubled times) was pretext for age discrimination, where he relied solely on facts that he was replaced by younger person, that 4 other employees who were all more than 40 years old and earning more than $70,000 were terminated and may have been replaced by younger persons, and that he was never notified of his performance deficiencies. Strohmeyer v International Bhd. of Painters & Allied Trades, 989 F. Supp. 455, 1997 U.S. Dist. LEXIS 21172 (W.D.N.Y. 1997), aff'd, 164 F.3d 619, 1998 U.S. App. LEXIS 35691 (2d Cir. N.Y. 1998).

Painter's age discrimination claim must fail, even though he makes much of fact that 5 older employees terminated in December 1994 were making in excess of $70,000 and may have been replaced by younger, lower-paid individuals, because mere fact that age may have some correlation with salary does not mean that employer's termination of high-salaried, nonproductive employees is indicative of age discrimination. Strohmeyer v International Bhd. of Painters & Allied Trades, 989 F. Supp. 455, 1997 U.S. Dist. LEXIS 21172 (W.D.N.Y. 1997), aff'd, 164 F.3d 619, 1998 U.S. App. LEXIS 35691 (2d Cir. N.Y. 1998).

Town comptroller stated age discrimination claim on basis that he was 51 years old at expiration of his term and his replacement was 20 years his junior. Stanley v Cooper, 996 F. Supp. 316, 1998 U.S. Dist. LEXIS 3037 (S.D.N.Y. 1998).

Age discrimination claims of newspaper employees laid off in reduction-in-force are denied summarily, where recession necessitating reductions is well-documented, and various statistics quantify decrease in percentage of workers over 40 at only 4 to 6 percent, because testimony by employees as to their personal beliefs—that their qualifications were superior and that layoffs were age-based since certain replacement workers were younger—is insufficient to raise issue of fact as to pretext. O'Sullivan v New York Times, 37 F. Supp. 2d 307, 1999 U.S. Dist. LEXIS 3011 (S.D.N.Y. 1999).

Former employer's proffered reason for terminating older employee rather than younger employee, namely that employer was making extensive down-sizing and younger employee was ranked higher than older employee, was legitimate, nondiscriminatory reason and not pretext for age discrimination claim under Exec § 296(3-a)(a), even though younger employee was later transferred, director commented that younger employee may have been ranked too high, and manager of older employee commented that his termination was unfair. Brink v Union Carbide Corp., 41 F. Supp. 2d 406, 1999 U.S. Dist. LEXIS 1732 (S.D.N.Y. 1999), aff'd, 210 F.3d 354, 2000 U.S. App. LEXIS 13480 (2d Cir. N.Y. 2000).

Under Exec § 296, company's termination of 43-year-old supervisor for harassment of employee who reported environmental concern was not pretext for age discrimination, even if state unemployment commission held that supervisor's conduct did not "rise to level of misconduct under law," where all persons involved in incident were terminated under company's "no retaliation policy," which was instituted after company had been subject of criminal proceedings for environmental crimes. Connell v Consolidated Edison Co. of N.Y., Inc., 109 F. Supp. 2d 202, 2000 U.S. Dist. LEXIS 11727 (S.D.N.Y. 2000).

Under Exec § 296(1)(a), waiver of state and city age discrimination claims by executive was knowing and voluntary, where waiver was set forth in clear language, executive was competent to understand and enter into waiver, and executive consulted counsel before executing waiver. Sheridan v McGraw-Hill Cos., 129 F. Supp. 2d 633, 2001 U.S. Dist. LEXIS 752 (S.D.N.Y.), aff'd, 24 Fed. Appx. 64, 2001 U.S. App. LEXIS 25197 (2d Cir. N.Y. 2001).

Employer did not discriminate against 52-year-old employee due to age in violation of Exec § 296 and federal law when he was replaced by employee 2 years older, who had been hired several months before, after complaining employee allegedly was wrongfully terminated. Carr v WestLB Admin., Inc., 171 F. Supp. 2d 302, 2001 U.S. Dist. LEXIS 17491 (S.D.N.Y. 2001).

In an action in which television writers filed suit against various employers and agencies, alleging an industry-wide pattern or practice of age discrimination in violation of the Age Discrimination Employment Act, California's Fair Employment and Housing Act, and New York State's Human Rights Law, as well as the Labor Management Relations Act, the writers' claims of aiding and abetting must be dismissed for two reasons: (1) the writers had not adequately pled a claim of discrimination against any one particular defendant; and (2) the writers failed adequately to allege that any specific defendant "substantially assisted" any other specific defendant in discriminatory hiring. Wynn v NBC, 234 F. Supp. 2d 1067, 2002 U.S. Dist. LEXIS 25893 (C.D. Cal. 2002), dismissed, 2002 U.S. Dist. LEXIS 28774 (C.D. Cal. Mar. 6, 2002).

In a former employee's action against her former employer alleging age discrimination in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C.S. § 621 et seq., and N.Y. Exec. Law § 296 following her termination, the employer was granted summary judgment where, regarding the employee's job search assignments claim, the employee's supervisor's assignment decisions did not constitute an adverse employment action because the employee failed to offer evidence that the change in her job search assignments affected her income or income potential, the employer's explanation that it did not promote the employee because she lacked management skills and leadership ability was legitimate and non-discriminatory, and the employee failed to show that she was qualified for the promotion and failed to produce evidence to show that the employer's asserted reasons were pretextual, and the employer's explanation that it terminated the employee due to her unprofessional behavior was legitimate and non-discriminatory, and the employee failed to offer any evidence that her termination was retaliatory or that she was terminated because of her age. Newsom-Lang v Warren Int'l, Inc., 249 F. Supp. 2d 292, 2003 U.S. Dist. LEXIS 2993 (S.D.N.Y.), aff'd, 80 Fed. Appx. 124, 2003 U.S. App. LEXIS 22732 (2d Cir. N.Y. 2003).

Where an employee who was discharged following a merger failed to offer evidence that the persons who made the decision to discharge the employee were aware that the employee was 61 years old, the employee was unable to establish a prima facie case of age discrimination; allegations that the employee's age was well known in the market and industry and appeared in the personnel file did not establish that the decision-makers knew the employee's age. Woodman v WWOR-TV, Inc., 293 F. Supp. 2d 381,

2003 U.S. Dist. LEXIS 21057 (S.D.N.Y. 2003), aff'd, 411 F.3d 69, 2005 U.S. App. LEXIS 11060 (2d Cir. N.Y. 2005).

In an action in which a former employee filed suit against his former employer alleging discrimination based on age and national origin in violation of the New York State Human Rights Law, N.Y. Exec. Law § 296 (2003), and the New York City Human Rights Law, New York City, N.Y., Admin. Code §§ 8-107 and 8-502 et seq., the employer was granted summary judgment where the employee had not identified any facts that gave rise to an inference of discrimination; because there was no evidence in the record to suggest that coworkers engaged in conduct that was of comparable seriousness to the employee's, the employee had not shown that the coworkers were similarly situated. Milani v IBM, 322 F. Supp. 2d 434, 2004 U.S. Dist. LEXIS 11025 (S.D.N.Y. 2004), aff'd, 137 Fed. Appx. 430, 2005 U.S. App. LEXIS 13251 (2d Cir. N.Y. 2005).

In an action in which a former employee filed suit against his former employer alleging violations of the Age Discrimination in Employment Act, 29 U.S.C.S. § 621 et seq., Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., the New York State Human Rights Law, N.Y. Exec. Law § 296 et seq., and the New York City Human Rights Law, New York City, N.Y., Admin. Code § 8-101 et seq., the employer was granted summary judgment on the age discrimination claim where (1) the employer offered sufficient admissible evidence, including affidavits from a customer, from which a jury could conclude that the employee was fired for, inter alia, possibly committing an egregious error with the customers negatives; and (2) the only admissible, probative evidence of age discrimination was the bare fact that the employee was 63 years old when he was discharged. Pronin v Raffi Custom Photo Lab, Inc., 383 F. Supp. 2d 628, 2005 U.S. Dist. LEXIS 18142 (S.D.N.Y. 2005).

Former employee, who was reassigned jobs, given a pay cut, and then terminated and replaced by a younger worker failed to establish a prima facie case of age discrimination in violation of the New York State Human Rights Law, N.Y. Exec. Law § 296(1)(a), because replacement by a younger worker, without more, was insufficient to establish a prima facie case of age discrimination. Shain v Ctr. for Jewish History, Inc., 418 F. Supp. 2d 360, 2005 U.S. Dist. LEXIS 20629 (S.D.N.Y. 2005).

In an action that an employee brought pursuant to the Age Discrimination in Employment Act, 29 U.S.C.S. § 621 et seq., and the New York State Human Rights Law, N.Y. Exec. Law § 296, an employer, which stated that it dismissed the employee for submitting reports late and missing sales targets, was entitled to summary judgment on the age discrimination claims because ambiguous comments made by non-decision makers, the turnover of older employees, the bare allegation that a younger sales representative was favored, and the fact that the employer tolerated the employee's deficiencies in the past did not support the inference that the employer's stated reasons were pretextual. Hoffman v CIBA Vision Corp., 436 F. Supp. 2d 389, 2006 U.S. Dist. LEXIS 39773 (N.D.N.Y. 2006).

Although an employer's decision to discharge an employee was markedly influenced by questions regarding the employee's capabilities and the need to reduce the employer's workforce, the employer violated both the Age Discrimination in Employment Act, 29 U.S.C.S. § 623(a)(1), and the New York Human Rights Law, N.Y. Exec. Law § 296, because age had considerable influence on the employer's decision as to who should be included in the workforce reduction. The employer acted on the assumption that because of his age, the employee would be unable to conform his job performance as plant controller to the expectations of the new management, and the employer did not engage in any meaningful measures to determine whether the employee could meet the employer's expectations as he apparently had in prior years. Ferguson v Lander Co., 2008 U.S. Dist. LEXIS 26738 (N.D.N.Y. Apr. 2, 2008).

Aside from alleging that he was age 51 at the time his employment was terminated, the urologist did not make a single allegation that his termination or the alleged disparate treatment was related to his age; the urologist failed to allege that the counterparts who allegedly received better treatment were younger than the urologist. Accordingly, the claims for age discrimination under the Age Discrimination in Employment Act, 29 U.S.C.S. § 621 et seq. and N.Y. Exec. Law § 296(7) were dismissed without prejudice and with leave to amend. Rehman v State Univ. of N.Y., 596 F. Supp. 2d 643, 2009 U.S. Dist. LEXIS 12897 (E.D.N.Y. 2009).

Defendants waived the reasonable factors other than age (RFOA) affirmative defense and that waiver was not excused; there existed no dispute that having asserted the RFOA defense in their answer, defendants never again asserted that defense throughout the trial, in their appeal, in their petition for certiorari, or at any time before proceedings in 2005. Defendants' decision to abandon their RFOA defense appeared to be the product of a rational choice of strategies and plaintiffs satisfied their burden of demonstrating that defendants' intentionally relinquished their right to assert the RFOA defense; defendants' references at trial to business necessity and business justification did not suffice to press or preserve an RFOA defense—defendants' failure to press the RFOA defense in words reasonably understood as asserting that defense rather than another could not survive a claim of waiver. Meacham v Knolls Atomic Power Lab., 627 F. Supp. 2d 72, 2009 U.S. Dist. LEXIS 36999 (N.D.N.Y.), vacated, in part, 358 Fed. Appx. 233, 2009 U.S. App. LEXIS 27956 (2d Cir. N.Y. 2009).

No conflicting statements in Second Circuit law concerning the reasonable factors other than age (RFOA) defense existed at the time of the trial; neither conflicts among circuit courts, silence on the issue in the Second Circuit at the time of trial, nor decisions on the issue by the Second Circuit or the U.S. Supreme Court years after the trial excused defendants' waiver under the Salomon Analyst exception to the waiver rule. Accordingly, defendants' waiver was not excused. Meacham v Knolls Atomic Power Lab., 627 F. Supp. 2d 72, 2009 U.S. Dist. LEXIS 36999 (N.D.N.Y.), vacated, in part, 358 Fed. Appx. 233, 2009 U.S. App. LEXIS 27956 (2d Cir. N.Y. 2009).

Reasonable factors other than age defense is an affirmative defense for which the employer bears the burden of persuasion. Meacham v Knolls Atomic Power Lab., 627 F. Supp. 2d 72, 2009 U.S. Dist. LEXIS 36999 (N.D.N.Y.), vacated, in part, 358 Fed. Appx. 233, 2009 U.S. App. LEXIS 27956 (2d Cir. N.Y. 2009).

Employer was entitled to summary judgment on a pressman's age discrimination claim because (1) comments indicating that management had a preference for younger workers were not made by persons who had authority to terminate the pressman's employment and did not support the inference that the pressman was discharged because of his age and (2) the pressman's resignation letter and a supervisor's report compelled the conclusion that the pressman voluntarily resigned. Ko Sheng Chuang v T.W. Wang Inc., 647 F. Supp. 2d 221, 2009 U.S. Dist. LEXIS 3182 (E.D.N.Y. 2009).

Employer was entitled to summary judgment on a staff member's age discrimination claim because the staff member's department was eliminated during internal restructuring, the employee retained in the reduction was the same age as the staff member and had superior qualifications, and the staff member had questioned the authority of a supervisor in a manner that could have supported termination for cause. Ko Sheng Chuang v T.W. Wang Inc., 647 F. Supp. 2d 221, 2009 U.S. Dist. LEXIS 3182 (E.D.N.Y. 2009).

Employer was entitled to summary judgment on age discrimination claims asserted by a deputy supervisor and a supervisor of a circulation department because the deputy supervisor was terminated for delegating his collection responsibilities in violation of company policy, the supervisor was terminated for interfering with the investigation of the deputy supervisor's misconduct, and stray remarks expressing a desire to hire younger employees did not support the inference that the deputy supervisor and the supervisor were terminated because of their age. Ko Sheng Chuang v T.W. Wang Inc., 647 F. Supp. 2d 221, 2009 U.S. Dist. LEXIS 3182 (E.D.N.Y. 2009).

Public school teacher's New York State Human Rights Law, N.Y. Exec. Law § 296, age-based hostile work environment claims failed to meet the standard of Fed. R. Civ. P. 8(a) because the teacher's complaints about a planning book meeting, an e-mail about another administrator's meeting with the teacher,

and the teacher's year-end evaluation contained no suggestion that this conduct was engaged in because of her age, let alone that the workplace was permeated with discriminatory intimidation and insult. Fordham v Islip Union Free Sch. Dist., 662 F. Supp. 2d 261, 2009 U.S. Dist. LEXIS 82767 (E.D.N.Y. 2009).

Any inference of age discrimination is undercut where a plaintiff is over 40 years old when she is hired. Vinokur v Sovereign Bank, 701 F. Supp. 2d 276, 2010 U.S. Dist. LEXIS 26854 (E.D.N.Y. 2010).

Because no reasonable jury could have conclude that age was a motivating factor in the decision to terminate a doctor, especially in light of the doctor's long and documented history of discipline and his complete failure to offer evidence that this history of discipline was a pretext for age discrimination, summary judgment was appropriate on his claims brought under the Age Discrimination in Employment Act, 29 U.S.C.S. § 621 et seq., as well as the New York State Human Rights Law, N.Y. Exec. Law § 296, and New York City discrimination laws. Saenger v Montefiore Med. Ctr., 706 F. Supp. 2d 494, 2010 U.S. Dist. LEXIS 43026 (S.D.N.Y. 2010).

25. —Termination at age 32

The provisions of this statute in the light of its legislative history, are limited in their application to persons between the ages of 40 and 65, and therefore, airline could terminate the employment of a stewardess upon her attaining the age of 32. American Airlines, Inc. v State Com. for Human Rights, 29 A.D.2d 178, 286 N.Y.S.2d 493, 1968 N.Y. App. Div. LEXIS 4784 (N.Y. App. Div. 1st Dep't 1968).

Cause of action under CLS Exec § 296(1)(a) for racial, gender and age discrimination resulting from defendant's alleged failure to consider plaintiff for tuition reimbursement plan accrued when plaintiff learned that employer had reimbursed another employee for similar educational program, not on later date when employer rejected formal request for reimbursement. Fern v IBM Corp., 204 A.D.2d 907, 612 N.Y.S.2d 492, 1994 N.Y. App. Div. LEXIS 5390 (N.Y. App. Div. 3d Dep't 1994).

In action by university professor alleging series of related acts and continuing policy of discrimination against women faculty members, plaintiff's claim that she was denied tenure by same individual for 6 successive years, despite having been recommended for tenure, was sufficient to trigger continuing violation doctrine; thus, Human Rights claim under CLS Exec § 297 was not barred by statute of limitations. Sunshine v Long Island Univ., 862 F. Supp. 26, 1994 U.S. Dist. LEXIS 12685 (E.D.N.Y. 1994).

Coach's 42 U.S.C.S. § 2000e-2(a)(1) sexual orientation discrimination claims were not viable because sexual orientation was not a protected characteristic under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., but the coach could assert such claims under the New York Human Rights Law, N.Y. Exec. Law § 290 et seq. Stouter v Smithtown Cent. Sch. Dist., 687 F. Supp. 2d 224, 2010 U.S. Dist. LEXIS 12279 (E.D.N.Y. 2010).

Terminated employee's age discrimination claims failed because the bare allegations that two other employees over 40 were fired, and that the employer had a practice of firing older employees, were not enough to make out an age claim. Foster v Humane Soc'y of Rochester & Monroe County, Inc., 724 F. Supp. 2d 382, 2010 U.S. Dist. LEXIS 73384 (W.D.N.Y. 2010).

26. —Termination at age 55

The Legislature did not intend to repeal subdivision e of section 381-b of the Retirement and Social Security Law, providing for mandatory retirement of uniformed State Police at age 55, by its subsequent definition of "civil right" in subdivision 1 of section 291 of the Executive Law to include freedom from age discrimination, since it had expressly excepted qualified retirement plans from "unlawful discriminatory practices" relating to age discrimination ever since the enactment of subdivision 3-a of section 296 of the Executive Law, prior to the adoption of section 381-b. Mandatory retirement at age 55 for uniformed members of the State Police under subdivision e of section 381-b of the Retirement and Social Security Law is not a subterfuge to evade the purposes of the age discrimination provisions of the Executive Law and, therefore, is not within its ban on age discrimination. Inasmuch as subdivision e of section 381-b of the Retirement and Social Security Law, calling for mandatory retirement of uniformed State Police at age 55, and subdivision 3-a of section 296 of the Executive Law, prohibiting unlawful age discrimination in employment, can be read together in a consistent manner, there is no conflict between the two statutes; even if the two statutes could not be reconciled, section 381-b would prevail because it was enacted at a later date. State Div. of Human Rights ex rel. Kozlowski v State, 62 A.D.2d 617, 406 N.Y.S.2d 401, 1978 N.Y. App. Div. LEXIS 10885 (N.Y. App. Div. 4th Dep't 1978), app. dismissed, 46 N.Y.2d 939, 415 N.Y.S.2d 1028, 1979 N.Y. LEXIS 3035 (N.Y. 1979).

Complaint by 55-year-old plaintiff, alleging age discrimination under CLS Exec § 296, was properly dismissed on grounds of payment and release where plaintiff executed severance agreement specifically releasing "all actions, causes of action, suits, debts...claims, and demands whatsoever, in law...or in equity, which [the parties] ever had, now have or hereafter can, shall or may have," since plaintiff was aware that his replacement was 48 years old at time he executed severance agreement. Stone v National Bank & Trust Co., 188 A.D.2d 865, 591 N.Y.S.2d 609, 1992 N.Y. App. Div. LEXIS 14375 (N.Y. App. Div. 3d Dep't 1992).

Terminated marketing and sales director for company providing telephone services failed to make showing under Exec § 296 and federal law that he was qualified for position or that termination for unsatisfactory job performance was pretextual by presenting affidavits of fellow workers not involved in termination decision as to his good qualities. Gambello v Time Warner Communs., Inc., 186 F. Supp. 2d 209, 2002 U.S. Dist. LEXIS 3167 (E.D.N.Y. 2002).

Although the trader's evidence was based almost entirely on their own testimony, and the employer had presented strong evidence to show that its actions where not discriminatory, the traders' age discrimination claims survived summary judgment. Schreiber v Worldco, LLC, 324 F. Supp. 2d 512, 2004 U.S. Dist. LEXIS 12888 (S.D.N.Y. 2004).

27. —Termination at age 59

An amended cause of action alleging unlawful age discrimination based upon plaintiff's discharge from his position with defendant corporation at age 59 after 23 years of service pursuant to Exec Law § 296 was time barred by the mandatory one-year statute of limitations applicable to such an action where the age discrimination amendment did not relate back to the original complaint to which it was added for purposes of the period of limitations, in that the original complaint failed to indicate any facts connecting plaintiff's discharge to the newly added age discrimination theory. Murphy v American Home Products Corp., 112 Misc. 2d 507, 447 N.Y.S.2d 218, 1982 N.Y. Misc. LEXIS 3157 (N.Y. Sup. Ct.), modified, 88 A.D.2d 870, 451 N.Y.S.2d 770, 1982 N.Y. App. Div. LEXIS 17189 (N.Y. App. Div. 1st Dep't 1982).

Former department store manager's human rights claim under CLS Exec Law § 296 will not be denied summarily, where he was forced into early retirement at age 59 ½ after purported harassment by superiors but also admitted violation of company policy by "floating" $907,000 in markdowns over 7-month period, because genuine issues are presented as to whether decision to terminate was (1) substantially related to manager's age, or (2) based on legitimate business reasons. Hastie v J.C. Penney Co., 886 F. Supp. 1017, 1994 U.S. Dist. LEXIS 20375 (W.D.N.Y. 1994).

Store manager established prima facie case of age discrimination where he was qualified for his position and had been employed as store manager for almost 20 years, he was forced to take early retirement at age 59 rather than be discharged, he was replaced by younger employee, and he presented evidence that employer encouraged employees to retire by age 60. Hastie v J.C. Penney Co., 886 F. Supp. 1017, 1994 U.S. Dist. LEXIS 20375 (W.D.N.Y. 1994).

Summary judgment was denied to a former employer in an age discrimination case brought by a 59-year-old former employee under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C.S. § 631, and N.Y. Exec. Law §§ 296 and 297 because allegations of constructive discharge and intolerable working conditions satisfied the elements of an adverse employ-

ment action leading to an inference of discrimination, and because even though the employer claimed that the conditions under which an employee worked never rose to the level required to show constructive discharge and that the employee left his position because he feared termination before the vesting of his medical benefits, the fact-finding required to accept the employer's version of the events was not an exercise that could be carried out in the context of a motion for summary judgment. Kern v Brookhaven Nat'l Lab., 293 F. Supp. 2d 214, 2003 U.S. Dist. LEXIS 21350 (E.D.N.Y. 2003).

28. —Termination at age 62

Employer was entitled to summary judgment dismissing age discrimination action where (1) employer submitted several sworn affidavits asserting that plaintiff was discharged solely for incompetency, (2) it was uncontradicted that plaintiff, 62 years old, was replaced by 60-year-old individual, and (3) plaintiff offered only conclusory assertion that "I believe that age was the determining factor in defendant's decision to terminate me"; mere fact that plaintiff was 62 years old when dismissed was not sufficient to raise fact question as to age discrimination. Heffernan v Colonie Country Club, Inc., 160 A.D.2d 1062, 553 N.Y.S.2d 544, 1990 N.Y. App. Div. LEXIS 3769 (N.Y. App. Div. 3d Dep't 1990).

Court properly denied leave to amend complaint (for third time) to allege that defendant religious institution had discriminated against 3-year-old disabled child in violation of CLS Exec § 296(4) by expelling child from nursery school where plaintiff's own letters and pleadings revealed that his son frequently ran out of nursery school classroom for no apparent reason, that school had legitimate reason, implemented as school policy, for classroom door to remain open, and that plaintiff himself had voluntarily removed his son from nursery school after school refused to change its policy. Posner v Central Synagogue, 202 A.D.2d 284, 609 N.Y.S.2d 195, 1994 N.Y. App. Div. LEXIS 2501 (N.Y. App. Div. 1st Dep't), app. dismissed, 83 N.Y.2d 953, 615 N.Y.S.2d 878, 639 N.E.2d 419, 1994 N.Y. LEXIS 1385 (N.Y. 1994).

Plaintiff stated cause of action for discrimination under CLS Exec § 296(1) where he alleged that defendant attempted to induce its older workers to retire early, and that he was told that had better take advantage of next retirement incentive offer that came along. Fern v IBM Corp., 204 A.D.2d 907, 612 N.Y.S.2d 492, 1994 N.Y. App. Div. LEXIS 5390 (N.Y. App. Div. 3d Dep't 1994).

Division of Human Rights properly determined that employer unlawfully discriminated against employee due to his age (63 years) where evidence showed that employer terminated employee and replaced him with younger person, and only purportedly nondiscriminatory reason proffered by employer was "downsizing due to financial difficulties." Laverack & Haines, Inc. v New York State Div. of Human Rights, 217 A.D.2d 955, 629 N.Y.S.2d 595, 1995 N.Y. App. Div. LEXIS 8381 (N.Y. App. Div. 4th Dep't 1995), rev'd, 88 N.Y.2d 734, 650 N.Y.S.2d 76, 673 N.E.2d 586, 1996 N.Y. LEXIS 3057 (N.Y. 1996).

Black shoppers could not maintain action against town for violation of CLS Exec § 296(2)(a) based on town police officers' conduct in removing them from department store at request of store manager, who suspected them of shoplifting, since town defendants did not fall within definition of persons liable under § 296(2)(a), and plaintiffs failed to set forth any facts that would support finding that agency relationship existed between town defendants and store. Robinson v Town of Colonie, 878 F. Supp. 387, 1995 U.S. Dist. LEXIS 2849 (N.D.N.Y. 1995).

Age discrimination claim of terminated dispatcher cannot be denied summarily, where gist of claim is that he was replaced by 26-year-old for conduct that, although seemingly insubordinate and rude, was in fact commonplace according to customs of dispatch room where he had worked for 25 years, because other evidence of company president's animus toward older employees leaves questions of fact remaining concerning actual reason for firing. Abramowitz v Inta-Boro Acres, Inc., 64 F. Supp. 2d 166, 1999 U.S. Dist. LEXIS 14132 (E.D.N.Y. 1999).

Employer was granted summary judgment on a 63-year-old employee's age discrimination claim, even though she stated a prima facie case, because she was unable to show that the employer's legitimate, non-discriminatory reason for terminating her was pretextual; the employer contended that it fired the employee because she could not process resident complaints efficiently, her duties were reduced, her work was reassigned to other workers, and she violated the employer's corporate policy for communicating with the media. Her supervisor's remarks about her age were nothing more than stray remarks, and he had promoted the employee and raised her salary. Tomassi v Insignia Fin. Group, Inc., 398 F. Supp. 2d 263, 2005 U.S. Dist. LEXIS 26962 (S.D.N.Y. 2005), vacated, 478 F.3d 111, 2007 U.S. App. LEXIS 3490 (2d Cir. N.Y. 2007).

Town's decision to layoff complainant from his maintenance position at town recreation center and its decision not to rehire complainant as seasonal security guard did not constitute age discrimination where layoff was based on complaints as to complainant's performance and supervisor's assessment of his performance, and security guard positions were committed to otherwise qualified people before complainant verbally announced his interest in position. 2000 Order Comm HR No. 9D-E-A-92-1200959A.

29. —Termination at age 65

A school bus driver's action challenging the validity of his termination upon his reaching the age of 65, pursuant to a regulation of the Commissioner of Education would be remitted for determination of whether Exec Law § 296(3-a)(d), which allows termination of employment due to age if age is a bona fide occupation qualification "reasonably necessary" to the performance of the job duties, affected plaintiff's entitlement to back pay and other benefits which may have resulted from his involuntary retirement at age 65. Ten Hoeve v Board of Education, 64 N.Y.2d 1036, 489 N.Y.S.2d 59, 478 N.E.2d 200, 1985 N.Y. LEXIS 16948 (N.Y. 1985).

Any claim that employment discrimination grounded on age under 65 is unlimited in scope is contrary to the public policy of this state against the employment of minors. American Airlines, Inc. v State Com. for Human Rights, 29 A.D.2d 178, 286 N.Y.S.2d 493, 1968 N.Y. App. Div. LEXIS 4784 (N.Y. App. Div. 1st Dep't 1968).

The dismissal of petitioner from his job pursuant to a provision of a company retirement plan permitting involuntary retirements before the age of 65 was not a violation of Exec Law § 296 where the company's retirement plan was obviously bona fide and not a subterfuge to evade the purposes of the Human Rights Law. Gross v New York State Human Rights Appeal Bd., 80 A.D.2d 678, 436 N.Y.S.2d 376, 1981 N.Y. App. Div. LEXIS 10378 (N.Y. App. Div. 3d Dep't 1981).

Evidence supported determination of Commission on Human Rights that petitioner was not fired because of her handicap in violation of NYC Admin Code § 8-107(1)(a) and (15) where record established that petitioner was terminated for reasons of economy, and that decision to terminate her was reached before employer learned of her medical condition; employer's humanitarian gesture of continuing petitioner's salary during 9 weeks of her convalescence would not operate to its prejudice. Buckhout v New York City Comm'n on Human Rights, 203 A.D.2d 67, 609 N.Y.S.2d 608, 1994 N.Y. App. Div. LEXIS 3610 (N.Y. App. Div. 1st Dep't 1994).

Jury's finding that employer had discharged employee in retaliation for her sexual harassment complaint was not against weight of evidence, despite employer's contention that decision to terminate employee was made before she advised employer of her complaint and that decision was based on employee's poor job performance, where (1) employee received regular and intermittent raises, was scheduled to receive another raise after date of her complaint, and had never had poor job review, and (2) she was fired shortly after submitting her sexual harassment complaint to employer. Gleason v Callanan Indus., 203 A.D.2d 750, 610 N.Y.S.2d 671, 1994 N.Y. App. Div. LEXIS 4163 (N.Y. App. Div. 3d Dep't 1994).

Jury verdict in favor of terminated security officer is vacated and judgment is entered as matter of law in favor of employer, where record unequivocally establishes that officer was terminated because he repeatedly lied when questioned about his admitted falsifications of ammunition records, because jury's verdict in plaintiff's favor on CLS Exec Law § 296 claim that he

was fired for contracting Lyme disease was based upon improper considerations that lacked evidentiary foundation. Jones v Associated Univs., 870 F. Supp. 1180, 1994 U.S. Dist. LEXIS 17920 (E.D.N.Y. 1994), aff'd, 71 F.3d 406, 1995 U.S. App. LEXIS 33395 (2d Cir. N.Y. 1995).

30. —Termination at age 70

Complaint alleged that the independent contractor was 74 years old and he was terminated because of his age, that he was told that he was "too old" to continue working and that letting him go would make way for "younger blood," and that "upon information and belief" the contractor was replaced by a younger employee; accordingly, the complaint provided defendants with fair notice of the basis for plaintiff's age discrimination claim and thus comported with the requirements of Fed. R. Civ. P. 8. Banks v Corr. Servs. Corp., 475 F. Supp. 2d 189, 2007 U.S. Dist. LEXIS 13092 (E.D.N.Y. 2007).

31. Discrimination based on arrest and/or conviction of crime

The State Division of Human Rights properly dismissed a complaint alleging an unlawful discriminatory practice where petitioner's employment as a trainee in a State psychiatric center was terminated when his employer learned that he had been charged with the sale of a controlled substance and had been adjudicated a youthful offender, since, although subdivision 15 of section 296 of the Executive Law provides that it is an unlawful discriminatory practice to deny employment to an individual by reason of his having been convicted of a criminal offense when such denial is in violation of the provisions of article 23-A of the Correction Law, in relation to actions by public agencies the provisions of article 23-A are enforceable by a proceeding brought pursuant to CPLR article 78. Perez v New York State Human Rights Appeal Board, 71 A.D.2d 150, 422 N.Y.S.2d 767, 1979 N.Y. App. Div. LEXIS 13241 (N.Y. App. Div. 3d Dep't 1979), app. denied, 49 N.Y.2d 702, 426 N.Y.S.2d 1027, 403 N.E.2d 188, 1980 N.Y. LEXIS 4983 (N.Y. 1980).

In an action alleging that an employer committed an unlawful dicriminatory act in employment by terminating plaintiff's employment solely on the basis of a criminal arrest that was disposed of in her favor, the trial court erred in granting the employer's application for disclosure of the Grand Jury minutes for use in preparing for the civil trial, notwithstanding that in a proper case a court may order the release of minutes for use at a civil trial for the limited purposes of impeachment and of leading a hostile witness, where there was no showing of a particularized need for such purposes and the application was not addressed to the testimony of a named witness. In re Application by U.S. Air for Disclosure of Grand Jury Testimony with Respect to Salanger, 97 A.D.2d 961, 469 N.Y.S.2d 39, 1983 N.Y. App. Div. LEXIS 20781 (N.Y. App. Div. 4th Dep't 1983).

An order terminating a corrections officer's employment was proper where it was based on testimony by witnesses that during a domestic argument the officer had aimed a loaded revolver at his wife, discharged it and that the bullet lodged in a wall after nearly missing his wife, even though a criminal action against the officer for the same conduct had been dismissed. Kenner v Coughlin, 105 A.D.2d 1130, 482 N.Y.S.2d 615, 1984 N.Y. App. Div. LEXIS 21227 (N.Y. App. Div. 4th Dep't 1984), app. dismissed, in part, app. denied, 65 N.Y.2d 603, 491 N.Y.S.2d 1028, 481 N.E.2d 573, 1985 N.Y. LEXIS 15104 (N.Y. 1985).

There was probable cause to believe respondent employer unlawfully discriminated against petitioner by firing him for denying existence of criminal record where he had been convicted of disorderly conduct, since petitioner truthfully answered question on employment application; crime is defined as misdemeanor or felony and disorderly conduct is neither. State Div. of Human Rights ex rel. Maymi v Sorrento Cheese Co., 115 A.D.2d 323, 495 N.Y.S.2d 865, 1985 N.Y. App. Div. LEXIS 54602 (N.Y. App. Div. 4th Dep't 1985).

Employer did not violate CLS Exec § 296 by discharging employee after criminal action against her was adjourned in contemplation of dismissal with view to ultimate dismissal of accusatory instrument in furtherance of justice pursuant to CLS CPL § 170.55, since criminal action was not yet "terminated" in employee's favor within meaning of CLS CPL § 160.50 and thus was still "pending" for purposes of § 296; criminal action is considered terminated in favor of accused under § 160.50 only where order to dismiss accusatory instrument has been entered, or where accusatory instrument is "deemed to have been dismissed" by failure to restore action to trial calendar within 6-month period, as set forth in § 170.55(2). Giles v Lockport Sav. Bank, 142 A.D.2d 943, 530 N.Y.S.2d 367, 1988 N.Y. App. Div. LEXIS 14962 (N.Y. App. Div. 4th Dep't 1988).

Judgment which dismissed petition reversed–petitioner's employment as caseworker was terminated based solely upon allegedly false statements on his employment application that he had no criminal record; petitioner contended that his discharge was arbitrary, capricious, abuse of discretion and in violation of Executive Law (Human Rights Law) § 296 (16) because he had obtained certificates of relief from civil disabilities (with box checked for "relieve the holder of all disabilities and bars to employment") as to two misdemeanor crimes of which he had been convicted as adult; in any event, petitioner had given his employer actual notice of existence of these matters, because he submitted copies of not only certificates, but also dispositions of his criminal cases along with his application–certificate of relief from civil disabilities bar forfeiture of employment based upon State law; petitioner, who became "superior", if not "outstanding" caseworker for disadvantaged, and showed great promise in community, should be enabled to continue to be valuable member of society, rather than be relegated to life of crime due to this baseless allegation that he was anything less than forthcoming about his past; Supreme Court erred in summarily dismissing petition; fact-finding hearing should be held so that both petitioner and respondent are afforded opportunity to present any evidence concerning relevant issues. Rodgers v New York City Human Resources Administration/Department of Social Services, 154 A.D.2d 233, 546 N.Y.S.2d 581, 1989 N.Y. App. Div. LEXIS 12224 (N.Y. App. Div. 1st Dep't 1989).

Court erred in summarily dismissing Article 78 petition to challenge petitioner's termination as caseworker based solely on allegedly false statements in his employment application that he had no criminal record where (1) petitioner's statements in employment application were made in good faith and on advice of counsel, (2) petitioner had obtained certificates of relief from civil disabilities, with box checked for relief from all disabilities and bars to employment, as to 2 misdemeanor crimes of which he had been convicted as adult, (3) petitioner had submitted certificates and dispositions of criminal cases along with his application, (4) petitioner was questioned by investigator from personnel department about apparent inconsistency and was subsequently informed that there would be no further problems with application, and (5) 2 years later, petitioner was terminated despite having received grades of "outstanding" and "superior" on his performance review; to summarily dismiss petition without fact-finding hearing was contrary both to intent of legislature as shown by CLS Correc § 702(2)(c) and to courts which granted petitioner second chance at life. Rodgers v New York City Human Resources Administration/Department of Social Services, 154 A.D.2d 233, 546 N.Y.S.2d 581, 1989 N.Y. App. Div. LEXIS 12224 (N.Y. App. Div. 1st Dep't 1989).

Physician was not entitled to summary judgment dismissing action for violation of CLS Exec § 296 where (1) plaintiff alleged that she was permitted to register at hospital's high-risk prenatal care clinic based on her physical examination and history, that she consented to AIDS test which proved positive for HIV antibody, and that physician then refused to treat her at clinic, told her she should have abortion, and referred her to another hospital at which she had abortion, and (2) physician failed to establish absence of any triable fact issues. Doe v Jamaica Hosp., 202 A.D.2d 386, 608 N.Y.S.2d 518, 1994 N.Y. App. Div. LEXIS 1922 (N.Y. App. Div. 2d Dep't 1994).

Court properly denied employer's motion for summary judgment in action alleging that disparate treatment and eventual discharge of employee from employment constituted unlawful racial discrimination in violation of CLS Exec § 296(1), even though employee was collaterally estopped from challenging factual findings made by arbitrator and by Administrative Law

Judge in prior quasi-judicial proceedings regarding accumulation of sufficient points to justify discharge of employee pursuant to employer's absenteeism policy, since fact issues existed as to alleged disparate treatment of employee during employment, and whether his discharge under absenteeism policy constituted pretext for racial discrimination, issues which were not raised during either of prior proceedings. Clark v Cargill, Inc., Flour Milling Div., 206 A.D.2d 870, 615 N.Y.S.2d 210, 1994 N.Y. App. Div. LEXIS 7782 (N.Y. App. Div. 4th Dep't 1994).

Termination of cashier/wire service operator for banking and brokerage firm was not due to misconduct, and thus he was not disqualified from receiving unemployment insurance benefits, even though he did not reveal on his employment application 2 arrests in 1991 for misdemeanor of aggravated harassment, where (1) those charges had been adjourned in contemplation of dismissal, and records thereof had been sealed, (2) application questions sought information about arrests for misdemeanors relating to acts of dishonesty, theft, or fraud, (3) cashier's arrests were not so related, and (4) CLS Exec § 296(16) prohibits employer, "unless specifically required or permitted by statute [from making] any inquiry about, whether in any form of application or otherwise, or to act upon adversely to the individual, any arrest or criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual." In re Claim of Ruggiero, 263 A.D.2d 554, 693 N.Y.S.2d 266, 1999 N.Y. App. Div. LEXIS 7706 (N.Y. App. Div. 3d Dep't 1999).

Commissioner's award of $25,000 in compensatory damages to an employee for mental anguish and humiliation in an age discrimination claim was not supported by the evidence, and was reduced to $15,000. New York State Tug Hill Commn. v New York State New York State Div. of Human Rights, 52 A.D.3d 1169, 860 N.Y.S.2d 698, 2008 N.Y. App. Div. LEXIS 5159 (N.Y. App. Div. 4th Dep't 2008).

In an Article 78 proceeding brought by a New York City marshal who was suspended from office after being charged with various crimes relating to his office, a directive issued by respondent officials of the Department of Investigation of the City of New York which provided that "any former Marshal who has been convicted of a crime related to the performance of his/her official duties may not be employed by any present City Marshal when such employment bears a direct relationship to the criminal offense for which the former Marshal was convicted" was constitutional on its face and as applied to petitioner and did not violate Correc Law § 752 or Exec Law § 290 where petitioner was an ex-city marshal currently employed in a marshal's office and was convicted of racketeering-based crimes said to have been committed while he was employed as a City marshal and in connection with his official duties. Ribotsky v Lupkin, 114 Misc. 2d 913, 452 N.Y.S.2d 806, 1982 N.Y. Misc. LEXIS 3586 (N.Y. Sup. Ct. 1982).

In an employment discrimination action, while N.Y. Exec. Law § 296(16) did not permit an employer to act adversely to an employee based on a pending drug possession charge followed by a conviction for disorderly conduct, the employer could consider the independent evidence of the conduct leading to the criminal charges, particularly in light of the fact that the employer was statutorily required to do a criminal background check under N.Y. Mental Hyg. Law §§ 16.33 and 31.35. Johnson v Association for the Advancement of the Blind & Retarded, 863 N.Y.S.2d 323, 21 Misc. 3d 268, 240 N.Y.L.J. 17, 2008 N.Y. Misc. LEXIS 4800 (N.Y. Sup. Ct. 2008).

Department of Corrections (DOC) properly terminated a probationary correction officer's employment—filing a false claim—even though the charge for which he was arrested was dismissed and sealed because the Human Rights Law was not violated where the DOC made an independent assessment that the conduct underlying the officer's arrest violated its internal rules and regulations, whether or not the officer's supervisor lied to the police about their relationship was irrelevant to his arrest, and there was no indicia of bias in either the police department's determination to arrest the officer, based upon its investigation, or the DOC's determination that making a false claim constituted conduct unbecoming an officer. Matter of Young v City of New York, 68 Misc. 3d 514, 124 N.Y.S.3d 892, 2020 N.Y. Misc. LEXIS 2332 (N.Y. Sup. Ct. 2020).

Employee's claims against employer under NY Exec Law § 296(16) were not preempted by federal law, where employer discharged employee upon his arrest on charges that were later dismissed, because employee's claims did not involve interpretation of a collective bargaining agreement. Gonzalez v Dynair Service Co., 728 F. Supp. 100, 1990 U.S. Dist. LEXIS 701 (E.D.N.Y. 1990).

32. Discrimination based on maritial status

Human Rights Law § 296(1)(a), making it an unlawful discriminatory practice for an employer to refuse to hire or employ or to bar or to discharge from employment an individual because of his marital status, did not prohibit an employer from enforcing an employment rule forbidding an employee from working under the supervision of a relative, which term was defined as including a spouse, a parent, a sibling, or an offspring, since the term marital status proscribed conduct that discriminated according to the individual's status, i.e., divorced, separated, widowed or single, and did not prohibit discrimination based on an individual's marital relationship to a specific spouse. The Commissioner of Human Rights erred in sustaining a complaint alleging that the complainant was discriminated against because of her marital status when she was terminated by her employer while employed under the direct supervision of her husband, since the term marital status means that employers may no longer decide whether to hire, fire, or promote someone because he or she is single, married, divorced, separated or the like, and the complainant was not discharged because she was married but rather because she was married to her supervisor. Manhattan Pizza Hut, Inc. v New York State Human Rights Appeal Board, 51 N.Y.2d 506, 434 N.Y.S.2d 961, 415 N.E.2d 950, 1980 N.Y. LEXIS 2744 (N.Y. 1980).

A village's conduct in terminating the employment of the wife of a tax assessor who had angered certain village residents by increasing the assessments of their properties did not constitute discrimination in employment on the basis of marital status prohibited by Exec Law § 296; rather, the conduct was an act of political retaliation against the husband who was employed by a neighboring municipality but whose jurisdiction extended to the village. State Div. of Human Rights ex rel. Howarth v Spencerport, 78 A.D.2d 50, 434 N.Y.S.2d 52, 1980 N.Y. App. Div. LEXIS 13406 (N.Y. App. Div. 4th Dep't 1980).

Termination of petitioner's employment as correction officer did not violate CLS Exec §§ 291 and 296, which prohibit discharge of employee due to marital status, although petitioner's undisclosed marriage to inmate and parolee was mentioned in notice of discipline, where basis for her termination was violation of Employees' Manual rules prohibiting employees from engaging in relationship with any inmate in manner or form not necessary or proper for discharge of duties, and requiring that any such relationship be reported. Vega v Department of Correctional Services, 186 A.D.2d 340, 588 N.Y.S.2d 202, 1992 N.Y. App. Div. LEXIS 10816 (N.Y. App. Div. 3d Dep't 1992), app. dismissed, 81 N.Y.2d 782, 594 N.Y.S.2d 718, 610 N.E.2d 391 (N.Y. 1993).

Plaintiff employee established prima facie case of discrimination based on marital status under CLS Exec § 296 where he submitted evidence that his supervisor had stated that one reason he was chosen for reduction-in-force layoff was that he was single and could withstand lack of work better from financial standpoint than co-worker who was married. Kipper v Doron Precision Sys., 194 A.D.2d 855, 598 N.Y.S.2d 399, 1993 N.Y. App. Div. LEXIS 5507 (N.Y. App. Div. 3d Dep't 1993).

Award of $54,000 for emotional distress as result or retaliatory discharge in violation of CLS Exec § 296(1)(e) was not excessive where (1) plaintiff testified that she suffered from irritable bowel syndrome, pains in her sides, insomnia, migraines and depression, and that as result thereof she sought medical treatment, (2) after her discharge, she was deeply concerned about her ability to support herself and her child because she was single mother with limited professional experience and training, and (3) she had been unable to secure comparable employment for approximately one year. Gleason v Callanan Indus., 203 A.D.2d 750, 610

N.Y.S.2d 671, 1994 N.Y. App. Div. LEXIS 4163 (N.Y. App. Div. 3d Dep't 1994).

Damages for lost wages in action under CLS Exec Art 15 should be calculated by difference between what plaintiff would have earned had he or she continued to remain employed with offending employer and what he or she actually earned; thus, in action for retaliatory discharge in violation of CLS Exec § 296(1)(i), jury was entitled to presume that plaintiff was to receive wage increases in years following her discharge commensurate with wage increases that she had received in past. Gleason v Callanan Indus., 203 A.D.2d 750, 610 N.Y.S.2d 671, 1994 N.Y. App. Div. LEXIS 4163 (N.Y. App. Div. 3d Dep't 1994).

Defendant was entitled to dismissal of action for age discrimination since plaintiff had signed release whereby she released defendant from any and all causes of action arising from or during her employment, including claims for employment discrimination; plaintiff could not escape impact of release by claiming that she had misinterpreted terms of release. Koster v Ketchum Communications, 204 A.D.2d 280, 611 N.Y.S.2d 298, 1994 N.Y. App. Div. LEXIS 4571 (N.Y. App. Div. 2d Dep't 1994), app. dismissed, 85 N.Y.2d 857, 639 N.Y.S.2d 782, 662 N.E.2d 1072, 1995 N.Y. LEXIS 266 (N.Y. 1995).

Assertion that plaintiff "Annette Cramer" was terminated "because she was married to Joseph Cramer" did not set forth cognizable action under CLS Exec § 296(1)(a), which prohibits discrimination based on individual's marital status rather than on fact that individual is married to any particular partner. Cramer v Newburgh Molded Prods., 228 A.D.2d 541, 645 N.Y.S.2d 46, 1996 N.Y. App. Div. LEXIS 7114 (N.Y. App. Div. 2d Dep't), app. denied, 89 N.Y.2d 803, 653 N.Y.S.2d 280, 675 N.E.2d 1233, 1996 N.Y. LEXIS 4267 (N.Y. 1996).

In action under CLS Exec § 296, plaintiff's claim that defendant's discriminatory firing caused her to choose to have abortion, and to separate from her husband, would be dismissed for lack of proximate cause. Martinez v Ketchum Advertising Co., 865 F. Supp. 166, 1994 U.S. Dist. LEXIS 14330 (S.D.N.Y. 1994).

Employee's claim alleging discrimination pursuant to N.Y. Exec. Law § 296(1)(a) due to his marital status to his wife, who was a fellow employee with the same employer, could not stand because there was no protection afforded under the New York Human Rights Law regarding one's marriage to a particular person. The relevant provision related to the employee's "marital status" not his or her "marital relationships." Pibouin v CA, Inc., 867 F. Supp. 2d 315, 2012 U.S. Dist. LEXIS 47102 (E.D.N.Y. 2012).

33. Discrimination based on disability, generally

In an Article 78 proceeding in which a city railroad clerk contended that his employer terminated his probationary appointment to a supervisory position because of a physical disability in violation of Exec Law § 296, the clerk's petition was improperly dismissed without a hearing, since discrimination is barred against an impaired individual who is reasonably able to do what the position requires; on remand, the employer must submit an answer addressing the discrimination issue, and it must be decided whether facts exist justifying conclusion that clerk cannot perform the job in a reasonable manner. Miller v Ravitch, 60 N.Y.2d 527, 470 N.Y.S.2d 558, 458 N.E.2d 1235, 1983 N.Y. LEXIS 3542 (N.Y. 1983).

An employee is properly terminated from employment where he indicated in his job application that he had no ailment or handicap such as would prevent him from doing any kind of work and, after being hired for a particular job he informed his employer that he was physically unable to perform that job; the employer was under no obligation to offer him a job which he could perform, and there was no unlawful discrimination against the employee. Korn v New York State Human Rights Appeal Board, 64 A.D.2d 308, 410 N.Y.S.2d 138, 1978 N.Y. App. Div. LEXIS 12735 (N.Y. App. Div. 3d Dep't 1978).

An employer who pursuant to a collective bargaining agreement construed an employee's failure to respond to a request for medical verification that she was unable to return to work after having been determined capable of doing so as a voluntary resignation did not engage in unlawful discriminatory practices, where the employer would have made such a determination with any employee who also failed to respond. Varano v New York State Human Rights Appeal Bd., 96 A.D.2d 1044, 466 N.Y.S.2d 454, 1983 N.Y. App. Div. LEXIS 19701 (N.Y. App. Div. 2d Dep't 1983).

CLS Executive § 296, making it unlawful discriminatory practice for employer to discharge employee because of disability, is limited under CLS Executive § 292 for disabilities which do not prevent employee from performing activities involved in job or occupation in reasonable manner; where record discloses that employee's physical disability prevented her from doing job in reasonable manner since it caused her to miss unacceptably high number of days of work in job that required consistently good attendance, complaint of unlawful discriminatory practice based on physical disability is dismissed. Silk v Huck Installation & Equipment Div., 109 A.D.2d 930, 486 N.Y.S.2d 406, 1985 N.Y. App. Div. LEXIS 47452 (N.Y. App. Div. 3d Dep't 1985).

Probationary employee who has been on medical leave without pay for some 5 months prior to termination of employment is not discriminatorily discharged where records indicate that employee was not reasonably able to perform duties of subject position. Dukelow v Lum, 112 A.D.2d 302, 491 N.Y.S.2d 990, 1985 N.Y. App. Div. LEXIS 56091 (N.Y. App. Div. 2d Dep't 1985).

In order to establish liability it is incumbent upon employee to prove that employment termination was because of disability and that, although disabled, his impairment did not preclude him from performing his duties in reasonable manner; summary judgment may not be granted where there is no clear indication of reason for employee's discharge. Doin v North American Carbide, Inc., 112 A.D.2d 499, 490 N.Y.S.2d 910, 1985 N.Y. App. Div. LEXIS 55845 (N.Y. App. Div. 3d Dep't 1985).

Probationary New York City Transit Police Officer who was unable to reasonably do what position required because of disability was not improperly terminated pursuant to CLS Exec § 296; under CLS Exec § 292 term "disability" is limited to disabilities which do not prevent complainant from performing in reasonable manner activities involved in job or occupation, and since officer could not be placed on patrol duty (his most important function as police officer), termination of his employment was proper. Caminiti v New York City Transit Authority Police Dep't, 125 A.D.2d 306, 508 N.Y.S.2d 590, 1986 N.Y. App. Div. LEXIS 62568 (N.Y. App. Div. 2d Dep't 1986).

Determination that removal of employee without subjecting him to physical examination constituted discrimination on basis of physical disability was supported by substantial evidence where employer (1) relied merely on lay opinion of one of its other employees that dismissed employee was disabled when he attempted to return to work following heart bypass surgery, (2) terminated employee without consulting medical personnel, (3) did not discuss matter with employee or his doctor, and (4) did not examine employee's medical records or seek to have him evaluated by doctors; moreover, employee's own doctor certified that he was able to return to his usual duties as warehouse manager, that he had been asymptomatic since operation, and that he had no medical restrictions. State Div. of Human Rights ex rel. Pecci v S. A. Cook Factory Showroom, 132 A.D.2d 935, 518 N.Y.S.2d 483, 1987 N.Y. App. Div. LEXIS 49388 (N.Y. App. Div. 4th Dep't 1987), aff'd, 71 N.Y.2d 922, 528 N.Y.S.2d 537, 523 N.E.2d 824, 1988 N.Y. LEXIS 592 (N.Y. 1988).

Employer was entitled to summary judgment dismissing employee's action alleging discrimination due to disability under CLS Exec § 296 where it was undisputed that employee's excessive absences were caused by various illnesses requiring hospitalization and employer's absence control plan required good employee attendance to effectively provide its communication services 24 hours per day, 365 days per year; since employee's condition was preventing her from reasonably performing her tasks, employee's decision to dismiss her was not unlawful discrimination. Giaquinto v New York Tel. Co., 135 A.D.2d 928, 522 N.Y.S.2d 329, 1987 N.Y. App. Div. LEXIS 52841 (N.Y. App. Div. 3d Dep't 1987), app. denied, 73 N.Y.2d 701, 535 N.Y.S.2d 595, 532 N.E.2d 101, 1988 N.Y. LEXIS 3347 (N.Y. 1988).

Court erred in granting summary judgment dismissing employee's cause of action for wrongful discharge because of disability in

violation of CLS Exec § 296, where fact question existed as to whether employer, in terminating employee for misconduct, had good faith belief that employee was no longer disabled during 6-month period in which he received disability benefits, based on employee's statement that he had been free of pain for 6 months. Miano v Caterpillar Tractor Co., 184 A.D.2d 807, 584 N.Y.S.2d 234, 1992 N.Y. App. Div. LEXIS 7822 (N.Y. App. Div. 3d Dep't 1992).

Employer was entitled to summary judgment in former employee's action for wrongful discharge where employee, because of non-job related automobile accident, suffered injuries which concededly often rendered him totally unable to perform his work; under circumstances, employer was permitted, under CLS Exec § 296, to dismiss employee due to his excessive absences and unsatisfactory performance. DiGeronimo v First Nationwide Bank, 209 A.D.2d 575, 619 N.Y.S.2d 640, 1994 N.Y. App. Div. LEXIS 11527 (N.Y. App. Div. 2d Dep't 1994), app. dismissed, 85 N.Y.2d 905, 627 N.Y.S.2d 326, 650 N.E.2d 1328, 1995 N.Y. LEXIS 5655 (N.Y. 1995).

Employer was entitled to summary judgment in action alleging that it violated CLS Exec § 296 by discharging plaintiff from his position as store manager, where plaintiff sustained foot injury that prevented him from performing his duties, which required much standing, bending, lifting, and walking around store to supervise other employees and where, upon his return to work after second surgical procedure, plaintiff admittedly only walked around store for about "an hour a day" and spent rest of his time sitting. Lawson v High Bar Wholesale Food Distribs., 217 A.D.2d 646, 629 N.Y.S.2d 807, 1995 N.Y. App. Div. LEXIS 8104 (N.Y. App. Div. 2d Dep't 1995).

Evidence supported determination that employee was not improperly terminated because of disability or in retaliation for instituting Human Rights proceedings where it was shown that she had received poor job performance ratings for 3 years, had many unexplained absences, and offered false excuses for missing work. Kamen v Rosa, 223 A.D.2d 433, 636 N.Y.S.2d 59, 1996 N.Y. App. Div. LEXIS 337 (N.Y. App. Div. 1st Dep't 1996).

There was no basis to set aside jury verdict dismissing plaintiff's claim that county failed to appoint her to permanent security guard position because of her physical disability although her eligibility for position was certified under CLS Civ S § 55-a, where she failed civil service exam administered for that position, and she failed to establish that commissioner had designated prescribed number of positions with duties that could be performed by certified physically disabled individuals or that open position existed in this category to which she could be appointed. Coluccio v County of Albany, 258 A.D.2d 756, 685 N.Y.S.2d 823, 1999 N.Y. App. Div. LEXIS 1165 (N.Y. App. Div. 3d Dep't 1999).

There was no basis to conclude that bridge and tunnel authority discriminated against employee on basis of disability by discharging him under CLS Civ S § 73 for continuous absence from work due to disability for more than one year where, in his 12-year absence on disability leave, employee never sought to return to work with or without accommodation, even after he was denied ordinary disability retirement. Fallon v Triborough Bridge & Tunnel Auth., 259 A.D.2d 377, 687 N.Y.S.2d 123, 1999 N.Y. App. Div. LEXIS 2835 (N.Y. App. Div. 1st Dep't 1999).

Court properly dismissed Article 78 proceeding in which petitioner alleged that his probationary employment was terminated based on perceived disability in violation of anti-discrimination laws where (1) in order to settle disciplinary charges relating to extensive history of absenteeism, petitioner agreed that, during stipulated probationary period, he could be terminated "without recourse to Article 33 of the State-CSEA Agreement or any other provision or law," and (2) during next 6 months, he was absent from work 7 times. Williams v Commissioner of the Office of Mental Health, 259 A.D.2d 623, 686 N.Y.S.2d 788, 1999 N.Y. App. Div. LEXIS 2496 (N.Y. App. Div. 2d Dep't 1999).

At-will employee asserting disability discrimination failed to raise triable issue sufficient to defeat defendants' summary judgment motion where she had been unable to perform her duties at time of adverse employment decision. Kelly v Poughkeepsie Area Chamber of Commerce, 265 A.D.2d 307, 696 N.Y.S.2d 215, 1999 N.Y. App. Div. LEXIS 9674 (N.Y. App. Div. 2d Dep't 1999).

Defendants were entitled to summary judgment dismissing employee's action alleging that they unlawfully discriminated against her by discharging her because of her disability in violation of CLS Exec § 296(1)(a) where (1) within a few days after employee was fired for poor work performance, she applied for workers' compensation benefits, claiming that she was totally disabled and unable to work as result of back injury sustained during course of her employment, (2) CLS Exec § 292(21) limits Human Rights Law recovery to disabilities that "do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held," and (3) employee could not claim that she was entitled to workers' compensation benefits on ground that she was totally disabled and, at same time, claim that her "disability" was within protection of § 292(21). Sherman v Kang, 275 A.D.2d 1016, 713 N.Y.S.2d 597, 2000 N.Y. App. Div. LEXIS 9602 (N.Y. App. Div. 4th Dep't 2000).

In action alleging that plaintiff was discharged from her job as receptionist and clerical worker, in violation of state and city Human Rights Laws, after it was discovered that she had condition similar to carpal tunnel syndrome ("bilateral ulnar nerve entrapment"), defendants were not entitled to summary judgment on ground that plaintiff's employment was terminated solely because of her poor job performance, as triable issues existed as to whether her disability prevented her from performing her job in reasonable manner and/or whether her termination was motivated by legitimate non-discriminatory reason. Umansky v Masterpiece Int'l Ltd., 276 A.D.2d 691, 714 N.Y.S.2d 735, 2000 N.Y. App. Div. LEXIS 10772 (N.Y. App. Div. 2d Dep't 2000).

Employee discrimination complaint against New York City Department of Correction (DOC) alleging harassment based on "perceived disability" was devoid of merit, as complainant's erratic and hostile conduct (including use of excessive force against inmates and verbal abuse of superiors and fellow officers) warranted subjecting him to drug tests and psychiatric evaluation, and DOC's precaution of first suspending and then terminating him could not be viewed as unreasonable or discriminatory, although test results were negative, given DOC's responsibility for safety of employees and inmates, its exposure to liability for any injury that might result, and fact that complainant's behavior continued to be erratic. Robinson v New York State Div. of Human Rights, 277 A.D.2d 76, 716 N.Y.S.2d 47, 2000 N.Y. App. Div. LEXIS 12002 (N.Y. App. Div. 1st Dep't 2000), app. dismissed, 96 N.Y.2d 775, 725 N.Y.S.2d 633, 749 N.E.2d 202, 2001 N.Y. LEXIS 586 (N.Y. 2001).

Determination that an employer violated N.Y. Exec. Law § 292(21-e) by failing to provide reasonable accommodations for the complainant's disability, which was a sensitivity to an ingredient in a cleaning solution used in her work, was supported by substantial evidence because, although the employer had protective equipment at the work site that may have alleviated the complainant's adverse reaction to the ingredient at issue, at no time before her termination from employment did the employer advise the complainant that the protective equipment was available for her use. Neither of the complainant's supervisors addressed the medical issues raised by the complainant and her physician before terminating her. Matter of New Venture Gear, Inc. v New York State Div. of Human Rights, 41 A.D.3d 1265, 839 N.Y.S.2d 375, 2007 N.Y. App. Div. LEXIS 7165 (N.Y. App. Div. 4th Dep't 2007).

Trial court properly concluded that an employee failed to state a cause of action for employment discrimination on the basis of disability as the employee failed to set forth factual allegations sufficient to show that, upon the provision of reasonable accommodations, she could perform the essential functions of her job. Staskowski v Nassau Community Coll., 53 A.D.3d 611, 862 N.Y.S.2d 544, 2008 N.Y. App. Div. LEXIS 6202 (N.Y. App. Div. 2d Dep't 2008).

Employee was not entitled to a judgment on a disability discrimination claim under N.Y. Exec. Law § 296 as her termination under N.Y. Civ. Serv. Law § 71 from her job as a developmental aide with the Office of Mental Retardation and Developmental Disabilities (OMRDD) was appropriate because the employee could no longer perform the essential functions of her

job, such as lifting and performing physical interventions with disabled individuals; even if she was reassigned to a work location with higher functioning individuals, she would have to do some lifting in certain circumstances. Gill v Maul, 61 A.D.3d 1159, 876 N.Y.S.2d 751, 2009 N.Y. App. Div. LEXIS 2635 (N.Y. App. Div. 3d Dep't 2009).

Finding that an employee suffered employment discrimination based on disability was proper because the employee testified that the restaurant manager told him he was fired from his part-time dishwashing job because of scarring on his head caused by a psoriasis and cellulitis condition, which presented a prima facie case of discrimination, and the employer's three explanations for the employee's termination were pretextual; there was no evidence that the employee was unable to perform his job responsibilities because of his condition and the employer was not permitted to discriminate on the basis of customers' preferences. There was no showing that the employee's condition constituted a health code violation, and while the employee's change in shift at another job required a change in his schedule with the employer, the employee was never warned that he could be terminated based on his unavailability. Matter of Tosha Rests., LLC v New York State Div. of Human Rights, 79 A.D.3d 1337, 911 N.Y.S.2d 734, 2010 N.Y. App. Div. LEXIS 9173 (N.Y. App. Div. 3d Dep't 2010).

Terminated employee's New York State Human Rights Law, N.Y. Exec. Law § 296(1)(a), and the New York City Human Rights Law, New York City, N.Y., Admin. Code § 8-107(1)(a), claim failed where: (1) employee was unable to perform the duties of his job as a construction inspector because of his lung condition, and no reasonable accommodation was available under N.Y. Exec. Law § 292(21) and New York City, N.Y., Admin. Code § 8-107(15) as the only way the employee was able to report on construction progress was to be at the site; (2) the employee could not complete his duties from the central office; and (3) the employee's doctor and the employee stated that the employee could not visit construction sites. Jacobsen v New York City Health & Hosps. Corp., 97 A.D.3d 428, 948 N.Y.S.2d 586, 2012 N.Y. App. Div. LEXIS 5386 (N.Y. App. Div. 1st Dep't 2012), aff'd in part, modified, 22 N.Y.3d 824, 988 N.Y.S.2d 86, 11 N.E.3d 159, 2014 N.Y. LEXIS 570 (N.Y. 2014).

Terminated employee's New York State Human Rights Law, N.Y. Exec. Law § 296(1)(a), and the New York City Human Rights Law, New York City, N.Y., Admin. Code § 8-107(1)(a), claim failed as the employer engaged in an interactive process for purposes of N.Y. Exec. Law § 292 and New York City, N.Y., Admin. Code § 8-107(15) by: (1) seeking clarification from the employee's doctor, keeping the employee's job open during two separate medical leaves, and communicating with the employee and his doctor; and (2) it was only after it was confirmed that the employee could not work at construction sites that he was terminated. Jacobsen v New York City Health & Hosps. Corp., 97 A.D.3d 428, 948 N.Y.S.2d 586, 2012 N.Y. App. Div. LEXIS 5386 (N.Y. App. Div. 1st Dep't 2012), aff'd in part, modified, 22 N.Y.3d 824, 988 N.Y.S.2d 86, 11 N.E.3d 159, 2014 N.Y. LEXIS 570 (N.Y. 2014).

Employee's claims under N.Y. Exec. Law § 296(1)(a) and New York City, N.Y., Admin. Code § 8-107(1)(a) were properly dismissed because the employee, through counsel, abruptly cut off the interactive process begun by the employer to reach a mutually acceptable accommodation. Romanello v Intesa Sanpaolo S.p.A., 97 A.D.3d 449, 949 N.Y.S.2d 345, 2012 N.Y. App. Div. LEXIS 5517 (N.Y. App. Div. 1st Dep't 2012), aff'd in part, modified, 22 N.Y.3d 881, 976 N.Y.S.2d 426, 998 N.E.2d 1050, 2013 N.Y. LEXIS 2755 (N.Y. 2013).

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Division of Human Rights properly concluded that a hearing-impaired court interpreter established a prima facie case of disability discrimination because permitting the interpreter to wear a hearing aid was a reasonable accommodation and would not pose a significant risk of substantial harm where the employer failed to provide any legitimate non-discriminatory reason for its decision, no sufficiently individualized assessment occurred, and, given the employer's blanket policy barring hearing-impaired persons from employment as court officers and its failure to accommodate the employee who had an asymmetric hearing loss, the civil penalty of $ 30,000 was correctly assessed. Matter of New York State Unified Ct. Sys. v New York State Div. of Human Rights, 180 A.D.3d 555, 120 N.Y.S.3d 292, 2020 N.Y. App. Div. LEXIS 1244 (N.Y. App. Div. 1st Dep't), app. denied, 35 N.Y.3d 916, 157 N.E.3d 141, 2020 N.Y. LEXIS 2545 (N.Y. 2020).

CLS Exec § 296(1)(a) claim for wrongful discharge based on physical disability was not exempt from broad arbitration clause in employment contract subject to Federal Arbitration Act, 9 USCS §§ 1 et seq., notwithstanding plaintiff's contention that her employment as registered securities representative involved transactions in commerce, since absence of federal statute prohibiting disability-based discrimination by private employers precluded inference that Congress intended to exempt such category of claims from rigorous enforcement of arbitration claims required by policy underlying Federal Arbitration Act. DeSapio v Josephthal & Co., 143 Misc. 2d 611, 540 N.Y.S.2d 932, 1989 N.Y. Misc. LEXIS 228 (N.Y. Sup. Ct. 1989).

In discrimination cases under N.Y. Exec. Law § 296, a discriminatory intent may have been inferred from the very fact that an employer offered a sham excuse for its action, and a plaintiff may have defeated a motion for summary judgment by raising a triable issue of fact concerning either the falsity of the employer's explanation for the challenged action or the employer's discriminatory motive; however, discrimination count was properly dismissed where nurse failed to raise a triable fact issue concerning either the falsity of the hospital's reason for terminating her employment or the alleged discriminatory motive of the hospital for its actions. Morse v Wyo. County Cmty. Hosp. & Nursing Facility, 305 A.D.2d 1028, 758 N.Y.S.2d 749, 2003 N.Y. App. Div. LEXIS 4726 (N.Y. App. Div. 4th Dep't 2003).

State university health science center established that a resident's narcolepsy prevented the resident from performing his duties in a reasonable manner despite reasonable attempts to accommodate his needs, and the trial court erred by denying the center's motion for summary judgment on the resident's claim that he was illegally terminated from his position, in violation of N.Y. Exec. Law § 296 and New York City, N.Y., Admin. Code § 8-107. Timashpolsky v State Univ. of N.Y. Health Sci. Ctr., 306 A.D.2d 271, 761 N.Y.S.2d 94, 2003 N.Y. App. Div. LEXIS 6244 (N.Y. App. Div. 2d Dep't 2003), app. denied, 1 N.Y.3d 507, 776 N.Y.S.2d 223, 808 N.E.2d 359, 2004 N.Y. LEXIS 78 (N.Y. 2004).

Employee's discrimination action based on her alleged disability failed because by her own admission, the employee could not perform an essential function of her customer service job, even with an accommodation. The employer's statutory obligation to provide a "reasonable accommodation" did not extend to reassignment or transfer of the employee to another position, particularly where the employee failed to adequately explain the extend and limits of her restriction. Pimentel v Citibank, N.A., 29 A.D.3d 141, 811 N.Y.S.2d 381, 2006 N.Y. App. Div. LEXIS 2949 (N.Y. App. Div. 1st Dep't), app. denied, 7 N.Y.3d 707, 854 N.E.2d 1277, 2006 N.Y. LEXIS 2120 (N.Y. 2006).

Substantial evidence supported a finding that a state department of correction (DOC) unlawfully discriminated against a correction officer on the basis of a disability under N.Y. Exec. Law § 296 by terminating his employment allegedly based on N.Y. Civ. Serv. Law § 73 as while a DOC medical examiner indicated that the officer could not perform his duties after suffering a heart attack because a physical confrontation with an inmate could possibly damage his defibrillator, such a possibility was speculative and the treating cardiologist, as well as a physician who performed an independent medical examination, found that the officer could work without restriction. Matter of New York State Dept. of Correctional Servs. v New York State Div. of Human

Rights, 57 A.D.3d 1057, 868 N.Y.S.2d 387, 2008 N.Y. App. Div. LEXIS 9201 (N.Y. App. Div. 3d Dep't 2008).

Dismissal of an actor's disability discrimination claim was error because the actor sufficiently stated a claim under, inter alia, N.Y. Exec. Law § 296; the actor stated that he suffered a disability when he was injured and that, at the time of his termination, he was still capable of resuming his employment as a performer. The production company's stated reason for the actor's termination was directly related to his disability, or its perception that he was disabled, i.e., that he was not eligible for the medical leave he had taken after his surgery to repair the injury he suffered. Vig v New York Hairspray Co., L.P., 67 A.D.3d 140, 885 N.Y.S.2d 74, 2009 N.Y. App. Div. LEXIS 6312 (N.Y. App. Div. 1st Dep't 2009).

State Division of Human Rights dismissal of former employee's disability discrimination claim was upheld in an N.Y. Exec. Law § 298 proceeding because the employer made reasonable efforts to both communicate with the former employee and consider accommodations requested, and former employee's delay in responding to employer was unexplained; the employer kept the former employee and his lawyer informed of the leave time, but, after the request for additional information, neither of them contacted the employer to inquire about the status of the accommodations request, or seek additional time to respond to the employer's inquiry. Matter of Vinikoff v New York State Div. of Human Rights, 83 A.D.3d 1159, 920 N.Y.S.2d 458, 2011 N.Y. App. Div. LEXIS 2698 (N.Y. App. Div. 3d Dep't 2011).

In an employment discrimination case, the federal district court properly granted summary judgment because plaintiff was collaterally estopped from asserting claims under ADA and the New York State Human Rights Law that he raised in a N.Y. C.P.L.R. art. 78 proceeding before the New York Supreme Court; plaintiff's state petition specifically asserted that his disqualification violated N.Y. Exec. Law § 296 and could be actionable pursuant to the ADA. The state supreme court reasonably concluded it would have been impossible to provide any reasonable accommodations for the essential functions of a police officer, because plaintiff could become mentally or physically incapacitated during bursts of severe exertion. Roth v Cty. of Nassau, 747 Fed. Appx. 891, 2019 U.S. App. LEXIS 1526 (2d Cir. N.Y.), cert. denied, 139 S. Ct. 2674, 204 L. Ed. 2d 1070, 2019 U.S. LEXIS 3756 (U.S. 2019).

Former employee who had performed landscaping and maintenance work for a county's parks department sufficiently stated a claim of disability discrimination under the New York State Human Rights Law, N.Y. Exec. Law § 296, against his former supervisor and park superintendents because the employee alleged that he suffered from a mental disability, that he was able to perform the essential functions of job, and that he was discharged on the basis of his disability. The employees' allegation that he received permission to leave work early gave rise to an inference that the decision to discharge the employee was based on unlawful discrimination rather than on the fact that the employee left work fifteen minutes early. Costabile v County of Westchester, 2007 U.S. Dist. LEXIS 29787 (S.D.N.Y. Apr. 20, 2007), amended, 485 F. Supp. 2d 424, 2007 U.S. Dist. LEXIS 33484 (S.D.N.Y. 2007).

Directed verdict for an employer on employee's N.Y. Exec. Law § 296 of the New York Human Rights Law claim was vacated and remanded; because the employee's evidence was sufficient to survive judgment as a matter of law on her Rehabilitation Act, 29 USCS § 701 et seq., claim, then a fortiori her New York Human Rights Law claim should have been submitted to the jury. Peters v Baldwin Union Free Sch. Dist., 320 F.3d 164, 2003 U.S. App. LEXIS 2510 (2d Cir. N.Y. 2003).

Employee's inability to perform part of his job may provide legitimate, non-discriminatory reason for terminating employment. O'Keefe v Niagara Mohawk Power Corp., 714 F. Supp. 622, 1989 U.S. Dist. LEXIS 6454 (N.D.N.Y. 1989).

Human Rights Law claim under CLS Exec Law § 296 need not be denied summarily, where former railroad worker supplies substantial evidence showing himself qualified to perform duties of trainman/freight conductor despite loss of his right hand and lower arm, because claim is not preempted by Railway Labor Act (45 USCS §§ 151 et seq.) and complaint makes out prima facie case of discrimination on basis of his disability. Jefferlone v Canadian Pac. (U.S.), 887 F. Supp. 487, 1995 U.S. Dist. LEXIS 7802 (W.D.N.Y. 1995).

Railroad employee who lost his hand and lower arm in railroad accident established prima facie case of unlawful discrimination based on physical disability where he showed that railroad refused to allow him to "bump" into bargaining unit position of trainman/freight conductor after his management position was eliminated, that railroad did not evaluate his ability to do tasks necessary for position or give him opportunity to show that he was qualified, that examining physician found him to be medically qualified for position, that his management position had periodically required him to perform duties of trainman/freight conductor, and that he was capable of performing those duties. Jefferlone v Canadian Pac. (U.S.), 887 F. Supp. 487, 1995 U.S. Dist. LEXIS 7802 (W.D.N.Y. 1995).

Railway Labor Act (45 USCS §§ 151 et seq.) did not preempt claim by railroad employee who alleged that railroad unlawfully discriminated against him on basis of disability after his hand and lower arm were amputated; trier of fact could decide, without interpreting parties' collective bargaining agreement, whether railroad violated New York law when it refused to allow employee to "bump" into bargaining unit position of trainman/freight conductor after his management position was eliminated, where complaint alleged that railroad did not evaluate employee's ability to do tasks necessary for position or give him opportunity to show that he was qualified, even though examining physician had reported that he was capable of performing necessary job functions. Jefferlone v Canadian Pac. (U.S.), 887 F. Supp. 487, 1995 U.S. Dist. LEXIS 7802 (W.D.N.Y. 1995).

Mere fact that plaintiff was discharged shortly after he voluntarily revealed his disability to his employer did not, by itself, establish factual basis to infer illegal discrimination where there was no evidence of underlying animus, plaintiff admittedly was met with sympathetic to neutral reactions from people he informed of his disability, and employer met its burden of showing reasonable, independent, and nondiscriminatory motive for discharge. Fitzgerald v Alleghany Corp., 904 F. Supp. 223, 1995 U.S. Dist. LEXIS 17337 (S.D.N.Y. 1995).

Deaf employee's claim under New York State Human Rights Law (CLS Exec Law §§ 290 et seq.) will not be denied summarily, where deaf employee makes out prima facie case alleging his firing was caused by lack of qualified interpreter at meeting regarding employee's placement of money of co-worker in his locker, because analysis of disability discrimination claim under § 296 is substantially same as that for failure-to-accommodate claim under Americans with Disabilities Act (42 USCS §§ 12101 et seq.). Mohamed v Marriott Int'l, 905 F. Supp. 141, 1995 U.S. Dist. LEXIS 15762 (S.D.N.Y. 1995).

Employee's status as breast-feeding mother does not render her "disabled" under Human Rights Law; to extent that plaintiff argues that her child must breast-feed as matter of medical necessity, any disability is that of child alone. Bond v Sterling, Inc., 997 F. Supp. 306, 1998 U.S. Dist. LEXIS 3103 (N.D.N.Y. 1998).

African-American clerk's disability discrimination claim must be dismissed, where she developed carpal tunnel syndrome, and employer responded by getting her ergonomically friendly work station and chair, assigning her to records department, and allowing her to type no more than 4 hours per day, because nothing in record supports her contentions that (1) her disabilities were not accommodated, and (2) employer reaction to her medical restrictions was racially biased. Hudson v Delphi Energy & Engine Mgmt. Sys., 10 F. Supp. 2d 256, 1998 U.S. Dist. LEXIS 16072 (W.D.N.Y. 1998).

Gender and disability discrimination claims against Postal Service, brought pursuant to Exec § 296, must be dismissed, where former employee sues following her discharge for excessive absences, because claims are preempted by federal discrimination law. Snay v United States Postal Serv., 31 F. Supp. 2d 92, 1998 U.S. Dist. LEXIS 18860 (N.D.N.Y. 1998).

Former nurse anesthetist has no viable state disability discrimination claim against medical center, where he really is only

contesting disparity in long-term disability benefits for employees with mental, as opposed to physical, disorders, because complaint admits he is unable to perform each of material duties of his former regular occupation, and he is not qualified to sue for disability discrimination under Exec § 296. Muller v First UNUM Life Ins. Co., 90 F. Supp. 2d 204, 2000 U.S. Dist. LEXIS 4026 (N.D.N.Y. 2000).

Employment discrimination case is remanded but without award of fees and costs under 28 USCS § 1447(c), even though employer removed arguing claim regarding termination for taking leaves of absence states claim only under federal law, where court finds such termination can support discrimination cause of action under Exec § 296, because employer's removal theory was colorable but ultimately unsuccessful. Bellido-Sullivan v American Int'l Group, 123 F. Supp. 2d 161, 2000 U.S. Dist. LEXIS 16970 (S.D.N.Y. 2000).

Where a city bus driver was terminated after having a mechanical heart valve implanted and starting a life-long anticoagulant regimen, the driver's disability discrimination claims failed to survive summary judgment because the employers did not perceive the driver as disabled and the driver was not qualified to perform the essential functions of the position. Burton v Metro. Transp. Auth., 244 F. Supp. 2d 252, 2003 U.S. Dist. LEXIS 2314 (S.D.N.Y. 2003).

In an action in which a former employee former employee filed suit against his former employer et al. alleging violations of the Americans with Disabilities Act (ADA) and New York Human Rights Law (NYHRL), there was genuine issues of material fact exist regarding whether the individual defendants participated in the alleged discrimination giving rise to violations of the NYHRL. Picinich v UPS, 321 F. Supp. 2d 485, 2004 U.S. Dist. LEXIS 11323 (N.D.N.Y. 2004).

In an action in which a former employee former employee filed suit against his former employer et al. alleging violations of the Americans with Disabilities Act (ADA) and New York Human Rights Law (NYHRL), the employee raised a material question of fact regarding whether the employer refused to accommodate him when it failed to engage in an interactive process in order to identify his limitations and the appropriate accommodations which would allow him to resume working; it was questionable whether the employer engaged in the interactive process in a timely matter in light of the fact that its ADA procedure took twice as long as estimated prior to its meeting with the employee. Picinich v UPS, 321 F. Supp. 2d 485, 2004 U.S. Dist. LEXIS 11323 (N.D.N.Y. 2004).

In an action in which a former employee former employee filed suit against his former employer et al. alleging violations of the Americans with Disabilities Act (ADA) and New York Human Rights Law (NYHRL), the employer's motion for summary judgment was denied as to the employee's claim for discriminatory discharge; there were genuine issues of material fact remaining regarding whether the employee was a qualified individual with a disability, whether the employer refused to accommodate him, and whether the requested accommodations would imposed an undue hardship upon the employer. Picinich v UPS, 321 F. Supp. 2d 485, 2004 U.S. Dist. LEXIS 11323 (N.D.N.Y. 2004).

Claim for disability discrimination failed because the employee failed to present sufficient evidence from which a reasonable jury could have found that he was discharged or otherwise treated adversely because of his disability. The employee was repeatedly absent without explanation; he was using drugs and alcohol leading up to and during the time of his absences; he ignored repeated requests to provide explanation for his absences; he was dismissed only after a hearing at which he was represented by his union and a neutral officer found that the charges of insubordination and excessive absenteeism were valid; and, three months after his discharge, he was rehired, as the employer gave him another chance. Robertson v AMTRAK, 400 F. Supp. 2d 612, 2005 U.S. Dist. LEXIS 31201 (S.D.N.Y. 2005).

New York Human Rights Law (NYHRL), N.Y. Exec. Law § 296(3-a)(g), does not protect an employee who, even upon the provision of a reasonable accommodation, is physically unable to perform her duties; therefore, a former teachers' aides discrimination claim under the NYHRL against a school district and others failed because she admitted that she was totally disabled and unable to work. Casale v Reo, 522 F. Supp. 2d 420, 2007 U.S. Dist. LEXIS 83611 (N.D.N.Y. 2007).

Former employee failed to show that he was unlawfully terminated due to his disability of corticobasal degeneration, in violation of the New York State Human Rights Law, N.Y. Exec. Law § 296, because there was no evidence that the employer knew of the disability until the employee stopped working after being diagnosed. Gallo v Alitalia - Linee Aeree Italiane - Societa Per Azioni, 585 F. Supp. 2d 520, 2008 U.S. Dist. LEXIS 94195 (S.D.N.Y. 2008).

Former employee raised genuine issues of fact concerning whether she had an Americans with Disabilities Act of 1990 (ADA) disability so as to preclude the entry of summary judgment and a genuine issue of material fact existed whether or not the supervisor considered the employee as having an impairment that limited her ability to work or freely go about other major life activities; the employee also at least raised a genuine issue of fact concerning the reasonableness of the short-term accommodation she actually sought. The New York State Human Rights Law, N.Y. Exec. Law §§ 296.1(a), 296.6; and, New York City Human Rights Law (NYCHRL), New York City, N.Y., Admin. Code § 8-107. recognize depression as a disability and even if the employee did not suffer from an ADA-recognized disability, her supervisor did not believe that the employee could resume her position. Reilly v Revlon, Inc., 620 F. Supp. 2d 524, 2009 U.S. Dist. LEXIS 45611 (S.D.N.Y. 2009).

Former employee offered evidence sufficient to show that her former employer discriminated against the employee, in violation of N.Y. Exec. Law § 296(1)(a), where the employee offered evidence to show that (1) she had not had previous performance deficiencies; (2) she was discharged after returning to work following her brain aneurysm surgery; (3) the manager who discharged the employee, after discussing her aneurysm, commented that they needed "someone at the top of their game" and someone "who could handle the pressure"; and (4) the employer appeared to regard the employee as being precluded from all television production jobs due to the aneurysm. Primmer v CBS Studios, Inc., 667 F. Supp. 2d 248, 2009 U.S. Dist. LEXIS 81187 (S.D.N.Y. 2009).

Employee stated a retaliation claim under both the New York State Human Rights Law (NYSHRL), N.Y. Exec. Law § 290 et seq., and the New York City Human Rights Law (NYCHRL), New York City, N.Y., Admin. Code § 8-101 et seq., based on her letter to a city official in which she voiced her opposition to unlawful employment practices with regard to her need to take an absence from work due to multiple sclerosis under the Family Medical Leave Act (FMLA), 29 USCS § 2601 et seq. . Harper v New York City, Hous. Auth., 673 F. Supp. 2d 174, 2009 U.S. Dist. LEXIS 105427 (S.D.N.Y. 2009).

While there is no unbending or rigid rule about what circumstances allow an inference of discrimination when there is an adverse employment decision, a plaintiff cannot simply rely on the fact that she was terminated; rather, she must point to facts that suggest the termination was motivated, at least in part, by animus based on her alleged disability. A plaintiff cannot sustain an action based on her conclusory allegations of discrimination. Vinokur v Sovereign Bank, 701 F. Supp. 2d 276, 2010 U.S. Dist. LEXIS 26854 (E.D.N.Y. 2010).

Based on the undisputed evidence and drawing every inference in the former employee's favor, no reasonable juror could conclude that the employer refused or failed to reasonably accommodate the employee's disability; on at least five occasions between 1999 and 2006, the employee was provided medically-excused leaves of absence from work due to her medical condition, and further, in response to the employee's request for Thursdays off, which was supported by a physician's note indicating that the employee could not work evenings past 5:00 p.m., she was reassigned to work on Sundays, when the branch was open until 1:00 p.m. That the parties dispute whether the employer asked for additional medical documentation was immaterial; although the employee was not happy with her reassignment, she failed to produce any admissible evidence that the steps taken by the employer to accommodate her disability were unreasonable, otherwise inad-

equate under the circumstances, or motivated by discriminatory animus. Vinokur v Sovereign Bank, 701 F. Supp. 2d 276, 2010 U.S. Dist. LEXIS 26854 (E.D.N.Y. 2010).

Fact issues remained on a former employee's disability discrimination claim as to whether the employer was alerted to the need for additional accommodations, whether the employee could perform the essential functions of the job with assistance, and whether proposed accommodations were reasonable. Lavigna v State Farm Mut. Auto. Ins. Co., 736 F. Supp. 2d 504, 2010 U.S. Dist. LEXIS 86865 (N.D.N.Y. 2010).

Very close temporal proximity between a supervisor's realization of the severity of the employee's condition and the mailing of the termination letter, coupled with a disbelief of the supervisor's stated reasons for terminating the employee rooted in a suspicion of mendacity, could justify a finder of fact in inferring intentional discrimination. Voltaire v Home Servs. Sys., 823 F. Supp. 2d 77, 2011 U.S. Dist. LEXIS 115081 (E.D.N.Y. 2011).

Even if the U.S. Supreme Court decided that transgendered individuals were not members of a protected class for the purposes of Title VII, creditor would still belong to a protected class for purposes of the New York State Human Rights Law and her state court judgment would still be valid and entitled to full faith and credit by the bankruptcy court in the creditor's action to have the judgment determined to be nondischargeable. Fuller v Rea (In re Rea), 606 B.R. 531, 2019 Bankr. LEXIS 2364 (Bankr. S.D.N.Y. 2019).

34. —AIDS-related

Discharge of complainant from his job as waiter occurred immediately after it became known he was diagnosed as suffering from AIDS-related complex; to extent restaurant asserts complainant failed to present expert testimony to establish he was afflicted with ARC, or that ARC is not "disability" contemplated by article 15 of Executive Law, these issues were not before administrative agency, and court may not consider them for first time on review–to extent complainant was similarly employed by another restaurant, Commissioner of Human Rights should offset wages and tips so earned against instant back-pay award–$5,000 awarded by Commissioner for mental anguish will not be disturbed; complainant's testimony as to mental anguish he suffered is sufficient to support such award, and expert medical or other corroborative testimony is not required. Club Swamp Annex v White, 167 A.D.2d 400, 561 N.Y.S.2d 609, 1990 N.Y. App. Div. LEXIS 13621 (N.Y. App. Div. 2d Dep't 1990), app. denied, 77 N.Y.2d 809, 571 N.Y.S.2d 912, 575 N.E.2d 398, 1991 N.Y. LEXIS 2508 (N.Y. 1991).

Determination that employer did not unlawfully discriminate against complainant because of his HIV-seropositive status was supported by medical and other evidence that physical manifestations of complainant's disability rendered him physically unable to perform job duties of any available position. Phillips ex rel. Phillips v Rosa, 222 A.D.2d 592, 635 N.Y.S.2d 92, 1995 N.Y. App. Div. LEXIS 12917 (N.Y. App. Div. 2d Dep't 1995), app. denied, 88 N.Y.2d 968, 647 N.Y.S.2d 722, 670 N.E.2d 1354, 1996 N.Y. LEXIS 5189 (N.Y. 1996).

Under N.Y. Exec. Law § 296(1)(a), employee claimed that he was discriminatorily discharged based upon his employer's perception that he had the human immunodeficiency virus. The court dismissed that claim by summary judgment as the employee did not make a showing that the employer's legitimate nondiscriminatory financial distress reason for discharging him was pretextual. Scardace v Mid Island Hosp., Inc., 21 A.D.3d 363, 800 N.Y.S.2d 42, 2005 N.Y. App. Div. LEXIS 8229 (N.Y. App. Div. 2d Dep't 2005).

Homosexual man who did not have AIDS and did not test positive for HIV infection stated cause of action against his former employer for employment disability discrimination under CLS Exec § 296 based on his claim that he was fired because of employer's perception that he had AIDS due to his having had sexual relations with person known to be HIV-positive, since statute bans discrimination based on perception, correct or not, that someone is HIV-positive; asymptomatic HIV infection is diagnosable medical abnormality and should be considered "disability" for purposes of statute. Petri v Bank of New York Co., 153 Misc. 2d 426, 582 N.Y.S.2d 608, 1992 N.Y. Misc. LEXIS 71 (N.Y. Sup. Ct. 1992).

Employee's termination, allegedly for his admission of petty theft, did not violate New York State Human Rights Law, N.Y. Exec. Law § 296(1)(a), where the employer was unaware of the employee's HIV-positive status. Priore v N.Y. Yankees, 307 A.D.2d 67, 761 N.Y.S.2d 608, 2003 N.Y. App. Div. LEXIS 6119 (N.Y. App. Div. 1st Dep't), app. denied, 1 N.Y.3d 504, 775 N.Y.S.2d 781, 807 N.E.2d 894, 2003 N.Y. LEXIS 4134 (N.Y. 2003).

35. —Alcoholism

Court would affirm city's determination terminating petitioner's employment as parking lot attendant where he did not contest substantial evidence of his misconduct while on duty, including drinking and refusing to undergo breathalyzer test as directed by supervisor, and although he established prima facie case that conduct which formed basis for his discharge was causally related to his alcoholism, city showed that subsequent to his completion of alcohol treatment program, he had relapse while on duty and was immediately charged with misconduct. Myszczenko v City of Poughkeepsie, 239 A.D.2d 584, 657 N.Y.S.2d 455, 1997 N.Y. App. Div. LEXIS 5639 (N.Y. App. Div. 2d Dep't 1997).

City police commissioner's decision to dismiss police officer was based on his misconduct, not his alcoholism, where officer, while attending memorial service for slain police officers, twice slid down hotel banister in nude and once discharged fire extinguisher without cause, resulting in hotel's evacuation in early morning hours. Hagmaier v Bratton, 245 A.D.2d 147, 665 N.Y.S.2d 880, 1997 N.Y. App. Div. LEXIS 13034 (N.Y. App. Div. 1st Dep't 1997).

Termination of correction officer for his pre-rehabilitation alcohol-related absenteeism violated Human Rights Law where he established that his dismissal was for misconduct caused by his alcoholism and that he performed his job in satisfactory manner after his discharge from rehabilitation program. Singleton v Kerik, 282 A.D.2d 682, 723 N.Y.S.2d 695, 2001 N.Y. App. Div. LEXIS 3974 (N.Y. App. Div. 2d Dep't), app. denied, 97 N.Y.2d 602, 735 N.Y.S.2d 491, 760 N.E.2d 1287, 2001 N.Y. LEXIS 3268 (N.Y. 2001).

Police officer was properly dismissed from force because of his refusal to acknowledge and accept treatment for alcoholism, even though Human Rights Law and Federal Rehabilitation Act prohibit employment discrimination on basis of disability which does not impede employee's performance of job-related activities in reasonable manner, since exclusion from employment is legally permissible where there exists rationally-based expectation that physical or psychological condition will result in future disability and it was reasonable to conclude that long-term effects of officer's alcoholism would result in diminished capacity to perform police functions and exercise judgment required of police officer. Smith v Ortiz, 136 Misc. 2d 110, 517 N.Y.S.2d 352, 1987 N.Y. Misc. LEXIS 2391 (N.Y. Sup. Ct. 1987).

Employee established prima facie case of disability discrimination where he admittedly suffered from recognized mental disability of alcoholism, his ingestion of alcohol was compulsive and beyond his control, it impaired normal function, and he was terminated from his position (in which he enjoyed unblemished record of promotions) after he revealed his disability to his supervisor and that he was seeking treatment through Alcoholics Anonymous. Grullon v South Bronx Overall Economic Dev. Corp., 185 Misc. 2d 645, 712 N.Y.S.2d 911, 2000 N.Y. Misc. LEXIS 350 (N.Y. Civ. Ct. 2000).

Nothing in case law or statutory framework of state and New York City Human Rights Law requires plaintiff to introduce medical evidence to prove his disability of alcoholism. Grullon v South Bronx Overall Economic Dev. Corp., 185 Misc. 2d 645, 712 N.Y.S.2d 911, 2000 N.Y. Misc. LEXIS 350 (N.Y. Civ. Ct. 2000).

Employee was not required to prove, in establishing prima facie case of disability discrimination, that his alcoholism adversely manifested itself in some significant way in his work, such that his performance at work would be "impaired" thereby. Grullon v South Bronx Overall Economic Dev. Corp., 185 Misc. 2d 645, 712 N.Y.S.2d 911, 2000 N.Y. Misc. LEXIS 350 (N.Y. Civ. Ct. 2000).

Jury was free to consider employer's "dishonesty about" reason for employee's discharge for alcoholism as affirmative evidence of guilt of disability discrimination where employer's witnesses presented weak and inconsistent testimony regarding claimed budget cuts and "budget reallocation," and evidence showed that discharge occurred shortly after employee revealed his disability to his supervisor, who was involved in decision to discharge him. Grullon v South Bronx Overall Economic Dev. Corp., 185 Misc. 2d 645, 712 N.Y.S.2d 911, 2000 N.Y. Misc. LEXIS 350 (N.Y. Civ. Ct. 2000).

Public employer was entitled to summary judgment dismissing discharged police officer's disability discrimination claim; although alcoholism could be the basis for a human rights violation claim, such a claim could only be made by an employee punished after rehabilitation, and, moreover, it seemed likelier that the officer was discharged for repeated incidences of family violence and other assaultive behavior. Riddick v City of New York, 4 A.D.3d 242, 772 N.Y.S.2d 294, 2004 N.Y. App. Div. LEXIS 1854 (N.Y. App. Div. 1st Dep't 2004).

Physician, whose alcoholism prevented him from performing in reasonable manner activities involved in his former position as hospital's chief of internal medicine, could not maintain disability discrimination action against hospital for its refusal to reinstate him to such position. Altman v New York City Health & Hosps. Corp., 100 F.3d 1054, 1996 U.S. App. LEXIS 30112 (2d Cir. N.Y. 1996).

Physician's claim against hospital under CLS Exec Law § 296, arising from hospital's refusal to reinstate him as chief of internal medicine 3 months after he had been found visibly drunk while treating patient and after he completed treatment program and entered recovery program, is denied summarily, because although alcoholism is "disability" for purposes of § 296, evidence shows that had physician been restored to his old post, he could not have performed his duties in manner which involved reasonably limited risk of harm to third parties. Altman v New York City Health & Hosps. Corp., 903 F. Supp. 503, 1995 U.S. Dist. LEXIS 14114 (S.D.N.Y. 1995), aff'd, 100 F.3d 1054, 1996 U.S. App. LEXIS 30112 (2d Cir. N.Y. 1996).

Court would dismiss recovering alcoholic's claim under CLS Exec § 296 for not being reinstated to his former position as hospital medical director after he completed alcohol treatment program; although alcoholism is "disability" under statute, plaintiff could not establish that, if he had been reinstated, he could have performed his duties in manner that involved "reasonably" limited risk of harm to third parties. Altman v New York City Health & Hosps. Corp., 903 F. Supp. 503, 1995 U.S. Dist. LEXIS 14114 (S.D.N.Y. 1995), aff'd, 100 F.3d 1054, 1996 U.S. App. LEXIS 30112 (2d Cir. N.Y. 1996).

Employee made out claim of disability discrimination where he alleged that he suffered from alcoholism, that he was rehabilitated but had relapsed on day of his termination when he drank after work hours, and that he was fired when his employer found him on work premises 20 to 30 minutes after had shift had ended. Lugo v Milford Mgmt. Corp., 956 F. Supp. 1120, 1997 U.S. Dist. LEXIS 2004 (S.D.N.Y. 1997).

36. —Cancer

Defendant's motion for summary judgment should have been granted in action for unlawful discrimination based on disability–defendant is close corporation in which husband and wife are principals; they employ one full-time person and one part-time person; plaintiff, defendant's full-time employee, was terminated following surgery for breast cancer; Executive Law § 296, which prohibits discriminatory practices based on disability, is inapplicable because of number of persons employed by defendant; Executive Law § 292 (5) provides that "employer" does not include any employer with fewer than four persons in his employ, and while plaintiff contends that defendant employed at least four persons, this figure is reached only by including principals husband and wife as employees. Germakian v Kenny International Corp., 151 A.D.2d 342, 543 N.Y.S.2d 66, 1989 N.Y. App. Div. LEXIS 7998 (N.Y. App. Div. 1st Dep't), app. denied, 74 N.Y.2d 615, 549 N.Y.S.2d 960, 549 N.E.2d 151, 1989 N.Y. LEXIS 3205 (N.Y. 1989).

Cause of action for disability discrimination was sufficiently stated where plaintiff alleged that he had been retained for life term as defendant's cantor for Passover and High Holiday services, that he was terminated solely on grounds of his medical condition (cancer), and that his medical condition did not prevent him from performing his employment activities in reasonable manner. Malamood v Kiamesha Concord, Inc., 182 A.D.2d 359, 582 N.Y.S.2d 118, 1992 N.Y. App. Div. LEXIS 5424 (N.Y. App. Div. 1st Dep't 1992).

Plaintiff's cancers and attendant surgeries did not constitute disability under discrimination statutes where they did not substantially limit her in "a major life activity," as evidenced by her physician's letters affirming her ability to work on regular full-time basis. Sirota v N.Y. City Bd. of Educ., 283 A.D.2d 369, 725 N.Y.S.2d 332, 2001 N.Y. App. Div. LEXIS 6583 (N.Y. App. Div. 1st Dep't 2001).

Plaintiff's claim for wrongful discharge under the Human Rights Law (Executive Law § 296 [1] [a]) based on physical disability (plaintiff having been discharged after being hospitalized for treatment of breast cancer) is not exempt from the broad arbitration clause of her employment contract, which is governed by the Federal Arbitration Act (9 USC § 1 et seq.) because her employment as a registered securities representative involved transactions in commerce, since there are no external Federal "legal constraints" which preclude arbitration of plaintiff's discrimination claim. The Federal policy underlying the Federal Arbitration Act requires the rigorous enforcement of arbitration agreements "unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue" and since there is no comparable Federal statute prohibiting disability-based discrimination by private employers, there is no congressional intent to exempt that category of claims from arbitration. DeSapio v Josephthal & Co., 143 Misc. 2d 611, 540 N.Y.S.2d 932, 1989 N.Y. Misc. LEXIS 228 (N.Y. Sup. Ct. 1989).

Trial court erred by dismissing a worker's complaint alleging employment discrimination based on a disability, in violation of N.Y. Exec. Law § 296 and the New York City, N.Y., Admin. Code § 8-107, since the employer (the City of New York), failed to engage in the required individualized process when considering the worker's request for extended medical leave, namely whether it was a reasonable accommodation, and the City's denial of such a request on the basis that extended medical leave was only for permanent civil service employees was a violation of both statutes. Separate and apart from the City's failure to engage in an individualized interactive process in evaluating the worker's request for accommodation, the worker had sufficiently pled causes of actions for disability discrimination under both statutes by establishing that her employment was terminated, that she requested leave to be able to have and recover from cancer surgery, and the accommodation she sought (extended medical leave) was not excluded by the definition of reasonable accommodation under the New York City Human Rights Law. Phillips v City of New York, 66 A.D.3d 170, 884 N.Y.S.2d 369, 2009 N.Y. App. Div. LEXIS 5834 (N.Y. App. Div. 1st Dep't 2009), overruled in part, Jacobsen v New York City Health & Hosps. Corp., 22 N.Y.3d 824, 988 N.Y.S.2d 86, 11 N.E.3d 159, 2014 N.Y. LEXIS 570 (N.Y. 2014).

Plaintiff's claim of discriminatory adverse employment action, alleging she was demoted, her salary was cut, she was subjected to a hostile work environment, and was constructively discharged, on account of her breast cancer, failed because plaintiff had failed to produce evidence to carry her burden of rebutting the employer's proffered nondiscriminatory reason for demoting plaintiff and reducing her salary; the employer produced evidence that plaintiff's division was merged into the employer's larger division because plaintiff's division's low and declining sales volume did not justify its existence as a freestanding division, and the employer produced evidence that the restructuring was motivated by the goal of achieving economies of scale through the combining of certain duplicative functions and that the changes in plaintiff's job description and salary resulted from that restructuring. Ferraro v Kellwood Co., 440 F.3d 96, 2006 U.S. App. LEXIS 5707 (2d Cir. N.Y. 2006).

Chief perfusionist at county hospital, 57-year-old woman diagnosed with breast cancer, states viable claim under Exec § 296, where she asserts that high-level hospital employees created and implemented policy to effect "changing of guard" at hospital and to replace her with other employees who were younger, politically and socially connected to themselves, and not physically disabled, because amended complaint pleads facts that could raise inference of age and disability discrimination. Bendel v Westchester County Health Care Corp., 112 F. Supp. 2d 324, 2000 U.S. Dist. LEXIS 13075 (S.D.N.Y. 2000).

37. —Cerebral palsy

State Division of Human Rights did not act arbitrarily or capriciously in determining that claimant, victim of congenital mild cerebral palsy, was not unlawfully discriminated against when she was dismissed from her job, since alleged discriminatory act occurred prior to effective date of 1979 amendment of CLS Executive Law § 292(21), and thus it was only necessary to demonstrate that complainant's physical or medical condition in some way interfered with her performance, and since Division could have reasonably concluded that decision to dismiss complainant was motivated by its interest in upholding job standards. Washington Square Inst. for Psychotherapy & Mental Health v New York State Human Rights Appeal Bd., 67 N.Y.2d 699, 499 N.Y.S.2d 926, 490 N.E.2d 845, 1986 N.Y. LEXIS 16632 (N.Y. 1986).

In an Article 78 proceeding to review the dismissal of a complaint alleging discrimination based on disability against a victim of congenital mild cerebral palsy who was dismissed by employer from its training program for psychoanalytic psychotherapy after the six patients assigned to her terminated therapy, an unprecedented 100 percent drop-out rate, the order of the State Division of Human Rights finding no probable cause would be found to have a rational basis, since the Division could have reasonably concluded that respondent's decision to dismiss petitioner from its program was motivated by its interest in upholding clinical standards as well as its concern for the patients assigned to her. Moreover, the employer in an effort to assist petitioner in meeting the program's clinical requirements, offered to tailor its curriculum to accommodate her disability, which offer she rejected. Washington Square Institute for Psychotherapy & Mental Health v New York State Human Rights Appeal Bd., 108 A.D.2d 672, 485 N.Y.S.2d 540, 1985 N.Y. App. Div. LEXIS 43013 (N.Y. App. Div. 1st Dep't 1985), aff'd, 67 N.Y.2d 699, 499 N.Y.S.2d 926, 490 N.E.2d 845, 1986 N.Y. LEXIS 16632 (N.Y. 1986).

38. —Crohn's disease

Medical evidence and statistical data were insufficient to support determination of police commissioner that there was reasonable expectation that probationary officer would be unable to perform job of officer currently or in future, despite fact that officer had suffered from Crohn's disease (gastrointestinal inflammation) and general statistical data suggested that symptoms might recur, where recurring symptoms—many of which were treatable—would not be so disabling as to prevent officer from reasonably performing his duties. Antonsen v Ward, 77 N.Y.2d 506, 569 N.Y.S.2d 328, 571 N.E.2d 636, 1991 N.Y. LEXIS 364 (N.Y. 1991).

39. —Drug dependency

Discharge of employee based on positive test result for cocaine did not constitute discrimination in employment against disabled person in violation of CLS Exec § 296(1) where there was no showing that basis of discharge was disability due to drug dependency, and discharge was based on adverse effect on employee's integrity brought about by even casual use of cocaine. In re Claim of Atkinson, 185 A.D.2d 415, 586 N.Y.S.2d 319, 1992 N.Y. App. Div. LEXIS 8896 (N.Y. App. Div. 3d Dep't 1992).

Trial court erred in denying a hospital's summary judgment motion pursuant to N.Y. C.P.L.R. 3212 in a nurse's employment discrimination action pursuant to N.Y. Exec. Law § 296; the hospital demonstrated valid, nondiscriminatory reasons for terminating the nurse's employment which were not based on the nurse's past drug use, and the nurse failed to raise a triable issue of fact as to whether the hospital's stated reasons for her discharge were pretextual. Laub v St. Vincent's Med. Ctr., 306 A.D.2d 322, 761 N.Y.S.2d 97, 2003 N.Y. App. Div. LEXIS 6506 (N.Y. App. Div. 2d Dep't 2003).

40. —Leg weakness

Petitioner, who had been employed as part-time/seasonal police officer, was found to be "not qualified" for full-time status by respondent County Department of Civil Service; respondent determined that due to weakened condition of his legs, petitioner did not satisfy standard for physical fitness established by Municipal Police Training Council (see, 9 NYCRR 6000.3); it was conceded by petitioner's own orthopedist that petitioner wears orthopedic brace on his left knee; this doctor indicated that petitioner suffers from "patella atrophy", or weakness of knee cap; Medical Director of Office of Employee Medical Review found that because of his condition, petitioner would be unable to physically perform duties required of police officer–there was rational basis for determination of respondent; because it was sufficiently demonstrated that condition of petitioner's knee may "prevent the [petitioner] from performing in a reasonable manner the activities involved in the job or occupation sought" (Executive Law § 292 [21]), petitioner's contention that respondent violated Executive Law § 296 in denying him this appointment because of "disability", must be disposed of summarily. Mainzer v Suffolk County Dep't of Civil Service, 159 A.D.2d 627, 553 N.Y.S.2d 26, 1990 N.Y. App. Div. LEXIS 2956 (N.Y. App. Div. 2d Dep't), app. denied, 76 N.Y.2d 704, 559 N.Y.S.2d 983, 559 N.E.2d 677, 1990 N.Y. LEXIS 1475 (N.Y. 1990).

Judgment which dismissed Article 78 proceeding affirmed–petitioner, probationary police officer, was injured in off-duty automobile accident; his injury consisted of compound fracture of left femur, which necessitated two surgeries and implantation of steel rod and pins into his leg; two police doctors expressed opinion that petitioner's leg will never heal completely and petitioner will never be able to fully perform his duties as police officer; petitioner's employment as probationary police officer was thereafter terminated–petitioner asserts he was terminated in violation of Executive Law § 296 (1) (a), which states that it is unlawful to discharge individual from employment on basis of disability; definition of "disability" (Executive Law § 292 [21]) states that term shall be limited to disabilities which do not prevent complainant from performing in reasonable manner activities involved in job or occupation sought or held–record clearly demonstrates that petitioner's disability does not fall within definition of term "disability" as contemplated by Executive Law and, accordingly, termination of petitioner did not constitute unlawful discrimination on part of respondent–additionally, where there is dispute among several doctors regarding petitioner's prognosis, it is not for courts to choose between diverse professional opinions–moreover, as probationary employee, petitioner could have been terminated at any time without hearing or statement of reasons for discharge; absent proof that discharge was in bad faith or for improper reason, probationary employees may be dismissed without hearing; there is no evidence in record which supports conclusory allegations of bad faith contained in petition. O'Hare v New York City Police Dep't, 161 A.D.2d 487, 555 N.Y.S.2d 753, 1990 N.Y. App. Div. LEXIS 6223 (N.Y. App. Div. 1st Dep't 1990).

Former airline mechanic is unable to prove prima facie case of disability discrimination, where he asserted, in ultimately successful disability proceedings and elsewhere, that he could not perform essential functions of airline mechanic due to injuries to his neck, back, arms, and legs, because he cannot show that he has disability that qualifies him for protection under New York Human Rights Law (Exec §§ 290 et seq.). Micari v TWA, 43 F. Supp. 2d 275, 1999 U.S. Dist. LEXIS 5976 (E.D.N.Y.), aff'd, 205 F.3d 1323, 1999 U.S. App. LEXIS 38264 (2d Cir. N.Y. 1999).

41. —Multiple sclerosis

In proceeding under Human Rights Law in which multiple sclerosis patient established that she was unlawfully terminated from her position as school bus driver because of her disability, bus company which employed driver was not shielded from liability on ground that it was required, by CLS Educ § 3624, to defer to school administrator's determination as to driver's physical fitness, inasmuch as it had directed driver to submit to additional physical exam and thus was not in compliance with

mandates of Education Law; § 3624 provides for driver to be examined only once yearly. Bayport-Blue Point School Dist. v State Div. of Human Rights, 131 A.D.2d 849, 517 N.Y.S.2d 209, 1987 N.Y. App. Div. LEXIS 48286 (N.Y. App. Div. 2d Dep't 1987).

Evidence supported finding by Division of Human Rights that school district unlawfully discriminated against bus driver who was diagnosed as having multiple sclerosis where neurology expert testified that disease did not prevent driver from performing job in reasonable manner; district was not shielded from liability on ground that it had relied on advice of its physician since (1) subjective intent to discriminate is not element of discrimination claim under Human Rights Law, and (2) district's reliance was inappropriate inasmuch as physician lacked previous contact with multiple sclerosis and lacked informed medical opinion as to multiple sclerosis patient's physical ability to drive bus. Bayport-Blue Point School Dist. v State Div. of Human Rights, 131 A.D.2d 849, 517 N.Y.S.2d 209, 1987 N.Y. App. Div. LEXIS 48286 (N.Y. App. Div. 2d Dep't 1987).

42. —Obesity

Dismissal of hazardous waste investigator who is unable to perform during training period as result of obesity does not constitute unlawful discrimination against person with physical impairment. Velger v Williams, 118 A.D.2d 1037, 500 N.Y.S.2d 411, 1986 N.Y. App. Div. LEXIS 54823 (N.Y. App. Div. 3d Dep't 1986).

43. —Pregnancy

In a proceeding alleging discrimination in employment on the basis of sex arising out of a then mandatory pregnancy-related resignation, notwithstanding that the regulation policy of 1959 did not then violate a statutory prescription and a complaint thereon is untimely the seniority system which became available in 1977 effectively revived that policy and constituted a separate discriminatory act, where the seniority system purportedly treated all personnel equally but disallowed credit for service preceding any resignation, thereby failing to take into account the fact that only a pregnancy-related resignation was required and imposing a distinct burden on a woman; a seniority system can be found to currently discriminate against a woman when, in computing seniority, it disregards all service rendered prior to a resignation compelled due to pregnancy, notwithstanding that the law did not prohibit sex-based discrimination when the pregnancy-related resignation was originally demanded. Board of Education v New York State Div. of Human Rights, 56 N.Y.2d 257, 451 N.Y.S.2d 700, 436 N.E.2d 1301, 1982 N.Y. LEXIS 3357 (N.Y. 1982).

Record contained sufficient evidence to support the Commissioner of the New York State Division of Human Rights' judgment that an employer illegally terminated a pregnant employee to avoid problems with his wife who suspected that he fathered the employee's child, and the state supreme court held that the intermediate appellate court erred by annulling the Commissioner's judgment. Mittl v N.Y. State Div. of Human Rights, 100 N.Y.2d 326, 763 N.Y.S.2d 518, 794 N.E.2d 660, 2003 N.Y. LEXIS 1313 (N.Y. 2003).

An order of the State Division of Human Rights awarding compensation to a woman formerly employed as a receptionist/file clerk in a small law firm on the ground that the firm had constructively discharged her when it had found out that she was pregnant would be reversed, where, although a partner in the firm stated that he would not have hired the woman if he had known that she was pregnant, the firm continued to treat her in a businesslike fashion, and, thus, the determination of the Division was not supported by substantial evidence. Beal, Kagan, Lentz & Romasch, P.C. v McCall, 107 A.D.2d 648, 485 N.Y.S.2d 528, 1985 N.Y. App. Div. LEXIS 42513 (N.Y. App. Div. 1st Dep't 1985).

A petition seeking to annul administrative finding of no probable cause to believe that the termination of petitioner's employment was based on her sex or pregnancy was properly dismissed, where the record showed no evidence of a policy against pregnant employees, and demonstrated repeated absences and an unsatisfactory attitude on the part of petitioner. Ditaranto v State Div. of Human Rights, 111 A.D.2d 702, 491 N.Y.S.2d 176, 1985 N.Y. App. Div. LEXIS 49960 (N.Y. App. Div. 1st Dep't 1985).

A petition seeking to annul administrative finding of no probable cause to believe that the termination of petitioner's employment was based on her sex or pregnancy was properly dismissed, where the record showed no evidence of a policy against pregnant employees, and demonstrated repeated absences and an unsatisfactory attitude on the part of petitioner. Ditaranto v State Div. of Human Rights, 111 A.D.2d 702, 491 N.Y.S.2d 176, 1985 N.Y. App. Div. LEXIS 49960 (N.Y. App. Div. 1st Dep't 1985).

Employee may not be terminated simply because she is pregnant; upon showing of prima facie case of discharge from employment because of gender-related condition of pregnancy, employer has burden to prove that circumstances warranted discharge by articulating legitimate, nondiscriminatory reason for termination. Energy Expo, Inc. v New York State Div. of Human Rights, 112 A.D.2d 302, 491 N.Y.S.2d 748, 1985 N.Y. App. Div. LEXIS 56263 (N.Y. App. Div. 2d Dep't 1985).

Employee may not be terminated simply because she is pregnant; upon showing of prima facie case of discharge from employment because of gender-related condition of pregnancy, employer has burden to prove that circumstances warranted discharge by articulating legitimate, nondiscriminatory reason for termination. Energy Expo, Inc. v New York State Div. of Human Rights, 112 A.D.2d 302, 491 N.Y.S.2d 748, 1985 N.Y. App. Div. LEXIS 56263 (N.Y. App. Div. 2d Dep't 1985).

Employer was entitled to summary judgment in gender discrimination action by former employee who alleged that she had been discharged after she had expressed her intention of becoming pregnant and taking maternity leave where any inference of discrimination was rebutted by employer's evidence that he filled employee's position with another woman of childbearing age who subsequently became pregnant and whose position was held open for her return while she was on maternity leave. Anthony v Nemec, 225 A.D.2d 883, 638 N.Y.S.2d 529, 1996 N.Y. App. Div. LEXIS 2047 (N.Y. App. Div. 3d Dep't 1996).

Two incidents in which pregnant employees were terminated before complaining employee was hired constituted nothing more than conjecture and speculation and were patently insufficient to establish statistical evidence that employer had practice of discriminating against pregnant employees. Anthony v Nemec, 225 A.D.2d 883, 638 N.Y.S.2d 529, 1996 N.Y. App. Div. LEXIS 2047 (N.Y. App. Div. 3d Dep't 1996).

Employer obviously failed to rebut prima facie showing that it had terminated complainant's employment because she was pregnant, in violation of CLS Exec § 296(1)(a), where employer neither appeared at hearing, challenged determination nor appeared in enforcement proceeding. State Div. of Human Rights v Demi Lass Ltd., 232 A.D.2d 335, 648 N.Y.S.2d 925, 1996 N.Y. App. Div. LEXIS 11215 (N.Y. App. Div. 1st Dep't 1996).

Court erred in denying defendant's summary judgment motion in action under CLS Exec § 296 for unlawful termination of employment where there was no evidence that defendant's president knew of plaintiff's pregnancy before he terminated her employment, and it was undisputed that president was negotiating with third party to be plaintiff's replacement before he learned of her pregnancy. Smith v Paris Int'l Corp., 267 A.D.2d 223, 699 N.Y.S.2d 490, 1999 N.Y. App. Div. LEXIS 12616 (N.Y. App. Div. 2d Dep't 1999).

Court would annul determination finding that employer unlawfully discriminated against employee on basis of sex and pregnancy-related disability where she presented no proof that she was incapacitated by severe sickness or injury when she applied for 3 days from sick leave bank established under collective bargaining agreement or that her application was treated in manner less liberal than those applications from employees with conditions unrelated to pregnancy and recovery from childbirth. Cheektowaga Cent. Sch. Dist. v Graziadei, 267 A.D.2d 985, 700 N.Y.S.2d 334, 1999 N.Y. App. Div. LEXIS 13715 (N.Y. App. Div. 4th Dep't 1999), app. denied, 2000 N.Y. App. Div. LEXIS 14175 (N.Y. App. Div. 4th Dep't Mar. 29, 2000), app. denied, 95 N.Y.2d 756, 712 N.Y.S.2d 448, 734 N.E.2d 760, 2000 N.Y. LEXIS 1844 (N.Y. 2000).

Probationary correction officer met her burden of demonstrating that there were disputed issues of material fact as to whether she was fired for good faith reasons or for discriminatory reasons and thus she was entitled to hearing at which corrections department would have burden of proving, by preponderance of evidence, that it terminated her in good faith, where she claimed that she was terminated because of pregnancy discrimination and it appeared that corrections department decided to terminate her based in part on some absences which were pregnancy-related. Card v Sielaff, 154 Misc. 2d 239, 586 N.Y.S.2d 191, 1992 N.Y. Misc. LEXIS 221 (N.Y. Sup. Ct. 1992).

Plaintiff's disability discrimination claim under the New York State Human Rights Law, N.Y. Exec. Law § 290 et seq., failed to state a claim as plaintiff failed to allege that her pregnancy impaired her in exercising a normal bodily function, or that she had any complications in connection with her pregnancy, which prevented her from normal life activity under N.Y. Exec. Law 292(21). Krause v Lancer & Loader Group, LLC, 965 N.Y.S.2d 312, 40 Misc. 3d 385, 2013 N.Y. Misc. LEXIS 1815 (N.Y. Sup. Ct. 2013).

Plaintiff's discrimination claim based on pregnancy under the New York State Human Rights Law, N.Y. Exec. Law § 290 et seq., survived a motion to strike where plaintiff alleged that she was in a protected class due to her pregnancy immediately prior to her discharge, that she was recruited by defendant one to work for defendant two based on his prior knowledge of plaintiff's ability to procure sales, and thus, that she was qualified for her position; given that plaintiff was discharged shortly after telling her supervisor of her pregnancy, she sufficiently raised an inference of discrimination. Krause v Lancer & Loader Group, LLC, 965 N.Y.S.2d 312, 40 Misc. 3d 385, 2013 N.Y. Misc. LEXIS 1815 (N.Y. Sup. Ct. 2013).

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Due to the common management, ownership, and financial control of an employer and its interrelated entities, their employees were properly aggregated to satisfy N.Y. Exec. Law § 292(5); in addition, since the employer violated N.Y. Exec. Law § 296(1) by discriminating against an employee based on her pregnancy, it was not entitled to N.Y. Exec. Law § 298 relief. Matter of Argyle Realty Assocs. v New York State Div. of Human Rights, 65 A.D.3d 273, 882 N.Y.S.2d 458, 2009 N.Y. App. Div. LEXIS 5399 (N.Y. App. Div. 2d Dep't 2009).

Employers were not entitled to summary judgment on the employee's claim of discrimination based on pregnancy under the New York State Human Rights Law and New York City Human Rights Law due to material factual issues regarding whether the employers' reasons for terminating the employee, because she allegedly refused to speak to them, were a pretext given the employee's testimony that she merely asked to postpone a conversation until she was in less pain. Coronado v Weill Cornell Med. Coll., 66 Misc. 3d 404, 114 N.Y.S.3d 193, 2019 N.Y. Misc. LEXIS 6411 (N.Y. Sup. Ct. 2019).

Record relied on by an administrative law judge and a New York court in finding that a Chapter 11 debtor violated N.Y. Exec. Law § 296 when he fired an attorney from her job after she became pregnant with her third child made it clear that the debtor acted willfully and with malice, and was sufficient to sustain the attorney's claim that a judgment in the amount of $244,665 she obtained against the debtor was nondischargeable under 11 U.S.C.S. § 523(a)(6). Rocco v Goldberg (In re Goldberg), 487 B.R. 112, 2013 Bankr. LEXIS 380 (Bankr. E.D.N.Y. 2013).

Former employee sufficiently alleged facts to survive motion to dismiss disability discrimination claim under CLS Exec Law § 296(6), where former employee alleged that she was terminated based on her pregnancy-related disabilities in violation of statute, and stated that her direct supervisor and another manager asked her if she wanted to go on disability leave or take leave of absence due to her pregnancy-related conditions, and she was terminated one week later. Cerrato v Durham, 941 F. Supp. 388, 1996 U.S. Dist. LEXIS 13454 (S.D.N.Y. 1996).

Pregnancy discrimination claim of village police officer under CLS Exec Law § 296 cannot be decided summarily, because, although village's disability policy appears to be facially neutral, female officer creates issue of material fact in alleging with support that policy was applied in intentionally discriminatory manner and had adverse impact on pregnant officers. Lehmuller v Incorporated Village of Sag Harbor, 944 F. Supp. 1087, 1996 U.S. Dist. LEXIS 16896 (E.D.N.Y. 1996).

Terminated physician's office manager states viable claim under CLS Exec Law § 296 for pregnancy discrimination, where physician's alleged statements regarding his preference that long time pass before manager became pregnant again raises issue of whether he acted on this preference when he made termination decision following announcement of manager's second pregnancy, because possibility of reprisal for bearing children is focus of discrimination law. Rivkin v Coleman, 978 F. Supp. 539, 1997 U.S. Dist. LEXIS 15995 (S.D.N.Y. 1997).

Employee failed to support pregnancy discrimination claim in face of employer's nondiscriminatory explanation that employee was terminated because she had exceeded 12 weeks of maternity leave allowed by employer. LaCoparra v Pergament Home Ctrs., Inc., 982 F. Supp. 213, 1997 U.S. Dist. LEXIS 15787 (S.D.N.Y. 1997).

Summary judgment is denied both sides in employment discrimination case brought by unmarried pregnant teacher who was fired from church-affiliated school, where she states prima facie case, while school states that she violated its religious teachings by engaging in premarital sexual activity, because issues of fact remain, and jury is in at least as good position as judge or appellate court to determine whether it was pregnancy or fornication that caused school to dismiss teacher. Ganzy v Allen Christian Sch., 995 F. Supp. 340, 1997 U.S. Dist. LEXIS 20938 (E.D.N.Y. 1997).

Employee terminated 2 weeks after returning to work from maternity leave sufficiently alleged inference of pregnancy discrimination in violation of Human Rights Law, where her supervisor allegedly expressed displeasure on learning of her pregnancy and fired her under auspices of her refusal to attend seminar after being told she was not permitted to bring her baby, which she sought to do in order to breast-feed. Bond v Sterling, Inc., 997 F. Supp. 306, 1998 U.S. Dist. LEXIS 3103 (N.D.N.Y. 1998).

Terminated sales representative's pregnancy discrimination claim under Exec § 296 may proceed, even though employer alleges she was fired for coming back late from vacation and poor performance, because timing of firing and other inconsistencies give rise to possibility that proffered reason was pretext for pregnancy discrimination. Flores v Buy Buy Baby, Inc., 118 F. Supp. 2d 425, 2000 U.S. Dist. LEXIS 15834 (S.D.N.Y. 2000).

Cross motions for summary judgment on discharged county employee's claims under the Pregnancy Discrimination Act, 42 U.S.C.S. § 2000e(k) and New York State Human Rights Law, N.Y. Exec. Law § 296, were denied where a factual issue remained whether plaintiff's pregnancy or her absence without leave was the real reason for her termination. Pellegrino v County of Orange, 313 F. Supp. 2d 303, 2004 U.S. Dist. LEXIS 6565 (S.D.N.Y. 2004).

Employee's only evidence that her supervisor's stated reasons for recommending the employee's termination—her bad reputation and her unimpressive work on a pitch—were pretext for unlawful pregnancy discrimination was the fact she was pregnant and she was treated unfairly; this was plainly insufficient. The evidence created, at best, an extremely weak issue of fact as to the truth of the supervisor's reasons for suggesting her termination; yet there could be no question that the two individuals who terminated the employee only alter consulting other supervisors, and who were unaware that the employee was pregnant, acted without discriminatory intent. Lambert v McCann Erickson, 543 F. Supp. 2d 265, 2008 U.S. Dist. LEXIS 26441 (S.D.N.Y. 2008).

Employer met its burden of production by putting forth evidence that the employee was fired for poor performance; the firing individuals' decisions could only have been discriminatory to the extent that they relied on recommendations or assessments that were motivated by improper consideration of the employee's pregnancy. This meant that none of the individuals' independent pre-termination actions or perceptions, however unfair or erroneous, could give rise to an inference that either was motivated by the employee's pregnancy. Lambert v McCann Erickson, 543 F. Supp. 2d 265, 2008 U.S. Dist. LEXIS 26441 (S.D.N.Y. 2008).

Given that there was nothing in the record to suggest that the employee was more to blame for the altercation than a coworker, and given the disputed circumstances surrounding the employee's decision not to report to work the Monday following the altercation, the disparate disciplinary action taken by defendants against the employee could reasonably be viewed as a pretext for unlawful discrimination based on pregnancy. Polito v Tri-Wire Eng'g Solution, Inc., 699 F. Supp. 2d 480, 2010 U.S. Dist. LEXIS 26008 (E.D.N.Y. 2010).

44. —Psychiatric disorder

Substantial evidence supported determination by Division of Human Rights that city board of education retirement system did not discriminate against petitioner in denying reinstatement because of his psychiatric disability where petitioner presented evidence that he was physically fit for employment but failed to controvert evidence that he suffered from continuing psychiatric disability which prevented him from performing job in reasonable manner. Bolecek v State, 151 A.D.2d 478, 542 N.Y.S.2d 268, 1989 N.Y. App. Div. LEXIS 7460 (N.Y. App. Div. 2d Dep't), app. denied, 74 N.Y.2d 613, 547 N.Y.S.2d 847, 547 N.E.2d 102, 1989 N.Y. LEXIS 3092 (N.Y. 1989).

Employee with bipolar affective disorder, who admitted striking coworker, did not establish that employer's reasons for discharging her were pretext for discrimination in violation of CLS Exec § 296(1)(a). Glowacki v Buffalo Gen. Hosp., 2 F. Supp. 2d 346, 1998 U.S. Dist. LEXIS 6241 (W.D.N.Y. 1998).

Hospital clerk's disability discrimination claim must fail, even though she was diagnosed with Bipolar Affective Disorder, where she was transferred due to demonstrated lack of dependability in her job and terminated after she hit and injured co-worker, because hospital articulated legitimate, nondiscriminatory reason for termination, and clerk could not prove pretext, even admitting that she "swatted" co-worker. Glowacki v Buffalo Gen. Hosp., 2 F. Supp. 2d 346, 1998 U.S. Dist. LEXIS 6241 (W.D.N.Y. 1998).

County department of social service's motion for summary judgment was denied on a psychiatric patient's constructive-discharge claim based on disability discrimination under N.Y. Exec. Law § 296(a), where the department did not dispute that it knew of the patient's mental disorder, the patient believed that the very people responsible for employing him had him arrested, taken to a hospital in handcuffs, and involuntarily detained, and a jury could conclude that the department's given reasons for taking its actions were not its true reasons. Ruhlmann v Ulster County Dep't of Soc. Servs., 234 F. Supp. 2d 140, 2002 U.S. Dist. LEXIS 25784 (N.D.N.Y. 2002).

In an employee's suit against her former employer alleging employment discrimination in violation of the Americans with Disabilities Act (ADA), 42 U.S.C.S. § 12101 et seq., and the New York State Human Rights Law (NYSHRL), N.Y. Exec. Law § 296 et seq., wherein the employee asserted that the employer discriminated against her by terminating her from her employment due to her depression, that the employer retaliated against her by terminating her for expressing her intention to file a formal complaint against her supervisor, and that she was subjected to a hostile work environment based upon her disability, the employee set forth sufficient facts to defeat the employer's motion for summary judgment on her claims for actual disability under the NYSHRL, record of disability under the ADA and NYSHRL, perceived disability under the ADA and NYSHRL, her claim of a hostile work environment under the NYSHRL, and her claim for retaliation, since there were disputed issues of material fact as to those claims. However, the court found that there was insufficient evidence to raise genuine issues of fact regarding the employee's discrimination claim upon actual disability under the ADA since the evidence showed that, at the time she was denied a pay increase/bonus and was terminated (the adverse employment actions she alleged), she was not suffering from a disability that substantially limited a major life activity since she admittedly was not experiencing any symptoms of depression at that time. McCowan v HSBC Bank USA, 689 F. Supp. 2d 390, 2010 U.S. Dist. LEXIS 12289 (E.D.N.Y. 2010).

45. —Seizures

Discharged bank employee failed to state cause of action for employment discrimination since contention that she was discharged because she suffered from nervous condition was entirely unfounded and conflicted with her acknowledgement that her dismissal resulted from inability to pass 2 polygraph tests administered to all employees following discovery of sizable cash shortage at branch; additionally, contention that her nervous condition constituted "disability" within meaning of CLS Exec § 292 was unsupported. Buffolino v Long Island Sav. Bank, FSB, 126 A.D.2d 508, 510 N.Y.S.2d 628, 1987 N.Y. App. Div. LEXIS 41650 (N.Y. App. Div. 2d Dep't 1987).

Petitioner's discharge as probationary Transit Police Officer was not violative of Executive Law § 296, which makes it unlawful discriminatory practice to discharge employee because of disability; pursuant to standards for medical fitness promulgated by Municipal Police Training Council, presence of seizure disorder is sufficient cause for disqualification of police candidate, and to qualify for service as police officer, candidate "must be seizure free for two years without medication" (9 NYCRR 6000.6 [31]); petitioner suffered from seizure disorder prior to her discharge and her disorder would have prevented her from performing her full duties until long after date on which her probationary status was scheduled to conclude; inasmuch as her permanent appointment to police force was precluded by existence of her seizure disorder and she was medically unqualified to reasonably perform activities involved in position, she is not entitled to protection of Human Rights Law; accordingly, petitioner has failed to sustain her claim of discrimination based upon her disability–as probationary employee, petitioner could be discharged without hearing and without statement of specific reasons; in absence of evidence of bad faith or unlawful reasons for discharge, respondents' determination is upheld. LaMotta v New York City Transit Authority, 165 A.D.2d 875, 560 N.Y.S.2d 346, 1990 N.Y. App. Div. LEXIS 11511 (N.Y. App. Div. 2d Dep't 1990).

New York City Transit Authority did not illegally discriminate on basis of disability (CLS Exec § 296) in firing probationary police officer who suffered from epileptic seizures where (1) department's policy stated that presence of seizure disorder was sufficient cause for disqualification of candidate, and that candidate must be seizure-free for 2 years to qualify for permanent appointment, and (2) medical evidence showed that officer suffered from seizure disorder which would interfere with her duties until long after her probationary status expired; since petitioner was legally excluded from permanent appointment, she was not protected by Human Rights Law. LaMotta v New York City Transit Authority, 165 A.D.2d 875, 560 N.Y.S.2d 346, 1990 N.Y. App. Div. LEXIS 11511 (N.Y. App. Div. 2d Dep't 1990).

46. —Urinary disorder

In action by probationary police officer against housing authority for being terminated based upon alleged disability, where officer alleges that termination was arbitrary and capricious contrary to CLS Executive Law § 296 forbidding employment discrimination based on physical disability, petitioner is entitled to full evidentiary hearing pursuant to CPLR 7804 in view of strong prima facie showing impermissible discrimination; respondent's position that petitioner suffered from untreatable disease of urinary tract was manifestly unsupportable since record indicated that petitioner had no underlying urinary tract disease, and if there was residual condition, it had been rendered benign through treatment; it is impossible to conclude that respondent had made good faith effort to evaluate extent to which petitioner's alleged impairment would interfere with reasonable performance of his duties as required by Executive Law § 296(1)(a). Carrero v New York City Housing Authority, 116 A.D.2d 141, 500 N.Y.S.2d

246, 1986 N.Y. App. Div. LEXIS 50373 (N.Y. App. Div. 1st Dep't 1986).

47. —Vision impairment

Petitioner was discharged from his position as carpenter with New York City Transit Authority (NYCTA) in violation of CLS Exec § 296 where NYCTA failed to show that petitioner's vision impairment rendered him incapable of reasonably performing activities involved in position of carpenter. Obas v Kiley, 149 A.D.2d 422, 539 N.Y.S.2d 767, 1989 N.Y. App. Div. LEXIS 4393 (N.Y. App. Div. 2d Dep't 1989).

48. National origin discrimination

In an employment discrimination action against a county, the Appellate Division properly dismissed the complaint which alleged that employment with defendant county was terminated on the basis of plaintiff's race and national origin in violation of Exec Law § 296 where plaintiff's failure to timely file a notice of claim under Gen. Mun L § 50-e was fatal in that the action had not been brought to indicate a public interest and leave to serve a late notice of claim had not been granted. Mills v County of Monroe, 59 N.Y.2d 307, 464 N.Y.S.2d 709, 451 N.E.2d 456, 1983 N.Y. LEXIS 3161 (N.Y.), cert. denied, 464 U.S. 1018, 104 S. Ct. 551, 78 L. Ed. 2d 725, 1983 U.S. LEXIS 2750 (U.S. 1983).

One-year filing requirement of CLS Exec § 297(5) did not apply to action by school district employee alleging unlawful suspension without pay due solely to his national origin or ancestry in violation of CLS Exec § 296; institution of civil actions to recover damages for unlawful discriminatory practices under § 296 is governed by 3-year statute of limitations prescribed in CLS CPLR § 214(2). School district employee was precluded from maintaining action against district for his suspension allegedly due to national origin or ancestry in violation of CLS Exec § 296 where he failed to comply with requirement of CLS Educ § 3813(1) that notice of claim be served within 3 months of accrual of claim, and he did not seek leave to serve late notice of claim until after 3-year limitation period of CLS Exec § 214(2) had expired. Stoetzel v Wappingers Cent. School Dist., 166 A.D.2d 643, 561 N.Y.S.2d 71, 1990 N.Y. App. Div. LEXIS 12920 (N.Y. App. Div. 2d Dep't 1990).

Court would annul determination finding that petitioner, not-for-profit corporation which renovated abandoned buildings, discriminated against Hispanic complainant on basis of national origin where petitioner provided low-income housing for homeless and training to its trainees, majority of whom were Hispanic and black, and overwhelming evidence was that petitioner was not anti-Hispanic and that true reasons for complainant's dismissal was that he was employee malcontent who saw himself as supervisor and could not accept subordinate role. Youth Action Homes v State Div. of Human Rights ex rel. Palombo, 231 A.D.2d 7, 659 N.Y.S.2d 447, 1997 N.Y. App. Div. LEXIS 6945 (N.Y. App. Div. 1st Dep't 1997).

Caucasian waitresses established prima facie case of restaurant's discrimination by showing that Asian waitresses were given preference with respect to hours and table assignments. Young Fu Hsu v New York State Div. of Human Rights, 241 A.D.2d 913, 661 N.Y.S.2d 400, 1997 N.Y. App. Div. LEXIS 7842 (N.Y. App. Div. 4th Dep't 1997).

Causes of action for discrimination based on ethnic origin were viable under both CLS Exec § 296 and NYC Admin Code § 8-107, and were properly sustained on motion for summary judgment in view of evidence of persistent verbal abuse. Nacinovich v Tullet & Tokyo Forex, 257 A.D.2d 523, 685 N.Y.S.2d 17, 1999 N.Y. App. Div. LEXIS 646 (N.Y. App. Div. 1st Dep't 1999).

University was entitled to summary judgment in a former employee's disparate impact claim concerning the elimination of the employee's adjunct teaching position because the university showed that of the six other adjuncts who were not reappointed, none were Japanese, and, in fact, all were non-Asian and two were Caucasian. Abe v New York Univ., 169 A.D.3d 445, 94 N.Y.S.3d 17, 2019 N.Y. App. Div. LEXIS 968 (N.Y. App. Div. 1st Dep't 2019).

Plaintiff's discharge from his employment with a town highway department solely because he was the son of the former town supervisor, a political adversary of the successor supervisor, did not state a cause of action for unlawful discriminatory practice under Exec Law § 296(1) as a discharge based on national origin; although Exec Law § 292(8) provides that the term national origin includes ancestry, the legislative intent of the statute was to prohibit discrimination based upon the country in which an individual was born, as well as the country in which an individual's ancestors were born; the discharge of an employee based on political differences with the employee's father is not prohibited. Ingalls v Lyndon, 127 Misc. 2d 442, 486 N.Y.S.2d 659, 1985 N.Y. Misc. LEXIS 2614 (N.Y. Sup. Ct. 1985).

Jury could reasonably conclude that employee suffered discrimination due to his Korean nationality where (1) Chinese co-worker, who was primary mover in decision to terminate employee, was shown to be biased against Koreans, and (2) at meeting discussing employee's termination, employee was described as former member of Korean military who was "authoritarian." Employee, as native of Korea, was member of protected class for purpose of employment discrimination action brought under federal Civil Rights Act of 1964 and state Human Rights Law. Song v Ives Laboratories, Inc., 957 F.2d 1041, 1992 U.S. App. LEXIS 2608 (2d Cir. N.Y. 1992).

Bus driver, who was of Puerto Rican background, failed to establish that he was fired due to national origin or ethnic discrimination in violation of Human Rights Law, where employer asserted that driver was fired because he tested positive for cocaine, drug test was administered in nondiscriminatory fashion to all drivers, and supervisor made no remarks at termination meeting suggesting that invidious discrimination was reason for discharge. Santiago v Greyhound Lines, Inc., 956 F. Supp. 144, 1997 U.S. Dist. LEXIS 1048 (N.D.N.Y. 1997).

Probationary patient representative's national origin discrimination claim must fail, even if hospital had English-only policy for conducting hospital business and she was terminated for violating it, where she was hired because of her ability to speak Spanish and English, because policy was clearly not used to discriminate against her. Velasquez v Goldwater Mem. Hosp., 88 F. Supp. 2d 257, 2000 U.S. Dist. LEXIS 2926 (S.D.N.Y. 2000).

Where plaintiff claims in her national origin discrimination claims that, on two occasions her supervisor told her that she was a "wetback," referring to her Mexican heritage, this harassment could not be classified as severe or pervasive, such that, as a matter of law, plaintiff could not maintain her national origin discrimination claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e-2(a)(1), or the New York Human Rights Law, N.Y. Exec. Law § 296 et seq. EEOC v Rotary Corp., 297 F. Supp. 2d 643, 2003 U.S. Dist. LEXIS 23225 (N.D.N.Y. 2003).

In an action in which a former employee filed suit against his former employer alleging discrimination based on age and national origin in violation of the New York State Human Rights Law, N.Y. Exec. Law § 296 (2003), and the New York City Human Rights Law, New York City, N.Y., Admin. Code §§ 8-107 and 8-502 et seq., the employer was granted summary judgment where the employee had not identified any facts that gave rise to an inference of discrimination; because there was no evidence in the record to suggest that coworkers engaged in conduct that was of comparable seriousness to the employee's, the employee had not shown that the coworkers were similarly situated. Milani v IBM, 322 F. Supp. 2d 434, 2004 U.S. Dist. LEXIS 11025 (S.D.N.Y. 2004), aff'd, 137 Fed. Appx. 430, 2005 U.S. App. LEXIS 13251 (2d Cir. N.Y. 2005).

Former provisional city hospital employee failed to show that she was terminated due to her national origin, in violation of the New York State Human Rights Law, N.Y. Exec. Law § 296, because she failed to show that she was treated differently from similarly situated non-Hispanic employees as, at the time that the employee was terminated, all provisional employees were replaced by employees from an established civil service list. Cabrera v New York City, 436 F. Supp. 2d 635, 2006 U.S. Dist. LEXIS 44461 (S.D.N.Y. 2006).

Former employee failed to satisfy his burden of establishing a prima facie case of discrimination based on national origin pursuant to Title VII of the Civil Rights Act of 1964 and N.Y. Exec. Law § 296 because, while it was undisputed that the employee was a member of a protected class because he was a

Bosnian male in the nursing field, and the employee experienced an adverse employment action because he was terminated from his position, (1) the employee failed to meet even the de minimus standard of demonstrating he was qualified for the position of staff nurse at the employer because, while it was undisputed that the employee passed the nursing boards and met the licensing and educational requirements of the employer, he failed to meet the excellent patient care standard in the employment and retention policy, (2) specifically, the employee committed multiple errors that did not meet the excellent patient care standard required for employee retention, and (3) the employee failed to provide evidence that gave rise to an inference of discrimination based on national origin. Memisevich v St. Elizabeth's Med. Ctr., 443 F. Supp. 2d 276, 2006 U.S. Dist. LEXIS 56315 (N.D.N.Y. 2006).

Even if a former employee satisfied his burden of establishing a prima facie case of discrimination based on national origin pursuant to Title VII of the Civil Rights Act of 1964 and N.Y. Exec. Law § 296, the employer offered legitimate, nondiscriminatory reasons for its termination decision because (1) the complaints about the employee's clinical errors were investigated and reasonably credited, which would have rebutted any presumption of discrimination, (2) the employee's disputes with co-workers were evident of personality conflicts, and (3) the employee was a probationary employee at the time of his termination and under the employer's policy could have been terminated during the probationary period with or without notice. Memisevich v St. Elizabeth's Med. Ctr., 443 F. Supp. 2d 276, 2006 U.S. Dist. LEXIS 56315 (N.D.N.Y. 2006).

Former public school psychologist's national origin discrimination claims under N.Y. Exec. Law § 296 failed because the school district and school officials offered legitimate and nondiscriminatory reasons for the psychologist's discharge, which included his lack of professionalism, failure to meet student needs, and intimidating attitude, and the psychologist was unable to show that these reasons were pretext for discrimination; that the school's principal told the psychologist that he did not fit into the culture at the school was not evidence of unlawful discrimination, as the principal indicated she was referring to the culture of professionalism, not the ethnic composition of the staff. Dorcely v Wyandanch Union Free Sch. Dist., 665 F. Supp. 2d 178, 2009 U.S. Dist. LEXIS 91543 (E.D.N.Y. 2009).

Former employee's hostile work environment claim against an employer failed because the record did not support the employee's claim that the employer imposed an "English only" policy; the employer provided interpreters and routinely hired workers it knew were not English speakers. Polanco v 34th St. P'ship, 724 F. Supp. 2d 420, 2010 U.S. Dist. LEXIS 68699 (S.D.N.Y. 2010).

Employee's claim alleging discrimination pursuant to New York Human Rights Law, N.Y. Exec. Law § 296(1)(a), based on his national origin as a person of French ancestry could not succeed because, based on evidence of the employee's worsening job performance leading up to his demotion and termination, the employer met its burden of demonstrating a legitimate, nondiscriminatory reason for adverse employment actions against the employee. Pibouin v CA, Inc., 867 F. Supp. 2d 315, 2012 U.S. Dist. LEXIS 47102 (E.D.N.Y. 2012).

Employer discriminated against complainant, native of Columbia, where she had been promoted to forelady after working as cleaning lady for 3 full years, shortly thereafter building supervisor removed her as forelady and replaced her with someone of national origin similar to building supervisor, Albanian national, and employer merely proffered single statement allegedly made by complainant's former supervisor that complainant was demoted because she did not work out. 2000 Order Comm HR No. 9D-E-O-89-136156E.

49. Racial discrimination

A complaint by an associate dean of a community college alleging unlawful discrimination on the basis of race in his discharge was properly dismissed, where a finding by the State Division of Human Rights of discrimination by use of a quota system was not warranted even though the evidence showed that the college tried to avoid penalizing any minority group when affecting a retrenchment plan, the college president presented a statistical analysis to the college affirmative action office showing no change in the racial balance of college employees as a result of the plan, and the college president had told the dean that his discharge was for "anthropological" reasons, in that the statement was ambiguous and the State Division of Human Rights had not found the statement to be evidence of prejudice or bias against the dean. CUNY-Hostos Community College v State Human Rights Appeal Bd., 59 N.Y.2d 69, 463 N.Y.S.2d 173, 449 N.E.2d 1251, 1983 N.Y. LEXIS 3027 (N.Y. 1983).

In an employment discrimination action against a county, the Appellate Division properly dismissed the complaint which alleged that employment with defendant county was terminated on the basis of plaintiff's race and national origin in violation of Exec Law § 296 where plaintiff's failure to timely file a notice of claim under Gen. Mun L § 50-e was fatal in that the action had not been brought to indicate a public interest and leave to serve a late notice of claim had not been granted. Mills v County of Monroe, 59 N.Y.2d 307, 464 N.Y.S.2d 709, 451 N.E.2d 456, 1983 N.Y. LEXIS 3161 (N.Y.), cert. denied, 464 U.S. 1018, 104 S. Ct. 551, 78 L. Ed. 2d 725, 1983 U.S. LEXIS 2750 (U.S. 1983).

Denial of summary judgment to a plaintiff with regard to her racial discrimination suit brought against her former employer was upheld on appeal because, though many factual issues were in dispute in the cause of action, none of such disputed facts were material to the plaintiff showing any causal connection between any alleged protected activity she had engaged in and her termination. The plaintiff had been discharged as a result of violating the employer's family leave policy, filed several grievances but never mentioned racial discrimination in any of them, and, though no love loss existed between the plaintiff and a supervisor, such animosity was not shown to have been racially motivated. Forrest v Jewish Guild for the Blind, 3 N.Y.3d 295, 786 N.Y.S.2d 382, 819 N.E.2d 998, 2004 N.Y. LEXIS 3489 (N.Y. 2004).

A determination of the State Division of Human Rights that a black child-care worker had been discriminated against because he had been terminated, while a white child-care worker had received only a two-day suspension for an allegedly more serious offense, was not supported by substantial evidence where the evidence showed that the black worker had been found asleep on the job three times in eight days in a high-security facility, had been found sleeping on duty once before and been reprimanded, and that there were no mitigating circumstances, whereas the evidence showed that the white worker had committed the offense of leaving three boys unattended only once and not in a high security facility, and that he had presented mitigating circumstances justifying the lighter sanction. State Div. of Human Rights ex rel. Eads v Baker Hall, Inc., 80 A.D.2d 733, 437 N.Y.S.2d 160, 1981 N.Y. App. Div. LEXIS 10461 (N.Y. App. Div. 4th Dep't 1981).

In an proceeding pursuant to Exec Law § 296, alleging wrongful discharge from employment based on racial discrimination, the proceeding would be barred under County Law § 52 for failure to file a notice of claim within 90 days of accrual, despite the fact that the action would not fall within the notice provisions of Gen Mun Law §§ 50-e, 50-i. Mills v County of Monroe, 89 A.D.2d 776, 453 N.Y.S.2d 486, 1982 N.Y. App. Div. LEXIS 17889 (N.Y. App. Div. 4th Dep't 1982), aff'd, 59 N.Y.2d 307, 464 N.Y.S.2d 709, 451 N.E.2d 456, 1983 N.Y. LEXIS 3161 (N.Y. 1983).

The State Division of Human Rights properly dismissed petitioner's complaint of unlawful discriminatory employment practice based on race and color, where petitioner's position was terminated due to a loss of federal funds and 14 white employees had also lost their jobs on the same day as petitioner for the same reason. Powe v County of Albany, Dep't of Employment & Training, 108 A.D.2d 997, 485 N.Y.S.2d 147, 1985 N.Y. App. Div. LEXIS 43326 (N.Y. App. Div. 3d Dep't), app. dismissed, 65 N.Y.2d 922, 493 N.Y.S.2d 1031, 483 N.E.2d 135, 1985 N.Y. LEXIS 15192 (N.Y. 1985).

Petitioner, who is black, was not dismissed from her position as a nurse aid with the employer-hospital on the basis of race where she was negligent in the performance of her duties, had received several warnings regarding her attitude, attendance and work performance, and had been denied annual merit increases on more than one occasion, and where the hospital had previously

discharged white employees for the same reason and had continued to employ a number of black employees following her termination. Gray v Albany Medical Center Hospital, 108 A.D.2d 1031, 485 N.Y.S.2d 601, 1985 N.Y. App. Div. LEXIS 43354 (N.Y. App. Div. 3d Dep't 1985).

Determination that employer dismissed its employee from his position as assistant manager of supermarket in racially discriminatory manner was supported by facts that employee had proven himself to be honest and valued employee, that he was subjected to improper polygraph test based on unsubstantiated, hearsay accusation of subordinate, and that purported ground for his dismissal—allowing customer to eat grapes—was plainly disproportionate to nature of charge and was inconsistent with previous treatment accorded to white assistant manager. Domino Supermarket, Inc. v New York State Div. of Human Rights, 147 A.D.2d 417, 538 N.Y.S.2d 265, 1989 N.Y. App. Div. LEXIS 2070 (N.Y. App. Div. 1st Dep't 1989).

It was excessive to award $50,000 for mental anguish suffered by employee who was unlawfully discharged in racially discriminatory manner where there was no evidence of lasting harm or impairment; appropriate award was $5,000. Domino Supermarket, Inc. v New York State Div. of Human Rights, 147 A.D.2d 417, 538 N.Y.S.2d 265, 1989 N.Y. App. Div. LEXIS 2070 (N.Y. App. Div. 1st Dep't 1989).

Determination that petitioner discriminated against complainant on basis of race, terminating her employment in violation of Executive Law § 296, is supported by substantial evidence in record–notwithstanding constant and blatant nature of racial discrimination against complainant, where sole evidence of mental anguish was complainant's own testimony that she was "[e]motionally and physically screwed up", award of $35,000 for mental anguish is grossly excessive and new award should not exceed $5,000–award of back pay from complainant's discharge in February 1985 until her reinstatement by petitioner constitutes punitive assessment against petitioner rather than compensation; complainant obtained new employment at same pay in July 1985; Division of Human Rights may not award what would amount to punitive damages solely on finding that unlawful discrimination occurred; award of back pay must be reduced to cover only period that complainant was out of work as result of her unlawful discharge; however, Division did not abuse its discretion in ordering petitioner to reinstate complainant–three-year period between filing of complaint and issuance of Division's determination did not operate to divest Division of jurisdiction; absent showing of substantial prejudice, time limitations enunciated in Executive Law § 297 are directory and not mandatory. Cosmos Forms, Ltd. v State Div. of Human Rights, 150 A.D.2d 442, 541 N.Y.S.2d 50, 1989 N.Y. App. Div. LEXIS 6521 (N.Y. App. Div. 2d Dep't 1989).

Evidence supported determination finding correctional facility guilty of unlawful discriminatory practice based on race where complainant and other black correction officers testified as to "hostile situation" at facility, black officers were placed in different "class" from white employees, they were denied more desirable assignments and shifts, they had their orders and directions disregarded by subordinates or countermanded by their superior officers, and they were disciplined more frequently and more harshly than white employees; furthermore, of 16 cases of alleged inmate abuse occurring at facility, complainant was sole correction officer who was dis-charged. New York State Dep't of Correctional Servs. v State Div. of Human Rights, 215 A.D.2d 908, 626 N.Y.S.2d 588, 1995 N.Y. App. Div. LEXIS 5326 (N.Y. App. Div. 3d Dep't 1995).

Employer's motion, under CLS CPLR § 4404(a), to set aside jury verdict for plaintiff in action for retaliatory discharge was properly granted where (1) evidence supported jury's finding that employee's transfer was not in retaliation for her complaint of age and racial discrimination in denial of promotion, (2) employee's discrimination complaint preceded her termination by 2 years, during which she received salary increases, and (3) there was ample evidence of employee's insubordination after her transfer. Budzanoski v Pfizer, Inc., 245 A.D.2d 72, 664 N.Y.S.2d 796, 1997 N.Y. App. Div. LEXIS 12836 (N.Y. App. Div. 1st Dep't 1997).

Employer was entitled to summary judgment in action by black former employee under CLS Exec § 296 where employer submitted evidence that plaintiff had been fired for misrepresenting transfer of account as new business in order to obtain commission, and plaintiff argued only that there was material issue as to whether account constituted new business without showing that employer's explanation was designed to mask racial discrimination. Sommerville v R.C.I., 257 A.D.2d 884, 684 N.Y.S.2d 53, 1999 N.Y. App. Div. LEXIS 519 (N.Y. App. Div. 3d Dep't 1999).

In action alleging that plaintiff's employer impermissibly discriminated against him when it demoted him for subjecting African American coworker to ridicule, jury could reasonably infer that plaintiff was demoted only because he was white and incident was thought to be racially motivated where (1) supervisor testified that poor treatment of minority employees in facility where plaintiff worked made it difficult to accomplish employer's goal of increasing number of minority employees and expressed concern that tolerating his "prank" would discourage minorities from accepting positions in that facility, and (2) expert in field of labor-management relations and employment discrimination testified that, contrary to supervisor's belief, prank in question (posting picture of bird-like stuffed animal with long multicolored beak and black body seated at African American coworker's desk) belied intimation of racial animus. Michaelis v State, 258 A.D.2d 693, 685 N.Y.S.2d 325, 1999 N.Y. App. Div. LEXIS 944 (N.Y. App. Div. 3d Dep't), app. denied, 93 N.Y.2d 806, 689 N.Y.S.2d 708, 711 N.E.2d 984, 1999 N.Y. LEXIS 1202 (N.Y. 1999).

Because an employee did not rebut an employer's evidence of a legitimate, nondiscriminatory explanation for the employee's termination, the employer was entitled to summary judgment in the employee's action for racial discrimination under N.Y. Exec. Law § 296(1)(a) and New York City, N.Y., Admin. Code § 8-107(1)(a). Dickerson v Health Mgmt. Corp. of Am., 21 A.D.3d 326, 800 N.Y.S.2d 391, 2005 N.Y. App. Div. LEXIS 8801 (N.Y. App. Div. 1st Dep't 2005).

Although an employer claimed that it fired an employee solely because of inadequate performance, the employee submitted statistical reports that allegedly demonstrated the employee's termination exemplified a pattern of racial discrimination by the employer against black managers; accordingly, the employer was not entitled to summary judgment in the employee's action under N.Y. Exec. Law § 296 et seq., and New York City, N.Y., Admin. Code § 8-101 et seq. Baldwin v Cablevision Sys. Corp., 65 A.D.3d 961, 888 N.Y.S.2d 1, 2009 N.Y. App. Div. LEXIS 6576 (N.Y. App. Div. 1st Dep't 2009), app. denied, 14 N.Y.3d 701, 898 N.Y.S.2d 96, 925 N.E.2d 101, 2010 N.Y. LEXIS 3821 (N.Y. 2010).

Trial court erred in denying summary judgment pursuant to N.Y. C.P.L.R. 3212 to an employer in an employee's racial discrimination action pursuant to N.Y. Exec. Law § 296; the employer presented evidence that the employee was fired for poor job performance, and the employee failed to refute that showing. Pramdip v Bldg. Serv. 32B-J Health Fund, 308 A.D.2d 523, 765 N.Y.S.2d 44, 2003 N.Y. App. Div. LEXIS 9641 (N.Y. App. Div. 2d Dep't 2003).

African-American employee did not show racial discrimination because there was a legitimate and nondiscriminatory basis for most of the conduct by her employer and supervisors, of which she complained, as reprimands were based on her charting errors, which jeopardized her employer's state funding, shifting the burden to her to show pretext, which was not shown, and the racial epithets of which she complained were not alone sufficient to show race discrimination; the employee was legitimately terminated for not providing required medical documentation to support her family leave claim that she needed to care for her ill father, for not responding to inquiries about her whereabouts, and for abandoning the care of her father without returning to work. Forrest v Jewish Guild for the Blind, 309 A.D.2d 546, 765 N.Y.S.2d 326, 2003 N.Y. App. Div. LEXIS 10478 (N.Y. App. Div. 1st Dep't 2003), aff'd, 3 N.Y.3d 295, 786 N.Y.S.2d 382, 819 N.E.2d 998, 2004 N.Y. LEXIS 3489 (N.Y. 2004).

African-American employee did not show that supervisors aided and abetted her employer's racial discrimination because, while an individual could be held liable under N.Y. Exec. Law § 296(6) and (7) for aiding and abetting discriminatory conduct,

the employee's aiding and abetting claim could not survive the supervisors' summary judgment motion because the employee did not successfully raise a question of fact as to the underlying discrimination claim. Forrest v Jewish Guild for the Blind, 309 A.D.2d 546, 765 N.Y.S.2d 326, 2003 N.Y. App. Div. LEXIS 10478 (N.Y. App. Div. 1st Dep't 2003), aff'd, 3 N.Y.3d 295, 786 N.Y.S.2d 382, 819 N.E.2d 998, 2004 N.Y. LEXIS 3489 (N.Y. 2004).

In this NYCHRL and NYSHRL action, while the employee had not provided facts specific enough to suggest that race was the sole motivating factor in her termination or other adverse employment actions, the employee alleged facts that suggested that her race may have been one of the motivating factors in her termination and other adverse employment actions. Palmer v Cook, 65 Misc. 3d 374, 108 N.Y.S.3d 297, 2019 N.Y. Misc. LEXIS 4283 (N.Y. Sup. Ct.), dismissed, in part, 64 Misc. 3d 1222(A), 117 N.Y.S.3d 469, 2019 N.Y. Misc. LEXIS 4286 (N.Y. Sup. Ct. 2019), dismissed, in part, 64 Misc. 3d 1222(A), 117 N.Y.S.3d 469, 2019 N.Y. Misc. LEXIS 4301 (N.Y. Sup. Ct. 2019).

In this NYCHRL and NYSHRL action, court denied employer's motion to dismiss employee's hostile work environment claim in its entirety as against assemblywoman where employee alleged that assemblywoman allegedly threw or destroyed small objects in fits of anger and when displeased with her staff assemblywoman would use profane epithets. Palmer v Cook, 65 Misc. 3d 374, 108 N.Y.S.3d 297, 2019 N.Y. Misc. LEXIS 4283 (N.Y. Sup. Ct.), dismissed, in part, 64 Misc. 3d 1222(A), 117 N.Y.S.3d 469, 2019 N.Y. Misc. LEXIS 4286 (N.Y. Sup. Ct. 2019), dismissed, in part, 64 Misc. 3d 1222(A), 117 N.Y.S.3d 469, 2019 N.Y. Misc. LEXIS 4301 (N.Y. Sup. Ct. 2019).

In light of jury's findings that defendant, a county employee, participated in an assault upon plaintiff, a black co-worker, that racial discrimination was a substantial factor in defendant's conduct, and that the assault was sufficiently severe to alter the terms and conditions of the co-worker's employment, a holding that the defendant was not acting under color of state law for purposes of 42 U.S.C.S. § 1983 did not affect the defendant's individual liability under 42 U.S.C.S. § 1981, or the New York Human Rights Law. Patterson v Balsamico, 440 F.3d 104, 2006 U.S. App. LEXIS 4943 (2d Cir. N.Y. 2006).

Jury's verdict holding two water department employees liable for an employee's wrongful termination for his interracial engagement was supported by evidence that both defendants knew about the harassment, did nothing to respond to it, and then participated directly in the investigation and termination of the employee. Additionally, one defendant, the employee relations specialist, had himself taunted the employee based on his fiancee's race. Matusick v Erie County Water Auth., 739 F.3d 51, 2014 U.S. App. LEXIS 192 (2d Cir. N.Y.), reprinted, 757 F.3d 31, 2014 U.S. App. LEXIS 3683 (2d Cir. N.Y. 2014).

Executive secretary's age and race discrimination claims against African airline under CLS Exec Law § 296 must fail, where, during relevant time period, her boss hired individuals of various ethnic backgrounds in roughly same proportion as existed prior to his promotion to head of Manhattan office, including 4 blacks, and these employees ranged in age from 22 to 55, nearly half in their 40s and 50s, because this evidence, coupled with lack of support for secretary's 4 specific allegations of discriminatory actions, supports conclusion that boss's employment decisions were made without regard to age or race. Gueye v Air Afrique, 917 F. Supp. 1024, 1996 U.S. Dist. LEXIS 2622 (S.D.N.Y.), aff'd, 104 F.3d 352, 1996 U.S. App. LEXIS 37808 (2d Cir. N.Y. 1996).

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Employer is entitled to summary dismissal of terminated employee's Human Rights Law (CLS Exec Law §§ 290 et seq.) race discrimination claim, where employee was fired for testing positive for marijuana use and claims test was manufactured in order to get him out based on prior requests that he change shifts, because employee offers nothing more than conclusory allegations and fails to show any evidence of disparate treatment from which court may infer that discrimination caused his termination. Leslie v Banctec Serv. Corp., 928 F. Supp. 341, 1996 U.S. Dist. LEXIS 8143 (S.D.N.Y. 1996).

White attorney, discharged after 12 years with firm, may proceed with case for race discrimination in violation of New York Human Rights Law (CLS Exec Law §§ 290 et seq.), where he claims he was terminated because he is married to black woman, because inherent in complaint is that he would not have been let go if his own race had been different—same as his wife's. Rosenblatt v Bivona & Cohen, P.C., 946 F. Supp. 298, 1996 U.S. Dist. LEXIS 17576 (S.D.N.Y. 1996).

Plaintiff's allegation that he was terminated by his former employer for being married to black woman stated claim under Human Rights Law. Rosenblatt v Bivona & Cohen, P.C., 946 F. Supp. 298, 1996 U.S. Dist. LEXIS 17576 (S.D.N.Y. 1996).

Standing alone, racially derogatory remarks made by company official regarding employee were not sufficient under CLS Exec Law § 296 to show that employee had been discharged in reduction in force owing to her race, even though such official had participated in ranking of employees in preparation for reduction, where official had made remarks several months before employee's termination, and remarks had related to single incident in which official had been angered by employee's behavior. Coleman v Prudential Relocation, 975 F. Supp. 234, 1997 U.S. Dist. LEXIS 12937 (W.D.N.Y. 1997).

New York Human Rights Law (Exec § 296) claim of Senior Facilities Analyst is denied summarily, even though he was forced to train employee who took over his duties, because he fails to create genuine issue of material fact that he was "replaced" by someone who was not member of his protected class, nor has he advanced any evidence that his job reassignment occurred in circumstances leading to inference of racial discrimination. Morris v Northrop Grumman Corp., 37 F. Supp. 2d 556, 1999 U.S. Dist. LEXIS 1700 (E.D.N.Y. 1999).

Former flight attendant's Exec § 296 claim of discriminatory discharge must fail, even though white attendant was terminated for violating regulations and leave requirements and disobeying orders in connection with caring for her injured African-American fiance who was also pilot for their employer, because employee who bore ultimate responsibility for approving discharge had no knowledge of race of either attendant or fiance, and there is no other evidence that proffered reasons for termination were merely pretext to discharge her due to interracial relationship. Segal v TWA, 63 F. Supp. 2d 373, 1999 U.S. Dist. LEXIS 13724 (S.D.N.Y. 1999).

Asian male terminated by telephone company has no viable racial discrimination claim under Exec § 296, where facts elicited by company support its claim that he was terminated for engaging in prohibited business activities in competition with company, because he fails to support assertions of racially offensive jokes by assistant manager and more lenient treatment of white offenders with any admissible factual evidence. Cheng v New York Tel. Co., 64 F. Supp. 2d 280, 1999 U.S. Dist. LEXIS 13588 (S.D.N.Y. 1999), aff'd, 225 F.3d 645, 2000 U.S. App. LEXIS 26341 (2d Cir. N.Y. 2000).

Terminated Hispanic state troopers failed to show pretextual nature of race-neutral reason for their termination, which was stated to be their obstreperous conduct during confrontation with local police in bar and afterward at station house, precluding racial discrimination in employment claim under Title VII and Exec § 296, where claim that 5 white police officers were given lesser punishments for similar conduct was insufficient, as white officers had not been in conflict with local police or involved in station house misbehavior. Aguirre v N.Y. State Police, 156 F. Supp. 2d 305, 2001 U.S. Dist. LEXIS 9249 (S.D.N.Y. 2001).

African-American histology department supervisor has no viable claim for wrongful termination under Exec § 296, even

though he alleges his employees made derogatory remarks about African-Americans, complained about him, and his guilt was presumed without investigation due to his race, because better evidence demonstrates that he was discharged because he repeatedly acted inappropriately as supervisor. Minton v Lenox Hill Hosp., 160 F. Supp. 2d 687, 2001 U.S. Dist. LEXIS 13045 (S.D.N.Y. 2001).

Employer is denied summary dismissal of African-American store manager's discriminatory termination claims, even though it asserts it let manager go due to his (1) poor leadership, (2) failure to recruit, and (3) lack of organization and cleanliness, where his sales success belies allegation that he had poor management skills, because he has clearly raised genuine issue of material fact as to whether employer's stated reasons for his termination are pretext for actual racial discrimination. Dais v Lane Bryant, Inc., 168 F. Supp. 2d 62, 2001 U.S. Dist. LEXIS 4497 (S.D.N.Y. 2001).

Insurance salesman's race discrimination claim under against an insurance company failed where the only evidence of discrimination was that the salesman was an African-American and the salesman's contract with the insurance company had been terminated and the insurance company presented substantial evidence showing that the salesman had failed to meet its production standards. Anyan v N.Y. Life Ins. Co., 192 F. Supp. 2d 228, 2002 U.S. Dist. LEXIS 5724 (S.D.N.Y. 2002), aff'd, 68 Fed. Appx. 260, 2003 U.S. App. LEXIS 13786 (2d Cir. N.Y. 2003).

Where a jury returned a verdict in favor of five African-American employees on their racial discrimination claims against an employer under 42 U.S.C.S. § 1981, the New York State Human Rights Law, N.Y. Exec. Law § 296 et seq., and the New York City Human Rights Law, New York City, N.Y., Admin. Code § 8-107, the evidence supported finding that the employer subjected four of the employees to harsher discipline than that received by their white co-workers, but the fifth employee did not establish disparate treatment; although the four employees were entitled to compensatory and punitive damages, the amounts exceeded awards in analogous cases and were subject to remittitur. Hill v Airborne Freight Corp., 212 F. Supp. 2d 59, 2002 U.S. Dist. LEXIS 12970 (E.D.N.Y. 2002).

In an action by a former employee against his former employer alleging race discrimination and retaliation in violation of 42 U.S.C.S. § 1981, N.Y. Exec. Law § 296, and New York City, N.Y. Admin. Code § 8-502(a), the employer's motion for summary judgment under Fed. R. Civ. P. 56(c) was granted in part where the employee's claim under New York City, N.Y., Admin. Code § 8-502(a) failed because the employee did not allege that the employer discriminated against him in New York City, and the employee's race discrimination claim failed because the employer articulated a legitimate, non-discriminatory reason for demoting the employee due to the evidence that the employee's inventory results were the worst of any of the other employees in his division, and the evidence that his supervisors warned him about his performance. Santos v Costco Wholesale, Inc., 271 F. Supp. 2d 565, 2003 U.S. Dist. LEXIS 12280 (S.D.N.Y. 2003).

Employer was not entitled to summary judgment on an employee's retaliatory discharge claims brought pursuant to Title VII of Title VII of the Civil Rights Act of 1964, the New York State Human Rights Law, and 42 U.S.C.S. § 1981 even though the employee was terminated as part of a company-wide reduction in force where there was a disputed issue of fact as to why the employee was chosen to be part of the group that was fired. Mitchell v Am. Online, 286 F. Supp. 2d 325, 2003 U.S. Dist. LEXIS 18410 (S.D.N.Y. 2003).

Employer was granted summary judgment on a former employee's hostile work environment claim based on race where a single incident of improper conduct by a fellow employee, i.e., commenting on the employee's race while dressed in a robber baron costume, did not indicate that the workplace was permeated with discriminatory intimidation, the employer had taken appropriate steps to alleviate the workplace tension and ensure that the conduct was not repeated, and the employee had not reported the other alleged acts of harassment to the employer. Kennedy v J.P. Morgan Chase & Co., 325 F. Supp. 2d 401, 2004 U.S. Dist. LEXIS 13342 (S.D.N.Y. 2004).

Summary judgment was granted dismissing an African-American employee's racial discrimination claims under 42 U.S.C.S. § 2000e et seq. and N.Y. Exec. Law § 290 et seq., arising from the termination of his employment as a custodial worker at a school, because (1) he did not sufficiently show that various adverse actions were due to his race; (2) his claim that he was disciplined for acts that white workers were allowed to engage in was insufficient because he did not compare himself to similarly situated employees, as he was a probationary employee and they were non-probationary employees; and (3) the person who hired him was also involved in firing him. Jones v Yonkers Pub. Schs, 326 F. Supp. 2d 536, 2004 U.S. Dist. LEXIS 14599 (S.D.N.Y. 2004).

In an action in which a former employee, a Puerto Rican female, filed suit against her former employer alleging that she was discharged because of her sex, race, and national origin in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., and N.Y. Exec. Law § 296, the employer was denied summary judgment where a rational trier of fact could conclude that the employer treated employees in a non-protected group more favorably than those in the protected group; non-tenured white administrators, similarly situated to the employee and two other Hispanic female administrators, were promoted and given extensions to their probationary periods. The employee, on the other hand, was discharged even though her performance ratings were "effective" and "very effective" for her two years as a probationary principal. Vergara v Yonkers Pub. Schs., 386 F. Supp. 2d 377, 2005 U.S. Dist. LEXIS 19926 (S.D.N.Y. 2005).

Racial discrimination case under N.Y. Exec. Law § 296 was dismissed because a former employer showed a nondiscriminatory reason for terminating a bus driver; the employee had a serious medical condition, and she failed to pass a required driving examination. Perry v Metro. Suburban Bus Auth., 390 F. Supp. 2d 251, 2005 U.S. Dist. LEXIS 21781 (E.D.N.Y. 2005).

Two former salespersons for a retail store failed to establish that the employer terminated them due to race where (1) the employees were repeatedly and admittedly late for work, (2) they did not offer any evidence that other employees were not disciplined for lateness, and (3) there was no evidence of racial hostility against the employees prior to their termination. Ebanks v Neiman Marcus Group, Inc., 414 F. Supp. 2d 320, 2006 U.S. Dist. LEXIS 4802 (S.D.N.Y. 2006).

Employee for a retail store failed to show that she was constructively discharged due to her race where (1) she failed to establish that she was subjected to a constant barrage of unwarranted criticism or intimidation by her manager or that she was subjected to a pattern of frequent behavior to show that the workplace was intolerable, and (2) there was no evidence linking anything that happened to the employee to her race. Ebanks v Neiman Marcus Group, Inc., 414 F. Supp. 2d 320, 2006 U.S. Dist. LEXIS 4802 (S.D.N.Y. 2006).

Former employee, who was a department manager for a retail store, failed to establish that the former employer failed to promote her due to her race because she failed to show that she applied for specific positions and was rejected; her assertion that she generally requested a promotion was insufficient. Ebanks v Neiman Marcus Group, Inc., 414 F. Supp. 2d 320, 2006 U.S. Dist. LEXIS 4802 (S.D.N.Y. 2006).

Former employee, who was a department manager for a retail store, failed to show that she was constructively discharged due to racial discrimination because she failed to show that the work conditions preceding her voluntary resignation rose to the level of intolerable where she earned five percent raises, her supervisor's conduct towards her improved markedly, and she did not seek any promotions. Ebanks v Neiman Marcus Group, Inc., 414 F. Supp. 2d 320, 2006 U.S. Dist. LEXIS 4802 (S.D.N.Y. 2006).

In an action in which a former employee filed suit against defendants, former employer and manager, alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., the Civil Rights Act of 1866, 42 U.S.C.S. § 1981, New York Human Rights Law, N.Y. Exec. Law § 296, and Title 8 of the Administrative Code and Charter of the City of New York, New York City, N.Y., Admin. Code § 8-107 et seq., defendants were

granted summary judgment on the disparate treatment claims where (1) according to defendants, the employee was demoted because in the supervisor's judgment, the employee had demonstrated inappropriate behavior as a manager by engaging in a relationship with a direct report, showed poor judgment in allowing it to continue without requesting to have the direct report transferred to another team, and failed to disclose the information until threats were made by his subordinate; and (2) the court found that the employee failed to show that the reasons were merely a pretext for discrimination. Conway v Microsoft Corp., 414 F. Supp. 2d 450, 2006 U.S. Dist. LEXIS 6351 (S.D.N.Y. 2006).

Plaintiff's N.Y. Exec. Law § 296 claim survived because the complaint sufficiently alleged that the individual defendants had power to make personnel decisions and/or actually participated in the alleged discriminatory and/or retaliatory conduct. Abdi v Brookhaven Sci. Assocs., LLC, 447 F. Supp. 2d 221, 2006 U.S. Dist. LEXIS 60983 (E.D.N.Y. 2006).

Verbal comments made by individuals not involved in making the adverse employment decision cannot themselves give rise to an inference of racial discrimination. Anderson v Hertz Corp., 507 F. Supp. 2d 320, 2007 U.S. Dist. LEXIS 63092 (S.D.N.Y. 2007), aff'd, 303 Fed. Appx. 946, 2008 U.S. App. LEXIS 25926 (2d Cir. N.Y. 2008).

Employee pointed to the fact that he was subjected to derogatory racial remarks by several subordinates and that senior management did not discipline those subordinates for their behavior, a subordinate instigated the verbal and physical altercation that led to the employee's termination, he was the only African-American manager hired at the facility in which the employee's supervisor's oversaw for 12 years, and he was replaced by a Caucasian man; however, even drawing all inferences in favor of the employee, none of these arguments was sufficient to make out a prima facie case that his termination came as a result of racial discrimination. Even if the employee's arguments were interpreted as sufficient to meet his prima facie burden, the employer demonstrated a legitimate, nondiscriminatory reason for the employee's termination; the employee could not maintain that the employer had no basis to believe that its reason for terminating the employee's employment—fighting—was false and the employee himself admitted to being part of the fight—the mere fact of the paucity of African-American managers did not rebut the employer's explanation for the employee's discharge. Anderson v Hertz Corp., 507 F. Supp. 2d 320, 2007 U.S. Dist. LEXIS 63092 (S.D.N.Y. 2007), aff'd, 303 Fed. Appx. 946, 2008 U.S. App. LEXIS 25926 (2d Cir. N.Y. 2008).

Employee did not make a prima facie case as she could not show that she was performing her job in a satisfactory manner at the time of her termination; the employer submitted numerous negative employer evaluations and the employee's only response to this voluminous evidence of unsatisfactory performance was her bare-bones contention, made for the first time in her opposition brief, that the evaluations themselves were conducted in a discriminatory fashion. The employee's conclusory allegation was not supported by any evidence. Bryant v Verizon Communs., Inc., 550 F. Supp. 2d 513, 2008 U.S. Dist. LEXIS 35916 (S.D.N.Y. 2008).

Employer's obligation under the New York Human Rights Law, N.Y. Exec. Law § 296(1)(a), to not discriminate on the basis of race did not give rise to a cause of action for breach of contract by the termination of an employee allegedly due to his race because any promise to not discriminate due to race could not constitute the consideration necessary to create a contract of employment. Hargett v Metro. Transit Auth., 552 F. Supp. 2d 393, 2008 U.S. Dist. LEXIS 30599 (S.D.N.Y. 2008).

Defendant contractor's motion to dismiss plaintiff employee's racial harassment action was denied because individuals could be held liable under N.Y. Exec. Law § 296 and New York City, N.Y., Admin. Code § 8-107. Doe v City of New York, 583 F. Supp. 2d 444, 2008 U.S. Dist. LEXIS 33488 (S.D.N.Y. 2008).

Former employee failed to show that her former employer, which was a state university, and three individuals, terminated her from her office manager job due to race discrimination, in violation of the New York State Human Rights Law, N.Y. Exec. Law § 296 et seq., because there was no circumstantial or direct evidence raising an inference of race discrimination, the employer asserted that the employee was terminated due to budget cuts, and the employee failed to show that this legitimate, nondiscriminatory reason for her termination was pretextual. Westbrook v City Univ. of N.Y., 591 F. Supp. 2d 207, 2008 U.S. Dist. LEXIS 102765 (E.D.N.Y. 2008).

Former employee, who was terminated from her office manager job due to budget cuts by her former employer, which was a state university, failed to show a racially hostile work environment in violation of the New York State Human Rights Law, N.Y. Exec. Law § 296 et seq., because she did not show that a supervisor made any direct racially offensive comments, and an arguably racially offensive comment made by the supervisor approximately two years before she was terminated regarding students at a predominantly African-American college at the university was a stray comment, which was insufficient to establish a racially hostile work environment. Westbrook v City Univ. of N.Y., 591 F. Supp. 2d 207, 2008 U.S. Dist. LEXIS 102765 (E.D.N.Y. 2008).

Employee's allegations that she was not paid at the maximum rate and that she was forced to work overtime and double shifts all occurred prior to the statutory period; each incident was separate and discrete and not alleged to bear any relation to the employee's timely claims. Therefore, the separate and discrete acts of discrimination and retaliation alleged to have occurred prior to January 2003, specifically, the employee's allegation of discriminatory scheduling, fell outside the scope of the continuing violation doctrine. Aspilaire v Wyeth Pharms., Inc., 612 F. Supp. 2d 289, 2009 U.S. Dist. LEXIS 35523 (S.D.N.Y. 2009).

Employee's claims of discrimination based on the fact that, in 2002, she was assigned to work double shifts and was reassigned from shift 1 to shift 2 were barred by the statute of limitations and even if these claims were timely, the claims would fail because the employee did not show an adverse employment act; moreover, even if shift assignments and reassignments were materially adverse employment acts, the employee was still unable to meet her prima facie burden because there was no evidence that gave rise to an inference of discrimination. The employee herself admitted that people of all races in her department were forced to work double shifts and it was undisputed that operators and lead operators were moved to different shifts based on manufacturing needs; no evidence indicated that any assignments or reassignments were based on race. Aspilaire v Wyeth Pharms., Inc., 612 F. Supp. 2d 289, 2009 U.S. Dist. LEXIS 35523 (S.D.N.Y. 2009).

Former employee's unlawful termination claim against defendants, two public entities and individuals, failed because (1) the circumstances surrounding the employee's discharge did not give rise to an inference of discrimination; (2) assuming that one of the individuals' conduct toward the employee was racially motivated, there simply was no evidence that the individual's racial bias tainted the ultimate decision to terminate the employee; and (3) even if the employee could have established a prima facie case of discrimination with regard to her termination, defendants proffered a legitimate, nondiscriminatory reason for her discharge, namely, her insubordination toward the individual. Anderson v New York, 614 F. Supp. 2d 404, 2009 U.S. Dist. LEXIS 36029 (S.D.N.Y. 2009).

Former employee's hostile work environment claim against defendants, two public entities and individuals, failed because, when viewed objectively, the conduct in issue was not sufficiently severe or pervasive to alter the conditions of her employment, and there was no evidence that the conduct occurred because of the employee's race, color, or national origin. Anderson v New York, 614 F. Supp. 2d 404, 2009 U.S. Dist. LEXIS 36029 (S.D.N.Y. 2009).

Assuming the employee made out a prima facie case and defendants articulated a legitimate non-discriminatory reason—namely, that the employee sent inappropriate e-mails and falsified employment documents—for taking disciplinary action against the employee, because he failed to meet his burden of raising a material issue of fact concerning whether defendants' stated reasons for firing him were a mere pretext for discrimination, the claim that defendants practiced illegal discrimination

failed. Hargett v N.Y. City Transit Auth., 640 F. Supp. 2d 450, 2009 U.S. Dist. LEXIS 67896 (S.D.N.Y. 2009), aff'd, 381 Fed. Appx. 12, 2010 U.S. App. LEXIS 12273 (2d Cir. N.Y. 2010).

Former public school psychologist's race discrimination claims under N.Y. Exec. Law § 296 failed because the school district and school officials offered legitimate and nondiscriminatory reasons for the psychologist's discharge, which included his lack of professionalism, failure to meet student needs, and intimidating attitude, and the psychologist was unable to show that these reasons were pretext for discrimination; that the school's principal told the psychologist that he did not fit into the culture at the school was not evidence of unlawful discrimination, as the principal indicated she was referring to the culture of professionalism, not the ethnic composition of the staff. Dorcely v Wyandanch Union Free Sch. Dist., 665 F. Supp. 2d 178, 2009 U.S. Dist. LEXIS 91543 (E.D.N.Y. 2009).

African-American woman's employment discrimination claims based on race and/or national origin under 42 U.S.C.S. § 1981, and N.Y. Exec. Law § 296(1) survived summary judgment because the the record was devoid of any contemporaneous writings that showed any indication that anyone was dissatisfied with her performance, a client for whom she had worked went with her when she left the employer, and she raised questions as to discriminatory animus. Memnon v Clifford Chance US, LLP, 667 F. Supp. 2d 334, 2009 U.S. Dist. LEXIS 99936 (S.D.N.Y. 2009).

Even if one could divorce the final warning from the termination, a reasonable juror could still determine that the coworker incident was merely a pretext for retaliation based on the circumstantial evidence that defendants never told the former employee specifically about the coworker and the employee's warning, discipline, and termination might have been disparate when compared to that accorded other employees; the claims of pretext presented disputed material facts for a jury to resolve, not the court. Kanhoye v Altana, Inc., 686 F. Supp. 2d 199, 2009 U.S. Dist. LEXIS 112506 (E.D.N.Y. 2009).

Employer was entitled to summary judgment on a former employee's claims for discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e, 42 U.S.C.S. § 1981, and N.Y. Exec. Law § 296, because the employee had not established that an employer's determination to terminate the employee was motivated by any sort of improper racial animus but was rather part of a business decision to reduce the employer's work force. The employee had not shown that he was not promoted because of race, but rather the employee did not meet the qualifications for promotion, and there was no evidence of a hostile work environment or an adverse employment action taken. Sealy v Hertz Corp., 688 F. Supp. 2d 247, 2009 U.S. Dist. LEXIS 76609 (S.D.N.Y. 2009).

Plaintiff had stated an actionable claim for a hostile work environment against an employer, in part due to the acts of the plaintiff's supervisor, under both federal, state, and city law, because plaintiff had alleged that his supervisor had subjected plaintiff, the only African American in the department, to harsh criticisms, unreasonable demands, shouting and profanity. Drew v Plaza Constr. Corp., 688 F. Supp. 2d 270, 2010 U.S. Dist. LEXIS 8699 (S.D.N.Y. 2010).

Union was entitled to summary judgment on a former employee's claims under the New York State Human Rights Law, N.Y. Exec. Law § 296 et seq., because the employee failed to establish that the union breached its duty of fair representation. Furthermore, the employee did not allege that the union had anything directly to do with the employee's termination, other than failing to fairly represent the employee in the employee's efforts to join the bargaining unit. Beachum v AWISCO N.Y. & Local 810, 785 F. Supp. 2d 84, 2011 U.S. Dist. LEXIS 28856 (S.D.N.Y. 2011), aff'd, 459 Fed. Appx. 58, 2012 U.S. App. LEXIS 2996 (2d Cir. N.Y. 2012).

Former employee was not entitled to bring claims that an employer violated civil rights laws by discriminating against the employee due to the employee's race because (1) the employee failed to show discriminatory reasons for adverse employment actions; (2) the employee could not recall any specific alleged racist comment or the first time any such comment was made; and (3) the employer had a nondiscriminatory reason for terminating the employee, based upon the employee's prolonged and unexcused medical absence. Beachum v AWISCO N.Y. & Local 810, 785 F. Supp. 2d 84, 2011 U.S. Dist. LEXIS 28856 (S.D.N.Y. 2011), aff'd, 459 Fed. Appx. 58, 2012 U.S. App. LEXIS 2996 (2d Cir. N.Y. 2012).

Former employee was not entitled to bring claims that an employer violated civil rights laws by retaliating against the employee for the employee's complaint of discrimination because the employee's evidence of temporal proximity was insufficient to permit an inference that the employer's proffered non-retaliatory reason for the employee's termination was pretextual and that retaliation was a substantial reason for the employee's termination. Beachum v AWISCO N.Y. & Local 810, 785 F. Supp. 2d 84, 2011 U.S. Dist. LEXIS 28856 (S.D.N.Y. 2011), aff'd, 459 Fed. Appx. 58, 2012 U.S. App. LEXIS 2996 (2d Cir. N.Y. 2012).

In a suit alleging that a city's drug testing policy for firefighters was intentionally racially discriminatory, the employees failed to rebut the employer's legitimate nondiscriminatory reason for employee discipline due to the clinically determined positive drug tests. M.O.C.H.A. Soc'y, Inc. v City of Buffalo, 872 F. Supp. 2d 264, 2012 U.S. Dist. LEXIS 74822 (W.D.N.Y. 2012), aff'd, 529 Fed. Appx. 20, 2013 U.S. App. LEXIS 13563 (2d Cir. 2013).

In a suit alleging that a city's drug testing policy for firefighters was intentionally racially discriminatory, where the employees failed to rebut the employer's legitimate nondiscriminatory reason for employee discipline due to the clinically determined positive drug tests, they failed to establish liability of individual city employees on a theory of aiding and abetting a discriminatory practice. M.O.C.H.A. Soc'y, Inc. v City of Buffalo, 872 F. Supp. 2d 264, 2012 U.S. Dist. LEXIS 74822 (W.D.N.Y. 2012), aff'd, 529 Fed. Appx. 20, 2013 U.S. App. LEXIS 13563 (2d Cir. 2013).

50. Religious discrimination

The Commissioner of the State Human Rights Division reasonably concluded that an employer engaged in an unlawful discriminatory practice and compelled an employee to quit her job, where the evidence indicated that the employer had made blatantly obscene anti-Semitic remarks to her in the presence of other employees and had refused to apologize, notwithstanding the fact that the employer did not directly fire the employee and in fact had urged her to return to work. In exercising his broad powers to adopt measures reasonably deemed necessary to redress the injury to the employee, the commissioner properly directed that the employer apologize in writing, offer to reinstate the woman with back pay, together with $500 in damages for the shock, humiliation and outrage she experienced. Imperial Diner, Inc. v State Human Rights Appeal Bd., 52 N.Y.2d 72, 436 N.Y.S.2d 231, 417 N.E.2d 525, 1980 N.Y. LEXIS 2830 (N.Y. 1980).

Finding of Human Rights Division that New York City Transit Authority, as employer, violated CLS Exec § 296(10) was supported by evidence that (1) Seventh Day Adventist was discharged as bus driver because her Sabbath observance prevented her from working normal weekend shift, and (2) although Transit Authority was under strictures of collective bargaining agreement that made shift selection dependent on seniority, and although union was unwilling to waive seniority rights to accommodate Sabbath observers, Transit Authority failed to take reasonable steps, short of labor litigation, in effort to reach accommodation of bus driver's religious needs. New York City Transit Auth. v Executive Dep't, Div. of Human Rights, 89 N.Y.2d 79, 651 N.Y.S.2d 375, 674 N.E.2d 305, 1996 N.Y. LEXIS 3162 (N.Y. 1996).

The Division of Human Rights properly found that an employer had discriminated against an employee by failing to accommodate her observance of the Sabbath as a Seventh Day Adventist and by terminating her employment, where the employer had placed the burden upon the employee to find other workers who were willing to swap assignments with her in order to permit her to observe her Sabbath. North Shore University Hospital v State Human Rights Appeal Bd., 82 A.D.2d 799, 439 N.Y.S.2d 408, 1981 N.Y. App. Div. LEXIS 14453 (N.Y. App. Div. 2d Dep't 1981), app. denied, 56 N.Y.2d 506, 437 N.E.2d 1160, 1982 N.Y. LEXIS 5389 (N.Y. 1982), app. dismissed, 459 U.S. 984, 103 S. Ct. 335, 74 L. Ed. 2d 379, 1982 U.S. LEXIS 4206 (U.S. 1982).

Jewish theological seminary was properly granted summary judgment in action for breach of employment contract brought by its former professor, who had resigned in response to seminary's

decision to admit women into its program for ordination of Rabbis, since (1) professor failed to prove that seminary had contractual duty to refrain from changing its admission policies or from doing anything to offend professor's religious beliefs, and (2) professor failed to demonstrate that seminary's policy decision discriminated against him on basis of his religious convictions. Faur v Jewish Theological Seminary, 146 A.D.2d 566, 536 N.Y.S.2d 516, 1989 N.Y. App. Div. LEXIS 120 (N.Y. App. Div. 2d Dep't), app. dismissed, 74 N.Y.2d 842, 546 N.Y.S.2d 559, 545 N.E.2d 873, 1989 N.Y. LEXIS 2932 (N.Y. 1989), app. denied, 76 N.Y.2d 706, 560 N.Y.S.2d 988, 561 N.E.2d 888, 1990 N.Y. LEXIS 3024 (N.Y. 1990).

Plaintiffs, licensed practical nurses, stated action under CLS Exec § 296(1)(a) by alleging that they showed religious or moral belief held by them, that defendants were aware thereof, and that defendants failed to reasonably accommodate such religious belief by summarily terminating plaintiffs for their refusal to the form abortive procedures. Larson v Albany Med. Ctr., 252 A.D.2d 936, 676 N.Y.S.2d 293, 1998 N.Y. App. Div. LEXIS 8687 (N.Y. App. Div. 3d Dep't 1998).

Former employees, who alleged that their jobs were terminated because they were Sunni Moslems rather than Shiite Moslems, were members of statutorily protected class, but defendant employer provided sufficient nondiscriminatory reasons by showing that their terminations were part of economically motivated reduction in force. Sheikh v Habib Bank Ltd., 270 A.D.2d 107, 704 N.Y.S.2d 75, 2000 N.Y. App. Div. LEXIS 2851 (N.Y. App. Div. 1st Dep't 2000).

State human rights commissioner's dismissal of complaint alleging that petitioner had been forced to resign from his employment because of his religious beliefs would be annulled, and case would be remitted for new decision with findings of fact, where (1) commissioner's decision was inconsistent in concluding both that petitioner failed to prove prima facie case of discrimination and that employer "has presented sufficient evidence to rebut the presumption of discrimination," which presumption arises only if employee proves prima facie case, (2) in deciding whether petitioner proved prima facie case, commissioner improperly considered employer's reasons for its actions, and (3) commissioner did not decide whether those reasons were pretext for discrimination. Draman v Lamar Advertising of Penn, Inc., 273 A.D.2d 808, 709 N.Y.S.2d 306, 2000 N.Y. App. Div. LEXIS 6841 (N.Y. App. Div. 4th Dep't 2000).

Where the former employee alleged that the former employee was harassed because the former employee was gay and Jewish and was fired for complaining, the employer, a religious organization, was not exempt from liability under N.Y. Exec. § 296(11); that provision only provided limited exemptions with regard to hiring preferences that did not allow harassment and discrimination of the kind alleged. Logan v Salvation Army, 809 N.Y.S.2d 846, 10 Misc. 3d 756, 234 N.Y.L.J. 99, 2005 N.Y. Misc. LEXIS 2542 (N.Y. Sup. Ct. 2005).

Reasonable jury could find that an employee's religion, Othrodox Judaism, was a motivating factor in his discharge since: (1) the employee's probationary period was extended three times, each instance following an accommodation of his religion and/or under circumstances giving rise to an inference of discrimination; (2) a performance appraisal contained references to his special needs, in particular his fairly complicated set of working hours; it noted his shrewd attention to examining what further accommodations he could be given, without fully living up to the deals struck with him; and it gave him an overall score that was significantly lower than his overall average score in each individual area and required automatic re-evaluation; and (4) defendants made additional comments reflective of discriminatory animus. Goldschmidt v N.Y. State Affordable Hous. Corp., 380 F. Supp. 2d 303, 2005 U.S. Dist. LEXIS 16233 (S.D.N.Y. 2005).

Although former employees presented sufficient evidence to preclude summary judgment on their claim that they were terminated due to their religious beliefs in violation of the New York State Human Rights Law, N.Y. Exec. Law § 621(a)(1), based on comments about their religious practices made by management, these comments were not so pervasive that they also established a hostile work environment. Shain v Ctr. for Jewish History, Inc., 418 F. Supp. 2d 360, 2005 U.S. Dist. LEXIS 20629 (S.D.N.Y. 2005).

Former employee contended that the superintendent's alleged anti-Semitic comments created a work environment permeated by religious discrimination; however, because the employee was admittedly not Jewish, she could not show that she was subjected to hostility because of her membership in a protected class. Accordingly, the employee's religion-based hostile work environment cause of action was dismissed. Illiano v Mineola Union Free Sch. Dist., 585 F. Supp. 2d 341, 2008 U.S. Dist. LEXIS 91854 (E.D.N.Y. 2008).

51. Sexual harassment

State was not entitled to dismissal of state employee's suit under CLS Exec § 296 which alleged that her supervisor fired her in retaliation for complaining about his sexually harassing conduct, even though she was not actually discharged but only placed on leave at half pay until being reassigned several months later, since her supervisor's acts in ordering her to clear out her desk and changing locks in her office could be considered constructive termination; Human Rights Law forbids not only discriminatory termination but also discrimination in terms, conditions or privileges of employment. Brown v State, 125 A.D.2d 750, 509 N.Y.S.2d 169, 1986 N.Y. App. Div. LEXIS 62984 (N.Y. App. Div. 3d Dep't 1986), app. dismissed, 70 N.Y.2d 747, 519 N.Y.S.2d 1034, 514 N.E.2d 392, 1987 N.Y. LEXIS 18626 (N.Y. 1987).

New York City Commission on Human Rights properly determined that New York City Transit Authority was guilty of sexual harassment and properly awarded discharged probationary employee back pay and damages for mental anguish where employee's supervisor unsuccessfully asked her for date on several occasions, then began writing reports charging her with various disciplinary infractions; harassment was exacerbated when she was told by Authority's manager of departmental relations that such conduct was to be expected because of her appearance and mode of dress. Levy v City Comm'n on Human Rights, 196 A.D.2d 214, 609 N.Y.S.2d 576, 1994 N.Y. App. Div. LEXIS 2436 (N.Y. App. Div. 1st Dep't 1994), aff'd, 85 N.Y.2d 740, 628 N.Y.S.2d 245, 651 N.E.2d 1264, 1995 N.Y. LEXIS 1122 (N.Y. 1995).

Finding by Unemployment Insurance Appeal Board that plaintiff "had been offered two transfers but had declined to accept either one" did not establish that sexual harassment did not constitute term or condition of plaintiff's continued employment so as to warrant summary judgment in favor of employer in action under CLS Exec § 296, where board's inquiry centered on unrelated question of whether plaintiff had provided employer with adequate evidence of disability to justify his failure to report to work, and employer offered no detail as to purported offers of transfer, or even verified that they were made; moreover, absent evidence that it took any disciplinary action against employee who perpetrated alleged harassment or other steps to alleviate threat of further occurrences, mere showing that employer offered to transfer plaintiff to different work location would not entitle it to judgment as matter of law. Goering v NYNEX Info. Resources Co., 209 A.D.2d 834, 619 N.Y.S.2d 167, 1994 N.Y. App. Div. LEXIS 11352 (N.Y. App. Div. 3d Dep't 1994).

Petitioner failed to establish prima facie case of either quid pro quo sexual harassment or harassment based on existence of hostile work environment where her claims were supported only by bald conclusory statements; thus, she was properly terminated by city transit authority for excessive absences, inability to get along with her subordinates and fellow managers, and poor job performance. Watts v New York City Transit Auth., 213 A.D.2d 253, 624 N.Y.S.2d 124, 1995 N.Y. App. Div. LEXIS 2796 (N.Y. App. Div. 1st Dep't 1995).

Rule against imposing vicarious liability in sex discrimination cases did not preclude imposition of direct liability on corporate employer for acts of sexual harassment committed by its chief executive officer. Father Belle Community Ctr. v New York State Div. of Human Rights, 221 A.D.2d 44, 642 N.Y.S.2d 739, 1996 N.Y. App. Div. LEXIS 5508 (N.Y. App. Div. 4th Dep't), reh'g denied, 647 N.Y.S.2d 652, 1996 N.Y. App. Div. LEXIS 10989 (N.Y. App. Div. 4th Dep't 1996), app. denied, 89 N.Y.2d 809, 655 N.Y.S.2d 889, 678 N.E.2d 502, 1997 N.Y. LEXIS 214 (N.Y. 1997).

Court would annul determination that petitioner was subjected to quid pro quo sexual harassment where petitioner solely offered her own testimony, she consistently testified that employer never made any sexual advances toward her, that frequency or intensity of alleged contacts never changed, that those interactions predominantly occurred in open view, and that, despite several after-hours meetings alone with employer, he never used those opportunities to engage in any inappropriate contact; moreover, petitioner's own testimony evinced that she never communicated, by words or behavior, that contacts were uninvited, offensive, or unwarranted. Bartle v Mercado, 235 A.D.2d 651, 652 N.Y.S.2d 139, 1997 N.Y. App. Div. LEXIS 95 (N.Y. App. Div. 3d Dep't), app. denied, 89 N.Y.2d 815, 659 N.Y.S.2d 855, 681 N.E.2d 1302, 1997 N.Y. LEXIS 1219 (N.Y. 1997), app. denied, 89 N.Y.2d 815, 659 N.Y.S.2d 855, 681 N.E.2d 1302 (N.Y. 1997).

Substantial evidence supported correction commissioner's decision that terminated correction officer had sexually harassed his subordinates where testimony of 2 complainants proved that officer sexually harassed them by exposing himself to them, and testimony of third complainant proved that officer sexually assaulted her. Arroyo v City of New York, 245 A.D.2d 186, 666 N.Y.S.2d 168, 1997 N.Y. App. Div. LEXIS 13150 (N.Y. App. Div. 1st Dep't 1997).

Penalty of termination of correction officer's employment was not so disproportionate to offenses as to shock Appellate Division's sense of fairness where 2 complainants testified that officer sexually harassed them by exposing himself to them, and third complainant testified that officer sexually assaulted her; either set of charges was sufficient, by itself, to support dismissal. Arroyo v City of New York, 245 A.D.2d 186, 666 N.Y.S.2d 168, 1997 N.Y. App. Div. LEXIS 13150 (N.Y. App. Div. 1st Dep't 1997).

Plaintiff failed to establish prima facie case of sexual harassment where majority of incidents alleged in her complaint took place before defendant became responsible for operation of her workplace and, once notified, defendant took immediate and adequate measures to ensure that alleged offensive behavior would cease. Pace v Ogden Servs. Corp., 257 A.D.2d 101, 692 N.Y.S.2d 220, 1999 N.Y. App. Div. LEXIS 6819 (N.Y. App. Div. 3d Dep't 1999).

Attorney was entitled to summary judgment dismissing his legal secretary/office manager's action for sex discrimination where, after attorney broke off parties' wholly consensual sexual relationship in order to attempt reconciliation with his wife, he terminated manager's employment because he no longer desired to have intimate relationship with her, and there was no coercion, harassment, or unwelcome sexual conduct before or after breakup of relationship, which was based on mutual affection. Mauro v Orville, 259 A.D.2d 89, 697 N.Y.S.2d 704, 1999 N.Y. App. Div. LEXIS 10935 (N.Y. App. Div. 3d Dep't 1999), app. denied, 94 N.Y.2d 759, 705 N.Y.S.2d 6, 726 N.E.2d 483, 2000 N.Y. LEXIS 60 (N.Y. 2000).

Restaurant owner was entitled to summary judgment insofar as its employee's action for sexual harassment under Human Rights Law was for damages suffered as result of rape by coworkers, since there was no evidence that owner encouraged, condoned, or approved of such conduct. Hendricks v 333 Bayville Ave. Restaurant Corp., 260 A.D.2d 545, 688 N.Y.S.2d 593, 1999 N.Y. App. Div. LEXIS 4081 (N.Y. App. Div. 2d Dep't), app. dismissed, 93 N.Y.2d 999, 695 N.Y.S.2d 745, 717 N.E.2d 1082, 1999 N.Y. LEXIS 1930 (N.Y. 1999).

Court properly denied plaintiff's motion to amend her complaint to assert cause of action under CLS Exec § 296(2)(a) where it was made after expiration of 3-year statute of limitations (CLS CPLR § 214(2)); moreover, Executive Law cause of action could not relate back to filing of original complaint as that action was not timely commenced. Karczewski v Sharpe, 260 A.D.2d 606, 688 N.Y.S.2d 673, 1999 N.Y. App. Div. LEXIS 4294 (N.Y. App. Div. 2d Dep't), app. dismissed, 94 N.Y.2d 858, 704 N.Y.S.2d 533, 725 N.E.2d 1095, 1999 N.Y. LEXIS 3958 (N.Y. 1999).

Substantial, if not overwhelming, evidence supported employer's failure to take proper measures to halt male employees' increasingly aggressive verbal and physical harassment of sole female employee in frozen food warehouse, constituting condonation of gender and age discrimination and hostile work environment, where (1) taunts included remarks that she was too old and slow, was taking man's job away, and was "biggest whore" in town, (2) physical abuse culminated in her being picked up by legs, turned upside down, carried in attempt to place her headfirst in garbage receptacle, and slammed into door of men's room, which caused disabling injuries, and (3) although principal perpetrator was warned that he would be fired if he did not refrain from such conduct, he was merely suspended for 3 days and continued to taunt complainant after suspension. Grand Union Co. v Mercado, 263 A.D.2d 923, 694 N.Y.S.2d 524, 1999 N.Y. App. Div. LEXIS 8451 (N.Y. App. Div. 3d Dep't 1999).

Corporate employer was not entitled to dismissal of female employee's sexual harassment claims based on her refusal to participate in its "prompt" and "neutral" investigation of her allegations, where alleged harasser was officer and ½ -owner of corporation, and his wife (who owned other ½) acknowledged that they jointly operated corporate business and that, if employees had any issues or concerns, they raised them directly with her husband or herself. Randall v Tod-Nik Audiology, Inc., 270 A.D.2d 38, 704 N.Y.S.2d 228, 2000 N.Y. App. Div. LEXIS 2576 (N.Y. App. Div. 1st Dep't 2000).

Defendant law firm was properly held vicariously liable for individual defendant's sexual harassment of plaintiff when she was first year associate at firm, where individual defendant was partner in firm, he assigned work to plaintiff, he voted for her termination, and he would be responsible for providing her with job references. Sier v Jacobs Persinger & Parker, 276 A.D.2d 401, 714 N.Y.S.2d 283, 2000 N.Y. App. Div. LEXIS 10763 (N.Y. App. Div. 1st Dep't 2000).

State Division of Human Rights' finding of sex discrimination in termination of female employee was not supported by substantial evidence where (1) employee's claim of reduced work hours was inconsistent with her claim that she was given more work than her coworkers were, (2) although she did not have locker for changing clothes, she was provided small room to change in, because of unavailability of separate lockers for female employees, (3) every fact finder who had heard employee's testimony had found it incredible, (4) court-appointed psychiatrist who examined employee described her belief of sexual harassment in terms of paranoid personality disorder, delusional psychosis, and distorted view of reality, and (5) employee's prior complaints against 2 former employers were never substantiated, one of them prompting federal judge to condemn her strongly. Jamco Bldg. Maint. Corp. v N.Y. State Div. of Human Rights, 281 A.D.2d 364, 724 N.Y.S.2d 20, 2001 N.Y. App. Div. LEXIS 3139 (N.Y. App. Div. 1st Dep't 2001), app. denied, 98 N.Y.2d 613, 749 N.Y.S.2d 475, 779 N.E.2d 186, 2002 N.Y. LEXIS 2699 (N.Y. 2002).

Issue of fact existed whether sexual harassment was so pervasive as to alter terms or conditions of plaintiff's employment where she allegedly was subjected to offensive touching and obscene communications on many occasions while still temporary employee, defendant's human resources officer informed her that he had been reluctant to hire her on permanent basis because she complained of sexual harassment, plant manager told her not to wear perfume or makeup and not to talk to any coworkers, she was taken from her work on production line more than once to answer allegedly fabricated complaints from male employees who reported that she had sexually harassed them, and numerous male employees on her shift engaged in horseplay against her that she perceived as hostile. Vitale v Rosina Food Prods., 283 A.D.2d 141, 727 N.Y.S.2d 215, 2001 N.Y. App. Div. LEXIS 5748 (N.Y. App. Div. 4th Dep't 2001).

Plaintiff's employer and supervisor were entitled to summary judgment dismissing her cause of action for sexual harassment where (1) she alleged that employer allowed, condoned, and ratified supervisor's conduct and that supervisor, over period of about 10 days, touched her shoulder several times, screamed at her about work, invaded her personal space, made one comment about sexual orientation, and glanced at her in sexual manner "one or two" times, and (2) alleged conduct was not sufficiently severe or pervasive. Baliva v State Farm Mut. Auto. Ins. Co., 286 A.D.2d 953, 730 N.Y.S.2d 655, 2001 N.Y. App. Div. LEXIS 8896 (N.Y. App. Div. 4th Dep't 2001).

Because an employee failed to offer any evidence that, through the employee's work on a state education program, the department of labor obtained any control over or responsibility for the employee's work, the employee failed to present a cognizable legal basis for holding either the employer or the department liable under Title VII of the Civil Rights Act, 42 U.S.C.S. § 2000e, or the Human Rights Law, N.Y. Exec. Law § 296(6). Strauss v New York State Dept. of Educ., 26 A.D.3d 67, 805 N.Y.S.2d 704, 2005 N.Y. App. Div. LEXIS 14128 (N.Y. App. Div. 3d Dep't 2005).

Former employer failed to show prejudice resulting from 12-year gap before a former employee brought a sexual harassment action; although two witnesses had died during that time, three other witnesses who observed the incidents complained of survived to testify, so subtantial evidence supported the deterimination of the Division of Human Rights that compensable harassment had occurred. Matter of Kowalewski v New York State Div. of Human Rights, 26 A.D.3d 888, 809 N.Y.S.2d 347, 2006 N.Y. App. Div. LEXIS 1336 (N.Y. App. Div. 4th Dep't 2006).

Because triable issues of fact existed as to whether the workplace was permeated with discriminatory sexual intimidation, ridicule, and insult, and as to whether the employer was aware of and acquiesced in a coworker's discriminatory conduct, the trial court erred in granting the employer's motion for summary judgment on the issue of whether the employer subjected the employee to a hostile work environment in violation of N.Y. Exec. Law § 296(1)(a). Sutherland v Roman Catholic Diocese of Rochester, 39 A.D.3d 1151, 833 N.Y.S.2d 819, 2007 N.Y. App. Div. LEXIS 5013 (N.Y. App. Div. 4th Dep't 2007).

Because a correction officer failed to show that the officer was subjected either to quid pro quo or hostile work environment sexual harassment under N.Y. Exec. Law art. 15, and because the officer's workplace was not permeated with discriminatory intimidation, ridicule, and insult, the officer's complaint was properly dismissed; accordingly, the officer was not entitled to N.Y. Exec. Law § 298 relief. Matter of Bracci v New York State Div. of Human Rights, 62 A.D.3d 1146, 878 N.Y.S.2d 830, 2009 N.Y. App. Div. LEXIS 3714 (N.Y. App. Div. 3d Dep't 2009), app. dismissed, 15 N.Y.3d 865, 910 N.Y.S.2d 31, 936 N.E.2d 912, 2010 N.Y. LEXIS 2963 (N.Y. 2010).

Because an employee was subjected to a hostile work environment, based on sex, that led to the employee's constructive discharge, pursuant to N.Y. Exec. Law §§ 296(1), 297(4)(c), the employer and its president were liable for the discriminatory conduct, and the employee was entitled to back pay, compensatory damages, and pre-determination interest. Matter of Eastport Assoc., Inc. v New York State Div. of Human Rights, 71 A.D.3d 890, 897 N.Y.S.2d 177, 2010 N.Y. App. Div. LEXIS 2066 (N.Y. App. Div. 2d Dep't 2010).

In an action for a sexually hostile work environment, the jury verdict for the employee was legally sufficient and not against the weight of the evidence, which showed the employer knew or should have known of the supervisor's harassing conduct, including inappropriate comments and unwanted touching, and failed to take action. Reynolds v State of New York, 180 A.D.3d 1116, 119 N.Y.S.3d 266, 2020 N.Y. App. Div. LEXIS 961 (N.Y. App. Div. 3d Dep't 2020).

Court denied defense motion to set aside jury verdict finding that plaintiff was subjected to hostile work environment based on her gender where proof showed that (1) comments were made about her breasts, she was subjected to sexually explicit jokes and derogatory language, she was physically assaulted twice, she was subjected to humiliating comments regarding her miscarriage, and she was exposed to profanity and other such incidents on almost daily basis, (2) her supervisor failed to investigate her complaints, take disciplinary action or dispel workplace hostility, (3) she did nothing to justify, condone or exonerate abusive behavior, and (4) she saw psychologist 21 times due to offensive nature of her work environment and her inability to cope with it, until she was discharged and could no longer afford his fees. McIntyre v Manhattan Ford, Lincoln-Mercury, 175 Misc. 2d 795, 669 N.Y.S.2d 122, 1997 N.Y. Misc. LEXIS 656 (N.Y. Sup. Ct. 1997), aff'd in part, modified, app. dismissed, 256 A.D.2d 269, 682 N.Y.S.2d 167, 1998 N.Y. App. Div. LEXIS 13944 (N.Y. App. Div. 1st Dep't 1998).

Trial court granted the employee and the employer's motion to dismiss after the terminated employee filed a sexual harassment suit against them, as the four isolated, relatively mild comments that she said the employee made to her while she was working for the employer were not sufficient to show that her workplace was permeated with the required hostility necessary to maintain a sexual harassment cause of action. Constantine v Kay, 792 N.Y.S.2d 308, 6 Misc. 3d 927, 2004 N.Y. Misc. LEXIS 2916 (N.Y. Sup. Ct. 2004).

In action alleging sexual harassment, plaintiff's claim that each individual defendant sexually assaulted her, thereby creating hostile working environment, sufficiently alleged violation of CLS Exec § 296(6). Tomka v Seiler Corp., 66 F.3d 1295, 1995 U.S. App. LEXIS 27612 (2d Cir. N.Y. 1995).

No reasonable jury could find that employer's failure to transfer employee to different job following sale of company was retaliatory for her providing deposition testimony in sexual harassment matter where there was no evidence suggesting that employer treated employee differently from other employees in connection with sale. Coffey v Dobbs Int'l Servs., Inc., 170 F.3d 323, 1999 U.S. App. LEXIS 4124 (2d Cir. N.Y. 1999).

Female probationary firefighters establish that their discharge violated Title VII where evidence shows they were not given full training opportunities, were improperly critiqued on performance, and were subjected to ostracism and mistreatment. Berkman v New York, 580 F. Supp. 226, 1983 U.S. Dist. LEXIS 11022 (E.D.N.Y. 1983), aff'd, 755 F.2d 913 (2d Cir. N.Y. 1985).

Former employees' Human Rights Law claims under CLS Exec Law § 296(1)(a) will not be dismissed due to likelihood of jury confusion, where employees sue employers as well as individuals who allegedly continually sexually harassed them during office hours, resulting in their constructive discharge, because differences between state claim under § 296 and federal claim under Title VII (42 USCS §§ 2000e et seq.)—damages limitation of $3,000 on Title VII claim and need to prove that employer "encouraged, condoned, or approved" harassment under § 296 claim —are not so radical as to be inexplicable by instruction. Bridges v Eastman Kodak Co., 800 F. Supp. 1172, 1992 U.S. Dist. LEXIS 13083 (S.D.N.Y. 1992).

Sexually explicit birthday cake presented to plaintiff by several coworkers would not be attributable to employer in sexual discrimination action where there was no indication that employer sanctioned such activity, plaintiff partook enthusiastically in event and failed to inform any supervisory personnel of incident, and when similar situation involving another female employee was reported to employer, employer issued memorandum stating that such behavior would not be tolerated and that any persons involved in such activity would be terminated. Hansen v Dean Witter Reynolds, Inc., 887 F. Supp. 669, 1995 U.S. Dist. LEXIS 7701 (S.D.N.Y. 1995).

Female employee's sexual harassment claim against supervisor under CLS Exec Law § 296(6) will not be dismissed, even though supervisor has no ownership interest in business they both worked for, where she alleges that supervisor actively participated in discriminatory conduct by making repeated unwelcome sexual comments and looking down her blouse, because court believes supervisor could be found individually liable under § 296(6). McIlwain v Korbean Int'l Inv. Corp., 896 F. Supp. 1373, 1995 U.S. Dist. LEXIS 11970 (S.D.N.Y. 1995).

Employee stated claim under CLS Exec § 296(6) against coworkers who allegedly made repeated unwelcome sexual comments to her and looked down her blouse while she was performing her job duties. McIlwain v Korbean Int'l Inv. Corp., 896 F. Supp. 1373, 1995 U.S. Dist. LEXIS 11970 (S.D.N.Y. 1995).

Supplemental federal jurisdiction will not be exercised over claims brought under CLS Exec Law §§ 296(1)(a,e) and 297(9), where court dismissed federal claim for sexual harassment and New York law is unclear with respect to sexual harassment vicarious liability for employers who take prompt and appropriate remedial action in response to hostile work environment complaints, because federal statute specifically provides that District Court may decline jurisdiction where claim raises novel or complex issue of state law. Walsh v National Westminster

Bancorp., 921 F. Supp. 168, 1995 U.S. Dist. LEXIS 20838 (S.D.N.Y. 1995).

Former employee's claim against former supervisor under CLS Exec Law § 296 is not dismissed, where employee alleged that supervisor created hostile work environment by making sexually lewd remarks and derogatory comments about employee's age while in her presence, because these allegations are sufficient to state claim under § 296(6). Storr v Anderson Sch., 919 F. Supp. 144, 1996 U.S. Dist. LEXIS 3039 (S.D.N.Y. 1996).

Thirty-year employee with clothing store has no viable cause of action under New York Human Rights Law (CLS Exec Law §§ 290 et seq.), where he was fired for sexually harassing 24-year-old female stock clerk, because detailed affidavits of personnel officials articulate completely appropriate and justifiable reason for dismissing employee, and nothing in record suggests that employer was motivated by his age, gender, or pension status. Agugliaro v Brooks Bros., 927 F. Supp. 741, 1996 U.S. Dist. LEXIS 7965 (S.D.N.Y. 1996).

Summary judgment is inappropriate on female police sergeant's CLS Exec Law § 296(6) claims against commanding officer and lieutenant, where their personal involvement in alleged sexual harassment and retaliation claims is disputed, because issues of material fact remain concerning (1) whether commanding officer knew about and/or condoned hostile working environment in precinct, and (2) whether lieutenant observed and failed to intervene in particular training room incident involving pornographic magazine. Wise v New York City Police Dep't, 928 F. Supp. 355, 1996 U.S. Dist. LEXIS 8242 (S.D.N.Y. 1996).

Employer is not liable for failure to investigate and take remedial action on employee's complaint of sexual harassment by supervisor, where jury finds no actual sexual harassment by supervisor, since conduct which violates CLS Exec Law § 296 is discrimination, and § 296 does not create liability for failure to investigate and remedy a complaint of discrimination. Karibian v Columbia Univ., 930 F. Supp. 134, 1996 U.S. Dist. LEXIS 9111 (S.D.N.Y. 1996).

Summary dismissal is denied with respect to former stenographer's claims of sexual harassment and retaliation under CLS Exec Law § 296, even though individual defendants claim they only had power to carry out personnel decisions of others, because any defendant who actually participates in conduct giving rise to discrimination claim may be held personally liable under § 296(6). Riedinger v D'Amicantino, 974 F. Supp. 322, 1997 U.S. Dist. LEXIS 12604 (S.D.N.Y. 1997).

Sexual harassment claims against corporate employers are sufficient to withstand motion to dismiss, where building concierge alleges that defendants knew or should have known of pervasive sexual harassment she was suffering at hands of executives of building's owner and leasing agent, yet did not investigate harassment or discipline executives, because complaint adequately pleads calculated inaction to harassment, which constitutes condonation actionable under CLS Exec Law § 296. Ross v Mitsui Fudosan, 2 F. Supp. 2d 522, 1998 U.S. Dist. LEXIS 5780 (S.D.N.Y. 1998).

Female city audit inspector has established her exposure to sexually hostile work environment, and $30,000 is appropriate measure of damages for emotional distress that she suffered, because she demonstrated that supervisor engaged in offensive sexual harassment that included commenting about her breasts, making obscene gestures directed at her, repeatedly using vulgar and offensive language when speaking to her or others in her presence, and leaving inappropriate and embarrassing messages over her work pager, and that city did not take reasonable care to prevent or promptly correct bad situation. Hollis v City of Buffalo, 28 F. Supp. 2d 812, 1998 U.S. Dist. LEXIS 20351 (W.D.N.Y. 1998), reh'g denied, 189 F.R.D. 260, 1999 U.S. Dist. LEXIS 12147 (W.D.N.Y. 1999).

Male former hospital worker's Exec § 296 claims are dismissed, although he may have subjectively believed he was experiencing sexually hostile work environment, where there is question as to whether female supervisor's irreverent conduct was truly unwelcome, because isolated incidents described by worker did not rise to level of pervasive hostile work environment. Lucas v South Nassau Communities Hosp., 54 F. Supp. 2d 141, 1998 U.S. Dist. LEXIS 6504 (E.D.N.Y. 1998).

Sexual harassment and retaliation claims of former employee need not be dismissed or arbitrated, even though she has not exhausted grievance and arbitration procedures under applicable collective bargaining agreement, because agreement does not contain clear and unmistakable waiver of plaintiff's right to judicial forum for her Exec § 296 claim of employment discrimination. Prince v Coca-Cola Bottling Co., 37 F. Supp. 2d 289, 1999 U.S. Dist. LEXIS 2352 (S.D.N.Y. 1999).

Former employee's state-law claims arising from alleged sexual harassment are not time-barred, even though she did not file timely charge of discrimination with EEOC or commence claim for intentional infliction of emotional distress within one year, because these statute-of-limitations defenses were not raised in responsive pleading and were waived. Funk v F&K Supply, Inc., 43 F. Supp. 2d 205, 1999 U.S. Dist. LEXIS 2865 (N.D.N.Y. 1999).

Terminated African-American security guard's sexual harassment claim against former employer will not be denied summarily, where she complained about harassment to at least 2 employees charged with responsibility for relaying employee complaints to company management, because complaint asserts that employer had actual notice of harassment, and question of fact remains whether it reasonably investigated and took corrective action. Sowemimo v D.A.O.R. Sec., Inc., 43 F. Supp. 2d 477, 1999 U.S. Dist. LEXIS 5436 (S.D.N.Y. 1999).

Employer is denied summary dismissal of sexual harassment claim of 3 female employees brought under Exec § 296, where employees complained to their supervisors, certain supervisors witnessed some of alleged harassment, and employer is charged with knowledge of complaints, because employer offers no evidence that it took appropriate action in response to complaints. Badlam v Reynolds Metals Co., 46 F. Supp. 2d 187, 1999 U.S. Dist. LEXIS 5787 (N.D.N.Y. 1999).

Sexual harassment action need not be declined by federal district court, even though federal claims have dropped out, where complaint alleges that female former employee is citizen of Florida, former supervisor is citizen of New Jersey, and amount in controversy exceeds $75,000, because court has jurisdiction over state-law claims, including Exec § 296 claim under New York Human Rights Law, based not only on supplemental but also on diversity jurisdiction. Moore v Sam's Club, 55 F. Supp. 2d 177, 1999 U.S. Dist. LEXIS 4868 (S.D.N.Y. 1999).

Under Exec § 296(6) prohibiting gender discrimination, female employee's co-workers could be held liable for such discrimination as aiders or abettors. Petrosky v New York State DMV, 72 F. Supp. 2d 39, 1999 U.S. Dist. LEXIS 20884 (N.D.N.Y. 1999).

Harbor master's sexual harassment claim against town board liaison may proceed under Exec § 296, even though exact nature of their unique supervisory relationship is not clear, where master alleges that liaison had authority to affect his employment, because, at this stage, liaison could be held liable as employer and/or aider and abettor. Perks v Town of Huntington, 96 F. Supp. 2d 222, 2000 U.S. Dist. LEXIS 7243 (E.D.N.Y. 2000).

Terminated receptionist's Exec § 296 discrimination claim is denied summarily, even though she claims she was fired for complaining about sexual harassment, because record is replete with evidence that she was, in fact, fired for simple reason that her performance was substandard. Galarza v American Home Assur. Co., 99 F. Supp. 2d 251, 2000 U.S. Dist. LEXIS 7822 (E.D.N.Y. 2000).

Female student's allegations are sufficient to state cause of action for sexual harassment against male professor, where harassment consisted of professor continuously referring to her as "Monica Lewinsky," observing that she wore same color lipstick as Monica, and making comments such as "How was your weekend with Bill," and "Shut up, Monica. I'll give you a cigar later," in front of entire class, because comments were not only insensitive and politically incorrect, but also actionable. Hayut v State Univ. of New York, 127 F. Supp. 2d 333, 2000 U.S. Dist. LEXIS 18845 (N.D.N.Y. 2000).

Former female executive at banking institutions may proceed with sexual harassment claim, where she testified she was

subjected to hostile and degrading remarks and threats over 4-week period and that she was fired after she complained about these remarks, because she has presented sufficient evidence from which reasonable jury could find that defendant's conduct constituted sexual harassment and that defendants failed to investigate her complaints. Carroll v Bayerische Landesbank, 150 F. Supp. 2d 531, 2001 U.S. Dist. LEXIS 6939 (S.D.N.Y. 2001).

Sexually hostile environment claim brought by female fast-food worker against male supervisor under Exec § 296 may proceed, even though he claims individual liability is improper, because supervisor, as general manager of restaurant, had authority to set schedules and salaries and to assign hours to employees, without consultation, so that he was empowered to do more than simply carry out others' personnel decisions, and was source of all alleged discriminatory conduct. Chamblee v Harris & Harris, Inc., 154 F. Supp. 2d 670, 2001 U.S. Dist. LEXIS 11153 (S.D.N.Y. 2001).

Employer is denied summary dismissal of long-time employee's sexually hostile environment claim, even though it asserts it had "open door policy" by which employees could complain to high-level manager about perceived sexual harassment, where plaintiff here presents evidence of high-level knowledge and alleged complicity in harassment, because grievance policy which does not specifically address sexual harassment does not, on its own, provide sufficient evidence of reasonable care for grant of summary judgment. Robles v Cox & Co., 154 F. Supp. 2d 795, 2001 U.S. Dist. LEXIS 10899 (S.D.N.Y. 2001).

Former employee's Exec § 296 claim need not be dismissed, where she alleges her supervisor used pejorative derivations of her first name and sexually explicit terms in addressing her and treated her like secretary, and that management ignored her complaints, because amended complaint clearly alleges sufficiently severe and persistent incidents directed at her because of her age and sex to support hostile work environment claim. Dooner v Keefe, Bruyette & Woods, Inc., 157 F. Supp. 2d 265, 2001 U.S. Dist. LEXIS 12507 (S.D.N.Y. 2001), dismissed, in part, 2003 U.S. Dist. LEXIS 619 (S.D.N.Y. Jan. 13, 2003).

Supervisors may be personally liable under N.Y. Exec. Law § 296(6) as aiders and abettors of the employer's alleged unlawful conduct where the employee alleged that one supervisor aided and abetted the alleged sexual harassment violation, and that two other supervisors incurred liability not only for aiding and abetting in the alleged sexual harassment of and retaliation against the employee, but also for their participation in the sham investigation of the employee's complaint. Bennett v Progressive Corp., 225 F. Supp. 2d 190, 2002 U.S. Dist. LEXIS 18605 (N.D.N.Y. 2002).

Employee sufficiently stated a claim of sexual harassment discrimination under N.Y. Exec. Law § 296 against her employer and one of its officers to survive dismissal where she alleged that certain instances of sexual harassment by the officer created a hostile work environment. Wait v Beck's N. Am., Inc., 241 F. Supp. 2d 172, 2003 U.S. Dist. LEXIS 844 (N.D.N.Y. 2003).

Former employee had established a hostile work environment case sufficient to proceed to a jury where on four occasions her supervisor placed his hand under her skirt and rubbed her leg above the knee moving his hand towards her groin; there were genuine issues in dispute with regard to the employee's prima facie case for retaliation and whether the grounds articulated by the employer to justify the employee's discharge were the real reasons for the action or a pretext for unlawful discrimination. Parrish v Sollecito, 249 F. Supp. 2d 342, 2003 U.S. Dist. LEXIS 2225 (S.D.N.Y. 2003).

Allegations, which included an incident where the male social worker sniffed the female teacher's genital area, taken as a whole, created a genuine issue of material fact as to whether the social worker, on the basis of her race or gender, undertook a campaign of continuous and concerted campaign of harassment over the course of her 10 week employment at the school which was so pervasive that it rendered her work environment objectively hostile. The trier of fact had to determine whether (1) his behavior was motivated by the teacher's race and/or sex, and (2) whether the teacher's work environment was objectively hostile, that is, whether the nature and frequency of his conduct was sufficiently pervasive so as to objectively alter the conditions of employment for the worse. Sullivan v Newburgh Enlarged Sch. Dist., 281 F. Supp. 2d 689, 2003 U.S. Dist. LEXIS 15943 (S.D.N.Y. 2003).

Summary judgment was denied to a former employer in an age discrimination case brought by a 59-year-old former employee under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C.S. § 631, and N.Y. Exec. Law §§ 296 and 297 because allegations of constructive discharge and intolerable working conditions satisfied the elements of an adverse employment action leading to an inference of discrimination, and because even though the employer claimed that the conditions under which an employee worked never rose to the level required to show constructive discharge and that the employee left his position because he feared termination before the vesting of his medical benefits, the fact-finding required to accept the employer's version of the events was not an exercise that could be carried out in the context of a motion for summary judgment. Kern v Brookhaven Nat'l Lab., 293 F. Supp. 2d 214, 2003 U.S. Dist. LEXIS 21350 (E.D.N.Y. 2003).

Summary judgment on the merits of plaintiff's sexual harassment claims under Title VII, 42 U.S.C.S. § 2000e-2, and the New York Human Rights Law, N.Y. Exec. Law § 296 et seq., was denied in light of questions surrounding whether defendant employer had in place a reasonable procedure for dealing with sexual harassment, as of the date plaintiff spoke to defendant's upper management, (if it did not, surely plaintiff could not be penalized for failing to utilize something that did not exist). EEOC v Rotary Corp., 297 F. Supp. 2d 643, 2003 U.S. Dist. LEXIS 23225 (N.D.N.Y. 2003).

Municipal defendants were denied summary judgment in hostile work environment (sexual harassment) claim where even though plaintiff made no oral or written harassment complaint, the municipal defendants were arguably given constructive notice of the plaintiff's harassment/hostile work environment claims as she contended that she made oral complaints regarding her own alleged sexual harassment to human resources investigators when they interviewed her regarding an unrelated charge of sexual harassment. Dunbar v County of Saratoga, 358 F. Supp. 2d 115, 2005 U.S. Dist. LEXIS 3193 (N.D.N.Y. 2005).

Employer was granted summary judgment on a female employee's hostile work environment claim because she failed to take advantage of the employer's sexual harassment complaint procedure publicized in its employee handbook and stated in a sexual harassment seminar. The employee did not provide any evidence that she was afraid a complaint would be ignored or that she would face adverse employment action if she reported her supervisor. Tomassi v Insignia Fin. Group, Inc., 398 F. Supp. 2d 263, 2005 U.S. Dist. LEXIS 26962 (S.D.N.Y. 2005), vacated, 478 F.3d 111, 2007 U.S. App. LEXIS 3490 (2d Cir. N.Y. 2007).

As to the employee's constructive discharge claims, there was no possible way that a reasonable person in the employee's shoes could have felt compelled to resign; the employer credited the employee's complaint, disciplined the coworker, and the sexual harassment stopped. Nothing supported a finding that the employer deliberately created working conditions that made life too difficult for the employee. Durant v A.C.S. State & Local Solutions, Inc., 460 F. Supp. 2d 492, 2006 U.S. Dist. LEXIS 80987 (S.D.N.Y. 2006).

To the extent the employee was attempting to assert a claim that she was retaliated against by losing her job offer from another company, she was barred from doing so, as such a claim was neither alleged in the civil complaint nor reasonably related to the allegations contained in the employee's New York State Division of Human Rights complaint; however, neither party was entitled to summary judgment on the hostile work environment claim. There were obvious issues of credibility regarding the nature and extent of the sexually-oriented comments and behavior to which the employee was subjected, the extent to which she complained about these matters and to whom, and what if any measures the employer took in response. Ribis v Mike Barnard Chevrolet-Cadillac, Inc., 468 F. Supp. 2d 489, 2007 U.S. Dist. LEXIS 1397 (W.D.N.Y. 2007).

Former employer was entitled to summary judgment as to a former employee's hostile work environment claims under 42 U.S.C.S. § 2000e and N.Y. Exec. Law § 296 becuase no physical threat was attached to the allegedly inappropriate comments and the employee's allegations did not meet the threshold for frequency and severity as the comments were too few and too mild to create an abusive working environment. Allen v Advanced Digital Info. Corp., 500 F. Supp. 2d 93, 2007 U.S. Dist. LEXIS 23676 (N.D.N.Y. 2007).

Former employee's version of the facts, more specifically the requirement that he submit to a customer's sexual demands in order to keep his job, if true, appeared to set forth a claim of sexual harassment such that a reasonable fact-finder could conclude that the employee was subject to a hostile working environment and constructive discharge. Lopes v Caffe Centrale LLC, 548 F. Supp. 2d 47, 2008 U.S. Dist. LEXIS 31449 (S.D.N.Y. 2008).

In her lawsuit against a university, a professor failed to show gender-based harassment in violation of the New York Human Rights Law, N.Y. Exec. Law § 296, because the behavior that she complained about was facially neutral, and she considered the other professor's behavior bizarre, rather than romantic, which did not constitute gender discrimination. Guarino v St. John Fisher College, 553 F. Supp. 2d 252, 2008 U.S. Dist. LEXIS 31353 (W.D.N.Y. 2008), aff'd, 321 Fed. Appx. 55, 2009 U.S. App. LEXIS 7511 (2d Cir. N.Y. 2009).

In a female police officer's suit against a city, its police department, and others (defendants), her claims that defendants' acts of transferring her, ordering her to wear a uniform, denying other requested transfers and overtime assignments, and denying her a take-home vehicle failed to show a sexually hostile work environment in violation of the New York Human Rights Law, N.Y. Exec. Law § 296, because none of these action demonstrated objectively hostile or abusive behaviour on account of gender. Lore v City of Syracuse, 583 F. Supp. 2d 345, 2008 U.S. Dist. LEXIS 89484 (N.D.N.Y. 2008), aff'd in part, vacated in part, 670 F.3d 127, 2012 U.S. App. LEXIS 1954 (2d Cir. N.Y. 2012).

Former employee alleged that the deputy superintendent referred to another woman using a derogatory term, told the employee she could be one of his girls and that he could have her any time he wanted to, and maintained an inappropriate relationship with his other administrative assistant by constantly placing his hands on her body and speaking to her with profane and sexually suggestive language;the employee alleged that the superintendent also referred to another woman using several derogatory terms. On these facts, the employee offered allegations that were sufficient to survive defendants' motions to dismiss; the individual defendants' comments and epithets were such that a reasonable employee could find that her employment had been altered for the worse by gender-based hostility. Illiano v Mineola Union Free Sch. Dist., 585 F. Supp. 2d 341, 2008 U.S. Dist. LEXIS 91854 (E.D.N.Y. 2008).

Police officer's hostile work environment claim did not survive summary judgment because derogatory comments made by other employees were not sufficiently severe and pervasive to alter the officer's working conditions, the officer admitted that she had no complaint about the presence of pornography at work, and the officer admitted that she sometimes used derogatory language when referring to other people at work. Lee v City of Syracuse, 603 F. Supp. 2d 417, 2009 U.S. Dist. LEXIS 24966 (N.D.N.Y. 2009), overruled in part, Widomski v State Univ. of N.Y., 748 F.3d 471, 2014 U.S. App. LEXIS 6466 (2d Cir. N.Y. 2014).

Employee's hostile work environment claim under N.Y. Exec. Law § 296(6) survived summary judgment because a reasonable juror could find that harassment consisting of sexual comments and unwelcome sexual contact made by a manager who did not work in the employee's department was sufficiently severe or pervasive as to alter the conditions of the employee's work environment and that requiring the manager to apologize two months after the employee initially reported the misconduct to her supervisor did not constitute appropriate remedial action. Maher v Alliance Mortg. Banking Corp., 650 F. Supp. 2d 249, 2009 U.S. Dist. LEXIS 79486 (E.D.N.Y. 2009).

Although it was a close call, the former employee submitted sufficient evidence to create an issue of fact; assuming arguendo that none of the acts or comments of two coworkers was sufficiently egregious on its own, when taken together they did describe a work environment in which a jury could find an ongoing pattern of sexually offensive and humiliating conduct. A jury could find that the coworkers' sexually offensive remarks, directed at the employee as well as at least one other female employee, together with one coworker's unwanted physical touches and the employee's pleas for him to stop, cast women in a demeaning role and negatively impacted the employee's working environment. Polito v Tri-Wire Eng'g Solution, Inc., 699 F. Supp. 2d 480, 2010 U.S. Dist. LEXIS 26008 (E.D.N.Y. 2010).

Where a terminated employee alleged that an affair between the employer's president and a donor adversely affected the employee's ability to perform the employee's job, the hostile work environment claims failed because the allegations did not indicate that gender was causally related to the hostility that the employee allegedly faced since, inter alia, nothing in the complaint suggested that the employee would have been treated any differently had the employee been a man, and the facts alleged did not show that a fellow employee was given preferential treatment. Foster v Humane Soc'y of Rochester & Monroe County, Inc., 724 F. Supp. 2d 382, 2010 U.S. Dist. LEXIS 73384 (W.D.N.Y. 2010).

Jailor did not establish a hostile work environment claim based on an incident involving sexual conduct by a jail visitor; the evidence did not show that the jailor was required to watch the visitor's conduct, and co-workers' alleged offensive utterances were not frequent, severe, or threatening. However, the jailor sufficiently alleged retaliation for having reported a hostile work environment; the jailor claimed to have been denied leave and compelled to return to work despite a medical condition. Kleehammer v Monroe County, 743 F. Supp. 2d 175, 2010 U.S. Dist. LEXIS 93395 (W.D.N.Y. 2010), app. dismissed, 583 Fed. Appx. 18, 2014 U.S. App. LEXIS 22110 (2d Cir. N.Y. 2014).

Former employee failed to establish sexual harassment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e-2(a), 42 U.S.C.S. § 1983, or the New York State Human Rights Law, N.Y. Exec. Law § 296 because the disputed behavior was not severe enough to rise to the level of a hostile work environment, but only amounted to mundane and routine workplace actions that were too trivial to constitute harassment as a matter of law, and in any event, none of the alleged actions were due to the fact that the employee was a man, but instead were facially neutral incidents. Conklin v County of Suffolk, 859 F. Supp. 2d 415, 2012 U.S. Dist. LEXIS 62436 (E.D.N.Y. 2012).

Where a former employee failed to establish sexual harassment in violation of the New York State Human Rights Law, N.Y. Exec. Law § 296, he was unable to establish that a coworker aided and abetted the fostering of a sexually hostile work environment. Conklin v County of Suffolk, 859 F. Supp. 2d 415, 2012 U.S. Dist. LEXIS 62436 (E.D.N.Y. 2012).

Plaintiff former employee stated a claim for discrimination in violation of N.Y. Exec. Law § 296(1)(a) because her female supervisor's conduct was because of her sex and the allegation of unwanted sexual contact—grabbing and squeezing one of her breasts—concerned unwanted sexual contact sufficient to defeat defendant employer and supervisor's motion to dismiss. Reid v Ingerman Smith LLP, 876 F. Supp. 2d 176, 2012 U.S. Dist. LEXIS 93974 (E.D.N.Y. 2012).

Plaintiff's quid pro quo and hostile work environment claims against her former employer under N.Y. Exec. Law § 296(6). but her claims brought for age and disability discrimination brought under 29 U.S.C.S. § 621 et seq. and 42 U.S.C.S. § 2000e et seq., were dismissed for failure to exhaust administrative remedies. Sloth v Constellation Brands, Inc., 883 F. Supp. 2d 359, 2012 U.S. Dist. LEXIS 79979 (W.D.N.Y. 2012).

Complainant, part-time legal secretary, was not subjected to hostile work environment by exposure to sexually explicit materials that were mailed to law office where, inter alia, owner of law firm was involuntarily placed on mailing lists of several direct marketers selling sexual materials, materials were marked with warning notices stating that contents were sexually explicit, materials were not directed toward complainant, or displayed by

law firm, and complainant opened mail knowing it contained sexual materials. 2000 Order Comm HR No. 9S-E-S-96-7940895.

52. Sex discrimination

Restaurant's belief that replacement of waiters with waitresses dressed in alluring costumes would enhance sales volume did not establish a bona fide occupational qualification for purposes of exempting discharge of waiters from operation of sex discrimination laws. Guardian Capital Corp. v New York State Div. of Human Rights, 46 A.D.2d 832, 360 N.Y.S.2d 937, 1974 N.Y. App. Div. LEXIS 3585 (N.Y. App. Div. 3d Dep't 1974), app. dismissed, 36 N.Y.2d 806, 1975 N.Y. LEXIS 2680 (N.Y. 1975), app. denied, 37 N.Y.2d 705, 1975 N.Y. LEXIS 2770 (N.Y. 1975).

Although the Human Rights Appeals Board erred in dismissing an employee's appeal from the Division's order of no probable cause since Exec Law § 297(2) is directory and not mandatory in setting 180 days as the time period within which the Division must investigate and determine a complaint of unlawful discrimination, the Division's finding of no probable cause would be confirmed where, in view of the evidence in the record of the employee's unsatisfactory performance, the employer was not guilty of unlawful discrimination in discharging him two weeks after he was hired. State Div. of Human Rights v American Can Co., 78 A.D.2d 1005, 433 N.Y.S.2d 906, 1980 N.Y. App. Div. LEXIS 13781 (N.Y. App. Div. 4th Dep't 1980).

A sex discrimination complaint by a female worker who was discharged after she failed to return to work following her lunch hour was properly dismissed, even though she claimed she was discharged because she refused to continue a personal relationship with her immediate supervisor, where defendant submitted affidavits showing that it had no knowledge of any discriminatory acts by plaintiff's supervisor and plaintiff in opposition submitted no evidence to the contrary. McBride v General Ry. Signal Co., 96 A.D.2d 1145, 467 N.Y.S.2d 457, 1983 N.Y. App. Div. LEXIS 19832 (N.Y. App. Div. 4th Dep't 1983).

A petition seeking to annul administrative finding of no probable cause to believe that the termination of petitioner's employment was based on her sex or pregnancy was properly dismissed, where the record showed no evidence of a policy against pregnant employees, and demonstrated repeated absences and an unsatisfactory attitude on the part of petitioner. Ditaranto v State Div. of Human Rights, 111 A.D.2d 702, 491 N.Y.S.2d 176, 1985 N.Y. App. Div. LEXIS 49960 (N.Y. App. Div. 1st Dep't 1985).

Instructor failed to make out cause of action for discrimination on basis of sex where complaint focused only on injury that she allegedly incurred by virtue of college's nonrenewal of her appointment and she did not allege that (1) she was paid lower salary than others performing similarly, (2) she was excluded from organizational meetings, (3) she was downgraded in evaluation, or (4) she was subjected to disparate treatment in nonrenewal of her appointment. Brumbach v Rensselaer Polytechnic Institute, 126 A.D.2d 841, 510 N.Y.S.2d 762, 1987 N.Y. App. Div. LEXIS 41975 (N.Y. App. Div. 3d Dep't 1987).

Plaintiffs' motion to amend their complaint to add cause of action for gender-based employment discrimination should have been granted–complaint stated 11 causes of action, all of which were predicated on alleged wrongful termination of plaintiffs' employment with defendant in violation of employment contracts entered into between parties; shortly after discovery commenced, plaintiffs moved to amend their complaint to add twelfth cause of action on behalf of female plaintiff for gender-based employment discrimination under New York Executive Law § 296 (1) (a) et seq.–plaintiffs' proposed twelfth cause of action states legally sufficient claim under Executive Law § 296 (1) (a); female plaintiff alleges that she is member of protected class (women) and that defendant discharged her because of her gender; plaintiffs submitted affidavit in support of their motion containing excerpted deposition testimony of president of defendant corporation which corroborates allegations made by plaintiffs in their proposed amended complaint; in absence of prejudice or unfair surprise, requests for leave to amend should be granted freely. Daniels v Empire-Orr, Inc., 151 A.D.2d 370, 542 N.Y.S.2d 614, 1989 N.Y. App. Div. LEXIS 8121 (N.Y. App. Div. 1st Dep't 1989).

Division of Human Rights properly found that there was no probable cause to believe that employer had engaged in sex or age discrimination in layoff of 4 female complainants where (1) employer experienced drastic reduction in customer orders which resulted in layoffs of more than $^1/_3$ of employees (i.e., over 1,000 employees), (2) record showed that employer laid off complainants because of economic necessity, (3) employees of both sexes older and younger than complainants were laid off at about same time, and (4) some female employees older than complainants were retained. Giles v State Div. of Human Rights, 166 A.D.2d 779, 563 N.Y.S.2d 142, 1990 N.Y. App. Div. LEXIS 12018 (N.Y. App. Div. 3d Dep't 1990).

Court would annul determination finding that petitioner had been discriminated against based on gender, in that employer had not enforced its time and attendance policy as stringently with similar female employees as with petitioner, or that employer had ever put similar female employees on disciplinary probation for having violated its time and attendance policy as it did with petitioner, where (1) petitioner's treatment was in accordance with employer's disciplinary policy, under which time and attendance disciplinary infractions were typically negotiated with employee, (2) statistical analysis of average measure of time and attendance violations (TAV), constructed by Commissioner of Division of Human Rights and used as basis for his determination of discrimination, used 4 other similar female employees as sample, (3) TAV analysis had no relationship to manner in which employer disciplined employees for time and attendance abuse, (4) TAV analysis failed to account for differences in number of months over which each employee accumulated their time and attendance violations, and contained errors in computation, (5) TAV analysis did not reflect severity of violations during certain periods, or reveal improvements in time and attendance made by employees during other time periods, (6) petitioner was not treated differently as to his first 3 notices of discipline from 3 of similar female employees sampled, and (7) there was no gender discrimination in settlement voluntarily entered into by petitioner as opposed to settlement made by fourth female. New York State Office of Mental Health v New York State Div. of Human Rights, 210 A.D.2d 686, 619 N.Y.S.2d 874, 1994 N.Y. App. Div. LEXIS 12467 (N.Y. App. Div. 3d Dep't 1994), app. denied, 86 N.Y.2d 705, 632 N.Y.S.2d 498, 656 N.E.2d 597, 1995 N.Y. LEXIS 3406 (N.Y. 1995), app. denied, 86 N.Y.2d 705, 632 N.Y.S.2d 498, 656 N.E.2d 597 (N.Y. 1995).

Male bank employee, who had been discharged for sexually harassing 2 subordinate female employees, failed to make out prima facie case of sexual discrimination under CLS Exec § 296 where he did not show that he was treated differently from female employees in same situation. Traviglia v Fleet Bank, N.A., 219 A.D.2d 644, 631 N.Y.S.2d 423, 1995 N.Y. App. Div. LEXIS 9881 (N.Y. App. Div. 2d Dep't), app. denied, 87 N.Y.2d 805, 640 N.Y.S.2d 877, 663 N.E.2d 919, 1995 N.Y. LEXIS 5038 (N.Y. 1995).

Defendants' former employee stated cause of action for unlawful employment discrimination on basis of sex where she had exemplary performance evaluations for 11 years prior to 7-month tenure of supervisor who fired her for poor job performance, she claimed that supervisor actually fired her because she refused to perform certain menial tasks (such as bringing him coffee, tea and oranges) that were not part of her job description, and she alleged that her successor (also female) was fired for refusing to do same tasks. Spector v Hebrew Hosp. Home, 229 A.D.2d 571, 646 N.Y.S.2d 37, 1996 N.Y. App. Div. LEXIS 8254 (N.Y. App. Div. 2d Dep't 1996).

Employee's complaint of sex discrimination against her former employer was properly dismissed by state Human Rights Commission where there was no proof of retaliatory firing, employer was experiencing financial difficulties, employee was not replaced by male, her position was eliminated, and her duties were assumed by another female on staff. Maury v Frederick Goldman, Inc., 232 A.D.2d 215, 648 N.Y.S.2d 80, 1996 N.Y. App. Div. LEXIS 9972 (N.Y. App. Div. 1st Dep't 1996).

Cause of action for discrimination based on sexual orientation, while viable under NYC Admin Code § 8-107, was not viable under CLS Exec § 296, and thus insofar as claim was based on state statute, defendant was entitled to summary judgment. Nacinovich v Tullet & Tokyo Forex, 257 A.D.2d 523, 685 N.Y.S.2d 17, 1999 N.Y. App. Div. LEXIS 646 (N.Y. App. Div. 1st Dep't 1999).

Discrimination against employee on basis of failed voluntary sexual relationship is not discrimination because of "sex" under CLS Exec § 296(1)(a); statutory term is synonymous with "gender" and does not include such concepts as "sexual activity," "sexual liaisons," or "sexual attractions." Mauro v Orville, 259 A.D.2d 89, 697 N.Y.S.2d 704, 1999 N.Y. App. Div. LEXIS 10935 (N.Y. App. Div. 3d Dep't 1999), app. denied, 94 N.Y.2d 759, 705 N.Y.S.2d 6, 726 N.E.2d 483, 2000 N.Y. LEXIS 60 (N.Y. 2000).

Evidence supported determination finding that employer discriminated against claimant on basis of sex where there were promotions and regular pay increases given to claimant and other indications of her satisfactory performance, lay-off of only female employees in claimant's department, retention of claimant's male peer in same department despite unfavorable evaluation by his immediate supervisor, pay differential between claimant and that male peer for 3 years, continuation of department services after claimant's termination, and employer's hiring of male for position involving claimant's former duties created less than year after claimant's termination and for which she was not considered. Georgeson & Co. v Stewart, 267 A.D.2d 126, 700 N.Y.S.2d 9, 1999 N.Y. App. Div. LEXIS 13054 (N.Y. App. Div. 1st Dep't 1999), app. denied, 95 N.Y.2d 758, 713 N.Y.S.2d 522, 735 N.E.2d 1287, 2000 N.Y. LEXIS 1812 (N.Y. 2000).

Defendant was properly granted summary judgment in action alleging that plaintiff, licensed architect, was fired from her position as associate, after 14 years of increasingly responsible employment with defendant, because of her sex where plaintiff presented no evidence that she was replaced by male employee; further, defendant showed that plaintiff was discharged for poor work performance. Kapila v Divney, 269 A.D.2d 127, 702 N.Y.S.2d 56, 2000 N.Y. App. Div. LEXIS 985 (N.Y. App. Div. 1st Dep't 2000).

State Division of Human Rights' finding of sex discrimination in termination of female employee was not supported by substantial evidence where (1) employee's claim of reduced work hours was inconsistent with her claim that she was given more work than her coworkers were, (2) although she did not have locker for changing clothes, she was provided small room to change in, because of unavailability of separate lockers for female employees, (3) every fact finder who had heard employee's testimony had found it incredible, (4) court-appointed psychiatrist who examined employee described her belief of sexual harassment in terms of paranoid personality disorder, delusional psychosis, and distorted view of reality, and (5) employee's prior complaints against 2 former employers were never substantiated, one of them prompting federal judge to condemn her strongly. Jamco Bldg. Maint. Corp. v N.Y. State Div. of Human Rights, 281 A.D.2d 364, 724 N.Y.S.2d 20, 2001 N.Y. App. Div. LEXIS 3139 (N.Y. App. Div. 1st Dep't 2001), app. denied, 98 N.Y.2d 613, 749 N.Y.S.2d 475, 779 N.E.2d 186, 2002 N.Y. LEXIS 2699 (N.Y. 2002).

Defendants were entitled to summary judgment as to plaintiff's action alleging employment discrimination in violation of N.Y. Exec. Law § 296, as defendants made a prima facie showing that plaintiff's employment was terminated for legitimate, nondiscriminatory reasons, and plaintiff failed to raise a triable issue of fact as to whether the reasons proffered by defendants for her discharge were merely pretextual. Morse v Cowtan & Tout, Inc., 41 A.D.3d 563, 838 N.Y.S.2d 162, 2007 N.Y. App. Div. LEXIS 7439 (N.Y. App. Div. 2d Dep't 2007).

Plaintiff stated valid cause of action for sexual discrimination in employment where she alleged that her employment was terminated on account of discontinuance of her consensual sexual relationship with her employer. Mauro v Orville, 172 Misc. 2d 499, 660 N.Y.S.2d 662, 1997 N.Y. Misc. LEXIS 235 (N.Y. Sup. Ct. 1997), aff'd in part and rev'd in part, 259 A.D.2d 89, 697 N.Y.S.2d 704, 1999 N.Y. App. Div. LEXIS 10935 (N.Y. App. Div. 3d Dep't 1999).

Former employee's sexual orientation discrimination claim under N.Y. Exec. Law § 296(1)(a) failed because the alleged conduct occurred before the sexual orientation discrimination amendment to § 296(1) became effective; the amendment applied prospectively only. Logan v Salvation Army, 809 N.Y.S.2d 846, 10 Misc. 3d 756, 234 N.Y.L.J. 99, 2005 N.Y. Misc. LEXIS 2542 (N.Y. Sup. Ct. 2005).

Division of Human Rights erred in finding no probable cause to support an employee's claim of sex discrimination because, even if it lacked jurisdiction over familial status discrimination in the employment context, a claim for "sex plus" was a form of sex discrimination under N.Y. Exec. Law § 296, which was within its jurisdiction. Bailey v New York State Div. of Human Rights, 959 N.Y.S.2d 833, 38 Misc. 3d 756, 2012 N.Y. Misc. LEXIS 5838 (N.Y. Sup. Ct. 2012).

Plaintiff's discrimination claim based on pregnancy under the New York State Human Rights Law, N.Y. Exec. Law § 290 et seq., survived a motion to strike where plaintiff alleged that she was in a protected class due to her pregnancy immediately prior to her discharge, that she was recruited by defendant one to work for defendant two based on his prior knowledge of plaintiff's ability to procure sales, and thus, that she was qualified for her position; given that plaintiff was discharged shortly after telling her supervisor of her pregnancy, she sufficiently raised an inference of discrimination. Krause v Lancer & Loader Group, LLC, 965 N.Y.S.2d 312, 40 Misc. 3d 385, 2013 N.Y. Misc. LEXIS 1815 (N.Y. Sup. Ct. 2013).

Trial court erred in setting aside a jury verdict in an action by an employee, alleging gender discrimination in violation of N.Y. Exec. Law § 296 and N.Y. Lab. Law § 194, where there was evidence to support a finding that the employee was terminated for misconduct due to her insubordination, rather than due to gender discrimination; further, the disparity in pay between her and other employees could have been due to a variety of nondiscriminatory reasons. Wheeler v Citizens Telcoms. Co. of N.Y., Inc., 18 A.D.3d 1002, 795 N.Y.S.2d 370, 2005 N.Y. App. Div. LEXIS 5174 (N.Y. App. Div. 3d Dep't 2005).

Terminated trader's New York Human Rights Law claim under CLS Exec Law § 296 must fail, even though male trader was kept on while she was terminated, because record contains ample testimony supporting brokerage firm's position that male was better qualified for position than plaintiff. Hansen v Dean Witter Reynolds, Inc., 887 F. Supp. 669, 1995 U.S. Dist. LEXIS 7701 (S.D.N.Y. 1995).

In sex discrimination case against employer, evidence established that male employee, who was retained on staff of Transactional Finance Unit ("TFU") repo trading desk following its consolidation with "fixed income desk," was better qualified than female plaintiff where it was shown that he had more experience in mortgage-backed trading than she did, that he was easier to work with than she was, and that he was able to negotiate better rate for clients than she could. Hansen v Dean Witter Reynolds, Inc., 887 F. Supp. 669, 1995 U.S. Dist. LEXIS 7701 (S.D.N.Y. 1995).

Management employee was not subject to liability in sex discrimination action brought by former concierge in office building where she had no ownership interest in defendant entities and complaint did not allege that she had ability to discharge plaintiff or that she participated in any conduct that would give rise to sex discrimination claim. Ross v Mitsui Fudosan, 2 F. Supp. 2d 522, 1998 U.S. Dist. LEXIS 5780 (S.D.N.Y. 1998).

Terminated employee's Exec § 296 gender-based discrimination claim is denied summarily, even though former Assistant Director of Engineering Minority Programs Office cites 10 instances as evidence of hostile work environment, because alleged incidents—mostly rude and negative comments by director about female employees' dress and appearance—are isolated and sporadic and not sufficiently severe or pervasive to alter terms or conditions of work environment so as to constitute sex discrimination. Roman v Cornell Univ., 53 F. Supp. 2d 223, 1999 U.S. Dist. LEXIS 10071 (N.D.N.Y. 1999).

Woman is unable to establish prima facie case with respect to her claim of discriminatory discharge as associate clinical professor, where discharge occurred after she began to work full-time for another university in November 1996, because her failure to comply with employer's rules concerning outside employment renders performance of her job duties unsatisfactory after that. Marks v New York Univ., 61 F. Supp. 2d 81, 1999 U.S. Dist. LEXIS 13424 (S.D.N.Y. 1999).

Complainant could not bring discrimination action under Exec §§ 296 and 297 while complaint was still pending with local

commission on human rights, even if Equal Opportunity Commission had already issued right to sue letter. Gonzalez v N.Y. State Dep't of Corr. Servs. Fishkill Corr. Facility, 122 F. Supp. 2d 335, 2000 U.S. Dist. LEXIS 17317 (N.D.N.Y. 2000).

First female banquet room sous chef at hotel may proceed with retaliation claim under Exec § 296, where it is undisputed that she made 15 to 20 complaints over course of one year to her supervisor and human resources director concerning her work environment, because genuine issue is presented as to whether she was fired for complaining about gender discrimination or because she could not get along with co-workers. Ramos v Marriott Int'l, 134 F. Supp. 2d 328, 2001 U.S. Dist. LEXIS 2819 (S.D.N.Y. 2001).

Employer's summary judgment motion was denied as the fired employee showed a prima facie case of employment discrimination based on his sex and national origin where the supervisor's comment that Russian men like to flirt with blondes and her subsequent practices were direct evidence of a discriminatory sales policy and practice and where, under the McDonnell Douglas burden shifting analysis, the employer's proffered nondiscriminatory reasons were not credible. Ames v Cartier, Inc., 193 F. Supp. 2d 762, 2002 U.S. Dist. LEXIS 5609 (S.D.N.Y. 2002).

Where record did not show that harassment that corrections officer endured was based on non-conformity with gender norms instead of his sexual orientation, or that he was perceived to act in an effeminate manner, his claim for sexual discrimination failed; harassment on basis of sexual orientation was not actionable. Martin v N.Y. State Dep't of Corr. Servs., 224 F. Supp. 2d 434, 2002 U.S. Dist. LEXIS 18094 (N.D.N.Y. 2002).

Former employer was awarded summary judgment on a former employee's gender discrimination claims because the employer claimed that the employee was fired for removing her performance review from her supervisor's desk without permission, and the employee did not offer evidence that created a triable issue of fact as to pretext. Burniche v GE Automation Servs., 306 F. Supp. 2d 233, 2004 U.S. Dist. LEXIS 1969 (N.D.N.Y. 2004).

In an action in which a former employee filed suit against her former employer alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., the New York State Human Rights Law, N.Y. Exec. Law § 296, and the New York City Human Rights Law, New York City, N.Y., Admin. Code § 8-107, the employer was denied summary judgment on the discriminatory discharge claim where (1) the employer's inconsistent explanations created an issue of fact as to whether the reason it currently asserted for terminating the employee was pretextual; and (2) the employee raised a triable issue of fact that her suprvisor's inability to get along with her had its genesis in the fact that the employee was a woman. Giannone v Deutsche Bank Sec., Inc., 392 F. Supp. 2d 576, 2005 U.S. Dist. LEXIS 20493 (S.D.N.Y. 2005).

Former employee, who was reassigned jobs, given a pay cut, and then terminated and replaced by a younger male employee failed to establish a prima facie case of gender discrimination in violation of the New York State Human Rights Law, N.Y. Exec. Law § 296(1)(a), because replacement by a male and the fact that there was a certain amount of camaraderie among the male workers, without more, was insufficient to establish a violation of Title VII. Shain v Ctr. for Jewish History, Inc., 418 F. Supp. 2d 360, 2005 U.S. Dist. LEXIS 20629 (S.D.N.Y. 2005).

Former employee failed to satisfy his burden of establishing a prima facie case of discrimination based on sex pursuant to Title VII of the Civil Rights Act of 1964 and N.Y. Exec. Law § 296 because, while it was undisputed that the employee was a member of a protected class because he was a Bosnian male in the nursing field, and the employee experienced an adverse employment action because he was terminated from his position, (1) the employee failed to meet even the de minimus standard of demonstrating he was qualified for the position of staff nurse at the employer because, while it was undisputed that the employee passed the nursing boards and met the licensing and educational requirements of the employer, he failed to meet the excellent patient care standard in the employment and retention policy, (2) specifically, the employee committed multiple errors that did not meet the excellent patient care standard required for employee retention, and (3) the employee failed to provide evidence that gave rise to an inference of discrimination based on sex. Memisevich v St. Elizabeth's Med. Ctr., 443 F. Supp. 2d 276, 2006 U.S. Dist. LEXIS 56315 (N.D.N.Y. 2006).

Even if a former employee satisfied his burden of establishing a prima facie case of discrimination based on sex pursuant to Title VII of the Civil Rights Act of 1964 and N.Y. Exec. Law § 296, the employer offered legitimate, nondiscriminatory reasons for its termination decision because (1) the complaints about the employee's clinical errors were investigated and reasonably credited, which would have rebutted any presumption of discrimination, (2) the employee's disputes with co-workers were evident of personality conflicts, and (3) the employee was a probationary employee at the time of his termination and under the employer's policy could have been terminated during the probationary period with or without notice. Memisevich v St. Elizabeth's Med. Ctr., 443 F. Supp. 2d 276, 2006 U.S. Dist. LEXIS 56315 (N.D.N.Y. 2006).

Since a former employee contended that she was constructively discharged, she was unable to maintain a claim of wrongful termination, in violation of the New York Human Rights Law, N.Y. Exec. Law § 296, against her former employer and a former coworker. Maney v Corning, Inc., 547 F. Supp. 2d 221, 2007 U.S. Dist. LEXIS 91382 (W.D.N.Y. 2007).

Defendants cited three reasons for their decision to terminate the employee: client cancellations, lack of business production by the employee, and the employee's poor attitude, however, viewing the record in favor of the employee, there were issues of fact concerning whether defendants' proffered reasons for terminating the employee were pretextual. The employee presented evidence that after she complained about what she perceived to be discriminatory treatment on account of her sex, her performance reviews became more negative and she was terminated about two months after she filed her Equal Employment Opportunity Commission complaint. Heinemann v Howe & Rusling, 529 F. Supp. 2d 396, 2008 U.S. Dist. LEXIS 177 (W.D.N.Y. 2008).

Employee's allegations included events spanning a period from 1999 to the disciplinary action taken against her regarding shift differential pay in 2003; further, throughout the relevant period, command of the unit remained under the supervision of the individuals responsible for the alleged harassment. Reading the complaint in the light most favorable to the employee, the employee sufficiently alleged a pattern of discrimination that continued over a period of years with some incidents occurring within the appropriate filing period; this reasoning applied with equal force to the employee's hostile environment claims pursuant to 42 U.S.C.S. § 1983 and N.Y. Exec. Law § 290 et seq. Anderson v Nassau County Dep't of Corr., 558 F. Supp. 2d 283, 2008 U.S. Dist. LEXIS 21774 (E.D.N.Y. 2008).

In a female police officer's suit against a city, its police department, and others, alleging gender discrimination, her claim regarding her transfer to the uniform patrol division failed to show gender discrimination in violation of the New York Human Rights Law, N.Y. Exec. Law 296, because the officer failed to show that the transfer was motivated at all by her gender. Lore v City of Syracuse, 583 F. Supp. 2d 345, 2008 U.S. Dist. LEXIS 89484 (N.D.N.Y. 2008), aff'd in part, vacated in part, 670 F.3d 127, 2012 U.S. App. LEXIS 1954 (2d Cir. N.Y. 2012).

Police officer did not establish a gender discrimination claim with regards to the seizure of her weapon and requests for medical records because the officer was placed on psychiatric medical leave and there was no evidence that the officer was treated differently that similarly situated male colleagues. Lee v City of Syracuse, 603 F. Supp. 2d 417, 2009 U.S. Dist. LEXIS 24966 (N.D.N.Y. 2009), overruled in part, Widomski v State Univ. of N.Y., 748 F.3d 471, 2014 U.S. App. LEXIS 6466 (2d Cir. N.Y. 2014).

Police officer failed to establish a gender discrimination claim with respect to disciplinary actions taken against her because the officer's violation of a city police department's rules provided a nondiscriminatory reason for disciplining the officer and there was no evidence that the city's actions were motivated by the officer's gender. Lee v City of Syracuse, 603 F. Supp. 2d 417, 2009 U.S. Dist. LEXIS 24966 (N.D.N.Y. 2009), overruled in part,

Widomski v State Univ. of N.Y., 748 F.3d 471, 2014 U.S. App. LEXIS 6466 (2d Cir. N.Y. 2014).

Employee claimed that the employer discriminated against her on the basis of her sex by: claims that assigning older bucket trucks to her, while assigning better trucks to less-senior male employees; assigning her to perform two-man jobs alone and encouraging her co-workers not to assist her; failing to provide a women-only bathroom and reprimanding her for using offsite bathrooms; criticizing her work and micro-managing her; denying her light duty work; employee also claimed retaliatory discharge based on the argument that she was forced to retire because she was denied light duty; retaliation based on allegations of co-worker hostility; and a hostile work environment claim; however, employee failed to establish a prima facie case of discrimination and her disparate treatment claims all failed. The retaliation claims failed, either because they were untimely or because employee two did not make out a prima facie case and as to the hostile environment claims, she did not offer sufficient evidence for a jury to find that her supervisors' alleged negative conduct was directed at her because of her sex. Dauer v Verizon Communs. Inc., 613 F. Supp. 2d 446, 2009 U.S. Dist. LEXIS 21506 (S.D.N.Y. 2009), vacated, 618 F.3d 112, 2010 U.S. App. LEXIS 16749 (2d Cir. N.Y. 2010).

No reasonable jury could have found that a former employee met his evidentiary burden in establishing a prima facie case with regard to showing circumstances that gave rise to an inference of gender discrimination, under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000 et seq., and the New York Human Rights Law, N.Y. Exec. Law § 296 et seq., because the employee did not present any direct evidence of discriminatory intent, and although the employee identified female comparators who were subject to the same disciplinary standards, the employee failed to adduce any evidence from which a reasonable juror could have inferred that the employee was treated differently under these standards based on his gender. Bennett v Hofstra Univ., 842 F. Supp. 2d 489, 2012 U.S. Dist. LEXIS 115315 (E.D.N.Y. 2012).

In an action by a former employee against her former employer alleging gender discrimination, failure to promote, and retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., N.Y. Exec. Law § 296, and New York City law, following the employer's production of a sample of e-mails from restored computer backup tapes, the employee's motion to compel production of all remaining backup e-mails was granted and one quarter of the cost of any further production concerning the computer backup tapes requested under Fed. R. Civ. P. 34(a) was shifted to the employee pursuant to Fed. R. Civ. P. 26(b)(2) and (c) because the employee demonstrated that the marginal utility of the backup tapes was potentially high, the cost of restoration was not significantly disproportionate to the projected value of the case, the employee probably had the financial wherewithal to cover at least some of the cost of restoration, and, although the employee did not show that there was indispensable evidence on the backup tapes, there was plainly relevant evidence that was only available on the backup tapes. Zubulake v UBS Warburg LLC, 216 F.R.D. 280, 2003 U.S. Dist. LEXIS 12643 (S.D.N.Y. 2003).

Maintenance of separate seniority lists of male and female physical education teachers is impermissible form of sex discrimination which no bona-fide occupational qualification can justify; thus, if female physical education teachers having less seniority were, in fact, retained in preference to male physical education teacher dismissed because of fiscal crisis, school district should reinstate male and pay salary from date of termination to date of reinstatement. Ops Comr Ed #9321.

Complainant, store cashier, failed to show that employer acted unlawfully in discharging her for failing to produce receipt for store merchandise placed in bag underneath her register, even though she showed that she was discharged on very day that she said she told employer's coordinator of detectives that she was breaking off their sexual relationship. 1999 Order Comm HR No. 9S-E-S-90-144553.

Complainant failed to show that she was denied employment opportunity on ground she rebuffed amorous advances of employer's vice president of finance where employer's chief financial officer and employer's executive board, not vice president, had final say in both offering complainant job and later revoking that offer of employment, and employer was motivated by financial considerations when it revoked its offer of employment to complainant and hired someone at roughly half salary. 1999 Order Comm HR No. 9D-E-S-89-136970-E.

Respondent, owner of insurance brokerage firm, did not engage in unlawful practices of sexual discrimination and harassment against complainant, respondent's office manager, where complainant's employment was ended because of her admitted falsification of clients' signatures, and because of statements made, or believed by respondent that complainant made, to insurance company which were inimical to respondent's financial interest. 2000 Order Comm HR No. 9S-E-S 95-7940446.

53. Retaliation

The trial court erred in denying a company's and individual's motion for summary judgment on claims of retaliation under N.Y. Exec. Law § 296, because an injured party failed to demonstrate that the temporary change in her duties was disadvantageous to her, or that the restriction on her entry into the warehouse was based on a subjective retaliatory motive. Martinez v Triangle Maint. Corp., 293 A.D.2d 721, 741 N.Y.S.2d 427, 2002 N.Y. App. Div. LEXIS 4134 (N.Y. App. Div. 2d Dep't 2002).

Although a police officer established, in accordance with the Americans with Disabilities Act, 42 U.S.C.S. § 12101 et seq., and N.Y. Exec. Law § 296, that the officer was disabled and that the police department failed to grant the officer a light-duty assignment or to approve the officer's request for "injured on duty" status, the officer failed to establish that any light-duty positions were available or that retaliation based on a supervisor's animosity; therefore, the officer was not entitled to N.Y. C.P.L.R. art. 78 relief. Matter of Abram v New York State Div. of Human Rights, 71 A.D.3d 1471, 896 N.Y.S.2d 764, 2010 N.Y. App. Div. LEXIS 2200 (N.Y. App. Div. 4th Dep't 2010).

Trial court erred in dismissing a minority employee's retaliation cause of action because he was involved in a prior federal action against the employer, which resulted in the issuance of a consent decree that subjected the employer to significant damages, and an employee with less experience was upgraded over the first employee shortly after the consent decree was issued. 2019 N.Y. App. Div. LEXIS 7981.

Trial court erred in denying a city's motion to dismiss a former police officer's action for refusal to withdraw a notice of discipline, termination of arbitration, and retaliation because the refusal was only the continuation of the arbitration that the officer had requested, he was not terminated until the arbitrator rendered his decision finding that the officer had engaged in misconduct warranting his dismissal, and the city's alleged request for additional security at a workers' compensation hearing could not constitute an adverse employment action as the city was no longer the officer's employer at that time. Miller v City of Ithaca, 179 A.D.3d 1235, 117 N.Y.S.3d 719, 2020 N.Y. App. Div. LEXIS 196 (N.Y. App. Div. 3d Dep't 2020).

Defendants were not entitled to summary judgment on plaintiff's retaliation claim because plaintiff raised disputed issues of fact about whether there was a mixed motive to terminate his employment, including plaintiff's manager telling him that if they could not be together then plaintiff could not work around her, and defendants' failure to adequately investigate plaintiff's claims prior to his termination. Franco v Hyatt Corp., 2020 N.Y. App. Div. LEXIS 7687 (N.Y. App. Div. 1st Dep't 2020).

In a former employee's suit asserting retaliatory and discriminatory discharge against his former employer under New York State Executive Law (NYSHRL), N.Y. Exec. Law § 296 et seq., and the New York City Human Rights Law (NYCHRL), New York City, N.Y., Admin. Code § 8-101 et seq., based on his alleged termination due to his sister-in-law previously suing the employer, the claim under NYSHRL required dismissal since NYSHRL clearly indicated that it only prohibited discrimination against individuals who were themselves disabled and was not intended to provide a cause of action for disability association discrimination. However, the former employee sufficiently established a cause of action under the NYCHRL since he made

sufficient allegations for pleading purposes to reasonably infer that he was terminated in retaliation for his association with his sister-in-law. Rivera v Lutheran Med. Ctr., 866 N.Y.S.2d 520, 22 Misc. 3d 178, 240 N.Y.L.J. 83, 2008 N.Y. Misc. LEXIS 6060 (N.Y. Sup. Ct. 2008), aff'd, in part, 73 A.D.3d 891, 899 N.Y.S.2d 859, 2010 N.Y. App. Div. LEXIS 4127 (N.Y. App. Div. 2d Dep't 2010).

African-American employee did not show retaliation, when she was terminated from her employment, because she did not show that she was engaged in a protected activity, as she did not show that she had complained to her employer of racial discrimination. Forrest v Jewish Guild for the Blind, 309 A.D.2d 546, 765 N.Y.S.2d 326, 2003 N.Y. App. Div. LEXIS 10478 (N.Y. App. Div. 1st Dep't 2003), aff'd, 3 N.Y.3d 295, 786 N.Y.S.2d 382, 819 N.E.2d 998, 2004 N.Y. LEXIS 3489 (N.Y. 2004).

Appeal board properly determined that a worker was not eligible for unemployment insurance benefits pursuant to N.Y. Lab. Law § 593; the worker was terminated for misconduct, based on a failure to comply with orders not to discuss harassment accusations with an accuser, and the worker's conduct had the potential of jeopardizing the employer's best interests by making it vulnerable to a claim of retaliatory discrimination on the part of the employee with whom the worker discussed the matter, N.Y. Exec. Law § 296(7). In re Claim of Bolasny, 3 A.D.3d 657, 770 N.Y.S.2d 767, 2004 N.Y. App. Div. LEXIS 96 (N.Y. App. Div. 3d Dep't 2004).

Summary judgment was properly granted to the school district and the board of education on the teacher's unlawful retaliation claim because, although the teacher was engaging in a protected activity when he filed his grievance alleging age discrimination, the school district and the board of education established that the teacher was terminated because the school district eliminated the drafting program, in which the teacher had a position, for economic reasons, not because of the teacher's grievance, and the teacher failed to raise an issue of fact. Davis v Sch. Dist. of Niagara Falls, 4 A.D.3d 866, 772 N.Y.S.2d 180, 2004 N.Y. App. Div. LEXIS 1379 (N.Y. App. Div. 4th Dep't 2004).

Although an employee failed to dispute an employer's prima facie showing of a lack of a hostile work environment based on a supervisor's alleged sexual harassment, the employee raised a triable issue of fact as to a claim of retaliation under N.Y. Exec. Law § 296(7); accordingly, the trial court erred in granting the employer's motion for summary judgment on that issue. Beharry v Guzman, 33 A.D.3d 742, 823 N.Y.S.2d 195, 2006 N.Y. App. Div. LEXIS 12486 (N.Y. App. Div. 2d Dep't 2006).

Because an employee's counterclaims were conclusory and failed to show that the employee either assisted or encouraged the filing of a "proceeding" within the meaning of N.Y. Exec. Law § 296(1)(e) or New York City, N.Y., Admin. Code § 8-107(7), the trial court erred in dismissing the employer's action for fraud and breach of fiduciary duty. Hunts Point Multi-Service Ctr., Inc. v Bizardi, 45 A.D.3d 481, 846 N.Y.S.2d 159, 2007 N.Y. App. Div. LEXIS 12084 (N.Y. App. Div. 1st Dep't 2007), app. dismissed, 10 N.Y.3d 909, 861 N.Y.S.2d 270, 891 N.E.2d 304, 2008 N.Y. LEXIS 1626 (N.Y. 2008).

Dismissal of the police officer's retaliation action against the town for discrimination in not promoting the officer because of an seizure disorder, in violation of the Americans With Disability Act, 42 USCS § 12101 et seq., the Rehabilitation Act of 1973, specifically 29 USCS § 794, and the New York State Human Rights Law, N.Y. Exec. Law § 296 et seq., was reversed as a reasonable jury could find that the non-retaliatory reasons given by the town were pretextual. Treglia v Town of Manlius, 313 F.3d 713, 2002 U.S. App. LEXIS 26120 (2d Cir. N.Y. 2002).

Where a former employee alleged that her employer retaliated against her because she refused to submit to a company officer's sexual advances, the district court properly granted summary judgment to the employer and the officer on the employee's retaliation claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., and the New York State Human Rights Law, N.Y. Exec. Law § 296, because there was no evidence that the employer or the officer took an adverse employment action against her in response to her complaints of sexual harassment; a proposed change by her supervisor in the employee's reporting structure could not be characterized as adverse treatment because the supervisor rescinded the change the following day, and did so with an apology. Schiano v Quality Payroll Sys., 445 F.3d 597, 2006 U.S. App. LEXIS 10279 (2d Cir. N.Y. 2006).

Because there was no indication that plaintiff employee, a human resources manager at her family business, believed that her sex had anything to do with her treatment after complaining about an affair that one of her brothers, a vice president, was having with another worker in the office or that her employers could have understood her statements as such, she had failed to establish a prima facie case for retaliation under Title VII or the New York State Human Rights Law, N.Y. Exec. Law § 290 et seq. Kelly v Howard I. Shapiro & Assocs. Consulting Eng'rs, P.C., 716 F.3d 10, 2013 U.S. App. LEXIS 8496 (2d Cir. N.Y. 2013).

City parks department did not terminate employee in retaliation for his filing complaint with EEOC, in violation of Title VII and Exec §§ 296 and 297, where evidence indicated normal termination in response to employee's disruptive work performance, with no showing of retaliatory animus. Allah v City of N.Y. Dep't of Parks & Rec., 162 F. Supp. 2d 270, 2001 U.S. Dist. LEXIS 14754 (S.D.N.Y. 2001), aff'd, 47 Fed. Appx. 45, 2002 U.S. App. LEXIS 20475 (2d Cir. N.Y. 2002).

Employer's Fed. R. Civ. P. 50(a) motion for judgment as a matter of law on an employee's retaliation claim brought pursuant to 42 U.S.C.S. § 2000e-3 and N.Y. Exec. Law § 296 was denied where a reasonable juror could have inferred from the timing of the alleged conversation just days following the harassment incident that a supervisor understood that the employee was referring to the harassing behavior and not to regular workplace problems, there was evidence the supervisor began to consider terminating the employee at about the time of the harassment incident, and the supervisor's reaction to the employee's complaint, i.e., confronting the employee and making statements of non-belief, was direct evidence of hostility directed at the employee. Parrish v Sollecito, 258 F. Supp. 2d 264, 2003 U.S. Dist. LEXIS 6262 (S.D.N.Y. 2003).

In an action by a former employee against his former employer alleging race discrimination and retaliation in violation of 42 U.S.C.S. § 1981, N.Y. Exec. Law § 296, and New York City, N.Y. Admin. Code § 8-502(a), the employer's motion for summary judgment under Fed. R. Civ. P. 56(c) was denied in part where the employee established his retaliation claim because his evidence suggested that, after he complained about the alleged discrimination, the employer started to collect negative information regarding his poor performance as manager of a warehouse, and the employer did not terminate the employee's predecessor after it discovered that he had downloaded pornography and visited a race track during work, and the employee was entitled to pursue his punitive damages claim under 42 U.S.C.S. § 1981a(b)(1). Santos v Costco Wholesale, Inc., 271 F. Supp. 2d 565, 2003 U.S. Dist. LEXIS 12280 (S.D.N.Y. 2003).

In order to show a retaliation claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., and the New York Human Rights Act, a plaintiff must show, among other things, a causal connection exists between the protected activity and the adverse action taken by an employer; in an action for discrimination based on sex, since an employee failed to produce any evidence of a causal connection between her complaints and the alleged adverse actions taken against her, the employers were entitled to summary judgment. Gibson v Crucible Materials Corp., 290 F. Supp. 2d 292, 2003 U.S. Dist. LEXIS 19990 (N.D.N.Y. 2003).

Pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., and New York Human Rights Law, in order to state a case for retaliation, among other things, a plaintiff must show that she is engaged in a protected activity; a professor denied tenure failed to show that teaching at a college was a protected activity. Byerly v Ithaca College, 290 F. Supp. 2d 301, 2003 U.S. Dist. LEXIS 20090 (N.D.N.Y. 2003), aff'd, 113 Fed. Appx. 418, 2004 U.S. App. LEXIS 21484 (2d Cir. N.Y. 2004).

Public employer was denied summary judgment on terminated employee's retaliation claim under the Americans with Disabilities Act, 42 U.S.C.S. § 12101 et seq., and the New York State Human Rights Law, N.Y. Exec. Law §§ 293-96, because there was sufficient evidence to satisfy the de minimis causal connection

requirement because: (1) termination of plaintiff's N.Y. Gen. Mun. Law § 207-c benefits followed his initial requests for explication of his light-duty assignment; and (2) his employment was terminated pursuant to N.Y. Civ. Serv. Law § 71 after his subsequent requests for a light-duty assignment and filing his complaint to the Equal Employment Opportunity Commission. King v Town of Wallkill, 302 F. Supp. 2d 279, 2004 U.S. Dist. LEXIS 2487 (S.D.N.Y. 2004).

Individual defendants' motion for summary judgment was denied on terminated employee's claims against them under N.Y. Human Rights Law, N.Y. Exec. Law §§ 296(6),(7), where the record revealed evidence of the active participation by all five named individual defendants in the actions giving rise to the employee's claims of retaliation. King v Town of Wallkill, 302 F. Supp. 2d 279, 2004 U.S. Dist. LEXIS 2487 (S.D.N.Y. 2004).

For purposes of her retaliation claim, plaintiff sheriff's office employee engaged in activity protected under both Title VII and the Equal Pay Act (EPA) and known to defendants, including filing complaints with the New York State Division of Human Rights, but the employees' other activities such as her claimed public advocacy for pay equality and complaints to her supervisor did not constitute protected activity under the EPA because these were not formal complaints or proceedings as required under the EPA; however, these activities could be found to constitute protected activity under Title VII of the Civil Rights Act of 1965, 42 U.S.C.S. § 2000e-2 and/or the First Amendment. Pfeiffer v Lewis County, 308 F. Supp. 2d 88, 2004 U.S. Dist. LEXIS 4126 (N.D.N.Y. 2004).

For the purposes of plaintiff sheriff's office employee's retaliation claim, a fair-minded trier of fact could conclude that the change in title and duties from performing supervisory functions as a dispatch supervisor to performing D/CO functions, being transferred back into the control room, and the non-renewal of an additional contract was an adverse could constitute a materially adverse change in employment. Pfeiffer v Lewis County, 308 F. Supp. 2d 88, 2004 U.S. Dist. LEXIS 4126 (N.D.N.Y. 2004).

Temporal proximity between plaintiff sheriff's office employee's complaints to the Equal Employment Opportunity Commission, her continual complaints concerning pay, the non-renewal of her administrative services agreement, the denial of her application to use sick bank leave time, the abolishment of her dispatch supervisor position, and the removal of her dispatch supervisor responsibilities were sufficient to support an inference of causation in the employee's retaliation claim against defendant employer county. Pfeiffer v Lewis County, 308 F. Supp. 2d 88, 2004 U.S. Dist. LEXIS 4126 (N.D.N.Y. 2004).

Where defendant county legislators' actions were taken by virtue of their positions with the county legislature, their actions were under color of state law; accordingly, the legislators could be held liable to the extent it could be found that their actions in refusing to permit defendant sheriff to provisionally appoint the employee to the dispatch supervisor position and/or in refusing to renew an administrative service contract with the employee were in retaliation for the employee's protected activity. Pfeiffer v Lewis County, 308 F. Supp. 2d 88, 2004 U.S. Dist. LEXIS 4126 (N.D.N.Y. 2004).

Court granted the employer summary judgment on the employee's retaliation claim because the supervisor who made the decision to terminate the employee declared under oath that he was unaware of the employee's complaints of a former supervisor at the time of his decision, the employee was terminated two months after complaining about her former supervisor's discriminatory comments, and the supervisor who terminated the employee stated that he did so because of his mandate to cut costs; he stated that the employee was a very highly compensated temporary clerical employee who did not provide any unique or essential skills. Hill v Citibank Corp., 312 F. Supp. 2d 464, 2004 U.S. Dist. LEXIS 5069 (S.D.N.Y. 2004).

Employer was denied summary judgment on a former employee's claim of retaliatory discharge where the employee was fired only months after bringing the instant action despite a supervisor's recommendation that he be retained after a reduction in force, thereby raising issues of fact as to whether his discharge occurred in circumstances giving rise to genuine issues to an inference of discrimination on the basis of the employee's race. Kennedy v J.P. Morgan Chase & Co., 325 F. Supp. 2d 401, 2004 U.S. Dist. LEXIS 13342 (S.D.N.Y. 2004).

When an an African-American employee sued his employer and supervisors for retaliation, under 42 U.S.C.S. § 2000e-3(a) and N.Y. Exec. Law § 296(1)(e), arising from the termination of his employment as a custodial worker at a school, summary judgment dismissing this claim was denied because the employee produced sufficient admissible evidence to create a genuine issue of material fact as to whether retaliation for threatening to sue the school and subpoena its employees was a factor in the decision to terminate his employment. Jones v Yonkers Pub. Schs, 326 F. Supp. 2d 536, 2004 U.S. Dist. LEXIS 14599 (S.D.N.Y. 2004).

53 year old probation officer failed to establish a prima facie case for age based retaliation under state and federal law where even if she was able to demonstrate participation in a protected activity known to defendants, she would be unable to show that there was a causal connection between the protected activity and an adverse employment action because each of the alleged adverse employment actions occurred before she filed her charge with the equal employment opportunity commission (EEOC) and thus she was unable to establish a causal connection between the alleged adverse employment actions and the filing of her EEOC complaint. Kearney v County of Rockland, 373 F. Supp. 2d 434, 2005 U.S. Dist. LEXIS 11956 (S.D.N.Y. 2005), aff'd, 185 Fed. Appx. 68, 2006 U.S. App. LEXIS 14670 (2d Cir. N.Y. 2006).

Reasonable jury could find that the steps an employer took immediately following receiving a letter from an employee accusing the employer of religious discrimination — immediately informing the employee his review would occur in only three months, not the six months originally stated; giving the employee a review that restated the identical ratings with no explanation whatsoever; and ultimately dismissing the employee — were taken, at least in part, because of the employer's strong negative reactions to the employee's accusations. Summary judgment on the employee's retaliation claim was denied. Goldschmidt v N.Y. State Affordable Hous. Corp., 380 F. Supp. 2d 303, 2005 U.S. Dist. LEXIS 16233 (S.D.N.Y. 2005).

In an action in which a former employee filed suit against his former employer alleging violations of the Age Discrimination in Employment Act, 29 U.S.C.S. § 621 et seq., Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., the New York State Human Rights Law, N.Y. Exec. Law § 296 et seq., and the New York City Human Rights Law, New York City, N.Y., Admin. Code § 8-101 et seq., the employer was denied summary judgment on the retaliation claim; the employee presented evidence that the employer was displeased with his position and participation in an investigation involving a co-worker. Pronin v Raffi Custom Photo Lab, Inc., 383 F. Supp. 2d 628, 2005 U.S. Dist. LEXIS 18142 (S.D.N.Y. 2005).

In an action in which a former employee filed suit against her former employer alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., the New York State Human Rights Law, N.Y. Exec. Law § 296, and the New York City Human Rights Law, New York City, N.Y., Admin. Code § 8-107, the employer was granted summary judgment on the employee's claim of retaliatory discharge where the employee was unable to make the required showing of pretext; the employer satisfied its burden by presenting evidence that the employee was fired because she and her supervisor could not get along. Giannone v Deutsche Bank Sec., Inc., 392 F. Supp. 2d 576, 2005 U.S. Dist. LEXIS 20493 (S.D.N.Y. 2005).

In an action brought by employees who alleged religious discrimination by a church employer that contracted with government entities, federal retaliation claims were barred by 42 U.S.C.S. § 2000e-1(a); the employees could, however, maintain state and local retaliation claims under N.Y. Exec. Law § 296(7) and New York City, N.Y., Admin. Code § 8-107(7). Lown v Salvation Army, Inc., 393 F. Supp. 2d 223, 2005 U.S. Dist. LEXIS 22260 (S.D.N.Y. 2005).

In an action brought by employees who alleged religious discrimination by a church employer that contracted with government entities, federal retaliation claims were barred by 42 U.S.C.S. § 2000e-1(a); the employees could, however, maintain

state and local retaliation claims under N.Y. Exec. Law § 296(7) and New York City, N.Y., Admin. Code § 8-107(7). Lown v Salvation Army, Inc., 393 F. Supp. 2d 223, 2005 U.S. Dist. LEXIS 22260 (S.D.N.Y. 2005).

Former employee, who was a department manager for a retail store, failed to show retaliation for filing a complaint with the Equal Employment Opportunity Commission (EEOC) because there was no evidence of any adverse employment actions taken against the employee after she filed the EEOC complaint, particularly as she received positive reviews and five percent raises and was not denied any other benefits in the time period following the EEOC filing, and she was not terminated from the company, but voluntarily resigned two years later. Ebanks v Neiman Marcus Group, Inc., 414 F. Supp. 2d 320, 2006 U.S. Dist. LEXIS 4802 (S.D.N.Y. 2006).

Employer was entitled to summary judgment on an employee's retaliation claim because (1) there was no evidence that the employee's termination was causally related to his filing of a complaint about a coworker's sexual harassment, (2) the employer produced evidence that the employee was terminated under a progressive discipline policy based upon the employee's misconduct in using a company car to drive coworkers the wrong way down a one-way street and in taking money from the employer without permission, and (3) there was no evidence tending to show that the employer's legitimate, non-discriminatory reasons were merely pretextual. Godineaux v Laguardia Airport Marriott Hotel, 460 F. Supp. 2d 413, 2006 U.S. Dist. LEXIS 80862 (E.D.N.Y. 2006).

Former employee failed to establish unlawful retaliation by her former employer and a former coworker, in violation of the New York Human Rights Law, N.Y. Exec. Law § 296, because her summary judgment opposition papers did not address this issue, and in any event, she failed to present any evidence rebutting the employer's nondiscriminatory reason for terminating her due to her inability to perform her job, based on her doctor's work restrictions, and she also did not present any evidence of a discriminatory animus. Maney v Corning, Inc., 547 F. Supp. 2d 221, 2007 U.S. Dist. LEXIS 91382 (W.D.N.Y. 2007).

Former employee failed to show that she was terminated in retaliation for engaging in protected activity by complaining that a coworker created a hostile work environment and engaged in sexual harassment when he exchanged vulgarities with her at a staff meeting, in violation of the new York State Human Rights Law, N.Y. Exec. Law § 296, because (1) the complaint did not constitute protected activity since the employee did not have a reasonable belief that the coworker's conduct constituted an unwanted sexual advance, particularly as she only made the complaint after the employer began investigating whether her behavior warranted discipline; (2) there was no causal connection since the termination decision preceded the employee's complaint; and (3) the employee did not rebut the legitimate nondiscriminatory reason for terminating her due to her inappropriate behavior. Middleton v Metro. College, 545 F. Supp. 2d 369, 2008 U.S. Dist. LEXIS 32607 (S.D.N.Y. 2008).

In her lawsuit against a university, a professor failed to show unlawful retaliation, in violation of the New York Human Rights Law, N.Y. Exec. Law § 296, because the alleged retaliatory behavior all occurred before she complained, and arguably engaged in protected activity, and after she complained, the employee did not suffer any adverse employment consequences, but, in fact, she was granted tenure. Guarino v St. John Fisher College, 553 F. Supp. 2d 252, 2008 U.S. Dist. LEXIS 31353 (W.D.N.Y. 2008), aff'd, 321 Fed. Appx. 55, 2009 U.S. App. LEXIS 7511 (2d Cir. N.Y. 2009).

Fact that an electrical industry board was not an electrician's employer did not entitle the board to summary judgment on retaliation claims that the electrician filed under N.Y. Exec. Law § 296(7) because a defendant could violate § 296(7) even if the defendant were not the plaintiff's employer. Infantolino v Joint Indus. Bd. of the Elec. Indus., 582 F. Supp. 2d 351, 2008 U.S. Dist. LEXIS 77330 (E.D.N.Y. 2008).

In a female police officer's suit against a city, its police department, and others (defendants), her claim that defendants gave her a subpar evaluation and a certain supervisor made a misconduct report in retaliation for her various protected activities, in violation of the New York Human Rights Law, N.Y. Exec. Law § 296, failed because defendants established that the misconduct report and the evaluation were based on legitimate facts and were not due to unlawful retaliation, and the officer failed to show that these legitimate, nondiscriminatory reasons were pretext. Lore v City of Syracuse, 583 F. Supp. 2d 345, 2008 U.S. Dist. LEXIS 89484 (N.D.N.Y. 2008), aff'd in part, vacated in part, 670 F.3d 127, 2012 U.S. App. LEXIS 1954 (2d Cir. N.Y. 2012).

In a female police officer's suit against a city, its police department, and others (defendants), her claim that defendants denied her a requested overtime assignment in retaliation for her various protected activities, in violation of the New York Human Rights Law, N.Y. Exec. Law § 296, failed because defendants established that the entity requesting this particular overtime placement requested a specific officer, who had been there before, and the officer had made more overtime requests than other, and the officer failed to show that this legitimate, nondiscriminatory reason was pretext. Lore v City of Syracuse, 583 F. Supp. 2d 345, 2008 U.S. Dist. LEXIS 89484 (N.D.N.Y. 2008), aff'd in part, vacated in part, 670 F.3d 127, 2012 U.S. App. LEXIS 1954 (2d Cir. N.Y. 2012).

Former employee possessed a good faith, reasonable belief that she was speaking out against gender discrimination and it was beyond dispute that defendants were aware of the employee's protected activity as she complained to both directly; with respect to the third element, defendants argued that the employee did not suffer an adverse employment action because she resigned of her own free will, but the employee countered that she was constructively discharged because she was coerced into resigning. According to the employee, the superintendent gave her three options: apologize to the deputy superintendent for the complaints she made about him. resign,or be fired; when she refused to do any of the three, he instructed her to type and sign her own resignation letter, thus under these facts, the employee offered allegations that were sufficient to establish she was constructively discharged. Illiano v Mineola Union Free Sch. Dist., 585 F. Supp. 2d 341, 2008 U.S. Dist. LEXIS 91854 (E.D.N.Y. 2008).

At the pleading stage, the former employee could establish that the deputy superintendent's lawsuit against her for defamation was the type of adverse action that might dissuade a reasonable former employee from bringing a discrimination claim; in this regard, that the employee was no longer a school district employee when the suit was filed in April of 2008 was immaterial. The employee alleged that her former employer explicitly threatened to sue her if she sought to vindicate her rights; accordingly, the employee's retaliatory lawsuit claim survived the motion to dismiss. Illiano v Mineola Union Free Sch. Dist., 585 F. Supp. 2d 341, 2008 U.S. Dist. LEXIS 91854 (E.D.N.Y. 2008).

Former employee, who was terminated from her office manager job due to budget cuts by her former employer, which was a state university, failed to show retaliation in violation of the New York State Human Rights Law, N.Y. Exec. Law § 296 et seq., due to the fact that the employee was directed to use up all of her accrued annual leave prior to the end of her job term because even though the employee filed a grievance regarding her termination and the required use of her accrued leave, the employer granted the employee five extra days of leave so that she was paid through the end of her job term. Westbrook v City Univ. of N.Y., 591 F. Supp. 2d 207, 2008 U.S. Dist. LEXIS 102765 (E.D.N.Y. 2008).

Urologist sufficiently alleged adverse actions in response to his complaints; he contended that following his complaints, certain equipment awarded to him pursuant to a grant was removed from his laboratory at the direction of the department chair, further, the urologist contended that he was ignored by the department chair at professional meetings and excluded from professional activities, such as interviewing faculty and residents. Finally, the urologist contended that he was disrupted during surgery and denied proper equipment, facilities, and assistance during his surgical procedures in retaliation for his complaints; such actions, if true, might well have dissuaded the urologist's complaints for fear that his ability to carry out his professional duties would be compromised. Rehman v State Univ. of N.Y., 596 F. Supp. 2d 643, 2009 U.S. Dist. LEXIS 12897 (E.D.N.Y. 2009).

It was not the constitution of the complaining group that rendered speech protected, but rather the articulated complaint itself and as no other evidence supported a finding that the employee made any complaint of racial discrimination, she failed to set forth a prima facie case of retaliation for the exercise of protected speech. Aspilaire v Wyeth Pharms., Inc., 612 F. Supp. 2d 289, 2009 U.S. Dist. LEXIS 35523 (S.D.N.Y. 2009).

Employee claimed that the employer unlawfully retaliated against her by subjecting her to hostility, micro management, and unjust scrutiny and denying her light duty; although she did not so plead in the complaint, employee also argued that her transfer and subsequent termination were retaliatory. The retaliation claims failed because employee did not establish a prima facie case of retaliation and the termination claim failed as she failed to exhaust her administrative remedies; the hostile work environment claim failed because she did not offer evidence from which a jury could find that the complained of conduct was objectively severe or pervasive. Dauer v Verizon Communs. Inc., 613 F. Supp. 2d 446, 2009 U.S. Dist. LEXIS 21506 (S.D.N.Y. 2009), vacated, 618 F.3d 112, 2010 U.S. App. LEXIS 16749 (2d Cir. N.Y. 2010).

Former public school psychologist's retaliatory discharge claims under N.Y. Exec. Law § 296 failed because although the court assumed that the psychologist made out a prima facie case of retaliation, school officials articulated legitimate, non-retaliatory reasons for their termination of the psychologist, including his poor work performance, lack of professionalism, insubordination, and inappropriate workplace behavior, as reflected in multiple reports and evaluations, and the psychologist failed to show that the proffered reasons were pretextual where he offered only his conclusory assertions as to the school officials' alleged lack of cultural sensitivity and also did not offer actual evidence that he repeatedly complained about that alleged lack of sensitivity. Dorcely v Wyandanch Union Free Sch. Dist., 665 F. Supp. 2d 178, 2009 U.S. Dist. LEXIS 91543 (E.D.N.Y. 2009).

Supervisor was responsible for setting the employee's work schedule, evaluating her job performance and disciplining her—given these facts, the supervisor was not entitled to summary judgment on the employee's claims against him under N.Y. Exec. Law § 296.1 for retaliatory acts that occurred through July 2002; however, the employee did not offer any evidence showing that the supervisor had the authority to hire or fire her, or change her schedule or salary, after July 2002. Accordingly, the supervisor was entitled to summary judgment onthe employee's § 296.1 claim against him for her termination in October 2002. Mugavero v Arms Acres, Inc., 2009 U.S. Dist. LEXIS 30431 (S.D.N.Y. Mar. 31, 2009).

Employee offered evidence from which a jury could find that the supervisor directly participated in the conduct that gave rise to each of her viable retaliation claims by providing information (or misinformation) about her conduct and the employer's policies and protocols; therefore, the supervisor was not entitled to summary judgment on the aiding-and-abetting retaliation claims relating to the April 24, May 3, July 25, and October 2002, adverse actions. However, because the employee could not prevail on any other retaliation claims against the employer, her N.Y. Exec. Law § 296.6 claims against the supervisor were otherwise dismissed. Mugavero v Arms Acres, Inc., 2009 U.S. Dist. LEXIS 30431 (S.D.N.Y. Mar. 31, 2009).

While defendants' arguments failed to convince that the former employee did not establish his prima facie case, the evidence they proffered in opposition did provide legitimate, nonretaliatory reasons for the issuance of the final warning, but the employee presented evidence sufficient to demonstrate that the reasons given by defendants were pretextual; the retirement party incident did not occur during work hours or at the employment site, casting some doubt on claims of work disruption and although the court recognized that allegations of discrimination could not per se immunize a plaintiff against the consequences of offensive or inappropriate conduct, the allegedly unprofessional behavior was so closely intertwined with the act of complaining itself that the court could not parse the two as a matter of law. The final warning did not address the retirement party conversation, nor did it mention any specific incident precipitating its issuance, which worked against defendants' claim that it was the true, underlying cause. Kanhoye v Altana, Inc., 686 F. Supp. 2d 199, 2009 U.S. Dist. LEXIS 112506 (E.D.N.Y. 2009).

Former employee had set forth an actionable claim for employment discrimination under Title VII of the Civil Rights Act of 1964, N.Y. State Human Rights Law, N.Y. Exec. Law § 296 and the New York City Human Rights Law, New York City, N.Y., Admin. Code § 8-107(1)(a), because the employee had set forth allegations that he was terminated in retaliation for attempting to exercise his rights under the Family Medical Leave Act, 29 U.S.C.S. § 2615, and that his supervisor had created a hostile work environment based on the employee's race. Drew v Plaza Constr. Corp., 688 F. Supp. 2d 270, 2010 U.S. Dist. LEXIS 8699 (S.D.N.Y. 2010).

Employer clearly articulated a legitimate, non-discriminatory reason for the employee's termination, namely, her apparent structuring of transactions and her inadequate explanation for doing so; even though the employee presented sufficient evidence to establish a prima facie retaliation case, she failed to demonstrate that the employer's stated legitimate, non-discriminatory reason for her termination was pretextual. Nor was there any evidence to indicate that unlawful retaliation was the real reason for the employee's termination; furthermore, mere temporal proximity was insufficient to support a claim of retaliation at the summary judgment stage. Vinokur v Sovereign Bank, 701 F. Supp. 2d 276, 2010 U.S. Dist. LEXIS 26854 (E.D.N.Y. 2010).

Where a terminated employee allegedly complained that an affair between the employer's president and a donor adversely affected the employee's ability to perform the employee's job, the retaliation claims failed because the employee never complained of unlawful discrimination; the mere fact that the employee used the term "hostile environment" in an email to a supervisor was not enough. Foster v Humane Soc'y of Rochester & Monroe County, Inc., 724 F. Supp. 2d 382, 2010 U.S. Dist. LEXIS 73384 (W.D.N.Y. 2010).

Former employee's retaliation claim failed because the record did not show that the employee's route change or alleged assignment of additional tasks resulted from complaints about discrimination; the employee's last documented complaint occurred four years before the route was changed. Polanco v 34th St. P'ship, 724 F. Supp. 2d 420, 2010 U.S. Dist. LEXIS 68699 (S.D.N.Y. 2010).

Former employee failed to establish a prima facie case of retaliatory termination because the fact that she told a supervisory person that she agreed with an anonymous letter criticizing a particular supervisor was not a protected activity since there was no indication in the letter that the criticism was due to gender or any other protected activity, rather than simply a complaint that the supervisor was a nasty and incompetent person. Mayers v Emigrant Bancorp, Inc., 796 F. Supp. 2d 434, 2011 U.S. Dist. LEXIS 44011 (S.D.N.Y. 2011).

Employee's retaliation claim against her immediate supervisor under N.Y. Exec. Law § 296 was dismissed because the employee alleged no facts which suggested that her immediate supervisor aided, abetted, or in any way influenced the general manager or the services manager's allegedly discriminatory employment actions. Atkinson v New York State Olympic Reg'l Dev. Auth., 822 F. Supp. 2d 182, 2011 U.S. Dist. LEXIS 112796 (N.D.N.Y. 2011).

Former employee failed to set forth a prima facie case of retaliation, under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000 et seq., and the New York Human Rights Law, N.Y. Exec. Law § 296 et seq., because (1) a reasonable juror could not have found that an email, or the employee's complaints about the supervisor's conduct towards students, constituted protected activity because the employee did not assert that any of the complaints pertained to unlawful discrimination; and (2) assuming the employee had a good faith, reasonable belief that he was the victim of discrimination on the basis of gender, he failed to establish that there was a genuine issue of material fact with respect to whether the supervisor understood, or reasonably could have understood, that his complaints were about gender discrimination. Bennett v Hofstra Univ., 842 F. Supp. 2d 489, 2012 U.S. Dist. LEXIS 115315 (E.D.N.Y. 2012).

Where there were disputed factual issues as to whether a former employee was subjected to a change in job position and

eventual termination in retaliation for engaging in protected activities, the employee failed to establish that a particular coworker was liable for such retaliation under the New York State Human Rights Law, N.Y. Exec. Law § 296, because there was no evidence that the coworker participated in any of the alleged retaliatory acts taken against the employee. Conklin v County of Suffolk, 859 F. Supp. 2d 415, 2012 U.S. Dist. LEXIS 62436 (E.D.N.Y. 2012).

Defendants were granted summary judgment on the retaliation claims because plaintiff failed to show that she engaged in any "protected activity" as defined by federal, state, or city discrimination law; taking Family and Medical Leave Act leave was not a "protected activity" under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the New York State Human Rights Law, or the New York City Human Rights Law. Sotomayor v City of New York, 862 F. Supp. 2d 226, 2012 U.S. Dist. LEXIS 72641 (E.D.N.Y. 2012), aff'd, 713 F.3d 163, 2013 U.S. App. LEXIS 7357 (2d Cir. N.Y. 2013).

Employee, however, failed to state a claim for retaliation under N.Y. Exec. Law § 296(7); there was no allegation that she took any action in response to the alleged harassment, and the mere rejection of sexual advances did not constitute a protected activity. Reid v Ingerman Smith LLP, 876 F. Supp. 2d 176, 2012 U.S. Dist. LEXIS 93974 (E.D.N.Y. 2012).

In this Title VII of the Civil Rights Act of 1964 and New York State Human Rights Law action, the employer was granted summary judgment because the employee had not made a prima facie showing that she suffered a materially adverse action that could support a retaliation claim; the managing director's actions —other than the alleged false disciplinary write ups—fell into the category of "trivial harms" that were not likely to deter a reasonable employee from making a complaint. Bundschuh v Inn on the Lake Hudson Hotels, LLC, 914 F. Supp. 2d 395, 2012 U.S. Dist. LEXIS 158443 (W.D.N.Y. 2012).

D. Benefits/Denial of Benefits

54. Seniority-related benefits

Provisions of Retirement and Social Security Law, which permit former public employees who have reached retirement age to continue working for government without loss or suspension of pension benefits but do not extend like permission to those retired because of disabilities, were not invalid as constituting discriminatory treatment of the disabled; pension programs for those retired on basis of age and for disabled were not comparable, since former employees have earned their benefits through longer service and greater monetary contributions, while latter are accorded pension to meet special needs. Kuhnle v New York State Div. of Human Rights, 40 N.Y.2d 720, 389 N.Y.S.2d 824, 358 N.E.2d 507, 1976 N.Y. LEXIS 3098 (N.Y. 1976), app. dismissed, 434 U.S. 898, 98 S. Ct. 290, 54 L. Ed. 2d 184, 1977 U.S. LEXIS 3606 (U.S. 1977), reh'g denied, 41 N.Y.2d 901, 1977 N.Y. LEXIS 3325 (N.Y. 1977).

In a civil rights action alleging that women were being discriminated against by defendant Transit Authority by the use of a facially neutral seniority system as the basis for provisional promotions and by giving seniority disproportionate weight as compared to performance in determining permanent promotional appointments, which practices allegedly had a disparate impact on women as a class, a valid cause of action for violation of Exec Law § 296 was stated; however, where the complaint alleged no present intent to discriminate, it did not sufficiently allege a cause of action under the equal protection clause of NY Const Art 1 § 11 and the constitutional claim would be dismissed without prejudice to an application by plaintiff for leave to amend said cause of action. People v New York City Transit Authority, 59 N.Y.2d 343, 465 N.Y.S.2d 502, 452 N.E.2d 316, 1983 N.Y. LEXIS 3174 (N.Y. 1983).

Human rights law does not bar employers, in their collective bargaining with their employees as to terms and conditions of employment, from altering seniority patterns from position seniority to departmentwide seniority, so long as purpose and effect of such a change is not to preserve previously existing patterns of unlawful discrimination. Trans World Airlines, Inc. v State Human Rights Appeal Bd., 46 A.D.2d 138, 361 N.Y.S.2d 380, 1974 N.Y. App. Div. LEXIS 3509 (N.Y. App. Div. 2d Dep't 1974), aff'd, 38 N.Y.2d 810, 382 N.Y.S.2d 40, 345 N.E.2d 583, 1975 N.Y. LEXIS 2401 (N.Y. 1975).

Where change in airline's seniority system, which allowed persons moving from one category of cabin attendants to another to carry with them the seniority acquired in the former category, in no way established sex as a criterion for employment benefits but rather barred sex criterion as a basis for promotion or demotion, and neither did it involve actions or standards which would offend statutory ban on discrimination based on sex, accident of a high percentage of women in cabin service staff with substantial seniority credit and its concomitant impact on seniority status of male pursers did not constitute discrimination based on sex. Trans World Airlines, Inc. v State Human Rights Appeal Bd., 46 A.D.2d 138, 361 N.Y.S.2d 380, 1974 N.Y. App. Div. LEXIS 3509 (N.Y. App. Div. 2d Dep't 1974), aff'd, 38 N.Y.2d 810, 382 N.Y.S.2d 40, 345 N.E.2d 583, 1975 N.Y. LEXIS 2401 (N.Y. 1975).

In an action by a black schoolteacher against a school board, claiming discrimination in employment on the basis of race, the trial court's finding that but for the board's discrimination the teacher would have been granted retention rights as an evening per-session teacher was unsupported by the evidence, where there was no proof that the evening community centers in which the teacher worked were in operation during the years he claimed to have been unable to work due to discrimination, and where, by the terms of a collective bargaining agreement between the school and the teachers' union, the teacher lost his retention rights after there were no programs for two years. A finding of discrimination against a black schoolteacher by refusing him retention rights as an evening community center per-session teacher would be confirmed; however, the award of compensatory damages would be reversed due to the trial court's failure to take into consideration the teacher's duty to mitigate damages. New York City Bd. of Education v Simley, 96 A.D.2d 947, 466 N.Y.S.2d 401, 1983 N.Y. App. Div. LEXIS 19579 (N.Y. App. Div. 2d Dep't 1983).

A directive of the New York City Department of Correction limiting the amount of overtime that may be worked by correction captains with over 14 years of service to 10% more than the average worked by all captains in the subject facility is not arbitrary and capricious nor is it age discrimination in violation of section 296 of the Executive Law, since the policy is intended to prevent "ballooning" which would overburden the pension system by increasing an employee's salary through excessive overtime in the year before retirement and is not discriminatory since the reason for the length of service criteria, which was formulated because pensions vest after 15 years and any year after the 14th might be considered an employee's last, serves the legitimate government interest of protection of the rights of all employees to their pension fund. Freeman v New York City Dep't of Correction, 101 Misc. 2d 22, 420 N.Y.S.2d 536, 1979 N.Y. Misc. LEXIS 2621 (N.Y. Sup. Ct. 1979).

Provisions of Policemen's and Firemen's Retirement System Act (PFRSA), CLS Retire & S S Art 8, which deny accidental disability retirement benefits to those over age 60, are not discriminatory and do not violate anti-age discrimination provisions of Human Rights Law (CLS Exec § 296), since PFRSA, although enacted 8 years after Human Rights Law, embodies policy which has been in effect prior to passage of Human Rights Law and is thus exempt from Human Rights Law; furthermore, age provisions of PFRSA do not violate anti-age discrimination provisions of federal Age Discrimination in Employment Act of 1967 (29 USCS § 623) since PFRSA involves bona fide retirement plan in that it exists and pays benefits, and PFRSA was enacted prior to passage of federal law and thus cannot be subterfuge to evade that law. Laudage v Regan, 135 Misc. 2d 195, 514 N.Y.S.2d 868, 1987 N.Y. Misc. LEXIS 2197 (N.Y. Sup. Ct. 1987).

55. Right to overtime work

In view of evidence that, in 27 nepotism cases involving husbands and wives at university, none of the husbands was required to accept temporary appointment while wife was either given temporary appointment or had nepotism rule waived permitting her to receive term appointment and that rule was waived when university sought to attract a "star" professor whose wife also wanted to work, rule resulted in discrimination against

women and female faculty member, whose husband had a term appointment and who was denied a term appointment for herself on basis of nepotism rule, was discriminated against on basis of her sex. Sanbonmatsu v Boyer, 45 A.D.2d 249, 357 N.Y.S.2d 245, 1974 N.Y. App. Div. LEXIS 4466 (N.Y. App. Div. 4th Dep't 1974), app. dismissed, 36 N.Y.2d 871, 370 N.Y.S.2d 926, 331 N.E.2d 701, 1975 N.Y. LEXIS 1917 (N.Y. 1975), app. denied, 37 N.Y.2d 705, 1975 N.Y. LEXIS 2779 (N.Y. 1975).

Division's finding that employer implemented employee's schedule change earlier than planned based on disability was inconsistent with the finding of no probable cause, and determination is therefore unsupported by record and must be remitted for hearing; whether employer acted in good faith, based on information available to it at time, is irrelevant. State Div. of Human Rights ex rel. Stratton v Haverling Cent. School Dist., 112 A.D.2d 787, 492 N.Y.S.2d 285, 1985 N.Y. App. Div. LEXIS 56031 (N.Y. App. Div. 4th Dep't 1985).

New York Transit Authority employee did not qualify as disabled person within purview of Human Rights Law, CLS Exec § 292(21)(c), since he was capable of performing certain tasks required of other employees assigned overtime work, but his medical condition prevented him from performing important function of patrol duty; under circumstances, failure to assign overtime work to employee did not violate antidiscrimination provisions of Human Rights Law. Yasinosky v New York City Transit Auth., 193 A.D.2d 731, 598 N.Y.S.2d 52, 1993 N.Y. App. Div. LEXIS 4951 (N.Y. App. Div. 2d Dep't 1993).

56. Right to be paid for religious holiday

Under statute prohibiting discrimination in employment based on person's observance of any particular day or days as sabbath or other holy day except where uniform application of terms and conditions of attendance to employees is essential to prevent undue economic hardship to employer, "undue economic hardship" does not require any threat or undermining of economic stability of enterprise; it is enough that palpable increase in costs or risk to industrial peace would be required. Record was insufficient to determine whether retaining employee in former higher-paid position would have resulted in undue economic hardship to employer because of employee's refusal to work on Saturdays by reason of religious belief, and record would be remanded for evidentiary hearing. State Div. of Human Rights v Carnation Co., 42 N.Y.2d 873, 397 N.Y.S.2d 781, 366 N.E.2d 869, 1977 N.Y. LEXIS 2216 (N.Y.), reh'g denied, 42 N.Y.2d 1015, 1977 N.Y. LEXIS 4759 (N.Y. 1977).

In an Article 78 proceeding, an employer had the discretion to properly charge to an employee's vacation time days off for observance of religious holidays, where prior to the holiday in question the employer changed its policy to provide that absences for religious holidays would be in all cases charged to either personal, vacation or compensatory leave. State Div. of Human Rights v Rochester Housing Authority, 85 A.D.2d 897, 446 N.Y.S.2d 736, 1981 N.Y. App. Div. LEXIS 16739 (N.Y. App. Div. 4th Dep't 1981).

Employee's failure to inform employer of religious needs and failure to assist in accommodation process may be fatal to rights of employee to have his beliefs accommodated by employer; employee's failure to inform superiors of religious basis for his request for time off for purpose of attending church dedication may constitute waiver of claim of religious discrimination. State Div. of Human Rights ex rel. Campbell v Rochester Products Div. of General Motors Corp., 112 A.D.2d 785, 492 N.Y.S.2d 282, 1985 N.Y. App. Div. LEXIS 56028 (N.Y. App. Div. 4th Dep't 1985).

Company violated CLS Executive § 296(10)(a) by scheduling employee who was member of Jewish faith to work on Sabbath and on Jewish holydays despite being informed that employee could not work on these days due to his religious beliefs, and award was supported by testimony of both employee and rabbi, establishing that employee is Sabbath observer, and that he had given his employer advance notice that he did not wish to work on such days, and award for mental anguish is warranted. Anchor Motor Freight, Inc. v McCall, 119 A.D.2d 672, 500 N.Y.S.2d 800, 1986 N.Y. App. Div. LEXIS 55589 (N.Y. App. Div. 2d Dep't 1986).

Appeals court decided that the teachers' union collective bargaining agreement's religious observance provision at issue (three days per year paid leave) did not offend the Establishment Clause in that it did not impermissibly advance religion by coercing members of the union to profess a religious belief; the provision imposed no requirements regarding which religious holidays could be invoked and limited the number of such days to three. Maine-Endwell Teachers' Ass'n v Bd. of Educ., 3 A.D.3d 685, 771 N.Y.S.2d 246, 2004 N.Y. App. Div. LEXIS 315 (N.Y. App. Div. 3d Dep't 2004).

New York, as well as the federal government, have enacted legislation mandating the reasonable accommodation of employees' religious needs, N.Y. Exec. Law § 296(10)(b), Civil Rights Act of 1964, 42 U.S.C.S. § 2000e(j); the United States Supreme Court implicitly has held that such accommodation is constitutional. Maine-Endwell Teachers' Ass'n v Bd. of Educ., 3 A.D.3d 685, 771 N.Y.S.2d 246, 2004 N.Y. App. Div. LEXIS 315 (N.Y. App. Div. 3d Dep't 2004).

Human Rights Law which makes it unlawful for an employer to disqualify any person or to discriminate against any person in obtaining or holding employment because of his observance of a particular day as sabbath or holy day but which exempts from such requirement any position dealing with safety or health where such person holding position must be available for duty whenever needed is not applicable to state police whose policemen are under duty to work at times and on dates and shifts assigned. State Div. of Human Rights v State, 77 Misc. 2d 597, 354 N.Y.S.2d 287, 1973 N.Y. Misc. LEXIS 1227 (N.Y. Sup. Ct. 1973).

57. Insurance benefits

Claim of petitioner that she was discriminated against because of her sex in that, while her employer was granting to all male employees option of a voluntary layoff, petitioner was directed to either accept transfer to another department or be terminated was without support in record indicating that petitioner was offered option of a voluntary layoff but refused such option due to risk that she would not then be eligible for unemployment insurance benefits. Pixley v Raymond Corp., 59 A.D.2d 979, 399 N.Y.S.2d 411, 1977 N.Y. App. Div. LEXIS 14248 (N.Y. App. Div. 3d Dep't 1977).

Proposal submitted by city to bargaining unit during interest arbitration that members "shall not be eligible for health insurance by the City if they are eligible for coverage under the plan of a spouse" did not violate city's duty to negotiate in good faith because proposal did not discriminate on basis of "marital status"; in upholding city's proposal, Public Employment Relations Board adopted interpretation of "marital status" as used in CLS Exec § 296 and interpreted in prior court decisions, and thus did not act in arbitrary fashion. Police Ass'n v N.Y. State Pub. Empl. Rels. Bd., 126 A.D.2d 824, 510 N.Y.S.2d 742, 1987 N.Y. App. Div. LEXIS 41963 (N.Y. App. Div. 3d Dep't 1987).

In action by women's organizations arising from insurance company's refusal to sell life and disability insurance to women on same terms as men, company was entitled to declaration that it did not violate CLS Exec § 296, and plaintiffs' claims for compensatory and injunctive relief would be dismissed, since Insurance Law permits distinctions based on sex in terms and conditions (but not offering) of life and disability insurance policies; legislature intended later, more specific legislation contained in Insurance Law to override more general prohibition against gender discrimination under Human Rights Law. NOW v Metropolitan Life Ins. Co., 131 A.D.2d 356, 516 N.Y.S.2d 934, 1987 N.Y. App. Div. LEXIS 47844 (N.Y. App. Div. 1st Dep't 1987), app. dismissed, 70 N.Y.2d 939, 524 N.Y.S.2d 672, 519 N.E.2d 618, 1988 N.Y. LEXIS 266 (N.Y. 1988).

Award of $35,000 for mental anguish in employment discrimination case was grossly excessive, and on remittitur should be reduced to no more than $5,000, despite "constant and blatant" nature of racial discrimination against complainant, where sole evidence of mental anguish was complainant's own testimony that she was "emotionally and physically screwed up" and there was no evidence of duration of her condition, its severity or consequences, or its treatment. Cosmos Forms, Ltd. v State Div. of Human Rights, 150 A.D.2d 442, 541 N.Y.S.2d 50, 1989 N.Y. App. Div. LEXIS 6521 (N.Y. App. Div. 2d Dep't 1989).

Finding of retaliation by employer against former employee (based on employer's threatened denial of unemployment insurance benefits) did not violate due process, even though no claim of retaliation was contained in age discrimination complaint, nor was complaint amended to include such claim, where employer had notice of and opportunity to contest allegations that were basis of finding of retaliation, and such allegation was within ambit of discrimination charges since retaliation is form of discrimination under CLS Exec § 296. Electchester Hous. Project v Rosa, 225 A.D.2d 772, 639 N.Y.S.2d 848, 1996 N.Y. App. Div. LEXIS 3155 (N.Y. App. Div. 2d Dep't 1996).

Employer's act of contesting employee's right to receive unemployment insurance benefits, after assuring employee that she would be entitled to such benefits, solely because she filed age discrimination complaint with state Division of Human Rights, was disadvantaging employment action for purposes of establishing claim of retaliation, even though employer's conduct occurred after employee's discharge and employee was ultimately unsuccessful in proving her age discrimination claim. Electchester Hous. Project v Rosa, 225 A.D.2d 772, 639 N.Y.S.2d 848, 1996 N.Y. App. Div. LEXIS 3155 (N.Y. App. Div. 2d Dep't 1996).

School district was entitled to dismissal, for failure to state cause of action, of retired teacher's action for employment discrimination where district's refusal to provide health insurance benefits for teacher's domestic partner was not discrimination based on "marital status" under CLS Exec § 296(1)(a), and dependent benefit coverage available to teacher as unmarried retiree was same as that available to married employees and retirees. Funderburke v Uniondale Union Free Sch. Dist. No. 15, 251 A.D.2d 622, 676 N.Y.S.2d 199, 1998 N.Y. App. Div. LEXIS 7881 (N.Y. App. Div. 2d Dep't), app. denied, 92 N.Y.2d 813, 681 N.Y.S.2d 474, 704 N.E.2d 227, 1998 N.Y. LEXIS 3717 (N.Y. 1998).

Employee's valid, same-sex Canadian marriage was entitled to recognition in New York because it did not fall within either of the two exceptions to the marriage-recognition rule; by refusing to recognize the employee's valid marriage for purposes of spousal health care insurance benefits, an employer violated N.Y. Exec. Law § 296(1)(a). The sole reason for the employer's rejection of the marital status of the employee was her sexual orientation. Martinez v County of Monroe, 50 A.D.3d 189, 850 N.Y.S.2d 740, 2008 N.Y. App. Div. LEXIS 854 (N.Y. App. Div. 4th Dep't), app. dismissed, 10 N.Y.3d 856, 859 N.Y.S.2d 617, 889 N.E.2d 496, 2008 N.Y. LEXIS 1450 (N.Y. 2008).

Retirees' claim that the town provided disparate insurance coverage to them on the basis of age could not be sustained under the New York Human Rights Law. Based on the plain reading of the statute, and in the absence of any authority to the contrary, the claim was dismissed. Lawrence v Town of Irondequoit, 246 F. Supp. 2d 150, 2002 U.S. Dist. LEXIS 26250 (W.D.N.Y. 2002).

Americans with Disabilities Act (ADA) did not prohibit employers from offering different insurance coverage to those with disabilities, so long as every employee was offered the same coverage regardless of current or future disability status. Given that disability claims pursuant to the ADA and the New York Human Rights Law were analyzed substantially the same, the retirees' claim of disability discrimination in violation of N.Y. Exec. Law § 296 failed. Lawrence v Town of Irondequoit, 246 F. Supp. 2d 150, 2002 U.S. Dist. LEXIS 26250 (W.D.N.Y. 2002).

Insurer's limitation of group coverage to same-sex domestic partners is not prohibited by Insurance Law or regulations, and enactment of SONDA in 2002 (CLS Exec § 296) does not on its face appear to compel different conclusion. Insurance Department, Opinions of General Counsel, Opinion Number 07-11-10.

58. Pregnancy-related benefits

Denial of sick leave benefits for pregnancy-related disabilities, when they are provided for other forms of disability, constitutes impermissible discrimination under the Human Rights Law. The Disability Benefits Law, which excepts disabilities caused by or arising in connection with pregnancy from the minimum benefits mandated by that law, and the Human Rights Law, which prohibits discrimination in employment based on sex, impose two concurrent independent minimum standards; for employers with three or fewer employees, the operative minimum is only that of the Disability Benefits Law; but for all others, within the reach of both statutes, the operative standard which imposes the greater obligation is controlling. Provision of the Disability Benefits Law which excepts disabilities caused by or arising in connection with pregnancy from the minimum benefits mandated by that law does not excuse private employers with more than three employees from the necessity of complying with provision of the Human Rights Law which prohibits discrimination in employment based on sex and which has been held to prohibit employment personnel policies which single out pregnancy and child birth for treatment different from that accorded other instances of physical or medical impairment or disability. Brooklyn Union Gas Co. v New York State Human Rights Appeal Bd., 41 N.Y.2d 84, 390 N.Y.S.2d 884, 359 N.E.2d 393, 1976 N.Y. LEXIS 3253 (N.Y. 1976), reh'g denied, 42 N.Y.2d 824, 1977 N.Y. LEXIS 3961 (N.Y. 1977).

A woman, who was denied pregnancy-related disability benefits solely on the basis that she had not applied for them within the 26-week period as provided by Work Comp Law § 217(1), was not subjected to an unlawful discriminatory practice on the basis of sex in employment in violation of Exec Law § 296(a)(1). Corbin, Ltd. v State Div. of Human Rights, 56 N.Y.2d 537, 449 N.Y.S.2d 966, 434 N.E.2d 1344, 1982 N.Y. LEXIS 3222 (N.Y. 1982).

Hospital had to permit female employee to apply her accrued paid sick leave against her maternity related absence. Hospital had to compensate maternity related disability just as it compensates other nonoccupational disabilities, notwithstanding an express statutory authorization for such an exclusion in the Workmen's Compensation Law, since a recognition of the continuing validity of that provision would sufficiently frustrate and impede the intended reforms meant to be accomplished by the later amendment of the Executive Law, whereby discrimination on the basis of sex became unlawful, as to work an implied repeal of the Workmen's Compensation Law provision. State Div. of Human Rights ex rel. Ambruster v Crouse-Irving Memorial Hospital, 50 A.D.2d 1083, 377 N.Y.S.2d 315, 1975 N.Y. App. Div. LEXIS 12113 (N.Y. App. Div. 4th Dep't 1975), aff'd, 41 N.Y.2d 84, 390 N.Y.S.2d 884, 359 N.E.2d 393, 1976 N.Y. LEXIS 3253 (N.Y. 1976).

Disallowance by medical center of pregnancy-related disabilities violated section of statute prohibiting discrimination by employer because of age, race, or sex in terms, conditions or privileges of employment. St. Vincent's Medical Center v State Human Rights Appeal Bd., 59 A.D.2d 778, 398 N.Y.S.2d 735, 1977 N.Y. App. Div. LEXIS 13833 (N.Y. App. Div. 2d Dep't 1977), app. dismissed, 44 N.Y.2d 731, 1978 N.Y. LEXIS 4465 (N.Y. 1978), app. denied, 45 N.Y.2d 705, 1978 N.Y. LEXIS 3048 (N.Y. 1978), cert. denied, 439 U.S. 1070, 99 S. Ct. 839, 59 L. Ed. 2d 35, 1979 U.S. LEXIS 286 (U.S. 1979).

The determination of the Commissioner of the State Division of Human Rights finding a company guilty of unlawful discrimination because of sex in terms, conditions, and privileges of employment would be anulled where the record conclusively established that the employee was denied pregnancy-related disability benefits solely because she had not applied for them within the 26 week period provided by Work Comp Law § 217. Corbin, Ltd. v State Div. of Human Rights, 84 A.D.2d 524, 443 N.Y.S.2d 656, 1981 N.Y. App. Div. LEXIS 15559 (N.Y. App. Div. 1st Dep't 1981), aff'd, 56 N.Y.2d 537, 449 N.Y.S.2d 966, 434 N.E.2d 1344, 1982 N.Y. LEXIS 3222 (N.Y. 1982).

Evidence established that award of $450,000 in compensatory damages was reasonably related to wrongdoing suffered by bus driver who was refused restricted duty during period of temporary disability due to pregnancy, was refused full-duty status after miscarriage, was required to submit to psychiatric evaluation, and was forced to go on unpaid leave for 8 months when she requested restricted duty after becoming pregnant again, where (1) episodes of intentional sexual discrimination continued for more than one year, (2) driver testified that she suffered anguish, guilt, depression, and anger at time of each occurrence, that anguish persisted to time of hearing, and that anguish would continue for rest of her life, and (3) hearing judge described case as "most shocking instance of abuse of an employee by an employer" in his 20-year experience with Division of Human Rights. New York City Transit Authority v State Div. of Human Rights, 181 A.D.2d 891, 581 N.Y.S.2d 426, 1992 N.Y. App. Div. LEXIS 5258 (N.Y. App. Div. 2d Dep't), amended, 185 A.D.2d 889,

1992 N.Y. App. Div. LEXIS 9980 (N.Y. App. Div. 2d Dep't 1992), app. denied, 80 N.Y.2d 762, 592 N.Y.S.2d 671, 607 N.E.2d 818, 1992 N.Y. LEXIS 3944 (N.Y. 1992).

In an action challenging the constitutionality of the Women's Health and Wellness Act, to the extent that a group of religious employers presented an issue of statutory construction on the ground that the contraceptive coverage mandate of the Act conflicted with the exemption for religious-related employers from the application of N.Y. Exec. Law § 296, nothing in N.Y. Exec. Law § 296 (11) suggested that the New York Legislature could not, in another section of law, impose affirmative requirements upon religious-related employers; Section 296(11) merely excused such employers from compliance with N.Y. Exec. Law § 296. Catholic Charities of Diocese of Albany v Serio, 28 A.D.3d 115, 808 N.Y.S.2d 447, 2006 N.Y. App. Div. LEXIS 278 (N.Y. App. Div. 3d Dep't), aff'd, 7 N.Y.3d 510, 825 N.Y.S.2d 653, 859 N.E.2d 459, 2006 N.Y. LEXIS 3201 (N.Y. 2006).

A state's human rights law, prohibiting, among other practices, discrimination in employee benefit plans on the basis of pregnancy, is preempted with respect to benefit plans under the Employee Retirement Income Security Act (29 USCS §§ 1001 et seq.) only insofar as it prohibits practices that are lawful under federal law. Shaw v Delta Air Lines, Inc., 463 U.S. 85, 103 S. Ct. 2890, 77 L. Ed. 2d 490, 1983 U.S. LEXIS 86 (U.S. 1983).

Executive Law §§ 290–301 to extent it obliged airlines to provide full coverage in employee benefits plans for pregnancy-related disabilities was pre-empted by Employee Retirement Income Security Act of 1974. Delta Air Lines, Inc. v Kramarsky, 666 F.2d 21, 1981 U.S. App. LEXIS 13407 (2d Cir. N.Y. 1981), modified, Shaw v Delta Air Lines, Inc., 463 U.S. 85, 103 S. Ct. 2890, 77 L. Ed. 2d 490, 1983 U.S. LEXIS 86 (U.S. 1983).

Human Rights Law (CLS, Executive Law §§ 290 et seq.) bars exclusion of pregnancy-related benefits from general employee disability plan as sex discrimination. Section 703(a)(1) of Title VII of Civil Rights Act of 1964 (42 USCS § 2000e-2(a)(1)), which provides that it is unlawful for employer to discriminate against individual with respect to compensation, terms, conditions, or privileges of employment because of sex, does not render New York Human Rights Law a nullity under supremacy clause of Article VI of US Constitution; Human Rights Law may prohibit employers from excluding pregnancy benefits from coverage although it has been determined that Title VII does not prohibit such practices. Thomas Publishing Co. v Division of Human Rights, 456 F. Supp. 1104, 1978 U.S. Dist. LEXIS 15466 (S.D.N.Y. 1978).

Female employee's state-law claims against employer's self-insured employee health benefits plan for breach of contract and violation of Exec § 296 arising from plan denial of benefits for infertility treatments were preempted by ERISA. Saks v Franklin Covey Co., 117 F. Supp. 2d 318, 2000 U.S. Dist. LEXIS 14792 (S.D.N.Y. 2000), modified, 316 F.3d 337, 2003 U.S. App. LEXIS 549 (2d Cir. N.Y. 2003).

59. —Availability to teachers

Personnel policy which singles out pregnancy, among all other physical conditions to which a teacher may be subject, as a category for special treatment in determining when leave from duty shall begin is prohibited by proscriptions of the Human Rights Law. Human Rights Law requires that pregnant teacher who takes pregnancy-related leave must be permitted to take advantage of her sick and sabbatical leave entitlements to the same extent as would be the case where she is suffering from some other temporary physical disability. Union Free Sch. Dist. No. 6 v N.Y. State Human Rights Appeal Bd., 35 N.Y.2d 371, 362 N.Y.S.2d 139, 320 N.E.2d 859, 1974 N.Y. LEXIS 1177 (N.Y. 1974), reh'g denied, 36 N.Y.2d 807, 1975 N.Y. LEXIS 2685 (N.Y. 1975).

School district and board of education, by enforcing terms of teachers' collective bargaining agreement requiring maternity leave to commence after third month of pregnancy, were properly found to have discriminated against female teachers on the basis of sex. Union Free School Dist. v New York State Div. of Human Rights, 43 A.D.2d 31, 349 N.Y.S.2d 757, 1973 N.Y. App. Div. LEXIS 3068 (N.Y. App. Div. 2d Dep't 1973), app. dismissed, 33 N.Y.2d 975, 353 N.Y.S.2d 739, 309 N.E.2d 137, 1974 N.Y. LEXIS 1762 (N.Y. 1974).

Maternity leave was required to be treated as all other disabilities, and hence teacher who claimed that the maternity leave time which she had taken should have been credited to her in computing the length of time she spent in service as a probationary teacher was entitled to a hearing of her contention that she had been discriminated on account of sex in violation of the Human Rights Law. Div. of Human Rights ex rel. Schwabenbauer v Bd. of Educ., 46 A.D.2d 483, 363 N.Y.S.2d 370, 1975 N.Y. App. Div. LEXIS 8524 (N.Y. App. Div. 4th Dep't 1975).

School district would be required to pay any teacher physically disabled by reason of maternity accrued sick leave benefits for that portion of school year coinciding with such disability or aggravation of such disability, unless such teacher elected to take unpaid maternity leave during which sick leave was not applicable, provided she furnished to district certificate from her attending physician to effect that during such period of time she was, in fact, physically disabled. State Div. of Human Rights v Board of Education, 51 A.D.2d 357, 381 N.Y.S.2d 544, 1976 N.Y. App. Div. LEXIS 11080 (N.Y. App. Div. 3d Dep't), aff'd, 40 N.Y.2d 1021, 391 N.Y.S.2d 532, 359 N.E.2d 1327, 1976 N.Y. LEXIS 3155 (N.Y. 1976).

Female teacher who was informed in February of 1968 that she would have to obtain a master's degree or complete 30 semester hours of approved graduate study by February 1, 1973, who, in September of 1969, requested and was granted five-year maternity leave, and who was discharged in January 1974 because she did not obtain the required additional study was not discriminated against on the basis of sex despite her contention that she should have been allowed an extension of time to complete her educational requirements coextensive with the length of her maternity leave. New York City Board of Education v New York State Human Rights Appeal Board, 54 A.D.2d 656, 387 N.Y.S.2d 873, 1976 N.Y. App. Div. LEXIS 14183 (N.Y. App. Div. 1st Dep't 1976).

Division of Human Rights had jurisdiction over teacher's claim that she was denied due process by reason of school district's enforcement of allegedly illegal maternity leave policy. State Div. of Human Rights ex rel. Mossler v Westmoreland Cent. School Dist., 56 A.D.2d 205, 392 N.Y.S.2d 149, 1977 N.Y. App. Div. LEXIS 10047 (N.Y. App. Div. 4th Dep't 1977).

A school teacher who chose maternity leave during her pregnancy would not be entitled to receive sick leave benefits for the period of her pregnancy-related disability where the teacher failed to carry her burden of proof that someone on a non-pregnancy-related leave of absence would be entitled to accrued sick leave during the period of the leave of absence. Jericho Union Free School Dist. v New York State Human Rights Appeal Bd., 97 A.D.2d 762, 468 N.Y.S.2d 393, 1983 N.Y. App. Div. LEXIS 20508 (N.Y. App. Div. 2d Dep't 1983).

E. Other Employment Matters

60. In general

Record supported conclusion that employee was victim of quid pro quo sexual harassment, and thus was entitled to compensatory damages, where employer exploited employee by, among other things, coercing her, as implicit condition of her employment, into having sexual liaisons with 2 business associates of employer's chairman and principal shareholder. Thoreson v Penthouse Int'l, 80 N.Y.2d 490, 591 N.Y.S.2d 978, 606 N.E.2d 1369, 1992 N.Y. LEXIS 4231 (N.Y. 1992).

Provision of CLS Exec § 296(10)(c) requiring employers to take reasonable steps to accommodate Sabbath observers does not necessarily require that employer become Sabbath observer's advocate by initiating adversarial proceedings against third party such as collective bargaining agent in effort to narrow scope of contractual protections afforded other employees. New York City Transit Auth. v Executive Dep't, Div. of Human Rights, 89 N.Y.2d 79, 651 N.Y.S.2d 375, 674 N.E.2d 305, 1996 N.Y. LEXIS 3162 (N.Y. 1996).

Under CLS Exec § 296(10)(c), employer must show that it exerted reasonable efforts to accommodate its Sabbath-observing employees; this standard does not require proof that accommodation was actually found, but rather than genuine search for reasonable alternatives was undertaken. New York City Transit

Auth. v Executive Dep't, Div. of Human Rights, 89 N.Y.2d 79, 651 N.Y.S.2d 375, 674 N.E.2d 305, 1996 N.Y. LEXIS 3162 (N.Y. 1996).

The statute does not require the operation of business enterprises in subordination to diverse religious practices and customs of employees, and employer engaged in a non-governmental and private business enterprise is not required to make exceptions to its established and uniformly applied rule requiring all employees to be clean-shaven in order to accommodate the religious practice of a potential employee. Eastern Greyhound Lines Div. of Greyhound Lines, Inc. v New York State Div. of Human Rights, 34 A.D.2d 916, 311 N.Y.S.2d 465, 1970 N.Y. App. Div. LEXIS 4578 (N.Y. App. Div. 1st Dep't), aff'd, 27 N.Y.2d 279, 317 N.Y.S.2d 322, 265 N.E.2d 745, 1970 N.Y. LEXIS 936 (N.Y. 1970).

Milk processors could not be found to have discriminated against employee because of his religious beliefs where although job which employee was offered so as to avoid Saturday work paid 50 cents per hour less than prior job where employer had made every effort to cooperate with the employee and did so until circumstances prevented it from continuing the prior work schedules, which had existed for two years, there being no record evidence, that the employer's decision was in fact actuated by discrimination against creed. State Div. of Human Rights ex rel. Clarke v Carnation Co., 53 A.D.2d 1053, 385 N.Y.S.2d 888, 1976 N.Y. App. Div. LEXIS 15866 (N.Y. App. Div. 4th Dep't 1976), rev'd, 42 N.Y.2d 873, 397 N.Y.S.2d 781, 366 N.E.2d 869, 1977 N.Y. LEXIS 2216 (N.Y. 1977).

Equality of footing is established only if employees otherwise entitled to the position, whether male or female, are excluded only upon a showing of individual incapacity. State Div. of Human Rights v New York State Dep't of Correctional Services, 61 A.D.2d 25, 401 N.Y.S.2d 619, 1978 N.Y. App. Div. LEXIS 9698 (N.Y. App. Div. 4th Dep't 1978).

A sex discrimination complaint by a 65-year-old college professor whose academic load and status was reduced following her 65th birthday was properly dismissed, where the sex discrimination allegations were purely speculative and conclusory, where the college at which the professor taught had appointed more females than males to positions of responsibility in recent years, and where the demotion was made on the recommendation of a female chairperson of the professor's division for academic, budgetary and personal reasons having nothing whatsoever to do with the professor's sex. Jochnowitz v Junior College of Albany, Div. of Russell Sage College, 96 A.D.2d 1131, 467 N.Y.S.2d 732, 1983 N.Y. App. Div. LEXIS 19798 (N.Y. App. Div. 3d Dep't), app. denied, 60 N.Y.2d 559, 1983 N.Y. LEXIS 5719 (N.Y. 1983).

Granting of position to male employee who held permanent appointment did not discriminate on basis of sex against female employee with seasonal position in view of legitimate and rational basis for decision, including desire of agency to protect provisional and permanent employees whose jobs were in jeopardy because of budgetary constraints. Mathis v New York State Office of Parks, Recreation & Historic Preservation, 109 A.D.2d 931, 486 N.Y.S.2d 407, 1985 N.Y. App. Div. LEXIS 47453 (N.Y. App. Div. 3d Dep't 1985).

School district was entitled to summary judgment dismissing action by teacher, alleging that district discriminated against her on account of her sex by denying her request for extension of educational leave and relief from administrative assignment, despite fact that 2 male teachers were granted educational leaves and one male teacher was granted administrative relief, since (1) teacher sought one-semester extension, not initial leave, (2) teacher failed to refute school district's showing that personnel needs in her department were more acute than in departments in which male teachers taught and that it was more difficult to secure replacement for one semester than for one year, and (3) teacher failed to account for fact that school district granted her initial request for one-year leave, even though request was tardy, and that school district offered her administrative relief for one semester following return from leave even though such action was unprecedented. Baker v Board of Educ. of West Irondequoit Cent. School Dist., 156 A.D.2d 1005, 550 N.Y.S.2d 762, 1989 N.Y. App. Div. LEXIS 16211 (N.Y. App. Div. 4th Dep't 1989), app. denied, 75 N.Y.2d 709, 555 N.Y.S.2d 691, 554 N.E.2d 1279, 1990 N.Y. LEXIS 748 (N.Y. 1990).

Determination by Division of Human Rights that employer (medical college) did not discriminate against employee (phlebotomist) based on her HIV-positive disability when it reassigned her to billing department was supported by evidence that employee was aware of policy requiring that gloves be worn on both hands when drawing blood and violated that policy on at least 3 occasions, and that employer was unaware of similar infractions by any other employee. Friedel v New York State Div. of Human Rights, 219 A.D.2d 547, 632 N.Y.S.2d 520, 1995 N.Y. App. Div. LEXIS 9604 (N.Y. App. Div. 1st Dep't 1995), app. denied, 91 N.Y.2d 802, 667 N.Y.S.2d 682, 690 N.E.2d 491, 1997 N.Y. LEXIS 4084 (N.Y. 1997).

In absence of discriminatory motive, employer (parking garage) did not violate law by requiring its cashier to wear bow tie, although she asserted that tie would violate her religious beliefs as Jehovah's Witness; although employer must accommodate employee's observance of Sabbath, there is no duty to accommodate general religious practices. Engstrom v Kinney Sys., 241 A.D.2d 420, 661 N.Y.S.2d 610, 1997 N.Y. App. Div. LEXIS 8153 (N.Y. App. Div. 1st Dep't), app. denied, 91 N.Y.2d 801, 666 N.Y.S.2d 563, 689 N.E.2d 533, 1997 N.Y. LEXIS 4149 (N.Y. 1997).

Employer (parking garage) was entitled to summary judgment in action by its cashier asserting that change in her working hours was instituted for purpose of interfering with her religious activities in violation of CLS Educ § 296(1)(e) where employer submitted unrefuted evidence that it changed work shifts of several employees due to changing business conditions, and cashier offered no evidence that change was instituted to harm her, claiming only that employer was aware of her evening religious meetings; prima facie case of retaliation requires evidence of subjective retaliatory motive. Engstrom v Kinney Sys., 241 A.D.2d 420, 661 N.Y.S.2d 610, 1997 N.Y. App. Div. LEXIS 8153 (N.Y. App. Div. 1st Dep't), app. denied, 91 N.Y.2d 801, 666 N.Y.S.2d 563, 689 N.E.2d 533, 1997 N.Y. LEXIS 4149 (N.Y. 1997).

Employee's rejection of employer's offer to seek accommodation regarding her schedule amounted to refusal to cooperate and constituted waiver of her right to maintain action for employment discrimination. Engstrom v Kinney Sys., 241 A.D.2d 420, 661 N.Y.S.2d 610, 1997 N.Y. App. Div. LEXIS 8153 (N.Y. App. Div. 1st Dep't), app. denied, 91 N.Y.2d 801, 666 N.Y.S.2d 563, 689 N.E.2d 533, 1997 N.Y. LEXIS 4149 (N.Y. 1997).

Employer was entitled to summary judgment in employment discrimination action alleging violation of employee's free speech rights, since employer was private entity, and state and federal constitutional guarantees of freedom of speech protect individual against action by governmental authorities. Engstrom v Kinney Sys., 241 A.D.2d 420, 661 N.Y.S.2d 610, 1997 N.Y. App. Div. LEXIS 8153 (N.Y. App. Div. 1st Dep't), app. denied, 91 N.Y.2d 801, 666 N.Y.S.2d 563, 689 N.E.2d 533, 1997 N.Y. LEXIS 4149 (N.Y. 1997).

Allegation that plaintiff was harassed by her female supervisor, not because of her gender but because of their nonwork-related intimate relationship, did not state cause of action for discrimination or retaliation under New York City Human Rights Law, either against plaintiff's supervisor or their employer. Stallings v U.S. Elecs., Inc., 270 A.D.2d 188, 707 N.Y.S.2d 9, 2000 N.Y. App. Div. LEXIS 3296 (N.Y. App. Div. 1st Dep't 2000).

It was proper to dismiss employees' hostile work environment claim where their factual allegations fell short of establishing that the workplace was permeated with discriminatory intimidation, ridicule, and insult that was sufficiently severe or pervasive so as to alter the conditions of their employment and create an abusive working environment. Schenkman v New York Coll. of Health Professionals, 29 A.D.3d 671, 815 N.Y.S.2d 159, 2006 N.Y. App. Div. LEXIS 6294 (N.Y. App. Div. 2d Dep't 2006).

Because an employer did not approve or condone the behavior of its supervisor, and because the offensive conduct was not sufficiently severe or pervasive to create an objectively hostile or abusive work environment in violation of N.Y. Exec. Law § 296, the employer was entitled to summary judgment. Barnum v New York City Tr. Auth., 62 A.D.3d 736, 878 N.Y.S.2d 454, 2009 N.Y. App. Div. LEXIS 3960 (N.Y. App. Div. 2d Dep't 2009).

Dismissal of employment discrimination claims alleging that an employer forced the employee to assist with the performance of

an abortion despite her known religious objections to doing so was proper because, inter alia, with respect to the N.Y. Exec. Law § 296(1)(a) claim, the employer made a prima facie showing that the employee did not suffer an adverse employment action and, in any event, offered legitimate, nondiscriminatory reasons for the challenged actions; in opposition, the employee failed to raise a triable fact issue as to whether she suffered an adverse employment action and whether the reasons proffered by the employer for the challenged actions were merely pretextual. Cenzon-Decarlo v Mount Sinai Hosp., 101 A.D.3d 924, 957 N.Y.S.2d 256, 2012 N.Y. App. Div. LEXIS 8625 (N.Y. App. Div. 2d Dep't 2012), app. denied, 21 N.Y.3d 858, 970 N.Y.S.2d 748, 992 N.E.2d 1093, 2013 N.Y. LEXIS 1663 (N.Y. 2013).

While issues of fact existed as to a nurse's claims of unlawful discrimination and retaliation under N.Y. Exec. Law § 296(1), (7), the nurse failed to show that the supervisors actually participated in the alleged discriminatory acts in support of her alternative theory of aiding and abetting the alleged acts under § 296(6). Asabor v Archdiocese of N.Y., 102 A.D.3d 524, 961 N.Y.S.2d 17, 2013 N.Y. App. Div. LEXIS 275 (N.Y. App. Div. 1st Dep't 2013).

Plaintiff's allegations that she was denied favorable benefits, terms and conditions of employment because of supervisor's favoring of another female employee under plaintiff's supervision with whom supervisor was having sexual relationship states cause of action for unlawful sex discrimination in employment under CLS Executive Law § 296[1][a], so long as plaintiff amends her pleadings so as to specify that her supervisor's relationship with other employee was sexual in nature. Kersul v Skulls Angels, Inc., 130 Misc. 2d 345, 495 N.Y.S.2d 886, 1985 N.Y. Misc. LEXIS 3201 (N.Y. Sup. Ct. 1985).

Cause of action based on claim of sexual harassment arising out of plaintiff actress' employment relationship with defendant, who coerced her into sexual activity with his business associates to further his own business interests, was cognizable under Human Rights Law, CLS Exec § 297(9), since actions of employer which discriminate against person in terms and conditions of employment because of person's sex are encompassed within ambit of wrongs actionable under statute. Under Human Rights Law, employer is prohibited from even attempting to exploit his dominant position by imposing sexual demands on employee as implicit condition of continued employment, and employee need not prove that he or she resisted abuse or refused to comply with sexual demands, that tangible job benefits were lost, or that discriminatory conduct was intentional. A cause of action based on plaintiff's claim of sexual harassment arising out of her employment relationship with defendant, who coerced her into sexual activity with his business associates in order to further his business, is cognizable under Executive Law § 297 (9), which provides that any person aggrieved by an unlawful discriminatory practice shall have a cause of action for damages, and actions of an employer which discriminate against an individual in the "terms, conditions or privileges of employment" because of that person's sex are encompassed within the ambit of actionable wrongs (see, Executive Law § 296 [1] [a]; § 292 [4]). Under the Human Rights Law, an employer is prohibited from even attempting to exploit his dominant position by imposing sexual demands upon an employee as an implicit condition of continued employment, and the employee need not prove that he or she resisted the abuse or refused to comply with the sexual demands, that tangible job benefits were lost, or that discriminatory conduct was intentional. Thoreson v Penthouse Int'l, 149 Misc. 2d 150, 563 N.Y.S.2d 968, 1990 N.Y. Misc. LEXIS 609 (N.Y. Sup. Ct. 1990), modified, 179 A.D.2d 29, 583 N.Y.S.2d 213, 1992 N.Y. App. Div. LEXIS 5427 (N.Y. App. Div. 1st Dep't 1992).

Cause of action for loss of consortium cannot be based on employment discrimination. Belle v Zelmanowicz, 305 A.D.2d 272, 761 N.Y.S.2d 26, 2003 N.Y. App. Div. LEXIS 5705 (N.Y. App. Div. 1st Dep't 2003).

Employee's allegation of the creation of a hostile work environment in the from of harassment, in violation of the New York State Human Rights Law, N.Y. Exec. Law § 296, failed because the employer's managers could not be held to be vicariously liable for condoning a situation implicating non-management employees, about which they were not only unaware, but had no reason to suspect. Priore v N.Y. Yankees, 307 A.D.2d 67, 761 N.Y.S.2d 608, 2003 N.Y. App. Div. LEXIS 6119 (N.Y. App. Div. 1st Dep't), app. denied, 1 N.Y.3d 504, 775 N.Y.S.2d 781, 807 N.E.2d 894, 2003 N.Y. LEXIS 4134 (N.Y. 2003).

Trial court properly determined that the injured party's sexual discrimination action filed pursuant to N.Y. Exec. Law § 296(1) against the Town of Van Buren and the Town's Board member was time-barred, where the action was filed three years and two months after the last of the alleged conduct occurred; this exceeded both the three-year statute of limitations under N.Y. C.P.L.R. 214(2) and the one-year and 90-day statute of limitations for an action against the Town under N.Y. Town Law § 67(2), and the statutes were not tolled during the pendency of the injured party's complaints filed with the New York State Division of Human Rights since they were dismissed, not for administrative convenience, but so that the injured party could file the instant action pursuant to N.Y. Exec. Law § 297(9). Henderson v Town of Van Buren, 15 A.D.3d 980, 789 N.Y.S.2d 355, 2005 N.Y. App. Div. LEXIS 1187 (N.Y. App. Div. 4th Dep't), app. denied, 4 N.Y.3d 710, 797 N.Y.S.2d 817, 830 N.E.2d 1146, 2005 N.Y. LEXIS 1106 (N.Y. 2005).

It was error to grant summary judgment dismissing an employee's disparate treatment claim because the employee raised triable issues as to (1) why the employee received the employee's boss's job without a pay increase, grade change, or better bonus pool, (2) whether reasons for this treatment were pretextual. Nettles v LSG Sky Chefs, 94 A.D.3d 726, 941 N.Y.S.2d 643, 2012 N.Y. App. Div. LEXIS 2421 (N.Y. App. Div. 2d Dep't 2012).

Summary judgment dismissing an employee's hostile work environment claim, based on race, was proper because the employee's employer and supervisor showed (1) alleged offensive conduct was intermittent, (2) racial comments were made once when the employee was not present, and (3) no objectively offensive acts were shown. Nettles v LSG Sky Chefs, 94 A.D.3d 726, 941 N.Y.S.2d 643, 2012 N.Y. App. Div. LEXIS 2421 (N.Y. App. Div. 2d Dep't 2012).

Summary judgment dismissing an employee's retaliation claim, based on race, was proper because (1) there was no causal connection between the employee's complaints of discrimination and alleged retaliation, and (2) the employee was treated favorably after the complaints. Nettles v LSG Sky Chefs, 94 A.D.3d 726, 941 N.Y.S.2d 643, 2012 N.Y. App. Div. LEXIS 2421 (N.Y. App. Div. 2d Dep't 2012).

Judgment for the State in a correction officer's N.Y. Exec. Law § 296 claim was proper because, inter alia, the trial court made a credibility determination that there was no evidence of a causal connection between the protected activity and the discipline imposed on the correction officer; the trial court's finding that the confrontation was more serious than the unrelated incident was supported by evidence that there were approximately 65 unconfined inmates in the vicinity observing the correction officer's confrontation, and a superintendent testified that the correction officer's conduct could have had serious consequences. The evidence did not support the claim of prior oral complaints, and the record demonstrated that isolated conduct was not sufficiently severe or pervasive so as to create an actionable hostile work environment. Clauberg v State of New York, 95 A.D.3d 1385, 943 N.Y.S.2d 653, 2012 N.Y. App. Div. LEXIS 3487 (N.Y. App. Div. 3d Dep't 2012).

Former employee who had performed landscaping and maintenance work for a county's parks department sufficiently stated a claim of hostile working environment the New York State Human Rights Law, N.Y. Exec. Law § 296, against his former supervisor and park superintendents because the employee alleged that the supervisor subjected the employee to numerous vicious acts of discriminatory treatment, including tying the employee to a tree and to chairs with shrink wrap, based on the employee's mental disability and that the superintendents were aware of the harassment and took no actions to stop it. Costabile v County of Westchester, 2007 U.S. Dist. LEXIS 29787 (S.D.N.Y. Apr. 20, 2007), amended, 485 F. Supp. 2d 424, 2007 U.S. Dist. LEXIS 33484 (S.D.N.Y. 2007).

Plaintiff stated claim under CLS Exec § 296 where she alleged that her former employer gave negative recommendation to her prospective employer to retaliate against her for objecting to workplace sexual harassment. Beckett v Prudential Ins. Co. of Am., 893 F. Supp. 234, 1995 U.S. Dist. LEXIS 6513 (S.D.N.Y. 1995).

Hospital employee failed to establish adverse retaliatory action predicated on hospital personnel department's delay in providing her with medical leave forms where there was no showing that she was harmed beyond inconvenience or that she was deprived of pay for period during which she was on leave, and she failed to show that delay in providing forms was traceable to her participation in protected activity. Dortz v City of New York, 904 F. Supp. 127, 1995 U.S. Dist. LEXIS 14438 (S.D.N.Y. 1995).

Employer's decision to split off 2 burgeoning district offices located on Long Island from Manhattan branch office, in order to create separate branch office located on Long Island, constituted reasonable exercise of informed judgment, and was not pretext for age discrimination against 52-year-old plaintiff, whose incentive compensation was somewhat lessened thereby. Ellis v Provident Life & Accident Ins. Co., 926 F. Supp. 417, 1996 U.S. Dist. LEXIS 6979 (S.D.N.Y. 1996), aff'd, 107 F.3d 2, 1997 U.S. App. LEXIS 6984 (2d Cir. N.Y. 1997).

Age discrimination claim of insurance company branch sales office manager is denied, where he complains solely about contraction of part of his source of incentive compensation due to decision to split off 2 district offices and restructure them into new branch office, because record is replete with evidence of business reasons for split that allowed more efficient servicing of brokers and their business through suburban branch office rather than through city branch office. Ellis v Provident Life & Accident Ins. Co., 926 F. Supp. 417, 1996 U.S. Dist. LEXIS 6979 (S.D.N.Y. 1996), aff'd, 107 F.3d 2, 1997 U.S. App. LEXIS 6984 (2d Cir. N.Y. 1997).

Race discrimination claim under Human Rights Law, challenging events that culminated in employee's decision to accept early retirement plan, was not preempted by ERISA; employee did not challenge structure of retirement plan, nor did he dispute execution or administration of plan. Parker v Chrysler Corp., 929 F. Supp. 162, 1996 U.S. Dist. LEXIS 8758 (S.D.N.Y. 1996), aff'd, 1997 U.S. App. LEXIS 6021 (2d Cir. N.Y. Mar. 27, 1997).

Human Rights Law does not provide for liability for failure on part of employer to take investigative and remedial measures in response to employee's sexual harassment complaint where it is determined that no sexual harassment occurred. Karibian v Columbia Univ., 930 F. Supp. 134, 1996 U.S. Dist. LEXIS 9111 (S.D.N.Y. 1996).

Complaint stated retaliation claim under Human Rights Law where husband alleged that his employment conditions deteriorated following his wife's complaints to management, and that deterioration intensified after she was discharged. Murphy v Cadillac Rubber & Plastics, 946 F. Supp. 1108, 1996 U.S. Dist. LEXIS 17463 (W.D.N.Y. 1996).

Female police officer's Exec § 296 claim is denied summarily, where she claims "retaliation for having opposed gender based discrimination in workplace," because she has adduced no admissible material facts showing gender-based retaliation after writing of her May 1997 letter complaining of gender bias was publicized by village clerk. Davis v Carey, 63 F. Supp. 2d 361, 1999 U.S. Dist. LEXIS 13498 (S.D.N.Y. 1999).

Disgruntled community college worker's retaliation claim must fail, where he was injured moving furniture but was covered by workers' compensation, returned to work, and was later promoted, because he has put forth nothing more than conclusory allegations to suggest causal relationship between his filing of grievances and complaints and his being assigned as part of furniture removal crew despite his light-duty status. Bembry v Darrow, 97 F. Supp. 2d 281, 2000 U.S. Dist. LEXIS 7569 (N.D.N.Y. 2000), aff'd, 7 Fed. Appx. 33, 2001 U.S. App. LEXIS 5091 (2d Cir. N.Y. 2001).

Human resources vice-president cannot be held liable for "aiding and abetting" employment discrimination in violation of Exec § 296(6), where complaint alleges only that she "set up" employee by asking him to come forward with information about his supervisor's improprieties but then harassed him after taking over for supervisor by requiring him to observe variety of new and unwanted working conditions, because these changes do not constitute "adverse employment actions" as matter of law. Smith v AVSC Int'l, Inc., 148 F. Supp. 2d 302, 2001 U.S. Dist. LEXIS 8646 (S.D.N.Y. 2001).

Plaintiff argued that solely as a result of her disability she was required to remain in her residence 24 hours a day, seven days a week, and that this requirement was not placed on non-disabled police officers, but, as all sick or injured police officers were subject to the same provisions, she utterly failed to demonstrate how she in particular was adversely treated on the basis of a disability or other personal attribute. Capasso v Metro. Transp. Auth., 198 F. Supp. 2d 452, 2002 U.S. Dist. LEXIS 6437 (S.D.N.Y. 2002).

Public school teachers' N.Y. Exec. Law § 296(1)(e) retaliation claims failed because the teachers' contention that their requests for leaves of absence were denied in retaliation for protected conduct was belied by the fact that the denials issued before the teachers' protected activity occurred. Pearson v Bd. of Educ., 499 F. Supp. 2d 575, 2007 U.S. Dist. LEXIS 59244 (S.D.N.Y. 2007).

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While there was a triable issue of fact as to whether an employee's diabetes was a cognizable disability under the New York Human Rights Law, N.Y. Exec. Law § 296, an offer of accommodation by defendants, an employer and a manager, was reasonable as a matter of law because, while the employee produced a note saying that she needed to be able to eat at 6 p.m., defendants offered the employee accommodation by allowing her to eat while on the food line, and the employee did not produce anything to dispute the reasonableness of the accommodation. Krikelis v Vassar College, 581 F. Supp. 2d 476, 2008 U.S. Dist. LEXIS 61543 (S.D.N.Y. 2008).

In a female police officer's suit against a city, its police department, and others (defendants), her claims that defendants' acts of transferring her, ordering her to wear a uniform, denying other requested transfers and overtime assignments, and denying her a take-home vehicle failed to show gender discrimination in violation of the New York Human Rights Act, N.Y. Exec. Law § 296, because defendants proffered legitimate, nondiscriminatory reasons for each action, and the officer failed to rebut this by showing that it was pretext. Lore v City of Syracuse, 583 F. Supp. 2d 345, 2008 U.S. Dist. LEXIS 89484 (N.D.N.Y. 2008), aff'd in part, vacated in part, 670 F.3d 127, 2012 U.S. App. LEXIS 1954 (2d Cir. N.Y. 2012).

Public school teacher's New York State Human Rights Law, N.Y. Exec. Law § 296, retaliation claim met the standard of Fed. R. Civ. P. 8(a) where the teacher alleged that she engaged in protected activity by sending letters to the school district about age discrimination and that the school's principal made an allegation of child abuse against the teacher shortly thereafter. Fordham v Islip Union Free Sch. Dist., 662 F. Supp. 2d 261, 2009 U.S. Dist. LEXIS 82767 (E.D.N.Y. 2009).

Although the former employee established a prima facie case, he could not show a genuine factual dispute about whether defendants' proffered reasons for the 2004 evaluation were merely a pretext for retaliation; the employee was unable to point to inconsistencies in defendants' story, and instead relied solely on his own speculation that a director manipulated the results because he had to approve all employee evaluations. Kanhoye v Altana, Inc., 686 F. Supp. 2d 199, 2009 U.S. Dist. LEXIS 112506 (E.D.N.Y. 2009).

61. Compensation

Where the evidence indicated that matrons performed substantially the same duties as the male guards at a city police headquarters, they were entitled to equal pay from the city. Mize v State Div. of Human Rights, 38 A.D.2d 278, 328 N.Y.S.2d 983, 1972 N.Y. App. Div. LEXIS 5293 (N.Y. App. Div. 4th Dep't 1972),

aff'd in part, 31 N.Y.2d 1032, 342 N.Y.S.2d 65, 294 N.E.2d 851, 1973 N.Y. LEXIS 1468 (N.Y. 1973), modified, 33 N.Y.2d 53, 349 N.Y.S.2d 364, 304 N.E.2d 231, 1973 N.Y. LEXIS 1002 (N.Y. 1973).

A board of education may compensate teachers who coach girls' sports teams performing duties of the same nature as coaches of boys' teams, but to a lesser degree, differently from the coaches of boys' teams. State Div. of Human Rights v Syracuse City Teachers Asso., 66 A.D.2d 56, 412 N.Y.S.2d 711, 1979 N.Y. App. Div. LEXIS 9989 (N.Y. App. Div. 4th Dep't 1979).

In a proceeding initiated by a black citizen of a foreign country (charging a university with discrimination on the basis of race, color, and national origin), the complaint was properly dismissed where the alleged discrimination was based on length of appointment to the faculty on a 12-month contract, rather than a nine-month contract held by certain other faculty members, where all faculty members in petitioner's department held 12-month contracts, and where petitioner received a salary approximately 30 percent greater than comparable faculty members holding nine-month contracts. Murapa v Kramarsky, 88 A.D.2d 1009, 451 N.Y.S.2d 934, 1982 N.Y. App. Div. LEXIS 17420 (N.Y. App. Div. 3d Dep't 1982).

Finding of CLS Exec § 296 violation was supported by evidence that woman performed functions of general manager but was paid less than male general managers, and that employer's proffered gender-neutral explanation—lack of experience—was pretextual, since 2 inexperienced men had been offered general manager positions at higher pay. Classic Coach v Mercado, 280 A.D.2d 164, 722 N.Y.S.2d 551, 2001 N.Y. App. Div. LEXIS 2571 (N.Y. App. Div. 2d Dep't), app. denied, 97 N.Y.2d 601, 735 N.Y.S.2d 490, 760 N.E.2d 1286, 2001 N.Y. LEXIS 3231 (N.Y. 2001).

Employee's racial discrimination claim based on different pay and stock options, denial of a fixed cost of living adjustment (COLA), and exclusion from a bonus pool failed because legitimate nondiscriminatory reasons were given as (1) the employee's job grade determined the employee's pay, stock options, and bonus pool, and (2) fixed COLAs were limited to those hired before a policy change. Nettles v LSG Sky Chefs, 94 A.D.3d 726, 941 N.Y.S.2d 643, 2012 N.Y. App. Div. LEXIS 2421 (N.Y. App. Div. 2d Dep't 2012).

In action alleging unequal pay for equal work, inference that employer acted with discriminatory intent was not supported by fact that male employees who performed substantially equal work under similar working conditions were paid more than female plaintiff, in absence of any evidence that employer paid plaintiff less because of her gender. Tomka v Seiler Corp., 66 F.3d 1295, 1995 U.S. App. LEXIS 27612 (2d Cir. N.Y. 1995).

Federal law preempts pilots' age-discrimination claim brought under CLS Exec Law § 296, where pilots challenge (1) manner in which they were integrated into pilots' seniority list, (2) requirement that they serve 10 years before they become eligible for full postretirement medical benefits, and (3) manner in which their pay is increased over 3-year period to reach parity with other pilots, because terms and conditions of employment sought by pilots would have potential impact on airline's prices and services, and such claims are preempted by federal statute. Abdu-Brisson v Delta Air Lines, Inc., 927 F. Supp. 109, 1996 U.S. Dist. LEXIS 6844 (S.D.N.Y. 1996), rev'd, 128 F.3d 77, 1997 U.S. App. LEXIS 28555 (2d Cir. N.Y. 1997).

Claims of discriminatory pay under Exec § 296 require showing of intentional discrimination. Sobol v Kidder, Peabody & Co., 49 F. Supp. 2d 208, 1999 U.S. Dist. LEXIS 1877 (S.D.N.Y. 1999).

Pay disparity claim of African-American administrative assistant for publisher must fail, even though she claims she took over research duties of white employee but received no extra pay, where she compares herself to magazine editor who provided editorial and research assistance to author of book and was paid $2,000 in extra compensation, because she is not similarly situated to white employee who was professional editor while she was administrative assistant with no experience as editor. Cruse v G & J United States Publ'g, 96 F. Supp. 2d 320, 2000 U.S. Dist. LEXIS 6084 (S.D.N.Y. 2000).

Although a former employee established that her former employer paid her less than a male coworker in the same job, she failed to establish a violation of the New York State Human Rights Law, N.Y. Exec. Law § 296(1)(a), because there was no evidence that the employer's compensation decisions were based on the employee's gender and that she was intentionally paid less than her coworker because of her gender. Cox v Quick & Reilly, Inc., 401 F. Supp. 2d 203, 2005 U.S. Dist. LEXIS 28434 (N.D.N.Y. 2005).

Despite substantial discovery, employee one conceded that he was unable to identify a single similarly-situated, non-African-American employee who was paid more than he and employee two failed to identify or provide evidence concerning any comparators that would support his claims of discriminatory compensation disparities. Wright v Eastman Kodak Co., 550 F. Supp. 2d 371, 2008 U.S. Dist. LEXIS 33509 (W.D.N.Y. 2008), aff'd, 328 Fed. Appx. 738, 2009 U.S. App. LEXIS 15647 (2d Cir. N.Y. 2009).

Employee's allegations that she was not paid at the maximum rate and that she was forced to work overtime and double shifts all occurred prior to the statutory period; even if timely, the claim still failed as the employee did not meet her prima facie burden of establishing that the adverse employment action (i.e., not being paid at the maximum pay rate) gave rise to an inference of discrimination. Aspilaire v Wyeth Pharms., Inc., 612 F. Supp. 2d 289, 2009 U.S. Dist. LEXIS 35523 (S.D.N.Y. 2009).

Former employee failed to demonstrate a prima facie case of gender discrimination; his claim was based solely on his own testimony that an unspecified female colleague told him that she was obtaining additional compensation for gowning up, from which he concluded an intent to discriminate on the basis of gender. Kanhoye v Altana, Inc., 686 F. Supp. 2d 199, 2009 U.S. Dist. LEXIS 112506 (E.D.N.Y. 2009).

Employee's claim of race discrimination under N.Y. Exec. Law § 296 failed at the prima facie stage because there was no evidence that the employee was discriminated against when he was promoted but placed in an ungraded salary plan; this was true even though the employee alleged that he was not informed that the new position was not part of the municipal employer's graded salary plan. Russell v County of Nassau, 696 F. Supp. 2d 213, 2010 U.S. Dist. LEXIS 14018 (E.D.N.Y. 2010).

Employee's claims of race discrimination under N.Y. Exec. Law § 296 failed at the prima facie stage for lack of evidence that a similarly-situated Caucasian coworker was higher paid; the persons to whom the employee cited as comparators were not similarly situated because they held higher or differing positions than the employee. Russell v County of Nassau, 696 F. Supp. 2d 213, 2010 U.S. Dist. LEXIS 14018 (E.D.N.Y. 2010).

Employee's claims of race discrimination under N.Y. Exec. Law § 296 failed at the prima facie stage for lack of evidence of discriminatory intent because the mere fact that the employee did not receive cost of living increases in and of itself did not permit an inference that the reason was his race. Russell v County of Nassau, 696 F. Supp. 2d 213, 2010 U.S. Dist. LEXIS 14018 (E.D.N.Y. 2010).

Because the employee conceded that she received offers of overtime employment, she did not establish that she suffered an adverse employment action—namely, the denial of overtime opportunities based on her race, gender, or age—and thus failed to establish her prima facie case of discrimination regarding her denial of overtime claims. Hall v N.Y. City DOT, 701 F. Supp. 2d 318, 2010 U.S. Dist. LEXIS 31077 (E.D.N.Y. 2010).

62. Failure to promote

The Appellate Division improperly vacated an affirmance by the State Human Rights Appeal Board of an order finding that a school board and board of education unlawfully discriminated against two interim acting school principals employed by the district, one of whom was black and the other Hispanic, based on their race, where such determination was supported by substantial evidence consisting of statistical evidence of a pervasive pattern within the school district of removing black and Hispanic principals and replacing them with white principals. New York City Bd. of Education v Batista, 54 N.Y.2d 379, 446 N.Y.S.2d 1, 430 N.E.2d 877, 1981 N.Y. LEXIS 3164 (N.Y. 1981).

In a proceeding in which a university professor alleged that she was denied tenure on the basis of her sex and that her department chairman had committed certain improper acts, the com-

plaint was properly dismissed on the basis that the university was not responsible for the chairman's acts where the university did not condone the chairman's discriminatory behavior but rather took affirmative action to investigate and correct it. State University of New York v State Human Rights Appeal Bd., 55 N.Y.2d 896, 449 N.Y.S.2d 29, 433 N.E.2d 1277, 1982 N.Y. LEXIS 3098 (N.Y. 1982).

Substantial evidence supported determination of Commissioner of Human Rights that black female employee was victim of race and sex discrimination where, inter alia, employee was acknowledged to be competent, she received her first promotion later than white male coworker whom she had trained, employer did not formally announce second opportunity for promotion for which employee was qualified, and she was denied advancement twice without receiving serious consideration. Consolidated Edison Co. v New York State Div. of Human Rights, 77 N.Y.2d 411, 568 N.Y.S.2d 569, 570 N.E.2d 217, 1991 N.Y. LEXIS 363 (N.Y. 1991).

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Requirement that candidate have at least three years of experience as volunteer fireman supported finding that petitioner "knowingly excluded all Negroes as a class from competing for fire alarm dispatcher positions", as a fire alarm system is completely automated and requires no discretion on the part of the dispatcher or any special knowledge of fire fighting equipment or geography of the area and only one governmental entity has a requirement of fireman experience thus requiring Civil Service Commission to cease and desist from setting forth such qualifications. Glen Cove Municipal Civil Service Com. v Glen Cove NAACP, 34 A.D.2d 956, 312 N.Y.S.2d 400, 1970 N.Y. App. Div. LEXIS 4640 (N.Y. App. Div. 2d Dep't), app. denied, (N.Y. App. Div. 1970).

The State Division of Human Rights properly found no probable cause to believe respondents engaged in the discriminatory practice complained of, where there was evidence in the record from which the division could reasonably conclude that the employer's decision not to promote complainant was in no way based on race but rather upon an evaluation of complainant's qualifications vis-a-vis the job requirements and the qualifications of other candidates. Logan v New York State Human Rights Appeal Bd., 86 A.D.2d 910, 448 N.Y.S.2d 259, 1982 N.Y. App. Div. LEXIS 15582 (N.Y. App. Div. 3d Dep't 1982).

A doctor's allegations claiming discrimination against him because of his Egyptian heritage and national origin on the part of the hospital in failing to promote him to the position of chief resident of the urology division, were unsubstantiated where two other urology residents, who were white, male, American, and Anglo-Saxon, and whose evaluation reports were higher than the doctor's, were also denied appointments as chief residents on the grounds of substandard work performances. Grace v New York State Human Rights Appeal Bd., 87 A.D.2d 726, 449 N.Y.S.2d 339, 1982 N.Y. App. Div. LEXIS 16067 (N.Y. App. Div. 3d Dep't 1982).

An order dismissing a complaint by a black Nigerian who alleged that the bank with whom he was employed had denied his admission to its management training program on the basis of his race was properly affirmed, where the record contained evidence from which the State Division of Human Rights could reasonably conclude that the bank's decision was not actuated by discrimination, including evidence that employee was not placed in the management training program due to a combination of nondiscriminatory factors, among which were lack of openings in the program and employee's qualifications, and the fact that employee became impatient and voluntarily terminated his employment. Omoragbon v Bankers Trust Co., N.A., 90 A.D.2d 887, 456 N.Y.S.2d 853, 1982 N.Y. App. Div. LEXIS 19156 (N.Y. App. Div. 3d Dep't 1982).

An employee of the state Workers' Compensation Board who was denied promotion to the position of Assistant Director of the Research and Statistics Department in favor of a younger, less well-qualified person, and who then chose to retire, was entitled to an award for age discrimination based on proper considerations, including backpay commencing from the date when the position was available, where the evidence was overwhelming that the employee was denied promotion based on her age, where the employee was thus put in the horrendous position of having to work for a younger person, where the employee was not required to accept such an inferior position as a result of discriminatory practices and also suffer the extreme humiliation, mental anguish and embarrassment attendant to the position, and where any employee placed in such an untenable position had a right to retire; the employee was not entitled to the position sought, however, since the Workers' Compensation Board, as a public employer, could not be directed by the administrative agency to make such an appointment. Further, an award of $1,000 to compensate the employee for the humiliation, mental anguish and embarrassment of having to work for a younger person was inadequate and an abuse of discretion. Weiss v New York State Human Rights Appeal Bd., 102 A.D.2d 471, 477 N.Y.S.2d 342, 1984 N.Y. App. Div. LEXIS 18808 (N.Y. App. Div. 1st Dep't 1984).

The State Division of Human Rights properly dismissed petitioner's complaint of an unlawful discriminatory practice based on age, for failure to promote him, where the record was replete with evidence, which petitioner was afforded ample opportunity to rebut, that it was petitioner's substandard performance which had caused him to be passed over for promotion, that 16 of the 49 people in the position he sought were over 50 years of age, and that 13 of those 16 employees were promoted within the last four years. Sedlacek v IBM Corp., 108 A.D.2d 1029, 485 N.Y.S.2d 599, 1985 N.Y. App. Div. LEXIS 43352 (N.Y. App. Div. 3d Dep't 1985).

Female deputy sheriff was not improperly passed over for appointment to position of sergeant, where uncontradicted testimony was that position to be filled required seargent to conduct daily announced and unannounced inspections of cell block areas to monitor security and sanitation conditions and, since inmates' toilet and shower facilities are in open view to personnel walking by cells, it would be violation of male inmates' right to privacy to have woman monitoring their activities, such that sex is "bona fide occupational qualification" within exception of CLS Exec § 296(1)(d). State Div. of Human Rights ex rel. Johnson v Oneida County Sheriff's Dep't, 119 A.D.2d 1006, 500 N.Y.S.2d 995, 1986 N.Y. App. Div. LEXIS 55945 (N.Y. App. Div. 4th Dep't 1986), aff'd, 70 N.Y.2d 974, 526 N.Y.S.2d 426, 521 N.E.2d 433, 1988 N.Y. LEXIS 79 (N.Y. 1988).

Transit authority's denial of promotion to employee in favor of applicant who scored below him on civil service test, based on employee's significantly poorer attendance record resulting from physical illness, was not discrimination on basis of disability in violation of CLS Exec § 296, since employee's illness prevented him from coming to work and thus was not disability as defined in CLS Exec § 292. Schmitt v Kiley, 124 A.D.2d 661, 507 N.Y.S.2d 907, 1986 N.Y. App. Div. LEXIS 61962 (N.Y. App. Div. 2d Dep't 1986), app. denied, 69 N.Y.2d 612, 517 N.Y.S.2d 1027, 511 N.E.2d 86, 1987 N.Y. LEXIS 16891 (N.Y. 1987).

Law professors, of whom one was black and one female, failed to plead facts sufficient to show violation of Title VII of Civil Rights Act or CLS Exec § 296 based on mere fact that they were rejected for tenure while 3 white male candidates were granted tenure, where it was acknowledged that law school, in accordance with its mission, would probably seek out other minority faculty. Faculty of City University of New York Law School at Queens College v Murphy, 149 A.D.2d 315, 539 N.Y.S.2d 367, 1989 N.Y. App. Div. LEXIS 4387 (N.Y. App. Div. 1st Dep't 1989).

Evidence did not support Division of Human Rights' determination that telephone company unlawfully discriminated against African-American employee by denying her promotion, where company established that it promoted white employee to Facilities Assistant position instead of complainant because complain-

ant was not familiar with telephone company power equipment, while white employee was familiar with equipment, having already performed some of those job duties, and because white employee had 4-year college education including physics and calculus, while complainant only had 2-year degree and had not studied physics or calculus. New York Tel. Co. v New York State Div. of Human Rights, 222 A.D.2d 234, 634 N.Y.S.2d 691, 1995 N.Y. App. Div. LEXIS 12729 (N.Y. App. Div. 1st Dep't 1995).

Determination of state Division of Human Rights finding that employee of city transportation department was denied promotion to "gasoline roller engineer" due to racial discrimination would be annulled where employee provided no evidence that he had worked for 3 years—or for 2 years plus additional year of relevant experience—operating gasoline roller on full-time paid basis, and thus division's finding that he was qualified to operate roller at time of his application for provisional position was unsupported by substantial evidence. City of New York v New York State Div. of Human Rights, 225 A.D.2d 421, 638 N.Y.S.2d 957, 1996 N.Y. App. Div. LEXIS 2800 (N.Y. App. Div. 1st Dep't 1996).

Explanation offered by city department of transportation for its decision to investigate and ultimately reject employee's application for promotion as "gasoline roller engineer"—department's knowledge of conflict between employee's claims of experience and his job duties as department employee—was not pretext for racial discrimination. City of New York v New York State Div. of Human Rights, 225 A.D.2d 421, 638 N.Y.S.2d 957, 1996 N.Y. App. Div. LEXIS 2800 (N.Y. App. Div. 1st Dep't 1996).

Commissioner of Human Rights' inference of retaliatory motive behind acts of city department of transportation against employee was unfounded and would be annulled, despite employee having filed prior complaint of racial discrimination after he was denied promotion, where, with regard to various incidents, department provided ample evidence that denial of overtime was based on assessments of his qualifications and job performance, amendment of his performance evaluation was based on 2 disciplinary incidents unknown to supervisor who drafted evaluation initially, and denial of his application for another promotion was based on his complete lack of qualifications for post. City of New York v New York State Div. of Human Rights, 225 A.D.2d 421, 638 N.Y.S.2d 957, 1996 N.Y. App. Div. LEXIS 2800 (N.Y. App. Div. 1st Dep't 1996).

Employee's assertion that civil service promotion examination regarding operation of "gasoline roller" (highway construction vehicle) was conducted against him in discriminatory or retaliatory manner due to his filing of racial discrimination complaint was unsupported where record established that he failed test on account of his own inabilities, including failure to reply correctly to questions which could be answered by simple observation of vehicle. City of New York v New York State Div. of Human Rights, 225 A.D.2d 421, 638 N.Y.S.2d 957, 1996 N.Y. App. Div. LEXIS 2800 (N.Y. App. Div. 1st Dep't 1996).

There was no merit in petitioner's complaint of race discrimination in employment and retaliation where substantial evidence supported findings that candidates who received 2 higher level positions sought by petitioner were more qualified than petitioner, who lacked necessary qualifications, undercut his claim that his poor performance evaluations were part of continuing pretext disguising retaliatory motive linked to his having expressed to superiors his belief that decisions not to promote him were based on race, and that such motive ultimately led to his termination, and there was no other basis to disturb findings crediting performance evaluations and other evidence offered by employer of legitimate, nondiscriminatory reasons for termination. Davis v Mercado, 240 A.D.2d 163, 658 N.Y.S.2d 862, 1997 N.Y. App. Div. LEXIS 5836 (N.Y. App. Div. 1st Dep't 1997).

Averments of city electrician in Article 78 proceeding stated viable claim that city and its pubic works commissioner acted illegally, in violation of statutory proscriptions (CLS Civ S § 107(1) and CLS Labor § 201-d(2)(a)) against making employment decisions on basis of employee's political activities where he alleged that, shortly after he was directed to refrain from wearing campaign sticker supporting commissioner's political opponent, and while city and commissioner knew that he continued to express his opposing political views on his own time, his job duties were adjusted—including reduction in responsibility—in way that was calculated to, and did, lead to his being denied promotion and concomitant salary increase. Richardson v City of Saratoga Springs, 246 A.D.2d 900, 667 N.Y.S.2d 995, 1998 N.Y. App. Div. LEXIS 524 (N.Y. App. Div. 3d Dep't 1998).

Federal mail fraud conviction, which involved petitioner's submission of false car service vouchers in connection with his employment as New York City Human Resources Administration caseworker, raised legitimate issues about his fitness for supervisory position, warranting dismissal of his Article 78 petition to compel city to promote him to supervisory position on basis that denial of promotion violated CLS Exec § 296(15). Alston v City of New York, 270 A.D.2d 3, 703 N.Y.S.2d 186, 2000 N.Y. App. Div. LEXIS 2231 (N.Y. App. Div. 1st Dep't 2000).

Physician failed to state a cause of action for failure to promote in violation of N.Y. Exec. Law § 296 because he did not allege any specific instance where the employer and the supervisors refused to promote him to a position for which he applied and for which he was qualified. Deshpande v TJH Med. Servs., P.C., 52 A.D.3d 648, 861 N.Y.S.2d 697, 2008 N.Y. App. Div. LEXIS 5563 (N.Y. App. Div. 2d Dep't 2008), app. denied, 12 N.Y.3d 704, 879 N.Y.S.2d 50, 906 N.E.2d 1084, 2009 N.Y. LEXIS 293 (N.Y. 2009), overruled in part, Webb-Weber v Community Action for Human Servs., Inc., 23 N.Y.3d 448, 992 N.Y.S.2d 163, 15 N.E.3d 1172, 2014 N.Y. LEXIS 1049 (N.Y. 2014).

Although a determination to allow firefighter eligibility lists to expire was made because those next in line for promotion were Caucasian, the Caucasian firefighters did not establish liability under N.Y. Exec. Law art. 15 by showing the absence of a compelling interest or that the action was not narrowly tailored to meet an allegedly compelling interest. Margerum v City of Buffalo, 63 A.D.3d 1574, 880 N.Y.S.2d 820, 2009 N.Y. App. Div. LEXIS 4437 (N.Y. App. Div. 4th Dep't 2009).

Retiree failed to make out a prima facie case of employment age discrimination under CLS Exec Law § 296(1)(a), where police sergeant's provisional promotion to lieutenant was withdrawn when it became clear that he was in process of retirement and would be unavailable for service, but retiree alleged entitlement to pension benefits based on the higher grade, because rescission of promotion was legitimately based on his retirement. Russo v White, 775 F. Supp. 639, 1991 U.S. Dist. LEXIS 14361 (S.D.N.Y. 1991).

Disgruntled fire lieutenant's Exec § 296 claim is denied summarily, where he sues consultant involved in preparation of 1994 and 1997 civil service exams, because she was private, independent consultant and neither agent of city nor lieutenant's "employer." McMenemy v City of Rochester, 63 F. Supp. 2d 309, 1999 U.S. Dist. LEXIS 14427 (W.D.N.Y. 1999), aff'd in part, vacated in part, 241 F.3d 279, 2001 U.S. App. LEXIS 3243 (2d Cir. N.Y. 2001).

Employer's proffered reason for failing to promote 2 black employees, that white candidate was better qualified for position, was not pretext for race discrimination under Exec § 296 or federal law, where there was no evidence that team interview process was pretext for race discrimination other than employees' vague conclusory allegations. Hines v Hillside Children's Ctr., 73 F. Supp. 2d 308, 1999 U.S. Dist. LEXIS 16200 (W.D.N.Y. 1999).

African-American clerk's race discrimination claim under Exec § 296 is denied summarily, where employer was in process of downsizing and consolidating its internal operations and as result only 2 promotions were made during year in question, bona fide promotion of African-American and proficiency promotion of white woman, because employer has articulated legitimate, nondiscriminatory reasons for its actions. Kent v GM Reg'l Pers. Ctr.-E. Region, 179 F. Supp. 2d 102, 2001 U.S. Dist. LEXIS 21146 (W.D.N.Y. 2001).

Employee offered sufficient proof that a county's and county manager's claims that she was not suited for an open position were blatantly false, sufficient to demonstrate pretext and sufficient to create factual issues regarding whether their true motive was discriminatory to establish a prima facie case of gender discrimination in violation of N.Y. Exec. Law § 296. Heap v

County of Schenectady, 214 F. Supp. 2d 263, 2002 U.S. Dist. LEXIS 15143 (N.D.N.Y. 2002).

Although the dean was personally involved in recruiting the doctor, there were no indications that he was involved in any discriminatory activities against the doctor. In fact the the decision to deny doctor tenure, upon which the lawsuit was based, was made two years after the dean left the medical school; the doctor's discrimination claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., N.Y. Exec. Law § 296, and New York City, N.Y., Admin. Code § 8-107, were dismissed. Hirsch v Columbia Univ., 293 F. Supp. 2d 372, 2003 U.S. Dist. LEXIS 21340 (S.D.N.Y. 2003).

Former employer was granted summary judgment on the former employee's discrimination claims under New York state and New York City anti-discrimination laws. N.Y. Exec. Law § 296-1; N.Y. City Admin. Code § 8-107(1)(a), that she was denied a promotion in late 2000, she was denied a promotion in the summer of 2001, and she was terminated in late 2001, instead of promoted, where the court found that the facts suggested that the employer was very pleased with the employee's work and was willing to promote her — that was, until it discovered her suspiciously excessive overtime. Ascione v Pfizer, Inc., 312 F. Supp. 2d 572, 2004 U.S. Dist. LEXIS 5808 (S.D.N.Y. 2004), aff'd, 138 Fed. Appx. 347, 2005 U.S. App. LEXIS 13366 (2d Cir. N.Y. 2005).

Probation officer failed to establish a prima facie case of age discrimination based on County's decision not to promote her to the position of Senior Probation Officer because she was unable to show that she was qualified for the promotion, and even assuming she were so qualified, the probation officer's age discrimination claims would fail as a matter of law as she presented absolutely no evidence to support her claim that the County's failure to promote her occurred under circumstances giving rise to an inference of age discrimination. Kearney v County of Rockland, 373 F. Supp. 2d 434, 2005 U.S. Dist. LEXIS 11956 (S.D.N.Y. 2005), aff'd, 185 Fed. Appx. 68, 2006 U.S. App. LEXIS 14670 (2d Cir. N.Y. 2006).

In an action in which a former employee filed suit against her former employer alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., the New York State Human Rights Law, N.Y. Exec. Law § 296, and the New York City Human Rights Law, New York City, N.Y., Admin. Code § 8-107, the employer was granted summary judgment on the employee's claims that ther employer failed to promote her or rehire her because she was a woman; for all three employment decisions, the employer offered the legitimate, non-discriminatory reason that the decisionmakers had prior experience with the men they promoted, were comfortable working with them and lacked first-hand experience with the employee. Giannone v Deutsche Bank Sec., Inc., 392 F. Supp. 2d 576, 2005 U.S. Dist. LEXIS 20493 (S.D.N.Y. 2005).

Where an employee claimed that an employer violated 42 U.S.C.S. § 2000e-2(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000 et seq., the Civil Rights Act of 1866, 42 U.S.C.S. § 1981, and the New York State Human Rights Law, N.Y. Exec. Law § 296 et seq., by denying the employee's request to have her Level 5 executive secretary position reclassified as a Level 6 senior executive secretary position, the employer was entitled to summary judgment on the employee's racial discrimination claims because (1) the employee did not meet the criteria set forth in a union contract insofar as she did not directly report to a dean and (2) there was no evidence that the criteria for the Level 6 position were developed in bad faith or applied inconsistently. Bush v Fordham Univ., 452 F. Supp. 2d 394, 2006 U.S. Dist. LEXIS 69510 (S.D.N.Y. 2006).

Employee one failed, in interrogatory responses, deposition testimony, or in response to the instant motion, to identify any position or promotion which he sought and was denied. Wright v Eastman Kodak Co., 550 F. Supp. 2d 371, 2008 U.S. Dist. LEXIS 33509 (W.D.N.Y. 2008), aff'd, 328 Fed. Appx. 738, 2009 U.S. App. LEXIS 15647 (2d Cir. N.Y. 2009).

As the employee filed her claims with the Human Rights Division on February 23, 2004 and was issued a right to sue letter on April 30, 2004, all events taking place before May 28, 2001 were time barred for purposes of the the employee's New York State failure to promote claims; however, earlier activities could be considered for the purposes of the hostile environment claims. Further, evidence of earlier promotion denials could constitute relevant background evidence in support of a timely claim and because the employee asked to be considered for a promotion, at least once during the limitations period—her last request made to the sheriff was on September 19, 2003—her failure to promote claims were not barred in their entirety. Anderson v Nassau County Dep't of Corr., 558 F. Supp. 2d 283, 2008 U.S. Dist. LEXIS 21774 (E.D.N.Y. 2008).

Employee's claims of race discrimination under N.Y. Exec. Law § 296 failed at the prima facie stage for lack of evidence of discriminatory intent where the evidence showed that in denying the employee's request for placement in more advanced positions, the county human rights commission for which the employee worked relied on requisite job qualifications, which the employee did not possess. Russell v County of Nassau, 696 F. Supp. 2d 213, 2010 U.S. Dist. LEXIS 14018 (E.D.N.Y. 2010).

Employee failed to satisfy her de minimis burden to establish a prima facie disparate treatment case of race, gender, or age discrimination based on her employer's alleged failure to promote her to a permanent letterer position with the City of New York because she did not satisfy the requirements for permanent competitive appointment to the civil service letterer position and, as a matter of New York law, was not "qualified" for the position. Hall v N.Y. City DOT, 701 F. Supp. 2d 318, 2010 U.S. Dist. LEXIS 31077 (E.D.N.Y. 2010).

Complainant's failure to receive promotion to associate professor did not constitute unlawful retaliation for filing previous complaints with Division of Human Rights where he was denied promotion for having failed to meet standards contained in parties' collective bargaining agreement as to any significant community activities or college service, same reasons that he was not promoted in preceding years. 2000 Order Comm HR No. 5-E-O-86-111682-E.

Complainant failed to show that respondent New York City Transit Authority was motivated by race in selecting line mechanics for provisional appointment to fill vacancies for "line supervisor" in its maintenance department, where list of eligible candidates was based strictly on employment seniority, complainant was 26th applicant on eligible list, and blacks were included in top 25 applicants who were trained and appointed provisionally; why respondent would not "grandfather" in complainant after he successfully completed training, when they had discretion to do so, was beyond scope of review. 2000 Order Comm HR No. 1D-E-R-88-132133E.

63. Demotion

Employee's demotion from probationary assistant station supervisor to railroad clerk did not violate antidiscrimination proscriptions of Human Rights Law where his heart condition prevented him from engaging in excessive stair climbing or other types of physical exertion required by his probationary position, so that he could not perform his duties in reasonable manner; thus, employee was not disabled within meaning of statute and was not protected by its provisions. Miller v Ravitch, 130 A.D.2d 579, 515 N.Y.S.2d 518, 1987 N.Y. App. Div. LEXIS 46579 (N.Y. App. Div. 2d Dep't), app. denied, 70 N.Y.2d 610, 522 N.Y.S.2d 110, 516 N.E.2d 1223, 1987 N.Y. LEXIS 19330 (N.Y. 1987).

Even if reason for reduction of petitioner from rank of deputy inspector to rank of captain was police commissioner's belief that petitioner had been on his job too long, it did not follow that petitioner was being discriminated against because of his age. Foran v Cawley, 77 Misc. 2d 809, 354 N.Y.S.2d 757, 1973 N.Y. Misc. LEXIS 1233 (N.Y. Sup. Ct. 1973).

Demoted 60-year-old maintenance supervisor at bottling/canning facility establishes prima facie case of age discrimination in violation of CLS Exec Law § 296, where supervisor managed maintenance functions of plant successfully for 16 years before arrival of new plant manager in 1987, he was replaced by 35-year-old, and he submits evidence to effect that new manager wanted "new 'blood' for maintenance department" and complained about numbers of older men in maintenance department at plant, because supervisor raised triable issue as to pretextual

nature of his demotion to technician for poor performance. Gallaway v Curtice-Burns Foods, Inc., 806 F. Supp. 28, 1992 U.S. Dist. LEXIS 20582 (W.D.N.Y. 1992).

Assistant director's retaliation claim under Exec § 296 is dismissed with leave to amend, where sole protected activity upon which she relies is memorandum to employer dated June 5, 1995 supporting her mother's assertion of disabilities and right to pursue claim of discrimination based on disabilities, because she was informed of temporary transfer of which she complains on May 30, 1995, destroying causal nexus between alleged protected activity and adverse employment action, but possibility exists that protected activity in form of oral complaints regarding her mother's treatment occurred earlier than May 30, 1995. Sacay v Research Found., 44 F. Supp. 2d 505, 1999 U.S. Dist. LEXIS 6324 (E.D.N.Y. 1999).

Demoted African-American bus operator's claim of race discrimination and retaliation in violation of Exec § 296 may proceed, where he has shown that he was demoted despite his qualification for job after being subjected to what he claims was hostile work environment and immediately after sending written complaint of harassment to employer's vice-president, and he presents affidavit of union business agent that white supervisors were not demoted for making payroll errors similar to errors for which he was demoted, because he has made sufficient showing of discrimination and pretext to defeat summary judgment. Morris v CNY Centro, Inc., 99 F. Supp. 2d 241, 2000 U.S. Dist. LEXIS 8650 (N.D.N.Y. 2000).

64. Adverse employment action

Employee's discrimination claims are properly dismissed for lack of allegations sufficient to show at least one adverse employment action or at least one discrete act contributing to a hostile work environment within the limitations period. Belle v Zelmanowicz, 305 A.D.2d 272, 761 N.Y.S.2d 26, 2003 N.Y. App. Div. LEXIS 5705 (N.Y. App. Div. 1st Dep't 2003).

Only purported acts of discrimination or retaliation alleged to have occurred within the three-year limitations period were a false offer of a generous retirement package intended to dissuade the employee from filing a discrimination claim, the lack of a pay raise, and utterance of racial epithets; those allegations, concerning the retirement offer and plaintiff's salary, did not show the requisite adverse change in the employee's employment. Belle v Zelmanowicz, 305 A.D.2d 272, 761 N.Y.S.2d 26, 2003 N.Y. App. Div. LEXIS 5705 (N.Y. App. Div. 1st Dep't 2003).

Retired judge failed to allege employment discrimination under N.Y. Exec. Law § 296 with respect to his reassignment because he did demonstrate any adverse employment action under § 296(1)(a) as his reassignment did not involve a demotion or a decrease in salary among other things. Ponterio v Kaye, 25 A.D.3d 865, 808 N.Y.S.2d 439, 2006 N.Y. App. Div. LEXIS 48 (N.Y. App. Div. 3d Dep't), app. denied, 6 N.Y.3d 714, 816 N.Y.S.2d 750, 849 N.E.2d 973, 2006 N.Y. LEXIS 1298 (N.Y. 2006).

University was entitled to summary judgment in a former employee's discrimination claims because the university demonstrated a legitimate nondiscriminatory reason why the employee's part-time darkroom lab manager and photography adjunct teaching positions were eliminated, citing budget cuts and that the duties of a full-time employee overlapped significantly with most of the employee's duties as part-time lab manager, and, in turn, the employee failed to raise an inference of pretext. Abe v New York Univ., 169 A.D.3d 445, 94 N.Y.S.3d 17, 2019 N.Y. App. Div. LEXIS 968 (N.Y. App. Div. 1st Dep't 2019).

None of the actions identified by the employee constituted a materially adverse change in the terms and conditions of employment under the New York State Human Rights Law, as they did not involve any demotion, decrease in salary, loss of privilege, diminution of responsibilities, or loss of benefits. Golston-Green v City of New York, 184 A.D.3d 24, 123 N.Y.S.3d 656, 2020 N.Y. App. Div. LEXIS 2870 (N.Y. App. Div. 2d Dep't 2020).

Public policy considerations were violated by an arbitrator's finding that an openly gay librarian engaged in inappropriate touching when his actions, i.e. touching, whispering and standing silently next to the students, were the same as the heterosexual female librarian and touching students and whispering in their ear were acceptable practices to maintain order in the library; thus, there was no rational basis for such a finding, especially given his history of 20 years of exemplary service. Asch v New York City Board/Department of Educ., 927 N.Y.S.2d 836, 32 Misc. 3d 886, 2011 N.Y. Misc. LEXIS 3104 (N.Y. Sup. Ct. 2011), rev'd, 104 A.D.3d 415, 960 N.Y.S.2d 106, 2013 N.Y. App. Div. LEXIS 1314 (N.Y. App. Div. 1st Dep't 2013).

Summary judgment dismissing professors' age discrimination claims against a university should have been granted because (1) a professor never sought research grants or assistants that were allegedly denied, and nondiscriminatory reasons supported the denials that occurred as to other professors, (2) the professors were allowed to teach overload and summer courses, contrary to the professors' claim, (3) the record contradicted a professor's claimed denial of a chance to teach graduate courses, which, in any event, was not an adverse employment action, under the circumstances, (4) nothing showed the professors received unfavorable course schedules, (5) barring a professor's continued service as department chair was not discriminatory, as it was pursuant to the university's term limits, and (6) the record did not support a professor's retaliation claim, so nothing showed the professors suffered an adverse employment action. Furfero v St. John's Univ., 94 A.D.3d 695, 941 N.Y.S.2d 639, 2012 N.Y. App. Div. LEXIS 2408 (N.Y. App. Div. 2d Dep't 2012).

In this NYCHRL and NYSHRL action, employer's motion to dismiss the employee's discrimination claim pursuant to her caregiver status was denied where the employee alleged that the employer made "grossly inappropriate and objectively hurtful statements" related to the employee's husband's health. Palmer v Cook, 65 Misc. 3d 374, 108 N.Y.S.3d 297, 2019 N.Y. Misc. LEXIS 4283 (N.Y. Sup. Ct.), dismissed, in part, 64 Misc. 3d 1222(A), 117 N.Y.S.3d 469, 2019 N.Y. Misc. LEXIS 4286 (N.Y. Sup. Ct. 2019), dismissed, in part, 64 Misc. 3d 1222(A), 117 N.Y.S.3d 469, 2019 N.Y. Misc. LEXIS 4301 (N.Y. Sup. Ct. 2019).

District court applied an incorrect standard to employees' retaliation claims against a supervisor, as the employees were not required to show a meaningful change in the terms and conditions of their employment in order to establish an adverse employment action. The employees offered sufficient evidence to survive summary judgment as to a claim of workplace sabotage and as to several punitive scheduling claims, as those alleged actions could well have dissuaded a reasonable worker from making or supporting a charge of discrimination. Hicks v Baines, 593 F.3d 159, 2010 U.S. App. LEXIS 2146 (2d Cir. N.Y. 2010).

Given the jury's finding, by a preponderance of the evidence, that the City attorney was motivated to retaliate against the employee because of her protected activity in making complaints of discrimination, the district court would not have been free to make a finding that the attorney proved by a preponderance of the evidence that he did not acted in bad faith; accordingly, the attorney did not establish his entitlement to qualified immunity with respect to the employee's claim that he retaliated against her in violation of the New York State Human Rights Law, N.Y. Exec. Law § 296 et seq. Lore v City of Syracuse, 670 F.3d 127, 2012 U.S. App. LEXIS 1954 (2d Cir. N.Y. 2012).

Written reprimand, coupled with reduction in job responsibilities, ostracization, and prevention of teacher from chaperoning school trip, constituted "adverse employment action" for purposes of § 1983 and Exec § 296(6). Beattie v Guilderland Cent. Sch. Dist., 124 F. Supp. 2d 802, 2000 U.S. Dist. LEXIS 18269 (N.D.N.Y. 2000).

Teacher's retaliation claim truly faltered on the two elements of an adverse employment action and a causal connection between his complaints and the adverse action. His transfers to and from various schools could not be considered adverse because there was no showing that plaintiff lost some tangible job benefits such as compensation, terms, conditions or privileges of employment. Murphy v Bd. of Educ., 273 F. Supp. 2d 292, 2003 U.S. Dist. LEXIS 12608 (W.D.N.Y. 2003), aff'd, 106 Fed. Appx. 746, 2004 U.S. App. LEXIS 15544 (2d Cir. N.Y. 2004).

Employer was entitled to summary judgment on an employee's retaliation claims involving a change in job title brought pursuant to Title VII of Title VII of the Civil Rights Act of 1964, the New York State Human Rights Law, and 42 U.S.C.S. § 1981 because a

change in job title without any change in duties, compensation, benefits, or reporting structure was not an adverse employment action. Mitchell v Am. Online, 286 F. Supp. 2d 325, 2003 U.S. Dist. LEXIS 18410 (S.D.N.Y. 2003).

Probation officer's involuntary reassignment did not constitute an actionable adverse employment action for purposes of her age discrimination claims because her reassignment was not "tantamount to a demotion" as she failed to proffer any evidence demonstrating that her reassignment resulted in a change in her job responsibilities "so significant as to constitute a setback" to her career, or that her chances for promotion were in any way affected by her reassignment. Kearney v County of Rockland, 373 F. Supp. 2d 434, 2005 U.S. Dist. LEXIS 11956 (S.D.N.Y. 2005), aff'd, 185 Fed. Appx. 68, 2006 U.S. App. LEXIS 14670 (2d Cir. N.Y. 2006).

Former employee sufficiently alleged that her conditions of work were affected and that the action was within the ambit of the New York State Human Rights Law, N.Y, Exec. Law § 296 et seq., by claiming that the harassing and discriminatory conduct made her job in New York more difficult to perform. Curto v Med. World Communs., Inc., 388 F. Supp. 2d 101, 2005 U.S. Dist. LEXIS 27088 (E.D.N.Y. 2005).

Motion to dismiss an employee's claim for retaliation, which was brought pursuant to violation of 42 U.S.C.S. § 2000e-3 and N.Y. Exec. Law § 296(1)(e), was granted for failure to state a claim for relief because: the employee's allegations that negative elements of her performance review did not constitute adverse action; her allegations of diminished secretarial functions failed to establish that the work reductions were sufficiently adverse; and, she did not complain about the reduction in responsibilities for over two years, and she was not claiming that any such adverse treatment was currently being imposed. Patane v Clark, 435 F. Supp. 2d 306, 2006 U.S. Dist. LEXIS 42581 (S.D.N.Y. 2006), aff'd in part and rev'd in part, 508 F.3d 106, 2007 U.S. App. LEXIS 27391 (2d Cir. N.Y. 2007).

Employee failed to establish a prima facie retaliation case, because he has not shown a causal connection between his protected activities and the asserted adverse action—the employee failed to show temporal proximity since the observed rides he complained of did not even begin until more than four months after he filed his federal lawsuit; casting further doubt on the employee's attempts to establish a causal connection was evidence of the employee's history of job infractions and customer complaints. Moreover, neutral arbitrators upheld each of the two suspensions—one involving a collision with a light pole, among other infractions, and the other an incident where the employee closed the doors of his bus on a passenger's neck. George v New York City Transit Auth., 496 F. Supp. 2d 231, 2007 U.S. Dist. LEXIS 51638 (E.D.N.Y. 2007).

Public school teacher's N.Y. Exec. Law § 296(1)(e) retaliation claim failed because the teacher alleged that he was retaliated against for assisting a coworker with filing a sexual harassment complaint against their supervisor but failed to state was form this retaliation took. Pearson v Bd. of Educ., 499 F. Supp. 2d 575, 2007 U.S. Dist. LEXIS 59244 (S.D.N.Y. 2007).

In a former employee's race discrimination lawsuit against his former employer, a state university, and several professors and administrators, under the New York Human Rights Law, N.Y. Exec. Law § 296, most of the employee's claims based on discrete incidents failed because they did not constitute adverse employment actions, particularly the employee's claims regarding the failure to appoint him to a certain committee, giving him a used computer, controlling his administrative assistant, requiring presentation of a complete grant package, and the initial denial of a paid research assistant and other administrative assistance. Whaley v City Univ. of N.Y., 555 F. Supp. 2d 381, 2008 U.S. Dist. LEXIS 35156 (S.D.N.Y. 2008).

Although the sexually-tinged remarks directed at the employee, standing alone, would likely not withstand a motion for summary judgment, when they were combined with her account of disparate treatment, failure to promote, and inappropriate discipline, there was a triable issue of fact as to whether her treatment was severe and pervasive; inter alia, the employee claimed she was the target of ten sexually charged statements made by superiors and the presence of superiors, she observed and was subjected to more burdensome requirements for medical leave and time accounting than her male counterparts, the use of her county vehicle was limited whereas use was not limited for male officers, and she was never considered for a promotion despite having attained the requisite two years of experience while the list created from the results of the June 2000 lieutenant's exam remained active. That the employee's claims raised a triable issue for a jury was further bolstered by the fact that both the alleged harassment and discrimination occurred at the hands of her superiors Anderson v Nassau County Dep't of Corr., 558 F. Supp. 2d 283, 2008 U.S. Dist. LEXIS 21774 (E.D.N.Y. 2008).

Because plaintiff employee offered no evidence that he suffered any adverse employment action as a result of the negative evaluations, and no evidence tending to suggest that the negative evaluations were occasioned by his race, ethnic background or religion, he failed to make out a prima facie case of discrimination under state and local as well as federal law. Siddiqi v New York City Health & Hosps. Corp., 572 F. Supp. 2d 353, 2008 U.S. Dist. LEXIS 63024 (S.D.N.Y. 2008).

In a female police officer's suit against a city, its police department, and others, alleging gender discrimination, her claim regarding a transfer to the technical operations section failed to show gender discrimination in violation of the New York Human Rights Law, N.Y. Exec. Law 296, because the officer failed to show that the transfer resulted in a substantial reduction of her material employment opportunities, and thus, that it constituted an adverse employment action. Lore v City of Syracuse, 583 F. Supp. 2d 345, 2008 U.S. Dist. LEXIS 89484 (N.D.N.Y. 2008), aff'd in part, vacated in part, 670 F.3d 127, 2012 U.S. App. LEXIS 1954 (2d Cir. N.Y. 2012).

In a female police officer's suit against a city, its police department, and others, alleging gender discrimination, her claim regarding her removal from a position as a public information officer failed to show gender discrimination in violation of the New York Human Rights Law, N.Y. Exec. Law 296, because the officer failed to show any reduction in responsibilities, and thus, that it constituted an adverse employment action. Lore v City of Syracuse, 583 F. Supp. 2d 345, 2008 U.S. Dist. LEXIS 89484 (N.D.N.Y. 2008), aff'd in part, vacated in part, 670 F.3d 127, 2012 U.S. App. LEXIS 1954 (2d Cir. N.Y. 2012).

Employee one claimed that the employer discriminated against her on the basis of her sex by: failing to provide her with a permanent bucket truck assignment and assigning an older bucket truck to her; assigning her to perform two-man jobs alone and instructing her co-workers not to assist her; failing to provide a women-only bathroom and reprimanding her for using offsite bathrooms; criticizing her work; denying her light duty work; and denying her pay for time off; however, employee one did not offer evidence from which a reasonable jury could find that she suffered an adverse employment action in circumstances giving rise to an inference of discrimination, and her disparate treatment claims all failed. Dauer v Verizon Communs. Inc., 613 F. Supp. 2d 446, 2009 U.S. Dist. LEXIS 21506 (S.D.N.Y. 2009), vacated, 618 F.3d 112, 2010 U.S. App. LEXIS 16749 (2d Cir. N.Y. 2010).

Where a refusal to provide equipment significantly interferes with or precludes job performance, or creates unreasonably dangerous conditions, such conduct can constitute an adverse employment action; but where the equipment at issue is more desirable, but the job can be performed without it, the failure to provide the desired equipment does not constitute an adverse employment action. Dauer v Verizon Communs. Inc., 613 F. Supp. 2d 446, 2009 U.S. Dist. LEXIS 21506 (S.D.N.Y. 2009), vacated, 618 F.3d 112, 2010 U.S. App. LEXIS 16749 (2d Cir. N.Y. 2010).

Employer's failure to provide same-sex bathrooms is not an adverse employment action. Dauer v Verizon Communs. Inc., 613 F. Supp. 2d 446, 2009 U.S. Dist. LEXIS 21506 (S.D.N.Y. 2009), vacated, 618 F.3d 112, 2010 U.S. App. LEXIS 16749 (2d Cir. N.Y. 2010).

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African-American doctor's N.Y. Exec. Law § 296 race discrimination claims failed because a letter of reprimand that was issued to him by the director of the emergency physicians company for which he worked did not constitute an adverse employment action where (1) the letter had no impact on the doctor's compensation, benefits, or privileges; (2) the doctor's allegations that the letter "poisoned people against him" were insufficient to establish an adverse employment action because it was the doctor, not the director, who publicized the communications regarding the reprimand letter; and (3) there was no evidence that the doctor's shifts were further decreased as a result of the reprimand letter, and instead, there was evidence that the doctor had requested to work fewer shifts because he was working at two other hospitals. Lawrence v Nyack Emergency Physicians, P.C., 659 F. Supp. 2d 584, 2009 U.S. Dist. LEXIS 87386 (S.D.N.Y. 2009), aff'd, 389 Fed. Appx. 54, 2010 U.S. App. LEXIS 16636 (2d Cir. N.Y. 2010).

Plaintiff employee could not show adverse employment actions as to her claims for employment discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., 42 U.S.C.S. § 1981, and N.Y. Exec. Law § 296(1) because the claims were based on alleged activities which took place after her employment had ended, including failure to provide an appropriate letter of recommendation and blackballing the employee with other prospective employers. Memnon v Clifford Chance US, LLP, 667 F. Supp. 2d 334, 2009 U.S. Dist. LEXIS 99936 (S.D.N.Y. 2009).

In a case in which the only claims remaining before the court were a former employee's retaliation claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., and the New York Human Rights Law, N.Y. Exec. Law § 290 et seq., and the former employer moved for summary judgment, the former employee could not establish her prima facie case, much less demonstrate an factual issues regarding pretext. The former employee did not allege any adverse employment action following her complaints to her plant manager. Hall v Parker Hannifan Corp., 824 F. Supp. 2d 464, 2009 U.S. Dist. LEXIS 108663 (W.D.N.Y. 2009).

Assuming that the employee experienced an adverse employment action as a result of enhanced scrutiny, she failed to present any admissible evidence that non-African-American male coworkers, or coworkers younger than the employee, were also not scrutinized, reprimanded, or written up. Thus, the employee has failed to satisfy her de minimis burden to establish a prima facie disparate treatment case of race, gender, or age discrimination based on her supervisors' alleged excessive scrutiny and reprimands. Hall v N.Y. City DOT, 701 F. Supp. 2d 318, 2010 U.S. Dist. LEXIS 31077 (E.D.N.Y. 2010).

Former employee's race and national origin discrimination claims failed because a route reassignment, a written warning, and other alleged actions did not amount to materially adverse employment actions. Polanco v 34th St. P'ship, 724 F. Supp. 2d 420, 2010 U.S. Dist. LEXIS 68699 (S.D.N.Y. 2010).

In the absence of any documentary evidence showing that someone substitute taught for an employee, the employer could not establish, as a matter of law, that the temporary decline in the employee's weekly pay was attributable to her having failed to teach a scheduled class; consequently, because the causal relation between the pay decrease and the Equal Employment Opportunity Commission claim was disputed, the court was unable to hold, as a matter of law, that the drop in pay was not retaliatory. Butler v N.Y. Health & Racquet Club, 768 F. Supp. 2d 516, 2011 U.S. Dist. LEXIS 9629 (S.D.N.Y. 2011).

Fifty-eight-year-old Hispanic female former employee of Puerto Rican descent failed to demonstrate discrimination under the New York State Human Rights Law, as none of the alleged actions, including denial of the former employee's request for a hotel overnight stay, giving negative performance evaluations, "micromanaging" the former employee's schedule, and denying the former employee a "work-at-home" day, qualified as adverse employment actions. Costello v New York State Nurses Ass'n, 783 F. Supp. 2d 656, 2011 U.S. Dist. LEXIS 44211 (S.D.N.Y. 2011).

Employee of a car service did not establish a discrimination claim under N.Y. Exec. Law § 296(15), as the service's temporary suspension of the employee after a background check revealed criminal convictions did not constitute an adverse employment action. The suspension was justified by the need to investigate the employee's past convictions, which was anticipated by N.Y. Correct. Law § 752. Fox v Commonwealth Worldwide Chauffeured Transp. of Ny, 865 F. Supp. 2d 257, 2012 U.S. Dist. LEXIS 45675 (E.D.N.Y. 2012).

Record contained sufficient evidence for a fact finder to conclude that there was a causal connection between the supervisor's actions and the employee's participation in protected activity; the proximity between the employee's complaint on July 10, 2006, and the Letter of Instruction (LOI) issuance on August 1, 2006—a matter of weeks—was plainly sufficient to satisfy this prong. The timing of the supervisor's discovery of the complaint, moreover, only reinforced the connection—a mere four days before the LOI was issued—such a close temporal connection between the protected activity and the adverse action was sufficient to establish causation. Alvarado v Metro. Transp. Auth., 2012 U.S. Dist. LEXIS 48530 (S.D.N.Y. Mar. 30, 2012).

Female employee had plausibly alleged a hostile work environment under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., and the New York Human Rights Law where her allegations regarding the pornographic snowman cartoon and the "bitch is back" song plausibly suggested a connection between the conduct and her gender, and the pleadings were silent as to whether an anti harassment policy was in place. Seale v Madison Cnty, 929 F. Supp. 2d 51, 2013 U.S. Dist. LEXIS 31284 (N.D.N.Y. 2013).

Female employee had not plausibly alleged discrimination, disparate treatment, or retaliation under N.Y. Exec. Law § 296 where her change in work schedule did not alter her compensation. Seale v Madison Cnty, 929 F. Supp. 2d 51, 2013 U.S. Dist. LEXIS 31284 (N.D.N.Y. 2013).

Court declined to dismiss a female employee's retaliation claim where although she had not alleged any extenuating circumstances in addition to the change in the level of flexibility of her work schedule, she had alleged that the flexibility of being able to work evenings, weekends and holidays was part of the incentives and compensation for her employment, and thus, it was plausible that the change of the location of her office, which eliminated that flexibility, was materially adverse to her. Seale v Madison Cnty, 929 F. Supp. 2d 51, 2013 U.S. Dist. LEXIS 31284 (N.D.N.Y. 2013).

65. Slurs and insults

Numerous inquiries by library trustee as to librarian's race, religion and maiden name, by constant harassment of her while she was performing her duties, and the incorporation by him in his charges of a gratuitous, baseless, irrelevant and insulting statement concerning her religious sect and "language background", notwithstanding her extensive educational background

and vocational excellence, when examined in aggregate, evidenced a prejudicial and biased attitude and a pattern of discrimination which the Human Rights Law was designed to combat. State Div. of Human Rights v Gorton, 32 A.D.2d 933, 302 N.Y.S.2d 966, 1969 N.Y. App. Div. LEXIS 3409 (N.Y. App. Div. 2d Dep't 1969).

Use of ethnic slurs and insults by a coworker or superior without knowledge or acquiescence of employer is not an unlawful discriminatory practice reached by provision of Human Rights Law prohibiting discrimination in compensation, terms, conditions or privileges of employment because of race, creed, color or national origin. State Div. of Human Rights v Henderson, 49 A.D.2d 1026, 375 N.Y.S.2d 497, 1975 N.Y. App. Div. LEXIS 11383 (N.Y. App. Div. 4th Dep't 1975).

An isolated insult of an employee by a supervisor is insufficient proof to find that the employer discriminated because of race and color, without evidence that the employer condoned or ratified the use of such language. Thus, an order of the Commissioner of Human Rights finding that an employer had discriminated against an employee because of race and color would be vacated where no evidence had been presented to show that the employer permitted or condoned the racial slur used by the supervisor against the employee in an argument over a work assignment. State Div. of Human Rights v GMC, Fisher Body Div., 78 A.D.2d 1006, 433 N.Y.S.2d 904, 1980 N.Y. App. Div. LEXIS 13783 (N.Y. App. Div. 4th Dep't 1980), aff'd, 54 N.Y.2d 905, 445 N.Y.S.2d 150, 429 N.E.2d 829, 1981 N.Y. LEXIS 3107 (N.Y. 1981).

Determination that petitioner engaged in unlawful discriminatory practice in conditions of complainant's employment was supported by substantial evidence where it was established that manager of store at which complainant worked frequently made derogatory comments about complainant's race, including references that complainant was his "little nigger slave," in presence of customers and complainant's co-workers; compensatory award of $5,000 for mental anguish was not excessive. Broad Elm Auto Centers, Inc. v New York State Div. of Human Rights, 159 A.D.2d 978, 552 N.Y.S.2d 763, 1990 N.Y. App. Div. LEXIS 3281 (N.Y. App. Div. 4th Dep't 1990).

Commissioner of Division of Human Rights had authority to determine that petitioner engaged in discriminatory practice based on manager's racial slurs, notwithstanding that complainant did not make that specific allegation in his complaint, since (1) elimination of discrimination in provision of basic opportunities is predominant purpose of Human Rights Law, (2) although complainant's testimony regarding racial slurs was in context of charge of unlawful termination, it was also directed at employment relationship between parties, and (3) petitioner could not claim surprise or prejudice from testimony as manager admitted making remarks on several occasions. Broad Elm Auto Centers, Inc. v New York State Div. of Human Rights, 159 A.D.2d 978, 552 N.Y.S.2d 763, 1990 N.Y. App. Div. LEXIS 3281 (N.Y. App. Div. 4th Dep't 1990).

Parking garage cashier's assertion that employer's vice-president once told her to tighten her bow tie, and that "I don't care if it chokes you" would not support finding of harassment or hostile work environment where she claimed that it occurred only once, and she was not disciplined as result. Engstrom v Kinney Sys., 241 A.D.2d 420, 661 N.Y.S.2d 610, 1997 N.Y. App. Div. LEXIS 8153 (N.Y. App. Div. 1st Dep't), app. denied, 91 N.Y.2d 801, 666 N.Y.S.2d 563, 689 N.E.2d 533, 1997 N.Y. LEXIS 4149 (N.Y. 1997).

In an action, inter alia, to recover damages for discrimination based on sex in violation of N.Y. Exec. Law § 296, etc., there was no evidence that an employee's coworker's isolated remarks and offensive conduct were so severe or pervasive as to permeate the workplace and alter the conditions of the employee's employment. The employee claimed that one of the employee's male coworkers repeatedly referred to the women in the office as "soup chickens" and "peasants," and intentionally punched the employee in the left breast during an argument. Thompson v Lamprecht Transp., 39 A.D.3d 846, 834 N.Y.S.2d 312, 2007 N.Y. App. Div. LEXIS 5167 (N.Y. App. Div. 2d Dep't 2007).

Plaintiff's employer and supervisor were entitled to summary judgment dismissing sexual harassment claims because plaintiff was unable to show that supervisor's alleged conduct, even if true, was promoted simply because of her gender, where he made negative gay comments to both men and women, his boorish behavior and inappropriate social skills did not constitute discriminatory harassment, and his touching of plaintiff's shoulders on "several" occasions over 10-day period in small work cubicle did not rise to level of sexual harassment. Baliva v State Farm Mut. Ins. Co., 186 Misc. 2d 254, 718 N.Y.S.2d 144, 2000 N.Y. Misc. LEXIS 478 (N.Y. Sup. Ct. 2000), aff'd, 286 A.D.2d 953, 730 N.Y.S.2d 655, 2001 N.Y. App. Div. LEXIS 8896 (N.Y. App. Div. 4th Dep't 2001), aff'd, 286 A.D.2d 953, 730 N.Y.S.2d 920, 2001 N.Y. App. Div. LEXIS 9016 (N.Y. App. Div. 4th Dep't 2001).

African-American employee did not show that she was constructively discharged from her employment due to racial discrimination as she did not show more than a few isolated incidents or racial enmity, and the occasional racist remarks she alleged did not suffice, even though directed at her, because they did not constitute harassment sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. Forrest v Jewish Guild for the Blind, 309 A.D.2d 546, 765 N.Y.S.2d 326, 2003 N.Y. App. Div. LEXIS 10478 (N.Y. App. Div. 1st Dep't 2003), aff'd, 3 N.Y.3d 295, 786 N.Y.S.2d 382, 819 N.E.2d 998, 2004 N.Y. LEXIS 3489 (N.Y. 2004).

Supervisor's occasional nastiness did not constitute adverse action disadvantaging former employee for purposes of retaliation claim under Human Rights Law. Van Zant v KLM Royal Dutch Airlines, 80 F.3d 708, 1996 U.S. App. LEXIS 5687 (2d Cir. N.Y. 1996).

Discrimination claim based on alleged hostile work environment was properly dismissed where sexual harassment that led to hostile work environment was attributable to co-employee, plaintiff complained to employer in accordance with employer's procedures, and employer promptly investigated complaint and dealt with situation by reprimanding (and then terminating) offending co-employee. Van Zant v KLM Royal Dutch Airlines, 80 F.3d 708, 1996 U.S. App. LEXIS 5687 (2d Cir. N.Y. 1996).

Plaintiff's allegation that her former supervisor created hostile work environment by making sexually lewd and derogatory remarks about her while in her presence stated cause of action under CLS Exec § 296(6), which makes it unlawful to aid, abet, incite, compel or coerce doing of any acts forbidden by Human Rights Law. Storr v Anderson Sch., 919 F. Supp. 144, 1996 U.S. Dist. LEXIS 3039 (S.D.N.Y. 1996).

Jurisdiction over racially hostile environment claim is sustained, where assembler/tester generally claims he was reassigned to finishing line and ultimately discharged due to his race, and specifically alleges one incident in which co-worker called him "black monkey" and that racial epithets appeared regularly on bathroom walls during his employment, because allegations could state claim under CLS Exec Law § 296. Cooper v Xerox Corp., 994 F. Supp. 429, 1998 U.S. Dist. LEXIS 1697 (W.D.N.Y. 1998).

African-American female security supervisor's Exec § 296 claim is denied summarily, even though white male manager called her "black bitch" on one occasion, because inability to establish prima facie case under Title VII (42 USCS §§ 2000e et seq.) is fatal to her claims under state law. Khan v Abercrombie & Fitch, Inc., 35 F. Supp. 2d 272, 1999 U.S. Dist. LEXIS 3808 (E.D.N.Y.), aff'd, 201 F.3d 431, 1999 U.S. App. LEXIS 36865 (2d Cir. N.Y. 1999).

Puerile and tasteless memoranda, insulting to residents of Arkansas and New Jersey, that were circulated at white employee's office, as well as comment made by co-worker about working with blacks were insufficient, either separately or together, to transform employee's work environment into hostile work environment under Exec Law § 296. Baer v Sprint Long Distance, 60 F. Supp. 2d 209, 1999 U.S. Dist. LEXIS 12245 (S.D.N.Y. 1999).

Race-based hostile environment claim of Indian information technology architect is denied summarily, even though co-worker made 6 comments over period of 7 months that architect found offensive, because infrequency and lack of severity of alleged discriminatory conduct defeats claim. Kodengada v IBM, 88 F. Supp. 2d 236, 2000 U.S. Dist. LEXIS 3066 (S.D.N.Y.), aff'd, 242 F.3d 366, 2000 U.S. App. LEXIS 36563 (2d Cir. N.Y. 2000).

Employees of municipal park service did not aid and abet violation of Exec § 296(1)(a), and similar city code provision, where noose was hung where black complaining employee would see it, he was exposed to poster depicting blacks in negative stereotypical fashion, and fellow employee allegedly once called him "fucking nigger," spat at him, and made obscene gesture, since incidents were too sporadic. McCoy v City of New York, 131 F. Supp. 2d 363, 2001 U.S. Dist. LEXIS 1534 (E.D.N.Y. 2001).

In a case alleging unlawful termination and hostile work environment due to age, the jury, considering the totality of the evidence, could and did conclude that $80,000 was a reasonable sum for a former employee's pain and suffering caused by defendants, her employer and its executive director. On the evidence, the jury's award for emotional distress did not deviate materially from the maximum compensation found reasonable in other similar cases, and defendants' motion to set aside the verdict or for a new trial on this issue was denied. Gatti v Cmty. Action Agency of Greene County, Inc., 263 F. Supp. 2d 496, 2003 U.S. Dist. LEXIS 8577 (N.D.N.Y. 2003), aff'd, 86 Fed. Appx. 478, 2004 U.S. App. LEXIS 2036 (2d Cir. N.Y. 2004).

Where an employee alleged that a coworker hissed at him, made offensive comments on two occasions, licked a bagel suggestively, and attempted to kiss the employee, an employer was not liable for creating a hostile work environment because the incidents were not severe or pervasive, the coworker was not in a supervisory position over the employee, and the employer took appropriate remedial action by issuing a warning that stopped the unwanted behavior. Godineaux v Laguardia Airport Marriott Hotel, 460 F. Supp. 2d 413, 2006 U.S. Dist. LEXIS 80862 (E.D.N.Y. 2006).

Employee did not merely suffer a few isolated incidents of name-calling, rather, he produced evidence that he was the victim of a persistent barrage of ethnically offensive comments that spiked following the $^{9}/_{11}$ attacks on the World Trade Center as well as one serious physical assault and a reasonable jury could thus find that the employee's working conditions were altered for the worse by the near-constant stream of biased rhetoric punctuated by a physical assault. The employee also showed that material issues of fact existed regarding whether the conduct could be imputed to his employer; given that the coworker was employee's union representative and the employee complained to supervisors about the coworker's own offensive conduct, the employee also raised triable issues of fact as to whether the employer provided the employee with a reasonable avenue for complaints. George v New York City Transit Auth., 496 F. Supp. 2d 231, 2007 U.S. Dist. LEXIS 51638 (E.D.N.Y. 2007).

African-American doctor's N.Y. Exec. Law § 296 race discrimination claims failed because there was no evidence that a letter of reprimand that was issued to him by the director of the emergency physicians company for which he worked was motivated by racial animus where (1) a coworker who was not disciplined with regard to the incident was not similarly situated to the doctor because the coworker was a recent medical school graduate and had not spoken with police or other hospital staff during the incident underlying the reprimand letter, which concerned a hysterical patient; and (2) the director's alleged sporadic racial comments before the incident were unconnected by time or date to the reprimand letter and were thus insufficient to support a claim of racial discrimination. Lawrence v Nyack Emergency Physicians, P.C., 659 F. Supp. 2d 584, 2009 U.S. Dist. LEXIS 87386 (S.D.N.Y. 2009), aff'd, 389 Fed. Appx. 54, 2010 U.S. App. LEXIS 16636 (2d Cir. N.Y. 2010).

66. —Interim position

Union had valid nondiscriminatory reason for acquiescing in employer's removal of female from position, furnishing her with interim positions, and then restoring her to original position, precluding claim of gender discrimination under federal law and CLS Exec Law § 296, where actions were taken in response to reduction in force, in accordance with seniority and pursuant to collective bargaining agreement. Szarka v Reynolds Metals Co., 17 F. Supp. 2d 115, 1998 U.S. Dist. LEXIS 13426 (N.D.N.Y. 1998).

Requiring black deputy to bring in doctor's excuse for taking one sick day from work in violation of union contract, attempting to dock his pay, and asking him to leave did not amount to adverse employment actions as required to establish racial discrimination claim under Exec § 296. Brown v Middaugh, 41 F. Supp. 2d 172, 1999 U.S. Dist. LEXIS 2225 (N.D.N.Y. 1999).

County police commissioner and county executive were entitled to qualified immunity from liability under Exec § 296 arising from their involvement in adoption and implementation of affirmative action program for county police department, absent evidence that decisions to formulate and implement program were not discretionary or that officials acted in bad faith. Hiller v County of Suffolk, 81 F. Supp. 2d 420, 2000 U.S. Dist. LEXIS 743 (E.D.N.Y. 2000).

III. Housing Discrimination

67. In general

Application for enforcement of order establishing discriminatory practices with relation to housing was premature where there was no evidence of noncompliance with said order. Castelluzzo v State Human Rights Appeal Board, 41 A.D.2d 1015, 343 N.Y.S.2d 718, 1973 N.Y. App. Div. LEXIS 4437 (N.Y. App. Div. 4th Dep't 1973).

Action to recover damages for unlawful discriminatory practices in housing was properly dismissed as to plaintiffs who were employees of antidiscrimination organization and who had visited defendants' apartment building only as "testers" under pretense of being prospective tenants after others had reportedly been denied accommodations there because of race, since testers conceded that they did not wish to rent apartment and had acted only on behalf of others. Dunn v Fishbein, 123 A.D.2d 659, 507 N.Y.S.2d 29, 1986 N.Y. App. Div. LEXIS 60809 (N.Y. App. Div. 2d Dep't 1986).

Jury verdict for defendants in action for housing discrimination based on sexual orientation was supported by evidence that board of directors had valid reasons for not approving plaintiff's housing application, including his admittedly false answers on his application form, his persistent tardiness in paying rent to his present landlord, and his lack of any apparent assets, where plaintiff did not show that those reasons were pretext for discrimination. Fine v Berman, 238 A.D.2d 220, 657 N.Y.S.2d 6, 1997 N.Y. App. Div. LEXIS 4080 (N.Y. App. Div. 1st Dep't 1997).

Plaintiffs' housing discrimination claims under 42 USCS §§ 1981 or 3604, and CLS Civ R § 40-c and CLS Exec § 296, were properly dismissed where property was sold to other bidders on terms more favorable to defendants than those then being offered by plaintiffs. Rice v Buie, 259 A.D.2d 360, 687 N.Y.S.2d 52, 1999 N.Y. App. Div. LEXIS 2813 (N.Y. App. Div. 1st Dep't 1999).

University's written policy, allowing medical students to live in its housing with fellow students or with their spouses and dependent children, did not discriminate against plaintiffs, unmarried women who were denied permission to live with their life partners in such housing, on basis of marital status in violation of state and city human rights laws (CLS Exec § 296(2-a), (5)(a)(1); NYC Admin Code §§ 8-107(5) and 8-130); further, university's policy did not have disparate impact on homosexuals since it had same impact on non-married, heterosexual medical students as it had on non-married, homosexual medical students. Levin v Yeshiva Univ., 272 A.D.2d 158, 709 N.Y.S.2d 392, 2000 N.Y. App. Div. LEXIS 5398 (N.Y. App. Div. 1st Dep't 2000), aff'd in part, modified, 96 N.Y.2d 484, 730 N.Y.S.2d 15, 754 N.E.2d 1099, 2001 N.Y. LEXIS 2016 (N.Y. 2001).

Attorney general was entitled to a permanent injunction prohibiting the landlord from violating West Seneca Fair Housing Code § 71-3 (A) because the landlord had engaged in discrimination based on a person's source of income by refusing to accept housing vouchers under § 8 of the United States Housing Act of 1937. Section 8 vouchers constituted a "source of income" because they were a recurrent benefit, measured in terms of money, that constituted financial gain to the recipient. People v Ivybrooke Equity Enters., LLC, 175 A.D.3d 1000, 107 N.Y.S.3d 248, 2019 N.Y. App. Div. LEXIS 6345 (N.Y. App. Div. 4th Dep't 2019).

Nothing in this and the two next succeeding sections states or indicates an intent to reserve to the state exclusive power over discrimination in housing which would preclude local legislation in that field not inconsistent with state laws. New York v

Claflington, Inc., 40 Misc. 2d 547, 243 N.Y.S.2d 437, 1963 N.Y. Misc. LEXIS 1934 (N.Y. Sup. Ct. 1963).

By its enactment of General Municipal Law § 239-s giving New York City concurrent jurisdiction with the State Commission for Human Rights with respect to discrimination in housing, the legislature conclusively demonstrated its intention not to grant exclusive jurisdiction to the state in the matters of discrimination in housing. Feigenblum v Commission on Human Rights, 53 Misc. 2d 360, 278 N.Y.S.2d 652, 1967 N.Y. Misc. LEXIS 1658 (N.Y. Sup. Ct. 1967).

Provision in order of commission for human rights restraining discrimination in rental of housing accommodations, land or commercial space subject to the law against discrimination would be deleted insofar as it applied to land and commercial space where hearing upon which such order was based since involved no property of such nature. New York State Com. for Human Rights v E. Landau Industries, Inc., 57 Misc. 2d 918, 293 N.Y.S.2d 917, 1968 N.Y. Misc. LEXIS 1200 (N.Y. Sup. Ct. 1968).

University's housing policy, which required proof of marriage in order for nonstudent spouses to reside in apartments, did not violate provisions of state and city Human Rights Law prohibiting discrimination on basis of marital status, notwithstanding alleged disparate impact on homosexuals who (unlike heterosexual couples) are not allowed to marry their same-sex partners. Levin v Yeshiva Univ., 180 Misc. 2d 829, 691 N.Y.S.2d 280, 1999 N.Y. Misc. LEXIS 205 (N.Y. Sup. Ct. 1999).

Likelihood of success of a housing applicant's fair housing claims under the New York State's and City's Human Rights Laws (N.Y. Exec. Law § 296 et seq.; New York City, N.Y., Admin. Code § 8-101 et seq.) is the same as the analysis of his claim under the Fair Housing Act, 42 U.S.C.S. § 3601 et seq., as, like the Fair Housing Act, New York State's and City's Human Rights Laws expressly prohibit an owner of a housing accommodation to make any record or inquiry in connection with the prospective purchase, rental or lease of such a housing accommodation which expresses, directly, or indirectly, any limitation, specification, or discrimination as to disability (N.Y. Exec. Law § 296(5)(a)(3); New York City, N.Y., Admin. Code § 8-107(5)(a)(3)). Hirschmann v Hassapoyannes, 811 N.Y.S.2d 870, 11 Misc. 3d 265, 234 N.Y.L.J. 114, 2005 N.Y. Misc. LEXIS 2748 (N.Y. Sup. Ct. 2005).

While this section makes it an unlawful discriminatory practice to refuse to rent accommodations in multiple dwellings to any person because of race, creed, color or national origin, it gives no specific remedy to a person so discriminated against and he can accordingly seek redress only through the existing procedures contained in this article of the Executive Law. Redd v Zier, 229 N.Y.S.2d 582, 1962 N.Y. Misc. LEXIS 4175 (N.Y. Sup. Ct. 1962).

In a N.Y. Exec. Law § 296 action, defendants' policy with respect to combining incomes to meet minimum financial qualifications for housing eligibility did not constitute discrimination based on marital status. Rather, defendants' policy was based on the absence of a marital relationship between plaintiffs, which was not unlawful discrimination. Heard v Stratford I Ltd. Partnership, 27 A.D.3d 1152, 811 N.Y.S.2d 841, 2006 N.Y. App. Div. LEXIS 3263 (N.Y. App. Div. 4th Dep't 2006).

Claim of sexual harassment states cause of action under state fair housing law, where state courts have recognized cause of action for sexual harassment under employment discrimination laws, and where employment discrimination laws and fair housing law are both part of overall scheme. New York by Abrams v Merlino, 694 F. Supp. 1101, 1988 U.S. Dist. LEXIS 10461 (S.D.N.Y. 1988).

Tenant's claims that a property rental agency violated N.Y. Exec. Law § 296 by failing to install ramps or widen doorways so as to accommodate the tenant's wheelchair-bound daughter failed because the agency was not obligated to undertake wholly new construction or to modify existing facilities. Reyes v Fairfield Props., 661 F. Supp. 2d 249, 2009 U.S. Dist. LEXIS 88328 (E.D.N.Y. 2009).

Tenant's claims that a property rental agency violated N.Y. Exec. Law § 296 by allowing the parking lot of the apartment complex to fall into disrepair and by refusing to allow the tenant a parking spot that was easily accessible to the tenant's wheelchair-bound minor daughter, were viable because such accommodations were considered reasonable and did not involve renovation or construction. Reyes v Fairfield Props., 661 F. Supp. 2d 249, 2009 U.S. Dist. LEXIS 88328 (E.D.N.Y. 2009).

68. Constitutionality issues

Provisions of Executive Law Article 15 are constitutional insofar as they authorize Human Rights Commission to effectuate state policy against discrimination in private housing. State Com. for Human Rights v Kennelly, 30 A.D.2d 310, 291 N.Y.S.2d 686, 1968 N.Y. App. Div. LEXIS 3427 (N.Y. App. Div. 2d Dep't), aff'd, 23 N.Y.2d 722, 296 N.Y.S.2d 367, 244 N.E.2d 58, 1968 N.Y. LEXIS 992 (N.Y. 1968).

Provisions of Executive Law Article 15 held constitutional insofar as they authorize Human Rights Commission to effectuate state policy against discrimination in private housing. State Com. for Human Rights v Kennelly, 30 A.D.2d 310, 291 N.Y.S.2d 686, 1968 N.Y. App. Div. LEXIS 3427 (N.Y. App. Div. 2d Dep't), aff'd, 23 N.Y.2d 722, 296 N.Y.S.2d 367, 244 N.E.2d 58, 1968 N.Y. LEXIS 992 (N.Y. 1968).

The statutory exemptions of owner-occupied, two-family houses from the application of the statute prohibiting discrimination in the rental of dwellings is constitutional. Berback v Mangum, 59 Misc. 2d 41, 297 N.Y.S.2d 853, 1969 N.Y. Misc. LEXIS 1741 (N.Y. Sup. Ct.), aff'd, 33 A.D.2d 655, 306 N.Y.S.2d 671, 1969 N.Y. App. Div. LEXIS 5650 (N.Y. App. Div. 4th Dep't 1969).

Even if § 296(5) of the Executive Law is unconstitutional, this fact alone would not serve to expand the jurisdiction of the Commission of Human Rights to previously exempted property, since the Legislature might well determine these cases are outside the Commission's jurisdiction leaving them for private disposition in suits pursuant to USCS § 1982 of Title 42. Richards v Mangum, 60 Misc. 2d 410, 303 N.Y.S.2d 320, 1969 N.Y. Misc. LEXIS 1370 (N.Y. Sup. Ct. 1969), rev'd, 35 A.D.2d 124, 314 N.Y.S.2d 512, 1970 N.Y. App. Div. LEXIS 3884 (N.Y. App. Div. 4th Dep't 1970).

Tenants of Harlem apartment complex, members of board of directors of tenants' association, and real estate developer whose bid to purchase complex was rejected by plaintiffs could not be held liable under Human Rights Law, CLS Exec § 296, for activities which included sending of letters to potential purchasers and issuing of newsletters expressing their views against sale of complex to white purchaser, since all such activities were constitutionally protected under of freedoms of speech, assembly and association. Delano Village Cos. v Orridge, 147 Misc. 2d 302, 553 N.Y.S.2d 938, 1990 N.Y. Misc. LEXIS 125 (N.Y. Sup. Ct. 1990).

State and its agencies, which negotiated lease for residence to provide housing for developmentally disabled persons and decided which individuals to place there, violated due process and equal protection rights of actual occupants of residence by failing to notify them of summary holdover proceeding involving residence. DiScala v Facilities Dev. Corp., 180 Misc. 2d 355, 691 N.Y.S.2d 229, 1998 N.Y. Misc. LEXIS 689 (N.Y. Civ. Ct. 1998).

69. Leases, generally

The trial court improperly dismissed a holdover proceeding brought by a landlord to evict a tenant for allegedly violating her lease by allowing a person not a tenant and not part of her immediate family to occupy the apartment with her, where in seeking to enforce the restrictive covenant, the landlord did not discriminate against the tenant on the basis of marital status in violation of Exec Law § 296 or the applicable city human rights law, in that the applicability of the restriction did not depend on the tenant's marital status, but would apply whether the additional resident was male or female. Hudson View Properties v Weiss, 59 N.Y.2d 733, 463 N.Y.S.2d 428, 450 N.E.2d 234, 1983 N.Y. LEXIS 3090 (N.Y. 1983).

Where Special Term modified an order of the State Commission on Human Rights by deleting a paragraph requiring certain apartment owners to maintain records for one year showing the number of apartments rented, the number unrented, and as to each vacant apartment the number of rooms, required rental, and names and addresses of accepted and rejected applicants with reasons for rejection, such paragraph was reinstated as being reasonably related to the unlawful act which such owners were

found to have committed and as not imposing undue hardship upon them. Kindt v State Com. for Human Rights, 23 A.D.2d 809, 258 N.Y.S.2d 250, 1965 N.Y. App. Div. LEXIS 4484 (N.Y. App. Div. 4th Dep't), aff'd, 16 N.Y.2d 1001, 265 N.Y.S.2d 662, 212 N.E.2d 898, 1965 N.Y. LEXIS 1001 (N.Y. 1965).

Sufficient evidence supported determination by New York City Commission on Human Rights that sublessor was guilty of discrimination where he had terminated dentist's sublease on ground that dentist provided treatment to persons who were ill with AIDS. Barton v New York City Com. on Human Rights, 151 A.D.2d 258, 542 N.Y.S.2d 176, 1989 N.Y. App. Div. LEXIS 7353 (N.Y. App. Div. 1st Dep't 1989).

Landlord's refusal to rent apartment to cohabiting couple was not unlawful discrimination on basis of "marital status" under CLS Exec § 296(5)(a); although landlords are prohibited from discriminating against persons because they are unmarried, landlords may discriminate against persons, married or unmarried, who wish to cohabit with nonspouse. Hoy v Mercado, 266 A.D.2d 803, 698 N.Y.S.2d 384, 1999 N.Y. App. Div. LEXIS 11920 (N.Y. App. Div. 4th Dep't 1999).

Based on evidence of a tenant's significant limitations on major life activities and interacting with others, he was disabled within the meaning of the Fair Housing Act and the New York Human Rights Act and established that he was entitled to an emotional support dog in his dog restricted apartment complex under both Acts. Hollandale Apts. & Health Club, LLC v Bonesteel, 173 A.D.3d 55, 100 N.Y.S.3d 711, 2019 N.Y. App. Div. LEXIS 3703 (N.Y. App. Div. 3d Dep't 2019).

There is nothing illegal in a landlord discriminating against lawyers as a group, or trying to keep out of his building intelligent persons, aware of their rights, who may give him trouble in the future, or rejecting any prospective tenant because of his or her failure to meet standards of acceptability other than standards which section 296 (subd 5) of the Human Rights Law (Executive Law, art 15) prohibits him from using. Kramarsky v Stahl Management, 92 Misc. 2d 1030, 401 N.Y.S.2d 943, 1977 N.Y. Misc. LEXIS 2630 (N.Y. Sup. Ct. 1977).

In addition to prohibiting a landowner or other person from refusing to sell, rent, or lease housing accommodations on a discriminatory basis, Exec Law § 296 prohibits a landowner from failing to renew a lease or serving a "notice to cure" for a discriminatory reason after a lease has been signed and, accordingly an unmarried couple who began living together after the commencement of a one-year lease would be granted a preliminary injunction restraining a landlord from evicting them under a clause in the lease which provided that "only a party signing this lease and the spouse and children of that party may use the apartment"; furthermore, the landlord would not be allowed to use a possible technical violation by the couple of the overcrowding provision of the city's Code which did not provide for enforcement of its terms by private persons, to circumvent the purpose of human rights legislation prohibiting discrimination based on marital status. Munroe v 344 East 76th Realty Corp., 113 Misc. 2d 155, 448 N.Y.S.2d 388, 1982 N.Y. Misc. LEXIS 3262 (N.Y. Sup. Ct. 1982).

In a holdover proceeding against respondent, who resided for 3 years in the apartment in question with her lover who was the only signatory on the lease, respondent would be entitled to remain in possession after the signatory tenant moved out and the proceeding would be dismissed, notwithstanding that the signatory tenant violated a substantial obligation of the tenancy in permitting the apartment to be occupied by persons other than his immediate family, since it is unlawful for a landlord to seek to evict someone in possession solely on the basis that she was not married to the signatory tenant under Exec Law § 296, which proscribes discrimination in housing on the basis of marital status, in that had the respondent been married to the signatory tenant she would have been allowed to remain in the apartment even if they subsequently became separated and she had not signed the lease. Yorkshire House Associates v Lulkin, 114 Misc. 2d 40, 450 N.Y.S.2d 962, 1982 N.Y. Misc. LEXIS 3431 (N.Y. Civ. Ct. 1982).

A "singles only" provision in a residential lease, restricting occupancy of an apartment to only one named tenant, would be violative of public policy of the State of New York as expressed by Exec Law § 296, where the arbitrary enforcement of the "singles only" restriction in such lease would, if the tenant married or chose a life-style with a man without benefit of marriage, subsequent to the inception of the lease term, constitute marital discrimination. Leonedas Realty Corp. v Brodowsky, 115 Misc. 2d 88, 454 N.Y.S.2d 183, 1982 N.Y. Misc. LEXIS 3635 (N.Y. Civ. Ct. 1982).

Discrimination in leasing of commercial space, in violation of New York City Administrative Code and Human Rights Law, is affirmative defense to summary holdover proceeding, although discriminatory motive is hard to prove and easy to allege without any factual basis; state may not judicially enforce landlord's bigotry. Elisau Estates v Schrager, 136 Misc. 2d 289, 518 N.Y.S.2d 712, 1987 N.Y. Misc. LEXIS 2426 (N.Y. Civ. Ct. 1987).

Nonprofit hospital's staff housing lease agreements, which provided for termination of employment and ancillary housing tenancy "without cause," would not be enforced in holdover summary proceedings if tenants were terminated because of their prior revelation of disability due to AIDS, in violation of NYC Admin Code § 8-108 and CLS Exec § 292(21). New York Infirmary - Beekman Downtown Hosp. v Sarris, 154 Misc. 2d 798, 588 N.Y.S.2d 748, 1992 N.Y. Misc. LEXIS 393 (N.Y. Civ. Ct. 1992).

Religious organization, which operated residence for young single working women between ages of 18 and 45 for period not to exceed 4 years, was not barred from enforcing 4-year residency restriction since (1) restriction was permissible to further organization's mission to provide safe haven for women of limited means embarking on new life in city, and (2) although organization had not enforced restriction in past, application forms signed by plaintiffs clearly stated that condition of admission was that length of stay would not exceed 4 years. Priolo v Saint Mary's Home for Working Girls, 157 Misc. 2d 494, 597 N.Y.S.2d 890, 1993 N.Y. Misc. LEXIS 144 (N.Y. Sup. Ct. 1993), modified, aff'd, 207 A.D.2d 664, 616 N.Y.S.2d 36, 1994 N.Y. App. Div. LEXIS 8646 (N.Y. App. Div. 1st Dep't 1994).

As the principles of Title VIII of the Civil Rights Act of 1964, the federal Fair Housing Act, specifically 42 U.S.C.S. § 3604(b), applied under N.Y. Exec. Law § 296(5)(a)(2), and a landlord engaged in a course of unwelcome, sexually-offensive behavior against a tenant, the New York State Division of Human Rights' petition pursuant to N.Y. Exec. Law § 298, seeking to enforce an award against the landlord was granted. Matter of State Div. of Human Rights v Stoute, 36 A.D.3d 257, 826 N.Y.S.2d 122, 2006 N.Y. App. Div. LEXIS 14350 (N.Y. App. Div. 2d Dep't 2006).

Offer of $6,000 per month renewal lease to operator of small grocery store in New York City was within realm of commercial reasonableness and thus economically rather than racially motivated; accordingly, New York Human Rights Law was inapplicable to action. In re Owens, 30 B.R. 399, 1983 Bankr. LEXIS 6043 (Bankr. S.D.N.Y. 1983).

Evidence that landlord denied sublease application because of proposed subtenant's race supported conclusions that legitimate, nondiscriminatory reason was pretext for housing discrimination and that landlord retaliated against tenant for supporting subtenants, for purpose of claim under CLS Exec Law § 296. Broome v Biondi, 17 F. Supp. 2d 211, 1997 U.S. Dist. LEXIS 17349 (S.D.N.Y. 1997).

70. —Rent control; stabilization

Division of Human Rights acted arbitrarily and capriciously in dismissing complaint of retiree who had filed waiting-list application for rent-stabilized apartment and who claimed landlord (1) was discriminating against him based on his age, (2) had raised his waiting-list number, and (3) was "warehousing" apartments and not renting to senior citizens in preparation for impending cooperative conversion plan, since division's investigation was inadequate and abbreviated in that after landlord denied allegations without any detail and failed to deliver division-requested roster of senior citizen tenants, division made "no probable cause" determination and dismissed retiree's complaint instead of investigating further. Flinker v State Div. of Human Rights, 123 A.D.2d 578, 507 N.Y.S.2d 12, 1986 N.Y. App. Div. LEXIS 60719 (N.Y. App. Div. 1st Dep't 1986).

A landlord would be awarded judgment of possession of a rent-stablized apartment, where a male tenant, who had been living with an unrelated male friend under a lease which restricted the use of the apartment to the tenant's "immediate family", would be in violation of a substantial obligation of the lease; but issuance of a warrant would be stayed on condition that the tenant's friend vacate the premises within 20 days. Evangelista Associates v Bland, 117 Misc. 2d 558, 458 N.Y.S.2d 996, 1983 N.Y. Misc. LEXIS 3184 (N.Y. Civ. Ct. 1983).

Because New York's disparate treatment of heterosexual and same-sex couples did not violate the due process or equal protection provisions of N.Y. Const. art. I, §§ 6, 11, and because a tenant and the tenant's same-sex partner were not spouses under N.Y. Comp. Codes R. & Regs. tit. 9, § 2522.5(g)(1), the Division of Housing and Community Renewal could rationally and lawfully treat them differently than a married couple seeking joint tenancy rights under N.Y. Exec. Law § 296(5)(a) and New York City, N.Y., Admin. Code § 8-107(5)(a); therefore, the tenant's petition to compel the division to add the partner to a rent-stabilized lease was dismissed for failing to state a claim upon which relief could be granted. Zagrosik v New York State Div. of Hous. & Cmty. Renewal, 817 N.Y.S.2d 486, 12 Misc. 3d 1076, 2006 N.Y. Misc. LEXIS 1503 (N.Y. Sup. Ct. 2006).

71. —Racial discrimination

There is sufficient evidence in the record to support the findings of the Commissioner of the Division of Human Rights that petitioner, in violation of section 296 (subd 5, par [a], cl [1]) of the Human Rights Law, had discriminated against claimant because of his race and color, by refusing to consider him as a prospective tenant for an available apartment, where established facts included the vacancy of the apartment, its preparations for and readiness for rental, the failure to notify the superintendent that the apartment was not to be shown, the communication that it was available at a specified rental, the meeting with the superintendent at the apartment site for the purpose of exhibition, his concern about the key upon seeing the Black prospect, his inquiries of the prospect as to whether the unit did in fact please when the prospect had already indicated enthusiastic acceptance, the failure to halt the prospect's departure to the bank to secure the down payment, the extended wait outside the superintendent's door upon return, the proffered excuse that the apartment was in litigation when in fact it was not and reasonably would not be, the failure to show another vacant apartment of similar size, the lack of proof of any suggestion by the managing agent that such other vacancy existed, the failure to obtain normal background particulars concerning the prospect, the subsequent lease for the same rental, and the dearth of Black tenants in the building; moreover, in view of the strong statutory policy to be effected, the award of compensatory damages should not be disturbed. 300 Gramatan Ave. Associates v State Div. of Human Rights, 45 N.Y.2d 176, 408 N.Y.S.2d 54, 379 N.E.2d 1183, 1978 N.Y. LEXIS 2107 (N.Y. 1978).

Misrepresentation as to the availability of apartments based upon color and racial identity constitutes an unlawful discriminatory practice under this section and is prohibited. Diona v Lomenzo, 26 A.D.2d 473, 275 N.Y.S.2d 663, 1966 N.Y. App. Div. LEXIS 2849 (N.Y. App. Div. 1st Dep't 1966).

Order of State Division of Human Rights finding that landlord had improperly denied housing on basis of applicant's race violated state's public policy to insure every individual an equal opportunity for housing insofar as said order required landlord to consider applicants referred by State Division of Human Rights without regard to any waiting list of other applicants. State Div. of Human Rights v Jakoblew, 41 A.D.2d 889, 343 N.Y.S.2d 141, 1973 N.Y. App. Div. LEXIS 4732 (N.Y. App. Div. 4th Dep't 1973).

Record supported determination by Commissioner of Human Rights that petitioner violated Human Rights Law, CLS Exec Art 15, by refusing to rent apartment to caucasian respondent because her 2 sons were black, where petitioner, earlier receptive to renting apartment, arranged second meeting so that she could meet children, and expressed reluctance to rent only after such meeting. Moore v State Div. of Human Rights, 154 A.D.2d 823, 546 N.Y.S.2d 487, 1989 N.Y. App. Div. LEXIS 12709 (N.Y. App. Div. 3d Dep't 1989).

Determination by Division of Human Rights that landlord had discriminated against complainant by refusing to rent apartment to her by reason of her race was supported by evidence that (1) when complainant contacted landlord about apartment, she told him that she was black and he avoided talking with her, and subsequently told her that apartment was not available, (2) when complainant's sister called by telephone about apartment, she was told it was available but when she inquired in person she was told that it was not available, and (3) when complainant's sister asked co-worker to inquire about apartment, she was told it was available. Szpilzinger v New York State Div. of Human Rights, 160 A.D.2d 196, 554 N.Y.S.2d 4, 1990 N.Y. App. Div. LEXIS 3680 (N.Y. App. Div. 1st Dep't), app. denied, 76 N.Y.2d 707, 560 N.Y.S.2d 989, 561 N.E.2d 889, 1990 N.Y. LEXIS 3041 (N.Y. 1990).

Court annulled Division of Human Rights' determination that respondent unlawfully discriminated in rental of available housing on basis of race and color, where respondent contended that it did not rent townhouse to complainant because it was unaware of her offer and because it intended to sell townhouse and would rent it only as "a last resort," no employee of respondent ever met complainant, there was no evidence that respondent knew that she was black, and there was no evidence that respondent entertained any offers from other persons interested only in renting. State Div. of Human Rights v RHS Mgmt. Corp., 270 A.D.2d 426, 707 N.Y.S.2d 123, 2000 N.Y. App. Div. LEXIS 4242 (N.Y. App. Div. 2d Dep't 2000).

A refusal to rent a room in a hotel to a Negro and his white wife constituted racial discrimination against both, and the corporation owning the hotel was liable for the acts of its desk clerk where it did not show that instructions had been given to the clerk not to discriminate racially. Hobson v York Studios, Inc., 145 N.Y.S.2d 162, 208 Misc. 888, 1955 N.Y. Misc. LEXIS 3300 (N.Y. Mun. Ct. 1955).

Subdivision 5 of this section, added in 1961, extending the discrimination ban to private multiple dwellings, etc., did not become effective until April 11, 1961, and was accordingly inapplicable to a 1955 refusal of accommodations to a Negro woman in a private apartment development outside New York City. Kates v Lefkowitz, 28 Misc. 2d 210, 216 N.Y.S.2d 1014, 1961 N.Y. Misc. LEXIS 2714 (N.Y. Sup. Ct. 1961).

The amendment of this article, effective July 1, 1955, banning discrimination in renting housing accommodations, extended only to "publicly-assisted housing accommodations" and would not sustain jurisdiction of the Estate Commission Against Discrimination to investigate a complaint by a Negro of refusal to rent her a vacant apartment in a private apartment building. Kates v Lefkowitz, 28 Misc. 2d 210, 216 N.Y.S.2d 1014, 1961 N.Y. Misc. LEXIS 2714 (N.Y. Sup. Ct. 1961).

Evidence by a complainant attempting to prove racial discrimination as the sole cause of her failure to secure an apartment in the form of elicited testimony designed to show the comparison between the treatment accorded to her and to a white "checker" posing as a prospective tenant was sufficient to support findings of the Commission of illegal discrimination, and those findings, supported by sufficient evidence, were conclusive. Lawrence Gardens, Inc. v State Com. for Human Rights, 53 Misc. 2d 20, 277 N.Y.S.2d 857, 1966 N.Y. Misc. LEXIS 1238 (N.Y. Sup. Ct. 1966).

A landlord was found in civil contempt for failure to properly obey a court order that he offer certain premises to a tenant, previously discriminated against by reason of race, and that the lease offered be the "in the standard form." It was provided the landlord could purge himself of contempt by complying with all provisions of the original order. State Com. for Human Rights v Kennelly, 59 Misc. 2d 278, 299 N.Y.S.2d 342, 1969 N.Y. Misc. LEXIS 1651 (N.Y. Sup. Ct. 1969).

In summary holdover proceeding, tenant failed to show discrimination in leasing in violation of CLS Exec § 296, based on landlord's changeover from residential tenants of various races to commercial tenants of Chinese heritage, since landlord was able to charge higher rent for commercial tenants than residential tenants regardless of their race, and changeover to commercial tenants complied with certificate of occupancy; furthermore, landlord's refusal to renew leases of white-owned bar and liquor store did not prove discrimination where other white merchants'

leases were renewed, since landlord was apparently motivated by permissible prejudice against alcohol, not impermissible prejudice against westerners. Elisau Estates v Schrager, 136 Misc. 2d 289, 518 N.Y.S.2d 712, 1987 N.Y. Misc. LEXIS 2426 (N.Y. Civ. Ct. 1987).

72. Public housing

Evidence that applicant for public housing accommodations was likely to be a disruptive and disorderly tenant who would be a potential threat to the peace and tranquility of the elderly and disabled tenants with whom she would reside sufficiently established that the New York Housing Authority did not violate the Executive Law by denying the applicant eligibility for public housing because she suffered from a mental disability and that the Housing Authority did not act arbitrarily or discriminatorily in denying eligibility to the applicant. Though, under the Executive Law provision prohibiting the managing agent of a publicly assisted housing accommodation from denying public housing to an applicant because such person suffers a disability, a determination of ineligibility for public housing accommodations grounded solely on mental disability would constitute an unlawful discriminatory practice, statute did not mean that a mentally disabled person could under no circumstances be denied eligibility; statute could not be used to insulate such an applicant from disqualification for public housing based on a valid reason. New York City Housing Authority Tenant Selection Div. v State Human Rights Appeal Board, 59 A.D.2d 742, 398 N.Y.S.2d 562, 1977 N.Y. App. Div. LEXIS 13750 (N.Y. App. Div. 2d Dep't 1977).

On a complaint alleging racial discrimination against a nonprofit housing corporation operated to provide moderately priced housing for professionals in the fine arts, the State Human Rights Division's dismissal of the complaint was proper where the division appeared to have appropriately exercised its legislatively endowed discretion to weigh and assess the conduct of the parties and reached its conclusion based on what was fairly inferable from the facts. The guidelines for screening an apartment applicant called for submission of a resume and references from three persons to demonstrate professional standing and provided that the owning of a substantial part of the applicant's income in an artistic field would be considered strong evidence of professional standing and applicant's evidence of professional earnings told approximately $400 for a eight-year period and revealed on his application for residence no current income from an artistic field and specified social services as his source of income from other sources. Westbeth Corp. Housing Dev. Fund Co. v New York State Human Rights Appeal Bd. Westbeth Corp. Housing Dev. Fund Co. v New York State Human Rights Appeal Bd., 93 A.D.2d 756, 461 N.Y.S.2d 313, 1983 N.Y. App. Div. LEXIS 17593 (N.Y. App. Div. 1st Dep't 1983).

A public housing authority's policy of restricting tenancies of residual single-person occupancies to people 50 years of age and older would not constitute a discriminatory practice under Exec Law § 296(2-a) as applied to a 28-year-old tenant who was evicted by the authority, since the tenant was not denied occupancy due to his age, but rather because he was a single-person occupant, and since the authority's election not to enforce the prohibition of residual single-person occupancies against tenants in its housing project who were 50 years of age and older did not constitute the use of a criterion or classification for tenancy based on age, but was merely a means of avoiding the imposition of undue hardship on older tenants. Mt. Vernon Housing Authority v Jordan, 120 Misc. 2d 670, 466 N.Y.S.2d 546, 1982 N.Y. Misc. LEXIS 4117 (N.Y. City Ct. 1982), aff'd, 124 Misc. 2d 886, 480 N.Y.S.2d 72, 1984 N.Y. Misc. LEXIS 3268 (N.Y. App. Term 1984).

It was premature to bring proceeding to compel New York City Housing Authority (NYCHA) to accept and place petitioner in public housing or, alternatively, to order NYCHA to process petitioner's application on priority basis without regard to his wife's medical disability, since it is incumbent on NYCHA to make investigation of people seeking admittance to project, and while NYCHA could not exclude petitioner's family because petitioner's wife suffered from mental illness, it would be obligated to exclude her if her conduct would cause substantial disturbance to other project tenants; such inquiry is not equivalent to exclusion. Custodio v Popolizio, 139 Misc. 2d 391, 527 N.Y.S.2d 333, 1987 N.Y. Misc. LEXIS 2821 (N.Y. Sup. Ct. 1987), aff'd, 138 A.D.2d 270, 526 N.Y.S.2d 392, 1988 N.Y. App. Div. LEXIS 2913 (N.Y. App. Div. 1st Dep't 1988).

73. Cooperatives/condominiums

State Division of Human Rights determination that the management of a federally financed cooperative apartment building had not unlawfully discriminated against two single women, who had been denied the right to purchase shares for an apartment they occupied as sublessees, would be remanded where the Division's initial investigation was one-sided and abbreviated, and its determination constituted an arbitrary and capricious exercise of its discretion in that the women made out at least a preliminary showing of age, sex or marital status discrimination, particularly in view of the management's failure to dispute the women's factual allegations, and the management's repeated attempts to use patently erroneous grounds for denying the women's application to purchase shares. Bachman v State Div. of Human Rights, 104 A.D.2d 111, 481 N.Y.S.2d 858, 1984 N.Y. App. Div. LEXIS 20216 (N.Y. App. Div. 1st Dep't 1984).

In action for specific performance of contract wherein cooperative corporation agreed to amend its offering plan and proprietary lease to allow 2 doctors (who already resided in cooperative apartments) to purchase additional unit for use as medical office, and to "cooperate" with doctors in obtaining amended certificate of occupancy, doctors were entitled to interim injunctive relief preventing corporation's attempted cancellation of contract, based on doctors' showing of (1) likelihood of success on merits, since corporation refused to cooperate only after learning that doctors treated patients suffering from acquired immune deficiency syndrome (AIDS), (2) irreparable injury absent grant of injunctive relief, in that doctors would be prevented from having office in building where they lived if they were relegated to monetary damages, and (3) equities in favor of granting relief, in view of public policy as codified by CLS Exec § 296 which makes it unlawful to refuse to sell commercial space to anyone because premises will be used in furnishing of facilities or services to disabled. Seitzman v Hudson River Associates, 126 A.D.2d 211, 513 N.Y.S.2d 148, 1987 N.Y. App. Div. LEXIS 41216 (N.Y. App. Div. 1st Dep't 1987).

Defendant sellers of cooperative unit were entitled to summary judgment dismissing housing discrimination claims for lack of evidence that their actions were participating or contributing cause of cooperative board's withholding of consent to plaintiff's purchase application. Moustakas v Noble, 259 A.D.2d 602, 686 N.Y.S.2d 778, 1999 N.Y. App. Div. LEXIS 2498 (N.Y. App. Div. 2d Dep't), app. dismissed, 93 N.Y.2d 958, 694 N.Y.S.2d 635, 716 N.E.2d 700, 1999 N.Y. LEXIS 1406 (N.Y. 1999).

Housing discrimination claim under N.Y. Exec. Law § 296(5) was properly dismissed because there was no evidence that either an attorney or an agent was involved in the determination to turn down a buyer's application to buy an apartment, and thus, there was no basis for a discrimination claim; there was no evidence raising an inference of discrimination. Sayeh v 66 Madison Ave. Apt. Corp., 73 A.D.3d 459, 901 N.Y.S.2d 26, 2010 N.Y. App. Div. LEXIS 3842 (N.Y. App. Div. 1st Dep't 2010).

While the cooperative owners failed to state claims for breach of a tenant corporation's fiduciary duties or against its directors individually, they stated causes of action for housing discrimination under N.Y. Exec. Law § 296(5)(a)(2) and 42 U.S.C.S. § 3601 et seq., and for punitive damages, which were limited to $10,000 by N.Y. Exec. Law § 297(4)(c)(iv), (9). Stalker v Stewart Tenants Corp., 93 A.D.3d 550, 940 N.Y.S.2d 600, 2012 N.Y. App. Div. LEXIS 2110 (N.Y. App. Div. 1st Dep't 2012).

Commissioner of the New York State Division of Human Rights properly determined that a co-op unlawfully discriminated against a tenant on the basis of disability when it would not allow her to keep an emotional support dog in her apartment because there was substantial evidence to conclude that the tenant suffered from generalized anxiety disorder, an impairment demonstrable by medically accepted clinical or laboratory diagnostic techniques, and that she required the use of a companion dog to use and enjoy her apartment; there was sufficient evidence that having a dog would affirmatively enhance her quality of life by ameliorating the effects of her disability, thus demonstrating

necessity within the meaning of the state human rights law. Matter of 1 Toms Point Lane Corp. v New York State Div. of Human Rights, 176 A.D.3d 930, 112 N.Y.S.3d 250, 2019 N.Y. App. Div. LEXIS 7404 (N.Y. App. Div. 2d Dep't 2019).

Because a buyer's failure to come forward with information concerning a disability and need for an accommodation was not a valid basis for withdrawing approval of a purchase application, the cooperative board's withdrawal of its initial approval violated New York City, N.Y., Admin. Code § 8-101, et seq., N.Y. Exec. Law § 296, et seq., and 42 U.S.C.S. § 3604. Hirschmann v Hassapoyannes, 843 N.Y.S.2d 778, 16 Misc. 3d 1014, 237 N.Y.L.J. 121, 2007 N.Y. Misc. LEXIS 6642 (N.Y. Sup. Ct. 2007), aff'd, 52 A.D.3d 221, 859 N.Y.S.2d 150, 2008 N.Y. App. Div. LEXIS 4787 (N.Y. App. Div. 1st Dep't 2008).

Apartments' N.Y. C.P.L.R. art. 78 action was granted, because an agency erred in determining that a resident in a cooperative apartment could keep a dog as a reasonable accommodation for her son's depression pursuant to N.Y. Exec. Law § 296 (2004), as the resident failed to show that a dog was required for the son's use and enjoyment of the apartment. One Overlook Ave. Corp. v N.Y. State Div. of Human Rights, 8 A.D.3d 286, 777 N.Y.S.2d 696, 2004 N.Y. App. Div. LEXIS 7458 (N.Y. App. Div. 2d Dep't 2004), app. denied, 5 N.Y.3d 714, 806 N.Y.S.2d 165, 840 N.E.2d 134, 2005 N.Y. LEXIS 2765 (N.Y. 2005).

Claim by a condominium unit owner that a condominium board acted in a discriminatory manner, in violation of N.Y. Exec. Law § 296, towards him due to his national origin when he had a prospective contract to sell his unit, such that the board interfered with the sale thereof, survived a summary judgment dismissal motion because unlawful discrimination was sufficiently culpable to support a claim of interference with prospective economic relations. 30 CPS, LLC v Board of Mgrs. of Cent. Park S. Med. Condominium, 874 N.Y.S.2d 879, 23 Misc. 3d 1024, 2009 N.Y. Misc. LEXIS 388 (N.Y. Sup. Ct. 2009).

Co-op resident could bring discrimination and retaliation claims against a co-op director; N.Y. Exec. Law § 296 and New York City, N.Y., Admin. Code § 8-107 provided for individual liability without an exemption for corporate directors, and discriminatory conduct was not protected by the business judgment rule. Fletcher v Dakota, Inc., 99 A.D.3d 43, 948 N.Y.S.2d 263, 2012 N.Y. App. Div. LEXIS 5245 (N.Y. App. Div. 1st Dep't 2012).

Plaintiffs, persons of Irish descent, fail to establish cause of action against housing co-operative and its president under CLS Exec L § 296(5)(a) based on allegation that defendants discriminated against plaintiffs in refusing to approve transfer of shares in co-operative to plaintiffs, since defendant's intent was not discriminatory but instead was based on subjective, non-discriminatory reasons in that decision was made upon subjective evaluation of unknown kind of tenancy which would result as consequence of one plaintiff's vague and unresponsive answers during interview with defendant. Murphy v 253 Garth Tenants Corp., 579 F. Supp. 1150, 1983 U.S. Dist. LEXIS 13275 (S.D.N.Y. 1983).

74. Discrimination by real estate brokers

Secretary of State exceeded her authority when, in response to community complaints regarding excessive solicitation and aggressive real estate activities, she promulgated order interdicting real estate brokers and salespersons from soliciting for sale residential realty in eastern Bronx County, despite legislatively-declared policy to ban blockbusting and secretary's power to discipline licensees who demonstrate "untrustworthiness," since order indicted all broker-initiated solicitation, not just illegal solicitation as targeted by legislature. Campagna v Shaffer, 73 N.Y.2d 237, 538 N.Y.S.2d 933, 536 N.E.2d 368, 1989 N.Y. LEXIS 4953 (N.Y. 1989).

A real estate broker's license was properly revoked for untrustworthiness, where it was proven he had employed a salesman who misrepresented the availability of apartments to deny housing to Negroes and improperly collected a fee from persons desiring apartments which was not refunded when no housing was secured. Rejecting the contention that the Secretary of State had not been delegated the power to deal with discriminatory acts, because this power had been vested in the State Commission for Human Rights, the court held the fact that certain actions may be expressly prohibited by one branch of law does not preclude the consideration of those acts to determine if a person is to be trusted in dealing with the general public. Diona v Lomenzo, 26 A.D.2d 473, 275 N.Y.S.2d 663, 1966 N.Y. App. Div. LEXIS 2849 (N.Y. App. Div. 1st Dep't 1966).

Article 15 of the Executive Law does not prevent the Department of State from disciplining real estate brokers and salesmen under Real Property Law § 441-c by reason of discriminatory practices in refusing to rent or sell housing accommodations to persons of the Negro race, notwithstanding that such department has not promulgated an express rule relating to such discriminatory practices. Kamper v Department of State, 26 A.D.2d 697, 272 N.Y.S.2d 808, 1966 N.Y. App. Div. LEXIS 3575 (N.Y. App. Div. 2d Dep't 1966), aff'd, 22 N.Y.2d 690, 291 N.Y.S.2d 804, 238 N.E.2d 914, 1968 N.Y. LEXIS 1379 (N.Y. 1968).

Petitioner committed unlawful discriminatory practice by refusing to sell piece of real property to complainant because of her race; realtor who represented complainant, and who was also black, was also victim of petitioner's discrimination insofar as petitioner refused to deal with realtor because of complainant's race. Feggoudakis v New York State Div. of Human Rights, 230 A.D.2d 739, 646 N.Y.S.2d 175, 1996 N.Y. App. Div. LEXIS 8219 (N.Y. App. Div. 2d Dep't 1996).

Where a real estate broker had shown the Negro complainant one unsatisfactory house, and represented no other homes in complainant's price range were listed with her and that she would contact complainant if such houses became available, evidence that, without contacting complainant, six days later the broker had shown six houses in the discussed price range to a white prospective buyer was sufficient to constitute proof of unlawful discriminatory practices. Mid Village Realty, Inc. v New York State Com. for Human Rights, 59 Misc. 2d 651, 300 N.Y.S.2d 483, 1969 N.Y. Misc. LEXIS 1520 (N.Y. Sup. Ct. 1969), aff'd, 34 A.D.2d 794, 311 N.Y.S.2d 977, 1970 N.Y. App. Div. LEXIS 4920 (N.Y. App. Div. 2d Dep't 1970).

Where prospective home buyers, who were African-American, sued for racial discrimination under the Fair Housing Act, 42 U.S.C.S. § 3601 et seq., 42 U.S.C.S. §§ 1981 and 1982, and N.Y. Exec. Law § 296(5)(a)(1), after a property was sold to a white purchaser, issues of fact existed as to whether the realtor departed from local custom by failing to inform the buyers that the homeowners received a better offer from the white purchaser, and if so, whether such a departure was based on racial grounds; accordingly, the appellate court reversed the district court's grant of summary judgment in favor of the realtor. Mitchell v Shane, 350 F.3d 39, 2003 U.S. App. LEXIS 23322 (2d Cir. 2003).

Plaintiff prospective home purchasers were not entitled to a preliminary injunction against homeowners, a real estate broker, and a real estate agent, as it was unlikely they would succeed on the merits of their claims that they were denied the opportunity to purchase a home because of their race; plaintiffs did not qualify for the property at the time of contracting and were given several opportunities to procure the home, and the agent took measures to keep the deal alive. Mitchell v Century 21 Rustic Realty, 233 F. Supp. 2d 418, 2002 U.S. Dist. LEXIS 21585 (E.D.N.Y. 2002).

75. Zoning as discriminatory

Since regulation of occupancy by reason of age is inherent in very concept of planned housing for the elderly and is rationally related to achievement of this laudatory purpose, and since drawing line at age 55, although necessarily arbitrary, was nonetheless reasonable, zoning ordinance limiting occupancy in planned retirement community to persons over 55 did not violate equal protection guaranty. Campbell v Barraud, 58 A.D.2d 570, 394 N.Y.S.2d 909, 1977 N.Y. App. Div. LEXIS 12589 (N.Y. App. Div. 2d Dep't 1977).

A zoning ordinance which, with a limited exception for two persons 62 years of age or over, restricted occupancy of one-family homes to persons related by blood, marriage or adoption, did not conflict with Exec Law § 296(5), since a restriction against occupancy by persons who have no familial relationship does not constitute illegal discrimination based on "marital status." McMinn v Oyster Bay, 105 A.D.2d 46, 482 N.Y.S.2d 773, 1984 N.Y. App. Div. LEXIS 20677 (N.Y. App. Div. 2d Dep't 1984), aff'd, 66 N.Y.2d 544, 498 N.Y.S.2d 128, 488 N.E.2d 1240, 1985 N.Y. LEXIS 17940 (N.Y. 1985).

Rejection of plaintiff's multi-purpose subdivision development plan and adoption of competing developer's plan, by town board and town planning board, did not violate due process or equal protection, even though competing developer's attorney was married to member of town board, where (1) even if plaintiff and competing developer were similarly situated, plaintiff did not prove that its application was maliciously singled out with intent to injure plaintiff, (2) competing developer's plan met town's legitimate interest in providing senior citizen housing without duplex units, and (3) plaintiff had no vested interest in subject property's existing zoning classification, which town board changed to accommodate competing developer's plan. Masi Mgmt., Inc. v Town of Ogden, 273 A.D.2d 837, 709 N.Y.S.2d 734, 2000 N.Y. App. Div. LEXIS 6737 (N.Y. App. Div. 4th Dep't 2000).

In action against town, town board, and town planning board for discrimination in rejection of plaintiff's multi-purpose subdivision development plan and adoption of competing developer's plan, there was no precedent for applying protection of CLS NY Const Art I § 1 to land use regulations, and Appellate Division would not do so. Masi Mgmt., Inc. v Town of Ogden, 273 A.D.2d 837, 709 N.Y.S.2d 734, 2000 N.Y. App. Div. LEXIS 6737 (N.Y. App. Div. 4th Dep't 2000).

IV. Other Discriminations

76. Advertising

Newspaper publisher who produced paper which contained separate help wanted listings for male and female help could not be held culpable for directly perpetuating discrimination due to sex because of the manner in which it labeled the ads. Newspaper publisher which published want ads under separate sex designations aided and abetted sex discrimination in violation of state law. NOW v State Div. of Human Rights, 34 N.Y.2d 416, 358 N.Y.S.2d 124, 314 N.E.2d 867, 1974 N.Y. LEXIS 1480 (N.Y. 1974).

Newspaper advertisements for employment opportunities located within the Republic of South Africa which merely referred to that country as the situs of employment and which did not recite, on the surface, any discriminatory conditions did not violate New York City antidiscrimination laws and newspaper's publishing of the advertisements did not thereby aid and abet invidious discrimination. Test for determining whether advertisement violates New York City antidiscrimination laws is not whether actual discrimination is practiced but whether the advertising expresses discrimination, directly or indirectly. Geographical reference in advertisement for employment opportunity to South Africa as the place of employment does not carry with it an expression of discrimination, directly or indirectly, and use of the term "South Africa" is not the type of code word impermissible in such advertising under New York City antidiscrimination laws. (Per Jasen, J., with two Judges concurring and two Judges concurring specially.) New York Times Co. v New York Com. on Human Rights, 41 N.Y.2d 345, 393 N.Y.S.2d 312, 361 N.E.2d 963, 1977 N.Y. LEXIS 1846 (N.Y. 1977).

Tavern owner who admitted that name selected for tavern and sign used for tavern were intended to attract male patrons and who was ordered to cease and desist from discriminating against women was not required to remove name and sign. Law relating to discriminatory practices does not prohibit appealing by signs or trade names to one sex or another but does prohibit displaying notice or advertisement to the effect that any of the facilities or privileges will be refused or withheld from or denied person on account of sex. Rosenberg v State Human Rights Appeal Board, 45 A.D.2d 929, 357 N.Y.S.2d 325, 1974 N.Y. App. Div. LEXIS 4500 (N.Y. App. Div. 4th Dep't 1974).

Under the provisions of section 296 (subd 1, par [d]) of the Executive Law, it is an unlawful discriminatory practice for any employer or employment agency to circulate an advertisement which expresses an employment preference based upon sex unless that preference represents a bona fide occupational qualification; however, a newspaper is not an "employer" or "employment agency" within the meaning of the statute, and, accordingly, a newspaper may not be held culpable under section 296 (subd 1, par [d]) for publishing an advertisement which expresses an employment preference based upon sex. A newspaper aids and abets sex discrimination, which constitutes an unlawful discriminatory practice (Executive Law, § 296, subd 6), when the body content of a published advertisement is palpably discriminatory and the published job title clearly lacks any basis as a bona fide occupational qualification; such a construction of subdivision 6 of section 296 does not violate State or Federal free press guarantees where the patently discriminatory content of the advertisement could be determined by the newspaper through visual examination inasmuch as commercial advertising proposing an illegal transaction, i.e., sex discrimination in employment, is not entitled to First Amendment protection. An order of the State Division of Human Rights, which directs a company to "cease and desist from publishing any employment advertisement in any of its newspapers which specifies a preference for applicants on the basis of sex without first securing from the prospective employer or agent thereof a written certification that the job is not covered by the Human Rights Law or is instinct with a bona fide occupational qualification", should not be set aside as the Human Rights Law (Executive Law, art 15) authorizes the Commissioner of Human Rights to direct that an offending party cease and desist from an unlawful discriminatory practice and further authorizes him to direct that affirmative action be taken as will effectuate the purposes of the law (Executive Law, § 297, subd 4, par [c]); while it would be unreasonable to impose upon a newspaper the burden of making an independent investigation to determine whether a particular job is instinct with a bona fide occupational qualification, the purpose and effect of requiring a newspaper to procure the written certification in advance of publication is to eliminate the need for the independent investigation and to insulate the newspaper from the imposition of penalties under the Human Rights Law. State Div. of Human Rights v Binghamton Press Co., 67 A.D.2d 231, 415 N.Y.S.2d 523, 1979 N.Y. App. Div. LEXIS 10097 (N.Y. App. Div. 4th Dep't 1979).

Unless it is established that the decision was based on legitimate business concerns unconnected with racial bigotry, refusal to distribute a free advertising circular in a predominantly black neighborhood is encompassed within the ambit of Exec Law § 296(13), providing that it is an unlawful discriminatory practice "for any person to discriminate against, boycott or blacklist, or refuse to buy from, sell or to trade with, any person, because of the race, creed, color, national origin or sex of such person," since the distribution of a circular is a business practice within the statute's protective scope, the activity of the distributor being profit motivated; the statute, as a remedial civil rights provision, is to be construed liberally for the accomplishment of its purposes. Holly v Pennysaver Corp., 98 A.D.2d 570, 471 N.Y.S.2d 611, 1984 N.Y. App. Div. LEXIS 16508 (N.Y. App. Div. 2d Dep't 1984).

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77. Automobile rental

Where the record supported State Human Rights Appeals Board's finding that petitioner refused to rent automobile to individual as retaliation for such individual's bringing complaint against him, but did not substantiate finding that such refusal was based on fact that the individual was a Negro, the automobile rental agency should not have been ordered to cease and desist from racially discriminatory practices in renting its automobiles. Avis-High Bennett Rent-A-Car, Inc. v State Human Rights Appeal Board, 40 A.D.2d 992, 338 N.Y.S.2d 694, 1972 N.Y. App. Div. LEXIS 3143 (N.Y. App. Div. 2d Dep't 1972).

Plaintiffs set forth prima facie case of discrimination under Human Rights Law where (1) they presented evidence that manager of car rental agency said that agency would not rent to them because they were Puerto Ricans and there was suspicion

that Puerto Ricans, as group, use false forms of identification, and (2) they produced evidence that agency's articulated reasons for denying rental were pretextual. Rivera v Hertz Corp., 990 F. Supp. 234, 1997 U.S. Dist. LEXIS 21660 (S.D.N.Y. 1997).

78. "Arab boycott"

Specific reference in CLS Exec § 296(13) to boycotts, blacklisting, and refusals to deal indicates that statute is directed at curbing, in particular, types of business practices that involve concerted use of economic means to disadvantage trade or commercial activities of member of targeted group; since term "discriminate" immediately precedes list of terms including boycott, blacklisting, and refusals to trade, such term should be construed to refer to similar types of commercial activity. Scott v Massachusetts Mut. Life Ins. Co., 86 N.Y.2d 429, 633 N.Y.S.2d 754, 657 N.E.2d 769, 1995 N.Y. LEXIS 3548 (N.Y. 1995).

Absence of evidence of formal boycott or blacklisting campaign will not be fatal to discrimination claim under CLS Exec § 296(13); for example, evidence establishing that defendant engaged in pattern of conduct that commercially disadvantaged only members of protected class may be sufficient to defeat summary judgment. Scott v Massachusetts Mut. Life Ins. Co., 86 N.Y.2d 429, 633 N.Y.S.2d 754, 657 N.E.2d 769, 1995 N.Y. LEXIS 3548 (N.Y. 1995).

Insurance company was properly granted summary judgment in discrimination action brought by agent for termination of her agency contract predicated on CLS Exec § 296(13), assuming that termination of agency contract qualified as business conduct or, more specifically, refusal to trade within statute's scope, where agent otherwise failed to show that contract termination was propelled by or was result of company's desire to collectively discriminate against protected class that included agent, it was not shown that termination resulted from blacklisting or commercial boycott of women, or of persons of her age or marital status, nor did she allege any facts to show that contract cancellation was part of larger pattern of dealing or policy instituted by company in effort to disadvantage females economically; agent's bare allegations that no other women had achieved district manager status in company (without some other proof of showing, for example, policy or pattern of rejections of qualified females who had applied for such posts) was insufficient to defeat summary judgment motion. Scott v Massachusetts Mut. Life Ins. Co., 86 N.Y.2d 429, 633 N.Y.S.2d 754, 657 N.E.2d 769, 1995 N.Y. LEXIS 3548 (N.Y. 1995).

It is within the legitimate police powers of the state for the New York Legislature to determine the effects of the so-called "Arab Boycott" in New York, to educate the public accordingly, and to monitor and otherwise evaluate new legislation passed to eradicate discrimination against citizens of New York in terms of such boycotts or black listing because of race, color, creed or national origin. General Electric Co. v New York State Assembly Committee on Governmental Operations, 425 F. Supp. 909, 1975 U.S. Dist. LEXIS 14579 (N.D.N.Y. 1975).

N.Y. Exec. Law § 296 did apply to a case where a provision of the charterparty read that "Owners warrant this vessel is not Israeli owned or controlled, and will not call at Israeli ports;" however, the correlative federal statute provided a stronger basis for the decision of a federal court, but the vessel's owners were Greek citizens. The court did not refuse to confirm the arbitral award on the basis of federal and state anti-discrimination statutes. Karen Mar. Ltd. v Omar Int'l Inc., 322 F. Supp. 2d 224, 2004 U.S. Dist. LEXIS 11390 (E.D.N.Y. 2004).

79. Insurance

Determination of whether insurance provision discriminates in contravention of CLS Exec § 296 must be made in court or before division of human rights; accordingly, arbitrator's award based on arbitrator's determination of issue will be vacated as having been made in excess of powers of arbitrator. Fallon v Greater Johnstown School Dist., 118 A.D.2d 936, 499 N.Y.S.2d 503, 1986 N.Y. App. Div. LEXIS 54767 (N.Y. App. Div. 3d Dep't), app. denied, 68 N.Y.2d 603, 506 N.Y.S.2d 1025, 497 N.E.2d 705, 1986 N.Y. LEXIS 19412 (N.Y. 1986).

Insurer which cancels automobile insurance policy (CLS Insurance § 3425) on basis of suspension of driver's license (CLS Vehicle & Traffic § 510) arising out of reversed conviction for driving while impaired has engaged in unlawful discriminatory practice (CLS Executive § 296) since suspension must be deemed vitiated by reversal of conviction and is thus not valid basis for cancellation where insurer has not considered evidence of conduct leading to criminal charges independent of driving record disseminated by department of motor vehicles which improperly includes conviction and reversal. Brown v Fireman's Fund Ins. Co., 131 Misc. 2d 525, 500 N.Y.S.2d 500, 1986 N.Y. Misc. LEXIS 2556 (N.Y. Sup. Ct. 1986).

80. Licensing matters

Department of Health was properly granted summary judgment dismissing action alleging that, by revoking plaintiff's medical license, it discriminated against him in violation of CLS Exec § 296, based on his adult Attention Deficit Disorder, as plaintiff essentially sought judicial review of determination which revoked his medical license, and such review had to be made via Article 78 proceeding, which was time barred. Horne v New York State Dep't of Health, 287 A.D.2d 940, 731 N.Y.S.2d 781, 2001 N.Y. App. Div. LEXIS 9979 (N.Y. App. Div. 3d Dep't 2001).

81. Places of public accommodation

A non-profit, tax-exempt foreign corporation and three of its local charter organizations located in New York, whose principal function was to offer courses on boat handling and safety at 650 locations nationwide to approximately 70,000 people a year, and who extended membership invitations to all males who passed a basic piloting course, were properly found to have unlawfully discriminated on the basis of sex against qualified female applicants based on the all-male membership policy. A non-profit, tax-exempt foreign corporation and three of its local charter organizations located in New York, which systematically offered a service or accommodation to the public through their boating courses and promotional activities, were owners of places of public accommodation, resort or amusement, notwithstanding that the place of such public accommodation was not of fixed location, and the corporation and its charter organizations failed to establish that they were distinctively private clubs within the statutory exclusion. United States Power Squadrons v State Human Rights Appeal Bd., 59 N.Y.2d 401, 465 N.Y.S.2d 871, 452 N.E.2d 1199, 1983 N.Y. LEXIS 3181 (N.Y. 1983).

Hospital policy with regard to drug treatment program which discriminates against pregnant women by treating them differently from others solely because they are pregnant constitutes facial sexual discrimination with regard to public accommodation under Human Rights Law; however, policy is supportable if hospital can establish (1) that blanket exclusion is medically warranted—i.e., that no pregnant woman, regardless of state of her general health, stage of her pregnancy, or severity of her addiction, can be treated safely, or (2) that hospital cannot, prior to admission, identify with reasonable medical certainty those women who might receive treatment without needing immediate, on-site obstetrical services. Elaine W. v Joint Disease N. Gen. Hosp., Inc., 81 N.Y.2d 211, 597 N.Y.S.2d 617, 613 N.E.2d 523, 1993 N.Y. LEXIS 1167 (N.Y. 1993).

Burden rested on hospital, as actor drawing distinctions based on pregnancy with regard to admission to drug treatment program, to prove that policy's distinctions were based on medical necessity, not on generalizations associated with pregnant women; that its motives were benign would not relieve hospital of burden. Elaine W. v Joint Disease N. Gen. Hosp., Inc., 81 N.Y.2d 211, 597 N.Y.S.2d 617, 613 N.E.2d 523, 1993 N.Y. LEXIS 1167 (N.Y. 1993).

Appellate Division properly annulled determination by Division of Human Rights that medical facility violated CLS Exec § 296(2)(a) by using heightened precautionary measures in 1985 while treating petitioner who was perceived to be at risk of carrying AIDS virus, even though petitioner complained of treatment in isolated room located at end of dark hallway, with all equipment draped in plastic, small "x" on door, and treating physician and staff outfitted in protective clothing, since medical facility showed that its protocol was reasonable, medically warranted, and consistent with its desire to protect patients and staff from spread of infectious diseases; such protocol was consistent

with accepted medical practice in 1985 for treatment of patients known or perceived to be at high risk of infection of then recently discovered, contagious, and fatal disease and was not pretext for discrimination. North Shore Univ. Hosp. v Rosa, 86 N.Y.2d 413, 633 N.Y.S.2d 462, 657 N.E.2d 483, 1995 N.Y. LEXIS 3553 (N.Y. 1995).

Commission against discrimination had power to waive time limit of its own rules which provided that application for reconsideration must be filed within 15 days from date of mailing of notice of disposition of investigation to determine whether petitioner was place of public accommodation within meaning of statute which forbids discrimination. Lake Placid Club, Inc. v Abrams, 6 A.D.2d 469, 179 N.Y.S.2d 487, 1958 N.Y. App. Div. LEXIS 4278 (N.Y. App. Div. 3d Dep't 1958), aff'd, 6 N.Y.2d 857, 188 N.Y.S.2d 561, 160 N.E.2d 92, 1959 N.Y. LEXIS 1289 (N.Y. 1959).

Evidence that private club had permitted it premises to be used for a fashion show, that tickets to such event were sold to general public without restriction and without limitation thereon as to facilities of club which would be open during show, and that there was a free flow of guests from banquet room to bar room with no attempt to restrict any except blacks, was ample to support determination that club was a place of public accommodation during show and that blacks had been refused service because of race or color. Batavia Lodge No. 196, L. O. M. v New York State Div. of Human Rights, 43 A.D.2d 807, 350 N.Y.S.2d 273, 1973 N.Y. App. Div. LEXIS 2914 (N.Y. App. Div. 4th Dep't 1973), rev'd, 35 N.Y.2d 143, 359 N.Y.S.2d 25, 316 N.E.2d 318, 1974 N.Y. LEXIS 1377 (N.Y. 1974).

A transportation authority did not engage in unlawful discriminatory practices toward disabled persons in violation of Exec Law § 296(2) (a) by virtue of its failure to buy buses and to construct terminals providing access to wheelchair-bound and semi-ambulatory persons, since that statute only prohibits discrimination against the disabled and does not require special efforts or affirmative action. Eastern Paralyzed Veterans Ass'n v Metro. Transp. Auth., 79 A.D.2d 516, 433 N.Y.S.2d 461, 1980 N.Y. App. Div. LEXIS 13832 (N.Y. App. Div. 1st Dep't 1980), dismissed, Eastern Paralyzed Veterans Asso. v Metropolitan Transp. Authority, 52 N.Y.2d 895, 437 N.Y.S.2d 305, 418 N.E.2d 1324, 1981 N.Y. LEXIS 2142 (N.Y. 1981).

Although the Commissioner of the State Division of Human Rights properly found that the 1978 New York City Marathon course was a "place of public accommodation" within the meaning of Exec Law § 292(9), the commissioner erred in determining that the running club which organized the marathon had engaged in an unlawful discriminatory practice by not permitting disabled individuals in wheelchairs to participate in the marathon since a marathon had historically been a foot race and since the running club had not excluded other disabled individuals who could compete on foot. New York Roadrunners Club v State Div. of Human Rights, 81 A.D.2d 519, 437 N.Y.S.2d 681, 1981 N.Y. App. Div. LEXIS 10976 (N.Y. App. Div. 1st Dep't 1981), aff'd, 55 N.Y.2d 122, 447 N.Y.S.2d 908, 432 N.E.2d 780, 1982 N.Y. LEXIS 3076 (N.Y. 1982).

Airline travel club open only to professional travel counselors and travel agents was not place of public accommodation within meaning of CLS Exec §§ 296(2)(a) and 292(9) since travel club was not available to general public but was merely incentive program for travel agents. Ness v Pan American World Airways, 142 A.D.2d 233, 535 N.Y.S.2d 371, 1988 N.Y. App. Div. LEXIS 12457 (N.Y. App. Div. 2d Dep't 1988).

Nursing home unlawfully discriminated against resident by placing him in strict isolation because he tested HIV-seropositive, and by refusing to allow him to use public telephone in nursing home. Marcus Garvey Nursing Home v New York State Div. of Human Rights, 209 A.D.2d 619, 619 N.Y.S.2d 106, 1994 N.Y. App. Div. LEXIS 11465 (N.Y. App. Div. 2d Dep't 1994).

Petitioners' dental practice was not "place of public accommodation" since they were private practitioners and operated on appointment basis in private facilities. Schulman v State Div. of Human Rights, 89 N.Y.2d 934, 226 A.D.2d 645, 641 N.Y.S.2d 134, 677 N.E.2d 284, 1996 N.Y. App. Div. LEXIS 4389 (N.Y. App. Div. 2d Dep't 1996), rev'd, 89 N.Y.2d 934, 654 N.Y.S.2d 713, 677 N.E.2d 284, 1997 N.Y. LEXIS 1802 (N.Y. 1997).

Trading floor of Commodities Exchange, Inc. (COMEX) was place of public accommodation under CLS Exec § 296(2)(a) since COMEX's trading floor supplied public service by enabling commodities to be traded, routinely accepted qualified applicants, and placed no subjective limits on number of persons eligible for membership. D'Amico v Commodities Exch., 235 A.D.2d 313, 652 N.Y.S.2d 294, 1997 N.Y. App. Div. LEXIS 506 (N.Y. App. Div. 1st Dep't 1997).

No cause of action was stated for gender discrimination under CLS Exec § 296 where there was no allegation that female patrons or guests of marina were denied accommodations or use of facilities on basis of gender, and defendants installed video cameras and surreptitiously conducted surveillance of persons using both men's and women's rooms. Mastro v Oak Park Marina, Inc., 238 A.D.2d 930, 661 N.Y.S.2d 554, 1997 N.Y. App. Div. LEXIS 4747 (N.Y. App. Div. 4th Dep't 1997), reh'g denied, 1997 N.Y. App. Div. LEXIS 7993 (N.Y. App. Div. 4th Dep't July 3, 1997).

Determination that dentist discriminated against complainant based on his HIV status would be annulled where dentist performed complete oral examination of complainant, and concluded that further treatment, in form of root canal therapy, was needed, it was undisputed that dentist did not perform root canal work, and that his associate, who performed root canal work on only 30 to 40 percent of practice's patients, was away on vacation, it was dentist's professional judgment that complainant needed immediate treatment because he was in pain, and that dental unit of university hospital would best provide that treatment in view of risk of secondary infection, no evidence was presented that such recommendation was inappropriate or medically unsound, and complainant contacted dentist's secretary to request additional referrals, but he sought no further treatment from dentist or his associates. Schulman v State Div. of Human Rights, 239 A.D.2d 588, 658 N.Y.S.2d 70, 1997 N.Y. App. Div. LEXIS 5622 (N.Y. App. Div. 2d Dep't 1997), app. denied, 92 N.Y.2d 801, 677 N.Y.S.2d 71, 699 N.E.2d 431, 1998 N.Y. LEXIS 1454 (N.Y. 1998).

Elks Lodge was not place of public accommodation, but rather was distinctly private for purposes of CLS Exec § 292(9). Cummings v Watertown Lodge No. 496 Benevolent & Protective Order of Elks, Inc., 262 A.D.2d 1007, 693 N.Y.S.2d 786, 1999 N.Y. App. Div. LEXIS 7207 (N.Y. App. Div. 4th Dep't 1999).

In a discrimination action under N.Y. Exec. Law § 296(2)(a) on the basis of disability by a stock exchange member alleging that a stock exchange's prohibition on the use of stools in major evacuation routes on the exchange floor was discriminatory, the trial court properly granted the exchange summary judgment where the exchange showed that its actions were nondiscriminatory since the prohibition at issue was based on a legitimate safety concern for its members and the member failed to raise a triable issue of fact in opposition. Blum v N.Y. Stock Exch., Inc., 298 A.D.2d 343, 751 N.Y.S.2d 202, 2002 N.Y. App. Div. LEXIS 9444 (N.Y. App. Div. 2d Dep't 2002).

In a disability discrimination action under N.Y. Exec. Law § 296(2)(a) by a stock exchange member alleging that a stock exchange's prohibition on the use of stools in major evacuation routes on the exchange floor was discriminatory, the issue of whether the exchange provided a reasonable accommodation to the member, who used a stool for medical reasons, was not relevant to the cause of action despite the member's contentions to the contrary. Blum v N.Y. Stock Exch., Inc., 298 A.D.2d 343, 751 N.Y.S.2d 202, 2002 N.Y. App. Div. LEXIS 9444 (N.Y. App. Div. 2d Dep't 2002).

A restaurant and bar which maintained a policy of refusing service to long haired males, but which did not refuse service to long haired females, violated Executive L § 296, subd 2, which proscribes discrimination on the basis of sex in places of public accommodation. Braun v Swiston, 72 Misc. 2d 661, 340 N.Y.S.2d 468, 1972 N.Y. Misc. LEXIS 1335 (N.Y. Sup. Ct. 1972).

Respondent State Division of Human Rights does not have concurrent jurisdiction with the Insurance Department over petitioners' alleged discriminatory practice of refusing to issue complainant, a married woman, a Blue Cross and Blue Shield health insurance policy for single persons because of her marital

status since insurance carriers are not places of "public accommodation" (Executive Law, § 296, subd 2, par [a]) over which respondent has jurisdiction. Places of "public accommodation" include "wholesale and retail stores and establishments dealing with goods or services of any kind" (Executive Law, § 292, subd 9). While an insurance carrier may be an establishment providing services, it is not a "wholesale and retail" establishment within the meaning of the statute. The Insurance Department has exclusive jurisdiction over questions concerning "unfairly discriminatory" rates (Insurance Law, § 255, subd 2). In any event, under subdivision 40 of the Insurance Law, rates which take into account an applicant's marital status are not "unfairly discriminatory". Rochester Hospital Service Corp. v Division of Human Rights of Executive Dep't, 92 Misc. 2d 705, 401 N.Y.S.2d 413, 1977 N.Y. Misc. LEXIS 2608 (N.Y. Sup. Ct. 1977).

A complaint which alleges that defendants have illegally used public funds in the purchase of buses and in the construction of transportation facilities which are inaccessible to wheelchair bound and semiambular persons in violation of statutes making it an unlawful discriminatory practice to deny to disabled persons the facilities of "any place of public accommodation" (Executive Law, § 292, subd 9; § 296, subd 2, par [a]), states a cause of action since the disabled require more than equal treatment to insure them the same rights in the utilization of mass transportation as other persons and defendants have not demonstrated on the motion for summary judgment that any of the required "special efforts" have been made; Federal law requires local transportation authorities receiving Federal funds to make special efforts in making facilities accessible to the disabled (US Code, tit 49, § 1612, subd [a]; tit 23, § 142) and affirmative action is imposed on the Secretary of Transportation not merely to refrain from discrimination against handicapped persons but to provide directly for them. Eastern Paralyzed Veteran's Ass'n v Metropolitan Transp. Authority, 103 Misc. 2d 933, 426 N.Y.S.2d 406, 1980 N.Y. Misc. LEXIS 2225 (N.Y. Sup. Ct.), modified, 79 A.D.2d 516, 433 N.Y.S.2d 461, 1980 N.Y. App. Div. LEXIS 13832 (N.Y. App. Div. 1st Dep't 1980).

Blind person has no statutory right to be allowed into hospital delivery room accompanied by his guide dog during birth of his child since delivery room as well as labor room and maternity ward are not public facilities, and hospital's exclusion of guide dog from delivery room is not unlawful discriminatory practice since Human Rights Law was never intended to effectuate radical change in hospital's compliance with law concerning control and/or prevention of infectious diseases; presence of dog would present unacceptable danger to expectant mother and to physicians and nurses in attendance. Perino v St. Vincent's Medical Center, 132 Misc. 2d 20, 502 N.Y.S.2d 921, 1986 N.Y. Misc. LEXIS 2630 (N.Y. Sup. Ct. 1986).

Local Elks lodge was not place of public accommodation under CLS Exec § 292(9), warranting dismissal of claims against lodge and lodge officials for alleged violations of CLS Exec § 296(2)(a) relative to denial of plaintiff's application for membership. Gifford v Guilderland Lodge, No. 2480, 178 Misc. 2d 707, 681 N.Y.S.2d 194, 1998 N.Y. Misc. LEXIS 530 (N.Y. Sup. Ct. 1998), aff'd, 272 A.D.2d 721, 707 N.Y.S.2d 722, 2000 N.Y. App. Div. LEXIS 5710 (N.Y. App. Div. 3d Dep't 2000).

Blanket exclusion of the mentally ill from the Metropolitan Transit Authority's Half-Fare Program without justification violated the Human Rights Law, N.Y. Exec. Law § 290 et seq., which the New York State Division of Human Rights was required to rectify. Staten Island Alliance for the Mentally Ill v Tolbert, 306 A.D.2d 31, 762 N.Y.S.2d 36, 2003 N.Y. App. Div. LEXIS 6312 (N.Y. App. Div. 1st Dep't 2003).

Fact that federal law did not require the mentally ill to be included as eligible for a transit authority's reduced fare program and that the state legislature only intended to gradually extend this specific benefit to the mentally ill by increments did not limit the broad anti-discriminatory protections provided mentally ill individuals under the Human Rights Law, N.Y. Exec. Law § 290 et seq. Staten Island Alliance for the Mentally Ill v Tolbert, 306 A.D.2d 31, 762 N.Y.S.2d 36, 2003 N.Y. App. Div. LEXIS 6312 (N.Y. App. Div. 1st Dep't 2003).

When an individual suffering from undifferentiated schizophrenia, who was seriously disabled and unable to use a map or plan a new route on the transit authority's system or even negotiate a round trip fare, was denied participation in the transit authority's reduced fare program, because her condition was not an "eligible handicap," and she was as disabled as an individual who fit within one of the categories of individuals eligible for the reduced fare, she suffered discrimination which was prohibited by N.Y. Exec. Law § 296(2). Staten Island Alliance for the Mentally Ill v Tolbert, 306 A.D.2d 31, 762 N.Y.S.2d 36, 2003 N.Y. App. Div. LEXIS 6312 (N.Y. App. Div. 1st Dep't 2003).

Trial court erred in denying a store summary judgment in plaintiff's claim based on discriminatory denial of use of a public accommodation under N.Y. Exec. Law § 296(2)(a); the store made a prima facie case that plaintiff's momentary detention, by asking her to pass through a security sensor a second time, had a legitimate, nondiscriminatory basis, i.e., the sensor's sounding. No evidence indicated that the store's nondiscriminatory explanation of the incident was a pretext for racially disparate treatment, that plaintiff otherwise suffered racial discrimination, or that a security guard even saw a Caucasian woman who plaintiff alleged was allowed to exit the store. Johnson v Lord & Taylor, 25 A.D.3d 435, 807 N.Y.S.2d 367, 2006 N.Y. App. Div. LEXIS 313 (N.Y. App. Div. 1st Dep't 2006).

Application of Massachusetts' public accommodations law to require private parade sponsor to include, as marching unit, organization of gays, lesbians and bisexuals violated sponsor's First Amendment right to free speech; inasmuch as every participating parade unit affects message conveyed by parade, application of state's law essentially forced private sponsor to alter parade's expressive content. Hurley v Irish-American Gay, Lesbian & Bisexual Group, 515 U.S. 557, 115 S. Ct. 2338, 132 L. Ed. 2d 487, 1995 U.S. LEXIS 4050 (U.S. 1995).

Commissions established by New York State Human Rights Law were authorized only to hear complaints about discriminatory employment practices by employers, employment agencies, labor organizations and apprenticeship committees and had no jurisdiction as to governmental action, or action by any entity not falling within the categories mentioned above. Percy v Brennan, 384 F. Supp. 800, 1974 U.S. Dist. LEXIS 5879 (S.D.N.Y. 1974).

Physician's claim under CLS Exec Law § 296 that emergency medicine board discriminated against him as black male native of Trinidad will not be dismissed, although board has argument that it is organization "which is in its nature distinctly private" and not subject to New York Human Rights Law (CLS Exec Law §§ 290 et seq.), because it may also prove to be case that board is place of public accommodation, and its requirement that photograph be attached to application prior to physician's being adjudged qualified to sit for board's examination at least raises suspicion of discriminatory purpose. Daniel v Am. Bd. of Emergency Med., 802 F. Supp. 912, 1992 U.S. Dist. LEXIS 21193 (W.D.N.Y. 1992).

Police officers were not agents of store under CLS Exec Law § 296(2)(a), where they asked black shoppers to leave at management's request due to shoplifting suspicion, because store had no right to control officers' actions. Robinson v Town of Colonie, 878 F. Supp. 387, 1995 U.S. Dist. LEXIS 2849 (N.D.N.Y. 1995).

Father's and son's claims against financial consultant under 42 USCS § 1981 are dismissed but not those under CLS Exec Law § 296 except as to citizenship discrimination, where consultant in process of setting up investment account for Canadian citizen father and U.S. citizen son merely followed order of his branch manager to terminate meeting, because complaint does not set forth facts from which one could infer that consultant intended to discriminate as required for federal claim, but consultant's execution of manager's order could be considered aiding and abetting under § 296(6), although state law does not extend to "citizenship" discrimination. Cheung v Merrill Lynch, Pierce, Fenner & Smith, 913 F. Supp. 248, 1996 U.S. Dist. LEXIS 591 (S.D.N.Y. 1996).

82. Private clubs

Blacks who were refused service at private club while attending fashion show open to public, although angered, embarrassed, and

humiliated by the incident, were entitled to compensatory damages absent evidence of expense, lost salary, or measurable damages suffered by reason of the discrimination; the indiscriminate award of $250 damages to each complainant was clearly not unreasonably large under the circumstances, and was within the statutory power to award compensatory damages to aggrieved persons. Batavia Lodge No. 196, etc. v New York State Div. of Human Rights, 35 N.Y.2d 143, 359 N.Y.S.2d 25, 316 N.E.2d 318, 1974 N.Y. LEXIS 1377 (N.Y. 1974).

A private organization did not unlawfully discriminate against the disabled when, in organizing and promoting the New York City Marathon, it required participants to use only their feet and not wheelchairs, skateboards, bicycles or other extraneous aids since, in setting the standards for the race traditionally planned as a foot event, it was a valid consideration for the club to take into account the fact that the uniform requirement that the race be run on foot would tend to equalize competition. New York Roadrunners Club v State Div. of Human Rights, 55 N.Y.2d 122, 447 N.Y.S.2d 908, 432 N.E.2d 780, 1982 N.Y. LEXIS 3076 (N.Y. 1982).

Police power delegated to municipalities under State Constitution's home rule provision permits City of New York to define for itself when club loses its "distinctly private" nature so as to subject it to antidiscrimination provision of City Human Rights Law, despite use of term "distinctly private" without further definition in CLS Exec § 292(9), since no evidence exists of legislature's preemption of antidiscrimination legislation and city's more specific definition merely established criteria of selectivity and privateness based on size and amount of business-related income from nonmembers. N.Y. State Club Ass'n v City of New York, 69 N.Y.2d 211, 513 N.Y.S.2d 349, 505 N.E.2d 915, 1987 N.Y. LEXIS 15359 (N.Y. 1987), aff'd, 487 U.S. 1, 108 S. Ct. 2225, 101 L. Ed. 2d 1, 1988 U.S. LEXIS 2861 (U.S. 1988).

Airline travel club open only to professional travel counselors and travel agents was not place of public accommodation within meaning of CLS Exec §§ 296(2)(a) and 292(9) since travel club was not available to general public but was merely incentive program for travel agents. Ness v Pan American World Airways, 142 A.D.2d 233, 535 N.Y.S.2d 371, 1988 N.Y. App. Div. LEXIS 12457 (N.Y. App. Div. 2d Dep't 1988).

Cause of action brought by a husband and a wife alleging that the board of a country club aided and abetted unlawful discrimination was properly dismissed, because an individual could not have been held to have aided and abetted his or her own actions. Goldin v Engineers Country Club, 54 A.D.3d 658, 864 N.Y.S.2d 43, 2008 N.Y. App. Div. LEXIS 6559 (N.Y. App. Div. 2d Dep't 2008), app. denied, 13 N.Y.3d 763, 886 N.Y.S.2d 864, 915 N.E.2d 1160, 2009 N.Y. LEXIS 3475 (N.Y. 2009).

Complaint filed by a husband and a wife against a country club failed to state a cause of action for sex discrimination based on their suspension from the country club; the husband and the wife failed to plead any facts showing how they were denied the privileges of membership on the basis of sex, particularly as both the husband and the wife were suspended while the other couple involved in a dispute with the husband and the wife, also a male and a female, were reinstated. Goldin v Engineers Country Club, 54 A.D.3d 658, 864 N.Y.S.2d 43, 2008 N.Y. App. Div. LEXIS 6559 (N.Y. App. Div. 2d Dep't 2008), app. denied, 13 N.Y.3d 763, 886 N.Y.S.2d 864, 915 N.E.2d 1160, 2009 N.Y. LEXIS 3475 (N.Y. 2009).

Commissioner of the New York State Division of Human Rights, properly found that a country club's membership admissions policy discriminated against applicants on the basis of creed, in violation of N.Y. Executive Law § 296(2)(a), as the club was properly determined to be a place of public accommodation, and did not fall within the distinctly private exception under N.Y. Executive Law § 292(9) since it had over 100 members and provided regular meals and services to non-members, thus, the club's religious quota system to admit new members was violative of N.Y. Executive Law § 296(2)(a). Further, a current member of the club had standing to file the discrimination complaint as his hearing testimony demonstrated that he was deprived of the associational benefits of interacting with at least two potential members who were placed on a waiting list because there were no available openings for members of their religion. Matter of Mill Riv. Club, Inc. v New York State Div. of Human Rights, 59 A.D.3d 549, 873 N.Y.S.2d 167, 2009 N.Y. App. Div. LEXIS 1108 (N.Y. App. Div. 2d Dep't), app. dismissed, 12 N.Y.3d 871, 882 N.Y.S.2d 679, 910 N.E.2d 428, 2009 N.Y. LEXIS 1779 (N.Y. 2009).

Bringing of action for libel and malicious prosecution by tavern owner against defendant who had filed discrimination complaint against the tavern owner with Division of Human Rights constituted an unlawful discriminatory practice on the part of the tavern owner requiring dismissal of the complaint and finding in favor of defendant on his counterclaim. Moran v Simpson, 80 Misc. 2d 437, 362 N.Y.S.2d 666, 1974 N.Y. Misc. LEXIS 1906 (N.Y. Sup. Ct. 1974).

Board of commissioners of fire district has discretion and authorization to approve or disapprove any person elected for membership in fire company, but board does not have unfettered discretion since (1) CLS Town § 176-b(3) and (16) expressly prohibit membership of nonresidents and convicted arsonists, and (2) discretion is also limited by antidiscrimination statutes. Waskewicz v Guy, 141 Misc. 2d 983, 535 N.Y.S.2d 345, 1988 N.Y. Misc. LEXIS 732 (N.Y. Sup. Ct. 1988).

Jewish religious organization could be held liable under CLS Civ R § 40 and CLS Exec § 296 for threatening boycott against resort facility in retaliation for proposed use of resort by plaintiff (allegedly anti-Jewish religious corporation), despite Jewish organization's right of free speech, since boycott (as with any mode of expression) designed to secure unlawful objective (i.e., discrimination based on religion) is not protected by First Amendment; moreover, it was of no constitutional significance that Jewish organization merely threatened boycott. Defendants (Jewish religious organization and its members) were not immune from liability under CLS Civ R § 40 and CLS Exec § 296 for threatening boycott against resort facility in retaliation for proposed use of resort by plaintiff (allegedly anti-Jewish religious corporation), despite defendants' desire to safeguard integrity of their religion, since, apart from certain statutory exceptions, parties are not exempt from conforming their actions to laws of general application not directed at speech but at conduct. Jews for Jesus, Inc. v Jewish Community Relations Council, Inc., 968 F.2d 286, 1992 U.S. App. LEXIS 15614 (2d Cir. N.Y. 1992).

83. Discrimination by religious organizations

Defendants did not violate CLS Exec § 296(2)(a) by circulating memorandum critical of plaintiffs' religious activities, even though it requested that recipients of memorandum urge others to deny plaintiffs access to facilities in which to conduct such activities, where plaintiffs conceded that they were not, in fact, denied access to place of public accommodation and that defendants (group of religious organizations) were not owners, lessees, or proprietors of such place. Defendants did not violate CLS Exec § 296(13) by circulating memorandum critical of plaintiffs' religious activities, even though it requested that recipients of memorandum urge others to deny plaintiffs access to facilities in which to conduct such activities, where defendants neither blacklisted nor refused to trade with plaintiffs. Defendants' conduct in circulating memorandum critical of plaintiffs' religious activities, and requesting that recipients of memorandum urge others to deny plaintiffs access to facilities in which to conduct such activities, was not prohibited by CLS Exec § 296(6), even though steps proposed were inconsistent with Human Rights Law and Civil Rights Law, where memorandum was not directed to restaurant owners or caterers, only to religious associates, and conduct did not go beyond proposal stage. Jews for Jesus, Inc. v Jewish Community Relations Council, Inc., 79 N.Y.2d 227, 581 N.Y.S.2d 643, 590 N.E.2d 228, 1992 N.Y. LEXIS 211 (N.Y. 1992).

Organization, which was membership corporation devoted to mutual improvement in religious knowledge of Spiritualism, which owned land claimed to be largest center for Spirtualism in world and which had received charter from national Spiritualist association, was "religious institution" within statutory exemption that nothing in statute pertaining to unlawful discriminatory practices bars religious institution from limiting sales or rental of housing accommodations or giving preference to persons of same religion or from making selection calculated to promote religious principles for which it is established or maintained. Attempt by

religious organization to make nonmembers conversant with the organization by making its residential properties available to nonmembers during summer tourist season was not beyond scope of organizations's fundamental rights under free exercise clause of first Amendment, notwithstanding contention that practice was inconsistent with denial of housing accommodations to other nonmember at other times during the year and was thus arbitrary and capricious and constituted a denial of equal protection to such nonmembers. Cowen v Lily Dale Assembly, 44 A.D.2d 772, 354 N.Y.S.2d 269, 1974 N.Y. App. Div. LEXIS 5308 (N.Y. App. Div. 4th Dep't 1974).

Jewish theological seminary was properly granted summary judgment in action for breach of employment contract brought by its former professor, who had resigned in response to seminary's decision to admit women into its program for ordination of Rabbis, since (1) professor failed to prove that seminary had contractual duty to refrain from changing its admission policies or from doing anything to offend professor's religious beliefs, and (2) professor failed to demonstrate that seminary's policy decision discriminated against him on basis of his religious convictions. Faur v Jewish Theological Seminary, 146 A.D.2d 566, 536 N.Y.S.2d 516, 1989 N.Y. App. Div. LEXIS 120 (N.Y. App. Div. 2d Dep't), app. dismissed, 74 N.Y.2d 842, 546 N.Y.S.2d 559, 545 N.E.2d 873, 1989 N.Y. LEXIS 2932 (N.Y. 1989), app. denied, 76 N.Y.2d 706, 560 N.Y.S.2d 988, 561 N.E.2d 888, 1990 N.Y. LEXIS 3024 (N.Y. 1990).

There is nothing in CLS Exec § 296(11) requiring that organization be incorporated pursuant to Religious Corporations Law in order to invoke exemption for organizations operated in connection with religious organization; thus, college could invoke exemption, notwithstanding that it was incorporated under Membership Corporations Law, since it was Catholic University and had fundamental purpose of offering education in Catholic atmosphere. There is nothing in CLS Exec § 296(11) requiring that organization be incorporated pursuant to Religious Corporations Law in order to invoke exemption for organizations operated in connection with religious organization; thus, college could invoke exemption, notwithstanding that it was incorporated under Membership Corporations Law, since it was Catholic University and had fundamental purpose of offering education in Catholic atmosphere. Scheiber v St. John's Univ., 195 A.D.2d 544, 600 N.Y.S.2d 734, 1993 N.Y. App. Div. LEXIS 7409 (N.Y. App. Div. 2d Dep't 1993), modified, aff'd, 84 N.Y.2d 120, 615 N.Y.S.2d 332, 638 N.E.2d 977, 1994 N.Y. LEXIS 1348 (N.Y. 1994).

Jewish religious organization was not entitled to summary judgment in action alleging that it violated CLS Exec § 296(6) in threatening boycott of resort facility in retaliation for proposed use of facility by plaintiff (allegedly anti-Jewish religious corporation) where trier of fact could find that statute was violated by application of concerted economic pressure and explicit threats on resort to coerce, compel or incite resort to cancel plaintiff's contract and deny access to plaintiff and its members. Jewish religious organization was not privileged and exempt from regulation under Human Rights Law based on its threat to boycott resort facility in retaliation for proposed use of facility by plaintiff (allegedly anti-Jewish religious corporation), and thus plaintiff's action under statute should go to trial on merits, since statute does not authorize forcing neutral party to discriminate on basis of religion in such party's daily operations. Jews for Jesus, Inc. v Jewish Community Relations Council, Inc., 968 F.2d 286, 1992 U.S. App. LEXIS 15614 (2d Cir. N.Y. 1992).

In an action brought by employees who alleged religious discrimination by a church employer that contracted with government entities, statutory religious discrimination claims could not be maintained because 42 U.S.C.S. § 2000e-1(a), N.Y. Exec. Law § 296(11), and New York City, N.Y., Admin. Code § 8-107(12) allow religious organizations to advance their religious missions by discriminating on the basis of religion in employment. Lown v Salvation Army, Inc., 393 F. Supp. 2d 223, 2005 U.S. Dist. LEXIS 22260 (S.D.N.Y. 2005).

84. Schools

Where petitioners alleged that the school board had illegally rezoned a school district so as to transfer white children to other schools and create room to transfer in Negro and Puerto Rican children in order to correct allegedly harmful racial imbalance, it was held that there existed neither a constitutional nor statutory mandate directing the board to promote integration nor any prohibition against such an attempt, and that the board's freedom to act was untrammeled by the courts, which would not substitute their views for those of the board if there was some reasonable basis for the board's conclusion. Van Blerkom v Donovan, 15 N.Y.2d 399, 259 N.Y.S.2d 825, 207 N.E.2d 503, 1965 N.Y. LEXIS 1405 (N.Y. 1965).

University's policy of limiting cohabitational housing eligibility to students, their spouses and dependent children did not facially discriminate against lesbians and gay men based on marital status, and thus action alleging such discrimination in violation of state and city Human Rights Laws was properly dismissed. Levin v Yeshiva Univ., 96 N.Y.2d 484, 730 N.Y.S.2d 15, 754 N.E.2d 1099, 2001 N.Y. LEXIS 2016 (N.Y. 2001).

In a civil rights proceeding brought by an epileptic nurse trainee who had been barred from a nurses' training program based on the dissatisfaction of the Board of Cooperative Education Services by which she was being trained with her physicians' attestations that her grand mal epilepsy was controlled by medication and that she was able to properly function as a licensed practical nurse, the Commissioner of Human Rights properly determined that the subject board was not an "employer" as defined in Exec Law § 296, since such board existed "for the purpose of carrying out a program of shared educational services in the schools of the supervisory district and for providing instruction in such special subjects as the [education] commissioner may approve" pursuant to Educ Law § 1950(1), so that the trainee's relationship to the board was educational in nature and lacked the mutually beneficial economic substance that is the touchstone of an employer-employee relationship; however, the commissioner erred in ruling that, due to the fact that the board was a public educational institution, it was not an "education corporation or association" within the meaning of Exec Law § 296(4) so as to be subject to the jurisdiction of the Division of Human Rights, since the board was an education corporation organized and existing under Educ Law § 1950, was nonsectarian, and was exempt from real property taxes under Real P Tax Law § 408, and so fell within the definition of the statute, and since the fact that the board was also subject to Educ Law § 313 did not affect the jurisdiction of the Human Rights Division, in that the division exercises concurrent jurisdiction over discrimination claims. State Div. of Human Rights v Board of Coop. Educ. Services, 98 A.D.2d 958, 470 N.Y.S.2d 209, 1983 N.Y. App. Div. LEXIS 21283 (N.Y. App. Div. 4th Dep't 1983), app. dismissed, 62 N.Y.2d 645 (N.Y. 1984).

An award of compensatory damages to a person aggrieved by an illegal discriminatory practice may include compensation for mental anguish, and such an award may be based solely on the testimony of the complainant. Board of Educ. v McCall, 108 A.D.2d 855, 485 N.Y.S.2d 357, 1985 N.Y. App. Div. LEXIS 43182 (N.Y. App. Div. 2d Dep't), app. denied, 65 N.Y.2d 601, 1985 N.Y. LEXIS 14750 (N.Y. 1985).

Fifty-three-year-old practicing psychologist, who alleged age discrimination under CLS Exec § 296(4), failed to establish cognizable cause of action since undisputed facts showed that his academic performance was below accepted standard for admission to defendant medical school where (1) estimated undergraduate grade point average in basic sciences of admitted students was 3.5, whereas plaintiff's average was 1.98 and was significantly lower than any admitted student, (2) overall grade point average of admitted students was 3.4, whereas plaintiff's average was 2.09, and (3) plaintiff's medical college admission test scores were well below average; contrary result was not required by fact that plaintiff was called for interview instead of being summarily eliminated from consideration on basis of his grades. Brown v Albert Einstein College of Medicine of Yeshiva University, 172 A.D.2d 197, 568 N.Y.S.2d 61, 1991 N.Y. App. Div. LEXIS 4233 (N.Y. App. Div. 1st Dep't 1991).

Medical student failed to state cause of action for discrimination by medical college where he alleged that college discriminated against him on basis of illness when it dismissed him purportedly because of poor academic performance since stu-

dent's illness was not disability within meaning of CLS Exec § 292(21) as he did not dispute that illness was cause of his poor performance. Lowinger v State University of New York Health Science Center, 180 A.D.2d 606, 580 N.Y.S.2d 316, 1992 N.Y. App. Div. LEXIS 2860 (N.Y. App. Div. 1st Dep't), app. denied, 80 N.Y.2d 753, 587 N.Y.S.2d 904, 600 N.E.2d 631, 1992 N.Y. LEXIS 1733 (N.Y. 1992).

Plaintiffs stated cause of action for discrimination where private nursery school denied use of its facilities to infant plaintiff by reason of her disability, in violation of CLS Exec § 296(2)(a) and (4) and NYC Admin Code § 8-107(4)(a), and denials complained of were not "strictly educational or pedagogic in nature" so as to remove them from purview of Code's antidiscrimination provisions by operation of NYC Admin Code § 8-107(4)(f). Stein v 92nd St. YM-YWHA, Inc., 273 A.D.2d 181, 710 N.Y.S.2d 68, 2000 N.Y. App. Div. LEXIS 7493 (N.Y. App. Div. 1st Dep't 2000).

Dismissal of a parent's statutory discrimination claims against a board of education—based on the board's alleged failure to provide the parent's handicapped child with an appropriate mode of transportation on a minibus to a special education school—was inappropriate because the board may have acted with bad faith, gross misjudgment, or deliberate indifference to the rights of the child to be transported by minibus thereby depriving the child of a free appropriate public education. I.M. v City of New York, 178 A.D.3d 126, 111 N.Y.S.3d 273, 2019 N.Y. App. Div. LEXIS 7763 (N.Y. App. Div. 1st Dep't 2019).

Dismissal of a parent's statutory discrimination claims against a school bus operator—based on a board of education's alleged failure due to a coding error to provide the parent's handicapped child with an appropriate mode of transportation on a minibus to a special education school—was appropriate because the operator was not liable for the failure to accommodate the child emanating solely from the board's statutory obligation to provide the child with a free appropriate public education. I.M. v City of New York, 178 A.D.3d 126, 111 N.Y.S.3d 273, 2019 N.Y. App. Div. LEXIS 7763 (N.Y. App. Div. 1st Dep't 2019).

As respects statute prohibiting any educational corporation or association that holds itself out to public to be nonsectarian and exempt from taxation from denying "use of its facilities" to any person otherwise qualified, by reason of race, color, religion, or national origin, attempt to distinguish between "denial of use of facilities" and "denial of admission" is a strained and tenuous construction not consonant with plain meaning in language; "use of facilities" covers admission of qualified students. New York University v New York State Div. of Human Rights, 84 Misc. 2d 702, 378 N.Y.S.2d 842, 1975 N.Y. Misc. LEXIS 3202 (N.Y. Sup. Ct.), aff'd, 49 A.D.2d 821, 373 N.Y.S.2d 719, 1975 N.Y. App. Div. LEXIS 10940 (N.Y. App. Div. 1st Dep't 1975).

Sex discrimination claim arising from university's decision to eliminate varsity wrestling, asserted by male students who had decided to attend university because they were told that wrestling program would be offered for 4 years, would be dismissed absent specific allegations that termination of wrestling program constituted intentional discrimination, or circumstance that could give rise to inference of racial discriminatory intent; furthermore, there was no proof that wrestlers were excluded on basis of gender from participating in, denied benefits of, or subjected to discrimination in university's athletic program. Cooper v Peterson, 164 Misc. 2d 878, 626 N.Y.S.2d 432, 1995 N.Y. Misc. LEXIS 179 (N.Y. Sup. Ct. 1995).

Trial court erred in an N.Y. C.P.L.R. art. 78 proceeding in prohibiting the State Division of Human Rights (SDHR) from investigating discrimination complaints against a school district because the school district had not exhausted its administrative remedies in that the hearing process was not completed, and, in the context of that administrative proceeding, the school district could have challenged the applicability of N.Y. Exec. Law § 296(4) and, at the same time, mounted a defense to the discrimination charges; once a final determination was issued, the school district, if necessary, had the opportunity to raise its issues in a challenge to SDHR's final determination, In addition, it was by no means certain that the SDHR would not find for the school district as to the discrimination charges and the school district, if necessary, also had the opportunity to challenge any final determination pursuant to N.Y. Exec. Law § 298. Matter of Newfield Cent. School Dist. v New York State Div. of Human Rights, 66 A.D.3d 1314, 888 N.Y.S.2d 244, 2009 N.Y. App. Div. LEXIS 7593 (N.Y. App. Div. 3d Dep't 2009).

Public school districts were among the "educational institutions" over which the New York State Division of Human Rights had jurisdiction for N.Y. Exec. Law § 296(4) purposes. Matter of Ithaca City School Dist. v New York State Div. of Human Rights, 87 A.D.3d 268, 926 N.Y.S.2d 686, 2011 N.Y. App. Div. LEXIS 5474 (N.Y. App. Div. 3d Dep't 2011), rev'd, 19 N.Y.3d 481, 950 N.Y.S.2d 67, 973 N.E.2d 162, 2012 N.Y. LEXIS 1353 (N.Y. 2012).

Determination that a school district, which did not dispute that the majority of the alleged incidents occurred, permitted students to engage in a course of racially-motivated harassment of a student was supported by substantial evidence where ample testimony and other evidence, including a videotape of one of these incidents, supported allegations that the student was subjected to verbal and physical abuse on a bus, including being spat upon, which was reported to the school; nevertheless, the school district's middle school administrators routinely imposed only two to three-day suspensions on the offending students in response and testified that they felt it was "unfair" to move a problem student to another school to address that student's conduct. The assistant principal conceded that there was a "racial tidal wave" that year, the school bus was a "hell hole" and he knew that the student had been threatened with gun violence, but did not require the offenders to submit to more serious superintendent's hearings, did not impose lengthier suspensions, and did not even exercise his unilateral power to ban the offenders from riding on that particular bus. Matter of Ithaca City School Dist. v New York State Div. of Human Rights, 87 A.D.3d 268, 926 N.Y.S.2d 686, 2011 N.Y. App. Div. LEXIS 5474 (N.Y. App. Div. 3d Dep't 2011), rev'd, 19 N.Y.3d 481, 950 N.Y.S.2d 67, 973 N.E.2d 162, 2012 N.Y. LEXIS 1353 (N.Y. 2012).

High school teacher was not discriminated against pursuant to N.Y. Exec. Law § 296 when directed to teach a weight-training class. The teacher conceded that other teachers at the school had been assigned to teach the same class and that, as a licensed physical education teacher, the teacher met the requirement for teaching weight training. Ruane-Wilkins v Board of Education of the City of New York, 238 N.Y.L.J. 17, 2007 N.Y. Misc. LEXIS 5422 (N.Y. Sup. Ct. July 3, 2007), aff'd, 56 A.D.3d 648, 868 N.Y.S.2d 112, 2008 N.Y. App. Div. LEXIS 8719 (N.Y. App. Div. 2d Dep't 2008).

High school teacher was not discriminated against pursuant to N.Y. Exec. Law § 296 when her request for a transfer was denied. The teacher acknowledged that the board of education was correct in denying her request since the teacher did not have enough seniority to qualify for a transfer that was not based on hardship. Ruane-Wilkins v Board of Education of the City of New York, 238 N.Y.L.J. 17, 2007 N.Y. Misc. LEXIS 5422 (N.Y. Sup. Ct. July 3, 2007), aff'd, 56 A.D.3d 648, 868 N.Y.S.2d 112, 2008 N.Y. App. Div. LEXIS 8719 (N.Y. App. Div. 2d Dep't 2008).

High school teacher alleged retaliation pursuant to N.Y. Exec. Law § 296(7) by being placed in an oversized class or being assigned to a weight training class, but except for the filing of a transfer request, the teacher did not advance any reason for the alleged retaliatory actions. The teacher's retaliation claims failed. Ruane-Wilkins v Board of Education of the City of New York, 238 N.Y.L.J. 17, 2007 N.Y. Misc. LEXIS 5422 (N.Y. Sup. Ct. July 3, 2007), aff'd, 56 A.D.3d 648, 868 N.Y.S.2d 112, 2008 N.Y. App. Div. LEXIS 8719 (N.Y. App. Div. 2d Dep't 2008).

School district could not have a public hearing enjoined on a probable cause determination by the New York State Division of Human Rights (SDHR) that it engaged in an unlawful discriminatory practice under N.Y. Exec. Law § 296(14) by not allowing a hearing impaired student to use a service dog as the district could not claim res judicata or collateral estoppel on the issue as the parents' separate action in federal district court did not include the SDHR as a party; the district had also not exhausted its administrative remedies under N.Y. Exec. Law § 298 as the public hearing had not yet been held. E. Meadow Union Free Sch. Dist. v New York State Div. of Human Rights, 238 N.Y.L.J. 36, 2007 N.Y. Misc. LEXIS 6004 (N.Y. Sup. Ct. Aug. 7, 2007).

School district could not have a public hearing enjoined on a probable cause determination by the New York State Division of Human Rights (SDHR) that it engaged in an unlawful discriminatory practice under N.Y. Exec. Law § 296(14) by not allowing a hearing impaired student to use a service dog because such a determination was not subject to review under N.Y. C.P.L.R. art. 78. E. Meadow Union Free Sch. Dist. v New York State Div. of Human Rights, 238 N.Y.L.J. 36, 2007 N.Y. Misc. LEXIS 6004 (N.Y. Sup. Ct. Aug. 7, 2007).

Disgruntled graduate student may proceed with human rights law claim against university, where he was forced out of doctorate program after failing oral examination for third time, because he claims that, had he been female, defendants would have given him opportunity to take examination in writing, given him different committee on third try, or permitted him to take course to make up for any deficiencies in his understanding of material. Bucklen v Rensselaer Polytechnic Inst., 166 F. Supp. 2d 721, 2001 U.S. Dist. LEXIS 12686 (N.D.N.Y. 2001).

Student's claim under N.Y. Exec. Law § 296 failed because no provision of New York Human Rights Law prohibited discrimination by a state college against a student on the basis of sex. Hayut v State Univ. of New York, 217 F. Supp. 2d 280, 2002 U.S. Dist. LEXIS 14203 (N.D.N.Y. 2002), aff'd in part, vacated in part, 352 F.3d 733, 2003 U.S. App. LEXIS 25723 (2d Cir. N.Y. 2003).

In an action in which students filed suit against a school district and a teacher claiming violations of § 296 of the New York Human Rights Law (NYHRL), N.Y. Exec. Law § 296, defendants were granted summary judgment because all of the alleged incidents in the present case occurred in the years 2000 and 2001, well before § 296(4) the NYHRL was amended in 2003 to allow students to sue for sexual harassment by a teacher, and because the NYHRL's provisions did not apply retroactively, Tesoriero v Syosset Cent. Sch. Dist., 382 F. Supp. 2d 387, 2005 U.S. Dist. LEXIS 22347 (E.D.N.Y. 2005).

In an action in which parents of a hearing impaired student alleged that a school district and its officials violated N.Y. Exec. Law § 296 by refusing to allow the student to bring a service dog to school, the parents failed to prove a likelihood of success on the merits because the school district provided the student with reasonable accommodations by providing a sign language interpreter, an FM transmitter, a student note taker, extra time to take tests, and daily one-on-one sessions with a specialist teacher for the deaf and hearing impaired. Cave v E. Meadow Union Free Sch. Dist., 480 F. Supp. 2d 610, 2007 U.S. Dist. LEXIS 19908 (E.D.N.Y. 2007).

In an action in which parents of a hearing impaired student alleged that a school district and its officials discriminated against the student by refusing to allow the student to bring a service dog to school, the parents were not likely to succeed on a claim under N.Y. Exec. Law § 296(14) because the parents did not prove by a preponderance of the evidence that the student had a speech discrimination score of forty percent or less and the legislature did not intend the phrase "a person with a disability" to include persons with hearing impairments. Under the parents' interpretation that § 296(14) applied because the student was a person with a disability, the portion of the law speaking specifically to hearing impairments was superfluous. Cave v E. Meadow Union Free Sch. Dist., 480 F. Supp. 2d 610, 2007 U.S. Dist. LEXIS 19908 (E.D.N.Y. 2007).

In a suit based on a sexual relationship between a teacher and a student, school employees were not liable under N.Y. Exec. Law § 296(4) because this provision only applied to education corporations. Romero v City of New York, 839 F. Supp. 2d 588, 2012 U.S. Dist. LEXIS 36049 (E.D.N.Y. 2012).

In a suit based on a sexual relationship between a teacher and a student, a special commissioner for investigation to a city school district was not liable under N.Y. Exec. Law § 296(4) because it was not an education corporation or association. Romero v City of New York, 839 F. Supp. 2d 588, 2012 U.S. Dist. LEXIS 36049 (E.D.N.Y. 2012).

In a suit based on a sexual relationship between a teacher and a student, a city department of education was not liable under N.Y. Exec. Law § 296(4) because it immediately took remedial measures when it obtained knowledge of the sexual relationship. Romero v City of New York, 839 F. Supp. 2d 588, 2012 U.S. Dist. LEXIS 36049 (E.D.N.Y. 2012).

Appeal alleging that superintendent and principal violated federal and state anti-discrimination laws by denying petitioner's hearing impaired son access to hearing dog during administration of Regents examination was dismissed to extent that petitioner sought determination that students who utilize guide dogs, hearing dogs or service dogs be granted access to all New York State Education Department approved Regents examination testing sites; commissioner does not have authority to issue declaratory judgments, petitioner lacked standing to seek relief on behalf of other students, and there were other proceedings involving same issues and same parties which were currently pending in state court. 2009 Op Comm Ed No. 15,899.

V. Practice and Procedure

85. In general

An award by the Commissioner of Human Rights of compensatory damages to a female complainant on the basis of sex discrimination in job qualifications should have been deleted from his order, not because of the failure of proof that the discrimination had been intentional, but because the record did not contain proof that she had suffered mental anguish or humiliation. Cullen v Nassau County Civil Service Com., 53 N.Y.2d 492, 442 N.Y.S.2d 470, 425 N.E.2d 858, 1981 N.Y. LEXIS 2583 (N.Y. 1981).

Town was not entitled to writ of prohibition to prevent Division of Human Rights from considering town employee's complaint of racial discrimination, despite assertion that employee had already litigated his discrimination claim in disciplinary proceeding brought against him under Civil Service Law, since division had jurisdiction to investigate and pass on claim of discrimination, and town would have opportunity to challenge division's findings on merits after division investigated complaint, and thus town suffered no irreparable harm. Town of Huntington v New York State Div. of Human Rights, 82 N.Y.2d 783, 604 N.Y.S.2d 541, 624 N.E.2d 678, 1993 N.Y. LEXIS 3273 (N.Y. 1993).

Defendant employer was not entitled to dismissal of gender discrimination complaint under CLS Exec § 296 on basis that State Division of Human Rights (SDHR) delayed 11 years before holding hearing on complaint and then delayed its order for another 3 years, where no substantial actual prejudice resulted in that employer's witnesses were able to testify without difficulties owing to memory loss regarding issues on which SDHR based its finding of discrimination. Diaz Chem. Corp. v New York State Div. of Human Rights, 91 N.Y.2d 932, 670 N.Y.S.2d 397, 693 N.E.2d 744, 1998 N.Y. LEXIS 599 (N.Y. 1998).

Commission against discrimination had power to waive time limit of its own rules which provided that application for reconsideration must be filed within 15 days from date of mailing of notice of disposition of investigation to determine whether petitioner was place of public accommodation within meaning of statute which forbids discrimination. Lake Placid Club, Inc. v Abrams, 6 A.D.2d 469, 179 N.Y.S.2d 487, 1958 N.Y. App. Div. LEXIS 4278 (N.Y. App. Div. 3d Dep't 1958), aff'd, 6 N.Y.2d 857, 188 N.Y.S.2d 561, 160 N.E.2d 92, 1959 N.Y. LEXIS 1289 (N.Y. 1959).

An employee was not collaterally estopped from asserting claims alleging sexual harassment where a prior administrative hearing that resulted in denial of unemployment benefits did not provide a full opportunity to litigate the issues raised, in that the prior administrative proceeding did not provide a full opportunity to litigate the instant issues. Schwarz v Schnipper, 87 A.D.2d 510, 447 N.Y.S.2d 488, 1982 N.Y. App. Div. LEXIS 15746 (N.Y. App. Div. 1st Dep't 1982).

The Commissioner of Human Rights erred in determining that complainant's civil service employment had been terminated due to an unlawful discriminatory practice under Exec Law § 296(16), and in ordering reinstatement of the complainant to his prior position and an allowance of back pay, since the commissioner lacked the power to order complainant's reinstatement in that the complainant was a probationary employee, and since the award of back pay was dependent at its terminus upon the offer of appointment. New York State Dep't of Mental Hygiene v State Div. of Human Rights, 103 A.D.2d 546, 481 N.Y.S.2d 371,

1984 N.Y. App. Div. LEXIS 19972 (N.Y. App. Div. 2d Dep't 1984), aff'd, 66 N.Y.2d 752, 497 N.Y.S.2d 361, 488 N.E.2d 107, 1985 N.Y. LEXIS 17645 (N.Y. 1985).

State was not entitled to dimsissal of state employee's suit for sexual discrimination under CLS Exec § 296 for failure to meet 90-day statute of limitations, even though some acts complained of had occurred more than one year earlier, where complaint alleged not isolated instances, but continuous course of discriminatory conduct resulting in employee's termination, date of which was within 90-day time period. State was not entitled to dismissal of state employee's suit for sexual discrimination in violation of CLS Exec § 296, on theory that employee had elected to pursue administrative remedies, where letter of complaint employee had sent to State Division of Human Rights did not result in investigation of charges, but only in division's sending employee letter indicating employee had to file formal, verified complaint before division would take any action, and employee did not respond further to division but instead filed suit. Brown v State, 125 A.D.2d 750, 509 N.Y.S.2d 169, 1986 N.Y. App. Div. LEXIS 62984 (N.Y. App. Div. 3d Dep't 1986), app. dismissed, 70 N.Y.2d 747, 519 N.Y.S.2d 1034, 514 N.E.2d 392, 1987 N.Y. LEXIS 18626 (N.Y. 1987).

State was entitled to dismissal of state employee's cause of action for intentional infliction of emotional distress which was part of CLS Exec § 296 action against both state and several of employee's supervisors for sexual discrimination since, under doctrine of respondeat superior, state could be liable for supervisors' acts only if employee could establish that supervisors were acting in their official capacities, proof of which would also bring into play public policy prohibiting maintenance against state of suits for intentional infliction of emotional distress where act complained of constitutes official conduct. Brown v State, 125 A.D.2d 750, 509 N.Y.S.2d 169, 1986 N.Y. App. Div. LEXIS 62984 (N.Y. App. Div. 3d Dep't 1986), app. dismissed, 70 N.Y.2d 747, 519 N.Y.S.2d 1034, 514 N.E.2d 392, 1987 N.Y. LEXIS 18626 (N.Y. 1987).

Employee was denied fair trial in age discrimination case when trial court limited testimony of plaintiff employee's witness (retired employee of defendant employer) concerning his personal experience with discriminatory attitude toward older employees displayed by individual responsible for terminating plaintiff's employment; it could not be said, as matter of law, that witness' intended testimony was so remote that potential for prejudice outweighed probative value of evidence on age discrimination issue. Murphy v American Home Products Corp., 159 A.D.2d 46, 558 N.Y.S.2d 920, 1990 N.Y. App. Div. LEXIS 8346 (N.Y. App. Div. 1st Dep't 1990).

Although action brought under CLS Exec § 296 is not tort claim which falls under notice provisions of General Municipal Law, notice of claim was nevertheless required by CLS Town § 67(1) and (2). Scopelliti v Town of New Castle, 210 A.D.2d 308, 620 N.Y.S.2d 405, 1994 N.Y. App. Div. LEXIS 12598 (N.Y. App. Div. 2d Dep't 1994).

Action brought under CLS Exec § 296 is not tort claim; thus, such action is not subject to notice of claim provisions of CLS Educ § 3813(2) or CLS Gen Mun § 50-e. Lane-Weber v Plainedge Union Free Sch. Dist., 213 A.D.2d 515, 624 N.Y.S.2d 185, 1995 N.Y. App. Div. LEXIS 2912 (N.Y. App. Div. 2d Dep't 1995), app. dismissed, 87 N.Y.2d 968, 642 N.Y.S.2d 196, 664 N.E.2d 1259, 1996 N.Y. LEXIS 144 (N.Y. 1996).

Plaintiff was not entitled to jury trial in action alleging age discrimination in employment where he sought both monetary damages and equitable relief in form of judgment setting aside his retirement and reinstating him to his former position. Bockino v Metropolitan Transp. Auth., 224 A.D.2d 471, 638 N.Y.S.2d 137, 1996 N.Y. App. Div. LEXIS 1204 (N.Y. App. Div. 2d Dep't), app. denied, 87 N.Y.2d 1017, 644 N.Y.S.2d 150, 666 N.E.2d 1064, 1996 N.Y. LEXIS 1204 (N.Y. 1996), app. denied, 88 N.Y.2d 805, 646 N.Y.S.2d 985, 670 N.E.2d 226, 1996 N.Y. LEXIS 1688 (N.Y. 1996).

Administrative Law Judge abused his discretion in refusing employer's request to have complainant examined by its psychiatrist where complainant had alleged serious psychiatric injuries as result of discrimination; any alleged difficulties complainant might experience with examination could be mitigated by imposition of reasonable conditions. Carrier Corp. v New York State Div. of Human Rights, 224 A.D.2d 936, 637 N.Y.S.2d 877, 1996 N.Y. App. Div. LEXIS 1572 (N.Y. App. Div. 4th Dep't 1996).

Employer was not prejudiced by Administrative Law Judge's (ALJ's) conduct of hearing on age discrimination and retaliation matter, even if ALJ had acted in prosecutorial fashion or partial manner, where none of questions asked by ALJ elicited 2 admissions of retaliatory conduct that were basis of finding of retaliation against employer. Electchester Hous. Project v Rosa, 225 A.D.2d 772, 639 N.Y.S.2d 848, 1996 N.Y. App. Div. LEXIS 3155 (N.Y. App. Div. 2d Dep't 1996).

Award of $25,000 to employee as compensatory damages for mental anguish and humiliation was excessive where she testified that, as result of employer's retaliatory action in threatening to deny her unemployment insurance benefits for bringing age discrimination action against it, she felt "bad, angry, hurt, embarrassed, and shocked"; such testimony only supported award of up to $2,500 for mental anguish and humiliation. Electchester Hous. Project v Rosa, 225 A.D.2d 772, 639 N.Y.S.2d 848, 1996 N.Y. App. Div. LEXIS 3155 (N.Y. App. Div. 2d Dep't 1996).

Determination by State Division of Human Rights that there was no probable cause to believe that employer unlawfully discriminated against petitioner on basis of his age was not arbitrary and capricious merely because no hearing was held since petitioner was given full opportunity to present his evidence and to discuss with Division status of investigation, and his submissions were in fact considered. Gleason v W.C. Dean Sr. Trucking, 228 A.D.2d 678, 646 N.Y.S.2d 20, 1996 N.Y. App. Div. LEXIS 7390 (N.Y. App. Div. 2d Dep't 1996).

It is within discretion of State Division of Human Rights to decide method to be used in investigating claim, and as long as petitioner has full opportunity to present claim, neither hearing nor confrontation conference is mandated. Gleason v W.C. Dean Sr. Trucking, 228 A.D.2d 678, 646 N.Y.S.2d 20, 1996 N.Y. App. Div. LEXIS 7390 (N.Y. App. Div. 2d Dep't 1996).

Delay of some 4 years from time of hearing to final determination of Division of Human Rights was not substantially prejudicial as matter of law so as to warrant dismissal of petition. Comor v New York State Div. of Human Rights, 231 A.D.2d 715, 647 N.Y.S.2d 842, 1996 N.Y. App. Div. LEXIS 9693 (N.Y. App. Div. 2d Dep't 1996).

Award of back pay should have been reduced by amount of unemployment insurance petitioner received during period covered by award. Allender v Mercado, 233 A.D.2d 153, 649 N.Y.S.2d 144, 1996 N.Y. App. Div. LEXIS 11498 (N.Y. App. Div. 1st Dep't 1996), app. dismissed, app. denied, 89 N.Y.2d 1055, 659 N.Y.S.2d 846, 681 N.E.2d 1292, 1997 N.Y. LEXIS 765 (N.Y. 1997).

In employees' discrimination action under CLS Exec § 296(1)(a), sanction imposed against employees' counsel of $1,000 payable to Lawyers' Fund for Client Protection would be vacated where counsel's actions did not rise to level of "frivolous conduct." Stephenson v Hotel Emples. & Restaurant Emples. Union Local 100, 246 A.D.2d 457, 668 N.Y.S.2d 193, 1998 N.Y. App. Div. LEXIS 626 (N.Y. App. Div. 1st Dep't 1998).

Dismissal of complaint by Division of Human Rights on ground of administrative convenience (ACD) was arbitrary, in contravention of CLS Exec § 297(9) and 9 NYCRR § 465.5(e)(2)(vi), where complainant filed administrative complaint with Division and thereafter sought ACD from Division in order to commence action in state court, and, before Division granted ACD, complainant commenced action in state Supreme Court. Legg v Eastman Kodak Co., 248 A.D.2d 936, 670 N.Y.S.2d 291, 1998 N.Y. App. Div. LEXIS 2969 (N.Y. App. Div. 4th Dep't 1998).

Court should have granted defendants' motion to change venue from Bronx to New York County where New York County was site of allegedly discriminatory conduct and county in which all of anticipated nonparty witnesses resided, defendants furnished names and addresses of potential nonparty witnesses, setting forth essence of their anticipated testimony, and manner in which they would be inconvenienced, and plaintiffs failed to identify single nonparty witness who would be inconvenienced by attending trial in New York County. Mohammad v Board of Managers,

262 A.D.2d 76, 691 N.Y.S.2d 486, 1999 N.Y. App. Div. LEXIS 6472 (N.Y. App. Div. 1st Dep't 1999).

In action alleging that school district negligently and recklessly administered health insurance claims of plaintiff's decedent, causes of action under CLS Exec § 296 and 42 USCS §§ 12101 et seq., based on alleged medical disability discrimination, were not tort claims governed by CLS Gen Mun § 50-e. Polvino v Island Group Admin., Inc., 264 A.D.2d 720, 694 N.Y.S.2d 728, 1999 N.Y. App. Div. LEXIS 9084 (N.Y. App. Div. 2d Dep't 1999).

Verdict sheet asking whether plaintiff attorney, suing his former law firm for age discrimination in firing him when he was 60 years old, possessed qualifications necessary for position required by firm at time of his discharge, did not unfairly increase his burden of proof; satisfactory job performance depends on employer's criteria, not standards that may seem reasonable to jury or judge. Schutz v Finkelstein, Bruckman, Wohl, Most & Rothman, 275 A.D.2d 407, 712 N.Y.S.2d 606, 2000 N.Y. App. Div. LEXIS 8850 (N.Y. App. Div. 2d Dep't 2000), app. denied, 96 N.Y.2d 779, 725 N.Y.S.2d 634, 749 N.E.2d 204, 2001 N.Y. LEXIS 645 (N.Y. 2001).

Testimony of employer's former director of equal opportunity which contained hearsay statements was not admissible on behalf of employment discrimination plaintiff, as admission of employer; declaration made by agent without authority to speak for principal is not within "speaking agent" exception to hearsay rule, even if agent was authorized to act in matter to which his declaration relates. Simpson v N.Y. City Transit Auth., 283 A.D.2d 419, 724 N.Y.S.2d 196, 2001 N.Y. App. Div. LEXIS 4772 (N.Y. App. Div. 2d Dep't 2001).

Sua sponte dismissal of a former employee's claim of disability discrimination in violation of N.Y. Exec. Law § 296 was error because, although the former employee failed to comply with the grievance procedure set forth in the parties' collective bargaining agreement (CBA), the CBA contained no provisions for resolution of employment discrimination disputes, let alone any clear and unmistakable language waiving the right to judicial forum for such claims; although the former employer and the superintendent asserted a failure to exhaust administrative remedies in support of their motion to dismiss the former employee's separate cause of action alleging breach of contract, the former employer and the superintendent never set forth the failure to exhaust administrative remedies in support of their motion to dismiss the employment discrimination claim, and thus the former employee was deprived of an opportunity to submit additional proof in opposition. Ambrosino v Village of Bronxville, 58 A.D.3d 649, 873 N.Y.S.2d 312, 2009 N.Y. App. Div. LEXIS 372 (N.Y. App. Div. 2d Dep't 2009).

Fire company, its president, and fire chief were not entitled to dismissal of a former fireman's discrimination causes of action based on the fireman's failure to serve a notice of claim because the notice of claim requirements of N.Y. Gen. Mun. Law § 50-e did not apply to discrimination causes of action under the Human Rights Law, N.Y. Exec. Law § 296 et seq. Thygesen v North Bailey Volunteer Fire Co., Inc., 106 A.D.3d 1458, 964 N.Y.S.2d 816, 2013 N.Y. App. Div. LEXIS 3128 (N.Y. App. Div. 4th Dep't 2013).

Grand Jury minutes, sealed pursuant to CPL 160.50 upon the dismissal of indictments against physicians accused of assault in the second degree, may not be disclosed to the Attorney-General for the purpose of aiding an investigation of the physicians' alleged professional misconduct since the purpose of CPL 160.50 and the related subdivision 14 of section 296 of the Executive Law is to protect individuals from adverse consequences based upon unsustained accusations, statutorily allowed judicial discretion to release Grand Jury minutes does not permit the disclosure of minutes sealed pursuant to CPL 160.50 except in limited circumstances and the instant action is not an appropriate case, as the key witness has published a book in which his activities as a "ghost surgeon" are detailed; the Attorney-General has, therefore, failed to demonstrate any overriding need for the Grand Jury minutes. In re Attorney-General of New York, 101 Misc. 2d 36, 420 N.Y.S.2d 685, 1979 N.Y. Misc. LEXIS 2624 (N.Y. Sup. Ct. 1979).

Doctrine of strict liability does not apply in cases involving sexual discrimination, but it is affirmative burden to plead and prove that employer either had knowledge or acquiesced in discriminatory conduct of supervisor or co-worker, however where plaintiff alleges in pleadings that her supervisor, who committed alleged sexual discrimination is president of corporate employer, his knowledge of wrongful conduct must be considered imputed to corporate defendant. Kersul v Skulls Angels, Inc., 130 Misc. 2d 345, 495 N.Y.S.2d 886, 1985 N.Y. Misc. LEXIS 3201 (N.Y. Sup. Ct. 1985).

Assertion of third cause of action for retaliatory firing under CLS Labor § 740, in complaint also alleging common law breach of contract and violation of Human Rights Law (CLS Exec § 296), technically required dismissal of first 2 causes of action since institution of action for retaliatory firing is "deemed a waiver of the rights and remedies available under any other contract, collective bargaining agreement, law, rule or regulation or under the common law" by CLS Labor § 740(7). Gonzalez v John T. Mather Memorial Hosp., 147 Misc. 2d 1082, 559 N.Y.S.2d 467, 1990 N.Y. Misc. LEXIS 388 (N.Y. Sup. Ct. 1990).

Cause of action under Human Rights Law, CLS Exec § 296, based on alleged discriminatory "rehiring" of Caucasian woman to fill plaintiff's position following her termination as part of general staff reduction, would be dismissed due to existence of prior administrative complaint for discrimination based on same hiring, even though administrative complaint did not use exact word "rehiring," since private person may commence action for violation of Human Rights Law only if that person has not previously filed administrative complaint with State Division of Human Rights covering same grievance. Plaintiff's cause of action under the Human Rights Law (Executive Law § 296), based upon the alleged discriminatory "rehiring" of a Caucasian woman to fill plaintiff's old position following her termination as part of a general staff reduction in defendant's news division, must be dismissed due to the existence of a prior administrative complaint based on the very same hiring. A private person may commence an action for violation of the Human Rights Law only if that person had not previously filed an administrative complaint with the State Division of Human Rights covering the same grievance. Although the administrative complaint does not use the word "rehire", there is a substantial identity of issues between the administrative complaint and the legal claim for a wrongful failure to rehire so as to require dismissal of the legal claim. Tong v National Broadcasting Co., 150 Misc. 2d 4, 566 N.Y.S.2d 819, 1990 N.Y. Misc. LEXIS 703 (N.Y. Sup. Ct. 1990), aff'd, 182 A.D.2d 354, 585 N.Y.S.2d 695, 1992 N.Y. App. Div. LEXIS 5206 (N.Y. App. Div. 1st Dep't 1992).

State procedures for adjudicating claim of employment discrimination are sufficient under due process clause of Fourteenth Amendment, where under state's law (1) claim requires state's antidiscrimination agency to investigate whether there is probable cause to believe that complaint is true, (2) before probable cause determination is made, claimant is entitled to full opportunity to present on record, though informally, charges against his employer or other respondent, including right to submit all exhibits which he wishes to present and testimony of witnesses in addition to his own testimony, (3) complainant is entitled to opportunity to rebut evidence submitted by or obtained from employer, (4) complainant may have attorney assist him and may ask state agency to issue subpoenas, (5) if investigation discloses probable cause and efforts at conciliation fail, state agency must conduct public hearing to determine merits of complaint, (6) public hearing must also be held if administrative appeal board within state agency finds that there has not been full investigation and opportunity for complainant to present his contentions and evidence, with full record, and (7) judicial review in state's appellate courts is available to assure that claimant is not denied any of procedural rights to which he was entitled and that state agency's determination was not arbitrary or capricious. Kremer v Chemical Constr. Corp., 456 U.S. 461, 102 S. Ct. 1883, 72 L. Ed. 2d 262, 1982 U.S. LEXIS 104 (U.S.), reh'g denied, 458 U.S. 1133, 103 S. Ct. 20, 73 L. Ed. 2d 1405, 1982 U.S. LEXIS 2945 (U.S. 1982).

In employment discrimination action brought under both state and federal law, district court sitting at equity in federal Title VII action must resolve Title VII claims in accordance with jury's determination on CLS Exec § 296 claim since elements of successful employment discrimination claim under both statutes are virtually identical. Song v Ives Laboratories, Inc., 957 F.2d 1041, 1992 U.S. App. LEXIS 2608 (2d Cir. N.Y. 1992).

Remedial defendants, state departments and department heads included simply because they might be required to satisfy judgment pursuant to state procedural law, are dismissed from action in which state employee claims she was demoted due to her age and gender in violation of CLS Exec Law § 296, because they are not proper parties since they had no personal involvement in alleged discriminatory demotion. Hamilton v New York State Dep't of Mental Hygiene, 876 F. Supp. 470, 1994 U.S. Dist. LEXIS 20198 (W.D.N.Y. 1994).

Judgment will be entered for fired female banker in amount of, inter alia, $300,000 in back pay awarded by jury, although 42 USCS § 1981a appears to leave back pay issue for court, because both parties agree that, even if back pay is issue for court, court, sitting in equity, is bound by jury's factual findings under Human Rights Law (CLS Exec Law §§ 296 et seq.). Dailey v Societe Generale, 889 F. Supp. 108, 1995 U.S. Dist. LEXIS 8626 (S.D.N.Y. 1995).

Employee's discrimination claims under CLS Exec Law § 296 of Human Rights Law against employer, state Health and Hospitals Corporation (HHC), and hospital are not denied summarily, where employee did not file notice of claim against HHC, because actions brought under § 296 are not regarded as tort actions, so notice-of-claim provision does not apply. Dortz v City of New York, 904 F. Supp. 127, 1995 U.S. Dist. LEXIS 14438 (S.D.N.Y. 1995).

Gender discrimination claim against city and its Health and Hospitals Corporation under CLS Exec § 296 was not barred by plaintiff's failure to file notice of claim under CLS Gen Mun § 50-e and CLS Unconsol Ch 214-A § 20, since New York courts do not regard claims under § 296 as tort claims. Dortz v City of New York, 904 F. Supp. 127, 1995 U.S. Dist. LEXIS 14438 (S.D.N.Y. 1995).

Individual employee defendants are denied dismissal of claim brought against them under New York Human Rights Law (CLS Exec Law §§ 290 et seq.), where former fellow employed alleged that defendants participated in plan to misappropriate his unique creative skills and worldwide telecommunications expertise with view toward breaching their obligations to him because of his national origin and skin color, because individuals who actually participate in conduct giving rise to discrimination claim may be held personally liable under CLS Exec Law § 296(6). Tagare v NYNEX Network Sys. Co., 921 F. Supp. 1146, 1996 U.S. Dist. LEXIS 4538 (S.D.N.Y. 1996).

Employee was precluded from asserting claim under CLS Exec § 296 where he knowingly and voluntarily signed release of employment discrimination claims and his assertions of ambiguity, fraud and economic duress were insufficient to create question of fact regarding validity of release. Nicholas v NYNEX, Inc., 929 F. Supp. 727, 1996 U.S. Dist. LEXIS 8527 (S.D.N.Y. 1996).

Rehabilitation Act of 1973 (29 USCS §§ 701 et seq.) preempted claim against federal employer for alleged violation of Human Rights Law asserted by federal employee with Human Immunodeficiency Virus. Rivera v Heyman, 982 F. Supp. 932, 1997 U.S. Dist. LEXIS 15524 (S.D.N.Y. 1997), aff'd, 1998 U.S. App. LEXIS 20859 (2d Cir. N.Y. Aug. 26, 1998), aff'd in part and rev'd in part, 157 F.3d 101, 1998 U.S. App. LEXIS 22598 (2d Cir. N.Y. 1998).

Sexual harassment plaintiff shall have jury decide her state-law claim and advisory jury will be utilized for her federal claims, where alleged harassment ended with her termination on March 4, 1991 but federal law amending Title VII (42 USCS §§ 2000e et seq.) to allow claimants to have trial by jury as well as to seek compensatory and punitive damages did not become effective until November 21, 1991, because 1991 expansion of Title VII does not apply but she is entitled to trial by jury and to compensatory damages pursuant to Exec § 296 claim. Waterson v Plank Rd. Motel Corp., 43 F. Supp. 2d 284, 1999 U.S. Dist. LEXIS 4582 (N.D.N.Y. 1999).

Standards applied by courts evaluating age and race discrimination claims under Exec § 296 are parallel to analysis used in Title VII and claims under ADEA. Dawkins v Witco Corp., 103 F. Supp. 2d 688, 2000 U.S. Dist. LEXIS 9758 (S.D.N.Y. 2000).

In an action in which television writers filed suit against various employers and agencies, alleging an industry-wide pattern or practice of age discrimination in violation of the Age Discrimination Employment Act, California's Fair Employment and Housing Act, and New York State's Human Rights Law, as well as the Labor Management Relations Act, the writers' claims seeking to hold each defendant jointly and severally liable for alleged acts of discrimination by other defendants pursuant to a uniform "industry-wide" practice of age discrimination were dismissed; there was no cognizable theory upon which one employer could be held jointly and severally liable for the discriminatory practices of another, without an alleged relationship between the two employers. Wynn v NBC, 234 F. Supp. 2d 1067, 2002 U.S. Dist. LEXIS 25893 (C.D. Cal. 2002), dismissed, 2002 U.S. Dist. LEXIS 28774 (C.D. Cal. Mar. 6, 2002).

Notice of claim requirement set forth in N.Y. Educ. Law § 3813(1) (2001) applied to an employee's claims of age and gender discrimination under N.Y. Exec. Law § 296 against a school district, its superintendent, and a high school principal where the employee did not seek to vindicate a public interest but rather sought to vindicate his own private interest and to recover money damages for his own alleged emotional and financial loss. The district, superintendent, and principal were not entitled to judgment on the pleadings on the age discrimination claim because an Equal Employment Opportunity Commission (EEOC) notice of a charge of age discrimination, which the EEOC sent to the district's director of personnel, satisfied the statutory notice of claim requirement; the district, superintendent, and principal were entitled to judgment on the pleadings on the employee's gender discrimination claim where the EEOC's notice of charge contained no reference to gender discrimination. Kushner v Valenti, 285 F. Supp. 2d 314, 2003 U.S. Dist. LEXIS 17637 (E.D.N.Y. 2003), abrogated, Brtalik v S. Huntington Union Free Sch. Dist., 2010 U.S. Dist. LEXIS 107373 (E.D.N.Y. Oct. 6, 2010).

In an action in which a police officer asserted gender discrimination and retaliation claims against a city under the New York Human Rights Law, N.Y. Gen. Mun. Law § 50-e did not permit the city to impose a notice of claim requirement. N.Y. County Law § 52, which permitted a notice of claim requirement in a broader range of cases, was inapplicable because the case involved a municipality rather than a county. Lee v City of Syracuse, 603 F. Supp. 2d 417, 2009 U.S. Dist. LEXIS 24966 (N.D.N.Y. 2009), overruled in part, Widomski v State Univ. of N.Y., 748 F.3d 471, 2014 U.S. App. LEXIS 6466 (2d Cir. N.Y. 2014).

Employee's claims of retaliation under N.Y. Exec. Law § 296(3) were barred because the employee failed to file a notice of claim in accordance with N.Y. County Law § 52; grievances and correspondence between the employee and the employer from 2001 to 2006 did not constitute notice because the one year and 90-day time limit in N.Y. Gen. Mun. Law § 50-i was not observed. Russell v County of Nassau, 696 F. Supp. 2d 213, 2010 U.S. Dist. LEXIS 14018 (E.D.N.Y. 2010).

Plaintiff employee stated a claim under N.Y. Exec. Law § 296 for aiding and abetting pursuant to § 296(6) only against those individual defendants who she alleged participated directly in the unlawful discrimination, harassment, and retaliation. Because the other individual defendants had not been participants and because they were not "employers" under § 296(1), they were dismissed from the lawsuit. Cohn v Keyspan Corp., 713 F. Supp. 2d 143, 2010 U.S. Dist. LEXIS 48672 (E.D.N.Y. 2010).

Although an employee labeled his claim as a discrimination claim under N.Y. Exec. Law § 296(1)(a), the employee's claim that his employer terminated him for the sole purpose of preventing the employee from receiving disability benefits was completely preempted by 29 U.S.C.S. § 1144(a) because the claim was a benefits deprivation claim under 29 U.S.C.S. § 1140 and fell within the scope of 29 U.S.C.S. § 1132(a)(1)(B) and the employee alleged no instances of discrimination that arose separately from his benefits termination claim. Thus, the action was properly removed pursuant to 28 U.S.C.S. § 1441(a) and remand

was not warranted under 28 U.S.C.S. § 1447(c). Schultz v Tribune ND, Inc., 754 F. Supp. 2d 550, 2010 U.S. Dist. LEXIS 129581 (E.D.N.Y. 2010), dismissed, 2011 U.S. Dist. LEXIS 103452 (E.D.N.Y. Sept. 14, 2011).

In a suit brought by parents asserting defamation and discrimination against a school district and others with regard to their son, their state claims against the school district for violating N.Y. Exec. Law § 296(4) were dismissed because the school district was a public corporation, which cannot be held liable under the section since it was not an education corporation within the meaning of § 296(4), however, the claims against the individual defendants survived dismissal. TC v Valley Cent. Sch. Dist., 777 F. Supp. 2d 577, 2011 U.S. Dist. LEXIS 41486 (S.D.N.Y. 2011), different results reached on reconsid., 2011 U.S. Dist. LEXIS 90260 (S.D.N.Y. June 29, 2011).

86. Jurisdiction

Trial court properly dismissed an employee's N.Y. Exec. Law § 290 et seq. age discrimination claim for want of subject matter jurisdiction because the employee did not allege that he was not a resident of, or employed in, the state of New York; nor did the employee claim that the alleged discriminatory conduct had an impact in the state of New York. Hoffman v Parade Publs., 15 N.Y.3d 285, 907 N.Y.S.2d 145, 933 N.E.2d 744, 2010 N.Y. LEXIS 1346 (N.Y. 2010).

Division lacked jurisdiction to investigate students' discrimination complaints against school districts under N.Y. Exec. Law § 296(4) because a public school district was not an "education corporation or association" as contemplated by § 296(4). Matter of North Syracuse Cent. School Dist. v New York State Div. of Human Rights, 19 N.Y.3d 481, 950 N.Y.S.2d 67, 973 N.E.2d 162, 2012 N.Y. LEXIS 1353 (N.Y. 2012).

In an action by a former employee against her employer charging a violation of the Human Rights Law, the employee, having invoked the jurisdiction of New York State, was properly ordered to appear for oral examination prior to trial in New York City, although she lived in South Carolina. Moreover, the employee, who had moved for class action certification, could not validly contend that she lacked financial resources to travel to New York for examination when she was simultaneously attempting to show that she would fairly and adequately protect the class. Mack v J. C. Penney Co., 81 A.D.2d 761, 439 N.Y.S.2d 118, 1981 N.Y. App. Div. LEXIS 11395 (N.Y. App. Div. 1st Dep't 1981).

CLS Exec §§ 296 and 297 did not grant jurisdiction to State Division of Human Rights to consider issue of union local's refusal to waive requirements of union labor for low bidding non-union subcontractor who was offered, but refused, opportunity to sign full time agreement with union; clear intent of law was to prohibit discrimination by labor union in its membership practices, not to deal with issues concerning persons neither union members nor applying for memberships. Gomez v New York State, Executive Dep't Div. of Human Rights, 122 A.D.2d 337, 504 N.Y.S.2d 307, 1986 N.Y. App. Div. LEXIS 59671 (N.Y. App. Div. 3d Dep't 1986).

In action to recover damages for unlawful discrimination based on marital status, plaintiff was not required to exhaust administrative remedies before commencing action in Supreme Court, even though Division of Human Rights is administrative agency charged with investigating and remedying discriminatory practices, since victims of discriminatory practices are given choice as to forum in which they may seek relief. Ness v Pan American World Airways, 142 A.D.2d 233, 535 N.Y.S.2d 371, 1988 N.Y. App. Div. LEXIS 12457 (N.Y. App. Div. 2d Dep't 1988).

Employer was not entitled to preliminary injunction of administrative proceedings before Division of Human Rights (DHR), since DHR maintains jurisdiction to investigate and pass on claims of discrimination, including claim raised by employee herein regarding employment discrimination based on disability; employer's argument as to effect of arbitration award (i.e., alleged error of law) lay first in administrative review and, following exhaustion of that remedy, in subsequent judicial review under CLS Exec § 298. Anker Management Corp. v State Div. of Human Rights, 215 A.D.2d 706, 627 N.Y.S.2d 73, 1995 N.Y. App. Div. LEXIS 5741 (N.Y. App. Div. 2d Dep't 1995).

Court properly dismissed action for employment discrimination where plaintiff had brought administrative action against corporate defendant, which was voluntarily withdrawn with no indication that withdrawal was done for administrative convenience. Brown v Wright, 226 A.D.2d 570, 641 N.Y.S.2d 125, 1996 N.Y. App. Div. LEXIS 4401 (N.Y. App. Div. 2d Dep't 1996).

Claimant could not avoid jurisdictional bar under CLS Exec § 297(9) by merely adding additional elements of damage arising out of same underlying conduct, by changing his legal theory, or couching his claim in such vague and conclusory terms as to thwart comparison of administrative and legal proceedings; further, given that administrative complaints of discrimination were dismissed due to absence of probable cause, and not "on the grounds of administrative convenience" (CLS Exec § 297(9)), failure to conduct hearing was irrelevant. Bhagalia v State, 228 A.D.2d 882, 644 N.Y.S.2d 398, 1996 N.Y. App. Div. LEXIS 7256 (N.Y. App. Div. 3d Dep't 1996).

Judicial Hearing Officer (JHO), in purporting to hold tenant liable to landlord for back rent, acted beyond his jurisdiction where court had consolidated landlord's summary holdover proceeding with tenant's discrimination action, deeming holdover proceeding to be counterclaim, and on landlord's default in failing to comply with discovery demands, court struck his answer, referring case to JHO for determination of tenant's damages. Likoua v Saudi, 231 A.D.2d 609, 647 N.Y.S.2d 540, 1996 N.Y. App. Div. LEXIS 9469 (N.Y. App. Div. 2d Dep't 1996).

Court should have granted defendants' summary judgment motion on ground that plaintiff elected to pursue administrative remedy by filing complaint with New York State Division of Human Rights (NYSDHR) since plaintiff failed to produce admissible proof as to whether her complaint was referred to NYSDHR by Equal Employment Opportunity Commission or whether she filed it directly with NYSDHR; she submitted only attorney's affirmation that was not based on personal knowledge of facts stated therein. Hirsch v Morgan Stanley & Co., 239 A.D.2d 466, 657 N.Y.S.2d 448, 1997 N.Y. App. Div. LEXIS 5365 (N.Y. App. Div. 2d Dep't 1997).

Prior service of process on New York City Commission on Human Rights and Corporation Counsel of City of New York under NYC Admin Code § 8-502(c) is not condition precedent to valid commencement of sex discrimination action under NYC Admin Code Title 8. Teller v America West Airlines, 240 A.D.2d 727, 659 N.Y.S.2d 314, 1997 N.Y. App. Div. LEXIS 7132 (N.Y. App. Div. 2d Dep't 1997).

Writ of prohibition was improperly granted divesting New York State Division of Human Rights s/h/a State of New York Executive Department, Division of Human Rights (SDHR) of jurisdiction to prosecute complaint of employment discrimination, despite fact that there had been delay in processing complaint, since one reason for delay was transfer of matter from county human rights commission to SDHR, which was result of administrative restructuring, and determination as to whether petitioner suffered substantial prejudice by delay and death of petitioner's former owner should have been made by SDHR after hearing; once there is final determination, appropriate appellate review is available. Pat's Carpet Outlet v State Exec. Dep't, Div. of Human Rights, 244 A.D.2d 338, 663 N.Y.S.2d 885, 1997 N.Y. App. Div. LEXIS 11011 (N.Y. App. Div. 2d Dep't 1997).

New York State Division of Human Rights properly dismissed, for lack of jurisdiction, claim of racial discrimination brought by certified home health care aide, who was employed by 93-year-old quadriplegic to provide 24-hour care to attend to his health and personal hygiene needs, to cook for him, to transport him, and otherwise to care for him. Thomas v Dosberg, 249 A.D.2d 999, 672 N.Y.S.2d 164, 1998 N.Y. App. Div. LEXIS 5177 (N.Y. App. Div. 4th Dep't 1998).

State Division of Human Rights had no jurisdiction to afford Article 78 petitioner relief for perceived wrongs not within remedial ambit of CLS Exec § 296. Flinker v New York State Div. of Human Rights, 265 A.D.2d 178, 695 N.Y.S.2d 570, 1999 N.Y. App. Div. LEXIS 9732 (N.Y. App. Div. 1st Dep't 1999).

State Division of Human Rights (DHR) had subject matter jurisdiction over complaint against Metropolitan Transit Authority (MTA) alleging MTA's denial of advantage by reason of disability of mental illness, even though MTA was not required by federal law to include mentally ill persons in its half-fare pro-

gram, where DHR was not thereby precluded from deciding that automatic exclusion of that class of disabled persons from public accommodation program was discriminatory practice in violation of State Human Rights Law. Staten Island Alliance for the Mentally Ill v Mercado, 273 A.D.2d 36, 708 N.Y.S.2d 402, 2000 N.Y. App. Div. LEXIS 6319 (N.Y. App. Div. 1st Dep't 2000).

An action instituted by New York City to restrain defendants from further discrimination with respect to housing rentals and from further violations of local laws was not subject to being stricken on the ground that the court had no jurisdiction over such an action, exclusive jurisdiction of the subject matter being vested in the State Commission against Discrimination. New York v Claflington, Inc., 40 Misc. 2d 547, 243 N.Y.S.2d 437, 1963 N.Y. Misc. LEXIS 1934 (N.Y. Sup. Ct. 1963).

The New York State Division of Human Rights in a special proceeding against a South African Airway was without jurisdiction to conduct a hearing on the visa policy of the Republic of South Africa as it affects the airline in carrying passengers. South African Airways v New York State Div. of Human Rights, 64 Misc. 2d 707, 315 N.Y.S.2d 651, 1970 N.Y. Misc. LEXIS 1180 (N.Y. Sup. Ct. 1970).

Education department and Division of Human Rights had concurrent jurisdiction to pass on complaint alleging that student applicant was denied admission to medical school on basis of discriminatory practices of school; thus school was not entitled to extraordinary remedy of writ to prohibit student applicant and Division from conducting discrimination complaint hearing on grounds they were proceeding in excess of jurisdiction. New York University v New York State Div. of Human Rights, 84 Misc. 2d 702, 378 N.Y.S.2d 842, 1975 N.Y. Misc. LEXIS 3202 (N.Y. Sup. Ct.), aff'd, 49 A.D.2d 821, 373 N.Y.S.2d 719, 1975 N.Y. App. Div. LEXIS 10940 (N.Y. App. Div. 1st Dep't 1975).

CLS Veh & Tr Art 19-A did not supersede or preempt Human Rights Law and thus did not oust Division of Human Rights from jurisdiction over complaint by 400-pound bus driver, whose employment was terminated when medical examiner determined that he was not physically qualified to perform his duties as bus driver under CLS Veh & Tr Art 19-A since regulations setting forth criteria to determine whether driver is qualified did not conflict with Human Rights Law provisions against discrimination. Public transportation authority was entitled to writ of prohibition precluding Division of Human Rights from holding hearing or taking any action in regard to complaint by former employee of authority's wholly owned subsidiary since discrimination alleged in complaint related to unlawful employment practices, and authority was not employee's employer. Subsidiary of public transportation authority was not entitled to writ of prohibition precluding Division of Human Rights (DHR) from holding hearing or taking any action in regard to discriminatory employment complaint by subsidiary's former employee, despite DHR's failure to comply with notice of claim provisions of CLS Pub A § 1342 since (1) statute only applied to "action" and not to "proceeding" such as instituted by DHR, (2) statute excluded subsidiary corporation from notice of claim requirement, and (3) notice of claim provision had no application to action to vindicate public interest. A proceeding in the nature of prohibition to preclude the State Division of Human Rights from holding a hearing or taking any action with respect to a complaint filed with the Division does lie with respect to the parent corporation of a wholly owned subsidiary which employed the complainant, who alleged that he was the victim of an unlawful discriminatory employment practice, since the parent corporation was not the complainant's employer; consequently, the Division lacks statutory jurisdiction to proceed against the parent corporation (see, Executive Law § 296 [1], [2]). Central New York Centro, Inc. v New York State Div. of Human Rights, 142 Misc. 2d 935, 539 N.Y.S.2d 626, 1989 N.Y. Misc. LEXIS 150 (N.Y. Sup. Ct. 1989).

A complaint addressed to a Supreme Court seeking an injunction against rental of apartments or sale or disposition of an apartment building because the owner and rental agent had violated this section by refusing to rent an apartment to plaintiff was dismissed for want of jurisdiction. Redd v Zier, 229 N.Y.S.2d 582, 1962 N.Y. Misc. LEXIS 4175 (N.Y. Sup. Ct. 1962).

While plaintiff employee was fired by defendant employer after her preliminary injunction motion in a racial and sexual harassment employment discrimination case under N.Y. Exec. Law § 296, New York City, N.Y., Admin. Code 8-502, the Family and Medical Leave Act, 29 U.S.C.S. § 2601 et seq., was denied, the issues were not moot because the appellate court could feasibly preclude intimidation of other employees who could be witnesses, which was a harm the employee feared and thus, the appellate court had U.S. Const. art. III jurisdiction. Moore v Consol. Edison Co. of N.Y., Inc., 409 F.3d 506, 2005 U.S. App. LEXIS 10042 (2d Cir. N.Y. 2005).

Supplemental jurisdiction will be exercised over terminated female law firm associate's remaining employment discrimination and related claims, where operative facts underlying her federal Title VII claims are identical to those underlying her CLS Exec Law § 296 and other state law claims, because dismissal of her state law claims on jurisdictional grounds would result in duplicative litigation over same conduct. Sigmon v Parker Chapin Flattau & Klimpl, 901 F. Supp. 667, 1995 U.S. Dist. LEXIS 14611 (S.D.N.Y. 1995).

Employment discrimination plaintiff is granted leave to amend complaint to add claim under CLS Exec Law § 296, although different recoveries may be available under § 296 and federal Title VII (42 USCS §§ 2000e et seq.), because that fact does not make § 296 claim "novel and complex" and best left to state court. Fastiggi v Waterview Hills Nursing Ctr., 6 F. Supp. 2d 242, 1998 U.S. Dist. LEXIS 7923 (S.D.N.Y. 1998).

U.S. Const. Amend. XI bars suits for money damages by reason of a state's failure to comply with the New York State Human Rights Law, N.Y. Exec. Law § 296. Briggs v New York State DOT, 233 F. Supp. 2d 367, 2002 U.S. Dist. LEXIS 22436 (N.D.N.Y. 2002).

Court did not have to decide whether the law with respect to N.Y. Exec. Law § 296(6) was so unsettled as to present a novel or complex issue of state law that would warrant the court declining to exercise jurisdiction over an employee's New York Human Rights Law, N.Y. Exec. Law § 296 et seq., claim against individual defendants, for the simple reason that the individual stated a facially valid claim against those defendants under § 296(1). Heinemann v Howe & Rusling, 260 F. Supp. 2d 592, 2003 U.S. Dist. LEXIS 7599 (W.D.N.Y. 2003).

Defendants, a town and a supervisor of the former employee, lacked the statutory authority to conduct a N.Y. Gen. Mun. Law § 50-h examination before the employment discrimination case could have been filed in the district court because no such examination was required under the New York State Human Rights Law, N.Y. Exec. Law, § 290 et seq. Gentile v Town of Huntington, 288 F. Supp. 2d 316, 2003 U.S. Dist. LEXIS 18870 (E.D.N.Y. 2003).

Aggrieved party has a right of action under N.Y. Exec. Law § 296 for actions committed outside New York when that discrimination was committed by a resident person or domestic corporation; claim by a male employee that he was discriminated against by his supervisors after having reported over the course of one year three separate incidents of alleged sexual harassment of female co-workers was dismissed on summary judgment as against the employer, because it was not a New York corporation, and as against one of the supervisors, because there was no proof that he was a New York resident. Howard v Sprint/United Mgmt. Co., 299 F. Supp. 2d 180, 2003 U.S. Dist. LEXIS 24090 (S.D.N.Y. 2003).

Where plaintiff former federal employee's employment discrimination action was dismissed as untimely, the court declined to exercise its discretion under 28 U.S.C.S. § 1367(c) over the employee's remaining state law claim under N.Y. Exec. Law § 296. Harrison v Potter, 323 F. Supp. 2d 593, 2004 U.S. Dist. LEXIS 12448 (S.D.N.Y. 2004).

Although the federal claims against the union and the union representative had been dismissed for want of subject matter jurisdiction, the doctrine of supplemental jurisdiction under 28 U.S.C.S. § 1367 permitted the court to exercise jurisdiction over the employee's claim against the union and the union representative under N.Y. Exec. Law § 296 in light of the remaining federal claims against the city and the hospital because the state

law claims against all defendants and the federal claim against the city and the hospital shared a common nucleus of operative fact, and trying the claims together promoted judicial efficiency; therefore, the motion to dismiss the employee's claim for lack of jurisdiction was denied. Cabrera v New York City, 2004 U.S. Dist. LEXIS 18402 (S.D.N.Y. Sept. 13, 2004).

Where the employee sued her employer and supervisor in state court alleging claims of gender discrimination and retaliation in violation of N.Y. Exec. Law § 296, and the employer removed the case to federal court on the basis of diversity jurisdiction, the employee's motion to remand was granted after the employer and the supervisor failed to show that the supervisor was fraudulently joined to defeat diversity. The supervisor's citizenship in New York destroyed the complete diversity necessary for federal diversity jurisdiction. Gross v Home Depot U.S.A., Inc., 386 F. Supp. 2d 296, 2005 U.S. Dist. LEXIS 9052 (S.D.N.Y. 2005).

In an action for, inter alia, violations of New York State Human Rights Law (NYSHRL), N.Y. Exec. Law § 296 et seq., slander per se, and intentional infliction of emotional distress, it was undisputed that none of the defendants was either a New York resident or a domestic corporation; thus, plaintiff's claim was viable only if she alleged that the discriminatory acts occurred in New York. Curto v Med. World Communs., Inc., 388 F. Supp. 2d 101, 2005 U.S. Dist. LEXIS 27088 (E.D.N.Y. 2005).

After plaintiff's Americans with Disabilities Act (ADA), 42 U.S.C.S. § 12101 et seq., claim was dismissed, the federal court declined to exercise jurisdiction over plaintiff's state law claim; because the pendent state law claim was not congruent with the federal claim, it was most appropriate for it to be adjudicated in the New York State courts. Almond v Westchester County Dep't of Corr., 425 F. Supp. 2d 394, 2006 U.S. Dist. LEXIS 15426 (S.D.N.Y. 2006).

87. Standing to bring action

Under above provisions plaintiff has standing to complain only of grievances to which he has been one of the persons subjected. Gaynor v Rockefeller, 15 N.Y.2d 120, 256 N.Y.S.2d 584, 204 N.E.2d 627, 1965 N.Y. LEXIS 1651 (N.Y. 1965).

Where evidence that private club served non-member whites while refusing service to blacks present at fashion show open to public established a violation of Executive Law § 296, subd 2, blacks who had not requested service were nevertheless aggrieved persons within the meaning of Executive Law § 297. Batavia Lodge No. 196, L. O. M. v New York State Div. of Human Rights, 43 A.D.2d 807, 350 N.Y.S.2d 273, 1973 N.Y. App. Div. LEXIS 2914 (N.Y. App. Div. 4th Dep't 1973), rev'd, 35 N.Y.2d 143, 359 N.Y.S.2d 25, 316 N.E.2d 318, 1974 N.Y. LEXIS 1377 (N.Y. 1974).

As between victim and spouse, it is only former who is "person . . . aggrieved" within ambit of statute granting right of action in damages to any person claiming to be aggrieved by unlawful discriminatory practice, and spouse of person discriminated against is impermissible plaintiff. Weinstein v Hospital for Joint Disease & Medical Center, 53 A.D.2d 627, 384 N.Y.S.2d 203, 1976 N.Y. App. Div. LEXIS 13330 (N.Y. App. Div. 2d Dep't 1976).

In a summary proceeding by an administratrix to recover from the decedent's cohabiter, a woman with whom he was living as husband and wife at the time of his death, possession of an apartment leased by decedent, the appellate court held that the proceeding was not an unlawful discrimination on the asserted ground of marital status in violation of Exec Law § 296 since the statute has no application to persons who do not stand substantially in the relationship of landlord and tenant. Young v Carruth, 89 A.D.2d 466, 455 N.Y.S.2d 776, 1982 N.Y. App. Div. LEXIS 18408 (N.Y. App. Div. 1st Dep't 1982).

Roommates (one white man and one black man) had standing to bring action against owners of apartment building for damages for alleged unlawful discriminatory practices where roommates alleged that owners knew that white roommate was seeking accommodation for himself and his roommate and that discriminatory practice occurred after white roommate's disclosure that his roommate was black; if such allegations were established, jury could find that both roommates were injured by owner's racial bias, and it was not relevant that one roommate was white. Dunn v Fishbein, 123 A.D.2d 659, 507 N.Y.S.2d 29, 1986 N.Y. App. Div. LEXIS 60809 (N.Y. App. Div. 2d Dep't 1986).

Principals of close corporation are generally not considered employees for purposes of determining applicability of CLS Exec § 296, which applies only to employers with 4 or more employees; essential element of control over conduct (including selection, payment of wages and power of dismissal) is generally lacking for principals. Germakian v Kenny International Corp., 151 A.D.2d 342, 543 N.Y.S.2d 66, 1989 N.Y. App. Div. LEXIS 7998 (N.Y. App. Div. 1st Dep't), app. denied, 74 N.Y.2d 615, 549 N.Y.S.2d 960, 549 N.E.2d 151, 1989 N.Y. LEXIS 3205 (N.Y. 1989).

Sublessee which sought prime landlord's consent to proposed sub-sub-lease of portion of subleased premises to sub-sub-lessee whose principals were black females did not fall within zone of interest which Human Rights Law protects, and thus landlord was entitled to summary judgment in sublessee's action for racial discrimination. Ivan Mogull Music Corp. v Madison-59th Street Corp., 162 A.D.2d 336, 556 N.Y.S.2d 906, 1990 N.Y. App. Div. LEXIS 7745 (N.Y. App. Div. 1st Dep't 1990).

Cause of action concerning alleged age discrimination would be dismissed where plaintiff was "partner" of defendant law firm as opposed to "employee" of firm, and thus lacked standing to sue under CLS Exec § 296. Levy v Schnader, Harrison, Segal & Lewis, 232 A.D.2d 321, 648 N.Y.S.2d 572, 1996 N.Y. App. Div. LEXIS 10552 (N.Y. App. Div. 1st Dep't 1996).

Plaintiffs, licensed practical nurses, lacked standing to assert claim that medical center's per se policy contravened CLS Civ R § 79-i and CLS Exec § 296 by punishing employees who had asserted their intention to refrain from participating in abortive procedures by requiring them to participate in emergency situations involving abortions since no emergency was implicated in instant circumstances nor did plaintiffs allege that they were forced to perform abortive procedure. Larson v Albany Med. Ctr., 252 A.D.2d 936, 676 N.Y.S.2d 293, 1998 N.Y. App. Div. LEXIS 8687 (N.Y. App. Div. 3d Dep't 1998).

Prospective sellers did not have standing to assert action under CLS Exec §§ 296 and 297 against property owners association and its environmental control committee for their denial of application by prospective buyers to use property as vacation convent, since prospective sellers had not been victims of any discrimination. Sisters of the Resurrection, New York Inc. v Country Horizons, 257 A.D.2d 729, 682 N.Y.S.2d 486, 1999 N.Y. App. Div. LEXIS 25 (N.Y. App. Div. 3d Dep't 1999).

In Article 78 proceeding to annul state human rights commissioner's decision that State Division of Human Rights lacked subject matter jurisdiction over complaint alleging that Metropolitan Transit Authority (MTA) denied advantage to petitioner by reason of disability of mental illness, equitable relief sought might have been rendered moot by 1999 and 2000 amendments to Public Authorities Law requiring MTA to establish half-fare program for mentally ill persons on its mass transit system. Staten Island Alliance for the Mentally Ill v Mercado, 273 A.D.2d 36, 708 N.Y.S.2d 402, 2000 N.Y. App. Div. LEXIS 6319 (N.Y. App. Div. 1st Dep't 2000).

Within statute to effect that any person claiming to be aggrieved by an unlawful discriminatory employment practice shall have cause of action, "aggrieved person" means victim of the discriminatory practice. Wife of individual against whom an allegedly unlawful discriminatory practice was committed during his employment was not an "aggrieved" person within Executive Law providing that any person claiming to be aggrieved by unlawful discriminatory practice shall have cause of action. Weinstein v Hospital for Joint Diseases & Medical Center, 81 Misc. 2d 366, 365 N.Y.S.2d 398, 1975 N.Y. Misc. LEXIS 2390 (N.Y. Sup. Ct. 1975), aff'd, 53 A.D.2d 627, 384 N.Y.S.2d 203, 1976 N.Y. App. Div. LEXIS 13330 (N.Y. App. Div. 2d Dep't 1976).

Women's organization had standing to file with Division of Human Rights a complaint alleging sex and race discrimination with respect to hiring, firing, promotion and compensation by operator of retail department store and the Division had power to investigate on basis of such complaint. State Div. of Human Rights ex rel. Ducette v Adam, Meldrum & Anderson Co., 84 Misc. 2d 52, 375 N.Y.S.2d 502, 1975 N.Y. Misc. LEXIS 3091 (N.Y. Sup. Ct. 1975).

Plaintiff's wife was not aggrieved person in action for age discrimination. Iwankow v Mobil Corp., 139 Misc. 2d 728, 528 N.Y.S.2d 313, 1988 N.Y. Misc. LEXIS 253 (N.Y. Sup. Ct. 1988), modified, 150 A.D.2d 272, 541 N.Y.S.2d 428, 1989 N.Y. App. Div. LEXIS 6931 (N.Y. App. Div. 1st Dep't 1989).

New York State had standing to bring suit, in its parens patriae capacity, on behalf of mentally disabled persons, to prove that a partnership, formed by neighboring residential property owners to purchase a house to prevent New York State from purchasing same to be used as a facility for mentally retarded adults, had thereby engaged in unlawful discriminatory practices which violate the civil rights of said mentally retarded citizens. People by Abrams v 11 Cornwell Co., 695 F.2d 34, 1982 U.S. App. LEXIS 23700 (2d Cir. N.Y. 1982), vacated, 718 F.2d 22, 1983 U.S. App. LEXIS 16825 (2d Cir. N.Y. 1983).

Naturalized citizen who graduated from foreign medical school, and was neither United States citizen nor permanent resident when he entered medical school, lacked standing to challenge his ineligibility for "Fifth Pathway" program under CLS Educ § 6528(a), whereby United States residents who graduate from foreign medical schools may be licensed after only one year of residency, as board of regents had granted him 2 years' credit toward his residency requirement so that he was required to complete only one year of residency and thus was placed in same position he would have occupied if he had been admitted to Fifth Pathway program, and court would not assume that, because board exercised its discretion to grant 2 years' credit under CLS Educ § 6506(5), it also would have exercised its discretion to waive requirement that he serve one year residency under Fifth Pathway program. Jaghory v New York State Dep't of Educ., 131 F.3d 326, 1997 U.S. App. LEXIS 35140 (2d Cir. N.Y. 1997).

Wife had standing to sue car rental agency for violation of Human Rights Law, although she who did not personally fill out application to rent car after her husband's application was refused, based on evidence that she showed rental agent her license in effort to secure car after her husband's attempt to rent car was rejected, and that rental agent told her that agency would not rent to her family because they were Puerto Rican. Rivera v Hertz Corp., 990 F. Supp. 234, 1997 U.S. Dist. LEXIS 21660 (S.D.N.Y. 1997).

Indian business developer's national origin discrimination claim under CLS Exec Law § 296 is denied summarily, where his agreement with defendant explicitly and unequivocally expressed parties' intent to create independent contractor relationship, because undisputed facts overwhelmingly indicate that developer was independent contractor, not employee of defendant. Tagare v NYNEX Network Sys. Co., 994 F. Supp. 149, 1997 U.S. Dist. LEXIS 19655 (S.D.N.Y. 1997).

Female manager of music store did not provide employer with notice that she was being sexually harassed by male store manager, so as to trigger employer's vicarious liability for sexual harassment under Title VII and Exec § 296, where she advised management not to promote male manager to supervisor without giving harassment as reason. O'Dell v Trans World Entm't Corp., 153 F. Supp. 2d 378, 2001 U.S. Dist. LEXIS 8865 (S.D.N.Y. 2001), aff'd, 40 Fed. Appx. 628, 2002 U.S. App. LEXIS 14446 (2d Cir. N.Y. 2002).

Employees lack standing to challenge school district policy, which allows officials to make inquiry into religious tenets of employees' religions before granting "personal" days, where district has given them all leave requested since new policy was implemented, and questioning for "sincerity analysis" of requests has been limited and not intrusive, because employees make no showing that policy is likely to cause them recurring injury. Burns v Warwick Valley Cent. Sch. Dist., 166 F. Supp. 2d 881, 2001 U.S. Dist. LEXIS 16785 (S.D.N.Y. 2001).

88. Complaint, generally

Where plaintiff merely alleges that he was "born on December 28, 1930" and that his dismissal from employment was based on age discrimination in violation of CLS Exec Law § 296, and where defendants make factual assertions as to cause for plaintiff's dismissal and assert that 6 of 22 employees were plaintiff's age or older, unsubstantiated allegation of discrimination is insufficient to defeat motion for summary judgment. Hill v Westchester Aeronautical Corp., 112 A.D.2d 977, 492 N.Y.S.2d 789, 1985 N.Y. App. Div. LEXIS 52191 (N.Y. App. Div. 2d Dep't 1985).

Action to recover damages for unlawful discriminatory practices in housing was properly dismissed as to plaintiffs who were employees of antidiscrimination organization and who had visited defendants' apartment building only as "testers" under pretense of being prospective tenants after others had reportedly been denied accommodations there because of race, since testers conceded that they did not wish to rent apartment and had acted only on behalf of others. Dunn v Fishbein, 123 A.D.2d 659, 507 N.Y.S.2d 29, 1986 N.Y. App. Div. LEXIS 60809 (N.Y. App. Div. 2d Dep't 1986).

Employer was entitled to summary judgment dismissing employee's action for wrongful discharge because of disability (under CLS Exec § 296) where employee was discharged for "misuse of sick time" while she was already on disciplinary probation; employee was not discharged because she was unable to perform her duties as result of disability, but was discharged for misconduct. Dicocco v Capital Area Community Health Plan, Inc., 135 A.D.2d 308, 525 N.Y.S.2d 417, 1988 N.Y. App. Div. LEXIS 2050 (N.Y. App. Div. 3d Dep't 1988).

Court properly denied county's motion to dismiss county employees' cause of action under Human Rights Law alleging that county discriminated against women by failing to give them equal pay for equal work, since claim was properly maintained against county, it involved continuing wrong and thus was not barred by statute of limitations, and no notice of claim was required because plaintiffs sought to vindicate public right. In action under Human Rights Law, alleging that county discriminated against women by failing to give them equal pay for equal work, court properly dismissed claim against individual county defendants where complaint failed to allege which of them had requisite authority to carry out personnel decisions; however, despite inartful pleadings, court properly granted leave to replead where it determined that plaintiffs' claim might be meritorious. Court properly dismissed action by female county employees against county and individual county defendants insofar as it alleged retaliatory conduct by certain individual defendant in violation of Human Rights Law, since complaint failed to allege discriminatory intent or to allege that any other defendants condoned retaliatory conduct; however, since alleged misconduct was ongoing to time of complaint, notice of claim was not untimely, and leave to replead was properly granted. Court properly dismissed county employees' action against county and individual county defendants insofar as it alleged that female employee was subjected to retaliatory demotion by individual defendant in violation of Human Rights Law, since complaint failed to allege discriminatory intent or to allege that other defendants acquiesced in demotion. Summers v County of Monroe, 147 A.D.2d 949, 537 N.Y.S.2d 703, 1989 N.Y. App. Div. LEXIS 1294 (N.Y. App. Div. 4th Dep't), app. dismissed, 74 N.Y.2d 735, 544 N.Y.S.2d 819, 543 N.E.2d 84, 1989 N.Y. LEXIS 4950 (N.Y. 1989).

Claim of violation of federal and state prohibitions of discrimination against handicapped was sufficiently pleaded, and motion to dismiss was properly denied, where hearing-impaired Haitian woman alleged that (1) city and state governmental entities, in attempting to provide service to prevent foster care placement of her children, deprived her of benefits by communicating with her only once in sign language and thus failed to perform any reasonably adequate provision of services, and (2) her children were removed from her because of her deafness and inability to hear them. Martin A. v Gross, 153 A.D.2d 812, 546 N.Y.S.2d 75, 1989 N.Y. App. Div. LEXIS 11926 (N.Y. App. Div. 1st Dep't 1989), app. dismissed, 75 N.Y.2d 808, 552 N.Y.S.2d 110, 551 N.E.2d 603, 1990 N.Y. LEXIS 31 (N.Y. 1990).

Attorneys were entitled to dismissal of action for violation of plaintiffs' civil rights which arose when attorneys, on behalf of hospital, applied to Supreme Court for order permitting hospital to give blood transfusions to plaintiff (Jehovah's Witness who was experiencing severe hemorrhaging after giving birth), which was granted ex parte but later vacated for failure to give notice, since plaintiff failed to expressly allege that attorneys were motivated by "malicious intentions." Nicoleau v Brookhaven Memorial

Hosp. Ctr., 181 A.D.2d 815, 581 N.Y.S.2d 382, 1992 N.Y. App. Div. LEXIS 3918 (N.Y. App. Div. 2d Dep't), app. denied, 80 N.Y.2d 754, 587 N.Y.S.2d 905, 600 N.E.2d 632, 1992 N.Y. LEXIS 1655 (N.Y. 1992).

State bar candidate, who suffered from dyslexia and who failed state bar examination, failed to state cause of action against state Board of Law Examiners under anti-discrimination provisions of CLS Exec § 296(1)(a); only Court of Appeals is empowered to waive or modify requirement of written bar exam, and CLS Jud § 464 merely authorizes Board of Law Examiners to perform ministerial role of certifying names of candidates who have successfully passed written exam. Koeppel v Wachtler, 183 A.D.2d 808, 583 N.Y.S.2d 975, 1992 N.Y. App. Div. LEXIS 7293 (N.Y. App. Div. 2d Dep't 1992).

Complaint under CLS Exec § 296(1)(a), alleging improper discharge of attorneys by client based solely on race, was properly dismissed since statute applies to employees, and parties' relationship was that of attorney and client rather than employer and employee. Giaimo & Vreeburg v Smith, 192 A.D.2d 41, 599 N.Y.S.2d 841, 1993 N.Y. App. Div. LEXIS 7011 (N.Y. App. Div. 2d Dep't), app. dismissed, 82 N.Y.2d 803, 604 N.Y.S.2d 559, 624 N.E.2d 697, 1993 N.Y. LEXIS 3838 (N.Y. 1993).

Actions against municipality to recover damages for unlawful discriminatory practices brought under CLS Exec § 296 are not subject to notice of claim requirement set down in CLS Gen Mun § 50-e for tort claims involving personal injury, wrongful death, or property damage. Morrison v New York City Police Dep't, 214 A.D.2d 394, 625 N.Y.S.2d 174, 1995 N.Y. App. Div. LEXIS 4208 (N.Y. App. Div. 1st Dep't 1995), app. denied, sub. op., 1995 N.Y. App. Div. LEXIS 7519 (N.Y. App. Div. 1st Dep't June 20, 1995).

Complaint alleging that termination of school teacher's employment was unlawfully based on acts of sex discrimination by principals employed by school district should have been dismissed for failure to comply with notice of claim requirement under CLS Educ § 3813(1). Saranac Lake Cent. Sch. Dist. v New York State Div. of Human Rights, 226 A.D.2d 794, 640 N.Y.S.2d 303, 1996 N.Y. App. Div. LEXIS 3503 (N.Y. App. Div. 3d Dep't), app. denied, 88 N.Y.2d 816, 651 N.Y.S.2d 406, 674 N.E.2d 336, 1996 N.Y. LEXIS 3340 (N.Y. 1996)).

Plaintiff's age discrimination action was barred by release where it was undisputed that he executed employment termination agreement expressly releasing defendant from all claims including those "arising under federal, state or local laws prohibiting employment discrimination." Cramer v Newburgh Molded Prods., 228 A.D.2d 541, 645 N.Y.S.2d 46, 1996 N.Y. App. Div. LEXIS 7114 (N.Y. App. Div. 2d Dep't), app. denied, 89 N.Y.2d 803, 653 N.Y.S.2d 280, 675 N.E.2d 1233, 1996 N.Y. LEXIS 4267 (N.Y. 1996).

Bare allegation that plaintiff was forced to resign due to his age was insufficient to state action to set aside release on ground that it was procured by duress. Cramer v Newburgh Molded Prods., 228 A.D.2d 541, 645 N.Y.S.2d 46, 1996 N.Y. App. Div. LEXIS 7114 (N.Y. App. Div. 2d Dep't), app. denied, 89 N.Y.2d 803, 653 N.Y.S.2d 280, 675 N.E.2d 1233, 1996 N.Y. LEXIS 4267 (N.Y. 1996).

Assertion that plaintiff "Annette Cramer" was terminated "because she was married to Joseph Cramer" did not set forth cognizable action under CLS Exec § 296(1)(a), which prohibits discrimination based on individual's marital status rather than on fact that individual is married to any particular partner. Cramer v Newburgh Molded Prods., 228 A.D.2d 541, 645 N.Y.S.2d 46, 1996 N.Y. App. Div. LEXIS 7114 (N.Y. App. Div. 2d Dep't), app. denied, 89 N.Y.2d 803, 653 N.Y.S.2d 280, 675 N.E.2d 1233, 1996 N.Y. LEXIS 4267 (N.Y. 1996).

Employment discrimination action brought against board of education was properly dismissed for failure to timely file notice of claim under CLS Educ § 3813(1), even though such failure is not fatal where action is brought to vindicate public interest, since plaintiffs were merely seeking damages for lost retirement benefits. Doyle v Board of Educ., 230 A.D.2d 820, 646 N.Y.S.2d 842, 1996 N.Y. App. Div. LEXIS 8550 (N.Y. App. Div. 2d Dep't 1996).

Complaint was properly dismissed where plaintiffs did not plead that they offered to bear expense of building modifications they requested (CLS Exec § 296(18)(1)), they admitted that originally alleged discriminatory practices and policies were corrected, and they failed to adduce evidence of any other discriminatory practices and policies. Mansolino v Haberman, 239 A.D.2d 276, 658 N.Y.S.2d 843, 1997 N.Y. App. Div. LEXIS 5425 (N.Y. App. Div. 1st Dep't 1997).

Plaintiff failed to state cause of action under Executive Law where she did not allege any acts of age or disability discrimination. Arroyo v New York State Ins. Dep't, 240 A.D.2d 307, 659 N.Y.S.2d 750, 1997 N.Y. App. Div. LEXIS 6726 (N.Y. App. Div. 1st Dep't), app. denied, 91 N.Y.2d 803, 668 N.Y.S.2d 558, 691 N.E.2d 630, 1997 N.Y. LEXIS 4203 (N.Y. 1997).

Allegations that individual defendant made both physical and verbal sexual advances toward plaintiff that were unwelcome and repelled, that she was told her job evaluation was tied to her willingness to accept advances, and that she was forced to resign because corporate defendant did not provide vehicle of redress stated action for both hostile environment and quid pro quo sexual harassment under Human Rights Law; those same allegations also showed discriminatory conduct within limitations period sufficiently similar to alleged conduct without limitations period to justify conclusion that both were part of single discriminatory practice, and thus plaintiff's claim was timely in its entirety under continuing violation doctrine. Walsh v Covenant House, 244 A.D.2d 214, 664 N.Y.S.2d 282, 1997 N.Y. App. Div. LEXIS 11535 (N.Y. App. Div. 1st Dep't 1997).

Plaintiffs, licensed practical nurses, stated action under CLS Exec § 296(1)(a) by alleging that they showed religious or moral belief held by them, that defendants were aware thereof, and that defendants failed to reasonably accommodate such religious belief by summarily terminating plaintiffs for their refusal to the form abortive procedures. Larson v Albany Med. Ctr., 252 A.D.2d 936, 676 N.Y.S.2d 293, 1998 N.Y. App. Div. LEXIS 8687 (N.Y. App. Div. 3d Dep't 1998).

In action for retaliation under CLS Exec § 296(7) brought against Board of Trustees of divinity school (defendant), court should have granted defendant's motion to dismiss complaint where there were no allegations that defendant fell within ambit of CLS Exec § 292(1), nor was it alleged that activity or activities in which defendant engaged were allegedly prohibited under Human Rights Law; although plaintiff alleged that defendant violated general duty to accommodate her disability under CLS Exec § 296(3)(a), that section applied to employers, licensing agencies, employment agencies, and labor organizations and did not apply here. Edwards v Board of Trustees of Colgate Rochester Divinity Sch., 254 A.D.2d 709, 677 N.Y.S.2d 868, 1998 N.Y. App. Div. LEXIS 10379 (N.Y. App. Div. 4th Dep't 1998).

Defendant's motion to strike jury demand should have been denied in this employment discrimination/sexual harassment action wherein plaintiff seeks back pay and compensatory money damages for mental pain and suffering and alleged wrongful infliction of mental distress; plaintiff has never requested reinstatement in her complaint; plaintiff is proceeding primarily under State Human Rights Law and nowhere does plaintiff actually request equitable relief; plaintiff's ritualistic use in prayer for relief of language "and such other and further relief as to this court seems just and proper" does not change legal character of relief demanded; fact that complaint asserts that plaintiff "seeks appropriate relief in contract" is also not determinative since plaintiff will be able to receive full redress from award of money damages only and she has claimed that she does not desire reinstatement or other equitable relief. Vega v Metropolitan Life Ins. Co., 146 A.D.2d 495, 536 N.Y.S.2d 451, 1989 N.Y. App. Div. LEXIS 228 (N.Y. App. Div. 1st Dep't 1989).

Complaint properly stated action for violation of CLS Exec § 296(16) by alleging that defendant took adverse employment actions against plaintiff, based on fact that plaintiff, police officer, was arrested, although arrest had not resulted in conviction. Annabi v Cassino, 269 A.D.2d 551, 703 N.Y.S.2d 745, 2000 N.Y. App. Div. LEXIS 2133 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff failed to state cause of action for retaliation under CLS Exec § 296(1)(e) where he did not allege that he had been retaliated against for participating in formal Human Rights Law proceeding, and he did not support or aid another's Human Rights Law complaint. Unotti v ABC, 273 A.D.2d 68, 710 N.Y.S.2d

822, 2000 N.Y. App. Div. LEXIS 6339 (N.Y. App. Div. 1st Dep't 2000).

Plaintiff's complaint stated a cause of action under Exec Law § 296, which prohibits discrimination in employment because of sex, by alleging: (1) that the defendant used his hegemonic position as her employer to influence her to acquiesce in and importuned her to engage in sexual intercourse with him; (2) that a condition of apprehension on her part was created to the effect that her employment would be terminated if she refused to engage in such sexual intercourse; and (3) that upon her refusal to continue sexual intercourse with defendant her employment was in fact terminated. Fletcher v Greiner, 106 Misc. 2d 564, 435 N.Y.S.2d 1005, 1980 N.Y. Misc. LEXIS 2734 (N.Y. Sup. Ct. 1980).

Plaintiff's discharge from his employment with a town highway department solely because he was the son of the former town supervisor, a political adversary of the successor supervisor, did not state a cause of action for unlawful discriminatory practice under Exec Law § 296(1) as a discharge based on national origin; although Exec Law § 292(8) provides that the term national origin includes ancestry, the legislative intent of the statute was to prohibit discrimination based upon the country in which an individual was born, as well as the country in which an individual's ancestors were born; the discharge of an employee based on political differences with the employee's father is not prohibited. Ingalls v Lyndon, 127 Misc. 2d 442, 486 N.Y.S.2d 659, 1985 N.Y. Misc. LEXIS 2614 (N.Y. Sup. Ct. 1985).

Complaint alleging that plaintiff was ultimately removed from job as result of action of his immediate supervisor in attempting to replace him with female employee with whom supervisor was having intimate sexual relationship would be dismissed, without prejudice, as failing to state cause of action under CLS Exec § 296 in absence of allegation that preferential treatment accorded to other employee resulted in discrimination not just against plaintiff but against other employees of same gender. Nicolo v Citibank New York State, N. A., 147 Misc. 2d 111, 554 N.Y.S.2d 795, 1990 N.Y. Misc. LEXIS 184 (N.Y. Sup. Ct. 1990).

Plaintiff failed to state cognizable claim under either New York City or New York State Human Rights Law by alleging that school district's denial of health insurance benefits to his domestic partner constituted discrimination on basis of marital status and sexual orientation. Funderburke v Uniondale Union Free Sch. Dist. No. 15, 172 Misc. 2d 963, 660 N.Y.S.2d 659, 1997 N.Y. Misc. LEXIS 260 (N.Y. Sup. Ct. 1997), aff'd, 251 A.D.2d 622, 676 N.Y.S.2d 199, 1998 N.Y. App. Div. LEXIS 7881 (N.Y. App. Div. 2d Dep't 1998).

Claim for negligent infliction of emotional distress based on plaintiff's allegations of sex discrimination by defendant employer and its president was insufficient as matter of law where no physical contact or threat thereof was involved. Gerson v Giorgio Sant'Angelo Collectibles, 176 Misc. 2d 388, 671 N.Y.S.2d 958, 1998 N.Y. Misc. LEXIS 114 (N.Y. Sup. Ct. 1998).

Claims that the lessor owners of a commercial building sought to bar the transgender clients of one of their tenants from using any rest room in the building, and in fact to bar them from the building entirely, stated a claim for gender discrimination under the New York Human Rights Law, N.Y. Exec. Law § 296(5)(b). Hispanic Aids Forum v Estate of Bruno, 839 N.Y.S.2d 691, 16 Misc. 3d 960, 238 N.Y.L.J. 28, 2007 N.Y. Misc. LEXIS 4843 (N.Y. Sup. Ct. 2007).

Claims that the lessor owners of a commercial building discriminated against the transgender clients of one of the building tenants on the basis of disability when the lessors demanded that the clients stop using rest rooms that were not for their biological sex, failed to state a cause of action because there were no allegations that the tenant had suggested reasonable accommodations that were rejected by the lessors. Hispanic Aids Forum v Estate of Bruno, 839 N.Y.S.2d 691, 16 Misc. 3d 960, 238 N.Y.L.J. 28, 2007 N.Y. Misc. LEXIS 4843 (N.Y. Sup. Ct. 2007).

Because an employee's notice of claim alleging a violation of N.Y. Exec. Law § 296 did not comply with N.Y. County Law § 52 or N.Y. Gen. Mun. Law § 50-e, it was dismissed. Sowich v County of Oneida, 938 N.Y.S.2d 413, 35 Misc. 3d 486, 2011 N.Y. Misc. LEXIS 6360 (N.Y. Sup. Ct. 2011), aff'd, 109 A.D.3d 1170, 971 N.Y.S.2d 720, 2013 N.Y. App. Div. LEXIS 6206 (N.Y. App. Div. 4th Dep't 2013).

A complaint charging violation of this section of the law by an apartment owner and his rental agent and seeking an injunction against sale or transfer of the property or rental of certain vacant apartments states no cause of action against the State Commission for Human Rights and that agency is accordingly not a proper party to the proceedings. Redd v Zier, 229 N.Y.S.2d 582, 1962 N.Y. Misc. LEXIS 4175 (N.Y. Sup. Ct. 1962).

Trial court properly dismissed a claim by a law client against a law firm, alleging a violation of N.Y. Exec. Law § 296, as, even if it were assumed that a law firm or an attorney's office was considered a "place of public accommodation" as defined by N.Y. Exec. Law § 292(9), the client failed to state a cause of action because she was not denied any "accommodations, advantages, facilities, or privileges" by the law firm under N.Y. Exec. Law § 296(2)(a). Ferdinand v Crecca & Blair, 5 A.D.3d 538, 774 N.Y.S.2d 714, 2004 N.Y. App. Div. LEXIS 2740 (N.Y. App. Div. 2d Dep't), app. denied, 3 N.Y.3d 609, 786 N.Y.S.2d 812, 820 N.E.2d 291, 2004 N.Y. LEXIS 2495 (N.Y. 2004).

Former employee sufficiently stated a cause of action for constructive discharge for opposing discriminatory practices under N.Y. Exec. Law § 296(1)(e) as to a former employer and two former coworkers where the former employee was further harassed after complaining of harassment and the coworkers allegedly aide and abetted the employer in constructively discharging the former employee from employment by making the atmosphere in the workplace intolerable. Mitchell v TAM Equities, Inc., 27 A.D.3d 703, 812 N.Y.S.2d 611, 2006 N.Y. App. Div. LEXIS 3762 (N.Y. App. Div. 2d Dep't 2006).

Former employee's complaint sufficiently stated a cause of action pursuant to N.Y. Exec. Law § 296(1)(a), based on sex and race harassment that created a hostile work environment where the employee alleged coworkers directed sexually and racially offensive language at the employee and the behavior was ignored by management. Mitchell v TAM Equities, Inc., 27 A.D.3d 703, 812 N.Y.S.2d 611, 2006 N.Y. App. Div. LEXIS 3762 (N.Y. App. Div. 2d Dep't 2006).

Former employee's complaint stated a cause of action against the employer pursuant to N.Y. Exec. Law § 296(7) based on unlawful retaliation where the employee's supervisors allegedly retaliated against the employee by, among other things, arbitrarily reprimanding the employee, personally berating the employee in front of subordinates, refusing to permit the employee normal lunch and personal breaks during long work days, and compelling the employee to return to work against medical advice after an injury. Mitchell v TAM Equities, Inc., 27 A.D.3d 703, 812 N.Y.S.2d 611, 2006 N.Y. App. Div. LEXIS 3762 (N.Y. App. Div. 2d Dep't 2006).

Former employee's N.Y. Exec. Law § 296 complaint was properly dismissed as to a parent company and sister company as there were no allegations in the complaint describing what direct role, if any, those parties had in the events underlying the discrimination action. Mitchell v TAM Equities, Inc., 27 A.D.3d 703, 812 N.Y.S.2d 611, 2006 N.Y. App. Div. LEXIS 3762 (N.Y. App. Div. 2d Dep't 2006).

Former manager of travel company must amend complaint, which alleges age and employment discrimination against employer in violation of NY Exec Law § 296, where manager failed to allege sufficient facts to determine whether there exists ongoing state administrative proceeding on claim, because federal court cannot exercise jurisdiction over state claim for age discrimination while state administrative proceeding is pending. Zinaman v USTS New York, Inc., 798 F. Supp. 128, 1992 U.S. Dist. LEXIS 9991 (S.D.N.Y. 1992).

Allegations in male former employee's complaint that employer knew that he would provide evidence favorable to female employee's sexual harassment charge adequately alleged that employee "participated in any manner" in investigation, proceeding, or hearing under Title VII and CLS Exec Law § 296(1)(e). Kaible v U.S. Computer Group, 27 F. Supp. 2d 373, 1998 U.S. Dist. LEXIS 19214 (E.D.N.Y. 1998).

Employee's complaint was sufficient to support a claim that her employer discriminated against her because of her marital status

as a single or engaged woman in violation of N.Y. Exec. Law § 296, to survive dismissal for failure to state a claim. McGrath v Nassau Health Care Corp., 217 F. Supp. 2d 319, 2002 U.S. Dist. LEXIS 14094 (E.D.N.Y. 2002).

Employee's employment discrimination action failed to survive summary judgment because the employee's sole allegation that she was terminated under circumstances giving rise to an inference of discrimination was that she was not treated in the same way as her supervisor, but the supervisor was not a similarly situated employee; the supervisor was a permanent employee of the employer, had responsibilities different from those of the employee, and the employee and the supervisor were disciplined for wholly different conduct (the employee was terminated after she directly violated the asset protection policies causing the employer to lose in excess of $11,000, and the supervisor was given a probationary warning on account of his management failures). Ortiz v Brookstone Co., 274 F. Supp. 2d 456, 2003 U.S. Dist. LEXIS 13077 (S.D.N.Y. 2003).

Because the actor's complaint did not allege any discriminatory impact in New York, the actor could not support claims under the New York City and New York State Human Rights Laws. Pearce v Manhattan Ensemble Theater, Inc., 528 F. Supp. 2d 175, 2007 U.S. Dist. LEXIS 16487 (S.D.N.Y. 2007).

Former employee's claims under N.Y. Exec. Law §§ 296 and 297 failed because (1) the plain language of N.Y. County Law § 52 clearly incorporated the notice of claim requirement contained in N.Y. Gen. Mun. Law § 50-e and applied it to any claim or notice of claim against a county for invasion of personal or property rights, of every name and nature; (2) the notice of claim provision covered the employee's claims against the county and its entities, which included a community college, an entity that was owned and operated by the county and whose employees were considered county employees; (3) the employee failed to satisfy the notice of claim requirement contained in N.Y. Gen. Mun. Law § 50-e because the employee failed to file a notice of claim; (4) the action was a private civil rights lawsuit and had not been brought in the public interest; (5) the employee never sought leave to serve a late notice of claim; and (6) the employee failed to offer a single case in which a court held that the filing of a complaint with the New York State Department of Human Rights, or the Equal Employment Opportunity Commission, satisfied the notice requirement of N.Y. Gen. Mun. Law § 50-e. Cody v County of Nassau, 577 F. Supp. 2d 623, 2008 U.S. Dist. LEXIS 72262 (E.D.N.Y. 2008), aff'd, 345 Fed. Appx. 717, 2009 U.S. App. LEXIS 20662 (2d Cir. N.Y. 2009).

In a former employee's suit for race and sex discrimination, the former employee's State of New York and city law claims survived the union's motion to dismiss for failure to state a cause of action because the holding of Martin, which provides that in common-law actions against unincorporated associations, individual liability of every single member must be alleged and proven, did not apply since it is established by N.Y. Exec. Law § 296(1-a)(c) that a labor organization, such as a union, does have an existence independent of its members. Langford v Int'l Union of Operating Eng'rs, Local 30, 765 F. Supp. 2d 486, 2011 U.S. Dist. LEXIS 17789 (S.D.N.Y. 2011).

Assuming that the employees otherwise stated a valid claim for age discrimination, identifying additional significant factors did not foreclose the possibility that age was the "but for" factor for the adverse employment actions taken against them; thus, the employees plausibly stated a claim for age discrimination under N.Y. Exec. Law § 296. Fagan v U.S. Carpet Installation, Inc., 770 F. Supp. 2d 490, 2011 U.S. Dist. LEXIS 28552 (E.D.N.Y. 2011).

Plaintiff failed to state a claim for racial discrimination as he failed to allege facts showing that a co-worker's alleged racist remarks were anything other than an isolated incident and his allegation that other similarly-situated employees were treated more favorably was a bare conclusion unsupported by any specific alleged facts. McDowell v N. Shore-Long Island Jewish Health Sys., 788 F. Supp. 2d 78, 2011 U.S. Dist. LEXIS 58653 (E.D.N.Y. 2011).

Plaintiff failed to state a claim for retaliation as the only causal connection plaintiff alleged was the temporal proximity between his complaint about racial harassment and his termination; the temporal proximity, without more, was insufficient to state a claim. McDowell v N. Shore-Long Island Jewish Health Sys., 788 F. Supp. 2d 78, 2011 U.S. Dist. LEXIS 58653 (E.D.N.Y. 2011).

Only reasonable interpretation of the lease conditions provision was that plaintiffs were required to obtain a guarantee from a government agency for the remaining rent due for the one-year lease period and the complaint was devoid of any facts from which could be inferred that, if given the opportunity, plaintiffs' could have provided a guarantee from a governmental agency; thus, as plaintiffs failed to allege they were qualified to rent the unit, they failed to state valid housing discrimination claims under the Fair Housing Amendments Act of 1988, , 42 U.S.C.S. §§ 3604(f) and 3617, Americans with Disabilities Act, Rehabilitation Act of 1973, and New York State Human Rights Law. Johnson v Levy, 812 F. Supp. 2d 167, 2011 U.S. Dist. LEXIS 106258 (E.D.N.Y. 2011).

89. —Amended complaint

Plaintiff would be permitted to amend complaint to add cause of action for gender based discrimination under CLS Exec § 296(1)(a) et seq. where (1) plaintiff alleged that she was member of protected class (women) and that defendant discharged her from employment and discriminated against her during her employment because of her gender, (2) plaintiff submitted supporting affidavit with exhibit which contained excerpt of deposition testimony of president of defendant which corroborated allegations, and (3) defendant opposed motion to amend complaint only with affidavit of counsel and affidavit of president of corporation which attempted to discredit his own earlier deposition testimony. Daniels v Empire-Orr, Inc., 151 A.D.2d 370, 542 N.Y.S.2d 614, 1989 N.Y. App. Div. LEXIS 8121 (N.Y. App. Div. 1st Dep't 1989).

Plaintiff was properly permitted to amend his age and religious discrimination complaint against law firm in order to add individual partners of firm, despite passage of several years between original complaint and amendment, since partners are jointly and severally liable for wrongful acts of partnership under CLS Partn §§ 24 and 26. Schutz v Finkelstein Bruckman Wohl Most & Rothman, 232 A.D.2d 470, 648 N.Y.S.2d 174, 1996 N.Y. App. Div. LEXIS 10217 (N.Y. App. Div. 2d Dep't 1996).

In action for sexual harassment and retaliatory discharge, court properly denied plaintiff's motion to amend complaint to add action for wrongful termination based on disability discrimination under CLS Exec § 296(1)(a) since plaintiff had been aware of facts underlying alleged claim since inception of action, she failed to offer any reason or excuse for delay in seeking to amend complaint, and defendants had prepared case in response to original complaint, had no notice of new claim, and would suffer prejudice by its late edition. Castagne v Barouh, 249 A.D.2d 257, 671 N.Y.S.2d 283, 1998 N.Y. App. Div. LEXIS 3656 (N.Y. App. Div. 2d Dep't 1998).

Because an employee's amended complaint was sufficient under N.Y. Exec. Law § 296, New York City, N.Y., Admin. Code §§ 8-107, and 8-130 to establish a hostile work environment, that the first employer transferred the employee to a different work location and gave the employee an undesirable schedule in retaliation, and that the employers aided and abetted each other's race and gender discrimination, the employers' motion to dismiss were denied. Artis v Random House, Inc., 936 N.Y.S.2d 479, 34 Misc. 3d 858, 2011 N.Y. Misc. LEXIS 6383 (N.Y. Sup. Ct. 2011).

Former employee is granted leave to amend her complaint to restate her claim of age discrimination based upon theory of disparate treatment but cannot add claim of age discrimination based upon disparate impact under CLS Exec Law § 296, where her EEOC complaint did not mention disparate impact theory, because proposed new claim is not reasonably related to claim asserted in EEOC complaint, and unexhausted claim may not be added. McKinney v Eastman Kodak Co., 975 F. Supp. 462, 1997 U.S. Dist. LEXIS 12934 (W.D.N.Y. 1997).

Thruway employee's sex and disability discrimination claims under CLS Exec Law §§ 290 et seq. survive only to extent of her surviving federal claims, where federal claims in amended complaint were narrowed to include only those made in EEOC charge and allegation of forced, additional medical examinations after filing of charge, because allowing broader state-law claims to

continue in federal court would enable plaintiff to circumvent statutory administrative exhaustion requirements. Cable v New York State Thruway Auth., 4 F. Supp. 2d 120, 1998 U.S. Dist. LEXIS 7678 (N.D.N.Y. 1998).

Thruway employee's sex and disability discrimination claims under CLS Exec Law §§ 290 et seq. survive only to extent of her surviving federal claims, where federal claims in amended complaint were narrowed to include only those made in EEOC charge and allegation of forced, additional medical examinations after filing of charge, because allowing broader state-law claims to continue in federal court would enable plaintiff to circumvent statutory administrative exhaustion requirements. Cable v New York State Thruway Auth., 4 F. Supp. 2d 120, 1998 U.S. Dist. LEXIS 7678 (N.D.N.Y. 1998).

Teacher who had attempted to bring Title VII employment discrimination suit against middle school director in director's personal capacity, when action could only be brought against school under Title VII, would be allowed to amend complaint in interests of justice, after teacher retained attorney, in order to bring personal capacity claim against director under Exec § 296. Copeland v Rosen, 38 F. Supp. 2d 298, 1999 U.S. Dist. LEXIS 2639 (S.D.N.Y. 1999), dismissed without prejudice, 194 F.R.D. 127, 2000 U.S. Dist. LEXIS 8243 (S.D.N.Y. 2000).

Female former employee's gender discrimination claim is dismissed with leave to file second amended complaint, where she has provided no specific factual allegations to enable court to evaluate her information and belief assertions that male employees performing substantially equal work were treated preferentially, because she has done nothing more than to paraphrase relevant legal standards, and her vague, conclusory allegations are insufficient to establish prima facie case of discrimination. Rose v Goldman, Sachs & Co., 163 F. Supp. 2d 238, 2001 U.S. Dist. LEXIS 13744 (S.D.N.Y. 2001).

Terminated white male senior portfolio manager is granted leave to amend his race and discrimination claims within 20 days, even though he was suddenly fired and denied bonus while other old, female, or African-American managers were not, where he alleges only that he was fired and others were not and that person who fired him said he "did not fit profile of High Yield Group," because further allegations are required to raise inference of discrimination. Tappe v Alliance Capital Mgmt. L.P., 177 F. Supp. 2d 176, 2001 U.S. Dist. LEXIS 17501 (S.D.N.Y. 2001).

Former employee was entitled to amend her complaint pursuant to Fed. R. Civ. P. 15(a) to include her race discrimination claim under 42 U.S.C.S. § 1981 and N.Y. Exec. Law § 296 against her former employer, co-employees, and officials, because 1.) the employee's allegations that she was treated more harshly than similarly situated employees who had used profanities in a patient-care area and that her tardiness did not prevent her from successfully performing her job were sufficient to withstand a motion to dismiss, and 2.) the employee's allegations regarding the authority of the co-employees and officials were sufficient to state a claim for personal liability by the co-employees and officials. Gilmore v Univ. of Rochester, 410 F. Supp. 2d 127, 2006 U.S. Dist. LEXIS 1863 (W.D.N.Y. 2006).

Professional skater's amended complaint was sufficient to withstand a Fed. R. Civ. P. 12(b)(6) motion on her claim of a sexually hostile workplace where she alleged sufficiently severe and pervasive abusive conditions, including that (1) her supervisor and employer required that the skaters be sexually alluring and required them to stuff their bras; (2) her supervisor made disparaging remarks about the sexual morals of a fellow skater; (3) her supervisor initiated unwelcome conversations with plaintiff and other skaters about their sex lives, his sex life, pubic hair, and oral sex; (4) the employer's deputy director of public relations made unwelcome sexual advances toward the skater and other employees of the employer; (5) at a bar, the deputy director of public relations proceeded to aggressively solicit the skater for sex verbally and by allegedly putting his tongue down her throat. Prince v Madison Square Garden, 427 F. Supp. 2d 372, 2006 U.S. Dist. LEXIS 17562 (S.D.N.Y. 2006).

Professional skater's amended complaint was sufficient to withstand a Fed. R. Civ. P. 12(b)(6) motion on her claim under N.Y. Exec. Law § 296(6) that her supervisor was liable as an "aider and abettor," in accordance with case law of the United States Court of Appeals for the Second Circuit holding individually liable those within the employment relationship who primarily and directly perpetrated the harassment. The skater alleged that (1) her supervisor required that the skaters be sexually alluring and required them to stuff their bras; (2) her supervisor made disparaging remarks about the sexual morals of a fellow skater; and (3) her supervisor initiated unwelcome conversations with plaintiff and other skaters about their sex lives, his sex life, pubic hair, and oral sex. Prince v Madison Square Garden, 427 F. Supp. 2d 372, 2006 U.S. Dist. LEXIS 17562 (S.D.N.Y. 2006).

90. Class action

Above provision is not enforceable in class action by Negro plaintiffs on behalf of themselves and all other Negro citizens of New York similarly situated for injunctive and declaratory relief against certain labor unions and various officials of State and of city therein, challenging expenditure of public funds on public works projects in such city on ground that qualified Negroes are unlawfully denied employment and opportunity therefor because contractors on such projects obtain virtually all their labor from defendant unions who exclude Negroes from membership and apprenticeship programs solely on basis of race and color. Provisions of subdivisions 1 and 1-a of above statute give full and adequate remedy for discrimination by either a labor organization, an employer, or any joint labor-management committee. There is therefore no warrant for invocation of aid of equity or for granting of declaratory relief in the case of any such discrimination. Gaynor v Rockefeller, 15 N.Y.2d 120, 256 N.Y.S.2d 584, 204 N.E.2d 627, 1965 N.Y. LEXIS 1651 (N.Y. 1965).

In an action by a former employee against her employer charging a violation of the Human Rights Law, the employee, having invoked the jurisdiction of New York State, was properly ordered to appear for oral examination prior to trial in New York City, although she lived in South Carolina. Moreover, the employee, who had moved for class action certification, could not validly contend that she lacked financial resources to travel to New York for examination when she was simultaneously attempting to show that she would fairly and adequately protect the class. Mack v J. C. Penney Co., 81 A.D.2d 761, 439 N.Y.S.2d 118, 1981 N.Y. App. Div. LEXIS 11395 (N.Y. App. Div. 1st Dep't 1981).

Police lieutenant's motion for summary judgment is denied where police officer alleged quid pro quo sexual harassment and hostile work environment because evidence supported officer's allegation that lieutenant was actual perpetrator of sexual harassment and not merely supervisor who could claim immunity from vicarious liability. Poulsen v City of N. Tonawanda, 811 F. Supp. 884, 1993 U.S. Dist. LEXIS 922 (W.D.N.Y. 1993).

Individual incentive payment of only $2,500 is awarded to former employee of large oil company, even though other specific plaintiffs in class action race discrimination case received $50,000 or more for their special assistance or unique circumstances, because former employee, who resigned shortly before commencement of case, does not face any significant postlitigation burden or risk of retaliation by employer. Roberts v Texaco, Inc., 979 F. Supp. 185, 1997 U.S. Dist. LEXIS 17056 (S.D.N.Y. 1997).

91. Declaratory judgment

Biologist claiming age and sex discrimination in termination of her employment with county health department was entitled to judgment declaring that she was not required to file notice of claim as prerequisite to maintaining that claim under CLS Exec § 296 with State Division of Human Rights (DHR) where (1) notice of claim requirements for tort claims against municipality apply to private discriminatory practice claims under § 296 that are commenced in court of law, not before administrative agency, (2) once person has elected to pursue § 296 claim with administrative agency, he or she is precluded by CLS Exec § 297(9) from pursuing same claim in court of law and thus should not be subjected to rules applicable to court claims, and (3) underlying purpose of notice of claim requirements was satisfied by DHR's compliance with administrative procedures set forth in Human Rights Law that gave county ample opportunity to investigate claim Freudenthal v County of Nassau, 283 A.D.2d 6, 726 N.Y.S.2d 116, 2001 N.Y. App. Div. LEXIS 5645 (N.Y. App. Div. 2d

Dep't 2001), aff'd, 99 N.Y.2d 285, 755 N.Y.S.2d 56, 784 N.E.2d 1165, 2003 N.Y. LEXIS 139 (N.Y. 2003).

Before formal complaint was filed, county health department was on notice of potential claim against it under CLS Exec § 296 for age and sex discrimination in termination of biologist's employment and had ample opportunity to investigate and address that claim, and thus underlying purpose of statutory notice of claim requirements was satisfied despite lack of formal notice of claim with county, where (1) within weeks after termination on January 9, 1992, county human rights commission began investigating biologist's claim, (2) that investigation included conversations with some of biologist's former colleagues, including at least one bureau chief, (3) formal charges of discrimination were filed with State Division of Human Rights (DHR) on April 21, 1992, less than 4 months after termination, (4) DHR requested that county health department respond to discovery requests no later than June 24, 1992, and (5) at least twice between July and September 1992, county health department offered to DHR documentation and explanations to support its actions. Freudenthal v County of Nassau, 283 A.D.2d 6, 726 N.Y.S.2d 116, 2001 N.Y. App. Div. LEXIS 5645 (N.Y. App. Div. 2d Dep't 2001), aff'd, 99 N.Y.2d 285, 755 N.Y.S.2d 56, 784 N.E.2d 1165, 2003 N.Y. LEXIS 139 (N.Y. 2003).

Application by state police for an order staying Division of Human Rights from holding hearing on complaint charging that state police acted in discriminatory manner in violation of Human Rights Law by refusing request to take police examination on day other than Saturday which was day observed by applicant as sabbath would be considered as in nature of a request for declaratory judgment as to whether Human Rights Law was applicable to state police. State Div. of Human Rights v State, 77 Misc. 2d 597, 354 N.Y.S.2d 287, 1973 N.Y. Misc. LEXIS 1227 (N.Y. Sup. Ct. 1973).

92. Discovery

In action under Human Rights Law, CLS Exec § 296, arising out of corporation's reduction in labor force, discovery order requiring corporation to furnish specified raw data regarding its employees "in any facility in Monroe County" and furnish certain personnel information for employees hired in Monroe County was overly broad, and would be modified to limit scope of discovery to plaintiff's employing unit within Monroe County since reduction in corporation's work force was implemented and managed at local level, and decision to terminate plaintiff's employment was made, implemented and managed by plaintiff's employing unit. Hasiotis v Xerox Corp., 191 A.D.2d 973, 594 N.Y.S.2d 509, 1993 N.Y. App. Div. LEXIS 2925 (N.Y. App. Div. 4th Dep't 1993).

In action against stock exchange for violation of Human Rights Law, plaintiff would be required to sign confidentiality agreement as condition of disclosure of documents regarding exchange's security and evacuation routes, even though exchange was not public entity entitled to assert "public interest" privilege, where documents sought involved sensitive security information that, if released to the public, could jeopardize safety of exchange's employees, and plaintiff gave no valid reason for refusing to sign agreement. Blum v New York Stock Exch., 263 A.D.2d 522, 693 N.Y.S.2d 225, 1999 N.Y. App. Div. LEXIS 8377 (N.Y. App. Div. 2d Dep't 1999).

In employment discrimination action setting forth disparate treatment and disparate impact claims, court properly found that plaintiff was entitled to information respecting defendant's termination of employees with 25 years of service, but should have limited defendant's disclosure to employees terminated within 5 years prior to plaintiff's termination. Abbott v Memorial Sloan-Kettering Cancer Ctr., 276 A.D.2d 432, 714 N.Y.S.2d 287, 2000 N.Y. App. Div. LEXIS 10750 (N.Y. App. Div. 1st Dep't 2000).

In employment discrimination action setting forth disparate treatment and disparate impact claims, plaintiff was entitled to disclosure of other charges filed against defendant but court should have limited scope of defendant's disclosure to discrimination charges based on discrimination by reason of race or color. Abbott v Memorial Sloan-Kettering Cancer Ctr., 276 A.D.2d 432, 714 N.Y.S.2d 287, 2000 N.Y. App. Div. LEXIS 10750 (N.Y. App. Div. 1st Dep't 2000).

In an action for wrongful discharge in violation of subdivision 1(a) of the above statute, it was held on motion for pretrial examination of witnesses that the tendency of any question to incriminate any of such witnesses under Penal Law § 700 could not then be dealt with and that the privilege against such incrimination must be claimed at the time each question is asked. Flanigen v Mullen & Gunn, Inc., 45 Misc. 2d 944, 258 N.Y.S.2d 609, 1965 N.Y. Misc. LEXIS 2051 (N.Y. Sup. Ct. 1965).

93. Burden of proof

Executive Law § 296, subd 1(a) in essence prevents disparate treatment of individuals, having regard for their abilities, capacities, and qualifications, gender as a source of such differentiation being neutralized, and the statute imposes the burden of warranting the exceptional treatment of the individual on the employer. Board of Education v New York State Div. of Human Rights, 42 A.D.2d 49, 345 N.Y.S.2d 93, 1973 N.Y. App. Div. LEXIS 4062 (N.Y. App. Div. 2d Dep't 1973), aff'd, 35 N.Y.2d 673, 360 N.Y.S.2d 887, 319 N.E.2d 202, 1974 N.Y. LEXIS 1326 (N.Y. 1974).

Burden of proving entitlement to bona fide occupational qualification exception to sex discrimination laws must be borne by party claiming its benefit. Guardian Capital Corp. v New York State Div. of Human Rights, 46 A.D.2d 832, 360 N.Y.S.2d 937, 1974 N.Y. App. Div. LEXIS 3585 (N.Y. App. Div. 3d Dep't 1974), app. dismissed, 36 N.Y.2d 806, 1975 N.Y. LEXIS 2680 (N.Y. 1975), app. denied, 37 N.Y.2d 705, 1975 N.Y. LEXIS 2770 (N.Y. 1975).

To make out prima facie case of age discrimination in employment, plaintiff must show that he or she was member of protected class, prove that he or she was discharged, prove that he or she was qualified for position, and either show that he or she was replaced by younger person, produce direct evidence of discriminatory intent, or produce statistical evidence of discriminatory conduct. Bockino v Metropolitan Transp. Auth., 224 A.D.2d 471, 638 N.Y.S.2d 137, 1996 N.Y. App. Div. LEXIS 1204 (N.Y. App. Div. 2d Dep't), app. denied, 87 N.Y.2d 1017, 644 N.Y.S.2d 150, 666 N.E.2d 1064, 1996 N.Y. LEXIS 1204 (N.Y. 1996), app. denied, 88 N.Y.2d 805, 646 N.Y.S.2d 985, 670 N.E.2d 226, 1996 N.Y. LEXIS 1688 (N.Y. 1996).

Article 78 proceeding to annul findings that State Office of Mental Health (SOMH) discriminated and retaliated against employee was properly dismissed where administrative law judge found that SOMH's witnesses were not credible and that employee made prima facie showing of discrimination and retaliation, and thus trier of fact could infer ultimate fact of intentional discrimination without need for employee to prove that SOMH's explanations for its conduct were pretextual. New York State Office of Mental Health v New York State Div. of Human Rights, 273 A.D.2d 829, 709 N.Y.S.2d 755, 2000 N.Y. App. Div. LEXIS 6849 (N.Y. App. Div. 4th Dep't 2000).

Teachers' association claiming, in Article 78 proceeding, that probationary teacher was unlawfully terminated by school district because of her protected union activity had burden of proving that (1) she was engaged in protected activity, (2) such activity was known to person making adverse employment decision, and (3) adverse action would not have been taken but for protected activity. Rockville Centre Teachers Ass'n v N.Y. State Pub. Empl. Rels. Bd., 281 A.D.2d 425, 721 N.Y.S.2d 112, 2001 N.Y. App. Div. LEXIS 2130 (N.Y. App. Div. 2d Dep't 2001).

In dismissing plaintiffs' allegations that defendant employer condoned or acquiesced in sexual harassment committed by male coworkers, court erred by imposing burden on plaintiffs to prove that they reported complained-of incidents to defendant, where defendant failed to plead affirmative defense that plaintiffs failed to take advantage of preventative or corrective opportunities provided by defendant so as to mitigate their damages; furthermore, had defendant pleaded such defense, burden would have been on it to establish defense, not on plaintiffs to disprove it in first instance. Vitale v Rosina Food Prods., 283 A.D.2d 141, 727 N.Y.S.2d 215, 2001 N.Y. App. Div. LEXIS 5748 (N.Y. App. Div. 4th Dep't 2001).

Under N.Y. Exec. Law § 296(1)(a), employee claimed that he was discriminatorily discharged based upon his employer's perception that he had the human immunodeficiency virus. The court dismissed that claim by summary judgment as the employee did not make a showing that the employer's legitimate

nondiscriminatory financial distress reason for discharging him was pretextual. Scardace v Mid Island Hosp., Inc., 21 A.D.3d 363, 800 N.Y.S.2d 42, 2005 N.Y. App. Div. LEXIS 8229 (N.Y. App. Div. 2d Dep't 2005).

Because a school terminated a teacher's probationary employment due to excessive absenteeism, and because the teacher was an at-will employee under N.Y. Educ. Law § 2573(1)(a), the teacher failed to raise a triable issue of fact that the stated reasons for the teacher's discharge were pretextual; consequently, the teacher was not entitled to damages for violation of N.Y. Exec. Law § 296 or breach of contract. Haviland v Yonkers Pub. Schs, 21 A.D.3d 527, 800 N.Y.S.2d 578, 2005 N.Y. App. Div. LEXIS 8694 (N.Y. App. Div. 2d Dep't 2005).

If a plaintiff met the burdens of proof required to show prima facie cases of racial or age discrimination in employment, the employer had to then produce admissible evidence that clearly set forth legitimate, independent and nondiscriminatory reasons to rebut the presumption of discrimination, and if the employer produced such evidence, the burden shifted back to plaintiff, who had to then show that the proffered reason was merely a pretext for discrimination by demonstrating both that the reason was false, and that discrimination was the real reason, but the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remained at all times with the plaintiff. Bailey v New York Westchester Sq. Med. Ctr., 38 A.D.3d 119, 829 N.Y.S.2d 30, 2007 N.Y. App. Div. LEXIS 72 (N.Y. App. Div. 1st Dep't 2007).

Trial court properly granted an employer's motion for summary judgment in an employee's action for employment discrimination on the basis of disability because it established a legitimate, non-pretextual reason for the termination of her employment by presenting evidence that the employee had been issued a warning for. inter alia, repeated tardiness, failure to dress in appropriate attire, and failing to know of the sales consultants' attendance and availability, the employee failed to demonstrate the existence of a triable issue of fact as to whether the employer's reasons were pretextual, and the employee presented no evidence that her actual or perceived disability played a role in the employer's decision to terminate her employment. D'Agostino v MMC E., LLC, 125 A.D.3d 751, 184 A.D.3d 719, 125 N.Y.S.3d 751, 2020 N.Y. App. Div. LEXIS 3491 (N.Y. App. Div. 2d Dep't 2020).

Although an employee was a member of a protected class, the employee's claims were time barred and for a child's disability, not the employee's own; because the employer had legitimate, independent, and nondiscriminatory reasons to support its challenged actions, the employee was not entitled to relief under N.Y. Exec. Law § 296. Wharton v Town of N. Hempstead, 875 N.Y.S.2d 426, 22 Misc. 3d 83, 2009 N.Y. Misc. LEXIS 70 (N.Y. App. Term 2009).

Under the Human Rights Law, once an employer establishes a non-discriminatory reason for the elimination of a position, or a reduction in grade, if the employee alleging age discrimination does not show that the explanation is pretextual, summary judgment in favor of the employer is appropriate. Roundtree v Sch. Dist. of Niagara Falls, 294 A.D.2d 876, 741 N.Y.S.2d 633, 2002 N.Y. App. Div. LEXIS 4474 (N.Y. App. Div. 4th Dep't 2002).

Because an employer tendered sufficient evidence that a former employee's employment was terminated for legitimate, nonretaliatory reasons, and the employee failed to raise a triable issue of fact, the trial court properly dismissed the former employee's disability discrimination and retaliation causes of action under N.Y. Exec. Law § 296. Thide v New York State Dept. of Transp., 27 A.D.3d 452, 811 N.Y.S.2d 418, 2006 N.Y. App. Div. LEXIS 2602 (N.Y. App. Div. 2d Dep't 2006).

District Court erred in concluding that plaintiffs, pilots of bankrupt airline, failed to create inference of age discrimination in violation of CLS Exec § 296 where plaintiffs showed that airline management representative assigned to investigate and evaluate acquisition of bankrupt airline made numerous comments about age of bankrupt airline's pilot force, referring to them as "contaminated" and " Abdu-Brisson v Delta Air Lines, Inc., 239 F.3d 456, 2001 U.S. App. LEXIS 2041 (2d Cir. N.Y.), cert. denied, 534 U.S. 993, 122 S. Ct. 460, 151 L. Ed. 2d 378, 2001 U.S. LEXIS 9990 (U.S. 2001).

Plaintiff's hostile work environment and constructive discharge claims failed because no genuine issue of fact precluded the employer from successfully asserting the Faragher/Ellerth affirmative defense; plaintiff did not dispute the reasonableness of the employer's antiharassment policy or its complaint procedures, and the handling of one prior complaint against the supervisor at issue was not adequate evidence to show that the employer "ignored or resisted" complaints against the supervisor similar to the one pressed by plaintiff, nor did it provide a basis to justify plaintiff's failure to avail herself of the employer's complaint procedure. Ferraro v Kellwood Co., 440 F.3d 96, 2006 U.S. App. LEXIS 5707 (2d Cir. N.Y. 2006).

Plaintiff has burden of establishing prima facie case; once he does so, burden is on defendant to demonstrate it had independent, legitimate reason, and not pretext, for action taken against plaintiff and against which plaintiff complains; defendants also have burden to show that any unusual treatment of plaintiff was justified. After plaintiff makes prima facie showing of discrimination and defendants counter with legitimate, non-discriminatory reason for termination, plaintiff is entitled to show facts indicating that stated reason for termination was merely pretext for discrimination; this may be done either directly, by persuading court that discriminatory reason more likely motivated employer, or indirectly, by showing that employer's proffered explanation is unworthy of credence. To establish liability under Human Rights Law plaintiff must prove that employment was terminated because of his disability and that, although disabled, his impairment did not preclude him from performing duties in reasonable manner. O'Keefe v Niagara Mohawk Power Corp., 714 F. Supp. 622, 1989 U.S. Dist. LEXIS 6454 (N.D.N.Y. 1989).

Elements and burdens of proof are same for discrimination claims brought under 42 USCS § 1981 and CLS Exec § 296. Smith v Cadbury Bevs., 942 F. Supp. 150, 1996 U.S. Dist. LEXIS 15004 (W.D.N.Y. 1996), aff'd, 116 F.3d 466, 1997 U.S. App. LEXIS 20232 (2d Cir. N.Y. 1997).

Under Exec § 296, performance of former employee suffering from Type I diabetes, coupled with employer's need to reduce staff, was legitimate, nondisability-based reason for terminating employee, where employee had poor performance statistics and poor performance evaluations overall and in comparison to his co-workers, and employee handbook required employer to consider relative strengths and weaknesses of affected individuals before making any reductions in staff. Burke v Royal Ins. Co., 39 F. Supp. 2d 251, 1999 U.S. Dist. LEXIS 2962 (E.D.N.Y. 1999).

Standard under Exec § 296 for proving disability is broader than that of federal Americans with Disabilities Act of 1990. Fagan v United Int'l Ins. Co., 128 F. Supp. 2d 182, 2001 U.S. Dist. LEXIS 382 (S.D.N.Y. 2001).

Burden-shifting framework of McDonnell Douglas applies to discrimination claims under Exec § 296. Mancabelli v Solvay Union Free Sch. Dist., 180 F. Supp. 2d 371, 2001 U.S. Dist. LEXIS 19721 (N.D.N.Y. 2001).

In order to allege a prima facie case of gender discrimination, the employee must allege: (1) membership in a protected class/age group, (2) qualification for the position, (3) an adverse employment decision/discharge, and (4) that the decision/discharge took place under circumstances giving rise to an inference of discrimination. Gross v Home Depot U.S.A., Inc., 386 F. Supp. 2d 296, 2005 U.S. Dist. LEXIS 9052 (S.D.N.Y. 2005).

To establish a prima facie case for retaliation, an employee must show that: (1) he or she was engaged in protected activity;, (2) the employer was aware of that activity, (3) the employee suffered an adverse employment action, and (4) there was a causal connection between the protected activity and the adverse employment action. Gross v Home Depot U.S.A., Inc., 386 F. Supp. 2d 296, 2005 U.S. Dist. LEXIS 9052 (S.D.N.Y. 2005).

While Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq.; the New York State Human Rights Law, N.Y. Exec. Law § 296; 42 U.S.C.S. §§ 1983, 1981; and the Equal Protection Clause of the Fourteenth Amendment prohibit race-based employment discrimination, they do not prohibit all race-conscious affirmative action plans. An employer's demonstration of the existence and application of an affirmative action plan constitutes a legitimate nondiscriminatory reason under the

McDonnell Douglas framework, thus if an employer asserts its compliance with an affirmative action plan as its legitimate nondiscriminatory reason, the burden then shifts back to the plaintiff to show that the plan is invalid. Vivenzio v City of Syracuse, 545 F. Supp. 2d 241, 2008 U.S. Dist. LEXIS 31874 (N.D.N.Y. 2008), vacated, in part, 611 F.3d 98, 2010 U.S. App. LEXIS 13464 (2d Cir. N.Y. 2010).

Although the mental health facility's conduct in treating the patients could have constituted discrimination under N.Y. Exec. Law § 296, the class of patients had not established that the facility acted with the requisite discriminatory intent since the patients only argued that the facility, a residential treatment center, specifically targeted mentally disabled people because of their disabilities. The argument that a party acted with discriminatory animus, simply because it operated a facility for the mentally disabled and mistreats them, was too conclusory to meet the standard for summary judgment. Romano v SLS Residential, Inc., 812 F. Supp. 2d 282, 2011 U.S. Dist. LEXIS 67769 (S.D.N.Y. 2011).

Purchasers failed to show they were improperly denied the opportunity to purchase property because of their race; the record clearly revealed that the property owners' decision to sell to another buyer as opposed to the purchasers was dictated by economical concerns and by their desire to sell the property expeditiously. Mitchell v Century 21 Rustic Realty, 233 F. Supp. 2d 445, 2002 U.S. Dist. LEXIS 21545 (E.D.N.Y. 2002), aff'd in part, vacated in part, 350 F.3d 39, 2003 U.S. App. LEXIS 23322 (2d Cir. 2003).

94. Collateral estoppel/res judicata

Determination by Unemployment Insurance Appeal Board that petitioner was "employee" for purposes of his claim for unemployment insurance benefits does not collaterally estop Division of Human Rights from determining that petitioner is independent contractor for purposes of age discrimination suit, since, inasmuch as issue of unemployment is ultimate fact, resolution of which is committed to discretion of board and division under independent bodies of law, there is no identity of issue in board's finding of employment that automatically mandates similar finding by division. Engel v Calgon Corp., 114 A.D.2d 108, 498 N.Y.S.2d 877, 1986 N.Y. App. Div. LEXIS 63686 (N.Y. App. Div. 3d Dep't 1986), aff'd, 69 N.Y.2d 753, 512 N.Y.S.2d 801, 505 N.E.2d 244, 1987 N.Y. LEXIS 15324 (N.Y. 1987).

In action for allegedly unlawful discriminatory discharge from employment, defendant was not entitled to summary judgment based on arbitration between parties which resulted in determination that plaintiff was discharged for just cause, although arbitrator's award is generally given preclusive effect in subsequent judicial proceeding, since arbitration is inappropriate forum for disposition of employment discrimination claim because arbitrator's sole task is to effectuate parties' intent in connection with collective bargaining agreement, not to consider claim of statutory discrimination. Uryevick v Pepcom Industries, Inc., 155 A.D.2d 450, 547 N.Y.S.2d 109, 1989 N.Y. App. Div. LEXIS 13946 (N.Y. App. Div. 2d Dep't 1989).

Employee was collaterally estopped from bringing action against employer under CLS Exec § 296 for sexual discrimination and sexual harassment where same claims were decided against employee by federal court in Title VII action after she was given full and fair opportunity to litigate. Porras v Montefiore Medical Center, 185 A.D.2d 784, 588 N.Y.S.2d 135, 1992 N.Y. App. Div. LEXIS 10021 (N.Y. App. Div. 1st Dep't 1992), app. denied, 81 N.Y.2d 704, 595 N.Y.S.2d 399, 611 N.E.2d 300, 1993 N.Y. LEXIS 250 (N.Y. 1993).

Plaintiff's action under CLS Exec § 296(7) should have been dismissed where federal court had previously dismissed such action, together with claim based on 42 USCS § 1981, stating that "Plaintiff now concedes that the claims under (federal law) and the New York Executive Law are time barred." Mchawi v State Univ. of New York, Empire State College, 248 A.D.2d 111, 669 N.Y.S.2d 545, 1998 N.Y. App. Div. LEXIS 1932 (N.Y. App. Div. 1st Dep't), app. denied, 92 N.Y.2d 804, 677 N.Y.S.2d 779, 700 N.E.2d 318, 1998 N.Y. LEXIS 1856 (N.Y. 1998).

Court would annul determination by administrative law judge (ALJ) finding that railroad company's termination of respondent for violent behavior against fellow worker was pretextual, wherein ALJ asserted that she was not bound by prior determination that assault took place, where prior determination to dismiss respondent was upheld on appeal by Special Board of Adjustment, arbitration panel authorized by Railway Labor Act (45 USCS § 153), respondent conceded that Board had administrative status, and Board conclusively determined that respondent violently assaulted and then threatened fellow worker. Metro-North Commuter R.R. Co. v New York State Exec. Dep't Div. of Human Rights, 271 A.D.2d 256, 707 N.Y.S.2d 50, 2000 N.Y. App. Div. LEXIS 4101 (N.Y. App. Div. 1st Dep't 2000).

Human Rights Law action was not barred by res judicata based on prior Workers' Compensation Law action, as petitioners were precluded by statute from obtaining compensatory damages in workers' compensation action and, in Human Rights action, employer was directed to pay them for lost wages, less actual earnings and any worker's compensation benefits that they received. Kondracke v Blue, 277 A.D.2d 953, 716 N.Y.S.2d 533, 2000 N.Y. App. Div. LEXIS 11599 (N.Y. App. Div. 4th Dep't 2000).

Plaintiff's application for and acceptance of disability benefits was not fatal to his action alleging disparate treatment as to terms and conditions of his employment due to disability where employer, by purposefully relieving plaintiff of his duties and "plac(ing) him in a non-salary status unless he fulfill(ed) the requirements for short-term disability," effectively required plaintiff to file application for disability benefits. Novak v Royal Life Ins. Co. of N.Y., 284 A.D.2d 892, 726 N.Y.S.2d 784, 2001 N.Y. App. Div. LEXIS 6849 (N.Y. App. Div. 3d Dep't 2001).

Employee's claims of sex discrimination in violation of N.Y. Exec. Law § 296 were barred by res judicata, as the employee had participated in a settlement of a federal class action against her employer, and insurance company, which contained claims duplicative of the allegations in the instant action. Eliasof v Metropolitan Life Ins. Co., 39 A.D.3d 801, 835 N.Y.S.2d 628, 2007 N.Y. App. Div. LEXIS 5238 (N.Y. App. Div. 2d Dep't 2007).

Judicially unreviewed findings by Division of Human Rights in age discrimination claim under CLS Exec Art 15 did not have preclusive effect on claim, based on same factual allegations, brought in federal court under Age Discrimination in Employment Act, 29 USCS §§ 621 et seq. Astoria Fed. Sav. & Loan Ass'n v Solimino, 501 U.S. 104, 111 S. Ct. 2166, 115 L. Ed. 2d 96, 1991 U.S. LEXIS 3320 (U.S. 1991).

The protection against discrimination afforded by Executive Law § 296 is at least as broad as that afforded by the Federal Constitution and civil rights statutes. Thus, the determination of the Appellate Division affirming the Appeal Board's affirmance of the State Division of Human Rights' dismissal of former employee's race discrimination claim against former employer on the ground of lack of probable cause, res judicata of all other state actions as a matter of statutory law, would be entitled to full faith and credit in a federal court hearing federal constitutional and civil rights claims. Mitchell v National Broadcasting Co., 553 F.2d 265, 1977 U.S. App. LEXIS 13960 (2d Cir. N.Y. 1977).

State court's upholding of hearing officer's determination of civil service employee misconduct did not collaterally estop employee from litigating separate age discrimination claim in federal court since such claim requires only showing that employee possessed basic skills necessary for performance of job and state court passed only on her conduct on job, not on her minimal qualification to perform it. Owens v New York City Housing Authority, 934 F.2d 405, 1991 U.S. App. LEXIS 10373 (2d Cir. N.Y.), cert. denied, 502 U.S. 964, 112 S. Ct. 431, 116 L. Ed. 2d 451, 1991 U.S. LEXIS 6582 (U.S. 1991).

Where an employee benefit fund's contention that CLS Executive Law § 296 was preempted by ERISA was rejected in a prior state court proceeding, the doctrine of collateral estoppel prevented the fund from raising the preemption issue again in a federal action to enjoin the Commissioner of New York Human Rights Division from enforcing CLS Executive Law § 296. United Federation of Teachers Welfare Fund v Kramarsky, 451 F. Supp. 333, 1978 U.S. Dist. LEXIS 17522 (S.D.N.Y. 1978), aff'd, 650 F.2d 1310, 1981 U.S. App. LEXIS 13404 (2d Cir. N.Y. 1981).

Former employee is collaterally estopped from filing suit against brokerage firm under CLS Exec Law § 296, where New

York City Commission on Human Rights has already conducted investigation and determined that there is no probable cause to believe that his charges have any merit, because employee can point to only one relevant witness commission determined not to interview, and that witness was by no means so fundamental that failure to interview him resulted in absence of full and fair opportunity for employee to be heard. Forbes v Merrill Lynch, Fenner & Smith, 957 F. Supp. 450, 1997 U.S. Dist. LEXIS 2661 (S.D.N.Y. 1997).

Former employee's prior proceedings before city human rights commission, alleging disability discrimination under Americans with Disabilities Act and New York City Administrative Code, collaterally estopped him from pursuing claim under CLS Exec § 296(1)(a) where he had full and fair opportunity to be heard in proceedings before city human rights commission. Forbes v Merrill Lynch, Fenner & Smith, 957 F. Supp. 450, 1997 U.S. Dist. LEXIS 2661 (S.D.N.Y. 1997).

Black former employees' filing of complaint with New York State Division of Human Rights barred commencement of action under Exec § 296 based on same incident and discriminatory grievance. Whidbee v McDonald's Corp., 75 F. Supp. 2d 183, 1999 U.S. Dist. LEXIS 18255 (S.D.N.Y. 1999), aff'd in part, vacated in part, 223 F.3d 62, 2000 U.S. App. LEXIS 20181 (2d Cir. N.Y. 2000).

Former X-ray technologist's claim under Family and Medical Leave Act (FMLA) (29 USCS §§ 2601 et seq.) is denied summarily, where she had full and fair opportunity to present ADA (42 USCS §§ 12101 et seq.) and Exec § 296 claims to state department of human rights, which determined there was no probable cause to believe her employer had engaged in unlawful discrimination, because collateral estoppel precludes her from relitigating here issue of whether employer terminated her position for legitimate business reasons. Kosakow v New Rochelle Radiology Assocs., P.C., 88 F. Supp. 2d 199, 2000 U.S. Dist. LEXIS 3122 (S.D.N.Y. 2000), vacated, 274 F.3d 706, 2001 U.S. App. LEXIS 26954 (2d Cir. N.Y. 2001).

White employee's second suit, alleging race discrimination arising from a failure to promote and resignation, was dismissed based upon collateral estoppel and res judicata. Cameron v Church, 253 F. Supp. 2d 611, 2003 U.S. Dist. LEXIS 4298 (S.D.N.Y. 2003).

Worker's action against a union, alleging claims under, inter alia, New York State Human Rights Law, N.Y. Exec. Law § 296 et seq., was barred on collateral estoppel grounds, as the case relied upon issues decided against the worker in an unsuccessful earlier action against the employer; the issues before the court were already litigated and decided in the worker's prior action against the employer, and in both cases, the worker claimed that she was discriminated against on account of her race, and the two complaints were based on the same underlying occurrences. Bush v O.P.E.I.U. Local 153, 499 F. Supp. 2d 571, 2007 U.S. Dist. LEXIS 59647 (S.D.N.Y. 2007).

Findings that creditor, a transgender woman, was discriminated against by debtor based on gender and disability in violation of the New York State Human Rights Law were sufficient to support a finding of willful injury for purposes of creditor's nondischargeability claim. Malice was implied by the state court's finding of deliberate discrimination, the acts and conduct of debtor in the context of the surrounding circumstances, and the imposition of a civil penalty. Fuller v Rea (In re Rea), 606 B.R. 531, 2019 Bankr. LEXIS 2364 (Bankr. S.D.N.Y. 2019).

95. Sufficiency of evidence

Evidence which tended to demonstrate that restaurant sales volume had increased slightly following replacement of male waiters with waitresses dressed in alluring costumes was insufficient to establish a bona fide occupational qualification exception which would protect restaurant's action from operation of sex discrimination law where there was no evidence establishing that increased sales were directly attributable to replacement of waiters. Guardian Capital Corp. v New York State Div. of Human Rights, 46 A.D.2d 832, 360 N.Y.S.2d 937, 1974 N.Y. App. Div. LEXIS 3585 (N.Y. App. Div. 3d Dep't 1974), app. dismissed, 36 N.Y.2d 806, 1975 N.Y. LEXIS 2680 (N.Y. 1975), app. denied, 37 N.Y.2d 705, 1975 N.Y. LEXIS 2770 (N.Y. 1975).

Where court in prior proceeding wherein waiter charged that restaurant which replaced staff of waiters with waitresses was guilty of sex discrimination held that restaurant failed to produce sufficient evidence to establish bona fide occupational qualification exception protecting restaurant's action from operation of sex discrimination law and where restaurant did not adduce any significantly different financial proof at hearing on instant sex discrimination complaint filed by another waiter who was discharged under same circumstances, prior decision controlled decision in instant proceeding on issue whether evidence was sufficient to establish bona fide occupational qualification exception. Guardian Capital Corp. v New York State Div. of Human Rights, 48 A.D.2d 753, 368 N.Y.S.2d 594, 1975 N.Y. App. Div. LEXIS 9834 (N.Y. App. Div. 3d Dep't), app. denied, 37 N.Y.2d 712, 1975 N.Y. LEXIS 2959 (N.Y. 1975).

An employer did not sustain his burden of proof, required by Exec Law § 296.10(c), to show that retaining a employee in his position, while permitting him to observe his Sabbath, would result in undue economic hardship to the employer where the employee submitted no cost analysis to support his plant foreman's opinion that accommodating the employee would have a "noticeable effect" on the employer's costs. State Div. of Human Rights ex rel. Clarke v Carnation Co., 86 A.D.2d 977, 448 N.Y.S.2d 330, 1982 N.Y. App. Div. LEXIS 15684 (N.Y. App. Div. 4th Dep't), app. denied, 57 N.Y.2d 607, 1982 N.Y. LEXIS 7208 (N.Y. 1982), cert. denied, 459 U.S. 1206, 103 S. Ct. 1194, 75 L. Ed. 2d 438, 1983 U.S. LEXIS 3409 (U.S. 1983).

Hearsay affirmation of disabled professional basketball referee's physician, offered by referee to show physical fitness to fully perform as referee, is insufficient standing alone to amount to substantial evidence that referee can reasonably perform required duties where, other than statement in affirmation that referee has undergone exercise tread mill test, there is no reference to medical tests sufficient to conclude, with degree of medical certainty, that disability is not job related. National Basketball Asso. v New York State Div. of Human Rights, 115 A.D.2d 365, 495 N.Y.S.2d 904, 1985 N.Y. App. Div. LEXIS 54768 (N.Y. App. Div. 1st Dep't 1985), aff'd, 68 N.Y.2d 644, 505 N.Y.S.2d 63, 496 N.E.2d 222, 1986 N.Y. LEXIS 19039 (N.Y. 1986).

Employer has knowledge of and acquiesces in sexually discriminatory conduct of supervisor where employer's president and general manager in charge of employee grievances is specifically advised of several incidents of physical abuse involving supervisor, to which president responds that he will not do anything at the present but desires to be advised of subsequent improper conduct. Spoon v American Agriculturalist, Inc., 120 A.D.2d 857, 502 N.Y.S.2d 296, 1986 N.Y. App. Div. LEXIS 56963 (N.Y. App. Div. 3d Dep't 1986).

Court properly granted employer's motion under CLS CPLR § 4401 for judgment dismissing employee's age discrimination complaint where employee failed to rebut employer's evidence that alleged discriminatory action was taken for legitimate business reasons as part of valid corporate reorganization plan. Keith v Carrier International Corp., 132 A.D.2d 926, 518 N.Y.S.2d 261, 1987 N.Y. App. Div. LEXIS 49377 (N.Y. App. Div. 4th Dep't), app. denied, 70 N.Y.2d 613, 524 N.Y.S.2d 431, 519 N.E.2d 342, 1987 N.Y. LEXIS 19901 (N.Y. 1987).

College employee's testimony regarding persistent daily sexual harassment during her employment at college, and significant physical manifestations that resulted from her emotional distress, so affecting her that she was unable to attend college during following semester, was clearly sufficient to establish mental anguish and humiliation, but award of $150,000 in compensatory damages for mental anguish was excessive and would be reduced to $100,000. SUNY College of Environmental Science & Forestry v State Div. of Human Rights, 144 A.D.2d 962, 534 N.Y.S.2d 270, 1988 N.Y. App. Div. LEXIS 14449 (N.Y. App. Div. 4th Dep't 1988).

Evidence supported determination finding correctional facility guilty of unlawful discriminatory practice based on race where complainant and other black correction officers testified as to "hostile situation" at facility, black officers were placed in differ-

ent "class" from white employees, they were denied more desirable assignments and shifts, they had their orders and directions disregarded by subordinates or countermanded by their superior officers, and they were disciplined more frequently and more harshly than white employees; furthermore, of 16 cases of alleged inmate abuse occurring at facility, complainant was sole correction officer who was dis-charged. New York State Dep't of Correctional Servs. v State Div. of Human Rights, 215 A.D.2d 908, 626 N.Y.S.2d 588, 1995 N.Y. App. Div. LEXIS 5326 (N.Y. App. Div. 3d Dep't 1995).

Award of $25,000 in compensatory damages for emotional distress and humiliation as result of unlawful racial discrimination was excessive where sole evidence of such damages was complainant's testimony that employer's unlawful conduct made him feel "victimized, ambushed and abandoned" and caused him to withdraw from relationships with his friends and family, that he was unable to pay court-ordered child support or to provide entertain-ment for his 3 children, and that he could not complete purchase of items he had ordered prior to his termination and forfeited $1,000 deposit on automobile; appropriate award in such case was $15,000. New York State Dep't of Correctional Servs. v State Div. of Human Rights, 215 A.D.2d 908, 626 N.Y.S.2d 588, 1995 N.Y. App. Div. LEXIS 5326 (N.Y. App. Div. 3d Dep't 1995).

Evidence did not support respondent's determination, based on disparate discriminatory impact analysis, that State Office of Mental Health was guilty of unlawful discriminatory practices for having employed African American and Hispanic employees as grade 9 Mental Health Therapy Aides (MHTAs) at regional forensic unit (RFU), while predominantly white workforce allegedly doing similar work at different forensic facility worked as grade 14 Secure Hospital Treatment Assistants; mere fact that racial imbalance existed in one segment of workforce did not, without more, establish prima facie case of disparate impact, especially in view of fact that MHTAs at two RFUs not considered by respondent, who also failed to receive grade 14 status, were predominantly white. New York State Office of Mental Health, Manhattan Psychiatric Ctr. v New York State Div. of Human Rights, 223 A.D.2d 88, 645 N.Y.S.2d 926, 1996 N.Y. App. Div. LEXIS 8013 (N.Y. App. Div. 3d Dep't 1996), app. denied, 89 N.Y.2d 806, 654 N.Y.S.2d 716, 677 N.E.2d 288, 1997 N.Y. LEXIS 32 (N.Y. 1997).

Defendants rebutted plaintiff's prima facie case of age discrimination where employer's general manager testified that he was hired, inter alia, to remedy serious deficiencies in management of employer's maintenance operations, general manager interviewed plaintiff, but found that plaintiff failed to make any suggestions to correct problems, claimed that problems were overstated, and blamed uncooperative union employees and poor conditions for problems, and general manager testified that he replaced plaintiff with another employee who ran efficient and organized repair facility and who presented sound and specific suggestions for improving operations. Bockino v Metropolitan Transp. Auth., 224 A.D.2d 471, 638 N.Y.S.2d 137, 1996 N.Y. App. Div. LEXIS 1204 (N.Y. App. Div. 2d Dep't), app. denied, 87 N.Y.2d 1017, 644 N.Y.S.2d 150, 666 N.E.2d 1064, 1996 N.Y. LEXIS 1204 (N.Y. 1996), app. denied, 88 N.Y.2d 805, 646 N.Y.S.2d 985, 670 N.E.2d 226, 1996 N.Y. LEXIS 1688 (N.Y. 1996).

Evidence did not support determination that rescue mission, in conditioning complainant's stay on further discussing her HIV status, denied her privilege and advantage of place of public accommodation where (1) all witnesses, including complainant, testified that complainant was asked whether she had any medications with her and was told that, if she did, they had to be put away, that she refused to respond to that inquiry, that if she wished to stay, she had to respond, and that she left rather than answering, and (2) question as to medications was not based on her HIV status, but rather was as matter of policy asked of all potential admittees. Rescue Mission Alliance v Mercado, 224 A.D.2d 934, 637 N.Y.S.2d 580, 1996 N.Y. App. Div. LEXIS 1571 (N.Y. App. Div. 4th Dep't), app. denied, 88 N.Y.2d 805, 646 N.Y.S.2d 985, 670 N.E.2d 226, 1996 N.Y. LEXIS 1714 (N.Y. 1996).

Court would annul determination that certain acts of dentist constituted refusal to treat complainant based on his status as person perceived to be at risk for HIV infection where dental office in question did not constitute "place of public accommodation." Schulman v State Div. of Human Rights, 89 N.Y.2d 934, 226 A.D.2d 645, 641 N.Y.S.2d 134, 677 N.E.2d 284, 1996 N.Y. App. Div. LEXIS 4389 (N.Y. App. Div. 2d Dep't 1996), rev'd, 89 N.Y.2d 934, 654 N.Y.S.2d 713, 677 N.E.2d 284, 1997 N.Y. LEXIS 1802 (N.Y. 1997).

Plaintiff who demonstrates that employer's proffered nondiscriminatory reason for unfavorable treatment is pretextual may prevail without also adducing further proof to establish that real motive was discrimination. Classic Coach v Mercado, 280 A.D.2d 164, 722 N.Y.S.2d 551, 2001 N.Y. App. Div. LEXIS 2571 (N.Y. App. Div. 2d Dep't), app. denied, 97 N.Y.2d 601, 735 N.Y.S.2d 490, 760 N.E.2d 1286, 2001 N.Y. LEXIS 3231 (N.Y. 2001).

There was no merit in inmate's claim that prison authorities arbitrarily and consistently refused to grant requests by Muslim inmates to attend religious services while in keeplock, even though he made 2 such requests that were denied, where those denials were legitimately based on his institutional record and thus were not arbitrary, he did not specifically challenge denial of his own requests, and there was no evidence to support his conclusory assertion that, as general proposition, such requests by Muslim inmates were routinely and arbitrarily denied. Abdullah v Goord, 281 A.D.2d 760, 722 N.Y.S.2d 281, 2001 N.Y. App. Div. LEXIS 2486 (N.Y. App. Div. 3d Dep't), app. denied, 96 N.Y.2d 715, 730 N.Y.S.2d 31, 754 N.E.2d 1114, 2001 N.Y. LEXIS 1893 (N.Y. 2001).

Determination of the New York State Division of Human Rights that an employer violated N.Y. Exec. Law § 296(1)(a) by discriminating against an employee on the basis of her military status was not supported by substantial evidence because the employer demonstrated that he terminated the employee for a legitimate, nondiscriminatory reason that was not based on her military status; the employee's time cards supported the employer's contention that he terminated her employment because she continued to be late after being placed on probation for lateness for reasons having nothing to do with her military status. Matter of Kaplan v New York State Div. of Human Rights, 95 A.D.3d 1120, 944 N.Y.S.2d 616, 2012 N.Y. App. Div. LEXIS 3829 (N.Y. App. Div. 2d Dep't 2012).

There was legally sufficient evidence to support a jury verdict in favor of a temporary employee on her racial discrimination claims alleging hostile work environment and retaliation. Additionally, the verdict was not against the weight of the evidence, and a punitive damages award of $28,500 was not excessive. Diggs v Oscar De La Renta, LLC, 169 A.D.3d 1003, 94 N.Y.S.3d 574, 2019 N.Y. App. Div. LEXIS 1431 (N.Y. App. Div. 2d Dep't 2019).

Substantial evidence supported the determination by the Division of Human Rights that a school district unlawfully discriminated against a former teacher because a principal with the school district provided a negative reference to a prospective employer's inquiry about the teacher, which was an adverse employment action related to the filing of the teacher's initial complaint. Matter of Copiague Union Free Sch. Dist. v Foster, 185 A.D.3d 1023, 129 N.Y.S.3d 95, 2020 N.Y. App. Div. LEXIS 4415 (N.Y. App. Div. 2d Dep't 2020).

Because a city conclusively established that its refusal to recalculate the separation payout for a retired police officer was justified by submitting an arbitration award, the Supreme Court of New York should have granted that branch of the city's motion pursuant to CPLR 3211 to dismiss the first cause of action alleging employment discrimination on the basis of age. Domitz v City of Long Beach, 187 A.D.3d 853, 133 N.Y.S.3d 647, 2020 N.Y. App. Div. LEXIS 5926 (N.Y. App. Div. 2d Dep't 2020).

Supreme Court properly granted those branches of the city's motion to dismiss the retired police officer's cause of action alleging employment discrimination on the basis of age due to the city's refusal to reimburse the plaintiff for certain out-of-pocket medical expenses and to dismiss the cause of action alleging breach of a collective bargaining agreement based upon the city's refusal to reimburse the plaintiff for those expenses because an arbitration award eliminated the city's obligation to reimburse all "PBA members" for the out-of-pocket expenses at issue, regardless of age or retirement status, as a means of assisting the city to

fund the award. Domitz v City of Long Beach, 187 A.D.3d 853, 133 N.Y.S.3d 647, 2020 N.Y. App. Div. LEXIS 5926 (N.Y. App. Div. 2d Dep't 2020).

EEOC is required to accord substantial weight to findings and orders made by state and local authorities in proceedings commenced under state law pursuant to limited deferral provisions of § 706 of Civil Rights Act of 1964 (42 USCS § 2000e-5(f)), but EEOC is not bound by such findings; "substantial weight" directive indicates only minimum level of deference Commission must afford all state determinations and it does not bar affording greater preclusive effect which may be required by 28 USCS § 1738 if judicial action is involved. Kremer v Chemical Constr. Corp., 456 U.S. 461, 102 S. Ct. 1883, 72 L. Ed. 2d 262, 1982 U.S. LEXIS 104 (U.S.), reh'g denied, 458 U.S. 1133, 103 S. Ct. 20, 73 L. Ed. 2d 1405, 1982 U.S. LEXIS 2945 (U.S. 1982).

Employee established requisite element, in employment discrimination case, that employer had hired or sought other applicants for his position by showing that his supervisor had reassigned employee's duties to other recently-hired employees. Song v Ives Laboratories, Inc., 957 F.2d 1041, 1992 U.S. App. LEXIS 2608 (2d Cir. N.Y. 1992).

In action alleging retaliatory discharge, plaintiff offered sufficient evidence to infer causal connection between her complaints of sexual assault committed by 3 coworkers on business trip and employer's decision to terminate her where she was terminated just weeks after she told her supervisor that she was considering legal action in connection with assaults, and just 3 months after her supervisor promised that her salary and benefits would continue until she had recovered from assaults; while employer offered legitimate reason for terminating plaintiff on basis that she failed either to return to work on specified date or to provide appropriate medical documentation, summary judgment was precluded by her assertion that she was not told to provide such documentation. Tomka v Seiler Corp., 66 F.3d 1295, 1995 U.S. App. LEXIS 27612 (2d Cir. N.Y. 1995).

Because the employees did not establish that the mayor and the village administrator violated the employee's equal protection rights to an unhostile work environment, and that therefore the mayor and the village administrator were entitled to qualified immunity on the federal claims, it followed that the employees did not establish a hostile work environment claim under New York State Human Rights Law, N.Y. Exec. Law § 296. The mayor and the village administrator were also entitled to summary judgment on the employees' state law claims for hostile work environment. Demoret v Zegarelli, 451 F.3d 140, 2006 U.S. App. LEXIS 14190 (2d Cir. N.Y. 2006).

Jury verdict is set aside and judgment entered in favor of employer, even though jury had found that black executive at international bank was paid $200,000 less than his white fellow executives over 18-month period, because evidence viewed as whole reveals such complete absence of proof of salary discrimination based on race and/or national origin in violation of CLS Exec Law § 296 that jury's findings could have only been result of surmise and conjecture. Dessie v Generale Bank, 799 F. Supp. 1544, 1992 U.S. Dist. LEXIS 12384 (S.D.N.Y. 1992).

In action under Human Rights Law, 51-year-old discharged plaintiff failed to raise issue as to whether proffered reason for his discharge, that he sexually harassed subordinate employee, was pretextual where he presented no evidence to show that he had not sexually harassed subordinate employee, or to rebut sworn statements of company officials that they believed in good faith that he had sexually harassed subordinate employee and that they fired him for that reason. Agugliaro v Brooks Bros., 927 F. Supp. 741, 1996 U.S. Dist. LEXIS 7965 (S.D.N.Y. 1996).

Although black employee established that white supervisor's allegation that employee's poor evaluations were related to poor performance was pretextual, employee failed to prove that real reason for poor evaluations was because of race in violation of Title VII, 42 USCS § 1981, or CLS Exec Law § 296, where one of employee's witnesses suggested that supervisor felt threatened because employee had too much power and that supervisor sought to "break her," and there was evidence suggesting that poor evaluations may have been result of personal animosity. Carter v Cornell Univ., 976 F. Supp. 224, 1997 U.S. Dist. LEXIS 13610 (S.D.N.Y. 1997), aff'd, 159 F.3d 1345, 1998 U.S. App. LEXIS 32035 (2d Cir. N.Y. 1998).

Under Exec § 296, prima facie case of retaliation requires evidence of subjective retaliatory motive for employment action. Copeland v Sears, Roebuck & Co., 25 F. Supp. 2d 412, 1998 U.S. Dist. LEXIS 18251 (S.D.N.Y. 1998).

Terminated white Jewish executive director of human rights commission cannot state prima facie case of race, gender, or religion discrimination under Exec § 296, even though he asserts commissioners acted on opinion that African-American female should have been given job, because undisputed fact that position was discontinued after his termination—and has never been reinstated in 2 years and 4 months since—conclusively shows that motivating cause of his termination was commission's feeling that position was no longer justifiable expenditure of public funds. Berkowitz v County of Orange, 120 F. Supp. 2d 386, 2000 U.S. Dist. LEXIS 16410 (S.D.N.Y. 2000).

Evidence was sufficient to find that insurance company employer's reasons for terminating employee from his position of head office underwriter during reduction in force (RIF), including employee's alleged lack of experience in property underwriting, were pretext for age discrimination in violation of Exec § 296 and New York City Human Rights Law, where there were discrepancies in employer's explanations for termination, employer's 5 oldest underwriters were terminated during RIF, and decision to terminate was made without review of employee's performance. Shannon v Fireman's Fund Ins. Co., 156 F. Supp. 2d 279, 2001 U.S. Dist. LEXIS 7452 (S.D.N.Y. 2001).

Employee argued that a coworker was her supervisor and that the coworker's acts of sexual harassment constituted quid pro quo harassment for which the employer was liable; however, the contention failed as the employee did not identify any tangible employment action that was occasioned by her refusal to submit to the coworker's sexual advances. Durant v A.C.S. State & Local Solutions, Inc., 460 F. Supp. 2d 492, 2006 U.S. Dist. LEXIS 80987 (S.D.N.Y. 2006).

Employee did not adduce sufficient evidence to get to a jury on a hostile work environment claim as the employee did not show a workplace permeated with discriminatory behavior and the employer took immediate and effective corrective action when it learned of the harassing conduct. The employee was not entitled to have the employer redress the situation in her preferred manner—she was only entitled to have the situation addressed in a manner that was reasonably calculated to end the harassment. Durant v A.C.S. State & Local Solutions, Inc., 460 F. Supp. 2d 492, 2006 U.S. Dist. LEXIS 80987 (S.D.N.Y. 2006).

Former employee failed to provide evidence that could lead a jury to reasonably conclude that she engaged in protected activity; the evidence showed, and the employee admitted, that she never explicitly raised the issue of gender discrimination when she complained about her work. The employee asserted, nevertheless, that complaints from a female high-level manager about having to perform secretarial work clearly implied that she was being subject to sex discrimination; however, the content of the employee's complaints, even when construed in the light most favorable to the employee, did not raise a genuine issue of fact as to whether defendants were put on notice that the employee felt she was being discriminated against on the basis of sex and defendants were granted summary judgment. Int'l Healthcare Exch., Inc. v Global Healthcare Exch., LLC, 470 F. Supp. 2d 345, 2007 U.S. Dist. LEXIS 2648 (S.D.N.Y. 2007).

Employer's motion to dismiss a former employee's employment discrimination claims under the New York State Human Rights Law and the New York City Human Rights Law was denied because the act of termination occurred in New York, which alone was sufficient to establish discrimination within New York, even if the employee felt the effects of the termination at her workplace in another state. Rylott-Rooney v Alitalia-Linee Aeree Italiane-Societa Per Azioni, 549 F. Supp. 2d 549, 2008 U.S. Dist. LEXIS 30803 (S.D.N.Y. 2008).

Former employee sustained her burden to state a plausible N.Y. Exec. Law § 296(6) claim against a director because the employee could have established that the director participated in unlawful, discriminatory acts because the employee alleged that the direc-

tor asked the employee, on several occasions, about her medical conditions and the medication she was taking; the director refused to consult a doctor's note offered by the employee; the director never discussed the employee's leave request with a second director as she promised to do; the director presented her with a negative employment review on the day she was fired; and, after the employee's termination, the director claimed that the employee never requested medical leave. Tully-Boone v North Shore-Long Island Jewish Hosp. Sys., 588 F. Supp. 2d 419, 2008 U.S. Dist. LEXIS 101093 (E.D.N.Y. 2008).

Former employee alleged a plausible aiding and abetting N.Y. Exec. Law § 296(6) claim against a director because the employee could have established that the director participated in acts that contributed to an alleged failure to accommodate her disability because the employee alleged that she inquired of the director about the status of her leave request and the director informed her that she was unaware of any such request; when the employee told the director in a meeting that her lateness was caused by her medication, the director became hostile and abruptly ended the meeting; and, after she was terminated, the employee was told that the director denied any knowledge of the employee's request for medical leave. Tully-Boone v North Shore-Long Island Jewish Hosp. Sys., 588 F. Supp. 2d 419, 2008 U.S. Dist. LEXIS 101093 (E.D.N.Y. 2008).

Former employee adequately pled that an assistant director could have been held liable as an aider and abetter under N.Y. Exec. Law § 296(6) because the assistant director may have been held liable for aiding and abetting allegedly unlawful discrimination by her employer even where her actions served as the predicate for the employer's vicarious liability, and the employee's complaint was replete with allegations that the assistant director actually participated in the alleged unlawful conduct. Tully-Boone v North Shore-Long Island Jewish Hosp. Sys., 588 F. Supp. 2d 419, 2008 U.S. Dist. LEXIS 101093 (E.D.N.Y. 2008).

Teacher's failure to demonstrate impermissible animus or retaliatory conduct necessarily stripped her state and municipal discrimination and retaliation claims of any traction, and thus required the complete dismissal of her disparate treatment, hostile work environment, and retaliation claims based upon New York State Human Rights Law, N.Y. Exec. Law § 296 and § 297. Missick v City of New York, 707 F. Supp. 2d 336, 2010 U.S. Dist. LEXIS 48292 (E.D.N.Y. 2010).

Former residents of the apartment building proffered no evidence that the agent of the limited liability company (LLC) had any knowledge of any allegedly unlawful conduct on the part of the village. Accordingly, the former residents' claims under 42 U.S.C.S. § 3604(a) and N.Y. Exec. Law § 296(6) were dismissed as against the agent, the member, and the LLC. Rivera v Inc. Vill. of Farmingdale, 2011 U.S. Dist. LEXIS 34185 (E.D.N.Y. Mar. 30, 2011).

Although a supervisor's failure to take adequate remedial measures could rise to the level of actual participation under the New York State Human Rights Law, N.Y. Exec. Law § 296(6), a former employee's claim against a particular individual failed because there was no evidence demonstrating that this person was a supervisor. Conklin v County of Suffolk, 859 F. Supp. 2d 415, 2012 U.S. Dist. LEXIS 62436 (E.D.N.Y. 2012).

Proof that administrator of New York State Fire Academy did not rehire complainant as adjunct instructor because he believed that complainant had defamed him, and because he did not like him, was insufficient to etablish prima facie case of retaliation where complainant's own testimony indicated that administrator's antagonism toward him existed years before he filed discrimination complaint on which retaliation claim was based. 2000 Order Comm HR No. 4-E-O-1200624.

Complainant failed to prove that any factors or age or national origin were involved in elimination of his job, as required to overcome respondent's stated reason that job was eliminated due to reduction of force necessitated by budgetary limitations, where co-worker with whom complainant shared same national origin (Indian) was not harassed or discharged, and employer retained another employer who was 13 years older than complainant. 2000 Order Comm HR No. 1B-E-AN-91-3500280A.

Conclusory allegations of race discrimination were insufficient to overcome respondent fire department's proof that complainant was terminated from fire training academy for having failed 8 field proficiency evaluations. 2000 Order Comm HR No. 7-E-R-89-133941E.

Requisite nexus between complainant's Puerto Rican national origin and adverse employment actions she suffered was not established by proof of isolated derogatory remark made by respondent's department head about Indian coworker. 2000 Order Comm HR No. 1B-E-N-90-144025E.

96. Statute of limitations

Trial court's order granting an employee's application for leave to file a late notice of her employment discrimination claim against a school district was improper because a late notice of claim was required to have been filed no later than one year after a cause of action accrued, and N.Y. Educ. Law § 3813(2-b) provided a one-year statute of limitations; since the proceeding was commenced more than one year after the claim arose, the trial court lacked the discretion to allow a late notice. Matter of Amorosi v South Colonie Ind. Cent. School Dist., 9 N.Y.3d 367, 849 N.Y.S.2d 485, 880 N.E.2d 6, 2007 N.Y. LEXIS 3711 (N.Y. 2007).

Action alleging unlawful discriminatory practices in violation of CLS Exec § 296(1)(a) was governed by 3-year limitation period of CLS CPLR § 214(2). Koeppel v Wachtler, 141 A.D.2d 613, 529 N.Y.S.2d 359, 1988 N.Y. App. Div. LEXIS 6911 (N.Y. App. Div. 2d Dep't 1988), app. dismissed, 74 N.Y.2d 650, 542 N.Y.S.2d 519, 540 N.E.2d 714, 1989 N.Y. LEXIS 541 (N.Y. 1989).

In action under Human Rights Law in which some claims were dismissed as time-barred and dismissal was affirmed on appeal, court should have granted plaintiff's renewal motion to reinstate dismissed claims based on "newly discovered" evidence where administrative complaint had been filed with Division of Human Rights (DHR) unbeknownst to plaintiff, on referral from United States Equal Employment Opportunity Commission (EEOC), and such complaint was not dismissed until 9 days after disposition of judicial appeal, since (1) statute of limitations was tolled during pendency of administrative complaint and therefore judicial proceeding should have been deemed to have been commenced on DHR's dismissal of complaint, (2) any lack of diligence in bringing renewal motion was attributable to plaintiff's attorney, and (3) defendants failed to demonstrate prejudice. Sciss v Metal Polishers Union Local 8A, 149 A.D.2d 318, 539 N.Y.S.2d 899, 1989 N.Y. App. Div. LEXIS 4385 (N.Y. App. Div. 1st Dep't 1989).

Absent "compelling circumstances," individual instances of failure to promote do not constitute continuing violation for purpose of statute of limitations in claims brought under CLS Exec § 296. Nielsen v United Parcel Serv., 210 A.D.2d 641, 619 N.Y.S.2d 844, 1994 N.Y. App. Div. LEXIS 12429 (N.Y. App. Div. 3d Dep't 1994).

Allegations that individual defendant made both physical and verbal sexual advances toward plaintiff that were unwelcome and repelled, that she was told her job evaluation was tied to her willingness to accept advances, and that she was forced to resign because corporate defendant did not provide vehicle of redress stated action for both hostile environment and quid pro quo sexual harassment under Human Rights Law; those same allegations also showed discriminatory conduct within limitations period sufficiently similar to alleged conduct without limitations period to justify conclusion that both were part of single discriminatory practice, and thus plaintiff's claim was timely in its entirety under continuing violation doctrine. Walsh v Covenant House, 244 A.D.2d 214, 664 N.Y.S.2d 282, 1997 N.Y. App. Div. LEXIS 11535 (N.Y. App. Div. 1st Dep't 1997).

Court erred in dismissing, as untimely, second cause of action in second amended complaint, alleging violation of Federal Age Discrimination in Employment Act (29 USCS § 623) (ADEA), since that action arose out of same facts and circumstances which gave rise to first and third causes of action, alleging violations of Human Rights Law (CLS Exec Art 15), which were interposed in timely fashion in original complaint, and defendants were at all times on notice of facts and occurrences giving rise to ADEA claim and did not show any prejudice or surprise. Schutz v Finkelstein Bruckman Wohl Most & Rothman, 247 A.D.2d 460, 668 N.Y.S.2d

669, 1998 N.Y. App. Div. LEXIS 1024 (N.Y. App. Div. 2d Dep't 1998).

Plaintiff's pursuit of grievance proceeding against defendant, as permitted by collective bargaining agreement, did not toll statute of limitations on his action for employment discrimination under CLS Exec § 296, and thus complaint was properly dismissed as time barred. Mitchell v Nassau Community College, 265 A.D.2d 456, 696 N.Y.S.2d 866, 1999 N.Y. App. Div. LEXIS 10590 (N.Y. App. Div. 2d Dep't 1999).

Lower court properly granted an employers' N.Y. C.P.L.R. 3211(a)(5) motion to dismiss an employee's employment discrimination complaint brought under N.Y. Exec. Law § 296 because the three-year statute of limitations set forth in N.Y. C.P.L.R. 214(2), (4) had run, and N.Y. C.P.L.R. 205(a) did not save the action from being time barred because the instant action was not filed and served within six months of the employee's earlier federal action being dismissed. Pi Ju Tang v St. Francis Hosp., 37 A.D.3d 690, 830 N.Y.S.2d 311, 2007 N.Y. App. Div. LEXIS 2049 (N.Y. App. Div. 2d Dep't 2007).

Contrary to the trial court's conclusion, a complaint filed by a husband and a wife alleging sex discrimination in violation of N.Y. Exec. Law § 296 was not time-barred; the statute of limitations for a claim under § 296 was three years. Goldin v Engineers Country Club, 54 A.D.3d 658, 864 N.Y.S.2d 43, 2008 N.Y. App. Div. LEXIS 6559 (N.Y. App. Div. 2d Dep't 2008), app. denied, 13 N.Y.3d 763, 886 N.Y.S.2d 864, 915 N.E.2d 1160, 2009 N.Y. LEXIS 3475 (N.Y. 2009).

Three-month notice of claim requirements of CLS Educ § 3813(1) did not apply to action alleging that school district's denial of health insurance benefits to plaintiff's domestic partner constituted discrimination on basis of marital status and sexual orientation since action sought relief which would benefit plaintiff and teachers similarly situated. Funderburke v Uniondale Union Free Sch. Dist. No. 15, 172 Misc. 2d 963, 660 N.Y.S.2d 659, 1997 N.Y. Misc. LEXIS 260 (N.Y. Sup. Ct. 1997), aff'd, 251 A.D.2d 622, 676 N.Y.S.2d 199, 1998 N.Y. App. Div. LEXIS 7881 (N.Y. App. Div. 2d Dep't 1998).

Former state trooper's action against state under CLS Exec § 296 for discriminatory and retaliatory practices allegedly amounting to constructive discharge was time barred where (1) applicable 3-year limitations period began to run when trooper submitted her resignation along with her shield and firearm, even though resignation was not effective until 3 days later, because that act signaled her conclusion that she no longer could tolerate alleged discrimination, (2) she commenced action 3 years and one day after submitting her resignation, and (3) another trooper's mere reporting of meeting about plaintiff's possible misuse of sick leave after she submitted her resignation was not further retaliatory conduct extending limitations period. Clark v State, 186 Misc. 2d 896, 721 N.Y.S.2d 747, 2001 N.Y. Misc. LEXIS 17 (N.Y. Sup. Ct. 2001).

Appeals court reversed that part of order that dismissed employee's sexual harassment, hostile work environment, and retaliation claims in violation N.Y. Exec. Law § 296 of the New York Human Rights Law, N.Y. Exec. Law art. 15, against employer; statute of limitations may not have run if acts were part of continuing violation. Clark v State, 302 A.D.2d 942, 754 N.Y.S.2d 814, 2003 N.Y. App. Div. LEXIS 949 (N.Y. App. Div. 4th Dep't 2003).

Causes of action alleging violations of N.Y. Exec. Law § 296 are governed by a three-year statute of limitations. Kwarren v Am. Airlines, 303 A.D.2d 722, 757 N.Y.S.2d 105, 2003 N.Y. App. Div. LEXIS 3487 (N.Y. App. Div. 2d Dep't 2003).

Employer was entitled to summary judgment pursuant to N.Y. C.P.L.R. 3212 in the employee's discriminatory discharge action under N.Y. Exec. Law § 296; the action was barred by the three-year statute of limitations on discriminatory discharge actions, as the action was commenced more than three years after the employee's termination. Horan v N.Y. Tel. Co., 309 A.D.2d 642, 765 N.Y.S.2d 788, 2003 N.Y. App. Div. LEXIS 10980 (N.Y. App. Div. 1st Dep't 2003).

Disability discrimination and hostile working environment claims that a former employee filed against a county pursuant to the New York State Human Rights Law, N.Y. Exec. Law § 296, were dismissed because the employee did not serve a timely notice of claim upon the county as required by N.Y. County Law § 52 and N.Y. Gen. Mun. Law §§ 50-e and 50-i; (2) the federal district court did not have jurisdiction under N.Y. Gen. Mun. Law § 50-e(5) and (7) to grant the employee's application for leave to serve a late notice of claim; and (3) N.Y. Gen. Mun. Law §§ 50-e(5) and 50-i(1)(c) and N.Y. County Law § 52(1) barred the court from granting leave to serve a late notice where more than one year and ninety days had passed since the employee's claims arose when the employee was terminated. Costabile v County of Westchester, 2007 U.S. Dist. LEXIS 29787 (S.D.N.Y. Apr. 20, 2007), amended, 485 F. Supp. 2d 424, 2007 U.S. Dist. LEXIS 33484 (S.D.N.Y. 2007).

Trainman who took leave of absence from railroad to attend drug rehabilitation program, and was subsequently refused permission to return to work, may not bring action under N.Y. Human Rights Law, NYCLS Exec Law § 296, where trainman took leave in 1978, claimed he was willing and able to return to work in 1986, and was denied re-employment by railroad in 1986, railroad reaffirmed denial in 1987, and trainman made unsuccessful, formal application for re-employment in 1992, because statute of limitations in human rights actions is 3 years, and trainman's claim, which accrued in 1987, is time-barred. Verdon v Consolidated Rail Corp., 828 F. Supp. 1129, 1993 U.S. Dist. LEXIS 11314 (S.D.N.Y. 1993).

Employment discrimination claim was not time barred where Division of Human Rights dismissed complaint for administrative convenience because employee wished to pursue court action, and action was filed within 3-year period for bringing plenary action under Human Rights Law; employer was collaterally estopped from asserting that administrative complaint should have been dismissed on basis that it was not timely filed under administrative statute of limitations. Ryan v New York State Thruway Auth., 889 F. Supp. 70, 1995 U.S. Dist. LEXIS 9052 (N.D.N.Y. 1995).

Employment discrimination claims that accrued after July 24, 1991 may be pursued under CLS Exec Law § 296, even though rejection of continuing-violation theory applies to state, as well as federal, claims, because, unlike Title VII's (42 USCS §§ 2000e et seq.) 300-day rule, statute of limitations for action premised on New York Human Rights Law is 3 years from date of accrual. Nicholas v NYNEX, 974 F. Supp. 261, 1997 U.S. Dist. LEXIS 11400 (S.D.N.Y. 1997).

Race discrimination claims brought under federal and state law are subject to limitations period of CLS Exec Law § 296. Johnson v Delphi Energy & Engine Mgmt. Sys., 12 F. Supp. 2d 281, 1998 U.S. Dist. LEXIS 16910 (W.D.N.Y. 1998), aff'd, 181 F.3d 82, 1999 U.S. App. LEXIS 21477 (2d Cir. N.Y. 1999).

County employee's wrongful termination claim against county under Exec § 296 accrued on date that he was formally terminated, and, thus, his failure to file notice of claim within 90 days of that accrual date, or 90 days from date of treatment for his injury, warranted dismissal of his action. Baker v County of Monroe, 47 F. Supp. 2d 371, 1999 U.S. Dist. LEXIS 7104 (W.D.N.Y. 1999).

Commuter railroad police officer's age and disability discrimination claims against employer are time-barred, where he knew he was no longer on sergeant seniority list no later than November 16, 1994, but did not file charge with state division of human rights until September 16, 1998, because one-year limitations period applies and mere continuation of his non-promotion to sergeant does not make "continuing violation" exception to limitations applicable. Parker v Metropolitan Transp. Auth., 97 F. Supp. 2d 437, 2000 U.S. Dist. LEXIS 6309 (S.D.N.Y. 2000).

Police department applicant's Exec § 296 claim is time-barred to extent it is based on alleged discriminatory acts prior to June 13, 1997, where action was commenced June 13, 2000 and claim is subject to 3-year statute of limitations, because merely alleging several distinct acts of discrimination does not establish continuing violation, and evidence fails to establish he was denied employment pursuant to policy of age discrimination. Purdy v Town of Greenburgh, 166 F. Supp. 2d 850, 2001 U.S. Dist. LEXIS 15563 (S.D.N.Y. 2001), modified, 178 F. Supp. 2d 439, 2002 U.S. Dist. LEXIS 120 (S.D.N.Y. 2002).

Town employee's sexual harassment claims under N.Y. Exec. Law § 296 against a town, a highway superintendent, and town board members, were time-barred where she failed to allege any sexual harassment in the previous three years. Lange v Town of Monroe, 213 F. Supp. 2d 411, 2002 U.S. Dist. LEXIS 14352 (S.D.N.Y. 2002).

Plaintiff employee's Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., 42 U.S.C.S. § 1981, and N.Y. Exec. Law § 296, challenging discriminatory acts such as the denial of a promotion, an inadequate raise in salary, and job transfer on the basis of allegedly disparate treatment, were time-barred as the statute of limitations in New York was three years from the date the claim accrued. As for the employee's hostile work environment claim, time-bar was not an issue because of the continuing violation doctrine. Staff v Pall Corp., 233 F. Supp. 2d 516, 2002 U.S. Dist. LEXIS 25659 (S.D.N.Y. 2002), aff'd, 76 Fed. Appx. 366, 2003 U.S. App. LEXIS 18392 (2d Cir. N.Y. 2003).

Guidance counselor's claims under Titles I and II of the Americans with Disabilities Act, 42 U.S.C.S. § 12101 et seq., the Rehabilitation Act, 29 U.S.C.S. § 791 et seq., N.Y. Exec. Law §§ 292(5) and 296, and New York City, N.Y., Admin. Code § 8-107, were not dismissed as untimely because the counselor alleged the existence of a policy or practice amounting to a continuing violation—the school board's failure to accommodate her disability and its failure to pay her line-of-duty injury pay—and alleged at least one act—the notification of her termination—that was not time barred. Bloom v New York City Bd. of Educ., 2003 U.S. Dist. LEXIS 5290 (S.D.N.Y. Mar. 31, 2003).

Employer was granted summary judgment on the employee's age discrimination claim under N.Y. Exec. Law § 296 because it was time-barred; the employee filed his claim on February 11, 2000, and therefore any discrimination claim occurring before February 11, 1997 was barred, but the employee had departed the employer and commenced new employment prior to February 11, 1997. Murphy v GE, 245 F. Supp. 2d 459, 2003 U.S. Dist. LEXIS 521 (N.D.N.Y. 2003).

Court granted the employer summary judgment on the employee's discrimination claims filed under the New York State Human Rights Law, N.Y. Exec. Law § 296, and the New York City Human Rights Law, N.Y. City, N.Y., Admin. Code § 8-107, because the three-year statute of limitations began running before March 1999, and therefore the March 8, 2002 complaint was untimely filed; the court held that a printout regarding "The Life of a Slave" the employee found at a communal printer and a supervisor's comment were not included in the alleged pattern of harassment concerning another supervisor. Hill v Citibank Corp., 312 F. Supp. 2d 464, 2004 U.S. Dist. LEXIS 5069 (S.D.N.Y. 2004).

On the hiring agents' motion to dismiss under Fed. R. Civ. P. 12(b)(6), arguing that the alien's causes of action under N.Y. Exec. Law § 296 were time-barred, the court dismissed the motion, holding that the alien benefited from the continuing violation exception to the limitations period. The alien's complain adequately alleged a continuing violation arising from the hiring agent's alleged course of action in placing and retaining the female alien in an H-2B position and their alleged policy and practice of placing women in H-2B positions, while seeking men for H-2A positions. Olvera-Morales ex rel. Olvera-Morales v Sterling Onions, Inc., 322 F. Supp. 2d 211, 2004 U.S. Dist. LEXIS 14244 (N.D.N.Y. 2004), reaff'd, 2006 U.S. Dist. LEXIS 17923 (N.D.N.Y. Apr. 10, 2006).

In an action in which a former employee filed suit against his former employer alleging discrimination based on age and national origin in violation of the New York State Human Rights Law, N.Y. Exec. Law § 296 (2003), and the New York City Human Rights Law, New York City, N.Y., Admin. Code §§ 8-107 and 8-502 et seq., the employer was granted summary judgment where the court found that the employee was time-barred from asserting claims based on incidents that occurred before May 1, 1999 because (1) the claims were based on discrete acts of discrimination, each of which was subject to its own three-year limitations period; (2) because the employee learned nothing new about actions taken by the emlployer before May 1, 1999, during the three years after that date, he could not show that claims based on those actions accrued on or after May 1, 1999; and (3) the employee produced no evidence to show that the employer did anything to deceive him about its allegedly discriminatory motives. Milani v IBM, 322 F. Supp. 2d 434, 2004 U.S. Dist. LEXIS 11025 (S.D.N.Y. 2004), aff'd, 137 Fed. Appx. 430, 2005 U.S. App. LEXIS 13251 (2d Cir. N.Y. 2005).

Union and the union representative's motion to dismiss the employee's claim against them brought pursuant to N.Y. Exec. Law § 296 was denied because the employee's failure to specify the dates relevant to the allegations contained in either her complaint or her opposition papers did not require dismissal of her claim because all inferences had to be drawn in the employee's favor on a motion to dismiss under Fed. R. Civ. P. 12(b)(6); therefore, the court could not conclude that the employee's claim with respect to incidents reported to the union representative in or after 1999 was time-barred as a matter of law. Cabrera v New York City, 2004 U.S. Dist. LEXIS 18402 (S.D.N.Y. Sept. 13, 2004).

Former public employee's disability discrimination claims under N.Y. Exec. Law § 296, and New York City, N.Y., Admin. Code § 8-101 against his former public employer were not subject to the thirty-day demand rule of N.Y. Pub. Auth. Law § 1276(1) or the one year and thirty day limitations period under N.Y. Pub. Auth. Law § 1276(2) because those claims were not tort claims, rather, those claims were subject to the general three-year limitations period under N.Y. C.P.L.R. § 214(2), applicable through N.Y. C.P.L.R. § 201. Treanor v Metro. Transp. Auth., 414 F. Supp. 2d 297, 2005 U.S. Dist. LEXIS 35861 (S.D.N.Y. 2005).

Former provisional city hospital employee's age and national origin discrimination claims as to events that occurred more than 300 days before she filed charges alleging that her termination was discriminatory were time-barred under the New York State Human Rights Law, N.Y. Exec. Law § 296, and the employee was unable to rely on a continuing violation theory because there was no evidence to establish that the alleged acts of various supervisors from different hospital departments were part of a discriminatory policy or mechanism. Cabrera v New York City, 436 F. Supp. 2d 635, 2006 U.S. Dist. LEXIS 44461 (S.D.N.Y. 2006).

In a former employee's race discrimination lawsuit against his former employer, a state university, and several professors and administrators, most of the allegedly discriminatory acts were time-barred under the three year statute of limitations under N.Y. C.P.L.R. § 214(2), which was applied to suits under the New York Human Rights Law, N.Y. Exec. Law § 296, because these events occurred more than three years before the suit was filed, and there was no basis to claim a continuing violation based on these discrete incidents. Whaley v City Univ. of N.Y., 555 F. Supp. 2d 381, 2008 U.S. Dist. LEXIS 35156 (S.D.N.Y. 2008).

In a female police officer's suit against a city, its police department, and others, alleging gender discrimination, her claims regarding a transfer to the technical operations section, a later transfer to the uniform patrol division, and the removal of her from her position as a public information officer were not time-barred under the New York Human Rights Law, N.Y. Exec. Law 296, because they occurred within three years of her filing of the lawsuit. Lore v City of Syracuse, 583 F. Supp. 2d 345, 2008 U.S. Dist. LEXIS 89484 (N.D.N.Y. 2008), aff'd in part, vacated in part, 670 F.3d 127, 2012 U.S. App. LEXIS 1954 (2d Cir. N.Y. 2012).

Claims in which an employee alleged that her reassignment and office relocation were the result of unlawful gender discrimination under the New York State Human Rights Law were time-barred under N.Y. Exec. Law § 296 and N.Y. C.P.L.R. § 214(2) because the employee's lawsuit was filed more than three years after the challenged employment actions. Ortiz-Moss v N.Y. City DOT, 623 F. Supp. 2d 379, 2008 U.S. Dist. LEXIS 32048 (S.D.N.Y. 2008).

State law gender and age discrimination claims were time barred; all claims set forth in the complaint occurred, at the latest by October of 2003 and the action was not commenced until more than three years after the last claimed act of discrimination. Hanrahan v Riverhead Nursing Home, Inc., 593 F. Supp. 2d 487, 2009 U.S. Dist. LEXIS 3183 (E.D.N.Y. 2009), vacated, 592 F.3d 367, 2010 U.S. App. LEXIS 1519 (2d Cir. N.Y. 2010).

Employee's N.Y. Exec. Law § 296 race discrimination claims were not time-barred under the three-year limitations period in N.Y. C.P.L.R. 214 to the extent that the employee sought to raise

claims based on incidents that occurred on or after April 23, 2004, which was three years prior to the employee's April 23, 2007 complaint. Russell v County of Nassau, 696 F. Supp. 2d 213, 2010 U.S. Dist. LEXIS 14018 (E.D.N.Y. 2010).

97. Jury instructions

Commissioner of Correctional Services was not entitled to summary judgment dismissing action alleging that deputy superintendent of correctional facility (plaintiff) was demoted based on race in violation of CLS Exec § 296, notwithstanding that demotion was properly based on fact that plaintiff, who was white, subjected black co-worker to racial insults in presence of staff (behavior undesirable in position plaintiff held), since commissioner did not offer any proof that same standard of conduct was or would be applied to all deputy superintendents regardless of race, and plaintiff's reply brief suggested that commissioner would not have sought discipline if plaintiff were black; under such circumstances, further discovery was necessary to determine existence of factual issues. Michaelis v State, 135 A.D.2d 1005, 522 N.Y.S.2d 960, 1987 N.Y. App. Div. LEXIS 52888 (N.Y. App. Div. 3d Dep't 1987), aff'd, 244 A.D.2d 636, 663 N.Y.S.2d 922, 1997 N.Y. App. Div. LEXIS 11105 (N.Y. App. Div. 3d Dep't 1997).

Jury instruction in employment discrimination case under Human Rights Law is proper where it allows jury to determine (1) whether illegitimate criterion was substantial or motivating factor in adverse employment decision, and (2) if so, whether employer has met its burden of proving that employment decision would have happened anyway; goal of Human Rights Law claim is to determine whether adverse employment decision was made "because of" illegitimate factor. Tyler v Bethlehem Steel Corp., 958 F.2d 1176, 1992 U.S. App. LEXIS 4161 (2d Cir. N.Y.), cert. denied, 506 U.S. 826, 113 S. Ct. 82, 121 L. Ed. 2d 46, 1992 U.S. LEXIS 5704 (U.S. 1992).

Jury was properly charged in case brought by worker who alleged that he was discriminated against because of his age where judge stated, inter alia, that jury should consider whether "plaintiff established...that the termination or denial of transfer occurred under circumstances giving rise to an inference that age was a motivating factor in the decision"; jury may reach its ultimate conclusion on issue of discrimination through either "direct" or "circumstantial" evidence. Tyler v Bethlehem Steel Corp., 958 F.2d 1176, 1992 U.S. App. LEXIS 4161 (2d Cir. N.Y.), cert. denied, 506 U.S. 826, 113 S. Ct. 82, 121 L. Ed. 2d 46, 1992 U.S. LEXIS 5704 (U.S. 1992).

98. Damages

Although an employee established that a hostile work environment existed and that the employer retaliated, because the employee attended only four counseling sessions, and did not claim that the employee took any leave or was prescribed any medication due to the resulting distress, pursuant to N.Y. Exec. Law § 296, an award of $850,000 in compensatory damages was excessive. Matter of N.Y. State Dep't of Corr. Servs. v New York State Div. of Human Rights, 53 A.D.3d 823, 861 N.Y.S.2d 494, 2008 N.Y. App. Div. LEXIS 7594 (N.Y. App. Div. 3d Dep't 2008).

In a hostile-work-environment action based on a co-worker's actions, the jury properly assessed future damages against the employer for emotional injury and lost income. The employee's testimony and her doctor's diagnosis of post-traumatic stress disorder supported the award, and the awards bore a reasonable relationship to the wrongdoing, were supported by substantial evidence, and were comparable to similar awards; however, the award of future loss of earnings had to be reduced based on the employee's last salary without any evidence to support an upward adjustment. Boodram v Brooklyn Developmental Ctr., 773 N.Y.S.2d 817, 2 Misc. 3d 574, 2003 N.Y. Misc. LEXIS 1582 (N.Y. Civ. Ct. 2003).

Award of $200,000 to a student who had been subjected to racial discrimination at a school was supported by the evidence; however, although the student's mother was entitled to relief, a $200,000 award to her was reduced to $50,000. Injunctive relief ordered by the division was appropriate. Matter of Ithaca City School Dist. v New York State Div. of Human Rights, 87 A.D.3d 268, 926 N.Y.S.2d 686, 2011 N.Y. App. Div. LEXIS 5474 (N.Y. App. Div. 3d Dep't 2011), rev'd, 19 N.Y.3d 481, 950 N.Y.S.2d 67, 973 N.E.2d 162, 2012 N.Y. LEXIS 1353 (N.Y. 2012).

Because defendant supervisor's liability for age discrimination against plaintiff employees was premised solely on N.Y. Exec. Law § 296, and the jury was instructed that liquidated damages could only be awarded against defendant local public entity employer, to the extent the district court's judgment was ambiguous in seeming to indicate that liquidated damages had also been awarded against the supervisor, the judgment was corrected on appeal. Cross v N.Y. City Transit Auth., 417 F.3d 241, 2005 U.S. App. LEXIS 15849 (2d Cir. N.Y. 2005).

Addition of prejudgment interest to fringe benefit component of back pay awarded to terminated employee who prevailed in age discrimination claim under Exec § 296 was inappropriate, since addition of such interest to award would have exceeded "make whole" objective of back pay. Shannon v Fireman's Fund Ins. Co., 136 F. Supp. 2d 225, 2001 U.S. Dist. LEXIS 2194 (S.D.N.Y. 2001).

Award of $313,242.38 to age discrimination plaintiff for emotional distress under Exec § 296 was excessive, and would be reduced to $175,000 upon acceptance of remittitur, where consequences of involuntary reduction in force (IRIF) included severe stress, personality changes, and treatment that had continued for 5 years since IRIF and would continue into foreseeable future. Meacham v Knolls Atomic Power Lab., 185 F. Supp. 2d 193, 2002 U.S. Dist. LEXIS 2197 (N.D.N.Y. 2002), aff'd, 381 F.3d 56, 2004 U.S. App. LEXIS 17873 (2d Cir. 2004).

Parties agreed that the jury's award of $2.5 million in compensatory damages should be allocated entirely to the employee's state law claim under N.Y. Exec. Law § 296 instead of under the employee's claim under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C.S. § 12101 et seq., because the ADA explicitly preserved the employee's right to recover damages under state law not available under federal law, 42 U.S.C.S. § 12201(b), and N.Y. Exec. Law § 296 placed no limit on the amount of compensatory damages that the employee could recover. Brady v Wal-Mart Stores, Inc., 2005 U.S. Dist. LEXIS 12151 (E.D.N.Y. June 21, 2005).

Where a jury found that an employer discriminated and retaliated against an employee on the basis of gender in violation of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C.S. § 2000e, the New York State Human Rights Law, N.Y. Exec. Law §§ 296-301, and New York City, N.Y., Admin. Code §§ 8-107-8-131, the prejudgment interest rate set forth in 28 U.S.C.S. § 1961(a) applied to an award of back pay because the award was made under both Title VII and the state and city laws, rather than as a supplemental claim. Zakre v Norddeutsche Landesbank Girozentrale, 541 F. Supp. 2d 555, 2008 U.S. Dist. LEXIS 9460 (S.D.N.Y. 2008), aff'd, 344 Fed. Appx. 628, 2009 U.S. App. LEXIS 12188 (2d Cir. N.Y. 2009).

99. Summary judgment

Insurance company was properly granted summary judgment in discrimination action brought by agent for termination of her agency contract predicated on CLS Exec § 296(13), assuming that termination of agency contract qualified as business conduct or, more specifically, refusal to trade within statute's scope, where agent otherwise failed to show that contract termination was propelled by or was result of company's desire to collectively discriminate against protected class that included agent, it was not shown that termination resulted from blacklisting or commercial boycott of women, or of persons of her age or marital status, nor did she allege any facts to show that contract cancellation was part of larger pattern of dealing or policy instituted by company in effort to disadvantage females economically; agent's bare allegations that no other women had achieved district manager status in company (without some other proof of showing, for example, policy or pattern of rejections of qualified females who had applied for such posts) was insufficient to defeat summary judgment motion. Scott v Massachusetts Mut. Life Ins. Co. (1995) 86 NY2d 429, 633 NYS2d 754, 657 NE2d 769, 69 BNA FEP Cas 93ec.

In race discrimination case, defendants were properly granted summary judgment where they met their burden of rebutting prima facie case by setting forth evidence of independent nondiscriminatory reason for terminating plaintiff's employment, and

plaintiff did not raise question of fact concerning falsity of proffered basis for termination, and that discrimination was more likely real reason for his termination. Scott v Citicorp Servs., 91 N.Y.2d 823, 666 N.Y.S.2d 560, 689 N.E.2d 530, 1997 N.Y. LEXIS 3689 (N.Y. 1997).

The mandate of Exec Law § 292(21), as it existed in 1975, excluded as a basis for a finding of discrimination in employment any disability related to the ability to engage in a particular job. Although this section was later amended to broaden the class sought to be protected, the amended section is not of retroactive application. Therefore, the trial court improperly denied employer's motion for summary judgment where former employee conceded her inability, due to her disability, to undertake the new duties required of a receptionist after an office reorganization. Pugach v Liggett Group, Inc., 81 A.D.2d 552, 438 N.Y.S.2d 307, 1981 N.Y. App. Div. LEXIS 11020 (N.Y. App. Div. 1st Dep't 1981), aff'd, 55 N.Y.2d 922, 449 N.Y.S.2d 172, 434 N.E.2d 241, 1982 N.Y. LEXIS 3116 (N.Y. 1982).

Supreme Court properly granted summary judgment for state in action against employer and polygraph service for various violations of Civil Rights Law and CLS Exec Art 15 based on polygraph operator's unnecessarily touching breasts of employer's female employees who were undergoing testing and polygraph operator's asking such employees improper questions of sexual nature; employer's continuing use of polygraph service, after having notice of improprieties and without taking remedial action, established violation of CLS Exec § 296, and violation of that section established, a fortiori, violation of CLS Civ R § 40-c. People by Abrams v Hamilton, 125 A.D.2d 1000, 511 N.Y.S.2d 190, 1986 N.Y. App. Div. LEXIS 63199 (N.Y. App. Div. 4th Dep't 1986).

College was not entitled to summary judgment in faculty member's action alleging violation of Human Rights Law regarding age discrimination, even though parties had executed settlement agreement regarding prior federal age discrimination suit in which college promised to continue member's employment until she turned age 70 in return for release from all claims, where settlement was silent as to employment beyond age 70, college was free at that point to offer teaching position or to refuse to do so based on legitimate factors, and college refused to continue member's employment past age 70 as matter of college policy, which member alleged was discriminatory act; moreover, faculty member would not be deemed to have waived rights under Human Rights Law since provisions on which she relied were not effective until after settlement was negotiated. Jochnowitz v Russell Sage College, 136 A.D.2d 822, 523 N.Y.S.2d 656, 1988 N.Y. App. Div. LEXIS 15175 (N.Y. App. Div. 3d Dep't 1988).

Employee is required to show evidence of discriminatory intent in action alleging violation of CLS Exec § 296 either if he cannot show that he was replaced by younger person or if he cannot produce statistical evidence of discriminatory conduct. Employer was entitled to summary judgment in employee's action alleging wrongful termination due to age in violation of CLS Exec § 296 where (1) employer claimed that termination was for legitimate business reasons aspart of valid corporate reorganization, and that employee was not qualified for any promotional positions for which he applied, and (2) employee did not offer any factual support for his conclusory allegation. Brown v General Electric Co., 144 A.D.2d 746, 534 N.Y.S.2d 743, 1988 N.Y. App. Div. LEXIS 10933 (N.Y. App. Div. 3d Dep't 1988).

Insurance company was entitled to summary judgment dismissing former field underwriter's action for discriminatory termination under CLS Exec § 296(1)(a) since underwriter was independent contractor where (1) contract specifically stated that underwriter was independent contractor, (2) underwriter's compensation consisted solely of commissions, (3) insurance company did not deduct any withholding taxes from underwriter's compensation, (4) underwriter hired and paid salary of his own secretary, and (5) underwriter had express authority to place insurance applications with other companies. Mehtani v New York Life Ins. Co., 145 A.D.2d 90, 537 N.Y.S.2d 800, 1989 N.Y. App. Div. LEXIS 1552 (N.Y. App. Div. 1st Dep't), app. denied, app. dismissed, 74 N.Y.2d 835, 546 N.Y.S.2d 341, 545 N.E.2d 631, 1989 N.Y. LEXIS 2897 (N.Y. 1989), app. denied, 85 N.Y.2d 806, 627 N.Y.S.2d 323, 650 N.E.2d 1325, 1995 N.Y. LEXIS 1227 (N.Y. 1995).

In action to recover for allegedly unlawful discharge from employment, defendant was not entitled to summary judgment where (1) plaintiff was out of work for about 2 months after sustaining job-related injury, (2) on first day back at work, plaintiff was asked to work 2 hours of overtime, but refused on basis that he was still not 100 percent well, and (3) plaintiff was terminated on next day for refusal to comply with request to work overtime; it was not clear from record whether plaintiff was able to perform his duties in reasonable manner within meaning of CLS Exec § 292(21)(c). Uryevick v Pepcom Industries, Inc., 155 A.D.2d 450, 547 N.Y.S.2d 109, 1989 N.Y. App. Div. LEXIS 13946 (N.Y. App. Div. 2d Dep't 1989).

Employer was entitled to summary judgment in action by former employee who alleged that he was discharged on basis of age discrimination in violation of Human Rights Law where (1) employee signed release of all claims against employer in consideration of extended severance benefits, (2) employee claimed that employer told him that release would not affect any subsequent actions he might take against it, (3) employee retained release agreement for 5 weeks before signing it, but failed to seek advice of counsel, and (4) employee was college graduate with extensive business experience. Skluth v United Merchants & Mfrs., Inc., 163 A.D.2d 104, 559 N.Y.S.2d 280, 1990 N.Y. App. Div. LEXIS 8330 (N.Y. App. Div. 1st Dep't 1990).

Defendant carpet manufacturer was entitled to summary judgment in action by plaintiff minority-owned business, alleging that defendant discriminated against plaintiff businesswoman on basis of gender in violation of CLS Exec § 296(13) by offering carpeting referred to in bid documents for state contract to other bidders at lower price, causing her bid submission with other carpeting to be rejected, since plaintiff offered no proof of discriminatory animus on defendant's part, and record showed solid business reasons for defendant to offer lower prices to other bidders, who were its dealers. West v Mohawk Commercial Carpets, 183 A.D.2d 182, 589 N.Y.S.2d 218, 1992 N.Y. App. Div. LEXIS 12640 (N.Y. App. Div. 3d Dep't 1992).

Defendant Japanese bank was entitled to summary judgment on cause of action by former employee for discrimination regarding promotion where (1) former employee alleged that Japanese male of equal rank was assigned to open desk in department, thus indicating his promotion ahead of her in conformity with Japanese business practices, but (2) bank established that promotion had not occurred, through uncontroverted statements which showed that desk change had nothing to do with promotion. Blaise-Williams v Sumitomo Bank, Ltd., 189 A.D.2d 584, 592 N.Y.S.2d 41, 1993 N.Y. App. Div. LEXIS 63 (N.Y. App. Div. 1st Dep't 1993).

Finding by Unemployment Insurance Appeal Board that plaintiff "had been offered two transfers but had declined to accept either one" did not establish that sexual harassment did not constitute term or condition of plaintiff's continued employment so as to warrant summary judgment in favor of employer in action under CLS Exec § 296, where board's inquiry centered on unrelated question of whether plaintiff had provided employer with adequate evidence of disability to justify his failure to report to work, and employer offered no detail as to purported offers of transfer, or even verified that they were made; moreover, absent evidence that it took any disciplinary action against employee who perpetrated alleged harassment or other steps to alleviate threat of further occurrences, mere showing that employer offered to transfer plaintiff to different work location would not entitle it to judgment as matter of law. Goering v NYNEX Info. Resources Co., 209 A.D.2d 834, 619 N.Y.S.2d 167, 1994 N.Y. App. Div. LEXIS 11352 (N.Y. App. Div. 3d Dep't 1994).

Defendants were entitled to summary judgment in action allegedly racial discrimination and retaliation in violation of CLS Exec §§ 296 and 297(9) where plaintiff put forth nothing to counter defendants' strong showing that actions complained of were taken as result of his hostile, aggressive confrontations with his co-workers and with employees of outside agencies, his large number of unauthorized absences, and his failure to complete assigned work on schedule; moreover, he failed to document single instance when he was treated differently from any other employee who was similarly situated. Hall v Paladino, 210 A.D.2d

595, 619 N.Y.S.2d 402, 1994 N.Y. App. Div. LEXIS 12458 (N.Y. App. Div. 3d Dep't 1994), app. dismissed, 85 N.Y.2d 923, 627 N.Y.S.2d 324, 650 N.E.2d 1326, 1995 N.Y. LEXIS 1367 (N.Y. 1995).

Employer was not entitled to summary judgment in action arising from termination of plaintiff's employment on basis of alleged reduction in work force where plaintiff was part of protected age group, and evidence indicated that plaintiff might have been qualified for other positions which were awarded to other younger employees. Landwehr v Grey Advertising, 211 A.D.2d 583, 622 N.Y.S.2d 17, 1995 N.Y. App. Div. LEXIS 850 (N.Y. App. Div. 1st Dep't 1995).

Court should have granted employer's motion for summary judgment where employee failed to show that employer's justification for his discharge was pretextual, existence of fact issue that he satisfactorily performed his job during period in question, or that his involuntary retirement was for other, impermissible reasons than those attested to by his supervisors. Burkland v IBM, 226 A.D.2d 316, 642 N.Y.S.2d 501, 1996 N.Y. App. Div. LEXIS 4631 (N.Y. App. Div. 1st Dep't 1996).

Employer was not entitled to summary judgment dismissing plaintiff's age discrimination claim where employer's favorable evaluations of plaintiff's job performance for over decade and up until time plaintiff turned 60 years old raised fact issues as to whether poor job performance was pretext for age discrimination. Cella v Fordham Univ., 228 A.D.2d 300, 644 N.Y.S.2d 53, 1996 N.Y. App. Div. LEXIS 7146 (N.Y. App. Div. 1st Dep't 1996).

Defendants were entitled to summary judgment in action alleging numerous violations of CLS Exec § 296 predicated on hostile work environment created by plaintiff's co-workers, even though plaintiff, who was male, was subjected to tasteless, offensive, and insulting remarks, since there was nothing to indicate that alleged harassment was based on his gender. Yukoweic v IBM, 228 A.D.2d 775, 643 N.Y.S.2d 747, 1996 N.Y. App. Div. LEXIS 6418 (N.Y. App. Div. 3d Dep't), app. denied, 88 N.Y.2d 816, 651 N.Y.S.2d 17, 673 N.E.2d 1244, 1996 N.Y. LEXIS 3317 (N.Y. 1996).

Court properly denied defendant' s summary judgment motion in action alleging disability discrimination since purportedly inconsistent position that plaintiff took before Social Security Administration in applying for disability benefits was not asserted against defendant and did not involve same standard as one at issue herein; moreover, plaintiff's appearance before Social Security Administration, which did not entail hearing, did not constitute type of prior legal proceeding that could form basis for application of judicial estoppel. Ferring v Merrill Lynch & Co., 244 A.D.2d 204, 664 N.Y.S.2d 279, 1997 N.Y. App. Div. LEXIS 11386 (N.Y. App. Div. 1st Dep't 1997).

Court should have granted defendant employer's summary judgment motion in action alleging sex discrimination where evaluations made of plaintiff's work by various partners of defendant over years of her employment provided ample support for decision to terminate her employment, and plaintiff relied primarily on mere unsupported hearsay statements contained in her own affidavit and deposition testimony, despite 6 years of discovery. Schwaller v Squire Sanders & Dempsey, 249 A.D.2d 195, 671 N.Y.S.2d 759, 1998 N.Y. App. Div. LEXIS 4661 (N.Y. App. Div. 1st Dep't 1998).

"Elks Club" lodge was entitled to summary judgment dismissing claim that it discharged plaintiff in retaliation for filing lawsuit after her application for membership in lodge was denied by reason of gender, allegedly in violation of CLS Exec § 296(2), as there was no reasonable basis for plaintiff to have believed that defendant engaged in any discriminatory practice when it denied her membership application, given that CLS Exec § 292(9) explicitly excludes benevolent organization such as Elks Club from mandate of § 296(2) and, since plaintiff was not even "colorably aggrieved" under § 296(2), there was no basis for claim of retaliatory discharge under § 296(1). Dodd v Middletown Lodge (Elks Club) No. 1097, 264 A.D.2d 706, 695 N.Y.S.2d 115, 1999 N.Y. App. Div. LEXIS 9066 (N.Y. App. Div. 2d Dep't 1999), app. denied, 96 N.Y.2d 707, 725 N.Y.S.2d 637, 749 N.E.2d 206, 2001 N.Y. LEXIS 1517 (N.Y. 2001).

Court erred in denying defendant's summary judgment motion in action under CLS Exec § 296 for unlawful termination of employment where there was no evidence that defendant's president knew of plaintiff's pregnancy before he terminated her employment, and it was undisputed that president was negotiating with third party to be plaintiff's replacement before he learned of her pregnancy. Smith v Paris Int'l Corp., 267 A.D.2d 223, 699 N.Y.S.2d 490, 1999 N.Y. App. Div. LEXIS 12616 (N.Y. App. Div. 2d Dep't 1999).

Defendants, plaintiffs' employer and owner, should have been granted summary judgment in action alleging national origin discrimination where there was no evidence that they encouraged, condoned, or approved of employee's allegedly discriminatory conduct. Escobar v Spartan Assemblies, Inc., 267 A.D.2d 272, 700 N.Y.S.2d 206, 1999 N.Y. App. Div. LEXIS 12942 (N.Y. App. Div. 2d Dep't 1999).

Employer was not entitled to summary judgment dismissing sexual harassment complaint based on assertion by its human resources director (who was owner's son) that no one had received any complaints from plaintiff where (1) plaintiff testified at her deposition that she complained to her supervisor after 3 male employees directed obscene communication and unwanted sexually-related physical conduct at her, but no action was taken, and that after another employee tried to rape her, she reported attempted rape to her supervisor, who assured her that it was safe to return to work, but when she returned to work employee molested her, and (2) employee who molested plaintiff was discharged less than one month later for poor attendance. Vitale v Rosina Food Prods., 283 A.D.2d 141, 727 N.Y.S.2d 215, 2001 N.Y. App. Div. LEXIS 5748 (N.Y. App. Div. 4th Dep't 2001).

Court improperly granted defendants' summary judgment motion on ground that award of Workers' Compensation benefits barred instant claim for sexual discrimination by plaintiff against her employers where workers' compensation award resulted solely from attempted videotaping of plaintiff by co-worker while she was in company locker room, and did not implicate alleged, intentional activities of company officer in subjecting her to hostile work environment by directing inappropriate sexual remarks and jokes toward her, and making demands on her for sexual relations in exchange for forgiving loan. Hanford v Plaza Packaging Corp., 284 A.D.2d 179, 727 N.Y.S.2d 407, 2001 N.Y. App. Div. LEXIS 6182 (N.Y. App. Div. 1st Dep't 2001), app. denied, 2001 N.Y. App. Div. LEXIS 9220 (N.Y. App. Div. 1st Dep't Sept. 25, 2001).

Court properly dismissed plaintiff's action alleging hostile work environment where defendant's alleged misconduct consisted merely of occasional sarcastic remarks about plaintiff's weight and heightened awareness of plaintiff's medical condition. Novak v Royal Life Ins. Co. of N.Y., 284 A.D.2d 892, 726 N.Y.S.2d 784, 2001 N.Y. App. Div. LEXIS 6849 (N.Y. App. Div. 3d Dep't 2001).

Court properly denied defendants' summary judgment motion in action alleging disparate treatment as to terms and conditions of plaintiff's employment due to his disability where affidavit of plaintiff's treating endocrinologist raised fact issue on whether plaintiff's disability prevented him from being able to perform job duties as of time of his actual termination, despite clear conflict between opinion stated in present affidavit and that previously expressed by endocrinologist, where endocrinologist gave rational explanation for discrepancy. Novak v Royal Life Ins. Co. of N.Y., 284 A.D.2d 892, 726 N.Y.S.2d 784, 2001 N.Y. App. Div. LEXIS 6849 (N.Y. App. Div. 3d Dep't 2001).

Court should have granted employer's motion for summary judgment where employee failed to show that employer's justification for his discharge was pretextual, existence of fact issue that he satisfactorily performed his job during period in question, or that his involuntary retirement was for other, impermissible reasons than those attested to by his supervisors. Burkland 226 ad2d 316.

Summary judgment was properly granted to a school district with regard to an discrimination suit brought by former teachers, because the school district proved that the teachers failed to file a claim with the Equal Employment Opportunity Commission within 300 days of the alleged discriminatory action and failed to demonstrate that a retirement incentive plan was discriminatory.

Brannigan v Bd. of Educ., 18 A.D.3d 787, 796 N.Y.S.2d 690, 2005 N.Y. App. Div. LEXIS 5902 (N.Y. App. Div. 2d Dep't), app. denied, 6 N.Y.3d 701, 810 N.Y.S.2d 415, 843 N.E.2d 1155, 2005 N.Y. LEXIS 3385 (N.Y. 2005).

While trial court properly held that a defendant could not be liable as an employer under N.Y. Exec. Law § 296(1)(a) since the defendant did not have authority over a doctor's employment status, the trial court improperly granted summary judgment to the defendant where he did not establish for summary judgment purposes that he did not aid or abet the other named defendants' discrimination, which would support the doctor's claim of liability under § 296(6). The trial court improperly entered summary judgment on that claims and, on appeal, the court denied summary judgment and reinstated the doctor's claim. Nesathurai v University At Buffalo, 23 A.D.3d 1070, 804 N.Y.S.2d 195, 2005 N.Y. App. Div. LEXIS 12410 (N.Y. App. Div. 4th Dep't 2005).

Summary judgment dismissing an employee's discrimination claim against a county was proper; the employee failed to make a prima facie showing of either disability or age discrimination in the county's failure to promote him to police sergeant because the employee failed to establish that he could perform the essential functions of the position of police sergeant. The employee also failed to make a prima facie showing of retaliation because he failed to establish a causal connection between the protected activity and the adverse action. Simeone v County of Suffolk, 36 A.D.3d 890, 828 N.Y.S.2d 560, 2007 N.Y. App. Div. LEXIS 966 (N.Y. App. Div. 2d Dep't 2007).

Trial court's grant of summary judgment to an employer in an employee's discrimination and retaliatory discharge action under N.Y. Exec. Law § 296 and New York City, N.Y., Admin. Code § 8-107 was proper where the employer offered a legitimate, nondiscriminatory reason for the employee's termination from employment due to her role in an elderly nursing care resident's fall and subsequent injuries while under the employee's charge, and the employee failed to show that the reason offered was pretextual or to otherwise raise a triable issue of fact. Cesar v Highland Care Ctr., Inc., 37 A.D.3d 393, 829 N.Y.S.2d 236, 2007 N.Y. App. Div. LEXIS 1482 (N.Y. App. Div. 2d Dep't 2007).

To prevail on a motion for summary judgment when race or age discrimination in employment was alleged, an employer had to demonstrate either the employee's failure to establish every element of intentional discrimination, or - having offered legitimate, nondiscriminatory reasons for the challenged action - the absence of a material issue of fact as to whether its explanations were pretextual. Bailey v New York Westchester Sq. Med. Ctr., 38 A.D.3d 119, 829 N.Y.S.2d 30, 2007 N.Y. App. Div. LEXIS 72 (N.Y. App. Div. 1st Dep't 2007).

Denial of summary judgment was proper as to four employees' racial discrimination counts under the New York State Human Rights Law, N.Y. Exec. Law § 296, and New York City, N.Y., Admin. Code § 8-107, as in opposition to defendants' prima facie showing that the adverse employment decisions were the result of legitimate, nondiscriminatory reasons, the employees showed that there were triable issues as to whether an illegitimate factor had a "motivating" or "substantial" role in defendants' adverse employment decisions as to three employees. Nelson v HSBC Bank USA, 41 A.D.3d 445, 837 N.Y.S.2d 712, 2007 N.Y. App. Div. LEXIS 6924 (N.Y. App. Div. 2d Dep't 2007).

Defendants established, prima facie, their entitlement to summary judgment dismissing the employees' unlawful retaliation counts under N.Y. Exec. Law § 296 by showing that the employees were not engaged in a protected activity. Nelson v HSBC Bank USA, 41 A.D.3d 445, 837 N.Y.S.2d 712, 2007 N.Y. App. Div. LEXIS 6924 (N.Y. App. Div. 2d Dep't 2007).

Employer and others were entitled to summary judgment in a retaliation action under N.Y. Exec. Law § 296(7) because the employee failed to make out a prima facie case of retaliation and failed to raise a triable issue of fact after defendants met their prima facie burden of establishing their entitlement to judgment as a matter of law. Keooulay v Transcore, Inc., 51 A.D.3d 874, 858 N.Y.S.2d 608, 2008 N.Y. App. Div. LEXIS 4384 (N.Y. App. Div. 2d Dep't 2008).

Because a male employee failed to raise an issue of material fact as to whether the termination of his employment occurred under circumstances giving rise to an inference of gender discrimination under N.Y. Exec. Law § 296, or as to whether the employer's motive was pretextual, the employer was entitled to summary judgment. DeFrancis v North Shore Plainview Hosp., 52 A.D.3d 562, 860 N.Y.S.2d 587, 2008 N.Y. App. Div. LEXIS 5358 (N.Y. App. Div. 2d Dep't 2008).

Employee sued a physician and a hospital, alleging the physician sexually harassed her, in violation of Executive Law § 296 and New York City, N.Y., Admin. Code § 8-107, and that the hospital was vicariously liable for this misconduct. The hospital had not been entitled to summary judgment, as triable issues of fact existed as to whether the hospital's director, whom the employee alleged saw the physician try to kiss her, knew about the physician's alleged misconduct and whether he acquiesced in the alleged offensive behavior by failing to take any action. Bianco v Flushing Hosp. Med. Ctr., 54 A.D.3d 304, 863 N.Y.S.2d 453, 2008 N.Y. App. Div. LEXIS 6398 (N.Y. App. Div. 2d Dep't 2008).

As triable issues of fact precluded summary judgment in favor of either a group of wheelchair users or a cinema on a complaint against the cinema that portable companion seating provided in the cinema's wheelchair seating section was less comfortable than the cinema's regular seating, and thus violated the Americans with Disabilities Act, 42 U.S.C.S. § 12101 et seq., and ADA Accessibility Guidelines, § 4.33.3, summary judgment was also precluded in favor of the cinema on the wheelchair users' claims under N.Y. Civ. Rights Law § 40-c and N.Y. Exec. Law § 296. Gordon v PL Long Beach, LLC, 74 A.D.3d 880, 903 N.Y.S.2d 461, 2010 N.Y. App. Div. LEXIS 4839 (N.Y. App. Div. 2d Dep't 2010).

In light of an employee's testimony regarding a principal's comments and conduct, the record did not conclusively establish that the department and the principal would have made the same decision to terminate the employee's employment had they not considered her sexual orientation; thus, there being triable issues of fact, summary judgment was precluded insofar as the complaint alleged unlawful discrimination under the New York State Human Rights Law. Summary judgment was precluded by triable issues of fact as to whether, in response to the employee's prima facie showing that her termination was the direct result of retaliatory animus, the department and the principal offered a pretextual explanation. Sandiford v City of New York Dept. of Educ., 94 A.D.3d 593, 943 N.Y.S.2d 48, 2012 N.Y. App. Div. LEXIS 3073 (N.Y. App. Div. 1st Dep't 2012), aff'd, 22 N.Y.3d 914, 977 N.Y.S.2d 699, 999 N.E.2d 1144, 2013 N.Y. LEXIS 2856 (N.Y. 2013), in part, 21 N.Y.3d 1029, 972 N.Y.S.2d 214, 995 N.E.2d 177, 2013 N.Y. LEXIS 1802 (N.Y. 2013).

Summary judgment would be granted employer in action alleging sexual discrimination in employment and the tort of abusive discharge where the affidavits of the parties established that, rather than rebuffing defendant's sexual advances, plaintiff welcomed them in the furtherance of a long standing meretricious relationship with defendant that, at one time, contemplated marriage. Fletcher v Greiner, 106 Misc. 2d 564, 435 N.Y.S.2d 1005, 1980 N.Y. Misc. LEXIS 2734 (N.Y. Sup. Ct. 1980).

Hospital, its anesthesiology department, and 2 of its physicians having authority over personnel decisions were not entitled to summary judgment dismissing sex discrimination action brought by anesthesiology resident arising from her unsatisfactory academic evaluation, since comments made to her during her evaluation reflecting discriminatory attitude, coupled with changes in her work schedule, created possible factual basis for conclusion of job discrimination. Samper v Univ. of Rochester Strong Mem'l Hosp., 139 Misc. 2d 580, 528 N.Y.S.2d 958, 1987 N.Y. Misc. LEXIS 2830 (N.Y. Sup. Ct. 1987), modified, 144 A.D.2d 940, 535 N.Y.S.2d 281, 1988 N.Y. App. Div. LEXIS 14409 (N.Y. App. Div. 4th Dep't 1988).

Defendants were not entitled to summary judgment in action for employment discrimination in violation of CLS Exec § 296 where (1) plaintiff was hired by defendants to reprise his role as voice of character in commercial, (2) after commercial was shown and defendants decided to make additional commercials with same character, defendant auditioned actors for commercial and did not even contact plaintiff, allegedly due to his age and handicap, (3) defendants claimed that their conduct was based on

demands made by plaintiff in connection with first commercial, and (4) plaintiff contended that he conveyed information to defendants that he was willing to work pursuant to their conditions on future commercials; resolution of why defendants refused to hire plaintiff involved fact issues inappropriate for summary judgment. Maxwell v N.W. Ayer, Inc., 159 Misc. 2d 454, 605 N.Y.S.2d 174, 1993 N.Y. Misc. LEXIS 470 (N.Y. Sup. Ct. 1993).

Defendants, plaintiff's immediate supervisor and employee in company's personnel department who allegedly became aware of sexual harassment and did nothing to remedy it, were entitled to summary judgment in sexual harassment action where plaintiff failed to raise fact issue under "economic reality" test as to whether either defendant should be considered "employer." Foley v Mobil Chem. Co., 170 Misc. 2d 1, 647 N.Y.S.2d 374, 1996 N.Y. Misc. LEXIS 302 (N.Y. Sup. Ct. 1996).

Defendant was not entitled summary judgment, even though it showed legitimate, nondiscriminatory reason for plaintiff's termination, reduction-in-force policy which caused plaintiff's termination in favor of 2 male co-workers who had vocational training and could work in both electrical and mechanical departments, where plaintiff, who had been employed in electrical department, submitted affidavits by co-workers and supervisors that she could perform more sophisticated wiring tasks than men, and that there was policy of gender segregation. Hughes v Prim Hall Enters., 182 Misc. 2d 892, 701 N.Y.S.2d 839, 1999 N.Y. Misc. LEXIS 544 (N.Y. Sup. Ct. 1999).

N.Y. Exec. Law § 296(2)(a) prohibits discrimination against disabled persons in public accommodations; in a personal injury action, where an individual slipped and fell on the steps of the lobby of a tenant's office, the slip and fall victim failed to offer any legal support for her contention that the statute prohibited discrimination against associated persons. Lugo v St. Nicholas Assocs., 772 N.Y.S.2d 449, 2 Misc. 3d 212, 2003 N.Y. Misc. LEXIS 1343 (N.Y. Sup. Ct. 2003), aff'd in part, modified, 18 A.D.3d 341, 795 N.Y.S.2d 227, 2005 N.Y. App. Div. LEXIS 5551 (N.Y. App. Div. 1st Dep't 2005).

General standards regarding the parties' respective burdens of proof on a motion for summary judgment are applicable in an age discrimination case. Peskin v N.Y. City Transit Auth., 304 A.D.2d 634, 757 N.Y.S.2d 594, 2003 N.Y. App. Div. LEXIS 3941 (N.Y. App. Div. 2d Dep't 2003).

Summary judgment pursuant to N.Y. C.P.L.R. 3212 was properly denied to employers in employees' sexual harassment action, as one employee sufficiently alleged that one of the employers made unwelcome physical and verbal sexual advances, which raised a triable issue of fact with respect to that employee's sexual harassment and assault claims under N.Y. Exec. Law § 296. Ortega v Bisogno & Meyerson, 2 A.D.3d 607, 769 N.Y.S.2d 279, 2003 N.Y. App. Div. LEXIS 13326 (N.Y. App. Div. 2d Dep't 2003).

Defendants were entitled to summary judgment pursuant to N.Y. C.P.L.R. 3212 dismissing the former employee's complaint alleging employment discrimination pursuant to N.Y. Exec. Law § 296; while the employee's job had been abolished and the employee had not been given a comparable job, the employee had failed to apply for a comparable job, and the employee failed to demonstrate the existence of a triable issue of fact that the employee was the victim of discrimination due to age or disability. Hettrick v Stark, 3 A.D.3d 471, 771 N.Y.S.2d 133, 2004 N.Y. App. Div. LEXIS 260 (N.Y. App. Div. 2d Dep't 2004).

Although a sexual harassment/hostile work environment claim brought by two former employees against their employer did not meet the severe and pervasive standard under N.Y. Exec. Law § 296 to survive summary judgment, the trial court erred by granting summary judgment to the employer under New York City, N.Y., Admin. Code § 8-107 because the employer's comments and emails objectifying women's bodies and exposing them to sexual ridicule, even if considered isolated, clearly signaled that he considered it appropriate to foster an office environment that degraded women. Hernandez v Kaisman, 103 A.D.3d 106, 957 N.Y.S.2d 53, 2012 N.Y. App. Div. LEXIS 9069 (N.Y. App. Div. 1st Dep't 2012).

District Court properly granted defendant airline's summary judgment motion dismissing age discrimination action, even though plaintiff pilots demonstrated prima facie case, where there was no evidence to suggest that defendant's stated nondiscriminatory reasons for challenged employment actions were false. Abdu-Brisson v Delta Air Lines, Inc., 239 F.3d 456, 2001 U.S. App. LEXIS 2041 (2d Cir. N.Y.), cert. denied, 534 U.S. 993, 122 S. Ct. 460, 151 L. Ed. 2d 378, 2001 U.S. LEXIS 9990 (U.S. 2001).

Where prospective home buyers sued for racial discrimination under the Fair Housing Act, 42 U.S.C.S. § 3601 et seq., 42 U.S.C.S. §§ 1981 and 1982, and N.Y. Exec. Law § 296(5)(a)(1), summary judgment in favor of the homeowners was proper where there was no evidence that they had any knowledge of the buyers' race being African-American until after the homeowners had rejected the buyers' offer and signed a contract with a white purchaser. Mitchell v Shane, 350 F.3d 39, 2003 U.S. App. LEXIS 23322 (2d Cir. 2003).

Where issues of fact existed as to a realtor's liability for racial discrimination in violation of the Fair Housing Act, 42 U.S.C.S. § 3601 et seq., 42 U.S.C.S. §§ 1981 and 1982, and N.Y. Exec. Law § 296(5)(a)(1), summary judgment in favor of the real estate agency that employed the realtor was also improper as the Fair Housing Act imposed liability without fault on employers in accordance with traditional agency principles. Mitchell v Shane, 350 F.3d 39, 2003 U.S. App. LEXIS 23322 (2d Cir. 2003).

District court erred in granting summary judgment to individual defendants under the New York State Human Rights Law where allegedly some of them had participated in creating a hostile work environment, some had assigned the plaintiff a disproportionate workload because of his race, and his supervisors not only had taken no action to remedy such behavior although they were aware of it, but also had terminated his employment on the basis of impermissible factors. Feingold v New York, 366 F.3d 138, 2004 U.S. App. LEXIS 8543 (2d Cir. N.Y. 2004).

Employer was not entitled to summary judgment in a hostile work environment case brought under 42 U.S.C.S. § 2000e and N.Y. Exec. Law § 296 because a rational juror could find that the combination of disparate treatment of plaintiff female employee and gender-based verbal abuse was sufficiently severe or sufficiently pervasive to alter the conditions of her employment. Pucino v Verizon Communs., Inc., 618 F.3d 112, 2010 U.S. App. LEXIS 16749 (2d Cir. N.Y. 2010).

Employer is entitled to partial summary judgment on employee's claims of race discrimination under CLS Exec Law § 296, even though chief clerk argues that promotion to head clerk, which she was denied, would have included change in salary, increased contact with public, and new status under collective bargaining agreement, because promotion in fact would not have established significant change in employee-employer relationship and would not have created "new and distinct relation" necessary to state claim. Bradley v National R. Passenger Corp., 797 F. Supp. 286, 1992 U.S. Dist. LEXIS 9984 (S.D.N.Y. 1992).

Employer is granted summary judgment on former branch manager's age discrimination claims under Age Discrimination in Employment Act (ADEA) (29 USCS §§ 621 et seq.) and CLS Exec Law § 296, where proof demonstrated that supervisor intimidated all his subordinates and was impersonable, overly aggressive, and even unsavory manager, but not that his actions which led to disabling of plaintiff were motivated by age, because state courts evaluate § 296 age discrimination claim by utilizing federal case law's interpretation and application of federal discrimination statutes in determining elements of prima facie case and burdens of production and order of proof. Spence v Maryland Casualty Co., 803 F. Supp. 649, 1992 U.S. Dist. LEXIS 14861 (W.D.N.Y. 1992), aff'd, 995 F.2d 1147, 1993 U.S. App. LEXIS 12666 (2d Cir. N.Y. 1993).

Former employee's disability discrimination claim against former employer is denied summarily, because although employee was member of protected class and generally qualified for former position, he failed to raise genuine issue as to whether he was discharged in circumstances giving rise to inference of discrimination by failing to point to evidence of discriminatory animus or that downsizing which resulted in his discharge was false or

exaggerated. Fitzgerald v Alleghany Corp., 904 F. Supp. 223, 1995 U.S. Dist. LEXIS 17337 (S.D.N.Y. 1995).

Employer is denied summary dismissal of terminated employee's age discrimination claim under New York Human Rights Law (CLS Exec Law §§ 290 et seq.), where employee made out prima facie case of discrimination, and employer also met its burden by proffering that employee was legitimately discharged as part of necessary reduction in force, because genuine issues of material fact remain as to employer's intent, since employer's use of sales reports and log book to measure relative productivity of employees was questionable. Fasano v Flour City Architectural Metals, 945 F. Supp. 512, 1996 U.S. Dist. LEXIS 19965 (E.D.N.Y. 1996).

African-American AP English teacher has CLS Exec Law § 296 claim denied summarily, even though she was forced to resign after controversy arising from her providing students with practice test questions that turned up on AP English examination, where she has failed to provide wisp of evidence to support her capitulation-to-a-mountain-of-racial-resentment theory, because school district has clearly articulated legitimate, nondiscriminatory reason for recommending her discharge. Richardson v Newburgh Enlarged City Sch. Dist., 984 F. Supp. 735, 1997 U.S. Dist. LEXIS 18037 (S.D.N.Y. 1997).

Age discrimination claims under CLS Exec Law § 296 must be denied summarily, where employer proffered that all plaintiffs were validly and accurately given relatively low performance assessment ratings that justified their terminations as part of economically justified reduction in force, because plaintiffs collectively have alleged massive conspiracy to fire older workers but have produced no evidence to support that claim. Wado v Xerox Corp., 991 F. Supp. 174, 1998 U.S. Dist. LEXIS 681 (W.D.N.Y. 1998), aff'd, 196 F.3d 358, 1999 U.S. App. LEXIS 29261 (2d Cir. N.Y. 1999).

Employment discrimination claim will not be denied summarily, where terminated employee of Puerto Rican descent relies primarily on alleged series of national origin epithets made by his supervisor in months preceding his discharge, even though employer claims he was fired for declining work performance and unwillingness to change shifts, because reasonable jury could find discrimination based on facts alleged. Cartagena v Ogden Servs. Corp., 995 F. Supp. 459, 1998 U.S. Dist. LEXIS 2824 (S.D.N.Y. 1998).

Fifty-two-year-old African-American female procurement specialist's claims are denied summarily, where she and 5 other procurement specialists were terminated pursuant to reduction in force, even though 4 of 6 terminated were African-American and 4 were age-protected, because no reasonable factfinder could conclude that age or race discrimination was substantial motivating factor in her termination. Duncan v New York City Transit Auth., 127 F. Supp. 2d 354, 2001 U.S. Dist. LEXIS 711 (E.D.N.Y. 2001), aff'd, 45 Fed. Appx. 14, 2002 U.S. App. LEXIS 17674 (2d Cir. N.Y. 2002).

Comment that claimant was "too old" to be pregnant did not support an inference of discriminatory intent under the Age Discrimination in Employment Act sufficient to withstand employer's motion for summary judgment where the comment was neither contemporaneous with or causally related to claimant's termination. Venti v EDS, 236 F. Supp. 2d 264, 2002 U.S. Dist. LEXIS 24701 (W.D.N.Y. 2002).

Because the court concluded that the employee's claim pursuant to the New York Human Rights Law (NYHRL), N.Y. Exec. Law § 296 et seq., against his town employer could stand, and because the supervisor was the active participant in the discriminatory conduct that formed the basis of the claim against the town, she could be held liable as an aider and abettor. Accordingly, her motion for summary judgment on the employee's NYHRL claim against her was denied. Perks v Town of Huntington, 251 F. Supp. 2d 1143, 2003 U.S. Dist. LEXIS 9918 (E.D.N.Y. 2003).

Court declined to grant summary judgment on former public employee's claim under N.Y. Exec. Law § 296(6) against her supervisor who had allegedly engaged in gender discrimination even though her former employer, the state, was protected by sovereign immunity. Kantha v Blue, 262 F. Supp. 2d 90, 2003 U.S. Dist. LEXIS 7859 (S.D.N.Y. 2003).

In an action by a former employee against his former employer alleging age discrimination in violation of the Age Discrimination in Employment Act, 29 U.S.C.S. § 621 et seq., and the New York Human Rights Law, N.Y. Exec. Law § 296, following his termination, summary judgment under Fed. R. Civ. P. 56(c) was granted for the employer where, although the employee presented a prima facie case of age discrimination because the fact that the employee was permanently replaced by someone substantially younger than he within two months after his termination presented circumstances giving rise to an inference of discrimination, the employer satisfied its burden of showing that the employee was fired for the legitimate, non-discriminatory reason that he was noted to have had poor sales performance, he was warned to improve his sales performance, and he failed to demonstrate sufficient progress towards improving his sales performance, and the employee failed to offer any evidence that the employer's reason was pretext for discrimination because severance payments were not precluded to persons who were terminated for inadequate performance, the employee failed to offer evidence suggesting that employer did not believe his sales performance to be deficient, and the employee stated at deposition that the only fact that led him to believe that he was discriminated against on account of his age was that he ultimately was replaced by an individual younger than he. Morris v Charter One Bank, F.S.B., 275 F. Supp. 2d 249, 2003 U.S. Dist. LEXIS 13849 (N.D.N.Y. 2003).

Defendants were not entitled to summary judgment on a former employee's age and gender discrimination claims under New York law with respect to the actions of two former managers who allegedly referred to the employee as "old and grandmotherly" and an "old bag"; however, there was no genuine fact issue as to whether a subsequent supervisor discriminated against the employee, as the employee did not allege that the supervisor made any derogatory comments, and the mere fact that the supervisor assigned an account to a younger woman did not establish age discrimination. Flaherty v Metromail Corp., 293 F. Supp. 2d 355, 2003 U.S. Dist. LEXIS 24032 (S.D.N.Y. 2003).

Alleged supervisors' motions for summary judgment on plaintiff's sexual harassment claim under the New York Human Rights Act (NYHRL), N.Y. Exec. Law § 296 et seq., was denied because it was possible that the alleged supervisors could incur individual liability for defendant employer's violation of N.Y. Exec. Law § 296(6), which makes it an unlawful discriminatory practice for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under the NYHRL, or to attempt to do so. EEOC v Rotary Corp., 297 F. Supp. 2d 643, 2003 U.S. Dist. LEXIS 23225 (N.D.N.Y. 2003).

Police officer's retaliation claims under the New York State Human Rights Law failed at summary judgment because no reasonable juror could have found that allegedly adverse employment actions, including negative performance evaluations and disciplinary actions, were causally related to the officer's sexual harassment complaint against a co-worker; defendants offered legitimate, nonretaliatory reasons for the evaluations and discipline, and the incidents were too temporally remote from the harassment complaint. Knight v City of New York, 303 F. Supp. 2d 485, 2004 U.S. Dist. LEXIS 2614 (S.D.N.Y. 2004), aff'd, 147 Fed. Appx. 221, 2005 U.S. App. LEXIS 23212 (2d Cir. N.Y. 2005).

Having concluded that employees of joint employers could not be aggregated, it was clear that the employee's relief was to be had in state court under the New York Human Rights Law (NYHRL), N.Y. Exec. Law §§ 296-97, which had a four-person minimum instead. The court declined to exercise supplemental jurisdiction under 28 U.S.C.S. § 1367 and dismissed the employee's claim under the NYHRL without prejudice. Arculeo v On-Site Sales & Mktg., LLC, 321 F. Supp. 2d 604, 2004 U.S. Dist. LEXIS 11538 (S.D.N.Y. 2004), aff'd, 425 F.3d 193, 2005 U.S. App. LEXIS 21212 (2d Cir. N.Y. 2005).

County was denied summary judgment on the female correctional officers' hostile work environment claim under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C.S. § 2000e et seq., and the New York State Human Rights Law (NYSHRL), N.Y. Exec. Law § 296, because the sergeant was the correctional officers' supervisor, as the court found persuasive the correctional

officers' assertion that the county had delegated supervisory responsibility to sergeants over correctional officers as the first link in the chain of command. The county could not establish the affirmative defense of Ellerth/Faragher because there existed a material issue of fact as to whether its response to the hostile work environment allegations were reasonable and prompt, as according to the correctional officers, neither the commissioner nor his special assistant ever spoke to them about their complaints nor was the sergeant terminated or even formally disciplined. Dawson v County of Westchester, 351 F. Supp. 2d 176, 2004 U.S. Dist. LEXIS 26100 (S.D.N.Y. 2004).

Commissioner and chief of operations were entitled to immunity with respect to the female correctional officers' claims against them under the New York State Human Rights Law (NYSHRL), N.Y. Exec. Law § 296, because their investigation of the correctional officers' hostile work environment complaints was discretionary in nature, involving the exercise of reasoned judgment. However, the sergeant who allegedly distributed copies of inmates' sexually explicit letters about the correctional officers to others was not entitled to summary judgment. Dawson v County of Westchester, 351 F. Supp. 2d 176, 2004 U.S. Dist. LEXIS 26100 (S.D.N.Y. 2004).

Plaintiff alleged his union discriminated against him because of his race by failing to refer him for work assignments; his data revealed a disparity of less than 4 percent between the overall hours worked by African-Americans and by non-minority union members, while the union's more reliable data produced a difference of .19 percent. As the purported statistical disparities were not substantial enough to support his claim that the union violated N.Y. Exec. Law § 296, this claim was dismissed on summary judgment. Duggan v Local 638, Enter. Ass'n of Steam, Hot Water, Hydraulic, Sprinkler, Pneumatic Tube, Ice Machine, Air Conditioning & Gen. Pipefitters, 419 F. Supp. 2d 484, 2005 U.S. Dist. LEXIS 28685 (S.D.N.Y. 2005).

City of New York, its Human Resources Administration (HRA), a director, and a supervisor were entitled to summary judgment on an employee's retaliation claim because the employee did not make a prima facie case and set forth no evidence that defendants had general corporate knowledge or knowledge through union publications that he filed a discrimination action against the City's Administration for Children's Services, an entity independent from the HRA, and the separate incidents of a denial of a supervisor of choice, failure to provide a telephone, reprimands about performance, removal from a civil service list, and disciplinary charges that were not conclusively adjudicated did materially alter the terms and conditions of employment and constitute materially adverse employment actions. Uddin v City of New York, 427 F. Supp. 2d 414, 2006 U.S. Dist. LEXIS 18904 (S.D.N.Y. 2006), aff'd in part, vacated in part, 316 Fed. Appx. 4, 2008 U.S. App. LEXIS 8783 (2d Cir. N.Y. 2008).

Former employee proffered evidence that, taken in the most favorable light, could reasonably convince a fact finder that her former employer's acting general counsel actively participated in discriminatory conduct; the employee asserted that counsel "actively participated" in her discriminatory termination, because he effectively affirmed the supervisor's prior discriminatory action by failing to reinstate her. A fact finder might reasonably conclude that counsel was in some way involved with the instances of discrimination that formed the basis of the employee's allegations of primary violations of the state and local human rights laws; therefore, the employee's proffered evidence raised a genuine issue of material fact as to whether counsel aided and abetted discriminatory conduct. Int'l Healthcare Exch., Inc. v Global Healthcare Exch., LLC, 470 F. Supp. 2d 345, 2007 U.S. Dist. LEXIS 2648 (S.D.N.Y. 2007).

In an action in which a former employee, an African-American who had worked as a correction officer, alleged that defendants, a county and a sheriff's department, discriminated against him based on his race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e-2(a), and the New York State Human Rights Law, N.Y. Exec. Law § 296, defendants, who contended that the employee was ineligible for tower and weapons training, that the employee's probationary period was extended due to the employee's disrespectful conduct during a traffic stop, and that the employee was terminated for allowing an inmate to perform his security tour, were not entitled to summary judgment because evidence indicating that white correction officers who were guilty of similar misconduct were not disciplined as severely as the employee was created a genuine issue of material fact as to whether defendants' decisions regarding the employee's probationary period and termination were based on discrimination. Hawkins v County of Oneida, 497 F. Supp. 2d 362, 2007 U.S. Dist. LEXIS 53575 (N.D.N.Y. 2007).

In an action in which a former employee, an African-American who had worked as a correction officer, asserted a hostile work environment claim against defendants, a county and a sheriff's department, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e-2(a), and the New York State Human Rights Law, N.Y. Exec. Law § 296, defendants were not entitled to summary judgment because evidence showing that racially discriminatory conduct was perpetrated with persistence by numerous people for more than two years and that internal investigations focusing on the employee were baseless created issues of fact as to whether the employee was subjected to an abusive working environment. Hawkins v County of Oneida, 497 F. Supp. 2d 362, 2007 U.S. Dist. LEXIS 53575 (N.D.N.Y. 2007).

School district and school officials were not entitled to summary judgment on pregnancy discrimination claims that a probationary teacher filed under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e-2(a), and the New York State Human Rights Law, N.Y. Exec. Law § 296, because evidence indicating that the teacher was subjected to harsh treatment and a pop-in evaluation shortly after returning from an extended maternity leave and that an evaluation that the teacher received after returning from leave was lower than the evaluations she received prior to her maternity leave created genuine issues of material fact as to whether the assertion that the teacher was denied tenure because she was not qualified for tenure was a pretext for discrimination. Helmes v S. Colonie Cent. Sch. Dist., 564 F. Supp. 2d 137, 2008 U.S. Dist. LEXIS 72960 (N.D.N.Y. 2008).

Because the definition of disability under the New York State Human Rights Law (NYSHRL), N.Y. Exec. Law § 296, was broader than under the Americans with Disabilities Act (ADA), 42 U.S.C.S. § 12102(2), the fact that a school district and others were entitled to summary judgment in a suit by a former school psychologist, who suffered from bipolar disorder and Lyme disease, and who failed to show that she was disabled for purposes of the ADA, was not dispositive of her NYSHRL claim. Levine v Smithtown Cent. Sch. Dist., 565 F. Supp. 2d 407, 2008 U.S. Dist. LEXIS 53864 (E.D.N.Y. 2008).

Arrestee's claims against a city and a police department under Title II of the Americans with Disabilities Act (ADA) and N.Y. Exec. Law § 296 survived a motion for summary judgment because police officers' knowledge of the arrestee's condition was a triable issue of fact, and even if the officers had such knowledge, there remained a triable issue of fact concerning whether their actions in locking the arrestee, alone and handcuffed, in a police wagon after being told she had just suffered a seizure and was about to have another seizure, and/or dragging her out of the wagon while she was unresponsive, constituted deliberate indifference to the arrestee's rights under the ADA. Fera v City of Albany, 568 F. Supp. 2d 248, 2008 U.S. Dist. LEXIS 58673 (N.D.N.Y. 2008).

Plaintiff employee's retaliation claim failed to survive summary judgment because it would have been impossible for any trier of fact to conclude that the disciplinary proceeding was motivated by anything other than the employee's inexplicable and unprofessional behavior; the employee was disciplined because he failed to tell a doctor about a test result showing that a patient had a highly elevated level of potassium in his system, lied about the test result in his written report (stating that he was "unable to perform the test" rather than give what he thought was an inaccurate result), and then refused a direct order to explain his extraordinary conduct. Siddiqi v New York City Health & Hosps. Corp., 572 F. Supp. 2d 353, 2008 U.S. Dist. LEXIS 63024 (S.D.N.Y. 2008).

Although the former employer argued that the former employee's substandard performance rendered him unqualified for his

position; that the circumstances of the employee's termination did not give rise to an inference of discrimination; and the employer had a legitimate, non-discriminatory reason for terminating the employee that he could not overcome by a showing of pretext, the employee raised a number of factual issues concerning whether the employer's proffered reasons for his termination were a pretext for discrimination to overcome summary judgment motion. Inter alia, although the employer stated that the employer transmitted certain information to an outside contractor in violation of established policy, the employer did not provide evidence of that policy and the employee raised another triable issue because the same individual who allegedly made derogatory comments about the employee's heritage was the principal decision-maker in his termination. Bang v IBM Corp., 600 F. Supp. 2d 430, 2009 U.S. Dist. LEXIS 18633 (E.D.N.Y. 2009).

Police officer's retaliation claims survived summary judgment because investigations into the officer's violations of police department rules occurred in close temporal proximity to the officer's complaints about discrimination and there was evidence that a deputy chief told the officer's supervisor to write the officer up every time she spoke about anyone and that other employees were not disciplined in the same manner. Lee v City of Syracuse, 603 F. Supp. 2d 417, 2009 U.S. Dist. LEXIS 24966 (N.D.N.Y. 2009), overruled in part, Widomski v State Univ. of N.Y., 748 F.3d 471, 2014 U.S. App. LEXIS 6466 (2d Cir. N.Y. 2014).

There was no dispute that the former employee never filed a notice of claim, nor did the employee leave to file a late notice of claim, and as the employee sought enforcement of a private right, as she sought relief in the form of money damages and placement in a tenured position with the school district on the basis that she alone was denied such a position on the basis of her national origin, defendants' motion for summary judgment with respect to the employee's state law claim brought under N.Y. Exec. Law § 296 was granted. Augustin v Enlarged City Sch. Dist. of Newburgh, 616 F. Supp. 2d 422, 2009 U.S. Dist. LEXIS 39949 (S.D.N.Y. 2009).

In an action in which African-American shoppers alleged that toy stores discriminated against them by asking to inspect their sales receipts after they made purchases while not inspecting the sales receipts of white shoppers, the shoppers' equal benefit claim under 42 U.S.C.S. § 1981 and their related claims under N.Y. Exec. Law § 296 and N.Y. Civ. Rights Law § 40 survived summary judgment because there were material issues of fact as to whether the shoppers were singled out for unlawful oppression by the enforcement of the stores' receipt checking policy and whether the stores' alleged discriminatory conduct deprived the shoppers of the full and equal benefit of § 296. Drayton v Toys 'R' Us Inc., 645 F. Supp. 2d 149, 2009 U.S. Dist. LEXIS 64214 (S.D.N.Y. 2009).

Summary judgment for defendant former employer was proper as to plaintiff employee's claims for employment discrimination and retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., 42 U.S.C.S. § 1981, and N.Y. Exec. Law § 296(1) because, in part, the employee could identify no specific communications between any prospective employer and the former employer to support the employee's blackballing theory. Memnon v Clifford Chance US, LLP, 667 F. Supp. 2d 334, 2009 U.S. Dist. LEXIS 99936 (S.D.N.Y. 2009).

With respect to the employee's demotion in 2005 to detention attendant, it was undisputed that the employee engaged in protected activity in the mid-1990s, that her employer was aware of it, and that there was an adverse action in 2005 in the form of a demotion; moreover, with respect to the earlier demotions in October 2004 to 911 operator and in December 2004 to switchboard operator, although defendants argued that neither of these demotions was an adverse action because of the lack of any reduction in pay or benefits, the facts were sufficiently in dispute to preclude summary judgment on that basis. Drees v County of Suffolk, 2009 U.S. Dist. LEXIS 27346 (E.D.N.Y. Mar. 30, 2009).

Employee proffered sufficient evidence regarding a retaliatory hostile work environment in 2004 and 2005 to survive summary judgment; according to the employee, following her conversation with a superior in 2004, two supervisors allegedly overscrutinized the employee and reprimanded her for actions that had not raised a concern prior to her meeting with the superior. According to the employee, the supervisors also reprimanded the employee for actions that they did not criticize when performed by the employee's colleagues who had not made complaints about sexual harassment or retaliation and each time the employee was reprimanded, her requests to be retrained were denied; the evidence was sufficient, when considered in light of the other evidence to survive summary judgment on the issue of retaliatory hostile work environment in 2004 and 2005. Drees v County of Suffolk, 2009 U.S. Dist. LEXIS 27346 (E.D.N.Y. Mar. 30, 2009).

Employee proffered specific evidence related to her gender-based hostile work environment claims sufficient to raise a genuine issue of material fact as to whether her workplace was permeated with discriminatory harassment that was sufficiently severe or pervasive as to alter the conditions of her work environment; the employee testified that she was subjected to verbal hostility beginning in 2000, that women were objectified in the workplace, and that her physical safety was threatened by her male coworkers on several occasions. When these acts were viewed together with gender-specific comments to which the employee was allegedly subjected, there were sufficient material issues of fact to preclude summary judgment on the employee's gender-based hostile work environment claims. Hall v N.Y. City DOT, 701 F. Supp. 2d 318, 2010 U.S. Dist. LEXIS 31077 (E.D.N.Y. 2010).

Given the interplay between evidence of gender-based hostility and racial hostility, summary judgment was not warranted on the employee's race-based hostile work environment claim; the undisputed evidence established that the employee (herself an African-American female) was referred to as "Omarosa," a female African-American television personality whom the employee described as a villain and that she overheard a coworker say that she lived with "mixed-race people." When viewed together with the incidents of alleged physical threats and gender-based hostility, a jury could have found from the racially hostile statements that the employee was subjected to a hostile work environment based on her race. Hall v N.Y. City DOT, 701 F. Supp. 2d 318, 2010 U.S. Dist. LEXIS 31077 (E.D.N.Y. 2010).

Employer was granted summary judgment on a former employee's reasonable accommodation claim under the New York Human Rights Law, N.Y. Exec. Law § 296, because the employee terminated the interactive process for discussing accommodations by tendering his resignation before the employer's director of human resources could investigate the situation and get back to him. Gingold v Bon Secours Charity Health Sys., 768 F. Supp. 2d 537, 2011 U.S. Dist. LEXIS 23781 (S.D.N.Y. 2011).

In a case where a teacher sued a school district alleging that she was sexually harassed by a principal at her school, the district was granted summary judgment on the claims under Title VII, 42 U.S.C.S. § 2000e-2, and N.Y. Exec. Law § 296 because it established that it had exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and the teacher failed to take advantage of any preventive or corrective opportunities provided by the employer. That is, the district established both prongs of the Faragher test. Alexander v Westbury Union Free Sch. Dist., 829 F. Supp. 2d 89, 2011 U.S. Dist. LEXIS 127738 (E.D.N.Y. 2011).

Notes to Unpublished Decisions

Analysis

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I. Generally

1. In general

Unpublished decision: Any error by the district court in failing to separately analyze the employee's discrimination and retaliation claims under the New York State Human Rights Law and the New York City Human Rights Law (NYCHRL) was harmless because even where the employee might be entitled to the NYCHRL's broader protections, there was no evidence that retaliation or the employee's age played even a partial motivating role in any of the allegedly adverse actions. Aiossa v Bank of Am., N.A., 538 Fed. Appx. 8, 2013 U.S. App. LEXIS 18321 (2d Cir. N.Y. 2013).

II. Employment Discrimination

A. Hiring/Failure to Hire

2. Age discrimination

Unpublished decision: Former employee failed to show age discrimination in a termination of the employee while other younger managers received written reprimands for the same misconduct, since the employer's determination that the employee lied during the investigation of the misconduct indicated a lack of discriminatory intent in the disparate treatment. Taddeo v L.M. Berry & Co., 526 Fed. Appx. 121, 2013 U.S. App. LEXIS 9579 (2d Cir. N.Y. 2013).

3. Racial discrimination

Unpublished decision: District court properly dismissed a candidate's claim that a city's system for ranking police officer candidates based on the results of its civil service examination discriminated against non-minority candidates because, even assuming that the candidate presented sufficient evidence to set forth a prima facie case of discrimination under § 296 of the New York State Human Rights Law, N.Y. Exec. Law § 296, the candidate failed to present any evidence showing that the city's nondiscriminatory reason for not hiring him—namely, his psychological disqualification—was pretextual because the candidate did not allege that his psychological evaluation was tainted by race-based discrimination, and the candidate did not point to evidence from which a reasonable jury could have concluded that an examiner's assessment, confirmed on appeal by a second psychologist, was unworthy of credence or otherwise suggested discriminatory motive. Damino v City of New York, 332 Fed. Appx. 679, 2009 U.S. App. LEXIS 13290 (2d Cir. N.Y. 2009).

4. Sex discrimination

Unpublished decision: Former employee failed to show gender discrimination in a termination of the female employee while other male managers received written reprimands for the same misconduct, since the employer's determination that the employee lied during the investigation of the misconduct indicated a lack of discriminatory intent in the disparate treatment. Taddeo v L.M. Berry & Co., 526 Fed. Appx. 121, 2013 U.S. App. LEXIS 9579 (2d Cir. N.Y. 2013).

B. Termination/Discharge from Employment

5. Age discrimination, generally

Unpublished decision: In a case in which present and former police department employees appealed a district court's denial of their motion to reconsider the dismissal of their class action complaint charging that a termination pay policy imposed in arbitration resulted in unlawful age discrimination, they failed to demonstrate that the district court overlooked facts that might reasonably be expected to alter its conclusion, they could not claim abuse of discretion in the denial of reconsideration. Older workers had to make a difficult choice between retiring before the policy took effect, thus avoiding the termination pay cap, or continuing to work and facing the reduction in termination pay that the cap imposed; however, younger workers were not afforded even that choice, they were necessarily subject to the cap. Young v County of Nassau, 511 Fed. Appx. 35, 2013 U.S. App. LEXIS 2371 (2d Cir. N.Y. 2013).

Unpublished decision: In a case in which present and former police department employees appealed a district court's denial of their motion for leave to file a second amended complaint as futile in which they sought to explain that the challenged policy discriminated against older workers relative to their younger counterparts because only employees over 40 could have accrued enough days to be adversely affected, whereas younger workers allegedly were not and mathematically could not be harmed by the new policy should they choose to retire. The flaw in the argument, as the district court recognized, was that the pleading nonetheless failed plausibly to allege discrimination between older and younger workers; the latter were plainly subject to the policy and would never have the option of recovering more than the capped amount of termination pay, and. by contrast, older workers who had accrued more than the capped amount were afforded a limited window within which to collect that full amount by opting to retire, an opportunity not available to their younger counterparts. Young v County of Nassau, 511 Fed. Appx. 35, 2013 U.S. App. LEXIS 2371 (2d Cir. N.Y. 2013).

Unpublished decision: Terminated employee's age discrimination claims survived dismissal because the complaint alleged that the employee was a 60-year-old man with "stellar" performance evaluations, who was terminated for pretextual reasons, and when combined with the allegation that the employer maintained substantially younger workers, no further amplification was necessary to state a plausible claim. Gonzalez v Carestream Health, Inc., 520 Fed. Appx. 8, 2013 U.S. App. LEXIS 6541 (2d Cir. N.Y. 2013).

Unpublished decision: Terminated employee's age discrimination claims failed because the employer's contention that the employee should have been at the plant on the day of an accident supported its decision to terminate the employee, as did the employee's ongoing refusal to accept responsibility, and the employee did not present sufficient evidence of pretext. Mikinberg v Bemis Co., 555 Fed. Appx. 34, 2014 U.S. App. LEXIS 2007 (2d Cir. N.Y. 2014).

6. Discrimination based on disability, generally

Unpublished decision: Employer was entitled to summary judgment on the employee's reasonable accommodation claim because the employee failed to adduce sufficient evidence to raise a material issue of fact as to whether her requested accommodation, transfer from the night shift to the day shift, was reasonable. Cody v County of Nassau, 345 Fed. Appx. 717, 2009 U.S. App. LEXIS 20662 (2d Cir. N.Y. 2009).

Unpublished decision: Executors pointed to five emails sent between a supervisor and other coworkers that contained negative and insensitive remarks about the deceased employee; the emails, however, took place months before the employee was terminated, and while disparaging of the employee, were not a sufficient basis on which to conclude that she was terminated because of her illness, as opposed to the employer's diminishing business prospects. Gioia v Forbes Media LLC, 501 Fed. Appx. 52, 2012 U.S. App. LEXIS 22689 (2d Cir. 2012).

7. Racial discrimination

Unpublished decision: Employee's race discrimination and retaliation claims failed because the employee was terminated for legitimate reasons relating to the department's budget and the employee's relative qualifications for the consolidated day manager position. Turner v Nyu Hosps. Ctr., 470 Fed. Appx. 20, 2012 U.S. App. LEXIS 6552 (2d Cir. N.Y. 2012).

Unpublished decision: Terminated employee's race discrimination and retaliation claims failed because the employee did not show a genuine dispute of fact regarding alleged discrimination in the employer's overtime distribution since the differences in

overtime hours were minimal and were easily explained by the higher rate at which African-American employees declined overtime opportunities, and the employee did not present sufficient evidence to create a genuine dispute of fact regarding whether the employee's purportedly "similarly situated" comparators were, in fact, similarly situated. Finn v N.Y. State Office of Mental Health-Rockland Psychiatric Ctr., 489 Fed. Appx. 513, 2012 U.S. App. LEXIS 25168 (2d Cir. N.Y. 2012).

8. Retaliation

Unpublished decision: Employee's retaliation claims failed, as the employee proffered no evidence establishing any connection between his religious accommodation suit and the adverse actions of which he complained, nor did he proffer any evidence tending to establish that defendants' explanations for the incidents were pretextual or otherwise illegitimate. Bowles v N.Y. City Transit Auth., 285 Fed. Appx. 812, 2008 U.S. App. LEXIS 14656 (2d Cir. N.Y. 2008).

Unpublished decision: In affirming a summary dismissal of retaliation claims under Title VII of the Civil Rights Act of 1964, N.Y. Exec. Law § 296, and New York City, N.Y., Admin. Code § 8-107, the court agreed that an employee failed to show that a retaliatory motive was a substantial or motivating factor in any adverse action, especially her negative performance evaluation which led to her termination. Malacarne v City Univ. of N.Y., 289 Fed. Appx. 446, 2008 U.S. App. LEXIS 17059 (2d Cir. N.Y. 2008).

Unpublished decision: Former employee failed to establish a prima facie case of retaliation because the employee's complaints about teaching curriculum disputes, his responsibilities, and his treatment by supervisors did not protest prohibited discrimination. Also, an ample basis for the adverse actions was shown. Benn v City of New York, 482 Fed. Appx. 637, 2012 U.S. App. LEXIS 10350 (2d Cir. N.Y. 2012).

Unpublished decision: Executors put forth no evidence that the employee's requests for accommodation, which included time off to go to doctors' appointments and taxi rides to work, provoked animus in her supervisors; to the contrary, her supervisors readily granted these requests. Nor was there any temporal proximity between when the employee first requested these accommodations and when she lost her job. Gioia v Forbes Media LLC, 501 Fed. Appx. 52, 2012 U.S. App. LEXIS 22689 (2d Cir. 2012).

Unpublished decision: Employee's claims of retaliatory demotion under Title VII of the Civil Rights Act of 1964 and state law failed because no reasonable juror could find that the nondiscriminatory reason for demoting the employee, i.e., a Civil Service Commission decision instructing the employer that the employee could not supervise other supervisors in his civil service title, was pretext for retaliatory animus and that "but for" the desire to retaliate, the employee would not have been demoted. Puglisi v Town of Hempstead, 545 Fed. Appx. 23, 2013 U.S. App. LEXIS 21114 (2d Cir. N.Y. 2013).

C. Other Employment Matters

9. Demotion

Unpublished decision: In a case in which an employee appealed a district court's entry of summary judgment in favor of his employer as to his discrimination claims under the Age Discrimination in Employment Act of 1967, 29 U.S.C.S. § 621 et seq., the Americans with Disabilities Act, 42 U.S.C.S. § 12101 et seq., and the New York State Human Rights Law, N.Y. Exec. Law § 296, the employer proffered substantial evidence that the employee's demotions and sometimes attendant decreases in compensation were the result of two division-wide reorganizations and his supervisors' repeatedly documented concerns about his management abilities. The employee did not offer evidence from which a reasonable jury could conclude that those reasons were mere pretext. Ben-Levy v Bloomberg, 518 Fed. Appx. 17, 2013 U.S. App. LEXIS 8843 (2d Cir. N.Y. 2013).

Unpublished decision: In a case in which an employee appealed a district court's entry of summary judgment in favor of his employer as to his retaliation claims under the Age Discrimination in Employment Act of 1967, 29 U.S.C.S. § 621 et seq., the Americans with Disabilities Act, 42 U.S.C.S. § 12101 et seq., the Family and Medical Leave Act, 29 U.S.C.S. § 2601 et seq., and the New York State Human Rights Law, N.Y. Exec. Law § 296, he had not presented any evidence from which a reasonable jury could conclude that the employer's business motivations for his moves within the company, compensation reductions, and negative performance evaluations were mere pretext for a retaliatory motivation. Ben-Levy v Bloomberg, 518 Fed. Appx. 17, 2013 U.S. App. LEXIS 8843 (2d Cir. N.Y. 2013).

10. Adverse employment action

Unpublished decision: Employee had failed to make out a prima facie case on his claim of religious discrimination because a supervisor's comment that the employee should have sought a job in the private sector if he wanted weekends off, which the employee construed as a threat of termination, standing alone, was insufficient to establish the third prong of the employee's prima facie case in light of the employee's failure to offer any evidence tending to establish that the supervisor's remarks ever ripened into any further action (let alone any action adversely affecting the terms and conditions of the employee's employment). Bowles v N.Y. City Transit Auth., 285 Fed. Appx. 812, 2008 U.S. App. LEXIS 14656 (2d Cir. N.Y. 2008).

III. Practice and Procedure

11. Burden of proof

Unpublished decision: Employee failed to even make the de minimus showing necessary to make out a prima facie case of discrimination; the employee's own affidavit and moving papers were the only "evidence" he offered to demonstrate disparate treatment, but it was plain that the information was not "made on personal knowledge," but rather "on information and belief," which was insufficient under Fed. R. Civ. P. 56. Lugo v City of New York, 518 Fed. Appx. 28, 2013 U.S. App. LEXIS 8855 (2d Cir. N.Y. 2013).

Unpublished decision: Employee's gender discrimination claims failed because defendants had demonstrated a non-pretextual reason for termination of the employee's employment (defendants dismissed the employee because of her sub-par customer service that included ignoring her tables, her quarrelsome relations with other employees, and her refusal to complete menial tasks required of servers), which the employee failed to counter with admissible evidence tending to show that the reasons tendered were pretextual. Govori v Goat Fifty, L.L.C., 519 Fed. Appx. 732, 2013 U.S. App. LEXIS 5967 (2d Cir. N.Y. 2013).

Unpublished decision: Employer was properly granted summary judgment on the employee's discrimination and retaliation claims under the New York State Human Rights Law and the New York City Human Rights Law because short of speculation, there was no evidence that retaliation or the employee's age played even a partial motivating role in any of the allegedly adverse actions. Aiossa v Bank of Am., N.A., 538 Fed. Appx. 8, 2013 U.S. App. LEXIS 18321 (2d Cir. N.Y. 2013).

12. Collateral estoppel/res judicata

Unpublished decision: Where a doctor alleged disability discrimination, the federal complaint was barred by res judicata because, inter alia, the claims raised in the federal complaint arose from the same transaction as the claims asserted in the doctor's prior state complaint since the factual allegations at the heart of both complaints involved the medical center's allegedly improper assessment of the doctor's competency and its subsequent decisions to deny the doctor credit for the doctor's first year of residency and to refrain from renewing the doctor's employment contract. Harris v Beth Isr. Med. Ctr., 367 Fed. Appx. 184, 2010 U.S. App. LEXIS 3496 (2d Cir. N.Y. 2010).

13. Statute of limitations

Unpublished decision: Because plaintiff had conceded in the district court that her New York State Human Rights Law claims were barred by the applicable three-year statute of limitations, she could not argue otherwise on appeal. Barkley v Penn Yan Cent. Sch. Dist., 442 Fed. Appx. 581, 2011 U.S. App. LEXIS 18535 (2d Cir. 2011).

14. Summary judgment

Unpublished decision: In a case in which a male employee appealed a district court's entry of summary judgment in favor of his employer on his claim of sex discrimination, the employee

alleged that one of his male supervisors sexually harassed him by touching his genitals and creating a hostile work environment. There were genuine issues of material fact: (1) a reasonable jury could find that direct comparative evidence showed that the supervisor treated women better than men and that, therefore, men were exposed to a disadvantageous term or condition of employment to which women were not; (2) the evidence similarly demonstrated that men were the primary targets of the supervisor's conduct, and, therefore, a jury could reasonably find that the conduct was gender-based; and (3) a reasonable jury could also consider the fact that some of his vulgar comments were sex-specific and that he frequently touched male-specific and sex-related body parts. Barrows v Seneca Foods Corp., 512 Fed. Appx. 115, 2013 U.S. App. LEXIS 3841 (2d Cir. N.Y. 2013).

Agency Opinions

Analysis

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A. Generally

2. Labor unions

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I. Generally

1. In general

By-law provisions for the admission of members of volunteer fire companies which provide that three negative votes or black balls will defeat election to membership appear to be valid but if they are used in a manner contrary to the Constitutions of the United States or of the State of New York or the anti-discrimination statutes of the state, such a by-law would be invlid. 1977 NY Ops Atty Gen May 9 (Informal), 1977 N.Y. AG LEXIS 114.

City is empowered to enact local law prohibiting discrimination based on sexual orientation and may by local law expand jurisdiction of its human rights commission to allow consideration of allegations of such discrimination. 1987 NY Ops Atty Gen No. 87-48, 1987 N.Y. AG LEXIS 56.

Licensing officials are authorized to consider the fitness of an applicant. In considering the effect of a prior conviction, the licensing officer may deny a license only after making the determinations required by the Legislature. No public hearing is required in making such a licensing determination. N.Y. Op. Att'y Gen. No. 84-37.

II. Employment Discrimination

A. Generally

2. Labor unions

Teachers' association proposal regarding retirement benefits does not violate Exec § 296.1 notwithstanding contentions that (1) by giving an added benefit to employees who exercise their right to retire at age 55 it discriminates on the basis of age against those who do not have that right because, having entered the service of the School District late, they may not retire at that age, and (2) it discriminates against employees who, by reason of disability, may have to retire before becoming 55. Re Windsor Asso. of Office Personnel & School Aides, 1984 Dec PERB No. U-7167.

B. Hiring/Failure to Hire

3. In general

Information as to age, sex, race and similar personal data requested in current civil service examination applications does not constitute an unlawful discriminatory practice. 1976 N.Y. Op. Att'y Gen. No. 34, 1976 N.Y. AG LEXIS 19.

It would seem that General Municipal Law § 103(1) does not preempt the enactment of a local law requiring, among other "affirmative actions", that prime contractors on construction contracts which are subject to competitive bidding requirements set aside a certain percentage of their contracts for the award of subcontracts to minority business enterprises. This Department is not in a position to determine whether such a local law adopted by a county is inconsistent with General Municipal Law, § 103(1). Prior opinions superseded to the extent inconsistent. 1981 Op St Compt No. 80-696.

4. Sex discrimination

A bylaw of a volunteer fire department may not exclude women from membership. 1975 NY Ops Atty Gen Apir 8 (Informal), 1975 N.Y. AG LEXIS 104.

C. Termination/Discharge from Employment

5. Age discrimination, generally

6. —Termination at age 70

The mandatory retirement age of 70, contained in the provisions of the Retirement and Social Security Law, governs the City of Auburn; and the City Clerk, as a member of the New York State Employees' Retirement System, is subject to its provisions regardless of his manner of appointment. 1977 NY Ops Atty Gen July 15 (Informal), 1977 N.Y. AG LEXIS 77.

7. Discrimination based on disability, generally

8. —Pregnancy

Disability Benefits Law, § 205(3) is superseded to the extent that it is inconsistent with Title VII of the 1964 Civil Rights Act on the subject of discrimination based on pregnancy disability. Further, the New York State Human Rights Law continues in full force and effect on that subject. 1980 N.Y. Op. Att'y Gen. No. 15, 1980 N.Y. AG LEXIS 96.

D. Benefits/Denial of Benefits

9. Seniority-related benefits

Teachers' association proposal regarding retirement benefits does not violate Exec § 296.1 notwithstanding contentions that (1) by giving an added benefit to employees who exercise their right to retire at age 55 it discriminates on the basis of age against those who do not have that right because, having entered the service of the School District late, they may not retire at that age, and (2) it discriminates against employees who, by reason of disability, may have to retire before becoming 55. Re Windsor Asso. of Office Personnel & School Aides, 1984 Dec PERB No. U-7167.

10. Pregnancy-related benefits

A county employee who has been granted a maternity leave of absence is entitled to the same use of accumulated leave time as

any other individual suffering from temporary physical impairment and such accrued leave time shall be paid at a rate based on the individual's current salary. 1978 NY Ops Atty Gen July 14, (Informal), 1978 N.Y. AG LEXIS 94.

Disability Benefits Law, § 205(3) is superseded to the extent that it is inconsistent with Title VII of the 1964 Civil Rights Act on the subject of discrimination based on pregnancy disability. Further, the New York State Human Rights Law continues in full force and effect on that subject. 1980 N.Y. Op. Att'y Gen. No. 15, 1980 N.Y. AG LEXIS 96.

An employee who is absent from work due to pregnancy must receive the same benefits as someone with any other physical or medical impairment or disability. This includes sick pay and other benefits connected with temporary physical disability. 1980 Op St Compt No. 80-14, 1980 N.Y. Comp. LEXIS 347.

E. Other Employment Matters

11. In general

Nursing homes operated by religious organizations may grant preference to members of their religious faith in the admission of patients to their facility provided that such preference may not be accorded in order to effectuate discriminatory practices based on race, color or national origin. 1986 N.Y. Op. Att'y Gen. No. 86-F8.

III. Housing Discrimination

12. In general

Nursing homes operated by religious organizations may grant preference to members of their religious faith in the admission of patients to their facility provided that such preference may not be accorded in order to effectuate discriminatory practices based on race, color or national origin. 1986 N.Y. Op. Att'y Gen. No. 86-F8.

A city is empowered to regulate discrimination in housing, and to prohibit discrimination in respect to owner-occupied two-family dwellings, even though such dwellings have been exempted from one of the major proscriptions of the state law against discrimination. A city may create a private cause of action for violation of the local law. A City is without power to dispense with the requirement of a bond as a condition to injunctive relief in enforcement of the private cause of action. A City is without power to alter applicable standards of state law (except special laws passed without home rule message and relating to the property, affairs or government of the City) in respect to permits or licenses issued under state law. 1979 Op St Compt No. 79-812, 1979 N.Y. Comp. LEXIS 125.

13. Leases, generally

A landlord may not (1) ask a prospective tenant to divulge his or her past, present or future marital status; (2) require a married applicant for housing, who has been subjected to domestic violence, to obtain a divorce as a condition to renting an apartment; and (3) deny housing accommodations to all victims of domestic violence. 1985 NY Op. Att'y Gen. No. 85-F15, 1985 N.Y. AG LEXIS 8.

IV. Other Discriminations

14. Advertising

A business promotion whereby raceway patrons belonging to a specified ethnic group would be entitled to a reduced admission fee at a raceway would violate the Human Rights Law. 1978 N.Y. Op. Att'y Gen. No. 25, 1978 N.Y. AG LEXIS 182.

15. "Arab boycott"

The Arab Boycott Law applies to banking transactions. 1976 N.Y. Op. Att'y Gen. No. 69, 1976 N.Y. AG LEXIS 37.

16. Insurance

City's negotiation demand which would discriminate between unit employees based upon circumstance that unit employee is, or is not, married to someone who was covered by a health insurance plan that meets certain specifications does not violate Executive Law § 296.1(a). In The Matter of City of Mt. Vernon, 1985 July PERB No. U-7438.

17. Licensing matters

State Liquor Authority may not ask applicants for a license whether or not they have ever been arrested but may ask only about pending arrests or arrests which have not been followed by a termination in favor of the applicant. 1977 N.Y. Op. Att'y Gen. No. 26, 1977 N.Y. AG LEXIS 117.

The Board of Commissioners of Pilots may decline to renew the license of a Long Island Sound-Block Island Sound pilot, who had not reached his sixtieth birthday on January 1, 1972, solely on the ground that he has now reached the age of sixty-five. 1980 N.Y. Op. Att'y Gen. No. 55, 1980 N.Y. AG LEXIS 53.

A licensing authority, consistent with Executive and Criminal Procedure Laws, may inquire into the incidents underlying a favorable disposition of an out-of-state criminal charge. 1990 N.Y. Op. Att'y Gen. No. F90-3.

18. Discrimination by religious organizations

Nursing homes operated by religious organizations may grant preference to members of their religious faith in the admission of patients to their facility provided that such preference may not be accorded in order to effectuate discriminatory practices based on race, color or national origin. 1986 N.Y. Op. Att'y Gen. No. 86-F8.

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Unlawful discriminatory practices in regard to membership in fire corporations, CLS N-PCL § 1402(i).

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2 Am Jur Proof of Facts 2d 237, Racial Discrimination in Employment–Testing and Education Requirements.

3 Am Jur Proof of Facts 2d 221, Racial Discrimination in Employment–Recruiting and Hiring.

4 Am Jur Proof of Facts 2d 477, Racial Discrimination in Employment—Post-Hiring Practices.

7 Am Jur Proof of Facts 2d 1, Retaliatory Termination of Private Employment.

10 Am Jur Proof of Facts 2d 1, Discrimination Under Age Discrimination in Employment Act.

12 Am Jur Proof of Facts 2d 49, "Business Necessity" Justifying Prima Facie Discriminatory Employment Practice.

12 Am Jur Proof of Facts 2d 645, Sex Discrimination in Employment—Promotion Practices.

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"Redlining," consisting of denial of home loans or insurance coverage in certain neighborhoods, as discrimination in violation of §§ 804 and 805 of Fair Housing Act (42 USCS §§ 3604, 3605). 73 ALR Fed 899.

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Schwartz & Reidenberg, Data Privacy Law (1996, LLP) § 13-1(a)(1, 3).

§ 296-a. Unlawful discriminatory practices in relation to credit.

1. It shall be an unlawful discriminatory practice for any creditor or any officer, agent or employee thereof:

a. In the case of applications for credit with respect to the purchase, acquisition, construction, rehabilitation, repair or maintenance of any housing accommodation, land or commercial space to discriminate against any such applicant because of the race, creed, color, national origin, sexual orientation, gender identity or expression, military status, age, sex, marital status, disability, or familial status of such applicant or applicants or any member, stockholder, director, officer or employee of such applicant or applicants, or of the prospective occupants or tenants of such housing accommodation, land or commercial space, in the granting, withholding, extending or renewing, or in the fixing of the rates, terms or conditions of, any such credit;

b. To discriminate in the granting, withholding, extending or renewing, or in the fixing of the rates, terms or conditions of, any form of credit, on the basis of race, creed, color, national origin, sexual orientation, gender identity or expression, military status, age, sex, marital status, disability, or familial status;

c. To use any form of application for credit or use or make any record or inquiry which expresses, directly or indirectly, any limitation, specification, or discrimination as to race, creed, color, national origin, sexual orientation, gender identity or expression, military status, age, sex, marital status, disability, or familial status;

d. To make any inquiry of an applicant concerning his or her capacity to reproduce, or his or her use or advocacy of any form of birth control or family planning;

e. To refuse to consider sources of an applicant's income or to subject an applicant's income to discounting, in whole or in part, because of an applicant's race, creed, color, national origin, sexual orientation, gender identity or expression, military status, age, sex, marital status, childbearing potential, disability, or familial status;

f. To discriminate against a married person because such person neither uses nor is known by the surname of his or her spouse.

This paragraph shall not apply to any situation where the use of a surname would constitute or result in a criminal act.

2. Without limiting the generality of subdivision one of this section, it shall be considered discriminatory if, because of an applicant's or class of applicants' race, creed, color, national origin, sexual orientation, gender identity or expression, military status, age, sex, marital status or disability, or familial status, (i) an applicant or class of applicants is denied credit in circumstances where other applicants of like overall credit worthiness are granted credit, or (ii) special requirements or conditions, such as requiring co-obligors or reapplication upon marriage, are imposed upon an applicant or class of applicants in circumstances where similar requirements or conditions are not imposed upon other applicants of like overall credit worthiness.

3. It shall not be considered discriminatory if credit differentiations or decisions are based upon factually supportable, objective differences in applicants' overall credit worthiness, which may include reference to such factors as current income, assets and prior credit history of such applicants, as well as reference to any other relevant factually supportable data; provided, however, that no creditor shall consider, in evaluating the credit worthiness of an applicant, aggregate statistics or assumptions relating to race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, marital status or disability, or to the likelihood of any group of persons bearing or rearing children, or for that reason receiving diminished or interrupted income in the future.

3-a. It shall not be an unlawful discriminatory practice to consider age in determining credit worthiness when age has a demonstrable and statistically sound relationship to a determination of credit worthiness.

4. a. If so requested by an applicant for credit, a creditor shall furnish such applicant with a statement of the specific reasons for rejection of the applicant's application for credit.

b. If so requested in writing by an individual who is or was married, a creditor or credit reporting bureau shall maintain in its records a separate credit history for any such individual. Such separate history shall include all obligations as to which such bureau has notice with respect to which any such person is or was individually or jointly liable.

5. No provision of this section providing spouses the right to separately apply for credit, borrow money, or have separate credit histories maintained shall limit or foreclose the right of creditors, under any other provision of law, to hold one spouse legally liable for debts incurred by the other.

6. Any person claiming to be aggrieved by an unlawful discriminatory practice engaged in by a regulated creditor, in lieu of the procedure set forth in section two hundred ninety-seven of this article, may file a verified complaint with the superintendent, as provided hereinafter; provided, however, that the filing of a complaint with either the superintendent or the division shall bar subsequent recourse to the other agency, as well as to any local commission on human rights, with respect to the grievance complained of.

7. In the case of a verified complaint filed with the superintendent the following procedures shall be followed:

a. After receipt of the complaint, the superintendent shall make a determination within thirty days of whether there is probable cause to believe that the person named in the complaint has engaged in or is engaging in an unlawful discriminatory practice. If the superintendent determines there is no such probable cause, the complaint shall be dismissed. If the superintendent determines that there is such probable cause, he or she shall attempt to resolve such complaint by conference and conciliation. If conciliation is achieved, the terms shall be recorded in a written agreement signed by the creditor and complainant, a copy of which shall be forwarded to the commissioner.

b. If conciliation is not achieved, the superintendent or his or her designated representative shall conduct a hearing with respect to the alleged violation of this section. All interested parties shall be entitled to adequate and timely notice of the hearing. Such parties shall have the right to be represented by counsel or by other representatives of their own choosing; to offer evidence and witnesses in their own behalf and to cross-examine other parties and witnesses; to have the power of subpoena exercised in their behalf; and to have access to a written record of such hearing. The superintendent or his or her representative shall not be bound by the strict rules of evidence prevailing in courts of law or equity. The testimony taken shall be under oath and a record shall be made of the proceedings. A written decision shall be made by the superintendent or his or her designated representative separately setting forth findings of fact and conclusions of law. A copy of such decision shall be forwarded to the commissioner.

c. If the superintendent finds that a violation of this section has occurred, the superintendent shall issue an order which shall do one or more of the following:

(1) impose a fine in an amount not to exceed ten thousand dollars for each violation, to be paid to the people of the state of New York;

(2) award compensatory damages to the person aggrieved by such violation;

(3) for a claim of sex discrimination only, award reasonable attorney's fees attributable to such claim to any prevailing party; provided, however, that a prevailing respondent or defendant in order to recover such reasonable attorney's fees must make a motion requesting such fees and show that the action or proceeding brought was frivolous. In no case shall attorney's fees be awarded to the department, nor shall the department be liable to a prevailing party for attorney's fees. In order to find the action or proceeding to be frivolous, the superintendent must find in writing one or more of the following:

(a) the action or proceeding was commenced, used or continued in bad faith, solely to delay or prolong the resolution of the litigation or to harass or maliciously injure another; or

(b) the action or proceeding was commenced or continued in bad faith without any reasonable basis and could not be supported by a good faith argument for an extension, modification or reversal of existing law. If the action or proceeding was promptly discontinued when the party or attorney learned or should have learned that the action or proceeding lacked such a reasonable basis, the court may find that the party or the attorney did not act in bad faith.

(4) require the regulated creditor to cease and desist from such unlawful discriminatory practices;

(5) require the regulated creditor to take such further affirmative action as will effectuate the purposes of this section, including, but not limited to, granting the credit which was the subject of the complaint.

d. Any complainant, respondent or other person aggrieved by any order or final determination of the superintendent may obtain judicial review thereof.

8. Where the superintendent makes a determination that a regulated creditor has engaged in or is engaging in discriminatory practices, the superintendent is empowered to issue appropriate orders to such creditor pursuant to the banking law. Such orders may be issued without the necessity of a complaint being filed by an aggrieved person.

9. Whenever any creditor makes application to the superintendent of financial services to take any action requiring consideration by the superintendent of the public interest and the needs and convenience thereof, or requiring a finding that the financial responsibility, experience, charter, and general fitness of the applicant, and of the members thereof if the applicant be a co-partnership or association, and of the officers and directors thereof if the applicant be a corporation, are such as to command the confidence of the community and to warrant belief that the business will be operated honestly, fairly, and efficiently, such creditor shall certify to the superintendent compliance with the provisions of this section. In the event that the records of the department of financial services show that such creditor has been found to be in violation of this section, such creditor shall describe what action has been taken with respect to its credit policies and procedures to remedy such violation or violations. The superintendent shall, in approving the forego-

ing applications and making the foregoing findings, give appropriate weight to compliance with this section.

10. Any complaint filed with the superintendent pursuant to this section shall be so filed within one year after the occurrence of the alleged unlawful discriminatory practice.

11. The superintendent is hereby empowered to promulgate rules and regulations hereunder to effectuate the purposes of this section.

12. The provisions of this section, as they relate to age, shall not apply to persons under the age of eighteen years.

HISTORY:

Add, L 1974, ch 173, § 6, eff July 15, 1974; amd, L 1974, ch 565, §§ 2, 3, eff May 23, 1974; L 1976, ch 632, § 3; L 1977, ch 168, §§ 1, 2, eff Aug 22, 1978; L 1987, ch 114, § 1, eff June 16, 1987; L 1999, ch 405, §§ 9, 10 (Part D), eff Aug 6, 1999; L 2000, ch 166, §§ 27–29, eff July 18, 2000; L 2002, ch 2, § 14, eff Jan 16, 2003 (see 2002 note below); L 2003, ch 106, § 20, eff July 1, 2003 (see 2003 note below); L 2011, ch 62, § 104 (Part A), eff Oct 3, 2011; L 2012, ch 155, § 52, eff July 18, 2012; L 2015, ch 364, § 2, effective January 19, 2016; L 2019, ch 8, § 14, effective February 24, 2019.

Editor's Notes Laws 2002, ch 2, § 1, eff Jan 16, 2003, provides as follows:

Section 1. Legislative findings and intent. The legislature reaffirms that the state has the responsibility to act to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life, and that the failure to provide such equal opportunity, whether because of discrimination, prejudice, intolerance or inadequate education, training, housing or health care not only threatens the rights and proper privileges of its inhabitants, but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants.

The legislature further finds that many residents of this state have encountered prejudice on account of their sexual orientation, and that this prejudice has severely limited or actually prevented access to employment, housing and other basic necessities of life, leading to deprivation and suffering. The legislature further recognizes that this prejudice has fostered a general climate of hostility and distrust, leading in some instances to physical violence against those perceived to be homosexual or bisexual.

In so doing, the legislature makes clear its action is not intended to promote any particular attitude, course of conduct or way of life. Rather its purpose is to ensure that individuals who live in our free society have the capacity to make their own choices, follow their own beliefs and conduct their own lives as they see fit, consistent with existing law.

Nothing in this legislation should be construed to create, add, alter or abolish any right to marry that may exist under the constitution of the United States, or this state and/or the laws of this state.

Laws 2003, ch 106, §§ 1 and 1-a, eff July 1, 2003, provide as follows:

Section 1. Legislative findings and intent. The legislature recognizes that the individuals who are members of the military make a tremendous sacrifice, especially in times like these when our military personnel are in many locations throughout the world and here in New York fighting against terrorism. This sacrifice is just as real for the men and women who comprise our reserve armed forces and state organized militia. For those who are not full-time active duty in the military, but instead are called to active duty as a member of the reserve armed forces or state organized militia, the rest of their lives must be put on hold to accommodate that service. However, such military personnel continue to be responsible for their own well-being and the well-being of their families and they must still face the obligations that exist in their everyday lives. Steps have been taken to ease some of the burdens that these brave men and women encounter, to allow them to focus their full energy on defending our country; however, the legislature recognizes that more must be done to ensure that military personnel engaged in active duty are not troubled by their obligations at home. In addition, the legislature recognizes that members of the military should not be discriminated against based upon their military status in areas such as housing, employment and education.

§ 1-a. Short title. This act shall be known as the "Patriot Plan".

Laws 2015, ch 364, § 4, eff January 19, 2016, provides:

§ 4. This act shall take effect on the ninetieth day after it shall have become a law, and shall apply to actions commenced on or after such date.

Laws 2019, ch 8, §§ 1, 25, provide:

Section 1. The legislature reaffirms that the state has the responsibility to act to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life, and that the failure to provide such equal opportunity, whether because of discrimination, prejudice, intolerance or inadequate education, training, housing or health care not only threatens the rights and proper privileges of its inhabitants, but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants.

The legislature further finds that many residents of this state have encountered prejudice on account of their gender identity or expression, and that this prejudice has severely limited or actually prevented access to employment, housing and other basic necessities of life, leading to deprivation and suffering. The legislature further recognizes that this prejudice has fostered a general climate of hostility and distrust, leading in some instances to physical violence against those perceived to live in a gender identity or expression which is different from that traditionally associated with the sex assigned to that person at birth.

In so doing, the legislature makes clear its action is not intended to promote any particular attitude, course of conduct or way of life. Rather its purpose is to ensure that individuals who live in our free society have the capacity to make their own choices, follow their own beliefs and conduct their own lives as they see fit, consistent with existing law.

The legislature further finds that, as court decisions have properly held, New York's sex discrimination laws prohibit discrimination based on gender stereotypes or because an individual has transitioned or intends to transition from one gender to another. This legislation is intended to codify this principle and to ensure that the public understands that discrimination on the basis of gender identity and expression is prohibited.

§ 25. This act shall take effect on the thirtieth day after it shall have become a law; provided, however, that sections nineteen through twenty-four of this act shall take effect on the first of November next succeeding the date on which it shall have become a law.

Amendment Notes The 2015 amendment by ch 364, § 2, added 7c(3); and redesignated former 7c(3) and 7c(4) as 7c(4) and 7c(5).

The 2019 amendment by ch 8, § 14, added "gender identity or expression" wherever it appears in 1, 2, and 3.

Notes to Decisions

Division of Human Rights has power to investigate and decide claim that disability insurance option (offered as part of automobile loan) was discriminatory term of credit under Human Rights Law, even though Insurance Department has statutory power and duty to determine whether policy premiums are rationally related to risks and expenses and to eliminate discriminatory practices in writing of insurance, since division has primary responsibility to "receive, investigate and pass upon" claimed discriminatory practices which violate Human Rights Law. Bing-

hamton GHS Employees Federal Credit Union v State Div. of Human Rights, 77 N.Y.2d 12, 563 N.Y.S.2d 385, 564 N.E.2d 1051, 1990 N.Y. LEXIS 3490 (N.Y. 1990).

Human Rights Commissioner's determination that disability insurance provision of automobile loan was "inextricably intertwined" with loan agreement, and was "term" of credit within meaning of CLS Exec § 296-a, was not arbitrary and capricious, even though coverage was optional with debtor, where insurance was offered in credit agreement and promissory note used by creditor, it was available with every installment loan and duration of every policy was keyed to amount and duration of loan, it was available only as part of credit transaction and was not offered to public generally, and premium was incorporated into loan. Binghamton GHS Employees Federal Credit Union v State Div. of Human Rights, 77 N.Y.2d 12, 563 N.Y.S.2d 385, 564 N.E.2d 1051, 1990 N.Y. LEXIS 3490 (N.Y. 1990).

Lender may not, as part of its regular loan procedures, offer disability benefits insurance policy, whether optional or not, that discriminates on basis of sex; such discrimination includes exclusion for disabilities caused by normal pregnancy. Binghamton GHS Employees Federal Credit Union v State Div. of Human Rights, 77 N.Y.2d 12, 563 N.Y.S.2d 385, 564 N.E.2d 1051, 1990 N.Y. LEXIS 3490 (N.Y. 1990).

CLS Exec § 296-a(1)(b) would be construed liberally to encompass optional as well as mandatory benefits of credit insurance coverage in order to effectuate purposes of remedial statute prohibiting discrimination. Binghamton GHS Employees Federal Credit Union v State Div. of Human Rights, 77 N.Y.2d 12, 563 N.Y.S.2d 385, 564 N.E.2d 1051, 1990 N.Y. LEXIS 3490 (N.Y. 1990).

Juvenile delinquency petition, alleging that juvenile committed act which ifcommitted by adult would constitute third degree sale of drugs, did not containsufficient nonhearsay allegations to make out prima facie case that substance testedwas cocaine where laboratory report attached to petition did not indicate that it wassigned by person who conducted test. In re Andy B., 205 A.D.2d 361, 613 N.Y.S.2d 366, 1994 N.Y. App. Div. LEXIS 6222 (N.Y. App. Div. 1st Dep't 1994).

New York State Attorney General's efforts in investigating national banks and their operating subsidiaries for violations of the Equal Credit Opportunity Act and N.Y. Exec. Law § 296-a constituted an unlawful exercise of visitorial powers under 12 U.S.C.S. § 484(a) because (1) 12 C.F.R. § 7.400(a)(2)(iv), which was promulgated by the Office of the Comptroller of the Currency (OCC) and precluded state officials from enforcing activities authorized or permitted under the National Bank Act, was a reasonable interpretation of 12 U.S.C.S. § 484(a) and was entitled to deference given the OCC's broad authority under 12 U.S.C.S. § 93a to implement the NBA; (2) the Attorney General's investigation concerned national banks' power under 12 U.S.C.S. § 371 to engage in real estate lending; and (3) the courts of justice exception under 12 U.S.C.S. § 484(a) did not grant governmental authorities any right to inspect, superintend, direct, regulate, or compel compliance by a national bank with respect to any law regarding the conduct of activities authorized by national banks under federal law. Clearing House Ass'n, L.L.C. v Cuomo, 510 F.3d 105, 2007 U.S. App. LEXIS 27938 (2d Cir. N.Y. 2007), aff'd in part and rev'd in part, 557 U.S. 519, 129 S. Ct. 2710, 174 L. Ed. 2d 464, 2009 U.S. LEXIS 4944 (U.S. 2009).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 292, 297; CLS Bank § 9-d.

Codes, Rules and Regulations:

Extension of credit on a nondiscriminatory basis. 3 NYCRR §§ 340.1 et seq.

Extension of credit on a nondiscriminatory basis. 3 NYCRR §§ 408.1 et seq.

Rules of Practice, Division of Human Rights. 9 NYCRR §§ 465.1.– 465.20. (CLS Exec Appx, Human R Rules §§ 465.1.– 465.20.).

General Regulations, Division of Human Rights. 9 NYCRR §§ 466.1.– 466.10. (CLS Exec Appx, Human R Rules §§ 466.1.– 466.10.).

Discrimination on the basis of sex or marital status in extension of credit. 9 NYCRR § 466.8.

Federal Aspects:

Equal Credit Opportunity Act, 15 USCS §§ 1691 et seq.

Forms: 7 Medina's Bostwick Practice Manual (Matthew Bender), Forms HR 101 et seq.(actions and proceedings relating to the Human Rights Law).

Texts: New York Employee Discrimination Handbook (1998 ed, Matthew Bender).

§ 296-b. Unlawful discriminatory practices relating to domestic workers

1. For the purposes of this section: "Domestic workers" shall have the meaning set forth in section two of the labor law.

2. It shall be an unlawful discriminatory practice for an employer to:

(a) Engage in unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature to a domestic worker when: (i) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; (ii) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or (iii) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, or offensive working environment.

(b) Subject a domestic worker to harassment as set out in paragraph (h) of subdivision 1 of section two hundred ninety-six of this article.

HISTORY:

Add, L 2010, ch 481, § 3, eff Nov 29, 2010 (see 2010 note below); L 2019, ch 8, § 15, eff Feb 24, 2019; L 2019, ch 160, § 3, effective October 11, 2019.

Editor's Notes Laws 2010, ch 481, § 1, eff Nov 29, 2010, provides as follows:

Section 1. Legislative findings and intent. Many thousands of domestic workers are employed in New York state as housekeepers, nannies, and companions to the elderly. The labor of domestic workers is central to the ongoing prosperity that the state enjoys, and yet, despite the value of their work, domestic workers do not receive the same protection of many state laws as do workers in other industries. Domestic workers often labor under harsh conditions, work long hours for low wages without benefits or job security, are isolated in their workplaces, and are endangered by sexual harassment and assault, as well as verbal, emotional and psychological abuse. Moreover, many domestic workers in the state of New York are women of color who, because of race and sex discrimination, are particularly vulnerable to unfair labor practices. Additionally, domestic workers are not afforded by law the right to organize labor unions for the purpose of collective bargaining.

The legislature finds that because domestic workers care for the most important elements of their employers' lives, their families and homes, it is in the interest of employees, employers, and the people of the state of New York to ensure that the rights of domestic workers are respected, protected, and enforced.

Laws 2019, ch 8, §§ 1, 25, provide:

Section 1. The legislature reaffirms that the state has the responsibility to act to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life, and that the failure to provide such equal opportunity, whether because of discrimination, prejudice, intolerance or inadequate education, training, housing or

health care not only threatens the rights and proper privileges of its inhabitants, but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants.

The legislature further finds that many residents of this state have encountered prejudice on account of their gender identity or expression, and that this prejudice has severely limited or actually prevented access to employment, housing and other basic necessities of life, leading to deprivation and suffering. The legislature further recognizes that this prejudice has fostered a general climate of hostility and distrust, leading in some instances to physical violence against those perceived to live in a gender identity or expression which is different from that traditionally associated with the sex assigned to that person at birth.

In so doing, the legislature makes clear its action is not intended to promote any particular attitude, course of conduct or way of life. Rather its purpose is to ensure that individuals who live in our free society have the capacity to make their own choices, follow their own beliefs and conduct their own lives as they see fit, consistent with existing law.

The legislature further finds that, as court decisions have properly held, New York's sex discrimination laws prohibit discrimination based on gender stereotypes or because an individual has transitioned or intends to transition from one gender to another. This legislation is intended to codify this principle and to ensure that the public understands that discrimination on the basis of gender identity and expression is prohibited.

§ 25. This act shall take effect on the thirtieth day after it shall have become a law; provided, however, that sections nineteen through twenty-four of this act shall take effect on the first of November next succeeding the date on which it shall have become a law.

Laws 2019, ch 160, § 16, eff August 12, 2019, provides:

§ 16. This act shall take effect immediately, provided, however:

(a) Sections one of this act shall take effect on the one hundred eightieth day after it shall have become a law.

(b) Sections one-a, two, three, four, five, seven, eight and nine of this act shall take effect on the sixtieth day after it shall have become a law.

(c) Section thirteen of this act shall take effect one year after it shall have become a law.

(d) Sections one, one-a, two, three, four, five, six and thirteen shall only apply to claims filed under such sections on or after the effective date of such sections.

(e) Effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized and directed to be made and completed on or before such effective date.

Amendment Notes The 2019 amendment by ch 8, § 15, added "sexual orientation, gender identity or expression" in 2(b).

The 2019 amendment by ch 160 § 3, substituted "worker to harassment as set out in paragraph (h) of subdivision 1 of section two hundred ninety-six of this article" for "worker to unwelcome harassment based on gender, race, religion, sexual orientation, gender identity or expression or national origin, where such harassment has the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, or offensive working environment" in 2(b).

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

45A Am Jur 2d, Job Discrimination §§ 135, 139– 142, 822—846.

22A Am Jur Pl & Pr Forms (Rev), Master and Servant § 529 (Complaint, petition, or declaration—Sex discrimination and sexual harassment—For damages).

50 Am Jur Proof of Facts 2d 127, Sexual Discrimination–Sexual Harassment Creating a Hostile Work Environment.

61 Am Jur Proof of Facts 3d 1, Employer Liability for Same–Sex Harassment.

62 Am Jur Trials 235, Individual Liability for Sexual Harassment.

33 Am Jur Trials 257, Sexual Harassment Damages and Remedies.

61 Am Jur Trials 489, Sexual Harassment in Employment.

73 Am Jur Trials 1, Taking the Deposition of the Sexual Harassment Plaintiff.

65 Am Jur Trials 65, Workplace Sexual Harassment: Quid Pro Quo.

Annotations:

When is work environment intimidating, hostile or offensive, so as to constitute sexual harassment under state law. 93 ALR5th 47.

Compensatory damages recoverable under state law actions for employer's sexual harassment or discrimination. 14 ALR6th 417.

§ 296-c. Unlawful discriminatory practices relating to interns

1. As used in this section, "Intern" means a person who performs work for an employer for the purpose of training under the following circumstances:

a. the employer is not committed to hire the person performing the work at the conclusion of the training period;

b. the employer and the person performing the work agree that the person performing the work is not entitled to wages for the work performed; and

c. the work performed:

(1) provides or supplements training that may enhance the employability of the intern;

(2) provides experience for the benefit of the person performing the work;

(3) does not displace regular employees; and

(4) is performed under the close supervision of existing staff.

2. It shall be an unlawful discriminatory practice for an employer to:

a. refuse to hire or employ or to bar or to discharge from internship an intern or to discriminate against such intern in terms, conditions or privileges of employment as an intern because of the intern's age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status, or domestic violence victim status;

b. discriminate against an intern in receiving, classifying, disposing or otherwise acting upon applications for internships because of the intern's age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status, or domestic violence victim status;

c. print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment as an intern or to make any inquiry in connection with prospective employment, which expresses directly or indirectly, any limitation, specification or discrimination as to age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital

status or domestic violence victim status, or any intent to make any such limitation, specification or discrimination, unless based upon a bona fide occupational qualification; provided, however, that neither this paragraph nor any provision of this chapter or other law shall be construed to prohibit the department of civil service or the department of personnel of any city containing more than one county from requesting information from applicants for civil service internships or examinations concerning any of the aforementioned characteristics, other than sexual orientation, for the purpose of conducting studies to identify and resolve possible problems in recruitment and testing of members of minority groups to insure the fairest possible and equal opportunities for employment in the civil service for all persons, regardless of age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status or domestic violence victim status;

d. to discharge, expel or otherwise discriminate against any person because he or she has opposed any practices forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article; or

e. to compel an intern who is pregnant to take a leave of absence, unless the intern is prevented by such pregnancy from performing the activities involved in the job or occupation in a reasonable manner.

3. It shall be an unlawful discriminatory practice for an employer to:

a. engage in unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature to an intern when:

(1) submission to such conduct is made either explicitly or implicitly a term or condition of the intern's employment;

(2) submission to or rejection of such conduct by the intern is used as the basis for employment decisions affecting such intern; or

(3) such conduct has the purpose or effect of unreasonably interfering with the intern's work performance by creating an intimidating, hostile, or offensive working environment; or

b. subject an intern to unwelcome harassment based on age, sex, race, creed, color, sexual orientation, military status, disability, predisposing genetic characteristics, marital status, domestic violence victim status, or national origin, where such harassment has the purpose or effect of unreasonably interfering with the intern's work performance by creating an intimidating, hostile, or offensive working environment.

4. Nothing in this section shall affect any restrictions upon the activities of persons licensed by the state liquor authority with respect to persons under twenty-one years of age.

5. Nothing in this section shall create an employment relationship between an employer and an intern for the purposes of articles six, seven, eighteen or nineteen of the labor law.

HISTORY:

L 2014, ch 97, § 1, effective July 22, 2014.

§ 297. Procedure.

1. Any person claiming to be aggrieved by an unlawful discriminatory practice may, by himself or herself or his or her attorney-at-law, make, sign and file with the division a verified complaint in writing which shall state the name and address of the person alleged to have committed the unlawful discriminatory practice complained of and which shall set forth the particulars thereof and contain such other information as may be required by the division. The commissioner of labor or the attorney general, or the chair of the commission on quality of care for the mentally disabled, or the division on its own motion may, in like manner, make, sign and file such complaint. In connection with the filing of such complaint, the attorney general is authorized to take proof, issue subpoenas and administer oaths in the manner provided in the civil practice law and rules. Any employer whose employees, or some of them, refuse or threaten to refuse to cooperate with the provisions of this article, may file with the division a verified complaint asking for assistance by conciliation or other remedial action.

2. a. After the filing of any complaint, the division shall promptly serve a copy thereof upon the respondent and all persons it deems to be necessary parties, and make prompt investigation in connection therewith. Within one hundred eighty days after a complaint is filed, the division shall determine whether it has jurisdiction and, if so, whether there is probable cause to believe that the person named in the complaint, hereinafter referred to as the respondent, has engaged or is engaging in an unlawful discriminatory practice. If it finds with respect to any respondent that it lacks jurisdiction or that probable cause does not exist, the commissioner shall issue and cause to be served on the complainant an order dismissing such allegations of the said complaint as to such respondent.

b. Notwithstanding the provisions of paragraph a of this subdivision, with respect to housing discrimination only, after the filing of any complaint, the division shall, within thirty days after receipt, serve a copy thereof upon the respondent and all persons it deems to be necessary parties, and make prompt investigation in connection therewith. Within one hundred days after a complaint is filed, the division shall determine whether it has jurisdiction and, if so, whether there is probable cause to believe that the person named in the complaint, hereinafter referred to as the respondent, has engaged or is engaging in an unlawful discriminatory practice. If it finds with respect to any respondent that it lacks jurisdiction or that probable cause does not exist, the commissioner shall issue and cause to be served

on the complainant an order dismissing such allegations of the said complaint as to such respondent.

3. a. If in the judgment of the division the circumstances so warrant, it may, at any time after the filing of the complaint, endeavor to eliminate such unlawful discriminatory practice by conference, conciliation and persuasion. Each conciliation agreement shall include provisions requiring the respondent to refrain from the commission of unlawful discriminatory practices in the future and may contain such further provisions as may be agreed upon by the division, the complainant, and the respondent, including a provision for the entry in the supreme court in any county in the judicial district where the alleged unlawful discriminatory practice was committed, or where any respondent resides or maintains an office for the transaction of business, or where the housing accommodation, land or commercial space specified in the complaint is located, of a consent decree embodying the terms of the conciliation agreement. The division shall not disclose what has transpired in the course of such endeavors.

b. If a conciliation agreement is entered into, the division shall issue an order embodying such agreement and serve a copy of such order upon all parties to the proceeding, and if a party to any such proceeding is a regulated creditor, the division shall forward a copy of the order embodying such agreement to the superintendent.

c. If the division finds that noticing the complaint for hearing would be undesirable, the division may, in its unreviewable discretion, at any time prior to a hearing before a hearing examiner, dismiss the complaint on the grounds of administrative convenience. However, in cases of housing discrimination only, an administrative convenience dismissal will not be rendered without the consent of the complainant. The division may, subject to judicial review, dismiss the complaint on the grounds of untimeliness if the complaint is untimely or on the grounds that the election of remedies is annulled.

d. [Relettered]

4. a. Within two hundred seventy days after a complaint is filed, or within one hundred twenty days after the court has reversed and remanded an order of the division dismissing a complaint for lack of jurisdiction or for want of probable cause, unless the division has dismissed the complaint or issued an order stating the terms of a conciliation agreement not objected to by the complainant, the division shall cause to be issued and served a written notice, together with a copy of such complaint, as the same may have been amended, requiring the respondent or respondents to answer the charges of such complaint and appear at a public hearing before a hearing examiner at a time not less than five nor more than fifteen days after such service and at a place to be fixed by the division and specified in such notice. The place of any such hearing shall be the office of the division or such other place as may be designated by the division. The case in support of the complaint shall be presented by one of the attorneys or agents of the division and, at the option of the complainant, by his or her attorney. With the consent of the division, the case in support of the complainant may be presented solely by his or her attorney. No person who shall have previously made the investigation, engaged in a conciliation proceeding or caused the notice to be issued shall act as a hearing examiner in such case. Attempts at conciliation shall not be received in evidence. At least two business days prior to the hearing the respondent shall, and any necessary party may, file a written answer to the complaint, sworn to subject to the penalties of perjury, with the division and serve a copy upon all other parties to the proceeding. A respondent who has filed an answer, or whose default in answering has been set aside for good cause shown may appear at such hearing in person or otherwise, with or without counsel, cross examine witnesses and the complainant and submit testimony. The complainant and all parties shall be allowed to present testimony in person or by counsel and cross examine witnesses. The hearing examiner may in his or her discretion permit any person who has a substantial personal interest to intervene as a party, and may require that necessary parties not already parties be joined. The division or the complainant shall have the power reasonably and fairly to amend any complaint, and the respondent and any other party shall have like power to amend his or her answer. The hearing examiner shall not be bound by the strict rules of evidence prevailing in courts of law or equity. The testimony taken at the hearing shall be under oath and a record made.

b. If the respondent fails to answer the complaint, the hearing examiner designated to conduct the hearing may enter the default and the hearing shall proceed on the evidence in support of the complaint. Such default may be set aside only for good cause shown upon equitable terms and conditions.

c. Within one hundred eighty days after the commencement of such hearing, a determination shall be made and an order served as hereinafter provided. If, upon all the evidence at the hearing, the commissioner shall find that a respondent has engaged in any unlawful discriminatory practice as defined in this article, the commissioner shall state findings of fact and shall issue and cause to be served on such respondent an order, based on such findings and setting them forth, and including such of the following provisions as in the judgment of the division will effectuate the purposes of this article: (i) requiring such respondent to cease and desist from such unlawful discriminatory practice; (ii) requiring such respondent to take such affirmative action, including (but not limited to) hiring, reinstatement or upgrading of employees, with or without back pay, restoration to membership in any respondent labor organization, admission to or participation in a guidance program, apprenticeship

training program, on-the-job training program or other occupational training or retraining program, the extension of full, equal and unsegregated accommodations, advantages, facilities and privileges to all persons, granting the credit which was the subject of any complaint, evaluating applicants for membership in a place of accommodation without discrimination based on race, creed, color, national origin, sex, disability or marital status, and without retaliation or discrimination based on opposition to practices forbidden by this article or filing a complaint, testifying or assisting in any proceeding under this article; (iii) awarding of compensatory damages to the person aggrieved by such practice; (iv) awarding of punitive damages, in cases of employment discrimination related to private employers, and, in cases of housing discrimination, with damages in housing discrimination cases in an amount not to exceed ten thousand dollars, to the person aggrieved by such practice; (v) requiring payment to the state of profits obtained by a respondent through the commission of unlawful discriminatory acts described in subdivision three-b of section two hundred ninety-six of this article; and (vi) assessing civil fines and penalties, in an amount not to exceed fifty thousand dollars, to be paid to the state by a respondent found to have committed an unlawful discriminatory act, or not to exceed one hundred thousand dollars to be paid to the state by a respondent found to have committed an unlawful discriminatory act which is found to be willful, wanton or malicious; (vii) requiring a report of the manner of compliance. If, upon all the evidence, the commissioner shall find that a respondent has not engaged in any such unlawful discriminatory practice, he or she shall state findings of fact and shall issue and cause to be served on the complainant an order based on such findings and setting them forth dismissing the said complaint as to such respondent. A copy of each order issued by the commissioner shall be delivered in all cases to the attorney general, the secretary of state, if he or she has issued a license to the respondent, and such other public officers as the division deems proper, and if any such order issued by the commissioner concerns a regulated creditor, the commissioner shall forward a copy of any such order to the superintendent. A copy of any complaint filed against any respondent who has previously entered into a conciliation agreement pursuant to paragraph a of subdivision three of this section or as to whom an order of the division has previously been entered pursuant to this paragraph shall be delivered to the attorney general, to the secretary of state if he or she has issued a license to the respondent and to such other public officers as the division deems proper, and if any such respondent is a regulated creditor, the commissioner shall forward a copy of any such complaint to the superintendent.

d. The division shall establish rules of practice to govern, expedite and effectuate the foregoing procedure and its own actions thereunder.

e. Any civil penalty imposed pursuant to this subdivision shall be separately stated, and shall be in addition to and not reduce or offset any other damages or payment imposed upon a respondent pursuant to this article. In cases of employment discrimination where the employer has fewer than fifty employees, such civil fine or penalty may be paid in reasonable installments, in accordance with regulations promulgated by the division. Such regulations shall require the payment of reasonable interest resulting from the delay, and in no case permit installments to be made over a period longer than three years.

5. Any complaint filed pursuant to this section must be so filed within one year after the alleged unlawful discriminatory practice. In cases of sexual harassment in employment, any complaint filed pursuant to this section must be so filed within three years after the alleged unlawful discriminatory practices.

6. At any time after the filing of a complaint with the division alleging an unlawful discriminatory practice under this article, if the division determines that the respondent is doing or procuring to be done any act tending to render ineffectual any order the commissioner may enter in such proceeding, the commissioner may apply to the supreme court in any county where the alleged unlawful discriminatory practice was committed, or where any respondent resides or maintains an office for the transaction of business, or if the complaint alleges an unlawful discriminatory practice under subdivision two-a or paragraph (a), (b) or (c) of subdivision five of section two hundred ninety-six of this article, where the housing accommodation, land or commercial space specified in the complaint is located, or, if no supreme court justice is available in such county, in any other county within the judicial district, for an order requiring the respondents or any of them to show cause why they should not be enjoined from doing or procuring to be done such act. The order to show cause may contain a temporary restraining order and shall be served in the manner provided therein. On the return date of the order to show cause, and after affording all parties an opportunity to be heard, if the court deems it necessary to prevent the respondents from rendering ineffectual an order relating to the subject matter of the complaint, it may grant appropriate injunctive relief upon such terms and conditions as it deems proper.

7. Not later than one year from the date of a conciliation agreement or an order issued under this section, and at any other times in its discretion, the division shall investigate whether the respondent is complying with the terms of such agreement or order. Upon a finding of non-compliance, the division shall take appropriate action to assure compliance.

8. No officer, agent or employee of the division shall make public with respect to a particular person without his consent information from reports obtained by the division except as necessary to the conduct of a proceeding under this section.

9. Any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for damages, including, in cases of housing discrimination only, punitive damages, and such other remedies as may be appropriate, including any civil fines and penalties provided in subdivision four of this section, unless such person had filed a complaint hereunder or with any local commission on human rights, or with the superintendent pursuant to the provisions of section two hundred ninety-six-a of this chapter, provided that, where the division has dismissed such complaint on the grounds of administrative convenience, on the grounds of untimeliness, or on the grounds that the election of remedies is annulled, such person shall maintain all rights to bring suit as if no complaint had been filed with the division. At any time prior to a hearing before a hearing examiner, a person who has a complaint pending at the division may request that the division dismiss the complaint and annul his or her election of remedies so that the human rights law claim may be pursued in court, and the division may, upon such request, dismiss the complaint on the grounds that such person's election of an administrative remedy is annulled. Notwithstanding subdivision (a) of section two hundred four of the civil practice law and rules, if a complaint is so annulled by the division, upon the request of the party bringing such complaint before the division, such party's rights to bring such cause of action before a court of appropriate jurisdiction shall be limited by the statute of limitations in effect in such court at the time the complaint was initially filed with the division. Any party to a housing discrimination complaint shall have the right within twenty days following a determination of probable cause pursuant to subdivision two of this section to elect to have an action commenced in a civil court, and an attorney representing the division of human rights will be appointed to present the complaint in court, or, with the consent of the division, the case may be presented by complainant's attorney. A complaint filed by the equal employment opportunity commission to comply with the requirements of 42 USC 2000e-5(c) and 42 USC 12117(a) and 29 USC 633(b) shall not constitute the filing of a complaint within the meaning of this subdivision. No person who has initiated any action in a court of competent jurisdiction or who has an action pending before any administrative agency under any other law of the state based upon an act which would be an unlawful discriminatory practice under this article, may file a complaint with respect to the same grievance under this section or under section two hundred ninety-six-a of this article. In cases of housing discrimination only, a person whose complaint has been dismissed by the division after investigation for lack of jurisdiction or lack of probable cause may file the same cause of action in a court of appropriate jurisdiction pursuant to this section, unless judicial review of such dismissal has been sought pursuant to section two hundred ninety-eight of this article.

10. With respect to all cases of housing discrimination and housing related credit discrimination in an action or proceeding at law under this section or section two hundred ninety-eight of this article, the commissioner or the court may in its discretion award reasonable attorney's fees to any prevailing or substantially prevailing party; and with respect to a claim of credit discrimination where sex is a basis of such discrimination, and with respect to all claims of employment discrimination in an action or proceeding at law under this section or section two hundred ninety-eight of this article, the commissioner or the court may in its discretion award reasonable attorney's fees attributable to such claim to any prevailing party; provided, however, that a prevailing respondent or defendant in order to recover such reasonable attorney's fees must make a motion requesting such fees and show that the action or proceeding brought was frivolous; and further provided that in a proceeding brought in the division of human rights, the commissioner may only award attorney's fees as part of a final order after a public hearing held pursuant to subdivision four of this section. In no case shall attorney's fees be awarded to the division, nor shall the division be liable to a prevailing or substantially prevailing party for attorney's fees, except in a case in which the division is a party to the action or the proceeding in the division's capacity as an employer. In cases of employment discrimination, a respondent shall only be liable for attorney's fees under this subdivision if the respondent has been found liable for having committed an unlawful discriminatory practice. In order to find the action or proceeding to be frivolous, the court or the commissioner must find in writing one or more of the following:

(a) the action or proceeding was commenced, used or continued in bad faith, solely to delay or prolong the resolution of the litigation or to harass or maliciously injure another; or

(b) the action or proceeding was commenced or continued in bad faith without any reasonable basis and could not be supported by a good faith argument for an extension, modification or reversal of existing law. If the action or proceeding was promptly discontinued when the party or attorney learned or should have learned that the action or proceeding lacked such a reasonable basis, the court may find that the party or the attorney did not act in bad faith.

HISTORY:

Add, L 1951, ch 800, § 1, with substance transferred from § 132; amd, L 1952, ch 285, § 7; L 1960, ch 978, § 1; L 1961, ch 414, § 5; L 1962, ch 164, § 2; L 1962, ch 310, § 134; L 1962, ch 369, § 3; L 1962, ch 529, § 1; L 1965, ch 4, § 2; L 1965, ch 851, § 4, eff Sept 1, 1965; L 1968, ch 10, § 2; L 1968, ch 958, § 6, eff July 1, 1968; L 1969, ch 218, § 1, eff April 25, 1969; L 1969, ch 359, § 9,10; L 1969, ch 1070, § 2; L 1970, ch 316, § 1; L 1974, ch 27, § 2; L 1974, ch 173, §§ 7–9, eff July 15, 1974; L 1977, ch 729, §§ 1, 2, eff Aug 5, 1977; L 1982, ch 863, § 1, eff Sept 1, 1982; L 1984, ch 83, § 1; L 1984, ch 266, § 1, eff Aug 24, 1984; L 1989, ch

568, § 1, eff Jan 13, 1990, expired and repealed June 30, 1997; L 1991, ch 342, § 1; L 1991, ch 368, §§ 1, 6, eff July 15, 1991; L 1992, ch 182, § 1, eff June 16, 1992; L 1994, ch 210, § 1, eff June 28, 1994; L 1994, ch 262, § 2, eff Nov 3, 1994; L 1997, ch 374, §§ 1, 2, eff Aug 5, 1997; L 1999, ch 405, §§ 11–17 (Part D), eff Aug 6, 1999; L 2000, ch 166, §§ 30, 32–34, eff July 18, 2000; L 2009, ch 57, §§ 1, 2 (Part AA), eff July 6, 2009; L 2015, ch 364, § 1, effective January 19, 2016; L 2019, ch 160, § 5, effective October 11, 2019; L 2019, ch 160, § 13, effective August 12, 2020; L 2019, ch 161, § 3, effective October 11, 2019; L 2020, ch 236, § 1, effective January 5, 2021.

Editor's Notes See 1962 note under § 63-a.

See 1968 note under § 290.

Laws 1969, ch 1070, § 2-a, eff June 25, 1969, provides as follows:

§ 2-a. None of the amendments made by this act shall apply to the city of New York. (Amended by L 1970, ch 493, § 2, eff Sept 1, 1970, by adding § 2-a to Laws 1969, ch 1070.).

Laws 1989, ch 568, § 2, eff Jan 13, 1990, expires and repealed June 30, 1997, provides as follows:

§ 2. The commissioner of human rights shall establish a human rights arbitration advisory committee to assist and advise him or her in the promulgation of rules and regulations, and the implementation and functioning of the voluntary arbitration procedure. The committee shall consist of seven members, three of whom shall be appointed by the governor with at least one of these appointment being a member of the New York State bar association; two of whom shall be appointed by the speaker of the assembly; and two of whom shall be appointed by the majority leader of the senate. Committee members shall be chosen to represent a balance of complainant and respondent interests. The governor shall designate a chairperson of the committee. The chairperson and the commissioner of human rights each shall have the authority to convene the committee from time to time, as they deem appropriate. The committee shall report to the governor, the speaker of the assembly, and the majority leader of the senate on or before March 31, 1997, regarding the operation of the arbitration program; and the committee shall be entitled to receive from the commissioner of human rights such information as is necessary to monitor the arbitration program. The commission of human rights shall report to the governor, the speaker of the assembly and the majority leader of the senate semi-annually regarding the operation of the voluntary arbitration procedure. (Amd, L 1994, ch 210, § 2, eff June 28, 1994.).

Laws 1989, ch 568, § 3, eff Jan 13, 1990, provides as follows:

§ 3. This act shall take effect on the one hundred eightieth day after it shall have become law, and shall expire on June 30, 1997, on which date the provisions of this act shall be deemed repealed. (Amd, L 1994, ch 210, § 2, eff June 28, 1994.).

Laws 1991, ch 342, § 2, eff July 15, 1991, provides as follows:

§ 2. This act shall take effect immediately and shall apply to complaints filed with any federal commission on human rights on or after such date.

Laws 1992, ch 182, § 2, eff June 16, 1992, provides as follows:

§ 2. This act shall take effect immediately and shall apply to complaints filed with any federal commission on human rights on or after such date.

Laws 2015, ch 364, § 4, eff January 19, 2016, provides:

§ 4. This act shall take effect on the ninetieth day after it shall have become a law, and shall apply to actions commenced on or after such date.

Laws 2019, ch 160, § 16, eff August 12, 2019, provide:

§ 16. This act shall take effect immediately, provided, however:

(a) Sections one of this act shall take effect on the one hundred eightieth day after it shall have become a law.

(b) Sections one-a, two, three, four, five, seven, eight and nine of this act shall take effect on the sixtieth day after it shall have become a law.

(c) Section thirteen of this act shall take effect one year after it shall have become a law.

(d) Sections one, one-a, two, three, four, five, six and thirteen shall only apply to claims filed under such sections on or after the effective date of such sections.

(e) Effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized and directed to be made and completed on or before such effective date.

Laws 2019, ch 161, § 5, eff August 12, 2019, provides:

§ 5. This act shall take effect on the same date and in the same manner as a chapter of the laws of 2019 amending the executive law and other laws relating to increased protections for protected classes and special protections for employees who have been sexually harassed, as proposed in legislative bills numbers S. 6577 and A. 8421, takes effect.

Laws 2020, ch 236, § 3, eff January 5, 2021, provides:

§ 3. This act shall take effect on the ninetieth day after it shall have become a law.

Laws 2020, ch 236, § 3, eff January 5, 2021, provides:

§ 3. This act shall take effect on the ninetieth day after it shall have become a law.

Amendment Notes

2000. Chapter 166, § 30 amended:

Sub 1, by deleting "attorney-general" and "chairman".

1999. Chapter 405, § 13 (part d) amended:

Sub 3, par b, by deleting "serve a copy of the".

2009. Chapter 57, § 1 (part aa) amended:

Sub 4, par c, by deleting "in cases of housing discrimination only,".

The 2015 amendment by ch 364, § 1, in the first sentence of the introductory language of 10, substituted "all cases of housing discrimination and housing related credit discrimination" for "cases of housing discrimination only" and added "and with respect to a claim of employment or credit discrimination where sex is a basis of such discrimination, in an action or proceeding at law under this section or section two hundred ninety-eight of this article, the commissioner or the court may in its discretion award reasonable attorney's fees attributable to such claim to any prevailing party" and added the next to last of the introductory language of 10.

The 2019 amendment by ch 160 § 5, substituted "his or her" for "his her" in the first sentence of 1; substituted "damages, in cases of employment discrimination related to private employers, and, in cases of housing discrimination, with damages in housing discrimination cases in an amount" for "damages, in cases of housing discrimination only, in an amount" in 4(c)(iv); added "employment discrimination related to private employers and" in the first sentence of 9; and in the first sentence of the introductory paragraph of 10, substituted "claim of credit" for "claim of employment or credit", added "and with respect to all claims of employment discrimination" and substituted "the court shall award reasonable attorney's fees" for "the court may in its discretion award reasonable attorney's fees."

The 2019 amendment by ch 160, § 13, added the second sentence of 5.

The 2019 amendment by ch 161, § 3, substituted "the court may in its discretion award" for "the court shall award" in the first sentence of 10.

The 2020 amendment by ch 236, § 1, added the last sentence of 9.

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I. Generally

1. In general

In a proceeding alleging discrimination in employment on the basis of sex arising out of a then mandatory pregnancy-related resignation, notwithstanding that the regulation policy of 1959 did not then violate a statutory prescription and a complaint thereon is untimely the seniority system which became available in 1977 effectively revived that policy and constituted a separate discriminatory act, where the seniority system purportedly treated all personnel equally but disallowed credit for service preceding any resignation, thereby failing to take into account the fact that only a pregnancy-related resignation was required and imposing a distinct burden on a woman; a seniority system can be found to currently discriminate against a woman when, in computing seniority, it disregards all service rendered prior to a resignation compelled due to pregnancy, notwithstanding that the law did not prohibit sex-based discrimination when the pregnancy-related resignation was originally demanded. Board of Education v New York State Div. of Human Rights, 56 N.Y.2d 257, 451 N.Y.S.2d 700, 436 N.E.2d 1301, 1982 N.Y. LEXIS 3357 (N.Y. 1982).

Tavern owner who admitted that name selected for tavern and sign used for tavern were intended to attract male patrons and who was ordered to cease and desist from discriminating against women was not required to remove name and sign. Rosenberg v State Human Rights Appeal Board, 45 A.D.2d 929, 357 N.Y.S.2d 325, 1974 N.Y. App. Div. LEXIS 4500 (N.Y. App. Div. 4th Dep't 1974).

Despite its contention that such action was necessary to inform public of available procedures and remedies for discriminatory actions, State Division of Human Rights (SDHR) engaged in arbitrary and capricious conduct in issuing press release detailing allegations of age discrimination made against college by former employee, disclosing that matter had been settled, and setting forth parts of settlement terms, where stipulation of settlement, which SDHR had participated in negotiating on former employee's behalf, provided for absolute confidentiality except for enforcement purposes. Paul Smith's College of Arts & Sciences v Cuomo, 186 A.D.2d 888, 589 N.Y.S.2d 106, 1992 N.Y. App. Div. LEXIS 12126 (N.Y. App. Div. 3d Dep't 1992).

Sex, age, and disability discrimination claims filed against airline under CLS Exec § 296(1)(a) were not preempted by Federal Airlines Deregulation Act of 1978. Delta Air Lines v New York State Div. of Human Rights, 229 A.D.2d 132, 652 N.Y.S.2d 253, 1996 N.Y. App. Div. LEXIS 12963 (N.Y. App. Div. 1st Dep't 1996), app. dismissed, 90 N.Y.2d 882, 661 N.Y.S.2d 825, 684 N.E.2d 274, 1997 N.Y. LEXIS 2331 (N.Y. 1997), aff'd, 91 N.Y.2d 65, 666 N.Y.S.2d 1004, 689 N.E.2d 898, 1997 N.Y. LEXIS 3710 (N.Y. 1997).

Prospective sellers did not have standing to assert action under CLS Exec §§ 296 and 297 against property owners association and its environmental control committee for their denial of application by prospective buyers to use property as vacation convent, since prospective sellers had not been victims of any discrimination. Sisters of the Resurrection, New York Inc. v Country Horizons, 257 A.D.2d 729, 682 N.Y.S.2d 486, 1999 N.Y. App. Div. LEXIS 25 (N.Y. App. Div. 3d Dep't 1999).

N.Y. Exec. Law § 295(6)(a) and (b) were not collectively unconstitutional, based on the provisions for an administrative hearing under N.Y. Exec. Law § 297(4)(a) and (9); accordingly, the combined investigative and adjudicative functions of the New York State Division of Human Rights did not violate due process. Town of Oyster Bay v Kirkland, 81 A.D.3d 812, 917 N.Y.S.2d 236, 2011 N.Y. App. Div. LEXIS 1259 (N.Y. App. Div. 2d Dep't), app. dismissed, 17 N.Y.3d 778, 929 N.Y.S.2d 79, 952 N.E.2d 1073, 2011 N.Y. LEXIS 1679 (N.Y. 2011), aff'd, 19 N.Y.3d 1035, 954 N.Y.S.2d 769, 978 N.E.2d 1237, 2012 N.Y. LEXIS 2725 (N.Y. 2012).

Provision of above statute to effect that members of commission and its staff shall not disclose what has transpired "in the course of such endeavors," refers to the provision of previous sentence of statute that commissioner shall endeavor to eliminate unlawful discriminatory practice and not to facts found by the investigator for the commission. Kindt v State Com. for Human Rights, 44 Misc. 2d 896, 254 N.Y.S.2d 933, 1964 N.Y. Misc. LEXIS 1600 (N.Y. Sup. Ct. 1964), modified, 23 A.D.2d 809, 258 N.Y.S.2d 250, 1965 N.Y. App. Div. LEXIS 4484 (N.Y. App. Div. 4th Dep't 1965).

Article 15 procedure does not violate due process, since subdivision 2 of the Article provides for a separation of the investigative and quasi judicial functions of the commission members. Marrano Constr. Co. v State Com. for Human Rights, 45 Misc. 2d 1081, 259 N.Y.S.2d 4, 1965 N.Y. Misc. LEXIS 2061 (N.Y. Sup. Ct. 1965).

A cause of action based on plaintiff's claim of sexual harassment arising out of her employment relationship with defendant, who coerced her into sexual activity with his business associates in order to further his business, is cognizable under Executive Law § 297 (9), which provides that any person aggrieved by an unlawful discriminatory practice shall have a cause of action for damages, and actions of an employer which discriminate against an individual in the "terms, conditions or privileges of employment" because of that person's sex are encompassed within the ambit of actionable wrongs (see, Executive Law § 296 [1] [a]; § 292 [4]). Under the Human Rights Law, an employer is prohibited from even attempting to exploit his dominant position by imposing sexual demands upon an employee as an implicit condition of continued employment, and the employee need not prove that he or she resisted the abuse or refused to comply with the sexual demands, that tangible job benefits were lost, or that discriminatory conduct was intentional. Thoreson v Penthouse Int'l, 149 Misc. 2d 150, 563 N.Y.S.2d 968, 1990 N.Y. Misc. LEXIS 609 (N.Y. Sup. Ct. 1990), modified, 179 A.D.2d 29, 583 N.Y.S.2d 213, 1992 N.Y. App. Div. LEXIS 5427 (N.Y. App. Div. 1st Dep't 1992).

In action under Human Rights Law to recover compensatory and punitive damages for sexual harassment arising out of employer's coercion of female employee to engage in sexual acts with his business associates to further his own business interests, offensiveness of employer's conduct was not mitigated by fact that plaintiff's job as actress and model involved commercial exploitation of her physical appearance, since sexual slavery was not part of her job description, and fact that she accepted employment which exploited her sexuality did not constitute waiver of protections against sexual harassment in workplace. Thoreson v Penthouse Int'l, 149 Misc. 2d 150, 563 N.Y.S.2d 968, 1990 N.Y. Misc. LEXIS 609 (N.Y. Sup. Ct. 1990), modified, 179 A.D.2d 29, 583 N.Y.S.2d 213, 1992 N.Y. App. Div. LEXIS 5427 (N.Y. App. Div. 1st Dep't 1992).

Plaintiff failed to state cognizable claim under either New York City or New York State Human Rights Law by alleging that school district's denial of health insurance benefits to his domestic partner constituted discrimination on basis of marital status and sexual orientation. Funderburke v Uniondale Union Free Sch. Dist. No. 15, 172 Misc. 2d 963, 660 N.Y.S.2d 659, 1997 N.Y. Misc. LEXIS 260 (N.Y. Sup. Ct. 1997), aff'd, 251 A.D.2d 622, 676 N.Y.S.2d 199, 1998 N.Y. App. Div. LEXIS 7881 (N.Y. App. Div. 2d Dep't 1998).

Former university employee's state law claims under N.Y. Exec. Law § 291 were dismissed; because she chose to proceed with her discrimination complaint before the New York State Division of Human Rights (NYSDHR) and the NYSDHR did not dismiss her claim for administrative convenience, the claims were barred under N.Y. Exec. Law § 297(9). Forbes v State Univ. of N.Y., 259 F. Supp. 2d 227, 2003 U.S. Dist. LEXIS 7391 (E.D.N.Y. 2003).

Eleventh Amendment barred the 42 U.S.C.S. §§ 1981, 1983, and the New York State and City Human Rights Law complaints against a judge and a state judicial agency by the judge's former personal secretary; the Eleventh Amendment rendered the agency and the state immune from suit under § 1983 or under state law because the State of New York had not consented to suit in federal court, and because no express override of state statutory authority had been enacted by Congress in association with § 1983. Bland v New York, 263 F. Supp. 2d 526, 2003 U.S. Dist. LEXIS 5521 (E.D.N.Y. 2003).

Simply because a judge's former secretary filed an administrative complaint against a judicial agency and the judge for discrimination based on gender, race, and color with a city human rights commission did not necessarily mean that the secretary's State and City Human Rights Law claims were barred; the complaint was forwarded to the state human rights division, which dismissed it for administrative convenience. Accordingly, the election of remedies doctrine did not argue for dismissal of the secretary's claims. Bland v New York, 263 F. Supp. 2d 526, 2003 U.S. Dist. LEXIS 5521 (E.D.N.Y. 2003).

2. Procedure, generally

Complaint by Division of Human Rights charging employer with unlawful discriminatory practice relating to employment, alleging that employer's system of hiring had produced few Negro and Spanish-surnamed employees under circumstances where such minority groups were available for employment, was not insufficient to meet notice requirements of due process. State Div. of Human Rights v Kilian Mfg. Corp., 35 N.Y.2d 201, 360 N.Y.S.2d 603, 318 N.E.2d 770, 1974 N.Y. LEXIS 1309 (N.Y. 1974), app. dismissed, 420 U.S. 915, 95 S. Ct. 1108, 43 L. Ed. 2d 387, 1975 U.S. LEXIS 506 (U.S. 1975).

Under Executive Law § 297, subd 4(a), failure of complainant to appear personally and testify at hearing did not require dismissal of complaint. Batavia Lodge No. 196, L. O. M. v New York State Div. of Human Rights, 43 A.D.2d 807, 350 N.Y.S.2d 273, 1973 N.Y. App. Div. LEXIS 2914 (N.Y. App. Div. 4th Dep't 1973), rev'd, 35 N.Y.2d 143, 359 N.Y.S.2d 25, 316 N.E.2d 318, 1974 N.Y. LEXIS 1377 (N.Y. 1974).

Although it would have been better practice for Division of Human Rights to have conferred further with petitioner concerning the substantial information which it had gathered that her demotion was not the result of sex discrimination, there was no reason to declare procedure and determination of Division arbitrary or capricious or an abuse of discretion. Jackson v New York State Div. of Human Rights, 42 A.D.2d 684, 345 N.Y.S.2d 735, 1973 N.Y. App. Div. LEXIS 3988 (N.Y. App. Div. 4th Dep't 1973).

Relevant provisions of Executive Law, when read together, establish legislative intent that, before determining whether there is probable cause for complaint of discrimination, commissioner of Division of Human Rights should give complainant full opportunity to present on record, though informally, his charges against employer or other respondent, including right to submit all exhibits which he wishes to present and testimony of witnesses in addition to his own testimony. State Div. of Human Rights v New York State Drug Abuse Control Com., 59 A.D.2d 332, 399 N.Y.S.2d 541, 1977 N.Y. App. Div. LEXIS 13571 (N.Y. App. Div. 4th Dep't 1977).

An order, which affirmed the State Division of Human Rights' order dismissing petitioner's complaint alleging age discrimination by his employer as being without probable cause, would be annulled, where petitioner had been discharged at age 57 after 28 years of satisfactory service, and where the division failed to investigate adequately, failed to hold a confrontation conference, and failed to resolve all the issues raised. Steins v State Div. of Human Rights, 86 A.D.2d 795, 447 N.Y.S.2d 11, 1982 N.Y. App. Div. LEXIS 15408 (N.Y. App. Div. 1st Dep't), app. dismissed, 56 N.Y.2d 805, 1982 N.Y. LEXIS 5933 (N.Y. 1982).

It is within discretion of state Division of Human Rights to decide method or methods to be employed in investigating claim, so that determination by division of "no probable cause" should be overturned as capricious only where record demonstrates that its investigation was "abbreviated or one-sided." Chirgotis v Mobil Oil Corp., 128 A.D.2d 400, 512 N.Y.S.2d 686, 1987 N.Y. App. Div. LEXIS 44111 (N.Y. App. Div. 1st Dep't 1987).

Plaintiff's action under CLS Exec § 296(7) should have been dismissed where federal court had previously dismissed such action, together with claim based on 42 USCS § 1981, stating that "Plaintiff now concedes that the claims under (federal law) and the New York Executive Law are time barred." Mchawi v State Univ. of New York, Empire State College, 248 A.D.2d 111, 669 N.Y.S.2d 545, 1998 N.Y. App. Div. LEXIS 1932 (N.Y. App. Div. 1st Dep't), app. denied, 92 N.Y.2d 804, 677 N.Y.S.2d 779, 700 N.E.2d 318, 1998 N.Y. LEXIS 1856 (N.Y. 1998).

In action for sexual harassment and retaliatory discharge, court properly denied plaintiff's motion to amend complaint to add action for wrongful termination based on disability discrimination under CLS Exec § 296(1)(a) since plaintiff had been aware of facts underlying alleged claim since inception of action, she failed to offer any reason or excuse for delay in seeking to amend complaint, and defendants had prepared case in response to original complaint, had no notice of new claim, and would suffer prejudice by its late edition. Castagne v Barouh, 249 A.D.2d 257, 671 N.Y.S.2d 283, 1998 N.Y. App. Div. LEXIS 3656 (N.Y. App. Div. 2d Dep't 1998).

In action for retaliation under CLS Exec § 296(7) brought against Board of Trustees of divinity school (defendant), court should have granted defendant's motion to dismiss complaint

where there were no allegations that defendant fell within ambit of CLS Exec § 292(1), nor was it alleged that activity or activities in which defendant engaged were allegedly prohibited under Human Rights Law; although plaintiff alleged that defendant violated general duty to accommodate her disability under CLS Exec § 296(3)(a), that section applied to employers, licensing agencies, employment agencies, and labor organizations and did not apply here. Edwards v Board of Trustees of Colgate Rochester Divinity Sch., 254 A.D.2d 709, 677 N.Y.S.2d 868, 1998 N.Y. App. Div. LEXIS 10379 (N.Y. App. Div. 4th Dep't 1998).

Court should have granted defendants' motion to change venue from Bronx to New York County where New York County was site of allegedly discriminatory conduct and county in which all of anticipated nonparty witnesses resided, defendants furnished names and addresses of potential nonparty witnesses, setting forth essence of their anticipated testimony, and manner in which they would be inconvenienced, and plaintiffs failed to identify single nonparty witness who would be inconvenienced by attending trial in New York County. Mohammad v Board of Managers, 262 A.D.2d 76, 691 N.Y.S.2d 486, 1999 N.Y. App. Div. LEXIS 6472 (N.Y. App. Div. 1st Dep't 1999).

Complaint properly stated action for violation of CLS Exec § 296(16) by alleging that defendant took adverse employment actions against plaintiff, based on fact that plaintiff, police officer, was arrested, although arrest had not resulted in conviction. Annabi v Cassino, 269 A.D.2d 551, 703 N.Y.S.2d 745, 2000 N.Y. App. Div. LEXIS 2133 (N.Y. App. Div. 2d Dep't 2000).

Commissioner making investigation under above statute has right to question witnesses. Kindt v State Com. for Human Rights, 44 Misc. 2d 896, 254 N.Y.S.2d 933, 1964 N.Y. Misc. LEXIS 1600 (N.Y. Sup. Ct. 1964), modified, 23 A.D.2d 809, 258 N.Y.S.2d 250, 1965 N.Y. App. Div. LEXIS 4484 (N.Y. App. Div. 4th Dep't 1965).

The provision of this section requiring that a complaint charging discrimination in housing be filed in the Commission's Albany office prior to the designation of an investigating commissioner and the investigation is directory and not mandatory, and a failure to abide by such a directory rule does not affect a substantial right of a party and is no ground for upsetting the entire proceeding. Barnes v Goldberg, 54 Misc. 2d 676, 283 N.Y.S.2d 347, 1966 N.Y. Misc. LEXIS 1403 (N.Y. Sup. Ct. 1966).

The human rights law authorizes intervention by court to insure that proceeding before division of human rights remains in status quo while proceeding is pending. Kramarsky v New York Police Dep't, 90 Misc. 2d 733, 395 N.Y.S.2d 937, 1977 N.Y. Misc. LEXIS 2142 (N.Y. Sup. Ct. 1977).

Subsidiary of public transportation authority was not entitled to writ of prohibition precluding Division of Human Rights (DHR) from holding hearing or taking any action in regard to discriminatory employment complaint by subsidiary's former employee, despite DHR's failure to comply with notice of claim provisions of CLS Pub A § 1342 since (1) statute only applied to "action" and not to "proceeding" such as instituted by DHR, (2) statute excluded subsidiary corporation from notice of claim requirement, and (3) notice of claim provision had no application to action to vindicate public interest. Central New York Centro, Inc. v New York State Div. of Human Rights, 142 Misc. 2d 935, 539 N.Y.S.2d 626, 1989 N.Y. Misc. LEXIS 150 (N.Y. Sup. Ct. 1989).

Respondent State Division of Human Rights properly dismissed a race discrimination complaint under the Human Rights Law on grounds of "administrative convenience" at complainant's behest (Executive Law § 297 [3] [c]; see, 9 NYCRR 465.5 [d] [2] [vi]) so that complainant could pursue all her claims against petitioner in Federal court, since complainant had expressly elected to pursue both her State law claims and Federal claims under title VII of the Civil Rights Act of 1964 (42 USC § 2000e et seq.) in Federal court rather than before the State agency and only filed her complaint with the Division in order to satisfy the requirements of Federal law before her claims could be asserted in Federal court. The dismissal of the complaint serves the Division's "administrative convenience" by conserving its scarce resources where complainant has the desire and resources to bring the complaint in Federal court. New York Tel. Co. v New York State Div. of Human Rights, 148 Misc. 2d 765, 561 N.Y.S.2d 401, 1990 N.Y. Misc. LEXIS 536 (N.Y. Sup. Ct. 1990).

In a proceeding challenging the dismissal by respondent State Division of Human Rights of a race discrimination complaint on grounds of "administrative convenience" at complainant's behest (Executive Law § 297 [3] [c]; see, 9 NYCRR 465.5 [d] [2] [vi]), petitioner's request for admissions of fact (CPLR 3123) that respondent had not dismissed any complaints for "administrative convenience" within the last two years "primarily because there was an action pending" in Federal court, except where first requested by the complainant, in order to establish some arbitrary and capricious activity by respondent is denied, since petitioner's request seeks conclusions about material issues and the notice to admit may not be utilized to request admissions of material issues or ultimate or conclusory facts. New York Tel. Co. v New York State Div. of Human Rights, 148 Misc. 2d 765, 561 N.Y.S.2d 401, 1990 N.Y. Misc. LEXIS 536 (N.Y. Sup. Ct. 1990).

When the attorney general sought to subpoena records of a domestic worker placement agency, to determine if the agency was violating N.Y. Exec. Law § 296 et seq., N.Y. Civ. Rights Law § 40-c, and New York City, N.Y., Admin. Code § 8-107(a), by asking job applicants about their national origin, age, and marital status and accomodating employer preferences as to a worker's national origin and age, the attorney general's failure to serve a complaint on the agency, pursuant to N.Y. Exec. Law § 297, did not violate the agency's right to due process because the attorney general was free to initiate its own investigation into the agency's business practices, under its broad investigatory powers in N.Y. Exec. Law § 63(12), without regard to the requirements of § 297. Matter of Pavillion Agency Inc v Spitzer, 802 N.Y.S.2d 879, 9 Misc. 3d 626, 234 N.Y.L.J. 28, 2005 N.Y. Misc. LEXIS 1613 (N.Y. Sup. Ct. 2005).

Plaintiff's failure to serve copy of amended complaint on city commission on human rights and corporation counsel did not require dismissal of employment discrimination claims under New York City Human Rights Law, although NYC Admin § 8-502(c) required service of copy of complaint on such entities before suing, where plaintiff had served copy of original complaint on both entities before suing. Robins v Max Mara, U.S.A., 923 F. Supp. 460, 1996 U.S. Dist. LEXIS 1295 (S.D.N.Y. 1996).

3. Jurisdiction, generally

In view of the broad power granted by the legislature in its delegation to the commission, the jurisdiction of the commission must be taken as plenary. Holland v Edwards, 282 A.D. 353, 122 N.Y.S.2d 721, 1953 N.Y. App. Div. LEXIS 4474 (N.Y. App. Div. 1953), aff'd, 307 N.Y. 38, 119 N.E.2d 581, 307 N.Y. (N.Y.S.) 38, 1954 N.Y. LEXIS 1009 (N.Y. 1954).

Where grievance before Division of Human Rights was a retaliation complaint and, although based on some of same alleged facts, issues were different from those of discrimination complaint previously filed with EEDC, Division of Human Rights was not divested of jurisdiction. Russell Sage College v State Div. of Human Rights, 45 A.D.2d 153, 357 N.Y.S.2d 171, 1974 N.Y. App. Div. LEXIS 4561 (N.Y. App. Div. 3d Dep't 1974), aff'd, 36 N.Y.2d 985, 374 N.Y.S.2d 603, 337 N.E.2d 119, 1975 N.Y. LEXIS 2069 (N.Y. 1975).

Section of Human Rights Law providing that within 60 days after complaint is filed the Division of Human Rights must give notice of hearing on alleged violations and that the hearing must be held within 15 days thereafter, was directory rather than mandatory, and fact that Division exceeded such time limits was not cause for invalidating its proceedings or terminating its jurisdiction. Liverpool Cent. School Dist. v State Div. of Human Rights, 46 A.D.2d 1004, 361 N.Y.S.2d 787, 1974 N.Y. App. Div. LEXIS 3389 (N.Y. App. Div. 4th Dep't 1974).

Where complaint was filed with the State Division of Human Rights prior to initiation of Article 78 proceeding, the Division had jurisdiction and the remedy before the Division was exclusive, and thus the Human Rights Appeal Board was not divested of jurisdiction by petitioner's subsequent attempts to obtain court relief. State Div. of Human Rights v Commissioner of New York State Dep't of Civil Service, 57 A.D.2d 699, 395 N.Y.S.2d 774, 1977 N.Y. App. Div. LEXIS 11737 (N.Y. App. Div. 4th Dep't 1977).

In a proceeding by a woman who alleged that a hospital denied her the accommodations, advantages, and privileges of a place of public accommodation, the trial court erred in divesting the Division of jurisdiction by an order in the nature of prohibition since, although the Division's delay of 636 days between the time the complaint was filed and the time it found probable cause was clearly in excess of the time limits specified in Exec Law § 297, the time schedules contained in that statute are directory only and, absent some showing of substantial prejudice, noncompliance with such schedules does not operate to oust the Division of the jurisdiction conferred on it; even if the woman had made a showing of substantial prejudice, prohibition was an inappropriate remedy in that she failed to first exhaust the remedies of administrative and judicial review. St. Elizabeth Hospital v Kramarsky, 81 A.D.2d 1010, 440 N.Y.S.2d 97, 1981 N.Y. App. Div. LEXIS 11763 (N.Y. App. Div. 4th Dep't 1981).

CLS Exec §§ 296 and 297 did not grant jurisdiction to State Division of Human Rights to consider issue of union local's refusal to waive requirements of union labor for low bidding non-union subcontractor who was offered, but refused, opportunity to sign full time agreement with union; clear intent of law was to prohibit discrimination by labor union in its membership practices, not to deal with issues concerning persons neither union members nor applying for memberships. Gomez v New York State, Executive Dep't Div. of Human Rights, 122 A.D.2d 337, 504 N.Y.S.2d 307, 1986 N.Y. App. Div. LEXIS 59671 (N.Y. App. Div. 3d Dep't 1986).

New York State Division of Human Rights properly dismissed, for lack of jurisdiction, claim of racial discrimination brought by certified home health care aide, who was employed by 93-year-old quadriplegic to provide 24-hour care to attend to his health and personal hygiene needs, to cook for him, to transport him, and otherwise to care for him. Thomas v Dosberg, 249 A.D.2d 999, 672 N.Y.S.2d 164, 1998 N.Y. App. Div. LEXIS 5177 (N.Y. App. Div. 4th Dep't 1998).

Because a college was not subject to the provisions of the New York City Human Rights Law, N.Y. Exec. Law § 297, an employee was not entitled to an award of an attorney's fee and expenses under Administrative Code of the City of NY § 8-502(f) or front pay; however, the employee was entitled to prejudgment interest on the employee's back pay under N.Y. C.P.L.R. 5001(b). Jattan v Queens Coll. of City Univ. of N.Y., 64 A.D.3d 540, 883 N.Y.S.2d 110, 2009 N.Y. App. Div. LEXIS 5629 (N.Y. App. Div. 2d Dep't 2009).

By its enactment of General Municipal Law § 239-s giving New York City concurrent jurisdiction with the State Commission for Human Rights with respect to discrimination in housing, the legislature conclusively demonstrated its intention not to grant exclusive jurisdiction to the state in the matters of discrimination in housing. Feigenblum v Commission on Human Rights, 53 Misc. 2d 360, 278 N.Y.S.2d 652, 1967 N.Y. Misc. LEXIS 1658 (N.Y. Sup. Ct. 1967).

The New York State Division of Human Rights in a special proceeding against a South African Airway was without jurisdiction to conduct a hearing on the visa policy of the Republic of South Africa as it affects the airline in carrying passengers. South African Airways v New York State Div. of Human Rights, 64 Misc. 2d 707, 315 N.Y.S.2d 651, 1970 N.Y. Misc. LEXIS 1180 (N.Y. Sup. Ct. 1970).

Executive Law §§ 297(9) and 300, taken together must be construed to mean that the State Division of Human Rights does not have any jurisdiction over a matter which was initiated before another administrative agency. Board of Education v State Div. of Human Rights, 65 Misc. 2d 679, 318 N.Y.S.2d 633, 1971 N.Y. Misc. LEXIS 1807 (N.Y. Sup. Ct. 1971).

Where employer against whom employee filed age discrimination complaint with Division of Human Rights did not maintain office in New York County but in fact had its offices in Nassau County where alleged discrimination occurred, Supreme Court of New York County did not have jurisdiction to enjoin alleged discrimination pending decision of Division. Sable v Sperry Gyroscope Div., 81 Misc. 2d 429, 365 N.Y.S.2d 595, 1975 N.Y. Misc. LEXIS 2400 (N.Y. Sup. Ct.), aff'd, 50 A.D.2d 517, 375 N.Y.S.2d 120, 1975 N.Y. App. Div. LEXIS 12207 (N.Y. App. Div. 1st Dep't 1975).

Education department and Division of Human Rights had concurrent jurisdiction to pass on complaint alleging that student applicant was denied admission to medical school on basis of discriminatory practices of school; thus school was not entitled to extraordinary remedy of writ to prohibit student applicant and Division from conducting discrimination complaint hearing on grounds they were proceeding in excess of jurisdiction. New York University v New York State Div. of Human Rights, 84 Misc. 2d 702, 378 N.Y.S.2d 842, 1975 N.Y. Misc. LEXIS 3202 (N.Y. Sup. Ct.), aff'd, 49 A.D.2d 821, 373 N.Y.S.2d 719, 1975 N.Y. App. Div. LEXIS 10940 (N.Y. App. Div. 1st Dep't 1975).

Employer was not entitled to dismissal of employment discrimination suit on alleged jurisdictional defect that employee had not obtained notice of right-to-sue from Equal Employment Opportunity Commission (EEOC), since employee had requested right-to-sue letter from EEOC after waiting statutorily required 180 days from time charges were filed but received no response; thus, she was entitled to notice and EEOC's failure to issue letter would not preclude her action. Scott v Carter-Wallace, Inc., 134 Misc. 2d 458, 511 N.Y.S.2d 767, 1986 N.Y. Misc. LEXIS 3119 (N.Y. Sup. Ct. 1986), dismissed, in part, 137 Misc. 2d 672, 521 N.Y.S.2d 614, 1987 N.Y. Misc. LEXIS 2698 (N.Y. Sup. Ct. 1987).

Because a claimant could maintain both an administrative proceeding and a federal court action for sexual harassment and employment discrimination, the New York State Division of Human Rights had jurisdiction under N.Y. Exec. Law § 297(3)(c) to dismiss the petitioner's complaint for administrative convenience; therefore, prohibition was not warranted under N.Y. C.P.L.R. art. 78. Peek v New York State Div. of Human Rights, 835 N.Y.S.2d 877, 16 Misc. 3d 346, 2007 N.Y. Misc. LEXIS 3525 (N.Y. Sup. Ct. 2007).

A complaint addressed to a Supreme Court seeking an injunction against rental of apartments or sale or disposition of an apartment building because the owner and rental agent had violated this section by refusing to rent an apartment to plaintiff was dismissed for want of jurisdiction. Redd v Zier, 229 N.Y.S.2d 582, 1962 N.Y. Misc. LEXIS 4175 (N.Y. Sup. Ct. 1962).

Commissions established by New York State Human Rights Law were authorized only to hear complaints about discriminatory employment practices by employers, employment agencies, labor organizations and apprenticeship committees and had no jurisdiction as to governmental action, or action by any entity not falling within the categories mentioned above. Percy v Brennan, 384 F. Supp. 800, 1974 U.S. Dist. LEXIS 5879 (S.D.N.Y. 1974).

Federal court lacked jurisdiction over action against state university based on alleged violation of Human Rights Law, as state did not waive its exclusive jurisdiction over such claims merely by allowing federal Equal Employment Opportunity Commission to take responsibility for investigating plaintiff's complaints. Jungels v State Univ. College, 922 F. Supp. 779, 1996 U.S. Dist. LEXIS 5483 (W.D.N.Y. 1996), aff'd sub. nom., Jungels v Jones, 112 F.3d 504, 1997 U.S. App. LEXIS 14106 (2d Cir. N.Y. 1997).

Defendants, a town and a supervisor of the former employee, lacked the statutory authority to conduct a N.Y. Gen. Mun. Law § 50-h examination before the employment discrimination case could have been filed in the district court because no such examination was required under the New York State Human Rights Law, N.Y. Exec. Law, § 290 et seq. Gentile v Town of Huntington, 288 F. Supp. 2d 316, 2003 U.S. Dist. LEXIS 18870 (E.D.N.Y. 2003).

4. —Court of Claims jurisdiction

Plaintiff's action against the State, alleging that his employment at a State psychiatric center under the jurisdiction of the Department of Mental Hygiene was improperly terminated on the basis of his physical disability in violation of the Human Rights Law (Exec Law § 296) and seeking reinstatement, back pay, and damages for embarrassment, humiliation and mental and emotional distress, was properly commenced in the Supreme Court since, inasmuch as the Court of Claims has no power to order such equitable relief as reinstatement, a contrary conclusion would lead to the unfair result of requiring the person against whom the State has unlawfully discriminated to institute separate lawsuits to fully redress the wrong committed. Koerner

v State, 62 N.Y.2d 442, 478 N.Y.S.2d 584, 467 N.E.2d 232, 1984 N.Y. LEXIS 4406 (N.Y. 1984).

An action by an individual of Hispanic descent, alleging improper termination by reason of her supervisor's racial prejudice, properly set forth a cause of action under Exec Law §§ 296, 297(9), but was time-barred by Ct Cl Act § 10(3) where the claimant elected to assert the claim in the Court of Claims, notwithstanding that the same action brought against the State in its role as claimant's employer, if brought in Supreme Court, would be governed by a three-year statute of limitations. Figueroa v State, 126 Misc. 2d 304, 481 N.Y.S.2d 946, 1984 N.Y. Misc. LEXIS 3606 (N.Y. Ct. Cl. 1984).

5. —Subject matter jurisdiction

In a proceeding brought pursuant to Exec Law § 298, to review a determination of the State Human Rights Appeal Board, which affirmed an order of the State Division of Human Rights dismissing plaintiff's complaint for lack of subject matter jurisdiction, the court properly found that the State Division of Human Rights did not have subject matter jurisdiction over plaintiff's complaint since plaintiff had pursued his action in the federal courts and Exec Law § 297(9) prohibits plaintiffs who initiate any action in a court of competent jurisdiction from pursuing the same grievance before the Division of Human Rights. McGrath v State Human Rights Appeal Bd., 90 A.D.2d 916, 456 N.Y.S.2d 874, 1982 N.Y. App. Div. LEXIS 19195 (N.Y. App. Div. 3d Dep't 1982).

A complaint charging a public agency with an unfair discriminatory practice based upon a person's prior criminal convictions was properly dismissed by the State Division of Human Rights for lack of subject matter jurisdiction, since an Article 78 proceeding is the exclusive remedy available to remedy such a wrong. New York City Transit Authority v State Human Rights Appeal Bd., 97 A.D.2d 825, 468 N.Y.S.2d 708, 1983 N.Y. App. Div. LEXIS 20604 (N.Y. App. Div. 2d Dep't 1983), app. dismissed, 62 N.Y.2d 646, 1984 N.Y. LEXIS 8025 (N.Y. 1984).

The Division of Human Rights and the Human Rights Appeal Board properly exercised subject matter jurisdiction, pursuant to Exec Law §§ 296, 297-a, over a complaint by an applicant for a State Trooper position who had been disqualified by the State Police Division from its Hispanic-American/Spanish-surnamed minority hiring program, where the complaint effectively alleged that the State Police had discriminated against the applicant by refusing to treat him in the same manner that it treated others of Hispanic national origin or ancestry in considering him for employment, and where, though the Appeal Board specifically referred in its decision to an order by the United States District Court that had established guidelines for the State Police Division to follow in order to achieve a long-term goal of acquiring personnel comprised of women, blacks, and Spanish-surnamed Americans, there was uncontradicted documentary proof in the record, apart from the reference to the court order, to support the appeal board's conclusion that the applicant was of Hispanic origin, so that the appeal board did not base its decision solely on an interpretation of the Federal court order, and, therefore, did not exceed its jurisdiction. New York State Div. of State Police v McCall, 98 A.D.2d 921, 470 N.Y.S.2d 916, 1983 N.Y. App. Div. LEXIS 21243 (N.Y. App. Div. 3d Dep't 1983).

The trial court properly dismissed an action in which plaintiff alleged that her former employer had retaliated against her due to her earlier complaint of sexual harassment where the retaliation claims before the court and plaintiff's earlier complaint before the State Division of Human Rights were undeniably similar, and, although additional facts appeared in the complaint, including he fact of plaintiff's termination from her employment, it was clear that those facts emanated from a continuing process of alleged retaliation giving rise to one claim, not several; accordingly, Exec Law § 297(9) deprived the trial court of subject matter jurisdiction, even though the administrative complaint before the division had been litigated and was on administrative appeal. Spoon v American Agriculturalist, Inc., 103 A.D.2d 929, 478 N.Y.S.2d 174, 1984 N.Y. App. Div. LEXIS 19593 (N.Y. App. Div. 3d Dep't 1984).

Court lacked subject matter jurisdiction over plaintiff's claim for employment discrimination and wrongful discharge under CLS Exec § 297 since plaintiff had initially filed statutory claim of employment discrimination and thus was precluded from commencing court action involving same claim. Employee's cause of action against his employer for intentional infliction of emotional distress, in connection with alleged employment discrimination and wrongful discharge, was properly dismissed for lack of subject matter jurisdiction since he had initially filed statutory claim for employment discrimination and wrongful discharge with Division of Human Rights in which he was able to seek damages for mental anguish and humiliation, and he was precluded from commencing action in court for same injuries under slightly different labels of intentional infliction of emotional distress and prima facie tort. Horowitz v Aetna Life Ins., 148 A.D.2d 584, 539 N.Y.S.2d 50, 1989 N.Y. App. Div. LEXIS 3929 (N.Y. App. Div. 2d Dep't 1989).

Defendant corporation was entitled to dismissal of age discrimination action on basis of lack of subject matter jurisdiction where (1) plaintiff was Canadian citizen and resident of London, England who was employed by corporation for 28 years at various subsidiaries of corporation throughout United States and abroad, (2) plaintiff was employed in New York State for 2 ½ years ending in February, 1979, (3) at time his employment was terminated, plaintiff had been employed in London for 3 ½ years, and (4) plaintiff failed to allege that discriminatory act was committed within New York State. Iwankow v Mobil Corp., 150 A.D.2d 272, 541 N.Y.S.2d 428, 1989 N.Y. App. Div. LEXIS 6931 (N.Y. App. Div. 1st Dep't 1989).

In action under Human Rights Law (CLS Exec §§ 290 et seq.) for sex discrimination in employment in which plaintiff sought damages for, inter alia, emotional distress, court did not err in precluding testimony by defense expert that another lawsuit commenced against plaintiff caused her emotional distress, since (1) in diagnosis of plaintiff's condition, neither parties' experts had referred to other lawsuit, and (2) court allowed defendant to adduce testimony that several stress factors separate from plaintiff's discharge from employment were present in her life. Rhoades v Niagara Mohawk Power Corp., 202 A.D.2d 762, 608 N.Y.S.2d 733, 1994 N.Y. App. Div. LEXIS 2307 (N.Y. App. Div. 3d Dep't 1994).

Court properly dismissed action for employment discrimination where plaintiff had brought administrative action against corporate defendant, which was voluntarily withdrawn with no indication that withdrawal was done for administrative convenience. Brown v Wright, 226 A.D.2d 570, 641 N.Y.S.2d 125, 1996 N.Y. App. Div. LEXIS 4401 (N.Y. App. Div. 2d Dep't 1996).

Court should have granted defendants' summary judgment motion on ground that plaintiff elected to pursue administrative remedy by filing complaint with New York State Division of Human Rights (NYSDHR) since plaintiff failed to produce admissible proof as to whether her complaint was referred to NYSDHR by Equal Employment Opportunity Commission or whether she filed it directly with NYSDHR; she submitted only attorney's affirmation that was not based on personal knowledge of facts stated therein. Hirsch v Morgan Stanley & Co., 239 A.D.2d 466, 657 N.Y.S.2d 448, 1997 N.Y. App. Div. LEXIS 5365 (N.Y. App. Div. 2d Dep't 1997).

In terminated employee's action for gender and age discrimination under both CLS Exec §§ 290 et seq. and federal law, Supreme Court properly held that it lacked subject matter jurisdiction on ground that employee had elected to pursue her claims in federal court where (1) although language of CLS Exec former § 297(9), which was in effect when administrative convenience dismissal was issued, did not contain explicit prohibition on commencement of action in state court, right to do so was limited, (2) administrative convenience dismissal was not for purpose of allowing employee to commence state court action but to pursue matter as part of litigation in federal court, (3) employee requested such dismissal so that her state and federal claims could "be brought in a single action," and (4) State Division of Human Rights understood that statement to mean that all claims would be pursued in federal court for purpose of conserving scarce state resources, which purpose served convenience of agency. Kordich v Povill, 244 A.D.2d 112, 676 N.Y.S.2d 331, 1998 N.Y. App. Div. LEXIS 8680 (N.Y. App. Div. 3d Dep't 1998).

Department of Health was properly granted summary judgment dismissing action alleging that, by revoking plaintiff's medical license, it discriminated against him in violation of CLS Exec § 296, based on his adult Attention Deficit Disorder, as plaintiff essentially sought judicial review of determination which revoked his medical license, and such review had to be made via Article 78 proceeding, which was time barred. Horne v New York State Dep't of Health, 287 A.D.2d 940, 731 N.Y.S.2d 781, 2001 N.Y. App. Div. LEXIS 9979 (N.Y. App. Div. 3d Dep't 2001).

An action instituted by New York City to restrain defendants from further discrimination with respect to housing rentals and from further violations of local laws was not subject to being stricken on the ground that the court had no jurisdiction over such an action, exclusive jurisdiction of the subject matter being vested in the State Commission against Discrimination. New York v Claflington, Inc., 40 Misc. 2d 547, 243 N.Y.S.2d 437, 1963 N.Y. Misc. LEXIS 1934 (N.Y. Sup. Ct. 1963).

Plaintiffs' claims against the New York State Division of Human Rights, alleging that a settlement agreement entered into between the parties was void, properly survived a dismissal motion with respect to challenges to the validity of the agreement based upon events after the execution thereof, as the issues raised were not within the special competence of the Division pursuant to N.Y. Exec. Law § 290 et seq. or N.Y. Comp. Codes R. & Regs. tit. 9, § 465.1 et seq.; further, they were ripe for review and the Division had not commenced a proceeding under N.Y. Exec. Law § 297(7) and N.Y. Comp. Codes R. & Regs. tit. 9, § 465.18. Ken-Vil Assoc. Ltd. Partnership v New York State Div. of Human Rights, 100 A.D.3d 1390, 954 N.Y.S.2d 294, 2012 N.Y. App. Div. LEXIS 7446 (N.Y. App. Div. 4th Dep't 2012).

Exec Law § 297 prohibiting plaintiff from commencing action alleging racial discrimination in New York courts after charges have been filed with New York State Division of Human Rights cannot limit subject matter jurisdiction of federal courts. Clark v Times Square Stores Corp., 469 F. Supp. 654, 1979 U.S. Dist. LEXIS 12746 (S.D.N.Y. 1979).

Court lacks subject-matter jurisdiction over pendent state-law salary claim under CLS Exec Law § 297(9), where claim arose out of employment discrimination lawsuit against CUNY, because CUNY is arm of New York State, and statute does not expressly or by implication waive State's Eleventh Amendment immunity against suit. Moche v City Univ. of N.Y., 781 F. Supp. 160, 1991 U.S. Dist. LEXIS 18974 (E.D.N.Y. 1991), aff'd, 999 F.2d 538, 1993 U.S. App. LEXIS 18174 (2d Cir. N.Y. 1993).

Because the division of the state university had not consented to be sued in federal court on pendent state law claims and the statutory language of the New York State Human Rights Law (HRL), specifically N.Y. Exec. Law § 297(9), did not provide the basis for finding that New York State had waived its Eleventh Amendment Immunity, the district court concluded that the employee's HRL claims against the state university were barred by the Eleventh Amendment. Richman v Pediatric Serv. Group, LLP, 222 F. Supp. 2d 207, 2002 U.S. Dist. LEXIS 17491 (N.D.N.Y. 2002).

Federal court lacked subject matter jurisdiction over an employee's N.Y. Exec. Law § 297 claim because the employee elected to have the state human rights claims adjudicated by the New York State Department of Human Rights, and none of the exceptions of N.Y. Exec. Law § 279(9) were applicable. Johnson v County of Nassau, 411 F. Supp. 2d 171, 2006 U.S. Dist. LEXIS 5094 (E.D.N.Y. 2006).

Division of Human Rights is not barred from undertaking any of its procedures or enforcing any of its policies against respondent who is actively under jurisdiction of Bankruptcy Court, or one who filed for bankruptcy protection after cause of action arose. 1999 Order Comm HR No. 4-E-A-91-1400339A.

6. —Jurisdiction over employee of Human Rights Division

Writ of prohibition was improperly granted divesting New York State Division of Human Rights s/h/a State of New York Executive Department, Division of Human Rights (SDHR) of jurisdiction to prosecute complaint of employment discrimination, despite fact that there had been delay in processing complaint, since one reason for delay was transfer of matter from county human rights commission to SDHR, which was result of administrative restructuring, and determination as to whether petitioner suffered substantial prejudice by delay and death of petitioner's former owner should have been made by SDHR after hearing; once there is final determination, appropriate appellate review is available. Pat's Carpet Outlet v State Exec. Dep't, Div. of Human Rights, 244 A.D.2d 338, 663 N.Y.S.2d 885, 1997 N.Y. App. Div. LEXIS 11011 (N.Y. App. Div. 2d Dep't 1997).

Executive Law § 297, subd 2 is on its face nondiscriminatory, and since the Human Rights Division's policy not to take jurisdiction in cases involving its own employees is reasonable and rationally based, former division employee was not denied equal protection by refusal of division to take jurisdiction of his complaint. Colon v New York, Div. of Human Rights, 354 F. Supp. 343, 1973 U.S. Dist. LEXIS 15529 (S.D.N.Y. 1973), aff'd, 498 F.2d 1396 (2d Cir. N.Y. 1974).

7. Probable cause

It having been found that "probable cause" existed for believing the allegations of a complaint presented pursuant to this section, and such finding being supported by evidence, the Appellate Division properly remanded the matter to the commission for proceedings in accordance with art. 15, and the commission should accordingly proceed in accordance with the further mandates of this section. American Jewish Congress v Carter, 9 N.Y.2d 223, 213 N.Y.S.2d 60, 173 N.E.2d 788, 1961 N.Y. LEXIS 1446 (N.Y. 1961).

Legislature did not contemplate a formal hearing by State Division of Human Rights in determining probable cause issue. Jwayyed v New York Tel. Co., 42 A.D.2d 663, 345 N.Y.S.2d 233, 1973 N.Y. App. Div. LEXIS 4025 (N.Y. App. Div. 3d Dep't 1973).

In course of investigating complaint of discrimination, commissioner of Division of Human Rights should interview respondent's witnesses and receive its responses to complaint, and at such point, statute places upon commissioner responsibility to determine whether there is reasonable basis for sustaining complaint, based upon complainant's evidence, and for requiring employer or other respondent to answer and submit to hearing. State Div. of Human Rights v New York State Drug Abuse Control Com., 59 A.D.2d 332, 399 N.Y.S.2d 541, 1977 N.Y. App. Div. LEXIS 13571 (N.Y. App. Div. 4th Dep't 1977).

Evidence, in proceedings on state employee's complaints of racial discrimination against him and of retaliation against him because he filed his original complaint, supported determination, in each case, of no probable cause for complaint. State Div. of Human Rights v New York State Drug Abuse Control Com., 59 A.D.2d 332, 399 N.Y.S.2d 541, 1977 N.Y. App. Div. LEXIS 13571 (N.Y. App. Div. 4th Dep't 1977).

Provisions of Executive Law place responsibility on commissioner of Division of Human Rights to investigate complaint of discrimination and, if he finds that no probable cause exists for complaint, to dismiss complaint. State Div. of Human Rights v New York State Drug Abuse Control Com., 59 A.D.2d 332, 399 N.Y.S.2d 541, 1977 N.Y. App. Div. LEXIS 13571 (N.Y. App. Div. 4th Dep't 1977).

Where the Human Rights Appeal Board reversed the Division of Human Rights' finding of lack of probable cause that petitioner had been discriminated against on the basis of race, reinstated the complaint, and remanded it for further proceedings, respondent, petitioner's former employer, is required to produce, pursuant to a subpoena duces tecum issued by the division, records concerning the color of the foremen and employees involved, since the petition follows precisely the directions of the Appeal Board to the division and without that information, which is prima facie material and necessary, the essence of the inquiry may be blocked and the investigation and hearing may be futile; in spite of the language of section 297 (subd 4, par a) of the Executive Law which provides that after the board has reversed and remanded an order of the division dismissing a complaint for lack of probable cause the division shall serve written notice requiring the respondent to answer the charges of the complaint and appear at a public hearing, the division issued the subpoena duces tecum to respondent returnable before the regional director to give evidence in a further investigation, and in light of the

statute the proceeding before the regional director is interpreted as a public hearing in which petitioner's attorney has the right to appear and issue a subpoena duces tecum. Thompson v General Motors Corp., Chevrolet Motor Div., 67 A.D.2d 308, 415 N.Y.S.2d 548, 1979 N.Y. App. Div. LEXIS 10108 (N.Y. App. Div. 4th Dep't 1979).

An order by the New York State Division of Human Rights, which dismissed petitioner's complaint on the ground that there was no probable cause to believe that a racing corporation and certain of its officers had engaged in an unlawful discriminatory practice, would be confirmed where, given the nature of petitioner's complaint, the information uncovered through the division's written inquiry, and petitioner's failure to rebut said information after the opportunity to do so had been accorded him, the extent of the division's investigation was adequate. Meachem v New York State Human Rights Appeal Bd., 87 A.D.2d 813, 448 N.Y.S.2d 774, 1982 N.Y. App. Div. LEXIS 16264 (N.Y. App. Div. 2d Dep't 1982).

In a proceeding pursuant to Exec Law § 298 to review a determination of the Human Rights Appeal Board that probable cause existed to believe that the State Police discriminated on the grounds of race, color, and disability in the denial of a man's application to become a state trooper, no probable cause would exist where the man's only contention had been that the correctional services department, as his present employer, had charged him with irresponsibility, and with sleeping on the job, in an attempt to impede his effort to join the state police, and where the state police division had shown its compliance with a continuing federal court order that was designed to ensure proportionate minority representation on the police force. New York State Div. of State Police v Kramarsky, 91 A.D.2d 805, 458 N.Y.S.2d 54, 1982 N.Y. App. Div. LEXIS 19701 (N.Y. App. Div. 3d Dep't 1982).

In a proceeding by a former employee who alleged that she had been terminated from her restaurant employment as a result of her race, the employee's complaint was properly dismissed for want of probable cause where she received the same benefits as other employees, and where she was terminated as a result of her inability to resolve her differences with her immediate supervisor. State Div. of Human Rights ex rel. Jackson v Oswald Hof Brau-Haus, Inc., 91 A.D.2d 865, 458 N.Y.S.2d 368, 1982 N.Y. App. Div. LEXIS 19781 (N.Y. App. Div. 4th Dep't 1982).

An order of the State Division of Human Rights dismissing on a finding of no probable cause a complaint by a civil service employee that the oral test portion of an examination he took had been altered so that women received higher grade scores than men would be remanded, where in finding that there was no probable cause, the Division, for the most part, relied upon statistical percentages, which evaluated the final passing relationship between males and females, but made no attempt to isolate that portion of the test to which the complaint was directed, and thus it could not be ascertained on the record whether and to what extent the Division investigated the underlying basis of the claim. Baldovin v State Div. of Human Rights, 94 A.D.2d 659, 462 N.Y.S.2d 221, 1983 N.Y. App. Div. LEXIS 18066 (N.Y. App. Div. 1st Dep't 1983).

The State Division of Human Rights did not conduct an inadequate, one-sided investigation of petitioner's claim of employment discrimination based on his age, disability and a previous criminal accusation, alleging failure to promote where petitioner had been given ample opportunity to state the bases of his claim and to respond to the city's statements in opposition, and the record had established that the city had pursued its policy of appointing the top candidate from the civil service list for the position sought, petitioner did not rank first on either list, and had been on light duty since 1983 due to numerous physical ailments, so that there was clearly a rational basis for the division's determination of no probable cause. Shay v Elmira, 108 A.D.2d 968, 484 N.Y.S.2d 951, 1985 N.Y. App. Div. LEXIS 43299 (N.Y. App. Div. 3d Dep't 1985).

8. Evidence

Statistical evidence in conjunction with a hiring system that had the effect, even without evidence of intention, of excluding Black and Spanish-surnamed persons from employment was sufficient to support the entry of an order to cease and desist such constructive discriminatory practices. State Div. of Human Rights v Kilian Mfg. Corp., 35 N.Y.2d 201, 360 N.Y.S.2d 603, 318 N.E.2d 770, 1974 N.Y. LEXIS 1309 (N.Y. 1974), app. dismissed, 420 U.S. 915, 95 S. Ct. 1108, 43 L. Ed. 2d 387, 1975 U.S. LEXIS 506 (U.S. 1975).

Where substantial evidence supported finding of State Division of Human Rights that brokerage employee had not been discriminatorily discharged because of her age, State Human Rights Appeal Board erred in setting aside such finding because of "differences of opinion." Merrill Lynch, Pierce, Fenner & Smith, Inc. Merrill Lynch, Pierce, Fenner & Smith, Inc. v State Div. of Human Rights, 48 A.D.2d 391, 370 N.Y.S.2d 96, 1975 N.Y. App. Div. LEXIS 9900 (N.Y. App. Div. 1st Dep't 1975).

Where record of proceedings before regional director of State Division of Human Rights showed rational basis for his determination of no probable cause with respect to complaints filed by employees, where hearing was extensive and complainants were present and represented by counsel, and where representatives of employer against whom complaints were made were present, represented by counsel, and testified and were cross-examined by counsel for complainant, mere fact that director's daughter was employed as mail clerk by employer against whom complaints were filed was no basis for disqualification of director or for setting aside determination. State Div. of Human Rights v Merchants Mut. Ins. Co., 59 A.D.2d 1054, 399 N.Y.S.2d 813, 1977 N.Y. App. Div. LEXIS 14344 (N.Y. App. Div. 4th Dep't 1977).

In a proceeding pursuant to Exec Law § 296 alleging that the refusal to rehire a transit system employee was in retaliation for his having filed an earlier complaint against the system, the dismissal of the complaint was based on substantial evidence, including the employee's unexcused absence from work, insubordination, falsification of records, tardiness, and resignation without notice. Pisano v Capital Dist. Transit System, #1, 88 A.D.2d 1022, 451 N.Y.S.2d 912, 1982 N.Y. App. Div. LEXIS 17438 (N.Y. App. Div. 3d Dep't 1982).

In finding no probable cause to believe that a company had engaged in an unlawful discriminatory employment practice, the State Division of Human Right's investigation was not inadequate for failing to discover the existence of a tape recording made by the petitioner of his conversations with persons in the company's personnel office, where the petitioner failed to disclose the existence of the recording, notwithstanding that he had received a letter advising him to furnish the division with any additional information he might have. Fessette v New York State Human Rights Appeal Bd., 94 A.D.2d 929, 463 N.Y.S.2d 331, 1983 N.Y. App. Div. LEXIS 18379 (N.Y. App. Div. 3d Dep't), app. dismissed, 60 N.Y.2d 553, 1983 N.Y. LEXIS 5566 (N.Y. 1983).

Employer was entitled to summary judgment dismissing age discrimination action where (1) employer submitted several sworn affidavits asserting that plaintiff was discharged solely for incompetency, (2) it was uncontradicted that plaintiff, 62 years old, was replaced by 60-year-old individual, and (3) plaintiff offered only conclusory assertion that "I believe that age was the determining factor in defendant's decision to terminate me"; mere fact that plaintiff was 62 years old when dismissed was not sufficient to raise fact question as to age discrimination. Heffernan v Colonie Country Club, Inc., 160 A.D.2d 1062, 553 N.Y.S.2d 544, 1990 N.Y. App. Div. LEXIS 3769 (N.Y. App. Div. 3d Dep't 1990).

New York City Commission on Human Rights properly determined that New York City Transit Authority was guilty of sexual harassment and properly awarded discharged probationary employee back pay and damages for mental anguish where employee's supervisor unsuccessfully asked her for date on several occasions, then began writing reports charging her with various disciplinary infractions; harassment was exacerbated when she was told by Authority's manager of departmental relations that such conduct was to be expected because of her appearance and mode of dress. Levy v City Comm'n on Human Rights, 196 A.D.2d 214, 609 N.Y.S.2d 576, 1994 N.Y. App. Div. LEXIS 2436 (N.Y. App. Div. 1st Dep't 1994), aff'd, 85 N.Y.2d 740, 628 N.Y.S.2d 245, 651 N.E.2d 1264, 1995 N.Y. LEXIS 1122 (N.Y. 1995).

Testimony of investigator was properly received in action to review and annul order made by commission. Kindt v State Com.

for Human Rights, 44 Misc. 2d 896, 254 N.Y.S.2d 933, 1964 N.Y. Misc. LEXIS 1600 (N.Y. Sup. Ct. 1964), modified, 23 A.D.2d 809, 258 N.Y.S.2d 250, 1965 N.Y. App. Div. LEXIS 4484 (N.Y. App. Div. 4th Dep't 1965).

In enforcement proceedings under Article 15 of the Executive Law it is not necessary that findings be based on evidence establishing them beyond a reasonable doubt but it is sufficient if the findings are supported by evidence sufficiently substantial to prevent inferences of the existence of facts found to be reasonably drawn, and the Commission, at its hearing, is not bound by the strict rules of evidence prevailing in courts of law or equity. State Com. for Human Rights v Suburban Associates, Inc., 55 Misc. 2d 920, 286 N.Y.S.2d 733, 1967 N.Y. Misc. LEXIS 1016 (N.Y. Sup. Ct. 1967), modified, 34 A.D.2d 662, 310 N.Y.S.2d 1019, 1970 N.Y. App. Div. LEXIS 5125 (N.Y. App. Div. 2d Dep't 1970).

In fair hearing in progress before State Division on Human Rights on employee's claims that employer discriminated against her in employment by denying her equal terms, conditions and privileges of employment and by terminating her employment because of her age, court would enforce subpoena duces tecum requiring employer to produce certain enumerated documents sought by employee to show pattern and practice of terminating employees at given age to effect monetary savings of pension and profit-sharing benefits. Russo v Reader's Digest, 91 Misc. 2d 1, 396 N.Y.S.2d 803, 1977 N.Y. Misc. LEXIS 2221 (N.Y. Sup. Ct. 1977).

Plaintiff's action against his former employer (Federal Reserve Bank) under Title VII, Civil Rights Act of 1964 (42 USCS §§ 2000e et seq.) was barred by election of remedies provision of CLS Exec § 297 where plaintiff had filed complaint with New York State Division of Human Rights pursuant to CLS Exec §§ 290 et seq., and complaint had been dismissed for lack of jurisdiction over employer, not for administrative convenience; New York's remedies available to former employee who alleges unlawful discrimination are mutually exclusive. Moodie v Federal Reserve Bank, 861 F. Supp. 10, 1994 U.S. Dist. LEXIS 11480 (S.D.N.Y. 1994).

Complaint alleging that employer had discriminated against handicapped plaintiff would not be dismissed on basis that plaintiff had filed complaint with county human rights commission, constituting election of remedies under CLS Exec § 297(9), where (1) plaintiff denied filing written complaint, (2) defendant was unable to produce one notwithstanding access to agency's records under freedom of information procedures, and (3) there was no evidence that case number was ever assigned to matter, which suggested that plaintiff's contact with agency was not treated as complaint. Tumminello v Continental Baking Co., 861 F. Supp. 261, 1994 U.S. Dist. LEXIS 11971 (S.D.N.Y. 1994).

Plaintiff's claim against his former employer under New York State Human Rights Law was barred where he sought administrative remedy by first bringing his claim of discriminatory treatment to Division of Human Rights, and division dismissed his claim on merits. Janneh v Regency Hotel, 870 F. Supp. 37, 1994 U.S. Dist. LEXIS 17688 (N.D.N.Y. 1994).

9. Authority of commissioner

In conferring broad authority upon State Human Rights Commissioner, legislature was addressing general business and industrial sphere rather than highly professional fields regarding special expertise, such as education. New York Institute of Technology v State Div. of Human Rights, 40 N.Y.2d 316, 386 N.Y.S.2d 685, 353 N.E.2d 598, 1976 N.Y. LEXIS 2891 (N.Y. 1976).

State's strong and important public policy against discrimination and need for programmatic enforcement of antidiscrimination laws has led legislature to vest broad authority in Human Rights Commissioner so that he may take appropriate action to eliminate and prevent discriminatory practices, and human rights law should be liberally construed to accomplish its purposes. New York Institute of Technology v State Div. of Human Rights, 40 N.Y.2d 316, 386 N.Y.S.2d 685, 353 N.E.2d 598, 1976 N.Y. LEXIS 2891 (N.Y. 1976).

Statutory design for commissioner of Division of Human Rights review of complaint of discrimination differs from court procedure in which question of fact is generally determined by jury or tribunal apart from court which has decided that question of fact exists for determination in that when commissioner finds that evidence before him establishes probable cause for complaint of discrimination, he has duty to serve notice on respondent to answer charges of such complaint and appear at public hearing before examiner for hearing of witnesses under oath on record on each side of dispute and ultimate determination of merits of complaint shall then be made by commissioner. State Div. of Human Rights v New York State Drug Abuse Control Com., 59 A.D.2d 332, 399 N.Y.S.2d 541, 1977 N.Y. App. Div. LEXIS 13571 (N.Y. App. Div. 4th Dep't 1977).

Commissioner is required to make prompt investigation by field visit, written or oral inquiry, conference, or any method or combination thereof; matter is remitted to division for full and thorough investigation where probable cause issue was investigated in cursory and abbreviated manner and no independent inquiry was conducted to verify complainant's assertions prior to issue of no probable cause determination; investigation consisting of one interview with employer's personnel officer, obtaining copies of leave of absence policy and office memoranda together with letters from employer's attorney is insufficient. State Div. of Human Rights ex rel. Beckman v Gaylord Bros., Inc., 112 A.D.2d 726, 492 N.Y.S.2d 217, 1985 N.Y. App. Div. LEXIS 56237 (N.Y. App. Div. 4th Dep't 1985).

Determination of Commissioner of Human Rights would be annulled where commissioner had previously participated in matter as general counsel of Human Rights Division. New York State Dep't of Correctional Servs. v State Div. of Human Rights, 216 A.D.2d 658, 627 N.Y.S.2d 800, 1995 N.Y. App. Div. LEXIS 6117 (N.Y. App. Div. 3d Dep't 1995).

Fact-finding responsibility is lodged with Commissioner of Division of Human Rights, who is not bound by hearing examiner's recommendation. Friedel v New York State Div. of Human Rights, 219 A.D.2d 547, 632 N.Y.S.2d 520, 1995 N.Y. App. Div. LEXIS 9604 (N.Y. App. Div. 1st Dep't 1995), app. denied, 91 N.Y.2d 802, 667 N.Y.S.2d 682, 690 N.E.2d 491, 1997 N.Y. LEXIS 4084 (N.Y. 1997).

10. Conference and conciliation

Inclusion in final order of conciliation, agreement to which no objections had been received within 15-day period following service on claimant's attorney of proposed conciliation agreement was neither arbitrary nor an abuse of discretion where Executive Law § 297, subd 3 did not require that service of proposed agreement on claimant's attorney be accompanied either by service of a statement of the statutory provisions relating to filing of objections or of a warning that objections be filed within 15 days. Berry v Donner-Hanna Coke Corp., 42 A.D.2d 404, 348 N.Y.S.2d 414, 1973 N.Y. App. Div. LEXIS 3280 (N.Y. App. Div. 4th Dep't 1973), aff'd, 34 N.Y.2d 893, 359 N.Y.S.2d 283, 316 N.E.2d 717, 1974 N.Y. LEXIS 1445 (N.Y. 1974).

Service of proposed conciliation agreement on claimant's attorney rather than on claimant herself was proper where notice of appearance filed with regional director by claimant's attorney expressly demanded service on such attorney of "all subsequent written communications or notice to said party in this proceeding." Remand to State Division of Human Rights "for further investigation and action" on grounds that Division "should have looked into the question (of alleged discrimination) rather than discharging the complaint" did not require a hearing be conducted if the matter could be concluded by conciliation procedure. Berry v Donner-Hanna Coke Corp., 42 A.D.2d 404, 348 N.Y.S.2d 414, 1973 N.Y. App. Div. LEXIS 3280 (N.Y. App. Div. 4th Dep't 1973), aff'd, 34 N.Y.2d 893, 359 N.Y.S.2d 283, 316 N.E.2d 717, 1974 N.Y. LEXIS 1445 (N.Y. 1974).

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Conciliation agreement between employee and contractor providing that employee would not be discharged from construction project by subcontractor without notice to president of contractor and to employee's attorney, but not specifying type of notice to be given or person bearing responsibility of furnishing such notice, was not breached where employee's dismissal was occasioned by general strike of elevator operators affecting entire building industry, and formal notice was not given to employee's attorney, in view of fact that employee's attorney received actual notice, and subcontractor did not receive copy of conciliation agreement. Castagna & Son, Inc. v Chambers, 50 A.D.2d 833, 376 N.Y.S.2d 587, 1975 N.Y. App. Div. LEXIS 11689 (N.Y. App. Div. 2d Dep't 1975).

Where record raised no factual issue relating to claim that law firm unlawfully discriminated against individual by refusing to hire him, and it appeared as matter of law that complaint lacked merit and failed to raise genuine factual issues, confrontation conference was not required. State Div. of Human Rights ex rel. Jafree v Bond, Schoeneck & King, 52 A.D.2d 1045, 384 N.Y.S.2d 568, 1976 N.Y. App. Div. LEXIS 12958 (N.Y. App. Div. 4th Dep't 1976).

Though provisions of Executive Law pertaining to procedures on a race discrimination complaint do not mandate a confrontation conference between the complainant and his employer, such a conference is authorized under the regulations as an aid to eliminate the discriminatory practice complained of during the investigatory stage. State Div. of Human Rights ex rel. Powers v Mecca Kendall Corp., 53 A.D.2d 201, 385 N.Y.S.2d 665, 1976 N.Y. App. Div. LEXIS 12506 (N.Y. App. Div. 4th Dep't 1976).

Absent an explanation for the change in ordinary procedure, it was an abuse of discretion for the Division of Human Rights to exclude race discrimination complainant from participation in a conference between the Division's field representative and the complainant's employer. State Div. of Human Rights ex rel. Powers v Mecca Kendall Corp., 53 A.D.2d 201, 385 N.Y.S.2d 665, 1976 N.Y. App. Div. LEXIS 12506 (N.Y. App. Div. 4th Dep't 1976).

Complainant, who was denied both opportunity to present his complaint of unlawful discriminatory practice related to employment and to rebut evidence submitted in opposition, was entitled to confrontation conference so that he might present his case in a proper and seemly manner. Long Island Rail Road v New York State Human Rights Appeal Board, 59 A.D.2d 924, 399 N.Y.S.2d 259, 1977 N.Y. App. Div. LEXIS 14139 (N.Y. App. Div. 2d Dep't 1977).

In a proceeding brought pursuant to Exec Law § 298 for enforcement of an order of the State Division of Human Rights after conciliation between the Division and the State Department of Mental Hygiene which awarded complainants compensatory damages, the reviewing court would grant the third-party petition against the third-party defendant, the State Department of Audit and Control, directing the third-party defendant to pay the sums agreed upon in the conciliation agreement, since the Division is empowered to direct the state agency to pay back salary upon a finding of discrimination, and would further hold that by enacting authority for the Division to pursue discrimination claims against employers, and not excluding the state as an employer, the legislature exercised its power to waive the state's usual immunity, that the jurisdiction of the Court of Claims against the state is not totally exclusive but is determined as the legislature may provide, and that the failure of the legislature to appropriate funds for payment of civil rights claims against the state is not indicative of its intent that the state was not subject to such award. State Div. of Human Rights v Dep't of Mental Hygiene, Rome Dev. Ctr., 85 A.D.2d 915, 446 N.Y.S.2d 784, 1981 N.Y. App. Div. LEXIS 16759 (N.Y. App. Div. 4th Dep't 1981).

Investigation by State Division of Human Rights into employer's alleged age discrimination was not inadequate merely because division did not conduct confrontation conference or hearing, since petitioner was given full and fair opportunity to present evidence on his own behalf and to rebut evidence presented by employer. Murphy v Russell Sage College, 134 A.D.2d 716, 521 N.Y.S.2d 199, 1987 N.Y. App. Div. LEXIS 50907 (N.Y. App. Div. 3d Dep't 1987).

Division of Human Rights did not act arbitrarily in dismissing employees' age discrimination complaints for administrative convenience at their own behest where they elected to pursue remedies in federal court; dismissal was in conformance with regulations, since retaining complaints by division would not advance state's human rights goals, especially since it would compel use of scarce state resources where employees had desire and resources to bring complaints in federal court. Division of Human Rights has authority to dismiss employment discrimination case for administrative convenience not only where complainant objects to proposed conciliation agreement but also where noticing complaint for hearing would be otherwise undesirable. Eastman Chem. Prods., Inc. v New York State Div. of Human Rights, 162 A.D.2d 157, 556 N.Y.S.2d 571, 1990 N.Y. App. Div. LEXIS 6994 (N.Y. App. Div. 1st Dep't 1990).

Division of Human Rights properly dismissed complaint for race and disability discrimination on ground of administrative convenience prior to public hearing and formal fact-finding where complainant would be proceeding in federal court on identical claims. Tribune Entertainment Corp. v New York State Div. of Human Rights, 210 A.D.2d 11, 619 N.Y.S.2d 559, 1994 N.Y. App. Div. LEXIS 11872 (N.Y. App. Div. 1st Dep't 1994).

Respondent's contention that he was denied due process where Investigating Commissioner did not hold conciliation conference with him individually was rejected, since § 297, subd 2 authorized Investigating Commissioner to set a matter down for a hearing before the Commission after first making efforts at conciliation, if circumstances so warranted. Marrano Constr. Co. v State Com. for Human Rights, 45 Misc. 2d 1081, 259 N.Y.S.2d 4, 1965 N.Y. Misc. LEXIS 2061 (N.Y. Sup. Ct. 1965).

11. "Aggrieved person"

Where evidence that private club served non-member whites while refusing service to blacks present at fashion show open to public established a violation of Executive Law § 296, subd 2, blacks who had not requested service were nevertheless aggrieved persons within the meaning of Executive Law § 297. Batavia Lodge No. 196, L. O. M. v New York State Div. of Human Rights, 43 A.D.2d 807, 350 N.Y.S.2d 273, 1973 N.Y. App. Div. LEXIS 2914 (N.Y. App. Div. 4th Dep't 1973), rev'd, 35 N.Y.2d 143, 359 N.Y.S.2d 25, 316 N.E.2d 318, 1974 N.Y. LEXIS 1377 (N.Y. 1974).

Respondent NAACP was entitled to lodge complaint as an aggrieved party under statutory provisions and the Division of Human Rights did not lack jurisdiction simply because the alleged violater is a municipal agency. Glen Cove Municipal Civil Service Com. v Glen Cove NAACP, 34 A.D.2d 956, 312 N.Y.S.2d 400, 1970 N.Y. App. Div. LEXIS 4640 (N.Y. App. Div. 2d Dep't), app. denied, (N.Y. App. Div. 1970).

An organization whose members are injured by an alleged discriminatory act is an "aggrieved person" having a right to maintain a proceeding seeking judicial review. NOW v Gannett Co., 40 A.D.2d 107, 338 N.Y.S.2d 570, 1972 N.Y. App. Div. LEXIS 3217 (N.Y. App. Div. 4th Dep't 1972), app. dismissed, 32 N.Y.2d 940, 347 N.Y.S.2d 201, 300 N.E.2d 733, 1973 N.Y. LEXIS 1191 (N.Y. 1973), app. dismissed, 32 N.Y.2d 966, 1973 N.Y. LEXIS 2076 (N.Y. 1973), rev'd, 34 N.Y.2d 416, 358 N.Y.S.2d 124, 314 N.E.2d 867, 1974 N.Y. LEXIS 1480 (N.Y. 1974).

The trial court erred in failing to dismiss a loss of consortium action brought by the husband of a former medical center employee who alleged that the medical center and her former supervisor had discriminated against her by reason of her sex and marital status in violation of Exec Law § 296(1)(a) and had intentionally inflicted emotional distress upon her, since spouses of employees who allege actionable discrimination under the Executive Law are not "aggrieved persons" within the meaning of the statutes so as to support causes of action for loss of consortium, and since the wife's allegations were insufficient to state a cause of action for intentional infliction of emotional distress, so that any loss of consortium action derived therefrom would necessarily fail. Belanoff v Grayson, 98 A.D.2d 353, 471 N.Y.S.2d 91, 1984 N.Y. App. Div. LEXIS 16486 (N.Y. App. Div. 1st Dep't 1984).

In action under Human Rights Law (CLS Exec §§ 290 et seq.) for sex discrimination in employment, court would order new trial

as to damages unless plaintiff agreed to reduction of award from $575,000 to $350,000 where plaintiff had shown lost income of only $226,000, and psychiatric condition that plaintiff suffered from as result of defendants' conduct resolved itself within 2 years. Rhoades v Niagara Mohawk Power Corp., 202 A.D.2d 762, 608 N.Y.S.2d 733, 1994 N.Y. App. Div. LEXIS 2307 (N.Y. App. Div. 3d Dep't 1994).

Award of $54,000 for emotional distress as result or retaliatory discharge in violation of CLS Exec § 296(1)(e) was not excessive where (1) plaintiff testified that she suffered from irritable bowel syndrome, pains in her sides, insomnia, migraines and depression, and that as result thereof she sought medical treatment, (2) after her discharge, she was deeply concerned about her ability to support herself and her child because she was single mother with limited professional experience and training, and (3) she had been unable to secure comparable employment for approximately one year. Gleason v Callanan Indus., 203 A.D.2d 750, 610 N.Y.S.2d 671, 1994 N.Y. App. Div. LEXIS 4163 (N.Y. App. Div. 3d Dep't 1994).

Damages for lost wages in action under CLS Exec Art 15 should be calculated by difference between what plaintiff would have earned had he or she continued to remain employed with offending employer and what he or she actually earned; thus, in action for retaliatory discharge in violation of CLS Exec § 296(1)(i), jury was entitled to presume that plaintiff was to receive wage increases in years following her discharge commensurate with wage increases that she had received in past. Gleason v Callanan Indus., 203 A.D.2d 750, 610 N.Y.S.2d 671, 1994 N.Y. App. Div. LEXIS 4163 (N.Y. App. Div. 3d Dep't 1994).

Division of Human Rights erroneously awarded back pay based on projections rather than actual salary and benefits earned during relevant period by complainant's former co-worker, whose salary was identical to complainant's when complainant left employment; further, award of back pay should have been reduced by amount of unemployment compensation that complainant received during period covered by award. New York State Div. of Human Rights ex rel. Bice v Parkview Auto Sales, 206 A.D.2d 888, 616 N.Y.S.2d 113, 1994 N.Y. App. Div. LEXIS 7812 (N.Y. App. Div. 4th Dep't), transferred, 206 A.D.2d 889, 616 N.Y.S.2d 282, 1994 N.Y. App. Div. LEXIS 7813 (N.Y. App. Div. 4th Dep't 1994).

The State Commission for Human Rights was warranted in finding that a party who was not seeking housing for himself or anyone else, but who was merely acting as a tester for the purpose of obtaining information as to discriminatory practices of a real estate broker, was not an aggrieved person. Cumberbatch v Lytle, 55 Misc. 2d 1041, 287 N.Y.S.2d 132, 1967 N.Y. Misc. LEXIS 1008 (N.Y. Sup. Ct. 1967).

It is the prerogative of the commission to determine whether a petitioner is an aggrieved person. Cumberbatch v Lytle, 55 Misc. 2d 1041, 287 N.Y.S.2d 132, 1967 N.Y. Misc. LEXIS 1008 (N.Y. Sup. Ct. 1967).

Within statute to effect that any person claiming to be aggrieved by an unlawful discriminatory employment practice shall have cause of action, "aggrieved person" means victim of the discriminatory practice. Wife of individual against whom an allegedly unlawful discriminatory practice was committed during his employment was not an "aggrieved" person within Executive Law providing that any person claiming to be aggrieved by unlawful discriminatory practice shall have cause of action. Weinstein v Hospital for Joint Diseases & Medical Center, 81 Misc. 2d 366, 365 N.Y.S.2d 398, 1975 N.Y. Misc. LEXIS 2390 (N.Y. Sup. Ct. 1975), aff'd, 53 A.D.2d 627, 384 N.Y.S.2d 203, 1976 N.Y. App. Div. LEXIS 13330 (N.Y. App. Div. 2d Dep't 1976).

Prejudgment interest was not available on award of compensatory damages for pain and suffering under state Human Rights Law, although plaintiff was entitled to prejudgment interest on back pay award, since prejudgment interest is not recoverable in personal injury actions (CLS CPLR § 5001). McIntosh v Irving Trust Co., 873 F. Supp. 872, 1995 U.S. Dist. LEXIS 954 (S.D.N.Y. 1995).

12. —Standing to sue

Under above provisions plaintiff has standing to complain only of grievances to which he has been one of the persons subjected. Gaynor v Rockefeller, 15 N.Y.2d 120, 256 N.Y.S.2d 584, 204 N.E.2d 627, 1965 N.Y. LEXIS 1651 (N.Y. 1965).

Roommates (one white man and one black man) had standing to bring action against owners of apartment building for damages for alleged unlawful discriminatory practices where roommates alleged that owners knew that white roommate was seeking accommodation for himself and his roommate and that discriminatory practice occurred after white roommate's disclosure that his roommate was black; if such allegations were established, jury could find that both roommates were injured by owner's racial bias, and it was not relevant that one roommate was white. Dunn v Fishbein, 123 A.D.2d 659, 507 N.Y.S.2d 29, 1986 N.Y. App. Div. LEXIS 60809 (N.Y. App. Div. 2d Dep't 1986).

Women's organization had standing to file with Division of Human Rights a complaint alleging sex and race discrimination with respect to hiring, firing, promotion and compensation by operator of retail department store and the Division had power to investigate on basis of such complaint. State Div. of Human Rights ex rel. Ducette v Adam, Meldrum & Anderson Co., 84 Misc. 2d 52, 375 N.Y.S.2d 502, 1975 N.Y. Misc. LEXIS 3091 (N.Y. Sup. Ct. 1975).

Naturalized citizen who graduated from foreign medical school, and was neither United States citizen nor permanent resident when he entered medical school, lacked standing to challenge his ineligibility for "Fifth Pathway" program under CLS Educ § 6528(a), whereby United States residents who graduate from foreign medical schools may be licensed after only one year of residency, as board of regents had granted him 2 years' credit toward his residency requirement so that he was required to complete only one year of residency and thus was placed in same position he would have occupied if he had been admitted to Fifth Pathway program, and court would not assume that, because board exercised its discretion to grant 2 years' credit under CLS Educ § 6506(5), it also would have exercised its discretion to waive requirement that he serve one year residency under Fifth Pathway program. Jaghory v New York State Dep't of Educ., 131 F.3d 326, 1997 U.S. App. LEXIS 35140 (2d Cir. N.Y. 1997).

Wife had standing to sue car rental agency for violation of Human Rights Law, although she who did not personally fill out application to rent car after her husband's application was refused, based on evidence that she showed rental agent her license in effort to secure car after her husband's attempt to rent car was rejected, and that rental agent told her that agency would not rent to her family because they were Puerto Rican. Rivera v Hertz Corp., 990 F. Supp. 234, 1997 U.S. Dist. LEXIS 21660 (S.D.N.Y. 1997).

13. "Employer"

A complaint charging the state Department of Labor with discriminatory practices in violation of Exec Law § 296, based upon the agency's dismissal of a claim for unemployment insurance benefits, was properly dismissed since § 296 was inapplicable in that the Department of Labor was not the claimant's employer, nor was it an employment agency or a labor organization. State Div. of Human Rights v N.Y. State Dep't of Labor, Unemployment Ins. Div., 84 A.D.2d 961, 447 N.Y.S.2d 73, 1981 N.Y. App. Div. LEXIS 16238 (N.Y. App. Div. 4th Dep't 1981).

Factors considered in determining whether relationship of employer and employee exists are selection on engagement of servant, payment of wages or salary, power of dismissal, and power of control over servant's conduct; corporation is employer when corporation selects and hires petitioner and possesses and exercises power of control, reserves power of dismissal and indirectly pays wages; corporation may not avoid obligations by expediency of contracting with another for payment of workers under its control. State Div. of Human Rights ex rel. Emrich v GTE Corp., 109 A.D.2d 1082, 487 N.Y.S.2d 234, 1985 N.Y. App. Div. LEXIS 47571 (N.Y. App. Div. 4th Dep't 1985).

Management agency which takes over payroll responsibilities is not employer for purpose of age discrimination claim where persons who retain management agency also retain responsibility for personnel decisions, including hiring and firing. State Div. of Human Rights ex rel. Barnard v Broadway Warehouse Co., 109 A.D.2d 1090, 487 N.Y.S.2d 239, 1985 N.Y. App. Div. LEXIS 47582 (N.Y. App. Div. 4th Dep't 1985).

Plaintiff employee's conspiracy claim, based on theory that it linked individual defendant (another corporate employee) to employment discrimination claims asserted by plaintiff against corporate employer under Human Rights Law, was not actionable since discrimination claim under Human Rights Law is action created by statute, which did not exist at common law, and therefore cannot give rise to tort liability; also, corporate employee is not individually subject to discrimination suits under Human Rights Law absent showing of ownership interest or power to do more than carry out personnel decisions made by others. Monsanto v Electronic Data Systems Corp., 141 A.D.2d 514, 529 N.Y.S.2d 512, 1988 N.Y. App. Div. LEXIS 6313 (N.Y. App. Div. 2d Dep't 1988).

Portion of determination by state Division of Human Rights finding that New York City Transit Authority (NYCTA) had discriminated against petitioner and directing relief against NYCTA would be annulled where complaint was never amended to include allegations of discrimination against NYCTA, and NYCTA had no notice that it would be charged with discriminatory acts separate and apart from any alleged acts of discrimination on part of Manhattan and Bronx Surface Transit Operating Authority until hearing commenced. Manhattan & Bronx Surface Transit Operating Auth. v New York State Div. of Human Rights, 225 A.D.2d 553, 638 N.Y.S.2d 761, 1996 N.Y. App. Div. LEXIS 1938 (N.Y. App. Div. 2d Dep't 1996).

Since New York State Teachers' Retirement System, in awarding pension benefits to male retiree with a female beneficiary in an amount less than would have been granted to a female retiree of the same age whose beneficiary was either male or female was merely following statutory direction and since the system was neither an "employer," an "employment agency" nor a "labor organization," the retirement system was not subject to investigation by the Human Rights Division with respect to its award of retirement benefits. New York State Teachers' Retirement System v New York State Div. of Human Rights, 83 Misc. 2d 993, 373 N.Y.S.2d 964, 1975 N.Y. Misc. LEXIS 3027 (N.Y. Sup. Ct. 1975).

An applicant for a civil service position as a New York City police officer, who was deemed medically disqualified by the city's Department of Personnel due to a back condition, was entitled to sue the city under the anti-discrimination provisions of the Human Rights Law, Exec Law § 296(1)(a), and was not relegated to an Article 78 proceeding under Civ Serv Law § 50(4)(b); public employers are subject to the Human Rights Law, so that persons aggrieved by their alleged unlawful discriminatory practices are provided with alternative remedies. Ramos v New York City Police Dep't, 127 Misc. 2d 872, 487 N.Y.S.2d 667, 1985 N.Y. Misc. LEXIS 2750 (N.Y. Sup. Ct. 1985).

Public transportation authority was entitled to writ of prohibition precluding Division of Human Rights from holding hearing or taking any action in regard to complaint by former employee of authority's wholly owned subsidiary since discrimination alleged in complaint related to unlawful employment practices, and authority was not employee's employer. Central New York Centro, Inc. v New York State Div. of Human Rights, 142 Misc. 2d 935, 539 N.Y.S.2d 626, 1989 N.Y. Misc. LEXIS 150 (N.Y. Sup. Ct. 1989).

Medical school that provided medical services at city hospital was not entitled to dismissal of discrimination claim asserted by hospital employee on ground that it was not plaintiff's "employer"; although medical school did not have ultimate authority to hire or fire plaintiff and it did not pay her wages, its employees exercised significant influence and control over conditions of plaintiff's employment and her "fate" at hospital. Dortz v City of New York, 904 F. Supp. 127, 1995 U.S. Dist. LEXIS 14438 (S.D.N.Y. 1995).

II. Remedies

14. Remedies available

Strong statutory policy of eliminating discrimination gives Commissioner of Human Rights Division more discretion in effecting an appropriate remedy than he would have under strict common-law principles. Batavia Lodge No. 196, etc. v New York State Div. of Human Rights, 35 N.Y.2d 143, 359 N.Y.S.2d 25, 316 N.E.2d 318, 1974 N.Y. LEXIS 1377 (N.Y. 1974).

Under evidence, Human Rights Division properly issued cease and desist order against employer in relation to practices resulting in barring or refusing to hire persons because of race, etc.; means chosen by Division were reasonably calculated to achieve desired objective without unduly infringing upon rights of employer. State Div. of Human Rights v Kilian Mfg. Corp., 35 N.Y.2d 201, 360 N.Y.S.2d 603, 318 N.E.2d 770, 1974 N.Y. LEXIS 1309 (N.Y. 1974), app. dismissed, 420 U.S. 915, 95 S. Ct. 1108, 43 L. Ed. 2d 387, 1975 U.S. LEXIS 506 (U.S. 1975).

State Human Rights Commissioner has wide discretion in selecting appropriate remedy, but there are times when his determination of remedy may be set aside because it is erroneous as matter of law. Only under gravest of circumstances, where all other conceivable remedies have proved ineffective or futile, should Human Rights Commissioner enter campus to impose conferring of tenure, and even in extraordinary case where grant of tenure might serve as appropriate remedy the Commissioner should not impose such requirement without consulting with administration of institution and without considering effect of such order on institution and its faculty. That professor was not given fair opportunity to apply for tenure was insufficient to justify State Human Rights Commissioner's imposition of tenure requirement, and tenure requirement was deleted from his order. New York Institute of Technology v State Div. of Human Rights, 40 N.Y.2d 316, 386 N.Y.S.2d 685, 353 N.E.2d 598, 1976 N.Y. LEXIS 2891 (N.Y. 1976).

The Commissioner of the State Human Rights Division reasonably concluded that an employer engaged in an unlawful discriminatory practice and compelled an employee to quit her job, where the evidence indicated that the employer had made blatantly obscene anti-Semitic remarks to her in the presence of other employees and had refused to apologize, notwithstanding the fact that the employer did not directly fire the employee and in fact had urged her to return to work. In exercising his broad powers to adopt measures reasonably deemed necessary to redress the injury to the employee, the commissioner properly directed that the employer apologize in writing, offer to reinstate the woman with back pay, together with $500 in damages for the shock, humiliation and outrage she experienced. Imperial Diner, Inc. v State Human Rights Appeal Bd., 52 N.Y.2d 72, 436 N.Y.S.2d 231, 417 N.E.2d 525, 1980 N.Y. LEXIS 2830 (N.Y. 1980).

Human Rights Commissioner acted within his discretion when he ordered that deputy sheriff, who had been wrongfully terminated from her position due to racial and sex discrimination, be offered reinstatement to her position, even though remedy might deprive sheriff of his discretion in making appointments. State Div. of Human Rights ex rel. Cottongim v County of Onondaga Sheriff's Dep't, 71 N.Y.2d 623, 528 N.Y.S.2d 802, 524 N.E.2d 123, 1988 N.Y. LEXIS 603 (N.Y. 1988).

As remedy for example of unlawful employment discrimination based on race and sex, Division of Human Rights properly ordered employer (1) to notify its supervisory employees that they were obliged to comply with nondiscrimination provisions of Human Rights Law, (2) to offer complainant promotion, with back pay, to position comparable to one unlawfully denied her, and (3) to pay complainant $10,000 in compensatory damages for hurt, humiliation and mental anguish she suffered as result of unlawful discrimination. Consolidated Edison Co. v New York State Div. of Human Rights, 77 N.Y.2d 411, 568 N.Y.S.2d 569, 570 N.E.2d 217, 1991 N.Y. LEXIS 363 (N.Y. 1991).

An award of $500 for mental anguish and humiliation was improperly granted since it was neither sought in the complaint nor supported by any evidence in the record. Hillcrest General Hospital-GHI v New York State Human Rights Appeal Bd., 90 A.D.2d 481, 454 N.Y.S.2d 549, 1982 N.Y. App. Div. LEXIS 18487 (N.Y. App. Div. 2d Dep't 1982).

An award of compensatory damages to a person aggrieved by an illegal discriminatory practice may include compensation for mental anguish, and such an award may be based solely on the testimony of the complainant. Board of Educ. v McCall, 108 A.D.2d 855, 485 N.Y.S.2d 357, 1985 N.Y. App. Div. LEXIS 43182 (N.Y. App. Div. 2d Dep't), app. denied, 65 N.Y.2d 601, 1985 N.Y. LEXIS 14750 (N.Y. 1985).

Commissioner was not arbitrary and capricious in age discrimination proceeding in awarding backpay and in directing that complainant be offered reinstatement in his position as methods specialist or position with equivalent title discharging in substantial part duties formerly performed by complainant; fact that employer had reorganized its factory operations since time it fired complainant or that almost 8 years had elapsed between firing and reinstatement order did not prevent commissioner from granting remedy. State Div. of Human Rights ex rel. Cecconi v Chicago Pneumatic Tool Co., 110 A.D.2d 1080, 489 N.Y.S.2d 29, 1985 N.Y. App. Div. LEXIS 48967 (N.Y. App. Div. 4th Dep't 1985).

Although there was substantial evidence that department of corrections violated CLS Exec § 296(16) in making determination not to hire claimant as correction officer, claimant was not entitled to relief since civil service eligibility list in question expired almost one year before department made its determination and claimant made no challenge to list itself. New York City Dep't of Correction v White, 163 A.D.2d 250, 558 N.Y.S.2d 71, 1990 N.Y. App. Div. LEXIS 8581 (N.Y. App. Div. 1st Dep't 1990).

It was error for Commissioner of Human Rights to award respondent back pay from date he was disqualified from existing civil service eligibility list until list expired, as retroactive appointment with back pay would violate state policy of discretionary governmental appointive power underlying Civil Service Law and, while respondent was entitled to be considered for appointment, he was not guaranteed appointment had his name been on original list. City of New York v New York State Div. of Human Rights, 250 A.D.2d 273, 682 N.Y.S.2d 387, 1998 N.Y. App. Div. LEXIS 13953 (N.Y. App. Div. 1st Dep't 1998), modified, 93 N.Y.2d 768, 698 N.Y.S.2d 594, 720 N.E.2d 870, 1999 N.Y. LEXIS 3434 (N.Y. 1999).

Order denying a former trooper's motion for attorneys' fees was error because her suit alleging sex discrimination, sexual harassment, and retaliation was not a tort action, the Equal Access to Justice Act (EAJA), N.Y. C.P.L.R. art. 86, applied, and attorneys' fees were available under the EAJA; an order quashing subpoenas duces tecum issued defense counsel for fee records was also error. Kimmel v State of New York, 76 A.D.3d 188, 906 N.Y.S.2d 403, 2010 N.Y. App. Div. LEXIS 5351 (N.Y. App. Div. 4th Dep't), app. denied, 77 A.D.3d 1457, 908 N.Y.S.2d 381, 2010 N.Y. App. Div. LEXIS 7109 (N.Y. App. Div. 4th Dep't 2010), in part, 27 N.Y.3d 1121, 57 N.E.3d 68, 36 N.Y.S.3d 876, 2016 N.Y. LEXIS 1742 (N.Y. 2016), aff'd, in part, 29 N.Y.3d 386, 80 N.E.3d 370, 57 N.Y.S.3d 678, 2017 N.Y. LEXIS 1298 (N.Y. 2017).

Civil fine imposed upon the owners of a farm did not constitute an abuse of discretion because because a couple was discriminated against based on their sexual orientation, and the record reflected the hurt, humiliation, and mental anguish that they suffered as a result of the owners' conduct. Matter of Gifford v Mccarthy, 137 A.D.3d 30, 23 N.Y.S.3d 422, 2016 N.Y. App. Div. LEXIS 238 (N.Y. App. Div. 3d Dep't 2016).

Under this section, the Commission has wide discretion in its choice of remedies deemed adequate to cope with unlawful practices, and the courts will not interfere except when the remedy selected has no reasonable relation to the unlawful practices found to exist. Cooney v Katzen, 41 Misc. 2d 236, 245 N.Y.S.2d 548, 1963 N.Y. Misc. LEXIS 1318 (N.Y. Sup. Ct. 1963).

Since the Commission has great latitude in its choice of remedy, courts will not generally interfere unless the remedy has no reasonable relation to the discriminatory practices found to exist or unless the remedy exceeds the reasonable authority of the Commission. Where the Commission ordered a landlord to offer complainant the next vacant apartment to include a written lease of one, two, or three years at the option of the complainant, the remedy would be modified to the extent of deleting the provision for a one-year lease, which the court felt imposed an undue hardship on the landlord, since maximum rentals in rent controlled apartments could be increased only upon the execution of a lease for a minimum period of two years. Lawrence Gardens, Inc. v State Com. for Human Rights, 53 Misc. 2d 20, 277 N.Y.S.2d 857, 1966 N.Y. Misc. LEXIS 1238 (N.Y. Sup. Ct. 1966).

Court was aware of no case in which a New York court has awarded New York State Human Rights Law, New York City Human Rights Law, or tort compensatory damages for nonecomonic harms other than those falling within the recognized categories. Indeed, the New York Court of Appeals has noted that damages for nonpecuniary losses stand on less certain ground than does an award for pecuniary damages because they are based on a "legal fiction" that such losses can be compensated monetarily. United States v City of New York, 897 F. Supp. 2d 30, 2012 U.S. Dist. LEXIS 133283 (E.D.N.Y. 2012).

Under both federal and New York law, claimants may not obtain compensatory damages for emotional distress based merely on the fact that they were unable to obtain work in their chosen occupation. United States v City of New York, 897 F. Supp. 2d 30, 2012 U.S. Dist. LEXIS 133283 (E.D.N.Y. 2012).

15. —Injunctions

Although the Human Rights Appeals Board erred in dismissing an employee's appeal from the Division's order of no probable cause since Exec Law § 297(2) is directory and not mandatory in setting 180 days as the time period within which the Division must investigate and determine a complaint of unlawful discrimination, the Division's finding of no probable cause would be confirmed where, in view of the evidence in the record of the employee's unsatisfactory performance, the employer was not guilty of unlawful discrimination in discharging him two weeks after he was hired. State Div. of Human Rights v American Can Co., 78 A.D.2d 1005, 433 N.Y.S.2d 906, 1980 N.Y. App. Div. LEXIS 13781 (N.Y. App. Div. 4th Dep't 1980).

An application by the State Commission for Human Rights for an injunction preventing respondents from selling, renting, leasing, or otherwise disposing of a certain apartment to anyone other than the complainant was denied, pending a determination of the issues by the Commission itself, and especially since in the first instance the matter should have been referred to the City Commission of Human Rights, even though such action was not a prerequisite to the bringing of the instant proceeding. State Com. for Human Rights v Harvey Properties, Inc., 50 Misc. 2d 672, 271 N.Y.S.2d 365, 1966 N.Y. Misc. LEXIS 1916 (N.Y. Sup. Ct. 1966).

Where for the second time the owner of condominium apartments had offered to enter into a contract with the complainant for the sale of an apartment, provided a proceeding before the Commission for Human Rights was dismissed, and a prior application for an injunction preventing sale of the apartment had been denied because the court could find no evidence of alleged racial discrimination, defendant's motion for an injunction was denied. State Com. for Human Rights v Westchestertowne Houses, Inc., 55 Misc. 2d 1015, 287 N.Y.S.2d 624, 1968 N.Y. Misc. LEXIS 1773 (N.Y. Sup. Ct. 1968).

In proceedings pursuant to Civil Rights Law § 297, subd 6, policewoman could not enjoin city from appointing any officer other than herself, either permanently, temporarily, or provisionally, to vacant position of sergeant pending conclusion of all litigation on order of State Division of Human Rights requiring city to offer policewoman next available sergeant position where police sergeant eligible list had expired pursuant to Civil Service Law § 56 at time such order was made. State Div. of Human Rights v Schenectady, 76 Misc. 2d 843, 351 N.Y.S.2d 290, 1973 N.Y. Misc. LEXIS 1540 (N.Y. Sup. Ct. 1973), app. dismissed, 45 A.D.2d 569, 360 N.Y.S.2d 111, 1974 N.Y. App. Div. LEXIS 3742 (N.Y. App. Div. 3d Dep't 1974).

Only Commissioner of Division of Human Rights may bring action for injunction to maintain status quo pending Division's decision on discrimination complaint. Where, if employees prevailed on complaint to Division of Human Rights that employer's proposed layoffs were unlawfully discriminatory on basis of age, employees would be reinstated with back pay, while if employer was forced to stay layoff pending Division's decision, salaries paid out during stay would never be returned, injunction of layoffs pending Division's decision would not be proper. Sable v Sperry Gyroscope Div., 81 Misc. 2d 429, 365 N.Y.S.2d 595, 1975 N.Y. Misc. LEXIS 2400 (N.Y. Sup. Ct.), aff'd, 50 A.D.2d 517, 375 N.Y.S.2d 120, 1975 N.Y. App. Div. LEXIS 12207 (N.Y. App. Div. 1st Dep't 1975).

Where, if police department was allowed to make three appointments which it contended it was ready to make, any remedy which division of human rights might have endeavored to fashion might have proved fruitless, judgment would be entered restrain-

ing police department from making the appointments pending determination of complaint before the division of human rights. Kramarsky v New York Police Dep't, 90 Misc. 2d 733, 395 N.Y.S.2d 937, 1977 N.Y. Misc. LEXIS 2142 (N.Y. Sup. Ct. 1977).

Subdivision 6 of section 297 of the Executive Law, which provides that the Commissioner of the State Division of Human Rights may apply to the Supreme Court, after the filing of a complaint with the division alleging an unlawful discriminatory practice, for an order to show cause why a respondent should not be enjoined from doing or procuring an act which would tend to render ineffectual any order the commissioner might enter in such proceeding, affords a remedy designed to be invoked, in an appropriate case, during the period from the filing of the complaint with the division until the time that the commissioner issues an order in the proceeding; it was not designed to permit postdetermination intervention by the Supreme Court. Accordingly, a motion by the commissioner for a mandatory injunction compelling respondent to obey the commissioner's order to accept complainant, who alleged that she had been denied admission to respondent's graduate program because of a disability, was denied, since the court does not have the power to grant the relief sought. Kramarsky v New York Psychoanalytic Institute, 102 Misc. 2d 806, 424 N.Y.S.2d 581, 1979 N.Y. Misc. LEXIS 2922 (N.Y. Sup. Ct. 1979).

Pursuant to N.Y. Exec. Law § 297(9), plaintiff employee was not entitled to injunctive relief because he had not demonstrated any irreparable harm if the relief was not granted or shown how, despite the compensatory damages awarded, there was an absence of an adequate remedy at law. Furthermore, the employee acknowledged that his current position, which was created for him by his employer, did accommodate his disability Welch v UPS, 871 F. Supp. 2d 164, 2012 U.S. Dist. LEXIS 91687 (E.D.N.Y. 2012).

16. Exhaustion of administrative remedies

Administrative convenience dismissals under CLS Exec § 297(3)(c) are subject to judicial review to extent that they are "purely arbitrary"—that is, to extent that they contravene or threaten to contravene statute, constitutional right, or administrative regulation. Marine Midland Bank, N. A. v New York State Div. of Human Rights, 75 N.Y.2d 240, 552 N.Y.S.2d 65, 551 N.E.2d 558, 1989 N.Y. LEXIS 4454 (N.Y. 1989).

In an engineer's action against his former employer, alleging discriminatory discharge based on his national origin, the action would be dismissed where the engineer's administrative complaint, that was filed with the state human rights division, had not been dismissed for administrative convenience, inasmuch as an action for unlawful discriminatory practice is permitted after the filing of an administrative complaint only when the complaint is dismissed on the ground of administrative convenience. Low v Gibbs & Hill, Inc., 92 A.D.2d 467, 459 N.Y.S.2d 47, 1983 N.Y. App. Div. LEXIS 16668 (N.Y. App. Div. 1st Dep't 1983).

An action brought by a labor union member alleging that her employer breached her contract of employment by refusing to enroll her as an individual member in the employer's dental plan would not be barred by Exec Law § 297(9), which provides that an aggrieved person's filing of a discrimination complaint with the New York State Division of Human Rights constitutes a binding election of remedies, since plaintiff's breach of contract action was not the same as her discrimination charge previously commenced with the Division of Human Rights. Goosley v Binghamton City School Dist. Bd. of Education, 101 A.D.2d 942, 475 N.Y.S.2d 924, 1984 N.Y. App. Div. LEXIS 18670 (N.Y. App. Div. 3d Dep't 1984).

In action to recover damages for unlawful discrimination based on marital status, plaintiff was not required to exhaust administrative remedies before commencing action in Supreme Court, even though Division of Human Rights is administrative agency charged with investigating and remedying discriminatory practices, since victims of discriminatory practices are given choice as to forum in which they may seek relief. Ness v Pan American World Airways, 142 A.D.2d 233, 535 N.Y.S.2d 371, 1988 N.Y. App. Div. LEXIS 12457 (N.Y. App. Div. 2d Dep't 1988).

Approximate 7 ½ -year delay from filing of complaint with Division of Human Rights to conduct of hearing was not, by itself, prejudicial to employer as matter of law. Pepsico, Inc. v Rosa, 204 A.D.2d 552, 612 N.Y.S.2d 74, 1994 N.Y. App. Div. LEXIS 5239 (N.Y. App. Div. 2d Dep't 1994).

Where no procedures were pending before the State Commission on Human Rights with respect to defendant's charge of discrimination on part of tavern owner, which charge had been dismissed by the Division of Human Rights, defendant, against whom tavern owner subsequently brought action for libel and malicious prosecution, the filing of which action was itself an unlawful discriminatory practice, was not required to exhaust administrative procedure by filing a complaint under the human rights law but was entitled to assert counterclaim to the libel and malicious prosecution complaint in order to recover for the discriminatory practice which the filing of that complaint represented. Moran v Simpson, 80 Misc. 2d 437, 362 N.Y.S.2d 666, 1974 N.Y. Misc. LEXIS 1906 (N.Y. Sup. Ct. 1974).

Where division of human rights had not yet made final disposition of employment discrimination complaint, court could not concern itself with merits of controversy, and division was required to pursue matter to a conclusion before judicial intervention could be sought. Kramarsky v New York Police Dep't, 90 Misc. 2d 733, 395 N.Y.S.2d 937, 1977 N.Y. Misc. LEXIS 2142 (N.Y. Sup. Ct. 1977).

Federal employment discrimination suit was barred by plaintiff's failure to exhaust state administrative remedies where plaintiff had never sought redress through New York State Division of Human Rights, and where plaintiff did not pursue remedy with city civil rights commission until 4 years after initial complaint was filed with such agency by Equal Employment Opportunity Commission on plaintiff's behalf, and attorney error was insufficient excuse for failure to follow proper procedure. Albano v General Adjustment Bureau, Inc. (GAB), 478 F. Supp. 1209, 1979 U.S. Dist. LEXIS 8799 (S.D.N.Y. 1979), aff'd, 622 F.2d 572, 1980 U.S. App. LEXIS 19246 (2d Cir. N.Y. 1980).

Claim under § 296 of New York Executive Law must be dismissed as premature where plaintiff alleges that he filed charges of discrimination and retaliation before New York State Division of Human Rights and that investigation of these charges is pending; having elected to proceed before Division, plaintiff is now precluded from pressing claims under § 296 before District Court. Marin v New York State Dep't of Labor, 512 F. Supp. 353, 1981 U.S. Dist. LEXIS 11696 (S.D.N.Y. 1981), disapproved, Morse v University of Vermont, 973 F.2d 122, 1992 U.S. App. LEXIS 19365 (2d Cir. Vt. 1992).

African-American woman, terminated from position of senior financial associate, has no viable claim under New York State Human Rights Law (CLS Exec Law §§ 290 et seq.), even though claim is not administratively barred by exhaustion requirement, because her signature of release in conjunction with her termination was knowing and voluntary, and was thus valid under totality of circumstances. Branker v Pfizer ,Inc., 981 F. Supp. 862, 1997 U.S. Dist. LEXIS 17896 (S.D.N.Y. 1997).

Former part time employee's employment discrimination claims were barred under N.Y. Exec. § 297(7) because the "administrative convenience" exception did not apply to these state law claims which she had previously raised before the New York State Department of Human Rights as the claims had been dismissed on their merits. Ganthier v N. Shore-Long Island Jewish Health Sys., 345 F. Supp. 2d 271, 2004 U.S. Dist. LEXIS 23481 (E.D.N.Y. 2004).

Former employee's racially hostile work environment suit against his former employer was not subject to dismissal as time-barred under the New York Human Rights Law, N.Y. Exec. Law § 297(5), because the alleged racial slurs, denial of computer access, and other alleged discriminatory acts were part of the same practice, and at least one alleged act occurred during the filing period. Watson v Am. Red Cross Blood Servs., 468 F. Supp. 2d 484, 2007 U.S. Dist. LEXIS 1225 (W.D.N.Y. 2007).

17. Election of remedies

State Division of Human Rights was not authorized to dismiss, "for administrative convenience," age discrimination complaint which was time-barred by CLS Exec § 297(5), and thus subsequent judicial proceeding could not be brought under more

generous limitation period of CLS CPLR § 214(2), since dismissal would contravene one-year time limitation of CLS Exec § 297(5) and election of remedies requirement of CLS Exec § 297(9). Marine Midland Bank, N. A. v New York State Div. of Human Rights, 75 N.Y.2d 240, 552 N.Y.S.2d 65, 551 N.E.2d 558, 1989 N.Y. LEXIS 4454 (N.Y. 1989).

Employer was not actually prejudiced by 8 ½ -year delay by state Division of Human Rights in processing employee's complaint of handicap discrimination, and thus complaint should not have been dismissed, even though delay was inordinate, where employer's increased exposure for back pay liability did not implicate its ability to defend, documents regarding employee's Social Security disability applications remained available, and there was no indication either that employee contributed to delay or that division engaged in "repetitive, purposeless and oppressive" conduct. Corning Glass Works v Ovsanik, 84 N.Y.2d 619, 620 N.Y.S.2d 771, 644 N.E.2d 1327, 1994 N.Y. LEXIS 4438 (N.Y. 1994).

By commencing a grievance procedure under a collective bargaining agreement, charging discriminatory practices in employment, teachers were not barred, either permanently or pending completion of the grievance procedures, from filing a complaint with the State Division of Human Rights. Board of Education v State Div. of Human Rights, 38 A.D.2d 245, 328 N.Y.S.2d 732, 1972 N.Y. App. Div. LEXIS 5352 (N.Y. App. Div. 4th Dep't 1972), aff'd, 33 N.Y.2d 946, 353 N.Y.S.2d 730, 309 N.E.2d 130, 1974 N.Y. LEXIS 1743 (N.Y. 1974).

The Division of Human Rights properly asserted jurisdiction over a complaint of sexual discrimination filed by a female professor who had been denied tenure by her university, although the professor had previously instituted an Article 78 proceeding to review the university's denial of tenure, where the Article 78 proceeding and the sexual discrimination complaint were not based on the same "grievance," within the meaning of Exec Law § 297(9), which provided that no person who had initiated a court action or an action before an administrative agency based on an unlawful discriminatory practice could file a complaint with the division with respect to the same grievance, in that in the Article 78 proceeding the professor had challenged alleged procedural irregularities in the tenure review process, whereas the sexual discrimination complaint was directed at alleged improper actions on the part of her department head. State University of New York v State Human Rights Appeal Bd., 81 A.D.2d 688, 438 N.Y.S.2d 643, 1981 N.Y. App. Div. LEXIS 11240 (N.Y. App. Div. 3d Dep't 1981), aff'd, 55 N.Y.2d 896, 449 N.Y.S.2d 29, 433 N.E.2d 1277, 1982 N.Y. LEXIS 3098 (N.Y. 1982).

A city police officer, whose position was terminated after alcohol was detected in his blood in violation of a stipulation he had entered into in settlement of disciplinary charges against him, was barred by the provisions of Exec Law § 297(9) from pursuing his claim that he had been discriminated against due to his disability of alcoholism since his previous Article 78 proceeding, alleging that his dismissal had been improper, had been brought, on the same grounds as the present proceeding. Whitney v State Human Rights Appeal Bd., 105 A.D.2d 991, 482 N.Y.S.2d 142, 1984 N.Y. App. Div. LEXIS 21082 (N.Y. App. Div. 3d Dep't 1984).

State Division of Human Rights improperly dismissed complaint of unlawful discriminatory practice based on sex, on ground that petitioner had another proceeding pending before Department of Transportation, since matter petitioner brought before department could not have led to any binding, enforceable adjudication or determination redressing petitioner's complaint of sex discrimination, and as such, it cannot be considered to have constituted action which petitioner had pending before administrative agency which barred her from filing instant complaint. Fremgen v New York State Div. of Human Rights, 114 A.D.2d 679, 494 N.Y.S.2d 252, 1985 N.Y. App. Div. LEXIS 53353 (N.Y. App. Div. 3d Dep't 1985).

Employee who unsuccessfully files complaint before state division of human rights in which, in addition to alleging violations of human rights law, he alleges that union has tortiously interfered with contractual rights vis-a-vis employer by encouraging it to discriminate against him and that union has fraudulently mischaracterized nature of employee's position in prior proceeding before National Labor Relations Board is precluded from commencing action against union seeking to relitigate same claims. Kuperman v Association of Bar, 118 A.D.2d 547, 499 N.Y.S.2d 8, 1986 N.Y. App. Div. LEXIS 54408 (N.Y. App. Div. 2d Dep't 1986).

In confirming determination that employer was guilty of sexual harassment of discharged probationary employee, court did not err in denying employee's request for future lost earnings or prejudgment interest as alternative to reinstatement, but employee should have been reinstated to her position as probationary employee and given additional probationary period in which to demonstrate her competence in atmosphere untainted by sexual harassment. Levy v City Comm'n on Human Rights, 196 A.D.2d 214, 609 N.Y.S.2d 576, 1994 N.Y. App. Div. LEXIS 2436 (N.Y. App. Div. 1st Dep't 1994), aff'd, 85 N.Y.2d 740, 628 N.Y.S.2d 245, 651 N.E.2d 1264, 1995 N.Y. LEXIS 1122 (N.Y. 1995).

In civil action alleging employment discrimination based on sexual orientation, defendants were not entitled to dismissal of claims grounded in New York City Human Rights Law on basis that plaintiff elected his remedies under NYC Admin Code § 8-502(d) by filing complaint with New York City Human Rights Commission, as prior complaint was properly dismissed for "administrative convenience" under NYC Admin Code § 8-113(a)(5) to conserve city resources and allow joinder with state law claims in state court in that city commission has limited jurisdiction extending only to claims arising under administrative code, whereas Supreme Court has exclusive jurisdiction over pendent civil claims arising under state law. Acosta v Loews Corp., 276 A.D.2d 214, 717 N.Y.S.2d 47, 2000 N.Y. App. Div. LEXIS 12405 (N.Y. App. Div. 1st Dep't 2000).

Trial court erred by reversing its dismissal of plaintiff's state and city human rights law claims and common law claims based on retaliation and sexual harassment because plaintiff's state law and city causes of action were barred by her election of an administrative remedy under N.Y. Exec. Law § 297(9), and the common-law negligence causes of action were barred by the exclusivity provisions of N.Y. Workers' Comp. Law §§ 11 and 29(6). Rodriguez v Dickard Widder Indus., 150 A.D.3d 1169, 56 N.Y.S.3d 328, 2017 N.Y. App. Div. LEXIS 4088 (N.Y. App. Div. 2d Dep't 2017).

Since plaintiff was precluded from commencing a court action for damages based upon an alleged discriminatory practice occurring on September 16, 1976 while his complaint before the State Division of Human Rights was still pending (Executive Law, § 300), the filing of a summons with the clerk of the court on September 15, 1977, the same date that he requested the dismissal of the complaint before the Division of Human Rights, but two weeks before the complaint was actually dismissed on the ground of administrative convenience, was a nullity rendering the subsequent service of the summons and complaint on defendant on October 31, 1977 time-barred as not being served within one year of the date of the alleged discriminatory act (Executive Law, § 297, subd 5). The statute which provides that a dismissal of a complaint before the Division of Human Rights on the ground of administrative convenience does not bar the bringing of a court action (Executive Law, § 297, subd 9) only serves to preserve plaintiff's right to sue but does not provide him with an extension of the mandatory one-year time limitation. Cheselka v Eastern Air Lines, Inc., 93 Misc. 2d 219, 402 N.Y.S.2d 159, 1978 N.Y. Misc. LEXIS 2039 (N.Y. Sup. Ct. 1978).

An applicant for a civil service position as a New York City police officer, who was deemed medically disqualified by the city's Department of Personnel due to a back condition, was entitled to sue the city under the anti-discrimination provisions of the Human Rights Law, Exec Law § 296(1)(a), and was not relegated to an Article 78 proceeding under Civ Serv Law § 50(4)(b); public employers are subject to the Human Rights Law, so that persons aggrieved by their alleged unlawful discriminatory practices are provided with alternative remedies. Ramos v New York City Police Dep't, 127 Misc. 2d 872, 487 N.Y.S.2d 667, 1985 N.Y. Misc. LEXIS 2750 (N.Y. Sup. Ct. 1985).

It was arbitrary and improper for State Division of Human Rights (SDHR), during pendency of court review of employment discrimination complaint, to dismiss complaint on ground of administrative convenience since (1) dismissal deprived employer

of its right to continue to argue before SDHR that it had been prejudiced by 14-year delay between filing of complaint and probable cause determination, (2) dismissal was obvious attempt to deprive court of jurisdiction to review underlying matter, and (3) given that both federal and state statutory schemes for addressing illegal discrimination provide that discrimination claims be brought in only one forum, it appeared that dismissal was in fact means chosen to allow employee to select different forum (state court) to hear same matter that had previously been submitted to both federal court and state agency. Avon Products, Inc. v State Div. of Human Rights, 138 Misc. 2d 466, 524 N.Y.S.2d 346, 1988 N.Y. Misc. LEXIS 36 (N.Y. Sup. Ct. 1988).

Plaintiff whose civil rights complaint before state agency is dismissed for administrative convenience may seek court remedy, even if it is plaintiff who seeks dismissal in order to pursue judicial remedy in federal court; once dismissal occurs, election of remedies barrier is removed. Promisel v First Am. Artificial Flowers, 943 F.2d 251, 1991 U.S. App. LEXIS 20793 (2d Cir. N.Y. 1991), cert. denied, 502 U.S. 1060, 112 S. Ct. 939, 117 L. Ed. 2d 110, 1992 U.S. LEXIS 539 (U.S. 1992).

Plaintiff completed proper deferral of her charge in civil rights action to appropriate state or local agency before instituting suit under Civil Rights Act of 1964 where although plaintiff did not seek prior relief from any state or local agency, human rights commission had opportunity to act first after it was notified by Equal Employment Opportunity Commission of plaintiff's charge. Winsey v Pace College, 394 F. Supp. 1324, 1975 U.S. Dist. LEXIS 12496 (S.D.N.Y. 1975).

CLS Exec L § 297 does not bar employee from bringing sex discrimination action where Equal Employment Opportunity Commission referred her claim to state agency as is required under its own procedures, because required reference is not election by individual employee. O'Brien v King World Productions, Inc., 669 F. Supp. 639, 1987 U.S. Dist. LEXIS 8476 (S.D.N.Y. 1987).

Employee's administrative complaint, asserted before City Commission of Human Rights that lacked subject matter jurisdiction, was not binding election not to sue. Pierre v Chemical Bank, 960 F. Supp. 21, 1997 U.S. Dist. LEXIS 3032 (E.D.N.Y. 1997).

Former hospital employee's New York State Human Rights Law claims were barred by the election of remedies doctrine because the employee filed an administrative complaint on June 18, 2002, with the New York State Division of Human Rights, alleging unlawful employment action on the basis of age, disability, national origin, race, color, and sex, and the New York State Division of Human Rights issued a no probable cause determination after an investigation; N.Y. Exec. Law § 297(9) divested the court of such jurisdiction. Lennon v New York City, 392 F. Supp. 2d 630, 2005 U.S. Dist. LEXIS 22550 (S.D.N.Y. 2005).

Plaintiff's claim in a federal district court was not barred because of an election of remedies because the complaint filed with the New York State Division of Human Rights was filed by the Equal Employment Opportunity Commission for duty sharing purposes. Drew v Plaza Constr. Corp., 688 F. Supp. 2d 270, 2010 U.S. Dist. LEXIS 8699 (S.D.N.Y. 2010).

18. —Election between state and municipal remedies

Plaintiff, prior to commencing this action alleging violation of Labor Law § 194, filed complaint with City Commission on Human Rights alleging sexual discrimination arising out of same facts and circumstances; filing of administrative complaint constituted election of remedies barring maintenance of this action (Executive Law § 297 [9]; Administrative Code of City of New York § 8-112); plaintiff's argument that Administrative Code is inconsistent with Labor Law, in violation of "home rule" provisions of State Constitution, is without basis in view of explicit provisions of Executive Law § 297 (9) providing that filing of complaint "hereunder or with any local commission on human rights" shall preclude subsequent action in court. Jones v Gilman Paper Co., 166 A.D.2d 294, 564 N.Y.S.2d 121, 1990 N.Y. App. Div. LEXIS 12059 (N.Y. App. Div. 1st Dep't 1990).

Employer was entitled to dismissal of complaint charging age discrimination where employee had already brought complaint pro se to city commission on human rights, which resulted in decision on merits in favor of employer, notwithstanding employee's claim that he was unschooled, was without benefit of counsel, and had only rudimentary knowledge of English, since he had benefit of full hearing and determination on merits of his claim, and CLS Exec § 297(9) does not import any "knowledgeable" prerequisite for election of remedies. Magini v Otnorp, Ltd., 180 A.D.2d 476, 579 N.Y.S.2d 669, 1992 N.Y. App. Div. LEXIS 1308 (N.Y. App. Div. 1st Dep't), app. denied, 80 N.Y.2d 751, 587 N.Y.S.2d 287, 599 N.E.2d 691, 1992 N.Y. LEXIS 1568 (N.Y. 1992).

State Division of Human Rights properly dismissed Human Rights Law race discrimination complaint at complainant's request on ground of "administrative inconvenience" under CLS Exec § 297, in order to permit complainant to pursue all claims against petitioner in federal court, since complainant elected to pursue both state law claims and claims under 42 USCS § 2000-e et seq. in federal court and only filed complaint with division in order to satisfy requirements of federal law before her claims could be asserted in federal court. New York Tel. Co. v New York State Div. of Human Rights, 148 Misc. 2d 765, 561 N.Y.S.2d 401, 1990 N.Y. Misc. LEXIS 536 (N.Y. Sup. Ct. 1990).

Employee was entitled to hearing on his motion for costs and attorney's fees, and to denial of employer's motion to set aside punitive damages award, under New York City Human Rights Law (NYC Admin Code § 8-502(f)) in disability discrimination case, even though jury's verdict did not specify whether employer was liable for discriminatory discharge under city Human Right Law (which permits recovery of punitive damages and attorney's fees) or state Human Rights Law (which does not permit such recovery), since state Human Rights Law has not preempted field, and that statute does not prohibit recovery of such fees for discrimination claims prosecuted under city law. Grullon v South Bronx Overall Economic Dev. Corp., 185 Misc. 2d 645, 712 N.Y.S.2d 911, 2000 N.Y. Misc. LEXIS 350 (N.Y. Civ. Ct. 2000).

Employee was not required to abandon or withdraw his cause of action for disability discrimination under state Human Rights Law, as condition to recovery of punitive damages or attorney's fees under New York City Human Rights Law. Grullon v South Bronx Overall Economic Dev. Corp., 185 Misc. 2d 645, 712 N.Y.S.2d 911, 2000 N.Y. Misc. LEXIS 350 (N.Y. Civ. Ct. 2000).

Judicially unreviewed findings by Division of Human Rights in age discrimination claim under CLS Exec Art 15 did not have preclusive effect on claim, based on same factual allegations, brought in federal court under Age Discrimination in Employment Act, 29 USCS §§ 621 et seq. Astoria Fed. Sav. & Loan Ass'n v Solimino, 501 U.S. 104, 111 S. Ct. 2166, 115 L. Ed. 2d 96, 1991 U.S. LEXIS 3320 (U.S. 1991).

19. —Election between state and federal remedies

In a proceeding pursuant to Exec Law § 298 to review an order of the State Human Rights Appeal Board, the trial court erred in dismissing petitioner's complaint on the ground that it was filed while a federal civil rights complaint was pending, where the record showed that petitioner's federal lawsuit and state discrimination complaint constituted attempts to remedy two separate grievances and no election of remedies was involved. Grinan v Santaella, 81 A.D.2d 657, 438 N.Y.S.2d 371, 1981 N.Y. App. Div. LEXIS 11180 (N.Y. App. Div. 2d Dep't 1981).

Grievant who files charge of discrimination with federal Equal Employment Opportunity Commission is barred from pursuing remedy in state court since CLS Exec § 297 bars grievant from pursuing remedy in state court if he files complaint with state Division of Human Rights; right to bring action in state court should not depend on which agency grievant files with. Scott v Carter-Wallace, Inc., 147 A.D.2d 33, 541 N.Y.S.2d 780, 1989 N.Y. App. Div. LEXIS 6839 (N.Y. App. Div. 1st Dep't), app. dismissed, 75 N.Y.2d 764, 551 N.Y.S.2d 903, 551 N.E.2d 104, 1989 N.Y. LEXIS 4443 (N.Y. 1989).

Action for unlawful discriminatory discharge from employment was not barred by CLS Exec § 297(9), even though plaintiff mailed complaint alleging unlawful discriminatory practices to federal Equal Employment Opportunity Commission (EEOC) 3 days before commencing action, since EEOC did not receive complaint until 7 days after commencement of action. Rosa v

Blake Business School, 182 A.D.2d 615, 582 N.Y.S.2d 213, 1992 N.Y. App. Div. LEXIS 5664 (N.Y. App. Div. 2d Dep't 1992).

Court erred in invoking CLS CPLR § 3211(a)(4) to dismiss complaint alleging wrongful employment termination in violation of CLS Exec § 296 because of pendency of plaintiff's federal court action against defendant alleging violation of Age Discrimination in Employment Act, since causes of action were not same although they involved common issue of age discrimination. Walsh v Goldman Sachs & Co., 185 A.D.2d 748, 586 N.Y.S.2d 608, 1992 N.Y. App. Div. LEXIS 9865 (N.Y. App. Div. 1st Dep't 1992).

Administrative convenience dismissal of complaint with State Division of Human Rights alleging discriminatory discharge from employment on bases of race and physical disability was arbitrary where there was nothing in record to suggest that complainant intended to pursue his federal remedy before filing his administrative complaint or that he filed such complaint as prerequisite to commencing federal action, fact that over one year elapsed between filing of administrative complaint and commencement of federal action indicated that complainant initially intended to elect administrative remedy, and thus dismissal violated CLS Exec § 297(9) and CLS Div Hum Rts R § 465.5(e)(2) (9 NYCRR § 465.5(e)(2)). Wegmans Food Mkts. v New York State Div. of Human Rights, 245 A.D.2d 685, 664 N.Y.S.2d 685, 1997 N.Y. App. Div. LEXIS 12602 (N.Y. App. Div. 3d Dep't 1997).

Under current version of CLS Exec § 297(9), State Division of Human Rights may dismiss administrative complaint for purpose of allowing complainant to annul his or her election of remedies and pursue action in state, instead of federal, court. Kordich v Povill, 244 A.D.2d 112, 676 N.Y.S.2d 331, 1998 N.Y. App. Div. LEXIS 8680 (N.Y. App. Div. 3d Dep't 1998).

It was not "purely arbitrary" for State Division of Human Rights (SDHR) to dismiss complainant's sexual harassment complaint for administrative convenience after having initially found that there was probable cause to support her allegations, as her intervening commencement of federal court action asserting Title VII sexual harassment and retaliation claims, and pendant state claims mirroring her allegations in complaint filed with SDHR, effectuated election of remedies under CLS Exec § 297(9). Universal Packaging Corp. v New York State Div. of Human Rights, 270 A.D.2d 586, 704 N.Y.S.2d 332, 2000 N.Y. App. Div. LEXIS 2647 (N.Y. App. Div. 3d Dep't 2000).

In an action by an employee against her employer in which she alleged that she was discriminated against because she was a Caucasian and a native of the United States, the motion of the employer to dismiss her complaint, on the ground that the anti-discrimination statute did not apply to white Americans, would be denied where the plain meaning of the words used and the perceived scope and intended application of the statute indicated that it applied equally to all persons; the employer's motion to dismiss the complaint on the second ground that the employee had previously filed a complaint with the Equal Employment Opportunity Commission that was still pending would likewise be denied, even though the employee failed to wait 180 days after filing the federal complaint to institute the action, where the employee's actions indicated her election to pursue her complaint in court. Travis v Carlisle Corp., 109 Misc. 2d 173, 439 N.Y.S.2d 790, 1979 N.Y. Misc. LEXIS 2970 (N.Y. Sup. Ct. 1979).

Filing of federal complaint with Equal Opportunity Employment Commission that is then automatically referred to state Division of Human Rights is deemed to exercise plaintiff's option for administrative forum and thus precludes bringing court action. Promisel v First Am. Artificial Flowers, 943 F.2d 251, 1991 U.S. App. LEXIS 20793 (2d Cir. N.Y. 1991), cert. denied, 502 U.S. 1060, 112 S. Ct. 939, 117 L. Ed. 2d 110, 1992 U.S. LEXIS 539 (U.S. 1992).

Construing Age Discrimination in Employment Act (29 USCS § 621 et seq.) and CLS Exec L § 297 liberally, their combined effect is that plaintiff cannot bring court action asserting both federal and state age discrimination in employment claims; one exception being that under § 297(9), plaintiff is not barred from bringing subsequent court action on his state law claim if his HRD complaint has been dismissed on grounds of administrative convenience. Meschino v International Tel. & Tel. Corp., 563 F. Supp. 1066, 1983 U.S. Dist. LEXIS 17606 (S.D.N.Y. 1983).

State cause of action under Human Rights Law are not barred by filing of complaint with Division of Human Rights on grounds of election of remedies doctrine, as plaintiffs' Title VII (42 USCS § 2000e et seq.) and Age Discrimination in Employment Act (29 USCS § 621 et seq.) discrimination charges were filed initially with EEOC as prerequisite to commencement of court action and subsequent decision by EEOC to refer such charges to Division of Human Rights cannot serve to bar plaintiffs' assertion of their rights under state law; further, even had plaintiffs initially invoked administrative proceedings before Division of Human Rights, such actions would only preclude filing of complaint in District Court while resolution of matters remained undecided by agency. People by Abrams v Holiday Inns, 656 F. Supp. 675, 1984 U.S. Dist. LEXIS 24071 (W.D.N.Y. 1984).

Plaintiff seeking relief in federal court under Age Discrimination in Employment Act, after having filed timely complaint first with appropriate state agency and then with Equal Employment Opportunity Commission, as required by 29 USCS § 633, is not barred by CLS NY Executive Law § 297, subd 9, because plaintiff's choice between state judicial and administrative relief does not affect right to bring federal claims in federal court, however, requirement of election of remedies under state statutes requires that pendent claim under New York Human Rights Law be dismissed for lack of subject matter jurisdiction under doctrine of election of remedies where plaintiff has administrative proceeding pending before New York State Division of Human Rights. Hunnewell v Manufacturers Hanover Trust Co., 628 F. Supp. 759, 1986 U.S. Dist. LEXIS 29289 (S.D.N.Y. 1986).

In action by university professor alleging series of related acts and continuing policy of discrimination against women faculty members, plaintiff's claim that she was denied tenure by same individual for 6 successive years, despite having been recommended for tenure, was sufficient to trigger continuing violation doctrine; thus, Human Rights claim under CLS Exec § 297 was not barred by statute of limitations. Sunshine v Long Island Univ., 862 F. Supp. 26, 1994 U.S. Dist. LEXIS 12685 (E.D.N.Y. 1994).

Allocation of $11,400 emotional distress award and $17,713 "other expenses" award to fired female executive's claim under New York Human Rights Law (CLS Exec Law §§ 290 et seq.) is approved, where federal $300,000 damage cap severely shrank jury's award of more than $5 million on Title VII (42 USCS §§ 2000e et seq.) claim, because Title VII clearly does not relieve employer from liability and award of damages under state law where jury has found such violation under both laws. Luciano v Olsten Corp., 912 F. Supp. 663, 1996 U.S. Dist. LEXIS 613 (E.D.N.Y. 1996).

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Under Exec § 297(9), employee's failure to annul her election of administrative remedy of age discrimination claim against employer before administrative hearing precluded her from bringing age discrimination suit in federal court against employer under 29 USCS § 623, even if she and her attorney were unaware of intervening change in law that broadened grounds for annulment. Harrison v New York City Off-Track Betting Corp., 107 F. Supp. 2d 455, 2000 U.S. Dist. LEXIS 11084 (S.D.N.Y. 2000).

Under Exec § 297, individuals seeking assuagement for employment discrimination under state law may either bring their claims in proper court or file complaint before New York State Division of Human Rights, but they may not do both. Gallagher v IBEW, 127 F. Supp. 2d 139, 2000 U.S. Dist. LEXIS 19154 (N.D.N.Y. 2000).

Under Exec § 297(9), charge of discrimination filed with EEOC cannot be considered to have been filed with state agency for election of remedy purposes until complaint is actually forwarded to state agency by EEOC and state agency opens file. EEOC v Rotary Corp., 164 F. Supp. 2d 306, 2001 U.S. Dist. LEXIS 11550 (N.D.N.Y. 2001).

Where a former employee sued his former employer, alleging discrimination, including harassment, in violation of both state and federal laws, to the extent that the employee asserted discrimination claims under state law, they were barred by the doctrine of election of remedies under N.Y. Exec. Law § 297(9) (2005), because he filed a verified complaint with a state human rights division, which dismissed the complaint on the merits and not on the grounds of administrative convenience; however the employee was not thereby precluded from pursuing any claims under federal civil rights laws. Lewis v N. Gen. Hosp., 502 F. Supp. 2d 390, 2007 U.S. Dist. LEXIS 62490 (S.D.N.Y. 2007).

Federal court lacked jurisdiction over plaintiff's claims under the New York State Human Rights Law, N.Y. Exec. Law § 290 et seq., against every named defendant in his action, because those claims were based on the same facts and incidents raised in the charge; plaintiff's discrimination and retaliation claims were barred and subject to dismissal for lack of subject matter jurisdiction pursuant to the election of remedies doctrine set forth in N.Y. Exec. Law § 297(9). James v Countrywide Fin. Corp., 849 F. Supp. 2d 296, 2012 U.S. Dist. LEXIS 12838 (E.D.N.Y. 2012).

20. —Election between administrative and judicial remedies

Executive Law § 297 gives individuals a choice. They can either elect to sue in court and recover in damages which they can establish, including mental anguish, or they can elect to seek administrative relief under the Human Rights Law. Whether they elect to seek this latter relief, complainants may obtain directives and orders which will benefit both themselves and others in their position but they limit their recovery for damages to actual out-of-pocket expenses. State Div. of Human Rights v Luppino, 35 A.D.2d 107, 313 N.Y.S.2d 28, 1970 N.Y. App. Div. LEXIS 3948 (N.Y. App. Div. 2d Dep't 1970), aff'd, 29 N.Y.2d 558, 324 N.Y.S.2d 298, 272 N.E.2d 885, 1971 N.Y. LEXIS 1169 (N.Y. 1971).

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Person aggrieved by alleged unlawful discriminatory practice may seek relief in either an appropriate court or by complaint to the State Division of Human Rights, but not both. State Div. of Human Rights v Commissioner of New York State Dep't of Civil Service, 57 A.D.2d 699, 395 N.Y.S.2d 774, 1977 N.Y. App. Div. LEXIS 11737 (N.Y. App. Div. 4th Dep't 1977).

While Exec Law § 297 prohibits an aggrieved person from pursuing relief on a single discriminatory grievance in two separate forums, the statute cannot be employed to bar an aggrieved person from maintaining a proceeding before the State Division of Human Rights based upon a discrimination complaint while contemporaneously maintaining an action in the courts based on the alleged breach of an employment contract. Gondola v Center Moriches Union Free School Dist., 80 A.D.2d 600, 436 N.Y.S.2d 42, 1981 N.Y. App. Div. LEXIS 10289 (N.Y. App. Div. 2d Dep't 1981).

Court properly dismissed complaint alleging violation of CLS Labor § 194 where plaintiff previously had filed complaint with City Commission on Human Rights alleging sexual discrimination arising out of same facts and circumstances, since filing of administrative complaint constituted election of remedies, barring maintenance of action. Jones v New York City Transit Authority, 166 A.D.2d 293, 562 N.Y.S.2d 402, 1990 N.Y. App. Div. LEXIS 12051 (N.Y. App. Div. 1st Dep't 1990).

CLS Exec § 297 sets forth election of remedies provision, and thus plaintiff was barred from bringing cause of action asserting discrimination after he filed claim with Division of Human Rights. Scopelliti v Town of New Castle, 210 A.D.2d 308, 620 N.Y.S.2d 405, 1994 N.Y. App. Div. LEXIS 12598 (N.Y. App. Div. 2d Dep't 1994).

Plaintiff was barred from commencing action in state court for alleged discriminatory practices where she had elected to file complaint with Division of Human Rights based on same conduct. Ehrlich v Kantor, 213 A.D.2d 447, 624 N.Y.S.2d 888, 1995 N.Y. App. Div. LEXIS 2709 (N.Y. App. Div. 2d Dep't 1995).

Former employer was entitled to summary judgment dismissing racial discrimination action where action was based on same issues charged in complaint brought before Equal Employment Opportunity Commission, which referred matter to Division of Human Rights. McCain v Eaton Corp., 213 A.D.2d 462, 623 N.Y.S.2d 626, 1995 N.Y. App. Div. LEXIS 2721 (N.Y. App. Div. 2d Dep't 1995), app. denied, 88 N.Y.2d 801, 644 N.Y.S.2d 688, 667 N.E.2d 338, 1996 N.Y. LEXIS 1062 (N.Y. 1996).

Claimant could not avoid jurisdictional bar under CLS Exec § 297(9) by merely adding additional elements of damage arising out of same underlying conduct, by changing his legal theory, or couching his claim in such vague and conclusory terms as to thwart comparison of administrative and legal proceedings; further, given that administrative complaints of discrimination were dismissed due to absence of probable cause, and not "on the grounds of administrative convenience" (CLS Exec § 297(9)), failure to conduct hearing was irrelevant. Bhagalia v State, 228 A.D.2d 882, 644 N.Y.S.2d 398, 1996 N.Y. App. Div. LEXIS 7256 (N.Y. App. Div. 3d Dep't 1996).

Administrative convenience dismissal of complaint with State Division of Human Rights alleging discriminatory discharge from employment on bases of race and physical disability was arbitrary where there was nothing in record to suggest that complainant intended to pursue his federal remedy before filing his administrative complaint or that he filed such complaint as prerequisite to commencing federal action, fact that over one year elapsed between filing of administrative complaint and commencement of federal action indicated that complainant initially intended to elect administrative remedy, and thus dismissal violated CLS Exec § 297(9) and CLS Div Hum Rts R § 465.5(e)(2) (9 NYCRR § 465.5(e)(2)). Wegmans Food Mkts. v New York State Div. of Human Rights, 245 A.D.2d 685, 664 N.Y.S.2d 685, 1997 N.Y. App. Div. LEXIS 12602 (N.Y. App. Div. 3d Dep't 1997).

Dismissal of complaint by Division of Human Rights on ground of administrative convenience (ACD) was arbitrary, in contravention of CLS Exec § 297(9) and 9 NYCRR § 465.5(e)(2)(vi), where complainant filed administrative complaint with Division and thereafter sought ACD from Division in order to commence action in state court, and, before Division granted ACD, complainant commenced action in state Supreme Court. Legg v Eastman Kodak Co., 248 A.D.2d 936, 670 N.Y.S.2d 291, 1998 N.Y. App. Div. LEXIS 2969 (N.Y. App. Div. 4th Dep't 1998).

Statute providing that person filing complaint with Division of Human Rights is precluded from also commencing action in court on claim of sex discrimination and that person commencing court action is precluded from filing complaint with Human Rights Division was intended to permit mandatory choice of seeking all such damages in court as could be established, including mental anguish, or of seeking administrative directives and orders which would benefit both themselves and others similarly situated, limiting recovery of damages to out-of-pocket expenses. Allison v Board of Education, 70 Misc. 2d 215, 333 N.Y.S.2d 261, 1972 N.Y. Misc. LEXIS 1896 (N.Y. Sup. Ct. 1972).

Under statutes giving individual claiming unlawful discrimination in employment remedy of pursuing grievance in court and remedy of filing complaint with division of human rights, the two remedies are mutually exclusive, so that, except in the situation where a complaint filed with the division of human rights has been dismissed for administrative convenience, where one remedy has been pursued, the other is not available. Kramarsky v

New York Police Dep't, 90 Misc. 2d 733, 395 N.Y.S.2d 937, 1977 N.Y. Misc. LEXIS 2142 (N.Y. Sup. Ct. 1977).

Since a lodge of a benevolent order was not a place of public accommodation, New York's Division of Human Rights could dismiss a woman's challenge to the denial of her application to join the lodge for lack of jurisdiction; however, it was arbitrary and capricious for the Division to have indicated in its dismissal that it was dismissing her action on the merits, because this deprived her of the opportunity to annul her election of remedies and pursue relief through a court action. Orendorff v B.P.O.E. Lodge No. 96, 195 Misc. 2d 53, 753 N.Y.S.2d 703, 2003 N.Y. Misc. LEXIS 40 (N.Y. Sup. Ct. 2003).

Under CLS Exec § 297, once plaintiff has commenced administrative proceeding, he cannot bring court action while proceeding is ongoing. Promisel v First Am. Artificial Flowers, 943 F.2d 251, 1991 U.S. App. LEXIS 20793 (2d Cir. N.Y. 1991), cert. denied, 502 U.S. 1060, 112 S. Ct. 939, 117 L. Ed. 2d 110, 1992 U.S. LEXIS 539 (U.S. 1992).

Former employee's election to seek redress of his race discrimination claims before New York State Division of Human Rights, prior to seeking redress in court, deprived federal district court of subject matter jurisdiction pursuant to CLS Exec § 297(9). Moodie v Federal Reserve Bank, 58 F.3d 879, 1995 U.S. App. LEXIS 16414 (2d Cir. N.Y. 1995).

Attorney's attempt to bring a discrimination claim pursuant to the New York Human Rights Law, N.Y. Exec. Law § 290 et seq., in federal court was barred because the attorney had elected to initially pursue her claim with the New York State Department of Human Rights, and the election-of-remedies provisions applied to federal courts as well as state courts. York v Ass'n of the Bar, 286 F.3d 122, 2002 U.S. App. LEXIS 5947 (2d Cir. N.Y.), cert. denied, 537 U.S. 1089, 123 S. Ct. 702, 154 L. Ed. 2d 633, 2002 U.S. LEXIS 9280 (U.S. 2002).

Executive Law § 297(9) requires that aggrieved party elect between administrative and judicial remedies; thus, plaintiff who seeks to redress his involuntary termination from his employment at state agency, is precluded from bringing action in any court on claim he alleges under New York Human Rights Law unless complaint before New York State Division of Human Rights is terminated without prejudice. Rio v Presbyterian Hospital in New York, 561 F. Supp. 325, 1983 U.S. Dist. LEXIS 18031 (S.D.N.Y. 1983).

Former assistant vice-president and loan officer of bank is barred by doctrine of election of remedies from bringing action under CLS Exec L § 296(1)(a) for age discrimination, where claim was also filed with appropriate state agency, which rejected it. Moylan v National Westminster Bank, 687 F. Supp. 54, 1988 U.S. Dist. LEXIS 5130 (E.D.N.Y. 1988).

Employment discrimination plaintiff's state claims under state human rights law are barred by CLS Exec Law § 297(9), where plaintiff filed pro se complaint with state division of human rights (DHR), which found no probable cause for his discrimination claims, because filing with DHR constituted binding election of administrative remedy foreclosing access to state courts. Stout v International Business Machs. Corp., 798 F. Supp. 998, 1992 U.S. Dist. LEXIS 10600 (S.D.N.Y. 1992).

Discharged stock manager may replead his claim under New York Human Rights Law (CLS Exec Law §§ 290 et seq.), where he simply alleges that Human Rights Commission terminated its investigation for administrative convenience when it turned his claim over to EEOC investigator, because law requires that state administrative agency issue very specific order before manager can be released from initial choice of administrative, as opposed to judicial, forum for his sex/age discrimination claim. Agugliaro v Brooks Bros., 802 F. Supp. 956, 1992 U.S. Dist. LEXIS 11261 (S.D.N.Y. 1992).

Former employee's discrimination claims against former employer are dismissed, where employee elected to pursue administrative remedies by filing complaint with state Division of Human Rights (DHR) and then requested that DHR dismiss her claim for administrative convenience, because dismissals for administrative convenience should be limited to cases where dismissal is truly for convenience of agency rather than due to change of litigation strategy by complainant. Chachra v Katharine Gibbs Sch., Inc., 828 F. Supp. 176, 1993 U.S. Dist. LEXIS 11296 (E.D.N.Y. 1993).

In former employee's discrimination action against former employer, employee may not amend complaint to add claim under CLS Executive Law, where employee elected administrative forum in which to pursue this claim prior to July 15, 1991, because, under CLS Exec Law § 297(9), this election precludes later court action on same claim. Clements v St. Vincent's Hosp. & Med. Ctr., 919 F. Supp. 161, 1996 U.S. Dist. LEXIS 3535 (S.D.N.Y. 1996).

Age discrimination claim under Human Rights Law and city anti-discrimination provisions is not barred by election of remedies provision in CLS Exec § 297(7) and NYC Admin Code § 8-502, where case is closed for administrative convenience. Miles v North Gen. Hosp., 998 F. Supp. 377, 1998 U.S. Dist. LEXIS 3979 (S.D.N.Y. 1998).

Under Exec § 297(1), employee's filing of Human Rights Law claims directly with state Division of Human Rights prior to commencing discrimination action under state law barred employee's action, where proceedings were not terminated for administrative convenience. Woodcock v Montefiore Med. Ctr. the Univ. Hosp. of the Albert Einstein College of Med., Comprehensive Family Care Ctr., 48 F. Supp. 2d 231, 1999 U.S. Dist. LEXIS 5710 (E.D.N.Y. 1999).

If a litigant brings a discrimination complaint before the New York State Division of Human Rights (SDHR), she may not bring a subsequent judicial action under the New York Human Rights Law, N.Y. Exec. Law § 296, based on the same incident, unless the SDHR dismissed the complaint for administrative convenience. After the SDHR decides the claim, a litigant may only appeal that decision to the Supreme Court of the State of New York. Gad-Tadros v Bessemer Venture Partners, 326 F. Supp. 2d 417, 2004 U.S. Dist. LEXIS 14165 (E.D.N.Y. 2004).

Former employee was permitted to bring suit against defendants under the the New York Human Rights Law, N.Y. Exec. Law § 296, after having filed a complaint with the New York State Division of Human Rights (SDHR), because the SDHR dismissed her complaint on the basis of administrative convenience. Gad-Tadros v Bessemer Venture Partners, 326 F. Supp. 2d 417, 2004 U.S. Dist. LEXIS 14165 (E.D.N.Y. 2004).

Plaintiff employee's New York State Human Rights Law claims were barred by the election-of-remedies provision under N.Y. Exec. Law § 297(9); the employee had filed a charge with the New York State Division of Human Rights (NYSDHR), setting forth the same issues as she alleged in her complaint before the court, and the NYSDHR had issued a no probable cause determination. Benson v N. Shore-Long Island Jewish Health Sys., 482 F. Supp. 2d 320, 2007 U.S. Dist. LEXIS 28524 (E.D.N.Y. 2007).

Detective's claim that a village's sick leave policy was enforced in a discriminatory manner on the basis of gender, race, and disability in violation of the New York Human Rights Law, N.Y. Exec. Law § 296, was barred by the election of remedies provision of N.Y. Exec. Law § 297(9) because the detective had filed a discrimination complaint with the New York State Division of Human Rights and the detective's present claims of gender, race, and disability discrimination arose out of the same incident forming the basis of her claim before the Division even though the administrative complaint alleged only discrimination on the basis of creed. Borum v Village of Hempstead, 590 F. Supp. 2d 376, 2008 U.S. Dist. LEXIS 103891 (E.D.N.Y. 2008).

Election of remedies provisions in N.Y. Exec. Law §§ 297(9) and 300 did not bar a former employee, who had previously filed a complaint with the New York Division of Human Rights (DHR), from asserting breach of contract claims against her former employer because there was an insufficient identity of issues raised in the DHR complaint and the instant action. The federal lawsuit required consideration of whether the employer breached the terms of a collective bargaining agreement by failing to provide written, specific reasons for the employee's suspension and whether there was sufficient cause for her termination, whereas the employee's DHR complaint asked whether the employer engaged in unlawful discrimination and harassment in violation of the New York Human Rights Law. Gorenflo v Penske Logistics, 592 F. Supp. 2d 300, 2009 U.S. Dist. LEXIS 1032 (N.D.N.Y. 2009).

21. — —Where administrative claim is referred to state or to another administrative agency

Where Commissioner of Division of Human Rights was agency's general counsel at time charges were investigated and set down for hearing, she could not, having subsequently been named commissioner, act as impartial arbiter in same matter, notwithstanding that she was no longer general counsel at time of hearing. State Div. of Human Rights v Dorik's Au Natural Restaurant, 203 A.D.2d 163, 610 N.Y.S.2d 266, 1994 N.Y. App. Div. LEXIS 4123 (N.Y. App. Div. 1st Dep't 1994).

Employee was not barred by CLS Exec § 297 from bringing employment discrimination suit in state court on grounds that referral of her complaint from Equal Employment Opportunity Commission (EEOC) to New York State Division of Human Rights constituted election of remedies; statute limited class of persons who could not pursue their rights in state court to those aggrieved persons who had themselves filed complaint with Division of Human Rights, and since EEOC referred complaint to agency on behalf of employee, employee was not prohibited from commencing state court action involving same claim. Scott v Carter-Wallace, Inc., 134 Misc. 2d 458, 511 N.Y.S.2d 767, 1986 N.Y. Misc. LEXIS 3119 (N.Y. Sup. Ct. 1986), dismissed, in part, 137 Misc. 2d 672, 521 N.Y.S.2d 614, 1987 N.Y. Misc. LEXIS 2698 (N.Y. Sup. Ct. 1987).

Claim by disabled person that hospital discriminated against him on basis of his disability in violation of CLS Exec L § 296 must be dismissed under doctrine of election of remedies, where claim was addressed and decided by Division of Human Rights and matter was not dismissed for administrative convenience so as to provide exception under § 297(9). Leake v Long Island Jewish Medical Center, 695 F. Supp. 1414, 1988 U.S. Dist. LEXIS 8361 (E.D.N.Y. 1988), aff'd, 869 F.2d 130, 1989 U.S. App. LEXIS 2447 (2d Cir. N.Y. 1989).

Pendent jurisdiction will not be exercised over state-law claims, where employee brought federal and state claims involving age discrimination, but it is unclear whether cause of action exists pursuant to CLS Exec Law § 297 in that employee's EEOC claim was referred to state agency, thereby comprising election of remedies barring a claim in state courts, because state claim presents unsettled issues of state law such that comity counsels leaving the decision to state courts. Dapelo v Banco Nacional De Mexico, 767 F. Supp. 49, 1991 U.S. Dist. LEXIS 8262 (S.D.N.Y. 1991).

"Journey person" electrician's claims under CLS Exec Law § 296 may proceed to trial, where she claims employer subjected her to unequal treatment due to her sex and her pregnancy, even though she did file charge with EEOC which was automatically referred to state division of human rights which would ordinarily constitute election of administrative remedy barring action in state court under CLS Exec Law § 297(9), because administrative complaint was withdrawn by plaintiff, eliminating barrier to court action under Second Circuit precedent. Kelber v Forest Elec. Corp., 799 F. Supp. 326, 1992 U.S. Dist. LEXIS 9977 (S.D.N.Y. 1992).

22. — —Where state claim contains additional charge

Discharged employee of corrections department was precluded from maintaining Article 78 proceeding by election of remedies provision of CLS Exec § 297 since he had previously filed complaint with Division of Human Rights based on same incident, allegations in his Article 78 petition were virtually identical with those in complaint, and although his petition added charge under CLS CPLR § 7803, its essential thrust was same as that contained in complaint. James v Coughlin, 124 A.D.2d 728, 508 N.Y.S.2d 231, 1986 N.Y. App. Div. LEXIS 62032 (N.Y. App. Div. 2d Dep't 1986), app. denied, 69 N.Y.2d 609, 516 N.Y.S.2d 1025, 509 N.E.2d 360, 1987 N.Y. LEXIS 16420 (N.Y. 1987).

Court properly denied leave to amend complaint (for third time) to allege that defendant religious institution had discriminated against 3-year-old disabled child in violation of CLS Exec § 296(4) by expelling child from nursery school where plaintiff's own letters and pleadings revealed that his son frequently ran out of nursery school classroom for no apparent reason, that school had legitimate reason, implemented as school policy, for classroom door to remain open, and that plaintiff himself had voluntarily removed his son from nursery school after school refused to change its policy. Posner v Central Synagogue, 202 A.D.2d 284, 609 N.Y.S.2d 195, 1994 N.Y. App. Div. LEXIS 2501 (N.Y. App. Div. 1st Dep't), app. dismissed, 83 N.Y.2d 953, 615 N.Y.S.2d 878, 639 N.E.2d 419, 1994 N.Y. LEXIS 1385 (N.Y. 1994).

Complaint alleging that discharge of plaintiff violated federal Rehabilitation Act and New York State Human Rights Law was not precluded by fact that plaintiff's employment application and application for promotion had omitted reference to 2 prior employers by whom he had been employed, since there was no evidence that plaintiff would have been discharged had those omissions been discovered while he was employed. Jones v Associated Univs., 870 F. Supp. 1180, 1994 U.S. Dist. LEXIS 17920 (E.D.N.Y. 1994), aff'd, 71 F.3d 406, 1995 U.S. App. LEXIS 33395 (2d Cir. N.Y. 1995).

23. — —Third-party filing

Jury's finding that employer had discharged employee in retaliation for her sexual harassment complaint was not against weight of evidence, despite employer's contention that decision to terminate employee was made before she advised employer of her complaint and that decision was based on employee's poor job performance, where (1) employee received regular and intermittent raises, was scheduled to receive another raise after date of her complaint, and had never had poor job review, and (2) she was fired shortly after submitting her sexual harassment complaint to employer. Gleason v Callanan Indus., 203 A.D.2d 750, 610 N.Y.S.2d 671, 1994 N.Y. App. Div. LEXIS 4163 (N.Y. App. Div. 3d Dep't 1994).

Determination by Commissioner of Division of Human Rights that employer did not unlawfully discriminate against employee on basis of her pregnancy was supported by evidence that employee misrepresented her hours on time card, that she refused to assist her coworkers in answering telephones, and that she kept irregular work hours. Resnik v New York State Div. of Human Rights, 204 A.D.2d 330, 611 N.Y.S.2d 270, 1994 N.Y. App. Div. LEXIS 4511 (N.Y. App. Div. 2d Dep't 1994).

Cooperative corporation was entitled to summary judgment in action alleging discriminatory rejection of plaintiff's application to become shareholder where (1) it was undisputed that plaintiff's financial worth statement was overstated and that she altered letter of submission with intention of allowing her brother to stay overnight when she was not in apartment, which violated rules of cooperative, (2) cooperative cited those incidents as basis of disapproval, and (3) plaintiff's hearsay assertion—that real estate broker told her that cooperative discouraged elderly people from buying apartments because they were great burden to service staff—was unsupported by tally of number of elderly residents in building. Hitter v Rubin, 208 A.D.2d 480, 617 N.Y.S.2d 730, 1994 N.Y. App. Div. LEXIS 10553 (N.Y. App. Div. 1st Dep't 1994).

CLS Exec § 297 does not bar cause of action based upon state human rights laws on grounds of election of remedy where plaintiff himself does not file with the agency, but third party, such as EEOC, files on his behalf. Kaczor v Buffalo, 657 F. Supp. 441, 1987 U.S. Dist. LEXIS 3346 (W.D.N.Y. 1987).

Former employee's state-law age discrimination action must be dismissed, even though attorney, not employee, filed administrative charge, because attorney's filing of administrative charge on behalf of his client operates as election of remedies under NYCLS Elec Law § 297(9), precluding judicial forum. Bouker v Cigna Corp., 847 F. Supp. 337, 1994 U.S. Dist. LEXIS 2920 (E.D. Pa. 1994).

III. Time Limitations

24. In general

State Division of Human Rights was not authorized to dismiss, "for administrative convenience," age discrimination complaint which was time-barred by CLS Exec § 297(5), and thus subsequent judicial proceeding could not be brought under more generous limitation period of CLS CPLR § 214(2), since dismissal would contravene one-year time limitation of CLS Exec § 297(5) and election of remedies requirement of CLS Exec § 297(9). Marine Midland Bank, N. A. v New York State Div. of Human Rights, 75 N.Y.2d 240, 552 N.Y.S.2d 65, 551 N.E.2d 558, 1989 N.Y. LEXIS 4454 (N.Y. 1989).

Where relatively minor delays occur, statutory time limitations of Executive Law governing proceedings before State Division of Human Rights are directory rather than mandatory and noncompliance by Division is not cause for invalidating its proceedings or terminating its jurisdiction; however, protracted administrative delays in implementation of provisions of human rights law will constitute, as matter of law, prejudice to named proceeding respondents, warranting exercise of equitable powers of judiciary to divest Division of jurisdiction conferred by human rights law. Protracted administrative delays in implementation of provisions of human rights law, arising by virtue of seven-month delinquency in determination by State Division of Human Rights of jurisdiction and probable cause, nine-month delinquency in giving of notice, eight-month delinquency in holding of public hearing, 87-day delinquency in issuance of Division's determination, and delay in notifying parties of appeal board's decision, resulting in expiration of period in excess of three years from date of filing of complaint until date of serving of decision and order of appeal board, constituted, as matter of law, prejudice to named proceeding respondents, warranting exercise of equitable powers of judiciary to divest Division of jurisdiction conferred by human rights law. State Div. of Human Rights ex rel. Bailey v Board of Education, 53 A.D.2d 1043, 386 N.Y.S.2d 166, 1976 N.Y. App. Div. LEXIS 15855 (N.Y. App. Div. 4th Dep't 1976), aff'd, 42 N.Y.2d 862, 397 N.Y.S.2d 791, 366 N.E.2d 878, 1977 N.Y. LEXIS 2186 (N.Y. 1977).

Where the State Division of Human Rights had a meritorious defense to a proceeding for a judgment prohibiting it from proceeding on a complaint because of its alleged unreasonable delay, and it moved promptly to vacate a default judgment entered against it in that proceeding, its default should be excused in the interest of justice so that the complainant may be permitted to pursue her charge of unlawful discrimination. Tessy Plastics Corp. v State Div. of Human Rights, 62 A.D.2d 36, 403 N.Y.S.2d 946, 1978 N.Y. App. Div. LEXIS 10415 (N.Y. App. Div. 4th Dep't 1978), aff'd, 47 N.Y.2d 789, 417 N.Y.S.2d 926, 391 N.E.2d 1007, 1979 N.Y. LEXIS 2058 (N.Y. 1979).

Following a determination of the State Division of Human Rights after a hearing, that complainant, a psychologist who had applied for admission to the New York Psychoanalytic Institute and who was otherwise eminently qualified for admission, had been denied admission in violation of the Human Rights Law on the ground that she suffered from Hodgkin's disease, it was error, upon administrative appeal by the institute which has standing to appeal pursuant to section 297-a (subd 6, par c) of the Executive Law, which empowers the Appeal Board to hear appeals "by any party to any proceeding before the division", for the State Human Rights Appeal Board, without reaching the merits, to annul the division's order and dismiss the complaint on the ground that the division had unreasonably exceeded the statutory time limit, in violation of section 297 (subd 4, pars a, c) of the Executive Law, since the extended time limits provided by section 297 are directory, not mandatory, and absent a showing of substantial prejudice or such egregious delay as will constitute prejudice as a matter of law, delay attributable solely to the administrative agency should not operate to foreclose relief to an innocent complainant who is not responsible for it; there is no claim or evidence of actual prejudice to the institute as a result of delay and there is no claim of undue delay caused by petitioner. Accordingly, since the Appeal Board is limited upon review to the power of a court reviewing an administrative determination made after hearing (Executive Law, § 297-a, subd 7), the order of the Appeal Board is annulled and the order of the Division of Human Rights is confirmed, inasmuch as the record is sufficiently detailed to afford a reasonable basis for the administrative determination, despite the deliberate default by the institute at the hearing. Goldsmith v New York Psychoanalytic Institute, 73 A.D.2d 16, 425 N.Y.S.2d 561, 1980 N.Y. App. Div. LEXIS 9711 (N.Y. App. Div. 1st Dep't 1980).

An action on behalf of women bus drivers alleging that transit authority's use of seniority as a factor to be considered in making provisional and permanent appointments of bus operators to the position of surface line dispatcher would be dismissed as time barred, where the complaint was premised upon the transit authority's prior practice of effectively precluding women from filling bus operator positions until 1978 by virtue of a five-foot four-inches height requirement, and where it did not allege any present impropriety. People v New York City Transit Authority, 90 A.D.2d 766, 455 N.Y.S.2d 295, 1982 N.Y. App. Div. LEXIS 18975 (N.Y. App. Div. 2d Dep't 1982), modified, 59 N.Y.2d 343, 465 N.Y.S.2d 502, 452 N.E.2d 316, 1983 N.Y. LEXIS 3174 (N.Y. 1983).

The Appellate Division would not invalidate proceedings or divest the New York State Division of Human Rights of jurisdiction, although the period from the filing of the complaint until the final resolution by the State Human Rights Appeal Board was over five years, in the absence of a showing by petitioner, who had been found guilty of discrimination on the basis of sex, that it had been substantially prejudiced by the delay. County of Nassau v New York State Div. of Human Rights, 96 A.D.2d 818, 465 N.Y.S.2d 566, 1983 N.Y. App. Div. LEXIS 19405 (N.Y. App. Div. 2d Dep't 1983).

An action commenced in 1982 predicated upon the Human Rights Law (Executive Law § 290 et seq.) which alleged that plaintiff was refused any opportunity to be considered for employment as a specific trust officer until she was eventually promoted to that position in 1976, that she was placed in lower ranking and lower paying job titles as similarly or less qualified men during the period of 1974 through 1975, that she was denied promotions because of more stringent standards apply to her because of her sex, which promotions occurred more than three years prior to the commencement of the action, and that defendant gave female employees less frequent and smallest salary increases than male employees who were hired in or around 1974, was time barred by the three year statute of limitations applicable to court actions under the Human Rights Law and, although the impact of such alleged wrongs may have had a lasting effect, said discrimination claims were not continuing wrongs which result in the tolling of the statute of limitations. Patrowich v Chemical Bank, 98 A.D.2d 318, 470 N.Y.S.2d 599, 1984 N.Y. App. Div. LEXIS 16482 (N.Y. App. Div. 1st Dep't), app. dismissed, 62 N.Y.2d 801 (N.Y. 1984), aff'd, 63 N.Y.2d 541, 483 N.Y.S.2d 659, 473 N.E.2d 11, 1984 N.Y. LEXIS 4717 (N.Y. 1984).

Time limits set forth in CLS Exec § 297 were enacted for benefit of complainants, not those charged with violating statute, and in absence of substantial prejudice to party charged, delay attributable solely to administrative agency should not operate to foreclose relief to innocent complainant who is not responsible for it. Ambrosio v State Div. of Human Rights, 144 A.D.2d 662, 535 N.Y.S.2d 381, 1988 N.Y. App. Div. LEXIS 12444 (N.Y. App. Div. 2d Dep't 1988).

Allegations that individual defendant made both physical and verbal sexual advances toward plaintiff that were unwelcome and repelled, that she was told her job evaluation was tied to her willingness to accept advances, and that she was forced to resign because corporate defendant did not provide vehicle of redress stated action for both hostile environment and quid pro quo sexual harassment under Human Rights Law; those same allegations also showed discriminatory conduct within limitations period sufficiently similar to alleged conduct without limitations period to justify conclusion that both were part of single discriminatory practice, and thus plaintiff's claim was timely in its entirety under continuing violation doctrine. Walsh v Covenant House, 244 A.D.2d 214, 664 N.Y.S.2d 282, 1997 N.Y. App. Div. LEXIS 11535 (N.Y. App. Div. 1st Dep't 1997).

Plaintiffs' due process rights were not violated by failure of Human Rights Division to comply with time limits under CLS Exec § 297, where division delayed in hearing their complaints of housing discrimination, but they still either had complaints pending with division or had settled their cases and thus their complaints were not extinguished due to delay. Housing Opportunities Made Equal, Inc. v Pataki, 277 A.D.2d 888, 716 N.Y.S.2d 215, 2000 N.Y. App. Div. LEXIS 11352 (N.Y. App. Div. 4th Dep't 2000), app. denied, 96 N.Y.2d 712, 729 N.Y.S.2d 439, 754 N.E.2d 199, 2001 N.Y. LEXIS 1062 (N.Y. 2001).

Claims relating to defendants' alleged discriminatory conduct preceding plaintiff's 15-month medical leave of absence were barred by time requirements for filing of notice of claim and complaint with Equal Employment Opportunity Commission;

continuing violations exception was inapplicable since plaintiff's leave of absence, which was voluntary and thus could not be considered discrimination, interrupted alleged pattern of discrimination. Sirota v N.Y. City Bd. of Educ., 283 A.D.2d 369, 725 N.Y.S.2d 332, 2001 N.Y. App. Div. LEXIS 6583 (N.Y. App. Div. 1st Dep't 2001).

Human rights division (HRD) was not entitled to an extension of time to serve a summons and complaint under N.Y. C.P.L.R. 306-b as: (1) a tenant had been sued by the landlords before she filed her administrative complaint, and her initial defense was that the landlords consented to her having a dog, (2) the tenant's request to later add a defense that the dog was an emotional support animal was denied, (3) the tenant then filed the administrative complaint and settled a holdover action by agreeing to remove the dog, (4) the HRD waited two years to file a summons and complaint after the landlords elected under N.Y. Exec. Law § 297(9) to have it file suit, (5) the HRD attempted service only on the landlords' attorneys in the administrative proceeding, (6) after the statute of limitations under N.Y. C.P.L.R. 214(2) had expired, the HRD moved for a default judgment and virtually conceded in responding to the landlords' motion to dismiss for lack of jurisdiction that service was improper, and (7) over four years had passed since the landlords' alleged discriminatory act, and the tenant no longer lived in the building. New York State Div. of Human Rights v Giffuni, 40 A.D.3d 361, 836 N.Y.S.2d 125, 2007 N.Y. App. Div. LEXIS 6009 (N.Y. App. Div. 1st Dep't 2007).

Prohibition does not lie to prevent the Division of Human Rights from holding a hearing to determine whether a school district had kept a teacher from substitute teaching in retaliation for an earlier complaint although the school district was notified more than three years too late under the statutory requirements of charges and a hearing (Executive Law, § 297); the remedy for asserted error of law in jurisdiction or authority lies first in administrative review and after exhaustion of that remedy in judicial review; a court may not prohibit proceedings before the division no matter how long the delay or how substantial the prejudice. Board of Education v New York State Div. of Human Rights, 99 Misc. 2d 643, 420 N.Y.S.2d 648, 1979 N.Y. Misc. LEXIS 2308 (N.Y. Sup. Ct. 1979), aff'd, 74 A.D.2d 987, 426 N.Y.S.2d 589, 1980 N.Y. App. Div. LEXIS 10804 (N.Y. App. Div. 3d Dep't 1980).

Three-month notice of claim requirements of CLS Educ § 3813(1) did not apply to action alleging that school district's denial of health insurance benefits to plaintiff's domestic partner constituted discrimination on basis of marital status and sexual orientation since action sought relief which would benefit plaintiff and teachers similarly situated. Funderburke v Uniondale Union Free Sch. Dist. No. 15, 172 Misc. 2d 963, 660 N.Y.S.2d 659, 1997 N.Y. Misc. LEXIS 260 (N.Y. Sup. Ct. 1997), aff'd, 251 A.D.2d 622, 676 N.Y.S.2d 199, 1998 N.Y. App. Div. LEXIS 7881 (N.Y. App. Div. 2d Dep't 1998).

Employee's N.Y. Exec. Law § 298 proceeding was dismissed because, inter alia, the administrative law judge (ALJ) noted that all the incidents cited by the employee in support of her hostile working environmental claim occurred well over a year before she filed her complaint and were thus time-barred. Matter of Price v Southwest Airlines, Inc., 66 A.D.3d 1267, 888 N.Y.S.2d 255, 2009 N.Y. App. Div. LEXIS 7618 (N.Y. App. Div. 3d Dep't 2009).

25. Time limitations as directory not mandatory

The statutory provision for speedy processing of complaints, providing for determination within 15 days that it had jurisdiction and there was probable cause, is to be regarded as merely directory and not as a limitation on the agency's authority. Glen Cove Municipal Civil Service Com. v Glen Cove NAACP, 34 A.D.2d 956, 312 N.Y.S.2d 400, 1970 N.Y. App. Div. LEXIS 4640 (N.Y. App. Div. 2d Dep't), app. denied, (N.Y. App. Div. 1970).

Although the time provisions of Executive Law § 297, subd 4(a), (c) are directory and not mandatory, such interpretation of statute does not permit the Division of Human Rights to ignore completely the specific statutory provisions for timely action. State Div. of Human Rights ex rel. Salamy v Rinas, 42 A.D.2d 388, 348 N.Y.S.2d 422, 1973 N.Y. App. Div. LEXIS 3276 (N.Y. App. Div. 4th Dep't 1973).

Time provisions of Executive Law, relating to when Division of Human Rights must hold hearing and make final determination, are directory, not mandatory. State Div. of Human Rights ex rel. Hale v Great Atlantic & Pacific Tea Co., 46 A.D.2d 1001, 362 N.Y.S.2d 105, 1974 N.Y. App. Div. LEXIS 3385 (N.Y. App. Div. 4th Dep't 1974).

Time schedules enjoined upon Division of Human Rights by law are directory and not for benefit of violators. Guardian Capital Corp. v New York State Div. of Human Rights, 48 A.D.2d 753, 368 N.Y.S.2d 594, 1975 N.Y. App. Div. LEXIS 9834 (N.Y. App. Div. 3d Dep't), app. denied, 37 N.Y.2d 712, 1975 N.Y. LEXIS 2959 (N.Y. 1975).

Limitations set forth in Executive Law for handling of discrimination complaints by State Division of Human Rights are directory rather than mandatory, but in view of very egregious violations resulting in consumption of four years and two months for resolution of complaint, Division's proceedings were invalidated and its jurisdiction terminated. State Div. of Human Rights v Board of Education, 59 A.D.2d 1048, 399 N.Y.S.2d 805, 1977 N.Y. App. Div. LEXIS 14335 (N.Y. App. Div. 4th Dep't 1977).

Where the Division of Human Rights did not make a finding as to jurisdiction and probable cause until seven months after the filing of a complaint and did not issue a notice of charges and hearing until nine months after the filing of the complaint, although section 297 of the Executive Law, as it then existed, prior to 1977 amendments (see L 1977, ch 729), required it to make a finding as to jurisdiction and probable cause within 15 days of the filing of the complaint and to issue the notice of charges and hearing within 60 days of the filing of the complaint, but no actual substantial prejudice was suffered by the party charged, dismissal of the division's proceedings because of the delay is not warranted. The time limitations set forth in section 297 of the Executive Law for, *inter alia,* the making of a finding as to jurisdiction and probable cause by the Division of Human Rights and for its issuance of a notice of charges and hearing, are directory and not mandatory, and were enacted for the benefit of the complainants, not those charged with violating the statute; in the absence of substantial prejudice to the party charged, delay attributable solely to the division, if not egregious, should not operate to foreclose relief to an innocent complainant. Tessy Plastics Corp. v State Div. of Human Rights, 62 A.D.2d 36, 403 N.Y.S.2d 946, 1978 N.Y. App. Div. LEXIS 10415 (N.Y. App. Div. 4th Dep't 1978), aff'd, 47 N.Y.2d 789, 417 N.Y.S.2d 926, 391 N.E.2d 1007, 1979 N.Y. LEXIS 2058 (N.Y. 1979).

A delay in excess of seven years, between the time of filing of a complaint before the State Division of Human Rights and the time a determination was made, caused prejudice to the respondent employer as a matter of law and would warrant dismissal of the complaint. State Div. of Human Rights ex rel. Schilagi v Bethlehem Steel Corp., 86 A.D.2d 977, 448 N.Y.S.2d 331, 1982 N.Y. App. Div. LEXIS 15683 (N.Y. App. Div. 4th Dep't 1982).

The complaint charging an employer with the unlawful discriminatory denial of pregnancy-related disability benefits, which complaint was filed three months after the cessation by the employer of enforcing the alleged discriminatory policy and 21 months after the end of the pregnancy-related disability, would be considered timely filed under Exec L § 297(5) since, when a discriminatory practice is one of a "continuing nature," the date of its occurrence is deemed to be any date subsequent to its inception up to the date of its cessation, and in assessing whether a discriminatory practice is of such a nature, the determining factor is whether the discriminatory practice had a continuing impact on the complainant; in the instant case the employer's ongoing policy of denying such disability claims had an impact on the petition until the date of the cessation, at which point the one-year limitations period began to run; it is the cessation of the impact of the discriminatory practice and not the cessation of the disability which triggers the one-year period. State Div. of Human Rights ex rel. McClary v Marine Midland Bank, 87 A.D.2d 982, 450 N.Y.S.2d 109, 1982 N.Y. App. Div. LEXIS 16519 (N.Y. App. Div. 4th Dep't 1982).

The time schedules specified in Exec Law § 297 for the performance of certain acts on the part of the Division of Human Rights are directory rather than mandatory, and the mere passage of time normally will not constitute substantial prejudice to a respondent in a discrimination proceeding in the absence of some

showing of actual injury to the respondent. Totem Taxi, Inc. v New York State Human Rights Appeal Bd., 98 A.D.2d 923, 471 N.Y.S.2d 358, 1983 N.Y. App. Div. LEXIS 21244 (N.Y. App. Div. 3d Dep't 1983), rev'd, 65 N.Y.2d 300, 491 N.Y.S.2d 293, 480 N.E.2d 1075, 1985 N.Y. LEXIS 15079 (N.Y. 1985).

Failure of division to conduct investigation within time limits prescribed by law does not support complainant's request for further investigation or public hearing since time limits are directory rather than mandatory. State Div. of Human Rights ex rel. Clifford v Oneida, Ltd., 112 A.D.2d 793, 492 N.Y.S.2d 293, 1985 N.Y. App. Div. LEXIS 56039 (N.Y. App. Div. 4th Dep't 1985).

Determination of Division of Human Rights, which held that employer had discriminated against employee because of her sex by denying her pregnancy-related disability benefits, would be confirmed in proceeding pursuant to CLS Exec § 298, even though there had been substantial delay in proceedings, since time limitations enunciated in CLS Exec § 297 are directory, rather than mandatory, and are for benefit of complainants rather than violators, and since commissioner legitimately found that correspondence between division and employee's attorney reflected desire of attorney to stay proceedings pending resolution of employee's workers' compensation claim, rather than withdrawal of claim. Art Leather Mfg. Co. v State Div. of Human Rights, 144 A.D.2d 406, 533 N.Y.S.2d 1018, 1988 N.Y. App. Div. LEXIS 11795 (N.Y. App. Div. 2d Dep't 1988).

Where sole evidence of mental anguish was complainant's own testimony that she was "[e]motionally and physically screwed up", award of $35,000 for mental anguish is grossly excessive and new award should not exceed $5,000–award of back pay from complainant's discharge in February 1985 until her reinstatement by petitioner constitutes punitive assessment against petitioner rather than compensation; complainant obtained new employment at same pay in July 1985; Division of Human Rights may not award what would amount to punitive damages solely on finding that unlawful discrimination occurred; award of back pay must be reduced to cover only period that complainant was out of work as result of her unlawful discharge; however, Division did not abuse its discretion in ordering petitioner to reinstate complainant–three-year period between filing of complaint and issuance of Division's determination did not operate to divest Division of jurisdiction; absent showing of substantial prejudice, time limitations enunciated in Executive Law § 297 are directory and not mandatory. Cosmos Forms, Ltd. v State Div. of Human Rights, 150 A.D.2d 442, 541 N.Y.S.2d 50, 1989 N.Y. App. Div. LEXIS 6521 (N.Y. App. Div. 2d Dep't 1989).

Three-year period between filing of employment discrimination complaint and issuance of determination by Division of Human Rights did not operate to divest division of jurisdiction since, absent showing of substantial prejudice, time limitations in CLS Exec § 297 are directory and not mandatory. Cosmos Forms, Ltd. v State Div. of Human Rights, 150 A.D.2d 442, 541 N.Y.S.2d 50, 1989 N.Y. App. Div. LEXIS 6521 (N.Y. App. Div. 2d Dep't 1989).

Time limitations in CLS Exec § 297(2)(a) and (4)(a) are directory, not mandatory. Tiffany & Co. v Smith, 224 A.D.2d 332, 638 N.Y.S.2d 454, 1996 N.Y. App. Div. LEXIS 1456 (N.Y. App. Div. 1st Dep't), app. denied, 88 N.Y.2d 806, 646 N.Y.S.2d 985, 670 N.E.2d 226, 1996 N.Y. LEXIS 1723 (N.Y. 1996).

Former employee's 2003 claim against her corporate employer and its owner for sexual harassment by creating a hostile work environment that arose out of six months of employment in 1991 and 1992 was not untimely because the time limits contained in N.Y. Exec. Law § 297 were directory only; in the absence of prejudice, which the owner and employer failed to demonstrate, the time limits did not affect the jurisdiction of the New York Division of Human Rights over the employee's claim. Matter of R & B Autobody & Radiator, Inc. v New York State Div. of Human Rights, 31 A.D.3d 989, 819 N.Y.S.2d 599, 2006 N.Y. App. Div. LEXIS 9469 (N.Y. App. Div. 3d Dep't 2006).

The enlarged time periods in section 297 of the Executive Law, as amended, providing that the time frame for the determination of jurisdiction by the State Division of Human Rights be extended from 15 to 180 days and that a notice of public hearing be served within 270 rather than 60 days after the filing of the complaint, are mandatory rather than directory; accordingly, a delay by the division of 462 days in determining jurisdiction following the filing of a complaint and of 766 days before the issuance of a notice of public hearing requires the dismissal of the complaint. General Railway Signal Co. v New York State Div. of Human Rights, 95 Misc. 2d 260, 407 N.Y.S.2d 417, 1978 N.Y. Misc. LEXIS 2413 (N.Y. Sup. Ct. 1978), rev'd, 73 A.D.2d 834, 423 N.Y.S.2d 768, 1979 N.Y. App. Div. LEXIS 14722 (N.Y. App. Div. 4th Dep't 1979).

Plaintiffs were entitled to mandatory injunction, enjoining Division of Human Rights to immediately schedule hearings and determine merit of housing discrimination complaints which had been pending for many years, where they demonstrated substantial likelihood of success on merits of their claim that they were denied due process due to division's failure to render prompt determination. Housing Opportunities Made Equal, Inc. v Pataki, 180 Misc. 2d 778, 693 N.Y.S.2d 795, 1998 N.Y. Misc. LEXIS 699 (N.Y. Sup. Ct. 1998).

26. Time for determining jurisdiction and probable cause

Even though time limitations contained in Executive Law § 297, subd 4(a), (c) are directive and not mandatory, valid complaint for discriminatory housing practices was dismissed where delay of 5 months, 16 months, and 3 years respectively in hearing of complaint by division, in making determination and order by division, and in appeal board's affirmance of division's order, were unconscionable and so flagrant as to be prejudicial in law to respondent. State Div. of Human Rights ex rel. Salamy v Rinas, 42 A.D.2d 388, 348 N.Y.S.2d 422, 1973 N.Y. App. Div. LEXIS 3276 (N.Y. App. Div. 4th Dep't 1973).

Requirement of Executive Law § 297, subd 4(a), that Division of Human Rights serve notice fixing date of hearing within 60 days after complaint is filed is directory, rather than mandatory, and noncompliance with such requirement did not divest Division of jurisdiction. 121-129 Broadway Realty, Inc. v N.Y. State Div. of Human Rights, 43 A.D.2d 754, 349 N.Y.S.2d 1003, 1973 N.Y. App. Div. LEXIS 2965 (N.Y. App. Div. 3d Dep't 1973).

Complaints alleging sex discriminations in employment were not subject to being dismissed because the State Division of Human Rights failed to comply with 60-day provision contained in the Executive Law with respect to serving notice as to answer and hearing after receiving complaints. State Div. of Human Rights ex rel. Ellis v Jamestown Tel. Corp., 53 A.D.2d 1061, 386 N.Y.S.2d 141, 1976 N.Y. App. Div. LEXIS 15880 (N.Y. App. Div. 4th Dep't 1976), aff'd, 42 N.Y.2d 848, 397 N.Y.S.2d 630, 366 N.E.2d 290, 1977 N.Y. LEXIS 2174 (N.Y. 1977).

The limitations set forth in section 297 of the Executive Law concerning the timeliness of administrative actions in discrimination proceedings remain directory after amendment by chapter 729 of the Laws of 1977; accordingly, where a complaint, charging an employer with an unlawful discriminatory practice in that it denied complainant employment due to disability, was filed in August, 1975, public hearings were held on such charges in May of 1976, December of 1976 and May, 1977 and a determination was made thereon by the State Division of Human Rights in July, 1978, but the record discloses no substantial prejudice to the respondent employer resulting from said delay, the State Human Rights Appeal Board erred in reversing the division's order that complainant be hired with back pay and in dismissing the complaint on the ground that the administrative delay constituted prejudice as a matter of law. Gamble v Adirondack Steel Casting Co., 71 A.D.2d 165, 422 N.Y.S.2d 487, 1979 N.Y. App. Div. LEXIS 13245 (N.Y. App. Div. 3d Dep't 1979), app. denied, 50 N.Y.2d 801, 1980 N.Y. LEXIS 2947 (N.Y. 1980).

A motion to prohibit a public hearing before the State Division of Human Rights for failure to serve notice of hearing within 60 days of the filing of the complaint was denied as Article 15 of the Executive Law delineates the way complaints to the Division shall be handled, how they shall be heard, to whom they shall be appealed and by which court the appeal shall be reviewed and when the Division determined that it has the jurisdiction to act, prohibition should not intrude into the statutory procedure. McMillan Book Co. v State Div. of Human Rights, 64 Misc. 2d 692, 315 N.Y.S.2d 463, 1970 N.Y. Misc. LEXIS 1162 (N.Y. Sup. Ct. 1970).

27. Time for serving notice and holding hearing

Where commissioner of human right's order was not issued until 160 days after hearings before trial examiner and decision

on appeal from that order was not handed down for more than a year, actions by commissioner and board of appeals were not timely and would be vacated. Hillside Housing Corp. v State Div. of Human Rights, 44 A.D.2d 539, 353 N.Y.S.2d 460, 1974 N.Y. App. Div. LEXIS 5445 (N.Y. App. Div. 1st Dep't 1974).

Time provisions of Executive Law, relating to when Division of Human Rights must hold hearing and make final determination, are directory, not mandatory. State Div. of Human Rights ex rel. Hale v Great Atlantic & Pacific Tea Co., 46 A.D.2d 1001, 362 N.Y.S.2d 105, 1974 N.Y. App. Div. LEXIS 3385 (N.Y. App. Div. 4th Dep't 1974).

Dismissal of complaint filed with Division of Human Rights by complainant, whose unlawful discriminatory discharge of employment due to his age was demonstrated by substantial evidence, on ground that the Division did not hold hearing or make final determination within time periods provided under Executive Law would be repugnant to purposes of the Executive Law. State Div. of Human Rights ex rel. Hale v Great Atlantic & Pacific Tea Co., 46 A.D.2d 1001, 362 N.Y.S.2d 105, 1974 N.Y. App. Div. LEXIS 3385 (N.Y. App. Div. 4th Dep't 1974).

Statutory time limits for division to render determination are directory and not mandatory and there is no remedy where petitioner fails to show that delay resulted in substantial prejudice. State Div. of Human Rights ex rel. Spencer v Syracuse University School of Nursing, 112 A.D.2d 709, 492 N.Y.S.2d 197, 1985 N.Y. App. Div. LEXIS 56218 (N.Y. App. Div. 4th Dep't 1985).

Although time schedules set forth in CLS Exec § 297 are directory only, and noncompliance with them does not operate to oust State Division of Human Rights of jurisdiction absent some showing of substantial prejudice, unexplained 8 ½ -year delay between filing of complaint in proceeding under CLS Exec § 298 and commissioner's final determination caused substantial prejudice to employer, requiring annulment of award, since employer was thereby subjected to exposure for 8 ½ -year award of back pay. Corning Glass Works v Ovsanik, 199 A.D.2d 959, 606 N.Y.S.2d 475, 1993 N.Y. App. Div. LEXIS 12540 (N.Y. App. Div. 4th Dep't 1993), modified, aff'd, 84 N.Y.2d 619, 620 N.Y.S.2d 771, 644 N.E.2d 1327, 1994 N.Y. LEXIS 4438 (N.Y. 1994).

Physician was not entitled to summary judgment dismissing action for violation of CLS Exec § 296 where (1) plaintiff alleged that she was permitted to register at hospital's high-risk prenatal care clinic based on her physical examination and history, that she consented to AIDS test which proved positive for HIV antibody, and that physician then refused to treat her at clinic, told her she should have abortion, and referred her to another hospital at which she had abortion, and (2) physician failed to establish absence of any triable fact issues. Doe v Jamaica Hosp., 202 A.D.2d 386, 608 N.Y.S.2d 518, 1994 N.Y. App. Div. LEXIS 1922 (N.Y. App. Div. 2d Dep't 1994).

Defendant was entitled to dismissal of action for age discrimination since plaintiff had signed release whereby she released defendant from any and all causes of action arising from or during her employment, including claims for employment discrimination; plaintiff could not escape impact of release by claiming that she had misinterpreted terms of release. Koster v Ketchum Communications, 204 A.D.2d 280, 611 N.Y.S.2d 298, 1994 N.Y. App. Div. LEXIS 4571 (N.Y. App. Div. 2d Dep't 1994), app. dismissed, 85 N.Y.2d 857, 639 N.Y.S.2d 782, 662 N.E.2d 1072, 1995 N.Y. LEXIS 266 (N.Y. 1995).

Court would annul determination of Commissioner of Human Rights finding that employer engaged in unlawful discrimination where (1) public hearing did not commence until 7 years after complaint was filed, and commissioner's determination was not issued until nearly 4 years later, (2) delay was attributable to Division of Human Rights without explanation, and (3) during delay, employer lost access to 2 individuals who would have been called as witnesses, and it also lost access to documentary evidence that would have been used in its defense. Pepsico, Inc. v Rosa, 213 A.D.2d 550, 624 N.Y.S.2d 622, 1995 N.Y. App. Div. LEXIS 4449 (N.Y. App. Div. 2d Dep't), app. dismissed, 86 N.Y.2d 837, 634 N.Y.S.2d 445, 658 N.E.2d 223, 1995 N.Y. LEXIS 3707 (N.Y. 1995), app. denied, 86 N.Y.2d 709, 634 N.Y.S.2d 442, 658 N.E.2d 220, 1995 N.Y. LEXIS 3708 (N.Y. 1995).

Eleven-year delay between filing of discrimination complaint and scheduling of hearing by State Division of Human Rights (DHR), although egregious, did not deprive it of jurisdiction, and question of whether there were prejudicial consequences to employer that made fair hearing impossible should be determined in course of administrative proceeding or by subsequent judicial review; however, DHR should be prohibited from amending complaint with additional charges, since agency's power is limited under 9 NYCRR § 465.4(a) to making amendments "reasonably and fairly," and such standard had not been met. Presbyterian Hosp. v State Div. of Human Rights, 241 A.D.2d 319, 659 N.Y.S.2d 283, 1997 N.Y. App. Div. LEXIS 7030 (N.Y. App. Div. 1st Dep't 1997).

Notice of claim requirements are inapplicable to N.Y. Exec. Law § 297 claims timely filed with the New York Division of Human Rights. Freudenthal v County of Nassau, 99 N.Y.2d 285, 755 N.Y.S.2d 56, 784 N.E.2d 1165, 2003 N.Y. LEXIS 139 (N.Y. 2003).

To the extent that Board of Educ. of Union Free School Dist. No. 2, East Williston, Town of North Hempstead v New York State Div. of Human Rights, 44 N.Y.2d 902, 407 N.Y.S.2d 636, 379 N.E.2d 163 (1978), suggests that a petitioner must file a notice of claim prior to pursuing administrative relief from the New York Division of Human Rights, it is not to be followed. Freudenthal v County of Nassau, 99 N.Y.2d 285, 755 N.Y.S.2d 56, 784 N.E.2d 1165, 2003 N.Y. LEXIS 139 (N.Y. 2003).

28. Time in which to make final determination

Delay of more than 5 years in resolving discrimination claim against Department of Correctional Services did not warrant dismissal of claim where witnesses were able to testify to relevant events with reasonable certainty, prejudice was not established by replacement of originally-assigned administrative law judge, and there was no indication of "repetitive, purposeless and oppressive" conduct on part of complainant or Human Rights Division. New York State Dep't of Correctional Servs. v State Div. of Human Rights, 216 A.D.2d 658, 627 N.Y.S.2d 800, 1995 N.Y. App. Div. LEXIS 6117 (N.Y. App. Div. 3d Dep't 1995).

Delay of some 4 years from time of hearing to final determination of Division of Human Rights was not substantially prejudicial as matter of law so as to warrant dismissal of petition. Comor v New York State Div. of Human Rights, 231 A.D.2d 715, 647 N.Y.S.2d 842, 1996 N.Y. App. Div. LEXIS 9693 (N.Y. App. Div. 2d Dep't 1996).

Delay in a determination by the State Division of Human Rights that found the Department of Corrections (DOC) guilty of an unlawful discriminatory practice was prejudicial and constituted an abuse of discretion because the time that elapsed from the employee's initial complaint until issuance of the final order was more than 18 years, the DOC did not contribute to the delay, and the complaint presented issues that were relatively simple and straightforward. Matter of New York State Dept. of Corr. & Community Supervision v New York State Div. of Human Rights, 137 A.D.3d 1512, 29 N.Y.S.3d 558, 2016 N.Y. App. Div. LEXIS 2380 (N.Y. App. Div. 3d Dep't 2016).

29. Time in which to file complaint

Dismissal of a civil action alleging that plaintiff was discharged from his employment because of his age was improper based on the one-year period prescribed in Exec Law § 297(5), where the prescriptive period was intended to apply only to the filing of unlawful discriminatory practice complaints with the Division of Human Rights and not to the institution of a civil action to recover damages for unlawful discriminatory practices under Exec Law § 297(9), which is governed by the three-year limitations period prescribed in CPLR § 214(2). Murphy v American Home Products Corp., 58 N.Y.2d 293, 461 N.Y.S.2d 232, 448 N.E.2d 86, 1983 N.Y. LEXIS 2925 (N.Y. 1983)).

Where petitioner was employed by an airline, resigned, was married, and than applied for reinstatement, the time to file the complaint alleging discrimination ran from the refusal to reinstate. Munger v State Div. of Human Rights, 32 A.D.2d 502, 304 N.Y.S.2d 407, 1969 N.Y. App. Div. LEXIS 3134 (N.Y. App. Div. 1st Dep't 1969).

Assistant professor's cause of action for discriminatory notice of nonreappointment accrued when she received notice of nonreap-

pointment, and limitation period then began to run. McD. v La P., 49 A.D.2d 765, 372 N.Y.S.2d 722 (N.Y. App. Div. 2d Dep't 1975).

Where school teacher because of illegal maternity leave policy of school district was required to take maternity leave on June 1, 1972 and not permitted to return to work until October 2, 1972, one-year statute of limitations for teacher's filing of claim for sick pay and back pay commenced when discrimination ceased on October 2 so that her complaint filed on July 24, 1973 was timely. State Div. of Human Rights ex rel. Mossler v Westmoreland Cent. School Dist., 56 A.D.2d 205, 392 N.Y.S.2d 149, 1977 N.Y. App. Div. LEXIS 10047 (N.Y. App. Div. 4th Dep't 1977).

In a sex discrimination case in which an elementary school teacher challenged a policy of compelling resignations due to pregnancy, the complaint was untimely filed, where, as required by the regulations of the board of education, she resigned due to pregnancy, was rehired and continued in employment, and did not file a complaint until the board prepared a seniority list for teachers in which it denied credit for her preresignation service. The cause of action arose at the time of her resignation, and not later when its effect may have been felt; the act of compelling maternity resignation was not a continuing act of discrimination. Furthermore, an isolated incident concerning a fellow male teacher who resigned and then was allowed to rescind his resignation and regain his position with no loss of preresignation credit did not by itself support a claim of discrimination. Board of Education v New York State Div. of Human Rights, 82 A.D.2d 883, 440 N.Y.S.2d 308, 1981 N.Y. App. Div. LEXIS 14585 (N.Y. App. Div. 2d Dep't 1981), rev'd, 56 N.Y.2d 257, 451 N.Y.S.2d 700, 436 N.E.2d 1301, 1982 N.Y. LEXIS 3357 (N.Y. 1982).

CLS Exec § 297(5) requires complainant to file complaint within one year of alleged discriminatory action, but does not require complainant to serve respondent or necessary party with complaint; rather, statute requires State Division of Human Rights to promptly serve respondent and any necessary party with copy of complaint. Statute of limitations in CLS Exec § 297(5) did not bar joinder of union as necessary party in proceeding alleging religious discrimination by bus company against one of its employees, even though joinder occurred more than one year after alleged discriminatory action, since statute did not require complainant to serve necessary party with complaint, and State Division of Human Rights met its duty to "promptly" serve union with copy of complaint. Ambrosio v State Div. of Human Rights, 144 A.D.2d 662, 535 N.Y.S.2d 381, 1988 N.Y. App. Div. LEXIS 12444 (N.Y. App. Div. 2d Dep't 1988).

Cause of action for sex discrimination accrued on April 25 when board voted to terminate plaintiff, and not on February 5 when plaintiff's supervisor made his final evaluation of plaintiff's work, since (1) extent of plaintiff's damages could not be accurately assessed while assertedly discriminatory acts were still ongoing, and such acts continued for as long as supervisor continued to supervise plaintiff, and (2) impact of alleged discrimination was not ascertainable until plaintiff was terminated. Hoger v Thomann, 189 A.D.2d 1048, 592 N.Y.S.2d 887, 1993 N.Y. App. Div. LEXIS 776 (N.Y. App. Div. 3d Dep't 1993).

Proceeding brought by African-American correctional officer under CLS Exec § 298 alleging racial discrimination by his supervisor was timely commenced where he alleged that acts complained of occurred consistently during entire 2-year period during which officer was under supervisor's direct supervision, and officer brought complaint promptly after he was transferred. New York State Dep't of Correctional Servs. v New York State Div. of Human Rights, 225 A.D.2d 856, 638 N.Y.S.2d 827, 1996 N.Y. App. Div. LEXIS 2063 (N.Y. App. Div. 3d Dep't 1996).

Employee's claims under the New York State Human Rights Law, N.Y. Exec. Law § 290 et seq., were time-barred because the employee never filed a complaint with the New York State Division of Human Rights as required by N.Y. Exec. Law § 297(5). Bedden-Hurley v N.Y. City Bd. of Educ., 385 F. Supp. 2d 274, 2005 U.S. Dist. LEXIS 321 (S.D.N.Y. 2005).

Former employee's suit for race and sex discrimination survived the motion to dismiss for failure to state a cause of action filed by the defending employer and union because her claims that she was deprived of her rights as an apprentice to be in an apprenticeship program free from discriminatory conduct in the workplace were timely since she pled that throughout her employment, a supervisor used racially derogatory terms and required her to clean the men's locker room, which contained sexually suggestive photographs; because the period of her employment overlapped with the 300-day period, and the allegations of racially charged remarks and exposure to sexually suggestive material sufficiently contributed to a hostile work environment claim based on sex or race, her hostile work environment claims were timely. Langford v Int'l Union of Operating Eng'rs, Local 30, 765 F. Supp. 2d 486, 2011 U.S. Dist. LEXIS 17789 (S.D.N.Y. 2011).

30. —Amended complaint

Where, in September 1970, female assistant professor and two male professors were promoted but salaries for male professors were higher than that for female professor, and in October 1971, female professor filed complaint with Division of Human Rights charging college with unlawful discrimination and complaint was thereafter amended to allege that her salary continued to be less than salaries for male faculty members of similar rank and experience, lapse of more than one year since original promotion did not preclude Division of Human Rights from conducting hearing. Russell Sage College v State Div. of Human Rights, 45 A.D.2d 153, 357 N.Y.S.2d 171, 1974 N.Y. App. Div. LEXIS 4561 (N.Y. App. Div. 3d Dep't 1974), aff'd, 36 N.Y.2d 985, 374 N.Y.S.2d 603, 337 N.E.2d 119, 1975 N.Y. LEXIS 2069 (N.Y. 1975).

Court erred in dismissing, as untimely, second cause of action in second amended complaint, alleging violation of Federal Age Discrimination in Employment Act (29 USCS § 623) (ADEA), since that action arose out of same facts and circumstances which gave rise to first and third causes of action, alleging violations of Human Rights Law (CLS Exec Art 15), which were interposed in timely fashion in original complaint, and defendants were at all times on notice of facts and occurrences giving rise to ADEA claim and did not show any prejudice or surprise. Schutz v Finkelstein Bruckman Wohl Most & Rothman, 247 A.D.2d 460, 668 N.Y.S.2d 669, 1998 N.Y. App. Div. LEXIS 1024 (N.Y. App. Div. 2d Dep't 1998).

In a discrimination action, a petition to annul was granted on the basis that the proceeding was untimely commenced against petitioner employer because complainant who filed second amended complaint was not entitled to benefit of the relation back doctrine to comply with the time limitations of this statute, due to the fact that respondents were not united in interest. Matter of 130-10 Food Corp. v New York State Div. of Human Rights, 166 A.D.3d 962, 89 N.Y.S.3d 215, 2018 N.Y. App. Div. LEXIS 8074 (N.Y. App. Div. 2d Dep't 2018).

An amended cause of action alleging unlawful age discrimination based upon plaintiff's discharge from his position with defendant corporation at age 59 after 23 years of service pursuant to Exec Law § 296 was time barred by the mandatory one-year statute of limitations applicable to such an action where the age discrimination amendment did not relate back to the original complaint to which it was added for purposes of the period of limitations, in that the original complaint failed to indicate any facts connecting plaintiff's discharge to the newly added age discrimination theory. Murphy v American Home Products Corp., 112 Misc. 2d 507, 447 N.Y.S.2d 218, 1982 N.Y. Misc. LEXIS 3157 (N.Y. Sup. Ct.), modified, 88 A.D.2d 870, 451 N.Y.S.2d 770, 1982 N.Y. App. Div. LEXIS 17189 (N.Y. App. Div. 1st Dep't 1982).

Division erred in amending an administrative discrimination complaint by adding the president as a respondent because this amendment was made after the one-year limitations period of N.Y. Exec. Law § 297(5) had expired and the president had already appeared pro se on behalf of the employer at the public hearing on the complaint. Matter of Murphy v Kirkland, 88 A.D.3d 267, 928 N.Y.S.2d 333, 2011 N.Y. App. Div. LEXIS 6152 (N.Y. App. Div. 2d Dep't 2011).

31. —Three years for court complaint

A civil action against the State as an employer to recover damages pursuant to the Human Rights Law for discriminatory discharge (Exec Law, art 15) is governed by the three-year Statute of Limitations applicable to such actions against private employers (CPLR § 214); the Legislature did not intend to subject the injured person to a shorter limitations period when

the wrong was committed by the State. Koerner v State, 62 N.Y.2d 442, 478 N.Y.S.2d 584, 467 N.E.2d 232, 1984 N.Y. LEXIS 4406 (N.Y. 1984).

Action alleging unlawful discriminatory practice pursuant to CLS Exec § 296 would not be dismissed as time barred, even though total elapsed time between accrual of claim and commencement of action exceeded 3 years, where during pendency of employee's federal litigation—filed subsequent to State Division of Human Rights (SDHR) complaint but arising from same allegations—SDHR complaint had been stayed, and when SDHR dismissed employee's complaint on grounds of administrative convenience, it made clear that although SDHR agreed with conclusion of federal courts that employee's claim was time barred, its dismissal was not premised on that ground so as to permit employee to pursue remedy in state courts, and thus total elapsed time between date of claim accrual and claim interposition, after deduction of toll period, was only 2 years 11 months; dismissal of complaint filed with SDHR on ground of administrative convenience was not beyond scope of SDHR's authority even if complaint was clearly untimely. Miller v International Tel. & Tel. Corp., 153 A.D.2d 925, 545 N.Y.S.2d 732, 1989 N.Y. App. Div. LEXIS 11988 (N.Y. App. Div. 2d Dep't 1989).

One-year filing requirement of CLS Exec § 297(5) did not apply to action by school district employee alleging unlawful suspension without pay due solely to his national origin or ancestry in violation of CLS Exec § 296; institution of civil actions to recover damages for unlawful discriminatory practices under § 296 is governed by 3-year statute of limitations prescribed in CLS CPLR § 214(2). Stoetzel v Wappingers Cent. School Dist., 166 A.D.2d 643, 561 N.Y.S.2d 71, 1990 N.Y. App. Div. LEXIS 12920 (N.Y. App. Div. 2d Dep't 1990).

An action by an individual of Hispanic descent, alleging improper termination by reason of her supervisor's racial prejudice, properly set forth a cause of action under Exec Law §§ 296, 297(9), but was time-barred by Ct Cl Act § 10(3) where the claimant elected to assert the claim in the Court of Claims, notwithstanding that the same action brought against the State in its role as claimant's employer, if brought in Supreme Court, would be governed by a three-year statute of limitations. Figueroa v State, 126 Misc. 2d 304, 481 N.Y.S.2d 946, 1984 N.Y. Misc. LEXIS 3606 (N.Y. Ct. Cl. 1984).

Civil action to recover damages for alleged unlawful discriminatory practices under CLS Exec § 297(9) is governed by 3-year statute of limitations of CLS CPLR § 214(2) applicable to actions to recover upon liability, penalty or forfeiture created or imposed by statute. Benedict v Xerox Corp., 144 Misc. 2d 490, 544 N.Y.S.2d 418, 1989 N.Y. Misc. LEXIS 407 (N.Y. Sup. Ct. 1989).

Claim for Human Rights Law violation under CLS Exec § 297(9) was barred by applicable 3-year statute of limitations, CLS CPLR § 214(2), where plaintiff opted into federal class action within 3 years after alleged discriminatory act but failed to commence state action until 6 years after such act, since notice of decertification of federal class action stated that only statutes of limitations applicable to federal age discrimination claims would be tolled from time of opting into federal class action. Benedict v Xerox Corp., 144 Misc. 2d 490, 544 N.Y.S.2d 418, 1989 N.Y. Misc. LEXIS 407 (N.Y. Sup. Ct. 1989).

Former employee's claims under the New York State Human Rights Law (State Law) and the New York City Human Rights Law of sexual harassment, discrimination based on gender and national origin, and retaliation, arising out of his employment as a lab technologist, were subject to the three-year statute of limitations of CPLR 214(2) and were not tolled for the period in which his claim was pending in the administrative process because, pursuant to N.Y. Executive Law § 297(9) of the State Law, he had annulled his initial election to pursue an administrative remedy. Farrugia v North Shore Univ. Hosp., 820 N.Y.S.2d 718, 13 Misc. 3d 740, 2006 N.Y. Misc. LEXIS 2277 (N.Y. Sup. Ct. 2006).

Thruway Authority employee's requests for back pay and other compensatory damages on her Human Rights Law (CLS Exec Law §§ 290 et seq.) gender discrimination and sexual harassment claims will be submitted to jury, where her administrative complaint was dismissed for administrative convenience, because claim was timely filed within 3 years of last act of harassment alleged under applicable § 297(9). Ryan v New York State Thruway Auth., 889 F. Supp. 70, 1995 U.S. Dist. LEXIS 9052 (N.D.N.Y. 1995).

Employment discrimination claim was not time barred where Division of Human Rights dismissed complaint for administrative convenience because employee wished to pursue court action, and action was filed within 3-year period for bringing plenary action under Human Rights Law; employer was collaterally estopped from asserting that administrative complaint should have been dismissed on basis that it was not timely filed under administrative statute of limitations. Ryan v New York State Thruway Auth., 889 F. Supp. 70, 1995 U.S. Dist. LEXIS 9052 (N.D.N.Y. 1995).

32. —On year for administrative complaint

Employee's complaint of employment discrimination was not time-barred where she filed it within one year of acquiring knowledge that coworker (whose promotion triggered action) had been promoted several months earlier while employee was on maternity leave. Consolidated Edison Co. v New York State Div. of Human Rights, 77 N.Y.2d 411, 568 N.Y.S.2d 569, 570 N.E.2d 217, 1991 N.Y. LEXIS 363 (N.Y. 1991).

Incidental references in complaint to section of Labor Law prohibiting differential in rate of pay because of sex, even under most liberal rules of pleading, were insufficient to transmute complaint, which was specifically predicated on section of Executive Law giving any person claiming to be aggrieved by any unlawful discriminatory practice a cause of action for damages and other relief, into one seeking relief under Labor Law, and thus one-year statute of limitations provided for in the Executive Law was applicable. Lanzer v Fairchild Publications, Inc., 46 A.D.2d 644, 360 N.Y.S.2d 437, 1974 N.Y. App. Div. LEXIS 3760 (N.Y. App. Div. 1st Dep't 1974).

Record consisting of documentary and testimonial proof established that waiter's complaint charging sex discrimination on part of employer which replaced staff of waiters at dining facility with waitresses was timely filed with Division of Human Rights within one year of alleged discriminatory practice. Guardian Capital Corp. v New York State Div. of Human Rights, 48 A.D.2d 753, 368 N.Y.S.2d 594, 1975 N.Y. App. Div. LEXIS 9834 (N.Y. App. Div. 3d Dep't), app. denied, 37 N.Y.2d 712, 1975 N.Y. LEXIS 2959 (N.Y. 1975).

Where sex discrimination in employment complaint was filed more than one year after male employee was promoted instead of female complainant, complaint was barred insofar as it related to that promotion. State Div. of Human Rights ex rel. Bailey v Board of Education, 53 A.D.2d 1043, 386 N.Y.S.2d 166, 1976 N.Y. App. Div. LEXIS 15855 (N.Y. App. Div. 4th Dep't 1976), aff'd, 42 N.Y.2d 862, 397 N.Y.S.2d 791, 366 N.E.2d 878, 1977 N.Y. LEXIS 2186 (N.Y. 1977).

Despite fact that employee filed formal employment discrimination complaint more than one year after termination of his employment, where employee claimed that he had visited staff member of division of human rights six months after termination of employment and that employee had been assured by staff member that informal complaint was timely and that complaint would be deemed filed as of time of visit, interest of justice required that division of human rights conduct investigatory hearing to determine whether delay in filing formal complaint was due to division's own failure to render effectual assistance to employee, in which case division would be under duty to process complaint. Stacey v McDaniel, 54 A.D.2d 645, 387 N.Y.S.2d 631, 1976 N.Y. App. Div. LEXIS 14153 (N.Y. App. Div. 1st Dep't 1976).

Time limitation in Executive Law providing that any complaint must be filed within one year after alleged unlawful discriminatory practice is mandatory and is in nature of a condition upon the substantive right conferred by the Human Rights Law. State Div. of Human Rights ex rel. Mossler v Westmoreland Cent. School Dist., 56 A.D.2d 205, 392 N.Y.S.2d 149, 1977 N.Y. App. Div. LEXIS 10047 (N.Y. App. Div. 4th Dep't 1977).

For purposes of determining whether age discrimination complaint was filed within statutorily prescribed one-year period, discrimination against complainant commenced when she was

rejected for employment because of age and continued for as long as that rejection denied her certification to list of persons eligible for position applied for. New York City Dep't of Personnel v New York State Div. of Human Rights, 56 A.D.2d 795, 392 N.Y.S.2d 641, 1977 N.Y. App. Div. LEXIS 11090 (N.Y. App. Div. 1st Dep't 1977).

In a proceeding pursuant to Exec Law § 298 to review an order of the State Human Rights Appeal Board affirming a determination of the State Division of Human Rights, which found the petitioner guilty of having unlawfully discriminated against complainant by having denied her disability benefits for disability based on pregnancy, the petitioner's contention that the complaint was untimely was without merit, where the complaint was filed within one year after the complainant received notice from her employer's insurer that her claim for disability by reason of pregnancy had been denied. Hillcrest General Hospital-GHI v New York State Human Rights Appeal Bd., 90 A.D.2d 481, 454 N.Y.S.2d 549, 1982 N.Y. App. Div. LEXIS 18487 (N.Y. App. Div. 2d Dep't 1982).

The complaint of an insurance company employee was time barred under Exec Law § 297(5), where his complaint was not filed with the State Division of Human Rights until more than one year after he was allegedly forced into announcing his retirement. Burke v Continental Ins. Co., 104 A.D.2d 1034, 481 N.Y.S.2d 11, 1984 N.Y. App. Div. LEXIS 20470 (N.Y. App. Div. 2d Dep't 1984).

The State Division of Human Rights properly dismissed two complaints for unlawful discriminatory practices (forced maternity leave; denial of additional leave), where the complaints were not filed within one year of the alleged practices as required by Exec Law § 297(5). Syracuse v New York State Human Rights Appeal Bd., 107 A.D.2d 804, 484 N.Y.S.2d 638, 1985 N.Y. App. Div. LEXIS 42723 (N.Y. App. Div. 2d Dep't 1985).

Where resignation or leave is improperly forced due to pregnancy, one-year statute of limitations begins to run from date of discriminatory act; subsequently adopted seniority system which fails to take into account period of forced resignation imposes distinct discriminatory wrong, and in such circumstances period of limitation begins to run on date complainant learned of seniority list. State Div. of Human Rights v Board of Education, 112 A.D.2d 435, 492 N.Y.S.2d 412, 1985 N.Y. App. Div. LEXIS 56182 (N.Y. App. Div. 2d Dep't 1985).

Determination of New York State Division of Human Rights dismissing petition charging discriminatory discharge was proper where cause of action accrued on December 22, 1981, when she was discharged, and complaint was not filed until December 30, 1982, since complaint was not filed within one year after alleged discriminatory practice occurred. Morehead v Lind, 112 A.D.2d 996, 492 N.Y.S.2d 804, 1985 N.Y. App. Div. LEXIS 52206 (N.Y. App. Div. 2d Dep't 1985).

Complaint filed within one year of alleged discriminatory practice was not rendered untimely by Division of Human Rights' failure to act thereon through no fault of petitioner. Crayton v County of Suffolk, 139 A.D.2d 577, 527 N.Y.S.2d 79, 1988 N.Y. App. Div. LEXIS 3907 (N.Y. App. Div. 2d Dep't 1988).

Division of Human Rights properly determined that petitioner's complaint was time-barred where it was filed more than one year after petitioner was terminated by his employer; petitioner's subsequent attempts to compel employer to reconsider his termination and reinstate him did not toll statute of limitations found in CLS Exec § 297(5). Patel v New York State Div. of Human Rights, 216 A.D.2d 469, 628 N.Y.S.2d 379, 1995 N.Y. App. Div. LEXIS 6403 (N.Y. App. Div. 2d Dep't), app. dismissed, 87 N.Y.2d 893, 640 N.Y.S.2d 873, 663 N.E.2d 914, 1995 N.Y. LEXIS 5019 (N.Y. 1995).

Petitioner's claims that respondent unlawfully discriminated against her on basis of sex when they failed to hire her each time vacancy arose alleged discriminatory practice of continuing nature for purposes of determining whether complaint was time barred under CLS Exec § 297(5). Gordineer v New York State Div. of Human Rights, 234 A.D.2d 371, 651 N.Y.S.2d 92, 1996 N.Y. App. Div. LEXIS 12912 (N.Y. App. Div. 2d Dep't 1996), app. denied, 89 N.Y.2d 812, 657 N.Y.S.2d 405, 679 N.E.2d 644, 1997 N.Y. LEXIS 438 (N.Y. 1997).

Complaints filed more than one year after complainants' allegedly discriminatory discharges from employment were time-barred under CLS Exec § 297(5). Garrison v State Div. of Human Rights, 238 A.D.2d 591, 656 N.Y.S.2d 389, 1997 N.Y. App. Div. LEXIS 4427 (N.Y. App. Div. 2d Dep't 1997).

Employer's contention that an employee's back pay award for discrimination was limited to the one-year period of N.Y. Exec. Law § 297(5) was rejected because, by failing to raise that contention prior to the appeal, the employer implicitly waived the applicability of the limitation. Matter of Rite Aid of N.Y., Inc. v New York State Div. of Human Rights, 60 A.D.3d 1428, 875 N.Y.S.2d 708, 2009 N.Y. App. Div. LEXIS 2020 (N.Y. App. Div. 4th Dep't), app. denied, 13 N.Y.3d 702, 886 N.Y.S.2d 94, 914 N.E.2d 1012, 2009 N.Y. LEXIS 3443 (N.Y. 2009).

Since plaintiff was precluded from commencing a court action for damages based upon an alleged discriminatory practice occurring on September 16, 1976 while his complaint before the State Division of Human Rights was still pending (Executive Law, § 300), the filing of a summons with the clerk of the court on September 15, 1977, the same date that he requested the dismissal of the complaint before the Division of Human Rights, but two weeks before the complaint was actually dismissed on the ground of administrative convenience, was a nullity rendering the subsequent service of the summons and complaint on defendant on October 31, 1977 time-barred as not being served within one year of the date of the alleged discriminatory act (Executive Law, § 297, subd 5). The statute which provides that a dismissal of a complaint before the Division of Human Rights on the ground of administrative convenience does not bar the bringing of a court action (Executive Law, § 297, subd 9) only serves to preserve plaintiff's right to sue but does not provide him with an extension of the mandatory one-year time limitation. Cheselka v Eastern Air Lines, Inc., 93 Misc. 2d 219, 402 N.Y.S.2d 159, 1978 N.Y. Misc. LEXIS 2039 (N.Y. Sup. Ct. 1978).

Division of Human Rights properly added union local president as necessary party under CLS Exec § 297 in job discrimination action brought by union member, even though statute establishes one-year limitations period and president was added more than 2 years after member had filed complaint, since period applies only to initial filing of complaint with division, not to division's subsequent action either to notify respondent or to add necessary parties; moreover, president showed no prejudice by delay. Ambrosio v State Div. of Human Rights, 138 Misc. 2d 423, 524 N.Y.S.2d 600, 1987 N.Y. Misc. LEXIS 2802 (N.Y. Sup. Ct. 1987), aff'd, 144 A.D.2d 662, 535 N.Y.S.2d 381, 1988 N.Y. App. Div. LEXIS 12444 (N.Y. App. Div. 2d Dep't 1988).

Employment discrimination action found in New York Executive Law §§ 290 et seq. is subject to one-year statute of limitations by reason of § 295(5). Theobald v Botein, Hays, Sklar & Herzberg, 493 F. Supp. 1, 1979 U.S. Dist. LEXIS 13991 (S.D.N.Y. 1979).

33. — —Tolling of limitations statute

Community college employee's employment discrimination cause of action arose when she was given notice that she would not be reappointed, not when she completed her current term of employment, and complaint was therefore untimely filed when it was filed more than one year after such notice was given; one-year limitation was not tolled by employee's invocation of grievance procedure, which was merely an alternative remedy. Queensborough Community College of City University of New York v State Human Rights Appeal Board, 41 N.Y.2d 926, 394 N.Y.S.2d 625, 363 N.E.2d 349, 1977 N.Y. LEXIS 1990 (N.Y. 1977).

Where complaint, alleging sex discrimination as a result of employer's refusal to apply accrued sick leave benefits to maternity leave absence of employee, was filed more than a year after her voluntary resignation and there was no basis for tolling the one-year statute of limitations, complaint, which was filed more than a year after cessation of the alleged continuing discriminatory practice, was time barred. State Div. of Human Rights ex rel. Bailey v Board of Education, 53 A.D.2d 1043, 386 N.Y.S.2d 166, 1976 N.Y. App. Div. LEXIS 15855 (N.Y. App. Div. 4th Dep't 1976), aff'd, 42 N.Y.2d 862, 397 N.Y.S.2d 791, 366 N.E.2d 878, 1977 N.Y. LEXIS 2186 (N.Y. 1977).

An assertion by an ex-employee that the refusal of his former employer to give him a recommendation for the purpose of obtaining a new job amounted to retaliation for having previously filed an earlier complaint against his former employer charging discrimination, was untimely where it was not filed within one year of the alleged unlawful practice. Ghartey v Santaella, 86 A.D.2d 695, 446 N.Y.S.2d 515, 1982 N.Y. App. Div. LEXIS 15242 (N.Y. App. Div. 3d Dep't 1982).

An action commenced in 1982 predicated upon the Human Rights Law (Executive Law § 290 et seq.) which alleged that plaintiff was refused any opportunity to be considered for employment as a specific trust officer until she was eventually promoted to that position in 1976, that she was placed in lower ranking and lower paying job titles as similarly or less qualified men during the period of 1974 through 1975, that she was denied promotions because of more stringent standards apply to her because of her sex, which promotions occurred more than three years prior to the commencement of the action, and that defendant gave female employees less frequent and smallest salary increases than male employees who were hired in or around 1974, was time barred by the three year statute of limitations applicable to court actions under the Human Rights Law and, although the impact of such alleged wrongs may have had a lasting effect, said discrimination claims were not continuing wrongs which result in the tolling of the statute of limitations. Patrowich v Chemical Bank, 98 A.D.2d 318, 470 N.Y.S.2d 599, 1984 N.Y. App. Div. LEXIS 16482 (N.Y. App. Div. 1st Dep't), app. dismissed, 62 N.Y.2d 801 (N.Y. 1984), aff'd, 63 N.Y.2d 541, 483 N.Y.S.2d 659, 473 N.E.2d 11, 1984 N.Y. LEXIS 4717 (N.Y. 1984).

Age discrimination claimants' allegations that employer declined to hire them for new positions after they had been discharged did not convert their discharge claims into claims for continuing violations such that limitations period would be tolled. Garrison v State Div. of Human Rights, 238 A.D.2d 591, 656 N.Y.S.2d 389, 1997 N.Y. App. Div. LEXIS 4427 (N.Y. App. Div. 2d Dep't 1997).

Complaint filed with New York City Human Rights Commission alleging, inter alia, employment discrimination based on plaintiff's sexual orientation, was properly dismissed for "administrative convenience" under NYC Admin Code § 8-113(a)(5) and thus, in subsequent civil action, 3-year statute of limitations applicable to administrative claims was tolled under NYC Admin Code § 8-502(d) during pendency of administrative complaint; however, plaintiff's assault and battery claims were unrelated to his Human Rights Law claims and as such were unaffected by toll of applicable one-year statute of limitations. Acosta v Loews Corp., 276 A.D.2d 214, 717 N.Y.S.2d 47, 2000 N.Y. App. Div. LEXIS 12405 (N.Y. App. Div. 1st Dep't 2000).

Division of Human Rights erred in finding that harassment complaint was timely filed against employer on June 12, 1987, under continuous violation exception to one-year statute of limitations, on basis that allegation that 4 separate referrals for being absent without leave between July 1986 and June 1987 reflected "pattern of continuous harassment," with complainant's alleged lateness of June 1, 1987 falling within one-year statutory time period, where complainant proffered no evidence that accusation respecting his June 1, 1987 lateness had discriminatory motive, and thus he failed to show that this incident was part of employer's alleged discriminatory pattern of referring him for tests based on "perceived disability" in connection with charges of his attendance and conduct deficiencies. Robinson v New York State Div. of Human Rights, 277 A.D.2d 76, 716 N.Y.S.2d 47, 2000 N.Y. App. Div. LEXIS 12002 (N.Y. App. Div. 1st Dep't 2000), app. dismissed, 96 N.Y.2d 775, 725 N.Y.S.2d 633, 749 N.E.2d 202, 2001 N.Y. LEXIS 586 (N.Y. 2001).

Action commenced against employer in 1998 was time-barred insofar as it alleged discrimination based on denial of plaintiff's application for promotion in 1993; denial of promotion was single act and, as such, did not fall within continuing violation exception to Title VII limitations' period for Equal Employment Opportunity Claims as part of ongoing policy of discrimination. Martinez-Tolentino v Buffalo State College, 277 A.D.2d 899, 715 N.Y.S.2d 554, 2000 N.Y. App. Div. LEXIS 11646 (N.Y. App. Div. 4th Dep't 2000).

Commissioner of the New York State Division of Human Rights properly dismissed, as untimely a former volunteer firefighter's hostile work environment claim based on allegations of sexual harassment against a hook and ladder company because, while the volunteer established at the hearing a hostile work environment premised upon incidents of sexual harassment, those incidents occurred outside the limitations period, and she failed to prove that a specified related incident took place within the limitations period, which would have invoked the continuous violation doctrine. Matter of Lozada v Elmont Hook & Ladder Co. No. 1, 151 A.D.3d 860, 54 N.Y.S.3d 688, 2017 N.Y. App. Div. LEXIS 4763 (N.Y. App. Div. 2d Dep't 2017).

Commissioner of the New York State Division of Human Rights properly dismissed, as untimely a former volunteer firefighter's hostile work environment claim based on allegations of sexual harassment against a hook and ladder company because, while the volunteer established at the hearing a hostile work environment premised upon incidents of sexual harassment, those incidents occurred outside the limitations period, and she failed to prove that a specified related incident took place within the limitations period, which would have invoked the continuous violation doctrine. Matter of Lozada v Elmont Hook & Ladder Co. No. 1, 151 A.D.3d 860, 54 N.Y.S.3d 688, 2017 N.Y. App. Div. LEXIS 4763 (N.Y. App. Div. 2d Dep't 2017).

CPLR 203 (subd [b], par 5) which tolls the running of the Statute of Limitations when the summons is filed with the clerk of the court provided the summons is served on the defendant within 60 days after the period of limitation would have expired, did not toll the one-year time limitation applicable to a claim based on an alleged discriminatory practice under the Human Rights Law (Executive Law, § 297, subd 5) where the filing of the summons with the clerk within the one-year period but while a complaint before the State Division of Human Rights was still pending, was a nullity (Executive Law, § 300). The action would have been timely had the dismissal of the complaint before the Division of Human Rights at plaintiff's request on the ground of administrative convenience been made retroactive to the date the summons was filed with the clerk. Cheselka v Eastern Air Lines, Inc., 93 Misc. 2d 219, 402 N.Y.S.2d 159, 1978 N.Y. Misc. LEXIS 2039 (N.Y. Sup. Ct. 1978).

Trial court properly determined that the injured party's sexual discrimination action filed pursuant to N.Y. Exec. Law § 296(1) against the Town of Van Buren and the Town's Board member was time-barred, where the action was filed three years and two months after the last of the alleged conduct occurred; this exceeded both the three-year statute of limitations under N.Y. C.P.L.R. 214(2) and the one-year and 90-day statute of limitations for an action against the Town under N.Y. Town Law § 67(2), and the statutes were not tolled during the pendency of the injured party's complaints filed with the New York State Division of Human Rights since they were dismissed, not for administrative convenience, but so that the injured party could file the instant action pursuant to N.Y. Exec. Law § 297(9). Henderson v Town of Van Buren, 15 A.D.3d 980, 789 N.Y.S.2d 355, 2005 N.Y. App. Div. LEXIS 1187 (N.Y. App. Div. 4th Dep't), app. denied, 4 N.Y.3d 710, 797 N.Y.S.2d 817, 830 N.E.2d 1146, 2005 N.Y. LEXIS 1106 (N.Y. 2005).

Assuming that filing sexual harassment complaint with EEOC would not be deemed filing with state agency, despite existence of inter-agency agreement under which complaint filed with one agency would be deemed filed with other, filing with EEOC would equitably toll one-year filing period under Exec § 297(5). Cooper v Wyeth Ayerst Lederle, 34 F. Supp. 2d 197, 1999 U.S. Dist. LEXIS 920 (S.D.N.Y. 1999), dismissed, 106 F. Supp. 2d 479, 2000 U.S. Dist. LEXIS 9541 (S.D.N.Y. 2000).

Continuing violation doctrine tolled the statute of limitations for the 42 U.S.C.S. § 1983 claim, and the State and City Human Rights claims of a judge's former secretary because the secretary's claims were based on a hostile work environment created by the judge, her supervisor, and the last acts constituting part of that claim took place within the limitations period. Bland v New York, 263 F. Supp. 2d 526, 2003 U.S. Dist. LEXIS 5521 (E.D.N.Y. 2003).

Based on the fact that language in the New York State Human Rights Law (NYSHRL) prohibited filing of a claim with the state

court while that same claim was pending before the New York State Division of Human Rights and based upon the fact that under New York State law, a statute of limitations was tolled where the commencement of an action was prohibited by statute, the court held that plaintiff's NYSHRL claims were tolled while her federal Title VII claims were pending before the EEOC. Kennedy v Fed. Express Corp., 2016 U.S. Dist. LEXIS 133146 (N.D.N.Y. Sept. 28, 2016), aff'd in part, vacated in part, 698 Fed. Appx. 24, 2017 U.S. App. LEXIS 19617 (2d Cir. N.Y. 2017).

IV. Hearings

34. In general

Section 297 (subd 4, par a) of the Executive Law only requires that a public hearing be held on an unlawful discriminatory practice charge where the complaint is not dismissed by the State Division of Human Rights or conciliated, and, since that section does not prescribe a dismissal procedure, a regulation which empowers the State Commissioner of Human Rights to review the dismissal process (9 NYCRR 465.18) does not conflict with the statute. Accordingly, although a public hearing was never conducted on the matter, there is no infirmity in an order of the commissioner which reopened a proceeding held before a regional director of the division, directed further investigation of the charge and altered the director's determination that there was probable cause to believe an allegation that respondent employer had practiced discrimination because of disability, finding, instead, no probable cause to believe that respondent had engaged in said practice, and dismissed the complaint; a contrary view would deny the division the authority to qualify the power conferred upon regional directors, officers created and designated by the commissioner to administer a regional office of the Division of Human Rights. State Div. of Human Rights ex rel. Valdemarsen v Genesee Hosp., 50 N.Y.2d 113, 428 N.Y.S.2d 210, 405 N.E.2d 692, 1980 N.Y. LEXIS 2273 (N.Y. 1980).

Once Human Rights Division found probable cause to believe discrimination had occurred and set matter down for hearing, it was incumbent on employer to come forward with whatever proof it had to show that accommodation could not have been accomplished for its Sabbath-observing employee without undue economic hardship. New York City Transit Auth. v Executive Dep't, Div. of Human Rights, 89 N.Y.2d 79, 651 N.Y.S.2d 375, 674 N.E.2d 305, 1996 N.Y. LEXIS 3162 (N.Y. 1996).

Defendant employer was not entitled to dismissal of gender discrimination complaint under CLS Exec § 296 on basis that State Division of Human Rights (SDHR) delayed 11 years before holding hearing on complaint and then delayed its order for another 3 years, where no substantial actual prejudice resulted in that employer's witnesses were able to testify without difficulties owing to memory loss regarding issues on which SDHR based its finding of discrimination. Diaz Chem. Corp. v New York State Div. of Human Rights, 91 N.Y.2d 932, 670 N.Y.S.2d 397, 693 N.E.2d 744, 1998 N.Y. LEXIS 599 (N.Y. 1998).

Where the Director of Human Rights received information concerning the complaint by holding a conference and by investigation, but there was no hearing, and complainant had had no opportunity to present his case in a formal manner, for the Division of Human Rights to dismiss his complaint under such circumstances, it must appear that as a matter of law the complaint lacks merit. Mayo v Hopeman Lumber & Mfg. Co., 33 A.D.2d 310, 307 N.Y.S.2d 691, 1970 N.Y. App. Div. LEXIS 5481 (N.Y. App. Div. 4th Dep't), app. dismissed, 26 N.Y.2d 612, 1970 N.Y. LEXIS 1802 (N.Y. 1970).

The statute contemplates a preliminary investigation, conference and action by the Division of Human Rights, and if the complaint is not dismissed or a conciliation agreement is not reached, the respondents must be given an opportunity to answer and a public hearing must be held. Remand to State Division of Human Rights "for further investigation and action" on grounds that Division "should have looked into the question (of alleged discrimination) rather than discharging the complaint" did not require a hearing be conducted if the matter could be concluded by conciliation procedure. Berry v Donner-Hanna Coke Corp., 42 A.D.2d 404, 348 N.Y.S.2d 414, 1973 N.Y. App. Div. LEXIS 3280 (N.Y. App. Div. 4th Dep't 1973), aff'd, 34 N.Y.2d 893, 359 N.Y.S.2d 283, 316 N.E.2d 717, 1974 N.Y. LEXIS 1445 (N.Y. 1974).

Complainant was not entitled to a formal hearing under Exec L § 297, subd 2 on probable cause issue, and State Division of Human Rights did not act arbitrarily or capriciously in dismissing a complaint which alleged discrimination on basis of national origin, where evidence indicated that complainant was demoted due to substandard work performance and that he was given the same terms, conditions, and privileges of employment which were given to other employees. Jwayyed v New York Tel. Co., 42 A.D.2d 663, 345 N.Y.S.2d 233, 1973 N.Y. App. Div. LEXIS 4025 (N.Y. App. Div. 3d Dep't 1973).

More than a simple question of a fact must appear in order to obtain a hearing pursuant to Executive L § 297, subdivision 4(a), otherwise a hearing would be mandated in all cases and the conference and conciliation procedures established by the statute would serve no purpose. Thus a hearing is required when question of fact results from a conference and, upon granting full credence, as the Division must to the complainant's version of events, there is evidence of unlawful discrimination. State Div. of Human Rights v Buffalo Auto Glass Co., 42 A.D.2d 678, 344 N.Y.S.2d 374, 1973 N.Y. App. Div. LEXIS 4289 (N.Y. App. Div. 4th Dep't 1973).

The Comptroller was properly not joined as a party in administrative proceedings before the Commissioner of Human Rights in a proceeding against a State agency to recover for alleged unlawful discriminatory practices, since the Comptroller's role in paying such an award would be purely a ministerial one of auditor under the New York State Constitution, art V, § 1, and State Finance Law § 109. State Div. of Human Rights ex rel. Geraci v New York State Dep't of Correctional Services, 90 A.D.2d 51, 456 N.Y.S.2d 63, 1982 N.Y. App. Div. LEXIS 18809 (N.Y. App. Div. 2d Dep't 1982).

Confrontation conference is not required where complainant fails to offer evidence demonstrating that discharge was for reasons other than unsatisfactory work performance. State Div. of Human Rights ex rel. Clifford v Oneida, Ltd., 112 A.D.2d 793, 492 N.Y.S.2d 293, 1985 N.Y. App. Div. LEXIS 56039 (N.Y. App. Div. 4th Dep't 1985).

In proceeding against private employer in which employee alleged age and sex discrimination in denial of promotion and encouragement to retire, there was no basis to annul, as arbitrary or capricious, determination of state Division of Human Rights that no probable cause existed for complaints, even though division held no hearings or conferences on matter, where employee was given opportunity to present lengthy and detailed written submissions which were thoroughly considered by division. Chirgotis v Mobil Oil Corp., 128 A.D.2d 400, 512 N.Y.S.2d 686, 1987 N.Y. App. Div. LEXIS 44111 (N.Y. App. Div. 1st Dep't 1987).

Commissioner of Human Rights abused his discretion in refusing request by petitioner's appointed counsel to reopen hearing to consider evidence on issue of damages where (1) petitioner filed complaint with Division of Human Rights claiming that respondents determined that he was ineligible for position as parole officer due to his vision, (2) matter was referred to public hearing and petitioner was assigned to attorney employed by division, (3) after hearing, administrative law judge (ALJ) found that respondents had engaged in unlawful discriminatory action but made no award for compensatory damages because of absence of testimony with respect thereto, and (4) petitioner's attorney made application to reopen hearing to establish damages and urged that petitioner not be penalized due to her oversight, but commissioner upheld ALJ's decision and denied request to reopen; commissioner should have permitted reopening of case since hearing was not yet deemed complete at time petitioner's attorney requested that hearing be reopened, and record was incomplete and failed to provide basis for informed decision on issue of damages through no fault of petitioner. Farley v New York State Dep't of Civil Service, 142 A.D.2d 783, 530 N.Y.S.2d 329, 1988 N.Y. App. Div. LEXIS 7271 (N.Y. App. Div. 3d Dep't 1988).

Determination by State Division of Human Rights that there was no probable cause to believe that employer unlawfully discriminated against petitioner on basis of his age was not arbitrary and capricious merely because no hearing was held since petitioner was given full opportunity to present his evidence

and to discuss with Division status of investigation, and his submissions were in fact considered. Gleason v W.C. Dean Sr. Trucking, 228 A.D.2d 678, 646 N.Y.S.2d 20, 1996 N.Y. App. Div. LEXIS 7390 (N.Y. App. Div. 2d Dep't 1996).

It is within discretion of State Division of Human Rights to decide method to be used in investigating claim, and as long as petitioner has full opportunity to present claim, neither hearing nor confrontation conference is mandated. Gleason v W.C. Dean Sr. Trucking, 228 A.D.2d 678, 646 N.Y.S.2d 20, 1996 N.Y. App. Div. LEXIS 7390 (N.Y. App. Div. 2d Dep't 1996).

In deciding to dismiss police officer for misconduct at memorial service for slain police officers, city police commissioner properly considered police officer's statements made during official interview conducted pursuant to police patrol guide, even though statements were made in response to matters that occurred while officer was off duty. Hagmaier v Bratton, 245 A.D.2d 147, 665 N.Y.S.2d 880, 1997 N.Y. App. Div. LEXIS 13034 (N.Y. App. Div. 1st Dep't 1997).

Court would annul determination by administrative law judge (ALJ) finding that railroad company's termination of respondent for violent behavior against fellow worker was pretextual, wherein ALJ asserted that she was not bound by prior determination that assault took place, where prior determination to dismiss respondent was upheld on appeal by Special Board of Adjustment, arbitration panel authorized by Railway Labor Act (45 USCS § 153), respondent conceded that Board had administrative status, and Board conclusively determined that respondent violently assaulted and then threatened fellow worker. Metro-North Commuter R.R. Co. v New York State Exec. Dep't Div. of Human Rights, 271 A.D.2d 256, 707 N.Y.S.2d 50, 2000 N.Y. App. Div. LEXIS 4101 (N.Y. App. Div. 1st Dep't 2000).

Since the power of the State Commission for Human Rights is not limited to providing relief for a particular complaint, and the Commission has the power to order a respondent to cease and desist from continuing a general policy of discrimination, the Commission would not be enjoined from conducting a hearing as to whether certain real estate brokers were engaging in a general policy of unlawful discrimination in their real estate practice despite the fact that the realtors had already sold a house to the alleged aggrieved individual. Neidich v State Com. for Human Rights, 53 Misc. 2d 984, 280 N.Y.S.2d 463, 1967 N.Y. Misc. LEXIS 1893 (N.Y. Sup. Ct. 1967).

35. Disqualification of judge

Even if actual bias or prejudice on part of regional director of State Division of Human Rights had been shown to have resulted from fact that his daughter was employed as mail clerk by employer against whom complaints were filed, such showing would not be grounds for director's disqualification under section of Judiciary Law requiring disqualification of judge in proceeding if he is related within the sixth degree of consanguinity to party to proceeding, since actual bias of judge is not grounds for disqualification under such law. Although section of Judiciary Law providing that judge would be disqualified if he were related within sixth degree of consanguinity to party to proceeding does not apply to quasi-judicial administrative officers, Appellate Division would look to such law, in absence of any comparable statute setting forth grounds for disqualification of administrative officer, in deciding whether regional director of Division of Human Rights decision dismissing certain employees' complaints against their employer was abuse of discretion merely because director's daughter was employed as mail clerk by employer complained against. State Div. of Human Rights v Merchants Mut. Ins. Co., 59 A.D.2d 1054, 399 N.Y.S.2d 813, 1977 N.Y. App. Div. LEXIS 14344 (N.Y. App. Div. 4th Dep't 1977).

36. Sufficiency of complaint

Where the Director of Human Rights received information concerning the complaint by holding a conference and by investigation, but there was no hearing, and complainant had had no opportunity to present his case in a formal manner, for the Division of Human Rights to dismiss his complaint under such circumstances, it must appear that as a matter of law the complaint lacks merit. Mayo v Hopeman Lumber & Mfg. Co., 33 A.D.2d 310, 307 N.Y.S.2d 691, 1970 N.Y. App. Div. LEXIS 5481 (N.Y. App. Div. 4th Dep't), app. dismissed, 26 N.Y.2d 612, 1970 N.Y. LEXIS 1802 (N.Y. 1970).

In course of investigating complaint of discrimination, commissioner of Division of Human Rights should interview respondent's witnesses and receive its responses to complaint, and at such point, statute places upon commissioner responsibility to determine whether there is reasonable basis for sustaining complaint, based upon complainant's evidence, and for requiring employer or other respondent to answer and submit to hearing. State Div. of Human Rights v New York State Drug Abuse Control Com., 59 A.D.2d 332, 399 N.Y.S.2d 541, 1977 N.Y. App. Div. LEXIS 13571 (N.Y. App. Div. 4th Dep't 1977).

Employee's allegations had sufficient substance to warrant public hearing where after over 10 years of employment with employer's predecessor company and over 2 years with employer, employee alleged that she was discharged because she declined to respond to sexual advances of her superior, record contained written statements of 5 former co-workers stating that petitioner was target of sexual advances and sexual harassment by supervisor, record contained no denial, nor any statement whatsoever, by supervisor who allegedly made sexual advances to employee, although employer's answer stated that employee was laid off as result of work force consolidation and denied that employee was laid off due to her failure to succumb to sexual advances. Ragnetti v State Div. of Human Rights, 110 A.D.2d 895, 488 N.Y.S.2d 446, 1985 N.Y. App. Div. LEXIS 48798 (N.Y. App. Div. 2d Dep't 1985).

Complainant's burden is simply to establish that there is probable cause to believe that she has been victim of unlawful discrimination; determinations of no probable cause may be overturned for failure of division to conduct in-depth investigation. State Div. of Human Rights ex rel. Beckman v Gaylord Bros., Inc., 112 A.D.2d 726, 492 N.Y.S.2d 217, 1985 N.Y. App. Div. LEXIS 56237 (N.Y. App. Div. 4th Dep't 1985).

Action to recover damages for unlawful discriminatory practices in housing was properly dismissed as to plaintiffs who were employees of antidiscrimination organization and who had visited defendants' apartment building only as "testers" under pretense of being prospective tenants after others had reportedly been denied accommodations there because of race, since testers conceded that they did not wish to rent apartment and had acted only on behalf of others. Dunn v Fishbein, 123 A.D.2d 659, 507 N.Y.S.2d 29, 1986 N.Y. App. Div. LEXIS 60809 (N.Y. App. Div. 2d Dep't 1986).

Evidence supported determination finding correctional facility guilty of unlawful discriminatory practice based on race where complainant and other black correction officers testified as to "hostile situation" at facility, black officers were placed in different "class" from white employees, they were denied more desirable assignments and shifts, they had their orders and directions disregarded by subordinates or countermanded by their superior officers, and they were disciplined more frequently and more harshly than white employees; furthermore, of 16 cases of alleged inmate abuse occurr-ing at facility, complainant was sole correction officer who was dis-charged. New York State Dep't of Correctional Servs. v State Div. of Human Rights, 215 A.D.2d 908, 626 N.Y.S.2d 588, 1995 N.Y. App. Div. LEXIS 5326 (N.Y. App. Div. 3d Dep't 1995).

Plaintiff's age discrimination action was barred by release where it was undisputed that he executed employment termination agreement expressly releasing defendant from all claims including those "arising under federal, state or local laws prohibiting employment discrimination." Cramer v Newburgh Molded Prods., 228 A.D.2d 541, 645 N.Y.S.2d 46, 1996 N.Y. App. Div. LEXIS 7114 (N.Y. App. Div. 2d Dep't), app. denied, 89 N.Y.2d 803, 653 N.Y.S.2d 280, 675 N.E.2d 1233, 1996 N.Y. LEXIS 4267 (N.Y. 1996).

Bare allegation that plaintiff was forced to resign due to his age was insufficient to state action to set aside release on ground that it was procured by duress. Cramer v Newburgh Molded Prods., 228 A.D.2d 541, 645 N.Y.S.2d 46, 1996 N.Y. App. Div. LEXIS 7114 (N.Y. App. Div. 2d Dep't), app. denied, 89 N.Y.2d 803, 653 N.Y.S.2d 280, 675 N.E.2d 1233, 1996 N.Y. LEXIS 4267 (N.Y. 1996).

Assertion that plaintiff "Annette Cramer" was terminated "because she was married to Joseph Cramer" did not set forth

cognizable action under CLS Exec § 296(1)(a), which prohibits discrimination based on individual's marital status rather than on fact that individual is married to any particular partner. Cramer v Newburgh Molded Prods., 228 A.D.2d 541, 645 N.Y.S.2d 46, 1996 N.Y. App. Div. LEXIS 7114 (N.Y. App. Div. 2d Dep't), app. denied, 89 N.Y.2d 803, 653 N.Y.S.2d 280, 675 N.E.2d 1233, 1996 N.Y. LEXIS 4267 (N.Y. 1996).

Complaint was properly dismissed where plaintiffs did not plead that they offered to bear expense of building modifications they requested (CLS Exec § 296(18)(1)), they admitted that originally alleged discriminatory practices and policies were corrected, and they failed to adduce evidence of any other discriminatory practices and policies. Mansolino v Haberman, 239 A.D.2d 276, 658 N.Y.S.2d 843, 1997 N.Y. App. Div. LEXIS 5425 (N.Y. App. Div. 1st Dep't 1997).

Terminated correction officer's due process rights were not violated by alleged lack of specificity of dates in charges of sexual harassment of subordinates where charges were sufficiently specific to apprise officer of their nature and to allow for preparation of adequate defense; correction commissioner did not act in bad faith in failing to provide more precise dates where numerous and extensive investigations occurred before charges were filed, and one complaining witness delayed filing formal complaint. Arroyo v City of New York, 245 A.D.2d 186, 666 N.Y.S.2d 168, 1997 N.Y. App. Div. LEXIS 13150 (N.Y. App. Div. 1st Dep't 1997).

Plaintiffs, licensed practical nurses, stated action under CLS Exec § 296(1)(a) by alleging that they showed religious or moral belief held by them, that defendants were aware thereof, and that defendants failed to reasonably accommodate such religious belief by summarily terminating plaintiffs for their refusal to the form abortive procedures. Larson v Albany Med. Ctr., 252 A.D.2d 936, 676 N.Y.S.2d 293, 1998 N.Y. App. Div. LEXIS 8687 (N.Y. App. Div. 3d Dep't 1998).

Job applicant stated cause of action for employment discrimination based on disability in violation of CLS Exec § 296(1)(a) by alleging that employer subjected him to urinalysis test as condition of employment without demonstrating that such test was job related and that employer refused to hire applicant on basis of such test result (which revealed presence of opiates) without evaluating his capacity to reasonably perform in position sought. Doe v Roe, Inc., 143 Misc. 2d 156, 539 N.Y.S.2d 876, 1989 N.Y. Misc. LEXIS 187 (N.Y. Sup. Ct. 1989), aff'd, 160 A.D.2d 255, 553 N.Y.S.2d 364, 1990 N.Y. App. Div. LEXIS 3749 (N.Y. App. Div. 1st Dep't 1990).

Cause of action based on claim of sexual harassment arising out of plaintiff actress' employment relationship with defendant, who coerced her into sexual activity with his business associates to further his own business interests, was cognizable under Human Rights Law, CLS Exec § 297(9), since actions of employer which discriminate against person in terms and conditions of employment because of person's sex are encompassed within ambit of wrongs actionable under statute. Thoreson v Penthouse Int'l, 149 Misc. 2d 150, 563 N.Y.S.2d 968, 1990 N.Y. Misc. LEXIS 609 (N.Y. Sup. Ct. 1990), modified, 179 A.D.2d 29, 583 N.Y.S.2d 213, 1992 N.Y. App. Div. LEXIS 5427 (N.Y. App. Div. 1st Dep't 1992).

Probationary correction officer met her burden of demonstrating that there were disputed issues of material fact as to whether she was fired for good faith reasons or for discriminatory reasons and thus she was entitled to hearing at which corrections department would have burden of proving, by preponderance of evidence, that it terminated her in good faith, where she claimed that she was terminated because of pregnancy discrimination and it appeared that corrections department decided to terminate her based in part on some absences which were pregnancy-related. Card v Sielaff, 154 Misc. 2d 239, 586 N.Y.S.2d 191, 1992 N.Y. Misc. LEXIS 221 (N.Y. Sup. Ct. 1992).

Where a former employee alleged her male supervisor sexually harassed her, as the complaint made no allegations against her female supervisor, it failed to state a claim against her or to provide notice of the allegations against her, as required by due process and N.Y. Exec. Law 297; thus, the New York State Division of Human Right could not enforce a damage award in favor of the employee against the female supervisor. Matter of New York State Div. of Human Rights v Young Legends, LLC, 90 A.D.3d 1265, 934 N.Y.S.2d 628, 2011 N.Y. App. Div. LEXIS 8851 (N.Y. App. Div. 3d Dep't 2011).

Former employees' action under Human Rights Law against owner of employer is dismissed, where employees failed to plead facts regarding owner's involvement in creation, design, or implementation of employer's alleged discriminatory plan to terminate employees and failed to plead facts from which inference can be made that owner intended to discriminate against plaintiffs, because plaintiffs' use of word "defendants" is insufficient to allege individual action by owner where no other facts are alleged in support of individual liability. Leykis v NYP Holdings, 899 F. Supp. 986, 1995 U.S. Dist. LEXIS 20524 (E.D.N.Y. 1995).

37. Sufficiency of proof

Record supported conclusion that employee was victim of quid pro quo sexual harassment, and thus was entitled to compensatory damages, where employer exploited employee by, among other things, coercing her, as implicit condition of her employment, into having sexual liaisons with 2 business associates of employer's chairman and principal shareholder. Thoreson v Penthouse Int'l, 80 N.Y.2d 490, 591 N.Y.S.2d 978, 606 N.E.2d 1369, 1992 N.Y. LEXIS 4231 (N.Y. 1992).

A determination of the commission and its cease and desist order against the operator of an employment agency who made oral and written inquiries in respect of an applicant's creed and national origin should be sustained. Holland v Edwards, 282 A.D. 353, 122 N.Y.S.2d 721, 1953 N.Y. App. Div. LEXIS 4474 (N.Y. App. Div. 1953), aff'd, 307 N.Y. 38, 119 N.E.2d 581, 307 N.Y. (N.Y.S.) 38, 1954 N.Y. LEXIS 1009 (N.Y. 1954).

Evidence in support of complaint which alleged that demotion was based on discrimination by reason of age, including coworkers' testimony as to satisfactory nature of complainant's work, supported finding that demotion was based on discrimination by reason of age. Winitt v State Div. of Human Rights, 50 A.D.2d 767, 377 N.Y.S.2d 60, 1975 N.Y. App. Div. LEXIS 11562 (N.Y. App. Div. 1st Dep't 1975).

School district would be required to pay any teacher physically disabled by reason of maternity accrued sick leave benefits for that portion of school year coinciding with such disability or aggravation of such disability, unless such teacher elected to take unpaid maternity leave during which sick leave was not applicable, provided she furnished to district certificate from her attending physician to effect that during such period of time she was, in fact, physically disabled. State Div. of Human Rights v Board of Education, 51 A.D.2d 357, 381 N.Y.S.2d 544, 1976 N.Y. App. Div. LEXIS 11080 (N.Y. App. Div. 3d Dep't), aff'd, 40 N.Y.2d 1021, 391 N.Y.S.2d 532, 359 N.E.2d 1327, 1976 N.Y. LEXIS 3155 (N.Y. 1976).

Evidence showing, inter alia, city employee's chronic lateness, absenteeism, insubordination and poor work performance supported finding of division of human rights of no probable cause to believe that employee was victim of discrimination so that Human Rights Appeal Board exceeded its limited scope of review in determining that division's order dismissing employee's complaint was arbitrary, capricious and an abuse of discretion. New York City Housing Authority v State Div. on Human Rights, 53 A.D.2d 844, 385 N.Y.S.2d 785, 1976 N.Y. App. Div. LEXIS 13674 (N.Y. App. Div. 1st Dep't 1976).

In a proceeding pursuant to Exec Law § 298 brought by a 59-year-old engineer alleging age discrimination in his employer's reorganization of his engineering section that resulted in the abolishment of the engineer's position and his transfer to another unit, the complaint was properly dismissed where the engineer's salary was not reduced, and where the engineer was on a special assignment that was terminated only for business reasons. Boiko v New York State Human Rights Appeal Bd., 88 A.D.2d 1045, 452 N.Y.S.2d 691, 1982 N.Y. App. Div. LEXIS 17467 (N.Y. App. Div. 3d Dep't 1982).

In an action brought by a former medical center employee who alleged that the medical center and various individual defendants had discriminated against her on the basis of her sex and marital status in violation of Exec Law § 296(1)(a), and had retaliated against her in violation of Exec Law § 296(1)(e), the trial court

properly denied defendants' motion for summary judgment where issues of fact existed as to whether the individual defendants' treatment of plaintiff constituted discrimination and whether the medical center had had knowledge of or had acquiesced in any such discriminatory conduct, and where, in light of such issues of fact as to the first cause of action, there was no need for the trial court to have decided whether plaintiff had a cause of action for retaliatory discrimination absent any finding that the alleged discrimination had actually occurred. Belanoff v Grayson, 98 A.D.2d 353, 471 N.Y.S.2d 91, 1984 N.Y. App. Div. LEXIS 16486 (N.Y. App. Div. 1st Dep't 1984).

The State Division of Human Rights did not abuse its discretion when investigating a complaint alleging age discrimination and dismissing the complaint upon finding no probable cause, where the division's field representative reviewed the complaint itself and a letter from the associate personnel director of respondent, interviewed respondent's associate personnel director, and spoke with complainant when he visited the division office to review his file, in that the investigation was not so abbreviated and one sided that it resulted in a record which did not afford a reasonable basis for an administrative determination. Tirino v Long Island Jewish-Hillside Medical Center, 99 A.D.2d 513, 471 N.Y.S.2d 16, 1984 N.Y. App. Div. LEXIS 16720 (N.Y. App. Div. 2d Dep't 1984).

The State Division of Human Rights did not act arbitrarily in dismissing petitioner's complaint for unlawful employment discrimination where petitioner failed to rebut defendant's evidence that the job he had applied for was eliminated due to budget considerations. Baranowski v Cornell University, 106 A.D.2d 814, 484 N.Y.S.2d 202, 1984 N.Y. App. Div. LEXIS 21725 (N.Y. App. Div. 3d Dep't 1984), app. denied, 64 N.Y.2d 607, 1985 N.Y. LEXIS 16226 (N.Y. 1985).

Unsupported allegations of age discrimination were insufficient to meet petitioner's burden of showing that unlawful discriminatory acts were committed against him. Murphy v Russell Sage College, 134 A.D.2d 716, 521 N.Y.S.2d 199, 1987 N.Y. App. Div. LEXIS 50907 (N.Y. App. Div. 3d Dep't 1987).

To make out prima facie case of age discrimination in employment, plaintiff must show that he or she was member of protected class, prove that he or she was discharged, prove that he or she was qualified for position, and either show that he or she was replaced by younger person, produce direct evidence of discriminatory intent, or produce statistical evidence of discriminatory conduct. Bockino v Metropolitan Transp. Auth., 224 A.D.2d 471, 638 N.Y.S.2d 137, 1996 N.Y. App. Div. LEXIS 1204 (N.Y. App. Div. 2d Dep't), app. denied, 87 N.Y.2d 1017, 644 N.Y.S.2d 150, 666 N.E.2d 1064, 1996 N.Y. LEXIS 1204 (N.Y. 1996), app. denied, 88 N.Y.2d 805, 646 N.Y.S.2d 985, 670 N.E.2d 226, 1996 N.Y. LEXIS 1688 (N.Y. 1996).

Defendants rebutted plaintiff's prima facie case of age discrimination where employer's general manager testified that he was hired, inter alia, to remedy serious deficiencies in management of employer's maintenance operations, general manager interviewed plaintiff, but found that plaintiff failed to make any suggestions to correct problems, claimed that problems were overstated, and blamed uncooperative union employees and poor conditions for problems, and general manager testified that he replaced plaintiff with another employee who ran efficient and organized repair facility and who presented sound and specific suggestions for improving operations. Bockino v Metropolitan Transp. Auth., 224 A.D.2d 471, 638 N.Y.S.2d 137, 1996 N.Y. App. Div. LEXIS 1204 (N.Y. App. Div. 2d Dep't), app. denied, 87 N.Y.2d 1017, 644 N.Y.S.2d 150, 666 N.E.2d 1064, 1996 N.Y. LEXIS 1204 (N.Y. 1996), app. denied, 88 N.Y.2d 805, 646 N.Y.S.2d 985, 670 N.E.2d 226, 1996 N.Y. LEXIS 1688 (N.Y. 1996).

Evidence did not support determination that rescue mission, in conditioning complainant's stay on further discussing her HIV status, denied her privilege and advantage of place of public accommodation where (1) all witnesses, including complainant, testified that complainant was asked whether she had any medications with her and was told that, if she did, they had to be put away, that she refused to respond to that inquiry, that if she wished to stay, she had to respond, and that she left rather than answering, and (2) question as to medications was not based on her HIV status, but rather was as matter of policy asked of all potential admittees. Rescue Mission Alliance v Mercado, 224 A.D.2d 934, 637 N.Y.S.2d 580, 1996 N.Y. App. Div. LEXIS 1571 (N.Y. App. Div. 4th Dep't), app. denied, 88 N.Y.2d 805, 646 N.Y.S.2d 985, 670 N.E.2d 226, 1996 N.Y. LEXIS 1714 (N.Y. 1996).

Court would annul determination that certain acts of dentist constituted refusal to treat complainant based on his status as person perceived to be at risk for HIV infection where dental office in question did not constitute "place of public accommodation." Schulman v State Div. of Human Rights, 89 N.Y.2d 934, 226 A.D.2d 645, 641 N.Y.S.2d 134, 677 N.E.2d 284, 1996 N.Y. App. Div. LEXIS 4389 (N.Y. App. Div. 2d Dep't 1996), rev'd, 89 N.Y.2d 934, 654 N.Y.S.2d 713, 677 N.E.2d 284, 1997 N.Y. LEXIS 1802 (N.Y. 1997).

Age discrimination claims filed against airline based on airline's use of weight standards in hiring flight attendants, which allegedly discriminated against women with "large framed bodies," as well as older women, was properly dismissed where petitioners failed to show that age was major factor in weight gain, that airline's weight restrictions had had disparate impact on older employees, or that airline had used its restrictions to avoid hiring older individuals. Delta Air Lines v New York State Div. of Human Rights, 229 A.D.2d 132, 652 N.Y.S.2d 253, 1996 N.Y. App. Div. LEXIS 12963 (N.Y. App. Div. 1st Dep't 1996), app. dismissed, 90 N.Y.2d 882, 661 N.Y.S.2d 825, 684 N.E.2d 274, 1997 N.Y. LEXIS 2331 (N.Y. 1997), aff'd, 91 N.Y.2d 65, 666 N.Y.S.2d 1004, 689 N.E.2d 898, 1997 N.Y. LEXIS 3710 (N.Y. 1997).

Airline did not engage in sex discrimination based on its use of weight standards in hiring flight attendants where there was no evidence that it intended to deprive one sex of equal opportunity or treatment, or that weight requirements were applied in discriminatory manner, and airline showed that approximately 90 percent of its flight attendants were female, thereby negating claim that weight charts were somehow utilized to discriminate against women. Delta Air Lines v New York State Div. of Human Rights, 229 A.D.2d 132, 652 N.Y.S.2d 253, 1996 N.Y. App. Div. LEXIS 12963 (N.Y. App. Div. 1st Dep't 1996), app. dismissed, 90 N.Y.2d 882, 661 N.Y.S.2d 825, 684 N.E.2d 274, 1997 N.Y. LEXIS 2331 (N.Y. 1997), aff'd, 91 N.Y.2d 65, 666 N.Y.S.2d 1004, 689 N.E.2d 898, 1997 N.Y. LEXIS 3710 (N.Y. 1997).

Airline did not engage in unlawful discrimination based on its preemployment questions as to petitioners' national origin and gender where there was nothing to support conclusion that those questions, either expressly or intentionally, led to petitioners not being hired; rather, petitioners received good reviews from airline's interviewers and were not hired due to their failure to meet airline's weight guidelines or hiring eligibility deadline. Delta Air Lines v New York State Div. of Human Rights, 229 A.D.2d 132, 652 N.Y.S.2d 253, 1996 N.Y. App. Div. LEXIS 12963 (N.Y. App. Div. 1st Dep't 1996), app. dismissed, 90 N.Y.2d 882, 661 N.Y.S.2d 825, 684 N.E.2d 274, 1997 N.Y. LEXIS 2331 (N.Y. 1997), aff'd, 91 N.Y.2d 65, 666 N.Y.S.2d 1004, 689 N.E.2d 898, 1997 N.Y. LEXIS 3710 (N.Y. 1997).

Petitioner committed unlawful discriminatory practice by refusing to sell piece of real property to complainant because of her race; realtor who represented complainant, and who was also black, was also victim of petitioner's discrimination insofar as petitioner refused to deal with realtor because of complainant's race. Feggoudakis v New York State Div. of Human Rights, 230 A.D.2d 739, 646 N.Y.S.2d 175, 1996 N.Y. App. Div. LEXIS 8219 (N.Y. App. Div. 2d Dep't 1996).

Complaint alleging that plaintiff was denied appointment to permanent status, and was terminated from his employment with county agency as result of race discrimination, was properly dismissed where (1) several agency employees who had frequent contact with plaintiff testified that he was ill-prepared for meetings, failed to participate in discussions, had difficulty communicating and sharing information, and was generally unable to function as team member of work force, and (2) plaintiff failed to show that stated reason for his discharge was pretextual based on 3 witnesses' general testimony about his efficient and professional managerial style, and unsubstantiated assertions of animus toward him because of his race. Broome v Keener, 236 A.D.2d 498,

654 N.Y.S.2d 618, 1997 N.Y. App. Div. LEXIS 1343 (N.Y. App. Div. 2d Dep't 1997).

Court would affirm city's determination terminating petitioner's employment as parking lot attendant where he did not contest substantial evidence of his misconduct while on duty, including drinking and refusing to undergo breathalyzer test as directed by supervisor, and although he established prima facie case that conduct which formed basis for his discharge was causally related to his alcoholism, city showed that subsequent to his completion of alcohol treatment program, he had relapse while on duty and was immediately charged with misconduct. Myszczenko v City of Poughkeepsie, 239 A.D.2d 584, 657 N.Y.S.2d 455, 1997 N.Y. App. Div. LEXIS 5639 (N.Y. App. Div. 2d Dep't 1997).

Determination that dentist discriminated against complainant based on his HIV status would be annulled where dentist performed complete oral examination of complainant, and concluded that further treatment, in form of root canal therapy, was needed, it was undisputed that dentist did not perform root canal work, and that his associate, who performed root canal work on only 30 to 40 percent of practice's patients, was away on vacation, it was dentist's professional judgment that complainant needed immediate treatment because he was in pain, and that dental unit of university hospital would best provide that treatment in view of risk of secondary infection, no evidence was presented that such recommendation was inappropriate or medically unsound, and complainant contacted dentist's secretary to request additional referrals, but he sought no further treatment from dentist or his associates. Schulman v State Div. of Human Rights, 239 A.D.2d 588, 658 N.Y.S.2d 70, 1997 N.Y. App. Div. LEXIS 5622 (N.Y. App. Div. 2d Dep't 1997), app. denied, 92 N.Y.2d 801, 677 N.Y.S.2d 71, 699 N.E.2d 431, 1998 N.Y. LEXIS 1454 (N.Y. 1998).

Substantial evidence supported correction commissioner's decision that terminated correction officer had sexually harassed his subordinates where testimony of 2 complainants proved that officer sexually harassed them by exposing himself to them, and testimony of third complainant proved that officer sexually assaulted her. Arroyo v City of New York, 245 A.D.2d 186, 666 N.Y.S.2d 168, 1997 N.Y. App. Div. LEXIS 13150 (N.Y. App. Div. 1st Dep't 1997).

Court would annul determination finding that employer unlawfully discriminated against employee on basis of sex and pregnancy-related disability where she presented no proof that she was incapacitated by severe sickness or injury when she applied for 3 days from sick leave bank established under collective bargaining agreement or that her application was treated in manner less liberal than those applications from employees with conditions unrelated to pregnancy and recovery from childbirth. Cheektowaga Cent. Sch. Dist. v Graziadei, 267 A.D.2d 985, 700 N.Y.S.2d 334, 1999 N.Y. App. Div. LEXIS 13715 (N.Y. App. Div. 4th Dep't 1999), app. denied, 2000 N.Y. App. Div. LEXIS 14175 (N.Y. App. Div. 4th Dep't Mar. 29, 2000), app. denied, 95 N.Y.2d 756, 712 N.Y.S.2d 448, 734 N.E.2d 760, 2000 N.Y. LEXIS 1844 (N.Y. 2000).

There was sufficient unrebutted evidence in record to warrant public hearing on complaint that Delta Airlines discriminated on basis of age against 57-year-old automotive mechanic with 19 years of service with Pan American Airways when it did not hire him as part of its 1991 purchase of Pan Am's assets, where complaint alleged that specifically identified younger Pan Am mechanics with less seniority were hired in his stead. Sauer v N.Y. State Div. of Human Rights, 285 A.D.2d 372, 727 N.Y.S.2d 113, 2001 N.Y. App. Div. LEXIS 7370 (N.Y. App. Div. 1st Dep't 2001).

Administrative law judge (ALJ) did not err in finding that a complainant was subjected to a hostile work environment, as substantial evidence supported the ALJ's findings that petitioners were informed of sexually inappropriate conduct directed toward the complainant and condoned that conduct and that she was constructively discharged from employment; her use of sexual innuendo in a consensual setting did not waive her legal protections against unwelcome harassment. Matter of Amg Managing Partners, LLC v New York State Div. of Human Rights, 148 A.D.3d 1765, 51 N.Y.S.3d 764, 2017 N.Y. App. Div. LEXIS 2515 (N.Y. App. Div. 4th Dep't 2017).

A landlord's prior verbal commitment to another prospective tenant to hold an apartment for her for a few days, whether it bound him legally or morally, did not justify his refusal to show the apartment to the Negro complainant after he had arranged to do so. Barnes v Goldberg, 54 Misc. 2d 676, 283 N.Y.S.2d 347, 1966 N.Y. Misc. LEXIS 1403 (N.Y. Sup. Ct. 1966).

Where a former employee alleged her male supervisor sexually harassed her, as the New York State Division of Human Rights (SDHR) failed to satisfy its burden to prove that the employee's female supervisor condoned the discriminatory conduct., SDHR could not enforce a damage award in favor of the employee against the female supervisor. Matter of New York State Div. of Human Rights v Young Legends, LLC, 90 A.D.3d 1265, 934 N.Y.S.2d 628, 2011 N.Y. App. Div. LEXIS 8851 (N.Y. App. Div. 3d Dep't 2011).

Where a former employee testified that her male supervisor made offensive sexual comments, pressured her to come to his apartment, forced her to engage in sexual intercourse there, and fired her when she refused to return to his apartment, and he did not controvert her testimony, the evidence supported the administrative law judge's finding that she had been subjected to quid pro quo and hostile work environment sexual harassment. Matter of New York State Div. of Human Rights v Young Legends, LLC, 90 A.D.3d 1265, 934 N.Y.S.2d 628, 2011 N.Y. App. Div. LEXIS 8851 (N.Y. App. Div. 3d Dep't 2011).

Jury instruction in employment discrimination case under Human Rights Law is proper where it allows jury to determine (1) whether illegitimate criterion was substantial or motivating factor in adverse employment decision, and (2) if so, whether employer has met its burden of proving that employment decision would have happened anyway; goal of Human Rights Law claim is to determine whether adverse employment decision was made "because of" illegitimate factor. Jury was properly charged in case brought by worker who alleged that he was discriminated against because of his age where judge stated, inter alia, that jury should consider whether "plaintiff established...that the termination or denial of transfer occurred under circumstances giving rise to an inference that age was a motivating factor in the decision"; jury may reach its ultimate conclusion on issue of discrimination through either "direct" or "circumstantial" evidence. Tyler v Bethlehem Steel Corp., 958 F.2d 1176, 1992 U.S. App. LEXIS 4161 (2d Cir. N.Y.), cert. denied, 506 U.S. 826, 113 S. Ct. 82, 121 L. Ed. 2d 46, 1992 U.S. LEXIS 5704 (U.S. 1992).

District Court erred in concluding that plaintiffs, pilots of bankrupt airline, failed to create inference of age discrimination in violation of CLS Exec § 296 where plaintiffs showed that airline management representative assigned to investigate and evaluate acquisition of bankrupt airline made numerous comments about age of bankrupt airline's pilot force, referring to them as "contaminated" and " Abdu-Brisson v Delta Air Lines, Inc., 239 F.3d 456, 2001 U.S. App. LEXIS 2041 (2d Cir. N.Y.), cert. denied, 534 U.S. 993, 122 S. Ct. 460, 151 L. Ed. 2d 378, 2001 U.S. LEXIS 9990 (U.S. 2001).

Complainant, store cashier, failed to show that employer acted unlawfully in discharging her for failing to produce receipt for store merchandise placed in bag underneath her register, even though she showed that she was discharged on very day that she said she told employer's coordinator of detectives that she was breaking off their sexual relationship. 1999 Order Comm HR No. 9S-E-S-90-144553.

Complainant failed to show that she was denied employment opportunity on ground she rebuffed amorous advances of employer's vice president of finance where employer's chief financial officer and employer's executive board, not vice president, had final say in both offering complainant job and later revoking that offer of employment, and employer was motivated by financial considerations when it revoked its offer of employment to complainant and hired someone at roughly half salary. 1999 Order Comm HR No. 9D-E-S-89-136970-E.

Respondent, owner of insurance brokerage firm, did not engage in unlawful practices of sexual discrimination and harassment against complainant, respondent's office manager, where com-

plainant's employment was ended because of her admitted falsification of clients' signatures, and because of statements made, or believed by respondent that complainant made, to insurance company which were inimical to respondent's financial interest. 2000 Order Comm HR No. 9S-E-S 95-7940446.

Complainant, part-time legal secretary, was not subjected to hostile work environment by exposure to sexually explicit materials that were mailed to law office where, inter alia, owner of law firm was involuntarily placed on mailing lists of several direct marketers selling sexual materials, materials were marked with warning notices stating that contents were sexually explicit, materials were not directed toward complainant, or displayed by law firm, and complainant opened mail knowing it contained sexual materials. 2000 Order Comm HR No. 9S-E-S-96-7940895.

Complainant's failure to receive promotion to associate professor did not constitute unlawful retaliation for filing previous complaints with Division of Human Rights where he was denied promotion for having failed to meet standards contained in parties' collective bargaining agreement as to any significant community activities or college service, same reasons that he was not promoted in preceding years. 2000 Order Comm HR No. 5-E-O-86-111682-E.

Town's decision to layoff complainant from his maintenance position at town recreation center and its decision not to rehire complainant as seasonal security guard did not constitute age discrimination where layoff was based on complaints as to complainant's performance and supervisor's assessment of his performance, and security guard positions were committed to otherwise qualified people before complainant verbally announced his interest in position. 2000 Order Comm HR No. 9D-E-A-92-1200959A.

Employer discriminated against complainant, native of Columbia, where she had been promoted to forelady after working as cleaning lady for 3 full years, shortly thereafter building supervisor removed her as forelady and replaced her with someone of national origin similar to building supervisor, Albanian national, and employer merely proffered single statement allegedly made by complainant's former supervisor that complainant was demoted because she did not work out. 2000 Order Comm HR No. 9D-E-O-89-136156E.

V. Review and Enforcement

38. Judicial review

An objection that the commission did not have jurisdiction because the applicant could not be considered a person "aggrieved" within the meaning of the law is not open for review by the court where such objection was not urged before the commission. Objections in respect of the commission's directives which were not made until after the commission had gone into court to secure enforcement of its orders, were too late for judicial review. Holland v Edwards, 307 N.Y. 38, 119 N.E.2d 581, 307 N.Y. (N.Y.S.) 38, 1954 N.Y. LEXIS 1009 (N.Y. 1954).

The dismissal of petitioner's complaint of unlawful discrimination upon a determination by a single member of the State Commission Against Discrimination, whose decision was not disturbed by the commission chairman was reviewable by the courts. Jeanpierre v Arbury, 4 N.Y.2d 238, 173 N.Y.S.2d 597, 149 N.E.2d 882, 1958 N.Y. LEXIS 1072 (N.Y. 1958).

The jurisdiction of the State Human Rights Appeals Board is restricted by § 297 of the Executive Law and Rule III(10)(4) of the appeals board to final dispositions. South African Airways v New York State Div. of Human Rights, 35 A.D.2d 516, 312 N.Y.S.2d 111, 1970 N.Y. App. Div. LEXIS 4160 (N.Y. App. Div. 1st Dep't 1970).

Where Commissioner of Human Rights found complaint of discriminatory discharge by reason of race justified and ordered that petitioner be rehired, his further order of guidance and training programs for, and recruitment of, minority reporters was ultra vires of the division's powers, being excessive and not sufficiently related to the particular complaint, and Human Rights Appeal Board compounded error by making new findings not warranted by the original record rather than limiting its decision to ruling on the presence or absence of substantial supporting evidence. Artis v State Human Rights Appeal Bd., 42 A.D.2d 557, 345 N.Y.S.2d 570, 1973 N.Y. App. Div. LEXIS 4010 (N.Y. App. Div. 1st Dep't 1973).

In view of evidence that, although Ecuadorian professor voluntarily quit as acting chairman of Puerto Rican sequence in department of black and Puerto Rican studies because of protest directed at fact that he was non-Puerto Rican, he had functioned well as acting director, and that the professor was never accorded the opportunity to present his case in a formal manner in support of allegations, dismissal of his complaint that college had terminated him because of national origin was arbitrary and capricious. Rodriguez-Abad v Hurst, 49 A.D.2d 115, 373 N.Y.S.2d 583, 1975 N.Y. App. Div. LEXIS 10558 (N.Y. App. Div. 1st Dep't 1975).

It was improper for Supreme Court to transfer Article 78 proceeding, seeking review of determination by Division of Human Rights finding no probable cause to believe there had been unlawful discriminatory practice, where no public hearing had been held pursuant to CLS Exec § 297; only where such hearing has been held shall Supreme Court transfer proceeding to appropriate Appellate Division. Bentkowsky v Tokio Re Corp., 139 A.D.2d 436, 527 N.Y.S.2d 25, 1988 N.Y. App. Div. LEXIS 3975 (N.Y. App. Div. 1st Dep't 1988).

It was error for Supreme Court to review determination of Division of Human Rights reached after hearing, and matter should simply have been transferred to Appellate Division, which has exclusive jurisdiction over such cases under CLS Exec § 298. State Div. of Human Rights ex rel. Albino v YMCA of Greater New York, 139 A.D.2d 440, 527 N.Y.S.2d 219, 1988 N.Y. App. Div. LEXIS 3983 (N.Y. App. Div. 1st Dep't), app. denied, 72 N.Y.2d 807, 532 N.Y.S.2d 848, 529 N.E.2d 178, 1988 N.Y. LEXIS 2531 (N.Y. 1988).

Supreme Court did not abuse its discretion in denying application of union to review determination of State Division of Human Rights (SDHR) to join it as necessary party in proceeding alleging religious discrimination by bus company against one of its employees, even though joinder occurred 2 years after complaint was filed, since delay was caused by SDHR and union failed to substantiate claim that it was injured by delay. Ambrosio v State Div. of Human Rights, 144 A.D.2d 662, 535 N.Y.S.2d 381, 1988 N.Y. App. Div. LEXIS 12444 (N.Y. App. Div. 2d Dep't 1988).

After initially upholding human rights commission's finding of lack of probable cause to believe that corrections department refused to employ petitioner because of his Maryland arrest record, court properly granted reargument on basis that it had failed to apprehend that Maryland court documents in department's possession actually indicated that criminal proceedings against petitioner were disposed of in manner analogous to New York's adjournment in contemplation of dismissal. Johnson v New York City Comm'n of Human Rights, 270 A.D.2d 186, 706 N.Y.S.2d 18, 2000 N.Y. App. Div. LEXIS 3297 (N.Y. App. Div. 1st Dep't 2000).

New York State Division of Human Rights (DHR) abused its discretion by increasing an employer's civil fine to $ 60,000, because the DHR factored the employer's behavior during the administrative proceedings as part of the calculus to increase the fine, as opposed to focusing only whether the employer's discrimination was willful, wanton, or malicious. Matter of JPK Imports/Oneonta, Inc. v New York State Div. of Human Rights, 165 A.D.3d 1410, 86 N.Y.S.3d 638, 2018 N.Y. App. Div. LEXIS 6939 (N.Y. App. Div. 3d Dep't 2018), app. denied, 32 N.Y.3d 918, 123 N.E.3d 875, 100 N.Y.S.3d 216, 2019 N.Y. LEXIS 606 (N.Y. 2019).

The protection against discrimination afforded by Executive Law § 296 is at least as broad as that afforded by the Federal Constitution and civil rights statutes. Thus, the determination of the Appellate Division affirming the Appeal Board's affirmance of the State Division of Human Rights' dismissal of former employee's race discrimination claim against former employer on the ground of lack of probable cause, res judicata of all other state actions as a matter of statutory law, would be entitled to full faith and credit in a federal court hearing federal constitutional and civil rights claims. Mitchell v National Broadcasting Co., 553 F.2d 265, 1977 U.S. App. LEXIS 13960 (2d Cir. N.Y. 1977).

Administrative dismissal of age discrimination claim for administrative convenience under CLS Exec Law § 297(9) may not be reviewed by federal court, where employer argues that claim

actually was dismissed at employee's request to avoid unfavorable result and thus was not dismissed for administrative convenience, and employee's election of administrative remedy bars judicial remedy. Rivers v Standard & Poor's Corp., 764 F. Supp. 54, 1991 U.S. Dist. LEXIS 7351 (S.D.N.Y. 1991).

39. Judicial enforcement

In proceedings brought by several airline company employees who had allegedly been discharged because of their age, the State Human Rights Appeal Board exceeded its powers by reinstating the complaints that had been dismissed on the grounds of administrative convenience by the State Division of Human Rights, since the Division was authorized to dismiss a complaint on such basis in its "unreviewable discretion", under Exec Law § 297(3), notwithstanding that the Board is empowered to review the dismissal to determine whether it contravenes any statute, constitutional right, or divisional regulation, where there was no claim that the Division's decision was improper under its regulations or any statute, and dismissal for administrative convenience following settlement of a federal action involving similar allegations did not finally deprive the employees of their interests under the Human Rights Law since they could maintain the same type of action in a state court and receive a hearing on the merits. Pan American World Airways, Inc. v New York State Human Rights Appeal Bd., 61 N.Y.2d 542, 475 N.Y.S.2d 256, 463 N.E.2d 597, 1984 N.Y. LEXIS 4178 (N.Y. 1984).

Where Special Term modified an order of the State Commission on Human Rights by deleting a paragraph requiring certain apartment owners to maintain records for one year showing the number of apartments rented, the number unrented, and as to each vacant apartment the number of rooms, required rental, and names and addresses of accepted and rejected applicants with reasons for rejection, such paragraph was reinstated as being reasonably related to the unlawful act which such owners were found to have committed and as not imposing undue hardship upon them. Kindt v State Com. for Human Rights, 23 A.D.2d 809, 258 N.Y.S.2d 250, 1965 N.Y. App. Div. LEXIS 4484 (N.Y. App. Div. 4th Dep't), aff'd, 16 N.Y.2d 1001, 265 N.Y.S.2d 662, 212 N.E.2d 898, 1965 N.Y. LEXIS 1001 (N.Y. 1965).

Before the court exercises its discretion in issuing an enforcement order, there must be an appropriate record basis, i.e., that the papers disclose the results of the investigation made and that the Division has made findings as a result thereof. State Div. of Human Rights v Union Carbide Corp., 34 A.D.2d 636, 310 N.Y.S.2d 396, 1970 N.Y. App. Div. LEXIS 5023 (N.Y. App. Div. 1st Dep't 1970), dismissed, 28 N.Y.2d 555, 319 N.Y.S.2d 447, 268 N.E.2d 127, 1971 N.Y. LEXIS 1595 (N.Y. 1971).

The directions of the Commissioner of Human Rights are not self-enforcing and they are not brought into play unless there has been a violation of a Division Order, and then the Division must seek an enforcement order for non-compliance. State Div. of Human Rights v Janica, 37 A.D.2d 444, 326 N.Y.S.2d 854, 1971 N.Y. App. Div. LEXIS 2745 (N.Y. App. Div. 4th Dep't 1971).

Supreme Court improperly reinstated petitioner as permanent employee on finding of unlawful discriminatory discharge where, at time of discharge, he had completed only 8 months of one-year probationary period; petitioner was only entitled to reinstatement to probationary title he held at time of discharge. Obas v Kiley, 149 A.D.2d 422, 539 N.Y.S.2d 767, 1989 N.Y. App. Div. LEXIS 4393 (N.Y. App. Div. 2d Dep't 1989).

In an action to punish a landlord for contempt of court for wilful failure to obey the provisions of a court order enforcing an order of the Civil Rights Commission, an intervenor was relegated to a plenary action pursuant to Executive Law § 297(9) and any award for compensatory or punitive damages would have to be made by the court having jurisdiciton of that action. State Com. for Human Rights v Kennelly, 59 Misc. 2d 278, 299 N.Y.S.2d 342, 1969 N.Y. Misc. LEXIS 1651 (N.Y. Sup. Ct. 1969).

In Article 78 proceeding by petitioner who was terminated from his job as school bus driver for failing to complete alcoholism treatment program (pursuant to CLS Veh & Tr § 509-b), petitioner could not assert discrimination claim under CLS Exec § 296; such claims must be initiated by administrative proceeding before State Division of Human Rights or by bringing action for damages. Marcotte v Corinth Cent. Sch. Dist., 166 Misc. 2d 881, 635 N.Y.S.2d 1021, 1995 N.Y. Misc. LEXIS 593 (N.Y. Sup. Ct. 1995).

40. Administrative review

Appellate Division can only set aside determination of commissioner of Division of Human Rights if such determination is arbitrary or capricious; thus, it improperly set aside commissioner's award of back pay after having affirmed its finding of discrimination. Mize v State Div. of Human Rights, 33 N.Y.2d 53, 349 N.Y.S.2d 364, 304 N.E.2d 231, 1973 N.Y. LEXIS 1002 (N.Y. 1973).

Scope of State Human Rights Appeal Board's review is limited by statute and Board may not reverse a decision of the Division of Human Rights "in the interests of justice" nor may it substitute its judgment for that of the Division. State Div. of Human Rights ex rel. Powers v Mecca Kendall Corp., 53 A.D.2d 201, 385 N.Y.S.2d 665, 1976 N.Y. App. Div. LEXIS 12506 (N.Y. App. Div. 4th Dep't 1976).

Complainant, who filed a complaint with the State Division of Human Rights two and one-half months after his job demotion alleging a violation of the Human Rights Law, is entitled to have an order of the Human Rights Appeal Board dismissing an appeal to the board annulled and the matter remanded for further proceedings where after nearly a year passed following complainant's demotion without the matter being scheduled for a hearing, the division, pursuant to a request by complainant's counsel, ordered the matter dismissed for administrative convenience in order that complainant could obtain redress through court action, and subsequently amended its prior order such that the dismissal was effective *nunc pro tunc* as of the date of the original request following dismissal of the court action commenced by complainant due to untimeliness because the division's jurisdiction was exclusive while the matter was pending before it (Executive Law, § 297, subd 9) and the prior order of dismissal was made more than one year after the date of complainant's demotion; the dismissal of an appeal by complainant's employer from the division's amended order to the appeal board on the ground that it had no jurisdiction to review dismissal of the complaint grounded on administrative convenience (Executive Law, § 297, subd 3, par c) is annulled since although the division may in its unreviewable discretion dismiss the complaint on the grounds of administrative convenience and shall then issue an order containing notice of a right to appeal to the appeal board (9 NYCRR 465.5 [d] [1], [3]), the board has jurisdiction over appeals from any order of the Commissioner of Human Rights (9 NYCRR 550.2) and order of the commissioner is defined as "any order dismissing a complaint, other than a dismissal on grounds of administrative convenience" (9 NYCRR 550.3 [i] [3]). What is prohibited is review by the appeal board of the discretionary act of the division in determining to dismiss a complaint for administrative convenience, and inasmuch as that action differs from the action in determining the date such dismissal is to be effective, the latter act is not proscribed from administrative appellate review, for if there were no review, complainant would be deprived of a forum in which to air his claim; the principle of administrative finality may not be applied to preclude correction of error by the administrative agency itself where the determination is the result of irregularity in vital matters. Eastern Airlines, Inc. v State Human Rights Appeal Board, 66 A.D.2d 581, 413 N.Y.S.2d 925, 1979 N.Y. App. Div. LEXIS 10057 (N.Y. App. Div. 1st Dep't 1979).

Commissioner is required to make prompt investigation by field visit, written or oral inquiry, conference, or any method or combination thereof; matter is remitted to division for full and thorough investigation where probable cause issue was investigated in cursory and abbreviated manner and no independent inquiry was conducted to verify complainant's assertions prior to issue of no probable cause determination; investigation consisting of one interview with employer's personnel officer, obtaining copies of leave of absence policy and office memoranda together with letters from employer's attorney is insufficient. State Div. of Human Rights ex rel. Beckman v Gaylord Bros., Inc., 112 A.D.2d 726, 492 N.Y.S.2d 217, 1985 N.Y. App. Div. LEXIS 56237 (N.Y. App. Div. 4th Dep't 1985).

Determination by Division of Human Rights finding no probable cause to believe that employee was terminated due to her

religious beliefs would be annulled and matter remanded for public hearing where sparseness of record prevented proper review. Bentkowsky v Tokio Re Corp., 139 A.D.2d 436, 527 N.Y.S.2d 25, 1988 N.Y. App. Div. LEXIS 3975 (N.Y. App. Div. 1st Dep't 1988).

State Division of Human Rights properly denied landlord's application to reopen hearing into determination entered on default that landlord unlawfully discriminated on basis of race and marital status, where only excuse offered for failing to answer was that landlord "found it unimaginable that the complaint would be sustained because there was no discrimination in refusing to rent to [complainant] an apartment in a building which was and is predominantly tenanted by persons of the same race as [complainant]," and landlord offered only bare allegations regarding meritorious defense and failed to serve proposed answer to underlying complaint with application to reopen hearing. Interboro Management Co. v State Div. of Human Rights, 139 A.D.2d 697, 527 N.Y.S.2d 453, 1988 N.Y. App. Div. LEXIS 4415 (N.Y. App. Div. 2d Dep't 1988).

Appropriate standard of review of no probable cause determination of Division of Human Rights regarding possible violations of CLS Exec § 298, where no public hearing was held under CLS Exec § 297(4)(a), was whether determination was arbitrary and capricious, or lacking in rational basis, and not substantial evidence test. Giles v State Div. of Human Rights, 166 A.D.2d 779, 563 N.Y.S.2d 142, 1990 N.Y. App. Div. LEXIS 12018 (N.Y. App. Div. 3d Dep't 1990).

Mandamus to compel Division of Human Rights (DHR) to determine motion to dismiss complaint prior to substantive hearing on charge of unlawful discriminatory employment practice was not appropriate remedy since petitioners failed to demonstrate existence of duty which was ministerial in nature; neither CLS Exec § 297 nor Rules of Practice of DHR provided for prehearing motion practice. Central New York Centro, Inc. v New York State Div. of Human Rights, 142 Misc. 2d 935, 539 N.Y.S.2d 626, 1989 N.Y. Misc. LEXIS 150 (N.Y. Sup. Ct. 1989).

In proceeding challenging State Division of Human Rights' dismissal of race discrimination complaint at complainant's request on ground of "administrative inconvenience" under CLS Exec § 297, petitioner's request for admissions of fact that division had not dismissed any complaints on such ground within last 2 years except where first requested by complainant, in order to establish arbitrary or capricious activity on division's part, would be denied on ground that it sought conclusions about material issues for which notice to admit may not be utilized. New York Tel. Co. v New York State Div. of Human Rights, 148 Misc. 2d 765, 561 N.Y.S.2d 401, 1990 N.Y. Misc. LEXIS 536 (N.Y. Sup. Ct. 1990).

Determination made by State Division of Human Rights (SDHR) which, after reopening previous finding of probable cause, found "no probable cause" and dismissed petitioner's complaint, was arbitrary and capricious where (1) reopening order specifically contemplated remand to regional director for further investigation, but petitioner's counsel was never formally advised what additional evidence was needed and was not specifically asked to produce particular additional evidence, (2) record failed to show that any additional post-reopening investigation was conducted, and (3) SDHR did not explain its reversal of initial assessment finding probable cause. Boyea v New York State Exec. Dep't, Div. of Human Rights, 178 Misc. 2d 398, 679 N.Y.S.2d 548, 1998 N.Y. Misc. LEXIS 471 (N.Y. Sup. Ct. 1998).

41. Validity of administrative orders

In a proceeding alleging sex discrimination, an order properly directed a non-profit, tax-exempt foreign corporation and three of its local charter organizations located in New York to discontinue in New York their male-only membership practices, to extend membership invitations to female complainants and to submit annual statistical reports detailing the number of male and female members in the New York organizations as that remedy was neither overbroad nor excessive. United States Power Squadrons v State Human Rights Appeal Bd., 59 N.Y.2d 401, 465 N.Y.S.2d 871, 452 N.E.2d 1199, 1983 N.Y. LEXIS 3181 (N.Y. 1983).

Under regulation of the Human Rights Appeal Board authorizing Board to consider and decide issues presented by record but not specifically indicated in notice of appeal or requested when there is not resulting prejudice to a party's rights, where there was no objection to Board's right to amend determination of Division of the Human Rights, modification did not prejudice substantial right of party and there was no cross appeal, Board had authority to make modification in favor of complainant. State Div. of Human Rights ex rel. Mossler v Westmoreland Cent. School Dist., 56 A.D.2d 205, 392 N.Y.S.2d 149, 1977 N.Y. App. Div. LEXIS 10047 (N.Y. App. Div. 4th Dep't 1977).

Notwithstanding that a union was properly found to have discriminated against its minority trainees through various means which resulted in blocking the trainees' attainment of class "A" journeyman status with the union, the provision of the remedial order which provided for issuance to minority trainees of "A" cards regardless of training, qualification, or status was improper, where every other union member had to pass the "A" examination to become an "A" journeyman and therefore minority trainees who complete the required training were to be afforded an opportunity to take the next scheduled "A" examination. Schuck v State Div. of Human Rights, 102 A.D.2d 673, 478 N.Y.S.2d 279, 1984 N.Y. App. Div. LEXIS 18838 (N.Y. App. Div. 1st Dep't 1984).

In proceeding under Human Rights Law alleging racial discrimination, Commissioner of State Division of Human Rights erred in failing to set forth rationale for ordering damages for embarrassment, hurt and public humiliation in amount of $10,000 each for 4 complainants and $7,500 for fifth complainant. Specialty Restaurants v New York State Div. of Human Rights, 179 A.D.2d 1036, 579 N.Y.S.2d 299, 1992 N.Y. App. Div. LEXIS 2377 (N.Y. App. Div. 4th Dep't 1992).

Employer was denied due process where individual who appeared as counsel for Division of Human Rights in early stages of employment discrimination proceeding later became Commissioner of Human Rights and thereafter issued final determination in instant matter. Pepsico, Inc. v Rosa, 213 A.D.2d 550, 624 N.Y.S.2d 622, 1995 N.Y. App. Div. LEXIS 4449 (N.Y. App. Div. 2d Dep't), app. dismissed, 86 N.Y.2d 837, 634 N.Y.S.2d 445, 658 N.E.2d 223, 1995 N.Y. LEXIS 3707 (N.Y. 1995), app. denied, 86 N.Y.2d 709, 634 N.Y.S.2d 442, 658 N.E.2d 220, 1995 N.Y. LEXIS 3708 (N.Y. 1995).

As respects statute prohibiting any educational corporation or association that holds itself out to public to be nonsectarian and exempt from taxation from denying "use of its facilities" to any person otherwise qualified, by reason of race, color, religion, or national origin, attempt to distinguish between "denial of use of facilities" and "denial of admission" is a strained and tenuous construction not consonant with plain meaning in language; "use of facilities" covers admission of qualified students. New York University v New York State Div. of Human Rights, 84 Misc. 2d 702, 378 N.Y.S.2d 842, 1975 N.Y. Misc. LEXIS 3202 (N.Y. Sup. Ct.), aff'd, 49 A.D.2d 821, 373 N.Y.S.2d 719, 1975 N.Y. App. Div. LEXIS 10940 (N.Y. App. Div. 1st Dep't 1975).

Grand Jury minutes, sealed pursuant to CPL 160.50 upon the dismissal of indictments against physicians accused of assault in the second degree, may not be disclosed to the Attorney-General for the purpose of aiding an investigation of the physicians' alleged professional misconduct since the purpose of CPL 160.50 and the related subdivision 14 of section 296 of the Executive Law is to protect individuals from adverse consequences based upon unsustained accusations, statutorily allowed judicial discretion to release Grand Jury minutes does not permit the disclosure of minutes sealed pursuant to CPL 160.50 except in limited circumstances and the instant action is not an appropriate case, as the key witness has published a book in which his activities as a "ghost surgeon" are detailed; the Attorney-General has, therefore, failed to demonstrate any overriding need for the Grand Jury minutes. In re Attorney-General of New York, 101 Misc. 2d 36, 420 N.Y.S.2d 685, 1979 N.Y. Misc. LEXIS 2624 (N.Y. Sup. Ct. 1979).

State Division of Human Rights' administrative convenience dismissal of retaliation complaint was not "purely arbitrary" in view of plaintiff's plan to pursue her state-based claims of

continuing sexual harassment and retaliation in federal court action. Universal Packaging Corp. v New York State Div. of Human Rights, 179 Misc. 2d 167, 683 N.Y.S.2d 735, 1998 N.Y. Misc. LEXIS 616 (N.Y. Sup. Ct. 1998), aff'd, 270 A.D.2d 586, 704 N.Y.S.2d 332, 2000 N.Y. App. Div. LEXIS 2647 (N.Y. App. Div. 3d Dep't 2000).

It is within the legitimate police powers of the state for the New York Legislature to determine the effects of the so-called "Arab Boycott" in New York, to educate the public accordingly, and to monitor and otherwise evaluate new legislation passed to eradicate discrimination against citizens of New York in terms of such boycotts or black listing because of race, color, creed or national origin. General Electric Co. v New York State Assembly Committee on Governmental Operations, 425 F. Supp. 909, 1975 U.S. Dist. LEXIS 14579 (N.D.N.Y. 1975).

42. —Orders re housing

Division of Human Rights acted in excess of its authority where, after dismissing complainant's charge that apartment owners discriminated against him by denying him housing accommodations because of his natural origin on the ground of insufficient evidence, went on to find that housing owner had engaged in discriminatory rental practices; if Division had wished to challenge overall rental practices, it should have followed procedures set forth in Executive Law § 297. Hillside Housing Corp. v State Div. of Human Rights, 44 A.D.2d 539, 353 N.Y.S.2d 460, 1974 N.Y. App. Div. LEXIS 5445 (N.Y. App. Div. 1st Dep't 1974).

Order of commission issued after hearing under above statute may not extend beyond premises involved in complaint to include also other accommodations owned or controlled by same landlord. Kindt v State Com. for Human Rights, 44 Misc. 2d 896, 254 N.Y.S.2d 933, 1964 N.Y. Misc. LEXIS 1600 (N.Y. Sup. Ct. 1964), modified, 23 A.D.2d 809, 258 N.Y.S.2d 250, 1965 N.Y. App. Div. LEXIS 4484 (N.Y. App. Div. 4th Dep't 1965).

Commission order which directed that real estate firm and its officers make listings available to "prospective purchasers without regard to their race, creed, color or national origin," was far too vague and went beyond the reasonable authority of the Commission since a broker should be free to exercise his own business judgment as to how much time and effort he will expend on a person who claims to be a prospective purchaser. State Com. for Human Rights v Suburban Associates, Inc., 55 Misc. 2d 920, 286 N.Y.S.2d 733, 1967 N.Y. Misc. LEXIS 1016 (N.Y. Sup. Ct. 1967), modified, 34 A.D.2d 662, 310 N.Y.S.2d 1019, 1970 N.Y. App. Div. LEXIS 5125 (N.Y. App. Div. 2d Dep't 1970).

43. —Orders re employment

Retroactive seniority ordered by New York City Human Rights Commission in favor of female police officers of New York City Police Department (NYPD), based on pattern of gender-based discrimination engaged in by NYPD, did not violate discretionary appointive authority of police commissioner under "one-in-three rule" of CLS Civ S § 61; commission may fashion remedy to make victim whole for injuries suffered as result of discriminatory employment practices, and commissioner has broad powers to adopt measures which he (or she) reasonably deems necessary to redress injury. Beame v DeLeon, 87 N.Y.2d 289, 639 N.Y.S.2d 272, 662 N.E.2d 752, 1995 N.Y. LEXIS 4747 (N.Y. 1995).

New York City Human Rights Commission, as remedy for pattern of gender-based discrimination engaged in by New York City Police Department against female police officer, exceeded its powers by directing promotion of officer to police captain even before announcement of results of promotional examination she took for position; such promotion without establishment of her eligibility by passing competitive examination violated Merit and Fitness Clause of CLS NY Const Art V § 6, and salutary purposes of city's Human Rights Law (NYC Admin Code § 8-101 et seq.) to combat and remedy results of gender-based employment discrimination must give way to higher law of state constitution. Beame v DeLeon, 87 N.Y.2d 289, 639 N.Y.S.2d 272, 662 N.E.2d 752, 1995 N.Y. LEXIS 4747 (N.Y. 1995).

New York City Human Rights Commission, as remedy for pattern of gender-based discrimination engaged in by New York City Police Department (NYPD) against female police officers, had legal authority to backdate retroactive appointments of all subject officers for seniority purposes earlier than December 13, 1965 effective date of amendment of New York City Human Rights Law that first prohibited gender-based discrimination, since sex-based discriminatory seniority system in NYPD had roots preceding statutory prohibition against sex discrimination and was later applied in way that had prejudicial impact on women officers well after sex discrimination was outlawed; Commission's eradication of all gender-based seniority inequality by directing retroactive adjustments of officers' appointment dates even earlier than 1965 was thus rationally related to redress and prevention of recurrence of injuries suffered by officers after anti-sex discrimination legislation was enacted. Beame v DeLeon, 87 N.Y.2d 289, 639 N.Y.S.2d 272, 662 N.E.2d 752, 1995 N.Y. LEXIS 4747 (N.Y. 1995).

An order of the State Division of Human Rights, which directs a company to "cease and desist from publishing any employment advertisement in any of its newspapers which specifies a preference for applicants on the basis of sex without first securing from the prospective employer or agent thereof a written certification that the job is not covered by the Human Rights Law or is instinct with a bona fide occupational qualification", should not be set aside as the Human Rights Law (Executive Law, art 15) authorizes the Commissioner of Human Rights to direct that an offending party cease and desist from an unlawful discriminatory practice and further authorizes him to direct that affirmative action be taken as will effectuate the purposes of the law (Executive Law, § 297, subd 4, par [c]); while it would be unreasonable to impose upon a newspaper the burden of making an independent investigation to determine whether a particular job is instinct with a bona fide occupational qualification, the purpose and effect of requiring a newspaper to procure the written certification in advance of publication is to eliminate the need for the independent investigation and to insulate the newspaper from the imposition of penalties under the Human Rights Law. State Div. of Human Rights v Binghamton Press Co., 67 A.D.2d 231, 415 N.Y.S.2d 523, 1979 N.Y. App. Div. LEXIS 10097 (N.Y. App. Div. 4th Dep't 1979).

In an action by a former employee against her employer charging a violation of the Human Rights Law, the employee, having invoked the jurisdiction of New York State, was properly ordered to appear for oral examination prior to trial in New York City, although she lived in South Carolina. Moreover, the employee, who had moved for class action certification, could not validly contend that she lacked financial resources to travel to New York for examination when she was simultaneously attempting to show that she would fairly and adequately protect the class. Mack v J. C. Penney Co., 81 A.D.2d 761, 439 N.Y.S.2d 118, 1981 N.Y. App. Div. LEXIS 11395 (N.Y. App. Div. 1st Dep't 1981).

The decision of the Human Rights Appeals Board finding the employer guilty of an unlawful discriminatory practice by discriminating against a female employee because she had opposed practices which were forbidden by the Human Rights Law could not stand where the employer did not discriminate against the complaining employee and other female office workers on the basis of sex and thus the employer could not be found to have retaliated against the complaining employee for having opposed an unlawful practice; however, employees who feel victimized by unlawful discrimination do not act at their peril in trying to expose such practices, since absolute protection is afforded those who seek redress by the commencement of an administrative proceeding. Mohawk Finishing Products, Inc. v State Div. of Human Rights, 83 A.D.2d 970, 442 N.Y.S.2d 816, 1981 N.Y. App. Div. LEXIS 15431 (N.Y. App. Div. 3d Dep't 1981), aff'd, 57 N.Y.2d 892, 456 N.Y.S.2d 749, 442 N.E.2d 1260, 1982 N.Y. LEXIS 3772 (N.Y. 1982).

Retaliation complaint alleging that the employer failed to promote complainant during the pendency of an earlier-filed sex discrimination complaint was properly dismissed where complainant had not taken the required competitive examination needed to qualify for one position in question and where the person promoted to the other position in question had three months actual work experience in that specific position, which experience complainant lacked. Engel v New York State Human

Rights Appeal Bd., 84 A.D.2d 640, 444 N.Y.S.2d 288, 1981 N.Y. App. Div. LEXIS 15761 (N.Y. App. Div. 3d Dep't 1981).

In a proceeding against a county alleging unlawful discrimination on the basis of sex, the county was properly directed to place complainant's name on the list of eligibles for employment as a police officer where, when the administrative complaint was filed, the complainant's name appeared on the outstanding eligibility list and the complainant was within the age group eligible for appointment as an officer, where the county failed to prosecute an appeal from the administrative review board's affirmance of the original order directing reinstatement to the eligibility list, and where, due to the county's discriminatory practices and the necessity for administrative enforcement of the reinstatement order, the eligibility list expired before complainant's name could be placed thereon; where it is demonstrated that errors have rendered an eligibility list in derogation of the merit and fitness standards and candidates have demonstrated that they were aggrieved by those errors, the statutory durational period does not begin to run until the list is corrected, and Civ S Law § 58 does not provide an absolute bar to eligibility of persons over 29 in such circumstances. State Div. of Human Rights ex rel. Farella v County of Onondaga, 84 A.D.2d 931, 447 N.Y.S.2d 61, 1981 N.Y. App. Div. LEXIS 16194 (N.Y. App. Div. 4th Dep't 1981).

In a proceeding by the state correctional services department and a correctional facility to review a determination of the Commissioner of the State Division of Human Rights that a woman was wrongfully denied the position of assistant cook at the correctional facility on the basis of her sex, the correctional services department and the facility would not be directed to appoint the woman to the position of assistant cook since the Commissioner lacked the power to direct another state agency to appoint the woman in that directing her appointment would in effect deprive the appointing authority of the power of selection, despite the fact that there had been no question that the woman had been wrongfully denied the position on the basis of her sex. State Div. of Human Rights ex rel. Cox v New York State Dep't of Correctional Services, 91 A.D.2d 832, 458 N.Y.S.2d 422, 1982 N.Y. App. Div. LEXIS 19737 (N.Y. App. Div. 4th Dep't 1982).

The Division of Human Rights properly directed a city school board to reinstate a former employee to his prior position as an assitant principal where, though the employee had earlier rejected an offer by the school board to reinstate him to another position due to his feeling that he would be unable to function in the existing discriminatory environment, the division's order merely sought to restore the status quo after the discriminatory climate apparently had been eliminated, and where the school board could not properly complain about such order in that the employee's rejection of the earlier offer had resulted from the school board's own discriminatory conduct. New York City Bd. of Education v Sears, 97 A.D.2d 502, 468 N.Y.S.2d 21, 1983 N.Y. App. Div. LEXIS 20099 (N.Y. App. Div. 2d Dep't 1983), app. dismissed, 61 N.Y.2d 605, 1984 N.Y. LEXIS 7121 (N.Y. 1984).

Commissioner of Human Rights improperly awarded back pay commencing on date when employer denied complainant's request for 3-year term of renewal of employment, and ending on date when order was entered, where final decision was not rendered until 9 years after proceeding was commenced and delay was attributable to Division of Human Rights, since employer was thereby penalized for division's failure to act in timely manner. State University Agricultural & Technical College v State Div. of Human Rights, 134 A.D.2d 339, 520 N.Y.S.2d 814, 1987 N.Y. App. Div. LEXIS 50516 (N.Y. App. Div. 2d Dep't 1987).

Penalty of termination of correction officer's employment was not so disproportionate to offenses as to shock Appellate Division's sense of fairness where 2 complainants testified that officer sexually harassed them by exposing himself to them, and third complainant testified that officer sexually assaulted her; either set of charges was sufficient, by itself, to support dismissal. Arroyo v City of New York, 245 A.D.2d 186, 666 N.Y.S.2d 168, 1997 N.Y. App. Div. LEXIS 13150 (N.Y. App. Div. 1st Dep't 1997).

Court erred in annulling Division of Human Rights' finding of no probable cause and remanding race discrimination case for further investigation based on division's purportedly one-sided and abbreviated investigation where (1) fact-finding conference had lasted several hours, (2) employer's uncontroverted witnesses and documentary evidence showed that petitioner's work performance was subject of numerous complaints, and that he was discharged because he failed to improve despite numerous warnings and counseling sessions, (3) petitioner was replaced by another black employee, and (4) employer had significant percentage of black employees and discharged various employees of different races in same year as it discharged petitioner. McFarland v New York State Div. of Human Rights, 241 A.D.2d 108, 671 N.Y.S.2d 461, 1998 N.Y. App. Div. LEXIS 4041 (N.Y. App. Div. 1st Dep't 1998).

Selection of number of members of minority groups for position of state trooper for purpose of obtaining more minority representation in state police, without regard to their standing on eligibility list based on competitive examination for such position, would violate state constitutional provision that "Appointments . . . in the civil service . . . shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive." Ruddy v Connelie, 89 Misc. 2d 413, 391 N.Y.S.2d 819, 1977 N.Y. Misc. LEXIS 1880 (N.Y. Sup. Ct. 1977), aff'd, 61 A.D.2d 372, 402 N.Y.S.2d 245, 1978 N.Y. App. Div. LEXIS 9748 (N.Y. App. Div. 3d Dep't 1978).

Female umpire's state human rights law claim against major and minor baseball leagues may proceed in federal court, despite EEOC's referral of administrative complaint to state human rights division, division's notice to umpire of her options upon EEOC decision, EEOC's unfavorable determination, and umpire's failure to timely notify division of her intentions, because division's compliance with late request for administrative convenience dismissal to permit lawsuit under CLS Exec Law § 297(9) was well within unreviewable discretion granted it. Postema v National League of Professional Baseball Clubs, 799 F. Supp. 1475, 1992 U.S. Dist. LEXIS 10979 (S.D.N.Y. 1992), rev'd, 998 F.2d 60, 1993 U.S. App. LEXIS 15504 (2d Cir. N.Y. 1993).

VI. Other Procedural Matters

44. Filing notice of claim

In an employment discrimination action against a county, the Appellate Division properly dismissed the complaint which alleged that employment with defendant county was terminated on the basis of plaintiff's race and national origin in violation of Exec Law § 296 where plaintiff's failure to timely file a notice of claim under Gen. Mun L § 50-e was fatal in that the action had not been brought to indicate a public interest and leave to serve a late notice of claim had not been granted. Mills v County of Monroe, 59 N.Y.2d 307, 464 N.Y.S.2d 709, 451 N.E.2d 456, 1983 N.Y. LEXIS 3161 (N.Y.), cert. denied, 464 U.S. 1018, 104 S. Ct. 551, 78 L. Ed. 2d 725, 1983 U.S. LEXIS 2750 (U.S. 1983).

Teacher was not required to comply with notice provisions of Education Law § 3813, subd 1 prior to commencing action before State Division of Human Rights, alleging school board's discriminatory maternity leave policy, to enforce her right to return to her teaching position 5 months earlier than board would permit, and to preserve her right to fringe benefits, even though an award of money damages as back pay was a necessary concomitant of such relief; provisions of Executive Law § 297, subds 2, 4(a), being discretionary, did not deprive Division of jurisdiction to hear claim. Union Free School Dist. v New York State Human Rights Appeal Bd., 43 A.D.2d 749, 350 N.Y.S.2d 735, 1973 N.Y. App. Div. LEXIS 2818 (N.Y. App. Div. 2d Dep't 1973), aff'd, 35 N.Y.2d 371, 362 N.Y.S.2d 139, 320 N.E.2d 859, 1974 N.Y. LEXIS 1177 (N.Y. 1974).

Although action brought under CLS Exec § 296 is not tort claim which falls under notice provisions of General Municipal Law, notice of claim was nevertheless required by CLS Town § 67(1) and (2). Scopelliti v Town of New Castle, 210 A.D.2d 308, 620 N.Y.S.2d 405, 1994 N.Y. App. Div. LEXIS 12598 (N.Y. App. Div. 2d Dep't 1994).

Actions against municipality to recover damages for unlawful discriminatory practices brought under CLS Exec § 296 are not subject to notice of claim requirement set down in CLS Gen Mun § 50-e for tort claims involving personal injury, wrongful death, or property damage. Morrison v New York City Police Dep't, 214

A.D.2d 394, 625 N.Y.S.2d 174, 1995 N.Y. App. Div. LEXIS 4208 (N.Y. App. Div. 1st Dep't 1995), app. denied, sub. op., 1995 N.Y. App. Div. LEXIS 7519 (N.Y. App. Div. 1st Dep't June 20, 1995).

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Complaint alleging that termination of school teacher's employment was unlawfully based on acts of sex discrimination by principals employed by school district should have been dismissed for failure to comply with notice of claim requirement under CLS Educ § 3813(1). Saranac Lake Cent. Sch. Dist. v New York State Div. of Human Rights, 226 A.D.2d 794, 640 N.Y.S.2d 303, 1996 N.Y. App. Div. LEXIS 3503 (N.Y. App. Div. 3d Dep't), app. denied, 88 N.Y.2d 816, 651 N.Y.S.2d 406, 674 N.E.2d 336, 1996 N.Y. LEXIS 3340 (N.Y. 1996)).

Employment discrimination action brought against board of education was properly dismissed for failure to timely file notice of claim under CLS Educ § 3813(1), even though such failure is not fatal where action is brought to vindicate public interest, since plaintiffs were merely seeking damages for lost retirement benefits. Doyle v Board of Educ., 230 A.D.2d 820, 646 N.Y.S.2d 842, 1996 N.Y. App. Div. LEXIS 8550 (N.Y. App. Div. 2d Dep't 1996).

Compliance with notice of claim requirements of CLS Town § 67 and CLS Gen Mun § 50-e is condition precedent to pursuit of employment discrimination claim against town, regardless of whether claimant files complaint with Division of Human Rights under CLS Exec § 297(1) or commences court action under CLS Exec § 297(9). Town of Brookhaven v N.Y. State Div. of Human Rights, 282 A.D.2d 685, 723 N.Y.S.2d 410, 2001 N.Y. App. Div. LEXIS 3965 (N.Y. App. Div. 2d Dep't 2001).

Biologist claiming age and sex discrimination in termination of her employment with county health department was entitled to judgment declaring that she was not required to file notice of claim as prerequisite to maintaining that claim under CLS Exec § 296 with State Division of Human Rights (DHR) where (1) notice of claim requirements for tort claims against municipality apply to private discriminatory practice claims under § 296 that are commenced in court of law, not before administrative agency, (2) once person has elected to pursue § 296 claim with administrative agency, he or she is precluded by CLS Exec § 297(9) from pursuing same claim in court of law and thus should not be subjected to rules applicable to court claims, and (3) underlying purpose of notice of claim requirements was satisfied by DHR's compliance with administrative procedures set forth in Human Rights Law that gave county ample opportunity to investigate claim Freudenthal v County of Nassau, 283 A.D.2d 6, 726 N.Y.S.2d 116, 2001 N.Y. App. Div. LEXIS 5645 (N.Y. App. Div. 2d Dep't 2001), aff'd, 99 N.Y.2d 285, 755 N.Y.S.2d 56, 784 N.E.2d 1165, 2003 N.Y. LEXIS 139 (N.Y. 2003).

Before formal complaint was filed, county health department was on notice of potential claim against it under CLS Exec § 296 for age and sex discrimination in termination of biologist's employment and had ample opportunity to investigate and address that claim, and thus underlying purpose of statutory notice of claim requirements was satisfied despite lack of formal notice of claim with county, where (1) within weeks after termination on January 9, 1992, county human rights commission began investigating biologist's claim, (2) that investigation included conversations with some of biologist's former colleagues, including at least one bureau chief, (3) formal charges of discrimination were filed with State Division of Human Rights (DHR) on April 21, 1992, less than 4 months after termination, (4) DHR requested that county health department respond to discovery requests no later than June 24, 1992, and (5) at least twice between July and September 1992, county health department offered to DHR documentation and explanations to support its actions. Freudenthal v County of Nassau, 283 A.D.2d 6, 726 N.Y.S.2d 116, 2001 N.Y. App. Div. LEXIS 5645 (N.Y. App. Div. 2d Dep't 2001), aff'd, 99 N.Y.2d 285, 755 N.Y.S.2d 56, 784 N.E.2d 1165, 2003 N.Y. LEXIS 139 (N.Y. 2003).

Lower court did not have authority to grant the employee leave to file a late claim for discrimination, pursuant to N.Y. Gen. Mun. Law § 50-e(5) because N.Y. Rac. Pari-Mut. Wag. & Breed. Law § 618 did not contain any provision permitting the service of a late notice of claim. A cause of action under the New York Human Rights Law was not categorized as a tort for notice of claim purposes. Marino v N.Y. City Off-Track Betting Corp., 12 A.D.3d 606, 785 N.Y.S.2d 481, 2004 N.Y. App. Div. LEXIS 14216 (N.Y. App. Div. 2d Dep't 2004).

Gender discrimination claim against city and its Health and Hospitals Corporation under CLS Exec § 296 was not barred by plaintiff's failure to file notice of claim under CLS Gen Mun § 50-e and CLS Unconsol Ch 214-A § 20, since New York courts do not regard claims under § 296 as tort claims. Dortz v City of New York, 904 F. Supp. 127, 1995 U.S. Dist. LEXIS 14438 (S.D.N.Y. 1995).

Cause of action, alleging that plaintiff was falsely imprisoned by his supervisor on day he was discharged, was independent of employment discrimination claim arising from plaintiff's discharge; thus, one-year statute of limitations under CLS CPLR § 215 was not tolled by CLS Exec § 297, which prohibits plaintiff who has filed discrimination claim with Division of Human Rights from bringing same claim to courts until conclusion of division proceeding. Lugo v Milford Mgmt. Corp., 956 F. Supp. 1120, 1997 U.S. Dist. LEXIS 2004 (S.D.N.Y. 1997).

Former employee's claims under N.Y. Exec. Law §§ 296 and 297 failed because (1) the plain language of N.Y. County Law § 52 clearly incorporated the notice of claim requirement contained in N.Y. Gen. Mun. Law § 50-e and applied it to any claim or notice of claim against a county for invasion of personal or property rights, of every name and nature; (2) the notice of claim provision covered the employee's claims against the county and its entities, which included a community college, an entity that was owned and operated by the county and whose employees were considered county employees; (3) the employee failed to satisfy the notice of claim requirement contained in N.Y. Gen. Mun. Law § 50-e because the employee failed to file a notice of claim; (4) the action was a private civil rights lawsuit and had not been brought in the public interest; (5) the employee never sought leave to serve a late notice of claim; and (6) the employee failed to offer a single case in which a court held that the filing of a complaint with the New York State Department of Human Rights, or the Equal Employment Opportunity Commission, satisfied the notice requirement of N.Y. Gen. Mun. Law § 50-e. Cody v County of Nassau, 577 F. Supp. 2d 623, 2008 U.S. Dist. LEXIS 72262 (E.D.N.Y. 2008), aff'd, 345 Fed. Appx. 717, 2009 U.S. App. LEXIS 20662 (2d Cir. N.Y. 2009).

45. Prehearing motion practice

A proceeding in the nature of mandamus to compel the State Division of Human Rights to determine a prehearing motion to dismiss a complaint filed with the Division against petitioner does not lie where petitioner failed to demonstrate the existence of a duty which is ministerial in nature, not calling for the exercise of judgment or discretion; neither Executive Law § 297, nor the Rules of Practice of the Division (see, 9 NYCRR 465.1 et seq.) provide for prehearing motion practice. Central New York Centro, Inc. v New York State Div. of Human Rights, 142 Misc. 2d 935, 539 N.Y.S.2d 626, 1989 N.Y. Misc. LEXIS 150 (N.Y. Sup. Ct. 1989).

Petitioner, who took written and practical exams for master plumber's license in 1992-1994 and anticipated bringing discrimination action against city on ground that she was denied passing grade because she was female, was entitled to preaction discovery order directing city to preserve and produce for inspection work submitted by applicants for master plumber's license in those years since (1) petitioner had not requested information as to other employees or applicants without limit as to time, nature, or geographical location, but only asked for preservation of testing materials that were directly relevant to proving her discrimination case, and (2) it is in interests of clearly expressed state policy, judicial economy, and speedy enforcement of civil rights to afford prompt and broad discovery in civil rights and discrimination

actions. O'Grady v City of New York, 164 Misc. 2d 171, 624 N.Y.S.2d 337, 1995 N.Y. Misc. LEXIS 75 (N.Y. Sup. Ct. 1995).

46. Right to counsel

Petitioner who is dissatisfied with performance of division's attorney may secure his own attorney, and accordingly court is unmoved by claim of inadequate legal representation by division's attorney. State Div. of Human Rights ex rel. Campbell v Rochester Products Div. of General Motors Corp., 112 A.D.2d 785, 492 N.Y.S.2d 282, 1985 N.Y. App. Div. LEXIS 56028 (N.Y. App. Div. 4th Dep't 1985).

Executive Law § 297(4)(a) does not provide that private complainant appearing before New York Division of Human Rights has option of being represented by counsel provided by Division; language of statute provides for Division lawyers to present case "in support of the complaint" not in support of plaintiff; in early investigative stage no Division attorney is provided to represent private employee and in later appellate stage Division attorney, if present at all, appears only as advocate of decision rendered by Division or of Appeal Board, which may have denied employee's claim or granted less relief than complainant sought. Carey v New York Gaslight Club, Inc., 598 F.2d 1253, 1979 U.S. App. LEXIS 14825 (2d Cir. N.Y. 1979), aff'd, 447 U.S. 54, 100 S. Ct. 2024, 64 L. Ed. 2d 723, 1980 U.S. LEXIS 128 (U.S. 1980).

47. Right to jury trial

Plaintiff was entitled to jury trial in age discrimination action brought under CLS Exec § 297 where sole relief sought was money damages to compensate him for what he would have earned, both by way of salary and other benefits, had he remained in defendant's employ until his normal retirement, and additional award for punitive damages; plaintiff's ritualistic use in prayer for relief of language "and such other and further relief as...seems just and proper" did not change legal character of relief demanded, which was monetary and would afford plaintiff full and complete remedy as required under CLS CPLR § 4101, and fact that he sought damages for past and future lost earnings did not render relief sought equitable. Age discrimination suit brought under CLS Exec § 297, seeking monetary relief only, is for legal wrong triable by jury; thus, it was error for court to strike plaintiff's jury demand on ground of "an always present possibility" that it might grant nonmonetary equitable relief pursuant to CLS CPLR § 3017, since plaintiff had made clear that he did not seek or wish reinstatement or other injunctive relief but wished to be compensated by appropriate monetary award, and there was nothing in facts set forth by him to prevent entry of money judgment only for attainment of full and complete relief. Murphy v American Home Products Corp., 136 A.D.2d 229, 527 N.Y.S.2d 1, 1988 N.Y. App. Div. LEXIS 3730 (N.Y. App. Div. 1st Dep't 1988).

In action for employment discrimination and sexual harassment, plaintiff was entitled to jury trial where she sought back pay and compensatory money damages for mental pain and suffering and alleged wrongful infliction of mental distress, and did not seek equitable relief, since (1) although plaintiff's complaint cited 42 USCS §§ 2000e et seq., which provides for equitable relief only, it was clear that she was proceeding primarily under state law, (2) although plaintiff sought "appropriate relief in contract," it was clear that she would be able to receive full redress from award of money damages only, and (3) although plaintiff sought "such other and further relief as the Court deems appropriate and in the interest of justice," use of that ritualistic language did not change nature of relief sought. Vega v Metropolitan Life Ins. Co., 146 A.D.2d 495, 536 N.Y.S.2d 451, 1989 N.Y. App. Div. LEXIS 228 (N.Y. App. Div. 1st Dep't 1989).

Plaintiff was not entitled to jury trial in action alleging age discrimination in employment where he sought both monetary damages and equitable relief in form of judgment setting aside his retirement and reinstating him to his former position. Bockino v Metropolitan Transp. Auth., 224 A.D.2d 471, 638 N.Y.S.2d 137, 1996 N.Y. App. Div. LEXIS 1204 (N.Y. App. Div. 2d Dep't), app. denied, 87 N.Y.2d 1017, 644 N.Y.S.2d 150, 666 N.E.2d 1064, 1996 N.Y. LEXIS 1204 (N.Y. 1996), app. denied, 88 N.Y.2d 805, 646 N.Y.S.2d 985, 670 N.E.2d 226, 1996 N.Y. LEXIS 1688 (N.Y. 1996).

In action under Human Rights Law (CLS Exec §§ 290 et seq.), plaintiff was denied his constitutional right to jury trial when court granted defendant's motion for remittitur, reducing jury award from $750,000 to $75,000, without offering plaintiff option of new trial on damages. Lightfoot v Union Carbide Corp., 110 F.3d 898, 1997 U.S. App. LEXIS 5785 (2d Cir. N.Y. 1997).

Terminated teacher's jury demand is stricken, where she asserted entitlement to jury trial under CLS Exec Law § 297 only after it became clear that she had no right to jury trial under Title VII (42 USCS §§ 2000e et seq.), because complaint does not even suggest that action was brought pursuant to state law. Smith v New York City Bd. of Educ., 918 F. Supp. 120, 1996 U.S. Dist. LEXIS 2679 (S.D.N.Y. 1996).

48. Subpoenas

In a human rights proceeding against a stock brokerage company, a subpoena duces tecum issued by the Division of Human Rights which demanded that the company produce copies of the EEO-1 form for specified years would be quashed, since such forms were available to the Division from the Equal Employment Opportunity Commission upon request, and the brokerage company was under no affirmative duty to furnish them; additionally, a subpoena duces tecum that sought the complete personnel files of certain enumerated brokerage employees would be quashed, since the Division failed to demonstrate the requisite necessity and relevancy of such material to overcome the employees' rights of privacy in the information contained in their personnel records; finally, a subpoena duces tecum that requested names, dates of hire, dates of termination, race and color, and performance evaluations for all persons who had been terminated by the brokerage company during specified periods on the basis of tardiness would be modified so as to permit the brokerage company to delete the names of the individuals concerned from such records so as to protect their confidentiality. Dean Witter Reynolds, Inc. v New York State Executive Dep't Div. of Human Rights, 98 A.D.2d 676, 469 N.Y.S.2d 412, 1983 N.Y. App. Div. LEXIS 20967 (N.Y. App. Div. 1st Dep't 1983).

Subpoena issued by complainant in proceeding before state division of human rights is nonjudicial subpoena under CPLR 2302 which may be enforced under CPLR 2308; however, contempt punishment cannot be sought until compliance has been judicially ordered but not forthcoming. Dias v Consolidated Edison Co., 116 A.D.2d 453, 496 N.Y.S.2d 686, 1986 N.Y. App. Div. LEXIS 51309 (N.Y. App. Div. 1st Dep't 1986).

49. Summary Judgment

Insurance company was properly granted summary judgment in discrimination action brought by insurance agent under CLS Exec § 296(1)(a) where company's submissions showed that agent was responsible for financing her own operating expenses and support staff, she was paid by performance rather than salary, she did not have federal, state or local taxes withheld from her pay, she could sell competitors' products, and she had agreed by contract to operate as independent contractor; facts that agent was compelled to attend regular company meetings and was asked to draw up job description for her position were not inconsistent with her status as independent contractor. Scott v Massachusetts Mut. Life Ins. Co., 86 N.Y.2d 429, 633 N.Y.S.2d 754, 657 N.E.2d 769, 1995 N.Y. LEXIS 3548 (N.Y. 1995).

Absence of evidence of formal boycott or blacklisting campaign will not be fatal to discrimination claim under CLS Exec § 296(13); for example, evidence establishing that defendant engaged in pattern of conduct that commercially disadvantaged only members of protected class may be sufficient to defeat summary judgment. Scott v Massachusetts Mut. Life Ins. Co., 86 N.Y.2d 429, 633 N.Y.S.2d 754, 657 N.E.2d 769, 1995 N.Y. LEXIS 3548 (N.Y. 1995).

Employer was entitled to summary judgment dismissing employee's action for age discrimination where employee admitted that his computer skills were not up to par, that he had been warned about this problem and took no action to become more proficient, and that he failed to complete inventory project by his self-imposed deadline; single good performance appraisal, more than year prior to his termination, was not sufficient to raise question of fact with regard to reason for termination. Brooks v

Blue Cross, 195 A.D.2d 814, 600 N.Y.S.2d 346, 1993 N.Y. App. Div. LEXIS 7251 (N.Y. App. Div. 3d Dep't 1993).

Defendants were entitled to summary judgment in action allegedly racial discrimination and retaliation in violation of CLS Exec §§ 296 and 297(9) where plaintiff put forth nothing to counter defendants' strong showing that actions complained of were taken as result of his hostile, aggressive confrontations with his co-workers and with employees of outside agencies, his large number of unauthorized absences, and his failure to complete assigned work on schedule; moreover, he failed to document single instance when he was treated differently from any other employee who was similarly situated. Hall v Paladino, 210 A.D.2d 595, 619 N.Y.S.2d 402, 1994 N.Y. App. Div. LEXIS 12458 (N.Y. App. Div. 3d Dep't 1994), app. dismissed, 85 N.Y.2d 923, 627 N.Y.S.2d 324, 650 N.E.2d 1326, 1995 N.Y. LEXIS 1367 (N.Y. 1995).

Employer was not entitled to summary judgment in action arising from termination of plaintiff's employment on basis of alleged reduction in work force where plaintiff was part of protected age group, and evidence indicated that plaintiff might have been qualified for other positions which were awarded to other younger employees. Landwehr v Grey Advertising, 211 A.D.2d 583, 622 N.Y.S.2d 17, 1995 N.Y. App. Div. LEXIS 850 (N.Y. App. Div. 1st Dep't 1995).

Court should have granted employer's motion for summary judgment where employee failed to show that employer's justification for his discharge was pretextual, existence of fact issue that he satisfactorily performed his job during period in question, or that his involuntary retirement was for other, impermissible reasons than those attested to by his supervisors. Burkland v IBM, 226 A.D.2d 316, 642 N.Y.S.2d 501, 1996 N.Y. App. Div. LEXIS 4631 (N.Y. App. Div. 1st Dep't 1996).

Employer was not entitled to summary judgment dismissing plaintiff's age discrimination claim where employer's favorable evaluations of plaintiff's job performance for over decade and up until time plaintiff turned 60 years old raised fact issues as to whether poor job performance was pretext for age discrimination. Cella v Fordham Univ., 228 A.D.2d 300, 644 N.Y.S.2d 53, 1996 N.Y. App. Div. LEXIS 7146 (N.Y. App. Div. 1st Dep't 1996).

Defendants were entitled to summary judgment in action alleging numerous violations of CLS Exec § 296 predicated on hostile work environment created by plaintiff's co-workers, even though plaintiff, who was male, was subjected to tasteless, offensive, and insulting remarks, since there was nothing to indicate that alleged harassment was based on his gender. Yukoweic v IBM, 228 A.D.2d 775, 643 N.Y.S.2d 747, 1996 N.Y. App. Div. LEXIS 6418 (N.Y. App. Div. 3d Dep't), app. denied, 88 N.Y.2d 816, 651 N.Y.S.2d 17, 673 N.E.2d 1244, 1996 N.Y. LEXIS 3317 (N.Y. 1996).

Court properly denied defendant' s summary judgment motion in action alleging disability discrimination since purportedly inconsistent position that plaintiff took before Social Security Administration in applying for disability benefits was not asserted against defendant and did not involve same standard as one at issue herein; moreover, plaintiff's appearance before Social Security Administration, which did not entail hearing, did not constitute type of prior legal proceeding that could form basis for application of judicial estoppel. Ferring v Merrill Lynch & Co., 244 A.D.2d 204, 664 N.Y.S.2d 279, 1997 N.Y. App. Div. LEXIS 11386 (N.Y. App. Div. 1st Dep't 1997).

Court should have granted defendant employer's summary judgment motion in action alleging sex discrimination where evaluations made of plaintiff's work by various partners of defendant over years of her employment provided ample support for decision to terminate her employment, and plaintiff relied primarily on mere unsupported hearsay statements contained in her own affidavit and deposition testimony, despite 6 years of discovery. Schwaller v Squire Sanders & Dempsey, 249 A.D.2d 195, 671 N.Y.S.2d 759, 1998 N.Y. App. Div. LEXIS 4661 (N.Y. App. Div. 1st Dep't 1998).

Defendants were not entitled to summary judgment in employee's action for age discrimination where there were triable issues of fact as to whether employee was replaced by younger person and whether reason advanced by defendants was pretext. Dolgon v Standard Motor Prods., Inc., 251 A.D.2d 281, 671 N.Y.S.2d 1023, 1998 N.Y. App. Div. LEXIS 6360 (N.Y. App. Div. 2d Dep't 1998).

Court erred in denying defendant's summary judgment motion in action under CLS Exec § 296 for unlawful termination of employment where there was no evidence that defendant's president knew of plaintiff's pregnancy before he terminated her employment, and it was undisputed that president was negotiating with third party to be plaintiff's replacement before he learned of her pregnancy. Smith v Paris Int'l Corp., 267 A.D.2d 223, 699 N.Y.S.2d 490, 1999 N.Y. App. Div. LEXIS 12616 (N.Y. App. Div. 2d Dep't 1999).

Defendants, plaintiffs' employer and owner, should have been granted summary judgment in action alleging national origin discrimination where there was no evidence that they encouraged, condoned, or approved of employee's allegedly discriminatory conduct. Escobar v Spartan Assemblies, Inc., 267 A.D.2d 272, 700 N.Y.S.2d 206, 1999 N.Y. App. Div. LEXIS 12942 (N.Y. App. Div. 2d Dep't 1999).

Defendant was properly granted summary judgment in action alleging that plaintiff, licensed architect, was fired from her position as associate, after 14 years of increasingly responsible employment with defendant, because of her sex where plaintiff presented no evidence that she was replaced by male employee; further, defendant showed that plaintiff was discharged for poor work performance. Kapila v Divney, 269 A.D.2d 127, 702 N.Y.S.2d 56, 2000 N.Y. App. Div. LEXIS 985 (N.Y. App. Div. 1st Dep't 2000).

Court improperly granted defendants' summary judgment motion on ground that award of Workers' Compensation benefits barred instant claim for sexual discrimination by plaintiff against her employers where workers' compensation award resulted solely from attempted videotaping of plaintiff by co-worker while she was in company locker room, and did not implicate alleged, intentional activities of company officer in subjecting her to hostile work environment by directing inappropriate sexual remarks and jokes toward her, and making demands on her for sexual relations in exchange for forgiving loan. Hanford v Plaza Packaging Corp., 284 A.D.2d 179, 727 N.Y.S.2d 407, 2001 N.Y. App. Div. LEXIS 6182 (N.Y. App. Div. 1st Dep't 2001), app. denied, 2001 N.Y. App. Div. LEXIS 9220 (N.Y. App. Div. 1st Dep't Sept. 25, 2001).

Court properly dismissed plaintiff's action alleging hostile work environment where defendant's alleged misconduct consisted merely of occasional sarcastic remarks about plaintiff's weight and heightened awareness of plaintiff's medical condition. Novak v Royal Life Ins. Co. of N.Y., 284 A.D.2d 892, 726 N.Y.S.2d 784, 2001 N.Y. App. Div. LEXIS 6849 (N.Y. App. Div. 3d Dep't 2001).

Court properly denied defendants' summary judgment motion in action alleging disparate treatment as to terms and conditions of plaintiff's employment due to his disability where affidavit of plaintiff's treating endocrinologist raised fact issue on whether plaintiff's disability prevented him from being able to perform job duties as of time of his actual termination, despite clear conflict between opinion stated in present affidavit and that previously expressed by endocrinologist, where endocrinologist gave rational explanation for discrepancy. Novak v Royal Life Ins. Co. of N.Y., 284 A.D.2d 892, 726 N.Y.S.2d 784, 2001 N.Y. App. Div. LEXIS 6849 (N.Y. App. Div. 3d Dep't 2001).

Plaintiff's application for and acceptance of disability benefits was not fatal to his action alleging disparate treatment as to terms and conditions of his employment due to disability where employer, by purposefully relieving plaintiff of his duties and "plac(ing) him in a non-salary status unless he fulfill(ed) the requirements for short-term disability," effectively required plaintiff to file application for disability benefits. Novak v Royal Life Ins. Co. of N.Y., 284 A.D.2d 892, 726 N.Y.S.2d 784, 2001 N.Y. App. Div. LEXIS 6849 (N.Y. App. Div. 3d Dep't 2001).

In action to impose individual liability against employer's manager (defendant) based on his actions in discriminating against plaintiff on basis of his illness, court improperly denied defendant's summary judgment motion since plaintiff's conclusory allegations that "everyone at (employer) knew, as I did, that (defendant) as head of our employer ... had the power to hire, fire, transfer and promote employees in (employer's) headquarters" was insufficient to raise fact issue as to whether defendant had

any ownership in employer or any power to do more than carry out personnel decisions made by others. Novak v Royal Life Ins. Co. of N.Y., 284 A.D.2d 892, 726 N.Y.S.2d 784, 2001 N.Y. App. Div. LEXIS 6849 (N.Y. App. Div. 3d Dep't 2001).

Court should have granted employer's motion for summary judgment where employee failed to show that employer's justification for his discharge was pretextual, existence of fact issue that he satisfactorily performed his job during period in question, or that his involuntary retirement was for other, impermissible reasons than those attested to by his supervisors. Burkland 226 ad2d 316.

Defendants were not entitled to summary judgment in action for employment discrimination in violation of CLS Exec § 296 where (1) plaintiff was hired by defendants to reprise his role as voice of character in commercial, (2) after commercial was shown and defendants decided to make additional commercials with same character, defendant auditioned actors for commercial and did not even contact plaintiff, allegedly due to his age and handicap, (3) defendants claimed that their conduct was based on demands made by plaintiff in connection with first commercial, and (4) plaintiff contended that he conveyed information to defendants that he was willing to work pursuant to their conditions on future commercials; resolution of why defendants refused to hire plaintiff involved fact issues inappropriate for summary judgment. Maxwell v N.W. Ayer, Inc., 159 Misc. 2d 454, 605 N.Y.S.2d 174, 1993 N.Y. Misc. LEXIS 470 (N.Y. Sup. Ct. 1993).

Defendants, plaintiff's immediate supervisor and employee in company's personnel department who allegedly became aware of sexual harassment and did nothing to remedy it, were entitled to summary judgment in sexual harassment action where plaintiff failed to raise fact issue under "economic reality" test as to whether either defendant should be considered "employer." Foley v Mobil Chem. Co., 170 Misc. 2d 1, 647 N.Y.S.2d 374, 1996 N.Y. Misc. LEXIS 302 (N.Y. Sup. Ct. 1996).

Defendant was not entitled summary judgment, even though it showed legitimate, nondiscriminatory reason for plaintiff's termination, reduction-in-force policy which caused plaintiff's termination in favor of 2 mail co-workers who had vocational training and could work in both electrical and mechanical departments, where plaintiff, who had been employed in electrical department, submitted affidavits by co-workers and supervisors that she could perform more sophisticated wiring tasks than men, and that there was policy of gender segregation. Hughes v Prim Hall Enters., 182 Misc. 2d 892, 701 N.Y.S.2d 839, 1999 N.Y. Misc. LEXIS 544 (N.Y. Sup. Ct. 1999).

District Court properly granted defendant airline's summary judgment motion dismissing age discrimination action, even though plaintiff pilots demonstrated prima facie case, where there was no evidence to suggest that defendant's stated nondiscriminatory reasons for challenged employment actions were false. Abdu-Brisson v Delta Air Lines, Inc., 239 F.3d 456, 2001 U.S. App. LEXIS 2041 (2d Cir. N.Y.), cert. denied, 534 U.S. 993, 122 S. Ct. 460, 151 L. Ed. 2d 378, 2001 U.S. LEXIS 9990 (U.S. 2001).

50. Damages, generally

Record of proceeding before State Human Rights Division on appeal and on review demonstrated that, had complainant accepted employment offered, her damages would have been minimal, if not eliminated. State Div. of Human Rights v Board of Education, 59 A.D.2d 1048, 399 N.Y.S.2d 805, 1977 N.Y. App. Div. LEXIS 14335 (N.Y. App. Div. 4th Dep't 1977).

In a proceeding alleging that the State Parks and Recreation Commission committed an unlawful discriminatory practice against complainant based upon religion in refusing to hire complainant, an award by the Commissioner of Human Rights granting damages representing earnings complainant lost when he was denied a noncompetitive summer position was properly made, since there was no reasonable probability that complainant would not have been certified for the position, in that the Civil Service Department did not suggest any grounds for disqualification and therefore, the award purportedly representing back pay less ordinary payroll deductions was legally an award for a violation of complainant's civil rights requiring no discount in the amount of lost wages to reflect the contingency of nonappointment. State Div. of Human Rights ex rel. Geraci v New York State Dep't of Correctional Services, 90 A.D.2d 51, 456 N.Y.S.2d 63, 1982 N.Y. App. Div. LEXIS 18809 (N.Y. App. Div. 2d Dep't 1982).

Petitioner was not entitled to money damages on showing that he was wrongfully denied admission, on basis of his sex, to promotional test for position of county correction officer II where (1) he had later received provisional appointment to that position, (2) his provisional status had been revoked, not because of discriminatory action in connection with prior examination, but due to his failure to rank high enough on new promotional list based on later examination, and (3) there was insufficient evidence that he suffered any mental anguish. Crayton v County of Suffolk, 139 A.D.2d 577, 527 N.Y.S.2d 79, 1988 N.Y. App. Div. LEXIS 3907 (N.Y. App. Div. 2d Dep't 1988).

Damage award of $7,080 for landlord's refusal to rent to complainant because of race and marital status was excessive and matter would be remanded for reassessment of award. Interboro Management Co. v State Div. of Human Rights, 139 A.D.2d 697, 527 N.Y.S.2d 453, 1988 N.Y. App. Div. LEXIS 4415 (N.Y. App. Div. 2d Dep't 1988).

Court would direct on remittitur that State Division of Human Rights (SDHR) retain neutral hearing officer for purpose of reassessing damages where potential conflict of interest existed from complainant's status as employee of SDHR; matter should be referred to New York City Commission on Human Rights, which had concurrent jurisdiction, or outside hearing officer. Interboro Management Co. v State Div. of Human Rights, 139 A.D.2d 697, 527 N.Y.S.2d 453, 1988 N.Y. App. Div. LEXIS 4415 (N.Y. App. Div. 2d Dep't 1988).

Award of back pay in action against college for discrimination would be reduced to limit compensation to period of 1 ½ years following unlawful termination since respondent testified that she expected to remain in job only as long as she was student and that she expected to be student for only additional 1 ½ years before obtaining college degree. SUNY College of Environmental Science & Forestry v State Div. of Human Rights, 144 A.D.2d 962, 534 N.Y.S.2d 270, 1988 N.Y. App. Div. LEXIS 14449 (N.Y. App. Div. 4th Dep't 1988).

Division of Human Rights properly determined that complainant was entitled to award of back pay to be calculated at rate of assistant principal where substantial evidence supported finding that complainant would have received assistant principal's salary had he not been wrongfully removed from his position as interim acting assistant principal. New York City Bd. of Education v New York State Div. of Human Rights, 154 A.D.2d 679, 546 N.Y.S.2d 883, 1989 N.Y. App. Div. LEXIS 13781 (N.Y. App. Div. 2d Dep't 1989).

Although substantial evidence supported determination of Commissioner of Human Rights that complainant's employment was terminated solely due to her pregnancy, her backpay award should have been reduced to reflect fact that she obtained other employment. Empbanque Capital Corp. v White, 158 A.D.2d 686, 551 N.Y.S.2d 957, 1990 N.Y. App. Div. LEXIS 2356 (N.Y. App. Div. 2d Dep't 1990).

Because of strong state policy underlying broad hiring discretion vested in city and its appointing authorities under CLS Civ S § 61, plaintiff had merely "a hope of appointment" from having passed civil service examination, not legally protectable interest in appointment; thus, award of summary judgment in favor of plaintiff on her cause of action for unlawful disability discrimination against city did not entitle her to award of back pay or other retroactive benefits. Carro v City of New York, 214 A.D.2d 450, 625 N.Y.S.2d 516, 1995 N.Y. App. Div. LEXIS 4423 (N.Y. App. Div. 1st Dep't 1995), reh'g denied, 1995 N.Y. App. Div. LEXIS 8602 (N.Y. App. Div. 1st Dep't Aug. 3, 1995), app. denied, 87 N.Y.2d 804, 639 N.Y.S.2d 782, 662 N.E.2d 1072, 1995 N.Y. LEXIS 5696 (N.Y. 1995).

Judicial Hearing Officer (JHO), in purporting to hold tenant liable to landlord for back rent, acted beyond his jurisdiction where court had consolidated landlord's summary holdover proceeding with tenant's discrimination action, deeming holdover proceeding to be counterclaim, and on landlord's default in failing to comply with discovery demands, court struck his answer,

referring case to JHO for determination of tenant's damages. Likoua v Saudi, 231 A.D.2d 609, 647 N.Y.S.2d 540, 1996 N.Y. App. Div. LEXIS 9469 (N.Y. App. Div. 2d Dep't 1996).

Award of back pay should have been reduced by amount of unemployment insurance petitioner received during period covered by award. Allender v Mercado, 233 A.D.2d 153, 649 N.Y.S.2d 144, 1996 N.Y. App. Div. LEXIS 11498 (N.Y. App. Div. 1st Dep't 1996), app. dismissed, app. denied, 89 N.Y.2d 1055, 659 N.Y.S.2d 846, 681 N.E.2d 1292, 1997 N.Y. LEXIS 765 (N.Y. 1997).

Because an employee was subjected to a hostile work environment, based on sex, that led to the employee's constructive discharge, pursuant to N.Y. Exec. Law §§ 296(1), 297(4)(c), the employer and its president were liable for the discriminatory conduct, and the employee was entitled to back pay, compensatory damages, and pre-determination interest. Matter of Eastport Assoc., Inc. v New York State Div. of Human Rights, 71 A.D.3d 890, 897 N.Y.S.2d 177, 2010 N.Y. App. Div. LEXIS 2066 (N.Y. App. Div. 2d Dep't 2010).

Award of damages for lost pay and reimbursement for counseling services in the amount of $4,776, and compensatory damages for pain and suffering in the amount of $10,000, in case of employment discrimination were proper; the award for compensatory damages was based on the employer's conduct that resulted in, among other things, suicidal thoughts and the employee's need to attend counseling for nine months at an out-of-pocket cost of $200. In this regard, the award for emotional pain and suffering did not deviate markedly from comparable awards for similar injuries. Matter of Tosha Rests., LLC v New York State Div. of Human Rights, 79 A.D.3d 1337, 911 N.Y.S.2d 734, 2010 N.Y. App. Div. LEXIS 9173 (N.Y. App. Div. 3d Dep't 2010).

Award of $200,000 to a student who had been subjected to racial discrimination at a school was supported by the evidence; however, although the student's mother was entitled to relief, a $200,000 award to her was reduced to $50,000. Injunctive relief ordered by the division was appropriate. Matter of Ithaca City School Dist. v New York State Div. of Human Rights, 87 A.D.3d 268, 926 N.Y.S.2d 686, 2011 N.Y. App. Div. LEXIS 5474 (N.Y. App. Div. 3d Dep't 2011), rev'd, 19 N.Y.3d 481, 950 N.Y.S.2d 67, 973 N.E.2d 162, 2012 N.Y. LEXIS 1353 (N.Y. 2012).

Division of Human Rights properly concluded that a hearing-impaired court interpreter established a prima facie case of disability discrimination because permitting the interpreter to wear a hearing aid was a reasonable accommodation and would not pose a significant risk of substantial harm where the employer failed to provide any legitimate non-discriminatory reason for its decision, no sufficiently individualized assessment occurred, and, given the employer's blanket policy barring hearing-impaired persons from employment as court officers and its failure to accommodate the employee who had an asymmetric hearing loss, the civil penalty of $ 30,000 was correctly assessed. Matter of New York State Unified Ct. Sys. v New York State Div. of Human Rights, 180 A.D.3d 555, 120 N.Y.S.3d 292, 2020 N.Y. App. Div. LEXIS 1244 (N.Y. App. Div. 1st Dep't), app. denied, 35 N.Y.3d 916, 157 N.E.3d 141, 2020 N.Y. LEXIS 2545 (N.Y. 2020).

Jury award of $310,000 in back pay in case of age discrimination did not shock conscience, nor did it deviate substantially from what would be reasonable compensation, even though it was slightly higher than plaintiff's expert's calculation of $266,106. Jury award of $667,000 in future lost earnings ("front pay") in case of age discrimination was neither arbitrary, unreasonable nor speculative where it fell well within plaintiff's expert's projection of maximum $915,105 based on average working life and rate of increase, and it averaged $39,235 per year, which was less than plaintiff had made on average during previous 7 years. Tyler v Bethlehem Steel Corp., 958 F.2d 1176, 1992 U.S. App. LEXIS 4161 (2d Cir. N.Y.), cert. denied, 506 U.S. 826, 113 S. Ct. 82, 121 L. Ed. 2d 46, 1992 U.S. LEXIS 5704 (U.S. 1992).

51. —Compensatory damages

Evidence, in hearing before Commissioner of Human Rights on complaints charging private club with discrimination against blacks with regard to use of barroom during fashion show, warranted Commissioner's award of $250 compensatory damages to each complainant because of club's commission of willful discriminatory acts. Batavia Lodge No. 196, etc. v New York State Div. of Human Rights, 35 N.Y.2d 143, 359 N.Y.S.2d 25, 316 N.E.2d 318, 1974 N.Y. LEXIS 1377 (N.Y. 1974).

Petitioner who was improperly disqualified from consideration for employment on basis of disability was entitled to compensatory damages awarded by State Division of Human Rights (SDHR) although court annulled portion of SDHR's determination which directed creation of special eligible list and retroactive seniority pursuant to CLS Soc Serv § 56(3) on ground that § 56(3) violated Merit and Fitness Clause (CLS NY Const Art V § 6). City of New York v New York State Div. of Human Rights, 93 N.Y.2d 768, 698 N.Y.S.2d 594, 720 N.E.2d 870, 1999 N.Y. LEXIS 3434 (N.Y. 1999).

Executive Law § 297 gives individuals a choice. They can either elect to sue in court and recover in damages which they can establish, including mental anguish, or they can elect to seek administrative relief under the Human Rights Law. Whether they elect to seek this latter relief, complainants may obtain directives and orders which will benefit both themselves and others in their position but they limit their recovery for damages to actual out-of-pocket expenses. State Div. of Human Rights v Luppino, 35 A.D.2d 107, 313 N.Y.S.2d 28, 1970 N.Y. App. Div. LEXIS 3948 (N.Y. App. Div. 2d Dep't 1970), aff'd, 29 N.Y.2d 558, 324 N.Y.S.2d 298, 272 N.E.2d 885, 1971 N.Y. LEXIS 1169 (N.Y. 1971).

The compensatory damages which may be awarded to a complainant in a proceeding under the Executive Law is limited to out-of-pocket expenses and does not include damages for mental distress. Ernsteins v State Div. of Human Rights, 35 A.D.2d 599, 313 N.Y.S.2d 856, 1970 N.Y. App. Div. LEXIS 3953 (N.Y. App. Div. 2d Dep't 1970), app. dismissed, 28 N.Y.2d 802, 321 N.Y.S.2d 907, 270 N.E.2d 725, 1971 N.Y. LEXIS 1426 (N.Y. 1971).

Although the State Human Rights Appeals Board did not abuse its discretion in finding that a construction company refused to build a house because of the customer's racial origins, the Board erred as to the measure of damages to be applied in determining compensation. Kaval Constr. Corp. v State Div. of Human Rights, 39 A.D.2d 347, 334 N.Y.S.2d 341, 1972 N.Y. App. Div. LEXIS 4110 (N.Y. App. Div. 2d Dep't), app. denied, 31 N.Y.2d 641, 1972 N.Y. LEXIS 1662 (N.Y. 1972).

Even though New York City Department of Personnel committed unlawful age discrimination in rejecting applicant for position of parking enforcement agent on grounds of her age, it could not be required to offer such applicant next available position of parking enforcement agent, since such requirement would deprive appointing authority of the power to select from among eligible persons; Department likewise could not be required to pay applicant compensatory damages for period from date she would have been appointed had she not been rejected to date when position was finally offered her. New York City Dep't of Personnel v New York State Div. of Human Rights, 56 A.D.2d 795, 392 N.Y.S.2d 641, 1977 N.Y. App. Div. LEXIS 11090 (N.Y. App. Div. 1st Dep't 1977).

In a proceeding alleging unlawful discrimination against a state agency, an award of compensatory damages pursuant to Exec Law § 297 to the person aggrieved by the discriminatory practice properly included compensation for mental anguish and, furthermore, the award of interest on "back pay" awards to the aggrieved civil servant was also proper. State Div. of Human Rights ex rel. Geraci v New York State Dep't of Correctional Services, 90 A.D.2d 51, 456 N.Y.S.2d 63, 1982 N.Y. App. Div. LEXIS 18809 (N.Y. App. Div. 2d Dep't 1982).

In awarding back pay to 63-year-old employee who was wrongfully terminated due to his age, Division of Human Rights should have reduced award by unemployment insurance benefits and social security benefits received by employee. Laverack & Haines, Inc. v New York State Div. of Human Rights, 217 A.D.2d 955, 629 N.Y.S.2d 595, 1995 N.Y. App. Div. LEXIS 8381 (N.Y. App. Div. 4th Dep't 1995), rev'd, 88 N.Y.2d 734, 650 N.Y.S.2d 76, 673 N.E.2d 586, 1996 N.Y. LEXIS 3057 (N.Y. 1996).

Damages awarded for back pay based on racial discrimination were excessive to extent that order of Commissioner of State Division of Human Rights misstated date of complainant's termination as one year prior to correct date. American Int'l Group v Rosa, 224 A.D.2d 179, 637 N.Y.S.2d 121, 1996 N.Y. App. Div.

LEXIS 773 (N.Y. App. Div. 1st Dep't), app. denied, 87 N.Y.2d 807, 641 N.Y.S.2d 829, 664 N.E.2d 895, 1996 N.Y. LEXIS 167 (N.Y. 1996).

It was proper to award $5,000 damages each to complainant and to realtor who represented her, was also black, for petitioner's unlawful discriminatory practice of refusing to sell piece of real property to complainant because of her race. Feggoudakis v New York State Div. of Human Rights, 230 A.D.2d 739, 646 N.Y.S.2d 175, 1996 N.Y. App. Div. LEXIS 8219 (N.Y. App. Div. 2d Dep't 1996).

Award of compensatory damages under CLS Exec § 297 must be based on pecuniary loss and emotional injuries actually suffered as result of discrimination, and care must be taken to assure that award is not punitive. New York State Dep't of Correctional Servs. v State Div. of Human Rights, 241 A.D.2d 811, 661 N.Y.S.2d 85, 1997 N.Y. App. Div. LEXIS 7816 (N.Y. App. Div. 3d Dep't 1997), app. denied, 92 N.Y.2d 807, 678 N.Y.S.2d 593, 700 N.E.2d 1229, 1998 N.Y. LEXIS 2800 (N.Y. 1998).

Awards of compensatory damages for back pay, lost wages, lost tips and emotional distress were reasonably related to discriminatory conduct of restaurant in giving Asian waitresses preference over Caucasian waitresses with respect to hours and table assignments. Young Fu Hsu v New York State Div. of Human Rights, 241 A.D.2d 913, 661 N.Y.S.2d 400, 1997 N.Y. App. Div. LEXIS 7842 (N.Y. App. Div. 4th Dep't 1997).

While a former employee was entitled to compensatory damages under N.Y. Exec. Law § 297(4) as the victim of racial discrimination and a constructive discharge, the Commissioner of the State Division of Human Rights erred in adding a supervisor as a respondent after the statute of limitations in N.Y. C.P.L.R. 203(b) had run. Matter of New York State Div. of Human Rights v A.R. Heflin Painting Contr., Inc., 101 A.D.3d 1442, 956 N.Y.S.2d 666, 2012 N.Y. App. Div. LEXIS 8774 (N.Y. App. Div. 3d Dep't 2012).

Where a complainant was subjected to a hostile work environment due to sexual harassment, the administrative law judge's award to her of damages for lost wages was reasonably related to the discriminatory conduct, and petitioners failed to meet their burden to prove that she did not exercise diligent efforts to mitigate her damages. Matter of Amg Managing Partners, LLC v New York State Div. of Human Rights, 148 A.D.3d 1765, 51 N.Y.S.3d 764, 2017 N.Y. App. Div. LEXIS 2515 (N.Y. App. Div. 4th Dep't 2017).

This section which provides that the Commission may, among other things, order the payment of compensatory damages to the person aggrieved by a discriminatory practice is itself discriminatory in awarding damages only to a complainant and not to a landlord, and such procedure invalidates the provision for damages. Weynberg v New York Com. on Human Rights, 56 Misc. 2d 1, 287 N.Y.S.2d 1002, 1968 N.Y. Misc. LEXIS 1720 (N.Y. Sup. Ct. 1968).

In an action to punish a landlord for contempt of court for wilful failure to obey the provisions of a court order enforcing an order of the Civil Rights Commission, it was held that an intervenor was relegated to a plenary action pursuant to Executive Law § 297(9) and that any award for compensatory or punitive damages would have to be made by the court having jurisdiction of that action. State Com. for Human Rights v Kennelly, 59 Misc. 2d 278, 299 N.Y.S.2d 342, 1969 N.Y. Misc. LEXIS 1651 (N.Y. Sup. Ct. 1969).

Actress would be awarded $60,000 in compensatory damages where her employer utilized his employment relationship with her to coerce her into participating in sexual activity with his business associates to advance his own business interests, and compelled her to continue one such relationship, which he helped choreograph, for period of 18 months. Thoreson v Penthouse Int'l, 149 Misc. 2d 150, 563 N.Y.S.2d 968, 1990 N.Y. Misc. LEXIS 609 (N.Y. Sup. Ct. 1990), modified, 179 A.D.2d 29, 583 N.Y.S.2d 213, 1992 N.Y. App. Div. LEXIS 5427 (N.Y. App. Div. 1st Dep't 1992).

Although Article 78 proceeding cannot preclude later federal court § 1983 suit for damages, because, since damages are largely unavailable in Article 78 proceedings, court in initial action did not have power to award full measure of relief sought in second action, this rationale would not appear to apply in case where initial forum did have power to grant compensatory damages, such as New York State Division of Human Rights in hearing discrimination complaint. Kirkland v Peekskill, 651 F. Supp. 1225, 1987 U.S. Dist. LEXIS 227 (S.D.N.Y.), aff'd, 828 F.2d 104, 1987 U.S. App. LEXIS 12318 (2d Cir. N.Y. 1987).

In action under Human Rights law, finding that stress arising from employer's age discrimination against employee aggravated or accelerated progression of employee's Parkinson's symptoms, was not clearly erroneous. Shea v Icelandair, 925 F. Supp. 1014, 1996 U.S. Dist. LEXIS 5530 (S.D.N.Y. 1996).

In action under Human Rights law, record supported finding that stress arising from employer's age discrimination exacerbated employee's heart condition, where employee presented competent expert evidence of causal link between discrimination and onset of angina attacks. Shea v Icelandair, 925 F. Supp. 1014, 1996 U.S. Dist. LEXIS 5530 (S.D.N.Y. 1996).

In action predicated on age discrimination in employment, jury's award of $250,000 for pain and suffering would be reduced to $175,000 where (1) record established that employee suffered physically due to aggravation of his Parkinson's disease and heart condition, but did not establish how rapidly his condition would have deteriorated absent employer's conduct, and (2) employee failed to seek psychiatric help for his emotional distress. Shea v Icelandair, 925 F. Supp. 1014, 1996 U.S. Dist. LEXIS 5530 (S.D.N.Y. 1996).

$200,000 compensatory damage award under Human Rights Law deviated materially from what would be reasonable compensation, and new trial would be held on issue of compensatory damages unless age discrimination plaintiff accepted remittitur of $170,000, thereby reducing award to $30,000, where there was no showing of duration or magnitude of plaintiff's emotional injuries, nor any evidence of medical or psychological treatment. Tanzini v Marine Midland Bank, N.A., 978 F. Supp. 70, 1997 U.S. Dist. LEXIS 11793 (N.D.N.Y. 1997).

52. — —Mental anguish

The Commissioner of the State Human Rights Division reasonably concluded that an employer engaged in an unlawful discriminatory practice and compelled an employee to quit her job, where the evidence indicated that the employer had made blatantly obscene anti-Semitic remarks to her in the presence of other employees and had refused to apologize, notwithstanding the fact that the employer did not directly fire the employee and in fact had urged her to return to work. In exercising his broad powers to adopt measures reasonably deemed necessary to redress the injury to the employee, the commissioner properly directed that the employer apologize in writing, offer to reinstate the woman with back pay, together with $500 in damages for the shock, humiliation and outrage she experienced. Imperial Diner, Inc. v State Human Rights Appeal Bd., 52 N.Y.2d 72, 436 N.Y.S.2d 231, 417 N.E.2d 525, 1980 N.Y. LEXIS 2830 (N.Y. 1980).

Executive Law § 297 gives individuals a choice. They can either elect to sue in court and recover in damages which they can establish, including mental anguish, or they can elect to seek administrative relief under the Human Rights Law. Whether they elect to seek this latter relief, complainants may obtain directives and orders which will benefit both themselves and others in their position but they limit their recovery for damages to actual out-of-pocket expenses. State Div. of Human Rights v Luppino, 35 A.D.2d 107, 313 N.Y.S.2d 28, 1970 N.Y. App. Div. LEXIS 3948 (N.Y. App. Div. 2d Dep't 1970), aff'd, 29 N.Y.2d 558, 324 N.Y.S.2d 298, 272 N.E.2d 885, 1971 N.Y. LEXIS 1169 (N.Y. 1971).

The Commissioner of State Division of Human Rights has no power to award either attorney's fees to complainants or monetary damages for mental anguish or pain and suffering. State Div. of Human Rights v Luppino, 35 A.D.2d 107, 313 N.Y.S.2d 28, 1970 N.Y. App. Div. LEXIS 3948 (N.Y. App. Div. 2d Dep't 1970), aff'd, 29 N.Y.2d 558, 324 N.Y.S.2d 298, 272 N.E.2d 885, 1971 N.Y. LEXIS 1169 (N.Y. 1971).

In a proceeding pursuant to Exec Law § 298 to review a determination that a prospective employee was refused consideration on the basis of his arrest record, the determination that awarded compensatory damages for mental anguish and humili-

ation was properly confirmed where the job in question was as a mechanic at a state correctional facility, and where the human rights commissioner's broad power to order affirmative action included the power to award such compensatory damages to the aggrieved employee. State, Dep't of Correctional Services v New York State Div. of Human Rights, 88 A.D.2d 1061, 452 N.Y.S.2d 746, 1982 N.Y. App. Div. LEXIS 17482 (N.Y. App. Div. 3d Dep't 1982).

Compensatory damages are available under the Human Rights Law where a complainant has suffered mental anguish, humiliation, and emotional trauma as the direct result of a discriminatory act. Totem Taxi, Inc. v New York State Human Rights Appeal Bd., 98 A.D.2d 923, 471 N.Y.S.2d 358, 1983 N.Y. App. Div. LEXIS 21244 (N.Y. App. Div. 3d Dep't 1983), rev'd, 65 N.Y.2d 300, 491 N.Y.S.2d 293, 480 N.E.2d 1075, 1985 N.Y. LEXIS 15079 (N.Y. 1985).

The Commissioner of New York State Division of Human Rights did not err in not to awarding compensatory damages for emotional distress and humiliation, suffered by a woman when her supervisor told her to "stop acting like a bitch," where, although damage awards could be appropriate, the Commissioner had broad powers to adopt measures which he reasonably deemed necessary to redress the injury, and had ordered the Department of Social Services, petitioner's employer, to take affirmative action in advising its personnel about and implementing the State's policy of nondiscrimination due to sex, and where the Commissioner found that the sexually discriminatory utterance had been prompted by petitioner's refusal to comply with her superior's directive. Davey v Commissioner of New York State Dep't of Civil Service, 108 A.D.2d 1074, 485 N.Y.S.2d 641, 1985 N.Y. App. Div. LEXIS 43381 (N.Y. App. Div. 3d Dep't 1985).

In Human Rights Law proceeding brought by white female deputy sheriff who alleged sex and race discrimination, award of $30,000 compensatory damages for mental anguish was grossly excessive where deputy testified only that she was upset, depressed, felt demeaned and insecure, and continued to experience nightmares, and there was no indication of length of time these consequences were suffered, frequency of nightmares, or whether she sought medical or psychological attention or took any medication; thus, award of damages for mental anguish would be reduced to $15,000. State Div. of Human Rights ex rel. Cottongim v County of Onondaga Sheriff's Dep't, 127 A.D.2d 986, 513 N.Y.S.2d 68, 1987 N.Y. App. Div. LEXIS 43480 (N.Y. App. Div. 4th Dep't 1987), aff'd, 71 N.Y.2d 623, 528 N.Y.S.2d 802, 524 N.E.2d 123, 1988 N.Y. LEXIS 603 (N.Y. 1988).

College employee's testimony regarding persistent daily sexual harassment during her employment at college, and significant physical manifestations that resulted from her emotional distress, so affecting her that she was unable to attend college during following semester, was clearly sufficient to establish mental anguish and humiliation, but award of $150,000 in compensatory damages for mental anguish was excessive and would be reduced to $100,000. SUNY College of Environmental Science & Forestry v State Div. of Human Rights, 144 A.D.2d 962, 534 N.Y.S.2d 270, 1988 N.Y. App. Div. LEXIS 14449 (N.Y. App. Div. 4th Dep't 1988).

Division of Human Rights properly ordered employer to reinstate employee who established "constant and blatant" racial discrimination against her and suffered mental anguish therefrom. Cosmos Forms, Ltd. v State Div. of Human Rights, 150 A.D.2d 442, 541 N.Y.S.2d 50, 1989 N.Y. App. Div. LEXIS 6521 (N.Y. App. Div. 2d Dep't 1989).

Award of $15,000 to dentist for mental anguish suffered when sublessor terminated dentist's sublease on ground that dentist treated persons who were ill with AIDS was grossly excessive, and would be reduced to $5,000. Barton v New York City Com. on Human Rights, 151 A.D.2d 258, 542 N.Y.S.2d 176, 1989 N.Y. App. Div. LEXIS 7353 (N.Y. App. Div. 1st Dep't 1989).

Commissioner of Human Rights is authorized to include, as compensatory damages for violation of Human Rights Law, award for mental anguish and humiliation suffered by complainant, which may be established by testimony of claimant alone. Moore v State Div. of Human Rights, 154 A.D.2d 823, 546 N.Y.S.2d 487, 1989 N.Y. App. Div. LEXIS 12709 (N.Y. App. Div. 3d Dep't 1989).

Court would annul award of $10,000 for hurt, humiliation and mental anguish allegedly suffered when police department unlawfully discriminated against complainant by disqualifying him for position of police officer on basis of physical disability which did not prevent him from performing duties of that position in reasonable manner where, despite complainant's testimony that he was angry as result of his disqualification, there was no substantiation of his claim of hurt, humiliation and mental anguish, and especially since there was some basis for department's conclusion that complainant should be disqualified. New York v State Div. of Human Rights, 154 A.D.2d 56, 551 N.Y.S.2d 514, 1990 N.Y. App. Div. LEXIS 1888 (N.Y. App. Div. 1st Dep't), app. denied, 76 N.Y.2d 706, 560 N.Y.S.2d 988, 561 N.E.2d 888, 1990 N.Y. LEXIS 3001 (N.Y. 1990).

Employee who was denied promotion in retaliation for opposing discriminatory employer practices was properly awarded provisional appointment to desired position with back pay; however, award of $10,000 for mental anguish was not authorized under CLS Exec § 297 in absence of proof that employee suffered any ill effects from discrimination. New York State Office of Mental Retardation & Developmental Disabilities v New York State Div. of Human Rights, 164 A.D.2d 208, 563 N.Y.S.2d 286, 1990 N.Y. App. Div. LEXIS 13984 (N.Y. App. Div. 3d Dep't 1990).

In proceeding under Human Rights Law against nursing home that unlawfully discriminated against complainant by placing him in strict isolation because he tested HIV-seropositive, compensatory award of $150,000 was excessive, even though complainant presented evidence that he was lonely, depressed, agitated and generally tearful as result of his isolation, which endured for 9 ½ months, where there was no evidence as to severity or consequences of his condition, or that he sought medical treatment for it; in light of similar cases, award should not exceed $75,000. Marcus Garvey Nursing Home v New York State Div. of Human Rights, 209 A.D.2d 619, 619 N.Y.S.2d 106, 1994 N.Y. App. Div. LEXIS 11465 (N.Y. App. Div. 2d Dep't 1994).

Award of $25,000 in compensatory damages for emotional distress and humiliation as result of unlawful racial discrimination was excessive where sole evidence of such damages was complainant's testimony that employer's unlawful conduct made him feel "victimized, ambushed and abandoned" and caused him to withdraw from relationships with his friends and family, that he was unable to pay court-ordered child support or to provide entertain-ment for his 3 children, and that he could not complete purchase of items he had ordered prior to his termination and forfeited $1,000 deposit on automobile; appropriate award in such case was $15,000. New York State Dep't of Correctional Servs. v State Div. of Human Rights, 215 A.D.2d 908, 626 N.Y.S.2d 588, 1995 N.Y. App. Div. LEXIS 5326 (N.Y. App. Div. 3d Dep't 1995).

In order to sustain award for mental anguish, there must be evidence that mental anguish was caused by discriminatory practice, and there must be some evidence of magnitude of injury. Van Cleef Realty v New York State Div. of Human Rights, 216 A.D.2d 306, 627 N.Y.S.2d 744, 1995 N.Y. App. Div. LEXIS 5928 (N.Y. App. Div. 2d Dep't 1995).

Damage award of $30,000 for mental anguish suffered by couple who experienced racial steering in rental of housing was excessive where couple was not subjected to prolonged discrimination, their contact with realtor was limited to one-time encounter, realtor's conduct did not affect their ability to find housing, they were not subjected to rude or egregious racial epithets, they adduced no evidence as to duration or magnitude of their mental anguish, and their testimony was limited to single assertion each of distress they felt; proper award would not exceed $5,000. Van Cleef Realty v New York State Div. of Human Rights, 216 A.D.2d 306, 627 N.Y.S.2d 744, 1995 N.Y. App. Div. LEXIS 5928 (N.Y. App. Div. 2d Dep't 1995).

Employee, who was wrongfully terminated due to his age, was entitled to award in amount of $10,000 for mental anguish based on his testimony that he was "frightened to death" not to have job at age 63, and that he suffered loss of sleep and appetite. Laverack & Haines, Inc. v New York State Div. of Human Rights, 217 A.D.2d 955, 629 N.Y.S.2d 595, 1995 N.Y. App. Div. LEXIS

8381 (N.Y. App. Div. 4th Dep't 1995), rev'd, 88 N.Y.2d 734, 650 N.Y.S.2d 76, 673 N.E.2d 586, 1996 N.Y. LEXIS 3057 (N.Y. 1996).

Award of $25,000 to complainant who had been discriminated against on basis of her pregnancy was excessive where discriminatory conduct was limited to single encounter at which complainant's co-workers were not present, complainant was not subjected to rude or egregious treatment that might have aggravated her mental anguish, and complainant adduced no evidence of duration or magnitude of her mental anguish; matter would be remitted to Division of Human Rights for imposition of new award not to exceed $5,000. A.S.A.P. Personnel Servs. v Rosa, 219 A.D.2d 648, 631 N.Y.S.2d 396, 1995 N.Y. App. Div. LEXIS 9285 (N.Y. App. Div. 2d Dep't 1995).

In order to sustain award of damages for mental anguish resulting from discrimination, there must be evidence that mental anguish was caused by discriminatory practice, and there must be some evidence of magnitude of injury. A.S.A.P. Personnel Servs. v Rosa, 219 A.D.2d 648, 631 N.Y.S.2d 396, 1995 N.Y. App. Div. LEXIS 9285 (N.Y. App. Div. 2d Dep't 1995).

Award of $200,000 for mental anguish as result of sexual employment discrimination was excessive and should not have exceeded $5,000 where complainant's discussion of her mental anguish was brief, and there was no evidence as to duration of her condition, its severity or consequences, or evidence of treatment. Port Wash. Police Dist. v State Div. of Human Rights, 221 A.D.2d 639, 634 N.Y.S.2d 195, 1995 N.Y. App. Div. LEXIS 12381 (N.Y. App. Div. 2d Dep't 1995), app. denied, 88 N.Y.2d 807, 647 N.Y.S.2d 165, 670 N.E.2d 449, 1996 N.Y. LEXIS 1624 (N.Y. 1996).

Compensatory damages for mental anguish in amount of $50,000 for loss of employment opportunity was excessive where respondent never sought medical treatment as result of petitioners' discriminating conduct in disqualifying him for position of firefighter on basis of physical disability; award of $10,000 was appropriate under circumstances. City of Fulton v New York State Div. of Human Rights, 221 A.D.2d 971, 633 N.Y.S.2d 914, 1995 N.Y. App. Div. LEXIS 13462 (N.Y. App. Div. 4th Dep't 1995).

Evidence supported awards of $60,000 in compensatory damages to each of 3 complainants for mental anguish and humiliation arising from acts of sexual harassment committed by corporate employer's executive director, despite absence of psychiatric or other medical evidence, considering duration, severity, consequences and physical manifestations of mental anguish. Father Belle Community Ctr. v New York State Div. of Human Rights, 221 A.D.2d 44, 642 N.Y.S.2d 739, 1996 N.Y. App. Div. LEXIS 5508 (N.Y. App. Div. 4th Dep't), reh'g denied, 647 N.Y.S.2d 652, 1996 N.Y. App. Div. LEXIS 10989 (N.Y. App. Div. 4th Dep't 1996), app. denied, 89 N.Y.2d 809, 655 N.Y.S.2d 889, 678 N.E.2d 502, 1997 N.Y. LEXIS 214 (N.Y. 1997).

Damage award of $50,000 for mental anguish arising from racial discrimination in employment was excessive and would be reduced to $5,000. American Int'l Group v Rosa, 224 A.D.2d 179, 637 N.Y.S.2d 121, 1996 N.Y. App. Div. LEXIS 773 (N.Y. App. Div. 1st Dep't), app. denied, 87 N.Y.2d 807, 641 N.Y.S.2d 829, 664 N.E.2d 895, 1996 N.Y. LEXIS 167 (N.Y. 1996).

Award of $300,000 for mental anguish and compensatory damages was appropriate in light of petitioner's employees' constant, egregious, and blatant discriminatory conduct. Tiffany & Co. v Smith, 224 A.D.2d 332, 638 N.Y.S.2d 454, 1996 N.Y. App. Div. LEXIS 1456 (N.Y. App. Div. 1st Dep't), app. denied, 88 N.Y.2d 806, 646 N.Y.S.2d 985, 670 N.E.2d 226, 1996 N.Y. LEXIS 1723 (N.Y. 1996).

Administrative Law Judge abused his discretion in refusing employer's request to have complainant examined by its psychiatrist where complainant had alleged serious psychiatric injuries as result of discrimination; any alleged difficulties complainant might experience with examination could be mitigated by imposition of reasonable conditions. Carrier Corp. v New York State Div. of Human Rights, 224 A.D.2d 936, 637 N.Y.S.2d 877, 1996 N.Y. App. Div. LEXIS 1572 (N.Y. App. Div. 4th Dep't 1996).

It was not excessive to award $10,000 as compensatory damages for mental anguish due to unlawful discriminatory practice of terminating complainant from employment because of her gender and gender-specific disability (pregnancy). Heidie Tuxedos & Formals v New York State Div. of Human Rights, 224 A.D.2d 1022, 638 N.Y.S.2d 376, 1996 N.Y. App. Div. LEXIS 1700 (N.Y. App. Div. 4th Dep't 1996).

Award of $25,000 against Manhattan and Bronx Surface Transit Operating Authority, representing compensatory damages for mental anguish and humiliation for employment discrimination based on petitioner's disability, was excessive where employee testified that, as result of discriminatory acts, he felt "very upset" and "very angry," and he was reluctant to wear his hearing aids during other interviews; such testimony only supported award of up to $7,500. Manhattan & Bronx Surface Transit Operating Auth. v New York State Div. of Human Rights, 225 A.D.2d 553, 638 N.Y.S.2d 761, 1996 N.Y. App. Div. LEXIS 1938 (N.Y. App. Div. 2d Dep't 1996).

African-American correctional officer established entitlement to award for mental anguish and humiliation for racial discrimination suffered at hands of his supervisor over 2-year period where supervisor had negative attitude toward minorities, he consistently exhibited such attitude to his subordinates in work place, he repeatedly verbally harassed and humiliated officer in front of other officers, civilian bus drivers and prisoners, he pressured him to violate regulations, and he ordered officer to sit with prisoners during transportation assignments for periods of 12 to 15 hours in defiance of regulations requiring officer rotation every 30 minutes; however, award of $100,000 was excessive and would be reduced to $35,000 given lack of proof of severity, consequences and duration of effects which supervisor's negative conduct had on officer. New York State Dep't of Correctional Servs. v New York State Div. of Human Rights, 225 A.D.2d 856, 638 N.Y.S.2d 827, 1996 N.Y. App. Div. LEXIS 2063 (N.Y. App. Div. 3d Dep't 1996).

Award of $150,000 for mental anguish and humiliation as result of unlawful age discrimination was excessive and would be reduced to $100,000. Boutique Indus. v New York State Div. of Human Rights, 228 A.D.2d 171, 643 N.Y.S.2d 986, 1996 N.Y. App. Div. LEXIS 6283 (N.Y. App. Div. 1st Dep't 1996).

Complainant's testimony as to her feelings of embarrassment, humiliation and inadequacy, together with her testimony as to adverse physical effects of weight loss and inability to find comparable employment for almost 2 years as result of hostile work environment and discriminatory discharge, supported claim for mental anguish. Bronx County Medical Group, P.C. v Lassen, 233 A.D.2d 234, 650 N.Y.S.2d 113, 1996 N.Y. App. Div. LEXIS 11988 (N.Y. App. Div. 1st Dep't 1996), app. denied, 89 N.Y.2d 813, 658 N.Y.S.2d 243, 680 N.E.2d 617, 1997 N.Y. LEXIS 474 (N.Y. 1997).

Award of $250,000 for mental anguish as result of hostile work environment and discriminatory discharge was excessive and would be reduced to $25,000. Bronx County Medical Group, P.C. v Lassen, 233 A.D.2d 234, 650 N.Y.S.2d 113, 1996 N.Y. App. Div. LEXIS 11988 (N.Y. App. Div. 1st Dep't 1996), app. denied, 89 N.Y.2d 813, 658 N.Y.S.2d 243, 680 N.E.2d 617, 1997 N.Y. LEXIS 474 (N.Y. 1997).

Award of $75,000 would be reduced to $15,000 in proceeding against Department of Correctional Services for unlawful discriminatory practice based on race where claimant's testimony did not detail much in way of severity, consequence or duration of his mental anguish, and he admitted that his anxiety and stress were intermittent only. New York State Dep't of Correctional Servs. v State Div. of Human Rights, 241 A.D.2d 811, 661 N.Y.S.2d 85, 1997 N.Y. App. Div. LEXIS 7816 (N.Y. App. Div. 3d Dep't 1997), app. denied, 92 N.Y.2d 807, 678 N.Y.S.2d 593, 700 N.E.2d 1229, 1998 N.Y. LEXIS 2800 (N.Y. 1998).

In discrimination cases, awards for emotional distress are not dependent on psychiatric or other medical evidence. Young Fu Hsu v New York State Div. of Human Rights, 241 A.D.2d 913, 661 N.Y.S.2d 400, 1997 N.Y. App. Div. LEXIS 7842 (N.Y. App. Div. 4th Dep't 1997).

Award of $20,000 for mental anguish was excessive where complainant testified that, as a result of petitioner's racially discriminatory conduct in handling her employment application, she "felt hurt" and was generally irritable, remained in bed, and suffered from headaches and stomach distress for which she took Tylenol and Alka Seltzer, she testified that her fear of rejection made her postpone job-seeking activities for 2 months, and she

did not seek medical treatment; award of $10,000 was appropriate. Buffalo Ath. Club v New York State Div. of Human Rights, 249 A.D.2d 986, 672 N.Y.S.2d 210, 1998 N.Y. App. Div. LEXIS 5148 (N.Y. App. Div. 4th Dep't 1998).

$20,000 in compensatory damages for mental anguish, awarded to respondent who was wrongfully disqualified from civil service eligibility list in violation of Human Rights Law, was unsupported by evidence and would be reduced to $10,000 where respondent stated only that he was "hurt," "angry," and "emotional" at being denied employment he believed would offer job security for him and his family. City of New York v New York State Div. of Human Rights, 250 A.D.2d 273, 682 N.Y.S.2d 387, 1998 N.Y. App. Div. LEXIS 13953 (N.Y. App. Div. 1st Dep't 1998), modified, 93 N.Y.2d 768, 698 N.Y.S.2d 594, 720 N.E.2d 870, 1999 N.Y. LEXIS 3434 (N.Y. 1999).

In action against Niagara Frontier Transportation Authority for unlawful racial discrimination in failing to hire complainant for 2 positions for which she applied, award of damages for mental anguish and humiliation would be vacated, and case would be remitted for recalculation of such damages, where she proved discrimination as to only one position, and record did not specify any relation between award and any particular position. Niagara Frontier Transp. Auth. v New York State Div. of Human Rights, 275 A.D.2d 922, 713 N.Y.S.2d 631, 2000 N.Y. App. Div. LEXIS 9577 (N.Y. App. Div. 4th Dep't 2000).

In action against Niagara Frontier Transportation Authority for unlawful racial discrimination in failing to hire complainant for 2 positions for which she applied, case would be remitted for recalculation of back pay award where she proved discrimination as to only one position, and thus back pay had to calculated using date and salary for that position rather than other position. Niagara Frontier Transp. Auth. v New York State Div. of Human Rights, 275 A.D.2d 922, 713 N.Y.S.2d 631, 2000 N.Y. App. Div. LEXIS 9577 (N.Y. App. Div. 4th Dep't 2000).

Claimant's testimony as to severity and duration of her mental anguish, even unsubstantiated by medical or other objective evidence, supported award of $50,000 for emotional distress, where employer's acts of unlawful discrimination included sexual harassment by claimant's immediate supervisor over 4-month period, failure to act on her formal complaints to her superiors, including employer's equal opportunity office, and retaliation for such complaints by disciplining her twice and ultimately terminating her. City of New York v N.Y. State Div. of Human Rights, 283 A.D.2d 215, 728 N.Y.S.2d 367, 2001 N.Y. App. Div. LEXIS 4809 (N.Y. App. Div. 1st Dep't 2001).

Sexual harassment damage award of $50,000 for mental anguish and humiliation was excessive where there was no proof of severity and consequences of complainant's condition; thus, award of $20,000 was appropriate. State v N.Y. State Div. of Human Rights, 284 A.D.2d 882, 727 N.Y.S.2d 499, 2001 N.Y. App. Div. LEXIS 6888 (N.Y. App. Div. 3d Dep't 2001).

Award of $15,000 for mental anguish and humiliation for employment discrimination was excessive because the employee sought no medical treatment and her testimony in support of that award was sparse; an award of $5,000 was the maximum award supported by the evidence. Matter of Rite Aid of N.Y., Inc. v New York State Div. of Human Rights, 60 A.D.3d 1428, 875 N.Y.S.2d 708, 2009 N.Y. App. Div. LEXIS 2020 (N.Y. App. Div. 4th Dep't), app. denied, 13 N.Y.3d 702, 886 N.Y.S.2d 94, 914 N.E.2d 1012, 2009 N.Y. LEXIS 3443 (N.Y. 2009).

There was no basis upon which to disturb the compensatory damages award the State Division of Human Rights assessed because a couple was discriminated against based on their sexual orientation, and the record reflected the hurt, humiliation and mental anguish that they suffered as a result of farm owners' conduct; the awards were well in accord with those sustained in similar cases. Matter of Gifford v Mccarthy, 137 A.D.3d 30, 23 N.Y.S.3d 422, 2016 N.Y. App. Div. LEXIS 238 (N.Y. App. Div. 3d Dep't 2016).

Where a complainant was subjected to a hostile work environment due to sexual harassment, although the administrative law judge's award to her of damages for mental anguish and humiliation was reasonably related to the wrongdoing, the amount of the award was inappropriate when compared to other awards for similar injuries; accordingly, the court reduced the award from $ 65,000 to $ 25,000. Matter of Amg Managing Partners, LLC v New York State Div. of Human Rights, 148 A.D.3d 1765, 51 N.Y.S.3d 764, 2017 N.Y. App. Div. LEXIS 2515 (N.Y. App. Div. 4th Dep't 2017).

Jury award of $18,000 for emotional distress suffered by worker who was fired due to his age was extremely modest, and thus was neither conscience-shocking nor substantially deviant from reasonable compensation, where worker testified that losing his job was "like a divorce, your wife died or state of shock." Tyler v Bethlehem Steel Corp., 958 F.2d 1176, 1992 U.S. App. LEXIS 4161 (2d Cir. N.Y.), cert. denied, 506 U.S. 826, 113 S. Ct. 82, 121 L. Ed. 2d 46, 1992 U.S. LEXIS 5704 (U.S. 1992).

In action by employee who was discharged in retaliation for his complaints of race discrimination, award of $219,428 in compensatory damages for pain, suffering and humiliation was excessive where sole evidence as to magnitude and duration of employee's emotional injury or mental distress was his own testimony that he felt "humiliated," "angry," "shocked," "like dirt," and "terrible" during certain incidents at work, that he stayed home sick from work for several days and saw doctor once due to ailments related to nervous tension, and that he was "devastated" when he was discharged; new trial would be ordered unless employee agreed to reduced award of $20,000. McIntosh v Irving Trust Co., 887 F. Supp. 662, 1995 U.S. Dist. LEXIS 7700 (S.D.N.Y. 1995).

Terminated advertising salesman's claim for emotional distress in ad damnum clause of complaint is not time-barred, where he is not making separate claim for intentional infliction of emotional distress, because salesman, asserting age discrimination, is making proper and timely request for emotional distress damages as aspect of request for compensatory damages authorized under Exec § 297. Gagliardi v Universal Outdoor Holdings, Inc., 137 F. Supp. 2d 374, 2001 U.S. Dist. LEXIS 3936 (S.D.N.Y. 2001).

It was appropriate to award complainant $500 for mental anguish she suffered as a result of unlawful discriminatory demotion based on national origin. 2000 Order Comm HR No. 9D-E-O-89-136156E.

53. — —Loss of consortium

In action for discriminatory termination of employment, damages for loss of consortium were not recoverable since alleged wrongful conduct preceded marriage of employee, notwithstanding fact that actual effective date of discharge was subsequent to marriage, since underlying allegations were based in part on notification of discharge one day before wedding. Mehtani v New York Life Ins. Co., 145 A.D.2d 90, 537 N.Y.S.2d 800, 1989 N.Y. App. Div. LEXIS 1552 (N.Y. App. Div. 1st Dep't), app. denied, app. dismissed, 74 N.Y.2d 835, 546 N.Y.S.2d 341, 545 N.E.2d 631, 1989 N.Y. LEXIS 2897 (N.Y. 1989), app. denied, 85 N.Y.2d 806, 627 N.Y.S.2d 323, 650 N.E.2d 1325, 1995 N.Y. LEXIS 1227 (N.Y. 1995).

54. —Punitive damages

Person aggrieved by discriminatory practice in violation of Human Rights Law may not recover punitive damages in court action brought under CLS Exec § 297(9) since such relief is expressly excluded in proceeding before Division of Human Rights and, should such damages be permitted, aggrieved person would be encouraged to avoid administrative channel before division and bring their complaints in court proceedings. Thoreson v Penthouse Int'l, 80 N.Y.2d 490, 591 N.Y.S.2d 978, 606 N.E.2d 1369, 1992 N.Y. LEXIS 4231 (N.Y. 1992).

Where sole evidence of mental anguish was complainant's own testimony that she was "[e]motionally and physically screwed up", award of $35,000 for mental anguish is grossly excessive and new award should not exceed $5,000–award of back pay from complainant's discharge in February 1985 until her reinstatement by petitioner constitutes punitive assessment against petitioner rather than compensation; complainant obtained new employment at same pay in July 1985; Division of Human Rights may not award what would amount to punitive damages solely on finding that unlawful discrimination occurred; award of back pay must be reduced to cover only period that complainant was out of work as result of her unlawful discharge; however, Division did not abuse its discretion in ordering petitioner to reinstate com-

plainant–three-year period between filing of complaint and issuance of Division's determination did not operate to divest Division of jurisdiction; absent showing of substantial prejudice, time limitations enunciated in Executive Law § 297 are directory and not mandatory. Cosmos Forms, Ltd. v State Div. of Human Rights, 150 A.D.2d 442, 541 N.Y.S.2d 50, 1989 N.Y. App. Div. LEXIS 6521 (N.Y. App. Div. 2d Dep't 1989).

It was proper to award $2,500 in punitive damages each to complainant and to realtor who represented her, who was also black, for petitioner's unlawful discriminatory practice of refusing to sell piece of real property to complainant because of her race; however, it was error to make same award to second black realtor where her testimony showed only that she was complainant's realtor's employer, and that he recounted to her his dealings with petitioner. Feggoudakis v New York State Div. of Human Rights, 230 A.D.2d 739, 646 N.Y.S.2d 175, 1996 N.Y. App. Div. LEXIS 8219 (N.Y. App. Div. 2d Dep't 1996).

Retroactive application of 1991 amendment to CLS Exec § 297(4)(c)(iv) was appropriate with respect to punitive damages awarded in case filed in January 1991, although amendment was enacted in July 1991 and declared to be effective "immediately," since remedial statutes constitute exception to general rule against retroactive application. New York State Div. of Human Rights v Gruzdaitis, 265 A.D.2d 904, 696 N.Y.S.2d 330, 1999 N.Y. App. Div. LEXIS 10026 (N.Y. App. Div. 4th Dep't 1999).

While the cooperative owners failed to state claims for breach of a tenant corporation's fiduciary duties or against its directors individually, they stated causes of action for housing discrimination under N.Y. Exec. Law § 296(5)(a)(2) and 42 U.S.C.S. § 3601 et seq., and for punitive damages, which were limited to $10,000 by N.Y. Exec. Law § 297(4)(c)(iv), (9). Stalker v Stewart Tenants Corp., 93 A.D.3d 550, 940 N.Y.S.2d 600, 2012 N.Y. App. Div. LEXIS 2110 (N.Y. App. Div. 1st Dep't 2012).

This section which provides that the Commission may, among other things, order the payment of compensatory damages to the person aggrieved by a discriminatory practice is itself discriminatory in awarding damages only to a complainant and not to a landlord, and such procedure invalidates the provision for damages. Weynberg v New York Com. on Human Rights, 56 Misc. 2d 1, 287 N.Y.S.2d 1002, 1968 N.Y. Misc. LEXIS 1720 (N.Y. Sup. Ct. 1968).

Punitive damages, although not available in proceedings brought before the Human Rights Commission for a violation of the Human Rights Law, are available under appropriate circumstances to litigants who opt for a judicial forum rather than an administrative one since the Human Rights Law, by providing that "[a]ny person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for damages and such other remedies as may be appropriate" (Executive Law § 297 [9]), does not limit "damages" to compensatory "damages" only. In addition, although punitive damages may not be alleged as a separate cause of action, plaintiffs, two physicians who were denied the opportunity to purchase a cooperative apartment allegedly because defendant sponsor refused to take the necessary steps to facilitate the changeover of the apartment from a residence to a medical office when it learned that plaintiffs would be treating patients with Acquired Immune Deficiency Syndrome, sufficiently alleged punitive damages for defendant's alleged willful and malicious conduct in violation of the Human Rights Law. Seitzman v Hudson River Assoc., 143 Misc. 2d 1068, 542 N.Y.S.2d 104, 1989 N.Y. Misc. LEXIS 323 (N.Y. Sup. Ct. 1989).

Punitive damages are not recoverable for violation of Human Rights Law since law was designed to provide private right of action, legislature failed in attempt to pass legislation which would explicitly provide for such damages, and such damages are not available under equivalent federal statutes. Tyler v Bethlehem Steel Corp., 958 F.2d 1176, 1992 U.S. App. LEXIS 4161 (2d Cir. N.Y.), cert. denied, 506 U.S. 826, 113 S. Ct. 82, 121 L. Ed. 2d 46, 1992 U.S. LEXIS 5704 (U.S. 1992).

Action for employment discrimination in violation of Human Rights Law, except for claim for punitive damages, survives employee's death. Estwick v U.S.Air Shuttle, 950 F. Supp. 493, 1996 U.S. Dist. LEXIS 20104 (E.D.N.Y. 1996).

Under Exec § 297, punitive damages are not recoverable against municipality for human rights violations. Dean v Westchester County DA's Office, 119 F. Supp. 2d 424, 2000 U.S. Dist. LEXIS 16746 (S.D.N.Y. 2000).

Where a jury found that an employer discriminated and retaliated against an employee on the basis of gender in violation of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C.S. § 2000e, the New York State Human Rights Law, N.Y. Exec. Law §§ 296-301, and New York City, N.Y., Admin. Code §§ 8-107-8-131, a comparison of the punitive damage awards in comparable cases indicated that reducing the jury's $2,500,000 punitive damages award to $600,000 was appropriate because (1) 42 U.S.C.S. § 1981a(b)(3)(d) limited the maximum damages award in a Title VII case to $300,000, (2) N.Y. Exec. Law § 297(9) prohibited the imposition of punitive damages in an employment discrimination case, (3) punitive damages under New York City, N.Y., Admin. Code § 8-502(a) had a remedial purpose, and (4) the employee was awarded approximately $1.5 million in compensatory damages. Zakre v Norddeutsche Landesbank Girozentrale, 541 F. Supp. 2d 555, 2008 U.S. Dist. LEXIS 9460 (S.D.N.Y. 2008), aff'd, 344 Fed. Appx. 628, 2009 U.S. App. LEXIS 12188 (2d Cir. N.Y. 2009).

Findings that creditor, a transgender woman, was discriminated against by debtor based on gender and disability in violation of the New York State Human Rights Law were sufficient to support a finding of willful injury for purposes of creditor's nondischargeability claim. Malice was implied by the state court's finding of deliberate discrimination, the acts and conduct of debtor in the context of the surrounding circumstances, and the imposition of a civil penalty. Fuller v Rea (In re Rea), 606 B.R. 531, 2019 Bankr. LEXIS 2364 (Bankr. S.D.N.Y. 2019).

55. —Post-judgment interest

Complainant, who was awarded payment of back pay by Commissioner of Human Rights after finding that complainant had been discriminated against because of his race, was entitled to 6% interest on such award after payroll deductions from date of Commissioner's order rather than date compensation accrued where State Division of Human Rights, and not employer, was responsible for four-year delay from date compensation accrued. State Div. of Human Rights ex rel. Falleder v Massive Economic Neighborhood Development, Inc., 47 A.D.2d 187, 366 N.Y.S.2d 23, 1975 N.Y. App. Div. LEXIS 9136 (N.Y. App. Div. 1st Dep't 1975).

So that petitioner not be rewarded for its deliberate default by retaining use of ultimate damage award from date of order by State Division of Human Rights (SDHR) rendered on petitioner's default until SDHR issued new order after hearing on damages, final damage award would bear interest from date of SDHR's original order entered on default. Interboro Management Co. v State Div. of Human Rights, 139 A.D.2d 697, 527 N.Y.S.2d 453, 1988 N.Y. App. Div. LEXIS 4415 (N.Y. App. Div. 2d Dep't 1988).

Commissioner erred in requiring an employer to pay predetermination interest in employment discrimination claim relating to that portion of the "unreasonable delay" in determining the complaint that was attributable solely to the New York State Division of Human Rights. Matter of Rite Aid of N.Y., Inc. v New York State Div. of Human Rights, 60 A.D.3d 1428, 875 N.Y.S.2d 708, 2009 N.Y. App. Div. LEXIS 2020 (N.Y. App. Div. 4th Dep't), app. denied, 13 N.Y.3d 702, 886 N.Y.S.2d 94, 914 N.E.2d 1012, 2009 N.Y. LEXIS 3443 (N.Y. 2009).

Notes to Unpublished Decisions

Analysis

I. Remedies

1. Election of remedies
2. —Election between administrative and judicial remedies

II. Other Procedural Matters

3. Summary Judgment

I. Remedies

1. Election of remedies

2. —Election between administrative and judicial remedies

Unpublished decision: District court properly dismissed an employee's discrimination claims where he previously filed a complaint with the New York City Commission on Human Rights asserting identical claims, the Commission had dismissed the claims for lack of probable cause, and thus the claims were precluded by the election of remedies doctrine. DuBois v Macy's Retail Holdings, Inc., 533 Fed. Appx. 40, 2013 U.S. App. LEXIS 20301 (2d Cir. N.Y. 2013).

Unpublished decision: Bus driver's discrimination claim was properly dismissed because driver had already pursued that claim with New York State Division of Human Rights, which dismissed claim for lack of probable cause. Carris v First Student, Inc., 682 Fed. Appx. 30, 2017 U.S. App. LEXIS 4056 (2d Cir. N.Y. 2017).

II. Other Procedural Matters

3. Summary Judgment

Unpublished decision: Terminated employee's race discrimination and retaliation claims failed because the employee did not show a genuine dispute of fact regarding alleged discrimination in the employer's overtime distribution since the differences in overtime hours were minimal and were easily explained by the higher rate at which African-American employees declined overtime opportunities, and the employee did not present sufficient evidence to create a genuine dispute of fact regarding whether the employee's purportedly "similarly situated" comparators were, in fact, similarly situated. Finn v N.Y. State Office of Mental Health-Rockland Psychiatric Ctr., 489 Fed. Appx. 513, 2012 U.S. App. LEXIS 25168 (2d Cir. N.Y. 2012).

Agency Opinions

Analysis

I. Generally

1. In general
2. Preemption of local laws by state laws
3. "Employer"

II. Review and Enforcement

4. Validity of administrative orders
5. —Orders re licenses

I. Generally

1. In general

The Arab Boycott Law applies to banking transactions. 1976 N.Y. Op. Att'y Gen. No. 69, 1976 N.Y. AG LEXIS 37.

2. Preemption of local laws by state laws

Legislation prohibiting discrimination in housing practices has not been pre-empted by the State. Local laws may be enacted provided they do not make illegal that which the State allows. The validity of the local laws is not affected by the fact that greater penalties are thereby imposed. 1968 NY Ops Atty Gen Aug 1.

Local legislation prohibiting discrimination in housing, employment and places of public accommodation on the basis of sexual preference has not been pre-empted by the State. 1978 NY Ops Atty Gen March 6 (Informal).

3. "Employer"

The State is an employer subject to the Human Rights Law. The Commissioner of Human Rights may award compensatory damages in cases of discrimination by the State as employer. A person awarded damages does not have to sue in the Court of Claims in order to enforce the award. 1980 NY Ops Atty Gen Feb 28 (formal).

II. Review and Enforcement

4. Validity of administrative orders

5. —Orders re licenses

State Liquor Authority may not ask applicants for a license whether or not they have ever been arrested but may ask only about pending arrests or arrests which have not been followed by a termination in favor of the applicant. 1977 N.Y. Op. Att'y Gen. No. 26, 1977 N.Y. AG LEXIS 117.

The Board of Commissioners of Pilots may decline to renew the license of a Long Island Sound-Block Island Sound pilot, who had not reached his sixtieth birthday on January 1, 1972, solely on the ground that he has now reached the age of sixty-five. 1980 N.Y. Op. Att'y Gen. No. 55, 1980 N.Y. AG LEXIS 53.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 296, 296-a, 298, 298-a.

Form of complaint in action for racial discrimination in publicly assisted housing, see CLS Civ R § 18-c.

Undertaking by the state, municipal corporation or public officer, CLS CPLR 2512.

Codes, Rules and Regulations:

Rules of Practice, Division of Human Rights. 9 NYCRR §§ 465.1–465.20 (CLS Exec Appx, Human R Rules §§ 465.1–465.20).

General Regulations, Division of Human Rights. 9 NYCRR §§ 466.1–466.10 (CLS Exec Appx, Human R Rules §§ 466.1–466.10).

Public access to records. 9 NYCRR § 466.7.

Election of arbitration. 9 NYCRR §§ 467.1 et seq.

Jurisprudences:

1 NY Jur 2d Actions § 18.

18 NY Jur 2d Civil Rights § 42.

18A NY Jur 2d Civil Rights §§ 140, 142–144, 147–149, 156, 158, 161–163, 165–170, 172–174, 176–179, 181, 182, 184–187, 189, 192–197, 203, 204, 214, 216.

67A NY Jur 2d Injunctions §§ 53, 57.

84 NY Jur 2d Pleading § 111.

7 Medina's Bostwick Practice Manual (Matthew Bender), Forms HR 101 et seq. (actions and proceedings relating to the Human Rights Law).

15 Am Jur 2d, Civil Rights § 261.

5A Am Jur Pl & Pr Forms, Civil Rights, Forms 1, 21–52, 71–117, 141, 152.

2 Am Jur Proof of Facts 2d 187, Racial Discrimination in Employment (In general; Use of Statistics).

2 Am Jur Proof of Facts 2d 237, Racial Discrimination in Employment—Testing and Educational Requirements.

3 Am Jur Proof of Facts 2d 221, Racial Discrimination in Employment–Recruiting and Hiring.

22 Am Jur Proof of Facts 650, Dismissal of Teachers for Cause.

21 Am Jur Trials 1, Employment Discrimination Action Under Federal Civil Rights Acts.

28 Am Jur Trials 1, Housing Discrimination Litigation.

Law Reviews:

Preclusive effect of state judgments on subsequent 1983 actions. 78 Colum. L. Rev. 610.

Hermann, Financing public interest litigation in state court: a proposal for legislative action. 63 Cornell L. Rev. 173.

Res judicata held inapplicable to section 1983 action where issues of procedural due process were not raised in prior state litigation. 43 Fordham L. Rev. 459.

Waiver of sovereign immunity by a state does not give a federal cause of action for damages under sections 1983 and 1988 of the civil rights act. 2 Fordham Urb. L.J. 109.

Benetar, One man-one veto. (practice at Joint Task Force on Practices and Procedures of N.Y. State Division of Human Rights). 53 NYSB J 497.

Annotations:

Right to assistance by counsel in administrative proceedings. 33 ALR3d 229.

Hearsay evidence in proceedings before state administrative agencies. 36 ALR3d 12.

Validity, construction, and application of statutes making public proceedings open to the public. 38 ALR3d 1070.

Recovery of damages for emotional distress resulting from racial, ethnic, or religious abuse or discrimination. 40 ALR3d 1290.

Recovery of damages for emotional distress resulting from discrimination because of sex or marital status. 61 ALR3d 944.

Recovery of damages as remedy for wrongful discrimination under state or local civil rights provisions. 85 ALR3d 351.

Requiring apology as"affirmative action"or other form of redress under state civil rights act. 85 ALR3d 402.

Sufficiency of state remedy under 42 USCS § 2000e-5(c) to require 60-day deferral by Equal Employment Opportunity Commission to allow state time to act. 45 ALR Fed 347.

Disclosure of information by Equal Employment Opportunity Commission or other agency as affected by 42 USCS § 2000e-8(e), making it unlawful for officer or employee of Commission to make public information obtained by Commission prior to institution of proceeding involving such information. 47 ALR Fed 471.

Time limitations of § 706 of Civil Rights Act of 1964, as amended (42 USCS § 2000e-5(f)(1)) for bringing civil action by person aggrieved as subject to tolling because of equitable considerations. 54 ALR Fed 335.

When will Federal Government employee be excused from 30-day limitation period, established by Equal Employment Opportunity Commission regulation (29 CFR § 1613.214(a)(1)(i)), for bringing matters relating to employment discrimination to attention of Equal Employment Opportunity Counselor. 57 ALR Fed 116.

Effect on employment discrimination action of failure of Equal Employment Opportunity Commission to timely serve defendant with notice of charges as required by § 706(b) and (e) of Civil Rights Act of 1964 (42 USCS § 2000e-5(b) and (e)). 57 ALR Fed 565.

What constitutes impairment of proposed intervenor's interest to support intervention as matter of right under Rule 24(a)(2) of Federal Rules of Civil Procedure in employment discrimination actions. 74 ALR Fed 895.

Texts: Liddle & Marino, Labor and Employment in New York (Michie) pp 13-54.

New York Employee Discrimination Handbook (1998 ed, Matthew Bender).

§ 298. Judicial review and enforcement.

Any complainant, respondent or other person aggrieved by an order of the commissioner which is an order after public hearing, a cease and desist order, an order awarding damages, an order dismissing a complaint, or by an order of the division which makes a final disposition of a complaint may obtain judicial review thereof, and the division may obtain an order of court for its enforcement and for the enforcement of any order of the commissioner which has not been appealed to the court, in a proceeding as provided in this section. Such proceeding shall be brought in the supreme court in the county wherein the unlawful discriminatory practice which is the subject of the order occurs or wherein any person required in the order to cease and desist from an unlawful discriminatory practice or to take other affirmative action resides or transacts business. Such proceeding shall be initiated by the filing of a notice of petition and petition in such court. Thereafter, at a time and in a manner to be specified by rules of court, the division shall file with the court a written transcript of the record of all prior proceedings. Upon the filing of a notice of petition and petition, the court shall have jurisdiction of the proceeding and of the questions determined therein, except that where the order sought to be reviewed was made as a result of a public hearing held pursuant to paragraph a of subdivision four of section two hundred ninety-seven of this article, the court shall make an order directing that the proceeding be transferred for disposition to the appellate division of the supreme court in the judicial department embracing the county in which the proceeding was commenced. The court shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript an order enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part such order. No objection that has not been urged in prior proceedings shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. Any party may move the court to remit the case to the division in the interests of justice for the purpose of adducing additional specified and material evidence and seeking findings thereon, provided he or she shows reasonable grounds for the failure to adduce such evidence in prior proceedings. The findings of facts on which such order is based shall be conclusive if supported by sufficient evidence on the record considered as a whole. All such proceedings shall be heard and determined by the court and any appeal taken from its judgment or order shall be reviewed by the appropriate appellate court as expeditiously as possible and with lawful precedence over other matters. The jurisdiction of the courts over these proceedings, as provided for herein, shall be exclusive and their judgments and orders shall be final, subject to appellate review in the same manner and form and with the same effect as provided for appeals from a judgment in a special proceeding. The division's copy of the testimony shall be available at all reasonable times to all parties for examination without cost and for the purposes of judicial review of such order. Any appeal under this section and any proceeding, if instituted under article seventy-eight of the civil practice law and rules to which the division or the board is a party shall be heard on the record without requirement of printing. The division may appear in court by one of its attorneys. A proceeding under this section when instituted by any complainant, respondent or other person aggrieved must be instituted within sixty days after the service of such order. In cases of housing discrimination only, a complaint dismissed after investigation for lack of jurisdiction or lack of probable cause may either be appealed pursuant to this section or the same cause of action may be filed in a court of appropriate jurisdiction pursuant to section two hundred ninety-seven of this article.

HISTORY:

Add, L 1951, ch 800, § 1, with substance transferred from § 133; amd, L 1952, ch 285, § 7; L 1962, ch 310, § 135; L 1968, ch 958, § 8; L 1978, ch 225, § 1; L 1984, ch 83, § 3; L 1985, ch 340, § 1; L 1988, ch 505, § 1, eff Aug 1, 1988 (see 1988 note below); L

2000, ch 166, § 35, eff July 18, 2000; L 2020, ch 236, § 2, effective January 5, 2021.

Editor's Notes: See 1962 note under § 63-a.

See 1968 note under § 290.

Laws 1988, ch 505, §§ 2, 3, eff Aug 1, 1988, provide as follows:

§ 2. Notwithstanding any other provision of law, an appellate division of supreme court may transfer any proceeding for judicial review of an order or determination of the state commissioner of human rights or the state division of human rights, instituted therein prior to the effective date of this section, to the supreme court in the county wherein the unlawful discriminatory practice which is the subject of the order occurred or wherein any person required in the order to cease and desist from an unlawful discriminatory practice or to take other affirmative action resides or transacts business; provided, however, the appellate division may not transfer any such proceeding wherein the order sought to be reviewed was made as a result of a public hearing held pursuant to paragraph a of subdivision four of section two hundred ninety-seven of the executive law. Any proceeding for judicial review of a determination of the human rights appeal board instituted in an appellate division prior to the effective date of this section shall be heard and determined in such court in accordance with the provisions of section two hundred ninety-eight of the executive law in effect on the day immediately preceding the effective date of this act.

§ 3. This act shall take effect immediately and shall be applied to any suit action or administrative proceeding now pending or instituted after the effective date hereof.

Laws 2020, ch 236, § 3, eff January 5, 2021, provides:

§ 3. This act shall take effect on the ninetieth day after it shall have become a law.

Laws 2020, ch 236, § 3, eff January 5, 2021, provides:

§ 3. This act shall take effect on the ninetieth day after it shall have become a law.

Amendment Notes The 2020 amendment by ch 236, § 2, added the last sentence.

Notes to Decisions

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1. In general

CPLR 5701, subd b par 1 is not all encompassing; it is limited to denying appeals as of right from intermediate orders only in Article 78 proceedings and has no application to a proceeding by the state commission for human rights to enforce its order pursuant to § 298 of the Executive Law. State Com. for Human Rights v Lieber, 23 N.Y.2d 253, 296 N.Y.S.2d 319, 244 N.E.2d 24, 1968 N.Y. LEXIS 973 (N.Y. 1968).

In a proceeding brought in the Appellate Division pursuant to section 298 of the Executive Law to review an order of the State Human Rights Appeal Board reversing a determination of the State Division of Human Rights, the appropriate point of reference for the invocation of the substantial evidence rule or of the test of arbitrariness is the division's ruling, not the board's. State Office of Drug Abuse Services v State Human Rights Appeal Board, 48 N.Y.2d 276, 422 N.Y.S.2d 647, 397 N.E.2d 1314, 1979 N.Y. LEXIS 2381 (N.Y. 1979).

Rule of Division of Human Rights, which permits only parties and their attorneys to participate in preliminary proceedings which precede finding of probable cause for public hearings, is helpful in enabling Division to discharge its duty of inquiry into alleged facts and is not unreasonable. McGrath v New York State Div. of Human Rights, 52 A.D.2d 1027, 383 N.Y.S.2d 911, 1976 N.Y. App. Div. LEXIS 12931 (N.Y. App. Div. 3d Dep't 1976).

Where record raised no factual issue relating to claim that law firm unlawfully discriminated against individual by refusing to hire him, and it appeared as matter of law that complaint lacked merit and failed to raise genuine factual issues, confrontation conference was not required. State Div. of Human Rights ex rel. Jafree v Bond, Schoeneck & King, 52 A.D.2d 1045, 384 N.Y.S.2d 568, 1976 N.Y. App. Div. LEXIS 12958 (N.Y. App. Div. 4th Dep't 1976).

A proceeding pursuant to Exec Law § 298, in which petitioner alleged he had been discriminated against by the Lottery Division due to age disability was not the appropriate vehicle to challenge the reclassification of a civil service position from competitive to noncompetitive. Reiniger v New York State Div. of Lottery, 105 A.D.2d 902, 482 N.Y.S.2d 60, 1984 N.Y. App. Div. LEXIS 21021 (N.Y. App. Div. 3d Dep't 1984), app. denied, 64 N.Y.2d 609, 1985 N.Y. LEXIS 18863 (N.Y. 1985).

Orders issued by the State Commission for Human Rights which do not relate to activities in interstate or foreign commerce are not invalid as invading a field preempted by a federal legislation. Delaney v Conway, 39 Misc. 2d 499, 241 N.Y.S.2d 384, 1963 N.Y. Misc. LEXIS 2081 (N.Y. Sup. Ct. 1963).

Where findings of the State Commission for Human Rights are supported by substantial evidence, most of which is not disputed, they are conclusive. Cooney v Katzen, 41 Misc. 2d 236, 245 N.Y.S.2d 548, 1963 N.Y. Misc. LEXIS 1318 (N.Y. Sup. Ct. 1963).

Under CLS Exec § 298, sole means of obtaining judicial review of commissioner's order is through commencement of special proceeding in Supreme Court, which proceeding may thereafter be transferred to Appellate Division. Cruz v Amsterdam Hous. Auth., 174 Misc. 2d 189, 662 N.Y.S.2d 1024, 1997 N.Y. Misc. LEXIS 448 (N.Y. Sup. Ct. 1997).

2. Jurisdiction, generally

In view of the broad power granted by the legislature in its delegation to the commission, the jurisdiction of the commission must be taken as plenary. Holland v Edwards, 282 A.D. 353, 122 N.Y.S.2d 721, 1953 N.Y. App. Div. LEXIS 4474 (N.Y. App. Div. 1953), aff'd, 307 N.Y. 38, 119 N.E.2d 581, 307 N.Y. (N.Y.S.) 38, 1954 N.Y. LEXIS 1009 (N.Y. 1954).

A complaint charging a public agency with an unfair discriminatory practice based upon a person's prior criminal convictions was properly dismissed by the State Division of Human Rights for lack of subject matter jurisdiction, since an Article 78 proceeding is the exclusive remedy available to remedy such a wrong. New York City Transit Authority v State Human Rights Appeal Bd., 97 A.D.2d 825, 468 N.Y.S.2d 708, 1983 N.Y. App. Div. LEXIS 20604 (N.Y. App. Div. 2d Dep't 1983), app. dismissed, 62 N.Y.2d 646, 1984 N.Y. LEXIS 8025 (N.Y. 1984).

Where the Commission upon complaint of a colored person had made a final order directed against a beach club and upon motion such order was not vacated but was enforced and thereafter the complainant sued the beach club in the municipal court to recover damages and the beach club moved to vacate the order of the Commission on the basis of additional evidence to the effect that the complainant had commenced such action which fact the Commission admitted in its brief and argument, the proceedings were not remitted to the Commission to establish an admitted fact, and the Commission was not ousted of jurisdiction because of the subsequent action in the municipal court. Castle Hill Beach Club, Inc. v Arbury, 144 N.Y.S.2d 747, 208 Misc. 622, 1955 N.Y. Misc. LEXIS 3245 (N.Y. Sup. Ct. 1955), modified, 1 A.D.2d 943, 150 N.Y.S.2d 367, 1956 N.Y. App. Div. LEXIS 5716 (N.Y. App. Div. 1st Dep't 1956).

By its enactment of General Municipal Law § 239-s giving New York City concurrent jurisdiction with the State Commission for Human Rights with respect to discrimination in housing, the legislature conclusively demonstrated its intention not to grant exclusive jurisdiction to the state in the matters of discrimination in housing. Feigenblum v Commission on Human Rights, 53 Misc. 2d 360, 278 N.Y.S.2d 652, 1967 N.Y. Misc. LEXIS 1658 (N.Y. Sup. Ct. 1967).

3. Jurisdiction of commission

State's strong and important public policy against discrimination and need for programmatic enforcement of antidiscrimination laws has led legislature to vest broad authority in Human Rights Commissioner so that he may take appropriate action to eliminate and prevent discriminatory practices, and human rights law should be liberally construed to accomplish its purposes. New York Institute of Technology v State Div. of Human Rights, 40 N.Y.2d 316, 386 N.Y.S.2d 685, 353 N.E.2d 598, 1976 N.Y. LEXIS 2891 (N.Y. 1976).

In view of the broad power granted by the legislature in its delegation to the commission, the jurisdiction of the commission must be taken as plenary. Holland v Edwards, 282 A.D. 353, 122 N.Y.S.2d 721, 1953 N.Y. App. Div. LEXIS 4474 (N.Y. App. Div. 1953), aff'd, 307 N.Y. 38, 119 N.E.2d 581, 307 N.Y. (N.Y.S.) 38, 1954 N.Y. LEXIS 1009 (N.Y. 1954).

Prior to September 1, 1967, on which date legislation became effective to give the Commission jurisdiction over discriminatory practices by volunteer fire departments, fire companies or fire corporations, the Commission lacked jurisdiction over such discriminatory practices and could make no order with regard to such alleged practices occurring prior to such date. Martin v State Com. for Human Rights etc., 33 A.D.2d 703, 306 N.Y.S.2d 186, 1969 N.Y. App. Div. LEXIS 2811 (N.Y. App. Div. 2d Dep't 1969).

In an action against an Association brought pursuant to Exec Law § 298 and CPLR Article 78 to enforce an order of the State Division of Human Rights, directing payment of damages to the complainant for sexual harassment, in personam jurisdiction over the respondent Association was obtained where the association had appeared generally by counsel, at which time an adjournment was requested and granted, and where, although respondent's counsel did not appear at the adjourned hearing, counsel had been contacted by telephone and had consented that the hearing proceed upon the condition that the respondent would have the right to reopen the proceeding in the event it deemed it appropriate. State Div. of Human Rights v National Economic Development Asso., 83 A.D.2d 807, 441 N.Y.S.2d 688, 1981 N.Y. App. Div. LEXIS 15161 (N.Y. App. Div. 1st Dep't 1981).

In a proceeding brought pursuant to Exec Law § 298, to review a determination of the State Human Rights Appeal Board, which affirmed an order of the State Division of Human Rights dismissing plaintiff's complaint for lack of subject matter jurisdiction, the court properly found that the State Division of Human Rights did not have subject matter jurisdiction over plaintiff's complaint since plaintiff had pursued his action in the federal courts and Exec Law § 297(9) prohibits plaintiffs who initiate any action in a court of competent jurisdiction from pursuing the same grievance before the Division of Human Rights. McGrath v State Human Rights Appeal Bd., 90 A.D.2d 916, 456 N.Y.S.2d 874, 1982 N.Y. App. Div. LEXIS 19195 (N.Y. App. Div. 3d Dep't 1982).

New York State Division of Human Rights properly dismissed, for lack of jurisdiction, claim of racial discrimination brought by certified home health care aide, who was employed by 93-year-old quadriplegic to provide 24-hour care to attend to his health and personal hygiene needs, to cook for him, to transport him, and otherwise to care for him. Thomas v Dosberg, 249 A.D.2d 999, 672 N.Y.S.2d 164, 1998 N.Y. App. Div. LEXIS 5177 (N.Y. App. Div. 4th Dep't 1998).

Public school districts were among the "educational institutions" over which the New York State Division of Human Rights had jurisdiction for N.Y. Exec. Law § 296(4) purposes, Matter of Ithaca City School Dist. v New York State Div. of Human Rights, 87 A.D.3d 268, 926 N.Y.S.2d 686, 2011 N.Y. App. Div. LEXIS 5474 (N.Y. App. Div. 3d Dep't 2011), rev'd, 19 N.Y.3d 481, 950 N.Y.S.2d 67, 973 N.E.2d 162, 2012 N.Y. LEXIS 1353 (N.Y. 2012).

Executive Law § 297, subd 2 is on its face nondiscriminatory, and since the Human Rights Division's policy not to take jurisdiction in cases involving its own employees is reasonable and rationally based, former division employee was not denied equal protection by refusal of division to take jurisdiction of his complaint. Colon v New York, Div. of Human Rights, 354 F. Supp. 343, 1973 U.S. Dist. LEXIS 15529 (S.D.N.Y. 1973), aff'd, 498 F.2d 1396 (2d Cir. N.Y. 1974).

4. Jurisdiction of court

Where, although point was not raised in petition for review of decision by Commissioner of Human Rights, it was briefed to Appellate Division by treating issue on its merits, Appellate Division implicitly exercised its statutory authority to review question of law regardless of absence of timely objection, and where case also involved question of far-reaching public importance concerning issue of statutory interpretation of which the State Human Rights Commission sought final judicial resolution, it was proper for Court of Appeals to consider merits of appeal. New York Institute of Technology v State Div. of Human Rights, 40 N.Y.2d 316, 386 N.Y.S.2d 685, 353 N.E.2d 598, 1976 N.Y. LEXIS 2891 (N.Y. 1976).

Employee's appeal from a ruling of the Commissioner of the New York State Division of Human Rights was improperly dismissed, as her failure to include a return date in the notice of petition was at best a technical defect that did not deprive the reveiwing court of subject matter jurisdictional under N.Y. Exec. Law § 298, and the employer waived its right to challenge the defect by actively participating in the proceeding without timely objecting to the defect on personal jurisdiction grounds. Matter of Ballard v HSBC Bank USA, 6 N.Y.3d 658, 815 N.Y.S.2d 915, 848 N.E.2d 1292, 2006 N.Y. LEXIS 1287 (N.Y. 2006).

A court does not go beyond its jurisdiction under the above statute when it orders specific measures to be taken to effectuate enforcement of Although it is the duty of the Commission and not of the court, to police the activities of the parties to a proceeding before the Commission and to guard against continued discriminatory practices, this is not to say that the court does not have jurisdiction upon proper representation to take whatever steps may be necessary to enforce its orders theretofore made. And there is no need for the court to reserve jurisdiction of the proceedings in order to do so since it is to be assumed that the Commission will discharge its obligations of enforcement and pursuant to the above statute, will come to the court whenever

necessary for assistance in that task. The court either under the specific power given to it by CPLR 5015 or under its inherent powers, may modify its order if changed circumstances indicate the necessity for so doing. State Com. for Human Rights v Farrell, 24 A.D.2d 128, 264 N.Y.S.2d 489, 1965 N.Y. App. Div. LEXIS 2993 (N.Y. App. Div. 1st Dep't 1965), app. denied, 17 N.Y.2d 418, 1966 N.Y. LEXIS 1711 (N.Y. 1966).

The jurisdiction of the Supreme Court, Appellate Division, to review orders of the State Human Rights Appeals Board is not restricted to orders which deal solely with the merits of any complaint, and any person aggrieved by any order of the board may obtain judicial review in that court. South African Airways v New York State Div. of Human Rights, 35 A.D.2d 516, 312 N.Y.S.2d 111, 1970 N.Y. App. Div. LEXIS 4160 (N.Y. App. Div. 1st Dep't 1970).

Petition for review of order of State Division of Human Rights, even though untimely filed pursuant to Executive L § 298, was treated as an answer in Board's proceeding to enforce said order, enabling judicial review on the merits of Board's determination. State Div. of Human Rights v Gillotte, 41 A.D.2d 890, 342 N.Y.S.2d 879, 1973 N.Y. App. Div. LEXIS 4733 (N.Y. App. Div. 4th Dep't 1973).

Proceeding initiated to enforce order of state commissioner of human rights was improperly commenced where appellate division had previously denied the application and dismissed the petition, and the Court of Appeals in dismissing the appeal from that decision, stated that it was without jurisdiction of such an appeal not involving a constitutional question for a denial of enforcement, absent permission to appeal, which permission is later denied. State Div. of Human Rights v Merante, 41 A.D.2d 973, 343 N.Y.S.2d 378, 1973 N.Y. App. Div. LEXIS 4556 (N.Y. App. Div. 3d Dep't 1973).

Fact that State Division of Human Rights failed to file cross motions seeking enforcement order from Appellate Division of Supreme Court within 30 days after appeal board entered its order did not result in court lacking jurisdiction to enforce order since time limit concerns proceeding for review. Guardian Capital Corp. v New York State Div. of Human Rights, 46 A.D.2d 832, 360 N.Y.S.2d 937, 1974 N.Y. App. Div. LEXIS 3585 (N.Y. App. Div. 3d Dep't 1974), app. dismissed, 36 N.Y.2d 806, 1975 N.Y. LEXIS 2680 (N.Y. 1975), app. denied, 37 N.Y.2d 705, 1975 N.Y. LEXIS 2770 (N.Y. 1975).

A proceeding pursuant to Exec Law § 298 to enforce a determination of the Commissioner of Human Rights finding that a state agency committed an unlawful discriminative practice and awarding a money award against the State would be properly enforceable pursuant to § 298 in the Appellate Division rather than in the Court of Claims, since the State's liability has already been established by law and this was not the sort of unresolved claim against which the doctrine of sovereign immunity could properly be raised. State Div. of Human Rights ex rel. Geraci v New York State Dep't of Correctional Services, 90 A.D.2d 51, 456 N.Y.S.2d 63, 1982 N.Y. App. Div. LEXIS 18809 (N.Y. App. Div. 2d Dep't 1982).

Enforcement proceedings under CLS Exec § 298 should be heard and determined by Supreme Court in first instance. State Div. of Human Rights v Kosmatos, 134 A.D.2d 729, 523 N.Y.S.2d 923, 1987 N.Y. App. Div. LEXIS 50915 (N.Y. App. Div. 3d Dep't 1987).

It was improper for Supreme Court to transfer Article 78 proceeding, seeking review of determination by Division of Human Rights finding no probable cause to believe there had been unlawful discriminatory practice, where no public hearing had been held pursuant to CLS Exec § 297; only where such hearing has been held shall Supreme Court transfer proceeding to appropriate Appellate Division. Bentkowsky v Tokio Re Corp., 139 A.D.2d 436, 527 N.Y.S.2d 25, 1988 N.Y. App. Div. LEXIS 3975 (N.Y. App. Div. 1st Dep't 1988).

It was error for Supreme Court to review determination of Division of Human Rights reached after hearing, and matter should simply have been transferred to Appellate Division, which has exclusive jurisdiction over such cases under CLS Exec § 298. State Div. of Human Rights ex rel. Albino v YMCA of Greater New York, 139 A.D.2d 440, 527 N.Y.S.2d 219, 1988 N.Y. App. Div. LEXIS 3983 (N.Y. App. Div. 1st Dep't), app. denied, 72 N.Y.2d 807, 532 N.Y.S.2d 848, 529 N.E.2d 178, 1988 N.Y. LEXIS 2531 (N.Y. 1988).

Judgment which granted petitioners' application to annul determination finding probable cause to believe that petitioner had engaged in unlawful discriminatory practice relating to employment, and dismissed complaint, reversed–in September 1987, respondent filed complaint with State Division of Human Rights charging that petitioner had discriminated against him because of his age; regional office issued determination of probable cause to believe that respondent had been discriminated against and recommended public hearing; petitioners sought judicial review and Supreme Court, in opinion dated July 21, 1988, held that petitioner had right to seek judicial review and that finding of probable cause should be annulled; petition was granted by judgment dated August 9, 1988 and entered August 16, 1988–Executive Law § 298 was amended effective August 1, 1988 to provide that any "person aggrieved by an order of the commissioner which is an order after public hearing, a cease and desist order, an order awarding damages, an order dismissing a complaint, or by an order of the division which makes a final disposition of a complaint may obtain judicial review thereof", and amendment was to apply to any action or administrative proceeding pending on or instituted after its effective date, August 1, 1988; this proceeding was pending at time of effective date of amendment because, although Supreme Court's opinion was dated prior to August 1, 1988, judgment granting petition had not yet been entered; since only final orders of Division were subject to judicial review as of August 1, 1988, Division's probable cause determination was not reviewable. Albany v New York State Div. of Human Rights, 157 A.D.2d 1008, 550 N.Y.S.2d 488, 1990 N.Y. App. Div. LEXIS 587 (N.Y. App. Div. 3d Dep't 1990).

Court should have granted defendants' summary judgment motion on ground that plaintiff elected to pursue administrative remedy by filing complaint with New York State Division of Human Rights (NYSDHR) since plaintiff failed to produce admissible proof as to whether her complaint was referred to NYSDHR by Equal Employment Opportunity Commission or whether she filed it directly with NYSDHR; she submitted only attorney's affirmation that was not based on personal knowledge of facts stated therein. Hirsch v Morgan Stanley & Co., 239 A.D.2d 466, 657 N.Y.S.2d 448, 1997 N.Y. App. Div. LEXIS 5365 (N.Y. App. Div. 2d Dep't 1997).

Failure to object to alleged inadequacy of translator at administrative hearing precluded employer from raising that issue in proceeding under CLS Exec § 298. Young Fu Hsu v New York State Div. of Human Rights, 241 A.D.2d 913, 661 N.Y.S.2d 400, 1997 N.Y. App. Div. LEXIS 7842 (N.Y. App. Div. 4th Dep't 1997).

It was proper to transfer a petition by the State Division of Human Rights to enforce its order finding unlawful discrimination and awarding damages to the appellate division, as the proceeding raised the issue of whether the division's order was supported by sufficient evidence in the record as a whole. State Div. of Human Rights v 1368 E. 94th St. Corp., 293 A.D.2d 752, 741 N.Y.S.2d 285, 2002 N.Y. App. Div. LEXIS 4094 (N.Y. App. Div. 2d Dep't 2002).

The Supreme Court has jurisdiction over a petition of the Commission Against Discrimination for an order of enforcement, even though respondent no longer resided or transacted business in Nassau County, in which the unlawful discriminatory practice occurred. The order of the Commission applied to the respondent with respect to any barber shop which he operated within the state. State Com. State Com. Against Discrimination v Mustachio, 56 Misc. 2d 47, 288 N.Y.S.2d 20, 1961 N.Y. Misc. LEXIS 2895 (N.Y. Sup. Ct. 1961).

Where the parties to a certain proceeding before the Commission for Human Rights entered into a stipulation authorizing the Commission to make a certain order and to apply to the Supreme Court for an order enforcing it, the Supreme Court would issue the enforcement order on motion of the Commission. State Com. for Human Rights v Mullen, 41 Misc. 2d 969, 246 N.Y.S.2d 725, 1963 N.Y. Misc. LEXIS 1237 (N.Y. Sup. Ct. 1963).

Section 298 of the Executive Law provides for judicial review of a decision of the State Human Rights Appeal Board, which

reviews decisions of the State Division of Human Rights (Executive Law, § 297-a), by way of appeal to the Appellate Division only, and, it also provides that in cases where no appeal has been taken to the board, the division may obtain an order of court for the enforcement of any order of the Commissioner of the State Division of Human Rights by direct application to the Appellate Division; thus, the only enforcement powers granted with respect to the enforcement of either nonappealed orders of the commissioner or of the board are given to the Appellate Division. Accordingly, a motion in the Supreme Court by the commissioner for a mandatory injunction compelling a respondent to obey the commissioner's order was denied, since the court does not have the power to grant the relief sought. Kramarsky v New York Psychoanalytic Institute, 102 Misc. 2d 806, 424 N.Y.S.2d 581, 1979 N.Y. Misc. LEXIS 2922 (N.Y. Sup. Ct. 1979).

Where a former employee sought judicial review of an order of the New York State Division of Human Rights pursuant to N.Y. Exec. Law § 298, her failure to comply with N.Y. C.P.L.R. 403(a) by specifying the return date for the hearing in her notice of petition deprived the trial court of subject-matter jurisdiction; the matter was transferred to the appellate division. State Div. of Human Rights v HSBC Bank U.S.A., 793 N.Y.S.2d 903, 8 Misc. 3d 521, 2005 N.Y. Misc. LEXIS 840 (N.Y. Sup. Ct. 2005).

As N.Y. Exec. Law § 298 provides that judicial review of an order of the New York State Division of Human Rights made after a public hearing may be obtained only in a proceeding commenced by the filing of a notice of petition and a petition, and N.Y. C.P.L.R. 101 provides that the civil practice law and rules do not apply where the procedure is regulated by inconsistent statute (such as N.Y. Exec. Law § 298), the petitioner could not turn to N.Y. C.P.L.R. 304 to excuse a jurisdictional defect in the notice of petition she filed and served. State Div. of Human Rights v HSBC Bank U.S.A., 793 N.Y.S.2d 903, 8 Misc. 3d 521, 2005 N.Y. Misc. LEXIS 840 (N.Y. Sup. Ct. 2005).

5. Failure to make prior objections before commission

Objections in respect of the commission's directives which were not made until after the commission had gone into court to secure enforcement of its orders, were too late for judicial review. Holland v Edwards, 307 N.Y. 38, 119 N.E.2d 581, 307 N.Y. (N.Y.S.) 38, 1954 N.Y. LEXIS 1009 (N.Y. 1954).

An objection that the commission did not have jurisdiction because the applicant could not be considered a person "aggrieved" within the meaning of the law is not open for review by the court where such objection was not urged before the commission. Holland v Edwards, 307 N.Y. 38, 119 N.E.2d 581, 307 N.Y. (N.Y.S.) 38, 1954 N.Y. LEXIS 1009 (N.Y. 1954).

Where Appellate Division has implicitly exercised its statutory authority to review question of law, regardless of absence of timely objection, and particularly where that court also had before it cross petition for enforcement, Court of Appeals may not later declare that the issue has not been preserved. New York Institute of Technology v State Div. of Human Rights, 40 N.Y.2d 316, 386 N.Y.S.2d 685, 353 N.E.2d 598, 1976 N.Y. LEXIS 2891 (N.Y. 1976).

Where, upon a motion to vacate a default judgment entered against it in a proceeding for a writ of prohibition, the State Division of Human Rights did not contend that the order of prohibition was improper prior to the completion of the administrative process, but the error is obvious from an examination of the record, the Appellate Division may consider it on appeal for the first time. Tessy Plastics Corp. v State Div. of Human Rights, 62 A.D.2d 36, 403 N.Y.S.2d 946, 1978 N.Y. App. Div. LEXIS 10415 (N.Y. App. Div. 4th Dep't 1978), aff'd, 47 N.Y.2d 789, 417 N.Y.S.2d 926, 391 N.E.2d 1007, 1979 N.Y. LEXIS 2058 (N.Y. 1979).

In an original proceeding pursuant to Exec Law § 298 in which the State Division of Human Rights sought an order enforcing a prior determination of the Commissioner of Human Rights that village had unlawfully discriminated against the complainant by discharging her from employment on the basis of her marital status, the village's failure to appeal the commissioner's order did not preclude the court's review of the order on the merits; the division's petition would be dismissed, although the points raised by the village did not warrant dismissal, where the court found that as a matter of law the complainant's discharge had not been motivated by conduct proscribed by Exec Law § 296. State Div. of Human Rights ex rel. Howarth v Spencerport, 78 A.D.2d 50, 434 N.Y.S.2d 52, 1980 N.Y. App. Div. LEXIS 13406 (N.Y. App. Div. 4th Dep't 1980).

6. Scope of judicial review

Whether the finality of an order from which an appeal is taken constitutes a jurisdictional predicate for appeal to the Appellate Division is purely a statutory matter. Accordingly, judicial review is available to a party aggrieved by a nonfinal order of the State Human Rights Appeal Board in a proceeding pursuant to section 298 of the Executive Law, since section 298 clearly allows any person aggrieved by any order of the board to obtain judicial relief thereof and, moreover, subdivision 7 of section 297-a, though defining the scope of the board's authority as including the power to remand the matter to the State Division of Human Rights for further proceedings, makes no attempt to distinguish these orders of remand from others which are reviewable; nor is such appeal to the Appellate Division barred by subdivision 9 of section 297 or section 300 of the Executive Law, which statutes prohibit separate plenary discrimination actions in the courts only when a charge on the same grievance is pending before the division. State Office of Drug Abuse Services v State Human Rights Appeal Board, 48 N.Y.2d 276, 422 N.Y.S.2d 647, 397 N.E.2d 1314, 1979 N.Y. LEXIS 2381 (N.Y. 1979).

Scope of judicial review under Human Rights Law is extremely narrow and is confined to consideration of whether commissioner's determination is supported by substantial evidence in record; courts may not weigh evidence or reject commissioner's determination if evidence is conflicting and room for choice exists. In re State Div. In re State Di v of Human Rights, 70 N.Y.2d 100, 517 N.Y.S.2d 715, 510 N.E.2d 799, 1987 N.Y. LEXIS 16800 (N.Y. 1987).

Administrative convenience dismissals under CLS Exec § 297(3)(c) are subject to judicial review to extent that they are "purely arbitrary"—that is, to extent that they contravene or threaten to contravene statute, constitutional right, or administrative regulation. Marine Midland Bank, N. A. v New York State Div. of Human Rights, 75 N.Y.2d 240, 552 N.Y.S.2d 65, 551 N.E.2d 558, 1989 N.Y. LEXIS 4454 (N.Y. 1989).

In reviewing the directives of the commission the court, after accepting the facts as found in the extent they rest on substantial evidence, may make any order which it deems the commission should have made. This power of review transcends the accustomed judicial review in this state since the power of revision is not here limited to situations that would be regarded as arbitrary, capricious or illegal. It seems to be the deliberate view of the legislature that the large powers given to the commission should be followed by an unusual measure of judicial supervision and a shared judicial responsibility. The scope of review under this section seems broader than that admissible under Article 78 of the Civil Practice Act on the one hand, but on the other there is a concomitant duty resting on the court to enforce the orders of the commission which are deemed by it to be lawful. Holland v Edwards, 282 A.D. 353, 122 N.Y.S.2d 721, 1953 N.Y. App. Div. LEXIS 4474 (N.Y. App. Div. 1953), aff'd, 307 N.Y. 38, 119 N.E.2d 581, 307 N.Y. (N.Y.S.) 38, 1954 N.Y. LEXIS 1009 (N.Y. 1954).

Although a person aggrieved by an order of the State Division of Human Rights may appeal therefrom to the Human Rights Appeal Board, and this is the appropriate remedy in the first instance, nevertheless, if the Division proceeds in the Appellate Division, pursuant to § 298 of the Executive Law, for enforcement of the order, the Appellate Division is required to decide whether there is substantial evidence to sustain the order and the court may reverse or modify the order and, if it modifies the order, it may direct its enforcement as modified. Ernsteins v State Div. of Human Rights, 35 A.D.2d 599, 313 N.Y.S.2d 856, 1970 N.Y. App. Div. LEXIS 3953 (N.Y. App. Div. 2d Dep't 1970), app. dismissed, 28 N.Y.2d 802, 321 N.Y.S.2d 907, 270 N.E.2d 725, 1971 N.Y. LEXIS 1426 (N.Y. 1971).

Where the record, considered as a whole, justified division's finding of no probable cause for sex discrimination charge, board impermissibly exceeded limited scope of its own review in vacating division's order of dismissal. Long Island R. R. Co. v State Div.

of Human Rights, 42 A.D.2d 857, 346 N.Y.S.2d 849, 1973 N.Y. App. Div. LEXIS 3639 (N.Y. App. Div. 2d Dep't 1973).

Fact findings of Human Rights Appeal Board are to be affirmed if supported by sufficient record evidence; question is not whether the record would convince one of the facts found but whether on the record a reasonable man might make the finding involved. State Div. of Human Rights ex rel. Osuwagu v County of Onondaga, 50 A.D.2d 716, 374 N.Y.S.2d 871, 1975 N.Y. App. Div. LEXIS 12592 (N.Y. App. Div. 4th Dep't 1975).

Decision of commissioner of Division of Human Rights must prevail if it is supported by substantial evidence, and it is supported by substantial evidence if it rests on such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. State Div. of Human Rights v Syracuse, 57 A.D.2d 452, 394 N.Y.S.2d 948, 1977 N.Y. App. Div. LEXIS 11822 (N.Y. App. Div. 4th Dep't 1977), aff'd, 43 N.Y.2d 958, 404 N.Y.S.2d 343, 375 N.E.2d 409, 1978 N.Y. LEXIS 1857 (N.Y. 1978).

A determination of the Commissioner of the State Division of Human Rights must be confirmed if the determination is supported by sufficient evidence on the record considered as a whole; sufficient evidence is substantial evidence or such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. State Div. of Human Rights v Syracuse City Teachers Asso., 66 A.D.2d 56, 412 N.Y.S.2d 711, 1979 N.Y. App. Div. LEXIS 9989 (N.Y. App. Div. 4th Dep't 1979).

The State Division of Human Rights did not act irrationally in dismissing a complaint alleging that a county employee was dismissed due to racial discrimination where the employee's dismissal for sexual harassment of other employees had been upheld in a previous proceeding. Petties v New York State Office of Mental Retardation & Developmental Disabilities, 106 A.D.2d 739, 483 N.Y.S.2d 775, 1984 N.Y. App. Div. LEXIS 21671 (N.Y. App. Div. 3d Dep't 1984).

Findings of fact by division of human rights must be upheld if supported by sufficient evidence on record considered as whole. New York State Dep't of Correctional Services v McCall, 109 A.D.2d 953, 486 N.Y.S.2d 443, 1985 N.Y. App. Div. LEXIS 47469 (N.Y. App. Div. 3d Dep't 1985).

In reviewing administrative decision, court does not substitute its judgment for that of agency, and where conflicting evidence exists it is for administrative board or agency to pass upon credibility of witnesses; court must confirm administrative determination as long as it is based on substantial evidence. State Div. of Human Rights ex rel. Campbell v Rochester Products Div. of General Motors Corp., 112 A.D.2d 785, 492 N.Y.S.2d 282, 1985 N.Y. App. Div. LEXIS 56028 (N.Y. App. Div. 4th Dep't 1985).

In proceeding alleging racial discrimination in public employment, nonfinal decision of regional director of state Division of Human Rights was reviewable by Supreme Court under CLS Exec § 298; right to Supreme Court review was not affected by 1984 amendment to statute, since pertinent statutory language was modified only by deleting word "board" and inserting phrase "commissioner or division." Monticello v New York State Div. of Human Rights, 127 A.D.2d 962, 127 A.D.2d 963, 512 N.Y.S.2d 568, 1987 N.Y. App. Div. LEXIS 43445 (N.Y. App. Div. 3d Dep't), app. dismissed, 70 N.Y.2d 793, 522 N.Y.S.2d 107, 516 N.E.2d 1220, 1987 N.Y. LEXIS 19272 (N.Y. 1987).

In a proceeding filed by a corporate employer and its owner under N.Y. Exec. Law § 298 for review of a determination of the New York Commissioner of Human Rights that awarded compensatory damages to an employee for hostile work environment sexual harassment, the Commissioner was free to make findings of fact and was not required to adhere to an administrative law judge's previous finding that the employee's claims were not credible; to the extent that the employer and owner contended that the employee fabricated her allegations, a credibility issue was presented that was for the Commissioner to resolve and that was not to be second-guessed by the appellate court. Matter of R & B Autobody & Radiator, Inc. v New York State Div. of Human Rights, 31 A.D.3d 989, 819 N.Y.S.2d 599, 2006 N.Y. App. Div. LEXIS 9469 (N.Y. App. Div. 3d Dep't 2006).

Commissioner of the New York State Division of Human Rights made a determination that an employer discriminated against complainant former employee on the basis of national origin that was not supported by sufficient evidence under N.Y. Exec. Law § 298 as the employee conceded committing the insubordinate act that led to his discharge; an allegation that the manager who fired the employee stated that he did not want Egyptians working in the building was specifically denied and was also not mentioned in the complaint against the employer. Matter of 80 Lafayette Assoc. v Gibson, 59 A.D.3d 231, 873 N.Y.S.2d 63, 2009 N.Y. App. Div. LEXIS 1167 (N.Y. App. Div. 1st Dep't 2009), app. denied, 17 N.Y.3d 710, 930 N.Y.S.2d 555, 954 N.E.2d 1181, 2011 N.Y. LEXIS 2956 (N.Y. 2011).

When the State Division of Human Rights (SDHR) found a landlord discriminated against prospective tenants on the basis of race in the leasing of housing, its determination was entitled to considerable deference due to its expertise in evaluating discrimination claims. Matteo v N.Y. State Div. of Human Rights, 306 A.D.2d 484, 761 N.Y.S.2d 517, 2003 N.Y. App. Div. LEXIS 7418 (N.Y. App. Div. 2d Dep't 2003).

Under CLS Executive Law § 298 and CLS CPLR Article 78, reviewing courts generally are not required to consider matters which were not raised in the administrative proceedings. United Federation of Teachers Welfare Fund v Kramarsky, 451 F. Supp. 333, 1978 U.S. Dist. LEXIS 17522 (S.D.N.Y. 1978), aff'd, 650 F.2d 1310, 1981 U.S. App. LEXIS 13404 (2d Cir. N.Y. 1981).

7. Specific orders reviewed

The dismissal of petitioner's complaint of unlawful discrimination upon a determination by a single member of the State Commission Against Discrimination, whose decision was not disturbed by the Commission chairman was reviewable by the courts. Jeanpierre v Arbury, 4 N.Y.2d 238, 173 N.Y.S.2d 597, 149 N.E.2d 882, 1958 N.Y. LEXIS 1072 (N.Y. 1958).

A determination of the commission and its cease and desist order against the operator of an employment agency who made oral and written inquiries in respect of an applicant's creed and national origin should be sustained. Holland v Edwards, 282 A.D. 353, 122 N.Y.S.2d 721, 1953 N.Y. App. Div. LEXIS 4474 (N.Y. App. Div. 1953), aff'd, 307 N.Y. 38, 119 N.E.2d 581, 307 N.Y. (N.Y.S.) 38, 1954 N.Y. LEXIS 1009 (N.Y. 1954).

In a proceeding pursuant to Exec Law § 298 to review a determination of the State Human Rights Appeal Board which affirmed an order of the State Division of Human Rights finding no probable cause to believe that respondent-employer engaged in an unlawful discriminatory practice against petitioner based on creed, the court would confirm the determination on the basis that it was not arbitrary or unreasonable, where, after petitioner contended that his employer discriminated against him because of his religious beliefs when it terminated his employment for failure to appear for work on Christmas Eve as scheduled, the Division made a prompt investigation to determine if there was probable cause to believe that an illegal discrimination occurred, which investigation included an interview with petitioner's parents after attempting without success to personally interview petitioner. Fellows v Capital Area Community Health Plan, 84 A.D.2d 872, 444 N.Y.S.2d 743, 1981 N.Y. App. Div. LEXIS 16120 (N.Y. App. Div. 3d Dep't 1981).

In an Article 78 proceeding, an employer had the discretion to properly charge to an employee's vacation time days off for observance of religious holidays, where prior to the holiday in question the employer changed its policy to provide that absences for religious holidays would be in all cases charged to either personal, vacation or compensatory leave. State Div. of Human Rights v Rochester Housing Authority, 85 A.D.2d 897, 446 N.Y.S.2d 736, 1981 N.Y. App. Div. LEXIS 16739 (N.Y. App. Div. 4th Dep't 1981).

In a proceeding initiated by a black citizen of a foreign country (charging a university with discrimination on the basis of race, color, and national origin), the complaint was properly dismissed where the alleged discrimination was based on length of appointment to the faculty on a 12-month contract, rather than a nine-month contract held by certain other faculty members, where all faculty members in petitioner's department held 12-month contracts, and where petitioner received a salary approximately 30 percent greater than comparable faculty members holding nine-month contracts. Murapa v Kramarsky, 88 A.D.2d

1009, 451 N.Y.S.2d 934, 1982 N.Y. App. Div. LEXIS 17420 (N.Y. App. Div. 3d Dep't 1982).

Commissioner is required to make prompt investigation by field visit, written or oral inquiry, conference, or any method or combination thereof; matter is remitted to division for full and thorough investigation where probable cause issue was investigated in cursory and abbreviated manner and no independent inquiry was conducted to verify complainant's assertions prior to issue of no probable cause determination; investigation consisting of one interview with employer's personnel officer, obtaining copies of leave of absence policy and office memoranda together with letters from employer's attorney is insufficient. State Div. of Human Rights ex rel. Beckman v Gaylord Bros., Inc., 112 A.D.2d 726, 492 N.Y.S.2d 217, 1985 N.Y. App. Div. LEXIS 56237 (N.Y. App. Div. 4th Dep't 1985).

Division's failure to conduct confrontation conference or otherwise address issues raised by complainant's response to field investigation report renders determination of no probable cause capricious. State Div. of Human Rights ex rel. Schwab v Walden Book Co., 112 A.D.2d 745, 492 N.Y.S.2d 220, 1985 N.Y. App. Div. LEXIS 56108 (N.Y. App. Div. 4th Dep't 1985).

While New York State Division of Human Rights' investigation of complaint need not be extensive, it must not be so abbreviated and one-sided that it results in record which does not afford reasonable basis for administrative determination; consequently, where petitioner, who was hired by respondent when she was 59 and discharged approximately one year later, alleges that her employment was terminated approximately 3 weeks short of her eligibility for employer's retirement and pension plan when employer realized great expense of putting 60-year old woman on that plan, division's investigation was so one-sided and abbreviated that determination of no probable cause must be overturned as capricious. Hendel v New York State Div. of Human Rights, 114 A.D.2d 897, 495 N.Y.S.2d 135, 1985 N.Y. App. Div. LEXIS 53928 (N.Y. App. Div. 2d Dep't 1985).

Determination of New York State Division of Human Rights that petitioner was not denied promotion because of her religion or creed was supported by substantial evidence; additionally, petitioner was given full and fair opportunity to present evidence on her behalf and to rebut evidence presented by respondent employer, but she failed to produce any supportive evidence; furthermore, it is within discretion of Division of Human Rights to decide method or methods to be employed in investigating complaints of discrimination. Kushnir v New York State Div. of Human Rights, 114 A.D.2d 898, 495 N.Y.S.2d 71, 1985 N.Y. App. Div. LEXIS 53929 (N.Y. App. Div. 2d Dep't 1985).

Determination of State Division of Human Rights is confirmed and petitioner's complaint of unlawful discriminatory practice based on race, color and sex is dismissed since upon review of record, evidence clearly supported division's finding that prospective employer did not reject petitioner; rather, State Labor Department never referred petitioner's application to employer because hours she indicated she could work did not correspond to hours needed by employer. Hedrington v Hercules Corp., 115 A.D.2d 147, 495 N.Y.S.2d 514, 1985 N.Y. App. Div. LEXIS 54408 (N.Y. App. Div. 3d Dep't 1985).

Trial court erred in dismissing an employee's application to review a determination by the State Division of Human Rights (SDHR) finding no probable cause to believe that her employer and manager engaged in unlawful discrimination and retaliation against her because SDHR specifically requested that the court remand this case so that SDHR could conduct further investigation conceding that it "may have overlooked or not given full consideration" to the issues raised by the employee, that the final investigation and report erroneously included information from a wholly unrelated case, and the witnesses identified by the employee were not interviewed during the investigative process. Matter of Schwindt v Niagara Mohawk Power Corp., 186 A.D.3d 1809, 130 N.Y.S.3d 126, 2020 N.Y. App. Div. LEXIS 5113 (N.Y. App. Div. 3d Dep't 2020).

While it would seem from a reading of this section that no specific provision is made for judicial review of an intermediate order of dismissal, such as a finding by an investigating commissioner of the State Commission for Human Rights that probable cause for the petition did not exist, the rule is well settled that, in absence of any clear legislative expression to the contrary, courts may review discretionary acts of an administrative officer by an art. 78 proceeding to determine whether he has exercised discretion in an arbitrary or capricious manner. Application of United Asso. of Journeymen, etc., 40 Misc. 2d 440, 243 N.Y.S.2d 61, 1963 N.Y. Misc. LEXIS 1617 (N.Y. Sup. Ct. 1963).

Pursuant to Exec Law § 295(7), the State Division of Human Rights may hold hearings, provide for cross-interrogatories, subpoena witnesses and compel their attendance, administer oaths, take testimony, and require the production or examination of books and papers, and these are manifestly judicial or quasi-judicial functions for which the state is immune. Since by virtue of Exec Law § 298, the Appellate Divisions of the various Departments were given exclusive jurisdiction to review determinations of the Appeal Board, a claimant who had exercised his right to obtain such review could not launch a collateral attack upon the proceedings of the Division or the Appellate Board through an action in the Court of Claims. Rabinovici v State, 108 Misc. 2d 664, 438 N.Y.S.2d 460, 1981 N.Y. Misc. LEXIS 2266 (N.Y. Ct. Cl. 1981).

There is no provision in CLS Exec § 298 for review of order of hearing examiner, who may only prepare proposed order for presentation to commissioner. Cruz v Amsterdam Hous. Auth., 174 Misc. 2d 189, 662 N.Y.S.2d 1024, 1997 N.Y. Misc. LEXIS 448 (N.Y. Sup. Ct. 1997).

Hearing examiner's order in housing discrimination action was not directly reviewable, either by appeal or in special proceeding under CLS Exec § 298, and filing of notice of appeal with Supreme Court, Appellate Division, was not proper method of obtaining judicial review, absent evidence that commissioner issued order in matter. Cruz v Amsterdam Hous. Auth., 174 Misc. 2d 189, 662 N.Y.S.2d 1024, 1997 N.Y. Misc. LEXIS 448 (N.Y. Sup. Ct. 1997).

8. Aggrieved persons

An objection that the commission did not have jurisdiction because the applicant could not be considered a person "aggrieved" within the meaning of the law is not open for review by the court where such objection was not urged before the commission. Holland v Edwards, 307 N.Y. 38, 119 N.E.2d 581, 307 N.Y. (N.Y.S.) 38, 1954 N.Y. LEXIS 1009 (N.Y. 1954).

Respondent NAACP was entitled to lodge complaint as an aggrieved party under statutory provisions and the Division of Human Rights did not lack jurisdiction simply because the alleged violator is a municipal agency. Glen Cove Municipal Civil Service Com. v Glen Cove NAACP, 34 A.D.2d 956, 312 N.Y.S.2d 400, 1970 N.Y. App. Div. LEXIS 4640 (N.Y. App. Div. 2d Dep't), app. denied, (N.Y. App. Div. 1970).

Although a person aggrieved by an order of the State Division of Human Rights may appeal therefrom to the Human Rights Appeal Board, and this is the appropriate remedy in the first instance, nevertheless, if the Division proceeds in the Appellate Division, pursuant to § 298 of the Executive Law, for enforcement of the order, the Appellate Division is required to decide whether there is substantial evidence to sustain the order and the court may reverse or modify the order and, if it modifies the order, it may direct its enforcement as modified. Ernsteins v State Div. of Human Rights, 35 A.D.2d 599, 313 N.Y.S.2d 856, 1970 N.Y. App. Div. LEXIS 3953 (N.Y. App. Div. 2d Dep't 1970), app. dismissed, 28 N.Y.2d 802, 321 N.Y.S.2d 907, 270 N.E.2d 725, 1971 N.Y. LEXIS 1426 (N.Y. 1971).

Petitioner, as designer and marketer of "Stanton Survey" used by prospective employers to screen job applicants, had standing to seek judicial determination that Department of Labor (DOL) acted outside its authority in denying targeted jobs tax credits to employers using Stanton Survey on ground that use of survey would violate Ex-Offenders Law, since interests espoused by petitioner fell within "zone of interest" protected by statute, which requires final determination by appropriate agency before DOL may take action to deny services to offending employers. Stanton Corp. v Department of Labor, 166 A.D.2d 331, 561 N.Y.S.2d 6, 1990 N.Y. App. Div. LEXIS 12748 (N.Y. App. Div. 1st Dep't 1990).

On a proceeding brought by the State Commission Against Discrimination to enforce its order directed against discriminatory practices with respect to leasing of apartments in publicly assisted housing accommodations, an application by tenants to intervene for the purpose of opposing the enforcement of the order of the Commission was denied. The tenants were not parties in the proceeding before the Commission, were not persons aggrieved by the order of the Commission and were not entitled to a judicial review. New York State Com. New York State Com. Against Discrimination v Pelham Hall Apartments, Inc., 10 Misc. 2d 346, 171 N.Y.S.2d 558, 1958 N.Y. Misc. LEXIS 4048 (N.Y. Sup. Ct. 1958).

9. Housing discrimination

On the basis that Executive Law § 298 is unambiguous and requires the Appellate Division to examine and test the merits in any proceeding properly before it, the Appellate Division, pursuant to Executive Law § 298, properly reversed the finding of the State Division of Human Rights that a discriminatory practice had occurred where it was shown that a seller of realty refused to attend the closing, and that the prospective purchaser was a Negro, but not that the refusal of seller was occasioned by the race of the buyer. State Div. of Human Rights v Bystricky, 30 N.Y.2d 322, 333 N.Y.S.2d 398, 284 N.E.2d 560, 1972 N.Y. LEXIS 1630 (N.Y. 1972).

University's policy of limiting cohabitational housing eligibility to students, their spouses and dependent children did not facially discriminate against lesbians and gay men based on marital status, and thus action alleging such discrimination in violation of state and city Human Rights Laws was properly dismissed. Levin v Yeshiva Univ., 96 N.Y.2d 484, 730 N.Y.S.2d 15, 754 N.E.2d 1099, 2001 N.Y. LEXIS 2016 (N.Y. 2001).

Where discrimination had been found with respect to housing accommodations, an order involving "preferential referral" made by the Division of Human Rights was in direct conflict with the state's public policy to assure every individual an equal opportunity in respect to housing. State Div. of Human Rights ex rel. Johnson v Stern, 37 A.D.2d 441, 326 N.Y.S.2d 500, 1971 N.Y. App. Div. LEXIS 2833 (N.Y. App. Div. 4th Dep't 1971).

The evidence was insufficient to support a finding that complainant was discriminated against on her application for an apartment because of her color where it appeared that she did not qualify for an apartment under the standards utilized by respondents for all applicants, that her income was insufficient to meet the rule of thumb applied by respondent for financial ability, that she lied to the credit checker about her children's schooling, that the one-bedroom apartment for which she applied was insufficient to accommodate her 3 children, and that the credit check indicated she had experienced prior difficulties in meeting her obligations. State Div. of Human Rights v Fairway Apartments Corp., 39 A.D.2d 761, 332 N.Y.S.2d 474, 1972 N.Y. App. Div. LEXIS 4543 (N.Y. App. Div. 2d Dep't 1972), aff'd, 33 N.Y.2d 754, 350 N.Y.S.2d 131, 304 N.E.2d 775, 1973 N.Y. LEXIS 976 (N.Y. 1973).

Though, under the Executive Law provision prohibiting the managing agent of a publicly assisted housing accommodation from denying public housing to an applicant because such person suffers a disability, a determination of ineligibility for public housing accommodations grounded solely on mental disability would constitute an unlawful discriminatory practice, statute did not mean that a mentally disabled person could under no circumstances be denied eligibility; statute could not be used to insulate such an applicant from disqualification for public housing based on a valid reason. New York City Housing Authority Tenant Selection Div. v State Human Rights Appeal Board, 59 A.D.2d 742, 398 N.Y.S.2d 562, 1977 N.Y. App. Div. LEXIS 13750 (N.Y. App. Div. 2d Dep't 1977).

In a proceeding pursuant to Exec Law § 298 in which petitioner alleged that developer discriminated against him on the basis of race and color in connection with his purchase of a house, petitioner's complaint would be reinstated and the matter remitted to the State Division of Human Rights for public hearing pursuant to Exec Law § 297(4)(a). The findings of the state's human rights specialist, on which a no probable cause determination was based, were in many instances either inaccurate or without support in the record. Moreover, even assuming that the factual predicates relied upon by the human rights specialists were correct, the petitioner established that the delays experienced by his white neighbors were not comparable to the delays he suffered between the time he placed a binder deposit and executed a contract for his house and its completion. Rush v State Human Rights Appeal Bd., 108 A.D.2d 805, 485 N.Y.S.2d 321, 1985 N.Y. App. Div. LEXIS 43128 (N.Y. App. Div. 2d Dep't 1985).

Court annulled Division of Human Rights' determination that respondent unlawfully discriminated in rental of available housing on basis of race and color, where respondent contended that it did not rent townhouse to complainant because it was unaware of her offer and because it intended to sell townhouse and would rent it only as "a last resort," no employee of respondent ever met complainant, there was no evidence that respondent knew that she was black, and there was no evidence that respondent entertained any offers from other persons interested only in renting. State Div. of Human Rights v RHS Mgmt. Corp., 270 A.D.2d 426, 707 N.Y.S.2d 123, 2000 N.Y. App. Div. LEXIS 4242 (N.Y. App. Div. 2d Dep't 2000).

An application to vacate an order of the Commission for Human Rights requiring the owner of a multiple residence consisting of eight apartments to cease and desist from discriminating against Negro applicants to rent vacant apartments cannot be granted as against a motion to require enforcement of the order on the basis of an argument by the landlord that he has already rented one of the eight apartments to a Negro family and, because of the adverse reactions of his white tenants, has promised not to rent any more to Negroes because he has already taken in his quota of Negroes and cannot afford to take in any more as long as the attitude of the white community remains the same. Cooney v Katzen, 41 Misc. 2d 236, 245 N.Y.S.2d 548, 1963 N.Y. Misc. LEXIS 1318 (N.Y. Sup. Ct. 1963).

The overriding public policy that dictated enactment of this legislation would be frustrated if corporations or employers could evade their responsibility by claiming a challenged act was unauthorized and, therefore, order of Human Rights Commission directed against corporate real estate broker because of certain discriminatory actions by one of its employees was proper even though there was no proof that the corporation at any time was aware of, or participated in, or countenanced the acts of its employee. State Com. for Human Rights v Suburban Associates, Inc., 55 Misc. 2d 920, 286 N.Y.S.2d 733, 1967 N.Y. Misc. LEXIS 1016 (N.Y. Sup. Ct. 1967), modified, 34 A.D.2d 662, 310 N.Y.S.2d 1019, 1970 N.Y. App. Div. LEXIS 5125 (N.Y. App. Div. 2d Dep't 1970).

Where party complained of discriminatory practices perpetrated by real estate company and its agents and a commission official interviewed the complainant, made notes, and then dictated the complaint and the notes were destroyed whereupon complainant signed the complaint, the failure to produce the notes at a hearing did not constitute a violation of the rights of the real estate corporation or its agents, since in absence of any indication that destruction of the notes was for any improper purpose or that the data contained therein was not preserved in official records or reports, there was no requirement that all memoranda made in the course of an investigation be preserved. State Com. for Human Rights v Suburban Associates, Inc., 55 Misc. 2d 920, 286 N.Y.S.2d 733, 1967 N.Y. Misc. LEXIS 1016 (N.Y. Sup. Ct. 1967), modified, 34 A.D.2d 662, 310 N.Y.S.2d 1019, 1970 N.Y. App. Div. LEXIS 5125 (N.Y. App. Div. 2d Dep't 1970).

Provision in order of Commission for Human Rights restraining discrimination in rental of housing accommodations, land or commercial space subject to the law against discrimination would be deleted insofar as it applied to land and commercial space where hearing upon which such order was based involved no property of such nature. New York State Com. for Human Rights v E. Landau Industries, Inc., 57 Misc. 2d 918, 293 N.Y.S.2d 917, 1968 N.Y. Misc. LEXIS 1200 (N.Y. Sup. Ct. 1968).

10. Employment discrimination

Under employment discrimination provisions of Human Rights Law, where condition exists in fact which permits objective test as to whether practice operates invidiously against particular group, if it be so found, such obstacle can and should be removed by

appropriate action unless practice can be justified by business necessity. State Div. of Human Rights v Kilian Mfg. Corp., 35 N.Y.2d 201, 360 N.Y.S.2d 603, 318 N.E.2d 770, 1974 N.Y. LEXIS 1309 (N.Y. 1974), app. dismissed, 420 U.S. 915, 95 S. Ct. 1108, 43 L. Ed. 2d 387, 1975 U.S. LEXIS 506 (U.S. 1975).

Condonation, which may sufficiently implicate employer in discriminatory acts of its employee, to constitute basis for employer liability under Human Rights Law, contemplates knowing, after-the-fact forgiveness or acceptance of offense; employer's calculated inaction in response to discriminatory conduct may, as readily as affirmative conduct, indicate condonation. State Div. of Human Rights ex rel. Greene v St. Elizabeth's Hosp., 66 N.Y.2d 684, 496 N.Y.S.2d 411, 487 N.E.2d 268, 1985 N.Y. LEXIS 17238 (N.Y. 1985).

Where county employee's dismissal was occasioned solely by his refusal to obey lawful order of his superiors, State Division of Human Rights properly dismissed employee's complaint; fact that petitioner disobeyed orders on basis of his good faith belief in their illegality was matter for hearing officer of department which employed petitioner and for county civil service commission. Short v State Div. of Human Rights, 44 A.D.2d 557, 352 N.Y.S.2d 673, 1974 N.Y. App. Div. LEXIS 5574 (N.Y. App. Div. 2d Dep't 1974).

Where unlawfully discharged employee made no attempt to obtain other employment until almost five months after her discharge, although she was not physically prevented from doing so, award of backpay was arbitrary and capricious. 121-129 Broadway Realty, Inc. v New York State Div. of Human Rights, 48 A.D.2d 975, 369 N.Y.S.2d 837, 1975 N.Y. App. Div. LEXIS 10269 (N.Y. App. Div. 3d Dep't 1975).

Human Rights Appeal Board's order vacating an order of the division of human rights dismissing complaint by former city employee charging discrimination, though nonfinal, was appealable to the Supreme Court, Appellate Division, as of right. New York City Housing Authority v State Div. on Human Rights, 53 A.D.2d 844, 385 N.Y.S.2d 785, 1976 N.Y. App. Div. LEXIS 13674 (N.Y. App. Div. 1st Dep't 1976).

In a proceeding by a married female job applicant who alleged that she had been discriminated against because of her marital status, the trial court erred in affirming a determination ordering an employer to hire the applicant where it was obvious that the applicant was denied employment not because of her marital status but, rather, because of the additional fact that her husband already worked for the employer; such a refusal to hire is lawful and does not constitute discrimination based upon marital status. Campbell Plastics, Inc. v New York State Human Rights Appeal Bd., 81 A.D.2d 991, 440 N.Y.S.2d 73, 1981 N.Y. App. Div. LEXIS 11735 (N.Y. App. Div. 3d Dep't 1981).

An order finding that a county sheriff was guilty of an unlawful discriminatory practice based on national origin with respect to his discharge of one of his deputies would be modified by annulling that portion that directed the complainant be offered a position as a deputy with the current sheriff, where the current sheriff had not committed any discriminatory acts and thus an order forcing him to hire a deputy not of his own choosing, but for whose acts he would nevertheless be personally liable, would deprive him of the power to select his own duties and was thus beyond the division's power to fashion remedies. County of Clinton v Kramarsky, 90 A.D.2d 649, 456 N.Y.S.2d 264, 1982 N.Y. App. Div. LEXIS 18726 (N.Y. App. Div. 3d Dep't 1982).

There was a reasonable basis for the administrative determination that petitioner was not subjected to an unlawful discriminatory practice, where a dangerous chemical had been found in petitioner's locker, he had been placed on notice after prior safety violations that another infraction would result in dismissal, and the information submitted in support of his claim of racial discrimination was vague and uncorroborated. Lee v New York State Human Rights Appeal Bd., 111 A.D.2d 748, 490 N.Y.S.2d 242, 1985 N.Y. App. Div. LEXIS 49989 (N.Y. App. Div. 2d Dep't 1985).

There was probable cause to believe respondent employer unlawfully discriminated against petitioner by firing him for denying existence of criminal record where he had been convicted of disorderly conduct, since petitioner truthfully answered question on employment application; crime is defined as misdemeanor or felony and disorderly conduct is neither. State Div. of Human Rights ex rel. Maymi v Sorrento Cheese Co., 115 A.D.2d 323, 495 N.Y.S.2d 865, 1985 N.Y. App. Div. LEXIS 54602 (N.Y. App. Div. 4th Dep't 1985).

Requirement that employer either has knowledge of or acquiesces in discriminatory conduct in order to be held liable for conduct is clearly satisfied where employer and harasser are same individual. Salvatore v New York State Div. of Human Rights, 118 A.D.2d 715, 500 N.Y.S.2d 47, 1986 N.Y. App. Div. LEXIS 54574 (N.Y. App. Div. 2d Dep't 1986).

City police commissioner's decision to dismiss police officer was based on his misconduct, not his alcoholism, where officer, while attending memorial service for slain police officers, twice slid down hotel banister in nude and once discharged fire extinguisher without cause, resulting in hotel's evacuation in early morning hours. Hagmaier v Bratton, 245 A.D.2d 147, 665 N.Y.S.2d 880, 1997 N.Y. App. Div. LEXIS 13034 (N.Y. App. Div. 1st Dep't 1997).

State Division of Human Rights properly determined that an employer did not engage in an unlawful discriminatory practice when it terminated a disabled employee, who suffered from multiple sclerosis, as the employee, who worked as a drive-thru crew member of the employer's donut shop, was unable to contradict the employer's reasons for terminating the employee, and five others on the same day, which reasons included downsizing, job performance, and seniority. Proof was also presented that 10 additional employees were terminated prior to the new calendar year as part of the general overhaul of the store after a change in management occurred. Matter of Harrison v Chestnut Donuts, Inc., 60 A.D.3d 1130, 874 N.Y.S.2d 609, 2009 N.Y. App. Div. LEXIS 1547 (N.Y. App. Div. 3d Dep't 2009).

Where county and county officials against whom employment discrimination complaints were filed with the State Division of Human Rights failed to obtain dismissal of the complaints before the Division, recourse of county and officials after final determination in the Division was an appeal to the State Human Rights Appeal Board and, thereafter, review in an Article 78 proceeding before the Appellate Division. State Div. of Human Rights ex rel. Fitzhugh v County of Monroe, 88 Misc. 2d 16, 386 N.Y.S.2d 317, 1976 N.Y. Misc. LEXIS 2373 (N.Y. Sup. Ct. 1976).

Substantial evidence supported the Commissioner of Human Rights' decision that the Department of Correctional Services did not unlawfully discriminate against an applicant for a job as a correctional officer when it disqualified him because he could not raise one arm above his chest, because this limitation could endanger the applicant, other correctional officers, inmates or the public. Pageau v Tolbert, 304 A.D.2d 1067, 758 N.Y.S.2d 712, 2003 N.Y. App. Div. LEXIS 4224 (N.Y. App. Div. 3d Dep't 2003).

State Division of Human Rights dismissal of former employee's disability discrimination claim was upheld in an N.Y. Exec. Law § 298 proceeding because the employer made reasonable efforts to both communicate with the former employee and consider accommodations requested, and former employee's delay in responding to employer was unexplained; the employer kept the former employee and his lawyer informed of the leave time, but, after the request for additional information, neither of them contacted the employer to inquire about the status of the accommodations request, or seek additional time to respond to the employer's inquiry. Matter of Vinikoff v New York State Div. of Human Rights, 83 A.D.3d 1159, 920 N.Y.S.2d 458, 2011 N.Y. App. Div. LEXIS 2698 (N.Y. App. Div. 3d Dep't 2011).

11. Sex discrimination

A woman, who was denied pregnancy-related disability benefits solely on the basis that she had not applied for them within the 26-week period as provided by Work Comp Law § 217(1), was not subjected to an unlawful discriminatory practice on the basis of sex in employment in violation of Exec Law § 296(a)(1). Corbin, Ltd. v State Div. of Human Rights, 56 N.Y.2d 537, 449 N.Y.S.2d 966, 434 N.E.2d 1344, 1982 N.Y. LEXIS 3222 (N.Y. 1982).

Court of Appeals had jurisdiction to hear transit authority employee's appeal of Appellate Division's reduction of sex discrimination award, even though initial award was nonfinal, since

appeal lay pursuant to CLS CPLR § 5602(a)(2) and CLS Exec § 298. New York City Transit Authority v State Div. of Human Rights, 78 N.Y.2d 207, 573 N.Y.S.2d 49, 577 N.E.2d 40, 1991 N.Y. LEXIS 1010 (N.Y. 1991).

City department which had established height and weight requirements for lifeguards which excluded virtually all female applicants ordered to take steps to insure that any such standards bear proper and real relation to the job functions, although there was no evidence of intent to discriminate against females. State Div. of Human Rights ex rel. Callery v New York City Dep't of Parks & Recreation, 38 A.D.2d 25, 326 N.Y.S.2d 640, 1971 N.Y. App. Div. LEXIS 2743 (N.Y. App. Div. 1st Dep't 1971).

Where the record, considered as a whole, justified division's finding of no probable cause for sex discrimination charge, board impermissibly exceeded limited scope of its own review in vacating division's order of dismissal. Long Island R. R. Co. v State Div. of Human Rights, 42 A.D.2d 857, 346 N.Y.S.2d 849, 1973 N.Y. App. Div. LEXIS 3639 (N.Y. App. Div. 2d Dep't 1973).

State Division of Human Rights erred in ordering city not to appoint to vacant police sergeant post anyone other than policewoman who ranked third on eligibility list for the post and who had alleged that she had been the subject of sex discrimination in not receiving prior appointment since such action assumed that the policewoman was necessarily more qualified than any other potential candidate and would have effectively substituted the judgment of the Division for that of the appropriate appointing authorities. Schenectady v State Div. of Human Rights, 45 A.D.2d 569, 360 N.Y.S.2d 111, 1974 N.Y. App. Div. LEXIS 3742 (N.Y. App. Div. 3d Dep't 1974), rev'd, 37 N.Y.2d 421, 373 N.Y.S.2d 59, 335 N.E.2d 290, 1975 N.Y. LEXIS 2042 (N.Y. 1975).

Court is required to hear and determine as expeditiously as possible proceedings under Executive Law charging sex discrimination. Guardian Capital Corp. v New York State Div. of Human Rights, 48 A.D.2d 753, 368 N.Y.S.2d 594, 1975 N.Y. App. Div. LEXIS 9834 (N.Y. App. Div. 3d Dep't), app. denied, 37 N.Y.2d 712, 1975 N.Y. LEXIS 2959 (N.Y. 1975).

A formal hearing on claim of sex discrimination in employment was not required as long as record indicated that dismissal of complaint by State Division of Human Rights was not arbitrary, capricious nor an abuse of discretion. Pixley v Raymond Corp., 59 A.D.2d 979, 399 N.Y.S.2d 411, 1977 N.Y. App. Div. LEXIS 14248 (N.Y. App. Div. 3d Dep't 1977).

In a proceeding brought by a male probation officer to review an order of the State Division of Human Rights dismissing his complaint of sex discrimination upon a finding of a lack of probable cause, the failure of the Division to make the proper investigation into a regulation, permitting pregnant employees to use accumulated sick leave to extend infant care leave without any showing of actual disability, required a remand of the male probation officer's request to use his accumulated sick leave while on infant care leave in order to determine the validity of the regulation on its face and in its implementation; to the extent that the regulation so intended and that its implementation so operated, there was an apparent discrimination, at least to the extent that a pregnant woman who was able to work was authorized to utilize her sick leave while a man who had fathered a child and been given home care leave was denied the right to utilize sick leave. Chavkin v Santaella, 81 A.D.2d 153, 439 N.Y.S.2d 654, 1981 N.Y. App. Div. LEXIS 10507 (N.Y. App. Div. 1st Dep't 1981).

In a proceeding initiated pursuant to Exec Law § 298 to review a determination of the State Human Rights Appeal Board which affirmed an order of the State Division of Human Rights dismissing a petitioner's complaint based on allegations that her employer was discriminating against her because of her age and sex, the determination would be confirmed, where the petitioner had full opportunity to present her contentions and evidence and the investigation was not so inadequate as to render the determination of no probable cause arbitrary and capricious. The dismissal of the complaint by the State Division of Human Rights for lack of probable cause was not an abuse of discretion since the division's expertise in evaluating discrimination claims may not be lightly disregarded and since the Human Rights Law applies only when an employment decision was in fact actuated by discrimination. Piekielniak v New York State Dep't of Health, 90 A.D.2d 585, 456 N.Y.S.2d 128, 1982 N.Y. App. Div. LEXIS 18649 (N.Y. App. Div. 3d Dep't 1982).

Where determinations of no probable cause are based on investigations which are one sided and abbreviated, determination will be annulled; thus, in sex discrimination case, determination will be annulled where it was made solely on basis of petitioner's verified petition, letter from respondent's attorney, and petitioner's written response, petitioner was not interviewed in person nor were witnesses questioned, respondent's attorney did not have first hand knowledge of facts and his submitted information should therefore not have been relied upon, there was no contact with supervisors or personnel officers employed by respondent who might have had first hand knowledge, and where statistical data showing significantly lower success rate for women than for men was disregarded by investigator. Pape-Becker v Equitable Life Assurance Soc., 111 A.D.2d 427, 488 N.Y.S.2d 321, 1985 N.Y. App. Div. LEXIS 51523 (N.Y. App. Div. 3d Dep't 1985).

Defendants' former employee stated cause of action for unlawful employment discrimination on basis of sex where she had exemplary performance evaluations for 11 years prior to 7-month tenure of supervisor who fired her for poor job performance, she claimed that supervisor actually fired her because she refused to perform certain menial tasks (such as bringing him coffee, tea and oranges) that were not part of her job description, and she alleged that her successor (also female) was fired for refusing to do same tasks. Spector v Hebrew Hosp. Home, 229 A.D.2d 571, 646 N.Y.S.2d 37, 1996 N.Y. App. Div. LEXIS 8254 (N.Y. App. Div. 2d Dep't 1996).

Student and part-time employee of college had no cause of action against college for sex discrimination under CLS Exec § 296 where college placed its basketball coach on leave immediately after plaintiff informed it of coach's discriminatory conduct, and thus it did not acquiesce in or condone that conduct. Sormani v Orange County Community College, 240 A.D.2d 724, 659 N.Y.S.2d 507, 1997 N.Y. App. Div. LEXIS 7119 (N.Y. App. Div. 2d Dep't 1997).

Prior service of process on New York City Commission on Human Rights and Corporation Counsel of City of New York under NYC Admin Code § 8-502(c) is not condition precedent to valid commencement of sex discrimination action under NYC Admin Code Title 8. Teller v America West Airlines, 240 A.D.2d 727, 659 N.Y.S.2d 314, 1997 N.Y. App. Div. LEXIS 7132 (N.Y. App. Div. 2d Dep't 1997).

Attorney was entitled to summary judgment dismissing his legal secretary/office manager's action for sex discrimination where, after attorney broke off parties' wholly consensual sexual relationship in order to attempt reconciliation with his wife, he terminated manager's employment because he no longer desired to have intimate relationship with her, and there was no coercion, harassment, or unwelcome sexual conduct before or after breakup of relationship, which was based on mutual affection. Mauro v Orville, 259 A.D.2d 89, 697 N.Y.S.2d 704, 1999 N.Y. App. Div. LEXIS 10935 (N.Y. App. Div. 3d Dep't 1999), app. denied, 94 N.Y.2d 759, 705 N.Y.S.2d 6, 726 N.E.2d 483, 2000 N.Y. LEXIS 60 (N.Y. 2000).

Petition seeking enforcement of an order finding gender discrimination against six complainants was granted because the findings were supported by substantial evidence and the relief imposed by the commissioner was reasonably related to the discriminatory conduct. Matter of New York State Div. of Human Rights v Adams Sec., Inc., 38 A.D.3d 1194, 832 N.Y.S.2d 360, 2007 N.Y. App. Div. LEXIS 3357 (N.Y. App. Div. 4th Dep't 2007).

Determination finding an employer guilty of gender discrimination relating to a candidate's job application was proper because sufficient evidence supported the determination. Among other things, the candidate testified that during interviews, two employees told him that there was internal agency pressure to hire a female. One employee's denial that he made the statements or otherwise considered gender in making his decision created a credibility issue for the division, and, moreover, the employee's explanation that he preferred the applicant with virtually no relevant experience because she might have been innovative

conflicted with the job vacancy notice which stated that experience was "highly desirable." Matter of New York State Energy Research & Dev. Auth. v New York State Div. of Human Rights, 50 A.D.3d 1361, 857 N.Y.S.2d 269, 2008 N.Y. App. Div. LEXIS 3328 (N.Y. App. Div. 3d Dep't 2008).

Because a correction officer failed to show that the officer was subjected either to quid pro quo or hostile work environment sexual harassment under N.Y. Exec. Law art. 15, and because the officer's workplace was not permeated with discriminatory intimidation, ridicule, and insult, the officer's complaint was properly dismissed; accordingly, the officer was not entitled to N.Y. Exec. Law § 298 relief. Matter of Bracci v New York State Div. of Human Rights, 62 A.D.3d 1146, 878 N.Y.S.2d 830, 2009 N.Y. App. Div. LEXIS 3714 (N.Y. App. Div. 3d Dep't 2009), app. dismissed, 15 N.Y.3d 865, 910 N.Y.S.2d 31, 936 N.E.2d 912, 2010 N.Y. LEXIS 2963 (N.Y. 2010).

County's action pursuant to N.Y. Exec. Law § 298 to review an agencies determination that a worker was subjected to a discriminatory practice in her employment was granted; the agency erred in finding that the worker was discriminated against, as the worker, who was refused time off to accept a paid teaching position, was not similarly situated with a male employee, who was allowed time off to take a class. Washington County v N.Y. State Div. of Human Rights, 7 A.D.3d 895, 776 N.Y.S.2d 650, 2004 N.Y. App. Div. LEXIS 6763 (N.Y. App. Div. 3d Dep't 2004).

New York State Division of Human Rights' N.Y. Exec. Law § 298 petition to enforce an award based on a landlord's sexual harassment of a tenant was granted; N.Y. Exec. Law art. 15 forbade same-sex sexual harassment in the context of the rental of housing accommodations. The landlord engaged in a course of unwelcome, sexually-offensive behavior. Matter of State Div. of Human Rights v Stoute, 36 A.D.3d 257, 826 N.Y.S.2d 122, 2006 N.Y. App. Div. LEXIS 14350 (N.Y. App. Div. 2d Dep't 2006).

12. —Pregnancy

Personnel policy of school board's singling out childbirth among other physical conditions for special treatment in fixing terms of compensation and of return to employment thereafter was a violation of the Human Rights Law notwithstanding the fact that such policy was the product of negotiations conducted under the Taylor Law rather than having been unilaterally promulgated by employer school district. Union Free Sch. Dist. No. 6 v N.Y. State Human Rights Appeal Bd., 35 N.Y.2d 371, 362 N.Y.S.2d 139, 320 N.E.2d 859, 1974 N.Y. LEXIS 1177 (N.Y. 1974), reh'g denied, 36 N.Y.2d 807, 1975 N.Y. LEXIS 2685 (N.Y. 1975).

A complaint by an associate dean of a community college alleging unlawful discrimination on the basis of race in his discharge was properly dismissed, where a finding by the State Division of Human Rights of discrimination by use of a quota system was not warranted even though the evidence showed that the college tried to avoid penalizing any minority group when affecting a retrenchment plan, the college president presented a statistical analysis to the college affirmative action office showing no change in the racial balance of college employees as a result of the plan, and the college president had told the dean that his discharge was for "anthropological" reasons, in that the statement was ambiguous and the State Division of Human Rights had not found the statement to be evidence of prejudice or bias against the dean. CUNY-Hostos Community College v State Human Rights Appeal Bd., 59 N.Y.2d 69, 463 N.Y.S.2d 173, 449 N.E.2d 1251, 1983 N.Y. LEXIS 3027 (N.Y. 1983).

A pregnant teacher who goes on maternity leave should be permitted to use sick leave and sabbatical leave to same extent as other teachers suffering from temporary physical disability for duration of such disability and denial of such practice constitutes discrimination. Board of Education v State Div. of Human Rights, 42 A.D.2d 854, 346 N.Y.S.2d 843, 1973 N.Y. App. Div. LEXIS 3632 (N.Y. App. Div. 2d Dep't 1973), aff'd, 35 N.Y.2d 675, 360 N.Y.S.2d 887, 319 N.E.2d 203, 1974 N.Y. LEXIS 1327 (N.Y. 1974).

School district and board of education, by enforcing terms of teachers collective bargaining agreement requiring maternity leave to commence after third month of pregnancy, were properly found to have discriminated against female teachers on the basis of sex. Union Free School Dist. v New York State Div. of Human Rights, 43 A.D.2d 31, 349 N.Y.S.2d 757, 1973 N.Y. App. Div. LEXIS 3068 (N.Y. App. Div. 2d Dep't 1973), app. dismissed, 33 N.Y.2d 975, 353 N.Y.S.2d 739, 309 N.E.2d 137, 1974 N.Y. LEXIS 1762 (N.Y. 1974).

Hospital had to compensate maternity related disability just as it compensates other nonoccupational disabilities, notwithstanding an express statutory authorization for such an exclusion in the Workmen's Compensation Law, since a recognition of the continuing validity of that provision would sufficiently frustrate and impede the intended reforms meant to be accomplished by the later amendment of the Executive Law, whereby discrimination on the basis of sex became unlawful, as to work an implied repeal of the Workmen's Compensation Law provision. State Div. of Human Rights ex rel. Ambruster v Crouse-Irving Memorial Hospital, 50 A.D.2d 1083, 377 N.Y.S.2d 315, 1975 N.Y. App. Div. LEXIS 12113 (N.Y. App. Div. 4th Dep't 1975), aff'd, 41 N.Y.2d 84, 390 N.Y.S.2d 884, 359 N.E.2d 393, 1976 N.Y. LEXIS 3253 (N.Y. 1976).

School district would be required to pay any teacher physically disabled by reason of maternity accrued sick leave benefits for that portion of school year coinciding with such disability or aggravation of such disability, unless such teacher elected to take unpaid maternity leave during which sick leave was not applicable, provided she furnished to district certificate from her attending physician to effect that during such period of time she was, in fact, physically disabled. State Div. of Human Rights v Board of Education, 51 A.D.2d 357, 381 N.Y.S.2d 544, 1976 N.Y. App. Div. LEXIS 11080 (N.Y. App. Div. 3d Dep't), aff'd, 40 N.Y.2d 1021, 391 N.Y.S.2d 532, 359 N.E.2d 1327, 1976 N.Y. LEXIS 3155 (N.Y. 1976).

Female teachers by exercising right to optional unpaid maternity leave under collective bargaining agreement did not elect to forego right to accumulated sick leave for period of physical disability before and after date of birth. State Div. of Human Rights ex rel. Garfunkel v Union Free School Dist., 54 A.D.2d 928, 388 N.Y.S.2d 314, 1976 N.Y. App. Div. LEXIS 14781 (N.Y. App. Div. 2d Dep't 1976), app. denied, 42 N.Y.2d 802, 1977 N.Y. LEXIS 3651 (N.Y. 1977).

Court properly remanded proceedings by two employees of school district, charging discrimination in terms, conditions and privileges of employment on basis of sex, with respect to maternity leave policy for purpose of obtaining medical testimony as to when disability ended after date of birth. State Div. of Human Rights ex rel. Garfunkel v Union Free School Dist., 54 A.D.2d 928, 388 N.Y.S.2d 314, 1976 N.Y. App. Div. LEXIS 14781 (N.Y. App. Div. 2d Dep't 1976), app. denied, 42 N.Y.2d 802, 1977 N.Y. LEXIS 3651 (N.Y. 1977).

Absent any evidentiary basis for determining length of disability and when it began, Division of Human Rights' directive ordering city school district to permit pregnant teachers to use accrued sick leave benefits for those days during unpaid maternity leave in which they were unable to work for physical reasons was "arbitrary" exercise of power and had to be modified to require payment to teacher of accrued sick leave for that portion of school year coinciding with physical disability by reason of maternity, provided that teacher does not commence sick leave until actually disabled and provided further that attending physician furnish certificate as to dates of disability. State Div. of Human Rights ex rel. Schulte v Board of Education, 54 A.D.2d 1115, 388 N.Y.S.2d 785, 1976 N.Y. App. Div. LEXIS 15096 (N.Y. App. Div. 4th Dep't 1976).

In a proceeding pursuant to Exec Law § 298 to review an order of the State Human Rights Appeal Board affirming a determination of the State Division of Human Rights, which found the petitioner guilty of having unlawfully discriminated against complainant by having denied her disability benefits for disability based on pregnancy, the petitioner's contention that the complaint was untimely was without merit, where the complaint was filed within one year after the complainant received notice from her employer's insurer that her claim for disability by reason of pregnancy had been denied. Hillcrest General Hospital-GHI v New York State Human Rights Appeal Bd., 90 A.D.2d 481, 454 N.Y.S.2d 549, 1982 N.Y. App. Div. LEXIS 18487 (N.Y. App. Div. 2d Dep't 1982).

Employee may not be terminated simply because she is pregnant; upon showing of prima facie case of discharge from employment because of gender-related condition of pregnancy, employer has burden to prove that circumstances warranted discharge by articulating legitimate, nondiscriminatory reason for termination. Energy Expo, Inc. v New York State Div. of Human Rights, 112 A.D.2d 302, 491 N.Y.S.2d 748, 1985 N.Y. App. Div. LEXIS 56263 (N.Y. App. Div. 2d Dep't 1985).

Due to the common management, ownership, and financial control of an employer and its interrelated entities, their employees were properly aggregated to satisfy N.Y. Exec. Law § 292(5); in addition, since the employer violated N.Y. Exec. Law § 296(1) by discriminating against an employee based on her pregnancy, it was not entitled to N.Y. Exec. Law § 298 relief. Matter of Argyle Realty Assocs. v New York State Div. of Human Rights, 65 A.D.3d 273, 882 N.Y.S.2d 458, 2009 N.Y. App. Div. LEXIS 5399 (N.Y. App. Div. 2d Dep't 2009).

13. Discrimination by labor unions

A person has the right not to be excluded from a labor union because of race, creed, color or religious persuasion but there is no right to have such a union take affirmative steps looking toward integration. And an order of the Commission which does not exceed the above limitation will be enforced by the courts. State Com. for Human Rights v Farrell, 24 A.D.2d 128, 264 N.Y.S.2d 489, 1965 N.Y. App. Div. LEXIS 2993 (N.Y. App. Div. 1st Dep't 1965), app. denied, 17 N.Y.2d 418, 1966 N.Y. LEXIS 1711 (N.Y. 1966).

In a proceeding pursuant to Exec Law § 298 to review a determination that a prospective employee was refused consideration on the basis of his arrest record, the determination that awarded compensatory damages for mental anguish and humiliation was properly confirmed where the job in question was as a mechanic at a state correctional facility, and where the human rights commissioner's broad power to order affirmative action included the power to award such compensatory damages to the aggrieved employee. State, Dep't of Correctional Services v New York State Div. of Human Rights, 88 A.D.2d 1061, 452 N.Y.S.2d 746, 1982 N.Y. App. Div. LEXIS 17482 (N.Y. App. Div. 3d Dep't 1982).

The sheet metal worker's union was ordered to commence an apprenticeship class without regard to the background or ethnic origin of the applicants in accordance with an agreement made by the union, management, the court, and the Commission for Human Rights. State Com. for Human Rights v Farrell, 47 Misc. 2d 244, 262 N.Y.S.2d 526, 1965 N.Y. Misc. LEXIS 1645 (N.Y. Sup. Ct.), aff'd, 24 A.D.2d 128, 264 N.Y.S.2d 489, 1965 N.Y. App. Div. LEXIS 2993 (N.Y. App. Div. 1st Dep't 1965).

Where a sheet metal workers' union had a history of over a century of racial discrimination and unreasonable exclusiveness the court properly refused to reconsider an order requiring the continuance of an unsegregated apprentice training program, and the union's argument for noncompliance with the order on the ground of unemployment of some members was unavailing. State Com. for Human Rights v Farrell, 47 Misc. 2d 799, 263 N.Y.S.2d 250, 1965 N.Y. Misc. LEXIS 1483 (N.Y. Sup. Ct. 1965).

14. Enforcement orders

In proceeding by State Commission for Human Rights to enforce an order of said Commission, order of Supreme Court which (1) denied the Commission's application to enforce its order in its entirety and (2) vacated order of the Commission and remitted the matter to the Commission for a new public hearing after notice to respondents, was appealable as of right in an action originating in the Supreme Court or a county court. State Com. for Human Rights v Lieber, 23 N.Y.2d 253, 296 N.Y.S.2d 319, 244 N.E.2d 24, 1968 N.Y. LEXIS 973 (N.Y. 1968).

Since the language of Executive Law § 298 is not cast in mandatory terms, the Appellate Division retains discretionary control over an application for an enforcement order such as to an order issued by the State Division of Human Rights and may deny such enforcement order in the exercise of its discretion. State Div. of Human Rights v Employers-Commercial Union Ins. Group, 33 A.D.2d 273, 307 N.Y.S.2d 232, 1970 N.Y. App. Div. LEXIS 5601 (N.Y. App. Div. 1st Dep't), app. denied, 26 N.Y.2d 611, 1970 N.Y. LEXIS 1758 (N.Y. 1970).

Order of State Division of Human Rights could not be enforced after 2 year effective period thereof had expired, where no explanation was offered for delay in seeking enforcement, and court had no statutory authority to extend effective time period as provided by commissioner. State Div. of Human Rights v Jakoblew, 41 A.D.2d 889, 343 N.Y.S.2d 141, 1973 N.Y. App. Div. LEXIS 4732 (N.Y. App. Div. 4th Dep't 1973).

Court has no statutory authority to extend 2 year period of compliance beyond date of commissioner's order relating to discrimination. State Div. of Human Rights v Nissenbaum, 41 A.D.2d 1022, 344 N.Y.S.2d 306, 1973 N.Y. App. Div. LEXIS 4382 (N.Y. App. Div. 4th Dep't 1973).

In an original proceeding pursuant to Exec Law § 298 in which the State Division of Human Rights sought an order enforcing a prior determination of the Commissioner of Human Rights that a village had unlawfully discriminated against the complainant by discharging her from employment on the basis of her marital status, the village's failure to appeal the commissioner's order did not preclude the court's review of the order on the merits; the division's petition would be dismissed, although the points raised by the village did not warrant dismissal, where the court found that as a matter of law the complainant's discharge had not been motivated by conduct proscribed by Exec Law § 296. State Div. of Human Rights ex rel. Howarth v Spencerport, 78 A.D.2d 50, 434 N.Y.S.2d 52, 1980 N.Y. App. Div. LEXIS 13406 (N.Y. App. Div. 4th Dep't 1980).

In a proceeding pursuant to Exec Law § 298 to review a determination of no probable cause with respect to petitioner's claim of discrimination based on his race and color, the determination was properly confirmed and the petition dismissed where the affidavit of the regional director of the State Division of Human Rights detailed the routine office practice showing that the determination was mailed on a certain date, where petitioner offered no evidence rebutting the presumption that the determination was mailed on that date, and where the appeal was not filed within the 18-day time limit. Campbell v New York State Human Rights Appeal Bd., 89 A.D.2d 659, 453 N.Y.S.2d 111, 1982 N.Y. App. Div. LEXIS 17779 (N.Y. App. Div. 3d Dep't 1982).

Enforcement order will not be entered where division of human rights has not demonstrated that it has conducted investigation revealing employer's willful noncompliance with administrative order for which enforcement is sought. Salvatore v New York State Div. of Human Rights, 118 A.D.2d 715, 500 N.Y.S.2d 47, 1986 N.Y. App. Div. LEXIS 54574 (N.Y. App. Div. 2d Dep't 1986).

15. Particular orders as arbitrary and capricious

Appellate Division can only set aside determination of commissioner of Division of Human Rights if such determination is arbitrary or capricious; thus, it improperly set aside commissioner's award of back pay after having affirmed its finding of discrimination. Mize v State Div. of Human Rights, 33 N.Y.2d 53, 349 N.Y.S.2d 364, 304 N.E.2d 231, 1973 N.Y. LEXIS 1002 (N.Y. 1973).

Inclusion in final order of conciliation agreement to which no objections had been received within 15-day period following service on claimant's attorney of proposed conciliation agreement was neither arbitrary nor an abuse of discretion where Executive Law § 297, subd 3 did not require that service of proposed agreement on claimant's attorney be accompanied either by service of a statement of the statutory provisions relating to filing of objections or of a warning that objections be filed within 15 days. Berry v Donner-Hanna Coke Corp., 42 A.D.2d 404, 348 N.Y.S.2d 414, 1973 N.Y. App. Div. LEXIS 3280 (N.Y. App. Div. 4th Dep't 1973), aff'd, 34 N.Y.2d 893, 359 N.Y.S.2d 283, 316 N.E.2d 717, 1974 N.Y. LEXIS 1445 (N.Y. 1974).

Where dismissal of civil rights complaint based on age discrimination in discharge of doorman was based upon investigation which was abbreviated and one-sided, where the doorman had evidence to refute contention that he was discharged because he had misappropriated moneys given to him for transfer to another employee, and where supervisor who had allegedly told the doorman that he was being discharged because of his age was not

interviewed, affirmance by the State Human Rights Appeal Board of the dismissal was arbitrary and capricious. Tenenbaum v State Div. of Human Rights, 50 A.D.2d 257, 376 N.Y.S.2d 542, 1975 N.Y. App. Div. LEXIS 11491 (N.Y. App. Div. 1st Dep't 1975).

Determination that employer, which entered into conciliation agreement in settlement of complaint of unlawful discrimination and which sent petitioner's resume along with a cover letter to 44 different agencies and organizations covering a broad geographical area, had satisfied its duty under agreement to use its "best efforts" to locate employment for petitioner was neither arbitrary nor capricious. State Div. of Human Rights ex rel. Osuwagu v County of Onondaga, 50 A.D.2d 716, 374 N.Y.S.2d 871, 1975 N.Y. App. Div. LEXIS 12592 (N.Y. App. Div. 4th Dep't 1975).

Evidence showing, inter alia, city employee's chronic lateness, absenteeism, insubordination and poor work performance supported finding of division of human rights of no probable cause to believe that employee was victim of discrimination so that Human Rights Appeal Board exceeded its limited scope of review in determining that division's order dismissing employee's complaint was arbitrary, capricious and an abuse of discretion. New York City Housing Authority v State Div. on Human Rights, 53 A.D.2d 844, 385 N.Y.S.2d 785, 1976 N.Y. App. Div. LEXIS 13674 (N.Y. App. Div. 1st Dep't 1976).

Division of Human Rights acted arbitrarily and capriciously in dismissing complaint of retiree who had filed waiting-list application for rent-stabilized apartment and who claimed landlord (1) was discriminating against him based on his age, (2) had raised his waiting-list number, and (3) was "warehousing" apartments and not renting to senior citizens in preparation for impending cooperative conversion plan, since division's investigation was inadequate and abbreviated in that after landlord denied allegations without any detail and failed to deliver division-requested roster of senior citizen tenants, division made "no probable cause" determination and dismissed retiree's complaint instead of investigating further. Flinker v State Div. of Human Rights, 123 A.D.2d 578, 507 N.Y.S.2d 12, 1986 N.Y. App. Div. LEXIS 60719 (N.Y. App. Div. 1st Dep't 1986).

Department of Labor (DOL) acted arbitrarily in denying targeted jobs tax credits to employers using survey designed and marketed by petitioner ("Stanton Survey") to screen job applicants, on ground that survey questions dealing with theft of cash or merchandise violated Ex-Offender Law, in absence of final determination to that effect by Division of Human Rights, which was only agency vested with authority to make such determination, which would authorize DOL to discontinue services. Stanton Corp. v Department of Labor, 166 A.D.2d 331, 561 N.Y.S.2d 6, 1990 N.Y. App. Div. LEXIS 12748 (N.Y. App. Div. 1st Dep't 1990).

It was arbitrary and improper for State Division of Human Rights (SDHR), during pendency of court review of employment discrimination complaint, to dismiss complaint on ground of administrative convenience since (1) dismissal deprived employer of its right to continue to argue before SDHR that it had been prejudiced by 14-year delay between filing of complaint and probable cause determination, (2) dismissal was obvious attempt to deprive court of jurisdiction to review underlying matter, and (3) given that both federal and state statutory schemes for addressing illegal discrimination provide that discrimination claims be brought in only one forum, it appeared that dismissal was in fact means chosen to allow employee to select different forum (state court) to hear same matter that had previously been submitted to both federal court and state agency. Avon Products, Inc. v State Div. of Human Rights, 138 Misc. 2d 466, 524 N.Y.S.2d 346, 1988 N.Y. Misc. LEXIS 36 (N.Y. Sup. Ct. 1988).

Determination made by State Division of Human Rights (SDHR) which, after reopening previous finding of probable cause, found "no probable cause" and dismissed petitioner's complaint, was arbitrary and capricious where (1) reopening order specifically contemplated remand to regional director for further investigation, but petitioner's counsel was never formally advised what additional evidence was needed and was not specifically asked to produce particular additional evidence, (2) record failed to show that any additional post-reopening investigation was conducted, and (3) SDHR did not explain its reversal of initial assessment finding probable cause. Boyea v New York State Exec. Dep't, Div. of Human Rights, 178 Misc. 2d 398, 679 N.Y.S.2d 548, 1998 N.Y. Misc. LEXIS 471 (N.Y. Sup. Ct. 1998).

16. Sufficiency of evidence and proof

Where findings of fact on which order of State Human Rights Appeal Board are based are supported by sufficient evidence on the record as a whole, they are conclusive. Schenectady v State Div. of Human Rights, 37 N.Y.2d 421, 373 N.Y.S.2d 59, 335 N.E.2d 290, 1975 N.Y. LEXIS 2042 (N.Y. 1975).

Findings of fact made by human rights commissioner were not to be disturbed if they were supported by sufficient evidence on record considered as a whole. New York Inst. of Technology v State Div. of Human Rights, 48 A.D.2d 132, 368 N.Y.S.2d 207, 1975 N.Y. App. Div. LEXIS 9559 (N.Y. App. Div. 1st Dep't 1975), rev'd, 40 N.Y.2d 316, 386 N.Y.S.2d 685, 353 N.E.2d 598, 1976 N.Y. LEXIS 2891 (N.Y. 1976).

If State Human Rights Appeal Board decision dismissing complaint is supported by sufficient evidence, it is conclusive. State Div. of Human Rights ex rel. Courtemanche v Stone & Webster Engineering Corp., 52 A.D.2d 1088, 384 N.Y.S.2d 312, 1976 N.Y. App. Div. LEXIS 13026 (N.Y. App. Div. 4th Dep't 1976), app. denied, 42 N.Y.2d 805, 1977 N.Y. LEXIS 3742 (N.Y. 1977).

Choice of which conflicting evidence to accept lies with commissioner of Division of Human Rights and his finding is supported by the evidence and is conclusive if others might reasonably make the same choice. State Div. of Human Rights v Syracuse, 57 A.D.2d 452, 394 N.Y.S.2d 948, 1977 N.Y. App. Div. LEXIS 11822 (N.Y. App. Div. 4th Dep't 1977), aff'd, 43 N.Y.2d 958, 404 N.Y.S.2d 343, 375 N.E.2d 409, 1978 N.Y. LEXIS 1857 (N.Y. 1978).

A doctor's allegations claiming discrimination against him because of his Egyptian heritage and national origin on the part of the hospital in failing to promote him to the position of chief resident of the urology division, were unsubstantiated where two other urology residents, who were white, male, American, and Anglo-Saxon, and whose evaluation reports were higher than the doctor's, were also denied appointments as chief residents on the grounds of substandard work performances. Grace v New York State Human Rights Appeal Bd., 87 A.D.2d 726, 449 N.Y.S.2d 339, 1982 N.Y. App. Div. LEXIS 16067 (N.Y. App. Div. 3d Dep't 1982).

Determination that dentist discriminated against complainant based on his HIV status would be annulled where dentist performed complete oral examination of complainant, and concluded that further treatment, in form of root canal therapy, was needed, it was undisputed that dentist did not perform root canal work, and that his associate, who performed root canal work on only 30 to 40 percent of practice's patients, was away on vacation, it was dentist's professional judgment that complainant needed immediate treatment because he was in pain, and that dental unit of university hospital would best provide that treatment in view of risk of secondary infection, no evidence was presented that such recommendation was inappropriate or medically unsound, and complainant contacted dentist's secretary to request additional referrals, but he sought no further treatment from dentist or his associates. Schulman v State Div. of Human Rights, 239 A.D.2d 588, 658 N.Y.S.2d 70, 1997 N.Y. App. Div. LEXIS 5622 (N.Y. App. Div. 2d Dep't 1997), app. denied, 92 N.Y.2d 801, 677 N.Y.S.2d 71, 699 N.E.2d 431, 1998 N.Y. LEXIS 1454 (N.Y. 1998).

In enforcement proceedings under Article 15 of the Executive Law it is not necessary that findings be based on evidence establishing them beyond a reasonable doubt but it is sufficient if the findings are supported by evidence sufficiently substantial to prevent inferences of the existence of facts found to be reasonably drawn and the Commission, at its hearing, is not bound by the strict rules of evidence prevailing in courts of law or equity. State Com. for Human Rights v Suburban Associates, Inc., 55 Misc. 2d 920, 286 N.Y.S.2d 733, 1967 N.Y. Misc. LEXIS 1016 (N.Y. Sup. Ct. 1967), modified, 34 A.D.2d 662, 310 N.Y.S.2d 1019, 1970 N.Y. App. Div. LEXIS 5125 (N.Y. App. Div. 2d Dep't 1970).

Employee's N.Y. Exec. Law § 298 proceeding was dismissed because, inter alia, the record contained substantial evidence to support the findings of the administrative law judge (ALJ) that the employee was not treated differently for racial reasons, and that the incidents cited by employee failed to establish that the

employer permitted a racially hostile environment; the employee's proof relating to her constructive discharge claim lacked consistency, undermining her credibility, and the ALJ's rejection of this claim had adequate support in the record. Matter of Price v Southwest Airlines, Inc., 66 A.D.3d 1267, 888 N.Y.S.2d 255, 2009 N.Y. App. Div. LEXIS 7618 (N.Y. App. Div. 3d Dep't 2009).

Determination of a hostile work environment was confirmed in an N.Y. Exec. Law § 298 proceedings because the employees' testimony, and other testimony, established, among other things, that the employer's owner made sexual comments to the employees, including speaking about what he would do to them if he was not married and describing his past cheating on his wife, that the owner straddled one employee when she was taking a break on the porch outside the diner, and sat down on the other employee's lap at the same location, that the owner pulled on the employees' pants, and contrary testimony created a credibility issue for the commissioner to resolve; substantial evidence also supported the determination of retaliation and supported the compensatory awards and the back pay awards. The employees testified that, after they complained about the owner's behavior, the owner fired them. Matter of West Taghkanic Diner II, Inc. v New York State Div. of Human Rights, 105 A.D.3d 1106, 962 N.Y.S.2d 748, 2013 N.Y. App. Div. LEXIS 2230 (N.Y. App. Div. 3d Dep't 2013).

17. Evidence of age discrimination

Evidence sustained findings that employee's employment was not terminated because of his age and that he was not denied consideration for further employment in retaliation for having filed initial complaint alleging unlawful discrimination because of age. State Div. of Human Rights ex rel. Courtemanche v Stone & Webster Engineering Corp., 52 A.D.2d 1088, 384 N.Y.S.2d 312, 1976 N.Y. App. Div. LEXIS 13026 (N.Y. App. Div. 4th Dep't 1976), app. denied, 42 N.Y.2d 805, 1977 N.Y. LEXIS 3742 (N.Y. 1977).

Record supported finding of Commissioner of State Division of Human Rights that New York City Department of Personnel committed unlawful age discrimination by establishing maximum age of 40 years for position of parking enforcement agent and by rejecting applicant on basis that she was 54 years old; Department failed to establish its affirmative defense that age restriction was bona fide occupational qualification. New York City Dep't of Personnel v New York State Div. of Human Rights, 56 A.D.2d 795, 392 N.Y.S.2d 641, 1977 N.Y. App. Div. LEXIS 11090 (N.Y. App. Div. 1st Dep't 1977).

In an age discrimination case, there would be no probable cause to believe that an employee of the state education department had been a victim of discrimination as a result of his not being promoted to the position of bureau chief where the employee had not applied for one of the promotions in question, where another promotion had been given to one of the top three candidates on the civil service eligible list, and where other employees, who had been older than the complainant, had been promoted to positions on the bureau chief level. New York State Education Dep't v New York State Human Rights Appeal Bd., 92 A.D.2d 648, 460 N.Y.S.2d 176, 1983 N.Y. App. Div. LEXIS 16917 (N.Y. App. Div. 3d Dep't 1983).

An age-discrimination complaint by a newswriter for a television station was properly dismissed, even though the newswriter alleged that the president of the station had told him that his age and physical looks were a barrier to a requested position as an anchorman, where the president testified that the denial of the position was on the basis that the newswriter's contract did not provide for transfer based on seniority that the newswriter did not possess the necessary voice or delivery to anchor newscasts, and that the newswriter's termination was due to economic reasons, where no union grievance was filed on the newswriter's behalf, where seniority was not a determinative factor in job assignments according to the newswriter's contract, and where the newswriter had negotiated with the new owners of the station to accept three-quarters of his severance pay under the unsuitability clause of his contract and had executed a general release. State Div. of Human Rights v WBEN-Inc., 96 A.D.2d 1141, 467 N.Y.S.2d 738, 1983 N.Y. App. Div. LEXIS 19823 (N.Y. App. Div. 4th Dep't 1983).

Probable cause for age discrimination is shown where employee, who had been with firm for over 23 years, was bumped by more senior employee where company did not abide by employee handbook provisions in which company promised to exert efforts to find other position in company. State Div. of Human Rights ex rel. Walker v American Can Co., 112 A.D.2d 776, 492 N.Y.S.2d 219, 1985 N.Y. App. Div. LEXIS 56016 (N.Y. App. Div. 4th Dep't 1985), app. denied, 67 N.Y.2d 604, 500 N.Y.S.2d 1026, 490 N.E.2d 1232, 1986 N.Y. LEXIS 17109 (N.Y. 1986).

While New York State Division of Human Rights' investigation of complaint need not be extensive, it must not be so abbreviated and one-sided that it results in record which does not afford reasonable basis for administrative determination; consequently, where petitioner, who was hired by respondent when she was 59 and discharged approximately one year later, alleges that her employment was terminated approximately 3 weeks short of her eligibility for employer's retirement and pension plan when employer realized great expense of putting 60-year old woman on that plan, division's investigation was so one-sided and abbreviated that determination of no probable cause must be overturned as capricious. Hendel v New York State Div. of Human Rights, 114 A.D.2d 897, 495 N.Y.S.2d 135, 1985 N.Y. App. Div. LEXIS 53928 (N.Y. App. Div. 2d Dep't 1985).

Determination of Division of Human Rights upholding termination of employee of non-profit corporation was supported by substantial evidence, and was neither irrational nor capricious, where, despite employee's age of 60 years and status as department head, corporation was required by its precarious financial condition to consolidate departments and terminate those employees who were in charge of eliminated departments. Johnson v National League for Nursing, 135 A.D.2d 393, 521 N.Y.S.2d 689, 1987 N.Y. App. Div. LEXIS 52360 (N.Y. App. Div. 1st Dep't 1987).

Employer was entitled to summary judgment dismissing employee's action for age discrimination where employee admitted that his computer skills were not up to par, that he had been warned about this problem and took no action to become more proficient, and that he failed to complete inventory project by his self-imposed deadline; single good performance appraisal, more than year prior to his termination, was not sufficient to raise question of fact with regard to reason for termination. Brooks v Blue Cross, 195 A.D.2d 814, 600 N.Y.S.2d 346, 1993 N.Y. App. Div. LEXIS 7251 (N.Y. App. Div. 3d Dep't 1993).

Division of Human Rights properly determined that employer unlawfully discriminated against employee due to his age (63 years) where evidence showed that employer terminated employee and replaced him with younger person, and only purportedly nondiscriminatory reason proffered by employer was "downsizing due to financial difficulties." Laverack & Haines, Inc. v New York State Div. of Human Rights, 217 A.D.2d 955, 629 N.Y.S.2d 595, 1995 N.Y. App. Div. LEXIS 8381 (N.Y. App. Div. 4th Dep't 1995), rev'd, 88 N.Y.2d 734, 650 N.Y.S.2d 76, 673 N.E.2d 586, 1996 N.Y. LEXIS 3057 (N.Y. 1996).

Employee, who was fired for refusing to follow reasonable order to report to new work location, failed to establish prima facie case of age discrimination where she alleged that employer discriminated against her when her branch office closed by giving her temporary rather than permanent reassignment, but she admittedly had done nothing to pursue permanent reassignment, and coworker who was only one year younger than she was did receive permanent reassignment. Citibank, N.A. v New York State Div. of Human Rights, 227 A.D.2d 322, 643 N.Y.S.2d 68, 1996 N.Y. App. Div. LEXIS 6169 (N.Y. App. Div. 1st Dep't), app. denied, 88 N.Y.2d 815, 651 N.Y.S.2d 17, 673 N.E.2d 1244, 1996 N.Y. LEXIS 3282 (N.Y. 1996).

State Division of Human Rights' finding that there was no probable cause to believe that physician's employment with hospital was terminated because of age discrimination was supported by substantial evidence where reconsideration of physician's continued retention was justified by hospital's decision to switch emphasis of its radiology department's technology from research uses to clinical uses, as well as its need to adjust to budget constraints in manner that was consistent with its emerging clinical focus. Albert v Beth Israel Medical Ctr., 230 A.D.2d 695, 646 N.Y.S.2d 688, 646 N.Y.S.2d 695, 1996 N.Y. App. Div. LEXIS 8726 (N.Y. App. Div. 1st Dep't 1996).

Human Rights Specialist's investigation regarding physician's complaint alleging that his employment with hospital was terminated because of age discrimination afforded physician full and fair opportunity to rebut evidence submitted by hospital where Specialist made field trip to hospital and interviewed 2 other physicians, reviewed these interviews with physician in telephone conference, subsequently met with physician for approximately 2 ½ hours to discuss all documents in investigative file and allow physician to detail all factors he believed were relevant to his claim, made another field trip to hospital to review physician's personnel file, visited EEOC to review its files, and notified physician when her investigation was nearing completion and told him he should submit anything else he thought should be considered. Albert v Beth Israel Medical Ctr., 230 A.D.2d 695, 646 N.Y.S.2d 688, 646 N.Y.S.2d 695, 1996 N.Y. App. Div. LEXIS 8726 (N.Y. App. Div. 1st Dep't 1996).

Court would annul determination finding discrimination on basis of age where, at relevant times, there was controlling statutory authority to establish reasonable minimum and maximum age limits for firefighters (CLS Civ S former § 54). Buffalo Mun. Civil Serv. Comm'n v Mercado, 233 A.D.2d 877, 649 N.Y.S.2d 860, 1996 N.Y. App. Div. LEXIS 13359 (N.Y. App. Div. 4th Dep't 1996).

Defendants were not entitled to summary judgment in employee's action for age discrimination where there were triable issues of fact as to whether employee was replaced by younger person and whether reason advanced by defendants was pretext. Dolgon v Standard Motor Prods., Inc., 251 A.D.2d 281, 671 N.Y.S.2d 1023, 1998 N.Y. App. Div. LEXIS 6360 (N.Y. App. Div. 2d Dep't 1998).

Employer was entitled to summary judgment dismissing action for age discrimination where deposition testimony of plaintiff's friend and coworker that their supervisor told him, one week after plaintiff was terminated, that supervisor was "going to try to get somebody younger to work that job" was merely isolated and ambiguous statement that did not directly state or imply that plaintiff was terminated for discriminatory reason, and coworker acknowledged that supervisor did not disclose to him reasons for plaintiff's termination. Almanzar v Collegiate Church Corp., 255 A.D.2d 230, 681 N.Y.S.2d 240, 1998 N.Y. App. Div. LEXIS 12445 (N.Y. App. Div. 1st Dep't 1998).

Employer was entitled to directed verdict dismissing former employee's age discrimination action where (1) there was conflicting evidence as to whether employee, who was tailor in men's clothing store, was laid off or resigned to open his own business, (2) tailoring business was cyclical, (3) before union was voted out, layoffs were made during slow periods on basis of seniority, (4) after union was voted out, employees were given opportunity to avoid layoffs by taking one day off per week, (5) although employees voted for that plan, which affected all employees equally, plaintiff expressed his dissatisfaction with it, and (5) fact that newly hired tailor earned much less than plaintiff earned did not prove discrimination in light of evidence that new tailor was hired to fill in while plaintiff was on vacation and to replace another tailor who had health problems. Orlando v Rubersi Sales, Inc., 255 A.D.2d 802, 680 N.Y.S.2d 310, 1998 N.Y. App. Div. LEXIS 12499 (N.Y. App. Div. 3d Dep't 1998).

Substantial, if not overwhelming, evidence supported employer's failure to take proper measures to halt male employees' increasingly aggressive verbal and physical harassment of sole female employee in frozen food warehouse, constituting condonation of gender and age discrimination and hostile work environment, where (1) taunts included remarks that she was too old and slow, was taking man's job away, and was "biggest whore" in town, (2) physical abuse culminated in her being picked up by legs, turned upside down, carried in attempt to place her headfirst in garbage receptacle, and slammed into door of men's room, which caused disabling injuries, and (3) although principal perpetrator was warned that he would be fired if he did not refrain from such conduct, he was merely suspended for 3 days and continued to taunt complainant after suspension. Grand Union Co. v Mercado, 263 A.D.2d 923, 694 N.Y.S.2d 524, 1999 N.Y. App. Div. LEXIS 8451 (N.Y. App. Div. 3d Dep't 1999).

Judgment entered on jury verdict finding that employee was unlawfully discharged because of his age would not be disturbed, despite employer's claim that employee did not prove that employer's stated reasons for discharge were pretextual, where case was not tried on pretext theory but on mixed-motives theory, and thus when employee presented sufficient evidence to support inference of impermissible discrimination, burden shifted to employer to show that employment decision would have been reached in absence of impermissible motive. Allen v Domus Dev. Corp., 273 A.D.2d 891, 709 N.Y.S.2d 776, 2000 N.Y. App. Div. LEXIS 6963 (N.Y. App. Div. 4th Dep't 2000).

In Article 78 proceeding challenging county sheriff's termination of petitioner's employment as probationary correction officer in sheriff's department, petitioner's conclusory assertions were insufficient to prove prima facie case of age discrimination where he was hired at age 41 and terminated at age 42. Higgins v La Paglia, 281 A.D.2d 679, 722 N.Y.S.2d 592, 2001 N.Y. App. Div. LEXIS 2009 (N.Y. App. Div. 3d Dep't), app. dismissed, 96 N.Y.2d 854, 729 N.Y.S.2d 669, 754 N.E.2d 772, 2001 N.Y. LEXIS 1460 (N.Y. 2001).

There was sufficient unrebutted evidence in record to warrant public hearing on complaint that Delta Airlines discriminated on basis of age against 57-year-old automotive mechanic with 19 years of service with Pan American Airways when it did not hire him as part of its 1991 purchase of Pan Am's assets, where complaint alleged that specifically identified younger Pan Am mechanics with less seniority were hired in his stead. Sauer v N.Y. State Div. of Human Rights, 285 A.D.2d 372, 727 N.Y.S.2d 113, 2001 N.Y. App. Div. LEXIS 7370 (N.Y. App. Div. 1st Dep't 2001).

Park maintenance mechanic employed by county failed to establish prim facie case of age discrimination where termination of his employment was in response to budgetary constraints, his position was not filled by younger person but was left vacant for 2 years after his termination, and older person was hired when position was restored to county budget. Genesky v Local 1000, AFSCME, AFL-CIO, CSEA, 287 A.D.2d 594, 731 N.Y.S.2d 758, 2001 N.Y. App. Div. LEXIS 9864 (N.Y. App. Div. 2d Dep't 2001).

Commissioner's determination that an employee's termination was motivated by age discrimination and that the explanation offered by the employer was pretextual was confirmed in an N.Y. Exec. Law § 298 proceeding because it was supported by substantial evidence; the commissioner relied, inter alia, on evidence that the employee was not offered an opportunity previously offered to a younger individual to remain employed at a lower pay grade, that younger individuals were hired and promoted with raises within months of the employee's termination, and that the employer operated with more supervisory positions after the employee's termination than before his termination. New York State Tug Hill Commn. v New York State New York State Div. of Human Rights, 52 A.D.3d 1169, 860 N.Y.S.2d 698, 2008 N.Y. App. Div. LEXIS 5159 (N.Y. App. Div. 4th Dep't 2008).

Even if reason for reduction of petitioner from rank of deputy inspector to rank of captain was police commissioner's belief that petitioner had been on his job too long, it did not follow that petitioner was being discriminated against because of his age. Foran v Cawley, 77 Misc. 2d 809, 354 N.Y.S.2d 757, 1973 N.Y. Misc. LEXIS 1233 (N.Y. Sup. Ct. 1973).

No portion of New York State Human Rights Law—as it relates to age discrimination claims—will be preempted by Employee Retirement Income Security Act of 1974 (ERISA; 29 USCS § 1144), since age discrimination claims brought under Human Rights Law are governed by same standards as those brought under Age Discrimination in Employment Act (ADEA; 29 USCS §§ 621 et seq.) and both federal statutes rely on "joint state/federal enforcement" scheme. Devlin v Transportation Communs. Int'l Union, 173 F.3d 94, 1999 U.S. App. LEXIS 6969 (2d Cir. N.Y. 1999).

Employer's decision to split off 2 burgeoning district offices located on Long Island from Manhattan branch office, in order to create separate branch office located on Long Island, constituted reasonable exercise of informed judgment, and was not pretext for age discrimination against 52-year-old plaintiff, whose incentive compensation was somewhat lessened thereby. Ellis v Provident Life & Accident Ins. Co., 926 F. Supp. 417, 1996 U.S. Dist.

LEXIS 6979 (S.D.N.Y. 1996), aff'd, 107 F.3d 2, 1997 U.S. App. LEXIS 6984 (2d Cir. N.Y. 1997).

Plaintiff failed to prove that employer's legitimate nondiscriminatory reason for discharging him (payroll reduction) was pretext for age discrimination where ageist statements that created inference of discrimination were mostly made by supervisors not involved in discharge decision, plaintiff was not replaced by younger employee, and statistics indicated increase in number of employees over age 40. Boyle v McCann-Erickson, Inc., 949 F. Supp. 1095, 1997 U.S. Dist. LEXIS 43 (S.D.N.Y. 1997).

Defendant employer that terminated age discrimination plaintiff as part of reduction in force, allegedly due to his performance and lack of experience in his area, failed to offer legitimate nondiscriminatory reason under Human Rights Law where branch in which plaintiff worked was not closed, plaintiff's position was not eliminated, he was only branch manager of 19 to be fired, he was given good performance reviews prior to termination, and he had 6 years of experience in his area. Tanzini v Marine Midland Bank, N.A., 952 F. Supp. 937, 1997 U.S. Dist. LEXIS 933 (N.D.N.Y. 1997).

Plaintiff's allegation that he was performing his job satisfactorily, and that defendants never mentioned any deficiencies until after his termination, was not in itself probative of age discrimination, although it might tend to put at issue what real reason for termination actually was. Thomson v Saatchi & Saatchi Holdings, 958 F. Supp. 808, 1997 U.S. Dist. LEXIS 4300 (W.D.N.Y. 1997), aff'd, 159 F.3d 1348, 1998 U.S. App. LEXIS 32113 (2d Cir. N.Y. 1998).

Plaintiff, who was hired at age 52 and terminated 4 years later, failed to come forward with any evidence that defendant employer's legitimate nondiscriminatory reason for termination (his poor performance during financially troubled times) was pretext for age discrimination, where he relied solely on facts that he was replaced by younger person, that 4 other employees who were all more than 40 years old and earning more than $70,000 were terminated and may have been replaced by younger persons, and that he was never notified of his performance deficiencies. Strohmeyer v International Bhd. of Painters & Allied Trades, 989 F. Supp. 455, 1997 U.S. Dist. LEXIS 21172 (W.D.N.Y. 1997), aff'd, 164 F.3d 619, 1998 U.S. App. LEXIS 35691 (2d Cir. N.Y. 1998).

18. Evidence of employment discrimination

In proceeding before State Division of Human Rights for discriminatory discharge from employment, proof of mental anguish and humiliation should be such as would be sufficient in common-law action. 121-129 Broadway Realty, Inc. v New York State Div. of Human Rights, 48 A.D.2d 975, 369 N.Y.S.2d 837, 1975 N.Y. App. Div. LEXIS 10269 (N.Y. App. Div. 3d Dep't 1975).

Evidence that college teacher was recommended for tenure, that recommendations for tenure of teacher and five other faculty members were held in abeyance pending review of entire tenure policy of college, that teacher refused to participate in review hearing and submitted his resignation, that plan subsequently adopted recommended that faculty previously recommend for tenure, which included members of both sexes and several races, be granted continuing appointments, and that teacher's request for cancellation of his resignation, made after acceptance of plan, was denied, was sufficient to support finding of Division of Human Rights that teacher was not subject to unlawful discrimination. McGrath v New York State Div. of Human Rights, 52 A.D.2d 1027, 383 N.Y.S.2d 911, 1976 N.Y. App. Div. LEXIS 12931 (N.Y. App. Div. 3d Dep't 1976).

A determination of the State Human Rights Appeal Board finding that there was no probable cause to believe that the employer engaged in an unlawful discriminatory practice in discharging an employee, who alleged he was discharged due to his disability, a heart condition, would be affirmed where the employer presented evidence that the employee was fired for excessive absenteeism after his return to work upon recovering from his heart attack, that other employees had been terminated for similar reasons and that while recuperating from his heart attack the employer advanced the employee additional sick leave. Vadney v State Human Rights Appeal Bd., 93 A.D.2d 935, 462 N.Y.S.2d 311, 1983 N.Y. App. Div. LEXIS 17829 (N.Y. App. Div. 3d Dep't 1983).

The determination of the New York State Division of Human Rights that complainant was terminated from her employment on the basis of race was properly affirmed, notwithstanding the employer's contention that the previous determination of the Unemployment Insurance Appeal Board that complainant had been terminated for her own misconduct barred her from bringing the instant proceeding, where, inter alia, complainant was not represented by counsel in the previous proceeding, which involved a comparatively small claim, and where a full and fair opportunity to litigate the racial allegation was not afforded her. Board of Education v New York State Human Rights Appeal Bd., 106 A.D.2d 364, 482 N.Y.S.2d 495, 1984 N.Y. App. Div. LEXIS 21403 (N.Y. App. Div. 2d Dep't 1984).

Finding that school district had not discriminated (on basis of disability) against applicant for position as school bus driver lacked support in record where district had rejected applicant on strength of medical report in which doctor stated only that applicant should not operate bus until checked by cardiologist, and did not make final determination that applicant was unfit; accordingly, on applicant's Article 78 petition, decision of State Division of Human Rights, which had found no probable cause to believe that district had engaged in unlawful discriminatory practice, should be annulled. Sitler v New York State Div. of Human Rights, 133 A.D.2d 938, 520 N.Y.S.2d 653, 1987 N.Y. App. Div. LEXIS 51983 (N.Y. App. Div. 3d Dep't 1987).

Determination that employer unlawfully discriminated against complainant by failing to hire him because of disability was supported by fact that he was denied employment as kitchen helper simply because he had high blood pressure, with no evaluation done as to whether such condition would prevent him from reasonably performing his job activities. Trans World Airlines, Inc. v New York Executive Dept., State Div. of Human Rights, 147 A.D.2d 575, 537 N.Y.S.2d 868, 1989 N.Y. App. Div. LEXIS 1605 (N.Y. App. Div. 2d Dep't 1989).

Commissioner of Division of Human Rights had authority to determine that petitioner engaged in discriminatory practice based on manager's racial slurs, notwithstanding that complainant did not make that specific allegation in his complaint, since (1) elimination of discrimination in provision of basic opportunities is predominant purpose of Human Rights Law, (2) although complainant's testimony regarding racial slurs was in context of charge of unlawful termination, it was also directed at employment relationship between parties, and (3) petitioner could not claim surprise or prejudice from testimony as manager admitted making remarks on several occasions. Broad Elm Auto Centers, Inc. v New York State Div. of Human Rights, 159 A.D.2d 978, 552 N.Y.S.2d 763, 1990 N.Y. App. Div. LEXIS 3281 (N.Y. App. Div. 4th Dep't 1990).

Determination that employer did not unlawfully discriminate against complainant because of his HIV-seropositive status was supported by medical and other evidence that physical manifestations of complainant's disability rendered him physically unable to perform job duties of any available position. Phillips ex rel. Phillips v Rosa, 222 A.D.2d 592, 635 N.Y.S.2d 92, 1995 N.Y. App. Div. LEXIS 12917 (N.Y. App. Div. 2d Dep't 1995), app. denied, 88 N.Y.2d 968, 647 N.Y.S.2d 722, 670 N.E.2d 1354, 1996 N.Y. LEXIS 5189 (N.Y. 1996).

Determination of state Division of Human Rights finding that employee of city transportation department was denied promotion to "gasoline roller engineer" due to racial discrimination would be annulled where employee provided no evidence that he had worked for 3 years—or for 2 years plus additional year of relevant experience—operating gasoline roller on full-time paid basis, and thus division's finding that he was qualified to operate roller at time of his application for provisional position was unsupported by substantial evidence. City of New York v New York State Div. of Human Rights, 225 A.D.2d 421, 638 N.Y.S.2d 957, 1996 N.Y. App. Div. LEXIS 2800 (N.Y. App. Div. 1st Dep't 1996).

Commissioner of Human Rights may not substitute her judgment as to qualifications for hiring and promotion for that of employer. City of New York v New York State Div. of Human Rights, 225 A.D.2d 421, 638 N.Y.S.2d 957, 1996 N.Y. App. Div. LEXIS 2800 (N.Y. App. Div. 1st Dep't 1996).

Explanation offered by city department of transportation for its decision to investigate and ultimately reject employee's application for promotion as "gasoline roller engineer"—department's knowledge of conflict between employee's claims of experience and his job duties as department employee—was not pretext for racial discrimination. City of New York v New York State Div. of Human Rights, 225 A.D.2d 421, 638 N.Y.S.2d 957, 1996 N.Y. App. Div. LEXIS 2800 (N.Y. App. Div. 1st Dep't 1996).

Commissioner of Human Rights' inference of retaliatory motive behind acts of city department of transportation against employee was unfounded and would be annulled, despite employee having filed prior complaint of racial discrimination after he was denied promotion, where, with regard to various incidents, department provided ample evidence that denial of overtime was based on assessments of his qualifications and job performance, amendment of his performance evaluation was based on 2 disciplinary incidents unknown to supervisor who drafted evaluation initially, and denial of his application for another promotion was based on his complete lack of qualifications for post. City of New York v New York State Div. of Human Rights, 225 A.D.2d 421, 638 N.Y.S.2d 957, 1996 N.Y. App. Div. LEXIS 2800 (N.Y. App. Div. 1st Dep't 1996).

Employee's assertion that civil service promotion examination regarding operation of "gasoline roller" (highway construction vehicle) was conducted against him in discriminatory or retaliatory manner due to his filing of racial discrimination complaint was unsupported where record established that he failed test on account of his own inabilities, including failure to reply correctly to questions which could be answered by simple observation of vehicle. City of New York v New York State Div. of Human Rights, 225 A.D.2d 421, 638 N.Y.S.2d 957, 1996 N.Y. App. Div. LEXIS 2800 (N.Y. App. Div. 1st Dep't 1996).

Contention by clerk employed by correctional facility that facility's Deputy Superintendent of Administration had unlawfully prevented clerk from obtaining certain promotions was refuted by proof that Deputy lacked authority to influence those decisions. New York State Dep't of Correctional Servs. v State Div. of Human Rights, 238 A.D.2d 704, 656 N.Y.S.2d 78, 1997 N.Y. App. Div. LEXIS 3750 (N.Y. App. Div. 3d Dep't 1997).

Court would affirm city's determination terminating petitioner's employment as parking lot attendant where he did not contest substantial evidence of his misconduct while on duty, including drinking and refusing to undergo breathalyzer test as directed by supervisor, and although he established prima facie case that conduct which formed basis for his discharge was causally related to his alcoholism, city showed that subsequent to his completion of alcohol treatment program, he had relapse while on duty and was immediately charged with misconduct. Myszczenko v City of Poughkeepsie, 239 A.D.2d 584, 657 N.Y.S.2d 455, 1997 N.Y. App. Div. LEXIS 5639 (N.Y. App. Div. 2d Dep't 1997).

Electrician employed by city met his burden of presenting legally admissible proof that he was treated detrimentally for constitutionally impermissible reason of his off-duty political activities where, shortly after he was directed to refrain from wearing campaign sticker supporting political opponent of city public works commissioner, and while city and commissioner knew that he continued to express his opposing political views on his own time, his job duties were adjusted—including reduction in responsibility—in way that was calculated to, and did, lead to his being denied promotion and concomitant salary increase. Richardson v City of Saratoga Springs, 246 A.D.2d 900, 667 N.Y.S.2d 995, 1998 N.Y. App. Div. LEXIS 524 (N.Y. App. Div. 3d Dep't 1998).

In Article 78 proceeding by city electrician, in which he presented prima facie proof that he was unconstitutionally denied promotion and concomitant salary increase because of his expression of political views opposing city public works commissioner, fact that job reclassification that led to his nonpromotion was recommended by independent consultant and approved by city council was of little significance in rebutting prima facie case where those actions were direct result of changes in electrician's work duties effected by commissioner. Richardson v City of Saratoga Springs, 246 A.D.2d 900, 667 N.Y.S.2d 995, 1998 N.Y. App. Div. LEXIS 524 (N.Y. App. Div. 3d Dep't 1998).

Averments of city electrician in Article 78 proceeding stated viable claim that city and its pubic works commissioner acted illegally, in violation of statutory proscriptions (CLS Civ S § 107(1) and CLS Labor § 201-d(2)(a)) against making employment decisions on basis of employee's political activities where he alleged that, shortly after he was directed to refrain from wearing campaign sticker supporting commissioner's political opponent, and while city and commissioner knew that he continued to express his opposing political views on his own time, his job duties were adjusted—including reduction in responsibility—in way that was calculated to, and did, lead to his being denied promotion and concomitant salary increase. Richardson v City of Saratoga Springs, 246 A.D.2d 900, 667 N.Y.S.2d 995, 1998 N.Y. App. Div. LEXIS 524 (N.Y. App. Div. 3d Dep't 1998).

There was no basis to set aside jury verdict dismissing plaintiff's claim that county failed to appoint her to permanent security guard position because of her physical disability although her eligibility for position was certified under CLS Civ S § 55-a, where she failed civil service exam administered for that position, and she failed to establish that commissioner had designated prescribed number of positions with duties that could be performed by certified physically disabled individuals or that open position existed in this category to which she could be appointed. Coluccio v County of Albany, 258 A.D.2d 756, 685 N.Y.S.2d 823, 1999 N.Y. App. Div. LEXIS 1165 (N.Y. App. Div. 3d Dep't 1999).

Evidence did not support human rights commissioner's determination that employer condoned racial discrimination allegedly committed against complainant by her supervisor where (1) employer's equal employment opportunity (EEO) officer conducted prompt investigation, concluded that problem was more likely result of personality conflict than racial animus, and mediated settlement agreement which was approved by employer's executive board, and (2) while employer was unable to fund salary increase for complainant due to its limited resources, memorandum as to proper behavior was placed in parties' personnel files and EEO officer continued monitoring situation. Community Action Org. of Erie County v Mercado, 261 A.D.2d 935, 689 N.Y.S.2d 807, 1999 N.Y. App. Div. LEXIS 5032 (N.Y. App. Div. 4th Dep't 1999).

African-American woman did not prove that Niagara Frontier Transportation Authority unlawfully discriminated against her in denying her application for employment as Secretary to Transportation Superintendents where person who made hiring decision for that position also was African-American, and person hired had almost 20 years more experience than complainant and greater knowledge of computers. Niagara Frontier Transp. Auth. v New York State Div. of Human Rights, 275 A.D.2d 922, 713 N.Y.S.2d 631, 2000 N.Y. App. Div. LEXIS 9577 (N.Y. App. Div. 4th Dep't 2000).

Niagara Frontier Transportation Authority unlawfully discriminated against African-American woman in denying her application for employment as Secretary to General Manager where she raised inference of discrimination by proving that she was better qualified candidate than person hired and that persons responsible for hiring were informed of race of applicants before hiring decision was made, and authority did not rebut presumption of discrimination by proving, through admissible evidence, legitimate nondiscriminatory reason for its decision. Niagara Frontier Transp. Auth. v New York State Div. of Human Rights, 275 A.D.2d 922, 713 N.Y.S.2d 631, 2000 N.Y. App. Div. LEXIS 9577 (N.Y. App. Div. 4th Dep't 2000).

College history professor did not prove retaliatory discharge, even though her comments regarding "glass ceiling" for tenured female professors in history department could be protected activity under CLS Exec § 296(1)(a) and (e), where (1) there was no showing that comment caused discharge from her employment, which terminated at end of academic year by express terms of one-year, nonrenewable appointment, (2) she rejected offer of part-time adjunct position for ensuing academic year, and (3) even if she proved prima facie case of retaliatory discharge, college articulated legitimate, nondiscriminatory reasons for nonrenewal of her contract, and she did not show that those reasons

were pretexts for discrimination. Grafe v Iona College, 281 A.D.2d 347, 722 N.Y.S.2d 162, 2001 N.Y. App. Div. LEXIS 3138 (N.Y. App. Div. 1st Dep't 2001).

State Division of Human Rights' finding of sex discrimination in termination of female employee was not supported by substantial evidence where (1) employee's claim of reduced work hours was inconsistent with her claim that she was given more work than her coworkers were, (2) although she did not have locker for changing clothes, she was provided small room to change in, because of unavailability of separate lockers for female employees, (3) every fact finder who had heard employee's testimony had found it incredible, (4) court-appointed psychiatrist who examined employee described her belief of sexual harassment in terms of paranoid personality disorder, delusional psychosis, and distorted view of reality, and (5) employee's prior complaints against 2 former employers were never substantiated, one of them prompting federal judge to condemn her strongly. Jamco Bldg. Maint. Corp. v N.Y. State Div. of Human Rights, 281 A.D.2d 364, 724 N.Y.S.2d 20, 2001 N.Y. App. Div. LEXIS 3139 (N.Y. App. Div. 1st Dep't 2001), app. denied, 98 N.Y.2d 613, 749 N.Y.S.2d 475, 779 N.E.2d 186, 2002 N.Y. LEXIS 2699 (N.Y. 2002).

Assuming that plaintiff was otherwise qualified for her job as special education teacher, her allegation that defendant board of education refused to accommodate her requests for schedule modification or transfer did not show adverse employment action as required by discrimination statutes, but only permissible refusal to change terms and conditions of her employment. Sirota v N.Y. City Bd. of Educ., 283 A.D.2d 369, 725 N.Y.S.2d 332, 2001 N.Y. App. Div. LEXIS 6583 (N.Y. App. Div. 1st Dep't 2001).

Finding that an employee suffered employment discrimination based on disability was proper because the employee testified that the restaurant manager told him he was fired from his part-time dishwashing job because of scarring on his head caused by a psoriasis and cellulitis condition, which presented a prima facie case of discrimination, and the employer's three explanations for the employee's termination were pretextual; the award of damages for lost pay and reimbursement for counseling services in the amount of $4,776, and compensatory damages for pain and suffering in the amount of $10,000, were proper. Matter of Tosha Rests., LLC v New York State Div. of Human Rights, 79 A.D.3d 1337, 911 N.Y.S.2d 734, 2010 N.Y. App. Div. LEXIS 9173 (N.Y. App. Div. 3d Dep't 2010).

Trial court properly dismissed an employee's application to review a determination finding no probable cause to believe that a school district had engaged in unlawful discriminatory practices relating to employment because, inter alia, the employee was given the opportunity to respond to all of the district's submissions, the employee's requests for medical leave did not indicate the cause(s) of her requests or link them to her job assignment, the district sought to accommodate her, and the record did not show that the employee's treatment was based on her status as a domestic violence victim. Matter of Curtis v New York State Div. of Human Rights, 124 A.D.3d 1117, 3 N.Y.S.3d 138, 2015 N.Y. App. Div. LEXIS 599 (N.Y. App. Div. 3d Dep't 2015).

Trial court erred in dismissing an employee's application to review a determination by the State Division of Human Rights (SDHR) finding no probable cause to believe that her prior employer, current employer, and its parent corporation engaged in unlawfully discriminatory employment practices because the employee was deprived of a full and fair opportunity to present evidence on her behalf and to rebut the evidence presented by the employer inasmuch as SDHR refused to consider her response to the notes of a one-party conference and never advised her that the response had to be submitted by a specific time, but instead specified a calendar day that included "the time from midnight to midnight."Matter of Hong Wang v New York State Div. of Human Rights, 2019 N.Y. App. Div. LEXIS 8519 (November 21, 2019).

Employee established prima facie case of disability discrimination where he admittedly suffered from recognized mental disability of alcoholism, his ingestion of alcohol was compulsive and beyond his control, it impaired normal function, and he was terminated from his position (in which he enjoyed unblemished record of promotions) after he revealed his disability to his supervisor and that he was seeking treatment through Alcoholics Anonymous. Grullon v South Bronx Overall Economic Dev. Corp., 185 Misc. 2d 645, 712 N.Y.S.2d 911, 2000 N.Y. Misc. LEXIS 350 (N.Y. Civ. Ct. 2000).

Nothing in case law or statutory framework of state and New York City Human Rights Law requires plaintiff to introduce medical evidence to prove his disability of alcoholism. Grullon v South Bronx Overall Economic Dev. Corp., 185 Misc. 2d 645, 712 N.Y.S.2d 911, 2000 N.Y. Misc. LEXIS 350 (N.Y. Civ. Ct. 2000).

Employee was not required to prove, in establishing prima facie case of disability discrimination, that his alcoholism adversely manifested itself in some significant way in his work, such that his performance at work would be "impaired" thereby. Grullon v South Bronx Overall Economic Dev. Corp., 185 Misc. 2d 645, 712 N.Y.S.2d 911, 2000 N.Y. Misc. LEXIS 350 (N.Y. Civ. Ct. 2000).

Jury was free to consider employer's "dishonesty about" reason for employee's discharge for alcoholism as affirmative evidence of guilt of disability discrimination where employer's witnesses presented weak and inconsistent testimony regarding claimed budget cuts and "budget reallocation," and evidence showed that discharge occurred shortly after employee revealed his disability to his supervisor, who was involved in decision to discharge him. Grullon v South Bronx Overall Economic Dev. Corp., 185 Misc. 2d 645, 712 N.Y.S.2d 911, 2000 N.Y. Misc. LEXIS 350 (N.Y. Civ. Ct. 2000).

Hospital employee failed to establish adverse retaliatory action predicated on hospital personnel department's delay in providing her with medical leave forms where there was no showing that she was harmed beyond inconvenience or that she was deprived of pay for period during which she was on leave, and she failed to show that delay in providing forms was traceable to her participation in protected activity. Dortz v City of New York, 904 F. Supp. 127, 1995 U.S. Dist. LEXIS 14438 (S.D.N.Y. 1995).

Bus driver, who was of Puerto Rican background, failed to establish that he was fired due to national origin or ethnic discrimination in violation of Human Rights Law, where employer asserted that driver was fired because he tested positive for cocaine, drug test was administered in nondiscriminatory fashion to all drivers, and supervisor made no remarks at termination meeting suggesting that invidious discrimination was reason for discharge. Santiago v Greyhound Lines, Inc., 956 F. Supp. 144, 1997 U.S. Dist. LEXIS 1048 (N.D.N.Y. 1997).

Fact that teacher had disclosed to students questions to be used on national advanced placement examination prior to examination constituted legitimate nondiscriminatory reason for her constructive discharge. Richardson v Newburgh Enlarged City Sch. Dist., 984 F. Supp. 735, 1997 U.S. Dist. LEXIS 18037 (S.D.N.Y. 1997).

19. Evidence of housing discrimination

On the basis that Executive Law § 298 is unambiguous and requires the Appellate Division to examine and test the merits in any proceeding properly before it, the Appellate Division, pursuant to Executive Law § 298, properly reversed the finding of the State Division of Human Rights that a discriminatory practice had occurred where it was shown that a seller of realty refused to attend the closing, and that the prospective purchaser was a Negro, but not that the refusal of seller was occasioned by the race of the buyer. State Div. of Human Rights v Bystricky, 30 N.Y.2d 322, 333 N.Y.S.2d 398, 284 N.E.2d 560, 1972 N.Y. LEXIS 1630 (N.Y. 1972).

Where question of housing discrimination on basis of race revolved on credibility of witnesses, court lacked authority to vacate determination of State Division of Human Rights. Pappas v New York State Div. of Human Rights, 37 N.Y.2d 844, 378 N.Y.S.2d 36, 340 N.E.2d 470, 1975 N.Y. LEXIS 2228 (N.Y. 1975).

Evidence was sufficient to establish that corporate vendor of home discriminated against would-be purchaser on basis of race and color. Pappas v New York State Div. of Human Rights, 37 N.Y.2d 844, 378 N.Y.S.2d 36, 340 N.E.2d 470, 1975 N.Y. LEXIS 2228 (N.Y. 1975).

Where there was no evidence to support the Commissioner's finding that as result of a landlord's refusal to rent an apartment to complainant, complainant became aggrieved, and suffered

humiliation and mental anguish, State Division of Human Rights' petition for an enforcement order was dismissed. State Div. of Human Rights v McGinnis, 37 A.D.2d 759, 322 N.Y.S.2d 822, 1971 N.Y. App. Div. LEXIS 3600 (N.Y. App. Div. 4th Dep't 1971).

Where the complaint involved alleged discriminatory practices in connection with housing accommodations in Yonkers, Westchester County, and the respondents conducted their business from Nassau County, the proceeding was transferred to the Appellate Division, Second Department, where the action should have been instituted. Lemelle v State Div. of Human Rights, 37 A.D.2d 764, 324 N.Y.S.2d 470, 1971 N.Y. App. Div. LEXIS 3442 (N.Y. App. Div. 1st Dep't 1971).

The evidence was insufficient to support a finding that complainant was discriminated against on her application for an apartment because of her color where it appeared that she did not qualify for an apartment under the standards utilized by respondents for all applicants, that her income was insufficient to meet the rule of thumb applied by respondent for financial ability, that she lied to the credit checker about her children's schooling, that the one-bedroom apartment for which she applied was insufficient to accommodate her 3 children, and that the credit check indicated she had experienced prior difficulties in meeting her obligations. State Div. of Human Rights v Fairway Apartments Corp., 39 A.D.2d 761, 332 N.Y.S.2d 474, 1972 N.Y. App. Div. LEXIS 4543 (N.Y. App. Div. 2d Dep't 1972), aff'd, 33 N.Y.2d 754, 350 N.Y.S.2d 131, 304 N.E.2d 775, 1973 N.Y. LEXIS 976 (N.Y. 1973).

Record supported determination by Commissioner of Human Rights that petitioner violated Human Rights Law, CLS Exec Art 15, by refusing to rent apartment to caucasian respondent because her 2 sons were black, where petitioner, earlier receptive to renting apartment, arranged second meeting so that she could meet children, and expressed reluctance to rent only after such meeting. Moore v State Div. of Human Rights, 154 A.D.2d 823, 546 N.Y.S.2d 487, 1989 N.Y. App. Div. LEXIS 12709 (N.Y. App. Div. 3d Dep't 1989).

Determination by Division of Human Rights that landlord had discriminated against complainant by refusing to rent apartment to her by reason of her race was supported by evidence that (1) when complainant contacted landlord about apartment, she told him that she was black and he avoided talking with her, and subsequently told her that apartment was not available, (2) when complainant's sister called by telephone about apartment, she was told it was available but when she inquired in person she was told that it was not available, and (3) when complainant's sister asked co-worker to inquire about apartment, she was told it was available. Szpilzinger v New York State Div. of Human Rights, 160 A.D.2d 196, 554 N.Y.S.2d 4, 1990 N.Y. App. Div. LEXIS 3680 (N.Y. App. Div. 1st Dep't), app. denied, 76 N.Y.2d 707, 560 N.Y.S.2d 989, 561 N.E.2d 889, 1990 N.Y. LEXIS 3041 (N.Y. 1990).

Petitioner committed unlawful discriminatory practice by refusing to sell piece of real property to complainant because of her race; realtor who represented complainant, and who was also black, was also victim of petitioner's discrimination insofar as petitioner refused to deal with realtor because of complainant's race. Feggoudakis v New York State Div. of Human Rights, 230 A.D.2d 739, 646 N.Y.S.2d 175, 1996 N.Y. App. Div. LEXIS 8219 (N.Y. App. Div. 2d Dep't 1996).

Evidence that a construction company and its president refused to sell a house to a Negro and offered no reasonable explanation for such refusal, was sufficient to sustain findings of commission that respondents were guilty of discriminatory practices, since the statute made commission's findings conclusive if supported by sufficient evidence on the record considered as a whole. Marrano Constr. Co. v State Com. for Human Rights, 45 Misc. 2d 1081, 259 N.Y.S.2d 4, 1965 N.Y. Misc. LEXIS 2061 (N.Y. Sup. Ct. 1965).

Evidence by a complainant attempting to prove racial discrimination as the sole cause of her failure to secure an apartment in the form of elicited testimony designed to show the comparison between the treatment accorded to her and to a white "checker" posing as a prospective tenant was sufficient to support findings of the Commission of illegal discrimination, and those findings supported by sufficient evidence were conclusive. Lawrence Gardens, Inc. v State Com. for Human Rights, 53 Misc. 2d 20, 277 N.Y.S.2d 857, 1966 N.Y. Misc. LEXIS 1238 (N.Y. Sup. Ct. 1966).

Findings of discrimination by the Commission were supported by sufficient evidence in proceeding wherein complainant charged that he had attempted to purchase a home which had been advertised for sale by a real estate firm but that his efforts were frustrated because of his color by various dilatory and discouraging tactics engaged in by salesmen employed by the real estate firm, reference being made to appointments which were not kept and broken promises as well as other acts indicating a lack of co-operation and an overall passive attitude inconsistent with the eagerness to consummate a transaction normally exhibited by a salesman. State Com. for Human Rights v Suburban Associates, Inc., 55 Misc. 2d 920, 286 N.Y.S.2d 733, 1967 N.Y. Misc. LEXIS 1016 (N.Y. Sup. Ct. 1967), modified, 34 A.D.2d 662, 310 N.Y.S.2d 1019, 1970 N.Y. App. Div. LEXIS 5125 (N.Y. App. Div. 2d Dep't 1970).

State Division of Human Rights' determination that a landlord discriminated against prospective tenants in the leasing of housing was supported by sufficient evidence when it was shown that the landlord had agreed to rent an apartment in his house to one of the tenants, who was white, and the tenant's wife, until he learned the tenant's wife was black. Matteo v N.Y. State Div. of Human Rights, 306 A.D.2d 484, 761 N.Y.S.2d 517, 2003 N.Y. App. Div. LEXIS 7418 (N.Y. App. Div. 2d Dep't 2003).

20. Evidence of racial discrimination

Sheriff's department was not insulated from liability for acts of racial and sex discrimination against white female deputy, even though sheriff had not necessarily encouraged or condoned statements by his employees which referred to deputy as being "all done" and urged her to resign before she was fired so as not to bring shame on her family by disclosure of her alleged relationship with black male coemployee, where it was sheriff, as employer, who personally discharged deputy, participated in disparate treatment of deputy and coemployee, and offered justifications for deputy's terminations which were rejected as pretextual by Human Rights Commissioner. State Div. of Human Rights ex rel. Cottongim v County of Onondaga Sheriff's Dep't, 71 N.Y.2d 623, 528 N.Y.S.2d 802, 524 N.E.2d 123, 1988 N.Y. LEXIS 603 (N.Y. 1988).

Human Rights Commissioner properly concluded, in case of sex and racial discrimination, that sheriff did not show sufficient neutral justification for terminating white female deputy where (1) sheriff offered shifting responses when his initial charge (that deputy abused sick time) proved baseless, (2) second charge (that deputy failed to report coemployee's rule violation) was never shown to be sheriff department rule, and (3) third charge (that deputy allowed black male coemployee to enter her home and rest in her bedroom on his complaint of illness) resulted in no discipline of coemployee and could be seen as "blatantly improper" assertion that white woman's relationship with black man tended to bring discredit on her employer. State Div. of Human Rights ex rel. Cottongim v County of Onondaga Sheriff's Dep't, 71 N.Y.2d 623, 528 N.Y.S.2d 802, 524 N.E.2d 123, 1988 N.Y. LEXIS 603 (N.Y. 1988).

White, female deputy sheriff made out prima facie case of sex and racial discrimination by showing that she was disciplined differently from her black male coemployee, even though coemployee was protected by Civil Service Law and she, as at-will employee, was not, where she and coemployee performed same duties, they were both involved in same incident that gave rise to both being disciplined, and coemployee was never charged with offenses (acts tending to discredit sheriff's department, and failure to report rules violation) which department maintained were cause of employee's discharge. State Div. of Human Rights ex rel. Cottongim v County of Onondaga Sheriff's Dep't, 71 N.Y.2d 623, 528 N.Y.S.2d 802, 524 N.E.2d 123, 1988 N.Y. LEXIS 603 (N.Y. 1988).

The findings of the State Division of Human Rights directing an employer to pay complainant damages for lost wages was not supported by sufficient evidence on the record considered as a whole nor did the fact that the store manager advanced a false reason for discharging the complainant constitute sufficient evidence of discrimination to justify such drastic sanctions and there

was no other evidence of racial or color discrimination on which a reasonable conclusion could be based. Nescott of East Islip, Inc. v State Div. of Human Rights, 35 A.D.2d 573, 315 N.Y.S.2d 206, 1970 N.Y. App. Div. LEXIS 3998 (N.Y. App. Div. 2d Dep't), aff'd, 27 N.Y.2d 787, 315 N.Y.S.2d 851, 264 N.E.2d 345, 1970 N.Y. LEXIS 1060 (N.Y. 1970).

Where it appeared that company had no position of a supervisory nature available at time it interviewed individual and that no supervisory personnel was hired after that interview, evidence failed to establish discrimination in hiring because of race, color or national origin. State Div. of Human Rights v Winston A. Burnett Constr. Co., 41 A.D.2d 1022, 343 N.Y.S.2d 991, 1973 N.Y. App. Div. LEXIS 4383 (N.Y. App. Div. 4th Dep't 1973).

Where there was no showing on papers submitted that change in work assignment from 7 a.m. to 4 p.m. shift to 11 a.m. to 8 p.m. shift, which was necessitated by discontinuance of hot breakfast program and which petitioner alleged interfered with his attendance of evening classes, was attributable to discrimination because of race or color, determination in favor of employer was proper. Jowers v State Executive Dep't, 42 A.D.2d 523, 344 N.Y.S.2d 685, 1973 N.Y. App. Div. LEXIS 3813 (N.Y. App. Div. 1st Dep't 1973), aff'd, 34 N.Y.2d 601, 354 N.Y.S.2d 952, 310 N.E.2d 547, 1974 N.Y. LEXIS 1829 (N.Y. 1974).

Where same test on operation of automatic turret lathe was given to two white men, and black man, and position of automatic turret lathe operator was given to only man who had automatic turret lathe experience and who was also only man to answer test questions correctly, fact that man given position was white did not evidence discrimination by employer toward black applicant. Sperry Rand Corp. v State Human Rights Appeal Board, 46 A.D.2d 678, 360 N.Y.S.2d 57, 1974 N.Y. App. Div. LEXIS 3915 (N.Y. App. Div. 2d Dep't 1974).

Evidence that complainant, who had been laid off, lacked qualifications needed for newly created job requiring rapidity and extreme accuracy in typing and that complainant had refused to take qualifying typing test when offered opportunity to do so established that employer's failure to offer newly created job to complainant did not deny complainant equal terms, conditions and privileges of employment because of race and color. State Div. of Human Rights ex rel. Williams v Rome Cable Div. of Cyprus Mines Corp., 46 A.D.2d 1003, 362 N.Y.S.2d 100, 1974 N.Y. App. Div. LEXIS 3388 (N.Y. App. Div. 4th Dep't 1974).

Use of ethnic slurs and insults by a coworker or superior without knowledge or acquiescence of employer is not an unlawful discriminatory practice reached by provision of Human Rights Law prohibiting discrimination in compensation, terms, conditions or privileges of employment because of race, creed, color or national origin. State Div. of Human Rights v Henderson, 49 A.D.2d 1026, 375 N.Y.S.2d 497, 1975 N.Y. App. Div. LEXIS 11383 (N.Y. App. Div. 4th Dep't 1975).

Fact that acts of discrimination directed at black, female personnel occurred during course of complainant's employment did not support finding that those acts culminated in, or contributed to, the eventual dismissal of complainant, a black woman. Semimetals, Inc. v State Human Rights Appeal Board, 50 A.D.2d 925, 377 N.Y.S.2d 615, 1975 N.Y. App. Div. LEXIS 11853 (N.Y. App. Div. 2d Dep't 1975), aff'd, 43 N.Y.2d 883, 403 N.Y.S.2d 467, 374 N.E.2d 365, 1978 N.Y. LEXIS 1806 (N.Y. 1978).

A determination of discrimination in employment and a remedial provision ordering reinstatement would be confirmed where there was substantial evidence that sustained the finding of racial discrimination and petitioner would be reinstated to her former probationary teaching position and afforded a fair and nondiscriminatory evaluation for tenure. Guilderland Cent. School Dist. v New York State Human Rights Appeal Bd., 93 A.D.2d 908, 461 N.Y.S.2d 599, 1983 N.Y. App. Div. LEXIS 17798 (N.Y. App. Div. 3d Dep't 1983).

Racial discrimination is shown where, in reduction in force, white employee was permitted to bump black employee even though white employee lacked requisite qualifications for job and acquired such qualifications only after grant of leave of absence without pay while allowing seniority to accrue during leave. Texaco, Inc. v State Div. of Human Rights, 112 A.D.2d 361, 491 N.Y.S.2d 813, 1985 N.Y. App. Div. LEXIS 56495 (N.Y. App. Div. 2d Dep't 1985).

Determination that petitioner engaged in unlawful discriminatory practice in conditions of complainant's employment was supported by substantial evidence where it was established that manager of store at which complainant worked frequently made derogatory comments about complainant's race, including references that complainant was his "little nigger slave," in presence of customers and complainant's co-workers; compensatory award of $5,000 for mental anguish was not excessive. Broad Elm Auto Centers, Inc. v New York State Div. of Human Rights, 159 A.D.2d 978, 552 N.Y.S.2d 763, 1990 N.Y. App. Div. LEXIS 3281 (N.Y. App. Div. 4th Dep't 1990).

Evidence supported determination finding correctional facility guilty of unlawful discriminatory practice based on race where complainant and other black correction officers testified as to "hostile situation" at facility, black officers were placed in different "class" from white employees, they were denied more desirable assignments and shifts, they had their orders and directions disregarded by subordinates or countermanded by their superior officers, and they were disciplined more frequently and more harshly than white employees; furthermore, of 16 cases of alleged inmate abuse occurring at facility, complainant was sole correction officer who was dis-charged. New York State Dep't of Correctional Servs. v State Div. of Human Rights, 215 A.D.2d 908, 626 N.Y.S.2d 588, 1995 N.Y. App. Div. LEXIS 5326 (N.Y. App. Div. 3d Dep't 1995).

Evidence supported African-American correctional officer's claim of racial discrimination practiced by his supervisor, and officer's contention that Department of Correctional Services was aware of problem but failed to take appropriate remedial action, where supervisor had negative attitude toward minorities, he consistently exhibited such attitude to his subordinates in work place, he repeatedly verbally harassed and humiliated officer in front of other officers, civilian bus drivers and prisoners, he pressured him to violate regulations, and he ordered officer to sit with prisoners during transportation assignments for periods of 12 to 15 hours in defiance of regulations requiring officer rotation every 30 minutes. New York State Dep't of Correctional Servs. v New York State Div. of Human Rights, 225 A.D.2d 856, 638 N.Y.S.2d 827, 1996 N.Y. App. Div. LEXIS 2063 (N.Y. App. Div. 3d Dep't 1996).

Court would annul determination finding that petitioner, not-for-profit corporation which renovated abandoned buildings, discriminated against Hispanic complainant on basis of national origin where petitioner provided low-income housing for homeless and training to its trainees, majority of whom were Hispanic and black, and overwhelming evidence was that petitioner was not anti-Hispanic and that true reasons for complainant's dismissal was that he was employee malcontent who saw himself as supervisor and could not accept subordinate role. Youth Action Homes v State Div. of Human Rights ex rel. Palombo, 231 A.D.2d 7, 659 N.Y.S.2d 447, 1997 N.Y. App. Div. LEXIS 6945 (N.Y. App. Div. 1st Dep't 1997).

There was no merit in petitioner's complaint of race discrimination in employment and retaliation where substantial evidence supported findings that candidates who received 2 higher level positions sought by petitioner were more qualified than petitioner, who lacked necessary qualifications, undercut his claim that his poor performance evaluations were part of continuing pretext disguising retaliatory motive linked to his having expressed to superiors his belief that decisions not to promote him were based on race, and that such motive ultimately led to his termination, and there was no other basis to disturb findings crediting performance evaluations and other evidence offered by employer of legitimate, nondiscriminatory reasons for termination. Davis v Mercado, 240 A.D.2d 163, 658 N.Y.S.2d 862, 1997 N.Y. App. Div. LEXIS 5836 (N.Y. App. Div. 1st Dep't 1997).

Caucasian waitresses established prima facie case of restaurant's discrimination by showing that Asian waitresses were given preference with respect to hours and table assignments. Young Fu Hsu v New York State Div. of Human Rights, 241 A.D.2d 913, 661 N.Y.S.2d 400, 1997 N.Y. App. Div. LEXIS 7842 (N.Y. App. Div. 4th Dep't 1997).

Court erred in annulling Division of Human Rights' finding of no probable cause and remanding race discrimination case for further investigation based on division's purportedly one-sided and abbreviated investigation where (1) fact-finding conference had lasted several hours, (2) employer's uncontroverted witnesses and documentary evidence showed that petitioner's work performance was subject of numerous complaints, and that he was discharged because he failed to improve despite numerous warnings and counseling sessions, (3) petitioner was replaced by another black employee, and (4) employer had significant percentage of black employees and discharged various employees of different races in same year as it discharged petitioner. McFarland v New York State Div. of Human Rights, 241 A.D.2d 108, 671 N.Y.S.2d 461, 1998 N.Y. App. Div. LEXIS 4041 (N.Y. App. Div. 1st Dep't 1998).

In action alleging that plaintiff's employer impermissibly discriminated against him when it demoted him for subjecting African American coworker to ridicule, jury could reasonably infer that plaintiff was demoted only because he was white and incident was thought to be racially motivated where (1) supervisor testified that poor treatment of minority employees in facility where plaintiff worked made it difficult to accomplish employer's goal of increasing number of minority employees and expressed concern that tolerating his "prank" would discourage minorities from accepting positions in that facility, and (2) expert in field of labor-management relations and employment discrimination testified that, contrary to supervisor's belief, prank in question (posting picture of bird-like stuffed animal with long multicolored beak and black body seated at African American coworker's desk) belied intimation of racial animus. Michaelis v State, 258 A.D.2d 693, 685 N.Y.S.2d 325, 1999 N.Y. App. Div. LEXIS 944 (N.Y. App. Div. 3d Dep't), app. denied, 93 N.Y.2d 806, 689 N.Y.S.2d 708, 711 N.E.2d 984, 1999 N.Y. LEXIS 1202 (N.Y. 1999).

Court would annul determination by administrative law judge (ALJ) finding that railroad company's termination of respondent for violent behavior against fellow worker was pretextual, wherein ALJ asserted that she was not bound by prior determination that assault took place, where prior determination to dismiss respondent was upheld on appeal by Special Board of Adjustment, arbitration panel authorized by Railway Labor Act (45 USCS § 153), respondent conceded that Board had administrative status, and Board conclusively determined that respondent violently assaulted and then threatened fellow worker. Metro-North Commuter R.R. Co. v New York State Exec. Dep't Div. of Human Rights, 271 A.D.2d 256, 707 N.Y.S.2d 50, 2000 N.Y. App. Div. LEXIS 4101 (N.Y. App. Div. 1st Dep't 2000).

African-American woman did not prove that Niagara Frontier Transportation Authority unlawfully discriminated against her in denying her application for employment as Secretary to Transportation Superintendents where person who made hiring decision for that position also was African-American, and person hired had almost 20 years more experience than complainant and greater knowledge of computers. Niagara Frontier Transp. Auth. v New York State Div. of Human Rights, 275 A.D.2d 922, 713 N.Y.S.2d 631, 2000 N.Y. App. Div. LEXIS 9577 (N.Y. App. Div. 4th Dep't 2000).

Niagara Frontier Transportation Authority unlawfully discriminated against African-American woman in denying her application for employment as Secretary to General Manager where she raised inference of discrimination by proving that she was better qualified candidate than person hired and that persons responsible for hiring were informed of race of applicants before hiring decision was made, and authority did not rebut presumption of discrimination by proving, through admissible evidence, legitimate nondiscriminatory reason for its decision. Niagara Frontier Transp. Auth. v New York State Div. of Human Rights, 275 A.D.2d 922, 713 N.Y.S.2d 631, 2000 N.Y. App. Div. LEXIS 9577 (N.Y. App. Div. 4th Dep't 2000).

Although substantial evidence supported the determination that an employee was subjected to a hostile work environment and that the employer condoned the discriminatory acts of its employees, the employer took some measures to end the racial discrimination of which it was aware, which, while ineffective, did not rise to the level of deliberately and intentionally creating intolerable working conditions, and, moreover, the working conditions were not so intolerable, difficult, or unpleasant that a reasonable person would have felt compelled to resign; the employee testified that the frequency with which other workers made racial comments had decreased before he left, and, under the circumstances, the mere service of an answer to an administrative complaint was insufficient to support a constructive discharge claim. Therefore, the award for lost wages was annulled. Matter of Gold Coast Rest. Corp. v Gibson, 67 A.D.3d 798, 888 N.Y.S.2d 186, 2009 N.Y. App. Div. LEXIS 8082 (N.Y. App. Div. 2d Dep't 2009).

Commissioner of the New York State Division of Human Rights properly determined that an employer discriminated against an employee on the basis of his race and color by subjecting him to a hostile work environment where, inter alia, the owners' failure to intervene constituted condonation of the racial discrimination inasmuch as it rose to the level of a knowing, after-the-fact forgiveness or acceptance of the offense. Matter of New York State Div. of Human Rights v Besdad, Inc., 143 A.D.3d 987, 39 N.Y.S.3d 251, 2016 N.Y. App. Div. LEXIS 6913 (N.Y. App. Div. 2d Dep't 2016).

Fact that respondent airline's representative utilized subjective standards in recommending rejection of petitioner's application for employment, and that racial factors might have played a part in his arriving at that judgment, does not constitute a basis for overturning the commission's finding where a review of the entire record discloses other, non-racially motivated basis which, it is equally possible, might have led to the same conclusion. Grant v State Com. for Human Rights, 54 Misc. 2d 775, 283 N.Y.S.2d 486, 1967 N.Y. Misc. LEXIS 1241 (N.Y. Sup. Ct. 1967).

21. Evidence of religious discrimination

The Division of Human Rights properly dismissed a complaint of an unlawful discriminatory practice based on creed, founded on petitioner's discharge from his position as a shochet, or ritual slaughterer of chickens, with a kosher poultry processor and distributor, where the evidence showed that, not only had petitioner not been discriminated against on account of his Orthodox Judaism, but he would have never been employed as shochet had he not been an Orthodox Jew, that petitioner was disqualified by an Orthodox Jewish organization for working as a shochet due to the fact that he had neglected to follow certain significant parts of its prescribed methodology, and that, once petitioner lost the organization's approval, his employer was forced to discharge him in order to stay in business as a producer of kosher foods. Balban v State Div. of Human Rights, 104 A.D.2d 709, 480 N.Y.S.2d 777, 1984 N.Y. App. Div. LEXIS 20125 (N.Y. App. Div. 3d Dep't 1984).

Determination of New York State Division of Human Rights that petitioner was not denied promotion because of her religion or creed was supported by substantial evidence; additionally, petitioner was given full and fair opportunity to present evidence on her behalf and to rebut evidence presented by respondent employer, but she failed to produce any supportive evidence; furthermore, it is within discretion of Division of Human Rights to decide method or methods to be employed in investigating complaints of discrimination. Kushnir v New York State Div. of Human Rights, 114 A.D.2d 898, 495 N.Y.S.2d 71, 1985 N.Y. App. Div. LEXIS 53929 (N.Y. App. Div. 2d Dep't 1985).

It was error for Division of Human Rights to rule that city transit authority unlawfully discriminated against employee (who was Seventh-Day Adventist) by failing to accommodate her observance of Sabbath from sundown on Friday to sundown on Saturday, where division failed to take account of facts that transit authority operated buses on 7-day 24-hour basis, that weekend service was staffed almost entirely by junior employees, and that Transit Workers Union objected to employee's request for special consideration on religious grounds because it would conflict with earned rights of employees more senior to her; religious liberty is damaged when state promotes welfare of one religious group over another. New York City Transit Auth. v Executive Dep't, Div. of Human Rights, 211 A.D.2d 220, 627 N.Y.S.2d 360, 1995 N.Y. App. Div. LEXIS 5887 (N.Y. App. Div. 1st Dep't 1995), aff'd, modified, 89 N.Y.2d 79, 651 N.Y.S.2d 375, 674 N.E.2d 305, 1996 N.Y. LEXIS 3162 (N.Y. 1996).

State human rights commissioner's dismissal of complaint alleging that petitioner had been forced to resign from his employment because of his religious beliefs would be annulled, and case would be remitted for new decision with findings of fact, where (1) commissioner's decision was inconsistent in concluding both that petitioner failed to prove prima facie case of discrimination and that employer "has presented sufficient evidence to rebut the presumption of discrimination," which presumption arises only if employee proves prima facie case, (2) in deciding whether petitioner proved prima facie case, commissioner improperly considered employer's reasons for its actions, and (3) commissioner did not decide whether those reasons were pretext for discrimination. Draman v Lamar Advertising of Penn, Inc., 273 A.D.2d 808, 709 N.Y.S.2d 306, 2000 N.Y. App. Div. LEXIS 6841 (N.Y. App. Div. 4th Dep't 2000).

Commissioner of the New York State Division of Human Rights, properly found that a country club's membership admissions policy discriminated against applicants on the basis of creed, in violation of N.Y. Executive Law § 296(2)(a), as the club was properly determined to be a place of public accommodation, and did not fall within the distinctly private exception under N.Y. Executive Law § 292(9) since it had over 100 members and provided regular meals and services to non-members, thus, the club's religious quota system to admit new members was violative of N.Y. Executive Law § 296(2)(a). Further, a current member of the club had standing to file the discrimination complaint as his hearing testimony demonstrated that he was deprived of the associational benefits of interacting with at least two potential members who were placed on a waiting list because there were no available openings for members of their religion. Matter of Mill Riv. Club, Inc. v New York State Div. of Human Rights, 59 A.D.3d 549, 873 N.Y.S.2d 167, 2009 N.Y. App. Div. LEXIS 1108 (N.Y. App. Div. 2d Dep't), app. dismissed, 12 N.Y.3d 871, 882 N.Y.S.2d 679, 910 N.E.2d 428, 2009 N.Y. LEXIS 1779 (N.Y. 2009).

Inclusion in two places in a booklet sent to persons inquiring for reservations at a resort of the words "serving Christian clientele" since 1911 could not, as matter of law, be considered a violation of this section relating to discriminatory practices. Trowbridge v Katzen, 23 Misc. 2d 111, 203 N.Y.S.2d 736, 1960 N.Y. Misc. LEXIS 2875 (N.Y. Sup. Ct. 1960), modified, 14 A.D.2d 608, 218 N.Y.S.2d 808, 1961 N.Y. App. Div. LEXIS 9384 (N.Y. App. Div. 3d Dep't 1961).

22. Evidence of sex discrimination

Evidence, filed by policewoman with State Division of Human Rights alleging sex discrimination in that she was not promoted to vacant position of police sergeant, was sufficient to support finding that the policewoman who ranked third on eligibility list following two male police officers was the subject of sex discrimination. Evidence that when policewoman appeared before review board for consideration of promotion to police sergeant no questions were asked about her police work as such but that inquiries were made as to how her husband and son felt about her being a policewoman and as to whether she was afraid, that one of the members of the board stated that it was too bad that there were not any promotions within the youth aid bureau where policewoman was working, and that one member of the review board later told a representative of the Division of Human Rights that he did not feel that policewoman should be a police sergeant because she was a female sustained finding of sex discrimination. Schenectady v State Div. of Human Rights, 37 N.Y.2d 421, 373 N.Y.S.2d 59, 335 N.E.2d 290, 1975 N.Y. LEXIS 2042 (N.Y. 1975).

Sheriff's department was not insulated from liability for acts of racial and sex discrimination against white female deputy, even though sheriff had not necessarily encouraged or condoned statements by his employees which referred to deputy as being "all done" and urged her to resign before she was fired so as not to bring shame on her family by disclosure of her alleged relationship with black male coemployee, where it was sheriff, as employer, who personally discharged deputy, participated in disparate treatment of deputy and coemployee, and offered justifications for deputy's terminations which were rejected as pretextual by Human Rights Commissioner. Human Rights Commissioner properly concluded, in case of sex and racial discrimination, that sheriff did not show sufficient neutral justification for terminating white female deputy where (1) sheriff offered shifting responses when his initial charge (that deputy abused sick time) proved baseless, (2) second charge (that deputy failed to report coemployee's rule violation) was never shown to be sheriff department rule, and (3) third charge (that deputy allowed black male coemployee to enter her home and rest in her bedroom on his complaint of illness) resulted in no discipline of coemployee and could be seen as "blatantly improper" assertion that white woman's relationship with black man tended to bring discredit on her employer. White, female deputy sheriff made out prima facie case of sex and racial discrimination by showing that she was disciplined differently from her black male coemployee, even though coemployee was protected by Civil Service Law and she, as at-will employee, was not, where she and coemployee performed same duties, they were both involved in same incident that gave rise to both being disciplined, and coemployee was never charged with offenses (acts tending to discredit sheriff's department, and failure to report rules violation) which department maintained were cause of employee's discharge. State Div. of Human Rights ex rel. Cottongim v County of Onondaga Sheriff's Dep't, 71 N.Y.2d 623, 528 N.Y.S.2d 802, 524 N.E.2d 123, 1988 N.Y. LEXIS 603 (N.Y. 1988).

Restaurant's belief that replacement of waiters with waitresses dressed in alluring costumes would enhance sales volume did not establish a bona fide occupational qualification for purposes of exempting discharge of waiters from operation of sex discrimination laws. Evidence which tended to demonstrate that restaurant sales volume had increased slightly following replacement of male waiters with waitresses dressed in alluring costumes was insufficient to establish a bona fide occupational qualification exception which would protect restaurant's action from operation of sex discrimination law where there was no evidence establishing that increased sales were directly attributable to replacement of waiters. Guardian Capital Corp. v New York State Div. of Human Rights, 46 A.D.2d 832, 360 N.Y.S.2d 937, 1974 N.Y. App. Div. LEXIS 3585 (N.Y. App. Div. 3d Dep't 1974), app. dismissed, 36 N.Y.2d 806, 1975 N.Y. LEXIS 2680 (N.Y. 1975), app. denied, 37 N.Y.2d 705, 1975 N.Y. LEXIS 2770 (N.Y. 1975).

On application to reverse order of Commissioner of Division of Human Rights that assistant professor was not denied tenure because of her sex, appellate division's scope of review was limited to determination of whether there was sufficient evidence in the record to support the order. State Div. of Human Rights ex rel. Mortenson v Syracuse Univ., 46 A.D.2d 1002, 362 N.Y.S.2d 104, 1974 N.Y. App. Div. LEXIS 3386 (N.Y. App. Div. 4th Dep't 1974), app. denied, 36 N.Y.2d 643, 1975 N.Y. LEXIS 2497 (N.Y. 1975).

Where court in prior proceeding wherein waiter charged that restaurant which replaced staff of waiters with waitresses was guilty of sex discrimination held that restaurant failed to produce sufficient evidence to establish bona fide occupational qualification exception protecting restaurant's action from operation of sex discrimination law and where restaurant did not adduce any significantly different financial proof at hearing on instant sex discrimination complaint filed by another waiter who was discharged under same circumstances, prior decision controlled decision in instant proceeding on issue whether evidence was sufficient to establish bona fide occupational qualification exception. Guardian Capital Corp. v New York State Div. of Human Rights, 48 A.D.2d 753, 368 N.Y.S.2d 594, 1975 N.Y. App. Div. LEXIS 9834 (N.Y. App. Div. 3d Dep't), app. denied, 37 N.Y.2d 712, 1975 N.Y. LEXIS 2959 (N.Y. 1975).

Evidence that employer told female employee that she was being replaced because employer needed a man in the job was sufficient to support finding that employer unlawfully discriminated against employee. 121-129 Broadway Realty, Inc. v New York State Div. of Human Rights, 48 A.D.2d 975, 369 N.Y.S.2d 837, 1975 N.Y. App. Div. LEXIS 10269 (N.Y. App. Div. 3d Dep't 1975).

Although there was arguably substantial evidence in the record to establish that employer had discriminated against complainant by denying her same promotional opportunities as were available to males, evidence was insufficient to sustain Commissioner of State Division of Human Rights' finding that complain-

ant received lesser pay for same or similar work performed by male employees in her department, even accepting as true complainant's contention that employer maintained sex-linked job classifications. State Div. of Human Rights ex rel. Green v Eastman Kodak Co., Kodak Apparatus Div., 55 A.D.2d 842, 390 N.Y.S.2d 332, 1976 N.Y. App. Div. LEXIS 15661 (N.Y. App. Div. 4th Dep't 1976).

In a proceeding pursuant to Exec Law § 298 to review a determination affirming the dismissal by the State Division of Human Rights of a typist's claim of age and sex discrimination, the determination would be confirmed where the record indicated that each time the position sought by the typist was filled the appointment was made from a competitive civil service list or a preferred list, and the typist was either not on the list or so far down that she was not reachable for employment; additionally, the typist apparently refused a similar position in a different locale and failed to receive certain temporary appointments from her employer only because those persons who received the appointments had more seniority or experience. Engel v New York State Human Rights Appeal Bd., 78 A.D.2d 947, 433 N.Y.S.2d 252, 1980 N.Y. App. Div. LEXIS 13720 (N.Y. App. Div. 3d Dep't 1980).

The dismissal for lack of probable cause, of a complaint filed by a female employee who was terminated while three males in her department were retained was not arbitrary, capricious, or characterized by an abuse of discretion where the documentary evidence established that the work experience and the backgrounds of the male employees were more varied and their performance ratings higher than the complaining employee's, and there was substantial evidence to support the finding of no probable cause; the Human Rights Appeal Board could not substitute its factual judgment for that of the Division of Human Rights on the threshold issue of probable cause. GAF Corp. v New York State Human Rights Appeal Bd., 83 A.D.2d 974, 442 N.Y.S.2d 810, 1981 N.Y. App. Div. LEXIS 15436 (N.Y. App. Div. 3d Dep't 1981).

Evidence of sex discrimination is sufficient where fellow employees either admitted or did not deny participating in acts of discrimination and where employer was aware of discrimination by its employees and condoned such by taking no ameliorative action. New York State Dep't of Correctional Services v McCall, 109 A.D.2d 953, 486 N.Y.S.2d 443, 1985 N.Y. App. Div. LEXIS 47469 (N.Y. App. Div. 3d Dep't 1985).

Employment of 25-year-old male teacher with provisional certificate and minimal teaching experience over 42-year-old female teacher with teaching experience and experience as consultant for various educational institutions and with permanent certification sets forth prima facie case of discrimination; in view of lack of residency requirement for position or any policy against teachers engaging in outside work, reasons offered for rejecting female teacher, such as her indication that she would continue consulting business and her lack of residence in district, are not sufficient. Board of Education v State Div. of Human Rights, 109 A.D.2d 988, 486 N.Y.S.2d 469, 1985 N.Y. App. Div. LEXIS 47486 (N.Y. App. Div. 3d Dep't 1985).

Evidence of sex discrimination in failure to hire plaintiff female for position of correction counselor existed where person who interviewed her for position and who had responsibility for hiring described job negatively and told her it was too dangerous for women, and whose testimony was vague as to why plaintiff could not do job, and indicated his belief that women were more easily manipulated then men. New York State Dep't of Correctional Services v McCall, 111 A.D.2d 571, 489 N.Y.S.2d 633, 1985 N.Y. App. Div. LEXIS 51611 (N.Y. App. Div. 3d Dep't 1985).

Sufficient evidence supported determination that teacher and rehabilitation counselor was victim of sex discrimination in course of her employment where her testimony showed that her supervisor touched and rubbed her back, pulled on strap of her undergarment and made inappropriate comments and suggestions concerning her appearance and attitude toward sex, and further detailed how such actions affected her. In proceeding pursuant to CLS Exec § 298 to review determination that petitioner was guilty of unlawful discriminatory practice based on sex, court would affirm award of compensatory damages, notwithstanding intention that petitioner could not be held liable in absence of knowledge or approval of discriminatory acts, where (1) record revealed that petitioner's executive director made some inquiries regarding charge of discrimination, but termed supervisor's actions as "sophomoric" and merely directed him not to do them if he had done them, and (2) there was no evidence that petitioner adopted antidiscrimination policy, apologized to respondent or took other action against supervisor, thereby indicating that it condoned discriminatory acts. Capabilities, Inc. v State Div. of Human Rights, 148 A.D.2d 861, 539 N.Y.S.2d 135, 1989 N.Y. App. Div. LEXIS 2819 (N.Y. App. Div. 3d Dep't 1989), app. denied, 75 N.Y.2d 708, 555 N.Y.S.2d 691, 554 N.E.2d 1279, 1990 N.Y. LEXIS 691 (N.Y. 1990).

Court would annul determination finding that petitioner had been discriminated against based on gender, in that employer had not enforced its time and attendance policy as stringently with similar female employees as with petitioner, or that employer had ever put similar female employees on disciplinary probation for having violated its time and attendance policy as it did with petitioner, where (1) petitioner's treatment was in accordance with employer's disciplinary policy, under which time and attendance disciplinary infractions were typically negotiated with employee, (2) statistical analysis of average measure of time and attendance violations (TAV), constructed by Commissioner of Division of Human Rights and used as basis for his determination of discrimination, used 4 other similar female employees as sample, (3) TAV analysis had no relationship to manner in which employer disciplined employees for time and attendance abuse, (4) TAV analysis failed to account for differences in number of months over which each employee accumulated their time and attendance violations, and contained errors in computation, (5) TAV analysis did not reflect severity of violations during certain periods, or reveal improvements in time and attendance made by employees during other time periods, (6) petitioner was not treated differently as to his first 3 notices of discipline from 3 of similar female employees sampled, and (7) there was no gender discrimination in settlement voluntarily entered into by petitioner as opposed to settlement made by fourth female. New York State Office of Mental Health v New York State Div. of Human Rights, 210 A.D.2d 686, 619 N.Y.S.2d 874, 1994 N.Y. App. Div. LEXIS 12467 (N.Y. App. Div. 3d Dep't 1994), app. denied, 86 N.Y.2d 705, 632 N.Y.S.2d 498, 656 N.E.2d 597, 1995 N.Y. LEXIS 3406 (N.Y. 1995), app. denied, 86 N.Y.2d 705, 632 N.Y.S.2d 498, 656 N.E.2d 597 (N.Y. 1995).

Court would annul determination that petitioner was subjected to quid pro quo sexual harassment where petitioner solely offered her own testimony, she consistently testified that employer never made any sexual advances toward her, that frequency or intensity of alleged contacts never changed, that those interactions predominantly occurred in open view, and that, despite several after-hours meetings alone with employer, he never used those opportunities to engage in any inappropriate contact; moreover, petitioner's own testimony evinced that she never communicated, by words or behavior, that contacts were uninvited, offensive, or unwarranted. Bartle v Mercado, 235 A.D.2d 651, 652 N.Y.S.2d 139, 1997 N.Y. App. Div. LEXIS 95 (N.Y. App. Div. 3d Dep't), app. denied, 89 N.Y.2d 815, 659 N.Y.S.2d 855, 681 N.E.2d 1302, 1997 N.Y. LEXIS 1219 (N.Y. 1997), app. denied, 89 N.Y.2d 815, 659 N.Y.S.2d 855, 681 N.E.2d 1302 (N.Y. 1997).

Sex discrimination in selection of female over male applicant for position of Principal Clerk in Head's Clerk's office at women's correctional facility was not proved where (1) facility's Head Clerk and Deputy Superintendent, both of whom had interviewed applicants, testified convincingly that they were familiar with female applicant's work and found her to be the most desirable candidate because of her demonstrated ability, attitude, and initiative, (2) Deputy Superintendent further testified that he had been concerned about male applicant's attendance record, which left much to be desired, and (3) there was no evidence that interviewers' reasons did not represent true basis for their decision to choose female applicant. New York State Dep't of Correctional Servs. v State Div. of Human Rights, 238 A.D.2d 704, 656 N.Y.S.2d 78, 1997 N.Y. App. Div. LEXIS 3750 (N.Y. App. Div. 3d Dep't 1997).

Clerk employed by correctional facility failed to prove that facility's Deputy Superintendent of Administration (Taylor) harassed or threatened him in retaliation for his having lodged discrimination complaint where (1) although Taylor apparently did not hesitate to make his unfavorable opinion of clerk known to others at facility, there was no evidence that this behavior was prompted by retaliatory motive, (2) Taylor, who was familiar with clerk's abysmal time and attendance record, stated that he simply did not like clerk, because of his belief that clerk had abused his sick time and manipulated system to his advantage, and because clerk had made remark that Taylor considered to be ethnic slur, and (3) Taylor's abrasive and contentious personality indicated that he did not single out clerk for hostile treatment and that altercations complained of were not related to clerk's filing of complaint. New York State Dep't of Correctional Servs. v State Div. of Human Rights, 238 A.D.2d 704, 656 N.Y.S.2d 78, 1997 N.Y. App. Div. LEXIS 3750 (N.Y. App. Div. 3d Dep't 1997).

No cause of action was stated for gender discrimination under CLS Exec § 296 where there was no allegation that female patrons or guests of marina were denied accommodations or use of facilities on basis of gender, and defendants installed video cameras and surreptitiously conducted surveillance of persons using both men's and women's rooms. Mastro v Oak Park Marina, Inc., 238 A.D.2d 930, 661 N.Y.S.2d 554, 1997 N.Y. App. Div. LEXIS 4747 (N.Y. App. Div. 4th Dep't 1997), reh'g denied, 1997 N.Y. App. Div. LEXIS 7993 (N.Y. App. Div. 4th Dep't July 3, 1997).

Substantial evidence supported correction commissioner's decision that terminated correction officer had sexually harassed his subordinates where testimony of 2 complainants proved that officer sexually harassed them by exposing himself to them, and testimony of third complainant proved that officer sexually assaulted her. Arroyo v City of New York, 245 A.D.2d 186, 666 N.Y.S.2d 168, 1997 N.Y. App. Div. LEXIS 13150 (N.Y. App. Div. 1st Dep't 1997).

Substantial, if not overwhelming, evidence supported employer's failure to take proper measures to halt male employees' increasingly aggressive verbal and physical harassment of sole female employee in frozen food warehouse, constituting condonation of gender and age discrimination and hostile work environment, where (1) taunts included remarks that she was too old and slow, was taking man's job away, and was "biggest whore" in town, (2) physical abuse culminated in her being picked up by legs, turned upside down, carried in attempt to place her head-first in garbage receptacle, and slammed into door of men's room, which caused disabling injuries, and (3) although principal perpetrator was warned that he would be fired if he did not refrain from such conduct, he was merely suspended for 3 days and continued to taunt complainant after suspension. Grand Union Co. v Mercado, 263 A.D.2d 923, 694 N.Y.S.2d 524, 1999 N.Y. App. Div. LEXIS 8451 (N.Y. App. Div. 3d Dep't 1999).

Gender discrimination plaintiff established hostile work environment claim, where she testified that 39-year-old partner in defendant law firm made unwanted verbal and physical sexual advances toward her when she was 24-year-old first year associate at firm and remarked, after she was terminated, that she should not worry about her situation because "you'll take care of me and I'll take care of you." Sier v Jacobs Persinger & Parker, 276 A.D.2d 401, 714 N.Y.S.2d 283, 2000 N.Y. App. Div. LEXIS 10763 (N.Y. App. Div. 1st Dep't 2000).

State Division of Human Rights' finding of sex discrimination in termination of female employee was not supported by substantial evidence where (1) employee's claim of reduced work hours was inconsistent with her claim that she was given more work than her coworkers were, (2) although she did not have locker for changing clothes, she was provided small room to change in, because of unavailability of separate lockers for female employees, (3) every fact finder who had heard employee's testimony had found it incredible, (4) court-appointed psychiatrist who examined employee described her belief of sexual harassment in terms of paranoid personality disorder, delusional psychosis, and distorted view of reality, and (5) employee's prior complaints against 2 former employers were never substantiated, one of them prompting federal judge to condemn her strongly. Jamco Bldg. Maint. Corp. v N.Y. State Div. of Human Rights, 281 A.D.2d 364, 724 N.Y.S.2d 20, 2001 N.Y. App. Div. LEXIS 3139 (N.Y. App. Div. 1st Dep't 2001), app. denied, 98 N.Y.2d 613, 749 N.Y.S.2d 475, 779 N.E.2d 186, 2002 N.Y. LEXIS 2699 (N.Y. 2002).

Plaintiff's employer and supervisor were entitled to summary judgment dismissing her cause of action for sexual harassment where (1) she alleged that employer allowed, condoned, and ratified supervisor's conduct and that supervisor, over period of about 10 days, touched her shoulder several times, screamed at her about work, invaded her personal space, made one comment about sexual orientation, and glanced at her in sexual manner "one or two" times, and (2) alleged conduct was not sufficiently severe or pervasive. Baliva v State Farm Mut. Auto. Ins. Co., 286 A.D.2d 953, 730 N.Y.S.2d 655, 2001 N.Y. App. Div. LEXIS 8896 (N.Y. App. Div. 4th Dep't 2001).

Testimony of an employee and her co-worker that their corporate employer's owner made sexually explicit comments at work, the employee's testimony that she told a supervisor before leaving her job because of the comments, and the owner's admission that he might have made some of the alleged comments, although possibly in different language, were sufficient to support a finding that the owner and employer committed sexual harassment by creating a hostile work environment in violation of the N.Y. Human Rights Law. Matter of R & B Autobody & Radiator, Inc. v New York State Div. of Human Rights, 31 A.D.3d 989, 819 N.Y.S.2d 599, 2006 N.Y. App. Div. LEXIS 9469 (N.Y. App. Div. 3d Dep't 2006).

Although a three-day suspension was an adverse employment action for purposes of the employee's gender discrimination claim, most of the other employment actions taken against the employee were not adverse because they did not constitute "materially adverse changes in the terms and conditions of employment." Matter of Russo v New York State Div. of Human Rights, 137 A.D.3d 1600, 28 N.Y.S.3d 156, 2016 N.Y. App. Div. LEXIS 1985 (N.Y. App. Div. 4th Dep't 2016).

Even if an adverse employment action occurred and gave rise to an inference of gender discrimination, it was not actionable because the employer presented a legitimate, independent, and nondiscriminatory reason to support its decision based on the employee's conduct. Matter of Russo v New York State Div. of Human Rights, 137 A.D.3d 1600, 28 N.Y.S.3d 156, 2016 N.Y. App. Div. LEXIS 1985 (N.Y. App. Div. 4th Dep't 2016).

Plaintiff's employer and supervisor were entitled to summary judgment dismissing sexual harassment claims because plaintiff was unable to show that supervisor's alleged conduct, even if true, was promoted simply because of her gender, where he made negative gay comments to both men and women, his boorish behavior and inappropriate social skills did not constitute discriminatory harassment, and his touching of plaintiff's shoulders on "several" occasions over 10-day period in small work cubicle did not rise to level of sexual harassment. Baliva v State Farm Mut. Ins. Co., 186 Misc. 2d 254, 718 N.Y.S.2d 144, 2000 N.Y. Misc. LEXIS 478 (N.Y. Sup. Ct. 2000), aff'd, 286 A.D.2d 953, 730 N.Y.S.2d 655, 2001 N.Y. App. Div. LEXIS 8896 (N.Y. App. Div. 4th Dep't 2001), aff'd, 286 A.D.2d 953, 730 N.Y.S.2d 920, 2001 N.Y. App. Div. LEXIS 9016 (N.Y. App. Div. 4th Dep't 2001).

Substantial evidence supports the commissioner's determination that an employee was harassed by a supervisor because of her sex, that the employer condoned the harassment by failing to conduct a proper investigation upon being informed of the supervisor's misconduct and retaliated against the employee. Matter of Murphy v Kirkland, 88 A.D.3d 267, 928 N.Y.S.2d 333, 2011 N.Y. App. Div. LEXIS 6152 (N.Y. App. Div. 2d Dep't 2011).

Where a former employee alleged her male supervisor sexually harassed her, as the New York State Division of Human Rights (SDHR) failed to satisfy its burden to prove that the employee's female supervisor condoned the discriminatory conduct., SDHR could not enforce a damage award in favor of the employee against the female supervisor. Matter of New York State Div. of Human Rights v Young Legends, LLC, 90 A.D.3d 1265, 934 N.Y.S.2d 628, 2011 N.Y. App. Div. LEXIS 8851 (N.Y. App. Div. 3d Dep't 2011).

Where a former employee testified that her male supervisor made offensive sexual comments, pressured her to come to his apartment, forced her to engage in sexual intercourse there, and

fired her when she refused to return to his apartment, and he did not controvert her testimony, the evidence supported the administrative law judge's finding that she had been subjected to quid pro quo and hostile work environment sexual harassment. Matter of New York State Div. of Human Rights v Young Legends, LLC, 90 A.D.3d 1265, 934 N.Y.S.2d 628, 2011 N.Y. App. Div. LEXIS 8851 (N.Y. App. Div. 3d Dep't 2011).

23. —Pregnancy

Division of Human Rights was not entitled to enforcement of order of the Human Rights Appeal Board to compel town board of education to apply sick leave credit in all cases of pregnancy disability where, inter alia, appellate record contained substantial gaps apparently due to procedural setting, and, in particular, record did not contain sufficient proof as to comparable policies of board of education with respect to nonpregnancy-related disabilities, making it impossible to determine whether there was impermissible discrimination. State Div. of Human Rights v Board of Education, 40 N.Y.2d 1021, 391 N.Y.S.2d 532, 359 N.E.2d 1327, 1976 N.Y. LEXIS 3155 (N.Y. 1976).

Employer unlawfully discriminated against female employees, and was properly ordered to make monetary payments to them, where it required them to quit work two months before expected delivery dates and did not authorize early return to work after delivery, at times when employees were willing to work, and where it refused to permit them to apply their sick leave credits to such maternity absences, and refused to continue to pay premiums on insurance coverages. State Div. of Human Rights ex rel. Ellis v Jamestown Tel. Corp., 53 A.D.2d 1061, 386 N.Y.S.2d 141, 1976 N.Y. App. Div. LEXIS 15880 (N.Y. App. Div. 4th Dep't 1976), aff'd, 42 N.Y.2d 848, 397 N.Y.S.2d 630, 366 N.E.2d 290, 1977 N.Y. LEXIS 2174 (N.Y. 1977).

School district did not discriminate against employee who became pregnant and requested leave of absence which was treated as resignation by denying pre-resignation service credit for seniority list where record establishes that "no leave" policy applied equally to males and females and that no employees, male or female, were granted seniority credit for preresignation employment. Daly v Three Village Cent. School Dist., 109 A.D.2d 772, 486 N.Y.S.2d 286, 1985 N.Y. App. Div. LEXIS 47261 (N.Y. App. Div. 2d Dep't 1985).

Employer obviously failed to rebut prima facie showing that it had terminated complainant's employment because she was pregnant, in violation of CLS Exec § 296(1)(a), where employer neither appeared at hearing, challenged determination nor appeared in enforcement proceeding. State Div. of Human Rights v Demi Lass Ltd., 232 A.D.2d 335, 648 N.Y.S.2d 925, 1996 N.Y. App. Div. LEXIS 11215 (N.Y. App. Div. 1st Dep't 1996).

Employee failed to support pregnancy discrimination claim in face of employer's nondiscriminatory explanation that employee was terminated because she had exceeded 12 weeks of maternity leave allowed by employer. LaCoparra v Pergament Home Ctrs., Inc., 982 F. Supp. 213, 1997 U.S. Dist. LEXIS 15787 (S.D.N.Y. 1997).

24. Evidence of retaliation

Evidence warranted finding by commissioner of Division of Human Rights that city's chief of police was not guilty of retaliation in directing dismissed black policeman's arrest pursuant to nonsupport warrant when policeman was to appear for human rights hearings and in demanding that policeman pay his traffic tickets immediately or outstanding traffic warrant would be executed. State Div. of Human Rights v Syracuse, 57 A.D.2d 452, 394 N.Y.S.2d 948, 1977 N.Y. App. Div. LEXIS 11822 (N.Y. App. Div. 4th Dep't 1977), aff'd, 43 N.Y.2d 958, 404 N.Y.S.2d 343, 375 N.E.2d 409, 1978 N.Y. LEXIS 1857 (N.Y. 1978).

A determination that a former bus driver was not terminated in retaliation for having filed a prior complaint against his employer was supported by evidence that he previously had been terminated for defacing company property and causing an accident involving a discharged passenger, and that he recently had deliberately bypassed passengers in violation of policy. State Div. of Human Rights ex rel. Wright v Regional Transit Service, 79 A.D.2d 1106, 435 N.Y.S.2d 856, 1981 N.Y. App. Div. LEXIS 10054 (N.Y. App. Div. 4th Dep't 1981).

The decision of the Human Rights Appeals Board finding the employer guilty of an unlawful discriminatory practice by discriminating against a female employee because she had opposed practices which were forbidden by the Human Rights Law could not stand where the employer did not discriminate against the complaining employee and other female office workers on the basis of sex and thus the employer could not be found to have retaliated against the complaining employee for having opposed an unlawful practice; however, employees who feel victimized by unlawful discrimination do not act at their peril in trying to expose such practices, since absolute protection is afforded those who seek redress by the commencement of an administrative proceeding. Mohawk Finishing Products, Inc. v State Div. of Human Rights, 83 A.D.2d 970, 442 N.Y.S.2d 816, 1981 N.Y. App. Div. LEXIS 15431 (N.Y. App. Div. 3d Dep't 1981), aff'd, 57 N.Y.2d 892, 456 N.Y.S.2d 749, 442 N.E.2d 1260, 1982 N.Y. LEXIS 3772 (N.Y. 1982).

Evidence did not support determination by Division of Human Rights that complainant's application to rejoin YMCA had been denied in retaliation for his prior human rights complaint given that YMCA had renewed complainant's membership as matter of course following original complaint, he had freely relinquished his membership and was given complete refund of membership dues, and YMCA's subsequent refusal to grant him membership was in response to numerous difficulties in dealing with complainant for more than decade. State Div. of Human Rights ex rel. Albino v YMCA of Greater New York, 139 A.D.2d 440, 527 N.Y.S.2d 219, 1988 N.Y. App. Div. LEXIS 3983 (N.Y. App. Div. 1st Dep't), app. denied, 72 N.Y.2d 807, 532 N.Y.S.2d 848, 529 N.E.2d 178, 1988 N.Y. LEXIS 2531 (N.Y. 1988).

Division of Human Rights properly determined that employee was denied promotion in retaliation for his opposition to what he considered discriminatory employer practices, even if he was mistaken, since "reasonable belief" standard is appropriate in retaliatory discrimination cases, there was nothing in record to show that employee did not reasonably believe that employer's practices were forbidden, and finding that he reasonably believed that employer had violated Human Rights Law was supported by evidence that he took steps to ensure that various other employees did not suffer consequences of practices he thought forbidden. New York State Office of Mental Retardation & Developmental Disabilities v New York State Div. of Human Rights, 164 A.D.2d 208, 563 N.Y.S.2d 286, 1990 N.Y. App. Div. LEXIS 13984 (N.Y. App. Div. 3d Dep't 1990).

Evidence did not support commissioner's determination that employee was discharged in January 1985 in retaliation for filing July 1984 discrimination complaint where record was replete with testimony that employee was not doing job she was designated to perform, and there was insufficient evidence of subjective retaliatory motive for her discharge; in any event, even if prima facie case of retaliation could be found, there was ample proof of legitimate, independent and nondiscriminatory reasons for employee's dismissal. Milonas v Rosa, 217 A.D.2d 825, 629 N.Y.S.2d 535, 1995 N.Y. App. Div. LEXIS 8064 (N.Y. App. Div. 3d Dep't 1995), app. denied, 87 N.Y.2d 806, 641 N.Y.S.2d 597, 664 N.E.2d 508, 1996 N.Y. LEXIS 105 (N.Y. 1996).

Employer's motion, under CLS CPLR § 4404(a), to set aside jury verdict for plaintiff in action for retaliatory discharge was properly granted where (1) evidence supported jury's finding that employee's transfer was not in retaliation for her complaint of age and racial discrimination in denial of promotion, (2) employee's discrimination complaint preceded her termination by 2 years, during which she received salary increases, and (3) there was ample evidence of employee's insubordination after her transfer. Budzanoski v Pfizer, Inc., 245 A.D.2d 72, 664 N.Y.S.2d 796, 1997 N.Y. App. Div. LEXIS 12836 (N.Y. App. Div. 1st Dep't 1997).

Plaintiff who failed to establish her claim of sexual harassment also failed to establish her claim of retaliatory discharge, where record evidence did not establish that alleged retaliation took place within 2 months following her sexual harassment complaint. Pace v Ogden Servs. Corp., 257 A.D.2d 101, 692 N.Y.S.2d 220, 1999 N.Y. App. Div. LEXIS 6819 (N.Y. App. Div. 3d Dep't 1999).

Even if an employee met her initial burden on her retaliation claim, the employer presented a legitimate and nondiscriminatory reason for issuing a counseling memorandum on sexual harassment because it was based on the employee's sharing of sexually explicit material that she had on her cell phone, and the employee failed to show that such reason was pretextual. Matter of Russo v New York State Div. of Human Rights, 137 A.D.3d 1600, 28 N.Y.S.3d 156, 2016 N.Y. App. Div. LEXIS 1985 (N.Y. App. Div. 4th Dep't 2016).

Complaint stated retaliation claim under Human Rights Law where husband alleged that his employment conditions deteriorated following his wife's complaints to management, and that deterioration intensified after she was discharged. Murphy v Cadillac Rubber & Plastics, 946 F. Supp. 1108, 1996 U.S. Dist. LEXIS 17463 (W.D.N.Y. 1996).

Employer's refusal to grant additional sick days to employee, who was excessively absent from work, was not unreasonable and thus was inadequate to support retaliation claims under Human Rights Law. Castro v Local 1199, Nat'l Health & Human Servs. Emples. Union, 964 F. Supp. 719, 1997 U.S. Dist. LEXIS 5373 (S.D.N.Y. 1997).

25. Substantial evidence

Absent a full investigation including an opportunity for confrontation, the determination of the State Division of Human Rights that the State Division for Youth had not discriminated because of race, sex, and color against a black Puerto Rican female employee, who was requested to resign, was based on a record which was inadequate to meet the test of substantial evidence and was, therefore, arbitrary and capricious; since the investigation of the matter conducted by the Division of Human Rights involved separate meetings without hearings, it had to appear as a matter of law that the complaint lacked merit in order for the Division to dismiss the complaint. New York State Div. for Youth v State Human Rights Appeal Bd., 83 A.D.2d 972, 442 N.Y.S.2d 813, 1981 N.Y. App. Div. LEXIS 15434 (N.Y. App. Div. 3d Dep't 1981).

In a proceeding by the Division of Human Rights seeking to enforce an order pursuant to Exec Law § 298, the issue of whether there was substantial evidence to support the award against the Department of Correctional Services finding discrimination in employment was not waived by the Department's failure to take an administrative appeal under Exec Law § 297-a, or to seek judicial review of the award pursuant to Exec Law § 298; that issue must be resolved on an application to enforce the award under § 298 using the same degree of scrutiny that would have been exercised on an application for judicial review. State Div. of Human Rights ex rel. Geraci v New York State Dep't of Correctional Services, 90 A.D.2d 51, 456 N.Y.S.2d 63, 1982 N.Y. App. Div. LEXIS 18809 (N.Y. App. Div. 2d Dep't 1982).

Determination of New York State Division of Human Rights that petitioner was not denied promotion because of her religion or creed was supported by substantial evidence; additionally, petitioner was given full and fair opportunity to present evidence on her behalf and to rebut evidence presented by respondent employer, but she failed to produce any supportive evidence; furthermore, it is within discretion of Division of Human Rights to decide method or methods to be employed in investigating complaints of discrimination. Kushnir v New York State Div. of Human Rights, 114 A.D.2d 898, 495 N.Y.S.2d 71, 1985 N.Y. App. Div. LEXIS 53929 (N.Y. App. Div. 2d Dep't 1985).

Appropriate standard of review of no probable cause determination of Division of Human Rights regarding possible violations of CLS Exec § 298, where no public hearing was held under CLS Exec § 297(4)(a), was whether determination was arbitrary and capricious, or lacking in rational basis, and not substantial evidence test. Giles v State Div. of Human Rights, 166 A.D.2d 779, 563 N.Y.S.2d 142, 1990 N.Y. App. Div. LEXIS 12018 (N.Y. App. Div. 3d Dep't 1990).

Where findings of the State Commission for Human Rights are supported by substantial evidence, most of which is not disputed, they are conclusive. Cooney v Katzen, 41 Misc. 2d 236, 245 N.Y.S.2d 548, 1963 N.Y. Misc. LEXIS 1318 (N.Y. Sup. Ct. 1963).

Under this section, findings of the State Commission for Human Rights supported by substantial evidence on the record considered as a whole, are conclusive. State Com. State Comm'n for Human Rights v Farrell, 43 Misc. 2d 958, 252 N.Y.S.2d 649, 1964 N.Y. Misc. LEXIS 1486 (N.Y. Sup. Ct. 1964).

26. —Particular applications

Hearing examiner's determination, as affirmed by the State Human Rights Appeal Board, that petitioner was guilty of a discriminatory practice in refusing to rent an apartment to the complainant on the basis of his race and color was supported by substantial evidence. 300 Gramatan Ave. Associates v State Div. of Human Rights, 45 N.Y.2d 176, 408 N.Y.S.2d 54, 379 N.E.2d 1183, 1978 N.Y. LEXIS 2107 (N.Y. 1978).

Appellate Division properly annulled determination by Division of Human Rights that medical facility violated CLS Exec § 296(2)(a) by using heightened precautionary measures in 1985 while treating petitioner who was perceived to be at risk of carrying AIDS virus, even though petitioner complained of treatment in isolated room located at end of dark hallway, with all equipment draped in plastic, small "x" on door, and treating physician and staff outfitted in protective clothing, since medical facility showed that its protocol was reasonable, medically warranted, and consistent with its desire to protect patients and staff from spread of infectious diseases; such protocol was consistent with accepted medical practice in 1985 for treatment of patients known or perceived to be at high risk of infection of then recently discovered, contagious, and fatal disease and was not pretext for discrimination. North Shore Univ. Hosp. v Rosa, 86 N.Y.2d 413, 633 N.Y.S.2d 462, 657 N.E.2d 483, 1995 N.Y. LEXIS 3553 (N.Y. 1995).

While the Division of Human Rights' finding of discrimination by volunteer fire department against applicant on the basis of race was supported by substantial evidence, the matter would be resubmitted to petitioners for an immediate and thorough review of complainant's qualifications for appointment to the department in view of his alleged background as set forth in the petition. Bay Shore Fire Dep't v State Div. of Human Rights, 41 A.D.2d 738, 341 N.Y.S.2d 141, 1973 N.Y. App. Div. LEXIS 4970 (N.Y. App. Div. 2d Dep't 1973).

In Article 78 proceeding, determination of Human Rights Appeal Board was reversed for lack of substantial evidence where petitioner established that he had not been given an opportunity to offer at a conference whatever pertinent evidence he possessed in support of his complaint that his discharge was due to his age and national origin. Burns v Sabena Belgian World Airlines, 42 A.D.2d 347, 347 N.Y.S.2d 958, 1973 N.Y. App. Div. LEXIS 3453 (N.Y. App. Div. 1st Dep't 1973).

Although it would have been better practice for division of human rights to have conferred further with petitioner concerning the substantial information which it had gathered that her demotion was not the result of sex discrimination, there was no reason to declare procedure and determination of division arbitrary or capricious or an abuse of discretion. Jackson v New York State Div. of Human Rights, 42 A.D.2d 684, 345 N.Y.S.2d 735, 1973 N.Y. App. Div. LEXIS 3988 (N.Y. App. Div. 4th Dep't 1973).

Record in proceeding to enforce order of State Human Rights Appeal Board failed to disclose substantial evidence to support finding of discrimination in the form of a retaliatory dismissal of complainant from her position as a probationary teacher; on the contrary, the record demonstrated ample cause for dismissal because of unsatisfactory job performance. State Div. of Human Rights v Board of Education, 47 A.D.2d 524, 362 N.Y.S.2d 570, 1975 N.Y. App. Div. LEXIS 8581 (N.Y. App. Div. 2d Dep't 1975).

Where investigation of race discrimination complaint involved separate meetings without formal or informal hearings and where it appeared that parties had not been afforded opportunity directly to confront the issues, determination of Division of Human Rights dismissing the discrimination complaint was not based on a record adequate to meet test of the substantial evidence rule and remand for further proceedings was proper. State Div. of Human Rights ex rel. Powers v Mecca Kendall Corp., 53 A.D.2d 201, 385 N.Y.S.2d 665, 1976 N.Y. App. Div. LEXIS 12506 (N.Y. App. Div. 4th Dep't 1976).

Where findings of sex discrimination in employment made by the State Division of Human Rights and affirmed by the State

Human Rights Appeal Board were supported by substantial evidence, reviewing court was concluded on those questions of fact. State Div. of Human Rights ex rel. Ellis v Jamestown Tel. Corp., 53 A.D.2d 1061, 386 N.Y.S.2d 141, 1976 N.Y. App. Div. LEXIS 15880 (N.Y. App. Div. 4th Dep't 1976), aff'd, 42 N.Y.2d 848, 397 N.Y.S.2d 630, 366 N.E.2d 290, 1977 N.Y. LEXIS 2174 (N.Y. 1977).

Commissioner of Division of Human Rights finding that black policeman's dismissal from city police force was not the result of unlawful discrimination but based on proven acts of misconduct and finding that such penalty was appropriate to the misconduct charged and was not discriminatory were supported by substantial evidence. State Div. of Human Rights v Syracuse, 57 A.D.2d 452, 394 N.Y.S.2d 948, 1977 N.Y. App. Div. LEXIS 11822 (N.Y. App. Div. 4th Dep't 1977), aff'd, 43 N.Y.2d 958, 404 N.Y.S.2d 343, 375 N.E.2d 409, 1978 N.Y. LEXIS 1857 (N.Y. 1978).

The substantial evidence supported determination of New York State Human Rights Appeal Board affirming finding of State Division of Human Rights that age discrimination was not shown. Ashley v New York State Human Rights Appeal Board, 60 A.D.2d 568, 399 N.Y.S.2d 701, 1977 N.Y. App. Div. LEXIS 14500 (N.Y. App. Div. 2d Dep't 1977).

Where the state Division of Human Rights determined there was not probable cause to believe that a teacher had been discriminated against because of his religion either in scheduling of courses or in promotions, on basis of findings that the teacher failed to supply the university with a requested list of dates during which his religion required his absence and that he failed to follow the correct administrative procedure in regard to requests for promotions the determination was supported by substantial evidence. Adelson v New York State Human Rights Appeal Bd., 79 A.D.2d 720, 434 N.Y.S.2d 736, 1980 N.Y. App. Div. LEXIS 14129 (N.Y. App. Div. 3d Dep't 1980).

Petition to review human rights division's no cause order was properly dismissed in light of substantial evidence that employer promoted younger employee over petitioner for reasons unrelated to age; division adequately investigated petitioner's allegations where it held conferences with both parties, solicited from each party responses to other party's evidence and arguments, and evaluated taped conversations supplied by petitioner. Stewart v New York State Div. of Human Rights, 128 A.D.2d 625, 512 N.Y.S.2d 877, 1987 N.Y. App. Div. LEXIS 44313 (N.Y. App. Div. 2d Dep't 1987), app. denied, 70 N.Y.2d 614, 524 N.Y.S.2d 676, 519 N.E.2d 622, 1988 N.Y. LEXIS 21 (N.Y. 1988).

Evidence did not support determination that dismissal of 60-year-old employee was result of improper age discrimination where there had occurred change in nature of employer's work, with concomitant need to reduce staff, and first member of staff to be terminated was 31 years of age. New York State Div. of Human Rights ex rel. Dembo v Johnson & Higgins, 140 A.D.2d 214, 528 N.Y.S.2d 65, 1988 N.Y. App. Div. LEXIS 5138 (N.Y. App. Div. 1st Dep't), app. denied, 72 N.Y.2d 807, 533 N.Y.S.2d 56, 529 N.E.2d 424, 1988 N.Y. LEXIS 2620 (N.Y. 1988).

Substantial evidence supported determination that restaurant unlawfully discriminated against waiter because of his medical disability, despite restaurant's contention that discharge was based on complainant's poor work performance, where complainant, who had informed restaurant's part owner that he had been diagnosed as having AIDS-related complex (ARC), was discharged shortly thereafter, and complainant's roommate testified that restaurant's other part owner told him that reason for discharge was that he "couldn't face" complainant in his restaurant because he had been diagnosed as having ARC. Club Swamp Annex v White, 167 A.D.2d 400, 561 N.Y.S.2d 609, 1990 N.Y. App. Div. LEXIS 13621 (N.Y. App. Div. 2d Dep't 1990), app. denied, 77 N.Y.2d 809, 571 N.Y.S.2d 912, 575 N.E.2d 398, 1991 N.Y. LEXIS 2508 (N.Y. 1991).

County department of corrections was entitled to dismissal of petitioner's age discrimination claim where (1) during his period as probationary correction officer, petitioner failed to qualify in firearm training/unsafe procedures course, was failing course in defensive tactics, and had missed other required courses due to several absences, (2) petitioner was notified that he was discharged for unsatisfactory performance, and (3) petitioner thereafter wrote letters to Commissioner of Corrections in which he made no claim of age discrimination and admitted that he failed required courses. Pantaleone v Jackson, 204 A.D.2d 458, 611 N.Y.S.2d 631, 1994 N.Y. App. Div. LEXIS 4768 (N.Y. App. Div. 2d Dep't), app. denied, 84 N.Y.2d 806, 618 N.Y.S.2d 7, 642 N.E.2d 326, 1994 N.Y. LEXIS 3363 (N.Y. 1994).

Evidence did not support Division of Human Rights' determination that telephone company unlawfully discriminated against African-American employee by denying her promotion, where company established that it promoted white employee to Facilities Assistant position instead of complainant because complainant was not familiar with telephone company power equipment, while white employee was familiar with equipment, having already performed some of those job duties, and because white employee had 4-year college education including physics and calculus, while complainant only had 2-year degree and had not studied physics or calculus. New York Tel. Co. v New York State Div. of Human Rights, 222 A.D.2d 234, 634 N.Y.S.2d 691, 1995 N.Y. App. Div. LEXIS 12729 (N.Y. App. Div. 1st Dep't 1995).

Evidence did not support respondent's determination, based on disparate discriminatory impact analysis, that State Office of Mental Health was guilty of unlawful discriminatory practices for having employed African American and Hispanic employees as grade 9 Mental Health Therapy Aides (MHTAs) at regional forensic unit (RFU), while predominantly white workforce allegedly doing similar work at different forensic facility worked as grade 14 Secure Hospital Treatment Assistants; mere fact that racial imbalance existed in one segment of workforce did not, without more, establish prima facie case of disparate impact, especially in view of fact that MHTAs at two RFUs not considered by respondent, who also failed to receive grade 14 status, were predominantly white. New York State Office of Mental Health, Manhattan Psychiatric Ctr. v New York State Div. of Human Rights, 223 A.D.2d 88, 645 N.Y.S.2d 926, 1996 N.Y. App. Div. LEXIS 8013 (N.Y. App. Div. 3d Dep't 1996), app. denied, 89 N.Y.2d 806, 654 N.Y.S.2d 716, 677 N.E.2d 288, 1997 N.Y. LEXIS 32 (N.Y. 1997).

Evidence did not support determination that rescue mission, in conditioning complainant's stay on further discussing her HIV status, denied her privilege and advantage of place of public accommodation where (1) all witnesses, including complainant, testified that complainant was asked whether she had any medications with her and was told that, if she did, they had to be put away, that she refused to respond to that inquiry, that if she wished to stay, she had to respond, and that she left rather than answering, and (2) question as to medications was not based on her HIV status, but rather was as matter of policy asked of all potential admittees. Rescue Mission Alliance v Mercado, 224 A.D.2d 934, 637 N.Y.S.2d 580, 1996 N.Y. App. Div. LEXIS 1571 (N.Y. App. Div. 4th Dep't), app. denied, 88 N.Y.2d 805, 646 N.Y.S.2d 985, 670 N.E.2d 226, 1996 N.Y. LEXIS 1714 (N.Y. 1996).

Court would annul determination that certain acts of dentist constituted refusal to treat complainant based on his status as person perceived to be at risk for HIV infection where dental office in question did not constitute "place of public accommodation." Schulman v State Div. of Human Rights, 89 N.Y.2d 934, 226 A.D.2d 645, 641 N.Y.S.2d 134, 677 N.E.2d 284, 1996 N.Y. App. Div. LEXIS 4389 (N.Y. App. Div. 2d Dep't 1996), rev'd, 89 N.Y.2d 934, 654 N.Y.S.2d 713, 677 N.E.2d 284, 1997 N.Y. LEXIS 1802 (N.Y. 1997).

Evidence supported determination that petitioner was employee, despite commission-based nature of her pay, where employer, through its president, hired her, controlled her hours, established days that she worked, and provided her with office, supplies, and support staff; moreover, she worked exclusively for employer, which had right to dismiss her and make sole determination as to which products she was to sell and at what prices. Bartle v Mercado, 235 A.D.2d 651, 652 N.Y.S.2d 139, 1997 N.Y. App. Div. LEXIS 95 (N.Y. App. Div. 3d Dep't), app. denied, 89 N.Y.2d 815, 659 N.Y.S.2d 855, 681 N.E.2d 1302, 1997 N.Y. LEXIS 1219 (N.Y. 1997), app. denied, 89 N.Y.2d 815, 659 N.Y.S.2d 855, 681 N.E.2d 1302 (N.Y. 1997).

Substantial evidence supported Division of Human Rights' finding that employer condoned harassment of complainant by

her supervisor, and thus employer was vicariously liable for harassment, where employer acquired knowledge "after the fact" but neither adequately investigated complaint nor took corrective action. New York City Health & Hosps. Corp. v New York State Div. of Human Rights, 236 A.D.2d 310, 654 N.Y.S.2d 310, 1997 N.Y. App. Div. LEXIS 1591 (N.Y. App. Div. 1st Dep't 1997).

Record did not support finding that dentist discriminated against patient who was HIV-positive by draping all surfaces of operatory when treating him, and by scheduling his appointments at end of day; experts agree that some professional judgment must be exercised in implementing appropriate barriers for surfaces that might become contaminated by blood of HIV-positive patient. Cerio v New York State Div. of Human Rights, 258 A.D.2d 873, 684 N.Y.S.2d 738, 1999 N.Y. App. Div. LEXIS 1485 (N.Y. App. Div. 4th Dep't 1999).

Evidence supported employer's assertion that 54-year-old plaintiff was terminated for failure to meet employer's reasonable expectations, not due to age discrimination, where she was hired at age 53 to replace 40-year-old man who was discharged for unsatisfactory performance, she performed significantly worse than her predecessor, and she admittedly failed to meet sales quotas, lost or failed to regain key accounts, failed to comply with supervisor's reasonable recommendations for improving her sales performance, and created problems by informing coworker of supervisor's negative comments about him. Times Mirror Magazines, Inc. v Houghton, 268 A.D.2d 355, 702 N.Y.S.2d 265, 2000 N.Y. App. Div. LEXIS 715 (N.Y. App. Div. 1st Dep't 2000).

Division of Human Rights properly determined that employer condoned hostile work environment, where petitioners testified to numerous instances in which they reported harassment and discrimination by their co-workers to their superiors but nothing was done to stop offensive conduct, and employer did not want to get involved even after petitioners approached police in effort to stop harassment and physical intimidation. Kondracke v Blue, 277 A.D.2d 953, 716 N.Y.S.2d 533, 2000 N.Y. App. Div. LEXIS 11599 (N.Y. App. Div. 4th Dep't 2000).

Failure by defendant board of education and school principal to remedy alleged sexually hostile work environment created by classroom misbehavior of students did not support teacher's claim of unlawful discrimination. Sirota v N.Y. City Bd. of Educ., 283 A.D.2d 369, 725 N.Y.S.2d 332, 2001 N.Y. App. Div. LEXIS 6583 (N.Y. App. Div. 1st Dep't 2001).

Determination that an employer violated N.Y. Exec. Law § 292(21-e) by failing to provide reasonable accommodations for the complainant's disability, which was a sensitivity to an ingredient in a cleaning solution used in her work, was supported by substantial evidence because, although the employer had protective equipment at the work site that may have alleviated the complainant's adverse reaction to the ingredient at issue, at no time before her termination from employment did the employer advise the complainant that the protective equipment was available for her use. Neither of the complainant's supervisors addressed the medical issues raised by the complainant and her physician before terminating her. Matter of New Venture Gear, Inc. v New York State Div. of Human Rights, 41 A.D.3d 1265, 839 N.Y.S.2d 375, 2007 N.Y. App. Div. LEXIS 7165 (N.Y. App. Div. 4th Dep't 2007).

Determination of the New York State Division of Human Rights that an employer violated N.Y. Exec. Law § 296(1)(a) by discriminating against an employee on the basis of her military status was not supported by substantial evidence because the employer demonstrated that he terminated the employee for a legitimate, nondiscriminatory reason that was not based on her military status; the employee's time cards supported the employer's contention that he terminated her employment because she continued to be late after being placed on probation for lateness for reasons having nothing to do with her military status. Matter of Kaplan v New York State Div. of Human Rights, 95 A.D.3d 1120, 944 N.Y.S.2d 616, 2012 N.Y. App. Div. LEXIS 3829 (N.Y. App. Div. 2d Dep't 2012).

Substantial evidence supported the finding that an employer discriminated against each complainant by subjecting her to a sexually hostile work environment as each complainant testified that she was subjected to severe and pervasive sexualized comments and unwanted touching, and that she reported that behavior to management but her complaints were ignored; two complainants were retaliated against as they were terminated shortly after they reported the sexual harassment to management, which showed that the legitimate reasons proffered for the terminations were pretextual, and the third complainant was retaliated against by constructively discharging her. Matter of Stellar Dental Mgt. LLC v New York State Div. of Human Rights, 162 A.D.3d 1655, 80 N.Y.S.3d 757, 2018 N.Y. App. Div. LEXIS 4423 (N.Y. App. Div. 4th Dep't 2018).

Substantial evidence supported the determination that an employer discriminated against the complainant by subjecting her to a sexually hostile work environment because the complainant was subjected to severe and pervasive sexualized comments and unwanted touching by the employer's owner, repeatedly rejected the owner's advances and expressed to him that she felt his comments were inappropriate, and the complainant's testimony was supported by testimony from former employees. Matter of Oz Trucking & Rigging Corp. v New York State Div. of Human Rights, 178 A.D.3d 935, 116 N.Y.S.3d 52, 2019 N.Y. App. Div. LEXIS 9029 (N.Y. App. Div. 2d Dep't 2019).

Evidence supported the compensatory damages awarded to the complainant for mental anguish and humiliation because the complainant was subjected to constant sexual badgering and inappropriate behavior for the entire two years she was employed, endured two instances of unwanted physical contact, on at least one occasion, the complainant was so humiliated and mortified that she left the office on the verge of tears, and the award was within the range established by similar cases. Matter of Oz Trucking & Rigging Corp. v New York State Div. of Human Rights, 178 A.D.3d 935, 116 N.Y.S.3d 52, 2019 N.Y. App. Div. LEXIS 9029 (N.Y. App. Div. 2d Dep't 2019).

Substantial evidence supported the determination by the Division of Human Rights that a school district unlawfully discriminated against a former teacher because a principal with the school district provided a negative reference to a prospective employer's inquiry about the teacher, which was an adverse employment action related to the filing of the teacher's initial complaint. Matter of Copiague Union Free Sch. Dist. v Foster, 185 A.D.3d 1023, 129 N.Y.S.3d 95, 2020 N.Y. App. Div. LEXIS 4415 (N.Y. App. Div. 2d Dep't 2020).

Under provision of above statute as to conclusiveness of findings of commission, substantial evidence rule applies to proceeding seeking review and annulment of order made thereby. Substantial evidence on record in its entirety supported determination of commission that landlord refused to rent to married couple because husband was a Negro. Kindt v State Com. for Human Rights, 44 Misc. 2d 896, 254 N.Y.S.2d 933, 1964 N.Y. Misc. LEXIS 1600 (N.Y. Sup. Ct. 1964), modified, 23 A.D.2d 809, 258 N.Y.S.2d 250, 1965 N.Y. App. Div. LEXIS 4484 (N.Y. App. Div. 4th Dep't 1965).

Finding that there was a substantial continuity of business operations between an employer and its successor in interest did not support the imposition of successor liability because there was not substantial evidence that the successor in interest had notice of an age discrimination claim against the employer prior to the purported sale of assets, or that the president of the employer was unable to satisfy the award. Matter of MTA Trading, Inc. v Kirkland, 84 A.D.3d 811, 922 N.Y.S.2d 488, 2011 N.Y. App. Div. LEXIS 3682 (N.Y. App. Div. 2d Dep't 2011).

Determination that a school district, which did not dispute that the majority of the alleged incidents occurred, permitted students to engage in a course of racially-motivated harassment of a student was supported by substantial evidence where ample testimony and other evidence, including a videotape of one of these incidents, supported allegations that the student was subjected to verbal and physical abuse on a bus, including being spat upon, which was reported to the school; nevertheless, the school district's middle school administrators routinely imposed only two to three-day suspensions on the offending students in response and testified that they felt it was "unfair" to move a problem student to another school to address that student's conduct. The assistant principal conceded that there was a "racial tidal wave" that year, the school bus was a "hell hole" and he

knew that the student had been threatened with gun violence, but did not require the offenders to submit to more serious superintendent's hearings, did not impose lengthier suspensions, and did not even exercise his unilateral power to ban the offenders from riding on that particular bus. Matter of Ithaca City School Dist. v New York State Div. of Human Rights, 87 A.D.3d 268, 926 N.Y.S.2d 686, 2011 N.Y. App. Div. LEXIS 5474 (N.Y. App. Div. 3d Dep't 2011), rev'd, 19 N.Y.3d 481, 950 N.Y.S.2d 67, 973 N.E.2d 162, 2012 N.Y. LEXIS 1353 (N.Y. 2012).

27. Probable cause

State Human Rights Appeal Board impermissibly exceeded the limited scope of its own review and substituted its own judgment for that of State Division of Human Rights in reversing Division's finding of no probable cause, where evidence that complainant unauthorizedly left his job assignment and refused to utilize employer's available procedure for acquiring permission to leave the job assignment supported Division's findings that complainant's dismissal was based on unauthorized absence from his job assignments, and that there was no probable cause to believe that complainant's dismissal was in retaliation for numerous complaints previously filed against employer. Pepsi-Cola Metropolitan Bottling Co. v State Human Rights Appeal Bd., 42 A.D.2d 760, 346 N.Y.S.2d 299, 1973 N.Y. App. Div. LEXIS 3755 (N.Y. App. Div. 2d Dep't 1973).

Where the record, considered as a whole, justified division's finding of no probable cause for sex discrimination charge, board impermissibly exceeded limited scope of its own review in vacating division's order of dismissal. Long Island R. R. Co. v State Div. of Human Rights, 42 A.D.2d 857, 346 N.Y.S.2d 849, 1973 N.Y. App. Div. LEXIS 3639 (N.Y. App. Div. 2d Dep't 1973).

Where record considered as a whole clearly justified finding of no probable cause by Division of Human Rights, Appeal Board in vacating Division's order and remanding matter for further investigation impermissibly exceeded limited scope of its review and substituted its own judgment for that of Division. Grumman Aerospace Corp. v New York State Human Rights Appeal Board, 54 A.D.2d 958, 388 N.Y.S.2d 640, 1976 N.Y. App. Div. LEXIS 14869 (N.Y. App. Div. 2d Dep't 1976).

Absent evidence suggesting that hospital and others engaged in discriminatory practices because of petitioner's age it was not abuse of discretion for State Division of Human Rights to dismiss the complaint for want of probable cause. Talarico v Brookhaven Memorial Hospital, 55 A.D.2d 949, 391 N.Y.S.2d 146, 1977 N.Y. App. Div. LEXIS 10242 (N.Y. App. Div. 2d Dep't 1977).

Determination of State Division of Human Rights that petitioner's complaint of unlawful discriminatory act on ground of age was not supported by probable cause was supported by evidence in record and was neither arbitrary nor capricious. Kowalski v Nassau County Board of Supervisors, 57 A.D.2d 858, 394 N.Y.S.2d 263, 1977 N.Y. App. Div. LEXIS 12076 (N.Y. App. Div. 2d Dep't 1977).

Discrimination complaint was improperly dismissed after preliminary investigation where investigation revealed that complainant had been victim of racial insults and harassments and there was a suspicion that difficulty may have resulted from prejudice. Glen Cove Public Schools v New York State Human Rights Appeal Board, 58 A.D.2d 591, 395 N.Y.S.2d 493, 1977 N.Y. App. Div. LEXIS 12634 (N.Y. App. Div. 2d Dep't), app. denied, 42 N.Y.2d 811, 1977 N.Y. LEXIS 3924 (N.Y. 1977).

An order of State Human Rights Appeal Board affirming a finding of no probable cause by State Division of Human Rights on a discriminatory employment claim must be confirmed if supported by sufficient evidence in record. Pixley v Raymond Corp., 59 A.D.2d 979, 399 N.Y.S.2d 411, 1977 N.Y. App. Div. LEXIS 14248 (N.Y. App. Div. 3d Dep't 1977).

Where record of proceedings before regional director of State Division of Human Rights showed rational basis for his determination of no probable cause with respect to complaints filed by employees, where hearing was extensive and complainants were present and represented by counsel, and where representatives of employer against whom complaints were made were present, represented by counsel, and testified and were cross-examined by counsel for complainant, mere fact that director's daughter was employed as mail clerk by employer against whom complaints were filed was no basis for disqualification of director or for setting aside determination. State Div. of Human Rights v Merchants Mut. Ins. Co., 59 A.D.2d 1054, 399 N.Y.S.2d 813, 1977 N.Y. App. Div. LEXIS 14344 (N.Y. App. Div. 4th Dep't 1977).

The order of the State Human Rights Appeals Board that affirmed a determination of the State Division of Human Rights which held that there was no probable cause to believe that the respondent-employer had engaged in unlawful discriminatory practices resulting in the termination of petitioner's employment was supported by the record where termination was mandated by the Civil Service Law which provided for the creation of, and hiring from, preferred lists of employment. Coriou v New York State Dep't of Mental Hygiene, etc., 80 A.D.2d 597, 436 N.Y.S.2d 38, 1981 N.Y. App. Div. LEXIS 10283 (N.Y. App. Div. 2d Dep't 1981).

State Division of Human Rights did not abuse its discretion in dismissing petitioner's complaint charging her former employer with unlawful discrimination in employment without first holding a confrontation conference or a hearing where the record failed to establish any probable cause to believe that the employer had engaged in any unlawful discriminatory practices. Fischer v Kieley & Mueller, Inc., 81 A.D.2d 576, 437 N.Y.S.2d 430, 1981 N.Y. App. Div. LEXIS 11060 (N.Y. App. Div. 2d Dep't 1981).

In a proceeding pursuant to Exec Law § 298 to review an order of the State Human Rights Appeal Board dismissing the petitioner's complaint upon a finding of no probable cause, the petition was granted and the orders of the Appeal Board and division were annulled where the State Division's determination was made following an inadequate investigation of petitioner's claims and where the underlying investigation may have been somewhat one-sided. Wolchok v New York State Human Rights Appeal Bd., 83 A.D.2d 850, 441 N.Y.S.2d 746, 1981 N.Y. App. Div. LEXIS 15234 (N.Y. App. Div. 2d Dep't 1981).

The State Division of Human Rights did not act arbitrarily or capriciously in dismissing a complaint alleging discrimination in promotion due to disability for lack of probable cause where the complainant's employer, a county, was unaware of complainant's alleged disability due to alcoholism, had other disabled employees on its staff, and had made the promotions in a responsible manner. Gentili v State Div. of Human Rights, 106 A.D.2d 742, 483 N.Y.S.2d 742, 1984 N.Y. App. Div. LEXIS 21673 (N.Y. App. Div. 3d Dep't 1984).

Where determinations of no probable cause are based on investigations which are one sided and abbreviated, determination will be annulled; thus, in sex discrimination case, determination will be annulled where it was made solely on basis of petitioner's verified petition, letter from respondent's attorney, and petitioner's written response, petitioner was not interviewed in person nor were witnesses questioned, respondent's attorney did not have first hand knowledge of facts and his submitted information should therefore not have been relied upon, there was no contact with supervisors or personnel officers employed by respondent who might have had first hand knowledge, and where statistical data showing significantly lower success rate for women than for men was disregarded by investigator. Pape-Becker v Equitable Life Assurance Soc., 111 A.D.2d 427, 488 N.Y.S.2d 321, 1985 N.Y. App. Div. LEXIS 51523 (N.Y. App. Div. 3d Dep't 1985).

Probable cause that employer engaged in discriminatory practices is not shown merely by allegations that coemployees verbally abused petitioner in absence of indication that employer or senior executive was either involved in or condoned such harassment. Boddie v National Cleaning Contractors, Inc., 112 A.D.2d 421, 492 N.Y.S.2d 80, 1985 N.Y. App. Div. LEXIS 56168 (N.Y. App. Div. 2d Dep't 1985).

28. Burden of proof

Burden of establishing employment discrimination is upon complainant and he must establish that he was rejected solely because of his race and color. Sperry Rand Corp. v State Human Rights Appeal Board, 46 A.D.2d 678, 360 N.Y.S.2d 57, 1974 N.Y. App. Div. LEXIS 3915 (N.Y. App. Div. 2d Dep't 1974).

In view of applicant's apparent qualifications, evidence that, after employer refused to employ applicant on reasonable

grounds, and after applicant filed complaint of discrimination against the employer, the employer employed several other applicants without contacting or considering the applicant placed on the employer the burden of explanation of its failure to offer applicant a job and to show that it did not act in retaliation because of the complaint and sustained commissioner's finding that employer had acted in retaliation. State Div. of Human Rights ex rel. Dixon v Loblaw, Inc., 47 A.D.2d 591, 363 N.Y.S.2d 376, 1975 N.Y. App. Div. LEXIS 8690 (N.Y. App. Div. 4th Dep't 1975).

Unlike proceedings involving bona fide occupational qualification test under Human Rights Law where employer has burden of proving that employee's disability precludes him from reasonably performing job, in Article 78 proceeding brought by police officer seeking judgment directing officials to refrain from terminating his employment because of hearing loss, officer had to show that Municipal Police Training Council acted arbitrarily in adopting hearing standard under 9 NYCRR § 6000.3, which officer claimed was more stringent than necessary for efficient performance of police duties. Rice v Schuyler County Civil Service Com., 137 A.D.2d 359, 528 N.Y.S.2d 944, 1988 N.Y. App. Div. LEXIS 6071 (N.Y. App. Div. 3d Dep't), app. dismissed, 72 N.Y.2d 1003, 534 N.Y.S.2d 665, 531 N.E.2d 297, 1988 N.Y. LEXIS 2756 (N.Y. 1988).

Article 78 proceeding to annul findings that State Office of Mental Health (SOMH) discriminated and retaliated against employee was properly dismissed where administrative law judge found that SOMH's witnesses were not credible and that employee made prima facie showing of discrimination and retaliation, and thus trier of fact could infer ultimate fact of intentional discrimination without need for employee to prove that SOMH's explanations for its conduct were pretextual. New York State Office of Mental Health v New York State Div. of Human Rights, 273 A.D.2d 829, 709 N.Y.S.2d 755, 2000 N.Y. App. Div. LEXIS 6849 (N.Y. App. Div. 4th Dep't 2000).

In dismissing plaintiffs' allegations that defendant employer condoned or acquiesced in sexual harassment committed by male coworkers, court erred by imposing burden on plaintiffs to prove that they reported complained-of incidents to defendant, where defendant failed to plead affirmative defense that plaintiffs failed to take advantage of preventative or corrective opportunities provided by defendant so as to mitigate their damages; furthermore, had defendant pleaded such defense, burden would have been on it to establish defense, not on plaintiffs to disprove it in first instance. Vitale v Rosina Food Prods., 283 A.D.2d 141, 727 N.Y.S.2d 215, 2001 N.Y. App. Div. LEXIS 5748 (N.Y. App. Div. 4th Dep't 2001).

In action for alleged disability discrimination, employer satisfied its burden of showing that it had legitimate nondiscriminatory reasons for discharging security guard, on basis that he had violated company policy by being under influence of alcohol while on job, which jeopardized security of building and damaged employer's reputation with tenants. Lugo v Milford Mgmt. Corp., 956 F. Supp. 1120, 1997 U.S. Dist. LEXIS 2004 (S.D.N.Y. 1997).

29. Choice of remedies

State Human Rights Commissioner has wide discretion in selecting appropriate remedy, but there are times when his determination of remedy may be set aside because it is erroneous as matter of law. New York Institute of Technology v State Div. of Human Rights, 40 N.Y.2d 316, 386 N.Y.S.2d 685, 353 N.E.2d 598, 1976 N.Y. LEXIS 2891 (N.Y. 1976).

Only under gravest of circumstances, where all other conceivable remedies have proved ineffective or futile, should Human Rights Commissioner enter campus to impose conferring of tenure, and even in extraordinary case where grant of tenure might serve as appropriate remedy the Commissioner should not impose such requirement without consulting with administration of institution and without considering effect of such order on institution and its faculty. New York Institute of Technology v State Div. of Human Rights, 40 N.Y.2d 316, 386 N.Y.S.2d 685, 353 N.E.2d 598, 1976 N.Y. LEXIS 2891 (N.Y. 1976).

That professor was not given fair opportunity to apply for tenure was insufficient to justify State Human Rights Commissioner's imposition of tenure requirement, and tenure requirement was deleted from his order. New York Institute of Technology v State Div. of Human Rights, 40 N.Y.2d 316, 386 N.Y.S.2d 685, 353 N.E.2d 598, 1976 N.Y. LEXIS 2891 (N.Y. 1976).

Order of State Commission for Human Rights which directed respondent to notify the complainant of the first available three-room vacancy in any specified building owned by respondent was clearly designed to effectuate policy of Article 15 of the Executive Law (Law Against Discrimination) and the remedy granted bore a reasonable relationship to the unlawful discriminatory practices found to exist. State Com. for Human Rights v Lieber, 29 A.D.2d 663, 286 N.Y.S.2d 300, 1968 N.Y. App. Div. LEXIS 4851 (N.Y. App. Div. 2d Dep't), rev'd, 23 N.Y.2d 253, 296 N.Y.S.2d 319, 244 N.E.2d 24, 1968 N.Y. LEXIS 973 (N.Y. 1968).

Where a landlord had been found guilty of discriminatory practices in housing accommodations, the provisions of an order requiring him to file compliance reports, keep records of all vacancies and rejections and post the Division's regulations, were proper and enforceable. State Div. of Human Rights ex rel. Johnson v Stern, 37 A.D.2d 441, 326 N.Y.S.2d 500, 1971 N.Y. App. Div. LEXIS 2833 (N.Y. App. Div. 4th Dep't 1971).

Choice of remedies for discriminatory employment practice lay with Human Rights Division, which had wide latitude except that its orders were required to bear reasonable relation to discriminatory practices found and legislative policy behind the statute. New York Inst. of Technology v State Div. of Human Rights, 48 A.D.2d 132, 368 N.Y.S.2d 207, 1975 N.Y. App. Div. LEXIS 9559 (N.Y. App. Div. 1st Dep't 1975), rev'd, 40 N.Y.2d 316, 386 N.Y.S.2d 685, 353 N.E.2d 598, 1976 N.Y. LEXIS 2891 (N.Y. 1976).

Commissioner of Human Rights erred in directing university to rehire instructor where his only educational expertise was in area of photographic technology, department which university had discontinued in interim; reinstatement would require university and students to bear burden of instructor's lack of teaching expertise, and more appropriate award would be reimbursement of instructor for 3-year term of renewal which was denied him because of university's discrimination. State University Agricultural & Technical College v State Div. of Human Rights, 134 A.D.2d 339, 520 N.Y.S.2d 814, 1987 N.Y. App. Div. LEXIS 50516 (N.Y. App. Div. 2d Dep't 1987).

Supreme Court improperly reinstated petitioner as permanent employee on finding of unlawful discriminatory discharge where, at time of discharge, he had completed only 8 months of one-year probationary period; petitioner was only entitled to reinstatement to probationary title he held at time of discharge. Obas v Kiley, 149 A.D.2d 422, 539 N.Y.S.2d 767, 1989 N.Y. App. Div. LEXIS 4393 (N.Y. App. Div. 2d Dep't 1989).

In confirming determination that employer was guilty of sexual harassment of discharged probationary employee, court did not err in denying employee's request for future lost earnings or prejudgment interest as alternative to reinstatement, but employee should have been reinstated to her position as probationary employee and given additional probationary period in which to demonstrate her competence in atmosphere untainted by sexual harassment. Levy v City Comm'n on Human Rights, 196 A.D.2d 214, 609 N.Y.S.2d 576, 1994 N.Y. App. Div. LEXIS 2436 (N.Y. App. Div. 1st Dep't 1994), aff'd, 85 N.Y.2d 740, 628 N.Y.S.2d 245, 651 N.E.2d 1264, 1995 N.Y. LEXIS 1122 (N.Y. 1995).

Penalty of termination of correction officer's employment was not so disproportionate to offenses as to shock Appellate Division's sense of fairness where 2 complainants testified that officer sexually harassed them by exposing himself to them, and third complainant testified that officer sexually assaulted her; either set of charges was sufficient, by itself, to support dismissal. Arroyo v City of New York, 245 A.D.2d 186, 666 N.Y.S.2d 168, 1997 N.Y. App. Div. LEXIS 13150 (N.Y. App. Div. 1st Dep't 1997).

Administrative convenience dismissal of complaint with State Division of Human Rights alleging discriminatory discharge from employment on bases of race and physical disability was arbitrary where there was nothing in record to suggest that complainant intended to pursue his federal remedy before filing his administrative complaint or that he filed such complaint as prerequisite to commencing federal action, fact that over one year elapsed between filing of administrative complaint and commencement of federal action indicated that complainant initially

intended to elect administrative remedy, and thus dismissal violated CLS Exec § 297(9) and CLS Div Hum Rts R § 465.5(e)(2) (9 NYCRR § 465.5(e)(2)). Wegmans Food Mkts. v New York State Div. of Human Rights, 245 A.D.2d 685, 664 N.Y.S.2d 685, 1997 N.Y. App. Div. LEXIS 12602 (N.Y. App. Div. 3d Dep't 1997).

Employee was not barred by Workers' Compensation Law from receiving lost wages under State Division of Human Rights' decision that employer was liable for age and sex discrimination where employee's monetary recovery for intentional acts of discrimination in human rights proceeding was offset by amount of workers' compensation benefits paid to her, and thus CLS Work Comp § 29, which was designed to prevent double recovery, was not frustrated. Grand Union Co. v Mercado, 263 A.D.2d 923, 694 N.Y.S.2d 524, 1999 N.Y. App. Div. LEXIS 8451 (N.Y. App. Div. 3d Dep't 1999).

In a suit filed pursuant to N.Y. Exec. Law § 298, an employee's claim that the employee should have been permanently promoted to a provisional appointment after the employee was discriminated against based on gender was rejected as the decision whether to permanently appoint the employee, or one of the other two candidates, rested with the employer under N.Y. Civ. Serv. Law §§ 61 and 65; compelling circumstances were not implicated, and the opening for the Solid Waste Specialist III (grade 27) position resulted from a provisional promotion of another person to a grade 31 position and that person reverted back to the grade 27 position when that person failed to pass the Civil Service examination for the grade 31 position. In essence, the permanent position was no longer available when the provisional appointment expired. Matter of Close v New York State Div. of Human Rights, 43 A.D.3d 574, 840 N.Y.S.2d 660, 2007 N.Y. App. Div. LEXIS 8884 (N.Y. App. Div. 3d Dep't 2007), app. denied, 10 N.Y.3d 702, 854 N.Y.S.2d 103, 883 N.E.2d 1010, 2008 N.Y. LEXIS 260 (N.Y. 2008).

Development of non-discriminatory shop training programs by a court cannot be approached strictly within conventional confines of an adversary proceeding, but requires the cooperation of all parties. State Com. State Comm'n for Human Rights v Farrell, 43 Misc. 2d 958, 252 N.Y.S.2d 649, 1964 N.Y. Misc. LEXIS 1486 (N.Y. Sup. Ct. 1964).

Although there was sufficient evidence to show respondent's unlawful discrimination by their refusal to lease an apartment to a Negro, a Commission order directing the respondent to write a letter of apology and to notify the Negro applicant in question of available vacancies would be modified, where the applicant was a "checker" or "tester" who regularly sought to rent or lease such housing accommodations as were publicly offered for rental, an activity apparently part of the Commission's enforcement program. State Com. for Human Rights v Lieber, 52 Misc. 2d 1079, 277 N.Y.S.2d 589, 1967 N.Y. Misc. LEXIS 1759 (N.Y. Sup. Ct. 1967).

Plaintiff who, on becoming registered representative for defendant stock brokerage, executed agreement with New York Stock Exchange in which she agreed to arbitrate any controversy arising out of her employment or termination thereof, could not resort to judicial remedy but would instead be required to arbitrate claim that defendant engaged in sexual discrimination violative of Human Rights Law (CLS Exec §§ 290 et seq.) in connection with termination of her employment. Reid v Goldman, Sachs & Co., 154 Misc. 2d 756, 586 N.Y.S.2d 459, 1992 N.Y. Misc. LEXIS 318 (N.Y. Sup. Ct.), aff'd, 188 A.D.2d 350, 590 N.Y.S.2d 497, 1992 N.Y. App. Div. LEXIS 13708 (N.Y. App. Div. 1st Dep't 1992).

30. Damages, generally

Evidence, in hearing before Commissioner of Human Rights on complaints charging private club with discrimination against blacks with regard to use of barroom during fashion show, warranted Commissioner's award of $250 compensatory damages to each complainant because of club's commission of willful discriminatory acts. Batavia Lodge No. 196, etc. v New York State Div. of Human Rights, 35 N.Y.2d 143, 359 N.Y.S.2d 25, 316 N.E.2d 318, 1974 N.Y. LEXIS 1377 (N.Y. 1974).

Compensatory damages may be awarded only upon a factual basis appearing in the record. State Div. of Human Rights ex rel. Johnson v Stern, 37 A.D.2d 441, 326 N.Y.S.2d 500, 1971 N.Y. App. Div. LEXIS 2833 (N.Y. App. Div. 4th Dep't 1971).

An award of $500 compensatory damages was improperly affirmed where the record contains no proof of out-of-pocket expenses sustained by complainant as a result of the discrimination practiced against him. Sarantis v New York State Div. of Human Rights, 41 A.D.2d 885, 342 N.Y.S.2d 594, 1973 N.Y. App. Div. LEXIS 4800 (N.Y. App. Div. 4th Dep't 1973).

Where corporate employer which had been ordered by State Division of Human Rights to, inter alia, pay $500 in compensatory damages to woman who had been refused employment because of her sex was bankrupt, Division of Human Rights was directed to the bankruptcy court for a determination whether the bankrupt could be directed to offer employment and whether the original complainant should be granted a preference over other creditors with respect to the compensatory damages. State Div. of Human Rights v Scandinavian Ski & Sports Shops, Inc., 52 A.D.2d 788, 383 N.Y.S.2d 30, 1976 N.Y. App. Div. LEXIS 12576 (N.Y. App. Div. 1st Dep't 1976).

In a proceeding pursuant to Exec Law § 298 to review an order of the Human Rights Appeal Board directing a county civil service commission to pay a complainant $1,000 compensatory damages for discrimination, the award of damages was not warranted where, although the actions of the civil service commission were discriminatory in effect, the fact that the county commissioner made a good faith effort to establish reasonable and job-related qualifications for the examination served to demonstrate that the commission did not act wilfully. Cullen v Nassau County Civil Service Com., 78 A.D.2d 896, 433 N.Y.S.2d 222, 1980 N.Y. App. Div. LEXIS 13639 (N.Y. App. Div. 2d Dep't 1980), aff'd, 53 N.Y.2d 492, 442 N.Y.S.2d 470, 425 N.E.2d 858, 1981 N.Y. LEXIS 2583 (N.Y. 1981).

In Exec Law § 298 proceeding for enforcement of an order of the State Division of Human Rights awarding compensatory damages, the reviewing court may direct third-party defendant, the State Department of Audit and Control, to pay the sums agreed upon in the conciliation agreement; by enacting authority for the Division to pursue discrimination claims against employers, and not excluding the state as an employer, the legislature waived the state's immunity; failure of the legislature to appropriate funds for payment of civil rights claims against the state is not indicative of its intent that the state was not subject to such award. State Div. of Human Rights v Dep't of Mental Hygiene, Rome Dev. Ctr., 85 A.D.2d 915, 446 N.Y.S.2d 784, 1981 N.Y. App. Div. LEXIS 16759 (N.Y. App. Div. 4th Dep't 1981).

Damage award of $7,080 for landlord's refusal to rent to complainant because of race and marital status was excessive and matter would be remanded for reassessment of award. So that petitioner not be rewarded for its deliberate default by retaining use of ultimate damage award from date of order by State Division of Human Rights (SDHR) rendered on petitioner's default until SDHR issued new order after hearing on damages, final damage award would bear interest from date of SDHR's original order entered on default. Court would direct on remittitur that State Division of Human Rights (SDHR) retain neutral hearing officer for purpose of reassessing damages where potential conflict of interest existed from complainant's status as employee of SDHR; matter should be referred to New York City Commission on Human Rights, which had concurrent jurisdiction, or outside hearing officer. Interboro Management Co. v State Div. of Human Rights, 139 A.D.2d 697, 527 N.Y.S.2d 453, 1988 N.Y. App. Div. LEXIS 4415 (N.Y. App. Div. 2d Dep't 1988).

In proceeding under CLS Exec § 298, employees who were wrongfully denied appointments to new position created by employer after their former positions were abolished should have been awarded back pay based on lower pay scale for new position, not higher pay scale for abolished positions, since employer's creation of 2 lower paying positions to replace one higher paying position was legitimate organizational restructuring. Lutheran Social Services, Inc. v State Div. of Human Rights, 142 A.D.2d 950, 530 N.Y.S.2d 376, 1988 N.Y. App. Div. LEXIS 14971 (N.Y. App. Div. 4th Dep't 1988), aff'd, 74 N.Y.2d 824, 546 N.Y.S.2d 337, 545 N.E.2d 627, 1989 N.Y. LEXIS 2741 (N.Y. 1989).

Division of Human Rights properly determined that complainant was entitled to award of back pay to be calculated at rate of assistant principal where substantial evidence supported finding that complainant would have received assistant principal's salary had he not been wrongfully removed from his position as interim acting assistant principal. New York City Bd. of Education v New York State Div. of Human Rights, 154 A.D.2d 679, 546 N.Y.S.2d 883, 1989 N.Y. App. Div. LEXIS 13781 (N.Y. App. Div. 2d Dep't 1989).

Damage award of $75,000 for mental anguish and humiliation was neither reasonably related to employer's unlawful refusal to reinstate research scientist to his former position after his 2 heart attacks nor supported by evidence where (1) employer offered scientist less stressful and more sedentary position at same title and salary shortly after he applied for reinstatement, which he refused without adequate explanation, and (2) employer accorded scientist sick leave at half pay after expiration of sick time and annual leave to which he was entitled; appropriate award under circumstances was $7,500. New York State Office of Mental Retardation & Developmental Disabilities v New York State Div. of Human Rights, 183 A.D.2d 943, 583 N.Y.S.2d 580, 1992 N.Y. App. Div. LEXIS 6699 (N.Y. App. Div. 3d Dep't 1992).

Division of Human Rights erroneously awarded back pay based on projections rather than actual salary and benefits earned during relevant period by complainant's former co-worker, whose salary was identical to complainant's when complainant left employment; further, award of back pay should have been reduced by amount of unemployment compensation that complainant received during period covered by award. New York State Div. of Human Rights ex rel. Bice v Parkview Auto Sales, 206 A.D.2d 888, 616 N.Y.S.2d 113, 1994 N.Y. App. Div. LEXIS 7812 (N.Y. App. Div. 4th Dep't), transferred, 206 A.D.2d 889, 616 N.Y.S.2d 282, 1994 N.Y. App. Div. LEXIS 7813 (N.Y. App. Div. 4th Dep't 1994).

In proceeding under CLS Exec § 298 in which Department of Correctional Services was found guilty of discriminating against employee on basis of gender, $25,000 compensatory award for mental anguish and humiliation was excessive where injured employee testified that as result of department's discriminatory conduct she felt so "frustrated, depressed and angry" that she lost sleep and became embroiled in arguments with her fiance, that she saw psychiatrist 5 or 6 times, that she was forced to endure various incidents of harassment, and that some male officers refused to work with her or speak to her after she filed grievance; absent proof of severity and consequences of employee's condition, award of $10,000 was more consistent with awards for comparable injuries. New York State Dep't of Correctional Servs. v State Div. of Human Rights, 207 A.D.2d 585, 615 N.Y.S.2d 531, 1994 N.Y. App. Div. LEXIS 8112 (N.Y. App. Div. 3d Dep't 1994).

In proceeding under CLS Exec § 298 in which Department of Correctional Services was found guilty of discriminating against employee on basis of gender, $10,000 compensatory award for hurt, humiliation and mental anguish was excessive where only proof of employee's damages was her statement that she was upset and humiliated as result of department's discriminatory conduct; award of $2,500 was more consistent with awards for comparable injuries, given lack of evidence of duration of employee's condition, and lack of proof that she sought medical treatment. New York State Dep't of Correctional Servs. v State Div. of Human Rights, 207 A.D.2d 587, 615 N.Y.S.2d 499, 1994 N.Y. App. Div. LEXIS 8137 (N.Y. App. Div. 3d Dep't 1994).

Because of strong state policy underlying broad hiring discretion vested in city and its appointing authorities under CLS Civ S § 61, plaintiff had merely "a hope of appointment" from having passed civil service examination, not legally protectable interest in appointment; thus, award of summary judgment in favor of plaintiff on her cause of action for unlawful disability discrimination against city did not entitle her to award of back pay or other retroactive benefits. Carro v City of New York, 214 A.D.2d 450, 625 N.Y.S.2d 516, 1995 N.Y. App. Div. LEXIS 4423 (N.Y. App. Div. 1st Dep't 1995), reh'g denied, 1995 N.Y. App. Div. LEXIS 8602 (N.Y. App. Div. 1st Dep't Aug. 3, 1995), app. denied, 87 N.Y.2d 804, 639 N.Y.S.2d 782, 662 N.E.2d 1072, 1995 N.Y. LEXIS 5696 (N.Y. 1995).

In awarding back pay to 63-year-old employee who was wrongfully terminated due to his age, Division of Human Rights should have reduced award by unemployment insurance benefits and social security benefits received by employee. Laverack & Haines, Inc. v New York State Div. of Human Rights, 217 A.D.2d 955, 629 N.Y.S.2d 595, 1995 N.Y. App. Div. LEXIS 8381 (N.Y. App. Div. 4th Dep't 1995), rev'd, 88 N.Y.2d 734, 650 N.Y.S.2d 76, 673 N.E.2d 586, 1996 N.Y. LEXIS 3057 (N.Y. 1996).

Damages awarded for back pay based on racial discrimination were excessive to extent that order of Commissioner of State Division of Human Rights misstated date of complainant's termination as one year prior to correct date. American Int'l Group v Rosa, 224 A.D.2d 179, 637 N.Y.S.2d 121, 1996 N.Y. App. Div. LEXIS 773 (N.Y. App. Div. 1st Dep't), app. denied, 87 N.Y.2d 807, 641 N.Y.S.2d 829, 664 N.E.2d 895, 1996 N.Y. LEXIS 167 (N.Y. 1996).

It was proper to award $5,000 damages each to complainant and to realtor who represented her, was also black, for petitioner's unlawful discriminatory practice of refusing to sell piece of real property to complainant because of her race. Feggoudakis v New York State Div. of Human Rights, 230 A.D.2d 739, 646 N.Y.S.2d 175, 1996 N.Y. App. Div. LEXIS 8219 (N.Y. App. Div. 2d Dep't 1996).

It was proper to award $2,500 in punitive damages each to complainant and to realtor who represented her, who was also black, for petitioner's unlawful discriminatory practice of refusing to sell piece of real property to complainant because of her race; however, it was error to make same award to second black realtor where her testimony showed only that she was complainant's realtor's employer, and that he recounted to her his dealings with petitioner. Feggoudakis v New York State Div. of Human Rights, 230 A.D.2d 739, 646 N.Y.S.2d 175, 1996 N.Y. App. Div. LEXIS 8219 (N.Y. App. Div. 2d Dep't 1996).

Award of $318,232 in back pay on age discrimination claim, with interest from date of termination, medical expenses in amount of $20,809, and compensatory damages in amount of $250,000, would be modified to reduce compensatory damage award to $50,000 with interest from date of determination, and to award interest on back pay from date of determination, since neither award for compensatory damages nor award of interest from date of termination reflected awards for similar discriminatory conduct. Arbitron Co. v New York State Div. of Human Rights, 232 A.D.2d 321, 648 N.Y.S.2d 577, 1996 N.Y. App. Div. LEXIS 10577 (N.Y. App. Div. 1st Dep't 1996).

Award of back pay should have been reduced by amount of unemployment insurance petitioner received during period covered by award. Allender v Mercado, 233 A.D.2d 153, 649 N.Y.S.2d 144, 1996 N.Y. App. Div. LEXIS 11498 (N.Y. App. Div. 1st Dep't 1996), app. dismissed, app. denied, 89 N.Y.2d 1055, 659 N.Y.S.2d 846, 681 N.E.2d 1292, 1997 N.Y. LEXIS 765 (N.Y. 1997).

Awards of compensatory damages for back pay, lost wages, lost tips and emotional distress were reasonably related to discriminatory conduct of restaurant in giving Asian waitresses preference over Caucasian waitresses with respect to hours and table assignments. Young Fu Hsu v New York State Div. of Human Rights, 241 A.D.2d 913, 661 N.Y.S.2d 400, 1997 N.Y. App. Div. LEXIS 7842 (N.Y. App. Div. 4th Dep't 1997).

By reason of "one-in-three" rule of CLS Civ S § 61, only judicially available remedy for respondent's unlawful refusal to hire petitioner based on his arrest record, in violation of NYC Admin Code § 8-108(11), was direction that he be placed on eligible list, if still in existence, and be reconsidered for appointment. Johnson v New York City Comm'n of Human Rights, 270 A.D.2d 186, 706 N.Y.S.2d 18, 2000 N.Y. App. Div. LEXIS 3297 (N.Y. App. Div. 1st Dep't 2000).

In action to recover damages for discrimination on basis of disability in violation of CLS Exec § 296 and NYC Admin Code § 8-107, court properly denied defendants' motion to strike plaintiff's demand for punitive damages because, while such recovery was not available under state Human Rights Laws, city retained authority to give plaintiff ability to seek punitive damages, and plaintiff offered evidence that raised question of fact as to whether defendants deliberately discharged her knowing that such discharge violated city law. Umansky v Masterpiece Int'l

Ltd., 276 A.D.2d 692, 715 N.Y.S.2d 638, 2000 N.Y. App. Div. LEXIS 10771 (N.Y. App. Div. 2d Dep't 2000).

Compensatory damage award of $15,000 to an employee by the Commissioner of the New York Division of Human Rights on her claim of sexual discrimination by sexual harassment creating a hostile work environment against a corporate employer and its owner for sexually offensive, explicit comments made by the owner to the employee during her six months of employment as a car detailer and cleaner was not disturbed in a proceeding for judicial review under N.Y. Exec. Law § 298 because the award was consistent with other awards for comparable injuries. Matter of R & B Autobody & Radiator, Inc. v New York State Div. of Human Rights, 31 A.D.3d 989, 819 N.Y.S.2d 599, 2006 N.Y. App. Div. LEXIS 9469 (N.Y. App. Div. 3d Dep't 2006).

Determination that an employer was guilty of an unlawful discriminatory practice based on terminating an employee due to his disability involving alcoholism was upheld on appeal but the award of back pay to the employee was reversed since the loss of salary was attributable to the disability, not the discrimination. Matter of New York State Off. of Mental Health v New York State Div. of Human Rights, 53 A.D.3d 887, 861 N.Y.S.2d 223, 2008 N.Y. App. Div. LEXIS 6160 (N.Y. App. Div. 3d Dep't), app. denied, 11 N.Y.3d 713, 873 N.Y.S.2d 268, 901 N.E.2d 762, 2008 N.Y. LEXIS 3942 (N.Y. 2008).

Employer's contention that an employee's back pay award for discrimination was limited to the one-year period of N.Y. Exec. Law § 297(5) was rejected because, by failing to raise that contention prior to the appeal, the employer implicitly waived the applicability of the limitation. Matter of Rite Aid of N.Y., Inc. v New York State Div. of Human Rights, 60 A.D.3d 1428, 875 N.Y.S.2d 708, 2009 N.Y. App. Div. LEXIS 2020 (N.Y. App. Div. 4th Dep't), app. denied, 13 N.Y.3d 702, 886 N.Y.S.2d 94, 914 N.E.2d 1012, 2009 N.Y. LEXIS 3443 (N.Y. 2009).

Award of $200,000 to a student who had been subjected to racial discrimination at a school was supported by the evidence; however, although the student's mother was entitled to relief, a $200,000 award to her was reduced to $50,000. Injunctive relief ordered by the division was appropriate. Matter of Ithaca City School Dist. v New York State Div. of Human Rights, 87 A.D.3d 268, 926 N.Y.S.2d 686, 2011 N.Y. App. Div. LEXIS 5474 (N.Y. App. Div. 3d Dep't 2011), rev'd, 19 N.Y.3d 481, 950 N.Y.S.2d 67, 973 N.E.2d 162, 2012 N.Y. LEXIS 1353 (N.Y. 2012).

Plaintiff was not entitled to attorney's fees expended in obtaining $90,000 judgment on hostile work environment cause of action under New York Human Rights Law, even though she was entitled to award of attorney's fees and costs on Equal Pay Act claim on which jury returned award of $10,000, where it was undisputed that very substantial part of award of attorney's fees covered cost of litigating state hostile work environment sexual harassment cause of action, and plaintiff would not have been entitled to award of attorney's fees if state cause of action had been tried separately. Bonner v Guccione, 178 F.3d 581, 1999 U.S. App. LEXIS 8286 (2d Cir. N.Y. 1999).

In action under CLS Exec § 296, plaintiff's claim that defendant's discriminatory firing caused her to choose to have abortion, and to separate from her husband, would be dismissed for lack of proximate cause. Martinez v Ketchum Advertising Co., 865 F. Supp. 166, 1994 U.S. Dist. LEXIS 14330 (S.D.N.Y. 1994).

In action under Human Rights law, finding that stress arising from employer's age discrimination against employee aggravated or accelerated progression of employee's Parkinson's symptoms, was not clearly erroneous. Shea v Icelandair, 925 F. Supp. 1014, 1996 U.S. Dist. LEXIS 5530 (S.D.N.Y. 1996).

In action under Human Rights law, record supported finding that stress arising from employer's age discrimination exacerbated employee's heart condition, where employee presented competent expert evidence of causal link between discrimination and onset of angina attacks. Shea v Icelandair, 925 F. Supp. 1014, 1996 U.S. Dist. LEXIS 5530 (S.D.N.Y. 1996).

In action predicated on age discrimination in employment, jury's award of $250,000 for pain and suffering would be reduced to $175,000 where (1) record established that employee suffered physically due to aggravation of his Parkinson's disease and heart condition, but did not establish how rapidly his condition would have deteriorated absent employer's conduct, and (2) employee failed to seek psychiatric help for his emotional distress. Shea v Icelandair, 925 F. Supp. 1014, 1996 U.S. Dist. LEXIS 5530 (S.D.N.Y. 1996).

Action for employment discrimination in violation of Human Rights Law, except for claim for punitive damages, survives employee's death. Estwick v U.S.Air Shuttle, 950 F. Supp. 493, 1996 U.S. Dist. LEXIS 20104 (E.D.N.Y. 1996).

31. Damages for mental anguish

Appellate Division erred in reducing damages for mental anguish awarded by Division of Human Rights to city transit authority employee for sex discrimination where court (1) did not first determine whether there was evidence to support division's award, (2) accorded no deference to division's assessment of magnitude of employee's injuries, (3) failed to determine how award compared with other awards for similar injuries, and (4) substituted its own view that certain amount would adequately compensate employee. New York City Transit Authority v State Div. of Human Rights, 78 N.Y.2d 207, 573 N.Y.S.2d 49, 577 N.E.2d 40, 1991 N.Y. LEXIS 1010 (N.Y. 1991).

Even if corporate vendor had discriminated in the sale of homes against would-be purchasers on basis of race and color, $1,500 award of compensatory damages would have been excessive upon the record and would have been reduced to an award of $250 for anguish and humiliation. Pappas v New York State Div. of Human Rights, 45 A.D.2d 973, 359 N.Y.S.2d 590, 1974 N.Y. App. Div. LEXIS 4062 (N.Y. App. Div. 2d Dep't 1974), rev'd, 37 N.Y.2d 844, 378 N.Y.S.2d 36, 340 N.E.2d 470, 1975 N.Y. LEXIS 2228 (N.Y. 1975).

Record in its entirety showed that claimant, who had been unlawfully discriminated against by employer on basis of sex, introduced sufficient proof to authorize award of $100 for mental anguish and humiliation even though her testimony as to how she felt as a result of being fired was uncorroborated by medical testimony. 121-129 Broadway Realty, Inc. v New York State Div. of Human Rights, 49 A.D.2d 422, 376 N.Y.S.2d 17, 1975 N.Y. App. Div. LEXIS 11404 (N.Y. App. Div. 3d Dep't 1975).

Division is authorized to include, as compensatory damages, award for mental anguish suffered by complainant, which may properly be established by testimony of complainant alone; mental anguish may be established on basis of testimony that complainant was upset by rejection of application, had difficulty sleeping, had serious migraine headaches over extended period of time and that attendance at headache clinic failed to alleviate headaches. Board of Education v State Div. of Human Rights, 109 A.D.2d 988, 486 N.Y.S.2d 469, 1985 N.Y. App. Div. LEXIS 47486 (N.Y. App. Div. 3d Dep't 1985).

In proceeding under Human Rights Law, complainant's testimony that he "felt discriminated against," "felt very distressed," and "went through a very emotional period" did not support award of $10,000 for mental anguish, where he did not show how long or how often he suffered these effects and there was insufficient evidence that medical attention was required. State Div. of Human Rights ex rel. Fowlkes v Goodwill Industries, Inc., 129 A.D.2d 995, 514 N.Y.S.2d 299, 1987 N.Y. App. Div. LEXIS 45685 (N.Y. App. Div. 4th Dep't 1987), app. dismissed, 70 N.Y.2d 1001, 526 N.Y.S.2d 435, 521 N.E.2d 442, 1988 N.Y. LEXIS 155 (N.Y. 1988).

Compensatory damages of $10,000 awarded for mental anguish in discrimination action, increased by Commissioner of Human Services from original award of $1,500, were grossly excessive and would be reduced to $1,500 where complainant testified that she was upset for about one month following property owners' refusal to rent her an apartment, and that during this period she suffered headaches for which she took aspirin, but at no time sought medical treatment. Almeter v State Div. of Human Rights, 133 A.D.2d 530, 519 N.Y.S.2d 901, 1987 N.Y. App. Div. LEXIS 50011 (N.Y. App. Div. 4th Dep't 1987).

College employee's testimony regarding persistent daily sexual harassment during her employment at college, and significant physical manifestations that resulted from her emotional distress, so affecting her that she was unable to attend college during following semester, was clearly sufficient to establish

mental anguish and humiliation, but award of $150,000 in compensatory damages for mental anguish was excessive and would be reduced to $100,000. Award of back pay in action against college for discrimination would be reduced to limit compensation to period of 1 ½ years following unlawful termination since respondent testified that she expected to remain in job only as long as she was student and that she expected to be student for only additional 1 ½ years before obtaining college degree. SUNY College of Environmental Science & Forestry v State Div. of Human Rights, 144 A.D.2d 962, 534 N.Y.S.2d 270, 1988 N.Y. App. Div. LEXIS 14449 (N.Y. App. Div. 4th Dep't 1988).

Complainant was not entitled to award of $5,000 for mental anguish solely on basis of his testimony that he was "depressed" after he was unlawfully denied employment due to disability. Trans World Airlines, Inc. v New York Executive Dept., State Div. of Human Rights, 147 A.D.2d 575, 537 N.Y.S.2d 868, 1989 N.Y. App. Div. LEXIS 1605 (N.Y. App. Div. 2d Dep't 1989).

Award of $35,000 for mental anguish in employment discrimination case was grossly excessive, and on remittitur should be reduced to no more than $5,000, despite "constant and blatant" nature of racial discrimination against complainant, where sole evidence of mental anguish was complainant's own testimony that she was "emotionally and physically screwed up" and there was no evidence of duration of her condition, its severity or consequences, or its treatment. Cosmos Forms, Ltd. v State Div. of Human Rights, 150 A.D.2d 442, 541 N.Y.S.2d 50, 1989 N.Y. App. Div. LEXIS 6521 (N.Y. App. Div. 2d Dep't 1989).

Award of $25,000 for mental anguish and humiliation suffered by caucasian respondent who was denied apartment rental in violation of Human Rights Law because her 2 sons were black was grossly excessive, and would be reduced to $2,500, although respondent testified that she was hurt and upset by discrimination, where she sought no medical treatment as result of incident and record was devoid of evidence of physical symptoms. Moore v State Div. of Human Rights, 154 A.D.2d 823, 546 N.Y.S.2d 487, 1989 N.Y. App. Div. LEXIS 12709 (N.Y. App. Div. 3d Dep't 1989).

Determination of State Human Rights Commissioner that complainant was entitled to compensatory damages for mental anguish as consequence of discriminatory rejection of her application for membership in volunteer fire department was not supported by record, which showed that complainant never sought medical treatment for alleged mental anguish. Marcellus Volunteer Fire Dep't v Stock, 155 A.D.2d 982, 548 N.Y.S.2d 127, 1989 N.Y. App. Div. LEXIS 14872 (N.Y. App. Div. 4th Dep't 1989).

In proceeding pursuant to CLS Exec § 298 to review award for race discrimination, court would vacate award for mental anguish and humiliation in amount of $10,000, and would remit for new award not to exceed $5,000, where sole evidence of mental anguish and humiliation was complainant's testimony that she was "shocked" and "devastated" by her termination, that she was in "real pickle," and that she felt bad. Quality Care v Rosa, 194 A.D.2d 610, 599 N.Y.S.2d 65, 1993 N.Y. App. Div. LEXIS 5597 (N.Y. App. Div. 2d Dep't 1993).

In proceeding under Human Rights Law against nursing home that unlawfully discriminated against complainant by placing him in strict isolation because he tested HIV-seropositive, complainant's testimony was sufficient to support award of compensatory damages for mental anguish; expert medical or other corroborative testimony was not required. Marcus Garvey Nursing Home v New York State Div. of Human Rights, 209 A.D.2d 619, 619 N.Y.S.2d 106, 1994 N.Y. App. Div. LEXIS 11465 (N.Y. App. Div. 2d Dep't 1994).

In proceeding under Human Rights Law against nursing home that unlawfully discriminated against complainant by placing him in strict isolation because he tested HIV-seropositive, compensatory award of $150,000 was excessive, even though complainant presented evidence that he was lonely, depressed, agitated and generally tearful as result of his isolation, which endured for 9 ½ months, where there was no evidence as to severity or consequences of his condition, or that he sought medical treatment for it; in light of similar cases, award should not exceed $75,000. Marcus Garvey Nursing Home v New York State Div. of Human Rights, 209 A.D.2d 619, 619 N.Y.S.2d 106, 1994 N.Y. App. Div. LEXIS 11465 (N.Y. App. Div. 2d Dep't 1994).

Award of $25,000 in compensatory damages for emotional distress and humiliation as result of unlawful racial discrimination was excessive where sole evidence of such damages was complainant's testimony that employer's unlawful conduct made him feel "victimized, ambushed and abandoned" and caused him to withdraw from relationships with his friends and family, that he was unable to pay court-ordered child support or to provide entertain-ment for his 3 children, and that he could not complete purchase of items he had ordered prior to his termination and forfeited $1,000 deposit on automobile; appropriate award in such case was $15,000. New York State Dep't of Correctional Servs. v State Div. of Human Rights, 215 A.D.2d 908, 626 N.Y.S.2d 588, 1995 N.Y. App. Div. LEXIS 5326 (N.Y. App. Div. 3d Dep't 1995).

In order to sustain award for mental anguish, there must be evidence that mental anguish was caused by discriminatory practice, and there must be some evidence of magnitude of injury. Van Cleef Realty v New York State Div. of Human Rights, 216 A.D.2d 306, 627 N.Y.S.2d 744, 1995 N.Y. App. Div. LEXIS 5928 (N.Y. App. Div. 2d Dep't 1995).

Damage award of $30,000 for mental anguish suffered by couple who experienced racial steering in rental of housing was excessive where couple was not subjected to prolonged discrimination, their contact with realtor was limited to one-time encounter, realtor's conduct did not affect their ability to find housing, they were not subjected to rude or egregious racial epithets, they adduced no evidence as to duration or magnitude of their mental anguish, and their testimony was limited to single assertion each of distress they felt; proper award would not exceed $5,000. Van Cleef Realty v New York State Div. of Human Rights, 216 A.D.2d 306, 627 N.Y.S.2d 744, 1995 N.Y. App. Div. LEXIS 5928 (N.Y. App. Div. 2d Dep't 1995).

Employee, who was wrongfully terminated due to his age, was entitled to award in amount of $10,000 for mental anguish based on his testimony that he was "frightened to death" not to have job at age 63, and that he suffered loss of sleep and appetite. Laverack & Haines, Inc. v New York State Div. of Human Rights, 217 A.D.2d 955, 629 N.Y.S.2d 595, 1995 N.Y. App. Div. LEXIS 8381 (N.Y. App. Div. 4th Dep't 1995), rev'd, 88 N.Y.2d 734, 650 N.Y.S.2d 76, 673 N.E.2d 586, 1996 N.Y. LEXIS 3057 (N.Y. 1996).

Award of $25,000 to complainant who had been discriminated against on basis of her pregnancy was excessive where discriminatory conduct was limited to single encounter at which complainant's co-workers were not present, complainant was not subjected to rude or egregious treatment that might have aggravated her mental anguish, and complainant adduced no evidence of duration or magnitude of her mental anguish; matter would be remitted to Division of Human Rights for imposition of new award not to exceed $5,000. A.S.A.P. Personnel Servs. v Rosa, 219 A.D.2d 648, 631 N.Y.S.2d 396, 1995 N.Y. App. Div. LEXIS 9285 (N.Y. App. Div. 2d Dep't 1995).

In order to sustain award of damages for mental anguish resulting from discrimination, there must be evidence that mental anguish was caused by discriminatory practice, and there must be some evidence of magnitude of injury. A.S.A.P. Personnel Servs. v Rosa, 219 A.D.2d 648, 631 N.Y.S.2d 396, 1995 N.Y. App. Div. LEXIS 9285 (N.Y. App. Div. 2d Dep't 1995).

Award of $200,000 for mental anguish as result of sexual employment discrimination was excessive and should not have exceeded $5,000 where complainant's discussion of her mental anguish was brief, and there was no evidence as to duration of her condition, its severity or consequences, or evidence of treatment. Port Wash. Police Dist. v State Div. of Human Rights, 221 A.D.2d 639, 634 N.Y.S.2d 195, 1995 N.Y. App. Div. LEXIS 12381 (N.Y. App. Div. 2d Dep't 1995), app. denied, 88 N.Y.2d 807, 647 N.Y.S.2d 165, 670 N.E.2d 449, 1996 N.Y. LEXIS 1624 (N.Y. 1996).

Compensatory damages for mental anguish in amount of $50,000 for loss of employment opportunity was excessive where respondent never sought medical treatment as result of petitioners' discriminating conduct in disqualifying him for position of firefighter on basis of physical disability; award of $10,000 was appropriate under circumstances. City of Fulton v New York State Div. of Human Rights, 221 A.D.2d 971, 633 N.Y.S.2d 914, 1995 N.Y. App. Div. LEXIS 13462 (N.Y. App. Div. 4th Dep't 1995).

Damage award of $50,000 for mental anguish arising from racial discrimination in employment was excessive and would be reduced to $5,000. American Int'l Group v Rosa, 224 A.D.2d 179, 637 N.Y.S.2d 121, 1996 N.Y. App. Div. LEXIS 773 (N.Y. App. Div. 1st Dep't), app. denied, 87 N.Y.2d 807, 641 N.Y.S.2d 829, 664 N.E.2d 895, 1996 N.Y. LEXIS 167 (N.Y. 1996).

Award of $300,000 for mental anguish and compensatory damages was appropriate in light of petitioner's employees' constant, egregious, and blatant discriminatory conduct. Tiffany & Co. v Smith, 224 A.D.2d 332, 638 N.Y.S.2d 454, 1996 N.Y. App. Div. LEXIS 1456 (N.Y. App. Div. 1st Dep't), app. denied, 88 N.Y.2d 806, 646 N.Y.S.2d 985, 670 N.E.2d 226, 1996 N.Y. LEXIS 1723 (N.Y. 1996).

Administrative Law Judge abused his discretion in refusing employer's request to have complainant examined by its psychiatrist where complainant had alleged serious psychiatric injuries as result of discrimination; any alleged difficulties complainant might experience with examination could be mitigated by imposition of reasonable conditions. Carrier Corp. v New York State Div. of Human Rights, 224 A.D.2d 936, 637 N.Y.S.2d 877, 1996 N.Y. App. Div. LEXIS 1572 (N.Y. App. Div. 4th Dep't 1996).

It was not excessive to award $10,000 as compensatory damages for mental anguish due to unlawful discriminatory practice of terminating complainant from employment because of her gender and gender-specific disability (pregnancy). Heidie Tuxedos & Formals v New York State Div. of Human Rights, 224 A.D.2d 1022, 638 N.Y.S.2d 376, 1996 N.Y. App. Div. LEXIS 1700 (N.Y. App. Div. 4th Dep't 1996).

Award of $25,000 against Manhattan and Bronx Surface Transit Operating Authority, representing compensatory damages for mental anguish and humiliation for employment discrimination based on petitioner's disability, was excessive where employee testified that, as result of discriminatory acts, he felt "very upset" and "very angry," and he was reluctant to wear his hearing aids during other interviews; such testimony only supported award of up to $7,500. Manhattan & Bronx Surface Transit Operating Auth. v New York State Div. of Human Rights, 225 A.D.2d 553, 638 N.Y.S.2d 761, 1996 N.Y. App. Div. LEXIS 1938 (N.Y. App. Div. 2d Dep't 1996).

African-American correctional officer established entitlement to award for mental anguish and humiliation for racial discrimination suffered at hands of his supervisor over 2-year period where supervisor had negative attitude toward minorities, he consistently exhibited such attitude to his subordinates in work place, he repeatedly verbally harassed and humiliated officer in front of other officers, civilian bus drivers and prisoners, he pressured him to violate regulations, and he ordered officer to sit with prisoners during transportation assignments for periods of 12 to 15 hours in defiance of regulations requiring officer rotation every 30 minutes; however, award of $100,000 was excessive and would be reduced to $35,000 given lack of proof of severity, consequences and duration of effects which supervisor's negative conduct had on officer. New York State Dep't of Correctional Servs. v New York State Div. of Human Rights, 225 A.D.2d 856, 638 N.Y.S.2d 827, 1996 N.Y. App. Div. LEXIS 2063 (N.Y. App. Div. 3d Dep't 1996).

Award of $150,000 for mental anguish and humiliation as result of unlawful age discrimination was excessive and would be reduced to $100,000. Boutique Indus. v New York State Div. of Human Rights, 228 A.D.2d 171, 643 N.Y.S.2d 986, 1996 N.Y. App. Div. LEXIS 6283 (N.Y. App. Div. 1st Dep't 1996).

Award of $50,000 for mental anguish to employee who was terminated by her employer because she was pregnant did not "appear to be inappropriate." State Div. of Human Rights v Demi Lass Ltd., 232 A.D.2d 335, 648 N.Y.S.2d 925, 1996 N.Y. App. Div. LEXIS 11215 (N.Y. App. Div. 1st Dep't 1996).

Complainant's testimony as to her feelings of embarrassment, humiliation and inadequacy, together with her testimony as to adverse physical effects of weight loss and inability to find comparable employment for almost 2 years as result of hostile work environment and discriminatory discharge, supported claim for mental anguish. Bronx County Medical Group, P.C. v Lassen, 233 A.D.2d 234, 650 N.Y.S.2d 113, 1996 N.Y. App. Div. LEXIS 11988 (N.Y. App. Div. 1st Dep't 1996), app. denied, 89 N.Y.2d 813, 658 N.Y.S.2d 243, 680 N.E.2d 617, 1997 N.Y. LEXIS 474 (N.Y. 1997).

Award of $250,000 for mental anguish as result of hostile work environment and discriminatory discharge was excessive and would be reduced to $25,000. Bronx County Medical Group, P.C. v Lassen, 233 A.D.2d 234, 650 N.Y.S.2d 113, 1996 N.Y. App. Div. LEXIS 11988 (N.Y. App. Div. 1st Dep't 1996), app. denied, 89 N.Y.2d 813, 658 N.Y.S.2d 243, 680 N.E.2d 617, 1997 N.Y. LEXIS 474 (N.Y. 1997).

In discrimination cases, awards for emotional distress are not dependent on psychiatric or other medical evidence. Young Fu Hsu v New York State Div. of Human Rights, 241 A.D.2d 913, 661 N.Y.S.2d 400, 1997 N.Y. App. Div. LEXIS 7842 (N.Y. App. Div. 4th Dep't 1997).

Award of $20,000 for mental anguish was excessive where complainant testified that, as a result of petitioner's racially discriminatory conduct in handling her employment application, she "felt hurt" and was generally irritable, remained in bed, and suffered from headaches and stomach distress for which she took Tylenol and Alka Seltzer, she testified that her fear of rejection made her postpone job-seeking activities for 2 months, and she did not seek medical treatment; award of $10,000 was appropriate. Buffalo Ath. Club v New York State Div. of Human Rights, 249 A.D.2d 986, 672 N.Y.S.2d 210, 1998 N.Y. App. Div. LEXIS 5148 (N.Y. App. Div. 4th Dep't 1998).

$20,000 in compensatory damages for mental anguish, awarded to respondent who was wrongfully disqualified from civil service eligibility list in violation of Human Rights Law, was unsupported by evidence and would be reduced to $10,000 where respondent stated only that he was "hurt," "angry," and "emotional" at being denied employment he believed would offer job security for him and his family. City of New York v New York State Div. of Human Rights, 250 A.D.2d 273, 682 N.Y.S.2d 387, 1998 N.Y. App. Div. LEXIS 13953 (N.Y. App. Div. 1st Dep't 1998), modified, 93 N.Y.2d 768, 698 N.Y.S.2d 594, 720 N.E.2d 870, 1999 N.Y. LEXIS 3434 (N.Y. 1999).

Award of $7,500 for mental anguish and humiliation, imposed against dentist who discriminated against patient based on his HIV-positive status by overcharging him for routine cleaning, was excessive and would be reduced to $1,000. Cerio v New York State Div. of Human Rights, 258 A.D.2d 873, 684 N.Y.S.2d 738, 1999 N.Y. App. Div. LEXIS 1485 (N.Y. App. Div. 4th Dep't 1999).

Damages for mental anguish would be reduced from $30,000 to $10,000 for job discrimination against employee of Department of Correctional Services where she claimed to have been embarrassed, depressed, paranoid and concerned about how she would pay her bills, but her only physical symptom was feeling of weakness and she never sought medical or psychiatric treatment. New York State Dep't of Correctional Servs. v New York State Div. of Human Rights, 265 A.D.2d 809, 695 N.Y.S.2d 647, 1999 N.Y. App. Div. LEXIS 9838 (N.Y. App. Div. 4th Dep't 1999).

In action against Niagara Frontier Transportation Authority for unlawful racial discrimination in failing to hire complainant for 2 positions for which she applied, award of damages for mental anguish and humiliation would be vacated, and case would be remitted for recalculation of such damages, where she proved discrimination as to only one position, and record did not specify any relation between award and any particular position. Niagara Frontier Transp. Auth. v New York State Div. of Human Rights, 275 A.D.2d 922, 713 N.Y.S.2d 631, 2000 N.Y. App. Div. LEXIS 9577 (N.Y. App. Div. 4th Dep't 2000).

In action against Niagara Frontier Transportation Authority for unlawful racial discrimination in failing to hire complainant for 2 positions for which she applied, case would be remitted for recalculation of back pay award where she proved discrimination as to only one position, and thus back pay had to calculated using date and salary for that position rather than other position. Niagara Frontier Transp. Auth. v New York State Div. of Human Rights, 275 A.D.2d 922, 713 N.Y.S.2d 631, 2000 N.Y. App. Div. LEXIS 9577 (N.Y. App. Div. 4th Dep't 2000).

Award of damages for mental anguish was upheld where petitioners suffered from major depression, panic disorder and posttraumatic stress disorder that were causally related to hostile work environment condoned by respondent employer, and

incidents of harassment and discrimination by co-workers were numerous and continuous throughout petitioners' employment and included threats of physical harm. Kondracke v Blue, 277 A.D.2d 953, 716 N.Y.S.2d 533, 2000 N.Y. App. Div. LEXIS 11599 (N.Y. App. Div. 4th Dep't 2000).

Claimant's testimony as to severity and duration of her mental anguish, even unsubstantiated by medical or other objective evidence, supported award of $50,000 for emotional distress, where employer's acts of unlawful discrimination included sexual harassment by claimant's immediate supervisor over 4-month period, failure to act on her formal complaints to her superiors, including employer's equal opportunity office, and retaliation for such complaints by disciplining her twice and ultimately terminating her. City of New York v N.Y. State Div. of Human Rights, 283 A.D.2d 215, 728 N.Y.S.2d 367, 2001 N.Y. App. Div. LEXIS 4809 (N.Y. App. Div. 1st Dep't 2001).

Sexual harassment damage award of $50,000 for mental anguish and humiliation was excessive where there was no proof of severity and consequences of complainant's condition; thus, award of $20,000 was appropriate. State v N.Y. State Div. of Human Rights, 284 A.D.2d 882, 727 N.Y.S.2d 499, 2001 N.Y. App. Div. LEXIS 6888 (N.Y. App. Div. 3d Dep't 2001).

Award of $15,000 for mental anguish and humiliation for employment discrimination was excessive because the employee sought no medical treatment and her testimony in support of that award was sparse; an award of $5,000 was the maximum award supported by the evidence. Matter of Rite Aid of N.Y., Inc. v New York State Div. of Human Rights, 60 A.D.3d 1428, 875 N.Y.S.2d 708, 2009 N.Y. App. Div. LEXIS 2020 (N.Y. App. Div. 4th Dep't), app. denied, 13 N.Y.3d 702, 886 N.Y.S.2d 94, 914 N.E.2d 1012, 2009 N.Y. LEXIS 3443 (N.Y. 2009).

Employee's award for mental anguish and humiliation in an employment discrimination claim was reduced from $50,000 to $25,000 under circumstances in which the only evidence of the employee's mental anguish was the testimony of the employee and his sister, who testified that as a result of the hostile work environment, the employee felt "hurt," "angry," and "frustrated," became "somewhat depressed," "emotional," "withdrawn," and "traumatized," and that, once the employee left his employment he felt better; there were no physical manifestations of the employee's anguish, and he did not seek out a medical professional. The amount awarded was not similar to comparable awards for similar injuries. Matter of Gold Coast Rest. Corp. v Gibson, 67 A.D.3d 798, 888 N.Y.S.2d 186, 2009 N.Y. App. Div. LEXIS 8082 (N.Y. App. Div. 2d Dep't 2009).

State Division of Human Rights' (SDHR) award of damages to a landlord's prospective tenants, after finding the landlord discriminated against them on the basis of race in the leasing of housing, was not excessive as the tenants both testified to the mental anguish they suffered as a result of the landlord's discriminatory action, and, as the SDHR had broad powers to fulfill the extremely strong statutory policy of eliminating discrimination, its punitive damages award was not disturbed. Matteo v N.Y. State Div. of Human Rights, 306 A.D.2d 484, 761 N.Y.S.2d 517, 2003 N.Y. App. Div. LEXIS 7418 (N.Y. App. Div. 2d Dep't 2003).

Where the evidence established that a former employee, who was then in high school, had been sexually harassed by her supervisor and forced to have intercourse with him, an award of $500,000 to her for mental anguish was reduced to $50,000. The award was excessive because after two counseling sessions, she required no further medical or psychological treatment, and within several months was able to return to work for a different employer Matter of New York State Div. of Human Rights v Young Legends, LLC, 90 A.D.3d 1265, 934 N.Y.S.2d 628, 2011 N.Y. App. Div. LEXIS 8851 (N.Y. App. Div. 3d Dep't 2011).

Compensatory damages of $35,000 for complainant one, $ 65,000 for complainant two and $ 50,000 for complainant three awarded for mental anguish and humiliation were not excessive as each complainant testified that she suffered significant emotional distress and fear as a result of the sexual harassment she endured, and there was sufficient proof of the severity and duration of that distress to sustain the damages awarded; the awards were well within the range established by similar cases. Matter of Stellar Dental Mgt. LLC v New York State Div. of Human Rights, 162 A.D.3d 1655, 80 N.Y.S.3d 757, 2018 N.Y. App. Div. LEXIS 4423 (N.Y. App. Div. 4th Dep't 2018).

Compensatory damages for police officer's emotional pain and suffering which he suffered due to wrongful termination were recoverable under Executive Law as non-economic damages, and should be contrasted with economic damages of back pay and lost benefits actually awarded to officer as incidental to his reinstatement. Antonsen v Ward, 943 F.2d 198, 1991 U.S. App. LEXIS 19483 (2d Cir. N.Y. 1991).

Employer's motion for new trial is granted unless former employee agrees to remittitur reducing award of compensatory damages from $219,428 to $20,000, even though employee testified as to his mental anguish and charge on compensatory damages was correct, because there plainly was insufficient evidence of emotional injury to support such large award, which was grossly disproportionate to awards in similar cases. McIntosh v Irving Trust Co., 887 F. Supp. 662, 1995 U.S. Dist. LEXIS 7700 (S.D.N.Y. 1995).

In action by employee who was discharged in retaliation for his complaints of race discrimination, award of $219,428 in compensatory damages for pain, suffering and humiliation was excessive where sole evidence as to magnitude and duration of employee's emotional injury or mental distress was his own testimony that he felt "humiliated," "angry," "shocked," "like dirt," and "terrible" during certain incidents at work, that he stayed home sick from work for several days and saw doctor once due to ailments related to nervous tension, and that he was "devastated" when he was discharged; new trial would be ordered unless employee agreed to reduced award of $20,000. McIntosh v Irving Trust Co., 887 F. Supp. 662, 1995 U.S. Dist. LEXIS 7700 (S.D.N.Y. 1995).

32. Mitigation of damages

Record of proceeding before State Human Rights Division on appeal and on review demonstrated that, had complainant accepted employment offered, her damages would have been minimal, if not eliminated. State Div. of Human Rights v Board of Education, 59 A.D.2d 1048, 399 N.Y.S.2d 805, 1977 N.Y. App. Div. LEXIS 14335 (N.Y. App. Div. 4th Dep't 1977).

In an action for compensatory damages for discrimination based upon age brought by an interim acting principal who retired rather than accept an assistant principal position when his application for the position of principal was denied on grounds of age, compensatory damages should be measured by the difference between the amount that petitioner would have received in salary had he resumed employment as an assistant principal and the amount of pension benefits that he will receive as a former assistant principal rather than the difference between what he would have received as assistant principal and what he would have received as principal. New York City Bd. of Education v Sears, 83 A.D.2d 959, 443 N.Y.S.2d 23, 1981 N.Y. App. Div. LEXIS 15412 (N.Y. App. Div. 2d Dep't 1981).

On proof of discriminatory discharge of employee in temporary CETA (Comprehensive Employment and Training Act) project which was scheduled to end on particular date, employee was entitled only to damages consisting of amount he would have earned if had worked until project's completion, less his earnings and unemployment compensation received during same period; damage award should not have been determined on basis of amount of compensation employee would have received had he been offered seasonal employment where there was no evidence that he would have been offered such employment were it not for illegal discrimination. County of Nassau v New York State Div. of Human Rights, 123 A.D.2d 341, 506 N.Y.S.2d 353, 506 N.Y.S.2d 446, 1986 N.Y. App. Div. LEXIS 60116 (N.Y. App. Div. 2d Dep't 1986).

In proceeding under Human Rights Law involving employment discrimination because of disability, back pay award should have been reduced by amount of disability payments made to complainant for period during which she was wrongfully disqualified from her position as school bus driver. Bayport-Blue Point School Dist. v State Div. of Human Rights, 131 A.D.2d 849, 517 N.Y.S.2d 209, 1987 N.Y. App. Div. LEXIS 48286 (N.Y. App. Div. 2d Dep't 1987).

Award of back pay in employment discrimination case from complainant's discharge until her reinstatement by her employer constituted punitive assessment rather than compensation where complainant obtained new employment at same pay several months after discharge; award of back pay required reduction to cover only period that complainant was out of work as result of her unlawful discharge. Cosmos Forms, Ltd. v State Div. of Human Rights, 150 A.D.2d 442, 541 N.Y.S.2d 50, 1989 N.Y. App. Div. LEXIS 6521 (N.Y. App. Div. 2d Dep't 1989).

In proceeding pursuant to CLS Exec § 298 to review decision of Division of Human Rights which found that petitioner had discriminated against respondent on basis of age, award for back pay would be decreased by amount received by respondent for unemployment and severance payments subsequent to his termination. Grumman Aerospace Corp. v New York State Div. of Human Rights, 151 A.D.2d 573, 542 N.Y.S.2d 681, 1989 N.Y. App. Div. LEXIS 7898 (N.Y. App. Div. 2d Dep't 1989).

Although substantial evidence supported determination of Commissioner of Human Rights that complainant's employment was terminated solely due to her pregnancy, her backpay award should have been reduced to reflect fact that she obtained other employment. Empbanque Capital Corp. v White, 158 A.D.2d 686, 551 N.Y.S.2d 957, 1990 N.Y. App. Div. LEXIS 2356 (N.Y. App. Div. 2d Dep't 1990).

Time limit for commencement of enforcement proceedings in CLS Exec § 298 does not apply to Division of Human Rights. New York State Div. of Human Rights v Soundview Instruments, 206 A.D.2d 961, 616 N.Y.S.2d 284, 1994 N.Y. App. Div. LEXIS 7667 (N.Y. App. Div. 4th Dep't 1994).

33. Exhaustion of administrative remedies

The court will not grant judicial review of a non-final order of the State Human Rights Appeal Board pursuant to § 298 of the Executive Law inasmuch as the complainants must exhaust their administrative remedies before seeking judicial review as aggrieved parties. New York Urban League v Speer, 40 A.D.2d 689, 336 N.Y.S.2d 395, 1972 N.Y. App. Div. LEXIS 3787 (N.Y. App. Div. 2d Dep't 1972).

Employees were not required to exhaust their contractual remedies under collective bargaining agreement before seeking relief for alleged sex discrimination through the Division of Human Rights. State Div. of Human Rights ex rel. Ellis v Jamestown Tel. Corp., 53 A.D.2d 1061, 386 N.Y.S.2d 141, 1976 N.Y. App. Div. LEXIS 15880 (N.Y. App. Div. 4th Dep't 1976), aff'd, 42 N.Y.2d 848, 397 N.Y.S.2d 630, 366 N.E.2d 290, 1977 N.Y. LEXIS 2174 (N.Y. 1977).

Judicial review of proceedings of the Division of Human Rights by way of a motion for prohibition should not be entertained before the petitioner has exhausted its administrative remedies. Tessy Plastics Corp. v State Div. of Human Rights, 62 A.D.2d 36, 403 N.Y.S.2d 946, 1978 N.Y. App. Div. LEXIS 10415 (N.Y. App. Div. 4th Dep't 1978), aff'd, 47 N.Y.2d 789, 417 N.Y.S.2d 926, 391 N.E.2d 1007, 1979 N.Y. LEXIS 2058 (N.Y. 1979).

Failure of employer to file timely notices of appeal from orders of human rights appeals board under CLS Executive § 297-a precludes employer from seeking review of orders in court. In re United Parcel Service, Inc., 112 A.D.2d 307, 491 N.Y.S.2d 754, 1985 N.Y. App. Div. LEXIS 56267 (N.Y. App. Div. 2d Dep't 1985).

In action to recover damages for unlawful discrimination based on marital status, plaintiff was not required to exhaust administrative remedies before commencing action in Supreme Court, even though Division of Human Rights is administrative agency charged with investigating and remedying discriminatory practices, since victims of discriminatory practices are given choice as to forum in which they may seek relief. Ness v Pan American World Airways, 142 A.D.2d 233, 535 N.Y.S.2d 371, 1988 N.Y. App. Div. LEXIS 12457 (N.Y. App. Div. 2d Dep't 1988).

Human rights division's issuance of determination of probable cause that 38-year-old city fire fighter had been dismissed because of age was not judicially reviewable in proceeding by city under CLS Exec § 298 since (1) amendment limiting such proceedings to review of final administrative determinations was expressly applicable to actions then pending and (2) although Supreme Court had issued opinion prior to effective date of statute that matter was reviewable, judgment granting petition was not entered until after amendment's effective date; action or proceeding is terminated by entry of judgment. Albany v New York State Div. of Human Rights, 157 A.D.2d 1008, 550 N.Y.S.2d 488, 1990 N.Y. App. Div. LEXIS 587 (N.Y. App. Div. 3d Dep't 1990).

Article 78 proceeding challenging termination of cook's employment at state correctional facility as arbitrary and capricious was barred for failure to exhaust Executive Law administrative remedies, in view of fact that terminated cook had filed complaint with State Human Rights Division alleging that her termination was the product of unlawful discriminatory practices. Cox v Carey, 90 Misc. 2d 688, 395 N.Y.S.2d 901, 1977 N.Y. Misc. LEXIS 2134 (N.Y. Sup. Ct. 1977).

School district could not have a public hearing enjoined on a probable cause determination by the New York State Division of Human Rights (SDHR) that it engaged in an unlawful discriminatory practice under N.Y. Exec. Law § 296(14) by not allowing a hearing impaired student to use a service dog as the district could not claim res judicata or collateral estoppel on the issue as the parents' separate action in federal district court did not include the SDHR as a party; the district had also not exhausted its administrative remedies under N.Y. Exec. Law § 298 as the public hearing had not yet been held. E. Meadow Union Free Sch. Dist. v New York State Div. of Human Rights, 238 N.Y.L.J. 36, 2007 N.Y. Misc. LEXIS 6004 (N.Y. Sup. Ct. Aug. 7, 2007).

34. Time limitations, generally

The 30-day statutory period of limitations in § 298 of the Executive Law was not intended to mean that the court is without jurisdiction to examine the merits of the Division's order when the Division seeks from the court affirmative court action in the form of an enforcement order. Hempstead Volunteer Fire Dep't v New York State Div. of Human Rights, 35 A.D.2d 601, 313 N.Y.S.2d 814, 1970 N.Y. App. Div. LEXIS 3955 (N.Y. App. Div. 2d Dep't 1970).

Order of State Division of Human Rights could not be enforced after 2 year effective period thereof had expired, where no explanation was offered for delay in seeking enforcement, and where court had no statutory authority to extend effective time period as provided by commissioner. State Div. of Human Rights v Jakoblew, 41 A.D.2d 889, 343 N.Y.S.2d 141, 1973 N.Y. App. Div. LEXIS 4732 (N.Y. App. Div. 4th Dep't 1973).

Although petitioner's notice of motion and petition, appealing from determination of Division of Human Rights, were untimely filed by one day, where papers were timely filed by respondent Division, matter would be disposed of on its merits. McGrath v New York State Div. of Human Rights, 52 A.D.2d 1027, 383 N.Y.S.2d 911, 1976 N.Y. App. Div. LEXIS 12931 (N.Y. App. Div. 3d Dep't 1976).

Where complaint, alleging sex discrimination as a result of employer's refusal to apply accrued sick leave benefits to maternity leave absence of employee, was filed more than a year after her voluntary resignation and there was no basis for tolling the one-year statute of limitations, complaint, which was filed more than a year after cessation of the alleged continuing discriminatory practice, was time barred. Protracted administrative delays in implementation of provisions of human rights law, arising by virtue of seven-month delinquency in determination by State Division of Human Rights of jurisdiction and probable cause, nine-month delinquency in giving of notice, eight-month delinquency in holding of public hearing, 87-day delinquency in issuance of Division's determination, and delay in notifying parties of appeal board's decision, resulting in expiration of period in excess of three years from date of filing of complaint until date of serving of decision and order of appeal board, constituted, as matter of law, prejudice to named proceeding respondents, warranting exercise of equitable powers of judiciary to divest Division of Jurisdiction conferred by human rights law. State Div. of Human Rights ex rel. Bailey v Board of Education, 53 A.D.2d 1043, 386 N.Y.S.2d 166, 1976 N.Y. App. Div. LEXIS 15855 (N.Y. App. Div. 4th Dep't 1976), aff'd, 42 N.Y.2d 862, 397 N.Y.S.2d 791, 366 N.E.2d 878, 1977 N.Y. LEXIS 2186 (N.Y. 1977).

Complaints alleging sex discriminations in employment were not subject to being dismissed because the State Division of

Human Rights failed to comply with 60-day provision contained in the Executive Law with respect to serving notice as to answer and hearing after receiving complaints. State Div. of Human Rights ex rel. Ellis v Jamestown Tel. Corp., 53 A.D.2d 1061, 386 N.Y.S.2d 141, 1976 N.Y. App. Div. LEXIS 15880 (N.Y. App. Div. 4th Dep't 1976), aff'd, 42 N.Y.2d 848, 397 N.Y.S.2d 630, 366 N.E.2d 290, 1977 N.Y. LEXIS 2174 (N.Y. 1977).

Appeal from Division of Human Rights filed more than 15 days after service of Division's determination on complaint's attorney was untimely and failure of complainant to receive notice of Division's determination was immaterial. State Div. of Human Rights ex rel. Green v Shenango, Inc., 55 A.D.2d 852, 390 N.Y.S.2d 345, 1976 N.Y. App. Div. LEXIS 15672 (N.Y. App. Div. 4th Dep't 1976).

Although the time limitations imposed by section 298 of the Executive Law are directory rather than mandatory, protracted administrative delays in the implementation of the provisions of the Human Rights Law might warrant divestiture of the State Division of Human Rights' jurisdiction. State Div. of Human Rights v New York State Dep't of Correctional Services, 61 A.D.2d 25, 401 N.Y.S.2d 619, 1978 N.Y. App. Div. LEXIS 9698 (N.Y. App. Div. 4th Dep't 1978).

A proceeding to enforce an unappealed award against the New York State Parks and Recreation Commission representing back pay with interest and an award for mental anguish suffered as a result of that Commission's refusal to hire on the basis of religion would not be time-barred under the provision of § 298 that a "proceeding under this section when instituted by any complainant, respondent or other person aggrieved" be commenced within 30 days of service of the Commissioner of Human Rights's order, since that language refers to a proceeding for judicial review of an order of the Commissioner of Human Rights, and does not apply to a proceeding for judicial enforcement of section order, which only the Commissioner of Human Rights is authorized under the statute to bring. State Div. of Human Rights ex rel. Geraci v New York State Dep't of Correctional Services, 90 A.D.2d 51, 456 N.Y.S.2d 63, 1982 N.Y. App. Div. LEXIS 18809 (N.Y. App. Div. 2d Dep't 1982).

Petitioner could not seek review of the finding of no probable cause to believe that an airline had discriminated against him on the basis of his creed by denying his request for time to attend a precana conference, where the determination issued by the State Division of Human Rights finding no probable cause indicated that any party could appeal the order within 15 days after service, and where petitioner failed to do so. Vola v New York State Human Rights Appeal Bd., 96 A.D.2d 513, 464 N.Y.S.2d 817, 1983 N.Y. App. Div. LEXIS 19022 (N.Y. App. Div. 2d Dep't 1983).

A petition to review a determination of the State Human Rights Appeal Board affirming an order of the State Division of Human Rights, which involved a complaint of an unlawful discriminatory practice based on age and sex, would be dismissed where petitioner failed to commence the proceeding by the filing and service of a notice of motion and petition within 30 days of the service of the appeal board's order, as required by Exec Law § 298. Miller v General Electric Co., 102 A.D.2d 966, 477 N.Y.S.2d 834, 1984 N.Y. App. Div. LEXIS 19214 (N.Y. App. Div. 3d Dep't 1984).

Determination of New York State Division of Human Rights dismissing petition charging discriminatory discharge was proper where cause of action accrued on December 22, 1981, when she was discharged, and complaint was not filed until December 30, 1982, since complaint was not filed within one year after alleged discriminatory practice occurred. Morehead v Lind, 112 A.D.2d 996, 492 N.Y.S.2d 804, 1985 N.Y. App. Div. LEXIS 52206 (N.Y. App. Div. 2d Dep't 1985).

Date of institution of proceeding in Appellate Division to review administrative decision pursuant to CLS Executive Law § 298 is date of actual receipt of papers by court for filing. Cortland v White, 114 A.D.2d 641, 494 N.Y.S.2d 478, 1985 N.Y. App. Div. LEXIS 53326 (N.Y. App. Div. 3d Dep't 1985), app. denied, 67 N.Y.2d 601, 499 N.Y.S.2d 1027, 490 N.E.2d 555, 1986 N.Y. LEXIS 16679 (N.Y. 1986).

Where Commissioner of Division of Human Rights was agency's general counsel at time charges were investigated and set down for hearing, she could not, having subsequently been named commissioner, act as impartial arbiter in same matter, notwithstanding that she was no longer general counsel at time of hearing. State Div. of Human Rights v Dorik's Au Natural Restaurant, 203 A.D.2d 163, 610 N.Y.S.2d 266, 1994 N.Y. App. Div. LEXIS 4123 (N.Y. App. Div. 1st Dep't 1994).

Court would annul determination of Commissioner of Human Rights finding that employer engaged in unlawful discrimination where (1) public hearing did not commence until 7 years after complaint was filed, and commissioner's determination was not issued until nearly 4 years later, (2) delay was attributable to Division of Human Rights without explanation, and (3) during delay, employer lost access to 2 individuals who would have been called as witnesses, and it also lost access to documentary evidence that would have been used in its defense. Pepsico, Inc. v Rosa, 213 A.D.2d 550, 624 N.Y.S.2d 622, 1995 N.Y. App. Div. LEXIS 4449 (N.Y. App. Div. 2d Dep't), app. dismissed, 86 N.Y.2d 837, 634 N.Y.S.2d 445, 658 N.E.2d 223, 1995 N.Y. LEXIS 3707 (N.Y. 1995), app. denied, 86 N.Y.2d 709, 634 N.Y.S.2d 442, 658 N.E.2d 220, 1995 N.Y. LEXIS 3708 (N.Y. 1995).

Proceeding brought by African-American correctional officer under CLS Exec § 298 alleging racial discrimination by his supervisor was timely commenced where he alleged that acts complained of occurred consistently during entire 2-year period during which officer was under supervisor's direct supervision, and officer brought complaint promptly after he was transferred. New York State Dep't of Correctional Servs. v New York State Div. of Human Rights, 225 A.D.2d 856, 638 N.Y.S.2d 827, 1996 N.Y. App. Div. LEXIS 2063 (N.Y. App. Div. 3d Dep't 1996).

Complaints filed more than one year after complainants' allegedly discriminatory discharges from employment were time-barred under CLS Exec § 297(5). Garrison v State Div. of Human Rights, 238 A.D.2d 591, 656 N.Y.S.2d 389, 1997 N.Y. App. Div. LEXIS 4427 (N.Y. App. Div. 2d Dep't 1997).

Age discrimination claimants' allegations that employer declined to hire them for new positions after they had been discharged did not convert their discharge claims into claims for continuing violations such that limitations period would be tolled. Garrison v State Div. of Human Rights, 238 A.D.2d 591, 656 N.Y.S.2d 389, 1997 N.Y. App. Div. LEXIS 4427 (N.Y. App. Div. 2d Dep't 1997).

Plaintiffs' claims against the New York State Division of Human Rights, alleging that a settlement agreement entered into between the parties was void due to the Division's lack of authority to enter into it without first determining that there was probable cause to believe that plaintiffs engaged in an unlawful discriminating practice, and due to the allegation that it was entered into under duress, were dismissed where they were not raised in a timely manner under N.Y. Exec. Law § 298. Ken-Vil Assoc. Ltd. Partnership v New York State Div. of Human Rights, 100 A.D.3d 1390, 954 N.Y.S.2d 294, 2012 N.Y. App. Div. LEXIS 7446 (N.Y. App. Div. 4th Dep't 2012).

Delay in a determination by the State Division of Human Rights that found the Department of Corrections (DOC) guilty of an unlawful discriminatory practice was prejudicial and constituted an abuse of discretion because the time that elapsed from the employee's initial complaint until issuance of the final order was more than 18 years, the DOC did not contribute to the delay, and the complaint presented issues that were relatively simple and straightforward. Matter of New York State Dept. of Corr. & Community Supervision v New York State Div. of Human Rights, 137 A.D.3d 1512, 29 N.Y.S.3d 558, 2016 N.Y. App. Div. LEXIS 2380 (N.Y. App. Div. 3d Dep't 2016).

In action alleging discharge from employment due to racial discrimination fact that plaintiff did not commence action within time period specified by Exec Law § 298 after review of decision by New York State Human Rights Appeals Board did not bar suit since actions under 42 USCS § 1981 are not actions to review decision of state administrative agency but plenary action involving trial de novo of alleged discriminatory conduct with 3-year period of limitation. Clark v Times Square Stores Corp., 469 F. Supp. 654, 1979 U.S. Dist. LEXIS 12746 (S.D.N.Y. 1979).

In civil rights case alleging employment discrimination in violation of Equal Protection Clause and Due Process Clause, appropriate interests involved are sufficiently protected by appli-

cation of 3-year limitation period; contention that such claims deserves special consideration preserving them from dismissal on limitations grounds is in conflict with use of even shorter periods Congress deems reasonable for prosecution of typical federal employment discrimination actions and limitations periods for employment-related questions set by Executive Law. Fiesel v Board of Education, 490 F. Supp. 363, 1980 U.S. Dist. LEXIS 11613 (E.D.N.Y. 1980), reh'g denied, 524 F. Supp. 48, 1981 U.S. Dist. LEXIS 14737 (E.D.N.Y. 1981), aff'd, 675 F.2d 522, 1982 U.S. App. LEXIS 20249 (2d Cir. N.Y. 1982).

Employment discrimination claim was not time barred where Division of Human Rights dismissed complaint for administrative convenience because employee wished to pursue court action, and action was filed within 3-year period for bringing plenary action under Human Rights Law; employer was collaterally estopped from asserting that administrative complaint should have been dismissed on basis that it was not timely filed under administrative statute of limitations. Ryan v New York State Thruway Auth., 889 F. Supp. 70, 1995 U.S. Dist. LEXIS 9052 (N.D.N.Y. 1995).

35. Time limitations as directory not mandatory

Even though time limitations contained in Executive Law § 297, subd 4(a), (c) are directive and not mandatory, valid complaint for discriminatory housing practices was dismissed where delay of 5 months, 16 months, and 3 years respectively in hearing of complaint by division, in making determination and order by division, and in appeal board's affirmance of division's order, were unconscionable and so flagrant as to be prejudicial in law to respondent. State Div. of Human Rights ex rel. Salamy v Rinas, 42 A.D.2d 388, 348 N.Y.S.2d 422, 1973 N.Y. App. Div. LEXIS 3276 (N.Y. App. Div. 4th Dep't 1973).

Where relatively minor delays occur, statutory time limitations of Executive Law governing proceedings before State Division of Human Rights are directory rather than mandatory and noncompliance by Division is not cause for invalidating its proceedings or terminating its jurisdiction; however, protracted administrative delays in implementation of provisions of human rights law will constitute, as matter of law, prejudice to named proceeding respondents, warranting exercise of equitable powers of judiciary to divest Division of jurisdiction conferred by human rights law. State Div. of Human Rights ex rel. Bailey v Board of Education, 53 A.D.2d 1043, 386 N.Y.S.2d 166, 1976 N.Y. App. Div. LEXIS 15855 (N.Y. App. Div. 4th Dep't 1976), aff'd, 42 N.Y.2d 862, 397 N.Y.S.2d 791, 366 N.E.2d 878, 1977 N.Y. LEXIS 2186 (N.Y. 1977).

Determination of Division of Human Rights, which held that employer had discriminated against employee because of her sex by denying her pregnancy-related disability benefits, would be confirmed in proceeding pursuant to CLS Exec § 298, even though there had been substantial delay in proceedings, since time limitations enunciated in CLS Exec § 297 are directory, rather than mandatory, and are for benefit of complainants rather than violators, and since commissioner legitimately found that correspondence between division and employee's attorney reflected desire of attorney to stay proceedings pending resolution of employee's workers' compensation claim, rather than withdrawal of claim. Art Leather Mfg. Co. v State Div. of Human Rights, 144 A.D.2d 406, 533 N.Y.S.2d 1018, 1988 N.Y. App. Div. LEXIS 11795 (N.Y. App. Div. 2d Dep't 1988).

Although time schedules set forth in CLS Exec § 297 are directory only, and noncompliance with them does not operate to oust State Division of Human Rights of jurisdiction absent some showing of substantial prejudice, unexplained 8 ½ -year delay between filing of complaint in proceeding under CLS Exec § 298 and commissioner's final determination caused substantial prejudice to employer, requiring annulment of award, since employer was thereby subjected to exposure for 8 ½ -year award of back pay. Corning Glass Works v Ovsanik, 199 A.D.2d 959, 606 N.Y.S.2d 475, 1993 N.Y. App. Div. LEXIS 12540 (N.Y. App. Div. 4th Dep't 1993), modified, aff'd, 84 N.Y.2d 619, 620 N.Y.S.2d 771, 644 N.E.2d 1327, 1994 N.Y. LEXIS 4438 (N.Y. 1994).

Delay of some 4 years from time of hearing to final determination of Division of Human Rights was not substantially prejudicial as matter of law so as to warrant dismissal of petition. Comor v New York State Div. of Human Rights, 231 A.D.2d 715, 647 N.Y.S.2d 842, 1996 N.Y. App. Div. LEXIS 9693 (N.Y. App. Div. 2d Dep't 1996).

Former employee's 2003 claim under N.Y. Exec. Law § 298 against her corporate employer and its owner for sexual harassment by creating a hostile work environment that arose out of six months of employment in 1991 and 1992 was not untimely because the time limits contained in N.Y. Exec. Law § 297 were directory only; in the absence of prejudice, which the owner and employer failed to demonstrate, the time limits did not affect the jurisdiction of the New York Division of Human Rights over the employee's claim. Matter of R & B Autobody & Radiator, Inc. v New York State Div. of Human Rights, 31 A.D.3d 989, 819 N.Y.S.2d 599, 2006 N.Y. App. Div. LEXIS 9469 (N.Y. App. Div. 3d Dep't 2006).

36. Specific allowance of time for mailing of service

Although the facts established that the petition for review was served and filed beyond the 30-day period allowed under the statute therefor when by mail, the merits of the Division of Human Rights' order may be considered when the Division seeks from the court affirmative action in the form of an enforcement order. State Div. of Human Rights ex rel. Washington v Ganley, 37 A.D.2d 983, 327 N.Y.S.2d 402, 1971 N.Y. App. Div. LEXIS 2978 (N.Y. App. Div. 2d Dep't 1971).

Supreme Court, Appellate Division, did not have jurisdiction of special proceeding to review an order of the State Division and Appeal Board dismissing complaint of discrimination where petition and notice were not filed until several days after statutory period of 30 days, plus three days allowed because of service by mail, had elapsed. Denson v Buffalo Evening News, Inc., 45 A.D.2d 931, 357 N.Y.S.2d 328, 1974 N.Y. App. Div. LEXIS 4502 (N.Y. App. Div. 4th Dep't 1974).

Service of determination of the Division of Human Rights on complainant in employment discrimination case was complete when it was deposited for mailing, and complainant had 18 days from the date of mailing in which to appeal. State Div. of Human Rights v Xerox Corp., 57 A.D.2d 1069, 395 N.Y.S.2d 828, 1977 N.Y. App. Div. LEXIS 12383 (N.Y. App. Div. 4th Dep't 1977).

Petition to review order of the Human Rights Appeal Board affirming dismissal of a complaint for lack of probable cause was untimely and would be dismissed where order was entered and mailed to petitioner on April 19, 1977, and petition was not filed until June 3, 1977. Caraballo v State Div. on Human Rights, 59 A.D.2d 871, 399 N.Y.S.2d 238, 1977 N.Y. App. Div. LEXIS 14046 (N.Y. App. Div. 1st Dep't 1977).

37. Res judicata

The determination of the New York State Division of Human Rights that complainant was terminated from her employment on the basis of race was properly affirmed, notwithstanding the employer's contention that the previous determination of the Unemployment Insurance Appeal Board that complainant had been terminated for her own misconduct barred her from bringing the instant proceeding, where, inter alia, complainant was not represented by counsel in the previous proceeding, which involved a comparatively small claim, and where a full and fair opportunity to litigate the racial allegation was not afforded her. Board of Education v New York State Human Rights Appeal Bd., 106 A.D.2d 364, 482 N.Y.S.2d 495, 1984 N.Y. App. Div. LEXIS 21403 (N.Y. App. Div. 2d Dep't 1984).

Determination by Unemployment Insurance Appeal Board that petitioner was "employee" for purposes of his claim for unemployment insurance benefits does not collaterally estop Division of Human Rights from determining that petitioner is independent contractor for purposes of age discrimination suit, since, inasmuch as issue of unemployment is ultimate fact, resolution of which is committed to discretion of board and division under independent bodies of law, there is no identity of issue in board's finding of employment that automatically mandates similar finding by division. Engel v Calgon Corp., 114 A.D.2d 108, 498 N.Y.S.2d 877, 1986 N.Y. App. Div. LEXIS 63686 (N.Y. App. Div. 3d Dep't 1986), aff'd, 69 N.Y.2d 753, 512 N.Y.S.2d 801, 505 N.E.2d 244, 1987 N.Y. LEXIS 15324 (N.Y. 1987).

Proceeding brought by terminated employee pursuant to § 298 to review order of state human rights appeal board is not barred

by prior administrative determination of state department of labor that employment was terminated or unsatisfactory job performance where instant record is devoid of evidence regarding prior administrative determination and employer had neither asserted defense of collateral estoppel in answer to complaint of discrimination nor established reasonable ground for failure to present evidence of department of labor's determination before human rights division. Salvatore v New York State Div. of Human Rights, 118 A.D.2d 715, 500 N.Y.S.2d 47, 1986 N.Y. App. Div. LEXIS 54574 (N.Y. App. Div. 2d Dep't 1986).

Division's finding of retaliatory discharge was annulled in an N.Y. Exec. Law § 298 proceeding because the division should have dismissed the complaint based on res judicata and collateral estoppel as a result of an earlier arbitration decision; the arbitrator had the power to arbitrate and decided the underlying issues. There was no limitation on the arbitrator's power in the collective bargaining agreement (CBA), the CBA did not bar arbitration, the arbitrator reasonably resolved an ambiguity in the CBA the former employee's favor, and, as a result, relitigation of the arbitrator's findings or conclusions was precluded. Matter of New York State Dept. of Labor (Unemployment Ins. Appeal Board) v New York State Div. of Human Rights, 71 A.D.3d 1234, 897 N.Y.S.2d 740, 2010 N.Y. App. Div. LEXIS 1832 (N.Y. App. Div. 3d Dep't), app. denied, 15 N.Y.3d 714, 913 N.Y.S.2d 643, 939 N.E.2d 809, 2010 N.Y. LEXIS 3480 (N.Y. 2010).

Proceeding pursuant to N.Y. Exec. Law § 298 to review a determination of unlawful employment discrimination was denied as barred by the doctrine of res judicata where an earlier proceeding seeking review of the determination had been dismissed as abandoned. Under the Elms, Inc. v Tolbert, 1 A.D.3d 373, 766 N.Y.S.2d 876, 2003 N.Y. App. Div. LEXIS 11467 (N.Y. App. Div. 2d Dep't 2003).

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The protection against discrimination afforded by Executive Law § 296 is at least as broad as that afforded by the Federal Constitution and civil rights statutes. Thus, the determination of the Appellate Division affirming the Appeal Board's affirmance of the State Division of Human Rights' dismissal of former employee's race discrimination claim against former employer on the ground of lack of probable cause, res judicata of all other state actions as a matter of statutory law, would be entitled to full faith and credit in a federal court hearing federal constitutional and civil rights claims. Mitchell v National Broadcasting Co., 553 F.2d 265, 1977 U.S. App. LEXIS 13960 (2d Cir. N.Y. 1977).

Police officer's federal claim for compensatory damages for emotional pain and suffering was not barred by res judicata, even though he had prevailed in Article 78 proceeding in which he sought back pay and reinstatement to his former position, where compensatory damages were recoverable under Executive Law as civil rights violations, which were "incidental" to primary relief which he had sought in Article 78 proceeding. Antonsen v Ward, 943 F.2d 198, 1991 U.S. App. LEXIS 19483 (2d Cir. N.Y. 1991).

Federal de novo review of Title VII claim (42 USCS §§ 2000e et seq.) was barred by res judicata where New York appellate division had affirmed findings of division of human rights and human rights appeals board that former employee's discharge was not occasioned by an unlawful discriminatory practice as to religion and national origin. Kremer v Chemical Constr. Corp., 477 F. Supp. 587, 1979 U.S. Dist. LEXIS 9669 (S.D.N.Y. 1979), aff'd, 623 F.2d 786, 1980 U.S. App. LEXIS 17020 (2d Cir. N.Y. 1980).

Plaintiff, having sought judicial review of his allegedly discriminatory termination in state court pursuant to an Article 78 proceeding, is now barred by the doctrine of res judicata from relitigating his claims in a federal Title VII action; the Supreme Court, in Kremer v Chemical Constr. Corp., 456 US 461, 102 S Ct 1883, 72 L Ed 2d 262 (1982), held that a federal court hearing a Title VII action must afford res judicata effect to a state court's prior determination as to discrimination claims where, under state law, the plaintiff would be barred from relitigating the same claims in state court. Kent v New York City Dep't of Sanitation, 549 F. Supp. 570, 1982 U.S. Dist. LEXIS 14750 (S.D.N.Y. 1982), aff'd, 722 F.2d 728, 1983 U.S. App. LEXIS 30139 (2d Cir. N.Y. 1983).

New York court's dismissal of employee's age discrimination claims was based on election of remedies, not on statute of limitations, and thus did not have preclusive effect in federal court action, where thrust of decision dismissing claims was that employee could not file plenary action alleging discrimination because he had previously filed administrative complaint, and decision's discussion of statute of limitations defense related to proceeding that employee did not bring. Walsh v City of Auburn, 942 F. Supp. 788, 1996 U.S. Dist. LEXIS 15335 (N.D.N.Y. 1996).

38. Miscellaneous

Defendant employer was not entitled to dismissal of gender discrimination complaint under CLS Exec § 296 on basis that State Division of Human Rights (SDHR) delayed 11 years before holding hearing on complaint and then delayed its order for another 3 years, where no substantial actual prejudice resulted in that employer's witnesses were able to testify without difficulties owing to memory loss regarding issues on which SDHR based its finding of discrimination. Diaz Chem. Corp. v New York State Div. of Human Rights, 91 N.Y.2d 932, 670 N.Y.S.2d 397, 693 N.E.2d 744, 1998 N.Y. LEXIS 599 (N.Y. 1998).

Petition for review of decision of the State Human Rights Appeal Board dismissing appeal substantially complied with statute, through the Board was not named in the caption of the action, where the notice of motion and petition stated that appeal was from the determination of the Board and service was made on the commissioner of the State Division of Human Rights and his general counsel. State Div. of Human Rights v Commissioner of New York State Dep't of Civil Service, 57 A.D.2d 699, 395 N.Y.S.2d 774, 1977 N.Y. App. Div. LEXIS 11737 (N.Y. App. Div. 4th Dep't 1977).

Division of Human Rights did not act arbitrarily or capriciously in dismissing university employee's complaint of unlawful discriminatory practice based on disability where Division's investigation included field visits, conferences, interviews and submission of numerous documents, and where petitioner was given full opportunity to rebut respondent's evidence, particularly where petitioner was still suffering from medical disability when his position was eliminated for budgetary purposes. Guilfoose v New York State Agriculture Experiment Station, 111 A.D.2d 430, 488 N.Y.S.2d 491, 1985 N.Y. App. Div. LEXIS 51525 (N.Y. App. Div. 3d Dep't 1985).

Employer may not obtain reversal of order, which order requires reinstatement of terminated employee, on basis of sale of business during pendency of court proceedings; relief must be sought in proceeding before division of human rights. Salvatore v New York State Div. of Human Rights, 118 A.D.2d 715, 500 N.Y.S.2d 47, 1986 N.Y. App. Div. LEXIS 54574 (N.Y. App. Div. 2d Dep't 1986).

Although State Division of Human Rights correctly determined that sheriff's department discriminated against applicant by inquiring about prior arrests on application for employment in 1981, court would reverse those portions of division's order directing sheriff to hire applicant as mounted patrolmen and awarding back pay; inasmuch as applicant was never sworn in, or paid, as mounted patrolman, division lacked power to direct sheriff, public employer, to hire applicant since such direction would in effect deprive appointing authority of power of selection. Sheriff's Dep't v State Div. of Human Rights, 129 A.D.2d 789, 514

N.Y.S.2d 779, 1987 N.Y. App. Div. LEXIS 45479 (N.Y. App. Div. 2d Dep't 1987).

Employer was denied due process where individual who appeared as counsel for Division of Human Rights in early stages of employment discrimination proceeding later became Commissioner of Human Rights and thereafter issued final determination in instant matter. Pepsico, Inc. v Rosa, 213 A.D.2d 550, 624 N.Y.S.2d 622, 1995 N.Y. App. Div. LEXIS 4449 (N.Y. App. Div. 2d Dep't), app. dismissed, 86 N.Y.2d 837, 634 N.Y.S.2d 445, 658 N.E.2d 223, 1995 N.Y. LEXIS 3707 (N.Y. 1995), app. denied, 86 N.Y.2d 709, 634 N.Y.S.2d 442, 658 N.E.2d 220, 1995 N.Y. LEXIS 3708 (N.Y. 1995).

Determination of Commissioner of Human Rights would be annulled where commissioner had previously participated in matter as general counsel of Human Rights Division. New York State Dep't of Correctional Servs. v State Div. of Human Rights, 216 A.D.2d 658, 627 N.Y.S.2d 800, 1995 N.Y. App. Div. LEXIS 6117 (N.Y. App. Div. 3d Dep't 1995).

Disability discrimination claims filed against airline, based on airline's use of weight standards in hiring flight attendants, were properly dismissed where, inter alia, petitioners failed to show that they fell within class of persons protected by Human Rights Law and that airline intended to discriminate against older women, they did not claim that their weight limited their actions or abilities nor did they allege conditions which amounted to obesity, and they submitted no proof that they had been clinically observed as having "abnormal medical condition" or that they were medically incapable of meeting airline's weight requirements due to underlying medical problem. Delta Air Lines v New York State Div. of Human Rights, 229 A.D.2d 132, 652 N.Y.S.2d 253, 1996 N.Y. App. Div. LEXIS 12963 (N.Y. App. Div. 1st Dep't 1996), app. dismissed, 90 N.Y.2d 882, 661 N.Y.S.2d 825, 684 N.E.2d 274, 1997 N.Y. LEXIS 2331 (N.Y. 1997), aff'd, 91 N.Y.2d 65, 666 N.Y.S.2d 1004, 689 N.E.2d 898, 1997 N.Y. LEXIS 3710 (N.Y. 1997).

In terminated employee's action for gender and age discrimination under both CLS Exec §§ 290 et seq. and federal law, defendants did not waive their right to raise defense of subject matter jurisdiction by their failure to appeal from administrative convenience dismissal under CLS Exec § 298 where they were not aggrieved by dismissal as worded and thus had no incentive to appeal. Kordich v Povill, 244 A.D.2d 112, 676 N.Y.S.2d 331, 1998 N.Y. App. Div. LEXIS 8680 (N.Y. App. Div. 3d Dep't 1998).

It was not "purely arbitrary" for State Division of Human Rights (SDHR) to dismiss complainant's sexual harassment complaint for administrative convenience after having initially found that there was probable cause to support her allegations, as her intervening commencement of federal court action asserting Title VII sexual harassment and retaliation claims, and pendant state claims mirroring her allegations in complaint filed with SDHR, effectuated election of remedies under CLS Exec § 297(9). Universal Packaging Corp. v New York State Div. of Human Rights, 270 A.D.2d 586, 704 N.Y.S.2d 332, 2000 N.Y. App. Div. LEXIS 2647 (N.Y. App. Div. 3d Dep't 2000).

Commissioner of Human Rights exceeded scope of court's remittal when it awarded back pay to complainant on ground that employer was liable for constructive discharge based on hostile work environment, where he had initially concluded that employer retaliated against complainant for filing sexual harassment complaint but did not discharge her in retaliation therefor, complainant did not challenge his initial liability determination, and court implicitly upheld this aspect of his determination; issue of employer's liability for complainant's discharge was previously decided and, under "law of the case" doctrine, that determination was conclusive. Carrier Corp. v New York State Div. of Human Rights, 270 A.D.2d 796, 705 N.Y.S.2d 744, 2000 N.Y. App. Div. LEXIS 3579 (N.Y. App. Div. 4th Dep't 2000).

Plaintiff raised issues of fact as to whether employer had knowledge of her sexual harassment complaints and, if so, whether it reasonably investigated those complaints and took corrective action, where her deposition testimony described months of complaining to direct supervisors with no response from employer other than to transfer her to different worksite, where harassment by other employees continued. Vitale v Rosina Food Prods., 283 A.D.2d 141, 727 N.Y.S.2d 215, 2001 N.Y. App. Div. LEXIS 5748 (N.Y. App. Div. 4th Dep't 2001).

Department of Health was properly granted summary judgment dismissing action alleging that, by revoking plaintiff's medical license, it discriminated against him in violation of CLS Exec § 296, based on his adult Attention Deficit Disorder, as plaintiff essentially sought judicial review of determination which revoked his medical license, and such review had to be made via Article 78 proceeding, which was time barred. Horne v New York State Dep't of Health, 287 A.D.2d 940, 731 N.Y.S.2d 781, 2001 N.Y. App. Div. LEXIS 9979 (N.Y. App. Div. 3d Dep't 2001).

Commissioner erred in requiring an employer to pay predetermination interest in employment discrimination claim relating to that portion of the "unreasonable delay" in determining the complaint that was attributable solely to the New York State Division of Human Rights. Matter of Rite Aid of N.Y., Inc. v New York State Div. of Human Rights, 60 A.D.3d 1428, 875 N.Y.S.2d 708, 2009 N.Y. App. Div. LEXIS 2020 (N.Y. App. Div. 4th Dep't), app. denied, 13 N.Y.3d 702, 886 N.Y.S.2d 94, 914 N.E.2d 1012, 2009 N.Y. LEXIS 3443 (N.Y. 2009).

New York State Division of Human Rights (DHR) abused its discretion by increasing an employer's civil fine to $ 60,000, because the DHR factored the employer's behavior during the administrative proceedings as part of the calculus to increase the fine, as opposed to focusing only whether the employer's discrimination was willful, wanton, or malicious. Matter of JPK Imports/Oneonta, Inc. v New York State Div. of Human Rights, 165 A.D.3d 1410, 86 N.Y.S.3d 638, 2018 N.Y. App. Div. LEXIS 6939 (N.Y. App. Div. 3d Dep't 2018), app. denied, 32 N.Y.3d 918, 123 N.E.3d 875, 100 N.Y.S.3d 216, 2019 N.Y. LEXIS 606 (N.Y. 2019).

In fair hearing in progress before State Division on Human Rights on employee's claims that employer discriminated against her in employment by denying her equal terms, conditions and privileges of employment and by terminating her employment because of her age, court would enforce subpoena duces tecum requiring employer to produce certain enumerated documents sought by employee to show pattern and practice of terminating employees at given age to effect monetary savings of pension and profit-sharing benefits. Russo v Reader's Digest, 91 Misc. 2d 1, 396 N.Y.S.2d 803, 1977 N.Y. Misc. LEXIS 2221 (N.Y. Sup. Ct. 1977).

In proceeding challenging State Division of Human Rights' dismissal of race discrimination complaint at complainant's request on ground of "administrative inconvenience" under CLS Exec § 297, petitioner's request for admissions of fact that division had not dismissed any complaints on such ground within last 2 years except where first requested by complainant, in order to establish arbitrary or capricious activity on division's part, would be denied on ground that it sought conclusions about material issues for which notice to admit may not be utilized. New York Tel. Co. v New York State Div. of Human Rights, 148 Misc. 2d 765, 561 N.Y.S.2d 401, 1990 N.Y. Misc. LEXIS 536 (N.Y. Sup. Ct. 1990).

Court of Claims lacked jurisdiction to hear federal constitutional due process and equal protection claims alleged to have arisen when Division of Human Rights failed to resolve claimant's employment discrimination claim in timely manner; state is not "person" amenable to suit under 42 USCS § 1983. Ferrer v State, 172 Misc. 2d 1, 655 N.Y.S.2d 900, 1996 N.Y. Misc. LEXIS 571 (N.Y. Ct. Cl. 1996).

Court of Claims dismissed claims for violation of due process and equal protection under state constitution, which allegedly arose when Division of Human Rights failed to resolve claimant's employment discrimination claim in timely manner, as direct action under state constitution can be maintained only where no other equally effective or adequate remedy exists, and both statutory and common-law bases for redress were available pursuant to federal claims 42 USCS § 1983 and common-law negligence claims, respectively. Ferrer v State, 172 Misc. 2d 1, 655 N.Y.S.2d 900, 1996 N.Y. Misc. LEXIS 571 (N.Y. Ct. Cl. 1996).

Division erred in amending an administrative discrimination complaint by adding the president as a respondent because this amendment was made after the one-year limitations period of

N.Y. Exec. Law § 297(5) had expired and the president had already appeared pro se on behalf of the employer at the public hearing on the complaint. Matter of Murphy v Kirkland, 88 A.D.3d 267, 928 N.Y.S.2d 333, 2011 N.Y. App. Div. LEXIS 6152 (N.Y. App. Div. 2d Dep't 2011).

Where a former employee alleged her male supervisor sexually harassed her, as the complaint made no allegations against her female supervisor, it failed to state a claim against her or to provide notice of the allegations against her, as required by due process and N.Y. Exec. Law 297; thus, the New York State Division of Human Right could not enforce a damage award in favor of the employee against the female supervisor. Matter of New York State Div. of Human Rights v Young Legends, LLC, 90 A.D.3d 1265, 934 N.Y.S.2d 628, 2011 N.Y. App. Div. LEXIS 8851 (N.Y. App. Div. 3d Dep't 2011).

In action under Human Rights Law, 51-year-old discharged plaintiff failed to raise issue as to whether proffered reason for his discharge, that he sexually harassed subordinate employee, was pretextual where he presented no evidence to show that he had not sexually harassed subordinate employee, or to rebut sworn statements of company officials that they believed in good faith that he had sexually harassed subordinate employee and that they fired him for that reason. Agugliaro v Brooks Bros., 927 F. Supp. 741, 1996 U.S. Dist. LEXIS 7965 (S.D.N.Y. 1996).

39. Under former § 297-a; In general

Where, at time that order was made, statute provided for majority of entire four-member appeal board to make a decision, 2–1 determination directing reversal of Human Rights commissioner's order was invalid. New York City Board of Education v New York State Human Rights Appeal Board, 54 A.D.2d 656, 387 N.Y.S.2d 873, 1976 N.Y. App. Div. LEXIS 14183 (N.Y. App. Div. 1st Dep't 1976).

Relevant provisions of Executive Law, when read together, establish legislative intent that, before determining whether there is probable cause for complaint of discrimination, commissioner of Division of Human Rights should give complainant full opportunity to present on record, though informally, his charges against employer or other respondent, including right to submit all exhibits which he wishes to present and testimony of witnesses in addition to his own testimony. State Div. of Human Rights v New York State Drug Abuse Control Com., 59 A.D.2d 332, 399 N.Y.S.2d 541, 1977 N.Y. App. Div. LEXIS 13571 (N.Y. App. Div. 4th Dep't 1977).

In dismissing complaint of unlawful discriminatory practice relating to employment because of religious faith on finding that no probable cause existed, State Division of Human Rights was required to recite the reasons upon which it acted. County of Suffolk v Keshinover, 59 A.D.2d 709, 398 N.Y.S.2d 447, 1977 N.Y. App. Div. LEXIS 13674 (N.Y. App. Div. 2d Dep't 1977).

Proceeding before Human Rights Appeal Board on complaint charging unlawful discrimination due to age was not defective either because only one member of Board was present or because oral argument was not transcribed. Ashley v New York State Human Rights Appeal Board, 60 A.D.2d 568, 399 N.Y.S.2d 701, 1977 N.Y. App. Div. LEXIS 14500 (N.Y. App. Div. 2d Dep't 1977).

Where the statute envisions an administrative proceeding before the Division a party dissatisfied with the determination may appeal to the State Human Rights Appeal Board and the law specifically grants authority to the appeal board to review the Division's determination of jurisdiction and judicial review is available only from an order of the Appeal Board, therefore the petition was dismissed for failure to exhaust administrative remedy. McMillan Book Co. v State Div. of Human Rights, 64 Misc. 2d 692, 315 N.Y.S.2d 463, 1970 N.Y. Misc. LEXIS 1162 (N.Y. Sup. Ct. 1970).

Where county and county officials against whom employment discrimination complaints were filed with the State Division of Human Rights failed to obtain dismissal of the complaints before the Division, recourse of county and officials after final determination in the Division was an appeal to the State Human Rights Appeal Board and, thereafter, review in an Article 78 proceeding before the Appellate Division. State Div. of Human Rights ex rel. Fitzhugh v County of Monroe, 88 Misc. 2d 16, 386 N.Y.S.2d 317, 1976 N.Y. Misc. LEXIS 2373 (N.Y. Sup. Ct. 1976).

40. Scope of review

Authority of state human rights appeal board in reviewing determination of discrimination made by commissioner of state division of human rights is limited by statute to power of court reviewing administrative determination made after hearing; board is not empowered to find new facts or take different view of weight of evidence if commissioner's determination is supported by substantial evidence. State Div. of Human Rights v Columbia University in New York, 39 N.Y.2d 612, 385 N.Y.S.2d 19, 350 N.E.2d 396, 1976 N.Y. LEXIS 2714 (N.Y. 1976), cert. denied, 429 U.S. 1096, 97 S. Ct. 1112, 51 L. Ed. 2d 543, 1977 U.S. LEXIS 2143 (U.S. 1977).

Judicial review of the determination made by an administrative agency is limited to a consideration of whether that resolution was supported by substantial evidence upon the whole record, and allowance may not be made for information outside of it. 300 Gramatan Ave. Associates v State Div. of Human Rights, 45 N.Y.2d 176, 408 N.Y.S.2d 54, 379 N.E.2d 1183, 1978 N.Y. LEXIS 2107 (N.Y. 1978).

Human Rights Appeal Board is without statutory authority to reverse decision of the State Division of Human Rights "in the interest of justice." State Div. State Div. of Human Rights ex rel. Jackson v Genesee Hospital, 46 A.D.2d 729, 360 N.Y.S.2d 522, 1974 N.Y. App. Div. LEXIS 3888 (N.Y. App. Div. 4th Dep't 1974).

Scope of State Human Rights Appeal Board's review is limited by statute and Board may not reverse a decision of the Division of Human Rights "in the interests of justice" nor may it substitute its judgment for that of the Division. State Div. of Human Rights ex rel. Powers v Mecca Kendall Corp., 53 A.D.2d 201, 385 N.Y.S.2d 665, 1976 N.Y. App. Div. LEXIS 12506 (N.Y. App. Div. 4th Dep't 1976).

Where record considered as a whole clearly justified finding of no probable cause by Division of Human Rights, Appeal Board in vacating Division's order and remanding matter for further investigation impermissibly exceeded limited scope of its review and substituted its own judgment for that of Division. Grumman Aerospace Corp. v New York State Human Rights Appeal Board, 54 A.D.2d 958, 388 N.Y.S.2d 640, 1976 N.Y. App. Div. LEXIS 14869 (N.Y. App. Div. 2d Dep't 1976).

Scope of State Human Rights Appeal Board's review of determination of Division of Human Rights is limited and Board may not exceed scope of that review and substitute its judgment for that of Division. State Div. of Human Rights v Merchants Mut. Ins. Co., 59 A.D.2d 1054, 399 N.Y.S.2d 813, 1977 N.Y. App. Div. LEXIS 14344 (N.Y. App. Div. 4th Dep't 1977).

In reviewing determination made by State Division of Human Rights after investigatory conference, State Human Rights Appeal Board is limited to examining record to determine whether there was rational basis for regional director's decision. State Div. of Human Rights v Merchants Mut. Ins. Co., 59 A.D.2d 1054, 399 N.Y.S.2d 813, 1977 N.Y. App. Div. LEXIS 14344 (N.Y. App. Div. 4th Dep't 1977).

The Human Rights Appeal Board is required to exercise the same limited scope of review that a court ordinarily does when passing on the determination of an administrative agency; the Board may not substitute its factual judgment for that of the State Division of Human Rights on the threshold issue of probable cause. GAF Corp. v New York State Human Rights Appeal Bd., 83 A.D.2d 974, 442 N.Y.S.2d 810, 1981 N.Y. App. Div. LEXIS 15436 (N.Y. App. Div. 3d Dep't 1981).

41. —Particular applications

It is not province of either state human rights appeal board or Court of Appeals to render subjective determinations as to whether university should purchase new laboratory equipment, hire junior faculty in areas it deems necessary or, in alternative, appoint additional tenured professor in any particular area of expertise. State Div. of Human Rights v Columbia University in New York, 39 N.Y.2d 612, 385 N.Y.S.2d 19, 350 N.E.2d 396, 1976 N.Y. LEXIS 2714 (N.Y. 1976), cert. denied, 429 U.S. 1096, 97 S. Ct. 1112, 51 L. Ed. 2d 543, 1977 U.S. LEXIS 2143 (U.S. 1977).

Although the State Human Rights Appeals Board did not abuse its discretion in finding that a construction company refused to build a house because of the customer's racial origins, the Board erred as to the measure of damages to be applied in determining compensation. Kaval Constr. Corp. v State Div. of Human Rights, 39 A.D.2d 347, 334 N.Y.S.2d 341, 1972 N.Y. App. Div. LEXIS 4110 (N.Y. App. Div. 2d Dep't), app. denied, 31 N.Y.2d 641, 1972 N.Y. LEXIS 1662 (N.Y. 1972).

Where Commissioner of Human Rights found complaint of discriminatory discharge, by reason of race and order that petitioner be rehired, his further order of guidance and training programs for, and recruitment of minority reporters, was ultra vires of the division's powers, being excessive and not sufficiently related to the particular complaint, and Human Rights Appeal Board compounded error by making new findings not warranted by the original record rather than limiting its decision to ruling on the presence or absence of substantial supporting evidence. Artis v State Human Rights Appeal Bd., 42 A.D.2d 557, 345 N.Y.S.2d 570, 1973 N.Y. App. Div. LEXIS 4010 (N.Y. App. Div. 1st Dep't 1973).

State Human Rights Appeal Board impermissibly exceeded the limited scope of its own review and substituted its own judgment for that of State Division of Human Rights in reversing Division's finding of no probable cause, where evidence that complainant unauthorizedly left his job assignment and refused to utilize employer's available procedure for acquiring permission to leave the job assignment supported Division's finding that complainant's dismissal was based on unauthorized absence from his job assignments, and that there was no probable cause to believe that complainant's dismissal was in retaliation for numerous complaints previously filed against employer. Pepsi-Cola Metropolitan Bottling Co. v State Human Rights Appeal Bd., 42 A.D.2d 760, 346 N.Y.S.2d 299, 1973 N.Y. App. Div. LEXIS 3755 (N.Y. App. Div. 2d Dep't 1973).

Where the record, considered as a whole, justified division's finding of no probable cause for sex discrimination charge, board impermissibly exceeded limited scope of its own review in vacating division's order of dismissal. Long Island R. R. Co. v State Div. of Human Rights, 42 A.D.2d 857, 346 N.Y.S.2d 849, 1973 N.Y. App. Div. LEXIS 3639 (N.Y. App. Div. 2d Dep't 1973).

On application to reverse order of Commissioner of Division of Human Rights that assistant professor was not denied tenure because of her sex, appellate division's scope of review was limited to determination of whether there was sufficient evidence in the record to support the order. State Div. of Human Rights ex rel. Mortenson v Syracuse Univ., 46 A.D.2d 1002, 362 N.Y.S.2d 104, 1974 N.Y. App. Div. LEXIS 3386 (N.Y. App. Div. 4th Dep't 1974), app. denied, 36 N.Y.2d 643, 1975 N.Y. LEXIS 2497 (N.Y. 1975).

On employment discrimination complaint, record, considered as a whole, justified division of human rights' finding of no probable cause and, in reversing division's order and remanding matter for further proceedings, Human Rights Appeal Board impermissibly exceeded limited scope of its review and substituted its own judgment for that of division. Long Island R. R. Co. v New York State Div. of Human Rights, 50 A.D.2d 900, 377 N.Y.S.2d 546, 1975 N.Y. App. Div. LEXIS 11803 (N.Y. App. Div. 2d Dep't 1975).

Evidence showing, inter alia, city employee's chronic lateness, absenteeism, insubordination and poor work performance supported finding of division of human rights of no probable cause to beleive that employee was victim of discrimination so that Human Rights Appeal Board exceeded its limited scope of review in determining that division's order dismissing employee's complaint was arbitrary, capricious and an abuse of discretion. New York City Housing Authority v State Div. on Human Rights, 53 A.D.2d 844, 385 N.Y.S.2d 785, 1976 N.Y. App. Div. LEXIS 13674 (N.Y. App. Div. 1st Dep't 1976).

Following a determination of the State Division of Human Rights after a hearing, that complainant, a psychologist who had applied for admission to the New York Psychoanalytic Institute and who was otherwise eminently qualified for admission, had been denied admission in violation of the Human Rights Law on the ground that she suffered from Hodgkin's disease, it was error, upon administrative appeal by the institute which has standing to appeal pursuant to section 297-a (subd 6, par c) of the Executive Law, which empowers the Appeal Board to hear appeals "by any party to any proceeding before the division", for the State Human Rights Appeal Board, without reaching the merits, to annul the division's order and dismiss the complaint on the ground that the division had unreasonably exceeded the statutory time limit, in violation of section 297 (subd 4, pars a, c) of the Executive Law, since the extended time limits provided by section 297 are directory, not mandatory, and absent a showing of substantial prejudice or such egregious delay as will constitute prejudice as a matter of law, delay attributable solely to the administrative agency should not operate to foreclose relief to an innocent complainant who is not responsible for it; there is no claim or evidence of actual prejudice to the institute as a result of delay and there is no claim of undue delay caused by petitioner. Accordingly, since the Appeal Board is limited upon review to the power of a court reviewing an administrative determination made after hearing (Executive Law, § 297-a, subd 7), the order of the Appeal Board is annulled and the order of the Division of Human Rights is confirmed, inasmuch as the record is sufficiently detailed to afford a reasonable basis for the administrative determination, despite the deliberate default by the institute at the hearing. Goldsmith v New York Psychoanalytic Institute, 73 A.D.2d 16, 425 N.Y.S.2d 561, 1980 N.Y. App. Div. LEXIS 9711 (N.Y. App. Div. 1st Dep't 1980).

The State Human Rights Appeals Board properly affirmed the order of the State Division of Human Rights upholding the complaint of a 23-year-old applicant for a truck driver position who had been rejected for failing to meet the employer's minimum age requirement of 24 years where the employer had been unable to establish that age 24 was a bona fide occupational qualification and had, in fact, lowered its minimum hiring age to 23 years some months later. McLean Trucking Co. v State Human Rights Appeal Bd., 80 A.D.2d 809, 437 N.Y.S.2d 309, 1981 N.Y. App. Div. LEXIS 10616 (N.Y. App. Div. 1st Dep't), app. dismissed, 53 N.Y.2d 1030, 442 N.Y.S.2d 497, 425 N.E.2d 885, 1981 N.Y. LEXIS 2558 (N.Y. 1981), aff'd, 55 N.Y.2d 910, 449 N.Y.S.2d 29, 433 N.E.2d 1277, 1982 N.Y. LEXIS 3105 (N.Y. 1982).

The State Human Rights Appeals Board exceeded the limited scope of its power of review and substituted its own judgment for that of the State Division of Human Rights in reversing the division's order dismissing a claim of alleged unlawful employment discrimination and terminating its investigation of the matter, where the division had waited for nearly one year for the complainant's reply to evidence submitted by the employer, and where the employee had been given ample opportunity to rebut such evidence. Distrigas of New York Corp. v New York State Human Rights Appeal Bd., 80 A.D.2d 881, 437 N.Y.S.2d 131, 1981 N.Y. App. Div. LEXIS 10740 (N.Y. App. Div. 2d Dep't 1981).

42. Probable cause

Film processing department employee's contention that temporary retirement program was subterfuge relied upon to eliminate him from his employment because of his age was not supported by probable cause and thus complaint claiming loss of jobs due to age discrimination was properly dismissed, where early retirement was neither forced upon employee nor specifically directed towards him and was available only to older employees with long service, and several hundred of coemployees also elected to take advantage of option. Eastman Kodak Co. v State Div. of Human Rights, 44 A.D.2d 888, 355 N.Y.S.2d 676, 1974 N.Y. App. Div. LEXIS 4943 (N.Y. App. Div. 4th Dep't 1974).

Evidence before State Human Rights Appeal Board sustained finding that there was no probable cause to believe that law school engaged in unlawful discriminatory practice with respect to petitioner's application for position in law school library. Heron v Albany Law School of Union University, 57 A.D.2d 672, 393 N.Y.S.2d 617, 1977 N.Y. App. Div. LEXIS 11702 (N.Y. App. Div. 3d Dep't 1977).

The dismissal for lack of probable cause, of a complaint filed by a female employee who was terminated while three males in her department were retained was not arbitrary, capricious, or characterized by an abuse of discretion where the documentary evidence established that the work experience and the back-

grounds of the male employees were more varied and their performance ratings higher than the complaining employee's, and there was substantial evidence to support the finding of no probable cause; the Human Rights Appeal Board could not substitute its factual judgment for that of the Division of Human Rights on the threshold issue of probable cause. GAF Corp. v New York State Human Rights Appeal Bd., 83 A.D.2d 974, 442 N.Y.S.2d 810, 1981 N.Y. App. Div. LEXIS 15436 (N.Y. App. Div. 3d Dep't 1981).

43. Substantial evidence test

Hearing examiner's determination, as affirmed by the State Human Rights Appeal Board, that petitioner was guilty of a discriminatory practice in refusing to rent an apartment to the complainant on the basis of his race and color was supported by substantial evidence. 300 Gramatan Ave. Associates v State Div. of Human Rights, 45 N.Y.2d 176, 408 N.Y.S.2d 54, 379 N.E.2d 1183, 1978 N.Y. LEXIS 2107 (N.Y. 1978).

Substantial evidence is related to the charge or controversy and involves a weighing of the quality and quantity of the proof; it means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact; essential attributes are relevance and a probative character; more than seeming or imaginary, it is less than a preponderance of the evidence, overwhelming evidence or evidence beyond a reasonable doubt. 300 Gramatan Ave. Associates v State Div. of Human Rights, 45 N.Y.2d 176, 408 N.Y.S.2d 54, 379 N.E.2d 1183, 1978 N.Y. LEXIS 2107 (N.Y. 1978).

Upon a judicial review of findings made by an administrative agency, a determination is regarded as being supported by substantial evidence when the proof is so substantial that from it an inference of the existence of the fact found may be drawn reasonably. 300 Gramatan Ave. Associates v State Div. of Human Rights, 45 N.Y.2d 176, 408 N.Y.S.2d 54, 379 N.E.2d 1183, 1978 N.Y. LEXIS 2107 (N.Y. 1978).

There is sufficient evidence in the record to support the findings of the Commissioner of the Division of Human Rights that petitioner, in violation of section 296 (5[a][1]) of the Human Rights Law, had discriminated against claimant because of his race and color, by refusing to consider him as a prospective tenant for an available apartment, where established facts included the vacancy of the apartment, its preparations for and readiness for rental, the failure to notify the superintendent that the apartment was not to be shown, the communication that it was available at a specified rental, the meeting with the superintendent at the apartment site for the purpose of exhibition, his concern about the key upon seeing the Black prospect, his inquiries of the prospect as to whether the unit did in fact please when the prospect had already indicated enthusiastic acceptance, the failure to halt the prospect's departure to the bank to secure the down payment, the extended wait outside the superintendent's door upon return, the proffered excuse that the apartment was in litigation when in fact it was not and reasonably would not be, the failure to show another vacant apartment of similar size, the lack of proof of any suggestion by the managing agent that such other vacancy existed, the failure to obtain normal background particulars concerning the prospect, the subsequent lease for the same rental, and the dearth of Black tenants in the building; moreover, in view of the strong statutory policy to be effected, the award of compensatory damages should not be disturbed. 300 Gramatan Ave. Associates v State Div. of Human Rights, 45 N.Y.2d 176, 408 N.Y.S.2d 54, 379 N.E.2d 1183, 1978 N.Y. LEXIS 2107 (N.Y. 1978).

The State Human Rights Appeal Board exercises the same limited scope of review of decisions of the State Division of Human Rights that a court ordinarily does when passing on the determination of an administrative agency—whether the order of the division is supported by substantial evidence on the whole record (Executive Law, § 297-a, subd 7, par d) or is not arbitrary and capricious or characterized by abuse of discretion or clearly an unwarranted exercise of discretion (Executive Law, § 297-a, subd 7, par e). Accordingly, where there was ample evidence from which to conclude that an employer's action in laying off a black electrical instructor, while a white electrical instructor in the same civil service class and with less seniority was kept on the job, was in no way actuated by racial discrimination, but was based on the white employee's specialized skills in the fields of air conditioning, refrigeration and heating, skills needed to teach an existing course, the division's finding that there was no probable cause to believe race or color discrimination had occurred cannot be considered to have been devoid of a rational basis, and the board's action in setting aside the division's finding was unwarranted, even if the division's decision is measured against the additional statutory basis for board review, that of substantial evidence. State Office of Drug Abuse Services v State Human Rights Appeal Board, 48 N.Y.2d 276, 422 N.Y.S.2d 647, 397 N.E.2d 1314, 1979 N.Y. LEXIS 2381 (N.Y. 1979).

The substantial evidence test contained in Executive Law § 297-a(7) (d) relates to the determination by the Division of Human Rights upon the record and a public hearing. The test as to whether the action of the Division of Human Rights is arbitrary, capricious, etc., contained in subdivision e relates to a determination by the Division of Human Rights prior to a hearing. Mayo v Hopeman Lumber & Mfg. Co., 33 A.D.2d 310, 307 N.Y.S.2d 691, 1970 N.Y. App. Div. LEXIS 5481 (N.Y. App. Div. 4th Dep't), app. dismissed, 26 N.Y.2d 612, 1970 N.Y. LEXIS 1802 (N.Y. 1970).

Orders of the State Division of Human Rights upholding the complaints of employment applicants and awarding them damages upon allegations of discrimination on the basis of disabilities unrelated to the jobs they applied for were supported by substantial evidence where the employer had failed to obtain written medical reports from the physician who examined the claimants' x-rays and did not call him as a witness, the employer had no records to establish what findings were made by the doctor, and where the employer was unable to establish the relationship of the alleged conditions to the requirements of the positions sought. McLean Trucking Co. v State Human Rights Appeal Bd., 80 A.D.2d 809, 437 N.Y.S.2d 309, 1981 N.Y. App. Div. LEXIS 10616 (N.Y. App. Div. 1st Dep't), app. dismissed, 53 N.Y.2d 1030, 442 N.Y.S.2d 497, 425 N.E.2d 885, 1981 N.Y. LEXIS 2558 (N.Y. 1981), aff'd, 55 N.Y.2d 910, 449 N.Y.S.2d 29, 433 N.E.2d 1277, 1982 N.Y. LEXIS 3105 (N.Y. 1982).

Absent a full investigation including an opportunity for confrontation, the determination of the State Division of Human Rights that the State Division for Youth had not discriminated because of race, sex, and color against a black Puerto Rican female employee, who was requested to resign, was based on a record which was inadequate to meet the test of substantial evidence and was, therefore, arbitrary and capricious; since the investigation of the matter conducted by the Division of Human Rights involved separate meetings without hearings, it had to appear as a matter of law that the complaint lacked merit in order for the Division to dismiss the complaint. New York State Div. for Youth v State Human Rights Appeal Bd., 83 A.D.2d 972, 442 N.Y.S.2d 813, 1981 N.Y. App. Div. LEXIS 15434 (N.Y. App. Div. 3d Dep't 1981).

44. Limitations of time

While the State Human Rights Appeal Board is required to hear appeals by any party to any proceeding from all orders of the commissioner, provided such appeals are commenced by filing a notice of appeal with the Board within 15 days after service of such order, the court has no power to extend time permitted for an appeal and although § 298 provides that a respondent aggrieved by an order of the Board may obtain judicial review thereof, the court should not act until the administrative remedies provided by law have been exhausted. State Div. of Human Rights v Merante, 35 A.D.2d 652, 312 N.Y.S.2d 1015, 1970 N.Y. App. Div. LEXIS 3971 (N.Y. App. Div. 3d Dep't 1970).

Even though time limitations contained in Executive Law § 297, subd 4(a), (c) are directive and not mandatory, valid complaint for discriminatory housing practices was dismissed where delay of 5 months, 16 months, and 3 years respectively in hearing of complaint by division, in making determination and order by division, and in appeal board's affirmance of division's order, were unconscionable and so flagrant as to be prejudicial in law to respondent. State Div. of Human Rights ex rel. Salamy v Rinas, 42 A.D.2d 388, 348 N.Y.S.2d 422, 1973 N.Y. App. Div. LEXIS 3276 (N.Y. App. Div. 4th Dep't 1973).

Appeal from Division of Human Rights filed more than 15 days after service of Division's determination on complaint's attorney was untimely and failure of complainant to receive notice of Division's determination was immaterial. State Div. of Human Rights ex rel. Green v Shenango, Inc., 55 A.D.2d 852, 390 N.Y.S.2d 345, 1976 N.Y. App. Div. LEXIS 15672 (N.Y. App. Div. 4th Dep't 1976).

If appeal is not timely filed, the Human Rights Appeal Board is without jurisdiction to review a determination of the Division of Human Rights. State Div. of Human Rights v Xerox Corp., 57 A.D.2d 1069, 395 N.Y.S.2d 828, 1977 N.Y. App. Div. LEXIS 12383 (N.Y. App. Div. 4th Dep't 1977).

45. Pleading

Where the Director of Human Rights received information concerning the complaint by holding a conference and by investigation, but there was no hearing, and complainant had had no opportunity to present his case in a formal manner, for the Division of Human Rights to dismiss his complaint under such circumstances, it must appear that as a matter of law the complaint lacks merit. Mayo v Hopeman Lumber & Mfg. Co., 33 A.D.2d 310, 307 N.Y.S.2d 691, 1970 N.Y. App. Div. LEXIS 5481 (N.Y. App. Div. 4th Dep't), app. dismissed, 26 N.Y.2d 612, 1970 N.Y. LEXIS 1802 (N.Y. 1970).

Allegations upon information and belief, not stating any sources of information or grounds for belief, that respondents have complied with only one provision of the order, did not sufficiently allege noncompliance with the order in any respect. State Div. of Human Rights v Merante, 35 A.D.2d 652, 312 N.Y.S.2d 1015, 1970 N.Y. App. Div. LEXIS 3971 (N.Y. App. Div. 3d Dep't 1970).

46. Evidence

In proceedings on complaint charging that university discriminated against plaintiff as woman in rejecting her application for position as tenured professor in psychology department, resolution of conflict in evidence as to plaintiff's area of expertise was for commissioner of state division of human rights. State Div. of Human Rights v Columbia University in New York, 39 N.Y.2d 612, 385 N.Y.S.2d 19, 350 N.E.2d 396, 1976 N.Y. LEXIS 2714 (N.Y. 1976), cert. denied, 429 U.S. 1096, 97 S. Ct. 1112, 51 L. Ed. 2d 543, 1977 U.S. LEXIS 2143 (U.S. 1977).

School district would be required to pay any teacher physically disabled by reason of maternity accrued sick leave benefits for that portion of school year coinciding with such disability or aggravation of such disability, unless such teacher elected to take unpaid maternity leave during which sick leave was not applicable, provided she furnished to district certificate from her attending physician to effect that during such period of time she was, in fact, physically disabled. State Div. of Human Rights v Board of Education, 51 A.D.2d 357, 381 N.Y.S.2d 544, 1976 N.Y. App. Div. LEXIS 11080 (N.Y. App. Div. 3d Dep't), aff'd, 40 N.Y.2d 1021, 391 N.Y.S.2d 532, 359 N.E.2d 1327, 1976 N.Y. LEXIS 3155 (N.Y. 1976).

Where record raised no factual issue relating to claim that law firm unlawfully discriminated against individual by refusing to hire him, and it appeared as matter of law that complaint lacked merit and failed to raise genuine factual issues, confrontation conference was not required. State Div. of Human Rights ex rel. Jafree v Bond, Schoeneck & King, 52 A.D.2d 1045, 384 N.Y.S.2d 568, 1976 N.Y. App. Div. LEXIS 12958 (N.Y. App. Div. 4th Dep't 1976).

Evidence supported division of human rights' finding of no probable cause with regard to 53-year-old employee's complaint that she was demoted from position of supervisor to that of clerk because of her age and sex. American Tel. & Tel. Co. v State Human Rights Appeal Board, 53 A.D.2d 598, 383 N.Y.S.2d 646, 1976 N.Y. App. Div. LEXIS 13258 (N.Y. App. Div. 2d Dep't 1976).

47. Judicial review

Where findings of fact on which order of State Human Rights Appeal Board are based are supported by sufficient evidence on the record as a whole, they are conclusive. Schenectady v State Div. of Human Rights, 37 N.Y.2d 421, 373 N.Y.S.2d 59, 335 N.E.2d 290, 1975 N.Y. LEXIS 2042 (N.Y. 1975).

In passing upon question of whether or not state human rights appeal board exceeded its statutory authority in setting aside determination of commissioner of state division of human rights, Court of Appeals must decide whether decision of commissioner was supported by substantial evidence. State Div. of Human Rights v Columbia University in New York, 39 N.Y.2d 612, 385 N.Y.S.2d 19, 350 N.E.2d 396, 1976 N.Y. LEXIS 2714 (N.Y. 1976), cert. denied, 429 U.S. 1096, 97 S. Ct. 1112, 51 L. Ed. 2d 543, 1977 U.S. LEXIS 2143 (U.S. 1977).

A court reviewing the substantiality of the evidence upon which an administrative agency has acted exercises a genuine judicial function and does not confirm a determination simply because it was made by such an agency. 300 Gramatan Ave. Associates v State Div. of Human Rights, 45 N.Y.2d 176, 408 N.Y.S.2d 54, 379 N.E.2d 1183, 1978 N.Y. LEXIS 2107 (N.Y. 1978).

Whether the finality of an order from which an appeal is taken constitutes a jurisdictional predicate for appeal to the Appellate Division is purely a statutory matter. Accordingly, judicial review is available to a party aggrieved by a nonfinal order of the State Human Rights Appeal Board in a proceeding pursuant to section 298 of the Executive Law, since section 298 clearly allows any person aggrieved by any order of the board to obtain judicial relief thereof and, moreover, subdivision 7 of section 297-a, though defining the scope of the board's authority as including the power to remand the matter to the State Division of Human Rights for further proceedings, makes no attempt to distinguish these orders of remand from others which are reviewable; nor is such appeal to the Appellate Division barred by subdivision 9 of section 297 or section 300 of the Executive Law, which statutes prohibit separate plenary discrimination actions in the courts only when a charge on the same grievance is pending before the division. State Office of Drug Abuse Services v State Human Rights Appeal Board, 48 N.Y.2d 276, 422 N.Y.S.2d 647, 397 N.E.2d 1314, 1979 N.Y. LEXIS 2381 (N.Y. 1979).

Administrative process was not ended by order of State Human Rights Appeal Board, which vacated prior order of the State Division of Human Rights and remanded proceedings for further investigation and other proceedings, and such order would therefore not be reviewed by the Appellate Division since nonfinal orders were not intended to be reviewed. Pepsi-Cola Albany Bottling Co. v Naylor, 57 A.D.2d 981, 394 N.Y.S.2d 93, 1977 N.Y. App. Div. LEXIS 12274 (N.Y. App. Div. 3d Dep't 1977).

Where record of proceedings on state employee's complaints of discrimination showed that State Division of Human Rights' investigations into complaints were extensive and that complainant had full opportunity to present his contentions and evidence, and where record demonstrated that there was rational basis for commissioner's determination of no probable cause. Appeal Board erred in reversing commissioner's determination and remanding complaints to him for further proceedings. State Div. of Human Rights v New York State Drug Abuse Control Com., 59 A.D.2d 332, 399 N.Y.S.2d 541, 1977 N.Y. App. Div. LEXIS 13571 (N.Y. App. Div. 4th Dep't 1977).

After commissioner of State Division of Human Rights has made full investigation into complaint of discrimination, wherein complainant has had full opportunity to present his evidence and exhibits, under oath if he so requests, if commissioner determines that complainant has not shown probable cause for his complaint, Appeal Board has no authority to reverse such determination and order public hearing, provided that commissioner's determination is rationally supported by record before him. State Div. of Human Rights v New York State Drug Abuse Control Com., 59 A.D.2d 332, 399 N.Y.S.2d 541, 1977 N.Y. App. Div. LEXIS 13571 (N.Y. App. Div. 4th Dep't 1977).

Trial court properly dismissed shoppers' petitions seeking review of a human rights division determination that found no probable cause to believe that a store and a medical center had engaged in unlawful discriminatory practices related to the shoppers where, while the petition and related documents were mailed to the medical center, they were not personally served; also, the store had a strict anti-discrimination policy, the security guards involved received written materials and training courses to prevent discrimination, the shoppers were the only Asians apprehended for shoplifting from the store during a one-year

period, the races of apprehended shoplifters were proportionally similar to the county's racial profile, the security guards had reason to focus on the shoppers based on a police flier indicating that one of them was a shoplifter, and the guards saw the shoppers hide merchandise and leave the store without paying for it. Jo v May Dep't Stores Co., 21 A.D.3d 614, 799 N.Y.S.2d 839, 2005 N.Y. App. Div. LEXIS 8274 (N.Y. App. Div. 3d Dep't), app. dismissed, 5 N.Y.3d 880, 808 N.Y.S.2d 142, 842 N.E.2d 28, 2005 N.Y. LEXIS 3261 (N.Y. 2005).

Section 298 of the Executive Law provides for judicial review of a decision of the State Human Rights Appeal Board, which reviews decisions of the State Division of Human Rights (Executive Law, § 297-a), by way of appeal to the Appellate Division only, and, it also provides that in cases where no appeal has been taken to the board, the division may obtain an order of court for the enforcement of any order of the Commissioner of the State Division of Human Rights by direct application to the Appellate Division; thus, the only enforcement powers granted with respect to the enforcement of either nonappealed orders of the commissioner or of the board are given to the Appellate Division. Accordingly, a motion in the Supreme Court by the commissioner for a mandatory injunction compelling a respondent to obey the commissioner's order was denied, since the court does not have the power to grant the relief sought. Kramarsky v New York Psychoanalytic Institute, 102 Misc. 2d 806, 424 N.Y.S.2d 581, 1979 N.Y. Misc. LEXIS 2922 (N.Y. Sup. Ct. 1979).

Trial court erred in an N.Y. C.P.L.R. art. 78 proceeding in prohibiting the State Division of Human Rights (SDHR) from investigating discrimination complaints against a school district because the school district had not exhausted its administrative remedies in that the hearing process was not completed, and, in the context of that administrative proceeding, the school district could have challenged the applicability of N.Y. Exec. Law § 296(4) and, at the same time, mounted a defense to the discrimination charges; once a final determination was issued, the school district, if necessary, had the opportunity to raise its issues in a challenge to SDHR's final determination, In addition, it was by no means certain that the SDHR would not find for the school district as to the discrimination charges and the school district, if necessary, also had the opportunity to challenge any final determination pursuant to N.Y. Exec. Law § 298. Matter of Newfield Cent. School Dist. v New York State Div. of Human Rights, 66 A.D.3d 1314, 888 N.Y.S.2d 244, 2009 N.Y. App. Div. LEXIS 7593 (N.Y. App. Div. 3d Dep't 2009).

N.Y. Exec. Law § 298 required immediate transfer to an appellate court without consideration of any threshold issues; therefore, the appellate court vacated the order appealed from and reviewed the matter de novo. Matter of Ithaca City School Dist. v New York State Div. of Human Rights, 87 A.D.3d 268, 926 N.Y.S.2d 686, 2011 N.Y. App. Div. LEXIS 5474 (N.Y. App. Div. 3d Dep't 2011), rev'd, 19 N.Y.3d 481, 950 N.Y.S.2d 67, 973 N.E.2d 162, 2012 N.Y. LEXIS 1353 (N.Y. 2012).

The protection against discrimination afforded by Executive Law § 296 is at least as broad as that afforded by the Federal Constitution and civil rights statutes. Thus, the determination of the Appellate Division affirming the Appeal Board's affirmance of the State Division of Human Rights' dismissal of former employee's race discrimination claim against former employer on the ground of lack of probable cause, res judicata of all other state actions as a matter of statutory law, would be entitled to full faith and credit in a federal court hearing federal constitutional and civil rights claims. Mitchell v National Broadcasting Co., 553 F.2d 265, 1977 U.S. App. LEXIS 13960 (2d Cir. N.Y. 1977).

48. Decisions as arbitrary or capricious

Appellate Division can only set aside determination of commissioner of Division of Human Rights if such determination is arbitrary or capricious; thus, it improperly set aside commissioner's award of back pay after having affirmed its finding of discrimination. Mize v State Div. of Human Rights, 33 N.Y.2d 53, 349 N.Y.S.2d 364, 304 N.E.2d 231, 1973 N.Y. LEXIS 1002 (N.Y. 1973).

Although it would have been better practice for division of human rights to have conferred further with petitioner concerning the substantial information which it had gathered that her demotion was not the result of sex discrimination, there was no reason to declare procedure and determination of division arbitrary or capricious or an abuse of discretion. Jackson v New York State Div. of Human Rights, 42 A.D.2d 684, 345 N.Y.S.2d 735, 1973 N.Y. App. Div. LEXIS 3988 (N.Y. App. Div. 4th Dep't 1973).

Human Rights Appeal Board's reversal of State Division of Human Rights' pre-hearing dismissal of complaint alleging age discrimination was required to be based upon finding the Division acted arbitrarily. Eastman Kodak Co. v State Div. of Human Rights, 44 A.D.2d 888, 355 N.Y.S.2d 676, 1974 N.Y. App. Div. LEXIS 4943 (N.Y. App. Div. 4th Dep't 1974).

38. Miscellaneous

Imposition of a civil fine and penalty of $20,000 for each complainant against an employer for a hostile work environment and retaliation was similar to the fines and penalties imposed in other discrimination cases and did not shock the appellate court's sense of fairness. Matter of Stellar Dental Mgt. LLC v New York State Div. of Human Rights, 162 A.D.3d 1655, 80 N.Y.S.3d 757, 2018 N.Y. App. Div. LEXIS 4423 (N.Y. App. Div. 4th Dep't 2018).

Notes to Unpublished Decisions

1. Employment discrimination

Unpublished decision: In a case in which a former employee appealed a district court's dismissal of his age discrimination claims brought against his former employer, a foreign corporation, under the New York State Human Rights Law, N.Y. Exec. Law § 297 et seq., the statute did not provide a private cause of action to New York residents discriminated against outside of New York by foreign corporations. Harte v Woods Hole Oceanographic Inst., 495 Fed. Appx. 171, 2012 U.S. App. LEXIS 18813 (2d Cir. N.Y. 2012).

Agency Opinions

Analysis

1. Sex discrimination
2. —Pregnancy

1. Sex discrimination

2. —Pregnancy

Disability Benefits Law, § 205(3) is superseded to the extent that it is inconsistent with Title VII of the 1964 Civil Rights Act on the subject of discrimination based on pregnancy disability. Further, the New York State Human Rights Law continues in full force and effect on that subject. 1980 N.Y. Op. Att'y Gen. No. 15, 1980 N.Y. AG LEXIS 96.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Proceeding against body or officer, CLS CPLR §§ 7801 et seq.

Codes, Rules and Regulations:

Rules of Practice, Division of Human Rights. 9 NYCRR §§ 465.1–465.20 (CLS Exec Appx, Human R Rules §§ 465.1–465.20).

General Regulations, Division of Human Rights. 9 NYCRR §§ 466.1–466.10 (CLS Exec Appx, Human R Rules §§ 466.1–466.10).

Jurisprudences:

18 NY Jur 2d Civil Rights § 36.

18A NY Jur 2d Civil Rights §§ 197, 198, 200–207.

7 Medina's Bostwick Practice Manual (Matthew Bender), Forms HR 101 et seq. (actions and proceedings relating to the Human Rights Law).

1A Am Jur Pl & Pr Forms, Administrative Law, Forms 241–270.

21 Am Jur Trials 1, Employment Discrimination Action Under Federal Civil Rights Acts.

Texts: Liddle & Marino, Labor and Employment in New York (Michie) pp 13-54.

New York Employee Discrimination Handbook (1998 ed, Matthew Bender).

ARTICLE 18 New York State Uniform Fire Prevention and Building Code Act

Section
372. Definitions
375. Powers of the council
376-a. Code enforcement training and certification.
377. New York state uniform fire prevention and building code
378. Standards for New York state uniform fire prevention and building code
379. Incorporation of higher standards by council upon recommendation of local government; local building regulations
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381. Administration and enforcement of the New York state uniform fire prevention and building code and the New York state energy conservation construction code
382. Remedies
382-a. Buildings with truss type construction; notice requirements and enforcement
382-b. Residential buildings with truss type, pre-engineered wood or timber construction; notice requirements

HISTORY:
Add, L 1981, ch 707, § 1, eff July 21, 1981.

§ 372. Definitions

As used in this article, the following terms shall have the meaning ascribed to them, unless the context otherwise requires:

1. "Administrator" means the state fire administrator established pursuant to article six-C of this chapter.

2. "Areas of public assembly" means all buildings or portions of buildings used for gathering together fifty or more persons for amusement, athletic, civic, dining, educational, entertainment, patriotic, political, recreational, religious, social, or similar purposes, the entire fire area of which they are a part, and the means of egress therefrom.

3. "Building" means a combination of any materials, whether portable or fixed, having a roof, to form a structure affording shelter for persons, animals or property. The word "building" shall be construed when used herein as though followed by the words "or part or parts thereof" unless the context clearly requires a different meaning. The term "building" shall also mean "factory manufactured home" and "mobile home". The term "building" shall not include a "temporary greenhouse".

4. "Construction" means the construction, reconstruction, alteration, conversion, repair, installation of equipment or use of buildings, and requirements or standards relating to or affecting materials used in connection therewith, including provisions for safety and sanitary conditions.

5. "Council" means the state fire prevention and building code council created by this article.

6. "Department" means the department of state.

7. "Equipment" means plumbing, heating, electrical, ventilating, air conditioning, refrigerating equipment, elevators, dumb waiters, escalators and other mechanical additions or installations.

8. "Factory manufactured home" means a structure designed primarily for residential occupancy constructed by a method or system of construction whereby the structure or its components are wholly or in substantial part manufactured in manufacturing facilities, intended or designed for permanent installation, or assembly and permanent installation, on a building site.

9. "Fire area" means the floor area of a story of a building within exterior walls, party walls, fire walls, or any combination thereof.

10. "Fire protection equipment and systems" means apparatus, assemblies, or systems, either portable or fixed, for use to detect, prevent, control, or extinguish fire.

11. "Local government" means a village, town (outside the area of any incorporated village) or city.

12. "Means of egress" means a continuous unobstructed way of exit from any point in a building or structure to a public way. A means of egress comprises the vertical and horizontal ways of travel and includes intervening room spaces, doorways, hallways, corridors, passageways, balconies, ramps, stairs, enclosures, lobbies, escalators, horizontal exits, courts, and yards.

13. "Mobile home" means a moveable or portable unit designed and constructed to be towed on its own chassis, comprised of frame and wheels, connected to utilities, and designed and constructed without a permanent foundation for year-round living. A unit may contain parts that may be folded, collapsed or telescoped when being towed and expanded later to provide additional cubic capacity as well as two or more separately towable components designed to be joined into one integral unit capable of being again separated into the components for repeated towing. "Mobile home" shall mean units designed to be used exclusively for residential purposes, excluding travel trailers.

14. "Office" means the office of fire prevention and control created pursuant to article six-C of this chapter.

15. "Secretary" means the secretary of state.

16. "State agency" means any department, bureau, commission, board, public authority or other agency of the state, including any public benefit corporation any member of whose board is appointed by the governor.

17. "Temporary greenhouse" means specialized agricultural equipment having a framework covered with demountable polyurethane materials or materials of polyurethane nature and lacking a permanent and continuous foundation, which is specifically designed, constructed and used for the culture and propagation of horticultural commodities. A "temporary greenhouse" may include, but is not limited to, the use of heating devices, water and electrical utilities, and supporting poles embedded in non-continuous concrete. In no instance will a temporary greenhouse be used for the retail sale of any farm or non-farm products.

18. "Uniform code" or "code" means the New York state uniform fire prevention and building code promulgated pursuant to section three hundred seventy-seven of this article.

19. "Truss type construction" means a fabricated structure of wood or steel, made up of a series of members connected at their ends to form a series of triangles to span a distance greater than would be possible with any of the individual members on their own.

20. [Redesignated]

HISTORY:

Add, L 1981, ch 707, § 1, eff July 21, 1981; amd, L 1992, ch 496, §§ 1, 2, eff July 17, 1992; L 1996, ch 309, § 149, eff July 13, 1996; L 2001, ch 119, § 1, eff Jan 1, 2002; L 2007, ch 108, § 1, eff July 3, 2007; L 2007, ch 159, § 2, eff July 3, 2007.

Prior Law: Former § 372, add, L 1951, ch 800, § 1, with substance transferred from § 177; amd, L 1951, ch 580, § 3, L 1954, ch 166, § 1, L 1961, ch 197, § 2; repealed, L 1981, ch 707, § 12, eff Jan 1, 1984.

Editor's Notes: Laws 2001, ch 119, § 3, eff Jan 1, 2002, provides as follows:

§ 3. This act shall take effect on the first day of January next succeeding the date on which it shall have become a law; provided, however, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date is authorized and directed to be made and completed within 180 days after the date on which this act shall have become a law.

Laws 2007, ch 159, § 1, eff July 3, 2007, provides as follows:

Section 1. Legislative findings and intent. The legislature finds and declares that agricultural buildings differ in structure and usage from other types of buildings and thus warrant specialized treatment under the New York state uniform fire prevention and building code. In recognition of the unique nature of such buildings, agricultural buildings have long been exempted from the construction-related provisions of the uniform fire prevention and building code, and should remain exempted from such provisions. The legislature further finds that the department of state should continue to consult with the department of agriculture and markets to assure that the department's interpretation of code requirements continues to recognize and reflect the unique nature of agricultural buildings. The farming industry and code enforcement officials will benefit from additional guidance regarding the appropriate implementation of code requirements for agricultural buildings and other farm-based structures. Therefore, it is in the public interest to have the written interpretations of code provisions by the department of state easily accessible to these sectors, and the public at large, through publication on the department's website.

Amendment Notes:

2007. Chapter 159, § 2 amended:

Sub 3, by deleting "The term 'building' shall not include any permanent structure used in conjunction with the working of a farm operation as defined in article twenty-five-AA of the agriculture and markets law."

Notes to Decisions

Analysis

1. In general
2. Under former § 372
3. Under former § 386

1. In general

Outdoor residential swimming pool was not "building" under CLS Exec § 372, and thus was not exempt from regulation requiring enclosure (9 NYCRR § 1243.7) despite having been built prior to regulation's effective date. Tarquini v Aurora, 77 N.Y.2d 354, 568 N.Y.S.2d 538, 570 N.E.2d 186, 1991 N.Y. LEXIS 208 (N.Y. 1991).

Building used for storage does not meet the statutory definition of "temporary greenhouse," and requires a permit prior to construction. People v Camardella, 192 Misc. 2d 513, 747 N.Y.S.2d 898, 2002 N.Y. Misc. LEXIS 1142 (N.Y. City Ct. 2002).

Although there was conflicting evidence as to whether the portion of a lake upon which a trustee's floating boathouse sat was publicly owned or navigable under N.Y. Nav. Law § 2(4), (5), a town could regulate, control, restrict, or otherwise issue a building permit for the boathouse under N.Y. Exec. Law §§ 371(5)(d), 372(3), 373(1). Beneke v Town of Santa Clara, 36 A.D.3d 1195, 828 N.Y.S.2d 692, 2007 N.Y. App. Div. LEXIS 665 (N.Y. App. Div. 3d Dep't), dismissed, 8 N.Y.3d 929, 834 N.Y.S.2d 519, 866 N.E.2d 465, 2007 N.Y. LEXIS 1225 (N.Y. 2007), app. dismissed, 8 N.Y.3d 938, 834 N.Y.S.2d 713, 866 N.E.2d 1041, 2007 N.Y. LEXIS 862 (N.Y. 2007).

2. Under former § 372

City board of appeal's determination that addition of six stories onto existing building as part of phased construction plan constituted "new construction" rather than "addition" and was thus subject to lower building permit fee was not contrary to law, notwithstanding fact that board refused to apply state building code definition of "addition." Syracuse v Hueber, 52 A.D.2d 341, 383 N.Y.S.2d 774, 1976 N.Y. App. Div. LEXIS 12026 (N.Y. App. Div. 4th Dep't 1976).

Zoning board of appeals could not deny a conditional use permit on ground that proposed drive-in restaurant was a "place of public assembly" which lacked the requisite number of parking spaces under the state building code, Executive L § 372, subd 4, since "zoning ordinances" are specifically excluded from the ambit of said statute. Franchise Realty Interstate Corp. v Rab, 72 Misc. 2d 1061, 340 N.Y.S.2d 446, 1973 N.Y. Misc. LEXIS 2271 (N.Y. Sup. Ct. 1973).

3. Under former § 386

Multiple dwelling was not included within term "miscellaneous occupancy" within statutory provision that "general building construction" provisions of State Building Construction Code are applicable to "business, mercantile, industrial, storage, assembly, institutional, and miscellaneous occupancy and uses." People v Halpern, 79 Misc. 2d 790, 361 N.Y.S.2d 578, 1974 N.Y. Misc. LEXIS 1750 (N.Y. City Ct. 1974).

Where building had been used as rooming house since prior to adoption of State Building Construction Code and costs of subsequent alterations and repairs to building did not, within a 12 month period, exceed 50% of replacement cost of building at beginning of that 12 month period, "Multiple Dwellings" provisions of code were not applicable to building. People v Halpern, 79 Misc. 2d 790, 361 N.Y.S.2d 578, 1974 N.Y. Misc. LEXIS 1750 (N.Y. City Ct. 1974).

Phrase "under local conditions" in state building code rule which requires that "installer shall consult with the local authority having jurisdiction to determine the durability of materials and joints used under local conditions" refers to local physical or environmental conditions which might affect durability of material, rather than to local conditions imposed by municipality and building inspector. Association of Employing Plumbing Contractors, Inc. v Hanold, 84 Misc. 2d 990, 378 N.Y.S.2d 241, 1975 N.Y. Misc. LEXIS 3248 (N.Y. Sup. Ct. 1975).

Agency Opinions

Analysis

1. In general
2. Under former § 372

1. In general

Exclusion of "plastic" greenhouses from definition of "building" in State Building Code Act is not determinative of their taxable status for purposes of CLS Real Property Tax Law; such green-

houses are real property for real property tax purposes if they are fixtures. 9 Op Counsel SBEA No. 96 (1992).

2. Under former § 372

In municipalities where it is operative and for buildings to which it is applicable, the State Building Construction Code is a proper alternative to other State and Local building regulations. 1955 N.Y. Op. Att'y Gen. No. 261.

Under the above sections, should the Town of Mamaroneck adopt the State Building Construction Code, all standards, requirements, rules and regulations promulgated or adopted by the State Building Code Council would pertain to the Town, unless the State Building Code Council, pursuant to provisions of Executive Law, § 376, limited their application or portions thereof to specified classes or types of buildings or to an area wherein the Town of Mamaroneck is situated. 1969 NY Ops Atty Gen Feb 6.

Condemnations by cities under the power of eminent domain are not "appropriations" by "the state or any agency or department thereof" pursuant to ECL § 25-0602. 1974 NY Ops Atty Gen Oct 10.

RESEARCH REFERENCES AND PRACTICE AIDS

Federal Aspects:

Definitions under Federal Fire Prevention and Control Act, 15 USCS § 2203.

Jurisprudences:

19A NY Jur 2d Condominiums and Cooperative Apartments § 74.

25 NY Jur 2d Counties, Towns, and Municipal Corporations § 374.

27 NY Jur 2d Counties, Towns, and Municipal Corporations § 1535.

§ 375. Powers of the council

The council is authorized and empowered:

1. To subpoena witnesses, take testimony, compel production of books and records and to hold public hearings. The secretary may designate one or more members of the council, or one or more officers or employees of the department, or the administrator, on request of the secretary, may designate one or more employees of the office, to hold public hearings and report on such hearings to the council.

2. To study the operation of the uniform fire prevention and building code, the state energy conservation construction code established by article eleven of the energy law, local regulations and other laws relating to the construction of buildings and the protection of buildings from fire to ascertain their effects upon the cost of building construction and the effectiveness of their provisions for health, safety and security, particularly as such provisions relate to the protection of life and property from the dangers of fire.

3. To recommend tests and approvals or to require the testing and approval of materials, devices and methods of construction to ascertain their acceptability under the requirements of the uniform fire prevention and building code.

4. To advise and assist the secretary in carrying out the provisions and purposes of this article and to make recommendations concerning the program and activities of the office and appointments to be made by the secretary in connection with the uniform fire prevention and building code.

5. To make and establish and, from time to time, alter and amend rules for the organization and internal management of the council, and for such other purposes as may be necessary, desirable or proper in carrying out its powers and duties under this article.

6. To avoid duplication of effort and in the interest of economy, the council may make use of existing studies, surveys, plans, data and other materials in the possession of any state agency. Each such agency is hereby authorized and directed to make the same available to the council and otherwise to assist it in the performance of its functions. The officers and personnel of such agencies may serve at the request of the council upon such advisory committees as the council shall determine to create and such officers and personnel may serve upon such committees without forfeiture of office or employment and with no loss or diminution in the compensation, status, rights and privileges which they otherwise enjoy.

7. To review and approve standards established by rules and regulations promulgated by the commissioner of health for the implementation of item (ii) of clause (a) of section three hundred twenty-two-c of the general business law.

8. To examine, evaluate, and make recommendations concerning the standardization of the uniform code and local building codes and permit processes for the purpose of facilitating and encouraging the installation and operation of solar and wind energy generating systems throughout the state. For this purpose, the council is authorized to hold public hearings and consult with the solar and wind energy generating industry throughout the state. Any recommendations formulated pursuant to this subdivision shall be submitted to the governor, the secretary of state, the temporary president of the senate and the speaker of the assembly along with such legislative proposals as the council deems necessary to implement its recommendations.

HISTORY:

Add, L 1981, ch 707, § 1, eff July 21, 1981; amd, L 1995, ch 83, § 58, eff June 20, 1995; L 1996, ch 309, § 151, eff July 13, 1996; L 1997, ch 443, § 3, eff Aug 20, 1997; L 2010, ch 552, § 1, eff Oct 20, 2010.

Prior Law: Former § 375, add, L 1951, ch 800, § 1, with substance transferred from § 180; amd, L 1951, ch 580, § 6; repealed, L 1981, ch 707, § 12, eff Jan 1, 1984.

Amendment Notes: 2010. Chapter 552 § 1 amended:

By adding sub 8.

1997. Chapter 443, § 3 amended:

By adding sub 7.

1996. Chapter 309, § 151 amended:

Sub 1 by deleting at figs 1 and 3 "commissioner", at fig 2 "division" and adding the matter in italics.

Sub 4 by deleting at figs 1 and 3 "commissioner", at fig 2 "division" and adding the matter in italics.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

Racing and wagering board: electronic bingo aids. 9 NYCRR Part 5823.

Federal Aspects:

National Institute of Building Sciences, 12 USCS § 1701j-2.

National Academy for Fire Prevention and Control, 15 USCS § 2206.

Jurisprudences:

19A NY Jur 2d Condominiums and Cooperative Apartments § 74.

25 NY Jur 2d Counties, Towns, and Municipal Corporations § 374.

27 NY Jur 2d Counties, Towns, and Municipal Corporations § 1535.

§ 376-a. Code enforcement training and certification.

1. For the purpose of this section, the term code enforcement personnel shall mean a code enforcement official certified pursuant to this section charged with enforcement of the uniform fire prevention and building code or the state energy conservation construction code.

2. In addition to the functions, powers and duties otherwise provided by this article, the secretary of state may promulgate rules and regulations with respect to:

(a) The approval, or revocation thereof, of code enforcement training programs for code enforcement personnel;

(b) Minimum courses of study, attendance requirements, and equipment and facilities to be required for approved code enforcement training programs for code enforcement personnel;

(c) Minimum training and examination requirements to qualify for code enforcement officer certification, provided that such training and examination requirements shall not result in code enforcement personnel that have otherwise completed the minimum basic training requirements in order to be eligible for continued employment or permanent appointment as of the effective date of the chapter of the laws of two thousand seventeen that amended this paragraph from being ineligible without further training or examination for certification pursuant to paragraph (d) of this subdivision;

(d) Issuance of a code enforcement officer certification when an applicant satisfies the requirement set forth in paragraph (c) of this subdivision;

(e) Revocation or suspension of the certification of any code enforcement personnel found after a hearing to have materially failed to uphold duties of a code enforcement officer, including but not limited to, making material errors or omissions on an inspection report. The hearing required prior to such revocation or suspension shall provide the code enforcement officer the opportunity to be heard and shall be conducted pursuant to article three of the state administrative procedure act;

(f) Minimum qualifications for instructors for approved code enforcement training programs for code enforcement personnel;

(g) The requirements of minimum basic training which code enforcement personnel shall complete in order to be eligible for continued employment or permanent appointment, and the time within which such basic training must be completed following such appointment;

(h) The requirements for in-service training programs designed to assist code enforcement personnel in maintaining skills and being informed of technological advances;

(i) Categories or classifications of advanced in-service training programs and minimum courses of study and attendance requirements with respect to such categories or classifications;

(j) Exemptions from particular provisions of this article in the case of any county, city, town, or village if in the opinion of the secretary of state the standards of code enforcement training established and maintained by such county, city, town, or village are equal to or higher than those established pursuant to this article; or revocation in whole or in part of such exemption, if in his or her opinion the standards of code enforcement training established and maintained by such county, city, town, or village are lower than those established pursuant to this article;

3. In furtherance of his or her functions, powers and duties as set forth in this section, the secretary of state may:

(a) Recommend studies, surveys and reports to be made by the department of state regarding the carrying out of the objectives and purposes of this section;

(b) Visit and inspect any code enforcement training programs approved by the secretary of state or for which application for such approval has been made; and

(c) Recommend standards for promotion to supervisory positions.

4. In addition to the functions, powers and duties otherwise provided by this section, the secretary of state shall:

(a) Approve code enforcement training programs for code enforcement personnel and issue certificates of approval to such programs, and revoke such approval or certificate;

(b) Certify, as qualified, instructors for approved code enforcement training programs for code enforcement personnel and issue appropriate certificates to such instructors;

(c) Certify code enforcement personnel who have satisfactorily completed basic training programs and in-service training programs, and issue appropriate certificates to such code enforcement personnel, and revoke such certificate;

(d) Investigate and conduct hearings as appropriate relative to complaints made against code enforcement personnel;

(e) Cause studies and surveys to be made relating to the establishment, operation, effectiveness and approval of code enforcement training programs;

(f) Cause studies and surveys to be made relating to the completion or partial completion of training programs by video or computer to the maximum extent practicable;

(g) Consult with and cooperate with the state university of New York and private universities, colleges and institutes in the state for the development of specialized courses of study for code enforcement personnel.

HISTORY:

Add, L 2010, ch 56, § 29 (Part B), eff July 1, 2010; L 2017, ch 468, § 1, effective March 18, 2018.

Editor's Notes Laws 2017, ch 468, § 2, eff March 18, 2018, provides:

§ 2. This act shall take effect on the ninetieth day after it shall have become a law.

Amendment Notes The 2017 amendment by ch 468, § 1, added "and certification" in the section heading; added "certified pursuant to this section" in 1; added 2(c) through 2(e); redesignated former 2(c) through 2(g) as 2(f) through 2(j); added 4(d); and redesignated former 4(d) through 4(f) as 4(e) through 4(g).

§ 377. New York state uniform fire prevention and building code

1. The council shall formulate a uniform fire prevention and building code which shall take effect on the first day of January, nineteen hundred eighty-four. The council may from time to time amend particular provisions of the uniform code and shall periodically review the entire code to assure that it effectuates the purposes of this article and the specific objectives and standards hereinafter set forth. The secretary shall conduct public hearings on said uniform code and any amendment thereto. The secretary shall review such code or amendment, together with any changes incorporated by the council as a result of such hearings, to insure that it effectuates the purposes of this article. Upon being so satisfied, the secretary shall approve said code or amendment prior to its becoming effective.

2. The uniform fire prevention and building code shall:

a. provide reasonably uniform standards and requirements for construction and construction materials for public and private buildings, including factory manufactured homes, consonant with accepted standards of engineering and fire prevention practices;

b. formulate such standards and requirements, so far as may be practicable, in terms of performance objectives, so as to make adequate performance for the use intended the test of acceptability;

c. permit to the fullest extent feasible, use of modern technical methods, devices and improvements which tend to reduce the cost of construction without substantially affecting reasonable requirements for the health, safety and security of the occupants or users of buildings;

d. encourage, so far as may be practicable, the standardization of construction practices, methods, equipment, material and techniques; and

e. eliminate restrictive, obsolete, conflicting and unnecessary building regulations and requirements which tend to increase unnecessarily construction costs or retard unnecessarily the use of new materials, or provide unwarranted preferential treatment to types or classes of material or products or methods of construction.

HISTORY:

Add, L 1981, ch 707, § 1, eff July 21, 1981; amd, L 1986, ch 772, § 2, eff Aug 2, 1986; L 1996, ch 309, § 153, eff July 13, 1996.

Prior Law: Former § 377, add, L 1951, ch 800, § 1, with substance transferred from § 182; amd, L 1951, ch 580, § 7, L 1961, ch 197, § 8; repealed, L 1981, ch 707, § 12, eff Jan 1, 1984.

Editor's Notes: Laws 1986, ch 772, § 1, eff Aug 2, 1986, provides as follows:

Section 1. Purpose. The legislature hereby finds and declares that, in an effort to meet the housing needs within the state of New York, the private housing and construction industry has developed mass production techniques which can substantially reduce housing construction costs, and that the mass production of housing presents unique problems with respect to the establishment of uniform health and safety standards and inspection procedures. The legislature further finds and declares that, by adopting uniform standards for factory manufactured homes, it is demonstrating its intention to encourage new and improved technology, techniques, methods and materials to increase the available supply of housing, to reduce housing construction costs and to make home ownership more feasible for all residents of the state.

Amendment Notes:

1996. Chapter 309, § 153 amended:
Sub 1, by deleting "commissioner".

Notes to Decisions

1. In general

In personal injury action against out-of-possession landlord for negligent maintenance of basement stairway, plaintiff failed to raise triable issue of fact as to whether premises violated State Uniform Fire Prevention and Building Code (9 NYCRR Part 600 et seq.), absent admissible evidence that premises, which were constructed before promulgation of Code and therefore were not subject to its provisions, had such alterations or repairs so as to be brought within coverage of Code. Lester v Waterman, 242 A.D.2d 683, 664 N.Y.S.2d 927, 1997 N.Y. App. Div. LEXIS 9204 (N.Y. App. Div. 2d Dep't 1997).

It was error for a trial court in a slip and fall case, after finding that a doll on the outer stairway of a home had caused a visitor's fall, to award summary judgment to the homeowners on a finding that their failure to add a handrail to the stairway, in apparent violation of the New York Uniform Fire Prevention and Building Code, N.Y. Exec. Law § 377(1), did not cause the fall. As more than one conclusion could have been formed from the evidence, it was for the trier of fact to determine whether the doll on the stairway, or the violation of the Code, or both, had proximately caused the visitor's fall and her injuries. Scala v Scala, 31 A.D.3d 423, 818 N.Y.S.2d 151, 2006 N.Y. App. Div. LEXIS 8676 (N.Y. App. Div. 2d Dep't 2006).

Agency Opinions

Analysis

1. In general
2. Under former § 377
3. Under former § 392

1. In general

Municipality is not authorized to condition issuance of permits or licenses affecting real property on payment of delinquent real property taxes. 1996 N.Y. Op. Att'y Gen. No. 96-45, 1996 N.Y. AG LEXIS 62.

All local government buildings, no matter how used, are subject to provisions of New York State Uniform Fire Prevention and Building Code, so that proposed building of sewer agency, which agency is division of county government, is subject to provisions of code. NY Ops Atty Gen 89-6 (Informal).

2. Under former § 377

When a town, by local law, has adopted the fire prevention code promulgated by the American Insurance Association, the town cannot provide in a local law that changes to the code as made from time to time by the Association shall automatically amend the code as adopted by the town. 1980 Op St Compt File #184.

3. Under former § 392

A municipality may not adopt a part of the State Building Conservation and Fire Prevention Code. The local board of review may not approve variances and modifications of the Code applicable throughout the municipality but may approve them on a case-by-case basis upon a finding of practical difficulty or unnecessary hardship. 1981 NY Ops Atty Gen Feb 5 (informal).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 372, 381.

Codes, Rules and Regulations:

Fire mobilization and mutual aid plan. 9 NYCRR §§ 205.1 et seq.

State uniform fire prevention and building code. 9 NYCRR §§ 600.1 et seq.

Department of state: standards for construction of enclosed mall buildings. 9 NYCRR §§ 768.1 et seq.

State fire prevention code. 9 NYCRR §§ 1150.1 et seq.

Department of state: residential code. 9 NYCRR § 1220.1.

Department of state: building code. 9 NYCRR § 1221.1.

Department of state: plumbing code. 9 NYCRR § 1222.1.

Department of state: mechanical code. 9 NYCRR § 1223.1.

Department of state: fuel gas code. 9 NYCRR § 1224.1.

Department of state: fire code. 9 NYCRR § 1225.1.

Department of state: property maintenace code. 9 NYCRR § 1226.1.

Fire prevention and safety, multiple residences. 9 NYCRR §§ 1500.1 et seq.

Building materials and finishes fire gas toxicity data file. 19 NYCRR §§ 439.1 et seq.

Department of state: identification of lumber to be used for load supporting purposes. 19 NYCRR § 1220.2, 1221.2.

Department of state: landings at required exit doors. 19 NYCRR § 1220.3.

Department of state: dampproofing and waterproofing of foundation walls. 19 NYCRR § 1220.4.

Department of state: carbon monoxide alarms. 19 NYCRR § 1225.2.

Department of state: temporary swimming pool enclosures. 19 NYCRR § 1228.4.

Department of state: installation of pool alarms in residential and commercial swimming pools. 19 NYCRR §§ 1228.1 et seq.

Hudson River Park Trust: regulations of payments. 21 NYCRR Part 753.

Federal Aspects:

Federal Fire Prevention and Control Act, 15 USCS §§ 2201 et seq.

Jurisprudences:

13 Am Jur 2d, Buildings §§ 18 et seq.

13A Am Jur Legal Forms 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 180:64.

§ 378. Standards for New York state uniform fire prevention and building code

The uniform code shall address the following subjects:

1. Standards for the construction of all buildings or classes of buildings, or the installation of equipment therein, including standards for materials to be used in connection therewith, and standards for safety and sanitary conditions. Notwithstanding the above, sleeping quarters in a children's overnight camp as defined in subdivision one of section thirteen hundred ninety-two of the public health law shall be governed by subdivision one of section thirteen hundred ninety-four of such law.

2. Standards for the condition, occupancy, maintenance, conservation, rehabilitation and renewal of certain existing buildings, structures and premises and for the safeguarding of life and property therein and thereabout from the hazards of fire, explosion or release of toxic gases arising from the storage, handling or use of combustible or hazardous substances, materials or devices.

3. Standards for passenger elevators to promote uniformity and ease of use for the handicapped including, but not limited to:

a. placement and identification of operating controls,

b. door jamb markings,

c. operation and leveling features,

d. operation, width, and safety features for doors,

e. hall buttons, and

f. hall lanterns.

4. Standards for areas of public assembly requiring:

a. approved fire protection equipment and systems shall be installed;

b. interior finishes shall be of appropriate grade to materially retard the spread of smoke and flame, taking into consideration the fire protection equipment and systems in place, and shall be maintained in that condition;

c. no combustible material shall be placed in such amounts and locations as would cause existing fire protection equipment and systems to be substantially overburdened, nor shall any material be placed in such manner as would cause safe exit to be significantly impeded; and

d. incorporation of the retroactivity provisions of article eighteen-AA of this chapter.

e. for buildings included in group C5 of paragraph (f) of section 900.2 of title nine of the official compilation of codes, rules and regulations of the state of New York, that water closets and urinals provided for occupants, based upon capacity, shall be deemed sanitary fixtures and shall be distributed on a basis such that the number of such sanitary fixtures provided in rest facilities for men shall be equal to the number of water closets provided in rest facilities provided for women in buildings with an occupancy of four hundred or less. For buildings consisting of more than four hundred occupants, an additional water closet shall be added to a rest facility provided for women for each sanitary fixture added to a similarly situated rest facility provided for men.

The standards shall include provisions for the type, number, spacing and location of fire protection equipment and systems, the classification and maintenance of interior finishes, and the accumulation of materials.

5. Standards for hotels, motels and lodging houses, requiring that a notice be posted in a prominent place in each guest room, including but not limited to the following information:

a. location of nearest exits and fire alarms;

b. procedures to be followed when the fire or smoke detector gives warning; and

c. procedures to be followed in the event of fire or smoke development.

5-a. Standards for installation of carbon monoxide detectors requiring that every one or two-family dwelling, or any dwelling accommodation located in a building owned as a condominium or cooperative in the state or any multiple dwellings shall have installed an operable carbon monoxide detector of such manufacture, design and installation standards as are established by the council. Carbon monoxide detectors required by this section are required only where the dwelling unit has appliances, devices or systems that may emit carbon monoxide or has an attached garage. For purposes of this subdivision, multiple dwelling means a dwelling which is either rented, leased, let or hired out, to be occupied, or is occupied as the temporary or permanent residence or home of three or more families living independently of each other, including but not limited to the following: a tenement, flat house, maisonette apartment, apartment house, apartment hotel, tourist house, bachelor apartment, studio apartment, duplex apartment, kitchenette apartment, hotel, lodging house, rooming house, boarding house, boarding and nursery school, furnished room house, club, sorority house, fraternity house, college and school dormitory, convalescent, old age or nursing homes or residences. It shall also include a dwelling, two or more stories in height, and with five or more boarders, roomers or lodgers residing with any one family. New construction shall mean a new facility or a separate building added to an existing facility.

5-b. Standards for installation of single station smoke detecting alarm devices requiring that:

a. every one or two-family dwelling or any dwelling accommodation located in a building owned as a condominium or cooperative in the state used as a residence shall have installed an operable single station smoke detecting alarm device or devices,

b. such device or devices shall be installed in an area so that it is clearly audible in each bedroom or other room used for sleeping purposes, with intervening doors closed, in accordance with rules to be promulgated by the council,

c. such device or devices shall be in compliance with the uniform code, provided, however, that for purposes of this subdivision, battery operated devices shall be permitted,

d. upon conveyance of any real property containing a one or two-family dwelling or a condominium unit used as a residence and the transferor of the shares allocated to an apartment located in a building owned by a cooperative housing corporation where such apartment is used as a residence, the grantor shall deliver to the grantee at the time of conveyance an affidavit indicating that the grantor is in compliance with this subdivision. The grantee shall have ten days from the date of conveyance within which to notify the grantor if the alarm or alarms are not operable. Upon notification, the transferor shall bear any cost of compliance with the provisions of this subdivision,

e. notwithstanding any other provision of law, a failure to comply with the provisions of this subdivision shall not be a breach of any warranty in a conveyance of real property, nor shall it be a defense to any claim made under a policy of insurance issued to insure the property against fire or other casualty loss.

5-c. Standards for inspections of solid fuel burning heating appliances, chimneys and flues requiring:

a. prior to the installation of any solid fuel burning heating appliance, chimney or flue in any dwelling used as a residence, the owner thereof, or his agent, shall first secure a building permit from the appropriate local government official;

b. an appropriate and qualified inspector, as determined by the local government, shall cause an inspection to be made of the solid fuel burning heating appliance, chimney or flue at a time when such inspection will best determine conformity of such installation with the uniform code, provided, however, that the local government official may waive such inspection for good cause shown;

c. upon approval of such installation, the appropriate local government official shall issue a certificate evidencing compliance with the appropriate provisions of the uniform code;

d. no owner of any dwelling used as a residence shall operate, or cause to be operated, any solid fuel burning heating appliance until such installation, including chimney and flue, has been approved and a certificate indicating such approval obtained from the appropriate local government official;

e. in the event of an accidental fire, requiring the services of a fire department, in a solid fuel burning heating appliance, chimney or flue, the chief of the fire department so responding may issue a temporary thirty day certificate indicating substantial conformity with the uniform code, until such time as an official inspector, as determined by local law, or in the case of a locality that relies on state inspection, a state inspector, shall cause an inspection to be made and a certificate to be issued indicating conformity of such solid fuel burning heating appliance, chimney or flue with the uniform code;

f. the issuance of such certificate of compliance shall not be deemed to give rise to any claim or cause of action for damages against the local government or local official for damages resulting from operation or use of such solid fuel burning heating appliance, chimney or flue;

g. the local government in which such property is located may establish and collect a reasonable fee for such inspection from the owner of such property or his agent;

h. any violation of this subdivision shall be deemed a violation and be punishable by a fine not to exceed two hundred fifty dollars;

i. notwithstanding the foregoing provisions of this subdivision, in the event of an emergency, where a delay occasioned by the requirement of securing a

building permit could reasonably be expected to cause irrepairable [irreparable]* damage to the property or serious personal injury to the occupants or other person, the owner or his agent may commence such installation without first obtaining such building permit provided application therefore [therefor]** is filed within three business days after such work is commenced.

5-d. Standards for installation of carbon monoxide detecting devices requiring that the owner of every building that contains one or more restaurants and the owner of every commercial building in the state shall have installed in such building and shall maintain operable carbon monoxide detecting device or devices of such manufacture, design and installation standards as are established by the council. Carbon monoxide detecting devices shall only be required if the restaurant or commercial building has appliances, devices or systems that may emit carbon monoxide or has an attached garage.

6. Standards for the use of lead in water supply systems constructed or portions added on or after January first, nineteen hundred eighty-six, including limiting the amount of lead in solder which may be utilized in piping to convey potable water to not more than two-tenths of one percent.

7. Standards for the construction of water supply systems which shall prohibit the use of asbestos cement pipe to convey potable water for any new or modified construction on or after January first, nineteen hundred ninety-two.

8. Standards for hotels, motels and lodging houses requiring (in addition to any other requirement) portable smoke-detecting alarm devices for the deaf and hard of hearing of audible and visual design, available for three percent of all units available for occupancy, with a minimum of one unit. If any other law or regulation requires a central, closed circuit interior alarm system, such device shall be incorporated into or connected to the system so as to be capable of being activated by the system. Incorporation into the existing system shall be in lieu of the portable alarms. Standards shall require operators of any such establishment to post conspicuously at the main desk or other similar station a notice in letters at least three inches in height stating that smoke-detector alarm devices for the deaf and hard of hearing are available. The council shall mandate by rule and regulation the specific design of the smoke-detector alarm devices.

9. Standards for buildings (designated as "Group B3-senior citizens" in regulations promulgated pursuant to the New York state uniform fire prevention and building code act) housing senior citizens, intended primarily for persons sixty-two years old or more, who are in good physical condition and do not require physical assistance, requiring that a notice be posted in a prominent place in each residential unit, including but not limited to the following information:

a. location of nearest exits and fire alarms;

b. procedures to be followed when the fire or smoke detector gives warning; and

c. procedures to be followed in the event of fire or smoke development.

10. Standards for assistive listening systems for new construction commenced after January first, nineteen hundred ninety-one requiring the installation of assistive listening systems at all places of public assembly so designated by the appropriate building and fire code for use by persons who are deaf or hard of hearing who require use of such a system to improve their reception of sound.

a. For purposes of this subdivision, the term (i) "assistive listening system" shall mean situational-personal acoustic communication equipment designed to improve the transmission and auditory reception of sound; and

(ii) "place of public assembly" shall mean a facility which is open to the public as a theater, meeting hall, hearing room, amphitheater, auditorium, or in any other similar capacity.

b. Standards for such systems shall be developed by the state fire prevention and building code council upon receiving recommendations from the advisory board on assistive listening systems in places of public assembly.

c. The appropriate building code or ordinance shall designate such places of public assembly which shall be required to install such assistive listening systems.

11. Standards for buildings shall authorize the installation of potable water heaters for all domestic uses, including space heating.

12. a. [There are two subdivisions 12] Standards for bed and breakfast dwellings shall be promulgated for fire safety. Notwithstanding any other provision of this article, for the purposes of this subdivision a "bed and breakfast dwelling" shall include an owner-occupied residence providing at least three but not more than five rooms for temporary transient lodgers with sleeping accommodations and a meal in the forenoon of the day. Such standards shall distinguish bed and breakfast dwellings from one and two family dwellings, provide specific options for hard-wired single-station smoke detectors and provide a notice to each guest that contains:

(i) the location of nearest exits and fire alarms;

(ii) procedures to be followed when fire or smoke detectors give warning; and

(iii) procedures to be followed in the event of fire or smoke development.

b. Such standards shall also include egress design options to preserve the aesthetic charm and histori-

*The bracketed word has been inserted by the Publisher.
**The bracketed word has been inserted by the Publisher.

cal significance of such dwellings that shall be limited to one of the following:

(i) an automatic sprinkler head in the stairwell area of any means of egress;

(ii) an external second floor egress; or

(iii) a portable escape device for each guest room.

c. The standards required by this subdivision shall be promulgated and implemented not later than one hundred twenty days after the effective date of this paragraph.

12. [There are two subdivisions 12] Standards for hospice residences, as defined in section four thousand two of the public health law, which shall be deemed to be either a single family dwelling or a two family dwelling for the purposes of local laws and ordinances relating to fire safety and building construction standards.

13. Standards for the abandonment or removal of heating oil storage tanks and related piping in connection with the conversion of liquid fuel burning appliance to alternative fuel requiring:

a. The entire contents of the heating oil storage tank and related piping shall be emptied, cleaned and purged of all vapor. The contents of the storage tank and related piping shall be removed from the premises or property and disposed of in accordance with applicable local, state or federal rules and regulations;

b. If the heating oil storage tank is to be abandoned in place, the vent line shall remain open and intact, unless the tank is filled with an inert material. The oil fill pipe and other related piping shall either be removed, or the oil fill pipe shall be filled with concrete;

c. If the heating oil storage tank is to be removed, the vent line, oil fill pipe and related piping shall also be removed, or the oil fill pipe shall be filled with concrete;

d. An appropriate and qualified inspector, as determined by the local government, shall cause an inspection to be made of the abandonment or removal in connection with the conversion to determine conformity with the uniform code; provide [provided]*, however, that the local government official may waive such inspection for good cause shown; and

e. No approval of such abandonment or removal shall be granted unless written proof of the heating oil storage tank's oil fill pipe having been removed or filled with concrete in accordance with appropriate provisions of the uniform code has been provided by the property owner to the local inspector or, in the event that an inspection has been waived for good cause shown, to the local government official.

f. For the purposes of this subdivision, "heating oil storage tank" shall mean a tank used for storing heating oil for consumptive use on the premises where stored.

g. In cities with a population of over one million, such cities' local code provisions shall be at least as stringent as the provisions of this subdivision.

h. The property owner shall provide written notice to his or her home heating oil supplier or suppliers to inform them of such conversion to an alternate fuel prior to the commencement of the new home heating service.

14. Provide that any:

a. gates required to be provided in a swimming pool enclosure shall be self-closing and self-latching with the latch handle located within the enclosure and at least forty inches above grade, and shall be securely locked with a key, combination or other child proof lock sufficient to prevent access to such swimming pool through such gate when such swimming pool is not in use or supervised;

b. residential or commercial swimming pool constructed or substantially modified after the effective date of this paragraph shall be equipped with an acceptable pool alarm capable of detecting a child entering the water and of giving an audible alarm; and

c. [There are two sub 14, paragraphs c] hot tub or spa with a safety cover which complies with American Society of Testing and Materials International standard F1346 (2003) or any similar standard which may be approved by the council or swimming pool, other than a hot tub or spa, with an automatic power safety cover which complies with American Society of Testing and Materials International standard F1346 (2003) or any similar standard which may be approved by the council shall be exempt from the provisions of paragraph b of this subdivision.

c. [There are two sub 14, paragraphs c] temporary swimming pool enclosure shall be required to be replaced by a permanent enclosure which is in compliance with New York state codes, regulations or local laws within ninety days from the issuance of a local building permit or the commencement of the installation of an in-ground swimming pool, whichever is later. A local building department may issue a waiver to allow an extension of such ninety day time period for good cause including but not limited to adverse weather conditions delaying construction.

15. Standards for temporary swimming pool enclosures used during the installation or construction of swimming pools requiring that any such enclosure shall sufficiently prevent any access to such swimming pool by any person not engaged in the installation or construction of such swimming pool and shall sufficiently provide for the safety of any such person.

16. Standards requiring the installation and maintenance of at least one safe, sanitary, and convenient diaper changing station, deck, table, or similar amenity which shall be available for use by both male and female occupants and which shall comply with section 603.5 (Diaper Changing Tables)

*The bracketed word has been inserted by the Publisher.

of the two thousand nine edition of the publication entitled ICC A117.1, Accessible and Usable Buildings and Facilities, published by the International Code Council, Inc., on each floor level containing a public toilet room in all newly constructed buildings in the state that have one or more areas classified as assembly group A occupancies or mercantile group M occupancies and in all existing buildings in the state that have one or more areas classified as assembly group A occupancies or mercantile group M occupancies and undergo a substantial renovation. The council shall prescribe the type of renovation to be deemed to be a substantial renovation for the purposes of this subdivision. The council may exempt historic buildings from the requirements of this subdivision.

17. Standards requiring that, in each building that has one or more areas classified as assembly group A occupancies or mercantile group M occupancies and in which at least one diaper changing station, deck, table, or similar amenity is installed, a sign shall be posted in a conspicuous place in each public toilet room indicating the location of the nearest diaper changing station, deck, table, or similar amenity that is available for use by the gender using such public toilet room. The requirements of this subdivision shall apply without regard to whether the diaper changing station, deck, table, or similar amenity was installed voluntarily or pursuant to subdivision sixteen of this section or any other applicable law, statute, rule, or regulation. No such sign shall be required in a public toilet room in which any diaper changing station, deck, table, or similar amenity is located.

18. a. Except as otherwise provided by statute, no change to the building code shall become effective until at least ninety days after the date on which notice of such change has been published in the state register, unless the council finds that:

(i) an earlier effective date is necessary to protect health, safety and security; or

(ii) the change to the code will not impose any additional compliance requirements on any person.

b. Notwithstanding the provisions of paragraph a of this subdivision, the council may provide that, in the period during which changes to the code have been adopted but are not yet effective pursuant to paragraph a of this subdivision, a person shall have the option of complying with either the provisions of the code as changed or with the code provisions as they were set forth immediately prior to the change.

HISTORY:

Add, L 1981, ch 707, § 1, eff July 21, 1981; amd, L 1984, ch 374, § 1, eff Nov 15, 1984; L 1984, ch 864, § 1, eff Jan 1, 1985; L 1984, ch 971, § 1; L 1985, ch 190, § 1; L 1986, ch 435, § 1; L 1987, ch 157, § 1; L 1987, ch 412, § 1, eff Jan 19, 1988; L 1987, ch 763, § 1, eff Nov 5, 1987; L 1988, ch 96, § 1, eff Nov 23, 1988; L 1988, ch 295, § 3; L 1988, ch 506, § 1, eff Nov 29, 1988; L 1989, ch 23, § 2; L 1989, ch 82, § 1, eff Nov 7, 1989; L 1989, ch 270, § 2, eff June 1, 1990; L 1991, ch 494, § 1, eff Jan 15, 1992; L 1994, ch 310, § 1, eff July 20, 1994; L 1995, ch 132, § 1, eff July 5, 1995; L 1995, ch 532, § 3, eff Aug 2, 1995; L 1996, ch 463, § 1, eff Aug 8, 1996; L 1997, ch 98, § 1, eff June 11, 1997; L 1997, ch 636, § 1, eff Sept 24, 1997; L 1998, ch 398, § 1, eff Sept 1, 1998; L 2002, ch 257, § 1, eff Nov 27, 2002; L 2005, ch 438, § 2, eff Dec 7, 2005; L 2006, ch 94, §§ 3, 4, eff June 7, 2006; L 2006, ch 202, § 1, eff July 26, 2006, deemed eff on and after Dec 7, 2005; L 2006, ch 450, § 2, eff Dec 14, 2006; L 2007, ch 75, § 1, eff June 12, 2007, deemed eff on and after Dec 14, 2006; L 2007, ch 234, §§ 1, 2, eff Jan 14, 2008; L 2009, ch 367, § 2, eff Feb 22, 2010; L 2009, ch 443, § 1, eff Sept 16, 2009; L 2014, ch 541, § 2, effective June 27, 2015; L 2018, ch 58, §§ 1, 2 (Part LL), effective January 1, 2019; L 2018, ch 221, § 3, effective August 24, 2018; L 2019, ch 725, § 3, effective March 19, 2020.

Prior Law: Former § 378, add, L 1951, ch 800, § 1, with substance transferred from § 183; amd, L 1961, ch 197, § 9; repealed, L 1981, ch 707, § 12, eff Jan 1, 1984.

Editor's Notes Laws 1984, ch 374, § 2, eff Nov 15, 1984, provides as follows:

§ 2. This act shall take effect on the one hundred twentieth day after it shall have become a law, except that any rules and regulations necessary for the timely implementation of this act on its effective date shall be promulgated on or before such date.

Laws 1987, ch 157, § 2, eff Oct 27, 1987, provides as follows:

§ 2. This act shall take effect on the one hundred twentieth day after it shall have become a law, except that any rules and regulations necessary for the timely implementation of this act on its effective date shall be promulgated on or before such date.

Laws 1988, ch 96, § 2, eff Nov 23, 1988, provides as follows:

§ 2. This act shall take effect on the one hundred eightieth day after it shall have become a law, provided however, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of the foregoing section of this act on its effective date are authorized and directed to be made and completed on or before such effective date.

Laws 1988, ch 506, § 5, eff Nov 29, 1988, provides as follows:

§ 5. This act shall take effect on the one hundred twentieth day after it shall have become a law, provided however, that effective immediately, the addition, amendment and/or repeal of any rules or regulations necessary for the implementation of the foregoing sections of this act on their effective date are authorized and directed to be made and completed on or before such effective date.

Laws 1989, ch 82, § 2, eff Nov 7, 1989, provides as follows:

§ 2. This act shall take effect on the one hundred eightieth day after it shall have become a law, provided however, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the timely implementation of this act on its effective date is authorized and directed to be made and completed on or before such effective date.

Laws 1989, ch 270, §§ 1 and 3, eff June 1, 1990, provide as follows:

Section 1. Legislative findings. The legislature finds that the current standards regarding the number of sanitary fixtures, including water closets, urinals and lavatories under paragraph (f) of section 900.2 of title nine of the official compilation of codes, rules and regulations of the state of New York, relating to the New York state uniform fire prevention and building code for buildings under group C5, assembly, do not adequately provide for the sanitary needs of women at the places of public assembly named therein.

The legislature further finds that this inadequacy of sanitary facilities in such places of public assembly causes not only a gender-specific inconvenience, but a threat to public health, safety and comfort.

The legislature further finds that such inequity of public rest facilities in such C5 buildings is attributable to provisions in the New York state uniform fire prevention and building code which provide equality in the number of water

closets and urinals in C5 buildings but which do not include provisions for an equal distribution of such fixtures for use among men and women.

The legislature therefore finds that legislation must be introduced which will provide for the equal distribution of such fixtures for use among such men and women.

§ 3. This act shall take effect on June 1, 1990 and shall only apply to buildings constructed on or after such effective date.

Laws 1991, ch 494, § 2, eff Jan 1, 1992, provides as follows:

§ 2. This act shall take effect on the one hundred eightieth day after it shall have become a law, provided however, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of the foregoing sections of this act on their effective date are authorized and directed to be made and completed on or before such effective date.

Laws 2002, ch 257, § 2, eff Nov 27, 2002, provides as follows:

§ 2. This act shall take effect on the one hundred twentieth day after it shall have become a law, provided, however, that effective immediately, the addition, amendment and/or repeal of any rules or regulations by the secretary of state necessary for the implementation of the foregoing section of this act on its effective date is authorized and directed to be made and completed on or before such effective date.

Laws 2005, ch 438, §§ 1, 3, eff Dec 7, 2005, provide as follows:

Section 1. This act shall be known and cited as "Daniel's Law".

§ 3. This act shall take effect on the one hundred twentieth day after it shall have become law, provided, however, that effective immediately, the addition, amendment and/or repeal of any rules or regulations by the secretary of state necessary for the implementation of the foregoing sections of this act on its effective date is authorized and directed to be made and completed on or before such effective date.

Laws 2006, ch 450, § 3, eff Dec 14, 2006, provides as follows:

§ 3. This act shall take effect on the one hundred twentieth day after it shall have become a law; provided, however, that effective immediately, the addition, amendment and/or repeal of any rule or regulation by the secretary of state necessary for the implementation of this act on its effective date are authorized and directed to be made and completed on or before such effective date.

Laws 2007, ch 234, § 3, eff Jan 14, 2008, provides as follows:

§ 3. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided, however, that effective immediately, the addition, amendment and/or repeal of any rule or regulation by the secretary of state necessary for the implementation of this act on its effective date are authorized and directed to be made and completed on or before such effective date.

Laws 2009, ch 367, § 1, eff Feb 22, 2010, provides as follows:

Section 1. Short title. This act shall be known and may be cited as "Amanda's law".

Laws 2014, ch 541, § 1, eff June 27, 2015, provides:

§ 1. This act shall be known and may be cited as "Steven Nelson's law".

Laws 2018, ch 58, § 3 (Part LL), eff January 1, 2018, provides:

§ 3. This act shall take effect January 1, 2019; provided, however, that effective immediately, the addition, amendment and/or repeal of any rules or regulations by the secretary of state and/or by the state fire prevention and building code council necessary for the implementation of section two of this act on its effective date are authorized and directed to be made and completed on or before such effective date.

Laws 2019, ch 725, § 4, eff March 19, 2020, provides:

§ 4. This act shall take effect on the ninetieth day after it shall have become a law. Effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized to be made and completed on or before such effective date.

Amendment Notes The 2014 amendment by ch 541, § 2, added 5-d.

2009. Chapter 367, § 2 amended:

Sub 5-a by deleting at figs 1 and 2 "constructed or offered for sale after July thirtieth, two thousand two", at fig 3 "constructed or offered for sale after August ninth, two thousand five", at fig 4 "For the purposes of this section, sale shall mean the transfer of ownership of a business or property, provided however, transfer of franchises shall not be deemed a sale." and adding the matter in italics.

2009. Chapter 433, § 1 amended:

Sub 1 by adding the matter in italics.

2007. Chapter 75, § 1 amended:

Sub 14, par a by deleting at fig 1 "and".

Sub 14, par b by deleting at fig 1 a period and adding the matter in italics.

By adding sub 14, par c [first setout].

2007. Chapter 234, § 1 amended:

Sub 14, par a by deleting at fig 1 "and".

Sub 14, par b by deleting at fig 1 a period and adding the matter in italics.

By adding sub 14, par c [second setout].

2007. Chapter 234, § 2 amended:

By adding sub 16.

2006. Chapter 94, § 3 amended:

By redesignating sub 5 [third setout] as sub 5-b.

2006. Chapter 94, § 4 amended:

By redesignating sub 5 [second setout] as sub 5-c.

1998. Chapter 398, § 1 amended:

By adding sub 15.

1997. Chapter 98, § 1 amended:

By adding sub 12 [first setout], par c.

1996. Chapter 463, § 1 amended:

By adding sub 13.

1995. Chapter 132, § 1 amended:

By adding sub 12 [first setout].

1995. Chapter 532, § 3 amended:

By adding sub 12 [second setout].

The 2018 amendment by ch 58, §§ 1, 2 (Part LL), renumbered former 15 as 18; and added 16 and 17.

The 2018 amendment by ch 221, § 3, substituted "deaf and hard of hearing" for "deaf and hearing impaired" in the first and fourth sentences of 8; and substituted "by persons who are deaf or hard of hearing" for "by hearing impaired persons" in the introductory language of 10.

The 2019 amendment by ch 725, § 3, added 13(h).

Notes to Decisions

Analysis

1. In general
2. Under former § 375

1. In general

CLS Exec § 378(2) does not authorize only regulations involving specific hazards of fire and toxic gases; statute also permits regulations relating to existing buildings, structures and premises. Tarquini v Aurora, 77 N.Y.2d 354, 568 N.Y.S.2d 538, 570 N.E.2d 186, 1991 N.Y. LEXIS 208 (N.Y. 1991).

Swimming pool (meaning assembly of materials framed of component parts and situated on parcel of land) falls under "structures and premises" language of CLS Exec § 378(2). Tarquini v Aurora, 77 N.Y.2d 354, 568 N.Y.S.2d 538, 570 N.E.2d 186, 1991 N.Y. LEXIS 208 (N.Y. 1991).

CLS Exec § 378(2) authorized State Fire Prevention and Building Code Council to promulgate safety regulation requiring enclosure of at least 4 feet in height around residential outdoor swimming pools (9 NYCRR § 1243.7). Tarquini v Aurora, 77 N.Y.2d 354, 568 N.Y.S.2d 538, 570 N.E.2d 186, 1991 N.Y. LEXIS 208 (N.Y. 1991).

Outdoor residential swimming pool was not "building" under CLS Exec § 372, and thus was not exempt from regulation requiring enclosure (9 NYCRR § 1243.7) despite having been built prior to regulation's effective date. Tarquini v Aurora, 77 N.Y.2d 354, 568 N.Y.S.2d 538, 570 N.E.2d 186, 1991 N.Y. LEXIS 208 (N.Y. 1991).

In proceeding wherein town sought order directing defendant to repair its building and conform to provisions of State Uniform Fire Prevention and Building Code, courts below properly concluded that Code provisions regulating property maintenance applied to apartment buildings (such as defendant's) constructed prior to enactment of Code. Town of Conklin v Ritter, 97 N.Y.2d 712, 739 N.Y.S.2d 355, 765 N.E.2d 851, 2002 N.Y. LEXIS 150 (N.Y. 2002).

2. Under former § 375

The state building construction code does not impose an absolute duty upon an owner to install a handrail and artificial illumination in a staircase. Hence, an injured person must prove his freedom from contributory negligence to recover damages from the owner. The code was not designed to protect a definite class of persons from a hazard of "definable orbit" and is in no way analogous to the provisions of the Labor Law providing safeguards for workmen. Major v Waverly & Ogden, Inc., 8 A.D.2d 380, 190 N.Y.S.2d 526, 1959 N.Y. App. Div. LEXIS 7873 (N.Y. App. Div. 2d Dep't 1959), aff'd, 7 N.Y.2d 332, 197 N.Y.S.2d 165, 165 N.E.2d 181, 1960 N.Y. LEXIS 1512 (N.Y. 1960).

"Stepped pathway" which was built for convenience of public with so-called treads approximately six feet wide and having varying depths running from 28 to 43 ½ inches was obviously distinguishable from flight of stairs to be utilized at a normal gait by person descending or ascending and thus stairway construction provisions contained in state building code were inapplicable in determining State's liability for personal injuries sustained as result of fall while descending pathway, which was located at state park. Johnson v State, 53 A.D.2d 1018, 386 N.Y.S.2d 146, 1976 N.Y. App. Div. LEXIS 15824 (N.Y. App. Div. 4th Dep't 1976).

Agency Opinions

Analysis

1. Under former § 375
2. Under former § 376

1. Under former § 375

The City of Auburn Industrial Development Authority is not required to obtain a certificate of occupancy from the City of Auburn to occupy a building it erected and is not subject to local or state building construction codes or fire codes or to local inspections and regulations. The City of Auburn has no enforcement jurisdiction over such building and cannot be liable for failure to enforce the codes. 1980 NY Ops Atty Gen March 24 (Informal), 1980 N.Y. AG LEXIS 138.

2. Under former § 376

Under this section and certain provisions of the State Building Construction Code, that code applies to town halls and garages. 1961 NY Ops Atty Gen Aug 15.

Under the above sections, should the Town of Mamaroneck adopt the State Building Construction Code, all standards, requirements, rules and regulations promulgated or adopted by the State Building Code Council would pertain to the Town, unless the State Building Code Council, pursuant to provisions of Executive Law, § 376, limited their application or portions thereof to specified classes or types of buildings or to an area wherein the Town of Mamaroneck is situated. 1969 NY Ops Atty Gen Feb 6.

The City of Auburn Industrial Development Authority is not required to obtain a certificate of occupancy from the City of Auburn to occupy a building it erected and is not subject to local or state building construction codes or fire codes or to local inspections and regulations. The City of Auburn has no enforcement jurisdiction over such building and cannot be liable for failure to enforce the codes. 1980 NY Ops Atty Gen March 24 (Informal), 1980 N.Y. AG LEXIS 138.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 381.

Codes, Rules and Regulations:

Fire mobilization and mutual aid plan. 9 NYCRR §§ 205.1 et seq.

State uniform fire prevention and building code. 9 NYCRR §§ 600.1 et seq.

Department of state: standards for construction of enclosed mall buildings. 9 NYCRR §§ 768.1 et seq.

State fire prevention code. 9 NYCRR §§ 1150.1 et seq.

Department of state: residential code. 9 NYCRR § 1220.1.

Department of state: building code. 9 NYCRR § 1221.1.

Department of state: plumbing code. 9 NYCRR § 1222.1.

Department of state: mechanical code. 9 NYCRR § 1223.1.

Department of state: fuel gas code. 9 NYCRR § 1224.1.

Department of state: fire code. 9 NYCRR § 1225.1.

Department of state: property maintenace code. 9 NYCRR § 1226.1.

Fire prevention and safety, multiple residences. 9 NYCRR §§ 1500.1 et seq.

Department of state: identification of lumber to be used for load supporting purposes. 19 NYCRR § 1220.2, 1221.2.

Department of state: landings at required exit doors. 19 NYCRR § 1220.3.

Department of state: dampproofing and waterproofing of foundation walls. 19 NYCRR § 1220.4.

Department of state: carbon monoxide alarms. 19 NYCRR § 1225.2.

Department of state: temporary swimming pool enclosures. 19 NYCRR § 1228.4.

Department of state: installation of pool alarms in residential and commercial swimming pools. 19 NYCRR §§ 1228.1 et seq.

Federal Aspects:

Federal Fire Prevention and Control Act, 15 USCS §§ 2201 et seq.

Jurisprudences:

13A Am Jur Legal Forms 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 180:64.

5 Am Jur Proof of Facts 3d 383, Negligent Failure to Install or Maintain Smoke Alarm or Sprinkler System.

Law Reviews:

Asbestos litigation: the dust has yet to settle. 7 Fordham Urb. L.J. 55.

Matthew Bender's New York Practice Guides: 2 New York Practice Guide: Real Estate § 6.10.

§ 379. Incorporation of higher standards by council upon recommendation of local government; local building regulations

1. Except in the case of factory manufactured homes, intended for use as one or two family dwelling units or multiple dwellings of not more than two stories in height, the legislative body of any local government may duly enact or adopt local laws or ordinances imposing higher or more restrictive standards for construction within the jurisdiction of such local government than are applicable generally to such local government in the uniform code. Within thirty days of such enactment or adoption, the chief executive officer, or if there be none, the chairman of the legislative body of such local government, shall so notify the council, and shall petition the council for a determination of whether such local laws or ordinances are more stringent than the standards for construction applicable generally to such local government in the uniform code. Such local laws or ordinances shall take full force and effect upon an

affirmative determination by the council as provided herein.

2. If the council finds that such higher or more restrictive standards are reasonably necessary because of special conditions prevailing within the local government and that such standards conform with accepted engineering and fire prevention practices and the purposes of this article, the council shall adopt such standards, in whole or part. The council shall have the power to limit the term or duration of such standards, impose conditions in connection with the adoption thereof, and to terminate such standards at such times, and in such manner as the council may deem necessary, desirable or proper.

3. Nothing in this article shall be construed to prohibit any municipality from adopting or enacting any building regulations relating to any matter as to which the uniform fire prevention and building code does not provide, but no municipality shall have the power to supersede, void, repeal or make more or less restrictive any provisions of this article or of rules or regulations made pursuant hereto.

4. Within one hundred twenty days after the effective date of the uniform code, a local government may by resolution duly enacted petition the council for a determination as to whether an existing building and/or fire code in force in said local government is more stringent than the uniform code. During the period in which the council is considering such petition such local code shall remain in full force and effect. If, after review, the council determines that such local code is less stringent than the uniform code the council shall notify the chief executive officer or, if there be none, the chairman of the legislative body of such local government and the uniform code shall, thirty days after the date of notification, apply in such local government. If the council finds that such local code is not less stringent than the uniform code such local code shall continue in full force and effect until the council, upon its own initiative, reviews such local code and determines that it is no longer more stringent, whereupon the council shall notify the chief executive officer or chairman of the legislative body of such local government and thirty days after the date of notification the uniform code shall apply in such local government.

5. Notwithstanding the provisions of subdivision one of this section, the legislative body of Nassau county may have duly enacted or adopted or may duly enact or adopt local laws or ordinances imposing higher or more restrictive standards for construction within the jurisdiction of the county than are applicable generally to the county in the uniform code. The chief executive officer, or if there be none, the chairman of the legislative body of the county, shall notify the council, and shall petition the council for a determination of whether such preexisting local laws or ordinances, or within thirty days of such enactment or adoption of such local laws or ordinances, are more stringent than the standards for construction applicable generally to such county in the uniform code. During the period in which the council is considering such petition, such local laws or ordinances shall remain in full force and effect.

HISTORY:

Add, L 1981, ch 707, § 1, eff July 21, 1981; amd, L 1986, ch 622, § 1, eff July 26, 1986; L 1986, ch 772, § 3, eff Aug 2, 1986; L 2017, ch 348, § 1, effective October 23, 2017.

Prior Law: Former § 379, add, L 1951, ch 800, § 1, with substance transferred from § 184; amd, L 1961, ch 197, § 11, L 1978, ch 311, § 1; repealed, L 1981, ch 707, § 12, eff Jan 1, 1984.

Editor's Notes: See 1986 note under § 377.

Amendment Notes The 2017 amendment by ch 348, § 1, in the third sentence of 1, deleted "During the period in which the council is considering such petition" at the beginning and substituted "shall take full force and effect upon an affirmative determination by the council as provided herein" for "shall remain in full force and effect."

Notes to Decisions

Analysis

1. In general
2. Under former § 379
3. Under former § 386

1. In general

Local law prohibiting conversion of multiple dwelling buildings into condominiums or cooperatives until building inspector determined that structure complied with all applicable building codes and issued new certificate of occupancy authorizing change was not invalid as preempted by CLS Gen Bus Art 23-A since Attorney General has no power to require cooperative or condominium sponsors to repair or eliminate building code violations as precondition to selling property, and CLS Exec § 379(3) specifically enables municipality to enact "any building regulations relating to any matter as to which the uniform fire prevention and building code does not provide," such as certificates of occupancy; moreover, Multiple Residence Law speaks to certificates of occupancy in CLS Mult R § 302, and expressly permits municipalities to enact more restrictive laws under CLS Mult R § 329(1). P.O.K. RSA, Inc. v New Paltz, 157 A.D.2d 15, 555 N.Y.S.2d 476, 1990 N.Y. App. Div. LEXIS 4732 (N.Y. App. Div. 3d Dep't), app. dismissed, 76 N.Y.2d 886, 561 N.Y.S.2d 546, 562 N.E.2d 871, 1990 N.Y. LEXIS 3186 (N.Y. 1990).

In Article 78 proceeding to prevent construction and opening of dry cleaning establishment in residential building after New York City Department of Buildings issued permit, court erred in granting mandamus relief compelling code council to convene to determine whether city code was less stringent than State Uniform Fire Prevention and Building Code with respect to location of dry cleaning facilities in multiple dwelling buildings because, under CLS Exec § 383(1)(c), decision whether to review code is discretionary with code council, not mandatory. Morrison v New York State Div. of Hous. & Community Renewal, 241 A.D.2d 34, 672 N.Y.S.2d 2, 1998 N.Y. App. Div. LEXIS 3257 (N.Y. App. Div. 1st Dep't 1998), rev'd, 93 N.Y.2d 834, 687 N.Y.S.2d 621, 710 N.E.2d 267, 1999 N.Y. LEXIS 28 (N.Y. 1999).

City ordinance adopted in 1995, requiring owner of any structure used wholly or partially for residential purposes...to install and maintain smoke/heat detector or system," was inconsistent and in direct conflict with Uniform Building Code as set forth in CLS Exec art 18 insofar as it applied retroactively to pre-1984 buildings. Rabinor v City of Ithaca Bldg. Code Bd. of Appeals, 252 A.D.2d 290, 682 N.Y.S.2d 704, 1998 N.Y. App. Div. LEXIS 14116 (N.Y. App. Div. 3d Dep't 1998).

Information charging defendant with violating § 2703.9.8(1) of the New York State Uniform Fire Prevention and Building Code, N.Y. Exec. Law art. 18, §§ 370-383, was improperly dismissed as a local ordinance did not have a comparable section to the Code

section allegedly violated and thus the Code was applicable under N.Y. Exec. Law §§ 379(4) and 383(1). People v Oceanside Institutional Indus., Inc., 833 N.Y.S.2d 350, 15 Misc. 3d 22, 2007 N.Y. Misc. LEXIS 380 (N.Y. App. Term), app. denied, 8 N.Y.3d 989, 838 N.Y.S.2d 492, 869 N.E.2d 668, 2007 N.Y. LEXIS 1940 (N.Y. 2007).

2. Under former § 379

A town may have adopted both its own town building code and the State Code, provided the town code does not allow its code to supersede, void, repeal or contain a more restrictive provision then the State Code. 1969 Ops St Compt File #129.

Where a town has adopted the State Building Construction Code, it may not enact building regulations which are inconsistent with, or supersede, any provision thereof. More restrictive standards of building construction may be adopted by the State Building Code Council and made applicable to such town on recommendation of the town board. 1974 Ops St Compt File #1021.

3. Under former § 386

Having adopted the New York State Building Construction Code, a town may not deviate from its provisions. Bon-Air Estates, Inc. v Building Inspector of Ramapo, 31 A.D.2d 502, 298 N.Y.S.2d 763, 1969 N.Y. App. Div. LEXIS 4268 (N.Y. App. Div. 2d Dep't 1969).

Agency Opinions

Analysis

1. In general
2. Under former § 379
3. Under former § 386
4. Under former § 397

1. In general

Municipality is not authorized to condition issuance of permits or licenses affecting real property on payment of delinquent real property taxes. 1996 N.Y. Op. Att'y Gen. No. 96-45, 1996 N.Y. AG LEXIS 62.

Plans and specifications for school building heating equipment and facilities were subject to review by Department of Environmental Conservation in accordance with its jurisdiction under CLS ECL Art 19; county's air quality regulations were not applicable. 1999 N.Y. Op. Att'y Gen. No. 99-5, 1999 N.Y. AG LEXIS 4.

2. Under former § 379

A municipality which has adopted the State Building Construction Code may also have a local code with provisions more restrictive than the State Code provided that builders are given the option of complying with the State Code or the local code, pursuant to Executive Law, §§ 374 and 380. 1978 NY Ops Atty Gen May 18.

3. Under former § 386

More restrictive provisions of a town's Fire Prevention Code, enacted subsequent to said town's adoption of the State Building Construction Code, are invalid unless consent thereto is obtained from the State Building Code Council. 1968 NY Ops Atty Gen June 25.

4. Under former § 397

Many provisions of the State Fire Protection Code regulate fire safety practices in existing buildings. A municipality that does not accept the application of the State code, may adopt its own building conservation and fire prevention code. 1982 NY Ops Atty Gen Jan 25 (informal).

RESEARCH REFERENCES AND PRACTICE AIDS

Federal Aspects:

Federal Fire Prevention and Control Act, 15 USCS §§ 2201 et seq.

Jurisprudences:

13A Am Jur Legal Forms 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 180:64.

Law Reviews:

Weinberg, Cargo of fire: a call for stricter regulation of liquefied natural gas shipment and storage. 4 Fordham Urb. L.J. 495.

§ 380. Granting authority

The secretary shall administer a program of local assistance to aid local governments in the administration and enforcement of locally adopted or state promulgated building and fire codes. Said program of local assistance shall conform to the requirements of section fifty-four-g of the state finance law. The secretary shall adopt, amend and rescind such rules, regulations and guidelines as may be necessary for the performance of his or her functions, powers and duties under this section.

HISTORY:

Add, L 1981, ch 707, § 1, eff July 21, 1981; amd, L 2010, ch 56, § 51 (Part B), eff July 1, 2010.

Prior Law: Former § 380, add, L 1951, ch 800, § 1, with substance transferred from § 185; amd, L 1953, ch 472, § 1, L 1955, ch 512, § 1; repealed, L 1981, ch 707, § 12, eff Jan 1, 1984.

Amendment Notes 2010. Chapter 56, § 51 (Part B) amended:

By deleting at fig 1 ", by and through the office of fire prevention and control,".

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

State assistance to local governments for support of activities related to fire prevention and building codes, CLS St Fin § 54-g.

Codes, Rules and Regulations:

Financial assistance to local governments for building and fire code administration and enforcement. 19 NYCRR §§ 433.1 et seq.

§ 381. Administration and enforcement of the New York state uniform fire prevention and building code and the New York state energy conservation construction code

1. The secretary shall promulgate rules and regulations prescribing minimum standards for administration and enforcement of the uniform fire prevention and building code promulgated in accordance with sections three hundred seventy-seven and three hundred seventy-eight of this article and the state energy conservation construction code adopted in accordance with article eleven of the energy law. Such rules and regulations shall become effective not later than the first day of January, nineteen hundred eighty-five. The secretary shall promulgate such regulations after public hearing and after considering reaction to initial administration and enforcement of the uniform building and fire prevention code, including how local governments have organized to provide for such initial administration and enforcement. Such rules and regulations shall address the nature and quality of enforcement and shall include, but not be limited to the following:

a. frequency of mandatory inspections for compliance with the uniform code and the state energy conservation construction code,

b. number and qualifications of staff, including requirements that inspectors be certified pursuant to this chapter,

c. required minimum fees for administration and enforcement,

d. adequacy of inspections,

e. adequacy of means for insuring compliance with the uniform code and the state energy conservation construction code, including provisions intended to achieve compliance with the state energy conservation construction code consistent with the compliance goals set forth in section 410(2)(C) of the American Recovery and Reinvestment Act of 2009,

f. establishment of a procedure whereby any provision or requirement of the uniform code may be varied or modified in cases where strict compliance with such provision or requirement would entail practical difficulties or unnecessary hardship or would otherwise be unwarranted. Such procedure shall be designed to insure that any such variance or modification shall not substantially affect adversely provisions for health, safety and security, and that equally safe and proper alternatives may be prescribed. Requests for a variance shall be resolved within sixty days of the date of application unless a longer period is required for good cause shown,

g. procedures for inspection of certain classes of buildings based upon design, construction, ownership, occupancy or use, including, but not limited to, mobile homes, factory manufactured homes and state-owned buildings,

h. minimum basic training and in-service training requirements for personnel charged with administration and enforcement of the state energy conservation construction code; and

i. standards and procedures for measuring the rate of compliance with the state energy conservation construction code, and provisions requiring that such rate of compliance be measured on an annual basis.

Nothing in the rules shall require or be construed to require regular, periodic inspections of (A) owner-occupied one and two-family dwellings, or (B) agricultural buildings used directly and solely for agricultural purposes, provided, however that this shall not be a limitation on inspections conducted at the invitation of the owner or where conditions on the premises threaten or present a hazard to public health, safety, or welfare.

2. Except as may be provided in regulations of the secretary pursuant to subdivision one of this section, every local government shall administer and enforce the uniform fire prevention and building code and the state energy conservation construction code on and after the first day of January, nineteen hundred eighty-four, provided, however, that a local government may enact a local law prior to the first day of July in any year providing that it will not enforce suchcodes on and after the first day of January next succeeding. In such event the county in which said local government is situated shall administer and enforce such codes within such local government from and after the first day of January next succeeding the effective date of such local law, in accordance with the provisions of paragraph b of subdivision five of this section unless the county shall have enacted a local law providing that it will not enforce such codes within that county. In such event the secretary in the place and stead of the local government shall, directly or by contract, administer and enforce the uniform code and the state energy conservation construction code. A local government or a county may repeal a local law which provides that it will not enforce such codes and shall thereafter administer and enforce such codes as provided above. Two or more local governments may provide for joint administration and enforcement of the uniform code, the state energy conservation construction code, or both, by agreement pursuant to article five-G of the general municipal law. Any local government may enter into agreement with the county in which such local government is situated to administer and enforce the uniform code, the state energy conservation construction code, or both, within such local government. Local governments or counties may charge fees to defray the costs of administration and enforcement.

3. On and after the first day of July, nineteen hundred eighty-five, the secretary shall have power to investigate and conduct hearings relative to whether administration and enforcement of the uniform fire prevention and building code complies with the minimum standards promulgated pursuant to subdivision one of this section. At least ten days written notice of any such hearing shall be provided to the elective or appointive chief executive officer or, if there be none, the chairman of the legislative body of the local government or county whose administration and enforcement of the uniform code is at issue.

4. If the secretary determines that a local government has failed to administer and enforce the uniform fire prevention and building code in accordance with the minimum standards promulgated pursuant to subdivision one of this section, the secretary shall take any of the following actions, either individually or in combination in any sequence:

a. The secretary may issue an order compelling compliance by such local government with the standards for administration and enforcement of the uniform code.

b. The secretary may ask the attorney general to institute in the name of the secretary an action or proceeding seeking appropriate legal or equitable relief to require such local government to administer and enforce the uniform code.

c. the secretary may designate the county in which such local government is located to administer and enforce the uniform code in such local government. In the case of such designation, the provisions of subdivision five of this section shall apply.

d. The secretary may, in the place and stead of the local government, administer and enforce the uniform code in accordance with the minimum standards promulgated pursuant to subdivision one of this section. In such event, the provisions of subdivision five of this section shall apply.

5. Where the secretary has designated a county to administer and enforce the uniform fire prevention and building code within a local government or has assumed authority for administration and enforcement pursuant to subdivision two or paragraph d of subdivision four of this section:

a. Such local government or county government shall not administer and enforce the uniform code, and shall not charge or collect fees for such administration and enforcement.

b. Such county shall administer and enforce the uniform code within such local government from and after the date of such designation. Such administration and enforcement shall apply the minimum standards promulgated by the secretary pursuant to subdivision one of this section. Notwithstanding any other provisions of law, such county shall have full power to administer and enforce the uniform code in accordance with such minimum standards, including the power to charge and collect fees for such administration and enforcement.

c. The secretary shall designate the local government or county government to resume administration and enforcement of the uniform code when the secretary is satisfied that such local government or county will provide such administration and enforcement in compliance with the minimum standards promulgated pursuant to subdivision one of this section.

d. The provisions of subdivisions three and four of this section shall apply to counties which have been designated to administer and enforce the uniform code in such local government.

6. The secretary shall study and from time to time make recommendations to the governor and legislature concerning:

a. Appropriate means to provide encouragement, support and inducements for local governments and counties to exercise their responsibilities pursuant to this section; and

b. Appropriate means to provide encouragement, support and inducements to facilitate compliance with the provisions of the uniform code.

HISTORY:

Add, L 1981, ch 707, § 1, eff July 21, 1981; amd, L 2007, ch 159, § 3, eff July 3, 2007; L 2010, ch 560, § 10, eff Jan 1, 2011 (see 2010 note below).

Prior Law: Former § 381, add, L 1951, ch 800, § 1, with substance transferred from § 186; amd, L 1961, ch 197, § 12, L 1964, ch 66, § 1; repealed, L 1981, ch 707, § 12, eff Jan 1, 1984.

Editor's Notes: Laws 2007, ch 159, § 1, eff July 3, 2007, provides as follows:

Section 1. Legislative findings and intent. The legislature finds and declares that agricultural buildings differ in structure and usage from other types of buildings and thus warrant specialized treatment under the New York state uniform fire prevention and building code. In recognition of the unique nature of such buildings, agricultural buildings have long been exempted from the construction-related provisions of the uniform fire prevention and building code, and should remain exempted from such provisions. The legislature further finds that the department of state should continue to consult with the department of agriculture and markets to assure that the department's interpretation of code requirements continues to recognize and reflect the unique nature of agricultural buildings. The farming industry and code enforcement officials will benefit from additional guidance regarding the appropriate implementation of code requirements for agricultural buildings and other farm-based structures. Therefore, it is in the public interest to have the written interpretations of code provisions by the department of state easily accessible to these sectors, and the public at large, through publication on the department's website.

Laws 2010, ch 560, § 11, eff Jan 1, 2011, provides as follows:

§ 11. This act shall take effect January 1, 2011; provided, however, that the state fire prevention and building code council and the secretary of state are authorized and directed to adopt such regulations as deemed necessary and proper to implement this act, prior to such effective date.

Amendment Notes: 2010. Chapter 560, § 10 amended:

Section heading by adding the matter in italics.

Sub 1, opening par by adding the matter in italics.

Sub 1, par a by adding the matter in italics.

Sub 1, par e by adding the matter in italics.

Sub 1, par f by deleting at fig 1 "and".

Sub 1, par g by deleting at fig 1 a period and adding the matter in italics.

By adding sub 1, pars h and i.

Sub 2 by deleting at figs 1–5 "the uniform code", at fig 6 "Local" and adding the matter in italics.

Notes to Decisions

Analysis

1. In general
2. Under former § 383
3. Under former § 384
4. Under former § 385
5. Under former § 386
6. Under former § 396

1. In general

Court would annul determination vacating building permit and certificate of compliance issued by village building inspector for installation of above-ground gasoline storage tanks where (1) review board failed to make findings as to whether issuance of permit and compliance certificate was proper act of discretion under Flammable and Combustible Liquids Code No. 30-1981 § 1-1.5 of National Fire Protection Association (NFPA Code), as such finding was essential to ultimate determination of whether construction complied with either NFPA Code or State Uniform Fire Prevention and Building Code (9 NYCRR parts 600-1282), (2) review board did not consider request by village and its building inspector for variance from requirements of Uniform Code, (3) only evidence presented on issue of compliance supported finding of compliance, and (4) participating board member failed to disqualify himself despite appearance of impropriety. Engleson & Van Liere, Inc. v Sodus Point, 135 A.D.2d 1141, 523 N.Y.S.2d 269, 1987 N.Y. App. Div. LEXIS 53011 (N.Y. App. Div. 4th Dep't 1987).

County, on determining that county-owned building located in historic district in city was risk to public safety and required demolition, was nevertheless subject to city ordinance which created Historic Resources Commission (HRC) and prohibited demolition of protected buildings without HRC consent. Historic Albany Found. v Breslin, 282 A.D.2d 981, 724 N.Y.S.2d 113, 2001 N.Y. App. Div. LEXIS 4161 (N.Y. App. Div. 3d Dep't), app. denied, 97 N.Y.2d 636, 735 N.Y.S.2d 489, 760 N.E.2d 1284, 2001 N.Y. LEXIS 3357 (N.Y. 2001).

Supreme court did not err in determining that the Municipal Code Violations Bureau (MCVB) had jurisdiction to adjudicate a citizen's violations of the New York State Uniform Fire Prevention and Building Code 19 NYCRR 1219.1 et seq. because the citizen was charged only with violations of the Building Code pursuant to Executive Law § 382(1), and Executive Law § 381(1)

specifically authorized local governments to enforce the Building Code; pursuant to City of Rochester, N.Y., Municipal Code § 13A-2(1), the MCVB had jurisdiction to adjudicate the violations in question, and because the citizen was charged with only violations pursuant to Executive Law § 382(1) rather than misdemeanor offenses pursuant to Executive Law § 382 (2), the city was not required to allege as an element of the violations that the citizen had been served with an order to remedy those violations. Matter of Ophardt v Vasquez, 74 A.D.3d 1742, 904 N.Y.S.2d 835, 2010 N.Y. App. Div. LEXIS 4958 (N.Y. App. Div. 4th Dep't), app. dismissed, app. denied, 15 N.Y.3d 867, 910 N.Y.S.2d 33, 936 N.E.2d 915, 2010 N.Y. LEXIS 2988 (N.Y. 2010).

Because the premises in question were in the custody of a N.Y. Rac. Pari-Mut. Wag. & Breed. Law art. V off-track betting corporation, pursuant to N.Y. Exec. Law § 381(2) and N.Y. Comp. Codes R. & Regs. tit. 19, § 1201.2(c), the county and not the village was the responsible party to administer and enforce the uniform fire prevention and building code with respect to such building and its premises; therefore, the corporation was entitled to N.Y. C.P.L.R. art. 78 relief in the form of prohibition against the village. Matter of Catskill Regional Off-Track Betting Corp. v Village of Suffern, 862 N.Y.S.2d 280, 20 Misc. 3d 935, 240 N.Y.L.J. 22, 2008 N.Y. Misc. LEXIS 4486 (N.Y. Sup. Ct. 2008), rev'd, 65 A.D.3d 1340, 886 N.Y.S.2d 214, 2009 N.Y. App. Div. LEXIS 6719 (N.Y. App. Div. 2d Dep't 2009).

Town's allegations that it had the power to enforce the New York State Uniform Fire Prevention and Building Code (Code) against a landowner who built a boathouse without the required permit or variance because it had enacted local laws authorizing its code enforcement officer to enforce the Code were sufficient to withstand the landowner's motion to dismiss the town's counterclaim for injunctive relief and an order removing the boathouse in the landowner's declaratory judgment action. Beneke v Town of Santa Clara, 28 A.D.3d 998, 814 N.Y.S.2d 315, 2006 N.Y. App. Div. LEXIS 4534 (N.Y. App. Div. 3d Dep't 2006).

Town had capacity to file an action against a landowner for injunctive relief and an order removing the landowner's boathouse even if it was not an appropriate party under N.Y. Exec. Law § 382(3); the town was a municipal corporation under N.Y. Town Law § 2, and, as a corporation, had the right to sue and be sued in all courts like a natural person under N.Y. Const. art. X, § 4, and the action was not contrary to its authorized enforcement powers under N.Y. Exec. Law §§ 381, 382. Beneke v Town of Santa Clara, 28 A.D.3d 998, 814 N.Y.S.2d 315, 2006 N.Y. App. Div. LEXIS 4534 (N.Y. App. Div. 3d Dep't 2006).

N.Y. Exec. Law §§ 381(2), 371(2)(d) can be read as no more than a direction to New York State municipalities as to how to act, in contrast with statutory language relied on by municipalities in cases in which they have been held to be immune where a similar direction was coupled with an explicit conferral of regulatory power. Elec. Inspectors, Inc. v Vill. of East Hills, 313 F.3d 685, 2002 U.S. App. LEXIS 25533 (2d Cir. N.Y.), reprinted, 320 F.3d 110, 2002 U.S. App. LEXIS 28147 (2d Cir. N.Y. 2002).

A county's costs in administering and enforcing the New York State Fire Prevention and Building Code on behalf of local governments which have elected to have the county perform such activities are payable from county-wide taxes, fees and State aid. 1984 Op St Compt 84-56.

A county's costs in administering and enforcing the New York State Fire Prevention and Building Code on behalf of local governments which have elected to have the county perform such activities are payable from county-wide taxes, fees and State aid. 1984 Op St Compt No. 84-56.

A village may appropriate funds for an education program which promotes fire prevention. 1984 Op St Compt 84-67.

When town establishes excessive building permit fee to cover costs of administering and enforcing State Uniform Fire Prevention and Building Code (CLS Exec §§ 370 et seq.), town may adopt local law authorizing refund of claims which are equitably payable. 1986 Op St Compt No. 86-42.

Town permit fees must bear direct relation to costs of issuing permit and inspecting or enforcing permitted activity, and may not be charged to offset cost of general governmental functions, and reasonable classifications of applicants may be established and different fees fixed for each such class, if town has rational basis for such distinctions; higher town building permit fees for seasonal, unheated structures would appear to be more readily justifiable if town's administrative costs for processing permit and inspecting and regulating site were greater for such type of structure. 1999 Op St Compt No. 99-13.

The Village of Bronxville may adopt a local law authorizing the sharing of state aid moneys which it receives for administration and enforcement of the State Fire Prevention and Building Code with the Eastchester Fire District of which it is a part. 1984 Op St Comp File #84-33.

2. Under former § 383

Since regulation and imposition of building permit fees is statutorily reserved to local jurisdictions, there is strong presumption that city did not intend that state code provisions should infringe upon this local authority. Syracuse v Hueber, 52 A.D.2d 341, 383 N.Y.S.2d 774, 1976 N.Y. App. Div. LEXIS 12026 (N.Y. App. Div. 4th Dep't 1976).

The determination by a town board of zoning appeals declaring that a use of petitioner's premises as a motel and restaurant was illegal because the certificate of occupancy issued therefor was null and void and based on an illegal building permit, was wholly improper, arbitrary and lacking in substantial evidence. The Board was without jurisdiction to declare the certificate of occupancy null and void since, pursuant to former Executive Law § 383, once the certificate of occupancy was issued by an officer of the town, the town was bound as to all matters set forth within that certificate, and no order, direction or requirement at variance therewith could be made by any municipal agency regarding the validity of the certificate; the town, by adopting the State Building Code, wherein § 383 was contained, also adopted the exclusive remedies set out in said section to set aside the certificate, and until such time as the certificate is set aside by the proper authority, it is binding and conclusive as to the legality of the use set forth therein. Bekermus v Nardy, 123 Misc. 2d 378, 472 N.Y.S.2d 570, 1984 N.Y. Misc. LEXIS 3010 (N.Y. Sup. Ct. 1984).

State building construction code is adopted by resolution of the town board and necessary enforcement legislation is enacted by ordinance. 1953 Ops St Compt 396.

There is no authority for contract between town and village or villages therein whereby town would administer and enforce state building code in entire town. 1954 Ops St Compt 103.

After a town has adopted the State Building Code, its building inspector should not continue as director of a firm which sells building materials and supplies to the town or in the town. 1963 Ops St Compt #303.

A municipality may adopt the state building construction code by adoption of a resolution but enforcement must be pursuant to an ordinance or local law. 1967 Ops St Compt File #493.

It is not necessary that the municipality pass a resolution abandoning its local building code after the adoption of the state building construction code. 1967 Ops St Compt File #493.

Where a building is constructed and is in violation of the state building construction code, the town may: (1) utilize any enforcement method adopted by local law or ordinance; (2) order necessary corrections; (3) obtain an injunction against further construction or ordering an abatement; or (4) refuse to issue a certificate of occupancy. 1967 Ops St Compt File #525.

A town may have adopted both its own town building code and the State Code, provided the town code does not allow its code to supersede, void, repeal or contain a more restrictive provision than the State Code. 1969 Ops St Compt File #129.

A municipality adopting the State Building Construction Code must adopt by local law or ordinance penalty provisions to cover violations of the code. Penalties adopted for the town's own building code do not apply to violations of the State Code because the lack of notice would create a due process problem. 1969 Ops St Compt File #129.

Where precluded by the town board, a town building inspector may not institute a civil action for the enforcement of the State Building Construction Code, as adopted by the town. In such case,

he bears no legal responsibility for the non-enforcement thereof. 1976 Ops St Compt File #35.

3. Under former § 384

Where a building is constructed and is in violation of the state building construction code, the town may: (1) utilize any enforcement method adopted by local law or ordinance; (2) order necessary corrections; (3) obtain an injunction against further construction or ordering an abatement; or (4) refuse to issue a certificate of occupancy. 1967 Ops St Compt File #525.

4. Under former § 385

The primary purpose of this law being to provide standards and not to protect any particular person or classes of persons against defined hazards, a building code violation does not subject the violator to absolute statutory liability for damage or injury to others, but merely constitutes some evidence of negligence. Major v Waverly & Ogden, Inc., 7 N.Y.2d 332, 197 N.Y.S.2d 165, 165 N.E.2d 181, 1960 N.Y. LEXIS 1512 (N.Y. 1960).

Where a building is constructed and is in violation of the state building construction code, the town may: (1) utilize any enforcement method adopted by local law or ordinance; (2) order necessary corrections; (3) obtain an injunction against further construction or ordering an abatement; or (4) refuse to issue a certificate of occupancy. 1967 Ops St Compt File #525.

A municipality adopting the State Building Construction Code must adopt by local law or ordinance penalty provisions to cover violations of the code. Penalties adopted for the town's own building code do not apply to violations of the State Code because the lack of notice would create a due process problem. 1969 Ops St Compt File #129.

5. Under former § 386

Party for whom a home had been constructed by the defendant corporation could not charge the defendant corporation and an individual officer thereof with violation of the State Building Construction Code in view of a town ordinance which, in adopting the Code, provided that the building department was charged with the enforcement of the State Building Construction Code. People v Yarrington, 62 Misc. 2d 1030, 310 N.Y.S.2d 976, 1970 N.Y. Misc. LEXIS 1749 (N.Y. Dist. Ct. 1970).

Where town had accepted state building code, and rules adopted by state building council specifically permitted use of plastic pipe in one and two-family dwellings and multiple dwellings not exceeding six stories in height, neither the town superintendent of buildings nor any town official, nor the town board itself had authority to promulgate order banning plastic piping in the town, and such order was illegal, arbitrary and capricious. Association of Employing Plumbing Contractors, Inc. v Hanold, 84 Misc. 2d 990, 378 N.Y.S.2d 241, 1975 N.Y. Misc. LEXIS 3248 (N.Y. Sup. Ct. 1975).

A municipality adopting the State Building Construction Code must adopt by local law or ordinance penalty provisions to cover violations of the code. Penalties adopted for the town's own building code do not apply to violations of the State Code because the lack of notice would create a due process problem. 1969 Ops St Compt File #129.

6. Under former § 396

A town may not, by local law or otherwise, delegate to fire district fire chiefs and assistant chiefs the power to enforce the state building conservation and fire prevention code as adopted by the town. 1976 Ops St Compt File #884.

Agency Opinions

Analysis

1. In general
2. Under former § 380
3. Under former § 383
4. Under former § 385
5. Under former § 386

1. In general

County may not "opt out" of enforcement of Uniform Fire Prevention and Building Code as to industrial development agency property; county may "opt out" of enforcement as to all county property or may make agreements with local governments allocating enforcement responsibility. 1995 NY Ops Atty Gen I 95-15.

Provisions of Criminal Procedure Law, including CLS CPL § 420.10(6), are applicable to prosecutions under CLS Gen Mun § 136 and under State Uniform Fire Prevention and Building Code (CLS Exec Art 18). 1995 NY Ops Atty Gen I 95-53.

Village must, under Uniform Fire Prevention and Building Code, establish fire lanes so that emergency services and personnel have access to buildings within village and to permit enforcement of code provisions. 1996 NY Ops Atty Gen I 96-48.

2. Under former § 380

The City of Auburn Industrial Development Authority is not required to obtain a certificate of occupancy from the City of Auburn to occupy a building it erected and is not subject to local or state building construction codes or fire codes or to local inspections and regulations. The City of Auburn has no enforcement jurisdiction over such building and cannot be liable for failure to enforce the codes. 1980 NY Ops Atty Gen March 24 (Informal), 1980 N.Y. AG LEXIS 138.

3. Under former § 383

A Village Police Justice's court has jurisdiction to determine violations of the State Building Code committed within the village. 1959 NY Ops Atty Gen May 12 (informal).

Under the provisions of the Charter of the City of Geneva § 172, a conflict of interest would exist where the City Assessor continues in the real estate business within the city while serving as such Assessor. 1970 NY Ops Atty Gen Dec 9.

A city may adopt an ordinance to provide civil penalties for violations of the State Building Construction Code, except as otherwise expressly provided in article 18 of the Executive Law. 1974 NY Ops Atty Gen Sept 27 (Informal), 1974 N.Y. AG LEXIS 157.

In the City of Batavia the Labor Law and rules and regulations adopted pursuant thereto (i.e., the Industrial Code) apply to all municipal buildings. The SBCC applies only to municipal property in the City of Batavia not used in connection with the performance of purely governmental functions. With regard to municipal property to which both the SBCC and the Industrial Code are applicable, the SBCC is controlling by virtue of Executive Law, § 374(1). 1974 NY Ops Atty Gen Sept 30.

The offices of Building Inspector and Assessor in the City of Norwich could be held by the same person at the same time without creating an incompatibility proscribed by the common law. 1975 NY Ops Atty Gen May 27.

4. Under former § 385

A Village Police Justice's Court has jurisdiction to determine violations of the State Building Code committed within the village. 1959 NY Ops Atty Gen May 12 (informal).

5. Under former § 386

A city may adopt an ordinance to provide civil penalties for violations of the State Building Construction Code, except as otherwise expressly provided in article 18 of the Executive Law. 1974 NY Ops Atty Gen Sept 27 (Informal), 1974 N.Y. AG LEXIS 157.

The City of Auburn Industrial Development Authority is not required to obtain a certificate of occupancy from the City of Auburn to occupy a building it erected and is not subject to local or state building construction codes or fire codes or to local inspections and regulations. The City of Auburn has no enforcement jurisdiction over such building and cannot be liable for failure to enforce the codes. 1980 NY Ops Atty Gen March 24 (Informal), 1980 N.Y. AG LEXIS 138.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 382; CLS Energy §§ 11-107, 11-108; CLS St Fin § 54-g.

Municipal cooperation, CLS Gen Mun §§ 119-m et seq.

Codes, Rules and Regulations:

State aid for housing code enforcement: New York City. 9 NYCRR §§ 1350.1 et seq.

Financial assistance to local governments for building and fire code administration and enforcement. 19 NYCRR §§ 433.1 et seq.

Minimum standards for code enforcement personnel in the state of New York. 19 NYCRR §§ 434.1 et seq.

Minimum standards for code enforcement personnel in the state of New York-administrative procedures. 19 NYCRR §§ 435.1 et seq.

Uniform code: procedures for certain classes of buildings. 19 NYCRR §§ 441.1 et seq.

Uniform code: administration and enforcement in certain local governments. 19 NYCRR §§ 442.1 et seq.

Uniform Fire Prevention and Building Code: variance procedures. 19 NYCRR §§ 450.1 et seq.

Department of state: administration and enforcement of the Uniform Code. 19 NYCRR Part 1203.

Federal Aspects:

Federal Fire Prevention and Control Act, 15 USCS §§ 2201 et seq.

Jurisprudences:

13 Am Jur 2d, Buildings §§ 39 et seq.

Annotations:

Municipal liability for negligent fire inspection and subsequent enforcement. 69 ALR4th 739.

§ 382. Remedies

1. In addition to and not in limitation of any power otherwise granted by law, every local government and its authorized agents shall have the power to order in writing the remedying of any condition found to exist in, on or about any building in violation of the uniform fire prevention and building code and to issue appearance tickets for violations of the uniform code.

2. Any person, having been served, either personally or by registered or certified mail, with an order to remedy any condition found to exist in, on, or about any building in violation of the uniform fire prevention and building code, who shall fail to comply with such order within the time fixed by the regulations promulgated by the secretary pursuant to subdivision one of section three hundred eighty-one of this article, such time period to be stated in the order, and any owner, builder, architect, tenant, contractor, subcontractor, construction superintendent or their agents or any other person taking part or assisting in the construction of any building who shall knowingly violate any of the applicable provisions of the uniform code or any lawful order of a local government, a county or the secretary made thereunder regarding standards for construction, maintenance, or fire protection equipment and systems, shall be punishable by a fine of not more than one thousand dollars per day of violation, or imprisonment not exceeding one year, or both.

3. Where the construction or use of a building is in violation of any provision of the uniform code or any lawful order obtained thereunder, a justice of the supreme court at a special term in the judicial district in which the building is located, may order the removal of the building or an abatement of the condition in violation of such provisions. An application for such relief may be made by the secretary, an appropriate municipal officer, or any other person aggrieved by the violation.

4. Where a building has been altered in violation of any provision of the uniform code or any lawful order obtained thereunder, and such alteration impedes a person's egress from such building during a fire or other emergency evacuation, the owner of such building who has knowledge of such alteration or should have had knowledge of such alteration shall be subject to a civil penalty of up to seven thousand five hundred dollars.

HISTORY:

Add, L 1981, ch 707, § 1, eff July 21, 1981; amd, L 1997, ch 135, § 1, eff June 25, 1997; L 2020, ch 333, § 1, effective December 15, 2020.

Prior Law: Former § 382, add, L 1951, ch 800, § 1, with substance transferred from § 187; amd, L 1954, ch 377, § 1, L 1961, ch 197, § 13, L 1962, ch 310, § 136, L 1974, ch 266, § 1, L 1978, ch 397, § 5; repealed, L 1981, ch 707, § 12, eff Jan 1, 1984.

Notes to Decisions

Analysis

1. In general
2. Under former § 382

1. In general

Property owners' causes of action under CLS Exec § 382(3) against neighbor alleging that neighbor's garage eave created storm water drainage problem on owners' property was time-barred under CLS CPLR § 214(2) where action was commenced more than 3 years after accrual of action—i.e., when garage was completed. Sova v Glasier, 192 A.D.2d 1069, 596 N.Y.S.2d 228, 1993 N.Y. App. Div. LEXIS 4071 (N.Y. App. Div. 4th Dep't 1993).

Ruling by employee of State Division of Housing and Community Development was not conclusive of any facts in dispute in litigation concerning violation of state Uniform Fire Prevention and Building Code where ruling was explicitly characterized as "advisory" only, it was solicited by plaintiffs' expert without notice to defendants, it responded to question premised on data with which defendants took issue, and no defendant had opportunity to be heard before agency prior to issuance of ruling. Zehnder v Ginsburg & Ginsburg Architects, 238 A.D.2d 582, 656 N.Y.S.2d 376, 1997 N.Y. App. Div. LEXIS 4386 (N.Y. App. Div. 2d Dep't 1997).

Court properly denied city's application under CLS Exec § 382(3) for order directing property owner to remove all trees and overgrowth located on certain portions of her property where city had provided owner with vague or inconsistent directives as to what steps must be taken to abate violations of uniform Fire Prevention and Building Code. Allen v Piasecki, 272 A.D.2d 828, 707 N.Y.S.2d 729, 2000 N.Y. App. Div. LEXIS 5970 (N.Y. App. Div. 3d Dep't 2000).

County's plan to demolish county-owned building located in historic district in city was not emergency action exempt from State Environmental Quality Review Act, although parties agreed that building was unsafe, where city ordered stabilization and submission of preservation plan for building's facade, while county claimed that cost of stabilization and preservation of facade was prohibitive; question of fact existed under 6 NYCRR 617.5(c)(38) regarding which type of emergency action would "cause the least change or disturbance, practicable under the circumstances, to the environment." Historic Albany Found. v Breslin, 282 A.D.2d 981, 724 N.Y.S.2d 113, 2001 N.Y. App. Div. LEXIS 4161 (N.Y. App. Div. 3d Dep't), app. denied, 97 N.Y.2d 636, 735 N.Y.S.2d 489, 760 N.E.2d 1284, 2001 N.Y. LEXIS 3357 (N.Y. 2001).

Order for injunctive relief compelling the removal of a floating boathouse was affirmed because the continued presence of the floating boathouse constituted a continuing violation of a town's local law, and N.Y. Exec. Law § 382(2) expressly authorized the ongoing accrual of penalties for continuing violations. Beneke v

Town of Santa Clara, 45 A.D.3d 1164, 846 N.Y.S.2d 681, 2007 N.Y. App. Div. LEXIS 12485 (N.Y. App. Div. 3d Dep't 2007), app. denied, 10 N.Y.3d 706, 857 N.Y.S.2d 39, 886 N.E.2d 804, 2008 N.Y. LEXIS 808 (N.Y. 2008).

Supreme court did not err in determining that the Municipal Code Violations Bureau (MCVB) had jurisdiction to adjudicate a citizen's violations of the New York State Uniform Fire Prevention and Building Code 19 NYCRR 1219.1 et seq. because the citizen was charged only with violations of the Building Code pursuant to Executive Law § 382(1), and Executive Law § 381(1) specifically authorized local governments to enforce the Building Code; pursuant to City of Rochester, N.Y., Municipal Code § 13A-2(1), the MCVB had jurisdiction to adjudicate the violations in question, and because the citizen was charged with only violations pursuant to Executive Law § 382(1) rather than misdemeanor offenses pursuant to Executive Law § 382 (2), the city was not required to allege as an element of the violations that the citizen had been served with an order to remedy those violations. Matter of Ophardt v Vasquez, 74 A.D.3d 1742, 904 N.Y.S.2d 835, 2010 N.Y. App. Div. LEXIS 4958 (N.Y. App. Div. 4th Dep't), app. dismissed, app. denied, 15 N.Y.3d 867, 910 N.Y.S.2d 33, 936 N.E.2d 915, 2010 N.Y. LEXIS 2988 (N.Y. 2010).

There was substantial evidence in the record to support the determination that a citizen received the notices and orders advising him that he was in violation of the New York State Uniform Fire Prevention and Building Code 19 NYCRR 1219.1 et seq., and because the citizen was not charged with misdemeanor offenses pursuant to Executive Law § 382(2), service by registered or certified mail was not required. Matter of Ophardt v Vasquez, 74 A.D.3d 1742, 904 N.Y.S.2d 835, 2010 N.Y. App. Div. LEXIS 4958 (N.Y. App. Div. 4th Dep't), app. dismissed, app. denied, 15 N.Y.3d 867, 910 N.Y.S.2d 33, 936 N.E.2d 915, 2010 N.Y. LEXIS 2988 (N.Y. 2010).

Defendant's conviction for using a cellar as a habitable space, in violation of 9 NYCRR § 1241.1(c), pursuant to N.Y. Exec. Law § 382(2), was reversed as the accusatory instrument made no allegations regarding a written order that defendant failed to comply with; consequently, the accusatory instrument failed to contain nonhearsay allegations of fact that established, if true, every element of the offense charged as was required by N.Y. Crim. Proc. Law § 100.40(1), and was facially insufficient. People v Caravousanos, 770 N.Y.S.2d 820, 2 Misc. 3d 7, 2003 N.Y. Misc. LEXIS 1684 (N.Y. App. Term 2003).

Town had capacity to file an action against a landowner for injunctive relief and an order removing the landowner's boathouse even if it was not an appropriate party under N.Y. Exec. Law § 382(3); the town was a municipal corporation under N.Y. Town Law § 2, and, as a corporation, had the right to sue and be sued in all courts like a natural person under N.Y. Const. art. X, § 4, and the action was not contrary to its authorized enforcement powers under N.Y. Exec. Law §§ 381, 382. Beneke v Town of Santa Clara, 28 A.D.3d 998, 814 N.Y.S.2d 315, 2006 N.Y. App. Div. LEXIS 4534 (N.Y. App. Div. 3d Dep't 2006).

As a trial court appropriately set forth its reasoning for imposing a fine on a property owner who repeatedly refused to remove a boathouse from a lake despite court orders to do so, the imposition of a fine pursuant to N.Y. Exec. Law § 382(2) was proper. Beneke v Town of Santa Clara, 61 A.D.3d 1079, 876 N.Y.S.2d 229, 2009 N.Y. App. Div. LEXIS 2437 (N.Y. App. Div. 3d Dep't 2009).

Accusatory instruments charging defendant with violating N.Y. Exec. Law § 382(2) were facially insufficient and had to be dismissed because they did not allege that defendant was properly served, did not timely comply with orders to remedy observed violations of the Uniform Code, was taking part or assisting in the construction of the buildings, and knowingly violated the Uniform Code. People v Plateau Assoc. LLC, 952 N.Y.S.2d 769, 38 Misc. 3d 770, 2012 N.Y. Misc. LEXIS 4800 (N.Y. J. Ct. 2012).

Justice court erred in convicting defendant, after a nonjury trial, of violating the Property Maintenance Code because the first section of the Executive Law at issue contained no provision authorizing the imposition of a fine or a jail sentence, and the information did not allege that defendant had been served with a notice to remedy, or that any of the violations of the Property Maintenance Code had been committed in conjunction with the construction of a building. People v Levin, 59 Misc. 3d 53, 74 N.Y.S.3d 681, 2018 N.Y. Misc. LEXIS 1189 (N.Y. App. Term 2018).

2. Under former § 382

Town's remedy with respect to alleged violations of State Building Construction Code by Urban Development Corporation was to appeal to State Board of Review. Greece v Urban Dev. Corporation-Greater Rochester, Inc., 79 Misc. 2d 375, 360 N.Y.S.2d 171, 1974 N.Y. Misc. LEXIS 1667 (N.Y. Sup. Ct. 1974).

Agency Opinions

1. In general

Village must, under Uniform Fire Prevention and Building Code, establish fire lanes so that emergency services and personnel have access to buildings within village and to permit enforcement of code provisions. 1996 NY Ops Atty Gen I 96-48.

County building inspector may not also serve as town justice for town within county, as inspector can issue appearance tickets for violations which are returnable in town court, such that appearance of impropriety exists if town justice, in capacity as building inspector, is required to appear as complainant before his fellow justice. NY Ops Atty Gen 88-44 (Informal).

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

13 Am Jur 2d, Buildings §§ 39 et seq.

Annotations:

Municipal liability for neglient fire inspection and subsequent enforcement. 69 ALR4th 739.

§ 382-a. Buildings with truss type construction; notice requirements and enforcement

1. All commercial and industrial structures that utilize truss type construction shall be marked by a sign or symbol in a manner sufficient to warn persons conducting fire control and other emergency operations of the existence of truss construction in the structure.

2. The council shall promulgate rules and regulations it deems necessary to carry into effect the provisions of this section, including, but not limited to:

a. The dimensions and color of such sign or symbol;

b. The time within which commercial and industrial structures that utilize truss type construction shall be so marked; and

c. The location on each commercial and industrial structure that utilizes truss type construction where such sign or symbol should be posted.

3. The fee for producing the signs or symbols used to mark buildings with truss type construction shall be fifty dollars, which cost shall be borne by the owner of such building.

4. Local governments shall provide by local law for the enforcement of the provisions of this section. Local governments may provide for joint enforcement of the provisions of this section by agreement pursuant to article five-G of the general municipal law.

5. The provisions of this section shall not apply to any city with a population of one million or more persons.

HISTORY:

Add, L 2001, ch 119, § 2, eff Jan 1, 2002 (see 2001 note below).

Editor's Notes: Laws 2001, ch 119, § 3, eff Jan 1, 2002, provides as follows:

§ 3. This act shall take effect on the first day of January next succeeding the date on which it shall have become a law; provided, however, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date is authorized and directed to be made and completed within 180 days after the date on which this act shall have become a law.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

Department of state: identification of buildings utilizing truss type construction. 19 NYCRR Part 1264.

§ 382-b. Residential buildings with truss type, pre-engineered wood or timber construction; notice requirements

1.

a. Any person utilizing truss type, pre-engineered wood or timber construction for the erection of any new residential structure, for any addition to an existing residential structure, or for any rehabilitation of an existing residential structure, shall, upon application for a building permit with the local government having jurisdiction, include on the permit application that truss type, pre-engineered wood or timber construction is being utilized.

b. The property owner or the property owner's representative shall complete a form prescribed by the council designating the structure as truss type, pre-engineered wood or timber construction and file such form with the application for a building permit.

c. Upon receiving the application for a building permit and a form designating the structure as truss type, pre-engineered wood or timber construction, the local government having jurisdiction shall notify by certified mail, facsimile, e-mail or other electronic means, the chief of the fire district, fire department or fire company having jurisdiction over the structure to be erected, added to, or modified, or his or her designee, that truss type, pre-engineered wood or timber construction is being utilized.

d. As a condition of the final receipt of a certificate of occupancy or certificate of completion, a sign or symbol designed and approved by the council shall be affixed to any electric box attached to the exterior of the structure, if one exists.

e. The property owner or his or her representative shall be responsible for maintaining the sign or symbol on the electric box of the residence, as required by paragraph d of this subdivision, and shall replace the sign or symbol when any changes or modifications are made to the electric box or the sign or symbol is damaged.

2.

a. The local building department or local code enforcement official having jurisdiction over the residential structure to be erected, added to, or modified, or his or her designee shall consult with the county fire coordinator, local 911 and emergency dispatchers, and the local fire protection provider or entity deemed pertinent to determine the manner sufficient to warn persons conducting fire control and other emergency operations of the existence of truss type, pre-engineered wood or timber construction in the structure.

b. The chief of the fire district, fire department, or fire company having jurisdiction over the residential structure to be erected, added to, or modified, or his or her designee shall use the information provided under subdivision one of this section to warn persons conducting fire control and other emergency operations of the existence of truss type, pre-engineered wood or timber construction in the structure.

c. Nothing contained in this section shall in any way affect or diminish section two hundred five-b of the general municipal law.

3. The council shall promulgate rules and regulations it deems necessary to carry into effect the provisions of this section including, but not limited to, the dimensions and color of such sign or symbol.

4. Local governments shall provide by local law or resolution for the enforcement of the provisions of this section, if necessary. Local governments may provide for joint enforcement of the provisions of this section by agreement pursuant to article five-G of the general municipal law.

5. The provisions of this section shall not apply to any city with a population of one million or more persons.

HISTORY:

L 2014, ch 353, § 1, effective January 1, 2015.

Editor's Notes Laws 2014, ch 353, §§ 2 and 3, eff Jan 1, 2015, provide:

§ 2. The secretary of state, and the state fire administrator, shall to the greatest extent practical make available, and incorporate into existing uniform fire prevention and building code training, and other fire safety training, educational information highlighting truss type, pre-engineered wood or timber construction and safety precautions.

§ 3. This act shall take effect on the first of January next succeeding the date on which it shall have become a law; provided, however, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date is authorized and directed to be made and completed within 180 days after the date on which this act shall have become a law.

ARTICLE 19 Display and Use of the Flag of the United States of America in Parks and on Public Buildings

Section

401. Definitions
402. Application
403. Rules; manner of display
403-b. Display of flag in certain parks

HISTORY:

Add, L 1971, ch 1152, § 1, eff Aug 5, 1971; amd, L 2006, ch 688, § 1, eff Sept 13, 2006.

§ 401. Definitions

As used in this article, unless a different meaning clearly appears from the context, the following terms shall have the following meanings:

1. "Flag" shall mean the flag of the United States of America.

2. "Public building" shall mean all buildings including grounds and premises adjacent or appurtenant thereto or connected thereto belonging to the state, county, town, village, school district or any other political or civil subdivision of state or local government.

3. "Local agency" shall include all county, city, town and village governing bodies, all other public corporations, special districts and school districts in the state.

4. "State agencies" shall include any department, division, board, bureau, commission, office, agency, authority or public corporation of the state.

HISTORY:

Add, L 1971, ch 1152, § 1, eff Aug 5, 1971.

Prior Law: Former § 401, add, L 1954, ch 98, § 1; amd, L 1958, ch 317, § 1; repealed, L 1961, ch 208, § 1, eff April 3, 1961, with substance transferred to Civ S § 152.

Prior § 401, see history note to Article 19.

RESEARCH REFERENCES AND PRACTICE AIDS

Federal Aspects:

Design and use of flag of the United States of America, 4 USCS §§ 1 et seq.

Jurisprudences:

35C NY Jur 2d Criminal Law Substantive Principles and Offenses §§ 1838, 1840.

§ 402. Application

The rules and procedures for display and use of the flag set forth in this article shall govern the display of the flag on all public buildings within the state and shall supersede any contrary rule or custom of state or local agencies governing display provided, however, a school district may promulgate its own regulations to allow the flag to be flown at half-staff to commemorate the death of a present or former board member, present employee, teacher, student, clerk or custodian.

HISTORY:

Add, L 1971, ch 1152, § 1, eff Aug 5, 1971.

RESEARCH REFERENCES AND PRACTICE AIDS

Federal Aspects:

Design and use of flag of the United States of America, 4 USCS §§ 1 et seq.

§ 403. Rules; manner of display

The following rules and customs shall be deemed the proper manner to display the flag:

1. The flag shall be displayed only from sunrise to sunset on buildings and on stationary flagstaffs in the open. However, the flag may be displayed at night upon special occasions when it is desired to produce a patriotic effect.

2. The flag shall be displayed daily, weather permitting, on or near the main administration building of every public institution, whenever such institution is open to the public. The flag shall also be displayed, weather permitting, on the following days in each year: the first day of January, known as New Year's day; the third Monday of January, known as Dr. Martin Luther King, Jr. day; the twelfth day of February, known as Lincoln's birthday; the third Monday in February, known as Washington's birthday; the last Monday in May, known as Memorial day; the second Sunday of June, known as Flag day; the fourth day of July, known as Independence day; the first Monday in September, known as Labor day; the third Friday in September, known as National POW/MIA Recognition day, except if such date of commemoration cannot be observed due to a religious holiday, such observances shall then be conducted on the second Friday in September; September eleventh, known as September 11th Remembrance Day; the second Monday in October, known as Columbus day; the eleventh day of November, known as Veterans day; the fourth Thursday in November, known as Thanksgiving day; the seventh day of December, known as Pearl Harbor day; and the twenty-fifth day of December, known as Christmas day, and if any of such days except Flag day is Sunday, the next day thereafter; each general election day, and each day appointed by the President of the United States or by the Governor of this state as a day of general thanksgiving or for displaying the flag.

3. The flag shall not be displayed on days when the weather is inclement.

4. The flag shall be displayed in or near every polling place on election days.

5. The flag shall be displayed daily during school days in, on or near every schoolhouse.

6. The flag shall be hoisted briskly and lowered ceremoniously.

7. No person shall display the flag of the United Nations or any other national or international flag equal, above, or in a position of superior prominence or honor to, or in place of, the flag of the United States provided, that nothing in this section shall make unlawful the continuance of the practice heretofore followed of displaying the flag of the United Nations in a position of superior prominence or honor, and other national flags in positions of equal prominence or honor, with that of the flag of the United States at the headquarters of the United Nations.

8. When a number of flags of states or localities or pennants of societies are grouped and displayed from staffs, the flag of the United States of America shall be at the center and at the highest point of the group.

9. When flags of states, cities, or localities, or pennants of societies are flown on the same halyard with the flag of the United States, the latter shall always be at the peak. When the flags are flown from adjacent staffs, the flag of the United States shall be hoisted first and lowered last. No such flag or pennant shall be placed above the flag of the United States or to the right of the flag of the United States.

10. When the flag of the United States is displayed from a staff projecting horizontally or at an angle from the window sill, balcony, or front of a building, the union of the flag shall be placed at the peak of the staff unless the flag is at half-staff. When

the flag is suspended over a sidewalk from a rope extending from a house to a pole at the edge of the sidewalk, the flag shall be hoisted out, union first, from the building.

11. When the flag is displayed otherwise than by being flown from a staff, it shall be displayed flat, whether indoors or out, or so suspended that its folds fall as free as though the flag were staffed.

12. When the flag is displayed over the middle of the street, it shall be suspended vertically with the union to the north in an east and west street or to the east in a north and south street.

13. The flag, when flown at half-staff, shall be first hoisted to the peak for an instant and then lowered to the half-staff position. The flag shall be again raised to the peak before it is lowered for the day. By "half-staff" is meant lowering the flag to one-half the distance between the top and bottom of the staff. Crepe streamers shall not be affixed to spear heads or flagstaffs except by order of the President of the United States or the Governor of this state.

14. No disrespect shall be shown to the flag of the United States of America, nor shall the flag be dipped to any person or thing.

15. The flag shall not be displayed with the union down except as a signal of dire and immediate distress.

16. The flag shall always be carried aloft and free, not flat or horizontally.

17. The flag shall not be fastened, displayed, used, or stored in such a manner as will permit it to be easily torn, soiled, or damaged in any way.

18. No one shall place upon the flag, or on any part of it, or attach to it any mark, insignia, letter, word, figure, design, picture, or drawing of any nature.

19. The flag, when it is in such condition that it is no longer a fitting emblem for display shall be destroyed in a dignified way by burning.

20. The flag shall not be used as a ceiling covering or drapery of any sort whatsoever, nor festooned, drawn back, nor up, in folds. The flag shall always be allowed to fall free without touching any surface or object beneath or below it.

21. The flag shall be flown at full staff at all times except it shall be flown at half-staff on the eleventh of September, known as September 11th Remembrance Day, the seventh day of December, known as Pearl Harbor Day, and to commemorate the death of a personage of national or state standing or of a local serviceman, official or public servant who, in the opinion of the local agency concerned, contributed to the community. It may also be flown at half-staff during special periods of mourning designated by the President of the United States or the Governor of this state.

HISTORY:

Add, L 1971, ch 1152, § 1, eff Aug 5, 1971; amd, L 1974, ch 445, § 1; L 1984, ch 437, § 1; L 1985, ch 120, § 1; L 1988, ch 561, § 1, eff Aug 15, 1988; L 1996, ch 325, § 1, eff July 17, 1996; L 2004, ch 666, §§ 2, 3, eff Oct 26, 2004.

Notes to Decisions

Prosecution under federal Flag Protection Act (18 USCS § 700) for burning American flag violated First Amendment. United States v Eichman, 496 U.S. 310, 110 S. Ct. 2404, 110 L. Ed. 2d 287, 1990 U.S. LEXIS 3087 (U.S. 1990).

RESEARCH REFERENCES AND PRACTICE AIDS

Federal Aspects:

Design and use of flag of the United States of America, 4 USCS §§ 1 et seq.

Display of flag, 36 USCS 173 et seq.

Jurisprudences:

35 Am Jur 2d, Flag §§ 2–5.

Annotations:

What constitutes violation of flag desecration statutes. 41 ALR3d 502.

Validity, and standing to challenge validity, of state statute prohibiting flag desecration and misuse. 31 ALR6th 333.

§ 403-b. Display of flag in certain parks

Any state park of this state with developed facilities for public use shall display the flag daily in an area where it is viewed by the public. Such display shall be in accordance with the rules and customs deemed proper for display pursuant to section four hundred three of this article.

HISTORY:

Add, L 2006, ch 688, § 2, eff Sept 13, 2006.

ARTICLE 19-B State Bingo Control Commission

Section

432.	Definitions
435.	Powers and duties of the commission
436.	Hearings; immunity
437.	Place of investigations and hearings; witnesses; books and documents
438.	Privilege against self-incrimination

HISTORY:

Add, L 1957, ch 853, § 1, eff Jan 1, 1958; amd, L 1962, ch 437, § 1, eff June 1, 1962.

§ 432. Definitions

As used in this article, the following terms shall have the following meanings:

1. "Control commission" or "commission" shall mean the New York state gaming commission created pursuant to section one hundred two of the racing, pari-mutuel wagering and breeding law.

2. "Municipality" shall mean any city, town or village within this state.

3. "Bingo" or "game" shall mean a specific game of chance, commonly known as bingo or lotto, in which prizes are awarded on the basis of designated numbers or symbols on a card conforming to numbers or symbols selected at random.

4. "Authorized organization" shall mean any bona fide religious or charitable organization or bona fide educational, fraternal, civic or service organization or bona fide organization of veterans, volunteer firefighters, or volunteer ambulance workers, which by its charter, certificate of incorporation, constitu-

tion, or act of the legislature, shall have as its dominant purpose or purposes one or more of the lawful purposes as defined in the bingo licensing law, provided that each shall operate without profit to its members, and provided that each such organization has engaged in serving one or more of the lawful purposes as defined in the bingo licensing law, article fourteen-H of the general municipal law, for a period of one year immediately prior to applying for a license under the licensing law.

5. "Bingo licensing law" shall mean article fourteen-h of the general municipal law.

HISTORY:

Add, L 1957, ch 853, § 1; amd, L 1962, ch 437, § 1, eff June 1, 1962; L 1963, ch 3, § 1, eff Feb 11, 1963; L 1977, ch 46, § 2, eff April 1, 1977; L 1988, ch 24, § 11, eff Jan 1, 1989; L 2012, ch 60, § 4 (Part A), eff Feb 1, 2013.

Editor's Notes: Laws 1977, ch 46, § 5, eff April 1, 1977, provides as follows:

§ 5. Whenever the state bingo control commission is referred to or designated in any general, special or local law or in any rule, regulation, executive order, contract or other document, such reference or designation shall be deemed to refer to the state racing and wagering board. For the purpose of succession to all functions, powers, duties, rights and obligations transferred and assigned to, devolved upon and assumed by the state racing and wagering board, the state racing and wagering board shall be deemed and held to constitute the continuation of the state bingo control commission and not a different agency or authority.

Laws 2012, ch 60, § 14 (Part A), eff Feb 1, 2013, provides as follows:

§ 14. This act shall take effect February 1, 2013; provided, however that effective immediately, the addition, amendment and/or repeal of any rules or regulations necessary for the implementation of the foregoing provisions of this act on its effective date are authorized and directed to be made and completed on or before such effective date (Amd, L 2012, ch 457, § 7, eff Sept 28, 2012.).

Laws 2012, ch 457, § 7, eff Sept 28, 2012 amended L 2012, ch 60, § 4 (Part A), so as to change the effective date October 1, 2012 to February 1, 2013.

Amendment Notes: 2012. Chapter 60, § 4 (Part A) amended:

Sub 1 by deleting at fig 1 "racing and wagering board" and adding the matter in italics.

Agency Opinions

Certain games called "Skilo" and "Darto" are sufficiently similar in nature to Bingo so that they may not be played without legislative approval. 1963 NY Ops Atty Gen Aug 15.

Use of word "bingo" by television game show broadcast into New York State does not itself bring that show within purview of bingo licensing law; however, if use of word "bingo" is accompanied by bingo type game which involves participation by home viewers, such activity creates impression that home participant is playing state sanctioned bingo which would bring activity within purview of state regulation. 1987 N.Y. Op. Att'y Gen. No. 87-F6.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

Bingo, definitions. 9 NYCRR § 5800.1.

Jurisprudences:

62 NY Jur 2d Gambling §§ 9, 64, 66.

§ 435. Powers and duties of the commission

1. The commission shall have the power and it shall be its duty to:

(a) Supervise the administration of the bingo licensing law and adopt, amend and repeal rules and regulations governing the issuance and amendment of licenses thereunder and the conducting of games under such licenses, which rules and regulations shall have the force and effect of law and shall be binding upon all municipalities issuing licenses, and upon licensees thereunder and licensees of the commission, to the end that such licenses shall be issued to qualified licensees only and that said games shall be fairly and properly conducted for the purposes and in the manner in the said bingo licensing law prescribed and to prevent the games thereby authorized to be conducted from being conducted for commercial purposes or purposes other than those therein authorized, participated in by criminal or other undesirable elements and the funds derived from the games being diverted from the purposes authorized, and, to provide uniformity in the administration of said law throughout the state, the commission shall prescribe forms of application for licenses, licenses, amendment of licenses, reports of the conduct of games and other matters incident to the administration of such law;

(b) Conduct, anywhere within the state, investigations of the administration, enforcement and potential or actual violations of the bingo licensing law and of the rules and regulations of the commission;

(c) Review all determinations and actions of the municipal governing body in issuing an initial license, and it may review the issuance of subsequent licenses and, after hearing, revoke those licenses which do not in all respects meet the requirements of this article, article fourteen-h of the general municipal law and the rules and regulations of the commission;

(d) Suspend or revoke a license, after hearing, for any violation of the provisions of this article, article fourteen-h of the general municipal law or the rules and regulations of the commission;

(e) Hear appeals from the determinations and action of the municipal governing body in connection with the refusing to issue licenses, the suspension and revocation of licenses and the imposition of fines in the manner prescribed by law and the action and determination of the commission upon any such appeal shall be binding upon the municipal governing body and all parties thereto;

(f) Initiate prosecutions for violations of this article and of the bingo licensing law;

(g) Carry on continuous study of the operation of the bingo licensing law to ascertain from time to time defects therein jeopardizing or threatening to jeopardize the purposes of this article, and to formulate and recommend changes in such law and in other laws of the state which the commission may determine to be necessary for the realization of such purposes, and to the same end to make a continuous study of the operation and administration of similar laws which may be in effect in other states of the United States.

(h) Supervise the disposition of all funds derived from the conduct of bingo by authorized organizations not currently licensed to conduct such games;

(i) Issue an identification number to an applicant authorized organization if it shall determine that the applicant satisfies the requirements of the bingo licensing law and the rules and regulations.

2. (a) The commission shall have the power to issue or, after hearing, refuse to issue a license permitting a person, firm or corporation to sell or distribute to any other person, firm or corporation engaged in business as a wholesaler, jobber, distributor or retailer of all cards, boards, sheets, pads and all other supplies, devices and equipment designed for use in the play of bingo by an organization duly licensed to conduct bingo games or to sell or distribute any such materials directly to such an organization. For the purposes of this section the words "sell or distribute" shall include, but shall not be limited to, the following activities; offering for sale, receiving, handling, maintaining, storing the same on behalf of such an organization, distributing or providing the same to such an organization, and offering for sale or lease bingo devices and equipment. Each such license shall be valid for one year.

(b) No person, firm or corporation, other than an organization that is or has been during the preceding twelve months duly licensed to conduct bingo games, shall sell or distribute bingo supplies or equipment without having first obtained a license therefor upon a written or electronic application made, verified and filed with the commission in the form prescribed by the rules and regulations of the commission. As a part of its determination concerning the applicant's suitability for licensing as a bingo supplier, the commission shall require the applicant to furnish to such board two sets of fingerprints. Such fingerprints shall be submitted to the division of criminal justice services for a state criminal history record check, as defined in subdivision one of section three thousand thirty-five of the education law, and may be submitted to the federal bureau of investigation for a national criminal history record check. In each such application for a license under this section shall be stated the name and address of the applicant; the names and addresses of its officers, directors, shareholders or partners; the amount of gross receipts realized on the sale or distribution of bingo supplies and equipment to duly licensed organizations during the last preceding calendar or fiscal year, and such other information as shall be prescribed by such rules and regulations. The fee for such license shall be a sum equal to twenty-five dollars plus an amount based upon the gross sales, if any, of bingo equipment and supplies to authorized organizations by the applicant during the preceding calendar year, or fiscal year if the applicant maintains his or her accounts on a fiscal year basis, and determined in accordance with the following schedule:

gross sales of $1,000 to $4,999.	$10.00
gross sales of $5,000 to $19,999	$50.00
gross sales of $20,000 to $49,999.	$200.00
gross sales of $50,000 to $100,000	$500.00
gross sales in excess of $100,000.	$1,000.00

(c) The following shall be ineligible for such a license:

(1) a person convicted of a crime if there is a direct relationship between one or more of the previous criminal offenses and the integrity and safety of bingo, considering the factors set forth in article twenty-three-A of the correction law;

(2) a person who is or has been a professional gambler or gambling promoter or who for other reasons is not of good moral character;

(3) a public officer or employee;

(4) an operator or proprietor of a commercial hall duly licensed under the bingo licensing law;

(5) a firm or corporation in which a person defined in clause (1), (2), (3) or (4) of this paragraph, or a person married or related in the first degree to such a person, has greater than a ten percent proprietary, equitable or credit interest or in which such a person is active or employed.

(d) The control commission shall have power to examine or cause to be examined the books and records of any applicant for a license, or any licensee, under this section. Any information so received shall not be disclosed except so far as may be necessary for the purpose of carrying out the provisions of this article and article fourteen-h of the general municipal law.

(e) Any solicitation of an organization licensed to conduct bingo games, to purchase or induce the purchase of bingo supplies and equipment, or any representation, statement or inquiry designed or reasonably tending to influence such an organization to purchase the same, other than by a person licensed or otherwise authorized pursuant to this section shall constitute a violation of this section.

(f) Any person who willfully shall make any material false statement in any application for a license authorized to be issued under this article or who willfully shall violate any of the provisions of this section or of any license issued hereunder shall be guilty of a misdemeanor and, in addition to the penalties in such case made and provided, shall forfeit any license issued to him or it under this section and be ineligible to apply for a license under this section for one year thereafter.

(g) At the end of the license period, a recapitulation shall be made as between the licensee and the commission in respect of the gross sales actually recorded during the license period and the fee paid therefor, and any deficiency of fee thereby shown to be due shall be paid by the licensee and any excess of fee thereby shown to have been paid shall be credited to said licensee in such manner as the commission by the rules and regulations shall prescribe.

3. The commission shall have the power to approve and establish a standard set of bingo cards comprising a consecutively numbered series and shall by its rules and regulations prescribe the manner in which such cards are to be reproduced and distributed to licensed authorized organiza-

tions. The sale or distribution to a licensed authorized organization of any card or cards other than those contained in the standard set of bingo cards shall constitute a violation of this section. Licensed authorized organizations shall not be required to use nor to maintain such cards seriatim excepting that the same may be required in the conduct of limited period bingo games.

HISTORY:

Add, L 1957, ch 853, § 1; amd, L 1962, ch 437, § 3, eff June 1, 1962; L 1963, ch 2, § 1, eff Feb 11, 1963; L 1963, ch 4, § 1; L 1963, ch 374, § 1, eff July 1, 1963; L 1963, ch 611, § 1, eff April 23, 1963; L 1964, ch 859, § 6; L 1966, ch 889, § 1, eff July 29, 1966; L 1967, ch 191, § 1, eff April 10, 1967; L 1969, ch 1088, § 1, eff Sept 1, 1969; L 1974, ch 371, § 1, eff Jan 1, 1975; L 1998, ch 337, § 4, eff Jan 10, 1999; L 2003, ch 164, § 12, eff July 22, 2003; L 2017, ch 59, § 1 (Part MM), effective July 9, 2017; L 2019, ch 55, § 1 (Part II, Subpart C), effective April 12, 2019.

Editor's Notes Laws 1998, ch 337, § 19, eff Jan 10, 1999, provides as follows:

§ 19. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided that the state racing and wagering board is authorized to promulgate any and all rules and regulations and take any other measures necessary to implement this act on its effective date on or before such date.

Laws 2003, ch 164, § 1, eff July 22, 2003, provides as follows:

Section 1. Legislative findings. There are New York state statutes which authorize the fingerprinting of individuals as a part of an application for employment, license or permit. Some of those statutes also authorize the submission of fingerprints to the New York state division of criminal justice services and the federal bureau of investigation for the purpose of obtaining national criminal history record information for these same applicants. After reviewing the applicable New York state statutes to determine compliance with Pub. L. 92-544, the federal statute which authorizes the federal bureau of investigation to exchange records with officials of state and local governments for purposes of employment and licensing, the federal bureau of investigation determined that the statutes amended by this act where insufficient to permit reliance on such statutes as a basis for the authority for the federal bureau of investigation to provide national criminal history record information to state or local government officials in connection with an application for employment, license or permit.

Subdivision 8-a of section 837 of the executive law provides that fingerprints may be submitted to the division of criminal justice services only in connection with an application for employment, license or permit. The amendments contained in this act are not intended to alter that provision in any way; they are simply intended to satisfy the requirements of Public Law 92-544.

Amendment Notes

1999. Chapter 337, § 4 amended:

Sub 2, par (a), by deleting "and".

The 2017 amendment by ch 59, § 1 (Part MM), in the introductory language of 2(b), in the first sentence, substituted "organization that is" for "organization which is" and "a written or electronic application" for "written application," substituted "the commission" for "the New York state racing and wagering board" in the second sentence, and substituted "his or her" for "his" in the last sentence.

The 2019 amendment by ch 55, § 1 (Part II, Subpart C), in 2c, rewrote (1), which formerly read: "a person convicted of a crime who has not received a pardon, a certificate of good conduct or a certificate of relief from disabilities," and in 2(c)(5), substituted "clause (1), (2), (3) or (4) of this paragraph" for "subdivision (1), (2), (3) or (4) above" and "ten percent" for "ten per centum."

Notes to Decisions

Analysis

1. In general
2. Under former § 433

1. In general

In view of the vicissitudes encountered by applicant for commercial lessor's license, the substantial sum allegedly expended in altering its premises for operation of bingo hall and fact that license was issued by Department of Consumer Affairs over a year previously in reliance on Wagering Board's annulment of Bingo Commission's stay, interests of justice and equity would be served by maintaining status quo pending determination of petitioners' appeal by the Bingo Commission. Church of Ascension v New York State Racing & Wagering Bd., 55 A.D.2d 874, 390 N.Y.S.2d 113, 1977 N.Y. App. Div. LEXIS 10067 (N.Y. App. Div. 1st Dep't), app. denied, 42 N.Y.2d 802, 1977 N.Y. LEXIS 3672 (N.Y. 1977), app. dismissed, 42 N.Y.2d 871, 397 N.Y.S.2d 793, 366 N.E.2d 880, 1977 N.Y. LEXIS 2195 (N.Y. 1977), aff'd, 46 N.Y.2d 776, 413 N.Y.S.2d 909, 386 N.E.2d 820, 1978 N.Y. LEXIS 2466 (N.Y. 1978).

Enactment of 1975–1976 state budget bill did not abolish the Bingo Commission nor did it transfer to the Wagering Board the powers and functions of said Commission; hence, Wagering Board lacked jurisdiction to vacate order of the Bingo Commission, which had granted petitioners' leave to file a notice of appeal, nunc pro tunc, from decision of Department of Consumer Affairs granting application for commercial lessor's license. Church of Ascension v New York State Racing & Wagering Bd., 55 A.D.2d 874, 390 N.Y.S.2d 113, 1977 N.Y. App. Div. LEXIS 10067 (N.Y. App. Div. 1st Dep't), app. denied, 42 N.Y.2d 802, 1977 N.Y. LEXIS 3672 (N.Y. 1977), app. dismissed, 42 N.Y.2d 871, 397 N.Y.S.2d 793, 366 N.E.2d 880, 1977 N.Y. LEXIS 2195 (N.Y. 1977), aff'd, 46 N.Y.2d 776, 413 N.Y.S.2d 909, 386 N.E.2d 820, 1978 N.Y. LEXIS 2466 (N.Y. 1978).

Although this section gives the State Lottery Commission power to adopt rules and regulations governing the issuance of bingo licenses, there is no indication of legislative intent to authorize the Commission to determine, in the first instance, whether or not a particular license should be issued, and the commission has no power to prescribe that an applicant must procure from it a certification number before it can make application to the local governing body. Local 320 Club, Inc. v Wackerle, 24 Misc. 2d 679, 206 N.Y.S.2d 957, 1960 N.Y. Misc. LEXIS 2322 (N.Y. Sup. Ct. 1960).

Although the State Lottery Control Commission has authority to regulate bingo and to adopt rules and regulations as to licensing bingo games under this section, its power to suspend or revoke licenses exists only "after hearing" for violation of the law or its regulations, and it has no power to issue a summary order that bingo shall not be played in a certain hall where this would have the effect of revoking local bingo licenses authorizing various organizations to operate bingo games to be played at that hall, without a hearing. Febish v New York State Lottery Control Com., 32 Misc. 2d 558, 224 N.Y.S.2d 520, 1961 N.Y. Misc. LEXIS 1840 (N.Y. Sup. Ct. 1961).

Specific language contained in program budget presentation which recommended abolition of State Bingo Control Commission and transfer of its functions to the State Racing and Wagering Board and subsequent passage of budget by the legislature which made no provision for the Commission evidenced sufficient direct action on the part of the legislature to abolish the Commission even though Senate failed to pass a specific bill abolishing the Commission. Ball v Carey, 85 Misc. 2d 1052, 381 N.Y.S.2d 652, 1976 N.Y. Misc. LEXIS 2113 (N.Y. Sup. Ct. 1976).

A town may not modify the additional license fee which it receives from bingo operations, a fee set by the State Bingo Control Commission at three per centum of reported net proceeds. 1976 Ops St Compt File #99.

2. Under former § 433

By failure to pass legislation explicitly abolishing the Bingo Control Commission or to specifically provide therefor in budget,

though not specifically appropriating any funds for the Commission, the legislature could be deemed to have expressed an intent not to eliminate the Commission or the office of chairman, and chairman was entitled to his salary. Ball v State, 41 N.Y.2d 617, 394 N.Y.S.2d 597, 363 N.E.2d 323, 1977 N.Y. LEXIS 1971 (N.Y. 1977).

Where legislature which enacted budget in which no funds were specially appropriated for the Bingo Control Commission or the salary of its chairman also amended section of the Executive Law without deleting therefrom express provision for chairman's salary, budget did not operate as a repeal by implication of the salary provisions. Ball v State, 41 N.Y.2d 617, 394 N.Y.S.2d 597, 363 N.E.2d 323, 1977 N.Y. LEXIS 1971 (N.Y. 1977).

Budget bill which was a general statute establishing a lump-sum appropriation for regulation of wagering, but contained no specific appropriation for the Bingo Control Commission, did not supersede the specific, detailed statutory provisions creating the Commission and its operations. Ball v State, 41 N.Y.2d 617, 394 N.Y.S.2d 597, 363 N.E.2d 323, 1977 N.Y. LEXIS 1971 (N.Y. 1977).

Agency Opinions

1. In general

The legislative body of a municipality should first enact an ordinance authorizing bingo and then submit a proposition thereon to the voters. Any person entitled to vote for officers of a municipality may vote on a proposition authorizing bingo. An ordinance to authorize bingo should be published in full. 1958 NY Ops Atty Gen Mar 17 (informal).

A licensed bingo supplier may not employ a public employee as a supply salesman either within or outside the state. 1963 NY Ops Atty Gen July 9.

The State Bingo Control Commission may adopt a rule to the effect that an organization may not obtain a license in a jurisdiction other than that in which it is domiciled. 1964 NY Ops Atty Gen Feb 4.

Indians on a reservation must obtain a bingo identification number and a license issued by the State Bingo Control Commission prior to conducting any game of bingo. They may not award prizes in excess of the amounts set forth in Article I, § 9 of the Constitution of the State of New York. 1973 NY Ops Atty Gen Aug 31 (formal).

Licenses may not be withheld from otherwise duly authorized and qualified bingo applicants, for the sole reason that if additional licenses are issued, the economic impact on those organizations already licensed will be detrimental. Provision is made by Executive Law, Section 435, for the State Bingo Control Commission to recommend appropriate legislation. 1974 NY Ops Atty Gen Mar 29 (formal).

Licenses may not be withheld from otherwise duly authorized and qualified bingo applicants for the sole reason that if additional licenses are issued, the economic impact on those organizations already licensed will be detrimental. Provision is made by Executive Law, § 435, for the State Bingo Control Commission to recommend appropriate legislation. 1974 NY Ops Atty Gen Mar 29.

Laws governing bingo do not authorize electronic bingo proposal. 1985 N.Y. Op. Att'y Gen. No. 85-F8.

A municipality receiving a share of the net proceeds of bingo occasions shall use this money to defray the cost of licensing and regulating bingo. Any excess not needed for this purpose is surplus revenue to be used for any lawful municipal purpose. 1980 Op St Compt File #602.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:
Bingo. 9 NYCRR §§ 5800.1 et seq.

Jurisprudences:
62 NY Jur 2d Gambling §§ 9, 64, 66, 69–70, 71, 75, 78.
38 Am Jur 2d, Gambling §§ 17–19, 42.

§ 436. Hearings; immunity

1. A hearing upon any investigation or review authorized by this article or by article fourteen-h of the general municipal law may be conducted by two or more members of the commission or by a hearing officer duly designated by the commission, as the commission shall determine.

2. A person who has violated any provision of this article or article fourteen-h of the general municipal law, or of the rules and regulations of the commission, or any term of any license issued under said articles or said rules and regulations, is a competent witness against another person so charged. In any hearing upon any investigation or review authorized by this article or article fourteen-h of the general municipal law, for or relating to a violation of any provision of said articles or of the rules and regulations of the commission or of the term of any such license, the commission, may confer immunity upon such witness in accordance with the provisions of section 50.20 of the criminal procedure law. Such immunity shall be conferred only upon the vote of at least three members of the commission, and only after affording the attorney general and the appropriate district attorney a reasonable opportunity to be heard with respect to any objections which they or either of them may have to the granting of such immunity.

HISTORY:

Add, L 1962, ch 437, § 4, eff June 1, 1962; amd, L 1967, ch 680, § 38; L 1971, ch 1097, § 39, eff Sept 1, 1971.

Prior Law: Former § 436, add, L 1957, ch 853, § 1; renumbered § 439, L 1962, ch 437, § 7, eff June 1, 1962.

Editor's Notes: See 1967 note under § 63.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:
Bingo, hearings and appeals. 9 NYCRR §§ 5830.1 et seq.

Jurisprudences:
62 NY Jur 2d Gambling §§ 9, 64.
1A Am Jur Pl & Pr Forms, Administrative Law, Forms 111-121.

Annotations:
Libel and slander: privilege applicable to judicial proceedings as extending to administrative proceedings. 45 ALR2d 1296.
Adequacy of immunity offered as condition of denial of privilege against self-incrimination. 53 ALR2d 1030.

§ 437. Place of investigations and hearings; witnesses; books and documents

The commission may conduct investigations and hearings within or without the state and shall have power to compel the attendance of witnesses, the production of books, records, documents and other evidence by the issuance of a subpoena signed by a member of the commission.

HISTORY:

Add, L 1957, ch 853, § 1; amd, L 1962, ch 437, § 5, eff June 1, 1962.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:
Bingo, hearings and appeals. 9 NYCRR §§ 5830.1 et seq.

Jurisprudences:
62 NY Jur 2d Gambling §§ 9, 64, 75.
2 Am Jur 2d, Administrative Law §§ 131, 338 et seq.

§ 438. Privilege against self-incrimination

The willful refusal to answer a material question or the assertion of privilege against self-incrimina-

tion during a hearing upon any investigation or review authorized by this article or by article fourteen-h of the general municipal law by any licensee or any person identified with any licensee as an officer, director, stockholder, partner, member, employee or agent thereof shall constitute sufficient cause for the revocation or suspension of any license issued under this article or under the licensing law, as the commission or as the municipal governing body may determine.

HISTORY:
Add, L 1962, ch 437, § 6, eff June 1, 1962.

Prior Law: Former § 438, add, L 1957, ch 853, § 1; renumbered § 439-a, L 1962, ch 437, § 8, eff June 1, 1962.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:
62 NY Jur 2d Gambling §§ 9, 64.
81 Am Jur 2d, Witnesses §§ 80, 83–85.

Annotations:
Tort or statutory liability for failure or refusal of witness to give testimony. 61 ALR3d 1297.

ARTICLE 19-G Office of Children and Family Services

Title 2. Facilities

Section
505. Directors of facilities

HISTORY:
Add, L 1960, ch 881, § 1, eff July 1, 1960; amd, L 2002, ch 182, § 11, eff July 23, 2002; Add, L 1960, ch 881, § 1, eff July 1, 1960; amd, L 2002, ch 182, § 11, eff July 23, 2002.

TITLE 2 Facilities

HISTORY:
Add, L 1992, ch 465, § 11, eff Jan 13, 1993 (see 1992 note below).

§ 505. Directors of facilities

1. There shall be a facility director of each office of children and family services operated facility. Such facility director shall be appointed by the commissioner of the office of children and family services and the position shall be in the noncompetitive class and designated as confidential as defined by subdivision two-a of section forty-two of the civil service law. The facility director shall have such experience and other qualifications as may be prescribed by the director of classification and compensation within the department of civil service in consultation with the commissioner of the office of children and family services based on differences in duties, levels of responsibility, size and character of the facility, knowledge, skills and abilities required, and other factors affecting the position. Such facility director shall serve at the pleasure of the commissioner of the office of children and family services.

2. Subject to regulations of the division, the facility director of a state facility in the division shall:

(a) operate and manage the facility,

(b) submit a monthly report on such matters as the division may specify.

3. Subject to the regulations of the division, the facility director may authorize the use of the buildings and grounds of the facility by a municipality, special district or non-profit association, corporation or organization for educational, recreational, social and civic purposes whenever such use may promote better relationships with the community in which the facility is located, provided, however, that such use does not interfere with the purposes and program of the facility.

HISTORY:
Formerly § 515, add, L 1971, ch 947, § 3, with substance of subs 1 and 2 transferred from Soc Serv Law § 419(1, 3); renumbered § 505 and amd, L 1992, ch 465, §§ 13, 18, eff Jan 13, 1993 (see 1992 note below); L 2015, ch 56, § 3 (Part J), effective April 13, 2015.

Prior Law: Former § 505, add, L 1966, ch 439, § 2; repealed, L 1992, ch 465, § 12, eff Jan 13, 1993 (see 1992 note below).

Editor's Notes: Laws 1992, ch 465, § 62, eff Jan 13, 1993, provides as follows:
§ 62. This act shall take effect on the one hundred eightieth day after it shall have become a law and shall apply to all persons in the custody of the division for youth on or after such date. (Amd, L 1993, ch 687, § 14, eff Dec 2, 1993.).

Amendment Notes The 2015 amendment by ch 56, § 3 (Part J), rewrote 1, which formerly read: "There shall be a facility director of each division for youth facility. Such facility director shall be appointed by the director of the division and shall be in the noncompetitive class and designated as confidential as defined by subdivision two-a of section forty-two of the civil service law. The facility director shall have two years experience in appropriate titles in state government. Such facility director shall have such other qualifications as may be prescribed by the director of the division, based on differences in duties, levels of responsibility, size and character of the facility, knowledge, skills and abilities required, and other factors affecting the position and shall serve at the pleasure of the director of the division."

ARTICLE 21-A Emergency Services Council

Section
580. Emergency services council

HISTORY:
Add, L 2000, ch 300, § 2, eff Aug 23, 2000.

§ 580. Emergency services council

1. Creation; members. There is hereby created in the department of state an emergency services council, the members of which shall be the directors of the office of fire prevention and control, the bureau of emergency medical services and the state emergency management office, the superintendent of state police, the commissioner of health, the secretary of state, the director of the state office for the aging and the director of state operations who shall be the chairperson unless otherwise appointed by the governor. There shall also be two representatives appointed by the state emergency medical services council, one of whom shall be a representative of volunteer ambulance service and one of whom shall be a representative of proprietary ambulance

service; two representatives appointed by the fire advisory board, one of which shall be representative of volunteer fire service and one of which shall be representative of paid fire service; one representative shall be appointed by the disaster preparedness commission; one physician shall be appointed by the state emergency medical advisory committee; one appointment shall be made by the governor; one appointment shall be made by the temporary president of the senate; and one appointment shall be made by the speaker of the assembly.

2. The role of the council shall be advisory. The purposes of the council shall be to develop and coordinate state emergency services, make recommendations on emergency services policy, and eliminate unnecessary duplication of effort in such a way as to ensure the provision of efficient and effective delivery of such services. The council shall adopt a mission statement consistent with the intent of this legislation and which shall affirm the council's commitment to fostering improved communication, coordination and cooperation among law enforcement, fire protection, emergency medical services and disaster preparedness agencies.

3. Powers and duties. The members of the council shall receive no compensation for their services but shall be allowed actual and necessary expenses incurred in the performance of their duties. The council may request and shall receive from any department, board, bureau, commission, office, agency or other instrumentality of the state, such facilities, assistance and data as it deems necessary or desirable for the proper execution of its powers and duties. The council shall meet at least quarterly and report annually no later then [than]* September thirtieth of each year. However should the need arise the council may submit incremental reports as deemed necessary. Such reports shall be submitted to the governor, the temporary president of the senate, the chairperson of the senate finance committee, the speaker of the assembly, and the chairperson of the assembly ways and means committee. The council shall have the power to hold public hearings and solicit testimony on any matter it deems relative to carrying out its mission. The council shall have the power to make non-binding recommendations concerning existing and/or future policy, rules and regulations and have the ability to take up for consideration recommendations submitted by either public or private entities. The council may have the ability to advise the governor, legislature, state agencies and entities, and localities on issues relating to and effecting the coordination and enhancement of emergency response, and public health and safety. Nothing in this section shall be deemed to supersede any established authority, duty and power established by local law, state law or regulation, or otherwise granted to any agency, body or entity.

*The bracketed word has been inserted by the Publisher.

HISTORY:

Add, L 2000, ch 300, § 2, eff Aug 23, 2000 (see 2000 note below); amd, L 2012, ch 40, § 1, eff May 31, 2012.

Editor's Notes: Laws 2000, ch 300, § 1, eff Aug 23, 2000, provides as follows:

Section 1. Legislative intent. The legislature hereby finds and declares that the dedicated service and protection of public health and safety provided by law enforcement, fire protection, emergency medical services and disaster preparedness personnel in New York state is outstanding. The legislature further finds and declares that it is vitally important to the citizens of New York to coordinate all resources available in the event of an emergency, disaster, or public safety incident, in order to provide the most effective emergency response and protect the public's health and safety. It is the intent of the legislature, therefore, to establish an advisory body whose purpose is to assist the state and localities in maximizing the effectiveness of law enforcement, fire protection, emergency medical services, disaster preparedness agencies, and others through the coordination of their respective activities, while recognizing and respecting the expertise and established authority and responsibility of each sector. Said advisory body shall identify all public and private resources available to address emergency situations, and shall encourage partnerships among state and local government agencies and private industry. The coordination sought by this legislation is further designed to encourage proactive behavior in order to prevent emergencies and escalation in severity of an emergency.

Amendment Notes: 2012. Chapter 40, § 1 amended: Sub 1 by adding the matter in italics.

Notes to Opinions

Attorney General Opinions

The Permanent Citizens Advisory Committee to the MTA may not seek federal designation as a tax-exempt organization, solicit donations directly from the public, or apply to state agencies for direct funding. 2014 N.Y. Op. Att'y Gen. No. 2014-F2, 2014 N.Y. AG LEXIS 87.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

96 NY Jur 2d State of New York § 86.

ARTICLE 26 Division of Homeland Security and Emergency Services

Section

709. Division of homeland security and emergency services; creation; powers and duties
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717-a. Direct dialing to public service answering points.
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HISTORY:

Add, L 2003, ch 403, § 1, eff Aug 26, 2003; amd, L 2004, ch 1, § 1 (Part B), eff July 23, 2004; L 2010, ch 56, § 13 (Part B), eff July 1, 2010; Add, L 2003, ch 403, § 1, eff Aug 26, 2003; amd, L 2004, ch 1, § 1 (Part B), eff July 23, 2004; L 2010, ch 56, § 13 (Part B), eff July 1, 2010.

§ 709. Division of homeland security and emergency services; creation; powers and duties

1. There is hereby created within the executive department the division of homeland security and emergency services, which shall have and exercise the powers and duties set forth in this article. Any reference to the 'office of public security', the 'office of homeland security', the 'state emergency management office' or the 'office of fire prevention and control' in the laws of New York state, executive orders, or contracts entered into on behalf of the state shall be deemed to refer to the division of homeland security and emergency services.

2. The division shall have the power and duty to:

(a) oversee and coordinate the state's homeland security and comprehensive emergency management resources, subject to any laws, rules or regulations governing the budgeting and appropriation of funds;

(b) review homeland security and comprehensive emergency management policies, protocols and strategies of state agencies. The agencies shall include, but not be limited to, the state agencies included on the disaster preparedness commission as identified in section twenty-one of this chapter;

(c) develop policies, protocols and strategies, which may be used to prevent, detect, respond to and recover from terrorist acts or threats and other natural and man-made disasters, which for purposes of this section shall have the same meaning as defined in article two-B of this chapter;

(d) identify potential inadequacies in the state's policies, protocols and strategies to detect, respond to and recover from terrorist acts or threats and other natural and man-made disasters;

(e) undertake periodic drills and simulations designed to assess and prepare responses to terrorist acts or threats and other natural and man-made disasters;

(f) coordinate state resources for the collection and analysis of information relating to natural and man-made disasters throughout the state subject to any applicable laws, rules, or regulations;

(g) coordinate and facilitate information sharing among local, state, and federal agencies to ensure appropriate intelligence to assist in the early identification of and response to natural and man-made disasters, subject to any applicable laws, rules, or regulations governing the release, disclosure or sharing of any such information;

(h) assess the preparedness of state and local public health systems to respond to terrorist acts and other natural and man-made disasters, including ensuring the availability of early warning systems designed to detect potential threats and determining adequacy and availability of necessary vaccines and pharmaceuticals and hospital capacity;

(i) coordinate strategies, protocols and first-responder equipment needs that may be used to monitor, detect, respond to and mitigate the consequences of a potential biological, chemical or radiological terrorist act or threat;

(j) work with local, state and federal agencies and private entities to conduct assessments of the vulnerability of critical infrastructure to terrorist attack and other natural and man-made disasters, including, but not limited to, nuclear facilities, power plants, telecommunications systems, mass transportation systems, public roadways, railways, bridges and tunnels, and develop strategies that may be used to protect such infrastructure from terrorist attack and other natural and man-made disasters;

(k) develop plans that may be used to promote rapid recovery from terrorist attacks and other natural and man-made disasters, to ensure prompt restoration of transportation, utilities, critical communications and information systems and to protect such infrastructure;

(*l*) develop plans that may be used to contain and remove hazardous materials used in a terrorist attack or released as a result of natural or man-made disaster;

(m) act as primary contact with the federal department of homeland security;

(n) adopt, promulgate, amend and rescind rules and regulations to effectuate the provisions and purposes of this article and the powers and duties of the division in connection therewith;

(o) consult with appropriate state and local governments, institutions of higher learning, first responders, health care providers and private entities as necessary to effectuate the provisions of this article, and work with those entities to establish, facilitate and foster cooperation to better prepare the state to prevent and respond to threats and acts of terrorism and other natural and man-made disasters;

(p) to serve as a clearinghouse for the benefit of municipalities regarding information relating to available federal, state and regional grant programs in connection with homeland security, disaster preparedness, communication infrastructure and emergency first responder services, and to promulgate rules and regulations necessary to ensure that grant information is timely posted on the division's website;

(q) request from any department, division, office, commission or other agency of the state or any political subdivision thereof, and the same are authorized to provide, such assistance, services and data as may be required by the division of homeland security and emergency services in carrying out the

purposes of this article, subject to applicable laws, rules, and regulations;

(r) develop standards and a certification process for training programs for training of private security officers in commercial buildings which shall:

(i) improve observation, detection and reporting skills;

(ii) improve coordination with local police, fire and emergency services;

(iii) provide and improve skills in working with advanced security technology including surveillance and access control procedures;

(iv) require at least forty hours of training including three hours of training devoted to terrorism awareness; and

(v) have been certified as a qualified program by the division of homeland security and emergency services;

(s) work in consultation with or make recommendations to the commissioner of agriculture and markets in developing rules and regulations relating to ammonium nitrate security; and

(t) develop, maintain, and deploy state, regional and local all-hazard incident management teams.

(u) Notwithstanding article six-C of this chapter, or any other provision of law to the contrary, the division of homeland security and emergency services shall establish best practices regarding training and education for firefighters and first responders which shall include but not be limited to: minimum basic training for firefighters and first responders; in-service training and continuing education; and specialized training as it may apply to the specific duties of a category of emergency personnel.

3. The division of homeland security and emergency services shall consist of several offices including, but not limited to, the office of counterterrorism, which shall have the powers, and be responsible for carrying out the duties, including but not limited to those set forth in section seven hundred nine-a of this article; the office of emergency management, which shall have the powers, and be responsible for carrying out the duties, including but not limited to those set forth in article two-B of this chapter; the office of fire prevention and control, which shall have the powers, and be responsible for carrying out the duties, including but not limited to those set forth in article six-C of this chapter and the office of interoperable and emergency communications, which shall have the powers, and be responsible for carrying out the duties, including but not limited to those set forth in section seven hundred seventeen of this article.

4. As set forth in section seven hundred ten of this article, the commissioner of the division of homeland security and emergency services shall be appointed by the governor, with the advice and consent of the senate, and hold office at the pleasure of the governor. The directors of the offices of counterterrorism, emergency management, fire prevention and control, and interoperable and emergency communications, and such other offices as may be established, shall be appointed by, and hold office at the pleasure of, the governor and they shall report to the commissioner of the division of homeland security and emergency services.

5. The directors of the offices of counterterrorism, emergency management, fire prevention and control, interoperable and emergency communications, and of such other offices as may be established, shall, in consultation with the commissioner, have the authority to promulgate rules and regulations to carry out the duties of their office, including the establishment of fees necessary to compensate for costs associated with the delivery of training and services.

6. The directors of the offices of counterterrorism, emergency management, fire prevention and control, interoperable and emergency communications, and such other offices as may be established, shall have the authority to enter into contracts with any person, firm, corporation, municipality, or government entity.

7. Annual report of the division. The commissioner of the division of homeland security and emergency services shall, on or before January first in each year, submit to the governor, the temporary president of the senate, and the speaker of the assembly, a report concerning the performance of the division with respect to outreach to businesses, not-for-profit organizations, and the general public, which shall include information regarding the content and scope of seminars, conferences, surveys, programs, and other programmatic means of engaging such parties to identify and meet the needs of such parties with respect to emergency mitigation, preparedness, response, and recovery, and the participation of such parties therein.

HISTORY:

Add, L 2004, ch 1, § 2 (Part B), eff July 23, 2004; amd, L 2005, ch 537, § 7, eff Aug 16, 2005; L 2005, ch 620, § 1, eff Nov 28, 2005 (see 2005 note below); L 2010, ch 56, §§ 14, 22 (Part B), eff July 1, 2010; L 2013, ch 55, § 1 (Part N), eff March 28, 2013; L 2016, ch 54, § 2 (Part MM), effective April 4, 2016.

Editor's Notes: Laws 2004, ch 1, § 1 (Part A), eff July 23, 2004, provides as follows:

Section 1. Legislative intent. The tragic events of the September 11, 2001 attack, together with the more recent arrests of members of alleged terrorist cells in Erie county and elsewhere throughout the world, underscore the compelling need for further anti-terror measures to enhance public safety. It is our nation's profound commitment to the principles of democracy and the rule of law that enables us to respond efficiently and effectively to the outrageous criminal acts of terrorists. Creating new criminal offenses and increasing penalties to enhance the powers of law enforcement are necessary to combat their cowardly and inhumane acts of terror.

A chemical or biological attack against a civilian population or the threat of such an attack, however unimaginable before September 11, 2001, has become a stark and disturbing reality. The subsequent outbreaks of anthrax, a deadly disease that caused death and illness across our nation, awakened us to a new type of crime, a crime so indecent that it threatens our values as well as our lives. Terrorists

committed to causing death and destruction with deadly or incapacitating chemicals or biological weapons must be brought to justice and punished severely. Although federal law explicitly proscribes such monstrous conduct, state law does not. This act, modeled on federal law, punishes those who criminally use or possess chemical or biological weapons and imposes the penalty of life imprisonment without parole in appropriate cases.

The images of the savage attack on the World Trade Center and the Pentagon on September 11, 2001 will be forever emblazoned on the psyches of all Americans. The slaughter of innocent civilians, and the sacrifice of selfless police officers, brave firefighters, and other heroic emergency services personnel, will never be forgotten. A crime of unimaginable horror, terrorism tears at the very fabric of our society, threatening to rob us of our commitment to freedom, justice, and democracy. This act protects that commitment by providing law enforcement officials with appropriate and effective tools to investigate, prosecute, and punish terrorists.

Laws 2005, ch 620, § 3, eff Nov 28, 2005, provides as follows:

§ 3. This act shall take effect on the ninetieth day after it shall have become a law; provided that any rules and regulations necessary to implement the provisions of this act on its effective date are authorized and directed to be promulgated on or before such effective date.

Amendment Notes: 2013. Chapter 55, § 1 (Part N) amended:

Sub 1 by deleting at fig 1 ", the 'office of cyber security' ".

Sub 3 by deleting at fig 1 "; the office of cyber security, which shall have the powers, and be responsible for carrying out the duties, including but not limited to those set forth in section seven hundred fifteen of this article;".

Sub 4 by deleting at fig 1 "cyber security,".

Sub 5 by deleting at fig 1 "cyber security,".

Sub 6 by deleting at fig 1 "cyber security,".

2010. Chapter 56, § 14 (Part B) amended:

Section heading by deleting at fig 1 "State office of homeland security" and adding the matter in italics.

Sub 1 by deleting at figs 1 and 2 "office of homeland security" and adding the matter in italics.

Sub 2, opening par by deleting at fig 1 "office" and adding the matter in italics.

Sub 2, par (a) by adding the matter in italics.

Sub 2, par (b) by deleting at fig 1 "the division of state police, division of military and naval affairs, state emergency management office, department of health, department of environmental conservation, division of criminal justice services, department of state, office for technology, and the department of transportation" and adding the matter in italics.

Sub 2, par (c) by adding the matter in italics.

Sub 2, par (d) by adding the matter in italics.

Sub 2, par (e) by adding the matter in italics.

Sub 2, par (f) by adding the matter in italics.

Sub 2, par (h) by adding the matter in italics.

Sub 2, par (j) by adding the matter in italics.

Sub 2, par (k) by adding the matter in italics.

Sub 2, par (l) by adding the matter in italics.

Sub 2, par (n) by deleting at fig 1 "office" and adding the matter in italics.

Sub 2, par (o) by adding the matter in italics.

Sub 2, par (p) by deleting at fig 1 "office's" and adding the matter in italics.

Sub 2, par (q) by deleting at fig 1 "office of homeland security", at fig 2 "and" and adding the matter in italics.

Sub 2, par (r) subpar (v) by deleting at fig 1 "state office of homeland security." and adding the matter in italics.

Sub 2, par (s) designated from former sub 2, par (r) [second setout] by deleting at fig 1 a period and adding the matter in italics.

Sub 2 by adding par (t).

By adding 7.

2010. Chapter 56, § 22 (Part B) amended sub 2 by adding par (u).

The 2016 amendment by ch 54, § 2 (Part MM), deleted "terrorist threats and terrorist activities and other" following "relating to" in 2(f) and in 2(g), deleted "law enforcement" following "federal" and "potential terrorist activities and other" following "response to."

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

Office of homeland security: security guard training tax credit. 9 NYCRR §§ 1000.1 et seq.

Office of homeland security: public access to records. 9 NYCRR Part 10025.

§ 709-a. Office of counterterrorism

The office of counterterrorism shall develop and analyze the state's policies, protocols and strategies relating to the prevention and detection of terrorist acts and terrorist threats. The office shall also be responsible for coordinating strategies, protocols and first responder equipment needs to detect a biological, chemical or radiological terrorist act or threat; working with private entities and local, state and federal agencies to conduct assessments of the vulnerability of critical infrastructure to terrorist attack; and consulting with appropriate state and local governments and private entities to facilitate and foster cooperation to better prepare the state to prevent and detect threats and acts of terrorism.

HISTORY:

Add, L 2010, ch 56, § 15-a (Part B), eff July 1, 2010; L 2016, ch 54, § 3 (Part MM), effective April 4, 2016.

Amendment Notes The 2016 amendment by ch 54, § 3 (Part MM), deleted "the collection, analysis and sharing of information relating to terrorist threats and terrorist activities throughout the state" following "responsible for" in the second sentence.

§ 710. Commissioner of the division of homeland security and emergency services; appointment of the commissioner; powers and duties

1. The commissioner of the division of homeland security and emergency services (commissioner) shall be appointed by the governor, by and with the advice and consent of the senate, and hold office at the pleasure of the governor.

2. The commissioner, acting by and through the division, shall have the power and duty to:

(a) administer the duties of the division pursuant to this section;

(b) administer such other duties as may be devolved upon the division from time to time pursuant to law;

(c) cooperate with and assist other state and federal departments, boards, commissions, agencies and public authorities in the development and administration of policies and protocols which will enhance the safety and security of the citizens of the state;

(d) enter into contracts with any person, firm, corporation or governmental agency, and do all things necessary to carry out the functions, powers and duties expressly set forth in this article, subject to any applicable laws, rules or regulations;

(e) establish offices, departments and bureaus and make changes therein as he or she may deem necessary to carry out the functions of the division;

(f) subject to the provisions of this article and the civil service law, and the rules and regulations adopted pursuant thereto, the commissioner may appoint other officers, employees, agents and consultants as may be necessary, prescribe their duties, fix their compensation, and provide for payment of their reasonable expenses, all within amounts available therefor by appropriation. The commissioner may transfer officers or employees from their positions to other positions in the division, or abolish or consolidate such positions; and

(g) accept and contract as agent of the state for any gift to support the development and training missions of the division of homeland security and emergency services.

HISTORY:

Add, L 2004, ch 1, § 2 (Part B), eff July 23, 2004; amd, L 2010, ch 56, § 15 (Part B), eff July 1, 2010.

Prior Law: Former § 710, redesignated § 713, L 2004, ch 1, § 2 (Part B), eff July 23, 2004.

Editor's Notes: Laws 2004, ch 1, § 1 (Part A), eff July 23, 2004, provides as follows:

Section 1. Legislative intent. The tragic events of the September 11, 2001 attack, together with the more recent arrests of members of alleged terrorist cells in Erie county and elsewhere throughout the world, underscore the compelling need for further anti-terror measures to enhance public safety. It is our nation's profound commitment to the principles of democracy and the rule of law that enables us to respond efficiently and effectively to the outrageous criminal acts of terrorists. Creating new criminal offenses and increasing penalties to enhance the powers of law enforcement are necessary to combat their cowardly and inhumane acts of terror.

A chemical or biological attack against a civilian population or the threat of such an attack, however unimaginable before September 11, 2001, has become a stark and disturbing reality. The subsequent outbreaks of anthrax, a deadly disease that caused death and illness across our nation, awakened us to a new type of crime, a crime so indecent that it threatens our values as well as our lives. Terrorists committed to causing death and destruction with deadly or incapacitating chemicals or biological weapons must be brought to justice and punished severely. Although federal law explicitly proscribes such monstrous conduct, state law does not. This act, modeled on federal law, punishes those who criminally use or possess chemical or biological weapons and imposes the penalty of life imprisonment without parole in appropriate cases.

The images of the savage attack on the World Trade Center and the Pentagon on September 11, 2001 will be forever emblazoned on the psyches of all Americans. The slaughter of innocent civilians, and the sacrifice of selfless police officers, brave firefighters, and other heroic emergency services personnel, will never be forgotten. A crime of unimaginable horror, terrorism tears at the very fabric of our society, threatening to rob us of our commitment to freedom, justice, and democracy. This act protects that commitment by providing law enforcement officials with appropriate and effective tools to investigate, prosecute, and punish terrorists.

Amendment Notes: 2010. Chapter 56, § 15 (Part B) amended:

Section heading by deleting at fig 1 "Director of the office of homeland security", at fig 2 "director" and adding the matter in italics.

Sub 1 by deleting at fig 1 "director of the office of homeland security (director)", at fig 2 "The salary of the director shall be fixed at a level commensurate with that of the state officers identified in paragraph (a) of subdivision one of section one hundred sixty-nine of this chapter." and adding the matter in italics.

Sub 2, opening par by deleting at fig 1 "director", at fig 2 "office" and adding the matter in italics.

Sub 2, par (a) by deleting at fig 1 "office" and adding the matter in italics.

Sub 2, par (b) by deleting at fig 1 "office" and adding the matter in italics.

Sub 2, par (c) by adding the matter in italics.

Sub 2, par (e) by deleting at fig 1 "office", at fig 2 ". One of the divisions within the office shall be the office of cyber security and critical infrastructure coordination which shall be dedicated to the identification and mitigation of the state's cyber security infrastructure vulnerabilities", at fig 3 "and" and adding the matter in italics.

Sub 2, par (f) by deleting at figs 1 and 2 "director", at fig 3 "office", at fig 4 a period and adding the matter in italics.

Sub 2 by adding par (g).

§ 711. Reports

1. On or before January thirty-first of each year, the director shall appear before and deliver a report to representatives of each house of the legislature. The temporary president of the senate and the speaker of the assembly shall each appoint three members of their respective houses, and the minority leader of each house shall each appoint one member, to hear the director's report. The appointed members may hear the report in a joint meeting of the members of the senate and assembly or in separate meetings attended by the members from one house. The report shall provide information including, but not limited to: the state's current threat level, imminent threats to New York state, the state's current threat posture and collaborative efforts among localities, regions and with other states to prepare for and defend against acts of terrorism.

2. The commissioner shall appear and give testimony before the annual legislative hearing on public protection held jointly by the assembly committee on ways and means and the senate finance committee as provided for in section three of article VII of the New York state constitution and section thirty-one of the legislative law.

3. The director shall report to the temporary president of the senate, speaker of the assembly and/or their designees within five days of an elevation of the state homeland security advisory system threat level as to the circumstances of the elevation.

4. Before the receipt of any report issued pursuant to this section, each recipient of such report shall develop confidentiality protocols in consultation with the director which shall be binding upon the recipient who issues the protocols and anyone to whom the recipient shows the report, for the maintenance and use of such report so as to ensure the confidentiality of all sensitive information contained therein, provided, however, that such protocols shall not be binding upon a person who is provided access to such report or any information contained therein

pursuant to section eighty-nine of the public officers law after a final determination that access to such report or any information contained therein could not be denied pursuant to subdivision two of section eighty-seven of the public officers law. The director shall also develop protocols for his or her office related to the maintenance and use of the report so as to ensure the confidentiality of all sensitive information contained in the report. On each copy of written reports, the director shall prominently display the following statement: "This report may contain information that if disclosed could endanger the life or safety of the public, and therefore, pursuant to section seven hundred eleven of the executive law, this report is to be maintained and used in a manner consistent with protocols established to preserve the confidentiality of the information contained herein in a manner consistent with law."

HISTORY:

Add, L 2004, ch 1, § 2 (Part B), eff July 23, 2004; amd, L 2013, ch 101, § 6 (Part A), eff July 11, 2013.

Editor's Notes: Laws 2004, ch 1, § 1 (Part A), eff July 23, 2004, provides as follows:

Section 1. Legislative intent. The tragic events of the September 11, 2001 attack, together with the more recent arrests of members of alleged terrorist cells in Erie county and elsewhere throughout the world, underscore the compelling need for further anti-terror measures to enhance public safety. It is our nation's profound commitment to the principles of democracy and the rule of law that enables us to respond efficiently and effectively to the outrageous criminal acts of terrorists. Creating new criminal offenses and increasing penalties to enhance the powers of law enforcement are necessary to combat their cowardly and inhumane acts of terror.

A chemical or biological attack against a civilian population or the threat of such an attack, however unimaginable before September 11, 2001, has become a stark and disturbing reality. The subsequent outbreaks of anthrax, a deadly disease that caused death and illness across our nation, awakened us to a new type of crime, a crime so indecent that it threatens our values as well as our lives. Terrorists committed to causing death and destruction with deadly or incapacitating chemicals or biological weapons must be brought to justice and punished severely. Although federal law explicitly proscribes such monstrous conduct, state law does not. This act, modeled on federal law, punishes those who criminally use or possess chemical or biological weapons and imposes the penalty of life imprisonment without parole in appropriate cases.

The images of the savage attack on the World Trade Center and the Pentagon on September 11, 2001 will be forever emblazoned on the psyches of all Americans. The slaughter of innocent civilians, and the sacrifice of selfless police officers, brave firefighters, and other heroic emergency services personnel, will never be forgotten. A crime of unimaginable horror, terrorism tears at the very fabric of our society, threatening to rob us of our commitment to freedom, justice, and democracy. This act protects that commitment by providing law enforcement officials with appropriate and effective tools to investigate, prosecute, and punish terrorists.

Amendment Notes: 2013. Chapter 101, § 6 (Part A) amended:

Sub 2 by deleting at fig 1 "director" and adding the matter in italics.

§ 711-a. Analyze and report on the feasibility of implementing tornado warning systems

1. The division shall analyze and report on the feasibility of implementing tornado warning systems, including the installation of tornado sirens in municipalities across the state. Such examination shall include determining whether certain municipalities should install tornado sirens, the potential placement of tornado sirens and whether they should be located near schools, hospitals, sports facilities, colleges or other populated areas.

2. The division shall analyze and report on the use of firehouse sirens as possible notification to the surrounding community of an impending tornado and the type of public education necessary to carry out such program.

3. The division shall also recommend other technologies to be used to issue tornado warnings such as text messages to cell phones and the systems necessary to carry out an emergency text message system.

4. The recommendations required pursuant to this section shall include a cost-benefit analysis of implementing a tornado warning system and possible funding mechanisms for the implementation of a tornado warning system.

5. The division shall issue the report to the governor and the legislature on or before March first, two thousand fourteen.

HISTORY:

Add, L 2013, ch 379, § 1, eff Sept 27, 2013.

§ 713. Protection of critical infrastructure including energy generating and transmission facilities

1. Notwithstanding any other provision of law, the commissioner of the division of homeland security and emergency services shall conduct a review and analysis of measures being taken by the public service commission and any other agency or authority of the state or any political subdivision thereof and, to the extent practicable, of any federal entity, to protect the security of critical infrastructure related to energy generation and transmission located within the state. The commissioner of the division of homeland security and emergency services shall have the authority to review any audits or reports related to the security of such critical infrastructure, including audits or reports conducted at the request of the public service commission or any other agency or authority of the state or any political subdivision thereof or, to the extent practicable, of any federal entity. The owners and operators of such energy generating or transmission facilities shall, in compliance with any federal and state requirements regarding the dissemination of such information, provide access to the commissioner of the division of homeland security and emergency services to such audits or reports regarding such critical infrastructure provided, however, that exclusive custody and control of such audits and reports shall remain solely with the owners and operators of such energy generating or transmission facilities. For the purposes of this article, the term "critical infrastructure" has the meaning ascribed to that term in

subdivision five of section eighty-six of the public officers law.

2. (a) On or before December thirty-first, two thousand four, and not later than three years after such date, and every five years thereafter, the commissioner of the division of homeland security and emergency services shall report to the governor, the temporary president of the senate, the speaker of the assembly, the chairperson of the public service commission and the chief executive of any such affected generating or transmission company or his or her designee. Such report shall review the security measures being taken regarding critical infrastructure related to energy generating and transmission facilities, assess the effectiveness thereof, and include recommendations to the legislature or the public service commission if the commissioner of the division of homeland security and emergency services determines that additional measures are required to be implemented, considering, among other factors, the unique characteristics of each energy generating or transmission facility.

(b) Before the receipt of such report identified in paragraph (a) of this subdivision, each recipient of such report shall develop confidentiality protocols, which shall be binding upon the recipient who issues the protocols and anyone to whom the recipient shows a copy of the report, in consultation with the commissioner of the division of homeland security and emergency services for the maintenance and use of such report so as to ensure the confidentiality of the report and all information contained therein, provided, however, that such protocols shall not be binding upon a person who is provided access to such report or any information contained therein pursuant to section eighty-nine of the public officers law after a final determination that access to such report or any information contained therein could not be denied pursuant to subdivision two of section eighty-seven of the public officers law. The commissioner of the division of homeland security and emergency services shall also develop protocols for his or her office related to the maintenance and use of such report so as to ensure the confidentiality of the report and all information contained therein. On each report, the commissioner of the division of homeland security and emergency services shall prominently display the following statement: "this report may contain information that if disclosed could endanger the life or safety of the public, and therefore, pursuant to section seven hundred eleven of the executive law, this report is to be maintained and used in a manner consistent with protocols established to preserve the confidentiality of the information contained herein in a manner consistent with law".

(c) Except in the case of federally licensed electric generating facilities, the public service commission shall have the discretion to require that the recommendations of the commissioner of the division of homeland security and emergency services be implemented by any owner or operator of an energy generating or transmission facility. Recommendations regarding federally licensed electric generating facilities shall instead only be made available by the commissioner of the division of homeland security and emergency services to the appropriate federal agency in compliance with any federal and state requirements regarding the dissemination of such information.

3. Any reports prepared pursuant to this article shall not be subject to disclosure pursuant to section eighty-eight of the public officers law.

HISTORY:

Add, L 2003, ch 403, § 1, eff Aug 26, 2003; amd, L 2004, ch 1, § 2 (Part B), eff July 23, 2004; L 2004, ch 426, § 1, eff Sept 14, 2004, deemed eff on and after Aug 26, 2003; L 2010, ch 56, § 16 (Part B), eff July 1, 2010.

Editor's Notes: Laws 2004, ch 1, § 1 (Part A), eff July 23, 2004, provides as follows:

Section 1. Legislative intent. The tragic events of the September 11, 2001 attack, together with the more recent arrests of members of alleged terrorist cells in Erie county and elsewhere throughout the world, underscore the compelling need for further anti-terror measures to enhance public safety. It is our nation's profound commitment to the principles of democracy and the rule of law that enables us to respond efficiently and effectively to the outrageous criminal acts of terrorists. Creating new criminal offenses and increasing penalties to enhance the powers of law enforcement are necessary to combat their cowardly and inhumane acts of terror.

A chemical or biological attack against a civilian population or the threat of such an attack, however unimaginable before September 11, 2001, has become a stark and disturbing reality. The subsequent outbreaks of anthrax, a deadly disease that caused death and illness across our nation, awakened us to a new type of crime, a crime so indecent that it threatens our values as well as our lives. Terrorists committed to causing death and destruction with deadly or incapacitating chemicals or biological weapons must be brought to justice and punished severely. Although federal law explicitly proscribes such monstrous conduct, state law does not. This act, modeled on federal law, punishes those who criminally use or possess chemical or biological weapons and imposes the penalty of life imprisonment without parole in appropriate cases.

The images of the savage attack on the World Trade Center and the Pentagon on September 11, 2001 will be forever emblazoned on the psyches of all Americans. The slaughter of innocent civilians, and the sacrifice of selfless police officers, brave firefighters, and other heroic emergency services personnel, will never be forgotten. A crime of unimaginable horror, terrorism tears at the very fabric of our society, threatening to rob us of our commitment to freedom, justice, and democracy. This act protects that commitment by providing law enforcement officials with appropriate and effective tools to investigate, prosecute, and punish terrorists.

Amendment Notes: 2010. Chapter 56, § 16 (Part B) amended:

Sub 1 by deleting at figs 1–3 "director of public security" and adding the matter in italics.

Sub 2, par (a) by deleting at figs 1 and 2 "director of public security", at fig 3 "On or before April thirtieth, two thousand four, the director of public security shall make a preliminary report to the governor, the temporary president of the senate, the speaker of the assembly, the chairman of the public service commission, and the chief executive of any such affected generating or transmission company or his or her designee." and adding the matter in italics.

Sub 2, par (b) by deleting at figs 1–3 "director of public security", at fig 4 "ten" and adding the matter in italics.

Sub 2, par (c) by deleing at figs 1 and 2 "director of public secuirty" and adding the matter in italics.

§ 714. Protection of critical infrastructure; storage facilities for hazardous substances

1. Notwithstanding any other provision of law and subject to the availability of an appropriation, the commissioner of the division of homeland security and emergency services shall conduct a review and analysis of measures being taken by the owners and operators of facilities identified pursuant to paragraph (b) of subdivision two of this section to protect the security of critical infrastructure related to such facilities. The commissioner of the division of homeland security and emergency services shall have the authority to review all audits or reports related to the security of such critical infrastructure, including all such audits or reports mandated by state and federal law or regulation, including spill prevention reports and risk management plans, audits and reports conducted at the request of the department of environmental conservation or at the request of any federal entity, or any other agency or authority of the state or any political subdivision thereof, and reports prepared by owners and operators of such facilities as required in this subdivision. The owners and operators of such facilities shall, in compliance with any federal and state requirements regarding the dissemination of such information, provide access to the commissioner of the division of homeland security and emergency services to such audits and reports regarding such critical infrastructure provided, however, exclusive custody and control of such audits and reports shall remain solely with the owners and operators of such facilities to the extent not inconsistent with any other law. For the purposes of this section, the term "critical infrastructure" has the meaning ascribed to that term in subdivision five of section eighty-six of the public officers law.

2. To effectuate his or her duties pursuant to this section and identify risks to the public, the commissioner of the division of homeland security and emergency services shall:

(a) within six months of the effective date of this section, in consultation with the commissioner of environmental conservation, the commissioner of health, and such representatives of the chemical industry and higher education as may be appropriate, prepare a list that identifies toxic or hazardous substances, including but not limited to those substances listed as hazardous to public health, safety or the environment in regulations promulgated pursuant to article thirty-seven of the environmental conservation law, as well as those substances for which the state possesses insufficient or limited toxicological information but for which there exists preliminary evidence that the substance or the class of chemicals with similar physical and chemical properties to which it belongs has the potential to cause death, injury, or serious adverse effects to human health or the environment, based on the severity of the threat posed to the public by the unauthorized release of such substances. Such list will be promulgated in accord with the provisions of the state administrative procedure act;

(b) upon completion of the list required pursuant to paragraph (a) of this subdivision, but no later than one hundred twenty days after such date, in consultation with the commissioner of environmental conservation, the commissioner of health and such representatives of the chemical industry and any state, local and municipal officials as may be appropriate, identify facilities, including facilities regulated pursuant to title nine and title eleven of article twenty-seven and article forty of the environmental conservation law, but excluding facilities that hold liquified petroleum gas for fuel at retail sale as described in section 112(1)(4)(B) of the Clean Air Act (42 U.S.C. section 7412(r)(4)(b)) and those facilities that are defined as "water suppliers" in subdivision one of section eleven hundred twenty-five of the public health law, which because of their storage of or relationship to such substances identified pursuant to paragraph (a) of this subdivision pose risks to the public should an unauthorized release of such hazardous substances occur; and

(c) require such facilities identified pursuant to paragraph (b) of this subdivision, as the commissioner so determines, to prepare a vulnerability assessment of the security measures taken by such facilities to prevent and respond to the unauthorized release of hazardous substances as may be stored therein, which assessments the commissioner of the division of homeland security and emergency services shall review and consider in light of the seriousness of the risk posed and vulnerability of such facility and, where appropriate, make recommendations with respect thereto.

3. (a) On or before June first, two thousand five, the commissioner of the division of homeland security and emergency services shall make a preliminary report to the governor, the temporary president of the senate, the speaker of the assembly, the commissioner of environmental conservation, the commissioner of health and the chief executive officer of any such affected facility or his or her designee, and on or before December thirty-first, two thousand five, and not later than three years after such date, and every five years thereafter, the commissioner of the division of homeland security and emergency services shall report to the governor, the temporary president of the senate, the speaker of the assembly, the commissioner of environmental conservation, the commissioner of health and the chief executive officer of any such affected facility or his or her designee. Such report shall review the security measures being taken regarding critical infrastructure related to such facilities, assess the effectiveness thereof, and include recommendations to the legislature, the department of environmental

conservation or the department of health if the commissioner of the division of homeland security and emergency services determines that additional measures are required to be implemented.

(b) Before the receipt of such report identified in paragraph (a) of this subdivision, each recipient of such report shall develop confidentiality protocols which shall be binding upon the recipient who issues the protocols and anyone to whom the recipient shows a copy of the report in consultation with the commissioner of the division of homeland security and emergency services, for the maintenance and use of such report so as to ensure the confidentiality of the report and all information contained therein, provided, however, that such protocols shall not be binding upon a person who is provided access to such report or any information contained therein pursuant to section eighty-nine of the public officers law after a final determination that access to such report or any information contained therein could not be denied pursuant to subdivision two of section eighty-seven of the public officers law. The commissioner of the division of homelandsecurity and emergency services shall also develop protocols for such division related to the maintenance and use of such report so as to ensure the confidentiality of all sensitive information contained in such report. On each report, the commissioner of the division of homeland security and emergency services shall prominently display the following statement: "This report may contain information that if disclosed could endanger the life or safety of the public, and therefore, pursuant to section seven hundred eleven of the executive law, this report is to be maintained and used in a manner consistent with protocols established to preserve the confidentiality of the information contained herein in a manner consistent with law."

(c) The department of environmental conservation shall have the discretion to require that recommendations of the commissioner of the division of homeland security and emergency services be implemented by any owner or operator of a hazardous substances storage facility as defined in this section.

HISTORY:

Add, L 2004, ch 1, § 1 (Part C), eff July 23, 2004; amd, L 2010, ch 56, § 17 (Part B), eff July 1, 2010.

Editor's Notes: Laws 2004, ch 1, § 1 (Part A), eff July 23, 2004, provides as follows:

Section 1. Legislative intent. The tragic events of the September 11, 2001 attack, together with the more recent arrests of members of alleged terrorist cells in Erie county and elsewhere throughout the world, underscore the compelling need for further anti-terror measures to enhance public safety. It is our nation's profound commitment to the principles of democracy and the rule of law that enables us to respond efficiently and effectively to the outrageous criminal acts of terrorists. Creating new criminal offenses and increasing penalties to enhance the powers of law enforcement are necessary to combat their cowardly and inhumane acts of terror.

A chemical or biological attack against a civilian population or the threat of such an attack, however unimaginable before September 11, 2001, has become a stark and disturbing reality. The subsequent outbreaks of anthrax, a deadly disease that caused death and illness across our nation, awakened us to a new type of crime, a crime so indecent that it threatens our values as well as our lives. Terrorists committed to causing death and destruction with deadly or incapacitating chemicals or biological weapons must be brought to justice and punished severely. Although federal law explicitly proscribes such monstrous conduct, state law does not. This act, modeled on federal law, punishes those who criminally use or possess chemical or biological weapons and imposes the penalty of life imprisonment without parole in appropriate cases.

The images of the savage attack on the World Trade Center and the Pentagon on September 11, 2001 will be forever emblazoned on the psyches of all Americans. The slaughter of innocent civilians, and the sacrifice of selfless police officers, brave firefighters, and other heroic emergency services personnel, will never be forgotten. A crime of unimaginable horror, terrorism tears at the very fabric of our society, threatening to rob us of our commitment to freedom, justice, and democracy. This act protects that commitment by providing law enforcement officials with appropriate and effective tools to investigate, prosecute, and punish terrorists.

Amendment Notes: 2010. Chapter 56, § 17 (Part B) amended:

Sub 1 by deleting at figs 1–3 "director of the office of homeland security" and adding the matter in italics.

Sub 2, opening par by deleting at fig 1 "directory of the office of homeland security" and adding the matter in italics.

Sub 2, par (c) by deleting at fig 1 "director", at fig 2 "director of the office of homeland security" and adding the matter in italics.

Sub 3, par (a) by deleting at figs 1–3 "director of the office of homeland security" and adding the matter in italics.

Sub 3, par (b) by deleting at figs 1, 2 and 4 "director of the office of homeland security", at fig 3 "office", at fig 5 ", as added by a chapter of the laws of two thousand four" and adding the matter in italics.

Sub 3, par (c) by deleting at fig 1 "director of the office of homeland security" and adding the matter in italics.

§ 716. Protection of critical infrastructure; commercial aviation, petroleum and natural gas fuel transmission facilities and pipelines

1. Notwithstanding any other provision of law, the commissioner of the division of homeland security and emergency services shall conduct a review and analysis of measures being taken by any other agency or authority of the state or any political subdivision thereof and, to the extent practicable, of any federal entity, to protect the security of critical infrastructure related to commercial aviation fuel, petroleum and natural gas transmission facilities and pipelines in this state which are not located upon the premises of a commercial airport. As deemed appropriate by such commissioner, the division of homeland security and emergency services shall have the authority to physically inspect the premises and review any audits or reports related to the security of such critical infrastructure, including audits or reports conducted at the request of any other agency or authority of the state or any political subdivision thereof or, to the extent practicable, of any federal entity. The operators of such commercial aviation fuel, petroleum or natural gas transmission facilities and pipelines shall, in compliance with any federal and state requirements regarding the dissemination of such information, provide access to the commissioner of the division of homeland secu-

rity and emergency services to such audits or reports regarding such critical infrastructure provided, however, that exclusive custody and control of such audits and reports shall remain solely with the operators of such commercial aviation fuel, petroleum or natural gas transmission facilities and pipelines. For the purposes of this article, the term "critical infrastructure" has the meaning ascribed to that term in subdivision five of section eighty-six of the public officers law.

2. (a) On or before December thirty-first, two thousand eleven, and every five years thereafter, the commissioner of the division of homeland security and emergency services shall report to the governor, the temporary president of the senate, the speaker of the assembly, the public service commission, and the operator of any such affected commercial aviation fuel, petroleum or natural gas transmission facility or pipeline. Such report shall review the security measures being taken regarding critical infrastructure related to commercial aviation fuel, petroleum or natural gas transmission facilities and pipelines, assess the effectiveness thereof, and include recommendations to the legislature, the public service commission, or the operator of a commercial aviation fuel, petroleum or natural gas transmission facility or pipeline, or any appropriate state or federal regulating entity or agency if the commissioner of the division of homeland security and emergency services determines that additional measures are required to be implemented, considering among other factors, the unique characteristics of each commercial aviation fuel, petroleum or natural gas transmission facility or pipeline.

(b) Before the receipt of such report identified in paragraph (a) of this subdivision, each recipient of such report shall develop confidentiality protocols, which shall be binding upon the recipient who issues the protocols and anyone to whom the recipient shows a copy of the report, in consultation with the commissioner of the division of homeland security and emergency services for the maintenance and use of such report so as to ensure the confidentiality of the report and all information contained therein, provided, however, that such report and any information contained or used in its preparation shall be exempt and not made available pursuant to article six of the public officers law. The commissioner of the division of homeland security and emergency services shall also develop protocols for his or her office related to the maintenance and use of such report so as to ensure the confidentiality of the report and all information contained therein. On each report, the commissioner of the division of homeland security and emergency services shall prominently display the following statement: "this report may contain information that if disclosed could endanger the life or safety of the public, and therefore, pursuant to section seven hundred eleven of the executive law, this report is to be maintained and used in a manner consistent with protocols established to preserve the confidentiality of the information contained herein in a manner consistent with law".

(c) The public service commission shall have the discretion to require, through regulation or otherwise, that the recommendations of the commissioner of the division of homeland security and emergency services be implemented at an affected commercial aviation fuel, petroleum or natural gas transmission facility or pipeline.

(d) The division of homeland security and emergency services shall receive necessary appropriations for the performance of its duties pursuant to this section.

HISTORY:

Add, L 2007, ch 630, § 1, eff Aug 28, 2007; amd, L 2010, ch 56, § 19 (Part B), eff July 1, 2010.

Amendment Notes: 2010. Chapter 56, § 19 (Part B) amended:

By redesignating § 715 [second setout] as § 716.

Sub 1 by deleting at figs 1 and 4 "director of the office of homeland security", at fig 2 "director", at fig 3 "office of homeland security" and adding the matter in italics.

Sub 2, par (a) by deleting at fig 1 "eight, and not later than three years after such date", at figs 2 and 3 "director of the office of homeland security", at fig 4 "On or before April thirtieth, two thousand eight, the director of the office of homeland security shall make a preliminary report to the governor, the temporary president of the senate, the speaker of the assembly, the public service commission, and the operator of any such affected commercial aviation fuel, petroleum or natural gas transmission facility or pipeline." and adding the matter in italics.

Sub 2, par (b) by deleing at figs 1–3 "director of the office of homeland security", at fig 4 "ten" and adding the matter in italics.

Sub 2, par (c) by deleting at fig 1 "director of the office of homeland security" and adding the matter in italics.

Sub 2, par (d) by deleting at fig 1 "office of homeland security" and adding the matter in italics.

§ 717. Office of interoperable and emergency communications

1. The office of interoperable and emergency communications shall be the principal state agency for all interoperable and emergency communications issues and oversee and direct the development, coordination and implementation of policies, plans, standards, programs and services related to interoperable and emergency communications, including those related to public safety land mobile radio communications. The office shall coordinate with federal, state, local, tribal, non-governmental and other appropriate entities.

2. The office shall be responsible for coordinating relevant grant programs and other funding sources to enhance interoperable and emergency communications, as consistent with the mission of the division. The director shall make final determinations regarding the distribution of grants, in consultation with the board.

3. The director of this office shall serve as the statewide interoperable and emergency communications coordinator.

4. To ensure appropriate coordination and consultation with relevant entities, the director shall be

the chairperson of the statewide interoperable and emergency communication board as defined in section three hundred twenty-seven of the county law, and whose duties shall include, but not be limited to all the duties regularly assigned to the board as defined by section three hundred twenty-eight of the county law.

5. The commissioner, in consultation with the director of the office, shall promulgate rules and regulations which require municipalities to report, no less than annually, on prior and planned expenditures to develop and operate interoperable and emergency communications. The regulations shall permit municipalities which participate in county or multi-county regional coordinated interoperability efforts to submit a single report to the division for all participating municipalities, so long as all expenses which would have been reported if the participating municipalities had submitted individual reports are contained in the combined report. The regulations shall not require a municipality that incurred no relevant expenses and anticipates no relevant expenses to submit such a report. The division shall include a summary of such information in its annual report to the governor, temporary president of the senate, and speaker of the assembly provided for in subdivision seven of section seven hundred nine of this article, as well as submitting such information at the same time to the state comptroller.

HISTORY:
Add, L 2010, ch 56, § 21 (Part B), eff July 1, 2010.

§ 717-a. Direct dialing to public service answering points.

1. For purposes of this section, "public building" shall mean any building belonging to the state, county, town, village, school district or any other political or civil subdivision of state or local government.

2. For purposes of this section, "multi-line telephone system" shall mean any system comprised of common control units, telephone sets, control hardware and software, and adjunct systems which enables users to make and receive telephone calls using shared resources such as telephone network trunks or data link bandwidth. This term includes, but is not limited to, network-based and premises-based systems such as Centrex service, premises-based, hosted and cloud-based VoIP, as well as PBX, Hybrid and Key Telephone Systems, as classified by the FCC under Part 68 of its rules.

3. All public buildings which operate on a multi-line telephone system in this state must configure their multi-line telephone system hardware to allow any call to 911 on the system to be directly connected to a public service answering point; provided however, that in the case of public buildings governed by section three hundred fifty-five or six thousand two hundred four of the education law which have on-campus emergency answering points, such public buildings may route such 911 calls to their on-campus answering points.

4. The requirements of subdivision three of this section shall not apply to any public building operating on a multi-line telephone system that would be required to upgrade the hardware of their telephone network to meet said requirement. However, every telephone in any exempt public building operating on a multi-line telephone system shall place an instructional sticker on or immediately adjacent to each telephone informing users of the phone's inability to directly dial 911 and the procedures to follow to connect to a 911 public service answering point, or in the case of public buildings governed by section three hundred fifty-five or six thousand two hundred four of the education law which have on-campus emergency answering points, such on-campus answering points, in case of an emergency.

HISTORY:
L 2019, ch 727, § 1, effective March 19, 2020; L 2020, ch 73, § 1, effective March 19, 2020.

Editor's Notes Laws 2019, ch 727, § 2, eff March 19, 2020, provides:

§ 2. This act shall take effect on the ninetieth day after it shall have become a law.

Laws 2020, ch 73, § 2, eff March 19, 2020, provides:

§ 2. This act shall take effect on the same date and in the same manner as a chapter of the laws of 2019, amending the executive law relating to direct dialing to public service answering points, as proposed in legislative bills numbers S. 4756 and A. 458, takes effect.

Amendment Notes The 2020 amendment by ch 73, § 1, added "provided however, that in the case of public buildings governed by section three hundred fifty-five or six thousand two hundred four of the education law which have on-campus emergency answering points, such public buildings may route such 911 calls to their on-campus answering points" at the end of (3); and added "or in the case of public buildings governed by section three hundred fifty-five or six thousand two hundred four of the education law which have on-campus emergency answering points, such on-campus answering points" in (4).

§ 718. Voluntary surveillance access database

1. The division shall establish a voluntary surveillance access database to be made accessible, upon written request, to any law enforcement agency solely for purposes of a criminal investigation.

2. Residential home owners and business owners who maintain a closed-circuit television or other electronic video surveillance system may elect to register such information, limited to the location of such system and the contact information for the owner, with the voluntary surveillance access database. Such owners may withdraw such registration from the database at any time.

3. Registration information from such database shall be kept confidential and shall not be made available for disclosure or inspection under the state freedom of information law unless a subpoena or other court order directs the division to release such information or image.

HISTORY:
Add, L 2012, ch 287, § 1, eff Jan 28, 2013 (see 2012 note below).

Editor's Notes: Laws 2012, ch 287, § 2, eff Jan 28, 2013, provides as follows:

§ 2. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided, however, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized and directed to be made and completed on or before such effective date.

ARTICLE 35 Division of Criminal Justice Services

Section

837-o. Search for arson and sex offense conviction records of volunteer firefighter applicants
837-r. Office of sex offender management
837-s. Search for sex offense conviction records of emergency medical technician and other first responder applicants
845. Central state registry of police officers and peace officers
845-a. Presentment of flags lowered to half-staff in memorial of the death of any police officer or peace officer

HISTORY:

Add, L 1972, ch 399, § 1, eff Sept 1, 1972.

§ 837-o. Search for arson and sex offense conviction records of volunteer firefighter applicants

1. Any person who applies for membership in a fire company, as such term is defined in section three of the volunteer firefighters' benefit law, or who seeks to transfer as a member to another fire company, shall be required to authorize the submission of his or her name and other authorized identifying information to the division which shall search its files for records indicating whether the person stands convicted of the crime of arson or a crime which requires the person to register as a sex offender under article six-C of the correction law. The chief of the fire company to which application is made shall provide written notice to the applicant that a search will be conducted, and if the applicant desires to proceed, he or she shall complete a search request on the form provided for this purpose by the division of criminal justice services.

2. Within ten business days of receipt from the applicant, the chief of the fire company shall send the completed search request form to either (i) the sheriff's department of the county in which the fire company is located, or (ii) the office of fire prevention and control, as follows:

(a) the sheriff's department of the county in which the fire company is located shall be responsible for receiving the search requests and processing the search requests with the division within ten business days of receipt from the chief of the fire company, unless the county legislative body adopts and files with the office of fire prevention and control pursuant to the municipal home rule law a local law providing that the sheriff's department shall not have such responsibility;

(b) in all other instances where a county legislative body has adopted a local law pursuant to paragraph (a) of this subdivision, the office of fire prevention and control shall be responsible for receiving search requests and forwarding the search requests to the division.

The office of fire prevention and control is hereby authorized to establish a communication network with the division for the purpose of forwarding search requests and receiving search results pursuant to paragraph (b) of this subdivision.

3.

(a) All searches concerning the application for membership in a fire company shall be conducted under the provisions of subdivision six of section eight hundred thirty-seven of this article without the assessment of any fee to the applicant or fire company and shall pertain solely to ascertaining whether the applicant stands convicted of arson or a crime which requires the person to register as a sex offender under article six-C of the correction law.

(b) The results of the search shall be communicated in writing, within ten business days of receipt from the division, to the chief of the fire company from which the search request originated by either the sheriff's department or the office of fire prevention and control, and shall be kept confidential by the chief, except as provided in paragraph (c) of this subdivision. The results of the search shall only state either that: (i) the applicant stands convicted of arson and/or a crime which requires the person to register as a sex offender under article six-C of the correction law, or (ii) the applicant has no record of conviction for arson or a crime which requires the person to register as a sex offender under article six-C of the correction law. The results of the search shall not divulge any other information relating to the criminal history of the applicant.

(c) At the time an applicant is advised that he or she is ineligible for membership due to a record of conviction for arson, he or she shall also be advised of the rights to challenge and appeal the information contained in the record of conviction as provided in the rules and regulations of the division. The applicant shall continue to be barred from membership until all administrative and judicial challenges to the accuracy of such information or appeals therefrom, are ultimately resolved in his or her favor, or if such a determination is unchallenged.

(d) If a person is denied election or appointment as a volunteer member of a fire company based in whole or in part on the fact that he or she stands convicted of a crime which requires the person to register as a sex offender under article six-C of the correction law, he or she shall be advised by the fire company of the rights to challenge and appeal the information contained in the record of conviction as provided in the rules and regulations of the division, and provided by the fire company with a copy of the criminal history record received by the fire company and with a copy of sections seven hundred fifty-two and seven hundred fifty-three of the correction law.

HISTORY:

Add, L 1999, ch 423, § 2, eff April 1, 2000; amd, L 2002, ch 689,

§ 1, eff Feb 18, 2003; L 2010, ch 56, § 41 (Part B), eff July 1, 2010; L 2014, ch 198, § 1, effective December 2, 2014.

Editor's Notes Laws 1999, ch 423, §§ 1, 6, eff April 1, 2000, provides as follows:

Section 1. Legislative intent. The efforts of volunteer firefighters in New York state embody many of the values and traditions long respected and admired by our citizens. Volunteer firefighters devote many hours acquiring necessary training and then expend their energies to protect lives and property while placing their own lives and physical well being in jeopardy. They are heroes to our children, are trusted in our hour of need and provide role models for dedication and discipline.

Unfortunately, each year the public and members of the volunteer firefighting services are shocked to learn that a very few volunteers among the ranks have themselves been responsible for setting fires in their communities. These are the very individuals who have received specific training as firefighters in the arts and techniques of the arsonist. While observers may differ as to whether these fires are set by individuals who are fascinated by fire itself, or are set by those who seek to create opportunities in which they can be viewed as brave heroes by others, the results are the same: a serious erosion in public confidence in the volunteer firefighting services as a whole, and a loss of trust and morale within the volunteer companies themselves. This small number of individuals also places our communities and citizens at serious physical risk.

Mindful of these consequences, the legislature enacted chapter 719 of the laws of 1985, making an arson conviction in any degree an absolute bar to membership in a fire company. This law, however, relied too heavily upon an individual's willingness to admit an arson conviction and resigning as a volunteer or in refraining from applying in the first instance. It is the intent of this law to strengthen the ability of fire companies to police their own ranks by enabling fire chiefs to require new applicants for membership as volunteer firefighters, including transfers between fire companies, to undergo an arson conviction record check prior to acceptance as members. The authority afforded will enable the early identification of persons convicted of arson who may not serve.

§ 6. This act shall take effect April 1, 2000 except that the division of criminal justice services and the department of state are immediately authorized to promulgate such rules and regulations necessary to implement this act on or before such effective date.

Amendment Notes 2010. Chapter 56, § 41 (Part B) amended:

Sub 2, opening par by deleting at fig 1 "department of state,".

Sub 2, par (a) by deleting at fig 1 "secretary of state" and adding the matter in italics.

Sub 2, par (b) by deleting at fig 1 "department of state,".

Sub 2, closing par by deleting at fig 1 "department of state,".

Sub 3, par (b) by deleting at fig 1 "depatment of state,".

The 2014 amendment by ch 198, § 1 added "and sex offense" in the section heading; added "or a crime which requires the person to register as a sex offender under article six-C of the correction law" at the end of the first sentence of 1; added "or a crime which requires the person to register as a sex offender under article six-C of the correction law" in 3(a); in the second sentence of 3(b), added "and/or a crime which requires the person to register as a sex offender under article six-C of the correction law" and added "or a crime which requires the person to register as a sex offender under article six-C of the correction law" at the end; and added 3(d).

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

26 NY Jur 2d Counties Towns, and Municipal Corporations § 948.

27 NY Jur 2d Counties Towns, and Municipal Corporations §§ 1172, 1195.

§ 837-r. Office of sex offender management

1. Establishment of office. There is hereby established within the division of criminal justice services the office of sex offender management, hereinafter in this section referred to as "the office."

2. Duties and responsibilities. The office, in consultation with the commissioner of mental health, shall be responsible for policy matters relating to sex offenders and the management of their behavior. Its activities as to such matters shall include, but not be limited to:

(a) Studying issues relating to management of sex offender behavior in consultation with experts, service providers and representative organizations in the field of sex offender management;

(b) Serving as a clearinghouse for information and materials including lists of treatment providers and other community resources for sex offender management;

(c) Advising the governor and the legislature on the most effective ways for state government to address issues of sex offender management;

(d) Coordinating and recommending sex offender management policy and interagency initiatives including matters relating to risk assessment; provision of treatment; supervision policy; the use of videoconferencing and other tools to expedite hearings; the use of polygraphs, electronic monitoring, and other supervisory tools; the sharing of information among relevant agencies; residential issues; and other matters relating to re-entry and integration into society;

(e) Developing recommendations as to standards, guidelines, best practices, and qualifications for sex offender assessment, treatment, and supervision;

(f) Acting as an advocate for sex offense victims and programs and coordinating activities of other agencies with related functions;

(g) Developing and implementing campaigns of public awareness, community outreach, and sex offense prevention;

(h) Coordinating programs of training and education for law enforcement and treatment providers, judges, attorneys, and other professionals; and

(i) Developing case management systems and other information technology to support state activities in the management of sex offender behavior.

3. Other state agencies shall provide cooperation and assistance to the office so as to assist it in the effective performance of its duties.

HISTORY:

Add, L 2007, ch 7, § 3, eff April 13, 2007.

Editor's Notes Laws 2007, ch 7, § 1, eff April 13, 2007, provides as follows:

Section 1. Short title. This act shall be known and may be cited as the "sex offender management and treatment act."

§ 837-s. Search for sex offense conviction records of emergency medical technician and other first responder applicants

1. The chief officer of any volunteer ambulance company, as such term is defined in subdivision two

of section three of the volunteer ambulance workers' benefit law, any proprietary ambulance service, or any other ambulance or emergency medical service providing emergency medical care and transportation of sick or injured persons to health care facilities, shall notify every new applicant for emergency medical technician, paramedic, certified first responder applicant, or any other applicant who would be responsible for providing emergency medical care and transportation of sick or injured persons to health care facilities, including applicants seeking to transfer from one ambulance company or service to another, that their personally identifying information will be checked against the public records of those individuals required to register under article six-C of the correction law.

2. If such applicant desires to proceed, within ten business days of receiving an application, the chief officer shall inquire of the division as to whether such applicant is required to register by calling the special telephone number established pursuant to section one hundred sixty-eight-p of the correction law. Such chief officer may also check the internet posting subdirectory of level two and three sex offenders established pursuant to section one hundred sixty-eight-q of the correction law.

3. Where such search reveals that an applicant is registered under article six-C of the correction law, the chief officer of the ambulance company or service shall determine whether or not such person shall be eligible to be elected or otherwise appointed as a member of such ambulance company or service. Such determination shall be made consistent with article twenty-three-A of the correction law and a copy of such article shall be provided to the applicant.

HISTORY:
L 2016, ch 429, § 1, effective March 14, 2017.

§ 845. Central state registry of police officers and peace officers

1. The division shall collect information to maintain, on a current basis, a registry of all police officers and peace officers in the state. Such registry shall contain, with respect to each officer, his or her name, date of birth, social security number, rank or title, employer, and date of successful completion of training required by section 2.30 of the criminal procedure law and section two hundred nine-q of the general municipal law.

2. Each head of a state or local agency, unit of local government, state or local commission, public authority or other organization which employs police officers or peace officers shall transmit to the division, no later than the fifteenth day of January annually, and in a form and manner prescribed by the division, a list containing the name of every police officer or peace officer employed by his or her agency, government, commission, authority or organization indicating with respect to each officer his or her date of birth, social security number, rank or title, employer, and whether he is employed full-time or part-time. In addition to such annual list, each such head, whenever officers have been newly appointed or have ceased to serve, shall immediately transmit to the division, in a form and manner prescribed by the division, a list containing the names of such officers which, in the instance of new appointees, shall include all the information required to be furnished in the annual listing.

3. The division shall establish rules and regulations to provide for a permanent system of identification for each police and peace officer, which shall include procedures for updating the registry upon an officer's failure to complete required training within the time limitations established in law or regulation.

4. Upon the failure or refusal to comply with the requirements of subdivision two of this section, the commissioner may apply to the supreme court for an order directed to the person responsible requiring compliance. Upon such application the court may issue such order as may be just, and a failure to comply with the order of the court shall be a contempt of court and punishable as such.

5. The division shall cooperate with the division of state police in making the information in the central registry of police and peace officers available for the purpose of verifying transactions involving firearms.

HISTORY:
Add, L 1979, ch 482, § 3, eff Sept 1, 1979; amd, L 2010, ch 491, § 2, eff Jan 1, 2011.

Prior Law: Former § 845, add, L 1973, ch 603, § 15; repealed, L 1979, ch 482, § 1, eff Sept 1, 1979.

Amendment Notes 2010. Chapter 491, § 2 amended:
Section heading by adding the matter in italics.
Sub 1 by deleting at fig 1 "police", at fig 2 "department", at fig 3 "whether he is employed full-time or part-time" and ading the matter in italics.
Sub 2 by deleting at fig 1 "or", at fig 2 ", nineteen hundred eighty", at fig 3 "on the first day of January, nineteen hundred eighty,", at fig 4 "police", at fig 5 "department", at fig 6 "Each such head shall thereafter, no later than the tenth day of each January and July, transmit to the division a list of those police officers who have been appointed, have had a change of rank, or have ceased to serve in the preceding six calendar months and, in the instance of new appointees, shall include all the information required to be furnished in the initial listing." and adding the matter in italics.
By deleting former sub 3 and adding sub 3.
By adding subs 4 and 5.

Repeal Notes: [1979, ch 482] Former § 845 of the Executive Law, repealed by section one of this act, created five regional criminal justice committees within the Division of Criminal Justice Services.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:
This section referred to in CLS Pub O § 92.

Jurisprudences:
96 NY Jur 2d State of New York § 79.

§ 845-a. Presentment of flags lowered to half-staff in memorial of the death of any police officer or peace officer

In the event the governor orders the flags of the United States and the State of New York to be

lowered to half-staff, in memorial of the death of any police officer or peace officer identified in the central state registry of police officers and peace officers established pursuant to section eight hundred forty-five of this article, the commissioner shall, in cooperation with the office of general services, arrange for the procurement of a flag of the United States and a flag of the State of New York, which were flying over the capitol building at the time such flags were lowered to half-staff in compliance with the governor's order. Upon the procurement of such flags, the commissioner, or his or her representative, shall offer the presentment of such flags, without cost, to the person designated to dispose of the remains of the officer, in whose honor such flags were lowered in memorial.

HISTORY:

L 2015, ch 385, § 1, effective October 26, 2015.

GENERAL BUSINESS LAW

Article
2. Sabbath
6-D. Business of Installing Security or Fire Alarm Systems
7-A. Security Guard Act
9-B. Use of Names and Symbols
19. Oil and Distilled Spirits
26. Miscellaneous
35-F. Fire Sprinkler Information

HISTORY:
Add, L 1909, ch 25, eff Feb 17, 1909.

ARTICLE 2 Sabbath

Section
14. Processions and parades on Sunday

HISTORY:
Add, L 1965, ch 1031, § 45, eff Sept 1, 1967.

§ 14. Processions and parades on Sunday

1. All processions and parades on Sunday in any city, excepting only funeral processions for the actual burial of the dead, and processions to and from a place of worship in connection with a religious service there celebrated, are forbidden; and in such excepted cases there shall be no music, fireworks, discharge of cannon or firearms, or other disturbing noise. At a military funeral, or at the funeral of a United States soldier, sailor or marine, or of a national guardsman, or of a deceased member of an association of veteran soldiers, sailors or marines, or of a disbanded militia regiment, or of a secret fraternal society, or of an association of employees of the national, state, or municipal governments, music may be played while escorting the body; also in patriotic military processions on Sunday previous to Decoration day, known as memorial Sunday, to cemeteries or other places where memorial services are held, and also by organizations of the national guard or naval militia or of an association of employees of the national, state, or municipal governments, attending religious service on Sunday; but in no case within one block of a place of worship where service is then being celebrated. Music may also be played in any procession conducted by a religious organization or society in connection with a religious service or religious rally after one o'clock noon on Sunday.

2. Notwithstanding the provisions of this section, it shall be lawful to conduct, witness, participate or engage in processions or parades and to play music in any such procession or parade on Sunday after two o'clock in the afternoon, in a city, town or village, as shall be permitted by a local law or ordinance heretofore or hereafter adopted by the common council or other legislative body of a city, town or village permitting such processions and parades on such day and after such hour.

3. This section shall not apply to a city with a population of one million or more; provided, however, that if a parade or procession is held in such city on Sunday before two o'clock in the afternoon there shall be no music, fireworks, discharge of cannon or firearms, or other disturbing noise in relation thereto within one hundred and fifty feet of a place of worship.

4. A person wilfully violating any provision of this section is punishable by a fine not exceeding twenty dollars or imprisonment not exceeding ten days, or by both.

HISTORY:
Add, L 1965, ch 1031, § 45, eff Sept 1, 1967; amd, L 1980, ch 597, § 1, eff June 26, 1980.

Prior Law: Former § 14, formerly § 15, add, L 1909, ch 25; renumbered § 14, L 1910, ch 187; repealed, L 1922, ch 48, § 296, with substance transferred to Agr & M Law § 183. Prior § 14, add, L 1909, ch 25; repealed, L 1910, ch 187.

Derivation Notes: Section 14 derived from substance from former Penal Law § 2151.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:
35C NY Jur 2d Criminal Law Substantive Principles and Offenses § 1901.

ARTICLE 6-D Business of Installing Security or Fire Alarm Systems

Section
69-l. Definitions
69-m. License required
69-n. Powers of the secretary of state
69-o. License after examination; application
69-p. License without examination
69-pp. Licensed master electrician waiver
69-q. Licenses; display; renewal; duplicates
69-r. Fees
69-s. Suspension and revocation of licenses
69-ss. Revocation, suspension, reprimands, fines; unlicensed activities
69-t. Hearing on charges; decision
69-u. Judicial review
69-v. Violations and penalties
69-vv. Civil penalties
69-w. Official acts used as evidence
69-x. Disposition of moneys derived from operation of article
69-y. Separability clause
69-z. Applicability

HISTORY:
Add, L 1991, ch 734, § 1; amd, L 1993, ch 575, § 1, eff Sept 26, 1993.

§ 69-l. Definitions

As used in this article, unless the context requires otherwise:

1. "Department" means the department of state.

2. "Person" means an individual, firm, company, partnership, limited liability company or corporation.

3. "Licensee" means a person as herein defined licensed to engage in the business of installing,

servicing or maintaining security or fire alarm systems under this article.

4. "To engage in the business of installing, servicing or maintaining security or fire alarm systems" means and refers to a person who holds himself out directly or indirectly, as being able, or who offers or undertakes, by any means or method, to install, service or maintain a security or fire alarm system to detect intrusion, break-in, movement, sound or fire.

5. "Fee", "examination fee", "license fee" and "renewal fee" mean the fees required to accompany an application for examination or fingerprint processing for or issuance of any license, including any temporary, apprentice or renewal license, pursuant to this article. Such fee shall be non-refundable.

HISTORY:

Add, L 1991, ch 734, § 1; amd, L 1991, ch 745, § 1, eff April 1, 1992; L 1993, ch 575, § 1, eff Sept 26, 1993; L 1998, ch 324, § 1, eff July 14, 1998.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

Licensing regulations for the business of installing, servicing or maintaining security or fire alarm systems. 19 NYCRR Part 195.

§ 69-m. License required

1. On and after October first, nineteen hundred ninety-two, no person shall engage in the business of installing, servicing or maintaining security or fire alarm systems or hold himself out as being able so to do unless he is licensed therefor pursuant to this article. Nothing herein shall prohibit a person licensed in accordance with the provisions of this article from employing individuals to assist in the installation, servicing or maintaining of security or fire alarm systems, provided such licensee issues identification cards on a form prescribed by the secretary of state to each unlicensed individual.

2. Notwithstanding the provisions of subdivision one of this section, a license shall not be required of a person to engage in the business of installing, servicing or maintaining security or fire alarm systems if such an alarm system is to be installed in a motor vehicle, water vessel or aircraft or is a battery-operated smoke detection device. Furthermore, a property owner or proprietor who purchases or owns an alarm system to be installed by him or his employees onto his property or place of business shall not fall under the provisions of this article.

HISTORY:

Add, L 1991, ch 734, § 1; amd, L 1993, ch 575, § 1, eff Sept 26, 1993.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

Licensing regulations for the business of installing, servicing or maintaining security or fire alarm systems. 19 NYCRR Part 195.

§ 69-n. Powers of the secretary of state

In addition to the powers and duties elsewhere prescribed in this article, the secretary of state shall have power:

1. To appoint an adequate number of assistants, inspectors and other employees as may be necessary to carry out the provisions of this article, to prescribe their duties, and to fix their compensation within the amount appropriated therefor.

2. To examine into the qualifications and fitness of applicants for licenses under this article.

3. To keep records of all licenses issued, suspended or revoked.

4. To prepare a manual of rules and regulations for the conduct of examinations and to furnish copies thereof to persons desiring the same upon payment of a reasonable fee therefor.

5. To adopt such rules and regulations not inconsistent with the provisions of this article, as may be necessary with respect to the form and content of applications for licenses, the reception thereof, the investigation and examination of applicants and their qualifications, and the other matters incidental or appropriate to his powers and duties as prescribed by this article and for the proper administration and enforcement of the provisions of this article, and to amend or repeal any of such rules and regulations.

6. [Repealed]

HISTORY:

Add, L 1991, ch 734, § 1; amd, L 1993, ch 575, § 1, eff Sept 26, 1993; L 2012, ch 60, § 63 (Part D), eff March 30, 2012.

Amendment Notes: 2012. Chapter 60, § 63 (Part D) amended:

By repealing sub 6.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

Licensing regulations for the business of installing, servicing or maintaining security or fire alarm systems. 19 NYCRR Part 195.

§ 69-o. License after examination; application

1. After successfully passing the designated examination, any person over the age of eighteen years, desiring a license to engage in the business of installing, servicing or maintaining security or fire alarm systems under this article, may make application to the secretary of state therefor. The application shall be subscribed by the applicant and affirmed by him as true under the penalties of perjury. The application shall be in such form and shall contain such information relative to the applicant and his qualifications as may be prescribed by the secretary of state. Each application shall be accompanied by:

(a) Two recent photographs of the applicant of a size prescribed by the secretary of state and two sets of fingerprints of the applicant to be recorded in such manner as the secretary of state may prescribe by rule. The fingerprints shall be taken on a standard fingerprint card approved for fingerprinting by the state division of criminal justice services and shall be accompanied by the appropriate processing fees in proper form for the division of criminal justice services;

(b) Evidence of education satisfactory to the secretary of state which shall include evidence of the successful completion of a course of study in a school duly licensed pursuant to the education law or approved by the board of regents as a school qualified to instruct students in the field of security or fire alarm systems or can demonstrate to the satisfaction of the secretary of state that he has successfully completed an approved industry sponsored training program; and

(c) Evidence of having successfully passed the required examination.

2. After the filing of an applicant's fingerprint cards, the secretary of state shall forward such fingerprints to the division of criminal justice services to be compared with the fingerprints on file with the division of criminal justice services in order to ascertain whether the applicant has been convicted of a felony involving fraud, bribery, perjury or theft pursuant to article one hundred forty, one hundred fifty-five, one hundred sixty, one hundred sixty-five, one hundred seventy, one hundred seventy-five, one hundred seventy-six, one hundred eighty, one hundred eighty-five, one hundred ninety, one hundred ninety-five, two hundred or two hundred ten of the penal law; or has a criminal action which has been pending for such a felony for under one year without a final disposition unless adjourned in contemplation of dismissal; provided, however, that for the purposes of this article, none of the following shall be considered criminal convictions or reported as such:

(a) A conviction which has been vacated and replaced by a youthful offender finding pursuant to article seven hundred twenty of the criminal procedure law, or the applicable provisions of law of any other jurisdiction; or

(b) A conviction the records of which have been expunged or sealed pursuant to the applicable provisions of the laws of this state or of any other jurisdiction; or

(c) A conviction for which a certificate of relief from disabilities or a certificate of good conduct has been issued pursuant to the correction law.

The division of criminal justice services shall retain the fingerprint cards and return the report of such convictions or pending cases, if any, to the secretary of state who shall retain them in a confidential file for no more than one year, after which time such report shall be destroyed.

The secretary of state shall deny the application of any individual convicted of a felony involving fraud, bribery, perjury or theft pursuant to article one hundred forty, one hundred fifty-five, one hundred sixty, one hundred sixty-five, one hundred seventy, one hundred seventy-five, one hundred seventy-six, one hundred eighty, one hundred eighty-five, one hundred ninety, one hundred ninety-five, two hundred or two hundred ten of the penal law; or has a criminal action which has been pending for such a felony for under one year without a final disposition unless adjourned in contemplation of dismissal; provided, however, that for the purposes of this article, none of the following shall be considered criminal convictions or reported as such:

(i) A conviction which has been vacated and replaced by a youthful offender finding pursuant to article seven hundred twenty of the criminal procedure law, or the applicable provisions of law of any other jurisdiction; or

(ii) A conviction the records of which have been expunged or sealed pursuant to the applicable provisions of the laws of this state or of any other jurisdiction; or

(iii) A conviction for which a certificate of relief from disabilities or a certificate of good conduct has been issued pursuant to the correction law.

3. The secretary of state shall prepare question papers which shall be the same for all applications at any given examination. The questions may be partly written and partly oral and shall not be confined to any specific method or system. In addition, a portion of the examination may include testing of practical skills through various exercises. No person shall receive a license hereunder who has not actually demonstrated to the secretary of state his ability and fitness to engage in the business of installing, servicing or maintaining security or fire alarm systems in such practical tests as may be required by the secretary of state.

4. Examinations shall be in the English language and shall be held at least quarterly and shall be given in at least four convenient places in the state.

5. There shall be an examination fee of fifteen dollars.

6. When an applicant has successfully passed the examination therefor, and has otherwise qualified for a license, the secretary of state on payment of the fee prescribed by this article, shall issue to such applicant a license to engage in the business of installing, servicing or maintaining security or fire alarm systems.

HISTORY:

Add, L 1991, ch 734, § 1; amd, L 1991, ch 745, §§ 2, 3, eff April 1, 1992; L 1993, ch 575, § 1, eff Sept 26, 1993.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

Approval of security or fire alarm system installer courses. 19 NYCRR §§ 196.1 et seq.

Licensing regulations for the business of installing, servicing or maintaining security or fire alarm systems. 19 NYCRR Part 195.

§ 69-p. License without examination

1. Any person over the age of eighteen years who shall present to the secretary of state satisfactory evidence that he has been actually engaged in the business of installing, servicing or maintaining security or fire alarm systems in this state for at least two years within the period of three years immediately prior to October first, nineteen hundred ninety-two, shall be entitled to a license under this article without examination, provided that applica-

tion therefor is accompanied by the requirements of paragraphs (a) and (b), respectively, of subdivision one of section sixty-nine-o of this article and the required annual license fee, is filed with the secretary of state.

2. The secretary of state shall upon application and without examination, issue a license to any person over the age of eighteen years who has been duly licensed by any other state, territory, protectorate or dependency of the United States to engage in the business of installing, servicing or maintaining security or fire alarm systems upon compliance with standards and requirements not lower, in the judgment of the secretary of state, than those of this state, provided, however, that such state extends similar reciprocity to licensees of this state. Such application shall be accompanied by the requirements of paragraphs (a) and (b), respectively, of subdivision one of section sixty-nine-o of this article and the required license fee.

3. (a) If any person, eligible for any license, mentioned in this section, be in the military service at or during the time application for such license is required to be filed and license fee paid, according to the provisions of this section, the period within which said application may be filed and license fee may be paid, is extended in behalf of such person, until three months after the termination of said military service, any provision contained in this article to the contrary, notwithstanding.

(b) In the case of persons who are or were in the military service and (i) have been or will be discharged under conditions other than dishonorable, or (ii) have a qualifying condition, as defined in section three hundred fifty of the executive law, and received a discharge other than bad conduct or dishonorable from such service, or (iii) are discharged LGBT veterans, as defined in section three hundred fifty of the executive law, and have received a discharge other than bad conduct or dishonorable from such service, the period of two years specified in subdivision one of this section need not be continuous. The length of time such person was engaged in the business of installing, servicing or maintaining security or fire alarm systems before entering the military service may be added to any period of time during which such person was or is engaged in the business of installing, servicing or maintaining security or fire alarm systems after the termination of military service.

HISTORY:

Add, L 1991, ch 734, § 1; amd, L 1991, ch 745, § 4; L 1993, ch 575, § 1, eff Sept 26, 1993; L 2019, ch 490, § 40, effective November 12, 2020.

Editor's Notes Laws 2019, ch 490, § 82, eff November 12, 2020, provides:

§ 82. This act shall take effect one year after it shall have become a law; provided, however that the amendments to subdivision 7 of section 369-h of the executive law made by section twenty-five of this act shall not affect the repeal of such section and shall be deemed repealed therewith. Effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized to be made and completed on or before such effective date.

Amendment Notes The 2019 amendment by ch 490, § 40, added "(i)" and "or (ii) have a qualifying condition, as defined in section three hundred fifty of the executive law, and received a discharge other than bad conduct or dishonorable from such service, or (iii) are discharged LGBT veterans, as defined in section three hundred fifty of the executive law, and have received a discharge other than bad conduct or dishonorable from such service" in the first sentence of 3(b).

§ 69-pp. Licensed master electrician waiver

1. Any person who is licensed by any municipality as a master electrician and who engages in the business of installing, servicing or maintaining security or fire alarm systems within such municipality shall be waived from the provisions of this article upon registration with the secretary of state in accordance with the provisions of this section.

2. Each licensed master electrician seeking a waiver shall register with the secretary of state on a form prescribed by the secretary. Such form shall include at least: the individual's name and home address, the business's name and address, a listing of jurisdictions in which the master electrician is licensed, a listing of all appropriate license numbers and such other information as the secretary shall deem necessary. No applicant for a waiver shall be required to meet the provisions of section sixty-nine-o of this article.

3. Any waiver shall only apply for engaging in the business of installing, servicing or maintaining security or fire alarm systems in municipalities where such master electrician is licensed. However, should a licensed master electrician for any reason become unlicensed by any municipality, such master electrician shall immediately inform the secretary of state of such action. The secretary of state may suspend any waiver granted upon the basis of the master electrician license.

4. A master electrician who engages in the business of installing, servicing or maintaining security or fire alarm systems in municipalities where such master electrician is not duly licensed, shall be required to be licensed pursuant to this article.

5. A master electrician who is licensed in any municipality within the state shall be deemed to have satisfied the requirements of paragraphs (b) and (c) of subdivision one of section sixty-nine-o of this article.

6. The fee for all waivers granted to any master electrician shall be established by the secretary of state and shall not exceed fifty dollars every two years. Provided, however, that any person licensed pursuant to this article prior to the effective date of this section shall be exempt from the waiver fee for periods prior to October first, nineteen hundred ninety-four. Such waiver shall be valid for a two year period and be renewable for two year periods thereafter.

7. Any license issued by any municipality establishing a master electrician license after July fif-

teenth, nineteen hundred ninety-three shall not be grounds for a waiver pursuant to this section unless the secretary determines that the standards for such master electrician license are not lower than those of this article.

HISTORY:

Add, L 1993, ch 575, § 1, eff Sept 26, 1993.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

Licensing regulations for the business of installing, servicing or maintaining security or fire alarm systems. 19 NYCRR Part 195.

§ 69-q. Licenses; display; renewal; duplicates

1. All licenses shall be for a period of two years.

2. No license shall be assignable or transferable except as hereinafter provided.

3. (a) A license issued to a limited liability company or to a corporation to engage in the business of installing, servicing or maintaining security or fire alarm systems shall require that such business be operated under the direction and control of at least one member or manager of the limited liability company or a manager or managing officer of a corporation, who shall be required to meet the licensing requirements of this article on behalf of the licensee and who, in the case of a corporation, shall not be required to be an officer of the corporation. If such member, manager or managing officer, who shall have met the requirements of this article, ceases to act in the capacity of member, manager or managing corporate officer for any reason whatsoever, the licensee shall notify the department in writing within fourteen days from such termination or cessation. The licensee may continue to conduct the business of installing, servicing or maintaining security or fire alarm systems for a period not to exceed sixty days from the date of such termination or cessation; the period of sixty days aforesaid may be extended upon application to the secretary of state and for good cause for an additional period not to exceed one hundred twenty days; by the end of such period a new member, manager or managing officer must be designated who has met the licensing requirements of this article on behalf of the licensee.

(b) The limited liability company or corporation shall be liable with respect to all actions taken by its member, manager or managing officer acting on behalf of such limited liability company or corporation.

4. A license to engage in the business of installing, servicing or maintaining security or fire alarm systems issued to an individual may be assigned or transferred for the remainder of the license period to a partnership, limited liability company or corporation if such individual is a member of such partnership, a member of the limited liability company or an officer of such corporation at the time of such assignment or transfer. A license issued to a partnership may be assigned or transferred for the remainder of the license period to any one member of such partnership, provided he obtains the consent of all of the other members of such partnership. The application for such transfer or assignment must be accompanied by the requirements of paragraphs (a) and (b) of subdivision one of section sixty-nine-o of this article and by proof satisfactory to the department that the requirements herein provided have been complied with. No assignment or transfer shall become effective unless and until the endorsement has been made on the face of the license by the department and such license, so endorsed, has been returned to the assignee or transferee. All such endorsements shall be made without payment of any fee. A bona fide purchaser of such business from the holder of the license thereof may continue to use the license of the seller for a period of thirty days from the date of the sale, provided there is endorsed on the face thereof the name of the purchaser, the date of the sale, and the signature of the seller and the purchaser; and provided further within five days from the date of the sale, an application, in accordance with the provisions of this article, shall be presented by the purchaser to the secretary of state for a license to conduct the business of installing, servicing or maintaining security or fire alarm systems.

5. Employees of a person licensed to conduct the business of installing, servicing or maintaining security or fire alarm systems shall not be required to be licensed provided that the nonlicensed employee have in his possession an identification card issued pursuant to section sixty-nine-m of this article. A person licensed to conduct such business shall, however, be required to submit to the department a full set of fingerprints of any employee who assists in the installation, servicing or maintaining of security or fire alarm systems, which shall be forwarded by the department to the division of criminal justice services to be compared with the fingerprints on file with the division to determine whether such employee has been convicted of a felony involving fraud, bribery, perjury or the theft pursuant to article one hundred forty, one hundred fifty-five, one hundred sixty, one hundred sixty-five, one hundred seventy, one hundred seventy-five, one hundred seventy-six, one hundred eighty, one hundred eighty-five, one hundred ninety, one hundred ninety-five, two hundred or two hundred ten of the penal law or has a criminal action which has been pending for under one year without a final disposition unless adjourned in contemplation of dismissal. Employee fingerprints will be recorded in such manner as the secretary of state may prescribe by rule. Such employee's fingerprints shall be taken on a standard fingerprint card approved for fingerprinting by the state division of criminal justice services and shall be accompanied by the appropriate processing fees in proper form for the division of criminal justice services. The division of criminal justice services shall return the fingerprint card and the report of such convictions to the department, who shall then

notify the licensee that such employee has been convicted of such a felony or has a criminal action pending pursuant to a schedule developed by the division in conjunction with the secretary of state but not to be implemented prior to September first, nineteen hundred ninety-four. Upon submission of such fingerprints to the department, a person may be employed on a provisional basis to assist in the installation, servicing or maintaining of security or fire alarm systems. However, such employee may not continue in such a capacity if it is determined that such employee has been convicted of such a felony or has a criminal action pending.

6. A license to conduct the business of installing, servicing or maintaining security or fire alarm systems issued to an individual or to a partnership may be used after the death of the licensed individual or co-partner by his next of kin or duly appointed administrator or executor in the name of the estate for a period of not more than sixty days from the date of death of such individual or co-partner, provided that there is endorsed upon the face of the license after the name of the decedent the word "deceased", the date of death and the name of the next of kin, administrator or executor under whose authority the license is being used; the period of sixty days aforesaid may be extended upon application to the secretary of state and for good cause shown for an additional period not to exceed one hundred twenty days. Any license so continued which shall expire during such period of sixty days or the extension thereof may be renewed by the next of kin, administrator or executor for the balance of such period or the extension thereof.

7. A license to conduct the business of installing, servicing or maintaining security or fire alarm systems shall be conspicuously posted upon the premises where the licensee is engaged in the business of installing, servicing or maintaining security or fire alarm systems.

8. Any license which has not been suspended or revoked, may, upon the payment of the renewal fee prescribed by this article, be renewed for additional periods of two years from its expiration, without further examination, upon the filing of an application for such renewal, on a form and with such additional information as prescribed by the secretary of state.

9. Any person failing to file application and fee for renewal of a license within one year immediately following the expiration of his last license shall pay an additional fee of sixty dollars, and if he fails to file application and fee for renewal within two years he shall be ineligible for such license until he shall have again met the requirements set forth in this article.

10. A duplicate license may be issued for one lost, destroyed or mutilated upon application therefor on a form prescribed by the secretary of state and the payment of the fee prescribed therefor by this article. Each such duplicate license shall have the word "duplicate" stamped across the face thereof and shall bear the same number as the one it replaces.

11. Notice in writing shall be given the secretary of state at his office in Albany by the holder of a license to conduct the business of installing, servicing or maintaining security or fire alarm systems of any change in address of the business or residence of the person engaged in such business together with the return of license, whereupon a properly signed endorsement will be made on the face of the license as to such change and the license then returned to the licensee. A change of address by a licensee without such notice and endorsement of license shall operate to cancel the license.

HISTORY:

Add, L 1991, ch 734, § 1; amd, L 1993, ch 575, § 1, eff Sept 26, 1993; L 1998, ch 324, § 2, eff July 14, 1998.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

Licensing regulations for the business of installing, servicing or maintaining security or fire alarm systems. 19 NYCRR Part 195.

§ 69-r. Fees

1. The fee for a license to engage in the business of installing, servicing or maintaining security or fire alarm systems shall be two hundred dollars plus an amount to be determined by the division of criminal justice services to cover the cost of the division's fingerprint search and report. For each renewal thereof, the fee shall be one hundred dollars plus an amount to be determined by the division of criminal justice services to cover the cost of the division's fingerprint search and report.

2. The fee for taking an examination under this article shall be fifteen dollars; provided, however, that if the applicant qualifies for a license as the result of such examination, the fee paid for the privilege of taking such examination shall be included in the license fee for the license issued to him thereon.

3. The fee for issuing a duplicate license in substitution for one lost, destroyed or mutilated shall be twenty-five dollars.

4. The fee for changing a name or address shall be ten dollars.

5. The fees hereinabove set forth shall be those for licenses issued for the license period of two years or fraction of such period.

HISTORY:

Add, L 1991, ch 734, § 1; amd, L 1993, ch 575, § 1, eff Sept 26, 1993.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

Licensing regulations for the business of installing, servicing or maintaining security or fire alarm systems. 19 NYCRR Part 195.

§ 69-s. Suspension and revocation of licenses

1. A license to engage in the business of installing, servicing or maintaining security or fire alarm systems may be suspended or revoked, or in lieu

thereof a fine not exceeding one thousand dollars per violation payable to the department may be imposed or a reprimand issued by the secretary of state, for any one or more of the following causes:

(a) Fraud or bribery in securing a license;

(b) The making of any false statement as to a material matter in any application or other statement or certificate required by or pursuant to this article;

(c) Incompetency;

(d) Failure to display the license as provided in this article;

(e) Violation of any provision of this article, or of any rule or regulation adopted hereunder;

(f) Conviction of a felony involving fraud, theft, perjury or bribery or other cause which would permit disqualifications from receiving a license upon the original application.

2. Whenever the license to engage in the business of installing, servicing or maintaining security or fire alarm systems is revoked, such license shall not be reinstated or reissued until after the expiration of a period of five years from the date of such revocation.

HISTORY:

Add, L 1991, ch 734, § 1; amd, L 1993, ch 575, § 1, eff Sept 26, 1993.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

Licensing regulations for the business of installing, servicing or maintaining security or fire alarm systems. 19 NYCRR Part 195.

§ 69-ss. Revocation, suspension, reprimands, fines; unlicensed activities

1. The secretary of state shall, before imposing any fine or reprimand on a person thereof, or before issuing any order directing the cessation of unlicensed activities, and at least ten days prior to the date set for the hearing, notify in writing such person, or the person alleged to have engaged in unlicensed activities, of any charges made and shall afford such person an opportunity to be heard in person or by counsel in reference thereto. Such written notice may be served by delivery of same personally to the person charged, or by mailing same by certified mail to the last known business or other address provided by such person to the secretary of state, or by any method authorized by the civil practice law and rules for the service of a summons. The hearing on such charges shall be at such time and place as the department shall prescribe.

2. The department, acting by such officer or person in the department as the secretary of state may designate, shall have the power to subpoena and bring before the officer or person so designated any person in this state, and administer an oath to and take testimony of any person or cause his deposition to be taken. A subpoena issued under this section shall be regulated by the civil practice law and rules.

HISTORY:

Add, L 2007, ch 437, § 1, eff Oct 30, 2007.

§ 69-t. Hearing on charges; decision

No license shall be suspended or revoked nor shall any fine or reprimand be imposed until after a hearing had before an officer or employee of the department designated for such purpose by the secretary of state, upon notice to the licensee of at least ten days. The notice shall be served either personally or by certified mail and shall state the date and place of hearing and set forth the ground or grounds constituting the charges against the licensee. The licensee shall have the opportunity to be heard in his defense either in person or by counsel and may produce witnesses and testify in his behalf. A stenographic record of the hearing shall be taken and preserved. The hearing may be adjourned from time to time. The person conducting the hearing shall make a written report of his findings and a recommendation to the secretary of state for decision. The secretary of state shall review such findings and the recommendation and, after due deliberation, shall issue an order accepting, modifying or rejecting such recommendation and dismissing the charges or suspending or revoking the license or in lieu thereof imposing a fine or reprimand upon the licensee. For the purpose of this article, the secretary of state or any officer or employee of the department designated by him, may administer oaths, take testimony, subpoena witnesses and compel the production of books, papers, records and documents deemed pertinent to the subject of investigation.

HISTORY:

Add, L 1991, ch 734, § 1; amd, L 1993, ch 575, § 1; L 2007, ch 266, § 1, eff July 18, 2007.

§ 69-u. Judicial review

The action of the secretary of state in suspending, revoking or refusing to issue or renew a license, or imposing a fine or reprimand on the holder thereof may be reviewed by a proceeding brought under and pursuant to article seventy-eight of the civil practice law and rules.

HISTORY:

Add, L 1991, ch 734, § 1; amd, L 1993, ch 575, § 1, eff Sept 26, 1993.

§ 69-v. Violations and penalties

Any person who shall directly or indirectly engage in the business of installing, servicing or maintaining security or fire alarm systems or hold himself out to the public as being able so to do without a license therefor, or who shall violate any of the provisions of this article, or having had his license suspended or revoked, shall continue to engage in the business of installing, servicing or maintaining security or fire alarm systems or who, without a license to engage in the business of installing, servicing or maintaining security or fire alarm systems, directly or indirectly employs, permits or authorizes an unlicensed person to engage in the business of installing, servicing or maintaining security or fire alarm systems, shall be

guilty of a misdemeanor and, upon conviction, shall be punishable by imprisonment of not more than six months, or by a fine of not more than one thousand dollars or by both such fine and imprisonment upon the first conviction and by imprisonment of not more than one year or by a fine of not less than one thousand dollars nor more than five thousand dollars or by both such fine and imprisonment upon a subsequent conviction. Each violation of this article shall be deemed a separate offense.

HISTORY:
Add, L 1991, ch 734, § 1; amd, L 1993, ch 575, § 1, eff Sept 26, 1993.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

Annotations:
Validity and construction of statutes or ordinances imposing civil or criminal penalties on alarm system users, installers, or servicers for false alarms, 17 ALR5th 825.

§ 69-vv. Civil penalties

Notwithstanding any inconsistent provision of law, with respect to violations of section sixty-nine-ss of this article, the secretary of state is authorized, upon the complaint of any person or on his or her own initiative, to investigate and prosecute violations of the provisions of such section by persons not licensed pursuant to this article and may impose a fine of up to one thousand dollars for the first violation; two thousand dollars for a second such violation; five thousand dollars for a third violation; and ten thousand dollars for a fourth violation and each subsequent violation. The attorney general, acting on behalf of the secretary of state, may commence an action or proceeding in a court of competent jurisdiction to obtain a judgment against such unlicensed person in an amount equal to that imposed as a fine.

HISTORY:
Add, L 2007, ch 437, § 1, eff Oct 30, 2007.

§ 69-w. Official acts used as evidence

The official acts of the secretary of state and department shall be prima facie evidence of the facts therein and shall be entitled to be received in evidence in all actions at law and other legal proceedings in any court or before any board, body or officer.

HISTORY:
Add, L 1991, ch 734, § 1; amd, L 1993, ch 575, § 1, eff Sept 26, 1993.

§ 69-x. Disposition of moneys derived from operation of article

Processing fees for the fingerprint search conducted by the division of criminal justice services shall accompany the fingerprint cards and shall be deposited to the credit of the general fund. All remaining moneys derived from the operation of this article shall be deposited in the business and licensing services account established pursuant to section ninety-seven-y of the state finance law.

HISTORY:
Add, L 1991, ch 734, § 1; amd, L 1991, ch 745, § 5; L 1993, ch 575, § 1; L 1999, ch 411, § 6 (Part B), eff Aug 9, 1999, deemed eff on and after April 1, 1999.

§ 69-y. Separability clause

If any part or provision of this article or the application thereof to any person or circumstance be adjudged invalid by any court of competent jurisdiction, such judgment shall be confined in its operation to the part, provision or application directly involved in the controversy in which such judgment shall have been rendered and shall not affect or impair the validity of the remainder of this article or the application thereof to other persons or circumstances and the legislature hereby declares that it would have enacted this article or the remainder thereof had the invalidity of such provision or application thereof been apparent.

HISTORY:
Add, L 1991, ch 734, § 1; amd, L 1993, ch 575, § 1, eff Sept 26, 1993.

§ 69-z. Applicability

1. The provisions of this article shall not be construed to limit in any way the authority of a city with a population of one million or more to enact, implement and continue to enforce local laws and regulations governing home improvement contractors and their agents or employees that were in effect prior to the effective date of this article, or to enact, implement and enforce any amendments thereto after the effective date of this article.

2. The provisions of this article shall govern notwithstanding any other law to the contrary; provided, however, that local law shall govern with respect to inspection of fire alarms by a fire marshall or any other person designated under such local law; and provided, further, that this article shall not be held to invalidate any provision of the laws of this state or any subdivision thereof unless there is a direct conflict between the provision of this article and the provision of such law or unless such law is duplicative of this article, in which case this article shall prevail, except as provided otherwise in subdivision one of this section. Except as provided in subdivision one of this section, no local law shall require any fee or license for the installation, servicing or maintaining of security or fire alarm systems, except that which is provided pursuant to this article.

HISTORY:
Add, L 1991, ch 734, § 1; amd, L 1993, ch 575, § 1, eff Sept 26, 1993.

Agency Opinions
Town law imposing charges on property owners for false emergency alarms is neither inconsistent with nor preempted by state law. 1996 NY Ops Atty Gen I 96-22.

ARTICLE 7-A Security Guard Act

Section
89-n. Training requirements

HISTORY:
Add, L 1992, ch 336, § 6, eff July 12, 1993 (see 1992 note below).

§ 89-n. Training requirements

1. Security guards shall be required to satisfactorily complete training programs given and administered by security guard training schools, schools which provide security guard training programs or security guard companies prescribed, certified and approved by the commissioner pursuant to section eight hundred forty-one-c of the executive law to include:

a. an eight hour pre-assignment training course;

b. an on-the-job training course to be completed within ninety working days following employment, consisting of a minimum of sixteen hours and a maximum of forty hours, as determined by the council, generally relating to the security guard's specific duties, the nature of the work place and the requirements of the security guard company;

c. a forty-seven hour firearms training course for issuance of a special armed guard registration card;

d. an eight hour annual in-service training course; and

e. an additional eight hour annual in-service training course for holders of special armed guard registration cards.

The training programs and courses required by this subdivision may, if approved and certified by the commissioner pursuant to subdivision two of section eight hundred forty-one-c of the executive law, be given and administered by security guard companies.

Nothing herein shall be construed to prohibit a security guard company from voluntarily providing training programs and courses which exceed the minimum requirements provided by this subdivision.

Upon completion of a required training course, a security guard shall receive from the provider a certificate evidencing satisfactory completion thereof in accordance with the requirements prescribed by the commissioner pursuant to section eight hundred forty-one-c of the executive law.

2. a. A security guard who has been or was previously employed as a peace officer for eighteen months or more who exhibits a valid certificate awarded pursuant to subdivision six of section 2.30 of the criminal procedure law attesting to his or her satisfactory completion of the training requirements imposed by section 2.30 of the criminal procedure law shall be exempt from the requirements of paragraph c of subdivision one of this section provided that such peace officer has completed a course of firearms training approved by the municipal police training council provided, however, that nothing in this subdivision shall be deemed to authorize such guard to carry, possess, repair or dispose of a firearm unless the appropriate license therefor has been issued pursuant to section 400.00 of the penal law.

b. [Redesignated]

3. A security guard who is also employed as a peace officer for eighteen months or more shall be exempt from the requirements of paragraph e of subdivision one of this section as long as he or she is currently employed as a peace officer and provides to his or her security guard employer proof of such annual in-service training required under paragraph e of subdivision one of this section.

4. The provisions of this section shall not apply to a security guard who is:

a. a correction officer of any state correctional facility having the powers of a peace officer pursuant to subdivision twenty-five of section 2.10 of the criminal procedure law;

b. a bridge and tunnel officer, sergeant or lieutenant of the Triborough bridge and tunnel authority having the powers of a peace officer pursuant to subdivision twenty of section 2.10 of the criminal procedure law;

c. a uniformed court officer of the unified court system having the powers of a peace officer pursuant to subdivision twenty-one of section 2.10 of the criminal procedure law;

d. a court clerk having the powers of a peace officer pursuant to subdivision twenty-one of section 2.10 of the criminal procedure law;

e. a deputy sheriff having the powers of a peace officer pursuant to subdivision two of section 2.10 of the criminal procedure law;

f. a police officer as defined in paragraphs (a), (b), (c), (d), (e), (f), (j), (k), (l), (o) and (p) of subdivision thirty-four of section 1.20 of the criminal procedure law who has been retired from such employment for a period not to exceed ten years, provided, however, that a retired police officer who has been retired from such employment for a period in excess of ten years shall be required to provide proof to his or her security guard employer of his or her satisfactory completion of an eight hour annual in-service training course approved by the commissioner, and provided further, however, that a retired police officer who will be required by his or her security guard employer to carry a firearm or will be authorized to have access to a firearm shall provide to such employer proof of his or her satisfactory completion of a forty-seven hour firearms training course approved by the commissioner and, if such firearms training course has not been completed within one year prior to such employment, satisfactory completion of an additional eight hour annual firearms in-service training course approved by the commissioner, such training course to be completed at least annually; or

g. a peace officer as defined in subdivisions two, twenty and twenty-five and paragraphs a and b of subdivision twenty-one of section 2.10 of the criminal procedure law who has been retired from such employment for a period not to exceed ten years, provided, however, that a retired peace officer who has been retired from such employment for a period in excess of ten years shall be required to provide

proof to his or her security guard employer of his or her satisfactory completion of an eight hour annual in-service training course approved by the municipal police training council, and provided further, however, that a retired peace officer who will be required by his or her security guard employer to carry a firearm or will be authorized to have access to a firearm shall provide to such employer proof of his or her satisfactory completion of a forty-seven hour firearms training course approved by the municipal police training council and, if such firearms training course has not been completed within one year prior to employment, satisfactory completion of an additional eight hour annual firearms in-service training course approved by the municipal police training council, such training course to be completed at least annually.

HISTORY:

Add, L 1992, ch 336, § 6, eff July 12, 1993; amd, L 1994, ch 634, §§ 12–14, eff Aug 2, 1994; L 2002, ch 508, § 1; L 2003, ch 221, § 1, eff July 29, 2003; L 2010, ch 491, § 4, eff Jan 1, 2011.

Amendment Notes: 2010. Chapter 491, § 4 amended:

Sub 2, par a by deleting at fig 1 "pursuant to the last paragraph of subdivision one of section 2.30 of the criminal procedure law".

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

Security guard training courses 9 NYCRR §§ 6027.1 et seq.

Approved security guard training schools. 9 NYCRR §§ 6028.1 et seq.

Security guard instructor standards and qualifications. 9 NYCRR §§ 6029.1 et seq.

ARTICLE 9-B Use of Names and Symbols

Section
137. Unauthorized wearing or use of badge, name or insignia of certain orders and societies

HISTORY:

Add, L 1965, ch 1031, § 52, eff Sept 1, 1967.

§ 137. Unauthorized wearing or use of badge, name or insignia of certain orders and societies

1. Any person who wilfully wears, or attaches to any motor vehicle, the badge, insignia, rosette or the button of the Grand Army of the Republic, the insignia, badge or rosette of the Military Order of the Loyal Legion of the United States or Military Order of Foreign Wars of the United States, or the badge or button of the United Spanish War Veterans, the Veterans of Foreign Wars of the United States, the American Legion, the Disabled American Veterans, the Military Order of the World War, the Army and Navy Union, U.S.A., or the Order of Patrons of Husbandry, or the Benevolent and Protective Order of Elks of the United States of America, or the Steuben Society of America, or the Jewish War Veterans of the United States, Inc., or the Catholic War Veterans, Inc., or the insignia or emblem of the Italian American War Veterans of the United States, Incorporated, or the insignia or emblem of the National Italo-American War Veterans, Inc., the insignia or emblem of the Polish Legion of American Veterans, Inc., or the insignia or emblem of the Military Order of the Purple Heart, Inc., or the insignia or emblem of any lodge, society or organization subordinate to or recognized as Masonic by the Grand Lodge of Free and Accepted Masons of the State of New York, or the insignia or emblem of the Masonic War Veterans of the State of New York, Inc., or the insignia or emblem of the Order of the Eastern Star of the State of New York, or the badge, banner, insignia, button or emblem of any lodge, society or organization subordinate to or recognized as Pythian by the Grand Lodge, Knights of Pythias of the State of New York, or the badge, insignia, button, tab, or chapeaux of La Societe des Forty Hommes et eight Chevaux or the Marine Corps League, or AMVETS, American Veterans of World War II, Air Force Association, or the insignia or emblem of the Knights of Columbus, or the badge, shield, emblem or name of the Police Conference of New York, Inc., or the badge, shield, emblem or name of the New York State Association of Chiefs of Police, or the shield of the Westchester County Police Conference or the badge, shield, emblem or name of the New York State Fire Fighters Association, or the badge, shield, emblem or name of the Policemen's Benevolent Association of Westchester County, Inc., or the badge, shield, emblem or name of the Metropolitan Police Conference of Eastern New York, Inc., or the badge, shield, emblem or name of the Nassau Police Conference, Inc., or the badge, shield, emblem or name of the International Veterans Boxers Association, or the badge, shield, emblem, insignia or name of the Grand council of Guardians, Inc., or the badge, shield, emblem or name of the New York Veteran Police Association, or the insignia, emblem, badge, banner, button of Grand Lodge of the State of New York, Order Sons of Italy in America, Incorporated, or any subordinate Lodge or Grand Lodge of the State of New York, Order Sons of Italy in America, Incorporated, or the insignia, emblem, badge, banner, button of Ladies' Lodges, Grand Lodge of the State of New York, Order Sons of Italy in America, Incorporated, or the badge, banner, insignia, button or emblem of any clan of the United Scottish Clans of New York and New Jersey, or the insignia, emblem, badge, banner or button of The Ladies Auxiliary, Italian American War Veterans of the United States, Incorporated, or the Civil Air Patrol, Inc., or the insignia, emblem, badge, banner or button of the Order of the American Hellenic Educational Progressive Association, Incorporated, or the insignia, emblem, badge, banner or button of the Polish Legion of American Veterans or Ladies Auxiliary of Polish Legion of American Veterans, or the insignia, emblem, badge, banner, or button of the Veterans of World War I of the United States of America Department of New York, Inc., China-Burma-India Veterans Association, Inc., Polish-American Veterans of World War II, Amsterdam, N. Y., Inc., Polish-American Veter-

ans of World War II, Schenectady, N. Y., Inc., World War Veterans Club of Lindenhurst, Inc., the Eastern Paralyzed Veterans Association, the Vietnam Veterans of America, the Army and Navy Union of the United States, the American Gold Star Mothers, Inc., Regular Veterans Association, Inc., the 369th Veterans Association, Inc., the Tri-County Council of Vietnam Veterans, the National Congress of Puerto Rican Veterans, or the Fleet Reserve Association, or the badge, insignia, rosette or button of any society, order or organization of ten years standing in the state of New York, or uses the same, or the name of any such society, order or organization by falsely representing himself to be a member thereof in good standing, to obtain, or in attempting to obtain, aid or assistance within the state, or wilfully uses the names of any such society, order or organization, or the titles of its officers, or uses its insignia or emblems, or the forms or designs thereof, or its ritual or ceremonies unless entitled to use or wear the same under the constitution and by-laws, rules, and regulations of such order or of such society, order or organization, is guilty of a violation punishable by a fine not to exceed one hundred dollars.

2. Nothing herein contained shall be construed as superseding any provision of law prohibiting certain use and display on private vehicles of state and other seals and insignia and of specified signs, lettering or devices.

HISTORY:

Add, L 1965, ch 1031, § 52, eff Sept 1, 1967; amd, L 1967, ch 581; L 1967, ch 680, § 45; L 1968, ch 376, § 3; L 1968, ch 805; L 1969, ch 47; L 1972, ch 299, § 1; L 1976, ch 206, § 1; L 1976, ch 872, § 3; L 1978, ch 227, § 1; L 1979, ch 400, § 1; L 1986, ch 531, § 1, eff Nov 1, 1986.

Prior Law: Former § 137, add, L 1909, ch 25; repealed, L 1962, ch 553, § 10-102, eff Sept 27, 1964.

Derivation Notes: Section 137 derived from substance from former Penal Law § 2240.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Unlawful use of identification of certain nonprofit organizations, § 397.

Designation of offenses, CLS Penal § 55.10.

Wearing uniform, badge, or other insignia to sell tickets, etc., CLS Civ Serv § 156.

Federal Aspects:

Unauthorized manufacture, sale or possession of official badges, identification cards or other insignia, 18 USCS § 701.

Jurisprudences:

35B NY Jur 2d Criminal Law Substantive Principles and Offenses § 1256.

ARTICLE 19 Oil and Distilled Spirits

Section

308. Retail sale and delivery of certain flammable liquids and kerosene

HISTORY:

Add, L 1909, ch 25, eff Feb 17, 1909.

§ 308. Retail sale and delivery of certain flammable liquids and kerosene

1. Definition. As used in this section:

"Flammable liquid" shall mean any liquid which has a flash point of seventy degrees Fahrenheit, or less, as determined by a Tagliabue or equivalent closed cup test device.

2. a. No person engaged in the retail sale of flammable liquids shall deliver any such liquids from bulk storage into portable containers of five gallons capacity or less unless the container is of sound metal or other unbreakable material construction, has a tight closure with screwed or spring cover and is fitted with a spout or so designed that the contents can be poured without spilling.

b. No person shall carry a lighted cigar, cigarette or pipe, nor use a match or other open flame while he is dispensing flammable liquids at retail sale from bulk storage.

3. No person engaged in the retail sale of kerosene shall deliver any such liquid from bulk storage into portable containers of five gallons capacity or less unless the container is of sound metal or other unbreakable material construction, has a tight closure with screwed or spring cover, is fitted with a spout or so designed that the contents can be poured without spilling, and is clearly and conspicuously labeled as containing kerosene.

4. The provisions of this section shall not apply to the sale, purchase or delivery of bona fide commercial packs of household products sold in the original sealed container as put up for package, sale or distribution by the manufacturer or packager, including but not limited to packs of medicinals, beverages or food.

5. The provisions of this section shall not apply in cities having a population of one million or more.

6. A violation of the provisions of this section shall be subject to a civil penalty of not more than one hundred dollars for each violation.

HISTORY:

Add, L 1965, ch 1031, § 62, with substance derived from former Penal Law § 1921; amd, L 1971, ch 701, eff Sept 1, 1971; L 1989, ch 480, § 1, eff Nov 1, 1989,2, eff Nov 1, 1989,277, eff June 12, 1991.

Repeal Notes: See 1963 note under § 310.

Prior Law: Former § 308, add, L 1909, ch 25; amd, L 1941, ch 167, § 1; repealed, L 1963, ch 959, § 2, eff Oct 1, 1963.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

12B Am Jur Pl & Pr Forms (Rev ed), Gas and Oil, Forms 22 et seq.

Annotations:

Liability of one selling or distributing liquid or bottled fuel gas, for personal injury, death, or property damage. 41 ALR3d 782.

ARTICLE 26 Miscellaneous

Section

391-s. [There are two sections 391-s] Restricted access to retail sale of dextromethorphan, commonly known as "dxm"

391-u. [There are two sections 391-u] Restrictions on the sale and use of firefighting equipment containing PFAS chemicals.

392-j. Sales of sparkling devices
399-ccc. Smoke detecting devices
399-n. Approval of electrical devices

HISTORY:
Add, L 1909, ch 25, eff Feb 17, 1909.

§ 391-s. [There are two sections 391-s] Restricted access to retail sale of dextromethorphan, commonly known as "dxm"

1. No retail establishment offering for sale any product or products containing as an active ingredient dextromethorphan, shall permit the sale of such products to persons under the age of eighteen without a valid prescription. Retail establishments shall require proof of legal age for purchase of such products. Such identification need not be required of any individual who reasonably appears to be at least twenty-five years of age, provided, however, that such appearance shall not constitute a defense in any proceeding alleging the sale of any product or products containing as an active ingredient dextromethorphan to an individual under eighteen years of age. Any retail establishment which violates the provisions of this section shall be subject to a fine of two hundred fifty dollars for each such violation.

2. As used in this section "retail establishment" means every vendor that in the regular course of business sells products containing dextromethorphan at retail directly to the public including, but not limited to, pharmacies, grocery stores, and other retail stores.

3. This section shall supersede any local laws or ordinances regulating the sales of products containing dextromethorphan.

HISTORY:
Add, L 2013, ch 357, § 1, eff March 26, 2014.

§ 391-u. [There are two sections 391-u] Restrictions on the sale and use of firefighting equipment containing PFAS chemicals.

1. As used in this section, unless the context clearly requires otherwise:

(a) "Class B firefighting foam" means foams designed to prevent or extinguish ignitable liquid fires.

(b) "Ignitable liquid fire" means any fire involving a flammable or combustible liquid where blanketing and smothering for vapor suppression is needed to extinguish the fire.

(c) "Firefighting personal protective equipment" means any clothing designed, intended, or marketed to be worn by firefighting personnel in the performance of their duties, designed with the intent for the use in firefighting and rescue activities, including jackets, pants, shoes, gloves, helmets, and respiratory equipment.

(d) "Local governments" includes any county, city, town, village, fire district, fire company as defined in section two hundred four-a of the general municipal law, regional fire protection authority, or other special purpose district that provides firefighting services.

(e) "Manufacturer" includes any person, firm, association, partnership, corporation, organization, joint venture, importer or domestic distributor of firefighting agents or firefighting equipment.

(f) "Perfluoroalkyl and polyfluoroalkyl substances" or "PFAS chemicals" means, for the purposes of firefighting agents and firefighting equipment, a class of fluorinated organic chemicals containing at least one fully fluorinated carbon atom.

(g) "Person" means any individual, partnership, association, public or private corporation, limited liability company or any other type of legal or commercial entity, including their members, managers, partners, directors, or officers.

2. No person or state agency shall discharge or otherwise use for training purposes class B firefighting foam that contains intentionally added perfluoroalkyl and polyfluoroalkyl substances (PFAS chemicals).

3.

(a) Commencing two years after the effective date of this section, no manufacturer of class B firefighting foam may manufacture, knowingly sell, offer for sale, distribute for sale, or distribute for use in this state class B firefighting foam to which PFAS chemicals have been intentionally added except as provided in paragraph (b) of this subdivision.

(b) The restrictions in paragraph (a) of this subdivision shall not apply to the manufacture, sale, or distribution of class B firefighting foam:

(1) For use in suppressing or preventing an ignitable liquid fire where the office of fire prevention and control, in consultation with the department of environmental conservation and the department of health, through promulgation of a rule, exempts a use of class B firefighting foam on the basis that an alternative firefighting agent to which PFAS chemicals have not been intentionally added and that is effective in suppressing or preventing an ignitable liquid fire is not available. If the office of fire prevention and control exempts a use of class B firefighting foam from the restrictions in paragraph (a) of this subdivision, it shall re-evaluate available alternative firefighting agents at least every two years as long as the exemption remains in place, and repeal such exemption upon a finding that an alternative firefighting agent to which PFAS chemicals have not been intentionally added is available that is effective in suppressing or preventing an ignitable liquid fire.

(2) Where the inclusion of PFAS chemicals are required by federal law or regulations. In the event that applicable federal laws or regulations change after the effective date of this section to allow the use of effective alternative firefighting agents that do not contain PFAS chemicals, the office of fire prevention and control may adopt rules that restrict PFAS chemicals for the manufacture, sale, and distribution of firefighting foam for uses that are addressed by the federal law or regulation.

4.

(a) A manufacturer of class B firefighting foam restricted under subdivision three of this section shall notify, in writing, persons that sell the manufacturer's products in this state about the provisions of this section no less than one year prior to the implementation date of the restrictions set forth in subdivision three of this section.

(b) A manufacturer that produces, sells, or distributes a class B firefighting foam prohibited under subdivision three of this section shall recall the product, which includes collection, transport, treatment, storage and safe disposal, after the implementation date of the restrictions set forth in subdivision three of this section and reimburse the retailer or any other purchaser for the product.

5.

(a) A manufacturer or other person that sells firefighting personal protective equipment to any person, local government, or state agency must provide written notice to the purchaser at the time of sale if the firefighting personal protective equipment contains PFAS chemicals. The written notice must include a statement that the firefighting personal protective equipment contains PFAS chemicals and the reason PFAS chemicals are added to the equipment.

(b) The manufacturer or person selling firefighting personal protective equipment and the purchaser of the equipment must retain the notice on file for at least three years from the date of the transaction.

6. The office of fire prevention and control may issue guidance to state agencies, fire protection districts and local governments in avoiding the purchase or use of class B firefighting foams to which PFAS chemicals have been intentionally added and to give priority and preference to the purchase of firefighting personal protective equipment that does not contain PFAS chemicals.

7. Any manufacturer or person in violation of the provisions of this section shall be subject to a civil penalty not to exceed five thousand dollars for each violation in the case of a first offense. Manufacturers or persons that are repeat violators of the provisions of this section shall be subject to a civil penalty not to exceed ten thousand dollars for each repeat offense. Penalties collected under this section shall be deposited in the hazardous waste remedial fund created by section ninety-seven-b of the state finance law.

HISTORY:

L 2020, ch 88, § 1, effective March 22, 2020.

Editor's Notes Laws 2020, ch 88, § 5, provides:

§ 5. This act shall take effect immediately, provided, however, that sections one, two and three of this act shall take effect on the same date and in the same manner as a chapter of the laws of 2019, amending the executive law relating to reducing the use of PFAS chemicals in firefighting activities, as proposed in legislative bills numbers S. 439-A and A. 445-A, takes effect.

Laws 2020, ch 286, § 1, eff November 23, 2020, provides:

§ 1. 1. The disposal by incineration of aqueous film-forming foam that contains perfluoroalkyl and polyfluoroalkyl substances shall be prohibited in a city with an environmental justice area designated by the department of environmental conservation and a population of not less than sixteen thousand and not more than seventeen thousand based upon the two thousand ten federal census. The commissioner of environmental conservation may promulgate any rules or regulations he or she may deem necessary in order to carry out the provisions of this act.

2. For the purposes of this act:

(a) "incineration" includes but is not limited to burning, combustion, pyrolysis, gasification, thermal oxidation (including flameless and regenerative), acid recovery furnace/oxidizer, ore roaster, cement kiln, lightweight aggregate kiln, industrial furnace, boiler and process heater; and

(b) "perfluoroalkyl and polyfluoroalkyl substances" means a class of fluorinated organic chemicals containing at least one fully fluorinated carbon atom.

§ 392-j. Sales of sparkling devices

1. Sales of sparkling devices as defined in subparagraph (vi) of paragraph (a) of subdivision one of section 270.00 of the penal law shall be lawful only for business registered by the state under section one hundred fifty-six-h of the executive law between June first and July fifth or from December twenty-sixth through January second of each year.

2. Failure to comply with this section shall be deemed an offense as defined in subdivision two of section 270.00 of the penal law.

HISTORY:

L 2014, ch 477, § 5, effective December 21, 2014.

§ 399-ccc. Smoke detecting devices

1. It shall be unlawful for any person or entity to distribute, sell, offer for sale, or import any solely battery operated smoke detecting alarm device powered by a replaceable, removable battery. All solely battery operated smoke detecting alarm devices that are distributed, sold, offered for sale, or imported, shall employ a non-removable, non-replaceable battery that powers the device for a minimum of ten years.

2. All product packaging containing a solely battery operated smoke detecting alarm device shall include the following information:

(a) the manufacturer's name or registered trademark and the model number of the smoke detecting alarm device; and

(b) that such alarm device is designed to have a minimum battery life of ten years.

3. The provisions of this section shall not apply to solely battery operated smoke detecting alarm devices powered by a replaceable, removable battery that have been ordered by, or are in the inventory of, owners, managing agents, contractors, wholesalers or retailers on or before the effective date of this section. The provisions of this section shall not apply to smoke detecting alarm devices that receive their power from the electrical system of the building, fire alarm systems with smoke detectors, fire alarm devices that connect to a panel, devices that use a low-power radio frequency wireless communication signal, or such other devices as the state fire admin-

istrator shall designate through its regulatory process.

HISTORY:

L 2015, ch 583, § 1, effective April 1, 2019; L 2016, ch 4, § 1, effective April 1, 2019.

Editor's Notes Laws 2015, ch 583, § 2, eff April 1, 2019, provides:

§ 2. This act shall take effect April 1, 2019; provided however, that effective immediately, all actions and procedures with respect to the proposed adoption, amendment, suspension or repeal of any rule or regulation necessary for the timely implementation of this act are authorized to be made on or before such effective date (Amd, L 2016, ch 4, § 2, eff April 1, 2019.).

Amendment Notes: The 2016 amendment by ch 4, § 1, in 1, deleted "not capable of powering such device for a minimum of ten years" at the end of the first sentence and added the second sentence; in 3, substituted "that have" for "not capable of powering such device for a minimum of ten years which have" in the first sentence and in the second sentence, deleted "or other" following "to a panel" and added "or such other devices as the state fire administrator shall designate through its regulatory process"; and made a stylistic change.

§ 399-n. Approval of electrical devices

Whenever electrical devices or electrical wiring or electrical apparatus are required to be approved by underwriters laboratories for fire safety by any statute, law, rule or regulation, of the state or any municipality thereof, approval by any qualified laboratory or testing organization that tests for fire safety in the state of New York will be deemed to be satisfaction of such requirement. For the purposes of this section, a qualified laboratory or testing organization is one which meets the criteria of (1) the American Society for Testing Materials test E548-76, or (2) any rules or regulations relating thereto that may be promulgated by the department of state.

HISTORY:

Add, L 1985, ch 576, § 1, eff Nov 23, 1985, except that any rules and regulations necessary for the timely implementation of this section on its effective date should be promulgated on or before such date; amd, L 2010, ch 56, § 43 (Part B), eff July 1, 2010.

Prior Law: Another § 399-n (Art 26-A), repealed, L 1983, ch 876, § 5, eff Dec 31, 1983.

Amendment Notes: 2010. Chapter 56, § 43 (Part B) amended:

By deleting at fig 1 "the office of fire prevention and control of".

ARTICLE 35-F Fire Sprinkler Information

Section

759. Definitions

759-a. Disclosure of automatic fire sprinkler system information

HISTORY:

L 2014, ch 201, § 1, effective December 3, 2014.

§ 759. Definitions

When used in this article, the following terms shall have the following meanings:

1. "Builder" means any person, corporation, partnership or other entity contracting with an owner for the construction of a one- or two-family residential dwelling having less than three stories.

2. "Buyer" means any person or persons who have contracted or who intend to contract with a builder for the construction of a one- or two-family residential dwelling having less than three stories.

HISTORY:

L 2014, ch 201, § 1, effective December 3, 2014.

Editor's Notes Laws 2014, ch 201, § 3, eff Dec 3, 2014, provides:

§ 3. This act shall take effect on the one hundred twentieth day after it shall have become a law; provided that, effective immediately, the office of fire prevention and control is authorized and directed to prepare the materials required by subdivision 21 of section 156 of the executive law, as added by section two of this act, on or before such effective date; and provided, further, that this act shall expire and be deemed repealed upon the effective date of provisions of the New York state uniform fire prevention and building code which are equivalent to the terms of section 313.2 (relating to automatic fire sprinkler systems in oneor two-family dwellings under three stories) of the International Residential Code (2009 edition) or any successor reversions thereof requiring fire sprinklers for one or two-family dwellings under three stories; provided that the state fire administrator shall notify the legislative bill drafting commission upon the adoption of such provisions of the New York state uniform fire prevention and building code in order that the commission may maintain an accurate and timely effective data base of the official text of the laws of the state of New York in furtherance of effectuating the provisions of section 44 of the legislative law and section 70-b of the public officers law.

§ 759-a. Disclosure of automatic fire sprinkler system information

A builder of a one- or two-family residential dwelling having less than three stories, prior to entering into a contract for construction of such dwelling with a buyer, shall provide the buyer with a copy of written materials prepared by the office of fire prevention and control pursuant to subdivision twenty-one of section one hundred fifty-six of the executive law, which details the benefits of and includes factors that can affect the costs associated with the installation and maintenance of an automatic fire sprinkler system. Upon request of the buyer, the builder shall, at the buyer's expense, install an automatic fire sprinkler system in such one- or two-family residential dwelling having less than three stories.

HISTORY:

L 2014, ch 201, § 1, effective December 3, 2014.

Editor's Notes Laws 2014, ch 201, § 3, eff Dec 3, 2014, provides:

§ 3. This act shall take effect on the one hundred twentieth day after it shall have become a law; provided that, effective immediately, the office of fire prevention and control is authorized and directed to prepare the materials required by subdivision 21 of section 156 of the executive law, as added by section two of this act, on or before such effective date; and provided, further, that this act shall expire and be deemed repealed upon the effective date of provisions of the New York state uniform fire prevention and building code which are equivalent to the terms of section 313.2 (relating to automatic fire sprinkler systems in oneor two-family dwellings

under three stories) of the International Residential Code (2009 edition) or any successor reversions thereof requiring fire sprinklers for one or two-family dwellings under three stories; provided that the state fire administrator shall notify the legislative bill drafting commission upon the adoption of such provisions of the New York state uniform fire prevention and building code in order that the commission may maintain an accurate and timely effective data base of the official text of the laws of the state of New York in furtherance of effectuating the provisions of section 44 of the legislative law and section 70-b of the public officers law.

GENERAL CITY LAW

Article
2. General Provisions
2-A. Powers of Cities

HISTORY:
Add, L 1909, ch 26, constituting Consolidated Laws, ch 21, eff Feb 17, 1909.

ARTICLE 2 General Provisions

Section
5. Certain parades and processions forbidden; penalty
15. Firefighters moving from one city to another.
16. Term of service; how reckoned.
16-a. Volunteer members of fire companies

HISTORY:
Add, L 1909, ch 26, eff Feb 17, 1909.

§ 5. Certain parades and processions forbidden; penalty

All processions or parades occupying or marching on any street of any city to the exclusion or interruption of other citizens in their individual right and use thereof, excepting the National Guard and the police and fire departments, and the associations of veteran soldiers, are forbidden, unless written notice of the object, time and route of such procession or parade be given by the chief officer thereof, not less than six hours previous to its forming or marching, to the police authorities of such city; and such police authorities may designate to such procession or parade how much of the street in width it can occupy with especial reference to crowded thoroughfares through which such procession may move; and, when so designated, the chief officer of such procession or parade shall be responsible that the designation is obeyed; and it shall be the duty of the police authorities to furnish such escort as may be necessary to protect persons and property and maintain the public peace and order. A person wilfully violating any provision of this section shall be guilty of a misdemeanor, punishable by a fine not exceeding twenty dollars or imprisonment not exceeding ten days, or both.

HISTORY:
Add, L 1909, ch 26, eff Feb 17, 1909.

Notes to Decisions

1. In general

In an Article 78 proceeding brought by a neighborhood improvement association to annul the determination of the city's zoning board that granted a use variance permitting a three-family unit dwelling in an area zoned for no more than two-family unit dwellings, the determination of the board would be annulled where the board improperly engaged in a piecemeal amendment of the ordinance by waiving the provision under which nonuse for 12 months or more was deemed a discontinuance of any nonconforming use, inasmuch as the use of the premises in question as a three-family unit dwelling had been discontinued for more than 12 months. Swartz v Wallace, 87 A.D.2d 926, 450 N.Y.S.2d 65, 1982 N.Y. App. Div. LEXIS 16450 (N.Y. App. Div. 3d Dep't 1982).

§ 15. Firefighters moving from one city to another.

The firefighters of the different cities of this state, in case of removal from one city to another, shall be allowed the time which they have served as such firefighters in the city they left, in the city to which they have removed, upon producing a certificate of such service, signed by the chief of the city so left, and being appointed firefighters in the city to which they have removed.

HISTORY:
Add, L 1909, ch 26, eff Feb 17, 1909; amd, L 1980, ch 88, § 2, eff Apr 28, 1980; L 2018, ch 476, § 85, effective December 28, 2018.

Amendment Notes

The 2018 amendment by ch 476, § 85, substituted "Firefighters" for "Firemen" in the section heading; and substituted "firefighters" for "firemen" three times.

§ 16. Term of service; how reckoned.

When any such firefighter shall have served as such for so long a time thereafter as shall make the whole term of service the same as required by law of firefighters residing in the city removed to, he shall be entitled to all the privileges and exemptions secured by law to the firefighters of the cities of Albany and New York.

HISTORY:
Add, L 1909, ch 26, eff Feb 17, 1909; L 2018, ch 476, § 86, effective December 28, 2018.

Amendment Notes The 2018 amendment by ch 476, § 86, substituted "firefighter" for "fireman", "law of firefighters" for "law of fireman" and "law to the firefighters" for "law to the fireman."

§ 16-a. Volunteer members of fire companies

1. Except as otherwise provided in a city charter or other special or local law, volunteer members of a fire company shall be elected and appointed as provided in this section.

2. The board of fire commissioners or other body or officer having control of the fire department shall appoint residents of the city as the volunteer members of any newly organized fire company. Thereafter, the fire company may elect other eligible persons, including city officers, as volunteer members. The election shall be pursuant to the by-laws, if any, of the fire company; otherwise, by a three-fourths vote of the members of the fire company present and voting at a regular or special meeting thereof. The membership of any person so elected shall become effective when approved by resolution of the board of fire commissioners or such other body or officer. Membership shall be deemed to have been approved pursuant to this subdivision in the event that no action is taken by such board, body or officer, either approving or disapproving, within thirty days after service of written notice of election to membership shall have been made by the secretary of the fire

company upon the chairman of such board or body, or upon such officer, either personally or by mail.

3. Any person elected to membership as a volunteer member of a fire company shall be a resident of the city or of territory outside the city which is afforded fire protection by the fire department of the city, or any fire company thereof, pursuant to a contract for fire protection, except as otherwise provided in subdivision six.

4. The membership of a volunteer member of a fire company shall terminate when he ceases to be a resident of the city or of any territory outside the city which is afforded fire protection by the fire department of the city, or any fire company thereof, pursuant to a contract for fire protection, except as otherwise provided in subdivision five.

5. Any fire company may authorize the continued membership of any volunteer member where such member notifies the secretary of his or her fire company (a) that he or she plans to change his or her residence to territory which is not in the city and is not protected by the fire department of the city, or any fire company thereof, pursuant to a contract for fire protection, and (b) that by reason of his or her residence in the vicinity and his or her usual occupation he or she will be available to render active service as a volunteer firefighter in the city or in territory outside the city which is afforded fire protection pursuant to a contract for fire protection by the fire department of the city, or a fire company thereof. Such authorization shall be pursuant to the by-laws, if any, of the fire company of which he or she is a member, otherwise by a three-fourths vote of the members of such fire company present and voting at a regular or special meeting thereof. Such authorization shall not become effective unless approved by resolution of the board of fire commissioners or other body or officer hereinabove mentioned. Any membership continued pursuant to the provisions of this subdivision shall terminate when the member cannot meet either the requirements of this subdivision or the residence requirements of subdivision three. In the case of a city which adjoins another state, the term "vicinity", as used in this subdivision, includes territory in this state and territory in the adjoining state.

6. A person who cannot meet the residence requirements of subdivision three of this section may be elected to membership as a volunteer member of any fire company of the fire department if by reason of his or her residence in the vicinity and his or her usual occupation he or she will be available to render active service as a volunteer firefighter in the city or in territory which is afforded fire protection pursuant to a contract for fire protection by the fire department of the city or a fire company thereof. Such authorization shall be pursuant to the by-laws, if any, of the fire company; otherwise by a three-fourths vote of the members of the fire company present and voting at a regular or special meeting thereof. Such authorization shall not become effective unless approved by resolution of the board of fire commissioners or other body or officer hereinabove mentioned. The membership of any volunteer member elected pursuant to the provisions of this subdivision shall terminate when the member cannot meet either the requirements of this subdivision or the residence requirements of subdivision three. In the case of a city which adjoins another state, the term "vicinity", as used in this subdivision, includes territory in this state and territory in the adjoining state.

7. The membership of any volunteer firefighter shall not be continued pursuant to subdivision five of this section, and persons shall not be elected to membership pursuant to subdivision six of this section, if, by so doing, the percentage of such non-resident members in the fire company would exceed forty-five per centum of the actual membership of the fire company.

8. The legislative body of the city, or the board of fire commissioners or other body or officer hereinabove mentioned subject to approval of such legislative body, by resolution may restrict the membership of volunteer members in any or all of the fire companies of the fire department to residents of the city. Any volunteer member who then resides in territory outside the city shall cease to be a member of any fire company to which the restriction is applicable unless the resolution provides that his membership shall continue during the existence of any lawful contract for fire protection to such territory by his company or the fire department or during the period in which he may continue to meet the requirements of subdivision three, five or six.

9. Residents of outside territory protected pursuant to a contract for fire protection who have been elected to volunteer membership, and non-residents whose volunteer memberships have been authorized or continued pursuant to subdivision five or six, shall have all the powers, duties, immunities, and privileges of resident volunteer members, except (1) they may not be elected or appointed to any office of the fire department which is required by law to be held by an elector of the city, (2) non-residents of the state may not be appointed or elected to any office in the fire company or fire department, and (3) a non-resident of this state whose membership has been continued pursuant to subdivision five of this section, or a non-resident of this state who was elected to membership pursuant to subdivision six of this section, shall not be considered to be performing any firemanic duty, or to be engaged in any firemanic activity, as a member of the fire company while he or she is outside of this state unless and until he or she has first reported to the officer or firefighter in command of his or her fire department, or any company, squad or other unit thereof, engaged or to be engaged in rendering service outside this state, or has received orders or authorization from an officer of the fire department or fire company to participate in or attend authorized activities

outside of this state in the same manner as resident members of the fire company.

10. A person shall not be eligible to volunteer membership in more than one fire company at one time.

11. The term "contract for fire protection" as used in this section means one under which a cash consideration is received by the city or by the fire department or a fire company thereof for the furnishing of fire protection to an area outside the city. Any such contract shall be deemed in full force and effect for the purposes of this section if negotiations are pending for the renewal thereof.

12. The provisions of this section shall not be deemed to authorize the election of any person as a member of a fire company or the continuance of membership in a fire company as herein provided if such election or continuance of membership shall be contrary to the by-laws, rules or regulations of the fire company or of the fire department of the city.

13. Any person:

(1) who was recognized prior to the first day of January, two thousand eleven, as a volunteer member of any fire company of a city subject to the provisions of this section by the governing board or board of fire commissioners of the city or by the officers and members of his fire company, and

(2) who rendered active service with such fire company between such dates, and

(3) who was, at the time of his or her election to membership, a resident of the city or of territory outside the city which was afforded fire protection by the fire department of the city, or any fire company thereof, pursuant to a contract for fire protection, or who was a non-resident who was elected to membership or who was continued as a member, pursuant to the provisions of subdivision five or six of this section, shall for all purposes in law be considered to have been duly elected and approved, or continued, as a member in such fire company as of the date of such approval, if any, and, if none, then as of the date of such election or, in the case of a continuance, as of the date of the approval, if any, by the board of fire commissioners or the governing board, and, if none, as of the date of authorization of continuance by the fire company; notwithstanding that there may have been some legal defect in such election, or the proceedings precedent thereto, or a failure of the board of fire commissioners or governing board to approve such member, or approve the continuance of membership of such member, as provided by the law in force at the time of such election, or continuance, and the status of such person as a volunteer firefighter as of such date is hereby legalized, validated and confirmed. This subdivision shall not apply to a person, if any, whose volunteer membership in a fire company was disapproved by the board of fire commissioners or declared invalid by a court of competent jurisdiction prior to the first day of January, two thousand eleven.

14.

(a) It shall be an unlawful discriminatory practice for any volunteer fire department or fire company, through any member or members thereof, officers, board of fire commissioners or other body or office having power of appointment of volunteer firefighters in any fire department or fire company pursuant to this section, because of the race, creed, color, national origin, sex or marital status of any individual, to exclude or to expel from its volunteer membership such individual, or to discriminate against any of its members because of the race, creed, color, national origin, sex or marital status of such volunteer members.

(b) Any person claiming to be aggrieved by an unlawful discriminatory practice pursuant to this section may by himself or his attorney at law make, sign and file with the state division of human rights, a verified complaint which shall set forth the particulars of the alleged unlawful discriminatory practice and contain such other information as the division of human rights may require. The division shall thereupon cause to be made an investigation and disposition of the charges pursuant to the provisions of article fifteen of the executive law.

HISTORY:

Add, L 1954, ch 699, eff Apr 14, 1954; amd, L 1955, ch 83, § 3; L 1958, ch 523, eff Apr 9, 1958; L 1959, ch 751; L 1961, ch 63, eff Feb 28, 1961; L 1967, ch 628, eff Sept 1, 1967; L 1969, ch 143; L 1969, ch 359, § 12, eff May 2, 1969; L 1976, ch 273, eff June 3, 1976; L 1978, ch 215, eff Sept 1, 1978; L 1980, ch 133, § 4, eff May 16, 1980; L 1984, ch 185, § 1, eff June 5, 1984; L 2003, ch 393, §§ 6, 7, eff Aug 19, 2003; L 2011, ch 373, §§ 6, 7, eff Aug 3, 2011; L 2018, ch 476, § 87, effective December 28, 2018.

Prior Law: Former § 16-a, add, L 1920, ch 13, repealed, L 1941, ch 687, eff Apr 23, 1941.

Editor's Notes Laws 2003, ch 393, § 1, eff Aug 19, 2003, provides as follows:

Section 1. Legislative intent. This legislation is designed to update certain provisions of the village law, the town law, the general city law and the not-for-profit corporation law relating to recognition of volunteer firefighters as duly elected or approved members of their respective fire companies. Periodically, these provisions of law should be updated to ensure that firefighters recently recognized as volunteers are considered to be duly elected and approved members in their respective fire companies, notwithstanding any legal defect in the election or approval process. This bill updates the relevant statutory provisions and ensures that more recently elected or approved volunteer members of fire companies are recognized as duly elected or approved for all purposes in law, including but not limited to coverage under the volunteer firefighters' benefit law.

Laws 2011, ch 373, § 1, eff Aug 3, 2011, provides as follows:

Section 1. Legislative intent. This legislation is designed to update certain provisions of the village law, the town law, the general city law and the not-for-profit corporation law relating to recognition of volunteer firefighters as duly elected or approved members of their respective fire companies. Periodically, these provisions of law should be updated to ensure that firefighters recently recognized as volunteers are considered to be duly elected and approved members in their respective fire companies, notwithstanding any legal defect in the election or approval process. This act updates the relevant statutory provisions and ensures that more recently elected or approved volunteer members of fire companies are recognized as duly elected or approved for all purposes in law,

including but not limited to coverage under the volunteer firefighters' benefit law.

Amendment Notes The 2018 amendment by ch 476, § 87, in 5, added "or her" wherever it appears, "or she" three times and substituted "firefighter" for "fireman"; in 6, added "of this section", "or her" twice and "or she" and substituted "firefighter" for "fireman"; in 7, substituted "firefighter" for "fireman" and added "of this section" twice; in 9, added "of this section", "or she" twice, substituted "firefighter" for "fireman" and added "or her" in 13(3), added "or her" and substituted "firefighter" for "fireman"; and substituted "firefighters" for "firemen" in 14(a).

Agency Opinions

1. In general

By-law provisions for the admission of members of volunteer fire companies which provide that three negative votes or black balls will defeat election to membership appear to be valid but if they are used in a manner contrary to the Constitutions of the United States or of the State of New York or the anti-discrimination statutes of the state, such a by-law would be invalid. 1977 NY Ops Atty Gen May 9 (Informal), 1977 N.Y. AG LEXIS 114.

A volunteer fireman may not be a member of two volunteer fire companies on or after July 1, 1954. 1954 Op St Compt No. 54–6669.

For a general explanation of Chapter 699 of Laws of 1954 in relation to non-resident members of volunteer fire departments, see 1954 Op St Compt No. 54–7063.

Villages, fire districts or cities may require that persons elected to membership in a volunteer fire company satisfactorily complete a physical examination. The cost of such a physical examination may be assumed by the respective municipality. 1969 Op St Compt No. 69–597.

There is no statutory prohibition on individual becoming member of fire company and member of volunteer ambulance corps at same time. 1997 Op St Compt No. 97-23, 1997 N.Y. Comp. LEXIS 23.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS Gen Mun Law § 200.

ARTICLE 2-A Powers of Cities

Section

20. Grant of specific powers

HISTORY:

Add, L 1913, ch 247, eff Apr 10, 1913.

§ 20. Grant of specific powers

Subject to the constitution and general laws of this state, every city is empowered:

* * * * *

12. To prevent and extinguish fires and to protect the inhabitants of the city and property within the city from loss or damage by fire or other casualty.

12-a. May appropriate moneys to a fire department to fund an annual firefighter's inspection dinner for volunteer firefighters and the city of Glen Cove may appropriate moneys to a fire department to fund an annual dinner for installation of fire district officers.

* * * * *

HISTORY:

Add, L 1913, ch 247, eff April 10, 1913; amd, L 1917, ch 483, eff May 15, 1917; L 1925, ch 394; L 1929, ch 678; L 1936, ch 223, eff April 3, 1936; L 1936, ch 425; L 1937, ch 591, eff May 24, 1937; L 1937, ch 658, eff May 27, 1937; L 1942, ch 662; L 1942, ch 750, eff May 9, 1942; L 1943, ch 287, eff April 5, 1943; L 1943, ch 710, Pt 1, eff July 2, 1944; L 1945, ch 428; L 1945, ch 521; L 1946, ch 194, eff March 22, 1946; L 1946, ch 416; L 1948, ch 874; L 1951, ch 177; L 1951, ch 765, eff May 1, 1951; L 1954, ch 269, § 2, eff March 26, 1954; L 1954, ch 600; L 1954, ch 692, § 3; L 1955, ch 79, eff March 10, 1955; L 1956, ch 148; L 1956, ch 216; L 1956, ch 295, § 3; L 1957, ch 949, eff April 25, 1957; L 1958, ch 58; L 1958, ch 891; L 1960, ch 265, eff March 22, 1960; L 1960, ch 525, eff April 14, 1960; L 1960, ch 635, § 2; L 1961, ch 142, eff March 14, 1961; L 1961, ch 632; L 1962, ch 161, eff March 19, 1962; L 1963, ch 803; L 1964, ch 816; L 1965, ch 782, eff July 15, 1965, applicable to contracts made on and after January 1, 1965; L 1965, ch 805, eff July 15, 1965; L 1966, ch 914; L 1967, ch 457; L 1968, ch 420, §§ 119, 120; L 1968, ch 513, eff Sept 1, 1968; L 1968, ch 1001, eff June 22, 1968; L 1970, ch 267, § 11, eff March 1, 1971; L 1970, ch 994, eff May 20, 1970; L 1970, ch 1034; L 1972, ch 696, eff May 30, 1972; L 1974, ch 598, § 1, eff May 30, 1974; L 1977, ch 812, eff Aug 5, 1977; L 1977, ch 840, § 28, eff July 1, 1978; L 1978, ch 550, § 28, eff July 24, 1978; L 1979, ch 742, § 2, eff Jan 1, 1981; L 1984, ch 805, § 25, eff Sept 1, 1984; L 1985, ch 758, § 1, eff Aug 1, 1985; L 1986, ch 138, § 1, eff June 9, 1986; L 1986, ch 755, § 1, eff Sept 1, 1986; L 1989, ch 327, § 1, eff July 10, 1989; L 1994, ch 660, § 1, eff Nov 1, 1994; L 1997, ch 458, § 1, eff July 1, 1998; L 2001, ch 383, § 5 (Part F), eff Oct 29, 2001, deemed eff April 1, 2001; L 2011, ch 62, § 104 (Part A), eff Oct 3, 2011; L 2018, ch 476, § 88, effective December 28, 2018.

Editor's Notes L 1943, ch 287, § 2, provides:

§ 2. This act shall not operate to deprive the local legislative body of any city of the power to enact local laws in relation to any matter in respect to which such power would otherwise exist, nor shall it limit such power. If this power otherwise exists, any provision of this act may be superseded, supplemented or amended by local law in the same manner and to the same extent as such provisions could be superseded, supplemented or amended had this act not been enacted.

L 1944, ch 606, amended the effective date of L 1943, ch 710, to read April 2, 1945, and L 1945, ch 338, § 64, eff. March 28, 1945 moved the effective date forward to Sept. 2, 1945.

L 1948, ch 874, § 2, provides:

§ 2. a. It is the intent and purpose of this act, notwithstanding any other provision of law, to vest in any board, commission or department of traffic control created pursuant to subdivision thirty-two of section twenty of the general city law, exclusive power and authority to regulate, direct, control and restrict the movement of vehicular and pedestrian traffic within a city, to limit the size of vehicles used within such city, to determine the location of garages, parking lots and parking meters and to decide upon the type, placement and operation of such meters within such city and to make rules and regulations to effectuate such power and authority. It is the intention and purpose of this act, however, that the regulation of hacks, taxicabs and taxi drivers pursuant to the provisions of any city charter, local law or ordinance of such city shall remain under the jurisdiction and control of the police commissioner, police department or analogous officer or department of such city.

b. Any such board, commission or department so created shall have power to continue any business, proceeding or other matter commenced by any such police commissioner, department or other officer or agency by whom or by which heretofore commenced.

c. Any provision of law, rule, regulation, contract, grant or other document relating to the subject-matter of the functions, powers or duties and applicable to the police commissioner or police department or any other officer or agency of a city in relation to the regulation, direction, control and restriction of the movement of vehicular and pedestrian traffic in such city, (except as hereinbefore provided) shall apply to such board, commission or department of traffic control.

d. All rules and regulations made by the police commissioner, police department or other officer or agency of a city, pursuant to the city charter of any such city, local law or

ordinance, in force when any such board, commission or department is created pursuant to this act, shall continue in full force and effect as the rules and regulations of such board, commission or department of traffic control, until amended, superseded or repealed by such board, commission or department.

e. Every right or remedy of whatsoever nature which existed prior to the enactment of the provisions of this act shall be available and shall survive unaffected and unimpaired by reason of the enactment of this act.

f. No action or proceeding, civil or criminal, pending at the time when this act shall take effect, by whomsoever brought, shall be affected or abated by the enactment of this act or by anything herein contained; but all such actions or proceedings may be continued notwithstanding that functions or powers of duties of any agency of the government of any city or of any other agency of government or public authority or officer party thereto may by this act be assigned or transferred to another such agency or officer, but in that event the same may be prosecuted or defended by the head of such assignee or transferee agency or officer.

Laws 1962 ch 161, § 1, provides as follows:

Section 1. Legislative declaration. It is hereby declared that the continued uninterrupted adequate, efficient and safe operation of omnibus lines in cities of one million or more inhabitants is essential to the health, welfare and safety of the inhabitants of such cities. In order to ensure such operation, such cities should have the right, whenever the governing body of such cities determines that the public convenience and necessity so requires, to acquire and take possession of the property of any omnibus line by condemnation in the manner hereinafter prescribed. It is hereby further declared that the provisions hereinafter enacted relate to the protection of the public health, welfare and safety and are for a public purpose.

Laws 1968, ch 1001, § 2, provides as follows:

§ 2. This act shall take effect immediately, and shall authorize reimbursements as provided herein for medicare premiums paid on and after January first, nineteen hundred sixty-eight.

[1968 ch 513] Subdivision 25-a of section twenty of the General City Law, and section two hundred twenty-six-a of the county law which were repealed by this act, provided that cities and counties were empowered to take various forms of action for the preservation of places, buildings, etc. having a special historical or aesthetic interest or value. This act has transferred these powers to a new section ninety-six-a of the General Municipal Law and made them applicable to all counties, towns, villages and cities. The wording of subdivision twenty-five-a, as thus made applicable to all such municipalities, was clarified by the act so as to evidence more explicitly the original legislative intent that districts and sites shall be eligible for the protections provided for by the legislation.

Laws 1977, ch 812, § 1, provides as follows:

Section 1. Legislative declaration. The services provided by volunteer firemen in this state are invaluable. In the highest tradition of exemplary public service, these firemen serve their neighbors, their community and their state. In order to insure the continued availability of this irreplaceable work force, it is in the best interest of the people of our state to provide financial assistance for programs of local fire departments which facilitate the recruitment, training and administration of new personnel who can contribute their loyalty and devotion in the interest of fire protection.

Laws 1977, ch 841, amended L 1977, ch 840, § 28, eff July 1, 1978 so as to change the effective date from Jan 1, 1978 to July 1, 1978.

Laws 1977, ch 840, §§ 150–152, provide:

§ 150. If any clause, sentence, paragraph, section or part of this chapter or the application thereof to any person, firm or corporation, project or circumstance shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section, or part of the application thereof to the person, firm or corporation, project or circumstance directly involved in the controversy in which such judgment shall have been rendered.

§ 151. This chapter shall not affect pending actions or proceedings, civil or criminal, but the same may be prosecuted or defended in the same manner and with the same effect as though this chapter had not been enacted.

§ 152. The amendment or repeal of any law by the provisions of this chapter shall not affect or impair any contract, or act done, or right accruing, accrued or acquired, or liability, or penalty, or forfeiture incurred prior to the time when this chapter or any section thereof takes effect, but the same may be enjoyed, asserted, enforced or prosecuted as fully and to the same extent, as if such laws had not been amended or repealed.

Laws 1979, ch 742, §§ 1, 5, eff Jan 1, 1981, provide:

Section 1. Legislative findings and intent. The legislature hereby finds that it is in the state's interest to encourage and expedite long-term development of renewable energy resources, such as solar energy. Use of alternate energy sources, such as solar energy, will aid state energy conservation efforts and will lessen New York's dependence on costly and imported fossil fuels. Therefore, it is the intent of the legislature to include access to solar energy as a valid public purpose within the zoning authority of local governments in this state.

§ 5. On or before September thirtieth, nineteen hundred eighty, the state energy office shall promulgate guidelines for use by municipal governments in implementing the provisions of this act.

Laws 2001, ch 383, § 20 (Part F), eff Oct 29, 2001, deemed eff April 1, 2001, provides as follows:

§ 20. This act shall take effect immediately and shall be deemed to have been in full force and effect on and after April 1, 2001 and shall apply to school years commencing on or after July 1, 2001, provided, however, that section fourteen-a of this act shall take effect on the same date and in the same manner as section 1 of part B of chapter 149 of the laws of 2001 takes effect.

Amendment Notes The 2018 amendment by ch 476, § 88, substituted "firefighter's" for "fireman's" in 12-a.

PRACTICE INSIGHTS:

AVOIDING PITFALLS IN ADOPTION AND AMENDMENT OF ZONING ORDINANCES.

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INSIGHT

Town Law § 264 and § 265 provide the procedures for adopting initial zoning ordinances or amending existing ones, and contain several important notice and hearing requirements. In today's practice, these sections are most relevant to zoning ordinance amendments because most municipalities have existing zoning ordinances or zoning laws. Although they appear to provide a straightforward methodology for the adoption or amendment of zoning ordinances or amendments, §§ 264 and 265 are fraught with potential pitfalls.

ANALYSIS

Coordinate Notice and Hearing Tasks with Proper Municipal Official to Ensure that Notice Requirements Are Fulfilled.

When seeking to adopt or amend a zoning ordinance, the practitioner must ensure that the notice requirements have been precisely fulfilled. As a practical matter, mistakes frequently result from administrative oversights when providing notice and scheduling public hearings. These oversights can lead to an unraveling of the proposed ordinance or amendment. To avoid these problems, the practitioner should

coordinate notice and hearing tasks with the municipal official responsible for these activities.

Determine Whether Zoning Regulation Is Ordinance or Local Law.

The second potential pitfall involves the interrelationship between Town Law § 264 and § 265, and the Municipal Home Rule Law. A municipality may enact zoning regulations under the authority of either statute. A zoning regulation adopted under the Town Law is an ordinance, while one enacted under Municipal Home Rule is a local law. As a practical matter, the classification of a zoning regulation as an ordinance or local law is a distinction without a difference. If a practitioner is challenging the enactment of either an ordinance or local law on procedural grounds, however, identifying the type of regulation is significant, as each has unique procedural prerequisites. The dichotomy between Town Law and Municipal Home Rule has been the subject of litigation and has led to confusion in understanding the manner in which a town may enact zoning regulations. By allowing local zoning regulations to be adopted under two different statutory schemes, the legislature perpetuates an unnecessary level of confusion in the zoning law arena.

When seeking to confirm whether a Town Board has properly adopted a zoning regulation, it is important that the practitioner review the text of the law to determine whether it was adopted pursuant to Town Law § 264 or § 265, or Municipal Home Rule. Without looking to both sources, ascertaining compliance with statutory requirements is impossible. This is an area where the legislature could add clarity by conforming the requirements for local zoning regulations.

Villages Have Standing to Challenge Town's Enactment of Local Law Enacted Under Municipal Home Rule Law.

Drawing upon the distinction between zoning laws enacted under the Town Law, as opposed to those enacted under the Municipal Home Rule Law, the Second Department has held that Town Law § 264 (4) does not prevent a Village from challenging, under SEQRA and General Municipal Law 239-m, a Town's adoption of a local law permitting adult student housing. The court clearly intended to limit the scope of the restrictions on neighboring jurisdictions set forth in the Town Law in favor of increased regional accountability. Matter of Village of Chestnut Ridge v. Town of Ramapo, 2007 N.Y. App. Div. LEXIS 9059 (2d Dept. 2007).

Comport with Comprehensive Plan to Avoid Nullification of Zoning Enactment.

Though not thoroughly addressed in the plain language of the statute, a key prerequisite to the adoption or amendment of a zoning ordinance or local law is conformity with a comprehensive plan. In short, a comprehensive plan is the overall planning goals for a town. It need not be a formal document, but rather a totality of activities showing that the town has a long-term land use vision. Any rezoning must be consistent with that vision and not the reaction to the unique desires of a specific applicant. The standards for such comprehensive plan are set forth in case law. *Gernatt Asphalt Products v. Town of Sardina*, 87 N.Y.2d 668 (1996). Failure of counsel to comport with a comprehensive plan will lead to nullification of the zoning enactment.

Limiting the Pool of Owners Who Can Seek to Force a Super-Majority Vote.

Town Law § 265 (1) (b) requires a super-majority vote where the zoning change is the subject of a written protest presented to the Town Board and signed by "the owners of twenty percent or more of the area of land immediately adjacent to that land included in such proposed change, extending one hundred feet therefrom." In Matter of Eadie v. Town Bd. of the N. Greenbush, 7 N.Y.3d 306, 821 N.Y.S.2d 142, 854 N.E.2d 464 (2006), the Court concluded that the "one hundred feet" must be measured from the boundary of the rezoned area, not the boundary of a parcel of which the rezoned area is a part. The effect of the Court's holding was to permit municipalities to enact "buffer zoning" in order to avoid a super-majority vote. A municipality may lawfully re-zone large parcels and leave a 100 foot "buffer zone" from the border of the affected parcels; the buffer zone effectively precludes the neighboring landowners from forcing a super-majority vote.

Notes to Decisions

Analysis

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4. —Disposition of property held by city
5. —Operation of buslines
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38. —Other matters
39. Sewer rents (subds. 26 and 26-a)
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41. Insurance (subds. 29 and 29-a)
42. Traffic control (subd. 32)
43. Repair or removal of unsafe structures (subd. 35)
44. Miscellaneous

1. Power of city to contract, defend and maintain actions (subd. 1)

Article IX, § 2 of the State Constitution and § 10 of the Municipal Home Rule Law, when read in conjunction with this section, evince a design on the part of the state to provide a city, when contracting for purchase of supplies or hiring of labor, with full power to fix terms and conditions upon which it will deal and to regulate its affairs in entering into such contracts as a private corporation is allowed in handling its business concerns. McMillen v Browne, 14 N.Y.2d 326, 251 N.Y.S.2d 641, 200 N.E.2d 546, 1964 N.Y. LEXIS 979 (N.Y. 1964).

In action by plaintiffs who entered into contract with former city manager, whereby city was to construct parking lot on plaintiffs' property and right-of-way for access in exchange for plaintiffs' release of any claim for damages arising out of street work which had eliminated their parking spaces and street access, city was entitled to summary judgment dismissing plaintiffs' action for breach of contract, specific performance and related claims, where uncontroverted proof demonstrated that city council did not approve contract with plaintiffs, that said contract was illegal and ultra vires, and that work already commenced on project was limited to city-owned property. Fatone v City of Troy, 236 A.D.2d 676, 653 N.Y.S.2d 195, 1997 N.Y. App. Div. LEXIS 1133 (N.Y. App. Div. 3d Dep't 1997).

City failed to make requisite showing to justify use of project labor agreement (PLA) as part of competitive bidding process on public works contract where there was no detailed projection of cost savings as result of PLA, there was no history of labor unrest that threatened success of project, and city's general concern that project be completed in timely manner to comply with funding requirements and deadlines imposed by New York State Department of Environmental Conservation, without more, was insufficient basis on which to impose such exceptional specification as PLA. Empire State Chapter of Associated Builders & Contrs. v City of Oswego, 239 A.D.2d 875, 659 N.Y.S.2d 672, 1997 N.Y. App. Div. LEXIS 6233 (N.Y. App. Div. 4th Dep't 1997).

Where a claim is not one for extra compensation, this section, reciting that a city shall have no power to grant extra compensation to any contractor, is not applicable. In re Shaddock, 220 N.Y.S. 113, 128 Misc. 616, 1927 N.Y. Misc. LEXIS 806 (N.Y. Sup. Ct.), rev'd, 220 A.D. 470, 221 N.Y.S. 677, 1927 N.Y. App. Div. LEXIS 9337 (N.Y. App. Div. 1927).

In New York power to condemn has long been delegated to cities and to municipalities under General City Law § 20(2) and General Municipal Law § 74; City of New Rochelle, which is both city and municipality, is empowered to condemn property for purposes of flood control; when it exercises power, it acts under color of state law. Kohlasch v New York State Thruway Authority, 482 F. Supp. 721, 1980 U.S. Dist. LEXIS 9809 (S.D.N.Y. 1980).

2. Power of city to acquire and hold real property (subd. 2)

Resistance on the part of a city which had taken a transit system by eminent domain to payment on alleged statutory grounds, four years after the taking, bordered on the verge of giving the 1962 Amendment of this section an unconstitutional construction. In re Fifth Ave. Coach Lines, Inc., 18 N.Y.2d 741, 274 N.Y.S.2d 349, 221 N.E.2d 174, 1966 N.Y. LEXIS 1110 (N.Y. 1966), dismissed, Fifth Ave. Coach Lines, Inc. v New York, 386 U.S. 778, 87 S. Ct. 1480, 18 L. Ed. 2d 524, 1967 U.S. LEXIS 1574 (U.S. 1967).

Although lease of building by city for welfare services was plainly within the scope of city's authority, subsequent resolution of board of estimate authorizing exercise of option to renew lease was not a valid ratification of earlier notice of city's intention to renew and failure to exercise option prior to its expiration rendered city month-to-month tenant rather than tenant under valid and binding lease. 120 Bay Street Realty Corp. v New York, 44 N.Y.2d 907, 407 N.Y.S.2d 639, 379 N.E.2d 167, 1978 N.Y. LEXIS 2096 (N.Y. 1978).

Where the State, at the request of the city manager raised the head of the water in the river at State's hydroelectric plant, thereby relieving the city's water shortage, city is bound by an implied agreement to reimburse the State. People v Schenectady, 60 N.Y.S.2d 911, 186 Misc. 385, 1946 N.Y. Misc. LEXIS 1962 (N.Y. Sup. Ct. 1946).

Delegation of right of eminent domain by the State through which city took petitioner's property, was within the power of the State. In re Brooklyn Battery Tunnel Plaza, 62 N.Y.S.2d 303, 186 Misc. 603, 1946 N.Y. Misc. LEXIS 2224 (N.Y. Sup. Ct.), aff'd, 270 A.D. 1027, 64 N.Y.S.2d 175 (N.Y. App. Div. 1946).

Where fee to property is in good faith appropriated for a particular public purpose, condemning municipality may subsequently convert it to other uses, or even abandon it entirely, without any impairment of the validity of the estate originally acquired or reversion to the former owners. Fur-Lex Realty, Inc. v Lindsay, 81 Misc. 2d 904, 367 N.Y.S.2d 388, 1975 N.Y. Misc. LEXIS 2491 (N.Y. Sup. Ct. 1975).

Court would dismiss proceeding brought pursuant to CLS Gen City § 20(2), in which city sought order providing that compensation to be paid for property should be ascertained and determined solely by income capitalization method, since proceeding called for advisory opinion given that city had not yet taken any property and property owner had not yet suffered any damage. In re Jamaica Water Supply Co., 158 Misc. 2d 378, 600 N.Y.S.2d 914, 1993 N.Y. Misc. LEXIS 255 (N.Y. Sup. Ct. 1993).

Court would dismiss proceeding brought pursuant to CLS Gen City § 20(2) in which city sought order providing that compensation to paid for property should be ascertained and determined solely by income capitalization method since question presented was not justiciable in that it was contingent on happening of future event, as city had not yet taken any property. In re Jamaica Water Supply Co., 158 Misc. 2d 378, 600 N.Y.S.2d 914, 1993 N.Y. Misc. LEXIS 255 (N.Y. Sup. Ct. 1993).

CLS Gen City § 20(2) is unconstitutional to extent that it directs court to render advisory opinion regarding valuation prior to any taking of property or legal commitment by city to acquire property, and prior to suffering of any damages by condemnee. In re Jamaica Water Supply Co., 158 Misc. 2d 378, 600 N.Y.S.2d 914, 1993 N.Y. Misc. LEXIS 255 (N.Y. Sup. Ct. 1993).

New York City had power to convey land under water, acquired at in rem tax proceeding, to respondents' predecessors without first receiving authorization from state legislature pursuant to CLS Gen City § 20(2); fact that city may have sought legislative approval for sale of other waterfront property acquired in tax foreclosure proceedings did not mean it was required to do so in connection with subject property. Coppotelli v Commissioner of the Dep't of Bldgs., 169 Misc. 2d 888, 646 N.Y.S.2d 773, 1996 N.Y. Misc. LEXIS 286 (N.Y. Sup. Ct. 1996), aff'd, 240 A.D.2d 666, 659 N.Y.S.2d 997, 1997 N.Y. App. Div. LEXIS 6829 (N.Y. App. Div. 2d Dep't 1997).

In the City of New York's toxic tort suit to recover from a corporation costs associated with the contamination of wells that the City purchased pursuant to N.Y. Gen. City Law § 20(2), the City had U.S. Const. art. III standing by alleging a present injury claim that certain wells were already contaminated by methyl tertiary butyl ether (MTBE) at a level that required remediation and a future injury claim that even if some of the wells were not currently contaminated by MTBE at a level that established injury, once the wells were turned on, the MTBE contamination would substantially and immediately increase to a level that constituted a cognizable injury to the City. City of New York v Exxon Mobil Corp. (In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.), 2009 U.S. Dist. LEXIS 59287 (S.D.N.Y. July 6, 2009).

City of New York's toxic tort suit to recover from a corporation costs associated with the contamination of wells that the City purchased pursuant to N.Y. Gen. City Law § 20(2) was ripe for review because the City alleged a present injury claim that certain wells were already contaminated by methyl tertiary butyl ether (MTBE) at a level that required remediation and a future injury claim that even if some of the wells were not currently contaminated by MTBE at a level that established injury, once the wells were turned on, the MTBE contamination would substantially and immediately increase to a level that constituted a cognizable injury to the City, and further, if the City delayed asserting its claims until the completion of a treatment facility that would allow for usage of the wells, its claims would likely be time barred. City of New York v Exxon Mobil Corp. (In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.), 2009 U.S. Dist. LEXIS 59287 (S.D.N.Y. July 6, 2009).

In the City of New York's toxic tort suit to recover from a corporation costs associated with the contamination of wells that the City purchased pursuant to N.Y. Gen. City Law § 20(2), the City had to establish its claims for damages by a preponderance of the evidence with regard to wells that already had levels of contaminant that required remediation, and as to wells in which present levels of contaminant were insufficient to constitute an injury, the City had to prove by clear and convincing evidence that the contaminant would remain in the wells by the date of the City's intended use of the water and that when the wells were

turned on, the influx of water would raise contaminant concentrations to an injurious level. City of New York v Exxon Mobil Corp. (In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.), 2009 U.S. Dist. LEXIS 59287 (S.D.N.Y. July 6, 2009).

In the City of New York's toxic tort suit to recover from a corporation costs associated with the contamination of wells that the City purchased pursuant to N.Y. Gen. City Law § 20(2) but was not yet using, the City's claims were not speculative; the City could recover damages for interference with its property and did not have to show that it would use the wells, only that it might and that the City would commence building its water treatment facility within 15 years. ity of City of New York v Exxon Mobil Corp. (In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.), 2009 U.S. Dist. LEXIS 59287 (S.D.N.Y. July 6, 2009).

3. —Acquisition of land for sewerage treatment purposes

Property acquired for sewer purpose is held by the city in a governmental capacity, and the city is not entitled to payment of compensation if such property is condemned by the state. New Rochelle v State, 19 A.D.2d 674, 241 N.Y.S.2d 272, 1963 N.Y. App. Div. LEXIS 3478 (N.Y. App. Div. 3d Dep't 1963), aff'd, 14 N.Y.2d 559, 248 N.Y.S.2d 654, 198 N.E.2d 41, 1964 N.Y. LEXIS 1325 (N.Y. 1964).

The general rule denying implied contractual liability against municipalities, barring recovery where the use of the remedy of quasi contract would thwart the purpose of the statutory provisions relating to the manner of making a contract binding upon a municipality, does not apply to plaintiffs' claims against defendants municipalities arising from the discharge of untreated sewage from a joint municipal sewage plant onto plaintiffs' lands since defendants have the power to "take real * * * property within and without the limits of the city * * * for any public or municipal purpose" (General City Law, § 20, subd 2) and "to pay or compromise claims equitably payable by the city though not constituting obligations legally binding on it" (General City Law, § 20, subd 5) and, allowing recovery does not thwart the intent of the Eminent Domain Procedure Law "to give due regard to * * * the legitimate interests of private owners * * * and the quality of the environment" (Eminent Domain Procedure Law, § 101), and, in any event, the claim is implied contract arising out of tort rather than contract. Accordingly, plaintiffs' cause of action alleging that defendants have been unjustly enriched by dumping sewage and other substances on plaintiffs' property is sustained. Evans v Johnstown, 96 Misc. 2d 755, 410 N.Y.S.2d 199, 1978 N.Y. Misc. LEXIS 2674 (N.Y. Sup. Ct. 1978).

Generally, land is not subject to the remedy of restitution since such an action is inconvenient for the purpose of determining title except where a "person who, having the power to take land by eminent domain for a particular purpose, has taken possession of it for such purpose but does not take the required proceedings". Restitution is therefore a proper remedy in plaintiffs' claim of unjust enrichment concerning the taking of an easement or using plaintiffs' property for the dumping of untreated wastes from a municipal sewage plant since title to the property is not in question and defendants municipalities have the power to acquire real property by condemnation for the "maintenance and operation of a sewage disposal plant" (General City Law, § 20, subd 2) and have allegedly taken possession and controlled plaintiffs' property by dumping sewage onto their lands. Plaintiffs need not allege dispossession since the possession by defendants need not be exclusive. Evans v Johnstown, 96 Misc. 2d 755, 410 N.Y.S.2d 199, 1978 N.Y. Misc. LEXIS 2674 (N.Y. Sup. Ct. 1978).

4. —Disposition of property held by city

A municipality could convey valid and legal title to waterfront and parkland property to an urban renewal agency pursuant to and urban renewal plan without the necessity of obtaining legislative approval, notwithstanding that Gen City Law § 20 provided that a public trust is impressed upon waterfront and parkland property when a municipality acquires title thereto and said title may not be divested or alienated without a special act of the legislature, since Gen Mun Law § 503-a empowers a municipality to convey title to its real property to an urban renewal agency in furtherance of an urban renewal program, and to the extent that there was a conflict with the General City Law, the General Municipal Law is superseding and controlling. Village Green Realty Corp. v Glen Cove Community Dev. Agency, 95 A.D.2d 259, 466 N.Y.S.2d 26, 1983 N.Y. App. Div. LEXIS 18957 (N.Y. App. Div. 2d Dep't 1983).

City was entitled to summary judgment in buyer's action for specific performance of contract to convey waterfront property where legislative approval permitting city to sell property was not obtained; CLS Gen City § 20 divests city of power to convey publicly owned waterfront property except by special act of legislature, even in cases where property was neither acquired nor dedicated for public use, due to unique geographical nature of waterfront property. Gladsky v Glen Cove, 164 A.D.2d 567, 563 N.Y.S.2d 842, 1991 N.Y. App. Div. LEXIS 458 (N.Y. App. Div. 2d Dep't), app. denied, 78 N.Y.2d 859, 575 N.Y.S.2d 455, 580 N.E.2d 1058, 1991 N.Y. LEXIS 4106 (N.Y. 1991).

Buyer was entitled to recover sums spent for down payment, title examination and survey of waterfront property under purchase agreement with city following proper dismissal of buyer's specific performance action due to failure of legislature to approve purchase by special act as required by CLS Gen City § 20. Gladsky v Glen Cove, 164 A.D.2d 567, 563 N.Y.S.2d 842, 1991 N.Y. App. Div. LEXIS 458 (N.Y. App. Div. 2d Dep't), app. denied, 78 N.Y.2d 859, 575 N.Y.S.2d 455, 580 N.E.2d 1058, 1991 N.Y. LEXIS 4106 (N.Y. 1991).

Ordinance which directed the sale of real property following the dissolution of portions of public streets and which provided that fee title would revert to the city in the event that a certain corporation ceased to operate in the city was in direct violation of this section and § 37 of the Second Class Cities Law requiring the sale and conveyance of realty at public auction to the highest bidder Deed Realty Corp. v Yonkers, 1 Misc. 2d 280, 147 N.Y.S.2d 136, 1955 N.Y. Misc. LEXIS 2268 (N.Y. Sup. Ct. 1955).

Collective interested in acquiring 2 city-owned radio stations could not compel New York City officials to sell stations through competitive bidding process, as New York City Charter § 384 did not directly apply to sale of radio stations or to city property generally, and city's authority to dispose of radio stations under CLS Gen City § 20(2) was not restricted by competitive bidding provisions. Creole Enters. v Giuliani, 167 Misc. 2d 810, 636 N.Y.S.2d 547, 1995 N.Y. Misc. LEXIS 601 (N.Y. Sup. Ct. 1995), aff'd, 236 A.D.2d 272, 653 N.Y.S.2d 576, 1997 N.Y. App. Div. LEXIS 1274 (N.Y. App. Div. 1st Dep't 1997).

CLS Gen Mun § 103, which imposes competitive bidding requirement for public works contracts, did not apply to city's sale of city-owned radio stations to private entity. Creole Enters. v Giuliani, 167 Misc. 2d 810, 636 N.Y.S.2d 547, 1995 N.Y. Misc. LEXIS 601 (N.Y. Sup. Ct. 1995), aff'd, 236 A.D.2d 272, 653 N.Y.S.2d 576, 1997 N.Y. App. Div. LEXIS 1274 (N.Y. App. Div. 1st Dep't 1997).

In Article 78 proceeding challenging sale of city-owned radio stations to private entity, court would not compel New York City officials to sell stations through competitive bidding process even though some city officials made representations in this regard and indicated that public hearings would be held, as decision to hold public hearing was in discretion of city, and any incorrect representation made by city official was not binding on city; estoppel-based argument did not apply in that competitive bidding laws exist for protection of public, not prospective bidders. Creole Enters. v Giuliani, 167 Misc. 2d 810, 636 N.Y.S.2d 547, 1995 N.Y. Misc. LEXIS 601 (N.Y. Sup. Ct. 1995), aff'd, 236 A.D.2d 272, 653 N.Y.S.2d 576, 1997 N.Y. App. Div. LEXIS 1274 (N.Y. App. Div. 1st Dep't 1997).

New York City officials' proposal to sell 2 city-owned radio stations to private entity, and not through competitive bidding process, was not arbitrary and capricious, even though petitioner offered higher price, as city properly considered purchaser's commitment to stations' value and character as cultural institution; absent competitive bidding requirement, city or agency has fiduciary duty to sell property in public interest, which may involve factors other than price. Creole Enters. v Giuliani, 167 Misc. 2d 810, 636 N.Y.S.2d 547, 1995 N.Y. Misc. LEXIS 601 (N.Y. Sup. Ct. 1995), aff'd, 236 A.D.2d 272, 653 N.Y.S.2d 576, 1997 N.Y. App. Div. LEXIS 1274 (N.Y. App. Div. 1st Dep't 1997).

In Article 78 proceeding challenging sale of city-owned radio stations to private entity, petitioner prematurely raised claim

that proposed sale violated 47 CFR § 73.1150(a) (which prohibits holder of license from retaining any reversionary interest or other rights in license when it transfers license) because city required private entity to provide it with free air time for public service announcements, as there was no signed agreement between city and purchaser; furthermore, challenge to proposed sale based on Federal Communications Commission (FCC) regulations must be presented to FCC. Creole Enters. v Giuliani, 167 Misc. 2d 810, 636 N.Y.S.2d 547, 1995 N.Y. Misc. LEXIS 601 (N.Y. Sup. Ct. 1995), aff'd, 236 A.D.2d 272, 653 N.Y.S.2d 576, 1997 N.Y. App. Div. LEXIS 1274 (N.Y. App. Div. 1st Dep't 1997).

5. —Operation of buslines

This section, as amended by Laws 1962, ch. 161, provides adequate notice of acquisition and taking over of a bus line by a city within its coverage, and adequately meets all legal requirements for exercise of the power of eminent domain. Fifth Ave. Coach Lines, Inc. v New York, 11 N.Y.2d 342, 229 N.Y.S.2d 400, 183 N.E.2d 684, 1962 N.Y. LEXIS 1133 (N.Y. 1962).

Transit companies whose properties were condemned by a city, which without interruption in service operated their transportation systems over the same routes using the same personnel and equipment, having demonstrated a capability for profitable operations under reasonable rates, were entitled to going concern value for their assets; and the measure of value was the cost of putting the entire systems together new plus all improvements, tangible and intangible, less depreciation. In re Fifth Ave. Coach Lines, Inc., 18 N.Y.2d 212, 273 N.Y.S.2d 52, 219 N.E.2d 410, 1966 N.Y. LEXIS 1186 (N.Y. 1966), app. dismissed, 386 U.S. 778, 87 S. Ct. 1480, 18 L. Ed. 2d 524, 1967 U.S. LEXIS 1574 (U.S. 1967).

No authority for operation of a bus or stage line by a city is to be found in the grant of specific powers contained in this section. Brooklyn C. R. Co. v Whalen, 191 A.D. 737, 182 N.Y.S. 283, 1920 N.Y. App. Div. LEXIS 4800 (N.Y. App. Div.), aff'd, 229 N.Y. 570, 128 N.E. 215, 229 N.Y. (N.Y.S.) 570, 1920 N.Y. LEXIS 775 (N.Y. 1920).

6. Leases of space in city buildings (subd. 2-a)

This section does not constitute or can be construed as constituting a special legislative sanction authorizing a lease or diversion of public property held by the city for public use to a possession or use exclusively private, for private business purposes. American Dock Co. v New York, 21 N.Y.S.2d 943, 174 Misc. 813, 1940 N.Y. Misc. LEXIS 2033, 1940 N.Y. Misc. LEXIS 2686 (N.Y. Sup. Ct. 1940), aff'd, 261 A.D. 1063, 26 N.Y.S.2d 704, 1941 N.Y. App. Div. LEXIS 8753 (N.Y. App. Div. 1941).

7. Power to hold property received by gift (subd. 3)

Police association's application for mandamus to compel city to turn over to it funds donated by citizens for benefit of police department would be denied where donations did not carry particular directions, and thus disbursements of funds were matter within discretion of city as trustee under CLS Gen City § 20. Rye Police Ass'n v Rye, 138 Misc. 2d 441, 524 N.Y.S.2d 994, 1988 N.Y. Misc. LEXIS 341 (N.Y. Sup. Ct. 1988).

Police association's application for mandamus to review city's disbursements of funds donated by citizens for benefit of police department would be denied, despite claims that city failed to carry out purposes of donations by expending funds without approval or consultation of association or its members, where association made no showing that such approval or consultation was directed by donors, or that any expenditure was inconsistent with fund's general purpose to benefit department; moreover, absent specific statement of intent by donors, there was no moral obligation on part of city which would overcome constitutional barrier against giving gratuities by municipality. Rye Police Ass'n v Rye, 138 Misc. 2d 441, 524 N.Y.S.2d 994, 1988 N.Y. Misc. LEXIS 341 (N.Y. Sup. Ct. 1988).

Police association failed to establish its entitlement to "a constructive and equitable trust" within its Article 78 proceeding seeking both mandamus to compel city to turn over funds donated by citizens for benefit of police department, and mandamus to review city's disbursements of funds, since neither mandamus to compel nor mandamus to review includes constructive and equitable trust within ambit of relief which can be afforded. Rye Police Ass'n v Rye, 138 Misc. 2d 441, 524 N.Y.S.2d 994, 1988 N.Y. Misc. LEXIS 341 (N.Y. Sup. Ct. 1988).

A bequest to a city would not lapse when at the testator's death there was in being a municipal corporation authorized to accept gifts of its nature under this section and § 21. Kibbe v Rochester, 57 F.2d 542, 1932 U.S. Dist. LEXIS 1130 (D.N.Y. 1932).

8. Levy and collection of taxes (subd. 4)

A city has no authority under this section to tax the utility on gross income received from the sale of products for purposes of resale. Brooklyn Union Gas Co. v Joseph, 298 N.Y. 536, 80 N.E.2d 669, 298 N.Y. (N.Y.S.) 536, 1948 N.Y. LEXIS 1126 (N.Y. 1948).

The New York City Finance Administrator was empowered to impose a tax upon a transportation company's gross income during the tax period only by virtue of § 20-b of the General City Law and not by the general taxing power granted by the legislature. Carey Transp., Inc. v Perrotta, 34 A.D.2d 147, 310 N.Y.S.2d 186, 1970 N.Y. App. Div. LEXIS 4993 (N.Y. App. Div. 1st Dep't 1970), aff'd, 29 N.Y.2d 814, 327 N.Y.S.2d 651, 277 N.E.2d 668, 1971 N.Y. LEXIS 953 (N.Y. 1971).

Ordinance which authorized city to reconvey property acquired by in rem foreclosure was not unconstitutionally arbitrary, overbroad and vague on basis that it failed to establish any standards by which city council's discretion over reconveying property should be exercised, where specific considerations in selling surplus property were delineated in other sections of city code. Murphy v Dworsky, 170 A.D.2d 787, 565 N.Y.S.2d 887, 1991 N.Y. App. Div. LEXIS 1519 (N.Y. App. Div. 3d Dep't), app. dismissed, 78 N.Y.2d 951, 573 N.Y.S.2d 646, 578 N.E.2d 444, 1991 N.Y. LEXIS 1308 (N.Y. 1991), app. dismissed, 78 N.Y.2d 951, 573 N.Y.S.2d 646, 578 N.E.2d 444, 1991 N.Y. LEXIS 1293 (N.Y. 1991), app. dismissed, 78 N.Y.2d 951, 573 N.Y.S.2d 646, 578 N.E.2d 444, 1991 N.Y. LEXIS 1309 (N.Y. 1991), app. denied, 78 N.Y.2d 860, 576 N.Y.S.2d 218, 582 N.E.2d 601, 1991 N.Y. LEXIS 4654 (N.Y. 1991), app. denied, 78 N.Y.2d 860, 576 N.Y.S.2d 218, 582 N.E.2d 601, 1991 N.Y. LEXIS 4664 (N.Y. 1991).

Judgment convicting corporate defendant of violating NYC Admin Code § 11-809(a) by guilty plea entered on its default was vacated under CLS CPL § 440.10(1)(a) and (h) where universal summons was facially insufficient for failure to allege that subject vehicle was type specified by ordinance, and defendant established meritorious defense (that ordinance was inapplicable to its vehicle) based on tax returns and affidavit proof. People v Hoffman Floor Covering Corp., 179 Misc. 2d 656, 686 N.Y.S.2d 651, 1999 N.Y. Misc. LEXIS 22 (N.Y. City Crim. Ct. 1999).

9. Power to spend money, pay claims and the like (subd. 5)

Local law, authorizing the board of estimate and apportionment, in its discretion, to make an award to a person injured by a police officer engaged in making an arrest, is not in conflict with New York Constitution, Article VIII, § 10 forbidding cities giving money or property to an individual or incurring indebtedness for other than city purposes. Evans v Berry, 262 N.Y. 61, 186 N.E. 203, 262 N.Y. (N.Y.S.) 61, 1933 N.Y. LEXIS 914 (N.Y. 1933).

City housing authority and other defendants were entitled to partial summary judgment dismissing causes of action seeking damages for extra work under municipal construction contract and damaged business reputation where plaintiff did not prove its strict compliance with notice, change order, and dispute resolution provisions of contract, and defendants did not waive strict compliance with those provisions. Sicoli & Massaro, Inc. v Niagara Falls Hous. Auth., 281 A.D.2d 966, 722 N.Y.S.2d 442, 2001 N.Y. App. Div. LEXIS 2728 (N.Y. App. Div. 4th Dep't 2001).

Construction of schools is a public or municipal purpose for which the city is authorized to assume debt. Spano v Middletown, 7 N.Y.S.2d 14, 169 Misc. 338, 1938 N.Y. Misc. LEXIS 1993 (N.Y. Sup. Ct. 1938).

New York city may expend its money and property in permitting the broadcast of proceedings at communion breakfasts of the Holy Name societies composed of city employees, where it appears that the broadcast is not made for the benefit of the societies but is of interest to the listening public. Lewis v La Guardia, 14 N.Y.S.2d 463, 172 Misc. 82, 1939 N.Y. Misc. LEXIS 2245 (N.Y. Sup. Ct.), aff'd, 258 A.D. 713, 14 N.Y.S.2d 991, 1939 N.Y. App. Div. LEXIS 6542 (N.Y. App. Div. 1939).

A subclass of claimants entitled to recover tax refunds from a city for their payment under protest of illegally collected tax revenues, there being more than 70,000 claimants in the class action involving more than $100,000,000 in illegally collected revenue, would not be entitled to immediate payment even though the city's liability to those members who paid the illegal portion of their taxes under protest had been established, since no remedy for any claimants that should be fashioned until the legality of the city's plan to recognize the claims of nonprotesters under Gen City Law § 20(5) had been determined on appeal, in that any informed exercise of discretion in fashion a class-action remedy must take into account factors such as the effect on the city and class members of a large judgment, increases in municipal bonding costs, related increases in taxes and disruption of services, which must await a final determination as to the rights of nonprotesters. Rochester v Chiarella, 121 Misc. 2d 595, 470 N.Y.S.2d 321, 1983 N.Y. Misc. LEXIS 3969 (N.Y. Sup. Ct. 1983), rev'd, 100 A.D.2d 46, 473 N.Y.S.2d 87, 1984 N.Y. App. Div. LEXIS 16977 (N.Y. App. Div. 4th Dep't 1984).

10. —Payment of equitable claims

Under subdivision 5 of this section authorizing cities to pay or compromise equitable claims, there is no basis for a holding that the compensation is to be limited to claimant's outlay, excluding customary profit. Rather is it measured by a fair and reasonable value of his material and labor, which includes such profit as would be due him in an action on quantum meruit. Shaddock v Schwartz, 246 N.Y. 288, 158 N.E. 872, 246 N.Y. (N.Y.S.) 288, 1927 N.Y. LEXIS 875 (N.Y. 1927).

An accountant is not entitled to a peremptory writ of mandamus requiring the corporation counsel to execute a certificate that he was the "prevailing party" in the mandamus proceeding to compel his reinstatement, setting forth the value of his counsel fees and other actual necessary expenses, because it is not a claim "equitably payable by the city." Goldschmidt v Hardy, 177 A.D. 547, 163 N.Y.S. 305, 1917 N.Y. App. Div. LEXIS 5134 (N.Y. App. Div. 1917), aff'd, 223 N.Y. 575, 119 N.E. 1045, 223 N.Y. (N.Y.S.) 575, 1918 N.Y. LEXIS 1274 (N.Y. 1918).

Taxpayers, who did not protest the payment of real property taxes that were subsequently found to be excessive, were not entitled to a refund on the principle that a taxpayer is entitled to a refund for the payment of illegal taxes only if he can show that the payment was made under protest or was otherwise involuntarily made; the fact that there was a lien routinely created against the property by the city until the tax was paid was not the kind of duress that would make the tax payment involuntary so as to excuse the lack of formal protest. Rochester v Chiarella, 86 A.D.2d 110, 449 N.Y.S.2d 112, 1982 N.Y. App. Div. LEXIS 15373 (N.Y. App. Div. 4th Dep't), app. dismissed, 56 N.Y.2d 923, 453 N.Y.S.2d 431, 438 N.E.2d 1146, 1982 N.Y. LEXIS 3512 (N.Y. 1982), app. dismissed, 56 N.Y.2d 1031, 1982 N.Y. LEXIS 6197 (N.Y. 1982), aff'd, 58 N.Y.2d 316, 461 N.Y.S.2d 244, 448 N.E.2d 98, 1983 N.Y. LEXIS 2926 (N.Y. 1983).

An ordinance of a city authorizing refunds to all taxpayers who without protest paid unconstitutionally-levied real property taxes was not invalid or an unconstitutional violation of the prohibition against gifts by municipalities, since the ordinance did nothing more than recognize the claims of the nonprotestors as equitable claims and provide that any compromise with nonprotesters be limited to the amount available in the city's special fund for tax refunds and thus was a proper exercise of a legislative function of the city council, since nothing in the ordinance affected the legal claims of the protesters against the city that had been established prior to the enactment of the ordinance, and since when the only impediment to legal liability lies in a technical defect that bars an otherwise valid claim, a recognizable moral and equitable obligation arises on which a city may act. Rochester v Chiarella, 98 A.D.2d 8, 470 N.Y.S.2d 181, 1983 N.Y. App. Div. LEXIS 20371 (N.Y. App. Div. 4th Dep't 1983), app. dismissed, 61 N.Y.2d 904, 1984 N.Y. LEXIS 7429 (N.Y. 1984), aff'd, 63 N.Y.2d 857, 482 N.Y.S.2d 270, 472 N.E.2d 46, 1984 N.Y. LEXIS 4656 (N.Y. 1984).

Under this section municipal corporations have power to recognize claims for work performed and materials furnished. In re Shaddock, 220 N.Y.S. 113, 128 Misc. 616, 1927 N.Y. Misc. LEXIS 806 (N.Y. Sup. Ct.), rev'd, 220 A.D. 470, 221 N.Y.S. 677, 1927 N.Y. App. Div. LEXIS 9337 (N.Y. App. Div. 1927).

In the event it should be determined that the certificates of indebtedness are not legal obligations of the city, their payment is a moral obligation of the city and, under subdivision 5 of this section, claims may be paid or compromised. Rondout Sav. Bank v Kingston, 259 N.Y.S. 30, 144 Misc. 880, 1932 N.Y. Misc. LEXIS 1185 (N.Y. Sup. Ct. 1932).

The city has a right to pay or compromise claims equitably payable by the city though such claims be not legally binding on the city. Blazejewski v Eckert, 3 N.Y.S.2d 87, 166 Misc. 716, 1938 N.Y. Misc. LEXIS 1390 (N.Y. Sup. Ct. 1938).

11. —Waiver of statute of limitations

Subdivision 5 is inapplicable in an action against the city of New York for personal injuries sustained by reason of slippery condition of sidewalk brought one year after the injury occurred where the city did not plead the defense of the statute of limitations in the answer or move to amend at the trial. Reilley v New York, 298 N.Y. 710, 83 N.E.2d 12, 298 N.Y. (N.Y.S.) 710, 1948 N.Y. LEXIS 1272 (N.Y. 1948).

The prohibition in subd. 5 of this section against waiver of a defense of limitations is directed to statutory limitations, not those contained in a contract; and accordingly a contractor was not estopped to assert that a board of education waived a contract provision requiring any action or claim to be filed within one year from acceptance of the work. Planet Constr. Corp. v Board of Education, 7 N.Y.2d 381, 198 N.Y.S.2d 68, 165 N.E.2d 758, 1960 N.Y. LEXIS 1429 (N.Y. 1960).

Although a city lacks the power to waive the Statute of Limitations (General City Law, § 20, subd 5), it is not otherwise precluded from granting an extension. John J. Kassner & Co. v New York, 46 N.Y.2d 544, 415 N.Y.S.2d 785, 389 N.E.2d 99, 1979 N.Y. LEXIS 1875 (N.Y. 1979).

An audit of claim by the common council of city within one year before the action was commenced did not waive the statute of limitations. George C. Diehl, C. E., Inc. v Lackawanna, 233 A.D. 348, 252 N.Y.S. 838, 1931 N.Y. App. Div. LEXIS 11289 (N.Y. App. Div. 1931), aff'd, 258 N.Y. 579, 180 N.E. 340, 258 N.Y. (N.Y.S.) 579, 1932 N.Y. LEXIS 1246 (N.Y. 1932).

A claim was filed by petitioners with N. Y. C. Commissioners of Appraisal concerning real property rights affected by the City's diversion of water (Title K of the N. Y. C. Administrative Code). The Commissioners took some testimony but discontinued on the ground that the statute of limitations had run on the claim. But Special Term directed that the hearing be resumed. It thought the statute of limitations had been waived. Held the city could not waive the statute of limitations. So the matter was referred to Special Term to determine whether the City's alleged failure to comply with statutory procedure tolled the statute of limitations. Application of Huie, 7 A.D.2d 599, 185 N.Y.S.2d 471, 1959 N.Y. App. Div. LEXIS 8842 (N.Y. App. Div. 3d Dep't 1959).

A city ordinance authorizing the payment of refunds to taxpayers who without protest paid unconstitutionally-levied real property taxes did not violate the prohibition in Gen City Law § 20 against waiver of the defense of the statute of limitations, since the nonprotesting taxpayers never had legally enforceable claims that could be subjected to a statute of limitations defense. Moreover, a challenge to a tax statute alleged to be unconstitutional may be treated as a plenary action for money had and received for which the applicable limitations period is 6 years and a counterclaim of nonprotesting taxpayers was interposed within that time period and thus was timely. Rochester v Chiarella, 98 A.D.2d 8, 470 N.Y.S.2d 181, 1983 N.Y. App. Div. LEXIS 20371 (N.Y. App. Div. 4th Dep't 1983), app. dismissed, 61 N.Y.2d 904, 1984 N.Y. LEXIS 7429 (N.Y. 1984), aff'd, 63 N.Y.2d 857, 482 N.Y.S.2d 270, 472 N.E.2d 46, 1984 N.Y. LEXIS 4656 (N.Y. 1984).

The city has no authority to waive the provisions of the 20-year statute of limitations contained in § 44 of the Civil Practice Act. Application of Long Island R. Co., 22 N.Y.S.2d 706, 174 Misc. 1037, 1940 N.Y. Misc. LEXIS 2202 (N.Y. Sup. Ct. 1940), aff'd, 261 A.D. 914, 25 N.Y.S.2d 1005, 1941 N.Y. App. Div. LEXIS 8078 (N.Y. App. Div. 1941).

By the specific provisions of this section the city has no power to waive the defense of the statute of limitations Farrell v New York, 98 N.Y.S.2d 56, 197 Misc. 1059, 1950 N.Y. Misc. LEXIS 1735 (N.Y. App. Term 1950).

In view of the strong public policy against payment by public bodies of claims barred by the statute of limitations, the acknowledgment of the debt by the city department after the statute of limitations had run was an impermissible waiver of the statute of limitations and it was error to deny the motion to dismiss the complaint. 35 Park Ave., Inc. v New York, 64 Misc. 2d 418, 315 N.Y.S.2d 205, 1969 N.Y. Misc. LEXIS 1509 (N.Y. App. Term 1969).

The one-year, 90-day period within which to serve a complaint pursuant to Gen Mun Law § 50-i(1)(c) constitutes a statute of limitations rather than a condition precedent to suit and must be asserted by a defendant municipality by a motion to dismiss prior to answer or as a specific affirmative defense in the answer and a municipality which does neither must be deemed to have waived the defense, since no compelling reason or authority has been found for treating a municipality differently from other litigants, and the court is without authority sua sponte to deem the defense included in a municipality's answer. Eagle Ins. Co. v New York (New York City Health & Hospitals Corp.), 120 Misc. 2d 188, 466 N.Y.S.2d 134, 1983 N.Y. Misc. LEXIS 3689 (N.Y. Civ. Ct. 1983).

In action to challenge constitutionality of CLS Civ S §§ 50(7) and 50-a and to create special eligible list, court would reject argument by defendant city department of personnel that, pursuant to CLS Gen City § 20(5), it could not waive statute of limitations for action by failure to assert defense in answer, since statute expressly applied to money claims and no such claim was made by plaintiffs. Mancuso v Levitt, 154 Misc. 2d 252, 585 N.Y.S.2d 164, 1992 N.Y. Misc. LEXIS 254 (N.Y. Sup. Ct. 1992), app. dismissed, 201 A.D.2d 386, 607 N.Y.S.2d 353, 1994 N.Y. App. Div. LEXIS 1359 (N.Y. App. Div. 1st Dep't 1994).

A proceeding to recover moneys due city employees as their military pay differential may not be maintained where they did not pursue their remedy within the period of 4 months. Although this limitation period was waived, no written protest was filed Russo v Bingham, 106 N.Y.S.2d 894, 1951 N.Y. Misc. LEXIS 2251 (N.Y. Sup. Ct. 1951).

The effect of the amendments to § 208-f of the General Municipal Law, Chapter 415 of Laws of 1982 and Chapter 348 of Laws of 1989, is to permit the special accidental death benefit to be paid to the deceased member's children under the age of 18 in both the situation where the deceased member is divorced at the time of his death and in the situation where the deceased member's spouse predeceases him. Further § 5 of Chapter 415 of the Laws of 1982 provided that payments to the children of deceased member may be made retroactive to September 1, 1978. While it appears that claims of eligible children, either retroactive from September 1, 1978 or thereafter, may be subject to a municipality obligation to interpose an appropriately statute of limitations defense, it should be noted that the 4 month statute of limitations contained in CPLR § 217 (subject to tolling for infancy), which would be applicable to the Article 78 proceeding in the nature of mandamus to compel payment, would not begin to run until there was a demand and a refusal, although a claim may be barred by laches even where no demand has been made if the claimant unreasonably delays in making the appropriate demand. 1990 Op St Compt 90-43.

Statute as it pertains to waiver of the statute of limitations does not encourage or permit a municipal attorney to stand as a barrier to a plaintiff filing a legitimate claim against a city. Dacosta v City of New York, 296 F. Supp. 3d 569, 2017 U.S. Dist. LEXIS 185306 (E.D.N.Y. 2017).

12. Construction, maintenance and discontinuance of streets, parks, sewers and the like (subd. 7)

In the construction of an extension of its waterworks system, a city performed a function necessary for the preservation of public health and safety and hence the complaint of the waterworks corporation to recover the costs of protecting and relocating its facilities in the streets where city planned to install facilities for distribution of city-owned water should be dismissed. Jamaica Water Supply Co. v New York, 304 N.Y. 917, 110 N.E.2d 739, 304 N.Y. (N.Y.S.) 917, 1953 N.Y. LEXIS 1097 (N.Y.), reh'g denied, 305 N.Y. 560, 111 N.E.2d 437, 305 N.Y. (N.Y.S.) 560, 1953 N.Y. LEXIS 1150 (N.Y. 1953).

New York City Corporation Counsel has no authority to originate policy regarding installation of bins on city streets for distribution of free publication; City Council is proper legislative body of City of New York in this substantive area (New York City Charter § 27(d)) and Board of Estimate holds exclusive implementing authority with respect to use of city property (New York City Charter § 67(1) and § 362). New York v American School Publications, Inc., 69 N.Y.2d 576, 516 N.Y.S.2d 616, 509 N.E.2d 311, 1987 N.Y. LEXIS 16369 (N.Y. 1987).

Although authorized to install street lighting by CLS Gen City § 20, municipality generally is required to do so only in certain situations where it is necessary to keep street safe, i.e., where there is defect or some unusual condition rendering street unsafe to traveling public; duty to maintain existing streetlights is similarly limited to those situations in which illumination is necessary to avoid dangerous and potentially hazardous conditions. Thompson v New York, 78 N.Y.2d 682, 578 N.Y.S.2d 507, 585 N.E.2d 819, 1991 N.Y. LEXIS 5147 (N.Y. 1991).

Pedestrian's claim that light bulb had burned out in street lighting fixture was not, standing alone, sufficient to establish cause of action against city for failure to maintain streetlight by replacing bulb; pedestrian was obliged to show that, by failing to replace bulb, city created dangerous condition on street, which she failed to do given fact that street and nearby intersection were merely busy at times, which was condition existing at many city intersections. Thompson v New York, 78 N.Y.2d 682, 578 N.Y.S.2d 507, 585 N.E.2d 819, 1991 N.Y. LEXIS 5147 (N.Y. 1991).

In action against city, pedestrian could have been entitled to damages from injuries resulting from traffic accident, without having to establish "special relationship" between herself and city, had she proved that street which she was crossing was not reasonably safe due to failure to replace streetlight bulb. Thompson v New York, 78 N.Y.2d 682, 578 N.Y.S.2d 507, 585 N.E.2d 819, 1991 N.Y. LEXIS 5147 (N.Y. 1991).

By virtue of Home Rule Bill (Article 2-A) a taxpayer may maintain an action to restrain the making of a contract for paving street and for laying water lines therein, on the ground that the proceedings are illegal official acts affecting the funds of city, and an injunction granted in the action will be continued. Gibbs v Luther, 143 N.Y.S. 90, 81 Misc. 611, 1913 N.Y. Misc. LEXIS 1214 (N.Y. Sup. Ct.), aff'd, 158 A.D. 951, 143 N.Y.S. 1118, 1913 N.Y. App. Div. LEXIS 7649 (N.Y. App. Div. 1913).

This section does not authorize a permanent or habitual obstruction of, or incumbrance upon, a public sidewalk. Hofeler v Buck, 180 N.Y.S. 563, 110 Misc. 402, 1920 N.Y. Misc. LEXIS 1152 (N.Y. Sup. Ct.), aff'd, 193 A.D. 262, 184 N.Y.S. 210, 1920 N.Y. App. Div. LEXIS 5538 (N.Y. App. Div. 1920).

The common council of Schenectady had the power to install sanitary or storm sewers. In re Schenectady Sewer Assessment, 236 N.Y.S. 455, 134 Misc. 810, 1929 N.Y. Misc. LEXIS 1240 (N.Y. Sup. Ct. 1929).

When written notice is given to municipal office which holds itself out as competent to investigate and resolve maintenance problems, purpose of municipality's prior notice statute has been met, and negligence action may proceed. Gilmore v City of Rochester, 163 Misc. 2d 660, 622 N.Y.S.2d 189, 1995 N.Y. Misc. LEXIS 5 (N.Y. Sup. Ct. 1995).

New York City could include, in contracts for public infrastructure work, specification requiring successful bidder to commence immediate negotiations with affected utility companies regarding compensation for contractor's performance of necessary utility "interference work" and further providing that, if no agreement was reached by 4 weeks after award of contract, dispute with utility company would be submitted to expedited binding arbitration; challenged specification was valid bidding "precondition" which did not impede competition. General Contrs. Ass'n v Tormenta, 180 Misc. 2d 384, 687 N.Y.S.2d 871, 1999 N.Y. Misc. LEXIS 126 (N.Y. Sup. Ct.), aff'd, 259 A.D.2d 177, 696 N.Y.S.2d 155, 1999 N.Y. App. Div. LEXIS 10501 (N.Y. App. Div. 1st Dep't 1999).

Subdivision 7 clearly negatives any intention on the part of the legislature to confer, under subdivision 2, the power to acquire a

water distribution system owned and operated by a water works corporation by a city of over 1,000,000 inhabitants. In re New York Water Service Corp., 67 N.Y.S.2d 850, 1946 N.Y. Misc. LEXIS 3316 (N.Y. Sup. Ct. 1946), aff'd, 271 A.D. 1019, 69 N.Y.S.2d 508, 1947 N.Y. App. Div. LEXIS 5676 (N.Y. App. Div. 1947).

Underground use of parkland for water treatment plant may be approved by city without need for ratification by state legislature, even though state cites common-law doctrine against alienation of parkland and Gen City §§ 20(2) and (7), and construction of plant will require disruption of park use, because parkland available for public use will not be reduced when project is completed. United States v City of New York, 96 F. Supp. 2d 195, 2000 U.S. Dist. LEXIS 6512 (E.D.N.Y. 2000).

13. —Alienation of land held for parks

Under "public trust doctrine," New York City was required to obtain state legislative approval for its proposed use of dedicated parkland (Moshulu Golf Course in Van Cortlandt Park) as water treatment plant, although plant would be substantially underground and park surfaces would be fully restored following construction, where 28 acres of parkland would be closed to public for at least 5 years during construction; because Court of Appeals reached its conclusion as matter of common law, it did not address CLS Gen City § 20. Friends of Van Cortlandt Park v City of New York, 95 N.Y.2d 623, 727 N.Y.S.2d 2, 750 N.E.2d 1050, 2001 N.Y. LEXIS 117 (N.Y. 2001).

The inalienability of parks provided for in subdivision 2 is not affected by subdivision 7. In re Central Parkway, Schenectady, 251 N.Y.S. 577, 140 Misc. 727, 1931 N.Y. Misc. LEXIS 1463 (N.Y. Sup. Ct. 1931).

Second-class city had no claim against State for the value of park lands appropriated for thruway purposes where the city had purchased the land for park purposes and held it in trust as an agency of the State for the use of the public. Schenectady v State, 6 Misc. 2d 232, 162 N.Y.S.2d 262, 1957 N.Y. Misc. LEXIS 3104 (N.Y. Ct. Cl. 1957), app. dismissed, 9 A.D.2d 851, 194 N.Y.S.2d 445, 1959 N.Y. App. Div. LEXIS 6081 (N.Y. App. Div. 3d Dep't 1959).

Where land was conveyed to city for park purposes, subsequent erroneous assessment of land in name or another was invalid, and tax foreclosure sale deed to such property by city was void and would be set aside. Rochester v Carnahan, 57 Misc. 2d 704, 293 N.Y.S.2d 479, 1967 N.Y. Misc. LEXIS 959 (N.Y. Sup. Ct. 1967).

Because a contract between a city and an "occupy" group clearly and unambiguously permitted the city to deny any renewal, and because a city code prohibiting overnight camping without a permit complied with the public trust doctrine in N.Y. Gen. City Law § 20(2) and did not violate the group's free speech rights, it was constitutional, therefore, the group was not entitled to a preliminary injunction under N.Y. C.P.L.R. 6301. Miller-Jacobson v City of Rochester, 941 N.Y.S.2d 475, 35 Misc. 3d 846, 2012 N.Y. Misc. LEXIS 1462 (N.Y. Sup. Ct. 2012).

14. Control and regulation of waterfront, docks and other facilities (subd. 8)

While ordinarily a city's jurisdiction is limited to the territory within its boundaries, as set forth in its charter, it appears that pursuant to § 20 subdivision 8 of the General City Law, the state has delegated to cities the power to control and administer the waterfront. People v McGuire, 63 Misc. 2d 639, 313 N.Y.S.2d 56, 1970 N.Y. Misc. LEXIS 1439 (N.Y. City Ct. 1970).

Municipal code provision providing that no person was permitted to use any surfboard in the waters adjacent to a beach park without having first obtained a license therefor from the city clerk was constitutional and a proper exercise of the police power by the city. People v McGuire, 63 Misc. 2d 639, 313 N.Y.S.2d 56, 1970 N.Y. Misc. LEXIS 1439 (N.Y. City Ct. 1970).

In Article 78 proceeding, court dismissed claim that Uniform Land Use Review Procedure (ULURP) was required prior to authorization of construction of one-family house on waterfront property pursuant to NYC Charter § 193-c, where ULURP review was required only if application involved "waterfront landfills," rational basis existed for city planning commission to interpret "waterfront landfills" to mean addition of fill materials to land below mean high water line, and documentary evidence established that any land-fill needed to complete construction of house would be above mean high water line. Coppotelli v Commissioner of the Dep't of Bldgs., 169 Misc. 2d 888, 646 N.Y.S.2d 773, 1996 N.Y. Misc. LEXIS 286 (N.Y. Sup. Ct. 1996), aff'd, 240 A.D.2d 666, 659 N.Y.S.2d 997, 1997 N.Y. App. Div. LEXIS 6829 (N.Y. App. Div. 2d Dep't 1997).

CLS Gen City § 20(8) does not grant cities power to include in lease of city piers restrictive covenant preventing any competitor from also leasing municipal pier, and because of breadth of regulatory authority conferred on cities with respect to waterfront operation and regulation by statute, no state action defense exists for city in action alleging anti-trust violations. Driscoll v New York, 650 F. Supp. 1522, 1987 U.S. Dist. LEXIS 132 (S.D.N.Y. 1987).

15. Construction, maintenance and discontinuance of bridges, tunnels and ferries (subd. 9)

The construction and maintenance of a bridge within the city is a governmental function and the obligation of city is to use reasonable care in construction and maintenance so that the bridge will be reasonably safe for public travel. Rickhold v Niagara Falls, 213 A.D. 451, 210 N.Y.S. 676, 1925 N.Y. App. Div. LEXIS 8513 (N.Y. App. Div. 1925).

Under this section city had power to cause the construction of toll bridge and tunnels. Robia Holding Corp. v Walker, 239 N.Y.S. 659, 136 Misc. 358, 1930 N.Y. Misc. LEXIS 1004 (N.Y. Sup. Ct.), aff'd, 230 A.D. 666, 246 N.Y.S. 210, 1930 N.Y. App. Div. LEXIS 8714 (N.Y. App. Div. 1930).

Protocol issued by New York City Department of Transportation Bureau of Bridges, governing removal of lead paint on bridges owned by city, was subject to mandatory environmental review under State Environmental Quality Review Act (CLS ECL Art 8); sandblasting, which spews clouds of paint particles and fine lead dust into surrounding atmosphere, is encompassed by 6 NYCRR § 617.11. Williamsburg Around the Bridge Block Ass'n v Giuliani, 167 Misc. 2d 980, 637 N.Y.S.2d 241, 1995 N.Y. Misc. LEXIS 631 (N.Y. Sup. Ct. 1995), aff'd, 223 A.D.2d 64, 644 N.Y.S.2d 252, 1996 N.Y. App. Div. LEXIS 7310 (N.Y. App. Div. 1st Dep't 1996).

Protocol issued by New York City Department of Transportation Bureau of Bridges, governing removal of lead paint on bridges owned by city, was subject to mandatory environmental review under New York City Environmental Quality Review (former 43 RCNY ch 6; 62 RCNY, ch 5, Appendix A), as sandblasting which spews clouds of lead paint particles into atmosphere, creates "hazard" to human health within purview of 42 RCNY § 6-06(a). Williamsburg Around the Bridge Block Ass'n v Giuliani, 167 Misc. 2d 980, 637 N.Y.S.2d 241, 1995 N.Y. Misc. LEXIS 631 (N.Y. Sup. Ct. 1995), aff'd, 223 A.D.2d 64, 644 N.Y.S.2d 252, 1996 N.Y. App. Div. LEXIS 7310 (N.Y. App. Div. 1st Dep't 1996).

Protocol issued by New York City Department of Transportation Bureau of Bridges, governing removal of lead paint on bridges owned by city, was not exempt from environmental review under State Environmental Quality Review Act pursuant to 6 NYCRR § 617.3(j), on ground that it involved "maintenance or repair" under 6 NYCRR § 617.2(q)(3), as maintenance and repair refers to routine and ordinary maintenance and repairs on existing facilities, and sandblasting that would spew clouds of lead paint particles into atmosphere was not routine or ordinary; furthermore, protocol concededly applied to major rehabilitation projects, and thus went beyond maintenance or repair. Williamsburg Around the Bridge Block Ass'n v Giuliani, 167 Misc. 2d 980, 637 N.Y.S.2d 241, 1995 N.Y. Misc. LEXIS 631 (N.Y. Sup. Ct. 1995), aff'd, 223 A.D.2d 64, 644 N.Y.S.2d 252, 1996 N.Y. App. Div. LEXIS 7310 (N.Y. App. Div. 1st Dep't 1996).

Protocol issued by New York City Department of Transportation Bureau of Bridges, governing removal of lead paint on bridges owned by city, was not subject to City Administrative Procedure Act (NY City Charter ch 45 §§ 1041 et seq.) which requires certain procedures for adoption of rules; protocol was not "rule" in that it did not govern conduct of public or regulate private behavior, but established rules for city's own behavior, which was subject to environmental review procedures. Williamsburg Around the Bridge Block Ass'n v Giuliani, 167 Misc. 2d 980,

637 N.Y.S.2d 241, 1995 N.Y. Misc. LEXIS 631 (N.Y. Sup. Ct. 1995), aff'd, 223 A.D.2d 64, 644 N.Y.S.2d 252, 1996 N.Y. App. Div. LEXIS 7310 (N.Y. App. Div. 1st Dep't 1996).

16. Franchises for use of public ways and places (subd. 10)

In municipalities other than New York City, cable franchises are granted by the town board, village board of trustees, or the common council of the city, as required by N.Y. Town Law § 64(7), N.Y. Village Law § 4-412(6), N.Y. Gen. City Law §§ 20(10) and 23(2)(b), and N.Y. Second Class Cities Law § 37, respectively; in New York City, however, the City Charter requires that the New York City Franchise and Concession Review Committee (FCRC) approve franchises and explicitly bars any participation by the Council after the Council passes an authorizing resolution. Thus, the FCRC was the body with authority to approve cable franchise renewals and the New York Public Service Commission's regulation did not require or authorize the additional approval of the Council. Council of N.Y. v PSC, 99 N.Y.2d 64, 751 N.Y.S.2d 822, 781 N.E.2d 886, 2002 N.Y. LEXIS 3371 (N.Y. 2002).

Presumed constitutionality of NYC Local Law No. 115, which prohibits commuter vans from dropping off and picking up passengers on bus routes and requires all commuter van passenger service to be prearranged, was not overcome where it bears rational relationship to legitimate governmental purposes of regulating transportation modalities and preventing conditions dangerous to public welfare. Ricketts v City of New York, 281 A.D.2d 245, 722 N.Y.S.2d 25, 2001 N.Y. App. Div. LEXIS 2445 (N.Y. App. Div. 1st Dep't), app. dismissed, 96 N.Y.2d 897, 730 N.Y.S.2d 793, 756 N.E.2d 81, 2001 N.Y. LEXIS 1949 (N.Y. 2001), app. dismissed, 98 N.Y.2d 692, 747 N.Y.S.2d 409, 775 N.E.2d 1289, 2002 N.Y. LEXIS 1991 (N.Y. 2002).

In an action to restrain the mayor of Oswego from signing a resolution revoking prior consent given plaintiff to operate motor buses in streets after consent had been given for ten years without reservation of power to revoke, consent did not require formal acceptance and acceptance was shown by application to public service commission for certificate of convenience and necessity, purchase of motor bus and bus route. Granting of said consent was not subject to provisions of § 23, subdivision 2, and it was properly granted under Transportation Corporations Law, § 26, and subdivisions 10 and 23 of this section. Colonial Motor Coach Corp. v Oswego, 215 N.Y.S. 159, 126 Misc. 829, 1926 N.Y. Misc. LEXIS 888 (N.Y. Sup. Ct.), aff'd, 217 A.D. 816, 217 N.Y.S. 907, 1926 N.Y. App. Div. LEXIS 9081 (N.Y. App. Div. 1926), aff'd, 220 A.D. 809, 222 N.Y.S. 789, 1927 N.Y. App. Div. LEXIS 10487 (N.Y. App. Div. 1927).

It was within the power of the common council to grant a franchise to operate a community antenna television system. People's Cable Corp. v Rochester, 70 Misc. 2d 763, 334 N.Y.S.2d 972, 1972 N.Y. Misc. LEXIS 1924 (N.Y. Sup. Ct. 1972), aff'd, 41 A.D.2d 585, 340 N.Y.S.2d 883, 1973 N.Y. App. Div. LEXIS 5373 (N.Y. App. Div. 4th Dep't 1973).

The operation of a limousine corporation's bus line over the streets of the City of New York requires the approval of both the State Commissioner of Transportation and the City of New York. New York v Long Island Airports Limousine Service Corp., 110 Misc. 2d 338, 442 N.Y.S.2d 365, 1981 N.Y. Misc. LEXIS 3088 (N.Y. Sup. Ct. 1981), modified, 91 A.D.2d 1149, 458 N.Y.S.2d 751, 1983 N.Y. App. Div. LEXIS 16490 (N.Y. App. Div. 3d Dep't 1983).

17. Construction of public buildings and works and assessment of costs (subd. 11)

Where the common council of a city is given general power to make public improvements and to assess the cost on property benefited, in the absence of regulatory legislation methods and procedures are within the council's discretion and it may proceed by special ordinance without prior enactment of a general ordinance covering all such instances. In re Improvement of Constr. of Lateral Sewer, 24 Misc. 2d 618, 194 N.Y.S.2d 279, 1959 N.Y. Misc. LEXIS 2772 (N.Y. Sup. Ct. 1959).

Despite provision of contract governing reimbursement of water company by city for relocation of mains and hydrants in the event of the change of grade of the city street, that interest should be payable at six percent, under this section interest could not exceed three percent. New Rochelle Water Co. v New Rochelle, 48 Misc. 2d 301, 264 N.Y.S.2d 737, 1965 N.Y. Misc. LEXIS 1387 (N.Y. Sup. Ct. 1965).

Where city instigated request for widening and changing of grade of road located within city, city was liable to water company for relocation of water mains and hydrants pursuant to contract between city and water company, notwithstanding that actual construction work on road was done by state. New Rochelle Water Co. v New Rochelle, 48 Misc. 2d 301, 264 N.Y.S.2d 737, 1965 N.Y. Misc. LEXIS 1387 (N.Y. Sup. Ct. 1965).

18. Fire prevention and firefighting (subds. 12 and 12-a)

In action arising from fire which damaged plaintiff's property, court properly dismissed cause of action against city based on its alleged failure to allocate sufficient resources for its fire department, as city's decision concerning allocation of those resources did not provide proper predicate for tort liability. Page v City of Niagara Falls, 277 A.D.2d 1047, 716 N.Y.S.2d 173, 2000 N.Y. App. Div. LEXIS 11409 (N.Y. App. Div. 4th Dep't 2000).

A Municipal ordinance restricting the erection of buildings within certain fire limits is not a zoning restriction but is a measure for fire prevention. People ex rel. Barker v Elkin, 80 N.Y.S.2d 525, 196 Misc. 188, 1948 N.Y. Misc. LEXIS 2606 (N.Y. Spec. Sess. 1948).

To extent that there is inconsistency between provisions of New York City Administrative Code related to "explosives" and "fireworks" and Fire Department rules which classify fireworks in same category as explosives in terms of storage and transportation, code takes precedence. Bay Fireworks v City of New York, 173 Misc. 2d 396, 661 N.Y.S.2d 731, 1997 N.Y. Misc. LEXIS 308 (N.Y. Sup. Ct. 1997), aff'd, 251 A.D.2d 359, 674 N.Y.S.2d 392, 1998 N.Y. App. Div. LEXIS 6621 (N.Y. App. Div. 2d Dep't 1998).

Petitioners, who contended that they were transporting "fireworks" to be used for legitimate fireworks displays and not "explosives," were entitled to preliminary injunctive relief in action challenging city's detention and seizure of their property pursuant to 3 RCNY § 40-07(e)(i), requiring fire department escort, as city's administrative code provisions relating to fireworks and explosives did not require escort, requiring escort resulted in charge for passing through city and thus impinged on intrastate and interstate commerce, and no rational basis was shown for fire department rule. Bay Fireworks v City of New York, 173 Misc. 2d 396, 661 N.Y.S.2d 731, 1997 N.Y. Misc. LEXIS 308 (N.Y. Sup. Ct. 1997), aff'd, 251 A.D.2d 359, 674 N.Y.S.2d 392, 1998 N.Y. App. Div. LEXIS 6621 (N.Y. App. Div. 2d Dep't 1998).

Fire chief did not have authority under city charter to order firefighters to patrol streets from 6:00 a.m. to 8:00 a.m. on school days in order to assist police in effort to combat rash of rapes of school children, because such patrols could not be seen in any way as "incidental or necessary to protection of life and property during fires and other emergencies," as charter dictated. Rochester Fire Fighters Ass'n, Local 1071 v Griffith, 175 Misc. 2d 977, 671 N.Y.S.2d 593, 1998 N.Y. Misc. LEXIS 72 (N.Y. Sup. Ct. 1998).

19. Enforcement of laws and regulation and licensing of businesses (subd. 13)

In the exercise of police power, while the fundamental rule must be observed that there is some evil existent or reasonably to be apprehended which the police power may be invoked to prevent and that the remedy proposed must be generally adapted to the purpose, the limit upon conditions held to come within this rule has been greatly enlarged. The power is not limited to regulations designed to promote public health, public morals or public safety or to the suppression of what is offensive, disorderly or unsanitary but extends to so dealing with conditions which exist as to bring out of them the greatest welfare of the people by promoting public convenience or general prosperity. Wulfsohn v Burden, 241 N.Y. 288, 150 N.E. 120, 241 N.Y. (N.Y.S.) 288, 1925 N.Y. LEXIS 551 (N.Y. 1925).

An undertaker is not a "professional" person, but a business man, and conducts a business within the meaning of this section. Bond v Cooke, 237 A.D. 229, 262 N.Y.S. 199, 1932 N.Y. App. Div. LEXIS 5316 (N.Y. App. Div. 1932).

The trial court improperly dismissed an Article 78 proceeding by an ex-offender against a city building commissioner and others to review the commissioner's determination denying petitioner's

application for a license to operate a rooming house, since, though conviction of a criminal offense can be the basis for denial of a license pursuant to Correc Law § 752(1) if there is a direct relationship between the offense and the specific license sought, and though petitioner's conviction for third degree burglary could arguably have a direct bearing on his responsibility as a rooming house operator to safeguard the facility's occupants and their possessions, respondents failed to produce any evidence to rebut the statutory presumption of rehabilitation that arose from the certificate of good conduct that petitioner had received pursuant to Correc Law § 753(2), since the commissioner's reliance on Correc Law § 753(1)(h), which requires that licensing agencies consider the legitimate interest of the agency in protecting property and the safety and welfare of specific individuals or the general public, was undermined by the fact that petitioner had obtained a license to drive a taxi from the public safety commissioner, and since, though petitioner's conviction could be the basis for a license denial pursuant to Correc Law § 752(2) if the issuance of the license would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public, there were no facts to support the commissioner's contention that petitioner, by virtue of his association with a program for ex-offenders, would show a predilection for renting to such persons and that this would create a security risk to the surrounding community. Marra v White Plains, 96 A.D.2d 17, 467 N.Y.S.2d 865, 1983 N.Y. App. Div. LEXIS 19872 (N.Y. App. Div. 2d Dep't), cert. denied, Weber v Stony Brook Hospital, 464 U.S. 1026, 104 S. Ct. 560, 78 L. Ed. 2d 732, 1983 U.S. LEXIS 2777 (U.S. 1983).

A city building commissioner improperly denied an application for a license to operate a rooming house on the asserted ground that the applicant had previously been convicted and fined for violations of the municipal building code and of the city's rooming house licensing and regulatory ordinance, since municipalities may not deny such a license based upon an applicant's past violations of local zoning ordinances in that adequate civil and criminal sanctions exist for enforcement of such ordinances, and since the record did not reveal whether there were any outstanding violations that the applicant had failed to correct or was unwilling to correct within a reasonable period of time. Marra v White Plains, 96 A.D.2d 17, 467 N.Y.S.2d 865, 1983 N.Y. App. Div. LEXIS 19872 (N.Y. App. Div. 2d Dep't), cert. denied, Weber v Stony Brook Hospital, 464 U.S. 1026, 104 S. Ct. 560, 78 L. Ed. 2d 732, 1983 U.S. LEXIS 2777 (U.S. 1983).

Court in Article 78 proceeding erred in granting taxi driver whose license was revoked new administrative hearing at which his licensing records had to be produced and considered, since licensing records were sought in support of driver's claim of discriminatory enforcement of disciplinary scheme by respondent licensing authority, and such claim cannot be raised in administrative hearing. Cannon v Urlacher, 155 A.D.2d 906, 547 N.Y.S.2d 495, 1989 N.Y. App. Div. LEXIS 14750 (N.Y. App. Div. 4th Dep't 1989).

Claim of discriminatory enforcement of disciplinary scheme by licensing authority cannot be raised at administrative hearing but must be submitted to court in Article 78 proceeding. Cannon v Urlacher, 155 A.D.2d 906, 547 N.Y.S.2d 495, 1989 N.Y. App. Div. LEXIS 14750 (N.Y. App. Div. 4th Dep't 1989).

New York City Department of Consumer Affairs correctly concluded that second inspection of parking garage within 6-month period was proper, even though department's regulations provided that such inspections would be conducted "at least once in every 2-year period" and that additional inspections would be conducted if violations had been revealed or department had received information alleging violation, since discretionary inspections were not limited to 2 situations set forth in regulation. 400 East 54th Street Garage Corp. v Green, 179 A.D.2d 452, 578 N.Y.S.2d 190, 1992 N.Y. App. Div. LEXIS 180 (N.Y. App. Div. 1st Dep't 1992).

Hearing examiner properly denied petitioner's request for adjournment of taxi driver's license revocation hearing so that he could go on family trip on basis that adjournment would be too disruptive of orderly administrative processes; thus, rational basis existed for respondent's refusal to vacate administrative finding made against petitioner in hearing at which he was not present. Bungeroth v New York City Taxi & Limousine Comm'n, 222 A.D.2d 221, 634 N.Y.S.2d 471, 1995 N.Y. App. Div. LEXIS 12541 (N.Y. App. Div. 1st Dep't 1995), app. denied, 87 N.Y.2d 809, 642 N.Y.S.2d 195, 664 N.E.2d 1258, 1996 N.Y. LEXIS 255 (N.Y. 1996).

The power to regulate and license occupations and businesses conferred by subd. 13 of this section includes power to regulate and license taxicabs, but any such regulation must be for the real and substantial protection of public health, safety, and welfare. People v Chimino, 39 Misc. 2d 555, 241 N.Y.S.2d 759, 1963 N.Y. Misc. LEXIS 2003 (N.Y. City Ct. 1963).

The provision of a city ordinance defining an amusement arcade as a place having four or more coin-operated amusement devices is not violative of equal protection; the provision prohibiting persons under age 16 from being in an amusement arcade during school hours is not lacking a rational basis and does not infringe First Amendment rights; the absence of formulated licensing standards in the ordinance does not render it unconstitutional; the $75 licensing fee for each device located in an arcade is not excessive; however, the provision prohibiting the operation of amusement devices between the hours of 11 p.m. and 10 a.m. bears no rational relationship to the purpose of the ordinance and is invalid. Pecoraro v Buffalo, 112 Misc. 2d 985, 447 N.Y.S.2d 842, 1982 N.Y. Misc. LEXIS 3227 (N.Y. Sup. Ct. 1982).

Defendant taxicab drivers' motion to dismiss actions charging them with violations of a municipal ordinance requiring that they be licensed prior to entering New York City would be dismissed, since the New York City Taxi and Limousine Commission may not require that limousine vehicles and drivers from beyond the boundaries of New York City be licensed by the commission prior to entering the city, since a vehicle not plying for hire, but rather operating solely in response to previous engagements, need not be licensed, and since the placing of an advertisement in the New York City telephone book and the occasional dropping off or picking up of a passenger within city limits is not sufficient to place a non-New York City limousine driver within the commission's licensing jurisdiction. People v Lopez, 117 Misc. 2d 575, 458 N.Y.S.2d 852, 1983 N.Y. Misc. LEXIS 3188 (N.Y. Crim. Ct. 1983), rev'd, 126 Misc. 2d 714, 486 N.Y.S.2d 595, 1984 N.Y. Misc. LEXIS 3692 (N.Y. App. Term 1984).

In dispute over issuance of notices of violations by New York City Department of Environmental Protection (DEP) in response to complaints of excessive noise at petitioners' nightclub, Environmental Control Board (ECB) had rational basis to grant DEP extension of time to appeal from administrative law judge's decision dismissing notices of violation where, at time of DEP's request, there was no rule governing extensions of time to appeal, and it was ECB's long-standing policy to extend time to appeal if request was made within 30-day limit to file appeal. Reminisce Bar & Lounge v City of New York Dep't of Envtl. Protection, 178 Misc. 2d 640, 680 N.Y.S.2d 143, 1998 N.Y. Misc. LEXIS 533 (N.Y. Sup. Ct. 1998).

In contempt proceeding arising from action under Nuisance Abatement Law (NYC Admin Code §§ 7-701 et seq.) wherein court reimposed closure provision of prior judgment due to defendants' continuing operation of adult establishment in C4 zoning district in violation of New York City zoning resolution § 32-01(a), city's motion for forfeiture of undertaking was denied without prejudice to renew, where there was no evidence of damage caused to city by reason of defendants' failure to abate nuisance and there was insufficient evidence that defendants engaged in conduct that would warrant holding them in contempt of court or subjecting them to penalties authorized by administrative code. City of New York v Wiggles, 178 Misc. 2d 1007, 682 N.Y.S.2d 824, 1998 N.Y. Misc. LEXIS 570 (N.Y. Sup. Ct. 1998).

20. —Particular licensing requirements

Plaintiff's salesmen, as an inducement to purchasers of their merchandise, agree that a portion of the purchase price shall go to some designated charity, are engaged in soliciting money, donations or financial assistance within the meaning of an ordinance of New York city forbidding solicitation of money, donations or financial assistance of any kind "upon the streets or in public places" in that city except upon a license issued by the commis-

sioner of public welfare. Madison Products Co. v Coler, 242 N.Y. 467, 152 N.E. 264, 242 N.Y. (N.Y.S.) 467, 1926 N.Y. LEXIS 1005 (N.Y. 1926).

A domestic corporation, which maintains a pasteurizing plant and pasteurizes milk in the city of Buffalo, but has never applied for license to sell milk in the city of Niagara Falls, as required by the ordinance of that city, is not in a position to question the validity of an ordinance forbidding the sale or offer for sale of pasteurized milk or cream within the city unless the same shall have been pasteurized therein. It should first apply to local authorities for a license or permit to sell its milk products and, if such application is unreasonably refused, it will then have a remedy by mandamus. Lang's Creamery, Inc. v Niagara Falls, 251 N.Y. 343, 167 N.E. 464, 251 N.Y. (N.Y.S.) 343, 1929 N.Y. LEXIS 729 (N.Y. 1929).

The power to make and enforce requirements preliminary to the operation of a boarding house, that every boarding house must obtain a license and permit from the board of health and pay a fee therefor before it can operate, is confirmed by legislative grant. Baddour v Long Beach, 279 N.Y. 167, 18 N.E.2d 18, 279 N.Y. (N.Y.S.) 167, 1938 N.Y. LEXIS 814 (N.Y. 1938), reh'g denied, 279 N.Y. 794, 19 N.E.2d 90, 279 N.Y. (N.Y.S.) 794, 1939 N.Y. LEXIS 960 (N.Y. 1939).

Although a city under its charter may license an exhibition of moving pictures, it cannot, in absence of statutory authority, pass or enforce an ordinance punishing by fine and imprisonment a person who gives such exhibition on Sunday. People ex rel. Kieley v Lent, 166 A.D. 550, 152 N.Y.S. 18, 1915 N.Y. App. Div. LEXIS 7300 (N.Y. App. Div.), aff'd, 215 N.Y. 626, 109 N.E. 1088, 215 N.Y. (N.Y.S.) 626, 1915 N.Y. LEXIS 1045 (N.Y. 1915).

A city ordinance enacted under city charter and purporting to regulate the sale of certain soft drinks, is enacted in pursuance of general authority and, therefore, may be opposed as unreasonable, but, in requiring that one conducting a place for sale of soft drinks shall secure a license from mayor, in prohibiting business during certain hours, in providing for inspection and taking of samples of beverages kept for sale, and in providing a penalty for violations, is constitutional and a valid exercise of the police power. Safee v Buffalo, 204 A.D. 561, 198 N.Y.S. 646, 1923 N.Y. App. Div. LEXIS 9521 (N.Y. App. Div. 1923).

The police chief of the City of Rochester, who is empowered by the City Code to issue amusement licenses for "public places of amusement" after he certifies that the premises wherein the particular amusement is to be held comply with the provisions of the City Code and any "orders, rules or regulations" which the commissioner of public safety "may deem necessary", improperly refused to grant an amusement license for petitioner's restaurant and bar without a hearing based upon a police report that illegal gambling activities had taken place on the premises and that "members of organized crime" frequented the premises. Petitioner is entitled to a clear statement of the reasons for denial and a fair opportunity to refute the allegations since reasons assigned for denial tend to stigmatize petitioner and his place of business. Carroll v Hastings, 64 A.D.2d 843, 407 N.Y.S.2d 329, 1978 N.Y. App. Div. LEXIS 12703 (N.Y. App. Div. 4th Dep't 1978).

The city was entitled to revoke without a hearing a new Special Rigger license which had been issued to petitioner after the trial court granted his Article 78 petition for an order restraining the Department of Buildings from revoking his license without first affording him a hearing, where the trial court had subsequently been reversed by the Court of Appeals which found that proper notice of a hearing had been given and where the new license was merely a reissuance of the old license based on the trial court's determination. Dunrite Painting Co. v Fruchtman, 81 A.D.2d 544, 438 N.Y.S.2d 319, 1981 N.Y. App. Div. LEXIS 11014 (N.Y. App. Div. 1st Dep't 1981).

A city building commissioner improperly denied an application for a license to operate a rooming house on the asserted ground that the applicant had obtained a certificate of occupancy that limited the premises to single-family use, so that reconversion of the building into a rooming house would violate the applicable building code safety requirements for fireproof construction, since the ordinance that required fireproof construction of rooming houses was inapplicable to the subject application in that it applied only to those rooming houses that were "constructed or put into operation" after 1976, and the premises in question had been built several decades before that, since the standards governing the granting of licenses must be applied equitably to all applicants, and a rooming house operation license had been granted to the building's previous owner without reference to the fireproof construction requirement, since the applicant's application for the single-family certificate of occupancy had been made at the behest of the building commissioner after the applicant's first license application had been rejected and had expressly stated that it was being filed under protest and that the use of the house as a one-family dwelling would not be deemed to be a waiver of rooming house use in the event issuance of a rooming house license was later ordered, so that the application for a single-family certificate of occupancy did not constitute an abandonment of the building's use as a rooming house so as to render the fire construction ordinance applicable. Marra v White Plains, 96 A.D.2d 17, 467 N.Y.S.2d 865, 1983 N.Y. App. Div. LEXIS 19872 (N.Y. App. Div. 2d Dep't), cert. denied, Weber v Stony Brook Hospital, 464 U.S. 1026, 104 S. Ct. 560, 78 L. Ed. 2d 732, 1983 U.S. LEXIS 2777 (U.S. 1983).

Hearing officer improperly received in evidence results of polygraph test administered to petitioner where there had been no proper foundation to establish reliability of particular machine used, its proper functioning on day test was given, and qualifications of person who administered test to petitioner; however, erroneous reception of evidence did not require annulment of administrative determination revoking petitioner's taxicab license and hack plate since, apart from polygraph test results, determination was supported by substantial evidence. Bezuneh v Urlacher, 149 A.D.2d 944, 540 N.Y.S.2d 76, 1989 N.Y. App. Div. LEXIS 5958 (N.Y. App. Div. 4th Dep't 1989).

Challenge to revocation of taxi driver's license did not establish prima facie case of discriminatory enforcement where driver (who admitted that he submitted vouchers for substantial overcharges to county and had lengthy record of traffic, taxi and parking code violations) offered only vague and conclusory statements that other taxi drivers and hack plate owners had committed crimes and had not been subjected to penalties as severe. Cannon v Urlacher, 155 A.D.2d 906, 547 N.Y.S.2d 495, 1989 N.Y. App. Div. LEXIS 14750 (N.Y. App. Div. 4th Dep't 1989).

Determination of Department of Consumer Affairs (DCA) denying petitioner's application for license to operate newsstand was not arbitrary or capricious where newsstand for which license was sought was 12 feet wide by 6 feet deep, to be situated on sidewalk 20 feet, 6 inches wide, and Department of Transportation (DOT) would not grant approval for clear path less than 13 feet, 6 inches, which was desired clear path for newsstands on sidewalks wider than 19 feet pursuant to Guideline Booklet for Newsstands, since DCA could not issue license pursuant to NYC Admin Code § 20-231(c) in absence of DOT clear path approval. Hajovsky v New York, 171 A.D.2d 507, 567 N.Y.S.2d 234, 1991 N.Y. App. Div. LEXIS 3457 (N.Y. App. Div. 1st Dep't 1991).

Respondent's determination, revoking petitioner's taxi driver's license, was supported by substantial evidence that petitioner overcharged passengers by running fast meter, in violation of NYC Admin Code § 19-507(a)(3), and Article 78 petition was properly dismissed, where complainants testified that they took same cab ride numerous times in past and were charged fare considerably less than fare charged by petitioner, and that they observed petitioner's meter and believed that it was running very fast. Bungeroth v New York City Taxi & Limousine Comm'n, 222 A.D.2d 221, 634 N.Y.S.2d 471, 1995 N.Y. App. Div. LEXIS 12541 (N.Y. App. Div. 1st Dep't 1995), app. denied, 87 N.Y.2d 809, 642 N.Y.S.2d 195, 664 N.E.2d 1258, 1996 N.Y. LEXIS 255 (N.Y. 1996).

NYC Admin Code § 20-360, which requires that catering establishments be licensed, is law of general application and thus is not preempted by Alcoholic Beverage Control Law. Cowgirl, Inc. v Department of Consumer Affairs, 234 A.D.2d 42, 650 N.Y.S.2d 678, 1996 N.Y. App. Div. LEXIS 12284 (N.Y. App. Div. 1st Dep't 1996).

Sole shareholder of taxicab company, who was charged with production of counterfeit "condition corrected" receipts and explicitly named as preparer of such receipts, had sufficient notice

and opportunity to be heard with respect to fraud charge against company so as to permit New York City Taxi and Limousine Commission, on finding company guilty of knowingly submitting fraudulent condition corrected receipts, to require him to divest himself of all remaining taxicab medallions owned through his solely-owned corporations. King Victor Taxi Corp. v New York City Taxi & Limousine Comm'n, 236 A.D.2d 325, 654 N.Y.S.2d 358, 1997 N.Y. App. Div. LEXIS 1681 (N.Y. App. Div. 1st Dep't 1997).

In denying renewal of cabaret license on ground that petitioner was in violation of NYC Admin Code § 20-361(a)(6) and RCNY § 2-202 and thus unfit to hold license, Department of Consumer Affairs did not improperly rely on events that were also subject of then-pending unresolved civil nuisance proceeding, including events which occurred after expiration petitioner's license, as license renewal applicant is required to provide information about events occurring subsequent to date of its renewal application. Stuart Cromwell, Inc. v Hoffman, 283 A.D.2d 333, 724 N.Y.S.2d 420, 2001 N.Y. App. Div. LEXIS 5379 (N.Y. App. Div. 1st Dep't 2001).

The city council of Long Beach has power to enact an ordinance regulating and licensing hawkers, peddlers and solicitors of orders for goods under provisions of its charter and subdivision 13 of this section. People ex rel. Jones v Judge, 274 N.Y.S. 510, 152 Misc. 571, 1934 N.Y. Misc. LEXIS 1685 (N.Y. City Ct. 1934).

A license fee of $150, which includes cost of enforcing ordinance, is unreasonable and invalid. People ex rel. Jones v Judge, 274 N.Y.S. 510, 152 Misc. 571, 1934 N.Y. Misc. LEXIS 1685 (N.Y. City Ct. 1934).

A city ordinance which regulates the sale of solid fuel and requires coal dealers of the city to procure licenses and pay a license fee is not authorized by subdivision 13 of this section and is void. Mett v Schenectady, 283 N.Y.S. 9, 157 Misc. 208, 1935 N.Y. Misc. LEXIS 1513 (N.Y. Sup. Ct. 1935).

A taxicab licensing ordinance adopted under authority of subd. 13 of this section and requiring a license for "keeping and using for hire a taxicab" within the city cannot be construed as preventing outside taxicabs from coming in to deliver passengers or to pick up passengers within the city where the hiring is done or call received outside the city. People v Chimino, 39 Misc. 2d 555, 241 N.Y.S.2d 759, 1963 N.Y. Misc. LEXIS 2003 (N.Y. City Ct. 1963).

An action by plaintiff church to declare unlawful a city ordinance abandoning a portion of a public street to the private use of defendant neighboring property owner, a commercial enterprise, thus eliminating or reducing one avenue of access to plaintiff's parking lot while allowing for enlargement of defendant's facility would be dismissed, where the city was authorized to close streets for public or municipal purposes, including "the promotion, creation, development or expansion of business, commerce, industry or job opportunities" pursuant to Gen City Law §§ 21, 29, and where, although access might now be somewhat more circuitous, the members of plaintiff's congregation had not been deprived of suitable access to the property. St. Luke's German Evangelical Lutheran Church v Rochester, 115 Misc. 2d 199, 453 N.Y.S.2d 1012, 1982 N.Y. Misc. LEXIS 3660 (N.Y. Sup. Ct. 1982).

Unlicensed vending regulation that required vendors to annually obtain licenses to lawfully sell goods or services on street (NYC Admin Code § 20-453) was unconstitutional as applied to defendant, who took photographs of people who paid him $5 to do so in front of painted backdrop which he provided, since limited number of licenses were issued and they were distributed on first-come first-served basis, and defendant was thereby precluded from using desired public location within any reasonable time because of license unavailability, thus depriving him of what he claimed were elements of his expression (street sights, sound, and atmosphere). People v Bissinger, 163 Misc. 2d 667, 625 N.Y.S.2d 823, 1994 N.Y. Misc. LEXIS 609 (N.Y. City Crim. Ct. 1994).

Unlicensed vending restrictions set forth in NYC Admin Code § 20-453 did not apply to defendant, who took photographs of people who paid him $5 to do so in front of painted backdrop which he provided, since defendant was not selling or vending simple photography service, he did not fit definition of "general vendor" under NYC Admin Code § 20-452, and his products did not fit statutory language of "goods" or "services." People v Bissinger, 163 Misc. 2d 667, 625 N.Y.S.2d 823, 1994 N.Y. Misc. LEXIS 609 (N.Y. City Crim. Ct. 1994).

Defendant, who was charged with being unlicensed general vendor under NYC Admin Code § 20-453 for failure to produce license on demand of police officer, was not entitled to dismissal of accusatory instrument on ground that statutory presumption of nonlicensing contained in NYC Admin Code § 20-474.3(a) was constitutionally invalid; given legislative mandate that general vendors carry and wear their licenses conspicuously at all times, rational connection existed between facts proved (failure to display or produce license) and fact to be inferred (that defendant was unlicensed). People v Chen Ye, 179 Misc. 2d 592, 685 N.Y.S.2d 602, 1999 N.Y. Misc. LEXIS 12 (N.Y. City Crim. Ct. 1999).

21. —Other ordinances and regulations

In consolidated actions to recover for wrongful death, personal injury and property damage which resulted when a crack in a major weight-bearing wall caused a portion of a hotel building to collapse, defendant city should not have been held liable, notwithstanding the fact that city building department employees knew of the dangerous structural condition in the building and failed to enforce city code provisions to ensure that the defect was remedied where the regulations were designed to protect the general public and no special relationship was shown that would establish a municipal duty to plaintiffs in particular on which to predicate the city's liability. Worth Distributors, Inc. v Latham, 59 N.Y.2d 231, 464 N.Y.S.2d 435, 451 N.E.2d 193, 1983 N.Y. LEXIS 3121 (N.Y. 1983).

Defendants' business of purchasing, repairing and then reselling homes involved "consumer goods or services" within jurisdiction of New York City's Department of Consumer Affairs (DCA), and motion to dismiss complaint alleging deceptive trade practices in violation of Consumer Protection Law, NYC Admin Code § 20-700, for failure to state cause of action and lack of capacity to sue, was properly denied; package of consumer services falls within DCA jurisdiction even though offered in context of real estate transaction. Polonetsky v Better Homes Depot, Inc., 97 N.Y.2d 46, 735 N.Y.S.2d 479, 760 N.E.2d 1274, 2001 N.Y. LEXIS 3414 (N.Y. 2001).

A local law prohibiting itinerant peddling, is invalid, on the ground that it constitutes an improper exercise of police power, and moreover, the city did not have power to enact the local law, under § 20, subdivision 13, or under City Home Rule Law, § 11. Good Humor Corp. v New York, 264 A.D. 620, 36 N.Y.S.2d 85, 1942 N.Y. App. Div. LEXIS 4220 (N.Y. App. Div. 1942), aff'd, 290 N.Y. 312, 49 N.E.2d 153, 290 N.Y. (N.Y.S.) 312, 1943 N.Y. LEXIS 1118 (N.Y. 1943).

Electrician who was found guilty of making false statements at hearings before electrical board, in violation of city administrative code, could be penalized under another section of code which authorizes building department commissioner to revoke or suspend license and to impose fine for fraudulent dealing or misrepresentation, since that section was not limited to misrepresentation in public documents and the like. Kaufman v Smith, 160 A.D.2d 202, 553 N.Y.S.2d 166, 1990 N.Y. App. Div. LEXIS 3663 (N.Y. App. Div. 1st Dep't 1990).

Evidence did not sustain determination of Commissioner of New York City Department of Consumer Affairs (DCA) which lowered maximum rate commercial refuse carters could charge their customers, and matter would be remanded for new rate-setting proceeding, where DCA relied on contradictory and unrealistic assumptions as to certain facts and used inconsistent methodologies to calculate waste industry costs. Council of Trade Waste Assoc., Inc. v New York, 179 A.D.2d 413, 579 N.Y.S.2d 330, 1992 N.Y. App. Div. LEXIS 150 (N.Y. App. Div. 1st Dep't), app. denied, 79 N.Y.2d 755, 581 N.Y.S.2d 665, 590 N.E.2d 250, 1992 N.Y. LEXIS 5009 (N.Y. 1992).

Substantial evidence supported determination of New York City Department of Consumer Affairs that garage owner was guilty of storing vehicles in excess of lawful capacity where garage had maximum capacity of 140 cars, department inspectors visited garage and counted 157 cars, and although petitioner contended that inspectors counted cars in another connected

garage, inspectors testified that if there were 2 separate garages, they would have ascertained boundary between them and would not have counted cars in other garage. 400 East 54th Street Garage Corp. v Green, 179 A.D.2d 452, 578 N.Y.S.2d 190, 1992 N.Y. App. Div. LEXIS 180 (N.Y. App. Div. 1st Dep't 1992).

Evidence supported city agency's determination that licensed private towing company violated NYC Admin Code § 20-509 by imposing unauthorized charges for illegal parking and storage fees in excess of maximum statutory rate on numerous vehicle owners, and that towing company also violated standards of honesty, integrity, and fair dealing required of all tow truck licensees; thus, city properly ruled that towing company could not act as privately owned version of municipal parking violations bureau by imposing punitive charges for illegal parking. V & A Towing v City of New York, 197 A.D.2d 386, 602 N.Y.S.2d 355, 1993 N.Y. App. Div. LEXIS 9092 (N.Y. App. Div. 1st Dep't 1993).

New York City Commission on Human Rights properly determined that landlords discriminated against tenant who was HIV positive on basis of disability and sexual orientation, where landlords engaged in repeated written and verbal attacks and other abusive acts against tenant over 1½-year period, in violation of NYC Admin Code § 8-107(5)(a)(1) and (2). 119-121 E. 97th St. Corp. v New York City Comm'n on Human Rights, 220 A.D.2d 79, 642 N.Y.S.2d 638, 1996 N.Y. App. Div. LEXIS 5166 (N.Y. App. Div. 1st Dep't 1996).

In proceeding against landlords who discriminated against tenant (who was HIV positive) on basis of disability and sexual orientation, by engaging in repeated written and verbal attacks and other abusive acts against tenant over 1½-year period in violation of NYC Admin Code § 8-107(5)(a)(1) and (2), tenant was properly awarded $100,000 for mental anguish where he testified that he suffered growing anger, sense of outrage and horror at discriminatory indignities, insults and unlawful acts perpetrated on his by landlords, there was corroboration from his employer (although none was needed) as to his torment and great mental anguish, and award was properly compared with other awards for similar injuries. 119-121 E. 97th St. Corp. v New York City Comm'n on Human Rights, 220 A.D.2d 79, 642 N.Y.S.2d 638, 1996 N.Y. App. Div. LEXIS 5166 (N.Y. App. Div. 1st Dep't 1996).

In proceeding against landlords who discriminated against tenant (who was HIV positive) on basis of disability and sexual orientation, in violation of NYC Admin Code § 8-107(5)(a)(1) and (2), by engaging in repeated written and verbal attacks and other abusive acts against tenant over 1½-year period, it was error to award civil penalty of $75,000 against landlords where they owned only 50 units and thus were not "large" landlords, there were no previous findings of discrimination against them, and $100,000 compensatory damage award to tenant for mental anguish would deter others from same conduct; under circumstances, penalty of $25,000 would have been more appropriate. 119-121 E. 97th St. Corp. v New York City Comm'n on Human Rights, 220 A.D.2d 79, 642 N.Y.S.2d 638, 1996 N.Y. App. Div. LEXIS 5166 (N.Y. App. Div. 1st Dep't 1996).

City ordinance regulating private car rental business, requiring certain equipment and periodic inspections, fell within the broad permissible area provided for under General City Law § 20, subd 13 which empowers cities to regulate and license occupations and businesses under the municipal police power, and said ordinance furthermore did not conflict with state law governing the operation and licensing of motor vehicles generally. Main Private Car Service, Inc. v Mayor of Yonkers, 71 Misc. 2d 417, 336 N.Y.S.2d 207, 1971 N.Y. Misc. LEXIS 1563 (N.Y. Sup. Ct.), aff'd, 37 A.D.2d 1044, 327 N.Y.S.2d 583, 1971 N.Y. App. Div. LEXIS 7147 (N.Y. App. Div. 2d Dep't 1971).

An action by a sandblasting company, which utilized the allegedly "lest damaging" pressure grit washing method of removing paint from brick buildings, against a city, challenging the constitutionality on equal protection grounds of an ordinance which prohibited sandblasting and other abrasive methods of restoring the brick exteriors of buildings would be dismissed since the classification of abrasive cleaners had a reasonable basis in that there was a reasonable apprehension that abrasive methods of removing paint from brick surfaces was harmful to the rehabilitation and renovation of brick buildings, plaintiff's system, at best, still caused "some damage," and the mere fact that the ordinance did not include other paint removal methods did not violate plaintiff's equal protection rights. A & C Sandblasting & Spraypainting, Inc. v Albany, 119 Misc. 2d 168, 463 N.Y.S.2d 983, 1983 N.Y. Misc. LEXIS 3481 (N.Y. Sup. Ct. 1983).

A New York City local law which defines a "taxicab broker" and provides for the licensing and regulation thereof is unenforceable as to duly licensed attorneys as an impermissible interference with the right to practice law, since taking the definition of a "taxicab broker" at face value (i.e., one "who . . . acts as an agent or intermediary in negotiating the purchase or sale of a taxicab"), it is clear that no attorney could possibly represent either a buyer or seller of a taxicab without first complying with the statute's regulatory scheme. Thus, in light of the fact that the qualifications for admission to the Bar, the rules governing conduct of attorneys, and the proscriptions imposed with respect to practicing law without a license are and have traditionally been regulated by the State Legislature and the courts, no local legislature has the power to define new limitations on the practice of law. Roth v Turoff, 127 Misc. 2d 998, 487 N.Y.S.2d 710, 1985 N.Y. Misc. LEXIS 2769 (N.Y. Sup. Ct. 1985).

New York City Trade Waste Commission had rational basis to deny waivers of 30-day termination clause required in carting contracts, pursuant to local law, where grounds set forth in each denial sufficiently established that waivers would be inconsistent with law's purpose to control corrupting influence of organized crime upon carting industry; thus, Article 78 proceeding by 3 petitioners engaged in business of commercial waste removal, seeking to vacate denial of their applications for waivers, was dismissed even though commission had granted waivers to other companies who were allegedly guilty of same wrongdoing attributed to petitioners. D & D Carting Co. v City of New York, 172 Misc. 2d 544, 658 N.Y.S.2d 825, 1997 N.Y. Misc. LEXIS 144 (N.Y. Sup. Ct. 1997).

Accusatory instrument charging defendant with unlicensed general vending, in violation of NYC Admin § 20-453, was dismissed on ground of facial insufficiency where only allegation was that defendant was "holding" and "showing" "clothing" "to numerous people," and statutory element of "in a public space" was missing. People v Montanez, 177 Misc. 2d 506, 676 N.Y.S.2d 785, 1998 N.Y. Misc. LEXIS 312 (N.Y. City Crim. Ct. 1998).

Enforcement of Department of Parks and Recreation regulation (56 RCNY) 1-05(b) against vendors of artwork was invalid under NYC Admin Code § 20-473, and defendant artists, who allegedly were selling or displaying their artwork for sale on department of parks property without permit or authorization from department, were entitled to dismissal of charges for violating that regulation. People v Balmuth, 178 Misc. 2d 958, 681 N.Y.S.2d 439, 1998 N.Y. Misc. LEXIS 551 (N.Y. City Crim. Ct. 1998), aff'd, 189 Misc. 2d 243, 731 N.Y.S.2d 314, 2001 N.Y. Misc. LEXIS 333 (N.Y. App. Term 2001).

City established existence of common law public nuisance based on numerous instances of disorderly conduct, and was granted preliminary injunction closing defendant night club even though only 2 incidents actually began inside club, where other incidents occurred in nearby streets and sidewalks at closing time, and included shots fired and people injured. City of Rochester v Premises Located at 10-20 South Washington St., 180 Misc. 2d 17, 687 N.Y.S.2d 523, 1998 N.Y. Misc. LEXIS 684 (N.Y. Sup. Ct. 1998).

A city may enact an ordinance regulating taxicabs and prohibiting drivers thereof, while awaiting employment, from parking cabs upon portions of streets not designated by city as cab stands. People v Smith, 15 N.Y.S.2d 459, 1939 N.Y. Misc. LEXIS 2412 (N.Y. City Ct. 1939).

The City of Batavia may, by local law, fix fares for taxicabs carrying passengers for hire on city streets. 1962 Op St Compt #1039.

22. Terms and conditions of employment for city employees (subd. 17)

Under the home rule provision of New York Constitution, Article XII, § 3, City Home Rule Law, §§ 11 and 31 and this section, New York city may by local law constitutionally assume

the liability for act of a police officer who, with or without fault on his part, injures an innocent bystander while engaged in his governmental duty of making an arrest. Evans v Berry, 262 N.Y. 61, 186 N.E. 203, 262 N.Y. (N.Y.S.) 61, 1933 N.Y. LEXIS 914 (N.Y. 1933).

Federal Election Campaign Act (2 USCS §§ 453 et seq.) does not preempt New York City Charter's conflict of interest rules, or limit jurisdiction of New York City Conflicts of Interest Board over ethical violations allegedly committed by New York City Comptroller. Holtzman v Oliensis, 91 N.Y.2d 488, 673 N.Y.S.2d 23, 695 N.E.2d 1104, 1998 N.Y. LEXIS 1020 (N.Y. 1998).

Legislature did not violate home rule provisions of CLS NY Const Art IX § 2 by enacting CLS Civ S § 209-a(1)(e); city's argument that statute deprived it of control over staffing of its fire department was unavailing and unprecedented. City of Utica v Zumpano, 91 N.Y.2d 964, 672 N.Y.S.2d 844, 695 N.E.2d 713, 1998 N.Y. LEXIS 1018 (N.Y. 1998).

Portion of city charter, providing that not more than 2 commissioners of public works could be of "same political opinion on state and national issues," was unconstitutionally vague for failing to provide objective standards or criteria and by placing complete discretion in hands of those enforcing provision to determine who would be disqualified from serving as commissioner. Carpinelli v Kingston, 175 A.D.2d 509, 572 N.Y.S.2d 777, 1991 N.Y. App. Div. LEXIS 10437 (N.Y. App. Div. 3d Dep't 1991).

Penalty of dismissal of 14-year employee from his position as Supervisor II with city's Administration for Children's Services did not shock Appellate Division's sense of fairness where employee had committed repeated acts of insubordination and disrespectful behavior over period of more than one year, including incident that occurred after employee was already under first set of disciplinary charges. Martinez v City of New York, 281 A.D.2d 187, 721 N.Y.S.2d 235, 2001 N.Y. App. Div. LEXIS 2196 (N.Y. App. Div. 1st Dep't 2001).

Penalty of dismissal of Supervisor of Housing Caretakers by city housing authority did not shock Appellate Division's sense of fairness where supervisor possessed and used illicit drugs and knowingly allowed her son to use apartment, leased to her by authority, to sell drugs. Fuller v N.Y. City Hous. Auth., 281 A.D.2d 231, 721 N.Y.S.2d 768, 2001 N.Y. App. Div. LEXIS 2439 (N.Y. App. Div. 1st Dep't 2001).

Caseworker's probationary employment with City Administration for Children's Services was properly terminated where her claim of retaliation for complaint about her supervisors' communication skills was speculative in light of her unacceptable work performance, and no issue of bad faith was raised by her claim that she never received written performance evaluations. Johnson v City of New York, 281 A.D.2d 322, 722 N.Y.S.2d 156, 2001 N.Y. App. Div. LEXIS 3035 (N.Y. App. Div. 1st Dep't 2001).

Evidence that provisional employee had received only one performance evaluation, which was favorable, during his 1 ½ years of employment with city did not satisfy his burden of showing that his termination was in bad faith or arbitrary and capricious where there was evidence of his substandard performance and no evidence that city was required to give him periodic performance evaluations. Bynoe v City of New York, 281 A.D.2d 340, 722 N.Y.S.2d 517, 2001 N.Y. App. Div. LEXIS 3189 (N.Y. App. Div. 1st Dep't 2001).

Proceeding to annul city police commissioner's termination of probationary officer's employment was properly dismissed for failure to state cause of action where officer's failure to correct his report of loss of his shield and identification badge after learning that it was incorrect provided legitimate reason to question his honesty and candor. Morgan v Safir, 281 A.D.2d 376, 722 N.Y.S.2d 542, 2001 N.Y. App. Div. LEXIS 3193 (N.Y. App. Div. 1st Dep't 2001), app. denied, 2001 N.Y. App. Div. LEXIS 7152 (N.Y. App. Div. 1st Dep't June 14, 2001), app. dismissed, 97 N.Y.2d 601, 735 N.Y.S.2d 490, 760 N.E.2d 1286, 2001 N.Y. LEXIS 3249 (N.Y. 2001).

In Article 78 proceeding challenging city's elimination of title/position of police detective, imposition of sanctions against city under CLS Stds & Adm Policies Part 130 (22 NYCRR Part 130) was not appropriate where such sanctions are not substitute for Supreme Court's power to punish for contempt of its own orders. Moshier v City of Little Falls, 281 A.D.2d 913, 721 N.Y.S.2d 848, 2001 N.Y. App. Div. LEXIS 2696 (N.Y. App. Div. 4th Dep't 2001).

An agreement voluntarily signed by petitioner, an employee of the City of New York who did not reside in the city, as a condition of his employment, whereby he agreed, pursuant to section 822 of the New York City Charter, to pay the New York City income tax, is an enforceable contract, is authorized by statute, is not unconscionable, and is not an indirect involuntary tax, since section 822 is a valid exercise of powers granted to every city in New York State and each city has full authority to establish conditions of employment for its employees. Legum v Goldin, 99 Misc. 2d 654, 416 N.Y.S.2d 712, 1979 N.Y. Misc. LEXIS 2310 (N.Y. Sup. Ct. 1979), aff'd, 78 A.D.2d 1020, 435 N.Y.S.2d 426, 1980 N.Y. App. Div. LEXIS 17042 (N.Y. App. Div. 1st Dep't 1980).

Portion of NYC Local Law No. 27, which qualifies registered domestic partner of city employee as family member for purpose of succession and occupancy rights in buildings operated by New York City Housing Authority and buildings under jurisdiction of Department of Housing Preservation and Development, is not irrational or inconsistent with state law and relevant regulations (9 NYCRR §§ 1727-8.2, 2104.6 and 2204.6). Slattery v City of New York, 179 Misc. 2d 740, 686 N.Y.S.2d 683, 1999 N.Y. Misc. LEXIS 35 (N.Y. Sup. Ct.), transferred, 93 N.Y.2d 883, 689 N.Y.S.2d 426, 711 N.E.2d 640, 1999 N.Y. LEXIS 692 (N.Y. 1999).

The closing by a city of the north end of a street which traverses a white residential community did not violate rights granted residents of a predominantly black area to the north by 42 USCS § 1982—which entitles all citizens to the same rights as white citizens with regard to the inheriting, purchasing, leasing, selling, holding, and conveying of real and personal property—where (1) the city's decision was motivated by its interest in protecting the safety and tranquility of a residential neighborhood and the procedures followed in making the decision were fair and were not affected by any racial or other impermissible factors, (2) the street closing did not adversely affect black residents in that it did not prevent blacks from exercising the same property rights as whites and had no effect on the value of the property owned by the black residents, (3) the street closing did not severely restrict access to black homes, and (4) the sole injury to the residents of the black area, which involves using one street rather than another for certain trips within the city, did not involve any impairment to the kind of property interests coming within the reach of § 1982. Memphis v Greene, 451 U.S. 100, 101 S. Ct. 1584, 67 L. Ed. 2d 769, 1981 U.S. LEXIS 87 (U.S.), reh'g denied, 452 U.S. 955, 101 S. Ct. 3100, 69 L. Ed. 2d 965 (U.S. 1981).

The closing by a city of the north end of a street which traverses a white residential community to the north of which lies a predominantly black residential area does not violate rights guaranteed residents of the black area by the Thirteenth Amendment, but is rather a routine burden of citizenship having no disparate impact on black citizens amounting to a badge or incident of slavery, where the city's action was not prompted by a racially discriminatory motive, but rather by the city's legitimate interest in traffic safety and tranquility which justify an adverse impact on motorists inconvenienced by the street closing—an inconvenience that cannot be equated to the type of actual restraint on the liberty of black citizens that the Thirteenth Amendment was designed to eradicate; furthermore, no violation of any of the enabling legislation enacted by Congress pursuant to § 2 of the Thirteenth Amendment is disclosed by the street closing. Memphis v Greene, 451 U.S. 100, 101 S. Ct. 1584, 67 L. Ed. 2d 769, 1981 U.S. LEXIS 87 (U.S.), reh'g denied, 452 U.S. 955, 101 S. Ct. 3100, 69 L. Ed. 2d 965 (U.S. 1981).

Court would abstain, under Pullman doctrine, from deciding federal constitutional challenge to zoning laws regulating adult establishments, in light of substantial claims presented under New York Constitution, which provided broader protection to free expression than did federal constitution, and as to which law governing state constitutional claims was unclear; ruling that resolution violated state constitution would obviate need to decide federal constitutional questions presented. Hickerson v City of New York, 932 F. Supp. 550, 1996 U.S. Dist. LEXIS 9042 (S.D.N.Y.), transferred, 171 Misc. 2d 376, 653 N.Y.S.2d 801, 1996 N.Y. Misc. LEXIS 537 (N.Y. Sup. Ct. 1996).

23. —Automatic deduction of union dues and other contributions from pay

The Board of Estimate of the City of New York adopted a resolution whereby rules and regulations governing the procedure under which city employees could have their organization dues voluntarily deducted from the regular payrolls from the City of New York were established and further provided the form to be executed by the employees to authorize deduction of these dues. Held: the above resolution applied to members of the city police force who requested the Commissioner to deduct from their pay dues as members of Patrolman's Benevolent Association. Moriarity v Kennedy, 20 Misc. 2d 593, 192 N.Y.S.2d 32, 1959 N.Y. Misc. LEXIS 3000 (N.Y. Sup. Ct. 1959).

New York City mayor had authority to issue proposed executive order granting exclusive dues checkoff privilege to employee organization which would be freely chosen as the exclusive bargaining representative by the majority of the employees in a city-wide bargaining unit. Bauch v New York, 54 Misc. 2d 343, 282 N.Y.S.2d 816, 1967 N.Y. Misc. LEXIS 1351 (N.Y. Sup. Ct.), aff'd, 28 A.D.2d 1209, 285 N.Y.S.2d 263, 1967 N.Y. App. Div. LEXIS 7987 (N.Y. App. Div. 1st Dep't 1967).

24. Municipal civil service (subd. 18)

NYC Charter § 1127, which requires nonresident city employees, as precondition of employment, to agree to make payments in lieu of personal income taxes to city in amount computed and determined as if they were city residents, did not apply to nonresidents involuntarily transferred from transit authority and housing authority police departments to New York City Police Department via mergers in April 1995, because transferred personnel were not city employees prior to mergers, and they never entered into pre-employment contract for § 1127 deductions. Ganley v Giuliani, 94 N.Y.2d 207, 701 N.Y.S.2d 324, 723 N.E.2d 73, 1999 N.Y. LEXIS 3745 (N.Y. 1999).

Provision of written agreement between city and police protective and benevolent association, giving police officer right to have an appearance before city council to "discuss" his grievance in respect to his assigned shift, did not constitute an interference by city council with powers delegated by city charter to commissioner of public safety to designate grades and duties of members of police department. Cole v Saratoga Springs, 85 Misc. 2d 376, 381 N.Y.S.2d 374, 1975 N.Y. Misc. LEXIS 3309 (N.Y. Sup. Ct. 1975).

Certiorari is appropriate to review the judicial or quasi-judicial action of a body or officer, but no court can mandate the passage of a formal resolution by a city council to designate the grades and duties of police officers when such power has not been vested in council by contract, statute or city charter. Cole v Saratoga Springs, 85 Misc. 2d 376, 381 N.Y.S.2d 374, 1975 N.Y. Misc. LEXIS 3309 (N.Y. Sup. Ct. 1975).

In dispute arising from police commissioner's adoption and enforcement of policy allowing police officers to execute document purporting to waive NYC Admin Code § 14-103(b)(2) and perform detective duties for more than 18 months without being appointed as detective, court granted petition for relief to extent of enjoining respondents from requesting or requiring police officers to execute waiver document, directing compliance with § 14-103(b)(2), declaring null and void ab initio any document purporting to waive rights under § 14-103(b)(2), and directing reinstatement into detective career path for any police officer transferred due to refusal to execute purported waiver; police commissioner cannot gain benefit of long-term assignment to detective work without designating police officer doing such work as detective. Scotto v Giuliani, 172 Misc. 2d 395, 655 N.Y.S.2d 256, 1997 N.Y. Misc. LEXIS 42 (N.Y. Sup. Ct. 1997).

25. Regulation of manner of transaction of city business (subd. 19)

The optional City Government Law (L 1914 c 444), by which seven plans of city government are proposed, in no way repealed, modified or affected broad grant of powers theretofore given to citizens of city by the General City Law, among which was power to regulate the manner of transacting city business and affairs, but on the other hand clarified and enlarged the General City Law, giving ample authority to adopt either an aldermanic or manager form of government, as the people might desire and elect. People ex rel. Purser v Cahill, 196 N.Y.S. 368, 119 Misc. 471, 1922 N.Y. Misc. LEXIS 1508 (N.Y. Sup. Ct. 1922).

26. Administration of pension funds (subd. 20)

City's zoning provision, which limited permitted uses within district to singlefamily dwellings and restricted special permit uses to public utility facilities, substations and structures, was unconstitutional on its face, and constituted ultra vires enactment, where it failed to provide any mechanism through which legitimate interests of parties could be balanced against one another to determine whether proposed educational use was contrary to public health, safety, or welfare. Trustees of Union College v Members of the Schenectady City Council, 230 A.D.2d 17, 656 N.Y.S.2d 425, 1997 N.Y. App. Div. LEXIS 3733 (N.Y. App. Div. 3d Dep't), aff'd, 91 N.Y.2d 161, 667 N.Y.S.2d 978, 690 N.E.2d 862, 1997 N.Y. LEXIS 3714 (N.Y. 1997).

Where the testatrix provided for a bequest to the "Mount Vernon Police Protection Fund", there being no Mount Vernon Police Protection Fund in existence when the decedent executed her will, and no fund so entitled has since been created, but there existed throughout such period a fund designated as the "Mount Vernon Police & Paid Firemen's Pension Fund", created under the local law of the city of Mount Vernon, it was held that the testatrix intended the bequest to go to "The Mount Vernon Police & Paid Firemen's Pension Fund". In re Schuetz's Will, 107 N.Y.S.2d 153, 1951 N.Y. Misc. LEXIS 2296 (N.Y. Sur. Ct. 1951).

27. Investigation into matters of concern to city (subd. 21)

A city has the authority under this section to investigate the local milk industry to determine whether milk prices were being maintained at an artificially high level by monopolistic practices for the purpose of determining whether new legislation is required. Dairymen's League Cooperative Asso. v Murtagh, 299 N.Y. 634, 86 N.E.2d 509, 299 N.Y. (N.Y.S.) 634, 1949 N.Y. LEXIS 1090 (N.Y. 1949).

The City of New York is empowered, through the Commissioner of Investigation, to inquire into all matters of concern to the City and its inhabitants. Lerner v Casey, 2 N.Y.2d 355, 161 N.Y.S.2d 7, 141 N.E.2d 533, 1957 N.Y. LEXIS 1210 (N.Y. 1957), aff'd, 357 U.S. 468, 78 S. Ct. 1311, 2 L. Ed. 2d 1423, 1958 U.S. LEXIS 666 (U.S. 1958).

Public policy barred arbitration of dispute as to whether employee rights provisions of collective bargaining agreement could be invoked by city employees to limit or restrict criminal investigation conducted by New York City Department of Investigation (DOI) concerning internal affairs, in light of broad investigatory powers vested in DOI and important role it plays in facilitating honest workings of city. City of New York v Uniformed Fire Officers Ass'n, 95 N.Y.2d 273, 716 N.Y.S.2d 353, 739 N.E.2d 719, 2000 N.Y. LEXIS 2875 (N.Y. 2000).

Investigation of trade practices in the sale and distribution of milk is within the province of the commissioner of investigation of New York City. Application of Dairymen's League Co-op. Ass'n, 274 A.D. 591, 84 N.Y.S.2d 749, 1948 N.Y. App. Div. LEXIS 3136 (N.Y. App. Div. 1948), aff'd, 299 N.Y. 634, 86 N.E.2d 509, 299 N.Y. (N.Y.S.) 634, 1949 N.Y. LEXIS 1090 (N.Y. 1949).

The powers of the Commissioner of Investigation are not limited to the examination of city departments but extend to an inquiry into the methods and activities of those who do business with the city. Application of Dairymen's League Co-op. Ass'n, 274 A.D. 591, 84 N.Y.S.2d 749, 1948 N.Y. App. Div. LEXIS 3136 (N.Y. App. Div. 1948), aff'd, 299 N.Y. 634, 86 N.E.2d 509, 299 N.Y. (N.Y.S.) 634, 1949 N.Y. LEXIS 1090 (N.Y. 1949).

The commissioner of investigation of the city of New York has power to investigate into matters of concern to the city and its inhabitants and by subpoena to enforce attendance of witnesses thereat. Application of Dairymen's League Co-op. Ass'n, 274 A.D. 591, 84 N.Y.S.2d 749, 1948 N.Y. App. Div. LEXIS 3136 (N.Y. App. Div. 1948), aff'd, 299 N.Y. 634, 86 N.E.2d 509, 299 N.Y. (N.Y.S.) 634, 1949 N.Y. LEXIS 1090 (N.Y. 1949).

City council resolution ordering commissioner of public safety to provide all reports and files of professional standards unit of city police department to standing committee on public safety of city council for review in confidential manner was not unlawful

but council should have exercised its authority by subpoena rather than resolution. Kilgallon v City Council of Troy, 53 A.D.2d 976, 385 N.Y.S.2d 841, 1976 N.Y. App. Div. LEXIS 15775 (N.Y. App. Div. 3d Dep't 1976).

Power to inquire under subd 21 of above statute is not limited to witnesses in service of the city. Hence where money partially supplied by city is being disbursed by private organization, its employees may properly be subpoenaed in investigation to determine if city funds involved have been misappropriated or misused. They may also be subpoenaed to obtain evidence whether employees of such organizations have instigated or advocated disregard for legally-constituted authority or attempted to indoctrinate beneficiaries of the program which they were administering with alien political doctrine detrimental to United States and New York State, as constituting matter of vital concern to city and its inhabitants. Fuentes v Fishel, 44 Misc. 2d 943, 255 N.Y.S.2d 446, 1964 N.Y. Misc. LEXIS 1223 (N.Y. Sup. Ct. 1964).

Where city is entitled to net revenues of membership corporation it has power to investigate finances thereof under subd 19 and 21 of above statute although books and vouchers of such corporation are subject to visitation and inspection of justice of the Supreme Court or of any person appointed by such court under Membership Corporations Law § 26. New York World's Fair 1964-1965 Corp. v Beame, 45 Misc. 2d 683, 257 N.Y.S.2d 543, 1965 N.Y. Misc. LEXIS 2241 (N.Y. Sup. Ct.), aff'd, 22 A.D.2d 611, 257 N.Y.S.2d 747, 1965 N.Y. App. Div. LEXIS 4535 (N.Y. App. Div. 1st Dep't 1965).

Mayor of New York City acted within his authority as chief executive officer in establishment of commission to investigate allegations of police corruption by holding hearings and examining witnesses, and to review police department's existing procedures to make recommendations for reforms. Kelly v Dinkins, 155 Misc. 2d 787, 590 N.Y.S.2d 166, 1992 N.Y. Misc. LEXIS 491 (N.Y. Sup. Ct. 1992).

28. —Subpoena power

Whether competition in the milk industry is restricted or prices fixed is a matter of concern to the city of New York and its inhabitants so that the Commissioner of Investigation may enforce by subpoena the attendance of witnesses and production of records by virtue of § 20 subdivision 21. Application of Dairymen's League Co-op. Ass'n, 274 A.D. 591, 84 N.Y.S.2d 749, 1948 N.Y. App. Div. LEXIS 3136 (N.Y. App. Div. 1948), aff'd, 299 N.Y. 634, 86 N.E.2d 509, 299 N.Y. (N.Y.S.) 634, 1949 N.Y. LEXIS 1090 (N.Y. 1949).

So long as the subpoena duces tecum issued by the commissioner of investigation is directed toward production of books, records, and documents which are material to the issue in an authorized investigation, there is no basis for interference with his power under this section. Application of Dairymen's League Co-op. Ass'n, 274 A.D. 591, 84 N.Y.S.2d 749, 1948 N.Y. App. Div. LEXIS 3136 (N.Y. App. Div. 1948), aff'd, 299 N.Y. 634, 86 N.E.2d 509, 299 N.Y. (N.Y.S.) 634, 1949 N.Y. LEXIS 1090 (N.Y. 1949).

The commissioner of investigation of New York City may issue subpoenas to compel the production of books and records of retail milk dealers showing names and addresses of its customers who purchase with rebates, and the amount of such rebates. Application of Dairymen's League Co-op. Ass'n, 274 A.D. 591, 84 N.Y.S.2d 749, 1948 N.Y. App. Div. LEXIS 3136 (N.Y. App. Div. 1948), aff'd, 299 N.Y. 634, 86 N.E.2d 509, 299 N.Y. (N.Y.S.) 634, 1949 N.Y. LEXIS 1090 (N.Y. 1949).

Where common council of city expressly authorized its committee to issue subpoenas to investigate circumstances surrounding suspension of chief of police by resolution in accordance with statute, committee was duly empowered to issue such subpoena; it was not required that the committee be established by ordinance which would be subject to veto by mayor. Hanna v Common Council of Utica, 46 A.D.2d 503, 363 N.Y.S.2d 361, 1975 N.Y. App. Div. LEXIS 8527 (N.Y. App. Div. 4th Dep't 1975).

City council had authority to issue legislative subpoena, in that such act is in furtherance of general power of inquiry conferred by General City Law. Kilgallon v City Council of Troy, 53 A.D.2d 976, 385 N.Y.S.2d 841, 1976 N.Y. App. Div. LEXIS 15775 (N.Y. App. Div. 3d Dep't 1976).

Where comptroller of city is granted, by charter of city, authority to investigate matters relating to finances of city and for such purpose is thereby granted the power to require attendance of and examine and take testimony under oath of witnesses, such powers are exercised on behalf of city, and grant of such powers in conjunction with the provisions of subds 19 and 21 of this section authorizes issuance of subpoenas by such officer. New York World's Fair 1964-1965 Corp. v Beame, 45 Misc. 2d 683, 257 N.Y.S.2d 543, 1965 N.Y. Misc. LEXIS 2241 (N.Y. Sup. Ct.), aff'd, 22 A.D.2d 611, 257 N.Y.S.2d 747, 1965 N.Y. App. Div. LEXIS 4535 (N.Y. App. Div. 1st Dep't 1965).

There is no statutory authority to serve subpoena outside area of jurisdiction of administrative agency and, therefore, attempt by city consumer affairs director to serve subpoena outside the city was a nullity. Baker/Beech-Nut Corp. v Wieloszynski, 89 Misc. 2d 256, 391 N.Y.S.2d 35, 1976 N.Y. Misc. LEXIS 2806 (N.Y. Sup. Ct. 1976).

29. Ordinances and penalties as to matters of concern to city (subd. 22)

City had power, in proper exercise of its delegated powers, to summarily abate public nuisance and compel owners of property involved to bear cost of abatement; and exercise of such power was not only statutorily authorized but was consistent with common-law principles and was constitutional. Lane v Mt. Vernon, 38 N.Y.2d 344, 379 N.Y.S.2d 798, 342 N.E.2d 571, 1976 N.Y. LEXIS 2245 (N.Y. 1976).

Where records of building code violations which resulted in assessment on property for city's abatement of violations were available for examination and stated expressly that failure to remedy violations would subject landowner to penalty outlined in building code, which outlined assessment procedure followed, subsequent purchaser of land was chargeable with constructive notice of assessment on property, even though property was debris-free at time of purchase and records of violations did not by themselves indicate how violation had been cleared or that there was outstanding charge for its clearance. Lane v Mt. Vernon, 38 N.Y.2d 344, 379 N.Y.S.2d 798, 342 N.E.2d 571, 1976 N.Y. LEXIS 2245 (N.Y. 1976).

City's Open Container Law was not unconstitutional, since it did not prohibit possession in public place of all open containers containing alcohol but only prohibited such possession "with the intent to consume the same" and, in adopting ordinance, city council made legislative findings that consumption of alcoholic beverages in public streets was detrimental to public good, and that there was significant relationship between (1) possession of open container in public place with intent to consume it and (2) consumption of alcohol in public place. People v Elhage, 147 A.D.2d 911, 537 N.Y.S.2d 375, 1989 N.Y. App. Div. LEXIS 1207 (N.Y. App. Div. 4th Dep't), app. denied, 73 N.Y.2d 1014, 541 N.Y.S.2d 768, 539 N.E.2d 596, 1989 N.Y. LEXIS 1831 (N.Y. 1989).

Amendments to Johnson Act, 15 USCS § 1175, which relaxed former prohibition against shipboard gambling, did not deprive states or municipalities of prerogative to reasonably regulate conduct of shipboard gambling businesses operating from within their jurisdictional bounds, and thus New York City was entitled to declaratory judgment that L 1997, ch 57, adding NYC Admin §§ 20-950 et seq., did not conflict with Johnson Law amendments and was valid to that extent. Padavan v City of New York, 258 A.D.2d 266, 685 N.Y.S.2d 35, 1999 N.Y. App. Div. LEXIS 900 (N.Y. App. Div. 1st Dep't 1999).

City Environmental Control Board's definition of "air contaminant" under NYC Admin Code § 24-141(b)(24), as encompassing usual and ordinary odors produced by spicy food escaping into complainant's residential apartment if detrimental to complainant's "health, safety, welfare or comfort," was reasonable and rational, and entitled to judicial deference. Burrito Factory, Inc. v City of New York, 270 A.D.2d 217, 706 N.Y.S.2d 383, 2000 N.Y. App. Div. LEXIS 3293 (N.Y. App. Div. 1st Dep't), app. dismissed, 95 N.Y.2d 848, 713 N.Y.S.2d 523, 735 N.E.2d 1288, 2000 N.Y. LEXIS 1790 (N.Y. 2000).

In proceeding under CLS Gen City § 20(22) to direct owner to allow city petitioners to enter his house to perform structural repairs so that work on nearby construction project could resume, court properly denied owner's motion to compel petitioners to

make further repairs under stipulation of settlement until after resolution of all causation issues in related tort action commenced by owner against petitioners where stipulation only obligated petitioners to restore house to condition that it was in before start of construction project. City of New York v Barry, 273 A.D.2d 380, 710 N.Y.S.2d 917, 2000 N.Y. App. Div. LEXIS 7044 (N.Y. App. Div. 2d Dep't 2000).

City ordinance, which mirrored substantive provisions and procedures of CLS Real P § 231 and CLS RPAPL § 715 while expanding grounds for eviction to include illegal drug use and possession, was not preempted by Real Property Law and RPAPL where it placed no impediment on landowners' free access to courts or to remedies provided in RPAPL but merely supplemented state statutory scheme by providing additional ground for eviction, and it was not shown to expressly conflict with any provision of state law. Zorn v Howe, 276 A.D.2d 51, 716 N.Y.S.2d 128, 2000 N.Y. App. Div. LEXIS 12207 (N.Y. App. Div. 3d Dep't 2000).

Both the State Constitution and the General City Law empower a city to adopt local laws within stated limits provided they are not inconsistent with the Constitution and general laws of the state. Di Paola v Reilly, 35 Misc. 2d 269, 231 N.Y.S.2d 317, 1962 N.Y. Misc. LEXIS 3190 (N.Y. Sup. Ct. 1962), rev'd, 22 A.D.2d 910, 255 N.Y.S.2d 532, 1964 N.Y. App. Div. LEXIS 2463 (N.Y. App. Div. 2d Dep't 1964).

Power of a city to enact local laws is subject to constitutional limitations, such as due process, applicable to state statutes, and to additional limitations peculiar to municipal legislation, two of which are that it shall not be inconsistent with the Constitution and laws of the state and shall not relate to affairs exclusively those of the state. Schacht v New York, 40 Misc. 2d 303, 243 N.Y.S.2d 272, 1963 N.Y. Misc. LEXIS 1600 (N.Y. Sup. Ct. 1963), aff'd, 27 A.D.2d 987, 281 N.Y.S.2d 973, 1967 N.Y. App. Div. LEXIS 5833 (N.Y. App. Div. 1st Dep't 1967).

The New York City Gun Control Law is within the power of the city to adopt and is constitutional. Grimm v New York, 56 Misc. 2d 525, 289 N.Y.S.2d 358, 1968 N.Y. Misc. LEXIS 1721 (N.Y. Sup. Ct. 1968).

Local law proscribing gambling was beyond city's power to legislate under NY Const Art 9 § 2 subd c ¶ 10, and Art 9 § 3 subd d ¶ 1, and General City L § 20(13) where state had pre-empted field of anti-gambling laws by passage of Penal L § 225.00, and 225.30. People v Wilkerson, 73 Misc. 2d 895, 342 N.Y.S.2d 936, 1973 N.Y. Misc. LEXIS 1993 (N.Y. County Ct. 1973).

Although there was short-term economic benefit to city as result of passage and enforcement of waste disposal ordinance, ordinance would not be declared an illegal exercise of police power on ground that underlying purpose was solely economic, i.e., to avoid monetary penalty provided in waste disposal contract with county, since economic benefit was only secondary to the motivating intent of the city council, i.e., to establish long-range solution to refuse problem. People v A & C Trucking Co., 88 Misc. 2d 988, 390 N.Y.S.2d 987, 1977 N.Y. Misc. LEXIS 1819 (N.Y. City Ct. 1977).

City ordinance that regulated semiautomatic rifles and shotguns with ammunition feeding devices permitting them to be loaded with combination of more than 6 rounds did not violate Second Amendment right to bear arms because Second Amendment creates no bar to state or local action; furthermore, ordinance expressly exempted all military uses of firearms, banned semiautomatic weapons were in fact not military weapons, and plaintiffs did not allege that they were members of state or federal National Guard, or that banned weapons were in use by such military groups. Citizens for a Safer Community v City of Rochester, 164 Misc. 2d 822, 627 N.Y.S.2d 193, 1994 N.Y. Misc. LEXIS 671 (N.Y. Sup. Ct. 1994).

Definition of "air guns" in Rochester Ordinance No. 93-62 was vague and overbroad, as it did not give reasonable notice of prohibited conduct, and those charged with enforcing it would be compelled to enforce ordinance in discriminatory manner to avoid unintended result of arresting all house contractors, handymen, and many children for technical violations. Citizens for a Safer Community v City of Rochester, 164 Misc. 2d 822, 627 N.Y.S.2d 193, 1994 N.Y. Misc. LEXIS 671 (N.Y. Sup. Ct. 1994).

City noise code which prohibits, inter alia, use of amplified sound at level greater than 65 decibels unless otherwise exempted by code, is valid restriction of time, place or manner of protected speech in that (1) decibel meter, by definition, is content neutral, (2) claim that 65-decibel limit burdens more speech than necessary merely constitutes disagreement with legislature as to acceptable levels of noise, and (3) while volume restrictions may somewhat reduce potential audience for defendant's speech, ample alternative channels of communication exist. People v Toback, 170 Misc. 2d 1011, 652 N.Y.S.2d 946, 1996 N.Y. Misc. LEXIS 501 (N.Y. City Ct. 1996).

City noise code which prohibits, inter alia, use of amplified sound at level greater than 65 decibels unless otherwise exempted by code, is not unconstitutionally vague or overbroad on its face; decibel level limitation is clear and precise, deterrent effect is neither real nor substantial, and purpose of code is regulation of noise and is in no way directed at suppression of protected speech. People v Toback, 170 Misc. 2d 1011, 652 N.Y.S.2d 946, 1996 N.Y. Misc. LEXIS 501 (N.Y. City Ct. 1996).

City noise code which prohibits, inter alia, use of amplified sound at level greater than 65 decibels unless otherwise exempted by code, does not violate equal protection of laws by prohibiting speech for some but not others, as all speakers are permitted to speak as long as they maintain volume of 65 decibels or less. People v Toback, 170 Misc. 2d 1011, 652 N.Y.S.2d 946, 1996 N.Y. Misc. LEXIS 501 (N.Y. City Ct. 1996).

Municipal ordinance completely prohibiting use of power blowers was unconstitutional in absence of showing that it was enacted to achieve, promote or address any valid purpose or objective. People v Edinger, 179 Misc. 2d 104, 683 N.Y.S.2d 820, 1998 N.Y. Misc. LEXIS 618 (N.Y. City Ct. 1998).

City code which prohibited animal owners from allowing their animals to cause "unnecessary noise," defined as that which disturbs "a considerable number of people," was unconstitutionally vague because it did not provide fair notice to animal owners or sufficiently clear standards to those charged with enforcing law, where it did not specify how many people constituted "a considerable number" or whether requisite number of people had to be disturbed all at once, and it did not specify what volume, intensity or duration of noise would disturb person of reasonable sensibilities. People v Donato, 179 Misc. 2d 192, 684 N.Y.S.2d 394, 1998 N.Y. Misc. LEXIS 619 (N.Y. City Ct. 1998).

In action to enjoin defendants from operating their establishment ("Naked City") in residential zone on ground that it was adult establishment under Zoning Resolution § 12-10, New York City established its entitlement to preliminary injunctive relief, where almost every defined sex activity was openly conducted and displayed publicly to customers and, even if restaurant area (which was separated merely by double curtain) could be considered as separate use from live entertainment, stage and individual viewing areas constituted more than 40 percent of premises accessible to patrons. City of New York v J & J Tummy Yummies, Inc., 179 Misc. 2d 527, 679 N.Y.S.2d 807, 1998 N.Y. Misc. LEXIS 529 (N.Y. Sup. Ct. 1998).

City was judicially estopped from seeking closure of defendants' club under Nuisance Abatement Law based on alleged violation of adult use provisions of zoning resolution which restricted location of adult establishments in districts where residences were allowed, where defendants' club was situated in area previously identified by city, in legal proceeding involving another adult establishment, as area in which adult establishments could operate. City of New York v Garter, 179 Misc. 2d 597, 685 N.Y.S.2d 606, 1999 N.Y. Misc. LEXIS 17 (N.Y. Sup. Ct. 1999), aff'd, 273 A.D.2d 188, 709 N.Y.S.2d 110, 2000 N.Y. App. Div. LEXIS 6306 (N.Y. App. Div. 2d Dep't 2000).

State's asset forfeiture law (CLS CPLR Art 13-A) did not preempt Property Clerk Forfeiture Law (NYC Admin § 14-140) of city's policy of applying it to vehicle operated by individual arrested for nonfelony driving while intoxicated. Grinberg v Safir, 181 Misc. 2d 444, 694 N.Y.S.2d 316, 1999 N.Y. Misc. LEXIS 259 (N.Y. Sup. Ct.), aff'd, 266 A.D.2d 43, 698 N.Y.S.2d 218, 1999 N.Y. App. Div. LEXIS 11379 (N.Y. App. Div. 1st Dep't 1999).

Forfeiture action under NYC Admin § 14-140, commenced against individual arrested for driving while intoxicated, did not constitute impermissible additional punishment or sentence imposed in violation of separation of powers, as forfeiture is not deemed criminal penalty if sought in separate civil action. Grinberg v Safir, 181 Misc. 2d 444, 694 N.Y.S.2d 316, 1999 N.Y. Misc. LEXIS 259 (N.Y. Sup. Ct.), aff'd, 266 A.D.2d 43, 698 N.Y.S.2d 218, 1999 N.Y. App. Div. LEXIS 11379 (N.Y. App. Div. 1st Dep't 1999).

While not condoning the violation of city laws by unpermitted cyclist participants in mass rides which snarled traffic, the court held that judicial interpretation of novel local regulations regarding parades, specifically New York City Admin. Code § 10-110(a) and New York City, N.Y., R. tit. 38, § 19-02(a), had to be made by a state court with primary jurisdiction over such matters. Thus, the court declined supplemental jurisdiction under 28 U.S.C.S. § 1367(a) over the city's counterclaims for an injunction pursuant to N.Y. Gen. City Law § 20(22) enjoining further group rides by the cyclists Bray v City of New York, 356 F. Supp. 2d 277, 2004 U.S. Dist. LEXIS 25722 (S.D.N.Y. 2004).

30. Exercise of necessary and proper powers (subd. 23)

It is well settled that a city, as a municipal corporation, is not restricted to exercise of its specifically granted powers but possesses also such powers as are necessarily incidental to, or may be implied from those specifically granted. Albany v McMorran, 34 Misc. 2d 304, 230 N.Y.S.2d 421, 1962 N.Y. Misc. LEXIS 3160 (N.Y. Sup. Ct.), rev'd, 16 A.D.2d 1021, 230 N.Y.S.2d 438, 1962 N.Y. App. Div. LEXIS 8793 (N.Y. App. Div. 3d Dep't 1962).

Federal Aviation Act did not preempt prosecution of defendant for allegedly operating motorboat with platform from which another individual took off while cabled to parasail in violation of NYC Admin Code § 10-126(c) which makes it unlawful for any person "avigating an aircraft" to take off or land, except in emergency, at any place other than designated places of landing; while federal government classifies parasails as moored kites, no federal regulation of moored kites deals with issue of locations for landing or takeoff. People v Santoriello, 180 Misc. 2d 533, 689 N.Y.S.2d 388, 1999 N.Y. Misc. LEXIS 169 (N.Y. City Crim. Ct. 1999).

31. Power to enact zoning and other land use regulations (subds. 24 and 25)

A zoning law is a proper exercise of police power and not an incumbrance on real property. Lincoln Trust Co. v Williams Bldg. Corp., 229 N.Y. 313, 128 N.E. 209, 229 N.Y. (N.Y.S.) 313, 1920 N.Y. LEXIS 685 (N.Y. 1920).

It is not an effective argument against ordinances, if otherwise valid, that they limit the use and may depreciate the value of premises. That frequently is the effect of police regulation and the general welfare of the public is superior in importance to the pecuniary profits of the individual. Wulfsohn v Burden, 241 N.Y. 288, 150 N.E. 120, 241 N.Y. (N.Y.S.) 288, 1925 N.Y. LEXIS 551 (N.Y. 1925).

A broad authority is given to the municipalities to regulate the height and bulk of buildings, to regulate and determine the area of yards, courts and open spaces and for such purposes to divide a city into districts and to adopt various other provisions classifying and regulating the use of land within its borders in the interest of the public health, safety and general welfare. Wulfsohn v Burden, 241 N.Y. 288, 150 N.E. 120, 241 N.Y. (N.Y.S.) 288, 1925 N.Y. LEXIS 551 (N.Y. 1925).

By subdivision 25, Saratoga Springs is empowered to enact a zoning ordinance and by § 83 the city council is empowered, on its own motion or on petition, to "amend, supplement or change regulations and districts established." Neddo v Schrade, 270 N.Y. 97, 200 N.E. 657, 270 N.Y. (N.Y.S.) 97, 1936 N.Y. LEXIS 1517 (N.Y. 1936).

A zoning law is not necessarily invalid because its primary if not its exclusive objective is the esthetic enhancement of the particular area involved, so long as it is related if only generally to the economic and cultural settings of the regulating community. Cromwell v Ferrier, 19 N.Y.2d 263, 279 N.Y.S.2d 22, 225 N.E.2d 749, 1967 N.Y. LEXIS 1666 (N.Y. 1967) (ovrlg Mid-State Advertising Corp. v Bond, 274 N.Y. 82, 8 N.E.2d 286, 274 N.Y. (N.Y.S.) 82, 1937 N.Y. LEXIS 820 (N.Y. 1937), overruled, Cromwell v Ferrier, 19 N.Y.2d 263, 279 N.Y.S.2d 22, 225 N.E.2d 749, 1967 N.Y. LEXIS 1666 (N.Y. 1967).

New York City ordinance, designating portion of Chinatown as special zoning district, would be upheld as against state constitutional due process challenge, asserting that it did not bear reasonable relation to legislative goals of developing and rehabilitating housing in area, where it was not shown that ordinance was inconsistent with city's general planning or that city had failed to make provision for low-cost housing. Asian Americans for Equality v Koch, 72 N.Y.2d 121, 531 N.Y.S.2d 782, 527 N.E.2d 265, 1988 N.Y. LEXIS 1684 (N.Y. 1988).

"Well-considered plan" required by CLS Gen City § 20 in order for city to exercise power to zone need not be contained in single document and need not be written at all; zoning legislation and its amendments are tested not by whether they define well-considered plan but by whether they accord with well-considered plan for development of community, based on examination of all available and relevant evidence of city's land use policies. Asian Americans for Equality v Koch, 72 N.Y.2d 121, 531 N.Y.S.2d 782, 527 N.E.2d 265, 1988 N.Y. LEXIS 1684 (N.Y. 1988).

In determining whether governmental unit should be subject to its own or another unit's land use controls, "balancing of public interests" test should be applied, rather than traditional test of whether function of particular use in question is governmental or proprietary; balancing approach subjects encroaching governmental unit in first instance, absent contrary legislative intent, to zoning requirements of host unit where extraterritorial land use would be employed, and requires weighing of factors including, inter alia, kind of land use involved, impact on legitimate local interests, practical alternatives, and intergovernmental participation in project at issue. In re County of Monroe's Compliance with Certain Zoning & Permit Requirements, etc., 72 N.Y.2d 338, 533 N.Y.S.2d 702, 530 N.E.2d 202, 1988 N.Y. LEXIS 2697 (N.Y. 1988).

Patrons of adult establishments lacked standing to claim that amended zoning code, which included array of site limitations and anticlustering provisions with respect to adult entertainment establishments, was unconstitutional, because challenged legislation did not directly regulate their conduct. Stringfellow's of New York v City of New York, 91 N.Y.2d 382, 671 N.Y.S.2d 406, 694 N.E.2d 407, 1998 N.Y. LEXIS 137 (N.Y. 1998).

A city possesses a general power to adopt ordinances regulating the construction of buildings so long as any such regulation bears a reasonable relationship to public health, safety, and the general welfare, but the exercise of the police power to locally legislate such enactments is limited by constitutional provisions and the general law of the state. Board of Education v Buffalo, 32 A.D.2d 98, 302 N.Y.S.2d 71, 1969 N.Y. App. Div. LEXIS 3977 (N.Y. App. Div. 4th Dep't 1969).

The power of legislature to authorize adoption of general zoning ordinances in cities is now delegated to the municipalities by this section. Lees v Cohoes Motor Car Co., 203 N.Y.S. 65, 122 Misc. 373, 1924 N.Y. Misc. LEXIS 663 (N.Y. Sup. Ct. 1924).

Power which the common council of Troy has to enact ordinances is limited in this instance by the specific provisions found in subdivision 25. No specific power having been conferred upon common council by legislature to make a restriction as to consents of property owners in a particular zone, such restriction is ultra vires. Coley v Campbell, 215 N.Y.S. 679, 126 Misc. 869, 1926 N.Y. Misc. LEXIS 962 (N.Y. Sup. Ct. 1926).

The rezoning of a district is a matter of fact and should be determined only after a full opportunity to present the evidence bearing upon the propriety of the proposed change. Prescott v Pierce, 223 N.Y.S. 609, 130 Misc. 63, 1927 N.Y. Misc. LEXIS 994 (N.Y. Sup. Ct. 1927).

The power to establish set back lines does not arise out of power to enact zoning ordinances, but from subdivision 24 of this section which, however, does not relate to character of use to which property may be put. Van Auken v Kimmey, 252 N.Y.S. 343, 141 Misc. 117, 1931 N.Y. Misc. LEXIS 1641 (N.Y. Sup. Ct. 1931).

Under subdivisions 24 and 25, the common council of a city has had duly delegated to it the power to adopt a zoning ordinance and to establish a residential district, excluding therefrom apartments or multi-family houses. MacEwen v New Rochelle, 267

N.Y.S. 36, 149 Misc. 251, 1933 N.Y. Misc. LEXIS 1366 (N.Y. Sup. Ct. 1933).

The authority conferred by statute to divide a municipality into districts and to regulate buildings and structures therein implies the power to change districts from time to time as becomes necessary. Greenberg v New Rochelle, 129 N.Y.S.2d 691, 206 Misc. 28, 1954 N.Y. Misc. LEXIS 3209 (N.Y. Sup. Ct.), aff'd, 284 A.D. 891, 134 N.Y.S.2d 593, 1954 N.Y. App. Div. LEXIS 3968 (N.Y. App. Div. 1954).

Subdivision 24 of this section provides that regulations in one or more districts may differ from those in other districts, and it has long been recognized that zoning is not static and that change is a matter of proper exercise of legislative discretion. Chase v Glen Cove, 41 Misc. 2d 889, 246 N.Y.S.2d 975, 1964 N.Y. Misc. LEXIS 2157 (N.Y. Sup. Ct. 1964).

The power given to the common council of a city under subdivisions 24 and 25 of this section to enact zoning regulations is a function of legislative character. Savatgy v Kingston, 51 Misc. 2d 251, 273 N.Y.S.2d 1, 1966 N.Y. Misc. LEXIS 1860 (N.Y. Sup. Ct.), aff'd, 26 A.D.2d 978, 274 N.Y.S.2d 852, 1966 N.Y. App. Div. LEXIS 3065 (N.Y. App. Div. 3d Dep't 1966).

Although this section empowered the City Council to adopt an ordinance regulating the location of trades and industries designed for specific uses, the regulation must be designed to promote public health, safety, and general welfare, and the Council was not empowered to restrict uses on the basis of need. Pomerantz v Lehmann, 55 Misc. 2d 315, 285 N.Y.S.2d 188, 1967 N.Y. Misc. LEXIS 1122 (N.Y. Sup. Ct. 1967).

City may by virtue of provisions of Municipal Home Rule Law enact a zoning ordinance by local law so long as all of the requirements of that section of Municipal Home Rule Law conferring power on city to adopt zoning regulations are complied with. March v Port Jervis, 89 Misc. 2d 1086, 393 N.Y.S.2d 494, 1976 N.Y. Misc. LEXIS 2921 (N.Y. Sup. Ct. 1976).

The power as to zoning ordinance is not restricted to regulating buildings and structures on land, but may also regulate the use of vacant land. People v Calvar Corp., 69 N.Y.S.2d 272, 1940 N.Y. Misc. LEXIS 1359 (N.Y. County Ct. 1940), aff'd, 286 N.Y. 419, 36 N.E.2d 644, 286 N.Y. (N.Y.S.) 419, 1941 N.Y. LEXIS 1457 (N.Y. 1941).

Zoning regulations are the product of farsighted planning calculated to promote the general welfare of the city at some future time. Little Falls v Fisk, 24 N.Y.S.2d 460, 1941 N.Y. Misc. LEXIS 1375 (N.Y. Sup. Ct. 1941).

All zoning legislation is in derogation of commonlaw rights to the use of property. Little Falls v Fisk, 24 N.Y.S.2d 460, 1941 N.Y. Misc. LEXIS 1375 (N.Y. Sup. Ct. 1941).

The basic test of zoning ordinance is—does it promote public health, safety and general welfare. People v Daly, 28 N.Y.S.2d 603, 1941 N.Y. Misc. LEXIS 1925 (N.Y. Spec. Sess. 1941).

Since a zoning ordinance is an exercise of police power, it must be strictly construed. People v Daly, 28 N.Y.S.2d 603, 1941 N.Y. Misc. LEXIS 1925 (N.Y. Spec. Sess. 1941).

The power to establish setback sideyard and rear yard restrictions is conferred by sub 24. Howell v Liebowitz, 116 N.Y.S.2d 537, 1952 N.Y. Misc. LEXIS 1910 (N.Y. City Ct. 1952).

The power to zone means districting for the purpose of location of trades, industries and buildings for specified uses and is conferred by sub 25. Howell v Liebowitz, 116 N.Y.S.2d 537, 1952 N.Y. Misc. LEXIS 1910 (N.Y. City Ct. 1952).

The provisions of the statute should be liberally construed: thus Board of Appeals had jurisdiction of property owners petition requesting interpretation of ordinance and elimination of violation thereof by another property owner. Crotty v Poersch, 129 N.Y.S.2d 793, 1954 N.Y. Misc. LEXIS 3231 (N.Y. Sup. Ct. 1954).

32. —Particular regulations

City zoning ordinance which created special classification for commercial development of unique ecological area was neither vague nor improper delegation of authority, despite fact that it conferred power on site plan review agency to determine and approve conformance of development to land contour, where (1) ordinance limited agency's discretion to allow office buildings higher than one story by requiring examination of land contour, and (2) agency was powerless to act pursuant to ordinance until second ordinance was enacted which created site plan review district and set forth specific criteria to be considered by agency in passing on development applications. Save the Pine Bush, Inc. v Albany, 70 N.Y.2d 193, 518 N.Y.S.2d 943, 512 N.E.2d 526, 1987 N.Y. LEXIS 17997 (N.Y. 1987).

Designation of portion of New York City's Chinatown as special zoning district was not impermissible "piecemeal" legislation where entire city had been zoned, and designation at issue simply related to one of many amendments to city's comprehensive zoning law; piecemeal zoning exists only when part of land within municipality is regulated by zoning laws. Asian Americans for Equality v Koch, 72 N.Y.2d 121, 531 N.Y.S.2d 782, 527 N.E.2d 265, 1988 N.Y. LEXIS 1684 (N.Y. 1988).

Low-income residents of New York City's Chinatown failed to state claim of impermissible exclusionary zoning arising from city's designation of portion of area as special zoning district where city had not, nor had it ever, excluded low-cost housing in Chinatown or in city generally, and low-income families could continue to live in district, "hopefully in rehabilitated or newly constructed low-cost housing," once purposes of designation were fulfilled. Asian Americans for Equality v Koch, 72 N.Y.2d 121, 531 N.Y.S.2d 782, 527 N.E.2d 265, 1988 N.Y. LEXIS 1684 (N.Y. 1988).

Low-income residents of New York City's Chinatown were not entitled to order compelling city to amend zoning ordinance to provide more low-income housing in 14-block special zoning district within Chinatown since (1) city, in enacting zoning amendments affecting particular district, must also address needs of broader community, (2) to require city planners to include particular uses in such small district could be "truly obnoxious" to city's over-all development and could defeat purpose of special district zoning to preserve and enhance troubled areas of city, and (3) city had already made extensive allowance for variety of housing opportunities within its boundaries, and also provided for such opportunities within district itself. Asian Americans for Equality v Koch, 72 N.Y.2d 121, 531 N.Y.S.2d 782, 527 N.E.2d 265, 1988 N.Y. LEXIS 1684 (N.Y. 1988).

Airport terminal, parking facilities and air freight facilities would be embraced within immunity of county airport from requirements of land use laws of city in which they were located since such facilities constituted accessory uses customarily incidental to airport operation. In re County of Monroe's Compliance with Certain Zoning & Permit Requirements, etc., 72 N.Y.2d 338, 533 N.Y.S.2d 702, 530 N.E.2d 202, 1988 N.Y. LEXIS 2697 (N.Y. 1988).

Expansion of county airport should be free of land use oversight by city, even though airport was located substantially within city limits, since CLS Gen Mun § 350 impliedly exempts county from preapproval requirement of city, and balancing of public interests favored expansion given pre-existing use, lack of alternative location, opportunity of city to participate in county's land use oversight process, lack of detriment to adjoining landowners, and furtherance of interstate and intrastate commerce goals. In re County of Monroe's Compliance with Certain Zoning & Permit Requirements, etc., 72 N.Y.2d 338, 533 N.Y.S.2d 702, 530 N.E.2d 202, 1988 N.Y. LEXIS 2697 (N.Y. 1988).

A zoning ordinance which applies only to a small part of a single street in a city and is not adopted "in accord with a well considered plan" for zoning city, is invalid, and not within the power delegated by subdivision 25. Utica v Hanna, 202 A.D. 610, 195 N.Y.S. 225, 1922 N.Y. App. Div. LEXIS 4945 (N.Y. App. Div. 1922).

In an action to enjoin the defendant from proceeding to erect a building in violation of the set-back regulation of a building zone ordinance, the plaintiffs, whose property is damaged, are not limited to their legal remedy for damages. Equity is available to compel, not only conformity with the ordinance nunc pro tunc, but also payment for the damage done to plaintiffs' property. Roock v Womer, 233 A.D. 566, 253 N.Y.S. 357, 1931 N.Y. App. Div. LEXIS 11365 (N.Y. App. Div. 1931).

Pursuant to subdivision 25 the common council of Buffalo had adopted an ordinance setting aside particular area in which defendant's plant is situated as a district in which coke ovens might lawfully be located; such decision will not be set aside in

the absence of bad faith, and an injunction will be denied. Bove v Donner-Hanna Coke Corp., 236 A.D. 37, 258 N.Y.S. 229, 1932 N.Y. App. Div. LEXIS 5881 (N.Y. App. Div.), reh'g denied, 236 A.D. 775, 258 N.Y.S. 1075, 1932 N.Y. App. Div. LEXIS 6864 (N.Y. App. Div. 1932).

Though the erection of an incinerator by the city may cause a depreciation of plaintiff's property and bring special hardship to plaintiffs, this is insufficient to invalidate a zoning regulation which promotes the general welfare. Hudson v Oyster Bay, 248 A.D. 737, 288 N.Y.S. 627, 1936 N.Y. App. Div. LEXIS 7122 (N.Y. App. Div. 1936).

City zoning ordinance establishing land conservation district for lands lying within flood plain of river and not allowing any use as of right but only certain special uses by permit was in accord with a well-considered plan of city which established 14 zoning districts, and the provisions of ordinance with respect to land conservation district were not ultra vires. Dur-Bar Realty Co. v Utica, 57 A.D.2d 51, 394 N.Y.S.2d 913, 1977 N.Y. App. Div. LEXIS 10477 (N.Y. App. Div. 4th Dep't), app. denied, 42 N.Y.2d 804, 1977 N.Y. LEXIS 3719 (N.Y. 1977), aff'd, 44 N.Y.2d 1002, 408 N.Y.S.2d 502, 380 N.E.2d 328, 1978 N.Y. LEXIS 2174 (N.Y. 1978).

City zoning ordinance provision establishing land conservation district with respect to parcels within flood plain of river, and permitting no use as of right while requiring special permits for specified uses and enumerating criteria for issuance of special use permits, including requirement that the use be so designated, located and proposed to be operated that the public health, safety, welfare, and convenience will be protected and not substantially injure value of neighboring property did not constitute an improper delegation of legislative authority to zoning board of appeals. Dur-Bar Realty Co. v Utica, 57 A.D.2d 51, 394 N.Y.S.2d 913, 1977 N.Y. App. Div. LEXIS 10477 (N.Y. App. Div. 4th Dep't), app. denied, 42 N.Y.2d 804, 1977 N.Y. LEXIS 3719 (N.Y. 1977), aff'd, 44 N.Y.2d 1002, 408 N.Y.S.2d 502, 380 N.E.2d 328, 1978 N.Y. LEXIS 2174 (N.Y. 1978).

In an action by the owner of a certain parcel of land situated within the City of Yonkers, the trial court correctly held that a city zoning ordinance which changed the zoning designation of the parcel from apartment house use to residential use was unconstitutional as discriminatory where the ordinance was contrary to the city's comprehensive development plan and had been disapproved by the City Planning Board. H. Development Corp. v Yonkers, 80 A.D.2d 841, 436 N.Y.S.2d 776, 1981 N.Y. App. Div. LEXIS 10670 (N.Y. App. Div. 2d Dep't), app. denied, 54 N.Y.2d 605, 443 N.Y.S.2d 1027, 1981 N.Y. LEXIS 4439 (N.Y. 1981).

Provision of municipal ordinance keying demolition of buildings in protected historical districts to showing either that building in question was not of historical, archeological or aesthetic value, or that its owner would suffer hardship by being required to repair or maintain property incapable of yielding reasonable return, was constitutionally valid since it virtually replicated regulatory framework which had sustained constitutional attack. Historic Albany Foundation, Inc. v Coyne, 159 A.D.2d 73, 558 N.Y.S.2d 986, 1990 N.Y. App. Div. LEXIS 8415 (N.Y. App. Div. 3d Dep't 1990).

Supreme Court erred in holding unconstitutional portion of city preservation ordinance which required owners of historic buildings to have plans for new development of site approved by municipal commission prior to demolishing building where county never showed economic impact of complying with ordinance, and thus court did not have specific facts before it to determine whether restrictions imposed on county's right to demolish were so severe as to amount to "taking." Historic Albany Foundation, Inc. v Coyne, 159 A.D.2d 73, 558 N.Y.S.2d 986, 1990 N.Y. App. Div. LEXIS 8415 (N.Y. App. Div. 3d Dep't 1990).

County, as owner of building in historic district, failed to show that city requirement of submission and approval of suitable plan of new development as condition for permitting demolition deprived county of all economically viable use of property since county was free to occupy, restore, use, rent or sell property, and it failed to avail itself of opportunities under demolition ordinance for obtaining administrative relief from strict enforcement. Historic Albany Foundation, Inc. v Coyne, 159 A.D.2d 73, 558 N.Y.S.2d 986, 1990 N.Y. App. Div. LEXIS 8415 (N.Y. App. Div. 3d Dep't 1990).

Portion of city preservation ordinance which required owners of historic buildings to have plans for new development of site approved by municipal commission prior to demolishing building substantially advanced legitimate municipal purposes underlying ordinance, and thus did not constitute unconstitutional "taking," since permitting demolition without assurance that it would be followed by some form of development would create grave risk of site becoming overgrown and receptacle for litter, which was totally antithetical to aesthetic purposes of ordinance, and submitting plan in advance of demolition insured that owner was willing and capable of accomplishing necessary amelioration of effect of demolition. Historic Albany Foundation, Inc. v Coyne, 159 A.D.2d 73, 558 N.Y.S.2d 986, 1990 N.Y. App. Div. LEXIS 8415 (N.Y. App. Div. 3d Dep't 1990).

New York City zoning resolution which required listed theatres to obtain special permit for demolition was not unconstitutional since there was no evidence that zoning resolution was not based on comprehensive plan, and similar demolition permits were required in several other special districts. Shubert Organization, Inc. v Landmarks Preservation Com., 166 A.D.2d 115, 570 N.Y.S.2d 504, 1991 N.Y. App. Div. LEXIS 7246 (N.Y. App. Div. 1st Dep't), app. dismissed, 78 N.Y.2d 1006, 575 N.Y.S.2d 456, 580 N.E.2d 1059, 1991 N.Y. LEXIS 4181 (N.Y. 1991), app. denied, 79 N.Y.2d 751, 579 N.Y.S.2d 651, 587 N.E.2d 289, 1991 N.Y. LEXIS 6083 (N.Y. 1991), cert. denied, 504 U.S. 946, 112 S. Ct. 2289, 119 L. Ed. 2d 213, 1992 U.S. LEXIS 3230 (U.S. 1992).

Amortization provisions, which require termination of nonconforming uses over specified period of time, are presumptively valid, unless owner can demonstrate that loss is so substantial that it outweighs public benefit gained by exercise of police power. Chekenian v Town Bd., 202 A.D.2d 542, 609 N.Y.S.2d 280, 1994 N.Y. App. Div. LEXIS 2644 (N.Y. App. Div. 2d Dep't 1994).

Amortization provisions, which require termination of nonconforming uses over specified period of time, are generally sustained when time period allowed owner to recapture investment in use is deemed reasonable, and in determining whether certain amortization period is reasonable, one must examine all facts, including length of amortization period in relation to investment and nature of use. Chekenian v Town Bd., 202 A.D.2d 542, 609 N.Y.S.2d 280, 1994 N.Y. App. Div. LEXIS 2644 (N.Y. App. Div. 2d Dep't 1994).

New York City Board of Standards did not act arbitrarily in deciding that special permit had not lapsed under New York City Zoning Resolution § 11-42, and thus Resolution § 11-43, authorizing review of factual basis for renewing permit before its lapse, did not apply, where legislative history of § 11-42 supported board's finding that section not apply retroactively, especially given presumption against retroactivity. Landmark West! v New York City Bd. of Stds. & Appeals, 266 A.D.2d 119, 699 N.Y.S.2d 334, 1999 N.Y. App. Div. LEXIS 12081 (N.Y. App. Div. 1st Dep't 1999).

The New York city zoning ordinances are not intended to prevent a temporary or occasional use of property which is not of a permanent nature. Bartsch v Ragonetti, 207 N.Y.S. 142, 123 Misc. 903, 1924 N.Y. Misc. LEXIS 1034 (N.Y. Sup. Ct. 1924), aff'd, 214 A.D. 799, 210 N.Y.S. 825, 1925 N.Y. App. Div. LEXIS 7860 (N.Y. App. Div. 1925).

A zoning ordinance, which arbitrarily establishes zoning line traversing, at an angle, two lots, so that portion of one lot is in "business" zone while remainder of lot is in "residence B" zone, and further provides for a twenty-five-foot "set-back" from all property lines, is not a "well-considered plan," and does not give reasonable consideration to "the conservation of property values," within meaning of subdivision 25 of this section, and in so far as ordinance affects said property it is unreasonable and void. Hecht-Dann Const. Co. v Burden, 208 N.Y.S. 299, 124 Misc. 632, 1924 N.Y. Misc. LEXIS 1109 (N.Y. Sup. Ct. 1924).

The zoning ordinance, passed by the common council of a city under authority of subdivision 25, which did not make a division of city into districts nor provide for regulation of trades and industries or prescribe what trades and industries should be excluded or subjected to special regulations, but delegated to the

owners of four-fifths of street frontage in any block power to determine structures to be erected or altered in that block, effected an unlawful delegation of governmental power and is, therefore, void. The fact that said invalid ordinance has not been so declared by a court of competent jurisdiction does not prohibit city authorities from further legislating on the subject, except after notice and hearing as provided by § 83. Glens Falls v Standard Oil Co., 215 N.Y.S. 354, 127 Misc. 104, 1926 N.Y. Misc. LEXIS 936 (N.Y. Sup. Ct. 1926).

Where permits to erect apartment houses were granted June 4, 1927, to defendant and ordinances adopted June 7, 1927, effective two weeks later placed defendant's property within the restricted residence district and at that time construction work had not commenced, the defendant had acquired no vested right and ordinance applies to the defendant. Furthermore plaintiffs owning nearby property may maintain an action since there is no adequate remedy at law. Rice v Van Vranken, 229 N.Y.S. 32, 132 Misc. 82, 1928 N.Y. Misc. LEXIS 863 (N.Y. Sup. Ct. 1928), aff'd, 225 A.D. 179, 232 N.Y.S. 506, 1929 N.Y. App. Div. LEXIS 11590 (N.Y. App. Div. 1929).

Where the "set-back line" provisions of an ordinance were not enacted with a view to public health, safety and general welfare and were arbitrary in that they gave no opportunity for variance or review, they were invalid. Van Auken v Kimmey, 252 N.Y.S. 343, 141 Misc. 117, 1931 N.Y. Misc. LEXIS 1641 (N.Y. Sup. Ct. 1931).

Where fabricating plants have been removing sand and clay from adjacent property in a manufacturing district, ordinance which separates the land from which the clay and sand are procured and the plants, enacted pursuant to subdivision 25 is not a reasonable regulation. Heller v Alter, 255 N.Y.S. 627, 143 Misc. 10, 1932 N.Y. Misc. LEXIS 1390 (N.Y. Mun. Ct.), rev'd, 257 N.Y.S. 391, 143 Misc. 783, 1932 N.Y. Misc. LEXIS 1092 (N.Y. App. Term 1932).

Designation of zoning districts in an ordinance by plotting in on a comparatively small map, certain spaces in color to scale of 800 feet to an inch, without regard to whether divisional lines cut through the dwellings, industrial establishments or other buildings and properties, is not sufficient under subdivision 25. Cordts v Hutton Co., 262 N.Y.S. 539, 146 Misc. 10, 1932 N.Y. Misc. LEXIS 1772 (N.Y. Sup. Ct. 1932), aff'd, 241 A.D. 648, 269 N.Y.S. 936, 1934 N.Y. App. Div. LEXIS 8614 (N.Y. App. Div. 3d Dep't 1934).

Where the planning and zoning laws applicable to a city include subds. 24 and 25 of this section, an ordinance rezoning a particular site for a housing project is invalid if it does not conform to a well-considered plan. Chase v Glen Cove, 34 Misc. 2d 810, 227 N.Y.S.2d 131, 1962 N.Y. Misc. LEXIS 3588 (N.Y. Sup. Ct. 1962).

Under provision of New York City's adult entertainment zoning law prohibiting location of adult establishments within 500 feet from residence district, measurement was to be made in straight line from entrance of adult establishment to boundary line of residence district, not in straight line from entrance of adult establishment to entry to premises of nearest neighbor in residence district. City of New York v Scandals, 178 Misc. 2d 267, 678 N.Y.S.2d 876, 1998 N.Y. Misc. LEXIS 463 (N.Y. Sup. Ct. 1998).

Setback, side yard and rear yard restrictions of a City Building Zone Ordinance did not apply to a sewerage lift station where such a station was not one of the "uses" permitted by the ordinance. Howell v Liebowitz, 116 N.Y.S.2d 537, 1952 N.Y. Misc. LEXIS 1910 (N.Y. City Ct. 1952).

33. —Particular regulations; amendments and exceptions

When more restrictive zoning ordinance is enacted, owner will be permitted, under vested rights doctrine, to complete structure or development which amendment has rendered nonconforming only where owner has undertaken substantial construction and made substantial expenditures prior to effective date of amendment; doctrine applies alike to single building or to subdivision. Ellington Constr. Corp. v Zoning Bd. of Appeals, 77 N.Y.2d 114, 564 N.Y.S.2d 1001, 566 N.E.2d 128, 1990 N.Y. LEXIS 4421 (N.Y. 1990).

A zoning ordinance which gives the Common Council authority to grant special exceptions from height regulations did not violate General City Law §§ 20 (24) and § 81. Mandis v Gorski, 24 A.D.2d 181, 265 N.Y.S.2d 210, 1965 N.Y. App. Div. LEXIS 2838 (N.Y. App. Div. 4th Dep't 1965).

Amendment to city zoning resolution which created special zoning district was product of "well-considered plan" that took many factors into consideration, including needs of low-income residents, since it (1) was based on extensive research and analysis undertaken by department of city planning in conjunction with urban planners, architects, and engineers, (2) was designed to result in balance of income groups within community, (3) limited development to vacant or substantially vacant sites, rather than allowing wholesale redevelopment, and (4) provided mechanisms to insure that construction would proceed in controlled fashion, responsive to community needs. Asian Americans for Equality v Koch, 128 A.D.2d 99, 514 N.Y.S.2d 939, 1987 N.Y. App. Div. LEXIS 43530 (N.Y. App. Div. 1st Dep't 1987), aff'd, 72 N.Y.2d 121, 531 N.Y.S.2d 782, 527 N.E.2d 265, 1988 N.Y. LEXIS 1684 (N.Y. 1988).

There was "reasonable relation" between city's rezoning of land from residential to light manufacturing to allow development of business park as site for new manufacturing facility, and city's goal of supporting economic development through retention of it largest employer and to reap associated economic and tax benefits in connection with development of business park, and thus court properly granted summary judgment to city respondents in combined Article 78 proceeding/declaratory judgment action seeking to annul alleged unlawful spot zoning. Save Our Forest Action Coalition, Inc. v City of Kingston, 246 A.D.2d 217, 675 N.Y.S.2d 451, 1998 N.Y. App. Div. LEXIS 8581 (N.Y. App. Div. 3d Dep't 1998).

A resolution by the common council of Buffalo granting to petitioner permission to erect a motion picture theatre on Hertel avenue on condition that he procure consent of authorities of a church on opposite side of the street is invalid. Wertheimer v Schwab, 210 N.Y.S. 312, 124 Misc. 822, 1925 N.Y. Misc. LEXIS 844 (N.Y. Sup. Ct. 1925).

When the zoning ordinance was amended so as to take only the property of plaintiffs out of the business zone and place it in the residence zone, although premises across the way were left zoned for business such amendment constituted an invasion of property rights of the plaintiffs and judgment was granted in favor of plaintiffs in an action to declare unconstitutional the resolution so amending zoning map of the town. Evanns v Gunn, 29 N.Y.S.2d 368, 177 Misc. 85, 1940 N.Y. Misc. LEXIS 2641 (N.Y. Sup. Ct. 1940), aff'd, 262 A.D. 865, 29 N.Y.S.2d 150, 1941 N.Y. App. Div. LEXIS 6309 (N.Y. App. Div. 1941).

An ordinance which altered the boundaries of the use district in which plaintiffs resided and changed the uses of property permitted in that district, was invalid where no public notice of the proposed change was given. Shefler v Geneva, 1 Misc. 2d 807, 147 N.Y.S.2d 400, 1956 N.Y. Misc. LEXIS 2266 (N.Y. Sup. Ct. 1956).

City charter section permitting a referendum on amendments to zoning ordinances was invalid where the charter was adopted under the City Home Rule Law which gave no authority to city to provide for a referendum on such ordinances. Elkind v New Rochelle, 5 Misc. 2d 296, 163 N.Y.S.2d 870, 1957 N.Y. Misc. LEXIS 3332 (N.Y. Sup. Ct.), aff'd, 4 A.D.2d 761, 165 N.Y.S.2d 709, 1957 N.Y. App. Div. LEXIS 4813 (N.Y. App. Div. 2d Dep't 1957).

The City of Ogdensburg filed an application with the common council for permission to operate leased premises as a city dump in an area zoned as a residential district. Held: the common council, acting as a Board of Appeals, must disclose the facts known to its members personally or by way of evidence before adopting a resolution granting such permission or variance. Bresett v Ogdensburg, 14 Misc. 2d 912, 180 N.Y.S.2d 908, 1958 N.Y. Misc. LEXIS 2063 (N.Y. Sup. Ct. 1958).

Where the relationship of a zoning amendment to public health, safety and welfare presents a fairly debatable question of fact, the amendment will not be declared unconstitutional. Mary Chess, Inc. v Glen Cove, 38 Misc. 2d 555, 237 N.Y.S.2d 607, 1963 N.Y. Misc. LEXIS 2291 (N.Y. Sup. Ct. 1963), aff'd in part and rev'd in part, 23 A.D.2d 266, 260 N.Y.S.2d 293, 1965 N.Y. App. Div. LEXIS 4065 (N.Y. App. Div. 2d Dep't 1965).

34. —Particular regulations; establishment of residential districts

Subdivision 25 confers upon the city a right to regulate and restrict the location of buildings designed for specified uses, and for said purpose to divide the city into districts and to prescribe for each district use for which buildings may not be erected or altered. Where attempted division is not a division into districts within meaning of the statute, setting apart of residential districts must fail as unauthorized, and ordinance attempting to give the council control of the factory buildings in so-called residential districts which do not in fact exist must also fail. In re Kensington-Davis Corp., 239 N.Y. 54, 145 N.E. 738, 239 N.Y. (N.Y.S.) 54, 1924 N.Y. LEXIS 477 (N.Y. 1924).

Having the power to establish residential districts, the zoning authorities of Mount Vernon had the power to make such classification really effective by adopting such regulations as would be conducive to the welfare, health and safety of those desiring to live in such a district and enjoy the benefits thereof, by excluding big apartment houses whereby the enjoyment of adjoining premises might be impaired, the character and safety of the district as a residential one destroyed and the value of property already devoted to private residences impaired. Wulfsohn v Burden, 241 N.Y. 288, 150 N.E. 120, 241 N.Y. (N.Y.S.) 288, 1925 N.Y. LEXIS 551 (N.Y. 1925).

The zoning authorities of the city of Mount Vernon were entitled to assume and the courts have found that the orderly and advantageous development of that city and the welfare of its citizens would be promoted by a fundamental division of the city into districts devoted respectively to business and residential purposes and it cannot properly be said, as matter of law, that a zoning regulation excluding large apartment houses from residential districts cannot be justified. Wulfsohn v Burden, 241 N.Y. 288, 150 N.E. 120, 241 N.Y. (N.Y.S.) 288, 1925 N.Y. LEXIS 551 (N.Y. 1925).

The 22-year history of residential zoning, immediately adjoining residential properties to the west and south as well as presence of a park directly to the east and personal inspection by presiding justice sufficiently supported conclusion that there was no violation of comprehensive plan by zoning subject tract for residential purposes. Puzio v Yonkers, 55 A.D.2d 909, 390 N.Y.S.2d 452, 1977 N.Y. App. Div. LEXIS 10152 (N.Y. App. Div. 2d Dep't), app. denied, 41 N.Y.2d 804, 1977 N.Y. LEXIS 3051 (N.Y. 1977).

The zoning ordinance not violated by erection of temporary small shanties on property in residential district where they were erected solely as adjuncts and accessories to the work of removing sand from the property. Bartsch v Ragonetti, 207 N.Y.S. 142, 123 Misc. 903, 1924 N.Y. Misc. LEXIS 1034 (N.Y. Sup. Ct. 1924), aff'd, 214 A.D. 799, 210 N.Y.S. 825, 1925 N.Y. App. Div. LEXIS 7860 (N.Y. App. Div. 1925).

Where the petitioner was not being interfered with in the use and occupancy of his property as it existed at the time when the district was converted into a residential district and where evidence failed to disclose any circumstances from which court could conclude that undue hardship was being worked upon petitioner in the operation of the zoning ordinance, petition for order of mandamus must be denied. Van Auken v Kimmey, 252 N.Y.S. 343, 141 Misc. 117, 1931 N.Y. Misc. LEXIS 1641 (N.Y. Sup. Ct. 1931).

The zoning of properties solely for residential purposes, where they are not reasonably suited for such use, is not made "with reasonable consideration . . . to the character of the district, its peculiar suitability for particular uses . . . and the direction of building development, in accord with a well considered plan." Cordts v Hutton Co., 262 N.Y.S. 539, 146 Misc. 10, 1932 N.Y. Misc. LEXIS 1772 (N.Y. Sup. Ct. 1932), aff'd, 241 A.D. 648, 269 N.Y.S. 936, 1934 N.Y. App. Div. LEXIS 8614 (N.Y. App. Div. 3d Dep't 1934).

A zoning ordinance which provides that each and every city block, "being the lands lying between intersecting streets in both directions" and occupied only by buildings used exclusively for residence purposes, churches and schoolhouses, and outbuildings appurtenant thereto, in which there are not less than ten dwelling houses, is a residence district, violates subdivision 25. Olean v Conkling, 283 N.Y.S. 66, 157 Misc. 63, 1935 N.Y. Misc. LEXIS 1521 (N.Y. Sup. Ct. 1935).

City zoning ordinance which limited occupancy of single-family houses by defining family as "one or more persons . . . living together as a single housekeeping unit, subject to a limit of not more than three unrelated persons 18 years of age or over" did not violate due process since it did not unconstitutionally restrict living arrangements which were "functional equivalent of traditional family" and it was reasonably related to government objectives of reducing traffic, controlling population density, preventing noise, and preserving character of single-family neighborhoods. People v Multari, 135 Misc. 2d 913, 517 N.Y.S.2d 374, 1987 N.Y. Misc. LEXIS 2334 (N.Y. County Ct.), app. denied, 70 N.Y.2d 877, 523 N.Y.S.2d 504, 518 N.E.2d 15, 1987 N.Y. LEXIS 19218 (N.Y. 1987).

35. —Particular regulations; garages, parking lots and the like

Validity of ordinance prohibiting gasoline service stations within 150 feet of residence (§ 20, subds 24, 25). Burack v Mt. Vernon, 303 N.Y. 997, 106 N.E.2d 71, 303 N.Y. (N.Y.S.) 997, 1952 N.Y. LEXIS 1421 (N.Y. 1952).

A City has the power (§ 20, sub 25) to apply zoning ordinance so that owners and lessees of a garage in a business zone are prohibited from using an adjoining lot in a residence zone as a means of ingress and egress for the business area. Yonkers v Rentways, Inc., 304 N.Y. 499, 109 N.E.2d 597, 304 N.Y. (N.Y.S.) 499, 1952 N.Y. LEXIS 719 (N.Y. 1952).

Where a city council had rezoned a prior residential district to one where gasoline stations were permitted as matter of right approximately one year prior to the filing of a petition by petitioner for a curb-lowering permit, the council could not properly deny the application without a finding that lowering of the curb would create a traffic hazard and change the character of the area so as not to be in the public interest, there being already 13 filling stations within a radius of four blocks. Adams Holding Corp. v Spitz, 17 A.D.2d 853, 233 N.Y.S.2d 486, 1962 N.Y. App. Div. LEXIS 7359 (N.Y. App. Div. 2d Dep't 1962).

City planning commission improperly denied psychiatrist permission to conduct part-time practice as home occupation in area zoned for such use where zoning ordinance required that parking area be screened from adjoining residential lots, psychiatrist made prima facie showing of compliance by wall, fencing, shrubbery and embankment, and commission nonetheless contradicted its prior, long-standing application of statutory phrase "buffer area" by requiring additional buffer from neighbors where none was called for in residential zone. Major v Cohen, 126 A.D.2d 205, 513 N.Y.S.2d 271, 1987 N.Y. App. Div. LEXIS 41144 (N.Y. App. Div. 3d Dep't 1987).

Syracuse, N.Y., General Ordinance 21 was enacted in violation of N.Y. Gen. City Law § 20(24) and Syracuse, N.Y., City Charter § 5-1302 because the ordinance was not uniform for each class of buildings within the district; the uniformity required by § 20(24) and § 5-1302 was uniformity for each class of buildings throughout any district. General Ordinance 21 treated buildings within the same class differently based on absentee property owners as opposed to owners who occupied the property. Tupper v City of Syracuse, 93 A.D.3d 1277, 941 N.Y.S.2d 383, 2012 N.Y. App. Div. LEXIS 2167 (N.Y. App. Div. 4th Dep't), app. denied, 96 A.D.3d 1514, 945 N.Y.S.2d 587, 2012 N.Y. App. Div. LEXIS 4558 (N.Y. App. Div. 4th Dep't 2012).

A city ordinance which regulates the location and use of public garages within the city is invalid in absence of any grant by charter of city of power to council of the city to enact ordinances regulating public garages. Subdivision 25 does not grant such power. Hoffer v Schwab, 213 N.Y.S. 659, 126 Misc. 289, 1926 N.Y. Misc. LEXIS 579 (N.Y. Sup. Ct. 1926).

The owner of a licensed garage opposite the premises of the defendants, who operate an open-air parking space for more than five cars in a restricted district, in violation of the zoning resolution and to the financial detriment of the plaintiff, is a proper party to prosecute an injunction action. Seidman & Sons, Inc. v Tilrose Camp Operating Co., 274 N.Y.S. 606, 153 Misc. 510, 1932 N.Y. Misc. LEXIS 1803 (N.Y. Sup. Ct. 1932).

In an action wherein the plaintiff, whose home was located across the street from a sixty-foot parcel at the rear of a hotel and an apartment house, seeks to restrain the use thereof as a parking lot, on the ground that such use constitutes a private nuisance, the plaintiff is deemed to have established a cause of action based on the injury to his property as a result of the lawful but unreasonable and obnoxious use of the lot. Buffalo Park Lane v Buffalo, 294 N.Y.S. 413, 162 Misc. 207, 1937 N.Y. Misc. LEXIS 1574 (N.Y. Sup. Ct. 1937).

A city's power to regulate the area of yards and courts under subd. 24 of this section is restricted to providing regulations uniform for each class of building throughout the many districts, and where a city provides separate regulations for off-street parking and parking lots, the parking lot regulations must be construed as applicable to all parking lots, including a non-accessory parking lot permitted in an R-3A district where the frontage is 70 feet with an area of 7000 feet. Airequipt Mfg. Co. v Gardner, 235 N.Y.S.2d 610, 1962 N.Y. Misc. LEXIS 4164 (N.Y. Sup. Ct. 1962).

36. Particular regulations; prohibition of particular business or use

Amortization provisions of zoning ordinance regulating preexisting uses are presumptively valid under constitution unless owner can demonstrate that loss suffered is so substantial that it outweighs public benefit gained by exercise of police power. Islip v Caviglia, 73 N.Y.2d 544, 542 N.Y.S.2d 139, 540 N.E.2d 215, 1989 N.Y. LEXIS 485 (N.Y. 1989).

Functional interdependence of related structures, rather than economic interdependence or nature of use, is proper test for determining whether landowner is entitled to continue nonconforming use of parcel following accidental destruction of one structure which is part of larger complex; by that formulation, public interest in eliminating nonconforming uses at legally opportunistic time is placed in reasonable balance with owner's interest in not having property investment abruptly altered or terminated. Pelham Esplanade, Inc. v Board of Trustees, 77 N.Y.2d 66, 563 N.Y.S.2d 759, 565 N.E.2d 508, 1990 N.Y. LEXIS 3720 (N.Y. 1990).

There is no absolute entitlement to reestablishment of nonconforming use; thus, where owner's investment is extinguished by accidental destruction of structure which had constituted nonconforming use, it is not unreasonable thereafter to require compliance with current zoning requirements and to base denial of reestablishment on some significant percent of value or volume destroyed. Pelham Esplanade, Inc. v Board of Trustees, 77 N.Y.2d 66, 563 N.Y.S.2d 759, 565 N.E.2d 508, 1990 N.Y. LEXIS 3720 (N.Y. 1990).

"Amortization period" in zoning regulation simply designates period of time granted to owners of nonconforming uses during which they may phase out their operations as they see fit and make other arrangements. Village of Valatie v Smith, 83 N.Y.2d 396, 610 N.Y.S.2d 941, 632 N.E.2d 1264, 1994 N.Y. LEXIS 328 (N.Y. 1994).

Length of "amortization period" during which property owners must phase out nonconforming use need not be based on municipality's land use objectives; to contrary, periods are routinely calculated to protect rights of individual owners (such as providing adequate time to recoup their investment in use) at temporary expense of public land use objectives. Village of Valatie v Smith, 83 N.Y.2d 396, 610 N.Y.S.2d 941, 632 N.E.2d 1264, 1994 N.Y. LEXIS 328 (N.Y. 1994).

Right to continue nonconforming use runs with land in absence of amortization legislation; however, once valid amortization scheme is enacted, right ends at termination of amortization period, and thus, as practical matter, owner of record during amortization period will enjoy right that cannot be transferred to subsequent owner once period passes. Village of Valatie v Smith, 83 N.Y.2d 396, 610 N.Y.S.2d 941, 632 N.E.2d 1264, 1994 N.Y. LEXIS 328 (N.Y. 1994).

Amortization period during which owners of nonconforming use must phase out use should not be deemed unreasonable merely because it might be too long; amortization periods are exceptions (in that, absent such scheme, owners of nonconforming uses are free to continue uses indefinitely and to transfer them to successor owners) and they have never been mandatory as matter of constitutional law. Village of Valatie v Smith, 83 N.Y.2d 396, 610 N.Y.S.2d 941, 632 N.E.2d 1264, 1994 N.Y. LEXIS 328 (N.Y. 1994).

Municipality is not obliged to permit exploitation of any and all natural resources within its borders as permitted use if limiting that use is reasonable exercise of its police powers to prevent damage to rights of others and to promote interests of community as whole. Gernatt Asphalt Prods. v Town of Sardinia, 87 N.Y.2d 668, 642 N.Y.S.2d 164, 664 N.E.2d 1226, 1996 N.Y. LEXIS 313 (N.Y. 1996).

Adequate objective intelligible standard for administrative action by way of legislative rule making is provided by NYC Local Law No. 14 (NYC Admin Code § 20-465.1) which delegates legislative power to Street Vendor Review Panel to designate specific street locations where street vending will be prohibited or restricted due to excessive pedestrian or vehicular traffic congestion posing public safety risk, even though such rule making necessarily entails agency fact-finding component. Big Apple Food v Street Vendor Review Panel, 90 N.Y.2d 402, 660 N.Y.S.2d 846, 683 N.E.2d 752, 1997 N.Y. LEXIS 1377 (N.Y. 1997).

City zoning ordinance, which included array of site limitations and anticlustering provisions with respect to adult entertainment establishments, was not unconstitutionally vague where its definitional provisions were sufficiently specific to provide public with clear and reasonable notice of type of businesses that were covered; ordinance's distance requirements (e.g., requiring adult establishments to be located at least 500 feet from one another) were not too vague merely because they did not include statement indicating precise standard for measurement. Stringfellow's of New York v City of New York, 91 N.Y.2d 382, 671 N.Y.S.2d 406, 694 N.E.2d 407, 1998 N.Y. LEXIS 137 (N.Y. 1998).

City defendants were properly granted summary judgment declaring that plaintiffs' rights of freedom of expression were not violated by provisions of amended zoning code whose enforcement would lead to forced relocation of 84 percent of city's 177 adult entertainment establishments, as reasonable alternative avenues of adult communication were shown to exist where city satisfied its initial burden of showing that space designated for adult uses would be adequate to accommodate 177 existing adult businesses, and affidavit of land-use planner (submitted by plaintiffs) was speculative and failed to raise triable question of fact with respect thereto. Stringfellow's of New York v City of New York, 91 N.Y.2d 382, 671 N.Y.S.2d 406, 694 N.E.2d 407, 1998 N.Y. LEXIS 137 (N.Y. 1998).

City defendants were properly granted summary judgment declaring that plaintiffs' rights of freedom of expression were not violated by amended zoning code which, inter alia, barred adult entertainment establishments from manufacturing and commercial districts that permitted residential development while permitting them in other manufacturing districts and all high-density general commercial districts; amended code protected only those communities and institutions that were most vulnerable to problems associated with adult establishments by preventing adult businesses from locating in potential residential districts while allowing them to locate in manufacturing and commercial districts, and plaintiffs' argument that certain individual adult businesses might be shown to not contribute to urban blight did not impair constitutionality of challenged regulations. Stringfellow's of New York v City of New York, 91 N.Y.2d 382, 671 N.Y.S.2d 406, 694 N.E.2d 407, 1998 N.Y. LEXIS 137 (N.Y. 1998).

Plaintiffs failed to establish that amended zoning code, which barred adult entertainment establishments from manufacturing and commercial districts that permitted residential development while permitting them in other manufacturing districts and all high-density general commercial districts, was impermissible attempt to regulate content of expression; legislative record established that decision to enact code was aimed at negative secondary effects caused by adult uses, which is legitimate governmental purpose, and plaintiffs' reliance on isolated comments of some city officials as evidence of alleged improper motive was unavailing because it is motive of legislature, not individual legislators, that is controlling. Stringfellow's of New York v City of

New York, 91 N.Y.2d 382, 671 N.Y.S.2d 406, 694 N.E.2d 407, 1998 N.Y. LEXIS 137 (N.Y. 1998).

Video store catering to gay male community, which had only 24 percent of its stock dedicated to adult use, was improperly found to be "adult establishment" under city zoning resolution and guidelines which adopted 60:40 formula for defining whether "substantial portion" of business' stock-in-trade is dedicated to adult use, irrespective of whether store owner offered nonadult products only to comply with 60:40 formula, where nonadult videos were prominently displayed on racks in front of store and were "accessible and available for sale" within meaning of guidelines as written; definition of "stock," as used in administrative guidelines, did not include inquiry into whether nonadult videos were offered solely for sale, not for rent, or whether nonadult inventory was profitable. City of New York v Hommes, 94 N.Y.2d 267, 702 N.Y.S.2d 576, 724 N.E.2d 368, 1999 N.Y. LEXIS 3929 (N.Y. 1999).

New York City Board of Standards and Appeals (BSA) had rational basis to determine that no environmental impact statement was necessary prior to granting use variances permitting development of 2 properties located along northernmost boundary of SoHo Cast-Iron Historic District, where BSA took "hard look" at potential environmental effects of proposed development, sought input from several interested agencies including city's Department of Environmental Protection and Landmarks Preservation Commission, and required archaeological studies and soil and groundwater testing. SoHo Alliance v New York City Bd. of Stds. & Appeals, 95 N.Y.2d 437, 718 N.Y.S.2d 261, 741 N.E.2d 106, 2000 N.Y. LEXIS 3568 (N.Y. 2000).

Under New York City Zoning Resolution § 12-10, "substantial portion" component applied in determining whether defendants' club, only part of which was dedicated to adult activities, constituted "adult establishment" subject to municipal regulation. City of New York v Dezer Props, Inc., 95 N.Y.2d 771, 710 N.Y.S.2d 836, 732 N.E.2d 943, 2000 N.Y. LEXIS 896 (N.Y. 2000).

Topless bar was not entitled to declaratory judgment that, because it purportedly admitted minors, it was "customarily open to the general public" and thus was not "adult eating or drinking establishment" under New York City amended zoning resolution § 12-10 as (1) "customary openness" requires openness that is usual, ordinary or habitual, rather than rare or occasional, and (2) petitioner's so-called "minors" policy, which involved elaborate 8-step protocol, represented obvious attempt to avoid restrictions of 12-10 and potential criminal liability, and was drawn so restrictively as to amount to de facto exclusion of minors. City of New York v Stringfellow's of N.Y., Ltd., 96 N.Y.2d 51, 725 N.Y.S.2d 617, 749 N.E.2d 192, 2001 N.Y. LEXIS 628 (N.Y. 2001).

Alcoholic Beverage Control Law did not preempt New York City's amended zoning resolution § 12-10 regulating location of "adult establishments" in city, because zoning resolution was local law of general application, its thrust was zoning and not regulation of alcohol, it applied to all adult establishments whether they sold alcohol or not, it was directed at alleviating secondary effects of adult establishments, and any impact on sellers of alcoholic beverages was merely incidental to city's land use scheme. DJL Rest. Corp. v City of New York, 96 N.Y.2d 91, 725 N.Y.S.2d 622, 749 N.E.2d 186, 2001 N.Y. LEXIS 944 (N.Y. 2001).

The City of Yonkers had the power to adopt a zoning ordinance prohibiting a business or commercial use of property (§ 20, sub 25). Yonkers v Rentways, Inc., 280 A.D. 821, 113 N.Y.S.2d 803, 1952 N.Y. App. Div. LEXIS 3814 (N.Y. App. Div.), aff'd, 304 N.Y. 499, 109 N.E.2d 597, 304 N.Y. (N.Y.S.) 499, 1952 N.Y. LEXIS 719 (N.Y. 1952).

Zoning ordinance which did not totally prohibit establishment of drug rehabilitation centers otherwise approved by state agency but which only required that such a facility conformed to certain criteria within competence of local zoning board to determine was not invalid as conflicting with Mental Hygiene Law. Ibero-American Action League, Inc. v Palma, 47 A.D.2d 998, 366 N.Y.S.2d 747, 1975 N.Y. App. Div. LEXIS 9497 (N.Y. App. Div. 4th Dep't 1975).

A city building commissioner improperly denied an application for a license to operate a rooming house on the asserted ground that the applicant had obtained a certificate of occupancy that limited the premises to single-family use, so that reconversion of the building into a rooming house would violate the applicable building code safety requirements for fireproof construction, since the ordinance that required fireproof construction of rooming houses was inapplicable to the subject application in that it applied only to those rooming houses that were "constructed or put into operation" after 1976, and the premises in question had been built several decades before that, since the standards governing the granting of licenses must be applied equitably to all applicants, and a rooming house operation license had been granted to the building's previous owner without reference to the fireproof construction requirement, since the applicant's application for the single-family certificate of occupancy had been made at the behest of the building commissioner after the applicant's first license application had been rejected and had expressly stated that it was being filed under protest and that the use of the house as a one-family dwelling would not be deemed to be a waiver of rooming house use in the event issuance of a rooming house license was later ordered, so that the application for a single-family certificate of occupancy did not constitute an abandonment of the building's use as a rooming house so as to render the fire construction ordinance applicable. Marra v White Plains, 96 A.D.2d 17, 467 N.Y.S.2d 865, 1983 N.Y. App. Div. LEXIS 19872 (N.Y. App. Div. 2d Dep't), cert. denied, Weber v Stony Brook Hospital, 464 U.S. 1026, 104 S. Ct. 560, 78 L. Ed. 2d 732, 1983 U.S. LEXIS 2777 (U.S. 1983).

City zoning ordinance that deemed abandoned any nonconforming use that had been discontinued for more than one year did not amount to "automatic reversion" to different zoning classification so as to subject ordinance to public notice and hearing requirements of CLS Gen City § 83, since loss of status as nonconforming use merely required use of such property to comply with existing restrictions applicable to particular zone. Carcuro v Madigan, 124 A.D.2d 294, 508 N.Y.S.2d 89, 1986 N.Y. App. Div. LEXIS 61331 (N.Y. App. Div. 3d Dep't 1986).

Purchaser of premises that had been used as tavern in residential neighborhood for many years until owner's death knew or should have known both of tavern's nonconforming use status and that discontinuance of use for substantial period of time could affect right to reinstitute nonconforming use, and thus city's issuance of restaurant permit to purchaser did not estop city from invoking ordinance deeming such use abandoned due to discontinuance of use during period between owner's death and purchaser's reopening. Carcuro v Madigan, 124 A.D.2d 294, 508 N.Y.S.2d 89, 1986 N.Y. App. Div. LEXIS 61331 (N.Y. App. Div. 3d Dep't 1986).

City planning commission had insufficient basis to deny psychiatrist permission to conduct part-time practice as home occupation in area zoned for such use where (1) commission found that proposed use would be inappropriate in its location and would have material adverse effect on existing development in zoning district, (2) there was nonetheless no evidence that use would have any visual impact, that it would detract from property values, or that minor influx of patients would be distinguishable from normal social visits to homes in area, and (3) commission, by restrictively identifying affected area as small group of homes on 2 adjoining streets, made nothing more than general objection to locating particular activity in area; zoning ordinance's inclusion of home occupations generally as permitted use acted to estop commission from finding that intrusion of any home occupation, no matter how innocuous, was undesirable. Major v Cohen, 126 A.D.2d 205, 513 N.Y.S.2d 271, 1987 N.Y. App. Div. LEXIS 41144 (N.Y. App. Div. 3d Dep't 1987).

Decision of city zoning board of appeals denying property owner special use permit to operate car wash on same parcel containing tavern, restaurant, dancehall and apartments was not arbitrary or capricious, even though board denied application on ground that addition of car wash would violate provision of zoning ordinance which allowed only certain accessory uses in conjunction with lot's primary use, and nothing in ordinance prohibited multiple primary uses, since board was entitled to determine that, where primary use was already in place, any additional uses requiring board approval were to be limited to allowable acces-

sory uses; construing ordinance to permit multiple primary uses through resort to special permit provisions would effectively nullify provision pertaining to accessory uses. Del Vecchio v Lalla, 136 A.D.2d 820, 523 N.Y.S.2d 654, 1988 N.Y. App. Div. LEXIS 276 (N.Y. App. Div. 3d Dep't 1988).

In Article 78 proceeding to challenge rezoning of property, court erred in requiring city's lead agency to take another "hard look" at zoning once specific plans for site had been formulated, since city had already taken hard look at potential environmental impact of development of site. Neville v Koch, 173 A.D.2d 323, 575 N.Y.S.2d 463, 1991 N.Y. App. Div. LEXIS 7272 (N.Y. App. Div. 1st Dep't 1991), aff'd, 79 N.Y.2d 416, 583 N.Y.S.2d 802, 593 N.E.2d 256, 1992 N.Y. LEXIS 1297 (N.Y. 1992).

City's zoning provision, which excluded educational uses from class of special permit uses in district, thereby depriving educational institution of opportunity to demonstrate that educational use of its property did not pose threat to public welfare, was not designed to accomplish or advance legitimate public purpose. Trustees of Union College v Members of the Schenectady City Council, 230 A.D.2d 17, 656 N.Y.S.2d 425, 1997 N.Y. App. Div. LEXIS 3733 (N.Y. App. Div. 3d Dep't), aff'd, 91 N.Y.2d 161, 667 N.Y.S.2d 978, 690 N.E.2d 862, 1997 N.Y. LEXIS 3714 (N.Y. 1997).

Owner's use of residence as boarding house was never nonconforming use that could have been abandoned, where city zoning board did not deny her application for certificate of nonconforming use because it found that she had abandoned nonconforming use; rather, it denied her application because it found that her residence had never been used as boarding house before enactment of zoning ordinance, which had restricted her area to single-family residences. Tilmont v City of Middletown, 238 A.D.2d 598, 657 N.Y.S.2d 952, 1997 N.Y. App. Div. LEXIS 4375 (N.Y. App. Div. 2d Dep't 1997).

New York City was entitled to preliminary injunction and partial summary judgment on issue of whether defendant cabaret, which featured topless entertainment and lap dancing by female performers, was "adult establishment" as defined by city zoning resolution § 12-10 and thus constituted public nuisance, notwithstanding defendant's purported policy of admitting previously banned minors when accompanied by parent or guardian; it could not be said that defendant "customarily" admitted minors as that term is ordinarily used. City of New York v Stringfellow's of N.Y., Ltd., 253 A.D.2d 110, 684 N.Y.S.2d 544, 1999 N.Y. App. Div. LEXIS 935 (N.Y. App. Div. 1st Dep't), app. dismissed, 93 N.Y.2d 916, 691 N.Y.S.2d 379, 713 N.E.2d 413, 1999 N.Y. LEXIS 1238 (N.Y. 1999).

City zoning resolution's "60-40 rule," which was used to determine whether "substantial portion" of commercial establishment's floor space was devoted to adult entertainment and thus subject to certain zoning restrictions, applied to single-use adult eating or drinking establishments and was not limited to adult book and video stores where resolution defined "adult establishment" as including any "commercial establishment where a 'substantial portion' of the establishment includes an . . . adult eating or drinking establishment," and there was no exemption for eating and drinking establishments, regardless of whether they were limited to those uses. City of New York v Dezer Props., Inc., 259 A.D.2d 116, 697 N.Y.S.2d 41, 1999 N.Y. App. Div. LEXIS 10889 (N.Y. App. Div. 1st Dep't 1999).

Plaintiffs failed to state cause of action against owners of not-for-profit homeless shelter and alcohol crisis center for breach of city zoning ordinance requiring special permit where (1) owners had received certificate of operation from State Department of Social Services to operate "shelter for adults," (2) center's provision of services, including primary care for alcoholics, counseling, and advice on job training, were consistent with and ancillary to its function as "shelter for adults" as defined in CLS Soc Serv § 2(23), (3) center's operations were heavily regulated by state, and (4) thus, application of zoning ordinance to center was preempted by CLS Soc Serv Art 7 and 18 NYCRR Part 485. DeStefano v Emergency Hous. Group, Inc., 281 A.D.2d 449, 722 N.Y.S.2d 35, 2001 N.Y. App. Div. LEXIS 2398 (N.Y. App. Div. 2d Dep't), app. denied, 96 N.Y.2d 715, 729 N.Y.S.2d 442, 754 N.E.2d 202, 2001 N.Y. LEXIS 1456 (N.Y. 2001).

An ordinance prohibiting in a particular part of the city a business which is not a nuisance per se is unconstitutional. People v Levine, 198 N.Y.S. 328, 119 Misc. 766, 1922 N.Y. Misc. LEXIS 1658 (N.Y. County Ct. 1922).

A city does not place unreasonable or unnecessary restrictions upon the erection of apartment houses in residential districts of city since restrictions, in the light of existing social conditions and advancing social necessities, are properly within the powers of a municipality to limit and restrict the use of private property under legislative authority. Headley v Fennell, 210 N.Y.S. 102, 124 Misc. 886, 1924 N.Y. Misc. LEXIS 1127 (N.Y. Sup. Ct. 1924), aff'd, 214 A.D. 810, 210 N.Y.S. 861, 1925 N.Y. App. Div. LEXIS 7930 (N.Y. App. Div. 1925).

Where thrust of city ordinance banning topless dancing was prohibition against any breast exposure in public, and ordinance was thus directed against nudity rather than obscenity, it infringed upon exercise of First Amendment rights; even if ordinance could have been constitutionally applied to activities of defendants, it could be challenged on basis of overbreadth in that it was drawn so as to sweep within its ambit the speech or expression of other persons not before the court. In re A., 89 Misc. 2d 109, 390 N.Y.S.2d 518, 1976 N.Y. Misc. LEXIS 2823 (N.Y. Fam. Ct. 1976).

Practice of electrolysis is not profession within meaning of city zoning ordinance, although practice requires some specialized training, since it does not involve long and extensive academic preparation and electrologists are not required to have either training or education to entitle them to be considered professionals. People v Marcus, 142 Misc. 2d 908, 538 N.Y.S.2d 928, 1989 N.Y. Misc. LEXIS 149 (N.Y. City Ct. 1989).

Provisions of municipal zoning ordinance which city invoked to deny special use permit to operator of adult bookstore to conduct "peep show" were "content neutral" where they were not directed at specific types of expression or at businesses at which particular types of expression were conducted, and therefore they did not bear heavy presumption of unconstitutionality as matter of federal constitutional law, and were not presumptively invalid and subject to strict scrutiny under state constitutional standards; issue was whether challenged provisions were valid time, place and manner restrictions. Barbulean v City of Newburgh, 168 Misc. 2d 728, 640 N.Y.S.2d 935, 1995 N.Y. Misc. LEXIS 687 (N.Y. Sup. Ct. 1995).

"Content neutral" zoning ordinance, which city invoked to deny special use permit to operator of adult bookstore to conduct "peep show" in commercial district, did not impose unconstitutional time, place and manner restrictions where it promoted substantial governmental interest of ensuring that retail establishments were not adversely affected by influx of large number of individuals whose presence at theater-type business created pedestrian and vehicular traffic and parking burdens, and it permitted operation of theaters in other zoning districts as of right. Barbulean v City of Newburgh, 168 Misc. 2d 728, 640 N.Y.S.2d 935, 1995 N.Y. Misc. LEXIS 687 (N.Y. Sup. Ct. 1995).

"Content neutral" zoning ordinance which required special use permit to operate theater (or "peep show") in commercial zoning district was facially unconstitutional, although it promoted legitimate governmental interests associated with time, place and manner restrictions, where restrictions were broader than needed to achieve municipality's purpose of controlling traffic; ordinance listed 12 specific factors for zoning authority to consider when determining whether or not to grant special use permit, but it also permitted consideration of "other things," which gave zoning authority virtually unlimited discretion in making its decision. Barbulean v City of Newburgh, 168 Misc. 2d 728, 640 N.Y.S.2d 935, 1995 N.Y. Misc. LEXIS 687 (N.Y. Sup. Ct. 1995).

Provision of adult entertainment zoning law, prohibiting location of adult establishments within 500 feet from residence district, was not invalid as applied to topless bar simply because substantial portion of residence district consisted of cemetery which, by its very nature, contained no living residents who would need protection from negative secondary effects of adult eating or drinking establishment. City of New York v Scandals,

178 Misc. 2d 267, 678 N.Y.S.2d 876, 1998 N.Y. Misc. LEXIS 463 (N.Y. Sup. Ct. 1998).

In action to abate nuisance under New York City zoning resolutions regulating adult establishments, city was not entitled to preliminary injunctive relief on ground that respondents continued to fall within definition of "adult establishment" and did not make sufficient abatement efforts, where respondents had reduced area of their premises devoted to adult uses to less than 40 percent; under Zoning Resolution § 12-10, "60:40 ratio" is singular factor in determining whether "substantial portion" of premises is devoted to adult use, although respondents were not thereby deemed automatically in compliance with zoning resolutions. City of New York v Show World, Inc., 178 Misc. 2d 812, 683 N.Y.S.2d 376, 1998 N.Y. Misc. LEXIS 552 (N.Y. Sup. Ct. 1998), aff'd sub. nom., City of New York v Hommes, 258 A.D.2d 284, 685 N.Y.S.2d 49, 1999 N.Y. App. Div. LEXIS 891 (N.Y. App. Div. 1st Dep't 1999).

"Cigar room" located within establishment that regularly featured live performances by nude women, in which bikini-clad women performed "private dances" for patrons, was inextricably connected with activity in main performance room even if dancers in cigar room did not expose intimate body parts, and thus it was included in calculation of customer-accessible floor space allocated to adult use for purpose of 60:40 formula for determining if establishment was "adult" establishment operating in C4 zoning district in violation of New York City zoning resolution § 32-01(a). City of New York v Wiggles, 178 Misc. 2d 1007, 682 N.Y.S.2d 824, 1998 N.Y. Misc. LEXIS 570 (N.Y. Sup. Ct. 1998).

"Certification of Waiver or Authorization" from Federal Aviation Administration, authorizing defendant's use of para-sails with banners on Hudson River, preempted NYC Admin Code § 10-126(d)(1) which makes it unlawful to advertise by towing banners from or on aircraft over New York City limits; because administrative code sought to entirely prohibit, rather than regulate, what federal government authorized, it was unconstitutional on its face. People v Santoriello, 183 Misc. 2d 54, 702 N.Y.S.2d 539, 1999 N.Y. Misc. LEXIS 568 (N.Y. City Crim. Ct. 1999).

Where defendant's adult establishment complied with New York City's zoning code as interpreted by administrative guidelines in existence when nuisance abatement action was commenced, city was not entitled to preliminary injunction and temporary closing order based on additional factors not specifically set forth in prior guidelines which established that defendant's literal compliance with then-existing guidelines was "sham" which would undermine adult use provisions of zoning code; court dimsissed action, without prejudice to future applications related to zoning code as interpreted by revised administrative guidelines. City of New York v Warehouse on the Block, Ltd., 183 Misc. 2d 489, 703 N.Y.S.2d 900, 2000 N.Y. Misc. LEXIS 18 (N.Y. Sup. Ct. 2000).

A zoning ordinance prohibiting businesses in specified area and excluding artists from the operation thereof was violated by defendant who made Neon signs at his residence. People v Daly, 28 N.Y.S.2d 603, 1941 N.Y. Misc. LEXIS 1925 (N.Y. Spec. Sess. 1941).

37. —Particular regulations; restriction on population density

Section of a zoning ordinance restricting the number of families that may lawfully be housed on an acre of ground or a fractional part thereof is not authorized by subdivision 24 and is invalid. Barker v Switzer, 209 A.D. 151, 205 N.Y.S. 108, 1924 N.Y. App. Div. LEXIS 8570 (N.Y. App. Div.), app. dismissed, 238 N.Y. 624, 144 N.E. 918, 238 N.Y. (N.Y.S.) 624, 1924 N.Y. LEXIS 807 (N.Y. 1924).

Creation of single-family residence districts does not constitute an exercise of the power to regulate density of population. Hall v Leonard, 260 A.D. 591, 23 N.Y.S.2d 360, 1940 N.Y. App. Div. LEXIS 4664 (N.Y. App. Div. 1940), aff'd, 285 N.Y. 719, 34 N.E.2d 893, 285 N.Y. (N.Y.S.) 719, 1941 N.Y. LEXIS 1711 (N.Y. 1941).

Under § 20, subdivision 24, as it existed in 1924, city of Albany had no authority to enact ordinance restricting number of families that might be lawfully housed on an acre of ground or a fractional part thereof. Albany v Anthony, 262 A.D. 401, 28 N.Y.S.2d 963, 1941 N.Y. App. Div. LEXIS 5377 (N.Y. App. Div. 1941).

38. —Other matters

City of Rye is not empowered by zoning enabling provisions of General City Law (§§ 20, 37), historical preservation provisions of General Municipal Law (§ 96-a) or landmarks preservation provisions of Rye City Code (Chapter 117) to mandate manner in which property may be owned or held or to impose upon owner of tract containing historic structures, or purchasers of properties neighboring tract, cost of rehabilitation or enhancement of properties. FGL & L Property Corp. v Rye, 66 N.Y.2d 111, 495 N.Y.S.2d 321, 485 N.E.2d 986, 1985 N.Y. LEXIS 17179 (N.Y. 1985).

City law, denying educational institution opportunity to apply for special use permits in single family historic district, was unauthorized and therefore unconstitutional; public interest in historic preservation does not as matter of law override competing educational interests, and thus decision to restrict proposed educational use can only be made after intended use is evaluated against other legitimate interests, with primary consideration given to over-all impact on public welfare. Trustees of Union College v Members of the Schenectady City Council, 91 N.Y.2d 161, 667 N.Y.S.2d 978, 690 N.E.2d 862, 1997 N.Y. LEXIS 3714 (N.Y. 1997).

Substantial evidence supported grant of use variances permitting development of 2 properties located along northernmost boundary of SoHo Cast-Iron Historic District where (1) City Planning Commission study established that idiosyncratic lot configuration of properties in question resulted in practical difficulties or unnecessary hardship not created by owners, (2) owners submitted expert evidence providing "dollars and cents" proof that no conforming uses or lesser nonconforming uses would yield reasonable rate of return of 9.9 percent, and (3) rational basis existed for New York City Board of Standards and Appeals to conclude that proposed development, which would bring only 185 new residents and conformed with Landmarks Preservation Commission's requirement that outward appearance of buildings be consistent with special architectural features of district, would not change essential character of neighborhood. SoHo Alliance v New York City Bd. of Stds. & Appeals, 95 N.Y.2d 437, 718 N.Y.S.2d 261, 741 N.E.2d 106, 2000 N.Y. LEXIS 3568 (N.Y. 2000).

The complaint does not show that plaintiff has requisite interest to maintain action in equity, for his property is not adjacent to defendant's property, although within zone, nor is there any allegation, other than the fact that the gasoline service station is to be erected, to show that the value of plaintiff's property will be materially reduced by the erection of a station or that the station will constitute a public nuisance. Nor is it alleged that gasoline service station is not of a good appearance or that its use will disturb the peace and quiet of the neighborhood or that it is within view of plaintiff's premises, or that any odors or disturbing noises therefrom will reach plaintiff's property. Nor is there any allegation that plaintiff will suffer irreparable damage by reason of erection of the station. Atkins v West, 222 A.D. 308, 226 N.Y.S. 335, 1928 N.Y. App. Div. LEXIS 8061 (N.Y. App. Div. 1928).

The fact that the board had previously denied an application to extend a commercial building, a motion picture theatre, into a residence district, did not preclude it from considering a second application, where the plans on the second application were dissimilar from those submitted on the first application and contained provisions safeguarding the character of the restricted district. In the second application it was not sought to change the use of the district in any degree but merely to use a very small portion of the residence district in order to accommodate the rear of the theatre. Reed v Board of Standards & Appeals, 230 A.D. 21, 243 N.Y.S. 263, 1930 N.Y. App. Div. LEXIS 8542 (N.Y. App. Div. 1930), aff'd, 255 N.Y. 126, 174 N.E. 301, 255 N.Y. (N.Y.S.) 126, 1931 N.Y. LEXIS 656 (N.Y. 1931).

Though record amply supported determination that existing city zoning classification, insofar as it related to plaintiff's property and to property within "affected area," was confiscatory and therefore void, where the improper zoning was not discriminatory per se, new zoning should be determined not by the court but by the Board of Estimate. Stilbell Realty Corp. v New York, 54

A.D.2d 962, 388 N.Y.S.2d 648, 1976 N.Y. App. Div. LEXIS 14880 (N.Y. App. Div. 2d Dep't 1976).

Complaint which challenged creation of special zoning district comprising 14-20 city blocks on ground that city did not affirmatively order construction of low- and moderate-income housing therein failed to state cause of action and should have been dismissed since (1) cities have no constitutional obligation to zone for low-to-moderate-income housing, (2) zoning board's community plan provided appropriate incentives to develop low- and moderate-income housing, and (3) zoning amendments in question were consistent with well-considered regional plan; there is no requirement that individual zoning districts contain housing balance so long as overall zoning resolution provides for balanced and integrated community. Asian Americans for Equality v Koch, 128 A.D.2d 99, 514 N.Y.S.2d 939, 1987 N.Y. App. Div. LEXIS 43530 (N.Y. App. Div. 1st Dep't 1987), aff'd, 72 N.Y.2d 121, 531 N.Y.S.2d 782, 527 N.E.2d 265, 1988 N.Y. LEXIS 1684 (N.Y. 1988).

Planning, design and construction of proposed improvements to international airport located in city but owned and operated by county were not subject to site plan review process and permit requirements of city code since county is authorized to operate and maintain airport by CLS Gen Mun §§ 350, 352, 355 and 356, and airport expansion involves governmental rather than proprietary function; thus, city ordinances and permit requirements did not apply to expansion of airport terminal building, temporary and permanent parking facilities, and air freight facility. In re County of Monroe's Compliance with Certain Zoning & Permit Requirements etc., 131 A.D.2d 74, 520 N.Y.S.2d 676, 1987 N.Y. App. Div. LEXIS 48597 (N.Y. App. Div. 4th Dep't 1987), aff'd, 72 N.Y.2d 338, 533 N.Y.S.2d 702, 530 N.E.2d 202, 1988 N.Y. LEXIS 2697 (N.Y. 1988).

Property owner was not required to take administrative appeal to city zoning board of appeals and thus could bring Article 78 proceeding to review determination of city historic district and landmarks preservation commission, which denied owner's application for preliminary site plan approval, since Article 78 was appropriate vehicle to challenge determination of landmark preservation commission, and relevant enabling statutes (CLS Gen City §§ 81(1), 20(24) and 20(25), and CLS Gen Mun § 96-a) did not empower city zoning board of appeals to hear and decide appeals from determinations of landmark preservation commission. Academy Mews, Inc. v Kane, 143 A.D.2d 960, 533 N.Y.S.2d 620, 1988 N.Y. App. Div. LEXIS 10764 (N.Y. App. Div. 2d Dep't 1988), app. dismissed, 73 N.Y.2d 906, 539 N.Y.S.2d 292, 536 N.E.2d 621, 1989 N.Y. LEXIS 162 (N.Y. 1989).

In Article 78 proceeding against city's zoning board of appeals, court erred in ordering hearing de novo before it on application for zoning use variance, since determination of whether to grant variance lies within discretion of zoning authorities and reviewing court may not conduct trial de novo. Cohen v Hahn, 155 A.D.2d 969, 547 N.Y.S.2d 780, 1989 N.Y. App. Div. LEXIS 14842 (N.Y. App. Div. 4th Dep't 1989).

Defendant's use of his residential premises constituted "customary home occupation" within meaning of city zoning ordinance where (1) only use by defendant of residence in connection with his limousine service was to receive telephone calls in response to which he or his son utilized various limousines for transportation of paying passengers to airport, (2) no customers arrived at or departed from residence, and (3) no external indicia of transportation business were displayed at defendant's residence. White Plains v Deruvo, 159 A.D.2d 534, 552 N.Y.S.2d 399, 1990 N.Y. App. Div. LEXIS 2709 (N.Y. App. Div. 2d Dep't 1990).

Owner of 4-story warehouse, who sought to convert it to restaurant on first floor and offices on remaining 3 floors, was not required to apply for variance for use of fourth floor as offices where (1) building was constructed in 1947 and was used continuously as warehouse until 1987, (2) building was in B-2 Central Business District, (3) in 1956, zoning code was changed to limit height of buildings in B-2 Central Business District to 3 stories and to prohibit warehouses, and (4) city zoning code provided that buildings which conformed in use but not in height would not be considered nonconforming. Elm Street Assoc. v Sniado, 159 A.D.2d 570, 552 N.Y.S.2d 432, 1990 N.Y. App. Div. LEXIS 2744 (N.Y. App. Div. 2d Dep't 1990).

Petitioner was not entitled to annulment of determination of city zoning board of appeals which denied request for demolition permit on basis of city historic resources commission ordinance which required that person seeking to demolish structure in protected district must first submit and obtain approval for plans for new development; plans for new development were required even though impetus for request for demolition was fire which made structure unsound and order by city which required petitioner to barricade structure and to stabilize and restore it. Lemme v Dolan, 163 A.D.2d 717, 558 N.Y.S.2d 991, 1990 N.Y. App. Div. LEXIS 8410 (N.Y. App. Div. 3d Dep't 1990).

Determination of Department of Consumer Affairs to discontinue consideration of petitioner's application for construction and maintenance of enclosed sidewalk cafe in front of leased restaurant premises was not arbitrary and capricious in light of ongoing dispute between petitioner and condominium building's board over control of sidewalk area, as well as community board's recommendation that application be denied because of expressed community concern regarding obstruction of pedestrian traffic. 600 West 115th Street Corp. v New York, 171 A.D.2d 425, 567 N.Y.S.2d 7, 1991 N.Y. App. Div. LEXIS 2637 (N.Y. App. Div. 1st Dep't 1991).

Assignment of out-of-sequence address to cooperative building was rational exercise of borough president's discretion since (1) borough president has full and final authority to make all determinations concerning designation of street addresses, and (2) NYC Admin Code §§ 3-506 and 3-507, governing numbering and renumbering of street addresses by borough president, do not require that internal street numbering for each block be in sequential or continuous order. Lincoln Plaza Tenants Corp. v Dinkins, 171 A.D.2d 577, 567 N.Y.S.2d 447, 1991 N.Y. App. Div. LEXIS 3809 (N.Y. App. Div. 1st Dep't 1991).

New York City regulation which prohibited installation of sidewalk structures for purpose of distribution of commercial speech was unconstitutional, even though city had substantial interest to be achieved by restrictions it would place on commercial speech distributed through sidewalk bins (namely, maintenance of safety, enjoyment and appearance of sidewalks), since (1) regulation did not advance such interest as it did not control installation of bins containing permitted publications, and (2) city failed to show that such interest could only be advanced through outright ban on sidewalk bins for commercial speech. New York v Learning Annex, Inc., 186 A.D.2d 475, 589 N.Y.S.2d 28, 1992 N.Y. App. Div. LEXIS 12174 (N.Y. App. Div. 1st Dep't 1992), app. dismissed, 81 N.Y.2d 880, 597 N.Y.S.2d 940, 613 N.E.2d 972, 1993 N.Y. LEXIS 5290 (N.Y. 1993).

Court should have dismissed Article 78 proceeding to annul designation of college rectory as landmark, where respondents concluded that rectory met 6 of 9 criteria for landmark designation set out in city code, and their conclusion had rational basis and was not arbitrary or capricious. Canisius College v City of Buffalo, 217 A.D.2d 985, 629 N.Y.S.2d 886, 1995 N.Y. App. Div. LEXIS 8422 (N.Y. App. Div. 4th Dep't), app. denied, 86 N.Y.2d 709, 634 N.Y.S.2d 443, 658 N.E.2d 221, 1995 N.Y. LEXIS 3731 (N.Y. 1995).

Respondents' designation of college rectory as landmark did not amount to "taking" where college (which sought to raze building to make way for additional student parking) failed to present evidence that designation physically or financially prevented or seriously interfered with, carrying out of college's charitable purpose. Canisius College v City of Buffalo, 217 A.D.2d 985, 629 N.Y.S.2d 886, 1995 N.Y. App. Div. LEXIS 8422 (N.Y. App. Div. 4th Dep't), app. denied, 86 N.Y.2d 709, 634 N.Y.S.2d 443, 658 N.E.2d 221, 1995 N.Y. LEXIS 3731 (N.Y. 1995).

City properly issued stop-work order for addition to owner's residence where owner had not satisfied building permit condition to construct retaining wall to replace existing retaining wall which was in severe state of deterioration and disrepair, there was legitimate link between construction of addition and reconstruction of retaining wall, owner had refused to exercise her right under CLS RPAPL § 881 to gain access to retaining wall, and she did not need elaborate 20-foot permanent easement which she contended was necessary to reconstruct and to maintain her wall. Massa v City of Kingston, 235 A.D.2d 947, 652

N.Y.S.2d 857, 1997 N.Y. App. Div. LEXIS 745 (N.Y. App. Div. 3d Dep't 1997).

City ordinance adopted in 1995, requiring owner of any structure used wholly or partially for residential purposes...to install and maintain smoke/heat detector or system," was inconsistent and in direct conflict with Uniform Building Code as set forth in CLS Exec art 18 insofar as it applied retroactively to pre-1984 buildings. Rabinor v City of Ithaca Bldg. Code Bd. of Appeals, 252 A.D.2d 290, 682 N.Y.S.2d 704, 1998 N.Y. App. Div. LEXIS 14116 (N.Y. App. Div. 3d Dep't 1998).

Petitioner failed to establish that respondent's approval of project involving construction of 3 open air community pavilions and attendant structures in park situated within historic district violated deeds and letters patent conveying subject property to city, which required that property be used for "local park and recreational purposes" and that project comply with specific controls and uses set forth in urban renewal plan, where pavilions would be available for use by various community groups and they were consistent with "active or passive recreation facilities" and accessory buildings contemplated by urban renewal plan. J.B. Realty Enter. v City of Saratoga Springs, 270 A.D.2d 771, 704 N.Y.S.2d 742, 2000 N.Y. App. Div. LEXIS 3096 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 758, 713 N.Y.S.2d 522, 735 N.E.2d 1287, 2000 N.Y. LEXIS 1802 (N.Y. 2000).

City zoning board of appeals' denial of area variance to apartment complex owner to allow construction of 32 additional apartment units on same property was rational and supported by substantial evidence where (1) those 32 units would have been 23 units in excess of minimum square footage requirement in city's code, (2) negative declaration under CLS ECL Art 8 regarding proposed addition was not dispositive of issue of addition's impact on neighborhood, because board could deny variance on other grounds, and (3) denial was not based on general or unsubstantiated concerns of residential neighbors. Chadwick Gardens Assocs., L.L.C. v City of Newburgh Zoning Bd. of Appeals, 273 A.D.2d 232, 709 N.Y.S.2d 450, 2000 N.Y. App. Div. LEXIS 6298 (N.Y. App. Div. 2d Dep't 2000).

City preservation board rationally held that owners of historical landmark building were not entitled to demolish it and redevelop site with retail business where (1) owners did not adequately explore alternative uses for building and thus did not prove economic hardship, and (2) owners neglected maintenance of building and made inadequate marketing efforts, and thus any hardship was self-created or self-imposed. Farash Corp. v City of Rochester, 275 A.D.2d 957, 713 N.Y.S.2d 423, 2000 N.Y. App. Div. LEXIS 9773 (N.Y. App. Div. 4th Dep't 2000), app. denied, 96 N.Y.2d 701, 722 N.Y.S.2d 793, 745 N.E.2d 1015, 2001 N.Y. LEXIS 18 (N.Y. 2001).

County, on determining that county-owned building located in historic district in city was risk to public safety and required demolition, was nevertheless subject to city ordinance which created Historic Resources Commission (HRC) and prohibited demolition of protected buildings without HRC consent. Historic Albany Found. v Breslin, 282 A.D.2d 981, 724 N.Y.S.2d 113, 2001 N.Y. App. Div. LEXIS 4161 (N.Y. App. Div. 3d Dep't), app. denied, 97 N.Y.2d 636, 735 N.Y.S.2d 489, 760 N.E.2d 1284, 2001 N.Y. LEXIS 3357 (N.Y. 2001).

In action to compel current owner of real property to comply with covenants agreed to by prior owner, court properly granted summary judgment awarding city relief not specifically requested in its complaint, where construction permits issued by city were expressly conditioned on owners' compliance with covenants, and relief requested in summary judgment motion was mandated by law. City of New York v Delafield 246 Corp., 236 A.D.2d 11, 662 N.Y.S.2d 286, 1997 N.Y. App. Div. LEXIS 7823 (N.Y. App. Div. 1st Dep't 1997), app. denied, 91 N.Y.2d 811, 671 N.Y.S.2d 715, 694 N.E.2d 884, 1998 N.Y. LEXIS 994 (N.Y. 1998).

A lessor, who leases premises for five years to be used as a rooming house, boarding house or hotel, which premises are situated in an apartment house zone or district, is not liable in damages to the lessee, although said lessor assisted in procuring amendment of the zoning ordinance so as to change the apartment house district to a business district and thereafter a garage was erected on adjoining premises, where it appears that the amendment in question did not legally depend upon lessor's consenting thereto or petitioning therefor. Geisler v Mitchell, 244 N.Y.S. 439, 137 Misc. 462, 1930 N.Y. Misc. LEXIS 1503 (N.Y. Sup. Ct. 1930).

The power to enact zoning ordinance under which defendant has been prosecuted is given by this section and provision for fine and imprisonment is not in excess of that authorized by Second Class Cities Law, § 42. People ex rel. Wolff v Margolies, 1 N.Y.S.2d 969, 166 Misc. 135, 1937 N.Y. Misc. LEXIS 1155 (N.Y. County Ct. 1937).

In an Article 78 proceeding, in which petitioner sought to annul a determination of the Landmarks Preservation Commission to include in a historic landmark district property purchased by petitioner, which petitioner intended for commercial redevelopment, the Commission adequately provided the requisite reasonable basis for approving the designation of the district to include petitioner's building, where the city planning commission and the city board of estimate had considered the relationship between historic district designation of the area, which included petitioner's building, and area zoning regulations, which permitted high-rise commercial development, and where this consideration was combined with an assessment of each building and the transitional function of petitioner's building between the low-scale townhouses of the historic district and the large-scale apartments and hotels south of the district. Omabuild N.V. v Board of Estimate, 116 Misc. 2d 566, 455 N.Y.S.2d 967, 1982 N.Y. Misc. LEXIS 3918 (N.Y. Sup. Ct. 1982).

Portion of city zoning ordinance which provided that each day that violation was uncorrected constituted separate offense was invalid because imposition of cumulative penalties for single but continuing violation of zoning ordinance is not permitted. People v Multari, 135 Misc. 2d 913, 517 N.Y.S.2d 374, 1987 N.Y. Misc. LEXIS 2334 (N.Y. County Ct.), app. denied, 70 N.Y.2d 877, 523 N.Y.S.2d 504, 518 N.E.2d 15, 1987 N.Y. LEXIS 19218 (N.Y. 1987).

In Article 78 proceeding to annul decision of city planning board which rejected petitioner's site plan for commercial building to be located in commercial zone bordered by undeveloped floodway zone, court dismissed claim that decision unlawfully denied petitioner use of its property on pretext of environmental concerns, in that aesthetic impact of site plan is proper factor to be considered under State Environmental Quality Review Act, planning board took notice of pertinent facts and considered competent opinion evidence based on such facts, and there was no proof that visual effects were overblown and misused to cloak board's alleged ulterior purpose to frustrate new investment and new enterprise. East Coast Dev. Co. v Kay, 174 Misc. 2d 430, 667 N.Y.S.2d 182, 1996 N.Y. Misc. LEXIS 594 (N.Y. Sup. Ct. 1996).

New York City Landmarks Preservation Commission (LPC) did not exceed its jurisdiction in issuing certificate of appropriateness for project involving construction of 19-story hotel at site located outside historic district but physically connected to renovated warehouse located on edge of historic district, although jurisdiction of LPC is limited to structures situated within historic districts, where all structural components of project were totally integrated into single hotel building with single mechanical system. 67 Vestry Tenants Ass'n v Raab, 172 Misc. 2d 214, 658 N.Y.S.2d 804, 1997 N.Y. Misc. LEXIS 124 (N.Y. Sup. Ct. 1997).

In issuing certificate of appropriateness for renovation of warehouse and construction of hotel partially using renovated warehouse, Landmarks Preservation Commission (LPC) did not violate NYC Admin Code §§ 25-307(b) and 25-304(a) which prohibit LPC from creating regulations or requirements regarding height and bulk of buildings, although developer had reduced tower component from 31 stories to 19 stories as result of LPC's review and comments; LPC did not specifically limit height of tower to 19 stories, but merely approved over-all aesthetic design of proposed project, including towner's mass in relation to warehouse and project's relation to historic district. 67 Vestry Tenants Ass'n v Raab, 172 Misc. 2d 214, 658 N.Y.S.2d 804, 1997 N.Y. Misc. LEXIS 124 (N.Y. Sup. Ct. 1997).

Mandamus did not lie to compel New York City Landmarks Preservation Commission (LPC) to entertain petitioners' application for landmark status for certain buildings, as LPC has unfettered discretion to decide whether to calendar items to be

considered for landmark designation, and fact that it must apply stated statutory criteria in deciding whether calendared building ought to be landmark does not mean that it must employ lengthy formal consideration process with respect to every application. Deane v City of New York Dep't of Bldgs., 177 Misc. 2d 687, 677 N.Y.S.2d 416, 1998 N.Y. Misc. LEXIS 328 (N.Y. Sup. Ct. 1998).

Petitioners were not entitled to notice and opportunity to be heard before New York City Landmarks Preservation Commission (LPC) decided whether or not to calendar their request for evaluation of certain buildings for landmark status, as entitlement to calendaring was subject to agency discretion, and petitioners had no protected property interest in obtaining landmark status or even in obtaining formal LPC consideration of their application. Deane v City of New York Dep't of Bldgs., 177 Misc. 2d 687, 677 N.Y.S.2d 416, 1998 N.Y. Misc. LEXIS 328 (N.Y. Sup. Ct. 1998).

Court dismissed Article 78 proceeding in which petitioners alleged that it was arbitrary and capricious for New York City Landmarks Preservation Commission (LPC) to decline to consider their request to evaluate certain buildings for landmark status, as LPC had complete discretion to calendar request or deny application for calendaring, and thus there could be nothing arbitrary or capricious about not calendaring it. Deane v City of New York Dep't of Bldgs., 177 Misc. 2d 687, 677 N.Y.S.2d 416, 1998 N.Y. Misc. LEXIS 328 (N.Y. Sup. Ct. 1998).

New York City Landmarks Preservation Commission (LPC) was not required to publish proceedings or create full administrative record when considering petitioners' request to evaluate certain buildings for landmark status, in view of LPC's complete discretion whether or not to afford formal consideration to applications for landmark status. Deane v City of New York Dep't of Bldgs., 177 Misc. 2d 687, 677 N.Y.S.2d 416, 1998 N.Y. Misc. LEXIS 328 (N.Y. Sup. Ct. 1998).

In Article 78 proceeding to annul New York City Landmarks Preservation Commission's decision not to consider certain brownstone buildings for landmark status, residents of neighboring buildings were not entitled to preliminarily enjoin demolition of subject buildings and construction of 17-story tower by respondent developers, as they were not likely to succeed on merits, and developers stood to lose great deal of money (and their window of opportunity to build tower) if injunction issued whereas all neighbors stood to lose was some sunlight and charm. Deane v City of New York Dep't of Bldgs., 177 Misc. 2d 687, 677 N.Y.S.2d 416, 1998 N.Y. Misc. LEXIS 328 (N.Y. Sup. Ct. 1998).

On motion to preliminarily enjoin defendants' operation of topless bar within 500 feet from residence district, plaintiff municipality established that premises was "adult establishment" under local zoning ordinance where bar featured live performances on regular basis with emphasis on naked female breasts and additional emphasis on fondling or erotic touching of genitals and breasts, age restriction sign was posted at point of entry to bar area, drinks were served at bar surrounding circular stage, and dancers could be seen from almost any point within premises. City of New York v Scandals, 178 Misc. 2d 267, 678 N.Y.S.2d 876, 1998 N.Y. Misc. LEXIS 463 (N.Y. Sup. Ct. 1998).

Although music in petitioner's nightclub was never turned off, Environmental Control Board had rational basis to find that petitioners violated NYC Admin Code § 24-241.1(a) by causing and permitting excessive noise at nightclub based on measurements of sound made by New York City Department of Environmental Protection, utilizing procedure for taking ambient readings during lulls (periodic drops in volume) in music. Reminisce Bar & Lounge v City of New York Dep't of Envtl. Protection, 178 Misc. 2d 640, 680 N.Y.S.2d 143, 1998 N.Y. Misc. LEXIS 533 (N.Y. Sup. Ct. 1998).

City was proper defendant in discriminatory treatment action by substance abuse treatment program and clients, arising from refusal of planning board and zoning board of appeals to permit program to relocate to another zoning district; though complaint did not contain any allegations against city specifically, city was vested with authority to establish zoning regulations, and regulated use of property through planning board and zoning board of appeals. Innovative Health Sys. v City of White Plains, 931 F. Supp. 222, 1996 U.S. Dist. LEXIS 9081 (S.D.N.Y. 1996), aff'd, in part, 117 F.3d 37, 1997 U.S. App. LEXIS 15361 (2d Cir. N.Y. 1997).

39. Sewer rents (subds. 26 and 26-a)

Since 1929, every city in this state has been empowered by express legislative provision to impose sewer rents based upon water use or "upon any other equitable basis." Black v General Wiper Supply Co., 305 N.Y. 386, 113 N.E.2d 528, 305 N.Y. (N.Y.S.) 386, 1953 N.Y. LEXIS 807 (N.Y. 1953).

Cost of work done in connection with maintenance, operation and repair of New York City sewer system was non-assessable against adjacent property after city adopted sewer rent system as authorized by this section. Riverview Estates, Inc. v New York, 20 A.D.2d 890, 248 N.Y.S.2d 937, 1964 N.Y. App. Div. LEXIS 4598 (N.Y. App. Div. 1st Dep't 1964), aff'd, 16 N.Y.2d 701, 261 N.Y.S.2d 895, 209 N.E.2d 552, 1965 N.Y. LEXIS 1295 (N.Y. 1965).

The fact that property is already served by a private sewer will not bar an assessment for construction of a public sewer to serve it. In re Improvement of Constr. of Lateral Sewer, 24 Misc. 2d 618, 194 N.Y.S.2d 279, 1959 N.Y. Misc. LEXIS 2772 (N.Y. Sup. Ct. 1959).

Determination of a city council that particular properties were specially benefited to an extent justifying assessment on account of a sewerage system was conclusive and not subject to judicial review, unless shown to be fraudulent or arbitrary. In re Improvement of Constr. of Lateral Sewer, 24 Misc. 2d 618, 194 N.Y.S.2d 279, 1959 N.Y. Misc. LEXIS 2772 (N.Y. Sup. Ct. 1959).

In an action by the City of New York against a property owner for certain water meter and sewer charges which it had properly entered in its books over a ten-year period and then submitted to plaintiff for payment the total accrued charges, which plaintiff property owner paid under protest, the property owner was not entitled to a refund of that portion of the charges paid which accrued more than six years prior to the time the corrected bills were entered under the theory that the six-year statute of limitations for contract actions was applicable, since the charges were duly entered in the city's books during the ten-year period and pursuant to administrative regulation the charges entered became liens upon the affected property and remained liens until paid, and the failure of the city to render bills or give notice of such charges did not affect the lien of those charges and they remained just debts; however, administrative regulations required that appropriate notice of said charges be given to the property owner before they became due and interest could accrue thereon and inasmuch as there was no evidence that the city rendered proper bills to anyone until the corrected bills were sent to the plaintiff property owner, interest did not commence accruing on the charges until that time. Marver Realty Corp. v New York, 117 Misc. 2d 763, 459 N.Y.S.2d 375, 1983 N.Y. Misc. LEXIS 3212 (N.Y. Sup. Ct. 1983).

40. Licensing and regulation of electricians (subd. 27)

The licensing of electricians by the Master Electricians Board of Examiners and the adoption of the National Electrical Code to set the standard by which electrical work in the city of Syracuse should be done does not violate the constitutional rights of petitioner as an unlawful delegation of power, and the city was entitled to a preliminary injunction to enjoin petitioner from performing any electrical work on the ground that petitioner had not been licensed and had failed the required examination on three separate occasions. Syracuse v Penny, 59 Misc. 2d 818, 300 N.Y.S.2d 679, 1969 N.Y. Misc. LEXIS 1637 (N.Y. Sup. Ct. 1969).

41. Insurance (subds. 29 and 29-a)

City of New York, by enacting Domestic Partners Law, which extends health and other benefits to domestic partners of city employees, did not transform domestic partnership into form of common-law marriage and thus did not impinge on state's exclusive right to regulate institution of marriage since there are enormous differences between marriage and domestic partnership. Slattery v City of New York, 266 A.D.2d 24, 697 N.Y.S.2d 603, 1999 N.Y. App. Div. LEXIS 11158 (N.Y. App. Div. 1st Dep't 1999), app. dismissed, 94 N.Y.2d 897, 706 N.Y.S.2d 699, 727 N.E.2d 1253, 2000 N.Y. LEXIS 231 (N.Y. 2000), app. dismissed, 95 N.Y.2d 823, 712 N.Y.S.2d 907, 734 N.E.2d 1208, 2000 N.Y. LEXIS 1865 (N.Y. 2000).

City of New York did not violate state or public policy by enacting Domestic Partners Law, which extends health and other benefits to domestic partners of city employees, where state has extended certain derivative health benefits to domestic partners of state employees and has allowed nonstate agencies that participate in state's health insurance program to offer same coverage to domestic partners of their employees. Slattery v City of New York, 266 A.D.2d 24, 697 N.Y.S.2d 603, 1999 N.Y. App. Div. LEXIS 11158 (N.Y. App. Div. 1st Dep't 1999), app. dismissed, 94 N.Y.2d 897, 706 N.Y.S.2d 699, 727 N.E.2d 1253, 2000 N.Y. LEXIS 231 (N.Y. 2000), app. dismissed, 95 N.Y.2d 823, 712 N.Y.S.2d 907, 734 N.E.2d 1208, 2000 N.Y. LEXIS 1865 (N.Y. 2000).

City of New York did not exceed its authority by enacting Domestic Partners Law, which extends health and other benefits to domestic partners of city employees, including retired and deceased employees, where (1) CLS Gen City § 20(29) empowers city to enter into insurance contracts or health plans that "shall permit any . . . employee . . . who is paid out of the city treasury voluntarily to subscribe to a plan or plans providing for medical and surgical services and hospital service to such . . . employees and their families," (2) term "family" has been defined expansively in context of eviction protection laws, (3) there was no reason to adopt more limited definition of "family in present context, and (4) CLS Gen City § 20(29-a) refers to "the widowed spouses and dependent children" of retired or deceased employees. Slattery v City of New York, 266 A.D.2d 24, 697 N.Y.S.2d 603, 1999 N.Y. App. Div. LEXIS 11158 (N.Y. App. Div. 1st Dep't 1999), app. dismissed, 94 N.Y.2d 897, 706 N.Y.S.2d 699, 727 N.E.2d 1253, 2000 N.Y. LEXIS 231 (N.Y. 2000), app. dismissed, 95 N.Y.2d 823, 712 N.Y.S.2d 907, 734 N.E.2d 1208, 2000 N.Y. LEXIS 1865 (N.Y. 2000).

Since neither the Department of Personnel of the City of New York nor its chief administrator has the authority to reduce the benefits available to the city's employees under the city's hospitalization contract pursuant to the authority to administer such hospitalization contract (General City Law, § 20, subd 29), a letter signed by the chief administrator purporting to exclude hospitalization benefits under the contract when mandatory no-fault benefits are available, is ineffective to limit hospitalization coverage and does not reduce the hospitalization benefits which plaintiff is entitled to receive pursuant to the applicable contract which contains no such exclusion of benefits. Bellmon v Blue Cross & Blue Shield of Greater New York, 98 Misc. 2d 445, 414 N.Y.S.2d 86, 1979 N.Y. Misc. LEXIS 2094 (N.Y. Civ. Ct. 1979).

NYC Local Law No. 27, which entitles registered domestic partners of current and retired city employees to certain medical, health and retirement benefits, does not constitute impermissible legislation in area of marriage and domestic relations which is under exclusive jurisdiction of state legislature. Slattery v City of New York, 179 Misc. 2d 740, 686 N.Y.S.2d 683, 1999 N.Y. Misc. LEXIS 35 (N.Y. Sup. Ct.), transferred, 93 N.Y.2d 883, 689 N.Y.S.2d 426, 711 N.E.2d 640, 1999 N.Y. LEXIS 692 (N.Y. 1999).

City and mayor did not exceed their authority by enacting NYC Local Law No. 27, entitling registered domestic partners of current and retired city employees to certain medical, health and retirement benefits in that (1) power conferred by CLS NY Const Art IX § 2 on local governments to determine salary of employees encompasses such benefits, (2) CLS Gen City § 20(29) authorizes city to furnish medical benefits to current city employees "and their families," which is not restricted to those who have formalized their relationship by obtaining marriage certificate or adoption order, and (3) CLS Gen Mun § 92-a(2) gives city power to offer medical and related services or insurance to retired employees and their families. Slattery v City of New York, 179 Misc. 2d 740, 686 N.Y.S.2d 683, 1999 N.Y. Misc. LEXIS 35 (N.Y. Sup. Ct.), transferred, 93 N.Y.2d 883, 689 N.Y.S.2d 426, 711 N.E.2d 640, 1999 N.Y. LEXIS 692 (N.Y. 1999).

42. Traffic control (subd. 32)

City was entitled to summary judgment in action for slip and fall on icy sidewalk while plaintiff was attempting to place money in parking meter maintained by city where (1) city's maintenance of parking meters was proper exercise of its police power and thus governmental rather than proprietary function, (2) in absence of prior written notice or showing that city affirmatively caused or created dangerous condition, its failure to timely remove accumulations of ice or snow was not actionable, and (3) provision of city's code requiring abutting landowner to remove snow and ice from sidewalks imposed no tort liability in absence of express provision therefor. Roser v City of Kingston, 251 A.D.2d 936, 674 N.Y.S.2d 877, 1998 N.Y. App. Div. LEXIS 7755 (N.Y. App. Div. 3d Dep't 1998).

Presumed constitutionality of NYC Local Law No. 115, which prohibits commuter vans from dropping off and picking up passengers on bus routes and requires all commuter van passenger service to be prearranged, was not overcome where it bears rational relationship to legitimate governmental purposes of regulating transportation modalities and preventing conditions dangerous to public welfare. Ricketts v City of New York, 281 A.D.2d 245, 722 N.Y.S.2d 25, 2001 N.Y. App. Div. LEXIS 2445 (N.Y. App. Div. 1st Dep't), app. dismissed, 96 N.Y.2d 897, 730 N.Y.S.2d 793, 756 N.E.2d 81, 2001 N.Y. LEXIS 1949 (N.Y. 2001), app. dismissed, 98 N.Y.2d 692, 747 N.Y.S.2d 409, 775 N.E.2d 1289, 2002 N.Y. LEXIS 1991 (N.Y. 2002).

City was entitled to summary judgment dismissing personal injury action where (1) there was no evidence that its alleged negligence in failing to post or replace overhead sign was proximate cause of accident, (2) plaintiff's expert evidence was speculative and conclusory, and (3) photos and sign card from city's Bureau of Traffic Operations, on which plaintiff relied, were inadmissible evidence of postaccident repairs or installations. Sosa v City of New York, 281 A.D.2d 469, 721 N.Y.S.2d 565, 2001 N.Y. App. Div. LEXIS 2375 (N.Y. App. Div. 2d Dep't 2001).

City could enforce its 30-mile-per-hour speed limit without enforcing provision of same ordinance setting maximum fine for violation of speed limit since provision setting maximum fine had been preempted by CLS Veh & Tr § 1180; CLS Veh & Tr § 3002(a) and (b) provides that local laws are void if they conflict with Vehicle and Traffic Law. People v Fried, 153 Misc. 2d 764, 583 N.Y.S.2d 135, 1992 N.Y. Misc. LEXIS 127 (N.Y. City Ct. 1992).

Defendant was not entitled to dismissal of speeding ticket on ground that speed limit was improperly set by city common council, rather than by city traffic commission, since (1) CLS Veh & Tr § 1643 authorizes legislative body of city to establish speed limits, and common council was legislative body of city, and (2) CLS Gen City § 20(32) authorized city to create traffic commission but did not authorize such commission to set speed limits. People v Fried, 153 Misc. 2d 764, 583 N.Y.S.2d 135, 1992 N.Y. Misc. LEXIS 127 (N.Y. City Ct. 1992).

Maximum fine for violation of city speed limit was not limited to $50, notwithstanding provision of CLS Gen City § 20(32) that local traffic commission can set fine of not more than $50 for violations of its rules and regulations, since such statute had nothing to do with speeding violations, which are exclusively governed by CLS Veh & Tr § 1180. People v Fried, 153 Misc. 2d 764, 583 N.Y.S.2d 135, 1992 N.Y. Misc. LEXIS 127 (N.Y. City Ct. 1992).

CLS Veh & Tr § 1180 has preempted local municipal field on fines for violations of speed limits. People v Fried, 153 Misc. 2d 764, 583 N.Y.S.2d 135, 1992 N.Y. Misc. LEXIS 127 (N.Y. City Ct. 1992).

Notwithstanding validity of city ordinance establishing citywide 30 mile per hour speed limit, fine for violation of speed limit was not limited by provision of same ordinance, which set fine for first violation at $50, since CLS Veh & Tr § 1180(h) and (h)(4) preempted local municipal field on speeding fines and made provision of city ordinance regarding fines obsolete. People v Fried, 153 Misc. 2d 764, 583 N.Y.S.2d 135, 1992 N.Y. Misc. LEXIS 127 (N.Y. City Ct. 1992).

New York City Department of Transportation (DOT) has authority to regulate pedestrian and cyclist access to city bridges by posting of signs, and thus court dismissed Article 78 proceeding seeking relief in nature of mandamus to compel DOT to follow proper rule-making procedures before closing lane on Queensboro Bridge to nonmotorized traffic on weekdays between 3:30 p.m. and 8:00 p.m.; petitioners did not establish clear right to relief. Kaehny v Lynn, 172 Misc. 2d 295, 659 N.Y.S.2d 388, 1997 N.Y. Misc. LEXIS 153 (N.Y. Sup. Ct. 1997).

New York City Traffic Rule 4-12(j)(1), barring vehicles from using city streets solely for purpose of displaying commercial advertising, did not impermissibly restrict commercial speech, given government's substantial interest in reducing number of vehicles congesting city streets and fact that regulation was narrowly tailored to fit legislative purpose. People v Target Adver. Inc., 184 Misc. 2d 903, 708 N.Y.S.2d 597, 2000 N.Y. Misc. LEXIS 168 (N.Y. City Crim. Ct. 2000).

34 RCNY 4-12(j)(1), which banned operation or parking of vehicles in New York City for purpose of commercial advertising except for advertising notices appearing on vehicles owned by advertised business, did not impermissibly regulate commercial speech where it was not adopted to suppress any particular advertised message and thus was neutral as to expression's content, it was narrowly tailored to remove class of vehicles from street, and it directly advanced city's interest in promoting traffic safety and alleviating traffic congestion. People v Professional Truck Leasing Sys., 185 Misc. 2d 734, 713 N.Y.S.2d 651, 2000 N.Y. Misc. LEXIS 363 (N.Y. City Crim. Ct. 2000).

Traffic rule that banned operation or parking of vehicles in New York City for purpose of "commercial advertising," except for advertising notices appearing on vehicles owned by advertised business, was not unconstitutionally vague for failing to define "commercial advertising," as such term is well defined by United States Supreme Court commercial speech doctrine, and distinction between prohibited commercial advertising and noncommercial forms of advertising is clear; focus is not on whether fee is charged for advertising on vehicle, but on whether vehicle carries advertising which proposes economic transactions unrelated to business for which that vehicle is used. People v Professional Truck Leasing Sys., 185 Misc. 2d 734, 713 N.Y.S.2d 651, 2000 N.Y. Misc. LEXIS 363 (N.Y. City Crim. Ct. 2000).

43. Repair or removal of unsafe structures (subd. 35)

City's notices and orders designating structures as an immediate danger to the health, safety, and welfare of the general public and ordering demolition constituted "demolition liens" within the meaning of the city's contracts with a tax lien purchaser; the notices and orders arguably were required to be filed with the county clerk's office under this section. Goldstein v Murphy, 267 A.D. 482, 47 N.Y.S.2d 438, 1944 N.Y. App. Div. LEXIS 4757 (N.Y. App. Div.), rev'd, 293 N.Y. 927, 60 N.E.2d 132, 293 N.Y. (N.Y.S.) 927, 1944 N.Y. LEXIS 2333 (N.Y. 1944).

Statute which authorizes cities to adopt ordinances compelling removal of blighted structures, which provides that demolition costs incurred by city should be levied as an assessment against land and which provides that nothing in statute should be construed to amend or affect any applicable local law is a supplemental and not a restrictive statute and does not mandate that cost of city demolition projects be levied as an assessment against land. Buffalo v Dankner, 48 A.D.2d 572, 370 N.Y.S.2d 266, 1975 N.Y. App. Div. LEXIS 9942 (N.Y. App. Div. 4th Dep't), dismissed, City of Buffalo v Dankner, 38 N.Y.2d 826, 382 N.Y.S.2d 1033, 1975 N.Y. LEXIS 3101 (N.Y. 1975).

1966 city ordinance which implemented city charter provision empowering city to recover costs of demolishing unsafe structures either by action or by local assessment and which expressly authorized city to recover demolition costs directly from owners of blighted structures as a supplement to assessing costs against land was valid and not in contravention of 1965 statute which provides that demolition costs should be assessed against the land and which expressly does not affect any existing local law pertaining to same subject matter or restrict city's power to amend existing local law. Buffalo v Dankner, 48 A.D.2d 572, 370 N.Y.S.2d 266, 1975 N.Y. App. Div. LEXIS 9942 (N.Y. App. Div. 4th Dep't), dismissed, City of Buffalo v Dankner, 38 N.Y.2d 826, 382 N.Y.S.2d 1033, 1975 N.Y. LEXIS 3101 (N.Y. 1975).

While petitioner owner, whose building was demolished by city as being dangerous, urged that it was not accorded a fair and impartial hearing, and was deprived of its property without due process of law, because city engineer sat as hearing officer when he had prejudged the matter based on facts of which he had acquired knowledge prior to the hearing, it was clear from building inspector's testimony that the city engineer, in giving formal notice to petitioner that its building was dangerous, was relying on the inspector's report and had made no independent determination that the building was dangerous prior to the hearing. Seven South Main Street, Inc. v Seaboyer, 57 A.D.2d 1031, 395 N.Y.S.2d 257, 1977 N.Y. App. Div. LEXIS 12333 (N.Y. App. Div. 3d Dep't), app. denied, 42 N.Y.2d 809, 1977 N.Y. LEXIS 3877 (N.Y. 1977).

Substantial evidence supported city engineer's determination that petitioner's building was dangerous and had to be repaired or demolished, including evidence that petitioner's building was interconnected with several other buildings with common walls, that two of those structures had already collapsed on each other, and that one of the collapsed buildings had a common wall with petitioner's building. Seven South Main Street, Inc. v Seaboyer, 57 A.D.2d 1031, 395 N.Y.S.2d 257, 1977 N.Y. App. Div. LEXIS 12333 (N.Y. App. Div. 3d Dep't), app. denied, 42 N.Y.2d 809, 1977 N.Y. LEXIS 3877 (N.Y. 1977).

In an action brought by the city seeking the demolition of certain structures, a precept would be issued directing demolition where the structures and premises were structurally unsafe, dangerous, and a fire hazard. New York v Unsafe Bldgs. Rose-Polly Properties, Inc., 88 A.D.2d 924, 451 N.Y.S.2d 170, 1982 N.Y. App. Div. LEXIS 17263 (N.Y. App. Div. 2d Dep't), aff'd, 57 N.Y.2d 929, 457 N.Y.S.2d 240, 443 N.E.2d 488, 1982 N.Y. LEXIS 3805 (N.Y. 1982).

A building inspector's order that a certain building should be demolished on the ground it was unsafe was properly upheld, where the record contained substantial evidence that the building suffered severe damage from racking due to an explosion in a nearby building, which racking resulted in the destabilization of significant portions of the load-bearing southerly wall and other walls connecting therewith, and although the building inspector did not consider the alternative of repair, but upon an evaluation of the building in its total context determined that it constituted an actual and immediate danger that should be addressed by the removal of the building, the matter was properly left to the judgment of the building inspector, based upon the facts as he perceived them as an individual experienced in architectural and engineering matters, where there were no official guidelines or criteria to determine whether or not a building should be demolished. Berncolors-Poughkeepsie, Inc. v Poughkeepsie, 96 A.D.2d 595, 465 N.Y.S.2d 548, 1983 N.Y. App. Div. LEXIS 19126 (N.Y. App. Div. 2d Dep't), app. dismissed, 60 N.Y.2d 701, 1983 N.Y. LEXIS 6248 (N.Y. 1983).

In proceeding under CLS Gen City § 20(22) to direct owner to allow city petitioners to enter his house to perform structural repairs so that work on nearby construction project could resume, court properly denied owner's motion to compel petitioners to make further repairs under stipulation of settlement until after resolution of all causation issues in related tort action commenced by owner against petitioners where stipulation only obligated petitioners to restore house to condition that it was in before start of construction project. City of New York v Barry, 273 A.D.2d 380, 710 N.Y.S.2d 917, 2000 N.Y. App. Div. LEXIS 7044 (N.Y. App. Div. 2d Dep't 2000).

In action by city to recover cost of removing asbestos from city buildings, there was de facto merger between first company and defendant sufficient to impose successor liability on defendant where (1) when defendant bought first company's building materials business, first company was in liquidation and soon dissolved, (2) first company had no substantial assets left after purchase, and (3) at minimum, there was cessation of first company's ordinary business coupled with continuation by defendant of purchased business at same physical location and with same assets, general business operation, and many of same employees. City of New York v Aaer Sprayed Insulations, 281 A.D.2d 228, 722 N.Y.S.2d 20, 2001 N.Y. App. Div. LEXIS 2460 (N.Y. App. Div. 1st Dep't 2001).

The action of the Board of Estimates in adopting a resolution changing the city map was legislative in character and not subject to attack in a proceeding for removal of structures and for restoration of streets. Asness Bros. v New York, 5 Misc. 2d 779, 160 N.Y.S.2d 733, 1957 N.Y. Misc. LEXIS 3493 (N.Y. Sup. Ct.), aff'd, 4 A.D.2d 677, 164 N.Y.S.2d 994, 1957 N.Y. App. Div. LEXIS 5269 (N.Y. App. Div. 2d Dep't 1957).

The decision of the Board of Zoning Appeals denying petitioner's application for a permit to construct a service station was arbitrary and capricious, where the Board's decision was based on a finding that the area was adequately served by existing facilities, since only in the event the board found the proposed use to be dangerous and detrimental to the public and to the property values nearby that the lack of need for the proposed use could be considered. Pomerantz v Lehmann, 55 Misc. 2d 315, 285 N.Y.S.2d 188, 1967 N.Y. Misc. LEXIS 1122 (N.Y. Sup. Ct. 1967).

New York City, which hired contractor to demolish building pursuant to its emergency police powers (NYC Admin Code §§ 26-235 et seq.) without notifying current owner that building was "unsafe" and scheduled for demolition, was liable as trespasser for injuries sustained by worker during demolition work. Holman v City of New York, 181 Misc. 2d 15, 691 N.Y.S.2d 739, 1999 N.Y. Misc. LEXIS 198 (N.Y. Civ. Ct. 1999).

City, which hired contractor to demolish building, was liable under common law and CLS Labor §§ 200, 240(1) and 241(6) for injuries sustained by worker during demolition work where (1) property owner had no supervision or control over demolition contractor, and (2) evidence established that demolition was negligently performed by or under city's direction and control, and that city and demolition contractor failed to enforce Industrial Code provisions regarding disposal of debris (12 NYCRR §§ 23-1.7, 23-2.1 and 23-3.3). Holman v City of New York, 181 Misc. 2d 15, 691 N.Y.S.2d 739, 1999 N.Y. Misc. LEXIS 198 (N.Y. Civ. Ct. 1999).

Preliminary injunctive relief was appropriate where (1) New York City Health and Hospitals Corporation (HHC) failed to obtain city council's consent before constructively surrendering HHC facility to New York City, allegedly because HHC lacked funds to make necessary repairs, and (2) city apparently precluded structural engineer retained by city council from conducting on-site inspection of facility buildings, thereby preventing city council from gathering facts sufficient to prepare for unsafe building proceeding under NYC Admin Code § 26-239(b). Council of City of New York v Giuliani, 183 Misc. 2d 799, 705 N.Y.S.2d 801, 1999 N.Y. Misc. LEXIS 639 (N.Y. Sup. Ct. 1999).

44. Miscellaneous

Court properly dismissed Article 78 petition to annul determination of New York City Commissioner of Consumer Affairs, fixing maximum allowable rates for commercial refuse collection, since commissioner had rational basis for setting petitioner's profits as percentage of operating costs, without including "tipping" fees, even though profits previously had been calculated based on inclusion of tipping fees, where (1) petitioners' operating costs were $6 per cubic yard, (2) tipping fees had increased from $12 per cubic yard to $40 per cubic yard over short period of time, and (3) increase in tipping fees was unrelated to amount of work performed by petitioners. Presidents' Council of Trade Waste Ass'ns v New York, 159 A.D.2d 428, 553 N.Y.S.2d 665, 1990 N.Y. App. Div. LEXIS 3081 (N.Y. App. Div. 1st Dep't 1990).

Failure of city court, which was component of state unified court system, to revoke bench warrant did not render city liable for false arrest and imprisonment. Shea v County of Erie, 202 A.D.2d 1028, 609 N.Y.S.2d 473, 1994 N.Y. App. Div. LEXIS 3406 (N.Y. App. Div. 4th Dep't 1994).

Court properly dismissed Article 78 petition to invalidate New York City Department of Consumer Affairs' Home Improvement Business Trust Fund, and to recover contributions made by contractors, since fund comported with goals of NYC Admin Code § 20-115 whereby legislature intended to extend protection available to victims of unfair practices by contractors as fully as possible, and legislature expressly contemplated that compliance with § 20-115 might be achieved by methods other than traditional bond. Brooklyn Gen. Contracting Co. v Green, 205 A.D.2d 314, 613 N.Y.S.2d 15, 1994 N.Y. App. Div. LEXIS 5823 (N.Y. App. Div. 1st Dep't 1994).

The power of a city to directly operate a foreign trade zone obtained under a federal grant does not carry with it as incidental a concomitant right to operate it through the medium of a contract which diverts possession or use of grant to private corporation for private business, in absence of legislative flat. American Dock Co. v New York, 21 N.Y.S.2d 943, 174 Misc. 813, 1940 N.Y. Misc. LEXIS 2033, 1940 N.Y. Misc. LEXIS 2686 (N.Y. Sup. Ct. 1940), aff'd, 261 A.D. 1063, 26 N.Y.S.2d 704, 1941 N.Y. App. Div. LEXIS 8753 (N.Y. App. Div. 1941).

Taking of property by New York City Transit Authority comported with due process where landowner had notice of hearing and full opportunity to be heard before New York City Site Selection Board; landowner was not entitled to notice of transit authority's site recommendations, nor to a hearing prior to mayor's approval of site, authority of Site Selection Board and mayor to choose site was not an illegal delegation of legislative power, members of Site Selection Board properly authorized deputies to act for them, and question of necessity and expediency of choice of site was not subject to judicial review. 6419 New Utrecht Realty Corp. v New York City Transit Authority, 76 Misc. 2d 711, 351 N.Y.S.2d 589, 1974 N.Y. Misc. LEXIS 2006 (N.Y. Sup. Ct. 1974).

NYC Local Law No. 93, which added name "Kudirat Abiola Corner" to street corner in New York across from building owned by Nigerian government to commemorate slain wife of jailed Nigerian dissident, was not irrational or arbitrary on ground that it constituted "insult" to government of Nigeria and, as such, was disruptive, arbitrary and injurious; New York City has right to name its own streets, and it is not court's function to question whether street corner naming was sufficiently appropriate or discreet. Opusunju v Giuliani, 175 Misc. 2d 541, 669 N.Y.S.2d 156, 1997 N.Y. Misc. LEXIS 657 (N.Y. Sup. Ct. 1997).

Combined proceeding pursuant to N.Y. C.P.L.R. art. 78 and action for declaratory judgment alleging that the third, fourth, and fifth extensions of the option agreements violated the New York State Environmental Quality Review Act, N.Y. Envtl. Conserv. Law art. 8, failed as a City did not have eminent domain power where a proposed solid waste disposal site was located under N.Y. Gen. City Law § 20, and the municipality in which the site was located was opposed to a facility there, so the extensions of the options to purchase the site were necessary to keep the site as a possible site; the use of options and extensions were not actions that set a definite course under N.Y. Comp. Codes R. & Regs. tit. 6, § 617.2(b)(2). Matter of Marshall v City of Albany, 45 A.D.3d 1064, 845 N.Y.S.2d 855, 2007 N.Y. App. Div. LEXIS 11693 (N.Y. App. Div. 3d Dep't 2007).

City had authority to maintain a cause of action against defendants for alleged violations of the Clean Water Act, trespass, and nuisance, because it was clear that the city council had expressed its consent to bringing the lawsuit. City of Newburgh v Sarna, 690 F. Supp. 2d 136, 2010 U.S. Dist. LEXIS 12269 (S.D.N.Y. 2010), aff'd in part, 406 Fed. Appx. 557, 2011 U.S. App. LEXIS 1232 (2d Cir. N.Y. 2011).

Agency Opinions

Analysis

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23. Terms and conditions of employment for city employees (subd. 17)
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33. Particular regulations; prohibition of particular business or use
34. —Other matters
35. Sewer rents (subds. 26 and 26-a)
36. Insurance (subds. 29 and 29-a)
37. Traffic control (subd. 32)
38. Reimbursement of officers and employees for official travel (subd. 33)
39. Repair or removal of unsafe structures (subd. 35)
40. Miscellaneous

1. Power of city to contract, defend and maintain actions (subd. 1)

City of Glens Falls may retain expert to value its watershed properties outside city. Compensation for such expert on a contingent basis discussed 1955 NY Ops Atty Gen Feb 23 (Informal), 1955 N.Y. AG LEXIS 169.

A common council of a city may enter into a contract for the removal and disposal of garbage and trash for five years even though the contract will extend beyond the terms of office of its members. 1955 Op St Compt No. 55–7676.

Where the board of health awarded a contract for spraying of a city dump, but the mayor and the city engineer changed the contract, due to defective specifications and increased the requirements under the contract for the first spraying, and the contract price was thereby increased, the board should execute a new contract and rescind the old one. However, the board could ratify the actions of the mayor and the engineer, and approve payment of the first spraying. 1959 Op St Compt 59–607.

A city may enter into a contract with a professional person as an independent contractor to provide services for the purpose of promoting economic growth and development, including promotion of the city for industry, tourism, recreation, etc. 1978 Op St Compt No. 78–295.

It would appear that a school district may agree to waive or release restrictive covenants it placed in a deed to a city, in exchange for the city agreeing to indemnify the school district and school board members for liability arising out of such waiver or release. 1979 Op St Compt No. 79–414.

Under its general authority to compromise or settle claims arising under city contracts, city may waive imposition of penalties arising from property owner's nonpayment of water rents in context of compromising claim asserted by property owner relative to accuracy of his water bill. 1988 Op St Compt No. 88-71, 1988 N.Y. Comp. LEXIS 64.

2. Power of city to acquire and hold real property (subd. 2)

The City of Cortland may finance construction of a dome or covering over existing tennis facilities located in a public park by means of a subscription plan which would entitle subscribers to reserve playing times ten years in advance. 1982 Op St Compt No. 82-289, 1982 N.Y. Comp. LEXIS 443.

A transaction whereby a not-for-profit corporation, without competitive bidding, constructs a public facility for use by a municipal corporation in the performance of its governmental functions and the municipal corporation acquires use of the facility under a lease agreement and has an option to purchase: (a) does not constitute indebtedness for purposes of the State Constitution and Local Finance Law if the lease agreement has an executory clause making the municipal corporation's obligation contingent on annual appropriations, although it is doubtful that a clause providing that, if the municipal corporation fails to appropriate money for the lease payments, the municipal corporation agrees not to purchase, lease or rent property to perform the same functions as the facility, would be enforceable; (b) constitutes a prohibited installment purchase contract if the total character of the transaction is that of a purchase rather than a lease; and (c) violates the competitive bidding requirements of General Municipal Law §§ 101, 103, if the total character of the transaction constitutes a contract for public work of the municipal corporation. 1991 Op St Compt No. 91-13, 1989 N.Y. Comp. LEXIS 53.

3. —Acquisition of land for sewerage treatment purposes

Cities, counties, towns and villages may (a) accept industrial wastes for treatment; (b) require pretreatment of industrial wastes; (c) refuse wastes from particular users; and (d) refuse wastes from any community not complying with the applicable area-wide waste treatment plan. 1978 N.Y. Op. Att'y Gen. No. 46, 1978 N.Y. AG LEXIS 51.

A municipality has the power of eminent domain to condemn real estate outside its territorial limits for the construction of a municipal sewerage disposal and treatment plant, irrespective of the zoning restrictions of the municipality in which the condemned real estate is located when the site is approved under the comprehensive plan of the State for the abatement and prevention of pollution. 1967 Op St Compt No. 67–156.

4. —Acquisition of property outside city limits

A city may accept a tract without city limits for forest purposes under § 21. 1925 N.Y. Op. Att'y Gen. No. 103.

A city can purchase land outside city limits for airport. 1927 N.Y. Op. Att'y Gen. No. 96.

A city may purchase real property without the limits of the city for municipal purposes. A town may enter into an agreement with a city for use of the city dump on such terms as may be agreed upon. 1959 NY Ops Atty Gen Oct. 27 (Informal), 1959 N.Y. AG LEXIS 229.

This section authorizes every city in the state to take, purchase, and hold real property outside its limits and does not limit the purchase to certain purposes or uses, hence such land can be purchased for a sewage disposal plant. 1962 NY Ops Atty Gen June 8 (Informal), 1962 N.Y. AG LEXIS 143.

The City of Port Jervis may not lease, for recreational purposes, a paddle tennis facility located outside the city limits. 1978 NY Ops Atty Gen Oct 2 (Informal), 1978 N.Y. AG LEXIS 364.

A City has the authority to regulate portions of a City park located in an adjacent Town. Town police have the authority to enforce the City park ordinance in those portions of the park located in the Town, but City police may do so only acting as private citizens. Jurisdiction over violations of the City park ordinance occurring in the area involved is in the Town Court and not in the City Court. 1980 NY Ops Atty Gen July 17 (Informal), 1980 N.Y. AG LEXIS 85.

The City of Gloversville Water Department may acquire title to water mains located outside the City pursuant to a contractual agreement without the necessity of the execution and recording of a deed or deeds. 1980 Op St Compt No. 80–719.

5. —Disposition of property held by city

The consent of the Legislature is necessary for a municipality to dispose of property held for public use. 1952 NY Ops Atty Gen (Informal) July 31, 1952 N.Y. AG LEXIS 272.

The terms of a city ordinance requiring that a sale of city-owned real property be at public auction and subject to referendum must be complied with 1953 NY Ops Atty Gen Mar 24 (Informal), 1953 N.Y. AG LEXIS 216.

Property held by a city for a public use may not be disposed of without the consent of the Legislature. 1954 NY Ops Atty Gen July 16 (Informal), 1954 N.Y. AG LEXIS 319.

The provision in subd. 2 of this section declaring "land under water" to be inalienable extends to lands formerly under water

but now filled in, making an enabling act by the State Legislature necessary for conveyance of such lands. 1961 NY Ops Atty Gen July 26 (Informal), 1961 N.Y. AG LEXIS 124.

Under subds. 2 and 7 of this section, real property used for public purposes is inalienable. 1963 NY Ops Atty Gen Jan 2 (Informal), 1963 N.Y. AG LEXIS 50.

City waterfront property may not be sold without a special act of the Legislature but it may be leased without such an act. If city waterfront property is leased, the consideration must be adequate. A city may amend General City Law § 23 subd 2 par b as to the manner of selling or leasing city property. 1980 NY Ops Atty Gen May 12 (Informal), 1980 N.Y. AG LEXIS 124.

The City of Ithaca may not exchange real property owned by the city for real property owner by an individual. 1957 Op St Compt No. 57–355.

A city has no authority to exchange municipally owned property no longer needed for municipal purposes for privately owned property; nor may a city amend its charter to permit an exchange of such property. 1959 Op St Compt No. 59–654.

A special act of the Legislature is not needed to authorize the sale of city-owned park land and waterfront property to the city community development agency for urban renewal purposes. 1982 Op St Compt No. 82-279, 1982 N.Y. Comp. LEXIS 452.

A city may adopt a local law amending its charter superseding section 23(2)(b) to provide that city-owned real property may be sold at private sale. A city may discontinue a city street if no longer needed for public use and if it owns the fee, sell it as provided in the charter for the sale of real property. 1982 Op St Compt No. 82-299, 1982 N.Y. Comp. LEXIS 427.

6. —Operation of buslines

The City of Jamestown, as owner of a city motor bus transportation system, may contract with either a private individual or a corporation to operate its bus system, and bus operators employed by the operator would not be city employees. 1962 NY Ops Atty Gen June 11 (Informal), 1962 N.Y. AG LEXIS 150.

The City of Troy is empowered to enact legislation regulating the sale of city-owned realty except where the enactment would operate unreasonably to lessen the price without commensurate benefit to the vendor. 1967 NY Ops Atty Gen Oct 17 (Informal), 1967 N.Y. AG LEXIS 134.

Where the power of condemnation has been delegated to it by the State, a city may, by local law, adopt a method of procedure, other than that provided by the Condemnation Law, in the condemnation of real property for public use. Such local law may be subject to permissive referendum and therefore should be adopted pursuant thereto. 1970 NY Ops Atty Gen Nov 18 (Informal), 1970 N.Y. AG LEXIS 130.

Except as otherwise provided in its charter, the City of Tonawanda has capacity to acquire by lease personal property necessary for the performance of its required functions. 1973 NY Ops Atty Gen Mar 12 (Informal), 1973 N.Y. AG LEXIS 45.

Alienation legislation should be sought before parkland is transferred from county to town. 2008 N.Y. Op. Att'y Gen. No. 2008-11, 2008 N.Y. AG LEXIS 12.

City has power to acquire and dispose of real property in accordance with an urban renewal plan for a designated area. 1967 Op St Compt No. 67–906.

7. Leases of space in city buildings (subd. 2-a)

While the City of Yonkers by following the provisions of General City Law, Section 20, subdivision 2-a, may not lease excess space in any building owned by the City for a term exceeding three years, it is authorized to execute such lease for a greater period by following the procedures under Second Class Cities Law, Section 37. 1971 NY Ops Atty Gen May 11 (Informal), 1971 N.Y. AG LEXIS 77.

The rental of space by a city (pursuant to General City Law, § 20(2-a)) under any one lease may not exceed $5,000, but the aggregate rental of several spaces separately leased may be in excess of $5,000. 1973 Op St Compt No. 73–1170.

A municipality is not authorized by General Municipal Law, § 139-c to build or purchase a building for the express purpose of leasing it to a private organization to use as a sheltered workshop. It is proper for a municipality to adapt space in an existing municipally-owned building for lease at fair consideration to a private organization for use as a sheltered workshop provided this space is not being used at all for municipal purposes. A city may not be a comaker or guarantor on a note for a building purchased or erected by the Association for Retarded Children. A city may not make a contribution to the Association for Retarded Children. Association for Retarded Children. 1978 Op St Compt No. 78-1078, 1979 N.Y. Comp. LEXIS 263.

A city may enter into a lease agreement with a not-for-profit corporation for the long term lease of space in an historic building owned by the city whereby the city and the corporation will expend funds for structural and internal improvements. There is no authority for the city to solicit funds to assist in the financing of improvements to be made by it. There is no legal prohibition against the corporation's charging an admission fee for events held in the portion of the building leased by it. 1983 Op St Compt No. 83-230, 1983 N.Y. Comp. LEXIS 255.

8. Power to hold property received by gift (subd. 3)

A town board, under Town Law § 64(17-a) does not have a right to obtain a historical landmark by condemnation or otherwise but might be authorized to acquire such by gift if Town Law § 64(8) is complied with. 1967 NY Ops Atty Gen Apr 24 (Informal), 1967 N.Y. AG LEXIS 68.

$250,000 tax limitation in Charter § 71 the type that may not be removed or raised by local law, if enacted by the Legislature; if amount raised for library purposes is for school library, this should be grouped with appropriations for "school purposes" which are excluded from the $250,000 limitation; amount raised for sanitation purposes (sewer, street cleaning and garbage disposal) may not be classified among the items excluded from such limitation "for board of health purposes." 1945 Op St Compt No. 45–540.

A city may accept an offer to dedicate a private road. If this is done the road becomes publicly owned and snow removal work may be done as part of the city's general maintenance of all municipality owned streets. 1979 Op St Compt No. 79–832.

9. Levy and collection of taxes (subd. 4)

Municipalities may not enter into agreement whereby taxing power is delegated to administrative agency. 1994 N.Y. Op. Att'y Gen. No. 94-5, 1994 N.Y. AG LEXIS 2.

A village may finance or appropriate village funds toward the expenses of a celebration to be held in honor of those who served in the Armed Forces during "World War II," such celebration to be held at a time other than on Memorial Day. 1946 Op St Compt No. 46–601.

A property owner may pay current taxes or water rents to the City of Rome when a previous tax or rent against the property is unpaid and outstanding. 1981 Op St Compt No. 81-95, 1981 N.Y. Comp. LEXIS 800.

10. Power to spend money, pay claims and the like (subd. 5)

It is believed that city funds may properly be expended to commemorate the anniversary of the incorporation of the city 1954 NY Ops Atty Gen July 9 (Informal), 1954 N.Y. AG LEXIS 316.

11. —Payment of equitable claims

If City of Poughkeepsie employees, who are driving city trucks are arrested in a nearby town on charges of operating overweight vehicles, even though they had no knowledge of the overloading, no duties in relation to loading the trucks and no means of weighing their loaded trucks, the Corporation Counsel may not represent them. However, the city could pay claims submitted by them for reimbursement for their losses. 1980 NY Ops Atty Gen Aug 4 (Informal), 1980 N.Y. AG LEXIS 73.

A city may not donate cash prizes to be awarded by a private art association in cooperation with the municipal art commission. 1954 Op St Compt No. 54–7010.

A city, town or village may pay membership dues of its judges in the New York State Association of Magistrates. All prior inconsistent opinions are hereby superseded. 1979 Op St Compt No. 79–848.

A town or village may pay membership dues of its judges in the New York State Association of Magistrates. Opn. No. 79-848 modified. 1979 Op St Compt No. 79–848-A.

There is no violation of Article VIII, § 1 of the State Constitution when a city official is given full-time use of a city-owned vehicle as part of his compensation in exchange for services. Municipal officials who are subject to being called to perform official duties in situations such as emergencies, during hours other than regular established working hours, may be permitted, in the public interest, to use municipal vehicles on a full-time basis to ensure the ready availability of essential city personnel during such situations. 1979 Op St Compt No. 79-850, 1980 N.Y. Comp. LEXIS 374.

As a general rule, there is no contractual obligation on the part of a city to pay the cost of ambulance charges incurred where city firemen or policemen summon ambulances of independent, private companies to the scene of a fire, accident or other emergency. In such an instance, the city would normally not be liable for the negligent acts or omissions of the ambulance company in rendering the services. 1980 Op St Compt No. 80–596.

Where a municipal governing body has determined that the attendance at a dinner business meeting of its own municipal officers with business executives or other municipal or State officers or employees, will serve the interests of the municipality, then the cost of meals consumed by all persons in attendance may be paid for by the municipality as a proper municipal expenditure. Opn No. 75-420 and any other prior inconsistent opinions superseded. 1981 Op St Compt No. 81-38, 1981 N.Y. Comp. LEXIS 859.

A municipal governing board may authorize reimbursement for meals consumed at a business luncheon or dinner if the board determines that the meeting will promote a valid municipal purpose but the board may not authorize reimbursement for the consumption of alcoholic beverages since these may not under any circumstances be considered a proper or necessary municipal expense. 1982 Op St Compt No. 82-213, 1982 N.Y. Comp. LEXIS 517.

Where a city manager intends to incur a business meal expense for a meal to be served at his home he may only receive an advance of funds for such an expenditure if the governing board has authorized it and an itemized voucher must be submitted after the meal, detailing the individuals who attended and the cost of the ingredients used in preparing the meal. 1982 Op St Compt No. 82-298, 1982 N.Y. Comp. LEXIS 432.

A city may not pay the legal fees incurred by a member of the city council for procuring an injunction enjoining the picketing by city employees of his business establishment to protest his vote on a matter affecting a labor contract between the city and the employees. 1984 Op St Compt No. 84-17, 1984 N.Y. Comp. LEXIS 122.

The effect of the amendments to § 208-f of the General Municipal Law, Chapter 415 of Laws of 1982 and Chapter 348 of Laws of 1989, is to permit the special accidental death benefit to be paid to the deceased member's children under the age of 18 in both the situation where the deceased member is divorced at the time of his death and in the situation where the deceased member's spouse predeceases him. Further § 5 of Chapter 415 of the Laws of 1982 provided that payments to the children of deceased member may be made retroactive to September 1, 1978. While it appears that claims of eligible children, either retroactive from September 1, 1978 or thereafter, may be subject to a municipality obligation to interpose an appropriately statute of limitations defense, it should be noted that the 4 month statute of limitations contained in CPLR § 217 (subject to tolling for infancy), which would be applicable to the Article 78 proceeding in the nature of mandamus to compel payment, would not begin to run until there was a demand and a refusal, although a claim may be barred by laches even where no demand has been made if the claimant unreasonably delays in making the appropriate demand. 1990 Op St Compt No. 90-43, 1990 N.Y. Comp. LEXIS 55.

12. Construction, maintenance and discontinuance of streets, parks, sewers and the like (subd. 7)

13. —Alienation of land held for parks

A city may discontinue streets, not constituting part of a park, appearing on its official map and convey the street lands when title to such lands was acquired by the city through proper "in rem" proceedings. 1966 NY Ops Atty Gen Apr 11 (Informal), 1966 N.Y. AG LEXIS 56.

A city may discontinue streets in accordance with such conditions as may be imposed by its charter upon the exercise of such power. 1972 NY Ops Atty Gen Aug 23 (Informal), 1972 N.Y. AG LEXIS 124.

The City of Dunkirk may not authorize the use of park lands for the purpose of public works contracts with drilling companies for the exploration, development and production of gas for its own use without a special act of the Legislature. If such purpose is authorized by a special act, such act may also provide for the method of financing the project. 1976 NY Ops Atty Gen Oct 13 (Informal), 1976 N.Y. AG LEXIS 160.

Real Property dedicated for park purposes not alienable by city without express consent of legislature, even though premises never used as a park. However, city must first establish valid title, as dedication alone does not pass title. 1979 NY Ops Atty Gen July 17 (Informal), 1979 N.Y. AG LEXIS 89.

The City of Fulton may discontinue use of city real property as a street. City owned real property, under the provisions of the Fulton City Charter, may be sold or leased only at public auction to the highest bidder. 1981 N.Y. Op. Att'y Gen. No. 81–191, 981 N.Y. AG LEXIS 139.

City, periodically, may close streets in city park, provided that closures do not restrict access to park. 1986 NY Ops Atty Gen No. 86-60, 1986 N.Y. AG LEXIS 23.

City cannot abolish state-created water board or provide that water board commissioners be appointed by city officials. 2007 N.Y. Op. (Inf.) Att'y Gen. 6, 2007 N.Y. AG LEXIS 9.

Under city charter, city chamberlain does not have authority to determine amount of surplus funds held by state-created water board, and city lacks authority to amend charter to give city chamberlain such power. 2007 N.Y. Op. Att'y Gen. No. 2007-6, 2007 N.Y. AG LEXIS 9.

A municipality may not alienate park property without the consent of the Legislature. 1956 Op St Compt No. 56–8219.

When a city holds land in fee for park purposes, subject to condition that such land must always be used for such purposes, and there is a valid executory interest subject to vesting upon failure of such condition, use of the land for park purposes may be discontinued only by act of the Legislature subsequent to release of the executory interest to the city, but once the executory interest has been released, the city, with legislative authorization, may convey or lease the land for library purposes. 1963 Op St Compt No. 63–865.

When determining its water rents, a city may include as part of the operating expenditures an item for water rents which are anticipated to be uncollectible. 1979 Op St Compt No. 79–755.

14. Control and regulation of waterfront, docks and other facilities (subd. 8)

The City of Newburgh may lease its water front property and public improvements thereon to a private concern so long as the benefit accrues to the public and the municipality retains ownership of the water front property and improvements thereon but such lease must satisfy the requirements of New York State Constitution, Article VIII, § 1. 1976 NY Ops Atty Gen March 16 (Informal), 1976 N.Y. AG LEXIS 80.

15. Construction, maintenance and discontinuance of bridges, tunnels and ferries (subd. 9)

School buses are not public carriers but are in the nature of private conveyances and thus are not required to obtain a franchise to operate over city streets. 1965 NY Ops Atty Gen Dec 1 (Informal), 1965 N.Y. AG LEXIS 163.

16. Franchises for use of public ways and places (subd. 10)

If the granting of an additional concession is within the scope of the original grant in a concession agreement entered into after competitive bidding, it may be accomplished without further advertising for bids. Construction of an improvement on municipal property by a licensee may be considered to be a municipal public works project under certain circumstances. 1981 Op St Compt No. 81–754.

17. Construction of public buildings and works and assessment of costs (subd. 11)

The Common Council of the City of Tonawanda upon proper notice is authorized on its own motion by a two-thirds vote of all

of its members to provide for the paving of City streets and assessing the full cost for such paving against the abutting landowners. 1977 NY Ops Atty Gen Dec 1 (Informal), 1977 N.Y. AG LEXIS 358.

A city may not contract to pay a portion of the moneys received from public subscriptions to build a city hospital, to a private agency soliciting such subscriptions. A city may not agree to underwrite the expenses of private committees seeking such subscriptions. 1947 Op St Compt No. 47–347.

A city may erect bulkheads outside the city limits for flood control and may charge the cost of construction as a special assessment against the property of a non-profit hospital whose property is benefited. 1967 Op St Compt File #693.

(1) There is no time limitation within which the city must assess the cost of an improvement. (2) The city council may not retroactively relieve property owners of an assessed charge for an improvement where the construction has already taken place and where the assessment roll has been completed. (3) It would not be possible to premise legislation retroactively relieving property owners of the assessments in this situation upon the theory of moral obligation. 1979 Op St Compt No. 79–479.

If the granting of an additional concession is within the scope of the original grant in a concession agreement entered into after competitive bidding, it may be accomplished without further advertising for bids. Construction of an improvement on municipal property by a licensee may be considered to be a municipal public works project under certain circumstances. 1981 Op St Compt No. 81–754.

18. Fire prevention and firefighting (subds. 12 and 12-a)

The positions of member of Glens Falls city council and firefighter in the Glenns Falls city fire department are incompatible, and therefore a person may not serve simultaneously in such office or positions. 1990 N.Y. Op. Att'y Gen. No. I90-15.

City empowered to acquire fire apparatus by gift or otherwise, to pay cost of maintenance and operation thereof, to pay rent for housing such apparatus and to have volunteer firemen fight fires. Contract may be made for such fire-fighting force to serve area in another city. 1947 Op St Compt No. 47–445.

A city may not enter into an agreement with a private individual or organization for the purpose of providing fire protection for a consideration without express statutory approval. 1968 Op St Compt No. 68–579.

Unless a city charter or the rules and regulations of the fire department provide otherwise, a city fireman may engage in firemanic duties outside his regular duty hours for a private organization and be compensated therefor. 1968 Op St Compt No. 68–579.

Villages, fire districts or cities may require that persons elected to membership in a volunteer fire company satisfactorily complete a physical examination. The cost of such a physical examination may be assumed by the respective municipality. l969 Op St Compt No. 69–597.

Where city volunteer firemen perform boating rescue work on the river adjoining the city, the city may not charge rescued persons or boat owners a rescue services fee nor may it impound rescued boats or charge for any damages to rescue equipment sustained during the course of rescue operations. 1972 Op St Compt No. 72–722.

It would seem that the provisions of a city fire prevention code, including restrictions therein with respect to blasting operations, are not applicable to the construction of a new school building for the city school district. 1977 Op St Compt No. 77–232.

Discussion of tuition reimbursement for paid city firemen who are also eligible to receive such reimbursement as a veteran's benefit. 1978 Op St Compt No. 78–493.

19. Enforcement of laws and regulation and licensing of businesses (subd. 13)

20. —Particular licensing requirements

The licensing of "masseurs" and "masseuses" and the regulation of their practice has been preempted by the State of New York by virtue of provisions contained in the Education Law and the City of Schenectady is not authorized to adopt an ordinance requiring persons to carry on the business of "massage operator" to be licensed by the City since the use of the title of "masseur" or "masseuse" is restricted to those licensed under the provisions of the Education Law and no person, firm, partnership or corporation is authorized to describe its services in any manner under the title "massage" unless such services as specified under the law are performed by or under the direct supervision of a person duly licensed under said law. Title 8, subarticle 4, section 6512 of Article 130 of the Education Law provides a penalty of a Class A misdemeanor for the unauthorized practice of the massage profession. There are ample provisions in the Penal Law for prosecution of other illegal activities. The physical requirements for the building in which massage parlors may be operated are under the jurisdiction of the Education Department although subject to local zoning, health and building code regulations. 1975 NY Ops Atty Gen Sept 18 (Informal), 1975 N.Y. AG LEXIS 163.

The City of Syracuse is not authorized to either adopt an ordinance or enact a local law which would increase the license fee and charge the license expiration date of a scrap processor as provided for in General Business Law, § 69-f. 1976 NY Ops Atty Gen Dec 17 (Informal), 1976 N.Y. AG LEXIS 193.

A county may not enact regulations licensing plumbers and electricians. 1955 Op St Compt No. 55–7740.

City may not charge a licensing fee which discriminates against those city residents who pay to have their garbage removed by private collectors. 1968 Op St Compt No. 68–1041.

A city may enact local police legislation requiring the licensing of superintendents of multiple dwellings provided that such legislation is reasonably related to the public health, welfare or safety. 1980 Op St Compt No. 80–748.

21. —Other ordinances and regulations

A city has power to license any business in which motor vehicles are used. 1919 N.Y. Op. Att'y Gen. No. 189.

The city of Niagara Falls may not require a building permit for the erection of the international bridge across the Niagara River or for construction of the custom houses at entrance to the bridge. 1941 N.Y. Op. Att'y Gen. No. 401, 1941 N.Y. AG LEXIS 209.

The City of Rochester has the authority to require hospitals and nursing homes to conform to local building and fire regulations as a condition of being able to operate. 1973 NY Ops Atty Gen July 9 (Informal), 1973 N.Y. AG LEXIS 84.

The City of White Plains, for the promotion of the health, safety, and welfare of the community, may adopt an ordinance in the exercise of the city's police power prohibiting undesirable acts on school district property without the consent of the school district. 1979 NY Ops Atty Gen June 12. (Informal), 1979 N.Y. AG LEXIS 108.

A second class city may supersede any provision of the Second Class Cities Law except provisions dealing with subjects withheld from local-law power or, if other than property, affairs or government, specifically restricted by the Legislature under its constitutional power. 1983 N.Y. Op. Att'y Gen. No. 83–11, 1983 N.Y. AG LEXIS 85.

A village that uses its meeting hall only occasionally or intermittently may rent it at other periods of time for fair and adequate consideration to private organizations such as the boys scouts. Such a rental must be subject to the stipulation that the village retains the option to use the facility at any time if an unforeseen emergency develops. 1979 Op St Compt No. 79–757.

22. Operation of hospitals, jails and other institutions (subd. 15)

The expense of burial of an indigent person, whose death occurred on a steamer, may be assumed by the city to which the body was taken. 1922 N.Y. Op. Att'y Gen. No. 186.

The City of Syracuse is not mandated to establish or to maintain a city jail. A county sheriff is mandated to receive any person lawfully committed to his custody. 1974 NY Ops Atty Gen July 2 (Informal), 1974 N.Y. AG LEXIS 101.

A city is not prohibited from appointing jailkeepers at the city jail, and said jailkeepers do not have to be police officers, provided that such employees are under the general control of the city police department. 1979 NY Ops Atty Gen May 8. (Informal), 1979 N.Y. AG LEXIS 125.

City of Mount Vernon may not contract with the Mount Vernon Hospital for the furnishing of an emergency room, together with

staff and equipment, in addition to furnishing of ambulance service. 1954 Op St Compt No. 54–7029.

The cost of operation and maintenance of a city jail is an expense of that city, and not of the county in which the city is located. 1968 Op St Compt No. 68–290.

23. Terms and conditions of employment for city employees (subd. 17)

The mayor, aldermen and corporation counsel of Port Jervis, as salaried officers, are not in the absence of local law entitled to reimbursement for expenses incurred in performing their duties. 1963 Op St Compt No. 63–207.

A city council which has the power to appoint a city manager has the implied authority to enter a contract of employment with such manager and this would not abolish, transfer, or curtail any power of an elected officer. But such an employment contract may not be for a term longer than the term of the council since the council may not bind its successors. 1982 Op St Compt No. 82-261, 1982 N.Y. Comp. LEXIS 467.

A city may as part of an officer's compensation give the individual the use of a city owned vehicle which he may employ for both official and personal uses but the city may not agree to reimburse him for all expenses incurred in the use of the vehicle for personal purposes since the compensation he is to receive must be a fixed amount and the city could not ascertain the amount of money which it would be obligated to pay for such personal expenses. Op St Comp No 82-261, 1982 N.Y. Comp. LEXIS 467.

A city governing board possesses the authority to adopt an ordinance or local law requiring that the zoning board of appeals hold monthly meetings on a prescribed day and at a specified hour. Op St Comp No. 84-34, 1984 N.Y. Comp. LEXIS 103.

24. —Automatic deduction of union dues and other contributions from pay

Although there is no statutory provision authorizing municipalities to deduct pledges to charitable organizations from the salaries of municipal employees, local laws may be enacted, under this section, authorizing such deductions. 1961 Op St Compt No. 61–5.

25. —Vacations, sick leaves and other leaves of absence

The common council of Kingston has no power, under Home Rule Law, to change fees of the city marshal during his term of office. 1913 N.Y. Op. Att'y Gen. No. 677.

The granting of annual vacations, sick leaves and leaves of absence to city officers and employees is not mandatory under this section 1953 NY Ops Atty Gen March 3 (Informal), 1953 N.Y. AG LEXIS 207.

Common Council of City of Ithaca may provide for leaves of absence to police officers where death occurs in the family. 1958 NY Ops Atty Gen Oct 23 (Informal), 1958 N.Y. AG LEXIS 228.

Where the Commissioner of Finance in the City of White Plains is presently appointed by the Common Council of said City the transfer of his budgetary powers to a Budget Director to be appointed by the Mayor with the approval of the Common Council may only be effected by the adoption of a local law by the Common Council by at least the majority affirmative vote of its total voting power followed by its submission to a referendum and its approval by the electors. 1975 NY Ops Atty Gen July 8 (Informal), 1975 N.Y. AG LEXIS 135.

The City Manager of the City of Troy is authorized, pursuant to provisions of the City Charter, to appoint the Corporation Counsel on a part-time basis. 1975 NY Ops Atty Gen Sept 15 (Informal), 1975 N.Y. AG LEXIS 161.

For a discussion of liability of city to reimburse city judge and chief of detectives for expense of defending civil action for false arrest and for damages recovered against them, see 1953 Op St Compt No. 53–6096.

City ordinance authorizing cash payments to employees in commutation of accrued sick leave upon resignation or retirement is invalid. It is questionable whether city may by ordinance authorize a vacation to be taken prior to the termination of employment equal in length to the amount of accrued sick leave 1953 Op St Compt No. 53–6277.

Employees of department of public works may not ordinarily be employed on an overtime basis; however, local law may be adopted authorizing such employment where not prohibited by sections 160 and 220 of the Labor Law. 1955 Op St Compt No. 55–7462.

A city may grant an injured officer or employee a leave of absence with pay. 1957 Op St Compt No. 57–82.

The General Municipal Law authorizes a city to pay a separated employee for unused vacation time. A city may not authorize similar payment for unused sick leave. There is no authority for a city to enter into a collective bargaining agreement with a labor union which claims to represent employees of the city. 1964 Op St Compt No. 64–895.

Where the salaries of a city mayor and city judge are duly increased by ordinance during their terms of office, such ordinance is not subject to a permissive referendum. A local law which was not subject to a permissive referendum may not provide for a "cost-of-living" increase for city councilmen during their terms of office. 1973 Op St Compt No. 73–1170.

Discussion of the power of appointment to the office of city harbor master. 1978 Op St Compt No. 78–322.

A city may, by resolution, provide that the city clerk shall have the additional duties of purchasing agent and it may also enact a local law amending its charter to give the city clerk the additional duties and powers of purchasing agent. 1978 Op St Compt No. 78–472.

Dual employment by the same municipality of the same person in full-time and part-time positions is not prohibited per se under General Municipal Law, § 801, if not otherwise prohibited. 1978 Op St Compt No. 78–946.

The city Director of Public Works is legally required to perform only such functions as are enumerated in the city charter or directed by the common council. The mayor cannot prescribe the director's duties. 1980 Op St Compt No. 80–249.

The Common Council of the City of Hudson has power to eliminate the civil service position of clerk in the elected City Treasurer's office, provided that it is done in good faith for reasons of economy, efficiency, or better service to the public. 1982 Op St Compt No. 82-171, 1982 N.Y. Comp. LEXIS 553.

26. Municipal civil service (subd. 18)

Licensing officials are authorized to consider the fitness of an applicant. In considering the effect of a prior conviction, the licensing officer may deny a license only after making the determinations required by the Legislature. No public hearing is required in making such a licensing determination. N.Y. Op. Att'y Gen. No. 84-37.

Unsalaried city civil service commissioners may be compensated, in the discretion of the city council, for serving as proctors at examinations and for attending meetings of the civil service commission. 1979 Op St Compt No. 79–426.

27. Regulation of manner of transaction of city business (subd. 19)

Mandamus is available to a city council to compel the mayor to execute documents duly authorized by the council and required by law to be signed by the mayor. 1969 Op St Compt No. 69–879.

Discussion of whether the Mayor of the City of Utica has the power to enter into a contract without Common Council approval and bind the city to payment for professional services rendered with respect to examination of the fiscal affairs of the city. 1978 Op St Compt No. 78–1031.

28. Investigation into matters of concern to city (subd. 21)

29. —Subpoena power

The City of White Plains may not by Local Law grant subpoena power to the White Plains Human Rights Commission. 1974 NY Ops Atty Gen June 17 (Informal), 1974 N.Y. AG LEXIS 91.

City's authority to issue subpoenas for testimony of witnesses may extend to non-city entities in course of city's investigation into matters of concern to city or its inhabitants. 2007 N.Y. Op. Att'y Gen. No. 2007-9, 2007 N.Y. AG LEXIS 14.

Power to issue subpoenas under CLS Gen City § 20(21) may encompass authority to issue subpoenas duces tecum. 2007 N.Y. Op. Att'y Gen. No. 2007-9, 2007 N.Y. AG LEXIS 14.

30. Ordinances and penalties as to matters of concern to city (subd. 22)

The City of Rye may not adopt an ordinance or local law prohibiting hunting within the City Limits. However, an ordinance which prohibited the discharge of firearms except by law enforcement officers would likely constitute a reasonable exercise of the police power if its operation were restricted to certain densely populated areas or areas where the discharge of firearms would be hazardous to the general public or to nearby residents. 1972 NY Ops Atty Gen Sept 13 (Informal), 1972 N.Y. AG LEXIS 139.

A city may adopt a local law which imposes a mandatory surcharge for local offenses which are classified as violations under its regulatory code. The penalty, however, must bear a reasonable relationship to the severity of the violation. 1990 N.Y. Op. Att'y Gen. No. I90-22.

Notwithstanding Article 240 of the Penal Law, a city may adopt an ordinance defining acts constituting disorderly conduct and impose a penalty for the violation thereof. 1973 Op St Compt No. 73–895.

Although the law is somewhat unclear, a city may impose a civil as well as a criminal penalty for a violation of its parking ordinance. 1978 Op St Compt No. 78–465.

Wildlife conservation is an area pre-empted by State law, but a municipal ordinance or local law that prohibits trapping within a specified distance of buildings in residential areas might still be a valid exercise of police power. 1978 Op St Compt No. 78-956, 1979 N.Y. Comp. LEXIS 253.

31. Power to enact zoning and other land use regulations (subds. 24 and 25)

32. —Particular regulations

Discussion of amendment of zoning ordinance to provide for creation of a historic district. 1962 NY Ops Atty Gen Mar 14 (Informal), 1962 N.Y. AG LEXIS 92.

The Mayor of the City of Syracuse may remove or suspend members of the City Planning Commission and the Board of Zoning Appeals. 1970 NY Ops Atty Gen March 16 (Informal), 1970 N.Y. AG LEXIS 48.

The provisions contained in General City Law, § 83, providing that, if a proper protest against a proposed amendment to a zoning ordinance be duly filed and acknowledged, such amendment shall not be passed except by a three-fourths vote of the common council, does not apply to the granting of a special permit by the Planning Commission and the Common Council of the City of Syracuse, since the amending of a zoning ordinance is a legislative act, while the granting of a special permit, under the Zoning Rules and Regulations of the City of Syracuse, consists of administrative action. 1974 NY Ops Atty Gen May 23 (Informal), 1974 N.Y. AG LEXIS 82.

A city may adopt an ordinance to provide civil penalties for violations of the State Building Construction Code, except as otherwise expressly provided in article 18 of the Executive Law. 1974 NY Ops Atty Gen Sept 27 (Informal), 1974 N.Y. AG LEXIS 157.

A city, whose local building code legislation is more restrictive than the applicable provisions of the Multiple Residence Law, may adopt local legislation to provide for civil penalties to enforce said local building code. 1975 NY Ops Atty Gen Jan 13 (Informal), 1975 N.Y. AG LEXIS 52.

As a general rule a municipality in the exercise of its governmental, as distinguished from its proprietary, functions is not bound by its own municipal building code. 1980 NY Ops Atty Gen Dec. 2 (Informal), 1980 N.Y. AG LEXIS 37.

A city regulation, prohibiting the keeping of certain fowl or birds and applying the prohibition to persons possessing these animals at the time of enactment, is valid. N.Y. Op. Att'y Gen. No. 85-7.

City is authorized to enact zoning regulations which include procedure for revocation of special permits. 1985 N.Y. Op. Att'y Gen. No. 85-43, 1985 N.Y. AG LEXIS 52.

33. Particular regulations; prohibition of particular business or use

A zoning ordinance would be construed as authorizing construction of an addition to a nonconforming building. A commissioner of buildings may not change the character of a zoning district 1953 Op St Comp No. 53–6274.

34. —Other matters

Legislature has withdrawn localities' authority to use zoning to regulate some defined types of human services; state and local regulation of other types may exist, and federal law, including Fair Housing Amendments Act of 1988, Americans with Disabilities Act, and Rehabilitation Act must be considered in evaluating local zoning laws. 1997 N.Y. Op. Att'y Gen. No. 97-F6, 1997 N.Y. AG LEXIS 56.

35. Sewer rents (subds. 26 and 26-a)

A city may levy a special sewer assessment on property benefited by public sewer installation, notwithstanding the property in question is already served by private sanitary sewer or septic tank. 1964 NY Ops Atty Gen Aug 5 (Informal), 1964 N.Y. AG LEXIS 123.

Under the above sections, while a city is authorized to levy a special sewer assessment on property benefited even though the property is serviced by a septic tank, sewer rents must be fixed on the basis reflecting actual use of the sewerage system by property owners. 1969 NY Ops Atty Gen Aug 25 (Informal), 1969 N.Y. AG LEXIS 75.

A city, by applying the provisions of the Sewer Rent Law or by local law, may collect unpaid sewer rents by adding them to the tax roll and collecting them at the same time and in the same manner as real property taxes. A city by local law may establish the same procedure for collection of unpaid water rents. Subject to due process requirements, city water service may be terminated for nonpayment of water rents. 1981 N.Y. Op. Att'y Gen. No. 81–56, 1981 N.Y. AG LEXIS 97.

In the City of Ithaca water rent must be based on meter consumption of water except where a pre-existing contract provides otherwise. 1958 Op St Compt No. 58–286.

Sewer rentals are improperly charged against properties which have not been connected with the city sewer, and, where they have been paid, the City of Beacon may properly audit and repay claims for the amounts paid. 1961 Op St Compt No. 61–844.

Unless specially excepted, in the enactment establishing water and sewer rents and the penalties for late payment thereof, a school district and a State hospital are subject to the same penalties as private users of those services. 1968 Op St Compt No. 68–295.

Where a city has failed to bill water users for water rents, it may do so, and collect the unpaid rents, upon discovery of the error. 1972 Op St Compt No. 72–683.

Absent contrary provisions in city charter, partial payments may be made on current water and sewer rents. But when water and sewer rents become delinquent and are added to tax roll and levied as taxes, they are collected in same manner as taxes. 1978 Op St Compt No. 78–342.

The City of Kingston may adopt a local law authorizing the Board of Water Commissioners to grant a partial exemption from water rents to senior citizens who earn $6,500 a year or less. 1981 Op St Compt No. 81-8, 1981 N.Y. Comp. LEXIS 890.

A property owner, who was charged and paid for use of a public sewer system to which his property was not connected, is not entitled to a refund of those payments under the Real Property Tax Law. A refund may be available, however, under the provisions of section 20 of the General City Law. 7 Op Counsel SBEA #12 (1979, April 16).

36. Insurance (subds. 29 and 29-a)

A city may pay, as a maximum, only one-half of the cost of accident and hospital insurance of its city officers and employees. 1961 NY Ops Atty Gen Sept 28 (Informal), 1961 N.Y. AG LEXIS 173.

There is no authority for a town to contribute to the cost of Blue Cross hospitalization insurance for its highway employees, as a part of their compensation. 1950 Op St Compt No. 50–4911.

City may contribute up to one-half of the cost of a family medical and surgical hospital policy covering families of employees 1954 Op St Compt No. 54–6485.

In absence of clear statutory authority a village may not contribute toward the cost of group medical insurance for its employees. 1955 Op St Compt No. 55–7203.

There is no general provision of law permitting a city or a county to contribute to the cost of group life insurance for its employees. 1956 Op St Compt No. 56–8141.

A city other than New York City has the choice of proceeding under either § 92-a of the General Municipal Law or § 20, subd. (29) of the General City Law in taking care of hospital and medical insurance and expense for its officers and employees. 1962 Op St Compt No. 62–1016.

A city council which has the power to appoint a city manager has the implied authority to enter a contract of employment with such manager and this would not abolish, transfer, or curtail any power of an elected officer. But such an employment contract may not be for a term longer than the term of the council since the council may not bind its successors. 1982 Op St Compt No. 82-261, 1982 N.Y. Comp. LEXIS 467.

37. Traffic control (subd. 32)

Legislative power to regulate public streets and places for parking and parking meters may not be delegated by the municipality unless expressly authorized by statute. 1964 NY Ops Atty Gen Apr 29 (Informal), 1964 N.Y. AG LEXIS 93.

Cities establishing a system of traffic control as authorized by General City Law § 20, subd 32, must do so strictly in accordance therewith whereupon exclusive power and authority to regulate traffic in that city vests in the body thereby created. 1971 NY Ops Atty Gen Apr 19 (Informal), 1971 N.Y. AG LEXIS 64.

CLS Gen City L § 20(32) does not supersede local legislation establishing city traffic agencies. 1989 N.Y. Op. Att'y Gen. No. 89-33, 1989 N.Y. AG LEXIS 40.

City may authorize policemen to "tag" vehicles for overtime parking. 1946 Op St Compt No. 46–506.

38. Reimbursement of officers and employees for official travel (subd. 33)

City may not reimburse city officer for damage caused by third party to such official's personally owned car while such officer was using such car in performance of his official duties, the city having previously agreed to reimburse such officer at a fixed rate for use of such car in performance of his official duties. 1947 Op St Compt No. 47–422.

A city may reimburse a city officer or employee for the use of his automobile in the performance of his duties within the city. 1958 Op Ct Compt No. 58–73.

City may authorize policemen to "tag" vehicles for overtime parking. 1946 Op St Compt No. 46–506.

39. Repair or removal of unsafe structures (subd. 35)

A village may adopt a local law to remove unsafe or dangerous buildings constituting a nuisance, provided that the local law is consistent with constitutional due process requirements, as, for example, shown by Multiple Dwelling Law, § 309(1)(a) through (f), Multiple Residence Law, § 305(2) or General City Law, § 20(35). 1974 NY Ops Atty Gen Sept 25 (Informal), 1974 N.Y. AG LEXIS 153.

A city board of health may order the abatement of a nuisance and may maintain court actions to enforce its orders and regulations. A city may enact a local law or ordinance providing a procedure pursuant to which the city may compel the removal or repair of unsafe buildings. 1960 Op St Compt File No. 60-145.

The City of Glens Falls may enact a valid ordinance empowering it to require repair or removal of unsafe buildings or structures, if the ordinance complies with constitutional requirements of due process of law. 1962 Op St Compt No. 62–1061.

A city ordinance which provides for repair by the city of private buildings which the city determines present a danger to public health and safety would be invalid if it fails to provide the owner of the building with notice of the alleged defects and an opportunity for a hearing. 1982 Op St Compt No. 82-130, 1982 N.Y. Comp. LEXIS 587.

The City of Niagara Falls may commence a special proceeding against a property owner to recover demolition costs incurred by the city in having an unsafe structure demolished. 1982 Op St Compt No. 82-142, 1982 N.Y. Comp. LEXIS 582.

40. Miscellaneous

The creation of the Newburgh Housing Authority does not pre-empt the City of Newburgh from acquiring property for the purpose of operation of low rent dwelling houses for persons of low income. 1968 NY Ops Atty Gen July 11 (Informal), 1968 N.Y. AG LEXIS 78.

General City Law § 20 authorizes cities of 50,000 or more population to expend funds to establish a publicity fund to further public or municipal purposes. 1979 N.Y. Op. Att'y Gen. No. 37, 1979 N.Y. AG LEXIS 161.

City may enter private property to remove inoperable, unregistered motor vehicle and impose cost of vehicle's impoundment on car's owner or property owner. 1987 N.Y. Op. Att'y Gen. No. 87-39, 1987 N.Y. AG LEXIS 65.

A city may not require all motor vehicle towing businesses to maintain a place of business within the city in order to obtain a license to do any business in the city. 1990 N.Y. Op. Att'y Gen. No. 90-66, 1990 N.Y. AG LEXIS 71.

Municipality by local law may establish exception to common law prohibition on holding incompatible offices where public interest would be served. 1994 N.Y. Op. Att'y Gen. No. 94-2, 1994 N.Y. AG LEXIS 5.

A city may not sell gasoline to private persons. 1946 Op St Compt No. 46–236.

Municipalities may not retain bank stocks acquired upon bank reorganizations. Power to sell same, and procedure therefor outlined. 1946 Op St Compt No. 46–341.

Cities may establish new departments by local law or ordinance. Special charter provisions might authorize establishment of such departments by resolution. 1946 Op St Compt No. 46–430.

Power of city of Beacon to contract for survey of assessed valuations of real property; supersession of Charter sections by local law. 1946 Op St Compt No. 46–517.

Power of city of Rochester to invest certain trust funds; investments of funds of trusts (1) created pursuant to Article 7 of the General Municipal Law, or (2) where private trustees are designated. 1947 Op St Compt No. 47–131.

A city may not sell gasoline to a company which furnishes school buses for transporting children to and from their homes. 1958 Op St Compt No. 58–396.

A city council which has the power to appoint a city manager has the implied authority to enter a contract of employment with such manager and this would not abolish, transfer, or curtail any power of an elected officer. But such an employment contract may not be for a term longer than the term of the council since the council may not bind its successors. 1982 Op St Compt No. 82-261, 1982 N.Y. Comp. LEXIS 467.

Fees so collected pursuant to an invalid ordinance may be refunded upon the adoption of a local law authorizing the payment of equitable claims against the town. 1967 Op St Compt File #765.

A city has the authority to act by resolution or local law to enable it to obtain a landowner's consent to strip a wooded area near the school district high school in order to prevent drug abuse and drug sales by high school students in this wooded area. 1978 Op St Compt File #408.

Discussion of the exercise of police power in a situation in which a so-called "dangerous tree" is located on private property away from sidewalks or streets. 1978 Op St Compt File #617.

Discussion of self-insurance by city for tort claims; "risk-management" plan whereby city pays tort claims up to $250,000 and insurance company pays claims greater than that amount and provides legal and investigatory services; and joint self-insurance by two or more municipalities. 1978 Op St Compt File #636.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 20-d, 20-e, 21, 30-a, 81, 83; CLS Pub A Law § 1206.

Notice of pendency, CLS CPLR Art 65, §§ 6501 et seq.

Local laws prohibiting disposal of earth, soil, refuse, or other solid substance in streams, ponds, or lakes, CLS ECL § 11-0503(6).

Control and maintenance of streets relocated or constructed by board of river regulating district, CLS ECL § 15-2113(3).

Removals and transportation of human remains, CLS ECL § 15-2117(5).

Powers of municipalities with respect to planning for construction of solid waste management facilities, CLS ECL § 27-0507.

Solid waste management facilities, CLS ECL §§ 27-0501 to 27-0511 (Law 1973 chs 399 and 400).

Solid waste recovery and management, CLS ECL §§ 51-0901 et seq.

Local highway safety programs, CLS Exec Law § 333.

Municipal assistance to public authorities furnishing transportation services, CLS Gen Mun Law § 98-b.

Control of aquatic plant growth, CLS Gen Mun Law § 99-j.

Mass transportation and airport and aviation facilities, CLS Gen Mun Law § 119-r.

Creation of conservation advisory council, CLS Gen Mun Law § 239-x.

Surrender of portion of state highway to city, CLS High Law § 10(32).

Maintenance and repair of highways, bridges, and culverts built with county aid, CLS High Law § 131-k.

Responsibility with state of developing plans, etc., to aid the mentally disabled, including alcoholics and narcotic addicts, CLS Men Hyg Law § 1.03.

Availability to local governments of laboratory services at facilities of department of mental hygiene, CLS Men Hyg Law § 9.23.

Fire corporations, CLS N-PCL § 1402.

Payments in aid of lower income elderly persons, CLS Priv Hous Fin Law §§ 31(9), 85-a(7), 126, 577-a.

Tax exemption of state urban development corporation project, CLS Priv Hous Fin Law §§ 93(6), 577(3).

Contracts with state commissioner of health for construction of sewer system, CLS Pub Health Law § 1263-d.

Contracts for consulting engineering services for solid waste management facilities, CLS Pub Health Law § 1383.

Tax abatement for rent controlled property occupied by senior citizens, CLS Real P Tax Law § 467-b.

Uniform ordinances, signs, signals, signal lights and markings, CLS Veh & Tr § 1610.

Duty to provide police, fire, sanitation, health protection and other services to State Urban Development and Research Corporation project, CLS Unconsol Laws Ch 252-A § 8(4).

Law Reviews:

Zoning—Equal Protection—Right of Privacy—Supreme Court Upholds Restrictive Definition of Family in Zoning Ordinance. 60 Cornell L Rev, No. 2, p. 299, January, 1975.

State Land Use Statutes: A Comparative Analysis. 45 Fordham L Rev, No. 5, p. 1154, April, 1977.

Rohan, Property Planning and the Search for a Comprehensive Housing Policy—The View from *Mount Laurel*. 49 St. John's L Rev, No. 4, p. 653, Summer, 1975.

1975 Survey of New York Law: Land Use Control. 27 Syracuse L Rev, No. 1, p. 167, 1976.

1976 Survey of New York Law: Land Use Control. 28 Syracuse L Rev, No. 1, p. 109, Winter, 1977.

1977 Survey of New York Law: Land Use Control. 29 Syracuse L Rev, No. 1, p. 187, Winter, 1978.

Straniere, Land use in New York: an evaluation of policy and performance. 40 Alb. L. Rev. 693.

Costonis, "Fair" compensation and the accommodation power: antidotes for the taking impasse in land use controversies. 75 Colum. L. Rev. 1021.

Legitimate use exclusions through zoning: applying a balancing test. 57 Cornell L. Rev. 461.

Sussna, Land use and zoning: the Staten Island experience. 42 N.Y. State Bar J. 626.

Zoning—standing, the right to travel and exclusionary zoning—phased-growth municipal zoning plan upheld as reasonable exercise of state police power. 50 NYU L Rev 1163.

Inapplicability of municipal zoning ordinances to governmental uses. 19 Syracuse L. Rev. 698.

Fonoroff and Terrill, Controlling traffic through zoning. 21 Syracuse L. Rev. 857.

Local government—a municipality has the power to regulate by local ordinance the emission of air pollutants. 22 Syracuse L. Rev. 1173.

GENERAL CONSTRUCTION LAW

Article
2. Meaning of Terms
2-A. Classification of Corporations and Definitions

HISTORY:
Add, L 1909, ch 27, eff Feb 17, 1909.

ARTICLE 2 Meaning of Terms

Section
20. Day, computation
24. Public holidays; half-holidays.
25-a. Public holiday, Saturday or Sunday in statutes; extension of time where performance of act is due on Saturday, Sunday or public holiday
33. Notice
41. Quorum and majority
60. Newspapers

HISTORY:
Add, L 1909, ch 27, eff Feb 17, 1909.

§ 20. Day, computation

A number of days specified as a period from a certain day within which or after or before which an act is authorized or required to be done means such number of calendar days exclusive of the calendar day from which the reckoning is made. If such period is a period of two days, Saturday, Sunday or a public holiday must be excluded from the reckoning if it is an intervening day between the day from which the reckoning is made and the last day of the period. In computing any specified period of time from a specified event, the day upon which the event happens is deemed the day from which the reckoning is made. The day from which any specified period of time is reckoned shall be excluded in making the reckoning.

HISTORY:
Add, L 1909, ch 27; amd, L 1910, ch 347; L 1952, ch 821, § 3; L 1964, ch 855; L 1965, ch 848, eff Sept 1, 1965; L 1988, ch 172, § 1, eff June 27, 1988.

Editor's Notes Laws 1965, ch 848, § 4, provides:

§ 4. This act shall take effect September first, nineteen hundred sixty–five but shall not apply to or affect contracts or obligations entered into or rights acquired prior to such date.

Committee Comments

1988 Recommendations of the Law Revision Commission:

I. Introduction.General Construction Law § 20 is designed to provide a uniform method of computing periods of time specified for the doing of an act (1952 Leg. Doc. No. 65[D]; 1952 Report, Recommendations and Studies, pp.103,107). * The statute contains basically three rules, only one of which is relevant to this memorandum. That rule provides that where an act is authorized or required to be done within, after or before a two-day period, Saturday, Sunday or a public holiday must be excluded from the computation of the period if such a day falls between the day from which "the reckoning" is made and the last day of the period. For example, suppose a shipping contract provided that a buyer could reject goods shipped, but only if he or she did so within two days of their receipt. If the goods were received on a Monday, and the following Tuesday was a public holiday, the buyer would have up to and including Thursday within which he or she could reject the goods. Monday would be considered the "day from which the reckoning is made," and Wednesday would otherwise be the "last day of the period." Since Tuesday would be an intervening public holiday, it is excluded from the computation of the period.The problem with the statute as now written is that it contains the unnecessary word "in". The pertinent portion of the statute reads as follows: "If such period is a period of two days, Saturday, Sunday or a public holiday must be excluded from the reckoning if it is in an intervening day between the day from which the reckoning is made and the last day of the period." (Emphasis added)The Commission has concluded that the word "in" does not belong as it appears, and that its existence is the result of a scrivener's error which occurred when the statute was amended in 1965 (L 1965, c 848, § 3; compare, L 1964, c 855 § 1). Consequently, the Commission recommends that General Construction Law § 20 be amended by deleting the word "in" from the second sentence. No substantive changes are intended or anticipated by this amendment.

II. The word "in"— A scrivener's error.

The presence of the word "in" in the second sentence of General Construction Law § 20 is most likely the result of a scrivener's error. Three reasons support this conclusion. First, the purpose of the 1965 amendment to § 20 (L 1965,c 848, § 3), at which time "in" first appeared, was to add Saturday to the days excluded from the calculation of two-day periods, within which or before which an act was to be performed. Prior law excluded only Sunday and public holidays. Achieving this goal required nothing more than simply adding the word "Saturday" to the statute, to precede "Sunday", so the statute would read, "If such period is a period of two days, Saturday, Sunday or a public holiday must be excluded …." (Emphasis added) The addition of "in" was unnecessary and inappropriate.

Secondly, the word "in", as it appeared in the Assembly bill preceding the 1965 Amendment just mentioned, was not italicized. This was in contravention of Assembly Rules in effect in 1965 which required that all new matters to be added to or inserted in existing law be printed in italics (1965 Leg. Doc. No. 5, p 7). Consequently, the addition of "in" was apparently not purposeful.

Finally, it makes no sense for the statute to read "… Saturday … must be excluded from the reckoning if it is in an intervening day …."

For these reasons, it seems clear that "in" 's existence is the result of a scrivener's error. Deleting the word would effect no substantive change in the law, but would eliminate a potential source of confusion.

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*The text of General Construction Law § 20 is set forth as follows:

20. Day, computation A number of days specified as a period from a certain day within which or after or before which an act is authorized or required to be done means such number of calendar days exclusive of the calendar day from which the reckoning is made. If such period is a period of two days, Saturday, Sunday or a public holiday must be excluded from the reckoning if it is in an intervening day between the day from which the reckoning is made and the last day of the period. In computing any specified period of time from a specified event, the day upon which the event happens is deemed the day from which the reckoning is made. The day from which any specified period of time is reckoned shall be excluded in making the reckoning.

Notes to Decisions

Analysis

1. In general
2. Computation of time period
3. —Particular examples
4. Effect of Sundays and holidays on computation of time
5. —Half holidays
6. —Time periods measured other than by days
7. —Sundays and holidays as intervening days
8. Fractions of days
9. Miscellaneous

1. In general

Section 58 is by its terms made applicable to the construction of the word "year" in private instruments, and this makes §§ 20 and 30 applicable in construing the word "year." In re Bardol's Will, 253 A.D. 498, 254 A.D. 647, 4 N.Y.S.2d 795, 1938 N.Y. App. Div. LEXIS 8480 (N.Y. App. Div.), aff'd, 278 N.Y. 543, 16 N.E.2d 96, 278 N.Y. (N.Y.S.) 543, 1938 N.Y. LEXIS 1389 (N.Y. 1938).

Neither § 20 nor § 30 relates to the computation of a period of time but only to the construction of the meaning of a number of days within, after or before which an act is authorized, and of the number of months after or before a certain day, and these sections are not applicable to the computation of a period of time generally. In re Bardol's Will, 253 A.D. 498, 254 A.D. 647, 4 N.Y.S.2d 795, 1938 N.Y. App. Div. LEXIS 8480 (N.Y. App. Div.), aff'd, 278 N.Y. 543, 16 N.E.2d 96, 278 N.Y. (N.Y.S.) 543, 1938 N.Y. LEXIS 1389 (N.Y. 1938).

CLS Gen Const § 20 is guideline for statutory and contractual interpretation used in determining when performance is due under specified time constraint and has no application to judicial order which specifically provides otherwise. Property Clerk, New York City Police Dep't v Seroda, 131 A.D.2d 289, 521 N.Y.S.2d 233, 1987 N.Y. App. Div. LEXIS 48921 (N.Y. App. Div. 1st Dep't 1987).

Section 20 applies only where period specified in the statute is fixed in number of days. Jablon v New York, 31 N.Y.S.2d 764, 177 Misc. 838, 1941 N.Y. Misc. LEXIS 2449 (N.Y. Sup. Ct. 1941), aff'd, 268 A.D. 859, 51 N.Y.S.2d 82, 1944 N.Y. App. Div. LEXIS 3886 (N.Y. App. Div. 1944).

The provisions of sections 20 and 30 relate to limitations set forth in private agreements as well as to limitations set forth in statutes. Biloz v Tioga County Patrons' Fire Relief Ass'n, 21 N.Y.S.2d 643, 1940 N.Y. Misc. LEXIS 1993 (N.Y. Sup. Ct.), aff'd, 260 A.D. 976, 23 N.Y.S.2d 460, 1940 N.Y. App. Div. LEXIS 5668 (N.Y. App. Div. 1940); Pomeranz v More, 63 N.Y.S.2d 111, 187 Misc. 383, 1946 N.Y. Misc. LEXIS 2330 (N.Y. Mun. Ct. 1946).

2. Computation of time period

The day from which any specified period of time is reckoned shall be excluded in making reckoning. First day is excluded in computation of years as well as in computation of days, weeks or months. Tismer v New York Edison Co., 228 N.Y. 156, 126 N.E. 729, 228 N.Y. (N.Y.S.) 156, 1920 N.Y. LEXIS 921 (N.Y.), reh'g denied, 228 N.Y. 585, 127 N.E. 923, 228 N.Y. (N.Y.S.) 585, 1920 N.Y. LEXIS 1055 (N.Y. 1920).

The general rule of computation which excludes one of terminal days was not changed by this section. Sunday is excluded only where it is the last day of a specified period. H. E. & S. Transp. Corp. v Checker Cab Sales Corp., 271 N.Y. 239, 2 N.E.2d 642, 271 N.Y. (N.Y.S.) 239, 1936 N.Y. LEXIS 1193 (N.Y. 1936).

When a specific period of time is mentioned in a statute as "within 30 days after the first day of the month," the first day of that month must be excluded in determining time. Bass v Board of Trustees, 226 A.D. 165, 235 N.Y.S. 250, 1929 N.Y. App. Div. LEXIS 8674 (N.Y. App. Div. 1929).

In computing a lapse of time the first day is excluded and the last day is included. Fisk Discount Corp. v Brooklyn Taxicab Trans. Co., 270 A.D. 491, 60 N.Y.S.2d 453, 1946 N.Y. App. Div. LEXIS 3725 (N.Y. App. Div. 1946).

Proper method for computing time periods is to exclude day of event and to include last day up to midnight of that day. Bacalokonstantis v Nichols, 141 A.D.2d 482, 529 N.Y.S.2d 111, 1988 N.Y. App. Div. LEXIS 6305 (N.Y. App. Div. 2d Dep't 1988).

Trial court properly dismissed an indictment for weapons violations on speedy trial grounds where the People were required to be ready for trial within 183 days, but a total of 191 days of pre-trial delay were properly chargeable to the People in keeping with the rule of N.Y. Gen. Constr. Law § 20 that, when computing a period of days, the first day was to be excluded but the last day was to be included. People v DiMeglio, 294 A.D.2d 239, 743 N.Y.S.2d 83, 2002 N.Y. App. Div. LEXIS 5430 (N.Y. App. Div. 1st Dep't 2002).

The general rule in computing time "from" a day, when there is nothing to show contrary intention of the parties, is to exclude the day named and include the last day. Pomeranz v More, 63 N.Y.S.2d 111, 187 Misc. 383, 1946 N.Y. Misc. LEXIS 2330 (N.Y. Mun. Ct. 1946).

This section referring to a period of days excludes Sunday from the reckoning, if the last day falls thereon. Ekas v City Cab Co., 118 N.Y.S.2d 119, 203 Misc. 730, 1953 N.Y. Misc. LEXIS 1442 (N.Y. Sup. Ct. 1953).

The date from which any reckoning of time is made is excluded in making the computation. Ekas v City Cab Co., 118 N.Y.S.2d 119, 203 Misc. 730, 1953 N.Y. Misc. LEXIS 1442 (N.Y. Sup. Ct. 1953).

In computing period of time, general rule of construction is that inception period is to be excluded and termination period included. Leatherby Ins. Co. v Villafana, 82 Misc. 2d 144, 368 N.Y.S.2d 102, 1975 N.Y. Misc. LEXIS 2584 (N.Y. Sup. Ct. 1975).

Whether the period of time in question be measured by days, weeks, months or years, the day from which the reckoning is made must be excluded. Biloz v Tioga County Patrons' Fire Relief Ass'n, 21 N.Y.S.2d 643, 1940 N.Y. Misc. LEXIS 1993 (N.Y. Sup. Ct.), aff'd, 260 A.D. 976, 23 N.Y.S.2d 460, 1940 N.Y. App. Div. LEXIS 5668 (N.Y. App. Div. 1940).

Plaintiff failed to file a timely notice of claim pursuant to N.Y. Gen. Mun. Law § 50-e on a transit authority in relation to a personal injury action, because plaintiff was unable to serve the transit authority on the 89th day, which fell on a Saturday, or the 90th day which fell on a Sunday, and instead, plaintiff served the transit authority on the next succeeding business day as allowed by N.Y. Gen. Constr. Law §§ 20, 25-a. Stewart v New York City Transit Auth., 238 N.Y.L.J. 21, 2007 N.Y. Misc. LEXIS 5436 (N.Y. Sup. Ct. July 12, 2007).

Under § 20 of General Construction Law date of event in question is excluded from computation of limitations period; when applicable limitation period is measured in years, this rule results in anniversary date as last day for instituting action. Evans v Hawker-Siddeley Aviation, Ltd., 482 F. Supp. 547, 1979 U.S. Dist. LEXIS 8012 (S.D.N.Y. 1979).

3. —Particular examples

A life policy issued on March 24, 1945, pursuant to the Insurance Law § 155, which provided that the policy shall be incontestable when in force for 2 years from date of its issue, was controlled by § 20 of the General Construction Law as to computation of days, weeks, months or years and the date of issue would be excluded from computation of time within which rescission action could be brought thereby making March 24, 1947, the last day for action to rescind. Metropolitan Life Ins. Co. v Schmidt, 299 N.Y. 428, 87 N.E.2d 442, 299 N.Y. (N.Y.S.) 428, 1949 N.Y. LEXIS 954 (N.Y. 1949).

An employment contract which provides that a new employee is to be regarded as a temporary employee for the first 60 days and that this probationary period could be extended for an additional 30 days if the employee and the union are notified in writing 10 days before the expiration of the first 60 days of employment requires that, in computing the date on which notice is to be given to extend the probationary period, the final day of probation is to be excluded, since there is evidence that section 20 of the General Construction Law, which provides that a number of days specified as a period from a certain day within which or after or before which an action is authorized or required to be done means such number of calendar days exclusive of the calendar day from which the reckoning is made, was intended to encompass contracts as

well as statutes. Messina v Lufthansa German Airlines, 47 N.Y.2d 111, 417 N.Y.S.2d 39, 390 N.E.2d 758, 1979 N.Y. LEXIS 1988 (N.Y. 1979).

Where evidence in a case terminated on May 1, decision and judgment rendered on May 16, was within 15 days required by § 68 of the Schenectady city court practice act. Como v Murphy, 248 A.D. 656, 287 N.Y.S. 995, 1936 N.Y. App. Div. LEXIS 6687 (N.Y. App. Div. 1936).

In view of this section, an application to permit late filing of an affidavit of intention to make claim against the MVAIC, made on September 11, was within the 120-day period since accrual of the cause of action on May 14. Rosante v Copenhaver, 15 A.D.2d 825, 225 N.Y.S.2d 664, 1962 N.Y. App. Div. LEXIS 11280 (N.Y. App. Div. 2d Dep't 1962).

Applying this section to an accident and health policy stating that such policy should be incontestable after it had been in force for a period of two years, as to statements contained in the application, where the policy was issued on August 16, 1957, and insured suffered a heart attack on August 16, 1959, it was still contestable. Union Mut. Life Ins. Co. v Kevie, 17 A.D.2d 109, 232 N.Y.S.2d 678, 1962 N.Y. App. Div. LEXIS 7915 (N.Y. App. Div. 1st Dep't 1962), aff'd, 13 N.Y.2d 971, 244 N.Y.S.2d 777, 194 N.E.2d 686, 1963 N.Y. LEXIS 935 (N.Y. 1963).

Notice of cancellation did not comply with 10 day notice requirement of Workmen's Compensation Law § 54, subd 5, where, excluding day of filing pursuant to General Construction Law § 20, only 9 days notice was given. Van Deurs v Regency Cabinet Corp., 42 A.D.2d 452, 349 N.Y.S.2d 133, 1973 N.Y. App. Div. LEXIS 4570 (N.Y. App. Div. 3d Dep't 1973).

Service of amended complaint on April 18, 1986 was not timely under terms of conditional order of dismissal, served on March 18, 1986, requiring that amended complaint be served within 30 days. Capoccia v Brognano, 132 A.D.2d 834, 517 N.Y.S.2d 622, 517 N.Y.S.2d 837, 1987 N.Y. App. Div. LEXIS 49323 (N.Y. App. Div. 3d Dep't 1987).

Under rule that time is to be computed by excluding day of event and including last day up to midnight of that day, plaintiffs who were allegedly injured by city vehicle at 2:35 p.m. on July 22, 1985, and who had one year and 90 days within which to commence action under CLS Gen Mun § 50-i, were required to serve municipal defendants by midnight on October 20, 1986; exclusion of first full day and inclusion of last day did not result in period ending at 2:34 p.m. on October 21, 1986, as contended by plaintiffs. Bacalokonstantis v Nichols, 141 A.D.2d 482, 529 N.Y.S.2d 111, 1988 N.Y. App. Div. LEXIS 6305 (N.Y. App. Div. 2d Dep't 1988).

Prison disciplinary hearing that was concluded on February 24 on basis of misbehavior reports written on February 10 was concluded within 14-day period required by 7 NYCRR 251-5.1(b), since day on which report was written was excluded from 14-day period pursuant to CLS Gen Const § 20. Afrika v Edwards, 160 A.D.2d 1212, 555 N.Y.S.2d 473, 1990 N.Y. App. Div. LEXIS 4662 (N.Y. App. Div. 3d Dep't 1990).

Proceeding under Election Law was timely commenced "within 3 business days" after board made determination of invalidity with respect to petition where date of determination was Wednesday, July 27; thus, under CLS Gen Const § 20, first business day of statutory period was Thursday, July 28. Pericak v Hooper, 207 A.D.2d 950, 617 N.Y.S.2d 247, 1994 N.Y. App. Div. LEXIS 10101 (N.Y. App. Div. 4th Dep't 1994).

Day on which alleged parole violator waived his right to preliminary hearing, which marked commencement of 90-day period within which hearing must be held, would be excluded from calculation of 90 days. People ex rel. Gray v Campbell, 241 A.D.2d 723, 660 N.Y.S.2d 186, 1997 N.Y. App. Div. LEXIS 7439 (N.Y. App. Div. 3d Dep't 1997).

Under Civ Ser. Law, § 14, life of eligible list must be computed, under Gen. Const. Law, § 20, by excluding date when list was promulgated. Broderick v New York, 47 N.Y.S.2d 714, 182 Misc. 990, 1944 N.Y. Misc. LEXIS 1834 (N.Y. Sup. Ct.), aff'd, 268 A.D. 856, 50 N.Y.S.2d 844, 1944 N.Y. App. Div. LEXIS 3846 (N.Y. App. Div. 1944).

Petitioner restored to his position on September 1 and, who filed an application for examination on October 31, complied with 60 day requirement of § 243, subd 5 of the Military Law, since October 31 was the 60th day within the meaning of this section. O'Connor v Eppig, 14 Misc. 2d 641, 181 N.Y.S.2d 456, 1958 N.Y. Misc. LEXIS 2423 (N.Y. Sup. Ct. 1958).

Where injury occurred on Aug. 21, 1957, a one year limitation period expired on Aug. 21, 1958. Kaplan v New York, 17 Misc. 2d 181, 181 N.Y.S.2d 411, 1958 N.Y. Misc. LEXIS 2403 (N.Y. Sup. Ct. 1958).

A lease provided for cancellation upon the mailing of a 90-day notice of registered mail and "the time shall be when the same is mailed." A notice was sent by registered mail on January 30th and fixed the cancellation date as of April 30th. Held: the notice was sufficient, and timely within the meaning of this section, since the time was not computed from the date of receipt but from the date of the mailing. Hartford v Regal Shoe Store No. 162, Inc., 20 Misc. 2d 1055, 192 N.Y.S.2d 167, 1959 N.Y. Misc. LEXIS 2746 (N.Y. Mun. Ct. 1959), aff'd, 10 A.D.2d 622, 197 N.Y.S.2d 426, 1960 N.Y. App. Div. LEXIS 11682 (N.Y. App. Div. 1st Dep't 1960).

In view of the provisions of this section, effective date of nullification of a policy of automobile liability insurance did not start to run until the day subsequent to mailing of notice of cancellation by the insurer. United States Fidelity & Guaranty Co. v Nationwide Mut. Ins. Co., 34 Misc. 2d 486, 226 N.Y.S.2d 183, 1962 N.Y. Misc. LEXIS 3802 (N.Y. Sup. Ct. 1962).

Where a personal injury action was commenced by delivery of the summons to the Sheriff of the county of defendants' residence on October 11, 1965 and personal service of that summons by the Sheriff within 60 days thereafter, and defendants contended that the cause of action accrued on October 11, 1962, the action had been commenced within the three year statute of limitations because of the method of computing time mandated by General Construction Law § 20. Rush v Bauerle, 49 Misc. 2d 595, 268 N.Y.S.2d 67, 1966 N.Y. Misc. LEXIS 2152 (N.Y. Sup. Ct. 1966).

The conviction of speeding in violation of the Vehicle and Traffic Law for offenses occurring March 9, 1962, July 15, 1963, and September 9, 1963, were convictions for offenses, all three of which occurred within a period of 18 months. Aretakis v Hults, 51 Misc. 2d 262, 273 N.Y.S.2d 30, 1966 N.Y. Misc. LEXIS 1958 (N.Y. Sup. Ct. 1966).

Where action governed by three year period of limitation accrued on October 17, 1964 and the summons and complaint were delivered to sheriff of Nassau County on October 17, 1967 and sheriff effected the service of the complaint within 60 days after delivery to him, service of summons and complaint were timely since date of accrual of the action must be excluded in computing the time. Brownstein v Schlanger, 55 Misc. 2d 904, 286 N.Y.S.2d 707, 1968 N.Y. Misc. LEXIS 1767 (N.Y. Dist. Ct. 1968).

A search warrant issued on November 25, 1969 which provided that it was to be executed within 10 days of the date of issuance had not expired at the time of its execution on 5 December, 1969. In re G., 64 Misc. 2d 129, 314 N.Y.S.2d 547, 1970 N.Y. Misc. LEXIS 1296 (N.Y. Fam. Ct. 1970).

Where notice was first published on September 19 and sale was held on October 3, excluding the first day and including the last, the sale took place 14 days from the first publication. Lewis v Jim's Boat Yard, Inc., 73 Misc. 2d 24, 341 N.Y.S.2d 28, 1973 N.Y. Misc. LEXIS 2190 (N.Y. Dist. Ct. 1973).

The function of the courts is to enforce statutes, not to usurp the power of the Legislature, and to interpret a statute where there is no necessity for interpretation, to conjecture, or to add to or to subtract from words having a definite meaning, constitutes judicial trespass upon the legislative domain. Accordingly, under subdivision (b) of section 739 of the Family Court Act, which sets forth two detention periods for a person alleged to be a juvenile delinquent or a person in need of supervision, an initial remand of "three days" prior to a determination of probable cause, and a subsequent remand of "not more than an additional three days exclusive of Saturdays, Sundays and public holidays", it was the legislative intent to include the afore-mentioned days in the computation of the initial remand period; to imply the exclusionary view with respect to the "first" remand is to engraft both language and result, neither expressed nor intended by the

Legislature, and, moreover, section 20 of the General Construction Law provides for the inclusion of Saturdays, Sundays and public holidays in reckoning periods of days for the purpose of computing a time period. In re D., 102 Misc. 2d 363, 423 N.Y.S.2d 423, 1979 N.Y. Misc. LEXIS 2873 (N.Y. Fam. Ct. 1979).

The 30-day period after which claims not paid by an insurer are considered overdue normally commences when a claimant submits the relevant forms, but when the insurer requests additional medical information, the period begins when the claimant has satisfied such requests and the insurer receives verification of all the relevant information in accordance with Ins Law § 675(1), so that the 30 days start the next day after the reckoning has been made; if payment is not made within the 30-day period, interest begins to accrue at a rate of two percent per month, compounded and calculated on a pro rata basis using a 30-day month. Hempstead Gen. Hosp. v Allstate Ins. Co., 120 Misc. 2d 303, 466 N.Y.S.2d 162, 1983 N.Y. Misc. LEXIS 3707 (N.Y. Sup. Ct. 1983), rev'd, 106 A.D.2d 429, 482 N.Y.S.2d 523, 1984 N.Y. App. Div. LEXIS 21471 (N.Y. App. Div. 2d Dep't 1984).

Administrative review proceeding commenced on July 15, 1985, seeking review of zoning board of appeals determination filed on June 13, 1985, is timely under CLS General City Law § 82 since, under CLS General Construction Law § 20, first of 30 days within which proceeding may be commenced is June 14, and last day is July 13, 1985; since latter is Saturday, limitations period is extended by CLS General Construction Law § 25-a to next business day, Monday, July 15, 1985. Hoxsie v Zoning Bd. of Appeals, 129 Misc. 2d 493, 493 N.Y.S.2d 535, 1985 N.Y. Misc. LEXIS 3074 (N.Y. Sup. Ct. 1985).

Day of arraignment should not be counted in determining whether prosecution's notice was timely under CLS CPL § 710.30(2), since arraignment is specified event, and, pursuant to CLS Gen Const § 20, day of "specified event" is explicitly excluded in computing applicable time period. People v Morales, 159 Misc. 2d 745, 610 N.Y.S.2d 720, 1994 N.Y. Misc. LEXIS 115 (N.Y. City Crim. Ct. 1994).

Employment search firm established its entitlement to commission conditioned on employment of placed employee for 30-day guarantee period, where employee started work on October 27, he worked his last day on November 25, November 26 was Thanksgiving, and he was not expected to return to work until Monday, November 30; only permissible inference was that employer allowed employee to take Friday after Thanksgiving as vacation day such that employee's abandonment was neither apparent nor unequivocal before November 30, and thus total period of his employment was 33 days. Marshall-Alan Assocs. v Warwick Hotel, 187 Misc. 2d 503, 723 N.Y.S.2d 815, 2000 N.Y. Misc. LEXIS 598 (N.Y. App. Term 2000).

In an action to recover on a fire insurance policy the action was brought "within twelve months after the fire" within the meaning of the policy of insurance, where the fire occurred on premises on Oct. 1, 1935 and the action was commenced Oct. 1, 1936. Biloz v Tioga County Patrons' Fire Relief Ass'n, 21 N.Y.S.2d 643, 1940 N.Y. Misc. LEXIS 1993 (N.Y. Sup. Ct.), aff'd, 260 A.D. 976, 23 N.Y.S.2d 460, 1940 N.Y. App. Div. LEXIS 5668 (N.Y. App. Div. 1940).

Where a labor union rule required that a member in order to be eligible for office must have one year or more of continuous membership, on November 6, 1954, he was not qualified after having been a member from November 7, 1953. Clarke v Corr, 145 N.Y.S.2d 125, 1955 N.Y. Misc. LEXIS 3292 (N.Y. Sup. Ct. 1955).

Where a ground lease provided that quarterly rent payments had to be made by the first of a month, pursuant to N.Y. Gen. Constr. Law § 20, a payment on the 31st of that month was within a 30-day default period; therefore, the trial court properly determined by summary judgment that the lease was in effect. JPMorgan Chase Bank v Lowell, 309 A.D.2d 541, 765 N.Y.S.2d 315, 2003 N.Y. App. Div. LEXIS 10345 (N.Y. App. Div. 1st Dep't 2003).

Prison disciplinary hearing was timely, as the day the misbehavior report was written and the inmate was confined was excluded when calculating the limitations period of of N.Y. Comp. Codes R. & Regs. tit. 7, § 251-5.1 pursuant to N.Y. Gen. Constr. Law § 20. Vasquez v Goord, 14 A.D.3d 903, 787 N.Y.S.2d 909, 2005 N.Y. App. Div. LEXIS 463 (N.Y. App. Div. 3d Dep't 2005).

Plaintiffs' motion pursuant to N.Y. C.P.L.R. 4404 to set aside a jury verdict in favor of defendants, made on December 9, 2004, was within 30 days from November 10, 2004, and was timely. A postmark dated December 11, 2004, on the envelope in which the motion was received did not establish that service was not completed on December 9, 2004. Kresch v Saul, 29 A.D.3d 863, 816 N.Y.S.2d 147, 2006 N.Y. App. Div. LEXIS 6830 (N.Y. App. Div. 2d Dep't 2006).

Civil rights claims (pleaded under 42 USCS § 1983), to effect that court officer had conducted unlawful arrest and search on December 12, 1985, were time-barred due to fact that complaint was not filed until December 13, 1988; in calculating 3-year period during which action could be brought, Federal Rule of Civil Procedure § 6(a) had same result as CLS Gen Const § 20, which has been interpreted to mean that, "when the applicable limitations period is measured in years,...the anniversary date of the date of accrual is the last day for instituting an action." Day v Morgenthau, 909 F.2d 75, 1990 U.S. App. LEXIS 15642 (2d Cir. 1990).

4. Effect of Sundays and holidays on computation of time

Where the last of twenty days within which defendant must serve answer falls on Sunday, due service may be made on the following Monday. Gilbert v Johnson, 169 A.D. 840, 155 N.Y.S. 687, 1915 N.Y. App. Div. LEXIS 5047 (N.Y. App. Div. 1915).

When the last day in which plaintiff may have service of summons on defendant falls upon Sunday, the time for service will be extended to the next day under this section. Triangle Radio Supply Co. v De Forest Radio Tel. & Tel. Co., 208 A.D. 614, 204 N.Y.S. 72, 1924 N.Y. App. Div. LEXIS 5100 (N.Y. App. Div. 1924).

The tenth day, if Sunday, is required to be excluded, as is January first, because it is holiday, in computing the time for the ten day notice required for a sale under a conditional sales contract. Carter v Brockway Motor Co., 248 A.D. 734, 288 N.Y.S. 720, 1936 N.Y. App. Div. LEXIS 7114 (N.Y. App. Div. 1936).

Where a sheriff took possession of goods under a writ of replevin on Friday, December 23, the three day period for which he was required to retain possession, expired at midnight Tuesday, December 27 since Sunday the 25th was Christmas and therefore Monday the 26th was a holiday. Fisk Discount Corp. v Brooklyn Taxicab Trans. Co., 270 A.D. 491, 60 N.Y.S.2d 453, 1946 N.Y. App. Div. LEXIS 3725 (N.Y. App. Div. 1946).

Where copy of order appealed from, with notice of entry, was served by mail on June 1, appellant had 33 days, by reason of fact that service was made by mail, to service notice of appeal. Since 33rd day fell on July 4, a legal holiday, plaintiff was permitted to serve notice of appeal on next business day, and service of notice of appeal on July 5 was timely and late filing of notice would be excused by court (notice mailed on last day of period and filed on following day). Messner v Messner, 42 A.D.2d 889, 347 N.Y.S.2d 589, 1973 N.Y. App. Div. LEXIS 3585 (N.Y. App. Div. 1st Dep't 1973).

Court should not have denied application to stay arbitration allegedly mailed on September 29 on ground that it was not made within 20 days of service of demand for arbitration on September 8 as required by CLS CPLR § 7503(c) since (1) excluding day of service of demand in accordance with CLS Gen Const § 20, 20 calendar days from September 8 was September 28, which fell on Sunday, and (2) when period of time within which something must be done ends on Sunday, such act may be done on following business day (CLS Gen Const § 25-a). American Casualty Co. v McCoy, 138 A.D.2d 485, 525 N.Y.S.2d 884, 1988 N.Y. App. Div. LEXIS 2835 (N.Y. App. Div. 2d Dep't 1988).

Where final day of 90-day period for conducting parole revocation hearing under CLS Exec § 259-i fell on Sunday, Division of Parole had until following day to complete hearing. People ex rel. Gray v Campbell, 241 A.D.2d 723, 660 N.Y.S.2d 186, 1997 N.Y. App. Div. LEXIS 7439 (N.Y. App. Div. 3d Dep't 1997).

Trial court properly denied defendant's speedy trial motion because the People were required under N.Y. Crim. Proc. Law §§ 1.20(17), 30.30(1)(a) to announce their readiness for trial by

July 27, 2010 and filed a statement of readiness on July 23, 2010; the prearraignment statement of readiness was valid under N.Y. Crim. Proc. Law § 210.10(2) because arraignment was possible on July 27, 2010, the second counted day after the indictment was filed and the last day within the six-month statutory period as July 23, 2010 was excluded as the day the indictment was filed and July 24 and 25, 2010 were excluded because they were a Saturday and Sunday, July 26, 2010 was the first counted day and July 27, 2010 was the second counted day. Although the trial court's later communication regarding the arraignment provided less than two days notice, the original communication was provided more than two days prior to the actual arraignment, and additionally, defendant and counsel appeared at the arraignment, and defendant did not complain to the trial court about the change in date or lack of sufficient notice. People v Prunier, 100 A.D.3d 1269, 954 N.Y.S.2d 689, 2012 N.Y. App. Div. LEXIS 8155 (N.Y. App. Div. 3d Dep't 2012), app. denied, 20 N.Y.3d 1064, 962 N.Y.S.2d 615, 985 N.E.2d 925, 2013 N.Y. LEXIS 412 (N.Y. 2013).

Where by consent of plaintiff's attorneys stay of execution and proceedings upon judgment of municipal court of New York city is granted for ten days and ends upon Sunday which by this section must be excluded in computing the time, stay of execution continues all of following Monday; and filing of a transcript of judgment and issuing of execution on that day will be set aside as unauthorized. Heckman v Stein, 117 N.Y.S. 1026, 64 Misc. 144, 1909 N.Y. Misc. LEXIS 246 (N.Y. Sup. Ct. 1909).

That this section is in disjunctive, excluding a Sunday "or" a public holiday, if it is last day of any period, from reckoning of period, does not require construction of statute so as to have last day of sixty-day period limited for appeal under Tax Law, § 249-x, fall on Saturday, fifty-ninth day. Legislature in granting period of sixty days to appeal from tax order considered such an interval a reasonable one; to permit time to be decreased to fifty-nine days would be unjust and unreasonable, and such a construction is not to be adopted unless inevitable. In re Kennedy's Estate, 271 N.Y.S. 469, 151 Misc. 292, 1934 N.Y. Misc. LEXIS 1288 (N.Y. Sur. Ct. 1934).

Where Sept. 1, when grace period expired, fell on Sunday, and Sept. 2 fell on Labor Day, both of which must be excluded in reckoning expiration of grace period under §§ 20 and 25, payment made Sept. 3 was made on time. Penrose v Metropolitan Life Ins. Co., 296 N.Y.S. 764, 163 Misc. 241, 1937 N.Y. Misc. LEXIS 1328 (N.Y. Sup. Ct. 1937).

Where the last day for issuance of a citation fell on Sunday, the period was extended to the next business day. In re Braddell's Estate, 299 N.Y.S. 1021, 164 Misc. 893, 1937 N.Y. Misc. LEXIS 1898 (N.Y. Sur. Ct. 1937).

Note of issue for March, 1939, term of the supreme court, Kings county, beginning on March 6, 1939, must be served at least twelve days before the commencement of term, or not later than February 21, 1939; February 22, 1939, being a legal holiday, must be excluded from reckoning under provisions of § 20. Brooklyn Bus Corp. v Edwards, 11 N.Y.S.2d 875, 171 Misc. 85, 1939 N.Y. Misc. LEXIS 1814 (N.Y. Sup. Ct. 1939).

Where a lease expired by its terms on December thirty-first, which was Sunday, and succeeding day, January first, a Monday, was a legal holiday, as specified in § 24, tenant had all day Tuesday, January second, to move. Kod-Rose Holding Corp. v Aglietti, 20 N.Y.S.2d 625, 174 Misc. 276, 1940 N.Y. Misc. LEXIS 1833 (N.Y. Mun. Ct. 1940).

An action for riot damage sustained on August 1 and 2, 1943, required to be commenced within 60 days, was timely as to the damage of August 2 when commenced on January 3, 1944 where the 60 day period ended on January 1 which was a holiday and January 2 was Sunday. Butchers' Mut. Casualty Co. v New York, 52 N.Y.S.2d 121, 182 Misc. 809, 1944 N.Y. Misc. LEXIS 2675 (N.Y. Sup. Ct. 1944).

Where, under the Court of Claims Act, notice of intention to file a claim against a state was required to be filed within ninety days after the accrual of the claim, the notice was timely with the claim accrued on March 1 and the notice of intention was filed on May 31, since the first day, March 1, is excluded under § 20 and the ninetieth day May 30 was Memorial Day, a holiday under § 24 and thus excluded. Nodine v State, 79 N.Y.S.2d 834, 192 Misc. 572, 1948 N.Y. Misc. LEXIS 2471 (N.Y. Ct. Cl. 1948).

In the computation of the time of the running of the statute of limitations in an action for libel, the day of publication is excluded and if the date upon which such an action was required to be instituted fell on a Sunday, process could have been served on the following business day. Stella v James J. Farley Ass'n, 122 N.Y.S.2d 322, 204 Misc. 998, 1953 N.Y. Misc. LEXIS 1847 (N.Y. Sup. Ct. 1953), aff'd, 284 A.D. 873, 135 N.Y.S.2d 234, 1954 N.Y. App. Div. LEXIS 3876 (N.Y. App. Div. 1954).

Where order suspending motorist's license was served by mail, the four months within which motorist could bring proceeding to review the order was extended three days, and since the day to which his time was extended was a legal holiday, he had until the following day to institute proceeding. Soffer v MacDuff, 130 N.Y.S.2d 217, 205 Misc. 972, 1954 N.Y. Misc. LEXIS 2011 (N.Y. Sup. Ct. 1954).

Where the thirtieth day of a 30-day grace period under a bond and mortgage fell on Sunday, the grace period included Monday. Fourth Section Corp. v Carton Enterprises, Inc., 29 Misc. 2d 746, 215 N.Y.S.2d 163, 1961 N.Y. Misc. LEXIS 2887 (N.Y. County Ct. 1961).

Where the personal injuries in question were sustained in an accident on February 24, 1960, plaintiff's action for damages was not barred where summons and complaint were served February 25, 1963, excluding the date of injury and the last day of the period, which was a Sunday, in computing the time. Farber v Besi Cab Corp., 41 Misc. 2d 296, 245 N.Y.S.2d 78, 1963 N.Y. Misc. LEXIS 1347 (N.Y. Sup. Ct. 1963).

Since plaintiff's accident occurred on November 8, 1963, the one-year statute of limitations prescribed by General Municipal Law § 50-e(5) began to run on November 9, 1963, and would normally expire on November 8, 1964, but where that day fell on a Sunday, the period expired on the following day, November 9, 1964. Conway v Board of Education, 47 Misc. 2d 172, 262 N.Y.S.2d 15, 1965 N.Y. Misc. LEXIS 1633 (N.Y. County Ct. 1965).

Under Real Property Actions and Proceedings Law § 735, subd 2, and General Construction Law § 20, notice of petition and petition was filed timely 6 days after personal delivery to respondent where a 3-day legal holiday was included in the 6 days. Shields v Benderson Development Co., 76 Misc. 2d 322, 350 N.Y.S.2d 549, 1973 N.Y. Misc. LEXIS 1474 (N.Y. County Ct. 1973).

Contrary to defendant's argument, the effective date of the Hate Crimes Act of 2000, N.Y. Penal Law § 485.00 et seq., was effective on the date of the incident, having the effective date commenced at midnight on the date of defendant's criminal conduct; that the effective date fell on a Sunday was of no moment, and N.Y. Gen. Constr. Law § 25-a did not support defendant's position that the effective date had to have been on a business day rather than a Sunday. The legislature had the power to cause statutes to take effect on holidays or Sundays. People v Assi, 63 A.D.3d 19, 877 N.Y.S.2d 231, 2009 N.Y. App. Div. LEXIS 2263 (N.Y. App. Div. 1st Dep't 2009), aff'd, 14 N.Y.3d 335, 902 N.Y.S.2d 6, 928 N.E.2d 388, 2010 N.Y. LEXIS 57 (N.Y. 2010).

5. —Half holidays

This section does not exclude half holiday from reckoning if it is last day of given period. Shaw v Lockport, 233 N.Y.S. 36, 133 Misc. 393, 1929 N.Y. Misc. LEXIS 655 (N.Y. Sup. Ct. 1929).

Where the last day to serve a notice of claim against a city falls on a Saturday, in the absence of any disability of the claimant, it is improper to grant an extension of time to serve the notice since a half holiday is not excluded from the reckoning if it is the last day of the given period. Meier v New York, 106 N.Y.S.2d 278, 199 Misc. 305, 1951 N.Y. Misc. LEXIS 2047 (N.Y. App. Term 1951).

Under above statute fact that period of time computed from certain day within which act is required to be done, ends on half holiday does not permit such act to be done on next succeeding business day. Bedford Lake Park Corp. v Board of Assessors, 45 Misc. 2d 485, 257 N.Y.S.2d 218, 1965 N.Y. Misc. LEXIS 2337 (N.Y. Sup. Ct. 1965).

6. —Time periods measured other than by days

In determining the period of one year the last day of the year may not be excluded because it falls on Sunday. Calagna v

Sheppard-Pollak, Inc., 264 A.D. 589, 35 N.Y.S.2d 934, 1942 N.Y. App. Div. LEXIS 4211 (N.Y. App. Div.), app. dismissed, 289 N.Y. 753, 46 N.E.2d 355, 289 N.Y. (N.Y.S.) 753, 1942 N.Y. LEXIS 1318 (N.Y. 1942).

Sunday, if it be the last day of a period, is not excluded where the period is measured by weeks, months or years. Russell v Kniffin, 194 N.Y.S. 792, 118 Misc. 808, 1922 N.Y. Misc. LEXIS 1298 (N.Y. Sup. Ct. 1922).

This section which calls for the exclusion of Sunday is applicable only when Sunday is the last day of a specified period of days not where it is the last day of a specified period of weeks, months or years. Foster v Thurber, 76 N.Y.S.2d 616, 1947 N.Y. Misc. LEXIS 3620 (N.Y. Sup. Ct. 1947).

Where, under the Workmen's Compensation Law, a plaintiff was required to bring an action against third parties within six months after the awarding of compensation and the last day of the six month period fell on a Sunday, the action was barred where the plaintiff's attorney did not deliver the summons until the following day. Foster v Thurber, 76 N.Y.S.2d 616, 1947 N.Y. Misc. LEXIS 3620 (N.Y. Sup. Ct. 1947).

7. —Sundays and holidays as intervening days

Cancelation of an insurance policy was effective although the date of cancelation fell on a holiday where the policy provided that it could be canceled on five days notice and the five day period expired the day previous to the holiday. Lesk v London & Lancashire Indem. Co., 286 N.Y. 443, 36 N.E.2d 655, 286 N.Y. (N.Y.S.) 443, 1941 N.Y. LEXIS 1460 (N.Y. 1941).

An option contained in a contract, which was delivered on December twenty-fourth, will be deemed a thirty-day option, in view of provisions of this section in the absence of agreement to the contrary, notwithstanding intervention of a holiday within thirty-day period. Frankfurter v Silverman, 208 N.Y.S. 405, 124 Misc. 751, 1925 N.Y. Misc. LEXIS 662 (N.Y. City Ct. 1925).

An oral agreement made on a Saturday for personal services to be rendered for a period of one year (without fixing a calendar date as the terminating day) to commence on the following Monday is void under the Statute of Frauds (Pers. Prop. Law, § 31, subd. 1). The fact that the intervening day was a Sunday is irrelevant (Gen. Const., §§ 19, 20). Silverstein v Lehrfeld, 43 N.Y.S.2d 694, 181 Misc. 291, 1943 N.Y. Misc. LEXIS 2305 (N.Y. City Ct. 1943).

Objection and specifications to designating petitions filed on July 13, 1989 were timely filed pursuant to CLS Elec § 6-154(2), which requires filing of objection within 3 days and specifications within 6 days, where objection was filed on Monday, July 17, 1989, and specifications were filed on Monday, July 24, 1989; in computing time for filing of objection, day from which time is reckoned and Sunday are excluded from reckoning pursuant to CLS Gen Const § 20. McHoul v Sellick, 153 A.D.2d 721, 544 N.Y.S.2d 687, 1989 N.Y. App. Div. LEXIS 11036 (N.Y. App. Div. 2d Dep't), app. denied, 74 N.Y.2d 609, 545 N.Y.S.2d 692, 544 N.E.2d 611, 1989 N.Y. LEXIS 2731 (N.Y. 1989).

8. Fractions of days

Fractions of days are not considered in computing time periods unless the hour itself is material to resolution of competing claims. Bacalokonstantis v Nichols, 141 A.D.2d 482, 529 N.Y.S.2d 111, 1988 N.Y. App. Div. LEXIS 6305 (N.Y. App. Div. 2d Dep't 1988).

In a prosecution for third degree burglary and third degree criminal mischief in which the alleged crimes had taken place five hours into the sixteenth anniversary date of defendant's birth but one-half hour before 16 years had elapsed from the exact moment of defendant's birth, defendant would be held to be an adult for purposes of prosecution within the adult criminal justice system, since age computation is controlled by the birth date itself rather than by fractions thereof, and fractions of a day will be disregarded except in cases in which the hour itself is material, such as cases in which priority of lien rights is in question, and since nothing in the General Construction Law indicates any legislative intent to alter such rule for purposes of computing the ages of human beings. People v Alouisa, 120 Misc. 2d 968, 466 N.Y.S.2d 1007, 1983 N.Y. Misc. LEXIS 3834 (N.Y. County Ct. 1983).

9. Miscellaneous

The provision of this section, which in computing time, excludes the first and includes the last day, has no application to a provision which is clear and explicit and can only be invoked where the act is to be done within a certain number of days or a specified period of time. When the statute says after the expiration of a time named, that time must fully expire. Marvin v Marvin, 75 N.Y. 240, 75 N.Y. (N.Y.S.) 240, 1878 N.Y. LEXIS 853 (N.Y. 1878).

In calculating time in which misdemeanor complaint must be converted to information under CLS CPL § 170.70, day one of custody is counted, unless it precedes day of arraignment or is a Sunday, even though it does not run entire time from midnight to midnight, and thus suspect taken into custody and arraigned on Tuesday had been in custody "more than five days" by following Monday; CLS Gen Const § 20 does not apply to exclude initial day from calculation since CLS CPL § 170.70 does not involve measurement "from a certain day" or "a specified event." People ex rel. Neufeld v McMickens, 70 N.Y.2d 763, 520 N.Y.S.2d 744, 514 N.E.2d 1368, 1987 N.Y. LEXIS 18877 (N.Y. 1987).

First day of statutory period should be excluded in calculating delay for determining whether dismissal is required under CLS CPL § 30.30; since § 30.30 specifies event which begins running of statutory period, computation is governed by CLS Gen Const § 20 providing for exclusion of first day. People v Stiles, 70 N.Y.2d 765, 520 N.Y.S.2d 745, 514 N.E.2d 1368, 1987 N.Y. LEXIS 18887 (N.Y. 1987).

Section 20 is applicable to a period of one year, when specified by dates, as well as to the identical period, when designated as "one year." Goon v Fu Manchu's Restaurant, Inc., 253 A.D. 531, 2 N.Y.S.2d 879, 1938 N.Y. App. Div. LEXIS 8488 (N.Y. App. Div. 1938).

This section is applicable to time limitations in insurance policies. Union Mut. Life Ins. Co. v Kevie, 17 A.D.2d 109, 232 N.Y.S.2d 678, 1962 N.Y. App. Div. LEXIS 7915 (N.Y. App. Div. 1st Dep't 1962), aff'd, 13 N.Y.2d 971, 244 N.Y.S.2d 777, 194 N.E.2d 686, 1963 N.Y. LEXIS 935 (N.Y. 1963).

In calculating 5 day period within which misdemeanor must be converted to information or defendant released under CPL 170.70, in accordance with General Construction Law § 20, day of arraignment is not to be included in calculation. People ex rel. Neufeld v McMickens, 117 A.D.2d 243, 503 N.Y.S.2d 397, 1986 N.Y. App. Div. LEXIS 52479 (N.Y. App. Div. 2d Dep't 1986), rev'd, 70 N.Y.2d 763, 520 N.Y.S.2d 744, 514 N.E.2d 1368, 1987 N.Y. LEXIS 18877 (N.Y. 1987).

Plaintiffs were entitled to summary judgment declaring that defendants violated administrative consent order where, under CLS Gen Const § 20, first day was excluded from 5-day period in CLS ECL § 70-0109(3)(b) for plaintiffs to respond to defendants' demand for order to allow mining on subject property, and thus defendants did not obtain permit by default. State v Hampton Sand Corp., 281 A.D.2d 536, 721 N.Y.S.2d 808, 2001 N.Y. App. Div. LEXIS 3492 (N.Y. App. Div. 2d Dep't 2001).

Three-year statute of limitations was applicable to an N.Y. Civ. Serv. Law § 102(2) action to recover for salary allegedly improperly paid to a third party; accordingly, the action to recover sums allegedly illegally paid was limited to the money paid on or after June 2, 2006. Eldridge v Carmel Cent. School Dist. Bd. of Educ., 82 A.D.3d 1147, 920 N.Y.S.2d 155, 2011 N.Y. App. Div. LEXIS 2552 (N.Y. App. Div. 2d Dep't 2011).

The common law rule that a minor becomes of age on the day preceding the twenty-first anniversary of his birth has not been altered by Gen. Constr. Law. In re Bardol's Will, 300 N.Y.S. 60, 164 Misc. 907, 1937 N.Y. Misc. LEXIS 1909 (N.Y. Sur. Ct. 1937), modified, 254 A.D. 647, 4 N.Y.S.2d 795, 1938 N.Y. App. Div. LEXIS 8480 (N.Y. App. Div. 1938).

This section is applicable in determining the time for service of notice of claim upon a municipality under § 50-e of the General Municipal Law, and the date on which the injury occurred is accordingly to be excluded in computing the statutory time limit. Aposporos v Poughkeepsie, 37 Misc. 2d 56, 232 N.Y.S.2d 700, 1962 N.Y. Misc. LEXIS 2488 (N.Y. Sup. Ct. 1962).

Provision of above statute for exclusion of calendar day from which reckoning is made, applied to provision of Real Property Tax Law § 702, subd 2, as to time for commencing proceeding to review assessment of real property. Bedford Lake Park Corp. v Board of Assessors, 45 Misc. 2d 485, 257 N.Y.S.2d 218, 1965 N.Y. Misc. LEXIS 2337 (N.Y. Sup. Ct. 1965).

Term "midnight," as used in automobile insurance policy, meant end of named day and not 12:01 a.m. on named day, and policy which was to become effective on midnight of December 31 therefore was not in effect at 11:15 p. m. on that day. Leatherby Ins. Co. v Villafana, 82 Misc. 2d 144, 368 N.Y.S.2d 102, 1975 N.Y. Misc. LEXIS 2584 (N.Y. Sup. Ct. 1975).

In a medical malpractice action, where the patient failed to file a note of issue within the required time and did not move to extend this time until the day the note was due, which motion was denied, it was error for the trial court to dismiss the action where the patient explained that the delay was caused by problems at her attorney's office, attributable to the events of September 11, 2001, these problems were neither willful nor deliberate, and it appeared the patient had a meritorious cause of action. Storchevoy v Blinderman, 303 A.D.2d 672, 757 N.Y.S.2d 82, 2003 N.Y. App. Div. LEXIS 3211 (N.Y. App. Div. 2d Dep't 2003).

Action was timely commenced because the accident victim established, through her counsel's testimony, the testimony of delivery couriers, and a court clerk, that her summons and complaint, in spite of the late date stamp appearing on the papers, were physically delivered to the county clerk's office prior to the expiration of the statute of limitations. Peace v Zhang, 15 A.D.3d 956, 789 N.Y.S.2d 362, 2005 N.Y. App. Div. LEXIS 1092 (N.Y. App. Div. 4th Dep't 2005).

Agency Opinions

Analysis

1. Computation of time period
2. Fractions of days

1. Computation of time period

Where publication of a notice of hearing on the adoption of an amendment to a town zoning ordinance occurred on June 26, and the hearing was held on July 6, there was compliance with the statutory ten day notice requirement. 1974 Op St Compt No. 74–707.

Date of computation for 30-day time period during which notice of claim must be sent by eligible injured person to No-Fault insurer in order to be receiving benefits begins on day after accident. N.Y. Ins. Dep't, Gen. Counsel Op. No. 03-05-07, 2003 154.

CLS Gen Const § 20 does not apply to CLS Ins § 3425(b) for notice of cancellation. Insurance N.Y. Ins. Dep't, Gen. Counsel Op. No. 06-07-11, 2006 135.

CLS Gen Const § 20 applies to time periods established by CLS Ins § 3425(d) for conditional renewals, nonrenewals, and substitutions of policy forms. N.Y. Ins. Dep't, Gen. Counsel Op. No. 06-07-11, 2006 135.

2. Fractions of days

Unless the hour itself is material, fractions of days are not considered in computing the number of days specified as a period from a certain day within which or after or before which an act is authorized or required to be done. 1964 NY Ops Atty Gen Aug 19 (Informal), 1964 N.Y. AG LEXIS 130.

Attendance at weekly military reserve meetings constitutes "ordered military service" and the leave prescribed in Military Law, § 242 applies. Any absence for ordered military leave counts as a day's absence whether such absence is for a full work day or not. 1970 Op St Compt No. 70–86.

RESEARCH REFERENCES AND PRACTICE AIDS

Federal Aspects:

Day, 19 USCS § 1401.

Treatises

Matthew Bender's New York Civil Practice: 1 Cox, Arenson, Medina, New York Civil Practice: SCPA ¶307.31.

Matthew Bender's New York AnswerGuides: LexisNexis AnswerGuide New York Negligence § 2.17 Preparing Answer.

LexisNexis AnswerGuide New York Negligence § 3.27 Commencing Action.

LexisNexis AnswerGuide New York Negligence § 6.16 Understanding Requirements of Notice of Claim.

LexisNexis AnswerGuide New York Negligence § 6.26 Commencing Action.

LexisNexis AnswerGuide New York Negligence § 7.28 Responding to Complaint.

§ 24. Public holidays; half-holidays.

The term public holiday includes the following days in each year: the first day of January, known as New Year's day; the third Monday of January, known as Dr. Martin Luther King, Jr. day; the twelfth day of February, known as Lincoln's birthday; the third Monday in February, known as Washington's birthday; the last Monday in May, known as Memorial day; the second Sunday in June, known as Flag day; the nineteenth day of June, known as Juneteenth; the fourth day of July, known as Independence day; the first Monday in September, known as Labor day; the second Monday in October, known as Columbus day; the eleventh day of November, known as Veterans' day; the fourth Thursday in November, known as Thanksgiving day; and the twenty-fifth day of December, known as Christmas day, and if any of such days except Flag day is Sunday, the next day thereafter; each general election day, and each day appointed by the president of the United States or by the governor of this state as a day of general thanksgiving, general fasting and prayer, or other general religious observances. The term half-holiday includes the period from noon to midnight of each Saturday which is not a public holiday.

HISTORY:

Add, L 1909, ch 27; amd, L 1909, ch 112; L 1934, ch 180; L 1939, ch 920; L 1940, ch 368; L 1942, ch 150; L 1946, ch 111; L 1947, ch 22; L 1955, ch 63; L 1964, ch 855; L 1969, ch 959; L 1974, ch 6; L 1975, ch 435; L 1975, ch 767; L 1976, ch 121, eff May 13, 1976; L 1980, ch 29, § 1, eff Mar 24, 1980; L 1984, ch 347, § 1, eff Jan 1, 1985; L 2020, ch 249, § 1, effective October 14, 2020.

Amendment Notes The 2020 amendment by ch 248, § 1, added "the nineteenth day of June, known as Juneteenth" in the first sentence.

Notes to Decisions

Analysis

1. In general
2. Saturdays
3. Transaction of business on holidays
4. Effect of Sundays and holidays on computation of time periods
5. Miscellaneous

1. In general

Section 24 does not vest in a mayor of a city power to declare a public holiday postponing the operation of a statute of limitations. Hall v Leonard, 260 A.D. 591, 23 N.Y.S.2d 360, 1940 N.Y. App. Div. LEXIS 4664 (N.Y. App. Div. 1940), aff'd, 285 N.Y. 719, 34 N.E.2d 893, 285 N.Y. (N.Y.S.) 719, 1941 N.Y. LEXIS 1711 (N.Y. 1941).

The definition of "holiday" in this section as including each day appointed by the President of the United States or the Governor of the State as a day of general thanksgiving, fasting, and prayer,

"or other general religious observances, does not include days of religious observance unless proclaimed by the Governor. Bloom v New York City Transit Authority, 19 A.D.2d 521, 240 N.Y.S.2d 124, 1963 N.Y. App. Div. LEXIS 3773 (N.Y. App. Div. 1st Dep't 1963).

A day of religious observance is not to be deemed a public holiday unless so proclaimed by the President or the Governor. Bloom v New York City Transit Authority, 19 A.D.2d 521, 240 N.Y.S.2d 124, 1963 N.Y. App. Div. LEXIS 3773 (N.Y. App. Div. 1st Dep't 1963).

National days of mourning declared for former Presidents Johnson and Truman were not "public holidays" within the contemplation of General Construction Law § 24 so as to entitle members of police department to extra pay under their labor agreement with county. Schmidt v Christ, 75 Misc. 2d 947, 348 N.Y.S.2d 473, 1973 N.Y. Misc. LEXIS 1345 (N.Y. Sup. Ct.), aff'd, 42 A.D.2d 963, 347 N.Y.S.2d 950, 1973 N.Y. App. Div. LEXIS 3493 (N.Y. App. Div. 2d Dep't 1973).

2. Saturdays

This section and § 25 apply only where last day falls on a holiday and do not apply where it falls on half holiday. Andes Co-operative Dairy Co. v Commercial Casualty Ins. Co., 207 A.D. 102, 201 N.Y.S. 664, 1923 N.Y. App. Div. LEXIS 5908 (N.Y. App. Div. 1923), aff'd, 237 N.Y. 622, 143 N.E. 767, 237 N.Y. (N.Y.S.) 622, 1924 N.Y. LEXIS 925 (N.Y. 1924).

Where broker procured lender able and willing to make a loan, and it was agreed to close loan on Saturday, no hour being named, and broker calling at defendant's office shortly after noon hour found that he had gone for day and subsequently refused to take loan, broker is entitled to his commissions, since he had whole of Saturday in which to close transaction. Van Orden v Simpson, 153 N.Y.S. 134, 90 Misc. 322, 1915 N.Y. Misc. LEXIS 929 (N.Y. App. Term 1915).

Fact that summons was returnable on Saturday afternoon did not invalidate service thereof or deprive court of jurisdiction. Cole v Phelps, 248 N.Y.S. 655, 139 Misc. 431, 1931 N.Y. Misc. LEXIS 1159 (N.Y. County Ct. 1931).

Where the last day to serve a notice of claim against a city falls on a Saturday, in the absence of any disability of the claimant, it is improper to grant an extension of time to serve the notice since a half holiday is not excluded from the reckoning if it is the last day of the given period. Meier v New York, 106 N.Y.S.2d 278, 199 Misc. 305, 1951 N.Y. Misc. LEXIS 2047 (N.Y. App. Term 1951).

3. Transaction of business on holidays

Memorial Day is a legal holiday but any business may be transacted during it except such acts as are expressly excepted by the statute. Morel v Stearns, 75 N.Y.S. 1082, 37 Misc. 486, 1902 N.Y. Misc. LEXIS 151 (N.Y. App. Term 1902).

The provision of this section declaring Saturday afternoon to be public holiday does not prohibit an officer from voluntarily performing an official act on such day, or render such act void or voidable, unless the act is such as to create an unlawful preference under the recording act, or is prohibited by some other statute. Cohn v Townsend, 94 N.Y.S. 817, 48 Misc. 47, 1905 N.Y. Misc. LEXIS 364 (N.Y. Sup. Ct. 1905).

4. Effect of Sundays and holidays on computation of time periods

Intervening Sunday will be excluded in computation of time under uniform bill of lading which provides that freight not moved within forty-eight hours, exclusive of legal holidays, after due notice of its arrival, may be kept by carrier as therein provided subject to its "responsibility as warehouseman only." Cereal Products Co. v Delaware, L. & W. R. Co., 198 A.D. 580, 190 N.Y.S. 698, 1921 N.Y. App. Div. LEXIS 8144 (N.Y. App. Div. 1921).

Petitioner's proceeding pursuant to CLS Elec § 16-102 was timely where petitioner's 10-day period in which to commence proceeding ended on February 13, 1989, which was legal holiday, and proceeding was properly commenced on day thereafter. Lucariello v Commissioners of Chautauqua County Bd. of Elections, 148 A.D.2d 1012, 539 N.Y.S.2d 602, 1989 N.Y. App. Div. LEXIS 2610 (N.Y. App. Div. 4th Dep't), app. denied, 73 N.Y.2d 707, 540 N.Y.S.2d 238, 537 N.E.2d 623, 1989 N.Y. LEXIS 306 (N.Y. 1989).

Certificate of substitution was timely filed within 10 days, as extended one day by reason of a public holiday, after the last day to file a declination with regard to a nomination made at the primary election. Matter of Kaufman v Poulos, 165 A.D.3d 1015, 85 N.Y.S.3d 150, 2018 N.Y. App. Div. LEXIS 7034 (N.Y. App. Div. 2d Dep't 2018).

Where a lease expired by its terms on December 31, which was a Sunday, and the succeeding day January 1 was a legal holiday as specified in this section the tenant had all day Tuesday January 2 to move. Kod-Rose Holding Corp. v Aglietti, 20 N.Y.S.2d 625, 174 Misc. 276, 1940 N.Y. Misc. LEXIS 1833 (N.Y. Mun. Ct. 1940).

Where, under the court of claims act, notice of intention to file a claim against a state was required to be filed within ninety days after the accrual of the claim, the notice was timely with the claim accrued on March 1 and the notice of intention was filed on May 31, since the first day, March 1, is excluded under § 20 and the ninetieth day May 30 was Memorial Day, a holiday under § 24 and thus excluded. Nodine v State, 79 N.Y.S.2d 834, 192 Misc. 572, 1948 N.Y. Misc. LEXIS 2471 (N.Y. Ct. Cl. 1948).

5. Miscellaneous

Motion for leave to appeal would be dismissed as untimely since CLS Gen Const § 25-a did not effect extension when time provided in CLS CPLR § 5513 expired on February 22 (date formerly celebrated as Washington's Birthday). Lee v Biderman, 77 N.Y.2d 936, 569 N.Y.S.2d 606, 572 N.E.2d 47, 1991 N.Y. LEXIS 461 (N.Y. 1991).

In a personal injury action against a city transit authority, the trial court improperly granted plaintiff's motion to strike the authority's affirmative defense of failure to file a timely notice of claim, even though the period to file a notice of claim expired on February 14, Lincoln's birthday, and the claim was filed the next day, and even though Gen Const Law § 75-a authorizes the doing of an act on a day following a public holiday, where according to Gen Const Law § 24 February 12, not February 14, was Lincoln's birthday and the mere fact that Lincoln's birthday may have been celebrated for certain purposes by the city and state courts and agencies on February 14 did not make that day a public holiday. O'Leary v New York City Transit Authority, 97 A.D.2d 789, 468 N.Y.S.2d 531, 1983 N.Y. App. Div. LEXIS 20544 (N.Y. App. Div. 2d Dep't 1983), aff'd, 64 N.Y.2d 813, 486 N.Y.S.2d 937, 476 N.E.2d 336, 1985 N.Y. LEXIS 14239 (N.Y. 1985).

Although the city of Utica has a right to select the holiday on which parking meters were to be in operation, the failure of the city to specify on the parking meters the holidays that were to be excepted made the city ordinance unenforceable, and therefore the term "holiday" as appearing on said parking meters would be interpreted to mean all of the holidays defined in § 24 of the General Construction Law including Washington's Birthday so that the defendant would not be required to insert a coin in the parking meter on said date, despite the fact that the city traffic ordinance did not include Washington's Birthday within the term "holiday". People v Abelove, 54 Misc. 2d 306, 282 N.Y.S.2d 611, 1967 N.Y. Misc. LEXIS 1327 (N.Y. City Ct. 1967).

Action was timely commenced because the accident victim established, through her counsel's testimony, the testimony of delivery couriers, and a court clerk, that her summons and complaint, in spite of the late date stamp appearing on the papers, were physically delivered to the county clerk's office prior to the expiration of the statute of limitations. Peace v Zhang, 15 A.D.3d 956, 789 N.Y.S.2d 362, 2005 N.Y. App. Div. LEXIS 1092 (N.Y. App. Div. 4th Dep't 2005).

Agency Opinions

Analysis

1. In general
2. Saturdays
3. Alternate days for observance of holidays
4. Transaction of business on holidays
5. Miscellaneous

1. In general

A town is not legally obligated to close its offices on the holidays designated in General Construction Law, § 24. The closing of

town offices in observance of public holidays is in the discretion of the town board. 1985 Op St Compt No. 85-33, 1985 N.Y. Comp. LEXIS 110.

2. Saturdays

A County Clerk's office must be kept open for the transaction of business every day except Saturdays, Sundays and holidays. General Construction Law § 24 makes no provision for an alternate day when a holiday falls on Saturday. In the absence of statutory provision, where a holiday falls on Saturday no other day may be observed in lieu thereof, except by express statutory provision. Therefore, it is my view that the County Clerk's office may not be closed on July 3rd or 6th. 1959 NY Ops Atty Gen June 3 (Informal), 1959 N.Y. AG LEXIS 161.

Town offices must remain open until noon on Saturdays. 1952 Op St Compt No. 52–5849.

The office of town receiver of taxes and assessments must remain open until noon of each Saturday which is not a holiday. 1953 Op St Compt No. 53–6394.

3. Alternate days for observance of holidays

In 1974, Columbus Day is celebrated on October 14, and Veteran's Day is celebrated on November 11. 1974 NY Ops Atty Gen Aug 19 (Informal), 1974 N.Y. AG LEXIS 130.

Veterans' Day is to be observed in New York State on the traditional date of November 11th in each year pursuant to New York General Construction Law, Section 24 and not on the Fourth Monday in October pursuant to the Federal definition of Veterans' Day contained in Public Law 90-363 (5 U.S.C. Section 6103). November 11 would also be the date for observance of Veterans' Day by all banks in this State as a bank holiday. 1974 NY Ops Atty Gen Sept 9 (Informal), 1974 N.Y. AG LEXIS 143.

There is no authority for the County of Westchester to enact a local law declaring any day other than the third Sunday in January a public holiday in celebration of Martin Luther King's birthday. 1975 NY Ops Atty Gen Oct 9 (Informal), 1975 N.Y. AG LEXIS 168.

In New York State, the 30th day of May is officially designated as Memorial Day, and county offices must close on that date. County offices must be open for business as usual on the fourth Monday in May. 1979 Op St Compt No. 79–77.

Except as authorized by section 206(3), a county may not adopt a local law closing county offices on Fridays preceding a Saturday public holiday since such a local law would be inconsistent with general State statutes. 1983 Op St Compt No. 83-193, 1983 N.Y. Comp. LEXIS 291.

4. Transaction of business on holidays

If the provisions of the Election Law with respect to the character of the polling place and the conduct of the election could be met, the Town of Penfield may leave its Town Hall open for official business on Election Day. 1973 NY Ops Atty Gen Oct 23 (Informal), 1973 N.Y. AG LEXIS 121.

Non-charter county must keep its offices open on day after Thanksgiving and may not adopt local law authorizing closing of county offices on such day; although determination of particular personnel to be present on that day is, in first instance, to be made at local level, subject to terms and conditions of any collective bargaining agreement, sufficient staff must be available to reasonably permit transaction of ordinary business at county offices. 1993 Op St Compt No. 93-10, 1993 N.Y. Comp. LEXIS 4.

5. Miscellaneous

County clerk's office should be closed Armistice Day. 1921 N.Y. Op. Att'y Gen. No. 377.

There is no authority for county to close county offices on day after Thanksgiving since that day is not holiday, Saturday or Sunday. 1993 N.Y. Op. Att'y Gen. No. 93-4, 1993 N.Y. AG LEXIS 4.

CLS Pub O § 62 relieves county employees from duty of performing official services on holidays. 1993 N.Y. Op. Att'y Gen. No. 93-56, 1993 N.Y. AG LEXIS 54.

When summons is issued returnable on Sunday, in an action pursuant to section 113 of Agriculture and Markets Law, no claim may be made for fee for services of justice in issuing summons and fee and mileage for services of constable in serving summons. 1945 Op St Compt No. 54–344.

Open Meetings Law is silent with regard to legality of meeting of board of education held on holiday or when school is closed; thus, it appears that public body may in its discretion conduct meetings on public holidays or weekends, so long as it complies with applicable provisions of law, such as Open Meetings Law. Comm on Open Gov't OML-AO-2458.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in Exec Law § 7.

§ 25-a. Public holiday, Saturday or Sunday in statutes; extension of time where performance of act is due on Saturday, Sunday or public holiday

1. When any period of time, computed from a certain day, within which or after which or before which an act is authorized or required to be done, ends on a Saturday, Sunday or a public holiday, such act may be done on the next succeeding business day and if the period ends at a specified hour, such act may be done at or before the same hour of such next succeeding business day, except that where a period of time specified by contract ends on a Saturday, Sunday or a public holiday, the extension of such period is governed by section twenty-five of this chapter.

2. Where time is extended by virtue of the provisions of this section, such extended time shall not be included in the computation of interest, except that when the period is specified as a number of months, such extended time shall be included in the computation of interest.

HISTORY:

Add, L 1952, ch 821, § 1; amd, L 1964, ch 855, eff Sept 27, 1964; L 1965, ch 848, eff Sept 1, 1965.

Prior Law: Former § 25–a, add, L 1920, ch 917, with substance transferred from Code Civ Proc § 3343, sub 10, renumbered § 25–b, L 1952, ch 821, § 5, eff Sept 1, 1952.

Notes to Decisions

Analysis

1. In general
2. Particular applications
3. —Limitation period for commencement of actions
4. —Tax matters
5. Miscellaneous

1. In general

Agency's determination that change of retirement option was invalid because it was not received prior to retiree's death as required by CLS Educ § 513 (and regulations promulgated thereunder) was not irrational; CLS Gen Const § 25-a (which extends time for doing act when authorized period ends on Saturday, Sunday, or public holiday) did not render receipt of change on day after retiree's death timely and effective on ground that retiree died on Sunday, since date of one's death is not ascertainable in advance, thereby precluding its use as point of reference which would permit advance determination of period of time within, after, or before which act must be done. Whitehill v New York State Teachers' Retirement System, 142 A.D.2d 902, 531 N.Y.S.2d 403, 1988 N.Y. App. Div. LEXIS 8047 (N.Y. App. Div. 3d Dep't 1988), aff'd, 73 N.Y.2d 944, 540 N.Y.S.2d 236, 537 N.E.2d 621, 1989 N.Y. LEXIS 291 (N.Y. 1989).

Trial court erred in denying a driver's motion to dismiss a passenger's personal injury action and in granting the passenger's cross-motion to extend the time to serve the complaint because the passenger failed to serve her complaint upon the driver after the driver served her with a notice of appearance and demand for a complaint, the passenger failed to demonstrate

either a reasonable excuse for the delay in serving the complaint or that her causes of action were meritorious, and the uncertified police accident report constituted inadmissible hearsay and did not contain any admission by the driver against her interest bearing on how the accident occurred. Ganchrow v Kremer, 157 A.D.3d 771, 69 N.Y.S.3d 352, 2018 N.Y. App. Div. LEXIS 285 (N.Y. App. Div. 2d Dep't 2018), overruled in part, Yassin v Blackman, 188 A.D.3d 62, 131 N.Y.S.3d 53, 2020 N.Y. App. Div. LEXIS 5171 (N.Y. App. Div. 2d Dep't 2020).

Where the last day for doing an act falls upon a Sunday and the next day is a public holiday, both days are to be excluded in computing the time limitation. In re Jefferson, 34 Misc. 2d 48, 226 N.Y.S.2d 523, 1962 N.Y. Misc. LEXIS 3696 (N.Y. Sup. Ct. 1962).

This section did not apply to a proceeding under New York City Charter § 166 which provided that a proceeding to review a final determination of the tax commission must be commenced before a stated date. R. R. Heywood Co. v Boyland, 140 N.Y.S.2d 769, 1955 N.Y. Misc. LEXIS 2426 (N.Y. Sup. Ct. 1955).

2. Particular applications

Motion for leave to appeal would be dismissed as untimely since CLS Gen Const § 25-a did not effect extension when time provided in CLS CPLR § 5513 expired on February 22 (date formerly celebrated as Washington's Birthday). Lee v Biderman, 77 N.Y.2d 936, 569 N.Y.S.2d 606, 572 N.E.2d 47, 1991 N.Y. LEXIS 461 (N.Y. 1991).

Where copy of order appealed from, with notice of entry, was served by mail on June 1, appellant had 33 days, by reason of fact that service was made by mail, to service notice of appeal. Since 33rd day fell on July 4, a legal holiday, plaintiff was permitted to serve notice of appeal on next business day, and service of notice of appeal on July 5 was timely and late filing of notice would be excused by court (notice mailed on last day of period and filed on following day). Messner v Messner, 42 A.D.2d 889, 347 N.Y.S.2d 589, 1973 N.Y. App. Div. LEXIS 3585 (N.Y. App. Div. 1st Dep't 1973).

Where last day for timely filing of Article 78 petition was Sunday and next day was national holiday, filing deadline was extended to Tuesday. Scuderi v Board of Education, 49 A.D.2d 942, 374 N.Y.S.2d 130, 1975 N.Y. App. Div. LEXIS 11228 (N.Y. App. Div. 2d Dep't 1975), app. dismissed, 38 N.Y.2d 848, 382 N.Y.S.2d 55, 345 N.E.2d 598, 1976 N.Y. LEXIS 2290 (N.Y. 1976).

Pursuant to Gen Const Law § 25-a(1), when any period of time within which an act is required to be done ends on a Saturday, Sunday, or a public holiday, the act may be done on the next succeeding business day; accordingly, when the 40-day period provided by the county charter within which a county Legislature was required to fill a vacancy expired on a Saturday, the Legislature's appointment on the following Monday of a successor to fill the vacancy was timely, and, though such appointment was made after business hours, it remained timely since there was no further statutory time limitation on the Legislature's action. Morris v Cahill, 96 A.D.2d 88, 469 N.Y.S.2d 231, 1983 N.Y. App. Div. LEXIS 19878 (N.Y. App. Div. 3d Dep't 1983).

In a personal injury action against a city transit authority, the trial court improperly granted plaintiff's motion to strike the authority's affirmative defense of failure to file a timely notice of claim, even though the period to file a notice of claim expired on February 14, Lincoln's birthday, and the claim was filed the next day, and even though Gen Const Law § 75-a authorizes the doing of an act on a day following a public holiday, where according to Gen Const Law § 24 February 12, not February 14, was Lincoln's birthday and the mere fact that Lincoln's birthday may have been celebrated for certain purposes by the city and state courts and agencies on February 14 did not make that day a public holiday. O'Leary v New York City Transit Authority, 97 A.D.2d 789, 468 N.Y.S.2d 531, 1983 N.Y. App. Div. LEXIS 20544 (N.Y. App. Div. 2d Dep't 1983), aff'd, 64 N.Y.2d 813, 486 N.Y.S.2d 937, 476 N.E.2d 336, 1985 N.Y. LEXIS 14239 (N.Y. 1985).

Respondents' claim for business damage suffered as a result of condemnation proceedings for the construction of reservoirs was timely presented, where the deadline provided in the applicable administrative regulations fell on a Sunday, and so was extended by Gen Const Law § 25-a(1) to the following Monday, the date respondents mailed their claim. In re Ford, 111 A.D.2d 951, 490 N.Y.S.2d 46, 1985 N.Y. App. Div. LEXIS 50227 (N.Y. App. Div. 3d Dep't 1985).

Petitioner was timely served with notice of time, place and purpose of preliminary parole revocation hearing, despite reception of notice more than 3 days after service of parole detention warrant in apparent violation of CLS Exec § 259-i, where 3-day period ended on Sunday and notice arrived on next business day. People ex rel. Frost v Meloni, 124 A.D.2d 1032, 508 N.Y.S.2d 764, 1986 N.Y. App. Div. LEXIS 62381 (N.Y. App. Div. 4th Dep't 1986), app. denied, 69 N.Y.2d 606, 514 N.Y.S.2d 1024, 507 N.E.2d 320, 1987 N.Y. LEXIS 15843 (N.Y. 1987).

Commissioner of Correctional Services was entitled to oppose prisoner's Article 78 petition brought to review disciplinary proceeding although commissioner's answering papers were not served 5 days prior to petitioner's original return date where Supreme Court, on original return date, had adjourned matter to later date; moreover, service of answering papers 3 days prior to new return date met requirements of CLS CPLR § 7804 because fourth and fifth days prior to new return date were Sunday and national holiday, respectively. Jones v Coughlin, 125 A.D.2d 883, 510 N.Y.S.2d 240, 1986 N.Y. App. Div. LEXIS 63072 (N.Y. App. Div. 3d Dep't 1986).

Court should not have denied application to stay arbitration allegedly mailed on September 29 on ground that it was not made within 20 days of service of demand for arbitration on September 8 as required by CLS CPLR § 7503(c) since (1) excluding day of service of demand in accordance with CLS Gen Const § 20, 20 calendar days from September 8 was September 28, which fell on Sunday, and (2) when period of time within which something must be done ends on Sunday, such act may be done on following business day (CLS Gen Const § 25-a). American Casualty Co. v McCoy, 138 A.D.2d 485, 525 N.Y.S.2d 884, 1988 N.Y. App. Div. LEXIS 2835 (N.Y. App. Div. 2d Dep't 1988).

Since 7-day period prescribed by 7 NYCRR § 251-5.1(a) ended on public holiday, prison disciplinary hearing commenced on next succeeding business day was timely. Dziedzic v Kelly, 143 A.D.2d 537, 533 N.Y.S.2d 25, 1988 N.Y. App. Div. LEXIS 10882 (N.Y. App. Div. 4th Dep't 1988), app. denied, 73 N.Y.2d 706, 539 N.Y.S.2d 299, 536 N.E.2d 628, 1989 N.Y. LEXIS 150 (N.Y. 1989).

Petitioner's proceeding pursuant to CLS Elec § 16-102 was timely where petitioner's 10-day period in which to commence proceeding ended on February 13, 1989, which was legal holiday, and proceeding was properly commenced on day thereafter. Lucariello v Commissioners of Chautauqua County Bd. of Elections, 148 A.D.2d 1012, 539 N.Y.S.2d 602, 1989 N.Y. App. Div. LEXIS 2610 (N.Y. App. Div. 4th Dep't), app. denied, 73 N.Y.2d 707, 540 N.Y.S.2d 238, 537 N.E.2d 623, 1989 N.Y. LEXIS 306 (N.Y. 1989).

CLS Gen Const § 25-a did not apply with regard to computing when additional 90-day period commenced, under CLS St Adm P Act § 202, for filing of notice of proposed regulation, even though initial 180-day period expired on Saturday, since § 25-a generally only permits doing of act on Monday when act was otherwise required to be done on weekend, and notice of continuation (for which department had additional 90 days to file) had to be filed prior to 180-day deadline. Desmond-Americana v Jorling, 153 A.D.2d 4, 550 N.Y.S.2d 94, 1989 N.Y. App. Div. LEXIS 15888 (N.Y. App. Div. 3d Dep't 1989), app. denied, 75 N.Y.2d 709, 555 N.Y.S.2d 691, 554 N.E.2d 1279, 1990 N.Y. LEXIS 739 (N.Y. 1990).

Where final day of 90-day period for conducting parole revocation hearing under CLS Exec § 259-i fell on Sunday, Division of Parole had until following day to complete hearing. People ex rel. Gray v Campbell, 241 A.D.2d 723, 660 N.Y.S.2d 186, 1997 N.Y. App. Div. LEXIS 7439 (N.Y. App. Div. 3d Dep't 1997).

Certificate of substitution was timely filed within 10 days, as extended one day by reason of a public holiday, after the last day to file a declination with regard to a nomination made at the primary election. Matter of Kaufman v Poulos, 165 A.D.3d 1015, 85 N.Y.S.3d 150, 2018 N.Y. App. Div. LEXIS 7034 (N.Y. App. Div. 2d Dep't 2018).

Probationary period of six months provided for policemen by municipal civil service commission, commenced on the date of appointment and was terminable six months from that date, even

though such day was Sunday. Application of Going, 3 Misc. 2d 82, 151 N.Y.S.2d 77, 1956 N.Y. Misc. LEXIS 2057 (N.Y. Sup. Ct. 1956).

Time for defendant to appeal, which expired on Thursday, January 1, was extended to Friday, January 2 by virtue of this section, but was not extended further, by the action of the Common Council in closing city offices including city court on Friday, January 2, or by the fact that offices were closed on Saturday. Palia v Ethridge, 16 Misc. 2d 1076, 191 N.Y.S.2d 754, 1959 N.Y. Misc. LEXIS 4026 (N.Y. County Ct. 1959).

Where the last day for serving notice of claim upon a municipality under § 50-e of the General Municipal Law falls on a Sunday, service on the next succeeding business day would meet the requirements of the statute. Aposporos v Poughkeepsie, 37 Misc. 2d 56, 232 N.Y.S.2d 700, 1962 N.Y. Misc. LEXIS 2488 (N.Y. Sup. Ct. 1962).

When the 90-day period within which the Parole Board must hold a final parole revocation hearing, pursuant to Exec Law § 259-i(3)(f)(i), ends on a Sunday the hearing may properly be held on the next day in accord with Gen Const Law § 25-a(1). People ex rel. Williams v Johnson, 116 Misc. 2d 649, 456 N.Y.S.2d 33, 1982 N.Y. Misc. LEXIS 3935 (N.Y. Sup. Ct. 1982).

In a summary proceeding, where petitioner effected service of process on respondent on a Friday and did not file proof of service until the following Wednesday, there was a lack of compliance with Real P Actions & Pr Law § 735(2), which requires filing of such proof within three days of service, since the intervening Saturday and Sunday could not be excluded from the computation of such period inasmuch as Gen Const Law § 25-a extends the time for the doing of an act only when the period of time for doing that act ended on a Saturday, Sunday or legal holiday. However, the court would permit the filing of the notice of petition and petition, nunc pro tunc, so as to be valid, pursuant to NYC Civil Ct Act § 411, since the specific provision of § 411 should not be rendered nugatory by the more general provision of the Real P Actions and Pr Law which required strict compliance with the service statute. Metropolitan Transp. Authority v Terminal Drago Shine Stands, Inc., 119 Misc. 2d 10, 462 N.Y.S.2d 758, 1983 N.Y. Misc. LEXIS 3452 (N.Y. Civ. Ct. 1983).

An indictment voted by a lawfully impaneled Grand Jury, the term of which, through error or inadvertence on the part of the district attorney, had not been properly extended pursuant to CPL § 190.15, would nonetheless be valid as the action of a de facto Grand Jury, since the matter in question had been unfinished at the conclusion of the Grand Jury's term, and the Grand Jury had continued to sit on the matter until the conclusion of the investigation; additionally, an earlier extension of the Grand Jury, which had been granted upon timely application under the statute, was proper where the original term had expired on a Friday that was a legal holiday, and the application had then been granted on the following Monday. People v Heller, 120 Misc. 2d 85, 465 N.Y.S.2d 671, 1983 N.Y. Misc. LEXIS 3667 (N.Y. Sup. Ct. 1983).

People's announcement of readiness for trial on ninety-first day after filing of accusatory instrument was not timely, even though day on which People would have been required to announce their readiness fell on Sunday; CLS CPL § 30.30(1)(b), which explicitly mandates 90-day period, makes no mention of exemptions of weekends or holidays, and thus invocation of CLS Gen Const § 25-a would contradict legislative intent. People v Powell, 174 Misc. 2d 907, 667 N.Y.S.2d 641, 1997 N.Y. Misc. LEXIS 597 (N.Y. City Crim. Ct. 1997), rev'd, 179 Misc. 2d 1047, 690 N.Y.S.2d 826, 1999 N.Y. Misc. LEXIS 384 (N.Y. App. Term 1999).

People timely announced their readiness on 91st day after commencement of action where 90th day fell on Sunday; provisions of CLS Gen Const § 25-a(1) applied to CLS CPL § 30.30, which does not express contrary intent. People v Powell, 179 Misc. 2d 1047, 690 N.Y.S.2d 826, 1999 N.Y. Misc. LEXIS 384 (N.Y. App. Term), app. denied, 93 N.Y.2d 928, 693 N.Y.S.2d 511, 715 N.E.2d 514, 1999 N.Y. LEXIS 1754 (N.Y. 1999).

Where the parties negotiated a settlement of the claimant's workers' compensation claim pursuant to N.Y. Workers' Comp. Law § 32 and a notice of approval was filed on September 12, 2001, and where the settlement funds were mailed to the claimant on September 24, 2001, the workers' compensation board erred in imposing a penalty on the employer for late payment pursuant to N.Y. Workers' Comp. Law § 25(3)(f); because the last day of the 10-day payment period fell on Saturday, September 22, 2001, under N.Y. Gen. Constr. Law § 25-a(1), that deadline was extended to Monday, September 24, 2001, which was when the payment was made. Johnson v Shelmar Corp., 2 A.D.3d 1010, 768 N.Y.S.2d 407, 2003 N.Y. App. Div. LEXIS 13150 (N.Y. App. Div. 3d Dep't 2003).

Plaintiff was required to "move" to confirm an ex parte order of attachment by Monday November 28, 2005, where the fifth day after levy was Saturday, November 26, 2005. Voice Communications, Inc. v Bello, 813 N.Y.S.2d 295, 12 Misc. 3d 318, 235 N.Y.L.J. 74, 2006 N.Y. Misc. LEXIS 573 (N.Y. Sup. Ct. 2006).

Where decedent died on September 19th and two years later September 19th fell on a Sunday, decedent's estate's wrongful death claim, which was commenced the next day, was timely. Rodriguez v Saal, 43 A.D.3d 272, 841 N.Y.S.2d 232, 2007 N.Y. App. Div. LEXIS 8879 (N.Y. App. Div. 1st Dep't 2007).

Contrary to defendant's argument, the effective date of the Hate Crimes Act of 2000, N.Y. Penal Law § 485.00 et seq., was effective on the date of the incident, having the effective date commenced at midnight on the date of defendant's criminal conduct; that the effective date fell on a Sunday was of no moment, and N.Y. Gen. Constr. Law § 25-a did not support defendant's position that the effective date had to have been on a business day rather than a Sunday. The legislature had the power to cause statutes to take effect on holidays or Sundays. People v Assi, 63 A.D.3d 19, 877 N.Y.S.2d 231, 2009 N.Y. App. Div. LEXIS 2263 (N.Y. App. Div. 1st Dep't 2009), aff'd, 14 N.Y.3d 335, 902 N.Y.S.2d 6, 928 N.E.2d 388, 2010 N.Y. LEXIS 57 (N.Y. 2010).

Insured and a beneficiary under life insurance policies argued that commencement of the insurer's action contesting the policies was not a "condition" under the policies because it was not an event that must have occurred before performance by the insured and the beneficiary under the policies became due, and that the policies' incontestability clause therefore barred the action because the extension afforded by N.Y. Gen. Constr. Law § 25 was unavailable; however, the incontestability clause was mandated by a statute, N.Y. Ins. Law § 3203(a)(3). Thus, N.Y. Gen. Constr. Law § 25-a applied to the time to contest the policies and extended the end of that period such that the action was not barred by the incontestability clause. Sec. Mut. Life Ins. Co. of N.Y. v Rodriguez, 65 A.D.3d 1, 880 N.Y.S.2d 619, 2009 N.Y. App. Div. LEXIS 3986 (N.Y. App. Div. 1st Dep't 2009).

Plaintiff failed to file a timely notice of claim pursuant to N.Y. Gen. Mun. Law § 50-e on a transit authority in relation to a personal injury action, because plaintiff was unable to serve the transit authority on the 89th day, which fell on a Saturday, or the 90th day which fell on a Sunday, and instead, plaintiff served the transit authority on the next succeeding business day as allowed by N.Y. Gen. Constr. Law §§ 20, 25-a. Stewart v New York City Transit Auth., 238 N.Y.L.J. 21, 2007 N.Y. Misc. LEXIS 5436 (N.Y. Sup. Ct. July 12, 2007).

Student's default judgment motion against a university was properly denied because (1) the 20th day following service of the summons in the student's suit fell on a holiday, so the university's time to respond was extended, and (2) the university timely responded. Mitchell v New York Univ. ("NYU"), 129 A.D.3d 542, 12 N.Y.S.3d 30, 2015 N.Y. App. Div. LEXIS 5039 (N.Y. App. Div. 1st Dep't), app. denied, 26 N.Y.3d 908, 40 N.E.3d 577, 18 N.Y.S.3d 599, 2015 N.Y. LEXIS 3483 (N.Y. 2015).

Lender was entitled to reargue its earlier application for summary judgment because its motion was timely filed, the lender's counsel established that the indorsement provided to the court was the reverse side of the signature page, not a separate, unadorned paper, and the borrowers were deemed ineligible by the lender for a loan modification where their accumulated arrears—including untolled interest, late charges and fees—were too high. One Westbank, FSB v Rodriguez, 57 Misc. 3d 756, 57 N.Y.S.3d 667, 2017 N.Y. Misc. LEXIS 2584 (N.Y. Sup. Ct. 2017).

3. —Limitation period for commencement of actions

Plaintiff failed to serve complaint within one-year-and-30-day limitation period provided for in CLS Pub A § 1276 where

accident occurred on September 2, 1988 and complaint was served on October 3, 1989; fact that accident occurred on Friday evening did not entitle plaintiff to 3-day extension of limitation period since CLS Gen Const § 25-a provides that extension is permitted only when limitation period "ends" on Saturday, Sunday or public holiday. Burgess v Long Island R. Authority, 172 A.D.2d 302, 568 N.Y.S.2d 385, 1991 N.Y. App. Div. LEXIS 4734 (N.Y. App. Div. 1st Dep't), aff'd, 79 N.Y.2d 777, 579 N.Y.S.2d 631, 587 N.E.2d 269, 1991 N.Y. LEXIS 5093 (N.Y. 1991).

Because extension of a juvenile's pre-petition detention under N.Y. Gen. Constr. Law § 25-a(1) would be inconsistent with the legislative intent underlying N.Y. Fam. Ct. Act § 307.4(7), a family court erred in extending the juvenile's pre-petition detention to accommodate the occurrence of a weekend and the court's calendar without a showing of good cause or special circumstances. Matter of Kevin M., 85 A.D.3d 920, 925 N.Y.S.2d 194, 2011 N.Y. App. Div. LEXIS 5161 (N.Y. App. Div. 2d Dep't 2011).

In the computation of the time of the running of the statute of limitations in an action for libel, the day of publication is excluded and if the date upon which such an action was required to be instituted fell on a Sunday, process could have been served on the following business day. Stella v James J. Farley Ass'n, 122 N.Y.S.2d 322, 204 Misc. 998, 1953 N.Y. Misc. LEXIS 1847 (N.Y. Sup. Ct. 1953), aff'd, 284 A.D. 873, 135 N.Y.S.2d 234, 1954 N.Y. App. Div. LEXIS 3876 (N.Y. App. Div. 1954).

Where the personal injuries in question were sustained in an accident on February 24, 1960, plaintiff's action for damages was not barred where summons and complaint were served February 25, 1963, excluding the date of injury and the last day of the period, which was a Sunday, in computing the time. Farber v Besi Cab Corp., 41 Misc. 2d 296, 245 N.Y.S.2d 78, 1963 N.Y. Misc. LEXIS 1347 (N.Y. Sup. Ct. 1963).

Since plaintiff's accident occurred on November 8, 1963, the one-year statute of limitations prescribed by General Municipal Law § 50-e(5) began to run on November 9, 1963, and would normally expire on November 8, 1964, but where that day fell on a Sunday, the period expired on the following day, November 9, 1964. Conway v Board of Education, 47 Misc. 2d 172, 262 N.Y.S.2d 15, 1965 N.Y. Misc. LEXIS 1633 (N.Y. County Ct. 1965).

In a summary proceeding for the collection of rent, the filing of the affidavit of service by petitioner landlord on October 13, 1981, more than three days after the "nail and mail" service performed on October 8 and 9, 1981, would not be violative of Real P Actions & Pr Law § 735(2), where October 12, 1981 was a legal holiday thereby making the filing on the next day proper. Dedvukaj v Madonado, 115 Misc. 2d 211, 453 N.Y.S.2d 965, 1982 N.Y. Misc. LEXIS 3662 (N.Y. Civ. Ct. 1982).

Administrative review proceeding commenced on July 15, 1985, seeking review of zoning board of appeals determination filed on June 13, 1985, is timely under CLS General City Law § 82 since, under CLS General Construction Law § 20, first of 30 days within which proceeding may be commenced is June 14, and last day is July 13, 1985; since latter is Saturday, limitations period is extended by CLS General Construction Law § 25-a to next business day, Monday, July 15, 1985. Hoxsie v Zoning Bd. of Appeals, 129 Misc. 2d 493, 493 N.Y.S.2d 535, 1985 N.Y. Misc. LEXIS 3074 (N.Y. Sup. Ct. 1985).

Action was timely commenced because the accident victim established, through her counsel's testimony, the testimony of delivery couriers, and a court clerk, that her summons and complaint, in spite of the late date stamp appearing on the papers, were physically delivered to the county clerk's office prior to the expiration of the statute of limitations. Peace v Zhang, 15 A.D.3d 956, 789 N.Y.S.2d 362, 2005 N.Y. App. Div. LEXIS 1092 (N.Y. App. Div. 4th Dep't 2005).

Where the deadline for holding the prison disciplinary hearing fell on a holiday, that day, pursuant to N.Y. Gen. Constr. Law § 25-a(1), was excluded from determining whether the hearing was timely. Matter of James v Goord, 28 A.D.3d 885, 812 N.Y.S.2d 713, 2006 N.Y. App. Div. LEXIS 4284 (N.Y. App. Div. 3d Dep't 2006).

As a proceeding was commenced on Monday, and the Court took judicial notice of the fact that the last day for purposes of .Y. Gen. Constr. Law § 25-a(1) was a Sunday, the proceeding was timely. Pursuant to General Construction Law § 25-a (1) Asch v New York City Board/Department of Educ., 927 N.Y.S.2d 836, 32 Misc. 3d 886, 2011 N.Y. Misc. LEXIS 3104 (N.Y. Sup. Ct. 2011), rev'd, 104 A.D.3d 415, 960 N.Y.S.2d 106, 2013 N.Y. App. Div. LEXIS 1314 (N.Y. App. Div. 1st Dep't 2013).

4. —Tax matters

Provision of subd 1 of above statute to effect that when any period of time computed from certain date, within which act is required to be done, ends on Sunday, applies to provision of New York City Charter providing that an application for correction of assessment may be filed during time that assessment books are opened for public inspection which time is defined by another provision of such charter as being from February 1 until March 15, so that application received on Monday, March 16, is valid and effective. Elbin Realty No. 2, Inc. v Boyland, 22 A.D.2d 913, 255 N.Y.S.2d 543, 1964 N.Y. App. Div. LEXIS 2468 (N.Y. App. Div. 2d Dep't 1964), aff'd, 16 N.Y.2d 599, 261 N.Y.S.2d 56, 209 N.E.2d 103, 1965 N.Y. LEXIS 1383 (N.Y. 1965).

Owners' N.Y. Real Prop. Tax Law art. 7 suit challenging property assessments was timely filed because N.Y. Real Prop. Tax Law § 702(2) required that a N.Y. Real Prop. Tax Law art. 7 proceeding be commenced within 30 days after the final completion and filing of the assessment roll, but, for the purposes of N.Y. Real Prop. Tax Law § 702(2), an assessment roll was not considered finally completed and filed until the last day for the filing of the assessment roll or until notice thereof had been given as required by law, whichever was later; N.Y. Real Prop. Tax Law § 516(1) required an assessor to complete and file the final assessment roll on or before July 1, but, in the year at issue, July 1 fell on a Saturday. Because July 1 fell on a Saturday, under N.Y. Gen. Constr. Law § 25-a(1), July 3 was the last day for the final assessment roll, regardless of the fact that the assessor did so earlier, and, thus, the owners had until that date to file their N.Y. Real Prop. Tax Law art. 7 proceeding. Matter of Mandel v Board of Assessors for Town of Woodbury, 60 A.D.3d 1063, 876 N.Y.S.2d 460, 2009 N.Y. App. Div. LEXIS 2766 (N.Y. App. Div. 2d Dep't 2009).

Pursuant to the intention of the Legislature in enacting this section, a taxpayer may file a tax protest on the next succeeding business day, if the final day for filing a tax protest falls on a Sunday or a legal holiday. Fay v Boyland, 18 Misc. 2d 150, 187 N.Y.S.2d 504, 1959 N.Y. Misc. LEXIS 3881 (N.Y. Sup. Ct. 1959).

5. Miscellaneous

Where the objections to probate were due in 10 days and where the 10th day fell on a Sunday, N.Y. Gen. Constr. Law § 25-a(1) provided that the objections were to be filed the next day. Matter of Esteves, 31 A.D.3d 1028, 819 N.Y.S.2d 181, 2006 N.Y. App. Div. LEXIS 9446 (N.Y. App. Div. 3d Dep't 2006).

Objections to order of hearing examiner on modification of child support were timely filed with court where (1) time for filing objections ended on Saturday, and therefore filing could be accomplished on Monday, which was next business day, (2) petitioner attorney delivered objections to home of court clerk on Friday evening, and (3) objections were actually received by court on Monday morning when they were delivered by clerk; while court could probably rationally hold that manner of transmittal of papers was nullity, fact remained that merits of support case involved support rights of 2 young children whose weekly support was reduced by hearing examiner from $175 per week to $110 per week. Doris B. v Michael B., 141 Misc. 2d 962, 535 N.Y.S.2d 343, 538 N.Y.S.2d 410, 1988 N.Y. Misc. LEXIS 723 (N.Y. Fam. Ct. 1988), rescinded, 538 N.Y.S.2d 410 (N.Y. Fam. Ct. 1989).

Notice of mechanic's lien was timely filed pursuant to the requirements of N.Y. Lien Law § 10(1), where it was filed within eight months after the last item of work was performed, based on the fact that the last day to file was a Saturday, which extended the time for filing to the next business day pursuant to N.Y. Gen. Constr. Law § 25-a(1). Fibernet Telecom Group, Inc. v E. Coast Optical Servs., 195 Misc. 2d 461, 760 N.Y.S.2d 621, 2002 N.Y. Misc. LEXIS 1969 (N.Y. Sup. Ct. 2002).

Agency Opinions

Analysis

1. Particular applications

2. —Tax matters
3. Miscellaneous

1. Particular applications

Petitioners whose terms as board members began on July 1, 2006, and who were removed on June 30, 2007 for failing to complete training mandated by CLS Educ § 2102-a, were entitled to reinstatement to board where June 30 fell on Saturday, and thus under CLS Gen Const § 25-a(1) they had until following business day (July 2) to complete their training, and (2) while they may not have taken statutory requirements seriously at first, once they were notified of removal proceedings, they made every effort to take required course as soon as possible and completed it within 28 days of end of first year of their terms. 2008 Op Comm Ed No. 15,732, 2008 25.

If insured's directors and officers liability policy expired at specific time on weekend, insured could purchase extended reporting period coverage endorsement at or before same time on following business day; where policy expiration ends at end of day on weekend, right to purchase such coverage will be in effect until end of work day on following business day. N.Y. Ins. Dep't Gen. Counsel Op. No. 01-12-09, 2001 249.

2. —Tax matters

Where the first day of a month is a legal holiday and holder of liquor license surrenders it on the next succeeding business day, a refund upon such surrendered license should be calculated as of the first day of such month. 1952 N.Y. Op. Att'y Gen. No. 98, 1952 N.Y. AG LEXIS 9.

If a tax due date falls on a Sunday or a public holiday, payments may be made on the following business day without additional charge. 1954 Op St Compt No. 54–6554; 1956 Op St Compt No. 56–958.

Where the fifteenth day of April falls on a Sunday, the public hearing on the tentative budget may be held on the following Monday. 1956 Op St Compt No. 56–8026.

Where a tax due date falls on a Saturday, payment may be made without penalty on the following Monday. 1967 Op St Compt No. 67–566.

a mailed tax payment received after the expiration of a warrant but postmarked prior to the expiration must be accepted by a collecting officer; similarly, where the last day for the payment of a tax before the expiration of a warrant falls on a Saturday, Sunday or public holiday, a collecting officer must accept a tender of taxes on the next succeeding business day. 1980 Op St Compt No. 80-346, 1980 N.Y. Comp. LEXIS 324.

When last day of penalty-free period for payment of real property taxes falls on Saturday, Sunday, or holiday, penalty-free period is automatically extended the next business day, and real property tax payment received in envelope postmarked on that next business day, and otherwise meeting requirements of CLS RPTL § 925, is considered timely. 1998 Op St Compt No. 98-11, 1998 N.Y. Comp. LEXIS 11.

3. Miscellaneous

The date of the postmark on an envelope containing tax payments is not determinative for imposing a charge of interest since the date on which the taxes are actually received is controlling. 1955 NY Ops Atty Gen Feb 2 (Informal), 1955 N.Y. AG LEXIS 146.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 24-a.

Treatises

Matthew Bender's New York Civil Practice:

3 Rohan, New York Civil Practice: EPTL ¶ 5-4.1.

Matthew Bender's New York AnswerGuides: LexisNexis AnswerGuide New York Negligence § 6.16 Understand Requirements of Notice of Claim.

§ 33. Notice

When a notice is required to be given to a board or body, service of such notice upon the clerk or chairman thereof shall be sufficient.

HISTORY:

Add, L 1909, ch 27, eff Feb 17, 1909.

§ 41. Quorum and majority

Whenever three or more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, gathered together in the presence of each other or through the use of videoconferencing, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board or body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty. For the purpose of this provision the words "whole number" shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were none of the persons or officers disqualified from acting.

HISTORY:

Add, L 1909, ch 27, eff Feb 17, 1909; amd, L 1948, ch 320, eff Mar 21, 1948; L 2000, ch 289, § 5, eff Aug 23, 2000.

Notes to Decisions

Analysis

1. In general
2. Definitions
3. Purpose
4. Actions of body distinguished
5. Absences
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7. Vacancies
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9. Consequences of invalid vote
10. Applicability of other laws and by-laws
11. —Supremacy of section
12. —Permitting less than majority vote
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14. Actions of particular public bodies
15. —County board of supervisors
16. —City council
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19. —Village board
20. —Zoning board
21. —Planning board
22. —Board of education
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24. —Board of Health
25. —Condemnation commission

1. In general

Gen Const Law § 41 is inapplicable to a hearing before an academic grievance tribunal at a State University college in disciplinary proceedings of a student on a charge of cheating on examinations since the statute refers to functions of public officers or persons charged with a public duty, public officers being persons whose duties involve the exercise of a portion of the State's sovereign power, in that the grievance tribunal's members discharge no such function, nor are they persons charged with performing any public duty but are called upon instead to enforce the internal rules and regulations of a university and their actions as tribunal members do not affect the public at large.

Mary M. v Clark, 100 A.D.2d 41, 473 N.Y.S.2d 843, 1984 N.Y. App. Div. LEXIS 16976 (N.Y. App. Div. 3d Dep't 1984).

N.Y. Gen. Constr. Law § 110 permitted variance from the quorum requirements of N.Y. Gen. Constr. Law § 41, since the Roosevelt Island Operating Corporation (RIOC) Act, N.Y. CLS Unconsol. Ch. 196, § 1 et seq., provided for action by a majority vote of the directors then in office, N.Y. CLS Unconsol. Ch. 196, § 3[2]; although N.Y. CLS Unconsol. Ch. 196 § 3[2] provided that the RIOC Board was to be composed of nine members, the unanimous vote by the four members who voted, out of the six members then in office, was sufficient for quorum purposes. Roosevelt Islanders for Responsible Southtown Dev. v Roosevelt Island Operating Corp., 291 A.D.2d 40, 735 N.Y.S.2d 83, 2001 N.Y. App. Div. LEXIS 12509 (N.Y. App. Div. 1st Dep't 2001), app. denied, 97 N.Y.2d 613, 742 N.Y.S.2d 606, 769 N.E.2d 353, 2002 N.Y. LEXIS 556 (N.Y. 2002), app. denied, 98 N.Y.2d 608, 746 N.Y.S.2d 692, 774 N.E.2d 757, 2002 N.Y. LEXIS 1903 (N.Y. 2002).

2. Definitions

In defining the "whole number" of a meeting of persons empowered to take certain action as the total number if there were no vacancies and no disqualifications, it is the sense of this section that as long as the lawfully required proportion of the whole number exercises the power, authority or duty which the Commission is designed to execute, a vacancy does not, per se, render the Commission powerless to perform its obligation. In re Farmingdale, 17 A.D.2d 655, 230 N.Y.S.2d 863, 1962 N.Y. App. Div. LEXIS 8585 (N.Y. App. Div. 2d Dep't 1962).

A "quorum" of a board consisting of five members is constituted by the presence of three of the five. Tabak v Holmes, 11 Misc. 2d 848, 174 N.Y.S.2d 857, 1958 N.Y. Misc. LEXIS 3152 (N.Y. Sup. Ct. 1958).

"Majority" required for board to take action is majority of total membership of board, not merely majority of those voting on action. Reiff v New York City Conciliation & Appeals Bd., 128 Misc. 2d 851, 491 N.Y.S.2d 565, 1985 N.Y. Misc. LEXIS 3010 (N.Y. Sup. Ct. 1985).

When establishing a final state equalization rate for a municipality, the New York State Board of Real Property Services is subject to the quorum requirements of N.Y. Gen. Constr. Law § 41. Thus, in order for the Board to validly exercise a public duty, at least three board members must be gathered together in the presence of each other or through the use of a video conference and assent to a proposed resolution. City of White Plains v N.Y. State Bd. of Real Prop. Servs., 18 A.D.3d 549, 795 N.Y.S.2d 292, 2005 N.Y. App. Div. LEXIS 5125 (N.Y. App. Div. 2d Dep't 2005).

3. Purpose

General Construction Law § 41 was designed to abrogate the common-law rule requiring the presence of the whole body to act. Smithtown v Howell, 31 N.Y.2d 365, 339 N.Y.S.2d 949, 292 N.E.2d 10, 1972 N.Y. LEXIS 944 (N.Y. 1972).

The purpose of Gen Const L § 41 is to insure that before official action is taken by a public body, there is clear and express approval by a majority of its members. Rockland Woods, Inc. v Suffern, 40 A.D.2d 385, 340 N.Y.S.2d 513, 1973 N.Y. App. Div. LEXIS 5138 (N.Y. App. Div. 2d Dep't 1973).

4. Actions of body distinguished

The words "a majority of the members" of town board, as used in Town Law, § 64, if limited to acts of members as distinguished from acts of town boards, are not otherwise defined in Town Law, and, accordingly, what constitutes a majority of the members of board is governed by Gen. Const. Law, § 41. Application of Crosby, 36 N.Y.S.2d 301, 178 Misc. 746, 1942 N.Y. Misc. LEXIS 1786 (N.Y. Sup. Ct.), aff'd, 265 A.D. 92, 37 N.Y.S.2d 745, 1942 N.Y. App. Div. LEXIS 5686 (N.Y. App. Div. 1942).

5. Absences

Where two members of seven-member zoning board of appeals voted to grant application for special exception permit, two voted to deny such application, two members abstained and one was absent, board's action was not valid and was equivalent to nonaction. Walt Whitman Game Room, Inc. v Zoning Board of Appeals, 54 A.D.2d 764, 387 N.Y.S.2d 698, 1976 N.Y. App. Div. LEXIS 14430 (N.Y. App. Div. 2d Dep't 1976), overruled in part, Tall Trees Constr. Corp. v Zoning Bd. of Appeals, 97 N.Y.2d 86, 735 N.Y.S.2d 873, 761 N.E.2d 565, 2001 N.Y. LEXIS 3413 (N.Y. 2001).

Tax Appeals Tribunal was not a nullity and did not lack jurisdiction to hear an appeal due to a vacancy on the three-member board. CS Integrated, LLC v Tax Appeals Tribunal, 19 A.D.3d 886, 798 N.Y.S.2d 166, 2005 N.Y. App. Div. LEXIS 7073 (N.Y. App. Div. 3d Dep't 2005).

6. Disqualifications

Where a quorum of four out of five members of Village Board were present at meeting, and one member disqualified himself, a vote of less than a majority of the board was sufficient to defeat a petition for a change of zone. Steers Sand & Gravel Corp. v Village Bd. of Northport, 129 N.Y.S.2d 403, 1954 N.Y. Misc. LEXIS 3147 (N.Y. Sup. Ct. 1954).

7. Vacancies

Where, in proceeding to condemn land for highway purposes, one of three commissioners died after all evidence had been received, surviving commissioners are not authorized to act under this section since High. Law, § 151 (now § 33), provides for filling of vacancy. Board of Sup'rs v Sawitz, 236 A.D. 268, 259 N.Y.S. 4, 1932 N.Y. App. Div. LEXIS 5950 (N.Y. App. Div. 1932).

In defining the "whole number" of a meeting of persons empowered to take certain action as the total number if there were no vacancies and no disqualifications, it is the sense of this section that as long as the lawfully required proportion of the whole number exercises the power, authority or duty which the Commission is designed to execute, a vacancy does not, per se, render the Commission powerless to perform its obligation. In re Farmingdale, 17 A.D.2d 655, 230 N.Y.S.2d 863, 1962 N.Y. App. Div. LEXIS 8585 (N.Y. App. Div. 2d Dep't 1962).

Candidate's nomination was invalid where (1) according to party's own rules and regulations, executive committee was to consist of 12 members, of which 8 members constituted quorum, and quorum was required to transact business, (2) at time committee met to nominate candidate, only 7 members were present, and (3) in attempt to remedy situation, chairman of committee appointed new member to fill vacancy. Hervey v Greene County Bd. of Elections, 166 A.D.2d 743, 563 N.Y.S.2d 110, 1990 N.Y. App. Div. LEXIS 12582 (N.Y. App. Div. 3d Dep't), app. denied, 76 N.Y.2d 710, 563 N.Y.S.2d 62, 564 N.E.2d 672, 1990 N.Y. LEXIS 3318 (N.Y. 1990).

Amendments to county sanitary code were not rendered invalid by 2 vacancies on 13-member health board when it adopted amendments where vote of members present was 10 to one. Empire State Restaurant & Tavern Ass'n v Rapoport, 240 A.D.2d 576, 658 N.Y.S.2d 687, 1997 N.Y. App. Div. LEXIS 6614 (N.Y. App. Div. 2d Dep't 1997).

Where after three commissioners appointed in condemnation proceedings to appraise damages caused by taking of land for railroad purposes had viewed premises and pending hearing to take testimony one commissioner died, surviving commissioners, under former Civil Code, § 3370 (now Condemnation Law 914) and this section, have ample power to continue work of commission. Lake S. & M. S. R. Co. v Mahle, 129 N.Y.S. 288, 72 Misc. 129, 1911 N.Y. Misc. LEXIS 344 (N.Y. Sup. Ct. 1911), rev'd, 158 A.D. 889, 143 N.Y.S. 1126, 1913 N.Y. App. Div. LEXIS 7750 (N.Y. App. Div. 1913).

Where statute provides for a five member board, there must be five appointed, and neither provision of Village Law that concurring vote of a majority of such board is sufficient to make a determination nor provision of General Construction Law that majority of board shall constitute a quorum authorize three members of a five member board to act, when only four members have been appointed. Gray v Maislen, 17 Misc. 2d 161, 130 N.Y.S.2d 466, 1954 N.Y. Misc. LEXIS 1913 (N.Y. Sup. Ct. 1954).

8. Abstentions

Abstaining vote on proposed zoning ordinance change could not be counted as an affirmative vote for the purposes of majority approval under Gen Const L § 41 where, of four out of possible five trustees present at board meeting, two trustees voted for and one against said change. Rockland Woods, Inc. v Suffern, 40 A.D.2d 385, 340 N.Y.S.2d 513, 1973 N.Y. App. Div. LEXIS 5138 (N.Y. App. Div. 2d Dep't 1973).

Where two members of seven-member zoning board of appeals voted to grant application for special exception permit, two voted to deny such application, two members abstained and one was absent, board's action was not valid and was equivalent to nonaction. Walt Whitman Game Room, Inc. v Zoning Board of Appeals, 54 A.D.2d 764, 387 N.Y.S.2d 698, 1976 N.Y. App. Div. LEXIS 14430 (N.Y. App. Div. 2d Dep't 1976), overruled in part, Tall Trees Constr. Corp. v Zoning Bd. of Appeals, 97 N.Y.2d 86, 735 N.Y.S.2d 873, 761 N.E.2d 565, 2001 N.Y. LEXIS 3413 (N.Y. 2001).

Where only three members of five-man zoning board were present on application for zoning variance, and one member did not participate, the hearing was invalid. Giuliano v Entress, 4 Misc. 2d 546, 158 N.Y.S.2d 961, 1957 N.Y. Misc. LEXIS 3589 (N.Y. Sup. Ct. 1957).

Disapproval of proposed downzoning, pursuant to § 1608 of the County Government Law, by a vote of three members of a county planning board with one abstention was ineffective to veto the downzoning, where the law creating the board provided for five members and a ⅔ vote of the whole board was required to defeat the proposed zoning change, since § 41 of the General Construction Law required ⅔ of the "whole number" authorized by statute and an abstention should be counted in opposition to the board's resolution. Downing v Gaynor, 47 Misc. 2d 535, 262 N.Y.S.2d 837, 1965 N.Y. Misc. LEXIS 1620 (N.Y. Sup. Ct. 1965).

9. Consequences of invalid vote

County planning commission disapproval of town zoning change was ineffective for lack of two-thirds majority of the entire commission where commission was to be composed of 15 members, 13 had been appointed, and 8 of 9 members present voted against such change; 10 votes would be necessary to obtain two-thirds majority. Smithtown v Howell, 31 N.Y.2d 365, 339 N.Y.S.2d 949, 292 N.E.2d 10, 1972 N.Y. LEXIS 944 (N.Y. 1972).

Supreme Court correctly annulled denial of petitioner's application for area variance; pursuant to General Construction Law § 41, majority of whole number of persons comprising board is required to constitute quorum and to exercise board's power, authority or duty; review of proceeding in this case reveals requisite majority of Zoning Board did not vote with respect to petitioner's application; with two members abstaining and only two members voting, Zoning Board vote was invalid action and was ineffectual to deny petitioner's application; however, appropriate remedy was not to direct issuance of building permit, but to remit matter to Zoning Board for vote by duly constituted impartial majority in accordance with General Construction Law § 41. Matter of Hoffis v Zoning Bd. of Appeals, 166 A.D.2d 850, 563 N.Y.S.2d 183, 1990 N.Y. App. Div. LEXIS 12802 (N.Y. App. Div. 3d Dep't 1990).

Where town planning board's denial of landowners' application for special permit for excavation and removal of soil material from their property was denied by less than majority of board's seven members, vote was ineffectual to deny application, was equivalent to nonaction and, by virtue of town's own zoning ordinance which required action within 45 days on such application, planning board was deemed to have approved landowners' application. Squicciarini v Planning Bd. of Chester, 48 A.D.2d 687, 367 N.Y.S.2d 845, 1975 N.Y. App. Div. LEXIS 9719 (N.Y. App. Div. 2d Dep't 1975), aff'd, 38 N.Y.2d 958, 384 N.Y.S.2d 152, 348 N.E.2d 609, 1976 N.Y. LEXIS 2597 (N.Y. 1976).

Where two members of seven-member zoning board of appeals voted to grant application for special exception permit, two voted to deny such application, two members abstained and one was absent, board's action was not valid and was equivalent to nonaction. Walt Whitman Game Room, Inc. v Zoning Board of Appeals, 54 A.D.2d 764, 387 N.Y.S.2d 698, 1976 N.Y. App. Div. LEXIS 14430 (N.Y. App. Div. 2d Dep't 1976), overruled in part, Tall Trees Constr. Corp. v Zoning Bd. of Appeals, 97 N.Y.2d 86, 735 N.Y.S.2d 873, 761 N.E.2d 565, 2001 N.Y. LEXIS 3413 (N.Y. 2001).

Where there was an unfilled vacancy on the State Board of Real Property Services, one member of the Board was not present at a meeting, and one participated by telephone conference call, which was a method not sanctioned by N.Y. Gen. Constr. Law § 41, the quorum and voting requirements of § 41 were not met for purposes of the Board's determination of the final State equalization rates for a variety of cities and towns; accordingly, those rate determinations were annulled as invalid, pursuant to a review proceeding brought under N.Y. C.P.L.R. 7801 and N.Y. Real Prop. Tax Law § 1218. Matter of Town of Eastchester v New York State Bd. of Real Prop. Servs., 23 A.D.3d 484, 808 N.Y.S.2d 90, 2005 N.Y. App. Div. LEXIS 13055 (N.Y. App. Div. 2d Dep't 2005).

Appointment of supervisor was unauthorized by a vote of two members of town board which was constituted by law at five members, and petition in a proceeding by one appointed to compel the respondent, who is holding over as supervisor (Pub. Off. Law, § 5), to surrender to books, records and property pertaining to the office, is properly dismissed. Application of Crosby, 36 N.Y.S.2d 301, 178 Misc. 746, 1942 N.Y. Misc. LEXIS 1786 (N.Y. Sup. Ct.), aff'd, 265 A.D. 92, 37 N.Y.S.2d 745, 1942 N.Y. App. Div. LEXIS 5686 (N.Y. App. Div. 1942).

Whether local school board membership was originally 16 or 10 members, an affirmative vote by five of all the permissible members was insufficient to exercise the power to hire a unit administrator. Board of Education v Alonso, 60 Misc. 2d 709, 303 N.Y.S.2d 932, 1969 N.Y. Misc. LEXIS 1234 (N.Y. Sup. Ct. 1969).

10. Applicability of other laws and by-laws

The definition of "quorum" in this section does not detract from the validity of tax equalization proceedings by such members of the new State Board of Equalization set up by §§ 200 et seq., of the Real Property Tax Law, prior to appointment of the full number of members called for. Smithtown v Moore, 11 N.Y.2d 238, 228 N.Y.S.2d 657, 183 N.E.2d 66, 1962 N.Y. LEXIS 1204 (N.Y. 1962).

Where, in proceeding to condemn land for highway purposes, one of three commissioners died after all evidence had been received, surviving commissioners are not authorized to act under this section since High. Law, § 151 (now § 33), provides for filling of vacancy. Board of Sup'rs v Sawitz, 236 A.D. 268, 259 N.Y.S. 4, 1932 N.Y. App. Div. LEXIS 5950 (N.Y. App. Div. 1932).

Where after three commissioners appointed in condemnation proceedings to appraise damages caused by taking of land for railroad purposes had viewed premises and pending hearing to take testimony one commissioner died, surviving commissioners, under former Civil Code, § 3370 (now Condemnation Law 914) and this section, have ample power to continue work of commission. Lake S. & M. S. R. Co. v Mahle, 129 N.Y.S. 288, 72 Misc. 129, 1911 N.Y. Misc. LEXIS 344 (N.Y. Sup. Ct. 1911), rev'd, 158 A.D. 889, 143 N.Y.S. 1126, 1913 N.Y. App. Div. LEXIS 7750 (N.Y. App. Div. 1913).

Educ. Law, § 1143-c, subd. 10, indicates that legislature intended that Gen. Const. Law, § 41, should not apply to proceedings and vote of board. McArdle v Board of Higher Education, 49 N.Y.S.2d 333, 181 Misc. 766, 1943 N.Y. Misc. LEXIS 2866 (N.Y. Sup. Ct. 1943).

11. —Supremacy of section

The words "a majority of the members" of town board, as used in Town Law, § 64, if limited to acts of members as distinguished from acts of town boards, are not otherwise defined in Town Law, and, accordingly, what constitutes a majority of the members of board is governed by Gen. Const. Law, § 41. Application of Crosby, 36 N.Y.S.2d 301, 178 Misc. 746, 1942 N.Y. Misc. LEXIS 1786 (N.Y. Sup. Ct.), aff'd, 265 A.D. 92, 37 N.Y.S.2d 745, 1942 N.Y. App. Div. LEXIS 5686 (N.Y. App. Div. 1942).

12. —Permitting less than majority vote

Section 41 does not limit right of city council to act by majority of quorum in intracameral matters. Morris v Cashmore, 253 A.D. 657, 3 N.Y.S.2d 624, 1938 N.Y. App. Div. LEXIS 8529 (N.Y. App. Div.), aff'd, 278 N.Y. 730, 17 N.E.2d 143, 278 N.Y. (N.Y.S.) 730, 1938 N.Y. LEXIS 1547 (N.Y. 1938).

13. —Requiring greater than majority vote

County planning commission disapproval of town zoning change was ineffective for lack of two-thirds majority of the entire commission where commission was to be composed of 15 members, 13 had been appointed, and 8 of 9 members present voted against such change; 10 votes would be necessary to obtain two-thirds majority. Smithtown v Howell, 31 N.Y.2d 365, 339 N.Y.S.2d 949, 292 N.E.2d 10, 1972 N.Y. LEXIS 944 (N.Y. 1972).

Although this section covers only majority votes, to hold that it does not also apply to greater than majority votes would create an anomalous situation which could not have been intended by the legislature, and where a zoning amendment was required to be approved by three-fourths vote of the city council, approval by three-fourths of the total number of members on the council was required, and approval by nine out of eleven members present was insufficient to adopt the amendment where the number or members on the council was thirteen. Savatgy v Kingston, 26 A.D.2d 978, 274 N.Y.S.2d 852, 1966 N.Y. App. Div. LEXIS 3065 (N.Y. App. Div. 3d Dep't 1966), aff'd, 20 N.Y.2d 258, 282 N.Y.S.2d 513, 229 N.E.2d 203, 1967 N.Y. LEXIS 1273 (N.Y. 1967).

Disapproval of proposed downzoning, pursuant to § 1608 of the County Government Law, by a vote of three members of a county planning board with one abstention was ineffective to veto the downzoning, where the law creating the board provided for five members and a ⅔ vote of the whole board was required to defeat the proposed zoning change, since § 41 of the General Construction Law required ⅔ of the "whole number" authorized by statute and an abstention should be counted in opposition to the board's resolution. Downing v Gaynor, 47 Misc. 2d 535, 262 N.Y.S.2d 837, 1965 N.Y. Misc. LEXIS 1620 (N.Y. Sup. Ct. 1965).

Since a majority of all the members in office must initially approve a zoning ordinance, and indeed pass an amendment in the absence of a protest, it should not be the rule that fewer votes than a majority of all the members might conceivably enact an amendment over a property owner's protest where § 83 of the General City Law provides that a "three-fourths vote of the council" is necessary; and an amendment to a zoning ordinance before a common council composed of 13 members, which received the affirmative approval of 9 members, was defeated. Savatgy v Kingston, 51 Misc. 2d 251, 273 N.Y.S.2d 1, 1966 N.Y. Misc. LEXIS 1860 (N.Y. Sup. Ct.), aff'd, 26 A.D.2d 978, 274 N.Y.S.2d 852, 1966 N.Y. App. Div. LEXIS 3065 (N.Y. App. Div. 3d Dep't 1966).

14. Actions of particular public bodies

The provisions of Canon Law in respect of the requisite quorum for vestry meetings and not the quorum rule of Religious Corporation Law § 42 applied to the election of a new rector. Church of Holy Trinity v Melish, 3 N.Y.2d 476, 168 N.Y.S.2d 952, 146 N.E.2d 685, 1957 N.Y. LEXIS 709 (N.Y. 1957).

The definition of "quorum" in this section does not detract from the validity of tax equalization proceedings by such members of the new State Board of Equalization set up by §§ 200 et seq., of the Real Property Tax Law, prior to appointment of the full number of members called for. Smithtown v Moore, 11 N.Y.2d 238, 228 N.Y.S.2d 657, 183 N.E.2d 66, 1962 N.Y. LEXIS 1204 (N.Y. 1962).

Quorum requirement of CLS Gen Const § 41 applies to decisions of Administrative Review Board for Professional Medical Conduct (ARB); thus, decision made by 3 physician members of ARB, without its 2 lay members, was valid. Wolkoff v Chassin, 89 N.Y.2d 250, 652 N.Y.S.2d 712, 675 N.E.2d 447, 1996 N.Y. LEXIS 3165 (N.Y. 1996).

Under this section it is not necessary for all three of local liquor commissioners to join in determination. People ex rel. Nally v Sisson, 182 A.D. 428, 169 N.Y.S. 706, 1918 N.Y. App. Div. LEXIS 7878 (N.Y. App. Div. 1918).

Failure of majority of Unemployment Insurance Appeal Board to affirm decision assessing employer for additional unemployment insurance benefits does not constitute violation of CLS Gen Const § 41 or 12 NYCRR 464.1(a); board's practice of assigning cases to panels is valid. In re Lincoln Storage of Buffalo, Inc., 156 A.D.2d 832, 550 N.Y.S.2d 69, 1989 N.Y. App. Div. LEXIS 15988 (N.Y. App. Div. 3d Dep't 1989), app. dismissed, 76 N.Y.2d 871, 560 N.Y.S.2d 984, 561 N.E.2d 884, 1990 N.Y. LEXIS 3048 (N.Y. 1990), aff'd, 77 N.Y.2d 823, 566 N.Y.S.2d 198, 567 N.E.2d 240, 1991 N.Y. LEXIS 3 (N.Y. 1991).

Under statute requiring majority of six affirmative votes from ten commissioners for adoption of resolution by city board of elections, resolution supported by five affirmative votes was ineffective. Temporary State Charter Revision Com. v Board of Elections, 83 Misc. 2d 1029, 374 N.Y.S.2d 946, 1975 N.Y. Misc. LEXIS 3036 (N.Y. Sup. Ct.), aff'd, 37 N.Y.2d 859, 378 N.Y.S.2d 43, 340 N.E.2d 475, 1975 N.Y. LEXIS 2239 (N.Y. 1975).

The vote on rent guidelines for rent stabilized apartments taken by the nine-member Rent Guidelines Board of the City of New York (Administrative Code of City of New York, § YY51-5.0, subd a) supported by only four of the eight members then on the board rather than by the affirmative vote of at least five board members necessary for the board to exercise any power, authority or duty by majority vote (General Construction Law, § 41), is invalid; the board is not foreclosed from setting the "maximum rate or rates of rent adjustment" after July 1 of each year (Administrative Code, § YY51-5.0, subd b) if no such rate was previously adopted assuming that the board's acts are otherwise in order. Rent Stabilization Ass'n v Rent Guidelines Board, 98 Misc. 2d 312, 413 N.Y.S.2d 950, 1978 N.Y. Misc. LEXIS 2884 (N.Y. Sup. Ct. 1978).

Order establishing legal rent for apartment issued by 3 to 2 vote of 9 member Conciliation and Appeals Board is invalid since less than majority of members of board have voted in support of order. Reiff v New York City Conciliation & Appeals Bd., 128 Misc. 2d 851, 491 N.Y.S.2d 565, 1985 N.Y. Misc. LEXIS 3010 (N.Y. Sup. Ct. 1985).

Operation of Surrogate Decision-Making Committee panels (established to expedite major medical treatment for mentally ill patients) with only 3 members present would be enjoined, in view of specific requirement of CLS Men Hyg § 80.05 that 4 panel members be selected from distinctly different categories, to afford different points of view and perspectives; legislature apparently considered presence of 4 panel members essential as substitute for judicial intervention, and thus "quorum rule" provided in CLS Gen Const § 41, permitting body charged with public duty to perform with majority (rather than all) of its members present, did not apply. Savastano v Sundram, 138 Misc. 2d 23, 523 N.Y.S.2d 387, 1987 N.Y. Misc. LEXIS 2771 (N.Y. Sup. Ct. 1987).

15. —County board of supervisors

Member's N.Y. C.P.L.R. art. 78 proceeding against a county legislature and an officer presented a nonjusticiable controversy because it was not the province of the courts to direct the legislature how to do its work, and the question of whether the county legislature violated its own internal rules was not subject to court oversight; even if there were a misinterpretation of the county legislature's own rules, it would not have contravened N.Y. County Law § 153(8), which simply granted authority to the county legislature to adopt its internal rules. There was no merit to the member's contention, in effect, that the county legislature's and the officer's interpretation of its rules contravened N.Y. Gen. Constr. Law § 41. Matter of Montano v County Legislature of County of Suffolk, 70 A.D.3d 203, 891 N.Y.S.2d 82, 2009 N.Y. App. Div. LEXIS 8470 (N.Y. App. Div. 2d Dep't 2009).

16. —City council

Section 41 does not limit right of city council to act by majority of quorum in intracameral matters. Morris v Cashmore, 253 A.D. 657, 3 N.Y.S.2d 624, 1938 N.Y. App. Div. LEXIS 8529 (N.Y. App. Div.), aff'd, 278 N.Y. 730, 17 N.E.2d 143, 278 N.Y. (N.Y.S.) 730, 1938 N.Y. LEXIS 1547 (N.Y. 1938).

Although this section covers only majority votes, to hold that it does not also apply to greater than majority votes would create an anomalous situation which could not have been intended by the legislature, and where a zoning amendment was required to be approved by three-fourths vote of the city council, approval by three-fourths of the total number of members on the council was required, and approval by nine out of eleven members present was insufficient to adopt the amendment where the number or members on the council was thirteen. Savatgy v Kingston, 26 A.D.2d 978, 274 N.Y.S.2d 852, 1966 N.Y. App. Div. LEXIS 3065 (N.Y. App. Div. 3d Dep't 1966), aff'd, 20 N.Y.2d 258, 282 N.Y.S.2d 513, 229 N.E.2d 203, 1967 N.Y. LEXIS 1273 (N.Y. 1967).

17. —Town board

Signing so-called consent to abandon and discontinue highway by 3 of the members of town board of six was by less than legal quorum of its members. Greene v Goodwin Sand & Gravel Co., 129 N.Y.S. 709, 72 Misc. 192, 1911 N.Y. Misc. LEXIS 357 (N.Y. Sup. Ct. 1911).

Under this section majority of members of town board may hear and determine charges against member of board of water commissioners of said town. Bryan v Town Board of Brighton, 232 N.Y.S. 18, 133 Misc. 315, 1928 N.Y. Misc. LEXIS 1171 (N.Y. Sup. Ct. 1928).

The words "a majority of the members" of town board, as used in Town Law, § 64, if limited to acts of members as distinguished from acts of town boards, are not otherwise defined in Town Law, and, accordingly, what constitutes a majority of the members of board is governed by Gen. Const. Law, § 41. Application of Crosby, 36 N.Y.S.2d 301, 178 Misc. 746, 1942 N.Y. Misc. LEXIS 1786 (N.Y. Sup. Ct.), aff'd, 265 A.D. 92, 37 N.Y.S.2d 745, 1942 N.Y. App. Div. LEXIS 5686 (N.Y. App. Div. 1942).

Appointment of supervisor was unauthorized by a vote of two members of town board which was constituted by law at five members, and petition in a proceeding by one appointed to compel the respondent, who is holding over as supervisor (Pub. Off. Law, § 5), to surrender to books, records and property pertaining to the office, is properly dismissed. Application of Crosby, 36 N.Y.S.2d 301, 178 Misc. 746, 1942 N.Y. Misc. LEXIS 1786 (N.Y. Sup. Ct.), aff'd, 265 A.D. 92, 37 N.Y.S.2d 745, 1942 N.Y. App. Div. LEXIS 5686 (N.Y. App. Div. 1942).

18. —Village board and mayor

A village mayor does not have the right to postpone a regular meeting of the Village board to a subsequent date. 1955 Op St Comp File #7640.

19. —Village board

Village board's denial of petitioner's application for subdivision plat approval, based on concurrence of only 2 of its 5 members, was not in accordance with CLS Gen Const § 41 and was thereby invalid since statute requires that power or authority be exercised by "not less than a majority of the whole number," notwithstanding that one board member was absent and one abstained. D.E.P. Resources, Inc. v Planning Bd. of Monroe, 131 A.D.2d 757, 516 N.Y.S.2d 954, 1987 N.Y. App. Div. LEXIS 48203 (N.Y. App. Div. 2d Dep't 1987).

Where statute provides for a five member board, there must be five appointed, and neither provision of Village Law that concurring vote of a majority of such board is sufficient to make a determination nor provision of General Construction Law that majority of board shall constitute a quorum authorize three members of a five member board to act, when only four members have been appointed. Gray v Maislen, 17 Misc. 2d 161, 130 N.Y.S.2d 466, 1954 N.Y. Misc. LEXIS 1913 (N.Y. Sup. Ct. 1954).

Where a quorum of four out of five members of Village Board were present at meeting, and one member disqualified himself, a vote of less than a majority of the board was sufficient to defeat a petition for a change of zone. Steers Sand & Gravel Corp. v Village Bd. of Northport, 129 N.Y.S.2d 403, 1954 N.Y. Misc. LEXIS 3147 (N.Y. Sup. Ct. 1954).

20. —Zoning board

When quorum of town zoning board of appeals is present and participates in vote on variance application by actually casting votes, vote of less than majority of board is deemed denial of variance. Tall Trees Constr. Corp. v Zoning Bd. of Appeals, 97 N.Y.2d 86, 735 N.Y.S.2d 873, 761 N.E.2d 565, 2001 N.Y. LEXIS 3413 (N.Y. 2001).

Abstaining vote on proposed zoning ordinance change could not be counted as an affirmative vote for the purposes of majority approval under Gen Const L § 41 where, of four out of possible five trustees present at board meeting, two trustees voted for and one against said change. Rockland Woods, Inc. v Suffern, 40 A.D.2d 385, 340 N.Y.S.2d 513, 1973 N.Y. App. Div. LEXIS 5138 (N.Y. App. Div. 2d Dep't 1973).

Where two members of seven-member zoning board of appeals voted to grant application for special exception permit, two voted to deny such application, two members abstained and one was absent, board's action was not valid and was equivalent to nonaction. Walt Whitman Game Room, Inc. v Zoning Board of Appeals, 54 A.D.2d 764, 387 N.Y.S.2d 698, 1976 N.Y. App. Div. LEXIS 14430 (N.Y. App. Div. 2d Dep't 1976), overruled in part, Tall Trees Constr. Corp. v Zoning Bd. of Appeals, 97 N.Y.2d 86, 735 N.Y.S.2d 873, 761 N.E.2d 565, 2001 N.Y. LEXIS 3413 (N.Y. 2001).

Court would annul of denial of petitioner's application for area variance from setback requirement where (1) petitioner's neighbor, who was commissioner on city zoning board of appeals, opposed request for variance, (2) neighbor disqualified himself from vote and 2 other members of zoning board of appeals abstained, and (3) of 2 remaining members of zoning board of appeals, one voted for variance and one voted against variance; zoning board of appeals acted without quorum, and petitioner was entitled to have matter remitted for vote by duly constituted impartial majority in accordance with CLS Gen Const § 41. Hoffis v Zoning Bd. of Appeals, 166 A.D.2d 850, 563 N.Y.S.2d 183, 1990 N.Y. App. Div. LEXIS 12802 (N.Y. App. Div. 3d Dep't 1990).

Where only three members of five-man zoning board were present on application for zoning variance, and one member did not participate, the hearing was invalid. Giuliano v Entress, 4 Misc. 2d 546, 158 N.Y.S.2d 961, 1957 N.Y. Misc. LEXIS 3589 (N.Y. Sup. Ct. 1957).

Since a majority of all the members in office must initially approve a zoning ordinance, and indeed pass an amendment in the absence of a protest, it should not be the rule that fewer votes than a majority of all the members might conceivably enact an amendment over a property owner's protest where § 83 of the General City Law provides that a "three-fourths vote of the council" is necessary; and an amendment to a zoning ordinance before a common council composed of 13 members, which received the affirmative approval of 9 members, was defeated. Savatgy v Kingston, 51 Misc. 2d 251, 273 N.Y.S.2d 1, 1966 N.Y. Misc. LEXIS 1860 (N.Y. Sup. Ct.), aff'd, 26 A.D.2d 978, 274 N.Y.S.2d 852, 1966 N.Y. App. Div. LEXIS 3065 (N.Y. App. Div. 3d Dep't 1966).

Where a proposed change in a zoning ordinance received only four votes out of eight possible votes, the resolution failed to pass. Iannarone v Caso, 59 Misc. 2d 212, 298 N.Y.S.2d 350, 1969 N.Y. Misc. LEXIS 1760 (N.Y. Sup. Ct.), aff'd, 33 A.D.2d 658, 306 N.Y.S.2d 404, 1969 N.Y. App. Div. LEXIS 5795 (N.Y. App. Div. 2d Dep't 1969).

21. —Planning board

County planning commission disapproval of town zoning change was ineffective for lack of two-thirds majority of the entire commission where commission was to be composed of 15 members, 13 had been appointed, and 8 of 9 members present voted against such change; 10 votes would be necessary to obtain two-thirds majority. Smithtown v Howell, 31 N.Y.2d 365, 339 N.Y.S.2d 949, 292 N.E.2d 10, 1972 N.Y. LEXIS 944 (N.Y. 1972).

Turning down petitioners' final plat application for failure to gain supermajority approval constituted dispositive planning board action under relevant statutes. Aloya v Planning Bd., 93 N.Y.2d 334, 690 N.Y.S.2d 475, 712 N.E.2d 644, 1999 N.Y. LEXIS 777 (N.Y. 1999).

Where town planning board's denial of landowners' application for special permit for excavation and removal of soil material from their property was denied by less than majority of board's seven members, vote was ineffectual to deny application, was equivalent to nonaction and, by virtue of town's own zoning ordinance which required action within 45 days on such application, planning board was deemed to have approved landowners' application. Squicciarini v Planning Bd. of Chester, 48 A.D.2d 687, 367 N.Y.S.2d 845, 1975 N.Y. App. Div. LEXIS 9719 (N.Y. App. Div. 2d Dep't 1975), aff'd, 38 N.Y.2d 958, 384 N.Y.S.2d 152, 348 N.E.2d 609, 1976 N.Y. LEXIS 2597 (N.Y. 1976).

Court would affirm town planning board's determination which disapproved petitioners' application for final subdivision plat approval since only 4-member majority of board voted to approve plat and override county planning board's negative recommendation, instead of requisite 5-member majority under CLS Gen Mun § 239-m(5); town planning board's vote was not equivalent to "non action" or failure to take action for purposes of "deemed granted approval" language in CLS Town § 276(8). Aloya v Planning Bd., 230 A.D.2d 790, 646 N.Y.S.2d 375, 1996 N.Y. App. Div. LEXIS 8365 (N.Y. App. Div. 2d Dep't 1996).

Disapproval of proposed downzoning, pursuant to § 1608 of the County Government Law, by a vote of three members of a county

planning board with one abstention was ineffective to veto the downzoning, where the law creating the board provided for five members and a ⅔ vote of the whole board was required to defeat the proposed zoning change, since § 41 of the General Construction Law required ⅔ of the "whole number" authorized by statute and an abstention should be counted in opposition to the board's resolution. Downing v Gaynor, 47 Misc. 2d 535, 262 N.Y.S.2d 837, 1965 N.Y. Misc. LEXIS 1620 (N.Y. Sup. Ct. 1965).

Legislative mandate imposed on municipal bodies that they, before taking final action on zoning regulations, refer same to county planning agency, is a condition precedent to "final action" by municipalities on zoning proposal following which municipality may, if planning agency fails to act within applicable time period or approves proposal, adopt proposal by bare majority vote, or if planning agency disapproves proposal, adopt proposal by vote of majority plus one. Schaus v Town Bd. of Clifton Park, 83 Misc. 2d 726, 372 N.Y.S.2d 952, 1975 N.Y. Misc. LEXIS 2972 (N.Y. Sup. Ct. 1975).

22. —Board of education

Acts of board of education of New York city must be by a majority of the members thereof pursuant to § 41. Talbot v Board of Education, 14 N.Y.S.2d 340, 171 Misc. 974, 1939 N.Y. Misc. LEXIS 2222 (N.Y. Sup. Ct. 1939).

Educ. Law, § 1143-c, subd. 10, indicates that legislature intended that Gen. Const. Law, § 41, should not apply to proceedings and vote of board. McArdle v Board of Higher Education, 49 N.Y.S.2d 333, 181 Misc. 766, 1943 N.Y. Misc. LEXIS 2866 (N.Y. Sup. Ct. 1943).

The school board cannot suspend a pupil for a period of more than five days without a hearing before a full board, and a hearing before a "Trial Commission" consisting of two of the five board members was insufficient, since the commission was less than a quorum or majority of the full board required to exercise its authority. Curry v Board of Education, 60 Misc. 2d 651, 303 N.Y.S.2d 760, 1969 N.Y. Misc. LEXIS 1238 (N.Y. Sup. Ct. 1969).

Whether local school board membership was originally 16 or 10 members, an affirmative vote by five of all the permissible members was insufficient to exercise the power to hire a unit administrator. Board of Education v Alonso, 60 Misc. 2d 709, 303 N.Y.S.2d 932, 1969 N.Y. Misc. LEXIS 1234 (N.Y. Sup. Ct. 1969).

23. —Water authority

Claim for cost of installing water mains will be denied where it is based solely on private conversations with two members of water district board inferring that claim would be satisfied, and it does not appear that board, acting as such, ever agreed officially to pay for mains. Amity Holding Corp. v Eden, 238 A.D. 628, 265 N.Y.S. 23, 1933 N.Y. App. Div. LEXIS 9577 (N.Y. App. Div. 1933).

24. —Board of Health

Where under this section board of health at time of adoption of resolution was lawfully composed of six members, including mayor, four affirmative votes were required to legally pass resolution and its adoption by a three to one vote was ineffective. Moll v Lockport, 194 N.Y.S. 250, 118 Misc. 573, 1922 N.Y. Misc. LEXIS 1224 (N.Y. Sup. Ct. 1922).

Board of health must adopt resolution by majority vote of full board before retiring petitioner, employee, from city health department for alleged misconduct in his official duties, and placing his name on pension roll. McMeekan v Department of Health, 283 N.Y.S. 358, 157 Misc. 620, 1935 N.Y. Misc. LEXIS 1553 (N.Y. Sup. Ct. 1935), aff'd, 249 A.D. 609, 292 N.Y.S. 177, 1936 N.Y. App. Div. LEXIS 5175 (N.Y. App. Div. 1936).

25. —Condemnation commission

Where, in proceeding to condemn land for highway purposes, one of three commissioners died after all evidence had been received, surviving commissioners are not authorized to act under this section since High. Law, § 151 (now § 33), provides for filling of vacancy. Board of Sup'rs v Sawitz, 236 A.D. 268, 259 N.Y.S. 4, 1932 N.Y. App. Div. LEXIS 5950 (N.Y. App. Div. 1932).

Where after three commissioners appointed in condemnation proceedings to appraise damages caused by taking of land for railroad purposes had viewed premises and pending hearing to take testimony one commissioner died, surviving commissioners, under former Civil Code, § 3370 (now Condemnation Law 914) and this section, have ample power to continue work of commission. Lake S. & M. S. R. Co. v Mahle, 129 N.Y.S. 288, 72 Misc. 129, 1911 N.Y. Misc. LEXIS 344 (N.Y. Sup. Ct. 1911), rev'd, 158 A.D. 889, 143 N.Y.S. 1126, 1913 N.Y. App. Div. LEXIS 7750 (N.Y. App. Div. 1913).

Agency Opinions

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1. In general

Two members of a three-man Board constitute a quorum which may act as the full Board. Action by the Board requires a majority vote which is two votes. 1969 N.Y. Op. Att'y Gen. No. 12, 1969 N.Y. AG LEXIS 4.

Majority vote of whole number of common counsel is necessary to take action, such that five to four vote of city common council composed of 10 members is insufficient to take action. 1989 NY Ops Atty Gen 89-33, 1989 N.Y. AG LEXIS 40.

General Construction Law governs provisions of Oneonta City Charter as to quorum and voting requirements; non-voting absent council members are not considered as having cast votes against provision so as to create tie vote that would permit mayor to break tie. 2001 N.Y. Op. Atty' Gen. No. 2001-6, 2001 N.Y. AG LEXIS 77.

A committee formed to operate a joint airport pursuant to General Municipal Law § 353-a, consisting of a member from each town board of the 7 participating towns, must act by majority vote of the entire committee. The participating towns may not, by local law, authorize the committee to act by majority of the quorum present at a meeting. 1990 Op St Compt 90-31, 1990 N.Y. Comp. LEXIS 38.

Public body, such as town board or public library board of trustees, cannot carry out its powers or duties except by means of affirmative vote of majority of its total membership taken at meeting duly held on reasonable notice to all of members. Comm on Open Gov't FOIL-AO-8330.

Open Meetings Law applies only if quorum is present; even when meeting is scheduled and reasonable notice is given to all members, but less than majority attends, gathering does not constitute "meeting" and public has no right to attend. Comm on Open Gov't OML-AO-2489.

Agency cannot validly take action outside of meeting held in accordance with Open Meetings Law, during which quorum is present and by means of affirmative vote of majority of its total membership; thus, agency cannot adopt new administrative fee schedule by unanimous written consent. Comm on Open Gov't OML-AO-2569.

Since local workforce investment boards (LWIBs), which are authorized by 7 USCS § 2143, consist of at least 3 persons, and those persons "are charged with [a] public duty to be performed or exercised by them jointly or as a board", LWIBs are subject to

requirements of CLS Gen Const § 41, as well as Open Meetings Law. Comm on Open Gov't OML-AO-3480.

Even when meeting is scheduled and reasonable notice is given to all members of public body in manner consistent with requirements of CLS Gen Const § 41, but less than majority attends, gathering would not constitute "meeting" and public would have no right to attend. Comm on Open Gov't OML-AO-4067.

Public body may not take action or vote by means of series of telephone calls or, for example, by e-mail. Comm on Open Gov't OML-AO-4113.

2. Definitions

A committee formed to operate a joint airport pursuant to General Municipal Law § 353-a, consisting of a member from each town board of the 7 participating towns, must act by majority vote of the entire committee. The participating towns may not, by local law, authorize the committee to act by majority of the quorum present at a meeting. 1990 Op St Compt 90-31, 1990 N.Y. Comp. LEXIS 38.

"Quorum" consists of majority of total membership of body for purpose of Open Meetings Law; thus, if, for example, school board consists of 7, its quorum would be 4, and in case of committee consisting of 3, quorum would be 2. Comm on Open Gov't FOIL-AO-12405.

Public body may not take action or vote by means of e-mail, telephone conference, or series of telephone conversations. Comm on Open Gov't OML-AO-3787.

3. Actions of body distinguished

It is not necessary that each parcel of real property be viewed and appraised by each member of a three-man board of assessors. It is proper for a three-man board of assessors to assign specific areas of the assessing unit to each member and for each to submit appraisals at a meeting of the board. Likewise, appraisers may be employed to perform field appraisals and to submit their appraisals to the board for final action by it. 2 Op Counsel, SBEA #77. Each of the three duly appointed park commissioners of a village has equal authority where the commission acts as a body in the discharge of its public duty. General Construction Law, § 41: 1953 Op St Compt No. 53–6020.

4. Absences

Where there is a village board made up of the mayor and four trustees, it is necessary to have the affirmative votes of three of those officers to carry any resolution or matter coming before the village board unless there is statutory authority or requirement for a different number or proportion. This is the case even though there are vacancies in one or more such offices or there are absences at a meeting of the village board of trustees. 1974 NY Ops Atty Gen Mar 1 (Informal), 1974 N.Y. AG LEXIS 47.

An affirmative vote for four members of the seven member town of Indian Lake Planning Board is required to exercise the powers of such Board regardless of vacancies on said Board, absences or disqualifications from acting, except in those instances where, by law, more than a majority of the whole number of the members of the Board is required for affirmative action. 1975 NY Ops Atty Gen Jan 29 (Informal), 1975 N.Y. AG LEXIS 62.

A committee formed to operate a joint airport pursuant to General Municipal Law § 353-a, consisting of a member from each town board of the 7 participating towns, must act by majority vote of the entire committee. The participating towns may not, by local law, authorize the committee to act by majority of the quorum present at a meeting. 1990 Op St Compt 90-31, 1990 N.Y. Comp. LEXIS 38.

Board of assessment review, which cannot comply with statutory minimum number of hours for its hearing because of religious observances of majority of its members, must reconvene on another date; new complaints may be filed at such recessed hearing. 9 Op Counsel SBEA No. 111 (1993).

5. Vacancies

Where a vacancy occurs in a town zoning commission by reason of the death of one of its members, the remaining members may function as provided by this section. 1957 NY Ops Atty Gen Oct 22 (Informal), 1957 N.Y. AG LEXIS 218.

Where there is a village board made up of the mayor and four trustees, it is necessary to have the affirmative votes of three of those officers to carry any resolution or matter coming before the village board unless there is statutory authority or requirement for a different number or proportion. This is the case even though there are vacancies in one or more such offices or there are absences at a meeting of the village board of trustees. 1974 NY Ops Atty Gen Mar 1 (Informal), 1974 N.Y. AG LEXIS 47.

An affirmative vote for four members of the seven member town of Indian Lake Planning Board is required to exercise the powers of such Board regardless of vacancies on said Board, absences or disqualifications from acting, except in those instances where, by law, more than a majority of the whole number of the members of the Board is required for affirmative action. 1975 NY Ops Atty Gen Jan 29 (Informal), 1975 N.Y. AG LEXIS 62.

A public officer holds over and continues to perform the duties of his office until a successor is chosen and qualified but the office is vacant for the purpose of selecting a successor. 1979 NY Ops Atty Gen Aug 13 (Informal), 1979 N.Y. AG LEXIS 69.

Failure of the newly elected mayor and three trustees to qualify for office by filing their constitutional oaths of office within 30 days created vacancies in the offices of mayor, one trustee for one year and two trustees for two years. 1979 NY Ops Atty Gen Aug 13 (Informal), 1979 N.Y. AG LEXIS 69.

Where there is a vacancy in the office of village mayor the board of trustees may fill that vacancy. 1979 NY Ops Atty Gen Aug 13 (Informal), 1979 N.Y. AG LEXIS 69.

The trustees have no authority to make an appointment to fill a vacancy in the office of trustee, which is a power given only to the mayor. 1979 NY Ops Atty Gen Aug 13 (Informal), 1979 N.Y. AG LEXIS 69.

The newly appointed mayor may fill the three vacancies on the village board of trustees, which appointments may be of any individuals qualified to hold the offices, including those who had been elected to the offices but who failed to qualify. 1979 NY Ops Atty Gen Aug 13 (Informal), 1979 N.Y. AG LEXIS 69.

The authorization for an immediate special election to fill vacancies in these village offices cannot be utilized because the statutory time has elapsed for calling one; thus the special election to fill vacancies for the unexpired portion of the terms of two trustees will be held in March, 1980, concurrently with the general village election at which will be elected successors to the mayor, Trustee West and the other trustee to be appointed now. 1979 NY Ops Atty Gen Aug 13 (Informal), 1979 N.Y. AG LEXIS 69.

If the board of trustees consisting of the trustee whose term has not expired and the two holdover trustees cannot agree unanimously on an individual to be appointed to fill the office of mayor, then the village clerk should notify the office of the Governor that there are vacancies in four village elective offices and request the Governor to proclaim a special election to fill the vacancies. 1979 NY Ops Atty Gen Aug 13 (Informal), 1979 N.Y. AG LEXIS 69.

In situations where majority vote is required, 7 member planning board may take action only through vote of 4 members of board, so that where 2 members are absent and 2 others abstain, planning board can take no action. 1988 NY Ops Atty Gen 88-83, 1988 N.Y. AG LEXIS 89.

There is no provision in state law which provides remedy to Love Canal Area Revitalization Agency in event there is deadlock in filling vacancy on board; Agency may act even with vacancy provided quorum and majority requirements of CLS Gen Const § 41 have been met. 1998 N.Y. Op. Att'y Gen. No. 98-9, 1998 N.Y. AG LEXIS 10.

A town zoning board of appeals may function although there is a vacancy on the board. Three members constitute a quorum and the concurring vote of three members is necessary for a decision of the board. 1955 Op St Compt No. 55–7179.

6. Abstentions

A resolution to appoint a member of the village planning and zoning board by a five member village board, all members being present at an organization meeting, said resolution being properly moved and seconded but receiving only two affirmative votes, one negative vote and two trustees voting "present", was defeated. 1966 NY Ops Atty Gen May 11 (Informal), 1966 N.Y. AG LEXIS 74.

In situations where majority vote is required, 7 member planning board may take action only through vote of 4 members of board, so that where 2 members are absent and 2 others abstain, planning board can take no action. 1988 NY Ops Atty Gen 88-83, 1988 N.Y. AG LEXIS 89.

A city charter granting to the mayor the authority to vote in the event of a tie vote of the common council may, consistent with State law, also provide that abstentions are to be treated as negative votes; it is necessary that city officials review the charter and, if necessary, local legislative intent, to determine whether abstentions are to be treated in this fashion. 1990 N.Y. Op. Att'y Gen. No. 90-79, 1990 N.Y. AG LEXIS 84.

Where three members of the board of fire commissioners retire from a meeting, the remaining two commissioners may not transact any fire district business. General Construction Law, § 41: 1953 Op St Compt No. 53–6086.

Where voting on resolutions granting applications for zoning changes resulted in nays and abstentions of town board members so that the resolutions did not receive an affirmative vote of the majority of the board, the resolutions are deemed defeated. 1974 Op St Compt No. 74–99.

A town board by resolution may provide that a member's abstention from voting shall be considered an affirmative vote. 1980 Op St Compt No. 80–122.

7. Consequences of invalid vote

Where board of education consists of six members, the votes of four members for the same individual are necessary to appoint a clerk. In the absence of requisite four votes, former clerk continues in office until successor is appointed. 1947 Op St Compt 368.

Local laws were not duly adopted by the board of supervisors of Schoharie County where only 10 or 11 members were present at a meeting duly convened, though eight voted affirmatively for adoption of the particular laws. 1960 Op St Compt No. 60–220.

Where voting on resolutions granting applications for zoning changes resulted in nays and abstentions of town board members so that the resolutions did not receive an affirmative vote of the majority of the board, the resolutions are deemed defeated. 1974 Op St Compt No. 74–99.

8. Applicability of other laws and by-laws

A committee formed to operate a joint airport pursuant to General Municipal Law § 353-a, consisting of a member from each town board of the 7 participating towns, must act by majority vote of the entire committee. The participating towns may not, by local law, authorize the committee to act by majority of the quorum present at a meeting. 1990 Op St Compt No. 90-31, 1990 N.Y. Comp. LEXIS 38.

9. —Supremacy of section

A provision in the Charter of the City of Rochester which sets forth in general that all sales of real estate belonging to the City must be authorized by ordinance of the Council and passed by three-fourths vote of all the members is not applicable to lands owned and sold by the Rochester Urban Renewal Agency. 1971 NY Ops Atty Gen May 6 (Informal), 1971 N.Y. AG LEXIS 75.

The requirement in Village Law, § 7-708, subdivision 1, requiring a four-to-one majority rather than a three-to-two majority to amend the village zoning law following a protest, yields to the overriding requirement of the State policy that urban renewal, stated by General Municipal Law, § 501, to be a public purpose essential to the public interest, be expedited and effective. A simple majority vote, three-to-two, is sufficient to amend the village zoning law to provide for an urban renewal project. 1974 NY Ops Atty Gen Nov 25 (Informal), 1974 N.Y. AG LEXIS 184.

The statute makes no provision for the number of members on a town zoning commission which may consist of any reasonable number of members decided upon by the town board and the town board may, from time to time, increase or diminish the number of members. Bylaws or rules of procedure of a zoning commission can not supersede the provisions of General Construction Law § 41 concerning quorum and majority. A future change in the number of members will not have any effect upon prior actions of the commission which would have to stand or fall upon the quorum and majority requirements then in effect. Such a commission may reconsider any matter previously having come before it. 1976 NY Ops Atty Gen July 30 (Informal), 1976 N.Y. AG LEXIS 135.

School board does not have power to enact a resolution stating that four out of five votes are necessary to change its policies, regulations and bylaws. In re Miller, N.Y. Op Comr Ed No. 9600.

Since resolution requiring the vote of four of five members of the school board in order to modify its policies, regulations and bylaws was void *ab initio,* appeal challenging the right of three members of the school board to rescind the resolution was moot. In re Miller, N.Y. Op Comr Ed No. 9600.

10. —Requiring greater than majority vote

A local governing body or board of a city, town or village in Monroe County may not, pursuant to section 397 of the Vehicle and Traffic Law, authorize the Law Enforcement Council of Monroe County to issue permits for the equipping of motor vehicles with radio receiving sets. 1975 NY Ops Atty Gen Jan 21 (Informal), 1975 N.Y. AG LEXIS 58.

Public Officers Law, § 42(1), is a general law and may not be amended by an inconsistent local law. Accordingly, where a City Councilman of the City of Port Jervis, was elected at the general election in November of 1977 for a two-year term commencing on January 1, 1978 and terminating on December 31, 1979, and resigned his office effective as of May 1, 1978, such resignation created a vacancy in said office which must be filled at the general election in November of 1978 for the remainder of said Councilman's term. The person appointed in 1978 to fill such vacancy may hold such office only until January 1, 1979. 1978 NY Ops Atty Gen May 11 (Informal), 1978 N.Y. AG LEXIS 130.

Three trustees and the mayor constitute a quorum for transaction of village business in a village having six trustees and a mayor on its board of trustees. However, five votes are required to pass a bond resolution or capital note resolution. 1954 Op St Compt No. 54–6946.

Provision of central school district's code of ethics, requiring super-majority (majority plus one) of board of education for removal of member of ethics board, was unlawful because neither Education Law nor General Construction Law authorizes school board to adopt requirements in excess of those already provided by CLS Gen Const § 41. 1998 Op Comm Ed No. 13,914, 1998 236.

Public body may not take action or vote by means of telephone calls or e-mail, since such action or vote would violate quorum requirements of CLS Gen Const § 41. Comm on Open Gov't OML-AO-3732.

If notice requirement of CLS Gen Const § 41 does not occur, even if majority is present, valid meeting could not be held or action could not validly be taken. Comm on Open Gov't OML-AO-3732.

11. Actions of particular public bodies

A committee formed to operate a joint airport pursuant to General Municipal Law § 353-a, consisting of a member from each town board of the 7 participating towns, must act by majority vote of the entire committee. The participating towns may not, by local law, authorize the committee to act by majority of the quorum present at a meeting. 1990 Op St Compt No. 90-31, 1990 N.Y. Comp. LEXIS 38.

A quorum of the Board of Managers of a public general hospital, for passage of resolutions, transaction of business, or election of officers, is a majority of the whole number of the board. 1963 Op St Compt No. 63–161.

Power or duty vested in three person board of assessors may only be exercised by majority of members of that board; chairman of board of assessors may not act unilaterally. 7 Op Counsel, SBEA #51, 1979 March 6.

12. —County board of supervisors

Local laws were not duly adopted by the board of supervisors of Schoharie County where only 10 or 11 members were present at a meeting duly convened, though eight voted affirmatively for adoption of the particular laws. 1960 Op St Compt No. 60–220.

County legislature's quorum rule is inconsistent with CLS Gen Const § 41 where rule states that "all voting shall be decided by a majority of those present and voting," while § 41 states that "not less than a majority of the whole number may perform and

exercise such power, authority or duty." Comm on Open Gov't OML-AO-3989.

13. —City council

Under the charter of the City of Amsterdam election of the vice-president of the Common Council by resolution rather than by ballot is invalid. 1967 NY Ops Atty Gen Feb 10 (Informal), 1967 N.Y. AG LEXIS 40.

The phrase "approved by the governing body" as used in Section 507 (2) (d) of the General Municipal Law means approval by a concurrence of a majority of the common council of the City of Rochester when it is approving a disposition of real property owned by the Rochester Urban Renewal Agency. 1970 NY Ops Atty Gen May 14 (Informal), 1970 N.Y. AG LEXIS 73.

A provision in the Charter of the City of Rochester which sets forth in general that all sales of real estate belonging to the City must be authorized by ordinance of the Council and passed by three-fourths vote of all the members is not applicable to lands owned and sold by the Rochester Urban Renewal Agency. 1971 NY Ops Atty Gen May 6 (Informal), 1971 N.Y. AG LEXIS 75.

The above section addresses itself to "public officers" and "persons" and the majority of the whole number of Supervisors comprising the Board of Supervisors of Putnam County constitutes a quorum when assembled at a duly convened meeting. 1975 NY Ops Atty Gen Apr 11 (Informal), 1975 N.Y. AG LEXIS 106.

The appointed City Manager of the City of Niagara Falls, and not the Mayor of that City, with the concurrence of the legislative body of the City Council, may request the Legislature to pass a specific bill relating to the property, affairs or government of the City of Niagara Falls. 1976 NY Ops Atty Gen Nov 15 (Informal), 1976 N.Y. AG LEXIS 175.

14. —Town board

A person named to fill a vacancy in the office of town supervisor or town councilman must receive not less than a majority of the votes of the entire authorized membership of the town board. 1972 NY Ops Atty Gen Nov 13 (Informal), 1972 N.Y. AG LEXIS 157.

In situations where majority vote is required, 7 member planning board may take action only through vote of 4 members of board, so that where 2 members are absent and 2 others abstain, planning board can take no action. 1988 NY Ops Atty Gen 88-83, 1988 N.Y. AG LEXIS 89.

If supervisor of town makes home rule request, town board can approve request through majority vote of its total membership; if supervisor fails to make home rule request, ⅔ vote of total membership is necessary to make request. 1993 N.Y. Op. Att'y Gen. No. 93-43, 1993 N.Y. AG LEXIS 63.

An individual must receive three votes to be appointed to fill a vacancy on the town board of a town of the second class. 1978 Op St Compt No. 78–1054.

15. —Village board and mayor

Where a village board consists of a mayor and four trustees, three members thereof constitute a quorum. 1953 NY Ops Atty Gen Aug 22 (Informal), 1953 N.Y. AG LEXIS 295.

A vacancy in a village board of trustees must be filled by a majority of the entire authorized membership of such board. The mayor has no authority to fill such vacancy. 1953 NY Ops Atty Gen Sept 1 (Informal), 1953 N.Y. AG LEXIS 300.

Where there is a village board made up of the mayor and four trustees, it is necessary to have the affirmative votes of three of those officers to carry any resolution or matter coming before the village board unless there is statutory authority or requirement for a different number or proportion. This is the case even though there are vacancies in one or more such offices or there are absences at a meeting of the village board of trustees. 1974 NY Ops Atty Gen Mar 1 (Informal), 1974 N.Y. AG LEXIS 47.

In any event, the acts of the village board of trustees since April 2, 1979, were the acts of a de facto board and as such are valid (Schick v Impellitteri (1953, Sup) 122 NYS2d 729, affd 282 AD 663, 122 NYS2d 794; Sylvia Lake Co. v Northern Ore Co. (1926) 242 NY 144, 151 NE 158, cert den 273 US 695, 71 L Ed 844, 47 S Ct 92). 1979 NY Ops Atty Gen Aug 13 (Informal), 1979 N.Y. AG LEXIS 69.

Trustee West, holdover Trustee Dibble and holdover Trustee Leslie, by unanimous action, may appoint a village mayor but none of those three may be appointed to that office (Wood v Whitehall (1923) 120 Misc 124, 197 NYS 789, affd on the opinion below 206 AD 786, 201 NYS 959). 1979 NY Ops Atty Gen Aug 13 (Informal), 1979 N.Y. AG LEXIS 69.

The acts of the board of trustees which were unanimously voted upon by the remaining trustee and the two holdover trustees are valid unless more than a simple majority vote is required for passage. 1979 NY Ops Atty Gen Aug 13 (Informal), 1979 N.Y. AG LEXIS 69.

No such appointees can hold office beyond the end of the official year in 1980 even though the term for two of them, if they had been elected, would otherwise have continued until 1981. 1979 NY Ops Atty Gen Aug 13 (Informal), 1979 N.Y. AG LEXIS 69.

A municipal board consisting of five members can act only by the affirmative vote of at least three members. So if there are three people who can act on the village board of trustees, if they act unanimously, their acts have validity. 1979 NY Ops Atty Gen Aug 13 (Informal), 1979 N.Y. AG LEXIS 69.

Trustee Leslie, whose term expired in 1979 and who was elected Mayor but who failed to file his oath of office, continues to be a trustee as a holdover in office. 1979 NY Ops Atty Gen Aug 13 (Informal), 1979 N.Y. AG LEXIS 69.

Trustee Dibble, whose term expired in 1979 and who was elected to succeed himself but who failed to file his oath of office, continues in office as a holdover trustee. 1979 NY Ops Atty Gen Aug 13 (Informal), 1979 N.Y. AG LEXIS 69.

At the 1979 election, successors had to be elected for both trustees whose elective terms were expiring in 1979, and for the mayor and the trustee who occupied their offices by appointment. 1979 NY Ops Atty Gen Aug 13 (Informal), 1979 N.Y. AG LEXIS 69.

General discussion of the powers of a village mayor and board of trustees in obtaining legal services. 1981 N.Y. Op. Att'y Gen. No. 81-75, 1981 N.Y. AG LEXIS 79.

Three trustees and the mayor constitute a quorum for transaction of village business in a village having six trustees and a mayor on its board of trustees. However, five votes are required to pass a bond resolution or capital note resolution. 1954 Op St Compt No. 54–6946.

16. —Village board

Where a Village Board of Trustees consists of five members, three trustees may properly enact a resolution. 1958 NY Ops Atty Gen Oct 22 (Informal), 1958 N.Y. AG LEXIS 227.

A resolution to appoint a member of the village planning and zoning board by a five member village board, all members being present at an organization meeting, said resolution being properly moved and seconded but receiving only two affirmative votes, one negative vote and two trustees voting "present", was defeated. 1966 NY Ops Atty Gen May 11 (Informal), 1966 N.Y. AG LEXIS 74.

While any official action of the board should be taken at a meeting open to the public, including the news media, a village board of trustees may adopt proper legislation by the affirmative vote of a majority of all its members prohibiting the use of tape recorders by the public during sessions of its board meetings. 1970 NY Ops Atty Gen March 18 (Informal), 1970 N.Y. AG LEXIS 50.

The village Board of Trustees of the Village of Honeoye Falls is authorized to adopt a resolution by an affirmative vote of a majority of all its members prohibiting the use of a tape recorder by one of its members during sessions of its Board meetings if in its judgment the recording distracts from the true deliberative process of the Board. 1972 NY Ops Atty Gen Oct 27 (Informal), 1972 N.Y. AG LEXIS 152.

A local board may take action only by a majority of the whole membership of the board. Villages by local law may establish "alternate" members of the zoning board of appeals, who could serve in a case where conflicts of interest of regular board members would preclude action by the board. 1982 N.Y. Op. Att'y Gen. No. 82-61, 1982 N.Y. AG LEXIS 40.

In the event of a protest of a proposed change in zoning regulations, action must be taken by three-fourths of the whole

number of a board of trustees consisting of seven members. Six votes are necessary for action. N.Y. Op. Att'y Gen. No. 85-6.

Regardless of the composition of a village board of review, a majority of its members must be present when the board meets to hear complaints with respect to assessments. 8 Op Counsel SBEA No. 54 (1985, April 25).

17. —Zoning board

Where a vacancy occurs in a town zoning commission by reason of the death of one of its members, the remaining members may function as provided by this section. 1957 NY Ops Atty Gen Oct 22 (Informal), 1957 N.Y. AG LEXIS 218.

A town board of zoning appeals consisting of five members may hold a meeting at which three members are present to consider the overruling of a recommendation of the Rockland County Planning Board and thereafter at a later or adjourned meeting legally provided for and properly assembled vote on such measure or through proper procedures reconsider a previous vote and if four votes are cast at such meeting on a proper resolution in the affirmative for overruling the recommendation of the Rockland County Planning Board, such action is valid. 1972 NY Ops Atty Gen Mar 20 (Informal), 1972 N.Y. AG LEXIS 75.

The requirement in Village Law, § 7-708, subdivision 1, requiring a four-to-one majority rather than a three-to-two majority to amend the village zoning law following a protest, yields to the overriding requirement of the State policy that urban renewal, stated by General Municipal Law, § 501, to be a public purpose essential to the public interest, be expedited and effective. A simple majority vote, three-to-two, is sufficient to amend the village zoning law to provide for an urban renewal project. 1974 NY Ops Atty Gen Nov 25 (Informal), 1974 N.Y. AG LEXIS 184.

The statute makes no provision for the number of members on a town zoning commission which may consist of any reasonable number of members decided upon by the town board and the town board may, from time to time, increase or diminish the number of members. Bylaws or rules of procedure of a zoning commission can not supersede the provisions of General Construction Law § 41 concerning quorum and majority. A future change in the number of members will not have any effect upon prior actions of the commission which would have to stand or fall upon the quorum and majority requirements then in effect. Such a commission may reconsider any matter previously having come before it. 1976 NY Ops Atty Gen July 30 (Informal), 1976 N.Y. AG LEXIS 135.

Action by a zoning board of appeals to reopen a public hearing is required to be taken by a majority vote of the whole number of such board. The reopening of a public hearing by a zoning board of appeals must be noticed in accordance with provisions of the Town Law. N.Y. Op. Att'y Gen. No. 84-25.

A town zoning board of appeals may function although there is a vacancy on the board. Three members constitute a quorum and the concurring vote of three members is necessary for a decision of the board. 1955 Op St Compt No. 55–7179.

Where voting on resolutions granting applications for zoning changes resulted in nays and abstentions of town board members so that the resolutions did not receive an affirmative vote of the majority of the board, the resolutions are deemed defeated. 1974 Op St Compt No. 74–99.

18. —Planning board

An affirmative vote for four members of the seven member town of Indian Lake Planning Board is required to exercise the powers of such Board regardless of vacancies on said Board, absences or disqualifications from acting, except in those instances where, by law, more than a majority of the whole number of the members of the Board is required for affirmative action. 1975 NY Ops Atty Gen Jan 29 (Informal), 1975 N.Y. AG LEXIS 62.

A regional planning board is subject to the provisions of section 41 of the General Construction Law governing quorum and majority vote requirements for public bodies. 1990 N.Y. Op. Att'y Gen. No. I90-4.

Regional planning board is subject to provisions of CLS Gen Const Law § 41 governing quorum and majority vote requirements for public bodies. 1990 N.Y. Op. Att'y Gen. No. I90-4.

19. —Board of education

School board does not have power to enact a resolution stating that four out of five votes are necessary to change its policies, regulations and bylaws. In re Miller, N.Y. Op Comr Ed No. 9600.

Since resolution requiring the vote of four of five members of the school board in order to modify its policies, regulations and bylaws was void *ab initio,* appeal challenging the right of three members of the school board to rescind the resolution was moot. In re Miller, N.Y. Op Comr Ed No. 9600.

Where board of education consists of six members, the votes of four members for the same individual are necessary to appoint a clerk. In the absence of requisite four votes, former clerk continues in office until successor is appointed. 1947 Op St Compt No. 47–368.

School board's collective determination—based on telephone calls from school superintendent in which he apparently solicited responses from school board members concerning salary range offered for new position—as to what salary range should be, should have occurred during open meeting held in accordance with provisions of Open Meetings Law; because decision to offer certain salary range was made, such action should be memorialized in minutes. Comm on Open Gov't OML-AO-4113.

20. —Police and fire commissions

Two members of a three man police board must agree before official board action can be taken. 1959 NY Ops Atty Gen May 8 (Informal), 1959 N.Y. AG LEXIS 149.

Under CLS Town § 176(3) (and not CLS Gen Const § 41), 2 fire commissioners then in office may appoint qualified persons to fill 3 vacancies on board of fire commissioners; on filling of first vacancy, 3 should appoint fourth, and so on. 2008 N.Y. Op. Att'y Gen. No. 2008-1, 2008 N.Y. AG LEXIS 1.

The attendance of three fire district commissioners is necessary for a quorum and the affirmative vote of three such commissioners is necessary for the adoption of any resolution. 1953 Op St Compt No. 53–5967.

Where three members of the board of fire commissioners retire from a meeting, the remaining two commissioners may not transact any fire district business. General Construction Law, § 41: 1953 Op St Compt No. 53–6086.

One member of a town board which serves as board of police commissioners has no power to make an investigation of the police department. 1967 Op St Compt No. 67–559 and 67–584.

21. —Water authority

The powers of the Great Neck Water Authority, a public benefit corporation consisting of three members, may be exercised by the concurrence of any two of its members at a meeting duly called and held and attended by all three members, the statutory quorum. 1960 NY Ops Atty Gen May 25 (Informal), 1960 N.Y. AG LEXIS 120.

22. —Board of Health

Two members of the three-man Crime Victims Compensation Board constitute a quorum which may act as the full Board. Action by the Board requires a majority vote which is two votes. 1969 N.Y. Op. Att'y Gen. No. 12, 1969 N.Y. AG LEXIS 4.

The State Hospital Review and Planning Council is a board charged with a public duty and therefore a majority of the whole number of such persons shall constitute a quorum, and not less than a majority of the whole number may perform and exercise such power, authority or duty. 1978 N.Y. Op. Att'y Gen. No. 56, 1978 N.Y. AG LEXIS 229.

The provisions of General Construction Law, § 41 are applicable to the Rochester Housing Authority. 1978 NY Ops Atty Gen Oct 27 (Informal), 1978 N.Y. AG LEXIS 375.

Majority of number of trustees authorized by law constitutes quorum of board of trustees of Higher Education Services Corporation. 1985 N.Y. Op. Att'y Gen. No. 85-F9.

Quorum and voting requirements for Love Canal Area Revitalization Agency are set forth in CLS Gen Const § 41. 1993 N.Y. Op. Att'y Gen. No. 93-41, 1993 N.Y. AG LEXIS 68.

A majority of the voting members of the Soil and Water Conservation Committee constitutes a quorum for the conduct of business. Ex officio members may hold offices but may not make motions. 1994 N.Y. Op. Att'y Gen. No. 84-F19, 1984 N.Y. AG LEXIS 8.

New York State Independent Living Council is subject to appointment provisions of Public Officers Law and quorum requirements of CLS Gen Const § 41. 1997 N.Y. Op. Att'y Gen. No. 97-F11, 1997 N.Y. AG LEXIS 92.

Thirteen voting members of state Independent Living Council constitute quorum. 2008 N.Y. Op. Att'y Gen. No. 2008-F1, 2008 N.Y. AG LEXIS 8.

Notwithstanding Robert's Rules of Order, CLS Gen Const § 41 provides that action of state Independent Living Council must have affirmative vote of majority of whole, i.e., at least 13 voting members. 2008 N.Y. Op. Att'y Gen. No. 2008-F1, 2008 N.Y. AG LEXIS 8.

Provisions of CLS Pub A § 3402(2)(c) govern number of Nassau Health Care Corporation directors needed to convene quorum and transact business, and those numbers vary depending on number of directors then in office and number of directors attending meeting at which quorum is present. N.Y. Op. Att'y Gen. No. 2011-3, 2011 N.Y. AG LEXIS 4.

It is not necessary that each parcel of real property be viewed and appraised by each member of a three-man board of assessors. It is proper for a three-man board of assessors to assign specific areas of the assessing unit to each member and for each to submit appraisals at a meeting of the board. Likewise, appraisers may be employed to perform field appraisals and to submit their appraisals to the board for final action by it. 2 Op Counsel, SBEA #77. Each of the three duly appointed park commissioners of a village has equal authority where the commission acts as a body in the discharge of its public duty. General Construction Law, § 41. 1953 Op St Compt No. 53–6020.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 13, 41-a; CLS Alt Co Gov Law § 4; CLS Pub A Law § 878.

§ 60. Newspapers

a. In any case in which notice of any fact is required by law to be published or advertised in a newspaper, the term "newspaper" shall mean a paper of general circulation which is printed and distributed ordinarily not less frequently than once a week, and has been so for at least one year immediately preceding such publication or advertisement, and which contains news, articles of opinion (as editorials), features, advertising, or other matter regarded as of current interest, has a paid circulation and (except for such a paper which has been printed and distributed not less frequently than once a week for a period of ten years prior to January one, nineteen hundred seventy-five) has been entered at United States post-office as second-class matter. A publication which is distributed or made available primarily for advertising purposes to the public generally without consideration being paid therefor shall not be deemed to be a "newspaper" for the purpose of publication or advertisement of such notice required by law. Notwithstanding any provision of this subdivision to the contrary, a publication which was designated and publishing notice as an official newspaper prior to the year nineteen hundred forty and continued to be so designated and publishing for at least thirty years after such year shall be deemed to be a newspaper within the meaning of this subdivision.

b. The terms "daily newspaper" and "newspaper published each business day" in a statute, contract, or any public or private instrument, mean, respectively, a newspaper customarily published on each business day of the year, whether or not such newspaper is published on any other day. The term "business day" when used herein does not include Saturdays, Sundays or legal holidays.

c. The term "newspaper of a county, city, town or village" when used in a statute shall mean a newspaper published, circulated, printed or distributed in the county, city, town or village.

HISTORY:

Add, L 1941, ch 166; amd, L 1944, ch 62; L 1958, ch 639; L 1973, ch 586, eff June 11, 1973; L 1975, ch 724; L 1975, ch 725, eff Aug 9, 1975; L 2005, ch 767, § 19, eff June 1, 2006.

Notes to Decisions

1. In general

Respondent, which published biweekly rental news publication bulletin containing data pertaining to apartments allegedly available for rent and which had approximately 2700 subscribers who were charged $20 each for one year's subscription to bulletin, was engaged in furnishing, for a fee, information concerning location and availability of apartment housing and fact that such information was furnished through device of published bulletin did not convert referral business into a newspaper and respondent would therefore be enjoined from engaging in apartment referral business until duly licensed. State by Lefkowitz v Harrell's Employment Guide, Inc., 89 Misc. 2d 807, 392 N.Y.S.2d 529, 1977 N.Y. Misc. LEXIS 1944 (N.Y. Sup. Ct. 1977).

Agency Opinions

1. In general

A newspaper which has been designated by a town as an official newspaper does not cease to be an official newspaper if it changes its name, changes its format, or if it closes down with no publication for one week in order to retool. 1990 N.Y. Op. Att'y Gen. No. I90-49.

While a town board may designate a "pennysaver" as an "additional newspaper", it would be impractical to do since the town may not pay for notices and advertisements placed in such a publication. 1978 Op St Compt No. 78–461.

A newspaper without a paid circulation and without a second class mailing permit may not be an official village newspaper. 1978 Op St Compt No. 78–862.

Discussion of official newspaper. 1979 Op St Compt No. 79–41.

A newspaper which has general circulation in the town by subscription, but is not available at news stands, may be designated as the official newspaper. 1980 Op St Compt No. 80–123.

A town may not designate as the official newspaper, a periodical that has not been entered as second class matter. Postal regulations prevent a publication designed primarily for advertising or having free circulation from being entered as second class matter. 1981 Op St Compt No. 81-70, 1981 N.Y. Comp. LEXIS 818.

A publication which is entered in the post office as second-class matter but which has no paid circulation may not be utilized for notices required by law to be published or advertised in a newspaper. 1984 Op St Compt No. 84-58, 1984 N.Y. Comp. LEXIS 81.

Publication must be "newspaper" as defined in CLS Gen Const § 60 and must satisfy conditions precedent set forth in CLS Pub O § 70-a before it can be designated as "official newspaper" of town pursuant to CLS Town § 64(11); place of publication of newspaper is question of fact. 1988 Op St Compt No 88-28, 1988 N.Y. Comp. LEXIS 24.

Publication which does not satisfy threshold requirements of CLS Gen Const § 60 and CLS Pub O § 70-a, because it is mailed as third class matter and does not have paid subscription, may not be designated as official newspaper. 1992 Op St Compt No. 92-24, 1992 N.Y. Comp. LEXIS 11.

Publication which was designated as official newspaper of village from prior to 1940 through 1970, and which would otherwise qualify as newspaper under CLS Gen Const § 60-a except that it was not registered as second-class matter, could be designated by county as one of its official newspapers, and could

submit claims for compensation under CLS Pub O § 70-a. 1994 Op St Compt No. 94-9, 1994 N.Y. Comp. LEXIS 7.

RESEARCH REFERENCES AND PRACTICE AIDS

Texts: Weinstein, Korn, Miller, CPLR Manual (Matthew Bender) § 27.19[d].

ARTICLE 2-A Classification of Corporations and Definitions

Section
66. Definitions

HISTORY:
Add, L 1973, ch 451, eff Sept 1, 1974.

§ 66. Definitions

1. A "public corporation" includes a municipal corporation, a district corporation, or a public benefit corporation.

2. A "municipal corporation" includes a county, city, town, village and school district.

3. A "district corporation" includes any territorial division of the state, other than a municipal corporation, heretofore or hereafter established by law which possesses the power to contract indebtedness and levy taxes or benefit assessments upon real estate or to require the levy of such taxes or assessments, whether or not such territorial division is expressly declared to be a body corporate and politic by the statute creating or authorizing the creation of such territorial division.

4. A "public benefit corporation" is a corporation organized to construct or operate a public improvement wholly or partly within the state, the profits from which inure to the benefit of this or other states, or to the people thereof.

4-a. A "benefit corporation" means a business corporation incorporated under article seventeen of the business corporation law and whose status as a benefit corporation has not been terminated as provided in article seventeen of the business corporation law.

5. A "religious corporation" is either (a) a Religious Corporations Law corporation as defined in section two of such law or (b) a corporation formed under any other general law or by a special act of this state which is organized and operated principally for religious purposes.

6. An "education corporation" is a corporation as defined in subdivision one of section two hundred sixteen-a of the education law.

7. A "not-for-profit corporation", if a domestic corporation, is a corporation as defined in subparagraph five of paragraph (a) of section one hundred two of the not-for-profit corporation law. A "not-for-profit corporation", if formed under laws other than the statutes of this state, is a foreign not-for-profit corporation as defined in subparagraph seven of paragraph (a) of such section.

8. A "business corporation", if a domestic corporation, is a corporation as defined in subparagraph four of paragraph (a) of section one hundred two of the business corporation law. A "business corporation", if formed under laws other than the statutes of this state, is a foreign business corporation as defined in subparagraph seven of paragraph (a) of such section.

9. A "moneyed corporation" is a corporation to which the banking law or the insurance law is made applicable by the provisions of such laws.

10. A "railroad corporation" is a corporation to which the railroad law is made applicable by a provision of such law.

11. A "transportation corporation" is a corporation to which the transportation corporations law is made applicable by a provision of such law.

12. A "cooperative corporation" is a corporation to which the cooperative corporations law is made applicable by a provision of such law.

13. The term "corporation formed other than for profit" includes every corporation other than a corporation formed for profit or a public corporation.

14. A "domestic corporation" is a corporation incorporated by or under the laws of the state or colony of New York. Every corporation which is not a domestic corporation is a foreign corporation, except as provided by the civil practice law and rules with respect to the construction of such law and rules.

15. The term "director", when used in relation to corporations, means any member of the governing board of such corporation, whether designated as director, trustee, manager, governor, or by any other title, designated to manage the affairs of a corporation.

16. The term "certificate of incorporation" includes (a) the original certificate of incorporation or any other instrument filed or issued under any statute to form a domestic or foreign corporation, as amended, supplemented or restated by certificates of amendment, merger or consolidation or other certificates or instruments filed or issued under any statute; or (b) a special act or charter creating a domestic or foreign corporation, as amended, supplemented or restated.

17. The term "member of a corporation" means one having membership rights in a corporation in accordance with the provisions of its certificate of incorporation or by-laws.

18. The term "office of a corporation" means the office the location of which is stated in the certificate of incorporation of a domestic corporation, or in the application for authority of a foreign corporation or an amendment thereof. Such office need not be a place where business or activities are conducted by such corporation.

19. The term "business of a corporation" when used with reference to a corporation formed for profit means the operations for the conduct of which the corporation is formed and may constitute "doing of business" or "transaction of business" as those terms are used in the statutes of this state.

20. The term "conducting of activities" when used with reference to a corporation formed not for profit means the operations for the conduct of which the

corporation is formed and may constitute "doing of business" or "transaction of business" as those terms are used in the statutes of this state.

21. The term "corporate law" when used in any law means the general statutes relating to corporations included in the consolidated laws of which this chapter is a part.

HISTORY:

Add, L 1973, ch 451, eff Sept 1, 1974; amd, L 1974, ch 326, eff May 13, 1974; L 2011, ch 599, § 2, eff Feb 10, 2012.

Notes to Decisions

Analysis

1. In general
2. Under former Gen Corp L § 3
3. —Public corporations
4. —Municipal corporations
5. —District corporations
6. —Public benefit corporations
7. —Religious corporations
8. —Moneyed corporations
9. —Stock corporations
10. —Membership corporations
11. —Officers and Members
12. —Office of corporation

1. In general

Particularized inquiry is necessary to determine whether—for specific purpose at issue—public benefit corporation should be treated like state since, although such corporations are created by state for general purpose of performing functions essentially governmental in nature, they are not identical to state or any of its agencies and rather enjoy, for some purposes, separate existence. Clark-Fitzpatrick, Inc. v Long Island R. Co., 70 N.Y.2d 382, 521 N.Y.S.2d 653, 516 N.E.2d 190, 1987 N.Y. LEXIS 18964 (N.Y. 1987).

N.Y. C.P.L.R. 213(7) six-year statute of limitations governed a school district's claim against a member instead of the N.Y. C.P.L.R. 214(4) three-year period because N.Y. C.P.L.R. 213(7) extended the limitations period to six years for an action by a corporation against a present or former officer to recover damages for waste or for an injury to property, or for an accounting, and the school district was both a municipal corporation and a public corporation. Roslyn Union Free School Dist. v Barkan, 16 N.Y.3d 643, 926 N.Y.S.2d 349, 950 N.E.2d 85, 2011 N.Y. LEXIS 654 (N.Y. 2011).

Under the capacity rule, public benefit corporations have no greater stature to challenge the constitutionality of State statutes than do municipal corporations or other local governmental entities and that courts need not engage in a particularized inquiry to determine whether a public benefit corporation should first be treated like the State and, unlike in other contexts, for purposes of our capacity bar, every public benefit corporation is the State. Matter of World Trade Ctr. Lower Manhattan Disaster Site Litigation., 30 N.Y.3d 377, 89 N.E.3d 1227, 67 N.Y.S.3d 547, 2017 N.Y. LEXIS 3286 (N.Y. 2017).

Petitioners, as taxpayers residing within school district, had standing under CLS Gen Mun § 51 to challenge support management services contract for custodial and maintenance needs entered into by district, as involving expenditure of taxpayers' funds in violation of competitive bidding requirements of CLS Gen Mun § 103; in view of fact that school district is now classified as municipal corporation under CLS Gen Const § 66(2), it is fair and reasonable to remove barrier which previously excluded local citizen-taxpayers from using judicial process to challenge fiscal policies and expenditures of their school districts. Schulz v Cobleskill-Richmondville Cent. Sch. Dist. Bd. of Educ., 197 A.D.2d 247, 610 N.Y.S.2d 694, 1994 N.Y. App. Div. LEXIS 4143 (N.Y. App. Div. 3d Dep't 1994), aff'd, Schulz v State, 217 A.D.2d 393, 634 N.Y.S.2d 780, 1995 N.Y. App. Div. LEXIS 12301 (N.Y. App. Div. 3d Dep't 1995).

State urban development corporation is a "public corporation" as that term is defined in the Lien Law, and liens filed as private improvement liens against property of the corporation would be discharged. New York State Urban Development Corp. v Memphis Constr., Inc., 82 Misc. 2d 232, 368 N.Y.S.2d 765, 1975 N.Y. Misc. LEXIS 2607 (N.Y. Sup. Ct. 1975).

Town fire district is not a "municipality," but it is a territorial division of state designated a "district corporation" and, as such, like a municipal corporation, it has no independent sovereignty of its own and its immunity from liability in suit, being merely an extension of state's immunity, was terminated by enactment of Court of Claims Act. Thomas v Consolidated Fire Dist. No. 1, 91 Misc. 2d 651, 398 N.Y.S.2d 497, 1977 N.Y. Misc. LEXIS 2382 (N.Y. Sup. Ct. 1977), aff'd, 64 A.D.2d 472, 410 N.Y.S.2d 176, 1978 N.Y. App. Div. LEXIS 12750 (N.Y. App. Div. 3d Dep't 1978).

Public school districts were among the "educational institutions" over which the New York State Division of Human Rights had jurisdiction for N.Y. Exec. Law § 296(4) purposes; to adopt the school district's premise that the General Construction Law definitions of "educational corporation" and "educational association" should have been applied to N.Y. Exec. Law § 296(4) would have been to accept that, in enacting the Human Rights Law, the legislature intended to provide its protection against discrimination only to the relatively minuscule percentage of students whose families can afford to send them to private, non-religious schools, relegating public school students to other more onerous and/or less comprehensive remedies. Such a result was so clearly contrary to the express purpose of the Human Rights Law that resort to the General Construction Law definitions was inappropriate and unreasonable. Matter of Ithaca City School Dist. v New York State Div. of Human Rights, 87 A.D.3d 268, 926 N.Y.S.2d 686, 2011 N.Y. App. Div. LEXIS 5474 (N.Y. App. Div. 3d Dep't 2011), rev'd, 19 N.Y.3d 481, 950 N.Y.S.2d 67, 973 N.E.2d 162, 2012 N.Y. LEXIS 1353 (N.Y. 2012).

Plaintiff fire and water district is a political, territorial and civil division of the State, designated a "district", public corporation (Local Finance Law, § 2.00, subd 3, par [c]; General Construction Law, § 66, subd 3), created for a public purpose, supported by public funds, governed by parties deriving their authority from government, possessing the power to contract indebtedness and levy taxes but having no independent sovereignty of its own, and as such, it falls under the jurisdiction of the County Civil Service Commission operating within its territorial area and must therefore make all appointments and promotions of employees from a civil service list. Hyde Park Fire & Water Dist. v County of Dutchess, 97 Misc. 2d 104, 410 N.Y.S.2d 783, 1978 N.Y. Misc. LEXIS 2755 (N.Y. Sup. Ct. 1978).

A complaint alleging that by providing untimely service and unsanitary conditions metropolitan and city transit authorities had breached implied contracts to transport plaintiff would be dismissed for failure to state a cause of action, where the transport authorities, as public benefit corporations, rendered services to and for the benefit of the public as a whole, and absent a special relationship or a showing that a private obligation existed, those services were not owed to any specific individual and thus individual relief could not be granted, where it was not the court's function to reorder governmental priorities, and where the ultimate public remedy for poor government management was through the electoral process. Leeds v Metropolitan Transp. Auth., 117 Misc. 2d 329, 460 N.Y.S.2d 219, 1983 N.Y. Misc. LEXIS 3158 (N.Y. App. Term 1983).

Action against Facilities Development Corporation are governed by General Municipal Law § 50-e, as corporation is public benefit corporation included within term "public corporation" as defined in General construction Law § 66; late filing provisions of § 50-e are applicable to action against corporation, despite absence of complementary provision in corporation's incorporating act (CLS Unconsolidated Laws, Chapter 214). Kroupa v Facilities Dev. Corp., 128 Misc. 2d 904, 491 N.Y.S.2d 908, 1985 N.Y. Misc. LEXIS 3022 (N.Y. Sup. Ct. 1985).

Applicable rate of interest on judgment against New York City Health and Hospitals Corporation (HHC) was 9 percent, rather than 3 percent as provided in New York City Health and Hospitals Corporation Act, CLS Unconsol § 7401, since 1982 amend-

ment changing interest rate paid by governmental bodies to uniform rate of 9 percent, embodied in CLS Gen Mun § 3-a, applies to HHC as public benefit corporation under CLS Gen Const § 66. Pjetri v New York City Health & Hosp. Corp., 147 Misc. 2d 636, 558 N.Y.S.2d 818, 1990 N.Y. Misc. LEXIS 315 (N.Y. Sup. Ct. 1990), aff'd, 169 A.D.2d 100, 571 N.Y.S.2d 934, 1991 N.Y. App. Div. LEXIS 8581 (N.Y. App. Div. 1st Dep't 1991), disapproved, Carson v New York City Health & Hosp. Corp., 178 A.D.2d 265, 578 N.Y.S.2d 134, 1991 N.Y. App. Div. LEXIS 16345 (N.Y. App. Div. 1st Dep't 1991)).

Public improvement lien was not enforceable against corporation created by Indian Tribal Council to provide low-cost housing on reservation for tribe members, and lien would be vacated, as tribal "authority" was not "public corporation" (CLS Gen Const § 66), and thus was not subject to CLS Lien § 5; benefits of tribal corporation are meant to exclusively benefit members of tribe, and do not flow to state or to people of state generally. Seneca Nation Hous. Auth. v Flynn Battaglia Architects, P.C., 167 Misc. 2d 1040, 642 N.Y.S.2d 476, 1996 N.Y. Misc. LEXIS 125 (N.Y. Sup. Ct. 1996).

Although CLS Pub A §§ 1596 et seq. does not specifically authorize court to allow service of late notice of claim against Yonkers Parking Authority, court may permit service of late notice in accordance with CLS Gen Mun § 50-e; Yonkers Parking Authority is public corporation as defined in CLS Gen Const § 66(1), and CLS Gen Mun § 50-e(5) is not actually inconsistent with any provision of Public Authorities Law (CLS Pub A § 1596-s). Michael v Yonkers Parking Auth., 172 Misc. 2d 304, 658 N.Y.S.2d 194, 1997 N.Y. Misc. LEXIS 181 (N.Y. Sup. Ct. 1997).

City of New York is "municipal corporation" under CLS Gen Const § 66(2), and is therefore "public corporation" under CLS Gen Const § 66(1), to which CLS Gen Mun § 50-e(1)(a), setting forth requirements of notice of claim, applies. Viruet v City of New York, 181 Misc. 2d 958, 695 N.Y.S.2d 663, 1999 N.Y. Misc. LEXIS 366 (N.Y. Sup. Ct. 1999), aff'd, 277 A.D.2d 33, 715 N.Y.S.2d 406, 2000 N.Y. App. Div. LEXIS 11296 (N.Y. App. Div. 1st Dep't 2000).

New York City Health and Hospitals Corporation is public benefit corporation (CLS Unconsol Ch 214-A § 4(1)), and is therefore "public corporation" under CLS Gen Const § 66(1), to which CLS Gen Mun § 50-e(1)(a), setting forth requirements of notice of claim, applies. Viruet v City of New York, 181 Misc. 2d 958, 695 N.Y.S.2d 663, 1999 N.Y. Misc. LEXIS 366 (N.Y. Sup. Ct. 1999), aff'd, 277 A.D.2d 33, 715 N.Y.S.2d 406, 2000 N.Y. App. Div. LEXIS 11296 (N.Y. App. Div. 1st Dep't 2000).

In an employment discrimination action, a local board of education was not entitled to Eleventh Amendment immunity as an arm of the state because (1) N.Y. Educ. Law §§ 1701 and 1709, N.Y. Gen. Constr. Law § 66(1) and (2), and N.Y. Const. art. X, § 5 could be construed to identify boards of education as municipal corporations; (2) board members were elected locally pursuant to N.Y. Educ. Law § 1804(2); (3) under N.Y. Educ. Law § 1709(20), school districts were funded by state appropriations and local property taxes; (4) education was a shared state and local responsibility even though N.Y. Const. art. XI, § 1 imposed upon the legislature the duty of providing a system of free common schools; (5) N.Y. Educ. Law §§ 305(2), 306(1) and (2), 308, 309, 310, and 1706 did not provide the New York State Commissioner of Education with veto power over the board's actions, and (6) N.Y. Educ. Law § 1709(8-c) and (26) required that any judgment against the board be paid from the board's funds rather than from the state treasury. Woods v Rondout Valley Cent. Sch. Dist. Bd. of Educ., 466 F.3d 232, 2006 U.S. App. LEXIS 25333 (2d Cir. N.Y. 2006).

2. Under former Gen Corp L § 3

A determination of the Public Service Commission disapproving a restricted stock option plan for key personnel of a gas corporation was beyond the administrative function of the Commission because it invaded the field of management. But the Public Service Commission's order was nonetheless confirmed where the proposed stock issue for the plan was not one within the purposes specified by § 69 of the Public Service Law. Brooklyn Union Gas Co. v Public Service Com., 8 A.D.2d 210, 187 N.Y.S.2d 207, 1959 N.Y. App. Div. LEXIS 8212 (N.Y. App. Div. 3d Dep't 1959), aff'd, 8 N.Y.2d 815, 202 N.Y.S.2d 322, 168 N.E.2d 390, 1960 N.Y. LEXIS 1233 (N.Y. 1960).

Since the Waterfront Commission of New York Harbor is neither a private nor a public corporation, there is no statutory authority for its examination before trial. Connolly v O'Malley, 17 A.D.2d 609, 229 N.Y.S.2d 845, 1962 N.Y. App. Div. LEXIS 8610 (N.Y. App. Div. 1st Dep't 1962).

The County Law contains no provision empowering a county sewer district established thereunder to contract indebtedness in its own name and to levy taxes or benefit assessments upon real estate or to require the levy of such taxes or assessments. Therefore, Chemung County Sewer District No. 1 is not a separate legal entity nor a body politic separate and apart from the municipal corporation, County of Chemung, and cannot be held to be a "District Corporation." Tom Sawyer Motor Inns, Inc. v Chemung County Sewer Dist., 33 A.D.2d 720, 305 N.Y.S.2d 408, 1969 N.Y. App. Div. LEXIS 2797 (N.Y. App. Div. 3d Dep't 1969).

The Board of Water Commissioners is not a public benefit corporation nor de facto corporation possessing status as an independent entity allowing it to sue or be sued within the meaning of General Corporation Law § 3, subdivision 4, as no certificate of incorporation was ever drawn nor legislation enacted establishing the board as a corporation and since there is no authorization upon which the board could become a de jure corporation it could not be deemed even a de facto corporation. Rathbun v Waverly, 35 A.D.2d 227, 315 N.Y.S.2d 237, 1970 N.Y. App. Div. LEXIS 3501 (N.Y. App. Div. 3d Dep't 1970).

The state insurance fund is an agency of the state and not a public corporation within any statutory definition of that term. Commissioners of State Ins. Fund v Lapidus, 50 N.Y.S.2d 589, 182 Misc. 368, 1943 N.Y. Misc. LEXIS 2891 (N.Y. Sup. Ct. 1943).

Under the definition of "public corporation" in this section the Waterfront Commission cannot be considered a public corporation for purposes of being subjected to examination under § 292-a of the Civil Practice Act. Application of Waterfront Com., 26 Misc. 2d 767, 206 N.Y.S.2d 123, 1960 N.Y. Misc. LEXIS 2576 (N.Y. Sup. Ct. 1960), aff'd, 13 A.D.2d 725, 217 N.Y.S.2d 487, 1961 N.Y. App. Div. LEXIS 11110 (N.Y. App. Div. 1st Dep't 1961).

3. —Public corporations

A public corporation contemplates ownership thereof by the state or a subdivision thereof and is essentially a public benefit corporation and is to be distinguished from a civil division such as a school district. Union Free School Dist. v Rye, 256 A.D. 456, 10 N.Y.S.2d 333, 1939 N.Y. App. Div. LEXIS 4755 (N.Y. App. Div.), aff'd, 280 N.Y. 469, 21 N.E.2d 681, 280 N.Y. (N.Y.S.) 469, 1939 N.Y. LEXIS 1340 (N.Y. 1939).

By § 3 the legislature has defined the terms "municipal corporation" and "public benefit corporation" and has recognized a difference between such corporations and had the legislature intended to place public benefit corporations as well as municipal corporations within Civil Pr. Act, § 292-a, it would have done so by express inclusion. Kennedy v Fehlhaber Pile Co., 263 A.D. 819, 31 N.Y.S.2d 376, 1941 N.Y. App. Div. LEXIS 5135 (N.Y. App. Div. 1941).

The term "public corporation" as defined by this section includes both municipal corporations and district corporations. Black River Regulating Dist. v Adirondack League Club, 282 A.D. 161, 121 N.Y.S.2d 893, 1953 N.Y. App. Div. LEXIS 4424 (N.Y. App. Div. 1953), rev'd, 307 N.Y. 475, 121 N.E.2d 428, 307 N.Y. (N.Y.S.) 475, 1954 N.Y. LEXIS 977 (N.Y. 1954), app. dismissed, 309 N.Y. 798, 130 N.E.2d 599, 309 N.Y. (N.Y.S.) 798, 1955 N.Y. LEXIS 1541 (N.Y. 1955).

The New York City Housing Authority is a public corporation within the meaning of the General Corporation Law. Hence, the time limitation of General Municipal Law § 50-e applied to a personal injury action brought against the authority. Robinson v New York City Housing Authority, 8 A.D.2d 747, 188 N.Y.S.2d 262, 1959 N.Y. App. Div. LEXIS 8470 (N.Y. App. Div. 2d Dep't 1959), aff'd, 7 N.Y.2d 908, 197 N.Y.S.2d 476, 165 N.E.2d 425, 1960 N.Y. LEXIS 1514 (N.Y. 1960).

While the New York City Housing Authority is a public corporation it is not a public corporation as defined in the General Corporation Law. Kaufman v New York City Housing Authority,

67 N.Y.S.2d 174, 188 Misc. 877, 1946 N.Y. Misc. LEXIS 3473 (N.Y. Sup. Ct. 1946), aff'd, 272 A.D. 829, 70 N.Y.S.2d 329, 1947 N.Y. App. Div. LEXIS 3824 (N.Y. App. Div. 1947).

The New York City Housing Authority is a public corporation within the purview of § 50-e of the General Municipal Law. Valente v New York City Housing Authority, 109 N.Y.S.2d 883, 201 Misc. 24, 1951 N.Y. Misc. LEXIS 2759 (N.Y. Sup. Ct. 1951).

The New York Port Authority being a public corporation within the definition thereof in this section is subject, in a tort action against it, to examination before trial pursuant to § 292-a of the Civil Practice Act. Estrada v Parking Associates Corp., 37 Misc. 2d 1033, 236 N.Y.S.2d 403, 1962 N.Y. Misc. LEXIS 2193 (N.Y. Sup. Ct. 1962).

Although district corporations such as library boards of trustees and school districts are included within the definition of public corporations under subdivision 1 of the above statute, a school district constitutes a municipal corporation under subdivision 2 of the same statute whereas a district corporation includes any territorial division of the state other than a municipal corporation according to the provision of subdivision 3 thereof. The two districts consequently are separate and distinct corporate entities so that a notice of claim served on a board of education cannot be deemed to convey notice under § 50-e of the General Municipal Law to the board of trustees of the library district of such school district. Maik v Massapequa Library Board of Trustees, 46 Misc. 2d 159, 258 N.Y.S.2d 916, 1965 N.Y. Misc. LEXIS 2089 (N.Y. Sup. Ct. 1965).

The Nassau Hospital Association is not a public corporation. Osborne v Nassau Hospital Ass'n, 61 N.Y.S.2d 623, 1946 N.Y. Misc. LEXIS 2099 (N.Y. Sup. Ct. 1946).

The distinct definitions of "municipal corporation" and "public benefit corporation" in this section constitutes legislative recognition of a difference between such corporations. Percudani v Westchester County Playland Com., 226 N.Y.S.2d 517, 1962 N.Y. Misc. LEXIS 4249 (N.Y. Sup. Ct. 1962).

4. —Municipal corporations

A county is literally a municipal corporation. In re Westchester County, 246 N.Y. 314, 158 N.E. 881, 246 N.Y. (N.Y.S.) 314, 1927 N.Y. LEXIS 879 (N.Y. 1927).

County farm bureau association is not a municipal corporation. State Bank of Commerce v Stone, 261 N.Y. 175, 184 N.E. 750, 261 N.Y. (N.Y.S.) 175, 1933 N.Y. LEXIS 1272 (N.Y.), reh'g denied, 262 N.Y. 522, 188 N.E. 47, 262 N.Y. (N.Y.S.) 522, 1933 N.Y. LEXIS 1040 (N.Y. 1933).

A town is a municipal corporation and as such may sue in all courts in like case as a natural person. Hempstead v Lawrence, 138 A.D. 473, 122 N.Y.S. 1037, 1910 N.Y. App. Div. LEXIS 1557 (N.Y. App. Div. 1910).

The Albany port district commission is a municipal corporation and has much broader powers than a public benefit corporation. Callanan Road Improv. Co. v Arthur McMullen Co., 253 A.D. 424, 2 N.Y.S.2d 666, 1938 N.Y. App. Div. LEXIS 8463 (N.Y. App. Div. 1938), amended, 257 A.D. 875, 12 N.Y.S.2d 761, 1939 N.Y. App. Div. LEXIS 8236 (N.Y. App. Div. 1939), aff'd, 280 N.Y. 536, 20 N.E.2d 7, 280 N.Y. (N.Y.S.) 536, 1939 N.Y. LEXIS 1370 (N.Y. 1939).

A statute authorizing a town supervisor to pay to each school district the amount of unpaid school taxes by borrowing upon the credit of the town does not violate the constitutional provision prohibiting towns from loaning credit to a public corporation as a school district is not a public corporation. It is a municipal corporation. Union Free School Dist. v Rye, 256 A.D. 456, 10 N.Y.S.2d 333, 1939 N.Y. App. Div. LEXIS 4755 (N.Y. App. Div.), aff'd, 280 N.Y. 469, 21 N.E.2d 681, 280 N.Y. (N.Y.S.) 469, 1939 N.Y. LEXIS 1340 (N.Y. 1939).

The board of education is a municipal corporation and in the absence of specific mention of municipal corporations those sections of the Civil Practice Act which make provision for discovery and examination before trial are inapplicable. Berryman v Board of Education, 257 A.D. 915, 12 N.Y.S.2d 135, 1939 N.Y. App. Div. LEXIS 8384 (N.Y. App. Div. 1939).

School districts are municipal corporations. Buchanan v Town of Salina, 270 A.D. 207, 58 N.Y.S.2d 797, 1945 N.Y. App. Div. LEXIS 2842 (N.Y. App. Div. 4th Dep't 1945), reh'g denied, 270 A.D. 800, 60 N.Y.S.2d 270, 1946 N.Y. App. Div. LEXIS 3979 (N.Y. App. Div. 1946); Board of Education v Stoddard, 49 N.Y.S.2d 38, 1944 N.Y. Misc. LEXIS 2049 (N.Y. Sup. Ct.), aff'd, 268 A.D. 936, 51 N.Y.S.2d 269, 1944 N.Y. App. Div. LEXIS 4314 (N.Y. App. Div. 1944).

The fact that school districts are treated as municipal corporations for certain purposes under subd 2 of this section is not controlling as to applicability of § 3 of the General Municipal Law to school districts, in view of failure to include them in the definition of municipal corporation in § 2 of that act. Central School Dist. v State, 18 A.D.2d 943, 237 N.Y.S.2d 682, 1963 N.Y. App. Div. LEXIS 4425 (N.Y. App. Div. 3d Dep't), aff'd, 13 N.Y.2d 1031, 245 N.Y.S.2d 602, 195 N.E.2d 311, 1963 N.Y. LEXIS 894 (N.Y. 1963).

A board of education and a village are municipal corporations. Mack v President & Trustees of School Board, 11 N.Y.S.2d 311, 171 Misc. 165, 1939 N.Y. Misc. LEXIS 1721 (N.Y. Sup. Ct. 1939).

A local board of education is a corporation; and the district, not the board, is defined as a municipal corporation in General Corporation Law § 3(2), but not in General Municipal Law § 2. Board of Education v Pace College, 50 Misc. 2d 806, 271 N.Y.S.2d 773, 1966 N.Y. Misc. LEXIS 1777 (N.Y. Sup. Ct.), rev'd, 27 A.D.2d 87, 276 N.Y.S.2d 162, 1966 N.Y. App. Div. LEXIS 2716 (N.Y. App. Div. 2d Dep't 1966).

5. —District corporations

A corporation chartered by the Board of Regents under the provisions of Education Law § 261 is a district corporation within the purview of subdivision 3 of the above statute. Maik v Massapequa Library Board of Trustees, 46 Misc. 2d 159, 258 N.Y.S.2d 916, 1965 N.Y. Misc. LEXIS 2089 (N.Y. Sup. Ct. 1965).

6. —Public benefit corporations

The Triborough Bridge and Tunnel Authority is a public benefit corporation within the definition in subd 4 of this section, and, as such, its books and records are not subject to inspection upon demand of a citizen or taxpayer under general statutes relating to inspection of public books and records. New York Post Corp. v Moses, 10 N.Y.2d 199, 219 N.Y.S.2d 7, 176 N.E.2d 709, 1961 N.Y. LEXIS 1088 (N.Y. 1961).

7. —Religious corporations

Although subd 15 of § 3 of the General Corporation Law and § 195 of the Religious Corporations Law contain certain definitions of membership, an allegation of membership in a religious corporation is sufficient, without more, to sustain a complaint against the trustees of such a corporation to compel them to call a meeting of members for adoption of by-laws and to render an accounting where it is alleged that there is no functioning church organization and no rules or regulations governing membership. Eisenberg v Fauer, 25 Misc. 2d 98, 200 N.Y.S.2d 749, 1960 N.Y. Misc. LEXIS 3374 (N.Y. Sup. Ct. 1960).

8. —Moneyed corporations

Under the definition of "moneyed corporation" in this section, and the clear cut distinction between moneyed and business corporations, a direction in a will limiting investments by trustees to securities authorized as savings bank investments in "stock of moneyed corporations of any kind" merely empowers them to invest in corporations of the "moneyed" type as herein defined. In re Estate of Thomas, 26 Misc. 2d 633, 209 N.Y.S.2d 230, 1960 N.Y. Misc. LEXIS 2317 (N.Y. Sur. Ct. 1960).

When question arises in New York whether a foreign corporation is or is not a moneyed corporation as defined in subd 6 of above statute, it is to be determined by reference to meaning given to term by the New York legislature or courts rather then by reference to legislation of foreign state. State Nat'l Bank v Laura, 45 Misc. 2d 430, 256 N.Y.S.2d 1004, 1965 N.Y. Misc. LEXIS 2339 (N.Y. County Ct. 1965).

9. —Stock corporations

Refusal to accept certificate of change of name of sales finance company to include word "finance" proper. The word "finance" in the name of any stock corporation is prohibited except for a moneyed corporation. The enactment of Article 11-B of the Banking Law requiring sales finance companies to obtain license

from superintendent of bank did not bring said companies within the definition of "moneyed" corporations. Retailers Collateral Sec. Trading Corp. v Department of State, 6 A.D.2d 975, 176 N.Y.S.2d 429, 1958 N.Y. App. Div. LEXIS 5040 (N.Y. App. Div. 3d Dep't), reh'g denied, 6 A.D.2d 1018, 178 N.Y.S.2d 639, 1958 N.Y. App. Div. LEXIS 4762 (N.Y. App. Div. 3d Dep't 1958), app. denied, 5 N.Y.2d 709, 1958 N.Y. LEXIS 1667 (N.Y. 1958).

10. —Membership corporations

An association is a membership corporation notwithstanding the fact that the certificate of incorporation contained a provision for capital stock and the issuance and increase of so-called shares of stock, where the association was created as and has at all times remained, and still is a membership corporation, and the shares were and are merely certificates of membership. Bartlett v Lily Dale Assembly, 249 N.Y.S. 482, 139 Misc. 338, 1931 N.Y. Misc. LEXIS 1248 (N.Y. Sup. Ct. 1931), dismissed, Ackerman v Fletcher, 6 A.D.2d 758, 174 N.Y.S.2d 903, 1958 N.Y. App. Div. LEXIS 5892 (N.Y. App. Div. 4th Dep't 1958), dismissed, 6 A.D.2d 758, 174 N.Y.S.2d 913, 1958 N.Y. App. Div. LEXIS 7384 (N.Y. App. Div. 4th Dep't 1958).

11. —Officers and Members

29. The signature of the president of a corporation to a contract which provided that the terms of the contract were binding upon members of the corporation as "member . . . pres." indicated clearly that the parties intended to bind the defendant individually even though the defendant was not a stockholder of the corporation. In a disclosed principal-agent relationship, the agent is personally bound where the intention of substituting his liability to that of the principal is clear. Mencher v Weiss, 306 N.Y. 1, 114 N.E.2d 177, 306 N.Y. (N.Y.S.) 1, 1953 N.Y. LEXIS 779 (N.Y. 1953).

By subdivision 15 of this section, the Legislature has defined "member of a corporation" as including a stockholder of record having the right to vote. Mencher v Weiss, 306 N.Y. 1, 114 N.E.2d 177, 306 N.Y. (N.Y.S.) 1, 1953 N.Y. LEXIS 779 (N.Y. 1953).

The trustees of an educational corporation chartered by the Board of Regents have the same status, under this subdivision, as directors. In re Lake Placid Co., 274 A.D. 205, 81 N.Y.S.2d 36, 1948 N.Y. App. Div. LEXIS 3040 (N.Y. App. Div. 1948).

Corporate vice-president had the right to sign a notice of meeting for the election of directors and officers, where he had caused a letter to be addressed to the attorneys for the corporation demanding that a meeting of the stockholders be called. In re Petition of Shulman, 2 Misc. 2d 896, 151 N.Y.S.2d 819, 1956 N.Y. Misc. LEXIS 1984 (N.Y. Sup. Ct. 1956).

Under the definition of "director" in this section as a person duly chosen or designated to manage the affairs of a corporation, the so-called "Spiritual Leader" of an incorporated society who is only an ex-officio member of the Board of Directors without right to vote or in any manner conduct business affairs of the organization, is not a director upon whom process may be served pursuant to § 228 subd 8 of the Civil Practice Act. Plainview Plumbing & Heating Co. v Ethical Culture Soc., 24 Misc. 2d 1005, 205 N.Y.S.2d 419, 1960 N.Y. Misc. LEXIS 2428 (N.Y. Sup. Ct. 1960).

12. —Office of corporation

For purposes of judicial procedure the residence or domicile of a corporation is the seat of government, and it makes no difference where the administrative departments and physical property of the corporation happen to be located. Gould v Texas & P. R. Co., 176 A.D. 818, 163 N.Y.S. 479, 1917 N.Y. App. Div. LEXIS 5154 (N.Y. App. Div. 1917).

The terms "principal place of business" and "principal office" are not synonymous and are not used synonymously in this section. Mason & Hanger Co. v Sharon, 231 F. 861, 1916 U.S. App. LEXIS 1721 (2d Cir. N.Y.), cert. denied, 241 U.S. 670, 36 S. Ct. 554, 60 L. Ed. 1230, 1916 U.S. LEXIS 1809 (U.S. 1916).

Corporations are residents of the county where the office of the company is located and its general business is carried on. Wienbroer v United States Shipping Board Emergency Fleet Corp., 299 F. 972, 1924 U.S. Dist. LEXIS 1595 (D.N.Y. 1924).

Agency Opinions

Analysis

1. In general
2. Under former Gen Corp L § 3
3. —Public corporations
4. — —District corporations
5. — —Public benefit corporations
6. —Moneyed corporations
7. —Stock corporations

1. In general

A fire district is a public corporation and may hold title to real property. 1974 NY Ops Atty Gen Aug 22 (Informal), 1974 N.Y. AG LEXIS 135.

The Auburn Industrial Development Authority is a "State agency" (as said term is defined in section 8-0105[1] of the Environmental Conservation Law, as amended by chapter 228 of the Laws of 1976) and was required to comply with the first step of the phased implementation of the State Environmental Quality Review Act (SEQR) on September 1, 1976. The Auburn Industrial Development Authority is not mandated to comply with the provisions of Executive Law, §§ 101-a and 102. 1976 NY Ops Atty Gen Nov 15 (Informal), 1976 N.Y. AG LEXIS 174.

An employee or public officer of a school district receiving annual compensation in excess of one thousand dollars may not serve as a grand juror pursuant to Judiciary Law, § 664. 1977 NY Ops Atty Gen June 14 (Informal), 1977 N.Y. AG LEXIS 93.

The term "political subdivision" as used in the Public Officers Law means the area from which an officer is selected and in the case of an elective officer, the area in which the people who elect him reside. 1977 NY Ops Atty Gen Aug 18 (Informal), 1977 N.Y. AG LEXIS 64.

An elected commissioner of Sanitary District No. 2 in the Town of Hempstead in the County of Nassau is a public officer of a political subdivision and not of a municipality; such a commissioner must be a resident of the sanitary district at the time of election; and if the sanitary district commissioner moves from that district to a new residence outside of the district, even though in the same town, the office becomes vacant under Public Officers Law § 30 subdivision 1 paragraph d. The provision of Public Officers Law § 30 subdivision 4-a, by its own terms, is confined in its operation to members of the department of sanitation of a municipality so it is not applicable to an officer of this political subdivision. 1977 NY Ops Atty Gen Aug 18 (Informal), 1977 N.Y. AG LEXIS 64.

Municipal Housing Authorities are public benefit corporations, and as such are required to procure suitable products from qualified and approved charitable non-profit-making agencies for the blind and other severely handicapped whenever such products are available. 1978 NY Ops Atty Gen Nov 9 (Informal), 1978 N.Y. AG LEXIS 21.

Construction projects to improve privately owned property that are funded by the Federal government under the Housing and Community Development Act of 1974, and administered by the Yonkers Community Development Agency, are public works contracts within the meaning of section 554-a of the General Municipal Law and public improvements within the meaning of section 2 of the Lien Law. 1981 N.Y. Op. Att'y Gen. No. 81-20, 1981 N.Y. AG LEXIS 140.

A commissioner of the Niagara Frontier Transportation Authority who also serves as corporation counsel for the City of Lockport, may not receive compensation for services rendered to the Authority. 1981 N.Y. Op. Att'y Gen. No. 65, 1981 N.Y. AG LEXIS 130.

The possession and rehabilitation of wildlife, as well as the restoration of wildlife to their natural habitat, are governed exclusively by the Environmental Conservation Law. Agents or officers of an incorporated society for the prevention of cruelty to animals or other humane societies may not engage in such activities, except in accordance with the procedures set forth in that statute. N.Y. Op. Att'y Gen. No. 82-78, 1982 N.Y. AG LEXIS 22.

A member of the board of education of a central school district is not disqualified under Judiciary Law, § 511(2) or (3) from serving as a juror. N.Y. Op. Att'y Gen. No. 83-40.

A central school district may not convey a building no longer needed for district purposes to a not-for-profit corporation for a nominal consideration. 1975 Op St Compt No. 75–1230.

The New York State Thruway Authority, being a "public benefit corporation", would come within section 103(6) of the General Municipal Law and, therefore, a town may purchase second-hand and surplus supplies, material or equipment from the Authority without competitive bidding. 1977 Op St Compt No. 77-238, 1977 N.Y. Comp. LEXIS 151.

A joint garbage and refuse district created pursuant to L 1934, ch 787 may participate in a county self-insurance plan. 1984 Op St Compt No. 84-14, 1984 N.Y. Comp. LEXIS 126.

Board of commissioners of fire district is public body subject to Open Meetings Law. Comm on Open Gov't OML-AO-2282.

If entity is district corporation or public benefit corporation, it constitutes "public corporation" that falls within coverage of Freedom of Information Law and Open Meetings Law. Comm on Open Gov't OML-AO-2598.

Governing body of special district library—its Board of Trustees—constitutes public body required to comply with Open Meetings Law, since library functions as district corporation, which, according to CLS Gen Const § 66, is kind of public corporation. Comm on Open Gov't OML-AO-3740.

Public corporations and public benefit corporations in New York are all governmental entities. Comm on Open Gov't OML-AO-3903.

Board of Roosevelt Island Operating Corporation (RIOC) is public body required to comply with Open Meetings Law, since according to CLS Unconsol Ch 196 § 3, RIOC "shall be a body corporate and politic constituting a public benefit corporation and a political subdivision of the state of New York," and public benefit corporation is type of public corporation. Comm on Open Gov't OML-AO-4190.

2. Under former Gen Corp L § 3

A water district is not a municipality and therefore such water district within Westchester county must obtain approval of the water power and control commission in order to use water from a New York city reservoir within that county. 1927 N.Y. Op. Att'y Gen. No. 186.

A water district subject to Town Law, Article 12 has no authority to contract indebtedness and, therefore, is not a public corporation as defined by General Corporation Law § 3. 1959 NY Ops Atty Gen Oct 14 (Informal), 1959 N.Y. AG LEXIS 217.

By virtue of their fundamentally dissimilar purposes and powers, a cooperative corporation may not consolidate with a business corporation. 1961 N.Y. Op. Att'y Gen. No. 47, 1961 N.Y. AG LEXIS 32.

A city may not legislate by charter provision, local law or otherwise, regarding the composition or functions of an urban renewal agency created by a special act of the State Legislature. 1966 NY Ops Atty Gen July 1 (Informal), 1966 N.Y. AG LEXIS 91.

A fire district is not authorized to provide disability benefits coverage for its employees pursuant to the Workmen's Compensation Law. 1967 NY Ops Atty Gen Nov 22 (Informal), 1967 N.Y. AG LEXIS 142.

3. —Public corporations

Counties, being municipal corporations, may lease properties owned by them and not devoted to public uses or purposes. 1945 Op St Compt No. 45–430.

4. — —District corporations

All real property owned by a school district, situated within a village, is subject to special ad valorem levies and special assessments of a fire district. 1966 NY Ops Atty Gen Aug 22 (Informal), 1966 N.Y. AG LEXIS 106.

5. — —Public benefit corporations

The term "municipality" contained in Highway Law § 10 does not apply to the Erie County Water Authority which is a "public benefit corporation." 1955 N.Y. Op. Att'y Gen. No. 215, 1955 N.Y. AG LEXIS 73.

6. —Moneyed corporations

A hospital service corporation formed pursuant to Membership Corporations Law as provided under the cited article of the Insurance Law is a moneyed corporation and may use the word "Insurance" as part of its corporate name. 1965 N.Y. Op. Att'y Gen. No. 46, 1965 N.Y. AG LEXIS 35.

7. —Stock corporations

An educational corporation authorized to issue stock, in which holders share in surplus profits, is a stock corporation. 1910 N.Y. Op. Att'y Gen. No. 548.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS ECL § 15- 2103; CLS Exec Law §§ 20, 151; CLS Gen Mun Law §§ 78-a, 302; CLS N-PCL § 102; CLS Pub O Law §§ 97, 102.

Treatises

Matthew Bender's New York Civil Practice:

3 Rohan, New York Civil Practice: EPTL ¶ 5-4.1.

GENERAL MUNICIPAL LAW

Article

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HISTORY:
Add, L 1909, ch 29, eff Feb 17, 1909.

ARTICLE 2 General Municipal Finances

Section

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22.	Claims against fire insurance proceeds; procedure

HISTORY:
Add, L 1909, ch 29, eff Feb 17, 1909.

§ 3-c. Limit upon real property tax levies by local governments.

1. Unless otherwise provided by law, the amount of real property taxes that may be levied by or on behalf of any local government, other than the city of New York and the counties contained therein, shall not exceed the tax levy limit established pursuant to this section.

2. When used in this section:

(a) "Allowable levy growth factor" shall be the lesser of: (i) one and two one-hundredths; or (ii) the sum of one plus the inflation factor; provided, however, that in no case shall the levy growth factor be less than one.

(b) "Available carryover" means the amount by which the tax levy for the prior fiscal year was below the tax levy limit for such fiscal year, if any, but no more than an amount that equals one and one-half percent of the tax levy limit for such fiscal year.

(c) "Coming fiscal year" means the fiscal year of the local government for which a tax levy limit shall be determined pursuant to this section.

(d) "Inflation factor" means the quotient of: (i) the average of the national consumer price indexes determined by the United States department of labor for the twelve-month period ending six months prior to the start of the coming fiscal year minus the average of the national consumer price indexes determined by the United States department of labor for the twelve-month period ending six months prior to the start of the prior fiscal year, divided by: (ii) the average of the national consumer price indexes determined by the United States department of labor for the twelve-month period ending six months prior to the start of the prior fiscal year, with the result expressed as a decimal to four places.

(e) "Local government" means a county, city, town, village, fire district, or special district including but not limited to a district created pursuant to article twelve or twelve-A, or governed by article thirteen of the town law, or created pursuant to article five-A, five-B or five-D of the county law, chapter five hundred sixteen of the laws of nineteen hundred twenty-eight, or chapter two hundred seventy-three of the laws of nineteen hundred thirty-nine, and shall include town improvements provided pursuant to articles three-A and twelve-C of the town law but shall not include the city of New York or the counties contained therein.

(f) "Prior fiscal year" means the fiscal year of the local government immediately preceding the coming fiscal year.

(g) "Tax levy limit" means the amount of taxes authorized to be levied by or on behalf of a local government pursuant to this section, provided, however, that the tax levy limit shall not include the following:

(i) a tax levy necessary for expenditures resulting from court orders or judgments against the local government arising out of tort actions for any amount that exceeds five percent of the total tax levied in the prior fiscal year;

(ii) in years in which the system average actuarial contribution rate of the New York state and local employees' retirement system, as defined by paragraph ten of subdivision a of section nineteen-a of the retirement and social security law, increases by more than two percentage points from the previous year, a tax levy necessary for expenditures for the coming fiscal year for local government employer contributions to the New York state and local employees' retirement system caused by growth in the system average actuarial contribution rate minus two percentage points;

(iii) in years in which the system average actuarial contribution rate of the New York state and local police and fire retirement system, as defined by paragraph eleven of subdivision a of section three hundred nineteen-a of the retirement and social security law, increases by more than two percentage points from the previous year, a tax levy necessary for expenditures for the coming fiscal year for local government employer contributions to the New York state and local police and fire retirement system caused by growth in the system average actuarial contribution rate minus two percentage points;

(iv) in years in which the normal contribution rate of the New York state teachers' retirement system, as defined by paragraph a of subdivision two of section five hundred seventeen of the education law, increases by more than two percentage points from the previous year, a tax levy necessary for expenditures for the coming fiscal year for local government employer contributions to the New York state teachers' retirement system caused by growth in the normal contribution rate minus two percentage points.

(h) "Tax" or "taxes" shall include (i) a charge imposed upon real property by or on behalf of a county, city, town, village or school district for municipal or school district purposes, and (ii) special ad valorem levies and special assessments as defined in subdivisions fourteen and fifteen of section one hundred two of the real property tax law.

3. (a) Subject to the provisions of subdivision five of this section, beginning with the fiscal year that begins in two thousand twelve, no local government shall adopt a budget that requires a tax levy that is greater than the tax levy limit for the coming fiscal year. Provided however the tax levy limit shall not prohibit a levy necessary to support the expenditures pursuant to subparagraphs (i) through (iv) of paragraph (g) of subdivision two of this section.

(b) (i) The commissioner of taxation and finance shall calculate a quantity change factor for each local government for the coming fiscal year based upon the physical or quantity change, as defined by section twelve hundred twenty of the real property tax law, reported to the commissioner of taxation and finance by the assessor or assessors pursuant to section five hundred seventy-five of the real property tax law. The quantity change factor shall show the percentage by which the full value of the taxable real property in the local government has changed due to physical or quantity change between the second final assessment roll or rolls preceding the final assessment roll or rolls upon which taxes are to be levied, and the final assessment roll or rolls immediately preceding the final assessment roll or rolls upon which taxes are to be levied. The commissioner of taxation and finance shall, as appropriate, promulgate rules and regulations regarding the calculation of the quantity change factor which may adjust the calculation based on the development on tax exempt land.

(ii) After determining the quantity change factor for the local government, the commissioner of taxation and finance shall proceed as follows:

(A) If the quantity change factor is negative, the commissioner of taxation and finance shall not determine a tax base growth factor for the local government.

(B) If the quantity change factor is positive, the commissioner of taxation and finance shall determine a tax base growth factor for the local government which is equal to one plus the quantity change factor.

(iii) The commissioner of taxation and finance shall notify the state comptroller and each local government of the applicable tax base growth factors, if any, as soon thereafter as such factors are determined.

(c) Each local government shall calculate the tax levy limit applicable to the coming fiscal year which shall be determined as follows:

(i) Ascertain the total amount of taxes levied for the prior fiscal year.

(ii) Multiply the result by the tax base growth factor, calculated pursuant to paragraph (b) of this subdivision, if any.

(iii) Add any payments in lieu of taxes that were receivable in the prior fiscal year.

(iv) Subtract the tax levy necessary to support expenditures pursuant to subparagraph (i) of paragraph (g) of subdivision two of this section for the prior fiscal year, if any.

(v) Multiply the result by the allowable levy growth factor.

(vi) Subtract any payments in lieu of taxes receivable in the coming fiscal year.

(vii) Add the available carryover, if any.

(d) Whenever the responsibility and associated cost of a local government function is transferred to another local government, the state comptroller shall determine the costs and savings on the affected local governments attributable to such transfer for the first fiscal year following the transfer, and notify such local governments of such determination and that they shall adjust their tax levy limits accordingly.

4. (a) When two or more local governments consolidate, the state comptroller shall determine the tax levy limit for the consolidated local government for the first fiscal year following the consolidation

based on the respective tax levy limits of the component local governments that formed such consolidated local government from the last fiscal year prior to the consolidation.

(b) When a local government dissolves, the state comptroller shall determine the tax levy limit for the local government that assumes the debts, liabilities, and obligations of such dissolved local government for the first fiscal year following the dissolution based on the respective tax levy limits of such dissolved local government and such local government that assumes the debts, liabilities, and obligations of such dissolved local government from the last fiscal year prior to the dissolution.

(c) The tax levy limit established by this section shall not apply to the first fiscal year after a local government is newly established or constituted through a process other than consolidation or dissolution.

5. A local government may adopt a budget that requires a tax levy that is greater than the tax levy limit for the coming fiscal year, not including any levy necessary to support the expenditures pursuant to subparagraphs (i) through (iv) of paragraph g of subdivision two of this section, only if the governing body of such local government first enacts, by a vote of sixty percent of the total voting power of such body, a local law to override such limit for such coming fiscal year only, or in the case of a district or fire district, a resolution, approved by a vote of sixty percent of the total voting power of such body, to override such limit for such coming fiscal year only.

6. In the event a local government's actual tax levy for a given fiscal year exceeds the tax levy limit as established pursuant to this section due to clerical or technical errors, the local government shall place the excess amount of the levy in reserve in accordance with such requirements as the state comptroller may prescribe, and shall use such funds and any interest earned thereon to offset the tax levy for the ensuing fiscal year. If, upon examination pursuant to sections thirty-three and thirty-four of this chapter, the state comptroller finds that a local government levied taxes in excess of the applicable tax levy limit, the local government, as soon as practicable, shall place an amount equal to the excess amount of the levy in such reserve in accordance with this subdivision.

7. All local governments subject to the provisions of this section shall, prior to adopting a budget for the coming fiscal year, submit to the state comptroller, in a form and manner as he or she may prescribe, any information necessary for calculating the tax levy limit for the coming fiscal year.

HISTORY:

Add, L 2011, ch 97, § 1 (Part A), eff June 24, 2011; L 2015, ch 20, § 2 (Part C, Subpart C), effective June 26, 2015.

Prior Law: § 3-c, add, L 1940, ch 592, § 1; repealed, L 1943, ch 712, § 3, eff Sept 2, 1945, with substance covered by Local Finance Law § 122.00.

Editor's Notes: Laws 2011, ch 97, § 13 (Part A), eff June 24, 2011, provides as follows:

§ 13. This act shall take effect immediately (Amd, L 2015, ch 20, § 18 (Part A), eff June 26, 2015; L 2019, ch 59, §1 (Part NNN), eff April 12, 2019).

Amendment Notes: The 2015 amendment by ch 20, § 2 (Part C, Subpart C), added the last sentence of 3(b)(i).

§ 5-a. Electronic or wire transfers

1. Notwithstanding any other law to the contrary, whenever an officer of a local government, as that term is defined in section ten of this article, is authorized or directed pursuant to law to disburse or transfer on behalf of the local government funds in the custody of the officer, that officer shall be authorized to disburse or transfer such funds by means of electronic or wire transfer. Such disbursement shall be otherwise subject to applicable laws, provided that:

(a) the governing board of the local government has entered into a written agreement with the bank or trust company in which such funds have been deposited, prescribing the manner in which electronic or wire transfer of such funds shall be accomplished, identifying by number and name those accounts from which electronic or wire transfers may be made, identifying which officer or officers are authorized to order the electronic or wire transfer of funds from those accounts, and implementing a security procedure as defined in section 4-A-201 of the uniform commercial code; and

(b) the bank or trust company processing the transfer shall provide to the officer ordering the electronic or wire transfer of funds written confirmation of each such transaction no later than the business day following the day on which the funds are transmitted.

2. It shall be the duty of the governing board of the local government to adopt a system of internal controls for the documentation and reporting of all transfers or disbursements of funds accomplished by electronic or wire transfer.

HISTORY:

Add, L 1996, ch 140, § 14, eff June 11, 1996; amd, L 1998, ch 469, § 9, eff July 22, 1998.

Editor's Notes: Laws 1996, ch 140, § 24, eff June 11, 1996, provides as follows:

§ 24. This act shall take effect immediately and shall apply to all budgets which are adopted after the date on which it shall have become a law.

Prior Law: Former § 5–a, add, L 1939, ch 221, § 1; repealed, L 1943, ch 712, § 3, eff Sept 2, 1945, with substance covered by Local Finance Law § 23.00, 53.00 and 100.00.

§ 5-b. Collection of fines, civil penalties, rent, rates, taxes, fees, charges and other amounts via the internet

1. The governing board of any local government, as that term is defined in section ten of this article, may, by local law, ordinance or resolution, determine that it is in the public interest and authorize such local government to provide for the acceptance of penalties, rents, rates, taxes, fees, charges, revenue, financial obligations or other amounts, including penalties, special assessments or interest via a mu-

nicipal internet website or the website of a third-party vendor that has contracted with the local government to receive such payments on its behalf. Submission via the internet may not, however, be required as the sole method for the collection of fines, civil penalties, rent, rates, taxes, fees, charges and other amounts. Such payments shall be accepted via the internet in a manner and condition defined by such local government. Any method used to receive internet payments shall comply with article three of the state technology law and any rules and regulations promulgated and guidelines developed thereunder and, at a minimum must (a) authenticate the identity of the sender; and (b) ensure the security of the information transmitted.

2. Any local government authorizing the payment of taxes via the internet shall provide or direct its vendor to provide a confirmation page to the taxpayer following the completion of the internet transaction. Such confirmation page shall include, at least, the following:

(a) the date the internet transaction was completed and sent by the taxpayer;

(b) the amount paid;

(c) a unique confirmation number; and

(d) a notice advising the taxpayer to print out and retain the confirmation page as his or her receipt.

3. Payments received via the internet shall be considered received by the appropriate officer and paid by the taxpayer at the time the internet transaction is completed and sent by the taxpayer.

4. The underlying debt, lien, obligation, bill, account or other amount owed to the local government for which payment by internet is accepted by the local government shall not be expunged, cancelled, released, discharged or satisfied, and any receipt or other evidence of payment shall be deemed conditional, until the local government has received final and unconditional payment of the full amount due.

5. The governing board, in enacting a local law, ordinance or resolution pursuant to this section, shall designate which of its officers, charged with the duty of collecting or receiving moneys on behalf of the local government, shall be authorized to accept such payments via the internet.

6. The state comptroller shall issue such guidelines as he or she deems appropriate governing the use of third-party vendors for this purpose. Any local government contracting with a third-party vendor for this purpose shall follow the guidelines issued by the state comptroller.

HISTORY:

Add, L 2003, ch 62, § 10 (Part X), eff May 15, 2003; amd, L 2005, ch 741, § 3, eff Oct 18, 2005; L 2011, ch 61, § 10 (Part U), eff March 31, 2011.

Prior Law: Former § 5-b, add, L 1939, ch 442, § 1; repealed, L 1943, ch 712, § 3, eff Sept 2, 1945, with substance covered by Local Finance Law §§ 25.00, 53.00 and 100.00.

Amendment Notes: 2011. Chapter 61, § 10 (Part U) amended:

Sub 1, by adding the matter in italics.

Sub 2, opening par by adding the matter in italics.

Sub 2, par (a) by deleting at fig 1 "and".

By redesignating former sub 2, par (b) as sub 2, par (d).

By adding sub 2, par (b).

By adding sub 2, par (c).

Sub 2, par (d) by deleting at fig 1 "to" and adding the matter in italics.

By adding sub 6.

§ 6-d. Repair reserve funds for municipal corporations, school districts, district corporations and improvement districts

1. The governing board of any municipal corporation, school district, district corporation, or town or county improvement district, may establish a special fund which shall be known as the repair reserve fund of such municipal corporation, school district, district corporation or improvement district. There may be paid into such fund an amount as may be provided therefor by budgetary appropriation or such revenues as are not required by law to be paid into any other fund or account.

2. In cases of emergency, moneys in such fund may be expended pursuant to a resolution approved by not less than two-thirds of the members of the governing body of such municipal corporation, school district, district corporation or improvement district providing that not less than one-half of the moneys so expended shall be repaid in the fiscal year immediately following the fiscal year in which such moneys were expended and the total amount shall be repaid not later than the last day of the second fiscal year succeeding the fiscal year in which the moneys were expended.

Prior to the adoption of any other resolution, act, ordinance or local law by the governing board of such municipal corporation, school district, district corporation or improvement district, appropriating money from such fund, the governing board shall cause to be published in the official newspaper or newspapers, if any, or otherwise in a newspaper or newspapers designated for such purpose, a notice stating in substance that it is proposed to appropriate a specified amount from the repair reserve fund for a particular purpose, and that a public hearing on such proposed appropriation will be held at a time and place stated therein. At least five days shall elapse between the publication of such notice and the date specified for the hearing. The hearing shall be held at the time and place so specified.

3. Moneys in such fund may be appropriated only:

a. For repairs of capital improvements or equipment, which repairs are of a type not recurring annually or at shorter intervals.

b. In the case of a municipal corporation, to a capital reserve fund established pursuant to section six-c of this article or to a contingency and tax stabilization reserve fund established pursuant to section six-e of this article.

c. In the case of a fire district, to a capital reserve fund established pursuant to section six-g.

d. In the case of a school district, to a reserve fund established pursuant to section thirty-six hundred fifty-one of the education law.

4. The moneys in such fund shall be deposited and secured in the manner provided by section ten of this article. The moneys in such fund so deposited shall be accounted for separate and apart from all other funds of the municipal corporation, school district, district corporation or improvement district, in the same manner as provided in subdivision ten of section six-c of this article. The governing board or the chief fiscal officer of such municipal corporation, school district, district corporation or improvement district, if the governing board shall delegate such duty to him, may invest the moneys in such fund in the manner provided in section eleven of this article. Any interest earned or capital gains realized on the moneys so deposited or invested shall accrue to and become part of such fund.

5. The members of the governing board of such municipal corporation, school district, district corporation or improvement district are hereby declared trustees of such fund and shall be subject to all the duties and responsibilities imposed by law on trustees, and such duties and responsibilities may be enforced by such municipal corporation, school district, district corporation or improvement district, as the case may be, or by any board, commission, agency, officer or taxpayer thereof.

6. The members of the governing board of such municipal corporation, school district or district corporation shall be guilty of a misdemeanor if they:

a. Authorize a withdrawal from a repair reserve fund for any other purpose except as provided in this section.

b. Expend any money withdrawn from a repair reserve fund for a purpose other than that as provided in this section.

7. Notwithstanding the foregoing provisions of this section, in any town which is located wholly or partly within the Adirondack park and has within its boundaries state lands subject to taxation assessed at more than thirty per centum of the total taxable assessed valuation of town as determined from the assessment rolls of the town as completed from time to time, or in any district corporation or improvement district situated in whole or in part in any such town, a repair reserve fund shall not be established unless the state comptroller, on behalf of the state, shall consent thereto, and in any such town or district corporation or improvement district no appropriation shall be made from a repair reserve fund unless the state comptroller, on behalf of the state, shall consent thereto.

8. Moneys of a municipal corporation, school district or district corporation which, upon June thirtieth, nineteen hundred fifty, constitute a repair reserve fund of such municipal corporation, school district or district corporation, shall continue to so constitute a special fund and be known as the repair reserve fund of such municipal corporation, school district or district corporation. From and after such date, payments to, and appropriations from, such fund shall be subject to the foregoing provisions of this section.

HISTORY:

Add, L 1950, ch 383, § 1, eff July 1, 1950; amd, L 1952, ch 693, § 1, eff April 14, 1952; L 1957, ch 740, § 1, eff April 19, 1957; L 1961, ch 828, § 1, eff April 22, 1961; L 1992, ch 708, § 2; L 1996, ch 140, § 5, eff June 11, 1996 (see 1996 note below),6, eff June 11, 1996 (see 1996 note below); L 2001, ch 424, § 2, eff Oct 31, 2001.

Editor's Notes: Laws 1996, ch 140, § 24, eff June 11, 1996, provides as follows:

§ 24. This act shall take effect immediately and shall apply to all budgets which are adopted after the date on which it shall have become a law.

Prior Law: Former § 6–d, add, L 1943, ch 542, § 6; amd, L 1946, ch 524, § 2; repealed, L 1950, ch 383, eff July 1, 1950.

Notes to Decisions

Analysis

1. In general
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1. In general

The Repair Reserve Fund established in reliance upon General Municipal Law, § 6-d is created for use in cases of emergency and may be expended only for special purposes upon special resolution following a public hearing, and provided that repayment thereof is made within the two ensuing fiscal years. Among the limited permitted purposes are repairs of capital improvements or equipment, which repairs are of a type not recurring annually. Sweeney v Farrington, 38 Misc. 2d 882, 239 N.Y.S.2d 254, 1963 N.Y. Misc. LEXIS 2156 (N.Y. Sup. Ct. 1963).

The "Repair Reserve Fund" contemplated by this section is created only for use in cases of emergency and expenditures can be made from it only upon special resolution following a public hearing with repayment to be made within two ensuing fiscal years; it does not permit any expenditures for repairs or improvements which are not of a type recurring annually. Sweeney v Farrington, 38 Misc. 2d 882, 239 N.Y.S.2d 254, 1963 N.Y. Misc. LEXIS 2156 (N.Y. Sup. Ct. 1963).

Moneys in repair reserve fund may be appropriated to duly authorized capital reserve fund; moneys in capital reserve fund may be expended to debt service on obligations only as authorized by CLS Gen Mun Law § 6-c (9-a). Ops St Compt 89-25.

Where all moneys in repair reserve fund have been expended and town board has determined that there is no longer need for such fund, fund may be abolished by board resolution; however, where moneys remain in fund, those moneys must be appropriated pursuant to subdivision 3 of CLS Gen Mun § 6-d before fund may be abolished. Ops St Compt 88-51.

2. Government bodies authorized to establish fund

The South Farmingdale Water District may establish a repair reserve fund but may not establish a capital reserve fund. 1982 St Compt File #82-230.

School district located within Adirondack Park may establish repair reserve fund pursuant to CLS Gen Mun Law § 6-d without prior consent of Office of State Comptroller. Ops St Compt 89-8.

A town board may establish a capital reserve fund and repair reserve fund. It may deposit surplus moneys of a public general hospital in such funds, and may authorize the investment of moneys in such funds. 1956 Ops St Compt File #8207.

3. Moneys constituting fund; surpluses

An unexpended village balance may be used to reduce levy or establish reserve funds pursuant to Sections 6-c, 6-d and 6-e of the General Municipal Law. 1945 Ops St Compt 125.

Fire district may establish by means of surplus money a repair reserve fund. 1947 Ops St Compt 465.

Unexpended balances of appropriations in the current fiscal year or surplus funds may be transferred to a fire district capital reserve fund or repair reserve fund. 1954 Ops St Compt File #6773.

A town board may establish a capital reserve fund and repair reserve fund. It may deposit surplus moneys of a public general hospital in such funds, and may authorize the investment of moneys in such funds. 1956 Ops St Compt File #8207.

4. Use of funds; fire district purposes

Fire commissioners may reject all bids and readvertise for new bids. If condemnation proceeding is discontinued, fire district may be ordered to pay damages to owners of realty. Board may not expend in excess of estimate set forth in bond resolution. Board may issue bonds to an amount smaller than approved. Expenses incurred in connection with building construction project disapproved in referendum are legal liabilities and may be paid. 1966 Ops St Compt File #751.

A fire district may establish a capital reserve fund to purchase a fire alarm system or establish a repair reserve fund to repair a fire alarm system under certain circumstances. A reserve fund may not be established to fund current expenses concerning, or maintenance of, a fire alarm system. 1973 Ops St Compt File #1015.

Board of trustees of a village may establish funds, except where subject to permissive or mandatory referendum, for the purchase of new fire apparatus and for certain repairs to existing equipment. 1956 Ops St Compt File #8020.

A fire district may not expend money from a repair reserve fund to purchase a fire alarm siren. A transfer of funds may be made to a fire district capital reserve fund and then the siren may be purchased from such capital reserve fund, subject to applicable referendum provisions. 1968 Ops St Compt File #632.

5. —Highways

Moneys in a town repair reserve fund established by appropriations or transfers from the general fund, may not be appropriated for highway item 3 purposes. An exception exists where only surplus town moneys have been transferred to the reserve fund. 1953 Ops St Compt File #6191.

6. —Investment

In the absence of specific authority, public moneys may not be invested; a city may by local law provide such authority or, by creating an appropriate reserve fund, may invest moneys therein pursuant to existing statutory authority. 1946 Ops St Compt 335.

A town board may establish a capital reserve fund and repair reserve fund. It may deposit surplus moneys of a public general hospital in such funds, and may authorize the investment of moneys in such funds. 1956 Ops St Compt File #8207.

7. —Miscellaneous uses

Moneys in repair reserve fund may be expended for dredging of town lake if work is intended to restore lake to sound condition rather than to rebuild, improve or add value to lake, and work need not be undertaken annually or at shorter intervals. Ops St Compt 88-51.

8. Procedure; establishment of fund; public hearing

A village is not required to hold a public hearing when establishing a reserve fund for street paving. 1954 Ops St Compt File #6509.

9. —Issuance of bonds

Fire commissioners may reject all bids and readvertise for new bids. If condemnation proceeding is discontinued, fire district may be ordered to pay damages to owners of realty. Board may not expend in excess of estimate set forth in bond resolution. Board may issue bonds to an amount smaller than approved. Expenses incurred in connection with building construction project disapproved in referendum are legal liabilities and may be paid. 1966 Ops St Compt File #751.

10. —Separate bank account for fund

Separate bank account must be set up for each reserve fund. 1947 Ops St Compt 258.

11. Violations

The provisions of this section making the members of the town board trustees of the Repair Reserve Fund and guilty of a misdemeanor if they authorize improper withdrawals or expenditures constitute such safeguards against probability of waste as to warrant denial of an injunction sought in a taxpayer's action challenging the validity of appropriations for such fund. Sweeney v Farrington, 38 Misc. 2d 882, 239 N.Y.S.2d 254, 1963 N.Y. Misc. LEXIS 2156 (N.Y. Sup. Ct. 1963).

Agency Opinions

Analysis

1. In general
2. Government bodies authorized to establish fund
3. Use of funds; fire district purposes
4. —Highways
5. —Miscellaneous uses
6. Procedure; establishment of fund; public hearing

1. In general

There is no requirement that moneys expended from a repair reserve fund in a non-emergency situation be replaced. 1982 Op St Compt File #82-122.

2. Government bodies authorized to establish fund

A school district may establish a repair reserve fund pursuant to section 6-d of the General Municipal Law without voter approval. 1979 Op St Compt File #397.

3. Use of funds; fire district purposes

4. —Highways

When a town includes an incorporated village, moneys in a repair reserve fund may not be transferred to item one of the highway fund to pay for reconstruction of a washed-out portion of town highway. 1982 Op St Compt File #82-249.

5. —Miscellaneous uses

Moneys in a repair reserve fund may not be used to pay debt service on obligations. 1979 Op St Compt File #63.

For purposes of section 6-d(2) of the General Municipal Law, a case of emergency is where an unexpected occurrence causes damage to a capital improvement or equipment and requires immediate repair. 1982 Op St Compt File #82-159.

Moneys held in a repair reserve refund established for a town water district may, upon consolidation of the town's water districts, be used solely for repairs to facilities and equipment of the water district for which the fund was established where the town board's resolution for the consolidation of the districts specifies that such moneys are to be used for that purpose rather than becoming the property of the consolidated district. 1983 Op St Compt File #83-136.

Moneys in a repair reserve fund may be expended for interior painting of a school building. 1984 Op St Compt File #84-8.

The installation of a new transmission and siren in a fire district pumper truck may well be a capital purpose for which moneys in a capital reserve fund could be expended. However, such funds probably could not be used for the reconditioning and replacement of springs and could not be used for repairs to such truck. 1978 Op St Compt File #576.

A fire district may not use moneys from a repair reserve fund to repaint and make alterations to the kitchen in the firehouse nor may it use these moneys to purchase a new stove. However, moneys from a capital reserve fund may be used to finance these improvements subject to permissive referendum. 1980 Op St Compt File #79.

Expenditures for repairs to fire district buildings and equipment may be made from a repair reserve fund if they do not occur annually or at shorter intervals. Such expenditures must be preceded by a public hearing. 1982 Op St Compt File #82-269.

6. Procedure; establishment of fund; public hearing

An appropriation to a repair reserve fund, not being an ordinary contingent expense, is subject to voter approval. 1981 Op St Compt File #81-401.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 6-e, 6-f; CLS Town § 176; CLS Unconsol Ch 139 § 8-b.

§ 6-e. Contingency and tax stabilization reserve fund for municipal corporations

1. As used in this section:

a. "Annual budget" means the annual budget or estimate, as finally adopted, of a municipal corporation which is required by law to adopt an annual budget or estimate of the expenditures to be made for a fiscal year for the general support or for the expenses of the government of such municipal corporation during such fiscal year.

b. "Base year" means the most recent fiscal year for which an annual report has been filed with the state comptroller pursuant to section thirty of this chapter.

c. "Chief executive officer" means a chief executive officer as defined in paragraph five-a of section 2.00 of the local finance law.

d. "Chief fiscal officer" means a chief fiscal officer as defined in paragraph five of section 2.00 of the local finance law.

e. "Eligible portion of the annual budget" means:

(1) in the case of a contingency and tax stabilization reserve fund established for a county, city, village or fire district, the general fund portion of the annual budget;

(2) in the case of a contingency and tax stabilization reserve fund established for a town, the townwide general fund and highway fund portions of the annual budget; and

(3) in the case of a contingency and tax stabilization reserve fund established for the part of a town outside any villages, the general fund and highway fund portions of the annual budget for such part of the town.

f. "Estimated revenue" means revenue from a specific source which is expected to be received during a fiscal year and which is included in the annual budget as finally adopted for that fiscal year.

g. "Governing board" means a governing board as defined in section two of this chapter and, in the case of a fire district, shall mean the board of fire commissioners.

h. "Municipal corporation" means a municipal corporation as defined in section two of this chapter and shall also include a fire district.

i. "Public emergency" means an epidemic, conflagration, riot, storm, flood or other sudden, unforeseen or unexpected occurrence or condition which requires the immediate expenditure of moneys to protect the public health, safety or welfare of the inhabitants of the municipal corporation.

j. "Tentative budget" means the tentative budget prepared pursuant to section three hundred fifty-four of the county law, section one hundred six of the town law or section 5-504 of the village law, the statement of expenditures prepared pursuant to section one hundred eighty-one of the town law, or similar document prepared pursuant to general, special or local law.

k. "Unanticipated expenditure" means an expenditure for a specific purpose for which there is no or insufficient appropriation or which will cause an appropriation to be insufficient that is necessitated by a change in federal or state laws, rules or regulations, a court order, judgement or decree, a public emergency, or an industry-wide price, rate or premium increase, which takes effect or occurs after final adoption of the annual budget and which could not have been reasonably anticipated prior to final adoption of the annual budget.

l. "Unanticipated revenue loss" means estimated revenue which is rendered unreceivable because of a change in federal or state laws, rules or regulations, a court order, judgement or decree, or other circumstance, which takes effect or occurs after final adoption of the annual budget and which could not have been reasonably anticipated prior to final adoption of the annual budget.

m. "Unappropriated unreserved fund balance" means the difference between the total assets for a fund and the total liabilities, deferred revenues, encumbered appropriations, amounts appropriated for the ensuing fiscal year's budget, and amounts reserved for stated purposes pursuant to law, including reserve funds established pursuant to the general municipal law for the fund, as determined through application of the system of accounts prescribed by the state comptroller pursuant to section thirty-six of this chapter.

n. "Voting strength" means the aggregate number of votes which all the members of the governing board are entitled to cast.

2. The governing board of any municipal corporation, by resolution subject to a permissive referendum, may establish a contingency and tax stabilization reserve fund for the municipal corporation and, in the case of a town, also for the part of the town outside any villages. Such permissive referendum shall be governed by:

a. in the case of a county, sections one hundred one through one hundred three of the county law;

b. in the case of a city, sections twenty-four through twenty-six of the municipal home rule law;

c. in the case of a town or the part of a town outside any villages, article seven of the town law;

d. in the case of a village, article nine of the village law; and

e. in the case of a fire district, subdivision four of section six-g of this article.

3. There may be paid into the contingency and tax stabilization reserve fund such amounts as may be provided therefor by budgetary appropriation, unappropriated unreserved fund balance in the eligible portion of the annual budget, and such revenues as are not required by law to be paid into any other fund or account; provided, however, that no amount may be appropriated for payment into a contingency and tax stabilization reserve fund which would

cause the balance of the fund to exceed ten percent of the eligible portion of the annual budget for the fiscal year for which the appropriation would be made.

4. a. The moneys in a contingency and tax stabilization reserve fund may be expended only pursuant to an appropriation for a purpose authorized by this subdivision. Except as provided in paragraph e of this subdivision, such an appropriation shall be made only upon the recommendation of the chief executive officer and the adoption of a resolution appropriating the recommended amount by at least two-thirds of the voting strength of the governing board.

b. The moneys in a contingency and tax stabilization reserve fund may be used to finance an unanticipated revenue loss chargeable to the eligible portion of the annual budget, subject to the following limitations:

(1) the maximum amount of moneys in the fund that may be used to finance an unanticipated revenue loss shall equal either the amount of the revenue actually received for the base year or the amount of the estimated revenue for the current fiscal year, whichever is less, minus the amount of the revenue actually received for the current fiscal year; and

(2) the moneys in the fund may be used only to finance that portion of the unanticipated revenue loss which, as a matter of law, cannot be financed with amounts available in any other account or fund.

c. The moneys in a contingency and tax stabilization reserve fund may be used to finance an unanticipated expenditure chargeable to the eligible portion of the annual budget, subject to the following limitations:

(1) the maximum amount of moneys in the fund that may be used to finance an unanticipated expenditure shall equal the sum of the amount of the unanticipated expenditure and the amount appropriated for that purpose for the current fiscal year minus either the amount appropriated for that purpose for the current fiscal year or the actual expenditure for the same purpose in the base year, whichever is greater; and

(2) the moneys in the fund may be used only to finance that portion of an unanticipated expenditure which, as a matter of law, cannot be financed with amounts available in any other account or fund.

d. The moneys in the contingency and tax stabilization reserve fund may be used to lessen or prevent any projected increase in excess of two and one-half percent in the amount of the real property tax levy needed to finance the eligible portion of the annual budget for the next succeeding fiscal year. The maximum amount of moneys in the fund that may be used for this purpose shall equal the difference between the projected amount of such real property tax levy and one hundred two and one-half percent of the amount of the real property tax levy needed to finance the eligible portion of the annual budget for the current fiscal year.

e. When preparing the tentative budget of a municipal corporation, if the current balance of a contingency and tax stabilization reserve fund, as shown by the statement of the chief fiscal officer required by subdivision six of this section, exceeds ten percent of the eligible portion of the annual budget for the current fiscal year, such excess shall be used to reduce the amount of real property taxes needed to finance the eligible portion of the annual budget for the next succeeding fiscal year.

5. The moneys in the contingency and tax stabilization reserve fund shall be deposited in one or more of the banks or trust companies designated, in the manner provided by law, as depositories of the funds of such municipal corporation. The governing board, or the chief fiscal officer having custody of such money of such municipal corporation, if the governing board shall delegate such duty to him, may invest the moneys in such fund in obligations specified in section eleven of this article. Any interest earned or capital gain realized on the money so deposited or invested shall accrue to and become part of such fund.

6. The chief fiscal officer shall account for the contingency and tax stabilization reserve fund separate and apart from all other funds of the municipal corporation. Such accounting shall show: the source, date and amount of each sum paid into the fund; the interest earned by such fund; capital gains or losses resulting from the sale of investments of the fund; the order, source thereof, date and amount of each appropriation from this fund; the assets of the fund, indicating cash balance and a schedule of investments. Not later than sixty days after the start of each fiscal year and at such times as may be required by the governing board, the chief fiscal officer shall furnish to the governing board a detailed report of the operation and condition of the fund during the preceding fiscal year which shall include a statement of receipts and disbursements, and a statement of the balance of the fund as of the last day of such preceding fiscal year and such other dates as may be specified by the governing board. Not later than thirty days prior to the last date provided by law for the filing of the tentative budget, the chief fiscal officer shall furnish to the officer or body responsible for preparing the tentative budget a statement of the current balance of the fund.

7. The members of the governing board are hereby declared trustees of the moneys in the contingency and tax stabilization reserve fund and shall be subject to all duties and responsibilities imposed by law on trustees, and such duties and responsibilities may be enforced by the municipal corporation or by any board, commission, agency, officer or taxpayer thereof.

8. Any officer of a municipal corporation shall be guilty of a misdemeanor if he or she willfully and knowingly causes the municipal corporation to:

a. Appropriate moneys from the contingency and tax stabilization reserve fund for any purpose not authorized by this section.

b. Expend any money from the contingency and tax stabilization reserve fund for a purpose other than that for which it was appropriated.

The provisions of this subdivision shall be considered to be in addition to any other penalties provided by law.

HISTORY:

Add, L 1992, ch 655, § 1, eff July 31, 1992; amd, L 1996, ch 140, § 7, eff June 11, 1996 (see 1996 note below); L 2000, ch 528, § 7, eff Oct 4, 2000 (see 2000 note below),8, eff Oct 4, 2000 (see 2000 note below),9, eff Oct 4, 2000 (see 2000 note below).

Editor's Notes: Laws 1992, ch 708, § 3, eff Nov 28, 1992, purported to amend sub 4 of former § 6-e, notwithstanding its earlier repeal by Laws 1992, ch 655, § 1, eff July 31, 1992, to read as follows:

4. Moneys in such fund shall be deposited and secured in the manner provided by section ten of this article. The moneys in such fund so deposited shall be kept in a separate bank account. The governing board or the chief fiscal officer of such municipality, if the governing board shall delegate such duty to him, may invest the moneys in such fund in the manner provided in section eleven of this article. Any interest earned or capital gains realized on the moneys so deposited or invested shall accrue to and become part of such fund. Such board or officer shall incur no personal liability on account of any investment made pursuant to the provisions of this section.

Laws 1996, ch 140, § 24, eff June 11, 1996, provides as follows:

§ 24. This act shall take effect immediately and shall apply to all budgets which are adopted after the date on which it shall have become a law.

Laws 2000, ch 528, § 19, eff Oct 4, 2000, provides as follows:

§ 19. This act shall take effect immediately and shall apply to budgets for fiscal years commencing on or after January 1, 2001.

Prior Law: Former § 6–e, add, L 1943, ch 542, § 6; amd, L 1946, ch 524,, § 3, L 1947, ch 206, § 1, L 1948, ch 840, § 7, L 1965, ch 755, § 8, L 1972, ch 892, § 14, L 1992, ch 708, § 3; repealed, L 1992, ch 655, § 1, eff July 31, 1992.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 6-d, 6-f.

Local laws subject to referendum on petition, CLS Mun H R § 24.

Propositions for the submission of local laws, CLS Mun H R § 25.

Reconsideration of local law before submission to referendum, CLS Mun H R § 26.

§ 6-f. Snow and ice removal and road repair reserve funds for municipal corporations

1. The governing board of any municipal corporation may establish a special fund which shall be known as the snow and ice removal and road repair reserve fund of such municipal corporation. There may be paid into such fund an amount as may be provided therefor by budgetary appropriation or such revenues as are not required by law to be paid into any other fund or account.

2. In cases of emergency, moneys in such fund may be expended pursuant to a resolution approved by not less than two-thirds of the members of the governing body of such municipal corporation providing that not less than one-half of the moneys so expended shall be repaid in the fiscal year immediately following the fiscal year in which such moneys were expended and the total amount shall be repaid not later than the last day of the second fiscal year succeeding the fiscal year in which the moneys were expended. Prior to the adoption of any other resolution, act, ordinance or local law by the governing board of such municipal corporation, appropriating money from such fund, the governing board shall cause to be published in the official newspaper or newspapers, if any, or otherwise in a newspaper or newspapers designated for such purpose, a notice stating in substance that it is proposed to appropriate a specified amount from the snow and ice removal and road repair reserve fund for a particular purpose, and that a public hearing on such proposed appropriation will be held at a time and place stated therein. At least five days shall elapse between the publication of such notice and the date specified for the hearing. The hearing shall be held at the time and place so specified.

3. Moneys in such fund may be appropriated only:

a. For the removal of snow and ice from the public thoroughfares and public places of such municipal corporation, which removal is of a type not likely to recur annually or at shorter intervals.

b. For repairing and maintaining roadways to the extent damage to such roadways was caused by the removal of snow and ice, including but not limited to repairing potholes and other road surface maintenance, which repairs and maintenance are of a type not likely to recur annually or at shorter intervals.

c. To a capital reserve fund established pursuant to section six-c, to a repair reserve fund established pursuant to section six-d or to a tax stabilization reserve fund established pursuant to section six-e of this article.

4. The moneys in such fund shall be deposited and secured in the manner provided by section ten of this article. The moneys in such fund so deposited shall be accounted for separate and apart from all other funds of the municipal corporation, in the same manner as provided in subdivision ten of section six-c of this article. The governing board or the chief fiscal officer of such municipal corporation, if the governing board shall delegate such duty to him, may invest the moneys in such fund in the manner provided in section eleven of this article. Any interest earned or capital gains realized on the moneys so deposited or invested shall accrue to and become part of such fund.

5. The members of the governing board of such municipal corporation are hereby declared trustees of such fund and shall be subject to all the duties and responsibilities imposed by law on trustees, and such duties and responsibilities may be enforced by such municipal corporation or by any board, commission, agency, officer or taxpayer thereof.

6. The members of the governing board of such municipal corporation shall be guilty of a misdemeanor if they:

a. Authorize a withdrawal from a snow and ice removal and road repair reserve fund for any other purpose except as provided in this section.

b. Expend any money withdrawn from a snow and ice removal and road repair reserve fund for a purpose other than that as provided in this section.

7. Notwithstanding the foregoing provisions of this section, in any town which is located wholly or partly within the Adirondack park and has within its boundaries state lands subject to taxation assessed at more than thirty per centum of the total taxable assessed valuation of the town as determined from the assessment rolls of the town as completed from time to time, or in any district corporation or improvement district situated in whole or in part in any such town, a snow and ice removal and road repair reserve fund shall not be established unless the state comptroller, on behalf of the state, shall consent thereto, and in any such town or district corporation or improvement district no appropriation shall be made from a snow and ice removal and road repair reserve fund unless the state comptroller, on behalf of the state, shall consent thereto.

HISTORY:

Add, L 1997, ch 548, § 1, eff Sept 10, 1997; amd, L 2001, ch 424, § 3, eff Oct 31, 2001; L 2003, ch 62, § 3 (Part X), eff May 15, 2003.

Prior Law: Former § 6–f, add, L 1943, ch 542, § 6; amd, L 1944, ch 152, § 1, L 1945, ch 29, § 1, L 1946, ch 524, § 4, L 1952, ch 693, § 2, L 1957, ch 384, § 1, L 1958, ch 229, § 1, L 1961, ch 828, § 2, L 1962, ch 890, § 1, L 1968, ch 877, § 1, L 1969, ch 770, § 1, L 1979, ch 684, § 1; repealed, L 1992, ch 708, § 4, eff Nov 28, 1992.

§ 6-g. Capital reserve funds for fire districts

1. As used in this section:

a. The term "capital improvement" shall mean:

(1) Any physical betterment or improvement or any preliminary studies and surveys relative thereto.

(2) Land or rights in land.

(3) Any furnishings, equipment, machinery or apparatus for any physical public betterment or improvement acquired at the time when such betterment or improvement is constructed, reconstructed or acquired.

b. The term "equipment" shall include any equipment, machinery or apparatus not included in the definition of the term "capital improvement" and for the acquisition of which a period of probable usefulness has been provided by law.

c. The term "obligations" shall include bonds, notes, certificates or other evidences of indebtedness.

2. The board of fire commissioners of any fire district may establish capital reserve funds for the financing of all or a part of the cost of:

a. The construction, reconstruction or acquisition of a specific capital improvement or the acquisition of a specific item or specific items of equipment.

b. The construction, reconstruction or acquisition of a type of capital improvement or the acquisition of a type of equipment.

3. If the board of fire commissioners authorizes the establishment of a capital reserve fund for the financing of all or part of the cost of the construction, reconstruction or acquisition of a specific capital improvement or the acquisition of a specific item or specific items of equipment, it shall set forth in such authorization the estimated maximum cost thereof.

4. Any resolution of the board of fire commissioners authorizing the establishment of a reserve fund shall not take effect until approved by the affirmative vote of a majority of the electors of such fire district affected, qualified to vote at an annual election of fire district officers, voting on such proposition. Any special election shall be held in the manner provided in section one hundred seventy-nine of the town law, as amended from time to time.

A proposition for the submission of any such resolution of the board of fire commissioners to the approval of the said qualified electors pursuant to this section, shall contain an abstract of such resolution concisely stating the purposes and effect thereof. The fire district secretary shall prepare such abstract with the advice of the attorney for the fire district, if there be one, and forthwith transmit the proposition to the board of fire commissioners in the form in which it is to be submitted at such annual or special election of such fire district. If there be more than one such proposition to be voted upon at such election, each proposition shall be separately and consecutively numbered.

5. There may be paid into any such capital reserve fund:

a. Such an amount as may be provided therefor in the annual budget of the fire district adopted pursuant to section one hundred eighty-one of the town law or pursuant to section one hundred eighty-one-a of the town law.

b. Such revenues as are not required by law to be paid into any other fund or account, including the proceeds from the sale of any capital improvement or equipment owned by such fire district.

6. The moneys in each such capital reserve fund shall be deposited and secured in the manner provided by section ten of this article. The board of fire commissioners or the fire district treasurer of such fire district, if the board of fire commissioners shall delegate such duty to him, may invest the moneys in each such fund in the manner provided in section eleven of this article. Any interest earned or capital gains realized on the moneys so deposited or invested shall accrue to and become part of each such fund. The separate identity of each such fund shall be maintained, whether its assets consist of cash or investments or both.

7. An expenditure from a reserve fund shall be made only upon authorization by the board of fire commissioners and for a specific capital improvement or a specific item or specific items of equipment, the cost of which may be financed therefrom. However, if a proposed expenditure is from a fund established for a type of capital improvement or

equipment and if it is required by law that the authorization by such board of fire commissioners of the issuance of obligations for such capital improvement or equipment be subject to a permissive or mandatory referendum, then the authorization of such an expenditure shall be subject to a permissive referendum. Within ten working days after the adoption by a board of fire commissioners of a resolution described in this section as being subject to a permissive referendum, the fire district secretary, in the same manner as provided for notice of annual elections, shall publish a notice which shall set forth the date of the adoption of the resolution and contain an abstract of such resolution concisely stating the purposes and effect thereof. The notice shall specify that such resolution was adopted subject to a permissive referendum. Any such resolution of the board of fire commissioners shall not take effect until thirty days after its adoption; nor until approved by the affirmative vote of a majority of the electors of such fire district affected, qualified to vote at an annual election of fire district officers, voting on such proposition, if within thirty days after its adoption there be filed with the fire district secretary a petition signed and acknowledged or proved in the same manner as a deed to be recorded, by resident taxpayers of such fire district, owning taxable real property aggregating at least one-quarter of the assessed valuation of all the taxable real property of the fire district as such valuations appear upon the latest completed assessment roll of the town or towns in which said fire district is located, protesting against such resolution and requesting that it be submitted to the qualified electors of the fire district affected for their approval or disapproval. If such petition be so filed not more than forty-five days nor less than thirty days prior to an annual election of fire district officers, a proposition for the approval of such resolution shall be submitted at such annual election of fire district officers. If a petition be so filed at any other time, a proposition for the approval of such resolution shall be submitted at a special fire district election to be held not more than forty days after the filing of such petition. If, within five days after the filing of such petition, a written objection thereto be filed with the fire district secretary, and a verified petition setting forth the objections be presented by the person so filing such objections to the supreme court or any justice thereof of the judicial district in which such fire district or any part thereof is located, such court or justice within twenty days shall determine any question arising thereunder and make such order as justice may require. Such proceeding shall be heard and determined in the manner prescribed by section 16-116 of the election law. A proposition for the submission of any such resolution of the board of fire commissioners to the approval of the said qualified electors pursuant to this section, shall contain an abstract of such resolution concisely stating the purposes and effect thereof. The fire district secretary shall prepare such abstract with the advice of the attorney for the fire district, if there be one, and forthwith transmit the proposition to the board of fire commissioners in the form in which it is to be submitted at such annual or special election of such fire district. If there be more than one such proposition to be voted upon at such election, each proposition shall be separately and consecutively numbered.

8. The board of fire commissioners may authorize the transfer to the credit of another capital reserve fund of such fire district all or part of:

a. The unexpended balance remaining in a fund established pursuant to this section for a specific capital improvement or a specific item or specific items of equipment, which improvement has been completed or acquired, or which equipment has been acquired, after deducting from such balance a sum sufficient to satisfy all outstanding claims arising from the construction, reconstruction or acquisition of such capital improvement or the acquisition of such equipment.

b. The unexpended balance remaining in a fund established pursuant to this section for a specific item or specific items of equipment which have not been acquired or a specific capital improvement which has not been completed or acquired, or remaining in a fund established pursuant to this section for a type of capital improvement or a type of equipment. If the proposed transfer is from a fund established for a specific capital improvement or a specific item or specific items of equipment, the authorization of such transfer shall be subject to a permissive referendum if the authorization of the creation of a fund for such capital improvement or item or items of equipment was subject to a permissive referendum. A permissive referendum on the authorization of such transfer shall be governed in the manner provided in subdivision seven of this section.

9. The fire district treasurer shall keep a separate account for each fund established. Such account shall show:

a. The date and amount of each sum paid into the fund.

b. The interest earned by such fund.

c. The capital gains or losses resulting from the sale of investments of the fund.

d. The interest or capital gains which have accrued to the fund.

e. The amount and date of each withdrawal from the fund.

f. The assets of the fund, indicating the cash balance therein and a schedule of the amounts invested in federal or state obligations. The fire district treasurer, at the termination of each fiscal year, shall render a detailed report of the operation and condition of each of such funds to the board of fire commissioners.

10. The members of the board of fire commissioners are hereby declared trustees of such funds and

shall be subject to all the duties and responsibilities imposed by law on trustees, and such duties and responsibilities may be enforced by the fire district or by any board, commission, agency, officer or taxpayer thereof.

11. The members of the board of fire commissioners shall be guilty of a misdemeanor if they:

a. Authorize a withdrawal from a fund for any purpose other than for a capital improvement or an item or items of equipment, the cost of which has been authorized to be financed in whole or in part from such fund.

b. Expend any money withdrawn from a fund for a purpose other than that for which it was authorized to be withdrawn.

The provisions of this subdivision shall be considered to be in addition to any other penalties provided by law.

12. The board of water commissioners of a water district to which the provisions of article thirteen of the town law apply, and which has the powers of the fire district commissioners as provided in subdivisions nine to twenty-four, inclusive, of section one hundred seventy-six of the town law, may establish capital reserve funds as in this section provided for the financing of all or a part of the cost of capital improvements and equipment for fire department and fire protection purposes, in the same manner and to the same extent that the board of fire commissioners of a fire district may establish capital reserve funds for such purposes, and all of the provisions of this section shall apply in relation to the financing of all or a part of such capital improvements or equipment, and all references in this section to a fire district shall be deemed to refer to such water district, and all references herein to a fire district secretary or treasurer shall be deemed to refer to the secretary or treasurer of such board of water commissioners, except that if such board of water commissioners does not have a treasurer the provisions relating to the fire district treasurer shall be deemed to refer to the supervisor of the town in which such water district is located.

13. Notwithstanding the foregoing provisions of this section, if any such fire district is situated in whole or in part in a town which is wholly or partly within the Adirondack park and has within the town boundaries state lands subject to taxation assessed at more than thirty per centum of the total taxable assessed valuation of the town as determined from the assessment rolls of the town, as completed from time to time, a capital reserve fund for the fire district shall not be established on and after May first, nineteen hundred forty-eight, unless the state comptroller, on behalf of the state, shall consent thereto, and, on and after May first, nineteen hundred forty-eight, in any such fire district so located, no expenditure or transfer shall be made from a capital reserve fund heretofore or hereafter established unless the state comptroller, on behalf of the state, shall consent thereto.

HISTORY:

Add, L 1944, ch 737, § 1; amd, L 1944, ch 532, § 4; L 1945, ch 153, § 1; L 1945, ch 747, § 1; L 1945, ch 838, § 20; L 1946, ch 524, § 5; L 1948, ch 849, § 1; L 1982, ch 106, § 1; L 1992, ch 708, § 5; L 1996, ch 140, § 8, eff June 11, 1996 (see 1996 note below); L 1998, ch 270, § 1; L 2001, ch 424, § 4, eff Oct 31, 2001; L 2006, ch 234, § 1, eff Jan 1, 2007; L 2006, ch 235, § 2; L 2007, ch 555, § 1, eff Aug 15, 2007 (see 2007 note below).

Editor's Notes: Laws 1996, ch 140, § 24, eff June 11, 1996, provides as follows:

§ 24. This act shall take effect immediately and shall apply to all budgets which are adopted after the date on which it shall have become a law.

Laws 2007, ch 555, § 10, eff Aug 15, 2007, provides as follows:

§ 10. This act shall take effect immediately and shall first apply to fire district budgets prepared for fiscal years commencing on or after January 1, 2008; provided, that the amendments to section 209-z of the general municipal law, made by section two of this act, shall take effect on the same date and in the same manner as chapter 237 of the laws of 2006 takes effect.

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20. —Transfer of fund to accomplish different purpose

1. In general

Balance of fire district funds on hand at end of fiscal year must be used to reduce tax levy. Capital reserve fund may be established for purpose of making alterations to fire house. Capital reserve fund is alternative to Section 179 of the Town Law. 1946 Ops St Compt 57.

2. Applicability to water districts

The Board of Water Commissioners of the Manhasset-Lakeville Water District may establish a capital reserve fund under this section. 1962 Ops St Compt #1028.

3. Source of fund; budgetary appropriation

Board of fire commissioners of fire district may establish capital reserve fund for the erection of fire house. Establishment of such capital reserve fund is subject to permissive referendum. Board of fire commissioners may make budgetary appropriation to the capital reserve fund. Amount which may be appropriated is not subject to spending limitation prescribed by subd. 18 of Section 176 of Town Law or to referendum provisions of Section 179 of Town Law. 1946 Ops St Compt 559.

4. —Insurance policy proceeds

Board of fire commissioners may establish capital reserve fund for construction of a fire house. Proceeds of fire insurance policy may be transferred to the capital reserve fund. 1946 Ops St Compt 143.

5. —Obligations

Where a capital reserve fund has been established to finance the purchase of a fire truck, bonds may nevertheless be issued to finance a portion of the cost. 1967 Ops St Compt File #699.

6. —Surplus funds

Board of Fire Commissioners of fire district may establish capital reserve fund for acquisition of real property for fire house and purchase of fire apparatus and equipment and also surplus funds of a fire district may be appropriated by Board of Fire Commissioners of fire district to establish capital reserve funds for acquisition of fire house and purchase of fire apparatus and equipment. 1945 Ops St Compt 352.

A fire district may establish a capital reserve fund and transfer thereto surplus fire district funds. 1951 Ops St Compt File #5493.

Unexpended balances of appropriations in the current fiscal year or surplus funds may be transferred to a fire district capital reserve fund or repair reserve fund. 1954 Ops St Compt File #6773.

7. —Surplus funds; accounting considerations

Board of fire commissioners must deduct unexpended balances remaining at close of fiscal year from amount authorized to be expended without adoption of a proposition. 1945 Ops St Compt 382.

The commissioners of a fire district, whose annual expenditures are limited to $1,000.00 may not expend in addition to such $1,000.00, surplus funds resulting from an expended balance of the previous year. Capital reserve fund suggested. 1946 Ops St Compt 687.

Fire district unexpended balance should be included in the annual estimate as a revenue. If not so included such moneys became unanticipated revenues in the following year and may be included as a revenue in the annual estimate for the following fiscal year. 1947 Ops St Compt 106.

8. Uses of fund; construction or alteration of firehouse

Plaintiffs' volunteer ambulance corps and an individual taxpayer failed to state a cause of action for an accounting against defendant fire district for tax monies allocated to the fire district and set up in an ambulance capital reserve fund, where the structure of the ambulance corps for a brief period of time as a fourth fire company did not create that relationship of trust between it and the fire district as would support such a cause of action, and the voluntary commencement by the fire district of an ambulance capital reserve fund and the deposit therein of sums out of its total revenues did not create an interest therein of the plaintiffs sufficient to require an accounting in equity, since revenues allocated to the fire district for its purposes could not be extended for the benefit of private independent organizations such as the ambulance corps. Kelly v Chester Fire Dist., 116 Misc. 2d 334, 455 N.Y.S.2d 312, 1982 N.Y. Misc. LEXIS 3879 (N.Y. Sup. Ct. 1982), rev'd, 95 A.D.2d 799, 463 N.Y.S.2d 518, 1983 N.Y. App. Div. LEXIS 18721 (N.Y. App. Div. 2d Dep't 1983).

Balance of fire district funds on hand at end of fiscal year must be used to reduce tax levy. Capital reserve fund may be established for purpose of making alterations to fire house. Capital reserve fund is alternative to Section 179 of the Town Law. 1946 Ops St Compt 57.

Board of fire commissioners may establish capital reserve fund for construction of a fire house. Proceeds of fire insurance policy may be transferred to the capital reserve fund. 1946 Ops St Compt 143.

Board of fire commissioners of fire district may establish capital reserve fund for the erection of fire house. Establishment of such capital reserve fund is subject to permissive referendum. Board of fire commissioners may make budgetary appropriation to the capital reserve fund. Amount which may be appropriated is not subject to spending limitation prescribed by subd. 18 of Section 176 of Town Law or to referendum provisions of Section 179 of Town Law. 1946 Ops St Compt 559.

The board of fire commissioners may at any time authorize expenditures from a capital reserve fund established for the construction or reconstruction of a heating system for the purpose of which established. Such expenditure is not subject to a permissive referendum. 1955 Ops St Compt File #7105.

Fire commissioners may reject all bids and readvertise for new bids. If condemnation proceeding is discontinued, fire district may be ordered to pay damages to owners of realty. Board may not expend in excess of estimate set forth in bond resolution. Board may issue bonds to an amount smaller than approved. Expenses incurred in connection with building construction project disapproved in referendum are legal liabilities and may be paid. 1966 Ops St Compt File #751.

9. —Fire apparatus and equipment

Board of Fire Commissioners of fire district may establish capital reserve fund for acquisition of real property for fire house and purchase of fire apparatus and equipment and also surplus funds of a fire district may be appropriated by Board of Fire Commissioners of fire district to establish capital reserve funds for acquisition of fire house and purchase of fire apparatus and equipment. 1945 Ops St Compt 352.

Fire district may establish capital reserve fund for the purchase of fire apparatus. 1946 Ops St Compt 81; 1946 Ops St Compt 144; 1955 Ops St Compt File #7596.

Moneys in a fire district capital reserve fund, established for the purchase of fire apparatus and equipment, may not be used to purchase a site for a fire house, unless such moneys are duly transferred as an unexpended balance to another capital reserve fund. 1952 Ops St Compt File #5784.

A contract may not be entered into for the purchase of a fire engine unless the contract cost is available or provided for on the date the contract is signed. 1970 Ops St Compt File #24.

Fire district may purchase fire truck from its fire department utilizing current funds if spending limitation contained in CLS Town § 176 will not be exceeded or if proposition has been adopted pursuant to CLS Town § 179; alternatively, Reserve Funds may be used, subject to limitations of CLS Gen Mun § 6-g, CLS Local Fin § 38.00, or obligations may be issued subject to mandatory referendum under CLS Local Fin § 38.00. 1986 Op St Compt No. 86-67.

Reserve fund established by fire district for type of equipment must identify kind or class of equipment which has distinguishing characteristics, and expenditures from such reserve fund may be made for any items which have specified distinguishing characteristics. 1987 Op St Compt No. 87-16.

Fire district board of commissioners may determine to include in annual fire district budget amount to be paid into capital reserve fund established for purchase of equipment, and board may fix such amount each year at approximately same amount previously paid annually for principal on obligations issued to finance fire truck; establishment of capital reserve fund for acquisition of specific item of equipment, or expenditures from capital reserve fund established for type of equipment, would be subject to permissive referendum requirements. 1996 Op St Compt No. 96-24.

Fire district may establish capital reserve fund for purpose of replacing chiefs' cars; it may also establish capital reserve fund for purpose of acquiring traffic signal control system. 1998 Op St Compt No. 98-7.

A fire district may not expend money from a repair reserve fund to purchase a fire alarm siren. A transfer of funds may be made to a fire district capital reserve fund and then the siren may be purchased from such capital reserve fund, subject to applicable referendum provisions. 1968 Ops St Compt File #632.

10. — —Ambulances

An action by an ambulance company to force a fire district to purchase an ambulance for the company out of the fire district's reserve fund would be dismissed, where the contractual arrangement previously entered into between the fire district and the company was illegal, where any understanding to purchase an ambulance for the company was an act beyond the power granted to the fire district by Gen Mun Law § 6-g, and where the fire district could not be estopped to deny its agreement, in that estoppel could not be invoked to prevent a municipality from disclaiming an unauthorized or unlawful act of its officers. Kelly v Chester Fire Dist., 95 A.D.2d 799, 463 N.Y.S.2d 518, 1983 N.Y. App. Div. LEXIS 18721 (N.Y. App. Div. 2d Dep't), aff'd, 60 N.Y.2d 660, 467 N.Y.S.2d 832, 455 N.E.2d 485, 1983 N.Y. LEXIS 3365 (N.Y. 1983).

11. — —Uniforms

Moneys in a capital reserve fund established for the purchase of equipment may not be expended for the purchase of new dress uniforms. 1982 Op St Compt #82-165.

12. —Investment purposes

All the interest earned from the investment of moneys on deposit in a capital reserve fund must be credited to that fund, even if this would cause the reserve fund to exceed the maximum established for the fund. 1968 Ops St Compt File #933.

Moneys in a capital reserve fund established by a fire district may be invested without prior voter approval. 1985 Op St Compt No. 85-12.

13. —Land acquisition

Board of Fire Commissioners of fire district may establish capital reserve fund for acquisition of real property for fire house and purchase of fire apparatus and equipment and also surplus funds of a fire district may be appropriated by Board of Fire Commissioners of fire district to establish capital reserve funds for acquisition of fire house and purchase of fire apparatus and equipment. 1945 Ops St Compt 352.

Moneys in a fire district capital reserve fund, established for the purchase of fire apparatus and equipment, may not be used to purchase a site for a fire house, unless such moneys are duly transferred as an unexpended balance to another capital reserve fund. 1952 Ops St Compt File #5784.

Fire commissioners may reject all bids and readvertise for new bids. If condemnation proceeding is discontinued, fire district may be ordered to pay damages to owners of realty. Board may not expend in excess of estimate set forth in bond resolution. Board may issue bonds to an amount smaller than approved. Expenses incurred in connection with building construction project disapproved in referendum are legal liabilities and may be paid. 1966 Ops St Compt File #751.

14. —Retirement of obligations

The unneeded balance of a capital reserve fund may not be used to retire bond anticipation notes. 1967 Ops St Compt File #14.

15. Procedure for establishing fund; generally

Creation of capital reserve funds by fire districts; payment therein of moneys set aside for building fire house; appropriations to capital reserve funds notwithstanding limitation on amount that may be expended without a vote on a proposition. 1946 Ops St Compt 514.

A fire district should not accumulate a surplus from year to year for the purpose of capital improvements but should establish capital reserve funds for such purposes. Moneys in a capital reserve fund may not be deposited in a savings bank or in time deposits, but may be invested in certain types of federal, state and fire district obligations. 1947 Ops St Compt 465; 1955 St Compt File #7193.

Discussion of procedure for establishment of capital reserve funds, payments into and expenditure from such funds, moneys to be kept in such funds and their investment, etc., under this section and § 6-f. 1964 Ops St Compt #159.

A board of fire commissioners must establish a capital reserve fund for a specific improvement in order to finance the construction of a fire house or substation. 1973 Ops St Compt File #800.

Absent special act of State Legislature, fire district may not make cash refunds to its taxpayers of unexpended monies in capital reserve fund that board of fire commissioners has determined are no longer needed for capital purposes. 2008 Op St Compt No. 08-3.

16. —Bond resolution

Fire commissioners may reject all bids and readvertise for new bids. If condemnation proceeding is discontinued, fire district may be ordered to pay damages to owners of realty. Board may not expend in excess of estimate set forth in bond resolution. Board may issue bonds to an amount smaller than approved. Expenses incurred in connection with building construction project disapproved in referendum are legal liabilities and may be paid. 1966 Ops St Compt File #751.

17. —Permissive referendum; when required

Creation of capital reserve fund by fire district subject to permissive referendum. 1946 Ops St Compt 546.

Board of fire commissioners of fire district may establish capital reserve fund for the erection of fire house. Establishment of such capital reserve fund is subject to permissive referendum. Board of fire commissioners may make budgetary appropriation to the capital reserve fund. Amount which may be appropriated is not subject to spending limitation prescribed by subd. 18 of Section 176 of Town Law or to referendum provisions of Section 179 of Town Law. 1946 Ops St Compt 559.

18. —Permissive referendum; when not required

The board of fire commissioners may at any time authorize expenditures from a capital reserve fund established for the construction or reconstruction of a heating system for the purpose for which established. Such expenditure is not subject to a permissive referendum. 1955 Ops St Compt File #7105.

Where a fire district has established a "capital reserve fund for new equipment" the name may be changed to "capital reserve fund for major apparatus and equipment thereof" without a permissive referendum. 1962 Ops St Compt #251.

19. —Restrictions on appropriations for fund

Where a fire district capital reserve fund has a limitation of $50,000 and provides that $5,000 per year be appropriated for deposit, only a maximum of $5,000 per year from any source should be appropriated into the reserve fund until the $50,000 total is reached. 1968 Ops St Compt File #933.

20. —Transfer of fund to accomplish different purpose

Moneys in a fire district capital reserve fund, established for the purchase of fire apparatus and equipment, may not be used to purchase a site for a fire house, unless such moneys are duly transferred as an unexpended balance to another capital reserve fund. 1952 Ops St Compt File #5784.

Where a bond resolution has been approved which authorizes a fire district to issue bonds to finance the construction of a firehouse and where a capital reserve fund has been previously established for the purchase of fire apparatus, the board of fire commissioners may not properly transfer the moneys from the capital reserve fund to pay for the actual cost of the construction and equipment of the firehouse. 1957 Ops St Compt File #563.

Fire district board of commissioners may not authorize transfer of expended balance of capital reserve fund into fire district's general fund; it may, however, authorize transfer of those moneys into another capital reserve fund in accordance with CLS Gen Mun § 6-g(8). 1996 Op St Compt No. 96-10.

Agency Opinions

Analysis

1. Source of fund; budgetary appropriation
2. —Repair reserve fund
3. —Surplus funds
4. Uses of fund; construction or alteration of firehouse
5. —Fire apparatus and equipment
6. — —Repairs
7. — —Ambulances
8. — —Uniforms
9. —Investment purposes
10. —Land acquisition
11. Procedure for establishing fund; generally
12. —Permissive referendum; when required

1. Source of fund; budgetary appropriation

2. —Repair reserve fund

Discussion of repair reserve fund vis-a-vis capital reserve fund for fire district purposes. 1978 Op St Compt File #957.

3. —Surplus funds

Fire district surplus moneys may be appropriated to a capital reserve fund. 1978 Op St Compt File #764.

Fire district surplus moneys may be appropriated to a capital reserve fund without regard to the spending limitation, but the establishment of the capital reserve fund may be subject to referendum requirements. 1978 Op St Compt File #1041.

4. Uses of fund; construction or alteration of firehouse

5. —Fire apparatus and equipment

6. — —Repairs

The installation of a new transmission and siren in a fire district pumper truck may well be a capital purpose for which

moneys in a capital reserve fund could be expended. However, such funds probably could not be used for the reconditioning and replacement of springs and could not be used for repairs to such truck. 1978 Op St Compt File #576.

Under proper circumstances, moneys in a capital reserve fund may be expended to purchase a new motor for a fire truck and to pay the cost of certain extensive body work to the truck involving the replacement of several parts of the body with new sheet metal. 1982 Op St Compt File #82-65.

7. — —Ambulances

A capital reserve fund may be established to pay for the acquisition of an ambulance. The expense of operation and maintenance of the ambulance cannot be paid from the capital reserve fund revenues. 1980 Op St Compt File #206.

8. — —Uniforms

Moneys in a capital reserve fund established for the purchase of equipment may not be expended for the purchase of new dress uniforms. 1982 Op St Compt File #82-165.

Discussion of expenditure from capital reserve fund for the purpose of purchasing and installing a tank on a fire district pumper truck. 1979 Op St Compt File #246.

9. —Investment purposes

Day-of-deposit to day-of-withdrawal accounts and so-called "six-month money market certificates" in commercial banks are among the permissible investments of moneys in a capital reserve established by a fire district. 1980 Op St Compt File #413.

10. —Land acquisition

Moneys in a duly established capital reserve fund may be expended by a fire district, pursuant to the procedures set forth in General Municipal Law, § 6-g, for the purchase of land. 1981 Op St Compt File #765.

While a fire district is not required to specify the location of a parcel of real property for the purchase of which a capital reserve fund is established, it may establish such a fund for the purchase of a specific parcel of real property located outside the boundaries of the district to be used as a fire sub-station. 1982 Op St Compt File #82-187.

A fire district may properly establish a capital reserve fund for purchase of a fire alarm communication system and the establishment of such fund is subject to permissive referendum. 1982 Op St Compt File #82-269.

Moneys in a capital reserve fund established by a fire district may be co-mingled with moneys in other capital reserve funds or with moneys in the general fund for purposes of investment. 1983 Op St Compt File #83-34.

A fire district may not use moneys from a repair reserve fund to repaint and make alterations to the kitchen in the firehouse nor may it use these moneys to purchase a new stove. However, moneys from a capital reserve fund may be used to finance these improvements subject to permissive referendum. 1980 Op St Compt File #79.

11. Procedure for establishing fund; generally

12. —Permissive referendum; when required

Fire district surplus moneys may be appropriated to a capital reserve fund without regard to the spending limitation, but the establishment of the capital reserve fund may be subject to referendum requirements. 1978 Op St Compt File #1041.

A fire district may not use moneys from a repair reserve fund to repaint and make alterations to the kitchen in the firehouse nor may it use these moneys to purchase a new stove. However, moneys from a capital reserve fund may be used to finance these improvements subject to permissive referendum. 1980 Op St Compt File #79.

Discussion of procedures for the establishment of a fire district capital reserve fund and use of the money; 2 enclosures. 1979 Op St Compt File #270.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 6-d, 6-f, 6-h; CLS Town § 176.

§ 6-h. Reserve fund for payment of bonded indebtedness in counties, cities, villages, towns and fire districts

1. As used in this section, the term "governing board," in so far as it is used in reference to a county, shall mean the board of supervisors thereof; in so far as it is used in reference to a city, shall mean the "local legislative body" thereof, as that term is defined in subdivision seven of section two of the municipal home rule law, as amended from time to time; in so far as it is used in reference to a village, shall mean the board of trustees thereof; in so far as it is used in reference to a town, shall mean the town board thereof; in so far as it is used in reference to a fire district, shall mean the board of fire commissioners.

2. The governing board of any county, city, village, town or fire district may by resolution adopted by a majority vote of its governing body establish a reserve fund for the payment of its bonded indebtedness as herein described, provided, however, that such debt reserve fund shall not be established for, or moneys therein used to pay, any obligations payable in the first instance from assessments, or from taxes levied upon an area in such county, city, village, town or fire district smaller than the area of such county, city, village, town or fire district.

3. Such fund may be established for the payment of one or of several issues of bonds of such municipality or the purchase of the same.

4. There may be paid into such fund:

a. Such an amount as may be provided therefor by budgetary appropriation.

b. Such revenues as are not otherwise appropriated or required by law to be paid into any other fund or account.

5. An expenditure from such a reserve fund may only be made by appropriation pursuant to a resolution of the governing board of the municipal corporation or fire district establishing the same and only for the payment of the principal and interest on bonds issued by such municipal corporation or fire district and forming a part of an issue having a maximum maturity of not less than five years; or for the purchase of bonds of such municipal corporation or fire district forming a part of an issue having a maximum maturity of not less than five years at a price not to exceed the par value thereof and accrued interest to the date of delivery of such bonds to such municipal corporation or fire district, provided, however, that if any such bonds were issued subject to the right of such municipal corporation or fire district to redeem the same prior to the maturity date thereof then such purchase may be made for the redemption of such bonds at the price and on the terms stated in such bonds or in the proceeding authorizing the same as the case may be.

Where provision has been made in the current budget from funds other than a reserve fund for the payment of the principal and interest on bonds or

the purchase thereof, no expenditure may be made for the purchase or payment of the same from such a reserve fund during the current fiscal year for which such budget was adopted.

All expenditures from such fund as provided in this subdivision may only be made by the chief fiscal officer of the municipal corporation or fire district establishing the same.

Any such bonds so paid, purchased or redeemed and any interest coupons representing unmatured interest attached thereto shall be cancelled and destroyed by the chief fiscal officer of such municipal corporation or fire district establishing such fund who shall make a notation of such cancellation and destruction in the bond register of such municipal corporation or fire district. Such notation shall describe each such bond by title, date of issue, number, denomination and date of maturity, and if coupons are attached thereto by number, face value and date of maturity.

6. The governing board of a municipal corporation may, subject to a permissive referendum, authorize the transfer of a portion or all of such reserve to a capital reserve fund established pursuant to section six-c of the general municipal law.

The board of fire commissioners of a fire district may, subject to the approval of the voters at a regular or special election in such district, in the manner provided in section one hundred seventy-nine of the town law, authorize the transfer of a portion or all of such reserve to a capital reserve fund established pursuant to section six-g hereof.

7. The chief fiscal officer shall keep a separate account for each fund established. Such account shall show:

a. The date and amount of each sum paid into the fund.

b. The interest earned by such fund.

c. The capital gains or losses resulting from the sale of investments of the fund.

d. The interest or capital gains which have accrued to the fund.

e. The amount and date of each withdrawal from the fund.

f. The assets of the fund, indicating the cash balance therein and a schedule of the amounts invested. The chief fiscal officer at the termination of each fiscal year shall render a detailed report of the operation and condition of each of such funds to the governing board.

8. The members of the governing board are hereby declared trustees of such funds and shall be subject to all the duties and responsibilities imposed by law on trustees, and such duties and responsibilities may be enforced by the county, city, village, town or fire district, as the case may be, or by any board, commission, agency, officer or taxpayer thereof.

9. The moneys in each such fund shall be deposited and secured in the manner provided by section ten of this article. The governing board or the chief fiscal officer of such municipal corporation or fire district, if the governing board shall delegate such duty to him, may invest the moneys in each such fund in the manner provided in section eleven of this article. Any interest earned or capital gains realized on the moneys so deposited or invested shall accrue to and become a part of each such fund. The separate identity of each such fund shall be maintained whether its assets consist of cash, investments, or both.

10. The members of the governing board shall be guilty of a misdemeanor if they:

a. Authorize a withdrawal from a fund for any other purpose except as provided in this section.

b. Expend any money withdrawn from a fund for a purpose other than that as provided in this section.

11. Notwithstanding the foregoing provisions of this section, in any town which is located wholly or partly within the Adirondack park and has within its boundaries state lands subject to taxation assessed at more than thirty percentum of the total taxable assessed valuation of the town as determined from the assessment rolls of the town, as completed from time to time, a reserve fund for the payment of bonded indebtedness shall not be established on and after May first, nineteen hundred forty-eight, unless the state comptroller, on behalf of the state, shall consent thereto, and, on and after May first, nineteen hundred forty-eight, in any such town no expenditure or transfer from any such fund heretofore or hereafter established shall be made unless the state comptroller, on behalf of the state, shall consent thereto.

HISTORY:

Add, L 1945, ch 742, § 1, eff April 12, 1945; amd, L 1944, ch 532, § 4; L 1945, ch 747, § 1; L 1946, ch 775, §§ 1, 2; L 1946, ch 995, § 1, eff April 24, 1946; L 1948, ch 840, § 8; L 1957, ch 592, § 1, eff April 16, 1957,2, eff April 16, 1957,3, eff April 16, 1957; L 1958, ch 229, § 2; L 1965, ch 755, § 9, eff July 1, 1965; L 1992, ch 708, § 6; L 1996, ch 140, § 9 (see 1996 note below); L 2001, ch 424, § 5, eff Oct 31, 2001.

Editor's Notes: Laws 1996, ch 140, § 24, eff June 11, 1996, provides as follows:

§ 24. This act shall take effect immediately and shall apply to all budgets which are adopted after the date on which it shall have become a law.

Notes to Decisions

Separate bank account must be set up for each reserve fund. 1947 Ops St Compt 258.

Proceeds from sale of village property may be paid into general fund, and, if not estimated as revenue in current budget, may be appropriated to increase any item or items in such budget. 1950 Ops St Compt File #4977.

If all of the facilities of a water district are sold to a water authority, the proceeds of the sale may not be invested, nor may an excess over the required reserve be used to acquire and maintain a park for the residents of the water district. 1957 Ops St Compt File #57-424.

Surplus proceeds from the sale of bonds to finance construction of a firehouse may not be paid into a reserve fund established pursuant to General Municipal Law, § 6-h for the payment of bonded indebtedness. 1960 Ops St Compt File #721.

A town board has no authority to establish a debt reserve fund for bonds issued for purposes of a water district smaller in area than such town. 1964 Ops St Compt File #764.

The unneeded balance of a capital reserve fund may not be used to retire bond anticipation notes. 1967 Ops St Compt File #14.

Where a village sells surplus real property, the purchase of which was not financed pursuant to the Local Finance Law, the proceeds of such sale may be placed in a reserve fund to pay the indebtedness outstanding on other capital improvements. 1967 Ops St Compt File #570.

If, upon the sale by a village of a capital improvement, there are outstanding obligations relating to such improvement, a mandatory reserve fund shall be established for the purpose of paying the balance due thereon. The village may treat the excess, if any, as surplus to be used for any lawful village purpose or may establish a reserve fund for the purpose of paying an indebtedness outstanding on other capital improvement. 1969 Ops St Compt File #155.

Resolution to establish reserve fund for bonded indebtedness for sole purpose of paying principal and interest on bond anticipation notes is ultra vires and void. 1987 Op St Compt No. 87-36.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 6-f; CLS Pub A §§ 2045-u, 2047-u, 2048-t, 2051-u; 2746; CLS Town § 176.

Definitions, CLS Mun H R § 2.

Codes, Rules and Regulations:

Cancellation and destruction of obligations of municipalities, school districts and district corporations. 2 NYCRR §§ 55.1 et seq.

Insurance of municipal bonds. 11 NYCRR §§ 63.0 et seq.

§ 6-l. Mandatory reserve fund for municipal corporations, fire districts and school districts

1. As used in this section, the term "governing board," in so far as it is used in reference to a municipal corporation, shall mean the "legislative body" thereof, as that term is defined in section two of the municipal home rule law, as amended from time to time; in so far as it is used in reference to a fire district, shall mean the board of fire commissioners thereof; in so far as it is used in reference to a school district, shall mean the board of trustees thereof.

2. Notwithstanding any other provision of this chapter, upon the cash sale by a municipal corporation, fire district or school district of a capital improvement, as defined in section six-c of this chapter, for the cost of which obligations were issued pursuant to the local finance law, and when all or part of such indebtedness is outstanding at the time of such sale, a mandatory reserve fund shall be established for the purpose of retiring such obligations, or, as an additional alternative, paying principal of, or redemption premiums in connection with such obligations or other obligations of at least equal weighted average life; provided however, that, if the proceeds of the sale are used or set aside to be used (i) to pay or provide for the construction, reconstruction, acquisition or installation of capital improvements or equipment, as defined in section six-c of this chapter, or (ii) for the payment of principal of, or redemption premiums in connection with, any outstanding obligations issued by the municipal corporation, fire district or school district to finance such capital improvements or equipment, in an amount not less than the lesser of such proceeds or the principal amount of the indebtedness outstanding on the capital improvement sold, then such fund need not be established; provided, however, that if such amount to be so used, together with any other amounts so used pursuant to this sentence in the same fiscal year of such municipal corporation, fire district or school district, would exceed one percent of the limit prescribed by section 104.00 of the local finance law, then such fund shall nevertheless be established; and provided further, that a municipal corporation, fire district or school district shall within thirty days after the use of such proceeds pursuant to clause (i) herein, file a report with the state comptroller identifying: (a) the asset sold, (b) the amount of net proceeds from such sale, (c) the amount to be paid or provided pursuant to such clause (i), and (d) the capital improvements or equipment to be so paid for or provided. When a municipal corporation, fire district or school district has outstanding indebtedness incurred to finance the cost of such a capital improvement, federal and state aid received on account of such improvement, to the extent that it is not applied directly to the payment of a part of the cost of such improvement or to retire indebtedness issued in anticipation of such aid, shall likewise be deposited in a reserve fund for the purpose of retiring either such obligations or, as an additional alternative, other obligations of at least equal weighted average life. The entire proceeds of the sale or such state or federal aid received, as the case may be, shall be deposited to the credit of such fund, provided however, that if the aggregate amount thereof shall exceed the principal of such indebtedness due or to become due, or if, when all such outstanding obligations have been retired, any moneys remain unexpended in the reserve fund, such excess moneys may be used for any lawful municipal or district purpose, as the case may be. The provisions of this section shall not apply in a case where a provision of any other law requires that the proceeds of the sale of a capital improvement shall be deposited in a reserve fund established for the purpose of retiring outstanding obligations.

2-a. The provisions of this section shall apply to capital improvements of town and county improvement districts. For the purpose of implementing the provisions of this section in regard to such districts, the term "governing board" shall mean the governing board of the town or county, as the case may be, in which such district is located, and the term "chief fiscal officer" shall mean the chief fiscal officer of such town or county.

3. Appropriations from such fund shall be made only for the payment or payments of all or part of the said outstanding indebtedness. However, any balance remaining in said fund upon the payment of all outstanding principal and interest may be expended for any lawful purpose of the municipal corporation, fire district or school district.

4. The chief fiscal officer shall keep a separate account for each of such funds established. Such account shall show:

a. The date of creation of the fund and the amount credited thereto.

b. The interest earned by such fund.

c. The capital gains or losses resulting from the sale of investments of the fund.

d. The interest or capital gains which have accrued to the fund.

e. The amount and date of each withdrawal from the fund.

f. The assets of the fund, indicating the cash balance therein and a schedule of the amounts invested. The chief fiscal officer at the termination of each fiscal year shall render a detailed report of the operation and condition of each of such funds to the governing board.

5. The members of the governing board are hereby declared trustees of such funds and shall be subject to all the duties and responsibilities imposed by law on trustees, and such duties and responsibilities may be enforced by the municipal corporation, fire district or school district, as the case may be, or by any board, commission, agency, office or taxpayer thereof. An expenditure from such mandatory reserve fund may be made only by appropriation pursuant to a resolution of the governing board.

6. The moneys in each such fund shall be deposited and secured in the manner provided by section ten of this article. The governing board or the chief fiscal officer of such municipal corporation, fire district or school district, if the governing board shall delegate such duty to him, may invest the moneys in each such fund in the manner provided in section eleven of this article. Any interest earned or capital gains realized on the moneys so deposited or invested shall accrue to and become a part of each such fund. The separate identity of each such fund shall be maintained whether its assets consist of cash, investments, or both.

7. The members of the governing board shall be guilty of a misdemeanor if they:

a. Authorize a withdrawal from any such mandatory reserve fund for any purpose other than as provided in this section.

b. Expend any money withdrawn from any such mandatory reserve fund for a purpose other than as provided in this section.

HISTORY:

Add, L 1965, ch 1052, § 1, eff July 1, 1965; amd, L 1969, ch 1083, § 1; L 1971, ch 881, § 1; L 1977, ch 807, § 1,2, eff Aug 5, 1977; L 1991, ch 413, § 32; L 1992, ch 708, § 9; L 1993, ch 261, § 6; L 1995, ch 117, § 1; L 1996, ch 140, § 11, eff June 11, 1996 (see 1996 note below); L 2002, ch 93, § 10 (Part A), eff June 25, 2002 (see 2002 note below).

Revision Notes: [1965, ch 1052] This act was prepared under the direction of the New York State Department of Audit and Control and was introduced at its request.

Editor's Notes: Laws 1996, ch 140, § 24, eff June 11, 1996, provides as follows:

§ 24. This act shall take effect immediately and shall apply to all budgets which are adopted after the date on which it shall have become a law.

Laws 2002, ch 93, § 1 (Part A), eff June 25, 2002, provides as follows:

Section 1. Short title. This act shall be known and may be cited as the "New York city debt modernization act of 2002".

Notes to Decisions

Where a village sells surplus real property, the purchase of which was not financed pursuant to the Local Finance Law, the proceeds of such sale may be placed in a reserve fund to pay the indebtedness outstanding on other capital improvements. 1967 Ops St Compt File #570.

If, upon the sale by a village of a capital improvement, there are outstanding obligations relating to such improvement, a mandatory reserve fund shall be established for the purpose of paying the balance due thereon. The village may treat the excess, if any, as surplus to be used for any lawful village purpose or may establish a reserve fund for the purpose of paying an indebtedness outstanding on other capital improvement. 1969 Ops St Compt File #155.

Where property of a component school district is appropriated, the provisions of Education Law, § 1804(6) must be complied with. 1969 Ops St Compt File #473.

Where State appropriates an unimproved and unneeded portion of a tract of land owned by a central school district, for the acquisition of which there is no outstanding indebtedness, the proceeds received do not have to be placed in a mandatory reserve fund, although a school building, against which there is outstanding indebtedness incurred for construction, has been erected on a portion of the tract. 1969 Ops St Compt File #473.

Whether proceeds of sale or parcel of land must be paid into a reserve fund to be applied to future installments of outstanding indebtedness incurred for improvements constructed thereon depends upon facts and circumstances of each case. 1969 Ops St Compt File #711.

If, upon the sale by a school district of an undeveloped land site, there are outstanding obligations that were issued to finance the purchase of such lands, a mandatory reserve fund must be established for the purpose of retiring such obligations. 1973 Ops St Compt File #792.

Where a village has issued obligations to finance the cost of constructing a sewer system and part or all of those bonds are outstanding, federal and state aid received on account of that system must be placed in a mandatory reserve fund to retire such obligations. 1974 Ops St Compt File #917.

Revenue from sale of real property purchased with obligations which are still outstanding must be deposited in mandatory reserve fund provided, however, that revenue in excess of aggregate amount necessary to retire debt may be used for any lawful municipal purpose. 1986 Op St Compt No. 86-26.

When parcel of real property is purchased by issuance of serial bonds as for single object or purpose, and then only part of parcel is sold, the entire sale proceeds must be deposited in mandatory reserve fund to retire indebtedness on whole parcel. 1987 Op St Compt No. 87-71.

Until July 1, 1993, municipal corporation, fire district or school district which sold capital improvement financed by issuance of outstanding obligations was not required to establish mandatory reserve fund if proceeds of sale of improvement were used to pay or provide for construction, reconstruction, acquisition or installation of another capital improvement or equipment, or to pay debt service on outstanding obligations issued to finance any capital improvement or equipment, subject to limitations in CLS Gen Mun § 6-l as amended by chapter 413 of Laws of 1991, notwithstanding whether all or portion of capital improvement were sold. 1992 Op St Compt No. 92-48.

City with 125,000 or more inhabitants which receives state aid on behalf of city school district on account of school building project for which indebtedness was contracted and remains outstanding must deposit aid in mandatory reserve fund for payment of debt service to extent that aid is not applied directly to pay for project or to retire obligations issued in anticipation of aid; state aid paid in relation to school building project financed from source other than proceeds of obligations which remain outstanding may be expended for any school purpose as provided in CLS Educ §§ 3064(4), 3609(3), and 3609-a(3), and is not restricted to use for funding capital projects. 1995 Op St Compt No. 95-24.

When county civic center is financed by both issuance of county obligations, and loan from Urban Development Corporation (UDC) pursuant to act of state legislature which requires county to enter into repayment agreement with UDC providing that, in event of sale of civic center, unpaid portion of loan will be repaid from proceeds of sale, repayment requirements of such act take precedence over mandatory reserve fund requirements of CLS Gen Mun § 6-l. 2000 Op St Compt No. 2000-10.

CLS Gen Mun § 11 constitutes exclusive authority for investment of proceeds of sale of real property by school district. 2005 Op St Compt No. 05-3.

Agency Opinions

Where obligations were issued to finance capital improvements to two school district buildings and only one of such buildings is sold, only so much of the proceeds of the sale as is needed to cover debt service due or to become due on that amount of the remaining outstanding indebtedness apportioned to the cost of the improvements to the building which was sold must be paid into a mandatory reserve fund. 1980 Op St Compt File #513.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS Town § 176.

Definitions, CLS Mun H R § 2.

§ 6-n. Insurance reserve fund.

1. a. "Municipal corporation," as used in this section, shall mean a municipal corporation, as defined in section two of this chapter, school district, except a school district in a city with a population of one hundred twenty-five thousand or more, board of cooperative educational services, fire district, a district corporation and a special improvement district governed by a separate board of commissioners.

b. "Judgments", "actions" and "claims", as used in this section, shall mean those judgments, actions and claims against the municipal corporation that arise out of those kinds of risks for which expenditures may be made pursuant to subdivision two of this section.

2. (a) The governing board of any municipal corporation may establish a reserve fund to be known as the insurance reserve fund. Upon the creation of the fund, the municipality may make expenditures from the fund for any loss, claim, action or judgment for which the municipal corporation is authorized or required to purchase or maintain insurance, except those kinds of risks for which insurance is authorized pursuant to paragraph one, two, three, fifteen, sixteen, seventeen, eighteen, twenty-two or twenty-three of subsection (a) of section one thousand one hundred thirteen of the insurance law, or for payments in lieu of contributions under article eighteen of the labor law; provided however, that no municipality shall make an expenditure from such fund for any loss, claim, action or judgment for which the municipal corporation has established a reserve fund under any other provision of law; provided, further that the Scarsdale union free school district, the Mamaroneck union free school district, the Minisink Valley central school district, the Vernon Verona Sherrill central school district, the Ithaca city school district, the Kenmore-Town of Tonawanda union free school district, the Bedford central school district, the Grand Island central school district, the Tonawanda city school district, the enlarged city school district of Middletown, the Frontier central school district, and the Binghamton city school district may establish insurance reserve funds in compliance with this section and article seventy-four of the education law and such school districts may make expenditures in compliance with this section and article seventy-four of the education law from such reserve fund for any loss, claim, action or judgment for which the school districts are authorized or required to purchase or maintain insurance for the kinds of risks for which insurance is authorized pursuant to paragraph three of subsection (a) of section one thousand one hundred thirteen of the insurance law.

(b) Notwithstanding any other provision of law to the contrary, where a municipal corporation has previously established a reserve fund under another provision of law for a type of risk for which expenditures may be made under paragraph (a) of this subdivision, the municipal corporation may, by resolution, discontinue such other reserve fund and transfer any unexpended balance to the reserve fund established under this section; provided, however, that to the extent such unexpended balance is subject to any liabilities incurred or accrued against the other reserve fund, any unexpended balances so transferred shall only be used for such incurred or accrued liabilities including expenses in connection therewith. Prior to the discontinuance of the other reserve fund, the fiscal and legal officers of the municipal corporation shall certify to the governing board thereof the amount that may be necessary to satisfy all liabilities incurred or accrued against it.

3. There may be paid into such fund:

a. Such amounts as may be provided by budgetary appropriations;

b. Amounts from any other fund authorized by this chapter by resolution subject to permissive referendum; and

c. Such other funds as may be legally appropriated.

4. The amount paid into such fund during any fiscal year shall not exceed the greater of thirty-three thousand dollars or five per centum of the total budget for such fiscal year.

5. The moneys in such fund shall be deposited and secured in the manner provided by section ten of this article. The governing board, or the chief fiscal officer of such municipal corporation, if the governing board shall delegate such duty to him, may invest the moneys in such fund in the manner provided by section eleven of this article. Any interest earned or capital gain realized on the money so deposited or invested shall accrue to and become part of such fund.

6. The chief fiscal officer shall account for this fund separate and apart from all other funds of the municipal corporation. Such accounting shall show: the source, date and amount of each sum paid into the fund; the interest earned by such fund; capital gains or losses resulting from the sale of invest-

ments of this fund; the order, purpose thereof, date and amount of each payment from this fund; the assets of the fund, indicating cash balance and a schedule of investments. The chief fiscal officer, within sixty days of the end of each fiscal year, shall furnish a detailed report of the operation and condition of this fund to the governing board. The chief fiscal officer shall also keep a separate account for each kind of risk funded pursuant to subdivision two of this section.

7. Notwithstanding any provision of law to the contrary, municipal corporations shall not have the power to enter into agreements, among themselves or one for the other, to pool their reserve fund established pursuant to subdivision two of this section for the payment of judgments, actions and claims.

8. Any action or claim shall be compromised or settled by the governing board, officer or employee of the municipal corporation authorized to settle or compromise actions or claims on behalf of the municipal corporation.

9. An expenditure may be made from this fund for the payment of all or part of the cost, including interest, of:

a. Judgments;

b. Actions that have been compromised or settled and that have been approved by the court in which the action or proceeding is pending;

c. Claims that have been settled or compromised and that have been approved by a justice of the supreme court of the judicial district in which the municipal corporation is located;

d. The uninsured portion of any loss to property owned by the municipal corporation if such loss arises out of a kind of risk described in subdivision two of this section.

e. Expert or professional services rendered in connection with the investigation, adjustment or settlement of claims, actions or judgments.

10. The order of the court or the justice approving such settlement or compromise may be granted upon motion of the body, officer or employee of the municipal corporation authorized to do so, supported by an affidavit setting forth the cause of action or claim against the municipal corporation and also such other information which, in its or his opinion, will enable the court or justice to arrive at a determination that such compromise or settlement is just, reasonable and to the interest of the municipal corporation. Such body, officer or employee may also present the affidavit of other persons in support of such motion. The court or the justice, in order to arrive at such a determination, may require such body, officer or employee to present additional information by a supplementary affidavit or affidavits or may require other persons to present additional information by their affidavits.

11. Notwithstanding subdivisions eight and nine of this section or any other provision of law to the contrary, the governing body of any municipal corporation may, without judicial approval, compromise or settle any action or claim and make an expenditure from this fund where the amount of such settlement or compromise does not exceed twenty-five thousand dollars.

12. The members of the governing board shall be guilty of a misdemeanor if they:

a. Authorize a withdrawal from this fund for any purpose except as provided in this section; or

b. Expend any money withdrawn from this fund for a purpose other than as provided in this section.

13. If, after the establishment of such fund, the municipality determines that such fund is no longer needed, the moneys remaining in such fund may be transferred to any other reserve fund of the municipal corporation authorized by this chapter that is comprised of moneys which were raised on the same tax base as the moneys in the reserve fund established under this section or section thirty-six hundred fifty-one of the education law, only to the extent that the moneys in this fund shall exceed the sum sufficient to pay all liabilities incurred or accrued against it. Prior to the discontinuance of such fund, the fiscal and legal officers of such municipal corporation shall certify to the governing board thereof the amount that may be necessary to retain in such fund to satisfy all liabilities incurred or accrued against it and such sum shall be retained in the fund for payment of such amounts or until later certified that such funds are no longer needed.

HISTORY:

Add, L 1979, ch 684, § 2; amd, L 1984, ch 377, § 1; L 1984, ch 805, § 27; L 1986, ch 819, § 1, eff Oct 1, 1986; L 1988, ch 350, § 1, eff July 29, 1988; L 1992, ch 708, § 11, eff Nov 28, 1992; L 2014, ch 433, § 1, effective November 21, 2014; L 2016, ch 414, § 1, effective November 4, 2016; L 2016, ch 416, § 1, effective November 4, 2016; L 2019, ch 318, § 1, effective October 3, 2019; L 2019, ch 321, § 1, effective October 3, 2019; L 2019, ch 325, § 1, effective October 3, 2019; L 2019, ch 342, § 1, effective October 4, 2019; L 2019, ch 499, § 1, effective November 20, 2019; L 2019, ch 509, § 1, effective November 20, 2019; L 2019, ch 510, § 1, effective November 20, 2019; L 2019, ch 551, § 1, effective November 25, 2019; L 2020, ch 246, § 1, effective October 7, 2020.

Amendment Notes The 2014 amendment by ch 433, § 1, added "provided, further that in the case of the Scarsdale union free school district, an insurance reserve fund may be established and such school district may make expenditures from such reserve fund for any loss, claim, action or judgment for which the school district is authorized or required to purchase or maintain insurance for the kinds of risks for which insurance is authorized pursuant to paragraph three of subsection (a) of section one thousand one hundred thirteen of the insurance law" at the end of 2(a).

The 2016 amendment by ch 414, § 1, in the second sentence of 2(a), substituted "provided, further that the Scarsdale union free school district and the Vernon Verona Sherrill central school district may establish insurance reserve funds in compliance with this section and article seventy-four of the education law" for "provided, further that in the case of the Scarsdale union free school district, an insurance reserve fund may be established" and added "in compliance with this section and article seventy-four of the education law"; and made stylistic changes.

The 2016 amendment by ch 416, § 1, in the second sentence of 2(a), substituted "provided, further that the Scarsdale union free school district and the Minisink Valley central school district may establish insurance reserve funds

in compliance with this section and article seventy-four of the education law" for "provided, further that in the case of the Scarsdale union free school district, an insurance reserve fund may be established" and added "in compliance with this section and article seventy-four of the education law"; and made stylistic changes.

The 2019 amendment by ch 318, § 1, substituted "the Vernon Verona Sherrill central school district the Minisink Valley central school district, and the Ithaca city school district may establish" for "the Vernon Verona Sherrill central school district may establish insurance reserve funds in compliance with this section and article seventy-four of the education law and the Minisink Valley central school district may establish" in the second sentence of 2; and made a related change.

The 2019 amendment by ch 321, § 1, substituted "the Vernon Verona Sherrill central school district the Minisink Valley central school district and the Kenmore-Town of Tonawanda union free school district may establish" for "the Vernon Verona Sherrill central school district may establish insurance reserve funds in compliance with this section and article seventy-four of the education law and, the Minisink Valley central school district may establish" in the second sentence of 2(a); and made a related change.

The 2019 amendment by ch 325, § 1, substituted "the Vernon Verona Sherrill central school district, the Minisink Valley central school district, and the Bedford central school district may establish" for "the Vernon Verona Sherrill central school district may establish insurance reserve funds in compliance with this section and article seventy-four of the education law and the Minisink Valley central school district may establish" in the second sentence of 2(a); and made a related change.

The 2019 amendment by ch 342, § 1, substituted "the Vernon Verona Sherrill central school district, the Minisink Valley central school district and the Grand Island central school district may establish" for "the Vernon Verona Sherrill central school district may establish insurance reserve funds in compliance with this section and article seventy-four of the education law and the Minisink Valley central school district may establish" in the second sentence of 2(a); and made a related change.

The 2019 amendment by ch 499, § 1, in the second sentence of 2(a), deleted "may establish insurance reserve funds in compliance with this section and article seventy-four of the education law and" following "central school district" and added "and the Tonawanda city school district"; and made related changes.

The 2019 amendment by ch 509, § 1, in the second sentence of 2(a), deleted "may establish insurance reserve funds in compliance with this section and article seventy-four of the education law and" following "central school district" and added "and the enlarged city school district of Middletown"; and made related changes.

The 2019 amendment by ch 510, § 1, in the second sentence of 2(a), deleted "may establish insurance reserve funds in compliance with this section and article seventy-four of the education law and" following "central school district" and added "and the Frontier central school district"; and made related changes.

The 2019 amendment by ch 551, § 1, in the second sentence of 2(a), added "the Mamaroneck union free school district, the Minisink Valley central school district" and deleted "and the Minisink Valley central school district may establish insurance reserve funds in compliance with this section and article seventy-four of the education law" following "the education law."

The 2020 amendment by ch 246, § 1, added "and the Binghamton city school district" in the second sentence of 2(a); and made related changes.

Notes to Decisions

Because a health center was a publicly operated facility, entitled to 90 days to make a settlement payment under N.Y. C.P.L.R. 5003-a(b), and payment was made from a county's insurance reserve under N.Y. Gen. Mun. Law § 6-n within that time frame, the trial court properly denied a patient's motion for a judgment with interest. Ansbach v Gorson, 2 A.D.3d 471, 767 N.Y.S.2d 883, 2003 N.Y. App. Div. LEXIS 13050 (N.Y. App. Div. 2d Dep't 2003).

16 CLS General Municipal Law § 6-n permits municipal corporation to set up liability and casualty reserve fund, e.g., self-insurance fund, but neither expressly nor impliedly addresses issue of selection of counsel, thus, it does not entitle police officers to counsel of their choice at government expense when being sued under 42 USCS § 1983. Suffolk County Patrolmen's Benevolent Asso. v County of Suffolk, 595 F. Supp. 1471, 1984 U.S. Dist. LEXIS 22681 (E.D.N.Y. 1984), aff'd, 751 F.2d 550, 1985 U.S. App. LEXIS 28628 (2d Cir. N.Y. 1985).

Board of education acted properly in voting to establish liability reserve fund to cover potential liability resulting from litigation then pending against respondent school district, but there was insufficient basis on which to allocate funds as "accrued liability" where letter from respondent's attorney, on which board's action was premised, did not indicate that it was probable that district would lose pending litigation. 1998 Op Comm Ed No. 13967.

Two or more municipalities may contract jointly with a private firm for administrative services on a liability and casualty self-insurance plan, but individual reserve funds established under GML § 6-n, may not be pooled into a single joint reserve fund. 1985 Op St Compt No. 85-67.

A school district may not transfer the unexpended balance of an insurance reserve fund established pursuant to General Municipal Law § 6-n into a reserve for property loss and liability claims established pursuant to Education Law § 1709(8-c). 1992 Op St Compt No. 92-11.

Village may not establish reserve fund for direct cash reimbursements by village for health care benefits of its officers and employees. 2004 Op St Compt No. 04-8.

CLS Gen Mun § 6-n, which authorizes municipal corporations to establish "insurance reserve funds", does not provide authority for reserve fund for self-funded health care benefits. 2004 Op St Compt No. 04-8.

County may purchase liability insurance to indemnify sheriff against civil liability without violating Article XIII, § 13 of Constitution, and purchase of such insurance coverage is authorized by CLS Gen Mun § 52; however, county may not make expenditures from its insurance reserve fund for any loss or claim of sheriff or for any action or judgment against him notwithstanding provisions of CLS Gen Mun § 6-n. Ops St Compt 88-36.

Agency Opinions

Section 6-n of the General Municipal Law, which authorizes municipalities to set up a liability and casualty reserve fund, does not apply to Workers' Compensation claims. Those claims are governed by General Municipal Law, § 6-j. Unlike section 6-n, section 6-j does not require municipalities to obtain court approval for the settlement of claims. Therefore, a county need not obtain court approval of a lump sum settlement of a Workers' Compensation claim. 1981 NY Ops Atty Gen April 20 (informal).

State law excludes participation by New York municipal corporations, including counties, towns, cities, villages, district corporations, special improvement districts, school districts and boards of cooperative educational services, in interstate reciprocals or risk retention groups. 1990 NY Ops Atty Gen F 90-12.

Municipalities and most school districts may now establish a liability and casualty reserve fund for self-insurance purposes. 1979 Op St Compt File #239.

Special districts that are not townwide may be self-insured in the town's liability and casualty reserve fund. Payments into the reserve fund on behalf of special districts for both liability and casualty protection are charged against the districts, and should be allocated among the districts on some equitable basis such as exposure to risk. 1979 Op St Compt File #621.

A town may not establish a reserve fund to pay for disability benefits. 1980 Op St Compt File #75.

General Municipal Law, § 6-n literally applies only to judgments, actions and claims against municipal corporations, and does not apply to judgments, actions and claims against munici-

pal officers and employees. Hence, a town may establish a liability and casualty reserve fund only to fund judgments, actions and claims against the town. Nevertheless, a judgment, action or claim against an officer or employee may become a judgment, action or claim against the town when the town, by appropriate legal action, assumes the liability of the officer or employee (see Town Law, § 116(2)); a town is authorized to establish an insurance or self-insurance plan to indemnify town employees for damages recovered against them in tort actions. 1981 Op St Compt File #81-71.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 6-f; CLS Town § 176; CLS Work Comp § 50.

Temporary investment of school moneys, CLS Educ § 1723-a.

Reserve fund, CLS Educ § 3651.

Kinds of insurance authorized, CLS Ins § 1113.

Unemployment insurance law, CLS Labor §§ 500 et seq.

Texts: New York Insurance Law (Matthew Bender's New York Practice Series) § 48.02[6][a][iv].

§ 6-r. Retirement contribution reserve funds

1. As used in this section:

a. "Municipal corporation" means a municipal corporation as defined in section two of this chapter, school district (except a school district in a city with a population of one hundred twenty-five thousand or more), board of cooperative educational services, fire district, district corporation, police district, and special improvement district governed by a separate board of commissioners.

b. "Participating employer" means: (i) a participating employer as defined in subdivision twenty of section two of the retirement and social security law or in subdivision twenty of section three hundred two of such law; or (ii) a participating employer as defined in subdivision three of section five hundred one of the education law.

c. "Retirement contribution" shall mean all or any portion of the amount payable by a municipal corporation to: (i) either the New York state and local employees' retirement system or the New York state and local police and fire retirement system pursuant to section seventeen or three hundred seventeen of the retirement and social security law; or (ii) the New York state teachers' retirement system pursuant to section five hundred twenty-one of the education law.

2. The governing board of any municipal corporation which is also a participating employer by resolution may establish a retirement contribution reserve fund for the purpose of (a) financing retirement contributions, and/or (b) in the case of a municipal corporation which is a participating employer as defined in subdivision three of section five hundred one of the education law, financing appropriations authorized by law in order to offset all or a portion of the amount deducted from the moneys apportioned to the municipal corporation from the state for the support of common schools pursuant to section five hundred twenty-one of the education law.

2-a. With respect to a municipal corporation which is a participating employer as defined in subdivision three of section five hundred one of the education law, which elects to utilize a retirement contribution reserve fund (a) to finance retirement contributions to the New York state teachers' retirement system pursuant to section five hundred twenty-one of the education law and/or (b) to offset all or a portion of the amount deducted from the moneys apportioned to the municipal corporation from the state for the support of common schools pursuant to section five hundred twenty-one of the education law, such municipal corporation shall establish a sub-fund within the retirement contribution reserve fund, which shall be separately administered consistent with the provisions of this section. Such municipal corporation may pay into such sub-fund during any particular fiscal year an amount not to exceed two per centum of the total compensation or salaries of all teachers in the employ of said municipal corporation who are members of the New York state teachers' retirement system paid during the immediately preceding fiscal year. The balance of such sub-fund may not exceed ten per centum of the total compensation or salaries of all teachers in the employ of the municipal corporation who are members of the New York state teachers' retirement system paid during the immediately preceding fiscal year. For the purposes of this subdivision, the term "teacher" shall have the same meaning as such term is defined under subdivision four of section five hundred one of the education law.

3. There may be paid into a retirement contribution reserve fund:

a. such amounts as may be provided therefor by budgetary appropriation or raised by tax therefor;

b. such revenues as are not required by law to be paid into any other fund or account;

c. such other funds as may be legally appropriated; and

d. notwithstanding any law to the contrary, such amounts as may be transferred from a reserve fund established pursuant to section six-c, six-d, six-e, six-f or six-g of this article comprised of moneys raised from the same tax base as the moneys in the retirement contribution reserve fund, or a reserve fund established pursuant to section thirty-six hundred fifty-one of the education law, provided, that any such transfer shall only be made by resolution of the governing board of such municipal corporation adopted after a public hearing held on at least fifteen days prior published notice in the official newspaper of the municipal corporation or, if the municipal corporation does not have an official newspaper, in at least one newspaper having general circulation in the municipal corporation.

4. The moneys in a retirement contribution reserve fund shall be deposited and secured in the manner provided by section ten of this article. The governing board of such municipal corporation, or the chief fiscal officer thereof if the governing board shall delegate such duty to him or her, may invest the moneys in such fund in the manner provided by

section eleven of this article. Any interest earned or capital gain realized on the money so deposited or invested shall accrue to and become part of such fund.

5. The governing board of such municipal corporation by resolution may authorize expenditures from a retirement contribution reserve fund. Except as otherwise provided by law, moneys in a retirement contribution reserve fund may only be expended (a) to finance retirement contributions, and/or (b) in the case of a municipal corporation which is a participating employer, as defined in subdivision three of section five hundred one of the education law, for appropriations authorized by law in order to offset all or a portion of the amount deducted from the moneys apportioned to the participating employer from the state for the support of common schools pursuant to section five hundred twenty-one of the education law. With respect to a municipal corporation which is a participating employer as defined in subdivision three of section five hundred one of the education law, expenditures from the retirement contribution reserve fund to finance retirement contributions to the New York State teachers' retirement system pursuant to section five hundred twenty-one of the education law and/or to offset all or a portion of the amount deducted from the moneys apportioned to the municipal corporation from the state for the support of common schools pursuant to section five hundred twenty-one of the education law may only be made from the sub-fund established pursuant to subdivision two-a of this section.

6. The governing board of such municipal corporation by resolution may authorize the transfer of a portion of the moneys in a retirement contribution reserve fund to a reserve fund of the municipal corporation established pursuant to section six-c, six-d, six-e, six-f or six-g of this article comprised of moneys raised from the same tax base as the moneys in the retirement contribution reserve fund, or a reserve fund established pursuant to section thirty-six hundred fifty-one of the education law, provided, that any such transfer shall only be made by resolution of the governing board of such municipal corporation adopted after a public hearing held on at least fifteen days prior published notice in the official newspaper of the municipal corporation or, if the municipal corporation does not have an official newspaper, in at least one newspaper having general circulation in the municipal corporation.

7. The chief fiscal officer of such municipal corporation shall account for a retirement contribution reserve fund separate and apart from all other funds of the municipal corporation. Such accounting shall show: the source, date and amount of each sum paid into the fund; the interest earned by such fund; capital gains or losses resulting from the sale of investments of this fund; the order, purpose thereof, date and amount of each payment from this fund; the assets of the fund, indicating cash balance and a schedule of investments. The chief fiscal officer, within sixty days of the end of each fiscal year, shall furnish a detailed report of the operation and condition of this fund to the governing board.

8. The members of the governing board of such municipal corporation are hereby declared trustees of a retirement contribution reserve fund and shall be subject to all the duties and responsibilities imposed by law on trustees, and such duties and responsibilities may be enforced by the municipal corporation, as the case may be, or by any board, commission, agency, officer or taxpayer thereof.

9. No member of the governing board of such municipal corporation shall:

(a) authorize a withdrawal from a retirement contribution reserve fund for any purpose except as provided in this section; or

(b) expend any money withdrawn from such fund for a purpose other than as provided in this section.

Any member of the governing board who violates the provisions of this subdivision shall be guilty of a misdemeanor.

10. The governing board of such municipal corporation by resolution may determine that a retirement contribution reserve fund is no longer needed and terminate the fund. Such resolution shall transfer any moneys remaining in such fund to one or more reserve funds of the municipal corporation established pursuant to section six-c, six-d, six-e, six-f or six-g of this article comprised of moneys raised from the same tax base as the moneys in the retirement contribution reserve fund, or one or more reserve funds established pursuant to section thirty-six hundred fifty-one of the education law.

11. The governing board of a municipal corporation which is a participating employer as defined in subdivision three of section five hundred one of the education law by resolution may (a) authorize the transfer of all or a portion of the monies in the separately administered sub-fund as established under subdivision two-a of this section to the retirement contribution reserve fund, and/or (b) authorize the transfer of all or a portion of the monies in the retirement contribution reserve fund to the separately administered sub-fund as provided in subdivision two-a of this section, subject to the limits on annual payments into the sub-fund and the balance of the sub-fund specified by subdivision two-a of this section.

HISTORY:

Add, L 2004, ch 260, § 1, eff July 30, 2004; L 2019, ch 59, §§ 52-g–52-k (Part YYY), effective April 12, 2019.

Editor's Notes Laws 2019, ch 59, § 54 (Part YYY), eff April 12, 2019, provides:

§ 54. This act shall take effect immediately, and shall be deemed to have been in full force and effect on and after April 1, 2019, provided, however, that:

1. Sections one, three, four, five, five-a, five-b, five-c, five-d, six, seven, eight, nine, ten, sixteen, seventeen, eighteen, nineteen, twenty-one, twenty-two, twenty-three, thirty-two, thirty-four, thirty-seven-a, forty-seven, fifty, fifty-one and fifty-two-a of this act shall take effect July 1, 2019;

2. Sections eleven, twelve, thirteen and fourteen of this act shall take effect July 1, 2020;

3. Paragraph (a) of subdivision 7-a of section 804 of the education law, as added by section thirty-three of this act, shall take effect July 1, 2019;

4. The amendments to section 3614 of the education law made by section two of this act shall not affect the repeal of such section and shall be deemed repealed therewith;

5. The amendments to chapter 756 of the laws of 1992, relating to funding a program for work force education conducted by the consortium for worker education in New York City made by sections thirty-five and thirty-six of this act shall not affect the repeal of such chapter and shall be deemed repealed therewith;

6. The amendments to sections 2590-b, 2590-c, 2590-e, 2590-h and 2590-g of the education law made by sections forty-three-a, forty-three-b, forty-three-c, forty-three-d, forty-three-e and forty-three-f of this act shall not affect the expiration or repeal of such provisions and shall expire and be deemed repealed therewith; and

7. Section fifty-two-f of this act shall take effect on the same date as the reversion of subdivision 1 of section 409-d of the education law as provided in section 3 of chapter 437 of the laws of 2014.

Amendment Notes The 2019 amendments by ch 59, §§ 52-g-52-k (Part YYY), in 1b, added the (i) designation and (ii); in 1c, added the (i) designation and (ii); in 2, added the (a) designation and (b); added 2-a; in 5, added the (a) designation and (b); added 11; and made related changes.

§ 10. Deposits of public money; security

1. For purposes of this section:

a. "Local government" shall mean any municipal corporation, school district, board of cooperative educational services, district corporation, special improvement district governed by a separate board of commissioners, industrial development agency or authority or a public library.

b. "Public funds" shall mean funds of a local government.

c. "Public deposits" shall mean deposits of public funds in a bank or trust company which are available for all uses generally permitted by the bank or trust company to the depositing local government for actually and finally collected funds under the bank's or trust company's account agreement or policies.

d. "Bank" shall mean a bank as defined by the banking law or a national banking association located and authorized to do business in New York.

e. "Trust company" shall mean a trust company as defined by the banking law and located and authorized to do business in New York.

f. "Eligible securities" shall mean any of the following:

(i) Obligations issued by the United States of America, an agency thereof or a United States government sponsored corporation or obligations fully insured or guaranteed as to the payment of principal and interest by the United States of America, an agency thereof or a United States government sponsored corporation.

(ii) Obligations issued or fully guaranteed by the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, and the African Development Bank.

(iii) Obligations partially insured or guaranteed by any agency of the United States of America, at a proportion of the market value of the obligation that represents the amount of the insurance or guaranty.

(iv) Obligations issued or fully insured or guaranteed by this state, obligations issued by a municipal corporation, school district or district corporation of this state or obligations of any public benefit corporation which under a specific state statute may be accepted as security for deposit of public moneys.

(v) Obligations issued by states (other than this state) of the United States rated in one of the three highest rating categories by at least one nationally recognized statistical rating organization.

(vi) Obligations of Puerto Rico rated in one of the three highest rating categories by at least one nationally recognized statistical rating organization.

(vii) Obligations of counties, cities and other governmental entities of another state having the power to levy taxes that are backed by the full faith and credit of such governmental entity and rated in one of the three highest rating categories by at least one nationally recognized statistical rating organization.

(viii) Obligations of domestic corporations rated in one of the four highest rating categories by at least one nationally recognized statistical rating organization.

(ix) Any mortgage related securities, as defined in the Securities Exchange Act of 1934, as amended, which may be purchased by banks under the limitations established by federal bank regulatory agencies.

(x) Commercial paper and bankers' acceptances issued by a bank (other than the bank with which the money is being deposited or invested) rated in the highest short-term category by at least one nationally recognized statistical rating organization and having maturities of not longer than sixty days from the date they are pledged.

(xi) Zero-coupon obligations of the United States government marketed as "Treasury STRIPS".

g. "Eligible surety bond" shall mean a bond executed by an insurance company authorized to do business in this state, the claims-paying ability of which is rated in the highest rating category by at least two nationally recognized statistical rating organizations.

h. "Eligible letter of credit" shall mean an irrevocable letter of credit issued in favor of the local government for a term not to exceed ninety days by a bank (other than the bank with which the money is being deposited or invested) whose commercial paper and other unsecured short-term debt obligations (or, in the case of a bank which is the principal subsidiary of a holding company, whose holding company's commercial paper and other unsecured short-term debt obligations) are rated in one of the three highest rating categories (based on the credit of such bank or holding company) by at least one nationally recognized statistical rating organization

or by a bank (other than the bank with which the money is being deposited or invested) that is incompliance [in compliance]* with applicable federal minimum risk-based capital requirements.

2. a. (i) The governing board of every local government shall designate one or more banks or trust companies for the deposit of public funds, the disposition of which is not otherwise provided for by law, received by the chief fiscal officer or any other officer authorized by law to make deposits. Such designation shall be by resolution of the governing board or, in the case of a city, such other body as may be authorized or required by law to designate depositaries. Such resolution shall specify the maximum amount which may be kept on deposit at any time in each such bank or trust company. Such designations and amounts may be changed at any time by further resolution.

(ii) The governing board of a local government that has designated one or more banks or trust companies for the deposit of public funds pursuant to subparagraph (i) of this paragraph may, in its discretion, authorize the designated bank or trust company to arrange for the redeposit of the local government's funds in one or more banking institutions, as defined in section nine-r of the banking law, for the account of the local government, through a deposit placement program that meets all of the following conditions:

(A) On or after the date that the local government's funds are received, the designated bank or trust company (I) arranges for the redeposit of such funds into deposit accounts in one or more banking institutions and (II) serves as custodian for the local government with respect to the funds redeposited into such accounts.

(B) Local government funds deposited in a designated bank or trust company in accordance with this subparagraph and held in the designated bank or trust company in excess of the amount insured by the federal deposit insurance corporation pending redeposit of the funds pursuant to this subparagraph shall be secured in accordance with subdivision three of this section.

(C) The full amount of local government funds redeposited by the designated bank or trust company into deposit accounts in banking institutions pursuant to this subparagraph (plus accrued interest, if any) shall be insured by the federal deposit insurance corporation.

(D) At the same time that the money of the local government is redeposited pursuant to this subparagraph, the selected depository receives an amount of deposits from customers of other financial institutions pursuant to the deposit placement program that are at least equal to the amount of the local government's funds redeposited by the designated bank or trust company.

b. Except as otherwise provided by law, all deposits shall be made to the credit of the local government. The deposit of public funds pursuant to this subdivision shall release the officer making the deposit and his or her surety from any liability for loss of such public funds by reason of the default or insolvency of any such bank or trust company.

c. The governing board of a local government, in which a banking development district has been designated by the superintendent of financial services pursuant to section ninety-six-d of the banking law, may designate a bank, trust company or national bank located in such district for the deposit of public funds, the disposition of which is not otherwise provided for by law, received by the chief fiscal officer or other officer authorized by law to make such deposits. Such designation shall be by resolution of the governing board or, in the case of a city, such other body as may be authorized or required by law to designate depositories. Such resolution shall specify the maximum amount which may be kept on deposit at any time with such bank, trust company or national bank located in such district. Subject to an agreement between such governing board and such banking institution, public funds deposited in such banking institution may earn a fixed interest rate which is at or below such banking institution's posted two year certificate of deposit rate. In those instances where there is such an agreement, its terms and conditions shall also be specified in the resolution. Any such designation, amount, or agreement provisions may be changed at any time by further resolution.

3. All public deposits in excess of the amount insured under the provisions of the Federal Deposit Insurance Act as now or hereafter amended shall be secured in accordance with this subdivision:

a. The officers making a deposit may accept a pledge of eligible securities having in the aggregate a market value at least equal to the aggregate amount of public deposits from such officers, or a pledge of a pro rata portion of a pool of eligible securities having in the aggregate a market value at least equal to the aggregate amount of public deposits from all such officers within the state at such bank or trust company, together with a security agreement from the bank or trust company. The security agreement and custodial agreement referred to below may be the same agreement including when the bank or trust company holding the public deposits holds the collateral for the public body. The security agreement shall provide that such eligible securities or pro rata portion of a pool of eligible securities are being pledged by the bank or trust company as security for the public deposits, together with agreed upon interest, if any, and any costs or expenses arising out of the collection of such deposit upon a default. It shall also provide for the conditions under which the securities or pro rata portion of a pool of eligible securities held may be sold, presented for payment, substituted or released

*The bracketed words have been inserted by the Publisher.

and the events of default which will enable the local government to exercise its rights against the pledged securities. Such agreement shall include all provisions deemed necessary and sufficient to secure in a satisfactory manner the local government's interest in the collateral. The custodial agreement shall provide that the pledged securities or pro rata portion of a pool of eligible securities will be held by the custodial bank or trust company as agent of, and custodian for, the local government, and will be kept separate and apart from the general assets of the custodial bank or trust company and it shall also provide for the manner in which the custodial bank or trust company shall confirm the receipt, substitution or release of the collateral. Such agreement shall provide for the frequency of revaluation of collateral by the custodial bank or trust company and the substitution of collateral when a change in the rating of a security causes ineligibility pursuant to paragraph f of subdivision one of this section. Such agreement shall include all provisions deemed necessary and sufficient to secure in a satisfactory manner the local government's interest in the collateral. Such agreement may also contain such other provisions as the governing board may deem necessary.

b. Whenever eligible securities delivered to a custodial bank or trust company pursuant to this paragraph are transferred by entries on the books of a federal reserve bank or other book-entry system operated by a federally regulated entity without physical delivery of the evidence of such obligations, the records of the custodial bank or trust company shall show, at all times, the interest of the local government in such securities or pro rata portion of a pool of eligible securities as set forth in the security agreement.

c. (i) In lieu of or in addition to the deposit of eligible securities, the officers making a deposit may accept an eligible surety bond payable to such local government as security for the payment of one hundred percent, or an eligible letter of credit payable to such local government as security for the payment of one hundred forty percent, of the aggregate amount of public deposits from such officers and the agreed upon interest, if any. The terms and conditions of any eligible surety bond shall be approved by the governing board.

(ii) In lieu of or in addition to the deposit of eligible securities, the officers making a deposit may, in the case of an irrevocable letter of credit issued in favor of the local government by a federal home loan bank whose commercial paper and other unsecured short-term debt obligations are rated in the highest rating category by at least one nationally recognized statistical rating organization, accept such letter of credit payable to such local government as security for the payment of one hundred percent of the aggregate amount of public deposits from such officers and the agreed upon interest, if any.

d. For purposes of determining the market value of securities as required by this subdivision:

(i) The eligible securities described in subparagraphs (viii), (x) and (xi) of paragraph f of subdivision one of this section shall be valued at eighty percent of their market value.

(ii) The eligible securities described in subparagraph (ix) of paragraph f of subdivision one of this section shall be valued at seventy percent of their market value.

(iii) Of the eligible securities described in subparagraphs (v), (vi) and (vii) of paragraph f of subdivision one of this section, those securities rated in the highest category shall be valued at one hundred percent of their market value; those securities rated in the second highest rating category shall be valued at ninety percent of their market value; and those securities rated in the third highest rating category shall be valued at eighty percent of their market value. When two nationally recognized statistical rating organizations rate a security in two different categories, the security shall be considered to be rated in the higher of the two categories.

4. (a) Notwithstanding any other provision of law to the contrary, the chief fiscal officer, or other officer authorized by law to make deposits, may, subject to the approval of the governing body of a local government, by resolution, enter into a contract with a courier service for the purpose of causing the deposit of public funds with a bank or trust company as provided in this section.

(b) The entrusting of public funds for deposit pursuant to paragraph (a) of this subdivision shall release the officer entrusting the public funds to the courier service and his or her surety from any liability for loss of such public funds by the courier service in the process of delivering such public funds to the designated bank or trust company.

(c) The local government authorizing the deposit of public funds by a courier service pursuant to paragraph (a) of this subdivision shall require the courier service to obtain a surety bond for the full amount entrusted to the courier, payable to the local government and executed by an insurance company authorized to do business in this state, the claims paying ability of which is rated in the highest rating category by at least two nationally recognized statistical rating organizations, to insure against any loss of public funds entrusted to the courier service for deposit or failure to deposit the full amount entrusted to the courier.

(d) A deposit made by a courier on behalf of a local government shall be deemed to be a deposit made by the chief fiscal officer or other officer entrusting such funds for purposes of the requirements contained in this section for securing public deposits.

(e) A bank or trust company may, from time to time and as agreed upon with a local government, reimburse all or part of, but not more than, the actual cost incurred by the local government in transporting cash, negotiable instruments or other items for deposit through a courier service. Any such reimbursement agreement shall apply only to a

specified deposit transaction, and may be subject to such terms, conditions and limitations as the bank or trust company deems necessary to ensure sound banking practices, including, but not limited to, any terms, conditions or limitations that may be required by the department of financial services or other federal or state authority.

HISTORY:

Add, L 1992, ch 708, § 12; amd, L 1992, ch 708, § 43; L 1993, ch 356, § 1, eff Oct 19, 1993; L 1996, ch 619, § 1; L 1997, ch 204, § 2, eff Jan 1, 1998; L 1997, ch 234, § 1, eff Sept 4, 1996; L 1998, ch 623, § 1, eff Oct 20, 1998; L 2002, ch 615, § 1, eff Oct 2, 2002; L 2005, ch 545, § 2, eff Aug 23, 2005; L 2011, ch 62, § 104 (Part A), eff Oct 3, 2011; L 2012, ch 128, § 1, eff July 18, 2012; L 2018, ch 424, § 1, effective January 1, 2019.

Prior Law: Former § 10, add, L 1954, ch 465, § 1; repealed, L 1992, ch 708, § 12, eff Nov 28, 1992.

Prior § 10, add, L 1909, ch 29; amd, L 1910, ch 129, L 1915, ch 382, L 1934, ch 223, L 1935, ch 234, § 1; repealed, L 1943, ch 712, § 3, with substance covered by Local Finance Law Article 2, Title 5 and § 163.00.

Editor's Notes: Laws 1992, ch 708, §§ 44 and 45, eff Nov 28, 1992, provide as follows:

§ 44. The state comptroller shall provide a model investment policy for local governments pursuant to section 39 of the general municipal law and model security and custodial agreements for local governments pursuant to section 10 of the general municipal law. It is the intent of the legislature that such model policy and agreements shall provide information and assistance to local government officials who are formulating local policies and agreements. The provision of such model policy and agreements by the comptroller shall not be construed as a mandate upon local governments to adopt identical policies and agreements.

§ 45. This act shall take effect on the one hundred twentieth day after it shall have become a law, provided that section forty-three of this act shall take effect June 4, 1997; and provided, however, that the amendments to the opening paragraph of subdivision 2 of section 11 of the general municipal law, made by section thirteen of this act and the opening paragraph of paragraph b of section 165.00 of the local finance law, made by section twenty-six of this act shall not affect the expiration and reversion of such provisions as provided in chapter 680 of the laws of 1976, as amended. (Amd, L 1995, ch 109, § 1, L 1996, ch 6, § 1, L 1996, ch 70, § 1, L 1996, ch 152, § 1, L 1997, ch 13, § 1, L 1997, ch 27, § 1, L 1997, ch 67, § 1, eff May 21, 1997, deemed eff May 21, 1997.).

Laws 1993, ch 356, § 38, eff Oct 19, 1993, provides as follows:

§ 38. This act shall take effect on the ninetieth day after it shall have become a law provided, however, that sections twenty-one and twenty-nine of this act shall take effect one year after the date on which this act shall have become a law; provided, further, that subdivision 13 of section 854 of the general municipal law, as amended by section three of this act and subdivision 10 of section 1951 of the public authorities law, as amended by section nineteen of this act, shall take effect immediately and provided further that subdivision 15 of section 858 of the general municipal law, as added by section seven of this act, subdivision 14 of section 1953 of the public authorities law as added by section twenty-three of this act and subdivision 14 of section 2306 of the public authorities law as added by section thirty-one of this act shall take effect on January 1, 1994; provided further however that the provisions of section fifteen of this act shall remain in full force and effect until the end of calendar day January 31, 2008, and provided further that the last four sentences of the opening paragraph, the second undesignated paragraph and the first sentence of the third undesignated paragraph of section 1953 of the public authorities law, as added by section twenty-two of this act and the second and third undesignated paragraphs and the first sentence of the fourth undesignated paragraph of section 2306 of the public authorities law, as added by section thirty of this act shall remain in full force and effect until the end of calendar day January 31, 2008 when upon such date the provisions of the opening paragraph of sections 1953 and 2306 of the public authorities law shall revert to and be read as set out in law on the date immediately preceding the effective date of this act and provided further that section 5 of chapter 905 of the laws of 1986, as amended by section thirty-five of this act, shall take effect immediately and shall be deemed in full force and effect on and after July 1, 1993; provided further, however, that this act shall not apply to projects for which an agency, through the issuance of its bonds, execution of leases, or the passage of an inducement resolution or bond resolution, has authorized any assistance prior to the date on which this act shall have become a law whether or not such projects are thereafter modified; provided further, however, that nothing contained herein shall be deemed to affect the application, qualification, expiration or repeal of any provision of law amended by any section of this act and such provisions shall be applied or qualified or shall expire or be deemed repealed in the same manner, to the same extent and on the same date as the case may be as otherwise provided by law. (Amd, L 1993, ch 357, § 15, L 1996, ch 254, § 2, L 1996, ch 278, § 2, L 1996, ch 305, § 2, L 1996, ch 307, § 2, L 1996, ch 309, § 460, L 1997, ch 444, § 5, L 1999, ch 444, § 3, L 2002, ch 112, § 2, L 2005, ch 159, § 2, L 2006, ch 142, § 2, L 2007, ch 381, § 2, eff July 26, 2008.).

Laws 1996, ch 619, § 1, eff Sept 4, 1996, provides as follows:

§ 2. This act shall take effect immediately; provided, however, that the amendment made to section 10 of the general municipal law by this act shall survive the expiration of such section as provided in chapter 708 of the laws of 1992, as amended.

Laws 1998, ch 623, § 8, eff Oct 20, 1998, provides as follows:

§ 8.This act shall take effect immediately; provided, however, that every local government that participates in a municipal cooperation agreement, which is currently in existence and would be within the definition of a cooperative investment agreement under this act, shall have one year from such effective date to execute those amendments necessary to comply with the requirements of sections four, five, and six of this act, and until the expiration of that year, nothing in this act shall affect the validity of any municipal cooperation agreement authorizing cooperative investments; provided further that, for purposes of complying with sections two, three and five of this act, any obligation owned by a local government on May 1, 1998, or held on May 1, 1998 pursuant to a municipal cooperation agreement that would be within the definition of a cooperative investment agreement under this act, that provides for the adjustment of its interest rate on set dates shall be deemed to mature on the date on which the interest rate resets; and provided further that, for purposes of complying with section six of this act, contracts for professional services procured on behalf of an existing municipal cooperation agreement that would be within the definition of a cooperative investment agreement under this act shall be awarded pursuant to a request for proposal process upon the expiration of existing contracts or thirty months from the effective date of this act, whichever occurs earlier, provided that the amendments to subdivision 3 of section 11 of the general municipal law made by section two of this act shall be subject to the expiration and reversion of such subdivision pursuant to section 7 of chapter 548 of the laws of 1997, as amended, when upon such date the provisions of section three of this act shall take effect.

Laws 2018, ch 424, § 2, eff January 1, 2019, provides:

§ 2. This act shall take effect on the first of January next succeeding the date on which it shall have become a law.

Amendment Notes: 2012. Chapter 128, § 1 amended:

By designating entire sub 2, par (a) as sub 2, par (a), subpar (i).

By adding sub 2, par (a), subpar (ii).

2011. Chapter 62, § 104 (Part A) amended:

Sub 2, par c at fig 1 by substituting "superintendent of financial services" for "superintendent of banks".

Sub 4, par (e) at fig 1 by substituting "department of financial services" for "banking department".

The 2018 amendment by ch 424, § 1, substituted "four" for "two" in 1f(viii).

Notes to Decisions

Expenditures by the Trustees of the Freeholders and Commonalty of the Town of Southampton, New York, did not have to be approved by the Town Board or the Town Comptroller; N.Y. Town Law § 64 did not transfer control over Freeholders Trust revenue to the Town Board or otherwise render Trust funds "public funds" under this section. Gessin v Throne-Holst, 134 A.D.3d 31, 20 N.Y.S.3d 367, 2015 N.Y. App. Div. LEXIS 6799 (N.Y. App. Div. 2d Dep't 2015), app. dismissed, 26 N.Y.3d 1094, 45 N.E.3d 613, 24 N.Y.S.3d 575, 2016 N.Y. LEXIS 35 (N.Y. 2016).

Term "bank" as used in CLS Gen Mun §§ 10 and 11 does not include state or federally chartered savings banks; term "national banking association" under CLS Gen Mun § 10 does not include federally chartered savings banks. 1995 Op St Compt No. 95-12.

Local government is not required by law to enter into security and custodial agreements identical to models prepared by office of state comptroller. 1995 Op St Compt No. 95-32.

Town may enter into custodial agreement under which custodial bank will be indemnified for costs, expenses, damages, liabilities, or claims that do not arise out from custodian's own negligence or willful misconduct (15 Opns St Comp 1959, p 37 is a superseded to the extent it may be inconsistent). 1999 Op St Compt No. 99-16.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

Debt statement form to be used in connection with public sales of bonds by counties, towns, villages and cities having less than 125,000 inhabitants. 2 NYCRR §§ 31.1, 31.2.

Federal Aspects:

The Federal Deposit Insurance Act, cited in statutory text, appears generally as 12 USCS §§ 1811 et seq.

The Securities Exchange Act of 1934, cited in statutory text, appears as 15 USCS §§ 78a et seq.

§ 11. Temporary investments.

1. For purposes of this section, the terms "local government", "bank" and "trust company" shall have the same meanings as in section ten of this article.

2. a. The governing board of any local government or, if the governing board so delegates, the chief fiscal officer or other officer having custody of the moneys may temporarily invest moneys not required for immediate expenditure, except moneys the investment of which is otherwise provided for by law, either: (1) in special time deposit accounts in, or certificates of deposit issued by, a bank or trust company located and authorized to do business in this state; or (2) in accordance with all of the following conditions:

(i) the moneys are invested through a bank or trust company located and authorized to do business in this state;

(ii) the bank or trust company arranges for the deposit of the moneys in certificates of deposit in one or more banking institutions, as defined in section nine-r of the banking law, for the account of the local government;

(iii) the full amount of principal and accrued interest of each such certificate of deposit must be insured by the federal deposit insurance corporation;

(iv) the bank or trust company acts as custodian for the local government with respect to such certificates of deposit issued for the local government's account; and

(v) at the same time that the local government's moneys are deposited and the certificates of deposit are issued for the account of the local government, the bank or trust company receives an amount of deposits from customers of other financial institutions equal to or greater than the amount of the moneys invested by the local government through the bank or trust company.

b. For any investment made pursuant to paragraph a of this subdivision, such time deposit account or certificate of deposit shall be payable within such time as the proceeds shall be needed to meet expenditures for which such moneys were obtained and provided further that such time deposit account or certificate of deposit be secured in the same manner as is provided for securing deposits of public funds by subdivision three of section ten of this article.

3. [Eff until July 1, 2023]

a. Investments pursuant to this section may also be made in the following:

(1) obligations of the United States of America or in obligations guaranteed by agencies of the United States of America where the payment of principal and interest are guaranteed by the United States of America or in obligations of the state of New York, or with the approval of the state comptroller in obligations issued pursuant to section 24.00 or 25.00 of the local finance law by any municipality, school district or district corporation other than the municipality, school district or district corporation investing such moneys pursuant to this paragraph. In addition, moneys in any reserve fund established pursuant to section six-c, six-d, six-e, six-f, six-g, six-h, six-j, six-k, six-l, six-m or six-n of this article may be invested in obligations of the municipality, school district, fire district or district corporation which has established the reserve fund, or in the case of a capital reserve fund established for a town or county improvement district, obligations of the town or county issued for the purposes of such district.

(2) notwithstanding any other provision of general, special or local law, any city having a population of one million or more may also make investments in the following:

(i) general obligation bonds and notes of any state other than this state, provided that such bonds and notes receive the highest rating of at least one independent rating agency designated by the state comptroller;

(ii) obligations of any corporation organized under the laws of any state in the United States maturing within two hundred seventy days, pro-

vided that such obligations receive the highest rating of two independent rating services designated by the state comptroller and that the issuer of such obligations has maintained such ratings on similar obligations during the preceding six months, provided, however, that the issuer of such obligations need not have received such rating during the prior six month period if such issuer has received the highest rating of two independent rating services designated by the state comptroller and is the successor or wholly owned subsidiary of an issuer that has maintained such ratings on similar obligations during the preceding six month period or if the issuer is the product of a merger of two or more issuers, one of which has maintained such ratings on similar obligations during the preceding six month period, provided, however, that no more than two hundred fifty million dollars may be invested in such obligations of any one corporation; or

(iii) bankers' acceptances maturing within two hundred seventy days which are eligible for purchase in the open market by federal reserve banks and which have been accepted by a bank or trust company which is organized under the laws of the United States or of any state thereof and which is a member of the federal reserve system and whose short-term obligations meet the criteria outlined in clause (ii) of this subparagraph. Provided, however, that no more than two hundred fifty million dollars may be invested in such bankers' acceptances of any one bank or trust company; or

(iv) obligations of, or instruments issued by or fully guaranteed as to principal and interest by, any agency or instrumentality of the United States acting pursuant to a grant of authority from the congress of the United States, including but not limited to, any federal home loan bank or banks, the Tennessee valley authority, the federal national mortgage association, the federal home loan mortgage corporation and the United States postal service, provided, however, that no more than two hundred fifty million dollars may be invested in such obligations of any one agency.

(v) no-load money market mutual funds registered under the Securities Act of 1933, as amended, and operated in accordance with Rule 2a-7 of the Investment Company Act of 1940, as amended, provided that such funds are limited to investments in obligations issued or guaranteed by the United States of America or in obligations of agencies or instrumentalities of the United States of America where the payment of principal and interest are guaranteed by the United States of America (including contracts for the sale and repurchase of any such obligations), and are rated in the highest rating category by at least one nationally recognized statistical rating organization, provided, however, that no more than two hundred fifty million dollars may be invested in such funds.

b. All investments made pursuant to this subdivision shall be subject to the following conditions:

(1) Such obligations shall be payable or redeemable at the option of the owner within such times as the proceeds will be needed to meet expenditures for purposes for which the moneys were provided and, in the case of obligations purchased with the proceeds of bonds or notes, shall be payable or redeemable in any event, at the option of the owner, within two years of the date of purchase. Obligations that are purchased pursuant to a repurchase agreement shall be deemed to be payable or redeemable for purposes of this paragraph on the date on which the purchased obligations are scheduled to be repurchased by the seller thereof. Any obligation that provides for the adjustment of its interest rate on set dates shall be deemed to be payable or redeemable for purposes of this paragraph on the date on which the principal amount can be recovered through demand by the holder thereof.

(2) Such obligations, unless registered or inscribed in the name of the local government, shall be purchased through, delivered to and held in the custody of a bank or trust company or, with respect to the city of New York, a reputable dealer in such obligations as shall be designated by the state comptroller, in this state. Such obligations shall be purchased, sold or presented for redemption or payment by such bank or trust company or dealer in obligations only in accordance with prior written authorization from the officer authorized to make the investment. All such transactions shall be confirmed in writing to the local government by the bank or trust company. All obligations held in the custody of a bank or trust company pursuant to this paragraph shall be held by such bank or trust company pursuant to a written custodial agreement as set forth in paragraph a of subdivision three of section ten of this article.

3. [Eff July 1, 2023] Investments pursuant to this section may also be made in obligations of the United States of America or in obligations guaranteed by agencies of the United States of America where the payment of principal and interest are guaranteed by the United States of America or in obligations of the state of New York. In addition, moneys in any reserve fund established pursuant to section six-c, six-d, six-e, six-f, six-g, six-h, six-j, six-k, six-l, six-m or six-n of this article may be invested in obligations of the municipality, school district, fire district or district corporation which has established the reserve fund, or in the case of a capital reserve fund established for a town or county improvement district, obligations of the town or county issued for the purposes of such district.

All investments made pursuant to this subdivision shall be subject to the following conditions:

a. Such obligations shall be payable or redeemable at the option of the owner within such times as the proceeds will be needed to meet expenditures for purposes for which the moneys were provided and, in the case of obligations purchased with the proceeds of bonds or notes, shall be payable or redeem-

able in any event, at the option of the owner, within two years of the date of purchase. Obligations that are purchased pursuant to a repurchase agreement shall be deemed to be payable or redeemable for purposes of this paragraph on the date on which the purchased obligations are scheduled to be repurchased by the seller thereof. Any obligation that provides for the adjustment of its interest rate on set dates shall be deemed to be payable or redeemable for purposes of this paragraph on the date on which the principal amount can be recovered through demand by the holder thereof.

b. Such obligations, unless registered or inscribed in the name of the local government, shall be purchased through, delivered to and held in the custody of a bank or trust company or, with respect to the city of New York, a reputable dealer in such obligations as shall be designated by the state comptroller, in this state. Such obligations shall be purchased, sold or presented for redemption or payment by such bank or trust company or dealer in obligations only in accordance with prior written authorization from the officer authorized to make the investment. All such transactions shall be confirmed in writing to the local government by the bank or trust company. All obligations held in the custody of a bank or trust company pursuant to this paragraph shall be held by such bank or trust company pursuant to a written custodial agreement as set forth in paragraph a of subdivision three of section ten of this article.

4. Notwithstanding any other provision of law, the governing board of a local government may authorize the aforementioned officers to turn over the physical custody and safekeeping of the evidences of the investments made pursuant to this section to (a) any bank or trust company incorporated in this state, or (b) any national bank located in this state, or (c) any private banker duly authorized by the superintendent of financial services of this state to engage in business here. All such private bankers shall, as private bankers, maintain a permanent capital of not less than one million dollars in this state. The said officers may direct such bank, trust company or private banker to register and hold any such evidences of investments in its custody, in the name of its nominee. Such officers may deposit or authorize such bank, trust company or private banker, to deposit, or arrange for the deposit of any such evidences of investments with a federal reserve bank or other book-entry transfer system operated by a federally regulated entity to be credited to an account as to which the ownership of, and other interests in, such evidences of investments may be transferred by entries on the books of such federal reserve bank or other book-entry transfer system operated by a federally regulated entity without physical delivery of any such evidences of investments. The records of any such bank, trust company or private banker shall show, at all times, the ownership of such evidences of investments, and they shall, when held in the possession of such bank, trust company or private banker be, at all times, kept separate from the assets of such bank, trust company or private banker. All evidences of investments delivered to a bank, trust company, or private banker pursuant to this subdivision shall be held by such bank, trust company or private banker pursuant to a written custodial agreement as set forth in paragraph a of subdivision three of section ten of this article. When any such evidences of investments are so registered in the name of a nominee, such bank, trust company or private banker shall be absolutely liable for any loss occasioned by the acts of such nominee with respect to such evidences of investments.

5. A county clerk may invest any money collected on behalf of the state until such time as the money is required to be remitted to the state. The county clerk shall invest the state money only in those investments authorized by this section and payable within such time as the proceeds shall be required to be remitted to the state. Any interest that accrues on moneys invested pursuant to this subdivision shall be payable in equal shares to the state and to the county provided, however, that any fees or service charges associated with the investment shall be paid from such interest.

6. Except as may otherwise be provided in a contract with bond or note holders, any moneys of a political subdivision authorized to be invested pursuant to this section may be commingled for investment purposes; provided, however, that any investment of commingled moneys shall be payable or redeemable at the option of the owner within such time as the proceeds shall be needed to meet expenditures for which such moneys were obtained or as otherwise specifically provided in this section. The separate identity of the sources of such funds shall at all times be maintained and income received on moneys commingled for the purpose of investment shall be credited on a pro rata basis to the fund or account from which the moneys were invested.

7. The chief fiscal officer of each local government shall maintain or cause to be maintained a proper record of all books, notes, securities or other evidences of indebtedness held by or for such subdivision for the purpose of investment. Such record shall at least identify the security, the fund for which held, the place where kept and entries shall be made therein showing date of sale or other disposition and the amount realized therefrom.

HISTORY:

Add, L 1954, ch 464, § 1; amd, L 1956, ch 203, § 1; L 1958, ch 302, § 1, eff March 21, 1958; L 1962, ch 890, § 1; L 1968, ch 877, § 1; L 1969, ch 770, § 2; L 1970, ch 352, § 1; L 1970, ch 704, § 1; L 1972, ch 984, § 1; L 1973, ch 997, § 1; L 1976, ch 680, § 2, expired June 30, 1998; L 1986, ch 265, § 1; L 1992, ch 708, § 13, eff Nov 28, 1992; L 1996, ch 374, § 1, eff July 30, 1996; L 1997, ch 366, § 1; L 1997, ch 548, § 6; L 1998, ch 130, § 1, eff June 30, 1998; L 1998, ch 623, § 2, eff Oct 20, 1998; L 1998, ch 623, § 3, eff July 1, 2001; L 1999, ch 406, § 1 (Part W), eff Aug 9, 1999; L 2005, ch 545, § 1, eff Aug 23, 2005; L 2011, ch 62, § 104 (Part A), eff Oct 3, 2011; L 2012, ch 128, § 2, eff July 18, 2012.

Prior Law: Former § 11, add, L 1909, ch 29, § 1; amd, L 1933, ch 364, § 2, L 1934, ch 223, § 1; repealed, L 1943, ch 712, § 3, with substance covered by Local Finance Law § 71.00.

Editor's Notes: Laws 1976, ch 680, § 5, provides as follows:

§ 5. This act shall take effect immediately provided that the amendment to the opening paragraph of subdivision 2 of section 11 of the general municipal law, made by section two of this act shall expire on June 30, 1998 , except that investments made prior to such expiration shall continue to be subject to the conditions contained in such subdivision of section 11 of the general municipal law to the same extent as they had been subject thereto prior to such expiration. (Amd, L 1977, ch 630, § 1, L 1978, ch 90, 1983, ch 908, § 1, L 1988, ch 189, § 1, L 1993, ch 196, § 1, L 1997, ch 548, § 5, eff Sept 10, 1997.).

Laws 1992, ch 708, § 45, eff Nov 28, 1992, provides as follows:

§ 45. This act shall take effect on the one hundred twentieth day after it shall have become a law, provided that section forty-three of this act shall take effect February 15, 1997; and provided, however, that the amendments to the opening paragraph of subdivision 2 of section 11 of the general municipal law, including the renumbering of such subdivision to be subdivision 3, made by section thirteen of this act shall not be subject to the expiration of other provisions contained in such opening paragraph as provided for in chapter 680 of the laws of 1976, as amended. (Amd, L 1995, ch 109, § 1, L 1996, ch 6, § 1, L 1996, ch 70, § 1, L 1996, ch 152, § 1, L 1997, ch 13, § 1, L 1997, ch 27, § 1, L 1997, ch 67, § 1, L 1997, ch 548, § 4, eff Sept 10, 1997.).

Laws 1996, ch 374, § 2, eff July 30, 1996, provides as follows:

§ 2. This act shall take effect immediately, provided that the original purchase date of investments so authorized shall in no event be later than June 30, 1998, at which time the amendments made by this act shall expire and be deemed repealed, except that investments pursuant to the provisions of subparagraph (2) of paragraph a of subdivision 3 of section 11 of the general municipal law made prior to such expiration and repeal shall continue to be subject to the conditions contained in such subdivision to the same extent as they had been subject thereto prior to such expiration and repeal, and provided, however, that the amendments to the opening paragraph of subdivision 3 of section 11 of the general municipal law, made by section one of this act shall not be subject to the expiration of other provisions contained in such opening paragraph as provided for in chapter 680 of the laws of 1976, as amended. (Amd, L 1997, ch 548, § 3, eff Sept 10, 1997.).

Laws 1997, ch 366, § 2, eff Aug 5, 1997, provides as follows:

§ 2. This act shall take effect immediately provided that the amendment made by section one of this act to paragraph a of subdivision 3 of section 11 of the general municipal law shall not affect the expiration of such subdivision and shall be deemed to expire therewith.

Laws 1997, ch 548, § 7, eff Sept 10, 1997, provides as follows:

§ 7. This act shall take effect immediately except that section six of this act shall take effect on June 30, 1998 and the amendments made by such section shall survive the expiration and repeal of any amendments to subdivision 3 of section 11 of the general municipal law made at any time prior to the enactment of this act.

Laws 1998, ch 130, § 2, eff June 30, 1998, provides as follows:

§ 2. This act shall take effect June 30, 1998 and shall expire and be deemed repealed on July 1, 2023, provided, however, that investments purchased prior to the expiration of this act pursuant to the provisions of paragraph a of subdivision 3 of section 11 of the general municipal law, as designated and amended by section one of this act, shall continue to be subject to the conditions contained in such subdivision to the same extent as they had been subject thereto prior to such expiration and repeal (Amd, L 1999, ch 406, § 2 (Part W); L 2002, ch 124, § 1; L 2005, ch 128, § 1; L 2008, ch 215, § 1, eff July 7, 2008, deemed eff on and after July 1, 2008; L 2011, ch 107, § 1, eff June 30, 2011; L 2014, ch 48, § 1, eff June 30, 2014; L 2017, ch 65, § 1, eff June 29, 2017; L 2020, ch 58, § 1 (Part XXX, Subpart B, Item OO), eff April 3, 2020).

Laws 1998, ch 623, § 8, eff Oct 20, 1998, provides as follows:

§ 8.This act shall take effect immediately; provided, however, that every local government that participates in a municipal cooperation agreement, which is currently in existence and would be within the definition of a cooperative investment agreement under this act, shall have one year from such effective date to execute those amendments necessary to comply with the requirements of sections four, five, and six of this act, and until the expiration of that year, nothing in this act shall affect the validity of any municipal cooperation agreement authorizing cooperative investments; provided further that, for purposes of complying with sections two, three and five of this act, any obligation owned by a local government on May 1, 1998, or held on May 1, 1998 pursuant to a municipal cooperation agreement that would be within the definition of a cooperative investment agreement under this act, that provides for the adjustment of its interest rate on set dates shall be deemed to mature on the date on which the interest rate resets; and provided further that, for purposes of complying with section six of this act, contracts for professional services procured on behalf of an existing municipal cooperation agreement that would be within the definition of a cooperative investment agreement under this act shall be awarded pursuant to a request for proposal process upon the expiration of existing contracts or thirty months from the effective date of this act, whichever occurs earlier, provided that the amendments to subdivision 3 of section 11 of the general municipal law made by section two of this act shall be subject to the expiration and reversion of such subdivision pursuant to section 7 of chapter 548 of the laws of 1997, as amended, when upon such date the provisions of section three of this act shall take effect.

Laws 1999, ch 406, § 3 (Part W), eff Aug 9, 1999, provides as follows:

§ 3. This act shall take effect immediately, provided, however, the amendment to subparagraph 2 of paragraph a of subdivision 3 of section 11 of the general municipal law, made by section one of this act, shall not affect the expiration of such subdivision 3 and shall expire and be deemed repealed therewith.

Laws 2005, ch 545, § 6, eff Aug 23, 2005, provides as follows:

§ 6. This act shall take effect immediately, provided, however, that the amendments to subparagraph 2 of paragraph a of subdivision 3 of section 11 of the general municipal law made by section one of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith.

Revision Notes: [1962, ch 890] This act was prepared under the direction of the New York State Department of Audit and Control and was introduced at its request.

Amendment Notes: 2012. Chapter 128, § 2 amended:

By designating entire sub 2 as sub 2, pars a and b.

Sub 2, par a, opening par by deleting at fig 1 ", provided however, that" and adding the matter in italics.

By adding sub 2, par a, subpars (i)–(v).

Sub 2, par b by adding the matter in italics.

2011. Chapter 62, § 104 (Part A) amended:

Sub 4 at fig 1 by substituting "superintendent of financial services" for "superintendent of banks".

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1. In general

City's revised Indigent Defense Plan, and its proposed implementation under New York City, N.Y., R. tit. 43, § 13-01 et seq., was not arbitrary and capricious or irrational because the plan did not require the consent of the bar associations and did not violate, inter alia, N.Y. County Law § 722 or N.Y. Gen. Mun. Law § 11(1)(e); the revised plan was a lawful "combination" plan under § 722(4), providing indigent representation under the "private legal aid bureau or society" option of § 722(2), which was not restricted to primary assignments, and the "plan of a bar association" option of § 722(3) did not give the bar associations the exclusive right to provide "conflict counsel." Although the revised plan provided for the assignment of conflict cases to institutional providers under § 722(2), it continued to permit the assignment of conflict cases to private counsel serving on Criminal Defense Panels. Matter of New York County Lawyers' Assn. v Bloomberg, 95 A.D.3d 92, 940 N.Y.S.2d 229, 2012 N.Y. App. Div. LEXIS 2016 (N.Y. App. Div. 1st Dep't), aff'd, 19 N.Y.3d 712, 955 N.Y.S.2d 835, 979 N.E.2d 1162, 2012 N.Y. LEXIS 3267 (N.Y. 2012).

The governing board of a municipal corporation or fire district may annually adopt a resolution authorizing the chief fiscal officer to deposit or invest moneys determined by him not to be required for immediate expenditure. 1965 Ops St Compt File #968.

Term "bank" as used in CLS Gen Mun §§ 10 and 11 does not include state or federally chartered savings banks; term "national banking association" under CLS Gen Mun § 10 does not include federally chartered savings banks. 1995 Op St Compt No. 95-12.

In addition to other procedural requirements, expenditure of public funds for preservation of open spaces and areas may be made only after due notice and public hearing. 2002 Op St Compt No. 2002-5.

The term "bank" as used in these sections does not include a savings bank or savings and loan association regardless of whether such institutions are state chartered or federally chartered. 1983 Op St Comp File #83-69.

New York State higher education loans which have been reinsured by the Federal government pursuant to the Higher Education Act of 1965 may be accepted as collateral to the extent of the amount which has been reinsured. 1983 Op St Comp File #83-107.

2. Governmental bodies authorized to invest

A town board may authorize the investment of the surplus funds of a public general hospital. 1956 Ops St Compt File #8207.

A municipal water utility is not required by Public Service Law § 117 to pay interest on consumer deposits at the rate fixed by the Public Service Commission. If the municipality in its discretion decides to invest those moneys, the interest earned must be credited to the consumers, but the municipality may retain a reasonable administrative fee. 1981 Op St Compt 81-27 and 1979 Op St Compt 79-754 are superseded with respect to the denial of retention of reasonable administrative fees. 1990 Op St Compt 19-22.

3. Library

Monetary contributions to the trustees of a municipally established public library may be invested only as authorized by section 11 of the General Municipal Law, unless such moneys constitute true trust funds. 1969 Ops St Compt File #421.

A board of trustees of a village public library is not authorized to invest moneys, received by bequest, in bond anticipation notes issued by the village. 1970 Ops St Compt File #33.

There is no statutory authority for the joint purchase by association libraries, public libraries and cooperative library systems of short-term certificates of deposit. 1973 Op St Compt No. 73–1138.

Moneys held in custody of chief fiscal officer or other officer of public library, whether obtained from public or private sources, may be invested only as prescribed in CLS Gen Mun § 11, except that investment of gifts, grants, or bequests in form of true trust are subject to "prudent investor" provisions of CLS EPTL §§ 11-2.2 and 11-2.3; prior inconsistent opinions are superseded. 1995 Op St Compt No. 95-30.

Interest earned on investment of public moneys appropriated by village to village public library must be credited to library fund and not to village general fund; moneys donated by private persons to village public library may be invested by library trustees in investments which they deemed to be for best interests of library, and need not be invested in manner specified in CLS Gen Mun § 11; annual report of financial transactions which public library treasurer must file with State Comptroller should include information both on public moneys and private source moneys. 1988 Op St Compt No. 88-76, 1988 N.Y. Comp. LEXIS 69.

4. Parking authority

The City of Yonkers Parking Authority would not seem authorized to invest its moneys in shares or certificates of deposit of a savings and loan association. 1967 Ops St Compt File #389.

5. School district

Extraclassroom activity funds and endowment funds, including donations made to school district from private sources in form of gift, grant, or bequest, investment of which is not otherwise provided for by law, must be invested by school district in accord with CLS Gen Mun § 11, while endowment moneys in form of true trust are governed by CLS EPTL § 11-2.2; whether particular provisions of school district's investment policies, enacted under CLS Gen Mun § 39, relate to endowment or extraclassroom funds must be determined by local officials. 1994 Op St Compt No. 94-15.

CLS Gen Mun § 11 constitutes exclusive authority for investment of proceeds of sale of real property by school district. 2005 Op St Compt No. 05-3.

School districts and municipalities are authorized to enter into municipal cooperation agreement to cooperatively undertake investment of monies, with allocation of all income, losses, and expenses relating to cooperative investment of funds among participants on pro rata basis, with fiscal officer of one of participants being given custody of funds for purpose of having that officer invest them on behalf of others; any agreement entered into for joint investment of funds must restrict investments to those investments or obligations in which all participants are permitted to invest, and each participant should be aware of restrictions on investment of particular funds; coopera-

tive agreement can not entail delegation of any statutory duties or responsibilities to investment advisor or administrator, as fiscal officer is responsible for all investment decisions, and investment functions may not be assigned to board of advisors but may be delegated only to officer having custody of monies; each participant must evaluate its individual investment needs to insure that cooperative investments made under agreement are consistent with sound investment policies and procedures. Op St Compt 88-46.

6. Tax receiver

A town receiver of taxes and assessments may not temporarily invest tax moneys collected. 1974 Ops St Compt File #920.

7. Water district

A municipal water utility is not required by Public Service Law § 117 to pay interest on consumer deposits at the rate fixed by the Public Service Commission. If the municipality in its discretion decides to invest those moneys, the interest earned must be credited to the consumers, but the municipality may retain a reasonable administrative fee. 1981 Op St Compt 81-27 and 1979 Op St Compt 79-754 are superseded with respect to the denial of retention of reasonable administrative fees. 1990 Op St Compt 19-22.

8. Others

The treasurer of a park district which has a separate board of commissioners may not invest district moneys under this section. 1969 Ops St Compt File #302.

9. Source of moneys, generally; bond proceeds

Bond proceeds may be deposited in special time deposit accounts. 1957 Ops St Compt File #485.

Funds held as retained percentages due ultimately to contractors may be invested in certificates of deposit. If funds are proceeds of sale of obligations, interest earned or capital gain realized thereon shall be applied only to the payment of principal and interest related to such obligations in accordance with section 165.00 of the Local Finance Law. If moneys are reserve funds or proceeds of current appropriations, interest earned or capital gain realized thereon would belong to the city and could be used by it subject to the same requirements as in the case of unexpended balances. 1967 Ops St Compt File #825.

10. Capital reserve fund

Town moneys which constitute a capital reserve fund may not be temporarily deposited in special time deposits or invested in certificates of deposit issued by a bank or trust company. 1957 Ops St Compt File #26.

Capital reserve fund moneys may not be invested in special time deposit accounts at the present time. 1957 Ops St Compt File #485.

Town may provide in its proposed budget appropriation of amount to be funded by real property tax and to be paid into capital reserve fund for purpose of accumulating monies for future purchase of development rights for open space preservation; if reserve fund is established for purchase of development rights of specific parcel, establishment of fund is subject to permissive referendum requirements. 2002 Op St Compt No. 2002-5.

Town may provide in its proposed budget appropriation of amount to be funded by real property tax and to be paid into capital reserve fund for purpose of accumulating monies for future purchase of development rights for open space preservation; if fund is established generally for acquisitions of rights in land for open space preservation, no referendum is required on establishment of reserve fund, but expenditures from fund to acquire development rights would be subject to permissive referendum requirements. 2002 Op St Compt No. 2002-5.

Town may provide in its proposed budget appropriation of amount to be funded by real property tax and to be paid into capital reserve fund for purpose of accumulating monies for future purchase of development rights for open space preservation; monies in fund may be invested in accordance with CLS Gen Mun § 11. 2002 Op St Compt No. 2002-5.

Funds held as retained percentages due ultimately to contractors may be invested in certificates of deposit. If funds are proceeds of sale of obligations, interest earned or capital gain realized thereon shall be applied only to the payment of principal and interest related to such obligations in accordance with section 165.00 of the Local Finance Law. If moneys are reserve funds or proceeds of current appropriations, interest earned or capital gain realized thereon would belong to the city and could be used by it subject to the same requirements as in the case of unexpended balances. 1967 Ops St Compt File #825.

11. Fire district funds

Temporary investment of fire district funds in savings accounts is not authorized; investment in time certificates, deposits, or open accounts, discussed. 1964 Ops St Compt #573.

12. Gifts or devises in trust

A legacy bequeathed to a town board in trust, to construct and thereafter maintain a town hall, does not in reality constitute a trust, but rather an absolute gift, and the town board must treat the residue of such building fund in the same manner as other town funds, subject to the testamentary limitation on its use, and may not deposit same in a savings and loan association. 1964 Ops St Compt File #1005.

Gifts devised or bequeathed to a town "in trust" do not constitute a true trust and are in reality, municipal funds. However, they may be used only for the purposes for which they were given. They must be invested as municipal funds pursuant to the statutes applicable thereto. 1967 Op St Compt No. 67–217.

Gifts devised or bequeathed to the trustees of town library for the benefit of the town, to be used for library purposes, constitute a true trust. 1967 Op St Compt No. 67–#217.

A board of trustees of a village public library is not authorized to invest moneys, received by bequest, in bond anticipation notes issued by the village. 1970 Ops St Compt File #33.

Perpetual care trust funds may be invested in a "long term savings account" in a savings bank. 1973 Ops St Compt File #992.

13. Highway funds

Supervisor of town need not have consent of town highway superintendent before investing town highway funds pursuant to General Municipal Law, § 11. 1960 Ops St Compt File #320.

Moneys raised by taxation for town highway improvements may be invested in certificates of deposit. Interest realized on such investment must be credited to the town highway improvement fund. 1968 Ops St Compt File #919.

Moneys raised by taxation for town highway improvements may be invested in certificates of deposit. Interest realized on such investment must be credited to the town highway improvement fund. 1968 Ops St Compt File #919.

14. Interest

Funds of the "Jones Fund" which represent public moneys must be invested pursuant to the provisions of section 11 of the General Municipal Law. 1967 Ops St Compt File #240.

Interest derived from the investment of cash on hand constitutes an unappropriated cash surplus which can be appropriated for any proper village purpose. 1969 Ops St Compt File #610.

A municipal water utility is not required by Public Service Law § 117 to pay interest on consumer deposits at the rate fixed by the Public Service Commission. If the municipality in its discretion decides to invest those moneys, the interest earned must be credited to the consumers, but the municipality may retain a reasonable administrative fee. 1981 Op St Compt 81-27 and 1979 Op St Compt 79-754 are superseded with respect to the denial of retention of reasonable administrative fees. 1990 Op St Compt 19-22.

Interest earned on investment of public moneys appropriated by village to village public library must be credited to library fund and not to village general fund; moneys donated by private persons to village public library may be invested by library trustees in investments which they deemed to be for best interests of library, and need not be invested in manner specified in CLS Gen Mun § 11; annual report of financial transactions which public library treasurer must file with State Comptroller should include information both on public moneys and private source moneys. 1988 Op St Compt No. 88-76, 1988 N.Y. Comp. LEXIS 69.

15. Proceeds from sale of property

If all of the facilities of a water district are sold to a water authority, the proceeds of the sale may not be invested, nor may an excess over the required reserves be used to acquire and maintain a park for the residents of the water district. 1957 Ops St Compt File #57-424.

16. Surplus moneys

The Common Council of the city of Mount Vernon may authorize the city comptroller to temporarily invest moneys on hand and not needed for immediate expenditure, including surplus revenues and unexpended balances, pursuant to this section; however, there is no authority for the investment of moneys in the reserve for delinquent taxes. 1955 Ops St Compt File #7377.

A town board may authorize the investment of the surplus funds of a public general hospital. 1956 Ops St Compt File #8207.

A town may invest surplus moneys in special time deposit accounts or certificates of deposit on a temporary basis up to the end of the fiscal year, but must apply such surplus to the reduction of town taxes for the following year, if not expended before the end of the current fiscal year. The only means by which moneys can be accumulated from year to year is by establishing a valid reserve fund. 1969 Ops St Compt File #708.

Cash balances of municipal public utilities may not be invested in obligations of the municipality of which the public utilities are a part. Reserve fund moneys of municipal public utilities may be invested in obligations of such municipality. 1970 Ops St Compt File #2.

Funds held as retained percentages due ultimately to contractors may be invested in certificates of deposit. If funds are proceeds of sale of obligations, interest earned or capital gain realized thereon shall be applied only to the payment of principal and interest related to such obligations in accordance with section 165.00 of the Local Finance Law. If moneys are reserve funds or proceeds of current appropriations, interest earned or capital gain realized thereon would belong to the city and could be used by it subject to the same requirements as in the case of unexpended balances. 1967 Ops St Compt File #825.

17. Taxes

The Common Council of the city of Mount Vernon may authorize the city comptroller to temporarily invest moneys on hand and not needed for immediate expenditure, including surplus revenues and unexpended balances, pursuant to this section; however, there is no authority for the investment of moneys in the reserve for delinquent taxes. 1955 Ops St Compt File #7377.

The receiver of taxes and assessments in a town of the first class in Monroe County may not invest money due the county treasurer in temporary investments from the time it is received until the settlement date. 1968 Ops St Compt File #151.

The treasurer or the City of Utica may commingle tax moneys collected for the county with general city moneys, but may not invest these moneys; and may deduct a 1% collection fee from all taxes levied on behalf of the county for county purposes. Taxes levied for home relief and for the costs of the city's participation in the county mutual workmen's compensation self-insurance plan are not levied for county purposes. 1969 Ops St Compt File #461.

The treasurer of the City of Hudson may not invest county tax moneys collected by the city on behalf of the county. 1969 Ops St Compt File #658.

18. Miscellaneous

Board of education's practice of investing portions of proceeds from tax anticipation notes (TANS) was proper where investments were to defray operating expenses, not for sole purpose of investment, board only invested proceeds not immediately required in certificates of deposit, those deposits were timed to become due and payable at times when school district would require cash, and principal amount of TANS would not exceed school district's greatest cash flow deficit during term of TANS. 1994 Op Comm Ed No. 13136.

Cash deposits made by electric consumers may be deposited in special time deposit accounts. 1957 Ops St Compt File #485.

A water district in Nassau County may contract to construct certain facilities for developers of subdivisions in such district. If such contract provides that the developer shall pay to the district the estimated costs of such construction and related costs, and that such moneys, when paid, belong to the district, subject to possible return of overpayments, the district may invest such moneys prior to their utilization and retain any interest earned. 1976 Ops St Compt File #190.

Funds held as retained percentages due ultimately to contractors may be invested in certificates of deposit. If funds are proceeds of sale of obligations, interest earned or capital gain realized thereon shall be applied only to the payment of principal and interest related to such obligations in accordance with section 165.00 of the Local Finance Law. If moneys are reserve funds or proceeds of current appropriations, interest earned or capital gain realized thereon would belong to the city and could be used by it subject to the same requirements as in the case of unexpended balances. 1967 Ops St Compt File #825.

19. Types of investments, generally; day-of-deposit to day-of-withdrawal accounts

The investment of municipal moneys in day of deposit to day of withdrawal accounts must be secured by a pledge of obligations by the bank or trust company. 1975 Ops St Compt File #1068.

20. Certificates of deposit and special time deposit accounts

Town moneys which constitute a capital reserve fund may not be temporarily deposited in special time deposits or invested in certificates of deposit issued by a bank or trust company. 1957 Ops St Compt File #26.

Cash deposits made by electric consumers may be deposited in special time deposit accounts. 1957 Ops St Compt File #485.

Capital reserve fund moneys may not be invested in special time deposit accounts at the present time. 1957 Ops St Compt File #485.

Bond proceeds may be deposited in special time deposit accounts. 1957 Ops St Compt File #485.

Certain funds of fire districts may be temporarily deposited to earn interest in: (a) time deposits, open account, and in (b) time certificates of deposit issued by banks or trust companies but not savings banks, industrial banks or savings and loan associations. 1964 Ops St Compt File #573 (Revised).

Temporary investment of fire district funds in savings accounts is not authorized; investment in time certificates, deposits, or open accounts, discussed. 1964 Ops St Compt #573.

A town supervisor may not deposit town funds in a nondesignated depository. The town board may authorize the supervisor to temporarily invest town funds, not needed for immediate expenditure, in certificates of deposit or special time deposit accounts in banks or trust companies. Such banks or trust companies may be banks other than those designated as official depositories. 1967 Ops St Compt File #399.

Moneys raised by taxation for town highway improvements may be invested in certificates of deposit. Interest realized on such investment must be credited to the town highway improvement fund. 1968 Ops St Compt File #919.

21. Investment firm transactions; repurchase agreements

A municipality may utilize the services of an investment consultant, such as National Money Market Services, Inc., for the purpose of assisting the chief fiscal officer or other officer having custody of moneys in investing municipal moneys. 1983 Op St Comp File #83-84.

22. Obligations

Cash balances of municipal public utilities may not be invested in obligations of the municipality of which the public utilities are a part. Reserve fund moneys of municipal public utilities may be invested in obligations of such municipality. 1970 Ops St Compt File #2.

A board of trustees of a village public library is not authorized to invest moneys, received by bequest, in bond anticipation notes issued by the village. 1970 Ops St Compt File #33.

Obligations issued by federal intermediate credit banks which are part of the Farm Credit System and subject to the supervision of the Farm Credit Administration are not acceptable collateral from municipal certificates of deposit; as far as determining what

other obligations of federal agencies may be pledged to secure investments made pursuant to this section, each type of obligation must be an obligation of the United States or fully guaranteed or insured as to payment of interest or principal by the United States; if the foregoing criteria are not met, then the obligations may not be used to secure investments made pursuant to General Municipal Law § 11, or the other related investment statutes. 1985 Op St Compt No. 85-68.

County may invest in obligations of Government National Mortgage Association, however, unless registered or inscribed in name of county, such obligations must be purchased through, delivered to, and held in custody of bank or trust company located and authorized to do business in New York. 1986 Op St Compt No. 86-51.

Local government may not, under CLS Gen Mun § 11, invest portion of its funds in obligation issued by financial institution and secured by irrevocable letter of credit issued by federal home loan bank; local government may not authorize such investment by local law. 1995 Op St Compt No. 95-28.

Town may issue bonds to finance acquisition of permanent development rights in land for open space preservation; bond resolution to authorize issuance of such obligations would be subject to permissive referendum if proposed maturity of bonds is more than 5 years. 2002 Op St Compt No. 2002-5.

Town may legally invest in bonds and notes of New York State Medical Care Facilities Finance Agency; however it may not accept bonds and notes of the Agency as collateral for its deposits or investments. 1986 Op St Comp No. 86-81.

23. Savings accounts

Temporary investment of fire district funds in savings accounts is not authorized; investment in time certificates, deposits, or open accounts, discussed. 1964 Ops St Compt #573.

A legacy bequeathed to a town board in trust, to construct and thereafter maintain a town hall, does not in reality constitute a trust, but rather an absolute gift, and the town board must treat the residue of such building fund in the same manner as other town funds, subject to the testamentary limitation on its use, and may not deposit same in a savings and loan association. 1964 Ops St Compt File #1005.

A village library memorial fund which is not a true trust fund may not be deposited in a savings bank. 1967 Ops St Compt File #413.

Perpetual care trust funds may be invested in a "long term savings account" in a savings bank. 1973 Ops St Compt File #992.

24. Securities

Fire district treasurer must deposit fire district moneys in a bank or trust company designated by the board of fire commissioners. Such moneys may not be invested. If paid into a duly established reserve fund, they may be invested in certain described securities. 1955 Ops St Compt File #7503.

Notwithstanding the charitable purposes for which a non-profit corporation is organized, a town may not invest in securities issued by such corporation because the transaction would constitute an illegal investment of municipal funds and would also violate Article VIII, section 1, of the New York State Constitution. 1967 Ops St Compt File #840.

25. Miscellaneous

Village board may not make a deposit of public moneys with a water corporation, or contract to make periodic payments in the future for materials or services to be furnished at this time; or pay now for materials and services to be furnished later. 1965 Ops St Compt File #175.

Funds of the "Jones Fund" which represent public moneys must be invested pursuant to the provisions of section 11 of the General Municipal Law. 1967 Ops St Compt File #240.

Municipal corporations and school districts may not purchase shares in mutual fund. 1987 Op St Compt No. 87-14.

Village may temporarily invest in short term United States Treasury Bills issued in book-entry form, which are registered in the name of the village, under the "Treasury Direct" program, where no physical security is issued, the security being evidenced only by an account master record and a description of the security in a securities portfolio associated therewith in the Federal Reserve's computer system. Ops St Compt 89-42.

School districts and municipalities are authorized to enter into municipal cooperation agreement to cooperatively undertake investment of monies, with allocation of all income, losses, and expenses relating to cooperative investment of funds among participants on pro rata basis, with fiscal officer of one of participants being given custody of funds for purpose of having that officer invest them on behalf of others; any agreement entered into for joint investment of funds must restrict investments to those investments or obligations in which all participants are permitted to invest, and each participant should be aware of restrictions on investment of particular funds; cooperative agreement can not entail delegation of any statutory duties or responsibilities to investment advisor or administrator, as fiscal officer is responsible for all investment decisions, and investment functions may not be assigned to board of advisors but may be delegated only to officer having custody of monies; each participant must evaluate its individual investment needs to insure that cooperative investments made under agreement are consistent with sound investment policies and procedures. Op St Compt 88-46.

Given the transactional nature of N.O.W. accounts, whenever a municipal officer or employee is authorized or required to deposit moneys received by him in his official capacity, said officer may utilize either a checking account or a N.O.W. account. A town clerk is required to deposit all moneys received by him not later than three business days after the total thereof exceeds fifty dollars and therefore is authorized to deposit moneys in a N.O.W. account designated by the town board as a depository of town funds. 1983 Op St Court File #83-123.

Municipality may accept, as collateral, for municipal investments under CLS Gen Mun § 11, pledge of trust certificates representing ownership of all or part of guaranteed portion of one or more loans which have been guaranteed by Small Business Administration under Small Business Act. 1987 Op St Comp No. 87-72.

26. Procedure for making investment, generally; authorization necessary

The Common Council of the city of Mount Vernon may authorize the city comptroller to temporarily invest moneys on hand and not needed for immediate expenditure, including surplus revenues and unexpended balances, pursuant to this section; however, there is no authority for the investment of moneys in the reserve for delinquent taxes. 1955 Ops St Compt File #7377.

Local government is not required by law to enter into security and custodial agreements identical to models prepared by office of state comptroller. 1995 Op St Compt No. 95-32.

School districts and municipalities are authorized to enter into municipal cooperation agreement to cooperatively undertake investment of monies, with allocation of all income, losses, and expenses relating to cooperative investment of funds among participants on pro rata basis, with fiscal officer of one of participants being given custody of funds for purpose of having that officer invest them on behalf of others; any agreement entered into for joint investment of funds must restrict investments to those investments or obligations in which all participants are permitted to invest, and each participant should be aware of restrictions on investment of particular funds; cooperative agreement can not entail delegation of any statutory duties or responsibilities to investment advisor or administrator, as fiscal officer is responsible for all investment decisions, and investment functions may not be assigned to board of advisors but may be delegated only to officer having custody of monies; each participant must evaluate its individual investment needs to insure that cooperative investments made under agreement are consistent with sound investment policies and procedures. Op St Compt 88-46.

27. Implied authority to authorize

The board of trustees of municipal or school district libraries possesses implied authority to authorize the temporary investment of library moneys in the custody of the library treasurer. 1974 Op St Compt No. 74–361.

Town board manages and controls finances of town, but may authorize its chief fiscal officer or officer having custody of town monies to temporarily invest monies not needed for immediate expenditure. Ops St Compt 89-35.

28. When authorization not necessary

Supervisor of town need not have consent of town highway superintendent before investing town highway funds pursuant to General Municipal Law, § 11. 1960 Ops St Compt File #320.

29. Pledge of securities

The investment of municipal moneys in day of deposit to day of withdrawal accounts must be secured by a pledge of obligations by the bank or trust company. 1975 Ops St Compt File #1068.

The guaranteed portion of SBA loans may be used as collateral for municipal and school district investments and deposits. 1976 Ops St Compt File #1155.

Municipality may not accept pledge of proportionate interest in single pool of obligations as security for its investments or deposits; however, pursuant to Joint investment agreement, municipalities may make joint investments and have obligations pledged to the credit of a single participant if joint investment agreement contains provisions stating that participant holding collateral will reimburse other participants if investment should fail. 1985 Op St Compt No. 85-47.

30. Control over securities

When a village deposits in a bank or trust company either current funds or moneys not required for immediate expenditure, the obligations pledged by the bank as security do not have to be delivered to the sole custody of the village treasurer, but they must be physically segregated and designated, approved by the village treasurer, and deposited in such place and held under such conditions as the village treasurer may determine, which conditions shall include at least joint control by such treasurer. 1967 Ops St Compt File #487.

31. Necessity that securities be kept separate

Where a village deposits current funds in a special time deposit account or certificate of deposit, pursuant to this section, the securities pledged by the depositary do not have to be deposited with the village, but they must be physically set aside as a separate and specific pledge. 1956 Ops St Compt File #8193.

When a village deposits in a bank or trust company either current funds or moneys not required for immediate expenditure, the obligations pledged by the bank as security do not have to be delivered to the sole custody of the village treasurer, but they must be physically segregated and designated, approved by the village treasurer, and deposited in such place and held under such conditions as the village treasurer may determine, which conditions shall include at least joint control by such treasurer. 1967 Ops St Compt File #487.

32. When pledge not necessary

A cooperative library system is not a municipal corporation. There is no statutory requirement that deposit of moneys of cooperative library system in bank or trust company checking account be secured by such depositary by pledge of obligations. 1965 Op St Compt No. 65–313.

Where a town has moneys in a demand deposit account which are unsecured, moneys in time deposit accounts or invested in certificates or deposit may be unsecured only to the extent that the $15,000 federal deposit insurance coverage exceeds the amount of the unsecured demand deposit. 1968 Ops St Compt File #79.

33. Registering investments in name of nominee

Assuming that the sexton Trust Fund is a true (technical) trust, the trustees thereof may authorize the bank having custody of the securities of the fund to register them in the name of a "nominee" of the bank. 1969 Ops St Compt File #234.

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1. In general

Moneys in County General Fund or in County Road Fund not required for immediate expenditure may be temporarily invested. 1955 NY Ops Atty Gen Apr 21 (informal).

Discussion of the authority and associated duties of county treasurer to invest county money, trust fund money and other money, that neither belongs to the county nor is held in trust by the county. 1980 Op St Compt File #430.

(1) A mailed listing from a bank of collateral pledged by the bank as security for municipal deposits and investments may serve as proof to the chief fiscal officer that the deposit or investment is properly secured if he has substantial reason, based upon the reputation of the bank or its own past dealings with the bank, to rely on the fact that such listing reflects steps actually taken by the bank to make the municipality a secured creditor. It is preferable, when possible, to have collateral delivered to the municipality or held by a third party. (2) Repurchase agreements (REPOS) are only authorized where a municipality actually purchases the securities which are the subject of the agreement and it is preferable that such securities be held by the municipality or a third party escrow agent. 1982 Op St Compt File #82-323.

Suffolk County is not required to credit tax revenues immediately upon receipt to part-county funds as well as to the general fund. 1981 Op St Compt File #81-57.

2. Governmental bodies authorized to invest

The Town Board may authorize temporary investments of town funds pursuant to the provisions of this section. 1961 NY Ops Atty Gen Dec 8.

A town clerk may not invest moneys which he receives nor may a town board authorize the clerk to invest town moneys on behalf of the supervisor. 1978 Op St Compt File #535.

A village may temporarily invest moneys held in trust and agency fund accounts provided that the moneys are eligible for investment. Disposition of the interest earned must be considered on an individual basis taking into account statutory, common law and other restrictions which govern the use of the particular moneys involved. 1979 Op St Compt File #754.

A town may not issue obligations to finance the purchase of a fire truck for a fire district located within the town. 1980 Op St Compt File #81-156.

A county may set up an investment pool for various towns within the county which would be administered by the county treasurer provided that an agreement is entered into governing such an arrangement, which among other things, preserves the right of each town officer having custody of town money and empowered by the town board to make investments, to refuse,

after such pooling, the use of his town's money for any particular investment. 1980 Op St Compt File #327.

A cash deposit given by a developer in lieu of a performance bond may be temporarily invested by a town, but the town may not charge an administrative fee against all or a portion of the interest earned to compensate the town for the town's site inspections. 1980 Op St Compt File #459.

A town and village may jointly invest in a certificate of deposit. Any opinions of this Department to the contrary are superseded. 1980 Op St Compt File #202.

3. Library

Moneys donated by private persons to a town public library may be invested by the library trustees in investments which they deem to be for the best interests of the library, and need not be invested in the securities specified in General Municipal Law, § 11. Previous opinions inconsistent herewith are superseded. 1980 Op St Compt File #450.

4. School district

Discussion concerning the temporary investment of moneys by a central high school district in a negotiable order of withdrawal ("N.O.W.") account in a savings bank or commercial bank. 1979 Op St Compt File #158.

A school district may not enter into a repurchase agreement (REPO) with a brokerage firm. 1979 Op St Compt File #659.

Although a supervisor of a town in Westchester County may not temporarily invest school tax moneys in his custody on his own initiative, he may be authorized by the board of education of the school district for which he holds the tax moneys to make such investments on behalf of the school district pending distribution of the tax moneys. Interest earned on such investments may not be retained by the town. It should be credited to the school district. Opn No. 75-9 superseded. 1979 Op St Compt File #861.

Even though Opinion No. 80-202, dealing with the joint investment in a certificate of deposit by a town and a village, is not directly applicable to school districts and B.O.C.E.S., those two entities do have authority to jointly invest their funds based on the same reasoning used in that opinion. 1981 Op St Compt File #80-763.

5. Tax receiver

A town receiver of taxes and assessments has no power on his own initiative to temporarily invest tax moneys he has collected nor may he be authorized by others to invest such moneys. 1978 Op St Compt File #893.

A receiver of taxes in Nassau County is specifically empowered to deposit collected tax moneys in interest bearing accounts prior to payment over to municipal fiscal officers. He is not empowered to deposit tax moneys in non-interest bearing accounts on his own initiative for the purpose of stimulating competition among banks at sales of town obligations by encouraging them to purchase at rates most favorable to the town. 1979 Op St Compt File #716.

Although a receiver of taxes and assessments may not temporarily invest tax moneys in his custody on his own initiative, he may be authorized by the governing board of the town, the fire district or the county and the board of education of a school district for which he collects taxes to make such investments on their behalf. 30 Opns St Comp, 1974, p 139, Opns St Comp, 1978, No. 78-893 and No. 78-983 and any other prior inconsistent opinions are hereby superseded. 1980 Op St Compt File #242.

County tax moneys collected in a town of the first class are to be held in the exclusive custody of the receiver of taxes and assessments and may be temporarily invested by the receiver prior to their payment over to the county which must be made by the fifteenth day of the month following their receipt. 1983 Op St Compt File #83-183.

6. Fire district

A fire district may not invest its moneys in a money market fund. 1979 Op St Compt File #920.

A fire district may not invest its funds in a savings account or certificate of deposit in a savings and loan association. 1980 Op St Compt File #29.

7. Water district

The Franklin Square Water District may not deposit or invest its moneys in a savings bank or savings and loan association. However, it may invest its moneys in special time deposits in, or certificates of deposit issued by, banks or trust companies, and may deposit its moneys in banks or trust companies, as those terms are defined in the Banking Law. Such investments or deposits need not be limited to a single bank or trust company. 1979 Op St Compt File #687.

8. Others

A not-for-profit corporation which supplies services under contract to a community college is not generally subject to the restrictions of General Municipal Law, § 11 in investing its funds. 1981 Op. St. Compt. No. 81–257, 257,, 1981 N.Y. Comp. LEXIS 628.

9. Capital reserve fund

Moneys in a capital reserve fund established by a fire district may be co-mingled with moneys in other capital reserve funds or with moneys in the general fund for purposes of investment. 1983 Op St Compt File #83-34.

10. Fire district funds

Moneys in a fire district's equipment fund which are not required for immediate expenditure may be temporarily invested pursuant to General Municipal Law § 11. 1978 Op St Compt File #321.

11. Gifts or devises in trust

A village may temporarily invest moneys held in trust and agency fund accounts provided that the moneys are eligible for investment. Disposition of the interest earned must be considered on an individual basis taking into account statutory, common law and other restrictions which govern the use of the particular moneys involved. 1979 Op St Compt File #754.

Moneys donated by private persons to a town public library may be invested by the library trustees in investments which they deem to be for the best interests of the library, and need not be invested in the securities specified in General Municipal Law, § 11. Previous opinions inconsistent herewith are superseded. 1980 Op St Compt File #450.

12. Highway funds

This section permits temporary investment of surplus funds in a town general and highway fund. 1962 NY Ops Atty Gen Feb 13.

13. Interest

Interest earned by a village's investment of moneys held as retained percentages under contracts belongs to the village rather than the contractor. 1978 Op St Compt File #989.

If a town receiver of taxes in Nassau County invests collected tax moneys (State, county, town, school district and special district taxes) in interest bearing accounts, the interest earned is to be paid by the receiver to the town supervisor upon the date of the return for unpaid taxes, such interest to be used for general town purposes. 1980 Op St Compt File #381.

14. Surplus moneys

This section permits temporary investment of surplus funds in a town general and highway fund. 1962 NY Ops Atty Gen Feb 13.

15. Taxes

A county may invest sales tax revenues, and interest earned therefrom belongs to the county. 1978 Op St Compt File #291.

The interest earned on sales tax proceeds temporarily invested by a county prior to distribution of the proceeds belongs to the county. 1979 Op St Compt File #472.

A receiver of taxes of a town in Suffolk County may be authorized by the governing board of the town, county, a fire district and the board education of a school district to temporarily invest tax collection on their behalf. 1981 Op St Compt File #81-16.

16. Miscellaneous

The Town of Moreau may temporarily invest security deposits which, pursuant to its sanitary landfill ordinance, are required to be posted by industrial waste haulers for faithful payment of fees, in the same manner prescribed by section 11 for the investment of town moneys. In the absence of a provision to the contrary in the ordinance, all interest earned from such investments should be credited to the haulers. 1981 Op St Compt File #81-27.

17. Types of investments, generally; day-of-deposit to day-of-withdrawal accounts

A municipality may temporarily invest funds in day-of-deposit to day-of-withdrawal accounts. Such an investment must be secured by a pledge of obligations by the bank or trust company, except to the extent that such investment is insured by the F.D.I.C. 1979 Op St Compt File #169.

A village may temporarily invest general fund moneys not required for immediate expenditure in day-of-deposit to day-of-withdrawal accounts in a commercial bank or trust company. 1979 Op St Compt File #306.

A municipal corporation or fire district may invest in "six-month money market certificates" subject to the restrictions in this statute. 1980 Op St Compt File #209.

Recent amendments to the Banking Law and other laws at an Extraordinary Session of the State Legislature (L 1980, ch 883) did not change the status of the law so as to authorize municipal funds to be invested in savings banks. 1981 Op St Compt No. 81-11, 1981

A town may not adopt a local law authorizing investments in savings banks, savings and loan associations and/or money market programs. 1981 Op St Compt No. 81-191, 1981 N.Y. Comp. LEXIS 693.

18. Certificates of deposit and special time deposit accounts

A county is not authorized to invest in certificates of deposit of a savings and loan association. Repurchase agreements (REPO's) may not be entered into between a county and an investment firm. 1978 Op St Compt File #760.

The Franklin Square Water District may not deposit or invest its moneys in a savings bank or savings and loan association. However, it may invest its moneys in special time deposits in, or certificates of deposit issued by, banks or trust companies, and may deposit its moneys in banks or trust companies, as those terms are defined in the Banking Law. Such investments or deposits need not be limited to a single bank or trust company. 1979 Op St Compt File #687.

Municipalities may invest in so-called 7 to 31 day accounts offered by a bank or trust company. 1982 Op St Compt File #82-322.

Investments in certificates of deposit are required to be secured by a pledge of obligations of the federal government, agencies of the federal government, the state of New York or of any municipal corporation, school district or district corporation of the state of New York. Checking accounts opened by a community college may, at the board of trustees discretion, be secured by a surety bond or obligation of the federal government, the state of New York, or of any municipality or college of the state of New York. Obligations which are the subject of a repurchase agreement must be purchased through, delivered to and held in the custody of a bank or trust company located in this state, unless registered or inscribed in the name of the purchasing municipality. 1983 Op St Compt File #83-21.

A town and village may jointly invest in a certificate of deposit. Any opinions of this Department to the contrary are superseded. 1980 Op St Compt File #202.

19. Negotiable order of withdrawal accounts

A town receiver of taxes and assessments has no authority to invest his tax collections temporarily in a Negotiable Order of Withdrawal (N.O.W.) account, which is a "day of deposit to day of withdrawal" savings account. 1978 Op St Compt File #983.

A town may temporarily invest town moneys in a Negotiable Order of Withdrawal (N.O.W.) account since such account is a special time deposit and, thus, a form of temporary investment authorized by this statute. 1978 Op St Compt File #1049.

Discussion concerning the temporary investment of moneys by a central high school district in a negotiable order of withdrawal ("N.O.W.") account in a savings bank or commercial bank. 1979 Op St Compt File #158.

Moneys held by a village or town justice may not be invested in NOW accounts prior to the transmittal of such moneys to this Department. 1979 Op St Compt File #351.

Given the transactional nature of N.O.W. accounts, whenever a municipal officer or employee is authorized or required to deposit moneys received by him in his official capacity, said officer may utilize either a checking account or a N.O.W. account. A town clerk is required to deposit all moneys received by him not later than three business days after the total thereof exceeds fifty dollars and therefore is authorized to deposit moneys in a N.O.W. account designated by the town board as a depository of town funds. 1983 Op St Compt File #83-123.

20. Investment firm transactions

A county may not legally invest its moneys in a fund held by an investment firm. 1978 Op St Compt File #273.

A municipality may utilize the services of an investment consultant for the purpose of assisting in the investment of municipal moneys. The procedures and services offered by Shearson/American Express, Inc. are not in conflict with General Municipal Law, § 11. 1983 Op St Compt File #83-141.

21. Investment firm transactions; repurchase agreements

A county is not authorized to invest in certificates of deposit of a savings and loan association. Repurchase agreements (REPO's) may not be entered into between a county and an investment firm. 1978 Op St Compt File #760.

The bearer obligations which are the obligations in a repurchase agreement (REPO's) must be purchased through, delivered to and held in the custody of a bank or trust company. It is not a compliance of these requirements, where the municipality enters into a repurchase agreement with a brokerage firm and the securities are delivered to and held in the custody of a bank or trust company. 1981 Op St Compt File #81-139.

Except for the City of New York, repurchase agreements may not be entered into between a municipality and an investment firm. 1978 Op St Compt File #891.

22. Savings accounts

A town receiver of taxes and assessments has no authority to invest his tax collections temporarily in a Negotiable Order of Withdrawal (N.O.W.) account, which is a "day of deposit to day of withdrawal" savings account. 1978 Op St Compt File #983.

The Franklin Square Water District may not deposit or invest its moneys in a savings bank or savings and loan association. However, it may invest its moneys in special time deposits in, or certificates of deposit issued by, banks or trust companies, and may deposit its moneys in banks or trust companies, as those terms are defined in the Banking Law. Such investments or deposits need not be limited to a single bank or trust company. 1979 Op St Compt File #687.

A municipality and a commercial bank may enter into an agreement whereby the bank will maintain certain specified balances in the village's checking account and its savings account. 1981 Op St Compt File #81-130.

A town is not authorized to invest town funds in a savings bank account. 1982 Op St Compt File #82-9.

A fire district may not invest its funds in a savings account or certificate of deposit in a savings and loan association. 1980 Op St Compt File #29.

23. Miscellaneous

A village may not invest cash bail on deposit with the village justice court. 1978 Op St Compt File #761.

A village may not legally invest its moneys in the "InterCapital Liquid Asset Fund". 1978 Op St Compt File #1066.

Niagara County may not invest its moneys with the Niagara County Employees Federal Credit Union. 1980 Op St Compt File #372.

A county community college which has been authorized to temporarily invest moneys appropriated for the college may not invest such moneys in a money market fund, the assets of which consist of government securities, commercial paper and bank certificates of deposit. 1982 Op St Compt File #82-345.

Municipalities may invest in money market deposit accounts offered by a bank or trust company. 1982 Op St Compt File #82-362.

A town clerk and a town collector of taxes may be authorized to deposit moneys received by them in N.O.W. accounts in a bank or trust company located and authorized to do business in this state. 1983 Op St Compt File #83-29.

24. Procedure for making investment, generally; authorization necessary

A cash deposit given by a developer in lieu of a performance bond may be temporarily invested by a town, but the town may not charge an administrative fee against all or a portion of the interest earned to compensate the town for the town's site inspections. 1980 Op St Compt File #459.

The Town of Moreau may temporarily invest security deposits which, pursuant to its sanitary landfill ordinance, are required to be posted by industrial waste haulers for faithful payment of fees, in the same manner prescribed by section 11 for the investment of town moneys. In the absence of a provision to the contrary in the ordinance, all interest earned from such investments should be credited to the haulers. 1981 Op St Compt File #81-27.

25. Pledge of securities

Temporary deposits of funds for income by a municipal corporation require security by a local banking institution; the statutes mentioned are not in conflict. 1965 NY Ops Atty Gen Apr 8.

Government National Mortgage Association obligations may be used to secure Dutchess County investments but may not be used as security for its demand deposits. 1978 Op St Compt File #907.

Student loans guaranteed by the United States government acting through HEW may be accepted as collateral for municipal and school district investments while student loans guaranteed by New York State acting through the Higher Education Services Corporation may not be. 1982 Op St Compt File #82-112.

With respect to securities pledged as collateral for municipal deposits and investments, the fiscal officer of a municipality should determine: whether proper securities have been pledged; whether the securities have an adequate market value to cover the deposits or investments; whether the securities have been physically separated and designated under joint custody; and whether he has sufficient control over release and substitution of the pledged collateral. The same determinations should be made where a second bank, other than the depositary bank, has custody of pledged collateral. 1982 Op St Compt File #82-194.

Municipalities and school districts are authorized to accept surety bonds as security for deposits from their designated depositary banks but are not authorized to accept surety bonds as security for investments. 1982 Op St Compt File #82-222.

Where a county commissioner of finance is authorized to invest municipal and school district moneys pursuant to a joint investment agreement, the securities pledged as collateral may be designated to the credit of the county if the joint investment agreement contains a provision stating that in the event of a default the county will reimburse the participating municipalities and school districts according to the contribution each has made to the investment. 1982 Op St Compt File #82-337.

26. Control over securities

The bearer securities which are the obligations in a repurchase agreement (REPO) must be purchased through, delivered to and held in the custody of a bank or trust company. Opns St Comp, 1981, No. 81-139 and 34 Opns St Comp, 1978 p 144 are superseded to the extent inconsistent. 1982 Op St Compt File #82-15.

27. When pledge not necessary

A municipality may temporarily invest funds in day-of-deposit to day-of-withdrawal accounts. Such an investment must be secured by a pledge of obligations by the bank or trust company, except to the extent that such investment is insured by the F.D.I.C. 1979 Op St Compt File #169.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS High § 114.

Notes and bonds as legal investments, CLS Educ § 490.

Tax anticipation notes, CLS Loc Fin § 24.00.

Revenue anticipation notes, CLS Loc Fin § 25.00.

Reduced rentals for the elderly, CLS Priv Hous Fin § 126.

Bonds legal investments for public officers, CLS Pub A §§ 1425-m, 1493-m, 1599-mmmm, 1600-l.

Tax exemptions, CLS Pub A § 1600-m.

Federal Aspects:

The Securities Act of 1933, cited in statutory text, appears as 15 USCS §§ 77a et seq.

The Investment Company Act of 1940, 15 USCS §§ 80a-1 et seq.

§ 12. Deposits of public authorities, public benefit corporations and other corporations

In the event any public authority, public benefit corporation or such other corporation to whose governing board the mayor of the city of New York appoints one or more members shall require security from a bank or trust company for deposit of moneys, then such security may include obligations of the city of New York.

HISTORY:

Add, L 1973, ch 805, § 1, eff June 22, 1973.

Prior Law: Former § 12, add, L 1909, ch 29; repealed, L 1943, ch 712, § 3, eff Sept 2, 1945, with substance covered by Local Finance Law § 11.00 and Article 2, Title 6.

Agency Opinions

A municipality may not contribute funds to a volunteer fire company for use in parades or conventions nor may it contribute funds to a veterans organization for use in Memorial Day observances or other celebrations. 1981 Op St Compt File #81-132.

§ 22. Claims against fire insurance proceeds; procedure

1. As used in this section, any inconsistent provision of law notwithstanding, the following terms shall have the following meanings:

(a) "Enforcing officer" means the elected or appointed officer of any tax district charged by law with the duty to enforce the collection of tax liens on real property.

(b) "Governing body" means the legislative body for the tax district.

(c) "Lien" means an unpaid tax, special ad valorem levy, special assessment or other charge imposed upon real property by or on behalf of a municipal corporation or special district which is an encumbrance on real property, whether or not evidenced by a written instrument, and provided that one such tax, levy, assessment or other charge has remained undischarged for a period of one year or more.

(d) "Municipal corporation" means a county, city, town, village or school district.

(e) "Real property" means property upon which there is erected any residential, commercial or industrial building or structure except an owner-occupied single family residential structure and owner-occupied two family residential structures.

(f) "Tax district" means a county, city, town or village having the power to enforce the collection of taxes, special ad valorem levies, special assessments or other charges imposed upon real property by or on behalf of a municipal corporation or special district.

2. Every tax district is hereby authorized and empowered to claim against the proceeds of a policy of fire insurance insuring the interest of an owner and issued on real property located therein to the extent of any lien thereon which claim, when made and perfected in the manner provided in this section, shall further constitute a lien against such proceeds and which shall, as to such proceeds, be

prior to all other liens and claims except the claim of a mortgagee of record named in such policy.

3. Upon the adoption of a resolution by the governing body providing therefor, the enforcing officer of the tax district shall cause a notice of intention to claim against proceeds to be served upon the state superintendent of financial services for entry in the index of tax districts maintained by him as provided in section three hundred thirty-one of the insurance law. Thereafter the enforcing officer shall render to any insurer the certificate required and in the manner prescribed by such section and the amounts stated in such certificate shall be a lien on the proceeds of the insurance policy until paid.

4. No resolution adopted as provided for in subdivision three hereof shall be effective unless prior thereto the local legislative body for the tax district shall have adopted a local law providing for the release or return to the insured of any amounts to which it would otherwise be entitled to claim provided that the insured agrees with the tax district in writing to restore the affected premises to the same or improved condition that it was in prior to the time that the lien of such district against proceeds provided for in this section arose, subject to such conditions as such resolution shall provide to guarantee performance of such obligation including, but not limited to, an agreement to deposit such proceeds in an escrow account or that the insured shall obtain a performance bond.

5. The provisions of this section shall not be deemed or construed to alter or impair the right of a tax district to acquire or enforce any lien against real property but shall be in addition to any other power provided by law to acquire or enforce such right.

HISTORY:

Add, L 1977, ch 738, § 1, eff Nov 3, 1977; amd, L 1977, ch 739, § 1; L 1978, ch 569, §§ 1, 2, eff Aug 23, 1978; L 1978, ch 570, § 1, eff Aug 23, 1978; L 1981, ch 711, § 8, eff July 1, 1982; L 1984, ch 805, § 28, eff Sept 1, 1984; L 2011, ch 62, § 104 (Part A), eff Oct 3, 2011; L 2017, ch 342, § 1, effective October 23, 2017.

Prior Law: Former § 22, add, L 1911, ch 769, § 1; repealed, L 1943, ch 712, § 3, eff Sept 2, 1945.

Editor's Notes: Laws 1977, ch 738, § 4, provides as follows:

§ 4. The provisions of this act shall take effect on the ninetieth day next succeeding the date on which the provisions hereof become law and shall apply to all fire insurance policies issued, reissued or renewed on or after such date and any such policy which fails to comply with the provisions of section one hundred sixty-eight-c of the insurance law, as added by this act, shall be construed as containing the statements required by such section to be contained therein.

Amendment Notes: 2011. Chapter 62, § 104 (Part A) amended:

Sub 3 at fig 1 by substituting "superintendent of financial services" for "superintendent of insurance".

The 2017 amendment by ch 342, § 1 substituted "an owner-occupied single family residential structure and owner-occupied two family residential structures" for "a one or two family residential structure" in 1(e).

Repeal Notes: [1978, ch 569] Former subdivision one of section twenty-two of the general municipal law, which was repealed by this act, constituted the definitional portion of section twenty-two. A new definition section is hereby added.

Notes to Decisions

New York City was entitled to proceeds of fire insurance policy which had been issued to court-appointed receiver of premises which were subject to tax foreclosure proceeding, under provision of Administrative Code of City of New York which gave city special lien against proceeds of policy which "insures the interest of an owner," since receiver has fiduciary responsibilities which embrace standing in stead of financially defaulting owner, and thus policy was one which insured interest of owner for purposes of satisfaction of prioritized municipal tax lien. Insurance Co. of North America v New York, 71 N.Y.2d 983, 529 N.Y.S.2d 70, 524 N.E.2d 424, 1988 N.Y. LEXIS 692 (N.Y. 1988).

City, as municipal lienholder, was not entitled to recover entirety of proceeds obtained from insurer through settlement of plaintiff's action to recover proceeds of fire insurance policy, since city's right to money did not supersede attorneys' charging lien inasmuch as efforts of plaintiff's attorneys were largely responsible for existence of settlement funds; if city were to prevail, attorneys would be deprived of incentive to accept cases in which fire insurance company refuses to pay on policy, which would contravene interests of municipality and public policy. LMWT Realty Corp. v Davis Agency, 205 A.D.2d 479, 614 N.Y.S.2d 16, 1994 N.Y. App. Div. LEXIS 7012 (N.Y. App. Div. 1st Dep't 1994), aff'd, 85 N.Y.2d 462, 626 N.Y.S.2d 39, 649 N.E.2d 1183, 1995 N.Y. LEXIS 1011 (N.Y. 1995).

Stipulation of settlement, entered into in open court, allowing fire insurer to pay insurance proceeds into court, subject to city tax lien, was not subject to vacatur on ground that subject premises was 2-family residence exempt from tax lien under CLS Gen Mun § 22(1)(e) since any evidence that premises was 2-family residence should have been presented before stipulation was entered. Mercer v New York Prop. Underwriting Ass'n, 247 A.D.2d 450, 668 N.Y.S.2d 664, 1998 N.Y. App. Div. LEXIS 1100 (N.Y. App. Div. 2d Dep't 1998).

In an action to determine the ownership of proceeds from a fire insurance policy, the mortgagee's equitable lien against the proceeds is not entitled to priority over a tax lien filed by the City of New York since the mortgage interest was recorded after the city's tax lien was perfected and the mortgagee of record was not named in the fire insurance policy, in breach of the mortgagor's covenant to insure the mortgaged premises against loss by fire for the benefit of the mortgagor, thereby establishing a mortgagee's equitable lien on the proceeds; although, ordinarily, the lien of a mortgagee of record named in the policy has priority over the city's tax lien (General Municipal Law, § 22, subd 2); the recorded lien will prevail over the subsequently recorded equitable lien since the public policy behind the requirement for prompt recording would be hindered if the equitable lien were to prevail. Kovacs v New York Property Ins. Underwriting Ass'n, 101 Misc. 2d 244, 420 N.Y.S.2d 837, 1979 N.Y. Misc. LEXIS 2660 (N.Y. Sup. Ct. 1979).

In an Unsafe Building Proceeding the City of New York was entitled to demolition costs and was authorized to impose a lien on proceeds from fire insurance where the building had been damaged by fire during the pendency of an agreement for repayment of delinquent taxes, the city had found the building unsafe and ordered its demolition, and the owner had taken no action to restore the property from the time of the fires to the time of filing the tax lien over one year later. The owner failed to meet his burden of establishing beyond a reasonable doubt the invalidity of Gen Mun Law § 22, given judicial deference to legislative enactments in the field of taxation, and given the legislative intent to take the profit out of arson by allowing the municipality to collect its taxes out of the fire insurance proceeds, unless the funds are used to restore the property. Shirpsen Realty Corp. v New York, 107 Misc. 2d 714, 435 N.Y.S.2d 896, 1981 N.Y. Misc. LEXIS 2088 (N.Y. Sup. Ct. 1981).

Special tax lien of NYC has priority on fire insurance proceeds over all other liens, except mortgagee of record named in fire insurance policy, including equitable lien of mortgagees, even though mortgage contained clause requiring mortgagor to obtain

fire insurance for benefit of mortgagees, but where mortgagees are not named in fire insurance policy purchased by mortgagor. Lis v City Collector of New York, 131 Misc. 2d 407, 500 N.Y.S.2d 468, 1986 N.Y. Misc. LEXIS 2398 (N.Y. Sup. Ct. 1986).

Agency Opinions

Section 33-a of the Insurance Law and § 22(3) of the General Municipal Law require the Superintendent of Insurance to maintain both an index of tax districts that have filed an intention to claim against the proceeds of a policy of fire insurance, and an index of liens on insured property located within a taxing district. 1977 NY Ops Atty Gen Oct 6.

A municipality has no authority to establish a procedure whereby it can collect past due real property taxes by making claims against the proceeds of fire insurance policies on one and two-family dwellings. 1991 NY Ops Atty Gen I 91-66.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS Ins §§ 318, 331.

Jurisprudences:

Texts: New York Insurance Law (Matthew Bender's New York Practice Series) § 36.03[1].

ARTICLE 3 Report of Financial Condition

Section

30. Reports
30-a. Reports from entities receiving foreign fire insurance premium tax
33. Accounts of officers to be examined
33-a. Examination of distribution of foreign fire insurance premium tax
34. Powers and duties of examiners.
34-a. Buffalo city comptroller
35. Filing of report of examination and notice thereof

HISTORY:

Add, L 1909, ch 29, eff Feb 17, 1909.

§ 30. Reports

1. Except as hereinafter provided, every municipal corporation and school, fire, improvement and special district shall annually make a report of its financial condition to the comptroller. Such report shall be made by the chief fiscal officer of each municipal corporation, by the chief fiscal officer of a municipal corporation having a school district governed by article fifty-two of the education law, for such school district, by the treasurer of each other school district, except for a common school district not having a treasurer, by the chairman of the school board or the sole trustee and by the treasurer of each fire, improvement or special district, or in the case of a consolidated health district, the president of the board of health. Such reports shall include the financial transactions of joint services defined by section one hundred nineteen-n of this chapter. If, pursuant to any general or special law, there is a separate treasurer for any municipal activity, the financial report of the activity shall be made by such treasurer.

2. An annual financial report for each municipal urban renewal agency shall be made by the treasurer of the agency.

3. An annual report of financial transactions shall be made by the treasurer of each public library and library service system established pursuant to section two hundred fifty-five of the education law, each county vocational education board established pursuant to section eleven hundred one of the education law and each board of cooperative educational services established pursuant to section nineteen hundred fifty-eight* of the education law.

4. If for any reason, the comptroller shall deem it necessary that additional information be furnished by any other officer, he may require such additional information from such other officer in such form as he may deem necessary to carry into effect the purposes of this article.

5. All reports shall be certified by the officer making the same. Except as otherwise provided in this subdivision with respect to the time for filing, all reports shall be filed with the comptroller within sixty days after the close of the fiscal year of such municipal corporation, district, agency or activity, provided, however, that upon written request from the chief fiscal officer of a municipal corporation, district, agency or activity, the comptroller may extend such sixty day period for filing such report for an additional sixty days. Reports may be filed by electronic transmission or in paper form. The method of certifying a report filed in electronic form shall be prescribed by the comptroller. It shall be the duty of the incumbent officer at the time such reports are required to be filed with the comptroller to file such report. The refusal or wilful neglect of such officer to file a report as herein prescribed shall be a misdemeanor and subject the financial officer so refusing or neglecting to a penalty of five dollars per day for each day's delay beyond the sixty days to be paid on demand of the comptroller. Notwithstanding any of the provisions contained in this section:

(a) Each town or village having a population, as shown by the latest preceding decennial federal census, between five thousand to nineteen thousand nine hundred ninety-nine, shall file their respective reports with the comptroller within ninety days after the close of the fiscal year of such town or village. Upon written request from the chief fiscal officer of such a town or village, the comptroller may extend such ninety day period for an additional thirty days.

(b) Each town or village having a population, as shown by the latest preceding decennial federal census, with twenty thousand or more, and all cities and counties, irrespective of their populations, shall file their respective reports with the comptroller within one hundred twenty days after the close of the fiscal year of such county, city, town or village.

6. Annually, each industrial development agency, the Troy industrial development authority established pursuant to title eleven of article eight of the public authorities law, and the Auburn industrial

*Renumbered § 1950, L 1972, ch 378, eff May 22, 1972.

development authority established pursuant to title fifteen of article eight of the public authorities law, shall file a financial report pursuant to section eight hundred fifty-nine of this chapter.

7. To the extent practicable, each municipal corporation shall make accessible to the public via its official internet web site documentation pertaining to its most recent annual financial reports, current year budget, most recent independent audit report and most recent fiscal performance plan or multi-year financial plan required pursuant to paragraph g of subdivision ten of section fifty-four of the state finance law, unless such information is covered by subdivision two of section eighty-seven of the public officers law.

HISTORY:

Add, L 1909, ch 29; amd, L 1911, ch 544, § 1; L 1925, ch 542, § 1; L 1943, ch 653, § 1; L 1944, ch 565, § 1; L 1952, ch 437, § 1; L 1954, ch 172, § 1; L 1964, ch 696, § 1, eff Oct 1, 1964; L 1971, ch 20, § 1,2, eff July 1, 1971; L 1973, ch 200, § 2, eff July 1, 1973; L 1976, ch 406, § 1; L 1977, ch 401, § 1, eff July 1, 1978; L 1980, ch 828, § 1; L 1989, ch 692, § 1; L 1991, ch 98, § 1; L 1993, ch 356, § 1–a, eff Oct 19, 1993 (see 1993 note below); L 1996, ch 140, § 22 (see 1996 note below); L 2006, ch 710, § 1, eff Sept 13, 2006; L 2008, ch 56, § 10 (Part O), eff April 23, 2008, deemed eff on and after April 1, 2008.

Editor's Notes: Laws 1993, ch 356, § 38, eff Oct 19, 1993, provides as follows:

§ 38. This act shall take effect on the ninetieth day after it shall have become a law provided, however, that sections twenty-one and twenty-nine of this act shall take effect one year after the date on which this act shall have become a law; provided, further, that subdivision 13 of section 854 of the general municipal law, as amended by section three of this act and subdivision 10 of section 1951 of the public authorities law, as amended by section nineteen of this act, shall take effect immediately and provided further that subdivision 15 of section 858 of the general municipal law, as added by section seven of this act, subdivision 14 of section 1953 of the public authorities law as added by section twenty-three of this act and subdivision 14 of section 2306 of the public authorities law as added by section thirty-one of this act shall take effect on January 1, 1994; provided further however that the provisions of section fifteen of this act shall remain in full force and effect until July 1, 1996, and provided further that sections twenty-two and thirty of this act shall remain in full force and effect until July 1, 1996 when upon such date the provisions of the opening paragraph of sections 1953 and 2306 of the public authorities law shall revert to and be read as set out in law on the date immediately preceding the effective date of this act and provided further that section 5 of chapter 905 of the laws of 1986, as amended by section thirty-five of this act, shall take effect immediately and shall be deemed in full force and effect on and after July 1, 1993; provided further, however, that this act shall not apply to projects for which an agency, through the issuance of its bonds, execution of leases, or the passage of an inducement resolution or bond resolution, has authorized any assistance prior to the date on which this act shall have become a law whether or not such projects are thereafter modified; provided further, however, that nothing contained herein shall be deemed to affect the application, qualification, expiration or repeal of any provision of law amended by any section of this act and such provisions shall be applied or qualified or shall expire or be deemed repealed in the same manner, to the same extent and on the same date as the case may be as otherwise provided by law. (Amd, L 1993, ch 357, § 15, eff Oct 19, 1993.).

Laws 1996, ch 140, § 24, eff June 11, 1996, provides as follows:

§ 24. This act shall take effect immediately and shall apply to all budgets which are adopted after the date on which it shall have become a law.

Notes to Decisions

Analysis

1. In general
2. Who must file

1. In general

Court incorrectly dismissed counts of indictment charging first degree offering false instrument for filing on ground that subject vouchers did not constitute "written instruments" under CLS Penal § 170.00(1) since vouchers were prepared and submitted by defendants, town officials, to Associate Examiner of State Comptroller's Office, who was performing audit of town's financial condition, to justify certain purported "chargebacks" to town's general fund from separate capital fund, and vouchers could have been relied on by Associate Examiner and thus necessarily would have affected his findings and conclusions as to town's financial condition in his final report with State Comptroller. People v Jacob, 248 A.D.2d 638, 670 N.Y.S.2d 530, 1998 N.Y. App. Div. LEXIS 2912 (N.Y. App. Div. 2d Dep't), app. denied sub. nom., People v Kluesner, 92 N.Y.2d 880, 678 N.Y.S.2d 27, 700 N.E.2d 565, 1998 N.Y. LEXIS 5091 (N.Y. 1998), app. denied sub. nom., People v Kelly, 92 N.Y.2d 880, 678 N.Y.S.2d 27, 700 N.E.2d 565, 1998 N.Y. LEXIS 5087 (N.Y. 1998), app. denied sub. nom., People v Harrington, 92 N.Y.2d 880, 678 N.Y.S.2d 27, 700 N.E.2d 565 (N.Y. 1998), app. denied sub. nom., People v Bernard, 92 N.Y.2d 878, 678 N.Y.S.2d 25, 700 N.E.2d 563 (N.Y. 1998), app. denied, 92 N.Y.2d 878, 678 N.Y.S.2d 27, 700 N.E.2d 565, 1998 N.Y. LEXIS 2969 (N.Y. 1998).

Auditing provisions of county charter, which empowered county comptroller to examine and audit accounts and records of any special district within county, did not authorize audit of financial affairs of fire district, which is political subdivision of state pursuant to CLS Town § 174(7) and therefore subject to exclusive jurisdiction of State Comptroller to conduct annual audits under CLS Gen Mun § 30 et seq. In re Inwood Fire Dist., 152 Misc. 2d 518, 577 N.Y.S.2d 575, 1991 N.Y. Misc. LEXIS 668 (N.Y. Sup. Ct. 1991).

Town board may not expend town moneys to employ assistants to aid a retiring supervisor in the making of the report described by Section 30 of the General Municipal Law when no authorization has been granted. 1945 Ops St Compt 75.

The "Chief fiscal officer" of the city of Lackawanna is the city comptroller. 1968 Ops St Compt File #71.

A town supervisor has a prohibited interest in a contract of his spouse for the preparation of the annual financial report. The contract is void and payment of her voucher should not be approved by the town board. 1985 Op St Compt 85-9.

CLS Educ § 263 does not operate to relieve public libraries from requirement that annual financial reports be filed with State Comptroller under CLS Gen Mun § 30. 1997 Op St Compt No. 97-21.

There is no conflict of interest or other legal impropriety where an accountant retained by a fire district to prepare its annual financial report is also the owner of a computer firm which is engaged by the district to perform data processing services. 1981 Op St Comp File #81-373.

2. Who must file

Annual report of fire district must be signed by retiring treasurer and not his successor. 1947 Ops St Compt 78.

The Director of Finance is, in fact, the chief fiscal officer of the City of New Rochelle, and is the person charged with the duty of making the annual report required by § 30 of the General Municipal Law. 1955 Ops St Compt File #7557.

Interest earned on investment of public moneys appropriated by village to village public library must be credited to library fund and not to village general fund; moneys donated by private persons to village public library may be invested by library trustees in investments which they deemed to be for best interests of library, and need not be invested in manner specified in

CLS Gen Mun § 11; annual report of financial transactions which public library treasurer must file with State Comptroller should include information both on public moneys and private source moneys. 1988 Op St Compt No. 88-76, 1988 N.Y. Comp. LEXIS 69.

Agency Opinions

Analysis

1. In general
2. Who must file

1. In general

The Hyde Park Fire and Water District is not required to submit a separate annual report for its fire functions and a separate report for its water functions. 1979 Op St Compt File #420.

A former town supervisor must turn over the town's records to his successor. 1979 Op St Compt File #759.

The penalty for failure to file the annual financial report is ambiguous. It may be treated solely as a criminal matter with the court imposing a criminal fine or as both a criminal matter and as an administrative matter with an administrative fine imposed by the Comptroller. In either case, the Comptroller would need the assistance of either the local district attorney, who may refuse to prosecute, or the Attorney General. Because of the burden placed on this Department in trying to enforce this provision we recommend amendment of the statute. 1981 Op St Compt No. 80-787.

2. Who must file

The annual financial report of a fire district must be filed by the incumbent treasurer at the time the report is due. 1979 Op St Compt File #903.

The incoming supervisor, rather than the outgoing supervisor, must file the financial report required by section 30. 1980 Op St Compt File #22.

Where a supervisor intentionally or willfully fails to submit his monthly and annual financial reports to the town board or fails to keep his books of account in proper order, (1) any citizen resident of the town may present to the Appellate Division of the Supreme Court an application for removal of such officer from office, or (2) the town board may bring an Article 78 proceeding in the nature of mandamus seeking a court order requiring the supervisor to properly perform his official duties, or (3) the town board may create the position of town comptroller and designate him as the accounting officer of the town with responsibility for keeping detailed accounting records, filing the annual financial reports with the town clerk, and filing the monthly financial reports with the town board. 1982 Op St Compt File #82-252.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 36; CLS County § 406; CLS Town §§ 29, 124, 177.

§ 30-a. Reports from entities receiving foreign fire insurance premium tax

Every entity receiving and disbursing foreign fire insurance premium tax funds distributed pursuant to sections nine thousand one hundred four and nine thousand one hundred five of the insurance law, the administrative code of the city of New York and the charter of the city of Buffalo shall make an annual verified report of the receipts, expenditures and balances relating to the use and application of such funds received and disbursed after January first, nineteen hundred seventy-six to the state comptroller. Such report shall be made by the treasurer, or if there be none, by the chief fiscal officer of such entity, and shall be filed no later than the last day of February of each year for the preceding calendar year.

HISTORY:

Add, L 1975, ch 537, § 1; amd, L 1984, ch 805, § 29, eff Sept 1, 1984.

Notes to Decisions

In CLS Gen Mun § 209-a, reference to "report required pursuant to" CLS Gen Mun § 33-a is intended to be reference, instead, to report required by CLS Gen Mun § 30-a. 2007 Op St Compt No. 07-8.

Agency Opinions

A municipal treasurer may pay over foreign fire insurance tax moneys to the treasurer of a firemen's association which does not consist of all members of the fire department provided the moneys will be expended for a purpose which the members of the entire fire department determine will be for the use and benefit of the department. 1982 Op St Compt File #82-239.

§ 33. Accounts of officers to be examined

1. Inspection and examination of certain accounts. The comptroller shall cause the accounts of all officers of each such municipal corporation, industrial development agency, district, agency and activity to be inspected and examined by one or more examiners of municipal affairs for such periods as the comptroller shall deem necessary. On every such examination inquiry shall be made as to the financial condition and resources of the municipal corporation, industrial development agency, district, agency or activity, and into the method and accuracy of its accounts

2. Audits of school districts, boards of cooperative educational services (BOCES) and charter schools.

a. Notwithstanding any other provisions of law to the contrary, the inspection and examination of school districts, charter schools and boards of cooperative educational services accounts shall be conducted pursuant to provisions of this subdivision. Within such funds as are made available for such purpose, the comptroller shall cause the accounts of every school district, BOCES and charter school in the state to be examined pursuant to a plan developed by the comptroller. Such audits shall be conducted in a manner so as to provide, that every school district, BOCES and charter school shall be audited at least once by March thirty-first, two thousand ten. The priority and frequency of such audits, and any audits conducted thereafter, shall be based upon a risk assessment process conducted by the comptroller which may include investigations of alleged improprieties, previous audit findings and recommendations, or other financial performance indicators. The comptroller shall provide affected school districts, BOCES and charter schools reasonable prior notice before the commencement of any audit.

b. In undertaking such audits the comptroller's review shall include, but not be limited to:

(1) examining, auditing and evaluating financial documents and records of school districts, BOCES and charter schools,

(2) assessing the current financial practices of school districts, BOCES and charter schools to ensure that they are consistent with established standards, including whether any school district that

uses a risk-based or sampling methodology to determine which claims are to be audited in lieu of auditing all claims has adopted a methodology that provides reasonable assurance that all the claims represented in the sample are proper charges against the school district; and

(3) determining that school districts, BOCES, and charter schools provide for adequate protections against any fraud, theft, or professional misconduct.

c. All audits shall include any appropriate findings and recommendations of the auditors, regarding the fiscal practices that the auditors believe to be in violation of, any state or federal law, rule or regulation, or demonstrate negligence or incompetence.

d. The office of the state comptroller shall upon making a finding of misconduct refer any findings of fraud, abuse or other conduct constituting a crime that are uncovered during the course of an audit, as appropriate, to the commissioner of education, the charter entity, the attorney general, United States attorney or district attorney having jurisdiction for appropriate action, together with any documents supporting the auditors' findings.

e. The final audit report resulting from audits performed pursuant to this section shall be made available to the public by school districts, BOCES or charter schools upon request for a period of at least five years. Furthermore, the school district, BOCES, or charter school shall be required to post the final audit report on their internet website, if available, or otherwise make available, for a period of five years.

f. Upon the request of the comptroller, any state agency, board of cooperative educational services, school district or charter school, shall cooperate with and make its staff, facilities, and resources available to the comptroller for the purpose of assisting the comptroller in carrying out all actions taken pursuant to this section, and shall provide the comptroller upon request, with all data and records in its possession that relate to audits undertaken pursuant to this section.

g. The comptroller shall inform and advise the governor and the legislature in December of each year regarding a review of all school districts, BOCES, and charter schools audits conducted during the preceding twelve months and any other pertinent information the comptroller deems appropriate.

3. Examinations and report. In addition to the inspection and examination of certain accounts pursuant to this section, the comptroller by the end of the two thousand eleven—two thousand twelve school year, shall also examine for the most recent school year as practicable, the employee benefit accrued liability reserve funds of school districts established pursuant to section six-p of this chapter. Such examination shall be for the purpose of determining the amount of funding in the reserve fund, the amount of liabilities against such fund and if there exist funds in the reserve fund which are in excess of the total liabilities of such fund. The comptroller shall notify the school district if such excess funds exist and the dollar value of the excess funding. The comptroller shall also prepare a report on the school districts with excess funds in their employee benefit accrued liability reserve fund and the amount of the excess funding for each district. Such report shall be submitted by July first, two thousand twelve to the director of the budget, the chair of the senate finance committee, the chair of the assembly ways and means committee and the commissioner of education.

HISTORY:

Add, L 1909, ch 29; amd, L 1917, ch 307, § 1; L 1920, ch 838, § 1; L 1943, ch 653, § 2; L 1944, ch 565, § 3; L 1964, ch 696, § 3; L 1989, ch 692, § 2, eff July 22, 1989; L 2005, ch 267, § 3, eff July 19, 200; L 2009, ch 57 § 40 (Part A), eff April 7, 2009, deemed eff on and after April 1, 2009; L 2011, ch 97, § 24 (Part C, Subpart F), eff June 24, 2011.

Amendment Notes: 2011. Chapter 97, § 24 (Part C, Subpart F) amended:

Sub 2, par b, subpar (2) by adding the matter in italics.

2009. Chapter 57, § 40 (Part A) amended:

By adding sub 3.

Notes to Decisions

State Comptroller has authority to conduct performance audits of New York City agencies. McCall v Barrios-Paoli, 93 N.Y.2d 99, 688 N.Y.S.2d 107, 710 N.E.2d 671, 1999 N.Y. LEXIS 225 (N.Y. 1999).

History of CLS Gen Mun §§ 33 and 34 unambiguously demonstrates that state legislature expected that State Comptroller might conduct audits into effective use of state funds by political subdivisions. McCall v Barrios-Paoli, 93 N.Y.2d 99, 688 N.Y.S.2d 107, 710 N.E.2d 671, 1999 N.Y. LEXIS 225 (N.Y. 1999).

New York City comptroller's explicit authority under city charter, to conduct audits into effective use of state funds by city, did not displace State Comptroller's authority under CLS Gen Mun §§ 33 and 34 to conduct performance audits of city. McCall v Barrios-Paoli, 93 N.Y.2d 99, 688 N.Y.S.2d 107, 710 N.E.2d 671, 1999 N.Y. LEXIS 225 (N.Y. 1999).

N.Y. Gen. Mun. Law § 33(2) and N.Y. Educ. Law § 2854(1)(c), which authorize the New York State Comptroller to audit charter schools, violate N.Y. Const. art. V, § 1, because charter schools are not political subdivisions of New York, nor is the task of auditing them an administrative duty that is incidental to the Comptroller's constitutionally prescribed functions. Matter of New York Charter Schools Assn., Inc. v DiNapoli, 13 N.Y.3d 120, 886 N.Y.S.2d 74, 914 N.E.2d 991, 2009 N.Y. LEXIS 2547 (N.Y. 2009).

Sections 33 and 34 of the General Municipal Law represent legislative exercise of the powers conferred by Art 5 § 1 of the State Constitution permitting assignment to the State Comptroller of supervision of accounts of any political subdivision. Levitt v Wanamaker, 12 A.D.2d 149, 209 N.Y.S.2d 75, 1961 N.Y. App. Div. LEXIS 13463 (N.Y. App. Div. 4th Dep't 1961).

Auditing provisions of county charter, which empowered county comptroller to examine and audit accounts and records of any special district within county, did not authorize audit of financial affairs of fire district, which is political subdivision of state pursuant to CLS Town § 174(7) and therefore subject to exclusive jurisdiction of State Comptroller to conduct annual audits under CLS Gen Mun § 30 et seq. In re Inwood Fire Dist., 152 Misc. 2d 518, 577 N.Y.S.2d 575, 1991 N.Y. Misc. LEXIS 668 (N.Y. Sup. Ct. 1991).

Town's N.Y. C.P.L.R. art. 78 proceeding seeking to enjoin a county and its comptroller from auditing the town's park district failed as: (1) assuming that the N.Y. Mun. Home Rule Law § 10(1)(ii)(a)(11)-(12) applied, the Nassau County Charter's del-

egation of authority to the county comptroller to audit towns and special districts remained valid; (2) neither N.Y. Const. art. V, § 1 nor N.Y. Gen. Mun. Law §§ 33 and 34 barred a local subdivision from exercising concurrent auditing powers with the state comptroller; (3) Nassau County, N.Y., Charter § 402(6) did not limit the county comptroller's authority to audit the county's subdivisions when directed to do so by the county legislature; and (4) the county legislature was not precluded from delegating, or local municipal corporations from exercising, concurrent auditing powers. Matter of Town of N. Hempstead v County of Nassau, 929 N.Y.S.2d 833, 32 Misc. 3d 809, 2011 N.Y. Misc. LEXIS 3147 (N.Y. Sup. Ct. 2011), aff'd, in part, 103 A.D.3d 734, 962 N.Y.S.2d 164, 2013 N.Y. App. Div. LEXIS 880 (N.Y. App. Div. 2d Dep't 2013).

N.Y. Gen. Mun. Law § 33(2) and N.Y. Educ. Law § 2854(1)(c) violate N.Y. Const. art. V, § 1 to the extent that such provisions authorize or direct the State Comptroller to conduct audits of charter schools. Matter of New York Charter Schools Assn., Inc. v DiNapoli, 857 N.Y.S.2d 450, 20 Misc. 3d 235, 2008 N.Y. Misc. LEXIS 2406 (N.Y. Sup. Ct. 2008), rev'd, 60 A.D.3d 119, 871 N.Y.S.2d 497, 2009 N.Y. App. Div. LEXIS 154 (N.Y. App. Div. 3d Dep't 2009).

Because charter schools were more analogous to public benefit corporations, as defined in N.Y. Const. art. X, § 5, pursuant to the application of the Not-for-Profit Corporation Law under N.Y. Educ. Law § 2853(1) and, thus, were not political subdivisions of the State, requiring the state comptroller to audit charter schools pursuant to N.Y. Gen. Mun. Law § 33(2) and N.Y. Educ. Law § 2854(1)(c) was in violation of N.Y. Const. art. V, § 1. Matter of New York Charter Schools Assn., Inc. v DiNapoli, 857 N.Y.S.2d 450, 20 Misc. 3d 235, 2008 N.Y. Misc. LEXIS 2406 (N.Y. Sup. Ct. 2008), rev'd, 60 A.D.3d 119, 871 N.Y.S.2d 497, 2009 N.Y. App. Div. LEXIS 154 (N.Y. App. Div. 3d Dep't 2009).

In light of the legislature's broad delegatory authority regarding the New York State Comptroller, and the enormous public funding received by charter schools, which implicates the Comptroller's fundamental duty to supervise state fiscal matters, N.Y. Gen. Mun. Law § 33(2) and N.Y. Educ. Law § 2854(1)(c), which require the Comptroller to audit charter schools, do not violate N.Y. Const. art. V, § 1. Matter of New York Charter Schools Assn., Inc. v DiNapoli, 60 A.D.3d 119, 871 N.Y.S.2d 497, 2009 N.Y. App. Div. LEXIS 154 (N.Y. App. Div. 3d Dep't), rev'd, 13 N.Y.3d 120, 886 N.Y.S.2d 74, 914 N.E.2d 991, 2009 N.Y. LEXIS 2547 (N.Y. 2009).

Agency Opinions

Powers and duties granted to office of State Comptroller pursuant to Constitution and under state statute provide authority for Comptroller or his designees to access confidential tax information during course of audit, even though such information may be statutorily protected. 2004 N.Y. Op. (Inf.) Att'y Gen. 13, 2004 N.Y. AG LEXIS 22.

Auditors or examiners of the Department of Audit and Control may not examine the records or papers of a criminal action or proceeding dismissed or otherwise terminated in favor of the accused, unless a court order is obtained. 1978 Op St Compt No. 78–910.

There is no statutory or constitutional mandate that the financial records of industrial development agencies be examined by the State Comptroller. 1980 Op St Compt File #676.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 470.

§ 33-a. Examination of distribution of foreign fire insurance premium tax

The state comptroller may cause the records and accounts of any entity receiving and disbursing foreign fire insurance premium tax funds distributed pursuant to sections nine thousand one hundred four and nine thousand one hundred five of the insurance law, the administrative code of the city of New York and the charter of the city of Buffalo to be inspected and examined respecting such funds received after January first, nineteen hundred seventy-six for such periods as the comptroller shall deem necessary. On every such examination inquiry shall be made as to the method and accuracy of accounts.

HISTORY:

Add, L 1975, ch 537, § 1; amd, L 1984, ch 805, § 30, eff Sept 1, 1984.

Notes to Decisions

In CLS Gen Mun § 209-a, reference to "report required pursuant to" CLS Gen Mun § 33-a is intended to be reference, instead, to report required by CLS Gen Mun § 30-a. 2007 Op St Compt No. 07-8.

Agency Opinions

A municipal treasurer may pay over foreign fire insurance tax moneys to the treasurer of a firemen's association which does not consist of all members of the fire department provided the moneys will be expended for a purpose which the members of the entire fire department determine will be for the use and benefit of the department. 1982 Op St Compt File #82-239.

§ 34. Powers and duties of examiners.

1. The comptroller and each examiner of municipal affairs shall have power to examine into the financial affairs of every such municipal corporation, industrial development agency, district, agency, activity, any fire company as defined in section two hundred four-a of this chapter, and any other organization, except a statewide association of local governments or local government officials, that is controlled by one or more of any such municipal corporations, industrial development agencies, districts or agencies. An organization shall be deemed under the control of one or more municipal corporations, industrial development agencies, districts or agencies when one or more individuals who serve as officers or employees of any such municipal corporation, industrial development agency, district or agency: (a) select either a majority of the organization's highest policy-making body or the organization's chief executive officer; (b) constitute a majority of the voting strength that selects either a majority of the organization's highest policy-making body or the organization's chief executive officer; or (c) serve as: (i) a majority of the organization's highest policy-making body; (ii) in his or her official capacity, the organization's chief executive officer; or (iii) in his or her official capacity, a partner in the organization. An organization under the control of one or more municipal corporations, industrial development agencies, districts or agencies shall also include any other organization that is controlled by such organization.

2. In connection with any examination authorized by subdivision one of this section, the comptroller and each examiner of municipal affairs shall have power to administer an oath to any person whose testimony may be required, and to compel the appearance and attendance of such person for the purpose of any such examination and investigation, and the production of books and papers. In the case of a municipal corporation, industrial development

agency, or school district, no such person shall be compelled to appear or be examined elsewhere than within such municipal corporation, industrial development agency, or school district. In the case of any district other than a school district, no such person may be compelled to appear or be examined elsewhere than within the town or one of the towns in which such district or portion thereof is located. In the case of an urban renewal agency, no such person shall be compelled to appear or be examined outside the municipal corporation wherein such agency is established. In the case of a fire company, no such person shall be compelled to appear or be examined outside the area served by the company. In the case of an activity, no such person shall be compelled to appear outside the area served by the activity. In the case of an organization under the control of one or more municipal corporations, industrial development agencies, districts or agencies, no such person shall be compelled to appear or to be examined outside the county in which the organization has its principal headquarters. Willful false swearing in such examination shall be perjury and shall be punishable as such.

3. For purposes of this section, the term "a majority of the organization's highest policy-making body" shall mean a majority of the whole number of positions comprising such body, provided, however, that if the documents establishing the organization's internal governance allow such body to act by a majority of a quorum, then such term shall mean a majority of the quorum.

HISTORY:

Formerly § 35, add, L 1909, ch 29; renumbered § 34 and amd, L 1945, ch 612, § 1; L 1943, ch 653, § 4; L 1944, ch 565, § 4; L 1964, ch 696, § 4; L 1989, ch 692, § 2; L 2006, ch 233, § 1, eff Jan 22, 2007; L 2019, ch 710, § 1, effective December 20, 2019.

Prior Law: Former § 34, add, L 1909, ch 29; amd, L 1910, ch 301, § 1; repealed, L 1943, ch 653, § 3.

Amendment Notes The 2019 amendment by ch 710, § 1, rewrote the section.

Notes to Decisions

State Comptroller has authority to conduct performance audits of New York City agencies. McCall v Barrios-Paoli, 93 N.Y.2d 99, 688 N.Y.S.2d 107, 710 N.E.2d 671, 1999 N.Y. LEXIS 225 (N.Y. 1999).

History of CLS Gen Mun §§ 33 and 34 unambiguously demonstrates that state legislature expected that State Comptroller might conduct audits into effective use of state funds by political subdivisions. McCall v Barrios-Paoli, 93 N.Y.2d 99, 688 N.Y.S.2d 107, 710 N.E.2d 671, 1999 N.Y. LEXIS 225 (N.Y. 1999).

New York City comptroller's explicit authority under city charter, to conduct audits into effective use of state funds by city, did not displace State Comptroller's authority under CLS Gen Mun §§ 33 and 34 to conduct performance audits of city. McCall v Barrios-Paoli, 93 N.Y.2d 99, 688 N.Y.S.2d 107, 710 N.E.2d 671, 1999 N.Y. LEXIS 225 (N.Y. 1999).

Sections 33 and 34 of the General Municipal Law represent legislative exercise of the powers conferred by Art 5 § 1 of the State Constitution permitting the assignment to the State Comptroller of supervision of accounts of any political subdivision. Levitt v Wanamaker, 12 A.D.2d 149, 209 N.Y.S.2d 75, 1961 N.Y. App. Div. LEXIS 13463 (N.Y. App. Div. 4th Dep't 1961).

In the light of this section, which is based on Art. V § 1 of the State Constitution, secrecy clauses in tax statutes and local laws relating to taxation must be considered as subject to exception where the State Comptroller seeks to examine tax returns in connection with auditing municipal accounts. Levitt v Wanamaker, 12 A.D.2d 149, 209 N.Y.S.2d 75, 1961 N.Y. App. Div. LEXIS 13463 (N.Y. App. Div. 4th Dep't 1961).

Court incorrectly dismissed counts of indictment charging first degree offering false instrument for filing on ground that subject vouchers did not constitute "written instruments" under CLS Penal § 170.00(1) since vouchers were prepared and submitted by defendants, town officials, to Associate Examiner of State Comptroller's Office, who was performing audit of town's financial condition, to justify certain purported "chargebacks" to town's general fund from separate capital fund, and vouchers could have been relied on by Associate Examiner and thus necessarily would have affected his findings and conclusions as to town's financial condition in his final report with State Comptroller. People v Jacob, 248 A.D.2d 638, 670 N.Y.S.2d 530, 1998 N.Y. App. Div. LEXIS 2912 (N.Y. App. Div. 2d Dep't), app. denied sub. nom., People v Kluesner, 92 N.Y.2d 880, 678 N.Y.S.2d 27, 700 N.E.2d 565, 1998 N.Y. LEXIS 5091 (N.Y. 1998), app. denied sub. nom., People v Kelly, 92 N.Y.2d 880, 678 N.Y.S.2d 27, 700 N.E.2d 565, 1998 N.Y. LEXIS 5087 (N.Y. 1998), app. denied sub. nom., People v Harrington, 92 N.Y.2d 880, 678 N.Y.S.2d 27, 700 N.E.2d 565 (N.Y. 1998), app. denied sub. nom., People v Bernard, 92 N.Y.2d 878, 678 N.Y.S.2d 25, 700 N.E.2d 563 (N.Y. 1998), app. denied, 92 N.Y.2d 878, 678 N.Y.S.2d 27, 700 N.E.2d 565, 1998 N.Y. LEXIS 2969 (N.Y. 1998).

State Attorney General exceeded his authority where, in conjunction with State Comptroller, and allegedly pursuant to CLS Exec § 63, he initiated investigation into affairs of County Public Administrator but did so without prior approval of Governor, and attorney general's name would be removed from action brought to enforce compliance with subpoenae; however, public administrator would be ordered to comply with subpoenae since comptroller did have authority to initiate investigation and issue subpoenae under CLS St Fin §§ 8-9 and CLS Gen Mun §§ 33-34. Abrams v Kearney, 133 Misc. 2d 845, 508 N.Y.S.2d 850, 1986 N.Y. Misc. LEXIS 2989 (N.Y. Sup. Ct. 1986).

Auditing provisions of county charter, which empowered county comptroller to examine and audit accounts and records of any special district within county, did not authorize audit of financial affairs of fire district, which is political subdivision of state pursuant to CLS Town § 174(7) and therefore subject to exclusive jurisdiction of State Comptroller to conduct annual audits under CLS Gen Mun § 30 et seq. In re Inwood Fire Dist., 152 Misc. 2d 518, 577 N.Y.S.2d 575, 1991 N.Y. Misc. LEXIS 668 (N.Y. Sup. Ct. 1991).

Town's N.Y. C.P.L.R. art. 78 proceeding seeking to enjoin a county and its comptroller from auditing the town's park district failed as: (1) assuming that the N.Y. Mun. Home Rule Law § 10(1)(ii)(a)(11)-(12) applied, the Nassau County Charter's delegation of authority to the county comptroller to audit towns and special districts remained valid; (2) neither N.Y. Const. art. V, § 1 nor N.Y. Gen. Mun. Law §§ 33 and 34 barred a local subdivision from exercising concurrent auditing powers with the state comptroller; (3) Nassau County, N.Y., Charter § 402(6) did not limit the county comptroller's authority to audit the county's subdivisions when directed to do so by the county legislature; and (4) the county legislature was not precluded from delegating, or local municipal corporations from exercising, concurrent auditing powers. Matter of Town of N. Hempstead v County of Nassau, 929 N.Y.S.2d 833, 32 Misc. 3d 809, 2011 N.Y. Misc. LEXIS 3147 (N.Y. Sup. Ct. 2011), aff'd, in part, 103 A.D.3d 734, 962 N.Y.S.2d 164, 2013 N.Y. App. Div. LEXIS 880 (N.Y. App. Div. 2d Dep't 2013).

The Jones Fund was established for the support of the poor in the Towns of Oyster Bay and North Hempstead. Since the fund is operated by a joint agency of the two towns, the fund is subject to examination by the State Comptroller. 1958 Ops St Compt File #348.

Agency Opinions

Powers and duties granted to office of State Comptroller pursuant to Constitution and under state statute provide authority for Comptroller or his designees to access confidential tax information during course of audit, even though such information

may be statutorily protected. 2004 N.Y. Op. (Inf.) Att'y Gen. 13, 2004 N.Y. AG LEXIS 22.

Auditors or examiners of the Department of Audit and Control may not examine the records or papers of a criminal action or proceeding dismissed or otherwise terminated in favor of the accused, unless a court order is obtained. 1978 Op St Compt No. 78–910.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 470.

Compulsion of evidence by offer of immunity, CLS CPL §§ 50.10 et seq.

§ 34-a. Buffalo city comptroller

1. Notwithstanding any other provision of law to the contrary, the Buffalo city comptroller shall have the power to examine into the financial affairs of the Buffalo public school district and audit all school district accounts as the comptroller deems necessary. The school district shall make available all books, papers, records, other materials or information required by the comptroller to conduct the examinations and audits authorized by this section. The school district shall be provided sufficient time and opportunity to respond to the findings and recommendations contained in any audit document or any report as a result of an examination prior to the release of any such audit or report. Any final audit document or report shall contain any responses and/or comments submitted by the school district.

2. The comptroller shall annually prepare and submit an audit report on the financial status of the school district to the school board, the mayor, the city council, the state comptroller and the state education department and shall also be made available to the public upon request. Any final report on the financial status of the school district shall contain any responses and/or comments submitted by the school district. The school district shall be given sufficient time and opportunity to review the report and submit a response and/or comments prior to such report's release.

HISTORY:

Add, L 2000, ch 167, § 1, eff July 18, 2000.

§ 35. Filing of report of examination and notice thereof

1. A report of such examination shall be made and shall be filed in the office of the state comptroller and in the office of the clerk of the municipal corporation, industrial development agency, district, agency or activity, or with the secretary if there is no clerk. An additional copy thereof shall be filed with the chief fiscal officer, except that in the case of a school district, such additional copy shall be filed in the office of the chairman of the board of trustees, the president of the board of education or the sole trustee, as the case may be. When so filed, each such report and copy thereof shall be a public record open to inspection by any interested person.

2. (a) Within ten days after the filing of a report of examination performed by the office of the state comptroller, a report of an external audit performed by an independent public accountant or any management letter prepared in conjunction with such an external audit with the clerk of the municipal corporation, industrial development agency, district, agency or activity, or with the secretary if there is no clerk, he shall give public notice thereof in substantially the following form: "Notice is hereby given that the fiscal affairs of (name of municipal corporation, industrial development agency, district, agency or activity) for the period beginning on and ending on , have been examined by (the office of the state comptroller or an independent public accountant), and that the (report of examination performed by the office of the state comptroller or report of, or management letter prepared in conjunction with, the external audit by the independent public accountant) has been filed in my office where it is available as a public record for inspection by all interested persons. Pursuant to section thirty-five of the general municipal law, the governing board of (name of municipal corporation, district, agency or activity) may, in its discretion, prepare a written response to the (report of examination performed by the office of the state comptroller or the report of external audit or management letter by independent public accountant) and file any such response in my office as a public record for inspection by all interested persons not later than (last date on which response may be filed)."

(b) Except as otherwise provided for a common school district, the clerk, or secretary if there is no clerk, shall cause such notice to be published at least once in the official newspaper, or if there be no official newspaper, in a newspaper having general circulation in the municipal corporation, industrial development agency, district or area served by the agency or activity. If there be no newspaper having general circulation, the clerk, or the secretary if there is no clerk, shall post such notice conspicuously in ten public places in the municipal corporation, industrial development agency, district or area served. In a common school district which maintains a home school, the clerk shall post such notice on the front door of the school house. In a common school district which does not maintain a home school, the clerk shall post such notice conspicuously in at least five public places in the district.

(c) The clerk of every municipal corporation, industrial development agency, district, agency and activity, or the secretary if there is no clerk, shall file in his office proof of the publication or posting of notices pursuant to this section. The proof so filed shall be in such form as may be prescribed by the state comptroller.

(d) In each school district subject to the jurisdiction of a district superintendent, under the provisions of article forty-five of the education law, such district superintendent shall ascertain that the public notice required by this subdivision has been published or posted, as the case may be.

3. The clerk, or secretary if there is no clerk, shall present the report of the examination to the governing body of the municipal corporation, industrial development agency, district, agency or activity for its consideration at the first meeting thereof held after the filing of the report with the clerk or secretary.

4. (a) The governing board or other board, officer or employee of the municipal corporation, industrial development agency, district, agency or activity receiving a report of an external audit performed by an independent public accountant or a management letter prepared in conjunction with such an audit shall file in the office of the clerk of the municipal corporation, industrial development agency, district, agency or activity, or with the secretary if there is no clerk, and shall furnish to the comptroller, a copy of the report or letter within ten days after receipt. If the report or letter is not received by the governing board, a copy shall be provided to the governing board within three days after receipt by any other board, officer or employee receiving the same.

(b) (1) Not later than ninety days after presentation to the governing board of a report of examination performed by the office of the state comptroller, or receipt by the governing board of any report of an external audit performed by an independent public accountant or any management letter in conjunction with such an audit, the governing board may, in its discretion, provide to the comptroller, and file in the office of the clerk, or with the secretary if there is no clerk, of the municipal corporation, industrial development agency, district, agency or activity, a written response to the findings and recommendations, if any, in the report or letter. In the case of municipal corporations, industrial development agency, districts, agencies or activities subject to examination by the commissioner of education, any written response shall also be provided to such commissioner.

(2) A written response prepared pursuant to subparagraph one of this paragraph shall be in such form as may be prescribed by the comptroller and shall include, with respect to each finding or recommendation, a statement of the corrective actions taken or proposed to be taken, or if corrective action is not taken or proposed, an explanation of the reasons therefor. Any such written response shall also include a statement on the status of corrective actions taken on findings or recommendations contained in any previous report of examination, or report of an external audit, or any management letter prepared in conjunction therewith, by an independent public accountant for which a written response was required. All officers and employees of the municipal corporation, industrial development agency, district, agency or activity shall fully cooperate with the governing board in the preparation of the response by the governing board.

(c) The provisions of this subdivision shall not apply to any city having a population of one million or more.

HISTORY:

Add, L 1945, ch 612, § 2; amd, L 1946, ch 511, § 2, eff April 5, 1946; L 1950, ch 433, § 1; L 1960, ch 441, § 1; L 1964, ch 696, § 5; L 1988, ch 376, § 1,2, eff Jan 1, 1989; L 1989, ch 692, § 2, eff July 22, 1989.

Prior Law: Former § 35, add, L 1909, ch 29; amd, L 1943, ch 653, § 4, L 1944, ch 565, § 4; renumbered § 34 and amd, L 1945, ch 612, § 1.

Notes to Decisions

Public interest demands that there be no legal or practical constraint placed on contents of reports of comptroller or deterrent to their availability to public scrutiny. Ward Telecommunications & Computer Services, Inc. v State, 42 N.Y.2d 289, 397 N.Y.S.2d 751, 366 N.E.2d 840, 1977 N.Y. LEXIS 2206 (N.Y. 1977).

Court incorrectly dismissed counts of indictment charging first degree offering false instrument for filing on ground that subject vouchers did not constitute "written instruments" under CLS Penal § 170.00(1) since vouchers were prepared and submitted by defendants, town officials, to Associate Examiner of State Comptroller's Office, who was performing audit of town's financial condition, to justify certain purported "chargebacks" to town's general fund from separate capital fund, and vouchers could have been relied on by Associate Examiner and thus necessarily would have affected his findings and conclusions as to town's financial condition in his final report with State Comptroller. People v Jacob, 248 A.D.2d 638, 670 N.Y.S.2d 530, 1998 N.Y. App. Div. LEXIS 2912 (N.Y. App. Div. 2d Dep't), app. denied sub. nom., People v Kluesner, 92 N.Y.2d 880, 678 N.Y.S.2d 27, 700 N.E.2d 565, 1998 N.Y. LEXIS 5091 (N.Y. 1998), app. denied sub. nom., People v Kelly, 92 N.Y.2d 880, 678 N.Y.S.2d 27, 700 N.E.2d 565, 1998 N.Y. LEXIS 5087 (N.Y. 1998), app. denied sub. nom., People v Harrington, 92 N.Y.2d 880, 678 N.Y.S.2d 27, 700 N.E.2d 565 (N.Y. 1998), app. denied sub. nom., People v Bernard, 92 N.Y.2d 878, 678 N.Y.S.2d 25, 700 N.E.2d 563 (N.Y. 1998), app. denied, 92 N.Y.2d 878, 678 N.Y.S.2d 27, 700 N.E.2d 565, 1998 N.Y. LEXIS 2969 (N.Y. 1998).

In a defamation action the state examiner's published report of the examination of accounts of a village police justice was conditionally privileged, not absolutely privileged, and the privilege remains in the absence of a showing by the claimant of actual malice or carelessness so wanton or reckless as to imply malice on the part of the state or its examiners. Peeples v State, 38 N.Y.S.2d 690, 179 Misc. 272, 1942 N.Y. Misc. LEXIS 2232 (N.Y. Ct. Cl. 1942), overruled, Ward Telecommunications & Computer Services, Inc. v State, 42 N.Y.2d 289, 397 N.Y.S.2d 751, 366 N.E.2d 840, 1977 N.Y. LEXIS 2206 (N.Y. 1977).

In order to be designated for the publication of notice that a report of examination has been filed with the clerk of a municipality, a newspaper must be the official newspaper of the municipality, or if there is no official newspaper, it must be a newspaper having general circulation in the municipality. In order to be designated for the publication of notice of such filing with the clerk of a school district, other than a common school district, a newspaper must have general circulation in the district. A newspaper may not be designated for such purpose in the case of a common school district. 1945 Ops St Compt 172.

Although the town clerk is required to record in the minutes of a town board meeting the name of each member of the board who was present, the clerk is under no statutory duty to record the names of other persons attending the meeting. A decision to publish the minutes of a town board meeting must be made by the affirmative vote of a majority of all the members of the town board, and not by the town supervisor acting unilaterally. The town board may also elect to publish at town expense the report of examination prepared by the office of the state comptroller. 1990 Op St Compt No. 90-52.

Agency Opinions

Management letter prepared in conjunction with annual school district audit report is public document which must be made available to public, not confidential document separate from audit report. Comm on Open Gov't FOIL-AO-9881.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS St Fin § 9.

ARTICLE 4 Negligence and Malfeasance of Public Officers; Taxpayers' Remedies

Section
50-a. Municipal liability for negligent operation of vehicles
50-b. Municipal liability for negligent operation of vehicles or other facility of transportation
50-e. Notice of claim
50-i. Presentation of tort claims; commencement of actions
52. Liability insurance for officers and employees

HISTORY:
Add, L 1909, ch 29, eff Feb 17, 1909.

§ 50-a. Municipal liability for negligent operation of vehicles

1. Every city, town and village shall be liable for the negligence of a person duly appointed by the governing board or body of the municipality, or by any board, body, commission or other officer thereof, to operate a municipally owned vehicle within the state in the discharge of a statutory duty imposed upon the municipality, provided the appointee at the time of the accident or injury was acting in the discharge of his duties and within the scope of his employment. Every such appointee shall, for the purpose of this section, be deemed an employee of the municipality, notwithstanding the vehicle was being operated in the discharge of a public duty for the benefit of all citizens of the community and the municipality derived no special benefit in its corporate capacity.

2. The provisions of this section shall not apply to the city of New York.

HISTORY:
Add, L 1936, ch 100, § 1, with substance transferred from Highway L § 282–g; amd, L 1940, ch 687, § 1, eff April 22, 1940; L 1979, ch 673, § 2, eff July 13, 1979.

Editor's Notes: See 1979 note under § 50-k.

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16. Practice and procedure; notice of claim
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1. In general

Section 50-a fastens responsibility upon a political subdivision only when all the elements of liability as outlined in this section are present. Enstrom v New York, 258 A.D. 672, 17 N.Y.S.2d 964, 1940 N.Y. App. Div. LEXIS 8269 (N.Y. App. Div.), reh'g denied, 259 A.D. 832, 19 N.Y.S.2d 1022, 1940 N.Y. App. Div. LEXIS 6894 (N.Y. App. Div. 1940).

Section 50-a is merely a continuation of Highway Law § 282-g, and the cases construing the latter section are applicable with equal force to the former section. Schwartz v New York, 16 Misc. 2d 822, 25 N.Y.S.2d 964, 1941 N.Y. Misc. LEXIS 1358 (N.Y. Sup. Ct. 1941).

2. Purpose

The purpose of this section and § 50-b is to impose liability upon a city for negligent operation of vehicles by police and other municipal officers and thereby overcome the hardship visited upon those injured by such negligence and who would otherwise be without remedy. Poniatowski v New York, 14 N.Y.2d 76, 248 N.Y.S.2d 849, 198 N.E.2d 237, 1964 N.Y. LEXIS 1259 (N.Y. 1964).

The statutes evince an intent to limit the liability of a municipality to the operation of vehicles upon the public streets or highways of the municipality or fire district. Cox v Greenwich, 33 A.D.2d 264, 306 N.Y.S.2d 987, 1970 N.Y. App. Div. LEXIS 5650 (N.Y. App. Div. 3d Dep't 1970).

3. Construction

Section 50-a (former Highway Law § 282-g) must be strictly construed regardless of its remedial characteristics. Berger v New York, 260 A.D. 402, 22 N.Y.S.2d 1006, 1940 N.Y. App. Div. LEXIS 4607 (N.Y. App. Div.), reh'g denied, 260 A.D. 1018, 24 N.Y.S.2d 1009, 1940 N.Y. App. Div. LEXIS 5881 (N.Y. App. Div. 1940), aff'd, 285 N.Y. 723, 34 N.E.2d 894, 285 N.Y. (N.Y.S.) 723, 1941 N.Y. LEXIS 1713 (N.Y. 1941).

While the section is remedial in character, it is also in derogation of the common law and must be strictly construed. Bernardine v New York, 268 A.D. 444, 51 N.Y.S.2d 888, 1944 N.Y. App. Div. LEXIS 3192 (N.Y. App. Div. 1944), aff'd, 294 N.Y. 361, 62 N.E.2d 604, 294 N.Y. (N.Y.S.) 361, 1945 N.Y. LEXIS 761 (N.Y. 1945).

4. Relationship to other statutes

The history of § 50-a and words of limitation in § 50-b make it clear that the indemnity afforded by § 50-b applies only in favor of an employee while discharging a governmental function. Fiebinger v New York, 51 N.Y.S.2d 383, 182 Misc. 1007, 1944 N.Y. Misc. LEXIS 2522 (N.Y. Sup. Ct. 1944).

In determining the applicability of § 50-c, the provisions of §§ 50-a, 50-b and 50-c must be read together. Fiebinger v New York, 51 N.Y.S.2d 383, 182 Misc. 1007, 1944 N.Y. Misc. LEXIS 2522 (N.Y. Sup. Ct. 1944).

5. Scope of liability; municipally-owned vehicles

A horse is not a "vehicle" within the meaning of §§ 50-a, 50-b, 50-c in effect at the time of the accident. Douglass v New York, 266 A.D. 717, 41 N.Y.S.2d 935, 1943 N.Y. App. Div. LEXIS 4035 (N.Y. App. Div. 1943).

6. —Fire department vehicles

Town was not liable under doctrine of respondeat superior as owner of ambulance involved in accident, even though CLS Gen Mun §§ 50-a, 50-b, and 205-b provide that town is liable for negligence of town "appointee" while operating municipally owned vehicle in discharge of his duties, since town had established fire district, thereby creating wholly independent political subdivision whose "members," including voluntary fireman who was driving ambulance, were employees of district and not town. Nelson v Garcia, 152 A.D.2d 22, 548 N.Y.S.2d 963, 1989 N.Y. App. Div. LEXIS 14856 (N.Y. App. Div. 4th Dep't 1989).

This section applies only to "municipally owned vehicles" and is inapplicable to damage caused by a fireman in operation of a privately owned vehicle. Sikora v Steinberg, 40 Misc. 2d 649, 243 N.Y.S.2d 766, 1963 N.Y. Misc. LEXIS 1586 (N.Y. Sup. Ct. 1963), aff'd, 20 A.D.2d 852, 249 N.Y.S.2d 401, 1964 N.Y. App. Div. LEXIS 5056 (N.Y. App. Div. 2d Dep't 1964).

A town is not liable for injuries or damage caused by negligent operation of vehicles owned by a fire district. 1947 Ops St Compt 458.

7. —Police vehicles

New York city was not liable for damages for the death of plaintiff's intestate as a result of being struck by an automobile driven by a police officer who had commandeered the vehicle

while pursuing fleeing suspects, notwithstanding the fact that the automobile in question came in violent contact with a push cart being lawfully operated on a public street by said intestate, and that it is conceded by defendant city that the police officer was guilty of negligence, and his negligence caused the injury and death of plaintiff's intestate. Berger v New York, 260 A.D. 402, 22 N.Y.S.2d 1006, 1940 N.Y. App. Div. LEXIS 4607 (N.Y. App. Div.), reh'g denied, 260 A.D. 1018, 24 N.Y.S.2d 1009, 1940 N.Y. App. Div. LEXIS 5881 (N.Y. App. Div. 1940), aff'd, 285 N.Y. 723, 34 N.E.2d 894, 285 N.Y. (N.Y.S.) 723, 1941 N.Y. LEXIS 1713 (N.Y. 1941).

"Municipally owned" vehicle within the meaning of § 50-a (former Highway Law § 282-g) means owned by a municipality and not a vehicle commandeered by police officer in order to pursue fleeing suspects. Berger v New York, 260 A.D. 402, 22 N.Y.S.2d 1006, 1940 N.Y. App. Div. LEXIS 4607 (N.Y. App. Div.), reh'g denied, 260 A.D. 1018, 24 N.Y.S.2d 1009, 1940 N.Y. App. Div. LEXIS 5881 (N.Y. App. Div. 1940), aff'd, 285 N.Y. 723, 34 N.E.2d 894, 285 N.Y. (N.Y.S.) 723, 1941 N.Y. LEXIS 1713 (N.Y. 1941).

8. Employee negligence, generally

Compliance by the plaintiffs with §§ 50-a, 50-b, 50-c, is not required where the action arises out of an accident which did not occur on the streets of the municipality. Babcock v McCaffrey, 300 N.Y.S. 493, 165 Misc. 103, 1937 N.Y. Misc. LEXIS 1948 (N.Y. Sup. Ct. 1937).

Section 50-a affords a remedy against sovereign immunity to persons injured through the negligence of an employee engaged in a governmental function. Fiebinger v New York, 51 N.Y.S.2d 383, 182 Misc. 1007, 1944 N.Y. Misc. LEXIS 2522 (N.Y. Sup. Ct. 1944).

9. —Firemen

There is no recovery, under this section, for the loss of personal property destroyed in a fire, on the theory that the state, through its municipal agent, negligently failed to furnish sufficient fire protection. Hughes v State, 252 A.D. 263, 299 N.Y.S. 387, 1937 N.Y. App. Div. LEXIS 5626 (N.Y. App. Div. 1937).

Even though accident occurred prior to the adoption of General Municipal Law § 204-a extending benefit coverage so as to include accidents occurring during fund raising activities, municipality would be vicariously liable for death of fireman who fell from running board of the fire engine, where fire chief had authorized use of fire engine in fund raising activities and village trustees did not object. Swerdzewski v Westhampton Beach, 30 A.D.2d 694, 291 N.Y.S.2d 848, 1968 N.Y. App. Div. LEXIS 3750 (N.Y. App. Div. 2d Dep't 1968), aff'd, in part, transferred, 24 N.Y.2d 760, 300 N.Y.S.2d 33, 247 N.E.2d 855, 1969 N.Y. LEXIS 1480 (N.Y. 1969).

There is no statute providing for an exemption from liability on the part of a village for injuries to persons or property which results from the negligent acts of a volunteer fireman when acting in the discharge of his duties. Cox v Greenwich, 33 A.D.2d 264, 306 N.Y.S.2d 987, 1970 N.Y. App. Div. LEXIS 5650 (N.Y. App. Div. 3d Dep't 1970).

In the absence of any statutory exemption for liability of a municipality to a plaintiff injured by a volunteer fireman negligently operating a private vehicle in the performance of his duties, the broad liability of municipalities for the negligence of their employees should be applied. Cox v Greenwich, 33 A.D.2d 264, 306 N.Y.S.2d 987, 1970 N.Y. App. Div. LEXIS 5650 (N.Y. App. Div. 3d Dep't 1970).

10. —Highway department employees

A negligence action against a town for injuries received by the plaintiff when the town's snow plow was in use upon a highway within the town when it collided with a car, was erroneously dismissed as to the town on the ground that the county road map designated the road on which the plow was at work as part of a county road system. Hemmingway v Dannemora, 269 A.D. 221, 55 N.Y.S.2d 828, 1945 N.Y. App. Div. LEXIS 2956 (N.Y. App. Div. 1945).

Snow removal from private roads and driveways by town highway equipment is improper. A town is not liable for negligence springing from the ultra vires acts of its officers and employees, liability, if any, resting with such officers and employees themselves. 1968 Ops St Compt File #818.

11. —Law enforcement employees

There is no reason for not extending the relief thus afforded private persons to police officers riding in a car driven by a fellow officer, as the phrasing of this section and § 50-b is such as to indicate that a defense of non-liability by reason of injuries sustained due to negligence of a fellow-servant is not available to the city. Poniatowski v New York, 14 N.Y.2d 76, 248 N.Y.S.2d 849, 198 N.E.2d 237, 1964 N.Y. LEXIS 1259 (N.Y. 1964).

The City of Albany, not being compelled to carry workmen's compensation insurance on its police officers and not having brought them within coverage of the Workmen's Compensation Law, was liable in damages for death of a policeman killed while riding in a prowl car due to negligent driving by a fellow employee. Robinson v Albany, 14 A.D.2d 626, 218 N.Y.S.2d 421, 1961 N.Y. App. Div. LEXIS 9401 (N.Y. App. Div. 3d Dep't 1961).

The negligence of a deputy sheriff in driving a county-owned vehicle is attributable to the county as owner of the vehicle. George v County of Erie, 66 Misc. 2d 871, 322 N.Y.S.2d 278, 1971 N.Y. Misc. LEXIS 1505 (N.Y. Sup. Ct. 1971).

In action by replacement worker who was injured by rock thrown by striking worker, question of fact was raised as to existence of requisite "special relationship" between municipality and plaintiff, precluding summary judgment on issue of municipality's alleged negligence in providing police services, since (1) plaintiff did not have direct contact with police, but was arguably part of limited group on whose behalf employer sought and obtained judicial order mandating police protection, (2) previous acts and threats of violence by striking workers created issue of fact as to whether police knew that inaction could lead to harm, (3) judge's order, requiring police to enforce preliminary injunction, created issue of fact as to whether police had assumed duty to protect replacement workers, and (4) fact that court had ordered police protection created issue of fact as to whether plaintiff and other replacement workers justifiably relied on such protection. Mauney v Imperial Delivery Servs., 865 F. Supp. 142, 1994 U.S. Dist. LEXIS 13831 (S.D.N.Y. 1994).

12. Employees' liability

Nothing in §§ 50-a et seq., suggests an attempt to provide indemnification to a municipal employee engaged in the operation of transit facilities where the injured person has a common-law remedy against the municipality and the employee. Fiebinger v New York, 51 N.Y.S.2d 383, 182 Misc. 1007, 1944 N.Y. Misc. LEXIS 2522 (N.Y. Sup. Ct. 1944).

13. —Conduct outside scope of employment

Snow removal from private roads and driveways by town highway equipment is improper. A town is not liable for negligence springing from the ultra vires acts of its officers and employees, liability, if any, resting with such officers and employees themselves. 1968 Ops St Compt File #818.

14. Insurance

A city had a liability policy on one of its police prowl cars. While cruising about the city, the prowl car had an accident and a passenger-police officer was killed. Held: the liability policy did not insure the city and the driver-police officer against liability in a wrongful death action against the city and the police officer who was driving. The deceased officer was a fellow servant or "another employee of the city" and as such was excluded by the policy. Albany v Standard Acci. Ins. Co., 7 N.Y.2d 422, 198 N.Y.S.2d 303, 165 N.E.2d 869, 1960 N.Y. LEXIS 1435 (N.Y. 1960).

Where there is no fire district in a town and no tax for fire protection purposes is levied, the town board may not expend town funds for the purchase of public liability insurance upon a truck owned by and licensed in the name of an unincorporated volunteer fire company furnishing fire protection services in the town. The town board may, however, expend town funds for the purchase of insurance indemnifying the town against any loss by reason of the liability imposed by Section 205 of the General Municipal Law. 1945 Ops St Compt 176.

15. —Other liability protection

A village discharged its duty to a volunteer fireman where it provided the coverage required by General Municipal Law § 205 and the applicable provisions of the Workmen's Compensation Law even though there would be no award of compensation since

deceased had no surviving spouse, child or dependent parent. This section was not applicable. Poulakis v Freeport, 7 Misc. 2d 1005, 162 N.Y.S.2d 737, 1957 N.Y. Misc. LEXIS 3287 (N.Y. Sup. Ct. 1957).

16. Practice and procedure; notice of claim

An action by a plaintiff claiming injury as a result of negligence of defendant, the operator of a trolley car owned by New York city, is not one "instituted pursuant to the provisions of" § 50-b, and plaintiff was not obliged to serve notices required in § 50-c. Fiebinger v New York, 51 N.Y.S.2d 383, 182 Misc. 1007, 1944 N.Y. Misc. LEXIS 2522 (N.Y. Sup. Ct. 1944).

Ninety day notice of claim period contained in General Municipal Law § 50-e does not fall within provisions of CPLR § 204, subd a. Santaniello v De Francisco, 74 Misc. 2d 229, 344 N.Y.S.2d 589, 1973 N.Y. Misc. LEXIS 1877 (N.Y. Sup. Ct. 1973), aff'd, 44 A.D.2d 831, 355 N.Y.S.2d 569, 1974 N.Y. App. Div. LEXIS 5109 (N.Y. App. Div. 2d Dep't 1974).

An action could be maintained against a city for injuries arising out of an accident involving an automobile operated by a police officer without notice served on the officer. Stern v Stoll, 29 N.Y.S.2d 311, 1941 N.Y. Misc. LEXIS 2054 (N.Y. App. Term 1941).

17. —Sufficiency of complaint

A complaint for damages for personal injuries which alleged that the car driven by the defendant was owned by the city and operated by the defendant with its permission was defective where it failed to allege compliance with the provisions of §§ 50-a through 50-e of the General Municipal Law. Griffo v Tauriello, 23 Misc. 2d 430, 198 N.Y.S.2d 160, 1960 N.Y. Misc. LEXIS 3310 (N.Y. Sup. Ct. 1960).

Agency Opinions

Analysis

1. Employee negligence, generally
2. —Other employees

1. Employee negligence, generally

2. —Other employees

The individual volunteer member of a civil defense force and the municipality are immune from liability for the tort or negligent act of such member committed during a declared emergency or any drill authorized by the local civil defense director. A drill is an authorized test, training or practice exercise, which may include directing traffic and patrolling neighborhoods. 1980 NY Ops Atty Gen March 21 (informal).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS Gen Mun § 205-b.

Jurisprudences:

4 Medina's Bostwick Practice Manual (Matthew Bender), Forms 38:101 et seq. (actions and proceedings against municipalities, public corporations and their agencies).

57 Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 225, 238–241.

Matthew Bender's New York Practice Guides: LexisNexis AnswerGuide New York Negligence § 2.09[1][f] Identifying Applicable Theories of Liability in Motor Vehicle Cases.

LexisNexis AnswerGuide New York Negligence § 2.09 Identifying Applicable Theories of Liability in Motor Vehicle Cases.

LexisNexis AnswerGuide New York Negligence § 6.09 Choosing Appropriate Basis of Liability.

Warren's Negligence in the New York Courts §§ 33.04, 99.03[4], 146.01[8], 194.01[5] (vicarious liability; scope of employment).

Warren's Negligence in the New York Courts Ch. 228 (motor vehicle liability).

Texts: Warren's Negligence in the New York Courts § 33.07 Liability for operation of motor vehicles under General Municipal Law.

§ 50-b. Municipal liability for negligent operation of vehicles or other facility of transportation

1. Every county, city, town, village and other subdivision of government, notwithstanding any inconsistent provisions of law, general, special or local or any limitation contained in the provision of any city charter, shall be liable and shall assume the liability for the negligence of, and shall save harmless, a person duly appointed by the governing board or body of the municipality, or by any board, body, commission or other officer thereof, in the operation of a municipally owned vehicle or other facility of transportation within the state in the discharge of a statutory duty imposed upon such person or municipality, provided the appointee at the time of the accident or injury was acting in the discharge of his duties and within the scope of his employment. Every such appointee shall, for the purpose of this section, be deemed an employee of the municipality, notwithstanding the vehicle or other facility of transportation was being operated in the discharge of a public duty for the benefit of all citizens of the community and the municipality derived no special benefit in its corporate capacity.

2. The provisions of this section shall not apply to the city of New York.

HISTORY:

Add, L 1936, ch 323, § 1, with substance transferred from Highway L § 282–g; amd, L 1940, ch 687, § 2; L 1941, ch 852, § 1, eff April 28, 1941; L 1979, ch 673, § 3, eff July 13, 1979.

Editor's Notes: See 1979 note under § 50-k.

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1. In general
2. Purpose
3. Relationship to other statutes
4. Scope of liability, generally
5. Subdivisions of government
6. Municipally-owned vehicles
7. Facility of transportation; horses
8. Appointees
9. Firemen
10. Highway employees
11. Medical employees
12. Transportation employees
13. Other employees
14. Nonemployees; relatives of employees
15. Towing company
16. Common law actions
17. Practice and procedure; when notice of claim required
18. Late notice of claim
19. Statute of limitations

1. In general

Under this section a direct liability for the negligence of its employees is imposed upon the municipality, and also direct responsibility to indemnify employee for any loss, provided that at the time of the accident he was operating a town-owned vehicle in the discharge of a statutory duty, etc., and, regardless of whether the municipality is joined as a party to any such action, its liability arises automatically under this statute, and § 50-c was intended to protect the municipality upon its automatic liability. Thayer v Westervelt, 105 N.Y.S.2d 745, 1951 N.Y. Misc. LEXIS 1964 (N.Y. Sup. Ct. 1951).

2. Purpose

The statutes evince an intent to limit the liability of a municipality to the operation of vehicles upon the public streets or

highways of the municipality or fire district. Cox v Greenwich, 33 A.D.2d 264, 306 N.Y.S.2d 987, 1970 N.Y. App. Div. LEXIS 5650 (N.Y. App. Div. 3d Dep't 1970).

This section was not intended to deprive the litigant of his common-law action for negligence against the operator of a vehicle. Circle Cab Corp. v Rizzuto, 295 N.Y.S. 185, 162 Misc. 547, 1937 N.Y. Misc. LEXIS 1644 (N.Y. Mun. Ct. 1937).

3. Relationship to other statutes

Plaintiff was not barred by Work Comp Law § 11 from asserting a cause of action against a county, even though his employer, which operated a county public transit system, was an appointee of the county within the meaning of Gen Mun Law § 50-b(1), where there was no indication that plaintiff was controlled or paid by the county, that the county furnished the equipment with which he worked, or that the county had the right to discharge him, and where, in fact, the only relationship between plaintiff and the county was that plaintiff was an employee of a company statutorily defined as an employee of the county. Carrion v County of Westchester, 99 A.D.2d 793, 472 N.Y.S.2d 123, 1984 N.Y. App. Div. LEXIS 17184 (N.Y. App. Div. 2d Dep't), app. dismissed, 62 N.Y.2d 802, 1984 N.Y. LEXIS 8281 (N.Y. 1984), app. dismissed, 63 N.Y.2d 943, 1984 N.Y. LEXIS 6200 (N.Y. 1984).

Defendant transit corporation was not entitled to change of venue from Bronx County to Westchester County under CLS CPLR § 504(1) because Westchester County was not party to action and, even if CLS Gen Mun § 50-b(1) was operative in context of § 504, defendant was not Westchester County employee under § 50-b(1) where there was no evidence of employer-employee relationship. Beaufort v Liberty Lines Transit, Inc., 270 A.D.2d 297, 704 N.Y.S.2d 284, 2000 N.Y. App. Div. LEXIS 2729 (N.Y. App. Div. 2d Dep't 2000).

In determining the applicability of § 50-c, the provisions of §§ 50-a, 50-b and 50-c must be read together. Fiebinger v New York, 51 N.Y.S.2d 383, 182 Misc. 1007, 1944 N.Y. Misc. LEXIS 2522 (N.Y. Sup. Ct. 1944).

4. Scope of liability, generally

The history of § 50-a and words of limitation in § 50-b make it clear that the indemnity afforded by § 50-b applies only in favor of employee while discharging a governmental function. Fiebinger v New York, 51 N.Y.S.2d 383, 182 Misc. 1007, 1944 N.Y. Misc. LEXIS 2522 (N.Y. Sup. Ct. 1944).

5. Subdivisions of government

A central school district is a subdivision of Government within the meaning of this section. Hence, a negligence action against the driver of a bus owned by the school district cannot be maintained unless notice of claim was served pursuant to § 50-e. Van Tassell v Hill, 285 A.D. 584, 139 N.Y.S.2d 663, 1955 N.Y. App. Div. LEXIS 5542 (N.Y. App. Div. 1955).

6. Municipally-owned vehicles

A horse is not a "vehicle" within the meaning of §§ 50-a, 50-b, 50-c in effect at the time of the accident. Douglass v New York, 266 A.D. 717, 41 N.Y.S.2d 935, 1943 N.Y. App. Div. LEXIS 4035 (N.Y. App. Div. 1943).

This section applies only to "municipally owned vehicles" and is inapplicable to damage caused by a fireman in operation of a privately owned vehicle. Sikora v Steinberg, 40 Misc. 2d 649, 243 N.Y.S.2d 766, 1963 N.Y. Misc. LEXIS 1586 (N.Y. Sup. Ct. 1963), aff'd, 20 A.D.2d 852, 249 N.Y.S.2d 401, 1964 N.Y. App. Div. LEXIS 5056 (N.Y. App. Div. 2d Dep't 1964).

7. Facility of transportation; horses

A horse is a "facility of transportation" within the section. Bernardine v New York, 294 N.Y. 361, 62 N.E.2d 604, 294 N.Y. (N.Y.S.) 361, 1945 N.Y. LEXIS 761 (N.Y. 1945).

In an action against a city for damages for personal injuries to plaintiff caused by a runaway police horse owned by the city and stopped by plaintiff on public highway, it was error for the court to dismiss the complaint solely on the ground that as a matter of law, the 1941 amendment to § 50-b did not extend statutory waiver of governmental immunity to negligence in "operation" of a city-owned police horse. Horse used to facilitate transporation of mounted policeman in course of his duties, is "a facility of transportation" within the meaning of § 50-b. Bernardine v New York, 268 A.D. 444, 51 N.Y.S.2d 888, 1944 N.Y. App. Div. LEXIS 3192 (N.Y. App. Div. 1944), aff'd, 294 N.Y. 361, 62 N.E.2d 604, 294 N.Y. (N.Y.S.) 361, 1945 N.Y. LEXIS 761 (N.Y. 1945).

A person injured by a mounted policeman's horse owned by the city, must recover under § 50-b, if at all, and to recover thereunder there must be a compliance with the terms of § 50-c. Bernardine v New York, 268 A.D. 444, 51 N.Y.S.2d 888, 1944 N.Y. App. Div. LEXIS 3192 (N.Y. App. Div. 1944), aff'd, 294 N.Y. 361, 62 N.E.2d 604, 294 N.Y. (N.Y.S.) 361, 1945 N.Y. LEXIS 761 (N.Y. 1945).

Injuries allegedly sustained by worker while engaged in replacing ceiling tiles in building used for maintenance, storage and fueling of county bus fleet did not arise out of "the operation of a municipally owned vehicle or other facility of transportation" within meaning of CLS Gen Mun § 50-b(1). Bailey v AGR Realty Co., 260 A.D.2d 322, 689 N.Y.S.2d 65, 1999 N.Y. App. Div. LEXIS 4359 (N.Y. App. Div. 1st Dep't 1999).

Under principle of ejusdem generis, general phrase "facility of transportation" in CLS Gen Mun § 50-b(1) is limited, by specific term "vehicle" preceding it, to actual instruments of transportation. Bailey v AGR Realty Co., 260 A.D.2d 322, 689 N.Y.S.2d 65, 1999 N.Y. App. Div. LEXIS 4359 (N.Y. App. Div. 1st Dep't 1999).

8. Appointees

When an action is brought under this section the word "appointee" is applicable only to "a person duly appointed," and when an action is brought under § 50-c "appointee" is applicable only to "any duly appointed policeman or fireman of the municipality." Circle Cab Corp. v Rizzuto, 295 N.Y.S. 185, 162 Misc. 547, 1937 N.Y. Misc. LEXIS 1644 (N.Y. Mun. Ct. 1937).

9. Firemen

Even though accident occurred prior to the adoption of General Municipal Law § 204-a extending benefit coverage so as to include accidents occurring during fund raising activities, municipality would be vicariously liable for the death of fireman who fell from running board of fire engine, where fire chief had authorized use of fire engine in fund raising activities and village trustees did not object. Swerdzewski v Westhampton Beach, 30 A.D.2d 694, 291 N.Y.S.2d 848, 1968 N.Y. App. Div. LEXIS 3750 (N.Y. App. Div. 2d Dep't 1968), aff'd, in part, transferred, 24 N.Y.2d 760, 300 N.Y.S.2d 33, 247 N.E.2d 855, 1969 N.Y. LEXIS 1480 (N.Y. 1969).

Town was not liable under doctrine of respondeat superior as owner of ambulance involved in accident, even though CLS Gen Mun §§ 50-a, 50-b, and 205-b provide that town is liable for negligence of town "appointee" while operating municipally owned vehicle in discharge of his duties, since town had established fire district, thereby creating wholly independent political subdivision whose "members," including voluntary fireman who was driving ambulance, were employees of district and not town. Nelson v Garcia, 152 A.D.2d 22, 548 N.Y.S.2d 963, 1989 N.Y. App. Div. LEXIS 14856 (N.Y. App. Div. 4th Dep't 1989).

This section applies only to "municipally owned vehicles" and is inapplicable to damage caused by a fireman in operation of a privately owned vehicle. Sikora v Steinberg, 40 Misc. 2d 649, 243 N.Y.S.2d 766, 1963 N.Y. Misc. LEXIS 1586 (N.Y. Sup. Ct. 1963), aff'd, 20 A.D.2d 852, 249 N.Y.S.2d 401, 1964 N.Y. App. Div. LEXIS 5056 (N.Y. App. Div. 2d Dep't 1964).

Where there is no fire district in a town and no tax for fire protection purposes is levied, the town board may not expend town funds for the purchase of public liability insurance upon a truck owned by and licensed in the name of an unincorporated volunteer fire company furnishing fire protection services in the town. The town board may, however, expend town funds for the purchase of insurance indemnifying the town against any loss by reason of the liability imposed by Section 205 of the General Municipal Law. 1945 Ops St Compt 176.

A town is not liable for injuries or damage caused by negligent operation of vehicles owned by a fire district. 1947 Ops St Compt 458.

10. Highway employees

Snow removal from private roads and driveways by town highway equipment is improper. A town is not liable for negligence springing from the ultra vires acts of its officers and

employees, liability, if any, resting with such officers and employees themselves. 1968 Ops St Compt File #818.

11. Medical employees

This section, and §§ 50-c and 50-e were inapplicable where it did not appear from the face of a complaint that defendant was operating a municipally-owned vehicle "in discharge of a statutory duty" or had been "appointed", although she claimed to have been acting as duly appointed health nurse and was acting in discharge of her duties in operating a county-owned vehicle which allegedly caused the injuries to plaintiff, no claim having been served upon the county in connection with the accident and defendant's answers consisting exclusively of general denials. Furlo v Cheek, 20 A.D.2d 939, 248 N.Y.S.2d 947, 1964 N.Y. App. Div. LEXIS 3920 (N.Y. App. Div. 3d Dep't 1964).

12. Transportation employees

Sections 50-b and 50-c did not apply, where it did not appear from the complaint, that the bus driver was driving a "municipally owned" vehicle, that he was duly appointed by the board to drive the vehicle, or that the vehicle was being driven "in the discharge of a statutory duty." Millard v Lewis, 17 Misc. 2d 698, 185 N.Y.S.2d 708, 1959 N.Y. Misc. LEXIS 4054 (N.Y. Sup. Ct. 1959).

13. Other employees

Under §§ 50-a and 50-b towns become liable for negligence of a driver of a truck in operation thereof on highways in discharge of a duty imposed on the town, even though the duty is a public duty for the benefit of the community and of no special benefit to the town. Van Buren v Richmondville, 253 A.D. 484, 3 N.Y.S.2d 128, 1938 N.Y. App. Div. LEXIS 8477 (N.Y. App. Div.), rev'd, 278 N.Y. 619, 16 N.E.2d 126, 278 N.Y. (N.Y.S.) 619, 1938 N.Y. LEXIS 1439 (N.Y. 1938).

14. Nonemployees; relatives of employees

Wife of county employee was engaged in county business while driving husband's county car, and was thus insured, where at time of accident wife was on route to beach to locate husband who had been summoned to work pursuant to 24-hour "on call" nature of employment. Glens Falls Ins. Co. v United States Fire Ins. Co., 41 A.D.2d 869, 342 N.Y.S.2d 624, 1973 N.Y. App. Div. LEXIS 4692 (N.Y. App. Div. 3d Dep't 1973), aff'd, 34 N.Y.2d 778, 358 N.Y.S.2d 773, 315 N.E.2d 813, 1974 N.Y. LEXIS 1562 (N.Y. 1974).

15. Towing company

Where the initial removal of the plaintiff's vehicle from the street was a proper one under the circumstances, the city could not be held responsible for the subsequent irresponsible behavior of the towing company in destroying the vehicle in violation of its contract with the city and thereby failing to afford plaintiff the opportunity of recovering his property. Turkel v Fiore, 62 Misc. 2d 210, 308 N.Y.S.2d 432, 1970 N.Y. Misc. LEXIS 1868 (N.Y. Civ. Ct. 1970).

16. Common law actions

Nothing in §§ 50-a et seq., suggests an attempt to provide indemnification to the municipal employee engaged in the operation of transit facilities where an injured person has the common-law remedy against the municipality and the employee. Fiebinger v New York, 51 N.Y.S.2d 383, 182 Misc. 1007, 1944 N.Y. Misc. LEXIS 2522 (N.Y. Sup. Ct. 1944).

17. Practice and procedure; when notice of claim required

A central school district is a subdivision of Government within the meaning of this section. Hence, a negligence action against the driver of a bus owned by the school district cannot be maintained unless notice of claim was served pursuant to § 50-e. Van Tassell v Hill, 285 A.D. 584, 139 N.Y.S.2d 663, 1955 N.Y. App. Div. LEXIS 5542 (N.Y. App. Div. 1955).

There is no necessity for service of a notice of claim upon a municipality as a condition precedent for an action against a city police officer for false arrest or malicious prosecution where the municipality is not made a party. O'Hara v Sears Roebuck & Co., 286 A.D. 104, 142 N.Y.S.2d 465, 1955 N.Y. App. Div. LEXIS 3985 (N.Y. App. Div. 1955).

Neither this section, nor §§ 50-c and 50-e, are applicable to a fire district, liability of such districts for negligent operation of vehicles owned by the district being as prescribed in § 205-b, which contains no requirement of preliminary service of notice of claim. Seyer v Schoen, 6 A.D.2d 177, 175 N.Y.S.2d 1003, 1958 N.Y. App. Div. LEXIS 5122 (N.Y. App. Div. 4th Dep't 1958).

This section, and §§ 50-c and 50-e were inapplicable where it did not appear from the face of a complaint that defendant was operating a municipally-owned vehicle "in discharge of a statutory duty" or had been "appointed", although she claimed to have been acting as duly appointed health nurse and was acting in discharge of her duties in operating a county-owned vehicle which allegedly caused the injuries to plaintiff, no claim having been served upon the county in connection with the accident and defendant's answers consisting exclusively of general denials. Furlo v Cheek, 20 A.D.2d 939, 248 N.Y.S.2d 947, 1964 N.Y. App. Div. LEXIS 3920 (N.Y. App. Div. 3d Dep't 1964).

Although this section imposes upon a city ultimate liability for damage inflicted by a city employee in performance of duties and within the scope of his employment, due and timely service of notice of claim upon the city under § 50-e is a condition precedent to commencement of an action to enforce such liability. Rusch v Karpick, 20 A.D.2d 954, 248 N.Y.S.2d 451, 1964 N.Y. App. Div. LEXIS 4110 (N.Y. App. Div. 4th Dep't 1964).

In a claim for damages arising from a collision with a school bus, timely service of a notice of claim in accordance with General Municipal Law § 50-e was required upon the driver of the school bus as a condition precedent to the maintenance of an action against him. Pugh v Board of Education, 38 A.D.2d 619, 326 N.Y.S.2d 300, 1971 N.Y. App. Div. LEXIS 2894 (N.Y. App. Div. 3d Dep't 1971), aff'd, 30 N.Y.2d 968, 335 N.Y.S.2d 830, 287 N.E.2d 621, 1972 N.Y. LEXIS 1215 (N.Y. 1972).

Where county had no obligation under CLS Gen Mun § 50-b to indemnify defendants against liability to plaintiff injured while working in county building, plaintiff was not required to file notice of claim as condition precedent to maintaining action under CLS Gen Mun § 50-e. Bailey v AGR Realty Co., 260 A.D.2d 322, 689 N.Y.S.2d 65, 1999 N.Y. App. Div. LEXIS 4359 (N.Y. App. Div. 1st Dep't 1999).

Action by a plaintiff claiming injury as a result of negligence of the defendant, an operator of a trolley car owned by New York city, is not one "instituted pursuant to the provisions of" § 50-b, and plaintiff was not obliged to serve notices required in § 50-c. Fiebinger v New York, 51 N.Y.S.2d 383, 182 Misc. 1007, 1944 N.Y. Misc. LEXIS 2522 (N.Y. Sup. Ct. 1944).

Sections 50-b and 50-e of the General Municipal Law do not require notice of claim to a county employee before suing him individually for injuries sustained by reason of his negligence in handling county equipment. De Angelo v Lattimer, 26 Misc. 2d 20, 208 N.Y.S.2d 75, 1960 N.Y. Misc. LEXIS 2193 (N.Y. Sup. Ct. 1960).

Notice of claim with respect to action against town employee must be served on town when employee is sued alone provided there is a duty on part of the municipality to indemnify employees. Fitzgerald v Sanitation Dist. No. 6, 89 Misc. 2d 1078, 393 N.Y.S.2d 542, 1977 N.Y. Misc. LEXIS 2730 (N.Y. City Ct.), modified, 116 Misc. 2d 325, 457 N.Y.S.2d 664, 1977 N.Y. Misc. LEXIS 2714 (N.Y. App. Term 1977).

Since town sanitation district would be under duty to indemnify district employee, claimed to have been negligent in operation of motor vehicle, were employee sued alone, claimants in that case would have to serve a notice of claim upon town and submit to oral examination pursuant to statute. Fitzgerald v Sanitation Dist. No. 6, 89 Misc. 2d 1078, 393 N.Y.S.2d 542, 1977 N.Y. Misc. LEXIS 2730 (N.Y. City Ct.), modified, 116 Misc. 2d 325, 457 N.Y.S.2d 664, 1977 N.Y. Misc. LEXIS 2714 (N.Y. App. Term 1977).

In an action in negligence arising out of the operation of a motor truck by the defendant where the complaint alleges that the defendant at the time was in possession and control of a certain truck owned by the town, and that such possession was with the town's consent, but there is no allegation that the defendant at the time of the accident was an employee of the town or that he was engaged in the performance of any duties on behalf of such town, a valid common law action in negligence is alleged against the defendant, and service of notice is unnecessary to sustain its sufficiency as a pleading. Thayer v Westervelt, 105 N.Y.S.2d 745, 1951 N.Y. Misc. LEXIS 1964 (N.Y. Sup. Ct. 1951).

18. Late notice of claim

While county, which allegedly owned the bus in which plaintiff was a passenger at time of accident, was not named a party defendant in action brought against transportation company which leased and operated the bus, there was no need for plaintiff to serve a late notice of claim against the county as a condition precedent to commencing her action against the transportation company only, irrespective of whatever agreement might exist between county and transportation company concerning indemnity for negligence. Rhodes v Westchester Street Transp. Co., 80 Misc. 2d 1021, 365 N.Y.S.2d 351, 1974 N.Y. Misc. LEXIS 1937 (N.Y. Sup. Ct. 1974).

Assuming, arguendo, that service of a notice of claim against county, which allegedly owned bus, was a necessary condition precedent to the commencement of an action by injured bus passenger against lessee and operator of the bus, plaintiff's affidavits were factually insufficient to warrant permitting service of a late notice of claim. Rhodes v Westchester Street Transp. Co., 80 Misc. 2d 1021, 365 N.Y.S.2d 351, 1974 N.Y. Misc. LEXIS 1937 (N.Y. Sup. Ct. 1974).

19. Statute of limitations

The 1-year Statute of Limitations provided by the New York City Administrative Code was applicable to an action against the city for injuries sustained as a result of an explosion on the subway. McGuire v New York, 3 Misc. 2d 569, 153 N.Y.S.2d 368, 1956 N.Y. Misc. LEXIS 1895 (N.Y. Sup. Ct. 1956).

In an action in negligence arising out of the operation of a motor truck by the defendant where the complaint alleges that the defendant at the time was in possession and control of a certain truck owned by the town, and that such possession was with the town's consent, but there is no allegation that the defendant at the time of the accident was an employee of the town or that he was engaged in the performance of any duties on behalf of such town, a valid common law action in negligence is alleged against the defendant, and service of notice is unnecessary to sustain its sufficiency as a pleading. Thayer v Westervelt, 105 N.Y.S.2d 745, 1951 N.Y. Misc. LEXIS 1964 (N.Y. Sup. Ct. 1951).

Agency Opinions

1. Other employees

Except for provisions of General Municipal Law § 50-b, neither a town nor a village may provide funds to save harmless employees of a joint recreation commission in connection with claims for negligence. 1966 NY Ops Atty Gen Oct 14.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 50-c, 205-b.

Jurisprudences:

4 Medina's Bostwick Practice Manual (Matthew Bender), Forms 38:101 et seq. (actions and proceedings against municipalities, public corporations and their agencies).

57 Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 225, 238–241.

Matthew Bender's New York Practice Guides: LexisNexis AnswerGuide New York Negligence § 2.09[1][g] Identifying Applicable Theories of Liability in Motor Vehicle Cases.

Lexis Nexis AnswerGuide New York Negligence § 6.09[1][a] Choosing Appropriate Basis of Liability.

LexisNexis AnswerGuide New York Negligence § 2.09 Identifying Applicable Theories of Liability in Motor Vehicle Cases.

LexisNexis AnswerGuide New York Negligence § 6.09 Choosing Appropriate Basis of Liability.

Warren's Negligence in the New York Courts Ch. 228 (motor vehicle liability).

Texts: Warren's Negligence in the New York Courts § 33.07 Liability for operation of motor vehicles under General Municipal Law.

§ 50-e. Notice of claim

1. When service required; time for service; upon whom service required.

(a) In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation, as defined in the general construction law, or any officer, appointee or employee thereof, the notice of claim shall comply with and be served in accordance with the provisions of this section within ninety days after the claim arises; except that in wrongful death actions, the ninety days shall run from the appointment of a representative of the decedent's estate.

(b) Service of the notice of claim upon an officer, appointee or employee of a public corporation shall not be a condition precedent to the commencement of an action or special proceeding against such person. If an action or special proceeding is commenced against such person, but not against the public corporation, service of the notice of claim upon the public corporation shall be required only if the corporation has a statutory obligation to indemnify such person under this chapter or any other provision of law.

2. Form of notice; contents. The notice shall be in writing, sworn to by or on behalf of the claimant, and shall set forth: (1) the name and post-office address of each claimant, and of his attorney, if any; (2) the nature of the claim; (3) the time when, the place where and the manner in which the claim arose; and (4) the items of damage or injuries claimed to have been sustained so far as then practicable but a notice with respect to a claim against a municipal corporation other than a city with a population of one million or more persons shall not state the amount of damages to which the claimant deems himself entitled, provided, however, that the municipal corporation, other than a city with a population of one million or more persons, may at any time request a supplemental claim setting forth the total damages to which the claimant deems himself entitled. A supplemental claim shall be provided by the claimant within fifteen days of the request. In the event the supplemental demand is not served within fifteen days, the court, on motion, may order that it be provided by the claimant.

3. How served; when service by mail complete; defect in manner of service; return of notice improperly served.

(a) The notice shall be served on the public corporation against which the claim is made by delivering a copy thereof personally, or by registered or certified mail, to the person designated by law as one to whom a summons in an action in the supreme court issued against such corporation may be delivered, or to an attorney regularly engaged in representing such public corporation or, in a city with a population of over one million, by electronic means in a form and manner prescribed by such city.

(b) Service by registered or certified mail shall be complete upon deposit of the notice of claim, enclosed in a postpaid properly addressed wrapper, in a post office or official depository under the exclusive

care and custody of the United States post office department within the state.

(c) If the notice is served within the period specified by this section, but in a manner not in compliance with the provisions of this subdivision, the service shall be valid if the public corporation against which the claim is made demands that the claimant or any other person interested in the claim be examined in regard to it, or if the notice is actually received by a proper person within the time specified by this section, and the public corporation fail to return the notice, specifying the defect in the manner of service, within thirty days after the notice is received.

(d) If the notice is served within the period specified by this section and is returned for the reason and within the time provided in this subdivision, the claimant may serve a new notice in a manner complying with the provisions of this subdivision within ten days after the returned notice is received. If a new notice is so served within that period, it shall be deemed timely served.

(e) If the notice is served by electronic means, as defined in paragraph two of subdivision (f) of rule twenty-one hundred three of the civil practice law and rules, it shall contain the information required under the provisions of subdivision two of this section. In addition, such notice shall contain the following declaration: "I certify that all information contained in this notice is true and correct to the best of my knowledge and belief. I understand that the willful making of any false statement of material fact herein will subject me to criminal penalties and civil liabilities." Service of the notice shall be complete upon successful transmission of the notice as indicated by an electronic receipt provided by such city, which shall transmit an electronic receipt number to the claimant forthwith.

(f) Service of a notice of claim on the secretary of state as agent of any public corporation, as defined in subdivision one of section sixty-six of the general construction law, whatsoever created or existing by virtue of the laws of the state of New York upon whom service of a notice of claim is required as a condition precedent to being sued, may be made by personally delivering to and leaving with the secretary of state or a deputy, or with any person authorized by the secretary of state to receive such service, at the office of the department of state in the city of Albany, duplicate copies of such notice of claim together with the statutory fee, which fee shall be a taxable disbursement but only in the amount equal to the portion of the fee collected by the public corporation in accordance with subdivision four of this section. Service on such public corporation shall be complete when the secretary of state is so served. Within ten days after receiving a notice of claim, the secretary of state shall either: (1) send one of such copies by certified mail, return receipt requested, to such public corporation, at the post office address on file in the department of state, specified for the purpose; or (2) electronically transmit a copy to such public corporation at the electronic address on file with the department of state specified for that purpose; or (3) transmit a copy to such public corporation by any other such means or procedure established by the secretary of state, provided that such other means or procedure of transmittal must be verifiable.

4. Requirements of section exclusive except as to conditions precedent to liability for certain defects or snow or ice. No other or further notice, no other or further service, filing or delivery of the notice of claim, and no notice of intention to commence an action or special proceeding, shall be required as a condition to the commencement of an action or special proceeding for the enforcement of the claim; provided, however, that nothing herein contained shall be deemed to dispense with the requirement of notice of the defective, unsafe, dangerous or obstructed condition of any street, highway, bridge, culvert, sidewalk or crosswalk, or of the existence of snow or ice thereon, where such notice now is, or hereafter may be, required by law, as a condition precedent to liability for damages or injuries to person or property alleged to have been caused by such condition, and the failure or negligence to repair or remove the same after the receipt of such notice.

5. Application for leave to serve a late notice.

Upon application, the court, in its discretion, may extend the time to serve a notice of claim specified in paragraph (a) of subdivision one of this section, whether such service was made upon a public corporation or the secretary of state. The extension shall not exceed the time limited for the commencement of an action by the claimant against the public corporation. In determining whether to grant the extension, the court shall consider, in particular, whether the public corporation or its attorney or its insurance carrier acquired actual knowledge of the essential facts constituting the claim within the time specified in subdivision one of this section or within a reasonable time thereafter. The court shall also consider all other relevant facts and circumstances, including: whether the claimant was an infant, or mentally or physically incapacitated, or died before the time limited for service of the notice of claim; whether the claimant failed to serve a timely notice of claim by reason of his justifiable reliance upon settlement representations made by an authorized representative of the public corporation or its insurance carrier; whether the claimant in serving a notice of claim made an excusable error concerning the identity of the public corporation against which the claim should be asserted; if service of the notice of claim is attempted by electronic means pursuant to paragraph (e) of subdivision three of this section, whether the delay in serving the notice of claim was based upon the failure of the computer system of the city or the claimant or the attorney representing the claimant; that such claim-

ant or attorney, as the case may be, submitted evidence or proof as is reasonable showing that (i) the submission of the claim was attempted to be electronically made in a timely manner and would have been completed but for the failure of the computer system utilized by the sender or recipient, and (ii) that upon becoming aware of both the failure of such system and the failure of the city to receive such submission, the claimant or attorney had insufficient time to make such claim within the permitted time period in a manner as otherwise prescribed by law; and whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits.

An application for leave to serve a late notice shall not be denied on the ground that it was made after commencement of an action against the public corporation.

6. Mistake, omission, irregularity or defect. At any time after the service of a notice of claim and at any stage of an action or special proceeding to which the provisions of this section are applicable, a mistake, omission, irregularity or defect made in good faith in the notice of claim required to be served by this section, not pertaining to the manner or time of service thereof, may be corrected, supplied or disregarded, as the case may be, in the discretion of the court, provided it shall appear that the other party was not prejudiced thereby.

7. Applications under this section. All applications under this section shall be made to the supreme court or to the county court: (a) in a county where the action may properly be brought for trial, (b) if an action to enforce the claim has been commenced, in the county where the action is pending, or (c) in the event that there is no motion term available in any of the counties specified in clause (a) or (b) hereof, in any adjoining county. Where the application is for leave to serve a late notice of claim, it shall be accompanied by a copy of the proposed notice of claim.

8. Inapplicability of section. (a) This section shall not apply to claims arising under the provisions of the workers' compensation law, the volunteer firefighters' benefit law, or the volunteer ambulance workers' benefit law or to claims against public corporations by their own infant wards.

(b) This section shall not apply to any claim made for physical, psychological, or other injury or condition suffered as a result of conduct which would constitute a sexual offense as defined in article one hundred thirty of the penal law committed against a child less than eighteen years of age, incest as defined in section 255.27, 255.26 or 255.25 of the penal law committed against a child less than eighteen years of age, or the use of a child in a sexual performance as defined in section 263.05 of the penal law committed against a child less than eighteen years of age.

HISTORY:

Add, L 1945, ch 694, § 1, eff Sept 1, 1945; amd, L 1950, ch 481, § 1, eff Sept 1, 1950; L 1951, ch 393, § 1; L 1956, ch 415, §§ 1, 2, eff Sept 1, 1956; L 1957, ch 383, § 1; L 1959, ch 814, § 1; L 1963, ch 660, § 2; L 1966, ch 732, § 1; L 1967, ch 252, § 1; L 1976, ch 745, § 2, eff Sept 1, 1976; L 1978, ch 531, § 1, eff Jan 1, 1979; L 1980, ch 686, § 1; L 1981, ch 738, § 1, eff Sept 1, 1981; L 1983, ch 62, § 1, eff June 2, 1983; L 1988, ch 24, § 12, eff Jan 1, 1989; L 2010, ch 12, §§ 1, 2, eff Sept 19, 2010; L 2012, ch 500, § 4, eff July 15, 2013; L 2012, ch 500, § 5, eff June 15, 2013; L 2013, ch 24, § 2, eff July 15, 2013; L 2019, ch 11, § 5, effective February 14, 2019.

1981 Recommendations of the Law Revision Commission: The Commissions attention has been directed to a problem in wrongful death actions brought against cities, towns and counties. Recent cases have shown no consistent interpretation as to the applicable time limitations within which such actions can be brought. Thus, for instance, one court has ruled that in a wrongful death action against a town the action is barred under section 50-i, General Municipal Law (GML), after one year and 90 days from the happening of the event causing the death. (Erickson v. Town of Henderson, 30 A D 2d 282.) Another court, however, has held that a wrongful death action commenced against a city, where section 50-i would seen to be directly applicable, is governed by the Estates, Powers and Trusts Law two-years-from-death provision found in section 5-4.1, because section 50-i does not specifically refer to wrongful death actions in its coverage (Priebe v. City of Canandaigua, 91 Misc 2d 1047).

The problem these examples illustrate can best be understood by first examining sections 50-e and 50-i GML. 1. Subdivision (1) of section 50-3 provides in pertinent part:

(a)In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation, as defined in the general construction law, or any officer, appointee or employee thereof, the notice of claim shall comply with and be served in accordance with the provisions of this section within ninety days after the claim arises. (Emphasis added.).

Subdivision (1) of section 50-i provides:

1. No action or special proceeding shall be prosecuted or maintained against a . . . [municipal corporation]. . . for personal injury or damage to real or personal property alleged to have been sustained by reason of the negligence or wrongful act of such . . . [municipal corporation] . . . unless, (a) a notice of claim shall have been made and served upon the . . . [municipal corporation] . . . in compliance with section fifty-e of this chapter, (b) it shall appear by and as an allegation in the complaint or moving papers that at least thirty days have elapsed since the service of such notice and that adjustment or payment thereof has been neglected or refused, and (c) the action or special proceeding shall be commenced within one year and ninety days after the happening of the event upon which the claim is based. (Emphasis added.) Section 50-e refers to tort actions generally, which include wrongful death actions; section 50-i is restricted to coverage of personal injury and property damage.2. Legislative memoranda bear no indication of any purposeful intent to exclude wrongful death actions from section 50-i coverage. (1960 NYS Leg. Ann. 29; 1959 NYS Leg. Ann. 458.) The time period in section 50-e starts running when "the claim arises'; the time period in section 50-i starts running from "the happening of the event upon which the claim is based.".

The need for conforming section 50-i to section 50-e so that the former specifically includes wrongful death actions is obvious. Another problem, not yet specifically addressed in the cases, concerns the anomaly that could arise in death cases because of the differing language concerning the point from which the 90-day-notice provision is measured, and the point from which the one-year-and-90-day time limitation is to be measured. It has been consistently held in death cases that the claim arises" and the ninety days starts running when the estate representative is appointed (Forero v. Town of Tuxedo, 51 A D 2d 443; Erickson v. Town of Henderson, supra; Devine v. City of New York, 28 Misc 2d 888). The

section 50-i language, however, is not construed so that the one year and 90 days starts running from the accrual of the cause of action, i.e., the death. The Court in Erickson, supra, seems to indicate, through an examination of the legislative history of section 50-i that the one year and 90 days runs from the happening of the accident: . In other words the Legislature apparently recognized that there were excellent reasons . . . why the beneficiaries of a wrongful death action should not be foreclosed by failure within 90 days from the happening of the event causing death to have an estate representative appointed and notice of claim served. By the 1959 enactment, however, the Legislature in substance notified such beneficiaries that they could not have the full period of two years (Decedent Estate Law, § 130; EPTL 5-4.1) but that such an action must be commenced within one year and 90 days from the happening of the event This places no unreasonable burden on the beneficiaries of such an action. They are given one year to have an estate representative appointed and another 90 days within which to serve notice of claim. The action must be commenced before the expiration of the two periods. (Id. at 285.)

If the Erickson Court is not absolutely clear in that passage that the "happening of the event" means the happening of the accident and not the happening of the death, its analysis of the legislative intent has been construed that way. In Cota v. Madison Central School District (89 Misc 2d 646, 648), the Court states: "The Legislature intended the time limitation for actions under section 50-i of the General Municipal Law to commence not upon the accrual of plaintiff's cause of action, but when the accident occurred. (In accord see Phillips v. Village of Waterford, 48 A D 2d 745.)".

This distinction in the starting points for the 50-e and 50-i time periods should remain unchanged as they apply to personal injury actions in view of the conscious legislative intent just noted. In most instances such starting point will be the same anyway. The Erickson Court's application of this differentiation to death cases, however, is troublesome. In that case the happening of the event and the death were simultaneous. The Legislature, and the Court in that case, may not have envisioned the situation where the causally related death is delayed. Where that is the case, it is conceivable that notice of a death claim could be timely under section 50-e, where the time runs from the appointment of a representative, although the time to bring the action would already have run under the one-year-and-90-day-from-the-event provision of section 50-i. Special provisions for wrongful death actions in both sections would obviate this flaw.

Such special provisions would also serve to obviate problems arising because of the interrelationship of section 50-i with other statutes. In contrast to section 50-i, death actions are specifically provided for in the County Law and Town Law.3. Subdivision (1) of § 52 of the County Law provides:

1. Any claim or notice of claim against a county for damage, injury or death, or for invasion of personal or property rights, of every name and nature, and whether casual or continuing trespass or nuisance and any other claim for damages arising at law or in equity, alleged to have been caused or sustained in whole or in part by or because of any misfeasance, omission of duty, negligence or wrongful act on the part of the county, its officers, agents, servants or employees, must be made and served in compliance with section fifty-a of the general municipal law. Every action upon such claim shall be commenced pursuant to the provisions of section fifty-i of the general municipal law. The place of trial shall be in the county against which the action is brought. (Emphasis added.).

Town Law § 67, inter alia, provides that:

1. Any claim including a claim specified in section sixty-five-a of this chapter which may be made against the town or town superintendent of highways for damages for wrong or injury to person or property or for the death of a person, shall be made and served in compliance with section fifty-e of the general municipal law.

2. Every action upon such claim shall be commenced pursuant to the provisions of section fifty-i of the general municipal law. . . (Emphasis added.) Those sections incorporate the sections 50-e and 50-i requirements. In Erickson, supra, a wrongful death action against a town, brought less than two years from the accident and simultaneous death, but more than one year and 90 days therefrom, was found time barred. The Court noted the failure of the Legislature to specifically include wrongful death actions in section 50-i, but refused to apply the EPTL two-year-from-death provision because of the Town Law's specific reference to section 50-i. In Priebe v. City of Canandaigua, supra, the Court, in a case brought against the city, where the section 50-i requirements would directly apply, avoided compliance with those requirements by pointing out that section 50-i does not specifically include wrongful death actions. The Priebe Court held that because of the omission of a reference to wrongful death in section 50-i it would apply the EPTL two-years-from-date-of-death time period.

In another case, however, the Appellate Division held that section 50-i does cover death cases (Phillips v. Village of Waterford, 48 A D 2d 745) . This involved a suit against a village. There is no special statute permitting suits in the Village Law as there is in the County and Town Laws. The Court held the 50-i provisions applicable in suits against villages and consequently time-barred under the one-year-and- 90-day limit. The Court apparently assumed that section 50-i included wrongful death actions despite its lack of reference thereto, and did not discuss, as did the judge in Priebe, the application of EPTL 5-4.1.

A further complicating factor is found in section 139 of the Highway Law, 4. Highway Law § 139:

When, by law, a county has charge of the repair or maintenance of a road, highway, bridge or culvert, the county shall be liable for injuries to person or property sustained in consequence of such road, highway, bridge or culvert being defective, out of repair, unsafe, dangerous or obstructed existing because of the negligence of the county, its officers, agents or servants. A civil action may be maintained against the county to recover damages for any such injury; but the county shall not be liable in such action unless a notice of claim shall have been made and served in compliance with section fifty-e of the general municipal law, and unless the action is commenced within one year from the date of service of the notice, but no such action shall be commenced upon such claim until the expiration of three months after the service of such notice. (Emphasis added.) which predates section 50-i, permitting personal injury actions against counties based on defective road maintenance. No reference is made to wrongful death actions. The section does refer to the section 50-e notice provision and provides that the action must be commenced "within one year from the date of service of the notice." Despite the lack of any reference to death cases in the section, the term "personal injury" has been held to include wrongful death (Treib v. Dutchess County, 56 A D 2d 866, app. dism'd 42 N Y 2d 824; Forero v. Town of Tuxedo, supra, 51 A D 2d 443).

The Commission considers that this confusion can be eliminated by the expedient of, first, writing into section 50-e a provision allowing the 90-day-notice provision to run from the appointment of an estate representative, which the codifies the present case law; and, second, tying this to new provisions in section 50-i which makes the section applicable in death actions and requires the death action to be brought within two years after the time of death.

This is an adaptation of subdivision 2 of section 10 of the Court of Claims Act which governs time provisions in actions against the State.5. Subdivision 2 of section 10, Court of Claims Act, is as follows:

2. A claim by an executor or administrator of a decedent who left him or her surviving a husband, wife or next of kin, for damages for a wrongful act, neglect or default, on the part of the state by which the decedent's death was caused, shall be filed within ninety days after the appointment of such executor or administrator, unless the claimant shall within such time file a written notice of intention to file a claim therefor in which event the claim shall be filed within two

years after the death of the decedent. In any event such claim shall be filed within two years after the death of the decedent.

Note that there is no separate requirement for a notice of claim as there is in section 50-e. Under the Court of Claims Act no notice is necessary if the representative starts the action within 90 days of his appointment. This distinction makes it impossible to incorporate this provision verbatim into section 50-i. Its utilization has the virtue of aligning these provisions, both applicable to very similar situations, and, along with EPTL 5-1.4, marking the time of death as the basis for time calculations.

Bearing in mind the purpose of the time provisions of sections 50-e and 50-i— to provide municipal authorities the opportunity for timely investigation of the claim and to accelerate the time within which the action must be commenced—a problem could arise because no limitation from the time of the event is placed. If the accident victim did not die within several years of the happening of the accident, but the time for bringing suit is tolled since no representative can be appointed until after death, a death action against a municipality could conceivably be brought many years after the event, thus frustrating the goal of timely investigation. Such a case ought to be extremely rare. If the event were catastrophic enough to cause injuries which lead to delayed, but eventual death, it is reasonable to presume that a timely personal injury action would be commenced. Under the rule of Caffaro v. Trayna (35 N Y 2d 245), the death cause of action could be added at any time to a properly commenced and pending injury action.

Another reason for considering the threat of death claims long after the event de minimis is because the date-of-death basis in section 10 of the Court of Claims Act has been wholly adequate for many years as a ceiling on death claims, there having been no reported cases of injustice to the sovereign due to the possibility of the rare case of delayed death.

With respect to sections 50-e and 50-i, then, the notice provision of the former would run from the appointment of the representative, and, under the latter, now expressly applicable to death actions, the action would have to be commenced in no event more than two years after the death; unless a personal injury action had been timely commenced, in which case the complaint in a pending action could be amended to include the death cause of action for the subsequent and related death under the Caffaro case.

With these amendments, plus an amendment to Highway Law section 139, making it applicable in death actions and incorporating the requirements of section 50-i as well as 50-e, wrongful death actions against municipal corporations will be handled in a uniform manner. Only if no representative is appointed within two years of death will there be a statutory bar against any opportunity to sue for wrongful death. Even in that event, it is unlikely that a personal injury action would not have been started to which the death action could be added.

Editor's Notes: Laws 1945, ch 694, § 13, provides:

The provisions of section fifty-e of the general municipal law, as added by this act, shall supersede inconsistent provisions of any general, special or local law, or charter provisions, and shall be controlling.

Laws 2012, ch 500, §§ 1 and 79, eff June 15, 2013, provide as follows:

Section 1. Short title. This act shall be known and may be cited as the "uniform notice of claim act".

§ 79. This act shall take effect on the one hundred eightieth day after it shall have become a law and shall apply to all actions and proceedings accruing on or after such date; provided, however, that section four of this act shall take effect two hundred ten days after this act shall have become a law; and provided, further, that section seventy-eight of this act shall take effect upon the enactment into law by the state of New Jersey of legislation having an identical effect as section seventy-eight of this act, but if the state of New Jersey shall have enacted such legislation into law prior to the first day of January next succeeding the date upon which this act shall have become a law, section seventy-eight of this act shall take effect on the one hundred eightieth day from the date upon which it shall have become a law; provided further, that the state of New Jersey shall notify the legislative bill drafting commission upon the occurrence of the enactment of the provisions provided for in this act in order that the commission may maintain an accurate and timely effective data base of the official text of the laws of the state of New York in furtherance of effecting the provisions of section 44 of the legislative law and section 70-b of the public officers law; and provided further that section nine of this act shall take effect upon the concurrence by members of the Delaware River Basin Water Commission. (Amd, L 2013, ch 24, § 7, eff June 15, 2013.).

Laws 2019, ch 11, § 12, eff February 14, 2019, provides:

§ 12. The provisions of this act shall be severable, and if any clause, sentence, paragraph, subdivision or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, subdivision or part thereof directly involved in the controversy in which such judgment shall have been rendered.

Revision Notes: This act was recommended by the Judicial Council. For explanation, see Twelfth Annual Report of the Judicial Council, pp. 21–23 and 59–60 (1946); also Matter of White v City of New York, 194 Misc 562 (1949).

Amendment Notes: 2013. Chapter 24, § 2 amended:

Sub 3, par (f) by deleting at fig 1 "any", fig 2 "or at one of his or her regularly established offices", at fig 3 "The secretary of state shall promptly", at fig 4 a comma and adding the matter in italics.

2012. Chapter 500, § 5 amended:

Sub 5, first undesignated par, by adding the matter in italics.

2010. Chapter 12, § 1 amended:

Sub 3, par (a), by adding the matter in italics.

Sub 3, by adding par (e).

The 2019 amendment by ch 11, § 5, added the 8(a) designation and added 8(b).

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I. Generally

1. In general

Restraint embodied in the notice of claim section of the General Municipal Law is mandatory. Murphy v Yates, 47 A.D.2d 807, 365 N.Y.S.2d 298, 1975 N.Y. App. Div. LEXIS 9129 (N.Y. App. Div. 4th Dep't 1975).

The provisions of Gen Mun Law § 50-e have no application to mandatory no-fault arbitration under Ins Law § 674. Accordingly, an insurance company seeking reimbursement of first-party benefits it had paid was not required to serve a notice of claim pursuant to Gen Mun Law § 50-e as a condition precedent to mandatory arbitration against a municipal self-insurer under Ins Law § 674. Syracuse v Utica Mut. Ins. Co., 83 A.D.2d 116, 443 N.Y.S.2d 901, 1981 N.Y. App. Div. LEXIS 14761 (N.Y. App. Div. 4th Dep't 1981), aff'd, 61 N.Y.2d 691, 472 N.Y.S.2d 600, 460 N.E.2d 1085, 1984 N.Y. LEXIS 4005 (N.Y. 1984).

In proceeding pursuant to CLS Gen Mun § 50-e for leave to serve late notice of claim, which followed prior application for similar relief that was dismissed with leave to make further application, reapplication was improperly dismissed on ground that further application should have been brought as special proceeding pursuant to CLS CPLR § 403 under new index number since county and city had actual notice of proceeding and submitted opposition papers, and thereby implicitly admitted jurisdiction by acquiescing to manner in which reapplication was brought. Kareca Lashawn J. v County of Westchester, 142 A.D.2d 729, 531 N.Y.S.2d 308, 1988 N.Y. App. Div. LEXIS 8000 (N.Y. App. Div. 2d Dep't 1988), app. denied, 74 N.Y.2d 602, 541 N.Y.S.2d 985, 539 N.E.2d 1113, 1989 N.Y. LEXIS 599 (N.Y. 1989).

There is no duty to raise failure to serve notice of claim as affirmative defense. Binyard v New York, 151 A.D.2d 712, 543 N.Y.S.2d 145, 1989 N.Y. App. Div. LEXIS 9154 (N.Y. App. Div. 2d Dep't 1989), app. dismissed, 75 N.Y.2d 896, 554 N.Y.S.2d 830, 553 N.E.2d 1340, 1990 N.Y. LEXIS 632 (N.Y. 1990).

Petitioner's motion for leave to serve late notice of claim was one for reargument, and thus denial thereof was not appealable, where petitioner failed to provide reasonable explanation as to why physician's medical opinion in support of petition for leave to serve late notice of claim, which was submitted as supplement to petitioner's motion to renew and reargue, could not have been provided with original petition. Thein v Mamaroneck Union Free Sch. Dist., 231 A.D.2d 730, 647 N.Y.S.2d 987, 1996 N.Y. App. Div. LEXIS 9706 (N.Y. App. Div. 2d Dep't 1996), app. dismissed, 89 N.Y.2d 938, 654 N.Y.S.2d 718, 677 N.E.2d 290, 1997 N.Y. LEXIS 47 (N.Y. 1997).

Federal law preempts state and municipal notice of claim statutes. Mitchell v La Barge, 257 A.D.2d 834, 684 N.Y.S.2d 10, 1999 N.Y. App. Div. LEXIS 364 (N.Y. App. Div. 3d Dep't 1999).

Where defendant doctors failed to present evidence to show that there was a triable issue of fact as to their claim that they were transient employees of defendant city corporation at the time they allegedly committed medical malpractice, the trial court properly dismissed their affirmative defenses of the statute of limitations under N.Y. Gen. Mun. Law § 50-k and failure to serve a notice of claim under N.Y. Gen. Mun. Law § 50-e. Ramos v Ravan, 289 A.D.2d 81, 734 N.Y.S.2d 66, 2001 N.Y. App. Div. LEXIS 12122 (N.Y. App. Div. 1st Dep't 2001).

Dismissal of a negligence and malpractice claim against a city hospital on the basis of res judicata was error because a prior action was dismissed for failure to serve a timely notice of claim pursuant to N.Y. Gen. Mun. Law § 50-e(1)(a) and CLS Uncons Laws of NY ch. 214-A, § 20(2), and thus was not a dismissal on the merits, which was a prerequisite to the invocation of res judicata. Wade v New York City Health & Hosps. Corp., 59 A.D.3d 528, 874 N.Y.S.2d 171, 2009 N.Y. App. Div. LEXIS 1156 (N.Y. App. Div. 2d Dep't 2009).

If the subject of claim and relief sought are within the coverage of this section, the fact that liability is clear and absolute does not dispense with the necessity of meeting the notice of claim requirements. Goldberg v Westchester County, 104 N.Y.S.2d 291, 199 Misc. 859, 1951 N.Y. Misc. LEXIS 1733 (N.Y. Sup. Ct. 1951).

The 1951 amendment to this section was enacted into law as remedial legislation. Anderlohr v New York, 112 N.Y.S.2d 135, 201 Misc. 605, 1952 N.Y. Misc. LEXIS 2616 (N.Y. Sup. Ct. 1952).

This section was never intended to be used as a device to defeat rights of people with legitimate claims upon grounds devoid of merit. Harwood v Hornell, 41 Misc. 2d 706, 246 N.Y.S.2d 222, 1964 N.Y. Misc. LEXIS 2155 (N.Y. Sup. Ct. 1964).

Court granted the police officer's application for leave to serve late notice of a claim that city's failure to provide proper respiratory gear resulted in lung damage; the brief delay in the application did not hamper the city's investigation of the circumstances. Taha v City of New York, 192 Misc. 2d 244, 746 N.Y.S.2d 386, 2002 N.Y. Misc. LEXIS 978 (N.Y. Sup. Ct. 2002).

Although a notice of claim filed by the New York Racing Association (NYRA) was untimely under N.Y. Rac. Pari-Mut. Wag. & Breed. Law § 514, a regional off-track betting corporation clearly received actual knowledge of the unauthorized telecasts within a reasonable time after they occurred and would not be substantially prejudiced by defending the claims on the merits; accordingly, NYRA was permitted in file a late notice of claim pursuant to N.Y. Gen. Mun. Law § 50-e. New York Racing Assn. v Nassau Regional Off-Track Betting Corp., 909 N.Y.S.2d 866, 29 Misc. 3d 539, 2010 N.Y. Misc. LEXIS 3840 (N.Y. Sup. Ct. 2010).

This section was designed to act as a shield and not as a sword to defeat rights of people having legitimate claims against a municipal body. Gisondi v Harrison, 220 N.Y.S.2d 105, 1961 N.Y. Misc. LEXIS 3680 (N.Y. Sup. Ct. 1961), modified, 16 A.D.2d 929, 229 N.Y.S.2d 698, 1962 N.Y. App. Div. LEXIS 9364 (N.Y. App. Div. 2d Dep't 1962).

Commencement provisions of CLS Gen Mun §§ 50-e and 50-i are applicable in federal action for prima facie tort, intentional infliction of mental distress, and constitutional claims based upon termination of plaintiff's employment with city; there is no direct conflict between CLS Gen Mun §§ 50-e, and 50-i and Federal Rules of Civil Procedure, Rules 3 and 4, such that, in federal court action state commencement rules must be complied with. Piesco v New York, Dep't of Personnel, 650 F. Supp. 896, 1987 U.S. Dist. LEXIS 5013 (S.D.N.Y. 1987).

Statute being clear and explicit as to which court can hear application for filing of late notice of claim, federal court lacks jurisdiction over civil rights plaintiff's application to file late notice of claim against public corporations and police officers, or to have such notice deemed timely filed, and plaintiff's state claims would be dismissed, without prejudice. Brown v Metropolitan Transp. Auth., 717 F. Supp. 257, 1989 U.S. Dist. LEXIS 8736 (S.D.N.Y. 1989).

2. Purpose

The purpose of the statute is to give the city notice of an accident or occurrence. Figueroa v New York, 279 A.D. 771, 109 N.Y.S.2d 126, 1951 N.Y. App. Div. LEXIS 3720 (N.Y. App. Div. 1951).

The clear purpose of General Municipal Law § 50-e is to require prompt notice of claims to a public corporation so as to permit investigation to be made promptly. Powell v Gates, 36 A.D.2d 220, 319 N.Y.S.2d 650, 1971 N.Y. App. Div. LEXIS 4318 (N.Y. App. Div. 4th Dep't 1971).

The purpose of requiring a notice of claim is to assure the recipient an adequate opportunity to investigate the circumstances surrounding the accident and to explore the merits of the claim while information is still readily available; a city has sufficient information to conduct a proper and timely investigation of the accident where a notice of claim for personal injuries indicates the location of the accident to be within 500 feet of where it actually occurred; moreover, the court has the power to correct or disregard a defective notice of claim if it appears that the other party was not prejudiced thereby. Leone v Utica, 66 A.D.2d 463, 414 N.Y.S.2d 412, 1979 N.Y. App. Div. LEXIS 10039 (N.Y. App. Div. 4th Dep't 1979), aff'd, 49 N.Y.2d 811, 426 N.Y.S.2d 980, 403 N.E.2d 964, 1980 N.Y. LEXIS 2925 (N.Y. 1980).

Whether regarded as permissible qualifications upon a legislatively created right or as reasonable conditions for the exercise of a common-law right, the recognized purposes of a notice of claim statute are, *inter alia,* to afford a local government the opportunity to fully investigate a claim against it, and, if regarded as appropriate, to settle claims without the expense and hazards of litigation. Though notice of claim provisions also benefit claimants by assuring earlier processing and consideration of their claims, they are enacted primarily for the benefit of the government agencies to which they apply. Cohen v Pearl River Union Free School Dist., 70 A.D.2d 94, 419 N.Y.S.2d 998, 1979 N.Y. App. Div. LEXIS 12306 (N.Y. App. Div. 2d Dep't 1979), rev'd, 51 N.Y.2d 256, 434 N.Y.S.2d 138, 414 N.E.2d 639, 1980 N.Y. LEXIS 2723 (N.Y. 1980).

The purpose of the statute is to protect the municipality against fraud arising out of stale claims and against the possible connivance of corrupt public officials. Its requirements, therefore, cannot be waived. Rudolph v New York, 77 N.Y.S.2d 788, 191 Misc. 947, 1947 N.Y. Misc. LEXIS 3730 (N.Y. Sup. Ct. 1947).

The purpose of this section was said by the judicial council discussing the proposed amendment from which it is derived, to be to incorporate the essence of the liberal correctional provisions of former CPA art 9, §§ 105–110-a, and 112-f, and RCP 62. Feldman v New York, 79 N.Y.S.2d 284, 192 Misc. 136, 1948 N.Y. Misc. LEXIS 2394 (N.Y. City Ct. 1948).

The principal purposes of a notice of claim statute are to afford the municipality an opportunity to explore claims against it, and, if deemed appropriate, to settle claims without the expense and risks of litigation; the test of the sufficiency of a notice is whether it adequately informs the municipality of the nature of the claim, and of the time when, the place where, and the manner in which the claim arose so as to enable the municipality to investigate promptly. Worrell v New York, 101 Misc. 2d 270, 420 N.Y.S.2d 994, 1979 N.Y. Misc. LEXIS 2667 (N.Y. Sup. Ct. 1979).

Plaintiffs could not prosecute their claim arising out of a hazing incident against the individual employees of a school district when their notice of claim was directed only against the district's board of education; to permit such an action would have been inconsistent with the purpose of N.Y. Gen. Mun. Law § 50-e to afford a public corporation the opportunity to locate a defect, conduct a proper investigation, and assess the merits of the claim White v Averill Park Cent. Sch. Dist., 195 Misc. 2d 409, 759 N.Y.S.2d 641, 2003 N.Y. Misc. LEXIS 263 (N.Y. Sup. Ct. 2003).

The prime objective of the notice of claim requirements is to assure the city an adequate opportunity to investigate the circumstances surrounding the accident and to explore the merits of the claim while information is still available. Borgia v New York, 216 N.Y.S.2d 897 (N.Y. Sup. Ct.), app. dismissed, 15 A.D.2d 557, 223 N.Y.S.2d 17, 1961 N.Y. App. Div. LEXIS 6859 (N.Y. App. Div. 2d Dep't 1961).

3. Constitutionality

New York case law and legislative history of N.Y. Gen. Mun. Law § 50-e made it clear that its savings provision was intended only to remedy defects in manner of service, not service on the wrong person; since the City of New York and the New York City, New York, Health and Hospitals Corporation (HHC) were entirely distinct entities for purposes of notices of claim, service of notice of a malpractice claim on the city's comptroller was entirely ineffective as notice to HHC. Scantlebury v N.Y. City Health & Hosps. Corp., 4 N.Y.3d 606, 797 N.Y.S.2d 394, 830 N.E.2d 292, 2005 N.Y. LEXIS 1086 (N.Y. 2005).

Statutes requiring 90-day notice of claim against public corporation were not unconstitutional as violating equal protection guarantees of State and Federal Constitutions. Guarrera v Lee Mem. Hosp., 51 A.D.2d 867, 380 N.Y.S.2d 161, 1976 N.Y. App. Div. LEXIS 11485 (N.Y. App. Div. 4th Dep't), app. dismissed, 39 N.Y.2d 942, 1976 N.Y. LEXIS 3538 (N.Y. 1976).

Discretion was providently exercised in allowing leave under N.Y. Gen. Mun. Law § 50-e(5) to serve a late notice of an infant daughter's medical malpractice claim against a county and since there was actual notice of the claim and an absence of prejudice in the delay, the lack of a reasonable excuse for failing to timely serve a notice of claim did not bar the supreme court from granting leave to serve the late notice. The county had actual knowledge of the claim because they had the daughter's medical records at the time of the alleged malpractice and there was no showing of substantial prejudice to the county as a result of the delay where the daughter was protected by the infancy toll under N.Y. C.P.L.R. 208. Nardi v County of Nassau, 18 A.D.3d 520, 795

N.Y.S.2d 300, 2005 N.Y. App. Div. LEXIS 5058 (N.Y. App. Div. 2d Dep't 2005).

General Municipal Law § 50-e, subdivision 1, does not unconstitutionally limit the filing of a formal notice of claim against the county to 90 days, notwithstanding a plaintiff has 3 years in which to assert a negligence action if suing a private defendant. Zipser v Pound, 75 Misc. 2d 489, 348 N.Y.S.2d 18, 1972 N.Y. Misc. LEXIS 1819 (N.Y. App. Term 1972).

CLS Gen Mun § 50-e(7), which provides that all applications regarding leave to serve late notice of claim "shall be made to the supreme court or to the county court" is unconstitutional denial of equal protection to New York City residents, and thus Civil Court had jurisdiction to decide whether to grant leave to file late notice of claim, where, apparently by inadvertent omission, § 50-e(7) imposes onerous and irrational burden on New York City residents who commence actions in Civil Court, avail themselves of procedures and adhere to rules of Civil Court, and yet must seek their remedy of late notice of claim in Supreme Court. Arvelo by Arvelo v City of New York, 182 Misc. 2d 101, 695 N.Y.S.2d 653, 1999 N.Y. Misc. LEXIS 377 (N.Y. Civ. Ct. 1999).

4. Construction

The statute is remedial and should be liberally construed. Application of Charlemagne, 277 A.D. 689, 102 N.Y.S.2d 661, 1951 N.Y. App. Div. LEXIS 5663 (N.Y. App. Div.), aff'd, 302 N.Y. 871, 100 N.E.2d 52, 302 N.Y. (N.Y.S.) 871, 1951 N.Y. LEXIS 985 (N.Y. 1951).

Savings provision of subdivision 5 hereof was intended as remedial legislation and should be liberally construed. Tricou v Duanesburg, 23 A.D.2d 949, 260 N.Y.S.2d 162, 1965 N.Y. App. Div. LEXIS 4040 (N.Y. App. Div. 3d Dep't 1965).

Requirements of CLS Gen Mun § 50-e(4) must be construed as flat prohibition not only of town's enactment of any notice of claim provision other than that provided for in statute, but also prohibition of any notice of defect enactment pertaining to locations beyond 6 specified therein. Fay v Town of Hempstead, 228 A.D.2d 641, 645 N.Y.S.2d 506, 1996 N.Y. App. Div. LEXIS 7427 (N.Y. App. Div. 2d Dep't 1996), overruled in part, Guiliano v Town of Brookhaven, 34 A.D.3d 734, 826 N.Y.S.2d 100, 2006 N.Y. App. Div. LEXIS 14359 (N.Y. App. Div. 2d Dep't 2006).

Injured motorist should have been permitted to amend her notice of claim to delete an incorrect license number for the city bus that allegedly hit her car where the claim otherwise contained sufficient information for the transit authority to investigate and her mistake was made in good faith; the fact that the transit authority waited four years before raising the issue in a motion to dismiss supported the court in determining that it had not been prejudiced by her mistake. Palmieri v N.Y. City Transit Auth., 288 A.D.2d 361, 733 N.Y.S.2d 127, 2001 N.Y. App. Div. LEXIS 11203 (N.Y. App. Div. 2d Dep't 2001).

Notice of claim requirements are construed strictly, in the sense that compliance with them is a condition precedent to suit. Meadows v Mineola, 72 N.Y.S.2d 368, 190 Misc. 815, 1947 N.Y. Misc. LEXIS 2750 (N.Y. Sup. Ct. 1947); Rudolph v New York, 77 N.Y.S.2d 788, 191 Misc. 947, 1947 N.Y. Misc. LEXIS 3730 (N.Y. Sup. Ct. 1947).

General Municipal Law § 50-e is to be construed strictly against a claimant. Zillman v Meadowbrook Hospital Co., 73 Misc. 2d 726, 342 N.Y.S.2d 302, 1973 N.Y. Misc. LEXIS 2107 (N.Y. Sup. Ct. 1973), rev'd, 45 A.D.2d 267, 358 N.Y.S.2d 466, 1974 N.Y. App. Div. LEXIS 4428 (N.Y. App. Div. 2d Dep't 1974).

5. Notice of claim as condition precedent to action

Compliance with this section as to notice of claim is a condition precedent to maintenance of an action, not merely matter of defense. and must be both pleaded and proved by plaintiff or he fails to make out a cause of action. Natoli v Board of Education, 277 A.D. 915, 98 N.Y.S.2d 540, 1950 N.Y. App. Div. LEXIS 3831 (N.Y. App. Div. 1950), aff'd, 303 N.Y. 646, 101 N.E.2d 761, 303 N.Y. (N.Y.S.) 646, 1951 N.Y. LEXIS 1076 (N.Y. 1951).

Plaintiff's failure to verify his notice of claim was purely inadvertent, and was not fatal to validity of notice. Creary v Mamaroneck, 110 A.D.2d 870, 488 N.Y.S.2d 427, 1985 N.Y. App. Div. LEXIS 48783 (N.Y. App. Div. 2d Dep't 1985).

Service of summons and complaint against board of education could not be deemed to be substitute for timely notice of claim under CLS Gen Mun § 50-e. Nu-Life Constr. Corp. v Board of Educ., 204 A.D.2d 106, 611 N.Y.S.2d 529, 1994 N.Y. App. Div. LEXIS 5147 (N.Y. App. Div. 1st Dep't), app. dismissed, 84 N.Y.2d 850, 617 N.Y.S.2d 139, 641 N.E.2d 160, 1994 N.Y. LEXIS 2683 (N.Y. 1994).

On motion to dismiss for failure to serve notice of claim on New York City Health and Hospitals Corporation (HHC), defendants (HHC and New York City) were under no duty to raise plaintiff's failure to serve notice of claim on HHC as affirmative defense or otherwise to bring to plaintiff's attention fact that city, on which plaintiff did serve notice of claim, was not proper party defendant; moreover, defendants were not estopped from asserting lack of proper notice, even though (1) defendants did not affirmatively advise plaintiff that she incorrectly served city instead of HHC, (2) HHC attorney appeared at CLS Gen Mun § 50-h hearing, and (3) defendants participated in litigation for years before moving to dismiss. Kroin v City of New York, 210 A.D.2d 95, 620 N.Y.S.2d 339, 1994 N.Y. App. Div. LEXIS 12688 (N.Y. App. Div. 1st Dep't 1994).

New York City Health and Hospitals Corporation (HHC) was not estopped from asserting plaintiffs' improper service of 90-day notice on New York City rather than HHC as basis for dismissal of medical malpractice action, where HHC was under no duty to raise plaintiffs' noncompliance with notice of claim provisions of CLS Gen Mun § 50-e and CLS Unconsol Ch 214-A § 20 as affirmative defense, or otherwise bring to plaintiffs' attention that city was not proper party defendant to action. Badgett v New York City Health & Hosps. Corp., 227 A.D.2d 127, 641 N.Y.S.2d 299, 1996 N.Y. App. Div. LEXIS 4751 (N.Y. App. Div. 1st Dep't 1996).

In a wrongful death action alleging medical malpractice, filed against a New York City, N.Y., public hospital, service of a notice of claim against the New York City Health and Hospitals Corporation was a condition precedent to the commencement of the action against the corporation and its member hospitals. Jones v City of New York, 300 A.D.2d 359, 751 N.Y.S.2d 522, 2002 N.Y. App. Div. LEXIS 11929 (N.Y. App. Div. 2d Dep't 2002).

Where the employee sought damages for the city's failure to satisfy its duty to provide a wage differential to the employee, this was a tort action, and the employee was required under N.Y. Gen. Mun. Law § 50-e to serve a notice of claim upon the city within 90 days after the claim arose. Melia v City of Buffalo, 306 A.D.2d 935, 762 N.Y.S.2d 197, 2003 N.Y. App. Div. LEXIS 6781 (N.Y. App. Div. 4th Dep't), app. denied, 100 N.Y.2d 516, 769 N.Y.S.2d 202, 801 N.E.2d 423, 2003 N.Y. LEXIS 3374 (N.Y. 2003).

Because plaintiff salon was not required to serve a notice of claim pursuant to General Municipal Law 50-e(1)(b) as a condition precedent to the commencement of the actions, and the supreme court incorrectly denied the salon's motion for summary judgment against defendant constables on the cause of action to recover damages for wrongful eviction in violation of RPAPL 749(2); because the position of town constable was not compensated, pursuant to the exclusionary language of Local Law No. 7, § 1(a), the constables were not entitled to indemnification from the town as a matter of law and, as a matter of law, the salon was not required to serve a notice of claim pursuant to General Municipal Law 50-e(1)(b) as a condition precedent to the commencement of the actions. Analisa Salon, Ltd. v Elide Props., LLC, 46 A.D.3d 721, 848 N.Y.S.2d 693, 2007 N.Y. App. Div. LEXIS 12829 (N.Y. App. Div. 2d Dep't 2007), dismissed, in part, 2011 N.Y. Misc. LEXIS 7186 (N.Y. Sup. Ct. July 22, 2011), in part, 2011 N.Y. Misc. LEXIS 7185 (N.Y. Sup. Ct. Dec. 13, 2011).

Because a plaintiff served neither the Corporation Counsel, a designee, nor the City Comptroller, as required by N.Y. C.P.L.R. 311(a)(2) and New York City, N.Y., Admin. Code § 7-201(a), and because the plaintiff also failed to seek leave to serve a late notice of claim prior to the expiration of the applicable statute of limitations in N.Y. Gen. Mun. Law § 50-e(5), the city was entitled to summary judgment dismissing the plaintiff's personal injury complaint. Knox v New York City Bur. of Franchises & N.Y. City, 48 A.D.3d 756, 853 N.Y.S.2d 573, 2008 N.Y. App. Div. LEXIS 1665 (N.Y. App. Div. 2d Dep't 2008).

Plaintiffs' notice of claim was sufficient to alert defendants to the allegations supporting those causes of action, regardless of the purported capacity in which one of the plaintiffs executed the notice of claim. Given the lack of any showing of bad faith by plaintiffs or prejudice to defendants, the appellate division exercised its discretion to treat the notice of claim as one filed on behalf of the decedent's estate. Freeland v Erie County, 122 A.D.3d 1348, 997 N.Y.S.2d 860, 2014 N.Y. App. Div. LEXIS 8088 (N.Y. App. Div. 4th Dep't 2014).

As the alleged tortious conduct of a recovery room nurse fell within the scope of her employment she was entitled to a timely notice of claim as a condition precedent to the commencement of any civil action against her, the supreme court properly denied plaintiff's motion for leave to amend to add the nurse as a defendant because notice was never served on her. Stewart v Westchester Inst. for Human Dev., 136 A.D.3d 1014, 25 N.Y.S.3d 656, 2016 N.Y. App. Div. LEXIS 1304 (N.Y. App. Div. 2d Dep't 2016).

Trial court properly granted a city's motion to dismiss an injured worker's complaint and denied his cross-motion for leave to amend the complaint because he failed to serve a timely notice of claim, and his proposed complaint alleging a "maritime tort," in addition to the Labor Law causes of action, was patently devoid of merit inasmuch as the accident allegedly occurred at a location not subject to maritime jurisdiction. Fernandez v City of New York, 148 A.D.3d 995, 51 N.Y.S.3d 100, 2017 N.Y. App. Div. LEXIS 1986 (N.Y. App. Div. 2d Dep't 2017).

Plaintiff's failure to name three officers in his notice of claim did not warrant dismissal of his false arrest and malicious prosecution claims against them because naming individual municipal employees in a notice of claim is not a condition precedent to joining those individuals as defendants in the action. Blake v City of New York, 148 A.D.3d 1101, 51 N.Y.S.3d 540, 2017 N.Y. App. Div. LEXIS 2355 (N.Y. App. Div. 2d Dep't 2017).

Plaintiff's failure to name three officers in his notice of claim did not warrant dismissal of his 42 U.S.C.S. § 1983 claims against them because a notice of claim is not a condition precedent to maintaining a cause of action pursuant to § 1983. Blake v City of New York, 148 A.D.3d 1101, 51 N.Y.S.3d 540, 2017 N.Y. App. Div. LEXIS 2355 (N.Y. App. Div. 2d Dep't 2017).

Trial court erred in granting a housing authority's motion for summary judgment and in denying a pedestrian's cross-motion to deem the notice of claim properly served because, although the envelope containing the notice of claim was addressed to the "Comptroller of the Authority" rather than just the authority itself, it had the correct address and was timely mailed, the minor misnomer on the envelope—"Comptroller"—was not fatal to the action, especially where the pedestrian's attorney asserted a claim against both the city and the authority, and the notice of claim itself named the authority. Carroll v City of New York, 149 A.D.3d 1026, 52 N.Y.S.3d 465, 2017 N.Y. App. Div. LEXIS 3097 (N.Y. App. Div. 2d Dep't 2017).

Former tenant was not permitted to add the town as a defendant because the former tenant failed to file a notice of claim, and, thus, the former tenant was not entitled to seek any relief arising out of its alleged contractual relationship with the town nor assert causes of action to recover damages for the town's alleged wrongful acts. Video Voice, Inc. v Local T.V., Inc., 156 A.D.3d 848, 68 N.Y.S.3d 475, 2017 N.Y. App. Div. LEXIS 8898 (N.Y. App. Div. 2d Dep't 2017).

Trial court properly granted dismissal of the cause of action alleging violations of the State Constitution on the ground that the administrative law judge failed to serve a notice of claim because the action did not fall within the public interest exception to the notice of claim requirement, since the complaint sought to vindicate the private rights of the administrative law judge, and the disposition of the claim would not directly affect or vindicate the rights of others. Further, although the complaint named the individual defendants in their individual capacities, it alleged retaliation by them as part of their employment, and thus, the notice of claim requirement applied. Ferreri v Town of Penfield, 34 A.D.3d 1243, 824 N.Y.S.2d 835, 2006 N.Y. App. Div. LEXIS 15989 (N.Y. App. Div. 4th Dep't 2006).

Trial court properly granted a school district's motion for summary judgment in a student athlete's personal injury action and denied the student's cross-motion for leave to serve an amended complaint because the student failed to serve a timely notice of claim or commence a timely proceeding for leave to serve a late notice of claim, there was no evidence in the record demonstrating that the district engaged in any misleading conduct that would support a finding of equitable estoppel, the district's participation in pretrial discovery did not preclude it from raising the untimeliness of the notice of claim, and the student's proposed amendment was palpably insufficient or devoid of merit. Sanchez v Jericho Sch. Dist., 180 A.D.3d 828, 120 N.Y.S.3d 163, 2020 N.Y. App. Div. LEXIS 1130 (N.Y. App. Div. 2d Dep't 2020).

Supreme Court improvidently exercised its discretion in denying petition for leave to serve late notice of claim because balance of statutory factors in the case warranted granting of the petition; the unusual occurrence report prepared and filed shortly after petitioner's accident provided respondent with timely actual knowledge of essential facts constituting the claim, since its specificity regarding location and circumstances of incident permitted respondent to readily infer that potentially actionable wrong had been committed. Matter of Catania v City of New York, 188 A.D.3d 1041, 134 N.Y.S.3d 421, 2020 N.Y. App. Div. LEXIS 6960 (N.Y. App. Div. 2d Dep't 2020).

Notice of claim requirements are construed strictly, in the sense that compliance with them is a condition precedent to suit. Meadows v Mineola, 72 N.Y.S.2d 368, 190 Misc. 815, 1947 N.Y. Misc. LEXIS 2750 (N.Y. Sup. Ct. 1947); Rudolph v New York, 77 N.Y.S.2d 788, 191 Misc. 947, 1947 N.Y. Misc. LEXIS 3730 (N.Y. Sup. Ct. 1947).

Service of notice of claim is a condition precedent to institution of an action against a municipality or municipal corporation, and the complaint must allege facts in support of performance of such conditions, such as when the alleged wrongful acts were done, what damage was caused, and when notice of claim was served. Bardo v Monroe County Water Authority, 37 Misc. 2d 638, 235 N.Y.S.2d 926, 1962 N.Y. Misc. LEXIS 2453 (N.Y. Sup. Ct. 1962).

As rule of substantive law, service of proper notice of claim under CLS Gen Mun § 50-e cannot be waived under relaxed procedural rules for Small Claims Court, pursuant to CLS NYC Civil Ct Act §§ 1802 and 1804. Lurie v New York City Office of Comptroller, 154 Misc. 2d 950, 587 N.Y.S.2d 831, 1992 N.Y. Misc. LEXIS 348 (N.Y. Civ. Ct. 1992).

Because an employee's notice of claim alleging a violation of N.Y. Exec. Law § 296 did not comply with N.Y. County Law § 52 or N.Y. Gen. Mun. Law § 50-e, it was dismissed. Sowich v County of Oneida, 938 N.Y.S.2d 413, 35 Misc. 3d 486, 2011 N.Y. Misc. LEXIS 6360 (N.Y. Sup. Ct. 2011), aff'd, 109 A.D.3d 1170, 971 N.Y.S.2d 720, 2013 N.Y. App. Div. LEXIS 6206 (N.Y. App. Div. 4th Dep't 2013).

Because it could not be determined from the record whether an employee failed to exhaust administrative remedies or take the necessary steps to protect the employee's whistleblower status under N.Y. Civ. Serv. Law § 75-b, further proceedings were required to determine the issues under N.Y. C.P.L.R. art. 78, including compliance with the notice requirements of N.Y. Gen. Mun. Law § 50-e. Yan Ping Xu v New York City Dept. of Health, 77 A.D.3d 40, 906 N.Y.S.2d 222, 2010 N.Y. App. Div. LEXIS 6387 (N.Y. App. Div. 1st Dep't 2010).

Where plaintiff failed to serve a timely notice of claim under N.Y. Gen. Mun. Law § 50-e(1)(a) on a public corporation, the corporation had no obligation to plead, as an affirmative defense, plaintiff's failure to comply with the statutory notice of claim requirement. Barnaman v New York City Health & Hosps. Corp., 90 A.D.3d 588, 934 N.Y.S.2d 443, 2011 N.Y. App. Div. LEXIS 8781 (N.Y. App. Div. 2d Dep't 2011).

Where plaintiff failed to serve a timely notice of claim under N.Y. Gen. Mun. Law § 50-e(1)(a) on a public corporation, the corporation's participation in pretrial discovery did not preclude it from raising the untimeliness of the notice of claim. Barnaman v New York City Health & Hosps. Corp., 90 A.D.3d 588, 934 N.Y.S.2d 443, 2011 N.Y. App. Div. LEXIS 8781 (N.Y. App. Div. 2d Dep't 2011).

Although an arrestee's negligent hiring, training, and retention claim was time-barred by N.Y. Gen. Mun. Law §§ 50-e(1)(a), 50-l, pursuant to N.Y. C.P.L.R. 3101, the arresting police officer was required to appear for a deposition and to produce the officer's personnel and disciplinary files (subject to redaction of personal information), as well as documentation of similar civil rights claims against other officers in the precinct. Pendleton v City of New York, 239 N.Y.L.J. 94, 2008 N.Y. Misc. LEXIS 2978 (N.Y. Sup. Ct. Apr. 14, 2008), modified, 21 Misc. 3d 1141(A), 2008 N.Y. Misc. LEXIS 6993 (N.Y. Sup. Ct. Dec. 3, 2008).

Because the supreme court had adhere to First Department precedent requiring the notice of claim to name individual defendants, the detectives' motion to dismiss was granted, and the arrestee's cross-motion to amend was denied; the supreme court was constrained by precedent to find that the arrestee's failure to name the detectives in the notice of claim merited dismissal against them because it was bound by the First Department's precedent. Wiggins v City of New York, 69 Misc. 3d 620, 133 N.Y.S.3d 178, 2020 N.Y. Misc. LEXIS 4076 (N.Y. Sup. Ct. 2020).

The provisions of §§ 50-e and 50-i of the General Municipal Law are more than mere statutes of limitation or statutes of repose; they establish conditions precedent to the initiation of a lawsuit against a municipality. Gregory v New York, 346 F. Supp. 140, 1972 U.S. Dist. LEXIS 12974 (S.D.N.Y. 1972), disapproved, Fountain v Metropolitan Atlanta Rapid Transit Authority, 678 F.2d 1038, 1982 U.S. App. LEXIS 18222 (11th Cir. 1982).

Plaintiff's failure to file notice of claim against individual defendants did not warrant dismissal of his claims against those defendants under Gen Mun § 50-e. Lieber v Village of Spring Valley, 40 F. Supp. 2d 525, 1999 U.S. Dist. LEXIS 4050 (S.D.N.Y. 1999)).

Plaintiff professor's negligent misrepresentation claim against defendant community college and officials was barred because the professor failed to file a notice of claim against the county under N.Y. Gen. Mun. Law § 50-e(1)(a) and N.Y. County Law § 52, and because the claim was time-barred under N.Y. C.P.L.R. § 214. Feingold v Hankin, 269 F. Supp. 2d 278, 2003 U.S. Dist. LEXIS 9903 (S.D.N.Y. 2003), aff'd in part and rev'd in part, 91 Fed. Appx. 176, 2004 U.S. App. LEXIS 3531 (2d Cir. N.Y. 2004).

Where defendants received the timely notice to which they were entitled under the statute, the fact that plaintiff failed to plead compliance with the requirement in his complaint was only a technical error, and plaintiff was granted leave to amend his second amended complaint to reflect that he filed a timely notice of claim. Razzano v County of Nassau, 599 F. Supp. 2d 345, 2009 U.S. Dist. LEXIS 12936 (E.D.N.Y. 2009).

Battery claims that a former prisoner asserted against a county were barred by N.Y. Gen. Mun. Law § 50 because the prisoner did not file timely notices of claim as required by N.Y. Gen. Mun. Law § 50-e and the prisoner's action was filed after the expiration of the one-year-and-ninety-day statute of limitations set forth in N.Y. Gen. Mun. Law § 50-i(1). Varricchio v County of Nassau, 702 F. Supp. 2d 40, 2010 U.S. Dist. LEXIS 24976 (E.D.N.Y. 2010).

Owner's notice of claim did not invoke the New York State Constitution, and thus its state constitutional claims against a town were barred. DC3, LLC v Town of Geneva, 783 F. Supp. 2d 418, 2011 U.S. Dist. LEXIS 39616 (W.D.N.Y. 2011).

Employee's retaliation claim against all defendants under the New York Human Rights Law must also be dismissed because he failed to file the requisite notice of claim against the county pursuant to N.Y. Gen. Mun. Law § 50-e. Seale v Madison Cnty, 929 F. Supp. 2d 51, 2013 U.S. Dist. LEXIS 31284 (N.D.N.Y. 2013).

Because plaintiff's claim sounded in tort and she failed to file a notice of claim, the court granted summary judgment to the City on the negligence claim on this ground. Breitkopf v Gentile, 41 F. Supp. 3d 220, 2014 U.S. Dist. LEXIS 121581 (E.D.N.Y. 2014).

City employee's state law claims against several supervisory city employees brought against them in their official capacities were dismissed because the employee failed to file a required notice of claim prior to filing suit. Manon v Pons, 131 F. Supp. 3d 219, 2015 U.S. Dist. LEXIS 125134 (S.D.N.Y. 2015).

In litigation that arose out of sexual relationship between minor high school student and teacher, state statutory claim for failure to report child abuse claim brought by parent against another teacher failed because parent did not file required pre-litigation notice. RF v S. Country Cent. Sch. Dist., 2016 U.S. Dist. LEXIS 130671 (E.D.N.Y. Sept. 23, 2016).

6. —Late notice

Where petitioner sued a school district for negligence, the trial court abused its discretion in denying his motion for leave to serve a late notice of claim because it erred 1) in placing the burden solely on him to establish lack of substantial prejudice and by failing to consider whether his initial showing shifted the burden to the district; and 2) by relying on speculation and inference rather than record evidence to find that the district would by substantially prejudiced by the late notice. Matter of Newcomb v Middle Country Cent. Sch. Dist., 28 N.Y.3d 455, 68 N.E.3d 714, 45 N.Y.S.3d 895, 2016 N.Y. LEXIS 3854 (N.Y. 2016), reh'g denied, 29 N.Y.3d 963, 73 N.E.3d 853, 51 N.Y.S.3d 496, 2017 N.Y. LEXIS 811 (N.Y. 2017).

Pursuant to N.Y. Gen. Mun. Law § 50-e(1)(a), a notice of claim must be filed within 90 days after the claim arose, however, a court may grant the claimant leave to file a late notice of claim within one year and ninety days of accrual; a trial court decision to deny a citizen's motion to file late notice of a claim against a city for a false accusation of rape was reversed because the citizen's mental incapacity was sufficiently established, and the local police force had sufficient facts in its possession to exonerate the citizen, thereby making the city liable. Nunez v City of New York, 307 A.D.2d 218, 762 N.Y.S.2d 384, 2003 N.Y. App. Div. LEXIS 8326 (N.Y. App. Div. 1st Dep't 2003).

Trial court properly denied plaintiffs' cross motion for leave to serve a late notice of claim in their medical malpractice action against defendants; the applicable factors under N.Y. Gen. Mun. Law § 50-e(5) weighed against allowing a late notice of claim. Fuentes v County of Nassau, 15 A.D.3d 346, 788 N.Y.S.2d 865, 2005 N.Y. App. Div. LEXIS 1415 (N.Y. App. Div. 2d Dep't 2005).

Court erred in allowing a claimant to file a notice of claim against a school district five years after the incident, as he did not file the notice of claim with his petition, as required by N.Y. Gen. Mun. Law § 50-e(7), and failed to show that the school district had actual notice of the essential facts of the claim within 90 days after it arose or a reasonable time thereafter. Matter of Scott v Huntington Union Free School Dist., 29 A.D.3d 1010, 816 N.Y.S.2d 165, 2006 N.Y. App. Div. LEXIS 7173 (N.Y. App. Div. 2d Dep't 2006).

Dismissal of plaintiff's complaint against a village was proper because there was no prior written notice of the allegedly defective curb condition at issue, and plaintiff failed to allege her affirmative act of negligence theory in her notice of claim; plaintiff further never sought leave to serve late notice of claim. Plaintiff's suggestion that the trial court erred in not allowing her to correct her notice of claim pursuant to N.Y. Gen. Mun. Law § 50-e(6) was meritless. Semprini v Village of Southampton, 48 A.D.3d 543, 852 N.Y.S.2d 208, 2008 N.Y. App. Div. LEXIS 1298 (N.Y. App. Div. 2d Dep't 2008).

Because a patient's untimely notice of claim upon a hospital was not the product of the patient's infancy, because the patient failed to establish that the hospital had actual notice of the claim, because the hospital's possession of the pertinent medical records was insufficient to establish notice of the specific claim, and because the patient failed to establish that the hospital would not be substantially prejudiced in maintaining its defense on the merits, the patient's Gen. Mun. Law § 50-e(5) motion to deem the notice of claim timely served was properly denied. Rowe v Nassau Health Care Corp., 57 A.D.3d 961, 871 N.Y.S.2d 330, 2008 N.Y. App. Div. LEXIS 10262 (N.Y. App. Div. 2d Dep't 2008).

Patient's medical malpractice claim against a City hospital arose in infancy, and the claim period was only extended under N.Y. Gen. Mun. Law § 50-e(5) and N.Y. C.P.L.R. 208 to 10 years from the time of accrual; to the extent that a patient's claim was predicated on acts that occurred prior to March 19, 1997, the patient's motion was untimely. Contreras v KBM Realty Corp., 66 A.D.3d 627, 887 N.Y.S.2d 172, 2009 N.Y. App. Div. LEXIS 7040 (N.Y. App. Div. 2d Dep't 2009), app. denied, 14 N.Y.3d 701, 898 N.Y.S.2d 96, 925 N.E.2d 101, 2010 N.Y. LEXIS 3847 (N.Y. 2010).

Patient's late notice of claim was not deemed timely under N.Y. Gen. Mun. Law § 50-e(5) as: (1) the patient did not move for leave to deem the patient's late notice of claim timely served until more than nine years after the patient was last diagnosed with an elevated blood lead level, and this delay was not a product of the patient's infancy; (2) the patient failed to offer a reasonable excuse for the patient's failure to serve a timely notice of claim, or that the hospital had actual notice of the patient's claim within the 90-day period or a reasonable time thereafter; (3) although the hospital was in possession of the patient's pediatric records, the records showed that the patient's blood lead level declined while the hospital's medical staff allegedly failed to provide anticipatory guidance; and (4) the patient did not show an injury attributable to any acts of medical malpractice. Contreras v KBM Realty Corp., 66 A.D.3d 627, 887 N.Y.S.2d 172, 2009 N.Y. App. Div. LEXIS 7040 (N.Y. App. Div. 2d Dep't 2009), app. denied, 14 N.Y.3d 701, 898 N.Y.S.2d 96, 925 N.E.2d 101, 2010 N.Y. LEXIS 3847 (N.Y. 2010).

Because a school district had actual notice of a mother's claim and failed to demonstrate substantial prejudice or that her claim was patently without merit, the mother's motion for leave to serve a late notice of claim under N.Y. Gen. Mun. Law § 50-e(5), N.Y. Educ. Law § 3813(2-a) was properly granted even though she failed to offer a reasonable excuse for her failure to serve a timely notice of claim. Matter of Hess v West Seneca Cent. School Dist., 71 A.D.3d 1568, 899 N.Y.S.2d 490, 2010 N.Y. App. Div. LEXIS 2598 (N.Y. App. Div. 4th Dep't), rev'd, 15 N.Y.3d 813, 908 N.Y.S.2d 146, 934 N.E.2d 879, 2010 N.Y. LEXIS 2223 (N.Y. 2010).

False arrest and unlawful imprisonment claims against a county and a sheriff should have been dismissed because the claims accrued on the date the client was released from prison, and the client did not file a notice of claim until four years after that date, and did not commence his action until long after the N.Y. Gen. Mun. Law § 50-i(1) time limit had expired. Brownell v LeClaire, 96 A.D.3d 1336, 948 N.Y.S.2d 168, 2012 N.Y. App. Div. LEXIS 5176 (N.Y. App. Div. 3d Dep't 2012).

Trial court erred in granting a resident leave to serve a late notice of claim under N.Y. Gen. Mun. Law § 50-e(5) as: (1) the resident's claim that she reported the incident to the New York City Housing Authority shortly after her release from the hospital did not show that the Authority acquired actual knowledge of the essential facts of the claim within 90 days of the incident or a reasonable later time; (2) an occurrence report filed with the Authority 12 months after the incident did not give the Authority timely, actual knowledge of the claim that the resident's injury was caused by the Authority's negligence; and (3) the resident failed to show that her delay would not substantially prejudice the Authority under § 50-e(5) and N.Y. Pub. Hous. Law § 157(2). Matter of Alvarez v New York City Hous. Auth., 97 A.D.3d 668, 948 N.Y.S.2d 648, 2012 N.Y. App. Div. LEXIS 5408 (N.Y. App. Div. 2d Dep't 2012).

Trial court erred in granting a student's petition for leave to serve a late notice of claim because the student did not explain the 15-month delay between the time she reached the age of majority and her commencement of a proceeding against a school district, the student did not show that the district had actual knowledge of her claim, a parent notification form was insufficient to apprise the district of the student's claims, and the student did not rebut the district's assertions of prejudice. Matter of Lewis v East Ramapo Cent. Sch. Dist., 110 A.D.3d 720, 972 N.Y.S.2d 326, 2013 N.Y. App. Div. LEXIS 6315 (N.Y. App. Div. 2d Dep't 2013).

In a medical malpractice case, the trial court erred in denying plaintiff's motion for leave to serve a late notice of claim on defendant city or to deem the proposed notice of claim timely served nunc pro tunc, as the city received the notice of claim less than one month after the expiration of the 90-day period for filing it and was not prejudiced since it acquired actual knowledge of the essential facts underlying the claim within a reasonable time after the 90-day period expired. Brunson v New York City Health & Hosps. Corp., 144 A.D.3d 854, 42 N.Y.S.3d 34, 2016 N.Y. App. Div. LEXIS 7503 (N.Y. App. Div. 2d Dep't 2016).

Trial court did not err in granting a city summary judgment on plaintiff's common law harassment claim, based on the city's issuance of notices of violation, as New York did not recognize that cause of action and plaintiff failed to serve a timely notice of claim on the city. Shahid v City of New York, 144 A.D.3d 1127, 43 N.Y.S.3d 88, 2016 N.Y. App. Div. LEXIS 7907 (N.Y. App. Div. 2d Dep't 2016).

Supreme court properly denied a motion for leave to serve late notice of a claim against a medical center because the plaintiff failed to show that the center had actual knowledge of the essential facts constituting the claim within the requisite 90-day period or a reasonable time thereafter. Stewart v Westchester Inst. for Human Dev., 136 A.D.3d 1014, 25 N.Y.S.3d 656, 2016 N.Y. App. Div. LEXIS 1304 (N.Y. App. Div. 2d Dep't 2016).

It was an improvident exercise of discretion to deny a city leave to serve late notices of claim against a county and to deem the late notices timely served nunc pro tunc because (1) the trial court had discretion to extend the time to serve the notices, (2) the county had timely actual knowledge of the essential facts constituting the claims, (3) N.Y. Gen. Mun. Law § 50-e(5) did not require that only officials statutorily designated to accept service of the notices be provided or know those facts, and (4) the city showed the county would not be substantially prejudiced by the late notices, as the claims were based on easily verifiable, well-documented, objective facts directly within the purview and knowledge of the police commissioner to whom the claims were reported. Matter of City of New York v County of Nassau, 146 A.D.3d 948, 46 N.Y.S.3d 155, 2017 N.Y. App. Div. LEXIS 467 (N.Y. App. Div. 2d Dep't 2017).

Trial court properly denied a motor vehicle passenger's motion for leave to serve a late notice of claim on the city and the city department of transportation, arising from alleged injuries when the vehicle he was riding in struck an open manhole on an expressway, as the motion was untimely because it was not made within 90 days and was not made before the one-year-and-90-day statute of limitations expired. Matter of Lubin v City of New York, 148 A.D.3d 898, 50 N.Y.S.3d 405, 2017 N.Y. App. Div. LEXIS 1788 (N.Y. App. Div. 2d Dep't 2017).

Injured motor vehicle passenger's motion for leave to renew the petition to file a late notice of claim was untimely, despite that the statute of limitations was tolled for a period of time, as the doctrine of equitable estoppel did not apply because the city entities' conduct did not mislead or discourage the service of a timely notice of claim. Matter of Lubin v City of New York, 148 A.D.3d 898, 50 N.Y.S.3d 405, 2017 N.Y. App. Div. LEXIS 1788 (N.Y. App. Div. 2d Dep't 2017).

In a proceeding pursuant to N.Y. Gen. Bus. Law § 50-e(5), the order granting petitioner leave to serve a late notice of claim was reversed as to the claim alleging conscious pain and suffering and wrongful death because the evidence submitted by petitioner failed to establish that appellants had actual knowledge of the essential facts constituting the claim to recover damages for conscious pain and suffering within the requisite 90-day period or a reasonable time thereafter. Matter of Shun Mao Ma v New York City Health & Hosps. Corp., 153 A.D.3d 529, 59 N.Y.S.3d 478, 2017 N.Y. App. Div. LEXIS 5897 (N.Y. App. Div. 2d Dep't 2017).

Developmentally disabled student and her parents had a meritorious defense to a school district's (SD) motion to dismiss as: (1) SD acquired actual knowledge of the facts within 90 days after the claim arose; (2) the bus attendant who sexually assaulted the student during the course of his employment was employed by SD; (3) SD conducted the investigation that yielded the attendant's admission of abuse and reported its findings to the police; (4) the notice of claim was served only two days late; and (5) the student's disabilities also weighed in favor of relief as she was in the very poor range of cognitive functioning, functioned at a 4th grade learning level and had no safety awareness or self-preservation skills. K.A. v Wappingers Cent. Sch. Dist., 151 A.D.3d 828, 54 N.Y.S.3d 683, 2017 N.Y. App. Div. LEXIS 4741 (N.Y. App. Div. 2d Dep't 2017).

Elementary school student's parent was not permitted to serve a late notice of claim on the school district because the notification of injury form prepared by the school nurse did not provide the district with timely, actual knowledge of the essential facts underlying the parent's claims for negligent supervision of students, and in the hiring and training of school personnel, and

there was no showing of a nexus between the student's infancy and the delay. McClancy v Plainedge Union Free Sch. Dist., 153 A.D.3d 1413, 62 N.Y.S.3d 126, 2017 N.Y. App. Div. LEXIS 6652 (N.Y. App. Div. 2d Dep't 2017), app. denied, 31 N.Y.3d 905, 103 N.E.3d 782, 78 N.Y.S.3d 711, 2018 N.Y. LEXIS 847 (N.Y. 2018).

Trial court erred in granting an injured pedestrian's motion for leave to serve a late notice of a personal injury claim against a public housing authority because the pedestrian's excuse regarding the identity of the owner of the walkway where he slipped and fell arose from a lack of due diligence in investigating the matter, he failed to proffer any explanation for the additional seven-month delay between the time that he discovered the error and the filing of his application for leave to serve a late notice of claim, notice to the city could not be imputed to the authority, and the pedestrian presented no evidence or plausible argument that his delay did not substantially prejudice the authority in defending on the merits. Kelly v City of New York, 153 A.D.3d 1388, 63 N.Y.S.3d 385, 2017 N.Y. App. Div. LEXIS 6643 (N.Y. App. Div. 2d Dep't 2017).

Order denying petitioner's motion for leave to serve a late notice of claim was reversed because the county had acquired actual knowledge of the essential facts constituting the claim before a representative of the estate was appointed and the police department had conducted an investigation and prepared a case report, thus, petitioner showed that the county was not prejudiced by the delay in being served a notice of claim. Matter of Kerner v County of Nassau, 150 A.D.3d 1234, 57 N.Y.S.3d 173, 2017 N.Y. App. Div. LEXIS 4208 (N.Y. App. Div. 2d Dep't 2017).

In determining whether to grant leave to serve a late notice of claim, the court must consider several factors, including, most importantly, whether the public corporation or its attorney or its insurance carrier acquired actual knowledge of the essential facts constituting the claim within the time specified in subdivision one within 90 days after the claim arose or within a reasonable time thereafter. Matter of Kerner v County of Nassau, 150 A.D.3d 1234, 57 N.Y.S.3d 173, 2017 N.Y. App. Div. LEXIS 4208 (N.Y. App. Div. 2d Dep't 2017).

Petitioner's lack of a reasonable excuse for the delay in serving a timely notice of claim is not necessarily fatal when weighed against other relevant factors. Matter of Kerner v County of Nassau, 150 A.D.3d 1234, 57 N.Y.S.3d 173, 2017 N.Y. App. Div. LEXIS 4208 (N.Y. App. Div. 2d Dep't 2017).

Trial court properly denied a petition for leave to serve a late notice of claim in a proceeding brought by the parent of a child allegedly injured when she hit her head at school because the parent failed to establish that the city acquired actual knowledge of the essential facts constituting the claim within 90 days after the accident or a reasonable time thereafter, failed to demonstrate a reasonable excuse, and presented no evidence that the delay did not substantially prejudice the city. Matter of Quinones v City of New York, 160 A.D.3d 874, 74 N.Y.S.3d 602, 2018 N.Y. App. Div. LEXIS 2620 (N.Y. App. Div. 2d Dep't 2018).

Driver was entitled to serve a late notice of claim to city where the claim arose out of an automobile collision in which the other driver lost control due to a pothole because the city acquired actual knowledge of claim when the other driver filed her own notice, and the city did not come forward with particularized evidence showing that the late notice had substantially prejudiced its ability to defend the claim. Matter of Tejada v City of New York, 161 A.D.3d 876, 77 N.Y.S.3d 95, 2018 N.Y. App. Div. LEXIS 3311 (N.Y. App. Div. 2d Dep't 2018).

It was error to deny an application for leave to serve a late notice of claim on a housing authority because (1) the housing authority acquired actual knowledge of the essential facts constituting the claim within a reasonable time after the claim period expired, as the application was made approximately two weeks after the period expired, and (2) an alleged injured party met an initial burden to show lack of prejudice to the housing authority, requiring the housing authority to rebut that showing with particularized evidence and not a conclusory assertion of substantial prejudice. Matter of Ramos v New York City Hous. Auth., 162 A.D.3d 884, 80 N.Y.S.3d 85, 2018 N.Y. App. Div. LEXIS 4464 (N.Y. App. Div. 2d Dep't 2018).

Claimant's failure to provide a reasonable excuse for the delay in serving a notice of claim was not fatal since claimant showed that respondent would not be substantially prejudiced by any delay because the injuries allegedly resulted from a fall at a construction site, and it was highly unlikely that the conditions existing at the time of the accident would still have existed if the notice of claim had been timely filed; however, claimant failed to show that respondent had timely actual knowledge of his first accident or of his injuries or damages and his motion to serve a late notice of claim failed as the incident report was not transmitted to respondent and the first accident was not mentioned in the construction closeout report submitted to respondent. Matter of Szymkowiak v New York Power Auth., 162 A.D.3d 1652, 80 N.Y.S.3d 565, 2018 N.Y. App. Div. LEXIS 4426 (N.Y. App. Div. 4th Dep't 2018).

Claimant established that respondent received timely actual knowledge of his second accident and was properly granted leave to serve a late notice of claim since the incident report was submitted to respondent's safety consultant, and the details and nature of the accident were included in the construction closeout report provided respondent; claimant's failure to provide a reasonable excuse for the delay was not fatal since claimant showed that respondent would not be substantially prejudiced by any delay because the injuries allegedly resulted from a fall at a construction site, and it was highly unlikely that the conditions existing at the time of the accident would still have existed if the notice of claim had been timely filed. Matter of Szymkowiak v New York Power Auth., 162 A.D.3d 1652, 80 N.Y.S.3d 565, 2018 N.Y. App. Div. LEXIS 4426 (N.Y. App. Div. 4th Dep't 2018).

Trial court properly denied a vehicle owner's petition for leave to serve a late notice of claim for damage to his vehicle after he collided with a village truck that was plowing snow because the owner did not demonstrate that the village obtained timely, actual knowledge of the essential facts constituting the claim where the late notice of claim was served upon the village approximately three months after the 90-day statutory period had elapsed and did not provide the village with actual knowledge of the essential facts of the claim, and while the village did not respond with a particularized evidentiary showing that it would be substantially prejudiced if late notice were allowed, prejudice was but one factor for the court to consider. Matter of Vega v Incorporated Vil. of Freeport, 164 A.D.3d 514, 83 N.Y.S.3d 290, 2018 N.Y. App. Div. LEXIS 5554 (N.Y. App. Div. 2d Dep't 2018).

Trial court properly denied an injured worker's petition for leave to serve a late notice of claim against a School Construction Authority because his ignorance of the requirement to serve the notice of claim within 90 days after the claim arose did not constitute a reasonable excuse, he did not show that he was incapacitated to such an extent that he could not have served a timely notice of claim, the evidence he submitted did not establish that the Authority had actual knowledge of the essential facts constituting the claim within 90 days after its accrual or a reasonable time thereafter, and the worker did not present evidence or plausible argument that his delay did not substantially prejudice the Authority in defending on the merits. Matter of Murnane v New York City Sch. Constr. Auth., 164 A.D.3d 506, 83 N.Y.S.3d 105, 2018 N.Y. App. Div. LEXIS 5537 (N.Y. App. Div. 2d Dep't 2018).

Trial court properly denied a mother's petition for leave to serve a late notice of claim and dismissed her personal injury complaint against a school principal and her employer (the defendants) for failure to timely serve a notice of claim because the principal's direct involvement in the incident, without more, was insufficient to establish that the defendants had actual knowledge of the essential facts constituting the claim, the mother failed to proffer a reasonable excuse for the failure to timely serve a notice of claim, and the defendants did not have the opportunity to conduct any physical or mental health examinations of the mother's child or to photograph or record his alleged physical injuries at or near the time of the incident. "Jane Doe" v Taylor, 164 A.D.3d 469, 83 N.Y.S.3d 295, 2018 N.Y. App. Div. LEXIS 5523 (N.Y. App. Div. 2d Dep't 2018).

Trial court properly denied a student's petition for leave to serve a late notice of claim for negligent supervision because her medical evidence showed that she was not incapacitated and had substantially healed long before the expiration of the time for filing the notice, she did not establish a nexus between her infancy and the failure to timely serve the notice, an incident report and e-mail sent by her physical education teacher to the student's parents did not provide the school or school district with actual knowledge of the facts underlying the claim, and the student did not show that granting the petition would not substantially prejudice them in maintaining a defense on the merits. Matter of Zelin v Blind Brook-Rye Union Free Sch. Dist., 164 A.D.3d 1352, 84 N.Y.S.3d 252, 2018 N.Y. App. Div. LEXIS 6074 (N.Y. App. Div. 2d Dep't 2018).

In a slip and fall case, petitioner did not demonstrate a reasonable excuse for his failure to serve a timely notice of claim upon respondents. Petitioner's alleged lack of awareness of the requirements of N.Y. Gen. Mun. Law § 50-e(5) was not a reasonable excuse for the failure to serve a timely notice of claim. Matter of McFarland v City of New York, 169 A.D.3d 687, 92 N.Y.S.3d 725, 2019 N.Y. App. Div. LEXIS 870 (N.Y. App. Div. 2d Dep't 2019).

Trial court erred in denying a father's motion, on behalf of his infant child, for leave to serve a late notice of claim or to deem a late notice of claim timely served nunc pro tunc because the statute of limitations was tolled for 10 years by the child's infancy, and the medical records provided the hospital with actual knowledge of the essential facts constituting the malpractice claim inasmuch as they showed that the mother was not admitted to the hospital, despite a physician's order, that two days later, the child was delivered one hour after the mother arrived at the hospital and only after a fetal heart monitor alarm sounded four times. J.H. v New York City Health & Hosps. Corp., 169 A.D.3d 880, 94 N.Y.S.3d 345, 2019 N.Y. App. Div. LEXIS 1236 (N.Y. App. Div. 2d Dep't 2019).

Trial court erred in denying a mother's motion, filed on behalf of her child, to deem a late notice of claim timely served nunc pro tunc and granted a hospital's cross-motion to dismiss the mother's medical malpractice action because the hospital had actual knowledge of the essential facts of the claim inasmuch as the parties' motions focused on whether the hospital's failure to monitor the child's glucose levels constituted malpractice that proximately caused the child's developmental delays, the hospital conducted a General Municipal Law examination, and the delay in serving a notice of claim was directly attributable to the child's infancy. Feduniak v New York City Health & Hosps. Corp. (Queens Hosp. Center), 170 A.D.3d 663, 95 N.Y.S.3d 340, 2019 N.Y. App. Div. LEXIS 1563 (N.Y. App. Div. 2d Dep't 2019).

Arrestee's false arrest claim against a village failed as he failed to serve a timely notice of claim since the cause of action accrued on the date of his arrest and he served his notice of claim beyond the expiration of the 90-day period; although the notice of claim was timely as to the malicious prosecution claim, the notice of claim expressly limited it to the county, and the accrual of the malicious prosecution claim against the county did not revive the arrestee's time-barred false arrest claim against the village. O'Dell v County of Livingston, 174 A.D.3d 1307, 103 N.Y.S.3d 730, 2019 N.Y. App. Div. LEXIS 5425 (N.Y. App. Div. 4th Dep't 2019).

Trial court erred in denying the adjoining landowners' application for leave to serve 67 late notices of claim against a town for damages arising from exposure to pollutants on or escaping from the town's landfill, which had been declared a state superfund site in the 1980s because the intervening filing of a federal class action, in which landowners were putative class members, tolled the statute of limitations, and they established that town received the requisite actual timely knowledge of the claims they asserted and would not town would not be substantially prejudiced by the delay. Matter of Bingham v Town of Wheatfield, 185 A.D.3d 1482, 128 N.Y.S.3d 729, 2020 N.Y. App. Div. LEXIS 4373 (N.Y. App. Div. 4th Dep't 2020).

Trial court properly denied an injured plaintiff's motion for leave to serve a late notice of claim upon a city's transportation authorities because the plaintiff did not provide a reasonable excuse for his failure to serve a timely notice of claim upon the authorities where he did not proffer any explanation for the six-month delay between the time that he discovered the error and the filing of his motion for leave to serve a late notice of claim, and he did not establish that the authorities received timely, actual knowledge of the essential facts constituting the claim. Durand v MV Transp., Inc., 186 A.D.3d 564, 129 N.Y.S.3d 123, 2020 N.Y. App. Div. LEXIS 4538 (N.Y. App. Div. 2d Dep't 2020).

Trial court erred in granting a mother's General Municipal Law § 50-e(5) application for leave to serve a late notice of claim with respect to her claims, asserted on behalf of her child, following an assault of the child by another student because the mother failed to establish a reasonable excuse for her failure to serve a timely notice of claim, the known facts failed to give reasonable notice from which it could be inferred that a potentially actionable wrong had been committed by the school district. Matter of Mary Beth B. v West Genesee Cent. Sch. Dist., 186 A.D.3d 979, 129 N.Y.S.3d 563, 2020 N.Y. App. Div. LEXIS 4811 (N.Y. App. Div. 4th Dep't 2020).

Trial court properly granted an injured state trooper's petition for leave to serve a late notice of claim against a county and sheriff relating to the trooper's claims because the county acquired timely actual knowledge of the essential facts constituting the troopers' claim where it produced various documents regarding the accident, including the police report, which indicated that the county committed a potentially actionable wrong when a deputy sheriff allegedly failed to yield the right of way to the trooper's vehicle even though the trooper's vehicle's lights and sirens were activated, and the county failed to demonstrate that the late notice of claim substantially prejudiced its ability to defend the claim on the merits. Matter of McVea v County of Orange, 186 A.D.3d 1221, 130 N.Y.S.3d 63, 2020 N.Y. App. Div. LEXIS 4955 (N.Y. App. Div. 2d Dep't 2020).

Trial court properly denied plaintiffs' cross motion for leave to amend the notice of claim or to serve a late notice of claim because the proposed amendments to the notice added substantive new facts and new theories of liability not set forth in the original notice of claim and which were not permitted as late filed amendments to a notice of claim; plaintiffs' failure to include a proposed notice of claim with their cross motion alone was a sufficient basis for denial. C.D. v Goshen Cent. Sch. Dist., 186 A.D.3d 1316, 131 N.Y.S.3d 40, 2020 N.Y. App. Div. LEXIS 5095 (N.Y. App. Div. 2d Dep't 2020).

Trial court properly denied a vehicle owner's motion for summary judgment and granted a city's motions for summary judgment because the owner failed to file a timely notice of claim against the city and failed to apply for an extension. Jagroop v Ramdhanny, 50 Misc. 3d 115, 26 N.Y.S.3d 821, 2016 N.Y. Misc. LEXIS 389 (N.Y. App. Term 2016).

Negligence and intentional tort claims against city are barred where plaintiff's belated service of notice of claim does not satisfy prerequisites to suit against municipality under CLS Gen Mun § 50. Mroz v City of Tonawanda, 999 F. Supp. 436, 1998 U.S. Dist. LEXIS 4577 (W.D.N.Y. 1998).

City's motion for judgment on the pleadings dismissing the state law claims was granted in an action brought by two bystanders who alleged an off-duty police officer pointed his pistol at them and threatened to kill them was granted because the bystanders did not serve a timely notice of claim as required by N.Y. Gen. Mun. Law § 50-e(1)(b). The bystanders did served a notice of claim more than nine months after it was due. Stoeckley v City of New York, 700 F. Supp. 2d 489, 2010 U.S. Dist. LEXIS 32068 (S.D.N.Y. 2010).

7. —Inapplicability

In an action to recover for personal injuries that were sustained in a vehicle accident, defendant town's motion for summary judgment, on the ground of plaintiffs' failure to give written notice of a defect in the highway before bringing an action against the town, was properly denied since plaintiffs alleged affirmative acts by the town in building and designing the highway in an unsafe manner that contributed to the accident, and since prior written notice is excused if a town has created the condition complained of, or has committed affirmative acts of negligence that are alleged to be a direct cause of damages. Haviland v Smith, 91

A.D.2d 764, 458 N.Y.S.2d 11, 1982 N.Y. App. Div. LEXIS 19656 (N.Y. App. Div. 3d Dep't 1982).

A city ordinance which required notice of the dangerous condition of "any public place" as a condition precedent to any suit against it based on such condition could not be applied to plaintiff, a factory owner whose factory was allegedly damaged due to a flood which resulted from a natural dam which formed when debris from city property was washed downstream, where the ordinance could only be construed to refer to public areas over which the public had access for travel, in that a city ordinance may not constitutionally require notice of dangerous conditions in areas not required by Gen Mun Law § 50-e(4), and the public property upstream from the factory could not be so defined. Amsterdam Brush Corp. v Amsterdam, 105 A.D.2d 881, 482 N.Y.S.2d 352, 1984 N.Y. App. Div. LEXIS 21009 (N.Y. App. Div. 3d Dep't 1984).

The trial court erred in granting a private bus transportation corporation's motion to dismiss for failure to serve a notice of claim pursuant to Gen Mun Law § 50-e; service of a notice of claim was not required despite the fact that the bus was being operated pursuant to a contract with a municipality, since the bus was owned by a private corporation. Schoenberg v Club Transp. Corp., 107 A.D.2d 745, 484 N.Y.S.2d 602, 1985 N.Y. App. Div. LEXIS 42652 (N.Y. App. Div. 2d Dep't 1985).

Notice of claim was not required in action against city to recover down payment on unimproved parcel of real property purchased from city at public auction, wherein it was alleged that property was unmarketable, since plaintiffs' theory of recovery was limited to suit to recover for breach of contract. Hoydal v New York, 154 A.D.2d 345, 545 N.Y.S.2d 823, 1989 N.Y. App. Div. LEXIS 12256 (N.Y. App. Div. 2d Dep't 1989).

Police officer was not required to file timely notice of claim or timely move for permission to file late notice of claim where his cause of action accrued in June 1993 and was revived by 1994 amendment to CLS Gen Mun § 205-e; thus, court erred in granting defendant city's summary judgment motion. Giblin v City of New York, 267 A.D.2d 127, 700 N.Y.S.2d 154, 1999 N.Y. App. Div. LEXIS 12978 (N.Y. App. Div. 1st Dep't 1999).

In a personal injury action, because a paved area in front of a village fire department, which was primarily used for access to the highway by the emergency vehicles and as a place to wash such vehicles, did not constitute the portion of the street intended for pedestrian use, N.Y. Veh. & Traf. Law § 144; the functional equivalent of a crosswalk, N.Y. Veh. & Traf. Law § 110(b); or a municipal parking lot that was the equivalent of a highway under N.Y. Veh. & Traf. Law § 118 and N.Y. Gen. Mun. Law § 50-e(4), the pedestrian who was injured was not required to give written notice of the defect under N.Y. C.P.L.R. § 9804 and N.Y. Village Law § 6-628 as a condition precedent. Smith v Village of Hancock, 25 A.D.3d 975, 809 N.Y.S.2d 589, 2006 N.Y. App. Div. LEXIS 413 (N.Y. App. Div. 3d Dep't 2006).

Employee's failure to file a notice of claim pursuant to N.Y. Gen. Mun. Law § 50-e as imposed by N.Y. County Law § 52, did not require dismissal of the sexual harassment action against a county library coworker or supervisor. Indeed, the conduct of the coworkers as alleged in the complaint amounted to intentional torts and, thus, fell outside the scope of their employment. Grasso v Schenectady County Pub. Lib, 30 A.D.3d 814, 817 N.Y.S.2d 186, 2006 N.Y. App. Div. LEXIS 7968 (N.Y. App. Div. 3d Dep't 2006).

Property owner was not required to serve a notice of claim as the claim was not subject to the notice of claim statute because his claim was primarily equitable in nature, specifically demanding that a building permit be issued; the demand for money damages was merely incidental to the request for an injunction. Johnson v City of Peekskill, 91 A.D.3d 825, 936 N.Y.S.2d 701, 2012 N.Y. App. Div. LEXIS 485 (N.Y. App. Div. 2d Dep't 2012).

Fire company, its president, and fire chief were not entitled to dismissal of a former fireman's discrimination causes of action based on the fireman's failure to serve a notice of claim because the notice of claim requirements of N.Y. Gen. Mun. Law § 50-e did not apply to discrimination causes of action under the Human Rights Law, N.Y. Exec. Law § 296 et seq. Thygesen v North Bailey Volunteer Fire Co., Inc., 106 A.D.3d 1458, 964 N.Y.S.2d 816, 2013 N.Y. App. Div. LEXIS 3128 (N.Y. App. Div. 4th Dep't 2013).

Trial court erred in granting a sheriff's motion to dismiss a complaint filed by a prisoner based on the failure to serve a timely notice of claim because this statute did not apply to a complaint filed against a sheriff in his official capacity given that the county had not statutory obligation to indemnify the sheriff. Villar v Howard, 126 A.D.3d 1297, 6 N.Y.S.3d 811, 2015 N.Y. App. Div. LEXIS 2252 (N.Y. App. Div. 4th Dep't 2015), aff'd, 28 N.Y.3d 74, 64 N.E.3d 280, 41 N.Y.S.3d 460, 2016 N.Y. LEXIS 3222 (N.Y. 2016).

In an action between a county and a property owner, arising from problems with their closing of the owner's property, it was error to grant summary judgment dismissal to the county on the owner's inverse condemnation counterclaim, as statutory notice was not necessary since the claim did not sound in tort. County of Jefferson v Onondaga Dev., LLC, 151 A.D.3d 1793, 59 N.Y.S.3d 203, 2017 N.Y. App. Div. LEXIS 4912 (N.Y. App. Div. 4th Dep't 2017).

The filing of a notice of claim according to the requirements of section 50-e of the General Municipal Law or sections 52 and 369 of the County Law is not a condition precedent to the commencement of an action upon a claim commenced in the Small Claims Part of a City Court against a municipality based upon tort or contract, since such statutes are procedural in nature and the Legislature in adopting section 1804 of the Uniform City Court Act has abolished the requirement that Small Claims Part be bound by such procedural statutes. Johnson v Timmerman, 92 Misc. 2d 626, 401 N.Y.S.2d 149, 1978 N.Y. Misc. LEXIS 1957 (N.Y. County Ct. 1978).

CPLR 205 (subd [a]), which provides, if an action is timely commenced and is terminated in a manner other than by a voluntary discontinuance or a dismissal of the complaint for neglect to prosecute or a final judgment on the merits, a new action may be commenced within six months, applies only to time limitations and does not apply to section 50-e of the General Municipal Law, which requires the filing of a notice of tort claim against a municipality within 90 days after the claim arises; the 90-day notice of claim is a mandatory condition precedent. Accordingly, plaintiff having failed to serve a notice of claim upon the defendant city within 90 days, a motion by defendant to dismiss the complaint is granted. Glamm v Amsterdam, 94 Misc. 2d 991, 405 N.Y.S.2d 993, 1978 N.Y. Misc. LEXIS 2333 (N.Y. Sup. Ct. 1978), aff'd, 67 A.D.2d 1056, 413 N.Y.S.2d 512, 1979 N.Y. App. Div. LEXIS 10871 (N.Y. App. Div. 3d Dep't 1979).

A personal injury action against a county transit system by a passenger who had been injured on one of the system's buses would not be dismissed on the basis of plaintiff's failure to file a notice of claim pursuant to Gen Mun Law § 50-e(1)(b), since, though the Court of Appeals decided after plaintiff's injury occurred that the laws creating the transit system imposed a statutory duty upon the county to operate the system and that, consequently, the statutory notice of claim requirements applied to actions against the system, such decision would be applied only prospectively in that such decision overruled clear past precedent on which litigants had a right to rely, the intent of the statute that municipalities receive actual, prompt notice of future claims had been satisfied, the equities of the situation clearly preponderated in favor of allowing plaintiff her day in court, and the county suffered no prejudice as a result of plaintiff's failure to provide it with formal notice. James v Liberty Lines, 119 Misc. 2d 1060, 465 N.Y.S.2d 144, 1983 N.Y. Misc. LEXIS 3644 (N.Y. Sup. Ct.), rev'd, 97 A.D.2d 749, 468 N.Y.S.2d 380, 1983 N.Y. App. Div. LEXIS 20491 (N.Y. App. Div. 2d Dep't 1983).

Lawsuit by an infant and his father that claimed that the infant was injured on playground equipment that was maintained by the village could not be dismissed for alleged lack of prior notice of the condition of the equipment because the village code that required such notice for playground equipment exceeded the scope of N.Y. Gen. Mun. Law § 50-e (4) concerning the prior notice that would be required for municipalities before claims could be brought against them. White v Inc. Vill. of Hempstead, 819 N.Y.S.2d 463, 13 Misc. 3d 471, 2006 N.Y. Misc. LEXIS 2095 (N.Y. Sup. Ct. 2006), aff'd, 41 A.D.3d 709, 838

N.Y.S.2d 607, 2007 N.Y. App. Div. LEXIS 7731 (N.Y. App. Div. 2d Dep't 2007).

Plaintiff's negligence suit against the Brooklyn Public Library survived its motion to dismiss; as the Library was not a "municipal corporation," plaintiff did not have to file a notice of claim pursuant to N.Y. Gen. Mun. Law §§ 50-e and 50-i to commence a tort action against the Library. Rodriguez v Brooklyn Pub. Lib., 934 N.Y.S.2d 291, 34 Misc. 3d 310, 2011 N.Y. Misc. LEXIS 5611 (N.Y. Sup. Ct. 2011).

United States is not required to file notice of claim pursuant to state general municipal law in order to maintain action against state and county for indemnification under Swine Flu Act (42 USCS § 247b(k)(7)). United States v New York, 595 F. Supp. 980, 1984 U.S. Dist. LEXIS 23795 (W.D.N.Y. 1984).

As a potential class action that sought to vindicate the rights of Medicaid recipients whose liens against their personal injury actions allegedly included improper amounts for related services, the action fell within the public interest exception, and plaintiffs, parents and infants, were excused from the notice of claim requirement under N.Y. Gen. Mun. Law § 50-e. Green v City of New York, 438 F. Supp. 2d 111, 2006 U.S. Dist. LEXIS 48360 (E.D.N.Y. 2006).

Since the minors did not assert any tort claims against the county there was no requirement to file notice under N.Y. Gen. Mun. Law § 50-e. S.W. v Warren, 528 F. Supp. 2d 282, 2007 U.S. Dist. LEXIS 85166 (S.D.N.Y. 2007).

8. —Dismissal or summary judgment

A complaint seeking damages for a violin stolen from plaintiff's automobile while it was parked in a municipally-owned lot would be dismissed with prejudice where plaintiff, an attorney, failed to serve the notice of claim required by Gen Mun Law § 50-e at least 30 days before filing and serving a complaint and summons, thus preventing defendants from investigating and evaluating the claim and frustrating the legislative intent of the notice requirement. Davidson v Bronx Municipal Hospital, 64 N.Y.2d 59, 484 N.Y.S.2d 533, 473 N.E.2d 761, 1984 N.Y. LEXIS 4776 (N.Y. 1984).

Service of a notice of claim was not required, when a jail inmate alleged that the inmate was sexually assaulted by another inmate in the county jail, because in the absence of any statutory obligation on the county to indemnify the sheriff — as opposed to an agreement to act as the sheriff's insurer — service of a notice of claim was not required. Villar v Howard, 28 N.Y.3d 74, 64 N.E.3d 280, 41 N.Y.S.3d 460, 2016 N.Y. LEXIS 3222 (N.Y. 2016).

Court properly granted city's motion to dismiss on ground that notice of claim was not filed within 90-day period as required under CLS Gen Mun § 50-e even though city had not pleaded untimeliness as affirmative defense in its answer; compliance with notice of claim provisions is condition precedent to suit and must be pleaded in complaint, and defendant need not allege lack of compliance as affirmative defense. Nicholas v New York, 130 A.D.2d 470, 515 N.Y.S.2d 53, 1987 N.Y. App. Div. LEXIS 46442 (N.Y. App. Div. 2d Dep't 1987).

Defendant physician was entitled to dismissal of action where (1) at time of surgical procedure alleged in complaint, he was resident physician at county medical center, and (2) plaintiffs failed to file notice of claim pursuant to CLS Gen Mun § 50-e and failed to commence action within limitations period of CLS Gen Mun § 50-i. Stanfield v Nohejl, 182 A.D.2d 1138, 586 N.Y.S.2d 765, 1992 N.Y. App. Div. LEXIS 7055 (N.Y. App. Div. 4th Dep't 1992).

On motion to dismiss action against New York City and New York City Health and Hospitals Corporation (HHC) on basis that plaintiff incorrectly served notice of claim on city and failed to serve notice of claim on HHC, plaintiff could not avoid dismissal on basis that both city and HHC were represented by corporation counsel since such fact did not provide necessary nexus to equate service of notice of claim on one with service on other; contrary result was not required by fact that city conducted hearing under CLS Gen Mun § 50-h at which plaintiff was examined by HHC attorney. Kroin v City of New York, 210 A.D.2d 95, 620 N.Y.S.2d 339, 1994 N.Y. App. Div. LEXIS 12688 (N.Y. App. Div. 1st Dep't 1994).

Trial court did not abuse its discretion by granting municipal power authority's motion for summary judgment and denying the injured parties' cross motion for leave to serve a late notice of claim because the injured parties offered an inadequate excuse for their failure to timely serve a notice of claim, the power authority did not possess actual knowledge of the facts underlying the claim within 90 days after the claim arose, and the power authority would have been prejudiced in its defense by virtue of the long delay between the time the claim arose and the filing of a late notice of claim. Benzinger v Town of Brookhaven, 288 A.D.2d 412, 735 N.Y.S.2d 394, 2001 N.Y. App. Div. LEXIS 11345 (N.Y. App. Div. 2d Dep't 2001).

Trial court erred when it denied a village's motion for summary judgment on plaintiff's claims alleging negligent hiring, negligent training, and negligent supervision because plaintiff failed to make those claims in the notice of claim she filed, and they were barred by N.Y. Gen. Mun. Law § 50-e(2). Dixon v Vill. of Spring Valley, 6 A.D.3d 489, 774 N.Y.S.2d 574, 2004 N.Y. App. Div. LEXIS 4446 (N.Y. App. Div. 2d Dep't 2004).

Library was correct that it was entitled to dismissal based upon an employee's noncompliance with the notice of claim condition precedent of N.Y. Gen. Mun. Law § 50-e as imposed by N.Y. County Law § 52 since there was no evidence that the library or the county actually received the US Equal Employment Opportunity Commission complaint at any time, or within the 90-day period; thus, in the absence of the required notice of claim or evidence establishing substantial compliance with the notice of claim requirement, the employee could not maintain the sexual harassment clam against the library. Grasso v Schenectady County Pub. Lib, 30 A.D.3d 814, 817 N.Y.S.2d 186, 2006 N.Y. App. Div. LEXIS 7968 (N.Y. App. Div. 3d Dep't 2006).

Because a boardwalk constituted a sidewalk within the meaning of N.Y. Gen. Mun. Law § 50-e(4), and because a pedestrian failed to establish that a town had prior written notice of a defective boardwalk, the town's motion for summary judgment should have been granted. Guiliano v Town of Brookhaven, 34 A.D.3d 734, 826 N.Y.S.2d 100, 2006 N.Y. App. Div. LEXIS 14359 (N.Y. App. Div. 2d Dep't 2006).

Plaintiffs' medical malpractice action should have been dismissed for failure to comply with N.Y. Unconsol. Law § 7401(2) and N.Y. Gen. Mun. Law §§ 50-e(5) and 50-i because before bringing suit, plaintiffs neither served a timely notice of claim nor sought leave to serve a late notice of claim with the one-year-and-90-day limitations period. McGriff v New York City Health & Hosps. Corp., 38 A.D.3d 504, 831 N.Y.S.2d 486, 2007 N.Y. App. Div. LEXIS 2580 (N.Y. App. Div. 2d Dep't 2007).

Supreme court erred in denying a city and police officers' motion to dismiss a former arrestee's false arrest and malicious prosecution claims, because the former arrestee's N.Y. Gen. Mun. Law § 50-e notice of claim was limited to allegations of assaultive conduct by the police officers and their use of excessive force. There were not, however, any allegations supporting the causes of action for false arrest and malicious prosecution; therefore, those claims were not allowed. Scott v City of New York, 40 A.D.3d 408, 836 N.Y.S.2d 140, 2007 N.Y. App. Div. LEXIS 6075 (N.Y. App. Div. 1st Dep't 2007).

Dismissal should have been granted to a city and the city department of transportation in a motorcyclist's personal injury action, as he failed to serve either the corporation counsel, his designee, or the city comptroller within the statutory period pursuant to General Municipal Law §§ 50-e(1)(a) and 50-i(1)(a). Khela v City of New York, 91 A.D.3d 912, 937 N.Y.S.2d 311, 2012 N.Y. App. Div. LEXIS 784 (N.Y. App. Div. 2d Dep't 2012).

Trial court should have granted a town's motion for summary judgment in the passengers' personal injury action because the town established that the notice of claim made no allegations that it defectively designed or negligently constructed a roadway and that it had no prior written notice of any alleged defect in the roadway, as required by N.Y. Gen. Mun. Law § 50-e(1)(a) and the town code. Crew v Town of Beekman, 105 A.D.3d 799, 962 N.Y.S.2d 677, 2013 N.Y. App. Div. LEXIS 2314 (N.Y. App. Div. 2d Dep't 2013).

Dismissal of claims by condominium communities and a joint homeowners' association against a village engineer, arising from

his issuance of certificates of occupancy for premises that contained construction defects, was not warranted on the basis of the failure to comply with the notice of claim requirements because it was unclear whether the engineer performed the inspections in his capacity as the village engineer or privately. Encore Lake Grove Homeowners Assn., Inc. v Cashin Assoc., P.C., 111 A.D.3d 881, 976 N.Y.S.2d 143, 2013 N.Y. App. Div. LEXIS 7863 (N.Y. App. Div. 2d Dep't 2013).

Trial properly declined to grant a public employee leave to serve a late notice of her whistleblower claim because the employee's ignorance of the notice requirement was not a reasonable excuse for the delay, her complaint to the city department of investigation did not give the employer actual knowledge of the essential facts constituting the claim, and the employer was prejudiced by the delay. Matter of Yan Ping Xu v New York City Dept. of Health & Mental Hygiene, 121 A.D.3d 559, 995 N.Y.S.2d 23, 2014 N.Y. App. Div. LEXIS 7220 (N.Y. App. Div. 1st Dep't 2014), app. denied, 27 N.Y.3d 902, 51 N.E.3d 564, 32 N.Y.S.3d 53, 2016 N.Y. LEXIS 471 (N.Y. 2016), cert. denied, 137 S. Ct. 641, 196 L. Ed. 2d 522, 2017 U.S. LEXIS 592 (U.S. 2017).

Trial court properly granted motions to dismiss filed by a city's department of education, office of payroll administration (OPA), comptrollers (the city defendants), and a teachers union for negligence and breach of fiduciary duty because she failed to serve a notice of claim on the city defendants, her remaining causes of action failed to state claims where she did not timely authorize the United States Treasury to release a refund to OPA, the Labor Law did not provide a private right of action against the union, and OPA sent a claim authorization form to her last known address on three separate occasions. Zito v New York City Off. of Payroll Admin., 130 A.D.3d 1326, 15 N.Y.S.3d 245, 2015 N.Y. App. Div. LEXIS 6146 (N.Y. App. Div. 3d Dep't 2015), app. dismissed, 27 N.Y.3d 962, 56 N.E.3d 903, 36 N.Y.S.3d 623, 2016 N.Y. LEXIS 1644 (N.Y. 2016).

Grant of summary judgment to a transit authority was reversed because plaintiff submitted evidence demonstrating that the transit authority was equitably estopped from asserting failure to timely serve a notice of claim defense under General Municipal Law § 50-e(1)(a) since it wrongfully or negligently engaged in conduct that misled plaintiff to justifiably believe that service of the notice of claim upon a separate transit authority was of no consequence. Konner v New York City Tr. Auth., 143 A.D.3d 774, 39 N.Y.S.3d 475, 2016 N.Y. App. Div. LEXIS 6583 (N.Y. App. Div. 2d Dep't 2016).

Trial court did not err in dismissing the police officers' employment discrimination claim based upon their failure to comply with the notice of claim condition precedent imposed by the city's charter because the charter predated the enactment of the General Municipal Law, was not expressly superseded or repealed thereby, nor was it inconsistent therewith. Matter of Farrell v City of Kingston, 156 A.D.3d 1269, 69 N.Y.S.3d 364, 2017 N.Y. App. Div. LEXIS 9262 (N.Y. App. Div. 3d Dep't 2017).

In a city judge's age discrimination action, the failure to serve a notice of claim required the dismissal state constitutional claims because the action did not fall within the public interest exception to the notice of claim requirement, but the trial court erred in denying the city judge's cross motion for leave to amend the complaint to include federal constitutional claims because, in part, it was a matter of public interest. Mirro v City of New York, 159 A.D.3d 964, 74 N.Y.S.3d 356, 2018 N.Y. App. Div. LEXIS 2077 (N.Y. App. Div. 2d Dep't 2018).

Former teacher failed to serve a timely notice of claim on the city's department of education, in connection with a fraud claim, because, inter alia, the teacher, at the very latest, possessed knowledge of the facts underlying the allegations of fraud as of July 25, 2013, but the notice of claim was served more than 90 days after the accrual date, and the teacher failed to seek leave to serve a late notice of claim. 2018 N.Y. App. Div. LEXIS 5838.

Trial court erred in denying a motion filed by a transportation authority (TA) and a railroad (RR) (jointly, the defendants) to dismiss the ticket holders' putative class action to recover damages for breach of contract and negligence because the holders failed to serve the TA with a notice of claim, the amended complaint did not allege that the holders presented the RR with a demand upon which their action was founded, and that 30 days had elapsed without resolution, and, assuming that the purchase of a monthly commutation ticket established a contractual relationship between the defendants and the holders, the documentary evidence submitted by the defendants conclusively established a defense to the allegations of breach of contract. Jacobs v Metropolitan Transp. Auth., 180 A.D.3d 657, 115 N.Y.S.3d 702, 2020 N.Y. App. Div. LEXIS 903 (N.Y. App. Div. 2d Dep't 2020).

Trial court properly granted summary judgment to the city as the city demonstrated, prima facie, that the notice of claim filed by plaintiff prior to commencement of the action failed to set forth any allegations of excessive force or false arrest by the police with respect to plaintiff. Lawhorn v City of New York, 186 A.D.3d 1509, 130 N.Y.S.3d 510, 2020 N.Y. App. Div. LEXIS 5148 (N.Y. App. Div. 2d Dep't 2020).

Trial court properly dismissed plaintiff medical student's tort causes of action asserted against defendants because no notice of claim was served upon defendant medical corporation; the remaining claims against defendants, sounding largely in discrimination, failed to state a cause of action because they were premised on laws that did not provide for individual liability, or failed to set forth adequate factual allegations in support of the claims. Attallah v New York Coll. of Osteopathic Medicine, 134 N.Y.S.3d 793, 2020 N.Y. App. Div. LEXIS 8028 (N.Y. App. Div. 2d Dep't 2020).

Failure to comply with the provisions of this section is a jurisdictional defect which could be fatal to the action and require dismissal thereof. Teodoro v Babylon, 56 Misc. 2d 476, 289 N.Y.S.2d 61, 1968 N.Y. Misc. LEXIS 1604 (N.Y. Dist. Ct. 1968).

An action against the New York City Health and Hospitals Corporation is dismissed where no timely notice of claim was filed pursuant to section 50-e of the General Municipal Law, although service of the summons and complaint was timely. Mills v Glancz, 104 Misc. 2d 1033, 430 N.Y.S.2d 22, 1980 N.Y. Misc. LEXIS 2444 (N.Y. Sup. Ct. 1980).

Because a tenant's service of a late notice of claim on the New York City Housing Authority without leave of court was a nullity under N.Y. Gen. Mun. Law §§ 50-e(5), and because she failed to move within one year and 90 days for such leave, her negligence suit against the Authority was dismissed as time-barred under N.Y. Pub. Hous. Law § 157(2). Middleton-Coulibaly v Danco, Inc., 919 N.Y.S.2d 305, 31 Misc. 3d 952, 2011 N.Y. Misc. LEXIS 901 (N.Y. Civ. Ct. 2011).

Where plaintiff failed to serve a timely notice of claim under N.Y. Gen. Mun. Law § 50-e(1)(a) on a public corporation, since plaintiff failed to make a timely application pursuant to § 50-e(5) for leave to serve a late notice of claim, the corporation was entitled to dismissal of the complaint. Barnaman v New York City Health & Hosps. Corp., 90 A.D.3d 588, 934 N.Y.S.2d 443, 2011 N.Y. App. Div. LEXIS 8781 (N.Y. App. Div. 2d Dep't 2011).

Transit authorities did not waive their right to assert, in support of their motions to dismiss and for summary judgment, that plaintiff did not meet the notice of claim requirements, because they were under no obligation to plead, as an affirmative defense, her failure to comply with those statutory requirements. Williams v MTA Bus Co., 989 N.Y.S.2d 806, 44 Misc. 3d 673, 2014 N.Y. Misc. LEXIS 2716 (N.Y. Sup. Ct. 2014), vacated, in part, 2017 N.Y. Misc. LEXIS 1354 (N.Y. Sup. Ct. Apr. 13, 2017).

CLS Gen Mun § 50-e applied to supplemental state tort claims against municipality in civil rights action commenced in federal district court under 42 USCS § 1983, and thus state claims would be dismissed where notice of claim was filed more than 90 days after they arose. Steiner v City of New York, 920 F. Supp. 333, 1996 U.S. Dist. LEXIS 3128 (E.D.N.Y. 1996).

City, police commissioner, and police officer were granted summary judgment on an individual's state law negligence claims where the individual offered no response to their claim that the individual had not filed a notice of claim as required by N.Y. Gen. Mun. Law § 50-e(1)(b) and the time to fulfill the filing requirement had since expired. Maxwell v City of New York, 272 F. Supp. 2d 285, 2003 U.S. Dist. LEXIS 13920 (S.D.N.Y. 2003), aff'd in part, vacated in part, 380 F.3d 106, 2004 U.S. App. LEXIS 16626 (2d Cir. N.Y. 2004), aff'd in part, vacated in part, 108 Fed. Appx. 10, 2004 U.S. App. LEXIS 16627 (2d Cir. N.Y. 2004).

Recycling company's tortious-interference with prospective advantage claim against a city was dismissed for failure to comply with N.Y. Gen. Mun. Laws §§ 50-e(1)(a) and 50-i(1) for the failure to timely serve a notice of claim. Further, the company could not assert equitable estoppel to prevent the dismissal as there was no allegation that the city induced the company not to serve a notice of claim within 90 days of accrual of the company's cause of action. Allocco Recycling, Ltd. v Doherty, 378 F. Supp. 2d 348, 2005 U.S. Dist. LEXIS 14269 (S.D.N.Y. 2005).

Employment discrimination plaintiff's libel and defamation claims were dismissed for failure to serve a timely notice of claim upon the City of New York, a prerequisite to maintaining defamation and libel claims against the city under N.Y. Gen. Mun. Law § 50-e. Gaston v N.Y City Dept. of Health, Office of Chief Med. Examiner, 432 F. Supp. 2d 321, 2006 U.S. Dist. LEXIS 28303 (S.D.N.Y. 2006).

Pretrial detainee's intentional infliction of emotional distress claim against county employees who allegedly performed an unlawful strip search was dismissed without prejudice because the detainee failed to file a notice of claim as required by N.Y. Gen. Mun. Law § 50-e. Dzwonczyk v Syracuse City Police Dep't, 710 F. Supp. 2d 248, 2008 U.S. Dist. LEXIS 103315 (N.D.N.Y. 2008).

There was no dispute that the former employee never filed a notice of claim, nor did the employee leave to file a late notice of claim, and as the employee sought enforcement of a private right, as she sought relief in the form of money damages and placement in a tenured position with the school district on the basis that she alone was denied such a position on the basis of her national origin, defendants' motion for summary judgment with respect to the employee's state law claim brought under N.Y. Exec. Law § 296 was granted. Augustin v Enlarged City Sch. Dist. of Newburgh, 616 F. Supp. 2d 422, 2009 U.S. Dist. LEXIS 39949 (S.D.N.Y. 2009).

City was entitled to summary judgment on plaintiff's malicious prosecution claim because plaintiff never filed a notice of the claim as required by N.Y. Gen. Mun. Law § 50-e(1)(a). Anderson v City of New York, 817 F. Supp. 2d 77, 2011 U.S. Dist. LEXIS 106619 (E.D.N.Y. 2011).

9. Retroactive effect

Amendment to claims provision of General Municipal Law had retroactive effect so that court had general discretion to extend time to serve notice before effective date of amendment. Van Horn v New Paltz, 57 A.D.2d 642, 393 N.Y.S.2d 218, 1977 N.Y. App. Div. LEXIS 11669 (N.Y. App. Div. 3d Dep't 1977).

Since amendment vesting courts with broader discretion to consider all relevant facts and circumstances in deciding whether to extend time to serve a notice of claim beyond specified 90-day period is both procedural and remedial, it would be applied to case filed before effective date. Rippe v Rochester, 57 A.D.2d 723, 395 N.Y.S.2d 556, 1977 N.Y. App. Div. LEXIS 11776 (N.Y. App. Div. 4th Dep't 1977).

Provision of General Municipal Law giving court discretion to extend time to serve notice of claim where underlying period of limitation governing cause of action has not expired could not be retroactively applied. Barrow v New York City Housing Authority, 59 A.D.2d 780, 398 N.Y.S.2d 901, 1977 N.Y. App. Div. LEXIS 13837 (N.Y. App. Div. 2d Dep't 1977).

Notice of infant plaintiff's claim, which arose almost 8 ½ years prior to 1976 amendment to CLS Gen Mun § 50-e(5), was governed by prior wording of § 50-e under which notice of claim must have been made within one year after event on which it was based, and such time was not tolled by infancy; expanded guidelines set forth in amended § 50-e(5) are available only to claimants whose tort claims against public corporations accrued within one year prior to September 1, 1976. Lallave v New York, 127 A.D.2d 634, 511 N.Y.S.2d 869, 1987 N.Y. App. Div. LEXIS 43123 (N.Y. App. Div. 2d Dep't 1987).

Former teachers' notices of claim were timely filed, and their action against school district and others for misrepresentation of retirement benefits was timely commenced, where claim accrued no earlier than date on which defendants notified teachers that their pensions would not include severance benefits, because that was date on which teachers could ascertain their damages. Bellanca v Grand Island Cent. Sch. Dist., 275 A.D.2d 944, 715 N.Y.S.2d 184, 2000 N.Y. App. Div. LEXIS 9670 (N.Y. App. Div. 4th Dep't 2000).

This section did not apply to claims arising prior to its effective date, and hence a notice of claim against the City of New York arising out of a July 28, 1945, accident was valid if filed within the six months' period requirement of the Administrative Code. Everett v New York, 58 N.Y.S.2d 463, 186 Misc. 39, 1945 N.Y. Misc. LEXIS 2459 (N.Y. Sup. Ct. 1945).

A claim which was already barred by failure to meet other statutory limitations, when this section took effect, could not be revived by serving notice pursuant to this section. Lotter v Westchester County Park Com., 63 N.Y.S.2d 208, 186 Misc. 377, 1946 N.Y. Misc. LEXIS 2342 (N.Y. Sup. Ct. 1946).

Where plaintiff's cause of action against town in connection with fall from water tower owned by town was viable on effective date of amendment giving court discretion to extend 90-day limitation period, application of amendment did not deprive town of vested right and thus was not retrospective. Barrows v Woodstock, 89 Misc. 2d 365, 391 N.Y.S.2d 524, 1977 N.Y. Misc. LEXIS 1869 (N.Y. Sup. Ct. 1977).

This section could not be used to aid a plaintiff whose claim was barred under the New York City Administrative Code prior to the effective date of this section. Dismond v New York, 111 N.Y.S.2d 459, 1952 N.Y. Misc. LEXIS 2523 (N.Y. Sup. Ct. 1952).

10. Relation to other statutes; Constitutional provisions

Town law requiring service of prior written notice of defect and service of written notice of claim with regard to defects on beach and playground areas was not invalid solely because it was inconsistent with CLS Gen Mun § 50-e(4) since town could supersede state law on matters of local concern in absence of clear expression of contrary intent by state legislature; however, town law was invalid because town failed to comply with requirement of CLS Mun H R § 22(1) that it state its intention to supersede state law with definiteness and explicitness. Walker v Town of Hempstead, 190 A.D.2d 364, 598 N.Y.S.2d 550, 1993 N.Y. App. Div. LEXIS 5455 (N.Y. App. Div. 2d Dep't 1993), aff'd, 84 N.Y.2d 360, 618 N.Y.S.2d 758, 643 N.E.2d 77, 1994 N.Y. LEXIS 3395 (N.Y. 1994).

Police officer was not exempt from requirements of CLS Gen Mun §§ 50-e and 50-i in his action under CLS Gen Mun § 205-e (effective on July 12, 1989) against New York City to recover damages for personal injuries suffered in slip-and-fall accident in course of his employment in city-owned building where action accrued after statute's effective date. Przybyszewski v City of New York, 225 A.D.2d 556, 638 N.Y.S.2d 763, 1996 N.Y. App. Div. LEXIS 1933 (N.Y. App. Div. 2d Dep't 1996), app. denied, 1996 N.Y. LEXIS 1758 (N.Y. June 13, 1996), app. denied, 88 N.Y.2d 806, 646 N.Y.S.2d 986, 670 N.E.2d 227, 1996 N.Y. LEXIS 1757 (N.Y. 1996).

In action to recover moneys due under lease, court erred in granting plaintiff's motion for leave to serve late notice of claim where it was undisputed that no such notice was served within 90-day time frame of CLS Racing & Wagering § 618, and CLS Gen Mun § 50-e was inapplicable. Whitestone Shopping Ctr. v New York City Off-Track Betting Corp., 256 A.D.2d 331, 683 N.Y.S.2d 274, 1998 N.Y. App. Div. LEXIS 13173 (N.Y. App. Div. 2d Dep't 1998).

In determining whether to enlarge injured child's time to appear for CLS Gen Mun § 50-h examination, court should have considered injured child's infancy, as well as other factors relevant to application for extension of time to file notice of claim under CLS Gen Mun § 50-e(5). Jusino v New York City Hous. Auth., 255 A.D.2d 41, 691 N.Y.S.2d 12, 1999 N.Y. App. Div. LEXIS 4346 (N.Y. App. Div. 1st Dep't 1999).

Discretion was providently exercised in allowing leave under N.Y. Gen. Mun. Law § 50-e(5) to serve a late notice of an infant daughter's medical malpractice claim against a county and since there was actual notice of the claim and an absence of prejudice in the delay, the lack of a reasonable excuse for failing to timely serve a notice of claim did not bar the supreme court from granting leave to serve the late notice. The county had actual knowledge of the claim because they had the daughter's medical

records at the time of the alleged malpractice and there was no showing of substantial prejudice to the county as a result of the delay where the daughter was protected by the infancy toll under N.Y. C.P.L.R. 208. Nardi v County of Nassau, 18 A.D.3d 520, 795 N.Y.S.2d 300, 2005 N.Y. App. Div. LEXIS 5058 (N.Y. App. Div. 2d Dep't 2005).

The provisions of the Constitution respecting claims barred by lapse of time do not apply to claims against counties or other municipal corporations. Bates v County of Onondaga, 141 N.Y.S.2d 264, 207 Misc. 767, 1955 N.Y. Misc. LEXIS 2511 (N.Y. Sup. Ct. 1955).

Court accepted a hospital's assertions that a claimant, who moved for leave to file a late claim for medical malpractice against the hospital, had to comply with the provisions of N.Y. Pub. Auth. Law § 3567(1), and by reference therein, N.Y. Gen. Mun. Law § 50-e, and upon the merit of the claim the court did grant the motion for leave to file a late claim. Tyson v Roswell Park Cancer Inst. Corp., 780 N.Y.S.2d 704, 4 Misc. 3d 556, 2003 N.Y. Misc. LEXIS 1922 (N.Y. Ct. Cl. 2003).

11. —Federal law

Former property owner's due process action against city for alleged tax abuse, brought under Federal Civil Rights Act of 1871 (42 USCS § 1983) after property had been sold for nonpayment of taxes, required dismissal where former owner failed to file notice of claim as called for by CLS Gen Mun § 50e or to apply for extension of time to do so within 3 year limitations period; application in Federal civil rights actions of notice of claim requirements of CLS Gen Mun § 50i as limited by § 50e is proper given importance of providing municipality with timely notice, ease of compliance, and opportunity afforded by § 50e of applying for leave to file late notice at any time during full 3 year limitation period. 423 South Salina Street, Inc. v Syracuse, 68 N.Y.2d 474, 510 N.Y.S.2d 507, 503 N.E.2d 63, 1986 N.Y. LEXIS 20894 (N.Y. 1986), cert. denied, 481 U.S. 1008, 107 S. Ct. 1880, 95 L. Ed. 2d 488, 1987 U.S. LEXIS 1595 (U.S. 1987).

Former owner of property which had been sold for nonpayment of taxes could not rely on public interest exception to requirement of CLS Gen Mun § 50e that timely notice of claim be made to municipality where former owner's due process action for alleged tax abuse by city brought under Federal Civil Rights Act of 1871 (42 USCS § 1983) sought relief limited to enforcement of former owner's private rights rather than vindication of rights of similarly situated property owners as class, even though former owner alleged that city had engaged in unlawful practices affecting others. 423 South Salina Street, Inc. v Syracuse, 68 N.Y.2d 474, 510 N.Y.S.2d 507, 503 N.E.2d 63, 1986 N.Y. LEXIS 20894 (N.Y. 1986), cert. denied, 481 U.S. 1008, 107 S. Ct. 1880, 95 L. Ed. 2d 488, 1987 U.S. LEXIS 1595 (U.S. 1987).

Former owner of property which had been sold by city for nonpayment of taxes could not rely on either application for preliminary injunction in prior tax assessment proceeding or notice of claim filed under Eminent Domain Procedure Law to constitute substantial compliance with requirement of CLS Gen Mun § 50e that timely notice of claim be made to municipality in former owner's due process action for damages for tax abuse brought under Federal Civil Rights Act of 1871 (42 USCS § 1983), since neither application for preliminary injunction nor eminent domain claim set forth any claim under Civil Rights Act, eminent domain claim was not filed within required 90 days, former owner did not seek leave to file late notice as permitted by CLS Gen Mun § 50e(5), and no basis existed for lower courts to exercise discretion vested in them by CLS Gen Mun § 50e(6). 423 South Salina Street, Inc. v Syracuse, 68 N.Y.2d 474, 510 N.Y.S.2d 507, 503 N.E.2d 63, 1986 N.Y. LEXIS 20894 (N.Y. 1986), cert. denied, 481 U.S. 1008, 107 S. Ct. 1880, 95 L. Ed. 2d 488, 1987 U.S. LEXIS 1595 (U.S. 1987).

County employees' cause of action against county and individual county defendants alleging violation of 29 USCS § 206(b) (Equal Pay Act) should not have been dismissed on ground of deficient notice of claim; state notice of claim requirements cannot defeat substantive federal right. Summers v County of Monroe, 147 A.D.2d 949, 537 N.Y.S.2d 703, 1989 N.Y. App. Div. LEXIS 1294 (N.Y. App. Div. 4th Dep't), app. dismissed, 74 N.Y.2d 735, 544 N.Y.S.2d 819, 543 N.E.2d 84, 1989 N.Y. LEXIS 4950 (N.Y. 1989).

Plaintiff's 42 U.S.C.S. § 1983 claim in an amended complaint against a detective predicated on claims of false arrest and imprisonment was improperly dismissed under N.Y. C.P.L.R. 3211(a)(5) because while the state law claims for false arrest and imprisonment had been dismissed, that did not vitiate the related allegations in the original complaint, so relation back pursuant to N.Y. C.P.L.R. 203(f) applied, and notice of claim requirements under N.Y. Gen. Mun. Law § 50-e did not apply to 42 U.S.C.S. § 1983 claims. Pendleton v City of New York, 44 A.D.3d 733, 843 N.Y.S.2d 648, 2007 N.Y. App. Div. LEXIS 10575 (N.Y. App. Div. 2d Dep't 2007).

In an action to file a late notice of claim regarding the terrorist attacks of September 11, 2001, the Air Transportation Safety and System Stabilization Act of 2001 (ATSSSA), Pub. L. No. 107-42, § 408(b)(1), was not intended to preempt N.Y. Gen. Mun. Law § 50-e as it only preempted state law damages remedies rather than substantive standards governing liability; requirements relating to a notice of claim under § 50-e did not present an insurmountable barrier to relief under ATSSSA. Matter of Felder v City of New York, 53 A.D.3d 401, 862 N.Y.S.2d 36, 2008 N.Y. App. Div. LEXIS 5849 (N.Y. App. Div. 1st Dep't), app. denied, 11 N.Y.3d 707, 868 N.Y.S.2d 599, 897 N.E.2d 1083, 2008 N.Y. LEXIS 3281 (N.Y. 2008).

In federal court, state notice-of-claim statutes apply to state-law claims; on other hand, when federal action is brought in federal court, court has discretion to borrow from state law when there are deficiencies in federal statutory scheme. Hardy v New York City Health & Hosps. Corp., 164 F.3d 789, 1999 U.S. App. LEXIS 567 (2d Cir. N.Y. 1999).

Emergency Medical Treatment and Active Labor Act (EMTALA; 42 USCS § 1395dd(f)) did not preempt New York notice-of-claim requirement under CLS Gen Mun § 50-e since there was no "physical impossibility" complying with both statutes, and state law did not thwart core purpose of EMTALA to prevent hospitals from failing to examine and stabilize uninsured patients who seek emergency treatment. Hardy v New York City Health & Hosps. Corp., 164 F.3d 789, 1999 U.S. App. LEXIS 567 (2d Cir. N.Y. 1999).

District Court will not dismiss plaintiff's federal civil rights action for failure to comply with notice of claim requirement of § 50-e, since it is not incumbent upon federal court to apply procedural rule of forum state when doing so would effectively extinguish important federal right. Williams v Allen, 616 F. Supp. 653, 1985 U.S. Dist. LEXIS 16512 (E.D.N.Y. 1985).

Federal District Court having jurisdiction over civil rights claim will not exercise pendent jurisdiction over otherwise valid state claim of person who concedes noncompliance with notice of claim requirements of §§ 50-e, 50-k. Jenkins v McMickens, 618 F. Supp. 1472, 1985 U.S. Dist. LEXIS 14819 (S.D.N.Y. 1985).

Parents' malicious prosecution claim was barred by the New York State court's denial of the parents' application to file a late notice of claim under N.Y. Gen. Mun. Law § 50-e, and if the federal constitutional right looked precisely like the state right previously at issue, a plaintiff who lost in state court could not seek a second chance to litigate under 42 U.S.C.S. § 1983; because the same four elements had to be proved for both the tort of malicious prosecution and the related § 1983 violation, the claims were virtually identical, and identically to the state claim, the existence of probable cause was a complete defense to a claim of malicious prosecution under § 1983. The court of appeals found the evidence legally sufficient to support the jury's determination that the officers acted recklessly, and the rule of law announced a day earlier, that depraved indifference to human life was a culpable mental state did not retroactively eliminate probable cause for the parents' arrest or prosecution under N.Y. Penal Law § 120.10(3), notwithstanding the court of appeals' downgrading that conviction. Swinton v City of New York, 785 F. Supp. 2d 3, 2011 U.S. Dist. LEXIS 32384 (E.D.N.Y. 2011).

12. Statutes which are superseded

This section deals only with notices of claim and was not intended to repeal or supersede limitations on time to commence

suit found elsewhere, such as in city charters. A limitation on time to sue is nonetheless applicable by way of defense to an action on a tort claim against a municipality because court permission for the late filing or service of notice of claim has been obtained. Sullivan v Watervliet, 285 A.D. 179, 136 N.Y.S.2d 411, 1954 N.Y. App. Div. LEXIS 3305 (N.Y. App. Div. 1954).

Local law which required written notice of defect with respect to "any highway, bridge, culvert, or any other property" owned by town as condition precedent to commencement of action against town was constitutional; fact that local law required prior written notice in situations not covered by CLS Gen Mun § 50-e or CLS Town § 65-a did not render it inconsistent, since none of its provisions were in direct conflict with those general laws. Barsh v Union, 126 A.D.2d 311, 513 N.Y.S.2d 875, 1987 N.Y. App. Div. LEXIS 41235 (N.Y. App. Div. 3d Dep't 1987).

90-day notice of claim period prescribed in CLS Gen Mun § 50-e supersedes 6-month period prescribed in CLS Pub A § 569-a(2). Guillan v Triborough Bridge & Tunnel Auth., 202 A.D.2d 472, 609 N.Y.S.2d 38, 1994 N.Y. App. Div. LEXIS 2405 (N.Y. App. Div. 2d Dep't), app. denied, 84 N.Y.2d 809, 621 N.Y.S.2d 518, 645 N.E.2d 1218, 1994 N.Y. LEXIS 4145 (N.Y. 1994).

CLS Gen Mun § 205-e(2) applies only to actions which accrued between January 1, 1987 and its effective date of July 12, 1989; thus, since police officer's action against New York City Transit Authority accrued on June 28, 1992, he was not exempt from notice of claim requirements under CLS Pub A § 1212 and CLS Gen Mun § 50-e. Huebner v New York City Transit Auth., 226 A.D.2d 678, 641 N.Y.S.2d 720, 1996 N.Y. App. Div. LEXIS 4600 (N.Y. App. Div. 2d Dep't 1996).

This section superseded provisions of local laws inconsistent therewith, and, as to subsequent claims, the time to serve notice of claim was reduced to that herein specified. Mahony v Long Beach, 66 N.Y.S.2d 278, 187 Misc. 4, 1946 N.Y. Misc. LEXIS 3036 (N.Y. County Ct. 1946).

This section likewise supersedes provisions of the Public Authorities Law, and notice was untimely where served more than 90 days after accident. Allmeroth v Triborough Bridge & Tunnel Authority, 133 N.Y.S.2d 777, 206 Misc. 529, 1954 N.Y. Misc. LEXIS 2435 (N.Y. Sup. Ct. 1954).

The filing of a notice of claim against a municipal corporation is not a civil right which is suspended by the Penal Law during a sentence in a state prison. Bates v County of Onondaga, 141 N.Y.S.2d 264, 207 Misc. 767, 1955 N.Y. Misc. LEXIS 2511 (N.Y. Sup. Ct. 1955).

The notice of claim provisions of this section supersede the provisions of § 10 of the Playland Commission Act with respect to required manner of service of notice of claim on the Commission, and an action against the Commission has to be dismissed where there is failure both to allege and prove service as required hereunder. Menter v Westchester County Playland Com., 42 Misc. 2d 4, 246 N.Y.S.2d 260, 1963 N.Y. Misc. LEXIS 1512 (N.Y. County Ct. 1963).

CPLR 205 (subd [a]), which provides, if an action is timely commenced and is terminated in a manner other than by a voluntary discontinuance or a dismissal of the complaint for neglect to prosecute or a final judgment on the merits, a new action may be commenced within six months, applies only to time limitations and does not apply to section 50-e of the General Municipal Law, which requires the filing of a notice of tort claim against a municipality within 90 days after the claim arises; the 90-day notice of claim is a mandatory condition precedent. Accordingly, plaintiff having failed to serve a notice of claim upon the defendant city within 90 days, a motion by defendant to dismiss the complaint is granted. Glamm v Amsterdam, 94 Misc. 2d 991, 405 N.Y.S.2d 993, 1978 N.Y. Misc. LEXIS 2333 (N.Y. Sup. Ct. 1978), aff'd, 67 A.D.2d 1056, 413 N.Y.S.2d 512, 1979 N.Y. App. Div. LEXIS 10871 (N.Y. App. Div. 3d Dep't 1979).

CLS Gen Mun § 50-e(4) barred application of local prior written notice ordinance in action against county for injuries sustained by infant in fall from horizontal ladder at playground, since defective condition of playground is not physical condition of street, highway, bridge or sidewalk. Norden by Norden v County of Sullivan, 161 Misc. 2d 915, 615 N.Y.S.2d 560, 1994 N.Y. Misc. LEXIS 321 (N.Y. Sup. Ct. 1994).

13. —Coequal statutes

By fair construction, the General Municipal Law provision requiring a personal injury action against a county to be commenced within one year and 90 days after the event can coexist with the Highway Law provision stating that a county is liable for injuries sustained due to a defective highway but that the county shall not be liable unless a notice of claim shall have been made and served and the action commenced within one year from the date of service; thus, in the instant case, since plaintiff complied with the Highway Law, her wrongful death action was not subject to dismissal, even though the county was not served with summons and complaint until more than two years after accident. Forero v Tuxedo, 51 A.D.2d 443, 382 N.Y.S.2d 328, 1976 N.Y. App. Div. LEXIS 11101 (N.Y. App. Div. 2d Dep't 1976).

14. —Statutes which supersede

Plaintiff may provide notice of intention to commence personal injury action against New York City Health and Hospitals Corporation (HHC) by serving notice of claim on New York City's Corporation Counsel rather than on officer or director of HHC. Viruet v City of New York, 97 N.Y.2d 171, 738 N.Y.S.2d 2, 763 N.E.2d 1143, 2001 N.Y. LEXIS 3419 (N.Y. 2001).

A sheriff or deputy sheriff can be sued individually without prior service of notice of claim, for damages arising out of his negligence or misconduct, notwithstanding the provisions of this section and § 52 of the County Law, since, under Const. Art. 9 § 5, a county is not liable for his acts. Kawar v Martin, 12 A.D.2d 876, 210 N.Y.S.2d 68, 1961 N.Y. App. Div. LEXIS 13497 (N.Y. App. Div. 4th Dep't 1961).

Since Title 8 (§§ 700–717) of the Public Authorities Law contains no requirement for the filing of a claim as a condition precedent to the beginning of an action against the Ogdensburg Bridge Authority established thereby although § 1397 of the same law makes applicable to an action against the Ogdensburg Port Authority the notice provision of § 50-e of the General Municipal Law, and the statute merging the two authorities as the Ogdensburg Bridge and Port Authority (Public Authorities Law §§ 725–734) provides in § 734 that the provisions of the Bridge Authority Act shall take precedence over those of the Port Authority Act and also provides in § 732 that no existing right or remedy shall be lost or otherwise affected by reason of this subsequent enactment, an action arising earlier than the period of 90 days provided by the General Municipal Law § 50-e before the coming into effect of such subsequent statute was held to be within the intention of the saving clause of Public Authorities Law § 732 as above stated and hence could be brought without compliance with § 50-e of the General Municipal Law. But the court specifically stated that it did not pass on the question whether the same result would obtain in an action founded upon a tort arising after the effective date of the act which merged the two authorities. Tarbell v Ogdensburg Bridge & Port Authority, 23 A.D.2d 447, 261 N.Y.S.2d 429, 1965 N.Y. App. Div. LEXIS 3530 (N.Y. App. Div. 3d Dep't 1965).

Public Authorities Law § 1569-q, which is a special law enacted subsequently to General Municipal Law § 50-e, supersedes the notice requirements of General Municipal Law § 50-e. Reinhart v Troy Parking Authority, 36 A.D.2d 654, 318 N.Y.S.2d 852, 1971 N.Y. App. Div. LEXIS 4789 (N.Y. App. Div. 3d Dep't 1971).

In an action arising out of the death of plaintiff's decedent after he was struck by a pleasure boat while crabbing within the navigable waters of the state, the defendant town's motion to dismiss the complaint for failure to comply with the notice of claim provisions of Gen Mun Law §§ 50-e and 50-i was properly denied, since in an action governed by general maritime law, state statutes do not operate so as to interfere with a plaintiff's substantive admiralty rights and thus the notice of claim provisions of the General Municipal Law are inapplicable. Scholl v Babylon, 95 A.D.2d 475, 466 N.Y.S.2d 976, 1983 N.Y. App. Div. LEXIS 19644 (N.Y. App. Div. 2d Dep't 1983).

Section 50-e of the General Municipal Law has no application to a claim filed under § 197 of the Highway Law, as such a claim is obviously not founded upon tort. Application of Cataldo, 25 Misc. 2d 489, 203 N.Y.S.2d 544, 1960 N.Y. Misc. LEXIS 2847 (N.Y. Sup. Ct. 1960), aff'd, 13 A.D.2d 779, 216 N.Y.S.2d 680, 1961 N.Y. App. Div. LEXIS 11208 (N.Y. App. Div. 2d Dep't 1961).

The filing of a notice of claim according to the requirements of section 50-e of the General Municipal Law or sections 52 and 369 of the County Law is not a condition precedent to the commencement of an action upon a claim commenced in the Small Claims Part of a City Court against a municipality based upon tort or contract, since such statutes are procedural in nature and the Legislature in adopting section 1804 of the Uniform City Court Act has abolished the requirement that Small Claims Part be bound by such procedural statutes. Johnson v Timmerman, 92 Misc. 2d 626, 401 N.Y.S.2d 149, 1978 N.Y. Misc. LEXIS 1957 (N.Y. County Ct. 1978).

Had the Legislature intended to create uniformity, it could have amended § 1212 of the Public Authorities Law when this section was modified by § 50-h and § 50-i, but it failed to do so and hence the time limit fixed by § 1212 for serving notice of claim remains applicable to claims presented under that section. Heeren v New York City Transit Authority, 231 N.Y.S.2d 993, 1962 N.Y. Misc. LEXIS 4176 (N.Y. Sup. Ct. 1962).

Statute of limitation period prescribed by CLS General Municipal Law § 50-e which requires the filing of a notice of claim within 90 days of the alleged tortious conduct, and the statute of limitation period of one year and 90 days prescribed by CLS General Municipal Law § 50-i, also applicable to alleged tortious conduct, are not applicable to actions commenced under 42 USCS § 1983; the statute of limitations applicable to such federal actions is the three-year period prescribed by CLS CPLR § 214(2). Altaire Builders, Inc. v Horseheads, 551 F. Supp. 1066, 1982 U.S. Dist. LEXIS 16155 (W.D.N.Y. 1982), disapproved, RRI Realty Corp. v Southampton, 870 F.2d 911, 1989 U.S. App. LEXIS 4753 (2d Cir. N.Y. 1989)).

Employee's Title VII civil rights action against community college, dean of students, and department chair is not dismissed, where employee did not serve notice of claim on county prior to bringing action, because application of notice-of-claim provisions would alter important rights created by Title VII. Tout v Erie Community College, 923 F. Supp. 13, 1995 U.S. Dist. LEXIS 20796 (W.D.N.Y. 1995).

II. Public Corporations

15. In general

Use of word "only" in definition of "municipal corporation" created certain and definite restriction on meaning of term, precluding judicial inclusion of public benefit corporation. Bender v Jamaica Hosp., 40 N.Y.2d 560, 388 N.Y.S.2d 269, 356 N.E.2d 1228, 1976 N.Y. LEXIS 3039 (N.Y. 1976).

Evidence that claimant's inability to speak English contributed to delay of service of malicious prosecution claim on city, and that city had knowledge of potential claim, absent allegation of disabilities specified in statute, did not permit late service of notice of claim on city. Torres v New York, 50 A.D.2d 826, 376 N.Y.S.2d 6, 1975 N.Y. App. Div. LEXIS 11673 (N.Y. App. Div. 2d Dep't 1975).

Cause of action in tort does not accrue, or arise, for purposes of both statute of limitations and section pertaining to notice of claim against public corporation until all requisite elements of tort have been satisfied. Beary v Rye, 59 A.D.2d 905, 399 N.Y.S.2d 140, 1977 N.Y. App. Div. LEXIS 14108 (N.Y. App. Div. 2d Dep't 1977), rev'd, 44 N.Y.2d 398, 406 N.Y.S.2d 9, 377 N.E.2d 453, 1978 N.Y. LEXIS 1960 (N.Y. 1978).

The failure to present a claim against a municipality within the applicable time period ordinarily operates to bar any claim or action against it for that particular cause of action, and it is of no consequence that the claim is asserted as a counterclaim in an action initiated by the municipality. Hart v East Plaza, Inc., 62 A.D.2d 113, 403 N.Y.S.2d 928, 1978 N.Y. App. Div. LEXIS 10425 (N.Y. App. Div. 4th Dep't), app. dismissed, 45 N.Y.2d 706, 408 N.Y.S.2d 1025, 1978 N.Y. LEXIS 3070 (N.Y. 1978).

The timely filing of a notice of claim against a municipality, whether in contract or tort, is generally a condition precedent to the maintenance of such a claim, and compliance with that condition precedent should be pleaded and proved by the claimant. Hart v East Plaza, Inc., 62 A.D.2d 113, 403 N.Y.S.2d 928, 1978 N.Y. App. Div. LEXIS 10425 (N.Y. App. Div. 4th Dep't), app. dismissed, 45 N.Y.2d 706, 408 N.Y.S.2d 1025, 1978 N.Y. LEXIS 3070 (N.Y. 1978).

Notwithstanding the enactment of § 50-i by ch. 788, Laws of 1959, this section is still applicable to commencement of actions and time limitations with respect to claims against "public corporations" other than those specifically listed and dealt with in § 50-i, including the Playland Commission of Westchester County, which is a distinct type of public corporation. Oraczewski v Westchester County, 32 Misc. 2d 217, 221 N.Y.S.2d 485, 1961 N.Y. Misc. LEXIS 2214 (N.Y. Sup. Ct. 1961).

The notice of claim procedure provided in this section does not automatically apply to all public corporations, but only to those where such notice is required by law as a condition precedent to the commencement of an action founded upon tort. Harrigan v Smithtown, 54 Misc. 2d 793, 283 N.Y.S.2d 424, 1967 N.Y. Misc. LEXIS 1199 (N.Y. Sup. Ct. 1967).

An action against a public corporation as defined in § 3(1) of the General Corporation Law, or any officer, appointee or employee thereof, requiring service of a notice of claim must follow the provisions of this section. Harrigan v Smithtown, 54 Misc. 2d 793, 283 N.Y.S.2d 424, 1967 N.Y. Misc. LEXIS 1199 (N.Y. Sup. Ct. 1967).

In a particular case involving a nonvehicular tort if it is found and determined that there is a public corporate responsibility to indemnify the alleged tortfeasor, the public corporation becomes the real party in interest and in any such case there must be a compliance with General Municipal Law §§ 50-e and 50-i. Sorge v New York, 56 Misc. 2d 414, 288 N.Y.S.2d 787, 1968 N.Y. Misc. LEXIS 1650 (N.Y. Sup. Ct. 1968).

The requirement of proper notice under General Municipal Law § 50-e, applies to officers, appointees and employees of municipalities as well as to the municipality itself. Ballin v Larkin, 62 Misc. 2d 949, 310 N.Y.S.2d 402, 1970 N.Y. Misc. LEXIS 1920 (N.Y. Sup. Ct. 1970), modified, 36 A.D.2d 530, 318 N.Y.S.2d 568, 1971 N.Y. App. Div. LEXIS 4912 (N.Y. App. Div. 2d Dep't 1971).

16. City and its employees

Section 50-e of the General Municipal Law is a general law, which is defined as one which in terms and in effect applies alike to all counties, all counties other than those wholly included within a city, all cities, all towns, or all villages. Zumbo v Farmington, 60 A.D.2d 350, 401 N.Y.S.2d 121, 1978 N.Y. App. Div. LEXIS 9680 (N.Y. App. Div. 4th Dep't 1978).

In an action by property owners against a municipality to recover damages allegedly caused when defendants unlawfully came upon plaintiffs' property, cut down numerous trees and removed large quantities of earth in connection with a town highway improvement program, the trial court erred in finding that plaintiffs' notice of claim had been timely filed where the notice had not been filed within 90 days of the latest date on which plaintiffs alleged their claims arose as required by Gen Mun Law § 50-e subd. 1; further, while a court is vested with broad discretion in determining whether to extend the time for serving a notice of claim, it cannot extend the period beyond the time limit for commencement of an action against a municipality. Gaynor v Hoosick, 85 A.D.2d 844, 446 N.Y.S.2d 475, 1981 N.Y. App. Div. LEXIS 16673 (N.Y. App. Div. 3d Dep't 1981), aff'd, 58 N.Y.2d 699, 458 N.Y.S.2d 544, 444 N.E.2d 1008, 1982 N.Y. LEXIS 3917 (N.Y. 1982).

Vehicle owner could not, under N.Y. Gen. Mun. Law § 50-e(1)(b), avoid the requirement of providing a town with notice of his claim for return of his vehicle, prior to filing suit, by suing municipal employees instead of the town, because of the town's statutory obligation to indemnify its employees. Smith v Scott, 294 A.D.2d 11, 740 N.Y.S.2d 425, 2002 N.Y. App. Div. LEXIS 3561 (N.Y. App. Div. 2d Dep't 2002).

Where the injured party asserted that the injured party served the notice of claim on the City of New York agency, such service, if received, was invalid under N.Y. Gen. Mun. Law § 50-e(3)(c); there was no evidence that the notice was actually forward to and received by the corporation counsel or the comptroller within 90 days of the accident as required by N.Y. Gen. Mun. Law § 50-e(1)(a), and since the injured party failed to make a timely application for leave to serve a late notice of claim pursuant to N.Y. Gen. Mun. Law § 50-e(5), the agency was entitled to

dismissal of the complaint insofar as it was asserted against the agency. Herrera v Duncan, 13 A.D.3d 485, 787 N.Y.S.2d 88, 2004 N.Y. App. Div. LEXIS 15846 (N.Y. App. Div. 2d Dep't 2004).

City hospital's records of a newly born child indicated that she had foot gangrene and had misadventure during her medical care so the city was on notice under N.Y. Gen. Mun. Law § 50-e(5) that it was subject to the child's claim even though the claim was filed four years after her discharge. The city was also not prejudiced by the child's motion, that she made four years after serving the late claim, for the late claim to be allowed since the city acknowledged that it had actually been served with the late claim. Caminero v N.Y. City Health & Hosps. Corp., 21 A.D.3d 330, 800 N.Y.S.2d 173, 2005 N.Y. App. Div. LEXIS 8800 (N.Y. App. Div. 1st Dep't 2005).

Where both the employees and the City of New York are sued as defendants, and the employees are entitled to indemnity, then a claim against all the defendants must be filed with the city in accordance with General Municipal Law § 50-e and suit must be instituted pursuant to General Municipal Law § 50-i. Sorge v New York, 56 Misc. 2d 414, 288 N.Y.S.2d 787, 1968 N.Y. Misc. LEXIS 1650 (N.Y. Sup. Ct. 1968).

City of New York is "municipal corporation" under CLS Gen Const § 66(2), and is therefore "public corporation" under CLS Gen Const § 66(1), to which CLS Gen Mun § 50-e(1)(a), setting forth requirements of notice of claim, applies. Viruet v City of New York, 181 Misc. 2d 958, 695 N.Y.S.2d 663, 1999 N.Y. Misc. LEXIS 366 (N.Y. Sup. Ct. 1999), aff'd, 277 A.D.2d 33, 715 N.Y.S.2d 406, 2000 N.Y. App. Div. LEXIS 11296 (N.Y. App. Div. 1st Dep't 2000).

City police officers were not entitled to summary judgment on an arrestee's state law claims because the city had no obligation to indemnify the officers for violations at common law and, thus, the arrestee was not required to name them in his notice of claim against the city. Grays v City of New Rochelle, 354 F. Supp. 2d 323, 2005 U.S. Dist. LEXIS 1593 (S.D.N.Y. 2005).

New York City and its insurer breached a settlement agreement with workers who were injured due to performing clean-up work at the World Trade Center site; contingent payments were due because the number of new claims against the City and its contractors that were active on a specified date did not exceed a certain threshold. Many cases that were filed in order to meet state and federal statutory deadlines were withdrawn or dismissed prior to the specified date. In re World Trade Ctr. Disaster Site Litig., 879 F. Supp. 2d 396, 2012 U.S. Dist. LEXIS 98451 (S.D.N.Y. 2012), rev'd, 754 F.3d 114, 2014 U.S. App. LEXIS 10681 (2d Cir. N.Y. 2014).

Notice of a lawsuit against a city was sufficient because each individual defendant did not have to be named in the notice in order for the notice to be effective and thus, a city received sufficient notice of the need to investigate a certain officer's conduct. Garcia v Cty. of Westchester, 2017 U.S. Dist. LEXIS 191980 (S.D.N.Y. Nov. 20, 2017).

17. College

Notice of claim under CLS Gen Mun §§ 50-e and 50-i was condition precedent to tort action against trustees of Schenectady County Community College since county has statutory obligation to indemnify its employees under CLS Educ § 6308, and thus claimant must comply with provisions of law pertaining to commencement of action against county (set forth in CLS County § 52) even if she chooses to sue only county's employees; CLS Educ § 6308 does not relieve claimant of responsibility for giving notice under other laws. Butterfield v Board of Trustees, 131 A.D.2d 963, 516 N.Y.S.2d 544, 1987 N.Y. App. Div. LEXIS 48371 (N.Y. App. Div. 3d Dep't 1987).

In an action against a community college outside the City of New York, compliance with County Law § 52 and General Municipal Law §§ 50-e, 50-i is not a condition precedent to maintenance of the action. Brown v North Country Community College, 63 Misc. 2d 442, 311 N.Y.S.2d 517, 1970 N.Y. Misc. LEXIS 1527 (N.Y. Sup. Ct. 1970).

In personal injury claim against Fashion Institute of Technology, requirements of CLS Gen Mun § 50-e must be met, since only board of education or trustees are amenable to suit, and proper forum would be either Supreme Court or New York City Civil Court, and not Court of Claims. Amato v State, 131 Misc. 2d 1049, 502 N.Y.S.2d 928, 1986 N.Y. Misc. LEXIS 2615 (N.Y. Ct. Cl. 1986).

County college was entitled to dismissal of small claims action by plaintiff (former student) who sought to recover full refund of semester's tuition after she was forced to drop math class at college's direction after semester had already begun, where plaintiff did not file requisite notice of claim under CLS Gen Mun § 50-e and CLS County § 52. Carren v Westchester County Community College, 176 Misc. 2d 490, 674 N.Y.S.2d 576, 1998 N.Y. Misc. LEXIS 122 (N.Y. City Ct. 1998).

18. County

In an action to determine adverse claims of title to real estate and to recover damages for trespass brought against a town and county, it was held that no statutory notice of claim was necessary as a prerequisite to the action against the town. However, the action against the county was governed by § 52 of the County Law, and plaintiff could not maintain such an action without compliance with §§ 50-e and 50-i of the General Municipal Law. Seabreeze Marina at Smithtown, Inc. v Smithtown, 25 A.D.2d 780, 269 N.Y.S.2d 662, 1966 N.Y. App. Div. LEXIS 4497 (N.Y. App. Div. 2d Dep't 1966).

Plaintiff's complaint in an action to determine adverse claims of title to realty, damages for trespass, and for injunctive and other relief failed to state a cause of action against the County of Suffolk, where the complaint did not allege compliance with the statutory notice requirements of §§ 50-e and 50-i of the General Municipal Law. Seabreeze Marina at Smithtown, Inc. v Smithtown, 25 A.D.2d 780, 269 N.Y.S.2d 662, 1966 N.Y. App. Div. LEXIS 4497 (N.Y. App. Div. 2d Dep't 1966).

Since Chemung County was the sole party liable for damages, if any, caused by an alleged nuisance created by the Chemung County Sewer Dist. No. 1, service of a notice of claim on the county pursuant to the provisions of § 50-e of the General Municipal Law was a prerequisite to the commencement of the cause of action. Tom Sawyer Motor Inns, Inc. v Chemung County Sewer Dist., 33 A.D.2d 720, 305 N.Y.S.2d 408, 1969 N.Y. App. Div. LEXIS 2797 (N.Y. App. Div. 3d Dep't 1969).

Section 50-e of the General Municipal Law is a general law, which is defined as one which in terms and in effect applies alike to all counties, all counties other than those wholly included within a city, all cities, all towns, or all villages. Zumbo v Farmington, 60 A.D.2d 350, 401 N.Y.S.2d 121, 1978 N.Y. App. Div. LEXIS 9680 (N.Y. App. Div. 4th Dep't 1978).

County was entitled to summary judgment in a former employee's action alleging a violation of the Public Sector Whistleblower Law because the employee's complaint sought damages for wrongful termination but the employee failed to serve a notice of claim within 90 days after the claim for retaliatory termination arose. Sager v County of Sullivan, 145 A.D.3d 1175, 41 N.Y.S.3d 443, 2016 N.Y. App. Div. LEXIS 7987 (N.Y. App. Div. 3d Dep't 2016), app. denied, 29 N.Y.3d 902, 80 N.E.3d 399, 57 N.Y.S.3d 706, 2017 N.Y. LEXIS 698 (N.Y. 2017).

Statutes requiring notice of claim and limiting time for commencement of action apply to a county, as a municipal corporation. Lewis County v Diana, 67 N.Y.S.2d 618, 188 Misc. 376, 1947 N.Y. Misc. LEXIS 1993 (N.Y. Sup. Ct. 1947), aff'd, 273 A.D. 943, 79 N.Y.S.2d 188, 1948 N.Y. App. Div. LEXIS 5383 (N.Y. App. Div. 1948).

Third-party complaint by city against county, on ground of county's negligence in leaving manhole uncovered, was dismissed where it failed to allege service of notice of claim on county. Keesler v Peekskill, 1 Misc. 2d 744, 152 N.Y.S.2d 919, 1955 N.Y. Misc. LEXIS 2121 (N.Y. County Ct. 1955).

In an action against a county and doctors who certified to plaintiff's insanity, defendants could avail themselves of the requirements of the County Law with respect to notice of claim. Dill v County of Westchester, 5 Misc. 2d 869, 160 N.Y.S.2d 957, 1957 N.Y. Misc. LEXIS 3400 (N.Y. Sup. Ct.), aff'd, 4 A.D.2d 779, 165 N.Y.S.2d 623, 1957 N.Y. App. Div. LEXIS 4739 (N.Y. App. Div. 2d Dep't 1957).

In action against county for damages as the result of the alleged invasion of plaintiff's property rights, complaint dismissed where there was no allegation that notice had been served upon the county attorney. Covello v County of Suffolk, 9 Misc. 2d 72, 167 N.Y.S.2d 510, 1957 N.Y. Misc. LEXIS 2471 (N.Y. Sup. Ct. 1957).

Fact that county first initiated litigation against defendant motorist does not relieve the defendant from complying with the provisions of General Municipal Law §§ 50-e and 50-i relating to service of notice of claim, where the defendant seeks affirmative relief by way of a counterclaim, and counterclaim should be dismissed in the absence of such compliance. County of Nassau v Wolfe, 51 Misc. 2d 848, 273 N.Y.S.2d 984, 1966 N.Y. Misc. LEXIS 1410 (N.Y. Dist. Ct. 1966).

There is no specific statutory requirement making the filing of a claim a condition precedent to a contract action and in the absence of such a provision an action is maintainable without prior presentation of a claim. Thus patrolman was entitled to bring action against county for recovery of salary and fringe benefits during period of suspension even though he filed no notice of claim. Meed v Nassau County Police Dep't, 70 Misc. 2d 274, 332 N.Y.S.2d 679, 1972 N.Y. Misc. LEXIS 1920 (N.Y. Sup. Ct. 1972).

A personal injury action against a county transit system by a passenger who had been injured on one of the system's buses would not be dismissed on the basis of plaintiff's failure to file a notice of claim pursuant to Gen Mun Law § 50-e(1)(b), since, though the Court of Appeals decided after plaintiff's injury occurred that the laws creating the transit system imposed a statutory duty upon the county to operate the system and that, consequently, the statutory notice of claim requirements applied to actions against the system, such decision would be applied only prospectively in that such decision overruled clear past precedent on which litigants had a right to rely, the intent of the statute that municipalities receive actual, prompt notice of future claims had been satisfied, the equities of the situation clearly preponderated in favor of allowing plaintiff her day in court, and the county suffered no prejudice as a result of plaintiff's failure to provide it with formal notice. James v Liberty Lines, 119 Misc. 2d 1060, 465 N.Y.S.2d 144, 1983 N.Y. Misc. LEXIS 3644 (N.Y. Sup. Ct.), rev'd, 97 A.D.2d 749, 468 N.Y.S.2d 380, 1983 N.Y. App. Div. LEXIS 20491 (N.Y. App. Div. 2d Dep't 1983).

N.Y. Gen. Mun. Law § 50-e(a) requires a notice of claim to be filed as a precondition to the commencement of an action against a public corporation; an individual's intentional infliction of emotional distress claim was dismissed because he had failed to allege that the conduct of a county and its employees was so outrageous in character that it went beyond all possible bounds of decency and the individual had failed to file a notice of his claim with the county as required under § 50-e(a). Rivas v Suffolk County, 326 F. Supp. 2d 355, 2004 U.S. Dist. LEXIS 13599 (E.D.N.Y. 2004).

In a suit by a former county parks department employee and his guardian ad litem (plaintiffs) against a city and three supervisory parks department employees, alleging disability discrimination, although plaintiffs failed to file a required notice prior to commencing litigation, they were able to maintain their state law claims against the supervisory employees because service of notice of claim was not a condition precedent under N.Y. Gen. Mun. Law § 50-e(1)(b) to the commencement of a suit against a county's employees or agents unless the county was required to indemnify the individuals, and the supervisors' alleged actions against the employee fell outside the scope of their employment. Costabile v County of Westchester, 485 F. Supp. 2d 424, 2007 U.S. Dist. LEXIS 33484 (S.D.N.Y. 2007).

When a county was sued for denying a concert promoter a permit, and the promoter subsequently alleged that the county and the county's employees spoliated evidence, the date on which the county's duty to preserve evidence arose was the date on which the county was served with notice of the promoter's claim against the county, because the county should have known, as of that date, that all documents related to the promoter's permit application might be relevant to future litigation. Field Day, LLC v County of Suffolk, 2010 U.S. Dist. LEXIS 28476 (E.D.N.Y. Mar. 25, 2010).

When a county was sued for denying a concert promoter a permit, and the promoter subsequently alleged that the county and the county's employees spoliated evidence, the date on which the employees' duty to preserve evidence arose was the date on which the promoter filed suit because it was not shown that the employees were served with notice of the promoter's claim against the county. Field Day, LLC v County of Suffolk, 2010 U.S. Dist. LEXIS 28476 (E.D.N.Y. Mar. 25, 2010).

19. —Equity

Any claim or notice of claim against a county for damages arising at law or in equity must be made and served in compliance with section 50-e of the General Municipal Law and the action must be commenced pursuant to the provisions of section 50-i of the General Municipal Law (County Law, § 52); in an equitable action seeking only injunctive relief, it is unnecessary to file a notice of claim. Malcuria v Seneca, 66 A.D.2d 421, 414 N.Y.S.2d 401, 1979 N.Y. App. Div. LEXIS 10029 (N.Y. App. Div. 4th Dep't 1979).

Although it is unnecessary to file a notice of claim in an equitable action against a county seeking only injunctive relief, inasmuch as any claim or notice of claim against a county for damages arising at law or in equity must be made and served in compliance with section 50-e of the General Municipal Law and the action must be commenced pursuant to the provisions of section 50-i of the General Municipal Law (County Law, § 52), if plaintiffs do not file a notice of claim pursuant to section 52 of the County Law and the complaint seeks both injunctive and monetary relief, a motion to dismiss the cause of action for damages is granted, leaving a viable cause of action for injunctive relief; plaintiffs should not be permitted to frustrate the legitimate purposes of the notice-of-claim statutes by grafting a claim for monetary damages to a claim seeking injunctive relief. Malcuria v Seneca, 66 A.D.2d 421, 414 N.Y.S.2d 401, 1979 N.Y. App. Div. LEXIS 10029 (N.Y. App. Div. 4th Dep't 1979).

20. Transit system operators

In a personal injury action against defendant, a private corporation which contractually operated buses with a county which owned the buses and leased them to defendant, the Appellate Division improperly granted plaintiff's motion to strike defendant's affirmative defense that the action could not be maintained because plaintiffs failed to file a notice of claim required by Gen Mun Law § 50-e, where the local law creating the transit system imposed on the county a statutory duty to operate it, and where the imposition of such duty created an obligation that the county indemnify defendant for any damages recovered against it, thereby requiring a notice of claim against the county. Coleman v Westchester Street Transp. Co., 57 N.Y.2d 734, 454 N.Y.S.2d 978, 440 N.E.2d 1324, 1982 N.Y. LEXIS 3659 (N.Y. 1982).

Carrier, which operated bus owned by county as part of county's public transit system, was entitled to dismissal of action for injuries sustained when plaintiff's vehicle collided with bus since plaintiff did not serve notice of claim on county; notice of claim was required since local laws which created county's transit system imposed on county duty to operate system and created obligation to indemnify bus line for any damages recovered against it. Singer v Liberty Lines, 183 A.D.2d 820, 584 N.Y.S.2d 111, 1992 N.Y. App. Div. LEXIS 7140 (N.Y. App. Div. 2d Dep't 1992).

While county, which allegedly owned the bus in which plaintiff was a passenger at time of accident, was not named a party defendant in action brought against transportation company which leased and operated the bus, there was no need for plaintiff to serve a late notice of claim against the county as a condition precedent to commencing her action against the transportation company only, irrespective of whatever agreement might exist between county and transportation company concerning indemnity for negligence. Rhodes v Westchester Street Transp. Co., 80 Misc. 2d 1021, 365 N.Y.S.2d 351, 1974 N.Y. Misc. LEXIS 1937 (N.Y. Sup. Ct. 1974).

21. Fire district

This section is inapplicable to fire districts, at least with respect to the liability cast upon them by § 205-b arising from negligence of volunteer firemen in operation of their fire vehicles. Seyer v

Schoen, 6 A.D.2d 177, 175 N.Y.S.2d 1003, 1958 N.Y. App. Div. LEXIS 5122 (N.Y. App. Div. 4th Dep't 1958).

Where a complaint alleged only that defendants were members and officers of a volunteer fire department, the requirements of this section as to notice of claim were inapplicable, the department being merely an unincorporated association. O'Neil v Foley, 6 A.D.2d 739, 174 N.Y.S.2d 280, 1958 N.Y. App. Div. LEXIS 5810 (N.Y. App. Div. 3d Dep't 1958).

Trial court acted within its discretion by permitting an ambulance patient to file a late notice of claim because the ambulance report suggested injury attributable to malpractice and provided the rescue squads with actual knowledge of the essential facts constituting the claim, and the rescue squads were not prejudiced by the delay in serving a late notice of claim; the patient was rendered a partial quadriplegic. Ballantine v Pine Plains Hose Co., Inc., 166 A.D.3d 718, 87 N.Y.S.3d 245, 2018 N.Y. App. Div. LEXIS 7739 (N.Y. App. Div. 2d Dep't 2018).

Claimant was not permitted to add the Fire District as a defendant because although a notice of claim was served upon the volunteer company, there was no evidence the claimant served a notice of claim specifically upon the Fire District, and timely service of the notice of claim upon the company did not equate to timely service upon the Fire District. Roberts v Coeymans Hollow Volunteer Fire Co., 168 A.D.3d 1144, 91 N.Y.S.3d 590, 2019 N.Y. App. Div. LEXIS 47 (N.Y. App. Div. 3d Dep't), app. denied, 33 N.Y.3d 903, 124 N.E.3d 256, 100 N.Y.S.3d 706, 2019 N.Y. LEXIS 1299 (N.Y. 2019).

General Municipal Law § 50-i, which provides that no action shall be maintained for personal injury by reason of the negligence of any volunteer fireman whose services have been accepted pursuant to § 209-i, unless a notice is served pursuant to General Municipal Law § 50-e is misleading, because prior to September 1, 1963, the requirements of General Municipal Law § 50-e did not apply to a claim against a fire district which arose out of the negligence of volunteer firemen, pursuant to General Municipal Law § 205-b. Hopkins v East Syracuse Fire Dist., 49 Misc. 2d 197, 267 N.Y.S.2d 61, 1966 N.Y. Misc. LEXIS 2216 (N.Y. City Ct. 1966).

22. Jail

Notice of claim provisions of General Municipal Law did not apply to action brought by inmates of Monroe County Jail alleging that jail authorities violated Federal Civil Rights Act of 1871 by failing to afford adequate medical treatment to inmates. Cooper v Morin, 50 A.D.2d 32, 375 N.Y.S.2d 928, 1975 N.Y. App. Div. LEXIS 11423 (N.Y. App. Div. 4th Dep't 1975).

Civil Rights L § 79 did not suspend civil rights of individual incarcerated in county jail and thus he was under no legal disability to file notice of claim against the city for false imprisonment pursuant to Gen Mun L § 50-e. Clair v Utica, 72 Misc. 2d 547, 339 N.Y.S.2d 616, 1972 N.Y. Misc. LEXIS 2224 (N.Y. Sup. Ct. 1972).

23. Medical facilities

City hospital was not estopped, on grounds of its alleged failure to publicize its municipal status, from asserting defense to malpractice action that statutes required 90-day notice of claim against it. Guarrera v Lee Mem. Hosp., 51 A.D.2d 867, 380 N.Y.S.2d 161, 1976 N.Y. App. Div. LEXIS 11485 (N.Y. App. Div. 4th Dep't), app. dismissed, 39 N.Y.2d 942, 1976 N.Y. LEXIS 3538 (N.Y. 1976).

Assuming that state was under no obligation to consent to any tort liability, but that it was required to implement reasonable procedural rules by which liability could be adjudicated once it assumed such an obligation, shortness of statutory 90-day period of limitation for filing notice of claim against county hospital for negligence allegedly committed in treating five-year-old infant plaintiff was not so unreasonable as to be violative of due process, where it was clear from complaint that mother of child was aware that child had suffered some injury before 90 days had elapsed and, though burdened with showing unconstitutional effect of limitation, plaintiffs failed even to explain why they were not able to serve required notice of claim. Pausley v Chaloner, 54 A.D.2d 131, 388 N.Y.S.2d 35, 1976 N.Y. App. Div. LEXIS 13736 (N.Y. App. Div. 3d Dep't 1976), app. dismissed, 41 N.Y.2d 900, 1977 N.Y. LEXIS 3304 (N.Y. 1977), app. denied, 41 N.Y.2d 805, 1977 N.Y. LEXIS 3061 (N.Y. 1977).

Provision of General Municipal Law requiring, as a condition of any tort action against a municipality, the notice of claim be served upon municipality within 90 days after claim arises was not subject to being stricken in suit against county hospital as violative of equal protection on ground that there was no difference between public and private hospitals inasmuch as plaintiffs had no right of action for alleged negligence in performance of a governmental function at common law and it was only by virtue of waiver of immunity by legislature in certain instances that plaintiffs had any access to courts at all. Pausley v Chaloner, 54 A.D.2d 131, 388 N.Y.S.2d 35, 1976 N.Y. App. Div. LEXIS 13736 (N.Y. App. Div. 3d Dep't 1976), app. dismissed, 41 N.Y.2d 900, 1977 N.Y. LEXIS 3304 (N.Y. 1977), app. denied, 41 N.Y.2d 805, 1977 N.Y. LEXIS 3061 (N.Y. 1977).

In a malpractice action arising out of the defendant doctor's allegedly negligent treatment of plaintiff at a New York City ambulatory care facility, the defendant's motion for summary judgment dismissing the complaint is granted, the Court of Appeals having determinined on a prior appeal involving the defendant's attempt to implead the city that the facility was a public institution maintained in part by the City of New York within the meaning of subdivision 1 of section 50-d of the General Municipal Law and that, accordingly, the city was required to indemnify the doctor, since plaintiff failed to comply with subdivision 2 of section 50-d of the General Municipal Law in that no notice of claim was served on the city pursuant to section 50-e of the General Municipal Law and the action was commenced well beyond the one-year and three-month Statute of Limitations provided in section 50-i of the General Municipal Law; the fact that the city did not interpose the statutory defenses in the prior impleader action does not require denial of the motion, since plaintiff was in no way misled by the city's previous position that under a contractual arrangement it was not required to indemnify the defendant doctor and in no way relied on it, and, moreover, the motion for summary judgment was brought by the defendant doctor. Additionally, the notice of claim and short Statute of Limitations provisions of sections 50-e and 50-i are defenses which may be raised by the doctor even though he, and not the city, was sued, and defendant is not estopped from interposing the statutory defenses since there was no evidence that the city had entered into arrangements with regard to the facility that had the capacity to, and in fact did, mislead the plaintiff to her detriment. Norr v Spiegler, 72 A.D.2d 20, 423 N.Y.S.2d 177, 1980 N.Y. App. Div. LEXIS 9653 (N.Y. App. Div. 1st Dep't 1980), aff'd, 53 N.Y.2d 661, 438 N.Y.S.2d 1000, 421 N.E.2d 120, 1981 N.Y. LEXIS 2319 (N.Y. 1981).

Plaintiffs would not be allowed to serve notice of a claim and complaint against a public health and hospital corporation, which had assumed control of hospitals formerly operated by the city, where approximately six and one half years had passed since the initiation of plaintiffs' malpractice action, where no excuse for the delay and no evidence of misconduct by the city or the corporation were offered, and where the corporation was never made a party to the plaintiffs' application. Marku v New York, 86 A.D.2d 601, 446 N.Y.S.2d 119, 1982 N.Y. App. Div. LEXIS 15127 (N.Y. App. Div. 2d Dep't 1982).

In a medical malpractice action, medical treatments initially administered to plaintiff at a City of New York public hospital, which were followed by referral to a private hospital at which plaintiff was treated for his original complaint, should have been characterized as a single continuous course of treatment for purposes of tolling the 90-day notice of claim period required by Gen Mun Law § 50-e(1)(a) and the New York City Health and Hospitals Corporation Act (Unconsol Laws Ch 214-A § 20(2), because of close nexus between the two hospitals; accordingly, a notice of claim served within 90 days from the last date of continuous treatment at the private hospital was timely. Cotto v New York, 99 A.D.2d 748, 471 N.Y.S.2d 865, 1984 N.Y. App. Div. LEXIS 17112 (N.Y. App. Div. 2d Dep't 1984).

Court properly dismissed medical malpractice complaint for failure to properly serve notice of claim on New York City Health and Hospitals Corporation (HHC) within 90 days of accrual, as

plaintiffs' service of notice of claim on city rather than HHC did not constitute compliance with notice of claim provisions of CLS Gen Mun § 50-e and CLS Unconsol Ch 214-A § 20(2). Badgett v New York City Health & Hosps. Corp., 227 A.D.2d 127, 641 N.Y.S.2d 299, 1996 N.Y. App. Div. LEXIS 4751 (N.Y. App. Div. 1st Dep't 1996).

Court properly denied motion to dismiss complaint against New York City Health and Hospitals Corporation (HHC) for failure to serve timely notice of claim, where plaintiff served notice by delivering it to Corporation Counsel, claiming authority for such service under CLS Gen Mun § 50-e(3)(a); to extent that CLS Unconsol Ch 214-A § 20 required that service be made only on officer or director of HHC, it gave way to uniform and more recently amended CLS Gen Mun § 50-e. Viruet v City of New York, 277 A.D.2d 33, 715 N.Y.S.2d 406, 2000 N.Y. App. Div. LEXIS 11296 (N.Y. App. Div. 1st Dep't 2000), aff'd, 97 N.Y.2d 171, 738 N.Y.S.2d 2, 763 N.E.2d 1143, 2001 N.Y. LEXIS 3419 (N.Y. 2001).

New York City Health and Hospitals Corporation (HHC) is public benefit corporation rather than municipal corporation within meaning of CLS Gen Mun § 50-d, and thus statute's provision placing financial responsibility for malpractice on municipal corporations did not apply to it; accordingly, physician sued for malpractice, who claimed to be employee of HHC, was not entitled to summary judgment for plaintiffs' failure to serve notice of claim required by CLS Gen Mun § 50-e. Hassan v Woodhull Hosp. & Med. Ctr., 282 A.D.2d 709, 724 N.Y.S.2d 184, 2001 N.Y. App. Div. LEXIS 4317 (N.Y. App. Div. 2d Dep't 2001).

City hospital's records of a newly born child indicated that she had foot gangrene and had misadventure during her medical care so the city was on notice under N.Y. Gen. Mun. Law § 50-e(5) that it was subject to the child's claim even though the claim was filed four years after her discharge. The city was also not prejudiced by the child's motion, that she made four years after serving the late claim, for the late claim to be allowed since the city acknowledged that it had actually been served with the late claim. Caminero v N.Y. City Health & Hosps. Corp., 21 A.D.3d 330, 800 N.Y.S.2d 173, 2005 N.Y. App. Div. LEXIS 8800 (N.Y. App. Div. 1st Dep't 2005).

New York City Health and Hospitals Corporation is public benefit corporation (CLS Unconsol Ch 214-A § 4(1)), and is therefore "public corporation" under CLS Gen Const § 66(1), to which CLS Gen Mun § 50-e(1)(a), setting forth requirements of notice of claim, applies. Viruet v City of New York, 181 Misc. 2d 958, 695 N.Y.S.2d 663, 1999 N.Y. Misc. LEXIS 366 (N.Y. Sup. Ct. 1999), aff'd, 277 A.D.2d 33, 715 N.Y.S.2d 406, 2000 N.Y. App. Div. LEXIS 11296 (N.Y. App. Div. 1st Dep't 2000).

Complaint in civil rights action initially filed against correction officials and employees and amended nine months later to include state malpractice claim against physicians employed by city did not satisfy requirement of 90-day notice of malpractice claim against city employees. Shakur v McGrath, 517 F.2d 983, 1975 U.S. App. LEXIS 14379 (2d Cir. N.Y. 1975).

Notice of claim was a condition precedent to suit against hospital which was a department of the County of Greene and therefore was entitled to all of the immunity and protection afforded the county itself. Pope v Memorial Hospital of Greene County, 387 F. Supp. 331, 1974 U.S. Dist. LEXIS 6276 (S.D.N.Y. 1974).

24. —Late notice

In the patient's request for leave to file late notice of claim under N.Y. Gen. Mun. Law § 50-e(5) in the patient's medical malpractice action stemming from the patient's birth, the patient's argument, that the hospital was not substantially prejudiced by the 10-year delay because it had actual knowledge of the facts, failed; given that the hospital lacked actual knowledge, the intermediate appellate court's finding of substantial prejudice was within its discretion. Williams v Nassau County Med. Ctr., 6 N.Y.3d 531, 814 N.Y.S.2d 580, 847 N.E.2d 1154, 2006 N.Y. LEXIS 650 (N.Y. 2006).

Where the birth of the patient in 1993 was difficult but where the patient's Apgar score and weight were within the normal range, the patient was not erroneously denied leave to serve late notice of claim under N.Y. Gen. Mun. Law § 50-e(5); the hospital did not have actual knowledge of the claim, as the hospital records did not give any reason to predict lasting harm to the patient. Williams v Nassau County Med. Ctr., 6 N.Y.3d 531, 814 N.Y.S.2d 580, 847 N.E.2d 1154, 2006 N.Y. LEXIS 650 (N.Y. 2006).

In reversing the order granting the patient leave to file late notice of claim under N.Y. Gen. Mun. Law § 50-e(5) in the patient's medical malpractice action stemming from the patient's birth, the intermediate appellate court did not exceed its discretion in pointing out that, among other reasons for denying leave, the 10-year delay was not the product of the patient's infancy; this was only one of the factors for the intermediate appellate court's decision, not the sole factor. Williams v Nassau County Med. Ctr., 6 N.Y.3d 531, 814 N.Y.S.2d 580, 847 N.E.2d 1154, 2006 N.Y. LEXIS 650 (N.Y. 2006).

Plaintiff's application for leave to serve a notice of claim upon the New York City Health and Hospitals Corporation nunc pro tunc should have been granted where, by virtue of the medical center's communications with plaintiff during the 90 days after the claim accrued, the Health and Hospitals Corporation acquired actual knowledge of the essential facts constituting the claim, Gen Mun Law § 50-e, and defendant failed to demonstrate any manner in which it would be prejudiced by plaintiff's delay in serving a formal notice of claim. Williams v New York City Health & Hospitals Corp., 93 A.D.2d 885, 461 N.Y.S.2d 411, 1983 N.Y. App. Div. LEXIS 17768 (N.Y. App. Div. 2d Dep't 1983).

Because a health care corporation had actual knowledge of the essential facts of the parents' claim and was not prejudiced by a six-month delay, and because the parents demonstrated a reasonable excuse for the delay, their N.Y. Gen. Mun. Law § 50-e(1)(a), (5) motion for leave to serve a late notice of claim should have been granted. Compass v County of Nassau, 37 A.D.3d 752, 830 N.Y.S.2d 583, 2007 N.Y. App. Div. LEXIS 2377 (N.Y. App. Div. 2d Dep't 2007).

Trial court erred in denying a patient's petition to deem his proposed notice of a medical malpractice claim against a public hospital and surgeon timely served nunc pro tunc because the hospital and surgeon acquired notice of the essential facts of the claim well within 90 days after the claim arose by virtue of the hospital's medical records, the hospital and surgeon would not be prejudiced by the delay, and they did not allege that there were any witnesses who were no longer available to testify. Matter of Khan v New York City Health & Hosps. Corp., 135 A.D.3d 940, 24 N.Y.S.3d 163, 2016 N.Y. App. Div. LEXIS 499 (N.Y. App. Div. 2d Dep't), app. denied, 28 N.Y.3d 902, 63 N.E.3d 70, 40 N.Y.S.3d 350, 2016 N.Y. LEXIS 2775 (N.Y. 2016).

Emergency room patient was permitted to serve a late notice of claim upon the city's Health and Hospitals Corporation (HHC) because, inter alia, HHC refused to forward the requested medical records the patient needed to fully review the medical records to determine whether HHC failed to examine the soft tissues supporting the thumb, and HHC did not establish substantial prejudice even though it did not receive timely actual knowledge of the patient's malpractice claim. Matter of Townson v New York City Health & Hosps. Corp., 158 A.D.3d 401, 70 N.Y.S.3d 200, 2018 N.Y. App. Div. LEXIS 579 (N.Y. App. Div. 1st Dep't 2018).

Trial court properly dismissed a complaint filed by a deceased patient's administrator for medical malpractice, conscious pain and suffering, and wrongful death against the city Health and Hospitals Corporation (HHC) for failure to serve a timely notice of claim because the trial court lacked authority to grant leave to serve a late notice or to deem the notice timely served nunc pro tunc absent a finding of equitable estoppel, there was no indication in the record that the administrator relied on any alleged act or omission of HHC or that such reliance caused the administrator to change his position to his detriment or prejudice, and HHC's participation in pretrial discovery did not preclude it from raising the untimeliness of the notice. Watts v City of New York, 186 A.D.3d 1574, 131 N.Y.S.3d 62, 2020 N.Y. App. Div. LEXIS 5143 (N.Y. App. Div. 2d Dep't 2020).

Claimant was allowed to serve a late notice of claim upon a hospital under N.Y. Gen. Mun. Law § 50-e(5) and the notice of claim served with the motion papers satisfied N.Y. Pub. Auth. Law § 3567(1) as: (1) the claimant's medical records reflected concern for a post-surgical problem, incertitude regarding test

results, and numerous complications; and (2) while the claimant's excuse for the 10-month delay between the end of the claimant's outpatient treatment and the filing of the motion was weak, the hospital had actual notice of the facts that constituted the claim and was not prejudiced by the delay. Clark v Roswell Park Cancer Inst. Corp., 919 N.Y.S.2d 268, 31 Misc. 3d 578, 2010 N.Y. Misc. LEXIS 6609 (N.Y. Ct. Cl. 2010), aff'd, 92 A.D.3d 1273, 938 N.Y.S.2d 483, 2012 N.Y. App. Div. LEXIS 1283 (N.Y. App. Div. 4th Dep't 2012).

Former employee's common law claims against his former employer, a city transportation authority and two of its executives, and against a metropolitan transportation authority and two of its employees, were dismissed; although notice was not required to be served upon individuals under N.Y. Gen. Mun. Law § 50-e(1)(b) (2007), the employee failed to serve notice of the claims on the agencies prior to filing suit, as required by N.Y. Gen. Mun. Law § 50-e(1)(a) (2007). Hargett v Metro. Transit Auth., 552 F. Supp. 2d 393, 2008 U.S. Dist. LEXIS 30599 (S.D.N.Y. 2008).

25. Exceptions to notice requirement

Indemnification claims and third-party complaints resulting from litigation not initially involving the public or municipal corporation and with respect to which its liability to the claimant depends upon the claimant's first being adjudicated liable to another, are not within the coverage of this section and are not precluded by failure to serve timely notice of claim. Valstrey Service Corp. v Board of Elections, 2 N.Y.2d 413, 161 N.Y.S.2d 52, 141 N.E.2d 565, 1957 N.Y. LEXIS 1155 (N.Y. 1957).

There is no necessity for service of a notice of claim upon a municipality as a condition precedent to an action against a city police officer for false arrest or malicious prosecution where the municipality is not made a party. O'Hara v Sears Roebuck & Co., 286 A.D. 104, 142 N.Y.S.2d 465, 1955 N.Y. App. Div. LEXIS 3985 (N.Y. App. Div. 1955).

Preliminary service of notice of claim is not necessary to prosecution of an action against an officer or employee of a public or municipal corporation individually, at least unless the cause of action is based upon misconduct or neglect in his official capacity for which the public or municipal corporation would have to respond in damages. Weissmann v Euker, 1 A.D.2d 30, 147 N.Y.S.2d 101, 1955 N.Y. App. Div. LEXIS 3701 (N.Y. App. Div. 3d Dep't 1955).

In an action by plaintiff who was admitted to a municipal hospital for treatment of a fractured ankle, the trial court properly denied plaintiff's motion for leave to file a late notice of claim, where plaintiff failed to give any explanation as to why he waited for one year before seeking to make a claim, and where plaintiff maintained that the injury to his ankle was very serious, but did not state that any medical attention was sought during that one-year period. Rodriguez v New York, 86 A.D.2d 533, 446 N.Y.S.2d 50, 1982 N.Y. App. Div. LEXIS 15047 (N.Y. App. Div. 1st Dep't 1982), app. dismissed, 58 N.Y.2d 899, 460 N.Y.S.2d 531, 447 N.E.2d 79, 1983 N.Y. LEXIS 2877 (N.Y. 1983).

An order denying leave to serve a late notice would be reversed where, even if a municipality did not receive actual notice of plaintiff's son's accident until the date of the application for leave to serve the late notice of claim nearly one year after the accident, the son should have been allowed to serve a late notice of claim, given the nature of his injuries, which had rendered him quadriplegic, and given the absence of any showing of substantial prejudice; however, plaintiff mother was properly denied similar relief, on the basis that she did not offer any acceptable excuse on her own behalf for the delay. Bensen v Islip, 99 A.D.2d 755, 471 N.Y.S.2d 670, 1984 N.Y. App. Div. LEXIS 17120 (N.Y. App. Div. 2d Dep't), app. dismissed, 62 N.Y.2d 798, 477 N.Y.S.2d 330, 465 N.E.2d 1266, 1984 N.Y. LEXIS 4375 (N.Y. 1984).

Trial court erred in vacating and denying its prior order granting a petition to deem a late notice of claim timely served nunc pro tunc because the decedent's medical records suggested injury attributable to malpractice and provided a university hospital with actual knowledge of the essential facts constituting the claim, the administratrix made an initial showing that the hospital would not suffer any prejudice by the delay in serving a notice of claim, the hospital failed to rebut the administratrix's showing with particularized indicia of prejudice, and the lack of a reasonable excuse was not dispositive where there was actual notice and absence of prejudice. Matter of Breslin v Nassau Health Care Corp., 153 A.D.3d 1256, 62 N.Y.S.3d 118, 2017 N.Y. App. Div. LEXIS 6428 (N.Y. App. Div. 2d Dep't 2017).

A defendant, who was also the Commissioner of Accounts of Nassau County could be sued personally in his individual capacity without compliance with the provisions applicable to the commencement of an action against the County of Nassau or its agents, servants and employees. Firester v Lipson, 50 Misc. 2d 527, 270 N.Y.S.2d 844, 1966 N.Y. Misc. LEXIS 2018 (N.Y. Sup. Ct. 1966).

Although a patient's claim against a hospital was untimely under N.Y. Gen. Mun. Law § 50-e, because there was an issue of fact as to the patient's mental condition under N.Y. Mental Hyg. Law § 9.39, a hearing was necessary to determine whether the patient was entitled to a toll under N.Y. C.P.L.R. 208 and, if so, the extent of the toll. Hoops v Director, Bellevue Hosp. Ctr., 906 N.Y.S.2d 674, 28 Misc. 3d 61, 2010 N.Y. Misc. LEXIS 3208 (N.Y. App. Term 2010).

Under N.Y. Gen. Mun. Law § 50-e(1)(b), a former employee's failure to serve a timely notice of claim upon defendants, county park superintendents and the employee's former supervisor, did not warrant dismissal of the employee's state law disability discrimination and hostile working environment claims against the park superintendents and the supervisor because the alleged acts of discrimination and harassment appeared from the pleadings to fall outside the scope of defendants' employment and defendants did not argue otherwise. Costabile v County of Westchester, 2007 U.S. Dist. LEXIS 29787 (S.D.N.Y. Apr. 20, 2007), amended, 485 F. Supp. 2d 424, 2007 U.S. Dist. LEXIS 33484 (S.D.N.Y. 2007).

Neither notice of claim requirement of General Municipal Law § 50-e nor limitations period set forth in General Municipal Law § 50-i applies in third-party actions against municipal defendants. Haehl v Port Chester, 463 F. Supp. 845, 1978 U.S. Dist. LEXIS 14253 (S.D.N.Y. 1978).

In action arising from alleged negligent inspection of wiring of house that burned down, Board of Fire Underwriters was not protected by short limitations period of CLS Gen Mun § 50-i based on its status as town's authorized representative for conducting electrical inspections, where board inspectors were not town employees entitled to be indemnified by town, and town was not real party in interest. Royal Ins. Co. of Am. v Ru-Val Elec. Corp., 918 F. Supp. 647, 1996 U.S. Dist. LEXIS 1723 (E.D.N.Y.), amended, 918 F. Supp. 647 (E.D.N.Y. 1996).

26. Playland Commission

This section requires service of notice of claim as a condition precedent to suit notwithstanding the claim is based on negligence of the operator of an amusement device commercially conducted in an area under control of the Westchester County Playland Commission as a proprietary function, and is not, for that reason, unconstitutional. Fullam v Westchester County Playland Com., 276 A.D. 925, 94 N.Y.S.2d 637, 1950 N.Y. App. Div. LEXIS 5157 (N.Y. App. Div. 1950).

Notwithstanding the enactment of § 50-i by ch. 788, Laws of 1959, this section is still applicable to commencement of actions and time limitations with respect to claims against "public corporations" other than those specifically listed and dealt with in § 50-i, including the Playland Commission of Westchester County, which is a distinct type of public corporation. Oraczewski v Westchester County, 32 Misc. 2d 217, 221 N.Y.S.2d 485, 1961 N.Y. Misc. LEXIS 2214 (N.Y. Sup. Ct. 1961).

That portion of § 2, ch. 777, Laws of 1941 relating to service of notice of claim against the Westchester County Playland Commission, was superseded and is now controlled by this section, since the Commission is a "public benefit corporation" within the scope of this section's coverage. Percudani v Westchester County Playland Com., 226 N.Y.S.2d 517, 1962 N.Y. Misc. LEXIS 4249 (N.Y. Sup. Ct. 1962).

The notice of claim requirements of this section having been made applicable to the Westchester County Playland Commission by ch. 777 L 1941, without regard to whether activities of the

Commission out of which an alleged cause of action for injuries sustained arises are governmental or proprietary in character, a complaint against the Commission is insufficient which fails to allege compliance with the notice requirements, notwithstanding it is contended that it arises out of proprietary activities. Pekar v Westchester County Playland Com., 190 F. Supp. 430, 1961 U.S. Dist. LEXIS 3528 (S.D.N.Y. 1961).

27. Police or sheriff

Gen Mun Law § 50-j(2), which requires that an off-duty police officer, to qualify for indemnity from his municipal employer for his tortious conduct, must have acted within "the geographical limits of his jurisdiction," contemplates the State-wide jurisdiction of the police officer, not the jurisdiction of the municipality. Accordingly, in an action for personal injuries allegedly due to tortious conduct by defendant off-duty Suffolk County police officer in Queens County, if defendant was acting as a police officer, he would be entitled to indemnity, and plaintiffs were required by Gen Mun Law § 50-j(3) to file a notice of claim. Defendant raised a question of fact as to whether he was "engaged in immediate and actual performance of a public duty imposed by law" as required by § 50-j(2); if defendant was acting as a police officer at the time of the incident, his affirmative defense that plaintiffs failed to comply with the notice of claim provisions of Gen Mun Law § 50-e would be valid; if he was not, plaintiffs were not required to submit a notice of claim. Alifieris v American Airlines, Inc., 63 N.Y.2d 370, 482 N.Y.S.2d 453, 472 N.E.2d 303, 1984 N.Y. LEXIS 4665 (N.Y. 1984).

A sheriff or deputy sheriff can be sued individually without prior service of notice of claim, for damages arising out of his negligence or misconduct, notwithstanding the provisions of this section and § 52 of the County Law, since, under Const. Art. 9 § 5, a county is not liable for his acts. Kawar v Martin, 12 A.D.2d 876, 210 N.Y.S.2d 68, 1961 N.Y. App. Div. LEXIS 13497 (N.Y. App. Div. 4th Dep't 1961).

Statutes repealing former statute which required notices of claim to be served upon individual police officers in action against such individual police officers were not meant to be applied retroactively, and thus where no notices of claim were served on individual police officers, complaint seeking damages for assault would be dismissed as against individual police officers. Clemente v Little, 59 A.D.2d 752, 398 N.Y.S.2d 698, 1977 N.Y. App. Div. LEXIS 13773 (N.Y. App. Div. 2d Dep't 1977).

A notice of claim was not required to permit action against sheriff as county of Monroe was not responsible for acts of sheriff or his deputies. Williams v Irondequoit, 59 A.D.2d 1049, 399 N.Y.S.2d 807, 1977 N.Y. App. Div. LEXIS 14336 (N.Y. App. Div. 4th Dep't 1977).

The reviewing court would grant plaintiff leave to file a late notice of claim pursuant to Gen Mun Law § 50-e, notwithstanding that the notice of claim was filed some seven months after the alleged negligent incident, where defendant's employees apparently led plaintiff to believe that the decedent's death was due to causes other than their negligence as did plaintiff's originally retained counsel, and where plaintiff demonstrated reasonable persistence in shortly thereafter retaining new counsel and eventually securing the appropriate medical records. Alessi v County of Nassau, 85 A.D.2d 725, 445 N.Y.S.2d 817, 1981 N.Y. App. Div. LEXIS 16549 (N.Y. App. Div. 2d Dep't 1981).

Filing of notice of claim is condition precedent to action against sheriff where sheriff's office has been abolished and replaced by commissioner/sheriff of public safety services who is county employee. McGinnis v Sheriff of Westchester County, 120 A.D.2d 577, 502 N.Y.S.2d 64, 1986 N.Y. App. Div. LEXIS 56659 (N.Y. App. Div. 2d Dep't 1986).

1990 constitutional amendment eliminating former CLS NY Const Art XIII § 13(a) provision that county shall never be made responsible for actions of sheriff had effect of requiring plaintiff to serve notice of claim as condition precedent to commencing action for false arrest, abuse of process and trespass against sheriff's department and 2 deputies since CLS Gen Mun § 50-e(1)(a) requires service of notice of claim as condition precedent to commencement of action against county, and sheriff's department is division of county. Bardi v Warren County Sheriff's Dep't, 194 A.D.2d 21, 603 N.Y.S.2d 90, 1993 N.Y. App. Div. LEXIS 10087 (N.Y. App. Div. 3d Dep't 1993).

Plaintiff was not required by CLS Gen Mun § 50-e(1)(a) to serve notice of claim as condition precedent to commencing action for false arrest, abuse of process and trespass against county sheriff since service of notice of claim on officer, appointee or employee of county is not condition precedent to commencement of action against such person unless county is required to indemnify such person, and while county is required to indemnify its employees for claims which arise while they are acting within scope of their employment, county sheriff is specifically excluded as person entitled to indemnification by CLS Pub O § 18(1)(b). Bardi v Warren County Sheriff's Dep't, 194 A.D.2d 21, 603 N.Y.S.2d 90, 1993 N.Y. App. Div. LEXIS 10087 (N.Y. App. Div. 3d Dep't 1993).

Service of notice of claim was not condition precedent to commencement of action against individual police officers who executed no-knock search warrant on petitioners' apartment. Delgado v Connolly, 246 A.D.2d 484, 667 N.Y.S.2d 255, 1998 N.Y. App. Div. LEXIS 698 (N.Y. App. Div. 1st Dep't 1998).

Where action was brought against county police officers, personally for their individual and unauthorized misconduct, in terms that would exclude municipal liability, issues of county liability and county duty to indemnify were not tendered by the complaint, and compliance with the notice of claims provision need not appear. Beyer v Werner, 299 F. Supp. 967, 1969 U.S. Dist. LEXIS 8600 (E.D.N.Y. 1969).

28. Public housing authority

A public housing authority, such as the New York City Housing Authority, is within the requirements of this section for service of notice of claim within 90 days after the claim arises, which limitation is controlling as against anything to the contrary in the statutes dealing with rights and liabilities of such authorities. Colasuonno v Municipal Housing Authority, 12 A.D.2d 866, 210 N.Y.S.2d 45, 1961 N.Y. App. Div. LEXIS 13037 (N.Y. App. Div. 3d Dep't 1961).

Action for personal injuries brought against city housing authority should have been dismissed where plaintiffs failed to serve notice of claim as required under CLS Pub Hous § 157 and failed to move for permission to serve late notice of claim. Mercier v Municipal Housing Authority, 133 A.D.2d 990, 521 N.Y.S.2d 142, 1987 N.Y. App. Div. LEXIS 52016 (N.Y. App. Div. 3d Dep't 1987).

29. School district

After notice of claim has been properly and timely served on a board of education, one of its teachers can be individually sued for the negligence of misconduct upon which the claim is based. Sandak v Tuxedo Union School Dist., 308 N.Y. 226, 124 N.E.2d 295, 308 N.Y. (N.Y.S.) 226, 1954 N.Y. LEXIS 938 (N.Y. 1954).

A central school district is a subdivision of Government within the meaning of General Municipal Law § 50-b. Hence, a negligence action against the driver of a bus owned by the school district cannot be maintained unless notice of claim was served pursuant to this section. Van Tassell v Hill, 285 A.D. 584, 139 N.Y.S.2d 663, 1955 N.Y. App. Div. LEXIS 5542 (N.Y. App. Div. 1955).

Even though an action against a teacher has been dismissed by a lower court as not sustainable on the basis of notice of claim against the board of education, if the dismissal has not become a final adjudication a new action can be brought and maintained on the basis of his individual liability. Weissmann v Euker, 1 A.D.2d 30, 147 N.Y.S.2d 101, 1955 N.Y. App. Div. LEXIS 3701 (N.Y. App. Div. 3d Dep't 1955).

School teacher who brought action against assistant principal, department chairman, and principal based on alleged defamation which apparently occurred in the course of, or arose out of, the performance of official duties was required to file notice of claim in compliance with the General Municipal Law. Cioffi v Giannone, 56 A.D.2d 620, 391 N.Y.S.2d 675, 1977 N.Y. App. Div. LEXIS 10710 (N.Y. App. Div. 2d Dep't 1977).

The limitation provisions of Gen Mun Law § 50-i are tolled by infancy pursuant to CPLR § 208; thus, where a transit authority had actual notice of an occurrence involving an injury to infant

plaintiff and was not prejudiced by the late notice claim filed under Gen Mun Law § 50-e, the court abused its discretion in denying the application made on the infant's behalf for leave to serve a notice of claim after the expiration of the statutory period against the transit authority. Fleming v Manhattan Bronx Surface Transit Operating Authority, 86 A.D.2d 509, 445 N.Y.S.2d 741, 1982 N.Y. App. Div. LEXIS 15022 (N.Y. App. Div. 1st Dep't 1982).

An 11-year-old claimant who fractured her elbow while using a slide on the grounds of respondent school district should have been permitted to serve a late notice of claim, where the school district received actual notice of the accident on the day it had occurred, where the delay of six years was occasioned, in part, by the reliance of the claimant's mother upon the school district's initial willingness to assume responsibility for the claimant's medical expenses, and where the delay was also occasioned by the fact that the full extent of the claimant's injury was not ascertainable until she had attained greater physical maturity, and thus was related to her infancy. Tetro v Plainview-Old Bethpage Cent. School Dist., 99 A.D.2d 814, 472 N.Y.S.2d 146, 1984 N.Y. App. Div. LEXIS 17206 (N.Y. App. Div. 2d Dep't 1984).

In action for injuries arising out of automobile accident allegedly caused by superintendent of schools while operating school district vehicle in scope of his employment, court erred in refusing to dismiss complaint based on plaintiff's failure to serve notice of claim on board of education under CLS Gen Mun § 50-e(1)(b) (on theory that superintendent was not entitled to be indemnified by district because he failed to comply with 10-day requirement of CLS Educ § 3023 for delivery of summons and complaint on board, and therefore service of notice of claim by plaintiff was unnecessary), since record indicated that superintendent timely delivered pleadings to clerk of board who forwarded papers to district's insurance agent, and that board had agreed to indemnify superintendent, and board did not contest proper receipt of pleadings. Kerch v Silvestri, 186 A.D.2d 322, 587 N.Y.S.2d 804, 1992 N.Y. App. Div. LEXIS 10818 (N.Y. App. Div. 3d Dep't 1992).

Grant of school district's motion to dismiss the injured party's claim on the ground that the notice of claim was deficient was reversed where the school district, which was timely served with a notice of claim, had notice of the nature of the claim, the date and location of the accident, and the items of damages; the school district did not assert a lack of good faith or claim that it would have been prejudiced by the omissions in the notice. Neal v Amityville Union Free Sch. Dist., 288 A.D.2d 450, 733 N.Y.S.2d 245, 2001 N.Y. App. Div. LEXIS 11357 (N.Y. App. Div. 2d Dep't 2001).

Trial court properly granted a high-school wrestler's application for leave to serve a late notice of claim against a school district because, while the wrestler did not demonstrate any specific nexus between his infancy and his delay in serving a late notice of claim, the district had actual knowledge of the injuries or damages sustained by the wrestler, and it was not a situation where it was unaware of the facts underlying the claim. Matter of Ficek v Akron Cent. Sch. Dist., 144 A.D.3d 1601, 41 N.Y.S.3d 616, 2016 N.Y. App. Div. LEXIS 7413 (N.Y. App. Div. 4th Dep't 2016).

Res judicata did not bar a former student's motion to file a late notice of claim against a school district based upon the denial of her father's earlier motion for leave to serve a late notice of claim because although both notices of claim alleged an ongoing pattern of bullying, harassment, and intimidation of the student, the father's notice mentioned only the January 2015 incident, while the student's notice was premised upon a subsequent June 2015 event. Sherb v Monticello Cent. Sch. Dist., 163 A.D.3d 1130, 81 N.Y.S.3d 265, 2018 N.Y. App. Div. LEXIS 4913 (N.Y. App. Div. 3d Dep't 2018).

Student was permitted to file a late notice of claim, asserting a claim for damages arising from the school district's alleged negligence in failing to prevent or stop the bullying of the student, because the district had notice of the alleged pattern of abuse, which occurred over several years, and the district was not substantially prejudiced by the delay in serving the notice of claim. Matter of C.B. v Carmel Cent. Sch. Dist., 164 A.D.3d 670, 83 N.Y.S.3d 276, 2018 N.Y. App. Div. LEXIS 5740 (N.Y. App. Div. 2d Dep't 2018).

Trial court did not err in determining that the student's notice of claim to the school district was timely because the alleged bullying and negligent supervision at issue was of continuing nature, and the school district had actual notice of the claim in time to properly investigate and obtain evidence. Motta v Eldred Cent. Sch. Dist., 172 A.D.3d 1575, 101 N.Y.S.3d 472, 2019 N.Y. App. Div. LEXIS 3709 (N.Y. App. Div. 3d Dep't 2019).

Trial court erred in denying a mother's petition, in her individual capacity, for to leave to serve a late notice of claim on two school districts and the board of education because the mother served her notice of claim within the one-year statutory period, the two-month delay in serving the notice of claim was reasonable under the circumstances, the districts acquired actual knowledge of the essential facts constituting the claims within a reasonable time after the expiration of the 90-day period, and the districts failed to rebut the showing of an absence of prejudice, with particularized evidence. Matter of D.S. v South Huntington Union Free Sch. Dist., 176 A.D.3d 1075, 111 N.Y.S.3d 687, 2019 N.Y. App. Div. LEXIS 7605 (N.Y. App. Div. 2d Dep't 2019).

The failure of the State of New York to serve or file a notice of claim against a school district precludes the state from maintaining an action for negligently caused damages to one of the state's trucks by an employee of the school district. State v Waverly Cent. School Dist., 53 Misc. 2d 843, 280 N.Y.S.2d 507, 1966 N.Y. Misc. LEXIS 1576 (N.Y. County Ct. 1966), aff'd, 28 A.D.2d 628, 280 N.Y.S.2d 505, 1967 N.Y. App. Div. LEXIS 4027 (N.Y. App. Div. 3d Dep't 1967).

Notice of claim directed to the board of education of a school district did not meet the notice requirements of N.Y. Educ. Law § 3813 and N.Y. Gen. Mun. Law § 50-e for an action that was subsequently filed against individual employees of the district by an infant and his mother. White v Averill Park Cent. Sch. Dist., 195 Misc. 2d 409, 759 N.Y.S.2d 641, 2003 N.Y. Misc. LEXIS 263 (N.Y. Sup. Ct. 2003).

Student failed to provide adequate and timely notice of her claim against a school district and others because the notice did not adequately advise of the exact nature of the claim and an attempted amendment of the notice was not timely. Tyrrell v Seaford Union Free Sch. Dist., 792 F. Supp. 2d 601, 2011 U.S. Dist. LEXIS 61418 (E.D.N.Y. 2011).

A school district is a "municipal corporation" within the meaning of the statute requiring municipal corporations to make and keep records of notices of claims filed pursuant to section 50-e of the General Municipal Law. 1956 Ops St Compt File #8221.

30. Town

Although town was on notice by letter sent some 18 months before damage to particular property became manifest and hence before any cause of action accrued, town was entitled by statute to prompt notice of subsequent bulkhead collapse and consequential harm while claim was still fresh, and there was failure of compliance with statutory requirements for notice of claim by one landowner. Doundoulakis v Hempstead, 42 N.Y.2d 440, 398 N.Y.S.2d 401, 368 N.E.2d 24, 1977 N.Y. LEXIS 2322 (N.Y. 1977).

Under this section, as made applicable to claims against towns by § 67 of the Town Law, an award of damages against the town incidental to an action for recovery of a strip of land allegedly wrongfully appropriated for use as a highway would be limited to the period of 90 days preceding filing of the notice of claim. Crawford v Hamburg, 19 A.D.2d 100, 241 N.Y.S.2d 357, 1963 N.Y. App. Div. LEXIS 3439 (N.Y. App. Div. 4th Dep't 1963).

In an action to determine adverse claims of title to real estate and to recover damages for trespass brought against a town and county, it was held that no statutory notice of claim was necessary as a prerequisite to the action against the town. However, the action against the county was governed by § 52 of the County Law, and plaintiff could not maintain such an action without compliance with §§ 50-e and 50-i of the General Municipal Law. Seabreeze Marina at Smithtown, Inc. v Smithtown, 25 A.D.2d 780, 269 N.Y.S.2d 662, 1966 N.Y. App. Div. LEXIS 4497 (N.Y. App. Div. 2d Dep't 1966).

Where a claimant sought to recover compensation and consequential damages from the defendant Town for its permanent appropriation of a portion of plaintiff's land for the widening of a

town highway, such action was not founded in tort and compliance with the notice of claim provisions of § 50-e of the General Municipal Law was not required. Torino v Pleasant Valley, 36 A.D.2d 963, 321 N.Y.S.2d 445, 1971 N.Y. App. Div. LEXIS 4140 (N.Y. App. Div. 2d Dep't 1971).

Section 50-e of the General Municipal Law is a general law, which is defined as one which in terms and in effect applies alike to all counties, all counties other than those wholly included within a city, all cities, all towns, or all villages. Zumbo v Farmington, 60 A.D.2d 350, 401 N.Y.S.2d 121, 1978 N.Y. App. Div. LEXIS 9680 (N.Y. App. Div. 4th Dep't 1978).

There is an exceedingly strong presumption of constitutionality that attaches even to local laws and a local law, which provides that no civil action shall be maintained against a town for injuries resulting from any property of the town being unsafe unless, prior to the occurrence of the injuries, the town shall have been given actual written notice of the condition complained of and shall have failed or neglected within a reasonable time to repair or remove the condition, is not unconstitutional due to any inconsistency with section 50-e of the General Municipal Law, inasmuch as such statute does not serve to dispense with any notice requirement relative to unsafe conditions which may otherwise be required by law, and plainly passes constitutional muster even though the superseded section 65-a of the Town Law related only to specified property, i.e., unsafe highways, bridges and culverts for which constructive notice was sufficient, since each town is expressly authorized to adopt local laws amending or superseding provisions of the Town Law relating to the property, affairs or government of the individual town unless the Legislature shall have expressly prohibited the adoption of such a local law. (Municipal Home Rule Law, § 10, subd 1, par [ii], cl d, subcl [3].) Accordingly, an order of Special Term, which dismissed the defendant town's affirmative defense that it could not be liable to plaintiff in an action based on personal injuries allegedly sustained as a result of the town's negligence in the construction and maintenance of a road because there had been no compliance with the local law in question, should be reversed, on the law, and the affirmative defense reinstated. Klimek v Ghent, 71 A.D.2d 359, 423 N.Y.S.2d 517, 1979 N.Y. App. Div. LEXIS 13483 (N.Y. App. Div. 3d Dep't 1979).

Tort action could not be maintained against town where plaintiff failed to allege compliance with notice of claim requirements of CLS Gen Mun § 50-e and CLS Town § 67 and there was nothing in record indicating compliance therewith; filing of notice of claim is condition precedent to tort action against town, not affirmative defense to be raised by town, it is not waived by town's failure to raise it in answer, and it may be considered for first time on appeal. E. Williamson Roofing & Sheet Metal Co. v Parish, 139 A.D.2d 97, 530 N.Y.S.2d 720, 1988 N.Y. App. Div. LEXIS 11231 (N.Y. App. Div. 4th Dep't 1988).

Town's superintendent of highways was not entitled to dismissal of defamation action on ground that plaintiff failed to timely file notice of claim against town pursuant to CLS Gen Mun § 50-e since (1) action was brought against superintendent individually, not in his capacity as town employee, and town was not named as defendant, (2) service of notice of claim was required only if town had statutory obligation to indemnify superintendent, and (3) town was not obligated to indemnify superintendent because CLS Pub O § 18 had never been adopted by local governing body; under local law, town had duty to defend defendant, not indemnify him. Wyman v Zeltins, 142 A.D.2d 913, 531 N.Y.S.2d 144, 1988 N.Y. App. Div. LEXIS 8019 (N.Y. App. Div. 3d Dep't 1988).

Appeals court reversed order and dismissed, under N.Y. C.P.L.R. § 3211(a)(7), owners' suit against town for ocean storm damages to their home; the town's officials' discretionary acts, denying the owners' application for an emergency stone revetment, enjoyed absolute governmental immunity. Kelleher v Town of Southampton, 306 A.D.2d 247, 760 N.Y.S.2d 235, 2003 N.Y. App. Div. LEXIS 6235 (N.Y. App. Div. 2d Dep't 2003).

Where complaint sounding in tort against town did not allege that a notice of claim had been filed as required by the General Municipal Law and papers before court indicated that no such notice had been filed, complaint was insufficient. Mazo v Shawangunk, 87 Misc. 2d 597, 386 N.Y.S.2d 519, 1976 N.Y. Misc. LEXIS 2262 (N.Y. Sup. Ct. 1976), aff'd, 60 A.D.2d 734, 401 N.Y.S.2d 305, 1977 N.Y. App. Div. LEXIS 14772 (N.Y. App. Div. 3d Dep't 1977).

Because it was undisputed that plaintiff never filed a notice of claim in compliance with N.Y. Gen. Mun. Law § 50-e, as required by N.Y. Gen. Mun. Law § 50-i(1)(c), plaintiff's state law claims against municipal defendants were dismissed. McLaurin v New Rochelle Police Officers, 373 F. Supp. 2d 385, 2005 U.S. Dist. LEXIS 11971 (S.D.N.Y. 2005), aff'd in part, vacated in part, 2007 U.S. App. LEXIS 1839 (2d Cir. N.Y. Jan. 25, 2007).

31. Transportation authorities

Compliance with this section, by due and timely service of notice of claim against a city, is a condition precedent to enforcement against it of liability arising under § 50-b for injuries inflicted by negligent operation of a municipally owned vehicle by one of its employees in course of duty. Rusch v Karpick, 20 A.D.2d 954, 248 N.Y.S.2d 451, 1964 N.Y. App. Div. LEXIS 4110 (N.Y. App. Div. 4th Dep't 1964).

Since Title 8 (§§ 700–717) of the Public Authorities Law contains no requirement for the filing of a claim as a condition precedent to the beginning of an action against the Ogdensburg Bridge Authority established thereby although § 1397 of the same law makes applicable to an action against the Ogdensburg Port Authority the notice provision of § 50-e of the General Municipal Law, and the statute merging the two authorities as the Ogdensburg Bridge and Port Authority (Public Authorities Law §§ 725–734) provides in § 734 that the provisions of the Bridge Authority Act shall take precedence over those of the Port Authority Act and also provides in § 732 that no existing right or remedy shall be lost or otherwise affected by reason of this subsequent enactment, an action arising earlier than the period of 90 days provided by the General Municipal Law § 50-e before the coming into effect of such subsequent statute was held to be within the intention of the saving clause of Public Authorities Law § 732 as above stated and hence could be brought without compliance with § 50-e of the General Municipal Law. But the court specifically stated that it did not pass on the question whether the same result would obtain in an action founded upon a tort arising after the effective date of the act which merged the two authorities. Tarbell v Ogdensburg Bridge & Port Authority, 23 A.D.2d 447, 261 N.Y.S.2d 429, 1965 N.Y. App. Div. LEXIS 3530 (N.Y. App. Div. 3d Dep't 1965).

Even if collision between vehicle and bus owner by subsidiary of regional transportation authority did occur outside of the regional transportation district, that fact would not excuse plaintiffs' failure to file a claim against the transportation authority within 90 days, would not excuse their failure to allege such a filing in their complaint, and would not excuse their failure to timely commence the action within one year and 30 days after accrual of the cause of action. Ponko v Regional Transit Service, Inc., 55 A.D.2d 1033, 391 N.Y.S.2d 243, 1977 N.Y. App. Div. LEXIS 10387 (N.Y. App. Div. 4th Dep't 1977).

A motion by defendant New York City Transit Authority (NYCTA) for summary judgment in an action arising out of an injury sustained by plaintiff while endeavoring to board a bus operated by the Manhattan and Bronx Surface Transit Operating Authority (MABSTOA) was properly granted where, despite notice requring plaintiff to submit to an oral examination in which MABSTOA was named as the body corporate against which the claim was made, a stipulation containing a handwritten change in title from NYCTA to MABSTOA, and denials of ownership, operation and control contained in NYCTA's answer, plaintiff did nothing until after they had deposed a representative of NYCTA, when, some two years after accident, plaintiff moved to serve an amended notice of claim and amended summons and complaint, nunc pro tunc, substituting MABSTOA as defendant; application for permission to file late notice of claim must be made prior to the expiration of the period fixed by law within which the action must be brought, which period expired long before plaintiff made his motion, and the doctrine of estoppel is not applicable to agencies of the State acting in their governmental capacity. Luka v New York City Transit Auth., 100 A.D.2d 323, 474 N.Y.S.2d 32, 1984 N.Y. App. Div. LEXIS 17009 (N.Y. App. Div.

1st Dep't), aff'd, 63 N.Y.2d 667, 479 N.Y.S.2d 524, 468 N.E.2d 706, 1984 N.Y. LEXIS 4523 (N.Y. 1984).

A trial court's order granting plaintiff's motion to serve a notice of claim on the Port Authority of New York and New Jersey nunc pro tunc would be reversed, and the complaint dismissed, where plaintiff's failure timely to file the claim was not due to disability resulting from minority or mental or physical incapacitation (Unconsol Laws Ch 179 § 7), in that Gen Mun Law § 50-e, which specifically accords a wide range of discretion to a court in permitting the filing of a late notice of claim, applies exclusively to municipal corporations and has no application to the Port Authority, and neither a lack of prejudice nor actual knowledge of the facts underlying a claim would permit late filing of a claim against the Port Authority. Luciano v Fanberg Realty Co., 102 A.D.2d 94, 475 N.Y.S.2d 854, 1984 N.Y. App. Div. LEXIS 18306 (N.Y. App. Div. 1st Dep't 1984).

No-fault claim form served on New York City Transit Authority was insufficient to satisfy notice of claim requirements of CLS Pub A § 1212 and CLS Gen Mun § 50-e. Zydyk v New York City Transit Authority, 151 A.D.2d 745, 542 N.Y.S.2d 768, 1989 N.Y. App. Div. LEXIS 9161 (N.Y. App. Div. 2d Dep't 1989).

Triborough Bridge and Tunnel Authority, as public benefit corporation under CLS Pub A § 552(1), is "public corporation" within meaning of CLS Gen Mun § 50-e(1)(a), and thus is required to be served with notice of claim founded on tort within 90 days. Guillan v Triborough Bridge & Tunnel Auth., 202 A.D.2d 472, 609 N.Y.S.2d 38, 1994 N.Y. App. Div. LEXIS 2405 (N.Y. App. Div. 2d Dep't), app. denied, 84 N.Y.2d 809, 621 N.Y.S.2d 518, 645 N.E.2d 1218, 1994 N.Y. LEXIS 4145 (N.Y. 1994).

In action against city transit authority for personal injuries sustained while plaintiff was riding subway, interlocutory judgment on jury verdict for plaintiffs would be reversed, and complaint would be dismissed, where (1) jury found in favor of plaintiffs on both negligence and design defect theories, (2) plaintiffs should not have been allowed to present evidence of design defect, because that theory was not referred to, either directly or indirectly, in their original or amended notices of claim, (3) limited testimony as to design defect was insufficient to sustain jury finding of liability on that claim, and (4) there was no valid line of reasoning and permissible inferences that could have led rational person to conclude that authority was negligent and that such negligence was proximate cause of damages alleged. Rodriguez v N.Y. City Transit Auth., 286 A.D.2d 681, 730 N.Y.S.2d 135, 2001 N.Y. App. Div. LEXIS 8432 (N.Y. App. Div. 2d Dep't 2001).

Trial court abused its discretion in denying a claimant's application for an extension of time to serve a notice of claim on a transit authority, where the transit authority was served with a notice of claim less than two months late and the transit authority failed to show that it was substantial prejudiced by the delay. Bertone Commissioning v City of New York, 27 A.D.3d 222, 810 N.Y.S.2d 183, 2006 N.Y. App. Div. LEXIS 2475 (N.Y. App. Div. 1st Dep't 2006).

Trial court should have permitted a vehicle driver to amend the complaint to add allegations of compliance with the statutory notice requirements in his vehicle/bus collision claim against a bus company (BC), as no prejudice to the BC and its driver was shown, and the BC had notice of the claim prior to the commencement of the action. Lindo v Brett, 149 A.D.3d 459, 52 N.Y.S.3d 308, 2017 N.Y. App. Div. LEXIS 2691 (N.Y. App. Div. 1st Dep't 2017).

Plaintiff failed to serve the transit authorities with a proper notice of claim as a letter sent by the plaintiff's counsel to the authority did not constitute a valid notice of claim as it did not substantially comply with the requirements of this section; plaintiff's claim that his claim sounded in contract, rather than tort, and that he was not required to serve a notice of claim was rejected. Brunache v MV Transp., Inc., 151 A.D.3d 1011, 59 N.Y.S.3d 37, 2017 N.Y. App. Div. LEXIS 5120 (N.Y. App. Div. 2d Dep't 2017).

By § 1212(2) of the Public Authorities Law, compliance with the requirements of General Municipal Law § 50-e is a condition precedent to the maintenance or an action against the Manhattan and Bronx Surface Transit Operating Authority in tort. Ware v Manhattan & Bronx Surface Transit Operating Authority, 49 Misc. 2d 704, 268 N.Y.S.2d 519, 1965 N.Y. Misc. LEXIS 1470 (N.Y. Sup. Ct. 1965).

Since the Saw Mill River Parkway, a part of the Westchester County Parkway System, is under the jurisdiction of the East Hudson Parkway Authority, and § 469 of the Public Authorities Law provides that tort actions against the Authority should be commenced by service of a notice of claim pursuant to this section, the Court of Claims has no jurisdiction over such actions since a provision for notice in the Court of Claims already exists in § 10 of the Court of Claims Act. Flynn v State, 52 Misc. 2d 101, 275 N.Y.S.2d 61, 1966 N.Y. Misc. LEXIS 1278 (N.Y. Ct. Cl. 1966).

While county, which allegedly owned the bus in which plaintiff was a passenger at time of accident, was not named a party defendant in action brought against transportation company which leased and operated the bus, there was no need for plaintiff to serve a late notice of claim against the county as a condition precedent to commencing her action against the transportation company only, irrespective of whatever agreement might exist between county and transportation company concerning indemnity for negligence. Rhodes v Westchester Street Transp. Co., 80 Misc. 2d 1021, 365 N.Y.S.2d 351, 1974 N.Y. Misc. LEXIS 1937 (N.Y. Sup. Ct. 1974).

A personal injury action against a county transit system by a passenger who had been injured on one of the system's buses would not be dismissed on the basis of plaintiff's failure to file a notice of claim pursuant to Gen Mun Law § 50-e(1)(b), since, though the Court of Appeals decided after plaintiff's injury occurred that the laws creating the transit system imposed a statutory duty upon the county to operate the system and that, consequently, the statutory notice of claim requirements applied to actions against the system, such decision would be applied only prospectively in that such decision overruled clear past precedent on which litigants had a right to rely, the intent of the statute that municipalities receive actual, prompt notice of future claims had been satisfied, the equities of the situation clearly preponderated in favor of allowing plaintiff her day in court, and the county suffered no prejudice as a result of plaintiff's failure to provide it with formal notice. James v Liberty Lines, 119 Misc. 2d 1060, 465 N.Y.S.2d 144, 1983 N.Y. Misc. LEXIS 3644 (N.Y. Sup. Ct.), rev'd, 97 A.D.2d 749, 468 N.Y.S.2d 380, 1983 N.Y. App. Div. LEXIS 20491 (N.Y. App. Div. 2d Dep't 1983).

Fact that plaintiff's claim against bridge and tunnel commission was based on admiralty law precluded application of state law requiring that authority be notified of claim within 90 days after it arose. Raymond International, Inc. v The M/T Dalzelleagle, 336 F. Supp. 679, 1971 U.S. Dist. LEXIS 10939 (S.D.N.Y. 1971).

32. —Railroad

Injured party was precluded from maintaining an action for personal injuries against the Metropolitan Commuter Transportation Authority where there was a failure to serve a 90-day notice of claim pursuant to the statutes. Conroy v Long Island Railroad, 31 A.D.2d 834, 298 N.Y.S.2d 105, 1969 N.Y. App. Div. LEXIS 4526 (N.Y. App. Div. 2d Dep't 1969).

New York City Transit Authority and its employee were entitled to summary judgment dismissing action for personal injuries sustained in accident that occurred at 117th Street in borough of Manhattan, since plaintiff's notice of claim stated that accident occurred at 117th Street in Queens county, and plaintiff did not seek leave to serve amended notice of claim until 3 ½ years after claim arose; even though original notice of claim was prepared and served in good faith, authority was clearly prejudiced by delay since it was unable to conduct proper investigation. Illera v New York City Transit Authority, 181 A.D.2d 658, 581 N.Y.S.2d 210, 1992 N.Y. App. Div. LEXIS 3028 (N.Y. App. Div. 2d Dep't 1992).

The Long Island Railroad, a private stock corporation, was neither a municipal nor public benefit corporation for whose protection General Municipal Law § 50-e was enacted, and only the acquisition of the railroad by the Metropolitan Transportation Authority and the subsequent amendment of the Public Authorities Law § 1276 by the addition of subd 6 made the notice provisions applicable to suits against the railroad. Quintero v

Long Island Railroad, 55 Misc. 2d 813, 286 N.Y.S.2d 748, 1968 N.Y. Misc. LEXIS 1865 (N.Y. Sup. Ct. 1968), aff'd, 31 A.D.2d 844, 298 N.Y.S.2d 109, 1969 N.Y. App. Div. LEXIS 4537 (N.Y. App. Div. 2d Dep't 1969).

Since the necessity of filing a notice of claim with respect to accidents involving the Long Island Railroad is vague and certainly not apparent on the face of Public Authorities Law § 1276(6), the provision was too vague to be enforceable and defendant estopped from asserting reliance thereon in defense of an action promptly instituted by an injured passenger. Belcastro v Long Island Railroad, 55 Misc. 2d 837, 286 N.Y.S.2d 945, 1968 N.Y. Misc. LEXIS 1820 (N.Y. Sup. Ct. 1968).

33. Village

Plaintiff's allegations that he retained law firm in which his prior attorney was partner to represent him in his claim against village, that former attorney was partner of attorney for village and that former attorney who negotiated settlement of claim failed to advise plaintiff that he could not represent him because he was partner of attorney for village were insufficient to raise triable issue of fact as to whether plaintiff's former attorney's actions were attributable to village so as to estop village from asserting affirmative defenses, inter alia, of plaintiff's failure to file notice of claim, failure to timely commence action and execution of valid general release with respect to claim. Ogilvie v Hoosick Falls, 55 A.D.2d 797, 389 N.Y.S.2d 907, 1976 N.Y. App. Div. LEXIS 15593 (N.Y. App. Div. 3d Dep't 1976).

Section 50-e of the General Municipal Law is a general law, which is defined as one which in terms and in effect applies alike to all counties, all counties other than those wholly included within a city, all cities, all towns, or all villages. Zumbo v Farmington, 60 A.D.2d 350, 401 N.Y.S.2d 121, 1978 N.Y. App. Div. LEXIS 9680 (N.Y. App. Div. 4th Dep't 1978).

Child, who was injured after being struck by a car in the vicinity of some excavation work being carried out by the village, was foreclosed from asserting a derivative claim against the village because the derivative claim was not set forth in the notice of claim served upon the village. Gonzalez v Povoski, 149 A.D.3d 1472, 53 N.Y.S.3d 423, 2017 N.Y. App. Div. LEXIS 3264 (N.Y. App. Div. 4th Dep't 2017).

Under applicable New York statutory law no action may be commenced against a village for injury to property rights unless (1) a notice is served and filed within 90 days after the claim arises; (2) at least 30 days are allowed to elapse; and (3) the action is commenced within one year and 90 days after the happening of the event on which the claim is based. Hackensack Water Co. v Nyack, 289 F. Supp. 671, 1968 U.S. Dist. LEXIS 10010 (S.D.N.Y. 1968).

34. Water district

No notice of claim was required under this section in an action by a waterworks corporation to recover damages for breach of a city's obligation not to interfere with its franchise rights to furnish water within a franchised area. New York Water Service Corp. v New York, 304 N.Y. 945, 110 N.E.2d 885, 304 N.Y. (N.Y.S.) 945, 1953 N.Y. LEXIS 1111 (N.Y. 1953).

In an action against a town and a water district alleging that defendants installed pipe under plaintiff's property and occupied same without permission, statute of limitations provisions of Town Law and General Municipal Law were inapplicable since it could not be said as a matter of pleading that the cause of action was for a continuing wrong. Jayne v East Hills Water Dist., 6 Misc. 2d 676, 164 N.Y.S.2d 284, 1957 N.Y. Misc. LEXIS 3051 (N.Y. Sup. Ct. 1957).

Inasmuch as a water district is not covered directly by General Municipal Law § 50-i, this would qualify the reference to public corporations in § 50-e(1) of that law and the provisions of Town Law § 67, and consequently the filing of a notice of claim is not a condition precedent to the commencement of a tort action against a water district. Harrigan v Smithtown, 54 Misc. 2d 793, 283 N.Y.S.2d 424, 1967 N.Y. Misc. LEXIS 1199 (N.Y. Sup. Ct. 1967).

Service of notice of claim on the water district is not a condition precedent to commencement of an action against district on a tort claim. Martin v Esopus, 57 Misc. 2d 487, 293 N.Y.S.2d 571, 1968 N.Y. Misc. LEXIS 1271 (N.Y. Sup. Ct. 1968).

The action of a private waterworks against the city for damages for breach of franchise because of the city's refusal to allow the waterworks to connect five new wells to its system, thus forcing it to procure additional water from the city at an uneconomic price, was, as established by the evidence, a cause of action in contract to which this section did not apply. New York Water Service Corp. v New York, 145 N.Y.S.2d 51 (N.Y. Sup. Ct. 1955), rev'd, 4 A.D.2d 209, 163 N.Y.S.2d 538, 1957 N.Y. App. Div. LEXIS 5168 (N.Y. App. Div. 1st Dep't 1957).

35. Other public corporations

Even though no statute explicitly identified a public library as a public corporation entitled to notice of personal injury claims, a library operated on land owned by a school district that was largely funded by the school district clearly qualified as a municipal public corporation and was entitled to timely notice of a claim by a patron injured in a fall on the sidewalk approaching the library. Bovich v East Meadow Pub. Lib., 16 A.D.3d 11, 789 N.Y.S.2d 511, 2005 N.Y. App. Div. LEXIS 1354 (N.Y. App. Div. 2d Dep't 2005).

Trial court erred in granting a motorist's motion pursuant to N.Y. Gen. Mun. Law § 50-e(5) to deem a late notice of claim served on a city hospital corporation timely served nunc pro tunc because service on the city was not service on the corporation, and the motorist failed to show, inter alia, that the corporation had timely actual knowledge of the facts of the claim; the fact that an accident report was prepared by the city police did not constitute notice to the corporation of the facts of the claim. The motorist's mistake as to the identity of the public corporation against which her claim should have been asserted was not excusable, and the motorist failed to demonstrate that her delay did not prejudice the corporation in its defense on the merits. Platt v New York City Health & Hosps. Corp., 105 A.D.3d 1026, 964 N.Y.S.2d 223, 2013 N.Y. App. Div. LEXIS 2672 (N.Y. App. Div. 2d Dep't 2013).

Action against Facilities Development Corporation are governed by General Municipal Law § 50-e, as corporation is public benefit corporation included within term "public corporation" as defined in General construction Law § 66; late filing provisions of § 50-e are applicable to action against corporation, despite absence of complementary provision in corporation's incorporating act (CLS Unconsolidated Laws, Chapter 214). Kroupa v Facilities Dev. Corp., 128 Misc. 2d 904, 491 N.Y.S.2d 908, 1985 N.Y. Misc. LEXIS 3022 (N.Y. Sup. Ct. 1985).

Although CLS Pub A §§ 1596 et seq. does not specifically authorize court to allow service of late notice of claim against Yonkers Parking Authority, court may permit service of late notice in accordance with CLS Gen Mun § 50-e; Yonkers Parking Authority is public corporation as defined in CLS Gen Const § 66(1), and CLS Gen Mun § 50-e(5) is not actually inconsistent with any provision of Public Authorities Law (CLS Pub A § 1596-s). Michael v Yonkers Parking Auth., 172 Misc. 2d 304, 658 N.Y.S.2d 194, 1997 N.Y. Misc. LEXIS 181 (N.Y. Sup. Ct. 1997).

III. Applicability to Types of Actions

36. In general

Cause of action in tort does not accrue, or arise, for purposes of both statute of limitations and section pertaining to notice of claim against public corporation until all requisite elements of tort have been satisfied. Beary v Rye, 59 A.D.2d 905, 399 N.Y.S.2d 140, 1977 N.Y. App. Div. LEXIS 14108 (N.Y. App. Div. 2d Dep't 1977), rev'd, 44 N.Y.2d 398, 406 N.Y.S.2d 9, 377 N.E.2d 453, 1978 N.Y. LEXIS 1960 (N.Y. 1978).

General Municipal L § 50-e, subdivision 6, which permits a court in its discretion to correct, supply or disregard a mistake, omission, irregularity or defects made in good faith in the notice of claim is limited in its application to tort actions, and no section comparable in effect has been shown to apply to actions in contract. Braslow v Barnett, 74 Misc. 2d 26, 343 N.Y.S.2d 819, 1973 N.Y. Misc. LEXIS 1953 (N.Y. Dist. Ct. 1973).

Federal court may not properly entertain motion for leave to file late notice of claim under CLS Gen Mun L § 50-e(5), because § 50-e(7) limits applications to supreme court or county court of state, and judicial economy would not be served by federal court's hearing of motion. Lipinski v Skinner, 700 F. Supp. 637, 1988 U.S. Dist. LEXIS 13749 (N.D.N.Y. 1988).

Human rights law claim under NYCLS Exec Law §§ 292(9) and 296(2) must be dismissed for noncompliance with NYCLS Gen Mun Law §§ 50-e and 50-i, despite discharged medical director's assertion that her claim regarding retaliation for helping persons with AIDS is brought to vindicate public interest, because, while it may be true that her victory in this case might have positive effect on AIDS sufferers and deterrent effect on other employers, her case is first and foremost quest to vindicate her own job rights and does not fall within "public interest" exception to notice-of-claim requirements. Finley v Giacobbe, 827 F. Supp. 215, 1993 U.S. Dist. LEXIS 9992 (S.D.N.Y. 1993).

37. Article 78 proceeding

City's service of notice of appeal in Article 78 proceeding effected stay of all proceedings to enforce judgment or order appealed from therein but in no way prevented wrecking company, which sought to recover for city's allegedly improper refusal to issue demolition permits, from filing notice of claim against city as required. Bloomfield Bldg. Wreckers, Inc. v Troy, 41 N.Y.2d 1102, 396 N.Y.S.2d 359, 364 N.E.2d 1130, 1977 N.Y. LEXIS 2134 (N.Y. 1977).

Supreme Court properly dismissed Article 78 proceeding against New York City police property clerk for return of money seized by police from petitioners (who had been charged with criminal possession of stolen property and jostling, but were permitted to plead guilty to violation of disorderly conduct) where petitioners had not served notice of claim pursuant to CLS Gen Mun § 50-e. Neumark v New York City Police Property Clerk, 122 A.D.2d 210, 504 N.Y.S.2d 744, 1986 N.Y. App. Div. LEXIS 59539 (N.Y. App. Div. 2d Dep't 1986).

No notice of claim under General Municipal Law § 50-e is required before bringing an Article 78 proceeding. In re Caggiano, 78 Misc. 2d 187, 342 N.Y.S.2d 203, 1973 N.Y. Misc. LEXIS 1243 (N.Y. Sup. Ct. 1973), aff'd, 44 A.D.2d 828, 355 N.Y.S.2d 170, 1974 N.Y. App. Div. LEXIS 5098 (N.Y. App. Div. 2d Dep't 1974).

Under both Gen Mun Law § 50-e and an administrative regulation, original papers would suffice as a notice of claim where a combined complaint and Art 78 petition served upon the corporate counsel of the City of New York was later converted into a civil rights action. Johnson on behalf of King v Perales, 123 Misc. 2d 659, 474 N.Y.S.2d 247, 1984 N.Y. Misc. LEXIS 3050 (N.Y. Sup. Ct. 1984).

Inmate could maintain Article 78 proceeding to compel New York City Police Department property clerk to return currency recovered from his person on arrest without having to first file notice of claim under CLS Gen Mun § 50-e within 90 days of seizure of money since district attorney had issued release for money, and petitioner could thus utilize Article 78 to compel Property Clerk to perform ministerial act of returning money. Torres v New York City Police Dept., 120 Precinct, 147 Misc. 2d 137, 555 N.Y.S.2d 579, 1990 N.Y. Misc. LEXIS 225 (N.Y. Sup. Ct. 1990).

38. Actions involving building construction and contracts

Where the plaintiff sued a town for damages based upon the revocation of a building permit issued to her, the gravemen of the complaint was in tort, requiring compliance with the statute. Band v Colonie, 36 A.D.2d 785, 319 N.Y.S.2d 118, 1971 N.Y. App. Div. LEXIS 4477 (N.Y. App. Div. 3d Dep't 1971).

Where correspondence which electrical subcontractor relied upon to support his negligence cause of action against dormitory authority, bonding companies, and contractor was not intended as notice and did not satisfy statutory requirements for such notice, negligence cause of action would be dismissed due to failure to timely file notice of claim. Schuler-Haas Electric Corp. v Wager Constr. Corp., 57 A.D.2d 707, 395 N.Y.S.2d 272, 1977 N.Y. App. Div. LEXIS 11755 (N.Y. App. Div. 4th Dep't 1977).

Court should have dismissed general contractor's action against village alleging negligent hiring and supervision in connection with sewer construction project, based on contractor's failure to file notice of claim under CLS Gen Mun § 50-e; to extent that village's duty of care overlapped its contractual duty, contractor's negligence claim was duplicative of its breach of contract action, while any duty beyond contractual duty would sound in tort, and would require notice of claim. Northrup Contracting, Inc. v Bergen, 129 A.D.2d 1002, 514 N.Y.S.2d 306, 1987 N.Y. App. Div. LEXIS 45699 (N.Y. App. Div. 4th Dep't 1987).

Bridge and tunnel authority was not entitled to summary judgment dismissing breach of contract cause of action by city for property damage sustained during construction of bridge approach where there was triable issue of fact as to existence of contractual relationship between parties; given viability of contract cause of action, authority did not prove applicability of notice of claim requirements of CLS Gen Mun § 50-e and CLS Pub A § 569-a. City of New York v Triborough Bridge & Tunnel Auth., 273 A.D.2d 157, 710 N.Y.S.2d 823, 2000 N.Y. App. Div. LEXIS 7498 (N.Y. App. Div. 1st Dep't 2000).

Claim by surety of defaulting construction contractor against town for breach of contract to pay for completed storage shed was untimely where (1) CLS Town § 65(3) requires that notice of claim be filed within 6 months after accrual of cause of action, (2) cause of action for work, labor, and services rendered under contract accrues when claim is actually or constructively rejected, (3) having received no response to either its 1993 demand for payment or its 1995 threat of litigation, surety should have reasonably concluded that town had constructively rejected its claim, and (4) surety did not file notice of claim until over 3 years later. Town of Nassau v Westchester Fire Ins. Co., 281 A.D.2d 803, 722 N.Y.S.2d 298, 2001 N.Y. App. Div. LEXIS 2513 (N.Y. App. Div. 3d Dep't 2001).

There was no merit in argument, by surety of defaulting construction contractor, that its claim against town for breach of contract to pay for completed storage shed had been prematurely dismissed because discovery was not complete where evidence concerning town's refusal to pay and any representations made by town concerning payment were not within exclusive knowledge of town, and surety's expectation of discovering any relevant and material evidence on which to base estoppel of town to assert late notice of claim under CLS Town § 65(3) was based on mere hope and speculation. Town of Nassau v Westchester Fire Ins. Co., 281 A.D.2d 803, 722 N.Y.S.2d 298, 2001 N.Y. App. Div. LEXIS 2513 (N.Y. App. Div. 3d Dep't 2001).

City housing authority and other defendants were entitled to partial summary judgment dismissing causes of action seeking damages for extra work under municipal construction contract and damaged business reputation where plaintiff did not prove its strict compliance with notice, change order, and dispute resolution provisions of contract, and defendants did not waive strict compliance with those provisions. Sicoli & Massaro, Inc. v Niagara Falls Hous. Auth., 281 A.D.2d 966, 722 N.Y.S.2d 442, 2001 N.Y. App. Div. LEXIS 2728 (N.Y. App. Div. 4th Dep't 2001).

General Municipal L § 50-e was not applicable in action for damages incurred by owner of non-conforming use in reliance on building permit initially issued by city's building commissioner, and revoked by city, for reconstruction of mixed residential and commercial use which had been damaged over 50 percent by fire. 154 East Park Ave. Corp. v Long Beach, 76 Misc. 2d 445, 350 N.Y.S.2d 974, 1973 N.Y. Misc. LEXIS 1507 (N.Y. Sup. Ct. 1973), modified, 49 A.D.2d 949, 374 N.Y.S.2d 569, 1975 N.Y. App. Div. LEXIS 11233 (N.Y. App. Div. 2d Dep't 1975).

Even if notice of claim requirement of General Municipal Law could be construed as being limited to actions for physical damage to tangible personal property and personal injury, where term "personal property" was very broadly defined in General Construction Law to include tangible or intangible property interests, and Administrative Code was indisputably absolute in its language requiring a notice of claim in every action or special proceeding prosecuted or maintained against city, notice of such claim was required prior to commencement of action against city for wrongful inducement of breach of contract, a traditional tort, and failure to give notice required dismissal. Hannibal General Contractors, Inc. v St. Matthew & St. Timothy's Housing Corp., 83 Misc. 2d 53, 371 N.Y.S.2d 535, 1975 N.Y. Misc. LEXIS 2801 (N.Y. Sup. Ct. 1975), aff'd, 55 A.D.2d 583, 390 N.Y.S.2d 588, 1976 N.Y. App. Div. LEXIS 15272 (N.Y. App. Div. 1st Dep't 1976).

39. Damages caused by mob or riot

Town was entitled to dismissal of personal injury action where town did not receive written notice of defect that allegedly caused accident, and plaintiff's claim of constructive notice based on

town's inspection and repair of curb near location of accident and about 2 months before accident was insufficient to overcome failure to give written notice required by town's code. Tonorezos v County of Nassau, 266 A.D.2d 387, 698 N.Y.S.2d 331, 1999 N.Y. App. Div. LEXIS 11525 (N.Y. App. Div. 2d Dep't 1999).

Requirement of subd 1 of the above statute that notice of claim shall be filed within 90 days after the claim arises, held not to have been met where claim was made under § 71 of this law while its operation was suspended by Unconsolidated Laws ch 131 § 113 as extended by § 121 of the same statute. Hart's Food Stores, Inc. v Rochester, 44 Misc. 2d 938, 255 N.Y.S.2d 390, 1965 N.Y. Misc. LEXIS 2374 (N.Y. Sup. Ct. 1965).

40. Counterclaim or cross-claim

Counterclaims which were filed in action to recover civil penalties for violation of a zoning ordinance were properly dismissed for failure to satisfy notice of claim requirements contained in General Municipal Law even under liberal construction urged by defendant. Southampton v Platt, 55 A.D.2d 603, 389 N.Y.S.2d 625, 1976 N.Y. App. Div. LEXIS 15314 (N.Y. App. Div. 2d Dep't 1976), app. dismissed, 41 N.Y.2d 970, 394 N.Y.S.2d 884, 363 N.E.2d 590, 1977 N.Y. LEXIS 1959 (N.Y. 1977), app. dismissed, 41 N.Y.2d 1008, 1977 N.Y. LEXIS 3430 (N.Y. 1977), app. denied, 42 N.Y.2d 802, 1977 N.Y. LEXIS 3649 (N.Y. 1977), modified, 43 N.Y.2d 848, 402 N.Y.S.2d 1005, 373 N.E.2d 1229, 1978 N.Y. LEXIS 1774 (N.Y. 1978).

Where counterclaims asserted in an action initiated by a municipality seek equitable relief, and the monetary relief demanded is merely incidental to the equitable relief sought, the requirement that a notice of claim be filed timely does not apply. Hart v East Plaza, Inc., 62 A.D.2d 113, 403 N.Y.S.2d 928, 1978 N.Y. App. Div. LEXIS 10425 (N.Y. App. Div. 4th Dep't), app. dismissed, 45 N.Y.2d 706, 408 N.Y.S.2d 1025, 1978 N.Y. LEXIS 3070 (N.Y. 1978).

The failure to present a claim against a municipality within the applicable time period ordinarily operates to bar any claim or action against it for that particular cause of action, and it is of no consequence that the claim is asserted as a counterclaim in an action initiated by the municipality. Hart v East Plaza, Inc., 62 A.D.2d 113, 403 N.Y.S.2d 928, 1978 N.Y. App. Div. LEXIS 10425 (N.Y. App. Div. 4th Dep't), app. dismissed, 45 N.Y.2d 706, 408 N.Y.S.2d 1025, 1978 N.Y. LEXIS 3070 (N.Y. 1978).

Court properly dismissed mortgagor's counterclaims against city in city's mortgage foreclosure action where mortgagor failed to file timely notice of claim under CLS Gen Mun § 50-e. New York v Kashau, 133 A.D.2d 205, 519 N.Y.S.2d 15, 1987 N.Y. App. Div. LEXIS 49714 (N.Y. App. Div. 2d Dep't 1987).

In action by city to recover amount of illegal payments made by defendants in form of alleged bribes to city employee, court properly dismissed defendants' counterclaim seeking monetary damages from city, since defendants failed to file notice of claim. New York v Corwen, 164 A.D.2d 212, 565 N.Y.S.2d 457, 1990 N.Y. App. Div. LEXIS 14084 (N.Y. App. Div. 1st Dep't 1990), overruled, City of New York v Keene Corp., 304 A.D.2d 119, 756 N.Y.S.2d 536, 2003 N.Y. App. Div. LEXIS 2410 (N.Y. App. Div. 1st Dep't 2003).

In an action for damages against a municipality and a private corporation, the latter was not required to file a notice with the city, in order to maintain a cross complaint for indemnity against the municipality. Antonelli v Mt. Vernon, 20 Misc. 2d 331, 189 N.Y.S.2d 52, 1959 N.Y. Misc. LEXIS 3521 (N.Y. Sup. Ct. 1959).

Fact that county first initiated litigation against defendant motorist does not relieve the defendant from complying with the provisions of General Municipal Law §§ 50-e and 50-i relating to service of notice of claim, where the defendant seeks affirmative relief by way of a counterclaim, and counterclaim should be dismissed in the absence of such compliance. County of Nassau v Wolfe, 51 Misc. 2d 848, 273 N.Y.S.2d 984, 1966 N.Y. Misc. LEXIS 1410 (N.Y. Dist. Ct. 1966).

41. Defamation action

In a slander action against a town superintendent of highways, a motion to implead the town as a third-party defendant was denied where no notice of claim had ever been filed and there was no statutory provision for indemnification to a highway superintendent other than for his negligence committed in the operation of the highway department and the maintenance of the town highways. Grinaldo v Meusburger, 34 A.D.2d 586, 307 N.Y.S.2d 974, 1970 N.Y. App. Div. LEXIS 5414 (N.Y. App. Div. 3d Dep't), app. dismissed, 27 N.Y.2d 598, 313 N.Y.S.2d 409, 261 N.E.2d 407, 1970 N.Y. LEXIS 1245 (N.Y. 1970).

School teacher who brought action against assistant principal, department chairman, and principal based on alleged defamation which apparently occurred in the course of, or arose out of, the performance of official duties was required to file notice of claim in compliance with the General Municipal Law. Cioffi v Giannone, 56 A.D.2d 620, 391 N.Y.S.2d 675, 1977 N.Y. App. Div. LEXIS 10710 (N.Y. App. Div. 2d Dep't 1977).

Regional off-track betting corporation was entitled to dismissal of complaint brought by race track to recover damages for injury to reputation since race track failed to serve notice of claim as required by CLS Racing & Wagering § 514(1) and (5), and CLS Gen Mun § 50-e(1)(a) and (b). Broadmeadow Lanes, Inc. v Catskill Regional Off-Track Betting Corp., 151 A.D.2d 631, 543 N.Y.S.2d 91, 1989 N.Y. App. Div. LEXIS 8215 (N.Y. App. Div. 2d Dep't 1989), app. denied, 75 N.Y.2d 707, 554 N.Y.S.2d 476, 553 N.E.2d 1024, 1990 N.Y. LEXIS 588 (N.Y. 1990).

Corporation's decision not to file a timely notice of claim with the City of New York because it hoped its business would recover once a board of education reinstated a contract that was suspended, because it was concerned that the City's Comptroller, who was running for mayor, would retaliate against it if it sued the City and the Comptroller's Office, and because it was beset with lawsuits filed by its creditors and lacked the resources to hire counsel were not reasonable excuses, and the trial court did not err when it denied the corporation's motion for leave to file a late notice of claim after it sued the City and the City's Comptroller's Office, alleging defamation, or by dismissing the corporation's complaint. Buric v Safir, 4 A.D.3d 160, 772 N.Y.S.2d 36, 2004 N.Y. App. Div. LEXIS 1649 (N.Y. App. Div. 1st Dep't), app. denied, 2 N.Y.3d 706, 781 N.Y.S.2d 287, 814 N.E.2d 459, 2004 N.Y. LEXIS 1061 (N.Y. 2004).

Petitioners' cause of action in defamation against a town based on statements made by a town supervisor regarding petitioners' comments on a proposed conveyance of a conservation easement to a not-for-profit corporation was properly dismissed because petitioners failed to file the required notice of claim against the town or to allege the elements of the tort with the required specificity. Matter of La Barbera v Town of Woodstock, 29 A.D.3d 1054, 814 N.Y.S.2d 376, 2006 N.Y. App. Div. LEXIS 5881 (N.Y. App. Div. 3d Dep't), app. dismissed, 7 N.Y.3d 844, 823 N.Y.S.2d 773, 857 N.E.2d 68, 2006 N.Y. LEXIS 2583 (N.Y. 2006).

A plaintiff suing two police officers and the City of New York in an alleged libel and slander action arising from the testimony of the two officers in proceedings before an Italian Judge in the Italian Consulate is subject to the provisions requiring filing of the notice of claim within 90 days. Sorge v New York, 56 Misc. 2d 414, 288 N.Y.S.2d 787, 1968 N.Y. Misc. LEXIS 1650 (N.Y. Sup. Ct. 1968).

42. Employment contracts

County employee was not required to serve notice of claim as to her causes of action for wrongful termination. Noel v Board of Elections, 203 A.D.2d 576, 611 N.Y.S.2d 222, 1994 N.Y. App. Div. LEXIS 4236 (N.Y. App. Div. 2d Dep't), app. denied, 84 N.Y.2d 804, 618 N.Y.S.2d 6, 642 N.E.2d 325, 1994 N.Y. LEXIS 3121 (N.Y. 1994), overruled in part, Picciano v Nassau County Civil Serv. Comm'n, 290 A.D.2d 164, 736 N.Y.S.2d 55, 2001 N.Y. App. Div. LEXIS 13074 (N.Y. App. Div. 2d Dep't 2001).

Terminated school bus driver's action against school district was properly dismissed where (1) to extent that she sought reinstatement and back pay based on alleged violation of her contractual rights, her failure to file notice of claim was fatal to her case, (2) collective bargaining agreement did not require that she be given notice of charges and hearing, and thus there was no contractual violation, and (3) her remaining claims lacked merit. Matrisciano v Board of Educ., 263 A.D.2d 472, 692 N.Y.S.2d 729, 1999 N.Y. App. Div. LEXIS 7882 (N.Y. App. Div. 2d Dep't 1999).

There is no specific statutory requirement making the filing of a claim a condition precedent to a contract action and in the

absence of such a provision an action is maintainable without prior presentation of a claim. Thus patrolman was entitled to bring action against county for recovery of salary and fringe benefits during period of suspension even though he filed no notice of claim. Meed v Nassau County Police Dep't, 70 Misc. 2d 274, 332 N.Y.S.2d 679, 1972 N.Y. Misc. LEXIS 1920 (N.Y. Sup. Ct. 1972).

City, city agencies, and officials are entitled to summary judgment as to transit authority police lieutenants' state law claims for breach of contract, fraud, and misrepresentation with regard to notification and scoring of captain's examination, where even most generous interpretation of argument does not support contention of implied contract as to scoring method arising from examination notice, because without breach of contract claim, tort claims must be dismissed for failure to meet CLS Gen Mun Law § 50-e requirements for filing notice of claim against city. Guinyard v New York, 800 F. Supp. 1083, 1992 U.S. Dist. LEXIS 13220 (E.D.N.Y. 1992).

43. Equity actions

The notice of claim requirements of this section do not apply to actions in equity, such as a suit for a mandatory injunction to compel restoration of a street to its former condition. Feuer v Brenning, 279 A.D. 1033, 112 N.Y.S.2d 382, 1952 N.Y. App. Div. LEXIS 5711 (N.Y. App. Div. 1952), aff'd, 304 N.Y. 881, 110 N.E.2d 173, 304 N.Y. (N.Y.S.) 881, 1953 N.Y. LEXIS 1078 (N.Y. 1953).

Where an action is grounded upon equitable principles there need be no compliance with § 50-e of the General Municipal Law. Accredited Demolition Constr. Corp. v Yonkers, 37 A.D.2d 708, 324 N.Y.S.2d 377, 1971 N.Y. App. Div. LEXIS 3537 (N.Y. App. Div. 2d Dep't 1971).

Where city terminated landowner's right to enjoin trespass by condemning land, damages for trespass would be limited to 90 days prior to filing of statutory notice of claim, even though compliance with notice of claim requirements is not necessary where action is brought in equity to restrain continuing act and where demand for money damages is merely incidental to requested injunctive relief. Rand v New York, 47 A.D.2d 937, 367 N.Y.S.2d 80, 1975 N.Y. App. Div. LEXIS 9398 (N.Y. App. Div. 2d Dep't 1975).

Any claim or notice of claim against a county for damages arising at law or in equity must be made and served in compliance with section 50-e of the General Municipal Law and the action must be commenced pursuant to the provisions of section 50-i of the General Municipal Law (County Law, § 52); in an equitable action seeking only injunctive relief, it is unnecessary to file a notice of claim. Malcuria v Seneca, 66 A.D.2d 421, 414 N.Y.S.2d 401, 1979 N.Y. App. Div. LEXIS 10029 (N.Y. App. Div. 4th Dep't 1979).

Property owners, who commenced separate actions against a town arising out of the town's maintenance of an uncovered salt and sand pile that allegedly contaminated water wells upon plaintiffs' properties, were not required to file notices of claim pursuant to Gen Mun Law § 50-e, where plaintiffs alleged that at the time of the service of the notices of claim and the complaint a nusiance and trespass existed which the plaintiffs sought to enjoin, and thus it was not unreasonable for the trial court to conclude that plaintiffs' main object was to prevent further contamination of their water supply, an action sounding in equity and not in tort. Watts v Gardiner, 90 A.D.2d 615, 456 N.Y.S.2d 161, 1982 N.Y. App. Div. LEXIS 18683 (N.Y. App. Div. 3d Dep't 1982).

In an action by a landowner, who attempted to build a wall to prevent water from further inundating his land as a result of a municipality's bridge repair efforts, in which the landowner sought damages, an injunction to prevent the town from continuing to divert water onto his land, and an injunction against his prosecution on charges of interfering with the banks of a trout stream tributary, the trial court incorrectly dismissed the complaint on the grounds that there was no personal jurisdiction over the town highway superintendent and the town as the summons was improperly served, since a notice of claim under Gen Mun Law § 50-e is not required for an action brought in equity against a municipality when the demand for money damages is incidental and subordinate to the requested injunctive relief, and although plaintiff sought money damages to compensate him for the alleged harm, the claims were subordinate and incidental to his cause of action seeking equitable relief. Likewise, Gen Mun Law § 50-i, was inapplicable. Dutcher v Shandaken, 97 A.D.2d 922, 470 N.Y.S.2d 767, 1983 N.Y. App. Div. LEXIS 20711 (N.Y. App. Div. 3d Dep't 1983).

The trial court erred in denying a motion for leave to file a late claim against a school district for injuries incurred by a child at a basketball game run by an outside organization on school premises where the school principal had received notice of the injury within five days after it had occurred by a call from the child's father, who then received a letter from the principal stating that the injuries would be covered by the other organization. Urban v Waterford-Halfmoon Union Free School Dist., 105 A.D.2d 1022, 483 N.Y.S.2d 463, 1984 N.Y. App. Div. LEXIS 21108 (N.Y. App. Div. 3d Dep't 1984).

No notice of claim was required in action by developer to challenge discontinuance of road by village since developer's claim for money damages was incidental to its primary equitable action. Bass Bldg. Corp. v Pomona, 142 A.D.2d 657, 530 N.Y.S.2d 595, 1988 N.Y. App. Div. LEXIS 7949 (N.Y. App. Div. 2d Dep't 1988).

Fact that equitable relief is sought does not obviate need for notice of claim. Greco v Incorporated Village of Freeport, 223 A.D.2d 674, 637 N.Y.S.2d 191, 1996 N.Y. App. Div. LEXIS 650 (N.Y. App. Div. 2d Dep't 1996).

Requirement to file formal notice of claim with municipality does not apply to action in equity to restrain continuing act or to demands for money damages that are merely incidental to such equitable claims. American Pen Corp. v City of New York, 266 A.D.2d 87, 698 N.Y.S.2d 472, 1999 N.Y. App. Div. LEXIS 11643 (N.Y. App. Div. 1st Dep't 1999).

In citizen suit against county to force landfill to comply with federal environmental laws, pendent state law claims would not be dismissed based on plaintiff's failure to file notice of claim (CLS Gen Mun § 50-e) since notice of claim is not required where parties primarily seek equitable relief. Orange Env't v County of Orange, 860 F. Supp. 1003, 1994 U.S. Dist. LEXIS 12011 (S.D.N.Y. 1994).

44. —Enjoining nuisance

Notice of claim is not a condition precedent to a suit in equity against a municipality to restrain a continuing act, such as an action to restrain maintenance of a nuisance; but if damages are likewise claimed, whether their recovery requires preliminary notice of claim depends upon the statute or charter provisions applicable to the particular municipality. Grant v Kirkland, 10 A.D.2d 474, 200 N.Y.S.2d 594, 1960 N.Y. App. Div. LEXIS 9911 (N.Y. App. Div. 4th Dep't 1960).

This section does not require the filing of a notice of claim as a condition to an action seeking equitable relief abating a nuisance, and also incidental damages by reason of the nuisance accruing prior to the action; what are incidental damages in each case depends upon the statute or charter provisions controlling the municipality. Grant v Kirkland, 10 A.D.2d 474, 200 N.Y.S.2d 594, 1960 N.Y. App. Div. LEXIS 9911 (N.Y. App. Div. 4th Dep't 1960).

Under section of County Law requiring any claim for damage, whether casual or continuing trespass or nuisance, to be served in compliance with section of General Municipal Law requiring notice of claim against municipality be given within 90 days after claim arises, service of notice of claim within 90 days of accrual of cause of action is required, even though primary relief sought is equitable and damages must be limited to those occurring within 90-day period before service of notice of claim. Doran v Cheektowaga, 54 A.D.2d 178, 388 N.Y.S.2d 385, 1976 N.Y. App. Div. LEXIS 13748 (N.Y. App. Div. 4th Dep't 1976).

Beachfront property owners' action against town was not time barred for failure to comply with CLS Gen Mun § 50-e where owners claimed unconstitutional taking of property without just compensation and sought permanent injunction to eliminate continuing nuisance of erosion of their property, allegedly caused by town's failure to abate effects of stone jetty constructed in 1964; compliance with § 50-e is not required where plaintiffs seek equitable relief to abate or enjoin nuisance, and demand for

money damages is incidental and subordinate to injunctive relief. Stanton v Town of Southold, 266 A.D.2d 277, 698 N.Y.S.2d 258, 1999 N.Y. App. Div. LEXIS 13057 (N.Y. App. Div. 2d Dep't 1999).

Current owner of beachfront property involved in Lockman v Town of Southold, 108 AD2d 900, was not precluded from participating in present action against same town where (1) plaintiffs in Lockman primarily sought damages for injury to their property caused by storm, (2) present action involved substantively different claims of unconstitutional taking of property without just compensation and continuing nuisance of erosion, (3) and Lockman was not decided on merits but on procedural ground of noncompliance with CLS Gen Mun § 50-e, which was inapplicable to present case. Stanton v Town of Southold, 266 A.D.2d 277, 698 N.Y.S.2d 258, 1999 N.Y. App. Div. LEXIS 13057 (N.Y. App. Div. 2d Dep't 1999).

Compliance with statutory requirements for notice of claim was not required in an equitable action to enjoin a village from trespassing upon property and from maintaining nuisances thereon. Victor v Angelo, 14 Misc. 2d 577, 179 N.Y.S.2d 755, 1958 N.Y. Misc. LEXIS 2294 (N.Y. Sup. Ct. 1958).

Where equitable relief is sought in the form of enjoining a continuing trespass or nuisance by a municipality, the case is not one where notice of claim is required by law. Bloss v Canastota, 35 Misc. 2d 829, 232 N.Y.S.2d 166, 1962 N.Y. Misc. LEXIS 2676 (N.Y. Sup. Ct. 1962).

Where the nature of plaintiff's action is equitable to enjoin the village from continuing a wrong and to abate a nuisance, the General Municipal Law requiring a notice of claim and a lapse of 30 days from notice has no applicability even though money damages are sought as incidental to the main relief. Kyle v Catskill, 81 Misc. 2d 1035, 367 N.Y.S.2d 158, 1975 N.Y. Misc. LEXIS 2524 (N.Y. Sup. Ct. 1975).

Plaintiff, an employee of the city against which she seeks to file a late notice of claim for injuries sustained in a fall on a city street (General Municipal Law, § 50-e), has not given the city actual notice of her injuries by notifying her superiors of the reason for her absence from work, as the notice must be served upon the authorized representative of the city and disclosure to another division, agency or branch cannot be treated as notice for the purposes of instituting a claim; moreover, in notifying her superiors, plaintiff did not express an intention to sue the city; therefore, actual notice cannot serve as a basis to allow plaintiff to file a late notice of claim. Phillips v New York, 98 Misc. 2d 1124, 415 N.Y.S.2d 349, 1979 N.Y. Misc. LEXIS 2206 (N.Y. Civ. Ct. 1979).

45. —Money damages

Notice of claim is not a condition precedent to a suit in equity against a municipality to restrain a continuing act, such as an action to restrain maintenance of a nuisance; but if damages are likewise claimed, whether their recovery requires preliminary notice of claim depends upon the statute or charter provisions applicable to the particular municipality. Grant v Kirkland, 10 A.D.2d 474, 200 N.Y.S.2d 594, 1960 N.Y. App. Div. LEXIS 9911 (N.Y. App. Div. 4th Dep't 1960).

It is well established that compliance with notice of claim requirements is not necessary where the action is brought in equity to restrain a continuing act and a demand for money damages is merely incidental to the requested injunctive relief. Fontana v Hempstead, 18 A.D.2d 1084, 239 N.Y.S.2d 512, 1963 N.Y. App. Div. LEXIS 3984 (N.Y. App. Div. 2d Dep't 1963), aff'd, 13 N.Y.2d 1134, 247 N.Y.S.2d 130, 196 N.E.2d 561, 1964 N.Y. LEXIS 1435 (N.Y. 1964).

Where relief demanded is primarily equitable in nature and monetary relief demanded is merely incidental to equitable relief sought, notice of claim provisions of General Municipal Law do not apply. Cooper v Morin, 50 A.D.2d 32, 375 N.Y.S.2d 928, 1975 N.Y. App. Div. LEXIS 11423 (N.Y. App. Div. 4th Dep't 1975).

Where counterclaims asserted in an action initiated by a municipality seek equitable relief, and the monetary relief demanded is merely incidental to the equitable relief sought, the requirement that a notice of claim be filed timely does not apply. Hart v East Plaza, Inc., 62 A.D.2d 113, 403 N.Y.S.2d 928, 1978 N.Y. App. Div. LEXIS 10425 (N.Y. App. Div. 4th Dep't), app. dismissed, 45 N.Y.2d 706, 408 N.Y.S.2d 1025, 1978 N.Y. LEXIS 3070 (N.Y. 1978).

Although it is unnecessary to file a notice of claim in an equitable action against a county seeking only injunctive relief, inasmuch as any claim or notice of claim against a county for damages arising at law or in equity must be made and served in compliance with section 50-e of the General Municipal Law and the action must be commenced pursuant to the provisions of section 50-i of the General Municipal Law (County Law, § 52), if plaintiffs do not file a notice of claim pursuant to section 52 of the County Law and the complaint seeks both injunctive and monetary relief, a motion to dismiss the cause of action for damages is granted, leaving a viable cause of action for injunctive relief; plaintiffs should not be permitted to frustrate the legitimate purposes of the notice-of-claim statutes by grafting a claim for monetary damages to a claim seeking injunctive relief. Malcuria v Seneca, 66 A.D.2d 421, 414 N.Y.S.2d 401, 1979 N.Y. App. Div. LEXIS 10029 (N.Y. App. Div. 4th Dep't 1979).

Compliance with notice of claim requirements of CLS Gen Mun § 50-e is not necessary where action is brought in equity to restrain continuing act and demand for money damages is merely incidental to requested injunctive relief. Rattner v Planning Com. of Pleasantville, 156 A.D.2d 521, 548 N.Y.S.2d 943, 1989 N.Y. App. Div. LEXIS 15803 (N.Y. App. Div. 2d Dep't 1989), app. dismissed, 75 N.Y.2d 897, 554 N.Y.S.2d 831, 553 N.E.2d 1341, 1990 N.Y. LEXIS 601 (N.Y. 1990).

Multimillion dollar damage claims against city were properly dismissed for failure to file formal notice, even though major part of complaint sought equitable relief, where damage claims were more than simply incidental to equitable relief sought. American Pen Corp. v City of New York, 266 A.D.2d 87, 698 N.Y.S.2d 472, 1999 N.Y. App. Div. LEXIS 11643 (N.Y. App. Div. 1st Dep't 1999).

No notice of claim is required in action against municipality if money damages demanded are incidental to equitable relief sought. Greaney v Springer, 266 A.D.2d 707, 701 N.Y.S.2d 450, 1999 N.Y. App. Div. LEXIS 11842 (N.Y. App. Div. 3d Dep't 1999).

An action in equity to restrain a continuing trespass by a town, by reason of the discharge of surface waters on the land of the plaintiff, and to recover money damages, was not subject to defense, in regard to claim for money damages, that no proof of claim was filed in accordance with this section. Meinken v County of Nassau, 14 Misc. 2d 304, 178 N.Y.S.2d 529, 1958 N.Y. Misc. LEXIS 2937 (N.Y. Sup. Ct. 1958).

In an equity action for injunctive relief no notice is required to recover monetary damages. Suburban Club of Larkfield, Inc. v Huntington, 57 Misc. 2d 1051, 294 N.Y.S.2d 4, 1968 N.Y. Misc. LEXIS 1177 (N.Y. Sup. Ct.), aff'd, 31 A.D.2d 718, 297 N.Y.S.2d 893, 1968 N.Y. App. Div. LEXIS 5223 (N.Y. App. Div. 2d Dep't 1968).

Where the nature of plaintiff's action is equitable to enjoin the village from continuing a wrong and to abate a nuisance, the General Municipal Law requiring a notice of claim and a lapse of 30 days from notice has no applicability even though money damages are sought as incidental to the main relief. Kyle v Catskill, 81 Misc. 2d 1035, 367 N.Y.S.2d 158, 1975 N.Y. Misc. LEXIS 2524 (N.Y. Sup. Ct. 1975).

46. —Other relief

The notice of claim requirements of this section do not apply to actions in equity, such as a suit for a mandatory injunction to compel restoration of a street to its former condition. Feuer v Brenning, 279 A.D. 1033, 112 N.Y.S.2d 382, 1952 N.Y. App. Div. LEXIS 5711 (N.Y. App. Div. 1952), aff'd, 304 N.Y. 881, 110 N.E.2d 173, 304 N.Y. (N.Y.S.) 881, 1953 N.Y. LEXIS 1078 (N.Y. 1953).

Woman entitled to sue county medical center for damages resulting from their denial of sterilization although she failed to serve notice of claim within 90 days where major relief originally sought was equitable and defendant was estopped from making argument because they had actual and prompt notice of claim. McCabe v Nassau County Medical Center, 453 F.2d 698, 1971 U.S. App. LEXIS 6447 (2d Cir. N.Y. 1971).

47. False imprisonment

The plaintiff, who had been convicted of murder in 1942 and released on a federal writ of habeas corpus in 1955, could not

maintain an action for malicious prosecution and false imprisonment for the period of confinement following his arraignment, and with respect to the period he was confined prior to arraignment his claim arose on the day of arraignment and the 90-day period within which to give notice of a claim commenced running on the day of plaintiff's release from actual physical confinement in 1955, and therefore his notice of claim served on July 16, 1963 was not timely. Caminito v New York, 25 A.D.2d 848, 269 N.Y.S.2d 826, 1966 N.Y. App. Div. LEXIS 4364 (N.Y. App. Div. 2d Dep't 1966), aff'd, 19 N.Y.2d 931, 281 N.Y.S.2d 338, 228 N.E.2d 396, 1967 N.Y. LEXIS 1467 (N.Y. 1967).

Trial court properly dismissed causes of action alleging false arrest and false imprisonment, as the notice of claim was filed more than 90 days after the offender was released from custody. Avgush v Town of Yorktown, 303 A.D.2d 340, 755 N.Y.S.2d 647, 2003 N.Y. App. Div. LEXIS 2102 (N.Y. App. Div. 2d Dep't 2003).

Claimant's failure to identify the arresting entity, despite evidence in the record that such information was available to him, rendered entirely speculative his claim that each entity timely acquired actual knowledge of the essential facts of his false imprisonment claim. Therefore, his late claim was dismissed. Matter of Rush v County of Nassau, 24 A.D.3d 560, 806 N.Y.S.2d 232, 2005 N.Y. App. Div. LEXIS 14142 (N.Y. App. Div. 2d Dep't 2005), app. dismissed, app. denied, 7 N.Y.3d 862, 824 N.Y.S.2d 601, 857 N.E.2d 1133, 2006 N.Y. LEXIS 3333 (N.Y. 2006).

Civil Rights L § 79 did not suspend civil rights of individual incarcerated in county jail and thus he was under no legal disability to file notice of claim against the city for false imprisonment pursuant to Gen Mun L § 50-e. Clair v Utica, 72 Misc. 2d 547, 339 N.Y.S.2d 616, 1972 N.Y. Misc. LEXIS 2224 (N.Y. Sup. Ct. 1972).

Proposed third amended complaint against assistant district attorney is futile, as plaintiffs do not claim to have served county clerk or any other county official designated in CPLR § 311, because they have failed to allege compliance with Gen Mun § 50-e, and they cannot do so since their own submissions admit they never served notice of claim on appropriate governmental entity. Haygood v City of New York, 64 F. Supp. 2d 275, 1999 U.S. Dist. LEXIS 13279 (S.D.N.Y. 1999).

48. False arrest

There is no necessity for service of a notice of claim upon a municipality as a condition precedent to an action against a city police officer for false arrest or malicious prosecution where the municipality is not made a party. O'Hara v Sears Roebuck & Co., 286 A.D. 104, 142 N.Y.S.2d 465, 1955 N.Y. App. Div. LEXIS 3985 (N.Y. App. Div. 1955).

Where notice of claim in connection with action, inter alia, to recover damages for false arrest was served on county more than 90 days after date infant plaintiff was released from actual custody, first cause of action, which sought damages from county for alleged false arrest, and third cause of action, insofar as it sought to recoup legal fees and medical expenses paid by plaintiff guardian in connection with arrest, were properly dismissed. Tucci v County of Nassau, 50 A.D.2d 945, 377 N.Y.S.2d 588, 1975 N.Y. App. Div. LEXIS 11888 (N.Y. App. Div. 2d Dep't 1975).

Plaintiff who offered no evidence that individual defendants were acting outside scope of their employment in making allegedly false arrest could not maintain action against them where no notice of claim had been filed as required by General Municipal Law. Zwecker v Clinch, 279 A.D.2d 572, 720 N.Y.S.2d 150, 2001 N.Y. App. Div. LEXIS 565 (N.Y. App. Div. 2d Dep't 2001).

Failure to file notice of claim against municipality would not necessarily preclude plaintiff from asserting cause of action against individual defendants based on alleged false arrest, since provisions of CLS Gen Mun § 50-e apply to claims against individual defendants only if municipality is obligated to indemnify them. Zwecker v Clinch, 279 A.D.2d 572, 720 N.Y.S.2d 150, 2001 N.Y. App. Div. LEXIS 565 (N.Y. App. Div. 2d Dep't 2001).

Law office failure was not an acceptable excuse under N.Y. Gen. Mun. Law § 50-e(5) for a claimant's failure to timely serve a notice of claim alleging malicious prosecution against a town, and the appellate court upheld the trial court's judgment denying the claimant's petition for leave to file a late notice of claim and the claimant's lawsuit alleging harassment. Baglivi v Town of Southold, 301 A.D.2d 597, 754 N.Y.S.2d 43, 2003 N.Y. App. Div. LEXIS 468 (N.Y. App. Div. 2d Dep't 2003).

Claimant's failure to identify the arresting entity, despite evidence in the record that such information was available to him, rendered entirely speculative his claim that each entity timely acquired actual knowledge of the essential facts of his false arrest claim. Therefore, his late claim was dismissed. Matter of Rush v County of Nassau, 24 A.D.3d 560, 806 N.Y.S.2d 232, 2005 N.Y. App. Div. LEXIS 14142 (N.Y. App. Div. 2d Dep't 2005), app. dismissed, app. denied, 7 N.Y.3d 862, 824 N.Y.S.2d 601, 857 N.E.2d 1133, 2006 N.Y. LEXIS 3333 (N.Y. 2006).

Because a police officer's conduct did not rise to the level of wantonness and maliciousness, even if an administratrix's claim for false arrest had been properly submitted to the jury as part of her N.Y. Gen. Mun. Law § 50-e claim, the jury's damage award was against the weight of the evidence. Garcia v O'Keefe, 34 A.D.3d 334, 825 N.Y.S.2d 38, 2006 N.Y. App. Div. LEXIS 13755 (N.Y. App. Div. 1st Dep't 2006).

County caseworker, accompanied police officers who entered the arrestee's home, conducted a search, discovered marihuana and arrested her; after the criminal charge was dismissed, the arrestee filed an action alleging a violation of her Fourth Amendment rights, pursuant to 42 U.S.C.S. § 1983, and her state constitutional rights. Because the record did not indicate that the arrestee timely filed a notice of claim and the complaint was not filed within one year and 90 days of the date the action accrued, it did not appear the arrestee could prevail in her cause of action alleging a state constitutional tort against the county. Pierce v Village of Horseheads Police Dept., 107 A.D.3d 1354, 970 N.Y.S.2d 95, 2013 N.Y. App. Div. LEXIS 4775 (N.Y. App. Div. 3d Dep't 2013).

After the statute of limitations barred plaintiff's action for false arrest, she could not by virtue of timely notice of suit served upon the county join as party to defendants the sheriff and deputy sheriff against whom her claims were time barred. Brenon v County of Oneida, 52 Misc. 2d 795, 276 N.Y.S.2d 393, 1966 N.Y. Misc. LEXIS 1274 (N.Y. Sup. Ct. 1966).

Woman alleging false arrest and negligence against police officers was required to serve notice of claim on village pursuant to CLS Gen Mun Law § 50-e(1)(b), where woman contended that it was not necessary to serve notice on village since village was not a named defendant, because officers were acting within the scope of their employment and were covered by statutory indemnification provision. Ruiz v Herrera, 745 F. Supp. 940, 1990 U.S. Dist. LEXIS 11519 (S.D.N.Y. 1990).

Arrestee could not maintain claim against municipality for negligent hiring, training, and/or supervision of police officers, where arrestee's notice of claim did not mention negligent hiring, training, or supervision and contained no allegations concerning such claims as required by CLS Gen Mun Law § 50-e. Fincher v County of Westchester, 979 F. Supp. 989, 1997 U.S. Dist. LEXIS 14613 (S.D.N.Y. 1997).

Arrestee's state law claims against a city and its police department were subject to dismissal because the arrestee did not include them in his notice of claim against the city as required by N.Y. Gen. Mun. Law § 50-e. Grays v City of New Rochelle, 354 F. Supp. 2d 323, 2005 U.S. Dist. LEXIS 1593 (S.D.N.Y. 2005).

Plaintiffs' state law false arrest claim was time-barred under N.Y. Gen. Mun. Law §§ 50-e, 50(1)(a) because the claim accrued on August 10, 2001, when he was released from custody and plaintiff did not file his notice of claim until July 22, 2002 and did not commence the action until April 30, 2003. Smith v City of New York, 388 F. Supp. 2d 179, 2005 U.S. Dist. LEXIS 231 (S.D.N.Y. 2005).

Plaintiffs' state law claims against a city for false arrest, false imprisonment, and malicious prosecution were allowed to stand because plaintiffs were granted leave to file a late notice of claim as permitted by N.Y. Gen. Mun. Law § 50-e(5); however, plaintiffs' claim for negligent or intentional infliction of emotional distress was dismissed in accordance with N.Y. Gen. Mun. Law § 50-i because the notice of claim did not state such a claim. Richards v City of New York, 433 F. Supp. 2d 404, 2006 U.S. Dist. LEXIS 39312 (S.D.N.Y. 2006).

Because false arrest was an intentional tort under New York law, an arrestee's false arrest claims against several police officers, by definition, constituted "intentional wrongdoing" that did not qualify for indemnification under N.Y. Gen. Mun. Law § 50-k(3), and thus, the notice of claim requirement of N.Y. Gen. Mun. Law § 50-e(1)(b) did not apply. Vesterhalt v City of New York, 667 F. Supp. 2d 292, 2009 U.S. Dist. LEXIS 99327 (S.D.N.Y. 2009).

In demonstrators' civil rights suit, where they alleged that they were unlawfully arrested while crossing a bridge, N.Y. Gen. Mun. Law § 50-e did not apply, because they asserted an important and directly affected right on behalf of a class. Garcia v Bloomberg, 865 F. Supp. 2d 478, 2012 U.S. Dist. LEXIS 79296 (S.D.N.Y. 2012), aff'd, 764 F.3d 170, 2014 U.S. App. LEXIS 16156 (2d Cir. N.Y. 2014), rev'd, 779 F.3d 84, 2014 U.S. App. LEXIS 24772 (2d Cir. N.Y. 2014), dismissed, 2015 U.S. Dist. LEXIS 123407 (S.D.N.Y. Sept. 9, 2015).

49. Infant's actions

Certain extraordinary circumstances and certain relationships between an infant claimant and the prospective defendant may make it unnecessary for any notice of claim to be served under the above statute. And where such defendant and its own agency (Department of Welfare) were the only parties reasonably situated to ascertain existence of the claim and to prosecute it, it would be idle gesture to require that they file notice of claim against themselves. Gibbs v New York, 23 A.D.2d 665, 257 N.Y.S.2d 242, 1965 N.Y. App. Div. LEXIS 4721 (N.Y. App. Div. 2d Dep't 1965).

Infant plaintiff's suit against city, et al., claiming that infant's eyesight had been impaired and she was permanently blind because she had received too much oxygen while in incubator at hospital and averring that neither infant's mother nor her father, both born in the Dominican Republic, and in this country since 1952 and 1963, respectively, had filed any notice of claim on behalf of their daughter because they did not know of requirement of New York law for giving such notice in suits against municipalities and did not learn of it until approximately one month before date of mother's affidavit was barred for failure to comply with requirements of subdivision of the General Municipal Law which allowed no more than one year and 90 days from date of occurrence giving rise to claim within which to bring motion for leave to serve late notice of claim. Rodriguez v New York, 54 A.D.2d 692, 387 N.Y.S.2d 283, 1976 N.Y. App. Div. LEXIS 14253 (N.Y. App. Div. 2d Dep't 1976), aff'd, 44 N.Y.2d 398, 406 N.Y.S.2d 9, 377 N.E.2d 453, 1978 N.Y. LEXIS 1960 (N.Y. 1978).

Chautauqua County was not entitled to summary judgment on ground that notice of claim had not been filed against it for its failure to bring claim on behalf of infant against Erie County for injuries sustained at hospital owned and operated by Erie County, since infant was ward of Chautauqua County when his cause of action arose and that status provided him with exemption from filing requirements of CLS Gen Mun § 50-e. Umlauf v County of Chautauqua, 132 A.D.2d 958, 518 N.Y.S.2d 491, 1987 N.Y. App. Div. LEXIS 49418 (N.Y. App. Div. 4th Dep't 1987), app. dismissed, 70 N.Y.2d 1002, 526 N.Y.S.2d 438, 521 N.E.2d 445, 1988 N.Y. LEXIS 108 (N.Y. 1988).

CLS Gen Mun § 50-e(8), which provides that notice of claim requirements "shall not apply...to claims against public corporations by their own infant wards," does not merely toll filing requirements during period of wardship, but eliminates any obligation to file notice of claim against public corporation on infant's behalf. Umlauf v County of Chautauqua, 132 A.D.2d 958, 518 N.Y.S.2d 491, 1987 N.Y. App. Div. LEXIS 49418 (N.Y. App. Div. 4th Dep't 1987), app. dismissed, 70 N.Y.2d 1002, 526 N.Y.S.2d 438, 521 N.E.2d 445, 1988 N.Y. LEXIS 108 (N.Y. 1988).

In proceeding by parents against county alleging that county was negligent in supervision and care of children while children were in custody of county, court would reject contention that one child was "infant ward" within meaning of CLS Gen Mun § 50-e(8), which exempted infant wards from notice of claim filing requirements, since infant was not ward of county at time of her placement in foster care. Maurice W. v Onondaga County Dep't of Social Services, 186 A.D.2d 986, 588 N.Y.S.2d 448, 1992 N.Y. App. Div. LEXIS 11509 (N.Y. App. Div. 4th Dep't 1992).

Infant plaintiffs were not under "disability because of infancy" so as to invoke tolling provisions CLS CPLR § 208, and thus their personal injury action against city was barred by limitations under CLS Gen Mun § 50-i, where their interests were protected by law guardian and counsel, who filed timely notice of claim under CLS Gen Mun § 50-e. Henry v City of New York, 244 A.D.2d 93, 676 N.Y.S.2d 616, 1998 N.Y. App. Div. LEXIS 8805 (N.Y. App. Div. 2d Dep't 1998), rev'd, 94 N.Y.2d 275, 702 N.Y.S.2d 580, 724 N.E.2d 372, 1999 N.Y. LEXIS 3928 (N.Y. 1999).

Lower court's denial of an application for leave to file late notice to the municipal agencies was affirmed; fact that the injured party was an infant, by itself, did not excuse the filing of a timely notice to the municipal agencies, and petitioners had failed to establish any reasonable excuse for the delay, particularly when there was no nexus between the injured party's infancy and the delay in serving notice. Rennell S. v N. Junior High Sch., 12 A.D.3d 518, 784 N.Y.S.2d 623, 2004 N.Y. App. Div. LEXIS 13663 (N.Y. App. Div. 2d Dep't 2004).

Since a defendant, a municipal medical center, had a plaintiff infant's records it was not prejudiced by her late notice of claim under N.Y. Gen. Mun. Law § 50-e(5) and her claim was tolled under the infancy toll of N.Y. C.P.L.R. 208, so her medical malpractice claim was allowed; but, her mother's derivative claim was not allowed since § 208 did not toll derivative actions. Nardi v County of Westchester, 18 A.D.3d 521, 795 N.Y.S.2d 302, 2005 N.Y. App. Div. LEXIS 5118 (N.Y. App. Div. 2d Dep't 2005).

Where children in custody of a county social service agency had a claim against it and the county, arising from their sexual abuse while in a foster father's custody, they were not required to file a notice of claim against the county entities pursuant to N.Y. Gen. Mun. Law § 50-e(8); a trial court should have dispensed with that requirement rather than allowing them to file the notice of claim late. Adam H. v County of Orange, 66 A.D.3d 737, 887 N.Y.S.2d 603, 2009 N.Y. App. Div. LEXIS 7262 (N.Y. App. Div. 2d Dep't 2009).

Plaintiff, an adjudicated juvenile delinquent placed in the care and custody of the Commissioner of Social Services for placement in foster care, was not a "ward" of the Commissioner within the meaning of Gen Mun Law § 50-e(8), which makes notice of claim requirements inapplicable "to claims against public corporations by their own infant wards," since the statute is designed to protect the rights of infants without known relatives, friends, or diligent guardians, and plaintiff had an independent guardian, his father, who was responsible for and capable of protecting plaintiff's rights. Thus, the failure to serve a notice of claim would require dismissal of the action against the Commissioner for placing plaintiff in a foster home which harbored a dog with known vicious propensities, and which attacked plaintiff. Grover v Martone, 127 Misc. 2d 40, 485 N.Y.S.2d 191, 1985 N.Y. Misc. LEXIS 2545 (N.Y. Sup. Ct. 1985).

Children who, through an adoptive parent, brought tort claims against a city and city employees arising from the alleged abuse of the children in a foster home were excused from filing a notice of claim pursuant to N.Y. Gen. Mun. Law. § 50-e(8), as the record indicated that the children's sole guardian during the 90-day notice period was the city. Tylena M. v Heartshare Children's Servs., 390 F. Supp. 2d 296, 2005 U.S. Dist. LEXIS 20646 (S.D.N.Y. 2005).

50. Insurance actions

A municipal self-insurer may not avoid the mandatory arbitration provisions of Ins Law § 674, the no-fault automobile insurance law, by alleging that the insurer demanding arbitration has failed to comply with a notice of claim provisions of Gen Mun Law §§ 50-e, 50-i, since the comprehensive nature of the no-fault legislation and the absence therefrom of any requirement for compliance with Gen Mun Law §§ 50-e, 50-i, indicate a legislative intent that the provisions of such statutes should have no application to the statutory arbitration proceedings between insurers or self-insurers. Syracuse v Utica Mut. Ins. Co., 61 N.Y.2d 691, 472 N.Y.S.2d 600, 460 N.E.2d 1085, 1984 N.Y. LEXIS 4005 (N.Y. 1984).

Failure to file a notice of claim was fatal to subrogation action against city by compensation carrier which had paid certain sums to assured's employee who had been injured during course of his

employment through alleged negligence of the city, notwithstanding argument that insurer's claim arose under provisions of the Workmen's Compensation Law and was excluded from notice requirement. Hartford Accident & Indem. Co. v Mt. Vernon, 82 Misc. 2d 919, 372 N.Y.S.2d 161, 1975 N.Y. Misc. LEXIS 2847 (N.Y. Sup. Ct. 1975).

Occupant who was injured in police vehicle owned by his city employer, and which vehicle was struck by uninsured motor vehicle, was required to file notice of claim with city prior to making claim for uninsured motorist coverage. Insurance Department, Opinions of General Counsel, Opinion Number 01-07-05.

51. Medical malpractice

Under the above statute a notice of claim which is not in compliance with the substantive requirements of subd 2 thereof or is not served within the period of time prescribed by subd 1, is fatally defective. Schildhaus v New York, 23 A.D.2d 409, 261 N.Y.S.2d 909, 1965 N.Y. App. Div. LEXIS 3626 (N.Y. App. Div. 1st Dep't 1965), aff'd, 17 N.Y.2d 853, 271 N.Y.S.2d 286, 218 N.E.2d 325, 1966 N.Y. LEXIS 1344 (N.Y. 1966).

Medical malpractice action could not be maintained against city for failure to comply with sections of general municipal law pertaining to time for filing notice of claim and commencement of actions. Davis v New York, 47 A.D.2d 529, 363 N.Y.S.2d 599, 1975 N.Y. App. Div. LEXIS 8588 (N.Y. App. Div. 2d Dep't), aff'd, 38 N.Y.2d 257, 379 N.Y.S.2d 721, 342 N.E.2d 516, 1975 N.Y. LEXIS 2348 (N.Y. 1975).

City hospital was not estopped, on grounds of its alleged failure to publicize its municipal status, from asserting defense to malpractice action that statutes required 90-day notice of claim against it. Guarrera v Lee Mem. Hosp., 51 A.D.2d 867, 380 N.Y.S.2d 161, 1976 N.Y. App. Div. LEXIS 11485 (N.Y. App. Div. 4th Dep't), app. dismissed, 39 N.Y.2d 942, 1976 N.Y. LEXIS 3538 (N.Y. 1976).

Infant plaintiff's suit against city, et al., claiming that infant's eyesight had been impaired and she was permanently blind because she had received too much oxygen while in incubator at hospital and averring that neither infant's mother nor her father, both born in the Dominican Republic, and in this country since 1952 and 1963, respectively, had filed any notice of claim on behalf of their daughter because they did not know of requirement of New York law for giving such notice in suits against municipalities and did not learn of it until approximately one month before date of mother's affidavit was barred for failure to comply with requirements of subdivision of the General Municipal Law which allowed no more than one year and 90 days from date of occurrence giving rise to claim within which to bring motion for leave to serve late notice of claim. Rodriguez v New York, 54 A.D.2d 692, 387 N.Y.S.2d 283, 1976 N.Y. App. Div. LEXIS 14253 (N.Y. App. Div. 2d Dep't 1976), aff'd, 44 N.Y.2d 398, 406 N.Y.S.2d 9, 377 N.E.2d 453, 1978 N.Y. LEXIS 1960 (N.Y. 1978).

In a malpractice action arising out of the defendant doctor's allegedly negligent treatment of plaintiff at a New York City ambulatory care facility, the defendant's motion for summary judgment dismissing the complaint is granted, the Court of Appeals having determinined on a prior appeal involving the defendant's attempt to implead the city that the facility was a public institution maintained in part by the City of New York within the meaning of subdivision 1 of section 50-d of the General Municipal Law and that, accordingly, the city was required to indemnify the doctor, since plaintiff failed to comply with subdivision 2 of section 50-d of the General Municipal Law in that no notice of claim was served on the city pursuant to section 50-e of the General Municipal Law and the action was commenced well beyond the one-year and three-month Statute of Limitations provided in section 50-i of the General Municipal Law; the fact that the city did not interpose the statutory defenses in the prior impleader action does not require denial of the motion, since plaintiff was in no way misled by the city's previous position that under a contractual arrangement it was not required to indemnify the defendant doctor and in no way relied on it, and, moreover, the motion for summary judgment was brought by the defendant doctor. Additionally, the notice of claim and short Statute of Limitations provisions of sections 50-e and 50-i are defenses which may be raised by the doctor even though he, and not the city, was sued, and defendant is not estopped from interposing the statutory defenses since there was no evidence that the city had entered into arrangements with regard to the facility that had the capacity to, and in fact did, mislead the plaintiff to her detriment. Norr v Spiegler, 72 A.D.2d 20, 423 N.Y.S.2d 177, 1980 N.Y. App. Div. LEXIS 9653 (N.Y. App. Div. 1st Dep't 1980), aff'd, 53 N.Y.2d 661, 438 N.Y.S.2d 1000, 421 N.E.2d 120, 1981 N.Y. LEXIS 2319 (N.Y. 1981).

In an action to recover damages for an allegedly unauthorized disclosure of confidential information received pursuant to the physician-patient relationship existing between plaintiff and a mental health center maintained by a county, the complaint would be dismissed for failure to comply with Gen Mun Law §§ 50-e and 50-i, since the alleged improper disclosure of confidential information is merely a facet of medical malpractice which sounds in tort, not contract, the bill of particulars evidences a malpractice claim, the damages sought are largely for noneconomic loss, and actions sounding in tort require compliance with Gen Mun Law §§ 50-e and 50-i. Silberstein v County of Westchester, 92 A.D.2d 867, 459 N.Y.S.2d 838, 1983 N.Y. App. Div. LEXIS 17239 (N.Y. App. Div. 2d Dep't), app. dismissed, 60 N.Y.2d 703, 1983 N.Y. LEXIS 6285 (N.Y. 1983), aff'd, 62 N.Y.2d 675, 476 N.Y.S.2d 291, 464 N.E.2d 989, 1984 N.Y. LEXIS 4283 (N.Y. 1984).

Medical malpractice plaintiff's mere conclusory assertion that she "understood" that her payments for services at county health center would go to individual physicians who treated her was insufficient to rebut defendant physicians' evidence that they did not receive any compensation from plaintiff for their services, and thus her complaint was properly dismissed for failure to serve notice of claim on county as required by CLS Gen Mun §§ 50-d(2) and 50-e, where physicians' affidavits and affidavit of county's principal financial analyst stated that all payments made by plaintiff for medical services rendered to her at health center were made directly to center and not to physicians. Adams v Bobb-McKoy, 245 A.D.2d 474, 666 N.Y.S.2d 701, 1997 N.Y. App. Div. LEXIS 13253 (N.Y. App. Div. 2d Dep't 1997).

Plaintiffs in medical malpractice action failed to comply with conditions precedent to commencing action, as specified in CLS Gen Mun §§ 50-e and 50-i, where plaintiffs' counsel, with minimum effort, could have surmised that it was necessary to file notice of claim, because name at top of all prenatal care records for plaintiff patient, which were on file with defendant hospital's labor and delivery unit, was Suffolk County Department of Health Services. Fuentes v Brookhaven Mem'l Hosp., 251 A.D.2d 540, 674 N.Y.S.2d 744, 1998 N.Y. App. Div. LEXIS 7535 (N.Y. App. Div. 2d Dep't 1998).

Although a hospital delayed in furnishing a complete medical file to a patient, the patient was not induced to refrain from filing suit or conducting an investigation into the relevant facts; the trial court erred in denying the hospital's motion to dismiss the patient's malpractice claim for failure to serve a timely N.Y. Gen. Mun. Law §§ 50-e, 50-i notice of claim. Walker v New York City Health & Hosps. Corp., 36 A.D.3d 509, 828 N.Y.S.2d 365, 2007 N.Y. App. Div. LEXIS 598 (N.Y. App. Div. 1st Dep't 2007).

An application for examination of the records of a city hospital employee in connection with alleged negligence of doctors and others in treatment of applicant's condition was denied where it was admitted that no notice of claim had been filed against the city and more than a year had elapsed. Application of Griffin, 20 Misc. 2d 639, 194 N.Y.S.2d 82, 1959 N.Y. Misc. LEXIS 2488 (N.Y. Sup. Ct. 1959).

In malpractice action against municipal hospital and its municipal supervising bodies and physician who was director of hospital, service of notice of claim upon municipal defendants was sufficient and statute does not require service of notice of claim upon the physician. Stephens v Department of Health, 64 Misc. 2d 81, 314 N.Y.S.2d 118, 1970 N.Y. Misc. LEXIS 1355 (N.Y. Sup. Ct. 1970).

Medical malpractice claim against physician who is clearly county employee, rather than independent contractor, is subject to notice of claim requirements of CLS Gen Mun Law § 50-e and time limitations of CLS Gen Mun law § 50-i, notwithstanding fact that physician maintains independent medical malpractice insurance; municipality's indemnification obligation pursuant to

CLS Gen Mun Law § 50-d is not excused by existence of physician's insurance. Hilligas v Veznedaroglu, 129 Misc. 2d 781, 493 N.Y.S.2d 974, 1985 N.Y. Misc. LEXIS 2710 (N.Y. Sup. Ct. 1985).

Medical malpractice action against a physician who was acting as an unpaid designee of a non-physician county mental health director when he examined the patient was subject to the notice of claim and limitations requirements applicable to all actions against public officers; if the physician was entitled to indemnification by the county, the statutes applicable to actions against a local governmental entity applied. Anderson v House of the Good Samaritan Hosp., 194 Misc. 2d 171, 752 N.Y.S.2d 815, 2002 N.Y. Misc. LEXIS 1576 (N.Y. Sup. Ct. 2002), app. dismissed, 5 A.D.3d 1058, 773 N.Y.S.2d 687, 2004 N.Y. App. Div. LEXIS 3122 (N.Y. App. Div. 4th Dep't 2004).

Complaint in civil rights action initially filed against correction officials and employees and amended nine months later to include state malpractice claim against physicians employed by city did not satisfy requirement of 90-day notice of malpractice claim against city employees. Shakur v McGrath, 517 F.2d 983, 1975 U.S. App. LEXIS 14379 (2d Cir. N.Y. 1975).

52. —Constitutionality

Assuming that state was under no obligation to consent to any tort liability, but that it was required to implement reasonable procedural rules by which liability could be adjudicated once it assumed such an obligation, shortness of statutory 90-day period of limitation for filing notice of claim against county hospital for negligence allegedly committed in treating five-year-old infant plaintiff was not so unreasonable as to be violative of due process, where it was clear from complaint that mother of child was aware that child had suffered some injury before 90 days had elapsed and, though burdened with showing unconstitutional effect of limitation, plaintiffs failed even to explain why they were not able to serve required notice of claim. Pausley v Chaloner, 54 A.D.2d 131, 388 N.Y.S.2d 35, 1976 N.Y. App. Div. LEXIS 13736 (N.Y. App. Div. 3d Dep't 1976), app. dismissed, 41 N.Y.2d 900, 1977 N.Y. LEXIS 3304 (N.Y. 1977), app. denied, 41 N.Y.2d 805, 1977 N.Y. LEXIS 3061 (N.Y. 1977).

It did not violate constitutional prohibition against legislative abrogation of "(t)he right of action now existing to recover damages for injuries resulting in death" (CLS NY Const Art I § 16) to require timely notice of claim as condition precedent to commencement of action for conscious pain and suffering against treating physician, who was staff physician of New York City Health and Hospitals Corporation. Yoo v New York City Health & Hosps. Corp., 239 A.D.2d 267, 657 N.Y.S.2d 189, 1997 N.Y. App. Div. LEXIS 5281 (N.Y. App. Div. 1st Dep't 1997).

53. —Late notice

Leave to serve a late notice of claim would be granted where hospital records were kept of all procedures performed on the injured claimant, where the allegedly negligent acts were necessarily performed by agents of the hospital, and where the city had actual knowledge of the essential facts constituting the malpractice claim. Newson v New York, 87 A.D.2d 630, 448 N.Y.S.2d 224, 1982 N.Y. App. Div. LEXIS 15951 (N.Y. App. Div. 2d Dep't 1982).

In view of the mother's unrebutted assertion that a hospital doctor informed her after the delivery that the infant had suffered a "brachial plexus type of injury" and that the infant subsequently received treatment for that injury at the hospital, it was apparent that the hospital, the city, and the city health and hospitals corporation had actual notice of the facts constituting the mother's claim within the 90-day statutory period; additionally, the mother's failure to provide a reasonable excuse for the delay was not fatal to her application because the hospital, the city, and the city corporation failed to present any evidence that the relatively short delay prejudiced their ability to maintain a defense. Therefore, the trial court erred in failing to grant the mother's application for leave to serve a late notice of claim pursuant to N.Y. Gen. Mun. Law § 50-e(5). Feroz v City of New York, 8 A.D.3d 275, 777 N.Y.S.2d 690, 2004 N.Y. App. Div. LEXIS 7518 (N.Y. App. Div. 2d Dep't 2004).

Since a defendant, a municipal medical center, had a plaintiff infant's records it was not prejudiced by her late notice of claim under N.Y. Gen. Mun. Law § 50-e(5) and her claim was tolled under the infancy toll of N.Y. C.P.L.R. 208, so her medical malpractice claim was allowed; but, her mother's derivative claim was not allowed since § 208 did not toll derivative actions. Nardi v County of Westchester, 18 A.D.3d 521, 795 N.Y.S.2d 302, 2005 N.Y. App. Div. LEXIS 5118 (N.Y. App. Div. 2d Dep't 2005).

Trial court did not err under N.Y. Gen. Mun. Law § 50-e(5) in denying the patient leave to file a late notice of claim against the health care provider in the malpractice action, as the patient failed to demonstrate a reasonable excuse for failing to serve a timely notice of claim, there was no showing that the provider acquired actual knowledge of the facts surrounding the claim merely because it maintained medical records, and the patient failed to establish that the provider would not be substantially prejudiced in maintaining its defense on the merits as a result of the lengthy delay in moving for leave to serve a late notice of claim. Breeden v Valentino, 19 A.D.3d 527, 798 N.Y.S.2d 79, 2005 N.Y. App. Div. LEXIS 6910 (N.Y. App. Div. 2d Dep't 2005).

Although a patient did not offer a reasonable excuse for failing to serve a timely notice of claim, the hospital acquired timely, actual knowledge of the facts constituting the patient's medical malpractice claim and would not be substantially prejudiced by the delay; accordingly, the trial court properly granted the patient's N.Y. Gen. Mun. Law § 50-e petition for leave to serve a late notice of claim. Matter of Chambers v Nassau County Health Care Corp., 50 A.D.3d 1134, 857 N.Y.S.2d 222, 2008 N.Y. App. Div. LEXIS 3909 (N.Y. App. Div. 2d Dep't 2008).

Because an adult patient failed to follow the advice given by a city hospital, waited approximately 11 months to serve a notice of claim against the hospital, failed to support the assertions with a physician's affidavit, failed to provide a reasonable excuse for the delay, and failed to demonstrate the lack of any prejudice to the hospital from the unexplained delay, the trial court erred in granting the patient's N.Y. Gen. Mun. Law § 50-e(5) motion to leave to serve a late notice of claim. Matter of Kelley v New York City Health & Hosps. Corp., 76 A.D.3d 824, 907 N.Y.S.2d 11, 2010 N.Y. App. Div. LEXIS 6639 (N.Y. App. Div. 1st Dep't 2010).

Trial court, inter alia, properly denied a motion by the child, by his mother, for leave to serve a late notice of claim upon a hospital because the child failed to demonstrate that the hospital had actual knowledge of the essential facts constituting his medical malpractice claim where the medical records did not suggest that the child's pre-term delivery was attributable to the hospital's alleged failure to treat the mother's medical conditions, the passage of time between the child's premature birth and the service of the notice of claim would prejudice the hospital's ability to defend the action, and the child's failure to serve a timely notice of claim could not be attributed to the his infancy and was not otherwise reasonable. Raut v New York City Health & Hosps. Corp., 145 A.D.3d 1049, 44 N.Y.S.3d 479, 2016 N.Y. App. Div. LEXIS 8742 (N.Y. App. Div. 2d Dep't 2016).

54. —Notice not required

Notice of claim was not required for fraud cause of action alleged against municipal doctor where fraudulent acts were separate from and subsequent to acts giving rise to malpractice claims by plaintiff against doctor and his municipal employer. Kramer v New York, 157 A.D.2d 404, 556 N.Y.S.2d 287, 1990 N.Y. App. Div. LEXIS 6655 (N.Y. App. Div. 1st Dep't 1990).

Defendants in medical malpractice case failed to establish that plaintiff was required to file notice of claim pursuant to CLS Gen Mun § 50-e where they did not demonstrate that defendant hospital was public institution maintained by county; thus, court properly dismissed affirmative defense and refused to dismiss complaint. Castillo v Zimmerly, 260 A.D.2d 243, 688 N.Y.S.2d 148, 1999 N.Y. App. Div. LEXIS 3956 (N.Y. App. Div. 1st Dep't 1999).

Physician, defendant in medical malpractice suit, who offered no evidence that he had complied with requirements of CLS Gen Mun § 50-k(4), was not entitled to summary judgment on ground that plaintiffs had not served notice of claim required by CLS Gen Mun § 50-e, since duty of city and city hospital to defend and indemnify physician was conditioned on his compliance with § 50-k(4). Hassan v Woodhull Hosp. & Med. Ctr., 282 A.D.2d 709, 724 N.Y.S.2d 184, 2001 N.Y. App. Div. LEXIS 4317 (N.Y. App. Div. 2d Dep't 2001).

City hospital's records of a newly born child indicated that she had foot gangrene and had misadventure during her medical care so the city was on notice under N.Y. Gen. Mun. Law § 50-e(5) that it was subject to the child's claim even though the claim was filed four years after her discharge. The city was also not prejudiced by the child's motion, that she made four years after serving the late claim, for the late claim to be allowed since the city acknowledged that it had actually been served with the late claim. Caminero v N.Y. City Health & Hosps. Corp., 21 A.D.3d 330, 800 N.Y.S.2d 173, 2005 N.Y. App. Div. LEXIS 8800 (N.Y. App. Div. 1st Dep't 2005).

55. Nuisance actions

Under section of County Law requiring any claim for damage, whether casual or continuing trespass or nuisance, to be served in compliance with section of General Municipal Law requiring notice of claim against municipality be given within 90 days after claim arises, service of notice of claim within 90 days of accrual of cause of action is required, even though primary relief sought is equitable and damages must be limited to those occurring within 90-day period before service of notice of claim. Doran v Cheektowaga, 54 A.D.2d 178, 388 N.Y.S.2d 385, 1976 N.Y. App. Div. LEXIS 13748 (N.Y. App. Div. 4th Dep't 1976).

Because paving a street did not constitute an artificial means of diversion, the owners failed to establish that a town created a continuing trespass or nuisance; inasmuch as the owners did not timely serve the town with notice under N.Y. Gen. Mun. Law §§ 50-e(1)(a), 50-i(1), the town was properly granted summary judgment. Smith v Town of Long Lake, 40 A.D.3d 1381, 837 N.Y.S.2d 391, 2007 N.Y. App. Div. LEXIS 6517 (N.Y. App. Div. 3d Dep't 2007).

Causes of action involving money damages for property and maintaining a nuisance against town for permitting certain septic tanks located on private property near plaintiff's real property to be maintained in a defective condition in violation of town ordinances should not be stricken since plaintiffs are not required to plead compliance with the requirements of the statute on such causes of action. Malloy v Niskayuna, 64 Misc. 2d 676, 315 N.Y.S.2d 502, 1970 N.Y. Misc. LEXIS 1171 (N.Y. Sup. Ct. 1970).

Action to enjoin village from improperly maintaining a catch basin on property adjoining the plaintiff's which caused surface water to be discharged onto the plaintiff's premises with resultant damage, and which also sought to have condition declared a nuisance and additionally demanded money damages as incidental to prime relief, which action was commenced more than one year and 90 days since accrual of the claim as alleged in the notices was not untimely. Kyle v Catskill, 81 Misc. 2d 1035, 367 N.Y.S.2d 158, 1975 N.Y. Misc. LEXIS 2524 (N.Y. Sup. Ct. 1975).

In plaintiff county's action for a declaratory judgment as to defendants insurers' duty to indemnify and defend an action brought by a landowner alleging negligent design and construction of a sea wall, the landowner had alleged a continuing tort which accrued anew each day, and by filing a notice of claim against the county under N.Y. Gen. Mun. Law § 50-e(1)(a) (McKinney 2002), that provision and N.Y. Gen. Mun. Law § 50-i (McKinney 2002), and N.Y. County Law § 52 (McKinney 2002), were satisfied; the landowner was not limited to damages sustained within 90 days preceding the notice. County of Suffolk v Travelers Ins. Co., 267 F. Supp. 2d 288, 2003 U.S. Dist. LEXIS 1409 (E.D.N.Y. 2003).

56. Real property actions

Although town was on notice by letter sent some 18 months before damage to particular property became manifest and hence before any cause of action accrued, town was entitled by statute to prompt notice of subsequent bulkhead collapse and consequential harm while claim was still fresh, and there was failure of compliance with statutory requirements for notice of claim by one landowner. Doundoulakis v Hempstead, 42 N.Y.2d 440, 398 N.Y.S.2d 401, 368 N.E.2d 24, 1977 N.Y. LEXIS 2322 (N.Y. 1977).

Under this section, as made applicable to claims against towns by § 67 of the Town Law, an award of damages against the town incidental to an action for recovery of a strip of land allegedly wrongfully appropriated for use as a highway would be limited to the period of 90 days preceding filing of the notice of claim. Crawford v Hamburg, 19 A.D.2d 100, 241 N.Y.S.2d 357, 1963 N.Y. App. Div. LEXIS 3439 (N.Y. App. Div. 4th Dep't 1963).

Plaintiff's complaint in an action to determine adverse claims of title to realty, damages for trespass, and for injunctive and other relief failed to state a cause of action against the County of Suffolk, where the complaint did not allege compliance with the statutory notice requirements of §§ 50-e and 50-i of the General Municipal Law. Seabreeze Marina at Smithtown, Inc. v Smithtown, 25 A.D.2d 780, 269 N.Y.S.2d 662, 1966 N.Y. App. Div. LEXIS 4497 (N.Y. App. Div. 2d Dep't 1966).

Action could not be maintained to determine claims of plaintiff and village to land situated near boundary line between their parcels, where complaint did not allege that notice of claim had been made and served upon village within 90 days of accrual, as required by General Municipal Law, and nothing else in record indicated that there had been compliance. Salesian Soc. v Ellenville, 50 A.D.2d 648, 374 N.Y.S.2d 805, 1975 N.Y. App. Div. LEXIS 12473 (N.Y. App. Div. 3d Dep't 1975), rev'd, 41 N.Y.2d 521, 393 N.Y.S.2d 972, 362 N.E.2d 604, 1977 N.Y. LEXIS 1915 (N.Y. 1977).

Inasmuch as boundary dispute involved an alleged continuing wrong on part of defendant village, plaintiff could maintain a new action to determine claims after properly filing notice of claim and any damages accruing during the 90-day period prior to such filing would be recoverable. Salesian Soc. v Ellenville, 50 A.D.2d 648, 374 N.Y.S.2d 805, 1975 N.Y. App. Div. LEXIS 12473 (N.Y. App. Div. 3d Dep't 1975), rev'd, 41 N.Y.2d 521, 393 N.Y.S.2d 972, 362 N.E.2d 604, 1977 N.Y. LEXIS 1915 (N.Y. 1977).

Town was entitled to summary judgment in property owner's action for reduction in value of property, and for loss of income derived from inaccessibility of property, due to town's abandonment of road and bridge, where owner failed to serve or allege service of notice of claim and also failed to establish de facto condemnation of property, which would excuse notice requirement, since he admitted to having access to property from different road. Van Nostrand v Town of Denning, 132 A.D.2d 93, 521 N.Y.S.2d 896, 1987 N.Y. App. Div. LEXIS 49550 (N.Y. App. Div. 3d Dep't 1987).

In mortgage foreclosure action, mortgagee city was entitled to summary judgment dismissing mortgagor's counterclaims for breach of contract and tortious interference with contract where mortgagor did not allege compliance with claim presentment requirements of CLS Gen Mun §§ 50-e and 50-i and NYC Admin Code § 7-201(a). City of New York v 611 West 152nd St., Inc., 273 A.D.2d 125, 710 N.Y.S.2d 36, 2000 N.Y. App. Div. LEXIS 7113 (N.Y. App. Div. 1st Dep't 2000).

City was entitled to dismissal of action against it where (1) action sounded in tort, not de facto taking of property, and thus notice of claim was required under CLS Gen Mun § 50-e(1)(a), (2) no such notice was filed, (3) action was not commenced within one year and 90 days "after the happening of the event upon which the claim is based" under CLS Gen Mun § 50-i(1)(c), and (4) plaintiff's request for leave to serve late notice of claim was untimely under CLS Gen Mun § 50-e(5). Grimaldi v City of Tonawanda, 275 A.D.2d 917, 715 N.Y.S.2d 175, 2000 N.Y. App. Div. LEXIS 9610 (N.Y. App. Div. 4th Dep't 2000).

Summary judgment was properly denied to a town in a case where an injured person had tripped over an anchor protruding from the ground in an area next to a municipal parking lot; the town failed to show that it owned or maintained the area at issue. Staudinger v Vill. of Granville, 304 A.D.2d 929, 758 N.Y.S.2d 415, 2003 N.Y. App. Div. LEXIS 3815 (N.Y. App. Div. 3d Dep't 2003).

Gas company's notices of claim, alleging the municipalities were negligent with respect to the installation and operation of sewer and water lines proximate to the company's gas laterals, were sufficient because the notices permitted the municipalities to investigate the claims with regard to the 39 service laterals identified in the notices and a metallurgical consultant's report. New York State Elec. & Gas Corp. v County of Chemung, 137 A.D.3d 1550, 29 N.Y.S.3d 579, 2016 N.Y. App. Div. LEXIS 2435 (N.Y. App. Div. 3d Dep't 2016).

An action by a landowner against a city for treble damages for destruction of trees and shrubs upon his property, based on §§ 533 and 534 of the Real Property Law, presents a claim within

the coverage of this section, and is subject to dismissal for failure to give timely notice of claim in advance of suit. Rice v New York, 32 Misc. 2d 942, 225 N.Y.S.2d 65, 1962 N.Y. Misc. LEXIS 3982 (N.Y. Sup. Ct. 1962).

A complaint against the defendants, as village trustees, alleging that they conspired among themselves and with other defendants to deprive plaintiff of certain right, title and interest in a certain agreement of sale of real property, to prevent him from acquiring title thereto and to have the property sold to the defendant village, failed to state a cause of action in that it failed to state compliance with Village Law §§ 341 and 341-b and the General Municipal Law § 50-e, which require a written proof of claim to be filed within 90 days after the claimed cause of action arose. Ballin v Larkin, 62 Misc. 2d 949, 310 N.Y.S.2d 402, 1970 N.Y. Misc. LEXIS 1920 (N.Y. Sup. Ct. 1970), modified, 36 A.D.2d 530, 318 N.Y.S.2d 568, 1971 N.Y. App. Div. LEXIS 4912 (N.Y. App. Div. 2d Dep't 1971).

Plaintiff failed to file a timely notice of claim pursuant to N.Y. Gen. Mun. Law § 50-e on a transit authority in relation to a personal injury action, because plaintiff was unable to serve the transit authority on the 89th day, which fell on a Saturday, or the 90th day which fell on a Sunday, and instead, plaintiff served the transit authority on the next succeeding business day as allowed by N.Y. Gen. Constr. Law § 20. Stewart v New York City Transit Auth., 238 N.Y.L.J. 21, 2007 N.Y. Misc. LEXIS 5436 (N.Y. Sup. Ct. July 12, 2007).

Because trespass was an intentional tort under New York law, an arrestee's trespass claims against several police officers, by definition, constituted "intentional wrongdoing" that did not qualify for indemnification under N.Y. Gen. Mun. Law § 50-k(3), and thus, the notice of claim requirement of N.Y. Gen. Mun. Law § 50-e(1)(b) did not apply. Vesterhalt v City of New York, 667 F. Supp. 2d 292, 2009 U.S. Dist. LEXIS 99327 (S.D.N.Y. 2009).

57. —Notice not required

In an action to determine adverse claims of title to real estate and to recover damages for trespass brought against a town and county, it was held that no statutory notice of claim was necessary as a prerequisite to the action against the town. However, the action against the county was governed by § 52 of the County Law, and plaintiff could not maintain such an action without compliance with §§ 50-e and 50-i of the General Municipal Law. Seabreeze Marina at Smithtown, Inc. v Smithtown, 25 A.D.2d 780, 269 N.Y.S.2d 662, 1966 N.Y. App. Div. LEXIS 4497 (N.Y. App. Div. 2d Dep't 1966).

Where a claimant sought to recover compensation and consequential damages from the defendant Town for its permanent appropriation of a portion of plaintiff's land for the widening of a town highway, such action was not founded in tort and compliance with the notice of claim provisions of § 50-e of the General Municipal Law was not required. Torino v Pleasant Valley, 36 A.D.2d 963, 321 N.Y.S.2d 445, 1971 N.Y. App. Div. LEXIS 4140 (N.Y. App. Div. 2d Dep't 1971).

Where city terminated landowner's right to enjoin trespass by condemning land, damages for trespass would be limited to 90 days prior to filing of statutory notice of claim, even though compliance with notice of claim requirements is not necessary where action is brought in equity to restrain continuing act and where demand for money damages is merely incidental to requested injunctive relief. Rand v New York, 47 A.D.2d 937, 367 N.Y.S.2d 80, 1975 N.Y. App. Div. LEXIS 9398 (N.Y. App. Div. 2d Dep't 1975).

In action to set aside tax sale and subsequent conveyances of real property previously owned by plaintiffs, summary judgment for defendants was not required by plaintiffs' failure to file notice of claim under CLS County § 52 and CLS Gen Mun §§ 50-e and 50-i where plaintiffs' primary objective was to set aside tax sale and conveyances and to obtain judgment declaring them to be owners of property, and any money damages sought were purely incidental to their attempt to regain title. Greaney v Springer, 266 A.D.2d 707, 701 N.Y.S.2d 450, 1999 N.Y. App. Div. LEXIS 11842 (N.Y. App. Div. 3d Dep't 1999).

In an action for a judgment declaring a corporation to be the owner in fee of the subject premises, voiding all conveyances arising from a tax sale of the premises, and for damages arising from the subsequent demolition of buildings thereon, the notice of claim provisions of Gen Mun Law § 50-e and CPLR § 9801 would not be applicable, since the complaint did not primarily seek money damages, and the money damages sought were merely incidental to the equitable relief sought. S.A.B. Enterprises, Inc. v Stewart's Ice Cream Co., 113 Misc. 2d 492, 449 N.Y.S.2d 408, 1982 N.Y. Misc. LEXIS 3326 (N.Y. Sup. Ct. 1982).

58. —Continuous trespass

Where city terminated landowner's right to enjoin trespass by condemning land, damages for trespass would be limited to 90 days prior to filing of statutory notice of claim, even though compliance with notice of claim requirements is not necessary where action is brought in equity to restrain continuing act and where demand for money damages is merely incidental to requested injunctive relief. Rand v New York, 47 A.D.2d 937, 367 N.Y.S.2d 80, 1975 N.Y. App. Div. LEXIS 9398 (N.Y. App. Div. 2d Dep't 1975).

Inasmuch as boundary dispute involved an alleged continuing wrong on part of defendant village, plaintiff could maintain a new action to determine claims after properly filing notice of claim and any damages accruing during the 90-day period prior to such filing would be recoverable. Salesian Soc. v Ellenville, 50 A.D.2d 648, 374 N.Y.S.2d 805, 1975 N.Y. App. Div. LEXIS 12473 (N.Y. App. Div. 3d Dep't 1975), rev'd, 41 N.Y.2d 521, 393 N.Y.S.2d 972, 362 N.E.2d 604, 1977 N.Y. LEXIS 1915 (N.Y. 1977).

Under section of County Law requiring any claim for damage, whether casual or continuing trespass or nuisance, to be served in compliance with section of General Municipal Law requiring notice of claim against municipality be given within 90 days after claim arises, service of notice of claim within 90 days of accrual of cause of action is required, even though primary relief sought is equitable and damages must be limited to those occurring within 90-day period before service of notice of claim. Doran v Cheektowaga, 54 A.D.2d 178, 388 N.Y.S.2d 385, 1976 N.Y. App. Div. LEXIS 13748 (N.Y. App. Div. 4th Dep't 1976).

Filing of notice of claim was not required in property owner's action to enjoin continuous trespass by town. Carr v Fleming, 122 A.D.2d 540, 504 N.Y.S.2d 904, 1986 N.Y. App. Div. LEXIS 59808 (N.Y. App. Div. 4th Dep't 1986).

Property owner's action to enjoin continuous trespass was not time-barred as matter of law where question of fact existed as to whether owner actually knew of town's installation of sewer system on owner's property, since only visible evidence of sewer's existence was manhole cover, and town had burden of establishing that owner actually knew of town's adverse use or that use was so visible, open, or notorious that such knowledge could be imputed to owner. Carr v Fleming, 122 A.D.2d 540, 504 N.Y.S.2d 904, 1986 N.Y. App. Div. LEXIS 59808 (N.Y. App. Div. 4th Dep't 1986).

In an action against a town and a water district alleging that defendants installed pipe under plaintiff's property and occupied same without permission, statute of limitations provisions of Town Law and General Municipal Law were inapplicable since it could not be said as a matter of pleading that the cause of action was for a continuing wrong. Jayne v East Hills Water Dist., 6 Misc. 2d 676, 164 N.Y.S.2d 284, 1957 N.Y. Misc. LEXIS 3051 (N.Y. Sup. Ct. 1957).

In cases involving nuisance or continuous trespass, the wrong is continuous or recurring, and the cause of action accrues anew everyday for each injury and the injured party may recover damages accruing within the statutory period prior to the commencement of the action even though the original wrong was committed before such time. Malloy v Niskayuna, 64 Misc. 2d 676, 315 N.Y.S.2d 502, 1970 N.Y. Misc. LEXIS 1171 (N.Y. Sup. Ct. 1970).

Estate administrator's claim for wrongful death against the New York City Health and Hospitals Corporation (HHC) was timely filed because the administrator was appointed on April 22, 2004 and the notice of claim was served on HHC on September 16, 2003. Walker v New York City Health & Hosps. Corp., 234 N.Y.L.J. 114, 2005 N.Y. Misc. LEXIS 3552 (N.Y. Sup. Ct. Dec. 14,

2005), rev'd, 36 A.D.3d 509, 828 N.Y.S.2d 365, 2007 N.Y. App. Div. LEXIS 598 (N.Y. App. Div. 1st Dep't 2007).

Although an action for damages to riparian rights was a continuing trespass, each new day establishing the cause anew, the provisions of General Municipal Law §§ 50-e and 50-i were more than mere statutes of limitation or repose but established conditions precedent to the initiation of a lawsuit against a municipality. Gregory v New York, 346 F. Supp. 140, 1972 U.S. Dist. LEXIS 12974 (S.D.N.Y. 1972), disapproved, Fountain v Metropolitan Atlanta Rapid Transit Authority, 678 F.2d 1038, 1982 U.S. App. LEXIS 18222 (11th Cir. 1982).

Action against City of New York by Pennsylvania resident who was riparian owner of land along Delaware river to recover damages resulting from diversion of water alleged a continuing trespass and delay in filing notice of claim barred any claim for damages incurred more than 90 days prior to filing. Gregory v New York, 346 F. Supp. 140, 1972 U.S. Dist. LEXIS 12974 (S.D.N.Y. 1972), disapproved, Fountain v Metropolitan Atlanta Rapid Transit Authority, 678 F.2d 1038, 1982 U.S. App. LEXIS 18222 (11th Cir. 1982).

59. Personal property actions

Where buildings on which plaintiff's advertising signs were maintained under lease with the property owner were destroyed by the city when it demolished the property after making a determination upon notice to the owner that the buildings were unsafe and a threat to the public welfare, and the plaintiff's action was for damages for destruction of its property, such action was founded upon tort and was dismissed for failure to allege that the plaintiff had filed a notice of claim as required by § 50-e of the General Municipal Law. Rochester Poster Advertising Co. v Rochester, 38 A.D.2d 679, 327 N.Y.S.2d 249, 1971 N.Y. App. Div. LEXIS 2774 (N.Y. App. Div. 4th Dep't 1971).

Petitioners were entitled to return of various items of property held by property clerk where (1) petitioners each pleaded guilty to misdemeanor of possession of stolen walkie-talkie and other charges against them were dropped, (2) petitioners made timely demand on property clerk for return of other property seized from their place of business pursuant to warrant, (3) property clerk refused demand on ground that property was subject to levy by Internal Revenue Service, (4) petitioners obtained release of tax levy and again made demand, and (5) property clerk refused demand as untimely; petitioners were entitled to possession unless timely forfeiture proceeding was commenced, and they were not required to serve additional notice under CLS Gen Mun § 50-e to obtain redress. Debellis v Property Clerk of New York, 168 A.D.2d 313, 562 N.Y.S.2d 646, 1990 N.Y. App. Div. LEXIS 15228 (N.Y. App. Div. 1st Dep't 1990), aff'd, 79 N.Y.2d 49, 580 N.Y.S.2d 157, 588 N.E.2d 55, 1992 N.Y. LEXIS 38 (N.Y. 1992).

Action for alleged conversion of property, which had been removed from plaintiffs' premises by town defendants and sold at sheriff's sale pursuant to court order, was properly dismissed for failure to serve notice of claim under CLS Gen Mun §§ 50-e and 50-i, as action was one for damage to personal property. Kranz v Town of Tusten, 236 A.D.2d 675, 653 N.Y.S.2d 194, 1997 N.Y. App. Div. LEXIS 1119 (N.Y. App. Div. 3d Dep't 1997).

Vehicle owner could not avoid the requirement to give a town notice of his claim for the wrongful detention of his vehicle after the conclusion of a criminal proceeding by characterizing it as one in equity for a continuing trespass. Smith v Scott, 294 A.D.2d 11, 740 N.Y.S.2d 425, 2002 N.Y. App. Div. LEXIS 3561 (N.Y. App. Div. 2d Dep't 2002).

Because the parents' attorney promptly commenced a N.Y. Gen. Mun. Law § 50-e(5) proceeding after recognizing that the wrong entity had been served, and because the school district was on notice of the essential facts of their personal injury claim on behalf of their child, the trial court properly granted the parents' motion to amend the complaint. Matter of McLean v Valley Stream Union Free School Dist. 30, 48 A.D.3d 571, 852 N.Y.S.2d 227, 2008 N.Y. App. Div. LEXIS 1293 (N.Y. App. Div. 2d Dep't 2008).

Cause of action was properly dismissed because the property owner failed to file a notice of claim regarding his personal property and because the cause of action was time-barred. The owner was required to file a notice of claim against the city within 90 days and to commence the action within one year and 90 days, neither of which he did. Wilczak v City of Niagara Falls, 174 A.D.3d 1446, 108 N.Y.S.3d 79, 2019 N.Y. App. Div. LEXIS 5986 (N.Y. App. Div. 4th Dep't 2019).

Even if notice of claim requirement of General Municipal Law could be construed as being limited to actions for physical damage to tangible personal property and personal injury, where term "personal property" was very broadly defined in General Construction Law to include tangible or intangible property interests, and Administrative Code was indisputably absolute in its language requiring a notice of claim in every action or special proceeding prosecuted or maintained against city, notice of such claim was required prior to commencement of action against city for wrongful inducement of breach of contract, a traditional tort, and failure to give notice required dismissal. Hannibal General Contractors, Inc. v St. Matthew & St. Timothy's Housing Corp., 83 Misc. 2d 53, 371 N.Y.S.2d 535, 1975 N.Y. Misc. LEXIS 2801 (N.Y. Sup. Ct. 1975), aff'd, 55 A.D.2d 583, 390 N.Y.S.2d 588, 1976 N.Y. App. Div. LEXIS 15272 (N.Y. App. Div. 1st Dep't 1976).

60. Zoning actions and building permits

Where plaintiff sued a town for damages based upon the revocation of a building permit issued to her, the gravamen of the complaint was in tort, requiring compliance with the statute. Band v Colonie, 36 A.D.2d 785, 319 N.Y.S.2d 118, 1971 N.Y. App. Div. LEXIS 4477 (N.Y. App. Div. 3d Dep't 1971).

Plaintiff's complaint against city for negligent issuance and wrongful revocation of building permit to construct storage warehouses in commercial service zone sounded in tort, and thus required compliance with notice of claim requirements of CLS Gen Mun § 50-e. Curtis Case, Inc. v Port Jervis, 150 A.D.2d 421, 541 N.Y.S.2d 32, 1989 N.Y. App. Div. LEXIS 6484 (N.Y. App. Div. 2d Dep't 1989).

Village was entitled to dismissal, under CLS CPLR § 3211(a), of action against it for, inter alia, damages for gross negligence and injunctive relief where action, which involved issuance of building permit, accrued when permit was issued and did not constitute continuing wrong, and thus plaintiff did not serve notice of claim within 90 days after accrual of action, as required by CLS Gen Mun § 50-e. Kaufman v Vill. of Mamaroneck, 286 A.D.2d 666, 729 N.Y.S.2d 778, 2001 N.Y. App. Div. LEXIS 8484 (N.Y. App. Div. 2d Dep't 2001), app. denied, 98 N.Y.2d 602, 744 N.Y.S.2d 762, 771 N.E.2d 835, 2002 N.Y. LEXIS 1060 (N.Y. 2002).

General Municipal Law § 50-e was not applicable in action for damages incurred by owner of non-conforming use in reliance upon building permit initially issued by city's building commissioner, and revoked by city, for reconstruction of mixed residential and commercial use which had been damaged over 50% by fire. 154 East Park Ave. Corp. v Long Beach, 76 Misc. 2d 445, 350 N.Y.S.2d 974, 1973 N.Y. Misc. LEXIS 1507 (N.Y. Sup. Ct. 1973), modified, 49 A.D.2d 949, 374 N.Y.S.2d 569, 1975 N.Y. App. Div. LEXIS 11233 (N.Y. App. Div. 2d Dep't 1975).

Disabled person's suit challenging city's zoning policy, under which permit to construct wheelchair ramp allegedly was denied because of commercial property owner's tax delinquency, came within public interest exception to statutory notice of claim requirements of Gen Mun § 50-e. Kennedy v Fitzgerald, 102 F. Supp. 2d 100, 2000 U.S. Dist. LEXIS 8688 (N.D.N.Y. 2000).

61. Personal injury actions

Plaintiffs' application for leave to serve a late notice of claim would be denied where defendant did not acquire actual knowledge of the essential facts until one year and 87 days after the accident and the long delay was substantially prejudicial to defendant since the alleged defects in the sidewalk and accumulated snow and ice would hardly be in similar condition over a year later and plaintiff's failure to serve late notice was not excused by law office failure. Zarrello v New York, 93 A.D.2d 886, 461 N.Y.S.2d 410, 1983 N.Y. App. Div. LEXIS 17769 (N.Y. App. Div. 2d Dep't), aff'd, 61 N.Y.2d 628, 471 N.Y.S.2d 846, 459 N.E.2d 1284, 1983 N.Y. LEXIS 3628 (N.Y. 1983).

In an action against a municipal transportation company to recover for injuries sustained by a high school student during a fight while a passenger in defendant's bus, the transportation

company's motion to dismiss the complaint for failure to serve a notice of claim pursuant to Gen Mun Law § 50-e was properly denied where the bus was not municipally owned, and therefore not within the purview of Gen Mun Law § 50-b, and where the municipality was under no duty to indemnify defendant transportation company or its employee in event either was required to respond in damages to the injured party. Montalto v Westchester Street Transp. Co., 102 A.D.2d 816, 476 N.Y.S.2d 586, 1984 N.Y. App. Div. LEXIS 18988 (N.Y. App. Div. 2d Dep't 1984).

Court should have granted town's motion for summary judgment dismissing personal injury action where notice of claim, which described place where claim arose as "the exit way of the Municipal Parking Field designated Number LV-2 located in Locust Valley," did not sufficiently describe accident site, and notice of claim did not adequately describe manner in which claim arose. Earle v Town of Oyster Bay, 247 A.D.2d 357, 668 N.Y.S.2d 630, 1998 N.Y. App. Div. LEXIS 839 (N.Y. App. Div. 2d Dep't 1998).

Injured firefighter's application for leave to file late notice of premises liability claim against city was properly denied where (1) fire department "Member Injury Report," on which he relied, was clearly inadequate to place city on notice of possible claim against it, because report mentioned neither city's alleged ownership of subject premises nor its purported causative negligence, and (2) passage of 7 months between accident and application clearly prejudiced city, which had no opportunity to investigate transitory condition (rubbish) that allegedly caused firefighter to trip and fall. Doherty v City of New York, 251 A.D.2d 368, 674 N.Y.S.2d 77, 1998 N.Y. App. Div. LEXIS 6573 (N.Y. App. Div. 2d Dep't 1998).

Cause of action for conscious pain and suffering is materially distinct from cause of action to recover for wrongful death, and notice of claim for former was required to be served within 90 days of occurrence, notwithstanding timely filing of notice of wrongful death claim within 90 days of appointment of representative of decedent's estate. Mack v City of New York, 265 A.D.2d 308, 696 N.Y.S.2d 206, 1999 N.Y. App. Div. LEXIS 9622 (N.Y. App. Div. 2d Dep't 1999), app. denied, 94 N.Y.2d 763, 708 N.Y.S.2d 51, 729 N.E.2d 708, 2000 N.Y. LEXIS 580 (N.Y. 2000).

Lower court did not err when it denied the transit authority's cross-motion for summary judgment based upon inadequate notice because the defects in notice could be waived when the injured party did not make the omissions in bad faith and the transit authority had not shown any prejudice from the inadequate notice. Ingle v N.Y. City Transit Auth., 7 A.D.3d 574, 777 N.Y.S.2d 154, 2004 N.Y. App. Div. LEXIS 6922 (N.Y. App. Div. 2d Dep't 2004).

Because a school district did not acquire actual knowledge of the essential facts constituting a student's alleged injury, the trial court erred by granting the mother's N.Y. Gen. Mun. Law § 50-e(5) application for leave to file a late notice of claim. Matter of Cook v Schuylerville Cent. School Dist., 28 A.D.3d 921, 813 N.Y.S.2d 569, 2006 N.Y. App. Div. LEXIS 4287 (N.Y. App. Div. 3d Dep't 2006).

While a town did not show how it was prejudiced by a pedestrian's untimely slip and fall claim, the trial court properly denied the pedestrian's petition due to the lack of timely actual knowledge of the facts constituting the claim and the pedestrian's lack of a reasonable excuse for the delay in filing a petition for leave to serve a late notice of claim upon the town pursuant to N.Y. Gen. Mun. Law § 50-e. Dell'Italia v Long Island Rail Rd. Corp., 31 A.D.3d 758, 820 N.Y.S.2d 81, 2006 N.Y. App. Div. LEXIS 9665 (N.Y. App. Div. 2d Dep't 2006).

Trial court properly granted a motion filed by an injured student and his parents for leave to serve a late notice of claim upon a town because the town failed to demonstrate that the underlying claim against it was patently without merit Williams v Gonzalez, 113 A.D.3d 757, 979 N.Y.S.2d 363, 2014 N.Y. App. Div. LEXIS 338 (N.Y. App. Div. 2d Dep't 2014).

Trial court properly denied a motion by a city and a school for summary judgment motion in a voter's personal injury action because her notice of claim included information that sufficiently enabled the school and city to investigate the claim, the defendants failed to eliminate all triable issues of fact as to whether there was a dangerous or defective condition in the area in which the voter fell or whether they created or had actual or constructive notice of it, and a power outage did not relieve them of their duty to address the allegedly dangerous condition created by the loss of power which may have obscured the mat over which the voter tripped. Lipani v Hiawatha Elementary Sch., 153 A.D.3d 1247, 61 N.Y.S.3d 582, 2017 N.Y. App. Div. LEXIS 6425 (N.Y. App. Div. 2d Dep't 2017).

Where plaintiffs, an infant and his mother, timely served a notice of claim on a town alleging its nonfunctioning street lights caused the infant to be hit by a car, the trial court did not err in denying plaintiffs' motion for leave to serve a late, amended notice of claim because plaintiffs failed to proffer a reasonable excuse for the delay in serving a notice of claim that described the infant plaintiff's injuries as arising from any negligence on the part of the town other than that related to the nonfunctioning street lights described in the original notice of claim; and plaintiffs did not show that, within 90 days after the accident or a reasonable time thereafter, the town knew the essential facts constituting the claim that it was negligent with respect to anything other than the street lights or that Town would not be substantially prejudiced by the delay. Palacios v Town of N. Hempstead, 165 A.D.3d 967, 86 N.Y.S.3d 117, 2018 N.Y. App. Div. LEXIS 6841 (N.Y. App. Div. 2d Dep't 2018).

Where plaintiffs, an infant and his mother, timely served a notice of claim on a town alleging its nonfunctioning street lights caused the infant to be hit by a car, the trial court did not err in denying plaintiffs' motion for leave to serve a late, amended notice of claim because the proposed amendments added new theories of liability related to the town's ownership, operation, control, design, planning, study, retention, supervision, maintenance, repair, inspection, and management of the street and sidewalks, and such amendments were not technical in nature and were not permitted as late-filed amendments to a notice of claim. Palacios v Town of N. Hempstead, 165 A.D.3d 967, 86 N.Y.S.3d 117, 2018 N.Y. App. Div. LEXIS 6841 (N.Y. App. Div. 2d Dep't 2018).

Where plaintiffs, an infant and his mother, timely served a notice of claim on a town alleging its nonfunctioning street lights caused the infant to be hit by a car, their amended notice of claim with respect to the mother's derivative claim was time-barred because the statute of limitations expired before plaintiffs moved to serve a late notice of claim, and the toll for infancy pursuant to N.Y. C.P.L.R. 208 did not apply to a parent's derivative cause of action. Palacios v Town of N. Hempstead, 165 A.D.3d 967, 86 N.Y.S.3d 117, 2018 N.Y. App. Div. LEXIS 6841 (N.Y. App. Div. 2d Dep't 2018).

Trial court properly denied a driver's petition for leave to serve a late notice on the city because the city did not acquire timely, actual knowledge of the essential facts constituting the driver's claim by virtue of the police accident report, which stated that the emergency medical services vehicle caused "no damage" to the driver's vehicle, and did not indicate any connection between the driver's alleged injuries and any negligent conduct on the part of the operator of the EMS vehicle. Matter of Lugo v GNP Brokerage, 185 A.D.3d 824, 127 N.Y.S.3d 527, 2020 N.Y. App. Div. LEXIS 3974 (N.Y. App. Div. 2d Dep't 2020).

Trial court properly denied a driver's petition for leave to serve a late notice on the city because the driver failed to present "some evidence or plausible argument" supporting a finding that the city would not be substantially prejudiced by the nearly one-year delay in seeking leave to serve a notice of claim, as the delay prevented the city from promptly conducting a thorough investigation and interviewing witnesses while their memories were still fresh. Matter of Lugo v GNP Brokerage, 185 A.D.3d 824, 127 N.Y.S.3d 527, 2020 N.Y. App. Div. LEXIS 3974 (N.Y. App. Div. 2d Dep't 2020).

A personal injury action against a county transit system by a passenger who had been injured on one of the system's buses would not be dismissed on the basis of plaintiff's failure to file a notice of claim pursuant to Gen Mun Law § 50-e(1)(b), since, though the Court of Appeals decided after plaintiff's injury occurred that the laws creating the transit system imposed a statutory duty upon the county to operate the system and that, consequently, the statutory notice of claim requirements applied

to actions against the system, such decision would be applied only prospectively in that such decision overruled clear past precedent on which litigants had a right to rely, the intent of the statute that municipalities receive actual, prompt notice of future claims had been satisfied, the equities of the situation clearly preponderated in favor of allowing plaintiff her day in court, and the county suffered no prejudice as a result of plaintiff's failure to provide it with formal notice. James v Liberty Lines, 119 Misc. 2d 1060, 465 N.Y.S.2d 144, 1983 N.Y. Misc. LEXIS 3644 (N.Y. Sup. Ct.), rev'd, 97 A.D.2d 749, 468 N.Y.S.2d 380, 1983 N.Y. App. Div. LEXIS 20491 (N.Y. App. Div. 2d Dep't 1983).

In an action alleging a defective road condition, a late notice of claim was permitted because, on learning accident might have occurred in New York, claimant's Pennsylvania lawyers promptly sought the police report, and when the location was verified the claimant promptly retained a New York attorney. Cockburn v Town of Mina, N.Y., 53 Misc. 3d 1002, 38 N.Y.S.3d 736, 2016 N.Y. Misc. LEXIS 3302 (N.Y. Sup. Ct. 2016).

Pedestrian's notice of claim against a county satisfied N.Y. Gen. Mun. Law § 50-e(2) because the notice stated that the pedestrian alleged that the injuries she suffered when she was struck by a vehicle were caused by the county's negligent design, placement, and configuration of bus stops and a crosswalk, and the pedestrian's testimony at a N.Y. Gen. Mun. Law § 50-h hearing that she was struck by a car near the curb as she attempted to cross the street was entirely consistent with the allegations set out in the notice of claim. Javed v Shuang Zhang, 872 F. Supp. 2d 194, 2012 U.S. Dist. LEXIS 6832 (N.D.N.Y. 2012).

62. —Notice of unsafe condition

Town law which required prior notice of defect for accidents at town "parking field, beach area," etc. as condition precedent to commencement of action against town was inconsistent with plain language of CLS Gen Mun § 50-e(4) (as incorporated into CLS Town § 67), which mandates that "no other or further notice...shall be required as a condition to the commencement of an action"; moreover, town is prohibited from enacting any notice of defect conditions pertaining to locations beyond specified exceptions contained in CLS Gen Mun § 50-e(4). Walker v Town of Hempstead, 84 N.Y.2d 360, 618 N.Y.S.2d 758, 643 N.E.2d 77, 1994 N.Y. LEXIS 3395 (N.Y. 1994).

The general laws of the State require no prior written notice of an unsafe condition of a recreational playing field in order to bring an action against a town for injuries sustained there, and to the extent that a local law requires such notice, it is inconsistent with the general laws limiting requirements of prior notice of unsafe condition to those pertaining to streets, highways, bridges, culverts, sidewalks or crosswalks and is, therefore, unconstitutional. Zumbo v Farmington, 60 A.D.2d 350, 401 N.Y.S.2d 121, 1978 N.Y. App. Div. LEXIS 9680 (N.Y. App. Div. 4th Dep't 1978).

In a personal injury action against a city to recover for injuries sustained when plaintiff fell on broken glass and debris in a municipal parking lot, summary judgment for the city would be granted, where personal injury suits against the city for injuries sustained on a highway were prohibited unless before an injury occurred the city had been given written notice of the dangerous condition that caused the injury, where the parking lot fell within the term highway in that the public had a general right of passage over the lot, where affidavits filed by the city in support of its motion showed no written notice in city files of the condition of the parking lot, where plaintiff's witnesses were insufficient to rebut the city's affidavits to the extent necessary to raise a triable issue of fact, and where the notice requirement was not in derogation of Gen Mun Law § 50-e. Stratton v Beacon, 91 A.D.2d 1018, 457 N.Y.S.2d 893, 1983 N.Y. App. Div. LEXIS 16335 (N.Y. App. Div. 2d Dep't 1983).

Special term erred in dismissing personal injury plaintiff's complaint against city on ground that city had not received prior written notice of injury-causing defect where plaintiff's complaint alleged liability by reason of failure to properly post or maintain one-way traffic signs; prior written notice requirements of CLS Gen Mun § 50-e(4) are limited to surface defects and do not extend to posting or maintaining of signs. Tyner v Buffalo, 152 A.D.2d 978, 543 N.Y.S.2d 794, 1989 N.Y. App. Div. LEXIS 9890 (N.Y. App. Div. 4th Dep't 1989).

City's written notice provision applied to action for injuries allegedly sustained when plaintiff tripped and fell over water line shut-off valve disk that was located within and protruded about ½ inch above public sidewalk; case did not fall within special use exception to general rule mandating prior notice. Charbonneau v City of Cohoes, 232 A.D.2d 931, 648 N.Y.S.2d 836, 1996 N.Y. App. Div. LEXIS 11276 (N.Y. App. Div. 3d Dep't 1996).

Town should have been granted summary judgment in action brought by plaintiff, who allegedly slipped and fell on ice in commuter parking lot owned by town, where town proved that it had not received prior written notice of defective condition as required by town code, which term "highway" therein was broad enough to encompass those paved surfaces open to public automobile traffic that could more precisely be defined as parking lots. Doherty v Town of Clarkstown, 233 A.D.2d 477, 650 N.Y.S.2d 31, 1996 N.Y. App. Div. LEXIS 12650 (N.Y. App. Div. 2d Dep't 1996).

Overgrown foliage constituted obstruction of "street" or "highway" under CLS Gen Mun § 50-e(4); thus, application of town's prior written notice statute to such obstruction did not conflict with General Municipal Law, and lack of such notice required dismissal of action alleging negligent failure by town to cut back overgrown foliage which purportedly obstructed line of sight at intersection. Forsythe-Kane v Town of Yorktown, 249 A.D.2d 505, 672 N.Y.S.2d 355, 1998 N.Y. App. Div. LEXIS 4637 (N.Y. App. Div. 2d Dep't 1998).

Prior written notice of defective stairway under NYC Admin Code § 7-201 was not required as condition of New York City's liability where plaintiff was injured when he fell on defective stairway located in municipal park; stairway was not "street, highway, bridge, culvert, sidewalk or crosswalk" within meaning of CLS Gen Mun § 50-e(4). Woodson v City of New York, 253 A.D.2d 715, 678 N.Y.S.2d 319, 1998 N.Y. App. Div. LEXIS 9777 (N.Y. App. Div. 1st Dep't 1998), rev'd, 93 N.Y.2d 936, 693 N.Y.S.2d 69, 715 N.E.2d 96, 1999 N.Y. LEXIS 1214 (N.Y. 1999).

Court properly denied defendant city's summary judgment motion in action for injuries sustained when plaintiff was struck by falling branch from tree located between sidewalk and curb in front of her home in area owned and maintained by defendant where fact issues existed as to whether tree was in defective condition at time of inspections conducted by city forester, whether defendant had notice of or should have had notice of defective condition, and whether defendant was negligent in not taking remedial action prior to accident; insofar as defendant's written notice statute provided that it applied to defective or unsafe condition of tree, it was beyond scope of CLS Gen Mun § 50-e(4) and was invalid. Newman v City of Glens Falls, 256 A.D.2d 1012, 682 N.Y.S.2d 314, 1998 N.Y. App. Div. LEXIS 13899 (N.Y. App. Div. 3d Dep't 1998).

Judgment granted in favor of the city was affirmed because the city did not receive notice of the alleged defect in the sidewalk as required by N.Y. Gen. Mun. Law § 50-e(4) and plaintiff did not present sufficient evidence to show that prior notice was obviated by the city's alleged knowledge of the defect or that the city had somehow created the defect. Fuhrmann v City of Binghamton, 31 A.D.3d 1036, 818 N.Y.S.2d 670, 2006 N.Y. App. Div. LEXIS 9449 (N.Y. App. Div. 3d Dep't 2006).

In an action against a village to recover damages for personal injuries, the lower court properly granted plaintiff's motion to vacate his default because (1) plaintiff's excuse of law office failure was reasonable under N.Y. C.P.L.R. 2005; (2) there was no evidence that plaintiff intended to abandon the action, that his default was willful, or that the village was prejudiced; and (3) plaintiff established that he had a meritorious cause of action because although the Village of Hempstead, N.Y., Code § 39-1(B) purported to require, as a condition precedent to the commencement of a tort action, that the village be provided with prior written notice of a playground or playground equipment being defective, out of repair, unsafe, dangerous or obstructed, pursuant to N.Y. Gen. Mun. Law § 50-e(4); N.Y. C.P.L.R. 9801(1), 9804; and N.Y. Village Law § 6-628, a village from requiring prior written notice of defects at municipal locations other than streets, highways, bridges, culverts, sidewalks, or crosswalks, and plaintiff raised a triable issue of fact as to whether the village created the condition that caused his injury. White v Incorporated Vil. of

Hempstead, 41 A.D.3d 709, 838 N.Y.S.2d 607, 2007 N.Y. App. Div. LEXIS 7731 (N.Y. App. Div. 2d Dep't 2007).

63. Third party actions

Trial court erred in granting the parents' petition to deem a late notice of claim timely served nunc pro tunc upon a school district because the parents' had no legally cognizable claim to recover damages for emotional distress they allegedly sustained from witnessing an accident where a student athlete was killed during a strength conditioning drill, or based upon the district's alleged refusal to provide continued counseling and maintain the coaching staff support system inasmuch as the parents' children were not immediate family members of the decedent, and the record reflected that the district provided ongoing counseling from mental health professionals employed by the district. Matter of Kmiotek v Sachem Cent. Sch. Dist., 176 A.D.3d 1063, 111 N.Y.S.3d 322, 2019 N.Y. App. Div. LEXIS 7583 (N.Y. App. Div. 2d Dep't 2019).

In an action brought in tort in which one of the defendants has properly brought a third-party action in indemnity against the City of New York, a motion by the plaintiff in the main tort action to amend the complaint to assert a new cause of action in tort against the city is denied; plaintiff has not served a notice of claim upon the city within 90 days of the date on which the underlying occurrence took place (General Municipal Law, § 50-e) and has not brought its action within one year and 90 days after said date (General Municipal Law, § 50-i) and, therefore, sections 50-e and 50-i are complete bars to the tort action against the city. While plaintiff may not have known that the city was a third-party defendant until it was too late to bring a direct tort action against the city, that factor does not fit any of the grounds under section 50-e or the recent amendments thereto, and, even if it did, section 50-e denies any such relief if the time for commencement of the action under section 50-i has long since expired. It is of no consequence that the city has not as yet answered the third-party complaint. 2999 Realty Corp. v Hallen Constr. Corp., 95 Misc. 2d 227, 406 N.Y.S.2d 951, 1978 N.Y. Misc. LEXIS 2406 (N.Y. Civ. Ct. 1978).

64. Wrongful death action

In a wrongful death action against the New York City Health and Hospitals Corporation, the two-year general limitation period for wrongful death actions established by EPTL § 5-4.1 and the two-year provision of Gen Mun Law § 50-i were inapplicable to the action against the public benefits corporation which existed independently of the City of New York and notice of the claim was required to be filed within 90 days after death except for extensions up to one year and 90 days, as permitted by Gen Mun Law § 50-e, and the action was required to be commenced within one year and 90 days from the date of the decedent's death. Brennan v New York, 59 N.Y.2d 791, 464 N.Y.S.2d 731, 451 N.E.2d 478, 1983 N.Y. LEXIS 3134 (N.Y. 1983).

By fair construction, the General Municipal Law provision requiring a personal injury action against a county to be commenced within one year and 90 days after the event can coexist with the Highway Law provision stating that a county is liable for injuries sustained due to a defective highway but that the county shall not be liable unless a notice of claim shall have been made and served and the action commenced within one year from the date of service; thus, in the instant case, since plaintiff complied with the Highway Law, her wrongful death action was not subject to dismissal, even though the county was not served with summons and complaint until more than two years after accident. Forero v Tuxedo, 51 A.D.2d 443, 382 N.Y.S.2d 328, 1976 N.Y. App. Div. LEXIS 11101 (N.Y. App. Div. 2d Dep't 1976).

The trial court did not abuse its discretion in granting plaintiff leave to amend notice of claim pursuant to Gen Mun Law § 50-e to add a claim for wrongful death, since defendant had been served with notice of claim for personal injuries and no additional notice of claim for wrongful death was therefore required. Scheel v Syracuse, 97 A.D.2d 978, 468 N.Y.S.2d 786, 1983 N.Y. App. Div. LEXIS 20826 (N.Y. App. Div. 4th Dep't 1983).

City was entitled to summary judgment on an estate administrator's claims for negligent infliction of emotional distress and wrongful death because the police sought medical care for the decedent immediately after he began to complain of chest pains. Davis v City of New York, 153 A.D.3d 658, 61 N.Y.S.3d 551, 2017 N.Y. App. Div. LEXIS 6119 (N.Y. App. Div. 2d Dep't 2017).

A complaint in an action for wrongful death against a village, under Decedent Estate Law, § 130, must allege the service of a notice of claim under § 50-e of the General Municipal Law or § 341 of the Village Law, in order to state a cause of action. Hammond v Southampton, 75 N.Y.S.2d 690, 191 Misc. 100, 1947 N.Y. Misc. LEXIS 3459 (N.Y. Sup. Ct. 1947).

In action against city for negligence resulting in death of truck driver's helper, notice of claim was timely where it was filed 3 days after the cause of action was assigned to plaintiff by operation of Workmen's Compensation Law § 29. Aetna Casualty & Surety Co. v New York, 5 Misc. 2d 110, 160 N.Y.S.2d 365, 1956 N.Y. Misc. LEXIS 1329 (N.Y. Sup. Ct. 1956).

Notice of claim requirement is satisfied in wrongful death action if timely notice is filed by proposed administratrix who has not yet received letters of administration. Aristide v New York, 129 Misc. 2d 483, 493 N.Y.S.2d 247, 1985 N.Y. Misc. LEXIS 3073 (N.Y. Sup. Ct. 1985).

65. Employment actions

Actions against municipality to recover damages for unlawful employment discrimination brought under CLS Exec § 296 are not subject to notice of claim requirement set down in CLS Gen Mun § 50-e for tort claims involving personal injury, wrongful death, or property damage. Morrison v New York City Police Dep't, 214 A.D.2d 394, 625 N.Y.S.2d 174, 1995 N.Y. App. Div. LEXIS 4208 (N.Y. App. Div. 1st Dep't 1995), app. denied, sub. op., 1995 N.Y. App. Div. LEXIS 7519 (N.Y. App. Div. 1st Dep't June 20, 1995).

Actions against municipality to recover damages for unlawful discrimination brought under CLS Exec § 296 are not subject to notice of claim requirement set down in CLS Gen Mun § 50-e for tort claims involving personal injury, wrongful death, or property damage. Morrison v New York City Police Dep't, 214 A.D.2d 394, 625 N.Y.S.2d 174, 1995 N.Y. App. Div. LEXIS 4208 (N.Y. App. Div. 1st Dep't 1995), app. denied, sub. op., 1995 N.Y. App. Div. LEXIS 7519 (N.Y. App. Div. 1st Dep't June 20, 1995).

In employee's action under CLS Labor § 740 against private employer, city, and director of city agency for retaliation against employee for "blowing the whistle" on unlawful practice, employee was not required to serve notice of claim on director for his allegedly retaliatory acts that were clearly beyond scope of his employment. Gorgone v Capozzi, 238 A.D.2d 308, 656 N.Y.S.2d 49, 1997 N.Y. App. Div. LEXIS 3388 (N.Y. App. Div. 2d Dep't 1997), app. denied, 95 N.Y.2d 767, 717 N.Y.S.2d 547, 740 N.E.2d 653, 2000 N.Y. LEXIS 3510 (N.Y. 2000).

Compliance with notice of claim requirements of CLS Town § 67 and CLS Gen Mun § 50-e is condition precedent to pursuit of employment discrimination claim against town, regardless of whether claimant files complaint with Division of Human Rights under CLS Exec § 297(1) or commences court action under CLS Exec § 297(9). Town of Brookhaven v N.Y. State Div. of Human Rights, 282 A.D.2d 685, 723 N.Y.S.2d 410, 2001 N.Y. App. Div. LEXIS 3965 (N.Y. App. Div. 2d Dep't 2001).

Biologist claiming age and sex discrimination in termination of her employment with county health department was entitled to judgment declaring that she was not required to file notice of claim as prerequisite to maintaining that claim under CLS Exec § 296 with State Division of Human Rights (DHR) where (1) notice of claim requirements for tort claims against municipality apply to private discriminatory practice claims under § 296 that are commenced in court of law, not before administrative agency, (2) once person has elected to pursue § 296 claim with administrative agency, he or she is precluded by CLS Exec § 297(9) from pursuing same claim in court of law and thus should not be subjected to rules applicable to court claims, and (3) underlying purpose of notice of claim requirements was satisfied by DHR's compliance with administrative procedures set forth in Human Rights Law that gave county ample opportunity to investigate claim Freudenthal v County of Nassau, 283 A.D.2d 6, 726 N.Y.S.2d 116, 2001 N.Y. App. Div. LEXIS 5645 (N.Y. App. Div. 2d

Dep't 2001), aff'd, 99 N.Y.2d 285, 755 N.Y.S.2d 56, 784 N.E.2d 1165, 2003 N.Y. LEXIS 139 (N.Y. 2003).

Before formal complaint was filed, county health department was on notice of potential claim against it under CLS Exec § 296 for age and sex discrimination in termination of biologist's employment and had ample opportunity to investigate and address that claim, and thus underlying purpose of statutory notice of claim requirements was satisfied despite lack of formal notice of claim with county, where (1) within weeks after termination on January 9, 1992, county human rights commission began investigating biologist's claim, (2) that investigation included conversations with some of biologist's former colleagues, including at least one bureau chief, (3) formal charges of discrimination were filed with State Division of Human Rights (DHR) on April 21, 1992, less than 4 months after termination, (4) DHR requested that county health department respond to discovery requests no later than June 24, 1992, and (5) at least twice between July and September 1992, county health department offered to DHR documentation and explanations to support its actions. Freudenthal v County of Nassau, 283 A.D.2d 6, 726 N.Y.S.2d 116, 2001 N.Y. App. Div. LEXIS 5645 (N.Y. App. Div. 2d Dep't 2001), aff'd, 99 N.Y.2d 285, 755 N.Y.S.2d 56, 784 N.E.2d 1165, 2003 N.Y. LEXIS 139 (N.Y. 2003).

Former county employee was not permitted to file a late notice of claim, alleging a violation of the Public Sector Whistleblower Law and seeking damages for wrongful termination, because the employee was terminated on May 15, 2013, and, therefore, his April 22, 2015 request, for which no toll was established, was not within the limitations period. Sager v County of Sullivan, 145 A.D.3d 1175, 41 N.Y.S.3d 443, 2016 N.Y. App. Div. LEXIS 7987 (N.Y. App. Div. 3d Dep't 2016), app. denied, 29 N.Y.3d 902, 80 N.E.3d 399, 57 N.Y.S.3d 706, 2017 N.Y. LEXIS 698 (N.Y. 2017).

To bring supplemental claims under New York law in federal action against county for employment discrimination, former employee was required to comply with notice requirement of Gen Mun § 50-e and to allege such compliance in the complaint as required by Gen Mun § 50-i. Harrington v County of Fulton, 153 F. Supp. 2d 164, 2001 U.S. Dist. LEXIS 11258 (N.D.N.Y. 2001)).

Former employee's claims under N.Y. Exec. Law §§ 296 and 297 failed because (1) the plain language of N.Y. County Law § 52 clearly incorporated the notice of claim requirement contained in N.Y. Gen. Mun. Law § 50-e and applied it to any claim or notice of claim against a county for invasion of personal or property rights, of every name and nature; (2) the notice of claim provision covered the employee's claims against the county and its entities, which included a community college, an entity that was owned and operated by the county and whose employees were considered county employees; (3) the employee failed to satisfy the notice of claim requirement contained in N.Y. Gen. Mun. Law § 50-e because the employee failed to file a notice of claim; (4) the action was a private civil rights lawsuit and had not been brought in the public interest; (5) the employee never sought leave to serve a late notice of claim; and (6) the employee failed to offer a single case in which a court held that the filing of a complaint with the New York State Department of Human Rights, or the Equal Employment Opportunity Commission, satisfied the notice requirement of N.Y. Gen. Mun. Law § 50-e. Cody v County of Nassau, 577 F. Supp. 2d 623, 2008 U.S. Dist. LEXIS 72262 (E.D.N.Y. 2008), aff'd, 345 Fed. Appx. 717, 2009 U.S. App. LEXIS 20662 (2d Cir. N.Y. 2009).

In an action in which a police officer asserted gender discrimination and retaliation claims against a city under the New York Human Rights Law, N.Y. Gen. Mun. Law § 50-e did not permit the city to impose a notice of claim requirement. N.Y. County Law § 52, which permitted a notice of claim requirement in a broader range of cases, was inapplicable because the case involved a municipality rather than a county. Lee v City of Syracuse, 603 F. Supp. 2d 417, 2009 U.S. Dist. LEXIS 24966 (N.D.N.Y. 2009), overruled in part, Widomski v State Univ. of N.Y., 748 F.3d 471, 2014 U.S. App. LEXIS 6466 (2d Cir. N.Y. 2014).

Employment discrimination claims brought pursuant to N.Y. Exec. Law § 296 were not subject to the statutory notice requirements Barella v Vill. of Freeport, 16 F. Supp. 3d 144, 2014 U.S. Dist. LEXIS 58827 (E.D.N.Y. 2014).

Employment discrimination claims brought pursuant to N.Y. Exec. Law § 296 were not subject to the statutory notice requirements Barella v Vill. of Freeport, 16 F. Supp. 3d 144, 2014 U.S. Dist. LEXIS 58827 (E.D.N.Y. 2014).

66. Actions based on federal law

In action alleging that school district negligently and recklessly administered health insurance claims of plaintiff's decedent, causes of action under CLS Exec § 296 and 42 USCS §§ 12101 et seq., based on alleged medical disability discrimination, were not tort claims governed by CLS Gen Mun § 50-e. Polvino v Island Group Admin., Inc., 264 A.D.2d 720, 694 N.Y.S.2d 728, 1999 N.Y. App. Div. LEXIS 9084 (N.Y. App. Div. 2d Dep't 1999).

Notice of claim requirements of CLS Gen Mun § 50-e do not apply to federal civil rights claims under 42 USCS § 1983. Zwecker v Clinch, 279 A.D.2d 572, 720 N.Y.S.2d 150, 2001 N.Y. App. Div. LEXIS 565 (N.Y. App. Div. 2d Dep't 2001).

Because two defendants were not named in the notice of claim as required by N.Y. Gen. Mun. Law § 50-e, the state claims against those two defendants were properly dismissed; the federal civil rights actions against those two defendants, however, should not have been dismissed since § 50-e only applied to tort and negligence actions. Tannenbaum v City of New York, 30 A.D.3d 357, 819 N.Y.S.2d 4, 2006 N.Y. App. Div. LEXIS 8516 (N.Y. App. Div. 1st Dep't 2006), abrogated in part, Matter of Kapon v Koch, 23 N.Y.3d 32, 988 N.Y.S.2d 559, 11 N.E.3d 709, 2014 N.Y. LEXIS 662 (N.Y. 2014).

Arrestee's petition for leave to serve a late notice of claim to assert, p violations of his federal civil and constitutional rights should have been denied as unnecessary because such a claim was not subject to the New York State statutory notice of claim requirement. Matter of Nunez v Village of Rockville Ctr., 176 A.D.3d 1211, 111 N.Y.S.3d 71, 2019 N.Y. App. Div. LEXIS 7800 (N.Y. App. Div. 2d Dep't 2019).

Plaintiff was not required to file notice of claim under New York City Health and Hospitals Corporation Act (CLS Unconsol Ch 214-A § 20) or CLS Gen Mun § 50-e before commencing federal civil rights action against defendant hospital; federal and state courts have concurrent jurisdiction in actions under 42 USCS § 1983, and federal law preempts state law to extent that state may not require notice of claim as prerequisite to recovery. Feuer v New York City Health & Hosps. Corp., 170 Misc. 2d 838, 657 N.Y.S.2d 283, 1996 N.Y. Misc. LEXIS 500 (N.Y. Sup. Ct. 1996).

Suit within admiralty jurisdiction is not subject to requirements of General Municipal Law § 50-e. National Sea Clammers Ass'n v New York (1980, CA3 NJ) 616 F2d 1222, 15 Envt Rep Cas 1314, 10 ELR 20155, vacated on other grounds, remanded (1981) 453 US 1, 101 S Ct 2615, 69 L Ed 2d 435, 16 Envt Rep Cas 1118, 11 ELR 20684 and questioned in Denison v Kitzhaber (2001, DC Or) 2001 US Dist LEXIS 12514)(applying New York law).

New York's notice-of-claim requirement is part of applicable "law of the State" that federal court must apply under 42 USCS § 1395dd(d)(2)(A) (Emergency Medical Treatment and Active Labor Act, EMTALA), and thus New York's notice-of-claim requirement is "condition precedent" to suing for damages in personal injury action against municipality. Hardy v New York City Health & Hosps. Corp., 164 F.3d 789, 1999 U.S. App. LEXIS 567 (2d Cir. N.Y. 1999).

New York State notice of claim requirements are inapplicable in civil rights action brought against municipality in federal court under 42 USCS § 1983. Burroughs v Holiday Inn, 621 F. Supp. 351, 1985 U.S. Dist. LEXIS 14420 (W.D.N.Y. 1985).

Employee's failure to serve municipality with notice of claim under CLS Gen Mun §§ 50-e and 50-i did not bar his Title VII action, as requiring notice of claim would alter important rights created by Title VII. Tout v Erie Community College, 923 F. Supp. 13, 1995 U.S. Dist. LEXIS 20796 (W.D.N.Y. 1995).

In federal court civil rights action, filing of notice of claim with town was prerequisite to plaintiff's maintenance of pendent state claims for violations of New York statutes governing treatment of juveniles upon their arrest and detention, violations of town police department's own policies, and negligent infliction of emotional distress. Johns v Town of E. Hampton, 942 F. Supp. 99, 1996 U.S. Dist. LEXIS 15020 (E.D.N.Y. 1996).

In federal court civil rights action, filing of notice of claim with town was prerequisite to plaintiff's maintenance of pendent state claim for negligent infliction of emotional distress against town officials in their individual capacities. Johns v Town of E. Hampton, 942 F. Supp. 99, 1996 U.S. Dist. LEXIS 15020 (E.D.N.Y. 1996).

In an individual's pro se 42 U.S.C.S. § 1983 claim against a police chief and a police officer, the notice requirement of N.Y. Gen. Mun. Law § 50-e was inapplicable to the individual's 42 U.S.C.S. § 1983 claim, as the statute applied only to state law claims, and thus the court denied summary judgment to defendants on this ground. Ahern v Neve, 285 F. Supp. 2d 317, 2003 U.S. Dist. LEXIS 17692 (E.D.N.Y. 2003).

In a former inmate's federal civil rights suit against a former assistant district attorney (ADA), a city, its department of corrections commissioner, and other unnamed persons, alleging violation of his constitutional rights by his incarceration in a state penitentiary eight and one-half months longer than legally prescribed, where the inmate also separately asserted that the ADA and the city violated a state judiciary law based on these events, the inmate was unable to maintain the state law claim because he failed to file a notice of claim, as required by N.Y. Gen. Mun. Law § 50-e(1)(a), he never applied for an extension of the allowed claim-filing period, and there was no basis for tolling the claim-filing period. Peterson v Tomaselli, 469 F. Supp. 2d 146, 2007 U.S. Dist. LEXIS 3200 (S.D.N.Y. 2007).

67. Small claims actions

In small claims action, small claims summons may constitute functional equivalent of notice of claim under CLS Gen Mun § 50-e if information required by that section is included on small claims summons. Schneider v Town of Orangetown, 171 Misc. 2d 497, 655 N.Y.S.2d 720, 1997 N.Y. Misc. LEXIS 24 (N.Y. J. Ct. 1997), aff'd, 175 Misc. 2d 899, 673 N.Y.S.2d 281, 1998 N.Y. Misc. LEXIS 140 (N.Y. App. Term 1998).

Small claims action seeking damages against Triborough Bridge and Tunnel Authority for "harassment" was properly dismissed for plaintiff's failure to file timely notice of claim or move for leave to serve late notice under CLS Gen Mun § 50-e; mandatory provisions of statute could not be dispensed with merely because plaintiff chose to pursue his action in Small Claims Part of Civil Court. Ragosto v Triborough Bridge & Tunnel Auth., 173 Misc. 2d 560, 663 N.Y.S.2d 462, 1997 N.Y. Misc. LEXIS 454 (N.Y. App. Term 1997).

Small claims action against municipality, seeking reimbursement for cost of replacing sewer line leading from main line, running under town road, to curb outside of plaintiffs' house, was based on theory of unjust enrichment, and thus General Municipal Law notice of claim requirements did not apply. Schneider v Town of Orangetown, 175 Misc. 2d 899, 673 N.Y.S.2d 281, 1998 N.Y. Misc. LEXIS 140 (N.Y. App. Term 1998).

68. Miscellaneous actions

Although a complaint alleges causes of action in fraud and negligence, where it is patently obvious that the basic claim, as supported by the facts pleaded, is one sounding in indemnification, the notice of claim provisions do not apply. Accredited Demolition Constr. Corp. v Yonkers, 37 A.D.2d 708, 324 N.Y.S.2d 377, 1971 N.Y. App. Div. LEXIS 3537 (N.Y. App. Div. 2d Dep't 1971).

Cause of action against town based on allegation that town has been derelict in duty to properly assess fire district tax is subject to notice of claim requirements and statute of limitations applicable to torts. Stanford Heights Fire Dist. v Niskayuna, 120 A.D.2d 878, 502 N.Y.S.2d 548, 1986 N.Y. App. Div. LEXIS 56975 (N.Y. App. Div. 3d Dep't 1986).

In action by landowners to challenge town's issuance of permits for moorings along bulkhead at boat launching ramp on pond, causes of action which sounded in trespass would be dismissed since no notice of claim was timely filed as required by CLS Gen Mun § 50-e. Clempner v Southold, 154 A.D.2d 421, 546 N.Y.S.2d 101, 1989 N.Y. App. Div. LEXIS 12515 (N.Y. App. Div. 2d Dep't 1989).

Action brought under CLS Exec § 296 is not tort claim; thus, such action is not subject to notice of claim provisions of CLS Educ § 3813(2) or CLS Gen Mun § 50-e. Lane-Weber v Plainedge Union Free Sch. Dist., 213 A.D.2d 515, 624 N.Y.S.2d 185, 1995 N.Y. App. Div. LEXIS 2912 (N.Y. App. Div. 2d Dep't 1995), app. dismissed, 87 N.Y.2d 968, 642 N.Y.S.2d 196, 664 N.E.2d 1259, 1996 N.Y. LEXIS 144 (N.Y. 1996).

Claim that defendant "Brooklyn District Attorney" engaged in continuous campaign of "harassment" of plaintiff and her son after she resigned as defendant's employee was barred by her failure to file notice of claim before commencing action where notice of claim that she filed after commencing action was without leave of court and without inclusion of information required by CLS Gen Mun § 50-e(2). Drakeford v Brooklyn DA, 266 A.D.2d 134, 700 N.Y.S.2d 1, 1999 N.Y. App. Div. LEXIS 12337 (N.Y. App. Div. 1st Dep't 1999), app. dismissed, 95 N.Y.2d 877, 715 N.Y.S.2d 212, 738 N.E.2d 359, 2000 N.Y. LEXIS 2310 (N.Y. 2000).

Notice of claim under CLS Gen Mun § 50-e was required in action based on town industrial development agency's alleged failure to properly discharge its duty under CLS Gen Mun §§ 856(2), 858(16), and 874(1). Mutuel Ticket Agents, Local 23293 v Roosevelt Raceway Assoc., 172 A.D.2d 595, 568 N.Y.S.2d 420, 1991 N.Y. App. Div. LEXIS 4649 (N.Y. App. Div. 2d Dep't 1991).

Because a housing authority's duty to maintain the security of a building did not extend to an abducted child regardless of whether the ultimate harm was reasonably foreseeable, and because the child and the child's father did not demonstrate, inter alia, a reasonable excuse for the delay or that the authority would not be prejudiced thereby, they were not entitled to leave to serve and file a late notice of claim under N.Y. Gen. Mun. Law § 50-e(5). Matter of Brown v New York City Hous. Auth., 39 A.D.3d 744, 834 N.Y.S.2d 279, 2007 N.Y. App. Div. LEXIS 4740 (N.Y. App. Div. 2d Dep't 2007).

Dismissal of a building owner's claims against a city for, inter alia, tortious interference of a lease for the building was proper because the owner did not file a notice of claim or request permission to file a late notice of claim, the claim sounded in tort, the claim was thus subject to the notice requirement, and the lack of notice was fatal to this claim; the owner's cause of action against the city for diminution in property value, to the extent it was even cognizable, clearly sounded in tort, as it alleged a breach of a duty of care, and thus the lack of a notice of claim was fatal to this claim as well. Montano v City of Watervliet, 47 A.D.3d 1106, 850 N.Y.S.2d 273, 2008 N.Y. App. Div. LEXIS 279 (N.Y. App. Div. 3d Dep't 2008).

Town was entitled to summary judgment on a resident's negligent supervision claim because, while the town employee had a duty to exercise reasonable care in the operation of a municipal dump truck and was aware of the resident's presence during the wood chip unloading process, the resident's intervening action in slamming the tailgate to loosen the clogged chips was the sole proximate cause of his injuries. Barone v Town of New Scotland, 145 A.D.3d 1416, 44 N.Y.S.3d 267, 2016 N.Y. App. Div. LEXIS 8776 (N.Y. App. Div. 3d Dep't 2016).

Trial court properly dismissed the purchasers' action to recover monetary damages for violations of the General Business Law as a claim sounding in tort that was subject to the requirements of the General Municipal Law, as a cause of action sounding in fraud. Singh v City of New York, 2020 N.Y. App. Div. LEXIS 8279 (N.Y. App. Div. 2d Dep't 2020).

A motion to dismiss a complaint made before submission of a case to the jury upon the ground that there was a failure to comply with § 244 of the Second Class Cities Law was not sufficient to entitle city to dismissal of complaint upon the grounds that plaintiffs had not complied with this section. Mink v Albany, 121 N.Y.S.2d 164, 203 Misc. 94, 1952 N.Y. Misc. LEXIS 2288 (N.Y. Sup. Ct. 1952).

A cause of action for regaining possession of property seized in a gambling raid is essentially one in tort, and, where it is against a county or other municipality, requires service of notice of claim as prescribed in this section. Kamienska v County of Westchester, 39 Misc. 2d 750, 241 N.Y.S.2d 814, 1963 N.Y. Misc. LEXIS 1918 (N.Y. County Ct. 1963).

N.Y. Pub. Health Law art. 27-F was enacted to protect a vulnerable class of individuals and in this regard, is dissimilar to

a standard personal injury action to which CLS Uncons Laws of New York § 7401 and N.Y. Gen. Mun. Law § 50-e apply. Thus, the requirement of the Unconsolidated Laws for service of a notice of claim within a shortened statute of limitations does not apply to an action under art. 27-5. Doe v Belmare, 920 N.Y.S.2d 623, 31 Misc. 3d 904, 245 N.Y.L.J. 76, 2011 N.Y. Misc. LEXIS 1570 (N.Y. Sup. Ct. 2011).

Because the notice requirement under N.Y. Gen. Mun. Law § 50-e did not accrue until a brother's painful realization that the decedent's body had been mutilated during embalming practice by students and buried in a mass grave of unclaimed bodies, the brother was entitled to damages for loss of sepulcher. Melfi v Mount Sinai Hosp., 64 A.D.3d 26, 877 N.Y.S.2d 300, 2009 N.Y. App. Div. LEXIS 3294 (N.Y. App. Div. 1st Dep't 2009).

Detainee's notice of claim sufficiently advised a City, a police lieutenant and a detective (defendants) that a claim for civil assault was being asserted as it alleged that defendants placed the detainee in apprehension of imminent harm or offensive conduct by pointing guns at her, handcuffing her, threatening to take her outside in public half naked and threatening to arrest her. Scott v City of New Rochelle, 986 N.Y.S.2d 819, 44 Misc. 3d 366, 2014 N.Y. Misc. LEXIS 2279 (N.Y. Sup. Ct. 2014).

Claim for damages for injuries allegedly suffered as result of vaccination is barred as to city defendant where no notice was served under General Municipal Law § 50-e(1)(a). Gomez v Maimonides Hospital, 580 F. Supp. 1447, 1984 U.S. Dist. LEXIS 19137 (E.D.N.Y. 1984).

Gender discrimination claim against city and its Health and Hospitals Corporation under CLS Exec § 296 was not barred by plaintiff's failure to file notice of claim under CLS Gen Mun § 50-e and CLS Unconsol Ch 214-A § 20, since New York courts do not regard claims under § 296 as tort claims. Dortz v City of New York, 904 F. Supp. 127, 1995 U.S. Dist. LEXIS 15668 (S.D.N.Y. 1995).

Plaintiff's state law civil rights claims against the county were dismissed because plaintiff did not comply with the notice requirements of N.Y. Gen. Mun. Law 50-e. McLaurin v New Rochelle Police Officers, 368 F. Supp. 2d 289, 2005 U.S. Dist. LEXIS 8982 (S.D.N.Y. 2005).

Inmate's motion for leave to amend was denied because amendment would be futile when there was insufficient evidence to support a finding that the inmate complied with the notice of claim requirements before filing his state law claims against the county and the county officials, pursuant to N.Y. Gen. Mun. Law §§ 50-d, 50-e, and 50-i, and as required by N.Y. County Law § 52. Although there were provisions under N.Y. Mun. Law § 50-e for addressing a late notice of claim, such a late claim needed to be addressed by a state court and not by the federal district court if the inmate wanted to pursue state law claims against the county and the county officials. Horvath v Daniel, 423 F. Supp. 2d 421, 2006 U.S. Dist. LEXIS 18439 (S.D.N.Y. 2006).

Arrestee's claims against the detectives alleging false arrest and ordinary acts of negligence fell into the category of claims involving conduct by the detectives that occurred while they were acting within the scope of their public employment and discharging official duties, and not in violation of any rule, therefore a notice of claim was required as the city had a statutory obligation to indemnify the detectives even if the action was brought against them but not against the city; but the claims asserting more extreme intentional misconduct, such as use of excessive force and intentional infliction of emotional distress, did not require a notice of claim. Brenner v Heavener, 492 F. Supp. 2d 399, 2007 U.S. Dist. LEXIS 45831 (S.D.N.Y. 2007).

Because trespass was an intentional tort under New York law, an arrestee's trespass claims against several police officers, by definition, constituted "intentional wrongdoing" that did not qualify for indemnification under N.Y. Gen. Mun. Law § 50-k(3), and thus, the notice of claim requirement of N.Y. Gen. Mun. Law § 50-e(1)(b) did not apply. Vesterhalt v City of New York, 667 F. Supp. 2d 292, 2009 U.S. Dist. LEXIS 99327 (S.D.N.Y. 2009).

IV. Time Limitations For Filing Notice

69. In general

This section requires that a notice of claim must be filed within 90 days after the claim arises, and that failure to file such a notice operates to bar any action against the public officer or body. Barchet v New York City Transit Authority, 20 N.Y.2d 1, 281 N.Y.S.2d 289, 228 N.E.2d 361, 1967 N.Y. LEXIS 1446 (N.Y. 1967).

Failure of claimant to file a notice of claim under this section within the time limit as revealed by claimant's pleadings will render his complaint subject to dismissal for failure to state a cause of action. Colehamer v Troy, 273 A.D. 1048, 78 N.Y.S.2d 686, 1948 N.Y. App. Div. LEXIS 5897 (N.Y. App. Div. 1948).

Under the above statute a notice of claim which is not in compliance with the substantive requirements of subd 2 thereof or is not served within the period of time prescribed by subd 1, is fatally defective. Schildhaus v New York, 23 A.D.2d 409, 261 N.Y.S.2d 909, 1965 N.Y. App. Div. LEXIS 3626 (N.Y. App. Div. 1st Dep't 1965), aff'd, 17 N.Y.2d 853, 271 N.Y.S.2d 286, 218 N.E.2d 325, 1966 N.Y. LEXIS 1344 (N.Y. 1966).

In a negligence action to recover damages for personal injuries, Special Term properly denied leave to serve a late notice of claim, where plaintiffs failed to establish adequate grounds on which to invoke the doctrine of equitable estoppel, there being no unusual or exceptional factual situation in the instant case, and where the infancy of one of the plaintiffs did not toll the time bar in that the prior wording of the statute imposed an unbending time bar. Soloff v Board of Education, 90 A.D.2d 829, 455 N.Y.S.2d 832, 1982 N.Y. App. Div. LEXIS 19077 (N.Y. App. Div. 2d Dep't 1982).

A personal injury action against a transit system operated by a county would be dismissed for failure to file a notice of claim in accord with Gen Mun Law § 50-e, even though the failure to file a proper notice occurred before a Court of Appeals case holding that a notice of claim was a condition precedent to suit against a transit system operated by a county, where absent a sharp break in the web of the law, all cases on direct appeal must be decided in accordance with any principles newly enunciated by the Court of Appeals, where the transit system case decided by the Court of Appeals did not represent such a sharp break with the past, in that it overruled no prior Court of Appeals precedents and merely presented that court with its first opportunity to construe the applicable statutory provisions. James v Liberty Lines, 97 A.D.2d 749, 468 N.Y.S.2d 380, 1983 N.Y. App. Div. LEXIS 20491 (N.Y. App. Div. 2d Dep't 1983).

Trial court erred in denying the school construction authority's motion to dismiss the injured party's complaint and granting the injured party's application to have his previously-served notice of claimed deemed timely served nunc pro tunc, as the injured party did not file that application until more than three months after the one-year statute of limitations had run on filing his personal injury complaint. Since the application was not filed within the statute of limitations period for filing the claim itself, the trial court did not have the discretion to permit the filing of the application, but, instead, should have granted the school construction authority's motion to dismiss. Hall v City of New York, 1 A.D.3d 254, 768 N.Y.S.2d 2, 2003 N.Y. App. Div. LEXIS 12175 (N.Y. App. Div. 1st Dep't 2003).

A court will generally consider three factors in determining whether to grant leave to serve a late notice of claim: (1) whether the movant demonstrated a reasonable excuse for the delay, (2) whether the public corporation acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter, and (3) whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits. In a personal injury action against a city, denial of a motion to file a late notice of claim was proper because : (1) the movant failed to offer a reasonable excuse for his failure to timely serve a notice of claim; (2) while certain forms in the city's possession contained information as to how the movant was injured, those forms did not suggest any connection between the happening of the accident and any alleged negligence by the city, so there was not actual notice of the movant's claim within the proper time period; and (3) the 15-month delay between the date of the accident and the date the movant sought to serve a notice of claim would prejudice the city's ability to defend against the action. Pappalardo v City of New York, 2 A.D.3d 699, 768 N.Y.S.2d 660, 2003 N.Y. App. Div. LEXIS 13815 (N.Y. App. Div. 2d Dep't 2003).

Injured person's claim against transit authorities, based on a fall which allegedly occurred while she was stepping to meet a bus, was precluded where the theory of liability against the transit authorities was not asserted in the original notice of claim or other filings; the alternative means for asserting the injured person's theory of liability, a late notice of claim, was of no avail since it was not asserted until 17 months after the accident, exceeding the one year and 90 days limitations period for a late notice, and, furthermore, the N.Y. Gen. Mun. Law § 50-e(6) notice of claim amendment provision did not permit substantive changes in the theory of liability. Mahase v Manhattan & Bronx Surface Transit Operating Auth., 3 A.D.3d 410, 771 N.Y.S.2d 99, 2004 N.Y. App. Div. LEXIS 401 (N.Y. App. Div. 1st Dep't 2004).

Property owner's N.Y. Gen. Mun. Law § 50-e(5) application to serve a late notice of claim was granted, as the City of New York, Department of Environmental Protection, had timely actual knowledge of the incident due to the owner's call reporting it, and the City was not prejudiced by the delay, as it had access to documents relating to the incident, including reports of the owner's complaints and records made by City employees involved in inspecting and cleaning the sewers. Matter of LFL Gallery, Inc. v City of N.Y. Dept. of Envtl. Protection, 812 N.Y.S.2d 820, 11 Misc. 3d 519, 2006 N.Y. Misc. LEXIS 112 (N.Y. Sup. Ct. 2006).

Fact that the property owner waited more than 10 months after the incident to file an application for leave to serve a late notice of claim was not fatal to the application where the City of New York, Department of Environmental Protection, was not prejudiced and where the City had timely actual notice of the incident. Matter of LFL Gallery, Inc. v City of N.Y. Dept. of Envtl. Protection, 812 N.Y.S.2d 820, 11 Misc. 3d 519, 2006 N.Y. Misc. LEXIS 112 (N.Y. Sup. Ct. 2006).

Although court may extend time to serve notice of claim on municipality under CLS Gen Mun L § 50-e(5), despite notice of claim requirement being express condition precedent to commencement of action, court may not grant leave to file late notice on those claims where applicable statute of limitations has expired. Piesco v New York, 693 F. Supp. 86, 1988 U.S. Dist. LEXIS 9962 (S.D.N.Y. 1988).

Plaintiff's pendent state law tort claims, brought as part of plaintiff's action under 42 U.S.C.S. § 1983, were dismissed when plaintiff did not follow the procedure for filing a notice of the claim prior to commencement of the action as required under N.Y. Gen. Mun. Law § 50-i(1), and waiver of the time for presentment requirement would be futile when the limitations period had already expired under N.Y. Gen. Mun. Law § 50-e. Warner v Goshen Police Dep't, 256 F. Supp. 2d 171, 2003 U.S. Dist. LEXIS 6368 (S.D.N.Y. 2003).

70. Amendment increasing filing period as retroactive

Under the 60-day limitation in this section prior to 1950 amendment, effective September 1, 1950, which increased the filing period to 90 days, a claim filed April 15, 1950, for an injury received on January 12, 1950, must be denied. Donovan v Board of Education, 102 N.Y.S.2d 47, 198 Misc. 330, 1950 N.Y. Misc. LEXIS 2374 (N.Y. Sup. Ct.), aff'd, 277 A.D. 904, 98 N.Y.S.2d 580, 1950 N.Y. App. Div. LEXIS 3796 (N.Y. App. Div. 1950).

Where injuries were sustained four days prior to the 1950 amendment extending the time to 90 days, the 90 day period was applicable to such claim. Iannotta v New York, 105 N.Y.S.2d 442, 1951 N.Y. Misc. LEXIS 1925 (N.Y. Mun. Ct. 1951).

71. Relationship to other statutes

Notice of claim requirements under N.Y. Gen. Mun. Law §§ 50-e and 50-i, were held inapplicable to claims pursuant to 42 USCS § 1983; thus, a plaintiff's failure to file a notice of claim did not require dismissal. Mompoint v City of New York, 299 A.D.2d 527, 751 N.Y.S.2d 38, 2002 N.Y. App. Div. LEXIS 11476 (N.Y. App. Div. 2d Dep't 2002).

Trial court erred in granting a petition filed by a mother and her child (the petitioners) for leave to serve a late notice of claim because they failed to show that the school district had actual knowledge of the essential facts constituting their claim within 90 days after the incident or a reasonable time thereafter where a medical claim form, which merely indicated that the child was injured when another student collided into her during recess, did not provide the district with actual knowledge of their claim, the petitioners did not demonstrate a reasonable excuse for their failure to serve a timely notice of claim, their delay in filing the petition, or that the district was not substantially prejudiced by their delay. Matter of A.C. v West Babylon Union Free School Dist., 147 A.D.3d 1047, 48 N.Y.S.3d 422, 2017 N.Y. App. Div. LEXIS 1339 (N.Y. App. Div. 2d Dep't 2017).

CPLR 205 (subd [a]), which provides, if an action is timely commenced and is terminated in a manner other than by a voluntary discontinuance or a dismissal of the complaint for neglect to prosecute or a final judgment on the merits, a new action may be commenced within six months, applies only to time limitations and does not apply to section 50-e of the General Municipal Law, which requires the filing of a notice of tort claim against a municipality within 90 days after the claim arises; the 90-day notice of claim is a mandatory condition precedent. Accordingly, plaintiff having failed to serve a notice of claim upon the defendant city within 90 days, a motion by defendant to dismiss the complaint is granted. Glamm v Amsterdam, 94 Misc. 2d 991, 405 N.Y.S.2d 993, 1978 N.Y. Misc. LEXIS 2333 (N.Y. Sup. Ct. 1978), aff'd, 67 A.D.2d 1056, 413 N.Y.S.2d 512, 1979 N.Y. App. Div. LEXIS 10871 (N.Y. App. Div. 3d Dep't 1979).

Action against Facilities Development Corporation are governed by General Municipal Law § 50-e, as corporation is public benefit corporation included within term "public corporation" as defined in General construction Law § 66; late filing provisions of § 50-e are applicable to action against corporation, despite absence of complementary provision in corporation's incorporating act (CLS Unconsolidated Laws, Chapter 214). Kroupa v Facilities Dev. Corp., 128 Misc. 2d 904, 491 N.Y.S.2d 908, 1985 N.Y. Misc. LEXIS 3022 (N.Y. Sup. Ct. 1985).

72. Computation of time; excludable time

In an action against the county based on a collision with one of its vehicles, the county's motion for summary judgment dismissing the action as time-barred was properly granted where plaintiff failed to commence her action by service of a summons with notice either before or at the same time she applied for leave to serve a late notice of claim, and where the period of time during which her motion for leave to serve a late notice of claim was pending did not constitute a judicial stay for purposes of tolling the statute of limitations inasmuch as plaintiff was authorized by statute, Gen Mun Law § 50-e(7)(b), to commence her action before applying for judicial permission to file a late notice. Corey v County of Rensselaer, 88 A.D.2d 1104, 453 N.Y.S.2d 65, 1982 N.Y. App. Div. LEXIS 17518 (N.Y. App. Div. 3d Dep't), app. denied, 57 N.Y.2d 602, 1982 N.Y. LEXIS 7088 (N.Y. 1982).

In a personal injury action against a city transit authority, the trial court improperly granted plaintiff's motion to strike the authority's affirmative defense of failure to file a timely notice of claim, even though the period to file a notice of claim expired on February 14, Lincoln's birthday, and the claim was filed the next day, and even though Gen Const Law § 75-a authorizes the doing of an act on a day following a public holiday, where according to Gen Const Law § 24 February 12, not February 14, was Lincoln's birthday and the mere fact that Lincoln's birthday may have been celebrated for certain purposes by the city and state courts and agencies on February 14 did not make that day a public holiday. O'Leary v New York City Transit Authority, 97 A.D.2d 789, 468 N.Y.S.2d 531, 1983 N.Y. App. Div. LEXIS 20544 (N.Y. App. Div. 2d Dep't 1983), aff'd, 64 N.Y.2d 813, 486 N.Y.S.2d 937, 476 N.E.2d 336, 1985 N.Y. LEXIS 14239 (N.Y. 1985).

In a wrongful death action against a county arising from circumstances indicating that plaintiff's decedent, while a prisoner in the custody of the county, was hospitalized on August 22, 1979, and from that date until his death on December 25, 1979, decedent was continuously in a coma, and a notice of claim was filed on March 25, 1980 but no application for leave to file a late notice of claim was made until November 18, 1982, an order granting the decedent's administrator's application for leave to file a late notice of claim was erroneous since, giving plaintiff the benefit of tolling of the statute of limitations, under CPLR § 208, during the entire period that he was in a coma, the application was not made until approximately 35 months after the disability ceased and after the expiration of the maximum period permitted

by Gen Mun Law §§ 50-e, 50-i. Donovan v County of Niagara, 100 A.D.2d 740, 473 N.Y.S.2d 635, 1984 N.Y. App. Div. LEXIS 17744 (N.Y. App. Div. 4th Dep't 1984), aff'd, 64 N.Y.2d 973, 489 N.Y.S.2d 61, 478 N.E.2d 202, 1985 N.Y. LEXIS 16673 (N.Y. 1985).

Court erred as matter of law in determining that injured plaintiff had until 90 days following his 18th birthday to timely file notice of claim under CLS Gen Mun § 50-e without court permission; 90-day notice of claim filing period is not tolled, and only time in which to apply for permission to serve late notice of claim is tolled. Purdy v Afton Cent. Sch. Dist., 202 A.D.2d 776, 608 N.Y.S.2d 748, 1994 N.Y. App. Div. LEXIS 2292 (N.Y. App. Div. 3d Dep't 1994).

Because a mother commenced a proceeding against a hospital on behalf of her child approximately nine years and one month after the claim accrued, the time period in N.Y. Gen. Mun. Law § 50-3 was tolled by the child's infancy; therefore, the trial court erred in denying the mother's petition for leave to serve a late notice of claim. Matter of Tapia v New York City Health & Hosps. Corp., 27 A.D.3d 655, 811 N.Y.S.2d 768, 2006 N.Y. App. Div. LEXIS 3521 (N.Y. App. Div. 2d Dep't), app. denied, 7 N.Y.3d 714, 824 N.Y.S.2d 607, 857 N.E.2d 1138, 2006 N.Y. LEXIS 3334 (N.Y. 2006).

In view of the provisions of §§ 20 and 25-a of the General Construction Law, where the injury on which a claim against a municipality is based occurs on July 22, 1961, that date is excluded and the statutory one-year period begins to run on the following day, and if the end of the period then falls on a Sunday, notice is timely if served on the next succeeding business day. Aposporos v Poughkeepsie, 37 Misc. 2d 56, 232 N.Y.S.2d 700, 1962 N.Y. Misc. LEXIS 2488 (N.Y. Sup. Ct. 1962).

Since plaintiff's accident occurred on November 8, 1963, the one-year statute of limitations prescribed by General Municipal Laws § 50-e(5) began to run on November 9, 1963, and would normally expire on November 8, 1964, but where that day fell on a Sunday, the period expired on the following day, November 9, 1964. Conway v Board of Education, 47 Misc. 2d 172, 262 N.Y.S.2d 15, 1965 N.Y. Misc. LEXIS 1633 (N.Y. County Ct. 1965).

Even though attorney-client privilege did not protect a medical malpractice plaintiff's attorney's observations of the plaintiff's general demeanor during the period when the statute of limitations for presenting claims against a government defendant was arguably being tolled because of the plaintiff's mental incompetance, a protective order was issued on public policy grounds because the same information affecting the tolling of the claim period could have been obtained in ways that would not have so intruded into the attorney-client relationship and would not have exposed the attorneys to a subsequent motion to disqualify them from representing a client they had been representing for several years. Giannicos v Bellevue Hosp. Med. Ctr., 793 N.Y.S.2d 893, 7 Misc. 3d 403, 233 N.Y.L.J. 28, 2005 N.Y. Misc. LEXIS 154 (N.Y. Sup. Ct. 2005).

73. Timeliness of notice

An action against a municipality based on trespass would be barred by reason of plaintiffs' failure to timely serve a notice of claim as required by Gen Mun Law § 50-e(1), the city having received no indication as to when, where, or how the claim stemming from the alleged trespassory acts arose so that it had no opportunity to investigate. O'Brien v Syracuse, 54 N.Y.2d 353, 445 N.Y.S.2d 687, 429 N.E.2d 1158, 1981 N.Y. LEXIS 3161 (N.Y. 1981).

Motion to extend time for filing notice of claim against municipality denied where the claim was filed one day after the expiration of the 90-day period and motion to validate was not made until nine months thereafter. Since petitioner was not incapacitated during the entire 90-day period, fact that representatives of defendants had advised her not to retain an attorney and had taken her written statement did not excuse noncompliance. Application of Kreuzer, 282 A.D. 881, 124 N.Y.S.2d 752, 1953 N.Y. App. Div. LEXIS 5318 (N.Y. App. Div. 1953).

New York City Transit Authority (NYCTA) was entitled to summary judgment dismissing negligence action for plaintiffs' failure to serve notices of claim within 90-day period required by CLS Gen Mun § 50-e, even though notices had been served on Metropolitan Transit Authority (MTA) within statutory period, since MTA was not proper recipient of service for NYCTA, and notices forwarded by MTA were not received by NYCTA until after expiration of 90-day period; while municipal corporation may, by its conduct, waive irregularity in notice of claim, requirements as to manner and time of service may not be so waived. Adams v New York City Transit Authority, 140 A.D.2d 572, 528 N.Y.S.2d 638, 1988 N.Y. App. Div. LEXIS 5631 (N.Y. App. Div. 2d Dep't 1988).

Court should have dismissed action for false arrest and imprisonment where notice of claim was served on city on April 12, 1991, but plaintiff had been released sometime in July 1988. Bennett v City of New York, 204 A.D.2d 587, 612 N.Y.S.2d 201, 1994 N.Y. App. Div. LEXIS 5529 (N.Y. App. Div. 2d Dep't 1994).

Plaintiff's service of notice of claim against city was untimely where event on which claim was based was city's alleged negligent failure to supervise installation of sewer line by town in 1988. Scarzfava v City of Newburgh, 255 A.D.2d 436, 680 N.Y.S.2d 595, 1998 N.Y. App. Div. LEXIS 11994 (N.Y. App. Div. 2d Dep't 1998).

Policy considerations involved in tolling an infant's lawsuit (otherwise barred by the statute of limitations) are quite different from those requiring prompt notice of the infant's claim against a city. Harris v City of New York, 297 A.D.2d 473, 747 N.Y.S.2d 4, 2002 N.Y. App. Div. LEXIS 8193 (N.Y. App. Div. 1st Dep't), app. denied, 99 N.Y.2d 503, 753 N.Y.S.2d 806, 783 N.E.2d 896, 2002 N.Y. LEXIS 3747 (N.Y. 2002).

Property owners' continuing trespass and nuisance claims against a town for allegedly damaging their property by piling plowed snow against the wall of their building were untimely; all the evidence indicated that the owners neglected the building for years, and only noticed the water damage when they tried to sell it. Alamio v Town of Rockland, 302 A.D.2d 842, 755 N.Y.S.2d 754, 2003 N.Y. App. Div. LEXIS 1738 (N.Y. App. Div. 3d Dep't 2003).

Action seeking money damages allegedly caused by the failure of the city to discharge a duty imposed upon it by law, specifically to provide a wage differential, sounded in tort; therefore, where the decedent failed to serve his claim upon the city within 90 days after the claim arose, pursuant to N.Y. Gen. Mun. Law § 50-e, or within the statute of limitations period of one year and 90 days, pursuant to N.Y. Gen. Mun. Law §§ 50-e and 50-i, the action was dismissed. Estate of Kalis v City of Buffalo, 306 A.D.2d 932, 762 N.Y.S.2d 195, 2003 N.Y. App. Div. LEXIS 6774 (N.Y. App. Div. 4th Dep't), app. denied, 100 N.Y.2d 515, 769 N.Y.S.2d 202, 801 N.E.2d 423, 2003 N.Y. LEXIS 3375 (N.Y. 2003).

Because an insurer's notice of claim merely sought to recover some of the damages flowing from the same incident as that described by its insured in a prior notice of claim, pursuant to N.Y. Gen. Mun. Law § 50-e, the insurer was entitled to rely on the timeliness of the insured's notice of claim. Hartford Ins. Co. v City of New York, 29 A.D.3d 519, 814 N.Y.S.2d 266, 2006 N.Y. App. Div. LEXIS 5931 (N.Y. App. Div. 2d Dep't 2006).

Trial court properly granted municipal defendants' motion to dismiss wrongful death and conscious pain and suffering claims by plaintiff, as plaintiff failed to timely serve a notice of claim on defendants with respect to the injuries in question as required by N.Y. Gen. Mun. Law § 50-e, and failed to commence an action with regard to the injuries within the requisite limitations period, N.Y. Gen. Mun. Law § 50-i. Braun v County of Orange, 31 A.D.3d 593, 819 N.Y.S.2d 296, 2006 N.Y. App. Div. LEXIS 9387 (N.Y. App. Div. 2d Dep't 2006).

Alleged injured party timely commenced a special proceeding against a city within the one year and 90-day statute of limitations in N.Y. Gen. Mun. Law §§ 50-e(5) and 50-i(1) when he filed an unsigned order to show cause, his attorney's affirmation and a verified proposed notice of claim because the affirmation and proposed notice were properly viewed as the petition (N.Y. C.P.L.R. 402) required to commence a special proceeding (N.Y. C.P.L.R. 304), and, having timely commenced the special proceeding, that proceeding could not be deemed a nullity despite his failure to serve the order to show cause within the time prescribed by the trial court, as any defect in service of the order merely raised an issue regarding whether the trial court had personal jurisdiction over the city. Matter of Jordan v City of New

York, 38 A.D.3d 336, 833 N.Y.S.2d 8, 2007 N.Y. App. Div. LEXIS 3638 (N.Y. App. Div. 1st Dep't 2007).

Husband's second notice of claim filed pursuant to N.Y. Gen. Mun. Law § 50-e against a city housing authority 17 days after the statutory 90-day time period expired was not untimely because the second notice merely amended a timely initial notice; the theory of liability, negligence, did not change; and the authority was not prejudiced as it had not begun an investigation. Goodwin v New York City Hous. Auth., 42 A.D.3d 63, 834 N.Y.S.2d 181, 2007 N.Y. App. Div. LEXIS 5406 (N.Y. App. Div. 1st Dep't 2007).

Motion court erred in denying a plaintiff's cross-motion to amend his notice of claim and should have exercised its discretion to treat the cross-motion as having been made under the General Municipal Law because, given the housing authority's actual knowledge of the facts constituting the claim within a reasonable time after the accident and the lack of evidence of an attempt to conduct an investigation either before or after it obtained knowledge of the issue concerning the handrail at issue, the authority's conclusory assertions of prejudice, based solely on the delay in serving the notice of claim, were insufficient. Thomas v New York City Hous. Auth., 132 A.D.3d 432, 17 N.Y.S.3d 130, 2015 N.Y. App. Div. LEXIS 7274 (N.Y. App. Div. 1st Dep't 2015).

Since the applicant never filed a notice of claim upon the the county, the civil service commission, or the police department within 90 days of the date his claims arose as required by N.Y. Gen. Mun. Law § 50-e, and the time to do so had expired, the applicant's state law claims had to be dismissed unless his action was brought to vindicate a public interest or he had been granted leave to serve a late notice of claim. Moreover, since the applicant sought the enforcement of his private interests, the public interest exception to the notice of claim requirement was inapplicable. Feldman v Nassau County, 349 F. Supp. 2d 528, 2004 U.S. Dist. LEXIS 25054 (E.D.N.Y. 2004), aff'd, 434 F.3d 177, 2006 U.S. App. LEXIS 453 (2d Cir. N.Y. 2006).

74. —Excuse for failure to file

Although a causal nexus between infancy and late filing of a claim against a city need no longer be shown, neither infancy alone nor ignorance of the law provides a sufficient excuse for failure to file a timely notice of claim. Harris v City of New York, 297 A.D.2d 473, 747 N.Y.S.2d 4, 2002 N.Y. App. Div. LEXIS 8193 (N.Y. App. Div. 1st Dep't), app. denied, 99 N.Y.2d 503, 753 N.Y.S.2d 806, 783 N.E.2d 896, 2002 N.Y. LEXIS 3747 (N.Y. 2002).

While the lack of a reasonable excuse for a delay in filing a claim against a city is not of itself fatal to the claim, two other factors — some prior actual notice and the absence of prejudice — which would be relevant in condoning the lack of reasonable excuse, must also be shown. Harris v City of New York, 297 A.D.2d 473, 747 N.Y.S.2d 4, 2002 N.Y. App. Div. LEXIS 8193 (N.Y. App. Div. 1st Dep't), app. denied, 99 N.Y.2d 503, 753 N.Y.S.2d 806, 783 N.E.2d 896, 2002 N.Y. LEXIS 3747 (N.Y. 2002).

Motion court erred in granting an injured worker's motion to deem a late notice of claim timely filed, nunc pro tunc, because, inter alia, the worker boldly misrepresented his ability to travel into the city to meet with counsel after a hurricane and omitted the fact that he actually did travel into the city on numerous occasions prior to expiration of the time period for serving a notice of claim, the motion court erred in entertaining arguments advanced for the first time in the worker's reply papers and in accepting their offer of new proof. Matter of Gonzalez v City of New York, 127 A.D.3d 632, 8 N.Y.S.3d 290, 2015 N.Y. App. Div. LEXIS 3444 (N.Y. App. Div. 1st Dep't 2015).

Petitioner (P) was not entitled to serve a late notice of claim as: (1) respondent (R) did not have actual knowledge of the essential facts within 90 days after the claim accrued or a reasonable time thereafter as the incident report indicated that the vehicle was taken by unknown persons; (2) the attorney's affirmation and the proposed notice of claim executed by a total theft examiner stating that a police officer directed a towing company to tow the vehicle on March 16, 2014, were not based on personal knowledge or substantiated; (3) P failed to proffer a reasonable excuse for the failure to serve a timely notice of claim and the delay in filing the petition; and (4) P did not show that its delay did not substantially prejudice R. Matter of Government Empls. Ins. Co. v Suffolk County Police Dept., 152 A.D.3d 517, 58 N.Y.S.3d 514, 2017 N.Y. App. Div. LEXIS 5272 (N.Y. App. Div. 2d Dep't 2017).

Arrestee was not permitted to file a late notice of claim against a city because, inter alia, the involvement of the city's police officers in the alleged incident did not, without more, establish that the city had actual knowledge of the essential facts constituting the claims, and the arrestee failed to explain why he could not recall the date of the incident, why he waited nearly four months to consult and retain counsel, and why he did not commence the proceeding until April 2015. Matter of Fethallah v New York City Police Dept., 150 A.D.3d 998, 55 N.Y.S.3d 325, 2017 N.Y. App. Div. LEXIS 3881 (N.Y. App. Div. 2d Dep't 2017).

Estate administrator was not entitled to leave to serve a late notice in medical malpractice, wrongful death, and negligence claim against the town and its ambulance service because the failure to review the medical records and ascertain the claim in a timely manner was not an acceptable excuse for the failure to serve a timely notice of claim. Matter of Mangino v Town of Mamaroneck, 160 A.D.3d 864, 75 N.Y.S.3d 81, 2018 N.Y. App. Div. LEXIS 2578 (N.Y. App. Div. 2d Dep't 2018).

Trial court did not err in denying appellant's motion for leave to serve a late notice of claim on appellee city because 1)an officer's arresting him did not establish that the city had actual knowledge of the facts constituting appellant's claims of false arrest, false imprisonment, and malicious prosecution within 90 days following their accrual; 2) the contents of the arrest report and the certificate of disposition were insufficient to impute actual knowledge to the city of the facts underlying his claims; 3) he did not establish that the delay in serving the notice of claim would not prejudice the city in maintaining its defense; and 4) his assigned criminal lawyer's failure to advise him of the notice of claim requirement was not a reasonable excuse for his failure to serve a timely a notice of claim. Matter of Islam v City of New York, 164 A.D.3d 672, 83 N.Y.S.3d 272, 2018 N.Y. App. Div. LEXIS 5701 (N.Y. App. Div. 2d Dep't 2018).

Former psychiatric patient was not permitted to serve a late notice of claim, alleging the county was negligent in failing to provide him with a discharge plan and medications to continue his treatment, because the patient did not establish that his illness, treatment, and incapacitation prevented him from filing a timely notice; the patient submitted a one-page, heavily redacted hospital discharge summary, which was insufficient to establish a reasonable excuse for the delay. Matter of Charles v County of Orange, N.Y., 164 A.D.3d 1232, 83 N.Y.S.3d 660, 2018 N.Y. App. Div. LEXIS 6006 (N.Y. App. Div. 2d Dep't 2018).

Supreme Court improvidently exercised its discretion in granting an arrestee's petition for leave to serve a late notice of claim alleging state law claims because the arrestee's explanation that his did not advise him of the notice of claim requirement and that he did not learn of the requirement when he retained his new attorney did not constitute a reasonable excuse for his failure to timely serve the village with a notice of claim for the remaining state law claims. Matter of Nunez v Village of Rockville Ctr., 176 A.D.3d 1211, 111 N.Y.S.3d 71, 2019 N.Y. App. Div. LEXIS 7800 (N.Y. App. Div. 2d Dep't 2019).

75. —Late notice

The trial court properly granted summary judgment to a city dismissing an injured party's complaint, on the ground that the injured party failed to timely serve a notice of claim pursuant to N.Y. Gen. Mun. Law § 50-e, as the injured party conceded that his original notice of claim was served on the city four days late, and thus the late service of the original notice of claim was a nullity since it was made without leave of the court, and furthermore, since the injured party's motion for leave to serve a late notice of claim was made more than one year and 90 days after the accrual date of the claim, the trial court did not have the authority to grant the motion, N.Y. Gen. Mun. Law §§ 50-e(5), 50-i. Santiago v City of New York, 294 A.D.2d 483, 742 N.Y.S.2d 566, 2002 N.Y. App. Div. LEXIS 5184 (N.Y. App. Div. 2d Dep't 2002).

Transitory nature of a defective condition giving rise to a claim against a city does not preclude the accrual of prejudice to the city from the late filing of the claim, but, it is a factor to be considered, and even where a municipal defendant has received some form of

actual notice within the 90-day period within which a claim is to be filed, its claim of prejudice may be rebutted by the transitory nature of the condition, i.e., that timely notice of claim would make no difference, but where there is neither actual notice nor a reasonable excuse for the late filing, the transitory nature of the defective condition weighs against the granting of an application to file a late notice of claim. Harris v City of New York, 297 A.D.2d 473, 747 N.Y.S.2d 4, 2002 N.Y. App. Div. LEXIS 8193 (N.Y. App. Div. 1st Dep't), app. denied, 99 N.Y.2d 503, 753 N.Y.S.2d 806, 783 N.E.2d 896, 2002 N.Y. LEXIS 3747 (N.Y. 2002).

Plain language of N.Y. Gen. Mun. Law § 50-e(5) does not provide a basis for judicial "reasonableness" as a basis for relief from late filing of a notice of claim against a city, and the reasonableness referred to in the statute is linked to consideration of whether the defendant public corporation acquired actual notice within a reasonable time, wholly apart from the notice of claim. Harris v City of New York, 297 A.D.2d 473, 747 N.Y.S.2d 4, 2002 N.Y. App. Div. LEXIS 8193 (N.Y. App. Div. 1st Dep't), app. denied, 99 N.Y.2d 503, 753 N.Y.S.2d 806, 783 N.E.2d 896, 2002 N.Y. LEXIS 3747 (N.Y. 2002).

Where a party who sought leave to file notice of a claim against a city beyond the required 90-day period had neither a reasonable excuse for the late filing nor could he show that the city had prior actual notice of the claim or would not be prejudiced by the late filing, leave to file the claim was properly denied. Harris v City of New York, 297 A.D.2d 473, 747 N.Y.S.2d 4, 2002 N.Y. App. Div. LEXIS 8193 (N.Y. App. Div. 1st Dep't), app. denied, 99 N.Y.2d 503, 753 N.Y.S.2d 806, 783 N.E.2d 896, 2002 N.Y. LEXIS 3747 (N.Y. 2002).

Where the contractor filed an application, pursuant to N.Y. Gen. Mun. Law § 50-e(5) and N.Y. Educ. Law § 3813(2-a), for leave to file a late notice of claim in the contractor's breach of contract action against the owners of the school facilities, where the owners only made partial payment during the project and almost a year later terminated the contract, the application was properly granted, as the claim accrued only upon termination of the contract; that was when damages became certain and ascertainable. SBR Roofing, Inc. v Richfield Springs Cent. Sch. Dist., 303 A.D.2d 886, 757 N.Y.S.2d 129, 2003 N.Y. App. Div. LEXIS 2496 (N.Y. App. Div. 3d Dep't 2003).

Where the contractor filed an application, pursuant to N.Y. Gen. Mun. Law § 50-e(5) and N.Y. Educ. Law § 3813(2-a), for leave to file a late notice of claim in the contractor's breach of contract action against the owners of the school facilities, the application was properly granted; even if the contractor failed to give notice of claim within 90 days of its accrual, the owners made no showing of prejudice, and the owners were aware of the essential facts underlying the claim. SBR Roofing, Inc. v Richfield Springs Cent. Sch. Dist., 303 A.D.2d 886, 757 N.Y.S.2d 129, 2003 N.Y. App. Div. LEXIS 2496 (N.Y. App. Div. 3d Dep't 2003).

Where the contractor filed an application, pursuant to N.Y. Gen. Mun. Law § 50-e(5) and N.Y. Educ. Law § 3813(2-a), for leave to file a late notice of claim in the contractor's breach of contract action against the owners of the school facilities, the application was properly granted; the owners' argument that the claim should have been dismissed, because the contractor failed to submit the claim to the project architect failed, as termination of the contract ended the architect's responsibility to supervise the contractor's performance. SBR Roofing, Inc. v Richfield Springs Cent. Sch. Dist., 303 A.D.2d 886, 757 N.Y.S.2d 129, 2003 N.Y. App. Div. LEXIS 2496 (N.Y. App. Div. 3d Dep't 2003).

Where a mother did not keep scheduled appointments and continually relocated between Guyana and New York, there was no continuing treatment of a child; without a timely request for leave to file a late notice of claim in accordance with N.Y. Gen. Mun. Law § 50-e and N.Y. C.P.L.R. 208, the claim was barred by N.Y. C.P.L.R. 214-a and the trial court erred in denying the hospital's motion to dismiss. Sarjoo v N.Y. City Health & Hosps. Corp., 309 A.D.2d 34, 763 N.Y.S.2d 306, 2003 N.Y. App. Div. LEXIS 8748 (N.Y. App. Div. 1st Dep't 2003), app. denied, 1 N.Y.3d 506, 776 N.Y.S.2d 221, 808 N.E.2d 357, 2004 N.Y. LEXIS 29 (N.Y. 2004).

City hospital's records of a newly born child indicated that she had foot gangrene and had misadventure during her medical care so the city was on notice under N.Y. Gen. Mun. Law § 50-e(5) that it was subject to the child's claim even though the claim was filed four years after her discharge. The city was also not prejudiced by the child's motion, that she made four years after serving the late claim, for the late claim to be allowed since the city acknowledged that it had actually been served with the late claim. Caminero v N.Y. City Health & Hosps. Corp., 21 A.D.3d 330, 800 N.Y.S.2d 173, 2005 N.Y. App. Div. LEXIS 8800 (N.Y. App. Div. 1st Dep't 2005).

Motion court erred in deeming the brother's notice of claim an application for leave to file a late notice of claim nunc pro tunc, and granting such leave, pursuant to N.Y. Gen. Mun. Law § 50-e, because the brother failed to timely file a notice of claim and failed to make a proper application to deem the late notice of claim timely filed. In granting the brother's request, made improperly in his complaint, and not decided until five years after the cause of action accrued, the motion court was, in effect, extending the statute of limitations. Kellogg v Office of the Chief Med. Examiner of the City of New York, 24 A.D.3d 376, 806 N.Y.S.2d 528, 2005 N.Y. App. Div. LEXIS 14890 (N.Y. App. Div. 1st Dep't 2005).

In a proceeding pursuant to N.Y. Gen. Mun. Law § 50-e(5) for leave to serve a late notice of claim, the trial court providently exercised its discretion in denying the application; petitioner failed to submit evidence establishing that respondents had actual knowledge of the claim within 90 days of the incident or within a reasonable time thereafter. Petitioner also failed to present a reasonable excuse for the delay, and there was no nexus between the delay and petitioner's infancy. Matter of Martinez v W. Hempstead Sch. Dist., 24 A.D.3d 557, 808 N.Y.S.2d 299, 2005 N.Y. App. Div. LEXIS 14047 (N.Y. App. Div. 2d Dep't 2005).

Claimant failed to provide a reasonable excuse for the delay in serving his notice of claim as provided in N.Y. Gen. Mun. Law § 50-e(5). So, the lower court providently exercised its discretion to deny the petition for leave to serve a late notice of claim as to false arrest and false imprisonment. Matter of Rush v County of Nassau, 24 A.D.3d 560, 806 N.Y.S.2d 232, 2005 N.Y. App. Div. LEXIS 14142 (N.Y. App. Div. 2d Dep't 2005), app. dismissed, app. denied, 7 N.Y.3d 862, 824 N.Y.S.2d 601, 857 N.E.2d 1133, 2006 N.Y. LEXIS 3333 (N.Y. 2006).

Plaintiff infant was not entitled to an order deeming his late notice of a medical malpractice action against a city hospital timely served nunc pro tunc; nine years had elapsed since his alleged birth injuries, his mother waited five years after learning the infant had cognitive and motor skill disabilities before contacting an attorney to investigate a possible claim, that delay could not be attributed to the her son's infancy, and the delay prejudiced the hospital. Beretey v New York City Health & Hosps. Corp. (Elmhurst Hosp. Center), 56 A.D.3d 591, 868 N.Y.S.2d 232, 2008 N.Y. App. Div. LEXIS 8574 (N.Y. App. Div. 2d Dep't 2008), app. denied, 12 N.Y.3d 714, 883 N.Y.S.2d 797, 911 N.E.2d 860, 2009 N.Y. LEXIS 2466 (N.Y. 2009).

Plaintiff could not be granted leave to serve a late notice of claim against defendants, a school district and others, alleging, inter alia, breach of contract as the statute of limitations had run on the claim itself under Education Law § 3813(2-a) and General Municipal Law § 50-e(5); due to those circumstances, plaintiff was also properly denied leave to amend under CPLR 3025(b) as the proposed amendment would be palpably insufficient. Boakye-Yiadom v Roosevelt Union Free School Dist., 57 A.D.3d 929, 871 N.Y.S.2d 314, 2008 N.Y. App. Div. LEXIS 10216 (N.Y. App. Div. 2d Dep't 2008).

Leave for parents to file late notice of claim pursuant to N.Y. Gen. Mun. Law §§ 50-e, 50-i, was proper because, among other things, the parents' lack of awareness that the child had been injured was a reasonable excuse, and, further, the record indicated that the notice of claim may not have been untimely as to all the events alleged therein; in addition to casting doubt on the lateness of the notice of claim, the police report provided the school district with actual knowledge of at least some of the facts constituting the claim about two months after the most recent assault occurred and, thus, within a reasonable time after the claim arose. The school district alleged that the memories of the children involved were likely to have faded and that it had no

documents or records related to the alleged incidents, but this was not established as the school district had not interviewed the children. Mindy O. v Binghamton City School Dist., 83 A.D.3d 1335, 921 N.Y.S.2d 696, 2011 N.Y. App. Div. LEXIS 3098 (N.Y. App. Div. 3d Dep't 2011).

Trial court abused its discretion in permitting a bricklayer to serve a late notice of claim on the city because, inter alia, the bricklayer's alleged failure to realize the severity of his injuries within 90 days after his accident did not constitute a reasonable excuse for the delay in serving a notice of claim, there was no evidence the city was aware of an accident even occurring, and the prejudice to the city was clear and explicit. Matter of Grajko v City of New York, 150 A.D.3d 595, 57 N.Y.S.3d 11, 2017 N.Y. App. Div. LEXIS 4101 (N.Y. App. Div. 1st Dep't), app. dismissed, 30 N.Y.3d 1011, 88 N.E.3d 382, 66 N.Y.S.3d 222, 2017 N.Y. LEXIS 3204 (N.Y. 2017), app. denied, 31 N.Y.3d 910, 106 N.E.3d 752, 81 N.Y.S.3d 369, 2018 N.Y. LEXIS 1476 (N.Y. 2018).

Although a property owner did not provide a reasonable excuse for the delay in filing a notice of claim, the town had actual knowledge of the owner's claim and would not be substantially prejudiced by the owner filing a late notice of claim because beginning between May 2015 and June 2015, the owner notified town officials on multiple occasions about flooding to his home due to the drainage system, and a town official inspected the property while the repairs to the home were ongoing. Daprile v Town of Copake, 155 A.D.3d 1405, 65 N.Y.S.3d 351, 2017 N.Y. App. Div. LEXIS 8264 (N.Y. App. Div. 3d Dep't 2017).

Student's parents were not entitled to serve a late notice of claim upon the school district because, inter alia, the medical claim form indicating that the student lacerated his eyebrow and fractured his wrist when he fell during gym class did not provide the school district with actual knowledge of the essential facts underlying the parents' various negligence claims, and the parents failed to demonstrate a reasonable excuse for the failure to serve a timely notice of claim. Matter of D.M. v Center Moriches Union Free Sch. Dist., 151 A.D.3d 970, 54 N.Y.S.3d 161, 2017 N.Y. App. Div. LEXIS 5017 (N.Y. App. Div. 2d Dep't 2017).

Driver was not permitted to serve a late notice of claim upon the city, in connection with a motor vehicle accident involving a city fire truck, because, inter alia, the police accident report and the letter from the driver's counsel failed to alert the city to the driver's claim that she had been seriously injured as a result of the accident, and the driver's delay in serving the notice of claim upon the city was the result of law office failure. Matter of Naar v City of New York, 161 A.D.3d 1081, 77 N.Y.S.3d 706, 2018 N.Y. App. Div. LEXIS 3659 (N.Y. App. Div. 2d Dep't 2018).

Worker was not permitted to serve the city with a late notice of claim because, inter alia, there was no indication that an investigation of the worker's specific claim of negligence was undertaken or contemplated or that a witness's statement was provided to the city; thus, the worker failed to establish that the city acquired actual knowledge of the essential facts constituting the claim within 90 days of the incident and that the city was not prejudiced by the delay. Matter of Nadler v City of New York, 166 A.D.3d 618, 87 N.Y.S.3d 335, 2018 N.Y. App. Div. LEXIS 7381 (N.Y. App. Div. 2d Dep't 2018).

Supreme court did not err in granting residents' application for leave to file a late notice of claim because a village had actual notice of all the essential facts underlying the residents' claims; there was sufficient proof in the record to establish the village's actual knowledge of both the existence of perfluorooctanoic acid (PFOA) in its municipal water supply system and the negative potential health risks associated with PFOA exposure that underlie the residents' claims. Matter of Holbrook v Village of Hoosick Falls, 168 A.D.3d 1263, 90 N.Y.S.3d 717, 2019 N.Y. App. Div. LEXIS 351 (N.Y. App. Div. 3d Dep't 2019).

Supreme court did not err in granting residents' application for leave to file a late notice of claim because there had been no demonstration of substantial prejudice to the village as a result of the residents' delay in seeking to file late notices of claim; the village had been aware of the perfluorooctanoic acid (PFOA) contamination in its municipal water supply, and it was apprised of the potential negative health risks to its residents from PFOA exposure. Matter of Holbrook v Village of Hoosick Falls, 168 A.D.3d 1263, 90 N.Y.S.3d 717, 2019 N.Y. App. Div. LEXIS 351 (N.Y. App. Div. 3d Dep't 2019).

Trial court providently exercised its discretion in denying leave to serve a late notice of a personal injury claim because a police accident report did not indicate that there had been any personal injury, nor did the record contain any evidence that the public entity's insurer had timely acquired actual knowledge of the claim, and the delay caused substantial prejudice by preventing the public entity from promptly conducting a thorough investigation and obtaining a medical examination. Matter of Harding v Yonkers Cent. Sch. Dist., 170 A.D.3d 725, 95 N.Y.S.3d 279, 2019 N.Y. App. Div. LEXIS 1581 (N.Y. App. Div. 2d Dep't 2019).

Supreme Court improvidently exercised its discretion in granting an arrestee's petition for leave to serve a late notice of claim alleging state law claims because the arrestee did not establish that the village acquired actual knowledge of the essential facts constituting the state law claims within 90 days after they arose or a reasonable time thereafter; reports and documentation prepared by the police department and the county district attorney's office could not be imputed to the village. Matter of Nunez v Village of Rockville Ctr., 176 A.D.3d 1211, 111 N.Y.S.3d 71, 2019 N.Y. App. Div. LEXIS 7800 (N.Y. App. Div. 2d Dep't 2019).

Trial court acted within its discretion by not allowing the child to serve a late notice of claim on the city because plaintiffs did not, inter alia, demonstrate a reasonable excuse for failing to serve a timely notice of claim, explain the delay between the time they commenced the action and the filing of the motion, or offer any evidence to show the city acquired actual knowledge of the essential facts constituting the claim within the 90-day statutory period or a reasonable time thereafter. E.R. v Windham, 181 A.D.3d 736, 122 N.Y.S.3d 106, 2020 N.Y. App. Div. LEXIS 1684 (N.Y. App. Div. 2d Dep't 2020).

Trial court acted within its discretion by not permitting petitioners to file a late notice of claim upon the city because, inter alia, the police accident report was inadequate to provide the city with actual knowledge of the facts constituting the claim against it, since it failed to alert the city to petitioners' claim that they had been seriously injured as a result of the accident, and 10-month delay in seeking leave to serve a late notice of claim prejudiced the city. Etienne v City of New York, 134 N.Y.S.3d 738, 2020 N.Y. App. Div. LEXIS 7938 (N.Y. App. Div. 2d Dep't 2020).

A motion to permit late filing of notice of claim could properly be granted where the notice of motion was served on defendant city one day short of expiration of a year since injury sustained by claimant as the result of malpractice in a city hospital, and it was shown that he was admitted to the hospital as the result of a severe accidental injury which, with the ensuing accident at the hospital, resulted in permanent physical and mental incapacity of the claimant followed by confinement to home and bed until shortly before the notice of motion was served. Shanahan v New York, 31 Misc. 2d 31, 219 N.Y.S.2d 418, 1961 N.Y. Misc. LEXIS 2815 (N.Y. Sup. Ct. 1961).

Granting a student an extension of time to serve a notice of claim against the New York City Department of Education (DOE) was appropriate because the DOE, due to its investigation of a relationship between a high school teacher and the student, had actual knowledge of the essential facts underlying the student's legal claims regarding the teacher and the DOE would not suffer prejudice as the investigation was conducted within a reasonable time after the time to file the notice of claim expired. Matter of T.T. v New York City Dept. of Educ., 48 Misc. 3d 607, 7 N.Y.S.3d 876, 2015 N.Y. Misc. LEXIS 1496 (N.Y. Sup. Ct. 2015).

Plaintiffs' failure to include their claims that defendant city was liable for their injuries based on negligent inspection and storage of diesel tanks before terrorist attacks could not be corrected by filing a late notice of claim under N.Y. Gen. Mun. Law § 50-e(5), because more than one year and 90 days have passed since the time plaintiffs' claims arose. Stein v JP Morgan Chase Bank, 279 F. Supp. 2d 286, 2003 U.S. Dist. LEXIS 21352 (S.D.N.Y. 2003).

76. —Burden of proof

To sustain cause of action against city, plaintiff must both plead and prove timely filing of notice of claim, but in certain instances,

defendant may be estopped from asserting defense of nontimely filing. Clienhans v Southern Cab Corp., 54 A.D.2d 672, 387 N.Y.S.2d 847, 1976 N.Y. App. Div. LEXIS 14204 (N.Y. App. Div. 1st Dep't 1976).

Because a mother did not establish that her delay of approximately one year in seeking leave to serve a late notice of claim under N.Y. Gen. Mun. Law § 50-e on a hospital was due, inter alia, to her daughter's infancy, the hospital was not afforded notice of the facts constituting the claim or alerted as to any potential negligence on its part; therefore, the trial court erred in granting the mother's motion for leave to file a late notice of claim. Matter of Nieves v New York Health & Hosps. Corp., 34 A.D.3d 336, 825 N.Y.S.2d 40, 2006 N.Y. App. Div. LEXIS 13753 (N.Y. App. Div. 1st Dep't 2006).

Because a child and the child's mother did not establish (1) that a city had knowledge of the essential facts underlying their claim that it was negligent in the operation, maintenance, control, and supervision of a shelter; (2) a connection between the child's infancy and the failure to timely serve a notice of claim; and (3) that the city would not be prejudiced in the preparation of its defense on the merits, the trial court erred in granting their N.Y. Gen. Mun. Law § 50-e(5) motion for leave to serve a late notice of claim. Matter of Julie F. v City of New York, 50 A.D.3d 794, 855 N.Y.S.2d 622, 2008 N.Y. App. Div. LEXIS 3101 (N.Y. App. Div. 2d Dep't 2008), app. denied, 11 N.Y.3d 715, 873 N.Y.S.2d 532, 901 N.E.2d 1286, 2009 N.Y. LEXIS 256 (N.Y. 2009).

Where plaintiff infant allegedly was injured at public school, the trial court erred in denying plaintiffs' motion for leave to serve a late notice of claim on defendants because 1) it erroneously inferred prejudice to defendants solely from plaintiffs' 83-day delay in making the motion; 2) plaintiffs' met their initial burden to show defendants would not be prejudiced since, given the evidence of the number of school personnel attending to the situation, the reporting of the incident to the infant's father, and the seriousness of the alleged injuries, a number of reports likely would have been prepared, thereby giving defendants actual notice of the claim; and 3) defendants did not present evidence showing that they would be prejudiced by the late notice of claim. N.F. v City of New York, 161 A.D.3d 1046, 77 N.Y.S.3d 712, 2018 N.Y. App. Div. LEXIS 3657 (N.Y. App. Div. 2d Dep't 2018).

Pedestrian failed to demonstrate a reasonable excuse for her failure to timely serve a notice of claim upon the city because while the pedestrian allegedly suffered injuries as a result of her fall in a crosswalk, the pedestrian submitted no medical evidence nor medically substantiate that her injuries prevented her from making timely service Matter of Bermudez v City of New York, 167 A.D.3d 733, 89 N.Y.S.3d 289, 2018 N.Y. App. Div. LEXIS 8474 (N.Y. App. Div. 2d Dep't 2018).

Pedestrian did not sustain her initial burden of presenting "some evidence or plausible argument" that the city would not be substantially prejudiced by the late notice of claim because photographs submitted by the pedestrian, showing the crosswalk's defective condition, taken "shortly after" the accident were never authenticated and the pedestrian did not identify the actual date the photographs were taken or the person who took them. Matter of Bermudez v City of New York, 167 A.D.3d 733, 89 N.Y.S.3d 289, 2018 N.Y. App. Div. LEXIS 8474 (N.Y. App. Div. 2d Dep't 2018).

77. Premature filing of claim

Malicious prosecution action could not be maintained against city where plaintiff's notice of claim was filed before criminal charges against him were dismissed, and was thus premature, and no other notice of claim was filed, nor did plaintiff move for leave to file late notice of claim; plaintiff's service of summons and complaint within 90 days after dismissal of criminal action did not excuse service of valid notice of claim. Vitale v Hagan, 71 N.Y.2d 955, 528 N.Y.S.2d 823, 524 N.E.2d 144, 1988 N.Y. LEXIS 640 (N.Y. 1988).

Court should have dismissed malicious prosecution complaint against New York City, as plaintiff's service of notice of claim more than 6 months before she was acquitted on original charge was premature, and her commencement of action within statutory period of time to serve notice of claim did not cure defect of premature notice. Guzman v City of New York, 236 A.D.2d 444, 653 N.Y.S.2d 143, 1997 N.Y. App. Div. LEXIS 1194 (N.Y. App. Div. 2d Dep't), app. denied, 90 N.Y.2d 810, 665 N.Y.S.2d 401, 688 N.E.2d 257, 1997 N.Y. LEXIS 3251 (N.Y. 1997).

The timeliness of plaintiff's notice of claim and institution of cause of action for malicious prosecution, with respect to requirements of General Municipal Law §§ 50-e and 50-i, was to be measured from date action accrued, even though both filings were made prior to accrual of action, where city was not prejudiced by premature filing of plaintiff's claim. Jastrzebski v New York, 423 F. Supp. 669, 1976 U.S. Dist. LEXIS 12429 (S.D.N.Y. 1976) (applying New York law).

78. Effect of late filing

Where notice of claim was filed 2 days after expiration of 90-day period, notice was not timely and action should be dismissed. Camarella v East Irondequoit Cent. School Board, 41 A.D.2d 29, 341 N.Y.S.2d 729, 1973 N.Y. App. Div. LEXIS 5050 (N.Y. App. Div. 4th Dep't 1973), aff'd, 34 N.Y.2d 139, 356 N.Y.S.2d 553, 313 N.E.2d 29, 1974 N.Y. LEXIS 1603 (N.Y. 1974).

Statute of limitations did not act as complete defense in action against village based on occurrence of electrical shocks on plaintiffs' farm from stray voltage, since such occurrences constituted continuing wrong giving rise to new cause of action each day it existed, and plaintiffs could accordingly recover damages for 90-day period preceding filing of notice of claim. Carhart v Village of Hamilton, 190 A.D.2d 973, 594 N.Y.S.2d 358, 1993 N.Y. App. Div. LEXIS 1724 (N.Y. App. Div. 3d Dep't 1993).

Notice of claim that was not served within 90 days after cause of action accrued, and was served without leave of court, was nullity, and thus no attempt to amend notice would be permitted. Henry v Aguilar, 282 A.D.2d 711, 724 N.Y.S.2d 325, 2001 N.Y. App. Div. LEXIS 4218 (N.Y. App. Div. 2d Dep't), app. denied, 97 N.Y.2d 602, 735 N.Y.S.2d 491, 760 N.E.2d 1287, 2001 N.Y. LEXIS 3270 (N.Y. 2001).

Compressed air did not qualify as a toxic substance under N.Y. C.P.L.R. 214-c, and, therefore, parties injured by exposure to compressed air could not rely on the date of discovery rule; thus, their application for leave to serve late notices of claim against city was time-barred under N.Y. Gen. Mun. Law §§ 50-e(5), 50-i(1). Huggler v City of New York, 289 A.D.2d 240, 733 N.Y.S.2d 725, 2001 N.Y. App. Div. LEXIS 11831 (N.Y. App. Div. 2d Dep't 2001), app. denied, 98 N.Y.2d 614, 751 N.Y.S.2d 169, 780 N.E.2d 980, 2002 N.Y. LEXIS 3139 (N.Y. 2002).

Lessees cause of action against the city and its employees was time-barred because the lessees, who rented a house from the city, noticed a mold and mildew in the house in 1995 and began to experience health problems in 1995, but did not file their notice of claim until 1998 when they learned that their health problems were caused by the mold and mildew. Searle v City of New Rochelle, 293 A.D.2d 735, 742 N.Y.S.2d 314, 2002 N.Y. App. Div. LEXIS 4124 (N.Y. App. Div. 2d Dep't 2002).

Minor's request to file a late notice of claim against county defendants in his action alleging that they were grossly negligent and careless in placing him in a foster care situation wherein he was subjected to sexual abuse was properly denied pursuant to N.Y. Gen. Mun. Law § 50-e(5) where the county would have suffered prejudice by the late filing; the fact of the minor's infancy did not, alone, justify granting the extension of the time to file the claim. Pryor v Serrano, 305 A.D.2d 717, 759 N.Y.S.2d 238, 2003 N.Y. App. Div. LEXIS 4593 (N.Y. App. Div. 3d Dep't 2003).

Where former police officers sought relief from the city's repudiation of a contract regarding payments to the officers for their disabling injuries, the officers could not file workers' compensation clams three years after the repudiation because notices had to be filed with one year and 90 days under Gen. Mun. Law § 50-e(5). Ezzo v City of Schenectady, 7 A.D.3d 954, 777 N.Y.S.2d 549, 2004 N.Y. App. Div. LEXIS 7090 (N.Y. App. Div. 3d Dep't 2004).

Appeals court dismissed plaintiffs' personal injury suit against a city since the plaintiffs did not serve a notice of claim against the city within 90 days after the accrual of their claim as required by N.Y. Gen. Mun. Law §§ 50-e(1)(a), 50-i(1)(a) and did not request leave to file late claim within one and one-half years after claim's accrual. Pierre v City of New York, 22 A.D.3d 733, 804

N.Y.S.2d 365, 2005 N.Y. App. Div. LEXIS 11343 (N.Y. App. Div. 2d Dep't 2005).

Mailing of notice one day after expiration of 90-day period is not a compliance with this section. Cavagnol v Orangetown, 17 Misc. 2d 943, 185 N.Y.S.2d 720, 1959 N.Y. Misc. LEXIS 3982 (N.Y. Sup. Ct. 1959).

Because a police officer did not serve a notice of a retaliation claim against a city until well beyond the 90-day period in N.Y. Gen. Mun. Law § 50-e(1)(a) and outside the one-year statute of limitations in N.Y. Lab. Law § 740(4)(a) and N.Y. Civ. Serv. Law § 75-b(3)(c), the city's motion to dismiss should have been granted in its entirety. Thomas v City of Oneonta, 90 A.D.3d 1135, 934 N.Y.S.2d 249, 2011 N.Y. App. Div. LEXIS 8536 (N.Y. App. Div. 3d Dep't 2011).

79. —Particular actions

In negligence action against city to recover damages for personal injuries, trial court acted properly in denying plaintiff motion to extend her time to serve complaint and for leave to file notice of claim nunc pro tunc, since court lacked power to grant extension beyond applicable period of limitations, one year and 90 days. Pavlicko v New York, 56 A.D.2d 840, 392 N.Y.S.2d 77, 1977 N.Y. App. Div. LEXIS 11170 (N.Y. App. Div. 2d Dep't 1977).

In a proceeding seeking leave to serve a late notice of claim upon the New York City Health and Hospitals Corporation pursuant to Gen Mun Law § 50-e, to assert a cause of action for conscious pain and suffering, Special Term erred in granting the petition on the asserted grounds that CPLR § 210 tolled the applicable period of limitations for a period of one year and that the one-year 90-day period had been extended for one year, where CPLR § 210 did not toll the statute of limitations in that it is of potential application only in situations in which the claimant dies with less than one year remaining on the relevant period of limitaitons and at the time of decedent's death more than one year remained on the statute of limitations. Gelpi v New York City Health & Hospitals Corp., 90 A.D.2d 503, 454 N.Y.S.2d 891, 1982 N.Y. App. Div. LEXIS 18534 (N.Y. App. Div. 2d Dep't 1982).

Where plaintiffs failed to file timely notice of claim and failed to make application to serve late notice of claim before applicable statute of limitations expired, court was powerless to grant their cross motion to have their notice of claim deemed timely filed, nunc pro tunc, and thus court properly granted defendants' motion to dismiss complaint. Diaz v City Hosp. Ctr., 241 A.D.2d 507, 661 N.Y.S.2d 528, 1997 N.Y. App. Div. LEXIS 7803 (N.Y. App. Div. 2d Dep't 1997), app. denied, 91 N.Y.2d 807, 669 N.Y.S.2d 260, 692 N.E.2d 129, 1998 N.Y. LEXIS 195 (N.Y. 1998).

Motion to dismiss complaint against New York City Health and Hospitals Corporation (NYCHHC) for failure to serve notice of claim was properly denied where there was evidence that NYCHHC had notice of claim and retained counsel to defend it 98 days after claim accrued, and NYCHHC waited until after 10-year toll in statute of limitations for infants had expired, after judgment in its favor had been vacated based on plaintiffs' meritorious cause of action, after plaintiffs complied with its request to depose nonparty witness, after discovery had been completed to its satisfaction, and after case was on trial calendar before moving to dismiss. Brown v City of New York, 264 A.D.2d 493, 694 N.Y.S.2d 461, 1999 N.Y. App. Div. LEXIS 8918 (N.Y. App. Div. 2d Dep't 1999).

Property owners' continuing trespass and nuisance claims against a town for allegedly damaging their property by piling plowed snow against the wall of their building were untimely; all the evidence indicated that the owners neglected the building for years, and only noticed the water damage when they tried to sell it. Alamio v Town of Rockland, 302 A.D.2d 842, 755 N.Y.S.2d 754, 2003 N.Y. App. Div. LEXIS 1738 (N.Y. App. Div. 3d Dep't 2003).

In deciding whether to permit service of a late notice of claim, the court generally will consider three factors: (1) whether the movant has a reasonable excuse for the failure to serve a timely notice of claim, (2) whether the municipality or agency acquired actual notice of the essential facts of the claim within 90 days after the claim arose or a reasonable time thereafter, and (3) whether the delay would substantially prejudice the municipality in its defense. In a personal injury case, a mother of injured infant did not show that a school district had notice of the facts forming the basis of her negligent supervision claim within either 90 days or a reasonable time thereafter where the only proof was an incident report on the day following the accident stating only that, in attempting to lift a chair into an overhead position while carrying the chair from one classroom to another, the infant lost control and the chair struck him in the forehead. Conroy v Smithtown Cent. Sch. Dist., 3 A.D.3d 492, 770 N.Y.S.2d 428, 2004 N.Y. App. Div. LEXIS 249 (N.Y. App. Div. 2d Dep't 2004).

Injured party was properly denied leave under N.Y. Gen. Mun. Law § 50-e(5) to serve a late notice of claim against the City of New York; the reports cited by the injured party as having provided the City with actual notice of the claim within a reasonable time of the accident did not suggest any causal connection between the accident and any negligence by the City. Matter of Henriques v City of New York, 22 A.D.3d 847, 803 N.Y.S.2d 194, 2005 N.Y. App. Div. LEXIS 11583 (N.Y. App. Div. 2d Dep't 2005).

Where a city and that city's separate municipal hospital corporation had already stipulated that an injured person would be deemed, by timely service of claim on the city, to have timely served notice nunc pro tunc on the hospital corporation as well, the hospital corporation had waived the right to argue in a motion to dismiss that it had not been timely served with a notice of claim. Wright v N.Y.C. Health & Hosps. Corp., 25 A.D.3d 737, 811 N.Y.S.2d 406, 2006 N.Y. App. Div. LEXIS 855 (N.Y. App. Div. 2d Dep't 2006).

Because the tolling during a minor ward's infancy was not available to a guardian, the trial court lacked power to grant leave to the guardian to file a late notice of claim to recover medical expenses incurred on behalf of the ward, as the petition was filed beyond the one year and 90-day statutes of limitations applicable to the claim in N.Y. Gen. Mun. Law § 50-e and N.Y. Educ. Law § 3813. Matter of Ricci v Harrison Cent. School Dist., 27 A.D.3d 653, 812 N.Y.S.2d 875, 2006 N.Y. App. Div. LEXIS 3508 (N.Y. App. Div. 2d Dep't 2006).

Because a mother and her son failed to move for leave to serve a late notice of claim pursuant to N.Y. Gen. Mun. Law § 50-e(5) within one year and 90 days of the date that their claims accrued, the trial court erred in denying a motion to dismiss filed by a city, its police department, and its corrections department. Laroc v City of New York, 46 A.D.3d 760, 847 N.Y.S.2d 677, 2007 N.Y. App. Div. LEXIS 12840 (N.Y. App. Div. 2d Dep't 2007).

Because a county was not named as a party or provided notice of the parents' N.Y. Gen. Mun. Law § 50-e motion to serve a late notice of claim on behalf of their child upon it, the trial court should not have considered the motion. Velasquez v Duprey-Murphy, 47 A.D.3d 625, 848 N.Y.S.2d 539, 2008 N.Y. App. Div. LEXIS 119 (N.Y. App. Div. 2d Dep't 2008).

Because an administrator's personal injury claim was brought on behalf of a decedent and was personal to the decedent, not the decedent's surviving infant distributees, the trial court's reliance on the infancy toll of N.Y. C.P.L.R. 208 was improper; therefore, leave to file a late notice of claim under N.Y. Gen. Mun. Law § 50-e(5) was required with respect to the claim for conscious pain and suffering arising out of the decedent's personal injuries. Heslin v County of Greene, 53 A.D.3d 996, 862 N.Y.S.2d 210, 2008 N.Y. App. Div. LEXIS 6328 (N.Y. App. Div. 3d Dep't 2008), aff'd, 14 N.Y.3d 67, 896 N.Y.S.2d 723, 923 N.E.2d 1111, 2010 N.Y. LEXIS 14 (N.Y. 2010).

In an action brought in tort in which one of the defendants has properly brought a third-party action in indemnity against the City of New York, a motion by the plaintiff in the main tort action to amend the complaint to assert a new cause of action in tort against the city is denied; plaintiff has not served a notice of claim upon the city within 90 days of the date on which the underlying occurrence took place (General Municipal Law, § 50-e) and has not brought its action within one year and 90 days after said date (General Municipal Law, § 50-i) and, therefore, sections 50-e and 50-i are complete bars to the tort action against the city. While plaintiff may not have known that the city was a third-party defendant until it was too late to bring a direct tort action against the city, that factor does not fit any of the grounds under section 50-e or the recent amendments thereto, and, even if it did, section

50-e denies any such relief if the time for commencement of the action under section 50-i has long since expired. It is of no consequence that the city has not as yet answered the third-party complaint. 2999 Realty Corp. v Hallen Constr. Corp., 95 Misc. 2d 227, 406 N.Y.S.2d 951, 1978 N.Y. Misc. LEXIS 2406 (N.Y. Civ. Ct. 1978).

Arrestee's state law claims for false arrest, false imprisonment, illegal search, gross incompetence, deliberate indifference, negligence in training, supervising and discipline, negligent entrustment, libel and defamation of character, and intentional infliction of emotional distress accrued at the latest on January 18, 2006, which was two days after the arrest and when he was released from jail, and because the arrestee did not provide notice to defendants of the claims until more than one year later, on August 24, 2007, the claims were barred under the time limitations for notice in N.Y. County Law § 52 and N.Y. Gen. Mun. Law §§ 50-e, 50-i Martin v County of Nassau, 692 F. Supp. 2d 282, 2010 U.S. Dist. LEXIS 22989 (E.D.N.Y. 2010).

Arrestee's state law claims for malicious prosecution, which accrued on June 21, 2007, when the charges against him were dropped, were barred under the time limitations for notice in N.Y. County Law § 52 and N.Y. Gen. Mun. Law §§ 50-e, 50-i where the arrestee did not file suit until a year and over four months later, on November 10, 2008. Martin v County of Nassau, 692 F. Supp. 2d 282, 2010 U.S. Dist. LEXIS 22989 (E.D.N.Y. 2010).

Motion to dismiss state law claim for abuse of process against a town and certain of its officials was granted because, without evidence of proper timely service, the notice of claim was untimely. Raus v Town of Southampton, 2015 U.S. Dist. LEXIS 64513 (E.D.N.Y. May 18, 2015), aff'd, 661 Fed. Appx. 81, 2016 U.S. App. LEXIS 17208 (2d Cir. N.Y. 2016).

80. — —Existence of prejudice

Since § 257 of the Long Beach City Charter requires service of notice of claim pursuant to this section as a condition precedent to commencement of action against an officer or employee thereof, as well as against the city, the city marshal of Long Beach was entitled to dismissal of a complaint against him for alleged tortious acts where no notice of claim was served within the 90-day period. Siegel v Epstein, 21 A.D.2d 821, 251 N.Y.S.2d 538, 1964 N.Y. App. Div. LEXIS 3488 (N.Y. App. Div. 2d Dep't 1964), aff'd, 17 N.Y.2d 639, 269 N.Y.S.2d 138, 216 N.E.2d 341, 1966 N.Y. LEXIS 1512 (N.Y. 1966).

A notice of claim for damages for an assault upon plaintiff's person submitted 91 days after the alleged assault took place was not timely filed, and judgment was correctly entered for the defendant. Komar v New York, 24 A.D.2d 941, 265 N.Y.S.2d 331, 1965 N.Y. App. Div. LEXIS 2796 (N.Y. App. Div. 1st Dep't 1965), app. denied, 17 N.Y.2d 424, 1966 N.Y. LEXIS 1892 (N.Y. 1966).

The lower court should have granted leave to serve a late notice of claim against a city social services department to a person whose throat was slashed and home robbed by a person hired by the department as a watchman, where the watchman had a prior criminal record, where the victim did not learn that fact until the watchman had been arrested, pled guilty, and been sentenced, where the victim then consulted an attorney who moved within a reasonable time for permission to serve a late notice of claim, where the department had actual knowledge of the essential facts of the victim's claim at the time of the application, and where the department failed to demonstrate any substantial prejudice. Monge v New York Dep't of Social Services, 95 A.D.2d 848, 464 N.Y.S.2d 207, 1983 N.Y. App. Div. LEXIS 18792 (N.Y. App. Div. 2d Dep't 1983).

Special Term properly amended its order to extend time for service of notice of claim on municipal hospital after claimant failed to serve hospital within 15 days from entry of order permitting her to file late notice of claim on previously expired period for service, despite 6-month delay in service of late notice and total elapsed period of more than one year and 90 days after claim arose, where mistake was inadvertent, claimant had otherwise satisfied notice requirements of CLS Gen Mun § 50-e, and hospital was not prejudiced by amendment. Dublanica v Rome Hospital/Murphy Memorial Hospital, 124 A.D.2d 1042, 508 N.Y.S.2d 753, 1986 N.Y. App. Div. LEXIS 62398 (N.Y. App. Div. 4th Dep't 1986).

Upon renewal, a driver was entitled to file a motion for leave to serve a late notice of claim in his personal injury action, where he proffered evidence that the District Attorney's Office prepared a vehicular incident evaluation report 34 days after the accident, and a driver's accident report 12 days after the accident; thus, the District Attorney's Officer would not suffer prejudice by the late service, since it obtained actual notice of the essential facts of the claim within 90 days after the claim arose. Hasmath v Cameb, 5 A.D.3d 438, 773 N.Y.S.2d 121, 2004 N.Y. App. Div. LEXIS 2446 (N.Y. App. Div. 2d Dep't 2004).

Where the injured party failed to file a timely notice of claim, the trial court did not err under N.Y. Gen. Mun. Law § 50-e(5) in granting granting the injured party's motion for leave to reargue pursuant to N.Y. C.P.L.R. 2221(b) and, upon reargument, granting the injured party's motion for leave to serve a late notice of claim; there was a minimal delay in serving the notice of claim, and the delay did not substantially prejudice the New York City Transit Authority. Morales v N.Y. City Transit Auth., 15 A.D.3d 580, 790 N.Y.S.2d 212, 2005 N.Y. App. Div. LEXIS 1802 (N.Y. App. Div. 2d Dep't 2005).

Although a library patron should have filed a notice of claim against the public library within 90 days of a fall, the trial court should have allowed late filing in a situation where the library had actual notice of the incident and knew the elderly patron had been badly hurt and where the patron's failure to file notice of claim was akin to an innocent mistake in service in that there was no statutory law holding that a public library was entitled to such notice; the fact that the library was prejudiced by its insurer's denial of coverage based on failure to provide timely notice to it was of no consequence since the library, based on its actual knowledge, should have known better. Bovich v East Meadow Pub. Lib., 16 A.D.3d 11, 789 N.Y.S.2d 511, 2005 N.Y. App. Div. LEXIS 1354 (N.Y. App. Div. 2d Dep't 2005).

In a proceeding under N.Y. Gen. Mun. Law § 50-e(5) for leave to serve a late notice of claim, the trial court erred in granting leave; timely knowledge of the facts constituting the claim was not received, and the injured party did not demonstrate a reasonable excuse for the delay and failed to demonstrate lack of substantial prejudice. Alexander v Bd. of Educ., 18 A.D.3d 654, 794 N.Y.S.2d 687, 2005 N.Y. App. Div. LEXIS 5297 (N.Y. App. Div. 2d Dep't 2005).

It was error for the lower court to grant the infant plaintiff's motion for leave to file a late claim almost 10 years after the alleged injury occurred because the infant's mother did not offer any reasonable excuse for the delay, the hospital was not otherwise on notice of the claim, and the hospital would be prejudiced by the delay. Seymour v New York City Health & Hosps. Corp. (Kings County Hosp. Ctr.), 21 A.D.3d 1025, 801 N.Y.S.2d 370, 2005 N.Y. App. Div. LEXIS 9206 (N.Y. App. Div. 2d Dep't 2005), app. denied, 6 N.Y.3d 711, 814 N.Y.S.2d 600, 847 N.E.2d 1173, 2006 N.Y. LEXIS 657 (N.Y. 2006).

Injured party was properly denied leave under N.Y. Gen. Mun. Law § 50-e(5) to serve a late notice of claim against the City of New York; the injured party's delay of nearly a year after the incident in seeking to serve a notice of claim prejudiced the City's ability to maintain a defense. Matter of Henriques v City of New York, 22 A.D.3d 847, 803 N.Y.S.2d 194, 2005 N.Y. App. Div. LEXIS 11583 (N.Y. App. Div. 2d Dep't 2005).

Trial court did not err in granting petitioners' application under N.Y. Gen. Mun. Law § 50-e for leave to serve late notice of claim; petitioners established that the school district and its insurer had actual knowledge of the essential facts underlying the claim within the 90-day statutory period and that the district and insurer were not prejudiced by the delay. Matter of "Jane Doe" v Hicksville Union Free School Dist., 24 A.D.3d 666, 808 N.Y.S.2d 387, 2005 N.Y. App. Div. LEXIS 14349 (N.Y. App. Div. 2d Dep't 2005).

Trial court improperly denied property owners' petition for leave to serve a late notice of their nuisance claim on a town pursuant to N.Y. Gen. Mun. Law § 50-e(5). While the owners did not have a reasonable excuse for the 11-month delay in filing the notice, the town was not prejudiced by the delay because it obtained actual knowledge of the facts constituting the claim within the statutory period or a reasonable time thereafter.

Matter of March v Town of Wappinger, 29 A.D.3d 998, 816 N.Y.S.2d 534, 2006 N.Y. App. Div. LEXIS 7145 (N.Y. App. Div. 2d Dep't 2006).

Court erred in allowing a claimant to file a notice of claim against a school district five years after the incident. Since the school district did not have actual knowledge of the essential facts constituting the negligence claim until approximately five years after the date of the incident, it would be unduly prejudiced in its ability to prepare a defense Matter of Scott v Huntington Union Free School Dist., 29 A.D.3d 1010, 816 N.Y.S.2d 165, 2006 N.Y. App. Div. LEXIS 7173 (N.Y. App. Div. 2d Dep't 2006).

Foster child was improvidently granted leave to file a late notice of claim as: (1) the child's ignorance of the law was insufficient, (2) a housing authority's actual knowledge of the essential facts under N.Y. Gen. Mun. Law § 50-e(5) was vague, (3) the authority's lack of further information from the department of social services (DSS) left the authority with no knowledge of its possible culpability, (4) the authority was notified that the foster child had been removed from his foster home, which suggested that he had been abused, as DSS found, and (5) the lengthy passage of time prejudiced the authority's ability to investigate and to prepare a defense. Webb v New York City Hous. Auth., 35 A.D.3d 313, 828 N.Y.S.2d 22, 2006 N.Y. App. Div. LEXIS 15847 (N.Y. App. Div. 1st Dep't 2006).

Because a petitioner did not establish that a village had actual knowledge of the essential facts constituting a claim within 90 days after an accident, did not have a reasonable excuse for the delay, and did not demonstrate that the village was not prejudiced in its defense, pursuant to N.Y. Gen. Mun. Law § 50-e(2), (5), (7), and N.Y. C.P.L.R. 2221(e)(2), (3), the trial court properly denied the petitions for leave to serve a late claim on the village. Matter of Narcisse v Incorporated Vil. of Cent. Islip, 36 A.D.3d 920, 829 N.Y.S.2d 578, 2007 N.Y. App. Div. LEXIS 981 (N.Y. App. Div. 2d Dep't 2007).

81. — —Civil rights and discrimination

In an employment discrimination action against a county, the Appellate Division properly dismissed the complaint which alleged that employment with defendant county was terminated on the basis of plaintiff's race and national origin in violation of Exec Law § 296 where plaintiff's failure to timely file a notice of claim under Gen. Mun L § 50-e was fatal in that the action had not been brought to indicate a public interest and leave to serve a late notice of claim had not been granted. Mills v County of Monroe, 59 N.Y.2d 307, 464 N.Y.S.2d 709, 451 N.E.2d 456, 1983 N.Y. LEXIS 3161 (N.Y.), cert. denied, 464 U.S. 1018, 104 S. Ct. 551, 78 L. Ed. 2d 725, 1983 U.S. LEXIS 2750 (U.S. 1983).

Lower court did not have authority to grant the employee leave to file a late claim for discrimination, pursuant to N.Y. Gen. Mun. Law § 50-e(5) because N.Y. Rac. Pari-Mut. Wag. & Breed. Law § 618 did not contain any provision permitting the service of a late notice of claim. A cause of action under the New York Human Rights Law was not categorized as a tort for notice of claim purposes. Marino v N.Y. City Off-Track Betting Corp., 12 A.D.3d 606, 785 N.Y.S.2d 481, 2004 N.Y. App. Div. LEXIS 14216 (N.Y. App. Div. 2d Dep't 2004).

Plaintiff's state tort claims alleged in federal civil rights action against city and police officers are dismissed, where plaintiff alleged that he filed notice of claim on September 22, 1991 and actions accrued on February 9, 1989, March 21, 1989, and May 10, 1990, because notice of claim was filed more than 90 days after claims arose and was therefore untimely under CLS Gen Mun Law § 50-e. Steiner v City of New York, 920 F. Supp. 333, 1996 U.S. Dist. LEXIS 3128 (E.D.N.Y. 1996).

In a civil rights suit by African-American and Hispanic motorists against a county, its police commissioner, and several unidentified officers and supervisors (defendants), state law allegations of negligent hiring, training, and supervision based on a policy of racial profiling for traffic stops was dismissed because the motorists failed to file a claim with defendants 90 days after their causes of action accrued, as required by N.Y. Gen. Mun. Law § 50-e(1)(a). Feliciano v County of Suffolk, 419 F. Supp. 2d 302, 2005 U.S. Dist. LEXIS 42221 (E.D.N.Y. 2005).

82. — —False arrest

Where notice of claim in connection with action, inter alia, to recover damages for false arrest was served on county more than 90 days after date infant plaintiff was released from actual custody, first cause of action, which sought damages from county for alleged false arrest, and third cause of action, insofar as it sought to recoup legal fees and medical expenses paid by plaintiff guardian in connection with arrest, were properly dismissed. Tucci v County of Nassau, 50 A.D.2d 945, 377 N.Y.S.2d 588, 1975 N.Y. App. Div. LEXIS 11888 (N.Y. App. Div. 2d Dep't 1975).

After the statute of limitations barred plaintiff's action for false arrest, she could not by virtue of timely notice of suit served upon the county join as party to defendants the sheriff and deputy sheriff against whom her claims were time barred. Brenon v County of Oneida, 52 Misc. 2d 795, 276 N.Y.S.2d 393, 1966 N.Y. Misc. LEXIS 1274 (N.Y. Sup. Ct. 1966).

83. — —Malpractice

Third-party action against county hospital, commenced by hospital which was defendant in malpractice suit, was not barred, with respect to claim for total indemnity or for apportioned contribution, by fact that county hospital was not served with notice of claim within 90 days after original plaintiff's alleged cause of action against it arose. Zillman v Meadowbrook Hospital Co., 45 A.D.2d 267, 358 N.Y.S.2d 466, 1974 N.Y. App. Div. LEXIS 4428 (N.Y. App. Div. 2d Dep't 1974).

Failure to timely serve notice of claim on the New York City Health and Hospitals Corporation was a defect fatal to claim against the Corporation for alleged negligence and medical malpractice. Bender v New York City Health & Hospitals Corp., 46 A.D.2d 898, 361 N.Y.S.2d 939, 1974 N.Y. App. Div. LEXIS 3337 (N.Y. App. Div. 2d Dep't 1974), rev'd, 38 N.Y.2d 662, 382 N.Y.S.2d 18, 345 N.E.2d 561, 1976 N.Y. LEXIS 2305 (N.Y. 1976).

In a proceeding against a county hospital for medical malpractice, the trial court erred in treating a second application for leave to serve a late claim against the hospital as a reinstatement of an earlier, withdrawn application, and in granting the application, where there was no provision in the CPLR for reinstatement of a withdrawn motion, where withdrawal of a motion leaves the record as if the motion had not been made, and where the court was without jurisdiction to grant the application, in that the second application was brought approximately 22 months after the medical malpractice occurred and after the expiration of the applicable one-year and 90-day statutes of limitations in Gen Mun Law §§ 50-e and 50-i. Stoute v New York, 91 A.D.2d 1043, 458 N.Y.S.2d 640, 1983 N.Y. App. Div. LEXIS 16366 (N.Y. App. Div. 2d Dep't), app. dismissed, 59 N.Y.2d 762, 1983 N.Y. LEXIS 5026 (N.Y. 1983).

Lack of index number and file stamp mark on summons filed against New York City Health and Hospitals Corporation (HHC) in medical malpractice action was correctable, not jurisdictional, defect where plaintiff successfully moved by order to show cause for leave to file late notice of claim and had purchased index number in connection with that special proceeding, and that show-cause order was served on HHC, with copy of summons and complaint attached, on last day of one year and 90 day limitations period for filing of late notice of claim. Rybka v New York City Health & Hosps. Corp., 263 A.D.2d 403, 693 N.Y.S.2d 566, 1999 N.Y. App. Div. LEXIS 8243 (N.Y. App. Div. 1st Dep't 1999).

Fact that county was not served with notice of claim within 90 days after accrual of plaintiff's original cause of action as required by General Municipal Law § 50-e would not bar third party action against county hospital commenced by another hospital which was defendant in malpractice suit. Zillman v Meadowbrook Hospital Co., 73 Misc. 2d 726, 342 N.Y.S.2d 302, 1973 N.Y. Misc. LEXIS 2107 (N.Y. Sup. Ct. 1973), rev'd, 45 A.D.2d 267, 358 N.Y.S.2d 466, 1974 N.Y. App. Div. LEXIS 4428 (N.Y. App. Div. 2d Dep't 1974).

V. Accrual of Particular Claims

84. In general

The running of the 90 day period is measured not from the time of the negligent act but from the date the negligent act produced injury to the plaintiff. Sexstone v Rochester, 32 A.D.2d 737, 301 N.Y.S.2d 887, 1969 N.Y. App. Div. LEXIS 4001 (N.Y. App. Div. 4th Dep't 1969).

Cause of action in tort does not accrue, or arise, for purposes of both statute of limitations and section pertaining to notice of

claim against public corporation until all requisite elements of tort have been satisfied. Beary v Rye, 59 A.D.2d 905, 399 N.Y.S.2d 140, 1977 N.Y. App. Div. LEXIS 14108 (N.Y. App. Div. 2d Dep't 1977), rev'd, 44 N.Y.2d 398, 406 N.Y.S.2d 9, 377 N.E.2d 453, 1978 N.Y. LEXIS 1960 (N.Y. 1978).

For purposes of CLS Gen Mun § 50-i, limitations period begins to run upon happening of event, irrespective of when action may technically accrue; thus, action commenced on January 21, 1986, alleging that child abuse report filed by county department of social services in July, 1982 was cause of plaintiff's inability to procure employment and concomitant physical and emotional distress, was properly dismissed because not brought within one year and 90 days of filing of report even though plaintiff claimed that he did not learn of report's existence until March, 1985; furthermore, even if action accrued upon plaintiff's discovery of report in March, 1985, his notice of claim filed September 28, 1985 was untimely because not filed within 90 days of discovery of report. Kitonyi v Albany County, 128 A.D.2d 1018, 513 N.Y.S.2d 555, 1987 N.Y. App. Div. LEXIS 44662 (N.Y. App. Div. 3d Dep't 1987).

Commencement of the 90-day period within which notice of claim must be served under this section "after the claim arises" should be considered as governed by the same principles as those governing accrual of a cause of action under § 50 of the Civil Practice Act. Borgia v New York, 216 N.Y.S.2d 897 (N.Y. Sup. Ct.), app. dismissed, 15 A.D.2d 557, 223 N.Y.S.2d 17, 1961 N.Y. App. Div. LEXIS 6859 (N.Y. App. Div. 2d Dep't 1961).

85. Class actions

Respondents' assertions that they did not fully appreciate the distinctions between a workers' compensation claim and a personal injury action, and that they mistakenly believed that their workers' compensation attorney would also prosecute a personal injury action against the city were insufficient to excuse the delay in serving notice of the claim; respondents' assertion that an incident report was filed with the city was completely unsubstantiated by the record and was refuted by the evidence submitted by the city. Similarly, testimony that an office worker employed by a city agency was present at the time of the incident was insufficient to provide the city with actual knowledge of the claim. Matter of Bruzzese v City of New York, 34 A.D.3d 577, 824 N.Y.S.2d 653, 2006 N.Y. App. Div. LEXIS 13481 (N.Y. App. Div. 2d Dep't 2006).

The statutory notice of claim requirements for personal injury claims against a public corporation (General Municipal Law, § 50-e) preclude a class action (CPLR 901) for environmental disaster claims arising from exposure over a period of time to deadly toxic chemical wastes dumped in the "Love Canal" area in the City of Niagara Falls since the facts underlying the claims contain variables which prevent a blanket consideration of all the claims in that the injuries are not identical and were not incurred at the same time and, since there is no definite starting point from which to measure the "accrual of a cause of action", the question of the timeliness of the notice of claims must be dealt with on an individual case-by-case basis; individual hearings on the circumstances concerning each claim are required in order to properly determine the timeliness of each claim or the propriety of permitting a late filing (General Municipal Law, § 50-e, subd 1, par [a]) and, in order to avoid duplicitous hearings, such determinations may be made in the trial parts of the court after the actions have been commenced. Mervak v Niagara Falls, 101 Misc. 2d 68, 420 N.Y.S.2d 687, 1979 N.Y. Misc. LEXIS 2629 (N.Y. Sup. Ct. 1979).

86. Continuing trespass

Since wrong or wrongs alleged in complaint seeking recovery for city's allegedly improper refusal to issue demolition permits were not continuing torts and since cause or causes of action, if any, accrued at time of sustaining of injury which, however, viewed, occurred more than 90 days prior to filing of notice of claim, wrecking company's complaint was properly dismissed for failure to timely file notice of claim against city. Bloomfield Bldg. Wreckers, Inc. v Troy, 41 N.Y.2d 1102, 396 N.Y.S.2d 359, 364 N.E.2d 1130, 1977 N.Y. LEXIS 2134 (N.Y. 1977).

Order denying leave to serve upon town a late notice of claim for continuing trespass, i.e., unlawful encroachment of certain subterranean pipes on petitioner's property, was reversed, and leave was granted to serve notice of claim nunc pro tunc. Wehlau v Cortlandt, 48 A.D.2d 901, 369 N.Y.S.2d 497, 1975 N.Y. App. Div. LEXIS 10166 (N.Y. App. Div. 2d Dep't 1975).

Inasmuch as boundary dispute involved an alleged continuing wrong on part of defendant village, plaintiff could maintain a new action to determine claims after properly filing notice of claim and any damages accruing during the 90-day period prior to such filing would be recoverable. Salesian Soc. v Ellenville, 50 A.D.2d 648, 374 N.Y.S.2d 805, 1975 N.Y. App. Div. LEXIS 12473 (N.Y. App. Div. 3d Dep't 1975), rev'd, 41 N.Y.2d 521, 393 N.Y.S.2d 972, 362 N.E.2d 604, 1977 N.Y. LEXIS 1915 (N.Y. 1977).

Because the cutting of a store's storm drainpipe by a transit authority and its subcontractors interfered with a store's easement and right of access to a sewer, it constituted a continuing trespass and resulted in successive causes of action that were timely under N.Y. Gen. Mun. Law §§ 50-e, 50-i, N.Y. Pub. Auth. Law § 1212, and N.Y. C.P.L.R. 214. Bloomingdales, Inc. v New York City Tr. Auth., 52 A.D.3d 120, 859 N.Y.S.2d 22, 2008 N.Y. App. Div. LEXIS 4153 (N.Y. App. Div. 1st Dep't 2008), aff'd, 13 N.Y.3d 61, 886 N.Y.S.2d 663, 915 N.E.2d 608, 2009 N.Y. LEXIS 1846 (N.Y. 2009).

Although an action for damages to riparian rights was a continuing trespass, each new day establishing the cause anew, the provisions of General Municipal Law §§ 50-e and 50-i were more than mere statutes of limitation or repose but established conditions precedent to the initiation of a lawsuit against a municipality. Gregory v New York, 346 F. Supp. 140, 1972 U.S. Dist. LEXIS 12974 (S.D.N.Y. 1972), disapproved, Fountain v Metropolitan Atlanta Rapid Transit Authority, 678 F.2d 1038, 1982 U.S. App. LEXIS 18222 (11th Cir. 1982).

87. Derivative actions

Mother's derivative action for nursing, hospital, and medical expenses incurred by her son accrued upon the date of her husband's death, the date upon which she assumed the entire burden of support of the child, and timeliness of the filing of the action was measured from that date. Clough v Board of Education, 56 A.D.2d 233, 392 N.Y.S.2d 170, 1977 N.Y. App. Div. LEXIS 10052 (N.Y. App. Div. 4th Dep't 1977).

Since a defendant, a municipal medical center, had a plaintiff infant's records it was not prejudiced by her late notice of claim under N.Y. Gen. Mun. Law § 50-e(5) and her claim was tolled under the infancy toll of N.Y. C.P.L.R. 208, so her medical malpractice claim was allowed; but, her mother's derivative claim was not allowed since § 208 did not toll derivative actions. Nardi v County of Westchester, 18 A.D.3d 521, 795 N.Y.S.2d 302, 2005 N.Y. App. Div. LEXIS 5118 (N.Y. App. Div. 2d Dep't 2005).

88. False arrest and imprisonment; accrual after arraignment

In an action for false arrest and imprisonment, the 90-day period of notice required by subd 1 of above statute held to begin to run when the plaintiff on arraignment upon a formal complaint was held for trial on his own recognizance. Molyneaux v County of Nassau, 22 A.D.2d 954, 256 N.Y.S.2d 123, 1964 N.Y. App. Div. LEXIS 2392 (N.Y. App. Div. 2d Dep't 1964), aff'd, 16 N.Y.2d 663, 261 N.Y.S.2d 294, 209 N.E.2d 286, 1965 N.Y. LEXIS 1272 (N.Y. 1965).

89. —After dismissal of charges

Notice of claim for false imprisonment and arrest filed over 6 months from release on bail did not comply with General Municipal L § 50-e, even though filed within 90 days following dismissal of criminal charges. Jones v Johnstown, 41 A.D.2d 866, 342 N.Y.S.2d 927, 1973 N.Y. App. Div. LEXIS 4687 (N.Y. App. Div. 3d Dep't 1973).

Arrestee was obligated to file a timely notice of claim by May 16, 2018, 90 days after the dismissal of all charges on February 15, 2018; because the arrestee did not cross-move to amend until June 26, 2019, amendment had be rejected as untimely. Wiggins v City of New York, 69 Misc. 3d 620, 133 N.Y.S.3d 178, 2020 N.Y. Misc. LEXIS 4076 (N.Y. Sup. Ct. 2020).

90. —After release

Under General Municipal Law § 50-e, period for filing false imprisonment claim began running on date of plaintiff's actual release from confinement on his own recognizance. Allee v New York, 42 A.D.2d 899, 347 N.Y.S.2d 708, 1973 N.Y. App. Div. LEXIS 3502 (N.Y. App. Div. 1st Dep't 1973).

A cause of action for false imprisonment accrues when the confinement terminates; accordingly, a claim of false imprisonment against a municipality is barred for failure to file a timely notice of claim where, assuming the defense was interposed properly, the claim is filed more than 90 days after plaintiff's confinement ended. Boose v Rochester, 71 A.D.2d 59, 421 N.Y.S.2d 740, 1979 N.Y. App. Div. LEXIS 13087 (N.Y. App. Div. 4th Dep't 1979).

In a proceeding against a municipality based on an underlying tort of false imprisonment, an application for leave to serve a late notice of claim was premature where petitioner was arrested on January 16, 1982 and incarcerated from that date until February 2, 1983, at which time he was acquitted of the charges against him, and where the application to serve a late notice of claim was initiated on or about February 10, 1983; the tort of false imprisonment accrues when the confinement terminates. Collins v McMillan, 102 A.D.2d 860, 477 N.Y.S.2d 49, 1984 N.Y. App. Div. LEXIS 19063 (N.Y. App. Div. 2d Dep't 1984).

Trial court properly granted summary judgment dismissing an arrestee's false arrest and false imprisonment claims against a village because those claims accrued when he was released from incarceration, and his notice of claim filed with the village five months later did not comply with the requirement of N.Y. Gen. Mun. Law § 50-e(1)(a) to provide such notice within 90 days of the accrual of a claim, so the arrestee's claims were time-barred, and his malicious prosecution claim, which accrued when charges against him were dismissed, did not extend the time for filing a claim because the malicious prosecution claim could only be asserted against the county, which prosecuted the arrestee through its district attorney. Roche v Vill. of Tarrytown, 309 A.D.2d 842, 766 N.Y.S.2d 46, 2003 N.Y. App. Div. LEXIS 10890 (N.Y. App. Div. 2d Dep't 2003).

Suspect's cause of action alleging false imprisonment was time-barred since he did not serve his notice of claim within 90 days of the accrual of the cause of action, N.Y. Gen. Mun. Law § 50-e, i.e., the date on which his confinement terminated. Santiago v City of Rochester, 19 A.D.3d 1061, 796 N.Y.S.2d 811, 2005 N.Y. App. Div. LEXIS 6309 (N.Y. App. Div. 4th Dep't), app. denied, 5 N.Y.3d 710, 804 N.Y.S.2d 35, 837 N.E.2d 734, 2005 N.Y. LEXIS 2607 (N.Y. 2005).

The motion of the defendant village to have stricken from the plaintiff's complaint allegations which set forth a cause of action for false imprisonment and false arrest on the ground that notice of claim, which was filed on August 5, was not filed within 60 days after the plaintiff's arrest on May 9 was denied notwithstanding the plaintiff was released on his own recognizance, since the false imprisonment and arrest continued until June 9, 1944, the date of his acquittal and discharge. Goolden v Massena, 99 N.Y.S.2d 927, 197 Misc. 647, 1950 N.Y. Misc. LEXIS 2054 (N.Y. Sup. Ct. 1950).

Action for false arrest and imprisonment accrued when plaintiffs were sentenced and discharged rather than at time they were arrested, since plaintiffs were theoretically in restraint after their release. La Curto v Brooklyn Nat'l League Baseball Club, Inc., 6 Misc. 2d 637, 160 N.Y.S.2d 499, 1957 N.Y. Misc. LEXIS 3447 (N.Y. Sup. Ct. 1957).

With respect to a cause of action against a county for false arrest and imprisonment, plaintiff's cause of action did not arise until date of his discharge from imprisonment, and notice of claim filed within 90 days thereafter met the requirements of this section. Tranberg v County of Nassau, 28 Misc. 2d 275, 209 N.Y.S.2d 995, 1961 N.Y. Misc. LEXIS 3598 (N.Y. Sup. Ct. 1961).

An alleged cause of action in favor of an ex-convict against New York City, based upon 25 years of imprisonment ultimately terminated by writ of error coram nobis and alleged to constitute false imprisonment because conviction was induced by suppression of evidence, did not accrue until his release from prison, and hence his notice of claim was timely served within the prescribed 90-day period thereafter and his action was timely commenced within one year. Zimmerman v New York, 40 Misc. 2d 179, 242 N.Y.S.2d 791, 1963 N.Y. Misc. LEXIS 1715 (N.Y. Sup. Ct. 1963), dismissed, 52 Misc. 2d 797, 276 N.Y.S.2d 711, 1966 N.Y. Misc. LEXIS 1247 (N.Y. Sup. Ct. 1966).

A cause of action for false imprisonment does not accrue until party has been discharged from restraint, including bail. Caminito v New York, 45 Misc. 2d 241, 256 N.Y.S.2d 670, 1965 N.Y. Misc. LEXIS 2278 (N.Y. Sup. Ct. 1965), aff'd in part, modified, 25 A.D.2d 848, 269 N.Y.S.2d 826, 1966 N.Y. App. Div. LEXIS 4364 (N.Y. App. Div. 2d Dep't 1966).

The 90-day period for serving a notice of claim on a county in an action for false arrest (General Municipal Law, § 50-e) commences on the day that the claimant is released from actual custody. Brenner v County of Rockland, 92 Misc. 2d 833, 401 N.Y.S.2d 434, 1978 N.Y. Misc. LEXIS 1973 (N.Y. Sup. Ct. 1978), aff'd, 67 A.D.2d 901, 413 N.Y.S.2d 185, 1979 N.Y. App. Div. LEXIS 10667 (N.Y. App. Div. 2d Dep't 1979).

91. —Series of false imprisonments

Where the claim for which notice is given under the above statute is one for a series of false imprisonments, the 90-day notice required by subd 1 thereof runs from the termination of each imprisonment complained of and not from the date of the plaintiff's acquittal. Schildhaus v New York, 23 A.D.2d 409, 261 N.Y.S.2d 909, 1965 N.Y. App. Div. LEXIS 3626 (N.Y. App. Div. 1st Dep't 1965), aff'd, 17 N.Y.2d 853, 271 N.Y.S.2d 286, 218 N.E.2d 325, 1966 N.Y. LEXIS 1344 (N.Y. 1966).

92. Malicious prosecution

For purposes of notice of claim under CLS Gen Mun § 50-e, cause of action for malicious prosecution arises on date that criminal charges against plaintiff are dismissed on merits or verdict is entered in plaintiff's favor, either occurrence being essential element to such claim. Vitale v Hagan, 71 N.Y.2d 955, 528 N.Y.S.2d 823, 524 N.E.2d 144, 1988 N.Y. LEXIS 640 (N.Y. 1988).

Failure to state malicious prosecution cause of action against city in notice of claim did not require dismissal of such cause of action where it had not accrued when notice of claim was served and where the action was commenced within 90 days after the cause of action did accrue. Kieninger v New York, 53 A.D.2d 602, 384 N.Y.S.2d 11, 1976 N.Y. App. Div. LEXIS 13269 (N.Y. App. Div. 2d Dep't 1976).

Last element to be satisfied with respect to cause of action for malicious prosecution against city was termination of criminal proceedings in favor of petitioner, which occurred when criminal complaint against petitioner was dismissed. Beary v Rye, 59 A.D.2d 905, 399 N.Y.S.2d 140, 1977 N.Y. App. Div. LEXIS 14108 (N.Y. App. Div. 2d Dep't 1977), rev'd, 44 N.Y.2d 398, 406 N.Y.S.2d 9, 377 N.E.2d 453, 1978 N.Y. LEXIS 1960 (N.Y. 1978).

A cause of action for malicious prosecution accrues when the proceeding terminates favorably to the plaintiff; accordingly, a claim of malicious prosecution against a municipality is timely where the notice of claim is filed within 90 days of the dismissal of the indictment. Boose v Rochester, 71 A.D.2d 59, 421 N.Y.S.2d 740, 1979 N.Y. App. Div. LEXIS 13087 (N.Y. App. Div. 4th Dep't 1979).

A cause of action for malicious prosecution is not barred by section 50-e of the General Municipal Law where the notice of intention to file a claim was served seven days prior to the entry of a judgment which dismissed the determination of a town board finding plaintiff guilty of certain charges of police misconduct, despite the fact that the claim was not filed within 90 days after the claim arose, inasmuch as the decision of the court awarding judgment to plaintiff was made some time before the making and entering of the judgment and, thus, the first disposition in favor of claimant arose when the court rendered its decision and not on the date when the formal judgment was rendered; in any event, such service shall be deemed valid if such notice is actually received by the public corporation before the 90-day period has expired. Groat v Town Bd., 73 A.D.2d 426, 426 N.Y.S.2d 339, 1980 N.Y. App. Div. LEXIS 10068 (N.Y. App. Div. 3d Dep't), app. dismissed, 50 N.Y.2d 928, 1980 N.Y. LEXIS 3257 (N.Y. 1980).

Plaintiff complied with time limitations imposed by statute in bringing malicious prosecution action inasmuch as plaintiff was

arrested by members of police department of village on August 10, 1981, on February 17, 1982 matter was presented to grand jury which refused to return indictment against him, and plaintiff served his notice of claim upon village on or about April 2, 1982, and commenced action on March 30, 1983; grand jury's decision not to return true bill constituted final disposition in criminal court and it was as of this date that criminal proceedings terminated in plaintiff's favor and that his claim for malicious prosecution accrued. Creary v Mamaroneck, 110 A.D.2d 870, 488 N.Y.S.2d 427, 1985 N.Y. App. Div. LEXIS 48783 (N.Y. App. Div. 2d Dep't 1985).

Supreme court's properly granted an arrestee's petition for leave to serve a late notice of claim to assert a claim of malicious prosecution against a village because the claim did not accrue until the charges against the arrestee were dismissed, and thus, the notice of claim was timely. Matter of Nunez v Village of Rockville Ctr., 176 A.D.3d 1211, 111 N.Y.S.3d 71, 2019 N.Y. App. Div. LEXIS 7800 (N.Y. App. Div. 2d Dep't 2019).

93. Medical malpractice

In a wrongful death action predicated upon medical malpractice, the trial court properly concluded that the defendant city hospital was not prejudiced by the plaintiff's delay in filing a notice of the claim, where the city, after having received a summons and complaint that was served either on the day or the day after the city held a hearing in the matter, had explored every possible claim that could be instituted against it. Waiters v New York City Health & Hospitals Corp., 83 A.D.2d 612, 441 N.Y.S.2d 294, 1981 N.Y. App. Div. LEXIS 14900 (N.Y. App. Div. 2d Dep't 1981).

In a medical malpractice action, plaintiffs' motion to strike from the answer of defendant City of New York the affirmative defense of failure to timely serve a notice of claim and to timely commence the action was improperly granted, where the service of a notice of claim on the city was untimely, inasmuch as the accrual of the female plaintiff's malpractice claim occurred when the tubal ligation operation was performed, and not when it was determined that she had become pregnant. Saler v New York, 96 A.D.2d 583, 465 N.Y.S.2d 279, 1983 N.Y. App. Div. LEXIS 19119 (N.Y. App. Div. 2d Dep't 1983).

Causes of action for conscious pain and suffering allegedly caused by medical malpractice of defendants, New York City Health and Hospitals Corporation and one of its staff physicians, were properly dismissed on ground that notice of claim was not served within 90 days of accrual, which was, at latest, date of death, and no motion for leave to serve late notice of claim was made within one year and 90-days Statute of Limitations; 1990 amendment to CLS Unconsol Ch 214-A § 20 (L1990, ch 804, § 122) excepting "an action for wrongful death" from usual 90-days-after-accrual rule does not mean that causes of action for wrongful death and conscious pain and suffering are so inextricably intertwined in context of medical malpractice that notice of claim time requirements applicable to former should govern latter. Yoo v New York City Health & Hosps. Corp., 239 A.D.2d 267, 657 N.Y.S.2d 189, 1997 N.Y. App. Div. LEXIS 5281 (N.Y. App. Div. 1st Dep't 1997).

City employee's action against city and its physicians for failure to inform him of their differential diagnosis of Lyme disease was properly dismissed for failure to serve timely notice of claim where (1) employee's 1992 notice of claim was not served within 90 days after he learned that he had Lyme disease, which was in January 1990 when city made diagnosis of Lyme disease and employee began receiving treatment for it, or within reasonable period after that 90-day period, (2) employee knew that he had been examined by defendants in August 1988, and (3) once employee learned that he had Lyme disease, he should have been more diligent in obtaining medical report of 1988 examination containing differential diagnosis. Ryan v City of New York, 251 A.D.2d 185, 675 N.Y.S.2d 862, 1998 N.Y. App. Div. LEXIS 7384 (N.Y. App. Div. 1st Dep't 1998).

To sustain a malpractice action against a city notice of claim must be served within 90 days after the claim accrues. Armstrong v New York, 39 Misc. 2d 445, 240 N.Y.S.2d 663, 1963 N.Y. Misc. LEXIS 2036 (N.Y. Sup. Ct. 1963).

Failure to timely serve employees of county hospital with copy of notice of claim for medical malpractice required dismissal of claim against such employees. Mc Queen v County of Nassau, 83 Misc. 2d 865, 373 N.Y.S.2d 767, 1975 N.Y. Misc. LEXIS 3005 (N.Y. Sup. Ct. 1975).

94. —Continuous treatment

A claim against a city based upon malpractice and negligence of physicians and nurses employed by the city in one of its hospitals and involving a course of treatment running over a considerable period of time and all related to the same original condition or complaint does not "accrue" until the end of the treatment period, and notice of claim served upon the city within 90 days thereafter is timely. Borgia v New York, 12 N.Y.2d 151, 237 N.Y.S.2d 319, 187 N.E.2d 777, 1962 N.Y. LEXIS 804 (N.Y. 1962).

In an action against the city based on medical treatment received in one of its hospitals, the claim of the infant plaintiff did not accrue until after the effective date of Gen Mun Law § 50-e(5) where the infant had been under the continuous care and treatment of the hospital and the statute of limitations was tolled by infancy since the amendment to Gen Mun Law § 50-e(5) providing for tolls for infancy was applicable. Chilan v New York, 87 A.D.2d 568, 448 N.Y.S.2d 509, 1982 N.Y. App. Div. LEXIS 15813 (N.Y. App. Div. 1st Dep't 1982).

In a medical malpractice action against a municipality in which plaintiff contended that, as a result of surgery performed at defendant city hospital, she lost vision in her left eye, the trial court properly denied the injured party's motion for leave to serve a late notice of claim, and granted the city's motion for summary judgment dismissing the action, where the motion was not made within one year and 90 days after the date of the occurrence, which, under the circumstances, was the date of last treatment. Thomas v New York, 102 A.D.2d 867, 477 N.Y.S.2d 42, 1984 N.Y. App. Div. LEXIS 19074 (N.Y. App. Div. 2d Dep't 1984).

Malpractice action was time barred where plaintiff failed to timely return to clinic after having been instructed to return in one month, where she failed to seek corrective treatment from defendant despite experiencing pain during ensuing one-year interval, and where she adamantly refused to undergo corrective treatment upon finally returning to clinic on day she signed notice of claim; although no single factor necessarily established lack of continuity, under circumstances, there was no continuity of treatment. Daniec v Synthes, Ltd. USA, 110 A.D.2d 675, 487 N.Y.S.2d 808, 1985 N.Y. App. Div. LEXIS 48573 (N.Y. App. Div. 2d Dep't 1985).

Statute of limitations does not begin to run in medical malpractice case until patient finishes regular course of continuous treatment. Rechenberger v Nassau County Medical Center, 112 A.D.2d 150, 490 N.Y.S.2d 838, 1985 N.Y. App. Div. LEXIS 56436 (N.Y. App. Div. 2d Dep't 1985).

Court erred in granting motion for leave to serve late notice of claim in medical malpractice action on ground that action did not accrue, and 10-year extended limitations period of CLS CPLR § 208 did not commence to run, until continuous treatment ended; subsequent continuous treatment does not change or extend accrual date of cause of action, but only serves to toll running of statute of limitations. Sergile v New York City Health & Hosp. Corp., 175 A.D.2d 119, 571 N.Y.S.2d 814, 1991 N.Y. App. Div. LEXIS 9380 (N.Y. App. Div. 2d Dep't 1991).

Malpractice action against New York City Health and Hospitals Corporation, arising from 2 elective surgeries performed on plaintiff's leg in 1972, was properly dismissed due to plaintiff's failure to serve timely notice of claim under CLS Unconsol Ch 214-A § 20 and CLS Gen Mun § 50-e(5), and because action was not commenced within applicable statute of limitations, where plaintiff stated at her deposition that last time her leg was treated prior to filing notice of claim in 1977 was in 1974, and that her leg was not tested against until 1990. Leale v New York City Health & Hosps. Corp., 222 A.D.2d 414, 634 N.Y.S.2d 536, 1995 N.Y. App. Div. LEXIS 12564 (N.Y. App. Div. 2d Dep't 1995).

In medical malpractice action alleging failure to timely diagnose plaintiff's breast cancer, New York City Health and Hospitals Corporation (NYCHHC) was not entitled to dismissal of complaint for failure to serve timely notice of claim, as question of

fact existed as to whether accrual was tolled by continuous treatment doctrine where (1) November 17, 1989 report of mammogram noted that plaintiff had mass "highly suspicious" of cancer, but when she returned to NYCHHC clinic on December 6 for mammography follow-up, her treating physician told her that because he did not receive anything from "upstairs," he thought everything was all right, and (2) abnormal mammography findings were not communicated to plaintiff until August 21, 1990; as far as plaintiff was concerned, whether she needed further treatment of her breast condition was not disposed of until mammogram results became available to her treating physician and could be read. Irizarry v New York City Health & Hosps. Corp., 268 A.D.2d 321, 701 N.Y.S.2d 399, 2000 N.Y. App. Div. LEXIS 517 (N.Y. App. Div. 1st Dep't 2000).

Action was based on medical malpractice and thus subject to doctrine of continuous treatment where plaintiff was injured on October 2, 1997 during seizure at county medical center while being monitored for seizure disorder, and she remained under care of medical center until October 6, 1997; thus, notice of claim filed on January 2, 1998 should not have been dismissed as untimely since time within which to file notice of claim did not expire until January 4, 1998. McKoy v County of Westchester, 272 A.D.2d 307, 707 N.Y.S.2d 203, 2000 N.Y. App. Div. LEXIS 4843 (N.Y. App. Div. 2d Dep't 2000).

In action alleging that plaintiff fell while patient in county hospital and hospital thereafter failed to diagnose and treat injuries sustained in fall, plaintiff's claim that she fell due to lack of bed restraints was based on ordinary negligence and thus was not subject to continuous treatment doctrine for purposes of determining whether notice of claim as to that portion of complaint was timely served. Teitell v County of Westchester, 277 A.D.2d 309, 716 N.Y.S.2d 76, 2000 N.Y. App. Div. LEXIS 11718 (N.Y. App. Div. 2d Dep't 2000).

Patient raised a triable issue as to whether the continuous treatment doctrine allowed her to recover for a county health center's negligence in not diagnosing and treating her Lyme disease when she first sought treatment there for a rash, where she continued to return to the center for a core group of conditions related to Lyme disease, even though her initial visit occurred more than 90 days before she filed a notice of claim with the county. Couch v County of Suffolk, 296 A.D.2d 194, 746 N.Y.S.2d 187, 2002 N.Y. App. Div. LEXIS 7936 (N.Y. App. Div. 2d Dep't 2002).

Partial summary judgment was improperly granted to a hospital in plaintiffs' action alleging, inter alia, medical malpractice based on a finding that the decedent's notice of claim was not timely under N.Y. Gen. Mun. Law § 50-e because plaintiffs raised a triable issue of fact as to whether the continuous treatment doctrine could be invoked against the hospital under N.Y. C.P.L.R. 214-a where the affidavit of plaintiffs' expert raised a triable issue as to whether the symptoms the decedent experienced and twice sought treatment for at the hospital were indicative of lung cancer. Shifrina v City of New York, 5 A.D.3d 660, 774 N.Y.S.2d 85, 2004 N.Y. App. Div. LEXIS 3330 (N.Y. App. Div. 2d Dep't 2004).

Appeals court reversed order dismissing patients' suit against municipal health care providers and remitted for trial court to determine if continuous treatment doctrine made claims for particular conditions' treatments before the N.Y. Gen. Mun. Law §§ 50-e, 50-i one year and 90-day claim deadline timely filed. McCoy v City of New York, 10 A.D.3d 724, 782 N.Y.S.2d 120, 2004 N.Y. App. Div. LEXIS 11068 (N.Y. App. Div. 2d Dep't 2004).

Under the continuous treatment doctrine, a notice of claim period does not begin to run until the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint. There existed questions of fact as to whether the doctrine was applicable, so dismissal of certain claims was not appropriate. McCoy v City of New York, 10 A.D.3d 724, 782 N.Y.S.2d 120, 2004 N.Y. App. Div. LEXIS 11068 (N.Y. App. Div. 2d Dep't 2004).

Plaintiff's time to file notice of claim against New York City Health and Hospitals Corporation (HHC) within 90 days of accrual of medical malpractice action could not be extended by continuous treatment rendered by HHC after plaintiff had served HHC with summons and complaint; continuous treatment doctrine does not toll statute of limitations under CLS CPLR § 214-a where patient seeks treatment after action has been commenced. Reyes v Duffy, 162 Misc. 2d 624, 618 N.Y.S.2d 484, 1994 N.Y. Misc. LEXIS 461 (N.Y. Sup. Ct. 1994).

95. — —Same or related condition

Defendant was entitled to dismissal of plaintiff's cause of action for medical malpractice where plaintiff's notice of claim alleging the malpractice was not served on defendant within the 90 day period from the date of injury; the trial court improperly applied the "continuous treatment" doctrine based on alleged treatment for her injury at another hospital, since the rule of "continuous treatment" applies only to a relationship of care or treatment with the defendant physician or hospital for the same or related illness or injuries. De Sainz v New York, 101 A.D.2d 746, 475 N.Y.S.2d 67, 1984 N.Y. App. Div. LEXIS 18379 (N.Y. App. Div. 1st Dep't 1984).

Finding of continuous treatment may not be based solely on finding of hospital-patient relationship; treatment afforded by hospital to infant for neurological injuries and related disorders is plainly intermittent and constitutes, for most part, separate and discrete treatments where at time of infant's original release from hospital, no further treatment is contemplated, infant returns to hospital on several occasions for emergency room treatment completely unrelated to neurological injuries and substantial temporal gaps exist between subsequent visits for treatment of neurological injuries. Grellet v New York, 118 A.D.2d 141, 504 N.Y.S.2d 671, 1986 N.Y. App. Div. LEXIS 53982 (N.Y. App. Div. 2d Dep't 1986).

Patient's contention that, under the continuous treatment doctrine, her medical malpractice claim did not accrue until the date of her last visit to the healthcare provider's facility, and thus that the trial court should have granted leave for her to serve a late notice of claim under N.Y. Gen. Mun. Law § 50-e, was without merit where the medical records showed that the patient's last visits to the healthcare provider's facility were not for the treatment of symptoms that she attributed to the condition underlying the malpractice claim, Lyme disease, but rather, they were for the specific purpose of treating a toothache, as well as an ankle sprain and hip injury which she allegedly sustained from an ice skating accident. Little v Nassau Health Care Corp., 15 A.D.3d 359, 790 N.Y.S.2d 465, 2005 N.Y. App. Div. LEXIS 1404 (N.Y. App. Div. 2d Dep't 2005).

96. — —Gap in treatment

In proceeding under CLS Gen Mun § 50-e(5) for leave to serve late notice of claim against county medical center, continuous treatment doctrine did not apply where gap between petitioner's treatments at center was from July 1996 to January 1998, which exceeded applicable limitations period of one year and 90 days under CLS Gen Mun § 50-i. Bulger v Nassau County Med. Ctr., 266 A.D.2d 212, 697 N.Y.S.2d 345, 1999 N.Y. App. Div. LEXIS 11101 (N.Y. App. Div. 2d Dep't 1999), overruled in part, Lohnas v Luzi, 30 N.Y.3d 752, 94 N.E.3d 892, 71 N.Y.S.3d 404, 2018 N.Y. LEXIS 215 (N.Y. 2018)).

A claim against the city for damages for malpractice in one of its hospitals accrues, for purposes of starting the time to serve notice of claim, only at the end of the treatment, there is no requirement that the injured party be confined to the hospital during the entire period complained of in order for there to be "continuous treatment," and notice of claim was accordingly timely filed where it was within 90 days following death of the patient though she had at one stage been released from the hospital and out of it for about a week before being returned for further treatment. Armstrong v New York, 39 Misc. 2d 445, 240 N.Y.S.2d 663, 1963 N.Y. Misc. LEXIS 2036 (N.Y. Sup. Ct. 1963).

There was sufficient evidence for the jury to find continuous treatment so as to preclude running of limitations period within which patient must file notice of claim against county, despite a substantial gap between the malpractice and the rehabilitative treatment. Modave v Long Island Jewish Medical Center, 501 F.2d 1065, 1974 U.S. App. LEXIS 7907 (2d Cir. N.Y. 1974).

In medical malpractice and products liability suit brought by mother of plaintiff decedent who contacted disease following

vaccination with drug, subsequent treatment at municipal hospital 7 years after innoculation did not establish continued course of treatment beginning in year of innocuation and ending in year of subsequent treatment as to make plaintiff's service of notice in 1969 timely under New York law. Ezagui v Dow Chemical Corp., 598 F.2d 727, 1979 U.S. App. LEXIS 15210 (2d Cir. N.Y. 1979).

97. — —Different medical facilities or departments

The doctrine of continuous treatment may be applied to toll the 90-day period within which a notice of claim must be filed pursuant to Gen Mun Law § 50-e and Unconsol Law Ch 214-A § 20(2) where a plaintiff patient is successfully treated for the same or related illnesses or injuries by different municipal medical facilities under the aegis of the New York City Health and Hospitals Corporation. However, the doctrine was inapplicable where plaintiff was treated and released from Coney Island Hospital following an automobile-motorcycle accident, subsequently returned of his own volition to the emergency room at that hospital on several occasions and left without being treated, and, having in the interim sought treatment from private physicians, was thereafter admitted and treated at Metropolitan Hospital for a condition that Coney Island Hospital allegedly failed to diagnose and treat. Marabello v City of New York, 99 A.D.2d 133, 472 N.Y.S.2d 933, 1984 N.Y. App. Div. LEXIS 16530 (N.Y. App. Div. 2d Dep't), app. dismissed, 62 N.Y.2d 942, 1984 N.Y. LEXIS 8523 (N.Y. 1984).

Continuous treatment doctrine did not extend period for filing notice of claim under CLS Gen Mun § 50-e(5) in medical malpractice action for aggravation of spinal injuries against New York City Health and Hospitals Corporation (NYCHHC), even though plaintiff was directed to return to Bronx Municipal Hospital Center (BMHC) for postsurgical physical therapy, where there was no indication that he ever received physical therapy there, his later examination at BMHC involved discovery of wire suture rather than physical therapy, plaintiff's own CLS Gen Mun § 50-h hearing testimony that he returned to BMHC for physical therapy was insufficient, and although he also claimed to have received continuing treatment at other hospitals owned by NYCHHC, such ownership alone did not prove necessary nexus. Dubose v New York City Health & Hosp. Corp., 255 A.D.2d 234, 680 N.Y.S.2d 95, 1998 N.Y. App. Div. LEXIS 12421 (N.Y. App. Div. 1st Dep't 1998), app. dismissed, 93 N.Y.2d 848, 688 N.Y.S.2d 494, 710 N.E.2d 1093, 1999 N.Y. LEXIS 136 (N.Y. 1999).

Continuous treatment doctrine could be imputed to other departments within hospital in order to toll applicable Statute of Limitations where patient received continuous treatment by hospital employees which was related to original alleged malpractice of hospital employee being sued. Turcios v Nassau County Medical Ctr., 173 Misc. 2d 646, 661 N.Y.S.2d 491, 1997 N.Y. Misc. LEXIS 373 (N.Y. Sup. Ct. 1997).

98. — —Routine examinations, monitoring, or evaluation

Court properly dismissed malpractice complaint alleging inappropriate prenatal and neonatal care delivered by New York City Health and Hospitals Corporation where notice of claim was not filed until more than 10 years after cause of action accrued, and plaintiff failed to raise issue of fact as to possible applicability of continuous treatment doctrine; fact that routine examinations undergone by plaintiff might have included monitoring or evaluation of medical condition with which he was born ("Erbs palsy") did not mean that he was being treated for that condition. Ganess v City of New York, 207 A.D.2d 765, 616 N.Y.S.2d 510, 1994 N.Y. App. Div. LEXIS 8764 (N.Y. App. Div. 2d Dep't 1994), aff'd, 85 N.Y.2d 733, 628 N.Y.S.2d 242, 651 N.E.2d 1261, 1995 N.Y. LEXIS 1110 (N.Y. 1995).

Defendant, New York City Health and Hospitals Corporation, was properly denied summary judgment in action alleging failure to timely diagnose and treat plaintiff's breast cancer, despite its contention that alleged misdiagnosis was made more than 1 year and 90 days prior to filing of plaintiff's notice of claim, where fact issue existed as to whether frequency and intensity of intervening monitoring of plaintiff constituted continuous treatment so as to toll limitations period. Oksman v City of New York, 271 A.D.2d 213, 705 N.Y.S.2d 360, 2000 N.Y. App. Div. LEXIS 3874 (N.Y. App. Div. 1st Dep't 2000).

Statutory period for filing notice of claim was not tolled by patient's continuous treatment by defendant, since ongoing general relationship with clinic for routine periodic health examinations did not constitute continuous treatment of condition on which allegations of malpractice were based. Vazquez v New York City Health & Hosps. Corp., 279 A.D.2d 368, 720 N.Y.S.2d 20, 2001 N.Y. App. Div. LEXIS 646 (N.Y. App. Div. 1st Dep't 2001).

Motion for leave to serve notice of claim on proposed defendants was denied where there was no service of notice of application for extension of time on such proposed defendants. Banks v Hebrew Children's Home, Inc., 133 N.Y.S.2d 618, 1954 N.Y. Misc. LEXIS 2269 (N.Y. Sup. Ct. 1954).

99. — —Patient's knowledge or intent

In medical malpractice action, 90-day period in which plaintiff was required to file notice of claim against New York City Health and Hospitals Corporation was not tolled by continuous treatment doctrine even though doctors who initially treated plaintiff expected her to return for further treatment, where there was no evidence that she herself contemplated any continuity of relationship, and her statements and actions indicated that she did not intend to return for further treatment. Allende v New York City Health & Hosps. Corp., 90 N.Y.2d 333, 660 N.Y.S.2d 695, 683 N.E.2d 317, 1997 N.Y. LEXIS 1375 (N.Y. 1997).

In medical malpractice action against New York City Health and Hospitals Corporation (HHC) wherein evidence indicated that plaintiff did not intend to return for further treatment to hospital where she was treated initially, fact that plaintiff subsequently received additional treatment at another HHC-owned hospital did not qualify as continuous treatment for purpose of tolling 90-day period in which she was required to file notice of claim against HHC. Allende v New York City Health & Hosps. Corp., 90 N.Y.2d 333, 660 N.Y.S.2d 695, 683 N.E.2d 317, 1997 N.Y. LEXIS 1375 (N.Y. 1997).

Continuous treatment doctrine codified in CLS CPLR § 214-a did not toll 90-day notice of claim period applicable to plaintiff's medical malpractice action against New York City Health and Hospital Corporation for alleged failure to timely diagnose and treat her cancerous breast condition, where plaintiff's allegations established that she was unaware of need for further treatment of her breast, and that no course of treatment for that condition had otherwise been established during dispositive time period; complaint was properly dismissed under CLS CPLR §§ 3211 and 3212. Young v New York City Health & Hosps. Corp., 91 N.Y.2d 291, 670 N.Y.S.2d 169, 693 N.E.2d 196, 1998 N.Y. LEXIS 8 (N.Y. 1998).

Continuous treatment doctrine rendered timely plaintiff's notice of medical malpractice claim against city, despite his failure to keep several scheduled appointments at city hospital's orthopedic clinic, where (1) notice was served within 90 days of his discharge after his second admission to hospital, (2) plaintiff was continuously treated for injury-related problems on his frequent return visits to hospital during 6 ½ months between his 2 long admissions, and (3) his initial stay of nearly 3 months entailed long-term recovery with potential for follow-up surgery. Watson v City of New York, 273 A.D.2d 115, 709 N.Y.S.2d 546, 2000 N.Y. App. Div. LEXIS 7130 (N.Y. App. Div. 1st Dep't 2000).

100. — —Private physician

Department of Sanitation was entitled to dismissal of employee's complaint on grounds of failure to timely file notice of claim pursuant to CLS Gen Mun § 50-e where employee alleged negligent diagnosis and treatment by physicians at department's clinic, notice of claim was not served until 2 ½ years after alleged negligence occurred, and plaintiff's invocation of continuous treatment doctrine was not supported by facts which showed that, although he repeatedly reported to clinic in connection with department's evaluation of his fitness for return to work and they occasionally dispensed muscle relaxants and took x-rays, he was being continuously treated by private physician during this period. Olkowski v New York, 179 A.D.2d 570, 578 N.Y.S.2d 570, 1992 N.Y. App. Div. LEXIS 726 (N.Y. App. Div. 1st Dep't), app. denied, 80 N.Y.2d 755, 588 N.Y.S.2d 823, 602 N.E.2d 231, 1992 N.Y. LEXIS 3133 (N.Y. 1992).

101. —"Foreign objects" rule

This section requires that a notice of claim must be filed within 90 days after the claim arises, and that failure to file such a notice operates to bar any action against the public officer or body. Barchet v New York City Transit Authority, 20 N.Y.2d 1, 281 N.Y.S.2d 289, 228 N.E.2d 361, 1967 N.Y. LEXIS 1446 (N.Y. 1967).

Where myelogram allegedly resulted in internal somatic effects not readily ascertainable and where the effects were not discovered until patient was advised of electromyelogram report some 13 months after the myelogram was performed, where there were hospital records of the alleged negligent myelogram and of the procedure which allegedly resulted in discovery of the alleged malpractice, where there was no possible break between the alleged negligence and the patient's injury, and where professional diagnostic judgment or discretion was not involved, patient was entitled, some 16 months after the alleged malpractice, to serve notice of claim on the New York City Health and Hospitals Corporation. Smalls v New York City Health & Hospitals Corp., 55 A.D.2d 537, 389 N.Y.S.2d 372, 1976 N.Y. App. Div. LEXIS 15201 (N.Y. App. Div. 1st Dep't 1976), rev'd, 44 N.Y.2d 398, 406 N.Y.S.2d 9, 377 N.E.2d 453, 1978 N.Y. LEXIS 1960 (N.Y. 1978).

In a medical malpractice action to recover damages allegedly sustained when defendants' employees inserted a IUD in plaintiff's body without removing an IUD already in place, plaintiff's claim accrued when plaintiff discovered or should have discovered the first IUD, a "foreign object;" notice of the claim was timely only if filed within 90 days of the date on which the claim accrued; and the action was time-barred unless commenced within one year and 90 days of that date (CPLR § 214-a, Gen Mun Law § 50-e). Ooft v New York, 80 A.D.2d 888, 437 N.Y.S.2d 30, 1981 N.Y. App. Div. LEXIS 10748 (N.Y. App. Div. 2d Dep't 1981), disapproved, Rodriguez v Manhattan Medical Group, P. C., 77 N.Y.2d 217, 566 N.Y.S.2d 193, 567 N.E.2d 235, 1990 N.Y. LEXIS 4494 (N.Y. 1990).

To sustain a malpractice action against a city notice of claim must be served within 90 days after the claim accrues. Armstrong v New York, 39 Misc. 2d 445, 240 N.Y.S.2d 663, 1963 N.Y. Misc. LEXIS 2036 (N.Y. Sup. Ct. 1963).

Postponement of accrual date of medical malpractice cause of action by virtue of "foreign objects" rule extended time in which action could be commenced against municipality. Darragh v County of Nassau, 91 Misc. 2d 53, 397 N.Y.S.2d 553, 1977 N.Y. Misc. LEXIS 2234 (N.Y. Sup. Ct. 1977), aff'd, 63 A.D.2d 1010, 405 N.Y.S.2d 1020, 1978 N.Y. App. Div. LEXIS 12098 (N.Y. App. Div. 2d Dep't 1978), disapproved, Rodriguez v Manhattan Medical Group, P. C., 77 N.Y.2d 217, 566 N.Y.S.2d 193, 567 N.E.2d 235, 1990 N.Y. LEXIS 4494 (N.Y. 1990).

102. —Subsequent discovery

With respect to a claim against a municipality based upon injuries due to malpractice at a municipal hospital, lack of knowledge of defendant's negligence until after expiration of the statutory period for serving notice of claim will not excuse failure to give timely notice. Borgia v New York, 16 A.D.2d 927, 229 N.Y.S.2d 318, 1962 N.Y. App. Div. LEXIS 9360 (N.Y. App. Div. 2d Dep't), rev'd, 12 N.Y.2d 151, 237 N.Y.S.2d 319, 187 N.E.2d 777, 1962 N.Y. LEXIS 804 (N.Y. 1962).

Where myelogram allegedly resulted in internal somatic effects not readily ascertainable and where the effects were not discovered until patient was advised of electromyelogram report some 13 months after the myelogram was performed, where there were hospital records of the alleged negligent myelogram and of the procedure which allegedly resulted in discovery of the alleged malpractice, where there was no possible break between the alleged negligence and the patient's injury, and where professional diagnostic judgment or discretion was not involved, patient was entitled, some 16 months after the alleged malpractice, to serve notice of claim on the New York City Health and Hospitals Corporation. Smalls v New York City Health & Hospitals Corp., 55 A.D.2d 537, 389 N.Y.S.2d 372, 1976 N.Y. App. Div. LEXIS 15201 (N.Y. App. Div. 1st Dep't 1976), rev'd, 44 N.Y.2d 398, 406 N.Y.S.2d 9, 377 N.E.2d 453, 1978 N.Y. LEXIS 1960 (N.Y. 1978).

103. Actions involving motor vehicles

Trial court's order granting an employee's application for leave to file a late notice of her employment discrimination claim against a school district was improper because a late notice of claim was required to have been filed no later than one year after a cause of action accrued, and N.Y. Educ. Law § 3813(2-b) provided a one-year statute of limitations; since the proceeding was commenced more than one year after the claim arose, the trial court lacked the discretion to allow a late notice. Matter of Amorosi v South Colonie Ind. Cent. School Dist., 9 N.Y.3d 367, 849 N.Y.S.2d 485, 880 N.E.2d 6, 2007 N.Y. LEXIS 3711 (N.Y. 2007).

City was not liable for damage sustained when truck struck tree which was partially obstructing highway where there was no proof that city had received prior written notice of highway obstruction, as required by city charter. Johnstown Leather Corp. v Gloversville, 56 A.D.2d 345, 393 N.Y.S.2d 89, 1977 N.Y. App. Div. LEXIS 10441 (N.Y. App. Div. 3d Dep't 1977).

Court properly denied personal injury plaintiff's motion under CLS Gen Mun § 50-e(6) and CLS CPLR § 3025(c) to amend her notice of claim, verified complaint, and bill of particulars to reflect correct date of accident and to restore case to trial calendar where there was unexplained 5-year delay in seeking such relief, there was no explanation for inaction of plaintiff's former counsel after he learned of date discrepancy at hearing, he repeated incorrect date in verified bill of particulars and notice to admit 3 years after hearing, and amendment would cause defendant clear prejudice. Kotler v City of New York, 266 A.D.2d 355, 697 N.Y.S.2d 530, 1999 N.Y. App. Div. LEXIS 11574 (N.Y. App. Div. 2d Dep't 1999).

In a claimant's personal injury action against a school district and a bus driver, the claimant's notice of claim was a nullity because the claim accrued on September 20, 2012, the day of the accident but the claimant served the notice of claim no earlier than February 4, 2013, approximately seven weeks after the deadline. Cassidy v Riverhead Cent. Sch. Dist., 128 A.D.3d 996, 11 N.Y.S.3d 102, 2015 N.Y. App. Div. LEXIS 4369 (N.Y. App. Div. 2d Dep't 2015).

When a county seized and retained a vehicle owner's car pursuant to an ordinance which was found unconstitutional, the owner was not required to file a notice of his claim against the county within 90 days of the vehicle's seizure, as it was unreasonable to require him to immediately allege the ordinance's unconstitutionality or lose any recovery, but a notice of his claim did have to be filed within 90 days of an appellate court's decision finding the ordinance to be unconstitutional, notwithstanding any appeal of that decision, because this was when he first became entitled to maintain an action. Lombardo v County of Nassau, 791 N.Y.S.2d 292, 6 Misc. 3d 836, 233 N.Y.L.J. 2, 2004 N.Y. Misc. LEXIS 2960 (N.Y. Sup. Ct. 2004).

When a county seized and retained a vehicle owner's car pursuant to an ordinance which was found unconstitutional, but the owner did not file a notice of his claim against the county until after the decision finding the ordinance unconstitutional was affirmed by tne New York Court of Appeals, the notice was not timely but the owner showed good cause for its late filing, due to the uncertain status of the ordinance, due to an appeal of the decision finding it unconstitutional, and uncertainty as to when the owner's claim accrued, and the county's knowledge of the claim's essential facts was not impaired by the late filing, nor was the county otherwise prejudiced. Lombardo v County of Nassau, 791 N.Y.S.2d 292, 6 Misc. 3d 836, 233 N.Y.L.J. 2, 2004 N.Y. Misc. LEXIS 2960 (N.Y. Sup. Ct. 2004).

104. Personal injury on municipal property

An order granting plaintiffs leave to file a late notice of claim pursuant to Gen Mun Law § 50-e(5) would be reversed, where plaintiffs submitted no competent proof of knowledge on the part of the defendant county as to the facts surrounding the claim, and offered no justifiable excuse for the delay in filing. Baehre v County of Erie, 94 A.D.2d 943, 464 N.Y.S.2d 69, 1983 N.Y. App. Div. LEXIS 18409 (N.Y. App. Div. 4th Dep't 1983).

City asserted viable affirmative defense that action for exposure to toxic substance was not commenced in compliance with CLS Gen Mun §§ 50-e(1)(a) and 50-i where action was filed more than 90 days after adult plaintiff was informed that infant plaintiff was suffering from elevated level of lead in his blood, because that was when claim arose. Perry v City of New York, 238

A.D.2d 326, 656 N.Y.S.2d 301, 1997 N.Y. App. Div. LEXIS 3415 (N.Y. App. Div. 2d Dep't 1997).

N.Y. Gen. Mun. Law § 50-e(5)'s discretionary period for filing a late claim did not begin to run until claimant's diagnosis. Porcaro v City of New York, 20 A.D.3d 357, 799 N.Y.S.2d 450, 2005 N.Y. App. Div. LEXIS 7991 (N.Y. App. Div. 1st Dep't 2005).

Trial court acted within its discretion in allowing a pedestrian to amend the notice of claim to reflect March 3, 2012, as the correct date of the accident because mere minutes constituted the difference between whether the pedestrian's fall occurred on March 2 or March 3, 2012, there was no indication that the original accident date set forth in the notice of claim was set forth in bad faith, and the transit authority did not demonstrate any actual prejudice as a result of the discrepancy. Bowers v City of New York, 147 A.D.3d 894, 47 N.Y.S.3d 409, 2017 N.Y. App. Div. LEXIS 1163 (N.Y. App. Div. 2d Dep't 2017).

Where a city acquires title to certain property by condemnation and takes no steps to have its title thereto recorded, the period of notice required by subd 1 of the above statute does not begin to run against an injury arising from the defective condition of such premises until the claimant or his attorney receives actual notice of the city's ownership. Thompson v 9 West 117th St. Corp., 44 Misc. 2d 920, 255 N.Y.S.2d 440, 1964 N.Y. Misc. LEXIS 1243 (N.Y. Sup. Ct. 1964).

Plaintiff, injured in a fall on a city street, will not be permitted to file a notice of claim against the city after expiration of the 90-day filing period (General Municipal Law, § 50-e); plaintiff fails to show compelling circumstances for, although she was disabled for a number of weeks, she was able to return to work before the termination of the 90-day period and was, therefore, not incapable of filing her claim. Phillips v New York, 98 Misc. 2d 1124, 415 N.Y.S.2d 349, 1979 N.Y. Misc. LEXIS 2206 (N.Y. Civ. Ct. 1979).

105. Public employee benefits

Under Gen Mun § 50-e and Pub Hous § 157, trial court was required to deny public employee's motion to file late notice of claim against housing authority more than one year and 90 days after claim accrued, where (1) claim for negligent failure to deliver membership application to retirement system accrued when employee became member of system by operation of law, that being latest date negligence could have occurred, and not when employee discovered negligence 15 months later upon retirement system's rejecting disability pension application, and (2) after rejection of pension application, employee waited 8 months further to file claim. Leon v New York City Housing Authority, 157 A.D.2d 628, 550 N.Y.S.2d 646, 1990 N.Y. App. Div. LEXIS 815 (N.Y. App. Div. 1st Dep't), app. denied, 76 N.Y.2d 702, 559 N.Y.S.2d 239, 558 N.E.2d 41, 1990 N.Y. LEXIS 1334 (N.Y. 1990).

In action alleging that school district negligently and recklessly administered health insurance claims of plaintiff's decedent, school district was entitled to summary judgment dismissing tort causes of action for failure to serve timely notice of claim, where decedent had written to district's assistant superintendent in January and March complaining of administration of her insurance claims, but notice of claim was not filed until July 28 (albeit within 3 months of her death). Polvino v Island Group Admin., Inc., 264 A.D.2d 720, 694 N.Y.S.2d 728, 1999 N.Y. App. Div. LEXIS 9084 (N.Y. App. Div. 2d Dep't 1999).

Former teachers' notices of claim were timely filed, and their action against school district and others for misrepresentation of retirement benefits was timely commenced, where claim accrued no earlier than date on which defendants notified teachers that their pensions would not include severance benefits, because that was date on which teachers could ascertain their damages. Bellanca v Grand Island Cent. Sch. Dist., 275 A.D.2d 944, 715 N.Y.S.2d 184, 2000 N.Y. App. Div. LEXIS 9670 (N.Y. App. Div. 4th Dep't 2000).

For purposes of both the 90-day period of limitations within which to file a claim against defendant city "after the claim arises" (General Municipal Law, §§ 50-e, 50-i, subd 1, par [a]) based upon the city's alleged negligence in not timely filing plaintiff's claim for accidental disability retirement with the State Policemen's and Firemen's Retirement System (Retirement and Social Security Law, § 363, subd c) and the one-year and 90-day period of limitations within which to commence suit "after the happening of the event upon which the claim is based" (General Municipal Law, § 50-i, subd 1, par [c]), the statutory periods commenced and plaintiff's cause of action accrued either on the date that plaintiff, by receipt of the time-stamped copy of the notice of accident filed by the city, first received actual knowledge that his claim was not timely filed by the city or on the date that plaintiff's claim for benefits was formally rejected by the retirement system since, had plaintiff been granted benefits by the system, there would be no claim, no cause of action and no injury. Kelly v Rochester, 98 Misc. 2d 435, 413 N.Y.S.2d 1006, 1979 N.Y. Misc. LEXIS 2093 (N.Y. Sup. Ct. 1979).

The 90-day period of limitation within which to file a notice of claim against defendant city (General Municipal Law, §§ 50-e, 50-i, subd 1, par [a]) based upon the city's alleged negligence in not timely filing plaintiff's claim for accidental disability retirement with the State Policemen's and Firemen's Retirement System (Retirement and Social Security Law, § 363, subd c) after plaintiff suffered a heart attack while fighting a fire in February, 1972, began to run on April 9, 1975 when plaintiff's attorney, after many requests, received the time-stamped copy of the notice of accident filed by the city and not from an April, 1973 hearing when plaintiff and his attorney first became aware that there might be a question as to the timeliness of the city's notice since the general rule is that the period of limitations is measured from the date that the cause of action accrues when the party is first enabled to bring his action and plaintiff could not have been sure that he was aggrieved, and thus first able to bring suit, until he had actual knowledge that his claim had been filed late by the city. Kelly v Rochester, 98 Misc. 2d 435, 413 N.Y.S.2d 1006, 1979 N.Y. Misc. LEXIS 2093 (N.Y. Sup. Ct. 1979).

106. Real property actions

Inasmuch as boundary dispute involved an alleged continuing wrong on part of defendant village, plaintiff could maintain a new action to determine claims after properly filing notice of claim and any damages accruing during the 90-day period prior to such filing would be recoverable. Salesian Soc. v Ellenville, 50 A.D.2d 648, 374 N.Y.S.2d 805, 1975 N.Y. App. Div. LEXIS 12473 (N.Y. App. Div. 3d Dep't 1975), rev'd, 41 N.Y.2d 521, 393 N.Y.S.2d 972, 362 N.E.2d 604, 1977 N.Y. LEXIS 1915 (N.Y. 1977).

Action could not be maintained to determine claims of plaintiff and village to land situated near boundary line between their parcels, where complaint did not allege that notice of claim had been made and served upon village within 90 days of accrual, as required by General Municipal Law, and nothing else in record indicated that there had been compliance. Salesian Soc. v Ellenville, 50 A.D.2d 648, 374 N.Y.S.2d 805, 1975 N.Y. App. Div. LEXIS 12473 (N.Y. App. Div. 3d Dep't 1975), rev'd, 41 N.Y.2d 521, 393 N.Y.S.2d 972, 362 N.E.2d 604, 1977 N.Y. LEXIS 1915 (N.Y. 1977).

Action against city for negligent issuance and wrongful revocation of building permit accrued, for purposes of notice of claim requirements of CLS Gen Mun § 50-e, when permit was revoked. Curtis Case, Inc. v Port Jervis, 150 A.D.2d 421, 541 N.Y.S.2d 32, 1989 N.Y. App. Div. LEXIS 6484 (N.Y. App. Div. 2d Dep't 1989).

Cause of action accrued, at latest, on date when determination was made that property was within regulated water course area, not when exact amount of damages plaintiff sustained was ascertainable. Grgecic v Town of Bedford, 264 A.D.2d 465, 694 N.Y.S.2d 160, 1999 N.Y. App. Div. LEXIS 8839 (N.Y. App. Div. 2d Dep't), app. dismissed, 94 N.Y.2d 858, 704 N.Y.S.2d 533, 725 N.E.2d 1095, 1999 N.Y. LEXIS 3955 (N.Y. 1999).

A town may not pay a claim for damage to real property where the claimant has failed to give notice within 90 days or such additional time as the court might allow. 1966 Ops St Compt File #385.

107. Replevin

Claim for moneys which were seized under search warrant that led to charges and which were retained by county police department after dismissal of criminal action against plaintiff's decedent was not subject to County Law and General Municipal Law 90-day notice of claim requirement. Boyle v Kelley, 53 A.D.2d 457,

385 N.Y.S.2d 791, 1976 N.Y. App. Div. LEXIS 13076 (N.Y. App. Div. 2d Dep't 1976), rev'd, 42 N.Y.2d 88, 396 N.Y.S.2d 834, 365 N.E.2d 866, 1977 N.Y. LEXIS 2107 (N.Y. 1977).

Vehicle owner's action against town police officers for the return of his vehicle after the conclusion of criminal proceedings, accrued when the district attorney failed to initiate a forfeiture proceeding within 60 days of the vehicle's seizure, so, under N.Y. Gen. Mun. Law § 50-e(1)(a), the owner had to serve notice of his claim within 90 days of that date. Smith v Scott, 294 A.D.2d 11, 740 N.Y.S.2d 425, 2002 N.Y. App. Div. LEXIS 3561 (N.Y. App. Div. 2d Dep't 2002).

Service of notice of claim was premature and insufficient with respect to a claim against the county to regain possession of property seized from plaintiff in a gambling raid, because plaintiff had no cause of action in replevin at time of demand for the property on March 31, 1958 or until dismissal in 1960 of the indictment against him on gambling charges. Kamienska v County of Westchester, 39 Misc. 2d 750, 241 N.Y.S.2d 814, 1963 N.Y. Misc. LEXIS 1918 (N.Y. County Ct. 1963).

Until the motion to suppress money seized by police in a gambling raid had been granted, money was not subject to replevin so that notice on 90th day after the claim arose and present action seeking to recover the money seized, begun less than a year later as required by Gen Mun L §§ 50-e and 50-i, were timely. Dwyer v County of Nassau, 66 Misc. 2d 1039, 322 N.Y.S.2d 811, 1971 N.Y. Misc. LEXIS 1602 (N.Y. Sup. Ct. 1971).

Claim against City of New York for replevin of money taken from defendant at time of his arrest on narcotics charge accrued on date money was seized, and notice of claim served more than 90 days afterward was not timely under CLS Gen Mun § 50-e. Beck v New York, 133 Misc. 2d 265, 507 N.Y.S.2d 129, 1986 N.Y. Misc. LEXIS 2861 (N.Y. Sup. Ct. 1986).

108. Wrongful death; accrual at time of injury causing death

Notice of claim for conscious pain and suffering of decedent must be served within 90 days after injury. Joseph v McVeigh, 285 A.D. 386, 137 N.Y.S.2d 577, 1955 N.Y. App. Div. LEXIS 5492 (N.Y. App. Div.), aff'd, 309 N.Y. 877, 131 N.E.2d 289, 309 N.Y. (N.Y.S.) 877, 1955 N.Y. LEXIS 1624 (N.Y. 1955).

In action against city and its transportation authority for trip and fall allegedly caused by sidewalk obstruction, plaintiff was not entitled to amend her notice of claim and complaint to allege proper location of accident, and complaint was properly dismissed for noncompliance with CLS Gen Mun § 50-e, where (1) plaintiff first asserted correct location in supplemental bill of particulars almost 4 years after notice of claim, (2) defendants had conducted investigation of wrong site 6 months after notice of claim, (3) neither plaintiff's obscure photos nor vague CLS Gen Mun § 50-h hearing testimony 4 months after notice of claim offered any assistance in identifying correct location, and (4) plaintiff did not respond to city's formal request, one month after notice of claim, for more information on precise location of accident. Reyes v City of New York, 281 A.D.2d 235, 722 N.Y.S.2d 17, 2001 N.Y. App. Div. LEXIS 2459 (N.Y. App. Div. 1st Dep't 2001).

Postponement of accrual date of medical malpractice cause of action by virtue of "foreign objects" rule extended time in which action could be commenced against municipality. Darragh v County of Nassau, 91 Misc. 2d 53, 397 N.Y.S.2d 553, 1977 N.Y. Misc. LEXIS 2234 (N.Y. Sup. Ct. 1977), aff'd, 63 A.D.2d 1010, 405 N.Y.S.2d 1020, 1978 N.Y. App. Div. LEXIS 12098 (N.Y. App. Div. 2d Dep't 1978), disapproved, Rodriguez v Manhattan Medical Group, P. C., 77 N.Y.2d 217, 566 N.Y.S.2d 193, 567 N.E.2d 235, 1990 N.Y. LEXIS 4494 (N.Y. 1990).

109. —Accrual at death

While a death action may be commenced within two years after the decedent's death, the cause of action arises at the death, not at the appointment of the administrator or executor. Only such representative may bring the action, but there is no such requirement in the statute providing for the filing of a notice of claim. The administrator or executor is only nominally the plaintiff in a wrongful death action since any recovery does not become an asset of the estate but becomes a special fund in trust for the next of kin. Hence, one of the next of kin should be permitted to file timely notice of claim even though an action cannot be brought until an administrator or executor is appointed. Winbush v Mt. Vernon, 306 N.Y. 327, 118 N.E.2d 459, 306 N.Y. (N.Y.S.) 327, 1954 N.Y. LEXIS 1029 (N.Y. 1954).

110. —Accrual upon appointment of administrator

A "wrongful death" claim, as distinguished from one for personal injuries, does not arise until an executor or administrator is appointed for the estate of the decedent, hence the 90-day period for serving notice of such a claim does not start to run and there is no necessity for obtaining an extension of time to give the required notice if it can be, and is, served within 90 days from the administrator's appointment. Joseph v McVeigh, 309 N.Y. 877, 131 N.E.2d 289, 309 N.Y. (N.Y.S.) 877, 1955 N.Y. LEXIS 1624 (N.Y. 1955).

A notice of claim in a wrongful death action against a municipality may be served within 90 days after appointment of an administrator or executor even though more than 90 days have expired since the death of the decedent. Buduson v Curtis, 309 N.Y. 879, 131 N.E.2d 290, 309 N.Y. (N.Y.S.) 879, 1955 N.Y. LEXIS 1625 (N.Y. 1955); Hackling v Board of Education, 61 N.Y.S.2d 724, 187 Misc. 52, 1946 N.Y. Misc. LEXIS 2134 (N.Y. Sup. Ct. 1946).

As to a claim for damages for wrongful death, the claim does not arise until appointment of an administrator. Mulligan v Westchester County, 272 A.D. 927, 71 N.Y.S.2d 152, 1947 N.Y. App. Div. LEXIS 4249 (N.Y. App. Div. 1947).

In interpreting this section and its predecessors, it has been consistently held that a cause of action for wrongful death accrues upon appointment of an executor or administrator and that the time for serving notice of claim begins to run from date of appointment of the representative. Application of Sellars, 20 A.D.2d 350, 246 N.Y.S.2d 937, 1964 N.Y. App. Div. LEXIS 4356 (N.Y. App. Div. 1st Dep't 1964).

The 90-day period for service of notice pursuant to General Municipal Law § 50-e in a death claim does not commence to run until the appointment of an estate representative. Erickson v Henderson, 30 A.D.2d 282, 291 N.Y.S.2d 403, 1968 N.Y. App. Div. LEXIS 3557 (N.Y. App. Div. 4th Dep't 1968).

In an administratrix' action against a city for wrongful death, and for conscious pain and suffering of her infant children who died in a residential fire, the causes of action for conscious pain and suffering were properly dismissed on the ground of an untimely notice of claim, although the cause of action for wrongful death was properly not dismissed, since the period for serving notice of claim for wrongful death was measured from the appointment of the administratrix, rather than from the date of the fire. Further, the administratrix' motion for leave to file a late notice of claim for conscious pain and suffering was properly denied as untimely where any tolling of the time in which to seek permission to serve a late notice would be improper in that the infancy disability had been removed by the death of the infants on the date of the fire. Gibbons v Troy, 91 A.D.2d 707, 457 N.Y.S.2d 950, 1982 N.Y. App. Div. LEXIS 19593 (N.Y. App. Div. 3d Dep't 1982).

New Jersey Tort Claims Act would not be given effect, under principles of comity, in New York wrongful death action brought by infant decedent's father against New Jersey municipal corporation since New Jersey does not offer New York residents protection similar to New York's requirements that notice of wrongful death action be filed within 90 days from date administrator is appointed, and that action not be brought until administrator is appointed. De Rose v New Jersey Transit Rail Operations, 165 A.D.2d 42, 565 N.Y.S.2d 305, 1991 N.Y. App. Div. LEXIS 803 (N.Y. App. Div. 3d Dep't 1991).

Court properly denied motion for leave to serve late notice of claim where plaintiff neither offered reasonable excuse for delay in serving notice nor showed that defendant had actual knowledge of nature of claim. Johnson v County of Suffolk, 238 A.D.2d 480, 657 N.Y.S.2d 55, 1997 N.Y. App. Div. LEXIS 4013 (N.Y. App. Div. 2d Dep't 1997).

Because an administrator served a wrongful death notice of claim on a county within a month of the administrator's appointment, the notice of claim was timely under N.Y. Gen. Mun. Law § 50-e(1)(a), General Municipal Law § 50-i(1); therefore, leave to

file late notice was not necessary under § 50-e(5). Heslin v County of Greene, 53 A.D.3d 996, 862 N.Y.S.2d 210, 2008 N.Y. App. Div. LEXIS 6328 (N.Y. App. Div. 3d Dep't 2008), aff'd, 14 N.Y.3d 67, 896 N.Y.S.2d 723, 923 N.E.2d 1111, 2010 N.Y. LEXIS 14 (N.Y. 2010).

Notice of claim requirement is satisfied in wrongful death action if timely notice is filed by proposed administratrix who has not yet received letters of administration. Aristide v New York, 129 Misc. 2d 483, 493 N.Y.S.2d 247, 1985 N.Y. Misc. LEXIS 3073 (N.Y. Sup. Ct. 1985).

An administrator may file a death claim within 90 days after his appointment, subject only to the limitation that the action be commenced within two years after the decedent's death. Motyka v Oswego, 133 N.Y.S.2d 816, 1954 N.Y. Misc. LEXIS 2449 (N.Y. Sup. Ct. 1954), aff'd, 285 A.D. 1013, 139 N.Y.S.2d 475, 1955 N.Y. App. Div. LEXIS 6501 (N.Y. App. Div. 1955).

111. Damage to private property

Where notice of claim was given on July 31, 1967 and where it could have been found as a fact, based on plaintiff's evidence, that destruction of plaintiff's property took place after May 2, 1967, or within 90 days before notice of the claim, dismissal for failure to give notice as required by General Municipal Law § 50-e was premature and prevented development of a full record with defendant's proofs. Eagle Vending Corp. v Board of Education, 41 A.D.2d 849, 342 N.Y.S.2d 706, 1973 N.Y. App. Div. LEXIS 4649 (N.Y. App. Div. 2d Dep't 1973).

In an action brought against a town, alleging that a jetty built in 1964 had caused serious damage and erosion to real property formerly owned by plaintiff, plaintiffs' notices of claim, served on March 5, 1979, were untimely under Gen Mun Law § 50-e(1)(a) where plaintiffs' cause of action, if any, had accrued upon the wrongful invasion of their property rights by erosion, which had begun far in advance of January 5, 1979, and where there was no continuing nuisance merely because consequential damages may have occurred subsequently. Lockman v Southold, 108 A.D.2d 900, 485 N.Y.S.2d 784, 1985 N.Y. App. Div. LEXIS 43232 (N.Y. App. Div. 2d Dep't 1985).

Court abused its discretion in denying petitioner's application to file late notice of claim for deprivation of access to decedent's body, even though petitioner had knowledge, within statutory period, of facts sufficient to support her claim, since respondents had actual knowledge of nature of claim within such period, and respondents failed to show any prejudice resulting from allowing late notice of claim. Rekemeyer v Cerone, 232 A.D.2d 833, 648 N.Y.S.2d 795, 1996 N.Y. App. Div. LEXIS 10512 (N.Y. App. Div. 3d Dep't 1996).

Lessor's notice of negligence claims against town were not timely, and claims were time-barred, where notice was filed in September 1994, and claims, which were based on town's alleged acceptance of illegal waste and cutting of trees at its leased landfill, accrued no later than April 1993 when closure of landfill was ordered and dumping operations ceased, rather than at expiration of lease in June 1994. Hubbard v Town of Sand Lake, 246 A.D.2d 708, 667 N.Y.S.2d 496, 1998 N.Y. App. Div. LEXIS 102 (N.Y. App. Div. 3d Dep't 1998).

Lessor's notice of breach of contract claim against town, filed in September 1994, did not comply with requirements of CLS Town § 65(3), and summary judgment was properly granted to town, where crux of complaint was that town breached lease by accepting illegal waste at landfill, landfill closed and dumping operations ceased in 1993, and thus any breach of lease occurred before that time. Hubbard v Town of Sand Lake, 246 A.D.2d 708, 667 N.Y.S.2d 496, 1998 N.Y. App. Div. LEXIS 102 (N.Y. App. Div. 3d Dep't 1998).

County was entitled to dismissal of claim on ground that plaintiff did not file timely notice of claim where (1) claim arose when county informed plaintiff, by letter dated March 13, 1966, that no certificate of occupancy would be issued for his property until certain structural problems were resolved, (2) complaint alleged that county was responsible for creating conditions that caused those problems, (3) claim was not filed until August 14, 1996, over 90 days after claim arose, (4) plaintiff did not seek leave to file late notice of claim within one year and 90 days after claim accrued, and (5) plaintiff did not show applicability of equitable estoppel doctrine. Augustyn v County of Wyo., 275 A.D.2d 1003, 716 N.Y.S.2d 341, 2000 N.Y. App. Div. LEXIS 9632 (N.Y. App. Div. 4th Dep't 2000).

A cause of action against a County Water Authority for property damage due to a leak in its water lines did not accrue until plaintiffs discovered that their premises had been damaged, and where notice of claim was served within 90 days after such discovery, it was timely. Damico v Onondaga County Water Authority, 36 Misc. 2d 158, 232 N.Y.S.2d 660, 1962 N.Y. Misc. LEXIS 3472 (N.Y. Sup. Ct. 1962).

Assuming that Public Authorities Law set the statute of limitations against airline company at one year and 30 days after company's alleged tort cause of action arising out of incident wherein regional transportation district's bus allegedly ran into airline company's aircraft causing damages accrued and thus that company's claim for damages was dead, it was unnecessary for airline company to perfect valid claim within limitation period under law against regional transportation district in order for it to use alleged tort damages for purposes of recoupment as against regional transportation district's claim against airline for unpaid rent due on bus service supplied by district to airline. Rochester-Genesee Regional Transp. Dist., Inc. v Trans World Airlines, Inc., 86 Misc. 2d 1011, 383 N.Y.S.2d 856, 1976 N.Y. Misc. LEXIS 2566 (N.Y. Sup. Ct. 1976).

Statute of limitations on claim for loss of property due to county's failure to maintain beach groins is not barred by statute of limitations where failure to maintain groins is continuing event from which limitations period is measured. Rapf v Suffolk County of New York, 755 F.2d 282, 1985 U.S. App. LEXIS 28483 (2d Cir. N.Y. 1985).

112. Miscellaneous actions

Time for filing notice of claim against city for its alleged improper refusal to grant demolition permit began to run on date on which it refused wrecking company's second application for such permit, not date on which Supreme Court judgment ordering city to issue such permit became final because of city's failure to prosecute appeal filed in Appellate Division, notwithstanding lack of prejudice to city from delay in filing notice of claim. Bloomfield Bldg. Wreckers, Inc. v Troy, 50 A.D.2d 673, 375 N.Y.S.2d 213, 1975 N.Y. App. Div. LEXIS 12510 (N.Y. App. Div. 3d Dep't 1975), aff'd, 41 N.Y.2d 1102, 396 N.Y.S.2d 359, 364 N.E.2d 1130, 1977 N.Y. LEXIS 2134 (N.Y. 1977).

In an Article 78 proceeding to compel the return of four guns to petitioner after the disposition of a criminal action, the proceeding would be dismissed as untimely where it had not been commenced within four months of the District Attorney's refusal to return the guns after petitioner's demand, and where a notice of claim had not been served within 90 days of the refusal. United States Redemption Centers, Inc. v Property Clerk, County of Nassau, 88 A.D.2d 959, 451 N.Y.S.2d 451, 1982 N.Y. App. Div. LEXIS 17330 (N.Y. App. Div. 2d Dep't 1982).

A notice of claim was not presented in a timely manner in an action against a county coroner for emotional distress due to the loss of specimens from a relative's organs used in an autopsy performed April 2, 1981, where plaintiffs learned no later than June 2, 1982, by an affidavit filed by a medical examiner in an Article 78 proceeding they commenced to determine the results of the autopsy, that the coroner's office had no record of decedent's specimens, their notice of claim was filed December 3 1982 without any request for an extension, and the article 78 proceeding could not be treated as notice of claim. Distel v County of Ulster, 107 A.D.2d 994, 484 N.Y.S.2d 715, 1985 N.Y. App. Div. LEXIS 49862 (N.Y. App. Div. 3d Dep't 1985).

Court properly denied plaintiff's motion to add village as defendant in nuisance action on basis of plaintiff's failure to serve timely notice of claim on village in compliance with CLS Gen Mun § 50-e, despite plaintiff's attempt to circumvent this requirement by alleging that claims asserted in proposed amended complaint against village arose from continuing wrong (i.e., its wrongful issuance to neighboring landowner of building permit and certificate of occupancy), since cause of action involving wrongful issuance of building permit accrues when permit is issued, and does not constitute continuing wrong. Solow v Liebman, 202

A.D.2d 493, 609 N.Y.S.2d 58, 1994 N.Y. App. Div. LEXIS 2475 (N.Y. App. Div. 2d Dep't 1994).

Cause of action involving wrongful issuance of building permit accrues when permit is issued, and does not constitute continuing wrong. Greco v Incorporated Village of Freeport, 223 A.D.2d 674, 637 N.Y.S.2d 191, 1996 N.Y. App. Div. LEXIS 650 (N.Y. App. Div. 2d Dep't 1996).

Where CLS Gen Mun §§ 50-e and 50-i are applicable because claim is asserted against municipality, statute of limitations of one year and 90 days is measured from date of discovery of injury caused by latent effects of exposure to toxic substances, or from date when, through exercise of reasonable diligence, injury should have been discovered, whichever is earlier. Annunziato v City of New York, 224 A.D.2d 31, 647 N.Y.S.2d 850, 1996 N.Y. App. Div. LEXIS 9790 (N.Y. App. Div. 2d Dep't 1996).

In action, inter alia, against fire district for personal injuries arising from contaminated groundwater, filing of notices of claim which began on July 30, 1993 were untimely since plaintiffs became aware of problem with their drinking water in early 1992 when Department of Environmental Conservation took water samples from their properties and arranged to have bottled water delivered to them. Bluitt v Ridge Fire Dist., 230 A.D.2d 814, 646 N.Y.S.2d 553, 1996 N.Y. App. Div. LEXIS 8566 (N.Y. App. Div. 2d Dep't 1996), app. denied, 89 N.Y.2d 810, 657 N.Y.S.2d 403, 679 N.E.2d 642, 1997 N.Y. LEXIS 328 (N.Y. 1997).

Claim arose on date that school district informed appellants of test results and its decision not to provide appellant with special education. Campbell v Union Free Sch. Dist. No. 14, 244 A.D.2d 334, 665 N.Y.S.2d 538, 1997 N.Y. App. Div. LEXIS 11005 (N.Y. App. Div. 2d Dep't 1997).

Notice of contract claim against city board of education was untimely under CLS Educ § 3813(1), which requires service of notice on board within 3 months after accrual of claim, where plaintiff was aware by October that board would refuse to pay claim, as confirmed by correspondence in November and by board's failure to respond within 10 days to plaintiff's November 7 demand for payment, and plaintiff did not serve notice of claim until March. Alfred Santini & Co. v City of New York, 266 A.D.2d 119, 698 N.Y.S.2d 678, 1999 N.Y. App. Div. LEXIS 12105 (N.Y. App. Div. 1st Dep't 1999), app. denied, 95 N.Y.2d 752, 711 N.Y.S.2d 154, 733 N.E.2d 226, 2000 N.Y. LEXIS 1067 (N.Y. 2000).

Action for alleged contamination of plaintiff's well water accrued, at very latest, in mid-September 1994 when plaintiff received letter from County informing him that his water contained levels of sodium and lead exceeding those prescribed by New York State Drinking Water Standards; thus, filing of notice of claim on January 9, 1995, approximately 4 months after plaintiff's action accrued, was untimely. Potanovic v County of Rockland, 267 A.D.2d 291, 700 N.Y.S.2d 195, 1999 N.Y. App. Div. LEXIS 12865 (N.Y. App. Div. 2d Dep't 1999).

In employee's claim against town, alleging that town council person had sexually harassed her and that town supervisor had retaliated against her for filing internal complaint against town regarding same alleged harassment, Supreme Court had authority to grant employee's motion for leave to file late notice of claim, despite town's claim that underlying harassment claim was not timely filed with State Division of Human Rights, where employee alleged discriminatory conduct within limitations period sufficiently similar to alleged conduct that outside limitations period to justify conclusion that both were part of single discriminatory practice, and thus claim was timely in its entirety under continuing violation doctrine. Henderson v Town of Van Buren, 281 A.D.2d 872, 723 N.Y.S.2d 282, 2001 N.Y. App. Div. LEXIS 2708 (N.Y. App. Div. 4th Dep't 2001).

Complaint dismissed where notice of claim against county for injuries sustained in jail was filed within 90 days from date of parole but more than 90 days from date of accident. Pascucci v County of Nassau, 8 Misc. 2d 229, 165 N.Y.S.2d 797, 1957 N.Y. Misc. LEXIS 2908 (N.Y. Sup. Ct. 1957).

For purposes of complying with notice provisions of General Municipal Law § 50-e, claim for wrongful sale of motorcycle did not arise until after demand by the plaintiff for the motorcycle and notification to the plaintiff that it would or could not be returned to him. Thomas v Grupposo, 73 Misc. 2d 427, 341 N.Y.S.2d 819, 1973 N.Y. Misc. LEXIS 2208 (N.Y. Civ. Ct. 1973).

Using February 22, 2002, as the accrual date for his claim of intentional infliction of emotional distress, the arrestee complied with the N.Y. Gen. Mun. Law §§ 50-i, 50-e by filing his notice of claim on May 22, 2002 and commencing his action on December 18, 2002. Accordingly, the arrestee's motion to dismiss the detectives and the police officers' notice of claim affirmative defense was granted, and the detectives and the police officers' motion to dismiss the arrestee's intentional infliction of emotional distress claim as time-barred was denied. Llerando-Phipps v City of New York, 390 F. Supp. 2d 372, 2005 U.S. Dist. LEXIS 22246 (S.D.N.Y. 2005).

Complaint was filed on July 7, 2006. and thus, any acts occurring before April 7, 2005, were beyond the applicable statute of limitations; the last actionable allegation occurred in March 2005, so nothing was alleged to have occurred within the applicable statute of limitations period. Moreover, there was no tolling of the statute of limitations during the time the employee's claim was pending in State Division because of her self-initiated discontinuance of her State Division action for administrative convenience; accordingly, because the state claims were untimely, summary judgment in defendants' favor was warranted on such claims. Drees v County of Suffolk, 2009 U.S. Dist. LEXIS 27346 (E.D.N.Y. Mar. 30, 2009).

VI. Extension of Time to File

113. In general

An extension of time to serve late notice of claim required by General Municipal Law may not exceed time limited for commencement of action. McGill v Board of Education, 59 A.D.2d 888, 399 N.Y.S.2d 41, 1977 N.Y. App. Div. LEXIS 14075 (N.Y. App. Div. 2d Dep't 1977), app. dismissed, 43 N.Y.2d 949, 1978 N.Y. LEXIS 2879 (N.Y. 1978), app. dismissed, 43 N.Y.2d 893, 403 N.Y.S.2d 499, 374 N.E.2d 396, 1978 N.Y. LEXIS 1815 (N.Y. 1978).

Claimant's application for leave to serve late notice of claim against county and county police was improperly brought as motion where no action by claimant was pending against county or county police. Eso v County of Westchester, 141 A.D.2d 542, 529 N.Y.S.2d 155, 1988 N.Y. App. Div. LEXIS 6282 (N.Y. App. Div. 2d Dep't 1988).

New York County was only proper venue, both for trial and motion to serve late notice of claim, where underlying accident occurred in New York County and New York County Transit Authority was defendant. Bukoff v New York City Transit Authority, 184 A.D.2d 610, 584 N.Y.S.2d 898, 1992 N.Y. App. Div. LEXIS 8057 (N.Y. App. Div. 2d Dep't 1992).

In proceeding for leave to file late notice of claim against town, failure of petitioner to include document designated as petition was merely defect in form which did not warrant dismissal since (1) attorney's affirmation, which was annexed to order to show cause, contained all ingredients necessary to petition, and (2) attorney's affirmation, together with affidavit of petitioner's mother, were adequate to inform appellant of relief requested and were sufficient to allow appellant to maintain defense on merits. Billone v Huntington, 188 A.D.2d 526, 591 N.Y.S.2d 437, 1992 N.Y. App. Div. LEXIS 14221 (N.Y. App. Div. 2d Dep't 1992).

Court erred in requiring petitioner for leave to serve late notice of claim, in addition to satisfying factors enumerated in CLS Gen Mun § 50-e(5), to offer evidence establishing that she had meritorious claim against municipal respondent. Strauss v New York City Transit Auth., 195 A.D.2d 322, 600 N.Y.S.2d 32, 1993 N.Y. App. Div. LEXIS 7117 (N.Y. App. Div. 1st Dep't 1993).

Justice did not improvidently exercise his discretion when he assigned application for leave to file late notice of claim to another justice before whom 45 related cases were then pending, for sake of judicial economy. Zee v Hicksville Union Free Sch. Dist., 210 A.D.2d 237, 620 N.Y.S.2d 279, 622 N.Y.S.2d 279, 1994 N.Y. App. Div. LEXIS 12362 (N.Y. App. Div. 2d Dep't 1994).

CLS Gen Mun § 50-e does not provide for automatic approval of application for leave to serve late notice of claim simply because it was made within applicable statute of limitations for commencing action and any tolling periods. Matarrese v New York City Health & Hosps. Corp., 215 A.D.2d 7, 633 N.Y.S.2d 837, 1995 N.Y.

App. Div. LEXIS 11863 (N.Y. App. Div. 2d Dep't 1995), app. denied, 87 N.Y.2d 810, 642 N.Y.S.2d 859, 665 N.E.2d 661, 1996 N.Y. LEXIS 351 (N.Y. 1996).

New York Housing Authority was prejudiced by petitioner's untimely notice of claim where she testified at hearing that she slipped and fell on sheet of ice, but proposed late notice of claim stated that authority was negligent in "causing, allowing, permitting and maintaining a.cracked, raised, irregular...condition on said sidewalk and further in permitting and allowing snow and ice to accumulate." Seif v City of New York, 218 A.D.2d 595, 630 N.Y.S.2d 742, 1995 N.Y. App. Div. LEXIS 8854 (N.Y. App. Div. 1st Dep't 1995).

It was abuse of discretion to grant plaintiffs' motion for leave to serve "new late notice of claim" where injured plaintiff had settled his property damage claim by executing unambiguous general release of all claims arising from accident. Sherwood v New York City Transit Auth., 226 A.D.2d 622, 641 N.Y.S.2d 354, 1996 N.Y. App. Div. LEXIS 4451 (N.Y. App. Div. 2d Dep't 1996).

Court should have denied claimants' motion for permission to file late notice of claim as unnecessary because notice was timely filed where claimants timely mailed notice to town clerk by certified mail, properly placing notice in depositary of United States Postal Service, and Postal Service made 2 attempts to deliver certified mailing, but on each occasion, town clerk failed either to accept or to claim mailing, which was then returned to claimants; municipality may not defeat service by failing to accept or claim delivery of certified mailing. Bartolotta v County of Wyoming, 231 A.D.2d 899, 647 N.Y.S.2d 622, 1996 N.Y. App. Div. LEXIS 10747 (N.Y. App. Div. 4th Dep't 1996).

Petitioner's "filing" of unsigned order to show cause with county clerk did not serve as timely application for leave to file late notice of claim. Graham v County of Fulton, 235 A.D.2d 824, 652 N.Y.S.2d 354, 1997 N.Y. App. Div. LEXIS 323 (N.Y. App. Div. 3d Dep't 1997).

Leave to serve a late notice of claim pursuant to N.Y. Gen. Mun. Law § 50-e(5) was inappropriate for a patently meritless claim; since a town was separate from a fire district, a subrogation claim against the town alleging that the fire district was negligent in its fire operations was without merit, and leave for late notice should not have been given. Matter of State Farm Fire & Cas. Co. v Village of Bronxville, 24 A.D.3d 453, 805 N.Y.S.2d 651, 2005 N.Y. App. Div. LEXIS 13772 (N.Y. App. Div. 2d Dep't 2005).

Inmate's motion for leave to file a late notice of claim against a department was properly granted because the department timely acquired actual knowledge of the essential facts of the claim; within two months of the last incident of sexual abuse underlying the claim, several prisoners, including the inmate, reported the alleged abuse, and, eventually, criminal charges were brought against a physician's assistant. Additionally, the inmate provided an explanation for the delay, citing her homelessness, incarceration, and depression. Catterson v Suffolk County Dept. of Health Servs., 49 A.D.3d 792, 854 N.Y.S.2d 205, 2008 N.Y. App. Div. LEXIS 2742 (N.Y. App. Div. 2d Dep't 2008).

Although venue in action against Facilities Development Corporation must be laid in Albany County, application by claimant for leave to file late notice of claim against Corporation pursuant to General Municipal Law § 50-e may properly be entertained in Dutchess County, if Corporation does not object to application on venue ground. Kroupa v Facilities Dev. Corp., 128 Misc. 2d 904, 491 N.Y.S.2d 908, 1985 N.Y. Misc. LEXIS 3022 (N.Y. Sup. Ct. 1985).

114. Construction

The statute of limitations for municipal tort liability is tolled from the time the plaintiff applies for permission to file a late notice of claim until the order granting that relief goes into effect, since an amendment to Gen Mun Law § 50-e that deleted the requirement that an application to file late notice be made prior to the commencement of an action and added a provision that an application for late notice would not be denied on the ground that it was made after the commencement of an action against a public corporation neither authorizes the practice of serving complaints before notice of claim nor eliminates the problems encountered by a plaintiff who has filed a premature complaint, and since the amendment simply eliminates the obstacle that prevented a plaintiff from applying for leave to file a late notice of claim once he had commenced the action and does not dispense with the requirement that the complaint alleged that the notice has been served and that more than thirty days have elapsed since the service. Giblin v Nassau County Medical Center, 61 N.Y.2d 67, 471 N.Y.S.2d 563, 459 N.E.2d 856, 1984 N.Y. LEXIS 3994 (N.Y. 1984).

The amendment of subdivision 5 of section 50-e of the General Municipal Law (L 1976, ch 745) did not negate the pre-1976 rule that once the 90 days allowed for service of a notice of claim had expired there could be no judicial extension of such time to serve the notice unless the application for such extension was made within the period specified in the statute; failure to seek a judicial extension of the 90-day period prior to the expiration of one year and 90 days precludes the exercise of judicial discretion to allow filing of a late notice of claim. Fraccola v Utica, 77 A.D.2d 161, 432 N.Y.S.2d 943, 1980 N.Y. App. Div. LEXIS 13008 (N.Y. App. Div. 4th Dep't 1980).

On motion for leave to serve late notice of claim under CLS Gen Mun § 50-e(5), failure to allege reasonable excuse for delay is not fatal. Meredithe C. v Carmel Cent. Sch. Dist., 192 A.D.2d 952, 597 N.Y.S.2d 199, 1993 N.Y. App. Div. LEXIS 4051 (N.Y. App. Div. 3d Dep't 1993).

CLS Gen Mun § 50-e(5) applies to tort claim asserted against regional off-track betting corporation, which is public corporation as defined by CLS Gen Const § 66. Salvaggio v Western Regional Off-Track Betting Corp., 203 A.D.2d 938, 612 N.Y.S.2d 94, 1994 N.Y. App. Div. LEXIS 4944 (N.Y. App. Div. 4th Dep't 1994).

Even where delay in serving notice of claim under this section beyond the 90-day period is very short, the limitation must be strictly construed and an application for late filing denied in the absence of establishing one of the statutory grounds for granting an exception in the court's discretion. Phillips v Frankfort, 31 Misc. 2d 815, 220 N.Y.S.2d 171, 1961 N.Y. Misc. LEXIS 3400 (N.Y. Sup. Ct. 1961).

115. Authority of court

Special Term was without authority to grant an application permitting late filing of a claim against the City of New York. Public Adm'r of County of New York v New York, 32 A.D.2d 627, 300 N.Y.S.2d 19, 1969 N.Y. App. Div. LEXIS 3982 (N.Y. App. Div. 1st Dep't 1969).

Fact that plaintiff did not obtain new index number (nonjurisdictional defect that was readily curable) was insufficient basis to deny second application for leave to serve late notice of claim. Fritsch v Westchester County DOT, 170 A.D.2d 602, 566 N.Y.S.2d 377, 1991 N.Y. App. Div. LEXIS 2283 (N.Y. App. Div. 2d Dep't 1991).

Trial court properly entertained question of whether continuous treatment doctrine was available to personal injury plaintiff where, prior to trial, city defendant moved to dismiss complaint on ground that plaintiff's notice of claim was not timely served, plaintiff invoked continuous treatment doctrine in opposition, court reserved question pending consideration of evidence, and city renewed its motion after plaintiff prevailed at trial; since jury was not called on to decide issue of applicability of doctrine, court did not usurp jury's function. Olkowski v New York, 179 A.D.2d 570, 578 N.Y.S.2d 570, 1992 N.Y. App. Div. LEXIS 726 (N.Y. App. Div. 1st Dep't), app. denied, 80 N.Y.2d 755, 588 N.Y.S.2d 823, 602 N.E.2d 231, 1992 N.Y. LEXIS 3133 (N.Y. 1992).

It was abuse of discretion to deny plaintiff's motion for leave to file late notice of claim against city transit authority for injury sustained on bus where plaintiff filed no-fault claim with transit authority within 90-day period under CLS Gen Mun § 50-e(1), claim contained all essential facts concerning claim, and transit authority was not prejudiced by delay. Richardson v New York City Transit Auth., 210 A.D.2d 38, 619 N.Y.S.2d 711, 1994 N.Y. App. Div. LEXIS 12369 (N.Y. App. Div. 1st Dep't 1994).

It was abuse of discretion to deny application for lease to serve late notice of claim in view of minor delay (11 days) and absence of prejudice to defendants. Isakov v City of New York, 221 A.D.2d 531, 634 N.Y.S.2d 394, 1995 N.Y. App. Div. LEXIS 11849 (N.Y. App. Div. 2d Dep't 1995).

Court properly denied petitioner's application for leave to serve late notice of claim where he failed to present legally acceptable excuse for his delay in presenting claim one year after alleged claim accrued, and he failed to show that city officials timely acquired actual knowledge of accident or that they would not suffer substantial prejudice in maintaining their defense on merits. People v Calvi, 224 A.D.2d 705, 638 N.Y.S.2d 736, 1996 N.Y. App. Div. LEXIS 1934 (N.Y. App. Div. 2d Dep't), modified, aff'd, 89 N.Y.2d 868, 653 N.Y.S.2d 89, 675 N.E.2d 843, 1996 N.Y. LEXIS 3586 (N.Y. 1996).

Court properly allowed filing of late notice of claim, even though petitioner failed to offer excuse for delay of some 5 ½ months between time extension granted by county had expired and petitioner's filing of application for leave to serve late notice of claim, since county conceded that it received actual notice of incident within statutory period, and county did not dispute finding that it would not be substantially prejudiced. Lawrence v County of Sullivan, 233 A.D.2d 609, 649 N.Y.S.2d 244, 1996 N.Y. App. Div. LEXIS 11474 (N.Y. App. Div. 3d Dep't 1996).

In personal injury action against city transit authority, Supreme Court had authority to grant plaintiff leave to file late notice of claim where action was begun within period specified in relevant statute of limitations. Sayad v New York City Transit Auth., 246 A.D.2d 639, 666 N.Y.S.2d 955, 1998 N.Y. App. Div. LEXIS 584 (N.Y. App. Div. 2d Dep't 1998).

Court improvidently exercised its discretion in granting leave to serve late notice of claim 9 months after alleged slip and fall in building owned by New York City Housing Authority, where petitioners failed to proffer either reasonable excuse for their delay or proof that housing authority had actual knowledge of essential facts of claim within 90 days of accrual or reasonable time thereafter. Rakhlev v New York City Hous. Auth., 253 A.D.2d 526, 676 N.Y.S.2d 877, 1998 N.Y. App. Div. LEXIS 9104 (N.Y. App. Div. 2d Dep't 1998).

Supreme Court could not extend 90-day period for serving notice of claim beyond time limit for commencement of action against town, since notice of claim requirement is condition precedent to commencement of such action and not statute of limitations that must be pleaded as affirmative defense; compliance with notice of claim requirement falls within threshold jurisdiction of court. Hey v Town of Napoli, 265 A.D.2d 803, 695 N.Y.S.2d 643, 1999 N.Y. App. Div. LEXIS 9828 (N.Y. App. Div. 4th Dep't 1999).

Trial court did not err in granting claimant's application, pursuant to N.Y. Educ. Law § 3813(2-a) and N.Y. Gen. Mun. Law § 50-e(5), for leave to serve a late notice of claim against a board of education because, while claimant did not offer any excuse for her failure to timely serve the notice, the board was not substantially prejudiced as a result of claimant's delay, in that it had acquired actual knowledge of the facts constituting the claim within weeks of its accrual. Matter of Lindstrom v Board of Educ. of Jamestown City School Dist., 24 A.D.3d 1303, 805 N.Y.S.2d 908, 2005 N.Y. App. Div. LEXIS 14543 (N.Y. App. Div. 4th Dep't 2005).

CLS Gen Mun § 50-e(7) should not apply in Small Claims Court since it would fly in face of goals of small claims procedure to require claimant to make motion for leave to serve late notice of claim in Supreme Court or County Court, and therefore Small Claims Court has power to entertain motion to serve late notice of claim. Lurie v New York City Office of Comptroller, 154 Misc. 2d 950, 587 N.Y.S.2d 831, 1992 N.Y. Misc. LEXIS 348 (N.Y. Civ. Ct. 1992).

Federal district court lacked jurisdiction, under N.Y. Gen. Mun. Law § 50-e(7), to grant an extension of time to file a late notice of claim and such requests must be directed to the appropriate state court. Mosdos Chofetz Chaim, Inc. v Vill. of Wesley Hills, 815 F. Supp. 2d 679, 2011 U.S. Dist. LEXIS 109649 (S.D.N.Y. 2011).

116. —Jurisdiction of court

Proceeding under CLS Gen Mun § 50-e(5) against county and others for leave to file late notice of claim would be dismissed where, after court properly vacated respondents' default in opposing petition because court lacked personal jurisdiction over them, all subsequent proceedings were null and void, and court did not then have authority to decide petitioner's motion for leave to serve late notice of claim nunc pro tunc. Cartier v County of Nassau, 281 A.D.2d 477, 722 N.Y.S.2d 45, 2001 N.Y. App. Div. LEXIS 2352 (N.Y. App. Div. 2d Dep't 2001).

Because a skater sought damages for personal injuries based on negligent ownership and/or maintenance of a road after the skater allegedly tripped and fell in a sink hole on a roadway while inline skating, the state agencies were entitled to dismissal of the skater's N.Y. Gen. Mun. Law § 50-e(5) petition for leave to serve a late notice of claim, as the Court of Claims had exclusive jurisdiction over the matter under N.Y. Const. art. VI, § 9, N.Y. Ct. Cl. Act §§ 8, 9(2). Matter of Peterson v New York City Dept. of Envtl. Protection, 66 A.D.3d 1027, 887 N.Y.S.2d 269, 2009 N.Y. App. Div. LEXIS 7702 (N.Y. App. Div. 2d Dep't 2009).

A city court has no jurisdiction to entertain an application for leave to serve a late notice of claim on the city of New York. Priceman v New York, 106 N.Y.S.2d 916, 199 Misc. 737, 1951 N.Y. Misc. LEXIS 2255 (N.Y. App. Term 1951).

In personal injury action against regional off-track betting corporation, Supreme Court had jurisdiction to extend time to serve notice of claim under CLS Racing & Wagering § 514 since (1) CLS Gen Mun § 50-e gives court general discretion to extend time to serve notice of claim in tort actions where notice of claim is required as condition precedent against "public corporation, as defined in the general construction law," (2) CLS Gen Const § 66 defines public corporation as "public benefit corporation," and (3) regional off-track betting corporation is public benefit corporation under CLS Racing & Wagering § 502. Burke v Capital Dist. Regional Off-Track Betting Corp., 137 Misc. 2d 448, 521 N.Y.S.2d 205, 1987 N.Y. Misc. LEXIS 2650 (N.Y. Sup. Ct. 1987).

Infant's application for leave to file a late notice of claim on a department of education and a board of education was denied because, although the infant had a reasonable excuse for the failure to file timely notice and the department and the board had actual notice, the order to show cause named and was served on the wrong party and thus the court lacked jurisdiction. Nacipucha v City of New York, 849 N.Y.S.2d 414, 18 Misc. 3d 846, 2008 N.Y. Misc. LEXIS 13 (N.Y. Sup. Ct. 2008).

Disability discrimination and hostile working environment claims that a former employee filed against a county pursuant to the New York State Human Rights Law, N.Y. Exec. Law § 296, were dismissed because the employee did not serve a timely notice of claim upon the county as required by N.Y. County Law § 52 and N.Y. Gen. Mun. Law §§ 50-e and 50-i; (2) the federal district court did not have jurisdiction under N.Y. Gen. Mun. Law § 50-e(5) and (7) to grant the employee's application for leave to serve a late notice of claim; and (3) N.Y. Gen. Mun. Law §§ 50-e(5) and 50-i(1)(c) and N.Y. County Law § 52(1) barred the court from granting leave to serve a late notice where more than one year and ninety days had passed since the employee's claims arose when the employee was terminated. Costabile v County of Westchester, 2007 U.S. Dist. LEXIS 29787 (S.D.N.Y. Apr. 20, 2007), amended, 485 F. Supp. 2d 424, 2007 U.S. Dist. LEXIS 33484 (S.D.N.Y. 2007).

An application to file a late notice of claim was properly before a federal District Court where a diversity action to enforce the plaintiff's negligence claim had been commenced in that court. Palazzo v New York, 444 F. Supp. 1089, 1978 U.S. Dist. LEXIS 20257 (E.D.N.Y. 1978).

Where female police officers' claims against a county and several individuals failed because they did not file a complaint prior to filing suit, as required by N.Y. County Law § 52, a federal district court lacked jurisdiction to grant the officers leave to file an amended notice of claim under N.Y. Gen. Mun. Law § 50-e(5) because only a state court had authority to do this. Olsen v County of Nassau, 2008 U.S. Dist. LEXIS 90426 (E.D.N.Y. Nov. 5, 2008).

Under N.Y. Gen. Mun. Law § 50-e(7), the federal district court did not have jurisdiction either (1) to deem that plaintiffs' untimely amended notice of claim for their state law claims against a county was timely filed or (2) to grant an extension of time to file a late notice of claim. Dayton v City of Middletown, 786 F. Supp. 2d 809, 2011 U.S. Dist. LEXIS 35770 (S.D.N.Y. 2011).

Federal district court lacked jurisdiction to grant plaintiff leave to serve a late notice of claim on a municipality, as applications for an extension of time had to be made to the state supreme court or county court. Berry v Millbrook, 815 F. Supp. 2d 711, 2011 U.S. Dist. LEXIS 109404 (S.D.N.Y. 2011).

117. —Discretion of court

Gen Mun Law § 50-e(5) was amended to allow greater discretion in permitting a late notice of claim to be filed, and therefore, petitioner, who had allegedly been injured in a slip and fall accident on a defective area of a town sidewalk, would be permitted to file a late notice of claim where the housing authority, which had actual notice of the accident at the time it occurred, would not be prejudiced by the delay, where petitioner relied on the alleged representations of payment of her hospital bills and where the actual filing of the notice was only 30 days late. Gelles v New York City Housing Authority, 87 A.D.2d 757, 449 N.Y.S.2d 36, 1982 N.Y. App. Div. LEXIS 16186 (N.Y. App. Div. 1st Dep't 1982).

Appellate Division is vested with broad discretion in considering whether service of late notice of claim should be permitted; among factors to be considered in determining whether to grant leave to file late notice of claim are whether public corporation had actual knowledge of essential facts constituting claim within 90-day period or reasonable time thereafter and whether delay in serving notice of claim substantially prejudiced public corporation in preparing its defense. Delzotto v County of Warren, 137 A.D.2d 950, 525 N.Y.S.2d 373, 1988 N.Y. App. Div. LEXIS 1752 (N.Y. App. Div. 3d Dep't 1988).

Standards governing consideration of applications for leave to file late notice of claim have been purposely made more elastic so as to afford broad discretion to courts. Strevell v South Colonie Cent. School Dist., 144 A.D.2d 733, 535 N.Y.S.2d 147, 1988 N.Y. App. Div. LEXIS 10901 (N.Y. App. Div. 3d Dep't 1988).

So long as application to file late notice of claim is made within time limited for commencement of action, court is vested with broad discretion to grant application pursuant to CLS Gen Mun § 50-e(5), and presence or absence of any one factor enumerated in statute is not necessarily determinative. Rotoli v Gaines, 184 A.D.2d 1085, 585 N.Y.S.2d 274, 1992 N.Y. App. Div. LEXIS 8371 (N.Y. App. Div. 4th Dep't 1992).

General Municipal Law allows for exercise of considerable discretion in determining whether to permit service of late notice of claim. Singh v City Univ. of New York/ Bronx Community College, 223 A.D.2d 545, 636 N.Y.S.2d 130, 1996 N.Y. App. Div. LEXIS 148 (N.Y. App. Div. 2d Dep't 1996).

As plaintiff was a minor at the time of her alleged injury in gym class and thus eligible for the infancy toll of N.Y. C.P.L.R. 208, and was confused as to the date of accident, and as defendants had timely notice of all of the essential facts, the trial court properly granted her motion to serve a late claim under N.Y. Gen. Mun. Law § 50-e to correct the date of the injury. Chirse v City School Dist. of Albany, 83 A.D.3d 1232, 920 N.Y.S.2d 841, 2011 N.Y. App. Div. LEXIS 3072 (N.Y. App. Div. 3d Dep't 2011).

As plaintiff's motion to add an additional claim under N.Y. Gen. Mun. Law § 50-e was filed three years after her alleged injury without any compelling excuse for the delay, and she sought to present a entirely new theory of liability that defendants would have to investigate, the trial court did not abuse its discretion in denying the motion. Chirse v City School Dist. of Albany, 83 A.D.3d 1232, 920 N.Y.S.2d 841, 2011 N.Y. App. Div. LEXIS 3072 (N.Y. App. Div. 3d Dep't 2011).

Trial court erred in, sua sponte, granting a subway passenger leave to amend his notice of claim as to the facts and legal theories within 30 days of the filing of the note of issue in a subsequent action to recover damages for personal injuries because the relief was dramatically different from the pre-action discovery that was the subject of the petition, the absence of a notice of claim rendered it impossible to determine whether the future notice of claim or any amendments thereto would comply with the General Municipal Law, and the city and its transit authority were prejudiced insofar as the court's permissive timeline potentially could be, inter alia, beyond the statute of limitations and after the completion of discovery. Matter of Velez v City of New York, 174 A.D.3d 813, 106 N.Y.S.3d 110, 2019 N.Y. App. Div. LEXIS 5780 (N.Y. App. Div. 2d Dep't 2019).

118. —Statutory extension period

The amendment of subdivision 5 of section 50-e of the General Municipal Law (L 1976, ch 745) did not negate the pre-1976 rule that once the 90 days allowed for service of a notice of claim had expired there could be no judicial extension of such time to serve the notice unless the application for such extension was made within the period specified in the statute; failure to seek a judicial extension of the 90-day period prior to the expiration of one year and 90 days precludes the exercise of judicial discretion to allow filing of a late notice of claim. Fraccola v Utica, 77 A.D.2d 161, 432 N.Y.S.2d 943, 1980 N.Y. App. Div. LEXIS 13008 (N.Y. App. Div. 4th Dep't 1980).

Where, at time motion seeking permission to serve late notice of claim was made, more than one year and 90 days had elapsed from time cause of action accrued, court was without discretion to grant relief sought. Ferrara v Terryville Fire Dist., 110 A.D.2d 749, 488 N.Y.S.2d 45, 1985 N.Y. App. Div. LEXIS 48651 (N.Y. App. Div. 2d Dep't 1985).

Application for extension in which to file late notice of claim must be made within one year and 90 days after cause of action accrues, unless statute is otherwise tolled, and thus, Special Term was without authority to grant permission to file late notice of claim. Nirenberg v County of Ulster, 119 A.D.2d 882, 500 N.Y.S.2d 438, 1986 N.Y. App. Div. LEXIS 55823 (N.Y. App. Div. 3d Dep't 1986).

Special Term was without authority to grant application to serve late notice of claim against City of New York in personal injury action where application was made after expiration of one-year and 90-day limitations provided by CLS Gen Mun §§ 50-e and 50-i and record contained no facts to support finding of equitable estoppel against city. Siahaan v New York, 123 A.D.2d 620, 506 N.Y.S.2d 777, 1986 N.Y. App. Div. LEXIS 60768 (N.Y. App. Div. 2d Dep't 1986).

Extension to file claim against municipal corporation could not be beyond date which was one year and 90 days after happening of event upon which claim was based; court was powerless to entertain application after such time. Walcott v Cazenovia, 91 Misc. 2d 437, 398 N.Y.S.2d 116, 1977 N.Y. Misc. LEXIS 2324 (N.Y. Sup. Ct. 1977), aff'd, 65 A.D.2d 671, 409 N.Y.S.2d 802, 1978 N.Y. App. Div. LEXIS 13394 (N.Y. App. Div. 3d Dep't 1978).

That the notice of claim regarding plaintiff's malpractice claim against the New York City Health and Hospital (HCC) was actually received by HCC's office of legal affairs was immaterial, as it received that notice after the 90-day period of the savings clause in N.Y. Gen. Mun. Law § 50-e(3)(c) had expired. Barnaman v New York City Health & Hosps. Corp., 90 A.D.3d 588, 934 N.Y.S.2d 443, 2011 N.Y. App. Div. LEXIS 8781 (N.Y. App. Div. 2d Dep't 2011).

In a suit by a former county parks department employee and his guardian ad litem (plaintiffs) against a city and three supervisory parks department employees, alleging disability discrimination, plaintiffs were unable to maintain their state law claims against the county because they failed to file a required notice prior to commencing litigation, and a federal district court lacked jurisdiction under N.Y. Gen. Mun. Law § 50-e(7) to consider plaintiffs' motion for leave to file a late notice of claim. Costabile v County of Westchester, 485 F. Supp. 2d 424, 2007 U.S. Dist. LEXIS 33484 (S.D.N.Y. 2007).

119. —Effect of statute of limitations

The trial court improperly granted a motion for leave to serve a late notice of claim nunc pro tunc upon a town and a sewer authority and to add the town and sewer authority as additional parties, where the applicable statute of limitations had expired and the court thus was without jurisdiction to grant the motion. Dua v Suffolk County, 96 A.D.2d 1072, 466 N.Y.S.2d 710, 1983 N.Y. App. Div. LEXIS 19722 (N.Y. App. Div. 2d Dep't 1983).

Supreme Court lacked authority to grant plaintiff's motion to amend, nunc pro tunc, prior order granting leave to serve late notice of claim on New York City Transit Authority after statute of limitations had expired. De Simone v New York, 132 A.D.2d

687, 518 N.Y.S.2d 165, 1987 N.Y. App. Div. LEXIS 49230 (N.Y. App. Div. 2d Dep't 1987).

Court had no discretion to extend plaintiff's time to file late notices of claim in negligence action against town, where notices were filed after statute of limitations had expired and there was no evidence that town defendants engaged in misconduct preventing plaintiff from timely filing his claim. Smith v Town of Ellisburg, 234 A.D.2d 938, 651 N.Y.S.2d 772, 1996 N.Y. App. Div. LEXIS 13665 (N.Y. App. Div. 4th Dep't 1996).

Where claimants sought to serve late notice of a claim against a sewer authority due to the late provision of discovery by a city's counsel, the trial court could not grant their request because the statute of limitations for a suit against the authority had expired and the authority was not equitably estopped from raising the statute of limitations, even though the city's counsel was also the authority's counsel, because the authority had done nothing to cause the discovery delay. Wilson v City of Buffalo, 298 A.D.2d 994, 747 N.Y.S.2d 657, 2002 N.Y. App. Div. LEXIS 9044 (N.Y. App. Div. 4th Dep't 2002), app. denied, 99 N.Y.2d 505, 755 N.Y.S.2d 712, 785 N.E.2d 734, 2003 N.Y. LEXIS 47 (N.Y. 2003).

In a wrongful death action alleging medical malpractice, filed against a New York City, N.Y., public hospital, the trial court did not have discretion to grant the survivor's request to serve a late notice of claim against the New York City Health and Hospitals Corporation because the statute of limitations for the commencement of wrongful death actions against the corporation had expired. Jones v City of New York, 300 A.D.2d 359, 751 N.Y.S.2d 522, 2002 N.Y. App. Div. LEXIS 11929 (N.Y. App. Div. 2d Dep't 2002).

Appeals court reversed a trial court order that had granted a land owner permission to file a late (under N.Y. Educ. Law 3813(2) and N.Y. Gen. Mun. Law 50-e(1)(a) as being served more than 90 days after the owner's claim accrued) notice of claim against a school for its sewer discharges; the trial court's permission could not be granted since the N.Y. Gen. Mun. Law § 50-i(1) one-year and 90-day statute of limitations period had expired. Schwinghammer v Sullivan W. Cent. Sch. Dist., 2 A.D.3d 1126, 768 N.Y.S.2d 696, 2003 N.Y. App. Div. LEXIS 13534 (N.Y. App. Div. 3d Dep't 2003).

When an injured party seeking damages from a municipality for personal injuries served notice of her claim 91 days after the accident, and then later sought an extension of time within which to file a timely claim, the trial court had no power to grant her request because the applicable statute of limitations expired three days before she sought an extension of time. Hallett v City of Ithaca, 8 A.D.3d 870, 778 N.Y.S.2d 321, 2004 N.Y. App. Div. LEXIS 8598 (N.Y. App. Div. 3d Dep't), app. denied, 3 N.Y.3d 608, 786 N.Y.S.2d 811, 820 N.E.2d 290, 2004 N.Y. LEXIS 2395 (N.Y. 2004).

In a claimant's personal injury action against a school district and a bus driver, the trial court lacked authority to grant the claimant leave to serve a late notice of claim because the 1-year-and-90-day period expired on December 19, 2013, but the claimant did not move for leave to serve a late notice of claim until approximately eight months after the statute of limitations had run. Cassidy v Riverhead Cent. Sch. Dist., 128 A.D.3d 996, 11 N.Y.S.3d 102, 2015 N.Y. App. Div. LEXIS 4369 (N.Y. App. Div. 2d Dep't 2015).

120. Burden of proof

Section 50-e casts upon the party making the application for leave to serve a notice of claim the duty of showing the particular facts causing the delay. Ruskin v New York, 271 A.D. 934, 67 N.Y.S.2d 597, 1947 N.Y. App. Div. LEXIS 5269 (N.Y. App. Div.), app. denied, 271 A.D. 1023, 69 N.Y.S.2d 921, 1947 N.Y. App. Div. LEXIS 5697 (N.Y. App. Div. 1947).

Upon an adequate showing of one of the statutory grounds for extending the time to give notice of claim, and upon application within the maximum time limitation, the court has discretion to grant an extension of time. Stuto v New York, 84 N.Y.S.2d 812, 192 Misc. 935, 1948 N.Y. Misc. LEXIS 3677 (N.Y. Sup. Ct. 1948).

Where a mother, on behalf of herself and her injured child, failed to show a reasonable excuse for her delay in filing a notice of claim in her personal injury action against a city and the city board of education, nor did she show actual knowledge of the claim on the part of the city and the board and the absence of prejudice to them, her request to file a late notice of claim required denial under N.Y. Gen. Mun. Law § 50-e(1). Bodrick v City of New York, 799 N.Y.S.2d 158, 5 Misc. 3d 1024(A), 2004 N.Y. Misc. LEXIS 2472 (N.Y. Sup. Ct. 2004).

121. Retroactive effect of amendment broadening relief

Claimants whose tort claims against public corporations accrued within one year prior to September 1, 1976, the effective date of an amendment to subdivision 5 of section 50-e of the General Municipal Law (L 1976, ch 745, § 2), may take advantage of the expanded guidelines which are set forth in that amendment for the exercise of a court's discretion in determining whether to allow late filing of a notice of such a claim and which, in substance, require a court to consider not only the factors to which it was formerly limited but other newly specified ones along with "all other relevant facts and circumstances", and to consider, in particular, whether the public corporation or those acting for it acquired actual knowledge of the essential facts of the claim within the prescribed period for filing it, which is 90 days of its accrual (General Municipal Law, § 50-e, subd 1, par [a]), or within a reasonable time thereafter. Beary v Rye, 44 N.Y.2d 398, 406 N.Y.S.2d 9, 377 N.E.2d 453, 1978 N.Y. LEXIS 1960 (N.Y. 1978).

An amendment to subdivision 5 of section 50-e of the General Municipal Law (L 1976, ch 745, § 2), expanding the grounds upon which a court may allow late filing of a notice of a tort claim against a public corporation and lengthening the time within which an application for such relief can be made from "one year after the happening of the event upon which the claim is based" to the "time limited for the commencement of an action by the claimant against the public corporation", which, save where the claimant is under a disability, is one year and 90 days after the happening of the event upon which the claim is based (General Municipal Law, § 50-i), may not be applied retrospectively to revive claims that accrued more than one year prior to its effective date of September 1, 1976. Beary v Rye, 44 N.Y.2d 398, 406 N.Y.S.2d 9, 377 N.E.2d 453, 1978 N.Y. LEXIS 1960 (N.Y. 1978).

Amendment to General Municipal Law which became effective September 1 and under which court had discretion to extend time to serve notice of claim should be given restrospective application. Nolan v County of Otsego, 55 A.D.2d 422, 391 N.Y.S.2d 15, 1977 N.Y. App. Div. LEXIS 9992 (N.Y. App. Div. 3d Dep't 1977).

Where statute originally limited applications to file late notice of claim against municipality to period of one year subsequent to date of accident and where such statute was amended, effective September 1, 1976, so as to extend period of time within which court could exercise its discretion to permit service of late notice of claim to period permitted for commencement of action by claimant against public corporation, but amendment gave no indication that it was meant to apply retroactively, one-year limitation period contained in prior law barred petitioner's action which was filed in January, 1976 and which was based on accident which occurred in June, 1973. Pauletti v Freeport Union Free School Dist., 59 A.D.2d 556, 397 N.Y.S.2d 146, 1977 N.Y. App. Div. LEXIS 13346 (N.Y. App. Div. 2d Dep't 1977), aff'd, 44 N.Y.2d 398, 406 N.Y.S.2d 9, 377 N.E.2d 453, 1978 N.Y. LEXIS 1960 (N.Y. 1978).

Amendment vesting courts with broader discretion to consider all relevant facts and circumstances in deciding whether to extend time to serve a notice of claim beyond specified 90-day period applies retroactively. Williams v Irondequoit, 59 A.D.2d 1049, 399 N.Y.S.2d 807, 1977 N.Y. App. Div. LEXIS 14336 (N.Y. App. Div. 4th Dep't 1977).

Under subdivision 5 of section 50-e of the General Municipal Law, as amended effective September 1, 1976, the period of one year and 90 days within which a court of competent jurisdiction may extend the time for a notice of claim to be served upon a public corporation may be tolled by infancy under CPLR 208, since it was the intent of the Legislature to extend significantly the discretion of the court to grant leave to file a notice of claim, and consideration of infancy is warranted even though the disability may not have been the reason for the failure to serve a

late notice; accordingly, an infant injured less than two months before the amendment may, some 17 months after the accident, file a late notice of claim against the town and village allegedly responsible for his injuries, since the amendment has been given a modified retroactive effect to claimants whose causes of action accrued within the prescribed one-year period preceding the effective amendatory date, and since the defendant municipalities not only had notice of plaintiff's injuries on the day it occurred, but actually investigated it that day. A just claim for damages for a serious injury should not be forfeited for failure to give notice where the basic purpose of the statute is not offended and where no substantial prejudice exists. Ziecker v Orchard Park, 70 A.D.2d 422, 421 N.Y.S.2d 447, 1979 N.Y. App. Div. LEXIS 12732 (N.Y. App. Div. 4th Dep't 1979), aff'd, 51 N.Y.2d 957, 435 N.Y.S.2d 720, 416 N.E.2d 1055, 1980 N.Y. LEXIS 2821 (N.Y. 1980).

Amendment to General Municipal Law granting to court discretion to extend time to serve notice of claim was remedial in nature and was to be given retrospective application. Walcott v Cazenovia, 91 Misc. 2d 437, 398 N.Y.S.2d 116, 1977 N.Y. Misc. LEXIS 2324 (N.Y. Sup. Ct. 1977), aff'd, 65 A.D.2d 671, 409 N.Y.S.2d 802, 1978 N.Y. App. Div. LEXIS 13394 (N.Y. App. Div. 3d Dep't 1978).

122. —Particular claims

Court had discretion under 1976 amendments to extend time to file notice of claim against county for injuries sustained in automobile accident on October 21, 1975. Nolan v County of Otsego, 55 A.D.2d 422, 391 N.Y.S.2d 15, 1977 N.Y. App. Div. LEXIS 9992 (N.Y. App. Div. 3d Dep't 1977).

Plaintiff was not entitled to leave to serve late notice of claim against municipal hospital, notwithstanding her continuous treatment from her birth in December 1973 until February 1977, since version of CLS Gen Mun § 50-e in effect in 1973 provided that application for leave to serve late notice of claim was required to be made within one year of event on which claim was based, and 1976 amendment to statute did not revive claims that accrued more than one year prior to amendment. Aponte v Bellevue Hosp. Center, 183 A.D.2d 594, 584 N.Y.S.2d 28, 1992 N.Y. App. Div. LEXIS 7425 (N.Y. App. Div. 1st Dep't 1992).

123. Relationship to other statutes

An order which granted plaintiff's motion for leave to file a late notice of claim and to serve an amended complaint was reversed, where plaintiff failed to comply with the requirements of Public Authorities Law § 1276(1) and § 50-e of the General Municipal Law. Sudakin v Long Island R. R. Co., 32 A.D.2d 560, 300 N.Y.S.2d 371, 1969 N.Y. App. Div. LEXIS 4190 (N.Y. App. Div. 2d Dep't 1969).

Plaintiffs' motion, to amend their notice of claim so as to include claims for loss of each other's services and consortium, was properly one for amendment so as to supply omission, inasmuch as it sought to add derivative causes of action predicated upon same facts which had already been included in plaintiffs' notice of claim and which defendant had already been duly and timely notified; motion should not have been treated as motion for leave to serve late notice of claim. Dodd v Warren, 110 A.D.2d 807, 488 N.Y.S.2d 70, 1985 N.Y. App. Div. LEXIS 48713 (N.Y. App. Div. 2d Dep't 1985).

Petitioner who failed to timely serve notice of claim on village would not be allowed to file late notice of claim on grounds that CLS CPLR § 215(8) tolls provisions of CLS Gen Mun § 50-e; § 50-e, which provides that notice of claim must be served within 90 days of accrual of claim, is condition precedent to suit, whereas § 215(8) is toll on commencement of substantive cause of action and does not apply to, or toll, time period within which notice of claim must be served. Herman v Chester, 125 A.D.2d 469, 509 N.Y.S.2d 818, 1986 N.Y. App. Div. LEXIS 62762 (N.Y. App. Div. 2d Dep't 1986).

Where, following service of notice of claim of injuries to an infant plaintiff, the defendant served notice upon plaintiffs requiring them to appear for examination before trial, and the examination was held October 15, 1964 and thereafter summons and complaint were served on May 24, 1965, one year and 138 days from the date of the accident, the plaintiffs being prohibited from commencing their action from April 21, 1964 until the examination on October 15, 1964, a period of 177 days, that period must be added to the period provided by § 50-i, and the action was timely commenced and was not barred by statutory limitations. Rowe v Board of Education, 47 Misc. 2d 621, 263 N.Y.S.2d 57, 1965 N.Y. Misc. LEXIS 1615 (N.Y. Sup. Ct. 1965).

In personal injury action against regional off-track betting corporation, Supreme Court had jurisdiction to extend time to serve notice of claim under CLS Racing & Wagering § 514 since (1) CLS Gen Mun § 50-e gives court general discretion to extend time to serve notice of claim in tort actions where notice of claim is required as condition precedent against "public corporation, as defined in the general construction law," (2) CLS Gen Const § 66 defines public corporation as "public benefit corporation," and (3) regional off-track betting corporation is public benefit corporation under CLS Racing & Wagering § 502. Burke v Capital Dist. Regional Off-Track Betting Corp., 137 Misc. 2d 448, 521 N.Y.S.2d 205, 1987 N.Y. Misc. LEXIS 2650 (N.Y. Sup. Ct. 1987).

124. Relationship to procedural rules

Plaintiff's application to serve a late notice of claim pursuant to Gen Mun Law § 50-e was improperly commenced as a motion since no action was pending against the town; however, it was proper to treat the matter as a special proceeding and therefore, under the express provisions of CPLR § 404, when the trial court overruled the municipality's objection to the application on the ground that the court had not acquired personal jurisdiction, it should have given the municipality permission to defend the application on the merits by way of answer and answering affidavits. Lannon v Henrietta, 87 A.D.2d 980, 450 N.Y.S.2d 108, 1982 N.Y. App. Div. LEXIS 16516 (N.Y. App. Div. 4th Dep't 1982).

Application for leave to file late notice of claim was improperly brought as motion against New York City Housing Authority where no previously-commenced action was pending. Rogers v New York City Housing Authority, 169 A.D.2d 763, 565 N.Y.S.2d 130, 1991 N.Y. App. Div. LEXIS 1034 (N.Y. App. Div. 2d Dep't 1991).

There being no action presently pending against a municipality, a court has no jurisdiction, under Civil Practice Act § 324, to grant, in connection with an infant's motion to extend time for service of notice of claim on the municipality, a motion to require a city investigator to produce statements given by claimant and her mother in support of the application to extend time for service. Berkowitz v Long Beach, 33 Misc. 2d 449, 225 N.Y.S.2d 1002, 1962 N.Y. Misc. LEXIS 3765 (N.Y. Sup. Ct. 1962).

The service of papers not in conformance with the provision of the former Rules of Civil Practice in that they did not conform to the copies of the affidavit and proposed claim, and the lack of the return of the statement of objections within the 24 hour period, will not prevent a court, in its discretion, in extending the statutory 90 day period for filing notice of claim. Tinkler v Board of Education, 106 N.Y.S.2d 262, 1951 N.Y. Misc. LEXIS 2042 (N.Y. Sup. Ct. 1951).

125. Summons and complaint in lieu of notice of claim

In an action resulting from a fall allegedly sustained on a municipal golf course, as to which plaintiffs had served an untimely notice of claim on defendant-town had moved to have the notice declared duly served pursuant to Gen Mun Law §§ 50-e and 50-i, and, while the decision on the motion was still pending, had served a summons and complaint alleging compliance with service of the notice of claim requirement of Gen Mun Law § 50-e, plaintiffs were not entitled to default judgment when defendant failed to comply with provisions of CPLR § 320(a) requiring it to move, appear and/or answer within 20 days where, when plaintiffs had moved to validate their notice of claim, defendant, being on notice of such motion, could reasonably have relied on the fact that plaintiffs themselves realized that their notice was deficient so that when the complaint had been received by defendant, before the motion to validate had been decided, defendant could again reasonably rely on the fact that compliance with Gen Mun Law § 50-e, as alleged in the complaint, could only be considered complete if plaintiffs' motion to validate was granted, which did not happen until well after the complaint was served, and the reasonable reliance permitted defendant under

the circumstances provided sufficient excuse for delay or default in answering, especially since no prejudice whatever had been shown by plaintiff. Kilbride v Fallsburg, 108 A.D.2d 1100, 485 N.Y.S.2d 668, 1985 N.Y. App. Div. LEXIS 43397 (N.Y. App. Div. 3d Dep't 1985).

Where the defendant railroad investigated an accident immediately after its occurrence, received actual notice of the accident by means of a letter from plaintiff's attorney, and was served within 88 days of the accident with a summons and complaint; plaintiff's motion to file a late notice of claim was granted, and alternatively plaintiff's motion that service of a notice of claim could be dispensed with in view of the service of summons and complaint was granted and the defendant estopped from establishing any defense based upon the failure to file a notice of claim within 90 days. Quintero v Long Island Railroad, 55 Misc. 2d 813, 286 N.Y.S.2d 748, 1968 N.Y. Misc. LEXIS 1865 (N.Y. Sup. Ct. 1968), aff'd, 31 A.D.2d 844, 298 N.Y.S.2d 109, 1969 N.Y. App. Div. LEXIS 4537 (N.Y. App. Div. 2d Dep't 1969).

126. Time excludable from statutory period; date of injury

Petitioner would be denied leave to file late notice of claim under CLS Gen Mun § 50-e where proceeding for permission to file late notice was commenced some 2 years and 9 months after claim accrued, and did not relate back to prior applications by petitioner for such relief; moreover, petitioner would not be entitled to 14-month extension of one-year 90-day limitation period simply because he allegedly filed notice of appeal from order denying his application on renewal and subsequently withdrew his appeal without ever perfecting it, since such extension would frustrate purpose of time limitations set forth in statute. Zimmerman v New York, 161 A.D.2d 591, 555 N.Y.S.2d 170, 1990 N.Y. App. Div. LEXIS 5361 (N.Y. App. Div. 2d Dep't), app. denied, 76 N.Y.2d 707, 560 N.Y.S.2d 989, 561 N.E.2d 889, 1990 N.Y. LEXIS 3032 (N.Y. 1990).

In view of the provisions of §§ 20 and 25-a of the General Construction Law, where the injury on which a claim against a municipality is based occurs on July 22, 1961, that date is excluded and the statutory one-year period begins to run on the following day, and if the end of the period then falls on a Sunday, notice is timely if served on the next succeeding business day. Aposporos v Poughkeepsie, 37 Misc. 2d 56, 232 N.Y.S.2d 700, 1962 N.Y. Misc. LEXIS 2488 (N.Y. Sup. Ct. 1962).

Since plaintiff's accident occurred on November 8, 1963, the one-year statute of limitations prescribed by General Municipal Laws § 50-e(5) began to run on November 9, 1963, and would normally expire on November 8, 1964, but where that day fell on a Sunday, the period expired on the following day, November 9, 1964. Conway v Board of Education, 47 Misc. 2d 172, 262 N.Y.S.2d 15, 1965 N.Y. Misc. LEXIS 1633 (N.Y. County Ct. 1965).

127. —Holidays

The fact that the last day for serving notice of claim is a half-holiday does not preclude service on that day, and if service is put off to the next day without obtaining an extension of time, the claim fails. Meier v New York, 106 N.Y.S.2d 278, 199 Misc. 305, 1951 N.Y. Misc. LEXIS 2047 (N.Y. App. Term 1951).

128. —Weekends

In view of the provisions of §§ 20 and 25-a of the General Construction Law, where the injury on which a claim against a municipality is based occurs on July 22, 1961, that date is excluded and the statutory one-year period begins to run on the following day, and if the end of the period then falls on a Sunday, notice is timely if served on the next succeeding business day. Aposporos v Poughkeepsie, 37 Misc. 2d 56, 232 N.Y.S.2d 700, 1962 N.Y. Misc. LEXIS 2488 (N.Y. Sup. Ct. 1962).

Since plaintiff's accident occurred on November 8, 1963, the one-year statute of limitations prescribed by General Municipal Laws § 50-e(5) began to run on November 9, 1963, and would normally expire on November 8, 1964, but where that day fell on a Sunday, the period expired on the following day, November 9, 1964. Conway v Board of Education, 47 Misc. 2d 172, 262 N.Y.S.2d 15, 1965 N.Y. Misc. LEXIS 1633 (N.Y. County Ct. 1965).

Where last calendar day for service of notice of claim fell on Saturday, when city offices were closed on Saturdays, service of notice on next business day, Monday, was held sufficient. Sternfield v New York, 55 Misc. 2d 70, 284 N.Y.S.2d 258, 1967 N.Y. Misc. LEXIS 1177 (N.Y. Civ. Ct. 1967).

129. Application for extension as tolling statute of limitations

Where a passenger injured in an accident on December 23, 1963 sought leave to file a late notice of claim on December 18, 1964 and an order permitting the late filing was signed on February 15, 1965, the one-year statute of limitations was tolled from the time the proceeding to file the late claim was instituted until the order granting that request was published, so that an action commenced within 30 days thereafter on March 22, 1965 was timely. Barchet v New York City Transit Authority, 20 N.Y.2d 1, 281 N.Y.S.2d 289, 228 N.E.2d 361, 1967 N.Y. LEXIS 1446 (N.Y. 1967).

One-year statute of limitations was tolled when personal injury claimant initiated successful proceedings to file a late claim 5 days before expiration of limitation period. Barchet v New York City Transit Authority, 20 N.Y.2d 1, 281 N.Y.S.2d 289, 228 N.E.2d 361, 1967 N.Y. LEXIS 1446 (N.Y. 1967).

In an action against a municipal corporation in which the claimant moved for permission to file a late notice of claim, the Appellate Division did not abuse its discretion as a matter of law in granting the motion after Special Term denied it; the case could not be held to be moot on the ground that the time for serving the complaint expired after the motion was made, since the running of the statute was tolled once the motion was made. Stevenson v County of Monroe, 63 N.Y.2d 963, 483 N.Y.S.2d 987, 473 N.E.2d 237, 1984 N.Y. LEXIS 4735 (N.Y. 1984).

Statute of limitations for commencement of action against municipality is tolled from time plaintiff seeks leave to serve late notice of claim until order granting such relief goes into effect. Rieara v New York, Dep't of Parks & Recreation, 156 A.D.2d 206, 548 N.Y.S.2d 466, 1989 N.Y. App. Div. LEXIS 15470 (N.Y. App. Div. 1st Dep't 1989).

Renewal of motion to file late notice of claim under CLS Gen Mun § 50-e in action against municipality does not relate back to date of initial motion which was denied with leave to renew. Rieara v New York, Dep't of Parks & Recreation, 156 A.D.2d 206, 548 N.Y.S.2d 466, 1989 N.Y. App. Div. LEXIS 15470 (N.Y. App. Div. 1st Dep't 1989).

Statute of limitations was tolled during pendency of plaintiff's application for leave to serve late notice of claim where plaintiff was statutorily prohibited from bringing action until she was granted such leave (CLS Pub Hous § 157, CLS Gen Mun § 50-e(5)); earlier, timely notice of claim signed by decedent's mother did not remove this impediment to suit since notice of claim must be sworn to by or on behalf of claimant. Munn v New York City Hous. Auth., 202 A.D.2d 210, 608 N.Y.S.2d 221, 1994 N.Y. App. Div. LEXIS 1847 (N.Y. App. Div. 1st Dep't 1994).

Amendment of General Municipal Law provision governing applications to obtain leave to file late notice of claim did not preclude application of rule tolling statute of limitations during pendency of such application to action commenced against school district after elapse of one year and 90-day period by plaintiff, whose application for leave to file late notice was not granted until after elapse of that period, and consequently action was not barred by statute of limitations. Colantuono v Valley Cent. School Dist., 90 Misc. 2d 918, 396 N.Y.S.2d 590, 1977 N.Y. Misc. LEXIS 2189 (N.Y. Sup. Ct.), aff'd, 59 A.D.2d 926, 399 N.Y.S.2d 262, 1977 N.Y. App. Div. LEXIS 14144 (N.Y. App. Div. 2d Dep't 1977).

Statute of limitations is tolled from time plaintiff commences proceeding to obtain leave to file late notice of claim until order granting that relief goes into effect, and order granting leave to serve late notice of claim is deemed effective when order is entered, rather than at time plaintiff receives order, unless plaintiff's delay in filing order is egregious. Redhead v Parish, 128 Misc. 2d 750, 490 N.Y.S.2d 721, 1985 N.Y. Misc. LEXIS 2989 (N.Y. Sup. Ct. 1985).

130. Notice of motion for extension

Amendment of CLS Gen Mun § 50-e(5) in 1976, omitting former requirement that notice of application to serve late notice of claim be served in same manner as notice of claim, was intentional omission designed to mitigate harsh consequences of

rigid application of prior requirements, and evinced legislative intent to give courts broad discretion in entertaining such applications; thus, Supreme Court did not lack jurisdiction to consider such application, although copy had been sent to city's corporation counsel by ordinary mail rather than being personally served. Callahan v New York, 75 N.Y.2d 899, 554 N.Y.S.2d 819, 553 N.E.2d 1329, 1990 N.Y. LEXIS 667 (N.Y. 1990).

Plaintiff's application to serve a late notice of claim pursuant to Gen Mun Law § 50-e was improperly commenced as a motion since no action was pending against the town; however, it was proper to treat the matter as a special proceeding and therefore, under the express provisions of CPLR § 404, when the trial court overruled the municipality's objection to the application on the ground that the court had not acquired personal jurisdiction, it should have given the municipality permission to defend the application on the merits by way of answer and answering affidavits. Lannon v Henrietta, 87 A.D.2d 980, 450 N.Y.S.2d 108, 1982 N.Y. App. Div. LEXIS 16516 (N.Y. App. Div. 4th Dep't 1982).

In proceeding under CLS Gen Mun § 50-e(5) against county and others for leave to file late notice of claim, court did not have personal jurisdiction over respondents, and thus they were entitled to vacatur of their default in opposing petition, where (1) original service of notice of petition and petition by ordinary mail was jurisdictionally defective under CLS CPLR § 403(c), and (2) reservice of process, which was accomplished on return date of petition, was jurisdictionally defective because it failed to give adequate notice of return date to respondents. Cartier v County of Nassau, 281 A.D.2d 477, 722 N.Y.S.2d 45, 2001 N.Y. App. Div. LEXIS 2352 (N.Y. App. Div. 2d Dep't 2001).

Supreme court properly exercised its discretion in granting an application under N.Y. Gen. Mun. Law § 50-e(5) to serve a late notice of claim on a county because the county, which possessed the relevant medical records from the time of the alleged malpractice, had actual notice of the essential facts underlying the claim and was not substantially prejudiced by the delay. Under the circumstances, the lack of a reasonable excuse did not prevent the court from granting leave to serve a late notice of claim on the county. Matter of Rivera-Guallpa v County of Nassau, 40 A.D.3d 1001, 836 N.Y.S.2d 288, 2007 N.Y. App. Div. LEXIS 6418 (N.Y. App. Div. 2d Dep't), app. denied, 9 N.Y.3d 816, 849 N.Y.S.2d 32, 879 N.E.2d 172, 2007 N.Y. LEXIS 3765 (N.Y. 2007).

Since subdivision 5 of section 50-e of the General Municipal Law, as amended effective September 1, 1976, no longer requires that notice be given to the party against whom the claim is made on an application to extend the time to serve a late notice of claim, as opposed to the prior statute which did contain a notice requirement, Special Term is free to exercise its discretion in deciding an ex parte application for leave to serve a late notice of claim based solely on the submitted application. Cobb v Niagara Frontier Transp. Authority, 98 Misc. 2d 191, 413 N.Y.S.2d 613, 1979 N.Y. Misc. LEXIS 2064 (N.Y. Sup. Ct. 1979).

131. Timeliness of motion for extension

Leave to file a late claim against a city would be denied to a plaintiff who was injured at a public pool, where at the time of the accident plaintiff gave as the cause of her injury a cause different from that contained in the request to file a late claim, where the original description of the cause of her injury did not provide the public entity with actual knowledge of the essential facts constituting the claim, where plaintiff was unable to adequately identify the persons to whom she allegedly provided the correct information on the day of the accident, and where plaintiff was unable to explain the lengthy delay in retaining counsel and initiating the claim against the county. Raczy v County of Westchester, 95 A.D.2d 859, 464 N.Y.S.2d 223, 1983 N.Y. App. Div. LEXIS 18809 (N.Y. App. Div. 2d Dep't 1983).

In a medical malpractice action against a county hospital, the trial court properly denied plaintiffs' motion for leave to serve a late notice of claim under Gen Mun Law § 50-e where such motion was raised ten months after plaintiff patient's discharge from defendant hospital, and where plaintiffs failed to include a proposed notice of claim with their motion papers in support of their application, and only submitted such a proposed notice of claim in response to defendant's opposition to plaintiffs' later motion for reargument following the trial court's initial denial of their application. Losavio v Stein, 98 A.D.2d 742, 469 N.Y.S.2d 447, 1983 N.Y. App. Div. LEXIS 21056 (N.Y. App. Div. 2d Dep't 1983).

Application under CLS Gen Mun § 50-e(5) to serve late notice of claim was properly denied where not only was delay not attributable to petitioner's infancy, as counsel was retained within 90 days of incident, but there was no evidence that county had actual knowledge of claim, and petitioner failed to give adequate explanation of why application was delayed more than one year after accident. Bast v County of Clinton, 173 A.D.2d 1079, 570 N.Y.S.2d 416, 1991 N.Y. App. Div. LEXIS 7207 (N.Y. App. Div. 3d Dep't), app. dismissed, 78 N.Y.2d 1002, 575 N.Y.S.2d 276, 580 N.E.2d 762, 1991 N.Y. LEXIS 4150 (N.Y. 1991).

Even if respondents misled petitioner as to relevant statute of limitations, petitioner was not entitled to leave to file late notice of claim in light of 7-month delay in commencing proceedings after learning of applicability of CLS Gen Oblig § 50-e. Nelson v Board of Collective Bargaining, 204 A.D.2d 216, 613 N.Y.S.2d 1, 1994 N.Y. App. Div. LEXIS 5572 (N.Y. App. Div. 1st Dep't), app. dismissed, 84 N.Y.2d 1004, 622 N.Y.S.2d 908, 647 N.E.2d 114, 1994 N.Y. LEXIS 4579 (N.Y. 1994), app. dismissed, 85 N.Y.2d 956, 628 N.Y.S.2d 47, 651 N.E.2d 916, 1995 N.Y. LEXIS 1425 (N.Y. 1995), app. dismissed, 86 N.Y.2d 809, 632 N.Y.S.2d 494, 656 N.E.2d 592, 1995 N.Y. LEXIS 3441 (N.Y. 1995).

Court erred in denying petitioner's application to serve late notice of claim against city where city had known about his injury from day it occurred, his counsel timely obtained order to show cause for leave to file late notice of claim, but erroneously served motion papers same day on Comptroller's office rather than corporation counsel, Comptroller subsequently acknowledged such service 2 days later, and thereafter it was only on return date of motion, 4 days after one-year-and-90-day period within which to make such motion had expired, that corporation counsel claimed lack of service and asked for one week adjournment to oppose application on jurisdictional grounds. Morgan v City of New York, 216 A.D.2d 246, 628 N.Y.S.2d 697, 1995 N.Y. App. Div. LEXIS 7109 (N.Y. App. Div. 1st Dep't 1995).

Leave to assert claim against school district for decedent's conscious pain and suffering and derivative claim was properly denied where petitioners failed to adequately explain their 15-month delay in moving for leave to assert late notice of claim. Traylor v Comsewogue Sch. Dist., 265 A.D.2d 332, 696 N.Y.S.2d 219, 1999 N.Y. App. Div. LEXIS 9616 (N.Y. App. Div. 2d Dep't 1999).

Trial court erred in granting plaintiff's motion pursuant to N.Y. Gen. Mun. Law § 50-e(5) for leave to serve a late notice of a negligent supervision claim against defendants; defendants did not receive timely actual knowledge of the facts underlying the claim, and plaintiff failed to show a reasonable excuse for the delay in filing the notice of claim. Jasinski v HB Ward Tech. Sch., 306 A.D.2d 347, 760 N.Y.S.2d 676, 2003 N.Y. App. Div. LEXIS 6474 (N.Y. App. Div. 2d Dep't 2003).

As an injured person failed to serve a notice of claim on a transit authority in a timely fashion, and failed to move to deem the notice of claim served nunc pro tunc in a timely fashion, the trial court was without authority to deem the notice served nunc pro tunc. Small v N.Y. City Tr. Auth., 14 A.D.3d 690, 789 N.Y.S.2d 229, 2005 N.Y. App. Div. LEXIS 776 (N.Y. App. Div. 2d Dep't 2005).

Supreme Court would deny plaintiff's motion to file late notice of claim against city for damages incurred when city sanitation truck backed into plaintiff's car where plaintiff's application to file late notice was also untimely and could not be considered renewal of initial, timely motion plaintiff had filed in Civil Court which motion had to be considered nullity because Civil Court lacked subject matter jurisdiction. Perez v New York, 133 Misc. 2d 1083, 509 N.Y.S.2d 289, 1986 N.Y. Misc. LEXIS 3033 (N.Y. Sup. Ct. 1986).

Request by an infant and his mother to file a late notice of claim naming a school district's individual employees in their action arising out of a hazing incident was denied; the request was untimely, and the infant and his mother offered no explanation for their failure to name the individual defendants in their original notice of claim or for the need to add the individual

defendants after the original notice was filed. White v Averill Park Cent. Sch. Dist., 195 Misc. 2d 409, 759 N.Y.S.2d 641, 2003 N.Y. Misc. LEXIS 263 (N.Y. Sup. Ct. 2003).

CLS Gen Mun L § 50-e, subd 5 recognizes that there may be instances when a lawsuit is commenced prior to the making of an application to file a late notice of claim, and specifically provides that such an application shall not be denied on the ground that it was made after the action was commenced. Palazzo v New York, 444 F. Supp. 1089, 1978 U.S. Dist. LEXIS 20257 (E.D.N.Y. 1978).

132. —Effect of statute of limitations

In three separate actions seeking money damages against a city in which permissions to file late notices of claim were requested after the limitations period for commencing actions against a municipality had expired under Gen Mun Law § 50-i, the trial court erred in granting the claimant's motion to strike the city's defense that there was no compliance with the notice of claim requirement of Gen Mun Law § 50-e and claimants would be granted leave to file late notices of claim nunc pro tunc since an application for an extension may be made before or after the commencement of the action but not more than one year and 90 days after the cause of action accrued, unless the statute has been tolled; to allow a court to grant an extension which exceeded the statute of limitations would render meaningless that portion of Gen Mun Law § 50-e which expressly prohibits a court from doing so. Pierson v New York, 56 N.Y.2d 950, 453 N.Y.S.2d 615, 439 N.E.2d 331, 1982 N.Y. LEXIS 3523 (N.Y. 1982).

The application for extension of time to serve notice of claim must be made prior to commencement of an action to enforce the claim, and the time limitations for commencement of such an action (now found in § 50-i) are not tolled or extended by existence of ground for, or the making of an application for, an extension of time to service the notice of claim. Christian v Herkimer, 5 A.D.2d 62, 169 N.Y.S.2d 81, 1957 N.Y. App. Div. LEXIS 3459 (N.Y. App. Div. 4th Dep't 1957), aff'd, 5 N.Y.2d 818, 181 N.Y.S.2d 212, 155 N.E.2d 122, 1958 N.Y. LEXIS 718 (N.Y. 1958).

In a medical malpractice action, the court was not authorized, as a matter of law, to grant leave to serve a late notice of claim upon an application pursuant to Gen Mun Law § 50-e made after the Statute of Limitations for an action against the public corporation had expired. Kral v County of Westchester, 101 A.D.2d 880, 476 N.Y.S.2d 353, 1984 N.Y. App. Div. LEXIS 18587 (N.Y. App. Div. 2d Dep't), app. dismissed, 63 N.Y.2d 944, 1984 N.Y. LEXIS 6205 (N.Y. 1984).

After statute of limitations had expired on wrongful death action, plaintiff who had served wrong party as defendant, and who also failed to make proper defendant a party to her application for relief, was not entitled to order permitting her to serve and file late notice of claim, summons and complaint on proper party nunc pro tunc, nor to amend her original notice of claim, summons and complaint to substitute proper party as defendant. Washington v Brookdale Hospital, 126 A.D.2d 719, 511 N.Y.S.2d 317, 1987 N.Y. App. Div. LEXIS 41865 (N.Y. App. Div. 2d Dep't 1987).

Even though city received notice of claim 8 months after incident but waited until statute of limitations had expired before making motion to dismiss complaint on ground that no timely notice of claim had been filed and no timely application for permission to file late notice of claim had been made, Special Term was without discretion to deny city's motion and sua sponte deem late notice of claim timely served, nunc pro tunc, since, as matter of law, court has no power to grant extensions of time to file notice of claim after statute of limitations expires, notwithstanding that city may have otherwise received notice of occurrence within statutory period. Henderson v New York, 127 A.D.2d 451, 511 N.Y.S.2d 242, 1987 N.Y. App. Div. LEXIS 42951 (N.Y. App. Div. 1st Dep't), app. dismissed, 69 N.Y.2d 1000, 517 N.Y.S.2d 1032, 511 N.E.2d 91, 1987 N.Y. LEXIS 16936 (N.Y. 1987), app. denied, 70 N.Y.2d 604, 519 N.Y.S.2d 1027, 513 N.E.2d 1307, 1987 N.Y. LEXIS 18195 (N.Y. 1987).

In action under Human Rights Law, in which court dismissed claim that county employee was subjected to retaliatory demotion by certain county official because plaintiffs failed to allege discriminatory intent or to allege that other county defendants acquiesced in demotion, plaintiffs were properly permitted to replead claim against individual defendants; however, leave to replead claim against county should have been denied, since notice of claim was not filed within 90 days, and motion to file late notice was not made within period of statute of limitations. Summers v County of Monroe, 147 A.D.2d 949, 537 N.Y.S.2d 703, 1989 N.Y. App. Div. LEXIS 1294 (N.Y. App. Div. 4th Dep't), app. dismissed, 74 N.Y.2d 735, 544 N.Y.S.2d 819, 543 N.E.2d 84, 1989 N.Y. LEXIS 4950 (N.Y. 1989).

Court had no authority to direct that earlier, untimely notice of claim against New York City Housing Authority be deemed timely where plaintiff failed to make application for leave to file late notice of claim prior to expiration of one-year statute of limitations applicable to his claims based on intentional torts; thus, those causes of action should have been dismissed. Rice v New York City Housing Authority, 149 A.D.2d 495, 539 N.Y.S.2d 977, 1989 N.Y. App. Div. LEXIS 4842 (N.Y. App. Div. 2d Dep't 1989).

Administrator of estate was not entitled to serve late notice of claim for conscious pain and suffering damages on county medical center, with respect to individual who died October 12, 1988 while patient of medical center, where administrator—who was appointed on January 12, 1990—both filed notice of claim alleging wrongful death by reason of medical malpractice early in April 1990 and simultaneously moved for leave to serve late notice of claim for pain and suffering; wrongful death notice was timely as within 90 days of administrator's appointment, but claim for pain and suffering was brought more than one year and 90 days after decedent's death, and thus statute of limitations had expired. Rasmussen v Nassau County Medical Center, 181 A.D.2d 679, 580 N.Y.S.2d 786, 1992 N.Y. App. Div. LEXIS 2989 (N.Y. App. Div. 2d Dep't 1992).

Defendant village was entitled to dismissal of complaint for failure to timely file notice of claim since delivery of summons and complaint to sheriff pursuant to CLS CPLR § 203(b)(5) did not toll statute of limitations, and thus did not render timely plaintiff's motion for leave to file late notice of claim which was served within 60 days of delivery of papers to sheriff. Robinson v Lancaster, 187 A.D.2d 932, 590 N.Y.S.2d 355, 1992 N.Y. App. Div. LEXIS 13923 (N.Y. App. Div. 4th Dep't 1992).

Plaintiffs' motion for leave to amend notice of claim and complaint should have been denied where it was made after statute of limitations had expired, and plaintiffs sought to add new theory of recovery that would have substantially altered nature of their claims. Herron v City of New York, 223 A.D.2d 676, 637 N.Y.S.2d 438, 1996 N.Y. App. Div. LEXIS 654 (N.Y. App. Div. 2d Dep't 1996).

Court properly denied leave to serve late notice of claim on New York City Department of Housing Preservation and Development (HPD) where application was not made until after expiration of statute of limitations, and petitioner failed to demonstrate that HPD engaged in any misleading conduct which would support finding of equitable estoppel. Dockery v Department of Hous. Preservation & Dev., 223 A.D.2d 705, 637 N.Y.S.2d 183, 1996 N.Y. App. Div. LEXIS 637 (N.Y. App. Div. 2d Dep't 1996).

Plaintiffs' motion for leave to serve late notice of claim against State Dormitory Authority (SDA) was untimely under CLS Gen Mun § 50-e(5), which provides that such extension "shall not exceed the time limited for the commencement" of action, where (1) notice of motion was dated 2 years and one month after accident, and (2) under CLS Pub A § 1691(1), with exception of action for wrongful death, tort action against SDA must be commenced within one year and 90 days after cause of action accrues. Chimera v New York State Dormitory Auth., 273 A.D.2d 802, 709 N.Y.S.2d 302, 2000 N.Y. App. Div. LEXIS 6808 (N.Y. App. Div. 4th Dep't 2000).

N.Y. Gen. Mun. Law § 50-e(5), which permitted the extension of the time to serve a notice of claim, was of no help to a former arrestee whose N.Y. Gen. Mun. Law § 50-e notice of claim did not include allegations of false arrest and malicious prosecution, because the former arrestee did not seek to file a late notice and was time-barred from bringing any new claims under N.Y. Gen. Mun. Law § 50-i(1). Scott v City of New York, 40 A.D.3d 408, 836 N.Y.S.2d 140, 2007 N.Y. App. Div. LEXIS 6075 (N.Y. App. Div. 1st Dep't 2007).

Under Gen Mun Law § 50-e(5) the court would be without jurisdiction to allow the filing of a late notice of claim with defendant New York City Industrial Development Agency, where no notice of claim was ever filed by plaintiffs with the agency and the application was made after expiration of the one-year limitations period in Gen Mun Law § 880(2) applicable to plaintiffs' causes of action for personal injury, conscious pain and suffering and wrongful death; the mere service of the complaint upon the agency within the statutory period, but beyond the initial 90 days, would not suffice as a timely "notice of claim" as contemplated by the statute. Colon v New York, 116 Misc. 2d 729, 456 N.Y.S.2d 320, 1982 N.Y. Misc. LEXIS 3947 (N.Y. Sup. Ct. 1982).

133. —Expiration of statutory period

Although plaintiffs in actions to recover damages for personal injuries commenced their actions against a housing authority within one year and 90 days from accrual of the action as required by Pub Hous Law § 157(2), they were precluded from serving a late notice of claim where they failed to seek a judicial extension of the 90-day period prior to the expiration of one year and 90 days. Cintron v New York, 82 A.D.2d 796, 439 N.Y.S.2d 414, 1981 N.Y. App. Div. LEXIS 14446 (N.Y. App. Div. 2d Dep't 1981).

An order granting a motion by plaintiff in a negligence action against the City of New York to serve a late notice of claim would be reversed, and the complaint would be dismissed, where the incident giving rise to the claim occurred on October 23, 1980, where notice of claim was filed with the city on March 24, 1981, more than two months after expiration of the 90-day period for service of a timely notice of claim under Gen Mun Law § 50-e, where defendant city duly answered the complaint by denying all the allegations contained therein but without raising any objection to the untimeliness of plaintiff's notice of claim, and where the plaintiff failed to move for an order declaring the late notice of claim to be timely service nunc pro tunc or, alternatively, for leave to file a late notice of claim, until March 9, 1983, since although, upon application, the court, in its discretion, could extend the time to serve a notice of claim, an application for such extension cannot be made more than one year and ninety days after the cause of action accrued, unless the statute has been tolled. Hochberg v New York, 99 A.D.2d 1028, 473 N.Y.S.2d 820, 1984 N.Y. App. Div. LEXIS 17465 (N.Y. App. Div. 1st Dep't), aff'd, 63 N.Y.2d 665, 479 N.Y.S.2d 524, 468 N.E.2d 706, 1984 N.Y. LEXIS 4522 (N.Y. 1984).

It was abuse of discretion to grant plaintiffs' motion to deem their notice of claim timely served nunc pro tunc where they did not move for requested relief until 11 months after expiration of one-year-and-90-day period from when cause of action accrued. Lopez v Brentwood Union Free School Dist., 149 A.D.2d 474, 539 N.Y.S.2d 969, 1989 N.Y. App. Div. LEXIS 4629 (N.Y. App. Div. 2d Dep't 1989).

Supreme Court had no discretion to grant plaintiff's application for leave to serve late notice of claim and to add party where application was not made within one year and 90 days after claim accrued and proposed additional party was not served with summons and complaint at any time within that period. Binyard v New York, 151 A.D.2d 712, 543 N.Y.S.2d 145, 1989 N.Y. App. Div. LEXIS 9154 (N.Y. App. Div. 2d Dep't 1989), app. dismissed, 75 N.Y.2d 896, 554 N.Y.S.2d 830, 553 N.E.2d 1340, 1990 N.Y. LEXIS 632 (N.Y. 1990).

Where plaintiff's application for leave to file late notice of claim for his decedent's conscious pain and suffering was not made until more than one year and 90 days after alleged malpractice, court was without discretion to excuse failure to file notice of claim within 90 days of alleged malpractice, and thus cause of action for conscious pain and suffering was properly dismissed. Abad v New York City Health & Hosps. Corp., 214 A.D.2d 342, 625 N.Y.S.2d 889, 1995 N.Y. App. Div. LEXIS 3697 (N.Y. App. Div. 1st Dep't 1995).

Petitioner, whose vehicle was confiscated and towed by city in January 1991 due to his failure to pay parking tickets, failed to timely make application for leave to file late notice of claim where, assuming parking tickets were invalid, conversion occurred when city wrongfully obtained possession of his vehicle, but his application was made more than one year and 90 days thereafter; if city exercised lawful dominion over vehicle until it dismissed tickets on December 29, 1992, action for conversion would have accrued if city thereafter refused his demand for return of vehicle, but he did not allege that city refused to return vehicle. White v City of Mount Vernon, 221 A.D.2d 345, 633 N.Y.S.2d 369, 1995 N.Y. App. Div. LEXIS 11184 (N.Y. App. Div. 2d Dep't 1995).

Court erred in granting plaintiff's application to serve late notice of claim against school board where plaintiff failed to apply within statutory period for leave to so file. Peek v Williamsville Bd. of Educ., 221 A.D.2d 919, 635 N.Y.S.2d 374, 1995 N.Y. App. Div. LEXIS 13402 (N.Y. App. Div. 4th Dep't 1995), modified, aff'd, 247 A.D.2d 924, 668 N.Y.S.2d 539, 1998 N.Y. App. Div. LEXIS 1289 (N.Y. App. Div. 4th Dep't 1998).

Court erred in permitting plaintiffs to serve late notice of claim nunc pro tunc because applicable periods in which notice must be served had expired. Greco v Incorporated Village of Freeport, 223 A.D.2d 674, 637 N.Y.S.2d 191, 1996 N.Y. App. Div. LEXIS 650 (N.Y. App. Div. 2d Dep't 1996).

Court erred in granting plaintiff's application for leave to serve late notice of claim where plaintiff conceded that her application was not filed with court and was not served on town until one year and 91 and one year and 92 days after accident, respectively; as such, court had no jurisdiction to grant application. Bell v Town of Oyster Bay, 233 A.D.2d 282, 649 N.Y.S.2d 799, 1996 N.Y. App. Div. LEXIS 11561 (N.Y. App. Div. 2d Dep't 1996).

Motion to file late notice of claim was properly denied where it was not made within statutory period. Bardi v Warren County Sheriff's Dep't, 260 A.D.2d 763, 687 N.Y.S.2d 775, 1999 N.Y. App. Div. LEXIS 3673 (N.Y. App. Div. 3d Dep't 1999).

Supreme Court lacked authority to grant application under CLS Gen Mun § 50-e(5) for leave to serve late notice of claim against county medical center where petitioner did not seek such leave until well after expiration of applicable limitations period of one year and 90 days under CLS Gen Mun § 50-i. Bulger v Nassau County Med. Ctr., 266 A.D.2d 212, 697 N.Y.S.2d 345, 1999 N.Y. App. Div. LEXIS 11101 (N.Y. App. Div. 2d Dep't 1999), overruled in part, Lohnas v Luzi, 30 N.Y.3d 752, 94 N.E.3d 892, 71 N.Y.S.3d 404, 2018 N.Y. LEXIS 215 (N.Y. 2018)).

Personal injury claim against school district was properly dismissed where (1) plaintiff did not serve timely notice of claim, (2) plaintiff's cross motion for leave to serve late notice of claim was made over one year and 90 days after accrual of claim, and (3) thus, court did not have authority to grant cross motion. Warren v Baldwin Union Free Sch. Dist., 281 A.D.2d 413, 721 N.Y.S.2d 289, 2001 N.Y. App. Div. LEXIS 2046 (N.Y. App. Div. 2d Dep't 2001).

It was error to grant plaintiff's motion for leave to serve late notice of claim against county where motion was filed after expiration of time period under CLS Gen Mun § 50-e(5), and there was no showing of estoppel. Rogozinski v Petronio, 284 A.D.2d 992, 726 N.Y.S.2d 886, 2001 N.Y. App. Div. LEXIS 5788 (N.Y. App. Div. 4th Dep't 2001).

134. —Minimal delay

An application to file a late notice of claim by a sanitation department employee who was severely injured in the line of duty was properly granted, where the notice of claim was served one day late, where the delay was minimal, where the city neither suffered nor claimed prejudice, and where the city had obtained actual knowledge of the claim within the 90-day period through the filing of an accident report. Cicio v New York, 98 A.D.2d 38, 469 N.Y.S.2d 467, 1983 N.Y. App. Div. LEXIS 20376 (N.Y. App. Div. 2d Dep't 1983).

The trial court did not abuse its discretion in granting a claimant leave to file a late notice of claim against a city where the application for such leave was only 15 days late. Baier v Rochester, 98 A.D.2d 991, 470 N.Y.S.2d 248, 1983 N.Y. App. Div. LEXIS 21344 (N.Y. App. Div. 4th Dep't 1983).

Court should have granted plaintiff's motion for leave to file late notice of claim against town by notice of motion dated 96 days after his employment was terminated by town highway department, since delay was minimal and town failed to show that its ability to maintain defense was prejudiced. Pierce v Arkwright,

147 A.D.2d 981, 537 N.Y.S.2d 410, 1989 N.Y. App. Div. LEXIS 1409 (N.Y. App. Div. 4th Dep't 1989).

135. —Prejudice

In proceeding pursuant to CLS Gen Mun § 50-e(5), petitioner's request to file late notice of claim was properly denied in view of absence of any valid excuse for approximately 10-month delay in serving notice, and prejudice to city which would have resulted if application had been granted. Gaye v New York, 144 A.D.2d 532, 535 N.Y.S.2d 957, 1988 N.Y. App. Div. LEXIS 11917 (N.Y. App. Div. 2d Dep't 1988).

Petitioners were not entitled to serve late notice of claim against city board of education and others where petitioners failed to present legally acceptable excuse for their delay of almost 6 months after expiration of statutory 90-day period, they failed to provide respondents with actual notice of essential facts of claim within 90 days or reasonable time thereafter, conditions at scene of accident had changed to prejudice of respondents, who never had opportunity to conduct their own investigation before conditions changed, and respondents were further prejudiced by fact that ladder was thrown out immediately after injured petitioner's fall and could not be examined. Mark v Board of Educ., 255 A.D.2d 586, 681 N.Y.S.2d 81, 1998 N.Y. App. Div. LEXIS 12875 (N.Y. App. Div. 2d Dep't 1998).

Delay of nearly one year in seeking to serve notice of claim prejudiced defendants' ability to maintain defense on merits, and thus court properly denied leave to serve late notice of claim. Salahudeen Rashad Saafir v Metro-North Commuter R.R. Co., 260 A.D.2d 462, 688 N.Y.S.2d 224, 1999 N.Y. App. Div. LEXIS 3863 (N.Y. App. Div. 2d Dep't), app. denied, 93 N.Y.2d 816, 697 N.Y.S.2d 563, 719 N.E.2d 924, 1999 N.Y. LEXIS 2802 (N.Y. 1999).

Trial court erred in denying a property owner's motion pursuant to N.Y. Gen. Mun. Law § 50-e to serve a late notice of claim on a city in an action for the return of jewelry confiscated by police; the city had timely notice of the action in the form of a letter sent to the police department, and the city's defense was not substantially prejudiced by the late notice of claim. Ramirez v City of White Plains, 306 A.D.2d 488, 761 N.Y.S.2d 522, 2003 N.Y. App. Div. LEXIS 7395 (N.Y. App. Div. 2d Dep't 2003).

Trial court properly denied a student's application to serve a late notice of claim against respondents pursuant to N.Y. Gen. Mun. Law § 50-e(5); respondents did not have notice of the alleged cause of the student's injury, insufficient sand in a long-jump landing pit, in a reasonable time period following the accident, and would have been prejudiced by the grant of the application, as the delay deprived respondents of an opportunity to investigate the quantity of sand in the landing pit at the time of the student's injury. Le Mieux v Alden High Sch., 1 A.D.3d 995, 767 N.Y.S.2d 348, 2003 N.Y. App. Div. LEXIS 12235 (N.Y. App. Div. 4th Dep't 2003).

Trial court properly denied the infant's application for leave to serve a late notice of claim pursuant to N.Y. Gen. Mun. Law § 50-e, as the infant failed to demonstrate a reasonable excuse for the lengthy delay in serving the late notice of claim and that respondents either had notice of the essential facts or would not suffer substantial prejudice if they were required to maintain a defense on the merits. Masaazi v N.Y. City Bd. of Educ. Pub. Sch. No. 133, 5 A.D.3d 491, 772 N.Y.S.2d 555, 2004 N.Y. App. Div. LEXIS 2464 (N.Y. App. Div. 2d Dep't 2004).

Petitioner injured party was improperly granted an application to file a late claim against the New York City Housing Authority and the city relating to his assault in the lobby of his mother's apartment building because he failed to substantiate with medical records or other documentation that physical and emotional disabilities precluded him from contacting an attorney for over four months after the alleged assault; defendants were prejudiced in their ability to identify witnesses and collect their testimony by a delay of more than six months in the filing of the claim. Matter of Rivera v New York City Hous. Auth., 25 A.D.3d 450, 807 N.Y.S.2d 373, 2006 N.Y. App. Div. LEXIS 449 (N.Y. App. Div. 1st Dep't 2006), app. dismissed, in part, 2006 N.Y. App. Div. LEXIS 3904 (N.Y. App. Div. 1st Dep't Mar. 28, 2006).

Petitioner was improperly granted leave to serve a late notice of a personal injury claim pursuant to N.Y. Gen. Mun. Law § 50-e and N.Y. Pub. Hous. Law § 157 (2) against the New York City Housing Authority (NYCHA) because her initial notice of claim, which was not filed within the 90-day time period, did not mention the allegedly defective condition and failed to specify the location of the accident with sufficient particularity, petitioner failed to demonstrate a reasonable excuse for a one-year delay in commencing the proceedings, and petitioner failed to rebut NYCHA's assertion that the delay prejudiced its ability to investigate and defend against the claim. Matter of White v New York City Hous. Auth., 38 A.D.3d 675, 831 N.Y.S.2d 515, 2007 N.Y. App. Div. LEXIS 2912 (N.Y. App. Div. 2d Dep't 2007).

Trial court abused its discretion by not allowing a claimant to file a late notice of claim, regarding an injury the claimant allegedly suffered in the parking lot of the school district's bus garage, because the claimant identified the precise location of the incident and represented that the parking lot defect had not changed since the time of the incident, and there was no evidence that the 12-week delay in filing the notice of claim caused substantial prejudice to the school district. Matter of Kranick v Niskayuna Cent. Sch. Dist., 151 A.D.3d 1262, 56 N.Y.S.3d 636, 2017 N.Y. App. Div. LEXIS 4441 (N.Y. App. Div. 3d Dep't 2017).

Trial court applied the incorrect legal standard when evaluating the issue of substantial prejudice from the claimant's serving a late notice of claim on the city because the city never provided any evidence to substantiate that it was prejudiced by the mere passage of time, but instead, the city made generic arguments and inferences, which could not establish substantial prejudice. Matter of Rodriguez v City of New York, 172 A.D.3d 556, 101 N.Y.S.3d 303, 2019 N.Y. App. Div. LEXIS 3915 (N.Y. App. Div. 1st Dep't 2019).

136. —Reasonable time after removal of disability

Failure of claimant to explain satisfactorily on the ground of incapacity a delay of some seven months in moving for permission to serve notice of claim after the period fixed for such service by this section had elapsed will render an order granting such permission improper. Christopher v New York, 273 A.D. 983, 78 N.Y.S.2d 403, 1948 N.Y. App. Div. LEXIS 5592 (N.Y. App. Div. 1948).

Notwithstanding the application for extension of time to serve notice of claim is made within the one-year period, and based on one of the statutory grounds, the court has discretion to deny it if delay in making the application beyond the usual 90-day period for serving such a notice is not so justified as to be considered reasonable. Russell v Board of Education, 274 A.D. 841, 80 N.Y.S.2d 634, 1948 N.Y. App. Div. LEXIS 3577 (N.Y. App. Div.), reh'g denied, 274 A.D. 872, 83 N.Y.S.2d 224, 1948 N.Y. App. Div. LEXIS 3763 (N.Y. App. Div. 1948), app. dismissed, 300 N.Y. 552, 89 N.E.2d 519, 300 N.Y. (N.Y.S.) 552, 1949 N.Y. LEXIS 1427 (N.Y. 1949).

Where a claimant's moving papers failed to show the duration of her disability, and thus failed to show that her application for leave was within a reasonable time after the expiration of the disability she relies upon as excusing her failure to serve the notice within the prescribed ninety-day limit, the motion under sub 5 of this section should be denied. Murray v Watervliet, 280 A.D. 1012, 116 N.Y.S.2d 761, 1952 N.Y. App. Div. LEXIS 4566 (N.Y. App. Div. 1952).

Claimant's showing was considered insufficient to serve as ground for late filing of notice of claim by reason of mental or physical incapacity, and such relief could not be granted in any event, where the renewed application was not made until after the one-year statutory period had expired and without leave of court to renew a prior such motion. Narciso v New York, 20 A.D.2d 647, 246 N.Y.S.2d 268, 1964 N.Y. App. Div. LEXIS 4584 (N.Y. App. Div. 2d Dep't 1964).

Application for leave to file late claim would be denied where claimant failed to show that he had made application therefor within a reasonable time after termination of disability. Jones v New York, 30 A.D.2d 938, 293 N.Y.S.2d 807, 1968 N.Y. App. Div. LEXIS 3251 (N.Y. App. Div. 1st Dep't 1968).

An application to serve a notice of claim was denied where it was not made within a reasonable time after the plaintiff's recovery from the disability relied on as her excuse for failure to

serve the notice within the time prescribed by statute. Occhuizzo v Salamanca Hospital Dist. Authority, 33 A.D.2d 649, 305 N.Y.S.2d 330, 1969 N.Y. App. Div. LEXIS 2943 (N.Y. App. Div. 4th Dep't 1969).

Permission to serve a late notice of claim denied where the claimant failed to establish any basis for relief within the statute, since he failed to persuasively show that the application was made within a reasonable time after termination of such period of time during which he could be deemed to have been mentally or physically incapacitated and practically unable to comply with the requirements of the statute. Chadwick v New York City Transit Authority, 35 A.D.2d 810, 316 N.Y.S.2d 168, 1970 N.Y. App. Div. LEXIS 3619 (N.Y. App. Div. 2d Dep't 1970).

The expression "reasonable time" means that upon the removal of the disability, mentally or physically, the claimant must act promptly, and where during a six month period between the time of injury and the execution of the affidavit upon which his application was based, he went to work as a salesman, contacted the city manager as well as the agents of the insurance carrier, the latter events happening within the 60 day period, the application for leave to serve a notice of claim will be denied. Balfour v Watertown, 105 N.Y.S.2d 950, 1950 N.Y. Misc. LEXIS 2525 (N.Y. Sup. Ct. 1950), app. dismissed, 103 N.Y.S.2d 662 (N.Y. App. Div. 1951).

The expiration of a period of approximately nine months was not such "reasonable time" as was contemplated by the language of sub 5 of this section where the injuries suffered were such that claimant was back at her employment for at least eight months prior to the making of an application for permission to file late a claim against a city. McGuire v New York, 116 N.Y.S.2d 163, 1952 N.Y. Misc. LEXIS 1828 (N.Y. Sup. Ct. 1952).

137. —Claim involving infant

An application by an infant who was injured when he fell down a stairway in a building owned by a city to file a late claim against the city should have been denied, where the application was filed three years and seven months after the accident occurred, where even though the infant's attorney did not know for three years that the city owned the building the attorney waited seven months after learning that fact before applying for leave to file a late claim, where it would be virtually impossible for the city to investigate the condition of the stairway and the circumstances concerning the accident, all to its prejudice, and where an affirmation in support of the application by the infant's attorney stated that the claimant's infancy was not the cause of the failure to file a timely notice of claim. Montana v New York, 96 A.D.2d 1031, 466 N.Y.S.2d 436, 1983 N.Y. App. Div. LEXIS 19693 (N.Y. App. Div. 2d Dep't 1983).

It was abuse of discretion to grant leave to serve late notice of claim under CLS Gen Mun § 50-e where petitioner purported to justify delay of almost 2 years from date of incident until date of his initial application on ground that he was infant at time incident occurred, but offered no excuse for 10-month delay in seeking relief once he attained his majority. Coyne v Cold Spring Harbor Cent. School Dist., 132 A.D.2d 660, 518 N.Y.S.2d 33, 1987 N.Y. App. Div. LEXIS 49205 (N.Y. App. Div. 2d Dep't 1987).

Court should have denied application for leave to serve late notice of claim against New York City Board of Education where petitioners failed to adequately explain unreasonable delay of almost 4 years in seeking leave to file late notice, and they presented no excuse for 6-month delay which occurred between their alleged discovery of serious nature of infant petitioner's injuries and application for leave to serve late notice; moreover, given substantial discrepancies between descriptions of accident contained in notice of claim and board's own internal records, board established that it would suffer substantial prejudice if late service of notice were permitted. Shea v City of New York Bd. of Educ., 222 A.D.2d 510, 635 N.Y.S.2d 533, 1995 N.Y. App. Div. LEXIS 12741 (N.Y. App. Div. 2d Dep't 1995).

In wrongful death action arising from alleged medical malpractice, where decedent was survived only by infant distributees, statute of limitations was tolled until date of issuance of letters of guardianship to claimant, who was therefore properly granted leave to serve late notice of claim on county medical center more than 2 years after decedent's death; contention that decedent was survived by 2 other infant distributees who purportedly had legal guardian was unavailing, where neither those children nor their purported guardian were eligible to receive letters of administration under CLS SCPA § 707 then in effect. Rivera v Westchester County Medical Ctr., 222 A.D.2d 680, 635 N.Y.S.2d 677, 1995 N.Y. App. Div. LEXIS 13969 (N.Y. App. Div. 2d Dep't 1995), app. denied, 88 N.Y.2d 808, 647 N.Y.S.2d 165, 670 N.E.2d 449, 1996 N.Y. LEXIS 1626 (N.Y. 1996).

Because timely filing of notice of claim is condition precedent to commencement of tort action against city, dismissal of adult plaintiff's action for infant plaintiff's exposure to toxic substance was required where adult plaintiff's application for permission to file late notice of claim was made after time to commence action had expired. Perry v City of New York, 238 A.D.2d 326, 656 N.Y.S.2d 301, 1997 N.Y. App. Div. LEXIS 3415 (N.Y. App. Div. 2d Dep't 1997).

Application under CLS Gen Mun § 50-e(5) to file late notice of lead-paint toxicity claim against city housing authority was properly denied, even though petitioner claimed that 13-year delay in bringing proceeding was due to injured boy's infancy, which generally would toll statute of limitations under CLS CPLR § 214-c(3), where petitioner failed to show (1) any nexus between disability of infancy and delay that would excuse such long delay, (2) that authority acquired actual knowledge of essential facts underlying claim within 90 days or reasonable time after accrual of claim, or (3) that authority was not prejudiced by long delay. Salter v Housing Auth., 251 A.D.2d 585, 674 N.Y.S.2d 758, 1998 N.Y. App. Div. LEXIS 7507 (N.Y. App. Div. 2d Dep't 1998).

Petitioners were not entitled to serve late notice of claim against city housing authority where they failed to adequately explain their delay in serving notice, delay was not attributable to injured petitioner's infancy, authority did not acquire actual knowledge of essential facts of claim within 90 days after its accrual or reasonable time thereafter, and there was no evidence connecting actions of authority's police officers with underlying incident or petitioners' allegations of assault, false arrest, and false imprisonment. Cuffee v City of New York, 255 A.D.2d 440, 680 N.Y.S.2d 580, 1998 N.Y. App. Div. LEXIS 11972 (N.Y. App. Div. 2d Dep't 1998).

Injured student's application for leave to file late notice of claim against school district was timely made prior to his 18th birthday, and should have been granted despite 10-month unexcused delay absent proof of substantial prejudice to district, as delay was product of student's infancy, and district had immediate actual knowledge of essential facts of incident (which occurred on school football field) where its agents witnessed incident, investigated student's injuries, provided him with medical treatment and had opportunity to further investigate extent of his injuries by sending him to hospital. Welch v Bd. of Educ., 287 A.D.2d 761, 731 N.Y.S.2d 94, 2001 N.Y. App. Div. LEXIS 9309 (N.Y. App. Div. 3d Dep't 2001).

Where the parents of a child, individually and as the child's parents and guardians, filed an application pursuant to N.Y. Gen. Mun. Law § 50-e(5) for leave to file a late notice of claim against respondents, a county and its public health department, related to injuries from lead poisoning, the application was timely as to the child since the one year and 90-day statute of limitations was tolled until the child reached age 18, and the child was only six years old. Lanphere v County of Washington, 301 A.D.2d 936, 754 N.Y.S.2d 125, 2003 N.Y. App. Div. LEXIS 341 (N.Y. App. Div. 3d Dep't 2003).

Infant who allegedly sustained injuries when she fell from her bicycle near an open trench that was located near a sidewalk should have determined who excavated the trench, and the trial court abused its discretion by granting the infant's application for leave to file a late notice of claim against a water authority that allegedly created the hazard, 11 months after the accident occurred and five months after the infant first learned about the water authority's involvement. Nieves v Girimonte, 309 A.D.2d 753, 765 N.Y.S.2d 64, 2003 N.Y. App. Div. LEXIS 10425 (N.Y. App. Div. 2d Dep't 2003), app. dismissed, 1 N.Y.3d 591, 776 N.Y.S.2d 219, 808 N.E.2d 354, 2004 N.Y. LEXIS 98 (N.Y. 2004).

Petition to file a late notice of a claim against a county was improperly granted where: (1) the delay in filing was not attributable to their son's infancy; (2) the parents had retained counsel in 1995 and counsel had promptly obtained all medical records from the county; (3) the parents did not retain new counsel until six years later; (4) the parent's excuse that they were unaware of the possibility of commencing a lawsuit was not a reasonable excuse; and (5) the parents failed to show that the county would not be substantially prejudiced by the nine year delay between the alleged medical malpractice and their motion to file a late notice. The supreme court improvidently exercised its discretion in granting the petition and the court reversed that decision and ordered that the proceeding be dismissed. Flores v County of Nassau, 8 A.D.3d 377, 777 N.Y.S.2d 739, 2004 N.Y. App. Div. LEXIS 7847 (N.Y. App. Div. 2d Dep't), app. denied, 3 N.Y.3d 606, 785 N.Y.S.2d 23, 818 N.E.2d 665, 2004 N.Y. LEXIS 2250 (N.Y. 2004).

Since there was a reasonable excuse for the delay and a nexus between the delay and the infancy, the school district and the school had knowledge of the facts constituting the claim within a few weeks of the incidents, and there was no substantial prejudice, a late notice of claim pursuant to N.Y. Gen. Mun. Law § 50-e(5) was properly allowed as to a child's claim that he was sexually assaulted on a school bus. Andrew T.B. v Brewster Cent. Sch. Dist., 18 A.D.3d 745, 795 N.Y.S.2d 718, 2005 N.Y. App. Div. LEXIS 5584 (N.Y. App. Div. 2d Dep't 2005).

Order granting a patient's N.Y. Gen. Mun. Law § 50-e(5) motion for leave to deem her notice of a malpractice claim against a hospital timely served nunc pro tunc was improper because the delay of more than nine years after the alleged malpractice in moving for leave to deem the notice of claim timely served was not the product of the patient's infancy, the hospital did not have actual notice of the claim within the requisite 90-day period, or within a reasonable time thereafter, and the patient failed to establish that the hospital would not have been substantially prejudiced in maintaining its defense on the merits as a result of the nine-year delay in moving for leave to deem the notice of claim timely served nunc pro tunc. Arias v New York City Health & Hosps. Corp. (Kings County Hosp. Ctr.), 50 A.D.3d 830, 855 N.Y.S.2d 265, 2008 N.Y. App. Div. LEXIS 3365 (N.Y. App. Div. 2d Dep't 2008), app. dismissed, 12 N.Y.3d 738, 876 N.Y.S.2d 345, 904 N.E.2d 500, 2009 N.Y. LEXIS 89 (N.Y. 2009).

Under N.Y. C.P.L.R. § 208, the tolling of the time limitation for commencing a tort action against a county due to the infancy of plaintiff children did not relieve the children from filing a notice of claim within ninety days of the accrual of the action. Because the ninety-day period had expired, N.Y. Gen. Mun. Law § 50-e(5) required the children to apply for leave to serve a late notice of claim, which a state court had discretion to grant because the statute of limitations had not yet run on the children's claims. Dayton v City of Middletown, 786 F. Supp. 2d 809, 2011 U.S. Dist. LEXIS 35770 (S.D.N.Y. 2011).

138. —Claim involving physically or mentally disabled person

In a negligence action arising out of a shooting by a New York City Transit Authority officer, in which plaintiff's injuries were sustained on July 29, 1980, plaintiff was hospitalized until October, 1980, after which he received continual outpatient care, and in which plaintiff moved, on October 27, 1981, for leave to serve a late notice of claim on defendant New York City Transit Authority and the City of New York, and in which the city submitted an apposing affidavit but subsequently defaulted, the application for leave to serve and file a late notice of claim would be granted where the city did not allege prejudice in maintaining a defense, where it obviously had actual notice of the incident complained of, and where the injured party's application to serve the late notice of claim was timely. Haynes v New York, 100 A.D.2d 572, 473 N.Y.S.2d 503, 1984 N.Y. App. Div. LEXIS 17544 (N.Y. App. Div. 2d Dep't 1984).

There was sufficient evidence to establish insanity within the purview of CPLR § 208 so as to toll the statute-of-limitations period for the purpose of extending plaintiff's time to serve a notice of claim in her action against a town and other municipal defendants arising out of an automobile accident, notwithstanding that insanity had not been adjudicated at the time the cause of action accrued, where plaintiff suffered a bona fide psychiatric disorder as a consequence of the accident, her physical injuries, and the loss of her 10-day-old daughter in the accident, and was unable to protect her legal rights because of an overall inability to function in society; in view of plaintiff's disability, and the fact that defendants had knowledge of the underlying accident within a week of its occurrence and were in a better position to acquire timely knowledge of the events than plaintiff, plaintiff would be granted leave to file a late notice of claim under Gen Mun Law § 50-e. Barnes v County of Onondaga, 103 A.D.2d 624, 481 N.Y.S.2d 539, 1984 N.Y. App. Div. LEXIS 20190 (N.Y. App. Div. 4th Dep't 1984), aff'd, 65 N.Y.2d 664, 491 N.Y.S.2d 613, 481 N.E.2d 245, 1985 N.Y. LEXIS 14773 (N.Y. 1985).

In action against county for injuries sustained by plaintiff in motor vehicle accident, plaintiff was properly allowed to serve late notice of claim despite absence of plausible explanation for her delay of more than 6 months in retaining attorney after she returned to work, where she had been mentally and physically incapacitated by severe head injury throughout statutory 90-day filing period, county had actual notice of accident, and county failed to show substantial prejudice by service of late notice; however, plaintiff's husband should not have been accorded same relief, since he did not have acceptable excuse on his own behalf for failing to timely serve notice of claim, or for his lengthy delay before consulting counsel. Fenton v County of Dutchess, 148 A.D.2d 573, 539 N.Y.S.2d 42, 1989 N.Y. App. Div. LEXIS 3916 (N.Y. App. Div. 2d Dep't), app. denied, 74 N.Y.2d 608, 545 N.Y.S.2d 104, 543 N.E.2d 747, 1989 N.Y. LEXIS 2343 (N.Y. 1989).

Time within which petitioner was obligated to bring proceeding for leave to file late notice of claim against county was not suspended by operation of "insanity" toll where (1) she was generally able to manage her own finances, handle daily financial transactions, pay her rent, cook, clean, go shopping, and travel by bus, (2) she completed high school education and was fluent in braille, (3) she had consulted with lawyers regarding her case and was informed that statute of limitations had run, and (4) her psychiatrist repeatedly evaluated her as being capable of functioning in society by assigning her global assessment function score of 80. McBride v County of Westchester, 211 A.D.2d 792, 622 N.Y.S.2d 100, 1995 N.Y. App. Div. LEXIS 719 (N.Y. App. Div. 2d Dep't), app. denied, 85 N.Y.2d 809, 628 N.Y.S.2d 52, 651 N.E.2d 920, 1995 N.Y. LEXIS 1502 (N.Y. 1995).

An application for permission to file a late notice of claim was denied because a delay of 77 days after claimant was discharged from hospital was more than a reasonable time where 84 days had already elapsed from the time the cause of action arose. Steele v New York, 12 Misc. 2d 605, 177 N.Y.S.2d 816, 1958 N.Y. Misc. LEXIS 3399 (N.Y. Sup. Ct. 1958).

The phrasing of this section is such as to absolutely preclude a court from granting an extension of time for service of notice of claim on a municipality, after expiration of the one-year period, notwithstanding plaintiff was actually in a hospital under sedation by reason of the injuries sustained and suffering from complete amnesia rendering him totally unable to file any notice of claim or impart the necessary information to anyone for making claim until two years after the accident occurred. Corso v New York, 42 Misc. 2d 677, 248 N.Y.S.2d 816, 1964 N.Y. Misc. LEXIS 1950 (N.Y. Sup. Ct. 1964).

The expression "reasonable time" means that upon the removal of the disability, mentally or physically, the claimant must act promptly, and where during a six month period between the time of injury and the execution of the affidavit upon which his application was based, he went to work as a salesman, contacted the city manager as well as the agents of the insurance carrier, the latter events happening within the 60 day period, the application for leave to serve a notice of claim will be denied. Balfour v Watertown, 105 N.Y.S.2d 950, 1950 N.Y. Misc. LEXIS 2525 (N.Y. Sup. Ct. 1950), app. dismissed, 103 N.Y.S.2d 662 (N.Y. App. Div. 1951).

139. —Failure to explain delay

Court properly denied petitioners' application for leave to serve late notice of claim where no explanation was offered for approximately 9-month delay after accident before petitioners retained

counsel and sought leave to serve late notice of claim as to alleged slip and fall accident. Orender v City of New York, 203 A.D.2d 577, 612 N.Y.S.2d 944, 1994 N.Y. App. Div. LEXIS 4235 (N.Y. App. Div. 2d Dep't 1994).

It was abuse of discretion to grant plaintiffs' motion for leave to serve "new late notice of claim," even assuming that claims were not extinguished by general release executed by injured plaintiff, where plaintiffs failed to show reasonable excuse for nearly 3-year delay in seeking permission to serve late notice of claim, and defendant had terminated its investigation of accident in reliance on release. Sherwood v New York City Transit Auth., 226 A.D.2d 622, 641 N.Y.S.2d 354, 1996 N.Y. App. Div. LEXIS 4451 (N.Y. App. Div. 2d Dep't 1996).

Court properly denied plaintiffs' motion to serve late notice of claim insofar as it alleged conscious pain and suffering of decedent in wrongful death action where plaintiffs failed to offer reasonable excuse for delay of nearly one year after previous notice was rejected as untimely, and they failed to demonstrate that defendants had actual knowledge of nature of claim within 90 days of accident. Mack v City of New York, 265 A.D.2d 308, 696 N.Y.S.2d 206, 1999 N.Y. App. Div. LEXIS 9622 (N.Y. App. Div. 2d Dep't 1999), app. denied, 94 N.Y.2d 763, 708 N.Y.S.2d 51, 729 N.E.2d 708, 2000 N.Y. LEXIS 580 (N.Y. 2000).

Leave to serve late notice of claim should not have been granted where it was not sought until more than 5 months after accident, and claimant proffered no excuse for delay. Sheff v County of Westchester, 279 A.D.2d 632, 719 N.Y.S.2d 696, 2001 N.Y. App. Div. LEXIS 852 (N.Y. App. Div. 2d Dep't 2001).

Petitioner was not entitled to serve a late notice of claim under N.Y. Gen. Mun. Law § 50-e(5) because petitioner failed to establish a reasonable excuse for his delay or that the city housing authority had knowledge of the essential facts underlying his claim within 90 days of its accrual or within a reasonable time thereafter; petioner also failed to establish that the housing authority would not be substantially prejudiced by the delay in its defense on the merits. Matter of Kalambalikis v New York City Hous. Auth., 41 A.D.3d 848, 839 N.Y.S.2d 182, 2007 N.Y. App. Div. LEXIS 8066 (N.Y. App. Div. 2d Dep't 2007).

Trial court did not abuse its discretion in denying appellant's application for leave to serve a late notice of claim against a school district because even assuming he was initially unaware of the severity of his injuries, he did not offer a reasonable excuse for not seeking leave to serve a late notice of claim until nearly seven months after his surgery. Kennedy v Oswego City School Dist., 148 A.D.3d 1790, 50 N.Y.S.3d 229, 2017 N.Y. App. Div. LEXIS 2493 (N.Y. App. Div. 4th Dep't 2017).

Claimant was not permitted to file a late notice of claim because, inter alia, the claimant's failure to serve a timely notice of claim was not reasonably attributable to her claimed delayed realization of the severity of her injuries, the claimant failed to offer any excuse for the additional 11-month delay, and the delay substantially prejudiced the city in maintaining its defense on the merits. Matter of Galicia v City of New York, 175 A.D.3d 681, 107 N.Y.S.3d 430, 2019 N.Y. App. Div. LEXIS 6427 (N.Y. App. Div. 2d Dep't 2019).

140. —Knowledge of defendant

In action against 2 municipalities to recover damages for personal injuries sustained by plaintiff when her car left road and struck utility pole, Appellate Division did not abuse its discretion as matter of law in denying plaintiff leave to serve late notices of claim against municipalities, where plaintiff applied for leave to serve late notices over full year and 90 days after accident, since municipalities did not receive actual knowledge of essential facts constituting claim within 90 days or reasonable time thereafter. Kravitz v County of Rockland, 67 N.Y.2d 685, 499 N.Y.S.2d 941, 490 N.E.2d 860, 1986 N.Y. LEXIS 16625 (N.Y. 1986).

The Supreme Court erred in denying leave to serve a late notice of claim against a city transit authority based on accident a subway train which derailed served his notice of claim two days after expiration of the 90-day statutory period where the accident concerned many people, and was a major disaster, so that defendant had actual knowledge of the occurrence, and where no prejudice resulted to defendant from the two-day delay in serving notice of claim, and where the notice allegedly was not filed earlier because plaintiff initially believed that his injury was more minor than it was. Annis v New York City Transit Authority, 108 A.D.2d 643, 485 N.Y.S.2d 529, 1985 N.Y. App. Div. LEXIS 42997 (N.Y. App. Div. 1st Dep't 1985).

Court properly denied application for leave to serve late notice of claim against public authority which owned property where accident occurred since (1) petitioner failed to establish that public authority acquired actual knowledge of essential facts of claim within 90 days following accident or within reasonable time thereafter, (2) it took petitioner's attorney inordinate period of time (3 months) to ascertain identity of property owner, and (3) even if there was nothing to readily indicate that public corporation was involved, another 5 weeks elapsed from time of discovery of authority's involvement to service of papers in support of application. Stenowich v Colonie Industrial Dev. Agency, 151 A.D.2d 894, 542 N.Y.S.2d 863, 1989 N.Y. App. Div. LEXIS 8119 (N.Y. App. Div. 3d Dep't), app. denied, 74 N.Y.2d 615, 549 N.Y.S.2d 960, 549 N.E.2d 151, 1989 N.Y. LEXIS 3186 (N.Y. 1989).

Trial court did not abuse its discretion in denying appellant's application for leave to serve a late notice of claim against a school district because he failed to establish that the district had actual knowledge of the essential facts constituting the claim within 90 days of its accrual; assuming arguendo that a construction manager was the district's agent and timely received an accident report, that report was insufficient to provide the district with actual knowledge of the essential facts constituting the claim since it made no connection between the accident and any liability on the part of the district. Kennedy v Oswego City School Dist., 148 A.D.3d 1790, 50 N.Y.S.3d 229, 2017 N.Y. App. Div. LEXIS 2493 (N.Y. App. Div. 4th Dep't 2017).

Claimant failed to establish that the city had actual knowledge of the essential facts constituting the claim based on the documentation the claimant submitted to the Workers' Compensation Board because the documentation failed to set forth any facts that suggested the claimant's injuries were caused by the city's negligence or that the city received the claimant's workers' compensation claim. Matter of Rodriguez v City of New York, 172 A.D.3d 556, 101 N.Y.S.3d 303, 2019 N.Y. App. Div. LEXIS 3915 (N.Y. App. Div. 1st Dep't 2019).

141. —Miscellaneous claims

Where multicar accident giving rise to alleged claim against county occurred in May 1972, where no notice of claim was ever served by petitioners and no suit against county was commenced by them, where application for leave to serve late notice of claim was not made until June 1976, where such application was motivated by April 1976 jury verdict against county in another action arising out of same accident, and where petitioners failed to establish any viable claim of estoppel against county, failure to seek leave to file late claim at time petitioners' counsel knew or should have known of possible "involvement" of county constituted laches and claim was absolutely time barred. Self v County of Nassau, 57 A.D.2d 963, 395 N.Y.S.2d 67, 1977 N.Y. App. Div. LEXIS 12243 (N.Y. App. Div. 2d Dep't), app. denied, 42 N.Y.2d 811, 1977 N.Y. LEXIS 3922 (N.Y. 1977).

In action against Niagara Frontier Transportation Authority, it was error to deny Authority's motion to dismiss complaint and grant plaintiff's cross-motion for leave to serve late notice of claim and amended complaint where (1) accident occurred on March 11, 1992, (2) plaintiff commenced action on March 11, 1993, (3) on April 19, 1993, Authority moved to dismiss complaint for failure to serve notice of claim and failure to plead that one had been served, by which time applicable period of limitations had expired (CLS Pub A § 1299-p), and (4) plaintiff cross-moved to serve late notice of claim in June 1993. Hall v Niagara Frontier Transp. Auth., 206 A.D.2d 853, 615 N.Y.S.2d 205, 1994 N.Y. App. Div. LEXIS 7761 (N.Y. App. Div. 4th Dep't 1994).

Court erred in granting mother's motion for leave to file late notice of claim as to her derivative claim alleging that school district exposed her daughter to "harmful and toxic substances" where daughter exhibited symptoms in September 1992, which were ultimately diagnosed as "environmentally related allergy problems," and mother's motion to file late notice of claim was not brought until March 1995. Seekings v Jamestown Pub. Sch. Sys.,

224 A.D.2d 942, 637 N.Y.S.2d 897, 1996 N.Y. App. Div. LEXIS 1578 (N.Y. App. Div. 4th Dep't 1996).

Court properly denied plaintiff's application for leave to serve late notice of claim against Niagara Frontier Transportation Authority for property damage arising from latent effects of exposure of property to any substance or combination of substances where plaintiff failed to timely seek leave for late service, measured from date of discovery of injury or date when, through exercise of reasonable diligence, injury should have been discovered (CLS CPLR § 214-c(3) and CLS Pub A § 1299-p(2)). Umbra U.S.A. v Niagara Frontier Transp. Auth., 233 A.D.2d 846, 649 N.Y.S.2d 275, 1996 N.Y. App. Div. LEXIS 13312 (N.Y. App. Div. 4th Dep't 1996).

Court had no authority to grant leave to serve late notice of claim against Board of Cooperative Educational Services (BOCES) in personal injury action by passenger of car driven by BOCES employee, because CLS Gen Mun § 50-e was not tolled under CLS CPLR § 203(c) by commencement of action against employee where BOCES was required to indemnify employee under CLS Educ § 3023; serving notice of claim remained condition precedent to commencing action against BOCES which was unaffected by commencement of action against BOCES employee. Schmidt v Board of Coop. Educ. Servs., 253 A.D.2d 433, 676 N.Y.S.2d 623, 1998 N.Y. App. Div. LEXIS 8786 (N.Y. App. Div. 2d Dep't 1998).

In city's action for breach of contract, defendant's motion for leave to file late notice of claim against city for tortious interference with contract was time barred where (1) defendant's claim accrued when its contract with city was allegedly wrongfully terminated, not on date of discovery of wrongful act, (2) motion was made over 7 years after claim accrued, and (3) defendant failed to show that its delay was result of fraud, misrepresentations, or deception by city or that city had duty to disclose its allegedly tortious conduct at earlier date. Bib Constr. Co. v City of Poughkeepsie, 273 A.D.2d 186, 709 N.Y.S.2d 112, 2000 N.Y. App. Div. LEXIS 6274 (N.Y. App. Div. 2d Dep't 2000).

It was improper to grant plaintiff's motion for leave to serve late notice of claim on New York City Transit Authority where plaintiff allegedly was injured on April 23, 1997, but she did not move for leave to serve late notice of claim until on or about August 21, 1998; thus, court lacked authority to allow service of late notice of claim or to deem late notice of claim timely nunc pro tunc. Jackson v New York City Transit Auth., 274 A.D.2d 501, 712 N.Y.S.2d 377, 2000 N.Y. App. Div. LEXIS 8204 (N.Y. App. Div. 2d Dep't 2000).

There was no substantial compliance with subd 5 of this section where a notice of motion for leave to file claim was not made until the last day for serving the notice, such notice was not accompanied by any affidavit or by the proposed notice of claim and was undated, and no attempt was made to correct these defects until two days later by sending by ordinary mail a copy of the notice of motion accompanied by affidavit and a proposed notice of claim, such service not being in accordance with subd 3. Aposporos v Poughkeepsie, 37 Misc. 2d 56, 232 N.Y.S.2d 700, 1962 N.Y. Misc. LEXIS 2488 (N.Y. Sup. Ct. 1962).

142. Sufficiency of supporting papers; conclusory allegations insufficient

Court should have granted claimant's motion to file late notice of claim where it was alleged that claimant's injuries were result of county's negligence in failing to maintain roads and to rectify dangerous condition, that county had notice of dangerous condition through prior accidents, and that county would not be prejudiced by serving late notice of claim, while county did not submit any affidavits in opposition to claimant's motion. Kissell v County of Erie, 138 A.D.2d 965, 526 N.Y.S.2d 297, 1988 N.Y. App. Div. LEXIS 2604 (N.Y. App. Div. 4th Dep't 1988).

Court properly denied plaintiff's motion to serve late notice of claim, which was filed with transit authority 2 days after 90-day period of CLS Gen Mun § 50-e had expired, since (1) plaintiff offered only unsubstantiated allegations in support of her motion urging that late notice be excused, (2) first mention of defective condition was made in plaintiff's bill of particulars, 3 months after untimely notice of claim was received and 6 months after alleged accident occurred, and (3) plaintiff failed to provide explanation for not seeking leave to serve late notice of claim until 4 months after receiving letter from defendant advising that original notice of claim had been untimely served. Johnson v New York City Transit Authority, 181 A.D.2d 619, 581 N.Y.S.2d 339, 1992 N.Y. App. Div. LEXIS 4125 (N.Y. App. Div. 1st Dep't 1992).

Attorney's affirmation that "only recently...this office became aware that the owner of the premises was The New York City Housing Authority" was merely law office failure, and thus insufficient excuse for delay in filing notice of claim. Seif v City of New York, 218 A.D.2d 595, 630 N.Y.S.2d 742, 1995 N.Y. App. Div. LEXIS 8854 (N.Y. App. Div. 1st Dep't 1995).

Absence of reasonable excuse for failure to timely service notice of claim is not necessarily fatal to plaintiff's proceeding seeking leave to serve late notice of claim. Alvarenga v Finlay, 225 A.D.2d 617, 639 N.Y.S.2d 115, 1996 N.Y. App. Div. LEXIS 2137 (N.Y. App. Div. 2d Dep't 1996).

Plaintiff was not entitled to serve late notice of claim against town and others for false arrest and malicious prosecution where she waited until just before filing period expired before making her motion and failed to tender even semblance of reasonable excuse for 15-month delay. Shapiro v Town of Clarkstown, 238 A.D.2d 498, 656 N.Y.S.2d 682, 1997 N.Y. App. Div. LEXIS 4107 (N.Y. App. Div. 2d Dep't), app. denied, 90 N.Y.2d 807, 664 N.Y.S.2d 269, 686 N.E.2d 1364, 1997 N.Y. LEXIS 3044 (N.Y. 1997).

Application for leave to serve late notice of claims attributable to staph infection which allegedly resulted from foreign object left in decedent after surgery, requiring him to undergo second surgery, should have been denied with leave to renew, where petitioners' failure to show that respondents had actual knowledge of facts relating to staph infection was inextricably intertwined with their previous inability to obtain decedent's hospital records, and they had since obtained possession of those records. Staley v Piper, 285 A.D.2d 601, 728 N.Y.S.2d 88, 2001 N.Y. App. Div. LEXIS 7590 (N.Y. App. Div. 2d Dep't 2001).

Trial court erred in granting plaintiff's motion for leave to serve a late notice of claim upon a city and thus save her otherwise jurisdictionally defective complaint under circumstances in which, although the city arguably was on notice that plaintiff was injured in an accident, there was no information in the documents submitted by plaintiff in support of her motion that would have informed the city of the essential facts constituting her claim; plaintiff did not establish that the city had "actual notice of the essential facts constituting the claim," within 90 days after her accident or within a reasonable time thereafter. Additionally, plaintiff did not demonstrate a reasonable excuse for her delay. Casias v City of New York, 39 A.D.3d 681, 833 N.Y.S.2d 662, 2007 N.Y. App. Div. LEXIS 4682 (N.Y. App. Div. 2d Dep't 2007).

Petitioners were not entitled to serve a late notice of claim for respiratory injuries arising from the terrorist attacks of September 11, 2001 pursuant to N.Y. Gen. Mun. Law § 50-e as the proceeding was barred by the one year and 90-day statute of limitations under N.Y. Gen. Mun. Law § 50-i as only a conclusory assertion was made that the respiratory illness was not apparent until its diagnosis; such an assertion lacked probative value as to when such illness should have been discovered under N.Y. C.P.L.R. § 214-c(3). Matter of Felder v City of New York, 53 A.D.3d 401, 862 N.Y.S.2d 36, 2008 N.Y. App. Div. LEXIS 5849 (N.Y. App. Div. 1st Dep't), app. denied, 11 N.Y.3d 707, 868 N.Y.S.2d 599, 897 N.E.2d 1083, 2008 N.Y. LEXIS 3281 (N.Y. 2008).

Where there has been no neglect or ineptitude giving rise to failure to file a timely notice of claim against a board of education on behalf of an infant, but unforeseen circumstances over which neither infant nor parent nor counsel had control, discretion may be exercised favorably, within the permissible period of one year, in relieving the claimant of default. However, on a motion to file a late notice of claim, all the facts must be presented, and petitioner cannot rely upon general conclusory statements. Samatin v Board of Education, 13 Misc. 2d 646, 178 N.Y.S.2d 399, 1958 N.Y. Misc. LEXIS 3392 (N.Y. Sup. Ct. 1958).

With respect to actions by the parents of a decedent to recover damages for the performance of an autopsy on the body of the deceased without their consent, the notice of claim requirements of this section could not be disregarded with respect to the

father's claim, or with respect to the mother's claim, upon the father's mere affidavit that she was mentally or physically incapacitated to give notice of claim within the 90-day period, but the mother's application was denied without prejudice to renewal upon additional proof of incapacity. Zaslowsky v Nassau County Public General Hospital, 27 Misc. 2d 379, 209 N.Y.S.2d 921, 1960 N.Y. Misc. LEXIS 2223 (N.Y. Sup. Ct. 1960).

Relief cannot be granted under this section on the basis of a conclusory allegation that the claimant was physically incapacitated. Application of Colon, 192 N.Y.S.2d 925 (N.Y. Sup. Ct. 1959).

143. —Claim involving infant

Where it was unclear on the record whether or not the disability of infancy was responsible for delay in serving notice of claim under this section, an order granting a motion for leave to serve late notice of claim was reversed and the proceedings remanded to the Special Term for taking of additional affidavits or other proofs. Application of Benjamin, 13 A.D.2d 764, 215 N.Y.S.2d 289, 1961 N.Y. App. Div. LEXIS 10616 (N.Y. App. Div. 1st Dep't 1961).

A motion for leave to serve notice of claim in behalf of an infant after the ordinary time for filing such notices is inadequate if the moving papers fail to show precise mental condition or mental age of the infant and the effect, if any, of these or infancy itself on failure to give timely notice. Application of Klee, 21 A.D.2d 975, 252 N.Y.S.2d 889, 1964 N.Y. App. Div. LEXIS 3183 (N.Y. App. Div. 4th Dep't 1964).

In an action brought against a town by the parent of a minor daughter who sustained injuries while riding a bicycle on an allegedly defective roadway, leave to serve a late notice of claim against the town was properly denied where there were no extenuating circumstances, and where the town did not have knowledge of the accident. Ford v Guilderland, 85 A.D.2d 868, 446 N.Y.S.2d 461, 449 N.Y.S.2d 658, 1981 N.Y. App. Div. LEXIS 16698 (N.Y. App. Div. 3d Dep't 1981).

Court properly denied petitioner's application for leave to serve late notice of claim against county where she did not submit affidavit in support of application, she was aware of general rule requiring filing of notices of claim in cases against governmental entities, she merely sued wrong government entity, even though she should have known correct entity, and her incarceration did not prevent her from preparing well-drafted papers originally filed in Court of Claims. Duarte v Suffolk County, 230 A.D.2d 851, 646 N.Y.S.2d 563, 1996 N.Y. App. Div. LEXIS 8552 (N.Y. App. Div. 2d Dep't 1996).

Court improperly granted plaintiffs' motion for leave to serve late notice of claim where there was no reasonable excuse offered for delay of one year in serving notice of claim after alleged sexual abuse, delay was unrelated to plaintiff's infancy, and delay had prejudiced defendants' ability to defend. Rogers v City of Yonkers, 271 A.D.2d 593, 706 N.Y.S.2d 444, 2000 N.Y. App. Div. LEXIS 4279 (N.Y. App. Div. 2d Dep't 2000).

Trial court erred in granting an injured child's motion to serve a late notice of claim, pursuant to N.Y. Gen. Mun. Law § 50-e, on a school district in a personal injury action, because the child failed to present a valid excuse for the failure to timely file a notice of claim pursuant to either N.Y. Educ. Law § 3813(2) and N.Y. Gen. Mun. Law § 50-e. Termini v Valley Stream Union Free Sch. Dist. No. 13, 2 A.D.3d 866, 769 N.Y.S.2d 596, 2003 N.Y. App. Div. LEXIS 14133 (N.Y. App. Div. 2d Dep't 2003), app. denied, 2 N.Y.3d 705, 780 N.Y.S.2d 310, 812 N.E.2d 1260, 2004 N.Y. LEXIS 943 (N.Y. 2004).

Leave to serve a late notice of claim on a child's behalf on a county hospital corporation under General Municipal Law § 50-e was properly denied because it was not shown that the 13-month delay was caused by infancy or the child's need for extraordinary care, that the corporation acquired knowledge of the facts of the claim within the time period in which the notice should have been served, or that the corporation would not be prejudiced by permitting late service of the notice. Matter of Rios v Westchester County Healthcare Corp., 32 A.D.3d 540, 821 N.Y.S.2d 102, 2006 N.Y. App. Div. LEXIS 10465 (N.Y. App. Div. 2d Dep't 2006).

Lower court improperly granted the motion of petitioners, an infant and his mother, for leave to serve a late notice of their medical malpractice claim upon a municipal medical corporation pursuant to N.Y. Gen. Mun. Law § 50-e(5) because (1) petitioners failed to establish that the seven-year delay in seeking leave to serve a late notice of claim was the product of the infant's infancy or the need to provide him with extraordinary care; (2) the record did not support petitioners' contention that the corporation had actual knowledge of the essential facts constituting the claim by virtue of its possession of the medical records pertaining to the mother's prenatal care and the infant's delivery; and (3) petitioners failed to proffer any excuse for the delay in serving a timely notice of claim and failed to establish that the corporation would not be substantially prejudiced in maintaining its defense on the merits as a result of the lengthy and unexcused delay in seeking leave to serve a late notice of claim. Matter of King v New York City Health & Hosps. Corp., 42 A.D.3d 499, 840 N.Y.S.2d 611, 2007 N.Y. App. Div. LEXIS 8587 (N.Y. App. Div. 2d Dep't 2007).

In a medical malpractice case where a minor patient alleged that providers at a facility of the New York City Health and Hospitals Corporation (NYCHHC) had negligently failed to screen and treat her for lead exposure or to warn her mother of the hazards posed by such exposure, it was error to deem the patient's notice of claim timely served. The NYCHHC's medical records furnished no notice or knowledge of elevated levels of lead in plaintiff's blood, and the patient had not provided a reasonable excuse or shown that the NYCHHC would not be prejudiced by granting her application. Aceituno v Lai On Chan, 46 A.D.3d 716, 848 N.Y.S.2d 699, 2007 N.Y. App. Div. LEXIS 12923 (N.Y. App. Div. 2d Dep't 2007).

Papers submitted by petitioner upon a motion on behalf of an infant claimant to file a late notice of claim with a board of education were inadequate, in that petitioner alleged merely that the infant was under the age of 14 years whereas the date of birth should have been given; no indication was given as to whether when the alleged accident occurred at respondent's playground there was immediate knowledge on respondent's part by virtue of some employee having been present or whether notice was given to respondent's supervisor on the spot; the injuries sustained by the child were not set forth; an alleged notice of claim prepared and executed at a stated time was not submitted; the dates when claimant's counsel became ill and was hospitalized were not stated, and the dates when new counsel took over, the file was examined, and the failure to file a notice of claim discovered, were not disclosed. Hence, the motion to file a late notice was denied, but without prejudice to renewal on adequate papers. Samatin v Board of Education, 13 Misc. 2d 646, 178 N.Y.S.2d 399, 1958 N.Y. Misc. LEXIS 3392 (N.Y. Sup. Ct. 1958).

Where an infant seeking leave to file a belated notice of claim under subd. 5 of this section is as old as 17 years of age, he should submit, with his application, an affidavit setting forth in chronological detail the circumstances of the accident and the subsequent periods of confinement in hospitals, as well as the intervals between such confinements, his educational background, and other relevant information tending to sustain his position that infancy constituted a disability excusing his failure to serve notice of claim within the time specified. Asencio v New York, 216 N.Y.S.2d 204 (N.Y. Sup. Ct. 1961).

144. —Claim involving physically or mentally disabled person

Although the showing of incapacity to file notice of claim within the 90-day period was insufficient for lack of medical affidavits, it merely being shown that plaintiff was obliged to see her doctor from time to time during the first part of the 90-day period and hospitalized only toward the end of such period, the motion for extension of time was denied without prejudice to right to reapply and present further proof of incapacity. Liegl v Buffalo, 12 A.D.2d 889, 209 N.Y.S.2d 1004, 1961 N.Y. App. Div. LEXIS 13331 (N.Y. App. Div. 4th Dep't 1961).

Leave to file late notice of claim against county for personal injury sustained in automobile accident would not be granted where claimant did not sufficiently allege in what way her injury prevented her from timely filing a notice of claim. Nolan v County of Otsego, 55 A.D.2d 422, 391 N.Y.S.2d 15, 1977 N.Y. App. Div. LEXIS 9992 (N.Y. App. Div. 3d Dep't 1977).

Special term did not abuse its discretion in granting motion for leave to serve late notice of claim against municipality, a school

district. Colantuono v Valley Cent. School Dist., 59 A.D.2d 926, 399 N.Y.S.2d 262, 1977 N.Y. App. Div. LEXIS 14144 (N.Y. App. Div. 2d Dep't 1977).

Police officer who was injured while on duty at police station was properly denied permission to serve late notice of claim against city since (1) city lacked actual knowledge of claim because officer's line-of-duty accident report did not contain essential facts of accident, and (2) officer failed to provide valid excuse for delay where he claimed that he was unaware of filing requirements set forth in CLS Gen Mun § 50-e, and where there was no documentation of his claim that he was disabled. Mallory v New York, 135 A.D.2d 636, 522 N.Y.S.2d 215, 1987 N.Y. App. Div. LEXIS 52570 (N.Y. App. Div. 2d Dep't 1987), app. denied, 72 N.Y.2d 803, 532 N.Y.S.2d 369, 528 N.E.2d 521, 1988 N.Y. LEXIS 1797 (N.Y. 1988).

In action against New York City Housing Authority (NYCHA) to recover for injuries sustained by plaintiff when she was assaulted and robbed in elevator of her apartment building, court did not err in deeming notice of claim timely although it was filed 8 months after occurrence, since plaintiff's reports of occurrence to NYCHA constituted actual notice, report of physician who first examined plaintiff was sufficient to establish her incapacity to seek timely legal advice due to depression, and sufficiency of plaintiff's excuse was not undermined by fact that she was able to report incident and perform her normal daily activities. Joseph v New York City Housing Authority, 179 A.D.2d 441, 577 N.Y.S.2d 860, 1992 N.Y. App. Div. LEXIS 164 (N.Y. App. Div. 1st Dep't 1992).

Pedestrian, who fell on city sidewalk and was allegedly hospitalized and confined to his home for 4 months as result, was not entitled to file late notice of claim where (1) he failed to offer medical reports to support claim of disability, (2) he waited 5 months after fall to contact attorney, (3) attorney served notice of claim nearly 3 months later, then waited 2 more months to apply for permission to file late notice, (4) attorney waited 4 more months before renewing application, and (5) to counter city's claim of prejudice, pedestrian relied on assumption that "some" pertinent ambulance report must exist "in the city hierarchy," on fact that written notice of number of other sidewalk defects was filed with city 11 months before accident, and on fact that accident scene remained unchanged for several months between time of accident and actual notice to city. Rios v New York, 180 A.D.2d 801, 580 N.Y.S.2d 438, 1992 N.Y. App. Div. LEXIS 3007 (N.Y. App. Div. 2d Dep't 1992).

A municipality could not raise by its answer the defense of the mental and physical condition of a plaintiff as bearing on a capability to file a notice of claim within a statutory period therefor where the City was in default on the plaintiff's application for leave to file a late notice of claim. This section seems to make clear that the capability of a claimant to file a claim should be determined by special term or the county court before an action is brought. Hence, the court struck out the City's defense but noted that if there was a variance between the testimony and the allegations submitted on the application for extension of time, appropriate disposition could be taken by the trial court. Gladstone v Board of Education, 111 N.Y.S.2d 163, 202 Misc. 1005, 1952 N.Y. Misc. LEXIS 2487 (N.Y. Sup. Ct. 1952).

145. —Miscellaneous claims

There being no allegations that grounds for leave to file late notice of claim against city for malicious prosecution fell within stricter mandates of statute pertaining to notice of claim against public corporation as it read prior to effective date of its amendment, which is not to be given retroactive effect, grant of leave to serve late notice of claim was improper. Beary v Rye, 59 A.D.2d 905, 399 N.Y.S.2d 140, 1977 N.Y. App. Div. LEXIS 14108 (N.Y. App. Div. 2d Dep't 1977), rev'd, 44 N.Y.2d 398, 406 N.Y.S.2d 9, 377 N.E.2d 453, 1978 N.Y. LEXIS 1960 (N.Y. 1978).

It was error to deny plaintiff's motion for leave to serve late notice of claim under CLS Gen Mun § 50-e where city employee was present at time of accident and directed traffic so that injured claimant could be taken to hospital; city had actual knowledge of essential facts of claim. Briggs v Geneva, 130 A.D.2d 942, 516 N.Y.S.2d 139, 1987 N.Y. App. Div. LEXIS 46918 (N.Y. App. Div. 4th Dep't 1987).

In action against public hospital for alleged malpractice, plaintiff was properly denied permission to file late notice of claim nunc pro tunc more than one year after last treatment where, on initial motion, plaintiff had failed to submit supporting affidavit by party with knowledge of facts, and on both initial motion and permissive renewal of motion, plaintiff had failed to offer explanation for delay in filing notice of claim. Perkins v New York City Health & Hosp. Corp., 167 A.D.2d 150, 561 N.Y.S.2d 230, 1990 N.Y. App. Div. LEXIS 13312 (N.Y. App. Div. 1st Dep't 1990).

Plaintiff was not entitled to serve late notice of claim on city Housing Authority, based on October 1989 incident wherein plaintiff was shot in leg during robbery while waiting for elevator on Authority's premises, where (1) plaintiff moved for leave to serve notice in February 1990, (2) he claimed that his failure to file timely notice was due to disability resulting from injuries, but provided no supporting documentation for claim, and (3) he failed to establish that Authority had actual notice of facts by showing that members of Authority's police had responded to scene, since "Police Aided Report" did not state facts from which claim of negligence against Authority could be discerned. Matthews v New York City Housing Authority, 180 A.D.2d 669, 580 N.Y.S.2d 61, 1992 N.Y. App. Div. LEXIS 1471 (N.Y. App. Div. 2d Dep't 1992).

In action against city to range to recover for hearing loss allegedly suffered by firearms instructor at police firing range, court did not abuse its discretion in denying leave to file late notice of claim since (1) facts on which city's liability was predicated were not discernable from line-of-duty report, aided card and witness statements submitted by instructor, (2) instructor failed to offer sufficient excuse for failing to timely file claim, and (3) instructor allowed 12 months to pass before filing claim although tests performed within one week of alleged injury revealed hearing loss to his left ear. Hernandez v New York, 184 A.D.2d 378, 585 N.Y.S.2d 38, 1992 N.Y. App. Div. LEXIS 8168 (N.Y. App. Div. 1st Dep't 1992), app. dismissed, 81 N.Y.2d 782, 594 N.Y.S.2d 714, 610 N.E.2d 387, 1993 N.Y. LEXIS 58 (N.Y. 1993).

Petitioner's vague, unsubstantiated argument that New York City Housing Authority had actual notice of claim because unidentified worker for authority was informed by petitioner's nurse's aide when, where, and why petitioner had fallen was insufficient to justify grant of petitioner's application for leave to serve late notice of claim since affidavit contained nothing more than conclusory assertions devoid of any specific statements of what was actually communicated, or of identity of maintenance man. Seif v City of New York, 218 A.D.2d 595, 630 N.Y.S.2d 742, 1995 N.Y. App. Div. LEXIS 8854 (N.Y. App. Div. 1st Dep't 1995).

Counsel's vague and unelaborated reference to "clerical error" was patently inadequate to constitute reasonable excuse for delay in filing notice of claim. Rosenblatt v City of New York, 221 A.D.2d 448, 633 N.Y.S.2d 557, 1995 N.Y. App. Div. LEXIS 11894 (N.Y. App. Div. 2d Dep't 1995).

Court properly denied plaintiff's motion for leave to serve late notice of claim against county where proposed notice of claim did not indicate exact location of accident or nature of county's alleged negligence, and plaintiff failed to show that county had actual notice of incident. Albers v County of Suffolk, 226 A.D.2d 526, 641 N.Y.S.2d 81, 1996 N.Y. App. Div. LEXIS 4341 (N.Y. App. Div. 2d Dep't 1996).

Inference that prejudice would accompany passage of time was not eliminated, and thus claimant was not entitled to extension of time to file claim against city housing authority for injuries allegedly suffered from robbery and sexual assault which allegedly occurred in her apartment, even though authority presumably had security records for building, and police were allegedly called to scene on day of attack, where there was no evidence as to scope of investigation conducted, nor any written report indicating that authority had actual knowledge of underlying facts which formed basis of lawsuit. Vargas v New York City Hous. Auth., 232 A.D.2d 263, 648 N.Y.S.2d 546, 1996 N.Y. App. Div. LEXIS 10295 (N.Y. App. Div. 1st Dep't 1996), app. denied, 89 N.Y.2d 817, 659 N.Y.S.2d 858, 681 N.E.2d 1305, 1997 N.Y. LEXIS 1311 (N.Y. 1997).

Plaintiffs' motion to serve late notice of claim against school district was properly denied where student incident report and accident and sickness proof of loss form relied on by plaintiffs

contained contradictory information as to how and where accident occurred and were inadequate to give notice either of nature and severity of injuries ultimately claimed or that injuries arose from slippery condition that constituted trap. Gangloff v East Islip Sch. Dist., 240 A.D.2d 366, 657 N.Y.S.2d 777, 1997 N.Y. App. Div. LEXIS 5772 (N.Y. App. Div. 2d Dep't 1997).

Court properly denied plaintiff's motion for leave to serve late notice of claim against city where city showed that person to whom plaintiff allegedly reported accident on day it occurred was field engineer employed by general contractor rather than by city, city showed that insurance carrier for plaintiff's employer, which acquired actual knowledge of plaintiff's accident, was not its insurance carrier, plaintiffs did not allege that condition resulting in accident had remained unchanged, and city showed that, because accident occurred at active construction site, it could not investigate condition that existed at time of accident. Williams v City of Niagara Falls, 244 A.D.2d 1006, 665 N.Y.S.2d 217, 1997 N.Y. App. Div. LEXIS 12463 (N.Y. App. Div. 4th Dep't 1997).

Assuming, arguendo, that service of a notice of claim against county, which allegedly owned bus, was a necessary condition precedent to the commencement of an action by injured bus passenger against lessee and operator of the bus, plaintiff's affidavits were factually insufficient to warrant permitting service of a late notice of claim. Rhodes v Westchester Street Transp. Co., 80 Misc. 2d 1021, 365 N.Y.S.2d 351, 1974 N.Y. Misc. LEXIS 1937 (N.Y. Sup. Ct. 1974).

Court denied petitioner's motion to assert late notice of tort claim against city where she admitted in her application that she was receiving workers' compensation benefits arising out of underlying incident; there was no point in letting petitioner file late notice of claims that were barred by workers' compensation exclusivity defense. Tirado v City of New York, 178 Misc. 2d 905, 680 N.Y.S.2d 923, 1998 N.Y. Misc. LEXIS 564 (N.Y. Sup. Ct. 1998).

146. Determination of motion

In action against county for injuries sustained by plaintiff whose car collided with bus which was being operated as loop bus for county, county failed to show that plaintiff's delay in serving notice of claim substantially prejudiced its ability to defend against claim that bus was negligently operated because it did not conduct independent investigation after receiving bus passenger's timely notice of claim but instead forwarded notice to bus company, which was contractually obligated to defend and indemnify it against such claims, since county proffered no evidence that bus company did not investigate accident, company and county were apparently united in interest with respect to rebutting allegations that bus was negligently operated, and county inferably had access to company's investigation of bus passenger's timely interposed claim. Fenton v County of Dutchess, 148 A.D.2d 573, 539 N.Y.S.2d 42, 1989 N.Y. App. Div. LEXIS 3916 (N.Y. App. Div. 2d Dep't), app. denied, 74 N.Y.2d 608, 545 N.Y.S.2d 104, 543 N.E.2d 747, 1989 N.Y. LEXIS 2343 (N.Y. 1989).

In action against county for injuries sustained by plaintiff whose car collided with bus on sharp curve on county road, county failed to show that plaintiffs' delay in serving notice of claim substantially prejudiced its ability to defend against design defect claim, on ground that changed circumstances would prevent accurate reconstruction of circumstances existing at time of accident, since (1) county official's conclusory representation that condition of road had changed since October 12, 1985 was irrelevant, as accident had occurred on November 12, 1985, (2) plaintiffs and nearby resident averred that, except for new warning signs, design and surface structure of road were unchanged since accident, and (3) there was no suggestion that county department that installed warning signs did not have relevant information. Fenton v County of Dutchess, 148 A.D.2d 573, 539 N.Y.S.2d 42, 1989 N.Y. App. Div. LEXIS 3916 (N.Y. App. Div. 2d Dep't), app. denied, 74 N.Y.2d 608, 545 N.Y.S.2d 104, 543 N.E.2d 747, 1989 N.Y. LEXIS 2343 (N.Y. 1989).

On motion of firefighter for leave to file late notice of claim for injuries sustained when rubbish left on stairs caused him to fall, defendant housing authority was not prejudiced by delay in filing notice of claim since it was unlikely that condition of rubbish on stairs would have remained in existence until end of 90-day period. Myette v New York City Hous. Auth., 204 A.D.2d 54, 611 N.Y.S.2d 521, 1994 N.Y. App. Div. LEXIS 4606 (N.Y. App. Div. 1st Dep't 1994).

Petitioner was not entitled to serve late notice of claim against transit authority in connection with injuries sustained in slip and fall on broken pavement where (1) petitioner originally served timely notice of claim against city, but claim was dismissed due to her misidentification of location of accident, (2) petitioner failed to present adequate excuse for delay, (3) there was no indication that transit authority acquired actual notice within 90 days of accident, and (4) petitioner's unsupported allegation that condition of pavement had not changed did not negate prejudice caused by long delay. Merino v Metropolitan Transp. Auth., 204 A.D.2d 329, 611 N.Y.S.2d 273, 1994 N.Y. App. Div. LEXIS 4508 (N.Y. App. Div. 2d Dep't 1994).

Absence of acceptable excuse for delay is not necessarily fatal to motion for leave to serve late notice of claim; all relevant factors should be considered on application, including actual knowledge of essential facts constituting claim within 90-day statutory period. Diallo v City of New York, 224 A.D.2d 339, 638 N.Y.S.2d 58, 1996 N.Y. App. Div. LEXIS 1455 (N.Y. App. Div. 1st Dep't 1996).

Petitioner was not entitled to serve late notice of claim against city transit authority and others where she did not prove that respondents acquired actual knowledge of essential facts of claim within 90 days of occurrence or reasonable time thereafter, she offered only conclusory allegation that respondents' employee prepared report describing manner in which claim arose and police "aided" report that did not connect occurrence with any negligence by respondents, she did not rebut respondents' showing of prejudice attributable to 14-month interval between occurrence and petitioner's application, there was no support for petitioner's claim that she reasonably relied on settlement offers made by respondents' personnel at scene, and she offered no other excuse for her delay. Walker v NYC Transit Auth., 266 A.D.2d 54, 698 N.Y.S.2d 460, 1999 N.Y. App. Div. LEXIS 11608 (N.Y. App. Div. 1st Dep't 1999).

Medical malpractice plaintiff was not entitled to serve late notice of claim against county medical center where she failed to show reasonable excuse for delay, center did not acquire actual knowledge of essential facts of claim within 90 days or reasonable time thereafter, and center would be substantially prejudiced in maintaining defense if leave were granted. Askew v Horton Mem'l Hosp., 266 A.D.2d 248, 698 N.Y.S.2d 506, 1999 N.Y. App. Div. LEXIS 11306 (N.Y. App. Div. 2d Dep't 1999).

Petitioner was not entitled, under CLS Gen Mun § 50-e(5), to serve late notice of claim against city where petitioner did not show either reasonable excuse for delay or that city received actual notice of her claim within statutory period or within reasonable time thereafter. Gonzalez v City of New York, 266 A.D.2d 290, 698 N.Y.S.2d 500, 1999 N.Y. App. Div. LEXIS 11339 (N.Y. App. Div. 2d Dep't 1999).

Petitioner's claim against county arising from allegedly negligent representation provided by assigned appellate counsel was patently meritless, and thus it would make little sense to grant him permission to serve late notice of claim, where county's sole involvement in his appeal from criminal conviction was to timely comply with criminal court's request that it suggest name of attorney to be assigned by court. Swain v County of Albany, 268 A.D.2d 747, 702 N.Y.S.2d 175, 2000 N.Y. App. Div. LEXIS 381 (N.Y. App. Div. 3d Dep't), app. denied, 94 N.Y.2d 764, 708 N.Y.S.2d 52, 729 N.E.2d 709, 2000 N.Y. LEXIS 568 (N.Y. 2000).

Respondent was not entitled to serve a late notice of claim under N.Y. Gen. Mun. Law § 50-e(5) because a police accident report did not give a city actual notice of the essential facts underlying respondent's claim and did not connect the subject accident to any negligence by the city; respondent's delay of one year in seeking to serve a notice of claim was prejudicial to the city's preparation of a defense. Matter of Acosta v City of New York, 39 A.D.3d 629, 834 N.Y.S.2d 267, 2007 N.Y. App. Div. LEXIS 4555 (N.Y. App. Div. 2d Dep't 2007).

Plaintiff who was wounded by "Staten Island Ferry slasher" would not be permitted to file late notice of claim pursuant to CLS Gen Mun § 50-e where his claim of municipal tort liability

alleged only inadequate police protection, since no such cause of action lies against municipality absent "special duty" owed to particular plaintiff and plaintiff set forth no facts that would establish special duty; existence of meritorious claim is relevant consideration in deciding whether to grant discretionary extension. Groell v New York, 135 Misc. 2d 823, 517 N.Y.S.2d 382, 1987 N.Y. Misc. LEXIS 2314 (N.Y. Sup. Ct. 1987).

In claim by cleaning person for injuries sustained from leaks of chemicals and vapors in building, motion for leave to file late notice of claim could only be determined after trier of fact determined whether claim arose when claimant first started to cough and have difficulty breathing or later when there was chemical spill in building and claimant was diagnosed as having chemical bronchitis and asthma, since issue of whether respondent received timely notice of facts was dependent on when claimant discovered or should have discovered her injury. Mesa v United Nations Dev. Corp., 157 Misc. 2d 362, 596 N.Y.S.2d 1012, 1993 N.Y. Misc. LEXIS 124 (N.Y. Sup. Ct. 1993).

Police officer involved in recovery operations at the World Trade Center established adequate grounds for the late service of his notice of claim against the city for injuries allegedly caused by toxic exposure and the city's failure to provide proper respiratory or protective equipment as (1) there was a reasonable excuse for his delay in that he waited until he had a good faith basis for claiming a tortious injury, (2) given extensive media coverage of the nature of the officer's claim and hundreds of other similar claims, the city had notice of the substance of his claim within a reasonable period after the 90-day as-of-right filing period, and (3) the officer's delay did not prejudice the city, as it was not prevented from attempting to investigate the substance of the claim. O'Halloran v City of New York, 770 N.Y.S.2d 583, 1 Misc. 3d 568, 2003 N.Y. Misc. LEXIS 1210 (N.Y. Sup. Ct. 2003).

147. —Grant of motion proper

Court properly granted petitioners' application for leave to serve late notice of claim, even though application was made one month after expiration of 90-day period for service notice, where proposed notice was sufficiently specific to assure defendant reasonable opportunity to conduct full and effective investigation of claim, and defendant failed to show any prejudice by delay. Tarnaras v Farmingdale Union Free Sch. Dist., 205 A.D.2d 545, 614 N.Y.S.2d 277, 1994 N.Y. App. Div. LEXIS 5930 (N.Y. App. Div. 2d Dep't 1994).

In granting application to file late notice of claim against school district by student whose hand was severely injured in classroom metal sheering accident, court properly considered evidence of postaccident repair—that district fastened or "tied down" table on which shearing machine sat—where such evidence, although inadmissible to prove district's negligence, was relevant to issue of its timely investigation of accident. Hayes v Peru Cent. Sch. Dist., 281 A.D.2d 794, 722 N.Y.S.2d 104, 2001 N.Y. App. Div. LEXIS 2504 (N.Y. App. Div. 3d Dep't 2001).

The trial court properly granted an injured party's application for leave to serve a late notice of claim pursuant to N.Y. Gen. Mun. Law § 50-e(5); even assuming that the injured party's erroneous belief that a railroad owned the parking lot where she fell constituted a reasonable excuse for her delay, neither respondent had notice of the facts underlying the claim until the injured party sought leave to serve a late notice of claim upon them, and furthermore, the trial court properly concluded that the delay would prejudice respondents' ability to investigate the defect and other circumstances. Aguilar v Town of Islip, 294 A.D.2d 358, 741 N.Y.S.2d 732, 2002 N.Y. App. Div. LEXIS 4759 (N.Y. App. Div. 2d Dep't 2002).

Where petitioners, the parents of a child, individually and as the child's parents and guardians, filed an application pursuant to N.Y. Gen. Mun. Law § 50-e(5) for leave to file a late notice of claim against respondents, a county and its public health department, related to injuries from lead poisoning, the trial court did not abuse its discretion in granting the application despite petitioners' failure to offer a reasonable excuse for their lengthy delay in filing the application, as respondents had actual notice of the facts underlying petitioners' two theories of liability and respondents offered no substantial evidence of compelling prejudice to their ability to prepare a defense. Lanphere v County of Washington, 301 A.D.2d 936, 754 N.Y.S.2d 125, 2003 N.Y. App. Div. LEXIS 341 (N.Y. App. Div. 3d Dep't 2003).

Order granting an infant leave to serve a late notice of claim against a school district upon reconsideration of an earlier order denying leave was proper because the infant demonstrated that the new facts set forth in the infant's affidavit would change the prior determination and the trial court considered N.Y. Gen. Mun. Law § 50-e(5) factors. Matter of Surdo v Levittown Pub. School Dist., 41 A.D.3d 486, 837 N.Y.S.2d 315, 2007 N.Y. App. Div. LEXIS 6945 (N.Y. App. Div. 2d Dep't 2007).

It was proper for the trial court to grant leave for petitioners, a pedestrian and others, to file a late notice of claim against respondents, a town and a police department, under General Municipal Law § 50-e(5). Respondents had actual notice of the essential underlying facts; the delay was excusable in that petitioners had been unaware of respondents' potential liability until they reviewed Freedom of Information Law materials; and respondents would not be substantially prejudiced, as an accident report containing details of the incident was compiled on the date that it occurred and respondents' conclusory assertions regarding the availability of witnesses and/or their abilities to recall events were unsubstantiated by the record. Matter of Dewey v Town of Colonie, 54 A.D.3d 1142, 863 N.Y.S.2d 849, 2008 N.Y. App. Div. LEXIS 6896 (N.Y. App. Div. 3d Dep't 2008).

Because the actions taken by a school district's employees placed it on notice of a student's accident and any potential claim that might arise therefrom, the trial court properly granted the student's N.Y. Gen. Mun. Law § 50-e(5) petition for leave to serve a late notice of claim upon the district. Matter of Leeds v Port Washington Union Free School Dist., 55 A.D.3d 734, 865 N.Y.S.2d 349, 2008 N.Y. App. Div. LEXIS 7733 (N.Y. App. Div. 2d Dep't 2008).

Order granting leave to file a late notice of claim against a county pursuant to N.Y. Gen. Mun. Law § 50-e(5) was proper because, inter alia, the motorist, who remained nonverbal and required constant care for profound disabilities sustained because of the subject accident, was incapable of interposing a negligence action on her own behalf; given the motorist's almost complete incapacity up to, and following, the filing of the application, there was a sufficient excuse for the delay in filing the late notice of claim. Given the motorist's traumatic brain injury and apparent inability to recollect the details of the accident, an earlier notice of claim would not have improved the county's ability to gain her first-hand account. Matter of Hubbard v County of Madison, 71 A.D.3d 1313, 897 N.Y.S.2d 538, 2010 N.Y. App. Div. LEXIS 2063 (N.Y. App. Div. 3d Dep't 2010).

Trial court properly granted a petition to deem a late notice of claim timely served nunc pro tunc. Appellant's hospital failed to provide the autopsy report for petitioner's stillborn fetus for eight months despite her multiple, prompt requests for it; appellant had actual, timely knowledge from petitioner's medical records of the essential facts constituting petitioner's claims; and appellant was not substantially prejudiced by the delay. Matter of Rojas v New York City Health & Hosps. Corp., 127 A.D.3d 870, 6 N.Y.S.3d 294, 2015 N.Y. App. Div. LEXIS 2947 (N.Y. App. Div. 2d Dep't 2015).

Patient was permitted to serve a late notice of claim upon a hospital because the hospital failed to confirm that the patient's tumor had been completely removed, thereby providing the hospital with actual knowledge of the essential facts constituting the claim, the hospital would not suffer any prejudice by the delay in serving a notice of claim, and the patient's extensive medical treatment during the time period at issue constituted a reasonable excuse for the delay. Matter of Leon v New York City Health & Hosps. Corp., 163 A.D.3d 670, 81 N.Y.S.3d 140, 2018 N.Y. App. Div. LEXIS 5097 (N.Y. App. Div. 2d Dep't 2018).

Respondent's application for leave to deem a late notice of claim timely served nunc pro tunc was properly granted; because respondent demonstrated that petitioner city acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose and that it would thus not be substantially prejudiced by the grant of his application, he had not also been required to supply a reasonable excuse for his failure to serve a timely notice of claim. Matter of Nieto v City of New York,

170 A.D.3d 1022, 96 N.Y.S.3d 283, 2019 N.Y. App. Div. LEXIS 2078 (N.Y. App. Div. 2d Dep't 2019).

Trial court acted within its discretion in allowing the student to serve a late notice of claim, regarding a missing stop sign, because the original timely notice of claim, to which was annexed a copy of the police report, gave the city defendants actual knowledge of the essential facts constituting the student's claim based upon the alleged missing stop sign within 90 days of accrual; the report expressly stated that the accident site was "missing a stop sign," thus "causing" the collision. M.L. v City of New York, 173 A.D.3d 848, 103 N.Y.S.3d 499, 2019 N.Y. App. Div. LEXIS 4691 (N.Y. App. Div. 2d Dep't 2019).

Leave to file a late notice of claim against a city and a department under N.Y. Gen. Mun. Law § 50-e was granted because the city and the department received worker's compensation reports which provided them with sufficient knowledge of nature of the claim, including the date, place, time, nature of the injury, and the specific location and reason for the fall, which was that there was a lift in the concrete next to the gate outside school doors; because the city and the department had actual notice of how the injury occurred and because a raised sidewalk was not necessarily a transient condition, there was no substantial prejudice to the city and the department. Quarto v City of New York, 859 N.Y.S.2d 362, 20 Misc. 3d 473, 239 N.Y.L.J. 115, 2008 N.Y. Misc. LEXIS 3110 (N.Y. Sup. Ct. 2008).

Since the arrestees' C.P.L.R. art. 4 petition was timely, and since any delay in serving a late notice of claim under N.Y. Gen. Mun. Law § 50-e(5) was inadvertent and not calculated to mislead or confuse the respondents, who were aware of the claim's essential facts; the respondents would not be substantially prejudiced by granting the application. Sorrell v Incorporated Vil. of Lynbrook, 902 N.Y.S.2d 776, 27 Misc. 3d 1026, 2010 N.Y. Misc. LEXIS 3479 (N.Y. Sup. Ct. 2010).

Where a former employee in a whistleblower suit timely served the employing municipal corporation with notice of her suit, she was granted leave to serve a late amended notice of claim against a city and a municipal agency because there was actual notice of the claim and no showing of prejudice from the delay. Williams v NYC Health & Hosps. Kings County Hosp. Ctr., 62 Misc. 3d 462, 88 N.Y.S.3d 847, 2018 N.Y. Misc. LEXIS 5436 (N.Y. Sup. Ct. 2018).

148. —Grant of motion improper

It was improper to grant leave to serve late notice of claim for injuries allegedly sustained in assault by police officers during petitioner's arrest since (1) county did not receive notice of incident by virtue of officers' participation in alleged assault, and (2) petitioner did not explain delay of nearly 7 months after he sought legal advice, especially given that he executed his own affidavit in support of application about 5 months before application was filed. McAllister v County of Nassau, 202 A.D.2d 670, 609 N.Y.S.2d 294, 1994 N.Y. App. Div. LEXIS 2902 (N.Y. App. Div. 2d Dep't 1994).

It was abuse of discretion to deny housing authority's motion to vacate order granting petitioner leave to serve late notice of claim where authority's failure to serve its opposition papers within time set in petitioner's notice motion was due to heavy caseload following substitution of counsel, and authority had meritorious defense that petitioner's application for leave to serve late notice of claim was not timely. Steward v New York City Hous. Auth., 205 A.D.2d 606, 613 N.Y.S.2d 408, 1994 N.Y. App. Div. LEXIS 6197 (N.Y. App. Div. 2d Dep't 1994).

It was abuse of discretion to grant petitioners' motion for leave to serve late notice of claim against board of education on behalf of infant claimants where there was no evidence that board had actual knowledge of infant's claims within 90 days of occurrence or within reasonable time thereafter, and board would be unable to refute petitioners' claim that city-wide reading and math tests of infant claimants were tampered with because actual city-wide reading and math tests taken by infant claimants had been destroyed, and it would be impossible to show that tests of those specific students were not tampered with. Sica v Board of Educ., 226 A.D.2d 542, 640 N.Y.S.2d 610, 1996 N.Y. App. Div. LEXIS 4329 (N.Y. App. Div. 2d Dep't 1996).

It was abuse of discretion to grant petition for leave to file late notice of claim against city housing authority where petitioner offered only conclusory and unpersuasive excuse for failing to file notice of claim until nearly 2 months beyond expiration of statutory period, authority did not receive actual notice of claim within statutory time or within reasonable time thereafter, and petitioner's claims were patently meritless. Finneran v City of New York, 228 A.D.2d 596, 644 N.Y.S.2d 537, 1996 N.Y. App. Div. LEXIS 7203 (N.Y. App. Div. 2d Dep't 1996).

Court erred in granting petitioner's application for leave to serve late notice of claim 14 months after date of accident, which was several months after New York City had rejected notice of claim as untimely and would substantially prejudice city in maintaining its defense on merits. Singletary v City of New York, 236 A.D.2d 546, 654 N.Y.S.2d 628, 1997 N.Y. App. Div. LEXIS 1356 (N.Y. App. Div. 2d Dep't 1997).

It was abuse of discretion to grant petitioner's application for leave to serve late notice of claim where petitioner failed to show either reasonable excuse for his delay or that town received actual notice of his claim within statutory time or within reasonable time thereafter. Gause v Town of Babylon, 256 A.D.2d 341, 681 N.Y.S.2d 756, 1998 N.Y. App. Div. LEXIS 13171 (N.Y. App. Div. 2d Dep't 1998).

Trial court abused its discretion under N.Y. Gen. Mun. Law § 50-e(5) by granting plaintiffs, injured party and others, leave to file a late notice of claim against defendant school district in their personal injury action where plaintiffs failed to establish that the school district was not prejudiced by the delay, that the claim articulated in the proposed notice of claim had any merit, or that the delay in attempting to serve the notice was related to infancy or could have been reasonably excused. Lopez v Hicksville Pub. Sch. Dist., 289 A.D.2d 381, 734 N.Y.S.2d 878, 2001 N.Y. App. Div. LEXIS 12204 (N.Y. App. Div. 2d Dep't 2001).

Plaintiffs' motion for leave to serve a late notice of claim against a transit authority almost 15 months after the subject incident should not have been granted; plaintiffs failed to fulfill the requirements of N.Y. Gen. Mun. Law § 50-e(1)(a), (5), as plaintiffs failed to offer a reasonable excuse for the delay of nearly one year and three months in requesting permission to serve a late notice of claim, a telephone report of accident, claim & no-fault completed shortly after the accident did not provide the transit authority with actual notice of the essential facts constituting plaintiffs' claim since it failed to suggest any connection between the happening of the accident and any alleged negligence in the ownership, operation, or control of the authority's bus, and plaintiffs' delay in seeking leave to serve a late notice of claim prejudiced the authority's ability to maintain a defense on the merits. Meehan v City of New York, 295 A.D.2d 581, 744 N.Y.S.2d 484, 2002 N.Y. App. Div. LEXIS 6767 (N.Y. App. Div. 2d Dep't 2002).

The trial court properly granted an injured party leave to serve a late notice of claim pursuant to N.Y. Gen. Mun. Law § 50-e(5) upon a school district in a personal injury action; under the circumstances, and in view of the minimal delay, the error concerning the identity of the municipal entity upon which the notice of claim was to be served was excusable, and a school district failed to show that the delay in service of the notice of claim hampered its ability to conduct an investigation. Cox v City of Peekskill, 297 A.D.2d 735, 747 N.Y.S.2d 547, 2002 N.Y. App. Div. LEXIS 8646 (N.Y. App. Div. 2d Dep't 2002).

Order granting a victim leave to serve late notices of claim on a city and a police department was error because the claim, which was based on a failure to staff a police anti-terrorism post in a train station where the victim was allegedly raped, was patently without merit as there was no allegation of a special relationship; it was appropriate to consider that argument on appeal despite the fact that it was raised for the first time on appeal, because it raised an issue of law that appeared on the face of the record, the determination of which could not have been avoided if raised in the trial court. The trial court did not err in granting that branch of the petition which was for leave to serve a late notice of claim on authorities because the authorities did not raise any issue with regard to the merits of the claim against them. Matter of Besedina v New York City Tr. Auth., 47 A.D.3d 924, 850 N.Y.S.2d

199, 2008 N.Y. App. Div. LEXIS 597 (N.Y. App. Div. 2d Dep't 2008).

Order on renewal to grant a worker leave to serve a late notice of his labor law claim against an authority pursuant to N.Y. Gen. Mun. Law § 50-e(5) was error because the worker failed to set forth a reasonable excuse for the delay in bringing the instant proceeding about one year after the accident; further, the worker did not meet his burden of demonstrating that the authority was not prejudiced in its investigation or defense by the delay, that the essential facts of the claim were known to it within the 90-day period after the accident or a reasonable time thereafter, and that within the statutory time frame, it was aware of the specific claim asserted by the petitioner and not just that an incident had occurred. Since the worker failed to articulate a reasonable justification for his failure to include the newly-discovered evidence in the petition in the first instance, and the newly-discovered evidence would not have required a different outcome on the petition, renewal was unwarranted. Matter of Knight v Dormitory Auth. of N.Y., 56 A.D.3d 780, 868 N.Y.S.2d 706, 2008 N.Y. App. Div. LEXIS 9080 (N.Y. App. Div. 2d Dep't 2008).

Order granting an infant leave to serve a late notice of claim against a municipal hospital under N.Y. Gen. Mun. Law § 50-e(5) was error because the infant's use of undocumented purported statements made to unnamed medical personnel could not have been used to establish that the hospital had actual notice of the facts underlying the claim; precedent barred the infant's use of undocumented purported statements made to unnamed medical personnel to meet her burden of establishing that the hospital had actual notice, as the infant was obliged to show that the hospital's records indicated or noted an injury. The hospital records, however, directly contradicted the infant's assertion that the infant suffered any injury, and, further, the records showed, among other things, that during the infant's time in the hospital's nursery, she was alert and active, with no neurological abnormalities. Cartagena v New York City Health & Hosps. Corp., 93 A.D.3d 187, 938 N.Y.S.2d 77, 2012 N.Y. App. Div. LEXIS 907 (N.Y. App. Div. 1st Dep't 2012).

Trial court was statutorily prohibited from extending the time in which an inmate had to serve her notice of claim upon the county because the inmate's failure to file her 2013 application with the proper clerk amounted to a nonwaivable jurisdictional defect, rendering the proceeding a nullity, and, as such, the inmate's 2015 submissions did not relate back to her 2013 attempted application. Matter of Dougherty v County of Greene, 161 A.D.3d 1253, 76 N.Y.S.3d 648, 2018 N.Y. App. Div. LEXIS 3146 (N.Y. App. Div. 3d Dep't 2018).

149. —Denial of motion proper

The trial court properly denied leave, under Gen Mun Law § 50-e(5), to serve a late notice of claim, given the almost five-and-one-half year delay between the injury and the bringing of the application, the fact that the identity of the counselor allegedly involved in the incident was unknown, the fact that the child's injuries did not appear serious at the time, and the lack of any records concerning the incident. Special Term's conclusion that permitting late service of a notice of claim would substantially prejudice the respondent in maintaining its defense on the merits rested upon a solid evidentiary predicate. Accordingly, it was an appropriate exercise of discretion to deny the application. Hogan v Orangetown, 108 A.D.2d 857, 485 N.Y.S.2d 360, 1985 N.Y. App. Div. LEXIS 43184 (N.Y. App. Div. 2d Dep't 1985).

Court properly denied petitioner's application to serve late notice of claim on New York City Transit Authority where authority had no notice of incident until receipt of petitioner's motion papers some 9 months after occurrence. Tully v New York City Transit Authority, 180 A.D.2d 566, 580 N.Y.S.2d 268, 1992 N.Y. App. Div. LEXIS 2714 (N.Y. App. Div. 1st Dep't 1992).

Plaintiff's application for leave to serve late notice of claim was properly denied since he was not injured as result of any defective condition of elevator where investigation by city housing authority and police showed that injury resulted from his climbing into elevator shaft to repair damage caused by his inebriated companion; under circumstances, housing authority did not have sufficient notice of claim of defective elevator to conduct meaningful investigation of alleged defective condition. Falcoun v New York City Housing Authority, 185 A.D.2d 202, 587 N.Y.S.2d 162, 1992 N.Y. App. Div. LEXIS 9075 (N.Y. App. Div. 1st Dep't 1992).

Petitioner was properly denied permission for leave to serve late notice of claim against housing authority where (1) on February 7, petitioner, who was diabetic, stepped on small piece of metal allegedly left outside her apartment by housing authority workers who had repaired leak in October and November of prior year, (2) on February 15, petitioner saw doctor and was thereafter hospitalized, and (3) on June 22, petitioner sought leave to serve late notice; housing authority would be substantially prejudiced since it had no knowledge of alleged injury or negligence until service of motion. Peterson v New York City Hous. Auth., 190 A.D.2d 738, 593 N.Y.S.2d 329, 1993 N.Y. App. Div. LEXIS 968 (N.Y. App. Div. 2d Dep't 1993).

Court properly denied plaintiffs' application for leave to file late notice of claim where (1) approximately 10 months elapsed before plaintiffs sought leave to serve late notice of claim as to alleged trip and fall accident, (2) alleged defect was transitory in nature, (3) plaintiffs failed to give reasonable excuse for their inaction, and (4) original notice of claim was inadequate because it misidentified actual location where accident allegedly occurred. Kornecki v City of New York, 205 A.D.2d 665, 614 N.Y.S.2d 298, 1994 N.Y. App. Div. LEXIS 6469 (N.Y. App. Div. 2d Dep't 1994).

Court properly denied petitioner's motion for leave to serve late notice of claim where there was no excuse offered for one-year delay in moving for leave to file late claim, and city was prejudiced by weather-related changes in condition of allegedly defective sidewalk, and by its inability to identify and interview witnesses. Crowell v City of New York, 228 A.D.2d 322, 644 N.Y.S.2d 231, 1996 N.Y. App. Div. LEXIS 7297 (N.Y. App. Div. 1st Dep't 1996).

It was proper to deny plaintiffs' motion for leave to amend their notice of claim 3 years after accident where they did not explain their failure to provide correct description of location of accident, and city conducted investigation at wrong location and was deprived of opportunity to conduct meaningful investigation. Molina v City of New York, 284 A.D.2d 511, 727 N.Y.S.2d 324, 2001 N.Y. App. Div. LEXIS 6820 (N.Y. App. Div. 2d Dep't 2001).

Petitioner's motion pursuant to N.Y. Gen. Mun. Law § 50-e(5) for leave to serve a late notice of claim against respondent housing authority was properly denied, because the housing authority did not have actual knowledge of the essential facts constituting the claim within the appropriate time period, petitioner failed to demonstrate a reasonable excuse for the delay in serving a timely notice of claim, and petitioner did not establish that the two-month delay after the expiration of the 90-day period would not substantially prejudice the housing authority in maintaining a defense on the merits as required by N.Y. Gen. Mun. Law § 50-e(5). Lorseille v N.Y. City Hous. Auth., 295 A.D.2d 612, 744 N.Y.S.2d 880, 2002 N.Y. App. Div. LEXIS 6743 (N.Y. App. Div. 2d Dep't 2002).

Trial court properly denied a petition under N.Y. Gen. Mun. Law § 50-e(5) to file a late notice of claim against a school district because petitioners failed to establish (1) that the school district acquired actual knowledge of the essential facts constituting the claim within 90 days or a reasonable time thereafter, (2) that there was a reasonable excuse for the delay in serving the notice of claim, (3) that the delay in attempting to serve the notice of claim was related to infancy or other incapacitation, or (4) that the school district was not prejudiced by the delay. Di Fusco v Mahopac Sch. Dist., 299 A.D.2d 544, 750 N.Y.S.2d 513, 2002 N.Y. App. Div. LEXIS 11484 (N.Y. App. Div. 2d Dep't 2002).

Trial court providently exercised its discretion in denying a motion by plaintiffs, a child and his mother, for leave to serve a late notice of claim against defendants, a city and other, pursuant to N.Y. Gen. Mun. Law § 50-e some two years after the claim arose; plaintiffs failed to demonstrate a reasonable excuse for the lengthy delay, or that there was a nexus between the infancy of the child and the delay. Berg v Town of Oyster Bay, 300 A.D.2d 330, 752 N.Y.S.2d 58, 2002 N.Y. App. Div. LEXIS 11916 (N.Y. App. Div. 2d Dep't 2002).

Trial court properly denied an injured party's application pursuant to N.Y. Gen. Mun. Law § 50-e(5) for leave to serve a late notice of claim for personal injuries upon respondents, a city, a

county, and others, because the injured party failed to offer a valid excuse for his delay, and respondents did not have actual knowledge of the claim within 90 days. Aliberti v City of Yonkers, 302 A.D.2d 456, 755 N.Y.S.2d 406, 2003 N.Y. App. Div. LEXIS 1352 (N.Y. App. Div. 2d Dep't 2003).

The trial court properly denied an injured party's motion pursuant to N.Y. Gen. Mun. Law § 50-e to serve a late notice of claim on a board of education in a personal injury action, and properly adhered to that decision upon the injured party's motion for leave to renew pursuant to N.Y. C.P.L.R. 2221 (2003); the injured party failed to show that the board timely acquired actual knowledge of the facts underlying the claim, and failed to show that the board would not be prejudiced by permitting the injured party to serve a late notice of claim, and did not establish the existence of a reasonable excuse for failing to timely serve the notice of claim as required by N.Y. Gen. Mun. Law § 50-e(5). Igneri v N.Y. City Bd. of Educ., 303 A.D.2d 635, 756 N.Y.S.2d 783, 2003 N.Y. App. Div. LEXIS 3160 (N.Y. App. Div. 2d Dep't 2003).

Where a claimant alleged that he was injured in an off-track betting parlor owned by a public benefit corporation, the trial court properly denied the claimant's application to serve a late notice of claim on the public benefit corporation where the claimant presented no good reason as to why his attorneys initial served the Attorney General, then realized their error after nine months; this delay was particularly prejudicial as there was no injury apparent immediately after the incident. Santana v W. Reg'l Off-Track Betting Corp., 2 A.D.3d 1304, 770 N.Y.S.2d 258, 2003 N.Y. App. Div. LEXIS 14158 (N.Y. App. Div. 4th Dep't 2003), app. denied, 2 N.Y.3d 704, 778 N.Y.S.2d 774, 811 N.E.2d 36, 2004 N.Y. LEXIS 661 (N.Y. 2004).

Motion to serve a late notice of a medical malpractice claim against a hospital under General Municipal Law § 50-e was properly denied; the patient's medical records did not suggest that the hospital knew that the patient's later medical issues were due to malpractice during his delivery. No reasonable excuse was proffered for 10-year delay, and there was no nexus between the patient's infancy and the delay. Lucero v New York City Health & Hosps. Corp. (Elmhurst Hosp. Center), 33 A.D.3d 977, 823 N.Y.S.2d 507, 2006 N.Y. App. Div. LEXIS 12991 (N.Y. App. Div. 2d Dep't 2006).

Trial court properly denied petitioner's application for leave to serve a late notice of claim pursuant to N.Y. Gen. Mun. Law § 50-e(5), because petitioner knew of the 90-day notice requirement at the time he filed the action, and offered a patently false excuse claiming he was unaware of the notice requirement. Matter of Rush v County of Suffolk, 35 A.D.3d 619, 826 N.Y.S.2d 640, 2006 N.Y. App. Div. LEXIS 15009 (N.Y. App. Div. 2d Dep't 2006).

Denial of petitioner's proceeding pursuant to N.Y. Gen. Mun. Law § 50-e(5) seeking leave to serve late notice of claim against a school was proper because, inter alia, an MRI report submitted by petitioner failed to demonstrate that his shoulder injury rendered petitioner incapacitated or disabled to such an extent that he could not have complied with the statutory requirement to serve a timely notice of claim, and there was no proof that, within the 90-day post-accident period or within a reasonable time thereafter, the school received notice of the facts supporting the claim; while petitioner's letter to the school's principal one day after the accident indicated that he fell from the top of auditorium steps in the school, it failed to apprise the school of the injury or of the contention that the steps, inter alia, were negligently installed or repaired. Moreover, the school's principal and nurse submitted affidavits explicitly contradicting petitioner's allegation that, due to conversations he had with them, they were aware of the defect which caused him to fall. Matter of Korman v Bellmore Pub. Schools, 62 A.D.3d 882, 879 N.Y.S.2d 194, 2009 N.Y. App. Div. LEXIS 3862 (N.Y. App. Div. 2d Dep't 2009).

Trial court erred in granting an injured worker's petition for leave to serve a late notice of claim on a city because he waited approximately six months after the alleged accident before seeking leave, his assertion that he was unaware of the notice of claim requirement was not a reasonable excuse, the record did not demonstrate that the city had timely actual knowledge of the claim, and it would be prejudiced by the delay. Matter of Bonaguro v City of New York, 122 A.D.3d 731, 996 N.Y.S.2d 144, 2014 N.Y. App. Div. LEXIS 7637 (N.Y. App. Div. 2d Dep't 2014).

Trial court properly denied a child's motion (filed on her behalf by her mother) for leave to serve a late notice of claim or to deem the late notice of claim timely served nunc pro tunc, and granted the cross-motion of a doctor and state hospital to dismiss the child's medical malpractice complaint because she failed to establish that the hospital and doctor had actual knowledge of the claim or that they would not be substantially prejudiced in maintaining a defense on the merits, and the child's infancy, without any showing of a nexus between the infancy and the delays, was insufficient to constitute a reasonable excuse for the failure to timely serve a notice of claim and in moving for leave. Hudson v Patel, 146 A.D.3d 758, 45 N.Y.S.3d 497, 2017 N.Y. App. Div. LEXIS 154 (N.Y. App. Div. 2d Dep't 2017).

Trial court properly denied a petition filed by a driver and passenger (the petitioners) for leave to serve a late notice of claim because a police accident report did not connect the petitioners' injuries to any negligent conduct on the part of a city employee, the employee's direct involvement in the accident itself, without more, was also insufficient to provide the city and its employee with actual notice of the essential facts constituting the claim, failed to proffer any excuse for the failure to serve a timely notice of claim or show that the 10-month delay would not substantially prejudice the ability of the city and the employee to investigate and defend against the claim. Matter of D'Agostino v City of New York, 146 A.D.3d 880, 46 N.Y.S.3d 635, 2017 N.Y. App. Div. LEXIS 308 (N.Y. App. Div. 2d Dep't 2017).

Mother of a seventh-grade student was not permitted to serve a late notice of claim upon the city board of education because while the mother alleged that the physical education teacher invented the exercise and was present when the student was injured, the mother failed to submit any evidence, inter alia, the city acquired actual knowledge of the essential facts underlying the claims, or that the city was not substantially prejudiced by the 11-month delay in serving a notice of claim. Matter of Ramos v Board of Educ. of the City of N.Y., 148 A.D.3d 909, 49 N.Y.S.3d 539, 2017 N.Y. App. Div. LEXIS 1787 (N.Y. App. Div. 2d Dep't 2017).

There was no merit to appellant's contention that a school district was equitably estopped from objecting to his late notice of claim based on its allegedly inadequate initial Freedom of Information Law (FOIL) responses, as there was no evidence that the district engaged in any improper conduct dissuading him from serving a timely notice of claim, and his purported reliance upon the FOIL responses in delaying the notice of claim was not justifiable under the circumstances. Kennedy v Oswego City School Dist., 148 A.D.3d 1790, 50 N.Y.S.3d 229, 2017 N.Y. App. Div. LEXIS 2493 (N.Y. App. Div. 4th Dep't 2017).

Pedestrian failed to show that her injuries and medical care constituted a reasonable excuse for her failure to timely serve a notice of claim on the city because the pedestrian had substantially healed after the fall on the sidewalk and no longer required any pain medication long before the expiration of the statutory 90-day period for timely filing her notice of claim; the pedestrian's late notice of claim, served without leave of court, did not provide the city with actual knowledge. Matter of Ashkenazie v City of New York, 165 A.D.3d 785, 85 N.Y.S.3d 508, 2018 N.Y. App. Div. LEXIS 6742 (N.Y. App. Div. 2d Dep't 2018).

Trial court acted within its discretion by not deeming a high school student's late notice of claim timely served nunc pro tunc on the Department of Education, regarding claims alleging sex discrimination and retaliation in violation of Title IX because the student did not demonstrate that the DOE acquired timely, actual knowledge of the essential facts constituting the claims. Doe v City of New York, 185 A.D.3d 659, 127 N.Y.S.3d 514, 2020 N.Y. App. Div. LEXIS 3847 (N.Y. App. Div. 2d Dep't 2020).

Plaintiffs were not permitted to serve a late notice of claim because the criminal complaint prepared by the police department failed to provide actual notice of the facts constituting plaintiffs' claims of, inter alia, negligent supervision and failure to provide adequate security, or that the decedent's brother was injured as a result of defendants' alleged negligence; the com-

plaint indicated only that the decedent was stabbed multiple times upon the body causing his demise. Melcer v City of New York, 185 A.D.3d 672, 127 N.Y.S.3d 507, 2020 N.Y. App. Div. LEXIS 3889 (N.Y. App. Div. 2d Dep't 2020).

150. —Denial of motion improper

A trial court erred in denying a motion for leave to file a late notice of claim under Gen. Mun. Law § 50-e by a worker injured when he inhaled coal-tar epoxy while working in a confined space, where the seriousness of the worker's injuries was not diagnosed until several months after the incident, and defendant county did not make any significant demonstration of prejudice. Passalacqua v County of Onondaga, 94 A.D.2d 949, 464 N.Y.S.2d 73, 1983 N.Y. App. Div. LEXIS 18420 (N.Y. App. Div. 4th Dep't 1983).

In a negligence action against a municipality to recover damages for personal injuries, Special Term abused its discretion in denying a motion for leave to serve a late notice of claim pursuant to Gen Mun Law § 50-e(5) based solely on the fact that plaintiffs failed to offer any excuse, other than their ignorance of the law, for their failure to serve a timely notice of claim, where the municipality and its insurer had both received actual notice of the essential facts constituting the claim within a short time after the accident, where the insurer sought to settle any potential claim for damage to plaintiffs' vehicle within 90 days after the accident, and where a medical authorization form was sent out by the insurer within that time period. Plass v Poughkeepsie, 102 A.D.2d 819, 476 N.Y.S.2d 375, 1984 N.Y. App. Div. LEXIS 18993 (N.Y. App. Div. 2d Dep't 1984).

Court improvidently exercised its discretion in denying claimants' request to extend time to serve notice of negligence claim against county hospital under CLS Gen Mun § 50-e since hospital had actual notice of facts of treatment that formed basis of alleged negligence by virtue of its possession of medical records pertaining to injured party's treatment at hospital, hospital did not demonstrate prejudice as result of delay, and claimants had sufficient reasons for delay. Strobel v County of Lewis, 147 A.D.2d 948, 537 N.Y.S.2d 707, 1989 N.Y. App. Div. LEXIS 1320 (N.Y. App. Div. 4th Dep't 1989).

Court abused its discretion in denying plaintiff's motion to extend time to serve notice of claim under CLS Gen Mun § 50-e where plaintiff timely served notice of claim for property damage within 2 days after occurrence of automobile accident involving one of defendant's vehicles, plaintiff alleged that nature and extent of her injuries were unknown to her at that time, and there was no substantial prejudice to defendant resulting from absence of notice for 10 months that plaintiff's damages included personal injuries. Hack v City of Syracuse, 256 A.D.2d 1226, 682 N.Y.S.2d 746, 1998 N.Y. App. Div. LEXIS 14399 (N.Y. App. Div. 4th Dep't 1998).

It was abuse of discretion to deny plaintiffs leave to serve late notice of claim where they had requested such relief in their opposition papers filed within one year and 90 days from date of accident, and defendant could not claim significant prejudice to its defense of claim. Lossino v New York City Transit Auth., 264 A.D.2d 383, 693 N.Y.S.2d 629, 1999 N.Y. App. Div. LEXIS 8517 (N.Y. App. Div. 2d Dep't 1999).

Court erred in denying plaintiff's application to serve late notice of claim where delay in filing application was merely 2 months, and there was no prejudice to defendant. Sykes v Buffalo Mun. Hous. Auth., 269 A.D.2d 848, 702 N.Y.S.2d 483, 2000 N.Y. App. Div. LEXIS 1795 (N.Y. App. Div. 4th Dep't 2000).

Trial court abused its discretion in denying an insurance company's application pursuant to N.Y. Gen. Mun. Law § 50-e(5) for leave to serve a late notice of claim against a city in relation to an incident in which a sewer backed up into an insured's home; although the insurance company offered no excuse for its delay, that failure was not fatal inasmuch as the insurance company sufficiently established that the city had actual knowledge of the essential facts approximately two weeks after the incident and that the city's insurer had notice within a reasonable time after the 90-day period, and there was no showing that the city would be prejudiced by the late service of the notice of claim. Nationwide Ins. Co. v Vill. of Alexandria Bay, 299 A.D.2d 855, 750 N.Y.S.2d 409, 2002 N.Y. App. Div. LEXIS 10841 (N.Y. App. Div. 4th Dep't 2002).

Trial court erred in denying an injured party's motion pursuant to N.Y. Gen. Mun. Law § 50-e(5) to serve a late notice of claim against a city in a personal injury action; the city had actual notice of the alleged injuries based on the fact that the police officers who allegedly assaulted the injured party would, as the city's employees, have had immediate knowledge of the events giving rise to this dispute, and because the city failed to show that it would be prejudiced as police and court records pertaining to the injured party's arrest, as well as the favorable disposition of charges against him, were presumably still in existence. Ansong v City of New York, 308 A.D.2d 333, 764 N.Y.S.2d 182, 2003 N.Y. App. Div. LEXIS 9334 (N.Y. App. Div. 1st Dep't 2003).

Trial court erred in denying a mother's motion pursuant to N.Y. Gen. Mun. Law § 50-e to file a late notice of claim against a housing authority alleging that a child ingested lead paint chips; the mother demonstrated a reasonable excuse for the delay, and showed that the authority had actual knowledge of the underlying facts. Frith v N.Y. City Hous. Auth., 4 A.D.3d 390, 771 N.Y.S.2d 392, 2004 N.Y. App. Div. LEXIS 1317 (N.Y. App. Div. 2d Dep't 2004).

Student's N.Y. Gen. Mun. Law § 50-e(5) petition to serve a late notice of claim against a board of education arising out of an alleged assault on school grounds should have been granted because, inter alia, the student demonstrated that the board acquired actual knowledge of facts of the claim within the statutory period or within reasonable time thereafter; the alleged assault took place in view of a school employee, the police were summoned, a prosecution ensued, and the student alleged, without contradiction, that school officials were on notice of threats previously made by the assailant against the student on school grounds. The student demonstrated that the board of education would not have been substantially prejudiced by the delay, and the fact that the student failed to provide a reasonable excuse for her failure to serve a timely notice of claim was not dispositive. Matter of Whittaker v New York City Bd. of Educ., 71 A.D.3d 776, 896 N.Y.S.2d 171, 2010 N.Y. App. Div. LEXIS 1942 (N.Y. App. Div. 2d Dep't 2010).

Trial court erred in granting a high school wrestler's application to file a late notice of claim as to a school district because it did not have actual knowledge of the essential facts constituting the claim until it received the wrestler's application that he was allegedly infected with herpes by wrestling the second district's student at a tournament. Matter of Ficek v Akron Cent. Sch. Dist., 144 A.D.3d 1601, 41 N.Y.S.3d 616, 2016 N.Y. App. Div. LEXIS 7413 (N.Y. App. Div. 4th Dep't 2016).

Trial court erred in rejecting a claimant's argument that the investigation provided the city with actual notice of the claim because negligence was the only theory of liability that could be implied by the claimant's conversations with the Department of Corrections employee, who could have determined who was in the room at the time of the alleged assault during the course of his investigation with a modicum of effort. Matter of Rodriguez v City of New York, 172 A.D.3d 556, 101 N.Y.S.3d 303, 2019 N.Y. App. Div. LEXIS 3915 (N.Y. App. Div. 1st Dep't 2019).

Trial court erred in denying the petitioner's petition for leave to deem a late notice of claim timely served nunc pro tunc and in dismissing that portion of the proceeding because the issue was not barred by the doctrines of collateral estoppel and res judicata where the issue was not litigated or decided by a prior federal order. Matter of Chodkowski v County of Nassau, 180 A.D.3d 778, 118 N.Y.S.3d 694, 2020 N.Y. App. Div. LEXIS 1133 (N.Y. App. Div. 2d Dep't 2020).

Trial court abused its discretion by not deeming a high school student's late notice of claim timely served nunc pro tunc on the Department of Education (DOE) because the DOE had actual knowledge, within the statutory period or reasonable time thereafter, of the facts constituting the negligent supervision and negligent infliction of emotional distress claims, arising as a result of an alleged rape, and the student established a lack of substantial prejudice to the DOE in maintaining a defense. Doe v City of New York, 185 A.D.3d 659, 127 N.Y.S.3d 514, 2020 N.Y. App. Div. LEXIS 3847 (N.Y. App. Div. 2d Dep't 2020).

151. Review

Court of Appeals will not review appellate division's exercise of sound discretion to grant or deny an appplication to file a late

notice of claim under General Municipal Law § 50-e. Stowe v Elmira, 31 N.Y.2d 814, 339 N.Y.S.2d 463, 291 N.E.2d 586, 1972 N.Y. LEXIS 978 (N.Y. 1972).

Ultimate discretion, under statute requiring notice of tort claims against municipal corporations be filed within 90 days after claim arises, in determining whether to grant leave to file notice of claim after expiration of 90 days must be exercised by the Appellate Division. Febles v New York, 44 A.D.2d 369, 355 N.Y.S.2d 147, 1974 N.Y. App. Div. LEXIS 5055 (N.Y. App. Div. 1st Dep't 1974).

The failure to timely file a notice of claim against a municipality is a defense which the municipality may raise for the first time on appeal. Hart v East Plaza, Inc., 62 A.D.2d 113, 403 N.Y.S.2d 928, 1978 N.Y. App. Div. LEXIS 10425 (N.Y. App. Div. 4th Dep't), app. dismissed, 45 N.Y.2d 706, 408 N.Y.S.2d 1025, 1978 N.Y. LEXIS 3070 (N.Y. 1978).

County defendants' appeal from order granting leave to serve late notice of claim did not enjoin plaintiff from serving his summons and complaint during pendency of appeal. Ramunno v County of Westchester, 224 A.D.2d 403, 637 N.Y.S.2d 481, 1996 N.Y. App. Div. LEXIS 888 (N.Y. App. Div. 2d Dep't), app. denied, 88 N.Y.2d 803, 645 N.Y.S.2d 445, 668 N.E.2d 416, 1996 N.Y. LEXIS 743 (N.Y. 1996).

Order granting motion for leave to file late notice of claim did not constitute law of the case, since such doctrine does not apply to appellate review of subordinate court's order. Hey v Town of Napoli, 265 A.D.2d 803, 695 N.Y.S.2d 643, 1999 N.Y. App. Div. LEXIS 9828 (N.Y. App. Div. 4th Dep't 1999).

Order denying petitioners' motion for leave to renew and reargue their prior application for leave to serve late notice of claim against city was not reviewable where they failed to perfect appeal from denial of prior application, which was dismissed for failure to prosecute, and that dismissal was adjudication on merits as to all issues that could have been reviewed therein. Gross v City of New York, 266 A.D.2d 214, 697 N.Y.S.2d 682, 1999 N.Y. App. Div. LEXIS 11090 (N.Y. App. Div. 2d Dep't 1999).

Supreme court's decision granting father's application to file late notice of claim against school district on behalf of student whose hand was severely injured in classroom metal sheering accident, and Appellate Division's review of that decision, were limited solely to claim on behalf of son, despite father's unilateral amendment of caption of action on his brief and counsel's assertion at oral argument that father had intended to assert derivative claim, where proposed notice of claim and application to allow late filing thereof made no reference to any derivative claim on behalf of father individually. Hayes v Peru Cent. Sch. Dist., 281 A.D.2d 794, 722 N.Y.S.2d 104, 2001 N.Y. App. Div. LEXIS 2504 (N.Y. App. Div. 3d Dep't 2001).

Trial court's denial of claimants' application pursuant to N.Y. Gen. Mun. Law § 50-e(5) to serve a late notice of claim on a city in a personal injury action was reversed; the appellate court exercised its discretion, as the delay was short and the city was not prejudiced. Rudloff v City of Rochester, 303 A.D.2d 1052, 756 N.Y.S.2d 818, 2003 N.Y. App. Div. LEXIS 2803 (N.Y. App. Div. 4th Dep't 2003).

Allowance of a late notice of claim was reversed and the action dismissed where a mother of an injured infant did not show that a school district had notice of the facts forming the basis of her negligent supervision claim within either 90 days or within a reasonable time thereafter; the only proof submitted was an incident report on the day following the accident stating only that, in attempting to lift a chair into an overhead position while carrying the chair from one classroom to another, the infant lost control and the chair struck him in the forehead. Conroy v Smithtown Cent. Sch. Dist., 3 A.D.3d 492, 770 N.Y.S.2d 428, 2004 N.Y. App. Div. LEXIS 249 (N.Y. App. Div. 2d Dep't 2004).

Petition to file a late notice of a claim against a county was improperly granted where: (1) the delay in filing was not attributable to their son's infancy; (2) the parents had retained counsel in 1995 and counsel had promptly obtained all medical records from the county; (3) the parents did not retain new counsel until six years later; (4) the parent's excuse that they were unaware of the possibility of commencing a lawsuit was not a reasonable excuse; and (5) the parents failed to show that the county would not be substantially prejudiced by the nine year delay between the alleged medical malpractice and their motion to file a late notice. The supreme court improvidently exercised its discretion in granting the petition and the court reversed that decision and ordered that the proceeding be dismissed. Flores v County of Nassau, 8 A.D.3d 377, 777 N.Y.S.2d 739, 2004 N.Y. App. Div. LEXIS 7847 (N.Y. App. Div. 2d Dep't), app. denied, 3 N.Y.3d 606, 785 N.Y.S.2d 23, 818 N.E.2d 665, 2004 N.Y. LEXIS 2250 (N.Y. 2004).

Where a mother suffered a ruptured uterus while hospitalized, gave birth to an infant with severe perinatal hypoxic injury, and had to undergo a total hysterectomy, the hospital had actual notice of her claim and would not be unduly prejudiced by the mother's delay in filing a timely notice of a claim against it. The supreme court improvidently exercised its discretion in denying her petition to file a late claim, especially where, under the circumstances, the absence of a reasonable excuse for failing to timely serve the notice was not a bar to granting leave to serve a late notice; the court deemed the notice served after reversing the denial of the mother's petition and ordering that the petition be granted. Hendershot v Westchester Med. Ctr., 8 A.D.3d 381, 777 N.Y.S.2d 743, 2004 N.Y. App. Div. LEXIS 7811 (N.Y. App. Div. 2d Dep't 2004).

Trial court properly denied an individual's petition for leave to serve a late notice of claim against a county health care corporation as the individual conceded that she filed her petition well after the one year and 90-day statute of limitations period had expired and there was no delayed discovery rule to toll the statute of limitations in actions to recover damages for personal injuries based on sexual abuse. N.M. v Westchester County Health Care Corp., 10 A.D.3d 421, 781 N.Y.S.2d 370, 2004 N.Y. App. Div. LEXIS 10310 (N.Y. App. Div. 2d Dep't 2004).

VII. Particular Grounds for Extension of Time

152. In general

Petitioner was properly denied an application for leave to serve a late notice of claim upon the city, where from the facts it appeared that petitioner had simply decided too late to seek legal assistance in bringing her claim. In re Martin, 100 A.D.2d 879, 473 N.Y.S.2d 1021, 1984 N.Y. App. Div. LEXIS 17997 (N.Y. App. Div. 2d Dep't 1984).

A motion for leave to serve a late notice of claim pursuant to Gen Mun Law § 50-3(5) was improperly denied, even though the only excuse given for late service was the negligence of a process server, where the notice of claim was served only two days beyond the statutory period, and the municipality conceded that it had acquired actual knowledge of the essential facts constituting the claim and that it had suffered no prejudice by reason of the delay; the lower court erred in concluding that petitioner's failure to establish the existence of one of the specific factors listed in Gen Mun Law § 50-e was fatal to his application. Patterson v Hempstead, 104 A.D.2d 975, 480 N.Y.S.2d 899, 1984 N.Y. App. Div. LEXIS 20415 (N.Y. App. Div. 2d Dep't 1984).

In personal injury action against city, plaintiffs were properly denied leave to serve late notice of claim under CLS Gen Mun § 50-e where application for leave was not brought until 10 months after accident and 7 months after expiration of prescribed 90-day period, plaintiffs failed to submit any medical affidavit or hospital records to document alleged physical disability which might have prevented timely service, duration of claimed incapacitation accounted for only ½ of 10-month period, and there was no evidence that city, its attorney or its insurance carrier acquired actual knowledge of essential facts constituting claim given fact that no police or accident report was prepared or filed; bare assertions by plaintiffs' counsel that city created dangerous condition were inadequate to establish actual knowledge. Carroll v New York, 130 A.D.2d 702, 516 N.Y.S.2d 23, 1987 N.Y. App. Div. LEXIS 46721 (N.Y. App. Div. 2d Dep't 1987).

In deciding whether leave to file late notice of claim against municipality should be granted, key factors are whether petitioner has demonstrated reasonable excuse for failure to serve timely notice of claim, whether municipality acquired actual knowledge of essential facts constituting claim within 90 days after claim arose or reasonable time thereafter, and whether

delay would substantially prejudice municipality in maintaining its defense on merits. Perry v New York, 133 A.D.2d 692, 519 N.Y.S.2d 862, 1987 N.Y. App. Div. LEXIS 51728 (N.Y. App. Div. 2d Dep't 1987).

Court properly granted town's motion to dismiss tort action where plaintiff (1) filed notice of claim well beyond 90-day period set forth in Gen Mun § 50-e, (2) failed to offer excuse for later filing or show that town was not prejudiced thereby, and (3) failed to appear for examination on his original notice of claim, as requested by town's attorney pursuant to CLS Gen Mun § 50-h. Baumblatt v Battalia, 134 A.D.2d 226, 520 N.Y.S.2d 571, 1987 N.Y. App. Div. LEXIS 50422 (N.Y. App. Div. 2d Dep't 1987).

Three key factors in determining whether leave to file late notice of claim should be granted are: (1) whether claimant has shown reasonable excuse for delay, (2) whether municipality had actual or constructive notice of essential facts constituting claim within 90 days of its accrual, or within reasonable time thereafter, and (3) whether delay would substantially prejudice municipality in maintaining its defense. Hilton v Town of Richland, 216 A.D.2d 921, 629 N.Y.S.2d 130, 1995 N.Y. App. Div. LEXIS 7251 (N.Y. App. Div. 4th Dep't 1995).

In determining whether to permit service of late notice of claim, court must focus on whether petitioner has reasonable excuse for failure to serve timely notice, whether municipality acquired actual notice of essential facts constituting claim within 90 days or reasonable time thereafter, and whether delay would substantially prejudice municipality in defending on merits. Singh v City Univ. of New York/ Bronx Community College, 223 A.D.2d 545, 636 N.Y.S.2d 130, 1996 N.Y. App. Div. LEXIS 148 (N.Y. App. Div. 2d Dep't 1996).

In deciding whether leave to serve late notice of claim should be granted, court should consider, as key factors, whether claimant has shown reasonable excuse for failing to serve timely notice of claim, whether municipality acquired actual knowledge of essential facts of claim within 90 days from its accrual or reasonable time thereafter, and whether delay would substantially prejudice municipality in maintaining its defense on merits. Resto v City of New York, 240 A.D.2d 499, 658 N.Y.S.2d 416, 1997 N.Y. App. Div. LEXIS 6067 (N.Y. App. Div. 2d Dep't), app. dismissed, 91 N.Y.2d 847, 667 N.Y.S.2d 680, 690 N.E.2d 490, 1997 N.Y. LEXIS 4067 (N.Y. 1997).

Absence of acceptable excuse is not necessarily fatal to application for leave to serve late notice of claim, but its absence in combination with other factors may serve as basis for denying application. Salahudeen Rashad Saafir v Metro-North Commuter R.R. Co., 260 A.D.2d 462, 688 N.Y.S.2d 224, 1999 N.Y. App. Div. LEXIS 3863 (N.Y. App. Div. 2d Dep't), app. denied, 93 N.Y.2d 816, 697 N.Y.S.2d 563, 719 N.E.2d 924, 1999 N.Y. LEXIS 2802 (N.Y. 1999).

Order denying appellant leave to serve late notice of claim on an authority was error because the authority's employees were directly involved in the relevant events and whose reports reflected actual knowledge sufficient to satisfy the statute; moreover, the reports, which identified the authority's employees who were present during the incident and gave reasonable notice from which it could have been inferred that a potentially actionable wrong had been committed by the authority and reflected a prompt and thorough investigation. Appellant further showed that the delay in serving the notice of claim, which was not particularly lengthy and was attributable in significant part to the nature of the information conveyed by the police department, did not cause the authority to suffer substantial prejudice in maintaining its defense. Matter of Boskin v New York City Tr. Auth., 44 A.D.3d 851, 843 N.Y.S.2d 454, 2007 N.Y. App. Div. LEXIS 10737 (N.Y. App. Div. 2d Dep't 2007).

Hospital was entitled to summary judgment in malpractice claim because patient failed to file a timely notice of claim, and failed to meet criteria that would have warranted exercise of discretion to permit her to file late notice under N.Y. Gen. Mun. Law § 50-e(5) as the patient failed to provide a reasonable excuse for the delay and failed to establish that the hospital had actual notice of the claim; the record showed that the delay was attributable to the fact that the patient's mother, while on notice of the infant's condition, lacked an understanding of the legal basis for the claim, but ignorance of the law was not a reasonable excuse. The patient failed to show that the hospital acquired actual notice of the facts constituting the claim from the medical record, as the record alone did not put the hospital on notice of alleged malpractice that might years later have given rise to another condition. Plaza v New York Health & Hosps. Corp. (Jacobi Med. Ctr.), 97 A.D.3d 466, 949 N.Y.S.2d 25, 2012 N.Y. App. Div. LEXIS 5519 (N.Y. App. Div. 1st Dep't 2012), aff'd, 21 N.Y.3d 983, 970 N.Y.S.2d 923, 993 N.E.2d 409, 2013 N.Y. LEXIS 1679 (N.Y. 2013).

Upon an adequate showing of one of the statutory grounds for extending the time to give notice of claim, and upon application within the maximum time limitation, the court has discretion to grant an extension of time. Stuto v New York, 84 N.Y.S.2d 812, 192 Misc. 935, 1948 N.Y. Misc. LEXIS 3677 (N.Y. Sup. Ct. 1948).

Subd 5 sets forth the sole grounds upon which leave may be granted to serve a late notice of claim under the above statute. Thompson v 9 West 117th St. Corp., 44 Misc. 2d 920, 255 N.Y.S.2d 440, 1964 N.Y. Misc. LEXIS 1243 (N.Y. Sup. Ct. 1964).

153. Incapacity defined

Incapacity, to serve as a ground for motion to extend time for serving notice of claim, means practical inability to execute the claim and to attend to its service. Smith v New York City Transit Authority, 18 A.D.2d 10, 238 N.Y.S.2d 250, 1963 N.Y. App. Div. LEXIS 4288 (N.Y. App. Div. 1st Dep't 1963).

154. Nature and extent of incapacity

Exercise of the court's discretion to grant an application for extension of time to serve notice of claim in behalf of an incapacitated claimant depends largely on the nature and extent of the incapacity established, the time of its occurrence, and its duration. A minor or temporary physical disability, which does not impair the mind or continue throughout the 90-day period, will not ordinarily justify an extension of time for notice. Haas v Cedarhurst, 298 N.Y. 757, 83 N.E.2d 156, 298 N.Y. (N.Y.S.) 757, 1948 N.Y. LEXIS 1307 (N.Y. 1948).

An application for leave to serve late notice of claim for damages for personal injuries upon a town was erroneously granted where it failed to show that failure to make timely service was due to mental or physical incapacity of the claimant. Lotrecchiano v Carmel, 22 A.D.2d 697, 253 N.Y.S.2d 774, 1964 N.Y. App. Div. LEXIS 3079 (N.Y. App. Div. 2d Dep't 1964).

In action by firefighter disabled in line of duty, it was abuse of discretion to deny leave to file late notice of claim where (1) injury report prepared on day of accident furnished city and fire department with actual knowledge of essential facts constituting firefighter's claim, (2) prejudicial impact of 7-month delay was substantially lessened by injury report and records of fire departmental medical staff who treated firefighter, and (3) firefighter's explanation (that he did not seek legal advice within statutory filing period because he was told by departmental medical staff that he would not suffer permanent injury) was reasonable; even if firefighter's excuse had been inadequate, it would not mandate different result since CLS Gen Mun § 50-e should be applied to do substantial justice. Swensen v New York, 126 A.D.2d 499, 511 N.Y.S.2d 20, 1987 N.Y. App. Div. LEXIS 41642 (N.Y. App. Div. 1st Dep't), app. denied, 70 N.Y.2d 602, 518 N.Y.S.2d 1024, 512 N.E.2d 550, 1987 N.Y. LEXIS 17402 (N.Y. 1987).

Claimant's inability to speak English does not constitute reasonable excuse for delay in filing notice of claim under CLS Gen Mun § 50-e. Sverdlin v City of New York, 229 A.D.2d 544, 645 N.Y.S.2d 843, 1996 N.Y. App. Div. LEXIS 7901 (N.Y. App. Div. 2d Dep't 1996).

Petitioner's failure to file notice of claim within 90-day period under CLS Gen Mun § 50-e(1)(a) was not excusable on ground that he was unaware of severity of his injuries prior to expiration of 90-day period where there was no affidavit by petitioner or medical evidence of his condition, and thus excuse offered by his counsel, who was not retained until after 90-day period had expired, had no probative value. McLaughlin v North Colonie Cent. Sch. Dist., 269 A.D.2d 658, 702 N.Y.S.2d 466, 2000 N.Y. App. Div. LEXIS 1089 (N.Y. App. Div. 3d Dep't 2000).

Oncologist's affidavit was unnecessary to establish a reasonable excuse for a decedent's failure to timely file a notice of a medical

malpractice claim against a county as the decdent's affidavit set forth her diagnosis and the dates of her hospitalizations, surgery, and chemotherapy treatments and stated that she was that she unable to attend to her needs due to her medical condition, that she was confined to bed and home, and that she was wheelchair-bound; further, the county had the decedent's medical records and thus had actual notice of the facts underlying the claim. Matter of Olsen v County of Nassau, 14 A.D.3d 706, 789 N.Y.S.2d 264, 2005 N.Y. App. Div. LEXIS 819 (N.Y. App. Div. 2d Dep't 2005).

155. Confinement in jail

A person who is serving a prison sentence on conviction for felony cannot seek an extension of time to serve notice of claim against a municipality after expiration of the 90-day period while deprived of civil rights under former § 510 of the Penal Law. Burns v New York, 21 A.D.2d 767, 250 N.Y.S.2d 680, 1964 N.Y. App. Div. LEXIS 3508 (N.Y. App. Div. 1st Dep't 1964).

Claimant's application to file late notice of claim against city for false imprisonment denied where, although he was in county jail or imprisoned in another state for part of the 90-day period following accrual of his cause of action, he had approximately 3 weeks during the 90-day period during which he was not incarcerated in which to file his claim. Clair v Utica, 72 Misc. 2d 547, 339 N.Y.S.2d 616, 1972 N.Y. Misc. LEXIS 2224 (N.Y. Sup. Ct. 1972).

156. —Hospitalization of prisoner

Trend of the cases indicates more liberality in interpreting subd. 5 of this section, and there was no abuse of discretion in granting an extension of time to serve notice of claim beyond the 90-day period for some six weeks following claimant's discharge from a hospital with respect to injuries sustained from a stab wound inflicted by a fellow jail-mate in connection with which emergency surgery and follow-up treatment kept him hospitalized from October 24 of one year to March 15 of the next. Shane v County of Albany, 20 A.D.2d 746, 246 N.Y.S.2d 837, 1964 N.Y. App. Div. LEXIS 4398 (N.Y. App. Div. 3d Dep't 1964).

The court may grant leave to an adult claimant to serve a notice of claim after the 90-day period only where the claimant had been mentally or physically incapacitated, and, by reason of such disability, has failed to serve a notice of claim within the time specified. The incapacity of his attorney is not one of the grounds for allowing such permission. Ostrander v Syracuse, 40 A.D.2d 622, 336 N.Y.S.2d 558, 1972 N.Y. App. Div. LEXIS 3907 (N.Y. App. Div. 4th Dep't 1972), aff'd, 33 N.Y.2d 960, 353 N.Y.S.2d 732, 309 N.E.2d 132, 1974 N.Y. LEXIS 1751 (N.Y. 1974).

Court abused its discretion in refusing to permit filing of late notice of claim for conscious pain and suffering where application was made less than 2 ½ months after expiration of statutory period, delay was attributable, in large part, to illness of counsel, and there was no showing of prejudice to defendant. Baker v New York City Health & Hospitals Corp., 44 A.D.2d 578, 353 N.Y.S.2d 493, 1974 N.Y. App. Div. LEXIS 5449 (N.Y. App. Div. 2d Dep't), app. dismissed, 34 N.Y.2d 943, 359 N.Y.S.2d 562, 316 N.E.2d 876, 1974 N.Y. LEXIS 1402 (N.Y. 1974), app. denied, 34 N.Y.2d 521, 1974 N.Y. LEXIS 2770 (N.Y. 1974), aff'd, 36 N.Y.2d 925, 373 N.Y.S.2d 539, 335 N.E.2d 847, 1975 N.Y. LEXIS 2021 (N.Y. 1975).

In personal injury action against county, inmate would be permitted to serve late notice of claim despite her lack of acceptable excuse for failure to serve timely notice since her injury occurred while she was incarcerated and she was treated at county medical center; county apparently had actual knowledge of essential facts of claim, and there was no indication that it was substantially prejudiced by delay. Rodriguez v County of Nassau, 126 A.D.2d 536, 510 N.Y.S.2d 658, 1987 N.Y. App. Div. LEXIS 41673 (N.Y. App. Div. 2d Dep't 1987).

An inmate's physical disability while in the hospital as the result of an accident incurred while working in a prison and the refusal of the prison authorities to permit him to communicate with a lawyer or with the Commissioner of Correction constituted such physical disability as, under the statute, would permit the granting of an application to serve a late notice of claim. Jones v New York, 12 Misc. 2d 911, 178 N.Y.S.2d 61, 1958 N.Y. Misc. LEXIS 3083 (N.Y. Sup. Ct. 1958).

157. Matters involving counsel; incapacity

Injuries in a bus accident, not amounting to such mental or physical disability as would cause the failure to serve notice of claim under this section, consultations with specialists, an accident to injured party's attorney, and uncertainty as to extent of injuries, are not sufficient excuse for failure to file notice of claim within the required time limit, sub 2 of this section permitting the setting out of injuries so far as then practicable, and sub 6 permitting later amendment. White v New York, 87 N.Y.S.2d 446, 194 Misc. 562, 1949 N.Y. Misc. LEXIS 1938 (N.Y. Sup. Ct.), app. dismissed, 276 A.D. 765, 93 N.Y.S.2d 151, 1949 N.Y. App. Div. LEXIS 3247 (N.Y. App. Div. 1949).

The excuse for failure to make timely service, that claimant's attorney was ill for a short time prior to service, and that a clerk in the Comptroller's office stated that it was unnecessary to serve notice, are without merit. Krauss v Board of Education, 103 N.Y.S.2d 939, 199 Misc. 505, 1951 N.Y. Misc. LEXIS 1693 (N.Y. Sup. Ct. 1951).

158. —Mistake

An application for leave to serve notice of claim under this section after expiration of the time prescribed therefor was improperly granted where the reason given for failure to serve timely notice was misinformation of attorney for claimant as to date of the accident, notwithstanding it appeared that claimant was an elderly lady who could neither read, write, nor understand English and her mistake in informing counsel as to date of the accident occurred while she was suffering pain, there was no police blotter report of the accident from which the date could be ascertained, and the notice served was actually served within 90 days from date of the occurrence as mistakenly stated by claimant to her attorney. Gugliotto v New York, 10 A.D.2d 986, 203 N.Y.S.2d 96, 1960 N.Y. App. Div. LEXIS 9719 (N.Y. App. Div. 2d Dep't 1960), aff'd, 9 N.Y.2d 738, 214 N.Y.S.2d 349, 174 N.E.2d 332, 1961 N.Y. LEXIS 1465 (N.Y. 1961).

An application of leave to serve a late notice of claim denied where no physical or mental incapacity of petitioner was shown, and the only explanation offered was the mistake in the office of the attorney. Cavaliere v New York City Transit Authority, 36 A.D.2d 532, 318 N.Y.S.2d 584, 1971 N.Y. App. Div. LEXIS 4914 (N.Y. App. Div. 2d Dep't 1971).

Supreme Court acted within its discretion in granting leave to serve late notice of claim against town pursuant to CLS Gen Mun § 50-e, since delay was caused by excusable error as to which public corporation was responsible for monitoring traffic on road, application to serve late notice was made promptly after discovery of error, and town failed to demonstrate that it was prejudiced in investigating and preparing its defense in light of existence of detailed accident report by town police officer, town's actual knowledge of essential facts of claim, and town's receipt of notice within 5 months of statutory deadline, during which time there had been no change in accident situs. Cannistra v Putnam Valley, 124 A.D.2d 801, 508 N.Y.S.2d 524, 1986 N.Y. App. Div. LEXIS 62121 (N.Y. App. Div. 2d Dep't 1986).

It was abuse of discretion to deny application for leave to file late notice of claim for injuries sustained by plaintiff in fall down stairwell at state university dormitory where (1) plaintiff offered reasonable excuse for delay because her counsel was misadvised by Attorney General regarding proper party defendant, (2) defendant received actual knowledge of claim shortly after 90-day statutory period, and (3) defendant failed to establish prejudice if motion were granted. Haley v Dormitory Authority of State, 133 A.D.2d 527, 519 N.Y.S.2d 900, 1987 N.Y. App. Div. LEXIS 50007 (N.Y. App. Div. 4th Dep't 1987).

Plaintiff was properly permitted to file late notice of claim against city housing authority where (1) he was arrested for driving while intoxicated by housing authority police officer, who allegedly complied with proper procedure by parking plaintiff's car on public street, (2) plaintiff alleged that he was neither advised of location of car nor given keys to car, and that car was never again found, (3) plaintiff's attorney filed original notice against city in good faith belief that plaintiff was arrested by city police officer, and (4) housing authority did not claim prejudice by delay. Copeland v New York City Housing Authority, 173 A.D.2d

335, 575 N.Y.S.2d 283, 1991 N.Y. App. Div. LEXIS 7254 (N.Y. App. Div. 1st Dep't 1991).

Court abused its discretion in granting petitioner resident of Georgia leave to file late notice of claim against village under CLS Gen Mun § 50-e(5) in connection with injuries she sustained when her automobile was struck by allegedly decayed tree in village, where only timely submission was letter written by Georgia attorney retained by petitioner, which purported to be notice of claim but was not verified, since (1) record did not show that village obtained actual or constructive notice of claim from either letter in question or accident report, in that neither document indicated that tree was located on property owned by village or was in decayed condition, and (2) ignorance of requirements of § 50-e by petitioner's Georgia attorney was not valid excuse for noncompliance. Wertenberger v Briarcliff Manor, 175 A.D.2d 922, 573 N.Y.S.2d 757, 1991 N.Y. App. Div. LEXIS 11316 (N.Y. App. Div. 2d Dep't 1991).

Where the injured party did not file a timely notice of claim against the county, the injured party was not entitled to leave to serve a late notice of claim pursuant to N.Y. Gen. Mun. Law § 50-e(5); the delay was a result of the unacceptable excuse of law office failure, there was no support for the contention that the county acquired actual knowledge of the essential facts constituting the claim within the appropriate time period, and the injured party did not establish that the delay in serving the notice of claim would not have substantially prejudiced the county in maintaining the defense on the merits. Belenky v Nassau Cmty. College, 4 A.D.3d 422, 771 N.Y.S.2d 379, 2004 N.Y. App. Div. LEXIS 1346 (N.Y. App. Div. 2d Dep't 2004).

159. —Miscellaneous matters

In a proceeding for leave to serve a late notice of claim against the city, leave to serve a late notice would be denied where counsel's delinquency in failing to timely commence the action would not be an acceptable excuse. Ferro v New York, Dep't of Correction, 88 A.D.2d 914, 450 N.Y.S.2d 571, 1982 N.Y. App. Div. LEXIS 17248 (N.Y. App. Div. 2d Dep't 1982).

Special Term properly excused plaintiff's delay in filing notice of claim pursuant to CLS Gen Mun § 50-e in action against county hospital where hospital had actual notice of facts constituting claim by virtue of its possession of medical records pertaining to plaintiff's care at hospital, action was brought regarding hospital's care so that hospital's lack of actual knowledge of subsequent care at another hospital was not fatal to plaintiff's motion, hospital did not show any prejudice to itself as result in delay and it was unlikely any prejudice could be shown given its actual knowledge, and counsel's failure to file notice of claim for 8 months, although possibly constituting law office failure, did not preclude excusing delay. Kavanaugh v Memorial Hospital & Nursing Home, 126 A.D.2d 930, 511 N.Y.S.2d 188, 1987 N.Y. App. Div. LEXIS 42029 (N.Y. App. Div. 3d Dep't 1987).

Claimant's 4-month delay in seeking leave to file late notice of claim was excusable where she did not learn of her attorney's death for 4 months, and her new attorney was not able to obtain her file from late attorney's widow until one month thereafter. Green v Manhattan & Bronx Surface Transit Operating Authority, 164 A.D.2d 851, 559 N.Y.S.2d 734, 1990 N.Y. App. Div. LEXIS 10816 (N.Y. App. Div. 1st Dep't 1990).

Claimant, who was shot by off-duty Housing Authority detective, was entitled to leave to serve late notice of claim under CLS Gen Mun § 50-e(5), even though he delayed 5 months in serving notice of claim on Authority, since claimant's counsel had good faith belief that detective was employed by city, Authority had received contemporaneous reports of incident, and Authority was not prejudiced by delay. Pungello v New York City Housing Authority, 181 A.D.2d 511, 580 N.Y.S.2d 359, 1992 N.Y. App. Div. LEXIS 3337 (N.Y. App. Div. 1st Dep't 1992).

Law office failure is not acceptable excuse for failure to timely comply with notice of claim provisions of CLS Gen Mun § 50-e. Serrano v New York City Hous. Auth., 197 A.D.2d 694, 602 N.Y.S.2d 935, 1993 N.Y. App. Div. LEXIS 9963 (N.Y. App. Div. 2d Dep't 1993).

Petitioners' mere contention that, for unknown reasons, their prior counsel simply failed to seek leave to serve late notice of claim was not valid and acceptable excuse for delay. Santana v City of New York, 211 A.D.2d 636, 621 N.Y.S.2d 884, 1995 N.Y. App. Div. LEXIS 100 (N.Y. App. Div. 2d Dep't 1995).

It was abuse of discretion to grant petition for leave to serve late notice of claim against New York City Housing Authority where petitioner's counsel merely claimed that it only recently noted that building in which petitioner lived and was injured was owned by Authority and that initial draft of notice of claim had been misplaced; further, it was not shown that Authority acquired actual knowledge of claim within 90-day period under CLS Gen Mun § 50-e(1)(a). King v New York City Hous. Auth., 274 A.D.2d 482, 711 N.Y.S.2d 33, 2000 N.Y. App. Div. LEXIS 7839 (N.Y. App. Div. 2d Dep't 2000).

Slip-and-fall plaintiff was not entitled to serve late notice of claim against city housing authority where (1) delay was result of law office failure, which is not acceptable excuse for failure to timely comply with CLS Gen Mun § 50-e, (2) authority did not have actual knowledge of essential facts of claim within appropriate period, and (3) plaintiff did not prove that delay in serving notice of claim would not substantially prejudice authority in maintaining defense on merits. Kittredge v New York City Hous. Auth., 275 A.D.2d 746, 713 N.Y.S.2d 219, 2000 N.Y. App. Div. LEXIS 9267 (N.Y. App. Div. 2d Dep't 2000).

Where petitioners, the parents of a child, individually and as the child's parents and guardians, filed an application pursuant to N.Y. Gen. Mun. Law § 50-e(5) for leave to file a late notice of claim against respondents, a county and its public health department, related to injuries from lead poisoning, and petitioners claimed that the delay in filing the application was due to a change in the law following a certain appellate opinion and due to their retention of new counsel, these excuses for the delay were not reasonable since the application was made 19 months after the appellate opinion in issue was released and more than 12 months after petitioners retained their new counsel. Lanphere v County of Washington, 301 A.D.2d 936, 754 N.Y.S.2d 125, 2003 N.Y. App. Div. LEXIS 341 (N.Y. App. Div. 3d Dep't 2003).

City hospital corporation's conclusory assertions, made solely by its attorney, that it was prejudiced by reason of the lengthy delay was insufficient to meet its burden of overcoming the patient's showing of lack of prejudice for filing a late notice of claim under N.Y. Gen. Mun. Law § 50-e(5). Gibbs v City of New York, 22 A.D.3d 717, 804 N.Y.S.2d 393, 2005 N.Y. App. Div. LEXIS 11432 (N.Y. App. Div. 2d Dep't 2005).

But the mere fact that some details were given to an attorney shortly after the accident did not affect the propriety of extension of time obtained by the attorney for serving a notice of tort claim against the city. Cohen v New York, 90 N.Y.S.2d 884, 1949 N.Y. Misc. LEXIS 2516 (N.Y. Sup. Ct. 1949).

160. Death of claimant

While a notice of claim for wrongful death may be given by the widow or next of kin of a decedent against the municipality, the only "claimant" who has the capacity to prosecute the claim is the administrator or executor and the fact that the next of kin are infants does not constitute them "claimants" within the meaning of subd. 5 of this section or permit the court to grant them time extensions for late filing of claims under subd. 5 after the maximum time period for serving notice of claim has expired. Lynn v New York, 18 A.D.2d 1076, 239 N.Y.S.2d 448, 1963 N.Y. App. Div. LEXIS 4056 (N.Y. App. Div. 2d Dep't), aff'd, 13 N.Y.2d 955, 244 N.Y.S.2d 457, 194 N.E.2d 423, 1963 N.Y. LEXIS 927 (N.Y. 1963).

Trial court erred in denying petitioner's application for leave to serve a late notice of claim for medical malpractice and loss of consortium upon the New York City Health and Hospitals Corporation where petitioner's deceased was physically incapacitated and died during the time within which notice should have been served and where petitioner's claim for loss of consortium was not a derivative but independent claim; decedent's incapacitation and death could not be said to effect service of notice of the survivor's claim since it is rare if not unknown to try a consortium claim separately from the negligence action thereby permitting late service under the new elastic standards of Gen Mun Law § 50-e(5). Centelles v New York City Health & Hospitals Corp., 84

A.D.2d 826, 444 N.Y.S.2d 193, 1981 N.Y. App. Div. LEXIS 16050 (N.Y. App. Div. 2d Dep't 1981).

Death or incapacity of party asserting claim is statutory ground on which leave to file late notice of claim against municipality may be predicated if there is no substantial prejudice to defendant. Banegas-Nobles v New York City Health & Hosps. Corp., 184 A.D.2d 379, 585 N.Y.S.2d 376, 1992 N.Y. App. Div. LEXIS 8525 (N.Y. App. Div. 1st Dep't 1992).

161. —Necessity that death occur within statutory period

If the person who had a claim against a municipality or public corporation for injuries sustained dies within the 90-day period for serving notice of his claim, without having given the required notice, the court, upon due and timely application, can grant a reasonable extension of time for service of notice, thereby saving the decedent's right of action for damages for the injuries sustained, including pain and suffering. Mulligan v Westchester County, 272 A.D. 927, 71 N.Y.S.2d 152, 1947 N.Y. App. Div. LEXIS 4249 (N.Y. App. Div. 1947).

Petitioner was not entitled to an order directing a city transit authority to accept a supplemental notice of claim for damages where (1) the notice was served more than 90 days after the claim arose; (2) circumstances negated a waiver by the authority of the statutory requirements as to the manner of service of an irregular but timely notice; (3) the authority did not examine the claimant; and (4) no showing was made that failure to serve was due to any disability and no explanation was given for claimant's failure to move for the order until more than 8 months after she served the untimely claim. Golden v New York City Transit Authority, 4 A.D.2d 954, 167 N.Y.S.2d 874, 1957 N.Y. App. Div. LEXIS 4014 (N.Y. App. Div. 2d Dep't 1957).

The 90-day period for service of notice of a claim is fully applicable to a claim based on conscious pain and suffering of a person since deceased, in the absence of a proper and timely application for an extension of time by reason of his death within the 90-day period. Cavagnol v Orangetown, 17 Misc. 2d 943, 185 N.Y.S.2d 720, 1959 N.Y. Misc. LEXIS 3982 (N.Y. Sup. Ct. 1959).

162. —Applicability of disability to administrator

Once an administrator has been duly appointed for the estate of a decedent, the 90-day period for serving notice of a wrongful death claim starts to run, there is no provision for extending it, and a court is powerless to extend it if the administrator fails to serve it within the 90-day period following his appointment. Mulligan v New York, 273 A.D. 152, 75 N.Y.S.2d 28, 1947 N.Y. App. Div. LEXIS 2944 (N.Y. App. Div. 1947).

The administratrix of a decedent, seeking to enforce a death claim against a municipality, is not one to whom the court may extend time for service of notice of claim under subd. 5 of this section. Lynn v New York, 18 A.D.2d 1076, 239 N.Y.S.2d 448, 1963 N.Y. App. Div. LEXIS 4056 (N.Y. App. Div. 2d Dep't), aff'd, 13 N.Y.2d 955, 244 N.Y.S.2d 457, 194 N.E.2d 423, 1963 N.Y. LEXIS 927 (N.Y. 1963).

With respect to a claim for wrongful death, the administratrix of the decedent is not within the protective ambit of subd. 5 of this section and the court accordingly lacks discretionary power to extend her time for filing notice of claim. Boston v New York City Transit Authority, 20 A.D.2d 709, 247 N.Y.S.2d 177, 1964 N.Y. App. Div. LEXIS 4471 (N.Y. App. Div. 2d Dep't 1964).

While the court has discretionary power to extend the time for service of notice of claim under this section on the ground of mental or physical incapacity of claimant, prior to his death, an extension of time should not be granted where his administratrix, applying for such extension, does not sufficiently show that incapacity was the cause of claimant's failure to file timely notice of claim or make application for an extension within a reasonable time. Boston v New York City Transit Authority, 20 A.D.2d 709, 247 N.Y.S.2d 177, 1964 N.Y. App. Div. LEXIS 4471 (N.Y. App. Div. 2d Dep't 1964).

Where the decedent's administratrix made no effort to file a claim as required under subdivision 1 of this section until at least eight months beyond the permissive 90 days, it was an abuse of the trial court's discretion to grant a motion for leave to file a late notice where her incapacity to file the claim timely was not established. Blecker v New York, 24 A.D.2d 714, 263 N.Y.S.2d 348, 1965 N.Y. App. Div. LEXIS 3348 (N.Y. App. Div. 1st Dep't 1965).

With respect to claim for wrongful death, administrator of estate is not one within purview of General Municipal Law § 50-e, subdivision 5 relating to those for whom court, in exercise of discretion, may extend time for service of notice of claim; however, as to action for conscious pain and suffering accrued during lifetime of decedent, court did have discretionary power to grant leave to serve notice of claim within reasonable time after 90-day period expired. Baker v New York City Health & Hospitals Corp., 44 A.D.2d 578, 353 N.Y.S.2d 493, 1974 N.Y. App. Div. LEXIS 5449 (N.Y. App. Div. 2d Dep't), app. dismissed, 34 N.Y.2d 943, 359 N.Y.S.2d 562, 316 N.E.2d 876, 1974 N.Y. LEXIS 1402 (N.Y. 1974), app. denied, 34 N.Y.2d 521, 1974 N.Y. LEXIS 2770 (N.Y. 1974), aff'd, 36 N.Y.2d 925, 373 N.Y.S.2d 539, 335 N.E.2d 847, 1975 N.Y. LEXIS 2021 (N.Y. 1975).

Subsequent to amendment of CLS Gen Mun § 50-e(5) in 1976, administratrix of claimant's estate is person entitled to seek relief pursuant to that statute. Smiley-Walsch v New York City Housing Authority, 172 A.D.2d 382, 568 N.Y.S.2d 762, 1991 N.Y. App. Div. LEXIS 4949 (N.Y. App. Div. 1st Dep't 1991).

163. —Municipal knowledge of cause of death

Where there was no doubt that defendant had full and complete knowledge of the occurrence causing injury followed by death of the decedent about 30 days after the injury, from police blotter reports on file and reports of its employees, but notice of claim for conscious pain and suffering was not served until more than three months after date of injury and the appointment of a temporary administrator, under subds. 5 and 6 of this section an order was entered holding that service of the notice should be deemed to have been made within the proper time. Curry v New York City Transit Authority, 23 Misc. 2d 331, 200 N.Y.S.2d 169, 1960 N.Y. Misc. LEXIS 3609 (N.Y. Sup. Ct. 1960).

164. —Timeliness of motion for extension

A cause of action for conscious pain and suffering accrues during the lifetime of the decedent and an extension of time to serve notice of claim can be granted within a reasonable time after the 90-day period has expired, but not as late as almost a year after decedent's death and more than ten months after appointment of an administrator without sufficient explanation of the delay. Lynn v New York, 18 A.D.2d 1076, 239 N.Y.S.2d 448, 1963 N.Y. App. Div. LEXIS 4056 (N.Y. App. Div. 2d Dep't), aff'd, 13 N.Y.2d 955, 244 N.Y.S.2d 457, 194 N.E.2d 423, 1963 N.Y. LEXIS 927 (N.Y. 1963).

The time for filing notice of claim for wrongful death against a municipality cannot be prolonged indefinitely, notwithstanding it does not begin to run until appointment of an executor or administrator, because (former) § 130 of the Decedent Estate Law requires commencement of an action for wrongful death within two years after decedent's death. Application of Sellars, 20 A.D.2d 350, 246 N.Y.S.2d 937, 1964 N.Y. App. Div. LEXIS 4356 (N.Y. App. Div. 1st Dep't 1964).

In a proceeding to permit the filing of a late notice of claim, it was held that with respect to a claim for personal injuries a motion made more than one year after the happening of the event on which the claim was based was not timely and must be denied, although a notice with respect to a claim for wrongful death was timely since it was filed within the statutory period after plaintiff's appointment as administratrix. Hall v New York City Transit Authority, 32 A.D.2d 932, 303 N.Y.S.2d 204, 1969 N.Y. App. Div. LEXIS 3406 (N.Y. App. Div. 2d Dep't 1969).

Leave of court to serve notice of a claim against a municipality for personal injuries in behalf of the injured party's estate after the statutory time limit has expired, will be granted where service of the motion for leave to serve was made on the corporation fourteen days after the appointment of an administrator and only seventy-seven days after the accident and it is shown that the decedent's family did not learn of the injury until the medical examiner's report was received, after which it was necessary to make investigations before legal action could be taken. Raymond v New York, 88 N.Y.S.2d 73, 194 Misc. 686, 1949 N.Y. Misc. LEXIS 2044 (N.Y. Sup. Ct. 1949).

A delay of nine months in filing a claim for pain and suffering, where the decedent died before the time limited for service of notice, was not a reasonable time and the court in its discretion denied a motion to serve a notice of claim. Cooperstein v New York, 12 Misc. 2d 473, 173 N.Y.S.2d 672, 1958 N.Y. Misc. LEXIS 3566 (N.Y. Sup. Ct. 1958).

165. Evidence unavailable; extent of injuries

In a patient's medical malpractice action against a city hospital, the patient's application to serve a late notice of claim on the city would be granted where the patient had been unaware of any negligence of the hospital in treating an injury to his right knee until the patient was informed by his physician of the possibility of negligence a considerable time after the treatment, and where the city and hospital had actual knowledge of the essential facts constituting the claim within 90 days after the claim arose. Ansaldo v New York, 92 A.D.2d 557, 459 N.Y.S.2d 302, 1983 N.Y. App. Div. LEXIS 16787 (N.Y. App. Div. 2d Dep't 1983).

Father was not entitled to serve late notice of claim in his action on behalf of his son (who was seriously injured in failed suicide attempt) despite allegations that he did not previously know that some brain damage sustained by his son could have resulted from negligence on part of village rescue squad; village clearly lacked actual knowledge of essential facts underlying claim, and father's one-year delay in seeking leave to serve late notice deprived village of chance to effectively investigate incident and preserve relevant evidence. Albanese v Floral Park, 128 A.D.2d 611, 512 N.Y.S.2d 867, 1987 N.Y. App. Div. LEXIS 44303 (N.Y. App. Div. 2d Dep't 1987).

Application for leave to serve late notice of claim was properly denied, despite contention that delay resulted from belated discovery that petitioner's injuries were permanent, where petitioner conceded that he retained counsel and commenced action against various other individuals prior to learning of permanent nature of injuries. Santana v City of New York, 211 A.D.2d 636, 621 N.Y.S.2d 884, 1995 N.Y. App. Div. LEXIS 100 (N.Y. App. Div. 2d Dep't 1995).

Court improperly denied leave to file late notice of claim against housing authority where (1) plaintiff was allegedly injured when he tripped over pipe protruding from broken chain link fence in courtyard of housing project on September 26, 1992, (2) police department accident report was prepared on next day and indicated that copy was forwarded to authority, (3) plaintiff consulted counsel on December 31, 1992, shortly after he learned that his injuries would require surgery, (4) notice of claim was served on January 8, 1993, and (5) authority did not suffer substantial prejudice. Castellano v New York City Hous. Auth., 212 A.D.2d 606, 622 N.Y.S.2d 546, 1995 N.Y. App. Div. LEXIS 1453 (N.Y. App. Div. 1st Dep't 1995).

Plaintiff was properly granted leave to file late notice of claim against city housing authority arising from injury allegedly incurred from lack of handrails on staircase where he offered, as excuse for filing notice 6 ½ months after accident, that he did not ascertain severity of injury until 3 months after his accident; also, underlying facts of claim became known to authority shortly after expiration of 90-day statutory time period. Lopez v New York City Hous. Auth., 225 A.D.2d 492, 639 N.Y.S.2d 389, 1996 N.Y. App. Div. LEXIS 3262 (N.Y. App. Div. 1st Dep't 1996).

Court properly denied petitioner's application for leave to serve late notice of claim, which was not made until 14 months after accident, even though she asserted that she was unaware that second vehicle involved in accident was municipal vehicle, since she conceded that she received police accident report, which revealed vehicle's ownership some 9 months before instant proceeding was commenced, and police report, which briefly described accident, did not provide city with notice of nature of petitioner's claim. Amin v City of New York, 243 A.D.2d 467, 663 N.Y.S.2d 93, 1997 N.Y. App. Div. LEXIS 9346 (N.Y. App. Div. 2d Dep't 1997).

It was proper to deny petitioner's application to serve late notice of claim, despite his assertion that he did not know that he sustained bone fractures, and not just soft tissue injury, until some 10 months after accident, where there was no medical evidence explaining why serious nature of injury took so long to become apparent and diagnose, and passage of 11 months between time of accident and making of instant application prejudiced city's ability to investigate alleged sidewalk defect effectively. Lefkowitz v City of New York, 272 A.D.2d 56, 707 N.Y.S.2d 316, 2000 N.Y. App. Div. LEXIS 4913 (N.Y. App. Div. 1st Dep't 2000).

Claimant seeking to serve late notice of claim against city housing authority had reasonable excuse for her delay where (1) during initial 90-day period, she was unaware of seriousness and permanency of her injury and unaware that apartment complex at which accident occurred was owned by authority, and (2) any additional delay between date of her consultation with her attorney and date of her motion under CLS Gen Mun § 50-e(5) was minimal. Greene v Rochester Hous. Auth., 273 A.D.2d 895, 709 N.Y.S.2d 767, 2000 N.Y. App. Div. LEXIS 6874 (N.Y. App. Div. 4th Dep't 2000).

Proffered excuse for failing to serve timely notice of malpractice claim—that patient did not discover her torn Achilles tendon until 10 months after surgery—could not be accepted without supporting medical evidence explaining delay in discovery and diagnosis. Eaddy v County of Nassau, 282 A.D.2d 675, 723 N.Y.S.2d 408, 2001 N.Y. App. Div. LEXIS 3990 (N.Y. App. Div. 2d Dep't 2001).

When an infant sought leave, pursuant to N.Y. Gen. Mun. Law § 50-e(5), to serve late notice of a negligent supervision claim on a school district, after the infant was injured by another student in gym class, the infant was not entitled to serve late notice because the infant's excuse for not serving timely notice, which was that the extent of the infant's injuries was unknown within 90 days of the incident, was insufficient. Matter of Scolo v Central Islip Union Free School Dist., 40 A.D.3d 1104, 838 N.Y.S.2d 577, 2007 N.Y. App. Div. LEXIS 6632 (N.Y. App. Div. 2d Dep't 2007).

Injuries in a bus accident, not amounting to such mental or physical disability as would cause the failure to serve notice of claim under this section, consultations with specialists, an accident to injured party's attorney, and uncertainty as to extent of injuries, are not sufficient excuse for failure to file notice of claim within the required time limit, sub 2 of this section permitting the setting out of injuries so far as then practicable, and sub 6 permitting later amendment. White v New York, 87 N.Y.S.2d 446, 194 Misc. 562, 1949 N.Y. Misc. LEXIS 1938 (N.Y. Sup. Ct.), app. dismissed, 276 A.D. 765, 93 N.Y.S.2d 151, 1949 N.Y. App. Div. LEXIS 3247 (N.Y. App. Div. 1949).

Where an estate administrator filed an untimely notice of claim against the New York City Health and Hospitals Corporation (HHC) because the medical malpractice claim accrued on the day the decedent was discharged from the HHC hospital and continuous treatment did not toll the statute of limitations, equitable estoppel barred HHC's statute of limitations defense because HHC delayed in furnishing a complete set of records. Walker v New York City Health & Hosps. Corp., 234 N.Y.L.J. 114, 2005 N.Y. Misc. LEXIS 3552 (N.Y. Sup. Ct. Dec. 14, 2005), rev'd, 36 A.D.3d 509, 828 N.Y.S.2d 365, 2007 N.Y. App. Div. LEXIS 598 (N.Y. App. Div. 1st Dep't 2007).

166. —Identity of tortfeasors

In personal injury action against New York City Industrial Development Agency, plaintiffs were entitled to file late notice of claim where greater part of their delay was due to excusable error concerning identity of public corporation against which claim should have been asserted, and corporation could offer only unsupported conclusory allegation of severe prejudice. Baldeo v New York, 127 A.D.2d 809, 511 N.Y.S.2d 937, 1987 N.Y. App. Div. LEXIS 53412 (N.Y. App. Div. 2d Dep't 1987).

An adult, who was assaulted by a policeman, but who was unable to identify assailant as a member of the city police department until after statutory period for notice had expired, was not entitled to file a late notice of claim. Bertucci v New York, 17 Misc. 2d 749, 188 N.Y.S.2d 147, 1959 N.Y. Misc. LEXIS 3938 (N.Y. Sup. Ct. 1959).

Application by claimant, correction officer injured by slipping and falling in tunnel during course of employment at correctional facility, to file late notice of claim pursuant to General Municipal Law § 50-e against Facilities Development Corporation, which contracted with third parties for construction of tunnel, will be

granted where, due to limited purposes of Corporation and fact that it plays no role whatsoever in management of facilities it develops, there was no way that claimant could have known of its involvement in project and, therefore, claimant's failure to identify Corporation as possible liable party was not unreasonable, where application is made as soon as claimant learns of corporation's involvement and where, moreover, Corporation will not be substantially prejudiced by inability to conduct investigation at scene shortly after accident. Kroupa v Facilities Dev. Corp., 128 Misc. 2d 904, 491 N.Y.S.2d 908, 1985 N.Y. Misc. LEXIS 3022 (N.Y. Sup. Ct. 1985).

Pedestrian injured at construction site was entitled to serve late notice of claim on New York City School Construction Authority (SCA) where she and her attorney had been unable to ascertain correct identity of public authority involved in project because of SCA's failure to comply with building code requirements that sign be erected on premises bearing name, address and telephone number of property owner and general contractor in addition to other telephone numbers and permits; obscure government agency may not intentionally or negligently obscure its involvement in accident and then hide behind shield of short statute of limitations. Horowitz v New York City Sch. Constr. Auth., 168 Misc. 2d 598, 644 N.Y.S.2d 879, 1996 N.Y. Misc. LEXIS 196 (N.Y. Sup. Ct. 1996).

167. —Ownership of land

Failure to discover that condemnation order had vested title in city until after notice period had run is not an excuse for late filing of claim under this section. Thompson v New York, 24 A.D.2d 427, 260 N.Y.S.2d 667, 1965 N.Y. App. Div. LEXIS 3929 (N.Y. App. Div. 1st Dep't 1965).

Seven month delay in filing notice of claim is excusable where claimant has had difficulty in ascertaining ownership of premises upon which accident upon which claim is based occurred and, in addition, commercial appearance of premises has caused claimant to mistakenly assume private ownership. Gerzel v New York, 117 A.D.2d 549, 499 N.Y.S.2d 60, 1986 N.Y. App. Div. LEXIS 52825 (N.Y. App. Div. 1st Dep't 1986).

Supreme Court properly denied application under CLS Gen Mun § 50-e(5) to serve late notice of claim since petitioner, in asserting only that he thought his exclusive remedy was through workers' compensation and that he did not know that county owned premises on which accident occurred, failed to offer sufficient excuse for delay. Coopersmith v County of Greene, 173 A.D.2d 1080, 570 N.Y.S.2d 417, 1991 N.Y. App. Div. LEXIS 7216 (N.Y. App. Div. 3d Dep't 1991).

Court improperly granted motion for leave to serve late notice of claim on city where plaintiffs were seeking to hold city liable for hazardous condition in building that it sold some 13 years prior to infant plaintiff's birth and some 15 years before he was diagnosed with lead poisoning; as matter of law, 13 years was more than reasonable period in which to discover and remedy hazard represented by presence of lead paint by subsequent cooperative owner, which purchased premises on "as is" basis. Caldwell v 302 Convent Ave. Hous. Dev. Fund Corp., 272 A.D.2d 112, 707 N.Y.S.2d 423, 2000 N.Y. App. Div. LEXIS 5400 (N.Y. App. Div. 1st Dep't 2000).

Claimant seeking to serve late notice of claim against city housing authority had reasonable excuse for her delay where (1) during initial 90-day period, she was unaware of seriousness and permanency of her injury and unaware that apartment complex at which accident occurred was owned by authority, and (2) any additional delay between date of her consultation with her attorney and date of her motion under CLS Gen Mun § 50-e(5) was minimal. Greene v Rochester Hous. Auth., 273 A.D.2d 895, 709 N.Y.S.2d 767, 2000 N.Y. App. Div. LEXIS 6874 (N.Y. App. Div. 4th Dep't 2000).

An action, brought on behalf of an infant by his guardian ad litem for injuries sustained when he fell into a large depression in front of premises owned and controlled by the city of New York, is not barred when brought more than one year after the injuries were sustained where the guardian was unaware of the ownership of the property, since the guardian's laches cannot be imputed to the infant and the provisions of this section are not in the nature of a statute of limitations which runs during infancy. Application of Curtin, 92 N.Y.S.2d 624, 196 Misc. 587, 1949 N.Y. Misc. LEXIS 2867 (N.Y. Sup. Ct. 1949).

Difficulty in ascertaining that a city was the owner of land where an accident occurred does not excuse late filing of a claim. Adanuncio v New York, 104 N.Y.S.2d 105, 200 Misc. 676, 1951 N.Y. Misc. LEXIS 1716 (N.Y. Sup. Ct. 1951), aff'd, 281 A.D. 763, 118 N.Y.S.2d 260, 1953 N.Y. App. Div. LEXIS 3213 (N.Y. App. Div. 1953).

168. Infancy

For claims against a public corporation arising after September 1, 1975, the outer limit of the period during which the claimant may apply for leave to serve late notice of his claim is to be measured by the time limited for the commencement of the action by the claimant against a public corporation, as specified in the current version of subdivision 5 of section 50-e of the General Municipal Law, and not by the one-year period following the happening of the event upon which the claim is based as was required by the predecessor provision, since no serious prejudice to the potentially liable public corporation would result from such a limited retroactive application of the amendment because the public corporation was already at risk with respect to these claims on the amendment's effective date pursuant to the former version of subdivision 5 of section 50-e and there is thus no danger of the revival of ancient claims as distinguished from the mere continuance of ones that have not finally expired. Furthermore, the period during which a court may grant an extension of the time within which to serve notice of claim is tolled during the infancy of the claimant in accordance with CPLR 208, since the amended version of subdivision 5 of section 50-e makes the period during which such an extension may be granted coextensive with the Statute of Limitations governing the claim (General Municipal Law, § 50-i, subd 1, par [c]), and where the time for commencing an action on the claim is tolled under CPLR 208, there will be a concomitant tolling of the time during which late notice of claim may be served. The mere availability of the toll does not in itself mandate that an extension be granted in every case involving a disability covered by CPLR 208, since the decision to grant or deny an extension under subdivision 5 of section 50-e is still purely a discretionary one, and the courts remain free to deny an application for an extension in the interests of fairness to the potentially liable public corporation. Cohen v Pearl River Union Free School Dist., 51 N.Y.2d 256, 434 N.Y.S.2d 138, 414 N.E.2d 639, 1980 N.Y. LEXIS 2723 (N.Y. 1980).

In Gen Mun Law § 50–e(5), which permits a court to extend the time within which a claimant may serve a notice of claim upon a public corporation, the expression "the time limited for the commencement of an action by the claimant" incorporates the tolling during a claimant's infancy provided for in CPLR § 208; moreover, Gen Mun L § 50–e(5) as amended effective September 1, 1976, would be construed to apply to all claims which on such date were not barred by the terms of such statute as it existed prior to its amendment. Thus, the lower court erred in denying, on the ground that tolling was impermissible, a claimant's motion under Gen Mun Law § 50–e(5) for leave to file a late notice of claim upon two public school districts which were allegedly liable for injuries claimant had sustained in an accident suffered during his infancy, where the claim had still been viable on September 1, 1976. Cohen v Pearl River Union Free School Dist., 51 N.Y.2d 256, 434 N.Y.S.2d 138, 414 N.E.2d 639, 1980 N.Y. LEXIS 2723 (N.Y. 1980).

If the claimant is an infant, the court has power, in its discretion, to grant leave to serve notice of claim after expiration of the time limit specified for serving such notices generally, and will ordinarily grant such leave. Natoli v Board of Education, 277 A.D. 915, 98 N.Y.S.2d 540, 1950 N.Y. App. Div. LEXIS 3831 (N.Y. App. Div. 1950), aff'd, 303 N.Y. 646, 101 N.E.2d 761, 303 N.Y. (N.Y.S.) 646, 1951 N.Y. LEXIS 1076 (N.Y. 1951).

Infancy alone will not automatically warrant granting of extension of time to serve notice of claim pursuant to CLS Gen Mun § 50-e. Tortorici v East Rockaway Pub. Sch. Dist. No. 19, 191 A.D.2d 495, 594 N.Y.S.2d 335, 1993 N.Y. App. Div. LEXIS 2019 (N.Y. App. Div. 2d Dep't 1993).

Late filing of a notice of claim on behalf of an infant against a school district pursuant to section 50-e of the General Municipal

Law is excused where the impediment of infancy did not prevent the public corporation, its attorney or its insurance carrier from acquiring actual knowledge of the essential facts constituting the claim within the time specified in subdivision 1 of section 50-e or within a reasonable time thereafter; the impediment may be presumed to attend infancy and need not be factually demonstrated. Bureau v Newcomb Cent. School Dist., 74 A.D.2d 133, 426 N.Y.S.2d 870, 1980 N.Y. App. Div. LEXIS 10444 (N.Y. App. Div. 3d Dep't 1980).

Notice of infant plaintiff's claim, which arose almost 8 ½ years prior to 1976 amendment to CLS Gen Mun § 50-e(5), was governed by prior wording of § 50-e under which notice of claim must have been made within one year after event on which it was based, and such time was not tolled by infancy; expanded guidelines set forth in amended § 50-e(5) are available only to claimants whose tort claims against public corporations accrued within one year prior to September 1, 1976. Lallave v New York, 127 A.D.2d 634, 511 N.Y.S.2d 869, 1987 N.Y. App. Div. LEXIS 43123 (N.Y. App. Div. 2d Dep't 1987).

In medical malpractice action against city involving prenatal, delivery and post-delivery care, Supreme Court did not abuse its discretion in granting motion of mentally impaired infant plaintiff to deem his notice of claim timely filed nunc pro tunc, although notice was not served until 13 years after tortious conduct allegedly occurred, since infancy tolled statute of limitations. Trejo v New York, 156 A.D.2d 164, 548 N.Y.S.2d 208, 1989 N.Y. App. Div. LEXIS 15294 (N.Y. App. Div. 1st Dep't 1989).

In action against town for injuries to child who was hit by car while riding her bicycle on town street in September 1991, it was error to allow late notice of claim since child's parents did not consult lawyer until June 1992 and did not seek leave to file late notice of claim until August 1992, delay was not related to child's infancy, child's parents failed to provide reasonable excuse for delay, and town did not acquire actual knowledge of claim by virtue of police accident report that did not mention anything about claimed negligence (alleged accumulation of sand on roadway). Leiblein by Leiblein v Clark, 207 A.D.2d 348, 615 N.Y.S.2d 437, 1994 N.Y. App. Div. LEXIS 8049 (N.Y. App. Div. 2d Dep't 1994).

Infancy of an injured child, standing alone, did not compel the granting of leave to serve a late notice of claim on the county; where the delay of more than seven years was not attributable to injured child's infancy, and where the county did not have actual notice of the claim, leave to serve a late notice was properly denied. Cotten v County of Nassau, 307 A.D.2d 965, 763 N.Y.S.2d 474, 2003 N.Y. App. Div. LEXIS 8662 (N.Y. App. Div. 2d Dep't), app. denied, 1 N.Y.3d 502, 775 N.Y.S.2d 239, 807 N.E.2d 289, 2003 N.Y. LEXIS 3995 (N.Y. 2003).

Where failure to serve timely notice of claim is related to infancy of petitioner, it may constitute acceptable excuse and warrant leave to serve late notice of claim under CLS Gen Mun § 50-e(5). Sanna v Bethpage Pub. Schs. Union Free Sch. Dist. 21, 193 A.D.2d 606, 597 N.Y.S.2d 430, 1993 N.Y. App. Div. LEXIS 4554 (N.Y. App. Div. 2d Dep't 1993).

Trial court improvidently exercised its discretion in granting infants leave to serve a late notice of claim against a county health care corporation as the infants failed to show a reasonable excuse for the delay after they revealed that they had been sexually abused or that there was a nexus between the infancy and the delay in serving the notice. N.M. v Westchester County Health Care Corp., 10 A.D.3d 421, 781 N.Y.S.2d 370, 2004 N.Y. App. Div. LEXIS 10310 (N.Y. App. Div. 2d Dep't 2004).

Adults' request for leave to file a late notice of claim on the County of Nassau and the hospital was properly granted pursuant to N.Y. Gen. Mun. Law § 50-e(5); the claim involved an infant, the County and hospital had actual notice since they possessed the infant's medical records, a reasonable excuse for the delay was given, and the claim of prejudice asserted by the County and hospital was unpersuasive. Ramirez v County of Nassau, 13 A.D.3d 456, 787 N.Y.S.2d 71, 2004 N.Y. App. Div. LEXIS 15251 (N.Y. App. Div. 2d Dep't 2004).

Trial court properly granted summary judgment to a city as to plaintiffs' personal injury and wrongful death actions, because the notices of claim of plaintiffs were insufficient to comply with the requirements of N.Y. Gen. Mun. Law § 50-e(2), and the trial court properly denied plaintiffs' motions to serve late notices of claims as plaintiffs failed to show that infancy served to toll the limitations period. Carter v City of New York, 38 A.D.3d 702, 832 N.Y.S.2d 630, 2007 N.Y. App. Div. LEXIS 3746 (N.Y. App. Div. 2d Dep't), app. denied, app. dismissed, 9 N.Y.3d 994, 849 N.Y.S.2d 21, 879 N.E.2d 160, 2007 N.Y. LEXIS 3735 (N.Y. 2007).

Trial court properly denied the motion of a mother, in her individual capacity, for leave to file a late notice of a personal injury claim pursuant to N.Y. Gen. Mun. Law § 50-e(5) on a department of education after the statute of limitations had expired because the infancy toll, N.Y. C.P.L.R. 208, was personal to the infant and did not extend to a derivative cause of action. Bazile v City of New York, 94 A.D.3d 929, 943 N.Y.S.2d 131, 2012 N.Y. App. Div. LEXIS 2808 (N.Y. App. Div. 2d Dep't 2012).

Time for filing infant claimant's late notice of claim against municipal corporation, as extended by court, may not exceed one year and 90 days; such limitation is not tolled by infancy. Walcott v Cazenovia, 91 Misc. 2d 437, 398 N.Y.S.2d 116, 1977 N.Y. Misc. LEXIS 2324 (N.Y. Sup. Ct. 1977), aff'd, 65 A.D.2d 671, 409 N.Y.S.2d 802, 1978 N.Y. App. Div. LEXIS 13394 (N.Y. App. Div. 3d Dep't 1978).

Although strict construction of this section is adhered to in the first department in differentiating between infancy as ground for an extension of time to serve notice of claim and instances where the fault lies with the infant's attorney, a more liberal interpretation obtains elsewhere. Chiovaro v County of Nassau, 221 N.Y.S.2d 577, 1961 N.Y. Misc. LEXIS 3697 (N.Y. Sup. Ct. 1961).

169. —As disability under procedural rules

Under subdivision 5 of section 50-e of the General Municipal Law, as amended September 1, 1976, the period of one year and 90 days within which a court may exercise its discretion to grant an extension for late filing of a notice of claim to be served upon a public corporation is tolled by the disability of infancy under CPLR 208; accordingly, an application for leave to file a late claim on behalf of an infant made 15 months after the effective date of the amendment to section 50-e and some 26 months after the accident, should be considered. Cohen v Pearl River Union Free School Dist., 51 N.Y.2d 256, 434 N.Y.S.2d 138, 414 N.E.2d 639, 1980 N.Y. LEXIS 2723 (N.Y. 1980).

Plaintiff, who was under age of 18 when his cause of action against city accrued, was entitled to benefit of infancy toll although his mother, after timely filing CLS Gen Mun § 50-e notice of claim on his behalf, failed to commence action within one year and 90 day limitation period of CLS Gen Mun § 50-i. Henry v City of New York, 94 N.Y.2d 275, 702 N.Y.S.2d 580, 724 N.E.2d 372, 1999 N.Y. LEXIS 3928 (N.Y. 1999).

An order granting a motion for leave to file notice of claim on behalf of an infant was reversed and the case remanded for further hearing where it did not appear from the record that infancy of the claimant was necessarily responsible for the delay, to find out when claimant first learned of the obligation to file notice of claim, first consulted an attorney, etc. Brown v New York City Housing Authority, 12 A.D.2d 590, 208 N.Y.S.2d 563, 1960 N.Y. App. Div. LEXIS 6639 (N.Y. App. Div. 1st Dep't 1960).

Under subdivision 5 of section 50-e of the General Municipal Law, as amended effective September 1, 1976, the period of one year and 90 days within which a court of competent jurisdiction may extend the time for a notice of claim to be served upon a public corporation may be tolled by infancy under CPLR 208, since it was the intent of the Legislature to extend significantly the discretion of the court to grant leave to file a notice of claim, and consideration of infancy is warranted even though the disability may not have been the reason for the failure to serve a late notice; accordingly, an infant injured less than two months before the amendment may, some 17 months after the accident, file a late notice of claim against the town and village allegedly responsible for his injuries, since the amendment has been given a modified retroactive effect to claimants whose causes of action accrued within the prescribed one-year period preceding the effective amendatory date, and since the defendant municipalities not only had notice of plaintiff's injuries on the day it occurred, but actually investigated it that day. A just claim for damages for a serious injury should not be forfeited for failure to

give notice where the basic purpose of the statute is not offended and where no substantial prejudice exists. Ziecker v Orchard Park, 70 A.D.2d 422, 421 N.Y.S.2d 447, 1979 N.Y. App. Div. LEXIS 12732 (N.Y. App. Div. 4th Dep't 1979), aff'd, 51 N.Y.2d 957, 435 N.Y.S.2d 720, 416 N.E.2d 1055, 1980 N.Y. LEXIS 2821 (N.Y. 1980).

The period in which an extension of time to serve a notice of claim against a public corporation can be granted pursuant to Gen Mun §§ 5-e, 50a in a medical malpractice case is tolled by the infancy provisions of CPLR § 208. Yepez v County of Nassau, 79 A.D.2d 1023, 435 N.Y.S.2d 51, 1981 N.Y. App. Div. LEXIS 9935 (N.Y. App. Div. 2d Dep't 1981).

Although a father's proposed notice of claim was properly dismissed as insufficient under N.Y. Gen. Mun. Law § 50-e(2), his daughter's N.Y. Educ. Law § 3813(2-a) claim should have been allowed under N.Y. C.P.L.R. 208 because her infancy tolled the statute of limitations; in addition, her claim was sufficiently alleged, and the school district's actual knowledge of the essential facts constituting the claim that enabled it to conduct an appropriate investigation. Matter of Melissa G. v North Babylon Union Free School Dist., 50 A.D.3d 901, 855 N.Y.S.2d 276, 2008 N.Y. App. Div. LEXIS 3429 (N.Y. App. Div. 2d Dep't 2008).

170. —Necessity that infancy be proximate cause of delay

In an infant's action against the city, the infant would not be allowed to serve a late notice of claim where infancy had been unrelated to the unexcused delay of more than two years in seeking to serve a late notice of claim, and where the city had been justified in failing to investigate the facts underlying the claim. Vezza v Yonkers, 92 A.D.2d 570, 459 N.Y.S.2d 324, 1983 N.Y. App. Div. LEXIS 16807 (N.Y. App. Div. 2d Dep't 1983).

Mother was not entitled to serve late notice of medical malpractice claim under CLS Gen Mun § 50-e on behalf of her infant child where (1) there was delay of over 9 years in bringing application for leave to serve, (2) affidavits submitted in support of application were vague and nonspecific as to nature of present condition of child, when those conditions first manifested themselves, and when possibility of malpractice claim was first considered, and (3) there was nothing in record of possible nexus between claimed permanent disabilities and treatment received by infant as newborn to justify inference that hospital had actual knowledge of essential facts underlying claim. Andersen v Nassau County Medical Center, 135 A.D.2d 530, 521 N.Y.S.2d 755, 1987 N.Y. App. Div. LEXIS 52482 (N.Y. App. Div. 2d Dep't 1987).

Infant was not entitled to leave to serve late notice of claim pursuant to CLS Gen Mun § 50-e(5) since disability of infancy was outweighed by other factors including (1) lack of adequate explanation for delay in bringing proceeding for leave to serve late notice of claim until more than one year after accident, (2) failure to allege adequate facts to establish that town had actual knowledge of facts underlying claim within reasonable time after accident, and (3) fact that delay was unrelated to claimant's infancy. Groshans v Babylon, 143 A.D.2d 666, 533 N.Y.S.2d 18, 1988 N.Y. App. Div. LEXIS 9468 (N.Y. App. Div. 2d Dep't 1988).

Infant would not be granted leave to serve late notice of claim against county since (1) record revealed that delay in seeking leave was not product of infancy, but was attributable to delay on part of her counsel, which was not adequately explained, and (2) nothing in record established nexus between infant's condition and alleged malpractice on part of county medical center, so that it could not be said that medical records alone gave county notice of facts underlying claim. Fallon v County of Westchester, 184 A.D.2d 510, 584 N.Y.S.2d 322, 1992 N.Y. App. Div. LEXIS 7612 (N.Y. App. Div. 2d Dep't 1992).

In action to recover for injuries sustained by 14-year-old student who was assaulted by another student outside school, in which plaintiffs alleged inadequate supervision by school district employees, court properly denied plaintiffs' application for leave to serve late notice of claim since (1) delay was not directly related to injured plaintiff's infancy in that plaintiffs concededly delayed serving notice of claim for fear of possible retaliation by school district, and (2) plaintiffs set forth no facts to support their conclusory assertion that school district thoroughly investigated its role in incident and thus had actual knowledge of facts within reasonable time after incident occurred. Doukas v East Meadow Union Free Sch. Dist., 187 A.D.2d 552, 590 N.Y.S.2d 226, 1992 N.Y. App. Div. LEXIS 13020 (N.Y. App. Div. 2d Dep't 1992).

Court did not improvidently exercise its discretion in denying infant claimant's application under CLS Gen Mun § 50-e(5) for leave to file late notice of claim since (1) delay was unrelated to claimant's infancy, (2) her father's inability to fully understand English was, in itself, insufficient excuse, and (3) there was no evidence that any representative of municipal defendant learned of incident until instant proceeding was commenced. Mrak v City of New York, 192 A.D.2d 608, 595 N.Y.S.2d 831, 1993 N.Y. App. Div. LEXIS 3576 (N.Y. App. Div. 2d Dep't 1993).

In action to recover for injuries sustained by child who was burned in fire in building owned by New York City Housing Authority, absence of demonstrated nexus between disability of infancy and delay in filing notice of claim under CLS Gen Mun § 50-e was not absolutely fatal to plaintiffs' request for leave to file late notice of claim, but rather was one factor for court to consider in exercising its discretion. Gilley v New York City Hous. Auth., 217 A.D.2d 493, 630 N.Y.S.2d 48, 1995 N.Y. App. Div. LEXIS 7850 (N.Y. App. Div. 1st Dep't 1995).

Court properly denied application for leave to serve late notice of claim where no acceptable excuse for 3 ½ -year delay in serving notice of claim was offered, there was no indication that delay was related to injured petitioner's infancy, there was no showing that defendant had actual knowledge of facts underlying claim within reasonable time after claim arose, and extensive delay would prejudice defendant's ability to defend claim. Altavilla v Patchogue Medford Sch. Dist., 221 A.D.2d 434, 633 N.Y.S.2d 576, 1995 N.Y. App. Div. LEXIS 11847 (N.Y. App. Div. 2d Dep't 1995).

Court properly granted leave to serve late notice of claim where defendant school district had actual notice of facts underlying claim within 90 days, and failure to serve timely notice was related to infancy of petitioners. Russo v Monroe-Woodbury Cent. Sch. Dist., 282 A.D.2d 465, 723 N.Y.S.2d 198, 2001 N.Y. App. Div. LEXIS 3266 (N.Y. App. Div. 2d Dep't 2001).

Failure to establish nexus between delay and petitioners' infancy is not fatal in cases where knowledge of facts alleged in claims was received contemporaneously and there is no prejudice due to delay. Russo v Monroe-Woodbury Cent. Sch. Dist., 282 A.D.2d 465, 723 N.Y.S.2d 198, 2001 N.Y. App. Div. LEXIS 3266 (N.Y. App. Div. 2d Dep't 2001).

The injured party was denied leave to serve a late notice of claim on the city under N.Y. Gen. Mun. Law § 50-e(1)(a), (5); the city did not have actual knowledge of the facts, there was no nexus between the delay and the injured party's infancy, and late notice prejudiced the city. Rabanar v City of Yonkers, 290 A.D.2d 428, 736 N.Y.S.2d 93, 2002 N.Y. App. Div. LEXIS 336 (N.Y. App. Div. 2d Dep't 2002).

Although infancy automatically tolled the statutory period for commencing an action against a municipality, the infancy of an injured claimant, standing alone, did not compel the granting of an application for leave to serve a late notice of claim; in determining whether to grant leave to serve a late notice of claim, the court had to consider certain factors, including whether the claim involved an infant, whether the claimant demonstrated a reasonable excuse for failing to timely serve a notice of claim, whether the municipality acquired actual knowledge of the facts constituting the claim within 90 days from its accrual or a reasonable time thereafter, and whether the municipality was substantially prejudiced by the delay, under N.Y. Gen. Mun. Law § 50-e(5). Nairne v N.Y. City Health & Hosps. Corp., 303 A.D.2d 409, 755 N.Y.S.2d 855, 2003 N.Y. App. Div. LEXIS 2124 (N.Y. App. Div. 2d Dep't 2003).

Where there was no nexus between a the infancy of a personal injury plaintiff and her failure to notify the New York City Transit Authority of her injury within the 90-day period of N.Y. Gen. Mun. Law. § 50-e(5), and the Authority would have been prejudiced by allowing her to file a late notice, the trial court erred by granting her motion to file a late notice. Maldonaldo v City of New York, 7 A.D.3d 582, 777 N.Y.S.2d 129, 2004 N.Y. App. Div. LEXIS 6936 (N.Y. App. Div. 2d Dep't 2004).

Trial court properly denied a motion which was, in effect, for leave to serve a late notice of claim upon a department of education (DOE) on behalf of an infant; the mother and the infant

failed to show that the DOE acquired timely, actual knowledge of the essential facts of the claim, and did not offer a reasonable excuse for the delay in seeking leave to serve a late notice. Further, the infancy, without any showing of a nexus between the infancy and the delay, was insufficient to constitute a reasonable excuse. Bazile v City of New York, 94 A.D.3d 929, 943 N.Y.S.2d 131, 2012 N.Y. App. Div. LEXIS 2808 (N.Y. App. Div. 2d Dep't 2012).

171. — —Under prior statutory provisions

Under subd 5(1) of the above statute an extension of time for filing claim can only be granted where the disability of infancy is proximately related to the failure to file within the specified period. Cohan v New York, 23 A.D.2d 554, 256 N.Y.S.2d 629, 1965 N.Y. App. Div. LEXIS 4838 (N.Y. App. Div. 1st Dep't 1965).

Failure to serve timely notice within the 90 day period prescribed by § 50-e of the General Municipal Law held, as a matter of law, not attributable to the infant plaintiff's disability. Anderson v County of Nassau, 31 A.D.2d 761, 297 N.Y.S.2d 665, 1969 N.Y. App. Div. LEXIS 4712 (N.Y. App. Div. 2d Dep't 1969).

It was an improvident exercise of discretion to grant the application of a 19-year-old automobile passenger to file a late notice of claim against the village, where the record contained no proof that the failure to serve the required notice within the required time was by reason of physical disability or infancy as provided by the statute. Pointing out that infancy alone was not sufficient, the court said a cognizable relation must be established between the fact of infancy and the failure to comply with the short statute of limitation. Harden v Akron, 32 A.D.2d 610, 299 N.Y.S.2d 92, 1969 N.Y. App. Div. LEXIS 4293 (N.Y. App. Div. 4th Dep't 1969).

The failure to serve a timely notice within the 90-day period prescribed by § 50-e of the General Municipal Law was not attributable to the infant's disability and an application for leave to file a late notice of claim on behalf of an infant claimant was denied. McKay v Mamaroneck, 35 A.D.2d 731, 315 N.Y.S.2d 207, 1970 N.Y. App. Div. LEXIS 3766 (N.Y. App. Div. 2d Dep't 1970).

The fact of infancy alone was insufficient basis for permitting late filing of notice of claim, absent a factual demonstration that delay in filing said notice was caused by infancy. Santiago v Board of Education, 41 A.D.2d 616, 340 N.Y.S.2d 491, 1973 N.Y. App. Div. LEXIS 5149 (N.Y. App. Div. 1st Dep't 1973).

In proceeding pursuant to General Municipal Law for leave to serve late notice of claim, allowing infant petitioner to serve late notice of claim against school district was proper exercise of discretion in view of demonstrable relationship between infancy and delay. Lopez v Union Free School Dist., 50 A.D.2d 818, 376 N.Y.S.2d 191, 1975 N.Y. App. Div. LEXIS 11656 (N.Y. App. Div. 2d Dep't 1975).

Claimant's application for leave to file and serve a claim for damages after expiration on the 90-day statutory period, which was filed on the last day of the one-year period prescribed by General Municipal Law § 50-e(5) was sufficient, where the disability of infancy was the sole cause of the delay in filing the notice of claim and the only attorney consulted on behalf of the infant claimant proceeded with all possible speed, and the proposed defendants had not been prejudiced by the delay in filing. Conway v Board of Education, 47 Misc. 2d 172, 262 N.Y.S.2d 15, 1965 N.Y. Misc. LEXIS 1633 (N.Y. County Ct. 1965).

172. — —Grant of leave to file late notice improper

Court improvidently exercised its discretion in permitting infant prospective plaintiff and her mother to file late notice of claim against housing authority where (1) no adequate explanation for their 3 ½ -year delay was given, (2) papers did not allege facts sufficient to establish that authority had knowledge of facts of incident, and (3) delay was unrelated to infancy of prospective plaintiff. Rogers v New York City Housing Authority, 169 A.D.2d 763, 565 N.Y.S.2d 130, 1991 N.Y. App. Div. LEXIS 1034 (N.Y. App. Div. 2d Dep't 1991).

It was error to grant leave to serve late notice of claim some 8 months after accident, after petitioners supplied proof of infant petitioner's age, since infancy did not explain delay in service of notice, and petitioners failed to show that defendant had actual notice of essential facts within limitations period of CLS Gen Mun 50-e(1)(a) or within reasonable time thereafter. Kardashinsky v New York City Housing Authority, 182 A.D.2d 676, 581 N.Y.S.2d 692, 1992 N.Y. App. Div. LEXIS 6051 (N.Y. App. Div. 2d Dep't 1992).

It was error to grant application for leave to file late notice of claim against town in connection with incident in which infant was struck by snowmobile while riding his bicycle on frozen surface of town lake where delay was caused by law office failure, not by infancy, and evidence did not show that report prepared by state police and several newspaper articles regarding collision sufficed to convey actual knowledge of essential facts of incident to town. O'Mara v Town of Cortlandt, 210 A.D.2d 337, 620 N.Y.S.2d 82, 1994 N.Y. App. Div. LEXIS 12520 (N.Y. App. Div. 2d Dep't 1994).

It was error to grant infant petitioner's application for leave to serve late notice of claim against city where petitioner's delay in ascertaining that playground was owned by city was inexplicable and was not attributable to petitioner's infancy, petitioner failed to show that city had actual knowledge of facts underlying claim within 90 days after claim arose or reasonable time thereafter, and city was unable to conduct its own investigation as to condition of playground equipment at time of accident. Calloway by Calloway v City of New York Hous. Auth., 219 A.D.2d 711, 631 N.Y.S.2d 752, 1995 N.Y. App. Div. LEXIS 9535 (N.Y. App. Div. 2d Dep't 1995).

It was abuse of discretion to grant petitioner leave to serve late notice of claim on school district where petitioner did not seek permission to serve notice of claim until some 3 ½ years following incident, she proffered no excuse for such delay, delay was manifestly unrelated to her infancy, and there was no evidence that school district and its insurance carrier acquired actual knowledge of facts constituting claim within 90 days or reasonable time thereafter. Dunlea v Mahopac Cent. Sch. Dist., 232 A.D.2d 558, 648 N.Y.S.2d 673, 1996 N.Y. App. Div. LEXIS 10376 (N.Y. App. Div. 2d Dep't 1996), app. denied, 89 N.Y.2d 812, 657 N.Y.S.2d 404, 679 N.E.2d 643, 1997 N.Y. LEXIS 386 (N.Y. 1997).

It was abuse of discretion to grant leave to serve late notice of claim on behalf of infant where any delay was not related to infancy itself, but rather was related solely to petitioners' delay in discovering possible causal connection between medical center's actions and infant's injuries, there was no claim that mother was unaware of infant's condition, or that she was in any way prevented or discouraged from investigating cause thereof, and defendants were prejudiced by poor condition of medical records. Scala v Westchester County Medical Ctr., 233 A.D.2d 514, 650 N.Y.S.2d 296, 1996 N.Y. App. Div. LEXIS 12682 (N.Y. App. Div. 2d Dep't 1996).

Trial court improvidently exercised its discretion when it granted an infant's second motion for leave to file a late notice of claim on an elementary school and a school district, alleging that he was injured when he fell down a flight of stairs, because the infant's mother did not offer a reasonable excuse for the delay in seeking leave to file a late notice of claim, there was no showing that the infant's age was the reason for the delay, and there was no evidence that the school or the school district acquired actual knowledge of the facts constituting the proposed claim within 90 days after the incident occurred, or within a reasonable time thereafter, so as to negate prejudice to them. . Lennon v Roosevelt Union Free Sch. Dist., 6 A.D.3d 713, 775 N.Y.S.2d 537, 2004 N.Y. App. Div. LEXIS 4976 (N.Y. App. Div. 2d Dep't 2004).

Minor could not serve a late notice of claim under N.Y. Gen. Mun. Law § 50-e or N.Y. Educ. Law § 3813(2-a) against a school and a school district regarding an incident in which a desk fell on the minor's hand as ignorance of the 90-day statutory requirement for service of a claim was not a reasonable excuse for the nearly 18-month delay; no nexus was shown between the minor's infancy and the delay. Matter of Vicari v Grand Ave. Middle School, 52 A.D.3d 838, 860 N.Y.S.2d 629, 2008 N.Y. App. Div. LEXIS 5771 (N.Y. App. Div. 2d Dep't 2008).

173. —Proof of infancy

It was an abuse of discretion to permit a late filing of claim where the record failed to support the infant's age. Cooke v City School Dist., 38 A.D.2d 686, 327 N.Y.S.2d 161, 1971 N.Y. App. Div. LEXIS 2792 (N.Y. App. Div. 4th Dep't 1971).

174. —Immature infants

If the infant claimant is not a very young child, but in the teen-age bracket or close to majority, the court, in exercise of its discretion, can take the view that his legal status as an infant at time of the occurrence was not the cause, or did not justify, his failure to serve notice of claim within the usual 90-day period and deny an application for extension of time. Application of Nori, 274 A.D. 545, 85 N.Y.S.2d 131, 1948 N.Y. App. Div. LEXIS 3125 (N.Y. App. Div. 1948), aff'd, 300 N.Y. 632, 90 N.E.2d 492, 300 N.Y. (N.Y.S.) 632, 1950 N.Y. LEXIS 1428 (N.Y. 1950).

A late notice of claim by an infant 18 years old at the time of the accident, who was mentally retarded and apparently had a mental age of about five years or less, should have been granted. Klee v Board of Cooperative Educational Services, 25 A.D.2d 715, 270 N.Y.S.2d 230, 1966 N.Y. App. Div. LEXIS 4630 (N.Y. App. Div. 4th Dep't 1966).

Where plaintiff, who commenced negligence action in November, 1975, to recover damages for injuries sustained by her at age 12 ½ on March 27, 1968, while performing required physical dexterity test at school, did not seek relief to serve and file a late notice of claim until August, 1976, which date was well beyond statutory period of one year and 90 days from September 1, 1974, date on which plaintiff reached her majority, lack of jurisdiction was affirmative defense and plaintiff would not be granted leave to serve a late notice of claim. McGill v Board of Education, 59 A.D.2d 888, 399 N.Y.S.2d 41, 1977 N.Y. App. Div. LEXIS 14075 (N.Y. App. Div. 2d Dep't 1977), app. dismissed, 43 N.Y.2d 949, 1978 N.Y. LEXIS 2879 (N.Y. 1978), app. dismissed, 43 N.Y.2d 893, 403 N.Y.S.2d 499, 374 N.E.2d 396, 1978 N.Y. LEXIS 1815 (N.Y. 1978).

Although a student's motion to serve a late notice of claim was made more than one year and 90 days after the claim accrued, the motion was timely because the limitations period was tolled by reason of the student's infancy. M.L. v City of New York, 173 A.D.3d 848, 103 N.Y.S.3d 499, 2019 N.Y. App. Div. LEXIS 4691 (N.Y. App. Div. 2d Dep't 2019).

An infant 17 years of age at the time of the accident cannot claim the benefits accorded to "immature infants," and will not be granted leave to file a claim after the lapse of more than 1 year, especially where the only explanations advanced by the claimant were that she was ignorant of the statute and that she was lulled into a sense of security by a statement of a city investigator that she would "hear from the city soon," and where claimant makes no explanation of her further delay after being informed by counsel of the necessity for filing a notice of claim. Witherspoon v New York, 85 N.Y.S.2d 443, 193 Misc. 730, 1948 N.Y. Misc. LEXIS 3794 (N.Y. Sup. Ct. 1948), disapproved, Cohen v Pearl River Union Free School Dist., 70 A.D.2d 94, 419 N.Y.S.2d 998, 1979 N.Y. App. Div. LEXIS 12306 (N.Y. App. Div. 2d Dep't 1979).

An infant, 15 ½ years old, of average intelligence for his age, is not an immature infant so as to excuse the filing of a claim. Adanuncio v New York, 104 N.Y.S.2d 105, 200 Misc. 676, 1951 N.Y. Misc. LEXIS 1716 (N.Y. Sup. Ct. 1951), aff'd, 281 A.D. 763, 118 N.Y.S.2d 260, 1953 N.Y. App. Div. LEXIS 3213 (N.Y. App. Div. 1953).

The courts have consistently distinguished between infants of tender years and those close to majority and held that immature infancy, as matter of law, constitutes a condition of physical and mental inability which excuses compliance with the statutory requirements as to timely filing of notice of claim. McGrouty v Central School Dist., 229 N.Y.S.2d 850 (N.Y. Sup. Ct. 1962).

175. —Infants close to majority

An injured infant, 17 years of age, is deemed sufficiently mature to be subject to the same requirements in giving timely notice of claim under this section as an adult, in the absence of a showing to the contrary. Asencio v New York, 216 N.Y.S.2d 204 (N.Y. Sup. Ct. 1961).

176. —Infant's capacity to protect own interest

The court did not abuse its discretion in allowing a 12-year-old infant to serve a notice of claim after the expiration of the statutory period since he did not have the capacity to protect his interest when he sustained injuries while carrying on his school activities and service of claim on city rather than on board of education thereof was due, inter alia, in some degree to the disability and limitations incident to the infancy which prevented him from ascertaining that the school where he was injured was operated by the board of education. Perry v Board of Education, 34 A.D.2d 1089, 312 N.Y.S.2d 640, 1970 N.Y. App. Div. LEXIS 4376 (N.Y. App. Div. 4th Dep't 1970).

An infant, age 15, was entitled to file a late claim for libel and slander against the city, based on statements allegedly made at, on, or before the date of his confinement to jail on a serious charge of which he was subsequently acquitted, in view of his emotional condition and seeming lack of mental capacity to protect his rights. Manceri v New York, 23 Misc. 2d 94, 198 N.Y.S.2d 388, 1960 N.Y. Misc. LEXIS 3581 (N.Y. Sup. Ct. 1960).

177. —Death of infant

Court properly granted application to serve late notice of claim for wrongful death where (1) infant decedent died at hospital on May 16, 1989, (2) plaintiff, decedent's mother, was allegedly too bereaved to contact attorney until February 20, 1990, and (3) plaintiff was appointed administratrix on April 16, 1990, and moved for leave to serve notice of claim on July 30, 1990; however, as to claims for loss of services and conscious pain and suffering, plaintiff's conclusory assertions were insufficient to excuse delay. Thompson v New York City Health & Hosp. Corp., 172 A.D.2d 433, 569 N.Y.S.2d 10, 1991 N.Y. App. Div. LEXIS 5174 (N.Y. App. Div. 1st Dep't 1991).

A woman sustained an injury on April 23 while pregnant. Her husband filed a notice in her behalf on July 21. The child was born on August 8 at the hospital and remained there until her death in November. The administrator of the child was given permission to file a claim for the child, since infancy prevented the filing of a timely claim. Application of Tripodi, 17 Misc. 2d 137, 184 N.Y.S.2d 996, 1959 N.Y. Misc. LEXIS 3916 (N.Y. Sup. Ct. 1959).

178. —Ignorance of notice requirements

There was no improvident exercise of discretion in letting a claim be filed after the 90-day period on behalf of an infant of tender age where a timely notice had been filed under the provisions of the Westchester County Playland Commission Act and, immediately upon discovery that that Act had been superseded by this section, an application was made for leave to serve the notice late. O'Rourke v Westchester County Playland Com., 283 A.D. 874, 129 N.Y.S.2d 196, 1954 N.Y. App. Div. LEXIS 5630 (N.Y. App. Div. 1954).

An order granting a motion for leave to file notice of claim on behalf of an infant was reversed and the case remanded for further hearing where it did not appear from the record that infancy of the claimant was necessarily responsible for the delay, to find out when claimant first learned of the obligation to file notice of claim, first consulted an attorney, etc. Brown v New York City Housing Authority, 12 A.D.2d 590, 208 N.Y.S.2d 563, 1960 N.Y. App. Div. LEXIS 6639 (N.Y. App. Div. 1st Dep't 1960).

Failure of a 19-year-old infant to serve notice of claim within the 90-day period is not excusable on the ground of infancy where he merely alleges that he was unaware of the statutory requirement until after he consulted an attorney, by which time the statutory period had already elapsed. Borowski v Clarence, 19 A.D.2d 580, 240 N.Y.S.2d 379, 1963 N.Y. App. Div. LEXIS 3723 (N.Y. App. Div. 4th Dep't 1963).

It was an improvident exercise of discretion to grant the application of a 17-year-old infant to file a notice of claim some 11 months after the cause of action accrued merely upon the allegation that neither the infant nor his father knew of the necessity for filing a claim within the statutory period of 90 days. Staub v New York, 29 A.D.2d 756, 287 N.Y.S.2d 935, 1968 N.Y. App. Div. LEXIS 4528 (N.Y. App. Div. 1st Dep't 1968).

The court did not abuse its discretion in allowing a 12-year-old infant to serve a notice of claim after the expiration of the statutory period since he did not have the capacity to protect his interest when he sustained injuries while carrying on his school activities and service of claim on city rather than on board of education thereof was due, inter alia, in some degree to the disability and limitations incident to the infancy which prevented him from ascertaining that the school where he was injured was operated by the board of education. Perry v Board of Education,

34 A.D.2d 1089, 312 N.Y.S.2d 640, 1970 N.Y. App. Div. LEXIS 4376 (N.Y. App. Div. 4th Dep't 1970).

Child injured in fall at school was not entitled to file late notice of claim against city and others, despite claim of ignorance of statutory requirement, where no legally acceptable excuse was presented for 2-year delay between fall and present application, there were substantial discrepancies between descriptions of incident in notice of claim and those contained in school board's internal records and child's medical records, and thus respondents would suffer substantial prejudice if late service of notice were allowed. Tineo v City of New York, 273 A.D.2d 397, 711 N.Y.S.2d 333, 2000 N.Y. App. Div. LEXIS 7077 (N.Y. App. Div. 2d Dep't 2000).

Because a school district had actual knowledge of the essential facts constituting a mother's claim of injury to her child, and because the school district failed to come forward with specific evidence demonstrating any impairment to its ability to conduct a defense as a result of the delay, the trial court properly granted the mother's N.Y. Gen. Mun. Law § 50-e(5) application for leave to file a late notice of claim based on her claim of ignorance of the notice requirements. Matter of Apgar v Waverly Cent. School Dist., 36 A.D.3d 1113, 828 N.Y.S.2d 652, 2007 N.Y. App. Div. LEXIS 561 (N.Y. App. Div. 3d Dep't 2007).

An infant 17 years of age at the time of the accident cannot claim the benefits accorded to "immature infants," and will not be granted leave to file a claim after the lapse of more than 1 year, especially where the only explanations advanced by the claimant were that she was ignorant of the statute and that she was lulled into a sense of security by a statement of a city investigator that she would "hear from the city soon," and where claimant makes no explanation of her further delay after being informed by counsel of the necessity for filing a notice of claim. Witherspoon v New York, 85 N.Y.S.2d 443, 193 Misc. 730, 1948 N.Y. Misc. LEXIS 3794 (N.Y. Sup. Ct. 1948), disapproved, Cohen v Pearl River Union Free School Dist., 70 A.D.2d 94, 419 N.Y.S.2d 998, 1979 N.Y. App. Div. LEXIS 12306 (N.Y. App. Div. 2d Dep't 1979).

Where an infant over fourteen years of age delayed in serving a notice of claim, this delay was attributable to the infant's failure to understand and comprehend the obligations which the statute imposed in respect of her claim and to her inability to fulfill these obligations by reason of her infancy and immaturity under which circumstances the protective features of the remedial statute must be invoked to preserve her rights in the proper exercise of judicial discretion. Gaddis v Board of Education, 108 N.Y.S.2d 320, 200 Misc. 44, 1951 N.Y. Misc. LEXIS 2506 (N.Y. Sup. Ct.), aff'd, 278 A.D. 1038, 106 N.Y.S.2d 915, 1951 N.Y. App. Div. LEXIS 5619 (N.Y. App. Div. 1951).

Petitioner, who suffered an injury to her back while participating in a trampoline exercise in a physical education class at school, was entitled to an order extending time to serve a notice of claim upon school district where it was apparent from record that neither petitioner nor her parents were aware of statutory requirements of filing a notice of claim within 90 days after accident and that they did not become aware of such requirement until they sought advice of counsel. Matey v Bethlehem Cent. School Dist., 89 Misc. 2d 390, 391 N.Y.S.2d 357, 1977 N.Y. Misc. LEXIS 1874 (N.Y. Sup. Ct. 1977), aff'd, 63 A.D.2d 807, 405 N.Y.S.2d 156, 1978 N.Y. App. Div. LEXIS 11760 (N.Y. App. Div. 3d Dep't 1978).

179. —Municipal knowledge of facts constituting claim

Absence of affidavit to establish that delay in filing notice of claim was result of child's infancy was not fatal to application since infancy is only one consideration, decision to grant or deny application is purely discretionary, and defendants had actual knowledge of facts constituting claim of malpractice within 90 days of acts and failed to establish prejudice. West v New York City Health & Hosps. Corp., 195 A.D.2d 517, 600 N.Y.S.2d 268, 1993 N.Y. App. Div. LEXIS 7157 (N.Y. App. Div. 2d Dep't 1993).

Plaintiff's failure to give any excuse for his delay in filing notice of claim or show that delay was product of infancy was not fatal to his motion for leave to file late notice where defendant county had actual knowledge of essential facts of claim within reasonable time after injury was discovered. Harwood by Murnane v County of Albany, 257 A.D.2d 747, 682 N.Y.S.2d 736, 1999 N.Y. App. Div. LEXIS 26 (N.Y. App. Div. 3d Dep't 1999).

180. — —Under prior statutory provisions

For claims against a public corporation arising after September 1, 1975, the outer limit of the period during which the claimant may apply for leave to serve late notice of his claim is to be measured by the time limited for the commencement of the action by the claimant against a public corporation, as specified in the current version of subdivision 5 of section 50-e of the General Municipal Law, and not by the one-year period following the happening of the event upon which the claim is based as was required by the predecessor provision, since no serious prejudice to the potentially liable public corporation would result from such a limited retroactive application of the amendment because the public corporation was already at risk with respect to these claims on the amendment's effective date pursuant to the former version of subdivision 5 of section 50-e and there is thus no danger of the revival of ancient claims as distinguished from the mere continuance of ones that have not finally expired. Furthermore, the period during which a court may grant an extension of the time within which to serve notice of claim is tolled during the infancy of the claimant in accordance with CPLR 208, since the amended version of subdivision 5 of section 50-e makes the period during which such an extension may be granted coextensive with the Statute of Limitations governing the claim (General Municipal Law, § 50-i, subd 1, par [c]), and where the time for commencing an action on the claim is tolled under CPLR 208, there will be a concomitant tolling of the time during which late notice of claim may be served. The mere availability of the toll does not in itself mandate that an extension be granted in every case involving a disability covered by CPLR 208, since the decision to grant or deny an extension under subdivision 5 of section 50-e is still purely a discretionary one, and the courts remain free to deny an application for an extension in the interests of fairness to the potentially liable public corporation. Cohen v Pearl River Union Free School Dist., 51 N.Y.2d 256, 434 N.Y.S.2d 138, 414 N.E.2d 639, 1980 N.Y. LEXIS 2723 (N.Y. 1980).

181. — —Filing late notice allowed

Where the municipality or public corporation was notified of the claim, or had knowledge of the occurrence shortly after it happened, and proceeded to investigate it, infancy or disability of the claimant has usually been held sufficient ground for granting an extension of time to serve notice of claim, or to perfect an informal notice, if the application for leave is made within a reasonable time after expiration of the 90-day period. Aufiero v Eastchester, 282 A.D. 1048, 126 N.Y.S.2d 905, 1953 N.Y. App. Div. LEXIS 5785 (N.Y. App. Div. 1953).

Where the city had knowledge of the condition of the roadway of the bridge on which the infants were injured, and there were no circumstances precluding the granting of the application, the court abused its discretion in denying the applications on behalf of infants for leave to file notice of the claim against the city for injuries sustained by the infants after the expiration of the statutory period. Rosenberg v New York, 285 A.D. 1085, 140 N.Y.S.2d 140, 1955 N.Y. App. Div. LEXIS 6735 (N.Y. App. Div.), rev'd, 309 N.Y. 304, 130 N.E.2d 629, 309 N.Y. (N.Y.S.) 304, 1955 N.Y. LEXIS 923 (N.Y. 1955).

Permission to file late claim granted under evidence that 14-year-old infant was involved in an automobile accident involving a county vehicle, the application for permission to file claim was made within one year as prescribed by the statute, and the county had actual notice within five days after the accident that plaintiff was injured by one of its vehicles and was going to make a claim therefor. Brooks v Rensselaer County, 34 A.D.2d 708, 309 N.Y.S.2d 659, 1970 N.Y. App. Div. LEXIS 5035 (N.Y. App. Div. 3d Dep't 1970).

The trial court properly granted an infant plaintiff's motion to file under Gen Mun Law § 50-e a late notice of claim against a county for injuries plaintiff suffered when the bicycle he was riding was struck by an automobile along a public highway in the county, although the motion was made four years after the occurrence of the accident, where the results of timely and detailed investigations conducted by other defendants in the action would be available to the county and where much neces-

sary information was contained in the county's own records and reports. Monte v Rochester, 81 A.D.2d 678, 437 N.Y.S.2d 796, 1981 N.Y. App. Div. LEXIS 11222 (N.Y. App. Div. 3d Dep't 1981).

Court did not err in granting petitioner's application for leave to serve late notice of claim under CLS Gen Mun § 50-e(5) where petitioner presented sufficient facts to establish that there was nexus between his infancy and delay in filing notice and that town had actual knowledge of essential facts of incident within 90 days of its occurrence; although petitioner failed to explain 5-month delay between time he reached his majority and commencement of instant proceeding, he had filed notice of claim within 90 days of his 18th birthday. Carpenter v Babylon, 150 A.D.2d 373, 543 N.Y.S.2d 299, 1989 N.Y. App. Div. LEXIS 5633 (N.Y. App. Div. 2d Dep't 1989).

Court erred in denying petitioner's application for leave to file late notice of claim on behalf of her infant son against county where county department of social services had custody of child at all relevant times and had placed him, along with his siblings, with foster parents, proposed notice of claim alleged that child was injured while at day care center where foster parents had placed him, child was confined to hospital for 2 months and placed in body cast, county immediately removed children from foster parents' residence and placed them in another home following incident, and county failed to show that it would be prejudiced if application were granted. In re McKithen ex rel. Solomon, 221 A.D.2d 1019, 634 N.Y.S.2d 580, 1995 N.Y. App. Div. LEXIS 13565 (N.Y. App. Div. 4th Dep't 1995).

Leave to file late notice of claim should have been granted where defendant had timely, actual knowledge of essential facts underlying infant plaintiff's claim, and there was no showing of prejudice to defendant. Perry v Manhattan & Bronx Surface Transit Operating Auth., 224 A.D.2d 208, 638 N.Y.S.2d 296, 1996 N.Y. App. Div. LEXIS 949 (N.Y. App. Div. 1st Dep't 1996).

Allegedly injured petitioners were entitled to file late notice under CLS Gen Mun § 50-e(5) where they were minors, their delay beyond statutory 90-day period was minimal, respondent city possessed records containing essential facts constituting claim, and city was not prejudiced in preparation of its defense. Melendez by Melendez v City of New York, 245 A.D.2d 564, 666 N.Y.S.2d 507, 1997 N.Y. App. Div. LEXIS 13355 (N.Y. App. Div. 2d Dep't 1997).

Plaintiff was properly allowed to file late notice of claim against city transit authority where authority acquired actual knowledge of essential facts of claim within 90 days after claim arose or within reasonable time thereafter, and there was no prejudice to authority in maintaining its defense on merits. Sayad v New York City Transit Auth., 246 A.D.2d 639, 666 N.Y.S.2d 955, 1998 N.Y. App. Div. LEXIS 584 (N.Y. App. Div. 2d Dep't 1998).

Municipal defendants, having kept record of plaintiff's medical condition during her 2-month hospital stay, knew essential facts constituting her medical malpractice claim (that her herpes encephalitis was not treated with anti-viral agent until 2 weeks after she was admitted to hospital, and that she suffered severe brain during that time), and such knowledge, along with plaintiff's infancy, justified relief excusing late service of notice of claim. Rodriguez v New York City Health & Hosps. Corp., 270 A.D.2d 110, 704 N.Y.S.2d 253, 2000 N.Y. App. Div. LEXIS 2845 (N.Y. App. Div. 1st Dep't 2000).

Because a school district and a department of social services had knowledge of a child's sexual abuse allegations against the child's stepfather during the relevant time, the guardian ad litem's N.Y. Gen. Mun. Law § 50-e application for leave to file a late claim was properly granted. Matter of Place v Beekmantown Cent. School Dist., 69 A.D.3d 1035, 892 N.Y.S.2d 638, 2010 N.Y. App. Div. LEXIS 40 (N.Y. App. Div. 3d Dep't 2010).

Former student was entitled to file a late notice of claim against a school district because the school had actual knowledge of at least some of the underlying acts of harassment, intimidation, and bullying against the student within a reasonable time, the school was able to investigate at least one of the incidents shortly after it occurred, and the school failed to show substantial prejudice by the filing of a late notice. Sherb v Monticello Cent. Sch. Dist., 163 A.D.3d 1130, 81 N.Y.S.3d 265, 2018 N.Y. App. Div. LEXIS 4913 (N.Y. App. Div. 3d Dep't 2018).

182. — — —Against defendant counties

Petitioners were properly granted leave to serve late notice of claim, which arose at time infant petitioner was born some 6 months after pesticide spraying occurred, despite absence of excuse for additional 7-month delay, where respondent county directed spraying, had records of event, and was not prejudiced. Lewin v County of Suffolk, 239 A.D.2d 345, 657 N.Y.S.2d 734, 1997 N.Y. App. Div. LEXIS 4586 (N.Y. App. Div. 2d Dep't 1997).

Discretion was providently exercised in allowing leave under N.Y. Gen. Mun. Law § 50-e(5) to serve a late notice of an infant daughter's medical malpractice claim against a county and since there was actual notice of the claim and an absence of prejudice in the delay, the lack of a reasonable excuse for failing to timely serve a notice of claim did not bar the supreme court from granting leave to serve the late notice. The county had actual knowledge of the claim because they had the daughter's medical records at the time of the alleged malpractice and there was no showing of substantial prejudice to the county as a result of the delay where the daughter was protected by the infancy toll under N.Y. C.P.L.R. 208. Nardi v County of Nassau, 18 A.D.3d 520, 795 N.Y.S.2d 300, 2005 N.Y. App. Div. LEXIS 5058 (N.Y. App. Div. 2d Dep't 2005).

183. — — —Against defendant hospitals and health organizations

Court should have allowed infant, who allegedly contracted lead poisoning as result of ingestion of lead-based paint in city's building, to file late notice of claim pursuant to CLS Gen Mun § 50-e(5), notwithstanding that there was 7-year delay between diagnosis and application for leave to file late notice, where city department of health, having been notified of diagnosis by hospital where infant was treated, conducted inspection within several months of diagnosis, which indicated "Elevated Lead Levels" on premises; under circumstances, department had actual notice of essential facts underlying claim within reasonable time after injury, and disability of infancy extended statutory period during which court could exercise discretion to permit filing of late notice. Holmes v City of New York, 189 A.D.2d 676, 592 N.Y.S.2d 371, 1993 N.Y. App. Div. LEXIS 350 (N.Y. App. Div. 1st Dep't 1993).

Nine-year-old petitioner was entitled to leave to file late notice of claim against city hospital for injuries sustained during her birth since (1) application was made within appropriate limitations period as tolled by her infancy, and (2) hospital was not unduly prejudiced, as injury was apparent at birth and hospital had been in possession of relevant medical records since that time. Tomlinson v New York City Health & Hosps. Corp., 190 A.D.2d 806, 593 N.Y.S.2d 565, 1993 N.Y. App. Div. LEXIS 1444 (N.Y. App. Div. 2d Dep't 1993).

In action to recover for permanent brain damage suffered by child due to allegednegligence and medical malpractice committed prior to and at time of his birth inmunicipal hospital, court should have granted leave to file late notice of claim underCLS Gen Mun § 50-e(5) since (1) hospital had possession of child's medical recordsfrom time of alleged malpractice, and thus had actual notice of claim and underlyingfacts within limitation period, (2) application to file late notice was made withinappropriate limitation period, as tolled by child's infancy, and (3) fact that child'smother waited 9 years from birth of child and 5 years from time child wasinstitutionalized should not be fatal, given hospital's knowledge and resulting lackof prejudice. Williams v Bronx Mun. Hosp. Ctr., 205 A.D.2d 420, 613 N.Y.S.2d 401, 1994 N.Y. App. Div. LEXIS 6495 (N.Y. App. Div. 1st Dep't 1994).

Court granted application for leave to serve late notice of claim on county hospital, on behalf of infant petitioner who allegedly suffered permanent injuries cause by negligent manner in which intravenous femoral line was inserted during her hospitalization for "diabetic ketoacitosis," where application was made within period of limitations as tolled by petitioner's infancy, county hospital had infant's medical records since time of alleged malpractice, it had actual notice of underlying facts, and it was not substantially prejudiced by delay. Robinson v Westchester County Med. Ctr., 270 A.D.2d 275, 703 N.Y.S.2d 528, 2000 N.Y. App. Div. LEXIS 2504 (N.Y. App. Div. 2d Dep't 2000).

It was proper to grant plaintiff's motion to deem his notice of claim against New York City Health and Hospitals Corporation (HHC) to be timely served where application was made within appropriate period of limitation, as tolled by plaintiff's infancy, and HHC was in possession of plaintiff's medical records as of time of alleged malpractice. Owens v New York City Health & Hosps. Corp., 271 A.D.2d 514, 706 N.Y.S.2d 355, 2000 N.Y. App. Div. LEXIS 4070 (N.Y. App. Div. 2d Dep't 2000).

Order granting leave to a parent to file a late notice of her minor son's claim against a school board pursuant to N.Y. Gen. Mun. Law § 50-e(5) and N.Y. Educ. Law § 3813(2-a) was proper because the school board had actual notice of the essential facts and had not shown prejudice by the delay; although the parent did not establish a nexus between the delay and the child's infancy, the parent's failure to show a reasonable excuse for delay was not fatal to the application. Although the parent sought leave to file the late notice over four years after the alleged incident, the statute of limitations was tolled by the son's infancy, and the school board had actual knowledge of the essential facts of the claim no later than approximately four months after the incident. Matter of Hinton v New Paltz Cent. School Dist., 50 A.D.3d 1414, 857 N.Y.S.2d 753, 2008 N.Y. App. Div. LEXIS 3680 (N.Y. App. Div. 3d Dep't 2008).

184. — — —Against defendant housing authorities

It was proper exercise of discretion to grant infant leave to serve late notice of claim against New York City Housing Authority (NYCHA) where (1) infant timely served City of New York, (2) subsequent investigation revealed that NYCHA may have been responsible for repairing sidewalk where infant was injured, (3) NYCHA police officer filed contemporaneous report, (4) photographs of accident site were apparently taken, (5) eyewitnesses had come forth, and (6) NYCHA had not articulated any countervailing prejudice. Lozada v City of New York, 189 A.D.2d 726, 592 N.Y.S.2d 742, 1993 N.Y. App. Div. LEXIS 731 (N.Y. App. Div. 1st Dep't 1993).

Court properly allowed mother of infant claimants to file late notice of claim relating to their alleged assault and unlawful imprisonment by police officers employed by New York City Housing Authority (NYCHA), after mother had inadvertently served notice of claim on New York City Police Department, where NYCHA did not rebut contention that mother's complaint which had been timely filed with Civilian Complaint Review Board provided NYCHA with actual notice of essential facts constituting claim within specified 90-day time period. Ellison v New York City Hous. Auth., 197 A.D.2d 688, 602 N.Y.S.2d 940, 1993 N.Y. App. Div. LEXIS 9955 (N.Y. App. Div. 2d Dep't 1993).

Infant, who was injured while living as foster child in building owned by New York City Housing Authority, was improperly denied permission to serve late notice of claim where he was in foster care at time of incident, he offered reasonable excuse for confusion about correct address of incident, Housing Authority had actual knowledge of incident within 90-day statutory period, and Housing Authority did not show that it would be prejudiced by delay. Shabazz v Sheltering Arms Childrens Serv., 216 A.D.2d 230, 629 N.Y.S.2d 20, 1995 N.Y. App. Div. LEXIS 7115 (N.Y. App. Div. 1st Dep't 1995).

Child who was severely burned in fire while living with his family in building owned by New York City Housing Authority was properly granted permission to serve notice of claim 8 months after expiration of 90-day period under CLS Gen Mun § 50-e(1)(a) where delay was not substantial and housing authority had actual knowledge of incident within 90-day period due to its receipt of police report 5 days after occurrence, which did not rule out plaintiffs' claim that injuries could have been prevented or lessened had properly functioning smoke detectors been in place. Gilley v New York City Hous. Auth., 217 A.D.2d 493, 630 N.Y.S.2d 48, 1995 N.Y. App. Div. LEXIS 7850 (N.Y. App. Div. 1st Dep't 1995).

Application for leave to serve late notice of claim against city and its housing authority was properly granted where petitioner was infant, period of delay was only 2 months, and housing authority, which claimed ignorance of any defects in injury-causing playground equipment before service of instant application, failed to show any reason for not believing that equipment was in same condition at time of such service as it was at time of accident. Muriqi by Muriqi v City of New York, 245 A.D.2d 79, 664 N.Y.S.2d 802, 1997 N.Y. App. Div. LEXIS 12833 (N.Y. App. Div. 1st Dep't 1997).

185. — — —Against defendant schools

It was not improvident exercise of discretion for court to permit late notice of claim against school district where (1) accident involving 10-year-old claimant occurred on school playground on May 6, (2) accident was reported to school on next day and school incident report was prepared on that day which included description of accident, injury, and name of witness, and (3) notice of claim was served on September 18. Tortorici v East Rockaway Pub. Sch. Dist. No. 19, 191 A.D.2d 495, 594 N.Y.S.2d 335, 1993 N.Y. App. Div. LEXIS 2019 (N.Y. App. Div. 2d Dep't 1993).

Late filing of a notice of claim on behalf of an infant against a school district pursuant to section 50-e of the General Municipal Law is excused where the impediment of infancy did not prevent the public corporation, its attorney or its insurance carrier from acquiring actual knowledge of the essential facts constituting the claim within the time specified in subdivision 1 of section 50-e or within a reasonable time thereafter; the impediment may be presumed to attend infancy and need not be factually demonstrated. Bureau v Newcomb Cent. School Dist., 74 A.D.2d 133, 426 N.Y.S.2d 870, 1980 N.Y. App. Div. LEXIS 10444 (N.Y. App. Div. 3d Dep't 1980).

The tolling provisions of CPLR § 208 were applicable to a tort action brought by an infant against a free school district; thus, the infant was entitled to serve a notice of a late claim upon proof pursuant to Gen Mun Law § 50-e that the school district or its authorized representative had acquired actual notice of the essential facts constituting the claim of the infant within 90 days of the accident or within a reasonable time thereafter. Cohen v Pearl River Union Free School Dist., 81 A.D.2d 876, 439 N.Y.S.2d 393, 1981 N.Y. App. Div. LEXIS 11575 (N.Y. App. Div. 2d Dep't 1981).

In an action against a school district brought by a 17-year-old high school student who allegedly had been injured when kicked in the groin, the court properly extended the time limit under Gen Mun Law § 50-e for filing a notice of claim, where initially it had been thought that the youth suffered from a mere muscle strain, but later it was discovered that he had malignant tumors which required removal of his pelvis and hip and subjected him to lengthy incapacity, and the school district had actual knowledge of the essential facts constituting his claim but failed to make a thorough investigation of the accident and injury. Lockskin v South Colonie Cent. School Dist., 81 A.D.2d 929, 439 N.Y.S.2d 505, 1981 N.Y. App. Div. LEXIS 11663 (N.Y. App. Div. 3d Dep't 1981).

In an action against a school district, stemming from the collision of a school bus with an 11-year-old child who was riding a bicycle, leave to serve a late notice of claim was properly granted six years after the collision since the limitation period for filing a notice of claim may be tolled during the claimant's infancy, since the school district had actual notice of the accident on the day it occurred, and since the child's broken leg and fractured pelvis were sufficiently serious to alert the school district as to the advisability of undertaking a thorough investigation of the accident. De Groff v Bethlehem Cent. School Dist., 92 A.D.2d 702, 460 N.Y.S.2d 630, 1983 N.Y. App. Div. LEXIS 16984 (N.Y. App. Div. 3d Dep't 1983).

In an action against a school district by a minor who had been injured five years earlier during a regularly scheduled gym class when he was kicked in the eye by a classmate during a football game, the trial court properly granted plaintiff's application to file a late notice of claim under Gen Mun Law § 50-e(5) where defendant had had immediate notice of the accident, two of its employees had been witnesses to the occurrence, a detailed report containing substantially the same information as a notice of claim had been given to the school district by one of its employees within 24 hours of the accident, and a blow of force sufficient to cause hemorrhaging of the eye could reasonably be considered sufficiently serious to have alerted the school district to the advisability of making a thorough investigation; additionally, despite the lapse of time, there was no indication that the school

district, through the proper exercise of discovery, would be unable to obtain complete information concerning the history, nature, and extent of the injury, nor any showing that defendant had been prejudiced by the delay. Welsh v Berne-Knox-Westerlo Cent. School Dist., 103 A.D.2d 950, 479 N.Y.S.2d 567, 1984 N.Y. App. Div. LEXIS 19617 (N.Y. App. Div. 3d Dep't 1984).

In a proceeding pursuant to Gen Mun Law § 50-e(5) for leave to serve a late notice of claim against a school district, time to serve the notice of claim would be extended. Immediately after the infant claimant's injury, which occurred during a gym class, the infant was sent by the gym teacher to the school nurse. Given that the school district acquired actual knowledge of the essential facts constituting the claim immediately after the accident and made no showing of any prejudice, the application to serve a late notice of claim should have been granted. Occhiuzzi v Occhiuzzi, 108 A.D.2d 799, 485 N.Y.S.2d 125, 1985 N.Y. App. Div. LEXIS 43123 (N.Y. App. Div. 2d Dep't), app. dismissed, 66 N.Y.2d 758, 496 N.Y.S.2d 1025, 490 N.E.2d 553, 1985 N.Y. LEXIS 17666 (N.Y. 1985).

Supreme Court improperly denied application for leave to file late notice of claim for injuries sustained by 4-year-old girl while she was participant in Head Start program, even though motion was filed more than 3 years after accident, where petitioner attested that she informed school district of accident immediately after it occurred and school district made no showing that delay caused prejudice. Nichols v Board of Educ. of Ballston Spa Cent. School Dist., 166 A.D.2d 846, 562 N.Y.S.2d 831, 1990 N.Y. App. Div. LEXIS 12785 (N.Y. App. Div. 3d Dep't 1990).

School district was not apprised of petitioner's claim that school personnel negligently failed to supervise students, even though school principal filled out incident report on day following incident and school district's insurance carrier received document 6 months later advising it of violent altercation, since both documents indicated only that petitioner was victim of intentional assault. Dunlea v Mahopac Cent. Sch. Dist., 232 A.D.2d 558, 648 N.Y.S.2d 673, 1996 N.Y. App. Div. LEXIS 10376 (N.Y. App. Div. 2d Dep't 1996), app. denied, 89 N.Y.2d 812, 657 N.Y.S.2d 404, 679 N.E.2d 643, 1997 N.Y. LEXIS 386 (N.Y. 1997).

Accusations against special education teacher made by other children did not place school district on notice of essential facts comprising petitioner's claim since school officials inquired of petitioner whether he had also been abused by teacher, but he continued to deny having been victim. Doe v Madrid-Waddington Cent. Sch. Dist., 232 A.D.2d 922, 649 N.Y.S.2d 88, 1996 N.Y. App. Div. LEXIS 11266 (N.Y. App. Div. 3d Dep't 1996).

Court properly granted permission to serve late notices of claim against school district to petitioners who were less than 18 years old when sexually abused and harassed by teacher, since district had knowledge of essential facts underlying claim in light of extensive investigation previously undertaken involving state police, resulting in disclosure of number of witnesses who attested to incidents and leading to teacher's criminal conviction, although there was no reasonable excuse for petitioners' delay in making their applications. Kelli A. v Galway Cent. Sch. Dist., 241 A.D.2d 883, 660 N.Y.S.2d 228, 1997 N.Y. App. Div. LEXIS 8166 (N.Y. App. Div. 3d Dep't 1997).

In action by petitioner alleging that he was sexually abused by 6th grade teacher in 1991 when he was 12 years old, there was no abuse of discretion in granting application to serve late notice of claim 9 months after petitioner attained age 18, although no excuse was proffered for delay, as no substantial prejudice to respondent school district was shown where it received actual notice of underlying facts within 90 days of alleged incident in form of oral and written complaints from petitioner and his parents, it could readily obtain names of petitioner's classmates who were interviewed by sheriff's department in 1991, and there was no showing that teacher in question was unavailable as source of information. Scuteri v Watkins Glen Cent. Sch. Dist., 261 A.D.2d 779, 689 N.Y.S.2d 751, 1999 N.Y. App. Div. LEXIS 5314 (N.Y. App. Div. 3d Dep't 1999).

Court did not err in granting application to file late notice of claim for damages arising out of alleged mistreatment of petitioner's son by one of his teachers despite lack of reasonable excuse for delay, where petitioner stated that she contacted school officials shortly after she learned of incidents involving her son, and it was undisputed that school district received other similar complaints and in fact had reprimanded teacher, which supported conclusion that school district received notice of central facts of claim within reasonable time. Drozdzal v Rensselaer City School Dist., 277 A.D.2d 645, 716 N.Y.S.2d 435, 2000 N.Y. App. Div. LEXIS 12028 (N.Y. App. Div. 3d Dep't 2000).

Student whose hand was severely injured in classroom metal sheering accident was entitled to file late notice of claim against school district where (1) he was 15 years old at time of accident, (2) district had immediate notice of accident through its school nurse, who called ambulance to take student to hospital, (3) school principal's affidavit showed that district had actual knowledge of all essential fact surrounding accident, (4) injury was sufficiently serious to have alerted district to advisability of making thorough investigation, and (5) district made no claim of prejudice by reason of late filing. Hayes v Peru Cent. Sch. Dist., 281 A.D.2d 794, 722 N.Y.S.2d 104, 2001 N.Y. App. Div. LEXIS 2504 (N.Y. App. Div. 3d Dep't 2001).

Filing of late notices of claim against board of education by minor who had been attacked in high school and her mother was allowable in view of minor's disability and fact that assailant had been indicted for such assault, thus giving board of education actual knowledge of essential facts constituting claim, and that no prejudice from lack of timely notice was shown. Lacy v Buffalo Board of Education, 89 Misc. 2d 255, 391 N.Y.S.2d 43, 1977 N.Y. Misc. LEXIS 1827 (N.Y. Sup. Ct. 1977).

186. — —Filing late notice not allowed

Application for leave to serve late notice of claim based on disability of infancy was properly denied where town did not receive actual knowledge of accident and claim until petitioners made instant application almost 2 years after accident, and thus disability of infancy was outweighed by prejudice to town. Caparco v Brookhaven, 133 A.D.2d 803, 520 N.Y.S.2d 185, 1987 N.Y. App. Div. LEXIS 51843 (N.Y. App. Div. 2d Dep't 1987).

Infant petitioner was not entitled to serve late notice of claim pursuant to CLS Gen Mun § 50-e since she failed to allege adequate facts to establish that respondents had acquired actual knowledge of essential facts constituting claim within 90 days after claim arose or within reasonable time thereafter where (1) claim of sexual abuse arose while infant was in attendance at day care facility operated between November, 1980 and December, 1981, (2) infant's mother allegedly failed to discover abuse until August, 1985, at which time day care facility had already been closed and principals had been arrested and indicted, and (3) initial application for leave to serve late notice of claim was not made until March, 1986. Kareca Lashawn J. v County of Westchester, 142 A.D.2d 729, 531 N.Y.S.2d 308, 1988 N.Y. App. Div. LEXIS 8000 (N.Y. App. Div. 2d Dep't 1988), app. denied, 74 N.Y.2d 602, 541 N.Y.S.2d 985, 539 N.E.2d 1113, 1989 N.Y. LEXIS 599 (N.Y. 1989).

Infant was not entitled to leave to serve late notice of claim pursuant to CLS Gen Mun § 50-e(5) since disability of infancy was outweighed by other factors including (1) lack of adequate explanation for delay in bringing proceeding for leave to serve late notice of claim until more than one year after accident, (2) failure to allege adequate facts to establish that town had actual knowledge of facts underlying claim within reasonable time after accident, and (3) fact that delay was unrelated to claimant's infancy. Groshans v Babylon, 143 A.D.2d 666, 533 N.Y.S.2d 18, 1988 N.Y. App. Div. LEXIS 9468 (N.Y. App. Div. 2d Dep't 1988).

Court erred in granting plaintiff's motion for leave to serve late notice of claim for injuries sustained by her 3-year-old son when he fell from playground slide onto blacktop surface where accident occurred 3 years before plaintiff moved for leave to file late notice of claim, and she failed to establish that defendant had any prior knowledge of incident. Howard v Rochester, 162 A.D.2d 1033, 557 N.Y.S.2d 816, 1990 N.Y. App. Div. LEXIS 9818 (N.Y. App. Div. 4th Dep't 1990).

Plaintiff would not be granted permission to file late notice of claim for injuries allegedly sustained when boy was injured in fall in school gymnasium while participating in game of kickball, allegedly as result of raised mat, although boy was infant and learning disabled, since school district did not receive notice of

accident and would, therefore, be prejudiced by delay in reporting of accident involving tripping over transient and movable object; infant disability usually only excuses late filing if such impediment did not prevent acquisition of actual knowledge of essential facts. Salyer v Valley Cent. School Dist., 163 A.D.2d 782, 558 N.Y.S.2d 746, 1990 N.Y. App. Div. LEXIS 8601 (N.Y. App. Div. 3d Dep't 1990), app. denied, 78 N.Y.2d 851, 573 N.Y.S.2d 69, 577 N.E.2d 60, 1991 N.Y. LEXIS 871 (N.Y. 1991).

Court correctly denied motion for leave to serve late notice of claim against school district as (1) bus incident report, stating that then 14-year-old plaintiff stepped off school bus and was walking away when he fell to ground and injured his leg, did not provide actual knowledge of essential facts constituting plaintiff's present claim that he was caused to slip and fall off steps of school bus, and that district was negligent in permitting bottom step to become wet and slippery, (2) plaintiff failed to proffer excuse for his 2-year delay in seeking to serve late notice, and (3) delay substantially prejudiced district's ability to investigate claim, which involved transitory condition. Johnson v Katonah - Lewisboro Sch. Dist., 285 A.D.2d 490, 727 N.Y.S.2d 171, 2001 N.Y. App. Div. LEXIS 7057 (N.Y. App. Div. 2d Dep't 2001).

Trial court properly denied petitioner's motion pursuant to N.Y. Gen. Mun. Law § 50-e to serve a late notice of claim on a city health and hospital corporation, as petitioner failed to show that the failure to file timely notice was due to her child's infancy, and failed to show that the corporation had actual knowledge of the facts of the claim merely because it maintained medical records concerning the child's birth. Matter of Dumancela v New York City Health & Hosps. Corp., 32 A.D.3d 515, 820 N.Y.S.2d 136, 2006 N.Y. App. Div. LEXIS 10306 (N.Y. App. Div. 2d Dep't 2006).

Minor was not entitled to serve late notices of claim against appellants, a town and a school district, under N.Y. Gen. Mun. Law § 50-e because the minor failed to establish that appellants acquired actual knowledge of the essential facts constituting the claim regarding birth defects allegedly caused by an airborne health hazard within 90 days of its accrual or a reasonable time thereafter; any alleged knowledge that contaminated fill material had been dumped at the subject sites did not provide appellants with actual knowledge that an airborne health hazard might have been created. Matter of Bucher v Town of Eastchester, 40 A.D.3d 1089, 837 N.Y.S.2d 224, 2007 N.Y. App. Div. LEXIS 6614 (N.Y. App. Div. 2d Dep't 2007).

Child was not entitled to serve a late notice of claim upon the village because there was insufficient evidence to establish that the village acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose, the delay in serving the notice of claim would substantially prejudice the village, there was no reasonable excuse for the delay, and there was no causal nexus between the child's infancy and the delay in the serving of the notice of claim. Matter of R.N. v Village of New Sq., 164 A.D.3d 508, 83 N.Y.S.3d 102, 2018 N.Y. App. Div. LEXIS 5543 (N.Y. App. Div. 2d Dep't 2018).

187. —Neglect of infant

Where the failure of a high school graduate to file a claim appeared to have arisen from sheer neglect or inadvertence of the infant rather than his immaturity, a motion to file a late claim was denied. Stowe v Elmira, 38 A.D.2d 992, 329 N.Y.S.2d 430, 1972 N.Y. App. Div. LEXIS 5209 (N.Y. App. Div. 3d Dep't), aff'd, 31 N.Y.2d 814, 339 N.Y.S.2d 463, 291 N.E.2d 586, 1972 N.Y. LEXIS 978 (N.Y. 1972).

Court properly denied petitioners' motion for leave to serve late notice of claim for damages arising from alleged sexual abuse of infant where (1) petitioners failed to establish that respondents had actual knowledge of facts underlying claim within 90-day statutory period or reasonable time thereafter, (2) because time period involved in claim was not more specific, respondents' knowledge arguably came anywhere from 4 months to 2 ½ years after claim arose, and (3) infant was 12-year-old boy at time of alleged abuse who had capacity to complain and make abuse known. Donald E. v Gloversville Enlarged Sch. Dist., 191 A.D.2d 749, 594 N.Y.S.2d 385, 1993 N.Y. App. Div. LEXIS 1878 (N.Y. App. Div. 3d Dep't 1993).

188. —Nonapparent nature of injuries

A twenty-year old girl was denied permission to file a late claim where the delay in filing was caused not by the girl's infancy but by the fact that the seriousness of the injury was not apparent until almost a year after the accident. Schnee v New York, 1 N.Y.2d 697, 150 N.Y.S.2d 801, 134 N.E.2d 69, 1956 N.Y. LEXIS 988 (N.Y. 1956).

Where it was asserted that a prematurely born infant was given excessive oxygen in an incubator, that such oxygen caused her blindness, and that injury was only discovered during sixth postdischarge check-up examination some months later, it was a proper exercise of discretion to permit filing of a late notice of claim in infant's favor. Charalambakis v New York, 54 A.D.2d 553, 387 N.Y.S.2d 4, 1976 N.Y. App. Div. LEXIS 13860 (N.Y. App. Div. 2d Dep't 1976), rev'd, 46 N.Y.2d 785, 413 N.Y.S.2d 912, 386 N.E.2d 823, 1978 N.Y. LEXIS 2471 (N.Y. 1978).

Court properly denied application for leave to serve late notice of claim brought on behalf of infant, who allegedly sustained serious injuries when she was assaulted on roof of housing authority apartment building, where (1) proffered excuse for delay—that mother did not realize seriousness of her daughter's injuries until approximately 5 months after incident—was unreasonable, (2) delay was unrelated to infancy, and (3) there was nothing in police reports that would connect incident with any negligence on part of housing authority. Plantin v New York City Hous. Auth., 203 A.D.2d 579, 611 N.Y.S.2d 28, 1994 N.Y. App. Div. LEXIS 4239 (N.Y. App. Div. 2d Dep't 1994).

Petitioner was not entitled to leave to serve late notice of claim in medical malpractice action on basis of his infancy where his mother's conclusory assertions that she only recently learned of possible nexus between petitioner's lung condition and surgery performed to correct congenital cardiopulmonary defect was unpersuasive, and county was prejudiced by delay since its medical records were insufficient to provide actual notice of nature of petitioner's claim. Bischert v County of Westchester, 212 A.D.2d 529, 622 N.Y.S.2d 308, 1995 N.Y. App. Div. LEXIS 1041 (N.Y. App. Div. 2d Dep't 1995).

Petitioner, whose son was seriously injured while participating in swim program conducted by respondent school district, was properly allowed to serve notice of claim more than 6 years after accident where (1) delay in filing was caused by, inter alia, time that elapsed before she ascertained extent and permanency of her son's disabilities, and by her mistaken belief that filing deadline would be tolled by her son's infancy, (2) respondent had notice of accident, and (3) there was no convincing showing that delay in filing caused undue prejudice to respondent. Cure v City of Hudson Sch. Dist., 222 A.D.2d 879, 634 N.Y.S.2d 884, 1995 N.Y. App. Div. LEXIS 12872 (N.Y. App. Div. 3d Dep't 1995).

Court properly denied infant petitioner's application for leave to serve late notice of claim alleging that she was sexually abused by her former fourth grade teacher at public school, even though petitioner revealed incident to school psychologist shortly after incident, and petitioner's father contended that he did not then know seriousness of matter, since 2 ½ -year delay had prejudiced school district's ability to defend against claim, and principal and teacher involved in matter were no longer employed by district and had moved out of state. Bordan v Mamaroneck Sch. Dist., 230 A.D.2d 792, 646 N.Y.S.2d 373, 1996 N.Y. App. Div. LEXIS 8367 (N.Y. App. Div. 2d Dep't 1996).

In action for injuries sustained by plaintiff's 15-year-old daughter in gym class, court properly granted plaintiff's motion to file late notice of claim where daughter was unaware of extent of her injuries until after expiration of 90-day period, defendant either had actual notice of incident on day that it happened or had notice within one month after extent of injuries were known, total time from date of incident to notice was no more than 5 months, and passage of time did not prevent defendant from investigating claim. More v General Brown Cent. Sch. Dist., 262 A.D.2d 1030, 691 N.Y.S.2d 850, 1999 N.Y. App. Div. LEXIS 7250 (N.Y. App. Div. 4th Dep't 1999).

Father offered sufficient excuse for late filing of notice of claim against school district on behalf of student whose hand was severely injured in classroom metal sheering accident where father did not retain counsel until he learned that his son's injuries might be permanent and then feared that his medical insurance benefits would be insufficient to cover medical costs.

Hayes v Peru Cent. Sch. Dist., 281 A.D.2d 794, 722 N.Y.S.2d 104, 2001 N.Y. App. Div. LEXIS 2504 (N.Y. App. Div. 3d Dep't 2001).

Retention by a city of a notice or claim for a period of four years does not constitute a waiver on the part of the city of the requirement of timely service. Lubarsky v Long Beach, 126 N.Y.S.2d 747, 205 Misc. 153, 1953 N.Y. Misc. LEXIS 2487 (N.Y. Sup. Ct. 1953).

189. —Reliance on representations

Estoppel from asserting defense based on failure to comply with notice of claim provision of General Municipal Law may best be asserted by motion to file notice of claim nunc pro tunc rather than by proceeding by way of service of amended complaint setting forth facts sufficient to excuse filing. Bender v New York City Health & Hospitals Corp., 38 N.Y.2d 662, 382 N.Y.S.2d 18, 345 N.E.2d 561, 1976 N.Y. LEXIS 2305 (N.Y. 1976).

Where a claimant was injured while playing softball on a city recreation field and did not file a notice of claim against the city within the statutory period, relying upon representations of the ball club that they would pay for his hospital and doctor expenses, the courts will not grant an extension of time to file the notice of claim since the delay was not occasioned by reason of the infancy of the claimant. Application of Nori, 274 A.D. 545, 85 N.Y.S.2d 131, 1948 N.Y. App. Div. LEXIS 3125 (N.Y. App. Div. 1948), aff'd, 300 N.Y. 632, 90 N.E.2d 492, 300 N.Y. (N.Y.S.) 632, 1950 N.Y. LEXIS 1428 (N.Y. 1950).

Court improperly denied application for leave to serve late notice of claim on behalf of infant where petitioners' alleged continuing reliance on respondents' representations that premises had been successfully remediated for lead paint contamination constituted facially reasonable excuse for their inactivity, and respondent city's health department was in possession of records generated by its employees who investigated lead contamination in petitioners' home and thus had actual notice of facts underlying claim. Fierro v City of New York, 271 A.D.2d 608, 706 N.Y.S.2d 451, 2000 N.Y. App. Div. LEXIS 4277 (N.Y. App. Div. 2d Dep't 2000).

An infant 17 years of age at the time of the accident cannot claim the benefits accorded to "immature infants," and will not be granted leave to file a claim after the lapse of more than 1 year, especially where the only explanations advanced by the claimant were that she was ignorant of the statute and that she was lulled into a sense of security by a statement of a city investigator that she would "hear from the city soon," and where claimant makes no explanation of her further delay after being informed by counsel of the necessity for filing a notice of claim. Witherspoon v New York, 85 N.Y.S.2d 443, 193 Misc. 730, 1948 N.Y. Misc. LEXIS 3794 (N.Y. Sup. Ct. 1948), disapproved, Cohen v Pearl River Union Free School Dist., 70 A.D.2d 94, 419 N.Y.S.2d 998, 1979 N.Y. App. Div. LEXIS 12306 (N.Y. App. Div. 2d Dep't 1979).

190. —Retention or change of counsel

Whether initial failure to file a notice of claim within the prescribed 90-day period is legally attributable to infant respondent's disability, it is apparent that application for leave to file a late claim was not, as a matter of law, made "within a reasonable time after the expiration of the . . . [said 90-day period]" as a result of an unexplained subsequent delay of at least three months between retention of counsel for purposes of applying for such leave and actual application to the court. Jagacki v Board of Education, 34 A.D.2d 957, 312 N.Y.S.2d 226, 1970 N.Y. App. Div. LEXIS 4641 (N.Y. App. Div. 2d Dep't 1970).

On an application by petitioner to file a notice of claim after the expiration of the 90-day period specified in the statute, where it appeared that her father consulted attorneys on her behalf within the 90-day period and that her present attorneys were thereafter employed by her and received the file from the original attorneys after the expiration of the filing period, petitioner should reveal when she first learned of the obligation to file a notice of claim, the details of her employment of and consultation with attorneys and details of her hospitalization and medical treatment. Marquart v County of Erie, 36 A.D.2d 578, 317 N.Y.S.2d 909, 317 N.Y.S.2d 910, 1971 N.Y. App. Div. LEXIS 4967 (N.Y. App. Div. 4th Dep't 1971).

Where, at the time of an infant's alleged injury during her birth in 1974 due to the alleged negligence of employees of a municipally owned hospital, there was no duty upon the infant to serve any notice of claim in order to maintain an action against the hospital's employees, and she could not be, subjected to the provisions of § 50-e of the General Municipal Law as they existed at the time of her injury, rather she would be subject to the provisions of that section as they existed at the time the duty to serve a notice of claim arose; thus, special term correctly applied the provisions as they were at the time the claim arose in granting leave to serve a late notice of claim. Perez v New York City Health & Hospitals Corp., 84 A.D.2d 789, 444 N.Y.S.2d 23, 1981 N.Y. App. Div. LEXIS 15985 (N.Y. App. Div. 2d Dep't 1981), app. denied, 56 N.Y.2d 508, 1982 N.Y. LEXIS 5434 (N.Y. 1982).

Failure to serve timely notice of claim required dismissal of infant's malpractice action against city and city hospitals corporation where notice was served 16 years after event and revival of claim would result in irreparable prejudice to defendants since (1) they lacked any substantive knowledge of claim, and (2) hospital involved had since been closed and its staff dispersed. Lallave v New York, 127 A.D.2d 634, 511 N.Y.S.2d 869, 1987 N.Y. App. Div. LEXIS 43123 (N.Y. App. Div. 2d Dep't 1987).

Minor could not serve a late notice of claim under N.Y. Gen. Mun. Law § 50-e or N.Y. Educ. Law § 3813(2-a) against a school and a school district regarding an incident in which a desk fell on the minor's hand as ignorance of the 90-day statutory requirement for service of a claim was not a reasonable excuse for the nearly 18-month delay; no nexus was shown between the minor's infancy and the delay. Matter of Vicari v Grand Ave. Middle School, 52 A.D.3d 838, 860 N.Y.S.2d 629, 2008 N.Y. App. Div. LEXIS 5771 (N.Y. App. Div. 2d Dep't 2008).

An application for leave to file a belated claim, pursuant to subd. 5 of this section, was allowed where the claimant was an infant injured while riding on a school bus, seven years of age at the time of the accident, her father and natural guardian retained counsel 26 days prior to expiration of the statutory 90-day period for filing claim, and the attorney attempted to file claim 11 days subsequent to expiration of the statutory period, the court stating that the legislature, in enactment of this section, intended that an infant should not have his rights forfeited because of failure of his guardian or attorney to act within the prescribed period provided leave is sought within one year of date of injury. Poulos v Union Free School Dist., 24 Misc. 2d 32, 201 N.Y.S.2d 602, 1960 N.Y. Misc. LEXIS 3237 (N.Y. Sup. Ct. 1960).

Although injuries were sustained by a nine-year-old child on defendant's school grounds on October 28, 1961, no notice of claim was served within the 90-day period and the child's parents did not even retain an attorney until February 28, 1962, application for leave to file late notice of claim was granted on the ground that the infant was only nine years of age at the time of injury and her rights should not be forfeited because of her parent's failure to meet the statutory requirements. McGrouty v Central School Dist., 229 N.Y.S.2d 850 (N.Y. Sup. Ct. 1962).

An extension of time should be granted for service of notice of claim in behalf of a seven-year-old infant, upon application of his attorney shortly after running of the 90-day period, and a showing that the infant's mother was not well versed in the English language or legal terminology and failed to contact an attorney on the infant's behalf until 25 days after prescribed statutory time for serving notice of claim, following which the attorney proceeded diligently to seek an extension of time to serve notice of claim. Tezin v New York, 236 N.Y.S.2d 915, 1962 N.Y. Misc. LEXIS 4251 (N.Y. Sup. Ct. 1962).

191. —Miscellaneous considerations

Service of a notice of claim on the county attorney was defective. But where the time to serve the claim of an infant had already been extended and a reasonable time fixed therefor, the court had no power to grant an additional time for service upon the proper officials. Every v Ulster County, 283 A.D. 987, 131 N.Y.S.2d 201, 1954 N.Y. App. Div. LEXIS 6012 (N.Y. App. Div.), reh'g denied, 283 A.D. 1120, 131 N.Y.S.2d 907, 1954 N.Y. App. Div. LEXIS 6478 (N.Y. App. Div. 1954), app. denied, 284 A.D. 816, 132 N.Y.S.2d 544, 1954 N.Y. App. Div. LEXIS 3550 (N.Y. App. Div.

1954), app. dismissed, 307 N.Y. 833, 122 N.E.2d 327, 307 N.Y. (N.Y.S.) 833, 1954 N.Y. LEXIS 1528 (N.Y. 1954).

In view of presumption of impediment attending infancy and considering 17-year-old boy's serious injuries sustained when he was struck by motorcycle while crossing an intersection, a language barrier, prompt action by infant's attorney in attempting to obtain accident reports, and city's failure to transmit facts in its possession tending to show possible liability of the city until more than 90 days after date of accident, discretion should have been exercised by Supreme Court, Special Term, in favor of application for leave to file late notice of claim against city. Febles v New York, 44 A.D.2d 369, 355 N.Y.S.2d 147, 1974 N.Y. App. Div. LEXIS 5055 (N.Y. App. Div. 1st Dep't 1974).

Where notice of claim in personal injuries action by 18-year-old against municipal transit authority was postmarked after 90-day period and arrived almost 2 weeks after such period, court would indulge in presumption of impediment attending infancy in allowing late notice of claim. Sherman v Metro. Transit Auth., 44 A.D.2d 533, 353 N.Y.S.2d 453, 1974 N.Y. App. Div. LEXIS 5439 (N.Y. App. Div. 1st Dep't 1974), modified, 36 N.Y.2d 776, 368 N.Y.S.2d 842, 329 N.E.2d 673, 1975 N.Y. LEXIS 1808 (N.Y. 1975).

County respondents were prejudiced by petitioners' 10-month delay in serving notice of claim arising from alleged wrongful detention of infant petitioner as result of allegations of child abuse or neglect that were apparently determined to be unfounded, where all records had been expunged pursuant to CLS Soc Serv § 422(5), depriving respondents of opportunity to utilize them as part of prompt investigation of petitioners' claim. Morehead v Westchester County, 222 A.D.2d 507, 635 N.Y.S.2d 65, 1995 N.Y. App. Div. LEXIS 12738 (N.Y. App. Div. 2d Dep't 1995).

Tort action against city would be remitted for decision on infant plaintiff's application for permission to file late notice of claim where Statute of Limitations and time within which to file late notice of claim were tolled by infancy, and defendant did not have opportunity to respond to application because Supreme Court did not address that issue. Perry v City of New York, 238 A.D.2d 326, 656 N.Y.S.2d 301, 1997 N.Y. App. Div. LEXIS 3415 (N.Y. App. Div. 2d Dep't 1997).

Although tort action against city housing authority would be dismissed because plaintiff's conclusory allegations of depression provided insufficient basis for infancy extension of period for filing notice of claim under CLS Gen Mun § 50-e(5), dismissal would be without prejudice to renew on plaintiff's submission of proper medical proof that (1) she had suffered depression for significant period between her alleged rape in 1984 and her retention of counsel in 1987, and (2) such depression was medically valid explanation for her failure to seek prompt legal advice and to file notice of claim. Price v Herstic, 240 A.D.2d 151, 657 N.Y.S.2d 700, 1997 N.Y. App. Div. LEXIS 5817 (N.Y. App. Div. 1st Dep't 1997).

192. — —Under prior statutory provisions

Where, at the time of an infant's alleged injury during her birth in 1974 due to the alleged negligence of employees of a municipally owned hospital, there was no duty upon the infant to serve any notice of claim in order to maintain an action against the hospital's employees, and she could not be, subjected to the provisions of § 50-e of the General Municipal Law as they existed at the time of her injury, rather she would be subject to the provisions of that section as they existed at the time the duty to serve a notice of claim arose; thus, special term correctly applied the provisions as they were at the time the claim arose in granting leave to serve a late notice of claim. Perez v New York City Health & Hospitals Corp., 84 A.D.2d 789, 444 N.Y.S.2d 23, 1981 N.Y. App. Div. LEXIS 15985 (N.Y. App. Div. 2d Dep't 1981), app. denied, 56 N.Y.2d 508, 1982 N.Y. LEXIS 5434 (N.Y. 1982).

193. — —Filing late notice allowed

Court properly exercised its discretion to allow infant petitioner to file late notice of claim against city and board of education where delay did not substantially prejudice them. Morales v New York, 132 A.D.2d 601, 517 N.Y.S.2d 434, 1987 N.Y. App. Div. LEXIS 49141 (N.Y. App. Div. 2d Dep't 1987).

Court was not precluded from granting application to file late notice of claim either by purported inadequacy of claimant's excuse for limited delay or by fact that claimant might ultimately be unsuccessful on merits where claimant was infant, defendant was given notice of claim promptly after expiration of 90-day period, and alleged defective condition existed subsequent to filing of notice. Feliciano v New York City Hous. Auth., 188 A.D.2d 296, 590 N.Y.S.2d 491, 1992 N.Y. App. Div. LEXIS 13649 (N.Y. App. Div. 1st Dep't 1992).

In action for injuries sustained by infant, including loss of use of right eye when he was hit in eye by firecracker or rocket while on property of housing authority, court did not improvidently exercise its discretion in granting leave to serve late notice of claim, roughly 2 weeks after infant's mother became aware that she possessed cause of action and consulted attorney, and about 7 months after incident, given all circumstances presented, including petitioner's infancy, severity of injury sustained, and existence of medical records. Gadson v New York City Hous. Auth., 196 A.D.2d 585, 601 N.Y.S.2d 184, 1993 N.Y. App. Div. LEXIS 8072 (N.Y. App. Div. 2d Dep't 1993).

Court properly granted infant's application for leave to serve late notice of claim where (1) application was made within appropriate limitation period, as tolled by infancy, (2) defendants would not be unduly prejudiced by delay, and (3) one defendant was in possession of infant's medical records, and thus had actual notice of claim and its underlying facts. Makris v Westchester County, 208 A.D.2d 843, 618 N.Y.S.2d 67, 1994 N.Y. App. Div. LEXIS 9999 (N.Y. App. Div. 2d Dep't 1994).

County and county medical center would not be unduly prejudiced by delay in serving notice of claim due to plaintiff's infancy where medical center was in possession of detailed infant medical records, and one doctor involved was still employed by medical center and was available to testify. Leone v County of Nassau, 225 A.D.2d 776, 639 N.Y.S.2d 954, 1996 N.Y. App. Div. LEXIS 3134 (N.Y. App. Div. 2d Dep't 1996).

In action alleging that New York City Housing Authority (NYCHA) failed to comply with federal regulations requiring inspections for lead paint, court should have granted plaintiff's motion for leave to file late notice of claim against NYCHA where plaintiff was 3 or 4 years old when he allegedly ingested lead paint, city defendants were served with timely notice and thus there was strong likelihood that failure to serve NYCHA was result of excusable error regarding identity of proper municipal parties to serve, and there was no evidence that permitting late filing would prejudice NYCHA in its defense. Ali by Ali v Bunny Realty Corp., 253 A.D.2d 356, 676 N.Y.S.2d 166, 1998 N.Y. App. Div. LEXIS 8814 (N.Y. App. Div. 1st Dep't 1998).

It was proper to grant petitioners' application for leave to serve late notice of claim where mother of injured infant was not immediately aware of severity of infant's injuries, but she shortly thereafter retained attorney and attempted to serve notice of claim 15 days after expiration of 90-day statutorily-required time to do so, there were no known witnesses to occurrence, and area in question appeared to be in same condition as it was on day of infant's fall. Presley v City of New York, 254 A.D.2d 490, 680 N.Y.S.2d 111, 1998 N.Y. App. Div. LEXIS 11251 (N.Y. App. Div. 2d Dep't 1998).

Where 5-year-old plaintiff was allegedly abused at school by 6th-grade student in January or February, but he did not tell his mother about incident until March 15, and she promptly reported incident to school authorities and police department and served notice of claim on defendants on June 9, court properly granted leave to serve late notice of claim considering age of plaintiff, physical threats made to him by alleged perpetrator, and lack of substantial prejudice to defendants due to their actual knowledge of essential facts of incident shortly after its alleged occurrence. Cruz v City of Yonkers, 268 A.D.2d 501, 702 N.Y.S.2d 356, 2000 N.Y. App. Div. LEXIS 703 (N.Y. App. Div. 2d Dep't 2000).

In action against school district for negligent supervision of students, court properly granted petitioners' application to serve late notice of claim 4 ½ years after incident where petitioners reported incident to district on day after it occurred and investigation was conducted, investigation led to disciplinary action against another student, district did not offer evidence that witnesses were actually unavailable or unable to recall details surrounding event, and school records indicated that school

officials were told that health care providers for petitioners' son believed that he was suffering from posttraumatic distress syndrome as result of incident, thereby negating assertion that district was unaware of seriousness of alleged injuries to petitioners' son. Mahan v Board of Educ., 269 A.D.2d 834, 703 N.Y.S.2d 627, 2000 N.Y. App. Div. LEXIS 1767 (N.Y. App. Div. 4th Dep't 2000).

Trial court erred in denying an infant's motion pursuant to N.Y. Gen. Mun. Law § 50-e(5) to serve late notice of a personal injury claim against a city, as the filing period for the claim was tolled by infancy, as the absence of a causal nexus between infancy and the delay in serving the notice of claim, while a factor to be considered by the court, was not fatal to the application, and the city's police department had actual notice of the incident, in which the infant was hit by a city police car after allegedly running into a roadway from between parked cars, as the department conducted an immediate investigation of the incident. Matter of Vasquez v City of Newburgh, 35 A.D.3d 621, 826 N.Y.S.2d 648, 2006 N.Y. App. Div. LEXIS 15008 (N.Y. App. Div. 2d Dep't 2006).

Trial court properly found that a former student's motion to file a late notice of claim against a school district was timely because while the student was a minor, the statute of limitations was tolled until her 18th birthday, and the student's motion was brought within one year and 90 days of her 18th birthday. Sherb v Monticello Cent. Sch. Dist., 163 A.D.3d 1130, 81 N.Y.S.3d 265, 2018 N.Y. App. Div. LEXIS 4913 (N.Y. App. Div. 3d Dep't 2018).

194. — —Filing late notice not allowed

Motion to file late notice of claim was properly denied as to wife and husband in action brought on behalf of themselves and their infant child who was born with heart disease allegedly due to emotional distress inflicted on wife by actions of her superiors while she was pregnant and still employed with defendant county, since there was no allegation that county was ever informed that wife was suffering physical ailment due to conduct of its employees, or that she was taking medication on account thereof, until after summons and complaint were served sometime after child's birth; however, infant could not have been expected to file, or to have filed for her, notice of claim arising from events occurring prior to her birth, and thus, as to her, motion would be granted since county would not be prejudiced by delay regarding any cause of action infant might have. Benjamin v County of Warren, 128 A.D.2d 973, 513 N.Y.S.2d 288, 1987 N.Y. App. Div. LEXIS 44629 (N.Y. App. Div. 3d Dep't 1987), app. denied, 71 N.Y.2d 806, 530 N.Y.S.2d 109, 525 N.E.2d 754, 1988 N.Y. LEXIS 1020 (N.Y. 1988).

Disability of infancy was insufficient basis for granting leave to file late notice of claim where claimant failed to explain unreasonable delay in bringing proceeding for leave to file late notice until nearly 3 years after accident, claimant failed to allege facts to establish that school districts had actual knowledge of circumstances underlying negligence claim within reasonable time after accident, delay was unrelated to claimant's infancy, and injury did not appear so serious that school districts would have been alerted to advisability of making full investigation of incident. Katz v Rockville Centre Union Free School Dist., 131 A.D.2d 574, 516 N.Y.S.2d 289, 1987 N.Y. App. Div. LEXIS 48030 (N.Y. App. Div. 2d Dep't 1987), app. denied, 71 N.Y.2d 801, 527 N.Y.S.2d 767, 522 N.E.2d 1065, 1988 N.Y. LEXIS 1175 (N.Y. 1988).

Infant plaintiff was not entitled to serve late notice of claim upon town since disability of infancy was outweighed by other factors where (1) counsel for infant was retained 4 months after accident, (2) no action was taken until notice of claim was served on town over 13 months after accident and 9 months after counsel was retained, (3) town did not receive actual notice of accident until notice of claim was served, and (4) motion for leave to serve late notice of claim was not made until 5 months after notice was served; town's ability to prepare defense was diminished, and examination of infant pursuant to CLS Gen Mun § 50-h more than 16 months after accident and prior to making of motion was insufficient to demonstrate lack of prejudice. Sampson v Cazzari, 142 A.D.2d 681, 531 N.Y.S.2d 26, 1988 N.Y. App. Div. LEXIS 7931 (N.Y. App. Div. 2d Dep't 1988).

Court properly denied application by infant petitioner for leave to file late notice of claim against school for injuries sustained in fall on May 17, 1984, where infant's June 1987 application was made on grounds that he was infant at time of fall, that he had been misinformed about seriousness of injury, and that he and his parents lacked familiarity with law, but (1) delay was unrelated to infancy, but was due to fact that injury did not appear to be serious at time of fall, (2) counsel was contacted over 6 months before application was filed, and (3) school demonstrated substantial prejudice due to failure to file timely notice of claim. Schirripa v Birch Lane Elementary School, 154 A.D.2d 536, 546 N.Y.S.2d 160, 1989 N.Y. App. Div. LEXIS 12798 (N.Y. App. Div. 2d Dep't 1989).

In action on behalf of child who was injured as result of ingestion of paint chips at premises operated by New York City Housing Authority, it was error to allow service of late notice of claim since (1) claimants failed to adequately explain why their first motion for leave to serve late notice was incorrectly served on city's corporation counsel, or why it was not made until 7 months after child's condition was diagnosed, and (2) there was no evidence that housing authority had actual knowledge of child's alleged injuries or existence of chipping paint in areas to which child had access prior to claimants' second motion, which was made 13 months after child's condition was diagnosed. Simpson by Simpson v New York City Hous. Auth., 207 A.D.2d 354, 616 N.Y.S.2d 203, 1994 N.Y. App. Div. LEXIS 8050 (N.Y. App. Div. 2d Dep't 1994).

Trial court improvidently exercised its discretion in granting leave to serve late notice of claim under CLS Gen Mun § 50-e in action against New York City Health and Hospitals Corporation for brain damage sustained by infant at birth where petitioner failed to provide any excuse for 8-year delay, nature of infant's injuries would have manifested itself within short time after birth, and petitioner failed to demonstrate lack of prejudice to defendant. Matarrese v New York City Health & Hosps. Corp., 215 A.D.2d 7, 633 N.Y.S.2d 837, 1995 N.Y. App. Div. LEXIS 11863 (N.Y. App. Div. 2d Dep't 1995), app. denied, 87 N.Y.2d 810, 642 N.Y.S.2d 859, 665 N.E.2d 661, 1996 N.Y. LEXIS 351 (N.Y. 1996).

Petitioner seeking leave to serve late notice of claim under CLS Gen Mun § 50-e in action against New York City Health and Hospitals Corporation for injuries sustained by infant at time of his birth failed to demonstrate lack of prejudice to defendant where all 4 physicians who had treated infant had terminated their employment at defendant's hospital at least 4 years before leave was sought, and there was nothing in record to suggest that medical records in defendant's possession contained information necessary to conduct adequate investigation into claim. Matarrese v New York City Health & Hosps. Corp., 215 A.D.2d 7, 633 N.Y.S.2d 837, 1995 N.Y. App. Div. LEXIS 11863 (N.Y. App. Div. 2d Dep't 1995), app. denied, 87 N.Y.2d 810, 642 N.Y.S.2d 859, 665 N.E.2d 661, 1996 N.Y. LEXIS 351 (N.Y. 1996).

Petitioner was not entitled to serve late notice of claim on village where she alleged that she had been sexually abused as child between 1983 and 1988 by employee of village's community center, village had no knowledge of allegations until proceeding was commenced in 1993 (10 months after petitioner reached her majority), by that time accused employee had retired, his immediate supervisor was no longer employed by village, and other children who had come into contact with employee had moved away and were no longer identifiable. O'Neill v Board of Zoning Appeals, 225 A.D.2d 782, 639 N.Y.S.2d 961, 1996 N.Y. App. Div. LEXIS 3132 (N.Y. App. Div. 2d Dep't 1996).

Court properly denied petitioner's application for leave to serve late notice of claim against school district, even though nature of allegations (sexual abuse), coupled with fact that petitioner's former special education teacher, authority figure to petitioner, "told (him) to 'trust me' and not to tell," adequately accounted for that portion of delay which occurred before petitioner first disclosed abuse, since there was no satisfactory explanation for remaining delay of nearly 18 months. Doe v Madrid-Waddington Cent. Sch. Dist., 232 A.D.2d 922, 649 N.Y.S.2d 88, 1996 N.Y. App. Div. LEXIS 11266 (N.Y. App. Div. 3d Dep't 1996).

Court lacked authority to grant plaintiff's motion to serve late notice of claim where plaintiff's counsel served notice of claim almost 2 year after incident without first having moved for permission to serve late notice of claim,and plaintiff did not move

for leave to serve late notice of claim until almost 2 months after expiration of Statute of Limitations, which began to run on plaintiff's 18th birthday. Simons v Sherburne-Earlville Cent. Sch. Dist., 233 A.D.2d 592, 649 N.Y.S.2d 111, 1996 N.Y. App. Div. LEXIS 11476 (N.Y. App. Div. 3d Dep't 1996).

Court properly dismissed malpractice claim for failure to serve timely notice where (1) mother of infant plaintiff attempted to explain why she did not consult counsel until plaintiff was 7 years old, but no adequate excuse was offered for counsel's additional 6-month delay in serving notice of claim, or for 2-year delay between service of late notice and motion to deem late notice timely served, and (2) county was prejudiced by late service in that medical records did not alert county to underlying facts of claim, and 4 doctors who had been involved in mother's prenatal treatment were no longer employed by county. Moise by Anglade v County of Nassau, 234 A.D.2d 275, 650 N.Y.S.2d 785, 1996 N.Y. App. Div. LEXIS 12735 (N.Y. App. Div. 2d Dep't 1996), app. denied, 89 N.Y.2d 811, 657 N.Y.S.2d 403, 679 N.E.2d 642, 1997 N.Y. LEXIS 360 (N.Y. 1997).

Court properly denied application for leave to serve late notice of claim where petitioner did not offer acceptable explanation as to why she did not serve her notice of claim sooner than 15 months after her claim arose, she failed to show that county acquired actual knowledge of alleged gross negligence and willful misconduct by child protection services in intentionally failing to protect her infant daughter, and county would be substantially prejudiced because records in case were expunged. Djeddah v County of Westchester, 239 A.D.2d 499, 658 N.Y.S.2d 66, 1997 N.Y. App. Div. LEXIS 5374 (N.Y. App. Div. 2d Dep't 1997).

Court improperly granted motion for leave to serve late notice of claim on city where plaintiffs were seeking to hold city liable for hazardous condition in building that it sold some 13 years prior to infant plaintiff's birth and some 15 years before he was diagnosed with lead poisoning; as matter of law, 13 years was more than reasonable period in which to discover and remedy hazard represented by presence of lead paint by subsequent cooperative owner, which purchased premises on "as is" basis. Caldwell v 302 Convent Ave. Hous. Dev. Fund Corp., 272 A.D.2d 112, 707 N.Y.S.2d 423, 2000 N.Y. App. Div. LEXIS 5400 (N.Y. App. Div. 1st Dep't 2000).

In personal injury action against school district and others, Supreme Court lacked power to extend plaintiff's time to serve late notice of claim or to deem late notice timely nunc pro tunc where plaintiff did not apply for leave to serve late notice of claim within one year and 90 days after her infancy ended. Mazzola v Kelly, 281 A.D.2d 604, 722 N.Y.S.2d 70, 2001 N.Y. App. Div. LEXIS 3050 (N.Y. App. Div. 2d Dep't 2001).

195. Conduct of counsel affecting infant's disability

Delay in filing notice of claim against a school district on behalf of a 13-year old infant was excusable under subd. 5 of this section and late filing could be permitted though not applied for until almost one year after the accident notwithstanding the delay in giving notice was attributable to actions of his parents and later his attorney, being nonetheless attributable to his infancy. Esslie v Central School Dist., 20 A.D.2d 748, 247 N.Y.S.2d 87, 1964 N.Y. App. Div. LEXIS 4323 (N.Y. App. Div. 3d Dep't 1964).

Ultimate discretion as to whether failure of attorney to file notice of claim for infant within specified time was due to disability of infancy rests with each appellate division rather than with special term. Crume v Clarence Cent. School Dist., 43 A.D.2d 492, 353 N.Y.S.2d 579, 1974 N.Y. App. Div. LEXIS 5559 (N.Y. App. Div. 4th Dep't 1974).

Although strict construction of this section is adhered to in the first department in differentiating between infancy as ground for an extension of time to serve notice of claim and instances where the fault lies with the infant's attorney, a more liberal interpretation obtains elsewhere. Chiovaro v County of Nassau, 221 N.Y.S.2d 577, 1961 N.Y. Misc. LEXIS 3697 (N.Y. Sup. Ct. 1961).

196. —Inadvertence as precluding extension

Where failure to file notice of claim with the proper public officer within the statutory time is due to inadvertence of counsel, it has been consistently held in the First Department that such failure is not "by reason of" the disability of infancy on the part of the injured person. Goglas v New York City Housing Authority, 13 A.D.2d 939, 216 N.Y.S.2d 756, 1961 N.Y. App. Div. LEXIS 10029 (N.Y. App. Div. 1st Dep't 1961), aff'd, 11 N.Y.2d 680, 225 N.Y.S.2d 756, 180 N.E.2d 910, 1962 N.Y. LEXIS 1418 (N.Y. 1962).

Where an infant claimant against a municipality had counsel within the 90-day period for filing notice of claim, failure to serve timely notice of claim was due to inadvertence of counsel and not by reason of infancy and no ground existed for extension of the statutory period. Odom v New York City Housing Authority, 17 A.D.2d 770, 232 N.Y.S.2d 287, 1962 N.Y. App. Div. LEXIS 7925 (N.Y. App. Div. 1st Dep't 1962).

An infant's application for leave to serve late notice of claim against a Board of Education should not be granted because of unreasonable delay in making the application where the infant's claimed injuries occurred on three separate dates, October 27, 1962 and November 6 and November 10 of the same year, an attorney was retained in January, 1963 to whom all facts were known at least by summer of 1963, but no application for late service was made until November 6, 1963. Gipp v Board of Education, 20 A.D.2d 924, 249 N.Y.S.2d 727, 1964 N.Y. App. Div. LEXIS 3945 (N.Y. App. Div. 2d Dep't 1964).

Where an infant claimant against a municipality has counsel within the statutory 90-day period for filing notice of claim, and the failure to timely file appears to be due to inadvertence of counsel, it is the settled rule in the First District that no extension of time for filing the notice should be granted because of the claimant's infancy. Shankman v New York City Housing Authority, 21 A.D.2d 968, 252 N.Y.S.2d 707, 1964 N.Y. App. Div. LEXIS 3199 (N.Y. App. Div. 1st Dep't 1964), aff'd, 16 N.Y.2d 500, 260 N.Y.S.2d 442, 208 N.E.2d 175, 1965 N.Y. LEXIS 1410 (N.Y. 1965).

An order granting an application by the mother of an infant to serve a late notice of claim was reversed, where it was shown that the failure to file a timely notice was due to the attorneys' inadvertence, and did not occur by reason of the disability of infancy. Jefferson v New York City Housing Authority, 24 A.D.2d 943, 265 N.Y.S.2d 336, 1965 N.Y. App. Div. LEXIS 2798 (N.Y. App. Div. 1st Dep't 1965).

Motion of infant to file late notice of claim for personal injuries denied where, even though infant was 6 years of age, an attorney was retained to represent her many days before the expiration of the statutory period fixed for service of notice of claim. Biberias v New York City Transit Authority, 33 A.D.2d 671, 305 N.Y.S.2d 88, 1969 N.Y. App. Div. LEXIS 2835 (N.Y. App. Div. 1st Dep't 1969), rev'd, 27 N.Y.2d 890, 317 N.Y.S.2d 365, 265 N.E.2d 775, 1970 N.Y. LEXIS 985 (N.Y. 1970).

Failure to serve a timely notice of claim, attributable to the inadvertence of counsel, was not "by reason of" the disability of infancy of the claimant, the standard set by statutory language. Clark v Manhattan & Bronx Surface Transit Operating Authority, 34 A.D.2d 770, 311 N.Y.S.2d 339, 1970 N.Y. App. Div. LEXIS 4812 (N.Y. App. Div. 1st Dep't 1970), aff'd, 28 N.Y.2d 614, 320 N.Y.S.2d 76, 268 N.E.2d 803, 1971 N.Y. LEXIS 1517 (N.Y. 1971).

Despite excuses for late filing of notice of claim pursuant to General Municipal Law against town, county, and sheriff in action relating to assault alleged to have been committed upon persons of plaintiffs by defendant police officers and deputy sheriffs in employ of defendant sheriff, which excuses were that counsel was too busy to give his attention to service of notice of claim for period of seven months and that plaintiffs were infants, in absence of showing of prejudice, failure of counsel to move to serve notice of claim until seven months after occurrence underlying claim was without justifiable excuse. Williams v Irondequoit, 59 A.D.2d 1049, 399 N.Y.S.2d 807, 1977 N.Y. App. Div. LEXIS 14336 (N.Y. App. Div. 4th Dep't 1977).

197. —Inadvertence as not precluding extension

According to some decisions, an extension of time to serve notice of claim can be granted to an infant claimant, in the court's discretion, notwithstanding failure to give notice within the statutory 90-day period is due in part, at least, to neglect or ignorance on the part of the infant's parent or attorney. Galerneau v North Colonie Cent. School Dist., 7 A.D.2d 693, 179

N.Y.S.2d 144, 1958 N.Y. App. Div. LEXIS 4350 (N.Y. App. Div. 3d Dep't 1958).

Delay for about six weeks by the attorney finally retained to represent an infant claimant in seeking leave to serve late notice of claim was not unreasonable, so as to require denial of the application, where the application was made within the one-year limit. Cohen v New York, 19 A.D.2d 722, 242 N.Y.S.2d 398, 1963 N.Y. App. Div. LEXIS 3401 (N.Y. App. Div. 2d Dep't 1963), aff'd, 14 N.Y.2d 659, 249 N.Y.S.2d 868, 198 N.E.2d 901, 1964 N.Y. LEXIS 1311 (N.Y. 1964).

Where original application for leave to serve late notice of claim was made within the one-year over-all period prescribed by statute and was based on all of subd 5 of § 50-e of the statute, including the infancy excuse, order which vacated and annulled order made on original application would be modified to the extent that pursuant to clause 1 of subd 5 of § 50-e of the General Municipal Law, the original decision be adhered to insofar as it granted the infant leave to serve a late notice of claim since an attorney's error causing a late or erroneous service will not preclude an infant's reliance on the statute. Kern v Central Free School Dist., 25 A.D.2d 867, 270 N.Y.S.2d 137, 1966 N.Y. App. Div. LEXIS 4245 (N.Y. App. Div. 2d Dep't 1966).

Attorney's error at causing a late or erroneous service will not preclude an infant's reliance on the statutes. Kern v Central Free School Dist., 25 A.D.2d 867, 270 N.Y.S.2d 137, 1966 N.Y. App. Div. LEXIS 4245 (N.Y. App. Div. 2d Dep't 1966).

Where attorney was retained by infant's father to bring action for personal injuries sustained by infant due to negligence of school district, failure of attorney to file notice of claim within prescribed time was due to infancy, as had it not been for his infancy plaintiff might have selected an attorney who would file proper notice. Crume v Clarence Cent. School Dist., 43 A.D.2d 492, 353 N.Y.S.2d 579, 1974 N.Y. App. Div. LEXIS 5559 (N.Y. App. Div. 4th Dep't 1974).

Thirteen-year-old child who was injured in attack by older children while riding on school bus returning from trip sponsored by town recreation commission could not reasonably be required to press his claim against town when his attorney failed to do so and should thus have been permitted to file late notice of claim by reason of his infancy despite fact that failure to file timely notice was to large extent due to inadvertence of counsel. Fornaro v Clarkstown, 44 A.D.2d 596, 353 N.Y.S.2d 516, 1974 N.Y. App. Div. LEXIS 5383 (N.Y. App. Div. 2d Dep't 1974).

Although attorney erred in waiting some 8 months to move for extension of time without justifiable cause, extension of time is granted where allegations upon which litigation is based are extremely serious and delay does not unduly prejudice municipality. Hill v County of Chemung, 112 A.D.2d 653, 491 N.Y.S.2d 853, 1985 N.Y. App. Div. LEXIS 56247 (N.Y. App. Div. 3d Dep't 1985).

Delay of fifteen-year-old infant's counsel in filing application was not sufficient grounds for denying infant permission to file late claim where defendant had notice of injury and application for permission to file late claim was made within one year of injury. Short v Board of Education, 12 Misc. 2d 440, 164 N.Y.S.2d 476, 1956 N.Y. Misc. LEXIS 1587 (N.Y. Sup. Ct. 1956).

Mature infant, age 17, was relieved of the neglect or inadvertence of her father and of the attorney employed by him, where it appeared that the county and playland commission and their insurer knew about the alleged claim well within the 90 day period, and where there was no showing of prejudice to them resulting from delay in filing. Application of Eisman, 15 Misc. 2d 550, 182 N.Y.S.2d 284, 1958 N.Y. Misc. LEXIS 2275 (N.Y. Sup. Ct. 1958).

An application for leave to file a belated claim, pursuant to subd. 5 of this section, was allowed where the claimant was an infant injured while riding on a school bus, seven years of age at the time of the accident, her father and natural guardian retained counsel 26 days prior to expiration of the statutory 90-day period for filing claim, and the attorney attempted to file claim 11 days subsequent to expiration of the statutory period, the court stating that the legislature, in enactment of this section, intended that an infant should not have his rights forfeited because of failure of his guardian or attorney to act within the prescribed period provided leave is sought within one year of date of injury. Poulos v Union Free School Dist., 24 Misc. 2d 32, 201 N.Y.S.2d 602, 1960 N.Y. Misc. LEXIS 3237 (N.Y. Sup. Ct. 1960).

198. —Other grounds for failure to timely file

It was an abuse of discretion to deny leave to file a late notice of claim for personal injuries sustained by an infant who was thrown from a town park swing, where the infant resided with foster parents under the custody of the New York Foundling Hospital and the social worker employed by the hospital and assigned to elicit details of the accident was absent due to illness and vacation, where the only witness to the accident was reluctant to cooperate with the social worker and the attorney assigned to the case, and where the attorney assigned to the case was transferred during the period for filing the claim and the claimant's file was misplaced while being transferred to the office of another attorney and the second attorney's law clerk in charge of maintaining a calendar on litigation cases did not realize the claim was one required to be filed within 90 days from the time of the accident. Spanos v Oyster Bay, 16 N.Y.2d 951, 265 N.Y.S.2d 101, 212 N.E.2d 535, 1965 N.Y. LEXIS 1107 (N.Y. 1965).

In a personal injury action against the state by a person injured while riding a bicycle on a county road, the trial court properly denied plaintiff's motion for leave to file a late claim against the county, even though plaintiff was an infant at the time of the accident, where infancy merely tolled the statute of limitations and did not automatically entitle the infant to file late claims, where the motion was not made until 27 months from the date of the accident, where plaintiff's counsel was aware long before the motion was made that the state denied that it had constructed and maintained the road in question, where plaintiff's counsel had deposed a state employee who testified that at the time of the accident the county was responsible for maintaining the road, and where the county was prejudiced by the delay. Goudie v County of Putnam, 95 A.D.2d 823, 463 N.Y.S.2d 866, 1983 N.Y. App. Div. LEXIS 18756 (N.Y. App. Div. 2d Dep't 1983).

A motion by an infant to file a late notice of claim was denied where the reason for said failure was that the attorneys could not make up their minds as to whether the infant had a good cause of action. Bivona v New York, 11 Misc. 2d 1020, 172 N.Y.S.2d 345, 1958 N.Y. Misc. LEXIS 3764 (N.Y. Sup. Ct. 1958).

A child, age 14, who was injured at municipal swimming pool, was entitled to file a late notice of claim, where notice was delayed by her attorney until receipt of a medical report. Spicer v Watertown, 19 Misc. 2d 756, 189 N.Y.S.2d 407, 1959 N.Y. Misc. LEXIS 3199 (N.Y. County Ct. 1959).

An extension of time for leave to file notice of claim in behalf of a 15 year old infant claimant could not be granted more than one year after happening of the accident where the only excuse for failure to serve timely notice was that claimant's attorney did not find out until after expiration of the statutory period that the premises on which the injuries were sustained were not city property but belonged to a City Housing Authority. Rentas v New York City Housing Authority, 36 Misc. 2d 301, 232 N.Y.S.2d 643, 1962 N.Y. Misc. LEXIS 2500 (N.Y. Sup. Ct. 1962).

199. —Service on wrong party

Where, following injuries sustained in a subway collision on April 19, 1957, a notice of claim was served in behalf of petitioner, 20 years old, on the New York City Comptroller within the 90-day period, but disallowed August 2, 1957, because it should have been served upon the New York City Transit Authority, the delay in service was not due to infancy of the petitioner but to mistake on the part of his counsel and leave to serve late notice of claim would not be granted four months after expiration of the 90-day period. Negrone v New York City Transit Authority, 15 A.D.2d 676, 224 N.Y.S.2d 172, 1962 N.Y. App. Div. LEXIS 11813 (N.Y. App. Div. 2d Dep't 1962).

Where a 15-year-old infant was injured in a subway accident on May 30, 1961 and an attorney was immediately retained by his parents to represent him but the attorney inadvertently served notice of claim on the New York City Comptroller instead of on the Transit Authority, an extension of time for service on the latter could properly be granted, in the court's discretion, based upon claimant's disability of infancy. Pandoliano v New York City

Transit Authority, 17 A.D.2d 951, 234 N.Y.S.2d 99, 1962 N.Y. App. Div. LEXIS 7233 (N.Y. App. Div. 2d Dep't 1962).

Six-year-old infant should have been permitted to serve board of education with late notice of claim for personal injuries suffered in classroom due to alleged negligence of teacher even though initial service only on city comptroller was occasioned by attorney's inability to locate address of school board. Potter v Board of Education, 43 A.D.2d 248, 350 N.Y.S.2d 671, 1974 N.Y. App. Div. LEXIS 5998 (N.Y. App. Div. 1st Dep't 1974).

Where an injured claimant against a municipality was five and one-half years of age, and it was not discovered until after timely service of notice upon the Town of Hempstead that the construction work in connection with which she was injured was in an area outside the town limits, on application within the maximum period for obtaining time extensions she was granted an extension of time to file claim against the county, but a like extension could not be granted in favor of the individual claim of her guardian ad litem. Super v County of Nassau, 32 Misc. 2d 973, 223 N.Y.S.2d 2, 1961 N.Y. Misc. LEXIS 2153 (N.Y. Sup. Ct. 1961).

Where a 13-year-old infant was injured May 16, 1961 on premises owned by a City Housing Authority, and timely notice of claim was served on the Housing Authority, but the attorney who served such notice was not advised and did not discover until January, 1962, that the premises in question had been leased to a Board of Education, which was actually operating and managing the playground, the fault in serving notice on the wrong agency could not be attributed to the infant and leave should be granted to serve late notice of claim on the proper agency. Morse v Board of Education, 34 Misc. 2d 190, 227 N.Y.S.2d 528, 1962 N.Y. Misc. LEXIS 3520 (N.Y. Sup. Ct. 1962).

Where a claim appears to be honest and a municipality has had the opportunity to make its investigation within a reasonable time, the rights of an infant claimant should not be forfeited because of laches of an attorney in serving notice of his claim upon the wrong official, if action is taken within the one-year period allowed by subd. 5 of this section to file a belated notice of claim. Parker v Board of Education, 213 N.Y.S.2d 482 (N.Y. Sup. Ct. 1961).

Where notice of claim for injury sustained by an infant as the result of a highway excavation was timely, but erroneously, served upon the town in which the excavating work was being done, and it was not discovered until brought out in course of an examination of a witness at the instance of the town served that the excavating work was actually being done by the county, following which application was immediately made for extension of time to serve notice of claim on the county, the extension application should be granted notwithstanding contention that the error was due to inadvertence of counsel rather than to infancy of the claimant. Chiovaro v County of Nassau, 221 N.Y.S.2d 577, 1961 N.Y. Misc. LEXIS 3697 (N.Y. Sup. Ct. 1961).

200. Conduct of parent or guardian affecting infant's disability

Delay in filing notice of claim against a school district on behalf of a 13-year old infant was excusable under subd. 5 of this section and late filing could be permitted though not applied for until almost one year after the accident notwithstanding the delay in giving notice was attributable to actions of his parents and later his attorney, being nonetheless attributable to his infancy. Esslie v Central School Dist., 20 A.D.2d 748, 247 N.Y.S.2d 87, 1964 N.Y. App. Div. LEXIS 4323 (N.Y. App. Div. 3d Dep't 1964).

Court should have granted application for leave to serve late notice of claim made approximately 4 months after learning that infant had lead poisoning where (1) mother averred that she had been preoccupied with her daughter's medical condition and treatment, as well as need to find different apartment to live in, and (2) county defendant had knowledge of facts forming basis of claim through its own investigation of premises. Guzman v County of Westchester, 208 A.D.2d 925, 618 N.Y.S.2d 405, 1994 N.Y. App. Div. LEXIS 10595 (N.Y. App. Div. 2d Dep't 1994).

Infant was entitled to serve late notice of medical malpractice claim, since she should not be penalized for 2-year delay of her mother in seeking legal counsel and 5-year delay caused by law office failure, where defendants had possessed her medical records since time of alleged malpractice and had not been prejudiced by delay. McMillan v City of New York, 279 A.D.2d 280, 718 N.Y.S.2d 819, 2001 N.Y. App. Div. LEXIS 102 (N.Y. App. Div. 1st Dep't 2001).

201. —Inadvertence in failing to timely file

According to some decisions, an extension of time to serve notice of claim can be granted to an infant claimant, in the court's discretion, notwithstanding failure to give notice within the statutory 90-day period is due in part, at least, to neglect or ignorance on the part of the infant's parent or attorney. Galerneau v North Colonie Cent. School Dist., 7 A.D.2d 693, 179 N.Y.S.2d 144, 1958 N.Y. App. Div. LEXIS 4350 (N.Y. App. Div. 3d Dep't 1958).

Motion to serve late notice of claim is denied as to injury to child where natural mother of child was aware of injury shortly after it occurred, and failed to explain reason for delay of over 5 years and 7 months before application to serve late notice of claim; claim arising out of abuse of child while in care of foster parents between November, 1982 and March, 1983 may be raised where, by time parents were informed, 90-day period had already expired, municipality was clearly aware of substance of claim within 90 days and had commenced its own investigation. Hill v County of Chemung, 112 A.D.2d 653, 491 N.Y.S.2d 853, 1985 N.Y. App. Div. LEXIS 56247 (N.Y. App. Div. 3d Dep't 1985).

In a medical malpractice action, the trial court improvidently exercised its discretion in granting plaintiffs' motion for leave to serve a late notice of claim on behalf of an infant (N.Y. Gen. Mun. Law § 50-e(5)) approximately 10 years after the alleged malpractice. The delay could not be said to be entirely the product of infancy; the infant's parent's lack of awareness of the possibility of a lawsuit was not a reasonable excuse for the parent's nearly five-year delay in contacting an attorney. Bucknor v New York City Health & Hosps. Corp. (Queens Hosp. Center), 44 A.D.3d 811, 844 N.Y.S.2d 100, 2007 N.Y. App. Div. LEXIS 10783 (N.Y. App. Div. 2d Dep't 2007).

Mature infant, age 17, was relieved of the neglect or inadvertence of her father and of the attorney employed by him, where it appeared that the county and playland commission and their insurer knew about the alleged claim well within the 90 day period, and where there was no showing of prejudice to them resulting from delay in filing. Application of Eisman, 15 Misc. 2d 550, 182 N.Y.S.2d 284, 1958 N.Y. Misc. LEXIS 2275 (N.Y. Sup. Ct. 1958).

202. —Ignorance of statutory requirements

Where an infant claimant aged 15 years and ten months, was injured on school premises on August 28, 1958 and his father spoke to the school nurse about the accident on the following day, but neither father nor son was aware of the requirements of this section, until the father consulted an attorney on February 13, 1959, an application to extend time for service of notice of claim, made February 16, was timely and properly granted. Wenz v Board of Education, 16 A.D.2d 930, 229 N.Y.S.2d 313, 1962 N.Y. App. Div. LEXIS 9367 (N.Y. App. Div. 2d Dep't 1962).

It was an improvident exercise of discretion to grant the application of a 17-year-old infant to file a notice of claim some 11 months after the cause of action accrued merely upon the allegation that neither the infant nor his father knew of the necessity for filing a claim within the statutory period of 90 days. Staub v New York, 29 A.D.2d 756, 287 N.Y.S.2d 935, 1968 N.Y. App. Div. LEXIS 4528 (N.Y. App. Div. 1st Dep't 1968).

The infancy of the plaintiff justified the trial court's exercise of discretion in granting plaintiff's mother's motion for leave to serve late notices of claim on behalf of her child, notwithstanding the presence of other factors which might have supported a contrary result. However, consideration of criteria set forth in General Municipal Law § 50-e required denial of the mother's late notice of claim for loss of services where the 11-month delay, the unreported character of the event, and the total absence of any information to the respondent or any of its agents of the fact of the accident combined to confirm the possibility of prejudice to the respondent, the fact that plaintiff's mother was Spanish speaking, and arguably less aware than the average person of her legal rights, was not sufficient to overcome accumulative fact of

the other factors presented. Tanco v New York City Housing Authority, 84 A.D.2d 501, 443 N.Y.S.2d 66, 1981 N.Y. App. Div. LEXIS 15515 (N.Y. App. Div. 1st Dep't 1981).

An order granting petitioners' application for leave to serve a late notice of claim against the City of New York would be reversed as a matter of discretion and petitioners' application would be denied, where the police report lacked certain information and did not furnish the City of New York with notice within the 90-day period or a reasonable time thereafter, it appeared that the City of New York would be prejudiced in maintaining a defense because of the delay, and petitioners failed to set forth valid reasons to excuse their delay in that ignorance of the statutory requirements was not a valid excuse for noncompliance nor was petitioners' inability to speak or understand English. Figueroa v New York, 92 A.D.2d 908, 460 N.Y.S.2d 119, 1983 N.Y. App. Div. LEXIS 17309 (N.Y. App. Div. 2d Dep't 1983).

Supreme court erred in granting the parents' application for leave to serve a late notice of claim, under N.Y. Gen. Mun. Law § 50-e(5), where: (1) the town did not acquire actual knowledge of the essential facts relating to their son's injury, (2) certain information was supplied for the first time in their reply papers, (3) they failed to demonstrate a nexus between the son's infancy and the delay; and, (4) the town would be prejudiced by the lapse since it was denied the opportunity to investigate the facts and defend itself on the merits. Perre v Town of Poughkeepsie, 300 A.D.2d 379, 752 N.Y.S.2d 68, 2002 N.Y. App. Div. LEXIS 11975 (N.Y. App. Div. 2d Dep't 2002).

Mother was properly granted leave to serve a late notice of claim under N.Y. Gen. Mun. Law § 50-e(5) against a hospital corporation regarding its failure to perform a risk assessment for lead poisoning on her minor child because the child should not be deprived of her remedy due to her mother's ignorance of the law and the corporation was in possession of the relevant medical records, thus depriving it of a claim of prejudice due to the delay. Pearson v New York City Health & Hosps. Corp. (Harlem Hosp. Center), 43 A.D.3d 92, 840 N.Y.S.2d 25, 2007 N.Y. App. Div. LEXIS 8185 (N.Y. App. Div. 1st Dep't 2007), aff'd, 10 N.Y.3d 852, 859 N.Y.S.2d 614, 889 N.E.2d 493, 2008 N.Y. LEXIS 1179 (N.Y. 2008).

Immature infant was allowed to file a late notice of claim where his failure to file timely notice resulted from his father's ignorance of the law and general attitude of temerity. Lessman v New York, 6 Misc. 2d 671, 161 N.Y.S.2d 163, 1957 N.Y. Misc. LEXIS 3304 (N.Y. Sup. Ct. 1957).

A motion by a guardian ad litem to permit filing of a notice nunc pro tunc was denied where the neglect was sought to be excused on the ground that neither the guardian nor the 16-year-old infant was familiar with the time limit and an attorney was not consulted until after the general time limit elapsed. Shopper v New York, 104 N.Y.S.2d 541, 1951 N.Y. Misc. LEXIS 1773 (N.Y. Sup. Ct. 1951).

203. —Other conduct

Leave to serve late notice of claim on a municipality with respect to injuries sustained by an infant on school premises could be granted on the ground that the delay was incident to claimant's infancy where it appeared that claimant and a witness reported the accident to the school authorities a few days after it occurred but were advised by them that the Board of Education was not subject to suit, and hence his father, relying on that statement, failed to consult an attorney until almost a year later, the application for extension of time having been made by the attorney within the one-year period. Cohen v New York, 19 A.D.2d 722, 242 N.Y.S.2d 398, 1963 N.Y. App. Div. LEXIS 3401 (N.Y. App. Div. 2d Dep't 1963), aff'd, 14 N.Y.2d 659, 249 N.Y.S.2d 868, 198 N.E.2d 901, 1964 N.Y. LEXIS 1311 (N.Y. 1964).

Mother's allegations that she had been misled by city hospital doctors into believing that her daughter's condition was transient, and that she was unaware of notice of claim filing requirements because she was from Haiti and did not speak English at time medical malpractice claim accrued, were not reasonable excuses for almost 12-year delay in seeking to commence action against hospital. Janvier v New York City Health & Hosp. Corp., 162 A.D.2d 342, 556 N.Y.S.2d 907, 1990 N.Y. App. Div. LEXIS 7750 (N.Y. App. Div. 1st Dep't), app. denied, 76 N.Y.2d 711, 563 N.Y.S.2d 62, 564 N.E.2d 672, 1990 N.Y. LEXIS 3388 (N.Y. 1990).

Excuse offered for delay in filing notice of malpractice claim against county health department was sufficient to permit court's exercise of discretion in favor of injured child where, during substantial portion of time prior to motion to serve late notice of claim, child's mother was consumed with child's serious medical problems and physical difficulties, and her own need (as single parent) to provide living for their family. McLaughlin by McLaughlin v County of Albany, 258 A.D.2d 778, 685 N.Y.S.2d 846, 1999 N.Y. App. Div. LEXIS 1183 (N.Y. App. Div. 3d Dep't 1999).

An action, brought on behalf of an infant by his guardian ad litem for injuries sustained when he fell into a large depression in front of premises owned and controlled by the city of New York, is not barred when brought more than one year after the injuries were sustained where the guardian was unaware of the ownership of the property, since the guardian's laches cannot be imputed to the infant and the provisions of this section are not in the nature of a statute of limitations which runs during infancy. Application of Curtin, 92 N.Y.S.2d 624, 196 Misc. 587, 1949 N.Y. Misc. LEXIS 2867 (N.Y. Sup. Ct. 1949).

204. Applicability of infant's disability to parent's derivative action

Application of claimant for leave to amend notice of claim against city was denied where the amendment sought to add cause of action for malicious prosecution as an additional ground, since this was, in effect, interposition of a new cause of action subsequent to time limited by statute and was not within the purview of this section. Kinard v New York, 26 A.D.2d 821, 273 N.Y.S.2d 775, 1966 N.Y. App. Div. LEXIS 3420 (N.Y. App. Div. 2d Dep't 1966).

With reference to the filing of a late claim against the city, the exception of infancy in the infant's action does not accrue to the benefit of the father in a derivative action. Defelice v Board of Education, 37 A.D.2d 930, 326 N.Y.S.2d 89, 1971 N.Y. App. Div. LEXIS 3062 (N.Y. App. Div. 1st Dep't 1971).

Discretion which was properly exercised by trial court because of injured petitioner's infancy did not accrue to benefit of father, and his claim, arising on date he was informed of infant's blindness due to an alleged excessive intake of oxygen in an incubator, was untimely when filing was delayed for many months past 90 day period of limitations. Charalambakis v New York, 54 A.D.2d 553, 387 N.Y.S.2d 4, 1976 N.Y. App. Div. LEXIS 13860 (N.Y. App. Div. 2d Dep't 1976), rev'd, 46 N.Y.2d 785, 413 N.Y.S.2d 912, 386 N.E.2d 823, 1978 N.Y. LEXIS 2471 (N.Y. 1978).

Discretion was providently exercised in allowing leave under N.Y. Gen. Mun. Law § 50-e(5) to serve a late notice of an infant daughter's medical malpractice claim against a county where the county had actual notice of the claim and there was no prejudice to the county in the delay. However, since the infancy toll under N.Y. C.P.L.R. 208 was personal to the daughter and did not extend to the daughter's mother's individual derivative cause of action, the supreme court improperly granted the mother leave to serve a late notice of her derivative claim against the county. Nardi v County of Nassau, 18 A.D.3d 520, 795 N.Y.S.2d 300, 2005 N.Y. App. Div. LEXIS 5058 (N.Y. App. Div. 2d Dep't 2005).

The claim of an adult parent arising out of injuries sustained by his infant child, and the derivative claim of one spouse arising out of injuries sustained by the other, are not within the coverage of the extension of time provisions for serving notice of claim under this section, and the court is ordinarily powerless to extend the time for giving notice of such claims, even though it can, and does, extend time in behalf of the infant's personal claim on the ground of his infancy, or the injured spouse's personal claim on the ground of incapacity. Young v Board of Education, 79 N.Y.S.2d 206, 193 Misc. 216, 1948 N.Y. Misc. LEXIS 2381 (N.Y. County Ct. 1948); Application of Hector, 85 N.Y.S.2d 440, 193 Misc. 727, 1948 N.Y. Misc. LEXIS 3793 (N.Y. Sup. Ct. 1948)).

A motion to permit late filing of notice of claim could properly be granted where the notice of motion was served on defendant city one day short of expiration of a year since injury sustained by claimant as the result of malpractice in a city hospital, and it was

shown that he was admitted to the hospital as the result of a severe accidental injury which, with the ensuing accident at the hospital, resulted in permanent physical and mental incapacity of the claimant followed by confinement to home and bed until shortly before the notice of motion was served. Shanahan v New York, 31 Misc. 2d 31, 219 N.Y.S.2d 418, 1961 N.Y. Misc. LEXIS 2815 (N.Y. Sup. Ct. 1961).

Although an application to file a late claim for medical malpractice would be granted with respect to an infant claimant when it was filed within one year and 90 days of the accrual of the cause of action under Gen Mun Law § 50-i(1)(a), an application to file a late claim with respect to the derivative action of the parent based upon the claimant daughter's infancy would be denied, where no showing was made concerning the reasons for the parent's failure to serve and file the notice of claim within the statutory period; the 1976 amendment to Gen Mun Law § 50-e(5) was not intended to give parents an automatic right to file late with respect to a derivative claim where the infant is granted an extension of time based upon the infancy. Manfredonio v New York City Health & Hospitals Corp., 116 Misc. 2d 652, 455 N.Y.S.2d 1010, 1982 N.Y. Misc. LEXIS 3936 (N.Y. Sup. Ct. 1982).

A parent's claim for injuries sustained by an infant child is barred by failure to serve notice of claim within the 90-day period, notwithstanding existence of discretion in the court to grant an application for delayed service of notice of claim in behalf of the infant. McGrouty v Central School Dist., 229 N.Y.S.2d 850 (N.Y. Sup. Ct. 1962).

205. —Parent with physical or mental disability

An extension of time to serve notice of a parent's claim for loss of services or medical expense by reason of injuries sustained by his infant child can, of course, be granted, if the parent was incapacitated during the 90-day period, as by emotional tension and mental distress brought on by his wife's condition and death following an accident, necessitating his taking over care of the household and children. Osborn v Board of Education, 5 A.D.2d 929, 172 N.Y.S.2d 453, 1958 N.Y. App. Div. LEXIS 6468 (N.Y. App. Div. 3d Dep't 1958).

Where father and son sought to serve late notices of claims arising from son's injuries in gym class, father's disabling stroke could not excuse late filing, absent clarification of whether stroke occurred within 90 days following son's injuries. Lambo v Board of Education, 10 A.D.2d 810, 197 N.Y.S.2d 861, 1960 N.Y. App. Div. LEXIS 11258 (N.Y. App. Div. 4th Dep't 1960).

A parent's claim with respect to injuries sustained by their infant child, as to which claim was not filed within the time limitation period of this section because of matrimonial differences between the parents, could not be filed after time in the absence of any showing of physical or mental incapacity on the part of the parents. Jacobs v New York, 35 Misc. 2d 120, 231 N.Y.S.2d 855, 1962 N.Y. Misc. LEXIS 3371 (N.Y. Sup. Ct. 1962).

206. —Parent in confinement

Order of trial court refusing permission to father to file late notice of claim for injury to child while confined in defendant's institution under subd 5 of above statute, where custody of child was not restored to plaintiff until the expiration of period of time after such injury longer than that specified in subd 1, affirmed, court stating that it did not reach or pass upon plaintiff's contention that his claim did not arise until such custody was restored and that therefore the period of subd 1 should be reckoned from the time of such restoration. Hansen v County of Monroe, 23 A.D.2d 523, 255 N.Y.S.2d 621, 1965 N.Y. App. Div. LEXIS 5093 (N.Y. App. Div. 4th Dep't 1965).

207. —Miscellaneous grounds for late filing

While mother of minor injured during course of scheduled school activity was properly denied permission to serve and file late notice of claim on her allegation that she was under impression that claim could be interposed within one year of date of occurrence, late notice of claim should have been allowed on behalf of minor. Valiquette v City School Dist., 55 A.D.2d 997, 391 N.Y.S.2d 23, 1977 N.Y. App. Div. LEXIS 10319 (N.Y. App. Div. 3d Dep't 1977).

Where an injured claimant against a municipality was five and one-half years of age, and it was not discovered until after timely service of notice upon the Town of Hempstead that the construction work in connection with which she was injured was in an area outside the town limits, on application within the maximum period for obtaining time extensions she was granted an extension of time to file claim against the county, but a like extension could not be granted in favor of the individual claim of her guardian ad litem. Super v County of Nassau, 32 Misc. 2d 973, 223 N.Y.S.2d 2, 1961 N.Y. Misc. LEXIS 2153 (N.Y. Sup. Ct. 1961).

208. Lack of evidence

Absence of harm or prejudice to the defendant municipality or public corporation has been a factor in some instances wherein the court has exercised its discretion to grant an extension of time to serve notice of claim on behalf of an infant or incapacitated person. Ciaffone v Board of Education, 5 A.D.2d 884, 172 N.Y.S.2d 758, 1958 N.Y. App. Div. LEXIS 6536 (N.Y. App. Div. 2d Dep't 1958).

Knowledge by and lack of prejudice to the city does not constitute a sufficient basis for the granting of relief pursuant to § 50-e, subd 5 of the General Municipal Law in the absence of proof that infancy or mental or physical incapacity caused the claimant's failure to serve the notice of claim within the statutory period. Bauer v New York, 33 A.D.2d 784, 307 N.Y.S.2d 183, 1969 N.Y. App. Div. LEXIS 2560 (N.Y. App. Div. 2d Dep't 1969).

City would be prejudiced by allowance of late notice of claim against it for negligence in failing to install guardrail at location of school bus accident where plaintiff's theory that guardrail would have greatly decreased or eliminated her injury was conclusory and speculative, could not reasonably have been anticipated by city, would require elaborate measurements of angles, speed, and deflections, and would depend largely on discovery of witnesses and their recall—especially because critical elements, including brick wall into which bus crashed, had changed since accident. Resto v City of New York, 240 A.D.2d 499, 658 N.Y.S.2d 416, 1997 N.Y. App. Div. LEXIS 6067 (N.Y. App. Div. 2d Dep't), app. dismissed, 91 N.Y.2d 847, 667 N.Y.S.2d 680, 690 N.E.2d 490, 1997 N.Y. LEXIS 4067 (N.Y. 1997).

Mother whose daughter injured her finger while playing flag football should not have been granted leave to file a late notice of claim against a school district under N.Y. Gen. Mun. Law § 50-e(5) and N.Y. Educ. Law § 3813(2). The mother had not provided a reasonable excuse for the two-and-a-half-year delay; a report was not sufficiently specific to provide the school district with actual notice of the essential facts of the claim; because the injury had appeared to be minor, the school district could not be faulted for not investigating it; and the mother had not shown that the school district would not be substantially prejudiced by the late claim. Matter of Padovano v Massapequa Union Free School Dist., 31 A.D.3d 563, 818 N.Y.S.2d 274, 2006 N.Y. App. Div. LEXIS 9136 (N.Y. App. Div. 2d Dep't 2006).

A city need not demonstrate prejudice resulting from delay in filing a notice of claim as a defense to a motion to file a late notice, since the policy underlying the imposition of the 90-day filing period, provided for in section 50-e of the General Municipal Law, is to protect the city from fraudulent and stale claims; accordingly, where a plaintiff fails to show countervailing circumstances, lack of prejudice cannot be asserted on a motion to file a late notice of claim and therefore, the motion is denied. Phillips v New York, 98 Misc. 2d 1124, 415 N.Y.S.2d 349, 1979 N.Y. Misc. LEXIS 2206 (N.Y. Civ. Ct. 1979).

209. Mental incapacity

Where there was no showing that claimant's age or injuries mentally or physically incapacitated her as to prevent the filing of her claim, an application to serve the notice of claim three and one-half months after the sixty day period was denied. Johnson v New York, 278 A.D. 945, 104 N.Y.S.2d 844, 1951 N.Y. App. Div. LEXIS 5322 (N.Y. App. Div. 1951).

Where notice of claim was not served on a municipality with respect to an accident which occurred on November 2, 1960, until after expiration of the 90-day period, and the application to serve late notice was not made until November 1, 1961, and made no showing of any mental or physical incapacity on the part of the claimant, the application to serve late notice must be denied.

Rankins v New York, 18 A.D.2d 705, 236 N.Y.S.2d 378, 1962 N.Y. App. Div. LEXIS 6268 (N.Y. App. Div. 2d Dep't 1962).

Claimant's showing was considered insufficient to serve as ground for late filing of notice of claim by reason of mental or physical incapacity, and such relief could not be granted in any event, where the renewed application was not made until after the one-year statutory period had expired and without leave of court to renew a prior such motion. Narciso v New York, 20 A.D.2d 647, 246 N.Y.S.2d 268, 1964 N.Y. App. Div. LEXIS 4584 (N.Y. App. Div. 2d Dep't 1964).

Where there was no proof or claim that an adult plaintiff in an action against a city was mentally or physically incapacitated from filing notice of claim in her own behalf within the time limited by statute, the court had no power to grant an extension of time. McAllister v New York City Housing Authority, 21 A.D.2d 660, 249 N.Y.S.2d 805, 1964 N.Y. App. Div. LEXIS 3774 (N.Y. App. Div. 1st Dep't 1964).

Upon an application for leave to serve a late notice of claim, the claimant's alleged inability to read English does not constitute mental incapacity on her part within the meaning and purview of the statute. Orioles v Long Island R. R. Co., 35 A.D.2d 668, 315 N.Y.S.2d 95, 1970 N.Y. App. Div. LEXIS 3909 (N.Y. App. Div. 2d Dep't 1970).

The court may grant leave to an adult claimant to serve a notice of claim after the 90-day period only where the claimant had been mentally or physically incapacitated, and, by reason of such disability, has failed to serve a notice of claim within the time specified. The incapacity of his attorney is not one of the grounds for allowing such permission. Ostrander v Syracuse, 40 A.D.2d 622, 336 N.Y.S.2d 558, 1972 N.Y. App. Div. LEXIS 3907 (N.Y. App. Div. 4th Dep't 1972), aff'd, 33 N.Y.2d 960, 353 N.Y.S.2d 732, 309 N.E.2d 132, 1974 N.Y. LEXIS 1751 (N.Y. 1974).

In considering whether to grant discretionary leave to serve late notice of claim on ground that claimant's failure to serve notice within time specified was due to mental or physical incapacity, careful analysis must be given to quality of proof respecting mental incapacity and the prejudice to the municipality; if likelihood of prejudice is great, proof of mental incapacity must be strong to overcome the statutory shield and vice versa. Prude v County of Erie, 47 A.D.2d 111, 364 N.Y.S.2d 643, 1975 N.Y. App. Div. LEXIS 8722 (N.Y. App. Div. 4th Dep't 1975).

Plaintiff's cursory allegation of "shock" was insufficient basis to justify 9-month delay in service of notice of claim; thus, it was improper to grant application for leave to file late notice of claim pursuant to CLS Gen Mun § 50-e(5). Munnerlyn v City of New York, 203 A.D.2d 437, 610 N.Y.S.2d 322, 1994 N.Y. App. Div. LEXIS 3991 (N.Y. App. Div. 2d Dep't 1994).

Because evidence showed that the plaintiff was capable of protecting the plaintiff's legal rights, and because the statement which the plaintiff offered from a doctor when the plaintiff filed a motion for leave to serve a late notice of claim was insufficient to raise the issue of whether the plaintiff's medical condition prevented the plaintiff from filing a timely claim, the trial court acted properly by concluding that the plaintiff had not filed a timely notice of claim and dismissing the plaintiff's lawsuit on that basis. Burgos v City of New York, 294 A.D.2d 177, 742 N.Y.S.2d 39, 2002 N.Y. App. Div. LEXIS 4994 (N.Y. App. Div. 1st Dep't 2002).

210. —As grounds for late filing

In a negligence action against municipal defendants in which plaintiff sought permission to file a late notice of claim, the weight of the evidence supported the determination that plaintiff was unable to protect her legal rights, was therefore entitled to file a late notice of claim, where the uncontradicted testimony from plaintiff's psychiatrist was that she suffered a major depressive disorder more serious than a neurosis, as a result of which she lacked an overall ability to function and did not know what to do. Barnes v County of Onondaga, 65 N.Y.2d 664, 491 N.Y.S.2d 613, 481 N.E.2d 245, 1985 N.Y. LEXIS 14773 (N.Y. 1985).

An adequate showing of either mental or physical incapacity of the claimant during the 90-day (formerly 60-day) period for serving notice of claim after the claim arises is sufficient to warrant the court, in its discretion, in granting an extension of time for service, and the extension should ordinarily be granted in such instances. Ervay v Ithaca, 274 A.D. 1085, 86 N.Y.S.2d 293, 1949 N.Y. App. Div. LEXIS 6159 (N.Y. App. Div. 1949).

Claimant's physical and mental disability, as well as failure of police department and county hospital to promptly furnish claimant with records containing evidentiary matter upon which claim is based, provide grounds for late filing of claim where it is clear that city against which claim is filed acquired actual knowledge of essential underlying facts by virtue of police complaint and where city has failed to show that it has been prejudiced by delay in serving formal notice of claim. Mazzilli v New York, 115 A.D.2d 604, 496 N.Y.S.2d 266, 1985 N.Y. App. Div. LEXIS 55026 (N.Y. App. Div. 2d Dep't 1985).

In medical malpractice action against city involving prenatal, delivery and post-delivery care, Supreme Court did not abuse its discretion in granting motion of mentally impaired infant plaintiff to deem his notice of claim timely filed nunc pro tunc, although notice was not served until 13 years after tortious conduct occurred, since infancy and mental incapacity are among criteria to be considered under CLS Gen Mun § 50-e(5) for discretionary extension of time to serve notice of claim. Trejo v New York, 156 A.D.2d 164, 548 N.Y.S.2d 208, 1989 N.Y. App. Div. LEXIS 15294 (N.Y. App. Div. 1st Dep't 1989).

Petitioner's alleged inability to concentrate in order to make decisions following his employment termination, and his lack of awareness of notice requirement, were insufficient to warrant granting leave to serve late notice of claim under CLS Gen Mun § 50-e. Plante v County of Rensselaer, 203 A.D.2d 835, 611 N.Y.S.2d 353, 1994 N.Y. App. Div. LEXIS 4458 (N.Y. App. Div. 3d Dep't 1994).

211. —Age as factor

Where there was no showing that claimant's age or injuries mentally or physically incapacitated her as to prevent the filing of her claim, an application to serve the notice of claim three and one-half months after the sixty day period was denied. Johnson v New York, 278 A.D. 945, 104 N.Y.S.2d 844, 1951 N.Y. App. Div. LEXIS 5322 (N.Y. App. Div. 1951).

In an action for leave to serve a late notice of claim against the city, leave would be granted to serve the notice ten months after the accident in question where the injured claimant, who was 86 years old at the time of the accident, and who had substantially impaired memory, had suffered a serious injury that required substantial hospital and nursing home care, and where the city had actual notice of the accident from the police and emergency clinic reports. Trakis v New York, 92 A.D.2d 569, 459 N.Y.S.2d 322, 1983 N.Y. App. Div. LEXIS 16800 (N.Y. App. Div. 2d Dep't 1983).

212. —Length of medical confinement

Claimant was incapable of presenting her claim within the statutory 90-day period in view of her confinement in a hospital for 175 days following the accident, the large number of drugs given to her, and the physical and emotional shock she experienced involving a double leg amputation. Millington v New York City Transit Authority, 33 A.D.2d 737, 305 N.Y.S.2d 870, 1969 N.Y. App. Div. LEXIS 2731 (N.Y. App. Div. 1st Dep't 1969).

Petitioner was properly allowed to file a late notice of claim under evidence that the injury occurred on August 30, 1969 as a result of which she suffered brain damage resulting in partial paralysis; was in a hospital for treatment thereof and rehabilitation and had suffered serious mental limitations until November 10, 1969 when she was sent home for continued rehabilitation; that she was seen by her doctor on January 28, 1970, and the latter reported that she as of that date was progressing slowly but satisfactorily and that she still had significant problems with attention span, concentration and learning as to which there would probably be further recovery; that on February 5, 1970, she attended a motor vehicle hearing accompanied by an attorney for the insurer; that it appeared at the hearing she had no memory of the accident and exhibited a limitation of mental response; that on or about March 5, 1970 she retained an attorney to represent her; and that on April 4, 1970, through her attorney, she made a motion for leave to file a late notice of claim. Hurd v County of Allegany, 39 A.D.2d 499, 336 N.Y.S.2d 952, 1972 N.Y. App. Div. LEXIS 3609 (N.Y. App. Div. 4th Dep't 1972).

A motion to permit late filing of notice of claim could properly be granted where the notice of motion was served on defendant city one day short of expiration of a year since injury sustained by claimant as the result of malpractice in a city hospital, and it was shown that he was admitted to the hospital as the result of a severe accidental injury which, with the ensuing accident at the hospital, resulted in permanent physical and mental incapacity of the claimant followed by confinement to home and bed until shortly before the notice of motion was served. Shanahan v New York, 31 Misc. 2d 31, 219 N.Y.S.2d 418, 1961 N.Y. Misc. LEXIS 2815 (N.Y. Sup. Ct. 1961).

Constant hospitalization, numerous operations, mental breakdown, and the suffering of severe pain, constitute sufficient excuse for an extension of time in filing a claim against a city after the lapse of the 60 day period. Figuerca v New York, 106 N.Y.S.2d 430, 1951 N.Y. Misc. LEXIS 2089 (N.Y. Sup. Ct.), aff'd, 279 A.D. 771, 109 N.Y.S.2d 126, 1951 N.Y. App. Div. LEXIS 3720 (N.Y. App. Div. 1951).

213. —Lapse of memory

Claimant swore that he had several lapses of memory so that he could not remember all facts of accident. His physician merely said that he suffered a lapse of memory immediately following the accident and had intermediate recurrences since. Held: this was far short of a prima facie showing that a failure to file a claim on time was due to the mental or physical incapacity of the claimant. Application of Herrans, 7 A.D.2d 709, 180 N.Y.S.2d 82, 1958 N.Y. App. Div. LEXIS 4052 (N.Y. App. Div. 1st Dep't 1958).

Petitioner was properly allowed to file a late notice of claim under evidence that the injury occurred on August 30, 1969 as a result of which she suffered brain damage resulting in partial paralysis; was in a hospital for treatment thereof and rehabilitation and had suffered serious mental limitations until November 10, 1969 when she was sent home for continued rehabilitation; that she was seen by her doctor on January 28, 1970, and the latter reported that she as of that date was progressing slowly but satisfactorily and that she still had significant problems with attention span, concentration and learning as to which there would probably be further recovery; that on February 5, 1970, she attended a motor vehicle hearing accompanied by an attorney for the insurer; that it appeared at the hearing she had no memory of the accident and exhibited a limitation of mental response; that on or about March 5, 1970 she retained an attorney to represent her; and that on April 4, 1970, through her attorney, she made a motion for leave to file a late notice of claim. Hurd v County of Allegany, 39 A.D.2d 499, 336 N.Y.S.2d 952, 1972 N.Y. App. Div. LEXIS 3609 (N.Y. App. Div. 4th Dep't 1972).

High school student was entitled to serve late notice of claim against village pursuant to CLS Gen Mun § 50-e(5) where (1) student alleged that she was pulled over for speeding by village police officer, that he told her to follow him to remote parking lot where he raped her, and that she became pregnant, left school, had baby and gave baby up for adoption, (2) paternity test indicated 99.9 percent probability that officer was father of baby, (3) psychiatric social worker asserted that student suffered post traumatic stress disorder and was therefore unable to register complaint in timely manner, and (4) student alleged that village was negligent in hiring officer under circumstances in which it knew or should have known that he was prone to commit such acts. Howe v Trumansburg, 169 A.D.2d 1018, 565 N.Y.S.2d 298, 1991 N.Y. App. Div. LEXIS 889 (N.Y. App. Div. 3d Dep't 1991).

Court did not abuse its discretion under CLS Gen Mun § 50-e(5) in granting claimant's application for leave to file late notice of claim although motion was made between 70 to 101 days after expiration of 90-day statutory period where (1) motion was made within 6 months of accrual of claim and gave notice to respondent "within a reasonable time" following expiration of 90-day period as contemplated by statute, (2) claimant persuasively contended that she was incapacitated by accident-induced amnesia from protecting her legal interests or pursuing claim for nearly 90 days following accident, (3) claimant lacked knowledge of essential facts underlying claim until she retained attorney and he investigated, and (4) respondent did not demonstrate prejudice. Downey v Macedon Center Volunteer Fire Dep't, 179 A.D.2d 999, 579 N.Y.S.2d 507, 1992 N.Y. App. Div. LEXIS 2323 (N.Y. App. Div. 4th Dep't 1992).

The phrasing of this section is such as to absolutely preclude a court from granting an extension of time for service of notice of claim on a municipality, after expiration of the one-year period, notwithstanding plaintiff was actually in a hospital under sedation by reason of the injuries sustained and suffering from complete amnesia rendering him totally unable to file any notice of claim or impart the necessary information to anyone for making claim until two years after the accident occurred. Corso v New York, 42 Misc. 2d 677, 248 N.Y.S.2d 816, 1964 N.Y. Misc. LEXIS 1950 (N.Y. Sup. Ct. 1964).

214. —Injuries sufficient to warrant late filing

If the claimant became irrational, confused, or mentally disturbed and disordered, as a result of the occurrence or of injuries sustained, and so remained during the normal period for giving notice of claim, or the greater part thereof, an application for extension of time may, and ordinarily should, be granted. Application of Colehammer, 276 A.D. 809, 93 N.Y.S.2d 499, 1949 N.Y. App. Div. LEXIS 3386 (N.Y. App. Div. 1949).

Claimant was incapable of presenting her claim within the statutory 90-day period in view of her confinement in a hospital for 175 days following the accident, the large number of drugs given to her, and the physical and emotional shock she experienced involving a double leg amputation. Millington v New York City Transit Authority, 33 A.D.2d 737, 305 N.Y.S.2d 870, 1969 N.Y. App. Div. LEXIS 2731 (N.Y. App. Div. 1st Dep't 1969).

Where county had notice at time of the incident in which radiator cover in county courthouse fell on claimant and fractured his ankle and where, though committee or guardian had not been appointed, he suffered a 100% total and permanent disability as a schizophrenic, he was characterized by his attorney as acting "peculiar" and was described as "mentally ill" by his attending physician, denial of motion for permission to serve late notice of claim against county shortly after expiration of the 90-day period on theory that failure to file notice had been due to mental incapacity was abuse of discretion. Prude v County of Erie, 47 A.D.2d 111, 364 N.Y.S.2d 643, 1975 N.Y. App. Div. LEXIS 8722 (N.Y. App. Div. 4th Dep't 1975).

Minor plaintiff was properly granted leave to serve late notice of claim against city housing authority one year after she was raped in apartment owned by authority where authority had actual notice of rape based on extensive investigation by police and contemporaneous news account, and plaintiff offered report of psychologist who had interviewed her 17 months after incident and who opined that she was just beginning to recover from traumatic stress disorder that had "incapacitated her emotionally and mentally for well over a year." Jacqueline G. v New York City Housing Authority, 181 A.D.2d 644, 582 N.Y.S.2d 109, 1992 N.Y. App. Div. LEXIS 5205 (N.Y. App. Div. 1st Dep't 1992).

Psychologist's report stating that petitioner "suffered from a particularly negative, overwhelming and intensely disruptive event which has...interfered with her ability to perform routine, daily tasks," and petitioner's affidavit, which stated that she was unable to talk about sexual assault until recently, were sufficient to show her inability to seek timely legal advice and justify short delay in filing notice of claim. Hilda B. v New York City Hous. Auth., 224 A.D.2d 304, 638 N.Y.S.2d 36, 1996 N.Y. App. Div. LEXIS 1247 (N.Y. App. Div. 1st Dep't 1996).

Developmentally-disabled, 19-year-old person who alleged that he was sexually assaulted by a person who worked for a consortium that provided community-based recreational programs to individuals with disabilities reported the incident shortly after it happened and, although he did not file his petition for leave to serve a late notice of claim until more than two months after the 90-day period prescribed by N.Y. Gen. Mun. Law § 50-e(1)(a) expired, the trial court did not abuse its discretion by granting the petition. Tumm v Town of Eastchester, 8 A.D.3d 581, 779 N.Y.S.2d 217, 2004 N.Y. App. Div. LEXIS 8691 (N.Y. App. Div. 2d Dep't 2004).

An application for extension of time to file notice of claim against a county, made within six months after the cause of action arose, though after expiration of the 90-day period, was granted

in exercise of the court's discretion under subd. 5 of this section upon a physician's affidavit that plaintiff was mentally incapacitated during the 90-day period to such extent as to be incoherent, irrational, and in an unbalanced state of mind, and was finally put in a strait jacket by hospital authorities. Zaslowsky v Nassau County Public General Hospital, 27 Misc. 2d 339, 211 N.Y.S.2d 545, 1960 N.Y. Misc. LEXIS 1986 (N.Y. Sup. Ct. 1960).

A mentally incompetent person cannot be held responsible for delay in her actions, and where a case of mental incompetency is made out during the 90-day period for filing notice of claim under this section, subd. 5 permits the court, in its discretion, to grant leave to serve a belated notice of claim. Zaslowsky v Nassau County Public General Hospital, 27 Misc. 2d 339, 211 N.Y.S.2d 545, 1960 N.Y. Misc. LEXIS 1986 (N.Y. Sup. Ct. 1960).

A motion to permit late filing of notice of claim could properly be granted where the notice of motion was served on defendant city one day short of expiration of a year since injury sustained by claimant as the result of malpractice in a city hospital, and it was shown that he was admitted to the hospital as the result of a severe accidental injury which, with the ensuing accident at the hospital, resulted in permanent physical and mental incapacity of the claimant followed by confinement to home and bed until shortly before the notice of motion was served. Shanahan v New York, 31 Misc. 2d 31, 219 N.Y.S.2d 418, 1961 N.Y. Misc. LEXIS 2815 (N.Y. Sup. Ct. 1961).

Constant hospitalization, numerous operations, mental breakdown, and the suffering of severe pain, constitute sufficient excuse for an extension of time in filing a claim against a city after the lapse of the 60 day period. Figuerca v New York, 106 N.Y.S.2d 430, 1951 N.Y. Misc. LEXIS 2089 (N.Y. Sup. Ct.), aff'd, 279 A.D. 771, 109 N.Y.S.2d 126, 1951 N.Y. App. Div. LEXIS 3720 (N.Y. App. Div. 1951).

Motion by plaintiff injured in auto accident to file late notice of claim was granted even though defendant city lacked actual knowledge of all the facts constituting the claim where the plaintiff was in need of constant medical treatment, required attendant care for a minimum of 12 hours a day, and was suffering from severe emotional depression, and where the city would not be substantially prejudiced because of the delay. Palazzo v New York, 444 F. Supp. 1089, 1978 U.S. Dist. LEXIS 20257 (E.D.N.Y. 1978).

215. —Injuries insufficient to warrant late filing

Although tragic loss of child is emotionally upsetting and may cause depression, without further factual proof, it does not rise to level of mental incapacity which would excuse late filing of claim; brief general statement without specifics, by claimant's employer's medical director, briefly reporting that claimant was distressed and grieving over death and that she was referred to counselor and psychiatrist for treatment unsupported by statement as to whether treatment was ever rendered and if so what it consisted of and diagnosis is insufficient to conclude that claimant was mentally incapacitated. Bullard v New York, 118 A.D.2d 447, 499 N.Y.S.2d 880, 1986 N.Y. App. Div. LEXIS 54337 (N.Y. App. Div. 1st Dep't 1986).

Claimant's unsubstantiated allegations of physical and psychological trauma resulting from robbery and sexual assault which allegedly occurred in her apartment did not provide reasonable excuse for her 4-month delay in serving notice of claim. Vargas v New York City Hous. Auth., 232 A.D.2d 263, 648 N.Y.S.2d 546, 1996 N.Y. App. Div. LEXIS 10295 (N.Y. App. Div. 1st Dep't 1996), app. denied, 89 N.Y.2d 817, 659 N.Y.S.2d 858, 681 N.E.2d 1305, 1997 N.Y. LEXIS 1311 (N.Y. 1997).

Court did not abuse discretion in refusing to permit late notice of claim by teacher who, after assault by student, asserted that her injury impaired her ability to make decisions regarding her legal rights, since she had been able to travel to Italy one month after incident, she offered no evidence that defendant had acquired actual knowledge of incident within reasonable time after its occurrence, and aide who had been assigned to assist student was not employee of defendant. Howard v Albany County Dep't of Soc. Servs., 241 A.D.2d 910, 660 N.Y.S.2d 485, 1997 N.Y. App. Div. LEXIS 8158 (N.Y. App. Div. 3d Dep't 1997).

Tenant who was scalded by excessively hot water while filling tub for bath was not excused from filing timely notice of claim against city housing authority, even though he asserted incapacity due to mental and physical distress arising from scalding, where his notice of claim was signed and notarized within 90-day statutory filing period and was product of discussion between tenant and counsel while tenant was at counsel's office for unrelated matter, and tenant's report to building maintenance department that water running from his faucets was excessively hot was insufficient to impart to housing authority actual knowledge of essential facts of his claim. Dickerson v New York City Hous. Auth., 245 A.D.2d 371, 664 N.Y.S.2d 834, 1997 N.Y. App. Div. LEXIS 12770 (N.Y. App. Div. 2d Dep't 1997).

Defendants were entitled to summary judgment dismissing legal malpractice action, because she did not show that she would have succeeded in obtaining leave of court to assert late notice of underlying claim against New York City Housing Authority involving her rape on its property, where (1) her trial testimony suggested that she was not, as she claimed, suffering from debilitating depression after incident that prevented her from seeking prompt legal advice, and (2) her psychiatrist's prior statements regarding plaintiff's recovery from incident, including her lack of need for further counseling, were inconsistent with his present opinion that she was suffering from "Silent Rape Reaction," which was variant of rape trauma syndrome. F.P. v Herstic, 263 A.D.2d 393, 693 N.Y.S.2d 123, 1999 N.Y. App. Div. LEXIS 7990 (N.Y. App. Div. 1st Dep't 1999).

Injuries in a bus accident, not amounting to such mental or physical disability as would cause the failure to serve notice of claim under this section, consultations with specialists, an accident to injured party's attorney, and uncertainty as to extent of injuries, are not sufficient excuse for failure to file notice of claim within the required time limit, sub 2 of this section permitting the setting out of injuries so far as then practicable, and sub 6 permitting later amendment. White v New York, 87 N.Y.S.2d 446, 194 Misc. 562, 1949 N.Y. Misc. LEXIS 1938 (N.Y. Sup. Ct.), app. dismissed, 276 A.D. 765, 93 N.Y.S.2d 151, 1949 N.Y. App. Div. LEXIS 3247 (N.Y. App. Div. 1949).

216. Physical incapacity

Inability to speak English is not "physical incapacity" within the meaning of General Municipal Law § 50-e, subd 5. Defelice v Board of Education, 37 A.D.2d 930, 326 N.Y.S.2d 89, 1971 N.Y. App. Div. LEXIS 3062 (N.Y. App. Div. 1st Dep't 1971).

Court properly denied petitioners' application to file late notice of medical malpractice claim on ground that county hospital would be prejudiced in its defense where petitioners failed to submit medical affidavit by physician or otherwise substantiate their claim that 8-month delay in service was due to physical incapacity, and incident report prepared by hospital's staff was devoid of any fact that could be construed as providing hospital with actual knowledge of potential malpractice claim. Mandia v County of Westchester, 162 A.D.2d 217, 556 N.Y.S.2d 868, 1990 N.Y. App. Div. LEXIS 7267 (N.Y. App. Div. 1st Dep't 1990).

In proceeding against city hospital in which petitioner sought to file late notice of claim, court erred by requiring petitioner to show that he was physically incapacitated during requisite 90 days for filing notice of claim under CLS Gen Mun § 50-e, since petitioner did not claim that he was physically incapacitated from filing notice; proof of physical incapacity is not prerequisite to obtaining extension of time of file. Ruiz v New York City Health & Hosp. Corp., 165 A.D.2d 75, 566 N.Y.S.2d 217, 1991 N.Y. App. Div. LEXIS 1250 (N.Y. App. Div. 1st Dep't 1991).

Court did not improvidently exercise its discretion in granting petitioner's application under CLS Gen Mun § 50-e(5) for leave to serve late notice of claim for injuries sustained in shooting inside apartment building owned by city housing authority, where petitioner's submissions, which included surgical report, indicated that he was seriously wounded as result of shooting, underwent emergency surgery, and was hospitalized for prolonged period, and authority, which conducted investigation into shooting, did not deny petitioner's claim that apartment building had no locks on its entrance doors for period of 2 years prior to incident. Townsend v New York City Hous. Auth., 194 A.D.2d 795, 599 N.Y.S.2d 833, 1993 N.Y. App. Div. LEXIS 6671 (N.Y. App. Div. 2d Dep't 1993).

Court did not improvidently exercise its discretion in granting petitioner leave to file late notice of claim against county where petitioner was prevented from seeking out aid of counsel and having notice of claim served timely by reason of severity of injuries he sustained in accident complained of, in that extensiveness of injuries and various therapies which were needed caused him to be more concerned with his own emotional and physical health than with maintaining action to receive compensation. In re Ramunno, 202 A.D.2d 511, 609 N.Y.S.2d 17, 1994 N.Y. App. Div. LEXIS 2442 (N.Y. App. Div. 2d Dep't 1994).

Plaintiffs were improperly granted leave to serve late notice of claim against New York City Housing Authority, where they contended that injured plaintiff was so severely injured that he was unable to seek legal counsel at earlier time, but they did not set forth medical records or physician's sworn statement in support of their claim. Robertson v New York City Hous. Auth., 237 A.D.2d 501, 655 N.Y.S.2d 572, 1997 N.Y. App. Div. LEXIS 2832 (N.Y. App. Div. 2d Dep't), app. dismissed, 90 N.Y.2d 844, 660 N.Y.S.2d 870, 683 N.E.2d 776, 1997 N.Y. LEXIS 1580 (N.Y. 1997).

Compliance with New York's notice-of-claim law and Emergency Medical Treatment and Active Labor Act (EMTALA; 42 USCS § 1395dd(f)) was not "physical impossibility" where plaintiff did not avail herself of opportunity to apply for extension. Hardy v New York City Health & Hosps. Corp., 164 F.3d 789, 1999 U.S. App. LEXIS 567 (2d Cir. N.Y. 1999).

217. —As ground for late filing

An adequate showing of either mental or physical incapacity of the claimant during the 90-day (formerly 60-day) period for serving notice of claim after the claim arises is sufficient to warrant the court, in its discretion, in granting an extension of time for service, and the extension should ordinarily be granted in such instances. Ervay v Ithaca, 274 A.D. 1085, 86 N.Y.S.2d 293, 1949 N.Y. App. Div. LEXIS 6159 (N.Y. App. Div. 1949).

Where there was no showing that claimant's age or injuries mentally or physically incapacitated her as to prevent the filing of her claim, an application to serve the notice of claim three and one-half months after the sixty day period was denied. Johnson v New York, 278 A.D. 945, 104 N.Y.S.2d 844, 1951 N.Y. App. Div. LEXIS 5322 (N.Y. App. Div. 1951).

Where notice of claim was not served on a municipality with respect to an accident which occurred on November 2, 1960, until after expiration of the 90-day period, and the application to serve late notice was not made until November 1, 1961, and made no showing of any mental or physical incapacity on the part of the claimant, the application to serve late notice must be denied. Rankins v New York, 18 A.D.2d 705, 236 N.Y.S.2d 378, 1962 N.Y. App. Div. LEXIS 6268 (N.Y. App. Div. 2d Dep't 1962).

Claimant's showing was considered insufficient to serve as ground for late filing of notice of claim by reason of mental or physical incapacity, and such relief could not be granted in any event, where the renewed application was not made until after the one-year statutory period had expired and without leave of court to renew a prior such motion. Narciso v New York, 20 A.D.2d 647, 246 N.Y.S.2d 268, 1964 N.Y. App. Div. LEXIS 4584 (N.Y. App. Div. 2d Dep't 1964).

An application for leave to serve late notice of claim for damages for personal injuries upon a town was erroneously granted where it failed to show that failure to make timely service was due to mental or physical incapacity of the claimant. Lotrecchiano v Carmel, 22 A.D.2d 697, 253 N.Y.S.2d 774, 1964 N.Y. App. Div. LEXIS 3079 (N.Y. App. Div. 2d Dep't 1964).

Notice of claim which was not filed until three days after expiration of the 90 day period prescribed by statute was not timely filed where the delay was not attributable to the claimant's physical condition. Lawrence v New York City Transit Authority, 31 A.D.2d 514, 294 N.Y.S.2d 644, 294 N.Y.S.2d 664, 1968 N.Y. App. Div. LEXIS 2957 (N.Y. App. Div. 1st Dep't 1968), aff'd, 27 N.Y.2d 546, 313 N.Y.S.2d 120, 261 N.E.2d 262, 1970 N.Y. LEXIS 1279 (N.Y. 1970).

Where the facts indicated that petitioner was physically incapacitated within the intendment of subd 5 of § 50-e of the General Municipal Law, discretion should have been exercised to excuse the late filing of the notice of claim. Driskell v New York, 31 A.D.2d 541, 295 N.Y.S.2d 175, 1968 N.Y. App. Div. LEXIS 2939 (N.Y. App. Div. 2d Dep't 1968).

Permission to file late claim denied where there was no showing that the failure to file timely notices was due to physical incapacity and no excuse was offered for the failure of the plaintiff-husband to file a notice within the prescribed period. Sobelman v New York, 33 A.D.2d 671, 305 N.Y.S.2d 33, 1969 N.Y. App. Div. LEXIS 2833 (N.Y. App. Div. 1st Dep't 1969).

Petitioner would be granted leave to serve a late notice of claim pursuant to Gen Mun Law § 50-e where the lateness in filing was due, at least in part, from her injuries and general physical condition, one respondent received actual notice the day after the accident and the other respondent received notice of the accident within 19 days of the expiration of the 90-day period. In re Chatman, 101 A.D.2d 838, 475 N.Y.S.2d 500, 1984 N.Y. App. Div. LEXIS 18507 (N.Y. App. Div. 2d Dep't 1984).

Plaintiff's motion to renew and reargue his motion for leave to file late notice of claim against New York City Housing Authority should be granted where plaintiff demonstrated physical incapacitation sufficient to excuse delay of only 22 days beyond statutory 90 days, stairway defect of which plaintiff complained was static condition, city was unable to show prejudice, and plaintiff's injuries appeared to be serious. Williams v New York City Housing Authority, 125 A.D.2d 258, 509 N.Y.S.2d 544, 1986 N.Y. App. Div. LEXIS 62534 (N.Y. App. Div. 1st Dep't 1986).

Trial court erred in denying an injured party's motion pursuant to N.Y. Gen. Mun. Law § 50-e(5) to serve a late notice of claim on a city in a personal injury action; the injured party presented an acceptable excuse based on the injured party's physical incapacity, and the city acquired knowledge of the essential facts of the claim within a reasonable time after the accident, and failed to show any prejudice to its defense based on the relatively short delay in filing the notice of claim. Dubowy v City of New York, 305 A.D.2d 320, 759 N.Y.S.2d 325, 2003 N.Y. App. Div. LEXIS 6111 (N.Y. App. Div. 1st Dep't 2003).

Court did not abuse its discretion in granting a guardian's application to file a late notice of claim, pursuant to N.Y. Gen. Mun. Law § 50-e(5), in a personal injury action because when the decedent fell from a hole in the third floor of a commercial building he never regained consciousness, making the extent of his injuries not immediately ascertainable. Tara V. v County of Otsego, 12 A.D.3d 984, 785 N.Y.S.2d 553, 2004 N.Y. App. Div. LEXIS 14310 (N.Y. App. Div. 3d Dep't 2004).

Denial of a motion for leave to serve a late notice of claim against a city pursuant to N.Y. Gen. Mun. Law § 50-e(5) was proper because petitioner's allegation that he was bedridden after his hospitalization for the injuries, and thus could not retain counsel and serve a notice until 17 days after the 90-day period expired, was not supported by the evidence, the record did not contain evidence that the city was apprised of petitioner's claim other than by the late notice of claim itself, and the late notice of claim did not provide sufficient notice of the essential facts of the claim within 90 days or soon thereafter, thus failing to meet the burden of demonstrating that the city was provided with timely knowledge of the facts of the claim and was not significantly prejudiced by the delay; the notice of claim did not specify the precise location in the basement where the accident occurred, and did not describe how the accident occurred, what petitioner was doing at the time, who employed petitioner, or if any witnesses were present. Additionally, petitioner asserted no facts to support the contention that the city was not prejudiced by the delay in the investigation and defense of the claim Matter of Kumar v City of New York, 52 A.D.3d 517, 860 N.Y.S.2d 144, 2008 N.Y. App. Div. LEXIS 4939 (N.Y. App. Div. 2d Dep't 2008).

Where the facts established that applicant was physically incapacitated beyond the statutory period, and was unable to investigate, prepare and file his claim or secure someone to do it, the court exercised its discretion and permitted the filing of a late claim. Christian v Herkimer, 148 N.Y.S.2d 384, 208 Misc. 814, 1955 N.Y. Misc. LEXIS 3918 (N.Y. County Ct. 1955), aff'd, 2 A.D.2d 648, 151 N.Y.S.2d 629, 1956 N.Y. App. Div. LEXIS 5515 (N.Y. App. Div. 4th Dep't 1956).

218. —Retention of counsel

Filing of late claim permitted under evidence that injured party had been physically and mentally disabled since time of accident,

even though the claimant's wife was under no disability and even though an attorney was acting on the matter within the 90-day time for filing the notice of claim. Reynolds v Greece Cent. School Dist., 36 A.D.2d 1020, 321 N.Y.S.2d 668, 1971 N.Y. App. Div. LEXIS 4030 (N.Y. App. Div. 4th Dep't), app. denied, 29 N.Y.2d 485, 325 N.Y.S.2d 1025, 274 N.E.2d 753, 1971 N.Y. LEXIS 2210 (N.Y. 1971).

The court may grant leave to an adult claimant to serve a notice of claim after the 90-day period only where the claimant had been mentally or physically incapacitated, and, by reason of such disability, has failed to serve a notice of claim within the time specified. The incapacity of his attorney is not one of the grounds for allowing such permission. Ostrander v Syracuse, 40 A.D.2d 622, 336 N.Y.S.2d 558, 1972 N.Y. App. Div. LEXIS 3907 (N.Y. App. Div. 4th Dep't 1972), aff'd, 33 N.Y.2d 960, 353 N.Y.S.2d 732, 309 N.E.2d 132, 1974 N.Y. LEXIS 1751 (N.Y. 1974).

Court properly denied motorcycle accident victim's application to serve late notice of claim, despite assertions that he was confined to his home for recuperation and could not promptly ascertain ownership of property where accident occurred, where victim had retained counsel before expiration of 90-day period yet had taken no action to ascertain owner until over 3 months after expiration, town and county did not acquire knowledge of accident's location until service of papers for late notice over 7 months after expiration, and victim offered only bare assertion that allegedly defective condition had not changed. In re Cali, 132 A.D.2d 555, 517 N.Y.S.2d 548, 1987 N.Y. App. Div. LEXIS 49079 (N.Y. App. Div. 2d Dep't 1987).

It was improper to grant petitioner's application for leave to serve late notice of claim one year after accident, even if she was incapacitated due to her injuries, where she failed to offer any excuse for 5-month delay after she obtained counsel, and she failed to show that county received actual notice within 90 days after claim arose or reasonable time thereafter. Gillum v County of Nassau, 284 A.D.2d 533, 726 N.Y.S.2d 458, 2001 N.Y. App. Div. LEXIS 6787 (N.Y. App. Div. 2d Dep't), app. denied, 97 N.Y.2d 604, 737 N.Y.S.2d 52, 762 N.E.2d 930, 2001 N.Y. LEXIS 3432 (N.Y. 2001).

219. —Medical documentation

Petitioner's physical disability is not required to be reason for delay in order to be considered as element bearing on court's determination of application to serve late notice of claim under CLS Gen Mun § 50-e. In re Cali, 132 A.D.2d 555, 517 N.Y.S.2d 548, 1987 N.Y. App. Div. LEXIS 49079 (N.Y. App. Div. 2d Dep't 1987).

Petitioner failed to adequately explain his delay in filing application for leave to serve late notice of claim against municipality approximately 14 months after date of accident where he failed to provide any medical records, and medical affidavit submitted was inadequate in that it accounted for only 2 months of delay. Perry v New York, 133 A.D.2d 692, 519 N.Y.S.2d 862, 1987 N.Y. App. Div. LEXIS 51728 (N.Y. App. Div. 2d Dep't 1987).

Tenant would not be granted leave to file late notice of claim against New York City Housing Authority where (1) on June 30, tenant allegedly tripped over debris left in stairway by another tenant who was moving out, (2) tenant filed accident report dated September 6 which failed to list date and time of incident, (3) tenant moved for leave to file late notice on November 28 and asserted in affidavit that she had reported facts of incident to named employee of housing authority who had stated that they would pay medical expenses, and (4) affidavit of named employee of housing authority stated that she had made no such statement; tenant offered no reasonable excuse for failure to file timely notice, notwithstanding her claim of physical incapacitation, since no medical documentation was submitted, and housing authority would suffer substantial prejudice from delay since debris left by another tenant would be highly transitory condition. Green v New York City Housing Authority, 180 A.D.2d 586, 580 N.Y.S.2d 743, 1992 N.Y. App. Div. LEXIS 2928 (N.Y. App. Div. 1st Dep't 1992).

Court properly denied plaintiff leave to serve late notice of claim against city housing authority on motion for reargument of earlier motion for same relief, despite contention that plaintiff failed to serve timely notice because he was disabled, where (1) at time of original application for leave to serve, hospital records related to alleged disability were in existence, but plaintiff failed to offer explanation regarding why they were not submitted with original application, and (2) plaintiff knew or should have known that statement of physician was essential to claim that he was disabled, but he failed to offer excuse for not submitting such statement with original application. Matthews v New York City Hous. Auth., 210 A.D.2d 205, 620 N.Y.S.2d 268, 1994 N.Y. App. Div. LEXIS 12342 (N.Y. App. Div. 2d Dep't 1994).

Court properly denied plaintiff's motion for leave to serve late notice of claim on city since (1) her lack of fluency in English and ignorance of law were not acceptable excuses for failure to serve timely notice of claim, and (2) her alleged incapacity due to injuries sustained in accident was insufficient in absence of supporting medical evidence. Turkenitz v City of New York, 213 A.D.2d 266, 624 N.Y.S.2d 127, 1995 N.Y. App. Div. LEXIS 3008 (N.Y. App. Div. 1st Dep't 1995).

Petitioner's excuse for not filing timely notice of claim—that he did not realize seriousness of his injury after 90-day period had expired and was thereafter physically incapacitated from doing so until he made instant motion to serve late notice of claim some 6 ½ months after incident—could not be accepted absent supporting medical documentation. Moran v New York City Hous. Auth., 224 A.D.2d 257, 637 N.Y.S.2d 698, 1996 N.Y. App. Div. LEXIS 997 (N.Y. App. Div. 1st Dep't 1996).

220. —Ability to pursue claim

Where the accident in which claimant sustained injuries occurred July 28, 1961, and notice of claim was not served until July 13, 1962, physical incapacity of claimant would not serve as ground for recognition of late service where it merely appeared that claimant was hospitalized from date of the accident until October 13, 1961, thereafter was in a nursing home until November 30, 1961 but thereafter was able to visit the scene of the accident with his attorney and make further investigations. Smith v New York City Transit Authority, 18 A.D.2d 10, 238 N.Y.S.2d 250, 1963 N.Y. App. Div. LEXIS 4288 (N.Y. App. Div. 1st Dep't 1963).

Failure to prove that claimant was unable to consult counsel due to physical incapacity was grounds for denial of application for leave to file a claim nunc pro tunc as plaintiff was discharged from the hospital in good condition and practically asymptomatic and had last seen a physician well before the time for filing expired. Bregman v New York City Transit Authority, 34 A.D.2d 929, 312 N.Y.S.2d 734, 1970 N.Y. App. Div. LEXIS 4446 (N.Y. App. Div. 1st Dep't 1970), aff'd, 28 N.Y.2d 679, 320 N.Y.S.2d 539, 269 N.E.2d 205, 1971 N.Y. LEXIS 1474 (N.Y. 1971).

Court properly denied injured motorcyclist's application to file late notice of claim under CLS Gen Mun § 50-e, even though motorcyclist's physician stated in affidavit that he had been hospitalized, required open reduction and internal fixation of his ankle, suffered great pain, and "for many weeks" was on heavy medication, since (1) motorcyclist claimed in his own affidavit that he was hospitalized for approximately one week, and (2) physician's allegations failed to explain with any particularity extent of delay, which exceeded 4 months, and did not demonstrate why motorcyclist was prevented from filing timely notice. Frick v Incorporated Village of Hempstead, 192 A.D.2d 605, 595 N.Y.S.2d 830, 1993 N.Y. App. Div. LEXIS 3571 (N.Y. App. Div. 2d Dep't 1993).

Petitioner's alleged physical incapacity was insufficient excuse to warrant late filing of notice of claim against city where Workers' Compensation Board "Attending Doctor's Report" established only that petitioner was disabled from employment, not incapacitated to extent that he could not pursue his legal remedies against city, and petitioner, during period of delay, pursued his personal injury claim against abutting landowner by retaining counsel, engaging in settlement negotiations with landowner's insurance company, and later commencing action. Jensen v City of Saratoga Springs, 203 A.D.2d 863, 611 N.Y.S.2d 330, 1994 N.Y. App. Div. LEXIS 4364 (N.Y. App. Div. 3d Dep't 1994).

Claimant failed to provide reasonable excuse for her delay in serving city with notice of claim where her contention that she was unable to file timely notice of claim "[d]ue to her extensive injury and severe physical disability" was negated where she filed

timely notice of claim against board of education. Resto v City of New York, 240 A.D.2d 499, 658 N.Y.S.2d 416, 1997 N.Y. App. Div. LEXIS 6067 (N.Y. App. Div. 2d Dep't), app. dismissed, 91 N.Y.2d 847, 667 N.Y.S.2d 680, 690 N.E.2d 490, 1997 N.Y. LEXIS 4067 (N.Y. 1997).

Fact that petitioner returned to accident site 6 days after accident, took photographs, brought photographs to police station, and met with filled out police reports, demonstrated that he was not suffering from any physical disability that prevented him from with consulting with attorney in timely fashion so as to excuse his delay in filing notice of claim. Gilliam v City of New York, 250 A.D.2d 680, 673 N.Y.S.2d 172, 1998 N.Y. App. Div. LEXIS 5551 (N.Y. App. Div. 2d Dep't 1998).

Where the facts established that applicant was physically incapacitated beyond the statutory period, and was unable to investigate, prepare and file his claim or secure someone to do it, the court exercised its discretion and permitted the filing of a late claim. Christian v Herkimer, 148 N.Y.S.2d 384, 208 Misc. 814, 1955 N.Y. Misc. LEXIS 3918 (N.Y. County Ct. 1955), aff'd, 2 A.D.2d 648, 151 N.Y.S.2d 629, 1956 N.Y. App. Div. LEXIS 5515 (N.Y. App. Div. 4th Dep't 1956).

221. —Age as factor

A motion, entered 39 days after the expiration of the 60-day limitation period by a 60-year-old claimant who fractured her wrist as the result of a fall on an icy sidewalk, for leave to serve notice within a reasonable time, pursuant to subd. 5 of this section, was improperly granted where there was no showing that the claimant's age or injuries physically incapacitated her or even required her to remain at home during the 60-day limitation period so as to prevent her from serving a notice of claim, sworn to by her or by someone in her behalf. Sullivan v Babylon, 277 A.D. 791, 97 N.Y.S.2d 240, 1950 N.Y. App. Div. LEXIS 3334 (N.Y. App. Div. 1950), aff'd, 302 N.Y. 609, 96 N.E.2d 898, 302 N.Y. (N.Y.S.) 609, 1951 N.Y. LEXIS 805 (N.Y. 1951).

Where there was no showing that claimant's age or injuries mentally or physically incapacitated her as to prevent the filing of her claim, an application to serve the notice of claim three and one-half months after the sixty day period was denied. Johnson v New York, 278 A.D. 945, 104 N.Y.S.2d 844, 1951 N.Y. App. Div. LEXIS 5322 (N.Y. App. Div. 1951).

In view of claimant's advanced age as well as fact that she was hospitalized for approximately 30 days during three-month period following accident and suffered loss of her son, notice of claim served within 35 days after expiration of 90-day statutory period was effected within a reasonable time, and where defendant city did not allege that it would suffer any prejudice as result of extension, and claimant moved for validation of notice of claim within one year after cause of action accrued, grant of petition for validation was a reasonable exercise of discretion. Rippe v Rochester, 57 A.D.2d 723, 395 N.Y.S.2d 556, 1977 N.Y. App. Div. LEXIS 11776 (N.Y. App. Div. 4th Dep't 1977).

Court did not err by granting leave to serve late notice of claim on defendant village on behalf of infant plaintiff where one-day delay beyond 90-day time period resulted from infant's ongoing treatment for serious injuries and her parent's concern for her condition, application for leave to serve late notice was made within one year and 90-day period of limitations imposed by CLS Gen Mun § 50-e(1)(c), and village was not substantially prejudiced by delay. Gallino v Village of Shoreham, 222 A.D.2d 506, 634 N.Y.S.2d 550, 1995 N.Y. App. Div. LEXIS 12735 (N.Y. App. Div. 2d Dep't 1995).

Where applicant, an aged person, was incapacitated as a result of injury and thereafter was ill with grippe so that the time in which to serve notice against the city elapsed and where no showing is made that the city will be prejudiced, the court will grant applicant leave to serve a notice of claim. Greenfield v New York, 60 N.Y.S.2d 333, 186 Misc. 903, 1946 N.Y. Misc. LEXIS 1864 (N.Y. Sup. Ct. 1946).

Time for service of notice of claim was extended on the basis of physical incapacity of the claimant where the claim was based upon an allegedly unauthorized autopsy performed upon her husband and the papers submitted in support of the application for extension of time showed that she was over 70 years of age and so physically incapacitated that she could not herself have served notice of claim during the 90-day statutory period. Shaugnessy v New York, 36 Misc. 2d 300, 232 N.Y.S.2d 672, 1962 N.Y. Misc. LEXIS 2545 (N.Y. Sup. Ct. 1962).

222. —Length of medical confinement

There is room for exercise of discretion, and a person injured through a fall on an icy sidewalk may be excused from filing a notice of claim under this section within the statutory time limit, where she was admitted to a hospital and remained there more than a month and was confined to her home under medical care for more than another month, returning to the hospital where she remained overnight, and going back periodically to the hospital thereafter. Bogle v New York, 299 N.Y. 620, 86 N.E.2d 179, 299 N.Y. (N.Y.S.) 620, 1949 N.Y. LEXIS 1077 (N.Y. 1949).

A motion to file a late notice of claim was denied where the motion was made 97 days after the accident and about 58 days after the injured party had been released from a hospital for a cerebral concussion and fractured skull which he sustained as a result of the accident. Appellant was about twenty years and eight months of age at the time of the accident. Edwards v Westchester County Playland Com., 1 A.D.2d 670, 147 N.Y.S.2d 694, 1955 N.Y. App. Div. LEXIS 3954 (N.Y. App. Div. 2d Dep't 1955).

It was an improper exercise of discretion to deny an application for late filing of notice of claim for serious injuries sustained from a fall on a sidewalk where it appeared, without contradiction, that claimant sustained a brain injury which caused her to be confined to her bed and home under care of a physician for the entire 90-day period following the accident, and, upon advice of her physician, did not place her case in the hands of an attorney until ten months after the accident, the court being of opinion that she, herself, could not have served the notice. Volpe v New York, 9 A.D.2d 786, 193 N.Y.S.2d 515, 1959 N.Y. App. Div. LEXIS 5896 (N.Y. App. Div. 2d Dep't 1959).

Claimant was incapable of presenting her claim within the statutory 90-day period in view of her confinement in a hospital for 175 days following the accident, the large number of drugs given to her, and the physical and emotional shock she experienced involving a double leg amputation. Millington v New York City Transit Authority, 33 A.D.2d 737, 305 N.Y.S.2d 870, 1969 N.Y. App. Div. LEXIS 2731 (N.Y. App. Div. 1st Dep't 1969).

Petitioner was properly allowed to file a late notice of claim under evidence that the injury occurred on August 30, 1969 as a result of which she suffered brain damage resulting in partial paralysis; was in a hospital for treatment thereof and rehabilitation and had suffered serious mental limitations until November 10, 1969 when she was sent home for continued rehabilitation; that she was seen by her doctor on January 28, 1970, and the latter reported that she as of that date was progressing slowly but satisfactorily and that she still had significant problems with attention span, concentration and learning as to which there would probably be further recovery; that on February 5, 1970, she attended a motor vehicle hearing accompanied by an attorney for the insurer; that it appeared at the hearing she had no memory of the accident and exhibited a limitation of mental response; that on or about March 5, 1970 she retained an attorney to represent her; and that on April 4, 1970, through her attorney, she made a motion for leave to file a late notice of claim. Hurd v County of Allegany, 39 A.D.2d 499, 336 N.Y.S.2d 952, 1972 N.Y. App. Div. LEXIS 3609 (N.Y. App. Div. 4th Dep't 1972).

Plaintiff, who was found by a police officer lying face down, unconscious and bleeding on a city sidewalk would be granted permission to file a notice of claim against the city nunc pro tunc pursuant to Gen Mun Law § 50-e(5) where the notice of claim giving the city actual knowledge of the essential facts constituting the claim was served three and one-half months after the expiration of the statutory 90-day period for service of such notice, where hospital records established that plaintiff was hospitalized during the relevant period for almost four months, during which time he underwent neurosurgery at least once, and where the city did not demonstrate any substantial prejudice resulting from the delay. Heiman v New York, 85 A.D.2d 25, 447 N.Y.S.2d 158, 1982 N.Y. App. Div. LEXIS 14955 (N.Y. App. Div. 1st Dep't 1982).

In a personal injury action against a town the trial judge properly denied claimant's application for leave to file a latent notice of claim pursuant to Gen Mun Law § 50-e(5), notwithstanding that the town failed to address itself to the issue of whether claimant's failure to file a timely notice of claim prejudiced it in maintaining its defense, where no evidence was proffered that defendant town received actual notice of the claim and the fact that the town employee in question may have had notice of claimant's claim did not constitute the required notice, and where claimant failed to prove that he was medically disabled for the 90 day time limit following the alleged incident in that the medical records submitted did not indicate that claimant was unable to communicate his wishes nor, indeed, do they show any evidence of the alleged beating inflicted by the town employee. O'Dell v Greenport, 97 A.D.2d 887, 470 N.Y.S.2d 710, 1983 N.Y. App. Div. LEXIS 20678 (N.Y. App. Div. 3d Dep't 1983).

The trial court abused its discretion in denying plaintiff's application to file a late notice of claim where plaintiff suffered serious injuries and spent five and one-half weeks in the hospital and was thereafter disabled until a date well beyond the 90-day limitation period imposed by Gen Mun Law § 50-e, where the action occurred on a public road owned by defendant town and constructed by defendant county, and where the accident was investigated by a county deputy sheriff within minutes and his report noted that plaintiff was unable to see that other vehicle due to the contour of the road and therefore defendant acquired actual knowledge of all the facts relevant to plaintiff's claim shortly after the claim arose. Innes v County of Genesee, 99 A.D.2d 642, 472 N.Y.S.2d 223, 1984 N.Y. App. Div. LEXIS 16876 (N.Y. App. Div. 4th Dep't), aff'd, 62 N.Y.2d 779, 477 N.Y.S.2d 326, 465 N.E.2d 1262, 1984 N.Y. LEXIS 4368 (N.Y. 1984).

Petitioner was properly granted leave to file late notice of claim against city under CLS Gen Mun § 50-e(5) where (1) affidavit of orthopedic surgeon indicated that petitioner sustained fractures to both feet in fall from flatbed truck, and was confined to his home for 2 months, (2) additional delay in service of claim was caused by petitioner's mistaken belief that construction company which employed him at time of fall was under contract to state, while it was actually under contract to city, (3) petitioner moved for leave to serve late notice as soon as he learned that contract was with city, and (4) city did not deny allegation that it received actual notice of facts of accident through records maintained by employer. Farrell v City of New York, 191 A.D.2d 698, 595 N.Y.S.2d 531, 1993 N.Y. App. Div. LEXIS 3095 (N.Y. App. Div. 2d Dep't 1993).

The fact that the claimant was hospitalized continuously throughout the entire statutory time period is sufficient evidence of physical incapacity to justify granting of leave to serve the notice after the expiration of the period. Williams v Albany, 85 N.Y.S.2d 799, 193 Misc. 1037, 1949 N.Y. Misc. LEXIS 1701 (N.Y. Sup. Ct. 1949).

A motion to permit late filing of notice of claim could properly be granted where the notice of motion was served on defendant city one day short of expiration of a year since injury sustained by claimant as the result of malpractice in a city hospital, and it was shown that he was admitted to the hospital as the result of a severe accidental injury which, with the ensuing accident at the hospital, resulted in permanent physical and mental incapacity of the claimant followed by confinement to home and bed until shortly before the notice of motion was served. Shanahan v New York, 31 Misc. 2d 31, 219 N.Y.S.2d 418, 1961 N.Y. Misc. LEXIS 2815 (N.Y. Sup. Ct. 1961).

Although the delay in applying for leave to serve a belated notice of claim under this section is only five days after expiration of the 90-day period, leave will not be granted where the applicant's disability consisted of only two weeks confinement in a hospital with later confinement to his home, during which period of later confinement applicant furnished various sworn statements as to the nature and extent of his injuries, and there is no supporting physician's statement as to continuing disability. Phillips v Frankfort, 31 Misc. 2d 815, 220 N.Y.S.2d 171, 1961 N.Y. Misc. LEXIS 3400 (N.Y. Sup. Ct. 1961).

Constant hospitalization, numerous operations, mental breakdown, and the suffering of severe pain, constitute sufficient excuse for an extension of time in filing a claim against a city after the lapse of the 60 day period. Figuerca v New York, 106 N.Y.S.2d 430, 1951 N.Y. Misc. LEXIS 2089 (N.Y. Sup. Ct.), aff'd, 279 A.D. 771, 109 N.Y.S.2d 126, 1951 N.Y. App. Div. LEXIS 3720 (N.Y. App. Div. 1951).

223. — —Length of time after care or confinement

Where the accident in which claimant sustained injuries occurred July 28, 1961, and notice of claim was not served until July 13, 1962, physical incapacity of claimant would not serve as ground for recognition of late service where it merely appeared that claimant was hospitalized from date of the accident until October 13, 1961, thereafter was in a nursing home until November 30, 1961 but thereafter was able to visit the scene of the accident with his attorney and make further investigations. Smith v New York City Transit Authority, 18 A.D.2d 10, 238 N.Y.S.2d 250, 1963 N.Y. App. Div. LEXIS 4288 (N.Y. App. Div. 1st Dep't 1963).

Evidence that adult claimant was confined to hospital for approximately two weeks following accident and to his home approximately five weeks thereafter failed to support finding that one-day lateness in filing claim was due to his physical incapacity, where he failed to offer any information regarding his physical or mental condition during extensive time before filing after his home confinement ended. O'Neil v Manhattan & Bronx Surface Transit Operating Authority, 23 A.D.2d 488, 255 N.Y.S.2d 903, 1965 N.Y. App. Div. LEXIS 4989 (N.Y. App. Div. 1st Dep't 1965).

Complaint against city asserted by plaintiff who was shot by police officer in April 1985 was properly dismissed, and plaintiff's cross motion for leave to file late notice of claim was properly denied, since time limitation specified in CLS Gen Mun § 50-i was not tolled by alleged physical incapacity of plaintiff where (1) plaintiff was discharged from hospital in September 1985, he received outpatient care until December 1985 when he was readmitted for 2-week period, and he was readmitted on October 1986 for one-week period, and (2) plaintiff did not file notice of claim until after he was convicted of weapon possession arising from incident in March 1987. Taverna v New York, 166 A.D.2d 314, 560 N.Y.S.2d 775, 1990 N.Y. App. Div. LEXIS 12728 (N.Y. App. Div. 1st Dep't 1990).

Permission will be granted under § 50-e to file a claim against a municipality after the expiration of the time limit for filing a claim where the claimant was hospitalized during the entire period and attempted to file his claim immediately upon release and the injury occurred in a collision with a vehicle owned by the municipality and driven by its servant so that it can be said the municipality must have known of the possible claim and its circumstances at the time of injury. Williams v Albany, 85 N.Y.S.2d 799, 193 Misc. 1037, 1949 N.Y. Misc. LEXIS 1701 (N.Y. Sup. Ct. 1949).

224. —Lapse of memory

Claimant swore that he had several lapses of memory so that he could not remember all facts of accident. His physician merely said that he suffered a lapse of memory immediately following the accident and had intermediate recurrences since. Held: this was far short of a prima facie showing that a failure to file a claim on time was due to the mental or physical incapacity of the claimant. Application of Herrans, 7 A.D.2d 709, 180 N.Y.S.2d 82, 1958 N.Y. App. Div. LEXIS 4052 (N.Y. App. Div. 1st Dep't 1958).

Petitioner was properly allowed to file a late notice of claim under evidence that the injury occurred on August 30, 1969 as a result of which she suffered brain damage resulting in partial paralysis; was in a hospital for treatment thereof and rehabilitation and had suffered serious mental limitations until November 10, 1969 when she was sent home for continued rehabilitation; that she was seen by her doctor on January 28, 1970, and the latter reported that she as of that date was progressing slowly but satisfactorily and that she still had significant problems with attention span, concentration and learning as to which there would probably be further recovery; that on February 5, 1970, she attended a motor vehicle hearing accompanied by an attorney for the insurer; that it appeared at the hearing she had no memory of the accident and exhibited a limitation of mental response; that on or about March 5, 1970 she retained an attorney to represent

her; and that on April 4, 1970, through her attorney, she made a motion for leave to file a late notice of claim. Hurd v County of Allegany, 39 A.D.2d 499, 336 N.Y.S.2d 952, 1972 N.Y. App. Div. LEXIS 3609 (N.Y. App. Div. 4th Dep't 1972).

Court did not abuse its discretion in denying application for leave to serve late notice of claim on city where (1) petitioner (professional baseball player) and companion were injured in August, 1983 when vehicle driven by petitioner crashed into barrier on highway, (2) companion served notice of claim about 61 days after accident, (3) petitioner initially sought leave to file late notice of claim in December, 1984, claiming that he had loss of memory about accident until after 1984 baseball season, (4) court denied application without prejudice to renewal if medical affidavit were submitted, and (5) petitioner renewed application in February, 1986 and court again denied application because physician's affidavit did not indicate that petitioner's loss of memory prevented filing of timely notice of claim; further, city was prejudiced by delay in examining petitioner since he claimed to have suffered arm injury that damaged his baseball career, but he had recovered sufficiently to play with New York Yankees in 1984 season. Robertson v New York, 146 A.D.2d 456, 536 N.Y.S.2d 70, 1989 N.Y. App. Div. LEXIS 13 (N.Y. App. Div. 1st Dep't), aff'd, 74 N.Y.2d 781, 545 N.Y.S.2d 102, 543 N.E.2d 745, 1989 N.Y. LEXIS 1005 (N.Y. 1989).

The phrasing of this section is such as to absolutely preclude a court from granting an extension of time for service of notice of claim on a municipality, after expiration of the one-year period, notwithstanding plaintiff was actually in a hospital under sedation by reason of the injuries sustained and suffering from complete amnesia rendering him totally unable to file any notice of claim or impart the necessary information to anyone for making claim until two years after the accident occurred. Corso v New York, 42 Misc. 2d 677, 248 N.Y.S.2d 816, 1964 N.Y. Misc. LEXIS 1950 (N.Y. Sup. Ct. 1964).

225. —Injuries sufficient to warrant late filing

Trend of the cases indicates more liberality in interpreting subd. 5 of this section, and there was no abuse of discretion in granting an extension of time to serve notice of claim beyond the 90-day period for some six weeks following claimant's discharge from a hospital with respect to injuries sustained from a stab wound inflicted by a fellow jail-mate in connection with which emergency surgery and follow-up treatment kept him hospitalized from October 24 of one year to March 15 of the next. Shane v County of Albany, 20 A.D.2d 746, 246 N.Y.S.2d 837, 1964 N.Y. App. Div. LEXIS 4398 (N.Y. App. Div. 3d Dep't 1964).

Claimant was incapable of presenting her claim within the statutory 90-day period in view of her confinement in a hospital for 175 days following the accident, the large number of drugs given to her, and the physical and emotional shock she experienced involving a double leg amputation. Millington v New York City Transit Authority, 33 A.D.2d 737, 305 N.Y.S.2d 870, 1969 N.Y. App. Div. LEXIS 2731 (N.Y. App. Div. 1st Dep't 1969).

Petitioner was properly allowed to file a late notice of claim under evidence that the injury occurred on August 30, 1969 as a result of which she suffered brain damage resulting in partial paralysis; was in a hospital for treatment thereof and rehabilitation and had suffered serious mental limitations until November 10, 1969 when she was sent home for continued rehabilitation; that she was seen by her doctor on January 28, 1970, and the latter reported that she as of that date was progressing slowly but satisfactorily and that she still had significant problems with attention span, concentration and learning as to which there would probably be further recovery; that on February 5, 1970, she attended a motor vehicle hearing accompanied by an attorney for the insurer; that it appeared at the hearing she had no memory of the accident and exhibited a limitation of mental response; that on or about March 5, 1970 she retained an attorney to represent her; and that on April 4, 1970, through her attorney, she made a motion for leave to file a late notice of claim. Hurd v County of Allegany, 39 A.D.2d 499, 336 N.Y.S.2d 952, 1972 N.Y. App. Div. LEXIS 3609 (N.Y. App. Div. 4th Dep't 1972).

In a negligence action to recover damages for personal injuries from a municipality, plaintiffs application pursuant to Gen Mun Law § 50-e(5) for leave to file a late notice of claim slightly more than a year after the accident was properly granted, where the trial court believed that plaintiff's eight months of continuous hospitalization immediately following the accident, together with his extensive physical and mental rehabilitation at home thereafter, was the primary, if not sole, reason for his failure to file a timely notice of claim. Flynn v Long Beach, 94 A.D.2d 713, 462 N.Y.S.2d 243, 1983 N.Y. App. Div. LEXIS 18153 (N.Y. App. Div. 2d Dep't 1983).

The trial court abused its discretion in refusing claimant leave to file a late notice of claim, where claimant was injured during construction and demolition work on a site owned by a city and the city transportation authority and was hospitalized for 48 days, where claimant's injuries were quite serious and required surgery, and where the one-month delay was comparatively short under the circumstances and should not have deprived the claimant of a right to pursue his claim. Chmielewski v New York, 97 A.D.2d 730, 468 N.Y.S.2d 637, 1983 N.Y. App. Div. LEXIS 20456 (N.Y. App. Div. 1st Dep't 1983), aff'd, 61 N.Y.2d 1010, 475 N.Y.S.2d 377, 463 N.E.2d 1229, 1984 N.Y. LEXIS 4230 (N.Y. 1984).

In a proceeding pursuant to Gen Mun Law § 50-e(5) for leave to serve a late notice of claim, the lower court improperly determined that petitioner had failed to establish that he was physically incapacitated, and the matter would consequently be remitted for a determination based on all the relevant factors set forth in Gen Mun Law § 50-e(5), since, in the case of an injury that renders an applicant a quadriplegic, neither a medical affidavit nor a hospital record is necessary to demonstrate physical incapacitation in that the extent and duration of the disability are readily apparent to a lay person; further, a delay in the case of such injury is excusable, since it can be inferred that during the period of hospitalization, and for a substantial time thereafter, the applicant will be more concerned with the condition of his health and learning to cope, both mentally and physically, with his disability, than with deciding whether, and if so how, to commence a lawsuit against the municipality within the statutorily prescribed time. Savelli v New York, 104 A.D.2d 943, 480 N.Y.S.2d 561, 1984 N.Y. App. Div. LEXIS 20384 (N.Y. App. Div. 2d Dep't 1984).

Leave to serve late notice of claim on causes of action to recover damages for conscious pain and suffering and loss of services of decedent must be granted where decedent was totally incapacitated, mentally and physically, and was continuously confined to same medical institution until death. Di Notte v County of Westchester, 115 A.D.2d 585, 496 N.Y.S.2d 247, 1985 N.Y. App. Div. LEXIS 55008 (N.Y. App. Div. 2d Dep't 1985).

Court reasonably exercised its discretion in granting plaintiff's application to file notice of claim against municipal defendant 2 months after expiration of statutory 90-day period where plaintiff was severely incapacitated by severance of his right arm and defendant had agents and employees at accident site who investigated and filed detailed reports, demonstrating ample opportunity to examine insulation mulching machine which caused amputation. Cabezas v New York, 184 A.D.2d 240, 584 N.Y.S.2d 563, 1992 N.Y. App. Div. LEXIS 7747 (N.Y. App. Div. 1st Dep't 1992).

Leave was granted for filing of late notice of claim against a city under N.Y. Gen. Mun. Law § 50-e(5) even though claimant did not provide a reasonable excuse for his delay in filing after the onset of his cold/flu symptoms and before his ultimate and different diagnosis. That was because the claimant was not to be penalized for waiting to see if his symptoms would resolve themselves, his filing was within § 50-e(5)'s discretionary period, and to not allow such claims encouraged early preemptive filings of meritless claims. Porcaro v City of New York, 20 A.D.3d 357, 799 N.Y.S.2d 450, 2005 N.Y. App. Div. LEXIS 7991 (N.Y. App. Div. 1st Dep't 2005).

Trial court properly granted plaintiff's petition pursuant to N.Y. Gen. Mun, Law § 50-e(5) for leave to serve a late notice of a claim seeking damages for personal injuries on a county, as the delay was attributable to the serious injuries plaintiff suffered in the subject automobile accident on a county road, which rendered plaintiff a quadriplegic. Matter of Haeg v County of Suffolk, 30

A.D.3d 519, 817 N.Y.S.2d 125, 2006 N.Y. App. Div. LEXIS 8033 (N.Y. App. Div. 2d Dep't 2006).

A motion to permit late filing of notice of claim could properly be granted where the notice of motion was served on defendant city one day short of expiration of a year since injury sustained by claimant as the result of malpractice in a city hospital, and it was shown that he was admitted to the hospital as the result of a severe accidental injury which, with the ensuing accident at the hospital, resulted in permanent physical and mental incapacity of the claimant followed by confinement to home and bed until shortly before the notice of motion was served. Shanahan v New York, 31 Misc. 2d 31, 219 N.Y.S.2d 418, 1961 N.Y. Misc. LEXIS 2815 (N.Y. Sup. Ct. 1961).

Claimant's injury and its disabling effects, which the claimant still experienced, furnished a proper foundation for the court to exercise its discretion in granting the claimant's motion to file a late claim approximately seven months after the accident. Blaisdell v County of Wayne, 54 Misc. 2d 415, 282 N.Y.S.2d 872, 1967 N.Y. Misc. LEXIS 1297 (N.Y. Sup. Ct. 1967).

Constant hospitalization, numerous operations, mental breakdown, and the suffering of severe pain, constitute sufficient excuse for an extension of time in filing a claim against a city after the lapse of the 60 day period. Figuerca v New York, 106 N.Y.S.2d 430, 1951 N.Y. Misc. LEXIS 2089 (N.Y. Sup. Ct.), aff'd, 279 A.D. 771, 109 N.Y.S.2d 126, 1951 N.Y. App. Div. LEXIS 3720 (N.Y. App. Div. 1951).

226. — —No or minimal prejudice to defendant

Police officer injured in fall while on duty was entitled to serve late notice of claim pursuant to CLS Gen Mun § 50-e where (1) city had actual notice of essential facts concerning claim by virtue of police reports filed within 90-day notice period, (2) delay was not unreasonable, and (3) city did not show substantial prejudice; injury, which apparently required officer's retirement from force, may have caused immobilizing physical and mental distress which temporarily distracted him from prompt attention to filing his claim. De Modna v New York, 126 A.D.2d 435, 510 N.Y.S.2d 581, 1987 N.Y. App. Div. LEXIS 41587 (N.Y. App. Div. 1st Dep't), app. denied, 70 N.Y.2d 609, 522 N.Y.S.2d 109, 516 N.E.2d 1222, 1987 N.Y. LEXIS 19300 (N.Y. 1987).

Court properly granted permission to serve late notice of claim since (1) claimant suffered stroke shortly after claim arose, (2) claimant promptly sought permission to file late claim on returning from doctor-recommended recuperation in Florida, and (3) county failed to demonstrate that it would suffer prejudice inasmuch as claimant had provided medical records pertaining to her treatment. Brand v Fulton County, 133 A.D.2d 893, 520 N.Y.S.2d 251, 1987 N.Y. App. Div. LEXIS 51951 (N.Y. App. Div. 3d Dep't 1987).

Court properly granted permission for petitioner to file late notice of claim against city housing authority in connection with shooting of petitioner by armed robbers inside apartment building where (1) petitioner was rendered paraplegic by shooting and remained in hospital for over 4 months, (2) petitioner sought leave to file late notice of claim about 6 weeks after his release from hospital, and (3) housing authority conducted investigation into shooting, and raised only conclusory claim of prejudice. White v New York City Hous. Auth., 203 A.D.2d 371, 610 N.Y.S.2d 90, 1994 N.Y. App. Div. LEXIS 3666 (N.Y. App. Div. 2d Dep't 1994).

It was abuse of discretion to deny petitioner's application for leave to serve late notice of claim where he sustained serious head injuries as result of accident which required surgery and lengthy rehabilitative process, city failed to show how it would be prejudiced by lack of prompt notice, and petitioner's counsel expeditiously filed notice of claim and commenced instant proceeding within matter of days after being retained so as not to compound delay. DeMolfetto v City of New York, 216 A.D.2d 295, 627 N.Y.S.2d 448, 1995 N.Y. App. Div. LEXIS 5911 (N.Y. App. Div. 2d Dep't 1995).

Court erred in denying plaintiff's motion for leave to file late notice of claim where she was physically and mentally incapacitated during intervening period, defendants showed no prejudice from delay, and defendants were aware of facts and circumstances surrounding alleged injury at time of its occurrence. Sayegh v Health & Hosps. Corp., 233 A.D.2d 206, 649 N.Y.S.2d 696, 1996 N.Y. App. Div. LEXIS 11802 (N.Y. App. Div. 1st Dep't 1996).

Plaintiff who slipped and fell on metal plate set in cracked and broken portion of city sidewalk was entitled to serve late notice of claim under CLS Gen Mun § 50-e(5) where (1) after experiencing severe pain, he was transported to hospital 2 weeks after accident and was diagnosed with fractures of his lower back, (2) after 20-day hospitalization, he undertook course of physical therapy, (3) he retained counsel 5 days after expiration of statutory 90-day period for filing notice of claim, (4) city received required notices 9 and 12 days after deadline, (5) plaintiff's disabling injury provided reasonable excuse for short delay in filing, and (6) any prejudice to city was minimal because alleged defect was not transitory or likely to dissipate over period of delay. Silva v City of New York, 246 A.D.2d 465, 668 N.Y.S.2d 189, 1998 N.Y. App. Div. LEXIS 634 (N.Y. App. Div. 1st Dep't 1998).

Where plaintiff, following fall from water tower owned by town, was placed in complete body cast for more than three months, he was thereafter severely hampered in his ability to leave home, it was unlikely that town was unaware that accident had occurred and someone had been injured, and it was not at all obvious that conditions had changed to such an extent that town would be substantially prejudiced in maintaining its defense, delay of just over two months from expiration of statutory period was not unreasonable and therefore plaintiff would be allowed extension of time to serve notice of claim on town. Barrows v Woodstock, 89 Misc. 2d 365, 391 N.Y.S.2d 524, 1977 N.Y. Misc. LEXIS 1869 (N.Y. Sup. Ct. 1977).

Motion by plaintiff injured in auto accident to file late notice of claim was granted even though defendant city lacked actual knowledge of all the facts constituting the claim where the plaintiff was in need of constant medical treatment, required attendant care for a minimum of 12 hours a day, and was suffering from severe emotional depression, and where the city would not be substantially prejudiced because of the delay. Palazzo v New York, 444 F. Supp. 1089, 1978 U.S. Dist. LEXIS 20257 (E.D.N.Y. 1978).

227. —Injuries insufficient to warrant late filing

Exercise of the court's discretion to grant an application for extension of time to serve notice of claim in behalf of an incapacitated claimant depends largely on the nature and extent of the incapacity established, the time of its occurrence, and its duration. A minor or temporary physical disability, which does not impair the mind or continue throughout the 90-day period, will not ordinarily justify an extension of time for notice. Haas v Cedarhurst, 298 N.Y. 757, 83 N.E.2d 156, 298 N.Y. (N.Y.S.) 757, 1948 N.Y. LEXIS 1307 (N.Y. 1948).

A motion, entered 39 days after the expiration of the 60-day limitation period by a 60-year-old claimant who fractured her wrist as the result of a fall on an icy sidewalk, for leave to serve notice within a reasonable time, pursuant to subd. Sullivan v Babylon, 277 A.D. 791, 97 N.Y.S.2d 240, 1950 N.Y. App. Div. LEXIS 3334 (N.Y. App. Div. 1950), aff'd, 302 N.Y. 609, 96 N.E.2d 898, 302 N.Y. (N.Y.S.) 609, 1951 N.Y. LEXIS 805 (N.Y. 1951).

Petitioner's broken leg was not incapacitation preventing filing of notice of claim, and thus application under CLS Gen Mun § 50-e for leave to file late notice of claim was properly denied. Montanez v New York, 156 A.D.2d 185, 548 N.Y.S.2d 441, 1989 N.Y. App. Div. LEXIS 15444 (N.Y. App. Div. 1st Dep't 1989).

Claimant's unsubstantiated allegations of physical and psychological trauma resulting from robbery and sexual assault which allegedly occurred in her apartment did not provide reasonable excuse for her 4-month delay in serving notice of claim. Vargas v New York City Hous. Auth., 232 A.D.2d 263, 648 N.Y.S.2d 546, 1996 N.Y. App. Div. LEXIS 10295 (N.Y. App. Div. 1st Dep't 1996), app. denied, 89 N.Y.2d 817, 659 N.Y.S.2d 858, 681 N.E.2d 1305, 1997 N.Y. LEXIS 1311 (N.Y. 1997).

Petitioner was not entitled to serve late notice of claim on basis of physical and mental impediment where he was ambulatory, had full range of vision, and was "neurologically and hemodynamically stable" on his discharge from hospital, less than one

week after being injured. Nunes v City of New York, 233 A.D.2d 399, 650 N.Y.S.2d 16, 1996 N.Y. App. Div. LEXIS 11539 (N.Y. App. Div. 2d Dep't 1996).

Tenant who was scalded by excessively hot water while filling tub for bath was not excused from filing timely notice of claim against city housing authority, even though he asserted incapacity due to mental and physical distress arising from scalding, where his notice of claim was signed and notarized within 90-day statutory filing period and was product of discussion between tenant and counsel while tenant was at counsel's office for unrelated matter, and tenant's report to building maintenance department that water running from his faucets was excessively hot was insufficient to impart to housing authority actual knowledge of essential facts of his claim. Dickerson v New York City Hous. Auth., 245 A.D.2d 371, 664 N.Y.S.2d 834, 1997 N.Y. App. Div. LEXIS 12770 (N.Y. App. Div. 2d Dep't 1997).

Fracture to petitioner's right lower extremity was not incapacitation preventing serving of timely notice of claim. Embery v City of New York, 250 A.D.2d 611, 671 N.Y.S.2d 984, 1998 N.Y. App. Div. LEXIS 4885 (N.Y. App. Div. 2d Dep't 1998).

Injuries in a bus accident, not amounting to such mental or physical disability as would cause the failure to serve notice of claim under this section, consultations with specialists, an accident to injured party's attorney, and uncertainty as to extent of injuries, are not sufficient excuse for failure to file notice of claim within the required time limit, sub 2 of this section permitting the setting out of injuries so far as then practicable, and sub 6 permitting later amendment. White v New York, 87 N.Y.S.2d 446, 194 Misc. 562, 1949 N.Y. Misc. LEXIS 1938 (N.Y. Sup. Ct.), app. dismissed, 276 A.D. 765, 93 N.Y.S.2d 151, 1949 N.Y. App. Div. LEXIS 3247 (N.Y. App. Div. 1949).

Confinement to a hospital with a broken ankle during the statutory period for filing a notice of claim was not such physical incapacity as to permit filing of a late notice. Nunziato v New York, 3 Misc. 2d 450, 149 N.Y.S.2d 636, 1956 N.Y. Misc. LEXIS 2167 (N.Y. Sup. Ct.), aff'd, 2 A.D.2d 670, 153 N.Y.S.2d 550, 1956 N.Y. App. Div. LEXIS 4914 (N.Y. App. Div. 1st Dep't 1956).

228. —Miscellaneous

In an action by an individual who was injured when the automobile in which he was traveling struck a pothole in a city street, the trial court erred in granting the individual leave under Gen Mun Law § 50-e(5) to serve a late notice of claim upon the municipality where the individual had conceded that he had not been disabled for such a substantial period of time following the accident so as to prevent his filing a timely notice of claim and where the proposed notice of claim was too vague. Klobnock v New York, 80 A.D.2d 854, 436 N.Y.S.2d 769, 1981 N.Y. App. Div. LEXIS 10689 (N.Y. App. Div. 2d Dep't 1981).

Claimant's physical and mental disability, as well as failure of police department and county hospital to promptly furnish claimant with records containing evidentiary matter upon which claim is based, provide grounds for late filing of claim where it is clear that city against which claim is filed acquired actual knowledge of essential underlying facts by virtue of police complaint and where city has failed to show that it has been prejudiced by delay in serving formal notice of claim. Mazzilli v New York, 115 A.D.2d 604, 496 N.Y.S.2d 266, 1985 N.Y. App. Div. LEXIS 55026 (N.Y. App. Div. 2d Dep't 1985).

Cryptic unsworn note from doctor concerning assault victim's inability to work did not support claim of physical disability as excuse for late filing of notice of claim. Giordano v New York City Housing Authority, 128 A.D.2d 671, 513 N.Y.S.2d 169, 1987 N.Y. App. Div. LEXIS 44362 (N.Y. App. Div. 2d Dep't 1987).

Petitioner was entitled to leave to file late notice of claim against county for injuries sustained in motor vehicle accident, notwithstanding that application for leave was not filed until 10 months after accident, since (1) petitioner suffered from physical and mental effects of accident over nearly 7-month period of rehabilitation and convalescence, during which he was in considerable pain and under constant medication, (2) attorney adequately explained that his need to make investigation after he was retained caused 2-month delay in filing application, and (3) county acquired actual knowledge of facts within 90-day statutory period; however, petitioner's wife was not entitled to same relief since she failed to proffer any excuse for her lengthy delay in consulting attorney or in filing timely notice of claim. Morano v County of Dutchess, 160 A.D.2d 690, 553 N.Y.S.2d 779, 1990 N.Y. App. Div. LEXIS 3883 (N.Y. App. Div. 2d Dep't 1990).

The discretion given the court to excuse failure to file in due season where delay is due to physical incapacity is more readily invoked where the municipality had full knowledge of the situation giving rise to the claim. Williams v Albany, 85 N.Y.S.2d 799, 193 Misc. 1037, 1949 N.Y. Misc. LEXIS 1701 (N.Y. Sup. Ct. 1949).

An inmate's physical disability while in the hospital as the result of an accident incurred while working in a prison and the refusal of the prison authorities to permit him to communicate with a lawyer or with the Commissioner of Correction constituted such physical disability as, under the statute, would permit the granting of an application to serve a late notice of claim. Jones v New York, 12 Misc. 2d 911, 178 N.Y.S.2d 61, 1958 N.Y. Misc. LEXIS 3083 (N.Y. Sup. Ct. 1958).

229. Reliance upon settlement representations

If governmental subdivision negligently or wrongfully induces reliance by a party who changes his position to his detriment, subdivision is estopped from asserting a right or defense otherwise available; such doctrine of estoppel can be applicable with regard to defense based on failure to comply with notice of claim provision of General Municipal Law. Bender v New York City Health & Hospitals Corp., 38 N.Y.2d 662, 382 N.Y.S.2d 18, 345 N.E.2d 561, 1976 N.Y. LEXIS 2305 (N.Y. 1976).

Where plaintiff was lulled into taking no action until after the statutory period for filing of the notice of claim had passed because of his reliance upon the defendant's representation that the matter could be settled without litigation, the plaintiff would not be required to file a notice or claim. Debes v Monroe County Water Authority, 16 A.D.2d 381, 228 N.Y.S.2d 364, 1962 N.Y. App. Div. LEXIS 9599 (N.Y. App. Div. 4th Dep't 1962).

Trial court properly granted an injured party's motion to serve a late notice of claim of a personal injury action against a county pursuant to N.Y. Gen. Mun. Law § 50-e(5); the injured party justifiably relied on settlement representations made by the county's insurer, and the county was not prejudiced. Shapiro v County of Nassau, 5 A.D.3d 690, 774 N.Y.S.2d 752, 2004 N.Y. App. Div. LEXIS 3310 (N.Y. App. Div. 2d Dep't 2004).

But new clause (3) added to subd. 5 of this section by 1959 amendment, dealing with instances where the claimant fails to serve notice of claim within the time limited by reason of justifiable reliance upon settlement representations, is a carefully defined extension of the court's discretion to permit late service of such notices, applicable only in situations clearly within its provisions. Carr v Genesee Valley Regional Market Authority, 28 Misc. 2d 624, 216 N.Y.S.2d 45, 1961 N.Y. Misc. LEXIS 2833 (N.Y. Sup. Ct. 1961).

230. —Construction

The 1959 amendment of par. 5 of this section, giving the court discretion to permit late filing of notice of claim where the claimant has justifiably relied upon written settlement representations, was remedial in nature and is to be liberally construed. Latragna v Brighton School Dist., 28 Misc. 2d 467, 210 N.Y.S.2d 236, 1961 N.Y. Misc. LEXIS 3485 (N.Y. Sup. Ct. 1961).

Subdivision (5)(3) of this section, authorizing the court to grant an extension of time for service of notice of claim on the basis of "justifiable reliance" upon written representations of settlement of the claim in question, is remedial in nature and to be liberally construed. Kern v Central Free School Dist., 41 Misc. 2d 288, 245 N.Y.S.2d 213, 1963 N.Y. Misc. LEXIS 1288 (N.Y. Sup. Ct. 1963).

231. —Relationship to other disabilities

Even before this section was amended, in 1959, to include a provision for discretionary granting of an extension of time to serve notice of claim on the ground of reliance upon such representations was a factor which the court might favorably consider in aid of a time extension application based upon infancy or incapacity of the claimant. Rock v County of Onondaga, 2 N.Y.2d 926, 161 N.Y.S.2d 889, 141 N.E.2d 919, 1957 N.Y. LEXIS 1192 (N.Y. 1957).

Even before a claimant's reliance on settlement attempts was made an independent ground for extension of time to serve notice of claim, offers or attempts to settle his claim, with knowledge of the circumstances, were sometimes taken into consideration in granting time extension applications in behalf of infants and incapacitated persons. Balbach v Central School Dist., 278 A.D. 710, 103 N.Y.S.2d 342, 1951 N.Y. App. Div. LEXIS 4447 (N.Y. App. Div. 1951).

232. —Former necessity that representations be in writing

Although no "writings" are submitted in connection with a motion to serve late notice of claim by reason of reliance upon settlement representations, the school district or other municipality against whom the claim is made may be estopped from setting up such a defense by reason of activities, conduct, statements, or writings of a representative of its insurance company, pursuant to which plaintiffs are not required to file notice of claim. Daley v Greece Cent. School Dist., 21 A.D.2d 976, 252 N.Y.S.2d 899, 1964 N.Y. App. Div. LEXIS 3171 (N.Y. App. Div. 4th Dep't), app. denied, 15 N.Y.2d 481, 1964 N.Y. LEXIS 2463 (N.Y. 1964), aff'd, 17 N.Y.2d 530, 267 N.Y.S.2d 909, 215 N.E.2d 165, 1966 N.Y. LEXIS 1622 (N.Y. 1966).

Prior version of this statute requires a written statement made by or on behalf of the defendant or its insurance carrier and therefore, a written statement made by or on behalf of the claimant does not provide an adequate basis for permission to file late. Withey v Board of Education, 28 A.D.2d 800, 280 N.Y.S.2d 925, 1967 N.Y. App. Div. LEXIS 3718 (N.Y. App. Div. 3d Dep't 1967).

The amended provisions of (former) par. 5 of this section, giving the court discretion to permit late service of notice of claim when his failure to serve timely notice was by reason of justifiable reliance upon written settlement representations, requires that the representations relied upon have been made in writing before expiration of the statutory period for serving notice, but the representations need not be to the effect that the claim will be settled and it is sufficient if they give reasonable assurance that procedures leading toward settlement are in motion. Latragna v Brighton School Dist., 28 Misc. 2d 467, 210 N.Y.S.2d 236, 1961 N.Y. Misc. LEXIS 3485 (N.Y. Sup. Ct. 1961).

An application to serve notice of tort claim after the usual 90-day period, on the basis of new clause (3) added to (former) subd. 5 of this section by 1959 amendment, must be denied where the insurance adjuster's representations concerning settlement of the claim are not alleged to have been in writing, nor are they related in substantial detail sufficient to support a determination that reliance upon them, by applicant, was justifiable. Carr v Genesee Valley Regional Market Authority, 28 Misc. 2d 624, 216 N.Y.S.2d 45, 1961 N.Y. Misc. LEXIS 2833 (N.Y. Sup. Ct. 1961).

An application for leave to serve notice of claim, where no notice was served within the 90-day period, could not be based upon alleged representations of defendant school district's insurance company that they would look after the interests of the injured infant and her parents, where such representations, if any, were (formerly) merely oral written statements by the insurer were contained in a letter denying the claim received long after expiration of the maximum time for serving notice of claim. McGrouty v Central School Dist., 229 N.Y.S.2d 850 (N.Y. Sup. Ct. 1962).

233. —Necessity that reliance be justifiable

Clause (3) of subd 5 of § 50-e of the General Municipal Law requires that the justifiable reliance on written settlement negotiations for which the court may excuse the failure to serve within the prescribed time must be such reliance on the part of the claimants and since plaintiff's attorney corresponded shortly after the accident in a fashion to indicate that even he was not relying on settlement negotiations as the basis for not serving a timely notice of claim, the plaintiff parent had no statutory basis upon which to serve a late notice of claim. Kern v Central Free School Dist., 25 A.D.2d 867, 270 N.Y.S.2d 137, 1966 N.Y. App. Div. LEXIS 4245 (N.Y. App. Div. 2d Dep't 1966).

Claimants failed to prove reliance upon written settlement representations so as to justify late filing of claim under this subdivision. Abare v Glenville Cent. School Dist., 27 A.D.2d 898, 278 N.Y.S.2d 155, 1967 N.Y. App. Div. LEXIS 4644 (N.Y. App. Div. 3d Dep't 1967).

Order granting permission to serve a late notice of claim against city, which order was granted under General Municipal Law provision vesting court with discretionary authority to grant such leave where claimant has failed to timely serve his notice "by reason of his justifiable reliance upon settlement representations made in writing by an authorized representative of the party against which the claim is made or of its insurance carrier," was erroneously granted where there was no writing, standing by itself, which justified reliance upon settlement representations. Scibilia v Niagara Falls, 44 A.D.2d 757, 354 N.Y.S.2d 229, 1974 N.Y. App. Div. LEXIS 5284 (N.Y. App. Div. 4th Dep't 1974).

Even assuming, based upon equitable estoppel, that a plaintiff may commence a suit against school district for injuries without first securing permission to serve a late notice of claim, facts could afford no basis for an estoppel where there was no contact between plaintiff and school district or its representatives during limitation period upon which plaintiff could justifiably rely in failing to give timely notice. Mello v Hicksville Union Free School Dist., 51 A.D.2d 580, 378 N.Y.S.2d 753, 1976 N.Y. App. Div. LEXIS 10870 (N.Y. App. Div. 2d Dep't 1976), aff'd, 41 N.Y.2d 927, 394 N.Y.S.2d 637, 363 N.E.2d 361, 1977 N.Y. LEXIS 1991 (N.Y. 1977).

An application to serve notice of tort claim after the usual 90-day period, on the basis of new clause (3) added to (former) subd. 5 of this section by 1959 amendment, must be denied where the insurance adjuster's representations concerning settlement of the claim are not related in substantial detail sufficient to support a determination that reliance upon them, by applicant, was justifiable. Carr v Genesee Valley Regional Market Authority, 28 Misc. 2d 624, 216 N.Y.S.2d 45, 1961 N.Y. Misc. LEXIS 2833 (N.Y. Sup. Ct. 1961).

234. —Particular representations; insurance negotiations

Under subd. (3) of this section, added in 1959, an adult who retains a lawyer and thereafter fails to file a notice of claim within 90 days may be excused for late filing because of justifiable reliance placed upon settlement representations made by an authorized representative of an insurance carrier. De Sorbo v Rotterdam, 20 A.D.2d 839, 247 N.Y.S.2d 931, 1964 N.Y. App. Div. LEXIS 4144 (N.Y. App. Div. 3d Dep't 1964).

Although no "writings" are submitted in connection with a motion to serve late notice of claim by reason of reliance upon settlement representations, the school district or other municipality against whom the claim is made may be estopped from setting up such a defense by reason of activities, conduct, statements, or writings of a representative of its insurance company, pursuant to which plaintiffs are not required to file notice of claim. Daley v Greece Cent. School Dist., 21 A.D.2d 976, 252 N.Y.S.2d 899, 1964 N.Y. App. Div. LEXIS 3171 (N.Y. App. Div. 4th Dep't), app. denied, 15 N.Y.2d 481, 1964 N.Y. LEXIS 2463 (N.Y. 1964), aff'd, 17 N.Y.2d 530, 267 N.Y.S.2d 909, 215 N.E.2d 165, 1966 N.Y. LEXIS 1622 (N.Y. 1966).

Delay in filing notice was excusable under subdivision (5)(3) of this section where written communication of settlement representations was directed to plaintiff's collision insurance carrier, it being foreseeable that plaintiff's carrier would transmit the information to plaintiff. Tricou v Duanesburg, 23 A.D.2d 949, 260 N.Y.S.2d 162, 1965 N.Y. App. Div. LEXIS 4040 (N.Y. App. Div. 3d Dep't 1965).

Letter sent by insurance carrier of school district to the plaintiff's collision insurance carrier constituted a written "settlement representation," within the meaning of this subdivision. Abare v Glenville Cent. School Dist., 27 A.D.2d 898, 278 N.Y.S.2d 155, 1967 N.Y. App. Div. LEXIS 4644 (N.Y. App. Div. 3d Dep't 1967).

Insurer's employee who attempted to collect not only the amount the insurer had paid towards the vehicular damage sustained but also the plaintiff's claim for the portion not covered by his collision policy, was acting as the plaintiff's agent in this regard, and therefore his knowledge of the written settlement representation from the insurance carrier of the school district was imputable to the plaintiff and constituted reliance upon

settlement representations within the meaning of this section justifying the late filing of a claim. Abare v Glenville Cent. School Dist., 27 A.D.2d 898, 278 N.Y.S.2d 155, 1967 N.Y. App. Div. LEXIS 4644 (N.Y. App. Div. 3d Dep't 1967).

In absence of allegation that written settlement representations resulted in plaintiff's failure to serve notice of claim on town, where motion was made more than 18 months after accident for which plaintiff had mistakenly sued county instead of town, special term had no authority to grant permission to serve late notice of claim on town on theory that the same insurer represented county and town and was notified within 90 days of the accident and investigated the same. Murphy v Yates, 47 A.D.2d 807, 365 N.Y.S.2d 298, 1975 N.Y. App. Div. LEXIS 9129 (N.Y. App. Div. 4th Dep't 1975).

In the absence of evidence of settlement negotiations or assertion of reliance on the part of plaintiffs on the fact that an adjuster met with them shortly after collision between automobile and bus owned by subsidiary of regional transportation authority, fact that the adjuster did talk with them did not estop the authority and its subsidiary from asserting notice of claim provisions of the Municipal Law or the one-year and 30-day statute of limitations. Ponko v Regional Transit Service, Inc., 55 A.D.2d 1033, 391 N.Y.S.2d 243, 1977 N.Y. App. Div. LEXIS 10387 (N.Y. App. Div. 4th Dep't 1977).

In an action against a fire department, any delay in filing a claim which may have occurred between the time when plaintiff's counsel entered the case and commenced settlement negotiations and the time when such settlement negotiations were terminated by the insurance carrier, were directly attributable to the defendant's justifiable reliance upon settlement negotiations. Under the circumstances, no prejudice was sustained by the insurance company and it could not now, after permitting defendant to rely upon settlement negotiations, be permitted to assert the failure to timely serve the notice of claim. Giretti v Greenlawn Fire Dep't, 80 A.D.2d 883, 437 N.Y.S.2d 129, 1981 N.Y. App. Div. LEXIS 10742 (N.Y. App. Div. 2d Dep't 1981).

Parents of child injured during school physical education class need not be granted leave to file late notice of claim on basis of initial misinformation as to scope of coverage provided by school district's accident insurance policy where misinformation is corrected before expiration of statutory time for filing claim and there is no misinformation concerning liability insurance which in fact is not discussed at all. Salo v Board of Education, 117 A.D.2d 922, 498 N.Y.S.2d 925, 1986 N.Y. App. Div. LEXIS 53176 (N.Y. App. Div. 3d Dep't 1986).

With respect to a personal injury claim against a school district, a letter from the district's insurance carrier to plaintiffs advising that the carrier had paid a hospital bill and suggesting forwarding of other medical bills for consideration and possible payment constituted settlement representations upon which justifiable reliance could be placed by plaintiffs in disregarding the 90-day limitation on time to serve notice of claim. Kern v Central Free School Dist., 41 Misc. 2d 288, 245 N.Y.S.2d 213, 1963 N.Y. Misc. LEXIS 1288 (N.Y. Sup. Ct. 1963).

The court had discretion to grant leave to serve a late notice of claim when a claimant failed to serve notice within the 90-day period because he justifiably relied upon settlement representations by the insurance carrier of the defendant, and a letter from defendant's insurer written after the 90-day period referring unequivocally to an offer of settlement made during the 90-day period was sufficient to satisfy the requirement of clause 3. Spensieri v County of Onondaga, 48 Misc. 2d 866, 266 N.Y.S.2d 328, 1966 N.Y. Misc. LEXIS 2319 (N.Y. Sup. Ct. 1966).

A town was estopped to rely upon failure to serve timely notice of claim against the town for damages sustained by plaintiff when his property was flooded from water overflowing from the town's water tower adjacent to his property where, in connection with an application for leave to file late notice of claim, it was shown that the police and the Town Water Commissioner were immediately notified of the incident, admitted that the accident was caused by defective controls, said the town had insurance coverage and that its insurer would take care of the matter, and told him to contact a certain insurance broker, to whom he supplied damage estimates, but heard nothing further about the matter until he was ultimately advised, after expiration of time to serve notice of claim, that the insurance company would not honor the claim. Berriman v Huntington, 232 N.Y.S.2d 464 (N.Y. Sup. Ct. 1962).

235. —Litigation unnecessary

Motion to extend time for filing notice of claim against municipality denied where the claim was filed one day after the expiration of the 90-day period and motion to validate was not made until nine months thereafter. Since petitioner was not incapacitated during the entire 90-day period, fact that representatives of defendants had advised her not to retain an attorney and had taken her written statement did not excuse noncompliance. Application of Kreuzer, 282 A.D. 881, 124 N.Y.S.2d 752, 1953 N.Y. App. Div. LEXIS 5318 (N.Y. App. Div. 1953).

Defendant Water Authority was estopped from raising a defense of limitations under this section where, by representing to plaintiff that the matter could be settled without litigation, it lulled him into taking no action until after the statutory period for filing notice of claim had passed. Debes v Monroe County Water Authority, 16 A.D.2d 381, 228 N.Y.S.2d 364, 1962 N.Y. App. Div. LEXIS 9599 (N.Y. App. Div. 4th Dep't 1962).

236. —Settlement procedures are underway

Plaintiff's application for permission to serve a late claim against school district to recover for injuries received in school yard accident could not be granted on basis of an equitable estoppel on theory that school district and its representatives had allegedly, by way of fraud and deceit, lulled plaintiff into taking no action until time for compliance with notice statute had passed. Mello v Hicksville Union Free School Dist., 51 A.D.2d 580, 378 N.Y.S.2d 753, 1976 N.Y. App. Div. LEXIS 10870 (N.Y. App. Div. 2d Dep't 1976), aff'd, 41 N.Y.2d 927, 394 N.Y.S.2d 637, 363 N.E.2d 361, 1977 N.Y. LEXIS 1991 (N.Y. 1977).

An infant 17 years of age at the time of the accident cannot claim the benefits accorded to "immature infants," and will not be granted leave to file a claim after the lapse of more than 1 year, especially where the only explanations advanced by the claimant were that she was ignorant of the statute and that she was lulled into a sense of security by a statement of a city investigator that she would "hear from the city soon," and where claimant makes no explanation of her further delay after being informed by counsel of the necessity for filing a notice of claim. Witherspoon v New York, 85 N.Y.S.2d 443, 193 Misc. 730, 1948 N.Y. Misc. LEXIS 3794 (N.Y. Sup. Ct. 1948), disapproved, Cohen v Pearl River Union Free School Dist., 70 A.D.2d 94, 419 N.Y.S.2d 998, 1979 N.Y. App. Div. LEXIS 12306 (N.Y. App. Div. 2d Dep't 1979).

The amended provisions of par. 5 of this section, giving the court discretion to permit late service of notice of claim when his failure to serve timely notice was by reason of justifiable reliance upon written settlement representations, requires that the representations relied upon have been made in writing before expiration of the statutory period for serving notice, but the representations need not be to the effect that the claim will be settled and it is sufficient if they give reasonable assurance that procedures leading toward settlement are in motion. Latragna v Brighton School Dist., 28 Misc. 2d 467, 210 N.Y.S.2d 236, 1961 N.Y. Misc. LEXIS 3485 (N.Y. Sup. Ct. 1961).

Where an insurance adjuster representing a school district's liability insurer contacted a person whose car was damaged and who was injured as the result of negligent operation of its school bus, shortly after the accident, looking to a settlement of his claims, advised him against consulting an attorney, and later settled the property damage claim, claimant was justified in relying upon a letter from the adjuster, written prior to expiration of the time for serving notice of claim, directing him to see a named physician employed by the insurer for a medical examination, as indicating that proceedings were going forward towards settlement of his claims for injuries, and, under the 1959 amendment of par. 5 of this section, the court, in its discretion, could grant leave to serve notice of claim after time. Latragna v Brighton School Dist., 28 Misc. 2d 467, 210 N.Y.S.2d 236, 1961 N.Y. Misc. LEXIS 3485 (N.Y. Sup. Ct. 1961).

"Settlement representations", as justifying the extension of time to serve notice of claim, are not to be strictly limited to written assurances of payment forthcoming, and a writing which

may reasonably give rise to honest belief that procedures are under way which may lead to full settlement is sufficient basis for permitting the court to exercise its discretion. Kern v Central Free School Dist., 41 Misc. 2d 288, 245 N.Y.S.2d 213, 1963 N.Y. Misc. LEXIS 1288 (N.Y. Sup. Ct. 1963).

Plaintiff would be excused from complying with § 50-e of the General Municipal Law and defendants would be estopped from contending that notice requirements of General Municipal Law would serve as a defense to late filing of claim where plaintiff established that a stenographic statement was taken in hospital from her, a handwritten statement and a medical authorization form were signed by her and these writings and oral statements of defendant's agent gave the plaintiff reasonable assurance that procedures were proceeding to a settlement of her claim. Teubner v O'Connell, 50 Misc. 2d 633, 270 N.Y.S.2d 978, 1966 N.Y. Misc. LEXIS 2163 (N.Y. Sup. Ct. 1966).

Where representatives of the City of New York were aware of the claim against it, had acknowledged in writing the damage upon which the action was based, and had given plaintiff reason to believe the claim would be settled, City was estopped from asserting that plaintiff's failure to file a notice of claim. Barber--Scotia College, Inc. v New York, 390 F. Supp. 525, 1975 U.S. Dist. LEXIS 14524 (S.D.N.Y. 1975).

237. —Miscellaneous representations

Late filing of notice of claim permitted under above statute where it had been delayed in reliance on knowingly false representations that it should be made when plaintiff had recovered from his disability. Orsell v Board of Education, 23 A.D.2d 703, 256 N.Y.S.2d 970, 1965 N.Y. App. Div. LEXIS 4701 (N.Y. App. Div. 3d Dep't 1965).

Clause (3) of subd 5 of § 50-e of the General Municipal Law requires that the justifiable reliance on written settlement negotiations for which the court may excuse the failure to serve within the prescribed time must be such reliance on the part of the claimants and since plaintiff's attorney corresponded shortly after the accident in a fashion to indicate that even he was not relying on settlement negotiations as the basis for not serving a timely notice of claim, the plaintiff parent had no statutory basis upon which to serve a late notice of claim. Kern v Central Free School Dist., 25 A.D.2d 867, 270 N.Y.S.2d 137, 1966 N.Y. App. Div. LEXIS 4245 (N.Y. App. Div. 2d Dep't 1966).

Claimant did not have a valid excuse for a five-year delay in seeking to serve a notice of claim on a school district. Though he alleged he delayed serving the notice of claim because he relied on the school district's representation that it would be responsible for his medical expenses, he failed to indicate when or where the school district allegedly made this promise Matter of Scott v Huntington Union Free School Dist., 29 A.D.3d 1010, 816 N.Y.S.2d 165, 2006 N.Y. App. Div. LEXIS 7173 (N.Y. App. Div. 2d Dep't 2006).

238. Service on wrong party

Court properly granted plaintiff permission to serve late notice of claim where city housing authority failed to show substantial prejudice by 38-day delay, and service of notice on city comptroller instead of city housing authority was excusable error. Simmons v New York City Housing Authority, 161 A.D.2d 377, 555 N.Y.S.2d 325, 1990 N.Y. App. Div. LEXIS 5576 (N.Y. App. Div. 1st Dep't 1990).

Petitioner was entitled to file late notice of claim under CLS Gen Mun § 50-e(5) where (1) petitioner made excusable error concerning identity of public corporation against which claim should have been asserted, and (2) although respondent claimed that it was prejudiced by untimely notice because it was deprived of opportunity to investigate, it conceded that accident site was under construction and continuously changing at time of accident. Harris v Dormitory Authority of New York, 168 A.D.2d 560, 562 N.Y.S.2d 781, 1990 N.Y. App. Div. LEXIS 15627 (N.Y. App. Div. 2d Dep't 1990).

Court improperly granted plaintiff's motion for leave to file late notice of claim against city where (1) notice of claim, although served within 90 days, was served on improper entity despite fact that correct entity could have been easily ascertained, (2) there was no evidence that city had actual knowledge of incident within 90 days or reasonable time thereafter, and (3) entity on which notice of claim was served was not alter ego of city; fact that entity on which notice of claim was served held hearing pursuant to CLS Gen Mun § 50-h did not impute knowledge to city. Pavone v New York, 170 A.D.2d 493, 566 N.Y.S.2d 71, 1991 N.Y. App. Div. LEXIS 2019 (N.Y. App. Div. 2d Dep't 1991).

Mother of infant injured by elevator door with dysfunctional safety device was entitled to serve late notice of claim on city housing authority where she timely served notice of claim on city, 7 months later she learned that authority was proper party, and authority clearly had actual notice of claim since its police department had conducted full investigation and interviews 2 weeks after accident occurred. Morgan v New York City Housing Authority, 181 A.D.2d 890, 581 N.Y.S.2d 425, 1992 N.Y. App. Div. LEXIS 5259 (N.Y. App. Div. 2d Dep't 1992).

Plaintiff was not entitled to leave to file late notice of claim against transit authority for injuries sustained while alighting from bus where (1) plaintiff served notice of claim and summons and complaint on wrong transit authority, (2) that transit authority denied that it owned or operated bus, and (3) while there was still time for plaintiff to file timely application for leave to file late notice of claim, claims examiner employed by correct transit authority communicated with plaintiff's counsel, and dispatcher for correct transit authority testified at examination before trial as "nonparty witness" with respect to operation of bus. Zaiman v Metropolitan Transit Authority,, 186 A.D.2d 555, 588 N.Y.S.2d 402, 1992 N.Y. App. Div. LEXIS 11162 (N.Y. App. Div. 2d Dep't 1992).

Court erred in granting petitioner leave to file late notice of claim against New York City Housing Authority (NYCHA) after original, timely notice was mistakenly served on New York City Transit Authority, notwithstanding petitioner's argument that NYCHA must have known of his "accident" due to appearance of New York City Fire Department on scene, since mere happening of incident and appearance of fire department on scene did not compel conclusion that NYCHA received actual notice of essential facts constituting claim, especially given affidavit of building manager that petitioner's tenant file contained no information concerning incident. Serrano v New York City Hous. Auth., 197 A.D.2d 694, 602 N.Y.S.2d 935, 1993 N.Y. App. Div. LEXIS 9963 (N.Y. App. Div. 2d Dep't 1993).

Court properly granted petitioners' application for leave to serve late notice of claim against town where period of delay was relatively brief, petitioners timely served notice of claim on wrong municipal defendant and then promptly sought leave to serve town shortly after discovering error, alleged defect which caused injuries was permanent so as to allow belated investigation, and town failed to allege any specific prejudice. Guarneri v Town of Oyster Bay, 224 A.D.2d 695, 638 N.Y.S.2d 711, 1996 N.Y. App. Div. LEXIS 1912 (N.Y. App. Div. 2d Dep't 1996).

Petitioner was properly granted application to serve late notice of claim where her notice of claim correctly named New York City Housing Authority as defendant, it was misdelivered to Corporation Counsel, and there was short period of delay of only 2 months, so that authority was not prejudiced thereby. Thornhill v New York City Hous. Auth., 232 A.D.2d 317, 648 N.Y.S.2d 575, 1996 N.Y. App. Div. LEXIS 10566 (N.Y. App. Div. 1st Dep't 1996).

Application to file late notice of claim was properly denied where (1) alleged law office failure, whether based on inadvertent clerical mishap or error in ascertaining correct party to sue, was insufficient, and (2) applicant did not show that respondents had actual knowledge of facts of her claim within 90-day filing period or reasonable time thereafter, as required by CLS Gen Mun § 50-e(5). Quinn v Manhattan & Bronx Surface Transit Operating Auth., 273 A.D.2d 144, 710 N.Y.S.2d 894, 2000 N.Y. App. Div. LEXIS 7149 (N.Y. App. Div. 1st Dep't 2000).

In personal injury action arising from accident that occurred at public school owned by city wherein plaintiff served timely notice of claim on city but complaint against city was dismissed because it was not proper party under CLS Educ § 2554(4) and NYC Charter, ch 20 § 521 as matter of law, plaintiff's motion to add board of education as defendant following expiration of statute of limitations was properly denied, as board of education and city were not united in interest and thus relation-back doctrine did

not apply. Goldman v City of New York, 287 A.D.2d 689, 732 N.Y.S.2d 78, 2001 N.Y. App. Div. LEXIS 10034 (N.Y. App. Div. 2d Dep't 2001).

Petitioners, a disabled minor and his natural guardians, were permitted to file a late notice of claim under N.Y. Gen. Mun. Law § 50-e against a board of cooperative educational services (BOCES) after improperly filing a personal injury claim against a city school district because the petition to file a late claim was made only 13 days after the error was discovered and the BOCES had notice of the claim within 90 days of the claim. Matter of Brandon Wimberly v Southern Westchester BOCES (Board of Coop. Educ. Services), 51 A.D.3d 810, 858 N.Y.S.2d 271, 2008 N.Y. App. Div. LEXIS 4271 (N.Y. App. Div. 2d Dep't 2008).

In the exercise of discretion under subdivision 5 of section 50-e of the General Municipal Law, where it appears that plaintiff's error in serving a notice of claim in an action for false arrest, assault and battery against the New York City Transit Authority upon the Comptroller of the City of New York, which notice was acknowledged and accepted by the city, did not result in demonstrable prejudice since the authority was served with a summons and complaint in the action within four months of the occurrence and therefore had reasonable notice thereof, leave to file late notice of claim against the authority is granted. While the circumstance involved is not particularized in subdivision 5, it is nevertheless within the ambit of an excusable error concerning the identity of the public corporation against which the claim should be asserted. The court is not limited to the exact bounds of the particular situations recited in the statute and may carry out the legislative intent thereof in its discretion. Campos v New York City Transit Authority, 93 Misc. 2d 708, 403 N.Y.S.2d 832, 1978 N.Y. Misc. LEXIS 2125 (N.Y. Civ. Ct. 1978).

239. Incapacity of spouse

There is no requirement that a claimant's spouse, or some friend or relative, serve or execute notice of claim in behalf of an incapacitated person; a wife, who was herself incapacitated during the 90-day period, is entitled to an extension of time to give notice, notwithstanding her husband could have done so for her. Rosenberg v New York, 309 N.Y. 304, 130 N.E.2d 629, 309 N.Y. (N.Y.S.) 304, 1955 N.Y. LEXIS 923 (N.Y. 1955).

An application to serve late notice of claim upon a municipality for flood damage to the cellar of a house owned by a husband and wife from the village's failure to repair a water main could not be granted on the basis of physical or mental incapacity of one of the spouses only during the 90-day period, where the condition causing her hospitalization and partial confinement to her home was not disclosed. Horowitz v Monticello, 18 A.D.2d 947, 237 N.Y.S.2d 660, 1963 N.Y. App. Div. LEXIS 4435 (N.Y. App. Div. 3d Dep't 1963).

Filing of late claim permitted under evidence that injured party had been physically and mentally disabled since time of accident, even though the claimant's wife was under no disability and even though an attorney was acting on the matter within the 90-day time for filing the notice of claim. Reynolds v Greece Cent. School Dist., 36 A.D.2d 1020, 321 N.Y.S.2d 668, 1971 N.Y. App. Div. LEXIS 4030 (N.Y. App. Div. 4th Dep't), app. denied, 29 N.Y.2d 485, 325 N.Y.S.2d 1025, 274 N.E.2d 753, 1971 N.Y. LEXIS 2210 (N.Y. 1971).

Where both parents are asserting claims which fall within the notice requirements of this section, the fact that one could have filed timely notice of claim in behalf of the other does not preclude the latter from seeking an extension of time to give notice if she was, in fact, demonstrably incompetent during the initial 90-day claim period. Zaslowsky v Nassau County Public General Hospital, 27 Misc. 2d 379, 209 N.Y.S.2d 921, 1960 N.Y. Misc. LEXIS 2223 (N.Y. Sup. Ct. 1960).

240. Waiver or estoppel as to failure to file timely notice

Although a municipality may be estopped from asserting the defense of failure to file a notice within the 90-day period, there must be a showing that the person upon whose acts or promises the estoppel is based, had authority to act for it, and it must also be shown that the acts of defendant or its representative justified plaintiff's reliance and that he did in fact rely upon them. Miller v Board of Education, 37 A.D.2d 798, 324 N.Y.S.2d 745, 1971 N.Y. App. Div. LEXIS 3425 (N.Y. App. Div. 4th Dep't 1971).

In certain instances, waiver or estoppel are employed to excuse late filing of a notice of claim, but, in all such cases, there is, within the 90-day period, some action by the plaintiff which gives the defendant notice of an intended claim and, by the defendant, either some responsive action upon which plaintiff relied or a failure to act where action would have permitted the plaintiff to comply with the strict requirements of the statute. Pugh v Board of Education, 38 A.D.2d 619, 326 N.Y.S.2d 300, 1971 N.Y. App. Div. LEXIS 2894 (N.Y. App. Div. 3d Dep't 1971), aff'd, 30 N.Y.2d 968, 335 N.Y.S.2d 830, 287 N.E.2d 621, 1972 N.Y. LEXIS 1215 (N.Y. 1972).

In an action for money damages by a property owner who had been notified that taxes on her property were being waived for 1974, and whose property was then sold for unpaid taxes for the same year, the doctrine of equitable estoppel prevented the action from being dismissed on the ground that it had not been brought within the 90-day period of Gen Mun Law § 50-e, notwithstanding defendant town's contention that the collection of taxes and the procedures pertinent thereto are the exercise of a governmental function and not subject to the doctrine of equitable estoppel, where the action was one in negligence for money damages that in no way sought to restrain defendant from the exercise of its governmental function, and where strict application of Gen Mun Law § 50-e would, under the circumstances of the case, trap the unwary in that by its acts and omissions defendant had caused plaintiff to believe that her tax payments were current. Chait v Thompson, 105 A.D.2d 578, 481 N.Y.S.2d 797, 1984 N.Y. App. Div. LEXIS 20595 (N.Y. App. Div. 3d Dep't 1984).

Special Term was without authority to grant application to serve late notice of claim against City of New York in personal injury action where application was made after expiration of one-year and 90-day limitations provided by CLS Gen Mun §§ 50-e and 50-i and record contained no facts to support finding of equitable estoppel against city. Siahaan v New York, 123 A.D.2d 620, 506 N.Y.S.2d 777, 1986 N.Y. App. Div. LEXIS 60768 (N.Y. App. Div. 2d Dep't 1986).

Estoppel precluding municipality from asserting failure to timely serve notice of claim will only be found where municipality's conduct was calculated to, or negligently did, mislead or discourage party from filing timely notice of claim or application for leave to serve late notice, and where such conduct was justifiably relied upon by party. Rieara v New York, Dep't of Parks & Recreation, 156 A.D.2d 206, 548 N.Y.S.2d 466, 1989 N.Y. App. Div. LEXIS 15470 (N.Y. App. Div. 1st Dep't 1989).

Plaintiff would not be granted permission to file late notice of claim for injuries allegedly sustained when boy was injured in fall in school gymnasium while participating in game of kickball, allegedly as result of raised mat, where there was no allegation that anyone at school actually witnessed accident and school's opposition papers stated that it had no record of any accident; school district would be prejudiced by being required to defend claim essentially involving someone tripping over transient and movable object where notice was long delayed. Salyer v Valley Cent. School Dist., 163 A.D.2d 782, 558 N.Y.S.2d 746, 1990 N.Y. App. Div. LEXIS 8601 (N.Y. App. Div. 3d Dep't 1990), app. denied, 78 N.Y.2d 851, 573 N.Y.S.2d 69, 577 N.E.2d 60, 1991 N.Y. LEXIS 871 (N.Y. 1991).

City's mere retention of late notice of claim did not constitute waiver of defense of untimeliness. Taverna v New York, 166 A.D.2d 314, 560 N.Y.S.2d 775, 1990 N.Y. App. Div. LEXIS 12728 (N.Y. App. Div. 1st Dep't 1990).

Court improperly invoked doctrine of equitable estoppel and granted application for leave to serve notice of claim against town industrial development agency based on town's conduct which, "throughout this litigation...failed to hint that it was not the real party in interest." Quintero v Babylon Industrial Dev. Agency, 172 A.D.2d 527, 567 N.Y.S.2d 870, 1991 N.Y. App. Div. LEXIS 4287 (N.Y. App. Div. 2d Dep't 1991).

Defendants would be estopped from asserting either affirmative defense of statute of limitations or untimeliness of supplemental notice of claim for wrongful death and conscious pain and suffering in medical malpractice action where they had (1)

actively concealed plaintiff's mother's death, and (2) failed to reasonably and diligently inquire or ascertain whereabouts of mother's relatives prior to releasing her body to city mortuary for funeral. Drysdale v New York, 182 A.D.2d 566, 582 N.Y.S.2d 716, 1992 N.Y. App. Div. LEXIS 6361 (N.Y. App. Div. 1st Dep't), app. dismissed, 81 N.Y.2d 759, 594 N.Y.S.2d 718, 610 N.E.2d 391, 1992 N.Y. LEXIS 4381 (N.Y. 1992).

Department of Transportation's failure to bring to plaintiff's attention after plaintiff served notice of claim, that notice was improperly served, did not give rise to estoppel claim. Acevedo v City of New York DOT, 227 A.D.2d 245, 642 N.Y.S.2d 291, 1996 N.Y. App. Div. LEXIS 5201 (N.Y. App. Div. 1st Dep't 1996).

Defendant county hospital in medical malpractice action was not estopped from asserting plaintiffs' failure to comply with conditions precedent to commencing action, as specified in CLS Gen Mun §§ 50-e and 50-i, where action was commenced 2 ½ years after occurrence of alleged malpractice, and plaintiffs failed to show when they hired their counsel or that counsel was misled so as to affect filing of notice of claim. Fuentes v Brookhaven Mem'l Hosp., 251 A.D.2d 540, 674 N.Y.S.2d 744, 1998 N.Y. App. Div. LEXIS 7535 (N.Y. App. Div. 2d Dep't 1998).

Town was not equitably estopped from contesting timeliness of motion to serve late notice of claim where such motion was made after statute of limitations had run, since jurisdiction may not be created by estoppel. Hey v Town of Napoli, 265 A.D.2d 803, 695 N.Y.S.2d 643, 1999 N.Y. App. Div. LEXIS 9828 (N.Y. App. Div. 4th Dep't 1999).

Denial of a representative's petition seeking to, inter alia, deem her notice of claim timely served was proper; the representative produced no evidence indicating that the city's personnel who investigated the death of her son either made any affirmative, knowingly false misrepresentation to her upon which she reasonably relied in foregoing the commencement of a timely lawsuit or intentionally concealed relevant information from her before the expiration of the limitations period, notwithstanding the existence of a fiduciary relationship requiring that such information be disclosed to her. The wholly conclusory and unsubstantiated allegations by the representative's attorney in this regard possessed no probative value. Matter of Pipitone v City of New York, 38 A.D.3d 557, 832 N.Y.S.2d 230, 2007 N.Y. App. Div. LEXIS 2591 (N.Y. App. Div. 2d Dep't), app. denied, 9 N.Y.3d 810, 844 N.Y.S.2d 786, 876 N.E.2d 515, 2007 N.Y. LEXIS 3094 (N.Y. 2007).

A court cannot, on a motion, independent of an action, relieve a claimant of his failure to comply with the notice requirement of this section upon the ground of waiver or estoppel. Cavagnol v Orangetown, 17 Misc. 2d 943, 185 N.Y.S.2d 720, 1959 N.Y. Misc. LEXIS 3982 (N.Y. Sup. Ct. 1959).

Failure to comply with the requirements of this section as to time and manner of service of notice of claim is not waived, and cannot be waived, by any act of defendant following attempted, but ineffectual, service of such a notice. Horowitz v Board of Education, 210 N.Y.S.2d 600 (N.Y. Sup. Ct. 1960).

Department of education was equitably estopped from asserting a N.Y. Gen. Mun. Law § 50-e notice of claim defense because the comptroller, wrongfully or negligently, induced a corporation to detrimentally believe that its notice of claim was proper and that the proper party had been served, which triggered the 30-day toll in N.Y. C.P.L.R. 204(a). Inner Force Economic Dev. Corp. v Department of Educ. of the City of New York, 948 N.Y.S.2d 557, 36 Misc. 3d 758, 2012 N.Y. Misc. LEXIS 3318 (N.Y. Sup. Ct. 2012).

241. —Actual knowledge of facts constituting claim

On a motion to file a late claim, while the nature of the accident did not lend itself to a claim of lack of knowledge on the part of the municipality, this is not dispositive, but may be taken into consideration. Boreffi v Vestal, 33 A.D.2d 1073, 307 N.Y.S.2d 400, 1970 N.Y. App. Div. LEXIS 5532 (N.Y. App. Div. 3d Dep't 1970).

Plaintiffs were properly granted permission to file late notice of claim against housing authority 3 ½ months after 90-day time limit since (1) housing authority acquired actual knowledge of injury to infant plaintiff only 3 days after accident occurred, when his guardian reported accident to housing authority and filled out work sheet requesting repair of door that caused accident, and (2) it was unlikely that conditions that existed at time of accident would have existed until end of 90-day period for filing of claim. Smitherman v New York, 188 A.D.2d 276, 590 N.Y.S.2d 474, 1992 N.Y. App. Div. LEXIS 13507 (N.Y. App. Div. 1st Dep't 1992).

Plaintiff was improperly granted leave to file late notice of claim against city housing authority where housing authority did not acquire actual knowledge of facts of incident within 90 days of incident, and plaintiff did not allege that condition resulting in incident had remained unchanged. Kalenda v Buffalo Mun. Hous. Auth., 203 A.D.2d 937, 611 N.Y.S.2d 386, 1994 N.Y. App. Div. LEXIS 4943 (N.Y. App. Div. 4th Dep't 1994), app. denied, 1994 N.Y. App. Div. LEXIS 7938 (N.Y. App. Div. 4th Dep't July 1, 1994).

On motion for leave to serve late notice of claim against city school construction authority after timely service against city board of education, allegation that board probably shared its actual knowledge of claim with authority was inadequate to establish that authority had actual knowledge of essential facts constituting claim within reasonable time after claim arose. Pecchio v National Safety Envtl., 211 A.D.2d 773, 621 N.Y.S.2d 665, 1995 N.Y. App. Div. LEXIS 700 (N.Y. App. Div. 2d Dep't 1995).

Court erred in denying plaintiff's motion for leave to serve late notice of claim and to deem notice of claim and summons and complaint timely filed where defendant was aware of incident in question, and there was no indication that defendant had been significantly prejudiced by delay. Cooper v City of New York, 216 A.D.2d 142, 628 N.Y.S.2d 279, 1995 N.Y. App. Div. LEXIS 6618 (N.Y. App. Div. 1st Dep't 1995).

While no one factor is dispositive in determining whether leave to file late notice of claim should be granted, knowledge of facts constituting claim is factor that should be accorded great weight. Hilton v Town of Richland, 216 A.D.2d 921, 629 N.Y.S.2d 130, 1995 N.Y. App. Div. LEXIS 7251 (N.Y. App. Div. 4th Dep't 1995).

Plaintiffs' service of timely notice of claim on housing authority's main office at 250 Broadway, which was only address listed in Green Book for its general counsel, rather than its law department located around corner, was sufficient to give housing authority actual notice of facts underlying infant plaintiff's claim, where service of process was acknowledged in writing and there was no showing of substantial prejudice to housing authority; thus, it was abuse of discretion to deny plaintiffs' motion to serve late notice of claim. Calix by Calix v New York City Hous. Auth., 234 A.D.2d 232, 651 N.Y.S.2d 512, 1996 N.Y. App. Div. LEXIS 12906 (N.Y. App. Div. 1st Dep't 1996).

Court denied petition for leave to serve and file late notice of claim against town as (1) petitioner failed to establish that town acquired actual notice of essential facts of claim where it had received notice that she tripped and fell on broken sidewalk, but proposed notice of claim alleged that she fell on sidewalk that was "raised and uplifted by tree roots," (2) degree to which sidewalk was raised would necessarily vary with passage of time and thus town was prejudiced by delay, and (3) petitioner's ignorance of statutory notice of claim requirement was not viable excuse for delay. Turner v Town of Oyster Bay, 268 A.D.2d 526, 701 N.Y.S.2d 653, 2000 N.Y. App. Div. LEXIS 702 (N.Y. App. Div. 2d Dep't 2000).

Trial court erred in denying a mother's petition pursuant to N.Y. Gen. Mun. Law § 50-e(5) for leave to file a late notice of a claim of negligent hiring and supervision of a teacher against a board of education; there was an issue of fact as to whether the board had actual notice of the teacher's alleged sexual abuse of a student within the relevant time frame. Young v Bd. of Educ., 1 A.D.3d 194, 767 N.Y.S.2d 214, 2003 N.Y. App. Div. LEXIS 11898 (N.Y. App. Div. 1st Dep't 2003).

Under N.Y. Gen. Mun. Law § 50-e(5), since the city's hospital corporation had actual notice of the patient's claim and since the city did not demonstrate it was prejudiced by the patient's late fling of her notice of claim, the patient's lack of a reasonable excuse did not bar the granting of leave to serve a late notice of claim. Gibbs v City of New York, 22 A.D.3d 717, 804 N.Y.S.2d 393, 2005 N.Y. App. Div. LEXIS 11432 (N.Y. App. Div. 2d Dep't 2005).

Administrator of the decedent's estate was granted leave to serve a late notice of claim to the town pursuant to N.Y. Gen. Mun. Law § 50-e(5) because the town received actual notice of the law suit within the 90 day period after the administrator had

been appointed and the town had not shown actual prejudice. Miller v County of Sullivan, 36 A.D.3d 994, 827 N.Y.S.2d 750, 2007 N.Y. App. Div. LEXIS 6 (N.Y. App. Div. 3d Dep't 2007).

Because a village acquired timely knowledge of the essential facts of an owner's claim for damages to a trailer that was impounded and sold, the owner established a lack of substantial prejudice to the village; accordingly, the trial court should have granted its N.Y. Gen. Mun. Law § 50-e(5) petition for leave to serve a late notice of claim. Brownstein v Incorporated Vil. of Hempstead, 52 A.D.3d 507, 859 N.Y.S.2d 682, 2008 N.Y. App. Div. LEXIS 4941 (N.Y. App. Div. 2d Dep't 2008).

In an action for assault and battery, false arrest and malicious prosecution arising out of plaintiff's arrest by a New York City policeman in 1967, defendant's motion to dismiss the third cause of action, made some 11 years after the incident, on the ground that plaintiff failed to comply with section 50-e of the General Municipal Law, is denied, plaintiff having served a notice of claim two and one-half months after the incident stating that the nature of the claim was assault and battery and false arrest, and an amended notice of claim eight months after the incident stating that an indictment against plaintiff had been dismissed, the Grand Jury having dismissed the indictment seven months after the incident, since favorable termination of prosecution, which is not an element of assault or false arrest, is an essential element of an action for malicious prosecution, and the amended notice could have had no purpose other than to put defendants on notice of the claim of malicious prosecution; the two notices read together gave defendants sufficient notice of plaintiff's claim of malicious prosecution and it is not a fatal defect that the words "malicious prosecution" were not used. Worrell v New York, 101 Misc. 2d 270, 420 N.Y.S.2d 994, 1979 N.Y. Misc. LEXIS 2667 (N.Y. Sup. Ct. 1979).

Where representatives of the City of New York were aware of the claim against it, had acknowledged in writing the damage upon which the action was based, and had given plaintiff reason to believe the claim would be settled, City was estopped from asserting that plaintiff's failure to file a notice of claim. Barber--Scotia College, Inc. v New York, 390 F. Supp. 525, 1975 U.S. Dist. LEXIS 14524 (S.D.N.Y. 1975).

242. — —Imputed or constructive knowledge

In action against town for false imprisonment and malicious prosecution, plaintiff would be permitted to file late notice of claim for cause of action for false imprisonment where (1) plaintiff was arrested in November 1986 for custodial interference arising out of dispute between her daughter and son-in-law, and charge was dismissed in August, 1987, and (2) plaintiffs served notice of claim in September, 1987 which, because of different accrual dates for different causes of action, was timely with respect to malicious prosecution but late with respect to false imprisonment; defendant town made insufficient showing of prejudice, and knowledge of facts underlying false imprisonment claim could be imputed to it. Montalto v Harrison, 151 A.D.2d 652, 543 N.Y.S.2d 97, 1989 N.Y. App. Div. LEXIS 8235 (N.Y. App. Div. 2d Dep't 1989).

Knowledge of occurrence by municipality's police or fire department cannot be imputed to public or municipal corporation for notice of claim purposes. Serrano v New York City Hous. Auth., 197 A.D.2d 694, 602 N.Y.S.2d 935, 1993 N.Y. App. Div. LEXIS 9963 (N.Y. App. Div. 2d Dep't 1993).

As general rule, knowledge of accident or occurrence by municipality's police or fire department cannot be imputed to another public or municipal corporation. Russ v New York City Hous. Auth., 198 A.D.2d 361, 603 N.Y.S.2d 338, 1993 N.Y. App. Div. LEXIS 10581 (N.Y. App. Div. 2d Dep't 1993).

On motion for leave to file late notice of claim, notice of incident to city could not be deemed to be constructive notice to city housing authority, as latter was independent agency unrelated to city. Kalenda v Buffalo Mun. Hous. Auth., 203 A.D.2d 937, 611 N.Y.S.2d 386, 1994 N.Y. App. Div. LEXIS 4943 (N.Y. App. Div. 4th Dep't 1994), app. denied, 1994 N.Y. App. Div. LEXIS 7938 (N.Y. App. Div. 4th Dep't July 1, 1994).

Mere fact that New York City Fire Department and New York Emergency Medical Service personnel were at scene of accident was insufficient to impute knowledge to city for purposes of extending time to serve notice of claim under CLS Gen Mun § 50-e. Vitali v City of New York, 205 A.D.2d 636, 613 N.Y.S.2d 270, 1994 N.Y. App. Div. LEXIS 6143 (N.Y. App. Div. 2d Dep't 1994).

Notice of claim served on City of New York could not be imputed to New York City Housing Authority. Seif v City of New York, 218 A.D.2d 595, 630 N.Y.S.2d 742, 1995 N.Y. App. Div. LEXIS 8854 (N.Y. App. Div. 1st Dep't 1995).

Actual knowledge of allegedly malicious prosecution could be imputed to city through police officers in its employ who were timely alleged to have beaten petitioner. Diallo v City of New York, 224 A.D.2d 339, 638 N.Y.S.2d 58, 1996 N.Y. App. Div. LEXIS 1455 (N.Y. App. Div. 1st Dep't 1996).

Supreme Court properly exercised its broad discretion by granting petitioner leave to serve late notice of claim against county, despite question as to reasonableness of petitioner's excuse, where county had actual knowledge of essential facts underlying claim within requisite period (due to filing of timely claim by passenger in petitioner's vehicle with regard to same accident), and county failed to substantiate its conclusory assertion that petitioner's delay had prejudiced its ability to defend. Alvarenga v Finlay, 225 A.D.2d 617, 639 N.Y.S.2d 115, 1996 N.Y. App. Div. LEXIS 2137 (N.Y. App. Div. 2d Dep't 1996).

For purposes of claimant's entitlement to serve late notice of claim against city housing authority, authority had notice of and opportunity to investigate allegedly defective condition and was not prejudiced by claimant's delay where claimant alleged that authority was negligent in designing parking lot so as to allow snow and ice to accumulate around drain and in clearing snow and ice only during week and not on weekends, authority was charged with having actual or constructive notice of that allegedly defective condition and with following negligent maintenance policy, and thus authority's acts of alleged negligence were of its own making and were recurrent or static and not transitory or likely to dissipate over period of claimant's delay. Greene v Rochester Hous. Auth., 273 A.D.2d 895, 709 N.Y.S.2d 767, 2000 N.Y. App. Div. LEXIS 6874 (N.Y. App. Div. 4th Dep't 2000).

243. — —Knowledge through other claims

Estate of gunshot victim was entitled to serve late notice of claim against city where delay was due to estate's administrator having learned after 90-day filing period that claim against city existed due to city's alleged failure to respond to 911 calls, and city had already been fully apprised of facts and circumstances of case by prior notice of claim that had been timely filed by estate of second victim in same incident. Heredia v New York, 141 A.D.2d 473, 529 N.Y.S.2d 793, 1988 N.Y. App. Div. LEXIS 7910 (N.Y. App. Div. 1st Dep't 1988).

In action against county for injuries sustained by plaintiff when her car collided with bus on sharp, steeply graded curve on county road, record showed that county had knowledge of facts underlying plaintiffs' design defect claim within 90 days of accident or within reasonable time thereafter where (1) timely notice of claim was served by passenger on bus, (2) it could be inferred that county had knowledge of potentially dangerous condition of road from prior numerous reported accidents and repeated complaints by nearby property owner, (3) after accident, county posted warning signs, and (4) accident report prepared by county deputy described circumstances of collision and contained diagram of accident scene. Fenton v County of Dutchess, 148 A.D.2d 573, 539 N.Y.S.2d 42, 1989 N.Y. App. Div. LEXIS 3916 (N.Y. App. Div. 2d Dep't), app. denied, 74 N.Y.2d 608, 545 N.Y.S.2d 104, 543 N.E.2d 747, 1989 N.Y. LEXIS 2343 (N.Y. 1989).

Petitioner would be granted leave to serve late notice of derivative claim on behalf of her husband where she served timely notice of claim for injuries sustained in slip and fall on sidewalk, and application to serve late notice of claim was made within limitations period, since respondent village could not claim to be prejudiced by derivative claim based on facts of which it received timely notice by petitioner's notice of claim. Cody v Lake George, 158 A.D.2d 888, 551 N.Y.S.2d 683, 1990 N.Y. App. Div. LEXIS 1860 (N.Y. App. Div. 3d Dep't 1990).

244. — —Knowledge through employees

Knowledge of town's police officers of facts constituting claim against them is not knowledge of public corporation itself for

purposes of determining whether corporation had notice of claim. Williams v Irondequoit, 59 A.D.2d 1049, 399 N.Y.S.2d 807, 1977 N.Y. App. Div. LEXIS 14336 (N.Y. App. Div. 4th Dep't 1977).

The trial court did not abuse its discretion in allowing the filing of a claim against a county more than one year after an incident in which claimant's child had been sexually abused by a foster child in the county's custody where the county had sufficient notice of the facts underlying the claim in that the case worker in charge of the foster child was informed of the assault on the day it occurred, and removed the foster child from the foster home as a result of the allegations. Chalmers v County of Chemung, 105 A.D.2d 885, 482 N.Y.S.2d 357, 1984 N.Y. App. Div. LEXIS 21011 (N.Y. App. Div. 3d Dep't 1984), app. dismissed, 65 N.Y.2d 690, 1985 N.Y. LEXIS 14794 (N.Y. 1985).

It was proper to grant leave to serve late notice of claim against school district where district's employee, physical education teacher, was present at time and place of injury, district's insurance carrier was made aware of accident within 90 days thereof, and there was no demonstrable evidence of prejudice. Rossi v South Country Cent. School Dist., 152 A.D.2d 557, 543 N.Y.S.2d 487, 1989 N.Y. App. Div. LEXIS 9614 (N.Y. App. Div. 2d Dep't 1989).

Plaintiff would be granted leave to file late notice of claim against school district for injuries sustained at school dance, notwithstanding her failure to establish acceptable excuse for her delay, where (1) she alleged that employees of school district had actual notice of incident which caused injuries as they were present when ambulance transported her to hospital after incident, and (2) school failed to allege that delay caused prejudice. Frazzetta v Rondout Valley Cent. School Dist., 166 A.D.2d 843, 563 N.Y.S.2d 533, 1990 N.Y. App. Div. LEXIS 12792 (N.Y. App. Div. 3d Dep't 1990).

Plaintiff was entitled to leave to file late notice of claim against school district under CLS Gen Mun § 50-e(5), since facts established that district had actual knowledge of facts of claim and would not be prejudiced where (1) baseball coach saw plaintiff immediately after he was injured and knew that assistant coach was taking him to hospital, (2) plaintiff was told that extent of his injuries would not be known until swelling in his eye subsided, and (3) on learning that he would require eye surgery, plaintiff retained lawyer who immediately sought to file late notice only 2 months after expiration of 90-day period. Esposito v Carmel Cent. Sch. Dist., 187 A.D.2d 854, 589 N.Y.S.2d 1009, 589 N.Y.S.2d 703, 1992 N.Y. App. Div. LEXIS 12853 (N.Y. App. Div. 3d Dep't 1992).

Petitioners were entitled to leave to file late notice of claim against city hospital for injuries sustained in accident with ambulance operated by hospital since (1) hospital had actual knowledge of events concerning claim because hospital ambulance driver performed acts complained of, (2) accident report stated that petitioner claimed to have green light at time of accident, and (3) hospital made no showing that it was prejudiced by 2-month delay. Ayala v City of New York, 189 A.D.2d 632, 592 N.Y.S.2d 352, 1993 N.Y. App. Div. LEXIS 241 (N.Y. App. Div. 1st Dep't 1993).

Absence of acceptable excuse for delay is not necessarily fatal to motion for leave to file late notice of claim, since all factors must be considered, including whether municipal authority acquired actual knowledge of essential facts constituting claim within 90-day statutory period, and where claim is for false imprisonment and malicious prosecution, such knowledge may be imputed to municipality through officers in its employ who made arrest and initiated prosecution. Justiniano v New York City Hous. Auth. Police, 191 A.D.2d 252, 595 N.Y.S.2d 6, 1993 N.Y. App. Div. LEXIS 2211 (N.Y. App. Div. 1st Dep't 1993).

In action by plaintiff who was allegedly injured in fall from parkway bridge, it was error to permit service of late notice of claim on Triborough Bridge & Tunnel Authority on basis that authority acquired actual knowledge of essential facts when bridge operator employed by authority reported incident to United States Coast Guard, since plaintiff's proof did not establish that incident was reported to bridge operator's supervisor or other authority employee with duty to investigate, and thus did not satisfy plaintiff's burden of demonstrating that authority had actual knowledge of essential facts of claim. Levette v Triborough Bridge & Tunnel Auth., 207 A.D.2d 330, 615 N.Y.S.2d 421, 1994 N.Y. App. Div. LEXIS 8090 (N.Y. App. Div. 2d Dep't 1994).

Court should have granted petitioner's application for permission to serve late notice of claim, even though his excuses for delay were not compelling, where (1) he averred that he believed that respondent school district's clerk of works was present on job site at time of accident and acquired knowledge of incident, (2) his counsel's inquiry of clerk of works elicited admission that clerk had been apprised of petitioner's accident a few days after it occurred, and (3) respondent proffered nothing to refute those representations, nor did it demonstrate that any actual prejudice would result from granting petitioner's application. Ruperti v Lake Luzerne Cent. Sch. Dist., 208 A.D.2d 1146, 617 N.Y.S.2d 597, 1994 N.Y. App. Div. LEXIS 10548 (N.Y. App. Div. 3d Dep't 1994).

Court abused its discretion in denying application for leave to serve late notice of claim where it was uncontroverted that school district had notice of accident through its employee, and its ability to maintain defense was not prejudiced by delay. Frazier v Board of Educ., 209 A.D.2d 1044, 619 N.Y.S.2d 1003, 1994 N.Y. App. Div. LEXIS 12129 (N.Y. App. Div. 4th Dep't 1994).

Plaintiff's affidavit relating to telephone conversation with "someone" in claims processing unit of transit authority wherein she gave information about accident failed to establish actual knowledge on part of transit authority of facts connecting occurrence with transit authority's negligence, especially where, in response to telephone conversation, transit authority sent blank notice of claim forms to plaintiff with instructions to file them within 90 days of occurrence. Burns v New York City Transit Auth., 213 A.D.2d 300, 624 N.Y.S.2d 30, 1995 N.Y. App. Div. LEXIS 3053 (N.Y. App. Div. 1st Dep't 1995).

Petitioners were properly denied leave to serve late notice of claim against county where, despite alleged retention of prior counsel on day following incident, application for leave to serve late notice was not made until 13 months later; mere fact that county employee was allegedly notified of matter did not supplant notice requirements of CLS Gen Mun § 50-e. Morehead v Westchester County, 222 A.D.2d 507, 635 N.Y.S.2d 65, 1995 N.Y. App. Div. LEXIS 12738 (N.Y. App. Div. 2d Dep't 1995).

Vague and unsubstantiated allegations that accident was witnessed by unspecified city employees were insufficient to establish city's actual knowledge of essential facts constituting petitioner's claim within 90 days of occurrence or reasonable time thereafter. Pope v City of New York, 282 A.D.2d 236, 722 N.Y.S.2d 385, 2001 N.Y. App. Div. LEXIS 3372 (N.Y. App. Div. 1st Dep't 2001).

245. — — —Public officers

Plaintiff would be granted leave to serve a late notice of claim against a municipality pursuant to Gen Mun Law § 50-e where the village clerk, one of the alleged tortfeasors, had actual knowledge of the essential facts constituting the alleged intentional torts committed by him and the individual respondent, the village clerk was a person designated by law to accept service of a notice of claim on the village, and, aside from the mere passage of time, the municipality set forth no evidence that the delay substantially prejudiced it in the maintenance of its defense. Hayden v Hempstead, 103 A.D.2d 765, 477 N.Y.S.2d 392, 1984 N.Y. App. Div. LEXIS 19380 (N.Y. App. Div. 2d Dep't 1984).

Tenant whose child suffered lead poisoning from ingestion of paint chips in apartment as to which respondent city allegedly acted negligently in issuing certificate of occupancy was properly permitted to serve late notice of claim under CLS Gen Mun § 50-e(5), having sufficiently alleged notice to city by asserting that its building inspector knew of presence of dangerous lead-based paint in apartment prior to tenant's occupancy. Logan v Albany, 154 A.D.2d 861, 546 N.Y.S.2d 722, 1989 N.Y. App. Div. LEXIS 13419 (N.Y. App. Div. 3d Dep't 1989).

In action by plaintiff who was involved in motor vehicle accident on road maintained by town, court properly concluded that town was given actual knowledge of plaintiff's claim on day accident occurred when plaintiff's mother told several town officials, including superintendent of highways and supervisor's secretary, about accident and her intent to sue town; thus, it was

not abuse of discretion to grant plaintiff's motion to file late notice of claim against town. Marolda v Town of Nassau, 227 A.D.2d 815, 642 N.Y.S.2d 428, 1996 N.Y. App. Div. LEXIS 5236 (N.Y. App. Div. 3d Dep't 1996).

246. — — —Supervisors

Plaintiff's motion for leave to serve a late notice of claim in an action to recover damages for personal injuries predicated upon theories of negligence and breach of contract was properly granted, where at the time of the incident complained of, two supervisory employees of the defendant were present and assisted the plaintiff, so that it was clear that defendant had actual knowledge of the essential facts constituting the claim and had not been substantially prejudiced in maintaining its defense. Mestel v Board of Education, 90 A.D.2d 809, 455 N.Y.S.2d 667, 1982 N.Y. App. Div. LEXIS 19036 (N.Y. App. Div. 2d Dep't 1982).

Petitioner was entitled to serve late notice of claim against village where (1) chief of police timely acquired actual knowledge of facts underlying claims, which was imputed to village, (2) village's actual knowledge made it unlikely that it would suffer prejudice by late serving of notice, and (3) no actual prejudice had been demonstrated (mere passage of time would not constitute substantial prejudice). Herman v Chester, 125 A.D.2d 469, 509 N.Y.S.2d 818, 1986 N.Y. App. Div. LEXIS 62762 (N.Y. App. Div. 2d Dep't 1986).

Petitioner's vague and unsubstantiated allegation that "the superintendent of the building was notified and upon information and belief, a full report was thereafter made" was insufficient proof that housing authority received actual knowledge of facts constituting claim. Davis by Brady v New York City Hous. Auth., 233 A.D.2d 110, 649 N.Y.S.2d 141, 1996 N.Y. App. Div. LEXIS 11440 (N.Y. App. Div. 1st Dep't 1996).

Court properly granted petitioner's motion for leave to serve late notice of claim against New York City School Construction Authority where Authority did not deny that its on-site supervisors received actual notice of incident immediately after it happened. Bollerman v New York City Sch. Constr. Auth., 247 A.D.2d 469, 668 N.Y.S.2d 709, 1998 N.Y. App. Div. LEXIS 1097 (N.Y. App. Div. 2d Dep't 1998).

247. — — —Building managers or superintendents

Petitioner would be granted leave to file late notice of claim where (1) she alleged that during 2-year-period from 1988 to 1990, while she was tenant in city-owned building, she was threatened and assaulted by her next door neighbor and that she made repeated requests of building manager for relocation which were ignored or denied, (2) she complained to police and obtained order of protection in 1990, (3) on June 21, 1990, while in building, neighbor shot petitioner in chest, (4) petitioner obtained counsel on July 6, 1990, shortly after her release from hospital, but she neglected to inform him of her new address and did not have telephone, and (5) counsel finally located petitioner in December, 1990, notices of claim were filed in January and February 1991, and motion for leave to file late notice of claim was filed in March 1991; city would not be substantially prejudiced by late filing of notice of claim since it had timely knowledge of underlying facts through police and building manager. Santana v New York, 183 A.D.2d 665, 584 N.Y.S.2d 53, 1992 N.Y. App. Div. LEXIS 7383 (N.Y. App. Div. 1st Dep't 1992).

248. — —Knowledge through reports

Infant was properly granted leave to serve late notice of claim against school district pursuant to CLS Gen Mun § 50-e(5) where (1) school district and its insurance carrier acquired knowledge of essential facts constituting claim within 90 days of incident which gave rise to injuries given that incident was witnessed by at least one employee of school district, and school quickly received written detailed reports of incident and injuries to infant, and (2) school district failed to show that it was prejudiced by late service of formal notice of claim or that its ability to investigate had been impaired. Friedman v Syosset Cent. School Dist., 154 A.D.2d 337, 545 N.Y.S.2d 814, 1989 N.Y. App. Div. LEXIS 12254 (N.Y. App. Div. 2d Dep't 1989).

Petitioner was entitled to file late notice of claim against city for injuries sustained when stray bullet entered open door of garbage truck and struck him, even though notice of claim was filed 29 days late, where (1) city had timely actual notice of incident, as petitioner contacted crime victims bureau, which wrote to city on his behalf, and incident was reported within city sanitation department, and (2) city was not prejudiced by delay. Parco v New York, 160 A.D.2d 581, 554 N.Y.S.2d 225, 1990 N.Y. App. Div. LEXIS 4661 (N.Y. App. Div. 1st Dep't 1990).

Evidence submitted by petitioner, consisting solely of ambulance report stating that he had fallen and sustained injury, and entry from police officer's memo book which merely indicated that officer responded to scene, was "woefully inadequate" to establish that city ever acquired actual knowledge of petitioner's injury claim, and thus warranted denial of petitioner's request to file late notice of claim. Zimmerman v New York, 161 A.D.2d 591, 555 N.Y.S.2d 170, 1990 N.Y. App. Div. LEXIS 5361 (N.Y. App. Div. 2d Dep't), app. denied, 76 N.Y.2d 707, 560 N.Y.S.2d 989, 561 N.E.2d 889, 1990 N.Y. LEXIS 3032 (N.Y. 1990).

City did not have actual and constructive notice of accident as result of report filed by driver of sanitation truck where so-called "report," which was more accurately described as internal Department of Sanitation accident claim form, did not identify petitioner by name, did not mention that vehicle other than sanitation truck was involved, and wholly failed to describe any of circumstances surrounding accident. Rosenblatt v City of New York, 221 A.D.2d 448, 633 N.Y.S.2d 557, 1995 N.Y. App. Div. LEXIS 11894 (N.Y. App. Div. 2d Dep't 1995).

Worker who had been injured on grounds of Bronx Community College, and who had served timely notices of claim against City of New York and State of New York, should be granted leave to serve late notice of claim on Board of Trustees of City University of New York, as mandated by CLS Educ § 6224, where board wholly failed to assert that it would be prejudiced by granting of application, board had apparently failed to disclose reports and records that its employees had compiled in aftermath of accident, thus frustrating worker's efforts to show that board had actual notice, and board did not take issue with assertion that it had acquired actual notice. Singh v City Univ. of New York/ Bronx Community College, 223 A.D.2d 545, 636 N.Y.S.2d 130, 1996 N.Y. App. Div. LEXIS 148 (N.Y. App. Div. 2d Dep't 1996).

Internal investigation report of housing authority police did not provide housing authority with notice of claim, even though report detailed actions of housing police officers leading up to accident with stolen car, since report made no mention of petitioner's accident. Finneran v City of New York, 228 A.D.2d 596, 644 N.Y.S.2d 537, 1996 N.Y. App. Div. LEXIS 7203 (N.Y. App. Div. 2d Dep't 1996).

Court properly denied plaintiff's motion for leave to amend her notice of claim to correct error as to location of alleged accident site where motion was not brought until almost 6 years after accident, and immediately prior to commencement of trial. Archon v City of New York, 239 A.D.2d 371, 657 N.Y.S.2d 429, 1997 N.Y. App. Div. LEXIS 5088 (N.Y. App. Div. 2d Dep't 1997).

Report prepared 27 days after accident, and stating that petitioner, student at technical school, was instructed by teacher to move large piece of plywood petitioner was working with from against wall and that plywood fell on her foot, did not give notice of claim that respondents were negligent in providing petitioner with mechanical means to move plywood and otherwise in their supervision of petitioner's activities. Kim v City of New York, 256 A.D.2d 83, 681 N.Y.S.2d 247, 1998 N.Y. App. Div. LEXIS 13098 (N.Y. App. Div. 1st Dep't 1998), app. denied, 93 N.Y.2d 896, 690 N.Y.S.2d 176, 712 N.E.2d 114, 1999 N.Y. LEXIS 846 (N.Y. 1999).

Infant plaintiff was properly granted leave to serve late notice of claim on basis that defendant city received actual notice of essential facts of claim within 90 days of accrual, where city employees were involved in remedying cited violations and city agency (New York City Department of Health) had records of all inspections done on subject premises. Zimmerly v Good Samaritan Hosp., 261 A.D.2d 614, 690 N.Y.S.2d 718, 1999 N.Y. App. Div. LEXIS 5683 (N.Y. App. Div. 2d Dep't 1999).

Special report indicating only that county jail inmate had burned himself, which was filled out by county employee 2 days after inmate was burned with scalding water he was using to clean floor, did not fairly apprise county of claim that it had negligently failed to supervise inmate's work so as to obviate

prejudice from inmate's failure to serve timely notice of claim. Sheff v County of Westchester, 279 A.D.2d 632, 719 N.Y.S.2d 696, 2001 N.Y. App. Div. LEXIS 852 (N.Y. App. Div. 2d Dep't 2001).

Trial court improperly allowed an injured child to serve a late notice of her claim against a school district approximately five months after the expiration of the 90-day statutory period where, inter alia, there was no evidence that the school district acquired actual knowledge of the facts constituting the claim of negligent hiring, training, and supervision within 90 days after the claim arose or a reasonable time thereafter; a report sent to the injured child's parents by the school nurse after the subject accident did not fairly apprise the school district of the claim that it was negligent in hiring and training its employees and that it failed to properly supervise the injured child. del del Carmen v Brentwood Union Free Sch. Dist., 7 A.D.3d 620, 777 N.Y.S.2d 152, 2004 N.Y. App. Div. LEXIS 6852 (N.Y. App. Div. 2d Dep't 2004).

249. — — —Police reports

In an action seeking leave to serve a late notice of claim against a county with respect to alleged negligence in failing to maintain a road on which petitioner's one-car collision occurred, the application for leave to serve a late notice was properly denied where a police report filed by the county did not furnish "actual notice" of the claim in that the report made no mention of any defective condition in the road, and where there was an unexplained four and one-half month delay in serving a notice of claim against the county after petitioner discovered that the town, against which his original notice of claim was served, was not responsible for maintaining the road. Morris v County of Suffolk, 88 A.D.2d 956, 451 N.Y.S.2d 448, 1982 N.Y. App. Div. LEXIS 17324 (N.Y. App. Div. 2d Dep't), aff'd, 58 N.Y.2d 767, 459 N.Y.S.2d 38, 445 N.E.2d 214, 1982 N.Y. LEXIS 3954 (N.Y. 1982).

Claimant's physical and mental disability, as well as failure of police department and county hospital to promptly furnish claimant with records containing evidentiary matter upon which claim is based, provide grounds for late filing of claim where it is clear that city against which claim is filed acquired actual knowledge of essential underlying facts by virtue of police complaint and where city has failed to show that it has been prejudiced by delay in serving formal notice of claim. Mazzilli v New York, 115 A.D.2d 604, 496 N.Y.S.2d 266, 1985 N.Y. App. Div. LEXIS 55026 (N.Y. App. Div. 2d Dep't 1985).

Petitioner was entitled to serve late notice of claim on city where (1) members of city police department participated in acts giving rise to false arrest and imprisonment claims, (2) numerous reports and complaints containing facts essential to claims had been filed with police department, (3) portion of delay was justified, and (4) there was no indication that delay resulted in prejudice to city. McKenna v New York, 154 A.D.2d 655, 546 N.Y.S.2d 660, 1989 N.Y. App. Div. LEXIS 13769 (N.Y. App. Div. 2d Dep't 1989).

Petitioner was entitled to serve late notice asserting claims against New York City to recover damages for false imprisonment, malicious prosecution and intentional infliction of emotional distress arising from his arrest for attempted murder and other crimes where arrest occurred on January 28, case was adjourned in contemplation of dismissal on March 22, and petitioner moved to file late notice on June 8; police arrest report and district attorney's investigation resulting in adjournment could be considered actual or constructive knowledge to city. Tatum v New York, 161 A.D.2d 580, 555 N.Y.S.2d 158, 1990 N.Y. App. Div. LEXIS 5346 (N.Y. App. Div. 2d Dep't), app. denied, 76 N.Y.2d 709, 561 N.Y.S.2d 548, 562 N.E.2d 873, 1990 N.Y. LEXIS 3171 (N.Y. 1990).

Petitioner would be permitted to serve late notice of claim on New York City Housing Authority where (1) on January 19, petitioner allegedly fell on accumulation of debris on common stairwell located in housing project and was transported by ambulance to hospital, (2) housing authority police officer filed report on same day stating that he observed puddle of urine at scene, that he notified persons to "correct condition, " and that he unsuccessfully attempted to contact "Claims and Risk," (3) petitioner's attorneys, by virtue of clerical error, served notice of claim on city on February 16, (4) on learning that housing authority was proper party to be served, petitioner's attorneys sought leave to serve untimely notice, but mistakenly moved by notice of motion served by ordinary mail instead of by notice of petition served as summons, and (5) instant application was made in papers dated August 31; housing authority had actual notice on day of accident, and there was no prejudice caused by delay in notice since condition that caused fall would not have lasted 90 days for investigation. Soto v New York City Housing Authority, 180 A.D.2d 570, 580 N.Y.S.2d 272, 1992 N.Y. App. Div. LEXIS 2732 (N.Y. App. Div. 1st Dep't 1992).

Report of housing authority police officer filed on date of accident did not provide basis for imparting knowledge of plaintiff's claim to housing authority. Valle v New York City Hous. Auth., 224 A.D.2d 433, 637 N.Y.S.2d 757, 1996 N.Y. App. Div. LEXIS 878 (N.Y. App. Div. 2d Dep't 1996).

In action for false arrest and malicious prosecution, police reports did not provide town defendants with knowledge of claim first interposed 15 months after incident. Shapiro v Town of Clarkstown, 238 A.D.2d 498, 656 N.Y.S.2d 682, 1997 N.Y. App. Div. LEXIS 4107 (N.Y. App. Div. 2d Dep't), app. denied, 90 N.Y.2d 807, 664 N.Y.S.2d 269, 686 N.E.2d 1364, 1997 N.Y. LEXIS 3044 (N.Y. 1997).

Police investigation of shooting of tenant in stairwell of apartment building owned by New York City Housing Authority (NYCHA) did not give NYCHA actual notice, within 90-day statutory period, of tenant's claim that NYCHA was negligent in failing to take action against assailants, who resided in that building, on basis of their prior criminal activity where investigation was geared toward finding perpetrators, police report indicated that perpetrators were unknown, and report did not connect shooting with any negligence by NYCHA. Lenoir v New York City Hous. Auth., 240 A.D.2d 497, 658 N.Y.S.2d 140, 1997 N.Y. App. Div. LEXIS 6085 (N.Y. App. Div. 2d Dep't 1997).

Police report regarding car accident does not itself constitute notice of accident to municipality. Continental Ins. Co. v City of Rye, 257 A.D.2d 573, 683 N.Y.S.2d 585, 1999 N.Y. App. Div. LEXIS 129 (N.Y. App. Div. 2d Dep't 1999).

Petitioner was granted leave to serve late notice of claim against Yonkers Parking Authority where parking authority received actual knowledge of essential facts 3 days after incident by virtue of its indicated receipt of police report, petitioner had made patently excusable error concerning identity of true owner of parking lot in which accident occurred, no factual prejudiced was shown by parking authority, and application to serve late notice was made within one-year limitation period to commence action. Michael v Yonkers Parking Auth., 172 Misc. 2d 304, 658 N.Y.S.2d 194, 1997 N.Y. Misc. LEXIS 181 (N.Y. Sup. Ct. 1997).

250. — — — —Police aided reports

City would not be deemed to have had actual notice of accident for purposes of excusing injured petitioner's 14-month delay in requesting leave to serve late notice of claim by reason of police "aided report" made immediately after accident since police reports are insufficient to satisfy requirement of actual knowledge; moreover, petitioner's failure to identify city employee to whom he allegedly reported his accident negated claim that city had actual notice. Perry v New York, 133 A.D.2d 692, 519 N.Y.S.2d 862, 1987 N.Y. App. Div. LEXIS 51728 (N.Y. App. Div. 2d Dep't 1987).

Police aided report and daily activity log that failed to suggest any connection between happening of accident and any negligence on part of government defendants were not sufficient to furnish them with actual knowledge of essential facts underlying personal injury claim, and thus court properly denied plaintiffs' motion for leave to serve late notice of claim. Salahudeen Rashad Saafir v Metro-North Commuter R.R. Co., 260 A.D.2d 462, 688 N.Y.S.2d 224, 1999 N.Y. App. Div. LEXIS 3863 (N.Y. App. Div. 2d Dep't), app. denied, 93 N.Y.2d 816, 697 N.Y.S.2d 563, 719 N.E.2d 924, 1999 N.Y. LEXIS 2802 (N.Y. 1999).

251. — — — —Police accident reports

In a proceeding for leave to serve a late notice of claim, a city police officer, who was injured while receiving motorcycle riding instructions from a police department instructor, would be granted leave to serve a late notice of claim against the city approximately four months after the 90-day limitation had run

where the city had acquired actual knowledge of all of the relevant facts by virtue of the police department's accident report, where the officer had been told by a police department doctor that his injuries had not been serious, and where the city had not been prejudiced by the delay in serving a formal notice of claim. Lucas v New York, 91 A.D.2d 637, 456 N.Y.S.2d 816, 1982 N.Y. App. Div. LEXIS 19491 (N.Y. App. Div. 2d Dep't 1982).

Supreme Court acted within its discretion in granting leave to serve late notice of claim against town pursuant to CLS Gen Mun § 50-e, since delay was caused by excusable error as to which public corporation was responsible for monitoring traffic on road, application to serve late notice was made promptly after discovery of error, and town failed to demonstrate that it was prejudiced in investigating and preparing its defense in light of existence of detailed accident report by town police officer, town's actual knowledge of essential facts of claim, and town's receipt of notice within 5 months of statutory deadline, during which time there had been no change in accident situs. Cannistra v Putnam Valley, 124 A.D.2d 801, 508 N.Y.S.2d 524, 1986 N.Y. App. Div. LEXIS 62121 (N.Y. App. Div. 2d Dep't 1986).

Court did not abuse its discretion by denying plaintiff's motion for leave to serve late notice of claim and dismissing personal injury complaint, since village did not acquire actual knowledge of underlying facts of claim by virtue of accident report filed with police department where (1) report did not connect accident with allegations of negligence on part of village and affirmatively discounted weather and sidewalk conditions as contributing causes of plaintiff's fall, and (2) police investigation was hampered by subsequent presence of snow in accident area. Dama v Tuckahoe, 134 A.D.2d 402, 521 N.Y.S.2d 29, 1987 N.Y. App. Div. LEXIS 50591 (N.Y. App. Div. 2d Dep't 1987), app. dismissed, 72 N.Y.2d 832, 530 N.Y.S.2d 550, 526 N.E.2d 41, 1988 N.Y. LEXIS 1124 (N.Y. 1988).

Plaintiff was properly granted leave to file late notice of claim against city housing authority where (1) she slipped on wet floor caused by leaky faucet which she had previously reported to housing authority, (2) after accident, she notified housing authority, which sent representative to shut off water as plaintiff was being taken to hospital in ambulance, (3) police accident report indicated that housing authority's investigative arm had been notified, (4) 2 months after accident, plaintiff again notified housing authority, and was told "not to worry" and that they were aware of her claim, and (5) more than one year passed before plaintiff consulted legal counsel and learned of requirement of filing formal notice of claim; defendant had adequate opportunity to investigate claim promptly while facts were still fresh. Staton v New York City Housing Authority, 166 A.D.2d 331, 561 N.Y.S.2d 5, 1990 N.Y. App. Div. LEXIS 12732 (N.Y. App. Div. 1st Dep't 1990).

Plaintiff was properly granted leave to serve late notice of claim, even though it offered no excuse for failing to file notice of claim within statutory 90-day period, where (1) plaintiff made persuasive showing that town had acquired actual notice of claim due to fact that one of its police officers was involved in accident, police promptly investigated, and they prepared written report, and (2) town made no particularized or persuasive showing that delay caused it substantial prejudice. Wetzel Servs. Corp. v Town of Amherst, 207 A.D.2d 965, 616 N.Y.S.2d 832, 1994 N.Y. App. Div. LEXIS 10135 (N.Y. App. Div. 4th Dep't 1994).

Court properly denied petitioner's application for leave to file late notice of claim against county, notwithstanding his contention that county had notice of accident due to presence of its personnel at scene, since police report describing accident did not state any connection between accident and condition complained of by petitioner. Shapiro v County of Nassau, 208 A.D.2d 545, 616 N.Y.S.2d 786, 1994 N.Y. App. Div. LEXIS 9276 (N.Y. App. Div. 2d Dep't 1994).

Neither Police Accident Report nor Fire Department Operations Report gave city actual knowledge of essential facts of belated negligence claim against city in connection with school bus accident where those reports did not mention road conditions, design defects, or lack of guardrail as possible causes of accident. Resto v City of New York, 240 A.D.2d 499, 658 N.Y.S.2d 416, 1997 N.Y. App. Div. LEXIS 6067 (N.Y. App. Div. 2d Dep't), app. dismissed, 91 N.Y.2d 847, 667 N.Y.S.2d 680, 690 N.E.2d 490, 1997 N.Y. LEXIS 4067 (N.Y. 1997).

Petitioner's mere completion of incident information slip and police accident reports at police station did not establish that city received actual notice of claim, where police reports did not connect his injuries to city's negligence. Gilliam v City of New York, 250 A.D.2d 680, 673 N.Y.S.2d 172, 1998 N.Y. App. Div. LEXIS 5551 (N.Y. App. Div. 2d Dep't 1998).

Plaintiff was not entitled to serve late notice of claim against city where (1) police accident report alone, without any evidence of further investigation by city, was inadequate to apprise city of nature or severity of injuries claimed, (2) plaintiff did not offer valid excuse for her failure to serve timely notice of claim, and (3) plaintiff did not rebut city's showing of prejudice. Hardayal v City of New York, 281 A.D.2d 593, 722 N.Y.S.2d 176, 2001 N.Y. App. Div. LEXIS 3053 (N.Y. App. Div. 2d Dep't 2001).

252. — — —Accident reports other than police

Plaintiff who was allegedly injured in collapse of city-owned building was entitled to file late notice of claim where city had actual notice of facts constituting claim due to presence of city inspectors on jobsite and existence of accident report. Washington v New York, 138 A.D.2d 235, 525 N.Y.S.2d 570, 1988 N.Y. App. Div. LEXIS 1930 (N.Y. App. Div. 1st Dep't), aff'd, 72 N.Y.2d 881, 532 N.Y.S.2d 361, 528 N.E.2d 513, 1988 N.Y. LEXIS 1665 (N.Y. 1988).

Fifteen-year-old plaintiff was entitled to serve late notice of claim pursuant to CLS Gen Mun § 50-e(5) for injuries suffered when she slipped on ice as she exited school building since (1) school district had knowledge about accident on day it occurred as plaintiff had to be carried to school nurse's office by janitor after she fell, and report on incident was prepared on behalf of school district and signed by one of its principals, (2) initial notice was filed within 5 months of accident and delay was attributable to plaintiff's age and fact that she was under treatment at pertinent time, and (3) school district did not suffer prejudice, particularly in light of its knowledge of accident and conduct of at least cursory investigation. Strevell v South Colonie Cent. School Dist., 144 A.D.2d 733, 535 N.Y.S.2d 147, 1988 N.Y. App. Div. LEXIS 10901 (N.Y. App. Div. 3d Dep't 1988).

Infant would be granted leave to file late notice of claim where (1) on day infant was injured on school property, he was attended by school nurse, and accident report and medical insurance forms were filled out, thus establishing that school had actual notice of accident, (2) fractured wrist sustained by infant was serious enough injury that school district should have been alerted to need for investigation, and (3) 14-month delay in filing notice of claim was occasioned by infant's family's reliance on representations made by school district that it would assume responsibility for infant's medical expenses. Zimmet v Huntington Union Free Sch. Dist., 187 A.D.2d 436, 589 N.Y.S.2d 546, 590 N.Y.S.2d 734, 1992 N.Y. App. Div. LEXIS 12547 (N.Y. App. Div. 2d Dep't 1992).

Petitioner would not be permitted leave to serve late notice of claim for injuries sustained when she slipped from chair while working at school since she failed to show that board of education had actual notice of facts surrounding accident and basis of claim of negligence, notwithstanding that petitioner completed Comprehensive Accident Report and Employee's Notice of Injury Report on day of accident. Rodriguez v New York City Bd. of Educ., 190 A.D.2d 579, 593 N.Y.S.2d 519, 1993 N.Y. App. Div. LEXIS 1472 (N.Y. App. Div. 1st Dep't), app. dismissed, 81 N.Y.2d 1041, 600 N.Y.S.2d 441, 616 N.E.2d 1103, 1993 N.Y. LEXIS 1813 (N.Y. 1993).

Court erroneously granted petitioner leave to file late notice of claim, notwithstanding that employees of defendant school district witnessed accident, since accident report prepared at time of incident stated that petitioner jumped up to throw basketball in hoop, felt his left knee go out of place, came down and felt pain, and dislocated knee, whereas in notice of claim, petitioner asserted that he slipped and fell on liquid substance on floor of basketball court. Hubbard v City Sch. Dist., 204 A.D.2d 721, 613 N.Y.S.2d 29, 1994 N.Y. App. Div. LEXIS 5696 (N.Y. App. Div. 2d Dep't 1994).

It was abuse of discretion to deny claimant's application for leave to serve late notice of claim against school district where

injury to claimant's daughter occurred between classes in hallway of school, and she was promptly examined by school nurse, who summoned ambulance and completed accident report; under circumstances, school district acquired actual knowledge of essential facts constituting claim shortly after occurrence. Bird v Port Byron Cent. Sch. Dist., 231 A.D.2d 916, 647 N.Y.S.2d 627, 1996 N.Y. App. Div. LEXIS 10795 (N.Y. App. Div. 4th Dep't 1996).

Court erred in granting petitioner's application for leave to serve late notice of claim against town, even though accident report was completed by town employee on date of accident, since report merely stated that petitioner claimed to have tripped and fallen on concrete walk and went to emergency room for examination; such report did not provide town with actual knowledge of essential facts constituting instant claim that town caused petitioner's injury by permitting broken, uneven, cracked, and rutted cement paving to exist at pool deck. Guiliano v Town of Oyster Bay, 244 A.D.2d 408, 664 N.Y.S.2d 314, 1997 N.Y. App. Div. LEXIS 11253 (N.Y. App. Div. 2d Dep't 1997).

Student accident report, stating "While participating in a blocking drill, (the petitioner's) knee appeared to lock. When (the petitioner) attempted to stand on his leg, after a brief rest, it again seemed to lock-up," did not provide school district with knowledge of specific claim which petitioner was seeking to assert, and it did not even provide reasonable notice that actionable wrong had been committed; thus, court erred in granting petitioner's application for leave to file late notice of claim. Baldi v Mt. Sinai Sch. Dist., 254 A.D.2d 414, 679 N.Y.S.2d 80, 1998 N.Y. App. Div. LEXIS 11124 (N.Y. App. Div. 2d Dep't 1998).

Court properly deemed plaintiff's late notices of claim against board of education timely served, nunc pro tunc, where (1) defendants had notice of facts from accident report and aided report filled out by police officer who responded to scene, and (2) claim that they were prejudiced by delay was significantly undermined by circumstances that there were no witnesses to accident, and icy condition to which plaintiff attributed her injury was highly transitory and would not have remained for investigation even if plaintiff's notices had been timely filed. Gamoneda v New York City Bd. of Educ., 259 A.D.2d 348, 687 N.Y.S.2d 46, 1999 N.Y. App. Div. LEXIS 2750 (N.Y. App. Div. 1st Dep't 1999).

Accident form filled out by school's athletic director 2 days after incident, indicating only that student was hit and injured by another player during supervised football practice, did not apprise school district of claim that school personnel negligently failed to supervise students so as to obviate prejudice to school district resulting from failure to serve notice of claim until 11 months after accident Ryder v Garden City Sch. Dist., 277 A.D.2d 388, 716 N.Y.S.2d 97, 2000 N.Y. App. Div. LEXIS 12161 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff, who fell from ladder due to strong gust of wind while painting barn owned by defendant town, should have been granted leave to serve late notice of claim where town's highway superintendent was present on day of incident and completed accident report such that town received actual notice of incident immediately after it occurred and did not suffer substantial prejudice as result of delay. Bazer v Town of Walworth, 277 A.D.2d 994, 716 N.Y.S.2d 523, 2000 N.Y. App. Div. LEXIS 11361 (N.Y. App. Div. 4th Dep't 2000).

253. — — —Line of duty reports

In a proceeding pursuant to Gen Mun L § 50-e for leave to serve a late notice of claim, the trial court properly granted plaintiff's application where it was apparent that the city, by virtue of the Line of Duty Injury Report filed with its Department of Sanitation, had actual knowledge of all facts relevant to the petitioner's injury shortly after the claim arose, and where the city failed to show that it had been in any way prejudiced by the petitioner's delay in filing a formal notice of claim. Somma v New York, 81 A.D.2d 889, 439 N.Y.S.2d 50, 1981 N.Y. App. Div. LEXIS 11596 (N.Y. App. Div. 2d Dep't 1981).

In a city police officer's action, alleging that injuries he sustained when a car collided with his patrol car had resulted from the failure of the city police, fire, and sanitation departments to respond quickly to calls to clean up an oil spill, leave to serve a late notice of claim was properly denied where the city did not have actual knowledge of the facts underlying the claim of negligence on the part of its agencies in that the police accident report and line-of-duty injury report failed to make any connection between the accident and the handling of the oil spill, and where the officer failed to adequately explain the unreasonable delay in bringing the motion for leave to serve the late notice until 11 months after the accident, despite the fact that the accident occurred as the officer was sitting in his patrol car while he was assigned to detour traffic from the oil spill on the expressway. Fox v New York, 91 A.D.2d 624, 456 N.Y.S.2d 806, 1982 N.Y. App. Div. LEXIS 19476 (N.Y. App. Div. 2d Dep't 1982).

New York City police officer was entitled to file late notice of claim as precondition to suing city for personal injuries sustained when he was bitten by police horse which he was attempting to restrain, even though his excuse for failing to serve timely notice was "tenuous" and various accident reports that were filed did not specify that horse was known to have vicious propensities, where city was nonetheless provided with actual notice of accident by virtue of "line of duty injury report" and city failed to show that any prejudice would result from untimely notice. Buono v New York, 133 A.D.2d 685, 519 N.Y.S.2d 855, 1987 N.Y. App. Div. LEXIS 51722 (N.Y. App. Div. 2d Dep't 1987).

254. — —Knowledge through medical records and statements

In a negligence action against a school district to recover damages for personal injuries, plaintiffs' crossmotion for leave to serve a late notice of claim was properly denied where the crossmotion was made more than one year and 90 days after plaintiff attained his majority, and where the school district's knowledge of the accident and receipt of statements for medical and dental services within 90 days from the date of the accident could not be equated with written notice of the claim. Briganti v Harrison Cent. School Dist., 91 A.D.2d 648, 457 N.Y.S.2d 89, 1982 N.Y. App. Div. LEXIS 19513 (N.Y. App. Div. 2d Dep't 1982).

In a negligence action following the amputation of plaintiff's cancerous right arm approximately one year after the pathology department of defendant hospital reported that the tumor was benign, leave to serve a late notice of claim under Gen Mun Law § 50-e(5) was properly granted where defendants were themselves in possession of the medical records upon which plaintiff's cause of action was based, defendants could not claim to lack knowledge of the facts constituting the cause of action or that the delay in question substantially prejudiced the defense, and plaintiff properly filed the claim following relief of the medical information from defendants' records. Hamm v Memorial Hospital of Greene County, 99 A.D.2d 638, 472 N.Y.S.2d 189, 1984 N.Y. App. Div. LEXIS 16870 (N.Y. App. Div. 3d Dep't 1984).

Court would grant application of infant to file late notice of claim to recover for personal injuries sustained in city hospital, as well as mother's derivative claim, where (1) infant was born prematurely at city hospital, placed in incubator and given oxygen, (2) on day after birth, infant was transferred to another hospital because city hospital lacked equipment necessary to treat her, (3) plaintiffs claimed that city hospital administered excess amount of oxygen which caused cerebral palsy, blindness and brain damage, and (4) mother did not consult attorney for almost 4 years because of representations by personnel at both hospitals that infant's injuries were unavoidable and that she would improve in time; city hospital, by virtue of medical records, had actual knowledge of facts constituting claim of malpractice, and record did not show substantial prejudice caused by delay. Quiroz v New York, 154 A.D.2d 315, 546 N.Y.S.2d 604, 1989 N.Y. App. Div. LEXIS 13596 (N.Y. App. Div. 1st Dep't 1989).

Plaintiff's motion to file late notice of malpractice claim was properly denied, even though hospital might have had knowledge of circumstances surrounding his treatment from records in its possession, where (1) he did not sufficiently allege malpractice claim, (2) he did not provide reasonable excuse for 8-month delay, and (3) there was no affidavit from plaintiff or doctor but only superficial affidavit from counsel in support of motion. Bailey v New York, 159 A.D.2d 280, 552 N.Y.S.2d 283, 1990 N.Y. App. Div. LEXIS 2635 (N.Y. App. Div. 1st Dep't 1990).

In action against public hospital for alleged malpractice in treatment of hand injury, hospital's possession of treatment records was not sufficient to provide it with actual notice of

essential facts constituting claim so as to extend time for filing of notice of claim. Perkins v New York City Health & Hosp. Corp., 167 A.D.2d 150, 561 N.Y.S.2d 230, 1990 N.Y. App. Div. LEXIS 13312 (N.Y. App. Div. 1st Dep't 1990).

Mere possession of hospital records could not be construed as providing New York City Health and Hospitals Corporation with actual knowledge of essential facts constituting claim. Thompson v New York City Health & Hosp. Corp., 172 A.D.2d 433, 569 N.Y.S.2d 10, 1991 N.Y. App. Div. LEXIS 5174 (N.Y. App. Div. 1st Dep't 1991).

Supreme Court erred in denying petition to file late notice of claim for wrongful death and conscious pain of plaintiff's decedent at city hospital, even though notice of claim was not filed until nearly 11 months after incident, since knowledge of claim possessed by hospital from decedent's hospital record was at least coextensive with, if not superior to, knowledge of decedent's representative. Banegas-Nobles v New York City Health & Hosps. Corp., 184 A.D.2d 379, 585 N.Y.S.2d 376, 1992 N.Y. App. Div. LEXIS 8525 (N.Y. App. Div. 1st Dep't 1992).

County had actual knowledge of essential facts of claim that it had been negligent in performing lead tests on various properties where its records contained history of plaintiff's medical treatment for elevated lead levels and county's tests of his residences, one of which was found to have lead hazards. Harwood by Murnane v County of Albany, 257 A.D.2d 747, 682 N.Y.S.2d 736, 1999 N.Y. App. Div. LEXIS 26 (N.Y. App. Div. 3d Dep't 1999).

County health department's status as plaintiff's primary healthcare provider, and its possession of all relevant medical records, provided it with essentially contemporaneous knowledge of facts underlying plaintiff's claim, although it may have been unaware of plaintiff's subsequently formed intent to pursue malpractice claim. McLaughlin by McLaughlin v County of Albany, 258 A.D.2d 778, 685 N.Y.S.2d 846, 1999 N.Y. App. Div. LEXIS 1183 (N.Y. App. Div. 3d Dep't 1999).

Since a defendant, a municipal medical center, had a plaintiff infant's records it was not prejudiced by her late notice of claim under N.Y. Gen. Mun. Law § 50-e(5) and her claim was tolled under the infancy toll of N.Y. C.P.L.R. 208, so her medical malpractice claim was allowed; but, her mother's derivative claim was not allowed since § 208 did not toll derivative actions. Nardi v County of Westchester, 18 A.D.3d 521, 795 N.Y.S.2d 302, 2005 N.Y. App. Div. LEXIS 5118 (N.Y. App. Div. 2d Dep't 2005).

City hospital's records of a newly born child indicated that she had foot gangrene and had misadventure during her medical care so the city was on notice under N.Y. Gen. Mun. Law § 50-e(5) that it was subject to the child's claim even though the claim was filed four years after her discharge. The city was also not prejudiced by the child's motion, that she made four years after serving the late claim, for the late claim to be allowed since the city acknowledged that it had actually been served with the late claim. Caminero v N.Y. City Health & Hosps. Corp., 21 A.D.3d 330, 800 N.Y.S.2d 173, 2005 N.Y. App. Div. LEXIS 8800 (N.Y. App. Div. 1st Dep't 2005).

255. — —Knowledge through media

Court erroneously granted plaintiff's motion to file late notice of claim against county alleging negligence in design, maintenance, construction and inspection of roadway 229 days after plaintiff's vehicle was damaged when it slid on ice into snowbank, since plaintiff, in support of his contention that county had actual knowledge of essential facts of his claim within 90 days after claim arose, merely submitted undated article from unnamed newspaper indicating occurrence of accident, that plaintiff was issued appearance ticket for travelling too fast for conditions, and letter signed by local residents stating that approximately 14 vehicles had gone off road in same area during period in question, but which did not specifically mention plaintiff's accident. Wencek v County of Chautauqua, 132 A.D.2d 950, 518 N.Y.S.2d 277, 1987 N.Y. App. Div. LEXIS 49407 (N.Y. App. Div. 4th Dep't 1987).

Student injured in school bus accident was properly granted leave to file late notice of claim against school district where (1) she and 25 other students were taken to hospital after accident, which was front-page story in local media, (2) she was treated at hospital for contusion of head and then released, but later came under her family doctor's care for abdominal and back pain, (3) she was referred to orthopedic surgeon, who surgically removed osteoid osteoma from her spine 19 months after accident, (4) her mother first consulted law firm 7 months after surgery (5) firm promptly prepared motion papers for leave to file late notice and timely made personal service on counsel for district, and (6) district failed to establish that it would be prejudiced; school district was aware of accident on day it occurred and circumstances should have alerted it to undertake thorough investigation of incident. Lamica v Malone Cent. School Dist., 180 A.D.2d 885, 580 N.Y.S.2d 93, 1992 N.Y. App. Div. LEXIS 1499 (N.Y. App. Div. 3d Dep't 1992).

Fact that school district may have learned from police investigation and media reports that body had been found at night in its elementary school yard did not suffice to put it on notice that it would be charged with responsibility for decedent's murder. Traylor v Comsewogue Sch. Dist., 265 A.D.2d 332, 696 N.Y.S.2d 219, 1999 N.Y. App. Div. LEXIS 9616 (N.Y. App. Div. 2d Dep't 1999).

256. — —Knowledge through letters

In personal injury action against transit company which operated bus owned by county, plaintiff was properly permitted to serve late notice of claim since letters from plaintiff's counsel to transit company, as well as no-fault application signed by plaintiff, coupled with fact that claim was handled by transit company's general counsel who was regularly engaged in representing county in actions occurring on buses operated by transit company, constituted in aggregate sufficient notice of claim within meaning of CLS Gen Mun § 50-e. Losada v Liberty Lines Transit, Inc., 155 A.D.2d 337, 547 N.Y.S.2d 307, 1989 N.Y. App. Div. LEXIS 14311 (N.Y. App. Div. 1st Dep't 1989).

Court abused its discretion in granting petitioner resident of Georgia leave to file late notice of claim against village under CLS Gen Mun § 50-e(5) in connection with injuries she sustained when her automobile was struck by allegedly decayed tree in village, where only timely submission was letter written by Georgia attorney retained by petitioner, which purported to be notice of claim but was not verified, since (1) record did not show that village obtained actual or constructive notice of claim from either letter in question or accident report, in that neither document indicated that tree was located on property owned by village or was in decayed condition, and (2) ignorance of requirements of § 50-e by petitioner's Georgia attorney was not valid excuse for noncompliance. Wertenberger v Briarcliff Manor, 175 A.D.2d 922, 573 N.Y.S.2d 757, 1991 N.Y. App. Div. LEXIS 11316 (N.Y. App. Div. 2d Dep't 1991).

In proceeding for leave to file late notice of claim against town, letters written by petitioner's mother to town 3 weeks after accident gave town actual knowledge of essential facts constituting claim, and thus town suffered no prejudice in maintaining defense on merits. Billone v Huntington, 188 A.D.2d 526, 591 N.Y.S.2d 437, 1992 N.Y. App. Div. LEXIS 14221 (N.Y. App. Div. 2d Dep't 1992).

Letter sent by abutting landowner's insurer to city's commissioner of public works did not establish that city had actual knowledge of claim within statutory period where letter failed to describe location of occurrence with sufficient particularity; statement in letter that petitioner fell "in the vicinity of Phila Street and Broadway" was too vague to enable city to locate sidewalk on which petitioner fell. Jensen v City of Saratoga Springs, 203 A.D.2d 863, 611 N.Y.S.2d 330, 1994 N.Y. App. Div. LEXIS 4364 (N.Y. App. Div. 3d Dep't 1994).

Letter, in which tenant asked New York City Housing Authority (NYCHA) for emergency transfer because of incident in which he was shot in stairwell of NYCHA's apartment building, did not give NYCHA actual notice, within 90-day statutory period, of tenant's claim that NYCHA was negligent in failing to take action against assailants, who resided in that building, on basis of their prior criminal activity where letter did not allege that NYCHA had been remiss in failing to remove "nuisance tenants" or in its management of building. Lenoir v New York City Hous. Auth., 240 A.D.2d 497, 658 N.Y.S.2d 140, 1997 N.Y. App. Div. LEXIS 6085 (N.Y. App. Div. 2d Dep't 1997).

Tenant's failure to present a notice of claim was not fatal where, based on letters the housing authority received from the tenant, it had actual notice of the essential facts constituting the tenant's claims of breach of warranty of habitability and constructive eviction. Semyonova v N.Y. City Hous. Auth., 15 A.D.3d 181, 789 N.Y.S.2d 38, 2005 N.Y. App. Div. LEXIS 965 (N.Y. App. Div. 1st Dep't 2005).

257. — —Knowledge through other documents

Denial of leave to file late notice of claim against city housing authority was proper, although petitioner claimed that her niece reported accident to building management within a few days of occurrence and that report contained all relevant information necessary to constitute notice of claim, where there was no documentary evidence or other support in record that report was actually filed. Perez v New York City Housing Authority, 156 A.D.2d 177, 548 N.Y.S.2d 222, 1989 N.Y. App. Div. LEXIS 15289 (N.Y. App. Div. 1st Dep't 1989).

Court did not improvidently exercise its discretion in granting plaintiffs' application to file late notice of claim against city housing authority, although made 6 months after expiration of 90-day period in which to do so, where plaintiffs submitted documentary evidence suggesting that defendant had received earlier actual notice that plaintiffs' apartment lacked heat, as alleged result of which infant plaintiff contracted pneumonia and bronchitis, and there was no showing that delay substantially prejudiced defendant's ability to defend or that conditions had changed. Moore v New York City Housing Authority, 184 A.D.2d 238, 584 N.Y.S.2d 561, 1992 N.Y. App. Div. LEXIS 7696 (N.Y. App. Div. 1st Dep't 1992).

258. — —Knowledge through investigations

Former correction officer was entitled to leave to serve late notice of claim against county, even though he failed to offer reasonable excuse for his delay, since record established that county had actual notice of facts surrounding officer's claims for malicious prosecution and civil rights violations within 90 days after claims arose where (1) officer, along with several other officers, had been arrested and prosecuted for assaulting inmate, and was ultimately acquitted, (2) 3 county agencies were involved in investigation, arrest and prosecution of officer, (3) another corrections officer, who had been arrested, prosecuted and acquitted along with officer, had filed timely notice of claim against county, and (4) no actual prejudice was demonstrated by county. Sanchez v County of Westchester, 146 A.D.2d 620, 536 N.Y.S.2d 529, 1989 N.Y. App. Div. LEXIS 477 (N.Y. App. Div. 2d Dep't 1989).

It was error to grant petitioner's motion for order declaring that his notice of claim as to cause of action for conscious pain and suffering be deemed timely served on ground that housing authority had actual notice of occurrence by virtue of ongoing investigation by housing police into murder of petitioner's decedent since that investigation was geared toward finding murderer and not toward preparation of defense in civil suit; moreover, condition of door and locks, which were alleged to have been negligently maintained, may have changed over time, and to reconstruct maintenance procedures of building and interview witnesses one year after incident was more difficult than it would have been had petitioner timely notified authority of his claim. Chattergoon v New York City Housing Authority, 161 A.D.2d 141, 554 N.Y.S.2d 859, 1990 N.Y. App. Div. LEXIS 4879 (N.Y. App. Div. 1st Dep't), app. dismissed, 76 N.Y.2d 875, 560 N.Y.S.2d 986, 561 N.E.2d 886, 1990 N.Y. LEXIS 3146 (N.Y. 1990), aff'd, 78 N.Y.2d 958, 574 N.Y.S.2d 934, 580 N.E.2d 406, 1991 N.Y. LEXIS 1003 (N.Y. 1991).

Plaintiff would be granted leave to file late notice of claim against regional off-track betting corporation, notwithstanding lack of strong excuse for delay in filing of notice of claim, where (1) corporation had notice of essential facts constituting claim and commenced investigation at scene of accident, and (2) corporation did not assert that it would be prejudiced by delay in filing of notice of claim. Salvaggio v Western Regional Off-Track Betting Corp., 203 A.D.2d 938, 612 N.Y.S.2d 94, 1994 N.Y. App. Div. LEXIS 4944 (N.Y. App. Div. 4th Dep't 1994).

In action by administrator alleging negligence of county in failing to install traffic light at location of accident in which his parents were killed, administrator was entitled to serve late notice of claim under CLS Gen Mun § 50-e(5), even though his explanation for his delay in serving notice of claim after his appointment as administrator was not persuasive, where county investigated circumstances of decedents' accident within 4 months of its occurrence in response to inquiry from public official about traffic accidents at same location, and county conducted study regarding need for traffic light or other safety measures at that intersection. Affleck v County of Nassau, 240 A.D.2d 569, 660 N.Y.S.2d 131, 1997 N.Y. App. Div. LEXIS 6607 (N.Y. App. Div. 2d Dep't 1997).

On motion by petitioner, seeking to file late notice of claim for sexual misconduct allegedly committed by correction officer at county jail, court reasonably concluded that county respondents had knowledge of essential facts and would not be prejudiced by late filing where, within 2 weeks of their happening, petitioner had reported incidents to sheriff's department and, shortly thereafter, underlying events were investigated by district attorney's office and sheriff's department. Hunt v County of Madison, 261 A.D.2d 695, 690 N.Y.S.2d 154, 1999 N.Y. App. Div. LEXIS 4688 (N.Y. App. Div. 3d Dep't 1999).

Plaintiff's failure to offer reasonable excuse for her delay in filing notice of claim against town was not fatal to her motion for leave to file late notice where (1) she notified town supervisor of first act of alleged sexual harassment immediately after its occurrence and filed internal complaint with town following final alleged act, (2) in response to internal complaint, town hired law firm to investigate allegations, and (3) thus, town received timely actual notice of facts constituting claim and would not be prejudiced by delay. Henderson v Town of Van Buren, 281 A.D.2d 872, 723 N.Y.S.2d 282, 2001 N.Y. App. Div. LEXIS 2708 (N.Y. App. Div. 4th Dep't 2001).

Late notice of claim was allowed under N.Y. Gen. Mun. Law § 50-e(5) against city's hospital corporation where it had timely actual notice of the underlying facts of the patient's claim and its ambulance driver and attendants who committed the acts complained of were not shown to be unavailable for investigation. The corporation was not prejudiced. Gibbs v City of New York, 22 A.D.3d 717, 804 N.Y.S.2d 393, 2005 N.Y. App. Div. LEXIS 11432 (N.Y. App. Div. 2d Dep't 2005).

259. — — —Police investigations

In an action by the wife of a county police officer, seeking leave to serve a late notice of claim against the county, after the wife was stabbed her husband following the county's failure to provide her with protection, leave would be granted where the county had actual knowledge of all the facts that were relevant to the wife's claim shortly after it arose, in view of the investigation by the county's police department, and the department's request that the wife co-operate with the department in locating her husband and in persuading him to seek psychiatric evaluation. Weinzel v County of Suffolk, 92 A.D.2d 545, 459 N.Y.S.2d 112, 1983 N.Y. App. Div. LEXIS 16767 (N.Y. App. Div. 2d Dep't 1983).

It was proper to grant petitioner leave to serve late notice of claim where (1) county, through active investigation by its police department for month prior to petitioner's arrest, had actual knowledge of facts relevant to claims for false arrest, false imprisonment and malicious prosecution, (2) county did not assert any prejudice from delay, and (3) petitioner's counsel promptly moved for appropriate relief on being retained by petitioner. Reisse v County of Nassau, 141 A.D.2d 649, 529 N.Y.S.2d 371, 1988 N.Y. App. Div. LEXIS 6644 (N.Y. App. Div. 2d Dep't 1988).

Plaintiffs should have been allowed to file late notice of claim pursuant to CLS Gen Mun § 50-e(5) to recover damages for assault and battery, wrongful arrest, false imprisonment, malicious prosecution, and violations of federal Civil Rights Act, even though they had no acceptable excuse for delay, where they had filed civilian complaint report, facts and circumstances surrounding incident were investigated by civilian complaint review board, and incident was investigated by police in preparation for criminal prosecution of plaintiffs; thus, knowledge of facts constituting claims would be imputed to city. Goodall v New York, 179 A.D.2d

481, 578 N.Y.S.2d 178, 1992 N.Y. App. Div. LEXIS 298 (N.Y. App. Div. 1st Dep't 1992).

Petitioner was entitled to leave to file late notice of claim against housing authority where police file sufficiently indicated that its investigation into death of petitioner's decedent, while it undoubtedly focused on solving homicide, also paid close attention, through preservation of physical evidence and interviews with building personnel, to condition of apartment locks and their maintenance, thus providing housing authority with actual knowledge of underlying facts. Chattergoon v New York City Hous. Auth., 197 A.D.2d 397, 602 N.Y.S.2d 381, 1993 N.Y. App. Div. LEXIS 9481 (N.Y. App. Div. 1st Dep't 1993).

Even if it were assumed that New York City Housing Authority (NYCHA) police conducted investigation into incident in which infant petitioner was shot at public housing project in outburst of drug-related gang warfare, such investigation did not necessarily mean that NYCHA acquired actual knowledge of essential facts constituting claim, as required for leave to file late notice of claim under CLS Gen Mun § 50-e(5), since police investigation into crime is geared toward finding perpetrator and not toward preparation of possible claim for pain and suffering on basis of alleged negligence of NYCHA. Russ v New York City Hous. Auth., 198 A.D.2d 361, 603 N.Y.S.2d 338, 1993 N.Y. App. Div. LEXIS 10581 (N.Y. App. Div. 2d Dep't 1993).

State Police investigation report did not provide actual knowledge to county that it was being charged with responsibility for accident in which plaintiff's decedent was electrocuted while performing work at county court building where there was nothing in report that could connect accident with any failure of county to provide safe place to work. Weber v County of Suffolk, 208 A.D.2d 527, 616 N.Y.S.2d 807, 1994 N.Y. App. Div. LEXIS 9356 (N.Y. App. Div. 2d Dep't 1994).

Court should have granted petitioner's request for leave to file late notice of claim against city as to false arrest and false imprisonment causes of action, as delay was not lengthy and city could not claim that it was prejudiced by delay in that knowledge of essential facts could be imputed to city where police department conducted extensive investigation in which district attorney's office participated during statutory period. Grullon v City of New York, 222 A.D.2d 257, 635 N.Y.S.2d 24, 1995 N.Y. App. Div. LEXIS 12829 (N.Y. App. Div. 1st Dep't 1995).

Plaintiffs failed to show that city had actual notice of accident by virtue of police investigation where no police reports were included in motion papers and plaintiffs offered no proof that police investigation of accident would have provided city with notice of their claim that fence and grounds had been negligently maintained near creek in which decedent drowned. Mack v City of New York, 265 A.D.2d 308, 696 N.Y.S.2d 206, 1999 N.Y. App. Div. LEXIS 9622 (N.Y. App. Div. 2d Dep't 1999), app. denied, 94 N.Y.2d 763, 708 N.Y.S.2d 51, 729 N.E.2d 708, 2000 N.Y. LEXIS 580 (N.Y. 2000).

260. — —Knowledge through insurer

The trial court did not abuse its discretion when it granted plaintiff, who had been injured when her automobile collided with defendant's fire engine, leave to file a late notice of claim pursuant to Gen Mun Law § 50-e(5), where within 90 days after the accident, defendant's insurer was made aware of the incident, for plaintiff's no-fault carrier, with whom a claim had been filed, and defendant's insurer were the same, defendant's employees were present and involved in the collision, and there was nothing in the record to suggest defendant would suffer by reason of the late service of the notice of claim; timely actual notice in the absence of demonstrable prejudice having been established, tardy filing was hardly of moment, even if it be styled as "law office failure". Whitehead v Centerville Fire Dist., 90 A.D.2d 655, 456 N.Y.S.2d 450, 1982 N.Y. App. Div. LEXIS 18731 (N.Y. App. Div. 3d Dep't 1982).

Court properly allowed service of late notice of claim on county, in action for injuries sustained when petitioner fell down steps of public bus owned and operated by county, where (1) claims adjuster for county contacted petitioner within one week of accident and had her fill out no-fault claim and authorization to obtain her medical records, (2) petitioner retained counsel within 2 months of accident, and (3) timely notice of claim was not served as result of law office failure; despite counsel's insufficient explanation for failure to timely serve notice and prejudice to county caused by delay, county had timely notice of accident and court would not make petitioner suffer for her counsel's actions. Fast v County of Broome, 151 A.D.2d 930, 543 N.Y.S.2d 203, 1989 N.Y. App. Div. LEXIS 8869 (N.Y. App. Div. 3d Dep't 1989).

Court would permit late service of notice of claim where defendant and its insurance carrier had actual notice of essential facts within reasonable time, especially since ongoing discussion with defendant's insurer could have contributed to delay. Burke v Capital Dist. Regional Off-Track Betting Corp., 137 Misc. 2d 448, 521 N.Y.S.2d 205, 1987 N.Y. Misc. LEXIS 2650 (N.Y. Sup. Ct. 1987).

261. — —Defendant's property involved in incident

Petitioner would be granted leave to file late notice of claim against county pursuant to CLS Gen Mun § 50-e(5) where (1) county acquired actual knowledge of events relevant to claim by virtue of fact that vehicle which collided with petitioner's vehicle was sheriff's department vehicle, and (2) county failed to demonstrate prejudice from 2-month delay in filing of notice of claim. DeAngelis v County of Dutchess, 159 A.D.2d 706, 553 N.Y.S.2d 1012, 1990 N.Y. App. Div. LEXIS 3637 (N.Y. App. Div. 2d Dep't 1990).

Court did not abuse its discretion in granting petitioner's application under CLS Gen Mun § 50-e(5) for leave to serve late notice of claim against school district for injuries sustained in collision with district's vehicle, notwithstanding petitioner's failure to allege reasonable excuse for delay, where district's vehicle was damaged in accident and towed from scene, police report was prepared, and district (and presumably its insurance carrier) thus had immediate notice of accident and adequate opportunity to investigate it. Krohn v Berne-Knox-Westerlo Cent. School Dist., 168 A.D.2d 826, 563 N.Y.S.2d 958, 1990 N.Y. App. Div. LEXIS 15495 (N.Y. App. Div. 3d Dep't 1990).

Plaintiff, who was injured in auto accident with police department vehicle, was entitled to serve late notice of claim where department's vehicle was damaged and towed from scene, all 3 individuals involved were injured and taken from scene by ambulance, police accident report was prepared and photographs were taken, and department conducted investigation within 90 days after accident; fact that police accident report attributed cause of accident to other driver's failure to yield right of way did not establish that department had no actual notice of claim. McAdams v Police Dep't of Clarkstown, 184 A.D.2d 847, 584 N.Y.S.2d 343, 1992 N.Y. App. Div. LEXIS 7666 (N.Y. App. Div. 3d Dep't 1992).

City had actual notice of accident, and late notice of claim was properly allowed, where claimant's vehicle was hit by city fire chief's vehicle during course of duty, city police accident report was made, fire department incident report was made, and investigation was conducted by board of fire wardens. Continental Ins. Co. v City of Rye, 257 A.D.2d 573, 683 N.Y.S.2d 585, 1999 N.Y. App. Div. LEXIS 129 (N.Y. App. Div. 2d Dep't 1999).

Permission will be granted under § 50-e to file a claim against a municipality after the expiration of the time limit for filing a claim where the claimant was hospitalized during the entire period and attempted to file his claim immediately upon release and the injury occurred in a collision with a vehicle owned by the municipality and driven by its servant so that it can be said the municipality must have known of the possible claim and its circumstances at the time of injury. Williams v Albany, 85 N.Y.S.2d 799, 193 Misc. 1037, 1949 N.Y. Misc. LEXIS 1701 (N.Y. Sup. Ct. 1949).

262. — —Miscellaneous; knowledge found

Permitting extension of time for filing notice of claim for death of claimant's decedent from alleged negligence and assault by police officers in employ of defendant village was not abuse of discretion where it appeared that village had acquired actual knowledge within 90-day period, since there had been disciplinary proceedings against officers, and no prejudice would result. Van Horn v New Paltz, 57 A.D.2d 642, 393 N.Y.S.2d 218, 1977 N.Y. App. Div. LEXIS 11669 (N.Y. App. Div. 3d Dep't 1977).

Pursuant to Gen Mun Law § 50-e, subd. 5 and CPLR 203 subd. [c], which should be considered in the same vein as CPLR 208, airport lessee was entitled to serve a late notice of counterclaims against the county lessor where the potential for injustice was apparent if the lessee was deprived of its counterclaims, where the lessor, in suing to recover for the loss arising from the alleged breach of contract or negligence of the lessee, was fully aware of the circumstancres surrounding the fire and could not be harmed by the filing of a late notice of claim, and where there was no valid reason why the opposing claim should not be adjudicated in the one action. County of Westchester v Edo Corp., 83 A.D.2d 829, 441 N.Y.S.2d 553, 1981 N.Y. App. Div. LEXIS 15201 (N.Y. App. Div. 2d Dep't 1981).

In a patient's medical malpractice action against a city hospital, the patient's application to serve a late notice of claim on the city would be granted where the patient had been unaware of any negligence of the hospital in treating an injury to his right knee until the patient was informed by his physician of the possibility of negligence a considerable time after the treatment, and where the city and hospital had actual knowledge of the essential facts constituting the claim within 90 days after the claim arose. Ansaldo v New York, 92 A.D.2d 557, 459 N.Y.S.2d 302, 1983 N.Y. App. Div. LEXIS 16787 (N.Y. App. Div. 2d Dep't 1983).

In personal injury action against county, inmate would be permitted to serve late notice of claim despite her lack of acceptable excuse for failure to serve timely notice since her injury occurred while she was incarcerated and she was treated at county medical center; county apparently had actual knowledge of essential facts of claim, and there was no indication that it was substantially prejudiced by delay. Rodriguez v County of Nassau, 126 A.D.2d 536, 510 N.Y.S.2d 658, 1987 N.Y. App. Div. LEXIS 41673 (N.Y. App. Div. 2d Dep't 1987).

Petitioner was entitled to leave to file late notice of claim against city for damages stemming from wrongful demolition of 3 of his buildings where he alleged that buildings were demolished between early October and early November, but that he did not know of demolition until following late January or early February; having ordered demolition and retained contractor for such purpose, city had timely actual knowledge of essential facts of claim. Norstrand v Rochester, 159 A.D.2d 1019, 552 N.Y.S.2d 465, 1990 N.Y. App. Div. LEXIS 3346 (N.Y. App. Div. 4th Dep't 1990).

Petitioner was entitled to serve late notice of claim on city housing authority where (1) authority had actual notice of defective condition on premises and happening of accident resulting therefrom, (2) authority's employee had repaired condition within statutory period for serving notice, and (3) application for leave was made only 10 days after expiration of statutory deadline, rendering it unlikely that authority was prejudiced. Licari v New York City Housing Authority, 181 A.D.2d 558, 582 N.Y.S.2d 3, 1992 N.Y. App. Div. LEXIS 3763 (N.Y. App. Div. 1st Dep't 1992).

Court did not abuse its discretion in permitting late filing of notice of claim against school district where (1) application was made about 15 months after accident in which 5-year-old girl fell from top of 12-foot high slide at school, (2) school district was notified of accident on Monday following accident, and (3) slide was still in same condition at same site. Andersen v Brewster Cent. Sch. Dist., 189 A.D.2d 1068, 593 N.Y.S.2d 91, 1993 N.Y. App. Div. LEXIS 765 (N.Y. App. Div. 3d Dep't 1993).

Infant plaintiff would be granted leave to serve late notice of claim against city housing authority about 5 months after 90-day time limit contained in CLS Gen Mun § 50-e(5) where (1) housing authority acquired actual knowledge of essential facts constituting claim on day that its employee allegedly raped and assaulted 14-year-old infant plaintiff in her apartment, (2) housing authority failed to show prejudice, and (3) it was likely that housing authority possessed records of its employee's work history and performance, including any reported misconduct, necessary to maintain defense against claim. Trudy W. v Morales, 190 A.D.2d 531, 593 N.Y.S.2d 32, 1993 N.Y. App. Div. LEXIS 874 (N.Y. App. Div. 1st Dep't 1993).

Court should have granted claimant's motion for permission to file late notice of claim pursuant to CLS Gen Mun § 50-e(5) where county had knowledge of essential facts constituting claim within period specified in CLS Gen Mun § 50-e(1)(a) for filing notice of claim, part of reason for failure to file timely notice of claim was claimant's erroneous identification of governmental entity involved, period of unexcused delay was relatively short, and county failed to demonstrate that it suffered prejudice by reason of delay. Nickerson v County of Jefferson, 199 A.D.2d 1070, 608 N.Y.S.2d 906, 1993 N.Y. App. Div. LEXIS 12719 (N.Y. App. Div. 4th Dep't 1993).

Petitioner was entitled to serve late notice of claim under CLS Gen Mun § 50-e(5) where city had actual knowledge of essential facts of claim within 90 days of its accrual, and thus no substantial prejudice to city resulted from delay. Canty v City of New York, 273 A.D.2d 467, 711 N.Y.S.2d 750, 2000 N.Y. App. Div. LEXIS 7386 (N.Y. App. Div. 2d Dep't 2000).

Court should have allowed petitioner to serve late notice of claim against respondent New York City School Construction Authority, although reasonableness of excuse for 7-day delay was open to question, where respondent had actual knowledge of essential facts of claim and failed to show that it was prejudiced by short delay. Urgiles v N.Y. City Sch. Constr. Auth., 283 A.D.2d 434, 723 N.Y.S.2d 876, 2001 N.Y. App. Div. LEXIS 4708 (N.Y. App. Div. 2d Dep't 2001).

School district was not substantially prejudiced as result of 14-year-old student's 10-month delay in filing notice of claim in connection with accident on school football field where it had immediate actual knowledge of essential facts of incident, it could obtain complete information through proper exercise of discovery, it did not assert that coaches who witnessed incident or trainer who initially examined student and allegedly misdiagnosed his injuries were unavailable, and it did not show that memories of potential witnesses had faded so much that its ability to maintain defense was unduly undermined. Welch v Bd. of Educ., 287 A.D.2d 761, 731 N.Y.S.2d 94, 2001 N.Y. App. Div. LEXIS 9309 (N.Y. App. Div. 3d Dep't 2001).

In a replevin action to recover $4,015.06 in cash held by the police property clerk of the New York City Police Department, the money having been seized at a "Las Vegas Nite" sponsored by the plaintiff, the defendants cannot avoid return of the property by raising as an affirmative defense the failure of the plaintiff to file a notice of claim pursuant to section 50-e of the General Municipal Law since the record establishes that the defendants had substantial actual notice of the plaintiff's claim constituting compliance with the statute's notice of claim provision. Williamsburg Volunteer Ambulance Corps v Wendt, 95 Misc. 2d 414, 408 N.Y.S.2d 207, 1978 N.Y. Misc. LEXIS 2441 (N.Y. Civ. Ct. 1978).

263. — —Miscellaneous; knowledge not found

The trial court properly denied a claimant's motion to serve and file a late notice of claim against a municipality where claimant failed to show that the public corporation timely acquired actual knowledge of the essential facts which constituted the claim. In affirming the denial of claimant's motion, the reviewing court would note that, had claimant demonstrated that the chief of police had timely acquired knowledge, it would have constituted knowledge of the municipality, in that the claimed knowledge would have been that of the person having authority over the police department and responsibility for the conduct of the individuals involved. Cooper v Rochester, 84 A.D.2d 947, 446 N.Y.S.2d 644, 1981 N.Y. App. Div. LEXIS 16221 (N.Y. App. Div. 4th Dep't 1981).

Actual knowledge of municipality of essential facts constituting claim is not established merely by assertion that municipality created dangerous condition and that condition had not changed over time period after accident. Kravitz v County of Rockland, 112 A.D.2d 352, 491 N.Y.S.2d 802, 1985 N.Y. App. Div. LEXIS 56487 (N.Y. App. Div. 2d Dep't 1985), aff'd, 67 N.Y.2d 685, 499 N.Y.S.2d 941, 490 N.E.2d 860, 1986 N.Y. LEXIS 16625 (N.Y. 1986).

Municipality's actual knowledge of death underlying parent's claim for emotional distress does not establish municipality's knowledge of parent's claim. Bullard v New York, 118 A.D.2d 447, 499 N.Y.S.2d 880, 1986 N.Y. App. Div. LEXIS 54337 (N.Y. App. Div. 1st Dep't 1986).

It was abuse of discretion to permit claimant to file late notices of claim under CLS Gen Mun § 50-e where claimant asserted only that there was "distinct possibility" that one or more defen-

dants acquired actual knowledge of accident within 90 days of its occurrence, which defendants denied; it was all but impossible to reconstruct circumstances existing at time of accident because accident occurred at active construction site. Thom v Wappingers Falls, 131 A.D.2d 855, 517 N.Y.S.2d 214, 1987 N.Y. App. Div. LEXIS 48290 (N.Y. App. Div. 2d Dep't 1987).

Fact that first attorney representing tenant whose child suffered lead poisoning from ingestion of paint chips in apartment was part-time assistant corporation counsel for city did not operate to give city notice of tenant's claim that city had acted negligently in issuing certificate of occupancy for purposes of permission to serve late notice of claim pursuant to CLS Gen Mun § 50-e(5). Logan v Albany, 154 A.D.2d 861, 546 N.Y.S.2d 722, 1989 N.Y. App. Div. LEXIS 13419 (N.Y. App. Div. 3d Dep't 1989).

In action arising from death of inmate at county jail due to asthmatic bronchitis, plaintiff was not entitled to file late notice of claim on ground that county acquired actual knowledge of essential facts of claim from events themselves or any subsequent investigation, in absence of allegation that any county employee participated in negligent acts; plaintiff alleged that negligence of sheriff's department caused death of inmate, and county is generally not liable for acts of sheriff or deputies. Bowman v Campbell, 193 A.D.2d 921, 597 N.Y.S.2d 772, 1993 N.Y. App. Div. LEXIS 4856 (N.Y. App. Div. 3d Dep't), app. dismissed, in part, app. denied, 82 N.Y.2d 740, 602 N.Y.S.2d 796, 622 N.E.2d 296, 1993 N.Y. LEXIS 3095 (N.Y. 1993).

Petitioner was properly granted leave to file late notice of claim pursuant to CLS Gen Mun § 50-e where notice was served only 16 days after expiration of 90-day time limit for service of notice, and respondent received actual notice of incident on day following its occurrence. Turner v City of New York, 203 A.D.2d 294, 612 N.Y.S.2d 894, 1994 N.Y. App. Div. LEXIS 3137 (N.Y. App. Div. 2d Dep't 1994).

Plaintiffs could not rely on rejected notice of claim to establish city's actual knowledge of accident where that notice was served without leave of court and was therefore nullity. Mack v City of New York, 265 A.D.2d 308, 696 N.Y.S.2d 206, 1999 N.Y. App. Div. LEXIS 9622 (N.Y. App. Div. 2d Dep't 1999), app. denied, 94 N.Y.2d 763, 708 N.Y.S.2d 51, 729 N.E.2d 708, 2000 N.Y. LEXIS 580 (N.Y. 2000).

Supreme court abused its discretion in granting a patient's motion for leave to serve a late notice of claim approximately 10 years after the alleged malpractice occurred, as: (1) the 10-year delay was not the product of the patient's infancy, and the fact that the patient was not aware of the requirement to serve a notice of claim within 90 days of its accrual was not a reasonable excuse for the failure to do so; (2) the appeals court was not persuaded that the doctors had actual notice of the claim within the requisite 90-day period, or within a reasonable time thereafter; and (3) the patient failed to establish that the doctors would not be substantially prejudiced in maintaining their defense on the merits as a result of the lengthy delay in moving for leave to serve a late notice of claim. Williams v Nassau County Med. Ctr., 13 A.D.3d 363, 786 N.Y.S.2d 207, 2004 N.Y. App. Div. LEXIS 14888 (N.Y. App. Div. 2d Dep't 2004), aff'd, 6 N.Y.3d 531, 814 N.Y.S.2d 580, 847 N.E.2d 1154, 2006 N.Y. LEXIS 650 (N.Y. 2006).

@(L)CLS/GMU $ 50-e n 183 Act(NEW{183.} Actual knowledge of facts constituting claim) @(P)Order granting an infant leave to file a late notice of claim against a school district for injuries suffered in cheerleader practice was error because, although the school district had knowledge of the accident and the injury, its knowledge was not actual knowledge of the essential facts of the claim; nowhere in the injury report filed by the infant's mother was there an allegation of the basis of the infant's negligence claim, which was that certain cheerleaders were either too small to catch the infant during a particular stunt or that the infant had told her coach her dissatisfaction with the team members. Among other things, the infant conceded that she deliberately delayed presentation of a claim because she did not want to involve her coach and the other cheerleaders, and failed to establish that the school district was not substantially prejudiced by the delay in several respects. Matter of Felice v Eastport/South Manor Cent. School Dist., 50 A.D.3d 138, 851 N.Y.S.2d 218, 2008 N.Y. App. Div. LEXIS 627 (N.Y. App. Div. 2d Dep't 2008).

264. —Examination of claimant after filing late notice

A city is not barred from prosecuting an appeal from an order permitting a claimant to serve notices of claim after the period set forth in this section had expired because the city comptroller examined the claimants upon the claim after notice was filed pursuant to the order. Fabricant v New York, 273 A.D. 975, 78 N.Y.S.2d 277, 1948 N.Y. App. Div. LEXIS 5560 (N.Y. App. Div. 1948), aff'd, 298 N.Y. 818, 83 N.E.2d 862, 298 N.Y. (N.Y.S.) 818, 1949 N.Y. LEXIS 1684 (N.Y. 1949).

Even though motorist who asserted claim against city arising out of collision with city-owned vehicle was examined by city, where notice of claim served by ordinary mail was received by city more than 90 days after accident, there was no compliance with statute relieving claimant of statutory duty of serving notice of claim by registered mail within 90 days after claim arises if notice is actually received within such time period and there is an examination of claimant. Adkins v New York, 51 A.D.2d 944, 381 N.Y.S.2d 485, 1976 N.Y. App. Div. LEXIS 11645 (N.Y. App. Div. 1st Dep't 1976), aff'd, 43 N.Y.2d 346, 401 N.Y.S.2d 469, 372 N.E.2d 311, 1977 N.Y. LEXIS 2469 (N.Y. 1977).

The Westchester County Playland Commission was not estopped to assert failure to serve notice of claim against it as required by this section by mere service of notice on claimant to appear for examination, there being nothing to indicate that an examination actually took place. Menter v Westchester County Playland Com., 42 Misc. 2d 5, 247 N.Y.S.2d 3, 1964 N.Y. Misc. LEXIS 2144 (N.Y. County Ct. 1964).

Where notice of claim against a county was timely served but not in the manner prescribed by law, and referred within 90 days after the claim arose to defendant's insurance carrier which proceeded to investigate the claim and interview claimants and conduct a physical examination of the allegedly injured wife, service of notice of claim could be deemed valid under subd 3 of this section. May v Suffolk County Police Dep't, 236 N.Y.S.2d 933 (N.Y. Sup. Ct. 1962).

265. —Request for statement of damages

While a municipality may be estopped from setting up the defense of failure timely to file a notice of claim by acts done within the 90 day period upon which a claimant may justifiably rely, such as asking for a list of special damages, offer to talk settlement and arranging for a physical examination, there can be no estoppel where no such acts are shown to have occurred within the 90 day period and there is no showing that claimant relied on any such acts. Johnson v Board of Education, 33 A.D.2d 647, 305 N.Y.S.2d 89, 1969 N.Y. App. Div. LEXIS 2937 (N.Y. App. Div. 4th Dep't 1969).

266. —Settlement representations

It was formerly the rule that failure to give the notice of claim to a village required by § 341 of the Village Law and § 50-e of the General Municipal Law, within the time prescribed, is not excused by the fact it was induced by representations of certain village officers and the insurance company protecting the village against negligence claims. Parsons v Dannemora, 275 A.D. 738, 87 N.Y.S.2d 71, 1949 N.Y. App. Div. LEXIS 4253 (N.Y. App. Div. 1949).

While a municipality may be estopped from setting up the defense of failure timely to file a notice of claim by acts done within the 90 day period upon which a claimant may justifiably rely, such as asking for a list of special damages, offer to talk settlement and arranging for a physical examination, there can be no estoppel where no such acts are shown to have occurred within the 90 day period and there is no showing that claimant relied on any such acts. Johnson v Board of Education, 33 A.D.2d 647, 305 N.Y.S.2d 89, 1969 N.Y. App. Div. LEXIS 2937 (N.Y. App. Div. 4th Dep't 1969).

Although a surviving spouse's claim for an insurance premium refund was untimely under N.Y. Educ. Law § 3813(2-b), a school district's employees' affirmative representations that a full refund was forthcoming estopped the district from asserting a notice of claim defense; therefore, the trial court erred in denying the spouse's application to file a late notice of claim pursuant to N.Y. Gen. Mun. Law § 50-e and the spouse was entitled to file a late notice of claim for the year immediately preceding the notice of

the overpayment. Palka v Union Endicott Cent. Sch. Dist., 2 A.D.3d 1174, 770 N.Y.S.2d 178, 2003 N.Y. App. Div. LEXIS 13926 (N.Y. App. Div. 3d Dep't 2003).

Where there was no service of a written notice of claim, the action of the representatives of a municipality and its insurer in proceeding with the investigation of an accident, in discussing and negotiating with the claimant concerning their responsibility for the accident and in arranging for the medical care of the claimant, could not be construed as a waiver of the statutory requirements for formal notice of claim. Millard v Lewis, 17 Misc. 2d 698, 185 N.Y.S.2d 708, 1959 N.Y. Misc. LEXIS 4054 (N.Y. Sup. Ct. 1959).

Parents of student injured in physical education class had cause of action against school's insurer on theory that insurer by false representations that insurer would pay for all injuries and damages advised parents not to file notice of claim as provided for by General Municipal Law. Trombley v Merchants Mut. Ins. Co., 79 Misc. 2d 742, 360 N.Y.S.2d 829, 1974 N.Y. Misc. LEXIS 1742 (N.Y. Sup. Ct. 1974).

Absence of any written representation by insurer of school that parents of student injured in physical education class would be paid for all injuries and damage sustained did not bar direct tort action by parents against insurer which allegedly made false representations in reliance on which parents did not file notice of claim required by General Municipal Law. Trombley v Merchants Mut. Ins. Co., 79 Misc. 2d 742, 360 N.Y.S.2d 829, 1974 N.Y. Misc. LEXIS 1742 (N.Y. Sup. Ct. 1974).

267. —Timeliness of objection to late filing

Upon a motion to set aside a verdict against it, the defendant's failure to move, prior to trial, against the plaintiff's cause of action because of the alleged late filing of a notice of claim, did not preclude the defendant from raising the issue upon such motion. Camarella v East Irondequoit Cent. School Board, 68 Misc. 2d 123, 326 N.Y.S.2d 350, 1971 N.Y. Misc. LEXIS 1088 (N.Y. Sup. Ct. 1971), modified, 41 A.D.2d 29, 341 N.Y.S.2d 729, 1973 N.Y. App. Div. LEXIS 5050 (N.Y. App. Div. 4th Dep't 1973).

268. —Other acts constituting waiver

Cases raising issue whether plaintiffs, who filed timely notices of malpractice claims against municipal hospitals with New York City, should be permitted to file notice of claim nunc pro tunc with city's health and hospitals corporation under doctrine of estoppel, would be remitted for consideration of facts relative to allegations that inter alia, corporation and city refrained for a time from applying statute requiring filing of notice of claim with corporation, that date of transfer of responsibilities was not publicly discoverable and that inaction of city and its corporation counsel was attributable to corporation. Bender v New York City Health & Hospitals Corp., 38 N.Y.2d 662, 382 N.Y.S.2d 18, 345 N.E.2d 561, 1976 N.Y. LEXIS 2305 (N.Y. 1976).

The trial court properly granted an infant plaintiff's motion to file under Gen Mun Law § 50-e a late notice of claim against a county for injuries plaintiff suffered when the bicycle he was riding was struck by an automobile along a public highway in the county, although the motion was made four years after the occurrence of the accident, where the results of timely and detailed investigations conducted by other defendants in the action would be available to the county and where much necessary information was contained in the county's own records and reports. Monte v Rochester, 81 A.D.2d 678, 437 N.Y.S.2d 796, 1981 N.Y. App. Div. LEXIS 11222 (N.Y. App. Div. 3d Dep't 1981).

Any delay on the part of plaintiffs in a medical malpractice action in serving the notice of claim and in commencing the action was attributable solely to the acts and omissions of defendants in failing promptly to furnish plaintiffs with the hospital record which contained the evidentiary matter upon which the action was based, and which for a period of over two years following plaintiffs' request had been kept from their counsel's view. Under the circumstances, service of the notice of claim, pursuant to Gen Mun Law § 50-e, approximately 32 months after the operation complained of was timely, and the commencement of the action 49 days thereafter was also within the time limit mandated by Gen Mun Law § 50-i. Cassidy v County of Nassau, 84 A.D.2d 742, 443 N.Y.S.2d 742, 1981 N.Y. App. Div. LEXIS 15908 (N.Y. App. Div. 2d Dep't 1981).

City did not waive plaintiff's noncompliance with notice of claim requirement of CLS Gen Mun § 50-e, even though city's failure to specifically deny, in its answer, certain paragraph in complaint constituted admission of factual allegation that notice of claim was served after expiration of 90-day filing period, since city's omission was not admission of pleaded legal conclusion that service was timely, particularly where answer asserted, as affirmative defense, complaint's failure to state cause of action. Curtis Case, Inc. v Port Jervis, 150 A.D.2d 421, 541 N.Y.S.2d 32, 1989 N.Y. App. Div. LEXIS 6484 (N.Y. App. Div. 2d Dep't 1989).

Court properly granted applications under CLS Gen Mun § 50-e(5) for leave to file late notices of claim for injuries sustained in fall at construction site, although respondent city asserted lack of opportunity to investigate radically changed work site, since nature of accident location as construction site made it highly unlikely that conditions existing at time of accident would still have existed even if claims had been timely filed. Gorinshek v Johnstown, 186 A.D.2d 335, 588 N.Y.S.2d 208, 1992 N.Y. App. Div. LEXIS 10808 (N.Y. App. Div. 3d Dep't 1992).

Defendant waived its right to assert that plaintiff failed to file notice of claim under CLS Gen Mun § 50-e where (1) answer interposed affirmative defense that plaintiff failed to state cause of action, but made no reference to any requirement that filing of notice of claim was required, (2) on receipt of answer, but prior to expiration of one-year-and-90-day limitations period of CLS Gen Mun § 50-i, plaintiff moved to strike affirmative defense, (3) defendant chose not to oppose motion and permitted affirmative defense to be unconditionally stricken from answer, and (4) as soon as limitations period expired, defendant moved to dismiss on ground that plaintiff failed to file notice of claim. Jeshurin v Liberty Lines Transit, Inc., 191 A.D.2d 412, 594 N.Y.S.2d 321, 1993 N.Y. App. Div. LEXIS 1800 (N.Y. App. Div. 2d Dep't 1993).

In personal injury action arising from accident on school grounds, city was not estopped from asserting that it was improper party on basis that it negligently prevented plaintiff from making motion to serve late notice of claim on board of education in compliance with CLS Gen Mun § 50-e and CLS Educ § 3813(2), since city's answer clearly indicated that, while it owned school property on which accident occurred, school was operated, maintained, and controlled by board of education. Campbell v City of New York, 203 A.D.2d 504, 611 N.Y.S.2d 248, 1994 N.Y. App. Div. LEXIS 4289 (N.Y. App. Div. 2d Dep't 1994).

Where the noncompliance of the plaintiff with the above statute was caused by defendant's conduct in unlawfully placing the plaintiff under restraint, it will not be heard to complain of his failure to comply with the conditions precedent to the beginning of an action specified in such statute. Caminito v New York, 45 Misc. 2d 241, 256 N.Y.S.2d 670, 1965 N.Y. Misc. LEXIS 2278 (N.Y. Sup. Ct. 1965), aff'd in part, modified, 25 A.D.2d 848, 269 N.Y.S.2d 826, 1966 N.Y. App. Div. LEXIS 4364 (N.Y. App. Div. 2d Dep't 1966).

Estoppel of the city to contest the timeliness of the plaintiff's filing of a notice of claim in a libel and slander action did not present a question of an extension of time to file, or of waiver thereof, but only of the disability or disqualification of the city to raise the claim of plaintiff's alleged late filing. Sorge v New York, 56 Misc. 2d 414, 288 N.Y.S.2d 787, 1968 N.Y. Misc. LEXIS 1650 (N.Y. Sup. Ct. 1968).

269. —Procedural considerations

Although estoppel of city to assert defense of nontimely filing of notice of claim might best be asserted by motion to file claim nunc pro tunc, with fact issues to be litigated prior to trial, alternative of alleging facts constituting estoppel in complaint is permissible. Clienhans v Southern Cab Corp., 54 A.D.2d 672, 387 N.Y.S.2d 847, 1976 N.Y. App. Div. LEXIS 14204 (N.Y. App. Div. 1st Dep't 1976).

Where contention was made at special term and on appeal that an estoppel was established against housing authority with respect to late filing of notices of claim, arising from collision with vehicle driven by housing authority officer, by virtue of acts or omissions on part of housing authority, and where contention was

not fully litigated in trial court, which ruled for petitioners on another ground, proceeding would be remitted to trial court for a consideration of evidentiary facts as to whether estoppel was established against housing authority. Barrow v New York City Housing Authority, 59 A.D.2d 780, 398 N.Y.S.2d 901, 1977 N.Y. App. Div. LEXIS 13837 (N.Y. App. Div. 2d Dep't 1977).

Court properly denied motion to amend notice of claim, complaint, and bill of particulars to correct date on which plaintiff allegedly slipped and fell on accumulation of paper handouts in subway station, as plaintiff's 5-year delay in seeking to amend original notice of claim, together with repetition of erroneous date in complaint, bill of particulars, and statutory hearing and deposition, frustrated defendant's ability to timely interview witnesses and otherwise prejudiced its ability to investigate. Davis v New York City Transit Auth., 234 A.D.2d 153, 651 N.Y.S.2d 31, 1996 N.Y. App. Div. LEXIS 12547 (N.Y. App. Div. 1st Dep't 1996).

270. —Amount of delay

In an action against the city brought by a patron of a tavern who was struck in the face by a bullet fired by a police officer during the pursuit of an alleged criminal, the notice of claim would be deemed to have been timely filed where it had been filed only one day late after counsel had miscalculated the appropriate date, where several agents of the city had actual notice of the claim within hours after the incident, where the city had participated in a hearing concerning the incident, where no prejudice had been claimed, and where the city had not raised the defense of untimeliness until some 15 months after receipt of the notice of claim. King v New York, 88 A.D.2d 891, 452 N.Y.S.2d 607, 1982 N.Y. App. Div. LEXIS 17213 (N.Y. App. Div. 1st Dep't), app. denied, 90 A.D.2d 714, 1982 N.Y. App. Div. LEXIS 18896 (N.Y. App. Div. 1st Dep't 1982).

In a proceeding by a former school superintendent against a county civil service commission alleging fraud, abuse of process, infliction of mental distress and other torts, the trial court improperly denied claimant's motion for leave to serve a late notice of claim pursuant to Gen Mun Law § 50-e, where one year after claimant's original notification that the determination dismissing him had been affirmed he received a letter from the then manager of the commission alleging that in determining to affirm his dismissal the commission had improperly considered unrelated criminal charges pending against him and claimant's application for leave to serve a late notice of claim was made one month after the receipt of said letter, in that when discovery of the facts underlying the claim is delayed through no fault of claimant, the delay in serving a notice of claim is justified and claimant or prompt service of the application gave the county actual notice of incident within a reasonable time; in determining an application pursuant to Gen Mun Law § 50-e(5) a showing that the proposed action is meritorious is not required. Stevenson v County of Monroe, 97 A.D.2d 969, 468 N.Y.S.2d 761, 1983 N.Y. App. Div. LEXIS 20799 (N.Y. App. Div. 4th Dep't 1983), aff'd, 63 N.Y.2d 963, 483 N.Y.S.2d 987, 473 N.E.2d 237, 1984 N.Y. LEXIS 4735 (N.Y. 1984).

The Supreme Court erred in denying leave to serve a late notice of claim against a city transit authority based on accident a subway train which derailed served his notice of claim two days after expiration of the 90-day statutory period where the accident concerned many people, and was a major disaster, so that defendant had actual knowledge of the occurrence, and where no prejudice resulted to defendant from the two-day delay in serving notice of claim, and where the notice allegedly was not filed earlier because plaintiff initially believed that his injury was more minor than it was. Annis v New York City Transit Authority, 108 A.D.2d 643, 485 N.Y.S.2d 529, 1985 N.Y. App. Div. LEXIS 42997 (N.Y. App. Div. 1st Dep't 1985).

Plaintiff who was 4 months pregnant when she slipped and fell on patch of ice while walking on public sidewalk would be granted leave to serve notice of personal injury claim against city 18 days after expiration of 90-day statutory period and 4 days after consulting counsel since, given transitory nature of alleged injury-causing condition, city's investigation of claim would be no more hindered on 108th day after accident than it would have been if notice had been served within 90-day period. Rosenblatt v New York, 160 A.D.2d 927, 554 N.Y.S.2d 800, 1990 N.Y. App. Div. LEXIS 4835 (N.Y. App. Div. 2d Dep't 1990).

Court did not improvidently exercise its discretion in granting petitioner's application to file late notice of claim for injuries sustained in trip and fall on city sidewalk, where proposed notice was served on city less than 5 weeks after expiration of 90-day filing period, and allegedly defective condition of sidewalk was of long duration. Irizarry v City of Yonkers, 193 A.D.2d 746, 597 N.Y.S.2d 729, 1993 N.Y. App. Div. LEXIS 4876 (N.Y. App. Div. 2d Dep't 1993).

It was abuse of discretion to deny claimants' motion to serve late notice of claim on water authority where claimants presented evidence that authority had actual knowledge of accident within days of its occurrence, accident involved infant, 6-month time period between expiration of 90-day notice of claim period and claimants' motion was comparatively short period of delay, and it was uncontradicted that site of infant's accident remained unchanged. Reed v City of Lackawanna, 221 A.D.2d 967, 633 N.Y.S.2d 912, 1995 N.Y. App. Div. LEXIS 13458 (N.Y. App. Div. 4th Dep't 1995).

Claimant was not entitled to serve late notice of claim under CLS Gen Mun § 50-e(5) where he failed to proffer reasonable excuse for waiting more than 5 months after expiration of 90-day period to commence proceeding against city, and there was no evidence that city had actual notice of essential facts constituting claim. Hunt v City of New Rochelle, 223 A.D.2d 643, 637 N.Y.S.2d 17, 1996 N.Y. App. Div. LEXIS 424 (N.Y. App. Div. 2d Dep't 1996).

Where plaintiff's attorney, with the properly executed notice of claim on his person, called at the only office listed in the telephone directory for the respondent, made a tender of notice of claim at the Authority's personnel department at its main office, and was prevented from effectuating such service by Authority employees on June 23, 1965, and thereafter served the notice on June 24, 1965, one day after the expiration of the 90-day period, the Supreme Court will treat the notice of claim as validly filed. Ware v Manhattan & Bronx Surface Transit Operating Authority, 49 Misc. 2d 704, 268 N.Y.S.2d 519, 1965 N.Y. Misc. LEXIS 1470 (N.Y. Sup. Ct. 1965).

271. —Change of conditions or circumstances

Petitioner would not be granted leave to serve late notice of claim against city where there was real danger that changed conditions would prevent accurate reconstruction of circumstances existing at time accident occurred, even though city did not clearly demonstrate prejudice due to 14-month delay and petitioner contended that premises remained unchanged. Perry v New York, 133 A.D.2d 692, 519 N.Y.S.2d 862, 1987 N.Y. App. Div. LEXIS 51728 (N.Y. App. Div. 2d Dep't 1987).

272. —Fault or error by defendant

Where the motion for permission to serve a notice of claim was filed 108 days after treatment of plaintiff for a cut wrist was concluded by the city hospital, but far less than 90 days after the plaintiff's subsequent surgery or the examination by the second hospital which referred him to the subsequent surgeon, who told him that internal muscles and ligaments which were severed in the accident had not been sutured before the external wound had been closed at the city hospital, discretion should have been exercised to grant the application for leave to serve a late notice of claim against the city hospital for alleged medical malpractice. Castano v New York City Health & Hospitals Corp., 83 A.D.2d 836, 441 N.Y.S.2d 565, 1981 N.Y. App. Div. LEXIS 15206 (N.Y. App. Div. 2d Dep't 1981).

Any delay on the part of plaintiffs in a medical malpractice action in serving the notice of claim and in commencing the action was attributable solely to the acts and omissions of defendants in failing promptly to furnish plaintiffs with the hospital record which contained the evidentiary matter upon which the action was based, and which for a period of over two years following plaintiffs' request had been kept from their counsel's view. Under the circumstances, service of the notice of claim, pursuant to Gen Mun Law § 50-e, approximately 32 months after the operation complained of was timely, and the commencement of the action 49 days thereafter was also within the time limit mandated by Gen Mun Law § 50-i. Cassidy v County of Nassau, 84 A.D.2d 742, 443

N.Y.S.2d 742, 1981 N.Y. App. Div. LEXIS 15908 (N.Y. App. Div. 2d Dep't 1981).

Plaintiff would be permitted to file late notice of claim against city for injuries sustained when he tripped over debris while working at construction site, despite contention that delay might make it impossible for city to reconstruct conditions that prevailed at time of accident, since injury occurred at massive construction site and it was unlikely that those conditions existed even at end of 90-day period for timely filing of notice. Ferrer v New York, 172 A.D.2d 240, 567 N.Y.S.2d 734, 1991 N.Y. App. Div. LEXIS 4454 (N.Y. App. Div. 1st Dep't 1991).

273. —Identification of defendant

It was proper exercise of discretion to permit plaintiff to file late notice of claim in wrongful death action against county hospital where application was made within one year and 90 days of accrual of action, plaintiff's attorney acted promptly upon discovery of hospital's correct status, and hospital did not claim substantial prejudice. Wendal v Memorial Hospital of Greene County, 127 A.D.2d 592, 511 N.Y.S.2d 649, 1987 N.Y. App. Div. LEXIS 43060 (N.Y. App. Div. 2d Dep't 1987).

Petitioner would be allowed to serve late notice of claim under CLS Gen Mun § 50-e(2) on condition that she include photograph of exact location where fall on property of city housing authority allegedly occurred where (1) petitioner served notice of claim on city instead of housing authority on September 14, (2) comptroller of city notified housing authority of claim on October 12, after 90-day period to file notice of claim had expired on September 26, (3) petitioner sought leave to file late notice of claim on October 19, and (4) housing authority did not show prejudice by reason of fact that petitioner's notice specified only street address in front of which she fell. Castro v New York City Housing Authority, 180 A.D.2d 415, 579 N.Y.S.2d 84, 1992 N.Y. App. Div. LEXIS 1059 (N.Y. App. Div. 1st Dep't 1992).

Petitioner would be granted permission to serve late notice of claim on city housing authority where (1) she tripped and fell on raised portion of sidewalk in front of premises allegedly operated by housing authority, (2) she retained counsel and served timely notice of claim on city, (3) on receiving notice from city that housing authority might be responsible for accident, she sought leave to serve untimely notice of claim on housing authority, and (4) housing authority failed to show that it was prejudiced by delay in obtaining notice and consequent inability to conduct prompt investigation, especially where housing authority still had not investigated location of accident. Shelden v New York City Housing Authority, 180 A.D.2d 551, 580 N.Y.S.2d 279, 1992 N.Y. App. Div. LEXIS 2724 (N.Y. App. Div. 1st Dep't 1992).

Supreme Court did not err in granting motion for leave to file late notice of claim arising out of fatal automobile accident where (1) claimants applied for permission to serve notice of claim within 10 months of its accrual, (2) claimants persuasively contended that they made application immediately upon discovering, as result of accident investigation, that defendant town had assumed responsibility for removal and trimming of foliage along accident site pursuant to contracts with county, and (3) precise reconstruction of accident scene could not have been effected had claim been timely served, and town's ability to conduct investigation of essential facts was aided by extensive media coverage of accident, which yielded videotape of scene made on date of accident. Rotoli v Gaines, 184 A.D.2d 1085, 585 N.Y.S.2d 274, 1992 N.Y. App. Div. LEXIS 8371 (N.Y. App. Div. 4th Dep't 1992).

Plaintiff, who was injured in accident near border of 2 counties, should have been granted leave to file late notice of claim where (1) accident occurred on November 3, 1990 and report by state trooper noted that extremely soft shoulder of road was contributing factor in accident, (2) plaintiff retained counsel about 45 days after accident, but notice of claim was not timely filed because of uncertainty as to public entity which was responsible for road and clerical error in attorney's office, and (3) motion for leave to file late notice was filed on March 21, 1991, which was 49 days after expiration of 90-day period; although municipal defendants contended that failure to serve timely notice severely prejudiced their ability to investigate because conditions of shoulder had been altered by plowing, sanding, salting, and snow removal, their ability to investigate was no more hindered on March 21, 1991 than if notice had been timely served on February 1, 1991. Sutton v Schuyler Falls, 185 A.D.2d 430, 585 N.Y.S.2d 830, 1992 N.Y. App. Div. LEXIS 8881 (N.Y. App. Div. 3d Dep't 1992).

Petitioner was entitled to serve late notice of claim against town where most of short delay of 26 days in serving notice was attributable to attempt to ascertain identity of public corporation against which claim had to be served, and town did not substantiate its conclusory assertions of resulting prejudice. National Sur. Corp. v Town of Greenburgh, 266 A.D.2d 550, 699 N.Y.S.2d 128, 1999 N.Y. App. Div. LEXIS 12242 (N.Y. App. Div. 2d Dep't 1999).

Failure to serve timely notice of claim against New York City Housing Authority was not excused by petitioner's failure to inform her attorney of proper party to sue, particularly where identity of owner of premises was easily ascertainable. Lugo v N.Y. City Hous. Auth., 282 A.D.2d 229, 724 N.Y.S.2d 28, 2001 N.Y. App. Div. LEXIS 3397 (N.Y. App. Div. 1st Dep't 2001).

Village was entitled to dismissal of an action by a homeowners association to recover for damage to property, as the association's failure to research the entity that owned a dock from which a boat drifted and damaged association property was not an acceptable excuse for failing to file a timely notice of claim against the village under N.Y. Gen. Mun. Law § 50-e(5). Bridgeview at Babylon Cove Homeowners Assn., Inc. v Incorporated Vil. of Babylon, 41 A.D.3d 404, 837 N.Y.S.2d 330, 2007 N.Y. App. Div. LEXIS 6956 (N.Y. App. Div. 2d Dep't 2007).

In an action brought in tort in which one of the defendants has properly brought a third-party action in indemnity against the City of New York, a motion by the plaintiff in the main tort action to amend the complaint to assert a new cause of action in tort against the city is denied; plaintiff has not served a notice of claim upon the city within 90 days of the date on which the underlying occurrence took place (General Municipal Law, § 50-e) and has not brought its action within one year and 90 days after said date (General Municipal Law, § 50-i) and, therefore, sections 50-e and 50-i are complete bars to the tort action against the city. While plaintiff may not have known that the city was a third-party defendant until it was too late to bring a direct tort action against the city, that factor does not fit any of the grounds under section 50-e or the recent amendments thereto, and, even if it did, section 50-e denies any such relief if the time for commencement of the action under section 50-i has long since expired. It is of no consequence that the city has not as yet answered the third-party complaint. 2999 Realty Corp. v Hallen Constr. Corp., 95 Misc. 2d 227, 406 N.Y.S.2d 951, 1978 N.Y. Misc. LEXIS 2406 (N.Y. Civ. Ct. 1978).

274. —Health of plaintiff or plaintiff's counsel

Trial court erred in denying petitioner's application for leave to serve a late notice of claim for medical malpractice and loss of consortium upon the New York City Health and Hospitals Corporation where petitioner's deceased was physically incapacitated and died during the time within which notice should have been served and where petitioner's claim for loss of consortium was not a derivative but independent claim; decedent's incapacitation and death could not be said to effect service of notice of the survivor's claim since it is rare if not unknown to try a consortium claim separately from the negligence action thereby permitting late service under the new elastic standards of Gen Mun Law § 50-e(5). Centelles v New York City Health & Hospitals Corp., 84 A.D.2d 826, 444 N.Y.S.2d 193, 1981 N.Y. App. Div. LEXIS 16050 (N.Y. App. Div. 2d Dep't 1981).

Petitioners' much greater concern with decedent's health than with commencing lawsuit established reasonable excuse for their 3 ½ -month delay in seeking leave to serve late notice of medical malpractice and wrongful death claims, given serious illness with which decedent had been diagnosed, his grim prognosis, chemotherapy and radiation treatments, alleged staph infection which caused him to again be hospitalized, and his subsequent recuperation and continued cancer treatments. Staley v Piper, 285 A.D.2d 601, 728 N.Y.S.2d 88, 2001 N.Y. App. Div. LEXIS 7590 (N.Y. App. Div. 2d Dep't 2001).

Leave was granted for filing of late notice of claim against a city under N.Y. Gen. Mun. Law § 50-e(5) even though claimant did not provide a reasonable excuse for his delay in filing after the

onset of his cold/flu symptoms and before his ultimate and different diagnosis. That was because the claimant was not to be penalized for waiting to see if his symptoms would resolve themselves, his filing was within § 50-e(5)'s discretionary period, and to not allow such claims encouraged early preemptive filings of meritless claims. Porcaro v City of New York, 20 A.D.3d 357, 799 N.Y.S.2d 450, 2005 N.Y. App. Div. LEXIS 7991 (N.Y. App. Div. 1st Dep't 2005).

The excuse for failure to make timely service, that claimant's attorney was ill for a short time prior to service, and that a clerk in the Comptroller's office stated that it was unnecessary to serve notice, are without merit. Krauss v Board of Education, 103 N.Y.S.2d 939, 199 Misc. 505, 1951 N.Y. Misc. LEXIS 1693 (N.Y. Sup. Ct. 1951).

In malpractice action against hospital, hospital's motion to dismiss claim for decedent's conscious pain and suffering based on fact that notice of claim therefor was not filed within 90 days of decedent's death would be denied where notice of claim for decedent's wrongful death was timely filed within 90 days of appointment of administrator, decedent's short hospitalization prior to death and delay in appointment of administrator made timely filing of notice impossible, and late filing of notice did not prejudice hospital since factors responsible for decedent's pain and suffering were identical to those causing wrongful death. Rivers v AT&T Technologies, Inc., 147 Misc. 2d 366, 554 N.Y.S.2d 401, 1990 N.Y. Misc. LEXIS 178 (N.Y. Sup. Ct. 1990).

275. —Plaintiff's lack of knowledge

Court properly denied petitioner's application to file late notice of claim against village where claim was premised on alleged conspiracy between village police chief and village trustee since (1) village did not possess actual knowledge of petitioner's claims within reasonable time where it first received notice of alleged conspiracy 6 months after incident, and (2) petitioner's excuse for delay, that he did not know such requirement existed, was inadequate. Andrews v Sherburne, 140 A.D.2d 790, 527 N.Y.S.2d 662, 1988 N.Y. App. Div. LEXIS 4674 (N.Y. App. Div. 3d Dep't), app. denied, 72 N.Y.2d 807, 533 N.Y.S.2d 56, 529 N.E.2d 424, 1988 N.Y. LEXIS 2538 (N.Y. 1988).

Neither lack of awareness of requirements of statute nor lack of fluency in English language is acceptable excuse justifying leave to file late notice of claim under CLS Gen Mun § 50-e. Perez v New York City Housing Authority, 156 A.D.2d 177, 548 N.Y.S.2d 222, 1989 N.Y. App. Div. LEXIS 15289 (N.Y. App. Div. 1st Dep't 1989).

Court erred in denying application for leave to file late notice of claim against school district, notwithstanding that petitioner failed to allege reason for 2-day delay, where (1) delay was caused by mistake and confused advice given to petitioner, and (2) school district and its insurer had prompt notice of accident and adequate opportunity to investigate, and there was no indication of prejudice. Ireland v Hinkle, 178 A.D.2d 823, 577 N.Y.S.2d 541, 1991 N.Y. App. Div. LEXIS 16725 (N.Y. App. Div. 3d Dep't 1991).

Court properly denied petitioners' request for leave to file late notice of claim since they did not serve notice until 13 months after claim accrued, and they merely attributed delay to their ignorance of notice of claim requirement and their failure to promptly contact attorney regarding incident. Ealey v City of New York, 204 A.D.2d 720, 612 N.Y.S.2d 445, 1994 N.Y. App. Div. LEXIS 5692 (N.Y. App. Div. 2d Dep't 1994).

Court properly denied plaintiff's motion for leave to serve late notice of claim on city since (1) her lack of fluency in English and ignorance of law were not acceptable excuses for failure to serve timely notice of claim, and (2) her alleged incapacity due to injuries sustained in accident was insufficient in absence of supporting medical evidence. Turkenitz v City of New York, 213 A.D.2d 266, 624 N.Y.S.2d 127, 1995 N.Y. App. Div. LEXIS 3008 (N.Y. App. Div. 1st Dep't 1995).

Ignorance of requirements of CLS Gen Mun § 50-e did not constitute reasonable excuse for failure to serve timely notice of claim. Dockery v Department of Hous. Preservation & Dev., 223 A.D.2d 705, 637 N.Y.S.2d 183, 1996 N.Y. App. Div. LEXIS 637 (N.Y. App. Div. 2d Dep't 1996).

Petitioner's belief that Workers' Compensation was his sole remedy for his injury prior to conferring with attorney did not constitute reasonable excuse for delay as to warrant leave to serve late notice of claim. O'Dowd v City of New York, 226 A.D.2d 642, 641 N.Y.S.2d 541, 1996 N.Y. App. Div. LEXIS 4327 (N.Y. App. Div. 2d Dep't 1996).

Petitioner's contention that she was unaware of requirements of CLS Gen Mun § 50-e was not reasonable excuse for her failure to serve timely notice of claim. Gaffney v Town of Hempstead, 226 A.D.2d 721, 641 N.Y.S.2d 709, 1996 N.Y. App. Div. LEXIS 4599 (N.Y. App. Div. 2d Dep't 1996).

Petitioners' claim that they were ignorant of law was not valid excuse for failure to serve notice of claim timely. Alper v City of New York, 228 A.D.2d 390, 644 N.Y.S.2d 623, 1996 N.Y. App. Div. LEXIS 7488 (N.Y. App. Div. 1st Dep't 1996).

Ignorance of statutory requirement for serving timely notice of claim is not acceptable excuse for delay. Salahudeen Rashad Saafir v Metro-North Commuter R.R. Co., 260 A.D.2d 462, 688 N.Y.S.2d 224, 1999 N.Y. App. Div. LEXIS 3863 (N.Y. App. Div. 2d Dep't), app. denied, 93 N.Y.2d 816, 697 N.Y.S.2d 563, 719 N.E.2d 924, 1999 N.Y. LEXIS 2802 (N.Y. 1999).

Excuse proffered by former inmate, that she was afraid of retaliation while still in jail and was unaware of 90-day requirement, was not fatal to her application for leave to serve late notice of claim alleging that she was subjected to sexual misconduct by county correction officer, where county had actual notice of incident, and there was no compelling evidence of prejudice to county respondents. Hunt v County of Madison, 261 A.D.2d 695, 690 N.Y.S.2d 154, 1999 N.Y. App. Div. LEXIS 4688 (N.Y. App. Div. 3d Dep't 1999).

Order granting a motorcycle driver leave to file a late notice of a claim against a town and county was reversed, where driver asserted that she did not file a notice of claim because she was unaware of the statutory requirement to do so; further, that a county employee was on hand to give first aid after the driver's accident on a county road and that members of the town's rescue squad might have been present to transport the injured driver to the hospital did not satisfy actual notice. Crocco v Town of New Scotland, 307 A.D.2d 516, 762 N.Y.S.2d 685, 2003 N.Y. App. Div. LEXIS 8048 (N.Y. App. Div. 3d Dep't 2003).

Order granting leave to serve a late notice of claim upon authorities was error because the authorities did not receive actual notice or acquire knowledge of the essential facts constituting the claim within 90 days after the occurrence, and respondent failed to demonstrate a reasonable excuse for his delay in commencing the proceeding; respondent's proffered excuses, that the respondent was unaware of the statutory time limit for serving a notice of claim and that an attorney whom he had previously contacted declined to take his case, were insufficient to excuse the delay. Furthermore, under the circumstances of this case, the authorities would have been prejudiced in their defense by the approximately six-month delay between the time the claim arose and the time respondent commenced the proceeding for leave to serve a late notice of claim. Matter of Groves v New York City Tr. Auth., 44 A.D.3d 856, 843 N.Y.S.2d 452, 2007 N.Y. App. Div. LEXIS 10718 (N.Y. App. Div. 2d Dep't 2007).

276. —Consulting or failing to consult counsel

Although claimant's failure to meet 90 day deadline for notice of claim is excusable where claimant does not learn of alleged cause of emotional problems within that time, further delay of 78 days, after consultation with attorney, before making motion to serve late notice of claim as inexcusable. Morgan v Elmira, 115 A.D.2d 885, 496 N.Y.S.2d 578, 1985 N.Y. App. Div. LEXIS 55251 (N.Y. App. Div. 3d Dep't 1985).

It was abuse of discretion to grant leave to file late notice of claim where plaintiff merely asserted that he did not immediately consult attorney because he assumed that pain in his hands would go away. Winter v City of Geneva, 203 A.D.2d 939, 611 N.Y.S.2d 82, 1994 N.Y. App. Div. LEXIS 4945 (N.Y. App. Div. 4th Dep't 1994), reh'g denied, app. denied, 1994 N.Y. App. Div. LEXIS 7939 (N.Y. App. Div. 4th Dep't July 1, 1994).

Court properly denied application for leave to file late notice of claim against town where petitioner did not consult with attorney

until after expiration of time period for filing of notice of claim, he did not attempt to serve notice of claim until almost 8 months after accident, and he asserted only that he did not timely consult attorney because he believed that worker's compensation was his sole remedy and that he was ignorant of possibility of recovery from town. Buddenhagen v Town of Brookhaven, 212 A.D.2d 605, 622 N.Y.S.2d 547, 1995 N.Y. App. Div. LEXIS 1454 (N.Y. App. Div. 1st Dep't 1995).

277. Miscellaneous grounds

The failure of an injured party to file a notice of claim within the period required by this section is not excused by the fact that the claimant was temporarily living away from his home on account of his health and that letters sent to him by his attorney requesting his appearance at the attorney's office were not forwarded to him because his family did not appreciate their importance, so that in spite of a "diligent effort," claimant was not found until one day after the statutory period had expired. Fabricant v New York, 298 N.Y. 818, 83 N.E.2d 862, 298 N.Y. (N.Y.S.) 818, 1949 N.Y. LEXIS 1684 (N.Y. 1949).

The trial court should have exercised its discretion to grant leave to serve a late notice of claim on a municipal sewer authority, where a timely notice of claim had been filed on the municipality by service upon the corporation counsel, where the corporation counsel was regularly engaged in representing the sewer authority, where that attorney was apprised of the essential facts constituting the claim by the original notice, where it was not unreasonable to conclude that under the circumstances the sewer authority's attorney acquired actual knowledge of the essential facts constituting the claim within a reasonable time after the incident, and where there was no prejudice to the sewer authority. Darmstedter v Buffalo Sewer Authority, 96 A.D.2d 1148, 467 N.Y.S.2d 460, 1983 N.Y. App. Div. LEXIS 19844 (N.Y. App. Div. 4th Dep't 1983).

Mistaken belief that New York City Health and Hosptials Corporation was city agency is sufficient excuse warranting late filing of claim where hospital corporation is on notice of incident from time of its occurrence and has had opportunity to conduct its own investigation. Tadros v New York City Health & Hospitals Corp., 112 A.D.2d 85, 491 N.Y.S.2d 643, 1985 N.Y. App. Div. LEXIS 56300 (N.Y. App. Div. 1st Dep't 1985).

Petitioners should have been granted leave to serve late notice of claim with respect to claimed violations by county of federal Civil Rights Act of 1871 where (1) petitioners, in their initial notice of claim, alleged claims for false arrest, false imprisonment, malicious prosecution and abuse of process, (2) permission to serve late notice of claim was sought some 4 months after Court of Appeals resolved uncertainty in law by deciding in unrelated case that notice of claim requirements of CLS Gen Mun § 50-i (as limited by CLS Gen Mun § 50-e) applied to federal civil rights actions, and (3) scope of common-law claims was sufficiently broad, and facts were sufficiently similar to federal claim, that county was not prejudiced by delay. Delzotto v County of Warren, 137 A.D.2d 950, 525 N.Y.S.2d 373, 1988 N.Y. App. Div. LEXIS 1752 (N.Y. App. Div. 3d Dep't 1988).

In personal injury action, petitioners were properly allowed to serve late notice of claim against city where they had failed to serve notice of claim because identity of police vehicle involved in accident was not discernible from police accident report on which their counsel relied. Pabon v New York City Housing Authority, 183 A.D.2d 445, 585 N.Y.S.2d 1014, 1992 N.Y. App. Div. LEXIS 6609 (N.Y. App. Div. 1st Dep't 1992).

Court properly denied petitioner's motion under CLS Gen Mun § 50-e(5) for leave to file late notice of claim against town for negligence of town engineer in delaying issuance of variance, which allegedly prevented petitioner from closing sale of her property, where only reason petitioner offered for delay was that she did not want to prejudice her chances of obtaining variance, and she failed to establish that town had actual knowledge of essential facts constituting claim. Katz v Town of Bedford, 192 A.D.2d 707, 597 N.Y.S.2d 140, 1993 N.Y. App. Div. LEXIS 4267 (N.Y. App. Div. 2d Dep't 1993).

Leave to file late notice of claim was properly denied where claim accrued on July 3, it was uncontroverted that town had no notice until it was served with petition on September 23, delay deprived town of opportunity to timely and effectively investigate incident, and thus town would be substantially prejudiced in maintaining its defense. Hilton v Town of Richland, 216 A.D.2d 921, 629 N.Y.S.2d 130, 1995 N.Y. App. Div. LEXIS 7251 (N.Y. App. Div. 4th Dep't 1995).

Petitioner's delay in filing notice of claim allegedly due to delay in obtaining copy of housing authority police investigation report was insufficient ground for leave to file late notice of claim where report was admittedly compiled shortly after accident, and petitioner failed to show when he first learned of its existence, when he first requested it, how long after his request it was received, or what difficulties, if any, were encountered in procurement process. Finneran v City of New York, 228 A.D.2d 596, 644 N.Y.S.2d 537, 1996 N.Y. App. Div. LEXIS 7203 (N.Y. App. Div. 2d Dep't 1996).

Plaintiff was not entitled to serve late notice of claim with regard to civil rights and defamation causes of action where he alleged that certain defendants illegally accessed state computer records in February 1994 and learned that plaintiff had been arrested for rape many years earlier, he claimed he first learned of identity of defendants in October 1994, and he offered no reasonable excuse for his failure to take legal action until January 1995. Gorman v Sachem Cent. Sch. Dist., 232 A.D.2d 452, 648 N.Y.S.2d 461, 1996 N.Y. App. Div. LEXIS 10167 (N.Y. App. Div. 2d Dep't 1996).

Infant was properly permitted to serve notice of claim on New York City 4 ½ years after being diagnosed with lead poisoning where City had received Health Department's nuisance abatement within month of diagnosis, tested apartment for lead almost immediately, tested twice more over next 3 years, and thus was not prejudiced by delay. Stanley v City of New York, 257 A.D.2d 497, 684 N.Y.S.2d 522, 1999 N.Y. App. Div. LEXIS 416 (N.Y. App. Div. 1st Dep't 1999).

Because a hospital possessed an infant's medical records, it had actual notice of the infant's claim and was not substantially prejudiced in maintaining a defense; since the infant provided a reasonable excuse for the delay, the infant's N.Y. Gen. Mun. Law § 50-e(5) motion for leave to serve a late notice of claim was properly granted. Matter of Corvera v Nassau County Health Care Corp., 38 A.D.3d 775, 833 N.Y.S.2d 537, 2007 N.Y. App. Div. LEXIS 3723 (N.Y. App. Div. 2d Dep't 2007).

While a driver's notice of claim was untimely under N.Y. Gen. Mun. Law § 50-e(1)(a), the trial court properly exercised its discretion in granting the driver's motion for leave to serve a late claim under § 50-e(5) since: (1) the City timely acquired actual knowledge of the essential facts underlying the claim by way of the timely notices of claim served by the passengers in the driver's vehicle, (2) the City's conclusory assertions of prejudice, based solely on the driver's delay in serving the notice of claim, were insufficient, and (3) while the driver's excuse for failing to timely serve the driver's notice of claim was insufficient, that was not fatal. Jordan v City of New York, 41 A.D.3d 658, 838 N.Y.S.2d 624, 2007 N.Y. App. Div. LEXIS 7696 (N.Y. App. Div. 2d Dep't 2007).

Order granting an insurance company leave to serve a late notice of claim on a town was error because, inter alia, the town did not receive actual notice or acquire knowledge of the essential facts of the claim asserted within 90 days after the accident or a reasonable time thereafter; the fact that the town's police department had knowledge of the accident, which occurred in a different municipality, was insufficient, and, furthermore, the police accident report and the police department call report failed to provide actual knowledge of the facts constituting the insurance company's claim that its subrogor's vehicle was damaged as a result of the town's negligence. The insurance company failed to provide any excuse for its lengthy delay in bringing the proceeding. Matter of National Grange Mut. Ins. Co. v Town of Eastchester, 48 A.D.3d 467, 851 N.Y.S.2d 632, 2008 N.Y. App. Div. LEXIS 1092 (N.Y. App. Div. 2d Dep't 2008).

Order denying a city's motion to dismiss a worker's personal injury claim and granting the worker's cross motion for leave to deem his late notice of claim timely served, nunc pro tunc, was improper because the worker's application to file a late notice of claim was itself untimely, and the worker was not entitled to rely

on a notice of claim filed by a workers' compensation carrier to avoid dismissal of his action. Angulo v City of New York, 48 A.D.3d 603, 852 N.Y.S.2d 355, 2008 N.Y. App. Div. LEXIS 1570 (N.Y. App. Div. 2d Dep't 2008).

The fact that a bill is pending before the legislature to increase the filing period under this section may not be considered as an excuse for failure to file within the required time limit. White v New York, 87 N.Y.S.2d 446, 194 Misc. 562, 1949 N.Y. Misc. LEXIS 1938 (N.Y. Sup. Ct.), app. dismissed, 276 A.D. 765, 93 N.Y.S.2d 151, 1949 N.Y. App. Div. LEXIS 3247 (N.Y. App. Div. 1949).

In order to effect "substantial justice" under CLS NYC Civil Ct Act § 1804, Small Claims Court would not dismiss pro se plaintiff's claim against defendant city as time-barred by virtue of plaintiff's late filing of notice of claim required by CLS Gen Mun § 50-e where plaintiff made reasonable attempt to accommodate law's technicalities and gave defendant sufficient notice of his allegations to enable it to promptly marshall evidence. Davis v New York, 148 Misc. 2d 422, 560 N.Y.S.2d 389, 1990 N.Y. Misc. LEXIS 474 (N.Y. Civ. Ct. 1990), overruled, Ragosto v Triborough Bridge & Tunnel Auth., 173 Misc. 2d 560, 663 N.Y.S.2d 462, 1997 N.Y. Misc. LEXIS 454 (N.Y. App. Term 1997).

Although a bus driver intentionally delayed filing a notice of claim against a city to gain a perceived strategic advantage in an underlying criminal prosecution, the driver failed to provide a reasonable excuse to support a N.Y. Gen. Mun. Law § 50-e motion for leave to serve a late notice of claim for false arrest and unlawful imprisonment. Perez v Empire Bus Co., 819 N.Y.S.2d 902, 13 Misc. 3d 535, 2006 N.Y. Misc. LEXIS 2182 (N.Y. Sup. Ct. 2006).

Because a bankruptcy trustee's bare allegation that a municipal agency created a defective condition was insufficient to establish the city's actual knowledge of the essential facts constituting the bankruptcy debtor's personal injury claim, and because it was unnecessary for the trustee to obtain Bankruptcy Court approval of counsel in order to file a notice of claim under General Municipal Law § 50-e(2), the trustee's time to file a notice of claim was not tolled; therefore, the trustee's motion for leave to serve a late notice of claim was denied. McCord v City of New York, 853 N.Y.S.2d 859, 19 Misc. 3d 544, 239 N.Y.L.J. 41, 2008 N.Y. Misc. LEXIS 918 (N.Y. Sup. Ct. 2008).

VIII. Form and Sufficiency of Notice

278. In general

The test of the sufficiency of a notice to avoid prejudice to a municipality is whether the notice sufficiently informed the municipality of the nature of the claim, and of the time when, the place where, and the manner in which the claim arose so as to enable the municipality to investigate the claim of negligence. Powell v Gates, 36 A.D.2d 220, 319 N.Y.S.2d 650, 1971 N.Y. App. Div. LEXIS 4318 (N.Y. App. Div. 4th Dep't 1971).

General negligence claim against a city with regard to a fire was not stated with requisite particularity, and was dismissed; the notice of claim failed to identify any conduct by the city, negligent or otherwise, that contributed to the occurrence of the fire at the privately operated hotel. Mollerson v City of New York, 8 A.D.3d 70, 778 N.Y.S.2d 475, 2004 N.Y. App. Div. LEXIS 7974 (N.Y. App. Div. 1st Dep't 2004).

Denial of a representative's motion to compel discovery from a transit authority was proper because the discovery demand, made 15 months after the representative's note of issue and certificate of readiness, and four years after the fatal accident, sought material relating to a theory of liability which was not set forth in the representative's N.Y. Gen. Mun. Law § 50-e(2) notice; the representative's theory would have substantially altered the claim alleged, and the transit authority was unable to conduct a timely and meaningful investigation of the merits of that theory. Manns v New York City Tr. Auth., 50 A.D.3d 860, 855 N.Y.S.2d 665, 2008 N.Y. App. Div. LEXIS 3383 (N.Y. App. Div. 2d Dep't 2008).

A summons and complaint may constitute a notice of claim under section 50-e of the General Municipal Law. Accordingly, in a second action by plaintiffs, against whom criminal charges had been brought and subsequently dropped, to recover moneys seized upon the execution of search warrants, a summons and complaint in a prior action to recover said property constituted a notice of claim within the statute even though said summons and complaint were served before the accrual of the cause of action, which accrual was dependent upon the resolution of a codefendant's appeal which was decided after the commencement of the prior action by plaintiffs. Tannuzzio v O'Brien, 104 Misc. 2d 90, 427 N.Y.S.2d 544, 1980 N.Y. Misc. LEXIS 2398 (N.Y. Sup. Ct. 1980).

In a suit brought by parents asserting defamation and discrimination against a school district and others with regard to their son, their state claims against a principal were dismissed because they failed to include the principal in their notice of claim. TC v Valley Cent. Sch. Dist., 777 F. Supp. 2d 577, 2011 U.S. Dist. LEXIS 41486 (S.D.N.Y. 2011), different results reached on reconsid., 2011 U.S. Dist. LEXIS 90260 (S.D.N.Y. June 29, 2011).

279. Name and post office address

Defendant city, as construction site general contractor, was entitled to summary judgment in personal injury action where injured worker's notice of claim contained deliberately false information as to his name and address. Brady v City of New York, 257 A.D.2d 466, 683 N.Y.S.2d 531, 1999 N.Y. App. Div. LEXIS 436 (N.Y. App. Div. 1st Dep't 1999).

Plaintiff, whose notice of claim contained deliberately false information as to his name and address, would not be heard to argue that such information did not prejudice defendant's investigation. Brady v City of New York, 257 A.D.2d 466, 683 N.Y.S.2d 531, 1999 N.Y. App. Div. LEXIS 436 (N.Y. App. Div. 1st Dep't 1999).

Notice of claim was not deficient for its failure to list address of infant plaintiff, since residence of infant is presumed to be that of parent or guardian. Elter v New York City Hous. Auth., 260 A.D.2d 232, 687 N.Y.S.2d 630, 1999 N.Y. App. Div. LEXIS 4004 (N.Y. App. Div. 1st Dep't 1999).

Municipal defendants were properly granted summary judgment where plaintiff's notice of claim contained deliberately false information identifying plaintiff as "Eva Pastrana, a/k/a Marlene Fuentes," when, in fact, only time plaintiff was ever known as "Marlene Fuentes" was when she used latter's Medicaid card to obtain coverage for surgery underlying instant action for malpractice. Pastrana v City of New York, 262 A.D.2d 53, 691 N.Y.S.2d 435, 1999 N.Y. App. Div. LEXIS 6414 (N.Y. App. Div. 1st Dep't 1999).

The court will look to the substance of the paper served and not to its label, and where a "complaint" was filed with the Transit Authority within 90 days of the accident and such complaint met all the statutory requirements of a notice or claim except that it did not set forth the plaintiff's post office address and that it was not served in duplicate, such pleading will be treated as notice of claim and plaintiff's motion for leave to serve an amended notice of claim and an amended complaint would be granted. Nagy v Rothstein, 53 Misc. 2d 367, 278 N.Y.S.2d 742, 1966 N.Y. Misc. LEXIS 1325 (N.Y. Sup. Ct. 1966).

Letter notice, which specified nature of claim against city, the time when, the place where and the manner in which the claim arose, and the injuries claimed to have been sustained, but which was not sworn to by or on behalf of claimant and did not set forth the name and post office address of claimant and his attorney, was not adequate to comply with notice requirements of General Municipal Law. Hartford Accident & Indem. Co. v Mt. Vernon, 82 Misc. 2d 919, 372 N.Y.S.2d 161, 1975 N.Y. Misc. LEXIS 2847 (N.Y. Sup. Ct. 1975).

280. Time, place, and manner of claim, generally

The test of the sufficiency of a notice to avoid prejudice to a municipality is whether the notice sufficiently informed the municipality of the nature of the claim, and of the time when, the place where, and the manner in which the claim arose so as to enable the municipality to investigate the claim of negligence. Powell v Gates, 36 A.D.2d 220, 319 N.Y.S.2d 650, 1971 N.Y. App. Div. LEXIS 4318 (N.Y. App. Div. 4th Dep't 1971).

Plaintiffs' failure to include specific date that claim arose did not render notice of claim against village jurisdictionally defective where claim was based on occurrence of electrical shocks on plaintiffs' farm from stray voltage, which is continuing wrong.

Carhart v Village of Hamilton, 190 A.D.2d 973, 594 N.Y.S.2d 358, 1993 N.Y. App. Div. LEXIS 1724 (N.Y. App. Div. 3d Dep't 1993).

Presence of single word "negligence" in notices of claim did not constitute statement of time when, place where, or manner in which plaintiffs' claim based on negligent hiring arose. Urena v City of New York, 221 A.D.2d 429, 633 N.Y.S.2d 391, 1995 N.Y. App. Div. LEXIS 12009 (N.Y. App. Div. 2d Dep't 1995).

Notice of claim, specifying that infant had been injured when "a large metal gate" fell, providing specific measurements of "gate," and situating it "in the backyard" of New York City Housing Authority-owned building, was sufficient to enable Authority to investigate merits of claim where there were no more than 15 gratings in backyard of Authority's building; thus, court improperly granted Authority's motion to dismiss complaint for failure to serve proper notice of claim, especially since Authority failed to show any prejudice resulting from description, and Authority did not exclude possibility that notice defects were remedied at CLS Gen Mun § 50-h hearing. Cruz v New York City Hous. Auth., 269 A.D.2d 108, 702 N.Y.S.2d 284, 2000 N.Y. App. Div. LEXIS 957 (N.Y. App. Div. 1st Dep't 2000).

Action against New York City Transit Authority, based on alleged negligence of bus driver in stopping bus over hole, was properly dismissed where notice of claim failed to identify route number of bus involved in accident. Raisner v City of New York, 272 A.D.2d 460, 707 N.Y.S.2d 498, 2000 N.Y. App. Div. LEXIS 5604 (N.Y. App. Div. 2d Dep't 2000).

Trial court properly denied a transit authority's motion for summary judgment in a personal injury action; the notice of claim provided by the injured party was sufficient under N.Y. Gen. Mun. Law § 50-e, as the notice enabled the authority to determine the place, time, and nature of the accident in question. Hudson v N.Y. City Transit Auth., 19 A.D.3d 648, 798 N.Y.S.2d 105, 2005 N.Y. App. Div. LEXIS 7325 (N.Y. App. Div. 2d Dep't 2005).

Because the plaintiffs' notices of claim contained no factual allegations concerning, inter alia, false arrest, detention, negligent hiring, or supervision, and did not refer to the park rangers in either their individual or official capacities, as required by N.Y. Gen. Mun. Law § 50-e(1)(a), the complaint was properly dismissed. Santoro v Town of Smithtown, 40 A.D.3d 736, 835 N.Y.S.2d 658, 2007 N.Y. App. Div. LEXIS 5894 (N.Y. App. Div. 2d Dep't 2007).

The principal purposes of a notice of claim statute are to afford the municipality an opportunity to explore claims against it, and, if deemed appropriate, to settle claims without the expense and risks of litigation; the test of the sufficiency of a notice is whether it adequately informs the municipality of the nature of the claim, and of the time when, the place where, and the manner in which the claim arose so as to enable the municipality to investigate promptly. Worrell v New York, 101 Misc. 2d 270, 420 N.Y.S.2d 994, 1979 N.Y. Misc. LEXIS 2667 (N.Y. Sup. Ct. 1979).

In a case brought by a coach against a city, seeking damages for injuries suffered because allegedly defective fencing at a baseball field caused the coach to be struck by a baseball, the court found that the coach's notice adequately set forth the location, time, and general nature of the accident, and therefore, it was legally sufficient; the inadvertent failure to reference the fence in the notice of claim did not prejudice the city. Reyes v City of New York, 835 N.Y.S.2d 852, 15 Misc. 3d 690, 2007 N.Y. Misc. LEXIS 849 (N.Y. Sup. Ct. 2007), rev'd, 51 A.D.3d 996, 858 N.Y.S.2d 760, 2008 N.Y. App. Div. LEXIS 4650 (N.Y. App. Div. 2d Dep't 2008).

281. —Manner or cause

In a personal injury action arising out of a fall on a sidewalk, the complaint was properly dismissed as against defendant City of New York, where plaintiff's notice of claim failed to describe the cause of his fall, nothing in the notice of claim provided a reasonable basis upon which the city could have adequately investigated the matter, a police aided report prepared on the date of the accident was insufficient to allow imputation of knowledge of causation to the city, and plaintiff's application to amend the notice of claim to include the manner in which the claim arose was not made until the eve of trial, nearly five years after the date of the accident. Levine v New York, 111 A.D.2d 785, 490 N.Y.S.2d 533, 1985 N.Y. App. Div. LEXIS 50037 (N.Y. App. Div. 2d Dep't 1985).

City was not entitled to summary judgment on ground that causes of action contained in complaint were not alleged in notice of claim and that amendment of notice of claim was barred by statute of limitations since notice of claim sufficiently apprised city that cause of injuries suffered by plaintiff was alleged negligence of city's agents in failing to properly supervise plaintiff's fellow inmates; thus, purpose of CLS Gen Mun § 50-e, that municipality be given opportunity to timely investigate that with which it is charged, had been satisfied. De Maio v New York, 144 A.D.2d 623, 534 N.Y.S.2d 704, 1988 N.Y. App. Div. LEXIS 12452 (N.Y. App. Div. 2d Dep't 1988).

In action against city for injuries sustained when child fell from playground apparatus in city park, plaintiffs were entitled to strike affirmative defense alleging that "notice of claim failed to state nature and substance of the alleged occurrence" where notice of claim stated that playground apparatus had improper landing surface and there were only 2 pieces of apparatus in playground. Basile v New York, 156 A.D.2d 239, 548 N.Y.S.2d 499, 1989 N.Y. App. Div. LEXIS 15515 (N.Y. App. Div. 1st Dep't 1989).

Court erroneously dismissed complaint against city on ground that notice of claim had not stated in exact language plaintiff's theory of recovery presented at trial since notice had alleged city's negligence in causing accident and had provided details of its negligence, which was sufficient to provide city with opportunity to conduct proper investigation and assess merits of claim while information was readily available. DeLeonibus v Scognamillo, 183 A.D.2d 697, 583 N.Y.S.2d 285, 1992 N.Y. App. Div. LEXIS 6760 (N.Y. App. Div. 2d Dep't 1992).

In action against city for injuries allegedly sustained as result of negligent maintenance of elevator, plaintiffs' failure to plead doctrine of res ipsa loquitur in notice of claim did not bar them from invoking doctrine at trial; thus, city was not entitled to notice of specific acts of negligence that caused elevator to mislevel. Horowitz v New York City Hous. Auth., 188 A.D.2d 392, 591 N.Y.S.2d 382, 1992 N.Y. App. Div. LEXIS 14298 (N.Y. App. Div. 1st Dep't 1992).

Supreme Court properly dismissed complaint against defendant housing authority where notice of claim alleged merely that plaintiff's fall in stairway of building owned by authority was occasioned "by reason of a defective, dangerous, wet, slippery and uneven staircase," since notice was fatally devoid of any particulars regarding location of fall in 20-story building containing 2 stairways, or nature of defective condition alleged to have precipitated fall, thus depriving defendant of opportunity to conduct proper and timely investigation. Ortiz v New York City Hous. Auth., 191 A.D.2d 177, 594 N.Y.S.2d 30, 1993 N.Y. App. Div. LEXIS 1835 (N.Y. App. Div. 1st Dep't 1993).

Notice of claim against housing authority was sufficient, even though it did not reveal that plaintiff fell when he stepped on board that was covering third step in first floor stairwell, and that stairway was poorly lit at time, since such information was supplied at statutory hearing held 5 months after accident, and police who were called to scene reported that plaintiff fell over steps being repaired. Ford v New York City Hous. Auth., 191 A.D.2d 366, 595 N.Y.S.2d 413, 1993 N.Y. App. Div. LEXIS 2838 (N.Y. App. Div. 1st Dep't 1993).

Plaintiff's notice of claim was insufficient where (1) it stated only that plaintiff "was a pedestrian at said location and was struck by an automobile due to...negligence, carelessness and recklessness of the Town...in the creation, operation and maintenance of said roadway," (2) bill of particulars failed to expand on notice, and (3) notice was silent as to causation. DiMenna v Long Island Lighting Co., 209 A.D.2d 373, 618 N.Y.S.2d 425, 1994 N.Y. App. Div. LEXIS 11020 (N.Y. App. Div. 2d Dep't 1994).

Court properly dismissed complaint for failure of notice of claim to describe manner in which accident occurred where notice of claim, complaint, and bill of particulars attributed accident to inadequate lighting, while injured plaintiff's deposition testimony established that he was injured because allegedly malfunctioning door slammed into him. Hussein v City of New York, 265 A.D.2d 302, 696 N.Y.S.2d 209, 1999 N.Y. App. Div. LEXIS 9681 (N.Y. App. Div. 2d Dep't 1999).

Notice of claim alleging that plaintiff's car went over "dip, hole, excavation, elevation, obstruction, depression in the road at the intersection of Bethpage Suite Hollow Road and Round Swamp Road," failed to describe nature of alleged defect or its location with sufficient particularity to allow town to locate it and conduct timely investigation. Wai Man Hui v Town of Oyster Bay, 267 A.D.2d 233, 699 N.Y.S.2d 485, 1999 N.Y. App. Div. LEXIS 12544 (N.Y. App. Div. 2d Dep't 1999), app. denied, 94 N.Y.2d 764, 708 N.Y.S.2d 52, 729 N.E.2d 709, 2000 N.Y. LEXIS 541 (N.Y. 2000).

Court, in granting New York City Housing Authority's summary judgment motion, erred in disregarding plaintiff's amended verified bill of particulars which, in itself, raised material fact issue sufficient to defeat Authority's showing that it had no notice of accumulation of water, even though specific explanation of reason for water accumulation was not introduced prior to that point, where notice of claim sufficiently apprized Authority of nature of claim that plaintiff had slipped on rain water which somehow entered stair well between second and third floors, and plaintiff testified at CLS Gen Mun § 50-h hearing that wet stairs after rainfall was "the usual thing in the building." David v N.Y. City Hous. Auth., 284 A.D.2d 169, 727 N.Y.S.2d 404, 2001 N.Y. App. Div. LEXIS 6144 (N.Y. App. Div. 1st Dep't 2001).

In a wrongful death action alleging medical malpractice, filed against a New York City, N.Y., public hospital, the survivor's notice of claim against the New York City Health and Hospitals Corporation was inadequate because it did not set forth the nature of its medical malpractice claim with the specificity required by N.Y. Gen. Mun. Law § 50-e(2). Jones v City of New York, 300 A.D.2d 359, 751 N.Y.S.2d 522, 2002 N.Y. App. Div. LEXIS 11929 (N.Y. App. Div. 2d Dep't 2002).

Claimant's accident report, which stated only, "right knee injured on school recess," could not have apprised the school district of his claim that it was negligent in supervising or equipping the tackle football game in which he participated. Matter of Scott v Huntington Union Free School Dist., 29 A.D.3d 1010, 816 N.Y.S.2d 165, 2006 N.Y. App. Div. LEXIS 7173 (N.Y. App. Div. 2d Dep't 2006).

As to respondents' claim that a city housing authority failed to take adequate security measures in an area where a minor child was accosted, respondents' notice of claim failed to comport with N.Y. Gen. Mun. Law § 50-e; although the notice mentioned the authority's negligence in failing to adequately light the area where the assault took place, despite the authority's prior knowledge of similar crimes in the same area, the notice did not state that the authority had inadequate security, and nothing in the notice alerted the authority that it should investigate the number and adequacy of the security personnel it employed. Monmasterio v New York City Hous. Auth., 39 A.D.3d 354, 833 N.Y.S.2d 498, 2007 N.Y. App. Div. LEXIS 4822 (N.Y. App. Div. 1st Dep't 2007).

Resident's notice of claim sufficiently apprised the town of his negligent supervision claim because the notice specified the date and time of the accident, the nature of the resident's injuries, spoke to the town's duty to supervise the dump truck's operation, and the "entrapping condition" of the tailgate, and the resident's testimony at the hearing along with the notice sufficiently enabled the town to investigate the claim, particularly so given the town's failure to show any prejudice. Barone v Town of New Scotland, 145 A.D.3d 1416, 44 N.Y.S.3d 267, 2016 N.Y. App. Div. LEXIS 8776 (N.Y. App. Div. 3d Dep't 2016).

Estate administrator failed to sufficiently plead assault and battery and negligent hiring, retention, and supervision claims against the city because the notice of claim did not contain allegations that the police assaulted the decedent, or that the city negligently hired, supervised, or retained the officers who were involved in the decedent's arrest, and the administrator's testimony at the examination could nor be used to amend the theories of liability set forth in the notice of claim. Davis v City of New York, 153 A.D.3d 658, 61 N.Y.S.3d 551, 2017 N.Y. App. Div. LEXIS 6119 (N.Y. App. Div. 2d Dep't 2017).

Negligent hiring, training and supervision claims brought by two plaintiffs against city had to be dismissed because those plaintiffs failed to provide proper notice of claim as they failed to indicate legal theories on which they now proceeded against city, and their notices of claim did not set forth any facts that in any way suggested claim for negligent hiring, training and supervision. Hargroves v City of New York, 2014 U.S. Dist. LEXIS 41661 (E.D.N.Y. Mar. 26, 2014).

282. —Location

A plaintiff's inadvertent failure to specify in a notice of claim against the city the location of the accident, which omission was in no way calculated to confuse or prevaricate, and which did not result in actual prejudice to the city did not justify dismissal of the complaint. Mayer v Du Pont Associates, Inc., 80 A.D.2d 799, 437 N.Y.S.2d 94, 1981 N.Y. App. Div. LEXIS 10599 (N.Y. App. Div. 1st Dep't 1981).

Municipal defendant that has been served with notice of claim lacking in specificity as to location of accident is nevertheless responsible for knowing location of property under its control and for reasonably applying that knowledge to supplement information contained in notice to determine precise location of accident. Lord v New York City Housing Authority, 184 A.D.2d 406, 585 N.Y.S.2d 49, 1992 N.Y. App. Div. LEXIS 8533 (N.Y. App. Div. 1st Dep't 1992).

Trial court did not err in dismissing town's motion to dismiss accident victim's complaint where the notice of claim did not set forth the exact accident location and was not properly verified in that the victim's failure to more precisely describe the accident location was made in good faith and, furthermore, the town did not demonstrate any actual prejudice. Butler v Town of Smithtown, 293 A.D.2d 696, 742 N.Y.S.2d 324, 2002 N.Y. App. Div. LEXIS 4157 (N.Y. App. Div. 2d Dep't 2002).

Because a passenger's notice of claim failed to describe the location of the incident with sufficient particularity to enable the transit authority to conduct a meaningful investigation, the claim was inadequate under N.Y. Gen. Mun. Law § 50-e(2); consequently, the authority was entitled to summary judgment in the passenger's personal injury action. DeJesus v New York City Tr. Auth., 854 N.Y.S.2d 839, 18 Misc. 3d 104, 2008 N.Y. Misc. LEXIS 536 (N.Y. App. Term 2008).

Where plaintiff sued transit authorities, alleging she was injured when the bus she was riding in either stopped short or rear-ended an automobile, the notice of claim's lack of a specific designation of the intersection or cross streets where the incident allegedly occurred did render the notice deficient, as the omission was not calculated to mislead or confuse, and the authorities did not show prejudice from the omission. Williams v MTA Bus Co., 989 N.Y.S.2d 806, 44 Misc. 3d 673, 2014 N.Y. Misc. LEXIS 2716 (N.Y. Sup. Ct. 2014), vacated, in part, 2017 N.Y. Misc. LEXIS 1354 (N.Y. Sup. Ct. Apr. 13, 2017).

283. — —Description sufficient

A notice of claim alleging that a press had been damaged as the result of the collision between the press, which was then being transported on the back of a flat-bed truck, and a bent-down metal girder hanging from an overpass on the Brooklyn-Queens Expressway near the Queens Boulevard entrance, was not defective for failing to set forth the specific location at which the accident had occurred, where there were only two overpasses on the Brooklyn-Queens Expressway in the vicinity of Queens Boulevard, each being located in extremely close proximity to the other, where the nature of the occurrence was such that the description contained in the notice enabled the city to locate the alleged defect with reasonable certainty and where no actual prejudice was demonstrated by the city. Evers v New York, 90 A.D.2d 786, 455 N.Y.S.2d 646, 1982 N.Y. App. Div. LEXIS 18997 (N.Y. App. Div. 2d Dep't 1982).

City was not entitled to dismissal of personal injury complaint against it on ground that injured party's notice of claim lacked required specificity of location, since notice of claim adequately enabled city to locate alleged defect and investigate claim where it described accident as occurring "on 162nd Street between Laburnum and Oak Avenues, in the vicinity of 4724 162nd Street, Queens, New York." Bravo v New York, 122 A.D.2d 761, 505 N.Y.S.2d 647, 1986 N.Y. App. Div. LEXIS 59286 (N.Y. App. Div. 2d Dep't 1986).

In action against city and transit authority arising from slip and fall which occurred as plaintiff disembarked from bus, notices of claim adequately described location of accident where (1)

notices stated that accident occurred "at sidewalk and curb" and "at bus stop containing a broken curb," (2) exact location of accident was brought out at statutory hearings, and (3) neither defendant indicated that it made any investigation of bus stop that was stymied by lack of specifics. Miles v New York, 173 A.D.2d 298, 569 N.Y.S.2d 691, 1991 N.Y. App. Div. LEXIS 7234 (N.Y. App. Div. 1st Dep't 1991).

Court improperly dismissed complaint for purportedly inadequate identification of accident site in notice of claim where (1) notice of claim described location of accident as empty lot used for parking between specified streets and more particularly by distance from specified landmarks, and also described accident as having been caused by manhole cover, (2) notice of claim was accompanied by 2 photographs showing manhole cover and its position in parking lot, (3) details of location of accident were reiterated at hearing, and (4) in response to further demands by city, plaintiff supplied city with 14 additional photographs, hand-drawn diagram with measurements, and results of title search which revealed that city owned location of accident. Herrera v City of New York, 211 A.D.2d 759, 622 N.Y.S.2d 524, 1995 N.Y. App. Div. LEXIS 685 (N.Y. App. Div. 2d Dep't 1995).

Notice of claim, which involved defective sidewalk, describing accident site as "the sidewalk adjacent to premises known as 160 East 8th Street, Brooklyn," set forth place where claim arose with adequate specificity where such premises was corner residence located at intersection of East 8th Street and Avenue "P," and it was later alleged in bill of particulars and established at trial that accident occurred on Avenue "P" side of premises located at 1601 East 8th Street, near tree; moreover, city did not conduct hearing under CLS Gen Mun § 50-h, there was no evidence that it conducted any investigation of accident in reliance on allegedly defective notice of claim, and plaintiff, at his examination before trial, noted direction in which he was walking, specified that he fell on part of sidewalk near tree, and pointed out accident site in photo provided by city. Halali v City of New York, 213 A.D.2d 449, 623 N.Y.S.2d 618, 1995 N.Y. App. Div. LEXIS 2712 (N.Y. App. Div. 2d Dep't 1995).

Notice of claim adequately identified site of alleged pavement defect where it stated that site was 25 feet from entrance to specified building, and 16 photographs were attached, depicting precise location, some with arrows pointing to defect. Elter v New York City Hous. Auth., 260 A.D.2d 232, 687 N.Y.S.2d 630, 1999 N.Y. App. Div. LEXIS 4004 (N.Y. App. Div. 1st Dep't 1999).

Detainee's notice of claim complied with this section as it included all information that would have enabled the City to conduct a thorough investigation to discover the identity of the individual police officers involved in the alleged incident as the detainee gave a detailed description of the time, place, and nature of the acts, and the City was not prejudiced by the failure to name the individual officers. Scott v City of New Rochelle, 986 N.Y.S.2d 819, 44 Misc. 3d 366, 2014 N.Y. Misc. LEXIS 2279 (N.Y. Sup. Ct. 2014).

284. — —Description insufficient

A notice of claim did not comply with the statute where it contained a misstatement of the place where the accident was claimed to have taken place. Moran v Yonkers, 282 A.D. 702, 122 N.Y.S.2d 60, 1953 N.Y. App. Div. LEXIS 4741 (N.Y. App. Div. 1953).

Personal injury action against city was properly dismissed where plaintiff's notice of claim merely stated that accident was caused by defective and dangerous street located at First Avenue between 105th and 106th Street in New York City, without reference to address, side of street accident occurred on, or whether accident occurred in street or on sidewalk, and where plaintiff had several opportunities to rectify inadequacies of notice of claim and did not do so. Mitchell v New York, 131 A.D.2d 313, 516 N.Y.S.2d 458, 1987 N.Y. App. Div. LEXIS 47804 (N.Y. App. Div. 1st Dep't 1987).

Notice of claim was facially insufficient where it simply stated in ambiguous terms where collision, claimed to be result of city's negligence, occurred, and failed to adequately set forth location of alleged act of negligence, as well as what act of negligence was and how it caused injuries claimed. Altmayer v New York, 149 A.D.2d 638, 540 N.Y.S.2d 459, 1989 N.Y. App. Div. LEXIS 5341 (N.Y. App. Div. 2d Dep't 1989).

Notice of claim failed to set forth place of allegedly defective sidewalk with adequate specificity claim where it merely described situs of accident as on "sidewalk located at Atlantic and Flatbush Avenues, at or near 4th Avenue." Frankfort v New York, 159 A.D.2d 680, 553 N.Y.S.2d 182, 1990 N.Y. App. Div. LEXIS 3597 (N.Y. App. Div. 2d Dep't 1990).

It was error to dismiss complaint against city on ground that notice of claim failed to sufficiently identify location of accident where notice was accompanied by 2 photographs of area in question, and by footage and compass directions to site; city investigator's choice to focus on "building line" when plaintiff's photographs portrayed defect in vicinity of street and curb was due to investigator's mistake, not insufficient notice by plaintiff. O'Keefe v New York, 181 A.D.2d 562, 582 N.Y.S.2d 88, 1992 N.Y. App. Div. LEXIS 3927 (N.Y. App. Div. 1st Dep't 1992).

Notice of claim against city was deficient as originally drawn since (1) it did not adequately specify location of slip and fall where it stated that accident occurred in front of specified premises at particular intersection, but photographic evidence showed that specified premises was large building, and (2) description of cause of accident as "partially iced over bumpy area" was ambiguous and did not make clear whether bumpiness was due to ice or sidewalk defect. Hoffman v New York Housing Auth., 187 A.D.2d 334, 589 N.Y.S.2d 475, 1992 N.Y. App. Div. LEXIS 13073 (N.Y. App. Div. 1st Dep't 1992).

Plaintiff's notice of claim, which alleged that she was injured as result of "fall on a wet substance on the subway platform at 53d Street and Lexington Avenue," failed to specify situs of accident with sufficient particularity; defect was not cured by plaintiff's reliance on police aided report, which stated only that plaintiff while running to train, "slipped on something," but failed to clarify spot on 670-foot platform on which plaintiff claimed she fell. Cappadonna v New York City Transit Auth., 187 A.D.2d 691, 590 N.Y.S.2d 274, 1992 N.Y. App. Div. LEXIS 13414 (N.Y. App. Div. 2d Dep't 1992), app. denied, 81 N.Y.2d 704, 595 N.Y.S.2d 399, 611 N.E.2d 299, 1993 N.Y. LEXIS 237 (N.Y. 1993).

Personal injury claim against New York City Transit Authority was properly dismissed for failure to comply with CLS Gen Mun § 50-e where notice of claim alleged that defendant's "negligence" caused plaintiff to "trip and fall" onto southbound 7th Avenue IRT express track at Wall Street subway station, and to be struck by train, since notice failed to identify situs of accident with sufficient particularity, and failed to alert defendant as to claimed cause of accident; moreover, neither plaintiff's testimony at hearing under CLS Gen Mun § 50-h, nor complaint, nor bill of particulars (which was served more than 1 ½ years after accident) served to sufficiently correct defective notice. Cheung v New York City Transit Auth., 208 A.D.2d 669, 618 N.Y.S.2d 44, 1994 N.Y. App. Div. LEXIS 9939 (N.Y. App. Div. 2d Dep't 1994), app. denied, 85 N.Y.2d 811, 631 N.Y.S.2d 287, 655 N.E.2d 400, 1995 N.Y. LEXIS 2098 (N.Y. 1995).

Notice of claim alleging slip and fall on ice was inadequate to meet requirements of CLS Gen Mun § 50-e(2) where notice misidentified accident site, and photographs accompanying notice contained no street signs or landmarks. Valle v New York City Hous. Auth., 224 A.D.2d 433, 637 N.Y.S.2d 757, 1996 N.Y. App. Div. LEXIS 878 (N.Y. App. Div. 2d Dep't 1996).

Notice of claim failed to comply with CLS Gen Mun § 50-e(2), because it did not identify location of accident with sufficient particularity, where it merely alleged that plaintiff sustained his injuries on campus of defendant college. Flanagan v County of Westchester, 238 A.D.2d 468, 657 N.Y.S.2d 59, 1997 N.Y. App. Div. LEXIS 4089 (N.Y. App. Div. 2d Dep't 1997).

Notice of personal injury claim against city under CLS Gen Mun § 50-e failed to describe location of alleged defect with sufficient particularity where it merely stated that accident occurred "at or about Clarkson Avenue and Rogers Avenue, Brooklyn," and neither photographs nor hearing sufficiently clarified notice of claim. Yankana v City of New York, 246 A.D.2d 645, 668 N.Y.S.2d 241, 1998 N.Y. App. Div. LEXIS 599 (N.Y. App. Div. 2d Dep't 1998).

Complaint was properly dismissed for failure to identify geographical location of accident in notice of claim where roadway defect involved was transitory in nature, plaintiffs sought to correct description of its location 4 years after accident to place 2 or 3 blocks from original location given, and photographs submitted failed to help clear up confusion. Edgehill v City of New York, 260 A.D.2d 597, 688 N.Y.S.2d 658, 1999 N.Y. App. Div. LEXIS 4284 (N.Y. App. Div. 2d Dep't 1999).

Dismissal of notice of claim against city housing authority was required where description of accident location was insufficient to allow authority to conduct proper investigation. Lee v City of New York, 266 A.D.2d 356, 698 N.Y.S.2d 154, 1999 N.Y. App. Div. LEXIS 11492 (N.Y. App. Div. 2d Dep't 1999).

Court improperly denied village's motion to dismiss complaint where notice of claim did not correctly or sufficiently describe location of accident, and village did not learn of correct location of accident until about 12 months after date of accident, when it received amended notice of claim. Ryan v County of Nassau, 271 A.D.2d 428, 705 N.Y.S.2d 398, 2000 N.Y. App. Div. LEXIS 3789 (N.Y. App. Div. 2d Dep't 2000).

Notice of claim stating that plaintiff tripped over uneven protruding boards on boardwalk in Long Beach in 100-square-foot area west of Magnolia Boulevard and opposite 220 West Broadway failed to describe place where accident occurred with sufficient particularity to enable city to conduct proper investigation and assess merits of claim, warranting dismissal of complaint. Bayer v City of Long Beach, 275 A.D.2d 433, 713 N.Y.S.2d 71, 2000 N.Y. App. Div. LEXIS 8944 (N.Y. App. Div. 2d Dep't), app. denied, 95 N.Y.2d 770, 722 N.Y.S.2d 473, 745 N.E.2d 394, 2000 N.Y. LEXIS 3923 (N.Y. 2000).

Because there was no evidence that an airport received actual notice of a shuttle bus driver's accident, including the exact location of the accident and that poor lighting was one of its causes, and because the driver's proffered excuse that the driver did not know the extent of the injuries was unpersuasive, the trial court erred in granting the driver's N.Y. Gen. Mun. Law § 50-e(5) application to file a late notice of claim. Matter of Heffelfinger v Albany Intl. Airport, 43 A.D.3d 537, 845 N.Y.S.2d 132, 2007 N.Y. App. Div. LEXIS 8829 (N.Y. App. Div. 3d Dep't 2007).

Because a plaintiff did not provide a sufficient description of the location of the door to a campus building where the plaintiff was injured, and because the county and the college demonstrated actual prejudice in their investigation and the preparation of a defense, the plaintiff's personal injury complaint was properly dismissed for failure to comply with N.Y. Gen. Mun. Law § 50-e(6). Atwater v County of Suffolk, 50 A.D.3d 713, 855 N.Y.S.2d 226, 2008 N.Y. App. Div. LEXIS 3193 (N.Y. App. Div. 2d Dep't), app. denied, 11 N.Y.3d 702, 864 N.Y.S.2d 389, 894 N.E.2d 653, 2008 N.Y. LEXIS 2555 (N.Y. 2008).

285. Amount of claimed damages

There is no requirement that a notice of claim against a municipality set forth the amount of claimed damages. Harwood v Hornell, 41 Misc. 2d 706, 246 N.Y.S.2d 222, 1964 N.Y. Misc. LEXIS 2155 (N.Y. Sup. Ct. 1964).

286. Necessity that notice be sworn to

Vehicle owner's failure to swear to his otherwise proper notice of claim against police officers, as required by N.Y. Gen. Mun. Law § 50-e(2), for return of his vehicle, could be waived by the court because it did not prejudice the officers. Smith v Scott, 294 A.D.2d 11, 740 N.Y.S.2d 425, 2002 N.Y. App. Div. LEXIS 3561 (N.Y. App. Div. 2d Dep't 2002).

In a wrongful death action alleging medical malpractice, filed against a New York City, N.Y., public hospital, the survivor's notice of claim against the New York City Health and Hospitals Corporation was inadequate because it was not verified. Jones v City of New York, 300 A.D.2d 359, 751 N.Y.S.2d 522, 2002 N.Y. App. Div. LEXIS 11929 (N.Y. App. Div. 2d Dep't 2002).

A notice of claim which is not sworn to as required by the statute for the maintenance of an action in negligence is insufficient in law. Lightboro Realty Corp. v New York, 81 N.Y.S.2d 465, 192 Misc. 947, 1948 N.Y. Misc. LEXIS 2814 (N.Y. App. Term 1948), aff'd, 275 A.D. 748, 88 N.Y.S.2d 272, 1949 N.Y. App. Div. LEXIS 4312 (N.Y. App. Div. 1949).

Letter notice, which specified nature of claim against city, the time when, the place where and the manner in which the claim arose, and the injuries claimed to have been sustained, but which was not sworn to by or on behalf of claimant and did not set forth the name and post office address of claimant and his attorney, was not adequate to comply with notice requirements of General Municipal Law. Hartford Accident & Indem. Co. v Mt. Vernon, 82 Misc. 2d 919, 372 N.Y.S.2d 161, 1975 N.Y. Misc. LEXIS 2847 (N.Y. Sup. Ct. 1975).

A paper purporting to be a notice of claim which was a letter signed by the attorney for the plaintiff, addressed to the Comptroller of the City of New York and served by ordinary mail was not in compliance with subdivision 2 which requires that the notice be sworn to and served personally or by registered mail, as required by subdivision 3 of § 50-e of the General Municipal Law. Wiegand v New York, 81 N.Y.S.2d 812, 1948 N.Y. Misc. LEXIS 2962 (N.Y. Sup. Ct.), aff'd, 273 A.D. 1025, 79 N.Y.S.2d 916, 1948 N.Y. App. Div. LEXIS 5840 (N.Y. App. Div. 1948).

287. Other requirements

City was not entitled to dismissal of complaint for failure to name known employee as defendant in notice of claim since there is no requirement for plaintiff to name any officer, appointee or employee in such notice where city is so named as party, and, in any event, city failed to show any prejudice caused by omission. Travelers Indem. Co. v Yonkers, 142 Misc. 2d 334, 537 N.Y.S.2d 429, 1988 N.Y. Misc. LEXIS 807 (N.Y. City Ct. 1988).

N. Y. Gen. Mun. Law § 50-e(1)(b) does not eliminate the need to name individual employees against whom a notice of claim is directed. White v Averill Park Cent. Sch. Dist., 195 Misc. 2d 409, 759 N.Y.S.2d 641, 2003 N.Y. Misc. LEXIS 263 (N.Y. Sup. Ct. 2003).

Trial court followed Goodwin v Pretorius, 962 N.Y.S.2d 539 (4th Dept. 2013), and held that a detainee was not required to name the individual officers, including a police lieutenant and a detective, in the notice of claim as a condition precedent to filing the state law tort claims against them. Scott v City of New Rochelle, 986 N.Y.S.2d 819, 44 Misc. 3d 366, 2014 N.Y. Misc. LEXIS 2279 (N.Y. Sup. Ct. 2014).

288. Excusable noncompliance with required form; prompt notification of defect

Where landowner promptly notified town of danger that its swamp fill operations might cause damage to landowners' property as result of subterranean percolation of waters, and that landowner would hold town accountable for such damage, and town made immediate general investigation at site, town was not prejudiced by landowners' failure to more precisely synchronize formal notice of claims with conditions gradually developing under soil of their house. Doundoulakis v Hempstead, 51 A.D.2d 302, 381 N.Y.S.2d 287, 1976 N.Y. App. Div. LEXIS 10696 (N.Y. App. Div. 2d Dep't 1976), rev'd, 42 N.Y.2d 440, 398 N.Y.S.2d 401, 368 N.E.2d 24, 1977 N.Y. LEXIS 2322 (N.Y. 1977).

Board of education was not entitled to dismissal of personal injury complaint for failure to serve proper notice of claim, even though notice of claim specified only date and time of accident and fact that plaintiff was injured at specific high school as result of negligence of board of education, where comptroller's hearing, which occurred within 4 months of accident, gave board of education sufficient information to investigate accident before any prejudice resulted since plaintiff specified at hearing that claim was for slip and fall on stairs at specified location, and plaintiff also produced 3 photographs of stairs in question. Calia v Board of Educ., 154 A.D.2d 640, 546 N.Y.S.2d 646, 1989 N.Y. App. Div. LEXIS 13759 (N.Y. App. Div. 2d Dep't 1989).

Defendant New York City Housing Authority was not entitled to summary judgment in action arising from infant plaintiff's slip and fall on rampway used to transport garbage out of defendant's building since (1) plaintiff's mental retardation, and his inability to speak, constituted acceptable excuse for his failure to offer statement with respect to conditions existing at time of accident, and (2) affidavit of plaintiff's mother, interpreting plaintiff's hand language, was sufficient. Pagan v New York City Housing Authority, 166 A.D.2d 390, 561 N.Y.S.2d 193, 1990 N.Y. App. Div. LEXIS 12976 (N.Y. App. Div. 1st Dep't 1990).

New York Transit Authority was improperly granted effective summary judgment in plaintiff's personal injury action because the trial court had discretion to allow plaintiff to correct her notice of claim under N.Y. Gen. Mun. Law § 50-e(6); the manner in which the accident occurred and the specific location of the accident were described in an administrative hearing under N.Y. Gen. Mun. Law § 50-h about three months after the accident, so the Authority was not prejudiced. Streletskaya v New York City Tr. Auth., 27 A.D.3d 640, 812 N.Y.S.2d 130, 2006 N.Y. App. Div. LEXIS 3537 (N.Y. App. Div. 2d Dep't 2006).

289. Sufficiency of particular notices

A notice of claim against a municipality failed to state with sufficient specifity the place at which the claim arose when it merely stated that it arose on the public roadway at an intersection of two city streets, since such statement was too vague to enable the city to locate the alleged defect in the road which led to the claimant's injury, and since the notice was silent regarding causation, which alone made it impossible for the city to investigate the matter; moreover, it was not an abuse of discretion to decline to disregard the claimant's defective notice, since the requisite particulars were not set forth in her bill of particulars, and since there was nothing to suggest that a report made by a police officer who aided the claimant immediately after her accident was ever filed with or otherwise brought to the attention of the appropriate city official. Caselli v New York, 105 A.D.2d 251, 483 N.Y.S.2d 401, 1984 N.Y. App. Div. LEXIS 20695 (N.Y. App. Div. 2d Dep't 1984).

Causes of action against a New York City Health and Hospitals Corporation hospital for defamation would be dismissed, where plaintiff had filed no notice of claim with respect to one cause, and where the notice for the other cause was insufficient to comply with Gen Mun Law §§ 50-e(2), 50-e(3) in that it asserted only that on a particular date, somewhere in the complex of hospital buildings, unnamed hospital employees (whose identities were known to plaintiff) made defamatory statements. Kasachkoff v New York, 107 A.D.2d 130, 485 N.Y.S.2d 992, 1985 N.Y. App. Div. LEXIS 42505 (N.Y. App. Div. 1st Dep't), app. dismissed, 65 N.Y.2d 722, 492 N.Y.S.2d 28, 481 N.E.2d 568, 1985 N.Y. LEXIS 15120 (N.Y. 1985), app. dismissed, in part, 67 N.Y.2d 645, 499 N.Y.S.2d 683, 490 N.E.2d 549, 1986 N.Y. LEXIS 16737 (N.Y. 1986), aff'd, 68 N.Y.2d 654, 505 N.Y.S.2d 67, 496 N.E.2d 226, 1986 N.Y. LEXIS 19043 (N.Y. 1986).

In medical malpractice action against New York City Health and Hospitals Corporation and individual physicians, court erred in dismissing causes of action premised on lack of informed consent on ground that they were not alleged in notice of claim, since notice of claim, which stated that defendants "committed acts and/or omissions constituting professional negligence," sufficiently apprised defendants of informed consent causes of action so as to enable them to conduct proper investigation. Goldman v New York City Health & Hosp. Corp., 186 A.D.2d 629, 588 N.Y.S.2d 412, 1992 N.Y. App. Div. LEXIS 11303 (N.Y. App. Div. 2d Dep't 1992).

Plaintiff's notice of claim was not defective in that cause of action asserting negligent training of police officer was not mentioned therein since city acknowledged that officer was acting within scope of her employment, and thus city could anticipate liability on its part for her actions if they stemmed from inadequate training. Clark v City of Ithaca, 235 A.D.2d 746, 652 N.Y.S.2d 819, 1997 N.Y. App. Div. LEXIS 322 (N.Y. App. Div. 3d Dep't 1997).

City was entitled to dismissal of personal injury action where (1) plaintiff's notice of claim, although timely, did not describe location of accident with sufficient specificity to comply with CLS Gen Mun § 50-e(2), and (2) conflicting and confusing information later offered by plaintiff as to location clearly prejudiced city by hindering its ability to conduct prompt and meaningful investigation; claims of roadway or sidewalk defects must be set forth with great specificity because of their transitory nature. Mack v City of New York, 286 A.D.2d 756, 730 N.Y.S.2d 730, 2001 N.Y. App. Div. LEXIS 8700 (N.Y. App. Div. 2d Dep't 2001).

Trial court erred in granting summary judgment pursuant to N.Y. C.P.L.R. 3212 to a transit authority in a personal injury action; the notice of claim provided to the authority by the injured party was sufficient pursuant to N.Y. Gen. Mun. Law § 50-e, as the notice enabled the authority to investigate and evaluate the merits of the claim. Bennett v N.Y. City Transit Auth., 4 A.D.3d 265, 772 N.Y.S.2d 320, 2004 N.Y. App. Div. LEXIS 1978 (N.Y. App. Div. 1st Dep't), aff'd, 3 N.Y.3d 745, 787 N.Y.S.2d 711, 821 N.E.2d 137, 2004 N.Y. LEXIS 3524 (N.Y. 2004).

Trial court properly dismissed claims of negligence and violations of 42 U.S.C.S. § 1983 by a mother and daughter arising from agency defendants' handling of the daughter's claim of abuse; the daughter was not properly named as a party in the notice of claim under N.Y. Gen. Mun. Law § 50-e, and defendants were entitled to immunity for their actions under N.Y. Soc. Serv. Law § 419 and 42 U.S.C.S. § 1983 because the action did not allege facts showing that the postremoval obligations imposed on an agency by N.Y. Fam. Ct. Act §§ 1024 and 1026 were applicable, or that defendants acted outside the scope of their employment or their conduct was ministerial so as to overcome their qualified immunity. Moore v Melesky, 14 A.D.3d 757, 788 N.Y.S.2d 679, 2005 N.Y. App. Div. LEXIS 88 (N.Y. App. Div. 3d Dep't 2005).

Although the estate representative's notices of claim regarding the wrongful death suit she was filing alleging that the city was responsible for the death of her sister during the sister's transportation from a criminal courtroom to prison were deficient because they were not properly verified, not properly served, nor sufficiently specific, she would be given a chance to replead in view of the fact that it took her so long to obtain her letters of administration in order to file her suit that she was compelled to file her complaint in the less than the 30 days she was required to give notice to the city of her claim so that the city could try and resolve it, as her complaint would have been otherwise time barred for not being filed within the two-year wrongful death statute of limitations. McKune v City of New York, 19 A.D.3d 308, 799 N.Y.S.2d 25, 2005 N.Y. App. Div. LEXIS 7254 (N.Y. App. Div. 1st Dep't 2005).

Because a school district was provided with sufficient information to conduct a meaningful examination into a student's sexual harassment claim, and because there was no evidence of bad faith by the studen or the student's parents or of prejudice to the district, the district's motion to dismiss for failure to comply with N.Y. Gen. Mun. Law § 50-e(2) was properly denied. Kim L. v Port Jervis City School Dist., 40 A.D.3d 1042, 837 N.Y.S.2d 241, 2007 N.Y. App. Div. LEXIS 6667 (N.Y. App. Div. 2d Dep't 2007).

Trial court improperly granted those branches of the cross motion of a county and a police department which were to dismiss plaintiffs' causes of action to recover damages for assault, battery, and negligent hiring, retention, and supervision because, contrary to the county's and the police department's contention, plaintiffs' notices of claim were sufficient to apprise the county and the police department of the nature of plaintiffs' claims. Blanco v County of Suffolk, 51 A.D.3d 700, 858 N.Y.S.2d 314, 2008 N.Y. App. Div. LEXIS 4195 (N.Y. App. Div. 2d Dep't 2008).

Trial court erred in denying a City's summary judgment motion in a suit arising out of surface water flowing on an owner's land allegedly due to the City's negligence in approving a nearby subdivision as the owner's notice of claim did not comply with N.Y. Gen. Mun. Law § 50-e(2) as it did not reference any acts or omissions attributable to the City, mention of the culvert system or of any type of drainage system, or mention any decision to subdivide the nearby property, and the theories of liability alleged in the complaint were not included in the owner's notice of claim; the owner failed to raise a fact issue and did not seek leave to serve a late notice of claim under § 50-e(5). Tully v City of Glen Cove, 102 A.D.3d 670, 957 N.Y.S.2d 719, 2013 N.Y. App. Div. LEXIS 63 (N.Y. App. Div. 2d Dep't), app. denied, 21 N.Y.3d 852, 965 N.Y.S.2d 790, 988 N.E.2d 528, 2013 N.Y. LEXIS 819 (N.Y. 2013).

Motion to dismiss doctors from a malpractice suit was properly denied because it was undisputed that the administratrix served a notice of claim on the county medical center in accordance with N.Y. Gen. Mun. Law § 50-e(1)(b), and there was no requirement that a plaintiff had to name individual defendants in § 50-e notice as a condition precedent to the commencement of an action against them; to the extent that Rew v. County of Niagara, 73

A.D.3d 1463 (App. Div. 2010), and Cropsey v. County of Orleans Indus. Dev. Agency, 66 A.D.3d 1361 (App. Div. 2009), held that § 50-e barred an action against individuals who had not been named in a notice of claim, where such a notice was required by law, those cases were no longer to be followed. Goodwin v Pretorius, 105 A.D.3d 207, 962 N.Y.S.2d 539, 2013 N.Y. App. Div. LEXIS 1912 (N.Y. App. Div. 4th Dep't 2013).

Contrary to the assertion by a municipality, the notice of claims filed by a group of lifeguards after they discovered video recording device in their locker room were sufficient with regard to their negligence and intentional infliction of emotional harm (IIEH) claims. Although not citing N.Y. Labor Law § 203-c with regard to the negligence action, that action was clearly based on § 203-c and the IIEH claim alleged invasion of privacy, violation of the Labor Law, and improper surveillance, and the items of damages or injuries included emotional and mental distress. Conroy v Incorporated Vil. of Freeport, 984 N.Y.S.2d 819, 43 Misc. 3d 608, 2014 N.Y. Misc. LEXIS 772 (N.Y. Sup. Ct. 2014).

Contrary to the assertion by a municipality, the notice of claims filed by a group of lifeguards after they discovered video recording device in their locker room were sufficient with regard to their negligence and intentional infliction of emotional harm (IIEH) claims. Although not citing N.Y. Labor Law § 203-c with regard to the negligence action, that action was clearly based on § 203-c and the IIEH claim alleged invasion of privacy, violation of the Labor Law, and improper surveillance, and the items of damages or injuries included emotional and mental distress. Conroy v Incorporated Vil. of Freeport, 984 N.Y.S.2d 819, 43 Misc. 3d 608, 2014 N.Y. Misc. LEXIS 772 (N.Y. Sup. Ct. 2014).

In a former inmate's suit against a city and several correctional officers, his notice of claim, which alleged violation of civil rights; battery; denial of medical care; and negligent screening, hiring, training, supervising and retaining of police officers adequately notified the municipal defendants that the inmate might bring an intentional infliction of emotional distress claim against them. Rentas v Ruffin, 816 F.3d 214, 2016 U.S. App. LEXIS 4306 (2d Cir. N.Y. 2016).

Arrestee's tort claims against police officers, asserted as pendent claims to his civil rights claim, are not dismissed, where arrestee filed notice of claim with city's Corporation Council's Law Department within 90 days after claim arose, and where notice contained all information mandated by CLS Gen Mun Law § 50e-(2) but made no mention of individual employees or claims against them, because naming individual employees is not statutorily required and would have been impossible since arrestee did not learn names until discovery, and because notice of claim put city on notice of nature of claims against its employees and notice was therefore not invalid. Messina v Mazzeo, 854 F. Supp. 116, 1994 U.S. Dist. LEXIS 7054 (E.D.N.Y. 1994).

Applicant's claims of libel and prima facie tort failed because the applicant did not meet the notice of claim requirements of N.Y. Educ. Law § 3813(2) and N.Y. Gen. Mun. Law §§ 50-e and 50-i where he did not file a notice of claim with the school board or the superintendent of schools and the district's human resources director; the applicant's age discrimination charge to the Equal Employment Opportunity Commission did not fulfill the notice of claim requirements because it did not mention the state law claims. Avgerinos v Palmyra-Macedon Cent. Sch. Dist., 690 F. Supp. 2d 115, 2010 U.S. Dist. LEXIS 11988 (W.D.N.Y. 2010).

Dismissal of several claims was not warranted based on an arrestee's alleged failure to comply with New York's Notice of Claim statute, because all of the claims in the notice of claim arose from the same underlying arrest, and defendants had sufficient notice of the claims asserted. Burbar v Inc. Vill. of Garden City, 961 F. Supp. 2d 462, 2013 U.S. Dist. LEXIS 117029 (E.D.N.Y. 2013).

Notice of claim alleging that police officers caused a decedent's death contained sufficient detail to allow the city to investigate the claim and ascertain the identities of the officers, so the failure to name the individual officers in the notice did not preclude them from being named as defendants in a subsequent lawsuit. Bah v City of New York, 2014 U.S. Dist. LEXIS 60856 (S.D.N.Y. Apr. 30, 2014).

Where plaintiff sued a town and certain of its officials for abuse of process, the court declined to dismiss the claim for failing to name the individual defendants because individuals did not have to be specifically named in the notice of claim as a condition precedent to bringing the claims. Raus v Town of Southampton, 2015 U.S. Dist. LEXIS 64513 (E.D.N.Y. May 18, 2015), aff'd, 661 Fed. Appx. 81, 2016 U.S. App. LEXIS 17208 (2d Cir. N.Y. 2016).

290. —Letters

Accident report filed with school board by school principal on day after accident on school ground and letter of representation filed by injured child's father's attorney with the board's insurance carrier one week thereafter could not be properly treated as a defective or irregular notice of claim under savings provisions of statute regarding notice of claim against a public corporation. Camarella v East Irondequoit Cent. School Board, 34 N.Y.2d 139, 356 N.Y.S.2d 553, 313 N.E.2d 29, 1974 N.Y. LEXIS 1603 (N.Y. 1974).

Letter written by parent and delivered to chairman and members of board of education, which mentioned in passing that child was assaulted in school, and which made no claim of tort liability, could not be construed either as a notice of claim or as proper service on said board under Gen Mun L § 50-e and CPLR § 311 subd 7. Santiago v Board of Education, 41 A.D.2d 616, 340 N.Y.S.2d 491, 1973 N.Y. App. Div. LEXIS 5149 (N.Y. App. Div. 1st Dep't 1973).

Letter which apparently was not intended to be notice of claim against municipality and failed to contain claim of tort liability against town and was not served on proper party within time allowed failed to comply with notice-of-claim statute, and relief against deficiencies in the alleged notice was properly denied. Skurski v Kreiger, 54 A.D.2d 601, 387 N.Y.S.2d 321, 1976 N.Y. App. Div. LEXIS 13989 (N.Y. App. Div. 4th Dep't 1976).

A replevin action against a deputy Chief Property Clerk of a county was properly dismissed where plaintiff relied upon a letter from his attorney to the District Attorney demanding return of the subject property to fulfill his obligations under Gen Mun Law §§ 50-e, 50-i, where the record did not indicate that the correspondence was intended as a notice of claim and did not satisfy the statutory requirements for such notices. Pretino v Wolbern, 84 A.D.2d 830, 444 N.Y.S.2d 190, 1981 N.Y. App. Div. LEXIS 16060 (N.Y. App. Div. 2d Dep't 1981).

A personal injury action against a village, based on injuries sustained by plaintiff when his vehicle collided with a village-owned vehicle that was being operated by a village employee, was properly dismissed by the trial court based on plaintiff's failure to comply with Gen Mun Law §§ 50-e, 50-i, where the unverified retainer letter that had been sent by plaintiff's attorney to the village, in which the attorney advised the village that his firm had been hired by plaintiff to prosecute his claim and requested that the village forward the letter to its insurance carrier so that the attorney might take up the matter with the carrier directly, neither stated the manner in which the alleged injuries had been sustained nor delineated the exact time and location of the occurrence, failed to identify one of the injured claimants, failed to furnish the postal addresses of either plaintiff or the other claimant, and failed to properly set forth the items of damage or the injuries claimed, where plaintiffs had made no attempt to serve a formal notice of claim within the statutory ninety-day period prescribed by Gen Mun Law § 50-e(1), and where plaintiffs failed to make any application for an order permitting service of a late notice of claim on the village within one year and ninety days of the accident pursuant to Gen Mun Law § 50-e(5). Gass v Hahn, 98 A.D.2d 741, 469 N.Y.S.2d 445, 1983 N.Y. App. Div. LEXIS 21052 (N.Y. App. Div. 2d Dep't 1983).

No-fault claim form completed by plaintiff and sent to defendant bus company, together with correspondence from attorney directed to defendant's claim department, constituted in aggregate sufficient notice of claim to county within meaning of CLS Gen Mun § 50-e. Miller v Liberty Lines, 208 A.D.2d 454, 617 N.Y.S.2d 471, 1994 N.Y. App. Div. LEXIS 10464 (N.Y. App. Div. 1st Dep't 1994).

Defendant transit corporation was not entitled to dismissal of personal injury complaint on ground that plaintiff failed to file timely notice of claim because where (1) plaintiff sent letter to

defendant's counsel at defendant's direction, reporting incident, (2) plaintiff filed no-fault application with defendant's claims administrator, and (3) driver of bus involved in accident submitted written and oral reports respecting incident to defendant. Santiago v Liberty Lines Transit, Inc., 259 A.D.2d 362, 687 N.Y.S.2d 57, 1999 N.Y. App. Div. LEXIS 2791 (N.Y. App. Div. 1st Dep't 1999).

The letter of the husband of a claimant who fell on a village sidewalk to a representative of the insurance company which covered the village does not constitute a notice of claim in compliance with the requirements of § 50-e. Application of Albiston, 114 N.Y.S.2d 579, 202 Misc. 973, 1952 N.Y. Misc. LEXIS 2939 (N.Y. Sup. Ct. 1952).

Although it was not verified, a letter constituted substantial compliance with the notice requirements because it contained a sufficient degree of descriptive detail, was adequately served upon the governing body, and was timely delivered. Berkowitz v E. Ramapo Cent. Sch. Dist., 932 F. Supp. 2d 513, 2013 U.S. Dist. LEXIS 39664 (S.D.N.Y. 2013).

291. —Adequacy of service

In a wrongful death action alleging medical malpractice, filed against a New York City, N.Y., public hospital, the survivor's notice of claim against the New York City Health and Hospitals Corporation was inadequate because it was not served personally, or by registered or certified mail, as required by N.Y. Gen. Mun. Law § 50-e(3), and the corporation denied receipt of it. Jones v City of New York, 300 A.D.2d 359, 751 N.Y.S.2d 522, 2002 N.Y. App. Div. LEXIS 11929 (N.Y. App. Div. 2d Dep't 2002).

Trial court erred in denying an injured party's motion to deem a notice of claim on a county as properly served; the county was a necessary party to the action, and although the original notice was not served on the proper person pursuant to N.Y. C.P.L.R. 311(a)(4), N.Y. Gen. Mun. Law § 50-e(3)(a), the original notice was actually received by a proper person, the county's counsel, in a timely fashion pursuant to N.Y. Gen. Mun. Law § 50-e(3)(a), (c). Santiago v Santana, 8 A.D.3d 650, 779 N.Y.S.2d 554, 2004 N.Y. App. Div. LEXIS 9140 (N.Y. App. Div. 2d Dep't 2004).

292. Variance of notice and complaint

Arrestee's general claims for violations of civil rights and intentional infliction of emotional distress were insufficient to alert a city as to his claim for false arrest and imprisonment and malicious prosecution, nor was the arrestee's N.Y. Gen. Mun. Law § 50-h hearing testimony sufficient to provide the required notice; the arrestee's claims against the city therefore should have been dismissed. Batista v City of New York, 15 A.D.3d 304, 790 N.Y.S.2d 445, 2005 N.Y. App. Div. LEXIS 1929 (N.Y. App. Div. 1st Dep't 2005).

Pursuant to N.Y. Gen. Mun. Law § 50-e(2) the trial court should have granted a city's motion to dismiss because an arrestee's notice of claim failed to allege the negligence and civil rights violations (under 42 U.S.C.S. § 1983 by the city and police officers regarding the deprivation of medical treatment during police custody) that were in the arrestee's complaint. Vargas v City of New York, 105 A.D.3d 834, 963 N.Y.S.2d 278, 2013 N.Y. App. Div. LEXIS 2333 (N.Y. App. Div. 2d Dep't 2013), app. dismissed, 24 N.Y.3d 1081, 25 N.E.3d 985, 2 N.Y.S.3d 70, 2014 N.Y. LEXIS 3816 (N.Y. 2014).

In action by pro se plaintiff who allegedly suffered emotional distress due to bus driver's offensive and racist comments, transit authority was not entitled to dismissal of complaint on ground that notice of claim alleged violations of state and federal civil rights while complaint alleged tortious conduct, where transit authority had ample information and opportunity to investigate claim. Williams v N.Y. City Transit Auth., 188 Misc. 2d 18, 724 N.Y.S.2d 830, 2001 N.Y. Misc. LEXIS 122 (N.Y. Civ. Ct. 2001).

IX. Claims Based On Street Or Similar Defects

293. In general

Prior-notice laws refer to physical defects such as holes and cracks, not to the failure to maintain or erect traffic signs; accordingly, plaintiff's action against defendant city for injuries sustained in a traffic accident at an intersection at which there was no stop sign was not barred, even though plaintiff did not prove that notice of the nonexistent stop sign was ever given to the city. Alexander v Eldred, 63 N.Y.2d 460, 483 N.Y.S.2d 168, 472 N.E.2d 996, 1984 N.Y. LEXIS 4679 (N.Y. 1984).

Plaintiff, who was injured when he fell on defective concrete stairway leading from sidewalk to municipal park, was required to give prior written notice of defective condition as prerequisite to lawsuit against city pursuant to NYC Admin Code § 7-201(c)(2) and CLS Gen Mun § 50-e(4) where administrative code reasonably defined sidewalk as including stairs when integrated with or serving as part of connected standard sidewalk. Woodson v City of New York, 93 N.Y.2d 936, 693 N.Y.S.2d 69, 715 N.E.2d 96, 1999 N.Y. LEXIS 1214 (N.Y. 1999).

Section 50-e of the General Municipal Law allows municipalities to require notice of an unsafe condition as a condition precedent to a suit for damages caused thereby only with regard to a street, highway, bridge, culvert, sidewalk or crosswalk. Zumbo v Farmington, 60 A.D.2d 350, 401 N.Y.S.2d 121, 1978 N.Y. App. Div. LEXIS 9680 (N.Y. App. Div. 4th Dep't 1978).

Municipal parking lot is "highway" for purposes of CLS Gen Mun § 50-e(4). Lauria v City of New Rochelle, 225 A.D.2d 1013, 639 N.Y.S.2d 867, 1996 N.Y. App. Div. LEXIS 2760 (N.Y. App. Div. 3d Dep't 1996).

Dismissal of complaint at completion of plaintiff's opening statement was proper where plaintiff's counsel, in that statement, admitted that there had been no compliance with "Pothole Law" in NYC Admin Code § 7-201(c)(2) and failed to propose that he would prove at trial that exception to prior written notice requirement existed in case. Sewell v City of New York, 238 A.D.2d 331, 656 N.Y.S.2d 916, 1997 N.Y. App. Div. LEXIS 3400 (N.Y. App. Div. 2d Dep't 1997).

Although open and obvious, accumulation of debris on sidewalk was "obstructed condition" of sidewalk requiring prior written notice to city under NYC Admin Code § 7-201(c)(2) where there was no reason not to construe that language according to its literal meaning. Almodovar by Guzman v City of New York, 240 A.D.2d 523, 658 N.Y.S.2d 446, 1997 N.Y. App. Div. LEXIS 6615 (N.Y. App. Div. 2d Dep't 1997).

NYC Admin Code § 7-201(c)(2), known as "Pothole Law," cannot serve as predicate for action under CLS Gen Mun § 205-e, because § 7-201(c)(2) does not impose on city affirmative duty to repair. Jackson v City of New York, 240 A.D.2d 708, 659 N.Y.S.2d 321, 1997 N.Y. App. Div. LEXIS 7106 (N.Y. App. Div. 2d Dep't 1997).

Defendant town was entitled to summary judgment in personal injury action where it did not, under CLS Town § 65-a(1) and town's code, receive prior written notice of any roadway defect in area of accident, and plaintiff failed to submit competent evidence that town affirmatively created defect. Gillan v Town of Clarkstown, 251 A.D.2d 287, 671 N.Y.S.2d 1023, 1998 N.Y. App. Div. LEXIS 6310 (N.Y. App. Div. 2d Dep't 1998).

City was entitled to dismissal of personal injury action where (1) plaintiff's notice of claim, although timely, did not describe location of accident with sufficient specificity to comply with CLS Gen Mun § 50-e(2), and (2) conflicting and confusing information later offered by plaintiff as to location clearly prejudiced city by hindering its ability to conduct prompt and meaningful investigation; claims of roadway or sidewalk defects must be set forth with great specificity because of their transitory nature. Mack v City of New York, 286 A.D.2d 756, 730 N.Y.S.2d 730, 2001 N.Y. App. Div. LEXIS 8700 (N.Y. App. Div. 2d Dep't 2001).

Compliance with notice of claim requirements (General Municipal Law, § 50-e) is a condition precedent to a claim against a municipality; while a notice of claim which alleges that plaintiff tripped over a raised sidewalk slab between "24th Street and Crescent Street in Astoria, New York", is defective for not sufficiently describing "the place where" the claim arose (General Municipal Law, § 50-e, subd 2) since the municipality is entitled to more particularity where the claim involves a defective sidewalk in order to enable it to locate the particular defective sidewalk said to have caused the accident, the defect will be disregarded since the city took a photograph of the sidewalk along where it was claimed plaintiff fell and was, therefore, not prejudiced by plaintiff's failure to have more specifically set forth the location of the defect; the Civil Court of the City of New York has jurisdiction to disregard the defect since relief from a defective

notice of claim may be sought "at any stage of an action", necessarily permitting any court in which the action is pending to grant such relief (General Municipal Law, § 50-e, subd 6), while the requirement that other applications under section 50-e be made only in the Supreme Court or the County Court (General Municipal Law, § 50-e, subd 7) applies to applications for leave to serve a late notice of claim. Maiello v New York, 103 Misc. 2d 1064, 427 N.Y.S.2d 381, 1980 N.Y. Misc. LEXIS 2255 (N.Y. Civ. Ct. 1980), aff'd, 113 Misc. 2d 122, 450 N.Y.S.2d 932, 1981 N.Y. Misc. LEXIS 3462 (N.Y. App. Term 1981).

This section does not purport to supersede or supplant other laws dealing with municipal liability for street, highway, and sidewalk defects and snow or ice hazards, and it expressly provides that giving of notice of claim hereunder does not dispense with necessity for prior notice of such defects and dangers as a condition to liability for damage or injury sustained; therefore, a complaint for damages arising out of such situations, where there is a statute requiring prior notice of the hazard on the part of the municipality, is nonetheless subject to dismissal because it alleges due compliance with this section, if it fails to allege compliance with the prior-to-accident notice requirements, or that they had been duly met. Levine v Glen Cove, 111 N.Y.S.2d 882, 1952 N.Y. Misc. LEXIS 2582 (N.Y. Sup. Ct. 1952); Weingarten v Long Beach, 154 N.Y.S.2d 101 (N.Y. City Ct. 1956).

However, most of the street defect statutes are construed as not making notice of the defect or hazard in advance of injury sustained a condition precedent to municipal liability if the street condition giving rise to the damage was due to some affirmative act, or to "affirmative negligence," of the municipality. Hence service of notice of claim, pursuant to this section, after injury sustained, is sufficient to sustain a right of action, if the claim is asserted in such manner as to bring it within this line of authority. Smith v Corning, 14 A.D.2d 27, 217 N.Y.S.2d 149, 1961 N.Y. App. Div. LEXIS 9699 (N.Y. App. Div. 4th Dep't 1961); Dryburgh v Rye, 210 N.Y.S.2d 183, 1958 N.Y. Misc. LEXIS 4122 (N.Y. Sup. Ct. 1958).

Before an action may be maintained against a village for damages occasioned by defects in a village street, highway, sidewalk, etc., the village must have had notice of such defects prior to the accident giving use to such damages. A notice of claim must also be served in order to maintain an action against the village. 1969 Ops St Compt File #96.

294. What constitutes notice of defects

A notice of claim against a municipality failed to state with sufficient specifity the place at which the claim arose when it merely stated that it arose on the public roadway at an intersection of two city streets, since such statement was too vague to enable the city to locate the alleged defect in the road which led to the claimant's injury, and since the notice was silent regarding causation, which alone made it impossible for the city to investigate the matter; moreover, it was not an abuse of discretion to decline to disregard the claimant's defective notice, since the requisite particulars were not set forth in her bill of particulars, and since there was nothing to suggest that a report made by a police officer who aided the claimant immediately after her accident was ever filed with or otherwise brought to the attention of the appropriate city official. Caselli v New York, 105 A.D.2d 251, 483 N.Y.S.2d 401, 1984 N.Y. App. Div. LEXIS 20695 (N.Y. App. Div. 2d Dep't 1984).

In action to recover damages for personal injuries sustained as result of allegedly defective condition in street, amendment of defective notice of claim will be denied where original notice was insufficient with respect to setting forth place and manner in which claim arose, thereby prejudicing city by depriving it of opportunity to conduct prompt and adequate investigation. Mazza v New York, 112 A.D.2d 921, 492 N.Y.S.2d 438, 1985 N.Y. App. Div. LEXIS 52134 (N.Y. App. Div. 2d Dep't 1985).

Court erred in denying city's motion for summary judgment dismissing complaint where plaintiff submitted no evidence to show that prior complaint of "low spot" in road in front of specific address, which condition city asserted was repaired same day, referred to crumbling and broken condition of curb or curb cut that allegedly caused her to fall 5 years later. McCauliffe v City of Syracuse, 221 A.D.2d 946, 635 N.Y.S.2d 558, 1995 N.Y. App. Div. LEXIS 13433 (N.Y. App. Div. 4th Dep't 1995).

Personal injury action against city was properly dismissed where most recent "Big Apple" map, on file with New York City Department of Transportation, did not show defect at location of plaintiff's fall. Civello v City of New York, 255 A.D.2d 353, 679 N.Y.S.2d 843, 1998 N.Y. App. Div. LEXIS 11815 (N.Y. App. Div. 2d Dep't 1998).

City did not acquire actual knowledge of the essential facts constituting a pedestrian's claim within 90 days of the accident or a reasonable time thereafter because while the city had prior knowledge of the crosswalk defect, actual knowledge of the defect was not tantamount to actual knowledge of the facts constituting the claim, since the city was not aware of the pedestrian's accident, her injuries, and the facts underlying her theory of liability. Matter of Bermudez v City of New York, 167 A.D.3d 733, 89 N.Y.S.3d 289, 2018 N.Y. App. Div. LEXIS 8474 (N.Y. App. Div. 2d Dep't 2018).

Although subd 4 of this section provides that service of notice of claim does not dispense with notice of defect whenever same is required, it is not to be interpreted as meaning that a notice of claim served upon a municipality for a prior accident cannot serve as written notice of a defect, such as a sidewalk defect, if, in fact, it concerned the same defective condition. Boyd v Keeseville, 24 Misc. 2d 33, 202 N.Y.S.2d 637, 1960 N.Y. Misc. LEXIS 2816 (N.Y. Sup. Ct. 1960), aff'd, 14 A.D.2d 446, 221 N.Y.S.2d 755, 1961 N.Y. App. Div. LEXIS 7347 (N.Y. App. Div. 3d Dep't 1961).

Notices of claim filed under CLS Gen Mun § 50-e constitute notices of defect under Pothole Law (NYC Admin Code § 7-201(c)) and CLS Gen Mun § 50-g. Shatzkamer v Eskind, 139 Misc. 2d 672, 528 N.Y.S.2d 968, 1988 N.Y. Misc. LEXIS 230 (N.Y. Civ. Ct. 1988), rev'd, 34 Misc. 3d 154(A), 1989 N.Y. Misc. LEXIS 925 (N.Y. App. Term 1989).

295. Sidewalk injury

In a personal injury action against the City of New York, in which no notice of claim was served on the city within the 90-day period prescribed by Gen Mun Law § 50-e, there was an ample basis upon which to conclude that the city's defense of the action had been substantially compromised by the delay, and thus it was not an abuse of discretion to deny plaintiffs' application for leave to file a late notice, where the city received no notice of the accident, which was not reported to the police, until one year and 87 days after its occurrence, and where the complaint alleged that the city's liability was predicated upon a defective sidewalk upon which plaintiff had fallen, and upon a dangerous condition created by the combined accumulation of snow and ice, which the city had no occasion to investigate until nearly one year after the time period for serving a notice of claim had run. Zarrello v New York, 61 N.Y.2d 628, 471 N.Y.S.2d 846, 459 N.E.2d 1284, 1983 N.Y. LEXIS 3628 (N.Y. 1983).

Constructive notice of sidewalk defect did not satisfy statutory requirement of written notice to municipality, warranting summary judgment in favor of defendant municipality. Amabile v City of Buffalo, 93 N.Y.2d 471, 693 N.Y.S.2d 77, 715 N.E.2d 104, 1999 N.Y. LEXIS 1300 (N.Y. 1999).

Notice of claim, which alleged that plaintiff tripped on broken portion of sidewalk and curb and identified accident site with particularity, was not rendered defective by fact that plaintiff circled defective curb but not adjacent sidewalk on each of 3 photographs depicting location where he fell; thus, Appellate Division erred in affirming trial court's dismissal of complaint, after jury specifically found that plaintiff fell on sidewalk before reaching curb, on ground that notice of claim did not notify city of location of injury-causing defect. Brown v City of New York, 95 N.Y.2d 389, 718 N.Y.S.2d 4, 740 N.E.2d 1078, 2000 N.Y. LEXIS 3505 (N.Y. 2000).

In an action for injuries sustained when, upon alighting from a bus, plaintiff was injured when her foot went into a broken curb of a sidewalk causing her to fall, and the proof was undisputed that the city had actual notice of the defective condition and ample time to remedy it, the issue of notice should not have been submitted to the jury and the refusal of the trial court to charge, as requested, that as a matter of law the city had actual and

constructive notice of the condition where plaintiff fell constituted prejudicial error requiring a new trial. Schlam v New York, 33 A.D.2d 1025, 308 N.Y.S.2d 122, 1970 N.Y. App. Div. LEXIS 5624 (N.Y. App. Div. 2d Dep't 1970).

In a personal injury action arising out of a fall on a sidewalk, the complaint was properly dismissed as against defendant City of New York, where plaintiff's notice of claim failed to describe the cause of his fall, nothing in the notice of claim provided a reasonable basis upon which the city could have adequately investigated the matter, a police aided report prepared on the date of the accident was insufficient to allow imputation of knowledge of causation to the city, and plaintiff's application to amend the notice of claim to include the manner in which the claim arose was not made until the eve of trial, nearly five years after the date of the accident. Levine v New York, 111 A.D.2d 785, 490 N.Y.S.2d 533, 1985 N.Y. App. Div. LEXIS 50037 (N.Y. App. Div. 2d Dep't 1985).

Pedestrian's motion to amend her notice of claim against city was properly denied, even though her timely notice was in error in designating intersecting streets nearest to defect within municipal parking lot, where 16 months passed between accident and motion to amend, and pedestrian made no effort to show that condition of defect remained unchanged; because of their transitory nature, claims of sidewalk defects must be set forth with greater specificity than cases involving defects that do not change over time. Fendig v New York, 132 A.D.2d 520, 517 N.Y.S.2d 536, 1987 N.Y. App. Div. LEXIS 49050 (N.Y. App. Div. 2d Dep't 1987).

Pedestrian complied with notice requirements of CLS Gen Mun § 50-e as to location of fall on city sidewalk where (1) on supplemental claim form, she indicated that accident occurred at "217-233 E. 70th St. in front of Post Office" and "closer to 2nd Ave. side of street," and (2) she attached 13 photographs showing uneven condition of sidewalk and various points of reference on facade of post office. Glekel v New York, 151 A.D.2d 231, 541 N.Y.S.2d 815, 1989 N.Y. App. Div. LEXIS 7134 (N.Y. App. Div. 1st Dep't 1989).

City housing authority was entitled to dismissal of complaint for failure to comply with CLS Gen Mun § 50-e where (1) plaintiff was resident of building with 2 entrances, one designated as 353 E. 141st St. and other designated as 355 E. 141st St., (2) plaintiff alleged that she broke her arm when she tripped on hole in sidewalk outside entrance to 355, (3) accident report prepared for housing authority designated site of accident as entrance to 353 and notice of claim contained same erroneous designation, (4) agent of housing authority investigated entrance to 353 and found no defect, and (5) error was corrected by plaintiff for first time at deposition which occurred 4 ½ years after accident; although misdesignation appeared to be inadvertent, housing authority was prejudiced by inability to investigate transitory defect. Wilson v New York City Hous. Auth., 187 A.D.2d 260, 589 N.Y.S.2d 425, 1992 N.Y. App. Div. LEXIS 12571 (N.Y. App. Div. 1st Dep't 1992), app. denied, 81 N.Y.2d 704, 595 N.Y.S.2d 398, 611 N.E.2d 299, 1993 N.Y. LEXIS 235 (N.Y. 1993).

Prejudice to city was proper basis to deny plaintiff's motion to amend notice of claim to provide correct location of defective sidewalk, where city had examined and photographed incorrect site soon after receiving notice of claim and did not learn correct location until 5 years later at plaintiff's deposition, plaintiff did not move for leave to amend her notice of claim until 3 years after deposition, and mere filing of police report did not provide sufficient basis for imputing knowledge of correct accident site to city. Lopez v City of New York, 287 A.D.2d 694, 732 N.Y.S.2d 81, 2001 N.Y. App. Div. LEXIS 10033 (N.Y. App. Div. 2d Dep't 2001).

Pedestrian was not entitled to amend his notice of claim to allege he slipped and fell on snow and ice on sidewalk adjacent to the housing authority's property because the pedestrian's original notice of claim stated that his fall resulted from a jagged and uneven sidewalk and the proposed amendment constituted a substantive change in the theory of liability; the pedestrian did not seek leave to serve a late notice of claim within 1 year and 90 days of the date that his claim accrued. Robinson v City of New York, 138 A.D.3d 1093, 30 N.Y.S.3d 311, 2016 N.Y. App. Div. LEXIS 3036 (N.Y. App. Div. 2d Dep't 2016).

Notice of claim served on city was sufficiently specific to inform city of location of incident where it stated that claimant fell on sidewalk on south side of named street between 2 other named cross streets, and further stated that fall was caused by bent metal post cemented into sidewalk adjoining particular building; claimant was not required to give metes and bounds description. Lurie v New York City Office of Comptroller, 154 Misc. 2d 950, 587 N.Y.S.2d 831, 1992 N.Y. Misc. LEXIS 348 (N.Y. Civ. Ct. 1992).

296. Snow or ice condition

See Zarrello v New York, 61 N.Y.2d 628, 471 N.Y.S.2d 846, 459 N.E.2d 1284, 1983 N.Y. LEXIS 3628 (N.Y. 1983).

Where evidence was that on January 19, and 20 a precipitation of snow of from 8 to 10 inches occurred and that on January 23 and 24 an additional snowfall of 1 to 2.2 inches occurred and the female plaintiff was injured on a pathway of snow and ice on a city sidewalk on January 26, it was for the jury to decide (a) whether the female plaintiff fell as a consequence of the first or second snowfall or as a result of the accumulation of both storms; (b) whether a 6-day or a 47-hour lapse of time had occurred from the end of the causal precipitation; (c) whether the city was faced with a usual or unusual snowfall; and (d) whether, if confronted by an ordinary situation of winter weather in the locality, the city had acted as a prudent and careful municipality in clearing the precipitation. Laufer v New York, 33 A.D.2d 1038, 308 N.Y.S.2d 795, 1970 N.Y. App. Div. LEXIS 5513 (N.Y. App. Div. 2d Dep't 1970).

County was entitled to summary judgment dismissing action for injuries sustained in motor vehicle accident allegedly caused by icy conditions on road where it was undisputed that no prior written notice of defect was received by county, plaintiffs failed to establish constructive notice of road condition, either by reports of prior accidents at same site or by unsworn statement of tow truck operator as to tow calls from site, since there was no information as to cause of alleged prior accidents or as to similarities of those accidents with instant accident. Buccellato v County of Nassau, 158 A.D.2d 440, 550 N.Y.S.2d 906, 1990 N.Y. App. Div. LEXIS 1288 (N.Y. App. Div. 2d Dep't), app. denied, 76 N.Y.2d 703, 559 N.Y.S.2d 982, 559 N.E.2d 676, 1990 N.Y. LEXIS 1387 (N.Y. 1990).

Court properly dismissed action against county based on its alleged failure to sand and salt icy roadway, notwithstanding plaintiff's contention that county was on constructive notice of need for sand and salt by virtue of existing weather conditions, and that county had received actual notice of roadway's icy condition, since plaintiff failed to allege compliance with county law requiring prior written notice of highway defect involving snow or ice; further, failure to sand roadway is insufficient to establish type of affirmative negligence required to excuse noncompliance with notice requirement. Lang v County of Sullivan, 184 A.D.2d 981, 585 N.Y.S.2d 609, 1992 N.Y. App. Div. LEXIS 8546 (N.Y. App. Div. 3d Dep't 1992).

Since snow and ice are conditions which change with passage of time, they should be set forth in notice of claim with even greater specificity than conditions which do not change over time; thus, notice of claim against city for injuries sustained by plaintiff when she fell on snow and ice on sidewalk, which merely recited that "[p]laintiff was caused to fall on the sidewalk," was insufficient under CLS Gen Mun § 50-e, even if city's ability to conduct physical examination of location where accident occurred was unaffected by plaintiff's failure to mention snow and ice in notice, in that those conditions had undoubtedly changed by time notice was served, since such failure (1) prejudiced city in maintaining its defense that accident occurred before it had reasonable amount of time to shovel sidewalk, and deprived city of opportunity to interview witnesses in timely manner about whether any nearby homeowners had shoveled sidewalk. Aviles v City of New York, 202 A.D.2d 530, 609 N.Y.S.2d 85, 1994 N.Y. App. Div. LEXIS 2638 (N.Y. App. Div. 2d Dep't 1994), app. denied, 84 N.Y.2d 813, 623 N.Y.S.2d 181, 647 N.E.2d 453, 1995 N.Y. LEXIS 69 (N.Y. 1995).

Notice of claim alleging slip and fall on ice was inadequate to meet requirements of CLS Gen Mun § 50-e(2) where notice misidentified accident site, and photographs accompanying notice contained no street signs or landmarks. Valle v New York City

Hous. Auth., 224 A.D.2d 433, 637 N.Y.S.2d 757, 1996 N.Y. App. Div. LEXIS 878 (N.Y. App. Div. 2d Dep't 1996).

Town was entitled to summary judgment dismissing personal injury action by plaintiff who allegedly slipped and fell on snow and ice in unidentified portion of town parking lot, where notice of claim merely described site of accident as parking lot "east of Route 107 between E. Nicholai Street and E. Marie Street." Markotsis v Town of Oyster Bay, 261 A.D.2d 451, 690 N.Y.S.2d 104, 1999 N.Y. App. Div. LEXIS 4738 (N.Y. App. Div. 2d Dep't 1999).

City was entitled to summary judgment dismissing action for slip and fall on its icy sidewalk where precipitation ended on morning preceding accident, and there were subfreezing temperatures on that day 2 preceding days. Saitta v City of New York, 281 A.D.2d 333, 722 N.Y.S.2d 522, 2001 N.Y. App. Div. LEXIS 3222 (N.Y. App. Div. 1st Dep't 2001).

Where in a personal injury action against the county pursuant to the victim's slip and fall accident, the victim's husband testified that the victim fell approximately 30 yards from a stop sign governing traffic leaving a parking lot operated by the county, the evidence sufficiently identified the location of the accident; however, the action was dismissed as the county submitted proof that no prior written notice of any icy condition on any of the paths located at the subject area had been filed in an appropriate office prior to the date of the accident. Rutto v County of Westchester, 298 A.D.2d 450, 748 N.Y.S.2d 172, 2002 N.Y. App. Div. LEXIS 9867 (N.Y. App. Div. 2d Dep't 2002).

297. Other dangerous conditions

In a pedestrian's action against the city, seeking recovery for injuries suffered in tripping on a depressed manhole in a city street, the action would be dismissed for failure either to plead or to prove compliance with the city code's notice provisions where compliance with the notice provisions was an essential element of the cause of action absent evidence that the defect had been caused by the city. Shaw v Auburn, 91 A.D.2d 817, 458 N.Y.S.2d 96, 1982 N.Y. App. Div. LEXIS 19715 (N.Y. App. Div. 4th Dep't 1982), aff'd, 59 N.Y.2d 780, 464 N.Y.S.2d 751, 451 N.E.2d 498, 1983 N.Y. LEXIS 3129 (N.Y. 1983).

In action for injuries sustained when plaintiff was "caused to fall on a broken, irregular hole in the street," court properly denied plaintiff's motion to strike city's affirmative defense that her notice of claim was insufficient where original notice of claim merely stated that accident occurred at "Crown Street and New York Avenue" and failed to describe location of alleged defect with sufficient particularity to enable city to conduct proper investigation. Harper v New York, 129 A.D.2d 770, 514 N.Y.S.2d 763, 1987 N.Y. App. Div. LEXIS 45465 (N.Y. App. Div. 2d Dep't 1987).

In action predicated on town's alleged negligence in failing to advise neighboring town of need for warning signs at town line where accident occurred, town was not entitled to summary judgment based on plaintiff's failure to comply with town's prior notice law, since CLS Gen Mun § 50-e(4) does not permit municipalities to enact local laws requiring prior notice other than in case of physical conditions of streets and sidewalks which do not immediately come to attention of municipal officers, and municipalities may not require prior notice of failure to erect or maintain traffic control devices. Adams v Lisbon, 170 A.D.2d 901, 566 N.Y.S.2d 729, 1991 N.Y. App. Div. LEXIS 2472 (N.Y. App. Div. 3d Dep't 1991).

In action to recover for injuries sustained when plaintiff tripped over metal sign sleeve that protruded about 6 inches above sidewalk, city was not entitled to summary judgment on basis that there was no prior written notice of defect since sign sleeve was not defect within meaning of city charter provision. Montante v Rochester, 187 A.D.2d 924, 590 N.Y.S.2d 352, 1992 N.Y. App. Div. LEXIS 13914 (N.Y. App. Div. 4th Dep't 1992), overruled, Poirier v City of Schenectady, 85 N.Y.2d 310, 624 N.Y.S.2d 555, 648 N.E.2d 1318, 1995 N.Y. LEXIS 684 (N.Y. 1995).

Court erred in granting town's motion for summary judgment dismissing action alleging that town negligently "designed, created, constructed, owned, maintained, controlled and/or inspected" highway, notwithstanding that no prior written notice of defect in highway had been filed with town, as required by local law, since it was undisputed that town owned road and had maintained it for at least 16 years, and affidavit of plaintiff's engineer stated that dirt and gravel which town had used to build up adjacent roadway surface was not compacted properly, and coupled with lack of retaining wall or other lateral support, led to collapse that precipitated accident; under circumstances, fact issue existed as to whether town, by its affirmative acts in maintaining road, created dangerous condition and thus could be held liable even absent prior written notice. Toohey v Brunswick, 191 A.D.2d 858, 595 N.Y.S.2d 132, 1993 N.Y. App. Div. LEXIS 2351 (N.Y. App. Div. 3d Dep't 1993).

New York City Transit Authority was entitled to summary judgment based on failure of notice of claim to describe accident location with sufficient particularity, and resulting prejudice, where (1) notice of claim erroneously described accident site as being "at the Atlantic Avenue Station for the #2 Train, more specifically, at stairway P-10," when actual location was adjacent Pacific Street subway station on stairway P-10, and (2) transit authority did not learn of correct location until 23 months after accident. Charles v New York City Transit Auth., 205 A.D.2d 488, 613 N.Y.S.2d 35, 1994 N.Y. App. Div. LEXIS 5964 (N.Y. App. Div. 2d Dep't 1994), app. denied, 85 N.Y.2d 801, 624 N.Y.S.2d 371, 648 N.E.2d 791, 1995 N.Y. LEXIS 179 (N.Y. 1995).

Sufficient evidence was adduced at trial to support finding that city negligently left in place inadequately secured guard rail section adjacent to sign post into which plaintiff's decedent's vehicle crashed, and thus city was not entitled to dismissal of complaint on grounds that it had not been given prior written notice of alleged highway defect, where plaintiff's engineering and highway expert concluded that guard rail section had not been equipped with number of bolts required to secure extended line of railing, and "work order" documents indicated that repair work had been done by city on guard rail at location where accident later occurred. Miller v City of New York, 225 A.D.2d 396, 640 N.Y.S.2d 11, 1996 N.Y. App. Div. LEXIS 2734 (N.Y. App. Div. 1st Dep't 1996), app. denied, 90 N.Y.2d 807, 664 N.Y.S.2d 268, 686 N.E.2d 1363, 1997 N.Y. LEXIS 3029 (N.Y. 1997).

In action by plaintiff who was injured when road on which he was driving caved in due to ruptured water line, city was not entitled to summary judgment on ground that it had no prior written notice of alleged defect, as city's prior notice statute did not refer to latent defects or conditions but rather referred to actual physical defects in street surface, and thus did not apply because leaking water pipe was subsurface and not visible. McKinnis v City of Schenectady, 234 A.D.2d 760, 650 N.Y.S.2d 910, 1996 N.Y. App. Div. LEXIS 12457 (N.Y. App. Div. 3d Dep't 1996).

Complaint by plaintiff, who slipped on section of public roadway that was oily and slippery, was properly dismissed for failure to plead compliance with prior notice provision of NYC Admin Code § 7-201 ("Pothole Law") where, by plaintiff's own description, condition was not fleeting or transitory but was in vicinity of parked motor vehicles to which repairs were routinely made, in course of which oil was caused to fall on roadway. Baez v City of New York, 236 A.D.2d 305, 653 N.Y.S.2d 926, 1997 N.Y. App. Div. LEXIS 1565 (N.Y. App. Div. 1st Dep't 1997).

In action against city for fall on defective drainage grating located in municipal parking lot, grating did not fall within special use exception to prior written notice requirement in city charter where drainage function of grating provided for proper maintenance of safe parking lot and thus served no municipal function inuring so special benefit of city. Barnes v City of Mount Vernon, 245 A.D.2d 407, 666 N.Y.S.2d 206, 1997 N.Y. App. Div. LEXIS 13105 (N.Y. App. Div. 2d Dep't 1997).

City was entitled to summary judgment, in action for fall on defective drainage grating located in municipal parking lot, where plaintiff failed to show that city either had prior written notice of defective grating or should have known of such condition because it inspected or worked on subject area shortly before accident. Barnes v City of Mount Vernon, 245 A.D.2d 407, 666 N.Y.S.2d 206, 1997 N.Y. App. Div. LEXIS 13105 (N.Y. App. Div. 2d Dep't 1997).

City was entitled to summary judgment dismissing personal injury action where plaintiff did not plead, and city did not

receive, written notice of oil spill that allegedly caused accident, as required by NYC Admin Code § 7-201(c)(2), and spill on city street was of unknown origin. Estrada v City of New York, 273 A.D.2d 194, 709 N.Y.S.2d 105, 2000 N.Y. App. Div. LEXIS 6265 (N.Y. App. Div. 2d Dep't), app. denied, 95 N.Y.2d 764, 716 N.Y.S.2d 38, 739 N.E.2d 294, 2000 N.Y. LEXIS 2815 (N.Y. 2000).

County did not have constructive notice of defective condition of tree that fell on plaintiff's car as he drove along county road where (1) sole evidence that tree was "leaning" was affidavit of witness who never described extent of leaning and never indicated that leaning was progressive, (2) municipality is on notice to make inspection only if tree is "hanging precariously" over roadway or "leaning precariously toward the [roadway]," which was not proved, and (3) even if inspection had been made, it would not have revealed that defect—inadequate root system, according to tree expert—was proximate cause of accident, absent any visible sign of decay from postaccident inspection of tree trunk. Quog v Town of Brookhaven, 273 A.D.2d 287, 708 N.Y.S.2d 715, 2000 N.Y. App. Div. LEXIS 6479 (N.Y. App. Div. 2d Dep't 2000).

A town may not settle a claim arising out of the alleged negligence of the town in maintaining a bridge, where it did not receive a notice of claim as provided in this section. 1954 Ops St Compt File #6562.

X. Service of Notice

298. In general

Where court granted permission for late service of notice of claim on county pursuant to CLS Gen Mun § 50-e, but service was then apparently made in improper manner, court properly amended its original order to provide that notice of claim was deemed to have been served on date on which notice of motion for permission to serve late notice of claim was served on county, since notice of motion had copy of notice of claim attached to it. Fast v County of Broome, 151 A.D.2d 930, 543 N.Y.S.2d 203, 1989 N.Y. App. Div. LEXIS 8869 (N.Y. App. Div. 3d Dep't 1989).

Although plaintiff's initial service on wrong municipal entity might have been reasonable excuse so as to support application for leave to serve late notice of claim made within available one year and 90-day period under CLS Gen Mun § 50-e(5), late service on correct municipal entity was nullity because it was made without leave of court where plaintiff never made timely motion under § 50-e(5). Kokkinos v Dormitory Auth., 238 A.D.2d 550, 657 N.Y.S.2d 81, 1997 N.Y. App. Div. LEXIS 4405 (N.Y. App. Div. 2d Dep't 1997).

In action for injuries allegedly sustained by infant when she fell in playground owned by New York City Housing Authority (defendant), court should have granted plaintiffs' motion for order deeming their second notice of claim to have been timely served nunc pro tunc where plaintiff's served defendant with second notice of claim just 56 days after statutory time period for making such service expired, defendant had photographs of location as it existed at time of accident, and repairs to defective condition were not made until about 2 months after defendant was served with second notice of claim. Barnes v New York City Hous. Auth., 262 A.D.2d 46, 691 N.Y.S.2d 463, 1999 N.Y. App. Div. LEXIS 6409 (N.Y. App. Div. 1st Dep't 1999), app. denied, 95 N.Y.2d 757, 713 N.Y.S.2d 1, 734 N.E.2d 1212, 2000 N.Y. LEXIS 1771 (N.Y. 2000).

Former subdivision 3 of this section prescribes the manner in which a notice of claim against a municipality or public corporation must be served and directs service upon the person, officer, agent, clerk or employee "designated by law as a person to whom a summons in an action in the supreme court issued against such party may be delivered." Except as this subdivision authorizes disregard of defects in service in case the notice is actually received by the person to be served and acted upon, these provisions are mandatory, and failure to comply with them during the period for serving notice is incurable and defeats any right of action. Application of Polite, 141 N.Y.S.2d 329, 207 Misc. 622, 1955 N.Y. Misc. LEXIS 2524 (N.Y. Sup. Ct. 1955).

A complaint which merely alleges that notice of plaintiff's claim has been filed as required by this section, without details as to the date and manner of service, is entirely insufficient as an allegation of fact and fails to state a cause of action. Giles v County of Otsego, 27 Misc. 2d 749, 218 N.Y.S.2d 731, 1961 N.Y. Misc. LEXIS 3309 (N.Y. County Ct. 1961).

In reference to General Municipal Law, legislature regards service of notice of claim as condition precedent to commencement of action or special proceeding against public corporation. Colantuono v Valley Cent. School Dist., 90 Misc. 2d 918, 396 N.Y.S.2d 590, 1977 N.Y. Misc. LEXIS 2189 (N.Y. Sup. Ct.), aff'd, 59 A.D.2d 926, 399 N.Y.S.2d 262, 1977 N.Y. App. Div. LEXIS 14144 (N.Y. App. Div. 2d Dep't 1977).

Where the firefighter, who alleged that the firefighter was injured because of exposure to toxic substances in the course of working at the site of terrorist attacks, did not become aware of the firefighter's condition until months after working at site of terrorist attacks, the firefighter was granted leave to serve late notice of claim under N.Y. Gen. Mun. Law § 50-e(5); the trial court refused to penalize the firefighter for failing to rush to sue before the firefighter had a good-faith basis to claim injury, the City of New York had actual notice of the facts due to intense government investigation and media scrutiny, the City was not prejudiced by the delay since the delay had no effect on the City's capacity to investigate, defend, or correct an allegedly hazardous condition or to objectively verify or refute a condition, and the City's right to conduct comptroller's examinations under N.Y. Gen. Mun. Law § 50-h was to ensure its right to explore certain issues thoroughly even before commencement of an action. Stephenson v City of New York, 812 N.Y.S.2d 802, 11 Misc. 3d 492, 235 N.Y.L.J. 11, 2005 N.Y. Misc. LEXIS 3058 (N.Y. Sup. Ct. 2005).

In an application for leave to serve late notice of claim pursuant to N.Y. Gen. Mun. Law § 50-e(5) does not require a showing of ultimate entitlement to judgment such as a motion for summary judgment under N.Y. C.P.L.R. 3212. Stephenson v City of New York, 812 N.Y.S.2d 802, 11 Misc. 3d 492, 235 N.Y.L.J. 11, 2005 N.Y. Misc. LEXIS 3058 (N.Y. Sup. Ct. 2005).

Trial court had jurisdiction to consider a claimant's application to allow a late claim under N.Y. Pub. Auth. Law § 3567(1) and N.Y. Gen. Mun. Law § 50-e(3)(a), which set forth specific provisions for the service of a notice of claim, including service by delivery to an attorney regularly engaged in representing such public corporation, as the statute was silent with respect to the manner by which an application for leave to file a late notice of claim was to be served, and the service on the New York Attorney General's Office comported with the service provisions since that office regularly engaged in the representation of the hospital in litigation in the New York Court of Claims. Clark v Roswell Park Cancer Inst. Corp., 919 N.Y.S.2d 268, 31 Misc. 3d 578, 2010 N.Y. Misc. LEXIS 6609 (N.Y. Ct. Cl. 2010), aff'd, 92 A.D.3d 1273, 938 N.Y.S.2d 483, 2012 N.Y. App. Div. LEXIS 1283 (N.Y. App. Div. 4th Dep't 2012).

299. Relationship to other statutes

The requirement for service of certain notices provided for in Labor Law § 220, subd 5(f), Village Law § 341-b, and General Municipal Law § 50-e are inapplicable to actions brought pursuant to Labor Law § 220, subd 8. Bucci v Port Chester, 22 N.Y.2d 195, 292 N.Y.S.2d 393, 239 N.E.2d 335, 1968 N.Y. LEXIS 1341 (N.Y. 1968).

A local county law which made prior written notification of a dangerous condition or defect a condition precedent to maintaining a suit against the county did not conflict with High Law § 139, which imposes liability on the county for injuries caused by unsafe or improperly maintained highways, so as to be declared unconstitutional since High Law § 139 defers to Gen Mun Law § 50-e regarding the commencement of an action, which specifically allows for the enactment of prior notification statutes and requires compliance with such laws, making no distinction between general and local laws. Holt v County of Tioga, 56 N.Y.2d 414, 452 N.Y.S.2d 383, 437 N.E.2d 1140, 1982 N.Y. LEXIS 3450 (N.Y. 1982).

300. Former requirement as to duplicate copies

The court will look to the substance of the paper served and not to its label, and where a "complaint" was filed with the Transit Authority within 90 days of the accident and such complaint met all the statutory requirements of a notice or claim except that it did not set forth the plaintiff's post office address and that it was

not served in duplicate, such pleading will be treated as notice of claim and plaintiff's motion for leave to serve an amended notice of claim and an amended complaint would be granted. Nagy v Rothstein, 53 Misc. 2d 367, 278 N.Y.S.2d 742, 1966 N.Y. Misc. LEXIS 1325 (N.Y. Sup. Ct. 1966).

A defect in serving notice of claim in that only one copy, instead of two, was served, is correctible upon motion. Gisondi v Harrison, 220 N.Y.S.2d 105, 1961 N.Y. Misc. LEXIS 3680 (N.Y. Sup. Ct. 1961), modified, 16 A.D.2d 929, 229 N.Y.S.2d 698, 1962 N.Y. App. Div. LEXIS 9364 (N.Y. App. Div. 2d Dep't 1962).

301. Process server; authority of server

A city cannot question the authority of the person who served the notice as it is a matter which concerns only the claimant and the person who was served with the notice on his behalf. Figueroa v New York, 279 A.D. 771, 109 N.Y.S.2d 126, 1951 N.Y. App. Div. LEXIS 3720 (N.Y. App. Div. 1951).

302. —Sufficiency of service

A notice served on the city is sufficient even if served by someone not authorized by the claimant, whether or not the claimant is competent. Figueroa v New York, 279 A.D. 771, 109 N.Y.S.2d 126, 1951 N.Y. App. Div. LEXIS 3720 (N.Y. App. Div. 1951).

303. Manner of service; certified mail

Under General Municipal Law § 50-e, (former) subdivision 3, notice of claim in false imprisonment action, sent by certified and not registered mail, was deemed served on day of actual receipt thereof, over 90 days after claimant's release from confinement. Montez v Metropolitan Transp. Authority, 43 A.D.2d 224, 350 N.Y.S.2d 665, 1974 N.Y. App. Div. LEXIS 6027 (N.Y. App. Div. 1st Dep't 1974).

Former requirement of General Municipal Law for service of notice of claim by registered mail was not satisfied by service by certified mail. Harvell v New York City Transit Authority, 49 A.D.2d 765, 373 N.Y.S.2d 14, 1975 N.Y. App. Div. LEXIS 10755 (N.Y. App. Div. 2d Dep't 1975).

Court should have denied claimants' motion for permission to file late notice of claim as unnecessary because notice was timely filed where claimants timely mailed notice to town clerk by certified mail, properly placing notice in depositary of United States Postal Service, and Postal Service made 2 attempts to deliver certified mailing, but on each occasion, town clerk failed either to accept or to claim mailing, which was then returned to claimants; municipality may not defeat service by failing to accept or claim delivery of certified mailing. Bartolotta v County of Wyoming, 231 A.D.2d 899, 647 N.Y.S.2d 622, 1996 N.Y. App. Div. LEXIS 10747 (N.Y. App. Div. 4th Dep't 1996).

Although this section with respect to service of notice of claim by mail, [formerly required] service by registered mail and had not [yet] been amended to permit service by certified mail, a motion to dismiss because notice was not served by registered mail should be denied where there is proof of mailing by certified mail, of receipt of the notice, and service was made on the proper official and in time. Perl v New York City Housing Authority, 35 Misc. 2d 92, 231 N.Y.S.2d 142, 1962 N.Y. Misc. LEXIS 3515 (N.Y. Sup. Ct. 1962).

A defendant city's motion for an order dismissing a complaint for failure to serve a timely notice of claim would be granted where plaintiff, having allegedly sent the notice of claim by regular mail, failed to establish actual receipt by defendant and where the common-law presumption that an item properly stamped, addressed and mailed would be presumed to be received by the addressee was not applicable to the exception to Gen Mun Law § 50-e that actual receipt of a notice of claim by a municipality sent by other than registered or certified mail constitutes properly completed service if the municipality fails to timely reject it. Krieger v New York, 118 Misc. 2d 537, 461 N.Y.S.2d 171, 1983 N.Y. Misc. LEXIS 3356 (N.Y. Sup. Ct. 1983).

304. —Regular mail

Former requirement of service by registered mail was fully and effectively waived where within the 90-day time limitation, plaintiff's attorney mailed, by ordinary mail, a letter apprising the defendant of his representation in connection with an infant's injuries sustained by reason of negligence in the operation of a school bus, and the letter "actually received" within the prescribed time by the clerk of the defendant school district, and where in addition the defendant's insurance carrier caused claimant to undergo a physical examination by physicians designated by it some eight months later. Melisi v Central School Dist., 25 A.D.2d 54, 266 N.Y.S.2d 933, 1966 N.Y. App. Div. LEXIS 4998 (N.Y. App. Div. 3d Dep't 1966).

A letter timely sent by ordinary mail by plaintiff's attorney to the defendant school district received by the clerk of the district constituted sufficient service of process to state a valid claim for personal injuries, and plaintiff's motion pursuant to General Municipal Law § 50-e(6) to serve an amended notice of claim was properly granted. Melisi v Central School Dist., 25 A.D.2d 54, 266 N.Y.S.2d 933, 1966 N.Y. App. Div. LEXIS 4998 (N.Y. App. Div. 3d Dep't 1966).

Plaintiffs may not recover in a negligence action arising out of injuries suffered by an infant plaintiff during a gymnastic exercise if they do not prove that their notice of claim served by ordinary mail upon the defendant school district's superintendent, was actually received by a member of the district board of education or by the board's clerk. Bayer v Board of Education, 29 A.D.2d 537, 285 N.Y.S.2d 1006, 1967 N.Y. App. Div. LEXIS 2865 (N.Y. App. Div. 2d Dep't 1967), app. dismissed, 24 N.Y.2d 1033, 302 N.Y.S.2d 855, 250 N.E.2d 255, 1969 N.Y. LEXIS 1262 (N.Y. 1969), app. dismissed, 25 N.Y.2d 889, 304 N.Y.S.2d 7, 251 N.E.2d 146, 1969 N.Y. LEXIS 1136 (N.Y. 1969), app. dismissed, 25 N.Y.2d 737, 1969 N.Y. LEXIS 1750 (N.Y. 1969), reh'g denied, 25 N.Y.2d 741, 1969 N.Y. LEXIS 1892 (N.Y. 1969).

Where a notice of claim on a county was sent to the county attorney by regular rather than by registered mail, it was invalid because of a mistake pertaining to the manner of service, and the court could not allow an additional notice to be served. Application of Polite, 141 N.Y.S.2d 329, 207 Misc. 622, 1955 N.Y. Misc. LEXIS 2524 (N.Y. Sup. Ct. 1955).

Mailing of notice by ordinary mail does not comply with this section. Cavagnol v Orangetown, 17 Misc. 2d 943, 185 N.Y.S.2d 720, 1959 N.Y. Misc. LEXIS 3982 (N.Y. Sup. Ct. 1959).

Permission given over phone by the Supervisor of a town on the last day of the 90-day period to file notice by mail, did not constitute a waiver of statutory requirements, nor was the town estopped from asserting noncompliance with this section. Cavagnol v Orangetown, 17 Misc. 2d 943, 185 N.Y.S.2d 720, 1959 N.Y. Misc. LEXIS 3982 (N.Y. Sup. Ct. 1959).

There was no substantial compliance with subd 5 of this section where a notice of motion for leave to file claim was not made until the last day for serving the notice, such notice was not accompanied by any affidavit or by the proposed notice of claim and was undated, and no attempt was made to correct these defects until two days later by sending by ordinary mail a copy of the notice of motion accompanied by affidavit and a proposed notice of claim, such service not being in accordance with subd 3. Aposporos v Poughkeepsie, 37 Misc. 2d 56, 232 N.Y.S.2d 700, 1962 N.Y. Misc. LEXIS 2488 (N.Y. Sup. Ct. 1962).

Motorist who sought to recover damages against city sustained in collision between sanitation truck owned by city and her automobile complied with requirement that motorist's claim be served on city within 90 days of accident by mailing notice of claim to city on 90th day by ordinary mail, despite fact that notice was received by city on 96th day after accident. Adkins v New York, 82 Misc. 2d 317, 369 N.Y.S.2d 893, 1974 N.Y. Misc. LEXIS 2035 (N.Y. Civ. Ct. 1974), aff'd, 83 Misc. 2d 298, 371 N.Y.S.2d 387, 1975 N.Y. Misc. LEXIS 2899 (N.Y. App. Term 1975).

A paper purporting to be a notice of claim which was a letter signed by the attorney for the plaintiff, addressed to the Comptroller of the City of New York and served by ordinary mail was not in compliance with (former) subdivision 2 which requires that the notice be sworn to and served personally or by registered mail, as required by subdivision 3 of § 50-e of the General Municipal Law. Wiegand v New York, 81 N.Y.S.2d 812, 1948 N.Y. Misc. LEXIS 2962 (N.Y. Sup. Ct.), aff'd, 273 A.D. 1025, 79 N.Y.S.2d 916, 1948 N.Y. App. Div. LEXIS 5840 (N.Y. App. Div. 1948).

305. —Waiver of service by registered mail

Former requirement of service by registered mail was fully and effectively waived where within the 90-day time limitation,

plaintiff's attorney mailed, by ordinary mail, a letter apprising the defendant of his representation in connection with an infant's injuries sustained by reason of negligence in the operation of a school bus, and the letter "actually received" within the prescribed time by the clerk of the defendant school district, and where in addition the defendant's insurance carrier caused claimant to undergo a physical examination by physicians designated by it some eight months later. Melisi v Central School Dist., 25 A.D.2d 54, 266 N.Y.S.2d 933, 1966 N.Y. App. Div. LEXIS 4998 (N.Y. App. Div. 3d Dep't 1966).

306. —Service by other means

Service of notice by enclosing same in an envelope addressed to comptroller, and sliding it under door because office closed, would be improper service. Sternfield v New York, 55 Misc. 2d 70, 284 N.Y.S.2d 258, 1967 N.Y. Misc. LEXIS 1177 (N.Y. Civ. Ct. 1967).

307. When service effected; date of mailing

Service of a notice of claim against a County was effected on the date of mailing by registered mail and not on the date of receipt of the notice. Desroches v Caron, 11 Misc. 2d 838, 174 N.Y.S.2d 627, 1958 N.Y. Misc. LEXIS 3454 (N.Y. Sup. Ct. 1958).

Where notice of claim was not given by registered mail or personally, as (formerly) required by this section, but given by certified mail, actually received by the proper officer and followed up by pre-trial examination of plaintiff after issue joined, defendant's motion for summary judgment on the basis of defective service of notice was denied. Freeman v New York City Housing Authority, 30 Misc. 2d 918, 219 N.Y.S.2d 96, 1961 N.Y. Misc. LEXIS 2699 (N.Y. Sup. Ct. 1961), aff'd, 16 A.D.2d 624, 227 N.Y.S.2d 245, 1962 N.Y. App. Div. LEXIS 10355 (N.Y. App. Div. 1st Dep't 1962).

308. Agent for service; action involving county

After expiration of the 90-day period, a court could not grant an order permitting a claimant against Monroe County to correct defective service of his notice of claim by serving a copy thereof on the Monroe County legal advisor, notwithstanding timely mailing of notice of claim by registered mail to the Chairman of the County Board of Supervisors. Application of Daly, 19 A.D.2d 691, 241 N.Y.S.2d 732, 1963 N.Y. App. Div. LEXIS 3512 (N.Y. App. Div. 4th Dep't 1963), aff'd, 14 N.Y.2d 574, 248 N.Y.S.2d 873, 198 N.E.2d 254, 1964 N.Y. LEXIS 1334 (N.Y. 1964).

In Monroe County, under §§ 7-s and 500 of the County Law and former § 228 of the Civil Practice Act, the county's legal advisor is the person who must be served with notice of claim against the county, and failure to serve him with notice of claim renders service of such notice defective. Application of Daly, 19 A.D.2d 691, 241 N.Y.S.2d 732, 1963 N.Y. App. Div. LEXIS 3512 (N.Y. App. Div. 4th Dep't 1963), aff'd, 14 N.Y.2d 574, 248 N.Y.S.2d 873, 198 N.E.2d 254, 1964 N.Y. LEXIS 1334 (N.Y. 1964).

Since § 229 of the former Civil Practice Act required, in connection with service of summons upon a county, service personally or by registered mail upon the County Attorney, if it had one, leaving a copy of a notice of claim against a county, in the absence of the County Attorney from the county, within the 90-day period with the clerk of the Board of Supervisors under his promise to make timely service on the County Attorney did not suffice as timely service on the County Attorney. Payne v Horseheads, 21 A.D.2d 715, 249 N.Y.S.2d 550, 1964 N.Y. App. Div. LEXIS 3837 (N.Y. App. Div. 3d Dep't 1964).

A Deputy Chief Property Clerk of a county is an officer, agent, servant or employee of the county for the purposes of Gen Mun Law § 50-e. Pretino v Wolbern, 84 A.D.2d 830, 444 N.Y.S.2d 190, 1981 N.Y. App. Div. LEXIS 16060 (N.Y. App. Div. 2d Dep't 1981).

Personal service of a notice of claim upon the deputy county clerk of the county on the last day of the statutory 60-day period without serving a copy upon the County Attorney within the statutory time was not in accordance with the provisions of this section. Merkle v Nassau County, 95 N.Y.S.2d 673, 197 Misc. 560, 1950 N.Y. Misc. LEXIS 1450 (N.Y. Sup. Ct. 1950).

Where service of a notice of claim was made only upon a county attorney and not upon the defendant county as required by former CPA § 228, a complaint failing to allege such double service must be dismissed. Davis v Oswego County, 114 N.Y.S.2d 113, 203 Misc. 80, 1952 N.Y. Misc. LEXIS 2849 (N.Y. Sup. Ct. 1952).

309. —Medical malpractice

Service of notice of claim on city of New York to recover for alleged negligence and malpractice of the New York City Health and Hospitals Corporation did not constitute notice to the Corporation, which is the public benefit corporation separate and distinct from the city. Bender v New York City Health & Hospitals Corp., 46 A.D.2d 898, 361 N.Y.S.2d 939, 1974 N.Y. App. Div. LEXIS 3337 (N.Y. App. Div. 2d Dep't 1974), rev'd, 38 N.Y.2d 662, 382 N.Y.S.2d 18, 345 N.E.2d 561, 1976 N.Y. LEXIS 2305 (N.Y. 1976).

In medical malpractice action against city and its health and hospitals corporation, service of notice of claim by delivery to city comptroller's office was ineffective as to health and hospitals corporation. Robles v City of New York, 251 A.D.2d 485, 674 N.Y.S.2d 422, 1998 N.Y. App. Div. LEXIS 6863 (N.Y. App. Div. 2d Dep't 1998), overruled in part, Viruet v City of New York, 97 N.Y.2d 171, 738 N.Y.S.2d 2, 763 N.E.2d 1143, 2001 N.Y. LEXIS 3419 (N.Y. 2001).

In medical malpractice action, lack of service of notice of claim on city health and hospitals corporation was not cured by its participation in hearing under CLS Gen Mun § 50-h or by operation of CLS Gen Mun § 50-e(3)(c). Robles v City of New York, 251 A.D.2d 485, 674 N.Y.S.2d 422, 1998 N.Y. App. Div. LEXIS 6863 (N.Y. App. Div. 2d Dep't 1998), overruled in part, Viruet v City of New York, 97 N.Y.2d 171, 738 N.Y.S.2d 2, 763 N.E.2d 1143, 2001 N.Y. LEXIS 3419 (N.Y. 2001)).

Court would take judicial notice of proposition that New York City Corporation Counsel (CC) could be objectively and reasonably regarded as "attorney regularly engaged in representing" New York City Health and Hospital Corporation (HCC) within meaning of CLS Gen Mun § 50-3(3)(a) pertaining to service of notice of claim, since it was beyond cavil that CC routinely represented HHC in hundreds, perhaps thousands, of medical malpractice actions every year, even though CC was not only attorney that represented HHC. Viruet v City of New York, 181 Misc. 2d 958, 695 N.Y.S.2d 663, 1999 N.Y. Misc. LEXIS 366 (N.Y. Sup. Ct. 1999), aff'd, 277 A.D.2d 33, 715 N.Y.S.2d 406, 2000 N.Y. App. Div. LEXIS 11296 (N.Y. App. Div. 1st Dep't 2000).

Motion to dismiss doctors from a malpractice suit was properly denied because it was undisputed that the administratrix served a notice of claim on the county medical center in accordance with N.Y. Gen. Mun. Law § 50-e(1)(b), and there was no requirement that a notice of claim had to served on the doctors, who were employees of the county medical center, as a condition precedent to the suit; to the extent that Rew v. County of Niagara, 73 A.D.3d 1463 (App. Div. 2010), suggested that service of a notice of claim upon an employee of a public corporation was a condition precedent to commencement of the action against such employee, that decision was no longer to be followed. Goodwin v Pretorius, 105 A.D.3d 207, 962 N.Y.S.2d 539, 2013 N.Y. App. Div. LEXIS 1912 (N.Y. App. Div. 4th Dep't 2013).

310. —Action involving school district

Service of a notice of claim on behalf of a nine-year-old claimant on a woman in a school district's office was invalid although the woman accepted service, endorsed receipt thereon and promptly forwarded it to the school attorney, where such woman was neither a member of the board of education nor the clerk of the board. Prior acceptance of papers by woman was not enough to cloak her with authority to act for the board nor enough to make her a member of the board or its clerk. Munroe v Booth, 305 N.Y. 426, 113 N.E.2d 546, 305 N.Y. (N.Y.S.) 426, 1953 N.Y. LEXIS 801 (N.Y. 1953).

Where notice of an infant's claim for damages for personal injuries against a board of education was not served upon, nor actually received in behalf of, the board by anyone designated for that purpose, service of notice upon the City Comptroller was not sufficient to meet the requirements of this section. Salner v New York, 12 A.D.2d 771, 209 N.Y.S.2d 477, 1961 N.Y. App. Div. LEXIS 13590 (N.Y. App. Div. 2d Dep't 1961).

Plaintiffs may not recover in a negligence action arising out of injuries suffered by an infant plaintiff during a gymnastic exer-

cise if they do not prove that their notice of claim served by ordinary mail upon the defendant school district's superintendent, was actually received by a member of the district board of education or by the board's clerk. Bayer v Board of Education, 29 A.D.2d 537, 285 N.Y.S.2d 1006, 1967 N.Y. App. Div. LEXIS 2865 (N.Y. App. Div. 2d Dep't 1967), app. dismissed, 24 N.Y.2d 1033, 302 N.Y.S.2d 855, 250 N.E.2d 255, 1969 N.Y. LEXIS 1262 (N.Y. 1969), app. dismissed, 25 N.Y.2d 889, 304 N.Y.S.2d 7, 251 N.E.2d 146, 1969 N.Y. LEXIS 1136 (N.Y. 1969), app. dismissed, 25 N.Y.2d 737, 1969 N.Y. LEXIS 1750 (N.Y. 1969), reh'g denied, 25 N.Y.2d 741, 1969 N.Y. LEXIS 1892 (N.Y. 1969).

Since a city and its board of education are distinct entities, timely service of notice of claim on city does not constitute timely service of notice on board. Santiago v Board of Education, 41 A.D.2d 616, 340 N.Y.S.2d 491, 1973 N.Y. App. Div. LEXIS 5149 (N.Y. App. Div. 1st Dep't 1973).

In an action brought by an infant and her mother against the City of New York and the Board of Education for personal injuries sustained by the infant on the school premises, although the infant's disability tolled the applicable statute of limitations under CPLR § 208, service of notice of claim upon the city did not constitute service upon the Board which was a separate and distinct entity. Therefore the Board was never made party to the action and the infant was not entitled to relief. Gold v New York, 80 A.D.2d 138, 437 N.Y.S.2d 973, 1981 N.Y. App. Div. LEXIS 9758 (N.Y. App. Div. 1st Dep't 1981).

In a personal injury action where there was no proof that a notice of claim was actually received by any member of the Board of Education, any trustee, or clerk thereof, as required by the statutes, the action must be dismissed despite the fact that a letter stating the claim was addressed to the Superintendent of Schools, was acknowledged by him in a letter in which he stated that the matter was being referred to the school insurance agency for action, and that a written statement was thereafter taken by an investigator all within 90 days after the claim arose. Bayer v Board of Education, 58 Misc. 2d 259, 295 N.Y.S.2d 131, 1968 N.Y. Misc. LEXIS 1042 (N.Y. Sup. Ct. 1968).

The failure to include the Superintendent of Schools in the list of officials upon whom service of summons can be made invalidates a notice of claim sent to him, unless he goes through the administratively useless step of delivering the notice in turn to the clerk or to a member of the Board before turning it over to the insurance carrier. Bayer v Board of Education, 58 Misc. 2d 259, 295 N.Y.S.2d 131, 1968 N.Y. Misc. LEXIS 1042 (N.Y. Sup. Ct. 1968).

A letter sent by ordinary mail and addressed to a named high school by the attorney representing a personal injury claimant is not "served" on an officer or employee of the school district as required by this section, though it duly advises the school district of the accident and the injuries sustained. Horowitz v Board of Education, 210 N.Y.S.2d 600 (N.Y. Sup. Ct. 1960).

311. —Transportation facilities

Within 90 days after plaintiff's injury while boarding a city bus, a notice of claim was served upon the City Comptroller who acknowledged the claim and then advised plaintiff's attorney that the claim was disallowed because the city was not liable because the bus was owned by the City Transit Authority. Plaintiff's attorney then talked to the Comptroller's office and someone there advised him that the notice would be sent to the Authority but the notice was never sent. Ninety-one days after the accident, a new notice of claim was served on the Authority. Held: the notice of claim was not properly served under this section and a motion to serve the notice late should have been denied. Coyle v New York City Transit Authority, 283 A.D. 1083, 131 N.Y.S.2d 502, 1954 N.Y. App. Div. LEXIS 6383 (N.Y. App. Div. 1954).

Leave to file a late notice of claim was denied where claimant, while walking underneath elevator structure in Brooklyn was struck by a piece of railroad tie receiving injuries which did not disable her from filing a proper and timely notice. Notice of claim was served on the City of New York within 90 days but claimant's attorney did not realize that the city, a few weeks prior to the accident, had leased the elevator structure to the transit authority. Polito v New York City Transit Authority, 285 A.D. 1179, 141 N.Y.S.2d 33, 1955 N.Y. App. Div. LEXIS 7072 (N.Y. App. Div. 1955).

Where liability and false imprisonment action was predicated on acts of employee of railroad subsidiary of transit authority, notice of claim was improperly served on transit authority (Public Authority Law § 1266, subd 5) absent a factual showing that said employee had in some manner become an agent of the transit authority, and service on authority was further ineffective as to subsidiary railroad, a distinct legal entity for purposes of suit (Public Authorities Law § 1266, subd 5). Montez v Metropolitan Transp. Authority, 43 A.D.2d 224, 350 N.Y.S.2d 665, 1974 N.Y. App. Div. LEXIS 6027 (N.Y. App. Div. 1st Dep't 1974).

Claim against the East Hudson corporate authority to recover, on theory of negligent maintenance, for injuries sustained when rock fell from an overhanging embankment onto the Taconic State Parkway, causing an accident, was barred where no claim or notice of intention to file a claim was served on any officer of the authority within 90 days of the incident; service on the Attorney General was not effective since he is not authorized to receive service on behalf of the Authority. McCormick v State, 51 A.D.2d 28, 378 N.Y.S.2d 991, 1976 N.Y. App. Div. LEXIS 10658 (N.Y. App. Div. 3d Dep't 1976), app. dismissed, 41 N.Y.2d 901, 1977 N.Y. LEXIS 3317 (N.Y. 1977), aff'd, 44 N.Y.2d 774, 406 N.Y.S.2d 37, 377 N.E.2d 481, 1978 N.Y. LEXIS 1972 (N.Y. 1978).

In action for personal injuries received by passenger on bus owned by county and operated by bus company, service of notice of claim on county was valid, although not carried out in manner specified in CLS Gen Mun § 50-e, where notice of claim was timely served on bus company and its general counsel, and it was undisputed that bus company's general counsel was attorney who was also regularly engaged in representing county in suits brought against it arising out of accidents occurring on buses, and thus was proper person to be served on county's behalf, and where county had not returned notice to passenger within 30 days of receipt. Tacinelli v Liberty Lines, 123 A.D.2d 756, 507 N.Y.S.2d 230, 1986 N.Y. App. Div. LEXIS 60898 (N.Y. App. Div. 2d Dep't 1986).

Court would not rectify failure to file timely notice on New York City Transit Authority, where plaintiffs filed their notice of claim with city controller through mistake. Phifer v New York City Transit Authority, 4 Misc. 2d 802, 159 N.Y.S.2d 647, 1956 N.Y. Misc. LEXIS 1263 (N.Y. Sup. Ct. 1956).

312. —Village

Objections that requirement as to service of notice in subd 3 was not complied with in that (1) where the defendant is a village the notice was mailed directed to the attention of the Village Clerk, and (2) that it was sent by certified rather than by registered mail, were without merit. Montana v Lynbrook, 23 A.D.2d 585, 256 N.Y.S.2d 651, 1965 N.Y. App. Div. LEXIS 4806 (N.Y. App. Div. 2d Dep't 1965).

313. —Miscellaneous actions

Although county attorney was not proper person to receive notice of claim on behalf of County Playland, Commission, Commission would be estopped from asserting such contention where county attorney informed plaintiff that he would accept service on behalf of the Commission, Commission had subsequently examined plaintiff pursuant to such notice plaintiff served summons and complaint and four years expired before contention was raised. Roa v Westchester County Playland Com., 34 A.D.2d 818, 311 N.Y.S.2d 527, 1970 N.Y. App. Div. LEXIS 4839 (N.Y. App. Div. 2d Dep't 1970), aff'd, 28 N.Y.2d 873, 322 N.Y.S.2d 259, 271 N.E.2d 235, 1971 N.Y. LEXIS 1330 (N.Y. 1971).

Notice of claim in wrongful death action against New York City Health and Hospitals Corporation (HHC) must be served on director or officer of HHC. Timmins v Beth Israel Med. Center-Kings Highway Div., 177 Misc. 2d 845, 676 N.Y.S.2d 911, 1998 N.Y. Misc. LEXIS 360 (N.Y. Sup. Ct. 1998).

314. Parties who must be served

Because a university medical center was never served with the respondents' N.Y. Gen. Mun. Law § 50-e petition for leave to serve a late notice of claim, and became aware of its existence only after the trial court issued an ex parte order granting the petition, the trial court never properly obtained jurisdiction over

the center. Matter of Colocho v Nassau Univ. Med. Ctr., 37 A.D.3d 462, 829 N.Y.S.2d 610, 2007 N.Y. App. Div. LEXIS 1519 (N.Y. App. Div. 2d Dep't 2007).

Where a Supreme Court summons would have to be served on more than one official of the municipality or public corporation, in an action brought against it, service or receipt of notice by one only is a fatal and incurable defect, once the time limit on service has expired without extension of time obtained. Merkle v Nassau County, 95 N.Y.S.2d 673, 197 Misc. 560, 1950 N.Y. Misc. LEXIS 1450 (N.Y. Sup. Ct. 1950).

In a student's action against the city university, seeking a refund of student fees after the student withdrew from certain courses, the action against the university would be dismissed where the student had failed to serve a copy of the notice of intention and claim on the university, rather than on the city as the university's funding body. Bicjan v Hunter College of City University, 116 Misc. 2d 978, 457 N.Y.S.2d 387, 1982 N.Y. Misc. LEXIS 3989 (N.Y. Ct. Cl. 1982).

315. —County

Provision of General Municipal Law requiring that in tort suits against county a notice of claim must be served upon the county and upon the officer, agent, servant or employee of the county is superseded by provision of General Municipal Law requiring service of notice of claim upon the municipality but not requiring personal service of notice upon the individual official, servant, agent or employee of the municipality, and plaintiffs, who brought suit for medical malpractice by physicians employed by county, were not required to serve notice of claim upon the physicians. Schiavone v County of Nassau, 51 A.D.2d 980, 380 N.Y.S.2d 711, 1976 N.Y. App. Div. LEXIS 11720 (N.Y. App. Div. 2d Dep't 1976), aff'd, 41 N.Y.2d 844, 393 N.Y.S.2d 701, 362 N.E.2d 252, 1977 N.Y. LEXIS 1888 (N.Y. 1977).

Where Broome County received a copy of the injured party's notice of claim within one year and 90 days under N.Y. Gen. Mun. Law § 50-e(5) but the notice of claim was served on the County more than two years after the accident, the trial court properly deemed the late notice of claim timely served nunc pro tunc, as any other conclusion would have elevated form over substance. LaMonte v County of Broome, 20 A.D.3d 756, 797 N.Y.S.2d 785, 2005 N.Y. App. Div. LEXIS 7777 (N.Y. App. Div. 3d Dep't 2005).

Failure to comply with the requirements of this section as to time and manner of service of notice of claim is not waived, and cannot be waived, by any act of defendant following attempted, but ineffectual, service of such a notice. Horowitz v Board of Education, 210 N.Y.S.2d 600 (N.Y. Sup. Ct. 1960).

Dismissal of a motorist's complaint as to a county employee, when the motorist sued the county as well, was not warranted because neither County Law § 52, nor the provisions of General Municipal Law §§ 50-e(2) and 50-i(2) required that the employee had to be named in the notice of claim. Pierce v Hickey, 129 A.D.3d 1287, 11 N.Y.S.3d 321, 2015 N.Y. App. Div. LEXIS 4816 (N.Y. App. Div. 3d Dep't 2015).

316. —Medical malpractice actions

New York City health and hospitals corporation was not "municipal corporation" within statute concerning liability of municipal corporation for malpractice of physician, and it was not necessary that notice of claim against doctors be served or filed. Bender v Jamaica Hosp., 40 N.Y.2d 560, 388 N.Y.S.2d 269, 356 N.E.2d 1228, 1976 N.Y. LEXIS 3039 (N.Y. 1976).

Where statute providing that every municipal corporation shall assume liability for practice of any physician who renders medical services without receiving compensation at public institutions maintained by that municipal corporation is applicable, ultimate financial responsibility rests not with treating physician but with appropriate municipal corporation, and no action will lie without notice of claim served in compliance with General Municipal Law. Bender v Jamaica Hosp., 40 N.Y.2d 560, 388 N.Y.S.2d 269, 356 N.E.2d 1228, 1976 N.Y. LEXIS 3039 (N.Y. 1976).

In suit against physicians employed by county, plaintiffs were entitled to rely on provision of General Municipal Law requiring service of notice of claim upon municipality but not requiring personal service of notice upon employee of municipality; such statute superseded provision of County Law requiring service of notice of claim upon municipality and also upon municipality's officer, agent, servant or employee within same period of time. Schiavone v County of Nassau, 41 N.Y.2d 844, 393 N.Y.S.2d 701, 362 N.E.2d 252, 1977 N.Y. LEXIS 1888 (N.Y. 1977).

Provision of General Municipal Law requiring that in tort suits against county a notice of claim must be served upon the county and upon the officer, agent, servant or employee of the county is superseded by provision of General Municipal Law requiring service of notice of claim upon the municipality but not requiring personal service of notice upon the individual official, servant, agent or employee of the municipality, and plaintiffs, who brought suit for medical malpractice by physicians employed by county, were not required to serve notice of claim upon the physicians. Schiavone v County of Nassau, 51 A.D.2d 980, 380 N.Y.S.2d 711, 1976 N.Y. App. Div. LEXIS 11720 (N.Y. App. Div. 2d Dep't 1976), aff'd, 41 N.Y.2d 844, 393 N.Y.S.2d 701, 362 N.E.2d 252, 1977 N.Y. LEXIS 1888 (N.Y. 1977).

Service of notice of claim, in medical malpractice action, on City of New York did not suffice as service of notice of claim on New York City Health and Hospitals Corporation. Oxley v City of New York, 240 A.D.2d 643, 658 N.Y.S.2d 697, 1997 N.Y. App. Div. LEXIS 6830 (N.Y. App. Div. 2d Dep't), app. denied, 91 N.Y.2d 802, 666 N.Y.S.2d 564, 669 N.E.2d 534, 1997 N.Y. LEXIS 4165 (N.Y. 1997).

Trial court properly granted summary judgment to defendants as to plaintiffs' medical malpractice action, because plaintiffs failed to serve defendants with proper notice of the claim as required by N.Y. Gen. Mun. Law § 50-e, as service of a notice of claim on a city comptroller was not adequate to inform defendants. King v Wu, 18 A.D.3d 716, 797 N.Y.S.2d 499, 2005 N.Y. App. Div. LEXIS 5600 (N.Y. App. Div. 2d Dep't), app. denied, 5 N.Y.3d 711, 806 N.Y.S.2d 161, 840 N.E.2d 130, 2005 N.Y. LEXIS 2665 (N.Y. 2005).

The service of a notice of claim upon the comptroller and corporation counsel of the city did not obviate the necessity for service of such a notice upon a physician sought to be held liable. Schmid v Werner, 72 N.Y.S.2d 361, 188 Misc. 718, 1947 N.Y. Misc. LEXIS 2748 (N.Y. Sup. Ct. 1947).

An action against a physician, for malpractice in services gratuitously rendered at a city-owned and operated hospital, and against the city as the party ultimately liable under § 50-d of the General Municipal Law, must be dismissed for failure to file the notice of claim in compliance with § 50-e of such law, required, by § 50-d, to be served on both the municipality and the physician. Martinez v Modica, 80 N.Y.S.2d 132, 191 Misc. 836, 1948 N.Y. Misc. LEXIS 2503 (N.Y. Sup. Ct. 1948).

This section requires the service of notice of claim within sixty days [now ninety days] of the date a claim against the municipality arises for malpractice of a physician rendering services gratuitously in a public hospital, it being necessary that such notice be served upon the physician as well as the municipality. Martinez v Modica, 80 N.Y.S.2d 132, 191 Misc. 836, 1948 N.Y. Misc. LEXIS 2503 (N.Y. Sup. Ct. 1948).

A motion to dismiss an action against defendant doctors, employees of the New York City Health and Hospitals Corporation is denied, where service of the summons and complaint was timely although no notice of claim was filed against the defendants; New York City Health and Hospitals Corporation physicians are to be indemnified and held harmless under section 50-k of the General Municipal Law, and a notice of claim must be served on the corporation but there is no requirement that such notice be served on an employee being sued. Mills v Glancz, 104 Misc. 2d 1033, 430 N.Y.S.2d 22, 1980 N.Y. Misc. LEXIS 2444 (N.Y. Sup. Ct. 1980).

Patient's malpractice suit against the New York City Health and Hospitals Corporation (HCC) was properly dismissed for her failure to serve a timely notice of claim under N.Y. Gen. Mun. Law § 50-e(1)(a); as New York City and HHC were separate entities, service on the New York City Comptroller was insufficient to constitute service on HHC. Barnaman v New York City Health & Hosps. Corp., 90 A.D.3d 588, 934 N.Y.S.2d 443, 2011 N.Y. App. Div. LEXIS 8781 (N.Y. App. Div. 2d Dep't 2011).

Patient's malpractice suit against the New York City Health and Hospitals Corporation (HCC) was properly dismissed for her

failure to serve a timely notice of claim; serving a notice on a hospital operated by HCC was insufficient under N.Y. Gen. Mun. Law § 50-e(3)(a), as the hospital was not a director or officer of HHC or the corporation counsel. Barnaman v New York City Health & Hosps. Corp., 90 A.D.3d 588, 934 N.Y.S.2d 443, 2011 N.Y. App. Div. LEXIS 8781 (N.Y. App. Div. 2d Dep't 2011).

317. —Replevin actions

Since a replevin action sounds in tort a notice of claim must be timely served upon defendant city (General Municipal Law, § 50-e) prior to the commencement of the replevin action seeking the return of plaintiff's vehicle, the notice of claim requirement being an element of the substantive cause of action; although the municipality defaulted in the replevin action, plaintiff cannot be granted a default judgment in the absence of proof of claim (CPLR 3215, subd [e]) which includes service of the notice of claim as an essential element of the substantive cause of action for replevin. Clark v New York, 98 Misc. 2d 660, 414 N.Y.S.2d 481, 1979 N.Y. Misc. LEXIS 2128 (N.Y. Civ. Ct. 1979).

318. —School district

In an action against a school district and two individual teachers of the district, service of a notice of claim on the individual teachers was not required where notice had been served on the district. Inasmuch as the teachers were entitled to indemnification the district was the real party defendant. Sandak v Tuxedo Union School Dist., 308 N.Y. 226, 124 N.E.2d 295, 308 N.Y. (N.Y.S.) 226, 1954 N.Y. LEXIS 938 (N.Y. 1954).

In an action brought by an infant and her mother against the City of New York and the Board of Education for personal injuries sustained by the infant on the school premises, although the infant's disability tolled the applicable statute of limitations under CPLR § 208, service of notice of claim upon the city did not constitute service upon the Board which was a separate and distinct entity. Therefore the Board was never made party to the action and the infant was not entitled to relief. Gold v New York, 80 A.D.2d 138, 437 N.Y.S.2d 973, 1981 N.Y. App. Div. LEXIS 9758 (N.Y. App. Div. 1st Dep't 1981).

Filing of workers' compensation claim was not notice of claim against city board of education and did not satisfy requirements of CLS Gen Mun § 50-e for serving timely notice of claim. Mark v Board of Educ., 255 A.D.2d 586, 681 N.Y.S.2d 81, 1998 N.Y. App. Div. LEXIS 12875 (N.Y. App. Div. 2d Dep't 1998).

Dismissal of the individuals' personal injury action against the school district was proper where, even accepting the individuals' contention that the non-employee report of injury form contained sufficient information to have been deemed a notice of claim, service upon the school nurse was not service on a person designated by law to be served, N.Y. Gen. Mun. Law § 50-e(3)(a), N.Y. C.P.L.R. 311(7), N.Y. Educ. Law § 2(13). Paladino v Commack Union Free Sch. Dist., 307 A.D.2d 284, 763 N.Y.S.2d 628, 2003 N.Y. App. Div. LEXIS 8249 (N.Y. App. Div. 2d Dep't 2003).

N.Y. Educ. Law § 3813 required compliance with N.Y. Gen. Mun. Law § 50-e before an action was filed against school employees, and § 50-e made no provision for filing a notice of claim against one entity and directing an action against another; the statutes therefore lent no support to a claim by an infant and his mother that they only needed to name a school board of education in their notice of claim before filing an action against individual school employees. White v Averill Park Cent. Sch. Dist., 195 Misc. 2d 409, 759 N.Y.S.2d 641, 2003 N.Y. Misc. LEXIS 263 (N.Y. Sup. Ct. 2003).

319. —Miscellaneous parties

Service of notice of claim on Comptroller of City of New York was insufficient to constitute service on New York City Health and Hospitals Corporation (NYCHHC), proper party to be served; lack of service was not cured by participation of NYCHHC in hearing under CLS Gen Mun § 50-h or by provisions of CLS Gen Mun § 50-e (3) (c). Stallworth v New York City Health & Hosps. Corp., 243 A.D.2d 704, 663 N.Y.S.2d 287, 1997 N.Y. App. Div. LEXIS 10727 (N.Y. App. Div. 2d Dep't 1997), app. denied, 91 N.Y.2d 807, 669 N.Y.S.2d 1, 691 N.E.2d 1027, 1998 N.Y. LEXIS 240 (N.Y. 1998).

Since town sanitation district would be under duty to indemnify district employee, claimed to have been negligent in operation of motor vehicle, were employee sued alone, claimants in that case would have to serve a notice of claim upon town and submit to oral examination pursuant to statute. Fitzgerald v Sanitation Dist. No. 6, 89 Misc. 2d 1078, 393 N.Y.S.2d 542, 1977 N.Y. Misc. LEXIS 2730 (N.Y. City Ct.), modified, 116 Misc. 2d 325, 457 N.Y.S.2d 664, 1977 N.Y. Misc. LEXIS 2714 (N.Y. App. Term 1977).

Appropriately captioned notice of claim served on New York City Health and Hospitals Corporation (HHC) by delivery to office of New York City Corporation Counsel in its capacity as "attorney regularly engaged in representing" HHC (CLS Gen Mun § 50-e(3)(a)) is effective alternative means of service. Viruet v City of New York, 181 Misc. 2d 958, 695 N.Y.S.2d 663, 1999 N.Y. Misc. LEXIS 366 (N.Y. Sup. Ct. 1999), aff'd, 277 A.D.2d 33, 715 N.Y.S.2d 406, 2000 N.Y. App. Div. LEXIS 11296 (N.Y. App. Div. 1st Dep't 2000).

320. Proceeding for validation of service

A special proceeding for validation of service of notice under this section was not a proceeding for which an additional allowance for cost could be made. Rosenberg v New York, 2 Misc. 2d 1027, 159 N.Y.S.2d 248, 1956 N.Y. Misc. LEXIS 2074 (N.Y. Sup. Ct. 1956).

XI. Disregarding Defects In Notice of Claim

321. In general

In determining whether to dismiss complaint against New York City Transit Authority for failure to serve adequate notice of claim, Supreme Court and Appellate Division erroneously concluded that their inquiry was strictly limited to "four corners" of notice of claim; in making relevant determination under CLS Gen Mun § 50-e(6), court may look to evidence adduced at hearing under CLS Gen Mun § 50-h, and to such other evidence as is properly before court. D'Alessandro v New York City Transit Auth., 83 N.Y.2d 891, 613 N.Y.S.2d 849, 636 N.E.2d 1382, 1994 N.Y. LEXIS 1070 (N.Y. 1994).

Court may, in its discretion, grant motion for leave to amend notice of claim under CLS General Municipal Law § 50-e where it determines that mistake or defect in original notice was made in good faith and that public corporation was not prejudiced. Mazza v New York, 112 A.D.2d 921, 492 N.Y.S.2d 438, 1985 N.Y. App. Div. LEXIS 52134 (N.Y. App. Div. 2d Dep't 1985).

City's request to adjourn hearing scheduled pursuant to CLS Gen Mun § 50-h did not alleviate plaintiff's burden to accurately and specifically identify location of accident since 90-day period for filing notice of claim had expired over 3 months before requested adjournment. Eagle v Yonkers, 143 A.D.2d 626, 532 N.Y.S.2d 887, 1988 N.Y. App. Div. LEXIS 9522 (N.Y. App. Div. 2d Dep't 1988).

New York City Housing Authority was not entitled to dismissal of personal injury action on ground that notice of claim was insufficient, even though "boilerplate" form used by plaintiff failed to give adequate notice of either defect alleged or manner in which it caused injury to plaintiff, where Authority advanced contention of insufficiency for first time on eve of trial, and it failed to allege that any investigation had been undertaken which might have been impeded by insufficiency, or that CLS Gen Mun § 50-h hearing, conducted within 5 months of incident, had failed to elicit sufficient information to allow it to investigate accident. Baez v New York City Housing Authority, 182 A.D.2d 554, 583 N.Y.S.2d 1, 1992 N.Y. App. Div. LEXIS 6285 (N.Y. App. Div. 1st Dep't 1992).

Amendments of substantive nature are not within purview of CLS Gen Mun § 50-e(6). Herron v City of New York, 223 A.D.2d 676, 637 N.Y.S.2d 438, 1996 N.Y. App. Div. LEXIS 654 (N.Y. App. Div. 2d Dep't 1996).

The City Court of Syracuse has authority under subdivision 6 of § 50-e of the General Municipal Law to grant relief from mistake, omission, irregularity, or defect made in good faith in the notice of claim required to be served in the absence of prejudice to the municipality. Hopkins v East Syracuse Fire Dist., 49 Misc. 2d 197, 267 N.Y.S.2d 61, 1966 N.Y. Misc. LEXIS 2216 (N.Y. City Ct. 1966).

322. Defects involving service of claim; failure to serve

Where plaintiff retained an attorney approximately 15 days prior to expiration of the 90-day period from date of accident, but

failed to complete service by failing to serve the County Attorney with a copy thereof, as required by former § 228 of the Civil Practice Act, failure to do so could not be attributed to mental or physical incapacity of plaintiff and was not a mere defect in the notice of claim, but rather one pertaining to manner or time of service which a court has no authority to permit correction of on the basis of subd 6 of this section after expiration of the time limit. Payne v Horseheads, 21 A.D.2d 715, 249 N.Y.S.2d 550, 1964 N.Y. App. Div. LEXIS 3837 (N.Y. App. Div. 3d Dep't 1964).

Third-party action against county hospital, commenced by hospital which was defendant in malpractice suit, was not barred, with respect to claim for total indemnity or for apportioned contribution, by fact that county hospital was not served with notice of claim within 90 days after original plaintiff's alleged cause of action against it arose. Zillman v Meadowbrook Hospital Co., 45 A.D.2d 267, 358 N.Y.S.2d 466, 1974 N.Y. App. Div. LEXIS 4428 (N.Y. App. Div. 2d Dep't 1974).

Report of accident sent by store employee to town clerk, which was signed by injured plaintiff, included details of her injuries, and contained names of 2 eyewitnesses, was properly treated as notice of claim, even though it was not served on clerk in manner and method described under CLS Gen Mun § 50-e, since town took oral depositions of plaintiffs, and no prejudice was shown. Carver v Town of Riverhead, 231 A.D.2d 545, 647 N.Y.S.2d 33, 1996 N.Y. App. Div. LEXIS 9238 (N.Y. App. Div. 2d Dep't 1996).

The discretion given the court to excuse failure to file in due season where delay is due to physical incapacity is more readily invoked where the municipality had full knowledge of the situation giving rise to the claim. Williams v Albany, 85 N.Y.S.2d 799, 193 Misc. 1037, 1949 N.Y. Misc. LEXIS 1701 (N.Y. Sup. Ct. 1949).

A defendant city's motion for an order dismissing a complaint for failure to serve a timely notice of claim would be granted where plaintiff, having allegedly sent the notice of claim by regular mail, failed to establish actual receipt by defendant and where the common-law presumption that an item properly stamped, addressed and mailed would be presumed to be received by the addressee was not applicable to the exception to Gen Mun Law § 50-e that actual receipt of a notice of claim by a municipality sent by other than registered or certified mail constitutes properly completed service if the municipality fails to timely reject it. Krieger v New York, 118 Misc. 2d 537, 461 N.Y.S.2d 171, 1983 N.Y. Misc. LEXIS 3356 (N.Y. Sup. Ct. 1983).

323. —Service on wrong party

Service of notice of claim against New York City Health and Hospitals Corporation (HHC), which was incorrectly served on New York City comptroller rather than on authorized representative of HHC, was validated by saving provision of CLS Gen Mun § 50-e(3)(c) and HHC was not entitled to dismissal of complaint based on plaintiff's failure to serve notice of claim, where comptroller demanded CLS Gen Mun § 50-h examination of plaintiff, corporation counsel conducted hearing, and there was no possibility of confusion about entity on whose behalf comptroller and corporation counsel were acting. Mercado v New York City Health & Hosps. Corp., 247 A.D.2d 55, 677 N.Y.S.2d 314, 1998 N.Y. App. Div. LEXIS 9250 (N.Y. App. Div. 1st Dep't 1998).

Even were the appellate court to agree with the county medical center that the patient's excuse for failing to timely serve a notice of claim was unreasonable, that was merely a factor to be considered and would not alone bar the granting of leave to file a notice of claim out of time. In any event, the patient had already served a timely notice of claim on the county, the recent and former owner and operator of the hospital; thus, the patient could argue that an excusable error concerning the identity of the public corporation against which the claim should have been asserted. Medley v Cichon, 305 A.D.2d 643, 761 N.Y.S.2d 666, 2003 N.Y. App. Div. LEXIS 5971 (N.Y. App. Div. 2d Dep't 2003).

In view of the confusion regarding the filing of a notice of claim against a municipality or fire district for the alleged negligence of volunteer firemen in removing the victim of a one-car accident from the wreckage of his automobile, the plaintiff's complaint was dismissed without prejudice to any motion for permission to file a late notice of claim under subdivision 5 of § 50-e of the General Municipal Law, and without prejudice to the plaintiff's bringing a new action and asserting that the complaint served upon the Fire Chief of the East Syracuse Volunteer Fire Department be considered service of a notice of claim against either the Village of East Syracuse, the Town of Dewitt, or the Dewitt Fire Protection District. Hopkins v East Syracuse Fire Dist., 49 Misc. 2d 197, 267 N.Y.S.2d 61, 1966 N.Y. Misc. LEXIS 2216 (N.Y. City Ct. 1966).

Doctrine of equitable estoppel is designed to assure that the notice requirements, such as those required by N.Y. Gen. Mun. Law § 50-e, are not used as a trap to catch the unwary. A governmental agency may be barred from raising a defense if the agency failed to act when it had a duty to do so, or gave a false sense to the other party, by virtue of the agency's positive acts, that the notice and service requirements were not made in error. Delacruz v Metropolitan Tr. Auth., 828 N.Y.S.2d 856, 14 Misc. 3d 886, 2007 N.Y. Misc. LEXIS 51 (N.Y. Sup. Ct.), rev'd, 45 A.D.3d 482, 846 N.Y.S.2d 160, 2007 N.Y. App. Div. LEXIS 12087 (N.Y. App. Div. 1st Dep't 2007).

An infant claimant was injured on January 7, 1952 in a high school and immediately after the occurrence, a written statement was taken from him. Twenty-four days after the occurrence, a notice of claim was served on the comptroller but no notice was served on the board of education. Thereafter, the corporation counsel held a hearing on behalf of the comptroller and took minutes headed "Board of Education Case." The hearing procedure followed the same procedure that would have been followed if a notice of claim had been in fact served on the board of education. Through the admitted mistake of the attorney, no notice of claim was served on the board. Application under this section for late filing of claim granted. Application of Paris, 118 N.Y.S.2d 407, 1952 N.Y. Misc. LEXIS 2160 (N.Y. Sup. Ct. 1952).

324. Lack of verification

Informalities in the notice or statement of claim, as served or given, such as lack of verification, have sometimes been disregarded or treated as inconsequential where prompt and actual notice of the incident and resultant damage was given to the proper authority, apparently without requiring a formal amendment of the claim statement. Valley v Central School Dist., 282 A.D. 533, 125 N.Y.S.2d 744, 1953 N.Y. App. Div. LEXIS 4510 (N.Y. App. Div. 1953).

With respect to a notice of claim for injuries sustained by an infant plaintiff and her father, the court could properly disregard words in the body of the notice indicating that the claim was against a town only and not likewise against a Board of Education, which admitted receipt of the notice of claim, and likewise properly permitted amendment of the notice to correct an improperly executed verification. Gisondi v Harrison, 16 A.D.2d 929, 229 N.Y.S.2d 698, 1962 N.Y. App. Div. LEXIS 9364 (N.Y. App. Div. 2d Dep't 1962).

Failure to verify notice of claim which is purely inadvertent is not fatal to validity of notice. Creary v Mamaroneck, 110 A.D.2d 870, 488 N.Y.S.2d 427, 1985 N.Y. App. Div. LEXIS 48783 (N.Y. App. Div. 2d Dep't 1985).

325. Miscellaneous defects

A misstatement in plaintiff's notice of claim as to the date of the alleged accident may be corrected, supplied, or disregarded in the discretion of the court, provided that the other party is not thereby prejudiced, and since the correct date of the accident was set forth in defendant's hospital records, it was doubtful if the defendant was misled to its prejudice by the erroneous date in the notice; therefore, the dismissal of plaintiff's complaint was set aside and plaintiff given an opportunity to amend his notice of claim. Sanchez v New York, 25 A.D.2d 731, 268 N.Y.S.2d 732, 1966 N.Y. App. Div. LEXIS 4473 (N.Y. App. Div. 1st Dep't 1966).

Even though notice of claim against county did not comply with controlling statutes, so that award of arbitrator in Small Claims Part in favor of plaintiff was based upon a mistake of law, finality and invulnerability attached to the judgment entered on the award. Brownstein v County of Westchester, Dep't of Parks, Recreation & Conservation, 51 A.D.2d 792, 380 N.Y.S.2d 62, 1976 N.Y. App. Div. LEXIS 11365 (N.Y. App. Div. 2d Dep't 1976).

The trial court properly refused to dismiss an action against various city police officers for unlawful imprisonment, malicious prosecution, and assault on the asserted ground that plaintiff had failed to comply with the notice of claim provisions of Gen Mun

Law § 50-e in that plaintiff's notice of claim had been preceded by his service of a summons with notice, since such service was a mere procedural irregularity, and defendants failed to show that any prejudice had resulted therefrom. Kelly v Kane, 98 A.D.2d 861, 470 N.Y.S.2d 816, 1983 N.Y. App. Div. LEXIS 21177 (N.Y. App. Div. 3d Dep't 1983).

Town was not entitled to summary judgment based on plaintiff's failure to sufficiently identify place where accident occurred and nature of town's claimed negligence since there was no competent evidence in record to show that town was prejudiced or that error was not made in good faith, and notice of claim was adequately supplemented at hearing under CLS Gen Mun § 50-h and in subsequent bill of particulars. Adams v Lisbon, 170 A.D.2d 901, 566 N.Y.S.2d 729, 1991 N.Y. App. Div. LEXIS 2472 (N.Y. App. Div. 3d Dep't 1991).

Although notice of claim was ambiguous as to whether slip and fall was caused by snow and ice or by defect in sidewalk, all doubt was dispelled by complaint which clearly stated that fall was caused by ice; therefore, city was not prejudiced by ambiguity in notice since cause of fall was extremely transitory in nature. Hoffman v New York Housing Auth., 187 A.D.2d 334, 589 N.Y.S.2d 475, 1992 N.Y. App. Div. LEXIS 13073 (N.Y. App. Div. 1st Dep't 1992).

City housing authority was not entitled to dismissal of complaint on ground that plaintiff's notice of claim did not specify accident location with sufficient particularity to allow meaningful investigation, although notice of claim did not specify exact location of accident, where plaintiff furnished exact location and exact time of accident at statutory hearing, and housing authority thereafter failed to even attempt to investigate matter. Poitier v New York City Hous. Auth., 199 A.D.2d 11, 604 N.Y.S.2d 566, 1993 N.Y. App. Div. LEXIS 11215 (N.Y. App. Div. 1st Dep't 1993).

In personal injury action against Manhattan and Bronx Surface Transit Operating Authority (MABSTOA), court properly declined to "correct, supply or disregard" failure of plaintiffs' notice of claim to include manner in which claim arose and sufficient description of accident site, where there was no showing that "mistake, omission, irregularity or defect" was made in good faith, and that MABSTOA was not prejudiced thereby. LaBorde v Most Serv. Co., 270 A.D.2d 462, 705 N.Y.S.2d 608, 2000 N.Y. App. Div. LEXIS 3204 (N.Y. App. Div. 2d Dep't 2000).

Grant of defendant city's motion to dismiss for failure to timely serve proper notice of claim was reversed, where plaintiff individual's notice failed to include the location of the arrest that was the subject of his lawsuit; it appeared that there was sufficient information in the original notice of claim to permit the city to sufficiently investigate the claim, and in any event the city did not state how it was prejudiced by the omission of the location. Malcolm v City of New York, 2 A.D.3d 696, 770 N.Y.S.2d 79, 2003 N.Y. App. Div. LEXIS 13848 (N.Y. App. Div. 2d Dep't 2003).

While a notice of claim against defendant city alleging that plaintiff wife tripped over a raised sidewalk slab was defective for not sufficiently describing "the place where" the claim arose, such defect could properly be disregarded since the city took a photograph of the sidewalk along where it was claimed plaintiff fell and was, therefore, not prejudiced by the defective notice of claim. The Civil Court had jurisdiction to disregard the defect since the requirement that certain applications for relief be made in the Supreme Court or County Court applies only to pretrial applications made by formal motion and relief from a defective notice of claim may be granted at any stage of the action necessarily permitting any trial court in which the action is pending to grant such relief, and to hold the plaintiffs' only remedy in the midst of a jury trial was to seek a Supreme Court order permitting the Civil Court to disregard the defect in the notice of claim would bring about a ludicrous result which the legislature never intended. Maiello v City of New York, 113 Misc. 2d 122, 450 N.Y.S.2d 932, 1981 N.Y. Misc. LEXIS 3462 (N.Y. App. Term 1981).

Corporation counsel may in good faith settle cases on behalf of the city, and late filing of notice of intention to sue did not upset such settlement. Radinsky v New York, 133 N.Y.S.2d 540, 1954 N.Y. Misc. LEXIS 2251 (N.Y. Sup. Ct. 1954).

Plaintiffs' failure to include their claims that defendant city was liable for their injuries based on negligent inspection and storage of diesel tanks before terrorist attacks could not be excused under N.Y. Gen. Mun. Law § 50-e(6) because by adding the claim, plaintiffs were asserting a new theory of liability (in essence, that the city's negligence in storing diesel tanks led to a building's collapse and the resulting contamination and damage to the plaintiffs' properties). Stein v JP Morgan Chase Bank, 279 F. Supp. 2d 286, 2003 U.S. Dist. LEXIS 21352 (S.D.N.Y. 2003).

326. Examination of claimant as waiver of defects

Under section 50-e of the General Municipal Law, as it existed prior to a 1976 amendment (L 1976, ch 745), which provided that, before commencing suit against a public corporation, a notice of claim was to be served on the party against whom the claim was made by delivering a copy thereof personally or by registered mail within 90 days after the claim arose, but which contained a "saving clause" providing that "if service of such notice be made within the period prescribed by this section, but in a manner not in compliance with the provisions of this subdivision, such service shall be deemed valid if such notice is actually received . . . and such party against whom the claim is made shall cause the claimant . . . to be examined in regard to such claim", service of a notice of claim by means other than registered mail or personal delivery constituted effective service only if the notice was actually received within the prescribed 90-day period and an examination of the claimant was conducted. Adkins v New York, 43 N.Y.2d 346, 401 N.Y.S.2d 469, 372 N.E.2d 311, 1977 N.Y. LEXIS 2469 (N.Y. 1977).

Transit operating authority was not entitled to summary judgment dismissing personal injury complaint on ground that plaintiff's notice of claim was defective, even though site description in notice was too vague to locate alleged defect in roadway and plaintiff misidentified number of bus which she was disembarking when injured, where confusion regarding route number was explained by recent change in route designations, correct bus route was identified at CLS Gen Mun § 50-h hearing 4 months after accident, and site of accident was further identified at hearing. Dillon v Manhattan & Bronx Surface Transit Operating Authority, 182 A.D.2d 553, 582 N.Y.S.2d 423, 1992 N.Y. App. Div. LEXIS 6262 (N.Y. App. Div. 1st Dep't 1992).

Former subdivision 3 of this section, as amended, provides that if service is made within the time prescribed, but in a manner not in compliance with its provisions, it is to be deemed valid if the notice is actually received by the proper person, officer, agent, clerk or employee and the claimant or anyone else interested in the claim is examined in regard to it. This provision has been given effect in instances where a notice of claim was simply mailed in, but received within the prescribed time and followed up by an examination into its merits. Unger v Falconer, 3 N.Y.2d 717, 163 N.Y.S.2d 962, 143 N.E.2d 512, 1957 N.Y. LEXIS 1035 (N.Y. 1957); Drake v Comptroller of New York, 278 A.D. 317, 104 N.Y.S.2d 774, 1951 N.Y. App. Div. LEXIS 3800 (N.Y. App. Div. 1951); Bard v Board of Education, 140 N.Y.S.2d 850, 1955 N.Y. Misc. LEXIS 2445 (N.Y. Sup. Ct. 1955).

327. —Applicability to particular public corporations

Where the notice of claim was originally improperly served but after July 1, 1951, the effective date of the amendment of § 50-e, the city caused claimant to be examined with regard to the claim, the service of the original notice of claim became good. Anderlohr v New York, 112 N.Y.S.2d 135, 201 Misc. 605, 1952 N.Y. Misc. LEXIS 2616 (N.Y. Sup. Ct. 1952).

The amendment to this section by the Laws of 1951, Chapter 393 which provide that the service of a notice of claim not made in compliance with the provisions as they were before the 1951 amendment, should be deemed valid if the notice was actually received by the person who should have been served and such party "shall cause the claimant . . . . to be examined in regard to such claim", was controlling in actions brought against a county, as well as those against other public corporations. Bronson v Westchester County, 10 Misc. 2d 293, 168 N.Y.S.2d 735, 1957 N.Y. Misc. LEXIS 2306 (N.Y. Sup. Ct. 1957).

328. —Timeliness of notice for examination

Review of affidavit of service and other matters showed that the first notice for examination of claimants, asserting personal injuries arising out of alleged negligence of town's sanitation

district employee in operation of district's motor vehicle was served timely within 90 days filing notice of claim contrary to assertion of claimants, and claimant by appearing at office of the corporate defendant's attorney for purpose of examination waived any objection to alleged loss of original notice in mail. Fitzgerald v Sanitation Dist. No. 6, 89 Misc. 2d 1078, 393 N.Y.S.2d 542, 1977 N.Y. Misc. LEXIS 2730 (N.Y. City Ct.), modified, 116 Misc. 2d 325, 457 N.Y.S.2d 664, 1977 N.Y. Misc. LEXIS 2714 (N.Y. App. Term 1977).

329. —Acts constituting examination

The city waived the requirement of § 50-e that a notice of claim must be delivered personally or by registered mail when the injured party obtained a form of notice of claim from a city department and mailed it by ordinary mail to the city comptroller who retained it and, before the expiration of the time limited for filing such notice, notified the injured party to appear for examination. Teresta v New York, 304 N.Y. 440, 108 N.E.2d 397, 304 N.Y. (N.Y.S.) 440, 1952 N.Y. LEXIS 734 (N.Y. 1952).

Where, within the time extended for filing notice of claim, a claim was sent to the county clerk and by him delivered to the county attorney, and the county examined the hospital records, the notice was valid. Soules v Rochester, 10 A.D.2d 362, 199 N.Y.S.2d 966, 1960 N.Y. App. Div. LEXIS 10393 (N.Y. App. Div. 4th Dep't 1960).

Under subd 6 of this section, appellant should have been granted leave to file claim nunc pro tunc against a town for injury sustained as the result of alleged negligence arising out of its snowplow colliding with a bus in which appellant was a passenger, although no claim was filed within the 90-day period, the accident having occurred February 10, the town having been informed of it on February 26, its insurance carrier having sought and obtained a physical examination of appellant on April 3, and the disability insurance carrier for appellant's employer having filed notice of lien upon the town likewise within the 90-day period. Kaiser v Salina, 20 A.D.2d 312, 247 N.Y.S.2d 9, 1964 N.Y. App. Div. LEXIS 4352 (N.Y. App. Div. 4th Dep't 1964).

Where notice of claim of infant's injuries was timely served upon the comptroller of the City of New York but was served one day late upon the Board of Education, and the comptroller within the prescribed period had transmitted the notice of claim to such Board, and both the comptroller and the Board examined the infant and her father at a hearing, the service was held proper. Lauricella v New York, 137 N.Y.S.2d 687, 207 Misc. 203, 1955 N.Y. Misc. LEXIS 2562 (N.Y. Sup. Ct. 1955).

Absence of any examination of claimant prior to commencement of action against the municipality or agency in question should not be permitted to defeat a claim which was timely served and received by the proper official and in time, and, in connection with which, defendant has conducted a pre-trial examination of claimant. Perl v New York City Housing Authority, 35 Misc. 2d 92, 231 N.Y.S.2d 142, 1962 N.Y. Misc. LEXIS 3515 (N.Y. Sup. Ct. 1962).

There is an examination of claimant at instance of the municipality within the 90-day period where the claims manager of the city's insurance company within that period following the accident interviews claimant at her home and takes a signed statement from her answering all his questions as to where, when and how the accident occurred and the nature and extent of her injuries. Harwood v Hornell, 41 Misc. 2d 706, 246 N.Y.S.2d 222, 1964 N.Y. Misc. LEXIS 2155 (N.Y. Sup. Ct. 1964).

Under subd. 3 of this section, providing that when manner of service of notice of claim is defective it may be deemed valid if notice was actually received and the municipality has caused the claimant to be examined, where notice of claim by reason of injuries sustained in a sidewalk fall was mailed to the mayor within eight days after the fall occurred and acknowledged by him providing full details and the claims manager of the city's insurance company, within the 90-day period, interviewed the claimant at length and took her written statement, the city was not prejudiced by the informal nature of the claim and claimant was entitled to leave of court to amend her claim to provide formal verification, etc. Harwood v Hornell, 41 Misc. 2d 706, 246 N.Y.S.2d 222, 1964 N.Y. Misc. LEXIS 2155 (N.Y. Sup. Ct. 1964).

330. —Acts not constituting examination

The Westchester County Playland Commission was not estopped to assert failure to serve notice of claim against it as required by this section by mere service of notice on claimant to appear for examination, there being nothing to indicate that an examination actually took place. Menter v Westchester County Playland Com., 42 Misc. 2d 5, 247 N.Y.S.2d 3, 1964 N.Y. Misc. LEXIS 2144 (N.Y. County Ct. 1964).

331. —Instances where defect not waived by examination

Where a notice of a personal injury claim was sent to the City of New York by ordinary mail on the 90th day after the accident which gave rise to the claim, and the city received it six days later and subsequently examined the claimant, the notice of claim was not timely served within the meaning of section 50-e of the General Municipal Law, which, as it existed at the time of the accident, permitted service of a notice of claim by means other than registered mail or personal delivery, but only if two conditions were met, the first being that the notice of claim be actually received within the 90-day period prescribed in that section, and the second being that there be an examination of the claimant. Adkins v New York, 43 N.Y.2d 346, 401 N.Y.S.2d 469, 372 N.E.2d 311, 1977 N.Y. LEXIS 2469 (N.Y. 1977).

Even assuming that an irregular notice of claim given four and one-half months after injury sustained by a school child, though irregular, was in such form as to be subject to amendments, being merely a signed notice of accident given to the teacher or principal of the school it was not served upon a person "designated by law" within the requirement of this section, and therefore a subsequent hearing and physical examination of plaintiff following the claim could not validate the service. Chikara v New York, 10 A.D.2d 862, 199 N.Y.S.2d 829, 1960 N.Y. App. Div. LEXIS 10689 (N.Y. App. Div. 2d Dep't), app. denied, 11 A.D.2d 688, 205 N.Y.S.2d 850, 1960 N.Y. App. Div. LEXIS 9440 (N.Y. App. Div. 2d Dep't 1960), app. dismissed, 8 N.Y.2d 1014, 206 N.Y.S.2d 780, 170 N.E.2d 204, 1960 N.Y. LEXIS 996 (N.Y. 1960).

Defendant city's conduct of hearing under CLS Gen Mun § 50-h and participation in years of litigation did not preclude it from first raising untimeliness of notice of claim after personal injury action was well advanced; it was free to do so until trial. Frank v City of New York, 240 A.D.2d 198, 658 N.Y.S.2d 293, 1997 N.Y. App. Div. LEXIS 6150 (N.Y. App. Div. 1st Dep't 1997).

Where a notice of claim under the above statute was timely served on the Board of Education of Union Free School District No. 23 for an injury to the claimant while performing work in the construction of a library building for the present defendant and claimant's attorney was subsequently served with a notice of examination from a law firm appearing in behalf of the "Library Trustees of Union Free School District No. 23 incorrectly sued herein" who later amended its appearance to show that it only represented the Board of Education, no estoppel could be predicated on the mistaken or unauthorized appearance by the attorneys for the Board of Education, and the conduct of the examination during which such amended appearance was filed could not confer any rights on the claimant as against the present defendant in the absence of a showing that service of a notice of claim was made upon it within the period prescribed by the above statute. Maik v Massapequa Library Board of Trustees, 46 Misc. 2d 159, 258 N.Y.S.2d 916, 1965 N.Y. Misc. LEXIS 2089 (N.Y. Sup. Ct. 1965).

332. Forwarding notice to proper party; claim involving county

Where, within the time extended for filing notice of claim, a claim was sent to the county clerk and by him delivered to the county attorney, and the county examined the hospital records, the notice was valid. Soules v Rochester, 10 A.D.2d 362, 199 N.Y.S.2d 966, 1960 N.Y. App. Div. LEXIS 10393 (N.Y. App. Div. 4th Dep't 1960).

Although notice of a tort claim against a county was not served in the precise manner prescribed by subd. 2 of this section, it was served in such manner as to give the county timely and adequate notice where the accident occurred on September 28 and a copy of the notice of claim was served on the County Attorney December 23, and likewise, on the same day, on the secretary to the Clerk of

the Board of Supervisors by acceptance of service by an office employee in the secretary's absence who followed it up by promptly transmitting it by mail to the County Attorney, and written memorandum to the Clerk of the Board, which memorandum was duly entered in the board minutes. Majane v County of Westchester, 39 Misc. 2d 238, 240 N.Y.S.2d 300, 1963 N.Y. Misc. LEXIS 2183 (N.Y. Sup. Ct. 1963).

333. —Claim involving school district

A notice of claim must be deemed valid where, although the notice was directed to the city of New York and was received by the city's comptroller, it was forwarded to and was received by the president of the board of education within the period provided for in this section and the corporation counsel of the city, who was also attorney for the board of education, held a hearing on the claim. Under the circumstances, it was unnecessary to serve another notice of claim on the board of education. Zivyak v Board of Education, 282 A.D. 704, 122 N.Y.S.2d 19, 1953 N.Y. App. Div. LEXIS 4745 (N.Y. App. Div. 1953).

Where it was inferable from the circumstances that a notice of claim against a Board of Education, erroneously served upon the City Comptroller, came to the board's notice within the period prescribed by this section, an answer having been served verified by the secretary of the Board of Education and the board's attorney having examined the claimant, the notice of claim would be deemed valid and service of an amended notice was not required. Torres v Board of Education, 13 A.D.2d 948, 216 N.Y.S.2d 875, 1961 N.Y. App. Div. LEXIS 9917 (N.Y. App. Div. 1st Dep't 1961).

Where claim was served upon comptroller and mailed by him to Board within statutory period, service was timely though not received by board until after expiration of statutory period. Stallone v Board of Education, 133 N.Y.S.2d 592, 205 Misc. 697, 1954 N.Y. Misc. LEXIS 2263 (N.Y. Sup. Ct. 1954).

Where notice of claim of infant's injuries was timely served upon the comptroller of the City of New York but was served one day late upon the Board of Education, and the comptroller within the prescribed period had transmitted the notice of claim to such Board, and both the comptroller and the Board examined the infant and her father at a hearing, the service was held proper. Lauricella v New York, 137 N.Y.S.2d 687, 207 Misc. 203, 1955 N.Y. Misc. LEXIS 2562 (N.Y. Sup. Ct. 1955).

Where a board of education had immediate notice of an accident and thereafter a notice of claim, addressed to the city and the board of education, was served on the comptroller but none was served on the board of education, an application for leave to file a notice of claim with the board of education would be granted where it appeared that the comptroller's office had notified the board of education by letter of such claim. Schreibersdorf v Board of Education, 126 N.Y.S.2d 548, 1953 N.Y. Misc. LEXIS 2460 (N.Y. Sup. Ct. 1953).

334. Investigation into merits of claim

Complaint against village was properly dismissed, to extent it sought recovery on theory that driver's accident was caused by stop sign obstructed by vegetation, where notice of claim under CLS Gen Mun § 50-e did not refer to this theory, and thus notice was inadequate to provide village with opportunity to investigate such transitory condition. Shea v Head of Harbor, 180 A.D.2d 675, 579 N.Y.S.2d 715, 1992 N.Y. App. Div. LEXIS 1462 (N.Y. App. Div. 2d Dep't 1992).

Complaint against village should not have been dismissed, even though notice of claim under CLS Gen Mun § 50-e did not make specific mention of failure to post double-arrow sign at T intersection or specify driver's injuries, where village had been preparing to defend case premised on theory of inadequate highway design and traffic control plan for 7 years, and it had opportunity to learn of plaintiff's injuries through discovery. Shea v Head of Harbor, 180 A.D.2d 675, 579 N.Y.S.2d 715, 1992 N.Y. App. Div. LEXIS 1462 (N.Y. App. Div. 2d Dep't 1992).

Alleged defects in notice of claim form did not prejudice ability of New York City Housing Authority (NYCHA) to defend action where accident report was filed shortly after incident, and NYCHA assigned claim number to matter and conducted investigation. Biggers v New York City Hous. Auth., 202 A.D.2d 537, 609 N.Y.S.2d 278, 1994 N.Y. App. Div. LEXIS 2641 (N.Y. App. Div. 2d Dep't 1994).

Neither a school district's efforts to investigate claims by an infant and his mother arising out of a hazing incident nor the district's coverage of the liability of its individual employees served as a substitute for compliance with N.Y. Educ. Law § 3813 and N.Y. Gen. Mun. Law § 50-e by naming the individual employees in the notice of claim. White v Averill Park Cent. Sch. Dist., 195 Misc. 2d 409, 759 N.Y.S.2d 641, 2003 N.Y. Misc. LEXIS 263 (N.Y. Sup. Ct. 2003).

But the giving, service, or attempted service of the notice must have been within the prescribed time period, so that notice was actually received within that period, before the informal method of giving it can be "deemed valid" on the strength of subsequent investigation into the claim's merits. McGuire v New York, 116 N.Y.S.2d 163, 1952 N.Y. Misc. LEXIS 1828 (N.Y. Sup. Ct. 1952).

335. Knowledge of facts constituting claim

Under subd 6 of this section, appellant should have been granted leave to file claim nunc pro tunc against a town for injury sustained as the result of alleged negligence arising out of its snowplow colliding with a bus in which appellant was a passenger, although no claim was filed within the 90-day period, the accident having occurred February 10, the town having been informed of it on February 26, its insurance carrier having sought and obtained a physical examination of appellant on April 3, and the disability insurance carrier for appellant's employer having filed notice of lien upon the town likewise within the 90-day period. Kaiser v Salina, 20 A.D.2d 312, 247 N.Y.S.2d 9, 1964 N.Y. App. Div. LEXIS 4352 (N.Y. App. Div. 4th Dep't 1964).

Payments made by the Board of Education to adjoining property owners in satisfaction of their claims for injury to their property by reason of a contractor's improper performance of work were not made without authorization, since the Board had the power to validly waive irregularities as to the service of notices of claim not pertaining to the time or manner of service since the Board was fully cognizant of the nature of the claims, and the contractor was not prejudiced by such waiver. Board of Education v A. Barbaresi & Son, Inc., 25 A.D.2d 855, 269 N.Y.S.2d 823, 1966 N.Y. App. Div. LEXIS 4306 (N.Y. App. Div. 2d Dep't 1966).

In an action by plaintiff, who was injured when struck in the face by a bullet fired by one of the defendant police officers while engaged in the pursuit of an alleged criminal, and who served notice of claim one day late, Special Term abused its discretion in denying plaintiff's request that the court deem that the notice of claim had been timely served, where several agents of the municipality had actual notice of the plaintiff's claim within hours after its occurrence and subsequently a hearing was held wherein the facts surrounding the incident were once again disclosed, where the record did not indicate that the city even claimed that it had suffered any prejudice by the late filing, and where the actions of the city prior to moving to dismiss the complaint amounted to a waiver of the right to assert the defense of the untimely service of the notice of claim. King v New York, 88 A.D.2d 891, 452 N.Y.S.2d 607, 1982 N.Y. App. Div. LEXIS 17213 (N.Y. App. Div. 1st Dep't), app. denied, 90 A.D.2d 714, 1982 N.Y. App. Div. LEXIS 18896 (N.Y. App. Div. 1st Dep't 1982).

A notice of claim against a municipality failed to state with sufficient specifity the place at which the claim arose when it merely stated that it arose on the public roadway at an intersection of two city streets, since such statement was too vague to enable the city to locate the alleged defect in the road which led to the claimant's injury, and since the notice was silent regarding causation, which alone made it impossible for the city to investigate the matter; moreover, it was not an abuse of discretion to decline to disregard the claimant's defective notice, since the requisite particulars were not set forth in her bill of particulars, and since there was nothing to suggest that a report made by a police officer who aided the claimant immediately after her accident was ever filed with or otherwise brought to the attention of the appropriate city official. Caselli v New York, 105 A.D.2d 251, 483 N.Y.S.2d 401, 1984 N.Y. App. Div. LEXIS 20695 (N.Y. App. Div. 2d Dep't 1984).

Delay in serving notice of claim is excused where municipal defendant was in possession of all records concerning medical malpractice and therefore had actual notice underlying facts of claim; delay is excused where it is not substantially prejudicial to municipal hospital. Rechenberger v Nassau County Medical Center, 112 A.D.2d 150, 490 N.Y.S.2d 838, 1985 N.Y. App. Div. LEXIS 56436 (N.Y. App. Div. 2d Dep't 1985).

Prejudice on part of city from lack of specificity in notice of claim as to location of defect was not negated by fact that city learned of location from accident report prepared by police officer who responded to scene where (1) plaintiff failed to proffer acceptable proof that site of accident was correctly recorded by officer, and (2) city challenged accuracy of accident report on basis of discrepancies between officer's description of location and that provided by plaintiff at hearing conducted 14 months after accident. Frankfort v New York, 159 A.D.2d 680, 553 N.Y.S.2d 182, 1990 N.Y. App. Div. LEXIS 3597 (N.Y. App. Div. 2d Dep't 1990).

City housing authority was not entitled to dismissal of complaint of woman who fell and was injured in one of authority's projects where (1) employees of authority responded to scene at time of accident, interviewed plaintiff, and filed accident report, (2) plaintiff timely filed notice of claim stating that fall was due to "dangerous and defective condition," and (3) 7 months after accident CLS Gen Mun § 50-h hearing was conducted, at which time plaintiff was further questioned and exact location of accident was determined; any deficiency in notice of claim was obviated by immediate, actual notice of facts underlying claim. Williams v New York City Housing Authority, 179 A.D.2d 523, 579 N.Y.S.2d 21, 1992 N.Y. App. Div. LEXIS 462 (N.Y. App. Div. 1st Dep't 1992).

Ten-year delay by insured New York City Housing Authority in reporting personal injury claim to its liability insurer constituted breach of authority's obligation under policy to give notice of pertinent occurrence "as soon as practicable" and entitled insurer to disclaim any duty to defend or indemnify authority, notwithstanding fact that authority itself received no notice of occurrence giving rise to injury other than that contained in police accident report; even if notice of claim provisions of CLS Gen Mun § 50-e were interpreted to mean that its police department's knowledge of accident could not be imputed to municipality, authority's duty of notification was controlled by insurance policy rather than by statute. White v New York, 180 A.D.2d 324, 585 N.Y.S.2d 41, 1992 N.Y. App. Div. LEXIS 8146 (N.Y. App. Div. 1st Dep't 1992), aff'd, 81 N.Y.2d 955, 598 N.Y.S.2d 759, 615 N.E.2d 216, 1993 N.Y. LEXIS 1127 (N.Y. 1993).

When an infant sought leave, pursuant to N.Y. Gen. Mun. Law § 50-e(5), to serve late notice of a negligent supervision claim on a school district, after the infant was injured by another student in gym class, the infant was not entitled to serve late notice because, while a school nurse had prepared an accident report regarding the incident, the report, which stated that the infant was injured during gym class as a result of an accident, did not show the district had actual knowledge of the essential facts underlying the infant's claim within 90 days of the incident or a reasonable time thereafter, and, as a result, the district would be prejudiced by granting leave because it would have had no opportunity to investigate the facts at the time of the incident. Matter of Scolo v Central Islip Union Free School Dist., 40 A.D.3d 1104, 838 N.Y.S.2d 577, 2007 N.Y. App. Div. LEXIS 6632 (N.Y. App. Div. 2d Dep't 2007).

As originally enacted, this section contained no provision whereby a defect in service of the required notice of claim could be overlooked or disregarded on the ground of actual notice or knowledge of the incident by officers or employees of the municipality or public corporation, and it was held, during that period, that actual notice or knowledge was immaterial and that no enforceable cause of action existed in the absence of at least substantial compliance with the service requirements. Broome County v Binghamton Taxicab Co., 75 N.Y.S.2d 423, 190 Misc. 925, 1947 N.Y. Misc. LEXIS 3409 (N.Y. Sup. Ct. 1947).

Under subd. 3 of this section, providing that when manner of service of notice of claim is defective it may be deemed valid if notice was actually received and the municipality has caused the claimant to be examined, where notice of claim by reason of injuries sustained in a sidewalk fall was mailed to the mayor within eight days after the fall occurred and acknowledged by him providing full details and the claims manager of the city's insurance company, within the 90-day period, interviewed the claimant at length and took her written statement, the city was not prejudiced by the informal nature of the claim and claimant was entitled to leave of court to amend her claim to provide formal verification, etc. Harwood v Hornell, 41 Misc. 2d 706, 246 N.Y.S.2d 222, 1964 N.Y. Misc. LEXIS 2155 (N.Y. Sup. Ct. 1964).

In a replevin action to recover $4,015.06 in cash held by the police property clerk of the New York City Police Department, the money having been seized at a "Las Vegas Nite" sponsored by the plaintiff, the defendants cannot avoid return of the property by raising as an affirmative defense the failure of the plaintiff to file a notice of claim pursuant to section 50-e of the General Municipal Law since the record establishes that the defendants had substantial actual notice of the plaintiff's claim constituting compliance with the statute's notice of claim provision. Williamsburg Volunteer Ambulance Corps v Wendt, 95 Misc. 2d 414, 408 N.Y.S.2d 207, 1978 N.Y. Misc. LEXIS 2441 (N.Y. Civ. Ct. 1978).

In action against city and its board of education for child's personal injuries sustained during gym class, plaintiffs would be granted leave to file late notice of claim against board of education where plaintiffs filed timely notice of claim against city, failure to file separate notice with board was inadvertent, city and board were represented by same corporation counsel, which filed single answer, board knew facts of incident early in litigation, mounted well prepared defense, and did not indicate that it would have defended action differently if notice of claim had been filed at its offices, and thus board was not prejudiced by late filing. Arvelo by Arvelo v City of New York, 182 Misc. 2d 101, 695 N.Y.S.2d 653, 1999 N.Y. Misc. LEXIS 377 (N.Y. Civ. Ct. 1999).

336. Receipt of defective notice

With respect to a notice of claim for injuries sustained by an infant plaintiff and her father, the court could properly disregard words in the body of the notice indicating that the claim was against a town only and not likewise against a Board of Education, which admitted receipt of the notice of claim, and likewise properly permitted amendment of the notice to correct an improperly executed verification. Gisondi v Harrison, 16 A.D.2d 929, 229 N.Y.S.2d 698, 1962 N.Y. App. Div. LEXIS 9364 (N.Y. App. Div. 2d Dep't 1962).

In a personal injury action where there was no proof that a notice of claim was actually received by any member of the Board of Education, any trustee, or clerk thereof, as required by the statutes, the action must be dismissed despite the fact that a letter stating the claim was addressed to the Superintendent of Schools, was acknowledged by him in a letter in which he stated that the matter was being referred to the school insurance agency for action, and that a written statement was thereafter taken by an investigator all within 90 days after the claim arose. Bayer v Board of Education, 58 Misc. 2d 259, 295 N.Y.S.2d 131, 1968 N.Y. Misc. LEXIS 1042 (N.Y. Sup. Ct. 1968).

Municipality waived the requirements of this section as to manner of service of notice of claim by accepting letter sent within 90-day period, by informing claimant that the letter had been received and by forwarding the letter to the insurance company whose representative interviewed the claimant at an early date. Boettner v Mamaroneck, 123 N.Y.S.2d 849, 1953 N.Y. Misc. LEXIS 2057 (N.Y. Sup. Ct. 1953).

337. —Duty to specify defect in notice

Court properly granted defendant's motion to dismiss complaint for failure to timely serve proper notice of claim where plaintiffs did not provide correct address of building where accident occurred until service of their summons and complaint, some 9 months after accident, and there was no excuse for such delay, plaintiffs having been advised by defendant some 3 months after accident that it did not own building at address given in plaintiffs' notice of claim. Rivera by Rivera v New York City Hous. Auth., 235 A.D.2d 296, 652 N.Y.S.2d 287, 1997 N.Y. App. Div. LEXIS 452 (N.Y. App. Div. 1st Dep't 1997).

Claimant who failed to file a timely notice of personal injury claim as required by law was not granted leave to file a late claim on the theory that he had served a timely claim by registered mail on the corporation counsel of the City of New York and the corporation counsel had failed to notify him of his mistake in filing before the expiration of the statutory period. Hayward v New York City Transit Authority, 3 Misc. 2d 295, 148 N.Y.S.2d 317, 1955 N.Y. Misc. LEXIS 2088 (N.Y. Sup. Ct. 1955).

City was not entitled to dismissal of complaint for failure to properly serve notice of claim where city merely returned defective notice without specifying nature of alleged defect, especially where irregularity in service was either clerical in nature or one of law office failure. Travelers Indem. Co. v Yonkers, 142 Misc. 2d 334, 537 N.Y.S.2d 429, 1988 N.Y. Misc. LEXIS 807 (N.Y. City Ct. 1988).

338. —Failure to return defective notice

In action for personal injuries received by passenger on bus owned by county and operated by bus company, service of notice of claim on county was valid, although not carried out in manner specified in CLS Gen Mun § 50-e, where notice of claim was timely served on bus company and its general counsel, and it was undisputed that bus company's general counsel was attorney who was also regularly engaged in representing county in suits brought against it arising out of accidents occurring on buses, and thus was proper person to be served on county's behalf, and where county had not returned notice to passenger within 30 days of receipt. Tacinelli v Liberty Lines, 123 A.D.2d 756, 507 N.Y.S.2d 230, 1986 N.Y. App. Div. LEXIS 60898 (N.Y. App. Div. 2d Dep't 1986).

Although notice of claim against a New York City Housing Authority was not served personally or by "registered" mail, where it was admittedly sent and received by "certified" mail and no objection was raised as to the method of service until after time for service had expired, the defect in method of service must be considered as waived. Caro v New York, 31 Misc. 2d 834, 222 N.Y.S.2d 927, 1961 N.Y. Misc. LEXIS 1997 (N.Y. Sup. Ct. 1961).

339. —Mere retention of defective notice

The retention of a late notice of claim does not bar a municipality from raising the defense of untimeliness. Miller v County of Putnam, 32 A.D.2d 827, 302 N.Y.S.2d 377, 1969 N.Y. App. Div. LEXIS 3651 (N.Y. App. Div. 2d Dep't), aff'd, 25 N.Y.2d 664, 306 N.Y.S.2d 473, 254 N.E.2d 773, 1969 N.Y. LEXIS 973 (N.Y. 1969).

Mere retention of a defective notice of claim served upon a municipality will not constitute a waiver of the defect. Bardo v Monroe County Water Authority, 37 Misc. 2d 638, 235 N.Y.S.2d 926, 1962 N.Y. Misc. LEXIS 2453 (N.Y. Sup. Ct. 1962).

XII. Amendment of Claim or Notice

340. In general

Subdivision 6 of this section provides that at or before trial or hearing on a claim within the coverage of this section the notice of claim can be amended as to any mistake, omission, irregularity or defect "made in good faith" and "not pertaining to the manner or time of service thereof", or such a defect can be disregarded, in the court's discretion, if it appears defendant was not prejudiced by the error. This obviously leaves the matter of allowing such amendments or disregarding such defects up to the court's discretion, on a basis of whether or not prejudice will result. Winbush v Mt. Vernon, 306 N.Y. 327, 118 N.E.2d 459, 306 N.Y. (N.Y.S.) 327, 1954 N.Y. LEXIS 1029 (N.Y. 1954).

The phrasing of subd. 6 is such as to make clear that no amendment can be allowed, nor can any defect be disregarded, which would deprive defendant of the protection provided by the strict requirements as to time and method of serving notice of claim, while leaving to the court's discretion the correction of any other kind of mistake or defect in such papers. Winbush v Mt. Vernon, 306 N.Y. 327, 118 N.E.2d 459, 306 N.Y. (N.Y.S.) 327, 1954 N.Y. LEXIS 1029 (N.Y. 1954); Miller v N.Y. City Hous. Auth., 7 A.D.2d 922, 183 N.Y.S.2d 518, 1959 N.Y. App. Div. LEXIS 9964 (N.Y. App. Div. 2d Dep't), aff'd, 6 N.Y.2d 932, 190 N.Y.S.2d 1002, 161 N.E.2d 215, 1959 N.Y. LEXIS 1209 (N.Y. 1959).

Applications to amend tort claim notices have been denied in a number of instances, wholly or in part, in exercise of the court's discretion, either because they tend to change the nature of the claim asserted or because they would, in some other way, prejudice the defendant. Application of Kesdan, 273 A.D. 1020, 79 N.Y.S.2d 916, 1948 N.Y. App. Div. LEXIS 5820 (N.Y. App. Div.), reh'g denied, 274 A.D. 801, 81 N.Y.S.2d 157, 1948 N.Y. App. Div. LEXIS 3414 (N.Y. App. Div. 1948).

Court may, in its discretion, grant motion for leave to amend notice of claim under CLS General Municipal Law § 50-e where it determines that mistake or defect in original notice was made in good faith and that public corporation was not prejudiced. Mazza v New York, 112 A.D.2d 921, 492 N.Y.S.2d 438, 1985 N.Y. App. Div. LEXIS 52134 (N.Y. App. Div. 2d Dep't 1985).

Statute of limitations on personal injury claim against town was not tolled during period in which plaintiff sought leave to amend her notice of claim, since application to amend can be made at any stage of action under terms of CLS Gen Mun § 50-e(6) and thus plaintiff did not have to delay commencement of action until decision was made on her motion to amend. Fiorito v Huntington, 140 A.D.2d 302, 527 N.Y.S.2d 1015, 1988 N.Y. App. Div. LEXIS 4620 (N.Y. App. Div. 2d Dep't 1988).

Court may grant leave to amend notice of claim under CLS Gen Mun § 50-e(6) when (1) mistake, omission, irregularity or defect in original notice was made in good faith, and (2) public corporation has not been prejudiced thereby. Williams v New York, 156 A.D.2d 361, 548 N.Y.S.2d 317, 1989 N.Y. App. Div. LEXIS 15407 (N.Y. App. Div. 2d Dep't 1989).

Under CLS Gen Mun § 50-e(6), court may, in its discretion, grant application for leave to serve amended notice of claim where mistake was made in good faith and municipality has not been prejudiced thereby. Kaminsky v City of New York, 238 A.D.2d 380, 656 N.Y.S.2d 324, 1997 N.Y. App. Div. LEXIS 3820 (N.Y. App. Div. 2d Dep't 1997).

The trial court improvidently exercised its discretion in denying an injured party's motion pursuant to N.Y. Gen. Mun. Law § 50-e(6) for leave to serve an amended notice of claim on a city; there was no allegation that the injured party's error in describing the location of the accident in her notice of claim was made in bad faith, and moreover, the notice of claim was accompanied by photographs from which the correct location of the accident site could have been ascertained, and the city was advised of the correct location at the hearing pursuant to N.Y. Gen. Mun. Law § 50-h, which took place approximately five months after the accident, and under these circumstances, the city failed to establish that the defective notice prejudiced it by impeding its ability to investigate the claim. Barrios v City of New York, 300 A.D.2d 480, 751 N.Y.S.2d 562, 2002 N.Y. App. Div. LEXIS 12335 (N.Y. App. Div. 2d Dep't 2002), app. denied, 100 N.Y.2d 534, 762 N.Y.S.2d 875, 793 N.E.2d 412, 2003 N.Y. LEXIS 951 (N.Y. 2003).

In an action which an injured party filed against New York City (New York) and the New York City Transit Authority, the trial court erred by denying the injured party's motion for leave to serve an amended notice of claim, pursuant to N.Y. Gen. Mun. Law § 50-e(6), to correct the date of the accident stated in the original notice, and by granting the Transit Authority's motion to dismiss the action, because the error in the original notice of claim was made in good faith and the Transit Authority did not demonstrate that it would suffer actual prejudice if the motion was granted. Lin v City of New York, 305 A.D.2d 553, 759 N.Y.S.2d 394, 2003 N.Y. App. Div. LEXIS 5700 (N.Y. App. Div. 2d Dep't 2003).

Subdivision 6 is a general amendment or curative provision, to the extent of its terms, not limited to instances where the claimant is an infant or has been incapacitated or in some manner misled into the mistake in question, and sanctions correction, in the court's discretion, of all manner of minor defects and mistakes in stating the precise and correct nature of any claimant's actual claim. Turner v New York, 61 N.Y.S.2d 199, 185 Misc. 1012, 1945 N.Y. Misc. LEXIS 2722 (N.Y. City Ct. 1945).

Time within which personal injury action must be commenced against municipality and municipality's board of education under CLS Gen Mun § 50-i, CLS Educ § 3813, is not tolled during time claimant moves to file amended notice of claim under CLS Gen Mun § 50-e. Gomez v New York, 130 Misc. 2d 272, 496 N.Y.S.2d 216, 1985 N.Y. Misc. LEXIS 3178 (N.Y. Sup. Ct. 1985).

341. Construction

Subdivision 6 of this section in providing that the court may, in its discretion, permit amendment of a notice of claim, should be liberally construed provided the municipality is not prejudiced thereby. Harwood v Hornell, 41 Misc. 2d 706, 246 N.Y.S.2d 222, 1964 N.Y. Misc. LEXIS 2155 (N.Y. Sup. Ct. 1964).

Amendment of notices of claim to correct good faith omissions or defects should be liberally allowed even as to matters of substance, provided there has been no prejudice to the municipality. Father of six-year-old infant was permitted to amend a letter which constituted his notice of claim to add a verification and to state time of accident and the basis of claim against a school district where the letter was delivered personally to the trustees of a school district sixty-six days after an accident. Baxter v Turner, 111 N.Y.S.2d 10, 1952 N.Y. Misc. LEXIS 2473 (N.Y. Sup. Ct. 1952).

342. Timeliness of application to amend

A motion to amend the notice under subd 6 of the above statute is not defeated by (1) undue delay in making an application to amend or (2) for want of an affidavit of merit, the only statutory requirement being that it shall appear that the other party was not prejudiced. Montana v Lynbrook, 23 A.D.2d 585, 256 N.Y.S.2d 651, 1965 N.Y. App. Div. LEXIS 4806 (N.Y. App. Div. 2d Dep't 1965).

In an action brought against New York City to recover for injuries sustained when plaintiff's automobile was struck by an automobile which was being chased by a New York City police car, the trial court erred in permitting plaintiff, two years after the accident, to add to his notice of claim a cause of action alleging that the city's negligence in allowing a pothole to exist in the street was a proximate cause of the accident, where plaintiff's original complaint had charged merely undifferentiated negligence in the operation and control of both the police car and the other automobile. McKie v New York, 79 A.D.2d 901, 434 N.Y.S.2d 239, 1981 N.Y. App. Div. LEXIS 9763 (N.Y. App. Div. 1st Dep't 1981).

Court properly refused to allow amendment of notice of claim where plaintiffs sought to cure defect in notice on day of trial, some 4 ½ years after accident, especially where there was no evidence that actual notice of location and cause of accident was imputable to city. Altmayer v New York, 149 A.D.2d 638, 540 N.Y.S.2d 459, 1989 N.Y. App. Div. LEXIS 5341 (N.Y. App. Div. 2d Dep't 1989).

Plaintiff, who filed notice of claim and complaint alleging that her fall in subway station and consequent severance of her leg by oncoming train were result of defendant transit authority's negligence in "ownership, operation, maintenance and control" of train and station, was improperly permitted to amend notice of claim 4 ½ years later to conform to her deposition testimony identifying, for first time, sandy or "blind" line running along edge of platform as source of her fall, since prior to deposition defendant was unaware that plaintiff was claiming that she fell to tracks because she tripped. Moore v New York City Transit Auth., 189 A.D.2d 862, 592 N.Y.S.2d 774, 1993 N.Y. App. Div. LEXIS 642 (N.Y. App. Div. 2d Dep't 1993).

Court properly denied plaintiff's motion to amend her notice of claim under CLS Gen Mun § 50-e where she allegedly injured herself on March 20, 1993 when she slipped and fell on accumulation of ice and snow, but served notice of claim on June 7, 1993 in which she stated that accident had occurred on March 13, and she did not move to correct error until almost one year later; long delay substantially prejudiced ability of defendant New York City Housing Authority to investigate short-lived condition of ice and snow. Rodriguez v City of New York, 223 A.D.2d 536, 636 N.Y.S.2d 388, 1996 N.Y. App. Div. LEXIS 162 (N.Y. App. Div. 2d Dep't), app. denied, 88 N.Y.2d 811, 649 N.Y.S.2d 378, 672 N.E.2d 604, 1996 N.Y. LEXIS 3039 (N.Y. 1996).

City transit authority would be prejudiced by plaintiff's attempt to amend notice of claim to correct date of accident nearly 4 ½ years after accident, and thus motion to amend was properly denied and complaint was properly dismissed. Pollicino v New York City Transit Auth., 225 A.D.2d 750, 640 N.Y.S.2d 168, 1996 N.Y. App. Div. LEXIS 3229 (N.Y. App. Div. 2d Dep't 1996), app. dismissed, in part, app. denied, 89 N.Y.2d 973, 655 N.Y.S.2d 886, 678 N.E.2d 498, 1997 N.Y. LEXIS 228 (N.Y. 1997).

Plaintiffs' request to amend notice of claim and complaint almost 4 years after accident was properly denied, since defendants were unable to conduct meaningful investigation of merits of claim. Hussein v City of New York, 265 A.D.2d 302, 696 N.Y.S.2d 209, 1999 N.Y. App. Div. LEXIS 9681 (N.Y. App. Div. 2d Dep't 1999).

In claim against city transit authority on behalf of passenger who died in fall from moving subway train while trying to change cars, authority's posttrial motion for summary judgment was untimely where (1) it was not filed within 120 after January 1, 1997, as required by CLS CPLR § 3212(a) in cases in which note of issue was filed before that date, (2) plaintiff served notice of claim on authority in September 1990, (3) by early 1992, authority was in position to argue that plaintiff was barred from adding new theories of liability by her failure to seek to amend notice of claim within limitation period of one year and 90 days "after the happening of the event upon which the claim is based," (4) evidence on which authority relied in support of its motion consisted entirely of testimony of witnesses who were deposed in 1994, (5) authority could have moved for summary judgment at any time within period prescribed by § 3212(a) after note of issue was filed in 1995, and (6) thus, authority's excuse—that it could not have moved for summary judgment until it had received trial transcript, including judge's proof-limiting order—was invalid. Barksdale v New York City Transit Auth., 273 A.D.2d 43, 709 N.Y.S.2d 531, 2000 N.Y. App. Div. LEXIS 6379 (N.Y. App. Div. 1st Dep't 2000).

Trial court providently exercised its discretion in denying an injured party's cross motion for leave to serve an amended notice of claim pursuant to N.Y. Gen. Mun. Law § 50-e(6) on a city in a personal injury action; the original notice of claim erroneously described the alleged accident, and the injured party did not seek to amend the notice of claim until over four and one-half years after the accident, which deprived the city of an opportunity to conduct a meaningful investigation. Sarkissian v City of New York, 302 A.D.2d 583, 755 N.Y.S.2d 300, 2003 N.Y. App. Div. LEXIS 1879 (N.Y. App. Div. 2d Dep't 2003).

It is stated that the practice on amendments to notices of claim should follow the practice prescribed under former art 9 Civil Practice Act, and that relief should be granted only where some reason or excuse appears for failure to act within the time prescribed by the statute, and a proper showing is made of prejudice or the absence of prejudice, a mere lapse of time of one year not being in and of itself sufficient to defeat the application or prove prejudice to the city. Feldman v New York, 79 N.Y.S.2d 284, 192 Misc. 136, 1948 N.Y. Misc. LEXIS 2394 (N.Y. City Ct. 1948).

City's failure to challenge an administratrix's notice of claim as deficient did not prohibit the city from arguing that the allegations in the administratrix's supplemental bill of particulars exceeded the scope of the notice of claim; because certain of the theories of liability were not contained in the notice of claim and a late notice of claim asserting such theories would in any event have been time-barred, the administratrix was not entitled to raise them in her supplemental bill of particulars. Furthermore, inasmuch as the administratrix sought to assert new substantive theories of liability, she was unable to amend her notice of claim under N.Y. Gen. Mun. Law § 50-e(6). Clare-Hollo v Finger Lakes Ambulance EMS, Inc., 99 A.D.3d 1199, 952 N.Y.S.2d 350, 2012 N.Y. App. Div. LEXIS 6622 (N.Y. App. Div. 4th Dep't 2012).

343. —Other procedural considerations

While subd. 6 of this section authorizes an order directing plaintiff's attorney to deliver a copy of the notice of claim to the attorney for defendant, in order to cure irregularity in service of a good faith notice, the application for such an order, if made before trial, must be made upon affidavits. Hite v Lyons Cent. School Dist., 11 A.D.2d 624, 200 N.Y.S.2d 144, 1960 N.Y. App. Div. LEXIS 10214 (N.Y. App. Div. 4th Dep't), reh'g denied, 11 A.D.2d 907, 205 N.Y.S.2d 1014, 1960 N.Y. App. Div. LEXIS 8777 (N.Y. App. Div. 4th Dep't 1960), app. dismissed, 8 N.Y.2d 708, 1960 N.Y. LEXIS 1847 (N.Y. 1960).

Amended notice of claim and amended complaint were properly deemed to have been timely interposed pursuant to relation-back provision of CLS CPLR § 203(e) where (1) papers were served pursuant to prior order of court to remedy omission in originals, (2) claims asserted in amended papers were based on same transactions and occurrences as claims asserted in original papers, and (3) defendants were provided with timely notice of transactions and occurrences giving rise to claims in amended papers. Sullivan v Board of Educ. of Eastchester Union Free School Dist., 154 A.D.2d 664, 546 N.Y.S.2d 665, 1989 N.Y. App. Div. LEXIS 13744 (N.Y. App. Div. 2d Dep't 1989).

Motion to serve amended notice of claim on school district would not be dismissed, although action had not been commenced at time motion was made and service of summons and complaint had yet to be effected on district, where district conceded that it had been served with notice of motion and supporting papers, and thus personal jurisdiction over it had been acquired. Cavanagh v Monticello Cent. Sch. Dist., 241 A.D.2d 654, 660 N.Y.S.2d 88, 1997 N.Y. App. Div. LEXIS 7354 (N.Y. App. Div. 3d Dep't 1997).

Where no action is pending, application to serve amended notice of claim must be made by commencement of special proceeding rather than by motion, but dismissal of motion is not required if personal jurisdiction has been obtained over defendant, in which case plaintiff's failure to properly designate papers may be disregarded. Cavanagh v Monticello Cent. Sch. Dist., 241 A.D.2d 654, 660 N.Y.S.2d 88, 1997 N.Y. App. Div. LEXIS 7354 (N.Y. App. Div. 3d Dep't 1997).

It is stated that the practice on amendments to notices of claim should follow the practice prescribed under art 9 Civil Practice Act, and that relief should be granted only where some reason or excuse appears for failure to act within the time prescribed by the statute, and a proper showing is made of prejudice or the absence of prejudice, a mere lapse of time of one year not being in and of itself sufficient to defeat the application or prove prejudice to the city. Feldman v New York, 79 N.Y.S.2d 284, 192 Misc. 136, 1948 N.Y. Misc. LEXIS 2394 (N.Y. City Ct. 1948).

The moving papers being insufficient to show that various defects and irregularities in a notice of claim were amendable under subd. 6 of this section, or whether the proposed amendment would in fact set up a new cause of action after expiration of the time to give notice, the motion was denied, with leave, however, to make further application upon proper moving papers within 30 days. Bailey v Port Leyden, 31 Misc. 2d 310, 220 N.Y.S.2d 89, 1961 N.Y. Misc. LEXIS 3001 (N.Y. Sup. Ct. 1961).

An application for an order amending a notice of claim pursuant to Gen Mun Law § 50-e would be denied, where the claimant had not yet instituted an action predicated on the notice of claim, and where a motion can be made only in an already pending action and when relief is sought prior to the commencement of an action a special proceeding should be commenced, and where if the application was regarded as a motion it had to be dismissed for lack of a pending action, and if construed as a special proceeding it had to be dismissed for lack of proper service. In re Crespo, 123 Misc. 2d 862, 475 N.Y.S.2d 319, 1984 N.Y. Misc. LEXIS 3096 (N.Y. Sup. Ct. 1984).

Husband operating an automobile owned by the wife at the time of the injury, was a bailee having an interest in the property which is sufficient to entitle him to sue third persons for injury to the automobile, and it was unnecessary to have the notice of claim against the city amended by substituting therein the name of his wife. Hurst v New York, 88 N.Y.S.2d 98, 1949 N.Y. Misc. LEXIS 2053 (N.Y. Sup. Ct. 1949).

344. Applicability to types of actions

In action to recover damages for personal injuries sustained as result of allegedly defective condition in street, amendment of defective notice of claim will be denied where original notice was insufficient with respect to setting forth place and manner in which claim arose, thereby prejudicing city by depriving it of opportunity to conduct prompt and adequate investigation. Mazza v New York, 112 A.D.2d 921, 492 N.Y.S.2d 438, 1985 N.Y. App. Div. LEXIS 52134 (N.Y. App. Div. 2d Dep't 1985).

The amendment provisions of this section are limited to claims within its coverage, and a plaintiff suing a city on contract cannot avail himself of them to amend his preliminary notice of claim. Crowley v New York, 70 N.Y.S.2d 333, 189 Misc. 170, 1947 N.Y. Misc. LEXIS 2392 (N.Y. Sup. Ct. 1947).

345. Adding or dropping parties

A father brought negligence actions against a county on behalf of himself and as guardian ad litem for each of his four children. In a fifth action, he and his wife sued. Notices of claim had been duly filed on behalf of the wife and children but not for the father individually. Since the notices actually filed clearly showed the relationship of the parties in the father's interest in the several claims, he was permitted to file an amended or supplementary notice for himself. His failure to file such an individual notice was in no wise prejudicial. Slocum v County of Madison, 6 A.D.2d 347, 176 N.Y.S.2d 741, 1958 N.Y. App. Div. LEXIS 5001 (N.Y. App. Div. 3d Dep't 1958).

The one-year limitation upon application to extend the time within which to file notice of claim under this section will not permit amendment of an original notice of claim, after that time, to include the City of New York as a new and additional party against whom the claim is asserted. Agress v New York, 13 A.D.2d 651, 214 N.Y.S.2d 24, 1961 N.Y. App. Div. LEXIS 11273 (N.Y. App. Div. 1st Dep't 1961).

In action against Manhattan and Bronx Surface Transit Operating Authority and Metropolitan Transportation Authority for injuries sustained by plaintiff in subway station, court erred in granting plaintiff's cross-motion to substitute New York City Transit Authority (NYCTA), which owned station, as proper defendant based on ground that it was estopped from challenging requested relief because, inter alia, it had been forwarded notice of claim and had conducted hearing, sent plaintiff copy of transcript and exchanged correspondence with her and her attorney, since (1) rather than misleading plaintiff, actions of NYCTA provided her with numerous indications that wrong entities had been sued, and (2) although plaintiff claimed that NYCTA agreed to be substituted as defendant, alleged promise was made after statute of limitations had expired. Nowinski v City of New York, 189 A.D.2d 674, 592 N.Y.S.2d 369, 1993 N.Y. App. Div. LEXIS 351 (N.Y. App. Div. 1st Dep't 1993).

It was abuse of discretion to deny plaintiff's motion to amend notice of claim against city to include fire department in caption thereof since department had actual notice of facts constituting claim within 90 days and failed to show any prejudice in maintaining defense on merits as result of delay; further, plaintiff served timely notice of claim on parties united in interest with fire department. Romanelli v City of New York, 233 A.D.2d 310, 649 N.Y.S.2d 169, 1996 N.Y. App. Div. LEXIS 11591 (N.Y. App. Div. 2d Dep't 1996).

Although a notice of claim was timely served on a city transit authority, the claimant could not, by surreptitiously slipping the name of a second transit authority into a proposed amended notice, bootstrapped into viability an apparently lapsed cause of action over a party never served during the 90-day statutory period, since service of notice of claim on one governmental entity does not constitute valid service on another, and since the claimant presented no evidence of excusable delay to justify her failure to give proper notice to the second authority. In re Crespo, 123 Misc. 2d 862, 475 N.Y.S.2d 319, 1984 N.Y. Misc. LEXIS 3096 (N.Y. Sup. Ct. 1984).

Petitioner would be granted leave to amend notice of claim for personal injuries against city transit authority in order to add plaintiff's husband as party where proposed amendment sought to add derivative cause of action based on same facts already included in notice of claim, and thus there was no prejudice to transit authority. Lalanne v New York City Transit Auth., 163 Misc. 2d 941, 622 N.Y.S.2d 869, 1994 N.Y. Misc. LEXIS 637 (N.Y. Sup. Ct. 1994).

Application to amend a notice of claim against a board of education to include the teacher in charge when the pupil was injured must be made prior to the institution of an action on the claim. However, the teacher is not a real party in interest, if he was acting in the course of his employment, and need not be included in the notice. Stearns v Board of Education, 137 N.Y.S.2d 711, 1955 N.Y. Misc. LEXIS 2569 (N.Y. Sup. Ct. 1955).

Where a notice of claim was entitled as against a named town and Board of Education, the fact that it was addressed only to the business manager of the town, demanding payment from the town, neither prejudiced nor led astray the Board of Education where the board was well aware of the purport of the claim, and any defects in these respects was subject to amendment. Gisondi v Harrison, 220 N.Y.S.2d 105, 1961 N.Y. Misc. LEXIS 3680 (N.Y. Sup. Ct. 1961), modified, 16 A.D.2d 929, 229 N.Y.S.2d 698, 1962 N.Y. App. Div. LEXIS 9364 (N.Y. App. Div. 2d Dep't 1962).

In a negligence action in which plaintiff allegedly sustained injuries inside a fire department ambulance, plaintiff's failure to name the city as a defendant was non-prejudical and correctable, as plaintiff timely filed the notice of claim with the city, the claim was addressed to the city, the city sent plaintiff's counsel a receipt for the claim, and the city conducted hearings in which plaintiff testified. The relation back doctrine was applicable to plaintiff's claim against the city as the claims against the fire department and the city arose out of the same conduct and occurrence, the fire department was an agency of the city, and plaintiff served her notice on the city. Allen-David v N.Y. City Fire Dep't, 2010 N.Y. Misc. LEXIS 7147 (N.Y. Sup. Ct. Sept. 22, 2010).

Omission of the names and address of the 134 plaintiffs besides plaintiff bank in a notice of claim could be excused because it was done in good faith and did not prejudice the defendant, so long as the 134 plaintiffs demonstrated that they were entitled to sue through, or in relation to, the bank. Stein v JP Morgan Chase Bank, 279 F. Supp. 2d 286, 2003 U.S. Dist. LEXIS 21352 (S.D.N.Y. 2003).

346. Former requirement as to amount of damages

The trial court should have permitted amendment of a notice of claim arising out of damages sustained by an infant plaintiff from burns suffered at a fireplace in a public park, greatly increasing the damage demand, upon a showing that since commencement of the action the infant has exhibited an excessive tendency to scar, requiring successive operations and indicating necessity of additional operative procedures for the purpose of adding skin to permit the infant's proper growth and development. Gisondi v Harrison, 16 A.D.2d 929, 229 N.Y.S.2d 698, 1962 N.Y. App. Div. LEXIS 9364 (N.Y. App. Div. 2d Dep't 1962).

Amendment of a claim for damages against a municipality after its service to increase the damage claim from $30,000 to $250,000 did not go to any essential part of the claim and could probably be considered as merely curative of a "mistake" under subd. 6 of this section, in any event, where the extent of the damage did not appear until after the notice of claim was served. Gardenier v Colonie, 19 A.D.2d 572, 239 N.Y.S.2d 993, 1963 N.Y. App. Div. LEXIS 3796 (N.Y. App. Div. 3d Dep't), aff'd, 13 N.Y.2d 1047, 245 N.Y.S.2d 769, 195 N.E.2d 454, 1963 N.Y. LEXIS 848 (N.Y. 1963).

Failure to comply with the requirements of subd 2 as to notice in that (1) it is not sworn to, by, or on behalf of claimant, (2) it does not state the manner in which the claim arose, and (3) it does not specify the items of damage or injuries claimed to have been sustained, may in absence of prejudice to the defendant, be supplied by way of amendment pursuant to subd 6. Montana v Lynbrook, 23 A.D.2d 585, 256 N.Y.S.2d 651, 1965 N.Y. App. Div. LEXIS 4806 (N.Y. App. Div. 2d Dep't 1965).

A notice of claim by husband and wife for personal injuries sustained by the wife, could be amended, so as to increase the demand from $15,000 to $17,500 and to also include an allegation that the damage sustained by the husband amounted to $2,500. Ficara v New York, 17 Misc. 2d 752, 186 N.Y.S.2d 361, 1959 N.Y. Misc. LEXIS 4060 (N.Y. Sup. Ct. 1959).

347. —Amendment not allowed

Plaintiff's mistake in her notice of claim as to the location of the alleged sidewalk defect where she was injured, together with a 22-month delay in seeking leave to amend the notice, prejudiced the city by depriving it of the opportunity to conduct a prompt investigation; the trial court's denial of plaintiff's request to amend her notice was proper. Canelos v City of New York, 37 A.D.3d 637, 830 N.Y.S.2d 334, 2007 N.Y. App. Div. LEXIS 2083 (N.Y. App. Div. 2d Dep't 2007).

A motion under subdivision 6 of this section to amend a notice of claim by increasing the amount of damages was denied where the action was not yet commenced by the service of summons. Moreover there is no requirement that a notice of claim set down the amount of claimed damages. Zultowski v New York City Transit Authority, 9 Misc. 2d 231, 169 N.Y.S.2d 276, 1957 N.Y. Misc. LEXIS 2193 (N.Y. Sup. Ct. 1957).

Where no new facts or injuries were shown in connection with an application for leave to amend a notice of claim, an amendment to increase the amount of damages claimed would not be allowed, notwithstanding grant of leave to amend the notice in certain other respects. Gisondi v Harrison, 220 N.Y.S.2d 105, 1961 N.Y. Misc. LEXIS 3680 (N.Y. Sup. Ct. 1961), modified, 16 A.D.2d 929, 229 N.Y.S.2d 698, 1962 N.Y. App. Div. LEXIS 9364 (N.Y. App. Div. 2d Dep't 1962).

348. Amendment involving facts constituting claim

Failure to comply with the requirements of subd 2 as to notice in that (1) it is not sworn to, by, or on behalf of claimant, (2) it does not state the manner in which the claim arose, and (3) it does not specify the items of damage or injuries claimed to have been sustained, may in absence of prejudice to the defendant, be supplied by way of amendment pursuant to subd 6. Montana v Lynbrook, 23 A.D.2d 585, 256 N.Y.S.2d 651, 1965 N.Y. App. Div. LEXIS 4806 (N.Y. App. Div. 2d Dep't 1965).

Court properly denied plaintiff's motion to amend original notice of claim which alleged injuries as result of fall caused by "hole in the street" where (1) plaintiff's testimony at comptroller's hearing described cause of accident as "raised crack around a manhole," (2) plaintiff thereafter took no further action to prosecute her suit for 5 years, and (3) proposed amended notice of claim set forth yet third description of defect, describing it as "protruding manhole cover"; in light of extreme delay and material discrepancies among plaintiff's descriptions, city would be prejudiced if application for leave to serve amended notice of claim were granted. Harper v New York, 129 A.D.2d 770, 514 N.Y.S.2d 763, 1987 N.Y. App. Div. LEXIS 45465 (N.Y. App. Div. 2d Dep't 1987).

High school principal was properly allowed to serve amended notice of claim, providing greater specificity of his claims against board of education sounding in defamation, intentional infliction of emotional distress, and prima facie tort, since board was not prejudiced where claims involved statements which board had allegedly published, and of which it therefore had knowledge, and board had also had ability to investigate circumstances. Sullivan v Board of Education, 131 A.D.2d 836, 517 N.Y.S.2d 197, 1987 N.Y. App. Div. LEXIS 48280 (N.Y. App. Div. 2d Dep't 1987).

Pedestrian's motion to amend her notice of claim against city was properly denied, even though her timely notice was in error in designating intersecting streets nearest to defect within municipal parking lot, where 16 months passed between accident and motion to amend, and pedestrian made no effort to show that condition of defect remained unchanged; because of their transitory nature, claims of sidewalk defects must be set forth with greater specificity than cases involving defects that do not change over time. Fendig v New York, 132 A.D.2d 520, 517 N.Y.S.2d 536, 1987 N.Y. App. Div. LEXIS 49050 (N.Y. App. Div. 2d Dep't 1987).

Court properly denied plaintiffs' motion to amend their notice of claim where notice failed to set forth time, place and manner in which claim arose, and plaintiffs subsequently attempted, approximately 4 years later, on eve of trial, to amend notice of claim and pleadings to change location of alleged accident and to allege new theory of recovery not referred to either directly to indirectly in original notice of claim. Soto v New York, 161 A.D.2d 246, 554 N.Y.S.2d 893, 1990 N.Y. App. Div. LEXIS 5055 (N.Y. App. Div. 1st Dep't 1990).

Court properly denied plaintiff's motion to amend his notice of claim, which would indicate that bus with which he collided was moving, and not standing still as he had previously claimed in his bill of particulars, deposition, and comptroller's hearing testimony; proposed amendment was particularly prejudicial because discovery had been completed and plaintiff's prior version was consistent with that of bus driver. Montgomery v Manhattan & Bronx Surface Transit Operating Auth., 254 A.D.2d 114, 678 N.Y.S.2d 626, 1998 N.Y. App. Div. LEXIS 10857 (N.Y. App. Div. 1st Dep't 1998).

In action against New York City Health and Hospitals Corporation (NYCHHC), it was improper to deny plaintiff's motion to amend her notice of claim to correct name of hospital where claim arose where both hospitals in question were run by NYCHHC, which had access to their patient records, NYCHHC was timely apprised of relevant facts at CLS Gen Mun § 50-h hearing, and plaintiff had always clearly presented nature of her client, dates of treatment, and sequence of events. Lomax v New York City Health & Hosps. Corp., 262 A.D.2d 2, 690 N.Y.S.2d 548, 1999 N.Y. App. Div. LEXIS 6154 (N.Y. App. Div. 1st Dep't 1999).

CLS Gen Mun § 50-e(6) does not permit amendments to notice of claim that are substantive in nature. Zwecker v Clinch, 279 A.D.2d 572, 720 N.Y.S.2d 150, 2001 N.Y. App. Div. LEXIS 565 (N.Y. App. Div. 2d Dep't 2001).

In an action for damages for injuries and for wrongful death, timely notice of claim for damages filed against the city may be amended to show that death later resulted from accident. O'Lear v Yonkers, 73 N.Y.S.2d 550, 189 Misc. 115, 1947 N.Y. Misc. LEXIS 3068 (N.Y. Sup. Ct. 1947).

349. —Amendment involving cause

On the basis that leave to serve an amended bill of particulars should be freely granted, the mere lapse of time was not a sufficient ground to deny a motion to amend a notice of claim which sought to allege more specifically an act of negligence and did not introduce a new and different cause of action which would prejudice the defendant. Yerdon v Baldwinsville Academy, 39 A.D.2d 824, 333 N.Y.S.2d 101, 1972 N.Y. App. Div. LEXIS 4497 (N.Y. App. Div. 4th Dep't 1972).

In a personal injury action against a city to recover for injuries sustained in a fall on a city sidewalk, the trial court improperly denied claimant's motion for permission to serve an amended notice of claim more specifically detailing the place and cause of the fall, even though the original notice of claim lacked sufficient specificity, where the original claim was apparently not in any way calculated to mislead the city, where claimant's testimony at a preliminary hearing did set forth the location of the accident with sufficient specificity to afford the city the opportunity to make a proper investigation, particularly in view of the fact that the alleged cause of the accident was snow and ice rather than a defect in the sidewalk, and where the city failed to demonstrate actual prejudice, even though it argued that lack of knowledge of the cause of the accident prevented it from interviewing witnesses before their memories faded, in that the city failed to show what investigation, if any, was undertaken. Cruz v New York, 95 A.D.2d 790, 463 N.Y.S.2d 851, 1983 N.Y. App. Div. LEXIS 18710 (N.Y. App. Div. 2d Dep't 1983).

In action to recover damages for personal injuries sustained as result of allegedly defective condition in street, amendment of defective notice of claim will be denied where original notice was insufficient with respect to setting forth place and manner in which claim arose, thereby prejudicing city by depriving it of opportunity to conduct prompt and adequate investigation. Mazza v New York, 112 A.D.2d 921, 492 N.Y.S.2d 438, 1985 N.Y. App. Div. LEXIS 52134 (N.Y. App. Div. 2d Dep't 1985).

Court improvidently exercised its discretion in allowing infant to serve amended notice of claim for injuries sustained in sledding accident in county park where original, rejected notice of claim did not specify where in park alleged collision with concrete bench occurred, or how it occurred, and infant did not elaborate on details of accident until complaint was filed more than 4 years later, which prejudiced county in its ability to investigate claim. Anselmo v County of Nassau, 192 A.D.2d 567, 596 N.Y.S.2d 128, 1993 N.Y. App. Div. LEXIS 3616 (N.Y. App. Div. 2d Dep't), app. denied, 82 N.Y.2d 659, 605 N.Y.S.2d 5, 625 N.E.2d 590, 1993 N.Y. LEXIS 4238 (N.Y. 1993).

Court should have denied leave to file amended notice of claim against housing authority, and claim itself should have been dismissed, where original notice given to housing authority employee failed to specify correct cause and location of accident, and plaintiff's 2 ½ -year delay in seeking to correct deficiencies resulted in prejudice to housing authority; whatever actual notice codefendant city acquired at CLS Gen Mun § 50-h hearing could not be imputed to housing authority, which was distinct entity not united in interest. Torres v New York City Hous. Auth., 261 A.D.2d 273, 690 N.Y.S.2d 257, 1999 N.Y. App. Div. LEXIS 5499 (N.Y. App. Div. 1st Dep't), app. denied, 93 N.Y.2d 816, 697 N.Y.S.2d 563, 719 N.E.2d 924, 1999 N.Y. LEXIS 2791 (N.Y. 1999).

Plaintiff was properly allowed to amend notice of claim concerning cause of her fall, although original notice alleged only snow and ice, where her testimony at CLS Gen Mun § 50-h hearing held within 2 months of service of notice of claim and less than 5 months after accident gave defendants timely notice of her present claim that large hole in sidewalk, concealed from view because covered over by snow and ice, contributed to her fall. Cruz v New York City Hous. Auth., 261 A.D.2d 296, 691 N.Y.S.2d 397, 1999 N.Y. App. Div. LEXIS 5770 (N.Y. App. Div. 1st Dep't 1999).

Court properly denied plaintiff's motion for leave to serve amended notice of claim where original notice of claim failed to include sufficient description of accident site and manner in which claim arose, and there was unexplained delay of 3 years in seeking leave to amend, which prejudiced defendant by preventing it from conducting proper investigation while facts were still fresh. Adrian v Town of Oyster Bay, 262 A.D.2d 433, 692 N.Y.S.2d 140, 1999 N.Y. App. Div. LEXIS 6630 (N.Y. App. Div. 2d Dep't 1999).

The trial court properly permitted the injured party to amend the notice of claim against the city under N.Y. Gen. Mun. Law § 50-e(6); the injured party's notice of claim was made in good faith, and the city failed to establish that it was prejudiced by the allegedly defective notice of claim, as it could have located the injury-causing condition with a modicum of effort. Seraita v City of Yonkers, 292 A.D.2d 456, 740 N.Y.S.2d 72, 2002 N.Y. App. Div. LEXIS 2499 (N.Y. App. Div. 2d Dep't 2002).

In an action to recover damages for personal injuries, pursuant to N.Y. Gen. Mun. Law § 50-e(6) it was within the court's discretion to grant an application for leave to serve an amended notice of claim; there was no allegation that an error in the notice of claim was made in bad faith. Additionally, at the N.Y. Gen. Mun. Law § 50-h hearing conducted about $3^1/_3$ months after the incident, plaintiff testified in detail about the manner in which the incident occurred, and the proposed notice of claim did not substantially alter plaintiff's theories of liability. Oschepkova v New York City Tr. Auth., 24 A.D.3d 523, 808 N.Y.S.2d 271, 2005 N.Y. App. Div. LEXIS 14087 (N.Y. App. Div. 2d Dep't 2005).

It was error to deny a mother's motion for leave to amend her notice of claim, complaint, and bill of particulars in an action arising from the alleged rape of her special needs daughter at a high school, as the daughter's fears and delays in cognitive and social functioning provided a good faith basis for the amendment. Doe v Rochester City School Dist., 137 A.D.3d 1761, 28 N.Y.S.3d 175, 2016 N.Y. App. Div. LEXIS 2259 (N.Y. App. Div. 4th Dep't 2016).

350. —Amendment involving location; amendment granted

In negligence action, plaintiffs should have been permitted to amend their notice of claim against county to include correct accident site and allegation of county's negligence in ownership and maintenance of rock garden on edge of roadway at scene of accident where plaintiffs' original mistake in notice of claim was based on their reliance on erroneous police report, but description in notice of claim nevertheless enabled county to locate actual accident site and to take pictures of site, county had knowledge of appearance of area and of terrain and location of alleged rock garden, and thus requested amendment would not prejudice county. Schepper v County of Orange, 121 A.D.2d 638, 504 N.Y.S.2d 41, 1986 N.Y. App. Div. LEXIS 58622 (N.Y. App. Div. 2d Dep't 1986).

In action to recover for injuries to infant plaintiff who was bitten by pit bull dog at city housing project, plaintiffs were properly allowed to amend their timely notice of claim against housing authority to reflect correct address of incident, since mistake in initial notice was made in good faith, housing authority was not prejudiced by mistake, and housing authority received notice of correct address in sufficient time to conduct adequate investigation. Capo v New York, 166 A.D.2d 201, 564 N.Y.S.2d 84, 1990 N.Y. App. Div. LEXIS 11622 (N.Y. App. Div. 1st Dep't 1990).

Personal injury plaintiff was entitled to amend notice of claim against New York City Housing Authority where plaintiff fell on authority's property on October 28, 1989, her notice of claim was served on December 13, 1989, it described street address and manner in which accident occurred but misstated county in which property was located, plaintiff moved for and was granted leave to amend on February 28, 1990, five days after CLS Gen Mun § 50-h hearing, and action was commenced on December 4, 1990; although plaintiff should have commenced special proceeding to acquire personal jurisdiction over authority as provided by CLS Gen Mun § 50-e(6), court was justified in granting leave to amend since error was in good faith and did not prejudice authority. Rodriguez v New York, 179 A.D.2d 560, 579 N.Y.S.2d 57, 1992 N.Y. App. Div. LEXIS 745 (N.Y. App. Div. 1st Dep't 1992).

Plaintiff, who served timely notice of claim stating that accident occurred at "888 Park Avenue, New York, New York," was properly granted leave to amend notice to state that location of accident was "888 Park Avenue, Brooklyn, New York," which was one of defendant's facilities; while notice in question could have been more specific had correct borough been designated, defendant could have determined correct location with modicum of effort. Lord v New York City Housing Authority, 184 A.D.2d 406, 585 N.Y.S.2d 49, 1992 N.Y. App. Div. LEXIS 8533 (N.Y. App. Div. 1st Dep't 1992).

In action for injuries sustained when motorcycle ridden by plaintiff was struck by bus while bus attempted to avoid water spray from fire hydrant, plaintiff would be permitted to amend notice of claim so as to place accident at 149th Street and Timpson Place, rather than 149th Street and Tinton Avenue, notwithstanding contention of city that it was prejudiced in its efforts to investigate allegedly leaking or defective hydrant, since (1) in regard to transitory incident, actual prejudice is not caused by passage of time after accident, and (2) 5 witnesses were listed in police accident report, including bus driver who allegedly stated that fire hydrant was open. Torres v City of N.Y., 190 A.D.2d 601, 593 N.Y.S.2d 804, 1993 N.Y. App. Div. LEXIS 1566 (N.Y. App. Div. 1st Dep't 1993).

Plaintiff should have been granted leave to file amended notice of claim where (1) initial notice of claim misdescribed vehicle accident scene by one block, (2) mistake went unnoticed until 53 days after expiration of statutory notice of claim period, when plaintiff testified as to correct state of facts at CLS Gen Mun § 50-h hearing, and (3) city was not prejudiced, in that it had correct information before completing investigation into allegedly malfunctioning traffic signal. Seise v City of New York, 212 A.D.2d 467, 622 N.Y.S.2d 941, 1995 N.Y. App. Div. LEXIS 2126 (N.Y. App. Div. 1st Dep't 1995).

Plaintiff was entitled to amend notice of claim to reflect correct site of accident where her original notice of claim misdescribed place of accident's occurrence as "the sidewalk between 255 Willis Avenue and 175-177 Willis Avenue, Bronx, New York, directly west from the southeast corner of Willis Avenue and East 137th Street, Bronx, New York," and accident actually occurred between 255 Willis Avenue and 175-177 Willis Avenue; essence of description of accident site was statement that it was directly west of southeast corner of Willis Avenue and 137th Street, not that it was between 2 addresses, which, in fact, were over 2 blocks apart. Ortiz v New York City Hous. Auth., 214 A.D.2d 491, 625 N.Y.S.2d 541, 1995 N.Y. App. Div. LEXIS 4620 (N.Y. App. Div. 1st Dep't 1995).

Court properly granted plaintiff's motion to amend her notice of claim and complaint to correct inadvertent transposition of digits of address in question where she had specified cross streets, supplied photographs of scene, described area, which included housing project, and otherwise identified correct location. Singer v City of New York, 226 A.D.2d 325, 642 N.Y.S.2d 227, 1996 N.Y. App. Div. LEXIS 4651 (N.Y. App. Div. 1st Dep't 1996).

Court should have allowed plaintiff to amend his notice of claim and complaint to correct address of parking garage, even though plaintiff's motion was made more than 2 years after accident and filing of notice of claim, where address was not posted on parking garage, there was no parking garage located at address given in notice of claim, and there was no showing of prejudice on part of city, which had actual knowledge of correct address and scene of accident. Perez v City of New York, 228 A.D.2d 164, 644 N.Y.S.2d 170, 1996 N.Y. App. Div. LEXIS 6274 (N.Y. App. Div. 1st Dep't 1996), reh'g denied, 1996 N.Y. App. Div. LEXIS 9601 (N.Y. App. Div. 1st Dep't).

Court improperly denied petitioner's application for leave to serve amended notice of claim to correct erroneous address where there was no allegation of bad faith on part of petitioner, photographs of accident scene which were served with original notice of claim and attached thereto sufficiently identified correct accident location, and city received notice of correct address at second CLS Gen Mun § 50-h hearing held about 5 months after accident and during which city was told that photographs of accident site had been taken shortly after accident and were available. Santarpia v City of New York, 231 A.D.2d 726, 647 N.Y.S.2d 861, 1996 N.Y. App. Div. LEXIS 9681 (N.Y. App. Div. 2d Dep't 1996).

Leave for plaintiff to serve amended notice of claim against city should have been granted where error in address of accident site was clearly made in good faith, plaintiff gave exact location of accident with measurements although not required to do so, plaintiff also provided photograph of scene, inclusion of reference to street address was superfluous, and inclusion of incorrect address did not prejudice city; although city claimed that it was so misled that it sent investigator to wrong site, no affidavit from investigator who visited site was included in record, and investigator sent to site could have ascertained exact location of alleged sidewalk defect with modicum of effort from exact measurements given, because actual site was close to incorrect address. Kaminsky v City of New York, 238 A.D.2d 380, 656 N.Y.S.2d 324, 1997 N.Y. App. Div. LEXIS 3820 (N.Y. App. Div. 2d Dep't 1997).

Plaintiff was properly permitted to amend notice of claim to correct mistake in description of accident site where amendment was corrected only 5 months after original notice of claim, mistake was inadvertent and not in bad faith, there was no evidence of prejudice to defendant, and belated investigation of accident site could be made because alleged defect was permanent rather than transitory in nature. Cavanagh v Monticello Cent. Sch. Dist., 241 A.D.2d 654, 660 N.Y.S.2d 88, 1997 N.Y. App. Div. LEXIS 7354 (N.Y. App. Div. 3d Dep't 1997).

351. —Amendment involving location; amendment denied

Plaintiff was not entitled to serve amended notice of claim and amended verified complaint in action against city to recover for personal injuries where original notice of claim alleged that plaintiff tripped over upraised tree trunk in named park, but incident actually occurred some distance away in different park, since (1) notice of claim was patently inadequate with respect to setting forth place where claim arose and defendant was clearly prejudiced because mistake in notice made it impossible to locate alleged defect and to conduct investigation, (2) even if notice had identified correct park, it would have been difficult or impossible to locate alleged defect because no location or description was provided, and (3) prejudice was not dissipated by fact that plaintiff provided correct location more than 14 months after incident. Eagle v Yonkers, 143 A.D.2d 626, 532 N.Y.S.2d 887, 1988 N.Y. App. Div. LEXIS 9522 (N.Y. App. Div. 2d Dep't 1988).

Plaintiff was not entitled to leave to amend notice of claim in pedestrian sidewalk fall action, and thus complaint was properly dismissed, where notice of claim described accident site as Broadway and West 182nd Street, although accident occurred at Broadway and West 162nd Street, since city was prejudiced by mistake in notice of claim where it conducted prompt investigation, but at wrong site; prejudice was neither eliminated nor cured by photographs submitted by plaintiff in order to show unchanged condition of defect. Alvarez v New York, 155 A.D.2d 373, 548 N.Y.S.2d 5, 1989 N.Y. App. Div. LEXIS 14564 (N.Y. App. Div. 1st Dep't 1989).

It was error to permit petitioner to file amended notice of claim under CLS Gen Mun § 50-e(6) to change location of accident from northeast corner of Seventh Avenue and West 18th Street to northwest corner of same intersection, and city was therefore entitled to summary judgment, since city was seriously prejudiced in that it was misled by erroneous notice of claim to investigate wrong site; fact that sidewalk defect on northwest corner of intersection was described in map previously filed with city by Big Apple Pothole & Sidewalk Protection Corporation did

not alleviate prejudice to city or fulfill purpose of accurate notice of claim. Adlowitz v City of New York, 205 A.D.2d 369, 613 N.Y.S.2d 174, 1994 N.Y. App. Div. LEXIS 6278 (N.Y. App. Div. 1st Dep't 1994).

Neither plaintiff's testimony 7 months after accident at CLS Gen Mun § 50-h hearing in which she placed accident site "on a sidewalk, sort of an exit from one of the projects...on 28th Street," nor her amended notice of claim proffered 2 weeks later, depicting accident as occurring on sidewalk alongside parking lot "located on the side of 2925 West 27th Street," served to dissipate prejudice to housing authority in its attempt to conduct timely and meaningful investigation; thus, it was proper to deny plaintiff's petition to deem her amended notice of claim timely served. Valle v New York City Hous. Auth., 224 A.D.2d 433, 637 N.Y.S.2d 757, 1996 N.Y. App. Div. LEXIS 878 (N.Y. App. Div. 2d Dep't 1996).

Complaint was properly dismissed for defective notice of claim, and plaintiff's application to amend notice was properly denied, where plaintiff first reported that he slipped on ice on sidewalk outside of Science Building of defendant college, he later testified at hearing under CLS Gen Mun § 50-h that accident occurred 25 feet from entrance to Science Building, complaint and bill of particulars did not provide any additional information as to location of accident, plaintiff's deposition testimony over 3 years after accident informed defendants that he actually fell near entrance to Health Science Building, which was located about 100 feet from Science Building, and subject walkway had been renovated in interim. Flanagan v County of Westchester, 238 A.D.2d 468, 657 N.Y.S.2d 59, 1997 N.Y. App. Div. LEXIS 4089 (N.Y. App. Div. 2d Dep't 1997).

Court improperly granted plaintiff's motion for leave to serve amended notice of claim indicating different accident site, even though mistake in original notice of claim was made in good faith, since defendant city was prejudiced in its ability to conduct prompt investigation of site of accident. Austin v City of Yonkers, 243 A.D.2d 597, 663 N.Y.S.2d 270, 1997 N.Y. App. Div. LEXIS 10208 (N.Y. App. Div. 2d Dep't 1997).

Court properly denied plaintiffs' motion to amend their notice of claim and complaint to reflect proper location of public school in which infant plaintiff was assaulted where defect in original notice caused defendants to conduct investigation at wrong site, plaintiffs' claims of difficulty with English and confusion over number of school did not excuse their failure to move to amend their notice of claim more expeditiously, particular since their counsel had notice that infant plaintiff may not have attended school designated in original notice of claim as site of assault, and defendants did not, notwithstanding defective notice of claim, have actual knowledge of event complained of within reasonable time. Nieves v City of New York, 262 A.D.2d 32, 690 N.Y.S.2d 591, 1999 N.Y. App. Div. LEXIS 6166 (N.Y. App. Div. 1st Dep't 1999).

352. — —Delay involving incorrect location

In negligence action against city, court erred by allowing plaintiff to amend her notice of claim to correct error as to location of allegedly defective sidewalk more than 7 months after claim arose since failure to specify correct location in original notice prevented city from conducting prompt investigation; plaintiff's assertion that she visited site 7 months after incident and found alleged defect unchanged would not enable city to conduct meaningful investigation. Martire v New York, 129 A.D.2d 567, 514 N.Y.S.2d 63, 1987 N.Y. App. Div. LEXIS 45233 (N.Y. App. Div. 2d Dep't), app. denied, 70 N.Y.2d 609, 522 N.Y.S.2d 109, 516 N.E.2d 1222, 1987 N.Y. LEXIS 19310 (N.Y. 1987).

In negligence action against city, court erred in permitting plaintiff to amend notice of claim to correct error as to location of allegedly defective sidewalk more than 9 months after claim arose since error in original notice, which placed accident site several miles away from sidewalk in question, prevented city from assessing merits of claim; plaintiff's assertion that he visited site 13 months after incident and found alleged defect unchanged did not enable city to conduct meaningful investigation. Malla v New York, 129 A.D.2d 580, 514 N.Y.S.2d 64, 1987 N.Y. App. Div. LEXIS 45249 (N.Y. App. Div. 2d Dep't), app. dismissed, 70 N.Y.2d 796, 522 N.Y.S.2d 112, 516 N.E.2d 1225, 1987 N.Y. LEXIS 19363 (N.Y. 1987).

Court did not abuse its discretion in denying plaintiff's motion for leave to amend her notice of claim nunc pro tunc 22 months after original notice was filed, and in granting city's motion for summary judgment, where plaintiff originally claimed that accident occurred while she was walking on west side of street but later indicated that it occurred on east side of street; defect in plaintiff's original notice deprived city of opportunity to conduct prompt and adequate investigation. Bacchus v New York, 134 A.D.2d 393, 521 N.Y.S.2d 27, 1987 N.Y. App. Div. LEXIS 50585 (N.Y. App. Div. 2d Dep't 1987).

Court properly denied plaintiff's motion to serve amended notice of claim to correct mistake as to location of alleged accident where there was indication that plaintiff had acted in bad faith in providing accurate information as to nature of claim and had not given reasonable explanation as to why it took over 5 years from time of alleged accident and over 2 years since discrepancy was indicated to seek to correct mistake as to location. Castro v New York, 139 A.D.2d 687, 527 N.Y.S.2d 441, 1988 N.Y. App. Div. LEXIS 4458 (N.Y. App. Div. 2d Dep't 1988).

In action to recover for personal injuries allegedly sustained due to defect in city sidewalk, court properly exercised its discretion in declining to grant plaintiff leave to amend her original notice of claim which had misidentified street adjacent to which alleged defect was located since (1) misdescription of location, coupled with 11-month delay prior to application for leave to amend, prejudiced city by depriving it of opportunity to conduct prompt investigation, (2) fact that plaintiff ultimately supplied correct location did not mitigate extent of prejudice sustained by city, and (3) representation by plaintiff that recent inspection of accident site showed it to be in same condition provided no substitute for timely notice to which city was entitled. Serrano v New York, 143 A.D.2d 652, 533 N.Y.S.2d 9, 1988 N.Y. App. Div. LEXIS 9512 (N.Y. App. Div. 2d Dep't 1988).

Court properly denied plaintiff's motion to amend her notice of claim to correct mistake as to address of site where accident occurred since approximate 2-year delay in moving to amend notice of claim deprived city of opportunity to conduct meaningful investigation, as evidenced by fact that city investigator examined and photographed incorrect site promptly after accident; mere filing of police officer's aided report and accident report did not provide sufficient basis for imputing knowledge of correct accident site to city. 147 A.D.2d 449, 537 N.Y.S.2d 299.

Court properly denied application to amend notice of claim against city to reflect correct location of accident where claimant did not move to amend notice of claim until 6 months after it was filed, during which time city had conducted investigation of claim based on original description of accident site. Valdez v Yonkers, 154 A.D.2d 382, 545 N.Y.S.2d 771, 1989 N.Y. App. Div. LEXIS 12248 (N.Y. App. Div. 2d Dep't 1989).

Plaintiff was not entitled to leave to file amended notice of claim against New York City Transit Authority in action for personal injuries due to allegedly defective condition of street where original notice of claim named wrong street, and proof submitted by authority showed that delay in identifying actual location of accident deprived it of adequate opportunity to investigate claim. Williams v New York, 156 A.D.2d 361, 548 N.Y.S.2d 317, 1989 N.Y. App. Div. LEXIS 15407 (N.Y. App. Div. 2d Dep't 1989).

In action against New York City Transit Authority to recover for injuries sustained in fall on subway staircase, court properly denied plaintiff's motion for leave to file amended notice of claim where original notice misidentified staircase; prejudice to authority was not eliminated by plaintiff's production of color photographs purporting to show true accident site on eve of trial 5 years after accident. Merino v New York City Transit Authority, 184 A.D.2d 441, 585 N.Y.S.2d 404, 1992 N.Y. App. Div. LEXIS 8545 (N.Y. App. Div. 1st Dep't 1992).

Court properly denied plaintiff's motion for leave to amend notice of claim against city housing authority so as to insert correct address of building at which alleged slip and fall occurred where it was approximately 9 months after alleged accident that plaintiff testified at hearing that location identified in notice of claim was wrong, whereupon he served verified complaint with correct address, and nearly 3 years passed before plaintiff moved

to amend admittedly defective notice of claim; under circumstances, defect in notice of claim prevented housing authority from opportunity to make prompt investigation. Barno v New York City Housing Authority, 185 A.D.2d 292, 586 N.Y.S.2d 291, 1992 N.Y. App. Div. LEXIS 9062 (N.Y. App. Div. 2d Dep't 1992).

Court properly denied plaintiffs' application to amend their notice of claim to correct information regarding location of accident since more than one year had passed after they served original notice of claim; under circumstances, such delay prejudiced city by depriving it of opportunity to timely and effectively investigate circumstances of accident. Simms v City of New York, 207 A.D.2d 480, 616 N.Y.S.2d 239, 1994 N.Y. App. Div. LEXIS 8431 (N.Y. App. Div. 2d Dep't 1994).

Court properly denied plaintiff's motion to amend her notice of claim, made over 3 years after accident, where defendant had already conducted and completed investigation at incorrect site set forth in notice of claim. Centeno v City of New York, 224 A.D.2d 268, 637 N.Y.S.2d 415, 1996 N.Y. App. Div. LEXIS 1046 (N.Y. App. Div. 1st Dep't), app. denied, 88 N.Y.2d 804, 646 N.Y.S.2d 984, 670 N.E.2d 225, 1996 N.Y. LEXIS 1647 (N.Y. 1996).

It was abuse of discretion to allow plaintiff to amend her notice of claim against New York City Housing Authority where Authority was misled by erroneous notice of claim to conduct investigation at wrong situs, plaintiff first rectified error at her CLS Gen Mun § 50-h hearing some 11 months after accident, wrong address reappeared thereafter in plaintiff's summons and complaint, and it was not until more than 3 years had elapsed, and Authority had moved to dismiss action, did plaintiff attempt to formally correct mistake by cross-moving to amend her notice of claim. Taylor v New York City Hous. Auth., 248 A.D.2d 376, 669 N.Y.S.2d 647, 1998 N.Y. App. Div. LEXIS 2187 (N.Y. App. Div. 2d Dep't 1998).

Leave to amend notice of claim was properly denied where city defendant did not learn of correct location of accident site until 10 months after accident when petitioner testified at hearing under CLS Gen Mun § 50-h. Prevete v City of New York, 272 A.D.2d 333, 707 N.Y.S.2d 192, 2000 N.Y. App. Div. LEXIS 4846 (N.Y. App. Div. 2d Dep't 2000).

Where plaintiff pedestrian's notice of claim against defendant city in a personal injury suit incorrectly specified the location where the pedestrian allegedly tripped and fell over broken asphalt, and the correct location also was not made apparent either in the pedestrian's testimony at a N.Y. Gen. Mun. Law § 50-h hearing, or in the pedestrian's complaint and bill of particulars, the trial court properly denied the pedestrian's motion to amend the notice of claim pursuant to N.Y. Gen. Mun. Law § 50-e(6) and the complaint to correct the erroneous description, as the motion was made nearly three years after the accident and after the pedestrian's filing of a note of issue, and the error and the delay in correcting it prejudiced the city's ability to conduct a prompt investigation. Rivera v City of New York, 303 A.D.2d 318, 757 N.Y.S.2d 273, 2003 N.Y. App. Div. LEXIS 3259 (N.Y. App. Div. 1st Dep't 2003).

353. — —Delay involving insufficient location

It was not an abuse of discretion for Special Term to have denied plaintiffs' motion to amend the notice of its claim and to have granted defendant city's cross-motion to dismiss the complaint on the grounds that the notice of claim failed to describe the accident location with sufficient particularity to enable defendant to conduct the proper investigation of the site and otherwise assess the merits of plaintiffs' claim where, although plaintiffs argued that the specific defect in description was negligible, and that the description was later clarified in a verified bill of particulars, in light of the significant delay in adequately particularizing the accident site and discrepancies included in its description, defendant would be prejudiced in allowing the amendment to the notice of claim. Faubert v New York, 90 A.D.2d 509, 455 N.Y.S.2d 24, 1982 N.Y. App. Div. LEXIS 18550 (N.Y. App. Div. 2d Dep't 1982).

It was proper to grant city's motion to dismiss complaint and to deny plaintiffs' motion to amend notice of claim where plaintiffs failed to describe location of alleged accident with sufficient particularity until almost 14 months after accident; such delay deprived city of its right to meaningful and adequate opportunity to investigate accident and to evaluate merits of claim at time when evidence and information with respect thereto remained readily available. Blank v New York, 137 A.D.2d 577, 524 N.Y.S.2d 468, 1988 N.Y. App. Div. LEXIS 978 (N.Y. App. Div. 2d Dep't 1988).

It was proper to deny plaintiff's motion to amend notice of claim, which failed to specify precise location of accident, where defendant first learned, at hearing held 5 months after accident, that accident allegedly occurred near rear exit door of building, and alleged defect involving debris and liquid in building lobby was transitory in nature. De Los Santos v New York City Hous. Auth., 214 A.D.2d 532, 625 N.Y.S.2d 80, 1995 N.Y. App. Div. LEXIS 3514 (N.Y. App. Div. 2d Dep't), app. denied, 86 N.Y.2d 702, 631 N.Y.S.2d 606, 655 N.E.2d 703, 1995 N.Y. LEXIS 2600 (N.Y. 1995).

Motion for leave to amend notice of claim against city was properly denied, and personal injury complaint was properly dismissed, where initial notice of claim and response to supplemental claim form described accident site only as "Rockaway Turnpike near Kennedy Airport," and plaintiffs' more than 2-year delay in seeking to file amended notice of claim prejudiced city by preventing it from conducting investigation while facts were still recent. Patellaro v City of New York, 253 A.D.2d 456, 675 N.Y.S.2d 319, 1998 N.Y. App. Div. LEXIS 8838 (N.Y. App. Div. 2d Dep't 1998).

Where defendant city was prejudiced by a confusing description in plaintiff injured party's notice of claim regarding the location where the injured party was injured in an accident, and the injured party waited several months to seek leave to amend the notice of claim, the trial court did not abuse its discretion by denying the injured party's motion for leave to amend the notice of claim under N.Y. Gen. Mun. Law § 50-e(6). Chechelnitskaya v City of New York, 293 A.D.2d 700, 741 N.Y.S.2d 123, 2002 N.Y. App. Div. LEXIS 4133 (N.Y. App. Div. 2d Dep't 2002).

354. —Date or time of accident

An application for permission to amend a notice of claim setting forth the date of the accident as 30 days prior to that stated in the original claim was denied, where the amendment would set forth a date more than 90 days prior to the filing of the claim and the failure to serve the notice of claim within the 90-day period was not by reason of the fact that the claimant was mentally or physically incapacitated but was due rather to inadvertence on his part and the fact that his attorney was misinformed as to the date of the accident. Sandifer v New York, 30 A.D.2d 979, 295 N.Y.S.2d 25, 1968 N.Y. App. Div. LEXIS 3071 (N.Y. App. Div. 2d Dep't 1968).

Where property owners' complaint alleging that town and county were major contributors to flooded conditions on their property and seeking injunction and damages failed to allege that service of notice of claim was within 90 days of flooded condition on their property, but only alleged that notice of claim was served within 90 days of date on which they discovered that county was source of discharge of water on their property, complaint failed to make necessary allegation and would be dismissed with leave to replead. Doran v Cheektowaga, 54 A.D.2d 178, 388 N.Y.S.2d 385, 1976 N.Y. App. Div. LEXIS 13748 (N.Y. App. Div. 4th Dep't 1976).

In an action for damages for false imprisonment, plaintiff was improperly denied leave to serve an amended notice of claim pursuant to Gen Mun Law § 50-e stting forth the specific locations of the initial arrest and the institutions in which plaintiff was incarcerated, when the timely original notice of claim omitted the place or places where the claims arose as required by the statute. Jackson v Police Dep't of New York, 86 A.D.2d 860, 447 N.Y.S.2d 320, 1982 N.Y. App. Div. LEXIS 15491 (N.Y. App. Div. 2d Dep't 1982).

In personal injury action against public authority, plaintiffs were entitled to serve amended notice of claim to list correct date of accident since defendant did not claim that plaintiffs' error was in bad faith and did not demonstrate prejudice; although defendant claimed that its investigative efforts were hampered by incorrect date, apparently no investigation was ever attempted. Tucker v Long Island R. Co., 128 A.D.2d 517, 512 N.Y.S.2d 450, 1987 N.Y. App. Div. LEXIS 44210 (N.Y. App. Div. 2d Dep't 1987).

Court properly denied motion for leave to amend notice of claim where petitioner's first notice of claim was defective because it failed to state time of accident and was not properly verified, second notice again failed to state time of accident and indicated different date of accident than did first notice, and on numerous occasions petitioner or her attorney failed to appear for scheduled hearing pursuant to CLS Gen Mun § 50(h). Brown v New York City Housing Authority, 186 A.D.2d 650, 589 N.Y.S.2d 781, 1992 N.Y. App. Div. LEXIS 11236 (N.Y. App. Div. 2d Dep't 1992).

Court properly denied plaintiffs' motion for leave to amend and correct their notice of claim and complaint so as to correct date on which plaintiff allegedly slipped and fell due to dangerous and hazardous condition, since (1) there were several substantive discrepancies as to date and location of accident, (2) there was lack of specificity as to accident site, and (3) motion was made more than 2 years after accident. Mercado v City of New York, 208 A.D.2d 910, 617 N.Y.S.2d 876, 1994 N.Y. App. Div. LEXIS 10699 (N.Y. App. Div. 2d Dep't 1994).

Plaintiff's motion to amend notice of claim against New York City Transit Authority, made more than 6 years after accident, was properly denied where erroneous accident date supplied not only in notice of claim but also at CLS Gen Mun § 50-h hearing, in bill of particulars, and at examination before trial prejudiced Authority's investigation by preventing it from obtaining aided report until one of its attorneys, preparing for trial, surmised correct date from plaintiff's medical reports, and aided report indicated accident location different from that specified in notice of claim. Siino v New York City Transit Auth., 248 A.D.2d 244, 671 N.Y.S.2d 216, 1998 N.Y. App. Div. LEXIS 2562 (N.Y. App. Div. 1st Dep't 1998).

Leave to file amended notice of claim against city to change date of plaintiff's alleged injuries should have been denied where he had initially failed to act when advised that his notice of claim was untimely, he repeated incorrect date in subsequent pleadings, he failed to explain how mistake occurred, he delayed more than 4 ½ years in seeking to correct date, and amendment would prejudice city. Torres v City of New York, 260 A.D.2d 368, 687 N.Y.S.2d 705, 1999 N.Y. App. Div. LEXIS 3558 (N.Y. App. Div. 2d Dep't), app. denied, 93 N.Y.2d 815, 697 N.Y.S.2d 562, 719 N.E.2d 923, 1999 N.Y. LEXIS 2144 (N.Y. 1999).

Granting of amendment to notice of claim to change date of plaintiff's alleged injuries would frustrate purpose of notice of claim requirement—to provide city opportunity to conduct prompt investigation—since revival of 4 ½ -year-old claim would force city to conduct belated investigation, hampered by changed condition of alleged sidewalk defect and limited availability and recollection of witnesses. Torres v City of New York, 260 A.D.2d 368, 687 N.Y.S.2d 705, 1999 N.Y. App. Div. LEXIS 3558 (N.Y. App. Div. 2d Dep't), app. denied, 93 N.Y.2d 815, 697 N.Y.S.2d 562, 719 N.E.2d 923, 1999 N.Y. LEXIS 2144 (N.Y. 1999).

Court improperly denied plaintiff's motion for leave to amend notice of claim and complaint to reflect correct date of accident where defendant, with police incident report and plaintiff's hospital records identified and presumably at hand, was unable to show how it had been prejudiced by inaccurate date that was left uncorrected for additional 7 months after evidentiary hearing in which parties agreed that pleadings, bill of particulars, and notice of claim would be amended to reflect correct date. Fabian v New York City Transit Auth., 271 A.D.2d 244, 707 N.Y.S.2d 36, 2000 N.Y. App. Div. LEXIS 3881 (N.Y. App. Div. 1st Dep't 2000).

Dismissal of a pedestrian's personal injury claim against a county and a village was proper because, although the pedestrian's original notices of claim were timely as measured from the actual accident date, they were untimely as measured from the incorrect accident date as stated in the original notices, and, although the pedestrian later sent amended notices, she failed to seek leave of court to amend as required by N.Y. Gen. Mun. Law § 50-e(6). Elliot v County of Nassau, 53 A.D.3d 561, 862 N.Y.S.2d 90, 2008 N.Y. App. Div. LEXIS 6132 (N.Y. App. Div. 2d Dep't 2008).

An application by the father of an infant claimant, to amend a notice of claim against the city, as to the father's cause of action, after the statutory period is run, to allege the happening of the accident two days later than stated in the claim, will be denied, although a similar application by the infant is granted, where no reason appears other than that the mistake was an error, and lack of prejudice to the city is not shown, with leave however to renew the application on proper papers showing the reason and the absence of prejudice if granted. Feldman v New York, 79 N.Y.S.2d 284, 192 Misc. 136, 1948 N.Y. Misc. LEXIS 2394 (N.Y. City Ct. 1948).

An application by an infant for leave to amend his notice of claim against the city to change the date of the accident alleged, by two days, may be allowed, though not made within the statutory period for amendments, and though no facts are produced or alleged showing the reason for the original error, or lack of prejudice to the city if the application is granted, because a denial of the application would be without prejudice to the commencement of a new action, and consequently the fact that the infant's guardian made a mistake in the date of the accident is sufficient ground for allowing the amendment as to the infant. Feldman v New York, 79 N.Y.S.2d 284, 192 Misc. 136, 1948 N.Y. Misc. LEXIS 2394 (N.Y. City Ct. 1948).

Amendment of notices of claim to correct good faith omissions or defects should be liberally allowed even as to matters of substance, provided there has been no prejudice to the municipality. Father of six-year-old infant was permitted to amend a letter which constituted his notice of claim to add a verification and to state time of accident and the basis of claim against a school district where the letter was delivered personally to the trustees of a school district sixty-six days after an accident. Baxter v Turner, 111 N.Y.S.2d 10, 1952 N.Y. Misc. LEXIS 2473 (N.Y. Sup. Ct. 1952).

Where the plaintiff served a notice of claim on the city within the statutory period, and the notice contained the precise hour, but not the date, of the accident and the precise location except the street address of the building, such omissions were inadvertent, and where the city had twice during the statutory period communicated with the claimant and would not be prejudiced, a motion to amend, made within six days after notification of the defect, was permissible. Application of Spaet, 145 N.Y.S.2d 227, 1955 N.Y. Misc. LEXIS 3309 (N.Y. Sup. Ct. 1955).

355. Defect in manner or time of service of notice

No provision of law authorizes a court to permit a claimant to correct a defect in manner or time of service of notice of claim after expiration of the 90-day period. Application of Daly, 19 A.D.2d 691, 241 N.Y.S.2d 732, 1963 N.Y. App. Div. LEXIS 3512 (N.Y. App. Div. 4th Dep't 1963), aff'd, 14 N.Y.2d 574, 248 N.Y.S.2d 873, 198 N.E.2d 254, 1964 N.Y. LEXIS 1334 (N.Y. 1964).

356. —Defects which do not bar amendment

Where it is attempted to amend a letter sent to a village to conform to the notice of claim requirements of this section, it must be made to appear that the letter was properly served upon the person to whom a summons might be delivered or actually received by such an authorized person and that the village caused claimants to be examined in regard to their claim, that the application to amend is in good faith, and that the village will not be prejudiced by granting the motion. Horowitz v Monticello, 18 A.D.2d 947, 237 N.Y.S.2d 660, 1963 N.Y. App. Div. LEXIS 4435 (N.Y. App. Div. 3d Dep't 1963).

Injured party's motion to renew the prior order dismissing the injured party's personal injury action against the New York City Housing Authority for failure to timely serve notice of claim and allowing the injured party to amend the date of the accident in the notice of claim and the complaint was properly granted, as the injured party submitted evidence that established that the dismissal was based on an incorrect date for the accident, which occurred on a later date than previously thought; although the records were previously available, the date of the accident was not at issue, N.Y. C.P.L.R. 2221(e)(3), and the Authority's investigation of the accident was not prejudiced by the delay pursuant to N.Y. Gen. Mun. Law § 50-e(6). Arroyo v N.Y. City Hous. Auth., 12 A.D.3d 254, 785 N.Y.S.2d 60, 2004 N.Y. App. Div. LEXIS 13759 (N.Y. App. Div. 1st Dep't 2004).

357. —Defects which bar amendment

A mere letter sent to the principal office of the New York City Housing Authority by the attorney for an infant claimant, al-

though mailed within a few days after the accident, will not suffice as a basis for an amendment on application more than one year later, where the letter did not contain the essential requirements for a statutory notice of claim. Miller v N.Y. City Hous. Auth., 7 A.D.2d 922, 183 N.Y.S.2d 518, 1959 N.Y. App. Div. LEXIS 9964 (N.Y. App. Div. 2d Dep't), aff'd, 6 N.Y.2d 932, 190 N.Y.S.2d 1002, 161 N.E.2d 215, 1959 N.Y. LEXIS 1209 (N.Y. 1959).

The provisions of subd. 6 of this section permitting correction of mistakes or irregularities in a notice of claim which do not pertain to the manner or time of service are inapplicable in the case of an adult sustaining injuries through a fall on a stairway in a school building, notwithstanding her son made an oral report of the accident to an official of the school who wrote down the information and notified the school's insurance carrier, there having been no notice of claim made and served within 90 days as required by this section. Ayotte v Board of Education, 12 A.D.2d 562, 206 N.Y.S.2d 702, 1960 N.Y. App. Div. LEXIS 7264 (N.Y. App. Div. 3d Dep't 1960).

After statute of limitations had expired on wrongful death action, plaintiff who had served wrong party as defendant, and who also failed to make proper defendant a party to her application for relief, was not entitled to order permitting her to serve and file late notice of claim, summons and complaint on proper party nunc pro tunc, nor to amend her original notice of claim, summons and complaint to substitute proper party as defendant. Washington v Brookdale Hospital, 126 A.D.2d 719, 511 N.Y.S.2d 317, 1987 N.Y. App. Div. LEXIS 41865 (N.Y. App. Div. 2d Dep't 1987).

Notice of claim may not be amended so as to add new theories of liability which are time barred at time when application for such amendment is made. Rice v New York City Housing Authority, 149 A.D.2d 495, 539 N.Y.S.2d 977, 1989 N.Y. App. Div. LEXIS 4842 (N.Y. App. Div. 2d Dep't 1989).

Dismissal should have been granted to a city and the city department of transportation in a motorcyclist's personal injury action, as he failed to serve either the corporation counsel, his designee, or the city comptroller, such that he could not rely on the saving provision of N.Y. Gen. Mun. Law § 50-e(3)(c); such provision was limited to defects in the manner of serving the notice on the correct public entity. Khela v City of New York, 91 A.D.3d 912, 937 N.Y.S.2d 311, 2012 N.Y. App. Div. LEXIS 784 (N.Y. App. Div. 2d Dep't 2012).

Where no formal notice of claim for personal injuries was served upon a school board, the court had no power to have such notice as was mailed to the Office of the Superintendent of Schools amended into and verified as effective notice. McKiernan v Board of Education, 1 Misc. 2d 925, 149 N.Y.S.2d 923, 1956 N.Y. Misc. LEXIS 2039 (N.Y. Sup. Ct. 1956).

358. Lack of sworn verification

Failure to comply with the requirements of subd 2 as to notice in that (1) it is not sworn to, by, or on behalf of claimant, (2) it does not state the manner in which the claim arose, and (3) it does not specify the items of damage or injuries claimed to have been sustained, may in absence of prejudice to the defendant, be supplied by way of amendment pursuant to subd 6. Montana v Lynbrook, 23 A.D.2d 585, 256 N.Y.S.2d 651, 1965 N.Y. App. Div. LEXIS 4806 (N.Y. App. Div. 2d Dep't 1965).

Lack of sworn verification, or a defect in the verification, of such notice of claim as was timely given, has consistently been regarded as an amendable oversight. Belardinelli v New York City Housing Authority, 67 N.Y.S.2d 94, 187 Misc. 920, 1946 N.Y. Misc. LEXIS 3187 (N.Y. Sup. Ct. 1946).

Amendment of notices of claim to correct good faith omissions or defects should be liberally allowed even as to matters of substance, provided there has been no prejudice to the municipality. Father of six-year-old infant was permitted to amend a letter which constituted his notice of claim to add a verification and to state time of accident and the basis of claim against a school district where the letter was delivered personally to the trustees of a school district sixty-six days after an accident. Baxter v Turner, 111 N.Y.S.2d 10, 1952 N.Y. Misc. LEXIS 2473 (N.Y. Sup. Ct. 1952).

359. New cause of action

Court properly denied plaintiff's motions for leave to amend notice of claim and complaint against city to assert claims against Board of Trustees of Fire Department Pension Fund where plaintiff did not include any claims against Board in his original complaint, and Statute of Limitations to interpose action against it had expired; further, conditions to be satisfied for claims against Board to relate back to claims in original complaint were not satisfied. Romanelli v City of New York, 233 A.D.2d 310, 649 N.Y.S.2d 169, 1996 N.Y. App. Div. LEXIS 11591 (N.Y. App. Div. 2d Dep't 1996).

Court properly denied motion for leave to serve amended notice of claim where original claim was for wrongful death, and proposed amendment—to add claim for conscious pain and suffering—would have added new theory of liability in violation of CLS Gen Mun § 50-e(6). Johnson v County of Suffolk, 238 A.D.2d 480, 657 N.Y.S.2d 55, 1997 N.Y. App. Div. LEXIS 4013 (N.Y. App. Div. 2d Dep't 1997).

Trial court improvidently exercised its discretion in granting that branch of plaintiff's motion which was for leave to file an amended notice of claim to include an assertion of negligent traffic planning and design where (1) plaintiff acknowledged that by withdrawing from the brief on appeal the language concerning negligent planning and design, the proposed amendment to the notice of claim regarding an allegation that the city negligently planned and designed the traffic control device at the subject intersection substantially altered the nature of plaintiff's claim, and (2) the new theory was time-barred, under N.Y. Gen. Mun. Law § 50-e(5), and not within the purview of N.Y. Gen. Mun. Law § 50-e(6). Hendler v City of New York, 2 A.D.3d 685, 768 N.Y.S.2d 626, 2003 N.Y. App. Div. LEXIS 13847 (N.Y. App. Div. 2d Dep't 2003).

The court's authority under subd. 6 of this section is limited to correcting a formal defect, such as a mistake or omission made in good faith, and does not include power to allow an amendment which is substantive in nature and changes the theory of the claim. Oliveras v New York City Transit Authority, 27 Misc. 2d 711, 207 N.Y.S.2d 313, 1960 N.Y. Misc. LEXIS 2493 (N.Y. Sup. Ct. 1960).

When a county seized and retained a vehicle owner's car pursuant to an ordinance which was found unconstitutional, and the owner sought to amend the notice of his claim against the county to include damages for lost employment and livelihood resulting in the loss of his residence and declaraing bankruptcy, where the initial claim was limited to the loss and damage of the vehicle, the proposed amendment was not a mere correction of a mistake or irregularity, but sought the addition of damages of a fundamentally different nature, requiring substantially different evidence in support of the claim, and the amendment added new theories of recovery of which the county did not have adequate notice, so the proposed amendment was prejudicial to the county and outside the purview of N.Y. Gen. Mun. Law § 50-e(6). Lombardo v County of Nassau, 791 N.Y.S.2d 292, 6 Misc. 3d 836, 233 N.Y.L.J. 2, 2004 N.Y. Misc. LEXIS 2960 (N.Y. Sup. Ct. 2004).

360. —False arrest or imprisonment or malicious prosecution

Defendant municipality, which did not plead the 90-day notice requirement contained in section 50-e of the General Municipal Law due to the fact that the only cause of action alleged in plaintiff's original complaint, malicious prosecution, was timely should have been permitted to amend its answer to assert the defense of section 50-e and the actions for negligence and false imprisonment should have been dismissed where, at the close of the evidence and after the trial court permitted plaintiff to amend her pleading to conform to the proof, it ignored defendant's request for a ruling that claims based upon negligence and false imprisonment were time barred. Boose v Rochester, 71 A.D.2d 59, 421 N.Y.S.2d 740, 1979 N.Y. App. Div. LEXIS 13087 (N.Y. App. Div. 4th Dep't 1979).

City was entitled to dismissal of causes of action for false arrest, false imprisonment, malicious prosecution, violation of plaintiff's constitutional rights and negligence where (1) plaintiff sustained injuries when he was allegedly assaulted by city police in 1982, (2) in 1985, court affirmed order which permitted

plaintiff to serve late notice of claim to recover for assault and battery, and (3) plaintiff subsequently served amended late notice of claim seeking to interpose additional causes of action; court would reject contention that additional causes of action could be inferred from cause of action for assault and battery. Mazzilli v New York, 154 A.D.2d 355, 545 N.Y.S.2d 833, 1989 N.Y. App. Div. LEXIS 12281 (N.Y. App. Div. 2d Dep't 1989).

Motion for leave to amend notice of claim for false arrest was properly denied, although arrest to which it pertained was based on same incident underlying previous arrest, for which notice had been served, where later charges involved different facts and allegations. Zwecker v Clinch, 279 A.D.2d 572, 720 N.Y.S.2d 150, 2001 N.Y. App. Div. LEXIS 565 (N.Y. App. Div. 2d Dep't 2001).

Supreme court erred in denying a city and police officers' motion to dismiss a former arrestee's false arrest and malicious prosecution claims, because the former arrestee's N.Y. Gen. Mun. Law § 50-e notice of claim was limited to allegations of assaultive conduct by the police officers and their use of excessive force, and did not include any allegations supporting the causes of action for false arrest and malicious prosecution. The former arrestee was unable to amend his notice of claim under N.Y. Gen. Mun. Law § 50-e(6) to include the additional causes of action because the provision did not authorize substantive changes on the theory of liability; he was also precluded from relying on his testimony at his N.Y. Gen. Mun. Law § 50-h hearing to correct deficiencies in the notice because the information supplied at the hearing amended the theory of liability and thereby changed the nature of the claim set forth in the notice. Scott v City of New York, 40 A.D.3d 408, 836 N.Y.S.2d 140, 2007 N.Y. App. Div. LEXIS 6075 (N.Y. App. Div. 1st Dep't 2007).

Plaintiff was denied leave to amend his notice of claim where his amended complaint seeking damages for two causes of action based on false arrest and false imprisonment, and for a third based on malicious prosecution, had no relation to the original notice. Berger v Seneca Falls, 3 Misc. 2d 647, 151 N.Y.S.2d 133, 1956 N.Y. Misc. LEXIS 1915 (N.Y. Sup. Ct. 1956).

Where the notice of claim against the city alleged false arrest or imprisonment, such notice did not give reasonable notice of a possible claim of malicious prosecution in connection therewith, and thus the claim could not be amended after more than one year to include a cause of action for malicious prosecution as such amendment would be of a substantive nature not contemplated by the statute. Grant v Rochester, 68 Misc. 2d 358, 326 N.Y.S.2d 691, 1971 N.Y. Misc. LEXIS 1065 (N.Y. Sup. Ct. 1971).

In action by minor against city for damages for false arrest and false imprisonment, minor would be permitted, in absence of any showing of prejudice by city, to amend her timely-filed notice of claim even though, as originally filed, it lacked designation of specific causes of action. Cohen v New York, 88 Misc. 2d 1012, 389 N.Y.S.2d 994, 1976 N.Y. Misc. LEXIS 2795 (N.Y. Sup. Ct. 1976).

361. —Actions involving infants

In an action by wife to recover for personal injuries and by husband for medical expenses and loss of services, motion, for leave to serve amended notice of claim to include claim for injury to infant suffered while he was en ventre sa mere at the time the wife fell and for leave to serve supplemental summons and amended complaint setting forth cause of action for infant, denied. Facts failed to establish mistake, omissions, irregularity or defect which might be corrected under subdivision 6. In actuality application being one to serve notice of claim on behalf of an infant was unauthorized since it was made after the one-year period in subdivision 5. Speranza v New York, 7 A.D.2d 936, 183 N.Y.S.2d 785, 1959 N.Y. App. Div. LEXIS 9878 (N.Y. App. Div. 2d Dep't 1959), aff'd, 11 N.Y.2d 917, 228 N.Y.S.2d 671, 183 N.E.2d 76, 1962 N.Y. LEXIS 1220 (N.Y. 1962).

The parents of a child, struck and fatally injured by a school bus, were not permitted to amend their notice of claim, in action for daughter's wrongful death, by including a claim in their own behalf for mental anguish as parents of the deceased infant, where, assuming such claim would constitute a valid cause of action, the amendment would be substantive in nature and in effect interpose a new cause of action subsequent to the time limited by statute. Dale v Half Hollow Hills School, Cent. School Dist., 37 A.D.2d 778, 325 N.Y.S.2d 267, 1971 N.Y. App. Div. LEXIS 3403 (N.Y. App. Div. 2d Dep't 1971).

Although an infant was adopted after being injured, the adoptive mother had standing to assert a derivative claim for future medical expenses incurred on the child's behalf; therefore, the trial court properly granted the infant's N.Y. Gen. Mun. Law § 50-e(6) motion to amend notice of claim and complaint to allege the mother's derivative claim. De'Leone v City of New York, 45 A.D.3d 254, 845 N.Y.S.2d 241, 2007 N.Y. App. Div. LEXIS 11022 (N.Y. App. Div. 1st Dep't 2007).

A plaintiff-father was permitted to amend a notice of tort claim, served on infant's behalf against a city, to allege father's claim for loss of services where city had prompt notice of the claim by infant "and" father. Jordan v New York, 8 Misc. 2d 995, 171 N.Y.S.2d 902, 1957 N.Y. Misc. LEXIS 2187 (N.Y. City Ct. 1957).

In action by minor against city for damages for false arrest and false imprisonment, minor would be permitted, in absence of any showing of prejudice by city, to amend her timely-filed notice of claim even though, as originally filed, it lacked designation of specific causes of action. Cohen v New York, 88 Misc. 2d 1012, 389 N.Y.S.2d 994, 1976 N.Y. Misc. LEXIS 2795 (N.Y. Sup. Ct. 1976).

362. —Personal injury actions

Even though the original notice of claim made specific reference to a claim of negligence in the operation of a school bus, and identified the time and place of the alleged negligence of the town, and the town acknowledged the claim and stated that it construed the claim as involving the maintenance of the highway, a motion, promptly made, to amend the notice alleging the failure of the town to fulfil its duty of properly maintaining the highway as regards the removal of snow and ice and negligently failed to remove the snow and ice and to sand and salt the surfaces of the highway, granted, it appearing that the allowance of the amendment would not substantially prejudice the town. Powell v Gates, 36 A.D.2d 220, 319 N.Y.S.2d 650, 1971 N.Y. App. Div. LEXIS 4318 (N.Y. App. Div. 4th Dep't 1971).

In an action brought against New York City to recover for injuries sustained when plaintiff's automobile was struck by an automobile which was being chased by a New York City police car, the trial court erred in permitting plaintiff, two years after the accident, to add to his notice of claim a cause of action alleging that the city's negligence in allowing a pothole to exist in the street was a proximate cause of the accident, where plaintiff's original complaint had charged merely undifferentiated negligence in the operation and control of both the police car and the other automobile. McKie v New York, 79 A.D.2d 901, 434 N.Y.S.2d 239, 1981 N.Y. App. Div. LEXIS 9763 (N.Y. App. Div. 1st Dep't 1981).

Plaintiffs' motion, to amend their notice of claim so as to include claims for loss of each other's services and consortium, was properly one for amendment so as to supply omission, inasmuch as it sought to add derivative causes of action predicated upon same facts which had already been included in plaintiffs' notice of claim and which defendant had already been duly and timely notified; motion should not have been treated as motion for leave to serve late notice of claim. Dodd v Warren, 110 A.D.2d 807, 488 N.Y.S.2d 70, 1985 N.Y. App. Div. LEXIS 48713 (N.Y. App. Div. 2d Dep't 1985).

Plaintiff's motion to amend notice of claim alleging negligent operation of city sanitation vehicle to add theory of negligent maintenance, management, operation and control of traffic signal should have been granted where city had actual knowledge of essential facts constituting claim, and delay in asserting new theory of liability did not substantially prejudice city in maintaining its defense on merits. Halperin v New York, 127 A.D.2d 461, 511 N.Y.S.2d 273, 1987 N.Y. App. Div. LEXIS 42963 (N.Y. App. Div. 1st Dep't 1987).

Court properly dismissed causes of action against city for malicious prosecution, libel, slander and negligent hiring, training and employment since (1) those claims were not referred to in original notice of claim but were first alleged in complaint served over 4 months after incident, (2) addition of such claims would substantially alter nature of original claims for personal injury based on assault and false arrest, and (3) complaint contained

mere conclusory allegations as to those causes of action. Demorcy v New York, 137 A.D.2d 650, 524 N.Y.S.2d 742, 1988 N.Y. App. Div. LEXIS 1779 (N.Y. App. Div. 2d Dep't 1988).

Court improperly granted leave to amend notices of claim against Manhattan and Bronx Surface Transit Operating Authority where proposed "slippery seat" theory (essentially claim of design defect) was not alluded to in complaint or in original notices of claim which asserted only human error and defect in steering mechanism, and it was first sought to be interposed long after one year and 90-day limitation had passed. Chipurnoi v Manhattan & Bronx Surface Transit Operating Auth., 216 A.D.2d 171, 628 N.Y.S.2d 666, 1995 N.Y. App. Div. LEXIS 6975 (N.Y. App. Div. 1st Dep't 1995).

Court properly denied plaintiffs' motion for leave to amend notices of claim previously filed against village by insurer where village only had notice of insurer's subrogation claim as to payments it made to injured plaintiff's husband for property damage as result of accident, and village was never notified, until action was commenced, of injured plaintiff's personal injury claim or of her husband's claim for loss of services. Steinberg v Village of Garden City, 247 A.D.2d 463, 668 N.Y.S.2d 674, 1998 N.Y. App. Div. LEXIS 1007 (N.Y. App. Div. 2d Dep't 1998).

Granting the victim's motion for leave to amend the notice of claim nunc pro tunc was error as the victim's original notice of claim did not comply with N.Y. Gen. Mun. Law § 50-e(2) because it failed to identify the location of the accident with sufficient particularity to enable the town to locate the alleged defect, conduct a meaningful investigation, and assess the merits of the victim's claim; the proposed amended notice of claim alleged, for the first time, that the victim fell because of a defect in the pavement which constituted an amendment of a substantive nature which was not within the purview of § 50-e(6). Richard v Town of Oyster Bay, 300 A.D.2d 561, 752 N.Y.S.2d 537, 2002 N.Y. App. Div. LEXIS 12758 (N.Y. App. Div. 2d Dep't 2002).

Where the notice of claim first filed and served by an infant charged defendant with various acts of negligence and omission in maintenance and operation of its subway platform and tracks, and a proposed amendment of such notice, after expiration of more than 90 days from the occurrence, would substitute a claim that the injuries were sustained by reason of an unprovoked assault perpetrated upon claimant by one of defendant's employees, the change was substantive, not a mere correction, and leave to amend would not be granted in the absence of showing that failure to serve such a notice within the 90-day period was "by reason of infancy." Oliveras v New York City Transit Authority, 27 Misc. 2d 711, 207 N.Y.S.2d 313, 1960 N.Y. Misc. LEXIS 2493 (N.Y. Sup. Ct. 1960).

Action against New York City Health and Hospitals Corporation, arising from incident wherein plaintiff's decedent was assaulted by recently-released nonparty psychiatric patient, sounded in medical malpractice in that underlying action vicariously related back to claim of medical negligence, where complaint alleged that patient was prematurely released and not provided with follow-up treatment. Lee v New York City Transit Auth., 175 Misc. 2d 632, 668 N.Y.S.2d 1014, 1998 N.Y. Misc. LEXIS 21 (N.Y. Sup. Ct. 1998), modified, aff'd, 257 A.D.2d 611, 685 N.Y.S.2d 84, 1999 N.Y. App. Div. LEXIS 335 (N.Y. App. Div. 2d Dep't 1999).

In action arising from suicide death of 17-year-old pretrial detainee at county jail, court granted plaintiff's motion to amend complaint to assert wrongful death claim and for order deeming notice of wrongful death claim as having been timely filed, nunc pro tunc, under CLS Gen Mun § 50-e(5), where county acquired actual knowledge of essential facts of claim within 90 days after it arose, service was made within 2-year limitations period for wrongful death actions as tolled by CLS CPLR § 208, and county failed to demonstrate significant prejudice warranting denial of motion. Rivera v County of Westchester, 188 Misc. 2d 746, 729 N.Y.S.2d 836, 2001 N.Y. Misc. LEXIS 266 (N.Y. Sup. Ct. 2001).

Personal representative of diver who drowned while engaged in underwater construction work for county water authority may amend her notice of claim pursuant to NY Gen Mun Law § 50-e(6), where claim gave notice for a wrongful death claim but not for personal injury claim, because claim provided sufficient detail to put water authority on notice to investigate incident involved and claims for conscious pain and suffering and wrongful death arise out of same incident covered in notice. Gregory v Monroe County Water Authority, 795 F. Supp. 92, 1992 U.S. Dist. LEXIS 11823 (W.D.N.Y. 1992).

363. — —Substantial alteration of nature of claim

In a personal injury action, the court properly denied the plaintiff's motion to correct his notice of claim by adding to its allegations of assault and-or the use of excessive force further allegations that his damages had been the product of the defendant's negligence since such amendment would have substantially altered the nature of the plaintiff's claim by adding a new theory of liability not previously imposed. Gordon v New York, 79 A.D.2d 981, 434 N.Y.S.2d 478, 1981 N.Y. App. Div. LEXIS 9871 (N.Y. App. Div. 2d Dep't 1981).

The trial court improperly permitted plaintiff to amend his claim against a municipality for wrongful death to add claims for pain and suffering and loss of consortium, where the amendment would have substantially altered the nature of plaintiff's claim by adding new theories of liability and was therefore not permissible under § 50-e(6) of the Gen Mun Law, and where under APTL 5-4.3, loss of consortium is not a "pecuniary injury" for which damages are recoverable in a wrongful death action. Monroe v Long Island College Hospital, 84 A.D.2d 576, 443 N.Y.S.2d 433, 1981 N.Y. App. Div. LEXIS 15668 (N.Y. App. Div. 2d Dep't 1981).

Plaintiff, who was present when her daughter was killed while attempting to exit stalled elevator that suddenly restarted, would not be permitted to amend notice of claim against city Housing Authority to add cause of action for negligent infliction of emotional distress since such amendment would substantially alter nature of plaintiff's original claim for wrongful death, and amendment was sought almost 5 years after occurrence of incident. Gonzalez v New York City Housing Authority, 181 A.D.2d 440, 580 N.Y.S.2d 760, 1992 N.Y. App. Div. LEXIS 3121 (N.Y. App. Div. 1st Dep't 1992).

Court erred in allowing plaintiffs to amend their notice of claim to assert new theories of liability where proposed amendments substantially altered nature of claims, and new theories were time-barred and were not within purview of CLS Gen Mun § 50-e(6). Ford v Babylon Union Free Sch. Dist., 213 A.D.2d 447, 624 N.Y.S.2d 435, 1995 N.Y. App. Div. LEXIS 2710 (N.Y. App. Div. 2d Dep't 1995).

Court would grant motion to amend notice of claim alleging wrongful death action against city to include action for conscious pain and suffering, even though applicable statute of limitations had expired, where there was no allegation of bad faith by plaintiff, amendment did no substantially alter plaintiff's claim or prejudice city, and amendment was predicated on same facts contained in timely notice. Hancock v City of New York, 164 Misc. 2d 122, 623 N.Y.S.2d 63, 1994 N.Y. Misc. LEXIS 640 (N.Y. Sup. Ct. 1994), rev'd, 230 A.D.2d 603, 645 N.Y.S.2d 797, 1996 N.Y. App. Div. LEXIS 8015 (N.Y. App. Div. 1st Dep't 1996).

364. Actions involving spouse

Where a wife failed to file a claim but the husband's claim for loss of services and medical expenses arising from injuries to wife was proper in all respects, and set forth all of the information which a claim of his wife would have contained, the husband will be permitted to amend to include the claim of his wife. Application of Charlemagne, 277 A.D. 689, 102 N.Y.S.2d 661, 1951 N.Y. App. Div. LEXIS 5663 (N.Y. App. Div.), aff'd, 302 N.Y. 871, 100 N.E.2d 52, 302 N.Y. (N.Y.S.) 871, 1951 N.Y. LEXIS 985 (N.Y. 1951).

Where husband's claim against city for personal injuries was timely filed, husband's original notice of claim ordered corrected to supply the omission of his wife's claim for loss of consortium. La Pan v County of Albany, 58 Misc. 2d 657, 296 N.Y.S.2d 416, 1968 N.Y. Misc. LEXIS 978 (N.Y. Sup. Ct. 1968).

365. —Wrongful death actions

The parents of a child, struck and fatally injured by a school bus, were not permitted to amend their notice of claim, in action for daughter's wrongful death, by including a claim in their own behalf for mental anguish as parents of the deceased infant, where, assuming such claim would constitute a valid cause of

action, the amendment would be substantive in nature and in effect interpose a new cause of action subsequent to the time limited by statute. Dale v Half Hollow Hills School, Cent. School Dist., 37 A.D.2d 778, 325 N.Y.S.2d 267, 1971 N.Y. App. Div. LEXIS 3403 (N.Y. App. Div. 2d Dep't 1971).

In a wrongful death action by the wife of a city police officer the wife, who had served a notice of claim on the city nearly two years before she was appointed administratrix of her husband's estate, would be permitted to file a corrected notice of claim, where the city, which had raised the affirmative defense that the claim was not properly filed by the administratrix, conceded that the notice was otherwise proper. Collins v New York, 89 A.D.2d 992, 454 N.Y.S.2d 327, 1982 N.Y. App. Div. LEXIS 18245 (N.Y. App. Div. 2d Dep't 1982).

Plaintiff was entitled to amend her notice of claim against city under CLS Gen Mun § 50-e(6) to add wrongful death cause of action where there was no allegation that her omission of her deceased husband's diagnosis date was made in bad faith, city made only general claim of prejudice, and information provided in notice of claim was sufficient to enable city to begin investigation. Perry v City of New York, 246 A.D.2d 380, 667 N.Y.S.2d 722, 1998 N.Y. App. Div. LEXIS 262 (N.Y. App. Div. 1st Dep't 1998).

While a summons and complaint were not a substitute for a notice of claim for wrongful death required by N.Y. Pub. Auth. Law §§ 1212(2) and 2980 and N.Y. Gen. Mun. Law § 50-e(1), § 50-e(6) permitted amendment of the claim if it would not prejudice a city transit authority, whose bus driver's negligence allegedly resulted in personal injuries and then the death of the wheelchair-bound deceden; because the wrongful death claim arose from the same facts as alleged in the timely notice of claim for personal injuries, the personal representative should have been granted leave to amend. Ramos v New York City Tr. Auth., 60 A.D.3d 517, 876 N.Y.S.2d 13, 2009 N.Y. App. Div. LEXIS 1894 (N.Y. App. Div. 1st Dep't 2009).

Where a notice of claim for wrongful death was deficient by reason of omission of the claim for pain and suffering, a defense is proper but since the claim has been filed an amended notice may be filed to set forth the claim for pain and suffering of decedent. Feiler v New York, 107 N.Y.S.2d 238, 1951 N.Y. Misc. LEXIS 2319 (N.Y. Sup. Ct. 1951).

366. —Miscellaneous actions

The provision for formal corrections in the above statute obviously does not include substantive changes such as the addition of a cause of action for prima facie tort to a notice of claim stating that it is for breach of contract and abuse of process. Widger v Central School Dist., 23 A.D.2d 811, 258 N.Y.S.2d 195, 1965 N.Y. App. Div. LEXIS 4487 (N.Y. App. Div. 4th Dep't), app. dismissed, 16 N.Y.2d 713, 261 N.Y.S.2d 907, 209 N.E.2d 561, 1965 N.Y. LEXIS 1312 (N.Y. 1965), rev'd, 18 N.Y.2d 646, 273 N.Y.S.2d 72, 219 N.E.2d 425, 1966 N.Y. LEXIS 1216 (N.Y. 1966).

The plaintiff could not rely upon General Municipal Law § 50-e, subdivision 6, in his attempt to amend his subrogee's notice of claim for property damage by adding a belated notice of claim for personal injury. La Rocco v New York, 37 A.D.2d 529, 322 N.Y.S.2d 163, 1971 N.Y. App. Div. LEXIS 3873 (N.Y. App. Div. 1st Dep't), aff'd, 29 N.Y.2d 687, 325 N.Y.S.2d 418, 274 N.E.2d 751, 1971 N.Y. LEXIS 1053 (N.Y. 1971).

Plaintiffs' motion, to amend their notice of claim so as to include claims for loss of each other's services and consortium, was properly one for amendment so as to supply omission, inasmuch as it sought to add derivative causes of action predicated upon same facts which had already been included in plaintiffs' notice of claim and which defendant had already been duly and timely notified; motion should not have been treated as motion for leave to serve late notice of claim. Dodd v Warren, 110 A.D.2d 807, 488 N.Y.S.2d 70, 1985 N.Y. App. Div. LEXIS 48713 (N.Y. App. Div. 2d Dep't 1985).

Court properly permitted injured plaintiff to amend her notice of claim to include her husband's claims for loss of consortium and medical expenses; in absence of prejudice, it is not improvident exercise of discretion to grant leave to amend notice of claim to assert derivative claims predicated on same facts already included in notice of claim. Burgarella v City of New York, 265 A.D.2d 361, 697 N.Y.S.2d 68, 1999 N.Y. App. Div. LEXIS 10241 (N.Y. App. Div. 2d Dep't 1999).

Building owner and tenant could not amend notice of claim filed against city where claim was based on negligence of city in operation of its transportation system and amended claim sought to include allegation that city negligently constructed subway entrance. Gersyl Corp. v New York, 10 Misc. 2d 88, 167 N.Y.S.2d 488, 1956 N.Y. Misc. LEXIS 1413 (N.Y. Sup. Ct. 1956), aff'd, 3 A.D.2d 941, 164 N.Y.S.2d 1019, 1957 N.Y. App. Div. LEXIS 5305 (N.Y. App. Div. 2d Dep't 1957).

While the legislature has authorized the court to exercise its discretion under certain prescribed circumstances, to permit service of the notice of claim required as a condition precedent to the commencement of a court action against a public corporation within a reasonable time after the expiration of the 90-day period, or to amend such notice in order to cure a mistake, omission, irregularity or defect therein made in good faith, there is no authority to transform a notice of claim served under § 40 of the Volunteer Firemen's Benefit Law into a notice of claim grounded in tort, which is the prerequisite to the commencement of an action against a public corporation as prescribed by § 50-e of the General Municipal Law. Raynor v Westhampton Beach, 58 Misc. 2d 1082, 296 N.Y.S.2d 704, 1969 N.Y. Misc. LEXIS 1856 (N.Y. Sup. Ct. 1969).

367. Miscellaneous amendments

Trial court erred by granting the decedent's mother leave to amend the complaint to assert a derivative cause of action to recover damages for loss of services on her own behalf against the city and the port authority (PA), General Municipal Law § 50-e, because, inter alia, there were no allegations that she, individually, sustained any damages for which compensation was sought from the city or the PA, and the city and the PA were not given timely notice of the mother's derivative claim. Conn v Tutor Perini Corp., 174 A.D.3d 680, 105 N.Y.S.3d 508, 2019 N.Y. App. Div. LEXIS 5707 (N.Y. App. Div. 2d Dep't 2019).

If a person is killed or dies as the result of injuries sustained, identity of the administrator of his estate has no bearing on the merits of a death claim or one for damages sustained by the decedent, hence a change in administration or an error in designation of the administrator is subject to amendment, provided there was original timely notice of the incident and basis of claim by someone in interest. Winbush v Mt. Vernon, 306 N.Y. 327, 118 N.E.2d 459, 306 N.Y. (N.Y.S.) 327, 1954 N.Y. LEXIS 1029 (N.Y. 1954); Millard v New York, 115 N.Y.S.2d 152, 1952 N.Y. Misc. LEXIS 1632 (N.Y. Sup. Ct. 1952).

In an action against the City of New York wherein it appeared that a compensation insurance carrier, which had a contingent interest in plaintiff's cause of action by virtue of subds. 1 and 2 of § 29 of the Workmen's Compensation Law, had filed notice of claim and that the city had actually examined plaintiff after filing of such notice, plaintiff's motion for leave to amend her notice of claim, pursuant to subd. 6 of this section, should have been granted. Verley v New York, 11 A.D.2d 1015, 206 N.Y.S.2d 435, 1960 N.Y. App. Div. LEXIS 7496 (N.Y. App. Div. 1st Dep't 1960).

Where summons and complaint were served within 90 days after an accident, and summons contained all required information, plaintiff permitted to serve an amended notice of claim and an amended complaint so as to include in the complaint plaintiff's post office address and her attorney's post office address. Quintero v Long Island Railroad, 31 A.D.2d 844, 298 N.Y.S.2d 109, 1969 N.Y. App. Div. LEXIS 4537 (N.Y. App. Div. 2d Dep't 1969).

Special Term abused its discretion in denying plaintiff's motion to amend a claim, which alleged that plaintiff was harassed and struck by a police officer while defendant was endeavoring to repair his car after it broke down on the street, and which incorrectly cited the officer's name, the date and the location of the accident, where no claim was asserted that the mistakes were not made in good faith and where no prejudice resulted from the mistakes. Nouri v New York, 90 A.D.2d 745, 456 N.Y.S.2d 1, 1982 N.Y. App. Div. LEXIS 18937 (N.Y. App. Div. 1st Dep't 1982).

In action to recover for injuries sustained when police officer fell down flight of stairs while investigating incident at building owned by housing authority, officer would be granted permission

to amend notice of claim so as to correct typographical error in description of site of accident since there was never any dispute as to location of accident, occurrence of accident was immediately described in witness statement reports and in police accident report, and officer was examined and treated by police department doctors. Venezian v New York, 172 A.D.2d 251, 568 N.Y.S.2d 82, 1991 N.Y. App. Div. LEXIS 4539 (N.Y. App. Div. 1st Dep't 1991).

Trial court properly granted an injured person leave to amend the notice of claim and complaint in a personal injury case against a city arising from an allegedly defect in a sidewalk to state the correct location where the accident allegedly occurred where, at the hearing pursuant to N.Y. Gen. Mun. Law § 50-h, the injured person submitted photographs of the location of the accident and identified the site of the accident on one of the photographs; there was no evidence that the city suffered prejudice. Rupp v City of Port Jervis, 10 A.D.3d 391, 780 N.Y.S.2d 766, 2004 N.Y. App. Div. LEXIS 10179 (N.Y. App. Div. 2d Dep't 2004).

Where a notice of claim against a municipality contains no day of the month in dating the claim, the defect is subject to correction, if it be error, under subd. 6 of this section, as the date of service of the notice, rather than its dated date, controls in case of conflict. Bernstein's Duck Farm v Brookhaven, 21 Misc. 2d 953, 71 N.Y.S.2d 311, 1947 N.Y. Misc. LEXIS 1955 (N.Y. Sup. Ct. 1947).

The court will look to the substance of the paper served and not to its label, and where a "complaint" was filed with the Transit Authority within 90 days of the accident and such complaint met all the statutory requirements of a notice or claim except that it did not set forth the plaintiff's post office address and that it was not served in duplicate, such pleading will be treated as notice of claim and plaintiff's motion for leave to serve an amended notice of claim and an amended complaint would be granted. Nagy v Rothstein, 53 Misc. 2d 367, 278 N.Y.S.2d 742, 1966 N.Y. Misc. LEXIS 1325 (N.Y. Sup. Ct. 1966).

Amendment of notice of claim to substitute one parent for the other with respect to a derivative cause of action would be allowed as nonprejudicial to defendant. Davidson v New York City Housing Authority, 56 Misc. 2d 635, 289 N.Y.S.2d 677, 1968 N.Y. Misc. LEXIS 1579 (N.Y. Sup. Ct. 1968).

Notes to Unpublished Decisions

Analysis

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11. —Other grounds for failure to timely file

I. Generally

1. Relation to other statutes; Constitutional provisions

2. —Federal law

Unpublished decision: Filing of a notice of claim against defendant city pursuant to N.Y. Gen. Mun. Law § 50-e(1)(a) was not the initial pleading, the filing of which would have commenced the time to file the city and others' notice of removal. Thus, their notice of removal was timely filed under 28 U.S.C.S. § 1446. Alexander v City of Syracuse, 454 Fed. Appx. 6, 2011 U.S. App. LEXIS 25598 (2d Cir. N.Y. 2011).

II. Accrual of Particular Claims

3. False arrest and imprisonment; accrual after arraignment

4. —After release

Unpublished decision: Plaintiff's insurer filed a notice of claim with a city, alleging only property damage; plaintiff did not file a notice of claim alleging personal injury until a year after the accident. Her motion under N.Y. Gen. Bus. Law § 50-e to allow the late filing was denied because, in effect, she was attempting to alter the nature of the claim, which was not permissible under § 50-e(6). Woolward v City of New York, 236 N.Y.L.J. 115, 2006 N.Y. Misc. LEXIS 3865 (N.Y. Sup. Ct. Nov. 27, 2006).

5. Malicious prosecution

Unpublished decision: Plaintiff's proceeding seeking leave to file a late notice of claim against a city under N.Y. Gen. Bus. Law § 50-e(1)(a) was a special proceeding and required a separate index number. However, as the city did not raise an objection to that procedural defect in its answer or in a pre-answer motion, its motion to dismiss on that ground was denied. Woolward v City of New York, 236 N.Y.L.J. 115, 2006 N.Y. Misc. LEXIS 3865 (N.Y. Sup. Ct. Nov. 27, 2006).

5.3. Abuse of process

Unpublished decision: Resident's abuse of process claim against a town was not time-barred because the claim accrued when the resident last appeared in court pursuant to the allegedly abused process less than 90 days before the resident served a notice of the resident's claim on the town. Raus v Town of Southampton, 661 Fed. Appx. 81, 2016 U.S. App. LEXIS 17208 (2d Cir. N.Y. 2016).

III. Extension of Time to File

5.5. Other actions

Unpublished decision: Arrestee's negligence claim against a county clerk was properly dismissed because he failed to comply with New York's notice of claim requirements. Allen v Antal, 665 Fed. Appx. 9, 2016 U.S. App. LEXIS 22165 (2d Cir. N.Y. 2016).

Unpublished decision: Arrestee's legal malpractice claim was properly dismissed because he failed to timely comply with New York's notice of claim requirements by filing timely notice after the indictment was dismissed. Allen v Antal, 665 Fed. Appx. 9, 2016 U.S. App. LEXIS 22165 (2d Cir. N.Y. 2016).

6. Authority of court

7. —Jurisdiction of court

Unpublished decision: Plaintiff's motion for leave to file a late notice of claim against a city under N.Y. Gen. Bus. Law § 50-e(1)(a) was denied because her excuse for her substantial delay in filing the notice of claim amounted to little more than law office failure, and she did not show that the city had actual knowledge of the essential facts constituting her claim within 90 days of its accrual, or that it was not substantially prejudiced in its opportunity to investigate the incident and defend against her claim. Woolward v City of New York, 236 N.Y.L.J. 115, 2006 N.Y. Misc. LEXIS 3865 (N.Y. Sup. Ct. Nov. 27, 2006).

IV. Particular Grounds for Extension of Time

8. Infancy

9. —Ignorance of notice requirements

Unpublished decision: Plaintiff's motion for leave to file a late notice of claim against a city under N.Y. Gen. Bus. Law § 50-e(1)(a) was denied. The fact that the city conducted a N.Y. Gen. Bus. Law § 50-h hearing and engaged in settlement discussions did not equitably estop it from asserting a statute of limitations defense. Woolward v City of New York, 236 N.Y.L.J. 115, 2006 N.Y. Misc. LEXIS 3865 (N.Y. Sup. Ct. Nov. 27, 2006).

10. Conduct of counsel affecting infant's disability

11. —Other grounds for failure to timely file

Unpublished decision: Plaintiff's insurer filed a notice of claim with a city, alleging only property damage; plaintiff did not file a notice of claim alleging personal injury until a year after the

accident. Her motion under General Municipal Law § 50-e to allow the late filing was denied because the accident report annexed to the property damage claim filed by her insurer did not establish that the city acquired actual knowledge of the personal injury claim within 90 days of its accrual. Woolward v City of New York, 236 N.Y.L.J. 115, 2006 N.Y. Misc. LEXIS 3865 (N.Y. Sup. Ct. Nov. 27, 2006).

Agency Opinions

Analysis

I. Generally

1. Statutes which are superseded
2. —Coequal statutes

II. Applicability to Types of Actions

3. Personal injury actions
4. —Notice of unsafe condition

III. Accrual of Particular Claims

5. Real property actions

IV. Amendment of Claim or Notice

6. Former requirement as to amount of damages

I. Generally

1. Statutes which are superseded

2. —Coequal statutes

The County of Onondaga is authorized to enact a local law requiring the giving of prior notice of defects before an action could be maintained against the County for damages or injuries sustained by reason of defective, unsafe, dangerous or obstructed condition of any street, highway, bridge, culvert, sidewalk or crosswalk, or of the existence of snow or ice thereon, and there was a failure or neglect on the part of the County to remedy such defects after receipt of such notice. 1978 NY Ops Atty Gen April 27.

The provisions of this section supersede inconsistent provisions of a city or village charter. 1952 NY Ops Atty Gen (Informal) Mar 20; 1961 NY Ops Atty Gen Oct 25.

II. Applicability to Types of Actions

3. Personal injury actions

4. —Notice of unsafe condition

The County of Onondaga is authorized to enact a local law requiring the giving of prior notice of defects before an action could be maintained against the County for damages or injuries sustained by reason of defective, unsafe, dangerous or obstructed condition of any street, highway, bridge, culvert, sidewalk or crosswalk, or of the existence of snow or ice thereon, and there was a failure or neglect on the part of the County to remedy such defects after receipt of such notice. 1978 NY Ops Atty Gen April 27.

III. Accrual of Particular Claims

5. Real property actions

Under the cited sections where the Wayne County Clerk certifies as to filed or recorded instruments in his office relating to real property pursuant to CPLR 8021(a) 11, a claim for damages would be timely if filed within 90 days after discovery of the error or omission in such certification. 1973 NY Ops Atty Gen Feb 12 (informal).

IV. Amendment of Claim or Notice

6. Former requirement as to amount of damages

A municipality served with an otherwise proper notice of claim but including a statement of damages in violation of section 50-e(2) of the General Municipal Law should accept service and make a motion to the court for an order directing the claimant to file an amended notice in compliance with the statute. 1981 NY Ops Atty Gen April 22 (Informal).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 960-n.; CLS Art & Cult Affrs § 55.23.; CLS CPLR § 214-c.; CLS High § 139-a.; Cls Priv Hous Fin § 61-a.; CLS CLS Pub A §§ 841., 1017., 1020-u., 1020-y., 1048-v., 1120-o., 1196-m., 1197-n., 1199-o., 1199-ooo., 1317., 1342., 1665., 1798-a., 1831-a., 1840-y., 1868-a., 1939-g., 2045-o., 2046-i., 2046-o., 2047-o., 2048-n., 2049-p., 2049-oo., 2051-o., 2490-o., 2622., 2717., 2739., 2980., 3110; CLS Pub O § 18; . CLS Racing & Wagering §§ 336., 436.; CLS Trans § 62-a.

Definitions, CLS Gen Const § 66.

Actions against authority, CLS Pub A § 1691.

Actions, CLS Pub A §§ 2032., 2447.

Claims and actions against authorities, CLS Pub Hous § 157.

Jurisprudences:

56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 629 et seq.

8 Am Jur Proof of Facts 2d 101., Municipality's Failure to Maintain Sewers Properly.

8 Am Jur Proof of Facts 2d 361., Municipality's Failure, in Making Street Repairs, to Avoid Injury to Adjacent Property.

86 Am Jur Proof of Facts 3d 327., Liability of Municipality or Abutting Landowner for Injury Caused by Defective Condition of Sidewalk.

Causes of Action:

Cause of Action Against Municipality for Injury Caused by Defective Sidewalk. 21 COA2d 71.

Law Reviews:

Ausubel, The impact of New York's judicially created loss apportionment amongst tortfeasors—Dole v Dow Chemical Co. 38 Alb. L. Rev. 155.

Notice of claim provisions: an equal protection perspective. 60 Cornell L. Rev. 417.

Liff and Humburg, Section 50-e, General Municipal Law re-examined, 45 NYSBJ 401.

Treatises

Matthew Bender's New York Civil Practice: Weinstein, Korn, Miller, CPLR Manual (Matthew Bender) §§ 2.04., 10.06.[b], 35.02.

3 Rohan, New York Civil Practice: EPTL ¶ 5-4.1., 5-4.2.

Matthew Bender's New York Practice Guides: 4 New York Practice Guide: Real Estate § 27.02.

Matthew Bender's New York Practice Guides: 2 New York Practice Guide: Probate and Estate Administration § 27.03.

Matthew Bender's New York Practice Guides: LexisNexis AnswerGuide New York Negligence § 2.11[2] I.dentifying Appropriate Defendants in Motor Vehicle Cases.

Matthew Bender's New York Practice Guides: LexisNexis AnswerGuide New York Negligence § 2.11.Identifying Appropriate Defendants in Motor Vehicle Cases.

Matthew Bender's New York Practice Guides: LexisNexis AnswerGuide New York Negligence § 6.03.Identifying Statutes That Provide for Shortened Time for Commencement of Action.

Matthew Bender's New York Practice Guides: LexisNexis AnswerGuide New York Negligence § 6.05.Examining Consequences of Bringing Action or Filing Notice Against Wrong Defendant.

Matthew Bender's New York Practice Guides: LexisNexis AnswerGuide New York Negligence § 6.11.Examining Laws Requiring Prior Written Notice of Defects.

Matthew Bender's New York Practice Guides: LexisNexis AnswerGuide New York Negligence § 6.16.Understanding Requirements of Notice of Claim.

Matthew Bender's New York Practice Guides: LexisNexis AnswerGuide New York Negligence § 6.19.Complying with Notice of Claim Requirements in Actions Against Municipality or Public Corporation.

Matthew Bender's New York Practice Guides: LexisNexis AnswerGuide New York Negligence § 6.21.Requiring Testimony and Physical Examination.

Matthew Bender's New York Practice Guides: LexisNexis AnswerGuide New York Negligence § 7.05.Determining Applicable Statute of Limitations.

Matthew Bender's New York Practice Guides: LexisNexis AnswerGuide New York Negligence § 7.10.Defining Liability of Hospitals.

Matthew Bender's New York Practice Guides: Warren's Negligence in the New York Courts § 138.07.

FORMS: 4 Medina's Bostwick Practice Manual (Matthew Bender), Forms 38:101 et seq.(actions and proceedings against municipalities, public corporations and their agencies).

§ 50-i. Presentation of tort claims; commencement of actions

1. No action or special proceeding shall be prosecuted or maintained against a city, county, town, village, fire district or school district for personal injury, wrongful death or damage to real or personal property alleged to have been sustained by reason of the negligence or wrongful act of such city, county, town, village, fire district or school district or of any officer, agent or employee thereof, including volunteer firefighters of any such city, county, town, village, fire district or school district or any volunteer firefighter whose services have been accepted pursuant to the provisions of section two hundred nine-i of this chapter, unless, (a) a notice of claim shall have been made and served upon the city, county, town, village, fire district or school district in compliance with section fifty-e of this article, (b) it shall appear by and as an allegation in the complaint or moving papers that at least thirty days have elapsed since the service of such notice, or if service of the notice of claim is made by service upon the secretary of state pursuant to section fifty-three of this article, that at least forty days have elapsed since the service of such notice, and that adjustment or payment thereof has been neglected or refused, and (c) the action or special proceeding shall be commenced within one year and ninety days after the happening of the event upon which the claim is based; except that wrongful death actions shall be commenced within two years after the happening of the death.

2. This section shall be applicable notwithstanding any inconsistent provisions of law, general, special or local, or any limitation contained in the provisions of any city charter.

3. Nothing contained herein or in section fifty-h of this chapter shall operate to extend the period limited by subdivision one of this section for the commencement of an action or special proceeding.

4. (a) Notwithstanding any other provision of law to the contrary, including any other subdivision of this section, section fifty-e of this article, section thirty-eight hundred thirteen of the education law, and the provisions of any general, special or local law or charter requiring as a condition precedent to commencement of an action or special proceeding that a notice of claim be filed or presented, any cause of action against a public corporation for personal injuries suffered by a participant in World Trade Center rescue, recovery or cleanup operations as a result of such participation which is barred as of the effective date of this subdivision because the applicable period of limitation has expired is hereby revived, and a claim thereon may be filed and served and prosecuted provided such claim is filed and served within one year of the effective date of this subdivision.

(b) For the purposes of this subdivision:

(1) "participant in World Trade Center rescue, recovery or cleanup operations" means any employee or volunteer that:

(i) participated in the rescue, recovery or cleanup operations at the World Trade Center site; or

(ii) worked at the Fresh Kills Land Fill in the city of New York after September eleventh, two thousand one; or

(iii) worked at the New York city morgue or the temporary morgue on pier locations on the west side of Manhattan after September eleventh, two thousand one; or

(iv) worked on the barges between the west side of Manhattan and the Fresh Kills Land Fill in the city of New York after September eleventh, two thousand one.

(2) "World Trade Center site" means anywhere below a line starting from the Hudson River and Canal Street; east on Canal Street to Pike Street; south on Pike Street to the East River; and extending to the lower tip of Manhattan.

5. Notwithstanding any provision of law to the contrary, this section shall not apply to any claim made against a city, county, town, village, fire district or school district for physical, psychological, or other injury or condition suffered as a result of conduct which would constitute a sexual offense as defined in article one hundred thirty of the penal law committed against a child less than eighteen years of age, incest as defined in section 255.27, 255.26 or 255.25 of the penal law committed against a child less than eighteen years of age, or the use of a child in a sexual performance as defined in section 263.05 of the penal law committed against a child less than eighteen years of age.

HISTORY:

Add, L 1959, ch 788, § 1; amd, L 1960, ch 151, § 1, eff March 8, 1960; L 1963, ch 660, § 1; L 1981, ch 738, § 2, eff Sept 1, 1981; L 2009, ch 440, § 2, eff Sept 16, 2009; L 2013, ch 24, § 5, eff June 15, 2013; L 2018, ch 476, § 29, effective December 28, 2018; L 2019, ch 11, § 6, effective February 14, 2019.

Revision Notes: [1959, ch 788[This act was recommended by the Joint Legislative Committee on Municipal Tort Liability. Its purpose was to clarify and make uniform existing provisions with respect to the filing of claims and the commencement of actions against municipal corporations. (1) Filing of a notice of claim had been required since enactment of § 50-e of the General Municipal Law by L 1945, ch 694. (2) A one year limitation upon commencement of actions existed as to all municipalities. However, the one year period ran in some laws from the happening of the event upon which the claim was based, in others from the accrual of the cause of action. The latter phrase had uniformly been construed to mean after the happening of the event (Christian v. Herkimer, 5 AD2d 62 (1958)), but the variation in terminology in the absence of definitive decision had led to uncertainty and

litigation. This act eliminated that uncertainty by expressly providing that the period ran from the happening of the event. The tolling provisions of § 24 of the Civil Practice Act had resulted in extension of the one year limitation for various periods up to ninety days. For purposes of clarity and uniformity this act provided a period of one year and ninety days with express provision against further tolling. (3) Former laws had provided that no action be brought for a period after the filing of a notice of claim. The periods varied from 15 to 90 days for various classes of municipalities. The Committee deemed unjustifiable the confusion which arose from the variation in periods. This act provided a uniform 30-day period for all municipalities. The act made necessary changes in the General Municipal Law, the Second Class Cities Law, the County Law, the Town Law, the Highway Law and the Village Law to ensure uniformity in its application.

[1960, ch 151] This act was recommended by the Joint Legislative Committee on Municipal Tort Liability. Its purpose was to make it clear that the period within which actions and special proceedings against municipalities are required to be brought was not intended to be tolled or extended by reason of its provisions.

1981 Recommendations of the Law Revision Commission: The Commissions attention has been directed to a problem in wrongful death actions brought against cities, towns and counties. Recent cases have shown no consistent interpretation as to the applicable time limitations within which such actions can be brought. Thus, for instance, one court has ruled that in a wrongful death action against a town the action is barred under section 50-i, General Municipal Law (GML), after one year and 90 days from the happening of the event causing the death. (Erickson v. Town of Henderson, 30 A D 2d 282.) Another court, however, has held that a wrongful death action commenced against a city, where section 50-i would seen to be directly applicable, is governed by the Estates, Powers and Trusts Law two-years-from-death provision found in section 5-4.1, because section 50-i does not specifically refer to wrongful death actions in its coverage (Priebe v. City of Canandaigua, 91 Misc 2d 1047).

The problem these examples illustrate can best be understood by first examining sections 50-e and 50-i GML.1. Subdivision (1) of section 50-3 provides in pertinent part: (a)In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation, as defined in the general construction law, or any officer, appointee or employee thereof, the notice of claim shall comply with and be served in accordance with the provisions of this section within ninety days after the claim arises. (Emphasis added.) Subdivision (1) of section 50-i provides: 1. No action or special proceeding shall be prosecuted or maintained against a . . . [municipal corporation]. . . for personal injury or damage to real or personal property alleged to have been sustained by reason of the negligence or wrongful act of such . . . [municipal corporation] . . . unless, (a) a notice of claim shall have been made and served upon the . . . [municipal corporation] . . . in compliance with section fifty-e of this chapter, (b) it shall appear by and as an allegation in the complaint or moving papers that at least thirty days have elapsed since the service of such notice and that adjustment or payment thereof has been neglected or refused, and (c) the action or special proceeding shall be commenced within one year and ninety days after the happening of the event upon which the claim is based. (Emphasis added.) Section 50-e refers to tort actions generally, which include wrongful death actions; section 50-i is restricted to coverage of personal injury and property damage.2. Legislative memoranda bear no indication of any purposeful intent to exclude wrongful death actions from section 50-i coverage. (1960 NYS Leg. Ann. 29; 1959 NYS Leg. Ann. 458.) The time period in section 50-e starts running when "the claim arises'; the time period in section 50-i starts running from "the happening of the event upon which the claim is based."

The need for conforming section 50-i to section 50-e so that the former specifically includes wrongful death actions is obvious. Another problem, not yet specifically addressed in the cases, concerns the anomaly that could arise in death cases because of the differing language concerning the point from which the 90-day-notice provision is measured, and the point from which the one-year-and-90-day time limitation is to be measured. It has been consistently held in death cases that the claim arises" and the ninety days starts running when the estate representative is appointed (Forero v. Town of Tuxedo, 51 A D 2d 443; Erickson v. Town of Henderson, supra; Devine v. City of New York, 28 Misc 2d 888). The section 50-i language, however, is not construed so that the one year and 90 days starts running from the accrual of the cause of action, i.e., the death. The Court in Erickson, supra, seems to indicate, through an examination of the legislative history of section 50-i that the one year and 90 days runs from the happening of the accident: . In other words the Legislature apparently recognized that there were excellent reasons . . . why the beneficiaries of a wrongful death action should not be foreclosed by failure within 90 days from the happening of the event causing death to have an estate representative appointed and notice of claim served. By the 1959 enactment, however, the Legislature in substance notified such beneficiaries that they could not have the full period of two years (Decedent Estate Law, § 130; EPTL 5-4.1) but that such an action must be commenced within one year and 90 days from the happening of the event This places no unreasonable burden on the beneficiaries of such an action. They are given one year to have an estate representative appointed and another 90 days within which to serve notice of claim. The action must be commenced before the expiration of the two periods. (Id. at 285.)

If the Erickson Court is not absolutely clear in that passage that the "happening of the event" means the happening of the accident and not the happening of the death, its analysis of the legislative intent has been construed that way. In Cota v. Madison Central School District (89 Misc 2d 646, 648), the Court states: "The Legislature intended the time limitation for actions under section 50-i of the General Municipal Law to commence not upon the accrual of plaintiff's cause of action, but when the accident occurred. (In accord see Phillips v. Village of Waterford, 48 A D 2d 745.)".

This distinction in the starting points for the 50-e and 50-i time periods should remain unchanged as they apply to personal injury actions in view of the conscious legislative intent just noted. In most instances such starting point will be the same anyway. The Erickson Court's application of this differentiation to death cases, however, is troublesome. In that case the happening of the event and the death were simultaneous. The Legislature, and the Court in that case, may not have envisioned the situation where the causally related death is delayed. Where that is the case, it is conceivable that notice of a death claim could be timely under section 50-e, where the time runs from the appointment of a representative, although the time to bring the action would already have run under the one-year-and-90-day-from-the-event provision of section 50-i. Special provisions for wrongful death actions in both sections would obviate this flaw.

Such special provisions would also serve to obviate problems arising because of the interrelationship of section 50-i with other statutes. In contrast to section 50-i, death actions are specifically provided for in the County Law and Town Law.3.Subdivision (1) of § 52 of the County Law provides: . 1. Any claim or notice of claim against a county for damage, injury or death, or for invasion of personal or property rights, of every name and nature, and whether casual or continuing trespass or nuisance and any other claim for damages arising at law or in equity, alleged to have been caused or sustained in whole or in part by or because of any misfeasance, omission of duty, negligence or wrongful act on the part of the county, its officers, agents, servants or employees, must be made and served in compliance with section fifty-a of the general municipal law. Every action upon such claim shall be

commenced pursuant to the provisions of section fifty-i of the general municipal law. The place of trial shall be in the county against which the action is brought. (Emphasis added.) Town Law § 67, inter alia, provides that: 1. Any claim including a claim specified in section sixty-five-a of this chapter which may be made against the town or town superintendent of highways for damages for wrong or injury to person or property or for the death of a person, shall be made and served in compliance with section fifty-e of the general municipal law 2. Every action upon such claim shall be commenced pursuant to the provisions of section fifty-i of the general municipal law. . . (Emphasis added.) Those sections incorporate the sections 50-e and 50-i requirements. In Erickson, supra, a wrongful death action against a town, brought less than two years from the accident and simultaneous death, but more than one year and 90 days therefrom, was found time barred. The Court noted the failure of the Legislature to specifically include wrongful death actions in section 50-i, but refused to apply the EPTL two-year-from-death provision because of the Town Law's specific reference to section 50-i. In Priebe v. City of Canandaigua, supra, the Court, in a case brought against the city, where the section 50-i requirements would directly apply, avoided compliance with those requirements by pointing out that section 50-i does not specifically include wrongful death actions. The Priebe Court held that because of the omission of a reference to wrongful death in section 50-i it would apply the EPTL two-years-from-date-of-death time period

In another case, however, the Appellate Division held that section 50-i does cover death cases (Phillips v. Village of Waterford, 48 A D 2d 745) . This involved a suit against a village. There is no special statute permitting suits in the Village Law as there is in the County and Town Laws. The Court held the 50-i provisions applicable in suits against villages and consequently time-barred under the one-year-and- 90-day limit. The Court apparently assumed that section 50-i included wrongful death actions despite its lack of reference thereto, and did not discuss, as did the judge in Priebe, the application of EPTL 5-4.1.

A further complicating factor is found in section 139 of the Highway Law, 4. Highway Law § 139: . When, by law, a county has charge of the repair or maintenance of a road, highway, bridge or culvert, the county shall be liable for injuries to person or property sustained in consequence of such road, highway, bridge or culvert being defective, out of repair, unsafe, dangerous or obstructed existing because of the negligence of the county, its officers, agents or servants. A civil action may be maintained against the county to recover damages for any such injury; but the county shall not be liable in such action unless a notice of claim shall have been made and served in compliance with section fifty-e of the general municipal law, and unless the action is commenced within one year from the date of service of the notice, but no such action shall be commenced upon such claim until the expiration of three months after the service of such notice. (Emphasis added.) which predates section 50-i, permitting personal injury actions against counties based on defective road maintenance. No reference is made to wrongful death actions. The section does refer to the section 50-e notice provision and provides that the action must be commenced "within one year from the date of service of the notice." Despite the lack of any reference to death cases in the section, the term "personal injury" has been held to include wrongful death (Treib v. Dutchess County, 56 A D 2d 866, app. dism'd 42 N Y 2d 824; Forero v. Town of Tuxedo, supra, 51 A D 2d 443)

The Commission considers that this confusion can be eliminated by the expedient of, first, writing into section 50-e a provision allowing the 90-day-notice provision to run from the appointment of an estate representative, which the codifies the present case law; and, second, tying this to new provisions in section 50-i which makes the section applicable in death actions and requires the death action to be brought within two years after the time of death.

This is an adaptation of subdivision 2 of section 10 of the Court of Claims Act which governs time provisions in actions against the State. 5. Subdivision 2 of section 10, Court of Claims Act, is as follows: . 2. A claim by an executor or administrator of a decedent who left him or her surviving a husband, wife or next of kin, for damages for a wrongful act, neglect or default, on the part of the state by which the decedent's death was caused, shall be filed within ninety days after the appointment of such executor or administrator, unless the claimant shall within such time file a written notice of intention to file a claim therefor in which event the claim shall be filed within two years after the death of the decedent. In any event such claim shall be filed within two years after the death of the decedent Note that there is no separate requirement for a notice of claim as there is in section 50-e. Under the Court of Claims Act no notice is necessary if the representative starts the action within 90 days of his appointment. This distinction makes it impossible to incorporate this provision verbatim into section 50-i. Its utilization has the virtue of aligning these provisions, both applicable to very similar situations, and, along with EPTL 5-1.4, marking the time of death as the basis for time calculations

Bearing in mind the purpose of the time provisions of sections 50-e and 50-i— to provide municipal authorities the opportunity for timely investigation of the claim and to accelerate the time within which the action must be commenced—a problem could arise because no limitation from the time of the event is placed. If the accident victim did not die within several years of the happening of the accident, but the time for bringing suit is tolled since no representative can be appointed until after death, a death action against a municipality could conceivably be brought many years after the event, thus frustrating the goal of timely investigation. Such a case ought to be extremely rare. If the event were catastrophic enough to cause injuries which lead to delayed, but eventual death, it is reasonable to presume that a timely personal injury action would be commenced. Under the rule of Caffaro v. Trayna (35 N Y 2d 245), the death cause of action could be added at any time to a properly commenced and pending injury action.

Another reason for considering the threat of death claims long after the event de minimis is because the date-of-death basis in section 10 of the Court of Claims Act has been wholly adequate for many years as a ceiling on death claims, there having been no reported cases of injustice to the sovereign due to the possibility of the rare case of delayed death.

With respect to sections 50-e and 50-i, then, the notice provision of the former would run from the appointment of the representative, and, under the latter, now expressly applicable to death actions, the action would have to be commenced in no event more than two years after the death; unless a personal injury action had been timely commenced, in which case the complaint in a pending action could be amended to include the death cause of action for the subsequent and related death under the Caffaro case.

With these amendments, plus an amendment to Highway Law section 139, making it applicable in death actions and incorporating the requirements of section 50-i as well as 50-e, wrongful death actions against municipal corporations will be handled in a uniform manner. Only if no representative is appointed within two years of death will there be a statutory bar against any opportunity to sue for wrongful death. Even in that event, it is unlikely that a personal injury action would not have been started to which the death action could be added.

Editor's Notes: Laws 2009, ch 440, § 1, eff Sept 16, 2009, provides as follows:

Section 1. Short title. This act shall be known and may be cited as "Jimmy Nolan's law".

Laws 2019, ch 11, § 12, eff February 14, 2019, provides:

§ 12. The provisions of this act shall be severable, and if any clause, sentence, paragraph, subdivision or part of this act shall be adjudged by any court of competent jurisdiction

to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, subdivision or part thereof directly involved in the controversy in which such judgment shall have been rendered.

Amendment Notes: 2013. Chapter 24, § 5 amended:

Sub 1 by deleting at fig 1 "chapter" and adding the matter in italics.

2009. Chapter 440, § 2 amended:

By adding sub 4.

The 2018 amendment by ch 476, § 29, substituted "firefighters" for "firemen" or variants in 1.

The 2019 amendment by ch 11, § 6, added 5.

NOTES TO DECISIONS

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1. In general

CPLR § 204(a), which provides that where the commencement of an action has been stayed by a court the duration of the stay is not a part of the period in which the action must be commenced, does not apply to Gen Mun Law § 50-i which requires actions against a public body or officer to be commenced within one year and 90 days after the happening of the event upon which the claim is based. Therefore, an order of the court pursuant to Gen Mun Law § 50-h staying the proceedings until plaintiff in a negligence action submitted to an examination requested by defendant town did not extend the limitations period for the bringing of plaintiff's action; and defendant's motion for summary judgment on the ground of the statute of limitations should have been granted where plaintiff's complaint against defendant was filed more than one year and 90 days from the date of the accident upon which the claim was based. Astromovich v Huntington School Dist., 80 A.D.2d 628, 436 N.Y.S.2d 93, 1981 N.Y. App. Div. LEXIS 10327 (N.Y. App. Div. 2d Dep't 1981), aff'd, 56 N.Y.2d 634, 450 N.Y.S.2d 786, 436 N.E.2d 192, 1982 N.Y. LEXIS 3300 (N.Y. 1982).

The trial court improperly granted a motion for leave to serve a late notice of claim nunc pro tunc upon a town and a sewer authority and to add the town and sewer authority as additional parties, where the applicable statute of limitations had expired and the court thus was without jurisdiction to grant the motion. Dua v Suffolk County, 96 A.D.2d 1072, 466 N.Y.S.2d 710, 1983 N.Y. App. Div. LEXIS 19722 (N.Y. App. Div. 2d Dep't 1983).

Claimants precluded from commencing actions prior to October 1, 1984, effective date of CPLR 4545, by operation of Gen Mun Law §§ 50-h, 50-i, are subject to provisions of CPLR 4545. Alford v New York, 115 A.D.2d 420, 496 N.Y.S.2d 224, 1985 N.Y. App. Div. LEXIS 54806 (N.Y. App. Div. 1st Dep't 1985), aff'd in part, 67 N.Y.2d 1019, 503 N.Y.S.2d 324, 494 N.E.2d 455, 1986 N.Y. LEXIS 18633 (N.Y. 1986).

Police officer was not exempt from requirements of CLS Gen Mun §§ 50-e and 50-i in his action under CLS Gen Mun § 205-e (effective on July 12, 1989) against New York City to recover damages for personal injuries suffered in slip-and-fall accident in course of his employment in city-owned building where action accrued after statute's effective date. Przybyszewski v City of New York, 225 A.D.2d 556, 638 N.Y.S.2d 763, 1996 N.Y. App. Div. LEXIS 1933 (N.Y. App. Div. 2d Dep't 1996), app. denied, 1996 N.Y. LEXIS 1758 (N.Y. June 13, 1996), app. denied, 88 N.Y.2d 806, 646 N.Y.S.2d 986, 670 N.E.2d 227, 1996 N.Y. LEXIS 1757 (N.Y. 1996).

Petitioner's "filing" of unsigned order to show cause with county clerk did not serve as timely application for leave to file late notice of claim. Graham v County of Fulton, 235 A.D.2d 824, 652 N.Y.S.2d 354, 1997 N.Y. App. Div. LEXIS 323 (N.Y. App. Div. 3d Dep't 1997).

In action brought against City of New York and New York City Health and Hospitals Corporation (defendants), court erred both in denying defendants' motion to amend their answer to assert affirmative defense of Statute of Limitations under CLS Gen Mun § 50-i and in granting plaintiff's motion to strike that defense where action was based on discovery of foreign object in plaintiff's body as result of surgical procedure, and documents submitted on plaintiff's motion to strike raised fact issue as to when plaintiff first discovered existence of sponge. Melendez v City of New York, 249 A.D.2d 197, 671 N.Y.S.2d 758, 1998 N.Y. App. Div. LEXIS 4655 (N.Y. App. Div. 1st Dep't 1998).

Dismissal of a motorist's complaint as to a county employee, when the motorist sued the county as well, was not warranted because neither County Law § 52, nor the provisions of General Municipal Law §§ 50-e(2) and 50-i(2) required that the employee had to be named in the notice of claim. Pierce v Hickey, 129 A.D.3d 1287, 11 N.Y.S.3d 321, 2015 N.Y. App. Div. LEXIS 4816 (N.Y. App. Div. 3d Dep't 2015).

In a city judge's age discrimination action, the failure to serve a notice of claim required the dismissal state constitutional claims because the action did not fall within the public interest exception to the notice of claim requirement, but the trial court erred in denying the city judge's cross motion for leave to amend the complaint to include federal constitutional claims because, in part, it was a matter of public interest. Mirro v City of New York, 159 A.D.3d 964, 74 N.Y.S.3d 356, 2018 N.Y. App. Div. LEXIS 2077 (N.Y. App. Div. 2d Dep't 2018).

Although legislature used words "prosecuted or maintained" in General Municipal Law provision that no action or special proceeding shall be prosecuted or maintained thereunder against public corporation unless notice of claim shall have been made or served in compliance with statutory requirements, it clearly meant "commenced." Colantuono v Valley Cent. School Dist., 90 Misc. 2d 918, 396 N.Y.S.2d 590, 1977 N.Y. Misc. LEXIS 2189 (N.Y. Sup. Ct.), aff'd, 59 A.D.2d 926, 399 N.Y.S.2d 262, 1977 N.Y. App. Div. LEXIS 14144 (N.Y. App. Div. 2d Dep't 1977).

After the court reviewed N.Y. Gen. Mun. Law § 50-i(1), N.Y. C.P.L.R. 203, City Civ. Ct. Act § 400, and City Civ. Ct. Act § 1803(a), it concluded that § 1803(a) controlled; and § 1803(a) clearly stated legislative intent that for a small claims action (in the instant case a tort suit by a claimant against New York City), suit was commenced when the matter was filed with the clerk of the small claims part. Zaurov v City of New York, 784 N.Y.S.2d 817, 5 Misc. 3d 418, 2004 N.Y. Misc. LEXIS 1278 (N.Y. Civ. Ct. 2004).

Although, in a wrongful death action, an ambulance company, a private corporation, was not entitled to rely on General Municipal Law N.Y. Gen. Mun. Law §§ 50-e, 50-i as a basis for relief, the trial court properly struck certain paragraphs of an administratrix's supplemental bill of particulars pursuant to N.Y. C.P.L.R. 3043(b) because those paragraphs contained new theories of liability not previously alleged in the complaint and initial bill of particulars; the paragraphs stricken pertaining to the ambulance company alleged that the ambulance company's employees acted negligently in the hiding or spoliation of evidence related to a 911 call and the treatment of the decedent. Although the complaint and initial bill of particulars against the ambulance company asserted numerous theories of negligence, none of those theories related to the ambulance company's handling or withholding of evidence. Clare-Hollo v Finger Lakes Ambulance EMS, Inc., 99 A.D.3d 1199, 952 N.Y.S.2d 350, 2012 N.Y. App. Div. LEXIS 6622 (N.Y. App. Div. 4th Dep't 2012).

The provisions of §§ 50-e and 50-i of the General Municipal Law are more than mere statutes of limitation or statutes of repose; they establish conditions precedent to the initiation of a lawsuit against a municipality. Gregory v New York, 346 F. Supp. 140, 1972 U.S. Dist. LEXIS 12974 (S.D.N.Y. 1972), disapproved, Fountain v Metropolitan Atlanta Rapid Transit Authority, 678 F.2d 1038, 1982 U.S. App. LEXIS 18222 (11th Cir. 1982).

Although an action for damages to riparian rights was a continuing trespass, each new day establishing the cause anew, the provisions of General Municipal Law §§ 50-e and 50-i were more than mere statutes of limitation or repose but established conditions precedent to the initiation of a lawsuit against a municipality. Gregory v New York, 346 F. Supp. 140, 1972 U.S. Dist. LEXIS 12974 (S.D.N.Y. 1972), disapproved, Fountain v Metropolitan Atlanta Rapid Transit Authority, 678 F.2d 1038, 1982 U.S. App. LEXIS 18222 (11th Cir. 1982).

2. Purpose

In an action commenced by an injured worker against a town 468 days after the date of the injury, the action was properly dismissed on the basis that the action was barred by the one-year and 90-day statute of limitations contained in Gen Mun Law § 50-i(1)(c), notwithstanding that a prior court order stayed the action until the injured worker complied with the town's demand for an examination pursuant to Gen Mun Law § 50-h, since the demand did not operate to toll the statute of limitations in that such an order should properly be characterized as "statutory" as it granted the town no relief greater than or inconsistent with that to which it became entitled under § 50-h(5), and as such should be considered in accordance with the provisions of § 50-i, which state that the aforementioned statute of limitations should be applicable notwithstanding any inconsistent provisions of law. Astromovich v Huntington School Dist., 56 N.Y.2d 634, 450 N.Y.S.2d 786, 436 N.E.2d 192, 1982 N.Y. LEXIS 3300 (N.Y. 1982).

The manifest legislative intention in enacting this section was to "centralize and make uniform provisions relating to commencement of actions against municipal corporations." La Fave v Franklin, 20 A.D.2d 738, 247 N.Y.S.2d 72, 1964 N.Y. App. Div. LEXIS 4385 (N.Y. App. Div. 3d Dep't 1964).

Library's reliance upon the notice of claim requirements contained in N.Y. Gen. Mun. Law § 50-i to dismiss an employee's discrimination claim was misplaced as it did not apply to discrimination claims. Grasso v Schenectady County Pub. Lib, 30 A.D.3d 814, 817 N.Y.S.2d 186, 2006 N.Y. App. Div. LEXIS 7968 (N.Y. App. Div. 3d Dep't 2006).

The legislative intent in adopting this section was to clarify and make uniform the provisions of law governing commencement of actions against municipal corporations, and it accordingly supersedes contrary provisions of law with respect to an action against a county. Oraczewski v Westchester County, 32 Misc. 2d 217, 221 N.Y.S.2d 485, 1961 N.Y. Misc. LEXIS 2214 (N.Y. Sup. Ct. 1961).

This section was intended by the Legislature to give a municipality an opportunity to settle meritorious claims before being subjected to suit. Renwick v Allegany, 34 Misc. 2d 461, 225 N.Y.S.2d 844, 1962 N.Y. Misc. LEXIS 3738 (N.Y. Sup. Ct. 1962), rev'd, 18 A.D.2d 877, 236 N.Y.S.2d 902, 1963 N.Y. App. Div. LEXIS 4731 (N.Y. App. Div. 4th Dep't 1963).

3. Construction

CLS Gen Mun §§ 50-h and 50-i must be read together and in harmony to give meaning and effect to both provisions, such that claimant may not, under any circumstances, commence suit against municipality within 30 days after filing of notice of claim, but can do so thereafter provided that no demand for examination pursuant to CLS Gen Mun § 50-h has been served by city, but this does not mean, however, that once action is commenced, municipality is foreclosed from pursuing examination, as CLS Gen Mun 50-h grants municipality 90 days within which to demand examination and it is entitled to full period within which to make its demand and to thereafter hold that hearing separate and distinct from any rights to discovery under CPLR, whether action has been commenced or not. Alouette Fashions, Inc. v Consolidated Edison Co., 119 A.D.2d 481, 501 N.Y.S.2d 23, 1986 N.Y. App. Div. LEXIS 55428 (N.Y. App. Div. 1st Dep't 1986), aff'd, 69 N.Y.2d 786, 513 N.Y.S.2d 114, 505 N.E.2d 624, 1987 N.Y. LEXIS 15353 (N.Y. 1987), aff'd, 69 N.Y.2d 787, 513 N.Y.S.2d 114, 505 N.E.2d 624, 1987 N.Y. LEXIS 15354 (N.Y. 1987).

Provision of CLS Gen Mun § 50-h(5) only applies to tort claims when it is read together with its coordinate statute CLS Gen Mun § 50-i. Cutrone v Village Bd. of Trustees, 226 A.D.2d 459, 640 N.Y.S.2d 599, 1996 N.Y. App. Div. LEXIS 3587 (N.Y. App. Div. 2d Dep't 1996).

Where the father was erroneously told by the county morgue that a recovered body was not that of his son, the statute of limitations for suing over that negligent act began to run on the date the erroneous information was given to the father, not the date the mistake was discovered. Jensen v City of New York, 288 A.D.2d 346, 734 N.Y.S.2d 88, 2001 N.Y. App. Div. LEXIS 11266 (N.Y. App. Div. 2d Dep't 2001).

Under earlier provisions, it was held that a reasonable interpretation of the General Municipal Law would not indicate intention to deprive municipalities of an opportunity to investigate and settle claims against them, prior to institution of suit thereon. Bergen v Ward, 73 N.Y.S.2d 124, 190 Misc. 566, 1947 N.Y. Misc. LEXIS 2953 (N.Y. Sup. Ct.), aff'd, 272 A.D. 1025, 74 N.Y.S.2d 186, 1947 N.Y. App. Div. LEXIS 4764 (N.Y. App. Div. 1947).

4. Constitutionality

Statutes requiring 90-day notice of claim against public corporation were not unconstitutional as violating equal protection guarantees of State and Federal Constitutions. Guarrera v Lee Mem. Hosp., 51 A.D.2d 867, 380 N.Y.S.2d 161, 1976 N.Y. App. Div. LEXIS 11485 (N.Y. App. Div. 4th Dep't), app. dismissed, 39 N.Y.2d 942, 1976 N.Y. LEXIS 3538 (N.Y. 1976).

The limitation provisions of Gen Mun Law § 50-i are tolled by infancy pursuant to CPLR § 208; thus, where a transit authority had actual notice of an occurrence involving an injury to infant plaintiff and was not prejudiced by the late notice claim filed under Gen Mun Law § 50-e, the court abused its discretion in denying the application made on the infant's behalf for leave to serve a notice of claim after the expiration of the statutory period against the transit authority. Fleming v Manhattan Bronx Surface Transit Operating Authority, 86 A.D.2d 509, 445 N.Y.S.2d 741, 1982 N.Y. App. Div. LEXIS 15022 (N.Y. App. Div. 1st Dep't 1982).

No invasion of equal protection occurred, in an action to recover for damage to riparian rights, because the statute, applicable to tort claim, imposed a one year and 90 days requirement for commencement of the action after the happening of the event upon which the claim is based while the New York City Administrative Code permitted an elapsed time period of 3 years from the completion of the work, since reasonable classification of different matters, treating them differently on a rational basis, is permissible. Gregory v New York, 346 F. Supp. 140, 1972 U.S. Dist. LEXIS 12974 (S.D.N.Y. 1972), disapproved, Fountain v Metropolitan Atlanta Rapid Transit Authority, 678 F.2d 1038, 1982 U.S. App. LEXIS 18222 (11th Cir. 1982).

5. Necessity of pleading compliance with statute

Plaintiff's complaint in an action to determine adverse claims of title to realty, damages for trespass, and for injunctive and other relief failed to state a cause of action against the County of Suffolk, where the complaint did not allege compliance with the statutory notice requirements of §§ 50-e and 50-i of the General Municipal Law. Seabreeze Marina at Smithtown, Inc. v Smithtown, 25 A.D.2d 780, 269 N.Y.S.2d 662, 1966 N.Y. App. Div. LEXIS 4497 (N.Y. App. Div. 2d Dep't 1966).

Although motion to amend complaint was initiated more than one year 90 days after cause of action accrued, in absence of demonstrable prejudice to defendants, it is abuse of discretion to deny application to amend complaint to plead necessary compliance with CLS General Municipal § 50-i. Fitzgibbon v County of Nassau, 112 A.D.2d 266, 491 N.Y.S.2d 715, 1985 N.Y. App. Div. LEXIS 56065 (N.Y. App. Div. 2d Dep't 1985).

In contract action, Special Term did not err in allowing plaintiffs to amend their complaint to allege service of notice of claim where timely service of notice of claim had in fact been made and plaintiffs' failure to allege such service was procedural and not jurisdictional defect; motion to amend was also not barred by one-year and 90-day limitations contained in CLS Gen Mun § 50-i, and amendment was not rendered improper by fact that notice of claim had been served after commencement of action. Runyan v Board of Education, 121 A.D.2d 708, 504 N.Y.S.2d 146, 1986 N.Y. App. Div. LEXIS 58693 (N.Y. App. Div. 2d Dep't 1986).

Trial Term erred in refusing to grant injured plaintiffs' motion, in personal injury action against City of New York, to amend their complaint to plead necessary compliance with CLS Gen Mun § 50 i (requiring allegations that 30 days have elapsed since service of notice of claim and that adjustment or payment of claim has been neglected or refused by city) where city, by its answer, specifically conceded that notice of claim had been presented to city comptroller, that more than 30 days had elapsed since such presentation, and that no adjustment thereof had been made. Bravo v New York, 122 A.D.2d 761, 505 N.Y.S.2d 647, 1986 N.Y. App. Div. LEXIS 59286 (N.Y. App. Div. 2d Dep't 1986).

Defendant physician was entitled to dismissal of action where (1) at time of surgical procedure alleged in complaint, he was resident physician at county medical center, and (2) plaintiffs failed to file notice of claim pursuant to CLS Gen Mun § 50-e and failed to commence action within limitations period of CLS Gen Mun § 50-i. Stanfield v Nohejl, 182 A.D.2d 1138, 586 N.Y.S.2d 765, 1992 N.Y. App. Div. LEXIS 7055 (N.Y. App. Div. 4th Dep't 1992).

Dismissal of a vehicle owner's action against town police officers for return of his impounded vehicle was required because he failed, pursuant to N.Y. Gen. Mun. Law § 50-i(1)(b), to wait 30 days from service of the required notice of claim before filing suit and failed to allege, in his complaint, that he had served the required notice of claim the specified amount of time before filing the complaint. Smith v Scott, 294 A.D.2d 11, 740 N.Y.S.2d 425, 2002 N.Y. App. Div. LEXIS 3561 (N.Y. App. Div. 2d Dep't 2002).

Property owner was not required to serve a notice of claim as the claim was not subject to the notice of claim statute because his claim was primarily equitable in nature, specifically demanding that a building permit be issued; the demand for money damages was merely incidental to the request for an injunction. Johnson v City of Peekskill, 91 A.D.3d 825, 936 N.Y.S.2d 701, 2012 N.Y. App. Div. LEXIS 485 (N.Y. App. Div. 2d Dep't 2012).

Dismissal should have been granted to a city and the city department of transportation in a motorcyclist's personal injury action, as he failed to serve either the corporation counsel, his designee, or the city comptroller within the statutory period pursuant to General Municipal Law §§ 50-e(1)(a) and 50-i(1)(a). Khela v City of New York, 91 A.D.3d 912, 937 N.Y.S.2d 311, 2012 N.Y. App. Div. LEXIS 784 (N.Y. App. Div. 2d Dep't 2012).

Trial court properly dismissed plaintiff medical student's tort causes of action asserted against defendants because no notice of claim was served upon defendant medical corporation; the remaining claims against defendants, sounding largely in discrimination, failed to state a cause of action because they were premised on laws that did not provide for individual liability, or failed to set forth adequate factual allegations in support of the claims. Attallah v New York Coll. of Osteopathic Medicine, 134 N.Y.S.3d 793, 2020 N.Y. App. Div. LEXIS 8028 (N.Y. App. Div. 2d Dep't 2020).

Failure to comply with the provisions of General Municipal Law § 50-i is not per se jurisdictional; rather it is procedural. Thus, upon a motion to dismiss for failure to allege the elements set forth in such section, the complaint, not the action, would be dismissed with leave to serve an amended complaint, where the statute had run and dismissal of the action would produce the harsh result. Teodoro v Babylon, 56 Misc. 2d 476, 289 N.Y.S.2d 61, 1968 N.Y. Misc. LEXIS 1604 (N.Y. Dist. Ct. 1968).

Where claim was timely filed against municipality and summons and complaint were served, motion for examination filed by municipality 82 days after the filing of the notice of claim, was proper even though subsequent to the service of the complaint. Bergman v Hempstead, 61 Misc. 2d 149, 304 N.Y.S.2d 1020, 1969 N.Y. Misc. LEXIS 1103 (N.Y. Sup. Ct. 1969).

Where complaint sounding in tort against town did not allege that a notice of claim had been filed as required by the General Municipal Law and papers before court indicated that no such notice had been filed, complaint was insufficient. Mazo v Shawangunk, 87 Misc. 2d 597, 386 N.Y.S.2d 519, 1976 N.Y. Misc. LEXIS 2262 (N.Y. Sup. Ct. 1976), aff'd, 60 A.D.2d 734, 401 N.Y.S.2d 305, 1977 N.Y. App. Div. LEXIS 14772 (N.Y. App. Div. 3d Dep't 1977).

United States is not required to file notice of claim pursuant to state general municipal law in order to maintain action against state and county for indemnification under Swine Flu Act (42 USCS § 247b(k)(7)). United States v New York, 595 F. Supp. 980, 1984 U.S. Dist. LEXIS 23795 (W.D.N.Y. 1984).

Failure to comply with CLS Gen Mun § 50-i regarding timely service of notice of claim and related pleading requirement of § 50-i(1)(b) is jurisdictional rather than procedural defect. Mroz v City of Tonawanda, 999 F. Supp. 436, 1998 U.S. Dist. LEXIS 4577 (W.D.N.Y. 1998).

Because it was undisputed that plaintiff never filed a notice of claim in compliance with N.Y. Gen. Mun. Law § 50-e, as required by N.Y. Gen. Mun. Law § 50-i(1)(c), plaintiff's state law claims against municipal defendants were dismissed. McLaurin v New Rochelle Police Officers, 373 F. Supp. 2d 385, 2005 U.S. Dist. LEXIS 11971 (S.D.N.Y. 2005), aff'd in part, vacated in part, 2007 U.S. App. LEXIS 1839 (2d Cir. N.Y. Jan. 25, 2007).

Where defendants received the timely notice to which they were entitled under the statute, the fact that plaintiff failed to plead compliance with the requirement in his complaint was only a technical error, and plaintiff was granted leave to amend his second amended complaint to reflect that he filed a timely notice of claim. Razzano v County of Nassau, 599 F. Supp. 2d 345, 2009 U.S. Dist. LEXIS 12936 (E.D.N.Y. 2009).

Because plaintiff's claim sounded in tort and she failed to file a notice of claim, the court granted summary judgment to the City

on the negligence claim on this ground. Breitkopf v Gentile, 41 F. Supp. 3d 220, 2014 U.S. Dist. LEXIS 121581 (E.D.N.Y. 2014).

6. Accrual of claim

The running of the 90 day period is measured not from the time of the negligent act but from the date the negligent act produced injury to the plaintiff. Sexstone v Rochester, 32 A.D.2d 737, 301 N.Y.S.2d 887, 1969 N.Y. App. Div. LEXIS 4001 (N.Y. App. Div. 4th Dep't 1969).

In a landowner's action against the county, alleging that sewage backed up on the landowner's property as a result of the county's severance of the landowner's lateral line from the main sewer line, the action was properly dismissed as time-barred since the limitation period begins to run upon the happening of the event, irrespective of when the action accrued, and since the event on which the landowner's case was based was the severance of his lateral line, rather than the backup of sewage on his property. Nebbia v County of Monroe, 92 A.D.2d 724, 461 N.Y.S.2d 127, 1983 N.Y. App. Div. LEXIS 17023 (N.Y. App. Div. 4th Dep't 1983).

In a personal injury action by a fireman against the owner of the building in which the fireman was injured during a fire, a town sued for indemnification and contribution by the building owner would be entitled to summary judgment denying the owner's claim for indemnity, even though the town may have negligently issued a building permit and certificate of occupancy some 30 years earlier to the previous owner of the building, and even though the statute of limitations in Gen Mun Law § 50-i did not bar a third-party action for indemnity, plaintiff had secured no judgment and defendant had made no payment of judgment, where there was no duty owed by the town to the owner, in that there was no special relationship between the town and the owner; summary judgment for the town on the issue of contribution would be denied, since a town's issuance of a certificate of occupancy could create a special relationship with the owner of the property if the town knew that a dangerous condition existed at the time it issued the certificate and the town could be held responsible to the defendant for that portion of the damages attributable to its own negligence. Dutton v Mitek Realty Corp., 95 A.D.2d 769, 463 N.Y.S.2d 471, 1983 N.Y. App. Div. LEXIS 18678 (N.Y. App. Div. 2d Dep't 1983).

For purposes of CLS Gen Mun § 50-i, limitations period begins to run upon happening of event, irrespective of when action may technically accrue; thus, action commenced on January 21, 1986, alleging that child abuse report filed by county department of social services in July, 1982 was cause of plaintiff's inability to procure employment and concomitant physical and emotional distress, was properly dismissed because not brought within one year and 90 days of filing of report even though plaintiff claimed that he did not learn of report's existence until March, 1985; furthermore, even if action accrued upon plaintiff's discovery of report in March, 1985, his notice of claim filed September 28, 1985 was untimely because not filed within 90 days of discovery of report. Kitonyi v Albany County, 128 A.D.2d 1018, 513 N.Y.S.2d 555, 1987 N.Y. App. Div. LEXIS 44662 (N.Y. App. Div. 3d Dep't 1987).

In action founded on alleged breach of city's duty to maintain its public right-of-way in safe condition, one-year 90-day period of limitation under CLS Gen Mun § 50-i does not begin to run until happening of accident, since that duty is continuous, separate and apart from duty not to create dangerous condition, and liability for breach thereof is established regardless of how, by whom, or when dangerous condition was created, so long as it can be shown that city had notice of condition and that it had reasonable time to correct it; thus, action brought against city on March 4, 1983, insofar as it alleged negligent maintenance of public roadway, should not have been dismissed as untimely under § 50-i where accident occurred on April 28, 1982. Sniper v Syracuse, 139 A.D.2d 93, 530 N.Y.S.2d 374, 1988 N.Y. App. Div. LEXIS 11230 (N.Y. App. Div. 4th Dep't 1988).

Homeowners association's action against town, averring that town had negligently permitted association's townhouse community to be constructed with improperly designed drainage system which caused extensive flooding on property, accrued on day town issued last certificate of occupancy for community, rather than on day engineer's report revealing cause of flooding was issued, and thus action brought nearly 4 years after issuance of last certificate was untimely under CLS Gen Mun § 50-i. Pleasant Ridge Townhouses Homeowners' Ass'n v T & D Constr. Corp., 181 A.D.2d 871, 581 N.Y.S.2d 857, 1992 N.Y. App. Div. LEXIS 4968 (N.Y. App. Div. 2d Dep't 1992).

Plaintiff's action against city arising from diversion of ground water onto her property accrued when city inspected adjacent property after drain pipe was altered and not on later date when plaintiff discovered that her basement wall had cracked. Johnson v Marianetti, 202 A.D.2d 970, 609 N.Y.S.2d 494, 1994 N.Y. App. Div. LEXIS 3322 (N.Y. App. Div. 4th Dep't 1994).

Court would dismiss plaintiff's action arising from her alleged "multiple chemical sensitivity" to newly constructed school she attended where her notice of claim was not filed until 5 years after her last exposure to school building in April 1989, she admitted that she began to experience entire array of symptoms shortly after she matriculated at school in September 1988, physical indicia of her injuries were fully developed and apparent to her and her treating physicians by April 1989, at latest, and it was not alleged that extent of technical knowledge of scientific and medical communities was not then sufficiently advanced to allow cause of those physical complaints to be ascertained. Krogmann v Glens Falls City Sch. Dist., 231 A.D.2d 76, 661 N.Y.S.2d 82, 1997 N.Y. App. Div. LEXIS 8110 (N.Y. App. Div. 3d Dep't), app. dismissed, 91 N.Y.2d 848, 667 N.Y.S.2d 683, 690 N.E.2d 492, 1997 N.Y. LEXIS 4121 (N.Y. 1997).

City asserted viable affirmative defense that action for exposure to toxic substance was not commenced in compliance with CLS Gen Mun §§ 50-e(1)(a) and 50-i where action was filed more than 90 days after adult plaintiff was informed that infant plaintiff was suffering from elevated level of lead in his blood, because that was when claim arose. Perry v City of New York, 238 A.D.2d 326, 656 N.Y.S.2d 301, 1997 N.Y. App. Div. LEXIS 3415 (N.Y. App. Div. 2d Dep't 1997).

In action alleging that city executed contract it knew it could not perform, limitation period began to run for purposes of CLS Gen Mun § 50-i(1) on date contract was executed, regardless of when payment thereunder was demanded or approval ultimately given. Serkil L.L.C. v City of Troy, 259 A.D.2d 920, 686 N.Y.S.2d 892, 1999 N.Y. App. Div. LEXIS 2523 (N.Y. App. Div. 3d Dep't), app. denied, 93 N.Y.2d 811, 694 N.Y.S.2d 633, 716 N.E.2d 698, 1999 N.Y. LEXIS 1837 (N.Y. 1999).

Action for alleged contamination of plaintiff's well water accrued, at very latest, in mid-September 1994 when plaintiff received letter from County informing him that his water contained levels of sodium and lead exceeding those prescribed by New York State Drinking Water Standards; thus, filing of notice of claim on January 9, 1995, approximately 4 months after plaintiff's action accrued, was untimely. Potanovic v County of Rockland, 267 A.D.2d 291, 700 N.Y.S.2d 195, 1999 N.Y. App. Div. LEXIS 12865 (N.Y. App. Div. 2d Dep't 1999).

County was entitled to dismissal of claim on ground that plaintiff did not file timely notice of claim where (1) claim arose when county informed plaintiff, by letter dated March 13, 1966, that no certificate of occupancy would be issued for his property until certain structural problems were resolved, (2) complaint alleged that county was responsible for creating conditions that caused those problems, (3) claim was not filed until August 14, 1996, over 90 days after claim arose, (4) plaintiff did not seek leave to file late notice of claim within one year and 90 days after claim accrued, and (5) plaintiff did not show applicability of equitable estoppel doctrine. Augustyn v County of Wyo., 275 A.D.2d 1003, 716 N.Y.S.2d 341, 2000 N.Y. App. Div. LEXIS 9632 (N.Y. App. Div. 4th Dep't 2000).

Claims against city and city police department based on negligent hiring of police officers and negligent impounding of plaintiff's vehicle accrued at time of plaintiff's arrest, not upon his acquittal; thus, such claims were properly dismissed as time-barred where action was not commenced within one year and 90 days of plaintiff's arrest. Murray v City of New York, 283 A.D.2d 560, 725 N.Y.S.2d 73, 2001 N.Y. App. Div. LEXIS 5224 (N.Y. App. Div. 2d Dep't 2001).

Fact that the sewage discharge was in the nature of a continuing wrong did not preclude application of the discovery rule of N.Y. C.P.L.R. § 214-c. Schwinghammer v Sullivan W. Cent. Sch. Dist., 2 A.D.3d 1126, 768 N.Y.S.2d 696, 2003 N.Y. App. Div. LEXIS 13534 (N.Y. App. Div. 3d Dep't 2003).

Trial court properly granted the defendants' motion to dismiss the complaint against them for negligent inspection and approval of improvements to the plaintiff's home pursuant to N.Y. C.P.L.R. 3211(a)(5), as the time within which to serve a notice of claim and to commence the action began to run on February 1, 2001, the date that a Code Enforcement Officer last inspected the premises; the plaintiff thus failed to serve a notice of claim within 90 days after the claim arose and failed to commence the action within one year and 90 days "after the happening of the event upon which the claim is based" under N.Y. Gen. Mun. Law § 50-i (1)(c). Sharpe v Town of Conesus, 19 A.D.3d 1029, 797 N.Y.S.2d 227, 2005 N.Y. App. Div. LEXIS 6237 (N.Y. App. Div. 4th Dep't 2005).

As plaintiff's claim against a town and its building inspector, alleging that they "negligently issued a certificate of occupancy" and that plaintiff reasonably relied on that certificate in purchasing a residence, was not commenced within one year and 90 days after the claim arose, under N.Y. Gen. Mun. Law § 50-i(1), the action was untimely, and the Supreme Court properly granted that part of defendants' motion to dismiss. The issuance of the certificate was the event from which the claim arose. Francis v Posa, 21 A.D.3d 1335, 801 N.Y.S.2d 857, 2005 N.Y. App. Div. LEXIS 10064 (N.Y. App. Div. 4th Dep't 2005).

Client's claim for malicious prosecution did not accrue until his judgment of conviction was vacated, and, thus, the notice of claim was timely filed and the underlying action was brought within the statutory time limits. Brownell v LeClaire, 96 A.D.3d 1336, 948 N.Y.S.2d 168, 2012 N.Y. App. Div. LEXIS 5176 (N.Y. App. Div. 3d Dep't 2012).

Action against city and police department would be dismissed for failure to commence it within one-year-and-90-day statute of limitations (CLS Gen Mun § 50(i)) where cause of action accrued when allegedly defamatory statements regarding cause of child's death were made by police at child's wake in August 1993, and action for defamation was commenced on November 2, 1995. Lauer v City of New York, 171 Misc. 2d 832, 656 N.Y.S.2d 93, 1997 N.Y. Misc. LEXIS 83 (N.Y. Sup. Ct. 1997), aff'd in part, modified, 258 A.D.2d 92, 693 N.Y.S.2d 167, 1999 N.Y. App. Div. LEXIS 7674 (N.Y. App. Div. 2d Dep't 1999).

Town was not entitled to leave to file a late summary judgment motion arguing a negligent design claim was time-barred because the claim was not barred, as the claim was based on allegations that a town breached the town's nondelegable duty in N.Y. High. Law § 140 to construct and maintain the town's roads in a reasonably safe condition, so the claim accrued upon the happening of an accident, not upon the happening of an event causing the alleged dangerous condition. Madden v Town of Greene, 949 N.Y.S.2d 326, 36 Misc. 3d 852, 2012 N.Y. Misc. LEXIS 3053 (N.Y. Sup. Ct. 2012).

7. —False arrest or imprisonment

Cause of action for false arrest and false imprisonment accrues at time imprisonment terminates, not when charges are dismissed or withdrawn, and thus action against county for false arrest and false imprisonment commenced on August 3, 1976 was not timely under statute providing that tort action against a municipal corporation must be commenced within one year and 90 days after its accrual where plaintiffs were released from imprisonment on March 13, 1975. Redding v County of Westchester, 59 A.D.2d 776, 398 N.Y.S.2d 732, 1977 N.Y. App. Div. LEXIS 13826 (N.Y. App. Div. 2d Dep't 1977).

Petitioner's claim against county, arising from allegedly negligent representation provided by assigned appellate counsel in criminal proceeding, did not accrue for purposes of CLS Gen Mun § 50-i until criminal conviction was reversed and indictment dismissed, as petitioner was legally precluded from asserting negligent representation claim until he could assert and establish his innocence. Swain v County of Albany, 268 A.D.2d 747, 702 N.Y.S.2d 175, 2000 N.Y. App. Div. LEXIS 381 (N.Y. App. Div. 3d Dep't), app. denied, 94 N.Y.2d 764, 708 N.Y.S.2d 52, 729 N.E.2d 709, 2000 N.Y. LEXIS 568 (N.Y. 2000).

False arrest and unlawful imprisonment claims against a county and a sheriff should have been dismissed because the claims accrued on the date the client was released from prison, and the client did not file a notice of claim until four years after that date, and did not commence his action until long after the N.Y. Gen. Mun. Law § 50-i(1) time limit had expired. Brownell v LeClaire, 96 A.D.3d 1336, 948 N.Y.S.2d 168, 2012 N.Y. App. Div. LEXIS 5176 (N.Y. App. Div. 3d Dep't 2012).

An alleged cause of action in favor of an ex-convict against New York City, based upon 25 years of imprisonment ultimately terminated by writ of error coram nobis and alleged to constitute false imprisonment because conviction was induced by suppression of evidence, did not accrue until his release from prison, and hence his notice of claim was timely served within the prescribed 90-day period thereafter and his action was timely commenced within one year. Zimmerman v New York, 40 Misc. 2d 179, 242 N.Y.S.2d 791, 1963 N.Y. Misc. LEXIS 1715 (N.Y. Sup. Ct. 1963), dismissed, 52 Misc. 2d 797, 276 N.Y.S.2d 711, 1966 N.Y. Misc. LEXIS 1247 (N.Y. Sup. Ct. 1966).

For the purpose of the time requirement of the above statute a cause of action for false imprisonment does not accrue until the party has been discharged from restraint, including bail. Caminito v New York, 45 Misc. 2d 241, 256 N.Y.S.2d 670, 1965 N.Y. Misc. LEXIS 2278 (N.Y. Sup. Ct. 1965), aff'd in part, modified, 25 A.D.2d 848, 269 N.Y.S.2d 826, 1966 N.Y. App. Div. LEXIS 4364 (N.Y. App. Div. 2d Dep't 1966).

Arrestee was obligated to file a timely notice of claim by May 16, 2018, 90 days after the dismissal of all charges on February 15, 2018; because the arrestee did not cross-move to amend until June 26, 2019, amendment had be rejected as untimely. Wiggins v City of New York, 69 Misc. 3d 620, 133 N.Y.S.3d 178, 2020 N.Y. Misc. LEXIS 4076 (N.Y. Sup. Ct. 2020).

Pendent state-law tort claims against village police officers are barred by statutory limitations period imposed by CLS Gen Mun Law § 50-i, despite plaintiff's claim that January 22, 1990 state-court decision concerning status of village police officers gave rise to new cause of action, where claims are and always have been predicated upon underlying arrest on December 12, 1984, because notice of claim and time limitations imposed by §§ 50-e and 50-i began to run as of date of arrest and had run out by time notice of claim was filed April 6, 1990. Malone v McHugh, 797 F. Supp. 154, 1991 U.S. Dist. LEXIS 20782 (E.D.N.Y. 1991), aff'd, 968 F.2d 1480, 1992 U.S. App. LEXIS 14220 (2d Cir. N.Y. 1992).

8. —Medical malpractice

Medical malpractice action could not be maintained against city for failure to comply with sections of general municipal law pertaining to time for filing notice of claim and commencement of actions. Davis v New York, 47 A.D.2d 529, 363 N.Y.S.2d 599, 1975 N.Y. App. Div. LEXIS 8588 (N.Y. App. Div. 2d Dep't), aff'd, 38 N.Y.2d 257, 379 N.Y.S.2d 721, 342 N.E.2d 516, 1975 N.Y. LEXIS 2348 (N.Y. 1975).

Provision of General Municipal Law requiring that in tort suits against county a notice of claim must be served upon the county and upon the officer, agent, servant or employee of the county is superseded by provision of General Municipal Law requiring service of notice of claim upon the municipality but not requiring personal service of notice upon the individual official, servant, agent or employee of the municipality, and plaintiffs, who brought suit for medical malpractice by physicians employed by county, were not required to serve notice of claim upon the physicians. Schiavone v County of Nassau, 51 A.D.2d 980, 380 N.Y.S.2d 711, 1976 N.Y. App. Div. LEXIS 11720 (N.Y. App. Div. 2d Dep't 1976), aff'd, 41 N.Y.2d 844, 393 N.Y.S.2d 701, 362 N.E.2d 252, 1977 N.Y. LEXIS 1888 (N.Y. 1977).

In a malpractice action arising out of the defendant doctor's allegedly negligent treatment of plaintiff at a New York City ambulatory care facility, the defendant's motion for summary judgment dismissing the complaint is granted, the Court of Appeals having determinined on a prior appeal involving the defendant's attempt to implead the city that the facility was a public institution maintained in part by the City of New York within the meaning of subdivision 1 of section 50-d of the General Municipal Law and that, accordingly, the city was required to

indemnify the doctor, since plaintiff failed to comply with subdivision 2 of section 50-d of the General Municipal Law in that no notice of claim was served on the city pursuant to section 50-e of the General Municipal Law and the action was commenced well beyond the one-year and three-month Statute of Limitations provided in section 50-i of the General Municipal Law; the fact that the city did not interpose the statutory defenses in the prior impleader action does not require denial of the motion, since plaintiff was in no way misled by the city's previous position that under a contractual arrangement it was not required to indemnify the defendant doctor and in no way relied on it, and, moreover, the motion for summary judgment was brought by the defendant doctor. Additionally, the notice of claim and short Statute of Limitations provisions of sections 50-e and 50-i are defenses which may be raised by the doctor even though he, and not the city, was sued, and defendant is not estopped from interposing the statutory defenses since there was no evidence that the city had entered into arrangements with regard to the facility that had the capacity to, and in fact did, mislead the plaintiff to her detriment. Norr v Spiegler, 72 A.D.2d 20, 423 N.Y.S.2d 177, 1980 N.Y. App. Div. LEXIS 9653 (N.Y. App. Div. 1st Dep't 1980), aff'd, 53 N.Y.2d 661, 438 N.Y.S.2d 1000, 421 N.E.2d 120, 1981 N.Y. LEXIS 2319 (N.Y. 1981).

Causes of action for conscious pain and suffering allegedly caused by medical malpractice of defendants, New York City Health and Hospitals Corporation and one of its staff physicians, were properly dismissed on ground that notice of claim was not served within 90 days of accrual, which was, at latest, date of death, and no motion for leave to serve late notice of claim was made within one year and 90-days Statute of Limitations; 1990 amendment to CLS Unconsol Ch 214-A § 20 (L1990, ch 804, § 122) excepting "an action for wrongful death" from usual 90-days-after-accrual rule does not mean that causes of action for wrongful death and conscious pain and suffering are so inextricably intertwined in context of medical malpractice that notice of claim time requirements applicable to former should govern latter. Yoo v New York City Health & Hosps. Corp., 239 A.D.2d 267, 657 N.Y.S.2d 189, 1997 N.Y. App. Div. LEXIS 5281 (N.Y. App. Div. 1st Dep't 1997).

Trial court erred in denying a father's motion, on behalf of his infant child, for leave to serve a late notice of claim or to deem a late notice of claim timely served nunc pro tunc because the statute of limitations was tolled for 10 years by the child's infancy, and the medical records provided the hospital with actual knowledge of the essential facts constituting the malpractice claim inasmuch as they showed that the mother was not admitted to the hospital, despite a physician's order, that two days later, the child was delivered one hour after the mother arrived at the hospital and only after a fetal heart monitor alarm sounded four times. J.H. v New York City Health & Hosps. Corp., 169 A.D.3d 880, 94 N.Y.S.3d 345, 2019 N.Y. App. Div. LEXIS 1236 (N.Y. App. Div. 2d Dep't 2019).

Postponement of accrual date of medical malpractice cause of action by virtue of "foreign objects" rule extended time in which action could be commenced against municipality. Darragh v County of Nassau, 91 Misc. 2d 53, 397 N.Y.S.2d 553, 1977 N.Y. Misc. LEXIS 2234 (N.Y. Sup. Ct. 1977), aff'd, 63 A.D.2d 1010, 405 N.Y.S.2d 1020, 1978 N.Y. App. Div. LEXIS 12098 (N.Y. App. Div. 2d Dep't 1978), disapproved, Rodriguez v Manhattan Medical Group, P. C., 77 N.Y.2d 217, 566 N.Y.S.2d 193, 567 N.E.2d 235, 1990 N.Y. LEXIS 4494 (N.Y. 1990).

Medical malpractice action against a physician who was acting as an unpaid designee of a non-physician county mental health director when he examined the patient was subject to the notice of claim and limitations requirements applicable to all actions against public officers; if the physician was entitled to indemnification by the county, the statutes applicable to actions against a local governmental entity applied. Anderson v House of the Good Samaritan Hosp., 194 Misc. 2d 171, 752 N.Y.S.2d 815, 2002 N.Y. Misc. LEXIS 1576 (N.Y. Sup. Ct. 2002), app. dismissed, 5 A.D.3d 1058, 773 N.Y.S.2d 687, 2004 N.Y. App. Div. LEXIS 3122 (N.Y. App. Div. 4th Dep't 2004).

9. —Wrongful death

Since time limitation within which claim against municipality is to be made is to be computed from date of event, i.e., death, in wrongful death action, action of widow against village for husband's wrongful death was barred where claim was not made against village until almost five years after husband's disappearance, when wife learned that he probably had died on date of disappearance. Phillips v Waterford, 48 A.D.2d 745, 368 N.Y.S.2d 77, 1975 N.Y. App. Div. LEXIS 9823 (N.Y. App. Div. 3d Dep't 1975).

Because an administrator served a wrongful death notice of claim on a county within a month of the administrator's appointment, the notice of claim was timely under N.Y. Gen. Mun. Law § 50-e(1)(a), General Municipal Law § 50-i(1); therefore, leave to file late notice was not necessary under § 50-e(5). Heslin v County of Greene, 53 A.D.3d 996, 862 N.Y.S.2d 210, 2008 N.Y. App. Div. LEXIS 6328 (N.Y. App. Div. 3d Dep't 2008), aff'd, 14 N.Y.3d 67, 896 N.Y.S.2d 723, 923 N.E.2d 1111, 2010 N.Y. LEXIS 14 (N.Y. 2010).

10. —Miscellaneous claims

Pedestrian who fell on allegedly broken and defective sidewalk was entitled to amend complaint to add uncontested factual allegation that defendant city had removed tree stump several years earlier, thereby creating defective sidewalk condition, to support pedestrian's contention that she was not required to provide city with prior written notice of unsafe condition; however, amended complaint could not be construed as stating separate cause of action based solely on city's negligence in removing tree stump since, if complaint were so construed, removal of stump would constitute "happening of the event" for purposes of CLS Gen Mun § 50-i, rendering pedestrian's action untimely. Kiernan v Thompson, 73 N.Y.2d 840, 537 N.Y.S.2d 122, 534 N.E.2d 39, 1988 N.Y. LEXIS 3532 (N.Y. 1988).

Where complaint's first cause of action explicitly alleged that defendant board of cooperative educational services, by certain specified conduct, had breached contract entered into with plaintiff, and portion of complaint styled "second cause of action" did not allege any additional conduct by defendant board, but simply realleged first cause of action and alleged that defendant board had acted maliciously and recklessly so as to justify assessment of punitive damages, so-called "second cause of action" was not founded upon tort, and did not state claim for prima facie tort, but entire complaint sounded wholly in contract, and therefore, statute governing service of summons and complaint in actions against school district "founded upon tort" was inapplicable. Effective Communications West, Inc. v Board of Cooperative Educational Services of Sole Supervisory Dist., 57 A.D.2d 485, 395 N.Y.S.2d 296, 1977 N.Y. App. Div. LEXIS 11401 (N.Y. App. Div. 4th Dep't 1977).

Where CLS Gen Mun §§ 50-e and 50-i are applicable because claim is asserted against municipality, statute of limitations of one year and 90 days is measured from date of discovery of injury caused by latent effects of exposure to toxic substances, or from date when, through exercise of reasonable diligence, injury should have been discovered, whichever is earlier. Annunziato v City of New York, 224 A.D.2d 31, 647 N.Y.S.2d 850, 1996 N.Y. App. Div. LEXIS 9790 (N.Y. App. Div. 2d Dep't 1996).

Statute of limitations period in CLS Gen Mun § 50-i for wrongful death actions is not affected by discovery rule in CLS CPLR § 214-c, which is limited to causes of action for personal injury and injury to property, and thus wrongful death causes of action were barred where not commenced within 2 years of death. Annunziato v City of New York, 224 A.D.2d 31, 647 N.Y.S.2d 850, 1996 N.Y. App. Div. LEXIS 9790 (N.Y. App. Div. 2d Dep't 1996).

Action commenced in 1997, alleging that lengthy sidewalk closure which resulted in losses at plaintiffs' respective businesses was due to New York City Transit Authority's negligence in "planning, design and construction" of elevator project that necessitated closure of sidewalk, was time barred under CLS Gen Mun § 50-i(1) and CLS Pub A § 1212(2) in that claim accrued at time of closure of sidewalk in 1994. Princess Video, Inc. v City of New York, 277 A.D.2d 300, 716 N.Y.S.2d 82, 2000 N.Y. App. Div. LEXIS 11714 (N.Y. App. Div. 2d Dep't 2000), app. denied, 96 N.Y.2d 705, 725 N.Y.S.2d 277, 748 N.E.2d 1073, 2001 N.Y. LEXIS 276 (N.Y. 2001).

Petitioners were not entitled to serve a late notice of claim for respiratory injuries arising from the terrorist attacks of Septem-

ber 11, 2001 pursuant to N.Y. Gen. Mun. Law § 50-e as the proceeding was barred by the one year and 90-day statute of limitations under N.Y. Gen. Mun. Law § 50-i as only a conclusory assertion was made that the respiratory illness was not apparent until its diagnosis; such an assertion lacked probative value as to when such illness should have been discovered under N.Y. C.P.L.R. § 214-c(3). Matter of Felder v City of New York, 53 A.D.3d 401, 862 N.Y.S.2d 36, 2008 N.Y. App. Div. LEXIS 5849 (N.Y. App. Div. 1st Dep't), app. denied, 11 N.Y.3d 707, 868 N.Y.S.2d 599, 897 N.E.2d 1083, 2008 N.Y. LEXIS 3281 (N.Y. 2008).

Time limitation for action under General Municipal Law provision that action against school district for personal injuries allegedly sustained by reason of negligence or wrongful act of school district or its employee must be commenced within one year and 90 days after happening of event upon which claim is based was intended to commence not upon accrual of plaintiff's cause of action but when accident occurred. Cota v Madison Cent. School Dist., 89 Misc. 2d 646, 392 N.Y.S.2d 233, 1977 N.Y. Misc. LEXIS 1913 (N.Y. Sup. Ct. 1977), aff'd, 62 A.D.2d 1083, 404 N.Y.S.2d 547, 1978 N.Y. App. Div. LEXIS 11178 (N.Y. App. Div. 3d Dep't 1978).

The 90-day period of limitation within which to file a notice of claim against defendant city (General Municipal Law, §§ 50-e, 50-i, subd 1, par [a]) based upon the city's alleged negligence in not timely filing plaintiff's claim for accidental disability retirement with the State Policemen's and Firemen's Retirement System (Retirement and Social Security Law, § 363, subd c) after plaintiff suffered a heart attack while fighting a fire in February, 1972, began to run on April 9, 1975 when plaintiff's attorney, after many requests, received the time-stamped copy of the notice of accident filed by the city and not from an April, 1973 hearing when plaintiff and his attorney first became aware that there might be a question as to the timeliness of the city's notice since the general rule is that the period of limitations is measured from the date that the cause of action accrues when the party is first enabled to bring his action and plaintiff could not have been sure that he was aggrieved, and thus first able to bring suit, until he had actual knowledge that his claim had been filed late by the city. Kelly v Rochester, 98 Misc. 2d 435, 413 N.Y.S.2d 1006, 1979 N.Y. Misc. LEXIS 2093 (N.Y. Sup. Ct. 1979).

For purposes of both the 90-day period of limitations within which to file a claim against defendant city "after the claim arises" (General Municipal Law, §§ 50-e, 50-i, subd 1, par [a]) based upon the city's alleged negligence in not timely filing plaintiff's claim for accidental disability retirement with the State Policemen's and Firemen's Retirement System (Retirement and Social Security Law, § 363, subd c) and the one-year and 90-day period of limitations within which to commence suit "after the happening of the event upon which the claim is based" (General Municipal Law, § 50-i, subd 1, par [c]), the statutory periods commenced and plaintiff's cause of action accrued either on the date that plaintiff, by receipt of the time-stamped copy of the notice of accident filed by the city, first received actual knowledge that his claim was not timely filed by the city or on the date that plaintiff's claim for benefits was formally rejected by the retirement system since, had plaintiff been granted benefits by the system, there would be no claim, no cause of action and no injury. Kelly v Rochester, 98 Misc. 2d 435, 413 N.Y.S.2d 1006, 1979 N.Y. Misc. LEXIS 2093 (N.Y. Sup. Ct. 1979).

11. Limitations period

An action against a municipality for personal injury or property damage must be commenced within one year and 90 days after "the happenning of the event upon which the claim is based." Klein v Yonkers, 53 N.Y.2d 1011, 442 N.Y.S.2d 477, 425 N.E.2d 865, 1981 N.Y. LEXIS 2546 (N.Y. 1981).

Although school district sent letter to plaintiffs acknowledging timely receipt of notice of claim, making obviously erroneous reference to receipt of summons and complaint, demanded hearing pursuant to CLS Gen Mun § 50-h, and sent letter to plaintiffs' attorney suggesting "amicable resolution of this matter," school district was nevertheless not estopped to object to plaintiffs' failure to serve summons and complaint until 17 days after expiration of statute of limitations since plaintiffs failed to demonstrate existence of fraud, misrepresentation or deception inducing them to refrain from timely commencement of action. Montelione v Greenburg Edgemont Union Free School Dist., 175 A.D.2d 113, 572 N.Y.S.2d 17, 1991 N.Y. App. Div. LEXIS 9775 (N.Y. App. Div. 2d Dep't 1991).

Mailing of summons and complaint to court clerk on last day of statute of limitations did not constitute "filing" within meaning of commencement-by-filing procedure under CLS CPLR § 304, and thus action against city was time-barred, where papers were not actually received by clerk until after statute of limitations under CLS Gen Mun § 50-i had expired. Enos v City of Rochester, 206 A.D.2d 159, 619 N.Y.S.2d 459, 1994 N.Y. App. Div. LEXIS 11976 (N.Y. App. Div. 4th Dep't 1994), app. denied, 1995 N.Y. App. Div. LEXIS 2069 (N.Y. App. Div. 1st Dep't Feb. 3, 1995).

Statue of Limitations under CLS Gen Mun § 50-i did not bar claim under CLS Gen Mun § 205-e on basis that notice of claim failed to specify that particular legal theory since neither CLS Gen Mun § 50-i nor governing case law imposed such requirement, notice of claim herein described in sufficient detail time, place, and manner of occurrence and plaintiff's damages to advise city of basis for claim so as to have opportunity to investigate, and imposing such theory-specific requirement in instant case would be inconsistent with remedial purpose of amendment to CLS Gen Mun § 205-e. Simons v City of New York, 252 A.D.2d 451, 675 N.Y.S.2d 597, 1998 N.Y. App. Div. LEXIS 8417 (N.Y. App. Div. 1st Dep't 1998).

Tort action against county employees was properly dismissed where acts or events that allegedly occurred before date when notice of claim allegedly was served fell beyond limitations period prescribed in either CLS Gen Mun § 50-i or CLS CPLR § 215(3), and plaintiff's failure to comply with notice of claim provisions of § 50-i was fatal as to any wrongful or negligent acts allegedly committed after that date. Pravda v County of Saratoga, 255 A.D.2d 717, 680 N.Y.S.2d 705, 1998 N.Y. App. Div. LEXIS 11901 (N.Y. App. Div. 3d Dep't 1998), app. dismissed, 93 N.Y.2d 1000, 695 N.Y.S.2d 745, 717 N.E.2d 1082, 1999 N.Y. LEXIS 1963 (N.Y. 1999), cert. denied, 528 U.S. 1063, 120 S. Ct. 619, 145 L. Ed. 2d 513, 1999 U.S. LEXIS 8308 (U.S. 1999).

For statute of limitations purposes, cause of action under 42 USC § 1983 alleging federal civil rights violations is characterized as personal injury action and is not subject to notice claim requirements of CLS Gen Mun § 50-i. Lopez v Shaughnessy, 260 A.D.2d 551, 688 N.Y.S.2d 614, 1999 N.Y. App. Div. LEXIS 4104 (N.Y. App. Div. 2d Dep't 1999).

Compressed air did not qualify as a toxic substance under N.Y. C.P.L.R. 214-c, and, therefore, parties injured by exposure to compressed air could not rely on the date of discovery rule; thus, their application for leave to serve late notices of claim against city was time-barred under N.Y. Gen. Mun. Law §§ 50-e(5), 50-i(1). Huggler v City of New York, 289 A.D.2d 240, 733 N.Y.S.2d 725, 2001 N.Y. App. Div. LEXIS 11831 (N.Y. App. Div. 2d Dep't 2001), app. denied, 98 N.Y.2d 614, 751 N.Y.S.2d 169, 780 N.E.2d 980, 2002 N.Y. LEXIS 3139 (N.Y. 2002).

N.Y. Gen. Mun. Law § 50-i(3) provided that nothing in N.Y. Gen. Mun. Law § 50-h would extend the statute of limitations; thus, when the trial court granted plaintiff in a personal injury suit an additional 60 days after a § 50-h examination to commence an action, the trial court had no jurisdiction to extend the statute of limitations. Cinqumani v County of Nassau, 28 A.D.3d 699, 814 N.Y.S.2d 663, 2006 N.Y. App. Div. LEXIS 4770 (N.Y. App. Div. 2d Dep't 2006).

Alleged injured party timely commenced a special proceeding against a city within the one year and 90-day statute of limitations in N.Y. Gen. Mun. Law §§ 50-e(5) and 50-i(1) when he filed an unsigned order to show cause, his attorney's affirmation and a verified proposed notice of claim because the affirmation and proposed notice were properly viewed as the petition (N.Y. C.P.L.R. 402) required to commence a special proceeding (N.Y. C.P.L.R. 304), and, having timely commenced the special proceeding, that proceeding could not be deemed a nullity despite his failure to serve the order to show cause within the time prescribed by the trial court, as any defect in service of the order merely raised an issue regarding whether the trial court had personal jurisdiction over the city. Matter of Jordan v City of New

York, 38 A.D.3d 336, 833 N.Y.S.2d 8, 2007 N.Y. App. Div. LEXIS 3638 (N.Y. App. Div. 1st Dep't 2007).

Plaintiffs' medical malpractice action should have been dismissed for failure to comply with N.Y. Unconsol. Law § 7401(2) and N.Y. Gen. Mun. Law §§ 50-e(5) and 50-i because before bringing suit, plaintiffs neither served a timely notice of claim nor sought leave to serve a late notice of claim with the one-year-and-90-day limitations period. McGriff v New York City Health & Hosps. Corp., 38 A.D.3d 504, 831 N.Y.S.2d 486, 2007 N.Y. App. Div. LEXIS 2580 (N.Y. App. Div. 2d Dep't 2007).

N.Y. Gen. Mun. Law § 50-e(5), which permitted the extension of the time to serve a notice of claim, was of no help to a former arrestee whose N.Y. Gen. Mun. Law § 50-e notice of claim did not include allegations of false arrest and malicious prosecution, because the former arrestee did not seek to file a late notice and was time-barred from bringing any new claims under N.Y. Gen. Mun. Law § 50-i(1). Scott v City of New York, 40 A.D.3d 408, 836 N.Y.S.2d 140, 2007 N.Y. App. Div. LEXIS 6075 (N.Y. App. Div. 1st Dep't 2007).

Although the trial court providently granted an inmate's motion for leave to serve a late notice of claim based on alleged sexual abuse, it should have limited the late notice of claim only to those claims not barred by the applicable statute of limitations. Catterson v Suffolk County Dept. of Health Servs., 49 A.D.3d 792, 854 N.Y.S.2d 205, 2008 N.Y. App. Div. LEXIS 2742 (N.Y. App. Div. 2d Dep't 2008).

In a medical malpractice case against a city, the trial court erred in denying plaintiff's unopposed motion to strike the city's statute of limitations defense because the action was commenced within one year and 90 days of the happening of the event and thus was not time-barred. Brunson v New York City Health & Hosps. Corp., 144 A.D.3d 854, 42 N.Y.S.3d 34, 2016 N.Y. App. Div. LEXIS 7503 (N.Y. App. Div. 2d Dep't 2016).

Any claims of an arrestee against a village for excessive force, assault and battery, and negligent training and supervision were barred by the statute of limitations, which, except for malicious prosecution, accrued on the date of the arrestee's arrest, as the complaint was filed more than 1 year and 90 days after his arrest. O'Dell v County of Livingston, 174 A.D.3d 1307, 103 N.Y.S.3d 730, 2019 N.Y. App. Div. LEXIS 5425 (N.Y. App. Div. 4th Dep't 2019).

Although court may extend time to serve notice of claim on municipality under CLS Gen Mun L § 50-e(5), despite notice of claim requirement being express condition precedent to commencement of action, court may not grant leave to file late notice on those claims where applicable statute of limitations has expired. Piesco v New York, 693 F. Supp. 86, 1988 U.S. Dist. LEXIS 9962 (S.D.N.Y. 1988).

As a father did not allege in his complaint that he filed a notice of claim with a municipality, more than thirty days passed without resolution of the claim prior to filing the member case, and he did not argue in opposition to a motion to dismiss that he had complied with the notice of claim requirements, the municipality was entitled to dismissal of the claim against it. Parent v New York, 786 F. Supp. 2d 516, 2011 U.S. Dist. LEXIS 55713 (N.D.N.Y. 2011), aff'd, 485 Fed. Appx. 500, 2012 U.S. App. LEXIS 12267 (2d Cir. N.Y. 2012).

New York City and its insurer breached a settlement agreement with workers who were injured due to performing clean-up work at the World Trade Center site; contingent payments were due because the number of new claims against the City and its contractors that were active on a specified date did not exceed a certain threshold. Many cases that were filed in order to meet state and federal statutory deadlines were withdrawn or dismissed prior to the specified date. In re World Trade Ctr. Disaster Site Litig., 879 F. Supp. 2d 396, 2012 U.S. Dist. LEXIS 98451 (S.D.N.Y. 2012), rev'd, 754 F.3d 114, 2014 U.S. App. LEXIS 10681 (2d Cir. N.Y. 2014).

12. —Computation of period

Under rule that time is to be computed by excluding day of event and including last day up to midnight of that day, plaintiffs who were allegedly injured by city vehicle at 2:35 p.m. on July 22, 1985, and who had one year and 90 days within which to commence action under CLS Gen Mun § 50-i, were required to serve municipal defendants by midnight on October 20, 1986; exclusion of first full day and inclusion of last day did not result in period ending at 2:34 p.m. on October 21, 1986, as contended by plaintiffs. Bacalokonstantis v Nichols, 141 A.D.2d 482, 529 N.Y.S.2d 111, 1988 N.Y. App. Div. LEXIS 6305 (N.Y. App. Div. 2d Dep't 1988).

In action against city arising from accident which occurred sometime between 11:30 p.m. on May 10 and 12:30 a.m. on May 11, complaint served one year and 91 days after May 10 was not rendered timely on basis that word "day" should be viewed in 24-hour increments when computing limitation period under CLS Gen Mun § 50-i, since such analysis would contravene long-settled prevailing rule that fractions of day will not be utilized when computing time periods unless they are material to resolution of competing claims. Pietrowski v New York, 166 A.D.2d 423, 560 N.Y.S.2d 662, 1990 N.Y. App. Div. LEXIS 11855 (N.Y. App. Div. 2d Dep't 1990).

Lessee's claim arising from the village's allegedly negligent construction and installation of the water and sewer main was time-barred because the alleged tortious conduct consisted of discrete acts of negligence that ceased upon completion of the water and sewer main construction in December 2009, but the lessee did not file suit until July 2014. 461 Broadway, LLC v Village of Monticello, 144 A.D.3d 1464, 42 N.Y.S.3d 419, 2016 N.Y. App. Div. LEXIS 7749 (N.Y. App. Div. 3d Dep't 2016).

Gas company's claim that the municipalities' alleged interference with the company's gas laterals during the installation of the sewer and water systems was untimely because the alleged interference occurred more than one year and 90 days ago and the interference was a singular event; the municipalities' alleged negligent conduct ceased once the water and sewer main construction was completed in the 1960s. New York State Elec. & Gas Corp. v County of Chemung, 137 A.D.3d 1550, 29 N.Y.S.3d 579, 2016 N.Y. App. Div. LEXIS 2435 (N.Y. App. Div. 3d Dep't 2016).

Gas company's claim that the municipalities' failed to maintain the sewer and water mains proximate to the company's gas laterals were timely because each municipality had a continuing duty to maintain its systems and the breach of the ongoing duty was the "event" that formed the basis for the claim. New York State Elec. & Gas Corp. v County of Chemung, 137 A.D.3d 1550, 29 N.Y.S.3d 579, 2016 N.Y. App. Div. LEXIS 2435 (N.Y. App. Div. 3d Dep't 2016).

Gas company's claim for continuing trespass against three municipalities, alleging continuing interference with the company's utilities, was timely because the company alleged the municipalities placed these a log or pole electrical tape on the company's service laterals and the continuing presence of the same caused some damage. New York State Elec. & Gas Corp. v County of Chemung, 137 A.D.3d 1550, 29 N.Y.S.3d 579, 2016 N.Y. App. Div. LEXIS 2435 (N.Y. App. Div. 3d Dep't 2016).

Trial court properly denied a motor vehicle passenger's motion for leave to serve a late notice of claim on the city and the city department of transportation, arising from alleged injuries when the vehicle he was riding in struck an open manhole on an expressway, as the motion was untimely because it was not made within 90 days and was not made before the one-year-and-90-day statute of limitations expired. Matter of Lubin v City of New York, 148 A.D.3d 898, 50 N.Y.S.3d 405, 2017 N.Y. App. Div. LEXIS 1788 (N.Y. App. Div. 2d Dep't 2017).

Worker's asbestos-related claims against a county and a hockey team were time-barred because more than three years prior to the commencement of the instant action on November 12, 2015, the worker had an objective level of awareness of the dangers and consequences of asbestos exposure sufficient to place him on notice of the primary condition on which his claims were based. O'Brien v County of Nassau, 164 A.D.3d 684, 83 N.Y.S.3d 311, 2018 N.Y. App. Div. LEXIS 5716 (N.Y. App. Div. 2d Dep't 2018).

13. —Continuing negligence

Because a store had legal rights against trespass for an unlawful encroachment by a conduit in its right of way, and because its actual damages arose from the need to install the new drainpipe in a different location, the store had a viable continuous causes of action sounding in trespass and private nuisance, for

which the statute of limitations in N.Y. Pub. Auth. Law § 1212(2) and N.Y. Gen. Mun. Law § 50-i had not yet run. Bloomingdales, Inc. v New York City Tr. Auth., 13 N.Y.3d 61, 886 N.Y.S.2d 663, 915 N.E.2d 608, 2009 N.Y. LEXIS 1846 (N.Y. 2009).

Plaintiff's claim against city for injuries she sustained in fall due to defective sidewalk was not time-barred on ground that city's removal of tree stump, which created crack in sidewalk, was "happening of the event" that initiated running of limitations period and occurred more than one year and 90 days prior to accident (CLS Gen Mun § 50-i), since city's active negligence created unsafe condition and constituted breach of its duty to maintain sidewalk in safe condition which occurred anew each day condition continued; in such circumstance, accident to plaintiff was "happening of the event," and insofar as complaint stated cause of action in passive negligence, action accrued at time of accident. Kiernan v Thompson, 134 A.D.2d 27, 522 N.Y.S.2d 719, 1987 N.Y. App. Div. LEXIS 50861 (N.Y. App. Div. 3d Dep't 1987), aff'd, 73 N.Y.2d 840, 537 N.Y.S.2d 122, 534 N.E.2d 39, 1988 N.Y. LEXIS 3532 (N.Y. 1988).

Lessee's claim that a village failed to properly maintain and/or repair its sewer and water mains was not time-barred because the village's negligence, if any, in failing to maintain or repair its water and/or sewage system constituted a continuing wrong that gave rise to a new cause of action for each injury that occurred. 461 Broadway, LLC v Village of Monticello, 144 A.D.3d 1464, 42 N.Y.S.3d 419, 2016 N.Y. App. Div. LEXIS 7749 (N.Y. App. Div. 3d Dep't 2016).

14. —Additional causes of action

In an action against a county and others to recover damages for wrongful death, additional causes of action for conscious pain and suffering and for medical malpractice were properly ruled to be untimely where neither was commenced within the one-year and ninety-day period of limitation specified by Gen Mun Law § 50-i. Alessi v County of Nassau, 100 A.D.2d 561, 473 N.Y.S.2d 487, 1984 N.Y. App. Div. LEXIS 17535 (N.Y. App. Div. 2d Dep't 1984).

Trial court erred in granting personal injury plaintiff's motion to amend negligence complaint against municipality to add derivative cause of action on behalf of wife, even though notice of claim was timely filed and advised municipality of derivative claim, where complaint filed just within one-year-and-90-day time limitation did not include wife's claim, and plaintiff did not seek order to add cause until 3 ½ years later. Kettle v Sweet Home Cent. School Dist., 152 A.D.2d 956, 543 N.Y.S.2d 783, 1989 N.Y. App. Div. LEXIS 16823 (N.Y. App. Div. 4th Dep't 1989).

As plaintiff's motion to add an additional claim under N.Y. Gen. Mun. Law § 50-e was filed three years after her alleged injury without any compelling excuse for the delay, and she sought to present a entirely new theory of liability that defendants would have to investigate, the trial court did not abuse its discretion in denying the motion. Chirse v City School Dist. of Albany, 83 A.D.3d 1232, 920 N.Y.S.2d 841, 2011 N.Y. App. Div. LEXIS 3072 (N.Y. App. Div. 3d Dep't 2011).

15. —Actions of government employees

Former deputy city police chief's actions in impounding motor vehicle and in denying owner's request for its return were not ultra vires or outside scope of his employment, so as to remove owner's action against chief for conversion and trespass to chattels from purview of one-year 90-day statute of limitations of CLS Gen Mun § 50-i, where chief was acting under direction of district attorney, and no evidence suggested that chief was pursuing interests other than city business. Pileckas v Trzaskos, 126 A.D.2d 926, 511 N.Y.S.2d 438, 1987 N.Y. App. Div. LEXIS 42024 (N.Y. App. Div. 3d Dep't), app. denied, 70 N.Y.2d 601, 518 N.Y.S.2d 1023, 512 N.E.2d 549, 1987 N.Y. LEXIS 17377 (N.Y. 1987).

Action against city for negligence and tortious interference with business was barred by statute of limitations where plaintiff failed to serve his complaint within one year and 90 days after city employee erroneously advised him that his proposed gymnasium was valid use under local zoning ordinance. McVan v New Rochelle, 127 A.D.2d 825, 511 N.Y.S.2d 942, 1987 N.Y. App. Div. LEXIS 43317 (N.Y. App. Div. 2d Dep't 1987).

Fact that action for intentional infliction of emotional distress arising from activities of police officer was timely commenced against municipal defendants within one year and 90 days as required by CLS Gen Mun § 50-i was insufficient to preserve untimely individual claim against officer, despite any duty municipal defendants might have had to defend officer under CLS Gen Mun § 50-k(2). Tumminello v City of New York, 212 A.D.2d 434, 622 N.Y.S.2d 714, 1995 N.Y. App. Div. LEXIS 1616 (N.Y. App. Div. 1st Dep't 1995).

Plaintiff's contention that she could not properly commence an action against defendants until she complied with defendants' demand for a hearing pursuant to N.Y. Gen. Mun. Law § 50-h was without merit, where the parties agreed to adjourn the scheduled hearing dates and the hearing was indefinitely postponed beyond the 90-day period from service of the demand. And, since the County failed to reschedule the hearing for the earliest possible date available, and the 90-day period had elapsed, plaintiff was entitled to commence this action before a hearing was conducted; thus, plaintiff was not prevented from commencing this action prior to the expiration of the statute of limitations. Artup v Simeone, 2020 N.Y. App. Div. LEXIS 7762 (N.Y. App. Div. 2d Dep't 2020).

By virtue of ¶ 2 of §§ 50-i and 101 of the General Construction Law, the General Municipal Law prevails over a general statute of limitations with respect to the commencement of actions in tort against a public corporation, and with respect to an action for libel and slander instituted against two city employees and the city the provisions of General Municipal Law § 50-i apply not only to the action against the city but also to the action against the city's employees, so that the employee's asserted defense pursuant to CPLR 215 was invalid. Sorge v New York, 56 Misc. 2d 414, 288 N.Y.S.2d 787, 1968 N.Y. Misc. LEXIS 1650 (N.Y. Sup. Ct. 1968).

Trial court erred in dismissing, as untimely, a slander claim against a justice based on statements made by the justice at a town board meeting relating to the termination of a former employee; as the former employee did not allege that the justice was acting outside the scope of his employment and the former employee referred to him throughout the complaint by his official title, the town was the real party in interest, and, therefore, N.Y. Gen. Mun. Law § 50-i applied. Thus, the slander claim was timely because it was filed less than a year and 90 days after the statements were made. Coe v Town of Conklin, 94 A.D.3d 1197, 942 N.Y.S.2d 255, 2012 N.Y. App. Div. LEXIS 2562 (N.Y. App. Div. 3d Dep't 2012).

16. —Relation to other limitations periods

For claims against a public corporation arising after September 1, 1975, the outer limit of the period during which the claimant may apply for leave to serve late notice of his claim is to be measured by the time limited for the commencement of the action by the claimant against a public corporation, as specified in the current version of subdivision 5 of section 50-e of the General Municipal Law, and not by the one-year period following the happening of the event upon which the claim is based as was required by the predecessor provision, since no serious prejudice to the potentially liable public corporation would result from such a limited retroactive application of the amendment because the public corporation was already at risk with respect to these claims on the amendment's effective date pursuant to the former version of subdivision 5 of section 50-e and there is thus no danger of the revival of ancient claims as distinguished from the mere continuance of ones that have not finally expired. Furthermore, the period during which a court may grant an extension of the time within which to serve notice of claim is tolled during the infancy of the claimant in accordance with CPLR 208, since the amended version of subdivision 5 of section 50-e makes the period during which such an extension may be granted coextensive with the Statute of Limitations governing the claim (General Municipal Law, § 50-i, subd 1, par [c]), and where the time for commencing an action on the claim is tolled under CPLR 208, there will be a concomitant tolling of the time during which late notice of claim may be served. The mere availability of the toll does not in itself mandate that an extension be granted in every case involving a disability covered by CPLR 208, since the decision to grant or

deny an extension under subdivision 5 of section 50-e is still purely a discretionary one, and the courts remain free to deny an application for an extension in the interests of fairness to the potentially liable public corporation. Cohen v Pearl River Union Free School Dist., 51 N.Y.2d 256, 434 N.Y.S.2d 138, 414 N.E.2d 639, 1980 N.Y. LEXIS 2723 (N.Y. 1980).

By fair construction, the General Municipal Law provision requiring a personal injury action against a county to be commenced within one year and 90 days after the event can coexist with the Highway Law provision stating that a county is liable for injuries sustained due to a defective highway but that the county shall not be liable unless a notice of claim shall have been made and served and the action commenced within one year from the date of service; thus, in the instant case, since plaintiff complied with the Highway Law, her wrongful death action was not subject to dismissal, even though the county was not served with summons and complaint until more than two years after accident. Forero v Tuxedo, 51 A.D.2d 443, 382 N.Y.S.2d 328, 1976 N.Y. App. Div. LEXIS 11101 (N.Y. App. Div. 2d Dep't 1976).

In an action for damages alleging wrongful acts by a county Department of Health in ordering cessation of construction of plaintiff's apartment complexes, in which plaintiff timely served a notice of claim and a summons and complaint pursuant to Gen Mun Law, defendant's affirmative defense claiming that plaintiff's cause of action was barred by the six-month statute of limitations contained within Pub Health Law § 329 was properly struck since Gen Mun Law § 50-i(2) supersedes the shorter statute of limitations contained in the Pub Health Law. Johnson v County of Chautauqua, 84 A.D.2d 960, 446 N.Y.S.2d 723, 1981 N.Y. App. Div. LEXIS 16236 (N.Y. App. Div. 4th Dep't 1981).

In personal injury action involving county-owned bus which had been leased to transportation authority, wherein plaintiff's action against authority was barred by one-year 30-day limitations period provided in CLS Pub A § 1276, court properly denied county's motion for dismissal on ground that same limitations period which applied to authority should apply to county because authority was "real party in interest" due to its contractual duty to indemnify county; pursuant to CLS County § 52, one-year 90-day limitations period set forth in CLS Gen Mun § 50-i was applicable to county, and county's contention—that authority's potential liability to county (if county did not have benefit of shorter statute) would circumvent operation of shorter statute as to authority—was irrelevant, because authority remained potentially liable in any event pursuant to third-party complaints interposed by other codefendants. Orkin v County of Nassau, 126 A.D.2d 618, 511 N.Y.S.2d 55, 1987 N.Y. App. Div. LEXIS 41751 (N.Y. App. Div. 2d Dep't 1987).

Court had no discretion to extend plaintiff's time to file late notices of claim in negligence action against town, where notices were filed after statute of limitations had expired and there was no evidence that town defendants engaged in misconduct preventing plaintiff from timely filing his claim. Smith v Town of Ellisburg, 234 A.D.2d 938, 651 N.Y.S.2d 772, 1996 N.Y. App. Div. LEXIS 13665 (N.Y. App. Div. 4th Dep't 1996).

Personal injury action against city based on defective sidewalk was timely, despite one-year limitations period for such actions in city charter, where CLS Gen Mun § 50-i(1) provides that claims for personal injuries allegedly sustained by reason of city's negligence "shall be commenced within one year and ninety days after the happening of the event upon which the claim is based," and CLS Gen Mun § 50-i(2) provides that "[t]his section shall be applicable notwithstanding any inconsistent provisions of law, general, special or local, or any limitation contained in the provisions of a city charter." Allen v Matthews, 266 A.D.2d 782, 699 N.Y.S.2d 166, 1999 N.Y. App. Div. LEXIS 12121 (N.Y. App. Div. 3d Dep't 1999).

In personal injury action against city based on defective sidewalk, plaintiff did not forfeit his right to application of proper limitations period by his failure to respond to that part of city's motion for summary judgment under CLS CPLR § 3212, even though better practice would have been to address, however perfunctorily, both grounds on which motion was based, where city neither raised limitations defense in its amended answer nor moved to dismiss complaint on that ground under CLS CPLR § 3211(a), and plaintiff was entitled to presume that issue would be decided in accordance with controlling law. Allen v Matthews, 266 A.D.2d 782, 699 N.Y.S.2d 166, 1999 N.Y. App. Div. LEXIS 12121 (N.Y. App. Div. 3d Dep't 1999).

Action seeking money damages allegedly caused by the failure of the city to discharge a duty imposed upon it by law, specifically to provide a wage differential, sounded in tort; therefore, where the decedent failed to serve his claim upon the city within 90 days after the claim arose, pursuant to N.Y. Gen. Mun. Law § 50-e, or within the statute of limitations period of one year and 90 days, pursuant to N.Y. Gen. Mun. Law §§ 50-e and 50-i, the action was dismissed. Estate of Kalis v City of Buffalo, 306 A.D.2d 932, 762 N.Y.S.2d 195, 2003 N.Y. App. Div. LEXIS 6774 (N.Y. App. Div. 4th Dep't), app. denied, 100 N.Y.2d 515, 769 N.Y.S.2d 202, 801 N.E.2d 423, 2003 N.Y. LEXIS 3375 (N.Y. 2003).

Municipal corporation does not waive right to examination under § 50-h by failing to demand hearing within 90 days of filing of notice of claim; however, since demand for examination does not toll time within which claimant must commence action, claimant need not wait until hearing is held before commencing action where demand for examination is not timely filed. Rizzi v Patchogue Medford UFSD #24, 132 Misc. 2d 408, 503 N.Y.S.2d 967, 1986 N.Y. Misc. LEXIS 2706 (N.Y. Sup. Ct. 1986).

17. — —CPLR

CPLR § 204(a) is not applicable to the statutory stays contained in § 50-h and this section of the General Municipal Law so as to extend the statute of limitations for the commencement of actions against a city based on a tort claim arising out of events occurring after September 1, 1959. Joiner v New York, 26 A.D.2d 840, 274 N.Y.S.2d 362, 1966 N.Y. App. Div. LEXIS 3174 (N.Y. App. Div. 2d Dep't 1966).

Motor vehicle owner's action seeking to recover damages against former deputy city chief of police for conversion and trespass to chattels was governed by one-year 90-day statute of limitations of CLS Gen Mun § 50-i, rather than 3-year period of CLS CPLR § 214, since CLS Gen Mun § 50-j governs actions against police officers for torts committed in performance of duty, owner sought recovery for common-law tort following impoundment of his vehicle after routine traffic safety stop, and thus any claim under federal civil rights statute (42 USCS § 1983) that would activate 3-year limitation period would not apply. Pileckas v Trzaskos, 126 A.D.2d 926, 511 N.Y.S.2d 438, 1987 N.Y. App. Div. LEXIS 42024 (N.Y. App. Div. 3d Dep't), app. denied, 70 N.Y.2d 601, 518 N.Y.S.2d 1023, 512 N.E.2d 549, 1987 N.Y. LEXIS 17377 (N.Y. 1987).

Plaintiff's actions against city police officer, alleging intentional torts on her part, were not required to be brought within one year of their inception where city admitted that officer was acting within scope of her employment, and thus benefitted by save-harmless requirement of CLS Gen Mun § 50-j(l), which in turn invokes provisions of CLS Gen Mun § 50-i, and instant actions were initiated within one year and 90-day requirements of CLS Gen Mun § 50-e; only where finding is made that police officer's acts were clearly not within scope of employment is one-year limitations period of CLS CPLR § 215(3) applicable. Clark v City of Ithaca, 235 A.D.2d 746, 652 N.Y.S.2d 819, 1997 N.Y. App. Div. LEXIS 322 (N.Y. App. Div. 3d Dep't 1997).

Plaintiffs' claims based on allegations of intentional tortious conduct by municipal defendants were governed by one-year-and-90-day period set forth in CLS Gen Mun § 50-i, not one-year statutory period under CLS CPLR § 215. Wright v City of Newburgh, 259 A.D.2d 485, 686 N.Y.S.2d 74, 1999 N.Y. App. Div. LEXIS 2038 (N.Y. App. Div. 2d Dep't 1999).

Action for assault, intentional infliction of emotional distress, false arrest and imprisonment, battery, and "embarrassment and humiliation" arising out of plaintiff's arrest by New York City Housing Authority officers outside of her parents' apartment is governed by one year statute of limitations in CPLR § 215(3) governing intentional torts, not by the one year and 90 days limitation period of General Municipal Law § 50-i, because the latter does not apply to the Housing Authority or its personnel. Rosado v New York, 713 F. Supp. 124, 1989 U.S. Dist. LEXIS 6053 (S.D.N.Y. 1989).

Statute of limitations applicable to intentional tort claims brought against defendants after they became New York City police officers, but premised on actions taken when they were still Housing Authority officers, was one year period applied to intentional torts of Housing Authority police officers under CLS CPLR § 215(3), not one year and 90-day period applied to intentional torts of New York City police officers under CLS Gen Mun § 50-i. Morales v Irizarry, 976 F. Supp. 256, 1997 U.S. Dist. LEXIS 13979 (S.D.N.Y. 1997).

18. —Pleading limitations period as defense

Plaintiffs asserting claim against village for mistakenly issuing building permit to construct residence within boundaries of floodplain, and for erroneously issuing certificate of occupancy following construction, were not excused from compliance with one-year 90-day statute of limitations of CLS Gen Mun § 50-i because of alleged misrepresentations by village where only representation made by village was generalized statement in certificate of occupancy that structure complied with all laws, which later turned out to be incorrect. Okie v Village of Hamburg, 196 A.D.2d 228, 609 N.Y.S.2d 986, 1994 N.Y. App. Div. LEXIS 3396 (N.Y. App. Div. 4th Dep't 1994).

This section only applies to causes of action which arose after September 1, 1959, and a defense that the action is barred by limitations cannot be raised, in any event, by motion pursuant to rule 106(4) of the Rules of Civil Practice. Fichtner v Babylon, 24 Misc. 2d 56, 203 N.Y.S.2d 533, 1960 N.Y. Misc. LEXIS 2611 (N.Y. Sup. Ct. 1960).

In an action for damages for personal injuries sustained by plaintiff as a result of defendant city's alleged negligence in maintaining a defective sidewalk, defendant's motion to dismiss contending that the action was time barred under Gen Mun Law § 50-i would be granted where, although a settlement and resulting payment by the city had essentially been a waiver of the defense of the statute of limitations, such a waiver by a city is impermissible and ineffective in light of the strong public policy against payment by public bodies of time barred claims. Burg v New York, 108 Misc. 2d 357, 437 N.Y.S.2d 593, 1981 N.Y. Misc. LEXIS 2206 (N.Y. Sup. Ct. 1981).

The one-year, 90-day period within which to serve a complaint pursuant to Gen Mun Law § 50-i(1)(c) constitutes a statute of limitations rather than a condition precedent to suit and must be asserted by a defendant municipality by a motion to dismiss prior to answer or as a specific affirmative defense in the answer and a municipality which does neither must be deemed to have waived the defense, since no compelling reason or authority has been found for treating a municipality differently from other litigants, and the court is without authority sua sponte to deem the defense included in a municipality's answer. Eagle Ins. Co. v New York (New York City Health & Hospitals Corp.), 120 Misc. 2d 188, 466 N.Y.S.2d 134, 1983 N.Y. Misc. LEXIS 3689 (N.Y. Civ. Ct. 1983).

19. Grounds for extension of limitations period

Trial court erred in dismissing an injured party's personal injury action against a city; the time limitation in N.Y. Gen. Mun. Law § 50-i was a statute of limitations, and therefore a tolling statute, N.Y. C.P.L.R. 205(a), applied to the action, and the action was therefore filed in a timely fashion after a federal civil rights action was dismissed. Campbell v City of New York, 4 N.Y.3d 200, 791 N.Y.S.2d 880, 825 N.E.2d 121, 2005 N.Y. LEXIS 174 (N.Y. 2005).

In negligence action against city to recover damages for personal injuries, trial court acted properly in denying plaintiff motion to extend her time to serve complaint and for leave to file notice of claim nunc pro tunc, since court lacked power to grant extension beyond applicable period of limitations, one year and 90 days. Pavlicko v New York, 56 A.D.2d 840, 392 N.Y.S.2d 77, 1977 N.Y. App. Div. LEXIS 11170 (N.Y. App. Div. 2d Dep't 1977).

Where, at time motion seeking permission to serve late notice of claim was made, more than one year and 90 days had elapsed from time cause of action accrued, court was without discretion to grant relief sought. Ferrara v Terryville Fire Dist., 110 A.D.2d 749, 488 N.Y.S.2d 45, 1985 N.Y. App. Div. LEXIS 48651 (N.Y. App. Div. 2d Dep't 1985).

Special Term was without authority to grant application to serve late notice of claim against City of New York in personal injury action where application was made after expiration of one-year and 90-day limitations provided by CLS Gen Mun §§ 50-e and 50-i and record contained no facts to support finding of equitable estoppel against city. Siahaan v New York, 123 A.D.2d 620, 506 N.Y.S.2d 777, 1986 N.Y. App. Div. LEXIS 60768 (N.Y. App. Div. 2d Dep't 1986).

Time for petitioner to file notice of claim against city hospital was not tolled on theory that claim was based on medical malpractice and continuous treatment doctrine applied, since petitioner's cause of action, for negligent hiring and retention, was based on negligence rather than malpractice. Bates v New York City Health & Hosps. Corp., 194 A.D.2d 422, 599 N.Y.S.2d 246, 1993 N.Y. App. Div. LEXIS 6285 (N.Y. App. Div. 1st Dep't 1993).

As plaintiff was a minor at the time of her alleged injury in gym class and thus eligible for the infancy toll of N.Y. C.P.L.R. 208, and was confused as to the date of accident, and as defendants had timely notice of all of the essential facts, the trial court properly granted her motion to serve a late claim under N.Y. Gen. Mun. Law § 50-e to correct the date of the injury. Chirse v City School Dist. of Albany, 83 A.D.3d 1232, 920 N.Y.S.2d 841, 2011 N.Y. App. Div. LEXIS 3072 (N.Y. App. Div. 3d Dep't 2011).

The one-year and 90-day period in which to commence an action against a municipality (General Municipal Law, § 50-i, subd 1) may not be extended by operation of any other provision of law (General Municipal Law, § 50-i, subds 2, 3); therefore the 60-day period after a Comptroller's hearing in the City of New York during which a claimant is barred from initiating an action against the city will not operate to toll the Statute of Limitations for at least 60 days after the one-year and 90-day period in an action in which a Comptroller's hearing was waived by the city. Hayes v New York, 100 Misc. 2d 922, 420 N.Y.S.2d 269, 1979 N.Y. Misc. LEXIS 2578 (N.Y. Sup. Ct. 1979).

In personal injury action arising from collision involving town-owned motor vehicle operated by town employee, statute of limitations was not tolled pursuant to CLS CPLR § 210 as against both town and driver, as parties united in interest, based on death of driver prior to expiration of statute of limitations; thus where service was not made on town until 3 days after expiration of statute, and service was never effected on deceased driver, town was entitled to summary judgment dismissing complaint. Anselmo v Copertino, 134 Misc. 2d 956, 513 N.Y.S.2d 596, 1987 N.Y. Misc. LEXIS 2134 (N.Y. Sup. Ct. 1987).

Infant's application for leave to file a late notice of claim on a department of education and a board of education was denied because, although the infant had a reasonable excuse for the failure to file timely notice and the department and the board had actual notice, the order to show cause named and was served on the wrong party and thus the court lacked jurisdiction. Nacipucha v City of New York, 849 N.Y.S.2d 414, 18 Misc. 3d 846, 2008 N.Y. Misc. LEXIS 13 (N.Y. Sup. Ct. 2008).

20. —Delivery of summons for service

Action to recover damages for blasting operation allegedly performed was properly dismissed where it was not commenced within one year and 90 days after the happening of the event upon which the claim was based (Gen Mun L § 50-i), the tolling provision afforded by CPLR 204 subd a being inapplicable, and CPLR § 203, subd b(5) being of no aid to plaintiffs where there was no proof that summons was delivered to sheriff for service upon the defendant before the limitation period of § 50-i of the General Municipal Law had run. Bellows v County of Montgomery, 42 A.D.2d 1020, 348 N.Y.S.2d 248, 1973 N.Y. App. Div. LEXIS 3326 (N.Y. App. Div. 3d Dep't 1973).

Provision for 60-day tolling of applicable statute of limitations following delivery of a summons to the sheriff is not inconsistent with provisions of the General Municipal Law governing negligence actions and was applicable to action brought against school district to recover expenses for student's medical, nursing and hospital care following an accident. Clough v Board of Education, 56 A.D.2d 233, 392 N.Y.S.2d 170, 1977 N.Y. App. Div. LEXIS 10052 (N.Y. App. Div. 4th Dep't 1977).

Service of demand by New York City for examination under CLS Gen Mun § 50-h does not toll one year and 90-day statute of limitations contained in CLS Gen Mun § 50-i. Cruz v City of New York, 232 A.D.2d 446, 648 N.Y.S.2d 467, 1996 N.Y. App. Div. LEXIS 10151 (N.Y. App. Div. 2d Dep't 1996).

CPLR 203 providing that a claim is interposed against a defendant when summons is delivered for service if such summons is served within 60 days thereafter does not extend the period of service of claim upon a municipal corporation within one year and 90 days provided for in General Municipal Law § 50-i. Family Bargain Centers, Inc. v Herkimer (1968) 56 Misc 2d 768, 290 NYS2d 207, holding that notice of claim served on village more than one year and 90 days after cause of action arose was not timely even though delivered to sheriff within such time and served within 60 days of such delivery .

Where summons was served, within period in which action was required to be commenced under General Municipal Law, on sheriff, who plaintiff claimed was entitled under statute to additional 60 days to serve defendant county, and who did not serve defendant county until day, action having already been commenced, additional days should not be viewed in terms of stay, nor as extension of time, but rather as condition subsequent which had to be satisfied and plaintiff having opted to serve sheriff within one year and 90-day period timely commenced action on condition that service was subsequently perfected, which in fact it was. Maurer v County of Putnam, 89 Misc. 2d 302, 391 N.Y.S.2d 801, 1977 N.Y. Misc. LEXIS 1841 (N.Y. Sup. Ct. 1977).

21. —Proceeding to file late claim

One-year statute of limitations was tolled when personal injury claimant initiated successful proceedings to file a late claim 5 days before expiration of limitation period. Barchet v New York City Transit Authority, 20 N.Y.2d 1, 281 N.Y.S.2d 289, 228 N.E.2d 361, 1967 N.Y. LEXIS 1446 (N.Y. 1967).

In three separate actions seeking money damages against a city in which permissions to file late notices of claim were requested after the limitations period for commencing actions against a municipality had expired under Gen Mun Law § 50-i, the trial court erred in granting the claimant's motion to strike the city's defense that there was no compliance with the notice of claim requirement of Gen Mun Law § 50-e and claimants would be granted leave to file late notices of claim nunc pro tunc since an application for an extension may be made before or after the commencement of the action but not more than one year and 90 days after the cause of action accrued, unless the statute has been tolled; to allow a court to grant an extension which exceeded the statute of limitations would render meaningless that portion of Gen Mun Law § 50-e which expressly prohibits a court from doing so. Pierson v New York, 56 N.Y.2d 950, 453 N.Y.S.2d 615, 439 N.E.2d 331, 1982 N.Y. LEXIS 3523 (N.Y. 1982).

In a proceeding for leave to serve a late notice of claim against the city, leave to serve a late notice would be denied where counsel's delinquency in failing to timely commence the action would not be an acceptable excuse. Ferro v New York, Dep't of Correction, 88 A.D.2d 914, 450 N.Y.S.2d 571, 1982 N.Y. App. Div. LEXIS 17248 (N.Y. App. Div. 2d Dep't 1982).

Renewal of motion to file late notice of claim under CLS Gen Mun § 50-e in action against municipality does not relate back to date of initial motion which was denied with leave to renew. Rieara v New York, Dep't of Parks & Recreation, 156 A.D.2d 206, 548 N.Y.S.2d 466, 1989 N.Y. App. Div. LEXIS 15470 (N.Y. App. Div. 1st Dep't 1989).

Plaintiff was properly granted leave to serve late notice of claim, even though it offered no excuse for failing to file notice of claim within statutory 90-day period, where (1) plaintiff made persuasive showing that town had acquired actual notice of claim due to fact that one of its police officers was involved in accident, police promptly investigated, and they prepared written report, and (2) town made no particularized or persuasive showing that delay caused it substantial prejudice. Wetzel Servs. Corp. v Town of Amherst, 207 A.D.2d 965, 616 N.Y.S.2d 832, 1994 N.Y. App. Div. LEXIS 10135 (N.Y. App. Div. 4th Dep't 1994).

Lack of index number and file stamp mark on summons filed against New York City Health and Hospitals Corporation (HHC) in medical malpractice action was correctable, not jurisdictional, defect where plaintiff successfully moved by order to show cause for leave to file late notice of claim and had purchased index number in connection with that special proceeding, and that show-cause order was served on HHC, with copy of summons and complaint attached, on last day of one year and 90 day limitations period for filing of late notice of claim. Rybka v New York City Health & Hosps. Corp., 263 A.D.2d 403, 693 N.Y.S.2d 566, 1999 N.Y. App. Div. LEXIS 8243 (N.Y. App. Div. 1st Dep't 1999).

In proceeding under CLS Gen Mun § 50-e(5) for leave to serve late notice of claim against county medical center, continuous treatment doctrine did not apply where gap between petitioner's treatments at center was from July 1996 to January 1998, which exceeded applicable limitations period of one year and 90 days under CLS Gen Mun § 50-i. Bulger v Nassau County Med. Ctr., 266 A.D.2d 212, 697 N.Y.S.2d 345, 1999 N.Y. App. Div. LEXIS 11101 (N.Y. App. Div. 2d Dep't 1999), overruled in part, Lohnas v Luzi, 30 N.Y.3d 752, 94 N.E.3d 892, 71 N.Y.S.3d 404, 2018 N.Y. LEXIS 215 (N.Y. 2018)).

Supreme Court lacked authority to grant application under CLS Gen Mun § 50-e(5) for leave to serve late notice of claim against county medical center where petitioner did not seek such leave until well after expiration of applicable limitations period of one year and 90 days under CLS Gen Mun § 50-i. Bulger v Nassau County Med. Ctr., 266 A.D.2d 212, 697 N.Y.S.2d 345, 1999 N.Y. App. Div. LEXIS 11101 (N.Y. App. Div. 2d Dep't 1999), overruled in part, Lohnas v Luzi, 30 N.Y.3d 752, 94 N.E.3d 892, 71 N.Y.S.3d 404, 2018 N.Y. LEXIS 215 (N.Y. 2018)).

Supreme court abused its discretion in granting a patient's motion for leave to serve a late notice of claim approximately 10 years after the alleged malpractice occurred, as: (1) the 10-year delay was not the product of the patient's infancy, and the fact that the patient was not aware of the requirement to serve a notice of claim within 90 days of its accrual was not a reasonable excuse for the failure to do so; (2) the appeals court was not persuaded that the doctors had actual notice of the claim within the requisite 90-day period, or within a reasonable time thereafter; and (3) the patient failed to establish that the doctors would not be substantially prejudiced in maintaining their defense on the merits as a result of the lengthy delay in moving for leave to serve a late notice of claim. Williams v Nassau County Med. Ctr., 13 A.D.3d 363, 786 N.Y.S.2d 207, 2004 N.Y. App. Div. LEXIS 14888 (N.Y. App. Div. 2d Dep't 2004), aff'd, 6 N.Y.3d 531, 814 N.Y.S.2d 580, 847 N.E.2d 1154, 2006 N.Y. LEXIS 650 (N.Y. 2006).

Court errs in deeming a notice of claim timely served under N.Y. Gen. Mun. Law §§ 50-e(1)(a), 50-i(1)(a), nunc pro tunc, in the absence of a motion for such relief under N.Y. C.P.L.R. 2215. Pierre v City of New York, 22 A.D.3d 733, 804 N.Y.S.2d 365, 2005 N.Y. App. Div. LEXIS 11343 (N.Y. App. Div. 2d Dep't 2005).

Although an injured worker was properly granted leave to serve a late notice of claim under N.Y. Gen. Mun. Law § 50-i(1)(b), because the complaint failed to allege that 30 days had elapsed since service of the notice and that the claim had been neglected or refused, as required by N.Y. Gen. Mun. Law § 50-e, it should have been dismissed. Perkins v City of New York, 26 A.D.3d 483, 810 N.Y.S.2d 218, 2006 N.Y. App. Div. LEXIS 2363 (N.Y. App. Div. 2d Dep't 2006).

Order granting leave to a parent to file a late notice of her minor son's claim against a school board pursuant to N.Y. Gen. Mun. Law § 50-e(5) and N.Y. Educ. Law § 3813(2-a) was proper because the school board had actual notice of the essential facts and had not shown prejudice by the delay; although the parent did not establish a nexus between the delay and the child's infancy, the parent's failure to show a reasonable excuse for delay was not fatal to the application. Although the parent sought leave to file the late notice over four years after the alleged incident, the statute of limitations was tolled by the son's infancy, and the school board had actual knowledge of the essential facts of the claim no later than approximately four months after the incident. Matter of Hinton v New Paltz Cent. School Dist., 50 A.D.3d 1414, 857 N.Y.S.2d 753, 2008 N.Y. App. Div. LEXIS 3680 (N.Y. App. Div. 3d Dep't 2008).

Leave for parents to file late notice of claim pursuant to N.Y. Gen. Mun. Law §§ 50-e, 50-i, was proper because, among other

things, the parents' lack of awareness that the child had been injured was a reasonable excuse, and, further, the record indicated that the notice of claim may not have been untimely as to all the events alleged therein; in addition to casting doubt on the lateness of the notice of claim, the police report provided the school district with actual knowledge of at least some of the facts constituting the claim about two months after the most recent assault occurred and, thus, within a reasonable time after the claim arose. The school district alleged that the memories of the children involved were likely to have faded and that it had no documents or records related to the alleged incidents, but this was not established as the school district had not interviewed the children. Mindy O. v Binghamton City School Dist., 83 A.D.3d 1335, 921 N.Y.S.2d 696, 2011 N.Y. App. Div. LEXIS 3098 (N.Y. App. Div. 3d Dep't 2011).

In a medical malpractice case, the trial court erred in denying plaintiff's motion for leave to serve a late notice of claim on defendant city or to deem the proposed notice of claim timely served nunc pro tunc, as the city received the notice of claim less than one month after the expiration of the 90-day period for filing it and was not prejudiced since it acquired actual knowledge of the essential facts underlying the claim within a reasonable time after the 90-day period expired. Brunson v New York City Health & Hosps. Corp., 144 A.D.3d 854, 42 N.Y.S.3d 34, 2016 N.Y. App. Div. LEXIS 7503 (N.Y. App. Div. 2d Dep't 2016).

The time limitation of one year and 90 days after happening of the event upon which a claim against a county is based for commencement of suit is not extended by the fact that, at that time, an appeal from an order permitting late filing of notice of claim is still pending, as a plaintiff is free to commence his action at any time following 30 days from service of notice of claim. Shane v County of Albany, 44 Misc. 2d 100, 252 N.Y.S.2d 962, 1964 N.Y. Misc. LEXIS 1408 (N.Y. Sup. Ct. 1964).

Trial court properly denied a vehicle owner's motion for summary judgment and granted a city's motions for summary judgment because the owner failed to file a timely notice of claim against the city and failed to apply for an extension. Jagroop v Ramdhanny, 50 Misc. 3d 115, 26 N.Y.S.3d 821, 2016 N.Y. Misc. LEXIS 389 (N.Y. App. Term 2016).

22. — —Pendency of motion to file late notice of claim

The limitations period in Gen Mun Law § 50-i for bringing an action against a municipality is tolled from the date of the plaintiff's application to serve a late notice of claim until the date of an order granting such an application. Therefore, an action to recover damages for personal injuries was timely, despite the fact that it was commenced one year and 91 days after the date of the accident, where the limitations period was tolled for 65 days, from the date of plaintiff's order to show cause requesting leave to serve a late notice of claim until the date of the order granting the application. Flynn v Long Beach, 108 A.D.2d 840, 485 N.Y.S.2d 565, 1985 N.Y. App. Div. LEXIS 43165 (N.Y. App. Div. 2d Dep't 1985).

Statute of limitations for commencement of action against municipality is tolled from time plaintiff seeks leave to serve late notice of claim until order granting such relief goes into effect. Rieara v New York, Dep't of Parks & Recreation, 156 A.D.2d 206, 548 N.Y.S.2d 466, 1989 N.Y. App. Div. LEXIS 15470 (N.Y. App. Div. 1st Dep't 1989).

Defendant county was entitled to dismissal of malicious prosecution action on basis of one-year-and-90-day statute of limitations contained in CLS Gen Mun § 50-i(1) where (1) action accrued on October 6, 1987, (2) on August 23, 1988, plaintiff attempted to serve motion for leave to file late notice of claim on county and Supreme Court Justice, but papers were returned as no request for judicial intervention had been filed and matter had not been assigned to Justice, (3) plaintiff obtained proper forms and index number and filed motion for leave to file late notice of claim on October 18, 1988, (4) motion was granted and order was entered on December 22, 1988, and (5) summons and complaint were served on April 18, 1989; statute of limitations was tolled only from October 18 until December 22, not from August 23 until December 22. Farber v County of Hamilton, 158 A.D.2d 902, 551 N.Y.S.2d 699, 1990 N.Y. App. Div. LEXIS 1846 (N.Y. App. Div. 3d Dep't 1990).

Amendment of General Municipal Law provision governing applications to obtain leave to file late notice of claim did not preclude application of rule tolling statute of limitations during pendency of such application to action commenced against school district after elapse of one year and 90-day period by plaintiff, whose application for leave to file late notice was not granted until after elapse of that period, and consequently action was not barred by statute of limitations. Colantuono v Valley Cent. School Dist., 90 Misc. 2d 918, 396 N.Y.S.2d 590, 1977 N.Y. Misc. LEXIS 2189 (N.Y. Sup. Ct.), aff'd, 59 A.D.2d 926, 399 N.Y.S.2d 262, 1977 N.Y. App. Div. LEXIS 14144 (N.Y. App. Div. 2d Dep't 1977).

In an action for damages, the statute of limitations under N.Y. Gen. Mun. Law § 50-i(1) was tolled under N.Y. C.P.L.R. 204(a) during a 12-day period in which an initial application to proceed by order to show cause for leave to serve a late notice of claim was pending, as well as a period during which a second application for similar relief was pending. Ambrus v City of New York, 87 A.D.3d 341, 928 N.Y.S.2d 719, 2011 N.Y. App. Div. LEXIS 5789 (N.Y. App. Div. 2d Dep't 2011).

23. —Reliance upon representations of defendant

Where there was no evidence in record that defendant made any representation or engaged in any course of conduct which led plaintiff to believe that it would be unnecessary to commence litigation in order to settle plaintiff's claim or that if litigation were commenced, the statute of limitations would not be pleased in bar, defendant's motion to dismiss plaintiff's complaint pursuant to General Municipal Law § 50-i should have been granted. Brands v Sperduti, 43 A.D.2d 903, 351 N.Y.S.2d 249, 1974 N.Y. App. Div. LEXIS 5956 (N.Y. App. Div. 4th Dep't 1974).

In a personal injury suit to recover for injuries sustained when plaintiff was struck by a bus operated by a city, plaintiff's summons and complaint, served one year and 58 days after the accrual of plaintiff's action, was untimely, even though defendant had requested a hearing pursuant to Gen Mun Law § 50-h, where the one-year statute of limitations in Pub A Law § 1317 governed plaintiff's action and defendant's wish to have a Gen Mun Law § 50-h hearing would not make the statute of limitations in Gen Mun Law § 50-i applicable or estop defendant from invoking the shorter statute of limitations in Pub A Law § 1317, where even if defendant's actions were misleading plaintiff was charged with knowledge of the proper statute of limitations, and where even if the action were governed by the period in Gen Mun Law § 50-i the action would be untimely in that specific language in § 50-i precluded any tolling of the statute of limitations due to a request by the municipality for hearing. Simon v Capital Dist. Transp. Authority, 95 A.D.2d 902, 463 N.Y.S.2d 913, 1983 N.Y. App. Div. LEXIS 18873 (N.Y. App. Div. 3d Dep't 1983).

Town was not estopped from invoking statute of limitations of CLS Gen Mun § 50-i where plaintiffs had filed timely notice of claim in compliance with CLS Gen Mun § 50-e, but claimed they were induced to forego further proceedings while awaiting settlement promised by town's insurance company, since evidence did not support assertion that town consented to or induced stay or postponement of suit so as to warrant estoppel, as there was no written or oral stipulation between parties agreeing to postpone commencement of action. Goyea v Bangor, 144 A.D.2d 886, 535 N.Y.S.2d 205, 1988 N.Y. App. Div. LEXIS 11850 (N.Y. App. Div. 3d Dep't 1988).

Dismissal of a pedestrian's suit for his slip and fall on a sidewalk next to a road was proper since his suit against a village was filed late under N.Y. Gen. Mun. Law § 50-i and the late filing was not due to his being misled by the village about its responsibility for the repair of the road and sidewalk to mislead him to delay his suit. The village was not estopped. Dowdell v Greene County, 14 A.D.3d 750, 788 N.Y.S.2d 439, 2005 N.Y. App. Div. LEXIS 85 (N.Y. App. Div. 3d Dep't 2005).

In a personal injury action against a city in which a timely notice of claim was served but plaintiff failed to serve a summons and complaint within the one-year and 90-day period required by subdivision 1 of section 50-i of the General Municipal Law, plaintiff is not entitled to an order compelling the city to accept service of a summons and complaint or an order estopping the city from asserting the Statute of Limitations as a defense since the city's waiver of a Comptroller's hearing did not amount to

misrepresentation which would lull the plaintiff into a sense of security, and there was no communication by the city which could be interpreted to be fraudulent or misleading. Hayes v New York, 100 Misc. 2d 922, 420 N.Y.S.2d 269, 1979 N.Y. Misc. LEXIS 2578 (N.Y. Sup. Ct. 1979).

24. —Statutory stays

For purpose of section of General Municipal Law declaring the one year and 90-day period of limitations to be applicable "not withstanding any inconsistent provisions of law," statute providing that where the commencement of an action is stayed by statutory prohibition, the statute of limitations affecting such action is tolled for the duration of the stay is an "inconsistent provision" and statute of limitations applicable to tort claims against a municipality are not extended by the statutory stays. Serravillo v New York City Transit Authority, 51 A.D.2d 1027, 381 N.Y.S.2d 308, 1976 N.Y. App. Div. LEXIS 11819 (N.Y. App. Div. 2d Dep't 1976), aff'd, 42 N.Y.2d 918, 397 N.Y.S.2d 1006, 366 N.E.2d 1360, 1977 N.Y. LEXIS 2250 (N.Y. 1977).

Serving notice of motion for permission to file late notice of claim had effect of tolling statute of limitations until time when such permission was granted by Special Term, but statute was no longer tolled thereafter, even though municipality appealed from Special Term's order, and thus statute resumed running and barred plaintiff's action when he failed to serve timely notice of claim; time for serving notice was not further extended by provision of CLS CPLR § 5519, giving municipalities automatic stay of "all proceedings to enforce the judgement or order appealed from," since statute did not prohibit plaintiff from serving notice of claim while municipality's appeal was pending. Dublanica v Rome Hospital/Murphy Memorial Hospital, 126 A.D.2d 977, 511 N.Y.S.2d 752, 1987 N.Y. App. Div. LEXIS 42097 (N.Y. App. Div. 4th Dep't), app. denied, 70 N.Y.2d 605, 519 N.Y.S.2d 1028, 513 N.E.2d 1308, 1987 N.Y. LEXIS 18221 (N.Y. 1987).

Court rejected plaintiffs' excuse for not commencing action within one-year-and-90-day limitation period, as extended during pendency of their application for leave to serve late notice of claim, as CLS CPLR § 204(a) toll lasted only until entry of order granting leave to file late notice of claim, there being no indication that plaintiffs did not then have complete control over acts necessary to comply with notice of claim requirements, and fact that order granting leave concluded with statement that proposed notice of claim would be deemed timely served if order with notice of entry was served within 20 days, without directing settlement of judgment, should not have created any confusion. T.K. Jewelry Inc. v City of New York, 283 A.D.2d 170, 724 N.Y.S.2d 590, 2001 N.Y. App. Div. LEXIS 4252 (N.Y. App. Div. 1st Dep't 2001).

This section is applicable only to claims arising out of injuries occurring on or after September 1, 1959, and, as to prior injuries, it is still the rule that when commencement of an action against the municipality is stayed by statute until a prescribed procedure is carried out, the limitation period is extended for the full period of the statutory stay. De Jose v Hempstead, 25 Misc. 2d 780, 208 N.Y.S.2d 6, 1960 N.Y. Misc. LEXIS 2323 (N.Y. Sup. Ct. 1960).

The one-year and 90-day period in which to commence an action against a municipality (General Municipal Law, § 50-i, subd 1) may not be extended by operation of any other provision of law (General Municipal Law, § 50-i, subds 2, 3); therefore the 60-day period after a Comptroller's hearing in the City of New York during which a claimant is barred from initiating an action against the city will not operate to toll the Statute of Limitations for at least 60 days after the one-year and 90-day period in an action in which a Comptroller's hearing was waived by the city. Hayes v New York, 100 Misc. 2d 922, 420 N.Y.S.2d 269, 1979 N.Y. Misc. LEXIS 2578 (N.Y. Sup. Ct. 1979).

Time within which personal injury action must be commenced against municipality and municipality's board of education under CLS Gen Mun § 50-i, CLS Educ § 3813, is not tolled during time claimant moves to file amended notice of claim under CLS Gen Mun § 50-e. Gomez v New York, 130 Misc. 2d 272, 496 N.Y.S.2d 216, 1985 N.Y. Misc. LEXIS 3178 (N.Y. Sup. Ct. 1985).

25. —Estoppel of defendant

Plaintiff's allegations that he retained law firm in which his prior attorney was partner to represent him in his claim against village, that former attorney was partner of attorney for village and that former attorney who negotiated settlement of claim failed to advise plaintiff that he could not represent him because he was partner of attorney for village were insufficient to raise triable issue of fact as to whether plaintiff's former attorney's actions were attributable to village so as to estop village from asserting affirmative defenses, inter alia, of plaintiff's failure to file notice of claim, failure to timely commence action and execution of valid general release with respect to claim. Ogilvie v Hoosick Falls, 55 A.D.2d 797, 389 N.Y.S.2d 907, 1976 N.Y. App. Div. LEXIS 15593 (N.Y. App. Div. 3d Dep't 1976).

Where multicar accident giving rise to alleged claim against county occurred in May 1972, where no notice of claim was ever served by petitioners and no suit against county was commenced by them, where application for leave to serve late notice of claim was not made until June 1976, where such application was motivated by April 1976 jury verdict against county in another action arising out of same accident, and where petitioners failed to establish any viable claim of estoppel against county, failure to seek leave to file late claim at time petitioners' counsel knew or should have known of possible "involvement" of county constituted laches and claim was absolutely time barred. Self v County of Nassau, 57 A.D.2d 963, 395 N.Y.S.2d 67, 1977 N.Y. App. Div. LEXIS 12243 (N.Y. App. Div. 2d Dep't), app. denied, 42 N.Y.2d 811, 1977 N.Y. LEXIS 3922 (N.Y. 1977).

Defendants county and county hospital were not collaterally estopped from raising question of timely service of notice of claim on cross motions for summary judgment by reason of prior order in disclosure motion that at time of injury infant plaintiff was ward of county and thus notice provisions did not apply. Umlauf v County of Erie, 58 A.D.2d 991, 397 N.Y.S.2d 487, 1977 N.Y. App. Div. LEXIS 13203 (N.Y. App. Div. 4th Dep't 1977).

In a damages action, the complaint was properly dismissed where the city-defendant's demand for examination did not toll the statute of limitations, and where the city was not equitably estopped from asserting the statute of limitations in that plaintiffs made no attempt to preserve their action by requesting that the examination be rescheduled for an earlier date. Graber v New York, 89 A.D.2d 598, 452 N.Y.S.2d 468, 1982 N.Y. App. Div. LEXIS 17680 (N.Y. App. Div. 2d Dep't 1982).

Where an estate administrator filed an untimely notice of claim against the New York City Health and Hospitals Corporation (HHC) because the medical malpractice claim accrued on the day the decedent was discharged from the HHC hospital and continuous treatment did not toll the statute of limitations, equitable estoppel barred HHC's statute of limitations defense because HHC delayed in furnishing a complete set of records. Walker v New York City Health & Hosps. Corp., 234 N.Y.L.J. 114, 2005 N.Y. Misc. LEXIS 3552 (N.Y. Sup. Ct. Dec. 14, 2005), rev'd, 36 A.D.3d 509, 828 N.Y.S.2d 365, 2007 N.Y. App. Div. LEXIS 598 (N.Y. App. Div. 1st Dep't 2007).

26. —Continuous treatment of plaintiff

Defendant, New York City Health and Hospitals Corporation, was properly denied summary judgment in action alleging failure to timely diagnose and treat plaintiff's breast cancer, despite its contention that alleged misdiagnosis was made more than 1 year and 90 days prior to filing of plaintiff's notice of claim, where fact issue existed as to whether frequency and intensity of intervening monitoring of plaintiff constituted continuous treatment so as to toll limitations period. Oksman v City of New York, 271 A.D.2d 213, 705 N.Y.S.2d 360, 2000 N.Y. App. Div. LEXIS 3874 (N.Y. App. Div. 1st Dep't 2000).

Appeals court reversed order dismissing patients' suit against municipal health care providers and remitted for trial court to determine if continuous treatment doctrine made claims for particular conditions' treatments before the N.Y. Gen. Mun. Law §§ 50-e, 50-i one year and 90-day claim deadline timely filed. McCoy v City of New York, 10 A.D.3d 724, 782 N.Y.S.2d 120, 2004 N.Y. App. Div. LEXIS 11068 (N.Y. App. Div. 2d Dep't 2004).

Under the continuous treatment doctrine, a notice of claim period does not begin to run until the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint. There existed questions of fact as to whether the doctrine was appli-

cable, so dismissal of certain claims was not appropriate. McCoy v City of New York, 10 A.D.3d 724, 782 N.Y.S.2d 120, 2004 N.Y. App. Div. LEXIS 11068 (N.Y. App. Div. 2d Dep't 2004).

27. —Other grounds for extension

Action commenced in October 1994, arising from automobile accident that occurred prior to 1992 amendment to CLS Gen Mun § 205-e, was timely under revival provision of amended statute, and defendant city was not entitled to summary judgment on ground that action was not timely commenced under CLS Gen Mun § 50-i; 1992 amendment of § 205-e, in response to judicial decisions under prior statutory amendment, was intended to encompass claims for any non-premises-related accidents occurring on or after effective date of original enactment (January 1, 1987) and on or before effective date of 1992 amendment (July 17, 1992). Schiavone v City of New York, 92 N.Y.2d 308, 680 N.Y.S.2d 445, 703 N.E.2d 256, 1998 N.Y. LEXIS 3215 (N.Y. 1998).

Arrangements between counsel resulting in adjournments of Comptroller's hearings did not extend statutory period of limitations nor form basis of estoppel where there remains a reasonable period of time within which to commence action. Ortiz v New York, 28 A.D.2d 1098, 284 N.Y.S.2d 370, 1967 N.Y. App. Div. LEXIS 3091 (N.Y. App. Div. 1st Dep't 1967).

Action to recover damages for blasting operation allegedly performed was properly dismissed where it was not commenced within one year and 90 days after the happening of the event upon which the claim was based (Gen Mun L § 50-i), the tolling provision afforded by CPLR 204 subd a being inapplicable, and CPLR § 203, subd b(5) being of no aid to plaintiffs where there was no proof that summons was delivered to sheriff for service upon the defendant before the limitation period of § 50-i of the General Municipal Law had run. Bellows v County of Montgomery, 42 A.D.2d 1020, 348 N.Y.S.2d 248, 1973 N.Y. App. Div. LEXIS 3326 (N.Y. App. Div. 3d Dep't 1973).

Where timely action was filed against county in federal district court for trespass to lands, and such action later was dismissed for want of jurisdiction, statute of limitations was tolled and suit brought in state court within six months after dismissal of federal action was timely. Smith v Rensselaer County, 52 A.D.2d 384, 384 N.Y.S.2d 223, 1976 N.Y. App. Div. LEXIS 12004 (N.Y. App. Div. 3d Dep't 1976).

Any delay on the part of plaintiffs in a medical malpractice action in serving the notice of claim and in commencing the action was attributable solely to the acts and omissions of defendants in failing promptly to furnish plaintiffs with the hospital record which contained the evidentiary matter upon which the action was based, and which for a period of over two years following plaintiffs' request had been kept from their counsel's view. Under the circumstances, service of the notice of claim, pursuant to Gen Mun Law § 50-e, approximately 32 months after the operation complained of was timely, and the commencement of the action 49 days thereafter was also within the time limit mandated by Gen Mun Law § 50-i. Cassidy v County of Nassau, 84 A.D.2d 742, 443 N.Y.S.2d 742, 1981 N.Y. App. Div. LEXIS 15908 (N.Y. App. Div. 2d Dep't 1981).

After claimant's service of notice of claim on Metropolitan Transit Authority and its subsidiary commuter railroad, their service of notice of oral examination on claimant did not operate to toll period to bring suit under either CLS Pub A § 1276 or CLS Gen Mun § 50-i. Rose v Metro N. C. Railroad, 143 A.D.2d 993, 533 N.Y.S.2d 629, 1988 N.Y. App. Div. LEXIS 10424 (N.Y. App. Div. 2d Dep't 1988), app. dismissed, 73 N.Y.2d 994, 540 N.Y.S.2d 1005, 538 N.E.2d 357, 1989 N.Y. LEXIS 266 (N.Y. 1989).

Plaintiff was not entitled to serve late notice of claim with regard to civil rights and defamation causes of action where he alleged that certain defendants illegally accessed state computer records in February 1994 and learned that plaintiff had been arrested for rape many years earlier, he claimed he first learned of identity of defendants in October 1994, and he offered no reasonable excuse for his failure to take legal action until January 1995. Gorman v Sachem Cent. Sch. Dist., 232 A.D.2d 452, 648 N.Y.S.2d 461, 1996 N.Y. App. Div. LEXIS 10167 (N.Y. App. Div. 2d Dep't 1996).

Where a claimant has prematurely instituted suit against a city, prior to submitting to examination with respect to his claim as required by subd. 5 of § 50-h, and stipulated to a discontinuance on demand of the city at time of examination, the discontinuance cannot be vacated, nor can a new action be instituted, after lapse of the maximum time period for instituting an action under this section. Hantverk v New York, 31 Misc. 2d 836, 222 N.Y.S.2d 243, 1961 N.Y. Misc. LEXIS 2126 (N.Y. Sup. Ct. 1961).

Where noncompliance of the plaintiff with the above statute was caused by defendant's conduct in unlawfully placing plaintiff under restraint, it will not be heard to complain of his failure to comply with the conditions precedent to the beginning of an action specified in such statute. Caminito v New York, 45 Misc. 2d 241, 256 N.Y.S.2d 670, 1965 N.Y. Misc. LEXIS 2278 (N.Y. Sup. Ct. 1965), aff'd in part, modified, 25 A.D.2d 848, 269 N.Y.S.2d 826, 1966 N.Y. App. Div. LEXIS 4364 (N.Y. App. Div. 2d Dep't 1966).

Action, which was brought by automobile driver to recover for injuries allegedly sustained in collision with school bus and which was not commenced within one year and 90 days after collision, was barred under statute providing that action against school district for injuries allegedly sustained by reason of negligence or wrongful act of school district or its employee must be commenced within one year and 90 days after happening of event upon which claim is based, despite automobile driver's claim that she did not incur necessary hospital, medical and prescription drug charges within statutory time period and thus could not have commenced suit within such period. Cota v Madison Cent. School Dist., 89 Misc. 2d 646, 392 N.Y.S.2d 233, 1977 N.Y. Misc. LEXIS 1913 (N.Y. Sup. Ct. 1977), aff'd, 62 A.D.2d 1083, 404 N.Y.S.2d 547, 1978 N.Y. App. Div. LEXIS 11178 (N.Y. App. Div. 3d Dep't 1978).

Claims for false arrest, assault and battery, and intentional infliction of emotional distress against a police lieutenant (LT) were not time-barred as the relation back doctrine applied since: (1) the claims arose out of the same incident as those against the City; (2) the City, as the employer of LT, might be vicariously liable for LT's alleged wrongful conduct committed while he was engaged in the City's business; (3) LT and the City were united in interest; (4) by reason of the employer-employee relationship, LT was charged with notice of the action; and (5) the detainee's failure to name LT in the original complaint was a mistake and not an intentional decision to gain a tactical advantage over the City. Scott v City of New Rochelle, 986 N.Y.S.2d 819, 44 Misc. 3d 366, 2014 N.Y. Misc. LEXIS 2279 (N.Y. Sup. Ct. 2014).

28. Infancy as toll

For claims against a public corporation arising after September 1, 1975, the outer limit of the period during which the claimant may apply for leave to serve late notice of his claim is to be measured by the time limited for the commencement of the action by the claimant against a public corporation, as specified in the current version of subdivision 5 of section 50-e of the General Municipal Law, and not by the one-year period following the happening of the event upon which the claim is based as was required by the predecessor provision, since no serious prejudice to the potentially liable public corporation would result from such a limited retroactive application of the amendment because the public corporation was already at risk with respect to these claims on the amendment's effective date pursuant to the former version of subdivision 5 of section 50-e and there is thus no danger of the revival of ancient claims as distinguished from the mere continuance of ones that have not finally expired. Furthermore, the period during which a court may grant an extension of the time within which to serve notice of claim is tolled during the infancy of the claimant in accordance with CPLR 208, since the amended version of subdivision 5 of section 50-e makes the period during which such an extension may be granted coextensive with the Statute of Limitations governing the claim (General Municipal Law, § 50-i, subd 1, par [c]), and where the time for commencing an action on the claim is tolled under CPLR 208, there will be a concomitant tolling of the time during which late notice of claim may be served. The mere availability of the toll does not in itself mandate that an extension be granted in every case involving a disability covered by CPLR 208, since the decision to grant or deny an extension under subdivision 5 of section 50-e is still purely a discretionary one, and the courts remain free to deny an application for an extension in the interests of fairness to the potentially liable public corporation. Cohen v Pearl River Union

Free School Dist., 51 N.Y.2d 256, 434 N.Y.S.2d 138, 414 N.E.2d 639, 1980 N.Y. LEXIS 2723 (N.Y. 1980).

Subdivision 2 of this section reflects only a legislative intent to supersede the numerous specific statutes which preceded § 50-i, but not to eliminate the applicability of § 60 of the Civil Practice Act (now CPLR § 208) tolling time limitations during infancy, which is still applicable in favor of an infant as against the requirement that a tort action against a municipality be commenced within one year and 90 days after happening of the event upon which the claim is based. La Fave v Franklin, 20 A.D.2d 738, 247 N.Y.S.2d 72, 1964 N.Y. App. Div. LEXIS 4385 (N.Y. App. Div. 3d Dep't 1964).

The time of disability by reason of infancy is not part of the time limited by subdivisions 1 and 2 § 50-i of the General Municipal Law for the commencement of an action against a municipality. Abbatemarco v Brookhaven, 26 A.D.2d 664, 272 N.Y.S.2d 450, 1966 N.Y. App. Div. LEXIS 3733 (N.Y. App. Div. 2d Dep't 1966).

The infancy tolling provisions of CPLR 208 are available to a plaintiff maintaining an action against a municipality notwithstanding the limitations provisions contained in General Municipal Law § 50-i. Corbett v Fayetteville-Manlius Cent. School Dist., 34 A.D.2d 379, 311 N.Y.S.2d 540, 1970 N.Y. App. Div. LEXIS 4361 (N.Y. App. Div. 4th Dep't 1970).

The period in which an extension of time to serve a notice of claim against a public corporation can be granted pursuant to Gen Mun §§ 5-e, 50a in a medical malpractice case is tolled by the infancy provisions of CPLR § 208. Yepez v County of Nassau, 79 A.D.2d 1023, 435 N.Y.S.2d 51, 1981 N.Y. App. Div. LEXIS 9935 (N.Y. App. Div. 2d Dep't 1981).

In a negligence action against a school district to recover damages for personal injuries, plaintiffs' crossmotion for leave to serve a late notice of claim was properly denied where the crossmotion was made more than one year and 90 days after plaintiff attained his majority, and where the school district's knowledge of the accident and receipt of statements for medical and dental services within 90 days from the date of the accident could not be equated with written notice of the claim. Briganti v Harrison Cent. School Dist., 91 A.D.2d 648, 457 N.Y.S.2d 89, 1982 N.Y. App. Div. LEXIS 19513 (N.Y. App. Div. 2d Dep't 1982).

A personal injury action against the school district was properly dismissed as barred by the statute of limitations, even though CPLR § 208 tolled the statute of limitations during the infant plaintiff's minority, where the action still had to be brought within the one year and 90 day period contained in Gen Mun Law § 50-i after plaintiff obtained majority, and where the claim was not filed within that period. Corpas v Copiague Union Free School Dist., 100 A.D.2d 951, 475 N.Y.S.2d 76, 1984 N.Y. App. Div. LEXIS 18092 (N.Y. App. Div. 2d Dep't 1984).

Proceeding seeking leave to file late summons and complaint on City of New York based on claimed toll for infancy should be dismissed since no cause of action exists for leave to file late summons and complaint. Meletiche v City of New York, 260 A.D.2d 385, 686 N.Y.S.2d 316, 1999 N.Y. App. Div. LEXIS 3556 (N.Y. App. Div. 2d Dep't 1999).

No toll for infancy would apply where injured infant was represented by her mother as guardian, and by counsel, both of whom were in position to adequately protect her interests. Meletiche v City of New York, 260 A.D.2d 385, 686 N.Y.S.2d 316, 1999 N.Y. App. Div. LEXIS 3556 (N.Y. App. Div. 2d Dep't 1999).

In action arising from school playground accident resulting in injuries to infant plaintiff, toll for infancy applied to statute of limitations set forth in CLS Gen Mun § 50-i even though mother timely served notice of claim on defendant school district; thus, infant plaintiff's personal injury claim, commenced more than one year and 90 days after accident, was not time-barred but mother's derivative claim was properly dismissed. Blackburn v Three Village Cent. Sch. Dist., 270 A.D.2d 298, 705 N.Y.S.2d 53, 2000 N.Y. App. Div. LEXIS 2707 (N.Y. App. Term 2000).

Although infancy automatically tolled the statutory period for commencing an action against a municipality, under N.Y. Gen. Mun. Law § 50-i and N.Y. C.P.L.R. 208, the infancy of an injured claimant, standing alone, did not compel the granting of an application for leave to serve a late notice of claim; in determining whether to grant leave to serve a late notice of claim, the court had to consider certain factors, including whether the claim involved an infant, whether the claimant demonstrated a reasonable excuse for failing to timely serve a notice of claim, whether the municipality acquired actual knowledge of the facts constituting the claim within 90 days from its accrual or a reasonable time thereafter, and whether the municipality was substantially prejudiced by the delay, under N.Y. Gen. Mun. Law § 50-e(5). Nairne v N.Y. City Health & Hosps. Corp., 303 A.D.2d 409, 755 N.Y.S.2d 855, 2003 N.Y. App. Div. LEXIS 2124 (N.Y. App. Div. 2d Dep't 2003).

Trial court properly denied a motion which was, in effect, for leave to serve a late notice of claim upon a department of education (DOE) on behalf of an infant; the mother and the infant failed to show that the DOE acquired timely, actual knowledge of the essential facts of the claim, and did not offer a reasonable excuse for the delay in seeking leave to serve a late notice. Further, the infancy, without any showing of a nexus between the infancy and the delay, was insufficient to constitute a reasonable excuse. Bazile v City of New York, 94 A.D.3d 929, 943 N.Y.S.2d 131, 2012 N.Y. App. Div. LEXIS 2808 (N.Y. App. Div. 2d Dep't 2012).

Amendments to Civil Practice Law and Rules providing that an infant is a person who has not attained the age of 18 years may not be applied so as to result in a finding that the infant's disability, or the appropriate statute of limitations, had expired prior to the effective date of the amendments when the disability or statute of limitations had not yet expired under the original version of the statute. Atwell v Playland Rye Com., 86 Misc. 2d 13, 380 N.Y.S.2d 845, 1975 N.Y. Misc. LEXIS 3355 (N.Y. Sup. Ct. 1975), aff'd, Atwell v Rye Playland Com., 58 A.D.2d 636, 396 N.Y.S.2d 39, 1977 N.Y. App. Div. LEXIS 12708 (N.Y. App. Div. 2d Dep't 1977).

29. —Particular actions

An action to recover damages for injuries sustained by parents and infant son who ran into an open ditch excavated by the village as untimely commenced and absent a showing of fraud as rightfully dismissed for failure to file timely summonses and complaints upon the village within the statutory period of one year and 90 days; however the infant's action was entitled to the benefit of the tolling provisions of CPLR 208 and his action was timely. Rathbun v Waverly, 35 A.D.2d 227, 315 N.Y.S.2d 237, 1970 N.Y. App. Div. LEXIS 3501 (N.Y. App. Div. 3d Dep't 1970).

Unless infant was ward of county and thus exempt from serving notice of claim upon county and county hospital for injury allegedly result of malpractice in hospital, complaint was required to be dismissed for failure to serve timely notices upon county and hospital. Umlauf v County of Erie, 58 A.D.2d 991, 397 N.Y.S.2d 487, 1977 N.Y. App. Div. LEXIS 13203 (N.Y. App. Div. 4th Dep't 1977).

Statute of limitations was tolled during infancy of infant plaintiff who allegedly was injured as result of medical malpractice in county hospital. Umlauf v County of Erie, 58 A.D.2d 991, 397 N.Y.S.2d 487, 1977 N.Y. App. Div. LEXIS 13203 (N.Y. App. Div. 4th Dep't 1977).

Where plaintiff did not reach her majority until September 1, 1974, she in effect had until September 1, 1975, plus an additional 90 days, within which to commence negligence action to recover damages for injuries sustained by her at age 12 ½ while performing required physical dexterity test at school on March 27, 1968, and she fulfilled that requirement by serving a summons and complaint in November, 1975. McGill v Board of Education, 59 A.D.2d 888, 399 N.Y.S.2d 41, 1977 N.Y. App. Div. LEXIS 14075 (N.Y. App. Div. 2d Dep't 1977), app. dismissed, 43 N.Y.2d 949, 1978 N.Y. LEXIS 2879 (N.Y. 1978), app. dismissed, 43 N.Y.2d 893, 403 N.Y.S.2d 499, 374 N.E.2d 396, 1978 N.Y. LEXIS 1815 (N.Y. 1978).

In an administratrix' action against a city for wrongful death, and for conscious pain and suffering of her infant children who died in a residential fire, the causes of action for conscious pain and suffering were properly dismissed on the ground of an untimely notice of claim, although the cause of action for wrongful death was properly not dismissed, since the period for serving notice of claim for wrongful death was measured from the

appointment of the administratrix, rather than from the date of the fire. Further, the administratrix' motion for leave to file a late notice of claim for conscious pain and suffering was properly denied as untimely where any tolling of the time in which to seek permission to serve a late notice would be improper in that the infancy disability had been removed by the death of the infants on the date of the fire. Gibbons v Troy, 91 A.D.2d 707, 457 N.Y.S.2d 950, 1982 N.Y. App. Div. LEXIS 19593 (N.Y. App. Div. 3d Dep't 1982).

Since plaintiff's decedent died "immediately," there was no period during which limitation period of CLS Gen Mun § 50-i could be tolled by reason of disability of infancy as to those causes of action concerning decedent infant's personal injuries and conscious pain and suffering. Myrick v County of Suffolk, 139 A.D.2d 633, 527 N.Y.S.2d 273, 1988 N.Y. App. Div. LEXIS 4386 (N.Y. App. Div. 2d Dep't 1988).

In action against municipal defendants brought by decedent's mother on behalf of decedent's infant daughter (his sole distributee), who was born 5 weeks after decedent's death, court erred in applying CLS CPLR § 208 to extend one-year and 90-day statute of limitations to estate's cause of action to recover for decedent's conscious pain and suffering; unlike wrongful death cause of action, action for personal injuries suffered by decedent is personal to decedent. Hidalgo v New York City Health & Hosps. Corp., 210 A.D.2d 481, 620 N.Y.S.2d 471, 1994 N.Y. App. Div. LEXIS 13127 (N.Y. App. Div. 2d Dep't 1994).

IAS court correctly applied one year and 90-day limitation period from date of plaintiff's 18th birthday in action to recover for personal injuries sustained at birth allegedly due to negligence and malpractice of employees of New York City Health and Hospitals Corporation, rather than 3-year limitation period applicable at time when his cause of action accrued, where action was instituted after July 13, 1979 effective date of statutory amendments providing for such one year 90-day period. Lozada by Lozada v Baeck, 225 A.D.2d 405, 640 N.Y.S.2d 3, 1996 N.Y. App. Div. LEXIS 2708 (N.Y. App. Div. 1st Dep't), app. denied, 88 N.Y.2d 816, 651 N.Y.S.2d 406, 674 N.E.2d 336, 1996 N.Y. LEXIS 3348 (N.Y. 1996).

Tort action against city would be remitted for decision on infant plaintiff's application for permission to file late notice of claim where Statute of Limitations and time within which to file late notice of claim were tolled by infancy, and defendant did not have opportunity to respond to application because Supreme Court did not address that issue. Perry v City of New York, 238 A.D.2d 326, 656 N.Y.S.2d 301, 1997 N.Y. App. Div. LEXIS 3415 (N.Y. App. Div. 2d Dep't 1997).

Infant plaintiffs were not under "disability because of infancy" so as to invoke tolling provisions CLS CPLR § 208, and thus their personal injury action against city was barred by limitations under CLS Gen Mun § 50-i, where their interests were protected by law guardian and counsel, who filed timely notice of claim under CLS Gen Mun § 50-e. Henry v City of New York, 244 A.D.2d 93, 676 N.Y.S.2d 616, 1998 N.Y. App. Div. LEXIS 8805 (N.Y. App. Div. 2d Dep't 1998), rev'd, 94 N.Y.2d 275, 702 N.Y.S.2d 580, 724 N.E.2d 372, 1999 N.Y. LEXIS 3928 (N.Y. 1999).

Although infant plaintiff's guardian, represented by counsel, failed to commence action within applicable one year and 90-day limitations period, infant's tort action against city was not time-barred where initial prosecution of his claim by his legal representatives did not preclude him from invoking disability toll under CLS CPLR § 208; unlike situation of wrongful death action, which at least technically is that of estate, causes of action at issue were in all respects those of infant, who should not be penalized for failures or neglect of his guardian or attorney. Rosado by Olivencia v Langsam Prop. Serv. Corp., 251 A.D.2d 258, 675 N.Y.S.2d 53, 1998 N.Y. App. Div. LEXIS 7791 (N.Y. App. Div. 1st Dep't 1998).

Where plaintiff was 19 years old at time of accident at county playland on July 14, 1974, her disability to commence an action ended on September 1, 1974, the effective date of amendments to Civil Practice Law and Rules providing that an infant is a person who has not attained the age of 18 years, and disability did not continue until she attained age of 21 years. Atwell v Playland Rye Com., 86 Misc. 2d 13, 380 N.Y.S.2d 845, 1975 N.Y. Misc. LEXIS 3355 (N.Y. Sup. Ct. 1975), aff'd, Atwell v Rye Playland Com., 58 A.D.2d 636, 396 N.Y.S.2d 39, 1977 N.Y. App. Div. LEXIS 12708 (N.Y. App. Div. 2d Dep't 1977).

30. —Derivative actions

The provisions of CPLR 208 which extend the time within which the action may be brought by an infant toll the time limitations of § 50-i of the General Municipal Law during infancy but the suspension of the running of the statute of limitations during infancy does not inure to the benefit of the parent's cause of action for loss of services and medical expenses. Kratz v Dussault, 33 A.D.2d 826, 305 N.Y.S.2d 734, 1969 N.Y. App. Div. LEXIS 2706 (N.Y. App. Div. 3d Dep't 1969).

An action to recover damages for injuries sustained by parents and infant son who ran into an open ditch excavated by the village was untimely commenced and absent a showing of fraud was rightfully dismissed for failure to file timely summonses and complaints upon the village within the statutory period of one year and 90 days; however the infant's action was entitled to the benefit of the tolling provisions of CPLR 208 and his action was timely. Rathbun v Waverly, 35 A.D.2d 227, 315 N.Y.S.2d 237, 1970 N.Y. App. Div. LEXIS 3501 (N.Y. App. Div. 3d Dep't 1970).

Where summons and complaint were served on March 16, 1973, with respect to injuries sustained by infant plaintiff on playground on April 5, 1967, commencement was timely as to infant plaintiff but not as to father, since as to father action was governed by one year plus 90 day limitations. Not suspended by infancy. Sadler v Horvath, 44 A.D.2d 905, 357 N.Y.S.2d 558, 1974 N.Y. App. Div. LEXIS 4894 (N.Y. App. Div. 4th Dep't 1974).

In tort action against city, living infant plaintiff's mother could not claim protection of infancy disability toll under CLS CPLR § 208. Rosado by Olivencia v Langsam Prop. Serv. Corp., 251 A.D.2d 258, 675 N.Y.S.2d 53, 1998 N.Y. App. Div. LEXIS 7791 (N.Y. App. Div. 1st Dep't 1998).

Trial court properly denied the motion of a mother, in her individual capacity, for leave to file a late notice of a personal injury claim pursuant to N.Y. Gen. Mun. Law § 50-e(5) on a department of education after the statute of limitations had expired because the infancy toll, N.Y. C.P.L.R. 208, was personal to the infant and did not extend to a derivative cause of action. Bazile v City of New York, 94 A.D.3d 929, 943 N.Y.S.2d 131, 2012 N.Y. App. Div. LEXIS 2808 (N.Y. App. Div. 2d Dep't 2012).

Where plaintiffs, an infant and his mother, timely served a notice of claim on a town alleging its nonfunctioning street lights caused the infant to be hit by a car, their amended notice of claim with respect to the mother's derivative claim was time-barred because the statute of limitations expired before plaintiffs moved to serve a late notice of claim, and the toll for infancy pursuant to N.Y. C.P.L.R. 208 did not apply to a parent's derivative cause of action. Palacios v Town of N. Hempstead, 165 A.D.3d 967, 86 N.Y.S.3d 117, 2018 N.Y. App. Div. LEXIS 6841 (N.Y. App. Div. 2d Dep't 2018).

Trial court acted within its discretion by not allowing a late notice of claim to be served upon the city on behalf of the mother in her individual capacity because the statute of limitations for her derivative cause of action had expired at the time the motion was made. E.R. v Windham, 181 A.D.3d 736, 122 N.Y.S.3d 106, 2020 N.Y. App. Div. LEXIS 1684 (N.Y. App. Div. 2d Dep't 2020).

Although derivative cause of action of father and natural guardian of infant plaintiffs had expired, this section was not a bar to the infants' cause of action. Berment v County of Erie, 53 Misc. 2d 366, 278 N.Y.S.2d 551, 1967 N.Y. Misc. LEXIS 1643 (N.Y. Sup. Ct. 1967).

Father's derivative cause of action against county playland commission for injuries sustained by daughter in bumper car-ride collision at playland was barred by statute requiring action against county playland commission to be commenced within period of nine months from date of the accident, even if daughter's cause of action survived by reason of her infancy at time of the accident. Atwell v Playland Rye Com., 86 Misc. 2d 13, 380 N.Y.S.2d 845, 1975 N.Y. Misc. LEXIS 3355 (N.Y. Sup. Ct. 1975), aff'd, Atwell v Rye Playland Com., 58 A.D.2d 636, 396 N.Y.S.2d 39, 1977 N.Y. App. Div. LEXIS 12708 (N.Y. App. Div. 2d Dep't 1977).

31. Waiting period before commencement of action

A provision formerly appeared in § 50-c requiring a 30-day time lapse between service of notice of claim and commencement of suit "against the municipality and the appointee," which was deemed applicable only where suit was against both jointly, not where it was against the appointee only. Circle Cab Corp. v Rizzuto, 295 N.Y.S. 185, 162 Misc. 547, 1937 N.Y. Misc. LEXIS 1644 (N.Y. Mun. Ct. 1937).

The provision for 30 days' notice in the above statute extends the 3 months' statute of limitations contained in General Municipal Law § 71. Mr. Paint Shop, Inc. v Rochester, 44 Misc. 2d 684, 254 N.Y.S.2d 728, 1964 N.Y. Misc. LEXIS 1175 (N.Y. Sup. Ct. 1964).

32. —Action commencement before waiting period has elapsed

A complaint against a town fails to state a cause of action where it is based upon a claim within the coverage of § 50-e and it appears on the face of the complaint that 30 days had not elapsed between service of notice under that section and commencement of action against the town. Renwick v Allegany, 18 A.D.2d 877, 236 N.Y.S.2d 902, 1963 N.Y. App. Div. LEXIS 4731 (N.Y. App. Div. 4th Dep't 1963).

In an action resulting from a fall allegedly sustained on a municipal golf course, as to which plaintiffs had served an untimely notice of claim on defendant-town had moved to have the notice declared duly served pursuant to Gen Mun Law §§ 50-e and 50-i, and, while the decision on the motion was still pending, had served a summons and complaint alleging compliance with service of the notice of claim requirement of Gen Mun Law § 50-e, plaintiffs were not entitled to default judgment when defendant failed to comply with provisions of CPLR § 320(a) requiring it to move, appear and/or answer within 20 days where, when plaintiffs had moved to validate their notice of claim, defendant, being on notice of such motion, could reasonably have relied on the fact that plaintiffs themselves realized that their notice was deficient so that when the complaint had been received by defendant, before the motion to validate had been decided, defendant could again reasonably rely on the fact that compliance with Gen Mun Law § 50-e, as alleged in the complaint, could only be considered complete if plaintiffs' motion to validate was granted, which did not happen until well after the complaint was served, and the reasonable reliance permitted defendant under the circumstances provided sufficient excuse for delay or default in answering, especially since no prejudice whatever had been shown by plaintiff. Kilbride v Fallsburg, 108 A.D.2d 1100, 485 N.Y.S.2d 668, 1985 N.Y. App. Div. LEXIS 43397 (N.Y. App. Div. 3d Dep't 1985).

Trial court properly dismissed cause of action for malicious prosecution against city where claim was filed on July 20, 1982, but cause did not accrue until April 28, 1983 when claimant was acquitted of criminal charges, and though claimant attached copy of notice of claim to complaint, he did not serve new notice of claim. McCoy v Travelers Ins. Cos., 152 A.D.2d 955, 543 N.Y.S.2d 840, 1989 N.Y. App. Div. LEXIS 9844 (N.Y. App. Div. 4th Dep't 1989).

Defense motion to dismiss personal injury complaint would be granted without prejudice to plaintiff serving new complaint on complying with CLS Gen Mun § 50-h(1), pursuant to CLS CPLR § 205, despite expiration of one-year-and-90-day limitation period of CLS Gen Mun § 50-i. Secor v Town of Orangetown, 250 A.D.2d 588, 672 N.Y.S.2d 392, 1998 N.Y. App. Div. LEXIS 4903 (N.Y. App. Div. 2d Dep't 1998)).

A cross motion by defendant city to accelerate an affirmative defense seeking to dismiss plaintiffs' complaint in a personal injury action as fatally defective under Gen Mun Law § 50-i in that the action was commenced within 30 days after the filing of the notice of claim would be denied, where the city's answer both asserted and denied that there had been compliance with the statute and since there was no conceivable prejudice in denying the cross motion in view of the fact that the city apparently had no intention of adjusting the claim nor ever exhibited such an intention. Torres v New York, 123 Misc. 2d 107, 473 N.Y.S.2d 101, 1984 N.Y. Misc. LEXIS 2950 (N.Y. Sup. Ct. 1984).

In wrongful death action against city, requirements of CLS Gen Mun § 50-i(1)(b) were not satisfied by filing and service of amended complaint, where original complaint was never served on defendants, who thus were not given notice of action within 2-year limitations period. Mroz v City of Tonawanda, 999 F. Supp. 436, 1998 U.S. Dist. LEXIS 4577 (W.D.N.Y. 1998).

Mother's wrongful death claim on behalf of son who committed suicide on February 5, 1994 after rough treatment by police is time-barred, even though she was appointed administratrix on January 30, 1996, filed summons and complaint in state court and served defendants with notice of claim on February 2, 1996, and action was timely commenced within 2-year wrongful death statute of limitations, because complaint did not and could not allege that 30 days had elapsed since service of notice of claim, which is precondition of suit against municipality and its police officers imposed by CLS Gen Mun Law § 50-i(1)(b). Mroz v City of Tonawanda, 999 F. Supp. 436, 1998 U.S. Dist. LEXIS 4577 (W.D.N.Y. 1998).

33. —Pleading requirements

Default judgment obtained against a municipality is not subject to motion to vacate because the complaint on the basis of which such judgment was obtained did not contain an allegation that 30 days had elapsed since service of notice of claim, as required by this section, the defect not being jurisdictional. Cochrane v Gates, 18 A.D.2d 1048, 238 N.Y.S.2d 411, 1963 N.Y. App. Div. LEXIS 4244 (N.Y. App. Div. 4th Dep't 1963).

Failure of a complaint against a municipality to allege that more than 30 days have elapsed since service of notice of claim does not affect jurisdiction of the court in which the action was brought to proceed to judgment in the absence of any objection to sufficiency of the complaint. Cochrane v Gates, 18 A.D.2d 1048, 238 N.Y.S.2d 411, 1963 N.Y. App. Div. LEXIS 4244 (N.Y. App. Div. 4th Dep't 1963).

The complaint in a tort action against a school district is required to contain the allegation that 30 days have elapsed since filing of the notice of claim, since § 3813, subd. 2 of the Education Law requires filing of notice of claim in accordance with § 50-e. Widger v Central School Dist., 20 A.D.2d 296, 247 N.Y.S.2d 364, 1964 N.Y. App. Div. LEXIS 4290 (N.Y. App. Div. 4th Dep't 1964).

Failure of personal injury claim against school board to allege that 30 days had elapsed since service of notice of claim as required by General Municipal Law § 50-i was not jurisdictional. Snyder v Board of Education, 42 A.D.2d 912, 347 N.Y.S.2d 727, 1973 N.Y. App. Div. LEXIS 3550 (N.Y. App. Div. 2d Dep't 1973).

34. Applicability to particular entities; city

Where a municipal employee is operating a municipally owned vehicle within the scope of his employment at the time of an accident and is entitled to be idemnified under General Municipal Law § 50-b, the municipality is the real party defendant in interest and the provisions of § 50-e and § 50-i of the General Municipal Law relative to the service of a notice of claim and the short statute of limitations of one year and 90 days is applicable to any action against the employee arising therefrom. Fitzgerald v Lyons, 39 A.D.2d 473, 336 N.Y.S.2d 940, 1972 N.Y. App. Div. LEXIS 3606 (N.Y. App. Div. 4th Dep't 1972).

In an action brought by the original low bidder for a city construction contract, alleging that the city appropriated its design and incorporated it into specifications accompanying a second advertisement for bids after the first bidding procedure was declared illegal, the city's motion to dismiss the complaint was properly granted where the bidder did not comply with notice requirements in his filing of a previous notice of claim that referred only to the city's alleged failure to carry out the original bidding procedure in conformity with law, where the previous notice was in connection with a complaint that was dismissed for failure to state a cause of action, and where the instant causes of action seeking money damages for the city's alleged failure to discharge its duty by providing compensation for the taking of private property for public use were not included in the original notice of claim. Phelps Steel, Inc. v Glens Falls, 89 A.D.2d 652, 453 N.Y.S.2d 118, 1982 N.Y. App. Div. LEXIS 17768 (N.Y. App. Div. 3d Dep't 1982).

Plaintiff's service of notice of claim against city was untimely where event on which claim was based was city's alleged negligent failure to supervise installation of sewer line by town in 1988. Scarzfava v City of Newburgh, 255 A.D.2d 436, 680 N.Y.S.2d 595, 1998 N.Y. App. Div. LEXIS 11994 (N.Y. App. Div. 2d Dep't 1998).

Regarding the libel action against the village, for the alleged wrongful act of one of its officials, the correction officer was required to comply with the notice of claim requirement set forth in N.Y. Gen. Mun. Law § 50-e; it thus followed that the time limitation in N.Y. Gen. Mun. Law § 50-i(1)(c) applied. Ruggiero v Phillips, 292 A.D.2d 41, 739 N.Y.S.2d 797, 2002 N.Y. App. Div. LEXIS 2741 (N.Y. App. Div. 4th Dep't 2002).

Action seeking money damages allegedly caused by the failure of the city to discharge a duty imposed upon it by law, specifically to provide a wage differential, sounded in tort; therefore, where the decedent failed to serve his claim upon the city within 90 days after the claim arose, pursuant to N.Y. Gen. Mun. Law § 50-e, or within the statute of limitations period of one year and 90 days, pursuant to N.Y. Gen. Mun. Law §§ 50-e and 50-i, the action was dismissed. Estate of Kalis v City of Buffalo, 306 A.D.2d 932, 762 N.Y.S.2d 195, 2003 N.Y. App. Div. LEXIS 6774 (N.Y. App. Div. 4th Dep't), app. denied, 100 N.Y.2d 515, 769 N.Y.S.2d 202, 801 N.E.2d 423, 2003 N.Y. LEXIS 3375 (N.Y. 2003).

Even though no statute explicitly identified a public library as a public corporation entitled to notice of personal injury claims, a library operated on land owned by a school district that was largely funded by the school district clearly qualified as a municipal public corporation and was entitled to timely notice of a claim by a patron injured in a fall on the sidewalk approaching the library. Bovich v East Meadow Pub. Lib., 16 A.D.3d 11, 789 N.Y.S.2d 511, 2005 N.Y. App. Div. LEXIS 1354 (N.Y. App. Div. 2d Dep't 2005).

Trial court did not err in granting a city summary judgment on plaintiff's common law harassment claim, based on the city's issuance of notices of violation, as New York did not recognize that cause of action and plaintiff failed to serve a timely notice of claim on the city. Shahid v City of New York, 144 A.D.3d 1127, 43 N.Y.S.3d 88, 2016 N.Y. App. Div. LEXIS 7907 (N.Y. App. Div. 2d Dep't 2016).

Trial court properly granted a city's motion to dismiss an injured worker's complaint and denied his cross-motion for leave to amend the complaint because he failed to serve a timely notice of claim, and his proposed complaint alleging a "maritime tort," in addition to the Labor Law causes of action, was patently devoid of merit inasmuch as the accident allegedly occurred at a location not subject to maritime jurisdiction. Fernandez v City of New York, 148 A.D.3d 995, 51 N.Y.S.3d 100, 2017 N.Y. App. Div. LEXIS 1986 (N.Y. App. Div. 2d Dep't 2017).

This section, in requiring that an action must be commenced within one year and 90 days after the accident, applies not only to an action against the city but also to an action against a city employee for whose neglect or misconduct the city is responsible. Hahin v Buffalo, 41 Misc. 2d 1018, 246 N.Y.S.2d 917, 1964 N.Y. Misc. LEXIS 2043 (N.Y. Sup. Ct. 1964).

By virtue of ¶ 2 of §§ 50-i and 101 of the General Construction Law, the General Municipal Law prevails over a general statute of limitations with respect to the commencement of actions in tort against a public corporation, and with respect to an action for libel and slander instituted against two city employees and the city the provisions of General Municipal Law § 50-i apply not only to the action against the city but also to the action against the city's employees, so that the employee's asserted defense pursuant to CPLR 215 was invalid. Sorge v New York, 56 Misc. 2d 414, 288 N.Y.S.2d 787, 1968 N.Y. Misc. LEXIS 1650 (N.Y. Sup. Ct. 1968).

Where both the employees and the City of New York are sued as defendants, and the employees are entitled to indemnity, then a claim against all the defendants must be filed with the city in accordance with General Municipal Law § 50-e and suit must be instituted pursuant to General Municipal Law § 50-i. Sorge v New York, 56 Misc. 2d 414, 288 N.Y.S.2d 787, 1968 N.Y. Misc. LEXIS 1650 (N.Y. Sup. Ct. 1968).

Plaintiff, whose complaint against the City of New York based upon the conduct of a marshal in carrying out an eviction was dismissed because a marshal is not an agent, servant or employee of the city, is not granted leave to replead and assert a new cause of action in bailment against the city since such claim is now time-barred. Iorio v New York, 96 Misc. 2d 955, 410 N.Y.S.2d 195, 1978 N.Y. Misc. LEXIS 2711 (N.Y. Civ. Ct. 1978).

Action against City of New York by Pennsylvania resident who was riparian owner of land along Delaware river to recover damages resulting from diversion of water alleged a continuing trespass and delay in filing notice of claim barred any claim for damages incurred more than 90 days prior to filing. Gregory v New York, 346 F. Supp. 140, 1972 U.S. Dist. LEXIS 12974 (S.D.N.Y. 1972), disapproved, Fountain v Metropolitan Atlanta Rapid Transit Authority, 678 F.2d 1038, 1982 U.S. App. LEXIS 18222 (11th Cir. 1982).

Recycling company's tortious-interference with prospective advantage claim against a city was dismissed for failure to comply with N.Y. Gen. Mun. Laws §§ 50-e(1)(a) and 50-i(1) for the failure to timely serve a notice of claim. Further, the company could not assert equitable estoppel to prevent the dismissal as there was no allegation that the city induced the company not to serve a notice of claim within 90 days of accrual of the company's cause of action. Allocco Recycling, Ltd. v Doherty, 378 F. Supp. 2d 348, 2005 U.S. Dist. LEXIS 14269 (S.D.N.Y. 2005).

35. —County

In an action to determine adverse claims of title to real estate and to recover damages for trespass brought against a town and county, it was held that no statutory notice of claim was necessary as a prerequisite to the action against the town. However, the action against the county was governed by § 52 of the County Law, and plaintiff could not maintain such an action without compliance with §§ 50-e and 50-i of the General Municipal Law. Seabreeze Marina at Smithtown, Inc. v Smithtown, 25 A.D.2d 780, 269 N.Y.S.2d 662, 1966 N.Y. App. Div. LEXIS 4497 (N.Y. App. Div. 2d Dep't 1966).

In wrongful death action against county based on improper highway maintenance, running of statute of limitations was governed by statute relating to liability of counties for injuries caused by defective highways, and not by General Municipal Law, so that the time began to run from the service of notice of claim and not from the time of accident. Treib v County of Dutchess, 56 A.D.2d 866, 392 N.Y.S.2d 473, 1977 N.Y. App. Div. LEXIS 11228 (N.Y. App. Div. 2d Dep't), app. dismissed, 42 N.Y.2d 824, 1977 N.Y. LEXIS 3951 (N.Y. 1977).

Although it is unnecessary to file a notice of claim in an equitable action against a county seeking only injunctive relief, inasmuch as any claim or notice of claim against a county for damages arising at law or in equity must be made and served in compliance with section 50-e of the General Municipal Law and the action must be commenced pursuant to the provisions of section 50-i of the General Municipal Law (County Law, § 52), if plaintiffs do not file a notice of claim pursuant to section 52 of the County Law and the complaint seeks both injunctive and monetary relief, a motion to dismiss the cause of action for damages is granted, leaving a viable cause of action for injunctive relief; plaintiffs should not be permitted to frustrate the legitimate purposes of the notice-of-claim statutes by grafting a claim for monetary damages to a claim seeking injunctive relief. Malcuria v Seneca, 66 A.D.2d 421, 414 N.Y.S.2d 401, 1979 N.Y. App. Div. LEXIS 10029 (N.Y. App. Div. 4th Dep't 1979).

Any claim or notice of claim against a county for damages arising at law or in equity must be made and served in compliance with section 50-e of the General Municipal Law and the action must be commenced pursuant to the provisions of section 50-i of the General Municipal Law (County Law, § 52); in an equitable action seeking only injunctive relief, it is unnecessary to file a notice of claim. Malcuria v Seneca, 66 A.D.2d 421, 414 N.Y.S.2d 401, 1979 N.Y. App. Div. LEXIS 10029 (N.Y. App. Div. 4th Dep't 1979).

In a wrongful death action against a county arising from circumstances indicating that plaintiff's decedent, while a prisoner in the custody of the county, was hospitalized on August 22, 1979, and from that date until his death on December 25, 1979,

decedent was continuously in a coma, and a notice of claim was filed on March 25, 1980 but no application for leave to file a late notice of claim was made until November 18, 1982, an order granting the decedent's administrator's application for leave to file a late notice of claim was erroneous since, giving plaintiff the benefit of tolling of the statute of limitations, under CPLR § 208, during the entire period that he was in a coma, the application was not made until approximately 35 months after the disability ceased and after the expiration of the maximum period permitted by Gen Mun Law §§ 50-e, 50-i. Donovan v County of Niagara, 100 A.D.2d 740, 473 N.Y.S.2d 635, 1984 N.Y. App. Div. LEXIS 17744 (N.Y. App. Div. 4th Dep't 1984), aff'd, 64 N.Y.2d 973, 489 N.Y.S.2d 61, 478 N.E.2d 202, 1985 N.Y. LEXIS 16673 (N.Y. 1985).

In action for wrongful autopsy performed by county medical examiner, court erred in dismissing complaint as time barred under one-year limitation period applicable to coroners under CLS CPLR § 215(1), for regardless of whether offices of medical examiner and coroner were same, action was brought against county, not medical examiner, so that one-year 90-day limitation period of CLS Gen Mun § 50-i was applicable. Estate of Adkins v County of Nassau, 141 A.D.2d 603, 529 N.Y.S.2d 524, 1988 N.Y. App. Div. LEXIS 6589 (N.Y. App. Div. 2d Dep't 1988).

In action under Human Rights Law, in which court dismissed claim that county employee was subjected to retaliatory demotion by certain county official because plaintiffs failed to allege discriminatory intent or to allege that other county defendants acquiesced in demotion, plaintiffs were properly permitted to replead claim against individual defendants; however, leave to replead claim against county should have been denied, since notice of claim was not filed within 90 days, and motion to file late notice was not made within period of statute of limitations. Summers v County of Monroe, 147 A.D.2d 949, 537 N.Y.S.2d 703, 1989 N.Y. App. Div. LEXIS 1294 (N.Y. App. Div. 4th Dep't), app. dismissed, 74 N.Y.2d 735, 544 N.Y.S.2d 819, 543 N.E.2d 84, 1989 N.Y. LEXIS 4950 (N.Y. 1989).

In tort action against county defendants, 90-day notice provision of CLS Gen Mun § 50-i(1)(a) applied where plaintiff did not request extension or allege that county employees acted beyond scope of their employment, and plaintiff merely asserted that employees' acts, in furtherance of their duties, should not be condoned as "municipal functions." Pravda v County of Saratoga, 255 A.D.2d 717, 680 N.Y.S.2d 705, 1998 N.Y. App. Div. LEXIS 11901 (N.Y. App. Div. 3d Dep't 1998), app. dismissed, 93 N.Y.2d 1000, 695 N.Y.S.2d 745, 717 N.E.2d 1082, 1999 N.Y. LEXIS 1963 (N.Y. 1999), cert. denied, 528 U.S. 1063, 120 S. Ct. 619, 145 L. Ed. 2d 513, 1999 U.S. LEXIS 8308 (U.S. 1999).

In a medical malpractice action, the trial court properly rejected the patient's claim that the continuous treatment doctrine tolled the statute of limitations, as the patient did not rebut the county medical center's showing that there was no relationship between the medical center and the subsequently treating hospital; thus, summary judgment was properly granted to medical center for the patient's failure to commence the action within the one-year and 90-day statute of limitations contained in N.Y. Gen. Mun. Law § 50-i. Conway v Nassau County Med. Ctr., 298 A.D.2d 423, 748 N.Y.S.2d 390, 2002 N.Y. App. Div. LEXIS 9870 (N.Y. App. Div. 2d Dep't 2002).

County caseworker, accompanied police officers who entered the arrestee's home, conducted a search, discovered marihuana and arrested her; after the criminal charge was dismissed, the arrestee filed an action alleging a violation of her Fourth Amendment rights, pursuant to 42 U.S.C.S. § 1983, and her state constitutional rights. Because the record did not indicate that the arrestee timely filed a notice of claim and the complaint was not filed within one year and 90 days of the date the action accrued, it did not appear the arrestee could prevail in her cause of action alleging a state constitutional tort against the county. Pierce v Village of Horseheads Police Dept., 107 A.D.3d 1354, 970 N.Y.S.2d 95, 2013 N.Y. App. Div. LEXIS 4775 (N.Y. App. Div. 3d Dep't 2013).

Trial court was statutorily prohibited from extending the time in which an inmate had to serve her notice of claim upon the county because the inmate's failure to file her 2013 application with the proper clerk amounted to a nonwaivable jurisdictional defect, rendering the proceeding a nullity, and, as such, the inmate's 2015 submissions did not relate back to her 2013 attempted application. Matter of Dougherty v County of Greene, 161 A.D.3d 1253, 76 N.Y.S.3d 648, 2018 N.Y. App. Div. LEXIS 3146 (N.Y. App. Div. 3d Dep't 2018).

Worker's fraud claim against the county, alleging the fraud was the concealment of the presence of asbestos at the hockey arena, was time-barred because the worker admitted he became aware on March 24, 2012, but commenced the instant action more than 1 year and 90 days after his discovery of the alleged fraud. O'Brien v County of Nassau, 164 A.D.3d 684, 83 N.Y.S.3d 311, 2018 N.Y. App. Div. LEXIS 5716 (N.Y. App. Div. 2d Dep't 2018).

Fact that county first initiated litigation against defendant motorist does not relieve the defendant from complying with the provisions of General Municipal Law §§ 50-e and 50-i relating to service of notice of claim, where the defendant seeks affirmative relief by way of a counterclaim, and counterclaim should be dismissed in the absence of such compliance. County of Nassau v Wolfe, 51 Misc. 2d 848, 273 N.Y.S.2d 984, 1966 N.Y. Misc. LEXIS 1410 (N.Y. Dist. Ct. 1966).

Action against Town Justice, town and county for malicious prosecution, false arrest and false imprisonment, which, as to county, was based on acts of deputy sheriff, was subject to limitations period of one year and 90 days provided by statute governing actions against, inter alia, a town or county, rather than one-year period prescribed for actions against, inter alia, a sheriff or for, inter alia, false imprisonment or malicious prosecution. Szerlip v Finnegan, 77 Misc. 2d 655, 354 N.Y.S.2d 555, 1974 N.Y. Misc. LEXIS 1209 (N.Y. Sup. Ct. 1974), aff'd, 47 A.D.2d 603, 365 N.Y.S.2d 1016, 1975 N.Y. App. Div. LEXIS 13000 (N.Y. App. Div. 2d Dep't 1975).

A medical malpractice action commenced against defendant physician, who treated plaintiff solely as a county employee, was barred by Gen Mun Law § 50-i where the action was not commenced within one year and 90 days of the accident, in that the provisions of said section apply not only to an action against a municipality but also to an action against the municipality's employee. Wahrmann v County of Nassau, 114 Misc. 2d 89, 450 N.Y.S.2d 742, 1982 N.Y. Misc. LEXIS 3439 (N.Y. Sup. Ct. 1982).

Inmate's motion for leave to amend was denied because amendment would be futile when there was insufficient evidence to support a finding that the inmate complied with the notice of claim requirements before filing his state law claims against the county and the county officials, pursuant to N.Y. Gen. Mun. Law §§ 50-d, 50-e, and 50-i, and as required by N.Y. County Law § 52. Although there were provisions under N.Y. Mun. Law § 50-e for addressing a late notice of claim, such a late claim needed to be addressed by a state court and not by the federal district court if the inmate wanted to pursue state law claims against the county and the county officials. Horvath v Daniel, 423 F. Supp. 2d 421, 2006 U.S. Dist. LEXIS 18439 (S.D.N.Y. 2006).

Battery claims that a former prisoner asserted against a county were barred by N.Y. Gen. Mun. Law § 50 because the prisoner did not file timely notices of claim as required by N.Y. Gen. Mun. Law § 50-e and the prisoner's action was filed after the expiration of the one-year-and-ninety-day statute of limitations set forth in N.Y. Gen. Mun. Law § 50-i(1). Varricchio v County of Nassau, 702 F. Supp. 2d 40, 2010 U.S. Dist. LEXIS 24976 (E.D.N.Y. 2010).

36. —Hospitals

City hospital was not estopped, on grounds of its alleged failure to publicize its municipal status, from asserting defense to malpractice action that statutes required 90-day notice of claim against it. Guarrera v Lee Mem. Hosp., 51 A.D.2d 867, 380 N.Y.S.2d 161, 1976 N.Y. App. Div. LEXIS 11485 (N.Y. App. Div. 4th Dep't), app. dismissed, 39 N.Y.2d 942, 1976 N.Y. LEXIS 3538 (N.Y. 1976).

Adoptive father's cause of action against county for adoptive's infant's injuries arising out of claimed medical malpractice of physician in county hospital was barred by applicable statute of limitations. Umlauf v County of Erie, 58 A.D.2d 991, 397 N.Y.S.2d 487, 1977 N.Y. App. Div. LEXIS 13203 (N.Y. App. Div. 4th Dep't 1977).

In a malpractice action arising out of the defendant doctor's allegedly negligent treatment of plaintiff at a New York City ambulatory care facility, the defendant's motion for summary judgment dismissing the complaint is granted, the Court of Appeals having determinined on a prior appeal involving the defendant's attempt to implead the city that the facility was a public institution maintained in part by the City of New York within the meaning of subdivision 1 of section 50-d of the General Municipal Law and that, accordingly, the city was required to indemnify the doctor, since plaintiff failed to comply with subdivision 2 of section 50-d of the General Municipal Law in that no notice of claim was served on the city pursuant to section 50-e of the General Municipal Law and the action was commenced well beyond the one-year and three-month Statute of Limitations provided in section 50-i of the General Municipal Law; the fact that the city did not interpose the statutory defenses in the prior impleader action does not require denial of the motion, since plaintiff was in no way misled by the city's previous position that under a contractual arrangement it was not required to indemnify the defendant doctor and in no way relied on it, and, moreover, the motion for summary judgment was brought by the defendant doctor. Additionally, the notice of claim and short Statute of Limitations provisions of sections 50-e and 50-i are defenses which may be raised by the doctor even though he, and not the city, was sued, and defendant is not estopped from interposing the statutory defenses since there was no evidence that the city had entered into arrangements with regard to the facility that had the capacity to, and in fact did, mislead the plaintiff to her detriment. Norr v Spiegler, 72 A.D.2d 20, 423 N.Y.S.2d 177, 1980 N.Y. App. Div. LEXIS 9653 (N.Y. App. Div. 1st Dep't 1980), aff'd, 53 N.Y.2d 661, 438 N.Y.S.2d 1000, 421 N.E.2d 120, 1981 N.Y. LEXIS 2319 (N.Y. 1981).

In a medical malpractice action, a motion for summary judgment by defendant municipality on the ground that the action was barred by the statute of limitations was properly denied where, under the circumstances, the "continuous treatment" doctrine was applicable to toll operation of the statutory period. Petrushansky v New York City Health & Hospitals Corp., 102 A.D.2d 819, 476 N.Y.S.2d 378, 1984 N.Y. App. Div. LEXIS 18992 (N.Y. App. Div. 2d Dep't 1984).

Coney Island Medical Group (CIMG), as well as doctors who serviced Coney Island Hospital, were employees of Health and Hospitals Corporation of New York City (HHC) by terms of affiliation agreement between CIMG and HHC, and were thus entitled to benefits of abbreviated period of limitation under CLS Gen Mun § 50-i. DeGradi v Coney Island Medical Group, P. C., 172 A.D.2d 582, 568 N.Y.S.2d 412, 1991 N.Y. App. Div. LEXIS 4672 (N.Y. App. Div. 2d Dep't), app. denied, 78 N.Y.2d 860, 576 N.Y.S.2d 218, 582 N.E.2d 601, 1991 N.Y. LEXIS 4686 (N.Y. 1991).

One-year-and-90-day statute of limitations, applicable in medical malpractice action against New York City Health and Hospitals Corporation (HHC) and several of its employees, was not tolled during waiting period between demand by HHC for hearing under CLS Gen Mun § 50-h and date of hearing; court's prior holding in Hauptman v New York City Health and Hospitals Corporation, 162 AD2d 588, was no longer to be followed. Mignott v New York City Health & Hosps. Corp., 250 A.D.2d 165, 680 N.Y.S.2d 565, 1998 N.Y. App. Div. LEXIS 12391 (N.Y. App. Div. 2d Dep't 1998), app. denied, 93 N.Y.2d 807, 691 N.Y.S.2d 1, 712 N.E.2d 1244, 1999 N.Y. LEXIS 1168 (N.Y. 1999).

Plaintiffs in medical malpractice action failed to comply with conditions precedent to commencing action, as specified in CLS Gen Mun §§ 50-e and 50-i, where plaintiffs' counsel, with minimum effort, could have surmised that it was necessary to file notice of claim, because name at top of all prenatal care records for plaintiff patient, which were on file with defendant hospital's labor and delivery unit, was Suffolk County Department of Health Services. Fuentes v Brookhaven Mem'l Hosp., 251 A.D.2d 540, 674 N.Y.S.2d 744, 1998 N.Y. App. Div. LEXIS 7535 (N.Y. App. Div. 2d Dep't 1998).

Defendant county hospital in medical malpractice action was not estopped from asserting plaintiffs' failure to comply with conditions precedent to commencing action, as specified in CLS Gen Mun §§ 50-e and 50-i, where action was commenced 2 ½ years after occurrence of alleged malpractice, and plaintiffs failed to show when they hired their counsel or that counsel was misled so as to affect filing of notice of claim. Fuentes v Brookhaven Mem'l Hosp., 251 A.D.2d 540, 674 N.Y.S.2d 744, 1998 N.Y. App. Div. LEXIS 7535 (N.Y. App. Div. 2d Dep't 1998).

Although a hospital delayed in furnishing a complete medical file to a patient, the patient was not induced to refrain from filing suit or conducting an investigation into the relevant facts; the trial court erred in denying the hospital's motion to dismiss the patient's malpractice claim for failure to serve a timely N.Y. Gen. Mun. Law §§ 50-e, 50-i notice of claim. Walker v New York City Health & Hosps. Corp., 36 A.D.3d 509, 828 N.Y.S.2d 365, 2007 N.Y. App. Div. LEXIS 598 (N.Y. App. Div. 1st Dep't 2007).

A motion by defendant public benefit corporation to dismiss a wrongful death action by plaintiff, who was appointed administratrix 16 months after decedent's death, on the basis that the notice of claim was untimely would be denied, since the New York City Health and Hospitals Corporation Act § 20(2) requires that an action against the corporation be commenced within one year and 90 days after the cause of action accrued, and a personal representative's right to file a notice of claim does not accrue until the date of appointment under EPTL § 5-4.1; Gen Mun Law § 50-i(1) does not apply to public benefit corporations under the provisions of the Act. St. Hill v New York City Health & Hospitals Corp., 112 Misc. 2d 1008, 448 N.Y.S.2d 105, 1982 N.Y. Misc. LEXIS 3231 (N.Y. Sup. Ct. 1982).

Personal injury complaint against New York City Health and Hospitals Corporation (NYCHH) was not time-barred inasmuch as stay was in force during pendency of hearing on NYCHH's demand for examination of claimant under CLS Gen Mun § 50-h; restriction against extending period of limitations (CLS Gen Mun § 50-i) was inapplicable to NYCHH, and thus absent express restriction, tolling provision of CLS CPLR § 204 applied. Sobkowicz v New York City Health & Hospitals Corp., 137 Misc. 2d 121, 520 N.Y.S.2d 103, 1987 N.Y. Misc. LEXIS 2657 (N.Y. Sup. Ct. 1987).

Notice of claim was a condition precedent to suit against hospital which was a department of the County of Greene and therefore was entitled to all of the immunity and protection afforded the county itself. Pope v Memorial Hospital of Greene County, 387 F. Supp. 331, 1974 U.S. Dist. LEXIS 6276 (S.D.N.Y. 1974).

37. —Playland Commission

Actions against county playland commission must normally be commenced within period of nine months from date of the accident and not within the one-year and 90-day period under the General Municipal Law. Atwell v Playland Rye Com., 86 Misc. 2d 13, 380 N.Y.S.2d 845, 1975 N.Y. Misc. LEXIS 3355 (N.Y. Sup. Ct. 1975), aff'd, Atwell v Rye Playland Com., 58 A.D.2d 636, 396 N.Y.S.2d 39, 1977 N.Y. App. Div. LEXIS 12708 (N.Y. App. Div. 2d Dep't 1977).

Since the provisions of this section are specifically limited to actions against a "city, county, town, or village," and the Westchester County Playland Commission is a "public benefit corporation," not within any of such terms, this section is inapplicable to extend the time to sue such commission on a claim for damages for personal injuries sustained, as against the limitations contained in ch. 826 § 10 of the Laws of 1940, specially applicable to claims and actions against the Commission. Percudani v Westchester County Playland Com., 226 N.Y.S.2d 517, 1962 N.Y. Misc. LEXIS 4249 (N.Y. Sup. Ct. 1962).

38. —School district

Under CPLR § 203, subd b(6), claim against school district and bus driver for personal injuries arising from collision with school bus was validly commenced within the statutory period of one year and 90 days (General Municipal Law § 50-i, subd 1(c)) by proper service of summons and complaint upon bus driver, even though claim, properly noticed to school district was not served upon proper school official. Jordan v Westhill Cent. School Dist., 42 A.D.2d 1043, 348 N.Y.S.2d 620, 1973 N.Y. App. Div. LEXIS 3308 (N.Y. App. Div. 4th Dep't 1973).

In an action brought by an infant and her mother against the City of New York and the Board of Education for personal injuries

sustained by the infant on the school premises, although the infant's disability tolled the applicable statute of limitations under CPLR § 208, service of notice of claim upon the city did not constitute service upon the Board which was a separate and distinct entity. Therefore the Board was never made party to the action and the infant was not entitled to relief. Gold v New York, 80 A.D.2d 138, 437 N.Y.S.2d 973, 1981 N.Y. App. Div. LEXIS 9758 (N.Y. App. Div. 1st Dep't 1981).

Petitioner properly made application for leave to file late notice of claim against school district within one-year-and-90-day period where (1) on last day of period, petitioner obtained order to show cause seeking permission to file late notice, (2) process server learned that president of board of education was not available and thus went to school district administrative offices and asked to see superintendent, (3) process server was informed that superintendent would not be available until next day and then asked if there was attendance officer available to accept service, (4) process server served papers on person to whom was directed, and (5) school district asserted that papers were served on secretary and not on supervisor of attendance; school district received actual notice in ample time, so that application for leave to file late notice of claim was made when papers were served and not when they were actually received by school officer as required by CLS CPLR § 311(7). Ireland v Hinkle, 178 A.D.2d 823, 577 N.Y.S.2d 541, 1991 N.Y. App. Div. LEXIS 16725 (N.Y. App. Div. 3d Dep't 1991).

Court erred in dismissing public school teacher's complaint against her principal on ground that teacher failed to serve notice of claim on city board of education as required by CLS Educ § 3813(2), since statute requires notice of claim only when alleged tort was committed by employee acting in discharge of duties within scope of employment, and allegations of complaint, which was filed against defendant individually, reflected conduct bearing no relation to proper discharge of duties of defendant as school principal. Radvany v Jones, 184 A.D.2d 349, 585 N.Y.S.2d 343, 1992 N.Y. App. Div. LEXIS 8115 (N.Y. App. Div. 1st Dep't 1992).

Personal injury claim against school district was properly dismissed where (1) plaintiff did not serve timely notice of claim, (2) plaintiff's cross motion for leave to serve late notice of claim was made over one year and 90 days after accrual of claim, and (3) thus, court did not have authority to grant cross motion. Warren v Baldwin Union Free Sch. Dist., 281 A.D.2d 413, 721 N.Y.S.2d 289, 2001 N.Y. App. Div. LEXIS 2046 (N.Y. App. Div. 2d Dep't 2001).

Appeals court reversed a trial court order that had granted a land owner permission to file a late (under N.Y. Educ. Law 3813(2) and N.Y. Gen. Mun. Law 50-e(1)(a) as being served more than 90 days after the owner's claim accrued) notice of claim against a school for its sewer discharges; the trial court's permission could not be granted since the N.Y. Gen. Mun. Law § 50-i(1) one-year and 90-day statute of limitations period had expired. Schwinghammer v Sullivan W. Cent. Sch. Dist., 2 A.D.3d 1126, 768 N.Y.S.2d 696, 2003 N.Y. App. Div. LEXIS 13534 (N.Y. App. Div. 3d Dep't 2003).

Lower court's denial of an application for leave to file late notice to the municipal school district and other related municipal agencies was affirmed; fact that the injured party was an infant, by itself, did not excuse the filing of a timely notice to the agencies, and petitioners had failed to establish any reasonable excuse for the delay, particularly when there was no nexus between the injured party's infancy and the delay in serving notice. Rennell S. v N. Junior High Sch., 12 A.D.3d 518, 784 N.Y.S.2d 623, 2004 N.Y. App. Div. LEXIS 13663 (N.Y. App. Div. 2d Dep't 2004).

Trial court properly granted a school district's motion for summary judgment in a student athlete's personal injury action and denied the student's cross-motion for leave to serve an amended complaint because the student failed to serve a timely notice of claim or commence a timely proceeding for leave to serve a late notice of claim, there was no evidence in the record demonstrating that the district engaged in any misleading conduct that would support a finding of equitable estoppel, the district's participation in pretrial discovery did not preclude it from raising the untimeliness of the notice of claim, and the student's proposed amendment was palpably insufficient or devoid of merit. Sanchez v Jericho Sch. Dist., 180 A.D.3d 828, 120 N.Y.S.3d 163, 2020 N.Y. App. Div. LEXIS 1130 (N.Y. App. Div. 2d Dep't 2020).

Action, which was brought by automobile driver to recover for injuries allegedly sustained in collision with school bus and which was not commenced within one year and 90 days after collision, was barred under statute providing that action against school district for injuries allegedly sustained by reason of negligence or wrongful act of school district or its employee must be commenced within one year and 90 days after happening of event upon which claim is based, despite automobile driver's claim that she did not incur necessary hospital, medical and prescription drug charges within statutory time period and thus could not have commenced suit within such period. Cota v Madison Cent. School Dist., 89 Misc. 2d 646, 392 N.Y.S.2d 233, 1977 N.Y. Misc. LEXIS 1913 (N.Y. Sup. Ct. 1977), aff'd, 62 A.D.2d 1083, 404 N.Y.S.2d 547, 1978 N.Y. App. Div. LEXIS 11178 (N.Y. App. Div. 3d Dep't 1978).

Education Law § 3813 and General Municipal Law § 50-i were the most appropriate statutes relating to limitations on bringing a Fourteenth Amendment claim against a school district for damages relating to termination of probationary position and teaching license. Lombard v Board of Education, 440 F. Supp. 577, 1977 U.S. Dist. LEXIS 12936 (E.D.N.Y. 1977).

Teacher's notice to a school district of her claims of slander, libel, defamation, prima facie tort, and intentional infliction of emotional distress substantially complied with N.Y. Gen. Mun. Law § 50-1 for purposes of N.Y. Educ. Law § 3813(2) because the teacher's EEOC charge, which was served on an officer of the school district, alleged a retaliatory investigation against her into her character and job performance and that she was falsely accused of selling drugs to and having sex with students, such that amendment was permitted under Fed. R. Civ. P. 15(a). Carlson v Geneva City Sch. Dist., 679 F. Supp. 2d 355, 2010 U.S. Dist. LEXIS 1556 (W.D.N.Y. 2010).

Student failed to provide adequate and timely notice of her claim against a school district and others because the notice did not adequately advise of the exact nature of the claim and an attempted amendment of the notice was not timely. Tyrrell v Seaford Union Free Sch. Dist., 792 F. Supp. 2d 601, 2011 U.S. Dist. LEXIS 61418 (E.D.N.Y. 2011).

A town may not pay a claim for damage to real property where the claimant has failed to give notice within 90 days or such additional time as the court might allow. 1966 Ops St Compt File #385.

39. —Town

In an action to determine adverse claims of title to real estate and to recover damages for trespass brought against a town and county, it was held that no statutory notice of claim was necessary as a prerequisite to the action against the town. However, the action against the county was governed by § 52 of the County Law, and plaintiff could not maintain such an action without compliance with §§ 50-e and 50-i of the General Municipal Law. Seabreeze Marina at Smithtown, Inc. v Smithtown, 25 A.D.2d 780, 269 N.Y.S.2d 662, 1966 N.Y. App. Div. LEXIS 4497 (N.Y. App. Div. 2d Dep't 1966).

Town's regulation of water level is proprietary function and it can therefore be held liable for damages caused by its improper methodology in carrying out such operations; accordingly, in action to recover for personal injuries sustained when plaintiff dove off dock on lake and struck head on bottom of lake, which action was commenced against town, owner and operator of dam which regulates water level of lake, Special Term properly denied defendant town's motion for summary judgment dismissing complaint; plaintiff's conduct did not, as matter of law, constitute such an unforeseeable superseding event as to absolve town of all liability. Searles v Horicon, 116 A.D.2d 93, 500 N.Y.S.2d 402, 1986 N.Y. App. Div. LEXIS 50367 (N.Y. App. Div. 3d Dep't 1986).

Town, the town's planning board, and town officials (town) were entitled to summary judgment in a land buyer's claim alleging a violation of equal protection under the New York State Constitution because the buyer failed to serve a timely notice of claim

upon the town, which was a condition precedent to the assertion of the claim. East End Resources, LLC v Town of Southold Planning Bd., 135 A.D.3d 899, 26 N.Y.S.3d 79, 2016 N.Y. App. Div. LEXIS 473 (N.Y. App. Div. 2d Dep't 2016).

Causes of action involving money damages for property and maintaining a nuisance against town for permitting certain septic tanks located on private property near plaintiff's real property to be maintained in a defective condition in violation of town ordinances should not be stricken since plaintiffs are not required to plead compliance with the requirements of the statute on such causes of action. Malloy v Niskayuna, 64 Misc. 2d 676, 315 N.Y.S.2d 502, 1970 N.Y. Misc. LEXIS 1171 (N.Y. Sup. Ct. 1970).

Action against Town Justice, town and county for malicious prosecution, false arrest and false imprisonment, which, as to county, was based on acts of deputy sheriff, was subject to limitations period of one year and 90 days provided by statute governing actions against, inter alia, a town or county, rather than one-year period prescribed for actions against, inter alia, a sheriff or for, inter alia, false imprisonment or malicious prosecution. Szerlip v Finnegan, 77 Misc. 2d 655, 354 N.Y.S.2d 555, 1974 N.Y. Misc. LEXIS 1209 (N.Y. Sup. Ct. 1974), aff'd, 47 A.D.2d 603, 365 N.Y.S.2d 1016, 1975 N.Y. App. Div. LEXIS 13000 (N.Y. App. Div. 2d Dep't 1975).

Where, inter alia, property owners alleged in complaint for money damages that defendant town did not obey a consent judgment which directed the town to discontinue operation of an open disposal dump, allegation amounted to charge that defendant town did not perform a duty imposed on it by law and, therefore, action sounded in tort and notice provisions of General Municipal Law were applicable. Mazo v Shawangunk, 87 Misc. 2d 597, 386 N.Y.S.2d 519, 1976 N.Y. Misc. LEXIS 2262 (N.Y. Sup. Ct. 1976), aff'd, 60 A.D.2d 734, 401 N.Y.S.2d 305, 1977 N.Y. App. Div. LEXIS 14772 (N.Y. App. Div. 3d Dep't 1977).

In action arising out of allegedly defective construction of plaintiffs' house, plaintiffs would be permitted to file late notice of claim against defendant town, as special relationship existed between plaintiffs and town through town building inspector, who told plaintiffs he would carefully inspect their house and then issued certificate of occupancy without conducting any inspection; thus, town was not entitled to summary judgment based on statute of limitations contained in General Municipal Law. Corona v Gallinger Real Estate Better Homes & Gardens, 168 Misc. 2d 429, 642 N.Y.S.2d 802, 1996 N.Y. Misc. LEXIS 146 (N.Y. Sup. Ct. 1996), aff'd, 242 A.D.2d 961, 665 N.Y.S.2d 598, 1997 N.Y. App. Div. LEXIS 10578 (N.Y. App. Div. 4th Dep't 1997).

40. —Water district

Under section 50-i of the General Municipal Law, service of a notice of claim is not a prerequisite to an action in negligence against a water district. Fraccola v Utica, 77 A.D.2d 161, 432 N.Y.S.2d 943, 1980 N.Y. App. Div. LEXIS 13008 (N.Y. App. Div. 4th Dep't 1980).

Inasmuch as a water district is not covered directly by General Municipal Law § 50-i, this would qualify the reference to public corporations in § 50-e(1) of that law and the provisions of Town Law § 67, and consequently the filing of a notice of claim is not a condition precedent to the commencement of a tort action against a water district. Harrigan v Smithtown, 54 Misc. 2d 793, 283 N.Y.S.2d 424, 1967 N.Y. Misc. LEXIS 1199 (N.Y. Sup. Ct. 1967).

Service of notice of claim on the water district is not a condition precedent to commencement of an action against district on a tort claim. Martin v Esopus, 57 Misc. 2d 487, 293 N.Y.S.2d 571, 1968 N.Y. Misc. LEXIS 1271 (N.Y. Sup. Ct. 1968).

Federal civil rights action for alleged police brutality was timely commenced where complaint was filed within period prescribed by General Municipal Law § 50-i, and 90-day notice provision of such statute would not operate to bar civil rights action. Davis v Krauss, 478 F. Supp. 823, 1979 U.S. Dist. LEXIS 8975 (E.D.N.Y. 1979).

41. —Miscellaneous entities

Notice of claim under CLS Gen Mun §§ 50-e and 50-i was condition precedent to tort action against trustees of Schenectady County Community College since county has statutory obligation to indemnify its employees under CLS Educ § 6308, and thus claimant must comply with provisions of law pertaining to commencement of action against county (set forth in CLS County § 52) even if she chooses to sue only county's employees; CLS Educ § 6308 does not relieve claimant of responsibility for giving notice under other laws. Butterfield v Board of Trustees, 131 A.D.2d 963, 516 N.Y.S.2d 544, 1987 N.Y. App. Div. LEXIS 48371 (N.Y. App. Div. 3d Dep't 1987).

In action against city and its employee for personal injuries allegedly sustained by plaintiffs in automobile accident involving vehicle owned by city and driven by employee, one-year-and-90-day statute of limitations contained in CLS Gen Mun § 50-i was applicable to plaintiffs' action against employee, as well as action against city, where (1) plaintiffs alleged in complaint that employee had been acting within scope of his employment when accident occurred, and (2) although city's answer had originally denied such allegation, Corporation Counsel indicated that such denial was purely inadvertent, and Corporation Counsel was in fact representing employee in belief that he had been acting within scope of his employment. Bacalokonstantis v Nichols, 141 A.D.2d 482, 529 N.Y.S.2d 111, 1988 N.Y. App. Div. LEXIS 6305 (N.Y. App. Div. 2d Dep't 1988).

Plaintiff who offered no evidence that individual defendants were acting outside scope of their employment in making allegedly false arrest could not maintain action against them where no notice of claim had been filed as required by General Municipal Law. Zwecker v Clinch, 279 A.D.2d 572, 720 N.Y.S.2d 150, 2001 N.Y. App. Div. LEXIS 565 (N.Y. App. Div. 2d Dep't 2001).

Failure to file notice of claim against municipality would not necessarily preclude plaintiff from asserting cause of action against individual defendants based on alleged false arrest, since provisions of CLS Gen Mun § 50-e apply to claims against individual defendants only if municipality is obligated to indemnify them. Zwecker v Clinch, 279 A.D.2d 572, 720 N.Y.S.2d 150, 2001 N.Y. App. Div. LEXIS 565 (N.Y. App. Div. 2d Dep't 2001).

As the police officer was acting in the performance of his duties and within the scope of his employment when he committed the alleged tort, the village had to indemnify him for damages arising therefrom; thus, the village was the real party in interest and the time limitation in N.Y. Gen. Mun. Law § 50-i(1)(c) applied to the libel cause of action against the police officer. Ruggiero v Phillips, 292 A.D.2d 41, 739 N.Y.S.2d 797, 2002 N.Y. App. Div. LEXIS 2741 (N.Y. App. Div. 4th Dep't 2002).

Applicable statute of limitations for personal injury actions against the Triborough Bridge and Tunnel Authority was the one-year period found in N.Y. Pub. Auth. Law § 569-a(2), and not the one-year and 90-day period found in N.Y. Gen. Mun. Law § 50-i(1) since the Authority was not a not a N.Y. Gen. Mun. Law § 50-i(1) entity. Arcuri v Ramos, 7 A.D.3d 741, 776 N.Y.S.2d 895, 2004 N.Y. App. Div. LEXIS 7292 (N.Y. App. Div. 2d Dep't 2004).

Mother, in her individual capacity, was not entitled to serve a late notice of claim upon the village because the statute of limitations for her derivative cause of action had expired at the time the proceeding was commenced, and the infancy toll was personal to the child and did not extend to the mother's derivative cause of action Matter of R.N. v Village of New Sq., 164 A.D.3d 508, 83 N.Y.S.3d 102, 2018 N.Y. App. Div. LEXIS 5543 (N.Y. App. Div. 2d Dep't 2018).

Claimant was not permitted to add the Fire District as a defendant because although a notice of claim was served upon the volunteer company, there was no evidence the claimant served a notice of claim specifically upon the Fire District, and timely service of the notice of claim upon the company did not equate to timely service upon the Fire District. Roberts v Coeymans Hollow Volunteer Fire Co., 168 A.D.3d 1144, 91 N.Y.S.3d 590, 2019 N.Y. App. Div. LEXIS 47 (N.Y. App. Div. 3d Dep't), app. denied, 33 N.Y.3d 903, 124 N.E.3d 256, 100 N.Y.S.3d 706, 2019 N.Y. LEXIS 1299 (N.Y. 2019).

General Municipal Law § 50-i, which provided that no action shall be maintained for personal injury by reason of the negligence of any volunteer fireman whose services have been accepted pursuant to § 209-i, unless a notice is served pursuant to General Municipal Law § 50-e is misleading, because prior to September 1, 1963, the requirements of General Municipal Law § 50-e did

not apply to a claim against a fire district which arose out of the negligence of volunteer firemen pursuant to General Municipal Law § 205-b. Hopkins v East Syracuse Fire Dist., 49 Misc. 2d 197, 267 N.Y.S.2d 61, 1966 N.Y. Misc. LEXIS 2216 (N.Y. City Ct. 1966).

In an action against a community college outside the City of New York, compliance with County Law § 52 and General Municipal Law §§ 50-3, 50-i is not a condition precedent to maintenance of the action. Brown v North Country Community College, 63 Misc. 2d 442, 311 N.Y.S.2d 517, 1970 N.Y. Misc. LEXIS 1527 (N.Y. Sup. Ct. 1970).

Plaintiff's negligence suit against the Brooklyn Public Library survived its motion to dismiss; as the Library was not a "municipal corporation," plaintiff did not have to file a notice of claim pursuant to N.Y. Gen. Mun. Law §§ 50-e and 50-i to commence a tort action against the Library. Rodriguez v Brooklyn Pub. Lib., 934 N.Y.S.2d 291, 34 Misc. 3d 310, 2011 N.Y. Misc. LEXIS 5611 (N.Y. Sup. Ct. 2011).

Plaintiff was not required to file a notice of claim before suing the owner in a premises liability suit because the owner was not a public benefit corporation entitled to notice under N.Y. Gen. Mun. Law § 50-i(1). Hughey v RHM-88, LLC, 77 A.D.3d 520, 912 N.Y.S.2d 175, 2010 N.Y. App. Div. LEXIS 7652 (N.Y. App. Div. 1st Dep't 2010).

Appellee, which was a public corporation, did not qualify for any exception to the general rule that state entities lack the capacity to raise constitutional challenges to state statutes, and its challenge to Jimmy Nolan's Law, which revived for one year all time-barred claims against public corporations for personal injuries sustained by workers who participated in post-9/11 cleanup efforts, was therefore rejected. Stanislaw Faltynowicz v Battery Park City Auth. (In re World Trade Ctr. Lower Manhattan Disaster Site Litig.), 892 F.3d 108, 2018 U.S. App. LEXIS 15181 (2d Cir. 2018).

Under applicable New York statutory law no action may be commenced against a village for injury to property rights unless (1) a notice is served and filed within 90 days after the claim arises; (2) at least 30 days are allowed to elapse; and (3) the action is commenced within one year and 90 days after the happening of the event on which the claim is based. Hackensack Water Co. v Nyack, 289 F. Supp. 671, 1968 U.S. Dist. LEXIS 10010 (S.D.N.Y. 1968).

County public health service is summarily dismissed from medical malpractice action, where service and county are so interrelated that county is real party in interest, because plaintiffs' failure to provide service with notice of claim required under CLS Gen Mun Law § 50-i is fatal to their cause of action. Donnelly v McLellan, 889 F. Supp. 136, 1995 U.S. Dist. LEXIS 8545 (D. Vt. 1995).

County was real party in interest for purposes of medical malpractice action against county public health service, and thus notice of claim statute (CLS Gen Mun § 50-i) applied, since liability insurance policy issued to county obligated county to indemnify public health service for any losses incurred by it, and New York courts have regularly applied notice provisions to municipal agencies and other entities not specifically mentioned in statute. Donnelly v McLellan, 889 F. Supp. 136, 1995 U.S. Dist. LEXIS 8545 (D. Vt. 1995).

In action against Metropolitan Transportation Authority (MTA) and Metro-North Commuter Railroad (Metro-North) by passenger who was injured while disembarking from train, court would apply limitation period under CLS Pub A § 1276 rather than period under CLS Gen Mun § 50-i, and thus action was time barred given fact that complaint was filed more than 130 days after date of alleged accident; MTA is public authority, and Metro-North is wholly owned subsidiary of MTA. Celli v Metro-North Commuter R.R., 891 F. Supp. 124, 1995 U.S. Dist. LEXIS 8621 (S.D.N.Y. 1995), aff'd, 101 F.3d 108, 1996 U.S. App. LEXIS 39287 (2d Cir. N.Y. 1996).

In action arising from alleged negligent inspection of wiring of house that burned down, Board of Fire Underwriters was not protected by short limitations period of CLS Gen Mun § 50-i based on its status as town's authorized representative for conducting electrical inspections, where board inspectors were not town employees entitled to be indemnified by town, and town was not real party in interest. Royal Ins. Co. of Am. v Ru-Val Elec. Corp., 918 F. Supp. 647, 1996 U.S. Dist. LEXIS 1723 (E.D.N.Y.), amended, 918 F. Supp. 647 (E.D.N.Y. 1996).

Negligent hiring, training and supervision claims brought by two plaintiffs against city had to be dismissed because those plaintiffs failed to provide proper notice of claim as they failed to indicate legal theories on which they now proceeded against city, and their notices of claim did not set forth any facts that in any way suggested claim for negligent hiring, training and supervision. Hargroves v City of New York, 2014 U.S. Dist. LEXIS 41661 (E.D.N.Y. Mar. 26, 2014).

State law claims of city employee, who worked for a city taxi and limousine commission, against several supervisory city employees brought against them in their official capacities were dismissed because the employee failed to file a required notice of claim prior to filing suit. Manon v Pons, 131 F. Supp. 3d 219, 2015 U.S. Dist. LEXIS 125134 (S.D.N.Y. 2015).

Child, who was injured after being struck by a car in the vicinity of some excavation work being carried out by the village, was foreclosed from asserting a derivative claim against the village because the derivative claim was not set forth in the notice of claim served upon the village. Gonzalez v Povoski, 149 A.D.3d 1472, 53 N.Y.S.3d 423, 2017 N.Y. App. Div. LEXIS 3264 (N.Y. App. Div. 4th Dep't 2017).

42. Applicability in particular actions

Appeals court dismissed plaintiffs' personal injury suit against a city since the plaintiffs did not serve a notice of claim against the city within 90 days after the accrual of their claim as required by N.Y. Gen. Mun. Law §§ 50-e(1)(a), 50-i(1)(a) and did not request leave to file late claim within one and one-half years after claim's accrual. Pierre v City of New York, 22 A.D.3d 733, 804 N.Y.S.2d 365, 2005 N.Y. App. Div. LEXIS 11343 (N.Y. App. Div. 2d Dep't 2005).

In a particular case involving a nonvehicular tort if it is found and determined that there is a public corporate responsibility to indemnify the alleged tortfeasor, the public corporation becomes the real party in interest and in any such case there must be a compliance with General Municipal Law §§ 50-e and 50-i. Sorge v New York, 56 Misc. 2d 414, 288 N.Y.S.2d 787, 1968 N.Y. Misc. LEXIS 1650 (N.Y. Sup. Ct. 1968).

Using February 22, 2002, as the accrual date for his claim of intentional infliction of emotional distress, the arrestee complied with the N.Y. Gen. Mun. Law §§ 50-i, 50-e by filing his notice of claim on May 22, 2002 and commencing his action on December 18, 2002. Accordingly, the arrestee's motion to dismiss the detectives and the police officers' notice of claim affirmative defense was granted, and the detectives and the police officers' motion to dismiss the arrestee's intentional infliction of emotional distress claim as time-barred was denied. Llerando-Phipps v City of New York, 390 F. Supp. 2d 372, 2005 U.S. Dist. LEXIS 22246 (S.D.N.Y. 2005).

43. —Admiralty actions

In an action arising out of the death of plaintiff's decedent after he was struck by a pleasure boat while crabbing within the navigable waters of the state, the defendant town's motion to dismiss the complaint for failure to comply with the notice of claim provisions of Gen Mun Law §§ 50-e and 50-i was properly denied, since in an action governed by general maritime law, state statutes do not operate so as to interfere with a plaintiff's substantive admiralty rights and thus the notice of claim provisions of the General Municipal Law are inapplicable. Scholl v Babylon, 95 A.D.2d 475, 466 N.Y.S.2d 976, 1983 N.Y. App. Div. LEXIS 19644 (N.Y. App. Div. 2d Dep't 1983).

Where the plaintiff's cause of action was based upon maritime law, the plaintiff's failure to bring suit within one year and 90 days after the accident as required by General Municipal Law § 50-i subd 1(c) did not preclude recovery. Rogers v New York, 46 Misc. 2d 373, 259 N.Y.S.2d 604, 1965 N.Y. Misc. LEXIS 2026 (N.Y. Sup. Ct. 1965).

Suit within admiralty jurisdiction is not subject to requirements of General Municipal Law § 50-i(l). National Sea Clammers Ass'n v New York (1980, CA3 NJ) 616 F2d 1222, 15 Envt Rep

Cas 1314, 10 ELR 20155, vacated on other grounds, remanded (1981) 453 US 1, 101 S Ct 2615, 69 L Ed 2d 435, 16 Envt Rep Cas 1118, 11 ELR 20684 and questioned in Denison v Kitzhaber (2001, DC Or) 2001 US Dist LEXIS 12514) (applying New York law).

Statute of limitations on claim for loss of property due to county's failure to maintain beach groins is not barred by statute of limitations where failure to maintain groins is continuing event from which limitations period is measured. Rapf v Suffolk County of New York, 755 F.2d 282, 1985 U.S. App. LEXIS 28483 (2d Cir. N.Y. 1985).

44. —Civil rights actions

Former property owner's due process action against city for alleged tax abuse, brought under Federal Civil Rights Act of 1871 (42 USCS § 1983) after property had been sold for nonpayment of taxes, required dismissal where former owner failed to file notice of claim as called for by CLS Gen Mun § 50e or to apply for extension of time to do so within 3 year limitations period; application in Federal civil rights actions of notice of claim requirements of CLS Gen Mun § 50i as limited by § 50e is proper given importance of providing municipality with timely notice, ease of compliance, and opportunity afforded by § 50e of applying for leave to file late notice at any time during full 3 year limitation period. 423 South Salina Street, Inc. v Syracuse, 68 N.Y.2d 474, 510 N.Y.S.2d 507, 503 N.E.2d 63, 1986 N.Y. LEXIS 20894 (N.Y. 1986), cert. denied, 481 U.S. 1008, 107 S. Ct. 1880, 95 L. Ed. 2d 488, 1987 U.S. LEXIS 1595 (U.S. 1987).

Former property owner's due process action against city for damages for alleged tax abuse brought under Federal Civil Rights Act of 1871 (42 USCS § 1983) would be governed by 3 year limitations period for damages for personal injuries (CLS CPLR § 214) rather than one year 90 day period for tort claims against city (CLS Gen Mun § 50i) since US Supreme Court in Wilson v Garcia (1985) 471 US 261, 85 L Ed 2d 254, 105 S Ct 1938required that each state select "the one most appropriate statute of limitations for all § 1983 claims" and found that "the characterization of all § 1983 actions as involving claims for personal injuries minimizes the risk that the choice of a state statute of limitations would not fairly serve the federal interests" of countering the "very ineffectiveness of state remedies that led Congress to enact the Civil Rights Acts in the first place. 423 South Salina Street, Inc. v Syracuse, 68 N.Y.2d 474, 510 N.Y.S.2d 507, 503 N.E.2d 63, 1986 N.Y. LEXIS 20894 (N.Y. 1986), cert. denied, 481 U.S. 1008, 107 S. Ct. 1880, 95 L. Ed. 2d 488, 1987 U.S. LEXIS 1595 (U.S. 1987).

The one year and 90 days limitations period applicable to actions to recover from a municipality for its employees' negligence or wrongful act (Gen Mun Law § 50-i), rather than the three-year limitations period applicable to actions to recover upon a liability, penalty or forfeiture created or imposed by statute (CPLR § 214(2)), governed an action brought against a municipality and seeking to recover for certain municipal police officers' alleged violations of plaintiffs' rights under 42 USCS §§ 1983, 1985. The most appropriate limitations period provided by state law is to be applied in actions brought under 42 USCS §§ 1983, 1985 since such statutes do not provide their own limitations period. Staffen v Rochester, 80 A.D.2d 16, 437 N.Y.S.2d 821, 1981 N.Y. App. Div. LEXIS 9737 (N.Y. App. Div. 4th Dep't 1981).

Actions against municipality to recover for federal and state civil rights violations are not subject to notice of claim requirements of CLS Gen Mun § 50-i. Liu v New York City Police Dep't, 216 A.D.2d 67, 627 N.Y.S.2d 683, 1995 N.Y. App. Div. LEXIS 6308 (N.Y. App. Div. 1st Dep't), app. denied, 87 N.Y.2d 802, 638 N.Y.S.2d 425, 661 N.E.2d 999, 1995 N.Y. LEXIS 4984 (N.Y. 1995), cert. denied, 517 U.S. 1167, 116 S. Ct. 1566, 134 L. Ed. 2d 666, 1996 U.S. LEXIS 2825 (U.S. 1996).

Notice of claim requirements under N.Y. Gen. Mun. Law §§ 50-e and 50-i, were held inapplicable to claims pursuant to 42 USCS § 1983; thus, a plaintiff's failure to file a notice of claim did not require dismissal. Mompoint v City of New York, 299 A.D.2d 527, 751 N.Y.S.2d 38, 2002 N.Y. App. Div. LEXIS 11476 (N.Y. App. Div. 2d Dep't 2002).

Federal civil rights action alleging that defendant hospital confined plaintiff against his will and in violation of CLS Men Hyg § 9.39 was governed by 3-year statute of limitations, not one-year-and-90-day period under New York City Health and Hospitals Corporation Act (CLS Unconsol Ch 214-A § 20) and CLS Gen Mun § 50-i; actions under 42 USCS § 1983 are characterized as personal injury actions which must be commenced within 3 years under CLS CPLR § 214(5). Feuer v New York City Health & Hosps. Corp., 170 Misc. 2d 838, 657 N.Y.S.2d 283, 1996 N.Y. Misc. LEXIS 500 (N.Y. Sup. Ct. 1996).

General Municipal Law § 50-i generally serves to limit municipality's duty to respond, or indemnify, by requiring that certain actions be speedily brought; § 50-i has never been applied to bar federal civil rights action commenced more than one year and 90 days, but less than 3 years, after event in question. Taylor v Mayone, 626 F.2d 247, 1980 U.S. App. LEXIS 16190 (2d Cir. N.Y. 1980).

In a civil rights action against a village and several of its police officers, the three-year limitation period of CPLR § 214 ordinarily applicable to civil rights actions, rather than the more specific 1-year and 90-day limitation period provisions of General Municipal Law §§ 50-i and 50-j, would control where, at the time of the incidents involved, § 50-j applied only to cities having a population of one million or more and its amendment to include every city, county, town, village, authority or agency became effective well after plaintiff's cause of action accrued, and under New York law statutes of limitations are given prospective application unless a contrary intent is clearly indicated. Sanabria v Monticello, 424 F. Supp. 402, 1976 U.S. Dist. LEXIS 11691 (S.D.N.Y. 1976).

A federal civil rights action alleging that various New York state and New York city officials committed a wholesale violation of plaintiffs' Constitutional rights would be governed by the three year limitations period provided by CPLR § 214(2), rather than by the one year 90-day limitation period provided by General Municipal Law § 50-i which governs tort claims against municipalities. Martin Hodas, East Coast Cinematics, Inc. v Lindsay, 431 F. Supp. 637, 1977 U.S. Dist. LEXIS 16280 (S.D.N.Y. 1977).

Statute of limitation period prescribed by CLS General Municipal Law § 50-e which requires the filing of a notice of claim within 90 days of the subject alleged tortious conduct, and the statute of limitation period of one year and 90 days prescribed by CLS General Municipal Law § 50-i, also applicable to alleged tortious conduct, are not applicable to actions commenced under 42 USCS § 1983; the statute of limitations applicable to such federal actions is the three-year period prescribed by CLS CPLR § 214(2). Altaire Builders, Inc. v Horseheads, 551 F. Supp. 1066, 1982 U.S. Dist. LEXIS 16155 (W.D.N.Y. 1982), disapproved, RRI Realty Corp. v Southampton, 870 F.2d 911, 1989 U.S. App. LEXIS 4753 (2d Cir. N.Y. 1989)).

New York State notice of claim requirements are inapplicable in civil rights action brought against municipality in federal court under 42 USCS § 1983. Burroughs v Holiday Inn, 621 F. Supp. 351, 1985 U.S. Dist. LEXIS 14420 (W.D.N.Y. 1985).

Arrestees' state-law claims against village police are not time-barred, where defendants rely on one-year statute of limitations set forth in CLS CPLR § 215, because applicable statute is rather one-year-and-90-day period for filing suit against municipalities and their employees in CLS Gen Mun Law § 50-i. Barnett v Dillon, 890 F. Supp. 83, 1995 U.S. Dist. LEXIS 8660 (N.D.N.Y. 1995).

Employee's failure to serve municipality with notice of claim under CLS Gen Mun §§ 50-e and 50-i did not bar his Title VII action, as requiring notice of claim would alter important rights created by Title VII. Tout v Erie Community College, 923 F. Supp. 13, 1995 U.S. Dist. LEXIS 20796 (W.D.N.Y. 1995).

Plaintiff's pendent state law tort claims, brought as part of plaintiff's action under 42 U.S.C.S. § 1983, were dismissed when plaintiff did not follow the procedure for filing a notice of the claim prior to commencement of the action as required under N.Y. Gen. Mun. Law § 50-i(1), and waiver of the time for presentment requirement would be futile when the limitations period had already expired under N.Y. Gen. Mun. Law § 50-e. Warner v Goshen Police Dep't, 256 F. Supp. 2d 171, 2003 U.S. Dist. LEXIS 6368 (S.D.N.Y. 2003).

In a suit against a village, its clerk, its election inspector, a nearby town, and a certain police officer, alleging violation of

plaintiff's civil rights from various events, including a certain allegedly harassing traffic stop, improper police responses to calls regarding child visitation disputes with her ex-husband, police failing to respond to complaints about a neighbor, the forced removal of plaintiff from her post as an election poll watcher, improper trimming of her trees, and harassment by a certain police officer, plaintiff's claims under a state human rights act and her common law claims of slander and assault were dismissed because she failed to comply with the notice requirement under N.Y. Gen. Mun. Law § 50-i(1), and she did not apply for leave to serve a late notice. Cotz v Mastroeni, 476 F. Supp. 2d 332, 2007 U.S. Dist. LEXIS 13019 (S.D.N.Y. 2007).

In an arrestee's suit alleging constitutional and state law violations by several county employees and officials and others, based on a police standoff incident at his home, the arrestee's state law claims against the county employees and officials were barred because he failed to file a notice of claim as required by N.Y. Gen. Mun. Law § 50-i(1) prior to commencing litigation. Maloney v County of Nassau, 623 F. Supp. 2d 277, 2007 U.S. Dist. LEXIS 71162 (E.D.N.Y. 2007).

45. — —Discrimination

CLS Gen Mun § 50-i is confined to claims for personal injury, wrongful death and property damage, and does not apply to discrimination claims. Parry v Tompkins County, 260 A.D.2d 987, 689 N.Y.S.2d 296, 1999 N.Y. App. Div. LEXIS 4418 (N.Y. App. Div. 3d Dep't 1999).

Biologist claiming age and sex discrimination in termination of her employment with county health department was entitled to judgment declaring that she was not required to file notice of claim as prerequisite to maintaining that claim under CLS Exec § 296 with State Division of Human Rights (DHR) where (1) notice of claim requirements for tort claims against municipality apply to private discriminatory practice claims under § 296 that are commenced in court of law, not before administrative agency, (2) once person has elected to pursue § 296 claim with administrative agency, he or she is precluded by CLS Exec § 297(9) from pursuing same claim in court of law and thus should not be subjected to rules applicable to court claims, and (3) underlying purpose of notice of claim requirements was satisfied by DHR's compliance with administrative procedures set forth in Human Rights Law that gave county ample opportunity to investigate claim Freudenthal v County of Nassau, 283 A.D.2d 6, 726 N.Y.S.2d 116, 2001 N.Y. App. Div. LEXIS 5645 (N.Y. App. Div. 2d Dep't 2001), aff'd, 99 N.Y.2d 285, 755 N.Y.S.2d 56, 784 N.E.2d 1165, 2003 N.Y. LEXIS 139 (N.Y. 2003).

Before formal complaint was filed, county health department was on notice of potential claim against it under CLS Exec § 296 for age and sex discrimination in termination of biologist's employment and had ample opportunity to investigate and address that claim, and thus underlying purpose of statutory notice of claim requirements was satisfied despite lack of formal notice of claim with county, where (1) within weeks after termination on January 9, 1992, county human rights commission began investigating biologist's claim, (2) that investigation included conversations with some of biologist's former colleagues, including at least one bureau chief, (3) formal charges of discrimination were filed with State Division of Human Rights (DHR) on April 21, 1992, less than 4 months after termination, (4) DHR requested that county health department respond to discovery requests no later than June 24, 1992, and (5) at least twice between July and September 1992, county health department offered to DHR documentation and explanations to support its actions. Freudenthal v County of Nassau, 283 A.D.2d 6, 726 N.Y.S.2d 116, 2001 N.Y. App. Div. LEXIS 5645 (N.Y. App. Div. 2d Dep't 2001), aff'd, 99 N.Y.2d 285, 755 N.Y.S.2d 56, 784 N.E.2d 1165, 2003 N.Y. LEXIS 139 (N.Y. 2003).

Trial court properly granted dismissal of the cause of action alleging violations of the State Constitution on the ground that the administrative law judge failed to serve a notice of claim because the action did not fall within the public interest exception to the notice of claim requirement, since the complaint sought to vindicate the private rights of the administrative law judge, and the disposition of the claim would not directly affect or vindicate the rights of others. Further, although the complaint named the individual defendants in their individual capacities, it alleged retaliation by them as part of their employment, and thus, the notice of claim requirement applied. Kassapian v City of New York, 155 A.D.3d 851, 65 N.Y.S.3d 562, 2017 N.Y. App. Div. LEXIS 8070 (N.Y. App. Div. 2d Dep't 2017).

Disability discrimination and hostile working environment claims that a former employee filed against a county pursuant to the New York State Human Rights Law, N.Y. Exec. Law § 296, were dismissed because the employee did not serve a timely notice of claim upon the county as required by N.Y. County Law § 52 and N.Y. Gen. Mun. Law §§ 50-e and 50-i; (2) the federal district court did not have jurisdiction under N.Y. Gen. Mun. Law § 50-e(5) and (7) to grant the employee's application for leave to serve a late notice of claim; and (3) N.Y. Gen. Mun. Law §§ 50-e(5) and 50-i(1)(c) and N.Y. County Law § 52(1) barred the court from granting leave to serve a late notice where more than one year and ninety days had passed since the employee's claims arose when the employee was terminated. Costabile v County of Westchester, 2007 U.S. Dist. LEXIS 29787 (S.D.N.Y. Apr. 20, 2007), amended, 485 F. Supp. 2d 424, 2007 U.S. Dist. LEXIS 33484 (S.D.N.Y. 2007).

There was no dispute that the former employee never filed a notice of claim, nor did the employee leave to file a late notice of claim, and as the employee sought enforcement of a private right, as she sought relief in the form of money damages and placement in a tenured position with the school district on the basis that she alone was denied such a position on the basis of her national origin, defendants' motion for summary judgment with respect to the employee's state law claim brought under N.Y. Exec. Law § 296 was granted. Augustin v Enlarged City Sch. Dist. of Newburgh, 616 F. Supp. 2d 422, 2009 U.S. Dist. LEXIS 39949 (S.D.N.Y. 2009).

Employee's claims of retaliation under N.Y. Exec. Law § 296(3) were barred because the employee failed to file a notice of claim in accordance with N.Y. County Law § 52; grievances and correspondence between the employee and the employer from 2001 to 2006 did not constitute notice because the one year and 90-day time limit in N.Y. Gen. Mun. Law § 50-i was not observed. Russell v County of Nassau, 696 F. Supp. 2d 213, 2010 U.S. Dist. LEXIS 14018 (E.D.N.Y. 2010).

Employment discrimination claims brought pursuant to N.Y. Exec. Law § 296 were not subject to the statutory notice requirements Barella v Vill. of Freeport, 16 F. Supp. 3d 144, 2014 U.S. Dist. LEXIS 58827 (E.D.N.Y. 2014).

46. — —Police brutality

Federal civil rights action for alleged police brutality was timely commenced where complaint was filed within period prescribed by General Municipal Law § 50-i, and 90-day notice provision of such statute would not operate to bar civil rights action. Davis v Krauss, 478 F. Supp. 823, 1979 U.S. Dist. LEXIS 8975 (E.D.N.Y. 1979).

Federal civil rights action alleging police brutality invoked indemnity provisions of General Municipal Law § 50-j, and was thus governed by the 1 year, 90-day limitation period set forth in General Municipal Law § 50-i, rather than the 3-year period provided by CPLR 214(2). Davis v Krauss, 478 F. Supp. 823, 1979 U.S. Dist. LEXIS 8975 (E.D.N.Y. 1979).

47. —Actions involving constitution

Discharged county correction lieutenant's cause of action alleging denial of his constitutional rights to due process and collective bargaining was barred by his failure to comply with CLS Gen Mun § 50-i where he was served with written notice of his termination in 1994, and his constitutional claims were not interposed until 1998. Monroe v Schenectady County, 266 A.D.2d 792, 699 N.Y.S.2d 164, 1999 N.Y. App. Div. LEXIS 12120 (N.Y. App. Div. 3d Dep't 1999).

Plaintiffs' constitutional claims against defendant county involving issues of due process, equal protection, freedom from self incrimination and freedom from unreasonable search and seizure arising out of their involuntary detention and interrogation at a police station on the purported authority of Grand Jury subpoenas issued by the Assistant District Attorney made returnable at the police station rather than before the Grand Jury which was

not even convened to hear the testimony for which the subpoenas were issued, are governed by the one-year and 90-day Statute of Limitations applicable to "tort claims" against a municipality (General Municipal Law, § 50-i), and are therefore timely. Drake v City of Rochester, 96 Misc. 2d 86, 408 N.Y.S.2d 847, 1978 N.Y. Misc. LEXIS 2557 (N.Y. Sup. Ct. 1978), aff'd, 74 A.D.2d 996, 429 N.Y.S.2d 394, 1980 N.Y. App. Div. LEXIS 10816 (N.Y. App. Div. 4th Dep't 1980).

A federal civil rights action alleging that various New York state and New York city officials committed a wholesale violation of plaintiffs' Constitutional rights would be governed by the three year limitations period provided by CPLR § 214(2), rather than by the one year 90-day limitation period provided by General Municipal Law § 50-i which governs tort claims against municipalities. Martin Hodas, East Coast Cinematics, Inc. v Lindsay, 431 F. Supp. 637, 1977 U.S. Dist. LEXIS 16280 (S.D.N.Y. 1977).

A claim against the city of New York for damages due to claimed violation of plaintiff's Constitutional rights under the Fourth and Fourteenth Amendments, arising out of an allegedly unlawful search of plaintiff's apartment by city police on March 31, 1973 and plaintiff's subsequent incarceration, was timely filed where the "event" which triggered commencement of the one year 90-day limitations period provided by General Municipal Law § 50-i, plaintiff's release from incarceration, did not occur until March 24, 1976, only some three months before the complaint was filed. Even if the federal cause of action were regarded as having arisen at the time of the illegal arrest, the action would not be dismissed since plaintiff had plausibly alleged that the conditions of his successive trials and of his incarceration virtually incapacitated him from bringing the suit until after his release, the proof of which allegations would establish a basis on which the statute of limitations should be tolled. Adekalu v New York City, 431 F. Supp. 812, 1977 U.S. Dist. LEXIS 15939 (S.D.N.Y. 1977).

Education Law § 3813 and General Municipal Law § 50-i were the most appropriate statutes relating to limitations on bringing a Fourteenth Amendment claim against a school district for damages relating to termination of probationary position and teaching license. Lombard v Board of Education, 440 F. Supp. 577, 1977 U.S. Dist. LEXIS 12936 (E.D.N.Y. 1977).

Three-year limitations period set forth in CPLR 214, subd 2, and not that provided by Gen Mun Law § 50-i, governed claims for monetary relief under Fourteenth Amendment, since (1) complaint was not couched in terms of tort action, (2) defendants were individuals rather than city, and (3) Fourteenth Amendment claims were interrelated with statutory claims under 42 USCS §§ 1981, 1983, and 1985(3). Lavender-Cabellero v Department of Consumer Affairs, 458 F. Supp. 213, 1978 U.S. Dist. LEXIS 14754 (S.D.N.Y. 1978).

Owner's notice of claim did not invoke the New York State Constitution, and thus its state constitutional claims against a town were barred. DC3, LLC v Town of Geneva, 783 F. Supp. 2d 418, 2011 U.S. Dist. LEXIS 39616 (W.D.N.Y. 2011).

48. —Continuing trespass

Property owners' continuing trespass and nuisance claims against a town for allegedly damaging their property by piling plowed snow against the wall of their building were untimely; all the evidence indicated that the owners neglected the building for years, and only noticed the water damage when they tried to sell it. Alamio v Town of Rockland, 302 A.D.2d 842, 755 N.Y.S.2d 754, 2003 N.Y. App. Div. LEXIS 1738 (N.Y. App. Div. 3d Dep't 2003).

Because paving a street did not constitute an artificial means of diversion, the owners failed to establish that a town created a continuing trespass or nuisance; inasmuch as the owners did not timely serve the town with notice under N.Y. Gen. Mun. Law §§ 50-e(1)(a), 50-i(1), the town was properly granted summary judgment. Smith v Town of Long Lake, 40 A.D.3d 1381, 837 N.Y.S.2d 391, 2007 N.Y. App. Div. LEXIS 6517 (N.Y. App. Div. 3d Dep't 2007).

Because the cutting of a store's storm drainpipe by a transit authority and its subcontractors interfered with a store's easement and right of access to a sewer, it constituted a continuing trespass and resulted in successive causes of action that were timely under N.Y. Gen. Mun. Law §§ 50-e, 50-i, N.Y. Pub. Auth. Law § 1212, and N.Y. C.P.L.R. 214. Bloomingdales, Inc. v New York City Tr. Auth., 52 A.D.3d 120, 859 N.Y.S.2d 22, 2008 N.Y. App. Div. LEXIS 4153 (N.Y. App. Div. 1st Dep't 2008), aff'd, 13 N.Y.3d 61, 886 N.Y.S.2d 663, 915 N.E.2d 608, 2009 N.Y. LEXIS 1846 (N.Y. 2009).

Action against City of New York by Pennsylvania resident who was riparian owner of land along Delaware river to recover damages resulting from diversion of water alleged a continuing trespass and delay in filing notice of claim barred any claim for damages incurred more than 90 days prior to filing. Gregory v New York, 346 F. Supp. 140, 1972 U.S. Dist. LEXIS 12974 (S.D.N.Y. 1972), disapproved, Fountain v Metropolitan Atlanta Rapid Transit Authority, 678 F.2d 1038, 1982 U.S. App. LEXIS 18222 (11th Cir. 1982).

49. —Equity actions

Where city terminated landowner's right to enjoin trespass by condemning land, damages for trespass would be limited to 90 days prior to filing of statutory notice of claim, even though compliance with notice of claim requirements is not necessary where action is brought in equity to restrain continuing act and where demand for money damages is merely incidental to requested injunctive relief. Rand v New York, 47 A.D.2d 937, 367 N.Y.S.2d 80, 1975 N.Y. App. Div. LEXIS 9398 (N.Y. App. Div. 2d Dep't 1975).

Any claim or notice of claim against a county for damages arising at law or in equity must be made and served in compliance with section 50-e of the General Municipal Law and the action must be commenced pursuant to the provisions of section 50-i of the General Municipal Law (County Law, § 52); in an equitable action seeking only injunctive relief, it is unnecessary to file a notice of claim. Malcuria v Seneca, 66 A.D.2d 421, 414 N.Y.S.2d 401, 1979 N.Y. App. Div. LEXIS 10029 (N.Y. App. Div. 4th Dep't 1979).

Although it is unnecessary to file a notice of claim in an equitable action against a county seeking only injunctive relief, inasmuch as any claim or notice of claim against a county for damages arising at law or in equity must be made and served in compliance with section 50-e of the General Municipal Law and the action must be commenced pursuant to the provisions of section 50-i of the General Municipal Law (County Law, § 52), if plaintiffs do not file a notice of claim pursuant to section 52 of the County Law and the complaint seeks both injunctive and monetary relief, a motion to dismiss the cause of action for damages is granted, leaving a viable cause of action for injunctive relief; plaintiffs should not be permitted to frustrate the legitimate purposes of the notice-of-claim statutes by grafting a claim for monetary damages to a claim seeking injunctive relief. Malcuria v Seneca, 66 A.D.2d 421, 414 N.Y.S.2d 401, 1979 N.Y. App. Div. LEXIS 10029 (N.Y. App. Div. 4th Dep't 1979).

The notice of claim provisions of section 50-i of the General Municipal Law do not apply to contract actions; furthermore, it is unnecessary to file a notice of claim in an equitable action seeking only injunctive relief. Accordingly, where causes of action asserted in a complaint are for breach of contract and specific performance, it is unnecessary to pass upon the timeliness of an application for leave to serve a late notice of claim. Fraccola v Utica, 77 A.D.2d 161, 432 N.Y.S.2d 943, 1980 N.Y. App. Div. LEXIS 13008 (N.Y. App. Div. 4th Dep't 1980).

In an action by a landowner, who attempted to build a wall to prevent water from further inundating his land as a result of a municipality's bridge repair efforts, in which the landowner sought damages, an injunction to prevent the town from continuing to divert water onto his land, and an injunction against his prosecution on charges of interfering with the banks of a trout stream tributary, the trial court incorrectly dismissed the complaint on the grounds that there was no personal jurisdiction over the town highway superintendent and the town as the summons was improperly served, since a notice of claim under Gen Mun Law § 50-e is not required for an action brought in equity against a municipality when the demand for money damages is incidental and subordinate to the requested injunctive relief, and although plaintiff sought money damages to compensate him for the alleged harm, the claims were subordinate and incidental to his

cause of action seeking equitable relief. Likewise, Gen Mun Law § 50-i, was inapplicable. Dutcher v Shandaken, 97 A.D.2d 922, 470 N.Y.S.2d 767, 1983 N.Y. App. Div. LEXIS 20711 (N.Y. App. Div. 3d Dep't 1983).

No notice of claim is required in action against municipality if money damages demanded are incidental to equitable relief sought. Greaney v Springer, 266 A.D.2d 707, 701 N.Y.S.2d 450, 1999 N.Y. App. Div. LEXIS 11842 (N.Y. App. Div. 3d Dep't 1999).

Where the nature of plaintiff's action is equitable to enjoin the village from continuing a wrong and to abate a nuisance, the General Municipal Law requiring a notice of claim and a lapse of 30 days from notice has no applicability even though money damages are sought as incidental to the main relief. Kyle v Catskill, 81 Misc. 2d 1035, 367 N.Y.S.2d 158, 1975 N.Y. Misc. LEXIS 2524 (N.Y. Sup. Ct. 1975).

50. —Federal actions

Petitioners should have been granted leave to serve late notice of claim with respect to claimed violations by county of federal Civil Rights Act of 1871 where (1) petitioners, in their initial notice of claim, alleged claims for false arrest, false imprisonment, malicious prosecution and abuse of process, (2) permission to serve late notice of claim was sought some 4 months after Court of Appeals resolved uncertainty in law by deciding in unrelated case that notice of claim requirements of CLS Gen Mun § 50-i (as limited by CLS Gen Mun § 50-e) applied to federal civil rights actions, and (3) scope of common-law claims was sufficiently broad, and facts were sufficiently similar to federal claim, that county was not prejudiced by delay. Delzotto v County of Warren, 137 A.D.2d 950, 525 N.Y.S.2d 373, 1988 N.Y. App. Div. LEXIS 1752 (N.Y. App. Div. 3d Dep't 1988).

Action against school district and village alleging Federal civil rights violations was not subject to notice of claim requirements of CLS Gen Mun § 50-i. Gorman v Sachem Cent. Sch. Dist., 232 A.D.2d 452, 648 N.Y.S.2d 461, 1996 N.Y. App. Div. LEXIS 10167 (N.Y. App. Div. 2d Dep't 1996).

General Municipal Law § 50-i generally serves to limit municipality's duty to respond, or indemnify, by requiring that certain actions be speedily brought; § 50-i has never been applied to bar federal civil rights action commenced more than one year and 90 days, but less than 3 years, after event in question. Taylor v Mayone, 626 F.2d 247, 1980 U.S. App. LEXIS 16190 (2d Cir. N.Y. 1980).

A federal civil rights action alleging that various New York state and New York city officials committed a wholesale violation of plaintiffs' Constitutional rights would be governed by the three year limitations period provided by CPLR § 214(2), rather than by the one year 90-day limitation period provided by General Municipal Law § 50-i which governs tort claims against municipalities. Martin Hodas, East Coast Cinematics, Inc. v Lindsay, 431 F. Supp. 637, 1977 U.S. Dist. LEXIS 16280 (S.D.N.Y. 1977).

Federal civil rights action alleging police brutality invoked indemnity provisions of General Municipal Law § 50-j, and was thus governed by the 1 year, 90-day limitation period set forth in General Municipal Law § 50-i, rather than the 3-year period provided by CPLR 214(2). Davis v Krauss, 478 F. Supp. 823, 1979 U.S. Dist. LEXIS 8975 (E.D.N.Y. 1979).

Commencement provisions of CLS Gen Mun §§ 50-e and 50-i are applicable in federal action for prima facie tort, intentional infliction of mental distress, and constitutional claims based upon termination of plaintiff's employment with city; there is no direct conflict between CLS Gen Mun §§ 50-e, and 50-i and Federal Rules of Civil Procedure, Rules 3 and 4, such that, in federal court action state commencement rules must be complied with. Piesco v New York, Dep't of Personnel, 650 F. Supp. 896, 1987 U.S. Dist. LEXIS 5013 (S.D.N.Y. 1987).

In federal court civil rights action, filing of notice of claim with town was prerequisite to plaintiff's maintenance of pendent state claims for violations of New York statutes governing treatment of juveniles upon their arrest and detention, violations of town police department's own policies, and negligent infliction of emotional distress. Johns v Town of E. Hampton, 942 F. Supp. 99, 1996 U.S. Dist. LEXIS 15020 (E.D.N.Y. 1996).

In federal court civil rights action, filing of notice of claim with town was prerequisite to plaintiff's maintenance of pendent state claim for negligent infliction of emotional distress against town officials in their individual capacities. Johns v Town of E. Hampton, 942 F. Supp. 99, 1996 U.S. Dist. LEXIS 15020 (E.D.N.Y. 1996).

51. —False arrest or imprisonment or malicious prosecution

Former correction officer's cause of action against county for false arrest would be dismissed as untimely since claim was not interposed within one year of date of his arrest and release from custody. Sanchez v County of Westchester, 146 A.D.2d 620, 536 N.Y.S.2d 529, 1989 N.Y. App. Div. LEXIS 477 (N.Y. App. Div. 2d Dep't 1989).

Plaintiffs' claims against defendant county for false arrest, false imprisonment, abuse of process and negligence, commenced on September 14, 1977, based upon incidents occurring on June 16 and 17, 1976 when plaintiffs were involuntarily detained and interrogated at a police station on the purported authority of Grand Jury subpoenas issued by the Assistant District Attorney made returnable at the police station rather than before the Grand Jury which was not even convened to hear the testimony for which the subpoenas were issued, are not time-barred by the one-year Statute of Limitations ordinarily applicable to claims for false imprisonment (CPLR 215) since plaintiffs' claims are instead governed by the one-year and 90-day limitation applicable to "tort claims" against a county for "personal injury", which includes claims for false imprisonment and malicious prosecution (General Construction Law, § 37-a), caused by the negligence or wrongful act of a county official, which time limitation supersedes "any inconsistent provisions of law" (General Municipal Law, § 50-i) thus rendering plaintiffs' claims timely. Drake v City of Rochester, 96 Misc. 2d 86, 408 N.Y.S.2d 847, 1978 N.Y. Misc. LEXIS 2557 (N.Y. Sup. Ct. 1978), aff'd, 74 A.D.2d 996, 429 N.Y.S.2d 394, 1980 N.Y. App. Div. LEXIS 10816 (N.Y. App. Div. 4th Dep't 1980).

The timeliness of plaintiff's notice of claim and institution of cause of action for malicious prosecution, with respect to requirements of general municipal law §§ 50-e and 50-i, was to be measured from date action accrued, even though both filings were made prior to accrual of action, where city was not prejudiced by premature filing of plaintiff's claim. Jastrzebski v New York, 423 F. Supp. 669, 1976 U.S. Dist. LEXIS 12429 (S.D.N.Y. 1976) (applying New York law).

Individual's state law claims against a county, sheriff's department, sheriff, and officers were dismissed as time-barred under N.Y. Gen. Mun. Law § 50-i, where the individual commenced the claims arising from his arrest and prosecution for, inter alia, assault and resisting arrest over one year and 10 months after the occurrence of the events. Houghton v Cardone, 295 F. Supp. 2d 268, 2003 U.S. Dist. LEXIS 22647 (W.D.N.Y. 2003).

Plaintiffs' state law claims against a city for false arrest, false imprisonment, and malicious prosecution were allowed to stand because plaintiffs were granted leave to file a late notice of claim as permitted by N.Y. Gen. Mun. Law § 50-e(5); however, plaintiffs' claim for negligent or intentional infliction of emotional distress was dismissed in accordance with N.Y. Gen. Mun. Law § 50-i because the notice of claim did not state such a claim. Richards v City of New York, 433 F. Supp. 2d 404, 2006 U.S. Dist. LEXIS 39312 (S.D.N.Y. 2006).

Arrestee's state law claims for malicious prosecution, which accrued on June 21, 2007, when the charges against him were dropped, were barred under the time limitations for notice in N.Y. County Law § 52 and N.Y. Gen. Mun. Law §§ 50-e, 50-i where the arrestee did not file suit until a year and over four months later, on November 10, 2008. Martin v County of Nassau, 692 F. Supp. 2d 282, 2010 U.S. Dist. LEXIS 22989 (E.D.N.Y. 2010).

Plaintiff failed to satisfy the notice-of-claim requirement before bringing state law claims against a municipality arising from plaintiff's prosecution; filing a summons with notice in state court did not satisfy the requirement that a separate notice of claim be filed prior to the initiation of a lawsuit. Berry v Millbrook, 815 F. Supp. 2d 711, 2011 U.S. Dist. LEXIS 109404 (S.D.N.Y. 2011).

52. —Actions involving infants

Court was powerless to grant leave for extension of time for infant to file notice of claim against school where no application for such leave was made within 1 year after accident from which claim arose, and claim was further prohibited under General Municipal Law § 50-i by claimant's failure to commence action within 1 year, 90 days after accident. Schiermeyer v Averill Park Cent. School Dist., 42 A.D.2d 654, 345 N.Y.S.2d 210, 1973 N.Y. App. Div. LEXIS 4046 (N.Y. App. Div. 3d Dep't 1973).

Because timely filing of notice of claim is condition precedent to commencement of tort action against city, dismissal of adult plaintiff's action for infant plaintiff's exposure to toxic substance was required where adult plaintiff's application for permission to file late notice of claim was made after time to commence action had expired. Perry v City of New York, 238 A.D.2d 326, 656 N.Y.S.2d 301, 1997 N.Y. App. Div. LEXIS 3415 (N.Y. App. Div. 2d Dep't 1997).

Where plaintiffs, an infant and his mother, timely served a notice of claim on a town alleging its nonfunctioning street lights caused the infant to be hit by a car, the trial court did not err in denying plaintiffs' motion for leave to serve a late, amended notice of claim because plaintiffs failed to proffer a reasonable excuse for the delay in serving a notice of claim that described the infant plaintiff's injuries as arising from any negligence on the part of the town other than that related to the nonfunctioning street lights described in the original notice of claim; and plaintiffs did not show that, within 90 days after the accident or a reasonable time thereafter, the town knew the essential facts constituting the claim that it was negligent with respect to anything other than the street lights or that the town would not be substantially prejudiced by the delay. Palacios v Town of N. Hempstead, 165 A.D.3d 967, 86 N.Y.S.3d 117, 2018 N.Y. App. Div. LEXIS 6841 (N.Y. App. Div. 2d Dep't 2018).

Where plaintiffs, an infant and his mother, timely served a notice of claim on a town alleging its nonfunctioning street lights caused the infant to be hit by a car, the trial court did not err in denying plaintiffs' motion for leave to serve a late, amended notice of claim because the proposed amendments added new theories of liability related to the town's ownership, operation, control, design, planning, study, retention, supervision, maintenance, repair, inspection, and management of the street and sidewalks, and such amendments were not technical in nature and were not permitted as late-filed amendments to a notice of claim. Palacios v Town of N. Hempstead, 165 A.D.3d 967, 86 N.Y.S.3d 117, 2018 N.Y. App. Div. LEXIS 6841 (N.Y. App. Div. 2d Dep't 2018).

Although an application to file a late claim for medical malpractice would be granted with respect to an infant claimant when it was filed within one year and 90 days of the accrual of the cause of action under Gen Mun Law § 50-i(1)(a), an application to file a late claim with respect to the derivative action of the parent based upon the claimant daughter's infancy would be denied, where no showing was made concerning the reasons for the parent's failure to serve and file the notice of claim within the statutory period; the 1976 amendment to Gen Mun Law § 50-e(5) was not intended to give parents an automatic right to file late with respect to a derivative claim where the infant is granted an extension of time based upon the infancy. Manfredonio v New York City Health & Hospitals Corp., 116 Misc. 2d 652, 455 N.Y.S.2d 1010, 1982 N.Y. Misc. LEXIS 3936 (N.Y. Sup. Ct. 1982).

53. —Real property actions

In action by mortgagee bank to recover condemnation proceeds that town paid to mortgagor, alleging that town's failure to notify bank of condemnation proceedings resulted in financial loss to bank after mortgagor defaulted on loan, town was entitled to summary judgment based on statute of limitations defense in that bank's claim against town accrued when town paid mortgagor, not when bank learned of payment, and town was not equitably estopped from raising statute of limitations defense where it had published public notices and posted additional notices regarding condemnation proceedings, and its failure to notify bank was not calculated to lull bank into inactivity. North Side Sav. Bank v Town of Hempstead, 236 A.D.2d 456, 653 N.Y.S.2d 649, 1997 N.Y. App. Div. LEXIS 1202 (N.Y. App. Div. 2d Dep't 1997).

In action to set aside tax sale and subsequent conveyances of real property previously owned by plaintiffs, summary judgment for defendants was not required by plaintiffs' failure to file notice of claim under CLS County § 52 and CLS Gen Mun §§ 50-e and 50-i where plaintiffs' primary objective was to set aside tax sale and conveyances and to obtain judgment declaring them to be owners of property, and any money damages sought were purely incidental to their attempt to regain title. Greaney v Springer, 266 A.D.2d 707, 701 N.Y.S.2d 450, 1999 N.Y. App. Div. LEXIS 11842 (N.Y. App. Div. 3d Dep't 1999).

In mortgage foreclosure action, mortgagee city was entitled to summary judgment dismissing mortgagor's counterclaims for breach of contract and tortious interference with contract where mortgagor did not allege compliance with claim presentment requirements of CLS Gen Mun §§ 50-e and 50-i and NYC Admin Code § 7-201(a). City of New York v 611 West 152nd St., Inc., 273 A.D.2d 125, 710 N.Y.S.2d 36, 2000 N.Y. App. Div. LEXIS 7113 (N.Y. App. Div. 1st Dep't 2000).

City was entitled to dismissal of action against it where (1) action sounded in tort, not de facto taking of property, and thus notice of claim was required under CLS Gen Mun § 50-e(1)(a), (2) no such notice was filed, (3) action was not commenced within one year and 90 days "after the happening of the event upon which the claim is based" under CLS Gen Mun § 50-i(1)(c), and (4) plaintiff's request for leave to serve late notice of claim was untimely under CLS Gen Mun § 50-e(5). Grimaldi v City of Tonawanda, 275 A.D.2d 917, 715 N.Y.S.2d 175, 2000 N.Y. App. Div. LEXIS 9610 (N.Y. App. Div. 4th Dep't 2000).

In an action between a county and a property owner, arising from problems with their closing of the owner's property, it was error to grant summary judgment dismissal to the county on the owner's inverse condemnation counterclaim, as statutory notice was not necessary since the claim did not sound in tort. County of Jefferson v Onondaga Dev., LLC, 151 A.D.3d 1793, 59 N.Y.S.3d 203, 2017 N.Y. App. Div. LEXIS 4912 (N.Y. App. Div. 4th Dep't 2017).

Causes of action involving money damages for property and maintaining a nuisance against town for permitting certain septic tanks located on private property near plaintiff's real property to be maintained in a defective condition in violation of town ordinances should not be stricken since plaintiffs are not required to plead compliance with the requirements of the statute on such causes of action. Malloy v Niskayuna, 64 Misc. 2d 676, 315 N.Y.S.2d 502, 1970 N.Y. Misc. LEXIS 1171 (N.Y. Sup. Ct. 1970).

Action to enjoin village from improperly maintaining a catch basin on property adjoining the plaintiff's which caused surface water to be discharged onto the plaintiff's premises with resultant damage, and which also sought to have condition declared a nuisance and additionally demanded money damages as incidental to prime relief, which action was commenced more than one year and 90 days since accrual of the claim as alleged in the notices was not untimely. Kyle v Catskill, 81 Misc. 2d 1035, 367 N.Y.S.2d 158, 1975 N.Y. Misc. LEXIS 2524 (N.Y. Sup. Ct. 1975).

In plaintiff county's action for a declaratory judgment as to defendants insurers' duty to indemnify and defend an action brought by a landowner alleging negligent design and construction of a sea wall, the landowner had alleged a continuing tort which accrued anew each day, and by filing a notice of claim against the county under N.Y. Gen. Mun. Law § 50-e(1)(a) (McKinney 2002), that provision and N.Y. Gen. Mun. Law § 50-i (McKinney 2002), and N.Y. County Law § 52 (McKinney 2002), were satisfied; the landowner was not limited to damages sustained within 90 days preceding the notice. County of Suffolk v Travelers Ins. Co., 267 F. Supp. 2d 288, 2003 U.S. Dist. LEXIS 1409 (E.D.N.Y. 2003).

A town may not pay a claim for damage to real property where the claimant has failed to give notice within 90 days or such additional time as the court might allow. 1966 Ops St Compt File 385.

54. —Third party actions

Claimant's filing notice of claim against city did not commence action against the city; thus, alleged discontinuance of claim

without insurer's consent did not constitute discontinuance of a third-party action such as would have absolved insurer of further responsibility for workmen's compensation. McCormick v Albany Urban Renewal Agency, 47 A.D.2d 779, 365 N.Y.S.2d 65, 1975 N.Y. App. Div. LEXIS 9084 (N.Y. App. Div. 3d Dep't 1975).

Cause of action against town based on allegation that town has been derelict in duty to properly assess fire district tax is subject to notice of claim requirements and statute of limitations applicable to torts. Stanford Heights Fire Dist. v Niskayuna, 120 A.D.2d 878, 502 N.Y.S.2d 548, 1986 N.Y. App. Div. LEXIS 56975 (N.Y. App. Div. 3d Dep't 1986).

Although defendant village was not entitled to amend its answer to assert affirmative defense of statute of limitations, since plaintiff would be thereby prejudiced, third party defendant was nevertheless entitled to summary judgment dismissing third-party complaint on ground that first-party action was not timely commenced. Taylor v Village of Ilion, 265 A.D.2d 841, 695 N.Y.S.2d 467, 1999 N.Y. App. Div. LEXIS 9910 (N.Y. App. Div. 4th Dep't 1999), app. denied, 1999 N.Y. App. Div. LEXIS 13947 (N.Y. App. Div. 4th Dep't Dec. 30, 1999).

With respect to third-party claims, such as a claim seeking right to reimbursement against municipal corporations, the period of limitation set up in this section runs from accrual of the third-party plaintiff's cause of action, not from accrual of the original plaintiff's cause of action against the municipality. Rizzo v Steiner, 36 Misc. 2d 701, 233 N.Y.S.2d 647, 1962 N.Y. Misc. LEXIS 2445 (N.Y. Sup. Ct. 1962).

In an action brought in tort in which one of the defendants has properly brought a third-party action in indemnity against the City of New York, a motion by the plaintiff in the main tort action to amend the complaint to assert a new cause of action in tort against the city is denied; plaintiff has not served a notice of claim upon the city within 90 days of the date on which the underlying occurrence took place (General Municipal Law, § 50-e) and has not brought its action within one year and 90 days after said date (General Municipal Law, § 50-i) and, therefore, sections 50-e and 50-i are complete bars to the tort action against the city. While plaintiff may not have known that the city was a third-party defendant until it was too late to bring a direct tort action against the city, that factor does not fit any of the grounds under section 50-e or the recent amendments thereto, and, even if it did, section 50-e denies any such relief if the time for commencement of the action under section 50-i has long since expired. It is of no consequence that the city has not as yet answered the third-party complaint. 2999 Realty Corp. v Hallen Constr. Corp., 95 Misc. 2d 227, 406 N.Y.S.2d 951, 1978 N.Y. Misc. LEXIS 2406 (N.Y. Civ. Ct. 1978).

Neither notice of claim requirement of General Municipal Law § 50-e nor limitations period set forth in General Municipal Law § 50-i applies in third-party actions against municipal defendants. Haehl v Port Chester, 463 F. Supp. 845, 1978 U.S. Dist. LEXIS 14253 (S.D.N.Y. 1978).

55. —Wrongful death actions

In an action against a municipality alleging negligence in the wrongful death of plaintiff's husband which was commenced within two years of the husband's death but beyond the one year and 90 day limitations period set forth in former Subd 1 of Gen Mun Law § 50-i, the court improperly granted the municipality's motion to dismiss the complaint, where the action was governed by the two-year limitations period for wrongful death actions found in EPTL § 5-4.1 and was not subject to the limitations period contained in Gen Mun Law § 50-i. Collins v New York, 55 N.Y.2d 646, 446 N.Y.S.2d 258, 430 N.E.2d 1311, 1981 N.Y. LEXIS 3229 (N.Y. 1981).

In a wrongful death action against the New York City Health and Hospitals Corporation, the two-year general limitation period for wrongful death actions established by EPTL § 5-4.1 and the two-year provision of Gen Mun Law § 50-i were inapplicable to the action against the public benefits corporation which existed independently of the City of New York and notice of the claim was required to be filed within 90 days after death except for extensions up to one year and 90 days, as permitted by Gen Mun Law § 50-e, and the action was required to be commenced within one year and 90 days from the date of the decedent's death. Brennan v New York, 59 N.Y.2d 791, 464 N.Y.S.2d 731, 451 N.E.2d 478, 1983 N.Y. LEXIS 3134 (N.Y. 1983).

General Municipal Law § 50-i further mandates that any action based on a wrongful death claim must be commenced within one year and 90 days after the happening of the event upon which the claim is based and such action is not timely if brought more than such period of time after the happening of such event even though brought within four days after the appointment of an administrator. Erickson v Henderson, 30 A.D.2d 282, 291 N.Y.S.2d 403, 1968 N.Y. App. Div. LEXIS 3557 (N.Y. App. Div. 4th Dep't 1968).

In wrongful death action against county based on improper highway maintenance, running of statute of limitations was governed by statute relating to liability of counties for injuries caused by defective highways, and not by General Municipal Law, so that the time began to run from the service of notice of claim and not from the time of accident. Treib v County of Dutchess, 56 A.D.2d 866, 392 N.Y.S.2d 473, 1977 N.Y. App. Div. LEXIS 11228 (N.Y. App. Div. 2d Dep't), app. dismissed, 42 N.Y.2d 824, 1977 N.Y. LEXIS 3951 (N.Y. 1977).

A cause of action for wrongful death was timely since the two-year limitations period in EPTL 5-4.1 controlled inasmuch as Gen Mun Law § 50-i did not specifically refer to wrongful death at the time the suit was initiated, although other causes of action for pain and suffering, and for loss of consortium, were dismissed as untimely. Puliafico v New York, 87 A.D.2d 512, 447 N.Y.S.2d 731, 1982 N.Y. App. Div. LEXIS 15750 (N.Y. App. Div. 1st Dep't 1982).

In an action against a county and others to recover damages for wrongful death, additional causes of action for conscious pain and suffering and for medical malpractice were properly ruled to be untimely where neither was commenced within the one-year and ninety-day period of limitation specified by Gen Mun Law § 50-i. Alessi v County of Nassau, 100 A.D.2d 561, 473 N.Y.S.2d 487, 1984 N.Y. App. Div. LEXIS 17535 (N.Y. App. Div. 2d Dep't 1984).

It was proper exercise of discretion to permit plaintiff to file late notice of claim in wrongful death action against county hospital where application was made within one year and 90 days of accrual of action, plaintiff's attorney acted promptly upon discovery of hospital's correct status, and hospital did not claim substantial prejudice. Wendal v Memorial Hospital of Greene County, 127 A.D.2d 592, 511 N.Y.S.2d 649, 1987 N.Y. App. Div. LEXIS 43060 (N.Y. App. Div. 2d Dep't 1987).

In wrongful death action commenced on behalf of decedent nearly 2 years after he was struck and killed by bus owned by New York City Transit Authority and operated by its subsidiary Manhattan Bronx Surface Transit Operating Authority, court properly allowed authorities to amend their answer to add affirmative defense that plaintiff failed to comply with 1-year 90-day limitation period of CLS Pub A § 1212, since 2-year limitation period for wrongful death actions against municipalities under CLS Gen Mun § 50-i and CLS EPTL § 5-4.1 does not apply to defendant authorities. Melendez v Manhattan & Bronx Surface Transit Operating Authority, 137 A.D.2d 390, 529 N.Y.S.2d 95, 1988 N.Y. App. Div. LEXIS 6534 (N.Y. App. Div. 1st Dep't 1988).

Although the estate representative's notices of claim regarding the wrongful death suit she was filing alleging that the city was responsible for the death of her sister during the sister's transportation from a criminal courtroom to prison were deficient because they were not properly verified, not properly served, nor sufficiently specific, she would be given a chance to replead in view of the fact that it took her so long to obtain her letters of administration in order to file her suit that she was compelled to file her complaint in the less than the 30 days she was required to give notice to the city of her claim so that the city could try and resolve it, as her complaint would have been otherwise time barred for not being filed within the two-year wrongful death statute of limitations. McKune v City of New York, 19 A.D.3d 308, 799 N.Y.S.2d 25, 2005 N.Y. App. Div. LEXIS 7254 (N.Y. App. Div. 1st Dep't 2005).

Trial court properly granted municipal defendants' motion to dismiss wrongful death and conscious pain and suffering claims by plaintiff, as plaintiff failed to timely serve a notice of claim on

defendants with respect to the injuries in question as required by N.Y. Gen. Mun. Law § 50-e, and failed to commence an action with regard to the injuries within the requisite limitations period, N.Y. Gen. Mun. Law § 50-i. Braun v County of Orange, 31 A.D.3d 593, 819 N.Y.S.2d 296, 2006 N.Y. App. Div. LEXIS 9387 (N.Y. App. Div. 2d Dep't 2006).

Term "personal injury," as referred to in one-year and 90-day statute of limitations period applicable to actions for personal injury alleged to have been sustained by reason of negligence or wrongful act of municipality, does not include wrongful death. Priebe v Canandaigua, 91 Misc. 2d 1047, 399 N.Y.S.2d 179, 1977 N.Y. Misc. LEXIS 2477 (N.Y. Sup. Ct. 1977).

Wrongful death claim against city was time barred, although plaintiff served notice of claim within 90 days of being appointed administratrix of decedent's estate, because complaint did not (and could not) allege that 30 days had passed since serving defendants with notice of claim pursuant to CLS Gen Mun § 50-i(3) where no such claim had then been served. Mroz v City of Tonawanda, 999 F. Supp. 436, 1998 U.S. Dist. LEXIS 4577 (W.D.N.Y. 1998).

56. —Arbitration

A municipal self-insurer may not avoid the mandatory arbitration provisions of Ins Law § 674, the no-fault automobile insurance law, by alleging that the insurer demanding arbitration has failed to comply with a notice of claim provisions of Gen Mun Law §§ 50-e, 50-i, since the comprehensive nature of the no-fault legislation and the absence therefrom of any requirement for compliance with Gen Mun Law §§ 50-e, 50-i, indicate a legislative intent that the provisions of such statutes should have no application to the statutory arbitration proceedings between insurers or self-insurers. Syracuse v Utica Mut. Ins. Co., 61 N.Y.2d 691, 472 N.Y.S.2d 600, 460 N.E.2d 1085, 1984 N.Y. LEXIS 4005 (N.Y. 1984).

A failure to comply with the special shortened Statute of Limitations for torts claims, under Gen Mun Law § 15-i(1)(c), would not be a bar to an insurance-loss transfer mandatory arbitration procedure. Syracuse v Utica Mut. Ins. Co., 90 A.D.2d 979, 456 N.Y.S.2d 571, 1982 N.Y. App. Div. LEXIS 19259 (N.Y. App. Div. 4th Dep't 1982), aff'd, 61 N.Y.2d 691, 472 N.Y.S.2d 600, 460 N.E.2d 1085, 1984 N.Y. LEXIS 4005 (N.Y. 1984).

57. —Contract actions

The notice of claim provisions of section 50-i of the General Municipal Law do not apply to contract actions; furthermore, it is unnecessary to file a notice of claim in an equitable action seeking only injunctive relief. Accordingly, where causes of action asserted in a complaint are for breach of contract and specific performance, it is unnecessary to pass upon the timeliness of an application for leave to serve a late notice of claim. Fraccola v Utica, 77 A.D.2d 161, 432 N.Y.S.2d 943, 1980 N.Y. App. Div. LEXIS 13008 (N.Y. App. Div. 4th Dep't 1980).

58. —Conversion actions

Action for alleged conversion of property, which had been removed from plaintiffs' premises by town defendants and sold at sheriff's sale pursuant to court order, was properly dismissed for failure to serve notice of claim under CLS Gen Mun §§ 50-e and 50-i, as action was one for damage to personal property. Kranz v Town of Tusten, 236 A.D.2d 675, 653 N.Y.S.2d 194, 1997 N.Y. App. Div. LEXIS 1119 (N.Y. App. Div. 3d Dep't 1997).

59. —Indemnification and contribution actions

One-year 90-day limitations period of CLS Gen Mun § 50-i has no application to action for indemnification and/or contribution. Petrucci v New York, 167 A.D.2d 29, 569 N.Y.S.2d 624, 1991 N.Y. App. Div. LEXIS 5567 (N.Y. App. Div. 1st Dep't 1991).

60. —Replevin actions

Until the motion to suppress money seized by police in a gambling raid had been granted, money was not subject to replevin so that notice on 90th day after the claim arose and present action seeking to recover the money seized, begun less than a year later as required by Gen Mun L §§ 59-e and 50-i, were timely. Dwyer v County of Nassau, 66 Misc. 2d 1039, 322 N.Y.S.2d 811, 1971 N.Y. Misc. LEXIS 1602 (N.Y. Sup. Ct. 1971).

Action against City of New York for replevin of money taken from plain tiff at time of his arrest on narcotics charge was not timely under CLS Gen Mun § 50-i where it was commenced more than one year and 90 days after imposition of sentence on plaintiff, notwithstanding plaintiff's contention that suit could not have been brought until appellate proceedings had concluded. Beck v New York, 133 Misc. 2d 265, 507 N.Y.S.2d 129, 1986 N.Y. Misc. LEXIS 2861 (N.Y. Sup. Ct. 1986).

61. —Defamation actions

Former foster parent's defamation claim against a county and a child services agency was time-barred because the notice of claim and amended complaint asserted that the letter containing the allegedly defamatory statements was disseminated to various individuals at the meeting that took place on March 10, 2015, and the foster parent commenced litigation more than one year and 90 days from that date. Ripka v County of Madison, 162 A.D.3d 1371, 80 N.Y.S.3d 479, 2018 N.Y. App. Div. LEXIS 4564 (N.Y. App. Div. 3d Dep't 2018).

Former foster parent's defamation claim against two employees of the child services agency was time-barred whether the employees were acting within the scope of their employment when they made the allegedly defamatory statements or acting on their own behalf when such statements were made because the foster parent commenced litigation more than one year and 90 days from the date the allegedly defamatory statements were disseminated to various individuals at a meeting. Ripka v County of Madison, 162 A.D.3d 1371, 80 N.Y.S.3d 479, 2018 N.Y. App. Div. LEXIS 4564 (N.Y. App. Div. 3d Dep't 2018).

By virtue of ¶ 2 of §§ 50-i and 101 of the General Construction Law, the General Municipal Law prevails over a general statute of limitations with respect to the commencement of actions in tort against a public corporation, and with respect to an action for libel and slander instituted against two city employees and the city the provisions of General Municipal Law § 50-i apply not only to the action against the city but also to the action against the city's employees, so that the employee's asserted defense pursuant to CPLR 215 was invalid. Sorge v New York, 56 Misc. 2d 414, 288 N.Y.S.2d 787, 1968 N.Y. Misc. LEXIS 1650 (N.Y. Sup. Ct. 1968).

Applicant's claims of libel and prima facie tort failed because the applicant did not meet the notice of claim requirements of N.Y. Educ. Law § 3813(2) and N.Y. Gen. Mun. Law §§ 50-e and 50-i where he did not file a notice of claim with the school board or the superintendent of schools and the district's human resources director; the applicant's age discrimination charge to the Equal Employment Opportunity Commission did not fulfill the notice of claim requirements because it did not mention the state law claims. Avgerinos v Palmyra-Macedon Cent. Sch. Dist., 690 F. Supp. 2d 115, 2010 U.S. Dist. LEXIS 11988 (W.D.N.Y. 2010).

62. —Malpractice actions

In a proceeding against a county hospital for medical malpractice, the trial court erred in treating a second application for leave to serve a late claim against the hospital as a reinstatement of an earlier, withdrawn application, and in granting the application, where there was no provision in the CPLR for reinstatement of a withdrawn motion, where withdrawal of a motion leaves the record as if the motion had not been made, and where the court was without jurisdiction to grant the application, in that the second application was brought approximately 22 months after the medical malpractice occurred and after the expiration of the applicable one-year and 90-day statutes of limitations in Gen Mun Law §§ 50-e and 50-i. Stoute v New York, 91 A.D.2d 1043, 458 N.Y.S.2d 640, 1983 N.Y. App. Div. LEXIS 16366 (N.Y. App. Div. 2d Dep't), app. dismissed, 59 N.Y.2d 762, 1983 N.Y. LEXIS 5026 (N.Y. 1983).

In an action to recover damages for an allegedly unauthorized disclosure of confidential information received pursuant to the physician-patient relationship existing between plaintiff and a mental health center maintained by a county, the complaint would be dismissed for failure to comply with Gen Mun Law §§ 50-e and 50-i, since the alleged improper disclosure of confidential information is merely a facet of medical malpractice which sounds in tort, not contract, the bill of particulars evi-

dences a malpractice claim, the damages sought are largely for noneconomic loss, and actions sounding in tort require compliance with Gen Mun Law §§ 50-e and 50-i. Silberstein v County of Westchester, 92 A.D.2d 867, 459 N.Y.S.2d 838, 1983 N.Y. App. Div. LEXIS 17239 (N.Y. App. Div. 2d Dep't), app. dismissed, 60 N.Y.2d 703, 1983 N.Y. LEXIS 6285 (N.Y. 1983), aff'd, 62 N.Y.2d 675, 476 N.Y.S.2d 291, 464 N.E.2d 989, 1984 N.Y. LEXIS 4283 (N.Y. 1984).

Statutory period for filing notice of claim was not tolled by patient's continuous treatment by defendant, since ongoing general relationship with clinic for routine periodic health examinations did not constitute continuous treatment of condition on which allegations of malpractice were based. Vazquez v New York City Health & Hosps. Corp., 279 A.D.2d 368, 720 N.Y.S.2d 20, 2001 N.Y. App. Div. LEXIS 646 (N.Y. App. Div. 1st Dep't 2001).

Patient's second cause of action, sounding in medical malpractice, was properly dismissed, since, under the circumstances, it was time-barred pursuant to N.Y. Gen. Mun. Law § 50-i and N.Y. C.P.L.R. 208; in this regard, the second cause of action was asserted against doctors, who allegedly had physician-patient relationships with the patient. The second cause of action was based upon certain alleged departures of those doctors from good and accepted medical practice in their treatment of the patient. Wade v New York City Health & Hosps. Corp., 59 A.D.3d 528, 874 N.Y.S.2d 171, 2009 N.Y. App. Div. LEXIS 1156 (N.Y. App. Div. 2d Dep't 2009).

So much of a patient's first cause of action as alleged inadequate supervision and training of a city hospital's obstetrical personnel sounded in negligence, and was, under the circumstances, timely asserted pursuant to N.Y. Gen. Mun. Law § 50-i and N.Y. C.P.L.R. 208; in this regard, that portion of the first cause of action, asserted only against the city hospital, was not based upon an allegation that the city hospital was vicariously liable for the defendant doctors' alleged medical malpractice, which would rendered that portion of the cause of action untimely, but, rather, that portion of the first cause of action, as well as the other allegations concerning the city hospital's failure, among other things, to promulgate and enforce proper procedures and regulations, which the trial court found sounded in negligence, were based upon certain alleged omissions of the city hospital's management. This challenged conduct did not constitute medical treatment or bear a substantial relationship to the rendition of medical treatment by a licensed physician, and did not require an analysis of the medical treatment furnished to the patient by the city hospital's employees Wade v New York City Health & Hosps. Corp., 59 A.D.3d 528, 874 N.Y.S.2d 171, 2009 N.Y. App. Div. LEXIS 1156 (N.Y. App. Div. 2d Dep't 2009).

One-year and 90-day period for commencement of a suit against the Erie County Medical Center Corporation (ECMCC) was not a condition precedent to suit but was a statute of limitations such that this suit was timely under N.Y. C.P.L.R. 205 as: (1) N.Y. Pub. Auth. Law § 3641 did not contain express conditional language; (2) § 205 applied to proceedings commenced under this section, which was identical to § 3641; and (3) § 3641 did not create the medical malpractice and wrongful death claims alleged as N.Y. Pub. Auth. Law art. 10-C, tit. 6 did not condition ECMCC's waiver of sovereign immunity and consent to suit on timely commencement. Benedetti v Erie County Med. Ctr. Corp., 129 A.D.3d 1462, 11 N.Y.S.3d 375, 2015 N.Y. App. Div. LEXIS 5001 (N.Y. App. Div. 4th Dep't), app. denied, 132 A.D.3d 1329, 17 N.Y.S.3d 341, 2015 N.Y. App. Div. LEXIS 7075 (N.Y. App. Div. 4th Dep't 2015).

Medical malpractice claim against physician who is clearly county employee, rather than independent contractor, is subject to notice of claim requirements of CLS Gen Mun Law § 50-e and time limitations of CLS Gen Mun law § 50-i, notwithstanding fact that physician maintains independent medical malpractice insurance; municipality's indemnification obligation pursuant to CLS Gen Mun Law § 50-d is not excused by existence of physican's insurance. Hilligas v Veznedaroglu, 129 Misc. 2d 781, 493 N.Y.S.2d 974, 1985 N.Y. Misc. LEXIS 2710 (N.Y. Sup. Ct. 1985).

New York City Health and Hospitals Corporation was not entitled to dismissal of mother's derivative cause of action for medical malpractice on grounds that action was time-barred under CLS Gen Mun § 50-i, since issue of fact existed as to whether statute was tolled based upon continuous treatment doctrine, where county hospital, which treated mother's child for neurological damage from birth, directly referred child to better-equipped medical center, and some nexus between the 2 hospitals was shown by medical center's transfer of child back to county hospital for further specialized testing. Frias v New York, 134 Misc. 2d 463, 511 N.Y.S.2d 469, 1986 N.Y. Misc. LEXIS 3120 (N.Y. Sup. Ct. 1986).

63. —Actions involving emotional distress or psychic trauma

Plaintiff's causes of action against village for loss of companionship and services of son, for psychic trauma, and for son's personal injuries and conscious pain and suffering, were governed by one-year-90-day limitation period of CLS Gen Mun § 50-i. Myrick v County of Suffolk, 139 A.D.2d 633, 527 N.Y.S.2d 273, 1988 N.Y. App. Div. LEXIS 4386 (N.Y. App. Div. 2d Dep't 1988).

Court erred in dismissing public school teacher's complaint against her principal for intentional infliction of emotional distress on ground that plaintiff failed to serve notice of claim on city board of education as required by CLS Gen Mun § 50-i, since municipal entity must receive notice of claim only when it has obligation to reimburse its employee for offending conduct, and pursuant to CLS Gen Mun § 50-k(3), municipal entity has no duty to indemnify where injury or damage resulted from intentional wrongdoing or recklessness on part of employee. Radvany v Jones, 184 A.D.2d 349, 585 N.Y.S.2d 343, 1992 N.Y. App. Div. LEXIS 8115 (N.Y. App. Div. 1st Dep't 1992).

Court would not dismiss action for negligent and intentional infliction of emotion distress brought by father of child whose death had mistakenly been reported as homicide, since defendants city, police department and medical examiner were equitably estopped from asserting defense of statute of limitations by medical examiner's failure, for some 18 months, to disclose that further examination revealed that child had died of natural causes; circumstances presented exception to general rule that equitable estoppel will not be applied against governmental agencies. Lauer v City of New York, 171 Misc. 2d 832, 656 N.Y.S.2d 93, 1997 N.Y. Misc. LEXIS 83 (N.Y. Sup. Ct. 1997), aff'd in part, modified, 258 A.D.2d 92, 693 N.Y.S.2d 167, 1999 N.Y. App. Div. LEXIS 7674 (N.Y. App. Div. 2d Dep't 1999).

Former inmate's intentional infliction of emotional distress (IIED) claim against a city was not time-barred because the IIED claim involved continuous tortious conduct and injury that spanned the criminal proceedings against the inmate and ended only when the criminal charges were dismissed and the statute of limitations on an IIED claim against a municipality and involving a continuous injury did not begin to run until the conduct ceased. Rentas v Ruffin, 816 F.3d 214, 2016 U.S. App. LEXIS 4306 (2d Cir. N.Y. 2016).

64. —Miscellaneous actions

Action to recover damages for blasting operation allegedly performed was properly dismissed where it was not commenced within one year and 90 days after the happening of the event upon which the claim was based (Gen Mun L § 50-i), the tolling provision afforded by CPLR 204 subd a being inapplicable, and CPLR § 203, subd b(5) being of no aid to plaintiffs where there was no proof that summons was delivered to sheriff for service upon the defendant before the limitation period of § 50-i of the General Municipal Law had run. Bellows v County of Montgomery, 42 A.D.2d 1020, 348 N.Y.S.2d 248, 1973 N.Y. App. Div. LEXIS 3326 (N.Y. App. Div. 3d Dep't 1973).

An order denying defendant city's motion to dismiss the complaint and granting plaintiffs' cross motion for an order deeming the summons and complaint to be a notice of claim and extending the time to file such notice of claim nunc pro tunc would be reversed and the complaint dismissed, where plaintiffs served the summons within one year of the subject accident and served the complaint within one year and 90 days of the accident, but where plaintiffs did not serve a notice of claim or submit to examination by defendant and did not move for permission to file a late notice of claim until almost four years after the accident. Tarquinio v New York, 84 A.D.2d 265, 445 N.Y.S.2d 732, 1982 N.Y. App. Div.

LEXIS 14919 (N.Y. App. Div. 1st Dep't), aff'd, 56 N.Y.2d 950, 453 N.Y.S.2d 615, 439 N.E.2d 331, 1982 N.Y. LEXIS 3523 (N.Y. 1982).

In a negligence action against a city and its employee, who was driving a city-owned vehicle which allegedly struck plaintiff, commenced more than one year and 90 days after the accident in violation of Gen Mun Law § 50-i, plaintiff's complaint against the employee was properly dismissed as time-barred. The city was the real party in interest and claims against both defendants were governed by the statute of limitations in Gen Mun Law § 50-i, where there was no factual issue as to whether the employee was operating the vehicle with the permission and consent of the city and within the scope of his employment and thus entitled to indemnification by the city. Urraro v Green, 106 A.D.2d 567, 483 N.Y.S.2d 80, 1984 N.Y. App. Div. LEXIS 21875 (N.Y. App. Div. 2d Dep't 1984).

Action brought against county alleging latent effects of exposure to toxic substances was time barred where plaintiffs were diagnosed with multiple chemical sensitivities in November 1987, and notice of claim was served on county on June 7, 1990 and summons and complaint served on April 24, 1991. Hedlund v County of Tompkins, 235 A.D.2d 980, 652 N.Y.S.2d 877, 1997 N.Y. App. Div. LEXIS 744 (N.Y. App. Div. 3d Dep't), app. dismissed, 89 N.Y.2d 1086, 659 N.Y.S.2d 859, 681 N.E.2d 1306, 1997 N.Y. LEXIS 1233 (N.Y. 1997), app. denied, 90 N.Y.2d 808, 664 N.Y.S.2d 269, 686 N.E.2d 1364, 1997 N.Y. LEXIS 3086 (N.Y. 1997).

Claim that defendant "Brooklyn District Attorney" engaged in continuous campaign of "harassment" of plaintiff and her son after she resigned as defendant's employee was barred by her failure to file notice of claim before commencing action where notice of claim that she filed after commencing action was without leave of court and without inclusion of information required by CLS Gen Mun § 50-e(2). Drakeford v Brooklyn DA, 266 A.D.2d 134, 700 N.Y.S.2d 1, 1999 N.Y. App. Div. LEXIS 12337 (N.Y. App. Div. 1st Dep't 1999), app. dismissed, 95 N.Y.2d 877, 715 N.Y.S.2d 212, 738 N.E.2d 359, 2000 N.Y. LEXIS 2310 (N.Y. 2000).

City was entitled to summary judgment dismissing action for slip and fall on dirt and grime on outdoor basketball court on which plaintiff was playing where such condition naturally occurred in outdoor setting and was not concealed, and plaintiff produced no evidence that city failed to use reasonable care. Flores v City of New York, 266 A.D.2d 148, 699 N.Y.S.2d 345, 1999 N.Y. App. Div. LEXIS 12331 (N.Y. App. Div. 1st Dep't 1999).

Plaintiff raised triable issue of fact as to whether city created dangerous condition of sidewalk, thus obviating need for city to have received prior written notice of defect, where plaintiff fell into 8-foot-deep vault in sidewalk covered by large piece of plywood, there was evidence that metal grate that had previously covered vault had been broken out so that fire department could run hoses into basement of building and pump out water, and plywood was surrounded by "DPW" barricades presumably placed by Department of Public Works. Allen v Matthews, 266 A.D.2d 782, 699 N.Y.S.2d 166, 1999 N.Y. App. Div. LEXIS 12121 (N.Y. App. Div. 3d Dep't 1999).

Notice to the City of New York of a discharged law firm's charging lien, pursuant to N.Y. Gen. Mun. Law § 50-i(1), was unnecessary because that provision was inapplicable to the law firm's action seeking to collect its fees earned in an underlying action wherein it represented infants in a lead paint exposure case. Schneider, Kleinick, Weitz, Damashek & Shoot v City of New York, 302 A.D.2d 183, 754 N.Y.S.2d 220, 2002 N.Y. App. Div. LEXIS 12853 (N.Y. App. Div. 1st Dep't 2002).

In an action which a farmer filed against a village, alleging that the village negligently failed to repair power lines under its control and that the farmer's dairy herd was damaged as a result, the trial court properly denied the farmer's claims for punitive damages and for compensatory damages arising more than 90 days before the farmer served a notice of claim on the village, and did not abuse its discretion by denying the farmer's motion for leave to serve a late amended notice of claim and a second amended complaint. Bliss v Vill. of Arcade, 306 A.D.2d 902, 761 N.Y.S.2d 573, 2003 N.Y. App. Div. LEXIS 6820 (N.Y. App. Div. 4th Dep't 2003).

Action seeking money damages allegedly caused by the failure of the city to discharge a duty imposed upon it by law, specifically to provide a wage differential, sounded in tort; therefore, where the decedent failed to serve his claim upon the city within 90 days after the claim arose, pursuant to N.Y. Gen. Mun. Law § 50-e, or within the statute of limitations period of one year and 90 days, pursuant to N.Y. Gen. Mun. Law §§ 50-e and 50-i, the action was dismissed. Estate of Kalis v City of Buffalo, 306 A.D.2d 932, 762 N.Y.S.2d 195, 2003 N.Y. App. Div. LEXIS 6774 (N.Y. App. Div. 4th Dep't), app. denied, 100 N.Y.2d 515, 769 N.Y.S.2d 202, 801 N.E.2d 423, 2003 N.Y. LEXIS 3375 (N.Y. 2003).

Trial court properly denied an individual's petition for leave to serve a late notice of claim against a county health care corporation as the individual conceded that she filed her petition well after the one year and 90-day statute of limitations period had expired and there was no delayed discovery rule to toll the statute of limitations in actions to recover damages for personal injuries based on sexual abuse. N.M. v Westchester County Health Care Corp., 10 A.D.3d 421, 781 N.Y.S.2d 370, 2004 N.Y. App. Div. LEXIS 10310 (N.Y. App. Div. 2d Dep't 2004).

Dismissal of a building owner's claims against a city for, inter alia, tortious interference of a lease for the building was proper because the owner did not file a notice of claim or request permission to file a late notice of claim, the claim sounded in tort, the claim was thus subject to the notice requirement, and the lack of notice was fatal to this claim; the owner's cause of action against the city for diminution in property value, to the extent it was even cognizable, clearly sounded in tort, as it alleged a breach of a duty of care, and thus the lack of a notice of claim was fatal to this claim as well. Montano v City of Watervliet, 47 A.D.3d 1106, 850 N.Y.S.2d 273, 2008 N.Y. App. Div. LEXIS 279 (N.Y. App. Div. 3d Dep't 2008).

Dismissal of claims by condominium communities and a joint homeowners' association against a village engineer, arising from his issuance of certificates of occupancy for premises that contained construction defects, was not warranted on the basis of the failure to comply with the notice of claim requirements because it was unclear whether the engineer performed the inspections in his capacity as the village engineer or privately. Encore Lake Grove Homeowners Assn., Inc. v Cashin Assoc., P.C., 111 A.D.3d 881, 976 N.Y.S.2d 143, 2013 N.Y. App. Div. LEXIS 7863 (N.Y. App. Div. 2d Dep't 2013).

Requirement of notice in subd 1 of the above statute held not to have been satisfied where action was for injury arising from mobs or riots under § 71 of this statute because such liability had been suspended by Unconsolidated Laws ch 131 § 113 as extended by § 121 of same statute. Hart's Food Stores, Inc. v Rochester, 44 Misc. 2d 938, 255 N.Y.S.2d 390, 1965 N.Y. Misc. LEXIS 2374 (N.Y. Sup. Ct. 1965).

In an action against the City of New York for personal injuries and property damage suffered as a result of the alleged negligent acts and omissions of the city in connection with a fire in a city-owned pier, a motion by plaintiffs for an order determining that their actions may proceed as a class action would be denied as violative of Gen Mun Law § 50-i, where the purpose of the notice requirement of that section would be frustrated by a class action involving potentially hundreds of thousands of unknown claimants living in the geographic bounds of the intended class in the instant action and where the statute of limitations for commencing actions against the city in the instant case having already expired perspective members of the class could not apply for leave to serve late notices of claim even if class action status were granted. Eisner v New York, 118 Misc. 2d 672, 461 N.Y.S.2d 216, 1983 N.Y. Misc. LEXIS 3381 (N.Y. Sup. Ct. 1983).

Appropriate statute of limitations governing claims based upon negligent hiring and respondeat superior against sheriff of county on charges of intentional torts of assault and battery by police officers is one year and 90 days. Brown v Albion, 128 Misc. 2d 586, 490 N.Y.S.2d 958, 1985 N.Y. Misc. LEXIS 2961 (N.Y. Sup. Ct. 1985).

Complaint was one for moneys had and received, not conversion, and plaintiff was not required to file notice of claim on defendant town or commence action within 1 year and 90 days from accrual of action, where complaint sought return of building permit application fee previously paid by plaintiff to town. Inte-

rior by Mussa, Ltd. v Town of Huntington, 174 Misc. 2d 308, 664 N.Y.S.2d 970, 1997 N.Y. Misc. LEXIS 547 (N.Y. App. Term 1997).

Small claims action against municipality, seeking reimbursement for cost of replacing sewer line leading from main line, running under town road, to curb outside of plaintiffs' house, was based on theory of unjust enrichment, and thus General Municipal Law notice of claim requirements did not apply. Schneider v Town of Orangetown, 175 Misc. 2d 899, 673 N.Y.S.2d 281, 1998 N.Y. Misc. LEXIS 140 (N.Y. App. Term 1998).

Failure to comply with terms of General Municipal Law § 50-i(l)(c) requires dismissal of plaintiffs' claims under New York Tort Claims Act; however, dismissal should be without prejudice to present compliance with requirements of those statutes and suit thereunder in future; failure to comply with requisites of state tort claims statutes, however, only bars suit under those statutes, but does not preclude suit if alternative basis for suit against defendants is pleaded. National Sea Clammers Ass'n v New York (1980, CA3 NJ) 616 F2d 1222, 15 Envt Rep Cas 1314, 10 ELR 20155, vacated on other grounds, remanded (1981) 453 US 1, 101 S Ct 2615, 69 L Ed 2d 435, 16 Envt Rep Cas 1118, 11 ELR 20684 and questioned in Denison v Kitzhaber (2001, DC Or) 2001 US Dist LEXIS 12514) (applying New York law).

City did not violate arrestee's right to procedural due process by allegedly misinforming him that his effort to press counterclaim in forfeiture action would be rejected, and that arrestee could not interpose counterclaim in civil forfeiture action unless he already filed notice of claim with city under CLS Gen Mun Law § 50-i(1), since statement was factually accurate. Mackey v Property Clerk of N.Y. City Police Dep't, 26 F. Supp. 2d 585, 1998 U.S. Dist. LEXIS 8013 (S.D.N.Y. 1998).

Public school teacher's claim of assault was time barred under N.Y. Gen. Mun. Law § 50-i where the claim was not filed within one year and 90 days of when the teacher's supervisor allegedly elbowed him as the two passed through a doorway. Pearson v Bd. of Educ., 499 F. Supp. 2d 575, 2007 U.S. Dist. LEXIS 59244 (S.D.N.Y. 2007).

Arrestee's state law claims for false arrest, false imprisonment, illegal search, gross incompetence, deliberate indifference, negligence in training, supervising and discipline, negligent entrustment, libel and defamation of character, and intentional infliction of emotional distress accrued at the latest on January 18, 2006, which was two days after the arrest and when he was released from jail, and because the arrestee did not provide notice to defendants of the claims until more than one year later, on August 24, 2007, the claims were barred under the time limitations for notice in N.Y. County Law § 52 and N.Y. Gen. Mun. Law §§ 50-e, 50-i Martin v County of Nassau, 692 F. Supp. 2d 282, 2010 U.S. Dist. LEXIS 22989 (E.D.N.Y. 2010).

Notes to Unpublished Decisions

Analysis

1. Applicability to particular entities; city
2. Applicability in particular actions
3. —False arrest or imprisonment or malicious prosecution

1. Applicability to particular entities; city

Unpublished decision: Dismissal of appellant's state law trespass claim against a city was appropriate, inasmuch as the record reflected that neither appellant's pleadings nor his motion papers established that at least 30 days had elapsed since the service of such notice. Parent v New York, 485 Fed. Appx. 500, 2012 U.S. App. LEXIS 12267 (2d Cir. N.Y.), cert. denied, 568 U.S. 1027, 133 S. Ct. 652, 184 L. Ed. 2d 460, 2012 U.S. LEXIS 9026 (U.S. 2012).

2. Applicability in particular actions

3. —False arrest or imprisonment or malicious prosecution

Unpublished decision: It is undisputed that plaintiff did not file a notice of claim with the city until over two-and-a-half years after the arrest at issue. Thus, to the extent he was able to state constitutional tort claims against the city arising out of those events, they would fail to comply with the 90-day notice requirement in N.Y. Gen. Mun. Law § 50-i. Felmine v City of New York, 2012 U.S. Dist. LEXIS 77299 (E.D.N.Y. June 4, 2012).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 50-c., 50-d., 50-j., 50-k., 50-m.; CLS CPLR §§ 214-c., 9801.; CLS County § 52.; CLS Educ §§ 3813., 6224.; CLS High §§ 139., 139-a.; CLS Sec Cl Cities § 244.; CLS Town § 67.

Causes of Action:

Cause of Action Against Municipality for Injury Caused by Defective Sidewalk. 21 COA2d 71.

Treatises

Matthew Bender's New York Civil Practice: Weinstein, Korn, Miller, CPLR Manual (Matthew Bender) § 35.02.

3 Rohan, New York Civil Practice: EPTL ¶ 5-4.1., 5-4.2.

Matthew Bender's New York Practice Guides: 2 New York Practice Guide: Probate and Estate Administration § 27.03.

Matthew Bender's New York Practice Guides: LexisNexis AnswerGuide New York Negligence § 2.11[4].Identifying Appropriate Defendants in Motor Vehicle Cases.

Matthew Bender's New York Practice Guides: LexisNexis AnswerGuide New York Negligence § 2.11.Identifying Appropriate Defendants in Motor Vehicle Cases.

Matthew Bender's New York Practice Guides: LexisNexis AnswerGuide New York Negligence § 2.16 [1].Preparing Summons and Complaint.

Matthew Bender's New York Practice Guides: LexisNexis AnswerGuide New York Negligence § 2.16.Preparing Summons and Complaint.

Matthew Bender's New York Practice Guides: LexisNexis AnswerGuide New York Negligence § 6.03.Identifying Statutes That Provide for Shortened Time for Commencement of Action.

Matthew Bender's New York Practice Guides: LexisNexis AnswerGuide New York Negligence § 6.05.Examining Consequences of Bringing Action or Filing Notice Against Wrong Defendant.

Matthew Bender's New York Practice Guides: LexisNexis AnswerGuide New York Negligence § 6.25.Defining Elements of Cause of Action and Necessary Allegations.

Matthew Bender's New York Practice Guides: LexisNexis AnswerGuide New York Negligence § 7.05.Determining Applicable Statute of Limitations.

Matthew Bender's New York Practice Guides: Warren's Negligence in the New York Courts § 6.01.Serving summons.

Matthew Bender's New York Practice Guides: Warren's Negligence in the New York Courts § 138.07.Elements of Governmental Liability.

FORMS: 4 Medina's Bostwick Practice Manual (Matthew Bender), Forms 38:101 et seq.(actions and proceedings against municipalities, public corporations and their agencies).

§ 52. Liability insurance for officers and employees

Each city, county, fire district, school district, town, village, town improvement district governed by a separate board of commissioners and each public library as defined in section two hundred fifty-three of the education law, may purchase liability insurance with such limits as it may deem reasonable for the purpose of protecting its officers and employees against liability for claims arising from their acts while exercising or performing or in good faith purporting to exercise or perform their powers and duties. For the purposes of this section, persons performing services pursuant to subdivision five of section 170.55 of the criminal procedure law, section seven hundred fifty-eight-a or section 353.6 of the family court act or paragraph (h) of subdivision two of section 65.10 of the penal law shall be deemed to be employees.

HISTORY:
Add, L 1976, ch 831, § 1; amd, L 1983, ch 909, § 1; L 1987, ch 18, § 1; L 1988, ch 292, § 1, eff Jan 25, 1989 (see 1988 note below).

Editor's Notes: Laws 1988, ch 292, § 2, eff Jan 25, 1989, provides as follows:

§ 2. This act shall take effect six months after the date on which it shall have become a law and shall apply to insurance contracts entered into or renewed on or after the effective date of this act.

Prior Law: Former § 52, add, L 1909, ch 29; repealed, L 1943, ch 712, § 3, eff Sept 2, 1945, with substance covered by Local Finance Law §§ 166.00 and 167.00.

Notes to Decisions

Analysis

1. In general
2. Constitutionality

1. In general

A town board, by resolution, ordinance or local law, may insure or self-insure its officers and employees against tort damage claims and may provide for indemnification of its officers and employees by means of a collective bargaining agreement. General Municipal Law § 52 by implication supersedes implied prohibition of Town Law § 116(2) against indemnification of employees. Reconsideration and clarification of 1981 Opn St Compt File #81-71.

Town may purchase liability insurance to protect town justices, however, town may not, pursuant to either CLS Gen Mun § 52 or CLS Pub O § 18, purchase insurance which provides coverage for disciplinary or removal proceedings brought against town or village justices. 1987 Op St Comp No. 86-89.

2. Constitutionality

County may purchase liability insurance to indemnify sheriff against civil liability without violating Article XIII, § 13 of Constitution, and purchase of such insurance coverage is authorized by CLS Gen Mun § 52; however, county may not make expenditures from its insurance reserve fund for any loss or claim of sheriff or for any action or judgment against him notwithstanding provisions of CLS Gen Mun § 6-n. Ops St Compt 88-36.

Agency Opinions

Analysis

1. In general
2. Coverage of intentional torts

1. In general

The County of Erie may purchase liability insurance for the purpose of protecting emergency medical technicians who are employed by the County against liability for claims arising from their acts while in good faith purporting to perform their duties, but there is no authority for the County of Erie to provide a complete indemnity to ambulance service agencies and their emergency medical technicians who are not employees of the County of Erie. 1977 NY Ops Atty Gen March 21.

An endorsement naming a fire department or company, fire commissioners and/or fire chiefs as additional insureds cannot be added to nor form a part of a fire district's Volunteer Firemen's Benefit Law insurance policy originally issued to take effect on or after March 1, 1962. A fire district may purchase liability insurance for the fire departments or companies, fire commissioners and fire chiefs serving the district. 1983 NY Ops Atty Gen April 14 (informal).

Special improvement districts with independently elected commissioners are not authorized to purchase liability insurance to cover their officers and employees. 1978 Op St Compt File #234.

A village may protect it's officers and employees against liability for claims either by purchasing liability insurance or becoming a self-insurer. 1978 Op St Compt File #996.

A village may purchase a public officials liability insurance policy—"errors and omissions" coverage—to protect its officers and employees. 1979 Op St Compt File #586.

The cost of liability insurance is a general town-wide charge, and may not be apportioned to the general part-town fund or the highway fund. 1980 Op St Compt File #456.

A county may purchase a public officials liability insurance policy—"errors and omissions" coverage—to protect directors of a county small watershed protection district established under Article 5-D of the County Law. 1981 Op St Compt File #81-183.

A private civic association may not be included as an additional named insured in a general liability policy purchased by a village, even if the association bears the additional cost. 1981 Op St Compt File #81-214.

2. Coverage of intentional torts

A town may purchase insurance or indemnify its officers and employees for litigation expenses and liability incurred in "intentional" tort actions based on good faith performance of employment duties. 1979 Op St Compt File #543.

A county may provide by resolution, ordinance, or local law for an insurance or self-insurance plan to indemnify county employees (except the sheriff) for damages recovered in civil actions based on the good faith performance of official duties, including so-called "intentional" tort actions and federal civil rights actions; absent statutory authorization, however, a county may not provide for indemnification of exemplary or punitive damages recoverable against county employees. 1980 Op St Compt File #80-688.

ARTICLE 5 Powers, Limitations and Liabilities

Section

71-a. Injury or death of person aiding a police officer or peace officer
72-g. Expenses of volunteer firefighters attending training schools and instruction courses
72-h. Sale, lease and transfer to municipal corporations of certain public lands
72-o. Expenses of volunteer fire officers and firefighters appearing before a court or other tribunal
77. Leases of public buildings to posts of veteran organizations, organizations of volunteer firefighters, and child care agencies.
77-b. Expenses of certain public officers and employees attending conventions, conferences and schools
77-c. Per diem meal allowances for travel on official business
91-a. Arson investigation
92-a. Medical, surgical and hospital services or insurance for officers, employees and retired officers and employees of public corporations and their families
93. Payment of certain insurance premiums for officers and employees of municipal corporations and agencies or instrumentalities thereof
97. Power of municipalities to furnish and contract for fire and police communication system
98. Operation and maintenance of railroad passenger stations in certain municipalities
99-r. Contracts for services

HISTORY:
Add, L 1909, ch 29, eff Feb 17, 1090.

§ 71-a. Injury or death of person aiding a police officer or peace officer

A person who, after having been lawfully commanded to aid a police officer or peace officer in effectuating or securing an arrest or in preventing the commission by another of any offense, is killed or injured or his property or that of his employer is

damaged and such death, injury or damage arises out of and in the course of aiding such officer, the person or employer so injured or whose property is so damaged or the personal representatives of the person so killed shall have a cause of action to recover the amount of such damage or injury against the municipal corporation by which such officer is employed at the time such command is obeyed. In the event of the death of the person so commanded to aid an officer, the action shall be governed by the provisions of part four of article five of the estates, powers and trusts law.

HISTORY:

Add, L 1965, ch 1031, § 97, with substance deriving from Penal Law § 1848; amd, L 1980, ch 843, § 149, eff Sept 1, 1980.

Notes to Decisions

Analysis

1. In general
2. Under Former Penal Law § 1848

1. In general

Plaintiffs were properly awarded damages under Gen Mun Law § 71-a for injuries sustained when they responded to an alleged command for assistance by a police officer for defendant village who was struggling with several persons during an arrest, where, although neither plaintiff testified that they were personally summoned by the officer, there was evidence that the command for assistance was directed toward the occupants of the truck in which plaintiffs were riding, and the trial court properly charged the jury that no precise words of command were required so long as the direction for assistance was evident from the language employed. Schiaroli v Ellenville, 111 A.D.2d 947, 490 N.Y.S.2d 43, 1985 N.Y. App. Div. LEXIS 50225 (N.Y. App. Div. 3d Dep't 1985).

City was entitled to summary judgment in action brought against it under CLS Gen Mun § 71-a where plaintiff's assistance to police officers was being provided at investigatory stage, and matter had not proceeded to stage where officers were effectuating or securing arrest. Fredericks v City of Elmira, 228 A.D.2d 911, 644 N.Y.S.2d 822, 1996 N.Y. App. Div. LEXIS 7221 (N.Y. App. Div. 3d Dep't), app. denied, 88 N.Y.2d 815, 651 N.Y.S.2d 17, 673 N.E.2d 1244, 1996 N.Y. LEXIS 3290 (N.Y. 1996).

2. Under Former Penal Law § 1848

Inference that chauffeur was in discharge of his duty at time of collision which resulted in his death, arising from fact that he was in charge of car at request of his employer, is not neutralized by evidence that he was chasing escaping criminal by order of policeman at time of accident, since in sending its employee upon highway employer knew or is chargeable with knowledge that man and car alike would have to answer call for assistance from officer under this section and in so far, therefore, as danger of pursuit was danger incidental to management of car it was one of risks of employment and so covered by Workmen's Compensation Law. Babington v Yellow Taxi Corp., 250 N.Y. 14, 164 N.E. 726, 250 N.Y. (N.Y.S.) 14, 1928 N.Y. LEXIS 983 (N.Y. 1928).

A public spirited young man "put the finger on" a notorious criminal, received threats on his life, asked for police protection, got none, and was killed by an unknown assassin. Held: the complaint in a wrongful death action against the City of New York was good where it alleged the City was negligent in its special duty to provide the young man with police protection upon demand, and recklessly exposing him to danger and in heedlessly giving him a false impression of safety (the police told the young man not to worry about the threats). Schuster v New York, 5 N.Y.2d 75, 180 N.Y.S.2d 265, 154 N.E.2d 534, 1958 N.Y. LEXIS 745 (N.Y. 1958).

A police officer has the right and duty to commandeer a standing unoccupied automobile and to pursue fleeing suspects who entered another automobile and speeded away, as regards city's liability for policeman's negligence. Berger v New York, 260 A.D. 402, 22 N.Y.S.2d 1006, 1940 N.Y. App. Div. LEXIS 4607 (N.Y. App. Div.), reh'g denied, 260 A.D. 1018, 24 N.Y.S.2d 1009, 1940 N.Y. App. Div. LEXIS 5881 (N.Y. App. Div. 1940), aff'd, 285 N.Y. 723, 34 N.E.2d 894, 285 N.Y. (N.Y.S.) 723, 1941 N.Y. LEXIS 1713 (N.Y. 1941).

This section is constitutional. Sawyer v Southport, 6 A.D.2d 553, 179 N.Y.S.2d 897, 1958 N.Y. App. Div. LEXIS 4043 (N.Y. App. Div. 3d Dep't 1958).

This section applies to a county. A complaint against a county was good where it alleged that the plaintiff was injured after complying with a command of a county deputy sheriff to assist in making an arrest. Sawyer v Southport, 6 A.D.2d 553, 179 N.Y.S.2d 897, 1958 N.Y. App. Div. LEXIS 4043 (N.Y. App. Div. 3d Dep't 1958).

Under this section, a city was liable to a private detective who, heeding the call of a police officer to help him disperse rowdies throwing missiles at officer, was hit by a brick which broke his arm. No precise words of command by the police officer were required so long as the direction for assistance was evidenced from the language employed. Riker v New York, 126 N.Y.S.2d 229, 204 Misc. 878, 1953 N.Y. Misc. LEXIS 2426 (N.Y. Sup. Ct. 1953), aff'd, 286 A.D. 808, 143 N.Y.S.2d 620, 1955 N.Y. App. Div. LEXIS 4181 (N.Y. App. Div. 1955).

Municipality is not liable under this section for failure to furnish adequate police protection to decedent killed after identifying dangerous criminal to police where complaint did not allege that decedent was, in effect pressed into service by police and where shooting of decedent occurred subsequent to the arrest of the criminal. Schuster v New York, 121 N.Y.S.2d 735, 207 Misc. 1102, 1953 N.Y. Misc. LEXIS 1784 (N.Y. Sup. Ct. 1953), aff'd, 286 A.D. 389, 143 N.Y.S.2d 778, 1955 N.Y. App. Div. LEXIS 4051 (N.Y. App. Div. 1955).

Sheriff sent two deputies to scene where husband had beaten his wife and the deputies commanded plaintiff to aid in arresting and apprehending the husband but then left the plaintiff alone at the scene. When the husband returned the plaintiff was injured. The complaint was insufficient for failure to state sufficient facts. Farley v Stone, 140 N.Y.S.2d 579, 207 Misc. 934, 1955 N.Y. Misc. LEXIS 3173 (N.Y. Sup. Ct. 1955), modified, 3 A.D.2d 810, 160 N.Y.S.2d 340, 1957 N.Y. App. Div. LEXIS 6227 (N.Y. App. Div. 4th Dep't 1957).

The provisions of this section did not apply where plaintiff was engaged at the request of police officer in directing traffic at scene where dog had been hit by automobile. Adamo v P. G. Motor Freight, Inc., 5 Misc. 2d 196, 159 N.Y.S.2d 993, 1957 N.Y. Misc. LEXIS 3646 (N.Y. Sup. Ct.), rev'd, 4 A.D.2d 758, 164 N.Y.S.2d 874, 1957 N.Y. App. Div. LEXIS 4809 (N.Y. App. Div. 2d Dep't 1957).

Agency Opinions

1. Under Former Penal Law § 1848

Persons legally rendering aid to a peace officer are protected against loss due to personal injury or property damage, and their representatives may be indemnified in event of death if injury, damage or death occur as the result of being legally ordered to render assistance. 1963 NY Ops Atty Gen Aug 26.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

Matthew Bender's New York Practice Guides: LexisNexis AnswerGuide New York Negligence § 6.08[4][a] Determining Applicability of Doctrine of Sovereign Immunity.

LexisNexis AnswerGuide New York Negligence § 6.08 Determining Applicability of Doctrine of Sovereign Immunity.

Warren's Negligence in the New York Courts §§ 18.02, 33.02, 33.08, 33.09, 44.01, 46.01, 55.01, 71.01, 71.02, 72.01, 81.02, 82.05, 87.01, 87.02, 114.05, 117.02, 138.03, 138.06, 145.01, 231.01, 231.02 (waiver of immunity for cities, towns and villages; waiver of immunity for counties; immunity for municipalities).

§ 72-g. Expenses of volunteer firefighters attending training schools and instruction courses

1. The chief officer of the fire department of a municipal corporation or fire district, subject to any

rules or regulations governing such department, may authorize the volunteer members of the department to attend training schools or courses of instruction for firefighters.

a. If any such school is located, or any such course is given, outside the county or outside one of the counties in which the municipal corporation or fire district is located, such authorization shall be subject to the prior approval of the governing board of the municipal corporation or fire district.

b. If any such school is located, or any such course is given, outside the state, in addition to the approval required in paragraph a of this subdivision, such authorization shall be subject to a finding from the governing board that such training course or school of instruction is necessary and in the public interest and is not available within a reasonable distance and time period in the state.

c. Notification and proof of attendance of any out-of-state training school from the chief officer shall be provided to the state office of fire prevention and control.

2. The governing board by resolution may provide for the payment, in the same manner as other claims against the municipal corporation or fire district are audited, allowed and paid, of all actual and necessary registration fees not in excess of fifty dollars and all actual and necessary expenses of travel, meals and lodging and all necessary tuition fees incurred by such volunteer members in attending such a training school, or course of instruction, in this country or in Canada.

3. If such travel is by car owned by the volunteer firefighter, he or she may be paid a reasonable mileage allowance for each mile actually and necessarily traveled by him or her in attending such school or course of instruction. Such mileage allowance shall not exceed the standard travel allowance for mileage adopted or prescribed for federal income tax purposes. Any claim for such expenses or reimbursement shall have endorsed thereon, or attached thereto, a statement by the chief officer of the fire department that the attendance had been duly authorized by him or her. The provisions of this section shall not be deemed to have amended the provisions of subdivision one of section two hundred nine of this chapter in relation to participation in fire training programs which are not conducted as training schools or regular or special courses of instruction for firefighters.

HISTORY:

Add, L 1935, ch 821, § 1; amd, L 1960, ch 100, § 1; L 1962, ch 180, § 1; L 1999, ch 359, § 1; L 2006, ch 236, § 1, eff Oct 24, 2006.

Revision Notes: [1960, ch 100] This act was recommended by the Joint Legislative Committee on Fire Laws. Advisory members of such Committee who represented the Firemen's Association of the State of New York, the New York State Association of Fire Chiefs and the Association of Fire Districts of the State of New York recommended the deletion of the former provisions of § 72-g relating to reimbursement for loss of earnings at a rate not exceeding $5.00 per day. It was believed that there had been relatively few cases where such reimbursement had been claimed in the past.

Notes to Decisions

Analysis

1. In general
2. Authority to establish training programs
3. Reimbursement for particular expenses; conferences and conventions
4. —Training schools and instruction courses
5. Procedure for reimbursement

1. In general

Laws authorizing payment of expenses of municipal officers and employees in going to and from and attending conferences of municipal officials, training courses and schools, generally cover traveling, hotel and eating expenses, but do not cover personal registration or membership fees of individual officers in various associations. 1946 Ops St Compt 60.

2. Authority to establish training programs

A town may not appropriate or expend town funds for a fire training program. 1947 Ops St Compt 501.

Neither a town nor a fire protection district has authority to maintain a training school for volunteer firemen or to enter into a joint agreement for operation of such a school. 1963 Ops St Compt #112.

Fire districts may not cooperate in establishing joint training programs to be conducted on lands owned by one of them, may not jointly acquire equipment and supplies, jointly construct improvements, or jointly employ instructors. 1963 Ops St Compt #626.

3. Reimbursement for particular expenses; conferences and conventions

A village may reimburse volunteer firemen for actual and necessary expenses incurred in attending the New York State Volunteer Firemen's Association Convention, if said convention falls within the category of a training school or offers instruction courses. 1960 Ops St Compt File #561.

The members of a village volunteer fire department may not be reimbursed under section 77-b of the General Municipal Law for expenses incurred in attending a convention, but such reimbursement may be allowed under 72-g, if the convention is actually a "training school" or "course of instruction" within the scope of the latter section. 1967 Ops St Compt File #807.

A volunteer fireman of a fire district fire department may not be authorized to attend and be reimbursed for attending a convention unless said convention is actually a training school or course of instruction within the scope of General Municipal Law, § 72-g. 1968 Ops St Compt File #811.

4. —Training schools and instruction courses

Fire district may pay expenses of volunteer firemen to and from factory within the State for purpose of obtaining instruction in operation of new fire truck. 1955 Ops St Compt File #7392.

The term "members of the fire department" includes volunteer firemen who are members of the fire department. Accordingly, the village may pay for the expenses incurred by the volunteer firemen who are members of the village fire department and who have been authorized by the village to attend a fire training school within the state. 1959 Ops St Compt File #800.

A fire district may authorize attendance of volunteer members of its fire department at a first aid clinic conducted by the Empire State Rescue and First Aid Association and pay actual expenses incurred in connection therewith, if such clinic may be deemed either a training school or an instruction course. 1964 Ops St Compt #427.

Fire district may pay expenses of volunteer firefighters attending emergency medical services conference if board of fire commissioners, based on review of program, determines that it is significantly devoted to technical training of firefighters who would attend. 1996 Op St Compt No. 96-17.

Fire district may reimburse volunteer firefighters for tuition expenses incurred for completing college courses, such as course

leading to degree in fire science, if board of fire commissioners determines that course provides, to significant extent, technical training relevant to duties of firefighters who would attend. 1996 Op St Compt No. 96-17.

This section, in providing for payment of expenses of volunteer firemen attending training schools and instruction courses, contains no authority for granting them "limited expense accounts" for such purposes. 1961 Ops St Comp File #36.

5. Procedure for reimbursement

A village board may require receipts for actual expenditures to be submitted by volunteer firemen in order to receive reimbursement for expenses incurred in attending training schools and instruction courses. 1960 Ops St Compt File #561.

Agency Opinions

Analysis

1. Reimbursement for particular expenses; conferences and conventions
2. —Training schools and instruction courses

1. Reimbursement for particular expenses; conferences and conventions

2. —Training schools and instruction courses

Fire district may pay tuition and expenses of volunteer firemen in attending training schools or courses of instruction for firemen. 1979 Op St Compt File #533.

A fire district may pay the expenses incurred by firemen under the age of 18, including the expense of travel to drills or for instruction, and may also pay for the purchase of equipment in connection with a properly authorized youth program. 1979 Op St Compt File #877.

A volunteer fireman may be authorized to attend a convention and obtain reimbursement for expenses only if it is actually a training school or course of instruction. The New York State Volunteer Fireman's Association convention fulfills this requirement but the New York State Fire Chief's convention does not. However, a fire chief or assistant fire chief could be authorized to attend and obtain reimbursement for any convention believed to be for the betterment of the municipality. 1979 Op St Compt File #311.

Volunteer firemen may be authorized to attend the New York State Association of Fire Chiefs' Annual Conference and may be reimbursed for certain expenses. (24 Opns St Comp, 1968, p 769, is hereby superseded and Opns St Comp, 1979, No. 79-311 is superseded to the extent it is inconsistent with this opinion). 1980 Op St Compt File #237.

The board of fire commissioners in a fire district may authorize a past-chief who is still an active fireman to attend conventions, conferences, or schools that would be for the benefit of the fire district. 1981 Op St Compt File #81-159.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS Town § 178-c; CLS Vol Fire Ben § 3.

§ 72-h. Sale, lease and transfer to municipal corporations of certain public lands

(a) Notwithstanding any provision of any general, special or local law or of any charter, the supervisors of a county, the town board of a town, the board of trustees of a village, the board of fire commissioners of a fire district, the board of estimate of a city, or if there be none the local legislative body of such city, and, in a city having a population of one million or more, the mayor, subject to disapproval by the council within thirty days following receipt of notice of the approval of the mayor, may sell, transfer or lease to or exchange with any municipal corporation or municipal corporations, school district, board of cooperative educational services, fire district, the state of New York, or the government of the United States and any agency or department thereof, either without consideration or for such consideration and upon such terms and conditions as shall be approved by such officer or body, any real property owned by such county, town, village, fire district or city; and any municipal corporation or fire district may acquire or lease such real property as provided in this section. The term of any lease entered into pursuant to the provisions of this section shall not exceed ten years but nothing herein contained shall prevent the renewal of any such lease.

(b) The provisions of this section shall not apply to any real property which is made inalienable under the provisions of any general, special or local law or of any charter.

HISTORY:

Add, L 1940, ch 233, § 1, eff March 24, 1940; amd, L 1961, ch 89, § 1; L 1962, ch 624, § 1; L 1963, ch 119, § 1; L 1964, ch 502, § 1; L 1968, ch 5, § 1; L 1972, ch 406, § 1; L 1990, ch 562, § 2, eff Sept 1, 1990.

Notes to Decisions

Analysis

1. In general; valuable consideration for conveyance
2. —Conveyance without consideration
3. Present or prospective use affecting conveyance
4. —Fire district uses
5. —Parks
6. —Unneeded property
7. —Miscellaneous uses
8. Method of acquisition; exchange of properties
9. —Referendum
10. —Miscellaneous methods

1. In general; valuable consideration for conveyance

Public property must be sold for the best price obtainable with reasonable diligence. The use to be made of the property by a prospective purchaser, however beneficial it may be to community, is not legal consideration. 1960 Ops St Compt File #158.

A town may not, for a nominal consideration, sell or lease real property to a fire district. 1960 Ops St Compt File #435.

A town may not lease town land to a private entity for a nominal consideration; where such real property has been acquired for park purposes, it may not, without specific legislative authority, lease the same under any circumstances. 1960 Ops St Compt File #545.

Town may issue obligations to finance construction of building for use by state police on land owned by state so long as town retains ownership interest in building during term of bonds. 1988 Op St Compt No 88-26.

2. —Conveyance without consideration

A town may not permit the gratuitous use of space in the town hall for the maintenance of county offices. 1965 Ops St Compt File #431.

A town board may lease real property to a fire district for up to ten years, subject to renewal, either without consideration or for such consideration as is approved by the board, such lease not being subject to a permissive referendum, if authorized pursuant to this section. 1973 Ops St Compt File #838.

A town may convey real property which it no longer needs to a fire district without consideration. 1973 Ops St Compt File #839.

Village may allow State agency, by lease or license, to utilize space in village hall several times per month for nominal or no consideration. Ops St Compt 89-23.

3. Present or prospective use affecting conveyance

Public property must be sold for the best price obtainable with reasonable diligence. The use to be made of the property by a

prospective purchaser, however beneficial it may be to community, is not legal consideration. 1960 Ops St Compt File #158.

4. —Fire district uses

A town may lease space in a fire house owned by a fire district for garage space for its town-owned police vehicle, and when such lease is made pursuant to provisions of the Town Law, it is subject to permissive referendum, but this is not the case if the lease is made pursuant to § 72-h of the General Municipal Law. 1964 Ops St Compt #678.

5. —Parks

A town may not lease town land to a private entity for a nominal consideration; where such real property has been acquired for park purposes, it may not, without specific legislative authority, lease the same under any circumstances. 1960 Ops St Compt File #545.

A county may not convey property dedicated to park purposes to a town without specific legislative authorization. 1965 Ops St Compt File #623.

6. —Unneeded property

Town has no authority to construct a building larger than necessary for town purposes in the foreseeable future, for the express purpose of leasing the excess space to a village. 1950 Ops St Compt File #4809.

A town may convey real property which it no longer needs to a fire district without consideration. 1973 Ops St Compt File #839.

7. —Miscellaneous uses

A village may lease to a town a dump owned by the village but located within the town for a period of ten years. 1962 Ops St Compt #983.

A school district is without authority to lease its real property to a town for town recreation purposes. 1964 Ops St Compt #876.

A town, which is the gratuitous grantee of land from a school district, should not, under the circumstances, convey the same land to a fire district for a use not contemplated in the original conveyance. 1967 Ops St Compt File #1005.

Village may allow State agency, by lease or license, to utilize space in village hall several times per month for nominal or no consideration. Ops St Compt 89-23.

In the context of a municipal cooperation agreement with a town, a village may agree to construct a village office building with excess space which will be leased to the town. 1983 Op St Comp File #83-104.

8. Method of acquisition; exchange of properties

The City of Ithaca may not exchange real property owned by the city for real property owned by an individual. 1957 Ops St Compt File #355.

Exchange of real estate by one municipality to another municipality is not applicable where the exchange is made to an independent corporation as a library service system established under a charter granted by the state regents. 1967 Ops St Compt File #200.

Village may acquire parcel of property to exchange for property owned by federal agency and needed for village road building where federal agency desires exchange of property rather than outright sale of its land. Ops St Compt 89-29.

9. —Referendum

A town may lease space in a fire house owned by a fire district for garage space for its town-owned police vehicle, and when such lease is made pursuant to provisions of the Town Law, it is subject to permissive referendum, but this is not the case if the lease is made pursuant to § 72-h of the General Municipal Law. 1964 Ops St Compt #678.

A fire district may convey fire district property by resolution of its Board of Commissioners, without a referendum, if such conveyance is made pursuant to this section. 1964 Ops St Compt #788.

A town board may lease real property to a fire district for up to ten years, subject to renewal, either without consideration or for such consideration as is approved by the board, such lease not being subject to a permissive referendum, if authorized pursuant to this section. 1973 Ops St Compt File #838.

10. —Miscellaneous methods

A city may not purchase real property from a county on the installment plan, nor may the county accept such payments. 1957 Ops St Compt File #230.

Agency Opinions

Analysis

1. In general; valuable consideration for conveyance
2. —Conveyance without consideration
3. Present or prospective use affecting conveyance
4. —Fire district uses
5. —Parks
6. —Unneeded property
7. —Miscellaneous uses
8. Method of acquisition; exchange of properties
9. —Referendum
10. —Miscellaneous methods
11. Conveyance or lease to nonpublic entity

1. In general; valuable consideration for conveyance

2. —Conveyance without consideration

The County of Genesee is authorized to transfer a parcel of real property owned by the County to a town within the County without consideration therefor, provided that the property has not been made inalienable by any provision of a general, special or local law. 1976 NY Ops Atty Gen Oct 21.

A town has authority to lease real property without consideration to the State University of New York at Stony Brook. 1978 Op St Compt File #562.

A fire district may lease unneeded space in one of its substations to a neighboring fire district for the purpose of vehicle storage, either with or without compensation therefor; two fire districts may enter into an agreement pursuant to Article 5-G of the General Municipal Law to effect such purpose. 1979 Op St Compt File #5.

A village may transfer its reservoir to the State of New York with or without consideration, reserving to itself the right to use of reservoir facilities. 1979 Op St Compt File #269.

The Town of Brookhaven may convey unneeded real property owned by the town to a fire district without consideration and without being subject to a permissive referendum. 1979 Op St Compt File #699.

A village may convey land to a town for a valuable consideration upon such terms and conditions as shall be approved by the village board. 1963 NY Ops Atty Gen May 16.

A county may convey land to the State of New York for a valuable consideration upon such terms and conditions as shall be approved by the Board of Supervisors. 1965 NY Ops Atty Gen Sept 30.

An agreement by a county to construct a fire training tower for the joint use of both a city and the county upon real property conveyed to it by such city, said real property to revert to the city upon its disuse as such joint facility, is a valuable consideration for such conveyance. Joint provision for such municipal facility may also be accomplished by a municipal cooperation agreement. 1966 NY Ops Atty Gen July 5.

A sewer district may convey unneeded property to a village in which the district is located, but such conveyance must be for a fair and adequate consideration. 1979 Op St Compt File #234.

There is no general law authorizing a village to transfer an unneeded ambulance to another village without consideration. However, a local law may be adopted to authorize such a transfer. 1979 Op St Compt File #593.

3. Present or prospective use affecting conveyance

4. —Fire district uses

Interests in a fire training center may be sold by a city to fire districts and town boards but not to volunteer fire companies; and an agreement may be entered into by the parties which would provide for the sharing of the maintenance and operation costs of the center. 1972 NY Ops Atty Gen Feb 23 (informal).

5. —Parks

Alienation legislation should be sought before parkland is transferred from county to town. 2008 N.Y. Op. Att'y Gen. No. 2008-11, 2008 N.Y. AG LEXIS 12.

6. —Unneeded property

A fire district may lease unneeded space in one of its substations to a neighboring fire district for the purpose of vehicle storage, either with or without compensation therefor; two fire districts may enter into an agreement pursuant to Article 5-G of the General Municipal Law to effect such purpose. 1979 Op St Compt File #5.

A sewer district may convey unneeded property to a village in which the district is located, but such conveyance must be for a fair and adequate consideration. 1979 Op St Compt File #234.

The Town of Brookhaven may convey unneeded real property owned by the town to a fire district without consideration and without being subject to a permissive referendum. 1979 Op St Compt File #699.

7. —Miscellaneous uses

The Town of Southampton is not authorized to convey title to cemetery lands to the Village of North Haven without a special act of the Legislature. 1972 NY Ops Atty Gen Sept 5 (informal).

A town may convey real property owned by it, including a portion of the town hall, to a village for village public library expansion, and the village may agree to construct an addition to the town hall at its expense as consideration therefor. 1982 Op St Compt File #82-305.

A city may transfer its unneeded airport real property to a county for less than fair and adequate consideration pursuant to General Municipal Law, § 72-h. A city may, by local law, transfer its unneeded airport equipment to a county in furtherance of a city purpose for less than fair and adequate consideration. 1982 Op St Compt No. 82-342, 1982 N.Y. Comp. LEXIS 392.

8. Method of acquisition; exchange of properties

9. —Referendum

Section 23(2)(b) of the General City Law may be superseded by a local law subject to a referendum on petition or a mandatory referendum, depending upon the changes to be made in superseding the various restrictions in that section. 1983 NY Ops Atty Gen March 10 (Informal).

The Town of Brookhaven may convey unneeded real property owned by the town to a fire district without consideration and without being subject to a permissive referendum. 1979 Op St Compt File #699.

10. —Miscellaneous methods

A city may enact a local law providing for the sale of city real estate at private sale. 1978 Op St Compt No. 78-823, 1978 N.Y. Comp. LEXIS 68.

As a general rule, a town may not submit formal bids on a State contract for the purchase of sand. However, a town may convey to the State an interest in the real property in which the sand is located. 1982 Op St Compt File #82-63.

Procedure, terms and conditions for sale of real property by town under CLS Gen Mun § 72-h are determined by town board. 1987 NY Ops Atty Gen No. 87-61 (Informal).

Transfer of town cemetery to village requires specific legislative approval. 2012 N.Y. Op. (Inf.) Att'y Gen. 09.

It would seem that a school district may convey a library building, without consideration, to the school district public library established in the district, and that the school district public library may convey, without consideration, a portion of its real property to the school district. 1981 Op St Compt File #81-81.

11. Conveyance or lease to nonpublic entity

Local government is not authorized to permit use of its property for private advertising. 1992 NY Ops Atty Gen I 92-56.

A fire district may not rent unneeded space in a fire district building to a free association library for nominal consideration. However, it is permissible for a town to grant money to such an institution which could then use it to rent property from the fire district at fair consideration. 1981 Op St Compt File #780.

A fire district may lease its training facility to fire districts and fire companies at such times as the facility is not needed for fire district purposes so long as use by lessee does not interfere with fire district use and the district receives the right to utilize the facility during the lease period if the need arises. Leases to fire districts may be without consideration. 1983 Op St Compt File #83-241.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 505 et seq.

13C Am Jur Legal Forms 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 180:103 et seq.

§ 72-o. Expenses of volunteer fire officers and firefighters appearing before a court or other tribunal

1. The chief officer of the fire department of a municipal corporation or fire district, subject to any rules or regulations governing such department, may authorize reimbursement for the volunteer officers or members of the department who appear before a court or other tribunal:

a. when the judicial or other proceeding relates to activities arising from the duties of the volunteer fire officer or firefighter; and

b. the volunteer fire officer or firefighter is not involved in any criminal activity or is the subject of or is personally charged with a violation of any section of law, rule or regulation being investigated by the court or other tribunal; and

c. the volunteer fire officer or firefighter has not been given immunity by a court or other tribunal in relation to such proceedings; and

d. the volunteer fire officer or firefighter has no financial interest in the outcome of such proceedings; and

e. the volunteer fire officer or firefighter has been issued a subpoena to appear and give testimony in such action or proceeding; and

f. the chief officer has been notified of the volunteer fire officer's or firefighter's receipt of a subpoena.

Such authorization from the chief officer may not be unreasonably withheld. Failure to obtain such authorization shall not be deemed to excuse a volunteer fire officer or firefighter from complying with a lawfully issued subpoena, but shall not entitle him to the payment of expenses incurred, as provided in subdivision two of this section.

2. The governing board of the municipal corporation or fire district by resolution may provide for the payment, in the same manner as other claims against the municipal corporation or fire district are audited, allowed and paid, of all actual and necessary expenses of travel, meals and lodging necessarily and reasonably incurred by such volunteer fire officers and firefighters in apppearing [appearing]* before a court or other tribunal. Such resolution may also provide for the reimbursement of all actual lost wages necessarily and reasonably incurred by such volunteer fire officers and firefighters, up to a maximum of one hundred dollars per day. If such travel is by a car owned by the volunteer fire officer or firefighter, he may be paid a reasonable mileage

*The bracketed word has been inserted by the Publisher.

allowance for each mile actually and necessarily traveled by him in appearing before such court or other tribunal. If such claim includes any amount for actual lost wages, a statement by the volunteer fire officer's or firefighter's employer shall be attached. Any claim for such expenses or reimbursement shall have endorsed thereon, or attached thereto, a statement by the chief officer of the fire department or fire district that he was notified of the volunteer fire officer's or firefighter's receipt of a subpoena requiring him to appear and give testimony before a court or other tribunal, such chief officer's authorization therefor and copy of such subpoena.

HISTORY:

Add, L 1988, ch 456, § 1, eff Aug 1, 1988.

Repeal Notes: [1961, ch 402] The repealing act enacted a new article 15 dealing with urban renewal. See in particular §§ 522–524 as having a bearing on the repeal of this section.

Prior Law: Former § 72–o, add, L 1960, ch 971, § 1; repealed, L 1961, ch 402, § 5, eff April 11, 1961.

Notes to Decisions

A volunteer firefighter appearing at an attorney's office in compliance with a subpoena for pre-trial questioning is making an appearance before the court for purposes of General Municipal Law § 72-o, and, therefore, is eligible for reimbursement of actual and necessary expenses of travel, meals and lodging and actual lost wages incurred by reason of such appearance as provided therein. 1992 Op St Compt No. 92-9.

Volunteer firefighter may not be reimbursed for actual lost wages pursuant to CLS Gen Mun Law § 72-o, as self-employed volunteer doing business as sole proprietor or partner in partnership is not considered to be his or her own "employer" for purposes of § 72-o. Ops St Compt 89-40.

§ 77. Leases of public buildings to posts of veteran organizations, organizations of volunteer firefighters, and child care agencies.

1. A municipal corporation may lease, for not exceeding five years, to a post or posts of the Grand Army of the Republic, Veterans of Foreign Wars of the United States, American Legion, Catholic War Veterans, Inc., Disabled American Veterans, the Army and Navy Union, U.S.A., Marine Corps League, AMVETS, American Veterans of World War II, Jewish War Veterans of the United States, Inc., Italian American War Veterans of the United States, Incorporated, Masonic War Veterans of the State of New York, Inc., Veterans of World War I of the United States of America Department of New York, Inc., Polish-American Veterans of World War II, Amsterdam, N.Y., Inc., Polish-American Veterans of World War II, Schenectady, N.Y., Inc., Polish Legion of American Veterans, Inc., Vietnam Veterans of America or other veteran organization of members of the armed forces of the United States who (a) were honorably discharged from such service or (b) have a qualifying condition, as defined in section three hundred fifty of the executive law, and received a discharge other than bad conduct or dishonorable from such service, or (c) are discharged LGBT veterans, as defined in section three hundred fifty of the executive law, and received a discharge other than bad conduct or dishonorable from such service, or to an incorporated organization or an association of either active or exempt volunteer firefighters, a public building or part thereof, belonging to such municipal corporation, except schoolhouses in actual use as such, without expense, or at a nominal rent, fixed by the board or council having charge of such buildings and provide furniture and furnishings, and heat, light and janitor service therefor, in like manner.

2. A municipal corporation may lease to a nonprofit corporation organized under the laws of the state of New York which is authorized to care for children and which is subject to the visitation, inspection and supervision of the state board of social services a public building or part thereof belonging to such municipal corporation, without expense or at a nominal rent, fixed by the board or council having charge of such buildings, and provide furniture and furnishings and heat, light and janitor service therefor, in like manner.

HISTORY:

Add, L 1909, ch 29; amd, L 1917, ch 583, § 1; L 1920, ch 230, § 1; L 1930, ch 267, § 1; L 1930, ch 800, § 1; L 1935, ch 788, § 1; L 1937, ch 682, § 1; L 1941, ch 324, § 2; L 1942, ch 483, § 1; L 1946, ch 575, § 1; L 1956, ch 487, § 3; L 1959, ch 485, § 3; L 1960, ch 120, § 3; L 1960, ch 592, § 3; L 1960, ch 610, § 2; L 1965, ch 14, § 4; L 1969, ch 1013, § 15, eff Sept 1, 1969; L 2015, ch 400, § 3, effective October 26, 2015; L 2018, ch 476, § 30, effective December 28, 2018; L 2019, ch 490, § 42, effective November 12, 2020.

Editor's Notes: Laws 1969, ch 1013, §§ 16, 18, provide as follows:

§ 16. Inconsistent provisions of other laws superseded. Insofar as the provisions of this act are inconsistent with the provisions of any other law, general, special or local, the provisions of this act shall be controlling.

§ 18. Construction. This act, being necessary for the welfare of the state and its inhabitants, shall be liberally construed so as to effectuate its purposes.

Laws 2019, ch 490, § 82, eff November 12, 2020, provides:

§ 82. This act shall take effect one year after it shall have become a law; provided, however that the amendments to subdivision 7 of section 369-h of the executive law made by section twenty-five of this act shall not affect the repeal of such section and shall be deemed repealed therewith. Effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized to be made and completed on or before such effective date.

Amendment Notes The 2015 amendment by ch 400, § 3, added "Vietnam Veterans of America" in 1.

The 2018 amendment by ch 476, § 30, substituted "firefighters" for "firemen" in the section heading; and substituted "firefighters" for "firemen" in 1.

The 2019 amendment by ch 490, § 42, in 1, deleted "honorably discharged" preceding "members" and added "who (a) were honorably discharged from such service or (b) have a qualifying condition, as defined in section three hundred fifty of the executive law, and received a discharge other than bad conduct or dishonorable from such service, or (c) are discharged LGBT veterans, as defined in section three hundred fifty of the executive law, and received a discharge other than bad conduct or dishonorable from such service."

Notes to Decisions

Two towns may erect a memorial building. 1945 Ops St Compt 433.

A town may erect a memorial building and any or all thereof may be leased to the organizations named in § 77 of the General Municipal Law. 1945 Ops St Compt 497.

Village property may not be conveyed to veterans' organizations for nominal consideration only. 1946 Ops St Compt 646.

A town board may not contribute town money to a veterans' organization for the purchase and erection of a building for such organization. 1947 Ops St Compt 124.

Town cannot pay rental on a building for the use thereof by the local unit of the National Guard, however a town does have authority to acquire property with any building thereon for the purpose of conveying the same to the state, with or without consideration, where the same is required for an armory, camp, range, base or any building, structure or other facility or purpose for the organized militia. 1957 Ops St Compt File #756.

Agency Opinions

The city may not pledge its credit under a bond issue for purpose of erecting a memorial building in which veterans will have absolute right to apportionment of rooms and accommodations. 1919 N.Y. Op. Att'y Gen. No. 120.

Under certain circumstances, a town may accept a gift from an American Legion Post of a building to be used as a town hall, subject to the donor retaining the right to occupy the building several evenings per month. A town may purchase a building in exchange for consideration other than cash. 1981 Op St Compt File #81-172.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 514 et seq.

§ 77-b. Expenses of certain public officers and employees attending conventions, conferences and schools

1. Definitions. As used in this section, the following terms shall mean:

(a) Municipality. A city, county, town, village, school district, cooperative educational services district, improvement district, soil conservation district, public library, community college, fire district.

(b) Governing Board. A common council, board of aldermen, city council, or board of estimate of a city, the county legislature or board of supervisors of a county, the town board of a town, the board of trustees of a village, the board of education of a school district, the board of cooperative educational services, the board of commissioners of an improvement district, the board of directors of a soil conservation district, the trustees of a public library, the trustees of a community college, and the board of fire commissioners of a fire district.

(c) Conference. A convention, conference, or school conducted for the betterment of any municipality or a convention or conference of firefighters or firemanic officers if believed to be of benefit to the municipality.

2. The governing board of a municipality may, by a majority vote, authorize any of its members or any officer or employee or the chief or assistant chief of its fire department or other person who has been elected pursuant to law to a public office of a municipality for which the term of office has not commenced to attend a conference. Such conference travel shall be for official business and shall be made utilizing a cost-effective and reasonable method of travel. Authorization must be by resolution adopted prior to such attendance, duly entered in the record of the proceedings of the municipality. However, the governing board may delegate the power to authorize attendance at such conference to any executive officer or any administrative board.

3. All actual and necessary registration fees, all actual and necessary expenses of travel, meals and lodging and all necessary tuition fees incurred in connection with attendance at a conference shall be a charge against the municipality and the amount thereof shall be audited, allowed and paid in the same manner as are other claims against such municipality.

4. Where authorization to attend a conference shall have been granted by any executive officer or administrative board no claim or expenses shall be audited, allowed or paid unless there shall be attached thereto a travel order or similar document signed by such executive officer or by the chairman of the administrative board, as the case may be, authorizing the claimant to attend such conference. If travel is by car, owned by any person so authorized, he shall receive an amount not to exceed the amount which the governing board allows as mileage.

5. No person shall be entitled to any compensation for the time spent in attending such a conference except that no deductions shall be made from the salary of a person so attending because of such attendance.

6. Advances of money for estimated expenditures, for registration fees, travel, meals, lodging and tuition fees may be made to a person duly authorized to attend a conference provided itemized vouchers showing actual expenditures are submitted after such attendance and moneys advanced in excess of such expenditures are refunded to the municipality or expenditures in excess of such estimate are audited and paid by the municipality. Where an officer or employee fails to return such excess advance, at the time of submitting his itemized vouchers or upon demand after audit of such voucher, the municipality shall deduct the amount of such unreturned excess advance from the salary or other money owed the officer or employee by the municipality.

HISTORY:

Add, L 1974, ch 413, § 2, eff May 23, 1974; amd, L 1976, ch 356, § 1, eff June 15, 1976; L 1979, ch 112, § 1; L 1982, ch 125, § 1; L 1988, ch 367, § 1, eff July 29, 1988; L 2006, ch 239, § 1, eff July 26, 2006; L 2018, ch 476, § 31, effective December 28, 2018.

Amendment Notes The 2018 amendment by ch 476, § 31, substituted "firefighters" for "firemen" in 1(c).

Repeal Notes: [1974, ch 413] Section seventy-seven-b of the general municipal law repealed by this act is set forth in less repetitious language while containing the same substance except that advances of expenses are allowed in the new section seventy-seven-b as set forth in this act.

Prior Law: Former § 77–b, add, L 1918, ch 637, § 1; amd, L 1919, ch 350, § 1, L 1923, ch 293, § 1, L 1945, ch 92, § 1, L 1945, ch 578, § 1, L 1946, ch 250, § 1, L 1950, ch 575, § 1, L 1953, ch 491, § 1, L 1954, ch 679, § 1, L 1955, ch 91, § 1, L 1956, ch 359, § 1, L 1956, ch 928, § 1, L 1957, ch 628, § 1, L 1960, ch 166, § 1, L 1960, ch 808, § 1, L 1962, ch 390, § 1,

L 1967, ch 9, § 1, L 1969, ch 663, § 1, L 1970, ch 817, § 1, L 1972, ch 892, § 15, L 1973, ch 529, § 1; repealed, L 1974, ch 413, § 1, eff May 23, 1974.

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1. In general

General discussion of dues, registration fees, and travel, meal and lodging expenses. 1967 Ops St Compt File #886.

2. Conferences and conventions within scope; bar association meetings

Meetings of Municipal Section of New York State Bar Association are unofficial conventions within the meaning of section 77-b of the General Municipal Law. Expenses actually and necessarily incurred for travel, meals and lodging by persons duly authorized, pursuant to section 77-b of the General Municipal Law, to attend meetings of such Municipal Section are proper charges against the municipalities and school districts to which such section 77-b is applicable. Section covers only persons regularly employed and compensated and expenses allowable are those for attending Municipal Section only. Annual membership dues of municipal attorneys in the New York State Bar Association (payment of which is a condition to membership in the Municipal Section of such Association) are personal obligations of such attorneys and are not proper charges against municipalities. 1946 Ops St Compt 85.

3. —Conferences for county officers

Meetings of county assessors' association are conventions within meaning of section 77-b. Annual membership dues of assessor not a charge against town. 1947 Ops St Compt 79.

Under this section, the chairman of a County Planning Board may be reimbursed for expenses incurred in attending conferences, if his attendance has been authorized by the Board of Supervisors. 1964 Ops St Compt #724.

Attendance at a general convention, of a county legislators' association, at which a committee subject is one of the items on the agenda, is not "committee work" for which per diem compensation is payable. 1974 Ops St Compt File #742.

4. —Firemanic conventions

A fire district may appropriate money for the purpose of defraying the travel expenses of the chief engineer in attending conferences and conventions of fire district officers, including conferences of civil defense groups, if prior authorization is given by the board of fire commissioners. However, the fire district may not pay travel expenses of the chief engineer in attending a convention of the Firemen's Association of the State of New York. 1953 Ops St Compt File #6220.

Chief or deputy chief engineer of fire district department may be authorized to attend conventions or conferences pursuant to this section. 1953 Ops St Compt File #6273.

The commissioners of a fire district may authorize attendance of the chief engineer and assistant engineers at the New York State Fire Chiefs' Convention and pay their actual and necessary expenses of travel, meals and lodging there incurred. 1964 Ops St Compt #22.

A fire district fire prevention officer, being an officer of the fire district, may be authorized to attend a convention outside the State and be reimbursed for his actual and necessary expenses. 1968 Ops St Compt File #877.

The chief engineer of a village fire department may be authorized to attend conventions and conferences pursuant to this section. 1955 Ops St Compt File #7346.

The board of fire commissioners of the fire district may authorize the attendance of the chief engineer at firemanic conferences and meetings outside of the district and may pay his expenses in connection therewith. The authorization to attend must be granted prior to attendance. 1960 Ops St Compt File #477.

5. —Firemanic conventions involving volunteer firemen

The members of a village volunteer fire department may not be reimbursed under section 77-b of the General Municipal Law for expenses incurred in attending a convention, but such reimbursement may be allowed under 72-g, if the convention is actually a "training school" or "course of instruction" within the scope of the latter section. 1967 Ops St Compt File #807.

A volunteer fireman of a fire district fire department may not be authorized to attend and be reimbursed for attending a convention unless said convention is actually a training school or course of instruction within the scope of General Municipal Law, § 72-g. 1968 Ops St Compt File #811.

6. —Judicial conferences

A town board in authorizing attendance of its justice of peace at a magistrate's convention, pursuant to General Municipal Law § 77-b, may not arbitrarily limit the amount of "actual and necessary expenses" to be incurred. 1959 Ops St Compt File #853.

7. —Police conventions

A city may not pay the expenses of its patrolmen in attending a Police Benevolent Association Convention. 1967 Ops St Compt File #375.

A city may grant leaves of absence with pay to policemen who attend Police Benevolent Association conferences and conventions if the city's governing board has acted to authorize said leaves. 1968 Ops St Compt File #845.

A village may pay the actual and necessary expenses of its chief of police at a state police convention if his attendance has been authorized prior thereto. However, the village may neither allow a lump-sum payment nor limit the allowance to less than actual and necessary expenses. 1958 Ops St Compt File #288.

8. —School conferences

Where school officer receives no compensation for services, he may be allowed actual and necessary expenses in performing duties of his office whether within or without school district.

Board of trustees is without authority to establish mileage allowance. 1947 Ops St Compt 278.

School district has no authority to pay expenses of holding a meeting of a county school boards association. 1953 Ops St Compt File #6193.

Neither members of a county board of cooperative educational services, nor employees thereof, may be reimbursed for necessary expenses incurred in attendance at a meeting of "county and rural area superintendents" in San Diego, California. 1958 Ops St Compt File #15.

A school district may not pay the expenses of officers or employees of a school district who attend as delegates the annual convention of the members of the State Teachers' Retirement System. 1960 Ops St Compt File #804.

9. —Conferences for town officers

A town officer may be paid expenses incurred in attending a convention of town officials held outside the State of New York. 1946 Ops St Compt 249.

Where previously authorized to attend, town superintendent of highways may be reimbursed expenses of attending convention, conference or school for town superintendents of highways. 1954 Ops St Compt File #6674.

Expenses incurred by a town building inspector in attending meetings of the New York State Building Officials Conference, Inc. are a proper charge against the town where attendance at such meetings has been previously authorized by resolution of the town board. 1964 Ops St Compt File #947.

The Town Law authorizes the payment of dues to the Association of Towns of the State of New York and other organizations which have as their primary purpose the fostering of better municipal government. Other association dues are the private responsibility of the individual officers. General Municipal Law, section 77-b authorizes the town to pay certain convention expenses of officers or employees authorized to attend a convention. 1967 Ops St Compt File #401.

10. —Miscellaneous conferences

Improvement district commissioners are not entitled to reimbursement for expenses at any time, and are not entitled to per diem compensation while attending a conference, convention or school for improvement district officers and employees. 1955 Ops St Compt File #7129.

A convention for members of a civil service employees' association is not within the intendment of this section, but leaves of absence for municipal officers and employees wishing to attend may be provided for by appropriate action. 1962 Ops St Compt #857.

A health officer shall be reimbursed for actual and reasonable expenses incurred while in attendance at a conference called by the commissioner of health or at the annual state health conference. 1968 Ops St Compt File #86.

11. Authorization for employee's attendance at conference or convention

12. —County employees

County may pay expenses of commissioners of elections attending convention of such officials, provided a resolution is adopted by board of supervisors authorizing such attendance and finding such attendance to be of benefit to county. 1947 Ops St Compt 98.

Proper method of authorizing attendance of county officers and employees at conventions, conferences and schools—delegation of authority to determine who shall attend. 1952 Ops St Compt File #5517.

By local law, the board of supervisors may delegate to its chairman the power to authorize attendance at conferences, conventions and schools for the betterment of municipal government. The chairman may then specify those conferences, etc. which are authorized as well as what persons may attend them. 1955 Ops St Compt File #7140.

It is doubtful whether a county may, by local law or resolution, arbitrarily limit reimbursable expenses incurred by county officers in the performance of their duties for an authorized attendance at a convention or conference. In any event, a county board may amend or revoke such an existing resolution by adopting another resolution. 1959 Ops St Compt #113.

A board of supervisors may not ratify attendance at conferences where authorization was not obtained in advance. It may delegate the power to authorize such attendance to the chief executive officer. 1969 Ops St Compt File #206.

A county may, in a collective bargaining agreement, provide for per diem travel allowances in connection with travel to conferences. It may not provide for such allowances in connection with other travel. 1983 Opt St Compt File #83-68.

13. —Education employees

In the absence of prior approval, a school district may not reimburse a board member for expenses in attending a convention. 1967 Ops St Compt File #443.

The trustees of a community college cannot authorize conference attendance or delegate that power to the college president. 1967 Ops St Compt File #949.

14. —Fire district employees

Fire district's contention that grand jury report on use of public funds to finance convention trip should be sealed due to deficiencies in charge to grand jury was without merit where grand jury was properly instructed on applicable law governing use of public funds by district officials for convention expenses (i.e., CLS Town § 178-c and CLS Gen Mun § 77-b). In re Report of 1985-1986 Special Grand Jury, Term IX, 150 A.D.2d 580, 541 N.Y.S.2d 842, 1989 N.Y. App. Div. LEXIS 6898 (N.Y. App. Div. 2d Dep't 1989).

When prior authorization is given, necessary expenses at convention of county fire and battalion chiefs may be paid from village funds. Village may not expend funds for entertainment of members of Nassau Village Officials' Association but when prior authorization is given expenses of village officials may be paid. 1946 Ops St Compt 721.

While this section provides for allowing and paying certain authorized expenses of fire department engineers attending conventions or conferences, there is no authority thereunder for giving them a "limited expense account" for such purposes. 1961 Ops St Compt File #36.

Authorization for members of the Kingston City Fire Department to attend technical conferences should come from the common council by resolution adopted prior to such attendance and duly entered in the record. 1961 Ops St Compt #641.

The commissioners of a fire district may authorize attendance of the chief engineer and assistant engineers at the New York State Fire Chiefs' Convention and pay their actual and necessary expenses of travel, meals and lodging there incurred. 1964 Ops St Compt #22.

A volunteer fireman of a fire district fire department may not be authorized to attend and be reimbursed for attending a convention unless said convention is actually a training school or course of instruction within the scope of General Municipal Law, § 72-g. 1968 Ops St Compt File #811.

A board of fire commissioners is required to pay the expenses of a commissioner who attends a convention, school or conference only if his attendance was authorized in advance by such board. However, such board may not prevent his attendance at his own expense. 1969 Ops St Compt File #719.

A board of fire commissioners may authorize the attendance by chief engineers and assistant engineers of a fire district fire department at certain conventions, conferences or schools. 1973 Ops St Compt File #819.

The board of fire commissioners of the fire district may authorize the attendance of the chief engineer at firemanic conferences and meetings outside of the district and may pay his expenses in connection therewith. The authorization to attend must be granted prior to attendance. 1960 Ops St Compt FIle #477.

15. —Medical employees

County may not audit and pay claims for county tuberculosis hospital nurses' expenses incurred while attending convention where no prior authorization has been given by board of supervisors. 1946 Ops St Compt 699.

The prior authorization of the county board of supervisors is necessary for technicians employed by a county laboratory to

attend programs of instruction sponsored by the New York State Department of Health. 1969 Ops St Compt File #423.

16. —Public library employees

Public library in accordance with subd 6 of § 77-b of CLS Gen Mun Law, may provide for cash advances for its officers and employees duly authorized to attend conferences. Ops St Compt 89-10.

17. —Public welfare officials

The amendment to section 77-b of the General Municipal Law by L. 1960, c. 166, which specifically authorizes officers and employees paid from county funds to attend conventions and conferences at expense of county, does not take away from county commissioners of public welfare the right to authorize the attendance of certain public welfare officials at the midwinter and annual conventions of public welfare officials pursuant to § 152 of the Social Welfare Law. 1960 Ops St Compt File #551.

Before a town highway superintendent may attend a training school, he must receive authorization from the town board and in the event that such authorization is received, all expenses necessarily incurred in connection therewith are to be paid from the town general fund. 1985 Op St Compt 85-11.

County commissioner of social services may authorize in advance the attendance of department of social services staff and employees at certain meetings of public welfare officials, authorization therefor by the chairman of the county board of supervisors not being required, where the money necessary to cover the expenses involved in such attendance has been included in the annual appropriation made for public assistance and care. 1969 Ops St Compt File #51.

18. —Town employees

A town assessor is entitled to reimbursement for his actual and necessary travel expenses in attending meetings called by the State Board of Equalization and Assessment within the county in which his town is situated only if the town board has authorized such attendance or the incurring of such expenses. 1957 Ops St Compt File #279.

A town board in authorizing attendance of its justice of peace at a magistrate's convention, pursuant to General Municipal Law § 77-b, may not arbitrarily limit the amount of "actual and necessary expenses" to be incurred. 1959 Ops St Compt File #853.

A town official may receive reimbursement from the town for expenses while attending authorized conventions or schools only if attendance is authorized in advance by the governing body of the municipality. 1963 Ops St Compt #59.

A town may authorize attendance of any town officer or employee at any convention or conference of public officers or employees or school conducted for the betterment of municipal government, if it believes that such attendance will be of sufficient value to the town. 1968 Ops St Compt File #373.

A town may pay the cost of travel and meals for officers attending monthly luncheon or dinner meetings of organizations of public officers where the programs at such meetings are directed toward the betterment of town government and the board believes the expenses to be necessary. 1968 Ops St Compt File #1050.

19. —Village employees

When prior authorization is given, necessary expenses at convention of county fire and battalion chiefs may be paid from village funds. Village may not expend funds for entertainment of members of Nassau Village Officials' Association but when prior authorization is given expenses of village officials may be paid. 1946 Ops St Compt 721.

There is no authority whereby the expenses of village officers and employees, incurred in attending conventions, conferences and schools, may be paid from a petty cash fund. 1967 Ops St Compt File #335.

A village may include in its budget an appropriation to reimburse unpaid members of a village planning board for expenses incurred in attending conferences of planning officials. 1968 Ops St Compt File #288.

A village may pay the actual and necessary expenses of its chief of police at a state police convention if his attendance has been authorized prior thereto. However, the village may neither allow a lump-sum payment nor limit the allowance to less than actual and necessary expenses. 1958 Ops St Compt File #288.

20. Reimbursable expenses

Expenses incurred pursuant to this section are not reimbursable if they were not actually incurred, were not necessary, or were for other than the authorized purposes. 1969 Ops St Compt File #563.

Cost of books and instructional materials supplied during conference, convention or school are properly categorized as "tuition" rather than "registration fees" for purposes of this section. 1985 Op St Compt No. 85-62.

21. —Expenses for spouse

A city school district official, who takes his wife to a convention or conference, may be reimbursed for his own lodging at the rate charged for a single accommodation, assuming, of course, that the cost of his attendance is a proper school district charge. 1973 Ops St Compt File #230.

A fire district officer or employee, or a chief or assistant chief of the fire district fire department, who takes his wife to a convention or conference may be reimbursed for his own lodging at the rate charged for a single accommodation, assuming, of course, that the cost of his attendance is a proper fire district charge. 1976 Ops St Compt File #811.

School district may not authorize incurrence and payment of travel and lodging expenses of spouse of members of board of education who accompanies board member in attending conference, even if board member has provided advance payment to school district. 1993 Op St Compt No. 93-12.

22. —Registration fees

Under this section, prior to amendment, a town could not pay a registration fee in excess of five dollars incurred by a person authorized to attend a conference. 1955 Ops St Compt File #7176.

There is no requirement that a Fire District Commissioner and Secretary attend conventions outside the fire district, but if their attendance is authorized they are entitled to registration fees not in excess of ten dollars and actual and necessary expenses. 1961 Ops St Compt #726.

23. —Travel expenses

The expense of town officer for travel in own automobile to a conference of municipal officers is a town charge. 1946 Ops St Compt 127.

Where school officer receives no compensation for services, he may be allowed actual and necessary expenses in performing duties of his office whether within or without school district. Board of trustees is without authority to establish mileage allowance. 1947 Ops St Compt 278.

Salaried village chief of police may not be reimbursed for use of his own automobile in performance of duties of his office either on a contract or lump sum basis. 1947 Ops St Compt 456.

The chief engineer of a fire district may use the district-owned chief's car for transportation to conventions if so authorized. 1962 Ops St Compt #759.

The use of a personal commercial credit card by an individual for travel on school district business, for which expenses he will be reimbursed by the district, is not improper. 1970 Ops St Compt File #167.

City, under CLS Gen Mun § 77-b, may pay travel, meal, lodging, registration, and tuition expenses of its city attorney for attending course at conference for municipal officials that relates to attorney's work as counsel for city and that city believes will be of benefit to it, even though attorney coincidentally receives continuing legal education (CLE) credit for attending course, if costs to city is same irrespective of whether CLE credit is obtained, but city may not, under statute, pay tuition charge imposed only on those who seek CLE credit, in addition to fees payable by others who attend same course; such additional tuition may be paid as part of attorney's total compensation if authorized under city's charter and, if it is not so authorized, city may adopt local law to provide therefor. 1999 Op St Compt No. 99-9.

24. —Miscellaneous expenses which are reimbursable

A city may reimburse officers and employees for reasonable tips paid by them while engaged in authorized travel on official city business. 1963 Ops St Compt #656.

City, under CLS Gen Mun § 77-b, may pay travel, meal, lodging, registration, and tuition expenses of its city attorney for attending course at conference for municipal officials that relates to attorney's work as counsel for city and that city believes will be of benefit to it, even though attorney coincidentally receives continuing legal education (CLE) credit for attending course, if costs to city is same irrespective of whether CLE credit is obtained, but city may not, under statute, pay tuition charge imposed only on those who seek CLE credit, in addition to fees payable by others who attend same course; such additional tuition may be paid as part of attorney's total compensation if authorized under city's charter and, if it is not so authorized, city may adopt local law to provide therefor. 1999 Op St Compt No. 99-9.

A county may pay an individual's college expenses as part of a recruitment program to obtain medical personnel, in exchange for a promise by the individual to accept employment with the county infirmary for a specific number of years. 1981 Op St Comp File #81-411.

25. —Miscellaneous expenses which are not reimbursable

The expense of town assessors in attending a meeting of assessors called by the chairman of the board of supervisors is not a county charge. 1956 Ops St Compt File #8065.

An officer may not be reimbursed for services and transportation of a nurse required by a physician to attend him on his return from a convention which the officer was duly authorized to attend. 1962 Ops St Compt #354.

A claim for reimbursement by a village mayor who attended a conference should be detailed. Garage, miscellaneous expenses and entertainment expenses should not be reimbursed. 1967 Ops St Compt File #593.

26. Membership dues

Laws authorizing payment of expenses of municipal officers and employees in going to and from and attending conferences of municipal officials, training courses and schools, generally cover traveling, hotel and eating expenses, but do not cover personal registration or membership of individual officers in various associations, but there is no provision authorizing payment of such membership fees in case of local public welfare officials who are members of state association of public welfare officials. 1946 Ops St Compt 60.

The dues of a public officer in an association of public officers are a private expense and cannot be paid by a town. 1968 Ops St Compt File #373.

27. —Law associations

Meetings of Municipal Section of New York State Bar Association are unofficial conventions within the meaning of section 77-b of the General Municipal Law. Expenses actually and necessarily incurred for travel, meals and lodging by persons duly authorized, pursuant to section 77-b of the General Municipal Law, to attend meetings of such Municipal Section are proper charges against the municipalities and school districts to which such section 77-b is applicable. Section covers only persons regularly employed and compensated and expenses allowable are those for attending Municipal Section only. Annual membership dues of municipal attorneys in the New York State Bar Association (payment of which is a condition to membership in the Municipal Section of such Association) are personal obligations of such attorneys and are not proper charges against municipalities. 1946 Ops St Compt 85.

Town may not pay dues of justice for membership in Association of Magistrates. 1954 Ops St Compt File #6565.

A county may not pay bar association or other professional society dues on behalf of its county judge. 1964 Ops St Compt #101.

A county may not pay the dues of a judge in the Association of Judges of the Family Court of the State of New York or the County Judges Association of the [So in original. Apparently "State" was omitted.] of New York. 1969 Ops St Compt File #77.

28. —School organizations

Payment by school districts of dues of school principals in state and national educational organizations is not authorized. 1962 Ops St Compt #1062.

A school district may not pay dues of its officers or employees in associations, however closely related to their work. 1968 Ops St Compt File #986.

29. —Miscellaneous groups

Laws authorizing payment of expenses of municipal officers and employees in going to and from and attending conferences of municipal officials, training courses and schools, generally cover traveling, hotel and eating expenses, but do not cover personal registration or membership of individual officers in various associations, but there is no provision authorizing payment of such membership fees in case of local public welfare officials who are members of state association of public welfare officials. 1946 Ops St Compt 60.

Meetings of county assessors' association are conventions within meaning of section 77-b. Annual membership dues of assessor not a charge against town. 1947 Ops St Compt 79.

A city may not pay the dues of one of its officials in the American Water Works Association, Inc. 1964 Ops St Compt File #824.

Village may not pay the membership dues and fees of one of its officials in the International Institute of Municipal Clerks. 1967 Ops St Compt File #405.

The Town Law authorizes the payment of dues to the Association of Towns of the State of New York and other organizations which have as their primary purpose the fostering of better municipal government. Other association dues are the private responsibility of the individual officers. General Municipal Law, section 77-b authorizes the town to pay certain convention expenses of officers or employees authorized to attend a convention. 1967 Ops St Compt File #401.

30. Training expenses; attorneys

The expenses and tuition of a district attorney and assistant district attorneys in attending a training program for prosecuting attorneys are not a county charge. 1954 Ops St Compt File #6569.

County may not pay tuition fees of assistant district attorney attending school for public prosecutors. 1954 Ops St Compt File #6885.

A county may not pay tuition and accompanying expenses for an unauthorized course in criminal defense taken by an assistant public defender. 1968 Ops St Compt File #792.

31. —Engineers

Village funds may not be used to pay expense in connection with attendance of the village engineer at night school to prepare for examination to become licensed engineer. 1953 Ops St Compt File #6412.

A municipality, which has increased the duties of its sanitary engineer, to include the enforcing of the "ionizing radiation" provisions of the State Sanitary Code, may send such employee to a school to take a course in nuclear engineering and pay the tuition and travel expenses in connection therewith. 1959 Ops St Compt File #779.

A town may not pay tuition and other expenses of an employee taking an instruction course to get a sanitary engineer's license in order to qualify for a civil service examination. 1963 Ops St Compt #350.

32. —Firemen

The members of a village volunteer fire department may not be reimbursed under section 77-b of the General Municipal Law for expenses incurred in attending a convention, but such reimbursement may be allowed under 72-g, if the convention is actually a "training school" or "course of instruction" within the scope of the latter section. 1967 Ops St Compt File #807.

A volunteer fireman of a fire district fire department may not be authorized to attend and be reimbursed for attending a convention unless said convention is actually a training school or course of instruction within the scope of General Municipal Law § 72-g. 1968 Ops St Compt File #811.

33. —Library employees

School district public library may not pay the expenses of a library employee taking college courses related to the administration of the public library, unless such attendance is pursuant to official orders and part of his official duties. 1965 Ops St Compt File #198.

A village treasurer may pay the educational expenses of a library employee taking courses related to the administration of the public library where such attendance is pursuant to an official request and authorization and thus part of her official duties. 1968 Ops St Compt File #985.

34. —Police

A town board may make it the duty of a town police officer to attend a police training school at an out-of-state university and may, accordingly, pay for tuition, travel, meals, lodging, books and incidental expense of the officer himself out of town funds, in addition to continuing the officer's regular salary during such training. 1967 Ops St Compt File #357.

A town may agree to pay the cost of tuition, books and the salary of police officers whom the town assigns to police training schools. 1968 Ops St Compt File #840.

35. —Town employees

Town may not pay expense incurred for tuition, text books or other study materials by a town officer or employee taking a correspondence school course of training beneficial to him in his capacity as a town officer or employee. 1957 Ops St Compt File #57-545.

Town may purchase text or reference books as a technical library for the use of officers and employees, provided title thereto remains in the town. 1957 Ops St Compt File #57-545.

A town may not pay for the cost incurred by members of the Town Board and the town clerk in receiving instructions in public speaking from a qualified private tutor. 1962 Ops St Compt #337.

36. —Miscellaneous employees

Public school moneys may be expended to reimburse a high school coach for necessary expenses incurred by him in attending a convention of coaches and coaching school conducted by New York State Public High School Athletic Association within limitations as prescribed by Section 77-b of the General Municipal Law. 1945 Ops St Compt 199.

Village board of light commissioners may not pay cost of course in auditing taken by manager of the electric utility. 1955 Ops St Compt File #7683.

A county hospital employee may be reimbursed his expenses for the successful completion of a degree credit course authorized to be taken at an institution of higher learning when it inures fundamentally to the public benefit of the municipality and only incidentally to the personal benefit of the employee. 1968 Ops St Compt File #654.

Training course designed to instruct county personnel in preparing patient review forms for long term care patient in residential health care facility is not "conference" for purposes of CLS Gen Mun § 77-b; however, cost of attendance is proper county charge under CLS County § 203 if county determines that it is necessary for personnel to acquire necessary qualifications and attendance is made part of official duties of personnel. 1986 Op St Compt No. 86-68.

A municipality may not expend funds to send a trainee public health nurse to school to complete her required 30 credit hours. 1959 Ops St Compt File #779.

37. Advance payments

City school district did not violate provisions of assistant superintendent's employment contract by withholding his salary pursuant to CLS Gen Mun § 77-b(1), even though contract provided that he was entitled to normal salary and benefits during period of suspension until employer determined merits of misconduct charges against him, since audit had revealed that he had received cash advances in excess of his expenditures, and district was recouping such excess by making deductions from his salary; thus, assistant superintendent was still technically receiving salary, but entire net amount was being applied to reimburse excess advances in accordance with statute. Duffy v Poughkeepsie City School Dist., 183 A.D.2d 1047, 583 N.Y.S.2d 658, 1992 N.Y. App. Div. LEXIS 7143 (N.Y. App. Div. 3d Dep't 1992).

Assistant superintendent was not entitled to enjoin city school district from withholding his salary, pursuant to CLS Gen Mun § 77-b(1), pending decision in disciplinary proceeding, where withholding was based on excess advances allegedly due to inappropriate and wasteful purchases made by assistant superintendent on behalf of district, as well as personal purchases made on district's credit cards, but charges in disciplinary proceeding did not include issue of excess advances, and such issue would therefore not be determined in disciplinary proceeding; thus, final determination in disciplinary action was not necessary to resolve injunction issue. Duffy v Poughkeepsie City School Dist., 183 A.D.2d 1047, 583 N.Y.S.2d 658, 1992 N.Y. App. Div. LEXIS 7143 (N.Y. App. Div. 3d Dep't 1992).

Advance lump sums for expenses at conventions of public officials illegal; reimbursement may be made for actual and necessary traveling, food and lodging expenses or mileage in lieu of traveling expenses if personal car is used. 1947 Ops St Compt 356.

A village may not adopt a resolution or local law authorizing cash advances to officers and employees for anticipated expenses of attending conferences and conventions. 1973 Ops St Compt File #137.

The town board may not pay a lump sum advance to an officer or employee authorized to attend a school, conference or convention. 1967 Ops St Compt File #756.

A municipality may enact a local law authorizing the payment of cash advances to municipal officers or employees to cover anticipated expenses at authorized conferences or conventions, provided such local law requires a strict accounting by such officials for the amount received. 1973 Ops St Compt File #954.

38. —Travel expenses

City may not make advance lump sum payments to officers and employees on account of expenses to be incurred by them in performance of official duties. City may, however, authorize appropriate officials to (1) expend city moneys to purchase traveling accommodations in advance of such use and (2) to make arrangements with hotels to furnish specified types of room and board to such officers or employees and to bill the city directly therefor. 1950 Ops St Compt File #4791.

A city may not make advance lump sum payments for travel expense of its officials at air or railroad rates where such officials are using their own automobiles and the city has established a mileage rate; nor may it purchase airplane tickets for private use of its officials, even though they ultimately reimburse the city therefor. 1960 Ops St Compt File #669.

City has power to enact local laws authorizing reimbursement of salaried officers for official expenses, authorizing advance lump sum payments to officers and employees to finance official travel, and limiting the amount of any expense reimbursable from public funds. Local law authorizing advance lump sum payments should provide for terminal date for accounting and refund. 1967 Ops St Compt File #429.

A school district may not pay a lump sum advance to a teacher authorized to attend a school, conference or convention to finance his travel expenses. 1969 Ops St Compt File #119.

39. —Other expenses

City may not make advance lump sum payments to officers and employees on account of expenses to be incurred by them in performance of official duties. City may, however, authorize appropriate officials to (1) expend city moneys to purchase traveling accommodations in advance of such use and (2) to make arrangements with hotels to furnish specified types of room and board to such officers or employees and to bill the city directly therefor. 1950 Ops St Compt File #4791.

A town may not prepay a registration fee for a town officer or employee who has been authorized to attend a conference, convention or school. 1969 Ops St Compt File #798.

40. Miscellaneous

Expense accounts of a town officer in attending an Association of Towns meeting may not be presented to the county board of

supervisors but are audited and paid by the town board. 1953 Ops St Compt File #6082.

Where attendance at convention is authorized by the chief executive officer, a travel order or similar document signed by such officer must be attached to any claim for expenses. 1953 Ops St Compt File #6082.

Agency Opinions

Analysis

1. Conferences and conventions within scope; bar association meetings
2. —Firemanic conventions
3. —Firemanic conventions involving volunteer firemen
4. —Judicial conferences
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6. —Conferences for town officers
7. —Miscellaneous conferences
8. Authorization for employee's attendance at conference or convention
9. —County employees
10. —Education employees
11. —Fire district employees
12. —Judicial officers or employees
13. Reimbursable expenses
14. —Expenses for spouse
15. —Registration fees
16. —Travel expenses
17. —Miscellaneous expenses which are reimbursable
18. —Miscellaneous expenses which are not reimbursable
19. Membership dues
20. —Miscellaneous groups
21. Training expenses; attorneys
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1. Conferences and conventions within scope; bar association meetings

2. —Firemanic conventions

A fire chief and his assistants may attend conferences authorized by the village board. 1979 Op St Compt File #911.

3. —Firemanic conventions involving volunteer firemen

A volunteer fireman may be authorized to attend a convention and obtain reimbursement for expenses only if it is actually a training school or course of instruction. The New York State Volunteer Fireman's Association convention fulfills this requirement but the New York State Fire Chief's convention does not. However, a fire chief or assistant fire chief could be authorized to attend and obtain reimbursement for any convention believed to be for the betterment of the municipality. 1979 Op St Compt File #311.

Volunteer firemen may be authorized to attend the New York State Association of Fire Chiefs' Annual Conference and may be reimbursed for certain expenses. (24 Opns St Comp, 1968, p 769, is hereby superseded and Opns St Comp, 1979, No. 79-311 is superseded to the extent it is inconsistent with this opinion). 1980 Op St Compt File #237.

4. —Judicial conferences

Town justice may recover actual and necessary expenses incurred in attending meetings of State and County Associations of Magistrates, provided that attendance is authorized in advance by resolution of town board. 1979 Op St Compt File #40.

A municipal judge may recover his actual and necessary expenses incurred in attending a seminar held by a national or regional judge's association, if attendance is authorized in advance by the local governing board upon the board's determination that attendance at the seminar is of benefit to the municipality. 1980 Op St Compt File #183.

A town or village justice court clerk, or justice who does his own clerical work, may recover hs actual and necessary expenses incurred in attending a seminar conducted by the New York State Association of Magistrates Court Clerks, if attendance is authorized in advance by the local governing board upon the board's determination that attendance at the seminar is of benefit to the municipality. 1980 Op St Compt File #380.

5. —School conferences

(1) A school district may pay actual and necessary registration fees up to $50 for persons it authorizes to attend a conference. Advances of money may be made for estimated expenses so that a person must refund any excess after the submission of vouchers. Reimbursement may be deferred until the person has actually paid the expenses and has submitted vouchers and a signed document authorizing him to attend the conference; (2) A school district may not pay the expenses of a spouse in attending a conference, but, if the spouse does attend, reimbursement for lodging or public transportation may be at the amount normally expended for one person. 1979 Op St Compt File #358.

6. —Conferences for town officers

A justice court clerk who, as an employee of the town, has received prior authorization to attend the Association of Towns meeting would be entitled to receive reimbursement for his or her actual and necessary expenses. The fact that the clerk also happens to be the spouse of the town justice is of no relevance. 1980 Op St Compt File #273.

7. —Miscellaneous conferences

The board of turstees of a public library may reimburse employees who attend intra-state library conferences, meetings and seminars for the purpose of improving their knowledge of library business and management. 1979 Op St Compt File #743.

The board of trustees of a public library may authorize a staff member to attend a conference of a professional organization, such as the American Library Association, and may provide reimbursement of certain expenses. 1980 Op St Compt File #472.

A county may pay expenses of the county director of community services, the members of the county community services board, and county mental hygiene staff members for attendance at conventions or seminars conducted by the N.Y. State Conference of Local Mental Hygiene Directors, provided the county governing board grants prior approval and determines that such attendance is of benefit to the county. 1981 Op St Compt File #80-639.

A municipality may pay expenses of its attorneys and his assistants for attendance at seminars conducted by law sections of national, state and local bar associations, provided its governing board grants prior approval and determines that such attendance by its attorneys at any such seminar is of benefit to the municipality. 1979 Op St Compt File #336.

8. Authorization for employee's attendance at conference or convention

9. —County employees

A county may not provide, by local law, per diem allowances for meal and lodging expenses incurred in connection with travel to a conference. It is not clear whether a county may, by local law, provide for per diem allowances in connection with other official travel. 1983 Op St Compt File #83-68.

A county may not, by resolution, provide per diem allowances for meal and lodging expenses incurred in connection with travel to conferences or travel in the performance of official duties. 1983 Op St Compt File #83-68.

10. —Education employees

The number of teachers which may be authorized to attend an expense paid conference is within the discretion of the board of education. 1979 Op St Compt File #176.

A school district may not adopt a resolution authorizing board members to attend such conferences as they may select, unless the conferences are specifically enumerated in the resolution. 1979 Op St Compt File #795.

11. —Fire district employees

A volunteer fireman may be authorized to attend a convention and obtain reimbursement for expenses only if it is actually a training school or course of instruction. The New York State Volunteer Fireman's Association convention fulfills this requirement but the New York State Fire Chief's convention does not.

However, a fire chief or assistant fire chief could be authorized to attend and obtain reimbursement for any convention believed to be for the betterment of the municipality. 1979 Op St Compt File #311.

Volunteer firemen may be authorized to attend the New York State Association of Fire Chiefs' Annual Conference and may be reimbursed for certain expenses. (24 Opns St Comp, 1968, p 769, is hereby superseded and Opns St Comp, 1979, No. 79-311 is superseded to the extent it is inconsistent with this opinion). 1980 Op St Compt File #237.

12. —Judicial officers or employees

Town justice may recover actual and necessary expenses incurred in attending meetings of State and County Associations of Magistrates, provided that attendance is authorized in advance by resolution of town board. 1979 Op St Compt File #40.

A municipal judge may recover his actual and necessary expenses incurred in attending a seminar held by a national or regional judge's association, if attendance is authorized in advance by the local governing board upon the board's determination that attendance at the seminar is of benefit to the municipality. 1980 Op St Compt File #183.

A town or village justice court clerk, or justice who does his own clerical work, may recover hs actual and necessary expenses incurred in attending a seminar conducted by the New York State Association of Magistrates Court Clerks, if attendance is authorized in advance by the local governing board upon the board's determination that attendance at the seminar is of benefit to the municipality. 1980 Op St Compt File #380.

A local law delegating to chief executive officers of a county, city or village, power to authorize attendance at conventions, etc., under General Municipal Law § 77-b is not subject to mandatory referendum under Municipal Home Rule Law § 23. 1964 NY Ops Atty Gen Jan 21.

The town board may authorize any employee of the town, including secretaries to the planning and zoning board or the town justice clerk, to attend conferences or conventions. GENERAL MUNICIPAL LAW, §§ 800(3), 801, 802(1)(h): An individual who has been appointed to a vacancy on the town board may not thereafter agree to perform work for the town on a contractual basis. 1982 Op St Compt File #82-108.

13. Reimbursable expenses

14. —Expenses for spouse

(1) A school district may pay actual and necessary registration fees up to $50 for persons it authorizes to attend a conference. Advances of money may be made for estimated expenses so that a person must refund any excess after the submission of vouchers. Reimbursement may be deferred until the person has actually paid the expenses and has submitted vouchers and a signed document authorizing him to attend the conference; (2) A school district may not pay the expenses of a spouse in attending a conference, but, if the spouse does attend, reimbursement for lodging or public transportation may be at the amount normally expended for one person. 1979 Op St Compt File #358.

15. —Registration fees

(1) A school district may pay actual and necessary registration fees up to $50 for persons it authorizes to attend a conference. Advances of money may be made for estimated expenses so that a person must refund any excess after the submission of vouchers. Reimbursement may be deferred until the person has actually paid the expenses and has submitted vouchers and a signed document authorizing him to attend the conference; (2) A school district may not pay the expenses of a spouse in attending a conference, but, if the spouse does attend, reimbursement for lodging or public transportation may be at the amount normally expended for one person. 1979 Op St Compt File #358.

16. —Travel expenses

The governing board, in the first instance, determines whether a given expense of attending a conference is actual and necessary. An officer or employee is not entitled to a mileage allowance when he either travels to a conference in a vehicle owned by a colleague who also attends the conference, or by bus. 1979 Op St Compt File #579.

A mileage allowance may not be paid to a member of the board of education for attending committee meetings, workshops, or special board meetings which take place at the same location as the regular board meetings. 1979 Op St Compt File #684.

A governing board of a county may reimburse a county officer for lodging where such lodging involves the sub-leasing of an apartment if the cost is reasonable and comparable to that of either a hotel or motel. In addition to a certified voucher submitted to the governing board, the board should require receipts as documentation but where receipts are not available, cancelled checks will suffice. Travel expenses may be paid on a mileage basis and in such a case no documentation other than a voucher would be required. 1982 Op St Compt File #82-20.

17. —Miscellaneous expenses which are reimbursable

An attorney retained by a town board as an independent contractor, may be reimbursed for conference expenses if his contract so provides. 1979 Op St Compt File #203.

The sales tax added on to a restaurant bill for meals consumed by a school district official on authorized business travel is reimbursable by the district as an actual and necessary expense. It is a long standing public policy and the policy of this Department that a board of education may not reimburse officials for alcoholic beverages consumed with meals. 1980 Op St Compt File #163.

A town board might, in its discretion, determine that the fee incurred by a town justice in securing traveler's checks in connection with the annual meeting of the Association of Towns is an actual and necessary expense. However, interest on a 30-day note secured by a town justice to pay his travel expense is not a proper town charge. 1980 Op St Compt File #221.

Tips to bellboys or maids are a reimbursable travel expense for an officer or employee authorized by a municipality to attend a conference. However, tips to bellboys or maids should not be included on a voucher as part of mileage expenses. 1980 Op St Compt File #717.

The board of commissioners of a water district may not pay a per diem meal allowance to officers or employees of the district when they travel on district business but may only reimburse them for those meal expenses actually incurred. The governing board of the district should require the submission of receipts for such expenses before reimbursement is made. 1982 Op St Compt File #82-141.

18. —Miscellaneous expenses which are not reimbursable

The sales tax added on to a restaurant bill for meals consumed by a school district official on authorized business travel is reimbursable by the district as an actual and necessary expense. It is a long standing public policy and the policy of this Department that a board of education may not reimburse officials for alcoholic beverages consumed with meals. 1980 Op St Compt File #163.

A town board might, in its discretion, determine that the fee incurred by a town justice in securing traveler's checks in connection with the annual meeting of the Association of Towns is an actual and necessary expense. However, interest on a 30-day note secured by a town justice to pay his travel expense is not a proper town charge. 1980 Op St Compt File #221.

The governing board, in the first instance, determines whether a given expense of attending a conference is actual and necessary. An officer or employee is not entitled to a mileage allowance when he either travels to a conference in a vehicle owned by a colleague who also attends the conference, or by bus. 1979 Op St Compt File #579.

19. Membership dues

20. —Miscellaneous groups

A town may not expend public funds for the purpose of paying membership dues of Recreation Commission members and employees in a county recreation association or in the New York State Recreation Society. Authority for this may not be created by local law. 1967 NY Ops Atty Gen August 24.

21. Training expenses; attorneys

22. —Firemen

A volunteer fireman may be authorized to attend a convention and obtain reimbursement for expenses only if it is actually a

training school or course of instruction. The New York State Volunteer Fireman's Association convention fulfills this requirement but the New York State Fire Chief's convention does not. However, a fire chief or assistant fire chief could be authorized to attend and obtain reimbursement for any convention believed to be for the betterment of the municipality. 1979 Op St Compt File #311.

23. —Town employees

If a town assessor enrolls in a real estate appraisal course at a local community college, he may be reimbursed for the cost of tuition and travel provided the town board has determined that attendance at the course will be of benefit to the town. However, since a college course is not a conference within the meaning of General Municipal Law, § 77-b(1)(c), the mechanisms of reimbursement provided by that section are inapplicable. 1981 Op St Compt File #81-152.

24. Advance payments

In addition to the authority for cash advances for travel contained in G.M.L., § 77-b, a town may enact a local law which would authorize the payment of cash advances to cover the cost of other anticipated expenses incurred by officers and employees in the performance of their official duties. 1979 Op St Compt File #202.

A B.O.C.E.S. may not make advance payments to teachers for certain expenses payable under a collective bargaining agreement, except as authorized in General Municipal Law, § 77-b(6) for expenses incurred in connection with conferences. A petty cash fund may be used, in certain circumstances, to make payments directly to vendors in advance of authorization. 1980 Op St Compt File #738.

25. Miscellaneous

(1) A school district may pay actual and necessary registration fees up to $50 for persons it authorizes to attend a conference. Advances of money may be made for estimated expenses so that a person must refund any excess after the submission of vouchers. Reimbursement may be deferred until the person has actually paid the expenses and has submitted vouchers and a signed document authorizing him to attend the conference; (2) A school district may not pay the expenses of a spouse in attending a conference, but, if the spouse does attend, reimbursement for lodging or public transportation may be at the amount normally expended for one person. 1979 Op St Compt File #358.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Audit and payment of claims, CLS Vill § 5-524.

§ 77-c. Per diem meal allowances for travel on official business

Whenever a municipality is authorized or required to reimburse its officers, employees, or the volunteer members or officers of the fire department of the municipality, for their actual and necessary expenses for meals in conjunction with travel on official business, the governing board of such municipality may determine by resolution to allow and pay a reasonable per diem allowance for meals in lieu of such actual and necessary expenses. In determining the amount of such allowance, the governing board shall consider the prevailing costs for meals in the area in which the travel will occur, but in no event shall such allowance exceed the standard meal allowance for business-related travel adopted or prescribed for federal income tax purposes. For purposes of this section, the terms "municipality" and "governing board" shall have the same meaning as in section seventy-seven-b of this article.

HISTORY:

Add, L 1991, ch 31, § 1, eff March 29, 1991.

Prior Law: Former § 77–c, add, L 1975, ch 245, § 1; renumbered § 77–d, L 1991, ch 31, § 1, eff March 29, 1991.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

63C Am Jur 2d, Public Officers and Employees § 485.

§ 91-a. Arson investigation

1. Every municipal corporation, the office of fire prevention and control, and any two or more municipal corporations jointly, are hereby authorized and empowered to investigate and to take such action as may be required to formulate task forces, teams, fire and/or police investigative units to investigate any case of a burn injury or wound sustained as reported pursuant to section 265.26 of the penal law, and to ascertain the cause of fires or explosions of suspicious origin within the municipality or participating municipalities, pursue necessary investigation thereof and assist in the preparation and prosecution of cases stemming from any alleged criminal activity attendant to such fires or explosions. In the case of a joint endeavor by two or more municipal corporations, the share of the costs to be borne by each such municipal corporation shall be fixed by contract. The expenditure of moneys for such purpose by a municipal corporation shall be deemed a lawful municipal purpose and the moneys appropriated for the purpose shall be raised by tax upon the taxable real property within the municipal corporation in the same manner as moneys for other lawful municipal purposes. Each municipal corporation is hereby authorized to accept and disburse grants of public or private money or other aid paid or made available by the state or federal government for such purpose or purposes.

2. Where an investigative unit formed by this section has investigated a fire and such fire is suspected to have been ignited by a cigarette and not caused by arson, the investigative unit shall forward to the office of fire prevention and control within fourteen days of completing the investigation into such fire information detailing, to the extent possible: (a) the specific brand and style of the cigarette suspected of having ignited such fire; (b) whether the cigarette package was marked as required by subdivision six of section one hundred fifty-six-c of the executive law; and (c) the location and manner in which such cigarette was purchased.

HISTORY:

Add, L 1979, ch 225, § 14; amd, L 1985, ch 201, § 2; L 2006, ch 583, § 2, eff Dec 14, 2006 (see 2006 note below).

Editor's Notes: Laws 2006, ch 583, § 7, eff Dec 14, 2006, provides as follows:

§ 7. This act shall take effect on the one hundred twentieth day after it shall have become a law; provided, however, that the prohibition against the distribution, sale or offering for sale of any package of cigarettes unless the manufacturer has placed the letters "FSC" as required by subdivision 6 of section 156-c of the executive law on such package; and the testing requirements set forth in paragraph a of subdivision 3 of section 156-c of the executive law as amended by section four of this act shall take effect twelve months after this act shall have become a law. Nothing in this act shall prohibit wholesale dealers or retail dealers from selling their inven-

tory of cigarettes existing on the date that is 12 months after this act takes effect; provided that such cigarettes contain a marking in compliance with section 8 of the office of fire prevention and control regulations at Title 19 NYCRR Part 429, as in existence as of the date this act becomes a law; provided, further, that such wholesale dealer or retail dealer can establish that New York state cigarette tax stamps were affixed to such cigarettes prior to the date that is 12 months after this act takes effect, and provided further that such wholesale dealer or retail dealer can establish that such inventory was purchased prior to such date in comparable quantity to the inventory purchased during the same period in the preceding year.

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A fire district may have implied authority to offer a reward for information leading to the apprehension, arrest and conviction of a person responsible for a suspected arson but in light of the General Municipal Law provisions pertaining to rewards and arson investigation, the best course of action may be for the fire district commissioners to discuss with the town officials the possibility of the town offering a reward and to determine what steps the town may be taking to apprehend a suspected arsonist. 1982 Op St Compt File #82-242.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Burn injury and wounds to be reported, CLS Penal § 265.26.

§ 92-a. Medical, surgical and hospital services or insurance for officers, employees and retired officers and employees of public corporations and their families

1. As used in this section, the term "public corporation" shall mean a municipal corporation, a district corporation, a school district, a consolidated health district and a county or town special district or a joint special district, governed by a separate board of commissioners. Officers, employees and retired officers and employees of a county or town special district which is not governed by a separate board of commissioners shall be deemed to be county or town officers and employees, or retired officers and employees, respectively.

1-a. As used in this section the term "retired officer" shall include any former school board member with twenty years or more service in such position. The total cost of participation by such former school board members and their families shall be borne by such former members.

2. A public corporation may contract with a non-profit membership corporation, organized under article forty-three of the insurance law and approved by the superintendent of financial services and the state board of social welfare, or with any insurance company authorized to do business in this state for the purpose of furnishing medical and surgical services and hospital service as defined in such article forty-three, or medical and surgical and hospital insurance to persons who contract with such non-profit membership corporation or insurance company, or who subscribe to a plan or plans, as hereinafter provided. Any such contract entered into by a public corporation shall permit any officer or employee or group of officers or employees of an agency or department of the public corporation voluntarily to subscribe to a plan or plans providing for medical and surgical and hospital insurance for, or medical and surgical services and hospital service to, such officers or employees and their families. Any such contract entered into by a public corporation may, if authorized by the governing board or body and subject to such conditions, limitations and eligibility requirements as may be fixed by such board or body, permit any retired officers and employees or group of retired officers and employees of an agency or department of the public corporation voluntarily to subscribe to such a plan or plans to provide such insurance for or service to themselves and their families. The comptroller or other disbursing officer of the public corporation, or of any fund out of which officers or employees of such public corporation are paid, is authorized to deduct from the wages or salary of such contracting or subscribing officer or employee, with his prior consent, in writing, the sums required to be paid by such officer or employee to such non-profit membership corporation or insurance company. Such public corporation, if such contract or plan provides that the employer shall contribute a share of the cost of such medical and surgical services and hospital service, or medical and surgical and hospital insurance, for its officers and employees or retired officers and employees, is authorized to appropriate a sum required to be paid under such contract by the public corporation as employer. The sum to be paid by it under such contract, in the discretion of such public corporation, may be any percentage of the total cost including the whole thereof. Where the compensation of any officer or employee whose position is covered by medical and surgical services and hospital service or medical and surgical and hospital insurance pursuant to this section is paid from a special or administrative fund provided for by law, the contributions required to be paid by the public corporation for such coverage shall be paid from such special or administrative fund. The public corporation shall be authorized to pay directly to such non-profit membership corporation or to such insurance company, the total of such appropriation and of such officer and employee deductions.

3. The authority conferred upon public corporations by this section shall be in addition to and in no way a limitation upon the authority conferred upon such public corporations to provide the same or similar benefits for their officers and employees pursuant to article eleven of the civil service law.

4. The provisions of this section shall apply to school board members, provided however, that the total cost of participation by such school board members and their families shall be borne by such members.

5. Any contract or contracts made pursuant to this section by a city with a population of one million or more inhabitants and any plan or plans effectuated by any such contract or contracts shall be administered by the department of personnel or the office of municipal labor relations of such city, or if

there be no such department or office therein, by a department, agency, or officer thereof designated by the mayor of such city.

6. (a) Notwithstanding any general, special or local law to the contrary, the governing board of a public corporation that, in lieu of contracting pursuant to subdivision two of this section, self-funds medical, surgical or hospital benefits, may enter into agreements with duly qualified contract administrators or other service providers to receive, investigate, make recommendations on, audit, approve or make payment of claims for such benefits. Such agreements shall be entered into pursuant to competitive bidding, or written request for proposals in accordance with the procurement policies and procedures of the public corporation adopted pursuant to section one hundred four-b of this chapter.

(b) In order to authorize the payment of claims for benefits audited and approved by a contract administrator or other service provider, an agreement entered into pursuant to this subdivision may provide that after claims have been audited by the contract administrator or other service provider, the contract administrator or other service provider shall periodically inform the public corporation of the total amount payable in satisfaction of the audited and approved claims, together with such other supporting information as the public corporation may require, and the public corporation may transfer moneys in that amount to the contract administrator or other service provider for disbursement to the claimants entitled thereto. Any such agreement shall provide that if a check issued by the contract administrator or other service provider in satisfaction of a claim remains unpaid after one hundred eighty days, the moneys payable in satisfaction of that claim shall be returned to the public corporation.

(c) Any agreement entered into pursuant to this subdivision shall contain, at a minimum, the following:

(i) a clear statement of the charges, fees or other compensation for the services provided under the agreement;

(ii) a statement that payment for the services provided under the agreement shall be made only after the services are rendered;

(iii) a provision stating that the contract administrator or other service provider to which functions are delegated shall be liable to the public corporation for all loss or damage that may result from any failure by the contract administrator or other service provider to discharge their duties, or from any improper or incorrect discharge of those duties, and a provision that expressly reserves to the public corporation all legal rights of set-off. The contract administrator or service provider shall save the public corporation free and harmless from any and all loss occasioned by or incurred in the performance of services under an agreement pursuant to this subdivision;

(iv) a provision requiring the contract administrator or other service provider to furnish a surety bond, irrevocable letter of credit or equivalent security, in a form and amount acceptable to the governing board of the public corporation, to secure the contract administrator's or other service provider's performance under the agreement;

(v) a provision requiring the contract administrator or service provider to establish, maintain and retain for a specified period complete and accurate books, records, documents, accounts and other evidence pertinent to performance under the agreement, and to submit quarterly and annual reports, in a form acceptable to the governing board of the public corporation, detailing the payment of claims and other activities of the contract administrator or other service provider during the relevant period. The auditing body or official of the public corporation shall have access to and may examine such books, records, documents, accounts and other evidence pertinent to performance under the agreement upon reasonable notice to the contract administrator or service provider;

(vi) a provision requiring an annual audit, and opinions thereon, by an independent certified public accountant, of the accounting procedures and internal control procedures of the contract administrator or other service provider;

(vii) a provision by which the contract administrator or other service provider agrees to maintain the confidentiality of medical records in its possession and that such confidentiality may only be waived upon the written consent of the covered person; and

(viii) a provision by which the contract administrator or other service provider acknowledges that those records maintained on behalf of the public corporation are subject to the provisions of article six of the public officers law.

(d) A contract entered into pursuant to this section shall be for a term not to exceed five years, except that it shall be subject to cancellation by the municipal corporation at any time upon thirty days' notice.

7. The provisions of this section shall permit a public corporation to provide coverage for volunteer firefighters, as defined in section three of the volunteer firefighters' benefit law, and volunteer ambulance workers, as defined in subdivision one of section three of the volunteer ambulance workers' benefit law, provided however, that the total cost of participation by such volunteers and their families shall be borne by such volunteers.

HISTORY:

Add, L 1958, ch 951, § 1; amd, L 1959, ch 84, § 1; L 1959, ch 385, § 1, eff Jan 1, 1960; L 1960, ch 406, § 1, eff April 7, 1960; L 1960, ch 830, § 1, eff April 1, 1960; L 1963, ch 680, § 1, eff April 23, 1963; L 1965, ch 782, §§ 3, 4, eff July 15, 1965, applicable to contracts made on and after January 1, 1965; L 1983, ch 158, § 1, eff May 31, 1983; L 1984, ch 805, § 31, eff Sept 1, 1984; L 1987, ch 505, § 1, eff July 30, 1987; L 2002, ch 681, § 1, eff Dec 20, 2002; L 2008, ch 331, § 1, eff Jan 17, 2009 (see 2008 note below);

L 2010, ch 71, § 1, eff May 5, 2010; L 2011, ch 62, § 104 (Part A), eff Oct 3, 2011.

Editor's Notes: Laws 2008, ch 331, § 2, eff Jan 17, 2009, provides as follows:

§ 2. This act shall take effect on the one hundred eightieth day after it shall have become a law, provided however, that nothing in this act shall be construed to affect any existing enrollment periods in effect within any political subdivision.

Amendment Notes: 2011. Chapter 62, § 104 (Part A) amended:

Sub 2 at fig 1 by substituting "superintendent of financial services" for "superintendent of insurance".

2010. Chapter 71, § 1 amended:

Sub 7 by deleting at fig 1 "apply for", at fig 2 "of" and adding the matter in italics.

Notes to Decisions

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1. In general

A municipality may directly contract with any insurance company authorized to do business in the state for the purpose of furnishing medical and surgical services. International Brotherhood of Teamsters v Cortlandt, 68 Misc. 2d 645, 327 N.Y.S.2d 143, 1971 N.Y. Misc. LEXIS 1524 (N.Y. Sup. Ct. 1971).

A municipality may confer fringe benefits upon its employees and officers only where such a conferral is specifically authorized by statute. 1968 Ops St Compt File #651.

Based on CLS Gen Mun § 92-a, municipal corporation may supplement medical insurance coverage by direct cash reimbursements for specified non-covered health care expenses. 2004 Op St Compt No. 04-8.

Indemnification provision of agreement between Municipal Cooperative Health Benefit Plan (MCHBP) and Health Maintenance Organization (HMO), which does not require HMO to indemnify MCHBP for negligence of HMO, renders agreement in non-compliance with specific mandate of CLS Gen Mun § 92-a(6)(c)(iii) that "any failure of the contract administrator" be indemnified, and thus in non-compliance with CLS Ins § 4705(d)(2)(D). Insurance Department, Opinions of General Counsel, Opinion Number 05-05-11.

Indemnification provision of agreement between Municipal Cooperative Health Benefit Plan (MCHBP) and Health Maintenance Organization (HMO), which authorizes HMO to settle claims in its own discretion, is settlement provision common in liability insurance policies and is not contrary to General Municipal Law or other relevant statute since such claims are not health claims, but in nature of tort claims, and cost will be borne by HMO (not public fisc). Insurance Department, Opinions of General Counsel, Opinion Number 05-05-11.

2. Officers and employees

Elected officers are "officers" within the meaning of this section. 1959 Ops St Compt File #499.

3. Retirees

Because a school district violated the moratorium provided by 2003 N.Y. Laws ch. 48 by ceasing to reimburse retirees for Medicare Part B premiums under N.Y. Gen. Mun. Law § 92-a(2), and because reimbursement did not violate N.Y. Const. art. VIII, § 1, the trial court properly ordered the board of education to reimburse the retirees; however, the trial court erred in granting relief to those similarly situated since such relief was not requested. Matter of Baker v Board of Educ., 29 A.D.3d 574, 815 N.Y.S.2d 112, 2006 N.Y. App. Div. LEXIS 6019 (N.Y. App. Div. 2d Dep't), app. denied, 7 N.Y.3d 708, 822 N.Y.S.2d 482, 855 N.E.2d 798, 2006 N.Y. LEXIS 2519 (N.Y. 2006).

City and mayor did not exceed their authority by enacting NYC Local Law No. 27, entitling registered domestic partners of current and retired city employees to certain medical, health and retirement benefits in that (1) power conferred by CLS NY Const Art IX § 2 on local governments to determine salary of employees encompasses such benefits, (2) CLS Gen City § 20(29) authorizes city to furnish medical benefits to current city employees "and their families," which is not restricted to those who have formalized their relationship by obtaining marriage certificate or adoption order, and (3) CLS Gen Mun § 92-a(2) gives city power to offer medical and related services or insurance to retired employees and their families. Slattery v City of New York, 179 Misc. 2d 740, 686 N.Y.S.2d 683, 1999 N.Y. Misc. LEXIS 35 (N.Y. Sup. Ct.), transferred, 93 N.Y.2d 883, 689 N.Y.S.2d 426, 711 N.E.2d 640, 1999 N.Y. LEXIS 692 (N.Y. 1999).

A municipality may undertake the payment of the full cost of Blue Cross and Blue Shield health insurance for its retired employees, under a plan entered into pursuant to section 92-a of the General Municipal Law or section 163(2) of the Civil Service Law, provided such retired employees retire subsequent to the adoption of such increased benefit plan. 1969 Ops St Compt File #431.

A municipality operating under a local health insurance plan may not cover former employees or officers after they separate from service by other than retirement until such time as they become retirees. 1983 Op St Comp File #83-85.

4. Effect of other benefits; sick leave credits

5. —Miscellaneous benefits

A county employee receiving workmen's compensation for injuries suffered in course of employment must be continued under coverage of the County Hospitalization, Medical, and Surgical Benefits Plan if he so desires, during the period of temporary disability. 1961 Ops St Compt File #35.

Employees of a municipality which participates in the State health insurance program may not, with certain exceptions, participate in such program unless they are employed at least twenty hours per week. There is no such restriction in health insurance programs contracted for by a municipality pursuant to General Municipal Law, § 92-a. 1966 Ops St Compt File #156.

Where a municipality pays hospitalization and medical insurance premiums for its employees and retired employees under a private plan, it may reimburse those 65 and older for Medicare premiums without the formality of a local law. 1972 Ops St Compt File #956.

6. Cities

City of New York did not exceed its authority by enacting Domestic Partners Law, which extends health and other benefits to domestic partners of city employees, including retired and deceased employees, where (1) CLS Gen City § 20(29) empowers city to enter into insurance contracts or health plans that "shall permit any . . . employee . . . who is paid out of the city treasury voluntarily to subscribe to a plan or plans providing for medical and surgical services and hospital service to such . . . employees and their families," (2) term "family" has been defined expansively in context of eviction protection laws, (3) there was no reason to adopt more limited definition of "family in present context, and (4) CLS Gen City § 20(29-a) refers to "the widowed spouses and dependent children" of retired or deceased employees. Slattery v City of New York, 266 A.D.2d 24, 697 N.Y.S.2d 603, 1999 N.Y. App. Div. LEXIS 11158 (N.Y. App. Div. 1st Dep't 1999), app. dismissed, 94 N.Y.2d 897, 706 N.Y.S.2d 699, 727 N.E.2d

1253, 2000 N.Y. LEXIS 231 (N.Y. 2000), app. dismissed, 95 N.Y.2d 823, 712 N.Y.S.2d 907, 734 N.E.2d 1208, 2000 N.Y. LEXIS 1865 (N.Y. 2000).

City of New York did not violate state or public policy by enacting Domestic Partners Law, which extends health and other benefits to domestic partners of city employees, where state has extended certain derivative health benefits to domestic partners of state employees and has allowed nonstate agencies that participate in state's health insurance program to offer same coverage to domestic partners of their employees. Slattery v City of New York, 266 A.D.2d 24, 697 N.Y.S.2d 603, 1999 N.Y. App. Div. LEXIS 11158 (N.Y. App. Div. 1st Dep't 1999), app. dismissed, 94 N.Y.2d 897, 706 N.Y.S.2d 699, 727 N.E.2d 1253, 2000 N.Y. LEXIS 231 (N.Y. 2000), app. dismissed, 95 N.Y.2d 823, 712 N.Y.S.2d 907, 734 N.E.2d 1208, 2000 N.Y. LEXIS 1865 (N.Y. 2000).

City of New York, by enacting Domestic Partners Law, which extends health and other benefits to domestic partners of city employees, did not transform domestic partnership into form of common-law marriage and thus did not impinge on state's exclusive right to regulate institution of marriage since there are enormous differences between marriage and domestic partnership. Slattery v City of New York, 266 A.D.2d 24, 697 N.Y.S.2d 603, 1999 N.Y. App. Div. LEXIS 11158 (N.Y. App. Div. 1st Dep't 1999), app. dismissed, 94 N.Y.2d 897, 706 N.Y.S.2d 699, 727 N.E.2d 1253, 2000 N.Y. LEXIS 231 (N.Y. 2000), app. dismissed, 95 N.Y.2d 823, 712 N.Y.S.2d 907, 734 N.E.2d 1208, 2000 N.Y. LEXIS 1865 (N.Y. 2000).

A city other than New York City has the choice of proceeding under either § 92-a of the General Municipal Law or § 20, subd. (29) of the General City Law in taking care of hospital and medical insurance and expense for its officers and employees. 1962 Ops St Compt #1016.

A city may pay the whole cost of providing hospital, medical, and surgical insurance for its employees and their families, pursuant to this section. 1964 Ops St Compt #697.

7. Counties; coverage of separated employees

8. —Coverage of other employees

It is doubtful whether a part-time county employee not carried on the payroll may participate in a county group health insurance plan. The county may not accept from him direct premium contributions, nor may it pay part of the cost of such insurance for his benefit. Retired municipal employees may participate in such insurance provided they are carried on the municipal payroll. 1959 Ops St Compt #196.

A county employee receiving workmen's compensation for injuries suffered in course of employment must be continued under coverage of the County Hospitalization, Medical, and Surgical Benefits Plan if he so desires, during the period of temporary disability. 1961 Ops St Compt File #35.

9. Fire districts; scope of coverage

This section is believed to provide authority for purchase of accident and health insurance coverage for paid employees, but not volunteer employees, of the fire department. 1961 Ops St Compt #228.

A fire district may, within the provisions of the statute, purchase hospital insurance for its officers and employees. 1961 Ops St Compt #430.

A fire district may purchase group hospital and medical insurance for its prior retired employees and their dependents. 1972 Ops St Compt File #846.

10. —Benefits

A fire district may not purchase group insurance which would supply blood, crutches and wheel chairs to fire district firemen and members of their families. 1963 Ops St Compt #247.

A fire district may not pay the premiums for hospital and medical insurance, now paid by an employee, to the Social Security Administration. 1969 Ops St Compt File #731.

11. Police departments

A town may not agree to pay the police association of the town $50 a year for each policeman to be used by the association for group health, life, retirement and disability insurance. 1968 Ops St Compt File #840.

Special police district board of commissioners may authorize the payment of compensation in the form of accident and health insurance coverage while on duty to special policemen appointed to serve with pay in specified situations, but may not provide such coverage for special policemen appointed to serve without pay in the event of certain public emergencies. 1969 Ops St Compt File #1.

The Port Washington Police District may agree in a contract with the Police Benevolent Association, to pay to it a lump sum to be used to purchase a dental insurance plan for its members. 1972 Ops St Compt File #68.

12. School districts

School district was not entitled to permanent stay of arbitration of faculty association's grievance concerning change in prescription drug coverage under health insurance plan provided to association members and other county employees on ground that parties' collective bargaining agreement (CBA) did not bind district to arbitrate disputes between association and third party health plan because, where CBA specifically included "prescription drug coverage," issues of who brought about reduction in benefits as between nonparty plan's governing board and school district, and whether district violated CBA, were for arbitrator to resolve. Richfield Springs Cent. Sch. Dist. v Allen, 270 A.D.2d 734, 705 N.Y.S.2d 709, 2000 N.Y. App. Div. LEXIS 3106 (N.Y. App. Div. 3d Dep't 2000).

The enactment of new legislation authorizing collective bargaining between an employees' organization or union and a political subdivision, including a school district, does not enlarge or alter the school district's authority with respect to the granting of benefits to its nonteaching employees in the following categories: terminal leave payments; converting sick leave accruals into cash; salary in lieu of weekly compensation awards; health and group life insurance plans; automobile expense. 1967 Ops St Compt File #378.

A school district is authorized to purchase group life, accident or health insurance for its teachers but may not purchase group income protection insurance. Any dividends received by the school district, where it pays the full premium, belongs to the district and may not be paid to the treasury of the teachers' association. 1969 Ops St Compt File #39.

School district may not reimburse former school board member who participates in municipal cooperative health benefit plan for Part B Medicare premiums paid by former school board member (1985 Op St Compt No. 85-3 superseded to extent inconsistent). 1997 Op St Compt No. 97-2.

Former unsalaried school board members, who are not members of, and eligible to receive a retirement allowance from, a public retirement system, may not be included in a health insurance plan established pursuant to General Municipal Law, § 92-a. 1985 Op St Comp 85-3.

13. Towns

A town, as a municipal corporation, may contract with a private insurance company to furnish hospital, medical and surgical coverage for town officers and employees. 1964 Ops St Compt #244.

14. —Scope of coverage

Where a town enters into a contract for medical, surgical, and hospital coverage for its highway employees, with the town paying one-third of the cost, whether or not other town employees may be included in the plan, with no contribution by the town, depends upon whether or not such discrimination is legally justifiable on the facts. 1964 Ops St Compt #138.

A town which has established a local health insurance plan under GML, § 92 may discontinue health insurance coverage for future employees, while continuing such coverage for current employees until separation from service. 1982 Op St. Compt File #82-2.

15. —Source of funds for purchasing insurance

Where a town grants hospital insurance coverage for its highway employees and its town officials, the cost of such coverage is a charge against the fund (town general, special or administrative) out of which their respective compensations are paid. 1960 Ops St Compt File #262.

A town's share of cost of health insurance and social security payments for highway employees is chargeable to the same fund from which their salaries are paid. 1964 Ops St Compt #282.

A town which furnishes hospital and medical insurance for its employees pursuant to section 92-a of the General Municipal Law, lacks authority to commute accumulated and unused sick leave time of its employees, who are to retire, into a cash value for the purpose of acquiring hospital and medical insurance. 1967 Ops St Compt File #828.

A town may purchase medical, surgical and hospital insurance for its officers and employees. The fund used to pay the town's share of such insurance should be the fund which pays the officer's or employee's compensation. 1968 Ops St Compt File #248.

16. Villages

A municipality may contract for hospital, medical and surgical insurance on behalf of certain village employees with private insurance companies. It is not required that all village employees be covered by the contract. 1959 Ops St Compt File #524.

A village of the first class may increase the amount of its contribution toward payment of employees' premiums under a plan of hospital, medical and surgical insurance either by resolution or local law, depending upon the type of local legislation originally used to establish the village's participation. 1963 Ops St Compt #331.

No prohibited conflict of interest exists where a village police justice sells group hospitalization and life insurance to the village in which he is such officer for the benefit of its employees and officers. 1967 Ops St Compt File #397.

The board of managers of a village public hospital may agree with an independent contractor to make payroll deductions and pay these funds directly to a third party. 1968 Ops St Compt File #350.

Village may not establish reserve fund for direct cash reimbursements by village for health care benefits of its officers and employees. 2004 Op St Compt No. 04-8.

Village may join State Health Plan during fiscal year although annual budget contained no provision for expense of participating. 1964 Ops St Compt File #1097.

17. —Coverage of other employees

A village may furnish medical and hospitalization coverage for village employees, or a class thereof, but it is doubtful whether it can provide such coverage for a single employee. 1963 Ops St Compt #348.

The only type of insurance which may be purchased by a village for the benefit of the volunteer members of the fire department is blanket accident insurance as authorized by section 213 of the Village Law. 1969 Ops St Compt File #413.

18. Other public corporations

Special district may "self-insure" optical plan for employees where such plan consists of nothing more than annual appropriations to meet optical claims arising in that year. 1976 Ops St Compt #950.

19. Joint plans

Cooperative self insurance plan, formed by several school districts pursuant to CLS Gen Mun Art 5-G, was extension or part of each of participating school districts and subject to their control, and, was thus not independent legal entity amenable to suit by qualified employee who sought entitlement to coverage under plan for cost of heart transplant operation and follow-up prescriptions. Rice v Cayuga-Onondaga Healthcare Plan, 190 A.D.2d 330, 599 N.Y.S.2d 344, 1993 N.Y. App. Div. LEXIS 5683 (N.Y. App. Div. 4th Dep't 1993).

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17. Joint plans

1. In general

A municipality may, as part of a collective bargaining agreement, agree to pay money on behalf of its employees into a union fund for the purchase of life insurance, health insurance, retirement or disability insurance. To the extent that Opns St Comp, 1968, No. 68-840 reported at 24 Opns St Comp, 1968, p 795 is inconsistent with this opinion it is hereby superseded. 1980 Op St Compt 80-281, 1980 N.Y. Comp. LEXIS 253.

Where a county is a member of the state-wide insurance plan it may not, as part of a collective bargaining agreement, agree to expand the coverage which is authorized and administered by the Civil Service Commission. A municipality may agree to benefits which are greater than those offered by the state-wide plan where the municipality has adopted or intends to adopt a local insurance plan in addition to the state-wide plan. 1982 Op St Compt File #82-328.

The term "compensation", when referring to compensation of public officers and employees, normally is construed as including salary and fringe benefits. Therefore, a city charter provision prohibiting change of compensation of elective officers after their elections would preclude increase of fringe benefits unless that term, as used therein, is intended to mean only annual salary. 1984 Op St Compt File #84-4.

2. Officers and employees

Both elective and appointed officials may be covered. So much or all of premium may be paid by village as is authorized by Board of Trustee. 1966 NY Ops Atty Gen Dec 9.

3. Retirees

Medical, surgical and hospital insurance for surviving dependents of deceased retired municipal employees may not be provided by a municipality which carries such insurance for officers and employees and retired officers and employees and their families under the authority of General Municipal Law, § 92-a. 1975 NY Ops Atty Gen June 6.

Opinion No. 80-105 is hereby amended to provide that the views expressed therein are applicable only to those municipalities which maintain their own health insurance programs. For those municipalities which participate in the State Health Insurance Plan, they may not discontinue coverage for those retirees who become eligible for medicare. Municipalities in the State plan may establish a service requirement greater than five years for those retireees who were hired after April 1, 1975. 1980 Op St Compt File #105-A.

Pursuant to collective bargaining, a school district may agree to pay dental benefits, on a self-insured basis, to current employees after they separate from service, where each individual pays to the school district an amount equal to the premium which would be payable to a private insurance company for similar coverage. The practical advisability of providing such coverage should be carefully considered by the school district. 1984 Op St Compt File #84-10.

4. Effect of other benefits; sick leave credits

A municipality operating a local health plan is authorized, either unilaterally or pursuant to collective bargaining, to apply accumulated, unused sick leave credits of a covered retiree as an offset against his contributions to the plan. 1978 Op St Compt File #874.

A community college operating under a local health plan may, either unilaterally or pursuant to collective bargaining, apply accumulated, unused sick leave credits of a covered retiree as an

offset against his contributions to the plan. 1979 Op St Compt File #186.

5. Cities

City council may adopt an ordinance conferring upon the city manager the duty to determine the extent of medical and hospitalization insurance for active and retired city officers and employees, and to initiate future changes in the program. 1979 Op St Compt File #332.

A city which has a local health insurance plan may provide coverage for the surviving dependents of deceased retired city employees pursuant to a collective bargaining agreement. 1980 Op St Compt File #512.

6. Counties; coverage of separated employees

7. —Coverage of other employees

A county and town(s) within the county may enter into a group self-insurance plan, and contract with a private firm to administer the plan, but claims may not be settled and paid by the private firm out of a joint municipal self-insurance fund without first being audited and approved and checks disbursed by the proper municipal officials. This opinion supersedes in part Opns St Comp, 1978, No. 78-405. 1982 Op St Compt File #82-197.

A county may not permit former employees who separate from service by other than retirement to subscribe to its health and hospitalization insurance plan, even if such individuals pay the entire cost of the coverage. 1979 Op St Compt File #656.

8. Police departments

A school district operating under a local health insurance plan may not, unilaterally, permit former employees who have separated from service by other than retirement to be included in the plan even if such individuals reimburse the school district for the entire cost of coverage. However, it would appear that a collective bargaining agreement could provide that current employees be permitted to participate in a local plan at their own expense after separation from service. 1983 Op St Compt File #83-195.

9. School districts

Education Law § 1709(8-c), added by L. 1978, c. 781, does not authorize a school district to establish a reserve fund to pay health care benefits. 1978 Op St Compt File #1029.

A common school district may provide paid-in-full hospitalization insurance to both its active and retired employees. 1979 Op St Compt File #61.

When a city school district contracts with an Art. IX-C corporation for administration of its self-insurance plan to provide health care benefits for its employees and dependents, contract may not provide for determination and payment of claims by corporation prior to audit and approval by school district; nor may corporation be paid for services before services are rendered. 1979 Op St Compt File #471.

Several school districts and a BOCES may jointly self-insure health care benefits for their employees, but may not establish a joint reserve fund for that purpose. Furthermore, moneys pooled for a group self-insurance plan would be subject to statutory fiscal requirements in the Education Law relating to custody, investment, and disbursement of funds. 1981 Op St Compt File #80-487.

Several school districts and a BOCES may jointly purchase a single health insurance policy, and establish a joint body to administer a health plan. 1982 Op St Compt File #82-109.

10. Towns

11. —Scope of coverage

If a town provides health insurance for its employees and their dependents, there is no legal requirement to compensate single employees without dependents for the value of a policy which covers dependents. 1979 Op St Compt File #375.

Town board resolution providing that town will pay hospitalization insurance premiums for retirees over the age of 65 with more than 15 years of service with the town must be considered in light of constitutional guarantees of equal protection of the law. The town could discontinue coverage of retirees provided that it gives reasonable notice of its intention to do so to the officers and employees affected. 1980 Op St Compt File #30.

A town and its employees may agree, in a collective bargaining contract, to provide for partial self-insurance of health care benefits through a plan whereby the town appropriates each year a specified medical deductible for each employee to cover small medical claims (large claims are covered by insurance) and the unused portions of the deductibles belong to the employees, and are payable when employment ceases. The town may hold these moneys in trust for the employees, but may not establish a reserve fund and hold them as municipal moneys. 1983 Op St Compt File #83-212.

12. —Retirees

A town may provide health insurance benefits for its retired employees. 1979 Op St Compt File #35.

A town providing health insurance benefits for retirees may, by resolution, discontinue benefits to all those in the class of retirees eligible for medicare. 1979 Op St Compt File #402.

Town board resolution providing that town will pay hospitalization insurance premiums for retirees over the age of 65 with more than 15 years of service with the town must be considered in light of constitutional guarantees of equal protection of the law. The town could discontinue coverage of retirees provided that it gives reasonable notice of its intention to do so to the officers and employees affected. 1980 Op St Compt File #30.

A town may provide health insurance to employees who retire from town service and may terminate such coverage when the retiree becomes eligible for medicare benefits. The town may also provide health insurance for its former employees based on the length of service to the town. 1980 Op St Compt File #105.

13. Villages

14. —Coverage of retirees

Section 92-a of the General Municipal Law does not authorize the provision of health insurance for dependents of deceased retired local government employees. Such coverage is available if a local government participates in the State health insurance plan. A local government, through agreement with an employee organization authorized by the Taylor Law, may provide health insurance coverage to dependents of deceased retired employees. N.Y. Op. Att'y Gen. No. 85-19.

A village may pay the premiums for medical and hospital insurance for its retired officers and employees. 1978 Op St Compt File #818.

A village board may discontinue its policy of paying the premiums for health insurance covering retired employees and, therefore, terminate such payments upon giving reasonable notice to those employees affected. 1978 Op St Compt File #826.

A village may cease paying premiums for health insurance providing benefits for retirees who have not as yet retired, although contractual obligations should be taken into consideration. 1978 Op St Compt File #826.

A village may not reimburse prior retirees for amounts expended for hospitalization insurance between the date of retirement and date health insurance plan or the collective bargaining agreement is implemented, unless the provision of hospitalization insurance for retirees is a previously unresolved issue of collective bargaining, in which case it may, pursuant to a collective bargaining agreement, reimburse retirees from the date such issue began to be negotiated. 1979 Op St Compt File #389.

General Municipal Law § 29-a authorizes expenditure of village funds to pay health insurance premiums for retired employees. 1978 Op St Compt File #826.

15. —Coverage of other employees

Both elective and appointed officials may be covered. So much or all of premium may be paid by village as is authorized by Board of Trustee. 1966 NY Ops Atty Gen Dec 9.

Where a village board of trustees informally agreed to extend medical insurance benefits to village officers at a meeting in 1973, and did so but without formal resolution, village board may now ratify such action by adoption of resolution or local law. 1979 Op St Compt File #266.

16. Other public corporations

A regional off-track betting corporation which does not participate in the State health insurance plan may include its directors

in a health insurance plan provided for its officers and employees. 1978 Op St Compt File #811.

The employees of a faculty-student association may not be included as additional insureds in a health insurance policy purchased by a community college for its employees, even if the FSA pays for the additional cost. 1982 Op St Compt File #82-116.

17. Joint plans

Two or more counties, cities, villages, towns or school districts may jointly self-insure health care benefits for their employees, but may not establish a joint reserve fund for that purpose. 1978 Op St Compt File #405.

A joint self-insurance plan would not be subject to regulation by Insurance Dept. under Insurance Law, Art. IX-C. 1978 Op St Compt File #405.

Moneys contributed to the plan by one participating municipality may not be used to pay benefits to an employee of another participating municipality. 1978 Op St Compt File #405.

Municipalities participating in joint self-insurance plan may not create a separate governmental entity to administer plan; also, contract with private independent contractor, such as an existing health insurance carrier, to administer plan probably would be both unworkable and illegal. 1978 Op St Compt File #405, 406.

Several school districts and a BOCES may jointly self-insure health care benefits for their employees, but may not establish a joint reserve fund for that purpose. Furthermore, moneys pooled for a group self-insurance plan would be subject to statutory fiscal requirements in the Education Law relating to custody, investment, and disbursement of funds. 1981 Op St Compt File #80-487.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Health insurance for state and retired state employees, CLS Civ S §§ 160 et seq.

§ 93. Payment of certain insurance premiums for officers and employees of municipal corporations and agencies or instrumentalities thereof

1. The fiscal or disbursing officer of every municipal corporation is hereby authorized to deduct from the wage or salary of any officer or employee of the municipality who is insured under any group or group plan of life, group accident or group health insurance or who is a member of a corporation existing by virtue of article forty-three of the insurance law, such amounts for the payment of the premium or premiums or payments thereon, as such officer or employee may specify in a writing filed with the said fiscal or disbursing officer and transmit to the insurer the sum so deducted. Any such written authorization may be withdrawn by such officer or employee or member at any time upon filing written notice of such withdrawal with the fiscal or disbursing officer. The provisions of this section shall apply to and be effective within every city, county, town, village, school district and organized public district in the state.

2. A municipal corporation, including a fire district, or town improvement district governed by a separate board of commissioners, if a group plan of life insurance provides that the employer shall contribute a share of the cost of such insurance for its officers and employees, or for the officers or employees of an agency or instrumentality thereof, is authorized to appropriate a sum required to be paid under such plan by the municipal corporation as employer. The sum to be paid by it under such plan, in the discretion of the municipal corporation, may be any percentage of the total cost, including the whole thereof. For the purposes of this section, the term employee shall include the volunteer firefighters of the municipality or fire district or employees, commissioners, or officers of a town improvement district governed by a separate board of commissioners.

HISTORY:

Add, L 1939, ch 608, § 1; amd, L 1941, ch 713, § 1; L 1957, ch 762, § 1, eff April 20, 1957; L 1966, ch 910, § 2, eff July 1, 1966; L 1983, ch 769, § 1; L 1984, ch 805, § 33, eff Sept 1, 1984; L 1996, ch 58, § 1, eff April 15, 1996; L 2018, ch 476, § 32, effective December 28, 2018.

Amendment Notes The 2018 amendment by ch 476, § 32, substituted "firefighters" for "firemen" in the last sentence of 2.

Notes to Decisions

Analysis

1. In general
2. Insurance sold by employee
3. Health and accident insurance; counties
4. —Towns
5. —Villages
6. —School districts
7. Hospitalization insurance
8. —Towns
9. —Villages
10. —School districts
11. Life insurance; counties
12. —Cities
13. —Towns
14. —Villages
15. —School districts
16. Miscellaneous
17. Savings and credit union deductions; school districts
18. —Miscellaneous
19. Miscellaneous benefits

1. In general

Municipal corporations, including school districts, may, upon written authorization from an employee, make payroll deductions for premiums on group insurance. While a municipal corporation may contract for group life insurance for not less than 1,000 employees, it may not contribute any part of the premiums therefor. 1959 Ops St Compt #73.

2. Insurance sold by employee

No prohibited conflict of interest exists where a village police justice sells group hospitalization and life insurance to the village in which he is such officer for the benefit of its employees and officers. 1967 Ops St Compt File #397.

A prohibited conflict of interest does not arise where a city commissioner of public safety sells group life insurance to participating city employees. Disclosure is, nevertheless, required. 1968 Ops St Compt File #55.

3. Health and accident insurance; counties

A county may contribute to the cost of group accident and health insurance of county hospital employees if so authorized by local law which fixes the compensation of such employees. 1954 Ops St Compt File #6777.

4. —Towns

Subject to the provisions of § 221 of the Insurance Law, a town may pay for group accident and health insurance for its employees. A town may not, however, expend town funds for premiums on group life insurance for its employees. 1952 Ops St Compt File #5778.

A town may deduct the cost of hospitalization and medical insurance carried with a non-profit hospital service corporation

from the wages of its highway employees. 1954 Ops St Compt File #6988.

A town may not purchase and pay for a group disability insurance policy with a profit insurance company for the benefit of its constables, who work only when called upon by the town supervisor. 1958 Ops St Compt File #185.

A town may provide hospitalization, medical and surgical insurance for town officers and employees, but not disability insurance for employees, and, with respect to group insurance, certain minimum requirements must be met. 1964 Ops St Compt #244.

A town may not agree to pay the police association of the town $50 a year for each policeman to be used by the association for group health, life, retirement and disability insurance. 1968 Ops St Compt File #840.

5. —Villages

In absence of clear statutory authority a village may not contribute toward the cost of group medical insurance for its employees. 1955 Ops St Compt File #7203.

A village may not voluntarily elect to provide for disability benefits to its employees pursuant to Article 9 of the Workmen's Compensation Law. 1956 Ops St Compt File #8043.

6. —School districts

The enactment of new legislation authorizing collective bargaining between an employees' organization or union and a political subdivision, including a school district, does not enlarge or alter the school district's authority with respect to the granting of benefits to its non-teaching employees in the following categories: terminal leave payments; converting sick leave accruals into cash; salary in lieu of weekly compensation awards; health and group life insurance plans; automobile expense. 1967 Ops St Compt File #378.

General Municipal L § 93 does not authorize school district to pay full cost of participation by nonsalaried board member in group medical, dental and life insurance policies. Opinions of Commissioner of Education No. 8736.

7. Hospitalization insurance

Deductions may be made from compensation of municipal employees for hospitalization insurance pursuant to Section 93 of the General Municipal Law. 1945 Ops St Compt 103.

8. —Towns

There is no authority for a town to contribute to the cost of Blue Cross hospitalization insurance for its highway employees, as a part of their compensation. 1950 Ops St Compt File #4911.

A town may deduct the cost of hospitalization and medical insurance carried with a non-profit hospital service corporation from the wages of its highway employees. 1954 Ops St Compt File #6988.

A town may provide hospitalization, medical and surgical insurance for town officers and employees, but not disability insurance for employees, and, with respect to group insurance, certain minimum requirements must be met. 1964 Ops St Compt #244.

9. —Villages

Village having power to adopt local laws may enact a local law providing for the payment by the village of all or a portion of the cost of hospitalization insurance for its employees. 1950 Ops St Compt File #4947.

A village other than a village of the first class may not purchase hospitalization insurance and life insurance covering village employees. 1954 Ops St Compt File #6681.

A village not having the power to adopt local laws may not pay all or a portion of the cost of hospitalization insurance for its employees. 1955 Ops St Compt File #7643.

10. —School districts

School districts may make payroll deductions for the payment of employee contracts with non-profit hospital service corporations. 1950 Ops St Compt File #4523.

11. Life insurance; counties

There is no general provision of law permitting a city or a county to contribute to the cost of group life insurance for its employees. 1956 Ops St Compt File #8141.

A county fiscal officer may not make deductions from the wages of county employees for the payment of premiums on individual life insurance policies. A county may not enact local legislation permitting such deductions. 1958 Ops St Compt File #258.

12. —Cities

There is no general provision of law permitting a city or a county to contribute to the cost of group life insurance for its employees. 1956 Ops St Compt File #8141.

13. —Towns

Subject to the provisions of § 221 of the Insurance Law, a town may pay for group accident and health insurance for its employees. A town may not, however, expend town funds for premiums on group life insurance for its employees. 1952 Ops St Compt File #5778.

A town may not pay the premiums on group life insurance for only its police force of eleven members, since the total number of employees covered would then be less than twenty-five. 1968 Ops St Compt File #58.

A town may provide group life insurance coverage and pay the premiums thereon for all town policemen and certain town highway employees when the total number covered exceed twenty-five, provided the classifications are reasonable and all eligible members of each class are covered. 1968 Ops St Compt File #58.

A town may not agree to pay the police association of the town $50 a year for each policeman to be used by the association for group health, life, retirement and disability insurance. 1968 Ops St Compt File #840.

A town may purchase group life insurance for all of its officers and employees. 1975 Ops St Compt File #57.

14. —Villages

A village may purchase and pay the full cost of group life insurance for its officers and employees, provided there are at least 25 members in the group to be covered by such insurance. 1968 Ops St Compt File #244.

15. —School districts

Municipal corporations, including school districts, may, upon written authorization from an employee, make payroll deductions for premiums on group insurance. While a municipal corporation may contract for group life insurance for not less than 1,000 employees, it may not contribute any part of the premiums therefor. 1959 Ops St Compt #73.

The enactment of new legislation authorizing collective bargaining between an employees' organization or union and a political subdivision, including a school district, does not enlarge or alter the school district's authority with respect to the granting of benefits to its non-teaching employees in the following categories: terminal leave payments; converting sick leave accruals into cash; salary in lieu of weekly compensation awards; health and group life insurance plans; automobile expense. 1967 Ops St Compt File #378.

General Municipal L § 93 does not authorize school district to pay full cost of participation by nonsalaried board member in group medical, dental and life insurance policies. Opinions of Commissioner of Education No. 8736.

16. Miscellaneous

A water district which has commissioners may not purchase group life insurance for its employees. 1960 Ops St Compt File #454.

The board of commissioners of the Port Washington police district may not properly contract for group life insurance or pay any portion of the premium for such insurance. 1969 Ops St Compt File #491.

17. Savings and credit union deductions; school districts

The use of school district facilities and personnel to deduct amounts to be paid to a teachers' credit union from the salaries of teachers is unauthorized. 1955 Ops St Compt File #7160.

A school district may not withhold from pay of school district employees in order to make payments to an employees' credit union. 1963 Ops St Compt #13.

18. —Miscellaneous

There is no statutory authority for a town to deduct an amount for payroll savings from the salaries of town employees. 1963 Ops St Compt File #631.

A board of cooperative educational services may not make salary deductions for its employees for payroll savings plans. 1970 Ops St Compt File #55.

19. Miscellaneous benefits

There is no statutory provision authorizing municipalities to deduct pledges to charitable organizations from the salaries of municipal employees. 1961 Ops St Compt File #5.

In the absence of local law, a village of the first class may neither deduct premium payments nor pay any portion of the cost of such premiums on behalf of employees who have joined an income protection insurance plan. 1963 Ops St Compt #331.

The enactment of new legislation authorizing collective bargaining between an employees' organization or union and a political subdivision, including a school district, does not enlarge or alter the school district's authority with respect to the granting of benefits to its non-teaching employees in the following categories: terminal leave payments; converting sick leave accruals into cash; salary in lieu of weekly compensation awards; health and group life insurance plans; automobile expense. 1967 Ops St Compt File #378.

A school district may not establish a plan whereby the retiring members of the teaching and supervisory staff are paid what amounts to a retirement benefit during their final working year, nor may it provide for the payment of a lump sum death benefit other than as expressly allowed by the General Municipal Law. 1968 Ops St Compt File #205.

The board of managers of a village public hospital may agree with an independent contractor to make payroll deductions and pay these funds directly to a third party. 1968 Ops St Compt File #350.

A collective bargaining agreement may contain a provision that a town will provide payroll deductions for the payment of premiums for employees participating in CSEA homeowners' and automobile insurance programs. 1974 Ops St Compt File #461.

General Municipal L § 93 does not authorize school district to pay full cost of participation by nonsalaried board member in group medical, dental and life insurance policies. Opinions of Commissioner of Education No. 8736.

Agency Opinions

Analysis

1. In general
2. Life insurance; counties
3. —Cities
4. —School districts
5. Miscellaneous

1. In general

A municipality may, as part of a collective bargaining agreement, agree to pay money on behalf of its employees into a union fund for the purchase of life insurance, health insurance, retirement or disability insurance. To the extent that Opns St Comp, 1968, No. 68-840 reported at 24 Opns St Comp, 1968, p 795 is inconsistent with this opinion it is hereby superseded. 1980 Op St Compt 80-281, 1980 N.Y. Comp. LEXIS 253.

2. Life insurance; counties

3. —Cities

Absent the establishment of an authorized group life insurance plan, the City of Oswego's fiscal or disbursing officer is not authorized to deduct life insurance premiums from the wages or salaries of its employees. 1978 NY Ops Atty Gen June 19.

4. —School districts

A group life insurance program established by a union free school district for its employees may include employees of the school district's public library so long as the library reimburses the school district for that portion of premiums attributable to library employees. 1980 Op St Compt File #199.

5. Miscellaneous

A fire district may pay all or a portion of the premium for a group life insurance policy for its volunteer firemen. Any prior opinions to the contrary are hereby superseded. 1982 Op St Compt File #82-339.

§ 97. Power of municipalities to furnish and contract for fire and police communication system

In a county having a population of more than five hundred twenty-five thousand and less than six hundred fifty thousand according to the last decennial federal census, it shall be lawful for a city located therein, and for said county and any town or village located therein, to enter into a contract for such a term of years as deemed advisable for the furnishing by said city to such a county, any town or village therein, broadcasting services, auto radio repair service and services incidental to and in connection with a fire and police radio communication system. Such system of communication shall be maintained and operated by the city. Each municipality electing to have such service rendered by the city shall pay to such city such sum or sums as shall be agreed upon toward the cost of the operation and maintenance of such system. The contract shall state the type of service to be rendered, the amount to be paid therefor, the time when such payment shall be made and shall contain such other terms and conditions as may be agreed upon between the parties thereto.

HISTORY:

Add, L 1950, ch 413, § 1; amd, L 1964, ch 918, § 1, eff April 23, 1964.

§ 98. Operation and maintenance of railroad passenger stations in certain municipalities

1. For the purposes of this section only, "municipality" means (i) a county not wholly contained within a city, (ii) a city having a population of more than twenty-five thousand but less than one million inhabitants according to the most recent federal decennial census, and (iii) a town of the first class.

2. Each municipality may from time to time contract with a railroad corporation providing passenger service by rail to or from any passenger station within the municipality for the operation and maintenance of one or more such stations owned or used by such railroad, including the buildings, appurtenances, platforms, land and approaches incidental or adjacent thereto, provided, however, that such contract shall contain provisions pursuant to which:

a. The railroad agrees for the term of such contract not to discontinue all passenger or all freight service, or petition any regulatory agency having jurisdiction in respect thereof for permission to discontinue all passenger or all freight service, to or from such stations without the consent of the municipality;

b. The railroad agrees for the term of such contract to continue the operation and maintenance of such existing facilities or portions thereof as may be required in the public interest for the sale of passen-

ger tickets and the handling of baggage, mail and freight at such stations;

c. The railroad shall continue responsible for all railroad operations and the maintenance and upkeep of all tracks, rights-of-way, yard facilities, signalling devices, automatic protective devices, third rail and catenary systems, electric power transmission and distribution facilities, bridges, tunnels and other roadway structures and facilities used by such railroad in its railroad operations;

d. With respect to the portion of any such station which is not required by the railroad for the sale of passenger tickets, the handling of baggage, mail and freight or its railroad operations, the municipality or, if the contracting municipality is a county, the city, town or village within which such station is located, with the consent of such county, or if the contracting municipality is a town, the village within which such station is located, with the consent of such town, may use the same for public purposes, or may lease the same to others for uses generally available to or serving the general public, including but not limited to access to the railroad and related services, facilities for the convenience and comfort of the general public, the parking of vehicles, public assembly, recreation, cultural activities, shelter, and terminal facilities for other modes of transportation; and

e. Such contract shall expire not later than the first day of July next succeeding its effective date.

Any contract made pursuant to this subdivision may contain such other terms and conditions, not inconsistent with the foregoing, as the municipality and the railroad may agree.

3. The municipality may provide the operation and maintenance required under such contract through its own employees or agents, or may, in its discretion, arrange for the performance of such operation and maintenance by the contracting railroad or, if the contracting municipality is a county, by the city, town or village within which such station is located, or, if the contracting municipality is a town, by the village within which such station is located. The county, and any city, town or village performing such operation and maintenance, are hereby authorized to repair, reconstruct, refurbish, paint, alter and otherwise maintain such station subject, however, to the provisions of the contract entered into between the contracting municipality and such railroad pursuant to this section.

4. The maintenance and operation of such stations are hereby declared county, city and town purposes. The cost of any part thereof shall be a county, city or town charge, as the case may be, and shall be paid from funds of the municipality appropriated, raised and expended in the manner provided by law for general county, city or town purposes. Such funds shall be appropriated or made available in accordance with applicable law (a) in the budget of the municipality or in any amendment or modification thereof, (b) by supplemental or emergency appropriation, (c) by transfer of appropriations, or (d) from a contingent fund, the unexpended balance of any appropriation, unanticipated revenues, any unappropriated unreserved fund balance, as defined in section six-e of this chapter, or similar source.

5. All action authorized to be taken hereunder by a municipality shall be taken by its governing board by local law, ordinance or resolution and, in the case of a county, upon the recommendation of or with the separate approval of its county executive, and any such local law, ordinance or resolution may be amended from time to time.

6. No contract entered into by a municipality pursuant to this section shall be effective until the terms and conditions thereof shall have been approved by the public service commission and the state commissioner of transportation.

HISTORY:

Add, L, 1963, ch 606, § 2, eff April 23, 1963, with substance transferred from County Law § 850; amd, L 1964, ch 500, § 1, eff April 10, 1964; L 1968, ch 420, § 123, eff May 31, 1968; L 2000, ch 528, § 10, eff Oct 4, 2000 (see 2000 note below).

Editor's Notes: Laws 1963, ch 606, § 1, provide as follows:

Section 1. Legislative declaration. Rail transportation is a vital element in the transportation network of the state. The ability of the state's railroads to continue and improve their passenger and freight transportation services is a matter of state concern affecting the commerce, defense and general welfare of the people of the state. The assumption by certain municipalities of the cost of maintaining and operating passenger stations of those railroads providing passenger and commuter service would materially enhance their financial ability to continue and improve passenger and commuter service. Similarly, the acquisition of railroad rights-of-way and other railroad facilities and property, both passenger and freight, by neighboring municipalities may permit the resumption of rail service on abandoned lines or may avert threatened abandonments. It is accordingly in the public interest to authorize certain municipal corporations to operate and maintain passenger stations of railroads operating in the state, or to reimburse to such railroads the costs thereof, in order to insure the continuation of rail service to and from such stations, their proper operation and maintenance, and the availability of such stations for other services to the general public. It is further in the public interest to authorize neighboring municipal corporations in which abandoned rights-of-way and other railroad facilities and property are located or to and from which rail service may be abandoned, to acquire rights-of-way, railroad facilities and property and to lease the same to an existing railroad, upon such terms and conditions as may be appropriate, for resumed or improved operation thereof in the transportation of persons or property.

Laws 2000, ch 528, § 19, eff Oct 4, 2000, provides as follows:

§ 19. This act shall take effect immediately and shall apply to budgets for fiscal years commencing on or after January 1, 2001.

Prior Law: Former § 98, add, L 1952, ch 257, § 1; repealed, L 1958, ch 959, eff Oct 1, 1959, with substance transferred to Real P Tax Law § 572.

Revision Notes: [1963, ch 606] Section 850 of the County Law, which was repealed by this act as of July 1, 1963, contained substantially the same provisions as new § 98 of the General Municipal Law, added by § 2 hereof, except that it was applicable only to Westchester, Nassau and Suffolk Counties.

§ 99-r. Contracts for services

Notwithstanding any other provisions of law to the contrary, the governing board of any municipal corporation may enter into agreements and/or contracts with any state agency including any department, board, bureau, commission, division, office, council, committee, or officer of the state, whether permanent or temporary, or a public benefit corporation or public authority, or a soil and water conservation district, and any unit of the state university of New York, pursuant to and consistent with sections three hundred fifty-five and sixty-three hundred one of the education law within or without such municipal corporation to provide or receive fuel, equipment, maintenance and repair, supplies, water supply, street sweeping or maintenance, sidewalk maintenance, right-of-way maintenance, storm water and other drainage, sewage disposal, landscaping, mowing, technology services, or any other services of government. Such state agency, soil and water conservation district, or unit of the state university of New York, within the limits of any specific statutory appropriation authorized and made available therefor by the legislature or by the governing body responsible for the operation of such state agency, soil and water conservation district, or unit of the state university of New York may contract with any municipal corporation for such services as herein provided and may provide, in agreements and/or contracts entered into pursuant to this section, for the reciprocal provision of services or other consideration of approximately equivalent value, including, but not limited to, routine and/or emergency services, monies, equipment, buildings and facilities, materials or a commitment to provide future routine and/or emergency services, monies, equipment, buildings and facilities or materials. Any such contract may be entered into by direct negotiations and shall not be subject to the provisions of section one hundred three of this chapter.

HISTORY:

Add, L 1991, ch 637, § 1; amd, L 2001, ch 485, § 1; L 2008, ch 165, § 4, eff July 7, 2008; L 2009, ch 494, § 1 (Part B), eff Nov 12, 2009; L 2011, ch 97, § 1 (Part C, Subpart B), eff June 24, 2011; L 2014, ch 55, § 2 (Part F), eff March 31, 2014.

Editor's Notes: Laws 2008, ch 165, § 1, eff July 7, 2008, provides as follows:

Section 1. Legislative findings. The legislature hereby finds and determines that intermunicipal cooperation as authorized by article 5-G of the general municipal law has proved to be an excellent method of providing certain governmental services in an effective and efficient manner, all to the benefit of the people of the state. The legislature upon recognizing the effectiveness of such intermunicipal cooperation expanded the authority of state departments and agencies to enter into similar agreements with municipalities. The dearth of such contracts, notwithstanding the obvious potential savings and efficiencies, attests to the existence of a statutory barrier. That barrier is a requirement that any revenues received by a contracting department must be returned to the state general fund and cannot be used by the department. The result is that the reward for achieving greater efficiency is a diminution of the revenues of the department. The legislature recognizes that the department of transportation offers great potential and enacts this legislation to assure such department that it will not lose revenues in the event it contracts to share its specialized equipment with municipalities.

Amendment Notes: 2014. Chapter 55, § 2 (Part F) amended:

Section by adding the matter in italics.

Notes to Decisions

County, under CLS Gen Mun § 99-r, by direct negotiation and without competitive bidding, may contract with public authority for transportation services, which county provides under Social Services Law and regulations, for Medicaid clients. 1998 Op St Compt No. 98-1.

ARTICLE 5-A Public Contracts

Section

100. Definitions
100-a. Declaration of policy
101. Separate specifications for certain public work
102. Deposits on plans and specifications
103. Advertising for bids and offers; letting of contracts; criminal conspiracies
103-d. [Eff until June 1, 2023] Statement of non-collusion in bids and proposals to political subdivision of the state
103-d. Statement of non-collusion in bids and proposals to political subdivision of the state [Effective June 1, 2023]
104. Purchase through office of general services; purchases from other public contracts; certain federal contracts
104. Purchase through office of general services. [Effective July 31, 2024]
104-b. Procurement policies and procedures
109. Assignment of public contracts
109-a. Purchases through the office of general services by certain public associations
109-b. Installment contracts
109-d. Emergency vehicle warranties.

HISTORY:

Add, L 1953, ch 861, § 18, eff Sept 1, 1953.

§ 100. Definitions

As used in this article:

1. "Political subdivison" means a municipal corporation, school district, district corporation and board of cooperative educational services.

2. "Fire company" means:

a. A volunteer fire company of a county, city, town, village or fire district fire department, whether or not any such company has been incorporated under any general or special law,

b. A fire corporation the members of which are volunteer firefighters and which was incorporated under or is subject to the provisions of section fourteen hundred two of the not-for-profit corporation law, which is not included within paragraph a above, if such corporation is by law under the general control of, or recognized as a fire corporation by, the governing board of a city, town, village or fire district, or

c. A fire corporation the members of which are volunteer firefighters and which was incorporated under, or established pursuant to the provisions of, any general or special law, which is not included within paragraphs a and b above, if such corporation

is by law under the general control of, or recognized as a fire corporation by, the governing board of a city, town, village, fire district or a district corporation other than a fire district.

3. "Voluntary ambulance service" means a voluntary ambulance service as defined in article thirty of the public health law and possessing a valid statement of registration or possessing a valid ambulance service certificate pursuant to article thirty of the public health law.

HISTORY:

Add, L 1953, ch 861, § 18; amd, L 1960, ch 104, § 1, eff Feb 23, 1960; L 1965, ch 1034, § 1, eff July 1, 1965; L 1973, ch 176, § 1, eff Sept 1, 1973; L 1978, ch 755, § 1, eff Sept 1, 1978; L 2018, ch 476, § 33, effective December 28, 2018.

Prior Law: Former § 100, add, L 1953, ch 870, § 1; renumbered § 118, L 1954, ch 177, § 1.

Revision Notes: [1965, ch 1034] This act was prepared under the direction of the New York State Department of Audit and Control and was introduced at its request.

Amendment Notes The 2018 amendment by ch 476, § 33, substituted "firefighters" for "firemen" in the first and second sentences of 2b and in 2c.

Notes to Decisions

Member of municipal airport's Crash Fire Rescue (CFR) unit was not officer or member of "fire company" entitled to benefits under CLS Gen Mun § 207-a where airport's CFR unit was not organized by any county, city, town, village or fire district department, it was not "Type B" not-for-profit fire corporation recognized by local entity under CLS N-PCL § 1402, and it was not incorporated under any other law. Robbins v County of Broome, 87 N.Y.2d 831, 637 N.Y.S.2d 679, 661 N.E.2d 151, 1995 N.Y. LEXIS 4430 (N.Y. 1995).

Agency Opinions

Successive one-year leases of street light fixtures by a lighting district are not purchases required to be let by competitive bid. 1967 NY Ops Atty Gen July 12.

A choice of law clause within a public contract would be permissible so long as there is authorization to enter into the underlying contract. 1983 Op St Compt File #83-178.

The term "political subdivision" as used in the Public Officers Law means the area from which an officer is selected and in the case of an elective officer, the area in which the people who elect him reside. 1977 NY Ops Atty Gen Aug 18 (Informal), 1977 N.Y. AG LEXIS 64.

An elected commissioner of Sanitary District No. 2 in the Town of Hempstead in the County of Nassau is a public officer of a political subdivision and not of a municipality; such a commissioner must be a resident of the sanitary district at the time of election; and if the sanitary district commissioner moves from that district to a new residence outside of the district, even though in the same town, the office becomes vacant under Public Officers Law § 30 subdivision 1 paragraph d. The provision of Public Officers Law § 30 subdivision 4-a, by its own terms, is confined in its operation to members of the department of sanitation of a municipality so it is not applicable to an officer of this political subdivision. 1977 NY Ops Atty Gen Aug 18 (Informal), 1977 N.Y. AG LEXIS 64.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS County § 408-a; CLS Pub A § 1680; CLS Veh & Tr §§ 115-a, 2101.

Emergency medical services, CLS Pub Health §§ 3000 et seq.

Jurisprudences:

Matthew Bender's New York Practice Guides: 2 New York Practice Guide: Business and Commercial §§ 13.02, 13.06, 13.16.

§ 100-a. Declaration of policy

It is hereby declared to be the policy of this state that this article shall be construed in the negotiation of contracts for public works and public purchases to which political subdivisions or and [any]* district therein is a party so as to assure the prudent and economical use of public moneys for the benefit of all the inhabitants of the state and to facilitate the acquisition of facilities and commodities of maximum quality at the lowest possible cost.

HISTORY:

Add, L 1964, ch 363, § 1, eff April 3, 1964.

Revision Notes: [1964, ch 363] This act was prepared under the direction of the New York State Department of Audit and Control and was introduced at its request.

Notes to Decisions

Analysis

1. In general
2. Excluding bidder or impeding competition
3. Inclusion of project labor agreement in specifications

1. In general

Competitive bidding statutes are not violated by lease to village of telephone terminal equipment under "two-tier" rate system, notwithstanding that under one part of rate structure, telephone company recovers cost of equipment provided, where title to all equipment remains in company, who assumes risk of loss due to events not within village's control and has obligation to service and repair equipment. Exley v Endicott, 51 N.Y.2d 426, 434 N.Y.S.2d 922, 415 N.E.2d 913, 1980 N.Y. LEXIS 2887 (N.Y. 1980).

Statutory requirements relating to bidding on public works projects are enacted for the benefit of property holders and taxpayers, not for the benefit or enrichment of bidders, and should be so construed and administered as to accomplish that purpose fairly and reasonably with sole reference to the public interest. Le Cesse Bros. Contracting, Inc. v Town Board of Williamson, 62 A.D.2d 28, 403 N.Y.S.2d 950, 1978 N.Y. App. Div. LEXIS 10414 (N.Y. App. Div. 4th Dep't 1978), aff'd, 46 N.Y.2d 960, 415 N.Y.S.2d 413, 388 N.E.2d 737, 1979 N.Y. LEXIS 1871 (N.Y. 1979).

In an Article 78 proceeding reviewing contract awards for the collection, removal and disposal of solid waste within a municipal garbage district, the bid specifications submitted by the lowest bidder would be invalid where the bid submitted in connection with a readvertised notice to bidders was defective and remained uncured until 3 days after the bids were opened, and the vessel specified in the resubmitted bids, for use under the contracts, not only lacked the required United States Coast Guard certification but also was in dry-dock and laid up for repairs at the time bids were opened; the contract awards, therefore, were made in violation of the spirit of the provisions requiring sealed competitive bidding for public contracts under Gen Mun Law §§ 100-A and 103(1). Superior Hydraulic, Inc. v Town Bd. of Islip, 88 A.D.2d 404, 453 N.Y.S.2d 711, 1982 N.Y. App. Div. LEXIS 17088 (N.Y. App. Div. 2d Dep't 1982), app. dismissed, 58 N.Y.2d 824, 1983 N.Y. LEXIS 3890 (N.Y. 1983).

Defendant New York City Health and Hospitals Corporation was not estopped, on ground of defendant's alleged ratification of its agent's oral modification of written contract whereby plaintiff was to furnish defendant with diaper and washcloth service, from denying validity of oral modification, so as to enable plaintiff contractor to recover for work performed without compliance to written contract provisions, in light of fact that any change in contract terms necessitated written change order. Cupid Diaper Service Corp. v New York City Health & Hospitals Corp., 86 Misc. 2d 116, 381 N.Y.S.2d 996, 1976 N.Y. Misc. LEXIS 2409 (N.Y. Sup. Ct. 1976).

*The bracketed word has been inserted by Publisher.

Municipal contracts are to be so construed as to assure the prudent and economical use of public moneys for the benefit of all the inhabitants of municipalities and to facilitate the acquisition of facilities and commodities of maximum quality at the lowest possible cost. Noel J. Brunell & Son, Inc. v Champlain, 95 Misc. 2d 320, 407 N.Y.S.2d 376, 1977 N.Y. Misc. LEXIS 2694 (N.Y. Sup. Ct. 1977), aff'd, 64 A.D.2d 757, 407 N.Y.S.2d 447, 1978 N.Y. App. Div. LEXIS 12598 (N.Y. App. Div. 3d Dep't 1978).

The inclusion of a provision in all construction contracts let by the City of New York under the Federally funded Public Works Employment Act of 1976 (US Code, tit 42, § 6701 et seq.) requiring contractors, in the event of a cancellation or reduction in Federal funding due to a breach of the terms of the Federal grant by the contractor, to assume liability for all damages flowing from the breach up to the amount of the total Federal grant, does not violate section 100-a of the General Municipal Law which requires the city, in letting contracts for public works projects, "to facilitate the acquisition of facilities and commodities of maximum quality at the lowest possible cost". If, to procure insurance against open streets, unfinished schools and public building reconstructions and other half-done projects, the city pays a somewhat higher price for these construction jobs than would otherwise be the case, it is no more to be faulted than it should be when it obtains other types of insurance. Subcontractors Trade Ass'n v Carroll, 92 Misc. 2d 917, 401 N.Y.S.2d 962, 1978 N.Y. Misc. LEXIS 1983 (N.Y. Sup. Ct. 1978).

Unsuccessful bidder on construction project for school districts could not maintain action for damages against public officials, since awarding of bids is discretionary function under CLS Gen Mun §§ 100-a and 103, and thus reviewable only through Article 78 proceedings. Di Berardino's, Inc. v Rome Consol. School Dist., 134 Misc. 2d 288, 510 N.Y.S.2d 791, 1986 N.Y. Misc. LEXIS 3101 (N.Y. Sup. Ct. 1986).

2. Excluding bidder or impeding competition

Competitive bidding statutes do not compel unfettered competition, but do demand that specifications that exclude class of would-be bidders be both rational and essential to public interest. Associated Gen. Contrs. v New York State Thruway Auth. (In re New York State Chapter), 88 N.Y.2d 56, 643 N.Y.S.2d 480, 666 N.E.2d 185, 1996 N.Y. LEXIS 314 (N.Y. 1996).

When public entity adopts specification in letting of public work contract that impedes competition to bid for such work, it must be rationally related to twin purposes of protecting public fisc by obtaining best work at lowest possible price, and preventing favoritism, improvidence, fraud, and corruption in awarding of public contracts. Associated Gen. Contrs. v New York State Thruway Auth. (In re New York State Chapter), 88 N.Y.2d 56, 643 N.Y.S.2d 480, 666 N.E.2d 185, 1996 N.Y. LEXIS 314 (N.Y. 1996).

New York City could include, in contracts for public infrastructure work, specification requiring successful bidder to commence immediate negotiations with affected utility companies regarding compensation for contractor's performance of necessary utility "interference work" and further providing that, if no agreement was reached by 4 weeks after award of contract, dispute with utility company would be submitted to expedited binding arbitration; challenged specification was valid bidding "precondition" which did not impede competition. General Contrs. Ass'n v Tormenta, 180 Misc. 2d 384, 687 N.Y.S.2d 871, 1999 N.Y. Misc. LEXIS 126 (N.Y. Sup. Ct.), aff'd, 259 A.D.2d 177, 696 N.Y.S.2d 155, 1999 N.Y. App. Div. LEXIS 10501 (N.Y. App. Div. 1st Dep't 1999).

3. Inclusion of project labor agreement in specifications

Project Labor Agreement (PLA) incorporated in bid specifications for county court facilities project did not violate competitive bidding laws or policy where, inter alia, (1) inclusion of no-strike clause in PLA would negate possibility of strike-induced delays that could disrupt abbreviated time schedule of project and thus imperil availability of $29 million in state funds, (2) elimination of potential labor unrest through use of PLA would avoid fixed fees of $41,400 per month payable to project's construction manager and architect, (3) use of PLA would result in savings of $2,111,250 by permitting designation of working forepersons and by excluding morning and afternoon work breaks, and (4) PLA contained no provisions that discriminated against nonunion contractors. Albany Specialties v County of Orange, 240 A.D.2d 739, 662 N.Y.S.2d 773, 1997 N.Y. App. Div. LEXIS 7147 (N.Y. App. Div. 2d Dep't 1997), app. denied, 1997 N.Y. LEXIS 4088 (N.Y. Dec. 2, 1997).

Mere fact that county construction manager's report recommending use of Project Labor Agreement (PLA) in bid specifications for county court facilities project bore strong resemblance to earlier report by him analyzing use of PLA for county correctional facility project did not render report invalid or suspect where similarities between 2 reports were inevitable, given closeness in time and location of 2 projects and their common labor market. Albany Specialties v County of Orange, 240 A.D.2d 739, 662 N.Y.S.2d 773, 1997 N.Y. App. Div. LEXIS 7147 (N.Y. App. Div. 2d Dep't 1997), app. denied, 1997 N.Y. LEXIS 4088 (N.Y. Dec. 2, 1997).

County construction manager's report recommending use of Project Labor Agreement (PLA) in bid specifications for county court facilities project in order to avoid potential labor strife did not suggest "capitulation to extortion," because avoidance of delays and work stoppages occasioned by labor strife is legitimate consideration in deciding whether to enter into PLA. Albany Specialties v County of Orange, 240 A.D.2d 739, 662 N.Y.S.2d 773, 1997 N.Y. App. Div. LEXIS 7147 (N.Y. App. Div. 2d Dep't 1997), app. denied, 1997 N.Y. LEXIS 4088 (N.Y. Dec. 2, 1997).

Agency Opinions

1. In general

If providing service is a legitimate consideration in relation to an item to be purchased and the bids are unsatisfactory in this respect, all bids may be rejected and the invitation for bids may be readvertised, with new specifications, to make it clear to the selling public that ability to provide service for the item is of importance in reaching a determination as to who is the lowest responsible bidder but such a provision cannot be used as a pretext for eliminating unwanted bidders. 1978 NY Ops Atty Gen Jan 25 (Informal).

A county may, subject to competitive bidding requirements, expend moneys for the purpose of renovating property which the county leases from a private landlord. Neither may the county, without competitive bidding, renegotiate the lease and, pursuant to such renegotiated lease, agree to make higher rental payments over the remaining term of the lease where such higher payments are designed to compensate the landlord for the cost of making the renovations. 1978 Op St Compt File #958.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

64 Am Jur 2d, Public Works and Contracts §§ 29 et seq.

§ 101. Separate specifications for certain public work

1. Except as otherwise provided in section two hundred twenty-two of the labor law, every officer, board or agency of a political subdivision or of any district therein, charged with the duty of preparing specifications or awarding or entering into contracts for the erection, construction, reconstruction or alteration of buildings, when the entire cost of such public work shall exceed three million dollars in the counties of the Bronx, Kings, New York, Queens, and Richmond; one million five hundred thousand dollars in the counties of Nassau, Suffolk and Westchester; and five hundred thousand dollars in all other counties within the state, shall prepare separate specifications for the following three subdivisions of the work to be performed:

a. Plumbing and gas fitting;

b. Steam heating, hot water heating, ventilating and air conditioning apparatus; and

c. Electric wiring and standard illuminating fixtures.

2. Such specifications shall be drawn so as to permit separate and independent bidding upon each of the above three subdivisions of work. All contracts awarded by any political subdivision or by an officer, board or agency thereof, or of any district therein, for the erection, construction, reconstruction or alteration of buildings, or any part thereof, shall award the three subdivisions of the above specified work separately in the manner provided by section one hundred three of this chapter. Nothing in this section shall be construed to prevent any political subdivision from performing any such branches of work by or through their regular employees, or in the case of public institutions, by the inmates thereof.

3. In the county of Erie, specifications for public work pertaining to the construction of a county stadium may provide for assignment of responsibility for supervision and coordination of any of the contracts for such work to a single responsible and reliable person, firm or corporation.

4. In the county of Albany, specifications for work pertaining to the construction of a civic center may provide for assignment of responsibility for supervision and coordination of any or all of the contracts for such work to a single responsible and reliable person, firm or corporation.

5. Each bidder on a public work contract, where the preparation of separate specifications is not required, shall submit with its bid a separate sealed list that names each subcontractor that the bidder will use to perform work on the contract, and the agreed-upon amount to be paid to each, for: (a) plumbing and gas fitting, (b) steam heating, hot water heating, ventilating and air conditioning apparatus and (c) electric wiring and standard illuminating fixtures. After the low bid is announced, the sealed list of subcontractors submitted with such low bid shall be opened and the names of such subcontractors shall be announced, and thereafter any change of subcontractor or agreed-upon amount to be paid to each shall require the approval of the public owner, upon a showing presented to the public owner of legitimate construction need for such change, which shall be open to public inspection. Legitimate construction need shall include, but not be limited to, a change in project specifications, a change in construction material costs, a change to subcontractor status as determined pursuant to paragraph (e) of subdivision two of section two hundred twenty-two of the labor law, or the subcontractor has become otherwise unwilling, unable or unavailable to perform the subcontract. The sealed lists of subcontractors submitted by all other bidders shall be returned to them unopened after the contract award.

HISTORY:

Add, L 1953, ch 861, § 18, eff Sept 1, 1953, with substance deriving from former § 88; amd, L 1964, ch 572, § 1, applicable to invitations for bids to be submitted on or after such date; L 1972, ch 40, § 1, eff March 6, 1972; L 1985, ch 375, § 6, eff July 19, 1985; L 2008, ch 57, § 1 (Part MM), eff July 1, 2008 (see 2008 note below).

Editor's Notes: Laws 2008, ch 57, § 20 (Part MM), eff July 1, 2008, provides as follows:

§ 20. This act shall take effect July 1, 2008, and shall control all contracts advertised or solicited for bid on or after the effective date of this act under the provisions of any law requiring contracts to be let pursuant to provisions of law amended by this act.

Prior Law: Former § 101, add, L 1953, ch 870, § 1; renumbered § 118–a, L 1954, ch 177, § 1.

Notes to Decisions

Analysis

1. In general
2. Supervision of work by general contractor; instances where proper
3. —Instances where improper
4. Construction by public employees
5. Enforcement proceedings
6. Libraries
7. Schools; bidding requirements
8. —Miscellaneous
9. Sewage plants
10. Miscellaneous

1. In general

CLS Gen Mun § 101 is general law that addresses valid and substantial state concern, and thus does not violate home rule provisions of state constitution. Building Contractors Ass'n v State, 218 A.D.2d 722, 630 N.Y.S.2d 763, 1995 N.Y. App. Div. LEXIS 8833 (N.Y. App. Div. 2d Dep't), app. dismissed, 87 N.Y.2d 895, 640 N.Y.S.2d 879, 663 N.E.2d 921, 1995 N.Y. LEXIS 5056 (N.Y. 1995), app. denied, 87 N.Y.2d 811, 644 N.Y.S.2d 144, 666 N.E.2d 1058, 1996 N.Y. LEXIS 1023 (N.Y. 1996).

CLS Gen Mun § 101 does not violate equal protection. Building Contractors Ass'n v State, 218 A.D.2d 722, 630 N.Y.S.2d 763, 1995 N.Y. App. Div. LEXIS 8833 (N.Y. App. Div. 2d Dep't), app. dismissed, 87 N.Y.2d 895, 640 N.Y.S.2d 879, 663 N.E.2d 921, 1995 N.Y. LEXIS 5056 (N.Y. 1995), app. denied, 87 N.Y.2d 811, 644 N.Y.S.2d 144, 666 N.E.2d 1058, 1996 N.Y. LEXIS 1023 (N.Y. 1996).

Separate bidding requirements applicable to public construction contracts requiring the preparation of separate specifications and separate and independent bidding thereon (General Municipal Law, § 101) are intended primarily for the protection of the taxpayers and municipalities as opposed to private interest contractor associations and, accordingly, in view of respondents' allegations that petitioner is associated with such an association and the fact separate bidding of construction contracts generates higher bid prices, respondent free association library was justified in putting out a single bid for a general contractor to do the entire construction job. French v Board of Education, 99 Misc. 2d 882, 417 N.Y.S.2d 389, 1979 N.Y. Misc. LEXIS 2353 (N.Y. Sup. Ct. 1979), aff'd, 72 A.D.2d 196, 424 N.Y.S.2d 235, 1980 N.Y. App. Div. LEXIS 9668 (N.Y. App. Div. 2d Dep't 1980).

A transaction whereby a not-for-profit corporation, without competitive bidding, constructs a public facility for use by a municipal corporation in the performance of its governmental functions and the municipal corporation acquires use of the facility under a lease agreement and has an option to purchase: (a) does not constitute indebtedness for purposes of the State Constitution and Local Finance Law if the lease agreement has an executory clause making the municipal corporation's obligation contingent on annual appropriations, although it is doubtful that a clause providing that, if the municipal corporation fails to appropriate money for the lease payments, the municipal corporation agrees not to purchase, lease or rent property to perform the same functions as the facility, would be enforceable; (b) constitutes a prohibited installment purchase contract if the total character of the transaction is that of a purchase rather than a

lease; and (c) violates the competitive bidding requirements of General Municipal Law §§ 101, 103, if the total character of the transaction constitutes a contract for public work of the municipal corporation. 1991 Op St Compt No. 91-13.

2. Supervision of work by general contractor; instances where proper

Provisions of contract whereby contractor agreed with board of education to prepare its own work schedules on time and to coordinate its work with each of the other prime contractors did not shift the responsibility for project coordination and supervision from the owner to the contractor and, hence, did not violate the provisions of the General Municipal Law. J. A. Valenti Electric Co. v Board of Education, 56 A.D.2d 884, 392 N.Y.S.2d 482, 1977 N.Y. App. Div. LEXIS 11267 (N.Y. App. Div. 2d Dep't 1977).

Requirement for bids on public works contract that general contractor perform "cutting and patching" for all work to be performed, including that of other prime contractors, did not constitute improper delegation of all coordinative and supervisory work to general contractor. Construction Contractors Ass'n v Board of Trustees, 192 A.D.2d 265, 600 N.Y.S.2d 953, 1993 N.Y. App. Div. LEXIS 7539 (N.Y. App. Div. 2d Dep't 1993).

Agreement in state construction contract whereby general contractor was responsible for co-ordinating work of prime contractors did not violate General Municipal Law § 101 or State Finance Law § 135. KEC Corp. v New York State Environmental Facilities Corp., 76 Misc. 2d 170, 350 N.Y.S.2d 331, 1973 N.Y. Misc. LEXIS 2345 (N.Y. Sup. Ct. 1973).

Bid contract documents for restoration work on historic building, which included requirement that general contractor perform cutting and patching work for all contracts, including those of other prime contractors, did not violate principle that overall supervision and coordination of other prime contractors must reside with owner or its agent rather than general contractor where building to be restored, which was described as "work of art," included Tiffany windows, ornate woodwork, extensive areas of stone, onyx and marble, and classical ornamentation, since minimization or avoidance of harm to building required that delicate work of cutting and patching be left to general contractor. Construction Contractors Ass'n v Board of Trustees of Orange Community College, 149 Misc. 2d 440, 565 N.Y.S.2d 997, 1991 N.Y. Misc. LEXIS 27 (N.Y. Sup. Ct. 1991), rev'd, 192 A.D.2d 265, 600 N.Y.S.2d 953, 1993 N.Y. App. Div. LEXIS 7539 (N.Y. App. Div. 2d Dep't 1993).

3. —Instances where improper

Under the provisions of Public Authorities Law § 1287, subd 1, it is clear that the legislature did not intend to provide authority in the contracting municipality under State Finance Law § 135 or General Municipal Law § 101 to delegate to one of the prime contractors the supervisory and co-ordination responsibility and authority, and thus bid specifications which required the general contractor's superintendent to correlate all the work on the job, the separate prime contractors to co-ordinate their work schedules with that of the general contractor, and hold the general contractor responsible for setting the pace for the job and for all work in place was violative of § 101 of the General Municipal Law. General Bldg. Contractors, Inc. v Syracuse, 40 A.D.2d 584, 334 N.Y.S.2d 730, 1972 N.Y. App. Div. LEXIS 4087 (N.Y. App. Div. 4th Dep't 1972), modified, 32 N.Y.2d 780, 344 N.Y.S.2d 961, 298 N.E.2d 122, 1973 N.Y. LEXIS 1314 (N.Y. 1973).

Contract specifications drawn by county violated General Municipal Law § 101 in that they imposed upon the general contractor responsibilities and obligations as to supervision and coordination not envisioned by the statute and which should be borne by the owner and/or the architect. General Bldg. Contractors, Inc. v County of Oneida, 54 Misc. 2d 260, 282 N.Y.S.2d 385, 1967 N.Y. Misc. LEXIS 1524 (N.Y. Sup. Ct. 1967).

Firm may not be engaged both as construction manager to act on behalf of town in coordinating work of prime contractors, and as prime contractor, on town building construction project subject to CLS Gen Mun § 101. 2002 Op St Compt No. 02-17.

The method set forth in the specifications for bids for construction of a school building for awarding subcontracts whereby the architect was authorized to accept bids and assign the successful bidder to the prime contractor was improper, as an owner such as a Board of Education may not require one prime contractor to supervise the work of other contractors to whom contracts were let by the owner. Ops Comr Ed No 8946.

The method for letting contracts under the system of allowances set forth in the specifications for bids for a school building which required the prime contractor to accept bids from at least three approved sources, and to assign subcontracts to the lowest bidders was improper, as the requirement that the school board approve or disapprove the proposed subcontractors interfered with free competitive bidding. Ops Comr of Ed No 8946.

4. Construction by public employees

A county community college may perform its own construction work with its own maintenance staff. 1967 Ops St Compt File #310.

Competitive bidding requirements of CLS Gen Mun §§ 101 and 103 are not violated by use of town employees to perform work in connection with construction of town salt storage shed, but purchases of materials and supplies for work would be subject to competitive bidding requirements if it is known or reasonably expected that competitive bidding monetary threshold for purchases will be exceeded; if it is not known or reasonably expected that competitive bidding threshold will be exceeded, town would be required to make such purchases in accordance with its procurement policies and procedures. 1999 Op St Compt No. 99-2.

5. Enforcement proceedings

It would have been inappropriate to grant Article 78 relief to compel compliance with General Municipal Law §§ 101 and 103 and Labor Law § 220 where delay by petitioner in commencing proceedings and absence of stay or restraining order pendente lite produced a situation where bids had already been received and opened, and construction begun. General Bldg. Contractors, Inc. v Board of Trustees, 42 A.D.2d 660, 345 N.Y.S.2d 195, 1973 N.Y. App. Div. LEXIS 4055 (N.Y. App. Div. 3d Dep't 1973).

Contractor, having failed to voice any objections to any of the provisions of its contract with board of education at the bid stage, and having accepted the contract and performed under it, could not seek to avoid possible liability to the board by claiming that those same contract provisions were illegal. J. A. Valenti Electric Co. v Board of Education, 56 A.D.2d 884, 392 N.Y.S.2d 482, 1977 N.Y. App. Div. LEXIS 11267 (N.Y. App. Div. 2d Dep't 1977).

Prior decision requiring that separate construction contracts for each type of work be made, which was complied with by city by having separate construction contracts for each type of work entered into between city's lessee and several prime contractors, was not binding on city on principles of collateral estoppel with respect to issue of city's liability as principal where such decision did not determine either expressly or by necessary implication that city and lessee could not agree that only "agent" should be liable on lessee's contract with one of several prime contractors. Renel Constr., Inc. v Brooklyn Cooperative Meat Distribution Center, Inc., 59 A.D.2d 391, 399 N.Y.S.2d 429, 1977 N.Y. App. Div. LEXIS 13937 (N.Y. App. Div. 1st Dep't 1977), aff'd, 46 N.Y.2d 859, 414 N.Y.S.2d 511, 387 N.E.2d 222, 1979 N.Y. LEXIS 1817 (N.Y. 1979).

6. Libraries

A free association library, as defined in section 253 of the Education Law, is a private corporation chartered by the Board of Regents and, as a private organization, it is not within the purview of section 101 of the General Municipal Law, which requires every officer, board or agency of a political subdivision or any district therein charged with the duty of preparing specifications or awarding or entering into contracts for the construction or alteration of buildings, when the entire cost of such work exceeds $50,000, to prepare separate specifications so as to permit separate and independent bidding upon each of three categories of work. Accordingly, where the taxpayer residents of a school district approved a budget that included a provision for finance charges on a prospective mortgage to be obtained by a free association library, which is registered with the Board of Regents, to finance a proposed addition thereto, the library properly sought unitary bids on its entire construction project and awarded the contract to the lowest responsible bidder, since said free associa-

tion library is not subject to the requirements of section 101. French v Board of Education, 72 A.D.2d 196, 424 N.Y.S.2d 235, 1980 N.Y. App. Div. LEXIS 9668 (N.Y. App. Div. 2d Dep't 1980).

Separate bidding requirements applicable to public construction contracts requiring the preparation of separate specifications and separate and independent bidding thereon (General Municipal Law, § 101) are intended primarily for the protection of the taxpayers and municipalities as opposed to private interest contractor associations and, accordingly, in view of respondents' allegations that petitioner is associated with such an association and the fact separate bidding of construction contracts generates higher bid prices, respondent free association library was justified in putting out a single bid for a general contractor to do the entire construction job. French v Board of Education, 99 Misc. 2d 882, 417 N.Y.S.2d 389, 1979 N.Y. Misc. LEXIS 2353 (N.Y. Sup. Ct. 1979), aff'd, 72 A.D.2d 196, 424 N.Y.S.2d 235, 1980 N.Y. App. Div. LEXIS 9668 (N.Y. App. Div. 2d Dep't 1980).

A nonpublic free association library, which used funds properly appropriated by respondent school district for the support of the library (Education Law, § 256) to pay the financing charges on a mortgage of the library's property in order to undertake a construction project to expand its facilities, may lawfully put out a single bid for a general contractor to do the entire job and is not bound by the separate bidding requirements applicable only to a "political subdivision" (General Municipal Law, § 101) since the school district's credit is in no way affected by the mortgage given by the library which owns the land, will completely control the erection of the building and the payments therefor and will end up owning and controlling everything; the fact that the money used by the library to cover the cost of mortgage financing originated with "tax dollars" by way of a contract with the school district to furnish library privileges does not make the library an entity subject to the separate bidding requirements and, in addition, the bidding requirements for the lease-purchase of a building to be erected on the district's property (Education Law, § 1726) are inapplicable. French v Board of Education, 99 Misc. 2d 882, 417 N.Y.S.2d 389, 1979 N.Y. Misc. LEXIS 2353 (N.Y. Sup. Ct. 1979), aff'd, 72 A.D.2d 196, 424 N.Y.S.2d 235, 1980 N.Y. App. Div. LEXIS 9668 (N.Y. App. Div. 2d Dep't 1980).

7. Schools; bidding requirements

Provisions of Education Law not only mandated school district's compliance with bidding requirements of General Municipal Law in respect to erection of an office building which district was then to lease from builder with an option to purchase at a later date, but specifically mandated district's compliance by requiring district to subdivide work and place it out for separately categorized bids. Liverpool Cent. School Dist. v Nyquist, 55 A.D.2d 194, 390 N.Y.S.2d 226, 1976 N.Y. App. Div. LEXIS 14081 (N.Y. App. Div. 3d Dep't 1976), app. denied, 41 N.Y.2d 803, 1977 N.Y. LEXIS 3025 (N.Y. 1977).

This article does not prohibit a combination of projects in one bid, a call for bids may direct combined bids and reserve right to accept the one which, in the board's judgment, is for the best interests of the school, and the school district may defer judgment on the bids until it has had opportunity to receive and weigh them and is not barred from exercising discretion in determining scope of the projects and awarding the contract to the lowest bidder on a combined bid. Bana Electric Corp. v Board of Education, 22 Misc. 2d 956, 194 N.Y.S.2d 657, 1959 N.Y. Misc. LEXIS 2346 (N.Y. Sup. Ct. 1959).

School board's action, after rejecting bids on a school construction project, in advertising and requesting only one bid for all of the work, instead of making separate specifications for plumbing, heating, and electrical wiring and lighting violated § 101 of the General Municipal Law. A. S. Reynolds Electric Co. v Board of Education, 46 Misc. 2d 140, 259 N.Y.S.2d 503, 1965 N.Y. Misc. LEXIS 2071 (N.Y. Sup. Ct. 1965).

Statute requiring separate bidding for specified items contained in contracts given by municipal corporations, including school districts, for erection of public buildings applies not only to school district which erects, constructs or alters public buildings itself but also applies to school district which causes a building to be erected by a private contractor who owns the building upon completion and which then leases the building with the option to buy. Liverpool Cent. School Dist. v Nyquist, 84 Misc. 2d 20, 374 N.Y.S.2d 942, 1975 N.Y. Misc. LEXIS 3080 (N.Y. Sup. Ct. 1975), aff'd, 55 A.D.2d 194, 390 N.Y.S.2d 226, 1976 N.Y. App. Div. LEXIS 14081 (N.Y. App. Div. 3d Dep't 1976).

Single bid by City University of New York (CUNY) for construction work exceeding $50,000 was valid despite provisions of CLS Gen Mun § 101, which requires fractionalization of bids for public construction contracts and applies to "Every officer, board or agency of political subdivision," since (1) CUNY is not "political subdivision" within meaning of statute, (2) if legislative intent was to include CUNY contracts under § 101, it could have so provided, and (3) CLS Educ § 6218, which applies to CUNY contracts and is more recent statute, does not require fractionalization of public contracts. Michael Mazzeo Electrical Corp. v Murphy, 137 Misc. 2d 853, 522 N.Y.S.2d 798, 1987 N.Y. Misc. LEXIS 2725 (N.Y. Sup. Ct. 1987).

The method set forth in the specification for bids for a school building whereunder the architect was authorized to designate a subcontractor without competitive bidding and assign him to the prime contractor was invalid. Ops Comr Ed No 8946.

8. —Miscellaneous

In view of this section and §§ 1709(6), 1804, 1805, and 7203, Education Law, and § 103, General Municipal Law, the legislature pre-empted not only the area of plans and specifications in the building of schools, but also the field of actual construction, and vested such power in the commissioner of education, so that a school board was not subject to local municipal building or plumbing codes in building schools. Poughkeepsie v Hopper Plumbing & Heating Corp., 46 Misc. 2d 761, 260 N.Y.S.2d 901, 1965 N.Y. Misc. LEXIS 1741 (N.Y. Sup. Ct. 1965), aff'd, 26 A.D.2d 772, 272 N.Y.S.2d 974, 1966 N.Y. App. Div. LEXIS 6124 (N.Y. App. Div. 2d Dep't 1966).

General contractor on school construction project may be required to provide a temporary water supply, and such requirement does not result in the general contractor performing plumbing work in contravention of General Municipal Law § 101. Ops Comr Ed No 8946.

9. Sewage plants

Provisions of General Municipal Law § 101 requiring that plumbing contracts be let separately applies only to those public works contracts pertaining to the erection, construction, reconstruction or alteration of buildings and does not apply to work in the nature of sewers which will benefit a general area and not a particular building. Plumbing Contractors Ass'n v Buffalo, 70 Misc. 2d 412, 334 N.Y.S.2d 9, 1972 N.Y. Misc. LEXIS 1802 (N.Y. Sup. Ct. 1972).

Contracts for the construction of that portion of a sewage plant which constitutes a storehouse, factory or shelter are subject to the separate specifications provisions of this section provided the cost of such portion of the plant exceeds twenty-five thousand dollars. 1958 Ops St Compt File #896.

10. Miscellaneous

CLS Gen Mun § 101 did not become special law rather than general law because of amendments that permitted delegation of supervision for construction of sports stadium in Erie County and civic center in Albany County, since those amendments did not exempt those counties from statute's separate-contracts requirement. Building Contractors Ass'n v State, 218 A.D.2d 722, 630 N.Y.S.2d 763, 1995 N.Y. App. Div. LEXIS 8833 (N.Y. App. Div. 2d Dep't), app. dismissed, 87 N.Y.2d 895, 640 N.Y.S.2d 879, 663 N.E.2d 921, 1995 N.Y. LEXIS 5056 (N.Y. 1995), app. denied, 87 N.Y.2d 811, 644 N.Y.S.2d 144, 666 N.E.2d 1058, 1996 N.Y. LEXIS 1023 (N.Y. 1996).

City was properly granted summary judgment in action alleging that "turnkey" contract for construction of new court and police facility was illegal for failure to comply with competitive bidding requirements where pre-1953 local law specifically provided for waiver of competitive bids when city manager determined that subject of proposed contract was such that completion was "impossible or impracticable" via competitive bidding process, and city manager found that competitive bidding was impractical because, inter alia, project required timely completion and cost-effective fixed price which competitive bidding could

not secure, new facility was necessary, construction on privately-owned land was required, site owned by developer was most appropriate and environmentally safe, developer would not transfer site without being awarded contract, and condemnation of site was too costly. Imburgia v City of New Rochelle, 223 A.D.2d 44, 645 N.Y.S.2d 111, 1996 N.Y. App. Div. LEXIS 7260 (N.Y. App. Div. 3d Dep't), app. denied, 88 N.Y.2d 815, 651 N.Y.S.2d 17, 673 N.E.2d 1244, 1996 N.Y. LEXIS 3299 (N.Y. 1996).

It was not arbitrary and capricious for police commissioner to disqualify petitioner from participating in New York City's "Arterial Tow Program," in light of undisputed evidence of criminal conviction of 2 of petitioner's principals arising from improper business practices. Knights Towing Corp. v Safir, 270 A.D.2d 145, 706 N.Y.S.2d 313, 2000 N.Y. App. Div. LEXIS 3072 (N.Y. App. Div. 1st Dep't 2000).

trial court properly dismissed petitioner's suit against the department of public works because the department's determination that petitioner's refusal to perform subcontract work on the terms set forth in general contractor's accepted bid constituted a "legitimate construction need" within the meaning of this section, and its approval of the general contractor's request to perform the subcontract itself was not arbitrary and capricious, affected by an error of law, or an abuse of discretion. Matter of Heritage Mech. Servs., Inc. v Suffolk County Dept. of Pub. Works, 165 A.D.3d 667, 86 N.Y.S.3d 87, 2018 N.Y. App. Div. LEXIS 6485 (N.Y. App. Div. 2d Dep't 2018).

Port of New York Authority was not required to comply with bidding requirements of General Municipal L §§ 101 and 103 in building a passenger ship terminal on lands which authority leased from city, even though city participated in financing the construction. New York City Chapter, Inc. of Nat'l Electrical Contractors Ass'n v Fabber, 73 Misc. 2d 859, 343 N.Y.S.2d 33, 1973 N.Y. Misc. LEXIS 2297 (N.Y. Sup. Ct.), aff'd, 41 A.D.2d 821, 343 N.Y.S.2d 558, 1973 N.Y. App. Div. LEXIS 4700 (N.Y. App. Div. 1st Dep't 1973).

Board of Regents Rule 29.3(b) (8 NYCRR § Rule 29.3(b)) which amends definition of "unprofessional conduct" for licensed professions of engineering, land surveying, architecture and landscape architecture to expressly exclude, under prescribed conditions, delegation of design work from one licensed professional to another through "intermediate entity" (typically, contractor or subcontractor) does not violate intent of Education Law or letter and intent of CLS Gen Mun §§ 101 and 103, and does not contravene public policy. General Bldg. Contrs. v New York State Educ. Dep't, 175 Misc. 2d 922, 670 N.Y.S.2d 697, 1997 N.Y. Misc. LEXIS 683 (N.Y. Sup. Ct. 1997).

Where a village intends to contract for construction of a fire house costing in excess of $25,000, the specifications must be prepared so as to permit separate bidding for plumbing, heating and electrical work. 1963 Ops St Compt File #700.

Agency Opinions

1. Miscellaneous

A village may agree with a property owner/builder that it will purchase or lease a village room complex if the builder constructs the complex on his property. 1981 NY Ops Atty Gen Nov 9 (Informal).

A village may not enter into a lease-purchase agreement under the "turnkey" concept for the construction of a building on property presently owned by the village, but which would be sold to the builder prior to entry into the agreement and then eventually repurchased by the village upon the completion of the building. 1982 NY Ops Atty Gen July 22 (informal).

(1) Off-Track Betting Corporations are to let contracts, procedurally, in the same manner as counties and, therefore, they are subject to the competitive bidding requirements of General Municipal Law, §§ 101 and 103, but not the requirements of Education Law, § 7209(3); (2) Both purchase and public works contracts of Off-Track Betting Corporations are subject to bidding where the estimated expense exceeds $10,000; (3) Off-Track Betting Corporations are governed by the principles relating to aggregate purchases; (4) A firm which aids in preparing bid specifications for a project is not precluded from submitting a bid on the project. 1980 Op St Compt File #503.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 109-b; CLS Pub A §§ 1198-q, 1199-qqq.

Jurisprudences:

64 Am Jur 2d, Public Works and Contracts §§ 29 et seq.

§ 102. Deposits on plans and specifications

1. Notwithstanding any inconsistent provision of any general, special or local law, the officer, board or agency of any political subdivision or of any district therein, charged with the duty of preparing plans and specifications for and awarding or entering into contracts for the performance of public work, may require, as a deposit to guarantee the safe return of such plans and specifications, the payment of a fixed sum of money, not exceeding one hundred dollars for each copy thereof, by persons or corporations desiring a copy thereof. Any person or corporation desiring a copy of such plans and specifications and making the payment required by this section shall be furnished with one copy of the plans and specifications.

2. If a proposal is duly submitted by any person or corporation making the deposit required by subdivision one and such proposal is accompanied by a certified check or other security in accordance with the requirements contained in the plans and specifications or in the public advertisement for bids, and if the copy of the plans and specifications used by such person or corporation, other than the successful bidder, is returned in good condition within thirty days following the award of the contract covered by such plans and specifications or the rejection of the bid of such person or corporation, the full amount of such deposit for one copy of the plans and specifications shall be returned to such person or corporation, including the successful bidder. Partial reimbursement, in an amount equal to the full amount of such deposit for one set of plans and specifications per unsuccessful bidder or non-bidder less the actual cost of reproduction of the plans and specifications as determined by the officer, board or agency of any political subdivision or of any district therein, charged with the duty of preparing the plans and specifications, shall be made for the return of all other copies of the plans and specifications in good condition within thirty days following the award of the contract or the rejection of the bids covered by such plans and specifications.

HISTORY:

Add, L 1953, ch 861, § 18, eff Sept 1, 1953, with substance deriving from Pub Wks Law § 14; amd, L 1961 ch 766, § 1; L 1984, ch 537, § 1, eff Aug 26, 1984; L 2011, ch 97, § 3 (Part C, Subpart B), eff June 24, 2011.

Prior Law: Former § 102, add, L 1953, ch 870, § 1; renumbered § 118-b, L 1954, ch 177, § 1.

Amendment Notes: 2011. Chapter 97, § 3 (Part C, Subpart B) amended:

Sub 1 by deleting at fig 1 "shall", at fig 2 "deposit" and adding the matter in italics .

Notes to Decisions

Under the present law a refund of deposits given for plans and specifications of public works in a political subdivision may be

made only upon the return of such plans and specifications within the thirty-day limitation. 1960 Ops St Compt File #829.

A political subdivision must return the entire amount of the deposit on plans and specifications for the performance of public work submitted by each unsuccessful bidder upon the proper return of a single set of the plans and specifications; if an unsuccessful bidder obtains more than one set of plans and specifications, the political subdivision must also return an amount equal to the deposit for one of the additional sets of plans and specifications less the cost of reproducing the set, upon the proper return of all the additional sets; if a nonbidder properly returns all sets of the plans and specifications, the political subdivision must return an amount equal to the deposit for one set of plans and specifications less the actual cost of reproducing the set. 1991 Op St Compt No. 91-38.

Agency Opinions

Plans and specifications for public work may be provided by a municipality to commercial publishers, to be duplicated by them and made available to the subscribers of their services, only in accordance with the clear mandate of the statute which requires a deposit for the plans and specifications; a partial return of the deposit may be made if the plans and specifications are returned in accordance with the statute. The actual percentage of the deposit which may be returned is to be determined by each municipality. 1976 NY Ops Atty Gen Aug 17.

A village may temporarily invest moneys held in trust and agency fund accounts provided that the moneys are eligible for investment. Disposition of the interest earned must be considered on an individual basis taking into account statutory, common law and other restrictions which govern the use of the particular moneys involved. 1979 Op St Compt File #754.

A town may not, by local law or otherwise, waive the deposit requirement of this section for an agency of the federal government. 1984 Op St Compt File #84-6.

A municipality may not adopt local legislation to require persons who request copies of plans and specifications in relation to proposed public works contracts to pay a non-refundable fee for each copy thereof. 1983 Op St Compt File #83-235.

§ 103. Advertising for bids and offers; letting of contracts; criminal conspiracies

1. [Eff until June 1, 2023] Except as otherwise expressly provided by an act of the legislature or by a local law adopted prior to September first, nineteen hundred fifty-three, all contracts for public work involving an expenditure of more than thirty-five thousand dollars and all purchase contracts involving an expenditure of more than twenty thousand dollars, shall be awarded by the appropriate officer, board or agency of a political subdivision or of any district therein including but not limited to a soil conservation district to the lowest responsible bidder furnishing the required security after advertisement for sealed bids in the manner provided by this section, provided, however, that purchase contracts (including contracts for service work, but excluding any purchase contracts necessary for the completion of a public works contract pursuant to article eight of the labor law) may be awarded on the basis of best value, as defined in section one hundred sixty-three of the state finance law, to a responsive and responsible bidder or offerer in the manner provided by this section except that in a political subdivision other than a city with a population of one million inhabitants or more or any district, board or agency with jurisdiction exclusively therein the use of best value for awarding a purchase contract or purchase contracts must be authorized by local law or, in the case of a district corporation, school district or board of cooperative educational services, by rule, regulation or resolution adopted at a public meeting. In any case where a responsible bidder's or responsible offerer's gross price is reducible by an allowance for the value of used machinery, equipment, apparatus or tools to be traded in by a political subdivision, the gross price shall be reduced by the amount of such allowance, for the purpose of determining the best value. In cases where two or more responsible bidders furnishing the required security submit identical bids as to price, such officer, board or agency may award the contract to any of such bidders. Such officer, board or agency may, in his or her or its discretion, reject all bids or offers and readvertise for new bids or offers in the manner provided by this section. In determining whether a purchase is an expenditure within the discretionary threshold amounts established by this subdivision, the officer, board or agency of a political subdivision or of any district therein shall consider the reasonably expected aggregate amount of all purchases of the same commodities, services or technology to be made within the twelve-month period commencing on the date of purchase. Purchases of commodities, services or technology shall not be artificially divided for the purpose of satisfying the discretionary buying thresholds established by this subdivision. A change to or a renewal of a discretionary purchase shall not be permitted if the change or renewal would bring the reasonably expected aggregate amount of all purchases of the same commodities, services or technology from the same provider within the twelve-month period commencing on the date of the first purchase to an amount greater than the discretionary buying threshold amount. For purposes of this section, "sealed bids" and "sealed offers", as that term applies to purchase contracts, (including contracts for service work, but excluding any purchase contracts necessary for the completion of a public works contract pursuant to article eight of the labor law) shall include bids and offers submitted in an electronic format including submission of the statement of non-collusion required by section one hundred three-d of this article, provided that the governing board of the political subdivision or district, by resolution, has authorized the receipt of bids and offers in such format. Submission in electronic format may, for technology contracts only, be required as the sole method for the submission of bids and offers. Bids and offers submitted in an electronic format shall be transmitted by bidders and offerers to the receiving device designated by the political subdivision or district. Any method used to receive electronic bids and offers shall comply with article three of the state technology law, and any rules and regulations promulgated and guidelines developed thereunder and, at a minimum, must (a) document the time and date of receipt of each bid and offer received electronically; (b) authenticate the identity

of the sender; (c) ensure the security of the information transmitted; and (d) ensure the confidentiality of the bid or offer until the time and date established for the opening of bids or offers. The timely submission of an electronic bid or offer in compliance with instructions provided for such submission in the advertisement for bids or offers and/or the specifications shall be the responsibility solely of each bidder or offerer or prospective bidder or offerer. No political subdivision or district therein shall incur any liability from delays of or interruptions in the receiving device designated for the submission and receipt of electronic bids and offers.

1. [Eff June 1, 2023] Except as otherwise expressly provided by an act of the legislature or by a local law adopted prior to September first, nineteen hundred fifty-three, all contracts for public work involving an expenditure of more than thirty-five thousand dollars and all purchase contracts involving an expenditure of more than twenty thousand dollars, shall be awarded by the appropriate officer, board or agency of a political subdivision or of any district therein including but not limited to a soil conservation district to the lowest responsible bidder furnishing the required security after advertisement for sealed bids in the manner provided by this section, provided, however, that purchase contracts (including contracts for service work, but excluding any purchase contracts necessary for the completion of a public works contract pursuant to article eight of the labor law) may be awarded on the basis of best value, as defined in section one hundred sixty-three of the state finance law, to a responsive and responsible bidder or offerer in the manner provided by this section except that in a political subdivision other than a city with a population of one million inhabitants or more or any district, board or agency with jurisdiction exclusively therein the use of best value of awarding a purchase contract or purchase contracts must be authorized by local law or, in the case of a district corporation, school district or board of cooperative educational services, by rule, regulation or resolution adopted at a public meeting. In determining whether a purchase is an expenditure within the discretionary threshold amounts established by this subdivision, the officer, board or agency of a political subdivision or of any district therein shall consider the reasonably expected aggregate amount of all purchases of the same commodities, services or technology to be made within the twelve-month period commencing on the date of purchase. Purchases of commodities, services or technology shall not be artificially divided for the purpose of satisfying the discretionary buying thresholds established by this subdivision. A change to or a renewal of a discretionary purchase shall not be permitted if the change or renewal would bring the reasonably expected aggregate amount of all purchases of the same commodities, services or technology from the same provider within the twelve-month period commencing on the date of the first purchase to an amount greater than the discretionary buying threshold amount. In any case where a responsible bidder's or responsible offerer's gross price is reducible by an allowance for the value of used machinery, equipment, apparatus or tools to be traded in by a political subdivision, the gross price shall be reduced by the amount of such allowance, for the purpose of determining the low bid or best value. In cases where two or more responsible bidders furnishing the required security submit identical bids as to price, such officer, board or agency may award the contract to any of such bidders. Such officer, board or agency may, in his, her or its discretion, reject all bids or offers and readvertise for new bids or offers in the manner provided by this section.

1-a. Whenever possible, practical, and feasible and consistent with open competitive bidding or competitive offering, the officer, board or agency of any political subdivision or of any district therein charged with the awarding of contracts may use the stock item specifications of manufacturers, producers and/or assemblers located in New York state in developing specifications for items to be let for bid or offer in its purchasing contracts and may use the data and information contained in stock item specifications forms as provided in section one hundred sixty-four-a of the state finance law to assist in his determination of what constitutes a stock item of a manufacturer, producer and/or assembler located in New York state for the purpose of helping to retain jobs, business and industry presently in the state of New York and attracting expanded and new business and industry to the state of New York so as to best promote the public interest.

1-b. [Expires and repealed July 31, 2024] A political subdivision or any district therein shall have the option of purchasing information technology and telecommunications hardware, software and professional services through cooperative purchasing permissible pursuant to federal general services administration information technology schedule seventy or any successor schedule. A political subdivision or any district therein that purchases through general services administration schedule seventy, information technology and consolidated schedule contracts shall comply with federal schedule ordering procedures as provided in federal acquisition regulation 8.405-1 or 8.405-2 or successor regulations, whichever is applicable. Adherence to such procedures shall constitute compliance with the competitive bidding requirements under this section.

1-c. [Expires and repealed March 18, 2021] In determining the lowest responsible bidder, the officer, board or agency of any political subdivision or of any district therein charged with awarding of contracts, shall consider whether or not the bidder, or any "substantially owned-affiliated entity" as defined by paragraph g of subdivision five of section two hundred twenty of the labor law, has been found to be in violation of the Davis-Bacon Act pursuant to 40 U.S.C. 3144, the Copeland Act pursuant to 18

U.S.C. 874 and 40 U.S.C. 3145 or the Contract Work Hours and Safety Standards Act pursuant to 40 U.S.C. 332.

2. [Eff until June 1, 2023] Advertisement for bids and offers shall be published in the official newspaper or newspapers, if any, or otherwise in a newspaper or newspapers designated for such purpose and may be published in the procurement opportunities newsletter pursuant to article four-C of the economic development law. Such advertisement shall contain a statement of the time when and place where all bids received pursuant to such notice will be publicly opened and read and where the identity of all offerers will be publicly disclosed, and the designation of the receiving device if the political subdivision or district has authorized the receipt of bids and offers in an electronic format. Such board or agency may by resolution designate any officer or employee to open the bids and offers at the time and place specified in the notice. Such designee shall make a record of such bids and offers in such form and detail as the board or agency shall prescribe and present the same at the next regular or special meeting of such board or agency. All bids received shall be publicly opened and read at the time and place so specified and the identity of all offerers shall be publicly disclosed at the time and place so specified. At least five days shall elapse between the first publication of such advertisement and the date so specified for the opening and reading of bids and offers.

2. [Eff June 1, 2023] Advertisement for bids and offers shall be published in the official newspaper or newspapers, if any, or otherwise in a newspaper or newspapers designated for such purpose and may be published in the procurement opportunities newsletter pursuant to article four-C of the economic development law. Such advertisement shall contain a statement of the time when and place where all bids received pursuant to such notice will be publicly opened and read and where the identity of all offerers will be publicly disclosed. Such board or agency may by resolution designate any officer or employee to open the bids and offers at the time and place specified in the notice. Such designee shall make a record of such bids and offers in such form and detail as the board or agency shall prescribe and present the same at the next regular or special meeting of such board or agency. All bids received shall be publicly opened and read at the time and place so specified and the identity of all offerers shall be publicly disclosed at the time and place so specified. At least five days shall elapse between the first publication of such advertisement and the date so specified for the opening and reading of bids and offers.

3. [Eff until July 31, 2024] Notwithstanding the provisions of subdivision one of this section, any officer, board or agency of a political subdivision or of any district therein authorized to make purchases of materials, equipment or supplies, or to contract for services, may make such purchases, or may contract for services, other than services subject to article nine of the labor law, when available, through the county in which the political subdivision or district is located or through any county within the state subject to the rules established pursuant to subdivision two of section four hundred eight-a of the county law; provided that the political subdivision or district for which such officer, board or agency acts shall accept sole responsibility for any payment due the vendor or contractor. All purchases and all contracts for such services shall be subject to audit and inspection by the political subdivision or district for which made. Prior to making such purchases or contracts the officer, board or agency shall consider whether such contracts will result in cost savings after all factors, including charges for service, material, and delivery, have been considered. No officer, board or agency of a political subdivision or of any district therein shall make any purchase or contract for any such services through the county in which the political subdivision or district is located or through any county within the state when bids and offershave been received for such purchase or such services by such officer, board or agency, unless such purchase may be made or the contract for such services may be entered into upon the same terms, conditions and specifications at a lower price through the county.

3. [Eff July 31, 2024] Notwithstanding the provisions of subdivision one of this section, any officer, board or agency of a political subdivision or of any district therein authorized to make purchases of materials, equipment or supplies, or to contract for services, may make such purchases, or may contract for services, other than services subject to article eight or nine of the labor law, when available, through the county in which the political subdivision or district is located or through any county within the state subject to the rules established pursuant to subdivision two of section four hundred eight-a of the county law; provided that the political subdivision or district for which such officer, board or agency acts shall accept sole responsibility for any payment due the vendor or contractor. All purchases and all contracts for such services shall be subject to audit and inspection by the political subdivision or district for which made. Prior to making such purchases or contracts the officer, board or agency shall consider whether such contracts will result in cost savings after all factors, including charges for service, material, and delivery, have been considered. No officer, board or agency of a political subdivision or of any district therein shall make any purchase or contract for any such services through the county in which the political subdivision or district is located or through any county within the state when bids and offers have been received for such purchase or such services by such officer, board or agency, unless such purchase may be made or the contract for such services may be entered into upon the same terms,

conditions and specifications at a lower price through the county.

4. Notwithstanding the provisions of subdivision one of this section, in the case of a public emergency arising out of an accident or other unforeseen occurrence or condition whereby circumstances affecting public buildings, public property or the life, health, safety or property of the inhabitants of a political subdivision or district therein, require immediate action which cannot await competitive bidding or competitive offering, contracts for public work or the purchase of supplies, material or equipment may be let by the appropriate officer, board or agency of a political subdivision or district therein.

5. Upon the adoption of a resolution by a vote of at least three-fifths of all the members of the governing body of a political subdivision or district therein stating that, for reasons of efficiency or economy, there is need for standardization, purchase contracts for a particular type or kind of equipment, material, supplies or services in excess of the monetary threshold fixed for purchase contracts in this section may be awarded by the appropriate officer, board or agency of such political subdivision or any such district therein, to the lowest responsible bidder or responsible offerer furnishing the required security after advertisement for sealed bids or sealed offers therefor in the manner provided in this section. Such resolution shall contain a full explanation of the reasons for its adoption.

6. Surplus and second-hand supplies, material or equipment may be purchased without competitive bidding or competitive offering from the federal government, the state of New York or from any other political subdivision, district or public benefit corporation.

7. A person or corporation who conspires to prevent competitive bidding or competitive offering on a contract for public work or purchase advertised for bidding or offering shall be guilty of a misdemeanor as provided in section one hundred three-e of this article.

8. Where municipal hospitals or nutrition programs that receive federal, state, or local funding purchase goods, supplies and services under joint contracts and arrangements entered into pursuant to section twenty-eight hundred three-a of the public health law, they shall not be required to comply with the provisions of subdivision one of this section.

8-a. (a) Notwithstanding the foregoing provisions of this section, a political subdivision, when letting contracts in accordance with this subdivision for the purchase of food products, may require provisions that mandate that the essential components of such food products are grown, produced or harvested in New York state, or that any processing of such food products take place in facilities located within New York state.

(b) The commissioner of agriculture and markets shall determine, using uniform criteria, those food products for which the requirements of this subdivision are deemed beneficial. The commissioner shall promulgate a list of such food products and ascertain those periods of time each year that the listed food products are available in sufficient quantity for competitive purchasing and shall forward such information upon request to such political subdivisions that shall make determinations as provided herein. The commissioner of agriculture and markets shall update such list as often as he deems necessary.

(c) (i) Such political subdivision shall specify, with the advice of the commissioner of agriculture and markets, the percentage of each food product required to be grown, produced, harvested or processed within New York state.

(ii) Upon a determination by such political subdivision that such food products are not available in sufficient quantity for purchasing, the specifications requiring such purchase shall be waived for that specific food product until the next contract for such food product is let out for bid.

(iii) Upon a determination by such political subdivision that food processing facilities are not available for the processing of food products purchased under specifications required by this section, the specifications requiring such processing shall be waived.

(iv) In the event that such a political subdivision receives no acceptable bids it may waive the provisions of this section and shall award a contract in accordance with other applicable statutes. In addition, if the commissioners of agriculture and markets and economic development agree as to any deleterious economic impact of specifications requiring such purchase, the provisions of this subdivision may be waived by a political subdivision for such purchase.

(d) The commissioner of the office of general services and the commissioner of agriculture and markets may issue such regulations as they deem necessary to implement this subdivision and to assist political subdivisions in complying with this subdivision.

(e) Notwithstanding any other provision of law, the department of agriculture and markets shall supply information required by paragraph (b) of this subdivision to the office of general services within one hundred eighty days of the effective date of this subdivision.

(f) The commissioners of general services, agriculture and markets, and economic development shall provide the legislature with a report on the fifteenth day of January of the second year next succeeding the year in which this subdivision became effective, and in their discretion periodically report thereafter, on the effects of this subdivision and on recommendations on ways to make it more effective.

9. Notwithstanding the foregoing provisions of this section to the contrary, a board of education, on behalf of its school district, or a board of cooperative

educational services, may separately purchase eggs, livestock, fish, dairy products (excluding milk), juice, grains, and species of fresh fruit and vegetables directly from New York State producers or growers, or associations of producers and growers, provided that:

(a)

(i) such association of producers or growers is comprised of ten or fewer owners of farms who also operate such farms and who have combined to fill the order of a school district or board of cooperative educational services as herein authorized, provided however, that a school district or board of cooperative educational services may apply to the commissioner of education for permission to purchase from an association of more than ten owners of such farms when no other producers or growers have offered to sell to such school or board of cooperative educational services; or

(ii) such association of producers or growers is comprised of owners of farms who also operate such farms and have combined to fill the order of a school district or board of cooperative educational services, and where such order is for one hundred thousand dollars or less as herein authorized, provided however, that a school district or board of cooperative educational services may apply to the commissioner of education for permission to purchase orders of more than one hundred thousand dollars from an association of owners of such farms when no other producers or growers have offered to sell to such school;

(b) the amount that may be expended by a school district in any fiscal year for such purchases shall not exceed an amount equal to twenty cents multiplied by the total number of days in the school year multiplied by the total enrollment of such school district;

(b-1) the amount that may be expended by a board of cooperative educational services in any fiscal year for such purchases shall not exceed an amount equal to twenty cents multiplied by the total number of days in the school year multiplied by the number of students receiving services by such board of cooperative educational services at facilities operated by a board of cooperative educational services;

(c) all such purchases shall be administered pursuant to regulations promulgated by the commissioner of education. Such regulations shall: be developed in consultation with the commissioner of agriculture and markets to accommodate and promote the provisions of the farm-to-school program established pursuant to subdivision five-b of section sixteen of the agriculture and markets law and subdivision thirty-one of section three hundred five of the education law as added by chapter two of the laws of two thousand two; ensure that the prices paid by a district or board of cooperative educational services for any items so purchased do not exceed the prices of comparable local farm products that are available to districts through their usual purchases of such items; ensure that all producers and growers who desire to sell to school districts or boards of cooperative educational services can readily access information in accordance with the farm-to-school law; include provisions for situations when more than one producer or grower seeks to sell the same product to a district or board of cooperative educational services to ensure that all such producers or growers have an equitable opportunity to do so in a manner similar to the usual purchasing practices of such districts or boards of cooperative educational services; develop guidelines for approval of purchases of items from associations of more than ten growers and producers; and, to the maximum extent practicable, minimize additional paperwork, recordkeeping and other similar requirements on both growers and producers and school districts.

9-a. Notwithstanding any provision of this section to the contrary, a county may separately purchase eggs, livestock, fish, dairy products, juice, grains, and species of fresh fruit and vegetables directly from New York state producers or growers, or associations of producers and growers, provided that:

(a) such association of producers or growers is comprised of ten or fewer owners of farms who also operate such farms and who have combined to fill the order of a county as herein authorized, provided however, that a county may purchase from an association of more than ten owners of such farms when no other producers or growers have offered to sell to such county;

(b) the amount that may be expended by a county in any fiscal year for such purchases shall not exceed the greater of:

(i) the expenditure threshold provided in subdivision one of this section; or

(ii) twenty cents multiplied by the total population of such county;

(c) all such purchases shall be administered pursuant to policies and procedures adopted by the county governing board and developed in consultation with the commissioner of agriculture and markets. Such policies and procedures shall ensure that the prices paid by a county for any items so purchased do not exceed the prices of comparable local farm products that are available to the political subdivision or district therein through their usual purchases of such items; include provisions for situations when more than one producer or grower seeks to sell the same product to a county to ensure that all such producers or growers have an equitable opportunity to do so in a manner similar to the usual purchasing practices of such county; include guidelines for the approval of purchases of items from associations of more than ten growers or producers; and, to the maximum extent practicable, minimize additional paperwork, recordkeeping and other similar requirements on both growers and producers and counties.

10. Notwithstanding the foregoing provisions of this section to the contrary, a board of education

may, on behalf of its school district, separately purchase milk, directly from licensed milk processors employing less than forty people pursuant to the provisions of this subdivision. The amount that may be expended by a school district in any fiscal year pursuant to this section shall not exceed an amount equal to twenty-five cents multiplied by the total number of days in the school year multiplied by the total enrollment of such school district. All purchases made pursuant to this subdivision shall be administered pursuant to regulations promulgated by the commissioner of education. The regulations promulgated by the commissioner of education shall ensure that the prices paid by a school district for items purchased pursuant to this subdivision do not exceed the market value of such items and that all licensed processors who desire to sell to a school district pursuant to this subdivision have equal opportunities to do so.

11. Bid mistake; public projects. (a) In all contracts governed by this section, where a unilateral error or mistake is discovered in a bid, such bid may be withdrawn after a showing of the following: (1) the mistake is known or made known to the awarding officer, board or agency prior to the awarding of the contract or within three days after the opening of the bid, whichever period is shorter; and (2) the price bid was based on an error of such magnitude that enforcement would be unconscionable; and (3) the bid was submitted in good faith and the bidder submits credible evidence that the mistake was a clerical error as opposed to a judgment error; and (4) the error in the bid is actually due to an unintentional and substantial arithmetic error or an unintentional omission of a substantial quantity of work, labor, material, goods or services made directly in the compilation of the bid, which unintentional arithmetic error or unintentional omission can be clearly shown by objective evidence drawn from inspection of the original work paper, documents, or materials used in the preparation of the bid sought to be withdrawn; and (5) it is possible to place the public agency, board, officer, or subdivision in status quo ante.

(b) Unless otherwise required by law, the sole remedy for a bid mistake in accordance with this section shall be withdrawal of that bid and the return of the bid bond or other security, if any, to the bidder. Thereafter, the awarding officer, board or agency may, in its discretion, award the contract to the next lowest responsible bidder or rebid the contract. Any amendment to or reformation of a bid or a contract to rectify such an error or mistake therein is strictly prohibited.

12. Notwithstanding any other provision of this section or any other provision of law, boards of education shall have the authority to determine that a bidder on a contract for the purchase of apparel or sports equipment is not a responsible bidder for purposes of subdivision one of this section, based upon either or both of the following considerations: (a) the labor standards applicable to the manufacture of the apparel or sports equipment, including but not limited to employee compensation, working conditions, employee rights to form unions, and the use of child labor; or (b) the bidder's failure to provide information sufficient for boards of education to determine the labor standards applicable to the manufacture of the apparel or sports equipment.

13. [Expired]

14. [None]

15. (a) Notwithstanding any general, special or local law or rule or regulation to the contrary, an officer, board or agency of any county, any school district or any political subdivision of the state with a population of fifty thousand or more charged with awarding a contract for public work may establish guidelines governing the qualifications of bidders seeking to bid or enter into such contracts. If such officer, board or agency maintains an appropriate list of qualified bidders, the bidding shall be restricted to those who have qualified prior to the receipt of bids according to standards fixed by such officer, board or agency. In determining whether a prospective bidder qualifies for inclusion on a list of pre-qualified bidders, the officer, board or agency shall consider the experience and record of performance of the prospective bidder in the particular type of work, as well as: (i) the prospective bidder's ability to undertake the particular type and complexity of work; (ii) the financial capability, responsibility and reliability of the prospective bidder for such type and complexity of work; (iii) the record of the prospective bidder in complying with existing labor standards and maintaining harmonious labor relations; (iv) the prospective bidder's compliance with equal employment opportunity requirements and anti-discrimination laws, and demonstrated commitment to working with minority and women-owned businesses through joint ventures or subcontractor relationships; and (v) the record of the prospective bidder in protecting the health and safety of workers on public works projects and job sites as demonstrated by the prospective bidder's experience modification rate for each of the last three years.

(b) Such public officer, board or agency shall, not less than annually, publish in a newspaper of general circulation in such political subdivision an advertisement requesting prospective bidders to submit qualification statements. Lists of pre-qualified bidders may be established on a project-specific basis. Prequalified lists shall include all bidders that qualify; provided, however, that any such list shall have no less than five bidders but shall remain open for all additional qualified bidders. The public officer, board or agency's procedures for prequalifying bidders shall include an appeals process for those denied a place on a pre-qualified list. Any denial must be based upon substantial evidence, cannot be arbitrary or capricious, and shall be subject to judicial review pursuant to article seventy-eight of the civil practice law and rules. The public officer, board

or agency may move forward on the contract award during such appeals.

(c) Any school district or political subdivision of the state with a population of less than fifty thousand may utilize a list of pre-qualified bidders maintained by the county within which the subdivision is located, if such list is maintained.

16. [Expires and repealed July 31, 2021] Notwithstanding the provisions of subdivisions one, two and three of this section, and section one hundred four of this article, any officer, board or agency of a political subdivision or of any district therein authorized to make purchases of apparatus, materials, equipment or supplies, or to contract for services related to the installation, maintenance or repair of apparatus, materials, equipment, and supplies, may make such purchases, or may contract for such services related to the installation, maintenance or repair of apparatus, materials, equipment, and supplies, as may be required by such political subdivision or district therein through the use of a contract let by the United States of America or any agency thereof, any state or any other political subdivision or district therein if such contract was let to the lowest responsible bidder or on the basis of best value in a manner consistent with this section and made available for use by other governmental entities; provided, however, that no political subdivision or district therein, other than a city with a population of one million or more inhabitants or any district, board or agency with jurisdiction exclusively therein, may make such purchases or contract for such services through the use of such a contract let on the basis of best value in a manner consistent with this section unless the political subdivision or district shall first adopt a local law, rule, regulation or resolution, as the case may be, pursuant to subdivision one of this section, authorizing the use of best value for awarding purchase contracts.

The authority provided to political subdivisions and districts therein pursuant to this subdivision shall not relieve any obligation of such political subdivision or district therein to comply with any applicable minority and women-owned business enterprise program mandates and the preferred source requirements of section one hundred sixty-two of the state finance law.

HISTORY:

Add, L 1953, ch 861, § 18, with substance deriving from Pub Wks Law § l5; amd, L 1955, ch 434, § 1, eff April 18, 1955; L 1955, ch 669, § 1; L 1957, ch 984, §§ 1, 2; L 1958, ch 296, § 1; L 1960, ch 997, §§ 2, 3, eff Sept 1, 1960; L 1962, ch 154, § 1; L 1962, ch 196, § 1; L 1963, ch 597, § 1, eff April 23, 1963; L 1967, ch 680, § 65; L 1972, ch 579, § 1; L 1973, ch 336, § 1; L 1973, ch 552, § 1; L 1974, ch 315, § 1, eff May 7, 1974; L 1977, ch 897, § 1; L 1978, ch 287, §§ 1, 2; L 1979, ch 595, § 2, eff July 10, 1979; L 1980, ch 703, § 1; L 1981, ch 635, § 1, eff Sept 1, 1981; L 1983, ch 453, §§ 1, 2; L 1983, ch 454, § 1; L 1983, ch 848, § 1, eff Jan 1, 1984; L 1986, ch 105, § 1; L 1986, ch 741, § 2; L 1991, ch 413, §§ 54, 55; L 1991, ch 429, § 1; L 1993, ch 490, § 7, eff Jan 1, 1994; L 1995, ch 148, § 1, eff July 19, 1995; L 1996, ch 620, § 5; L 1998, ch 622, § 1, eff Oct 20, 1998; L 2001, ch 227, § 1; L 2003, ch 62, §§ 1, 4, 5 (Part X); L 2003, ch 562, § 3, eff Sept 1, 2003; L 2004, ch 269, § 1, eff Aug 3, 2004; L 2005, ch 741, § 4, eff Oct 18, 2005; L 2007, ch 343, § 1, eff July 18, 2007; L 2008, ch 7, § 10; L 2008, ch 8, §§ 6, 7, eff April 27, 2008; L 2008, ch 57, § 1-a (Part MM), eff July 1, 2008; L 2010, ch 56, §§ 1–3 (Part FF), eff June 22, 2010; L 2010, ch 469, § 1, eff Aug 30, 2010; L 2011, ch 97, §§ 4, 5 (Part C, Subpart A), eff June 24, 2011; L 2011, ch 608, §§ 2, 4, eff June 1, 2013; L 2011, ch 608, §§ 1, 3, 5–10, eff Jan 27, 2012; L 2012, ch 2, § 1, eff Jan 27, 2012; L 2012, ch 2, § 2, eff June 1, 2013; L 2012, ch 308, § 1, eff Aug 1, 2012; L 2013, ch 497, § 1, eff Nov 13, 2013; L 2014, ch 367, §§ 1, 2, effective September 23, 2014; L 2016, ch 62, § 1, effective June 8, 2016; L 2017, ch 59, § 39 (Part YYY), effective April 10, 2017; L 2017, ch 90, §§ 1, 2, effective July 21, 2017; L 2017, ch 461, § 2, effective March 18, 2018; L 2018, ch 371, § 1, effective July 21, 2017; L 2020, ch 58, § 1 (Part JJ), effective April 3, 2020.

Editor's Notes Laws 2003, ch 62, § 41(a) (Part X), eff May 15, 2003, provides as follows:

§ 41. This act shall take effect immediately; provided, however,

(a) that sections four, five, six, seven, eight and nine of this act shall expire June 1, 2023 when upon such date the provisions of such sections shall be deemed repealed (Amd, L 2008, ch 133, § 1, eff July 1, 2008, L 2013, ch 298, § 1, eff July 31, 2013, deemed eff on and after June 1, 2013; L 2018, ch 70, § 1, eff June 1, 2018).

Laws 2009, ch 494, § 2 (Part D), eff Nov 12, 2009, provides as follows:

§ 2. This act shall take effect immediately, provided, however that the amendments to subdivision 1 of section 103 of the general municipal law made by section one of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith.

Laws 2010, ch 56, § 13, intro and sub 1 (Part FF), eff June 22, 2010, provides as follows:

§ 13. This act shall take effect immediately and shall apply to any contract let or awarded on or after such date; provided, however, that:

1. the amendments to subdivision 1 of section 103 of the general municipal law made by section one of this act shall not affect the expiration and reversion of such subdivision as provided in subdivision (a) of section 41 of part X of chapter 62 of the laws of 2003, as amended, when upon such date the provisions of section two of this act shall take effect; and.

Laws 2010, ch 469, § 2, eff Aug 30, 2010, deemed eff on and after Dec 31, 2010, provides as follows:

§ 2. This act shall take effect immediately, and shall apply to contracts entered into or otherwise formally solicited on or after such effective date; provided that this act shall expire and be deemed repealed December 31, 2014; and provided further, that this act shall also apply to any contract to which this act would otherwise apply that has been advertised or otherwise formally solicited on or after the effective date of this act and on or before December 31, 2014.

Laws 2011, ch 97, § 9 (Part C, Subpart A), eff June 24, 2011, provides as follows:

§ 9. This act shall take effect immediately, provided, however that:

1. sections four, five, six and seven of this act shall expire and be deemed repealed July 31, 2024 (Amd, L 2014, ch 55, § 2 (Part G), eff March 31, 2014; deemed eff on and after April 1, 2014; L 2019, ch 55 § 3 (Part GG), eff April 12, 2019);

2. the amendments to subdivision 4 of section 97-g of the state finance law made by section two of this act shall survive the expiration and reversion of such subdivision as provided in section 3 of chapter 410 of the laws of 2009, as amended;

3. sections four, five, six and seven of this act shall apply to any contract let or awarded on or after such effective date;

4. section one of this act shall expire and be deemed repealed July 31, 2029 (Add, L 2019, ch 55, § 3 (Part GG), eff April 12, 2019).

Laws 2011, ch 608, § 12, eff Jan 27, 2012, provides as follows:

§ 12. This act shall take effect immediately and shall apply to any contract let or awarded on or after such date; provided,

however, that the amendments to subdivisions 1 and 2 of section 103 of the general municipal law made by sections one and three of this act shall not affect the expiration and reversion of such subdivisions as provided in subdivision (a) of section 41 of part X of chapter 62 of the laws of 2003, as amended, when upon such date the provisions of sections two and four of this act shall take effect.

Laws 2012, ch 308, § 2, eff Aug 1, 2012, provides as follows:

§ 2. This act shall take effect immediately, and shall expire and be deemed repealed July 31, 2021 (Amd, L 2014, ch 55, § 5 (Part G), eff March 31, 2014, deemed eff on and after April 1, 2014; L 2018, ch 211, § 1, eff Aug 24, 2018).

Laws 2013, ch 497, § 3, eff Nov 13, 2013, provides as follows:

§ 3. This act shall take effect immediately; provided, however, that the amendments to subdivision 16 of section 103 of the general municipal law made by section one of this act shall not affect the repeal of such subdivision and shall be deemed repealed therewith; and provided further, however, that the amendments to subdivision 2 of section 104 of the general municipal law made by section two of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith.

Laws 2014, ch 367, § 3, eff Sept 23, 2014, provides as follows:

§ 3. This act shall take effect immediately, provided that the amendments to subdivision 2 of section 103 of the general municipal law made by section one of this act shall be subject to the expiration and reversion of such subdivision pursuant to subdivision (a) of section 41 of part X of chapter 62 of the laws of 2003, as amended, when upon such date the provisions of section two of this act shall take effect.

Laws 2017, ch 59, § 63 (Part YYY), eff April 10, 2017, provides:

§ 63. This act shall take effect immediately, and shall be deemed to have been in full force and effect on and after April 1, 2017, provided, however, that:

1. sections one, two, five, sixteen, sixteen-a, twenty-two, twenty-three, twenty-four, twenty-five, twenty-six, twenty-seven, twenty-eight, twenty-nine, thirty, thirty-one, thirty-one-a, thirty-one-b, thirty-two, thirty-three, thirty-four, thirty-five, thirty-eight, forty-eight, fifty-one, fifty-five, fifty-six, sixty and sixty-one of this act shall take effect July 1, 2017;

2. the amendments to chapter 756 of the laws of 1992, relating to funding a program for work force education conducted by a consortium for worker education in New York City, made by sections forty-four and forty-five of this act, shall not affect the repeal of such chapter and shall be deemed repealed therewith;

3. the amendments to chapter 89 of the laws of 2016, relating to supplementary funding for dedicated programs for public school students in the East Ramapo central school district, made by section forty-eight of this act shall not affect the repeal of such chapter and shall be deemed repealed therewith;

4. the amendments to subdivision 33 of section 305 of the education law, made by section seven of this act, shall not affect the repeal of such subdivision and shall be deemed repealed therewith;

5. the amendments to subdivision 7 of section 2802 of the education law, made by section eight of this act, shall not affect the repeal of such subdivision and shall be deemed repealed therewith;

6. the amendments to subdivision 7 of section 3214 of the education law, made by section nine of this act, shall not affect the repeal of such subdivision and shall be deemed repealed therewith;

7. the amendments to section 2590-c of the education law made by section nineteen of this act shall not affect the repeal of such section and shall be deemed repealed therewith;

8. the amendments to subdivision 1 of section 2856 of the education law made by section four of this act shall be subject to the expiration and reversion of such subdivision pursuant to subdivision d of section 27 of chapter 378 of the laws of 2007, as amended, when upon such date the provisions of section four-a of this act shall take effect;

9. the amendments to paragraphs d-1 and d-2 of subdivision 12 of section 3602-e of the education law made by section twenty-eight-a of this act shall not affect the repeal of such paragraphs and shall be deemed repealed therewith; and

10. the amendments to paragraph b-1 of subdivision 4 of section 3602 of the education law made by section sixteen-a of this act shall not affect the expiration of such paragraph and shall expire therewith.

Laws 2017, ch 461, § 4, eff December 18, 2017, provides:

§ 4. This act shall take effect immediately; provided, however, that sections one and two of this act shall take effect on the ninetieth day after it shall have become a law and shall apply to all public works bids and contracts solicited on or after such effective date and shall expire and be deemed repealed three years from such effective date; provided, that any contractor or subcontractor who is ineligible to submit a bid on any public work contract pursuant to this act shall remain ineligible as long as the name of the person or entity is published in the list of debarred contractors pursuant to 40 U.S.C. 3144 notwithstanding such repeal of this act; provided, further however, this act shall not apply retroactively to previously issued or existing public works contracts, with the state, any municipal corporation, public benefit corporation or public body.

Laws 2018, ch 371, § 2, eff July 21, 2017, provides:

§ 2. This act shall take effect on the same date and in the same manner as a chapter of the laws of 2017, amending the general municipal law, relating to purchasing on the behalf of a school district or a board of cooperative educational services, as prepared in legislative bills numbers A.6910-B and S.5251-B, takes effect.

Amendment Notes The 2014 amendment by ch 367, §§ 1, 2 added "and may be published in the procurement opportunities newsletter pursuant to article four-C of the economic development law" at the end of the first sentence of 2 [first and second setouts].

The 2016 amendment by ch 62, § 1, added the 9(a)(i) designation; added 9(a)(ii); and made a related change.

The 2017 amendment by ch 59, § 39 (Part YYY), substituted "fifty thousand dollars" for "twenty-five thousand dollars" twice in 9(a)(ii).

The 2017 amendment by ch 461, § 2, added 1-c.

The 2018 amendment by ch 371, § 1, deleted "apply to the commissioner of the office of general services for permission to" preceding "purchase" in 9-a(a); and in 9-a(c), substituted "policies and procedures adopted by the county governing board" for "regulations promulgated by the commissioner of the office of general services" in the first sentence and substituted "policies and procedures" for "regulations" in the second sentence.

The 2020 amendment by ch 58, § 1 (Part JJ), substituted "one hundred thousand dollars" for "fifty thousand dollars" twice in 9(a)(ii).

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1. In general

The above statute is based upon motives of public economy and may have originated in some degree of distrust of the officers to whom the duty of making contracts for the public service was committed. If executed according to its intention it will preclude favoritism and jobbing, and it is obvious that a contract made in violation of its requirements is null and void. Gerzof v Sweeney, 16 N.Y.2d 206, 264 N.Y.S.2d 376, 211 N.E.2d 826, 1965 N.Y. LEXIS 1040 (N.Y. 1965), reh'g denied, 17 N.Y.2d 549, 1966 N.Y. LEXIS 1945 (N.Y. 1966).

In view of the strong policy considerations underlying the enactment of section 103 of the General Municipal Law, which requires competitive bidding in the letting of contracts for public work in order to promote economy and exclude favoritism, a public work contract let in violation of that statute is generally held to be void. Albion Industrial Center v Albion, 62 A.D.2d 478, 405 N.Y.S.2d 521, 1978 N.Y. App. Div. LEXIS 10863 (N.Y. App. Div. 4th Dep't), app. denied, 45 N.Y.2d 710, 1978 N.Y. LEXIS 3174 (N.Y. 1978).

This section applies to purchases of materials and supplies by town superintendent where cost exceeds $1,000. No authority to dispense with competitive bidding where purchases "are made under state or county bid prices". Duties of county superintendent with reference to town highway purchases discussed. 1953 Op St Compt No. 53-6407.

Where a town has rejected all bids on a public works project, and where it can have the work done for less than $2,500, the town does not have to readvertise for new bids and may award the contract without complying with competitive bidding procedures. 1968 Op St Compt No. 68-831.

A municipality may exercise the option to purchase street lights contained in a lease with option to purchase if such contract was entered into in good faith and the option price represents the fair market value of the lights at the time of purchase. No competitive bidding would be necessary if the lease with option to purchase was initially competitively bid. The term of an expired public works contract may not be extended by mutual consent of the parties. 1979 Op St Compt No. 79-458, 1979 N.Y. Comp. LEXIS 191.

Town's determination that petitioner's bid for a refuse collection contract was deficient because petitioner failed to demonstrate it had either a license issued by the town or a valid joint venture agreement with a duly licensed carter, or that it had either the requisite experience or ability to fulfill the contract specifications, were sufficient to support rejection of petitioner's bid on the contract. Matter of AAA Carting & Rubbish Removal, Inc. v Town of Clarkstown, 132 A.D.3d 857, 18 N.Y.S.3d 124, 2015 N.Y. App. Div. LEXIS 7720 (N.Y. App. Div. 2d Dep't 2015), app. denied, 26 N.Y.3d 918, 47 N.E.3d 93, 26 N.Y.S.3d 763, 2016 N.Y. LEXIS 153 (N.Y. 2016).

2. Purpose

Provisions mandating that public work contracts be awarded to lowest responsible bidder reflects purpose to guard against favoritism, improvidence, extravagance, fraud and corruption, and were intended to benefit taxpayers and be administered with sole reference to public interest. Conduit & Foundation Corp. v Metropolitan Transp. Authority, 66 N.Y.2d 144, 495 N.Y.S.2d 340, 485 N.E.2d 1005, 1985 N.Y. LEXIS 17168 (N.Y. 1985).

Section 103 of the General Municipal Law and similar statutes were enacted to protect municipalities and taxpayers, and not to benefit or enrich bidders. Allen v Eberling, 24 A.D.2d 594, 262 N.Y.S.2d 121, 1965 N.Y. App. Div. LEXIS 3578 (N.Y. App. Div. 2d Dep't 1965).

The aim of the above statute is to obtain the lowest price for the purchase or work under consideration and under it every element which enters into the competitive scheme should be required equally for all and should not be left to the volition of the individual aspirant to follow or to disregard and thus to estimate his bid on a different basis than other contenders, a common standard by which all bidders are to be measured being implied by the statute. Gottfried Baking Co. v Allen, 45 Misc. 2d 708, 257 N.Y.S.2d 833, 1964 N.Y. Misc. LEXIS 1229 (N.Y. Sup. Ct. 1964).

General Municipal Law § 103 was enacted to protect municipalities and its taxpayers and not for the benefit of the bidders. Fonseca v Board of Education, 58 Misc. 2d 223, 294 N.Y.S.2d 952, 1968 N.Y. Misc. LEXIS 1179 (N.Y. Sup. Ct. 1968).

Petitioner was not entitled to be awarded a sewer contract as low bidder, even though federal notice requirements were complied with, where through inadvertence no advertisements inviting bids on the project appeared in the authorized county newspaper; the controlling statute was to be strictly construed and contracts awarded absent strict compliance were void since the purpose of the statute was to protect the public rather than the competing bidders. Marvec-All State, Inc. v Purcell, 110 Misc. 2d 67, 441 N.Y.S.2d 618, 1981 N.Y. Misc. LEXIS 3041 (N.Y. Sup. Ct. 1981), aff'd, 87 A.D.2d 593, 450 N.Y.S.2d 411, 1982 N.Y. App. Div. LEXIS 15861 (N.Y. App. Div. 2d Dep't 1982).

Statutory requirements for public bidding are not primarily enacted to enable a contractor to prosper in his business, but rather to assure that public affairs will be conducted economically, efficiently, and honestly, but nevertheless contractors should not be disqualified in advance from bidding by action of a Board of Education under subd. 12 of § 2556 of the Education Law without particularization of charges against them and an opportunity to be heard. Application of Pipe & Engineering Co., 220 N.Y.S.2d 175 (N.Y. Sup. Ct. 1961).

3. Construction

A contract which provides for a lesser income to the governmental unit than a competitor's contract might provide is an "expenditure" within the meaning of General Municipal L § 103. Signacon Controls, Inc. v Mulroy, 32 N.Y.2d 410, 345 N.Y.S.2d 527, 298 N.E.2d 670, 1973 N.Y. LEXIS 1214 (N.Y. 1973).

Unsuccessful bidder's Article 78 proceeding, which challenged city's selection of other contractors and sought preliminary injunction to prevent certification of let contracts, was converted into declaratory judgment action although injunctive proceeding was moot because work under contracts at issue was completely or substantially done, where issues raised in petition challenged validity of relatively new and pervasive public bidding regulations being used by city. Diamond Asphalt Corp. v Sander, 92 N.Y.2d 244, 678 N.Y.S.2d 567, 700 N.E.2d 1203, 1998 N.Y. LEXIS 1828 (N.Y. 1998).

In an action by the lowest bidder to challenge the award of a contract for the management of a town's refuse collection stations to the highest bidder, the town board had a rational basis for rejecting his bid and its decision was neither arbitrary nor capricious where, in light of the board's previous unsatisfactory experience with him and the potential use of unsatisfactory equipment by him, the board concluded that he was not a responsible bidder. Lauvas v Bovina, 86 A.D.2d 694, 446 N.Y.S.2d 516, 1982 N.Y. App. Div. LEXIS 15241 (N.Y. App. Div. 3d Dep't 1982).

CLS Gen Mun § 103, prescribing manner in which bids would be requested and contracts awarded, was enacted to protect municipalities and taxpayers, not to benefit bidders. Stride Contracting Corp. v Board of Contract & Supply, 181 A.D.2d 876, 581 N.Y.S.2d 446, 1992 N.Y. App. Div. LEXIS 4978 (N.Y. App. Div. 2d Dep't 1992).

In requiring the letting of contracts to the lowest "responsible" bidder, the word quoted is the key word, meaning "accountable" or

"reliable." Meyer v Board of Education, 31 Misc. 2d 407, 221 N.Y.S.2d 500, 1961 N.Y. Misc. LEXIS 2271 (N.Y. Sup. Ct. 1961).

Subdivision 4 of this section authorizes letting of contracts without competitive bidding only in emergency situations, which means under "unforeseen occurrences or conditions," and competitive bidding cannot be suspended by resolution declaring an emergency if none in fact exists. Rodin v Director of Purchasing, 38 Misc. 2d 362, 238 N.Y.S.2d 2, 1963 N.Y. Misc. LEXIS 2314 (N.Y. Sup. Ct. 1963).

Statutes requiring competitive bidding for award of municipal contracts are enacted for benefit of property holders and taxpayers and not for benefit or enrichment of bidders; thus statutes should be construed and administered to accomplish such purpose fairly and reasonably with sole reference to public interest. Surdell v Oswego, 91 Misc. 2d 1041, 399 N.Y.S.2d 173, 1977 N.Y. Misc. LEXIS 2476 (N.Y. Sup. Ct. 1977).

4. Relationship to other laws

This section of the General Municipal Law must be regarded as superseding all local laws to the extent that a conflict exists between such local laws and this section. 1954 Op St Compt No. 54-6899.

Reaffirmance of Opn No. 79-557 to the effect that a Board of Cooperative Educational Services may enter into installment contracts, generally. If an agreement entered into by a BOCES purports to be a lease of personal property, it must be in compliance with the provisions of Education Law, § 1950(4)(y). 1980 Op St Compt No. 80-159.

Contracts which are entered into under State or county contracts, or pursuant to competitive bidding, are not excepted from the conflicts of interest statutes. 1980 Op St Compt No. 80-633, 1980 N.Y. Comp. LEXIS 244.

It would seem that General Municipal Law § 103(1) does not pre-empt the enactment of a local law requiring, among other "affirmative actions", that prime contractors on construction contracts which are subject to competitive bidding requirements set aside a certain percentage of their contracts for the award of subcontracts to minority business enterprises. This Department is not in a position to determine whether such a local law adopted by a county is inconsistent with General Municipal Law, § 103(1). Prior opinions superseded to the extent inconsistent. 1980 Op St Compt No. 80-696.

It would appear that contracts entered into on or after June 26, 1980 for the operation of a sanitary landfill on municipal property may be entered into either pursuant to competitive bidding requirements of General Municipal Law, § 103 or pursuant to the alternate procedures set forth in General Municipal Law, § 120-w. It would appear that contracts for the operation of such a sanitary landfill prior to that date would be subject to the bidding requirements of section 103. 1981 Op St Compt No. 81-109, 1981 N.Y. Comp. LEXIS 769.

It would appear that a provision in the Tompkins County Charter providing that perishable foods, drugs and medical supplies may be purchased without competitive bidding is preempted by section 103 of the General Municipal Law, unless such provision is essentially a revision or codification of a pre-September 1, 1953 special or local law. 1981 Op St Compt No. 81-109, 1981 N.Y. Comp. LEXIS 769.

5. —Highway laws

Highway Law § 193, not this section, applies to letting of contracts for improvement of town highways. 1955 Op St Compt No. 55-7472.

Public advertisement for bids on highway equipment is not effected by notice pursuant to the repealed language of § 142 of the Highway Law concerning the town board's meeting to approve purchases of over $1,000. 1955 Ops St Compt No. 55-7654.

Discussion of county superintendent's power to approve purchase contracts pursuant to § 142(1, b) of the Highway Law. 1960 Op St Compt No. 60-673.

Provision in Subdivision 4 of CLS Highway Law § 142-c, which provides that work authorized by that section shall be performed upon such terms and conditions as may be agreed upon by town board and village board, clearly anticipates negotiated agreement between two governing boards, and therefore represents express statement by State Legislature that agreements entered into pursuant to § 142-c are not subject to competitive bidding requirements of CLS Gen Mun Laws § 103. 1989 Op State Compt No. 89-57, 1990 Op St Compt No. 89-57, 1990 N.Y. Comp. LEXIS 1.

6. —Other laws

City of Rochester Ordinance 82-450, providing for preferences to be given to bidders on municipal contracts where bidders' employees participate in state-approved apprenticeship program for certain trades, is invalid as violative of Gen Mun Law § 103 and similar legislative enactments requiring competitive bidding; although public policy is to encourage sound apprenticeship training standards and to equalize minimum labor costs between union contracts and nonunion employers, predominent purpose of legislature was protection of public fisc by requiring competitive bidding, and while apprentice training is desirable end, it was not intended to affect qualification of an otherwise responsible low bidder. Associated Builders & Contractors, Inc. v Rochester, 67 N.Y.2d 854, 501 N.Y.S.2d 653, 492 N.E.2d 781, 1986 N.Y. LEXIS 17597 (N.Y. 1986).

New York City Charter § 313(b)(2) approved by voters in 1989, which transferred bypass authority from defunct New York City Board of Estimate under pre-1953 charter to mayor, was not mere "revision" of pre-1953 charter and thus did not continue city's authority to bypass bid selection procedures under CLS Gen Mun § 103(1), which provides that all public work contracts must be awarded to lowest responsible bidder "except as otherwise expressly provided by...local law adopted prior to September 1, 1953." Diamond Asphalt Corp. v Sander, 92 N.Y.2d 244, 678 N.Y.S.2d 567, 700 N.E.2d 1203, 1998 N.Y. LEXIS 1828 (N.Y. 1998).

New York City Equal Benefits Law, New York City, N.Y., Admin. Code § 6-126 is preempted by N.Y. Gen. Mun. Law § 103(1) because it is plainly in tension with the requirement that the city give contracts to the lowest bidder. Under N.Y. Const. art. 9, § 2c(ii) and N.Y. Gen. Mun. Home Rule Law § 10(1)(ii), a city is not allowed to adopt laws of this nature where the legislature restricted such. Matter of Council of City of N.Y. v Bloomberg, 6 N.Y.3d 380, 813 N.Y.S.2d 3, 846 N.E.2d 433, 2006 N.Y. LEXIS 149 (N.Y. 2006).

The General Municipal Law, providing for threshold of $3,500 for public work contracts and $1,500 for purchase contract prevailed over code provision that board of legislators shall fix a sum not to exceed $1,000 as limit above which any contract must be advertised for sealed bids where the county charter was not adopted until 1961 and the code a year later, and competitive bidding was not required as to installation of direct dialing system at the county-maintained hospital at cost of approximately $1,300. Williams v Bryant, 53 A.D.2d 229, 385 N.Y.S.2d 425, 1976 N.Y. App. Div. LEXIS 12512 (N.Y. App. Div. 4th Dep't 1976).

An executive order that provided for a minimum of 10 percent of all construction contracts awarded by a city to be awarded to locally based enterprises would be declared unconstitutional, since it was an undisguised attempt on the part of the executive branch to mandate unconstitutional quotas, it violated Gen Mun Law § 103(1) by allowing locally based enterprises to escape the competitive bidding provisions that control on both state and municipal levels, and it violated Gen Mun Law § 103(1) by allowing locally based enterprises to proceed without posting proper security for their work. Subcontractors Trade Ass'n v Koch, 96 A.D.2d 774, 465 N.Y.S.2d 825, 1983 N.Y. App. Div. LEXIS 19371 (N.Y. App. Div. 1st Dep't 1983), aff'd, 62 N.Y.2d 422, 477 N.Y.S.2d 120, 465 N.E.2d 840, 1984 N.Y. LEXIS 4359 (N.Y. 1984).

New York City School Construction Authority is exempt from CLS Gen Mun § 103 under CLS Pub A § 1734(1)(a). George F. Kolsch, Inc. v New York City Sch. Constr. Auth., 211 A.D.2d 680, 621 N.Y.S.2d 628, 1995 N.Y. App. Div. LEXIS 278 (N.Y. App. Div. 2d Dep't), app. dismissed, 85 N.Y.2d 935, 628 N.Y.S.2d 53, 651 N.E.2d 921 (N.Y. 1995).

City was properly granted summary judgment in action alleging that "turnkey" contract for construction of new court and police facility was illegal for failure to comply with competitive

bidding requirements where pre-1953 local law specifically provided for waiver of competitive bids when city manager determined that subject of proposed contract was such that completion was "impossible or impracticable" via competitive bidding process, and city manager found that competitive bidding was impractical because, inter alia, project required timely completion and cost-effective fixed price which competitive bidding could not secure, new facility was necessary, construction on privately-owned land was required, site owned by developer was most appropriate and environmentally safe, developer would not transfer site without being awarded contract, and condemnation of site was too costly. Imburgia v City of New Rochelle, 223 A.D.2d 44, 645 N.Y.S.2d 111, 1996 N.Y. App. Div. LEXIS 7260 (N.Y. App. Div. 3d Dep't), app. denied, 88 N.Y.2d 815, 651 N.Y.S.2d 17, 673 N.E.2d 1244, 1996 N.Y. LEXIS 3299 (N.Y. 1996).

In view of this section and §§ 1709(6), 1804, 1805, and 7203, Education Law, and § 101, General Municipal Law, the legislature pre-empted not only the area of plans and specifications in the building of schools, but also the field of actual construction, and vested such power in the commissioner of education, so that a school board was not subject to local municipal building or plumbing codes in building schools. Poughkeepsie v Hopper Plumbing & Heating Corp., 46 Misc. 2d 761, 260 N.Y.S.2d 901, 1965 N.Y. Misc. LEXIS 1741 (N.Y. Sup. Ct. 1965), aff'd, 26 A.D.2d 772, 272 N.Y.S.2d 974, 1966 N.Y. App. Div. LEXIS 6124 (N.Y. App. Div. 2d Dep't 1966).

CLS Gen Mun § 103(1), regarding competitive bidding requirements, did not preempt competitive bidding exceptions in new New York City Charter, even though new charter was promulgated after statute's September 1, 1953, date after which all local laws purporting to create bidding exceptions are preempted, since new charter was merely recodification, restatement and revision of pre-date provisions. United States v New York, 972 F.2d 464, 1992 U.S. App. LEXIS 18654 (2d Cir. N.Y. 1992).

Award of city contract for purchase of computer hardware did not fall within the service exception of CLS Gen Mun Law § 103(1), where city accepted a bid from vendor based, in part, on outdated and inaccurate information, but contended that it was not required to select the lowest bidder due to the service exception, because city did not invite innovative design proposals but a designated machine requiring only installation and maintenance. Pacificorp Capital, Inc. v New York, 741 F. Supp. 481, 1990 U.S. Dist. LEXIS 8697 (S.D.N.Y. 1990).

A water district must let purchase contracts in accordance with this section and a town water district must let construction contracts in accordance with Town Law § 197. 1956 Op St Compt No. 56-8097.

II. Applicability of Bidding Requirements to Particular Agencies, Officials, etc.

7. In general

If the responsible municipal agency reasonably believes that the cost of an item of supply will aggregate more than $1,000.00 in an operating year, the contract must be submitted to competitive bidding. 1955 Op St Compt No. 55-7104.

Statutory public bidding and advertisement requirements are applicable to municipal corporations. 1967 Op St Compt No. 67-200.

8. Cities

Where the New York City charter required that contracts involving more than $2500 be founded on a sealed bid public letting, the comptroller was not arbitrary in refusing to register and certify as a valid contract a management consulting contract for $250,000 awarded by the mayor without competitive bidding and without the approval of the board of estimates. New York v Beame, 37 A.D.2d 89, 322 N.Y.S.2d 503, 1971 N.Y. App. Div. LEXIS 3716 (N.Y. App. Div. 1st Dep't 1971).

The City of Jamestown may engage a private collection agency to assist it with delinquent accounts owing to its Board of Public Utilities, any such contract may be subject to competitive bidding. 1979 Op St Compt No. 79-142.

9. Educational institutions

Although faculty-student association of community college advertised for bids on "skill and amusement games," where "information for bidders" provided that bids would be received by board of trustees of community college, that bids should be addressed to president of college, and both "information for bidders" and advertisement provided that board of trustees reserved right to reject any bids and to waive all formalities in bid, college was so united with association in advertising and awarding of contract that section of general municipal law relating to public work contracts governed award of contract. De Bonis v Hudson Valley Community College, 55 A.D.2d 778, 389 N.Y.S.2d 647, 1976 N.Y. App. Div. LEXIS 15566 (N.Y. App. Div. 3d Dep't 1976).

In a proceeding by an unsuccessful bidder in the award of a contract of purchase, service and supply to a food vending machine concession for a faculty-student association on a college campus, the trial court erred in annulling a contract between the association and the successful bidder where, pursuant to CPLR § 7804(h), the trial court should have ordered a trial and not proceeded in a summary fashion in that the record contained ample evidence to raise questions of fact with respect to whether the grantee of the food vending machine concession was so constrained by the contract between it and the college that the grantee could be deemed a functionary of the college when it awarded the contract, so as to make the contract subject to the competitive bidding requirements of Gen Mun Law § 103, whether the grantee's contractual rights to operate vending machines in the college's building constituted a franchise rather than a contract to perform public work, and whether the contract was illegal in that it anticipated use of the college's facilities by the grantee without any compensation to the college. Parkway Vending Services, Inc. v Faculty-Student Asso. of Broome Community College, Inc., 82 A.D.2d 933, 440 N.Y.S.2d 756, 1981 N.Y. App. Div. LEXIS 14664 (N.Y. App. Div. 3d Dep't 1981).

In an action seeking a declaration of the invalidity of a completion contract between a county sewer district and the sureties of the defaulting contractor, the award of the contract to the sureties did not violate Gen Mun Law § 103, which permits a municipal agency to reject all bids and readvertise for new bids where the advertising for bids specifically reserved the right. Furthermore, when a contractor had defaulted, the municipal agency may enter into a new contract with the surety for completion of the work without pursuing bid proposals under § 103. Spencer, White & Prentis, Inc. v Southwest Sewer Dist., 103 A.D.2d 802, 477 N.Y.S.2d 681, 1984 N.Y. App. Div. LEXIS 19426 (N.Y. App. Div. 2d Dep't), app. dismissed, 63 N.Y.2d 607, 1984 N.Y. LEXIS 5420 (N.Y. 1984), app. dismissed, 63 N.Y.2d 952, 1984 N.Y. LEXIS 6395 (N.Y. 1984).

School district award of a bid to a higher bidder over a low bidder who failed to bid on an alternate did not violate N.Y. Gen. Mun. Law § 103 because the failure to prioritize alternates prior to the bids being opened was not a sufficient ground to disturb an award to a higher bidder in the absence of a showing of actual favoritism or fraud, the school district provided a plausible explanation for not giving a priority ranking to the alternates in that it could not have done so because it did not know the cost of each alternate until it opened the bids, the school district provided a rational basis for its decision to have the alternate constructed and therefore reasonably rejected the low bid because it failed to bid on that alternate, and the school district did not improperly change the specifications after the close of the bidding process. Sicoli & Massaro, Inc. v Grand Island Cent. Sch. Dist., 309 A.D.2d 1229, 765 N.Y.S.2d 109, 2003 N.Y. App. Div. LEXIS 10056 (N.Y. App. Div. 4th Dep't 2003).

Since this section, requiring the letting of purchase contracts involving more than $1000, to the lowest responsible bidder, does not exclude school boards, it is deemed applicable to purchases made by them, and a violation of its provisions is subject to judicial review without prior appeal to the Commissioner of Education. Buffalo Audio Center Arrolite Co. v Union Free School Dist., 29 Misc. 2d 871, 208 N.Y.S.2d 760, 1960 N.Y. Misc. LEXIS 1998 (N.Y. Sup. Ct. 1960), aff'd, 15 A.D.2d 991, 226 N.Y.S.2d 1024, 1962 N.Y. App. Div. LEXIS 10696 (N.Y. App. Div. 4th Dep't 1962).

The City of Utica is not subject to the provisions of General Municipal Law, § 103(1) and (4) with the exception of the requirement for public bidding on contracts for public works involving an expenditure of more than $3500 and supply of

materials or purchase contracts involving expenditures of more than $1500. 1976 NY Ops Atty Gen August 20 (Informal), 1976 N.Y. AG LEXIS 144.

A school district may not award a contract to a discount house where the provisions of section 103 of the General Municipal Law are not complied with, if the amount of the purchase is over $1000. 1960 Op St Compt No. 60-731.

This section is inapplicable to Boards of Cooperative Educational Services. 1961 Op St Compt No. 61-754.

Where municipal or school district officials know, or have reason to believe, that purchase of a certain item of equipment or supply will amount to more than $1,000 in a fiscal year, all purchase contracts for that item must be competitively let even though each individual purchase contract is less than $1,000. 1962 Op St Compt No. 62-640.

A faculty-student association which owns vending machines and has a contract with a community college to supply food and vending services may enter into an agreement with a vending company for servicing and supplying of products for the vending machines without being subject to any requirement that contracts be let to the lowest responsible bidder after advertisement for bids. 1979 Op St Compt No. 79-449, 1979 N.Y. Comp. LEXIS 186.

In determining whether a bidder, a bus company for transportation of students, is a responsible bidder, the bidder's criminal record, a criminal investigation of, or an indictment against, the bidder, can be taken into account. When the determination of non-responsibility would adversely affect a bidder's ability to carry on his business, the bidder has a cognizable due process liberty interest and is entitled to notice of the reasons for the municipality's concern over his responsibility and an opportunity to rebut the charges. 1990 Op St Compt 90-48, 1990 N.Y. Comp. LEXIS 44.

A transaction entered into by BOCES with a private contractor to construct educational facilities must be in compliance with section 1958 of the Education Law and section 103 of the General Municipal Law. The local assessor should make a determination as to the taxable or exempt status of the property and leave legal clarification of the issue of compliance with the above laws to the parties involved. 3 Op Counsel, SBEA No. 23.

School board's authorizing the district principal to purchase a truck at a certain cost was in violation of competitive bidding requirements. NY Ops Educ Comm No. 9003.

10. Fire districts

Town board was not required to seek competitive bids on contract for fire protection district. Riley v Town Board, Halfmoon, 86 Misc. 2d 114, 382 N.Y.S.2d 230, 1976 N.Y. Misc. LEXIS 2408 (N.Y. Sup. Ct. 1976).

A fire district has no authority to lease fire fighting apparatus. If such equipment is purchased, the contracts must be competitively let. Fire district may not make purchases on an installment payment plan. 1956 Op St Compt No. 56-7886.

A fire district may not purchase without complying with competitive bidding requirements a used pumper from a fire protection district located in the State of Maryland. 1965 Op St Compt No. 65-778.

The Camillus Volunteer Fire Department may, without public bidding, purchase an ambulance with its own funds and then donate the ambulance to the village. But, any purchase made with village funds must meet the requirements of public bidding. 1979 Op St Compt No. 79-666.

There is no requirement that a town board on behalf of a fire protection district award contracts for fire protection pursuant to formal competitive bidding requirements. 1982 Op St Compt No. 82-163, 1982 N.Y. Comp. LEXIS 555.

11. Highway departments

A County Superintendent of Highways is an officer, as defined in County Law, § 408(a)(1), and must therefore award contracts in accordance with the procedures outlined in General Municipal Law, § 103. Such contracts must be competitively bid, if the value exceeds $1,000.00 for purchase contracts or $2,500.00 for public works contracts, and the award must be made to the lowest responsible bidder. 1972 NY Ops Atty Gen June 23 (Informal), 1972 N.Y. AG LEXIS 107.

A purchase made without competitive bidding by the county superintendent of highways is illegal. 1954 Op St Compt No. 54-6575.

A town may not pay all or part of a claim for a certain item purchased by the town highway superintendent, without competitive bidding on five separate occasions even though one of the purchases was for less than $1,000. Under the circumstances, where town officers know, or have reason to believe, that the purchase of a certain item of supply will amount to more than $1,000 in a fiscal year, all purchase contracts for that item must be competitively let. In the absence of an agreement required by Section 284 of the Highway Law, expenditures for highway repair and improvement are illegal. 1968 Op St Compt No. 68-315.

12. Libraries

A petitioner attacked the validity of a resolution and awarding of publishing contracts by a city school board, on the ground, that there was no advertising for bids. He was not required to show, that he was an aggrieved party, or that he had a special interest, since the proper advertising for bids and the letting of contracts is a matter of public interest. The Court vacated the resolution and set aside the contracts for failure of the Board to advertise for bids. McDonough v Board of Education, 20 Misc. 2d 98, 189 N.Y.S.2d 401, 1959 N.Y. Misc. LEXIS 3188 (N.Y. Sup. Ct. 1959).

If the cost of books will aggregate more than $1,000 in an operating year, the Board of Trustees of a public library must submit the contract to competitive bidding. 1962 NY Ops Atty Gen Feb 7 (Informal), 1962 N.Y. AG LEXIS 73.

A town public library is required to submit to public bid a contract for the installation of a new heating plant which will cost over $1,000. 1956 Op St Compt No. 56-8093.

Where there is more than one source of supply, school district library's purchase of any particular book or set of books involving an expenditure of more than $1,000 in a fiscal year is subject to competitive bidding. 1956 Op St Compt No. 56-8185.

Moneys received by the trustees of a village public library from gifts, legacies and an endowment fund are subject to the provisions of Article 5-A of the General Municipal Law. 1959 Op St Compt No. 59-937.

A contract of a joint public library for the technical processing of its books, which involves an expenditure of more than $2,500, is subject to competitive bidding requirements. 1968 Ops St Compt No. 68-901.

It would appear that a free association library which is designated as a third party to implement part of a county community development program which involves removing architectural barriers at the library is acting as an agency of the county for that purpose and would be subject to the same competitive bidding requirements as the county. Bidding is not required if the portion of a given library contract which is allocable to the Community Development Project (removing architectural barriers) does not exceed the monetary bidding threshhold. 1980 Op St Compt No. 80-54.

The purchase of books by a library system for or on behalf of a member library is subject to bidding requirements if such purchase would be subject to bidding requirements if made by the library itself. Opns St Comp, 1962, No. 62-835 and Opns St, 1980 N.Y. Comp. LEXIS 364 (Comp 1976).

13. Towns

A town may not enter into a contract for public work or purchase of material above the statutory amount without advertising for bids. The impropriety of such a contract can not be overcome by a provision therein for subsequent public bidding on the several separable portions of the work. 1976 NY Ops Atty Gen August 12 (Informal), 1976 N.Y. AG LEXIS 141.

Where past experience shows that the annual expenditure for gasoline exceeds $1,000, a town must advertise for bids, unless it buys under State or County contract. 1956 Op St Compt No. 56-8049.

Discussion of multiple questions concerning town government. 1978 Op St Compt No. 78-328.

The purchase by a town on behalf of a lighting district of certain lighting fixtures, light standards and cable would not constitute the purchase of a public utility system and would not be subject to a mandatory referendum. However, it would appear that such a purchase would be subject to competitive bidding. 1978 Op St Compt No. 78-851.

A town may not designate a private company as the "agent" of the town for the purpose of making electrical inspections under the town's electrical code, although a contract therefor may be entered into with a company to assist the town code enforcement officer, which contract is subject to competitive bidding statutes. 1979 Op St Compt No. 79-865.

Town may not make gratuitous payment to private individuals who voluntarily assist town in coordinating volunteers from not-for-profit organizations in providing services in connection with town's recycling program; however, town may (in accordance with applicable procurement procedures) contract with individuals for provision of such coordination services in connection with operation of town's recycling center and pay individuals consideration for such services pursuant to contract. 2002 Op St Compt No. 2002-9, 2002 N.Y. Comp. LEXIS 9.

14. Villages

Where pursuant to village ordinance, village served notice upon plaintiff that his private roadway was improperly maintained and, upon plaintiff's failure to correct situation, village constructed fully complying road at expense of $8,374.49, failure of village to comply with requisites of competitive bidding statutes preclude village from recovering cost of repairs from landowner. D'Angelo v Cole, 67 N.Y.2d 65, 499 N.Y.S.2d 900, 490 N.E.2d 819, 1986 N.Y. LEXIS 16605 (N.Y. 1986).

A village may not enter into a lease-purchase agreement under the "turnkey" concept for the construction of a building on property presently owned by the village, but which would be sold to the builder prior to entry into the agreement and then eventually repurchased by the village upon the completion of the building. 1982 NY Ops Atty Gen 82-54 (Informal), 1982 N.Y. AG LEXIS 47.

A construction contract for public works may be entered into by a village only after public bidding. Village may not take unit from one contractor and award work to another, who did not bid, at the unit rate. 1953 Op St Compt No. 53-6357.

A village is not required to enter into a contract for the receipt of ambulance services through competitive bidding. 1984 Op St Compt No. 84-59, 1984 N.Y. Comp. LEXIS 79.

15. Miscellaneous entities subject to bidding requirements

A purchase contract, made by a county hospital is subject to competitive bidding even though payment for same is to be made with funds received as gifts or legacies. 1966 NY Ops Atty Gen Feb 16 (Informal), 1966 N.Y. AG LEXIS 32.

A county may not enter into a purchase contract for equipment in excess of three thousand dollars without competitive bidding. 1979 NY Ops Atty Gen July 2 (Informal), 1979 N.Y. AG LEXIS 93.

To assist the blind to become self-supporting, Nassau County may permit blind individuals to operate vending stands and food service facilities on county property and may furnish them with space and utilities without charge for this purpose. These leases may be awarded without the need for competitive bids. 1984 NY Ops Atty Gen 84-44 (Informal), 1984 N.Y. AG LEXIS 46.

The Camillus Volunteer Fire Department may, without public bidding, purchase an ambulance with its own funds and then donate the ambulance to the village. But, any purchase made with village funds must meet the requirements of public bidding. 1979 Op St Compt No. 79-666.

(1) Off-Track Betting Corporations are to let contracts, procedurally, in the same manner as counties and, therefore, they are subject to the competitive bidding requirements of General Municipal Law, §§ 101 and 103, but not the requirements of Education Law, § 7209(3); (2) Both purchase and public works contracts of Off-Track Betting Corporations are subject to bidding where the estimated expense exceeds $10,000; (3) Off-Track Betting Corporations are governed by the principles relating to aggregate purchases; (4) A firm which aids in preparing bid specifications for a project is not precluded from submitting a bid on the project. 1980 Op St Compt No. 80-503, 1980 N.Y. Comp. LEXIS 289.

16. Miscellaneous entities not subject to bidding requirements

Private utility interference work is not "public work" under CLS Gen Mun § 103(1) for purpose of determining lowest responsible bidder by combining amounts bid for street reconstruction work and utility interference work inasmuch as it was not "public work" prior to creation of joint bidding technique, it is inherently private and for essential benefit of utility companies, which have obligation to pay all costs associated with protecting their facilities during street repair projects as precondition to "privilege" of using city streets for installing and maintaining utility equipment, and legislature in no way intended or authorized city to unilaterally and informally determine, define and alter contours of "public work." Diamond Asphalt Corp. v Sander, 92 N.Y.2d 244, 678 N.Y.S.2d 567, 700 N.E.2d 1203, 1998 N.Y. LEXIS 1828 (N.Y. 1998).

An off-track betting corporation, a public benefit corporation, could properly execute contract for computer data processing services without competitive bidding. American Totalisator Co. v Western Regional Off-Track Betting Corp., 44 A.D.2d 750, 396 N.Y.S.2d 301, 1974 N.Y. App. Div. LEXIS 5334 (N.Y. App. Div. 4th Dep't 1974).

An Ohio city may not be forced to arbitrate disputes under a broad arbitration provision in a public contract entered into on its behalf by an unauthorized agent in violation of statutory restrictions requiring city approval and competitive bidding, and the contract, including the arbitration clause contained therein, was void and unenforceable under either the law of New York or Ohio, since the city possessed no underlying authority to contract with the defendant and was not legally bound to the agreement; the city was not estopped from challenging the validity of the agreement in that the failure of the city council to approve the expenditure was not a mere technical irregularity but went to the heart of the contract's validity. Zanesville v Mohawk Data Sciences Corp., 97 A.D.2d 64, 468 N.Y.S.2d 271, 1983 N.Y. App. Div. LEXIS 20331 (N.Y. App. Div. 4th Dep't 1983).

New York City School Construction Authority is exempt from CLS Gen Mun § 103 under CLS Pub A § 1734(1)(a). George F. Kolsch, Inc. v New York City Sch. Constr. Auth., 211 A.D.2d 680, 621 N.Y.S.2d 628, 1995 N.Y. App. Div. LEXIS 278 (N.Y. App. Div. 2d Dep't), app. dismissed, 85 N.Y.2d 935, 628 N.Y.S.2d 53, 651 N.E.2d 921 (N.Y. 1995).

CLS County § 408-a was inapplicable to solicitation of bids by Oswego County Opportunities, Inc. (OCO) for construction of its new facility because OCO is not agency of Oswego County or any other municipality and, since it did not receive municipal funding for project, contract was not one for "public work" governed by CLS Gen Mun § 103; in any event, because project was entirely funded by bonds issued by County Industrial Development Agency, it was exempt from requirements of public bidding pursuant to CLS Gen Mun § 884. B. Milligan Contr., Inc. v Oswego County Opportunities, Inc., 258 A.D.2d 931, 685 N.Y.S.2d 359, 1999 N.Y. App. Div. LEXIS 1613 (N.Y. App. Div. 4th Dep't 1999).

The only power that the Jefferson County Board of Supervisors has over the Thousand Islands Bridge Authority is the approval of the appointments of members to the Authority when made by the Chairman of said County is authorized to audit the fiscal affairs of the Authority. The Thousand Islands Bridge Authority is not subject to General Municipal Law, § 103, or State Finance Law, § 174, regarding public bidding. 1973 NY Ops Atty Gen June 5 (Informal), 1973 N.Y. AG LEXIS 72.

The provisions of this article in relation to public bidding do not apply to the "Cranberry Lake Commission." 1954 Op St Compt No. 54-6969.

A county farm bureau and 4-H club and similar groups created under County Law § 224(8) are not subject to the public bidding requirements of the General Municipal Law. 1955 Op St Compt No. 55-7146.

A qualified charitable non-profit-making agency for the blind can sell goods, as determined by the Commissioner of General

Services, to the State or any governmental agency, political subdivision or public benefit corporation and the requirements of competitive bidding in General Municipal Law, § 103 will not be applicable. 1978 Op St Compt 78-800.

Industrial development agencies are not subject to Civil Service Laws; agency members are public officers and must take the oath of office; it is not mandatory that agency personnel be bonded; agencies are not subject to competitive bidding statutes; Comptroller may require agencies to submit annual financial reports. 1980 Op St Compt No. 80-370.

There is no statutory or common law competitive bidding requirement for purchases of equipment by Western Finger Lakes Solid Waste Management Authority; however, it is generally advisable for Authority to solicit competition for set procurements as Authority is public corporation created to perform essential government functions for benefit of people of participating counties and State. 1988 Op St Compt 88-48, 1988 N.Y. Comp. LEXIS 44.

A soil conservation district is a "district corporation" under the definition of that term in § 2.00 of the Local Finance Law, and hence not subject to the requirements of § 103 of the General Municipal Law as to letting of contracts on competitive bidding. 1961 NY Ops Atty Gen Oct 5 (Informal), 1961 N.Y. AG LEXIS 12.

A county may make purchases, pursuant to the exception to competitive bidding in General Municipal Law § 103(8), under a group purchasing program operated pursuant to Public Health Law § 2803-a, only for those county institutions or facilities which are within the definition of "hospital" contained in Public Health Law § 2801(1). 1991 Op St Compt No. 91-17, 1991 N.Y. Comp. LEXIS 15.

17. Failure to comply with bidding requirements

Where pursuant to village ordinance, village served notice upon plaintiff that his private roadway was improperly maintained and, upon plaintiff's failure to correct situation, village constructed fully complying road at expense of $8,374.49, failure of village to comply with requisites of competitive bidding statutes preclude village from recovering cost of repairs from landowner. D'Angelo v Cole, 67 N.Y.2d 65, 499 N.Y.S.2d 900, 490 N.E.2d 819, 1986 N.Y. LEXIS 16605 (N.Y. 1986).

When competitive bidding is statutorily required, and municipality fails to follow that procedure, contract is completely, not partially, void, and in such instances, third party should not be forced to reimburse municipality for expenditures it has advanced in connection with void contract; public fisc is still protected in that municipality is excused from any payment under void contract, and may recover any moneys already paid, even if performance under contract has been completed and return of material and labor is impossible. D'Angelo v Cole, 67 N.Y.2d 65, 499 N.Y.S.2d 900, 490 N.E.2d 819, 1986 N.Y. LEXIS 16605 (N.Y. 1986).

In annulling school district's award of public contract, Supreme Court erred in finding that company's bid failed to comply with bid requirements and in concluding that company thereby received substantial and material advantage over other bidders, despite company's failure to submit alternative bid with its base bid, where bid instructions did not require bid on both base and alternative proposals, did not require submission of alternative bid as condition of consideration and acceptance of base bid, and clearly reserved to school district right to consider base and alternative bids separately. Joseph Davis, Inc. v Mollenberg-Betz Machine Co., 124 A.D.2d 1071, 508 N.Y.S.2d 720, 1986 N.Y. App. Div. LEXIS 62434 (N.Y. App. Div. 4th Dep't 1986).

Town board resolution that authorized the town to enter into a recycling contract with respondent corporation was annulled because the town was required to procure the subject contract in compliance with N.Y. Gen. Mun. Law § 103 by obtaining sealed bids rather than simply requesting proposals in light of the considerable amounts involved; without sealed bids, it could not be determined whether respondent corporation's contract constituted a contract which provided for a lesser income to the town than a competing contract might provide and, thus, constituted an expenditure under § 103. Matter of Omni Recycling of Westbury, Inc. v Town of Oyster Bay, 41 A.D.3d 482, 837 N.Y.S.2d 317, 2007 N.Y. App. Div. LEXIS 6946 (N.Y. App. Div. 2d Dep't 2007), rev'd, 11 N.Y.3d 868, 873 N.Y.S.2d 248, 901 N.E.2d 741, 2008 N.Y. LEXIS 3719 (N.Y. 2008).

Although the city failed to pay the contractor more than $1.5 million under two municipal building contracts, estoppel against the city was unwarranted, as the contracts were illegal due to the city's violation of the statute's bidding requirement. Michael R. Gianatasio, PE, P.C. v City of New York, 53 Misc. 3d 757, 37 N.Y.S.3d 828, 2016 N.Y. Misc. LEXIS 3110 (N.Y. Sup. Ct. 2016), app. dismissed, 2017 N.Y. App. Div. LEXIS 5847 (N.Y. App. Div. 2d Dep't July 5, 2017), aff'd, 159 A.D.3d 659, 70 N.Y.S.3d 834, 2018 N.Y. App. Div. LEXIS 2126 (N.Y. App. Div. 1st Dep't 2018).

Although the city failed to pay the contractor more than $1.5 million under two municipal building contracts, the contractor could not maintain a claim for fraudulent inducement, as he did not allege any false statement that induced him to execute the contracts and perform the work, it was only when the contracts' illegality due to the city's violation of the statute's bidding requirement was discovered that non-payment arose, and the contractor could, and should, have been aware of the bidding requirement. Michael R. Gianatasio, PE, P.C. v City of New York, 53 Misc. 3d 757, 37 N.Y.S.3d 828, 2016 N.Y. Misc. LEXIS 3110 (N.Y. Sup. Ct. 2016), app. dismissed, 2017 N.Y. App. Div. LEXIS 5847 (N.Y. App. Div. 2d Dep't July 5, 2017), aff'd, 159 A.D.3d 659, 70 N.Y.S.3d 834, 2018 N.Y. App. Div. LEXIS 2126 (N.Y. App. Div. 1st Dep't 2018).

Although the city failed to pay the contractor more than $1.5 million under two municipal building contracts, the contractor could not recover under an account stated theory, as the contracts were invalid due to the city's violation of the statute's bidding requirement. Michael R. Gianatasio, PE, P.C. v City of New York, 53 Misc. 3d 757, 37 N.Y.S.3d 828, 2016 N.Y. Misc. LEXIS 3110 (N.Y. Sup. Ct. 2016), app. dismissed, 2017 N.Y. App. Div. LEXIS 5847 (N.Y. App. Div. 2d Dep't July 5, 2017), aff'd, 159 A.D.3d 659, 70 N.Y.S.3d 834, 2018 N.Y. App. Div. LEXIS 2126 (N.Y. App. Div. 1st Dep't 2018).

Although the city failed to pay the contractor more than $1.5 million under two municipal building contracts, the contractor could not recover in quantum meruit, as the contracts governing the work were illegal and unenforceable due to the city's violation of the statute's bidding requirement. Michael R. Gianatasio, PE, P.C. v City of New York, 53 Misc. 3d 757, 37 N.Y.S.3d 828, 2016 N.Y. Misc. LEXIS 3110 (N.Y. Sup. Ct. 2016), app. dismissed, 2017 N.Y. App. Div. LEXIS 5847 (N.Y. App. Div. 2d Dep't July 5, 2017), aff'd, 159 A.D.3d 659, 70 N.Y.S.3d 834, 2018 N.Y. App. Div. LEXIS 2126 (N.Y. App. Div. 1st Dep't 2018).

III. Applicability of Bidding Requirements to Particular Contracts

18. In general

This section, in requiring awarding of purchase contracts to "the lowest responsible bidder," by implication requires truly competive bidding. People v Bareika, 9 A.D.2d 1002, 195 N.Y.S.2d 97, 1959 N.Y. App. Div. LEXIS 5326 (N.Y. App. Div. 3d Dep't 1959).

This section applies to purchase contracts where the price exceeds $1000, although involving a cash expenditure of less than $1000, the balance being paid by means of a trade-in allowance. 1954 Op St Compt No. 54-6471.

Discussion of validity of contract let without competitive bidding. 1962 Op St Compt 62-601.

The term "purchase contract" pertains to purchases of materials, supplies, equipment or apparatus, while the term "public works" contracts encompasses contracts for services, labor or construction. 1963 Op St Compt No. 63-442.

Where the cost exceeds $2,500 the contract is subject to competitive bidding requirements. 1967 Op St Compt No. 67-342.

Expenditures of public funds are subject to competitive bidding requirements regardless of their initial source. 1968 Op St Compt No. 68-946.

There is no authority to dispense with competitive bidding where purchases are made from vendors other than the vendors which have the State or county contract. 1978 Op St Compt No. 78-369, 1978 N.Y. Comp. LEXIS 89.

A county and a vendor may not agree to extend the term of a county purchase contract, which by its own terms has expired, so that municipalities may make purchases thereunder without competitive bidding. 1979 Op St Compt No. 79-297, 1979 N.Y. Comp. LEXIS 200.

Competitive bidding provisions of CLS Gen Mun § 103 have no application to purchases made pursuant to CLS Correc §§ 184 and 186 of goods manufactured in state correctional institutions, and Department of Correctional Services may be contacted to ascertain conditions under which waiver of requirements of CLS Correc §§ 184 and 186 may be obtained. 1986 Op St Compt No. 86-55, 1986 N.Y. Comp. LEXIS 121.

19. Aggregate purchases above statutory minimum

Where items can only be purchased from one source, the purchase of such items is not subject to competitive bidding requirements. General discussion when items should be grouped together for bidding purposes. 1967 Op St Compt No. 67-558.

A contract for services in conjunction with publishing a series of school district newsletters is subject to competitive bidding requirements as a public works contract where it can be reasonably anticipated that the aggregate cost of such services for a fiscal year will exceed $5,000. 1980 Op St Compt No. 80-415, 1980 N.Y. Comp. LEXIS 290.

(1) An Off-Track Betting Corporation may divide the single public works project of remodeling or constructing a building, which totals in excess of $10,000, into components so long as contracts for each component are subject to competitive bidding; (2) Generally, where it is known or there is reason to know that contracts for a particular type of public work will exceed the bidding threshold in the course of a fiscal year, all such contracts are subject to competitive bidding; (3) Generally, the purchase of furniture would be considered separate and distinct from the work performed in the construction or remodeling of a building for the purpose of the bidding monetary threshold. 1980 Op St Compt No. 80-785.

Where it can be reasonably anticipated that purchases of a single item of maintenance supplies, or purchases of related items of supplies which are generally available from the same vendor, will exceed, in the aggregate, $3,000 in a fiscal year, all purchase contracts for the item or items are subject to competitive bidding. Second conclusion of Opn No. 6440, reported at 9 Opns St Compt, 1953, p 421, is hereby superseded to the extent inconsistent. 1981 Op St Compt No. 81-103, 1981 N.Y. Comp. LEXIS 782.

A town must comply with competitive bidding requirements where it can reasonably be anticipated that the aggregate cost of sanitary landfill maintenance services will exceed $5,000 during the fiscal year. 1981 Op St Compt No. 81-60, 1981 N.Y. Comp. LEXIS 831.

If it is known or may be reasonably anticipated that a political subdivision will spend in the aggregate over $5,000 for the purchase of fuel oil during a fiscal year, the political subdivision must competitively bid the purchase of that commodity unless an exception to § 106 of the General Municipal Law is applicable. 1990 Op St Compt No. 90-35, 1990 N.Y. Comp. LEXIS 47.

Purchase of kitchen utensils, furniture, books and sports equipment to be used at village youth center did not have to be aggregated with each other for purpose of determining whether competitive bidding monetary threshold would be exceeded. 1992 Op St Compt No. 92-46, 1992 N.Y. Comp. LEXIS 30.

Where a municipal official knows, or has reason to believe, that the purchase of an item or related items generally available from the same vendor will amount to more than $1,500 in a fiscal year, all purchase contracts for the item or items must be competitively let. 1972 Op St Compt No. 72-879.

20. Communications services and equipment

A village may contract for police and fire emergency communications with a private industrial firm whose employees would perform these services. This contract is subject to competitive bidding. 1964 Op St Compt No. 64-816.

Discussion of competitive bidding requirements with regard to telephone equipment. 1979 Op St Compt No. 79-319.

The outright purchase and installation of telephone equipment is subject to competitive bidding requirements. Since it is unclear whether such a contract is a public works or purchase contract, the most prudent course would be to advertise for bids if an expenditure over the lower monetary limit were involved. 1979 Op St Compt No. 79-762, 1980 N.Y. Comp. LEXIS 383.

The outright purchase and installation of a telephone system is subject to competitive bidding requirements. A true lease of a telephone system is not subject to bidding requirements. 1981 Op St Compt No. 81-426, 1981 N.Y. Comp. LEXIS 457.

21. Computer services

An off-track betting corporation, a public benefit corporation, could properly execute contract for computer data processing services without competitive bidding. American Totalisator Co. v Western Regional Off-Track Betting Corp., 44 A.D.2d 750, 396 N.Y.S.2d 301, 1974 N.Y. App. Div. LEXIS 5334 (N.Y. App. Div. 4th Dep't 1974).

A city may contract with a bank for the preparation of its payrolls by a data processing method. Such a contract, where the cost therefor exceeds $2,500 is subject to competitive bidding requirements. 1967 Op St Compt No. 67-454.

A county may contract with a bank for the preparation of its payrolls by a data processing method. Such a contract, where the cost thereof exceeds $2,500, is subject to competitive bidding requirements. 1968 Op St Compt No. 68-960.

Subject to competitive bidding considerations, a village may engage a data processing engineer for the purpose of collecting past due parking ticket fines by mail utilizing computer methods, and compensate him on the basis of the number of violations processed, with the total compensation not to exceed one-half of the total fines paid as a result thereof. 1973 Op St Compt No. 73-890.

Contracts for microfilm print recording services and data processing services are public work contracts subject to competitive bidding requirements. 1974 Op St Compt No. 74-427.

A contract for computer services is subject to competitive bidding requirements. However, under certain circumstances, contracts for additional systems or continuation of the existing contract would not be subject to competitive bidding procedures. 1978 Op St Compt 78-413.

Discussion of the competitive bidding requirements for the purchase of terminals for tie-in to a central computer system owned by a cooperative library system by municipal, school district and special district libraries. 1979 Op St Compt No. 79-512.

It would seem that the purchase of customized computer software or programming services is not subject to competitive bidding requirements since it involves the provision of highly skilled and technical services. However, the purchase of computer hardware or the purchase of a computer system consisting of both software and hardware is subject to bidding requirements, notwithstanding the fact that professional or technical services may be involved. Prior opinions superseded to the extent inconsistent with this opinion. 1980 Op St Compt No. 80-465, 1980 N.Y. Comp. LEXIS 280.

Contract involving both purchase and professional services may qualify under professional services exception if two criteria are met: (1) professional services component of contract is primary or predominant part of acquisition and (2) there is "inextricable integration" of professional services and "physical components"; in order to determine whether contract primarily involves professional services, "total character" of agreement must be examined to ascertain its essential character or focus; in case of acquisition of both computer software and professional computer services, following factors may be pertinent in making this determination: amount of time and effort involved in tailoring prepackaged or canned software, degree of customizing necessary, amount of time and effort involved in any personnel training services provided by vendor, and relative cost of prepackaged or canned software and services, respectively; if municipality objectively determines that particular prepackaged or canned software uniquely serves public interest and that software is available from only one source, it would appear that software could be acquired without competitive bidding under sole source exemption, and municipality should be prepared to show unique ben-

efits to municipality of software to be purchased as compared to other software in marketplace, that no other software provides substantial equivalent or similar benefits, and that, considering benefits received, cost of software is reasonable in comparison to other software in marketplace; in appropriate circumstances, municipality may standardize on particular make of software if municipality can objectively demonstrate that efficiency and economy will be served. 1988 Op St Compt No. 88-35, 1988 N.Y. Comp. LEXIS 31.

22. Fire protection; fire fighting equipment

Purchase of fire apparatus is subject to public bidding requirements of General Municipal Law, Article 5-A. 1953 Op St Compt No. 53-6416.

A contract calling for expenditure by a village of $3,000 for uniforms for members of the village fire department must be awarded by public bidding. 1961 Op St Compt No. 61-152.

The purchase of hose of different sizes, where the need is predictable, should, for competitive bidding purposes, be considered as a single item. 1967 Op St Compt No. 67-971.

The purchase by a fire district of equipment and apparatus for use by the fire department emergency rescue and first aid squad is subject to competitive bidding requirements even though moneys bequeathed to the fire district specifically to be used for such purchases are utilized. 1981 Op St Compt No. 81-187, 1981 N.Y. Comp. LEXIS 704.

23. —Fire stations

If cost of destruction of old fire house is less than $2500, competitive bidding is not required. 1953 Op St Compt No. 53-6410.

The painting of a fire house is a public work and public solicitation of bids is not required if the amount is $2,500 or less. 1958 Op St Compt No. 58-912.

Where the cost of a fire station which a village desires to erect will exceed $2,500, specifications must be prepared and the contract awarded to the lowest bidder in accordance with this section. 1962 Op St Compt No. 62-315.

The proposed construction work to a fire house costing $25,000 constitutes a single public works project which is subject to competitive bidding; a fire district board of fire commissioners may act, in effect, as its own general contractor and engage a separate independent contractor for each phase of such project so long as there is competitive bidding for each contract awarded. 1979 Op St Compt No. 79-204.

24. —Fire trucks

A contract to sand, paint, lacquer, re-stripe and letter a fire truck is a contract for "public work" under this section. 1957 NY Ops Atty Gen Jan 7 (Informal), 1957 N.Y. AG LEXIS 102.

A contract for maintenance and repair of village fire department vehicles is subject to competitive bidding if the cost thereof exceeds $5,000. 1978 Op St Compt No. 78-731, 1978 N.Y. Comp. LEXIS 51.

A village may sell an old fire engine no longer needed for village purposes to a volunteer firemen's association that wishes to use it for parades. Such a transaction is not subject to competitive bidding but the price paid should represent fair and adequate consideration rather than a nominal sum. 1978 Op St Compt No. 78-1082, 1979 N.Y. Comp. LEXIS 264.

Repairs or replacement of parts of a fire truck would be a public works contract subject to competitive bidding requirements. 1978 Op St Compt No. 78-576.

Discussion of procedures for village to follow in purchasing a fire truck costing approximately $45,000 where it is necessary to borrow money to finance such purchase. 1979 Op St Compt No. 79-52.

Award of concession to private vendor to sell food from mobile unit at joint town and village park is not subject to competitive bidding. 1979 Op St Compt No. 79-178.

Whether a contract to rehabilitate a fire truck is controlled by a sole source is a question of fact. However, the mere likelihood that only one firm will bid on the contract or the mere suspicion that one firm is better suited to do the work is not sufficient to justify a sole source procurement. 1983 Op St Compt No. 83-124, 1983 N.Y. Comp. LEXIS 358.

Fire district may purchase firefighting vehicle from fire department at cost of more than $5,000 only after compliance with competitive bidding requirements of CLS Gen Mun § 103. 1986 Op St Compt No. 86-67, 1986 N.Y. Comp. LEXIS 109.

25. Food services

Court erred in applying competitive bidding statute to selection process in awarding food service license and concession contract, as statute applies only to contracts for public works or purchase contracts. B.C.I. Indus. Catering, Inc. v Town of Huntington, 250 A.D.2d 675, 674 N.Y.S.2d 373, 1998 N.Y. App. Div. LEXIS 5528 (N.Y. App. Div. 2d Dep't 1998).

Discussion re necessity of competitive bidding on contracts for purchase of cafeteria supplies. 1955 Op St Compt No. 55-7087.

Purchases of perishable foods, which exceed $1,000 in a fiscal year, by municipality, must be competitively let. Such supplies may be purchased by a series of contracts, each to be competitively let. 1956 Op St Compt No. 56-8079.

Because perishable foods are subject to fluctuating prices, a county, in order to procure bids therefor, would probably have to award contracts for short periods of time for such items. 1967 Op St Compt No. 67-868.

A contract for a food concession to be conducted in a town public building is not subject to competitive bidding requirements. 1968 Op St Compt No. 68-115.

Although contracts with private contractors for comprehensive food management services are subject to competitive bidding requirements, independent contracts by municipalities with one or more, or an association of, dieticians are contracts for professional services and not subject to bidding requirements. 1979 Op St Compt No. 79-637, 1979 N.Y. Comp. LEXIS 136.

A town and city may enter into a cooperation agreement for the joint operation of a prepared meals program for senior citizens. Such agreement may include provision for joint purchases of food and/or joint contracting for preparation of meals, subject to competitive bidding requirements. 1981 Op St Compt No. 81-764.

In deterimining whether a county will exceed the bidding threshold when purchasing perishable foods, all anticipated purchases of similar items customarily handled by the same vendors should be considered in the aggregate, regardless of whether purchases are made for several departments or several locations throughout the county. 1984 Op St Compt No. 84-2, 1984 N.Y. Comp. LEXIS 136.

A municipality may draw bid specifications which solicit separate bids for each of five dairy products and which provide for the award of a separate contract for each product if such manner of proceeding is determined to be in the best interests of the municipality. 1984 Op St Compt No. 84-23, 1984 N.Y. Comp. LEXIS 115.

26. Garbage collection and disposal

In an Article 78 proceeding reviewing contract awards for the collection, removal and disposal of solid waste within a municipal garbage district, the bid specifications submitted by the lowest bidder would be invalid where the bid submitted in connection with a readvertised notice to bidders was defective and remained uncured until 3 days after the bids were opened, and the vessel specified in the resubmitted bids, for use under the contracts, not only lacked the required United States Coast Guard certification but also was in dry-dock and laid up for repairs at the time bids were opened; the contract awards, therefore, were made in violation of the spirit of the provisions requiring sealed competitive bidding for public contracts under Gen Mun Law §§ 100-A and 103(1). Superior Hydraulic, Inc. v Town Bd. of Islip, 88 A.D.2d 404, 453 N.Y.S.2d 711, 1982 N.Y. App. Div. LEXIS 17088 (N.Y. App. Div. 2d Dep't 1982), app. dismissed, 58 N.Y.2d 824, 1983 N.Y. LEXIS 3890 (N.Y. 1983).

A town, on behalf of a refuse and garbage district, may not change the contract price of a contract for garbage collection unless the existing contract is cancelled and a new contract is awarded pursuant to this section. 1962 Op St Compt No. 62-872.

A garbage collection contract, if in excess of $2,500, is subject to competitive bidding. 1963 Op St Compt No. 63-494.

Discussion of whether the Multi-Town Solid Waste Management Authority is eligible to receive funds from the Environmental Quality Bond Act where a solid waste recovery facility, to be owned by the Authority, is constructed without seeking competitive bids therefor. 1978 Op St Compt No. 78-892.

A town may contract for the sale and delivery of recyclable newspaper to a private recycling firm. Such a contract would not be subject to competitive bidding procedures. 1979 Op St Compt No. 79-146.

A village may not modify its garbage collection contract by increasing the compensation paid or reducing the number of days of pick-up without receiving additional consideration to support the modification, and any modification may not result in a material variance from the original bid specifications. 1981 Op St Compt No. 81-41, 1981 N.Y. Comp. LEXIS 852.

Where a village and a contractor are involved in litigation concerning the remaining year of a contract for refuse removal, a contract, financed from village moneys, to perform refuse removal services during the litigation would be subject to competitive bidding requirements. 1981 Op St Compt No. 81-41, 1981 N.Y. Comp. LEXIS 852.

27. Health care services

Where pursuant to village ordinance, village served notice upon plaintiff that his private roadway was improperly maintained and, upon plaintiff's failure to correct situation, village constructed fully complying road at expense of $8,374.49, failure of village to comply with requisites of competitive bidding statutes preclude village from recovering cost of repairs from landowner. D'Angelo v Cole, 67 N.Y.2d 65, 499 N.Y.S.2d 900, 490 N.E.2d 819, 1986 N.Y. LEXIS 16605 (N.Y. 1986).

A county mental health clinic may dispense prescriptions to patients with instructions to have the same filled at one particular drug store, where the county pays for such prescriptions. It may be that competitive bidding is necessary to select the druggist where the annual total cost of such prescriptions exceeds $1,000. 1965 Op St Compt No. 65-8.

The bulk purchase of prescription and non-prescription drugs is subject to bidding requirements. 1979 Op St Compt No. 79-721.

A contract for mosquito control work involving expenditure of more than $2,500 is subject to competitive bidding. 1961 Op St Compt No. 61-600.

A contract for dietetic services for the Genesee County Nursing Home is subject to competitive bidding requirements. 1978 Op St Compt No. 78-677.

While there are statutory and common law exceptions to § 103 of the General Municipal Law, there is no exception to competitive bidding requirements of this section based solely on the fact that the commodities purchased are medical supplies. Also, it should be noted that §§ 103-a and 103-b of the General Municipal Law relating to disqualification from contracting with municipal corporations for refusal to testify or waive immunity from prosecution have been declared unconstitutional as violation of the privilege against self-incrimination. 1990 Op St Compt No. 90-18, 1990 N.Y. Comp. LEXIS 25.

28. Highway contracts

Where past experience shows that the annual expenditure for sand and tar patch exceeds $1,000.00, a town must advertise for bids, unless it buys under State or county contract. 1958 NY Ops Atty Gen Mar 12 (Informal), 1958 N.Y. AG LEXIS 108.

This section is applicable to purchases of highway machinery costing in excess of $1,000 made pursuant to Highway Law § 133. 1954 Op St Compt No. 54-6491.

No notice is necessary to approve purchase of highway machinery or equipment costing more than $1,000 but town must advertise and receive public bids for such purchases. 1954 Op St Compt No. 54-6980.

Obtaining of gravel by a town by profit a prendre is subject to bidding requirements, and purchases of gravel pursuant to § 144 of the Highway Law are likewise subject to competitive bidding. 1963 Op St Compt No. 63-202.

The purchase of highway signs at a cost in excess of $1,000 is generally subject to competitive bidding requirements. 1967 Op St Compt No. 67-367.

Purchases of highway materials made using "CHIPS" (Consolidated Highway Improvement Program) moneys are subject to normal competitive bidding requirements. In order to be exempt from bidding under General Municipal Law, §§ 104, a purchase must be made from a vendor holding a current State contract or from a distributor or agent listed in the State contract. 1982 Op St Compt No. 82-224, 1982 N.Y. Comp. LEXIS 503.

A contract for the repair of highway machinery is subject to competitive bidding if the cost thereof exceeds $2500. 1969 Op St Compt No. 69-821.

29. Janitorial services

A contract whereby a bailor agrees to furnish dictaphone equipment to a county and to keep it in repair for a specified period, and bailee municipality assumes liability for loss or damage to the equipment, is not a mere lease of personal property and is subject to the provisions of this section, notwithstanding technical title remains in the bailor. 1962 Op St Compt No. 62-141.

Contracts for drilling for sub-surface characteristics in connection with construction, and contracts for janitorial services are public works contracts and are subject to bidding requirements where the cost thereof exceeds $2,500. 1968 Op St Compt No. 68-115.

30. Office supplies

Supplies for the office of the county clerk in an amount in excess of $1,000.00 included in one contract, must be purchased only after public solicitation of bids, even though the cost of no particular item included therein exceeds $1,000.00. 1956 Op St Compt No. 56-8175.

If purchase of an accounting machine involves more than $1,000, it must be submitted to competitive bidding. 1953 Op St Compt No. 53-6383.

31. Parking meter installation contracts

A village may properly enter into a contract with a parking meter manufacturer whereby meters are installed in the village under an arrangement whereby the costs thereof will be paid from the proceeds of the meters. 1954 NY Ops Atty Gen July 19 (Informal), 1954 N.Y. AG LEXIS 325.

A municipality may not properly enter into a contract with a parking meter manufacturer whereby meters are to be installed in the municipality by trading in old parking meters against a part of the cost, balance to be paid from proceeds produced by the new meters. 1962 NY Ops Atty Gen July 30 (Informal), 1962 N.Y. AG LEXIS 199.

A village contract with a parking meter manufacturer, under which the manufacturer will retain a percentage of meter revenues until the contract price is paid, and which does not commit the village to the payment of anything other than a percentage of the revenues, is proper and is not subject to competitive bidding. 1968 Op St Compt No. 68-360.

32. Power facilities

In Article 78 proceeding wherein court concluded that request for proposals (RFP) issued by Long Island Power Authority (LIPA) for design and construction of off-island electrical transmission system improperly included construction phase of project in addition to evaluation phase, petitioner's request to annul award to competing bidder was granted, petitioner was entitled to proceed without compensation with independent evaluation in accordance with evaluation phase of RFP, and any contract relating to original RFP would be set aside unless awardee agreed to proceed under contract pursuant to modified RFP (severing any construction award or option, but otherwise on original terms of bid) and unless LIPA consented to RFP as modified. AEP Resources Serv. Co. v Long Island Power Auth., 179 Misc. 2d 639, 686 N.Y.S.2d 664, 1999 N.Y. Misc. LEXIS 23 (N.Y. Sup. Ct. 1999).

33. Printing contracts

A contract for repair and rebinding of the libers in the office of the county clerk must be let only after public solicitation of bids where the estimated cost is over $2500.00. 1956 Op St Compt No. 56-8175.

Where a supplier furnishes a county with film for the microfilming of records of conveyances, the film is returned to him for

processing, and enlargements are reproduced on pages which are then permanently bound and become the record books or libers, the purchase of the film may be considered a separate transaction, subject to the $1000 provision of this section as to competitive bidding, in view of the interposition of the county in using the film in its own camera. However, the rest of the operation of reproducing the records is a contract for public work, subject to the $2500 provision as to public bidding. 1957 Op St Compt No. 57-506.

A county contract for the printing of town assessment rolls is subject to competitive bidding if the price exceeds $1,000. 1959 Op St Compt No. 59-26.

Competitive bidding is necessary with respect to printing of election forms, such as lists of registered voters, ballots, notices and similar material, where the aggregate amount exceeds $1,000 during a fiscal year. 1961 Op St Compt No. 61-386.

Whether competitive bidding is required for the purchase of printed items and forms used by the county clerk is governed by aggregate cost of the items and not individual cost of each item. 1962 Op St Compt No. 62-735.

The printing of court calendars and fee schedules constitutes a public works contract rather than a purchase contract, and the test applied to purchase contracts that the cost of the aggregate of all similar items controls, does not apply. 1962 Op St Compt No. 62-735.

A contract for printing proceedings of a County Board of Supervisors is subject to competitive bidding, if for over $2,500, notwithstanding repeal of subd. 3 of § 211 of the County Law by ch. 617 of the laws of 1962. 1962 Op St Compt No. 62-1065.

Competitive bidding is required for a contract the terms of which require an expenditure of $1,199 for the purchase of a generator and $300 or $400 for the installation thereof. Such a contract is essentially a purchase, rather than a public works contract, and bids are required where the cost exceeds $1,000. 1967 Op St Compt No. 67-945.

A contract for the printing of the proceedings of a board of supervisors may be effectuated without competitive bidding if it involves an expenditure of $2500 or less. 1969 Op St Compt No. 69-735.

A contract for construction of a municipal "solid waste to energy generating facility" is subject to the competitive bidding requirements of section 103 of the General Municipal Law. The by-products resulting from the operation of such a facility, as well as the energy which may be produced, may be sold to private industry. Furthermore, a town may contract with a public utility, another municipality or private industry for joint operation of such a facility. 1979 Op St Compt No. 79-110.

Contracts for printing briefs and records on appeal are subject to the competitive bidding requirements relating to public works contracts. 1980 Op St Compt No. 80-287, 1980 N.Y. Comp. LEXIS 279.

Under certain circumstances, printing and binding services in connection with codification of a county's local legislation would not be subject to competitive bidding requirements. 1982 Op St Compt No. 82-146, 1982 N.Y. Comp. LEXIS 578.

A contract for printing materials relating to elections, such as voting machine strips, canvass reports, tally sheets and ballots, is not exempt from competitive bidding as a professional service. The county, however, may require the bidder to demonstrate that they have experience in performing the required work; the county also may require the successful bidder to provide security for the successful completion of the project. 1991 Op St Compt No. 91-34, 1991 N.Y. Comp. LEXIS 32.

Contracts for the furnishing of assessment rolls and "field books" by a county are purchase contracts, and, as such, subject to bidding if the cost therefor exceeds $1,000 during a fiscal year. 1963 Op St Compt No. 63-50.

A contract for the printing of a yearbook which is paid for with school district moneys is subject to competitive bidding requirements as a public works contract. Contracts for certain technical services in connection with the preparation of a school district yearbook would be excepted from competitive bidding requirements as professional services. 1981 Op St Compt No. 81-178, 1981 N.Y. Comp. LEXIS 714.

34. Real estate purchases

A true agreement for the purchase by or rental to a municipality of real property is not subject to the competitive bidding requirements of section 103 of the General Municipal Law, which requires that all contracts for public work involving an expenditure of more than $3,500 and all purchase contracts involving an expenditure of more than $1,500 be awarded to the lowest responsible bidder. Albion Industrial Center v Albion, 62 A.D.2d 478, 405 N.Y.S.2d 521, 1978 N.Y. App. Div. LEXIS 10863 (N.Y. App. Div. 4th Dep't), app. denied, 45 N.Y.2d 710, 1978 N.Y. LEXIS 3174 (N.Y. 1978).

Real property may be purchased by the commissioners of a fire district from a fire company which is a membership corporation without necessity for competitive bidding. 1963 Op St Compt No. 63-169.

Competitive bidding is not required where county desires to purchase real property. 1978 Op St Compt No. 78-803, 1978 N.Y. Comp. LEXIS 67.

35. Recreation equipment and services

A contract for the cleaning and repairing of athletic equipment which does not exceed $2,500 is not subject to competitive bidding requirements. 1967 Op St Compt No. 67-992.

A municipality which proposes to purchase a number of molded concrete structural playground items which will cost more than $1000 in the aggregate, must solicit competitive bids. 1968 Op St Compt No. 68-107.

A true rental of film for a town recreation program is not subject to competitive-bidding. 1978 Op St Compt No. 78-443.

A town may not purchase baseballs specifically for use by a privately-operated little league, although the town may purchase baseballs for use in its own recreation program. The bid specifications for such items may include reasonable restrictions as to type and quality which will best serve the interests of the town. 1980 Op St Compt No. 80-204, 1980 N.Y. Comp. LEXIS 276.

True license or concession arrangement, which does not involve direct or indirect expenditure of public moneys and total character of which is neither purchase nor contract for public work, is not subject to competitive bidding; however, public officials have duty to secure fair reasonable terms for such arrangements. 1988 Op St Compt No. 88-60, 1988 N.Y. Comp. LEXIS 56.

A contract pursuant to which a private organization supplies umpires to officiate at softball games that are part of a public recreation program is not subject to competitive bidding requirements. 1980 Op St Compt No. 80-40, 1980 N.Y. Comp. LEXIS 305.

36. Rental or lease agreements

In determining whether a contract between a municipality and the owner of land, under which the latter would erect a building upon its land and then lease the land and the building to the municipality for a public use, is a true lease of private property for public use, which would not require competitive bidding under section 103 of the General Municipal Law, or a contract for public work, which would require competitive bidding under the statute, it is not dispositive that the document is labeled a "Lease Agreement"; in view of the obvious potential of serving as a device to circumvent the competitive bidding statute, it is necessary to look to the substance of the agreement, the rights it confers, and the obligations it imposes in order to determine the true nature of the transaction and the relationship of the parties. Albion Industrial Center v Albion, 62 A.D.2d 478, 405 N.Y.S.2d 521, 1978 N.Y. App. Div. LEXIS 10863 (N.Y. App. Div. 4th Dep't), app. denied, 45 N.Y.2d 710, 1978 N.Y. LEXIS 3174 (N.Y. 1978).

Where an agreement between a municipal corporation and a vendor for the use by the municipality of property or equipment for a stated period of time is termed a lease, the designation is a meaningless misnomer when the property or equipment is totally consumed in terms of its probable life during the stated period, and such a "lease" is a "purchase contract" within the meaning and intent of sections 100-a and 103 of the General Municipal Law, which require that public contracts be awarded to the lowest responsible bidder; moreover, the determination that a "lease" is in fact a public contract requiring competitive bidding need not

rest on the fortuitous selection by the municipality of a capital cost recoupment period that is identical to a statutory period of probable usefulness, but is also established when the vendor is assured of recovering its full capital cost, even in those situations where service is prematurely terminated, by means of a termination charge. Exley v Endicott, 74 A.D.2d 96, 427 N.Y.S.2d 68, 1980 N.Y. App. Div. LEXIS 10438 (N.Y. App. Div. 3d Dep't), modified, 51 N.Y.2d 426, 434 N.Y.S.2d 922, 415 N.E.2d 913, 1980 N.Y. LEXIS 2887 (N.Y. 1980).

The rental of highway equipment by a village not subject to competitive bidding requirements. 1978 Op St Compt No. 78-648.

An Off-Track Betting corporation is not required to competitively bid true leases. Clarification of conclusions reached in Opn No. 76-1035 regarding lease-purchase and installment purchase agreements by an Off-Track Betting corporation and the competitive bidding principles of aggregate purchases. 1980 Op St Compt No. 80-531, 1980 N.Y. Comp. LEXIS 263.

Under certain circumstances, an agreement entitled a "lease" may constitute an installment purchase if the term of the agreement extends over the actual useful life of the item acquired under the agreement, even though title never passes to the lessee. An installment purchase agreement is subject to the provisions of General Municipal Law, § 109-b, including those relating to competitive bidding requirements. Prior inconsistent opinions superseded. 1984 Op St Compt No. 84-57, 1984 N.Y. Comp. LEXIS 80.

A transaction whereby a not-for-profit corporation, without competitive bidding, constructs a public facility for use by a municipal corporation in the performance of its governmental functions and the municipal corporation acquires use of the facility under a lease agreement and has an option to purchase: (a) does not constitute indebtedness for purposes of the State Constitution and Local Finance Law if the lease agreement has an executory clause making the municipal corporation's obligation contingent on annual appropriations, although it is doubtful that a clause providing that, if the municipal corporation fails to appropriate money for the lease payments, the municipal corporation agrees not to purchase, lease or rent property to perform the same functions as the facility, would be enforceable; (b) constitutes a prohibited installment purchase contract if the total character of the transaction is that of a purchase rather than a lease; and (c) violates the competitive bidding requirements of General Municipal Law §§ 101, 103, if the total character of the transaction constitutes a contract for public work of the municipal corporation. 1991 Op St Compt No. 91-13, 1989 N.Y. Comp. LEXIS 53.

Discussion of "lease-to-own" arrangements. 1978 Op St Compt No. 78-794.

37. —Equipment, generally

A municipality may lease equipment whereby the owner of the equipment (lessor) will be liable for maintenance and repairs. 1978 Op St Compt No. 78-574.

The purchase of in-place leased equipment from the lessor is subject to competitive bidding, assuming the original lease was not let as a result of competitive bidding and the purchase price is above the statutory amount. 1979 Op St Compt No. 79-710.

(1) A municipality may combine in one bidding document a "total cost bid sale and a total cost bid lease" with municipality having the option to award a contract, in its sound discretion, either as a sale or a lease. (2) Where a municipality has entered into a five year lease for equipment, it may, at the end of the lease term, renew the lease for an additional five year term assuming that the equipment has a useful life or period in excess of ten years. (3) A municipality may enter into a ten year total cost bid sale or total cost bid lease. 1980 Op St Compt No. 80-352.

38. —Effect of lessor's supervision of use of leased equipment

There is no legal authority for an arrangement whereby a village rents machinery and operators from a private contractor and employs him to supervise and oversee certain work jointly with the village Superintendent of Public Works. 1963 Op St Compt No. 63-579.

The leasing of equipment by a village, on a temporary basis, where the lessor supervises and directs its proper use by employees of the village, is not subject to competitive bidding requirements, provided that the over-all work is handled by personnel of the village. 1967 Op St Compt No. 67-637.

39. —Fire fighting apparatus

Arrangement whereby company would give county a central fire control console worth $35,000 in return for county's allowing them to charge an override cost on each transmitter sold to noncounty purchasers did not constitute a gift to the county thereby removing contract from competitive bidding provisions of General Municipal L § 103, particularly in light of fact that county would have to pay from $1500 to $1800 for each of the transmitters it purchased. Signacon Controls, Inc. v Mulroy, 32 N.Y.2d 410, 345 N.Y.S.2d 527, 298 N.E.2d 670, 1973 N.Y. LEXIS 1214 (N.Y. 1973).

Discussion of rules and regulations relative to purchase of fire apparatus. 1953 Op St Compt No. 53-6421.

40. —Highway equipment

A lease agreement by a fire district for a two-way radio system, whereby the district would never obtain title to the system and the equipment would be returned to the leasor at the termination of the lease, is not subject to competitive bidding. 1960 Op St Compt No. 60-516.

A town superintendent of highways and supervisor cannot rent machinery, with rental to be applied to the purchase price. 1956 Op St Compt No. 56-8067.

Competitive bidding is not required where a village hires machinery and operators therefor, from a private contractor, on an hourly or daily rate for the repair of and snow removal on village streets, the work being performed jointly by village employees and the hired machinery and operators under the direction of the village road foreman. However, the purchase of gravel and asphalt to be used in connection therewith is subject to the provisions of § 103 of the General Municipal Law. 1960 Op St Compt No. 60-583.

41. —Involving real property

A true agreement for the purchase by or rental to a municipality of real property is not subject to the competitive bidding requirements of section 103 of the General Municipal Law, which requires that all contracts for public work involving an expenditure of more than $3,500 and all purchase contracts involving an expenditure of more than $1,500 be awarded to the lowest responsible bidder. Albion Industrial Center v Albion, 62 A.D.2d 478, 405 N.Y.S.2d 521, 1978 N.Y. App. Div. LEXIS 10863 (N.Y. App. Div. 4th Dep't), app. denied, 45 N.Y.2d 710, 1978 N.Y. LEXIS 3174 (N.Y. 1978).

A lease of village property for exploration for oil and gas is not subject to competitive bidding. 1960 Op St Compt No. 60-948.

An arrangement whereby a municipality agrees to "lease" developed real property for a specified time, with title to vest in the municipality at the conclusion thereof, would be void as an unauthorized installment purchase. The municipality could purchase or lease land and develop it, or agree to a true lease of such developed property. 1969 Op St Compt No. 69-217.

Where a county leases real property from a private landlord, it may not, without competitive bidding, contract directly with the landlord to have him perform renovations on the property, the cost of which will exceed $5,000. 1978 Op St Compt No. 78-958, 1978 N.Y. Comp. LEXIS 9.

A village may sell unneeded real property to a fire company. The fire company may construct a building and lease part of the structure back to the village to house village fire equipment if the arrangement constitutes a true lease. 1982 Op St Compt No. 82-341, 1982 N.Y. Comp. LEXIS 391.

42. —Effect of improvements on leased realty

A contract, entitled "Lease Agreement", which provided that the owner of land would erect a building upon it and then lease the land and the building to a town for use as a town garage and offices for a term of five years, at a rental of $1,000 per month for the first six months and $3,875 per month for the remaining 54 months, or a total rental of $215,250 over the five-year term, but

that the town was to have the option to purchase the premises after the first day of the sixth month of the term, but prior to the commencement of the seventh month thereof, for $141,200, and that the option would expire if the town failed to exercise it prior to the seventh month of the term, and which made no provision for renewal at the expiration of the original five-year term, may not fairly be characterized as a true lease, which would not require competitive bidding under section 103 of the General Municipal Law; the transaction which was contemplated by the parties was one of construction and purchase, rather than one of rental, and their clear intent, as reflected in the agreement, was to circumvent the mandate of section 103 of the General Municipal Law that "all contracts for public work . . . shall be awarded . . . to the lowest responsible bidder". Albion Industrial Center v Albion, 62 A.D.2d 478, 405 N.Y.S.2d 521, 1978 N.Y. App. Div. LEXIS 10863 (N.Y. App. Div. 4th Dep't), app. denied, 45 N.Y.2d 710, 1978 N.Y. LEXIS 3174 (N.Y. 1978).

Neither may the county, without competitive bidding, renegotiate the lease and, pursuant to such renegotiated lease, agree to make higher rental payments over the remaining term of the lease where such higher payments are designed to compensate the landlord for the cost of making the renovations. 1978 Op St Compt No. 78-958, 1978 N.Y. Comp. LEXIS 9.

A county may, subject to competitive bidding requirements, expend moneys for the purpose of renovating property which the county leases from a private landlord. 1978 Op St Compt No. 78-958, 1978 N.Y. Comp. LEXIS 9.

Where a lease between a county and a not-for-profit corporation for 20 years is terminated prematurely by the corporation, the county cannot reimburse the corporation the sum of $80,000 for improvements made by it to the building. 1979 Op St Compt No. 79-605.

43. —Miscellaneous

A contract between a municipality and the New York Telephone Company to provide telephone terminal systems under a two-tier rate, was a lease rather than a sale and therefore the municipality did not have to comply with the competitive bidding statute, Gen Mun Law § 103, since title for all equipment to be provided under the two-tier tariff system always remained in the New York Telephone Company, and the company assumed the risk of loss due to events not within the customer's control and the obligation to service and repair the equipment. Exley v Endicott, 51 N.Y.2d 426, 434 N.Y.S.2d 922, 415 N.E.2d 913, 1980 N.Y. LEXIS 2887 (N.Y. 1980).

Successive one-year leases of street light fixtures by a lighting district are not purchases required to be let by competitive bid. 1967 NY Ops Atty Gen July 12 (Informal), 1967 N.Y. AG LEXIS 96.

Discussion concerning proposed lease by village of ice-making and other equipment in view of competitive bidding and Local Finance Law requirements. 1978 Op St Compt No. 78-1040.

Whether lease arrangements under which a city leases hospital equipment and the lessor retains title are subject to competitive bidding requirements depends upon whether the leases are for the actual useful life of the equipment. 1979 Op St Compt No. 79-646, 1979 N.Y. Comp. LEXIS 134.

An arrangement whereby a village leases a pistol range to several private organizations in exchange for repair and renovation work to be performed by the organizations could be viewed as a circumvention of statutory competitive bidding and/or local financing requirements. 1982 Op St Compt No. 82-144, 1982 N.Y. Comp. LEXIS 572.

44. Security services

Where agreement to provide security guards for city of New York and the Housing and Development Administration was of indefinite duration and subject to cancellation by either party on reasonable notice and weekly billings fluctuated with extent of services rendered and never exceeded $550 for any single week, the agreement, which was entered into in 1971, at which time public works contracts involving expenditures of more than $2,500 were required to be competitively let, was not invalid because it was not subject to competitive bidding; agreement fell within exception to general rule of invalidity. Lance Investigation Service, Inc. v New York, 88 Misc. 2d 119, 387 N.Y.S.2d 32, 1976 N.Y. Misc. LEXIS 2592 (N.Y. App. Term 1976).

The City of Oneonta had the power to enter into contracts with a private security guard firm, since it appears there was no circumvention of civil service requirements. However, ultimate determination of this issue should be left to appropriate civil service agencies. Such contracts should have been let subject to appropriate competitive bidding requirements. 1980 Op St Compt No. 80-50.

Where an independent contract for watchmen's services exceeds $2500, it is subject to competitive bidding. 1968 Op St Compt No. 68-98.

45. Sewerage contracts

Contract between village and owner of subdivision calling for latter to build at its own expense sewage pump station to service owner's and adjacent subdivision and dedicate it to village, whereupon village would collect from owner of each lot connecting to station pro rata share of construction cost and pay that over to builder, was not unenforceable for failure to comply with competitive bidding process of CLS Gen Mun § 103 since contract did not involve expenditure of public funds. Webster v Fairport, 150 Misc. 2d 390, 576 N.Y.S.2d 491, 1991 N.Y. Misc. LEXIS 622 (N.Y. Sup. Ct. 1991).

A village must ask for formal bids where it wishes to purchase a machine costing $2,450, for cleaning its sanitary sewer mains, even though that is the only machine made that said village can afford to purchase and that will fulfill its needs. 1958 Op St Compt No. 58-372.

The purchase of a sewer treatment plant by a village from a corporation, organized under Article 10 of the Transportation Corporation Law, is not subject to competitive bidding. 1960 Op St Compt No. 60-700.

If the cost of extending the sewer line does not exceed $2,500, the contract is not subject to bidding requirements and the work may be performed by any person or contractor which the village believes is competent to undertake the project. 1967 Op St Compt No. 67-678.

A contract for construction of a sewer line from the property of an outside user into a sewer district sewer main is not subject to the competitive bidding requirements of section 103 of the General Municipal Law. 1978 Op St Compt No. 78-1010.

46. Transportation services and equipment

Notice of claim under CLS Educ § 3813(1) was not required in bus company's Article 78 proceeding against school district for violation of CLS Gen Mun § 103, which requires competitive bidding for public contracts, because purpose of § 103 is to protect public, and thus present proceeding did not solely seek enforcement of private right, but also vindication of public interest. Mary's Bus Serv. v Rondout Valley Cent. Sch. Dist., 238 A.D.2d 829, 656 N.Y.S.2d 534, 1997 N.Y. App. Div. LEXIS 4272 (N.Y. App. Div. 3d Dep't 1997).

Trial court properly dismissed a private bus company's petition challenging the award of a transportation service contract because the county's bid specification requiring a safety rating higher than the minimum allowed did have some rational basis rooted in the public interest, namely, attempting to assure the safety of children being transported under the county's care, and the private bus company asserted only speculation concerning improper motives and/or unfair dealing. Matter of Blueline Commuter, Inc. v Montgomery County, 126 A.D.3d 1161, 4 N.Y.S.3d 763, 2015 N.Y. App. Div. LEXIS 1986 (N.Y. App. Div. 3d Dep't 2015).

In an Article 78 proceeding by a bus company to enjoin the city's board of education from awarding contracts by public bidding for the supplying of transportation services to handicapped public school students, the bus company's petition would be dismissed where its contract with the board of education, that provided for the offering of any "increase" in bus services to existing contractors, had not applied to the replacement of the services of other bus companies that defaulted after a strike by school bus drivers, and where the contract provision for offering increases in services to existing contractors had been intended only to provide a convenient method for dealing with a modest increase as de-

manded by changes in the needs of the school system, rather than to provide a method for covering defaults. Master Coachman, Inc. v Board of Education, 116 Misc. 2d 965, 456 N.Y.S.2d 946, 1982 N.Y. Misc. LEXIS 3986 (N.Y. Sup. Ct. 1982).

Taxpayers had standing to seek declaratory and injunctive relief against transfer—to a private contractor—of claims processing work from former private bus companies being taken over by city's mass transit authority on grounds that proper bidding procedures had not been followed, since the bidding requirements were designed to prevent government waste. Andre v City of New York, 807 N.Y.S.2d 789, 10 Misc. 3d 361, 234 N.Y.L.J. 41, 2005 N.Y. Misc. LEXIS 1860 (N.Y. Sup. Ct. 2005).

An arrangement whereby a town agrees to hire vehicles for the period of their useful life at a stipulated periodic payment, the vehicles to be turned back to the dealer and replaced by him with new vehicles, is subject to the requirements of this section. 1962 Op St Compt No. 62-329.

Purchases of recapped tires in excess of $1,000 during a fiscal year are subject to competitive bidding requirements. 1963 Op St Compt No. 63-157.

A contract for bus transportation is a public works contract and not a purchase contract. General discussion of when such transportation would be subject to competitive bidding requirements. 1967 Op St Compt No. 67-741.

Where a county is contracting for mass transportation services with bus operators who hold franchises for existing routes, competitive bidding is not required. It would appear to be to the county's advantage to request competitive bids where new bus line service is to be initiated. 1978 Op St Compt No. 78-577.

Competitive bidding is not required for the sale of a damaged vehicle by a town, but is required for repair work to a damaged vehicle, if an expenditure in excess of the bidding monetary limit is involved. If no bidding is required for the repair work, the town is still obligated to secure such work at a reasonable cost and would be advised to obtain cost estimates in this regard. 1979 Op St Compt No. 79-560.

A town may enter into an agreement with a private firm whereby the firm will install and maintain bus stop shelters along town roads in exchange for the right to sell and display advertising on the shelters, so long as the town receives fair and adequate consideration under the agreement. Although not free from doubt, it would seem that such an arrangement is not subject to competitive bidding. Prior inconsistent opinions superseded. 1982 Op St Compt No. 82-133, 1982 N.Y. Comp. LEXIS 593.

When it is known or can be reasonably anticipated that the aggregate amount to be spent on similar types of vehicle repair work will exceed $7,000 in a fiscal year, competitive bidding requirements must be followed in procuring such work. 1984 Op St Compt No. 84-39, 1984 N.Y. Comp. LEXIS 99.

In determining whether a bidder, a bus company for transportation of students, is a responsible bidder, the bidder's criminal record, a criminal investigation of, or an indictment against, the bidder, can be taken into account. When the determination of non-responsibility would adversely affect a bidder's ability to carry on his business, the bidder has a cognizable due process liberty interest and is entitled to notice of the reasons for the municipality's concern over his responsibility and an opportunity to rebut the charges. 1990 Op St Compt No. 90-48, 1990 N.Y. Comp. LEXIS 44.

County contracts with private bus companies to provide paratransit services in connection with program in compliance with American with Disabilities Act of 1990 fall within professional services exception to competitive bidding requirements and may be procured through request for proposals process (RFP) in accordance with county's procurement policies and procedures. 2007 Op St Compt No. 2007-1, 2007 N.Y. Comp. LEXIS 1.

The purchase and installation of a truck motor costing in excess of $2,500 is subject to competitive bidding. 1956 Op St Compt No. 56-8088.

47. Used equipment

The sale of a used tractor by a village is not subject to the competitive bidding requirements governing village contracts for purchases of equipment. 1978 Op St Compt No. 78-723.

Competitive bidding is required when a municipality purchases used machinery from a private individual or corporation, involving an expenditure of more than $3000. 1979 Op St Compt No. 79-222.

Municipality may purchase surplus or second-hand equipment from another municipality of this State at auction pursuant to exception contained in CLS Gen Mun Law § 103(6), however, this exception does not apply to purchases from private sources. 1989 Op St Compt No. 89-13, 1989 N.Y. Comp. LEXIS 16.

Except as provided in General Municipal Law, § 103(6), the purchase of used equipment which is presently being used by a county pursuant to a true lease agreement is subject to competitive bidding if it involves an expenditure in excess of the bidding threshold. 1981 Op St. Compt No. 81-110, 1981 N.Y. Comp. LEXIS 770.

48. Water supply systems, and service

Where a municipality plans to have its water wells inspected and repaired if needed, the situation involves two separate projects for bidding purposes. If either such project does not exceed $2500, public bidding is not required therefor. 1960 Op St Compt No. 60-192.

A village may not purchase without bids a water truck where village's present truck is worn out. 1960 Op St Compt No. 60-905.

It would be a violation of competitive bidding requirements for a village to retain an engineering firm which in turn retains a contractor, without competitive bidding, to construct a project at the village's water pollution control facility. 1982 Op St Compt No. 82-43, 1982 N.Y. Comp. LEXIS 677.

It is not clear whether a contract for the provision of hot and cold water to county heating and air-conditioning facilities by a developer who acquires and modifies a utilities plant formerly owned by the county is a professional service exempt from competitive bidding requirements. 1983 Op St Compt No. 83-229, 1983 N.Y. Comp. LEXIS 257.

Agreement by town on behalf of water district for removal and retention by contractor of underground water tanks and related equipment, in compliance with county health department order and in conjunction with connection to new water supply, constitutes contract for public work subject to competitive bidding under CLS Gen Mun § 103 if it involves direct or indirect expenditure in excess of $20,000; value of tanks and equipment exchanged as consideration for removal work constitutes indirect expenditure for purposes of competitive bidding monetary threshold. 1999 Op St Compt No. 99-14, 1999 N.Y. Comp. LEXIS 14.

Construction of a village water system on property owned by the village or leased by it is subject to competitive bidding requirements and other applicable statutory requirements, even though the cost will be paid either by reimbursement or directed by a private utility. 1963 Op St Compt No. 63-226.

49. Collection agencies

Subject to competitive bidding consideration, city may engage services of private collection agency to perform ministerial functions relating to collection of unpaid parking fines imposed by city court. 1986 Op St Compt No. 86-75, 1986 N.Y. Comp. LEXIS 100.

50. Construction and renovation

Contracts for drilling for sub-surface characteristics in connection with construction, and contracts for janitorial services are public works contracts and are subject to bidding requirements where the cost thereof exceeds $2,500. 1968 Op St Compt No. 68-115.

Where city purchased labor and materials involving an expenditure in excess of competitive bidding requirements from an independent contractor, without competitive bidding, for the construction of a salt storage bin, there is, under the facts presented, at the very least, serious question as to whether competitive bidding requirements were properly complied with. 1979 Op St Compt No. 79-897, 1980 N.Y. Comp. LEXIS 406.

Contract with not-for-profit organization for renovation of village property, involving expenditure of moneys received from gifts and State-aid in excess of $7,000, is subject to competitive bidding requirements, though materials and supplies gratuitously provided by volunteers in connection with village public works

project are not subject to competitive bidding. 1987 Op St Compt No. 87-58, 1987 N.Y. Comp. LEXIS 121.

51. Consultant and management

Where the New York City charter required that contracts involving more than $2500 be founded on a sealed bid public letting, the comptroller was not arbitrary in refusing to register and certify as a valid contract a management consulting contract for $250,000 awarded by the mayor without competitive bidding and without the approval of the board of estimates. New York v Beame, 37 A.D.2d 89, 322 N.Y.S.2d 503, 1971 N.Y. App. Div. LEXIS 3716 (N.Y. App. Div. 1st Dep't 1971).

Under certain circumstances, a municipality may contract with a construction management firm. Further consideration of contract provisions which were the subject of Opn No. 80-5. 1980 Op St Compt No. 80-354, 1980 N.Y. Comp. LEXIS 316.

52. Sales of municipal property

Trial court properly held that a county legislature acted within its purview in rejecting the sales of surplus real property that the buyers had successfully bid on at auction as under Suffolk County, N.Y., Administrative Code § A14-30(I), sales for surplus county real property had to be approved by the legislature and that requirement was clearly stated in the auction brochure; N.Y. Gen. Mun. Law § 103 did not prohibit the legislature's actions as the qualification that the prevention of favoritism and fraud in the awarding of competitively bid contracts involving a municipality was a permissible objective of local legislation had not been extended to the sale of surplus county property. Matter of Toussie v County of Suffolk, 26 A.D.3d 506, 809 N.Y.S.2d 573, 2006 N.Y. App. Div. LEXIS 2384 (N.Y. App. Div. 2d Dep't), app. denied, 7 N.Y.3d 711, 823 N.Y.S.2d 770, 857 N.E.2d 65, 2006 N.Y. LEXIS 2651 (N.Y. 2006).

CLS Gen Mun § 103, which imposes competitive bidding requirement for public works contracts, did not apply to city's sale of city-owned radio stations to private entity. Creole Enters. v Giuliani, 167 Misc. 2d 810, 636 N.Y.S.2d 547, 1995 N.Y. Misc. LEXIS 601 (N.Y. Sup. Ct. 1995), aff'd, 236 A.D.2d 272, 653 N.Y.S.2d 576, 1997 N.Y. App. Div. LEXIS 1274 (N.Y. App. Div. 1st Dep't 1997).

53. Miscellaneous contracts

Application of this section to purchases of school text and library books discussed. 1954 Op St Compt No. 54-6978.

A contract for the spraying and pruning of village shade trees is subject to competitive bidding if it exceeds $2,500. 1958 Op St Compt No. 58-284.

The Jones Fund was established for the support of the poor in the Towns of Oyster Bay and North Hempstead, as a fund to be operated by a joint agency of the two towns, but the laws concerning competitive bidding apply to the fund. 1958 Op St Compt No. 58-348.

Purchase of uniforms for personnel of the sheriff's department by a county is subject to competitive bidding requirements where the cost exceeds $1,000 during a fiscal year. 1962 Op St Compt No. 62-1075.

The purchase of voting machines is subject to competitive bidding requirements. 1978 Op St Compt No. 78-812.

If it can be reasonably anticipated that total payments under an energy performance contract will exceed bidding threshhold, competitive bidding is required unless an exception to competitive bidding is applicable. 1985 Op St Compt No. 85-52., 1985 N.Y. Comp. LEXIS 90.

Competitive bidding would not be required if volunteer fire company expended moneys received from donations and membership dues to improve village fire hall and then made gift of improvement to village. 1987 Op St Compt No. 87-87, 1987 N.Y. Comp. LEXIS 123.

IV. Exceptions to Bidding Requirements

54. Change orders after award of contract

City's and Urban Development Corporation's contractual power to modify public project contract by change order was no a grant of authority to make a different or new contract without complying with competitive bidding statutes, and test to be applied was whether supplemental work ordered so varied from original plan, was of such importance, or so altered essential identity of main purpose of contract that it constituted a new undertaking requiring competitive bids. Albert Elia Bldg. Co. v New York State Urban Development Corp., 54 A.D.2d 337, 388 N.Y.S.2d 462, 1976 N.Y. App. Div. LEXIS 14038 (N.Y. App. Div. 4th Dep't 1976).

Discussion of change orders, directions, or authorizations in public works projects. 1960 Op St Compt No. 60-505.

The body or officer authorized to award a contract subject to competitive bidding is the party which should authorize change orders relating to such contract. 1978 Op St Compt No. 78-543.

55. —Instances where bidding not required

Where unanticipated utility line obstructions were discovered by the contractor, and the contract between the City of Lackawanna and the contractor contains provisions to the effect that (1) no extra payment will be allowed for variations in locations of structures and conditions as shown in the contract drawings and (2) the city does not guarantee the completeness or accuracy of such drawings, the additional work involved could be the subject of a change order without competitive bidding. However, this Department is not in a position to make a conclusive determination in this regard. 1980 Op St Compt No. 80-130, 1980 N.Y. Comp. LEXIS 367.

Although not free from doubt, it would seem that a municipality may issue a change order without competitive bidding for additional work on a sewer rehabilitation project where the additional work is of the same nature as the original work, is performed in the same area as the original work, is necessary to efficiently complete the project and was not anticipated until work on the original project was begun. 1983 Op St Compt No. 83-52, 1983 N.Y. Comp. LEXIS 430.

56. —Instances where bidding required

Contractor, who was prevented from entering any bid on construction project by virtue of city council's issuance of change order awarding work to another contractor, had standing to maintain Article 78 proceeding challenging issuance of change order as contrary to competitive bidding statutes and to restrain the making of payments to such other contractor by reason of allegedly illegal change order. Albert Elia Bldg. Co. v New York State Urban Development Corp., 54 A.D.2d 337, 388 N.Y.S.2d 462, 1976 N.Y. App. Div. LEXIS 14038 (N.Y. App. Div. 4th Dep't 1976).

Where original contract awarded by city and Urban Development Corporation covered construction of convention center and 18 months later another plaza project was accepted for development in area west of the center and the tunnel project developed six months later as an alternative to the original covered walkway submitted as part of the plaza, tunnel project could not be considered a modification of structure contemplated by publicly bid main contract and could not be awarded to the general contractor thereon by a change order in violation of competitive bidding statutes. Albert Elia Bldg. Co. v New York State Urban Development Corp., 54 A.D.2d 337, 388 N.Y.S.2d 462, 1976 N.Y. App. Div. LEXIS 14038 (N.Y. App. Div. 4th Dep't 1976).

57. Completion of work following default

Where sub-contractor has defaulted a municipality may, without re-advertising, enter into a contract, for the completion of work, with a contractor furnished by the bonding company. 1960 Op St Compt No. 60-273.

If the work of completing a public works project after forfeiture of the performance bond by a town is contracted out at a cost in excess of $2,500, it is subject to competitive bidding. 1962 Op St Compt No. 62-496.

Where a contractor has defaulted in performance of his contract, the political subdivision may, without advertising for bids, enter into a new contract for completion of the work. 1962 Op St Compt No. 62-827.

58. Emergencies

While emergency purchases do not require competitive bidding, it is nevertheless in the public interest that such purchases be made at the lowest cost to the municipality. Orange Front Paint Supply, Inc. v Scaramuccia, 59 A.D.2d 894, 399 N.Y.S.2d 52, 1977 N.Y. App. Div. LEXIS 14084 (N.Y. App. Div. 2d Dep't 1977).

In an action to recover from defendant village an amount representing the claimed reasonable value of goods sold to it by plaintiff, an order denying defendant's motion to dismiss the complaint on the ground that the sale or sales in question violated Gen Mun Law § 103(1), requiring competitive bidding in the circumstances presented, was proper where plaintiff's affidavits stated that the goods in question were ordered by defendant in four separate orders, each of which was under $3,000, which assertion was documented by four separate invoices, such affidavit and the facts therein raising a question of fact which, if proven, would render the statute inapplicable and where the affidavits also raised a question of fact as to whether bidding was possible, inasmuch as certain materials may have been requested or needed on an emergency basis. R.A.K. Industries, Div. of American Industries Sales Corp. v Saranac Lake, Inc., 100 A.D.2d 708, 474 N.Y.S.2d 626, 1984 N.Y. App. Div. LEXIS 17691 (N.Y. App. Div. 3d Dep't 1984).

Subdivision 4 of this section authorizes letting of contracts without competitive bidding only in emergency situations, which means under "unforeseen occurrences or conditions," and competitive bidding cannot be suspended by resolution declaring an emergency if none in fact exists. Rodin v Director of Purchasing, 38 Misc. 2d 362, 238 N.Y.S.2d 2, 1963 N.Y. Misc. LEXIS 2314 (N.Y. Sup. Ct. 1963); W. J. Gaskell, Inc. v Maslanka, 33 Misc. 2d 88, 225 N.Y.S.2d 94, 1962 N.Y. Misc. LEXIS 3988 (N.Y. Sup. Ct. 1962).

In order to dispense with competitive bidding requirements because of an emergency, a good faith emergency must exist and must not have been caused by dilatory behavior on the part of the municipality. 1978 Op St Compt No. 78-780.

When the furnace at the Village of Goshen Filter Plant broke down last winter and could not be repaired, the Village Board was authorized to let a contract to install a new furnace without competitive bidding after it declared a public emergency; however, the emergency must have been declared in good faith and not have been caused by dilatory behavior on the part of the Village. 1980 Op St Compt No. 80-266.

59. —Removal of unsafe buildings

Where two four-story buildings collapsed on September 6, leaving petitioner's adjoining building which had shared a common wall standing, but with its south wall exposed and with no support except for the rubble of the collapsed building, and a hearing was held at which point the property owner was given the chance to present evidence that the building was not dangerous and the further opportunity to repair and correct the danger after a finding that it was in fact dangerous, during which period of time the city lacked authority to demolish the building, then an emergency situation existed within the meaning and intent of section 103 of the General Municipal Law and the city's action on November 26 in ordering the demolition of the building without first advertising for bids was lawful and justified; the fact that the demolition contract included the demolition of other structures did not render the contract illegal, since all the structures were interconnected and were found to be dangerous buildings after hearings held by the city engineer; nor was the Common Council's allocation of the contract cost between the several buildings demolished, based upon the recommendation of the city engineer, arbitrary and capricious; accordingly, the special assessment levied against petitioner's property for the cost of demolition was not improper. Seven South Main Street, Inc. v Common Council of Gloversville, 95 Misc. 2d 596, 408 N.Y.S.2d 267, 1978 N.Y. Misc. LEXIS 2482 (N.Y. Sup. Ct. 1978), aff'd, Seven South Main St., Inc. v Common Council of Gloversville, 72 A.D.2d 672, 1979 N.Y. App. Div. LEXIS 16061 (N.Y. App. Div. 3d Dep't 1979).

A town may purchase gasoline and fuel oil either under State contract or through the facilities of the county (when authorized by the county legislative body) without the necessity of advertising for bids. 1968 Op St Compt No. 68-490.

The existence of an unsafe building which a city has the power to remove is not, itself, an emergency which would except the contract from competitive bidding, but certain buildings may, in fact, be in such condition as to permit a contract for removal without bidding. 1971 Op St Compt No. 71-449.

60. —Prison construction project

Where prison overcrowding problems became obvious as far back as 1971, shortfall was not as serious as projected, and closed bidding itself furnished proof of ability of state officials involved to expedite necessary work preliminary to public bidding and prepare separate bidding categories required by law, Department of Correctional Services was not confronted with situation that could be denominated emergency of type necessary to excuse compliance with notice and public bidding requirements. General Bldg. Contractors, Inc. v State, 89 Misc. 2d 279, 391 N.Y.S.2d 319, 1977 N.Y. Misc. LEXIS 1832 (N.Y. Sup. Ct. 1977).

An electrical contractor working in a public emergency situation, in which competitive bidding was waived (NY Const, art III, § 25; General Municipal Law, § 103, subd 4; L 1977, ch 101), had a valid contract with the State for electrical work at Warwick and Otisville Correctional Facilities although the Comptroller never approved the contract and the contractor was never given express authorization to begin work; the contractor believed that its contract had been accepted as the other companies with which it was working were authorized to begin work and had it not completed the underground electrical work before the other work, the State would have incurred additional costs, the State knew that it had begun to work and interposed no objection to the quality, and when a public emergency has been declared at certain correctional facilities and the contractor is under the assumption that the contract has been properly awarded, the Comptroller is authorized to audit and approve payment of said contractor's claim. Tri-Co Electric Corp. v Commissioner of General Services, 101 Misc. 2d 430, 421 N.Y.S.2d 304, 1979 N.Y. Misc. LEXIS 2696 (N.Y. Sup. Ct. 1979).

61. —Waste disposal

In a proceeding by planning consultants to recover monies allegedly due on an agreement pursuant to which the consultants organized and planned a county solid waste facility, the consultants were not entitled to a writ of mandamus to compel payment of the money where the legal authorization of the project was provided by a board of supervisors' resolution declaring that an emergency existed, thus providing the legal basis for the project to proceed in the absence of competitive bidding, where neither that resolution nor any subsequent resolution specified that the consultants were to receive the total amount they claimed for their work, and where the consultants failed to comply with the claims procedures of County Law § 369, providing that claims against a county may not be paid unless they have been audited, in that an itemized claim was submitted but no audit had been performed. Eberlin & Eberlin, P. C. v County of Putnam, 81 A.D.2d 376, 440 N.Y.S.2d 722, 1981 N.Y. App. Div. LEXIS 10921 (N.Y. App. Div. 2d Dep't 1981).

No such emergency existed as to permit suspension of competitive bidding requirements on purchase of 20 garbage trucks where a Town Board knew, on June 26, that its garbage truck leases would expire at the end of the year and it would have to purchase trucks before then, proceeded to advertise for bids on a certain amount of trucks, but awarding of contracts under the bids was held up by litigation, and thereafter took no steps to call for bids for an additional 20 trucks needed until December 18, when it sought to let a contract without competitive bidding for the additional trucks on the basis of the emergency clause in this section. Rodin v Director of Purchasing, 38 Misc. 2d 362, 238 N.Y.S.2d 2, 1963 N.Y. Misc. LEXIS 2314 (N.Y. Sup. Ct. 1963).

The city council's purchase of garbage disposal equipment without competitive bidding was proper as an emergency measure, where evidence revealed no garbage collections had been made for three days and the State Department of Health had ordered the city to remove the garbage, causing the City Manager to enter into a 30 day contract with a private contractor to do so. Grimm v Troy, 60 Misc. 2d 579, 303 N.Y.S.2d 170, 1969 N.Y. Misc. LEXIS 1508 (N.Y. Sup. Ct. 1969).

The action of respondent town board in determining that a public emergency health hazard exists at a site within the town due to polychlorinated biphenyl (PCB) contamination is amply supported by evidence that the level of PCB contamination at the site greatly exceeds allowable levels under Federal regulations (40 CFR Part 761) and, accordingly, because of the existence of an

imminent public health hazard respondent was authorized to contract, without public bidding, for the removal of certain PCB contaminated soil with a company licensed by the Federal Government to transport and store or otherwise dispose of PCBs (General Municipal Law, § 103, subd 4); in any event, the contract was not subject to public bidding requirements since there are only two licensed contractors in the northeast who could have disposed of the soil contaminated with PCBs and respondent secured quotes from both contractors and then awarded the contract to the one which submitted the lower quote. Vittengl v Congdon, 100 Misc. 2d 40, 417 N.Y.S.2d 587, 1979 N.Y. Misc. LEXIS 2410 (N.Y. Sup. Ct. 1979).

62. —Miscellaneous

Alleged emergency contract for certain county services would be declared invalid for lack of competitive bidding under CLS Gen Mun § 103 where "emergency" was not unforeseen or unavoidable, but was knowingly created when county executive vetoed appropriations for such services that had been added to budget by board of legislators, and board failed to override vetoes. Civil Serv. Emples. Ass'n, Local 1000 v O'Rourke, 173 Misc. 2d 460, 660 N.Y.S.2d 929, 1997 N.Y. Misc. LEXIS 262 (N.Y. Sup. Ct.), app. dismissed, aff'd, 240 A.D.2d 572, 659 N.Y.S.2d 794, 1997 N.Y. App. Div. LEXIS 6637 (N.Y. App. Div. 2d Dep't 1997).

A properly let contract for public work, which is about to expire, may not be extended, even for a relatively short time, without competitive bidding. Expiration of the contract according to its own terms does not create an emergency such as is contemplated by the statutes as a condition eliminating the requirement for competitive bidding. 1977 NY Ops Atty Gen Jan 25 (Informal), 1977 N.Y. AG LEXIS 176.

63. Government vendor

Subdivision 6 of this section does not restrict the amount of a purchase which may be made without competitive bidding. 1960 NY Ops Atty Gen March 11 (Informal), 1960 N.Y. AG LEXIS 84.

A school district may make purchases of prison made goods pursuant to § 184 of the Correction Law without advertising for bids under this section. 1954 Op St Compt No. 54-6893.

Subdivision 6 of this section provides an exception to the competitive bidding requirements where surplus and second-hand supplies or equipment are purchased from the State or the Federal Government, etc., but in purchasing such items from other sources competitive bidding is required if the cost is over $1,000. 1961 Op St Compt No. 61-246.

All purchase contracts involving an expenditure of more than one thousand dollars shall be awarded to the lowest possible bidder. Purchases of items in this category may also be made through the county or the state, eliminating the need for advertisement for bids. 1967 Op St Compt No. 67-615.

A municipal cooperation agreement whereby one municipality provides garbage collection services to another municipality is not subject to competitive bidding. 1981 Op St Compt No. 81-104, 1981 N.Y. Comp. LEXIS 783.

64. —Particular contracts

A school district may make purchases through the State Division of Standards and Purchase pursuant to § 104 of the General Municipal Law without advertising for bids under section 103 of such law. 1954 Op St Compt No. 54-6893.

The New York State Thruway Authority, being a "public benefit corporation", would come within section 103(6) of the General Municipal Law and, therefore, a town may purchase second-hand and surplus supplies, material or equipment from the Authority without competitive bidding. 1977 Op St Compt No. 77-238, 1977 N.Y. Comp. LEXIS 151.

65. Insurance

City was not obligated to readvertise and solicit new bids for its liability insurance contract upon court's invalidating city's procedure by which it had solicited bids, where competitive bidding was not required by statute and there was no pattern of conduct on part of city in awarding contracts on strictly competitive basis. Surdell v Oswego, 91 Misc. 2d 1041, 399 N.Y.S.2d 173, 1977 N.Y. Misc. LEXIS 2476 (N.Y. Sup. Ct. 1977).

Taking out of insurance to cover risks on municipal property, or the like, is not considered a "purchase" within the coverage of this section, and no letting of insurance contracts by competitive bidding is required. 1954 Op St Compt No. 54-6527; 1955 Op St Compt No. 55-7159; 1961 Op St Compt No. 61-233.

Policies of insurance, surety bonds and the like are not subject to competitive bidding under this section. 1954 Op St Compt No. 54-6899.

Where the intent of an insurance contract is that the insurance company may provide a replacement for a damaged or destroyed municipal structure, such replacement may be constructed without competitive bidding. 1978 Op St Compt No. 78-623, 1978 N.Y. Comp. LEXIS 31.

66. Monopoly vendor

A contract which is subject to competitive bidding requirements and which is renewable indefinitely would unduly restrict competition. 1982 Op St Compt No. 82-183, 1982 N.Y. Comp. LEXIS 540.

If a monopolistic situation exists, a town may purchase, without competitive bidding, in-place computer hardware which it had been leasing and for which software packages were developed. However, this Office has neither sufficient information nor the technical expertise necessary to make a knowledgeable determination with regard to the existence or non-existence of a monopolistic situation in this instance. 1981 Op St Compt No. 81-410, 981 N.Y. Comp. LEXIS 473.

67. —Telephone company

Proposed monthly service charge for direct dialing system to be installed in county-maintained hospital was, as a charge made by telephone company as a regulated monopoly, immune from operation of the competitive bidding statute. Williams v Bryant, 53 A.D.2d 229, 385 N.Y.S.2d 425, 1976 N.Y. App. Div. LEXIS 12512 (N.Y. App. Div. 4th Dep't 1976).

The General Municipal Law, providing for threshold of $3,500 for public work contracts and $1,500 for purchase contract prevailed over code provision that board of legislators shall fix a sum not to exceed $1,000 as limit above which any contract must be advertised for sealed bids where the county charter was not adopted until 1961 and the code a year later, and competitive bidding was not required as to installation of direct dialing system at the county-maintained hospital at cost of approximately $1,300. Williams v Bryant, 53 A.D.2d 229, 385 N.Y.S.2d 425, 1976 N.Y. App. Div. LEXIS 12512 (N.Y. App. Div. 4th Dep't 1976).

Competitive bidding is not required under this section where the subject of the contract is controlled by a monopoly, such as in the case of telephone electric service, so that no possibility of competition exists. 1954 Op St Compt No. 54-6899.

68. —Other monopolies

Where, in a town, only one dealer is licensed to supply pasteurized milk, it is unnecessary for a school district located therein to advertise for bids on purchases of milk. 1955 Op St Compt No. 55-7581.

A county may enter into an agreement, without competitive bidding, whereby it agrees to reimburse an electric company for the cost of a submarine cable necessary to furnish electric power to county property located on an island. 1960 Op St Compt No. 60-290.

69. Health services

The furnishing of ambulance services is not a contract for "public work" nor a "purchase contract" within the meaning of Gen Mun Law § 103, but rather is one requiring special skill or training excepting it from the general competitive bidding requirement. Amherst Columbia Ambulance Service, Ltd. v Gross, 80 A.D.2d 719, 437 N.Y.S.2d 137, 1981 N.Y. App. Div. LEXIS 10437 (N.Y. App. Div. 4th Dep't 1981).

County medical center did not act improperly in setting aside all bids for rental of special hospital beds after discovering inadequacy in bid specifications that precluded center from ascertaining which vendor was lowest bidder; moreover, center properly chose instead to lease beds under joint repurchasing program authorized by CLS Pub Health § 2803-a(2), rather than

to advertise for new bids, since CLS Gen Mun § 103(8) exempts municipal hospital from complying with competitive bidding requirements when it makes joint purchases under § 2803-a. Kinetic Concepts, Inc. v County of Erie, 172 A.D.2d 1031, 569 N.Y.S.2d 290, 1991 N.Y. App. Div. LEXIS 6289 (N.Y. App. Div. 4th Dep't 1991).

Contract for supplying unit dosage medication to two extended care nursing facilities called for professional knowledge and skill and, as a matter of law, was not subject to the requirement of competitive bidding for public contracts. Goldwin-Kent, Inc. v County of Broome, 107 Misc. 2d 722, 435 N.Y.S.2d 1011, 1981 N.Y. Misc. LEXIS 2090 (N.Y. Sup. Ct. 1981).

A county health department may contract with a laboratory for examination of sanitation samples of water and milk without advertising for competitive bids. 1960 Op St Compt No. 60-674.

A contract between a county nursing home and a hospital for pharmaceutical services is a contract for services requiring the application of special skills and professional training and, thus, is not subject to competitive bidding. 1978 Op St Compt No. 78-473, 1978 N.Y. Comp. LEXIS 115.

A municipal hospital may enter into a contract for the purchase of goods, supplies or services with a hospital association and such contract is not subject to competitive bidding requirements. Such contracts must be entered into in compliance with the provisions of Chapter V of Article 10 of the Codes, Rules and Regulations of the State of New York. 1979 Op St Compt No. 79-774.

While in the absence of a judicial decision or statutory clarification the issue is not free from doubt, it would seem that Niagara County may provide transportation services for physically and mentally handicapped individuals who are Medicaid recipients, to and from "Subchapter C" psychiatric day treatment programs, without compliance with formal competitive bidding requirements. However, the most prudent course for the County may be to follow competitive bidding procedures. 1980 Op St Compt No. 80-466.

Municipal hospitals may participate in group purchasing programs operated by hospital associations. Purchases made pursuant to such programs are exempt from normal statutory competitive bidding requirements. 1982 Op St Compt No. 82-198, 1982 N.Y. Comp. LEXIS 525.

Municipal nursing home may participate in group purchasing programs operated pursuant to CLS Pub Health L § 2803-a; purchases made pursuant to such programs are exempt from statutory competitive bidding requirements. 1989 Op St Compt No. 89-2, 1989 N.Y. Comp. LEXIS 5.

Purchases by county on behalf of "municipal hospital" or for county nutrition program that receives federal, state or local government funding may be made pursuant to joint agreements under CLS Pub Health § 2803-a under exception to competitive bidding in CLS Gen Mun § 103(8). 2004 Op St Compt No. 2004-9, 2004 N.Y. Comp. LEXIS 9.

70. Professional services

In action to annul support management services contract for custodial and maintenance needs as violative of competitive bidding requirements of CLS Gen Mun § 103, court erred in granting summary judgment voiding agreement and enjoining school district from entering into any similar contracts without public bidding since district's papers raised material question of fact as to whether services to be performed under agreement involved specialized skills, expertise, and exercise of judgment and discretion, so as to fall within "professional services" exception to competitive bidding requirements. Schulz v Cobleskill-Richmondville Cent. Sch. Dist. Bd. of Educ., 197 A.D.2d 247, 610 N.Y.S.2d 694, 1994 N.Y. App. Div. LEXIS 4143 (N.Y. App. Div. 3d Dep't 1994), aff'd, Schulz v State, 217 A.D.2d 393, 634 N.Y.S.2d 780, 1995 N.Y. App. Div. LEXIS 12301 (N.Y. App. Div. 3d Dep't 1995).

Management agreement by which contractor assumed responsibility for managing city's water system did not violate competitive bidding requirements of CLS Gen Mun § 103, and thus Article 78 proceeding by prospective contractor failed to state cause of action on that ground, where exception to competitive bidding requirements for contracts for services requiring specialized skills or training, including professional services or other services requiring technical expertise, was applicable to contracts for provision of management services. Fawcett v City of Buffalo, 275 A.D.2d 954, 713 N.Y.S.2d 610, 2000 N.Y. App. Div. LEXIS 9624 (N.Y. App. Div. 4th Dep't 2000), app. denied, 96 N.Y.2d 701, 722 N.Y.S.2d 793, 745 N.E.2d 1015, 2001 N.Y. LEXIS 20 (N.Y. 2001).

Agreement which County of Nassau (New York) entered into with entity that agreed to serve as curator at a museum complex was one requiring the provision of specialized services not subject to the statutory competitive bidding requirements, and was valid. Giustino v County of Nassau, 306 A.D.2d 376, 760 N.Y.S.2d 862, 2003 N.Y. App. Div. LEXIS 7112 (N.Y. App. Div. 2d Dep't 2003).

Contract for architectural services in connection with capital projects for construction, reconstruction and repair of district facilities was not subject to competitive bidding requirements, and architect's fee was properly based on customary charges for projects of like nature and magnitude. 1999 Op Comm Ed No. 14,128, 1999 NY Educ. Dept. LEXIS 268.

Certain aspects of a contract for the supervision, operation and maintenance of a municipal wastewater treatment facility would seem to qualify under the professional services exception to competitive bidding. Whether the entire contract qualifies under the exception is a question of fact. Opinion No. 80-672 is superseded to the extent inconsistent. 1982 Op St Compt No. 82-290, 1982 N.Y. Comp. LEXIS 426.

Since it is not clear whether long distance telephone service would be found by the courts to be exempt from competitive bidding as a "professional service" under General Municipal Law § 103, the most prudent course would be to comply with the provisions of this section. 1985 Op St Compt No. 85-66, 1985 N.Y. Comp. LEXIS 76.

Services in connection with preparation of title abstract fall within professional services exception to competitive bidding requirements. 1987 Op St Compt No. 87-21, 1987 N.Y. Comp. LEXIS 163.

Contract involving both purchase and professional services may qualify under professional services exception if two criteria are met: (1) professional services component of contract is primary or predominant part of acquisition and (2) there is "inextricable integration" of professional services and "physical components"; in order to determine whether contract primarily involves professional services, "total character" of agreement must be examined to ascertain its essential character or focus; in case of acquisition of both computer software and professional computer services, following factors may be pertinent in making this determination: amount of time and effort involved in tailoring prepackaged or canned software, degree of customizing necessary, amount of time and effort involved in any personnel training services provided by vendor, and relative cost of prepackaged or canned software and services, respectively. 1988 Op St Compt No. 88-35, 1988 N.Y. Comp. LEXIS 31.

Contract for publicity and promotional services involving development and implementation of marketing strategies would fall within professional services exception to competitive bidding; such services, however, must be procured in accordance with municipality's procurement polices and procedures. 1992 Op St Compt No. 92-33, 1992 N.Y. Comp. LEXIS 20.

Contract to engage services of firm to serve legal process is not exempt from competitive bidding requirements as professional service. 1993 Op St Compt No. 93-7, 1993 N.Y. Comp. LEXIS 1.

71. Realty appraisals

A town may enter into a contract for the services of a firm specializing in real property appraisal for assessment purposes without advertising for bids pursuant to this section. 1954 Op St Compt No. 54-6595.

Competitive bidding is not required in the award of a contract by a town for the preparation of a tax map and the appraisal of real property for purposes of taxation, although the contract involves an expenditure in excess of $2,500. 1954 Op St Compt No. 54-6909.

72. —Tax map preparation

The requirements of this section with respect to competitive bidding on contracts for public works and purchase contracts

involving expenditures above specified amounts do not apply to contracts for professional services requiring special skill or training, such as the preparation of a tax map. 1961 Op St Compt No. 61-246.

Competitive bidding is not required in the award of a contract for the preparation of a tax map and the appraisal of real property for the purposes of taxation, although the amount of the contract involves an expenditure in excess of $2,500. 1967 Op St Compt No. 67-373.

73. —Water surveys

A contract for an underground water survey, which involves such services as selecting the most probable sites, taking core samples and analyzing the same, drilling test wells, and demonstrating and predicting the maximum yield of water and, when requested, filing a bond guaranteeing such results, is a contract of services, requiring the application of special skills and professional training and such a contract is not subject to competitive bidding. 1959 Op St Compt No. 59-851.

Trustees of Westchester Joint Water Works may contract for engineering services for a water survey without advertising for bids. 1964 Op St Compt No. 64-520.

74. —Miscellaneous services

A contemplated 20-year management contract whereby a county, which was proposing to construct a domed stadium, whereby a corporation would provide promotional and management services, was exempt from competitive bidding where the executive officer of such corporation was the only man who ever had full responsibility for management of domed stadium, such proposed contract falling within an exception of the General Municipal Law § 103(1). Hurd v Erie County, 34 A.D.2d 289, 310 N.Y.S.2d 953, 1970 N.Y. App. Div. LEXIS 4851 (N.Y. App. Div. 4th Dep't 1970).

Contracts for professional services, i.e., evaluation of the educational program of a particular school, are not subject to the provisions of General Municipal Law § 103. Op Comm Ed No. 8619.

A contract for investment management service, even though in excess of $1,000, is not subject to competitive bidding. 1961 Op St Compt No. 61-569.

A contract entered into by a county for publicity services would involve services requiring special skills or training, and as such, would not be subject to competitive bidding. 1968 Op St Compt No. 68-428.

"Creative art work" required in connection with the printing of a brochure need not be submitted to bid. 1974 Op St Compt No. 74-413.

Stenographic services for the county attorney's office for examinations before trials and for hearings in connection with lawsuits involving the county constitute professional or technical services and may be obtained without seeking competitive bids. 1980 Op St Compt No. 80-287, 1980 N.Y. Comp. LEXIS 279.

Under certain circumstances, a municipality may contract with a construction management firm to, among other things, coordinate a public works project, provide consultant services throughout the various stages of the project and guarantee a maximum cost of the project, for a fixed fee. Such a contract would appear not to be subject to competitive bidding requirements since it would seem to be in the nature of a professional service. 1980 Op St Compt No. 80-5, 1980 N.Y. Comp. LEXIS 396.

A contract for the printing of a yearbook which is paid for with school district moneys is subject to competitive bidding requirements as a public works contract. Contracts for certain technical services in connection with the preparation of a school district yearbook would be excepted from competitive bidding requirements as professional services. 1981 St Compt No. 81-178, 1981 N.Y. Comp. LEXIS 714.

The design and acquisition of a comprehensive computer system including hardware, software, personnel training and vendor support services may fall within the professional services exception to competitive bidding if there is an inextricable integration of high technical skills uniquely related to the particular physical components. Opn No. 80-465 superseded in part. 1983 Op St Compt No. 83-164, 1983 N.Y. Comp. LEXIS 320.

A board of supervisors may employ a certified public accountant to conduct an audit without advertising for bids. 1953 Op St Compt No. 53-6420.

75. Concessions, franchises or licenses

Even though competitive bidding is not required in granting a franchise since the award of the franchise does not involve the payment or expenditure of funds out of the city treasury (General Municipal Law, § 103; New York City Charter, ch 13, § 341), the Board of Estimate of the City of New York did not act arbitrarily and capriciously in declining to extend petitioner's interim three-year franchise to construct bus stop shelters which display advertising material and instead awarding a long-term franchise to the highest bidder upon terms and conditions more advantageous to the city that petitioner could not meet since the board has the duty to obtain the best terms possible for the city and the fact that petitioner pioneered the bus stop shelter program does not entitle it to be granted the franchise on its own terms; in view of the active interest in the bus stop shelter program, the board reasonably determined to seek proposals from those interested based upon the terms and conditions formulated by the board's Bureau of Franchises. BusTop Shelters, Inc. v New York, 99 Misc. 2d 198, 415 N.Y.S.2d 726, 1978 N.Y. Misc. LEXIS 2905 (N.Y. Sup. Ct. 1978).

It would appear that the granting of a concession to a private contractor to provide cafeteria services at a county community college is neither a purchase nor a public works contract. However, in light of recent decisions, the issue is not free from doubt. The most prudent course would be to advertise for competitive bids. 1980 Op St Compt No. 80-473.

It would appear that the granting of a license or concession to sell refreshments in a town recreational facility to a local youth hockey organization is neither a "purchase" nor a "public works contract" subject to the competitive bidding requirements of section 103 of the General Municipal Law. However, in light of recent decisions, the issue is not free from doubt. The most prudent course would be to advertise for competitive bids. 1980 Op St Compt No. 80-491.

While not free from doubt, it would appear that formal competitive bidding is not required for the granting of a concession at a park facility. 1982 Op St Compt No. 82-237, 1982 N.Y. Comp. LEXIS 489.

76. Sole source or customized items

Customized off-site computer services provided to a water district in connection with the preparation of accounts receivable and billing are not subject to competitive bidding requirements. 1983 Op St Compt No. 83-71, 1983 N.Y. Comp. LEXIS 399.

When, at the time a contract is entered into, there is in fact only one source from which to acquire goods or services, competitive bidding is not required. 1983 Op St Compt No. 83-67, 1983 N.Y. Comp. LEXIS 418.

Whether or not contract for patented sand injection services is exempt from competitive bidding under sole source exception or professional service exception is better left to appropriate local officials for resolution. 1986 Op St Compt No. 86-25, 1986 N.Y. Comp. LEXIS 150.

77. Utility interference contracts

Private utility interference work is not "public work" under CLS Gen Mun § 103(1) for purpose of determining lowest responsible bidder by combining amounts bid for street reconstruction work and utility interference work inasmuch as it was not "public work" prior to creation of joint bidding technique, it is inherently private and for essential benefit of utility companies, which have obligation to pay all costs associated with protecting their facilities during street repair projects as precondition to "privilege" of using city streets for installing and maintaining utility equipment, and legislature in no way intended or authorized city to unilaterally and informally determine, define and alter contours of "public work." Diamond Asphalt Corp. v Sander, 92 N.Y.2d 244, 678 N.Y.S.2d 567, 700 N.E.2d 1203, 1998 N.Y. LEXIS 1828 (N.Y. 1998).

In satisfaction of CLS Gen Mun § 103(1), which provides that all contracts for "public work" must be awarded to the lowest responsible bidder "except as otherwise expressly provided by an

act of the legislature or by a local law adopted prior to [September 1, 1953]", bypass contractor selection authority formerly vested in the now abolished Board of Estimate by the old City Charter does not survive solely as the responsibility of the Mayor of the City of New York under New York City Charter § 313(b)(2). Diamond Asphalt Corp. v Sander, 92 N.Y.2d 244, 678 N.Y.S.2d 567, 700 N.E.2d 1203, 1998 N.Y. LEXIS 1828 (N.Y. 1998).

78. Miscellaneous exceptions

The competitive bid statutes, which require the submission of a non-collusion certificate and the award of public contracts to the lowest responsible bidder, are not applicable to a "turnkey" low-income development project. Marino v Ramapo, 68 Misc. 2d 44, 326 N.Y.S.2d 162, 1971 N.Y. Misc. LEXIS 1472 (N.Y. Sup. Ct. 1971).

Since towing services require special skills or training, and contracts for such services are not subject to competitive bidding requirements, a city was not required by Gen Mun Law § 103 to award the contract to the lowest responsible bidder, notwithstanding the fact that it had advertised for and accepted bids for such services. Mathalia Motors, Inc. v Oneida, 105 Misc. 2d 843, 433 N.Y.S.2d 548, 1980 N.Y. Misc. LEXIS 2625 (N.Y. Sup. Ct. 1980), aff'd, 84 A.D.2d 637, 449 N.Y.S.2d 448, 1981 N.Y. App. Div. LEXIS 15756 (N.Y. App. Div. 3d Dep't 1981).

Under Gen Mun Law § 103 and the New York City Charter, Ch 13, § 341, competitive bidding is ordinarily not required as a prerequisite to the granting of a lease by the city, since the award of the lease does not involve the payment or expenditure of funds out of the city treasury. However, the Bureau of Ferry and General Aviation Operations would be directed to prepare a request for proposal which would fully set forth the terms and conditions of bids for a lease of space at an airport and the reasons why bids would be refused, where the initial request for proposal issued by the Bureau was uncertain and unclear and subject to the arbitrary, personal, and subjective discretion of the Bureau in awarding the lease. O'Henry's Film Works, Inc. v Bureau of Ferry & General Aviation Operations, 111 Misc. 2d 464, 444 N.Y.S.2d 509, 1981 N.Y. Misc. LEXIS 3296 (N.Y. Sup. Ct. 1981).

Contracts for implementation of land-based sludge management plan fell within "special case" exception of NYC Charter § 312(b)(1)(ii), and therefore competitive bidding was not required, where evaluating competing proposals required judgment by Board of Estimate due to city's need to seek design of flexible sludge disposal system. United States v New York, 972 F.2d 464, 1992 U.S. App. LEXIS 18654 (2d Cir. N.Y. 1992).

Where the State Department of Transportation has to replace municipal utilities located in the right-of-way of a state highway and contracts the work out, such procedure is not a violation of the bidding statutes which require municipalities to award their public works contracts pursuant to competitive bidding. 1967 Op St Compt No. 67-863.

Subject to pertinent civil service requirements, a joint recreation commission may engage independent contractors to perform maintenance and directorial services. It would seem that the directorial services would not be subject to competitive bidding requirements. 1981 Op St Compt. No. 81-108, 1981 N.Y. Comp. LEXIS 768.

Services provided by volunteers in constructing a municipal or school district project are not subject to competitive bidding. However, materials utilized on the project must be acquired pursuant to competitive bidding requirements. 1982 Op St Compt No. 82-324, 1982 N.Y. Comp. LEXIS 404.

Even when it is clearly established that professional service exception is applicable and formal competitive bidding under General Municipal Law § 103 is not required, in order to assure that contract award is made in best interest of taxpayers, it is generally advisable for municipality to seek competition anyway. 1986 Op St Compt No. 86-25, 1986 N.Y. Comp. LEXIS 150.

Provision in Subdivision 4 of CLS Highway Law § 142-c, which provides that work authorized by that section shall be performed upon such terms and conditions as may be agreed upon by town board and village board, clearly anticipates negotiated agreement between two governing boards, and therefore represents express statement by State Legislature that agreements entered into pursuant to § 142-c are not subject to competitive bidding requirements of CLS Gen Mun Laws § 103. 1989 Op St Compt No. 89-57, 1990 N.Y. Comp. LEXIS 1.

Competitive bidding requirements of CLS Gen Mun §§ 101 and 103 are not violated by use of town employees to perform work in connection with construction of town salt storage shed, but purchases of materials and supplies for work would be subject to competitive bidding requirements if it is known or reasonably expected that competitive bidding monetary threshold for purchases will be exceeded; if it is not known or reasonably expected that competitive bidding threshold will be exceeded, town would be required to make such purchases in accordance with its procurement policies and procedures. 1999 Op St Compt No. 99-2, 1999 N.Y. Comp. LEXIS 4.

79. Combining purchases or work into single contract

Purchases of the same or similar nature must be combined in one set of specifications. In order to prevent abuses of the competitive bidding system, this section may not be evaded by the device of letting separate contracts, each falling below the amount required for competitive bidding. 1959 Op St Compt No. 59-647.

Discussion of which items must be lumped together for bidding purposes and necessity of competitive bidding where a municipality purchases additional items not in excess of $1,000 after a contract for similar articles has been awarded and consummated. 1964 Op St Compt No. 64-436.

A county may for competitive bidding purposes combine two public works projects into one contract. 1967 Op St Compt No. 67-515.

Office machines which are normally handled by one manufacturer or vendor should be considered in the aggregate as a single purchase. 1967 Op St Compt No. 67-971.

A town may award as a single project, drainage work for a drainage district, and highway repair work to be undertaken in the same street or streets, if the specifications are prepared in such a manner that the appropriate charges for the drainage work will be charged only against the drainage district and the appropriate charges for the highway repairs will be charged only against the proper highway fund. 1968 Op St Compt No. 68-369.

80. —Dividing purchases or work into separate contracts, generally

In an action to recover from defendant village an amount representing the claimed reasonable value of goods sold to it by plaintiff, an order denying defendant's motion to dismiss the complaint on the ground that the sale or sales in question violated Gen Mun Law § 103(1), requiring competitive bidding in the circumstances presented, was proper where plaintiff's affidavits stated that the goods in question were ordered by defendant in four separate orders, each of which was under $3,000, which assertion was documented by four separate invoices, such affidavit and the facts therein raising a question of fact which, if proven, would render the statute inapplicable and where the affidavits also raised a question of fact as to whether bidding was possible, inasmuch as certain materials may have been requested or needed on an emergency basis. R.A.K. Industries, Div. of American Industries Sales Corp. v Saranac Lake, Inc., 100 A.D.2d 708, 474 N.Y.S.2d 626, 1984 N.Y. App. Div. LEXIS 17691 (N.Y. App. Div. 3d Dep't 1984).

Discussion relating to necessity for competitive bidding on contracts for the purchase of milk and janitorial supplies. Purchases may not be split to avoid requirement for competitive bidding. 1953 Op St Compt No. 53-6440.

The splitting of purchases to evade the bidding requirements of the law would nullify the effect of the statute if permitted. 1955 Op St Compt No. 55-7104.

Competitive bidding laws are not circumvented if purchase contracts contain separate items totaling less than $1,000. What is in effect one job or one item may not be divided into separate contracts. 1955 Op St Compt No. 55-7299.

Where more than one thousand dollars of an item of supply is known to be required by a municipality for a fiscal year, a series of contracts for less than a year's needs may each be competitively

let. Specifications may require delivery at periodic intervals. 1956 Op St Compt No. 56-7847.

81. —Particular projects

Over a period of less than 1 year, plaintiff sold to defendant town some $11,000 worth of road materials. Held: the transaction did not contravene the competitive bidding requirements of this section, since it was handled by 54 separate contracts, each of which was less than $1,000 in amount. Furthermore, the town, having gained by the delivery of the materials, was estopped from denying the authority of its superintendent of highways to make the purchases. Rason Asphalt, Inc. v Oyster Bay, 6 A.D.2d 810, 175 N.Y.S.2d 302, 1958 N.Y. App. Div. LEXIS 5643 (N.Y. App. Div. 2d Dep't 1958).

A public works project in excess of $2,500 for landscaping village property cannot be broken into separate contracts, each less than $2,500, for the purpose of avoiding competitive bidding. 1962 Op St Compt No. 62-565.

Where proposed curb and sidewalk construction will cost over $2,500 in the aggregate, competitive bidding may not be avoided by splitting the project into several portions. 1963 Op St Compt No. 63-701.

A town may not pay all or part of a claim for a certain item purchased by the town highway superintendent, without competitive bidding on five separate occasions even though one of the purchases was for less than $1,000. Under the circumstances, where town officers know, or have reason to believe, that the purchase of a certain item of supply will amount to more than $1,000 in a fiscal year, all purchase contracts for that item must be competitively let. In the absence of an agreement required by Section 284 of the Highway Law, expenditures for highway repair and improvement are illegal. 1968 Op St Compt No. 68-315.

A town may divide the single public works project of renovating a building for use as town offices into components so long as contracts for each component are subject to competitive bidding. 1980 Op St Compt No. 80-211.

82. Standardized equipment

A municipality may specify a particular article or type of equipment which it regards as its general standard, but must provide that any other manufacturer of a similar object may meet the specifications, if his product is reasonably equivalent to that mentioned as standard. 1959 NY Ops Atty Gen Aug 14 (Informal), 1959 N.Y. AG LEXIS 192.

A municipality may legally specify and award a contract for a particular type of equipment or material to the exclusion of others where local geographic, atmospheric or other conditions require the use of the, and only the type of, equipment specified. 1960 Op St Compt NO. 60-543.

Where a political subdivision is required to award its public works contracts pursuant to competitive bidding requirements, it may not legally specify the product of a certain manufacturer to the exclusion of all other comparable products, except where such a designation is required for the public interest. 1968 Op St Compt No. 68-501.

Assuming there is a valid reason for standardizing, there is no reason, as a matter of law, why a village board would be prohibited from standardizing with regard to a particular make of fire equipment where such equipment will be custom made for the village. 1980 Op St Compt No. 80-570.

83. —Sufficiency of resolution specifying standardized equipment

Where a call for bids by a town desiring to purchase a clamshell bucket excavator "Bucyrus Erie Model B22 or Equal," in accordance with detailed specifications and proposal sheets, included specifications which only the Bucyrus-Erie crane could meet, the words "or equal" were meaningless, since it was determined in advance that only a Bucyrus-Erie crane would be purchased, and, under subd. 5 of this section, acceptance of bids should have been preceded by a two-thirds vote to that effect with a full explanation in the resolution of the reasons for its adoption. Hodge & Hammond, Inc. v Burns, 23 Misc. 2d 318, 202 N.Y.S.2d 133, 1960 N.Y. Misc. LEXIS 3194 (N.Y. Sup. Ct. 1960).

Where it is intended to take bids on standardized equipment, the standardization resolution cannot be passed subsequent to the advertisement for bids and is invalid if it specifies more than one make or kind of equipment. 1961 Op St Compt No. 61-344.

A two-thirds vote of the municipal governing board is not necessary to rescind a standardization resolution. 1978 Op St Compt No. 78-450, 1978 N.Y. Comp. LEXIS 108.

In evaluating the reasons of a proposed standardization resolution that recited that it was desirous to maintain a match of all tires on loaders, that a particular make of tire was a standard in the industry, and that the Commission of Public Works and Public Works Committee recommended that standard, the opinion in 1958 Op St Compt 58-484 is a guide. That opinion stated that a standardization resolution should declare why, as a matter of fact and not mere opinion, the efficiency or economy will be served; also stated was that while carefully drawn specifications will normally meet most situations, a resolution reciting that a particular make of equipment is specified because a certain official prefers it, or because in his opinion it would be more economical than other makes, would be patently insufficient. As to the proposed standardization resolution, the governing body should consider whether "a match of all tires on "the loaders" result in efficiency or economy because, as a matter of fact, such a match is necessary for the operation of the loader, or whether several makes of tires may be efficiently or economically utilized together. 1990 Op St Compt No. 90-45, 1990 N.Y. Comp. LEXIS 41.

84. —Provision for use of equivalent materials

Where a town calls for bids seeking to purchase a designated make of machine "or equal," it should not, in passing on bids submitted with respect to other makes, accept without question a report of its engineer favoring acceptance of a bid on the specified make without inquiry into performance of other makes included in the bidding, their relative durability, upkeep cost, etc. Hodge & Hammond, Inc. v Burns, 23 Misc. 2d 318, 202 N.Y.S.2d 133, 1960 N.Y. Misc. LEXIS 3194 (N.Y. Sup. Ct. 1960).

Specifications that do not provide for equivalencies exclude full competition and where specifications are drawn in that fashion such are defective and do not comply with the requirements of General Municipal Law § 103. Fonseca v Board of Education, 58 Misc. 2d 223, 294 N.Y.S.2d 952, 1968 N.Y. Misc. LEXIS 1179 (N.Y. Sup. Ct. 1968).

85. —Particular contracts

After a town board has duly adopted a resolution for standardization of certain equipment and issued a call for bids on a specified type and make of snow plow, an indictment for conspiracy to obstruct justice cannot be sustained merely because the exclusive distributor for such equipment in the county requests the manufacturer and another distributor in adjacent territory to bid, so that his bid will not be the only one. People v Bareika, 11 A.D.2d 292, 203 N.Y.S.2d 355, 1960 N.Y. App. Div. LEXIS 8395 (N.Y. App. Div. 3d Dep't 1960).

Board of education was not required by CLS Gen Mun § 103(5) to obtain vote of $^{3}/_{5}$ of its governing body before specifying particular type of sand injection machine to be used by bidders on contract for renovation of high school athletic field, since contract was for public work and not for purchase of equipment, material or supplies, and thus § 103(5) did not apply. In re K & M Turf Maintenance, 166 A.D.2d 445, 560 N.Y.S.2d 673, 1990 N.Y. App. Div. LEXIS 11846 (N.Y. App. Div. 2d Dep't 1990).

Specifications for school construction project referring to named products but making general provision for the submission of bids based on products other than those named in the specifications was adequate means of complying with requirement of General Municipal Law § 103 that the specification should provide for use of equivalent products. Op Comm Ed No. 8946.

Since school board advertised for bids only 12 days before bid opening, contractor could not have reasonably complied with requirement that it provide information about substitutions of materials described in specifications at least 7 days prior to opening, and since board denied contractor opportunity of using equivalent materials, in violation of General Municipal Law § 103, contract must be rebid. In re A-E Architectural Materials, Inc., Op Comm Ed No. 9538.

In calling for bids on bituminous materials, a municipality may specify such materials as conform to general state specifications, and may also specify a patented mix, but should specify the mix in general specifications or, if a trade name is used, an "equivalency" clause. 1962 Op St Compt No. 62-91.

Discussion concerning the standardization of voting machines. 1978 Op St Compt No. 78-812.

A village must ask for formal bids where it wishes to purchase a machine costing $2,450, for cleaning its sanitary sewer mains, even though that is the only machine made that said village can afford to purchase and that will fulfill its needs. 1958 Op St Comp No. 58-372.

86. —Miscellaneous

After a town board has duly adopted a resolution for standardization of certain equipment and issued a call for bids on a specified type and make of snow plow, an indictment for conspiracy to obstruct justice cannot be sustained merely because the exclusive distributor for such equipment in the county requests the manufacturer and another distributor in adjacent territory to bid, so that his bid will not be the only one. People v Bareika, 11 A.D.2d 292, 203 N.Y.S.2d 355, 1960 N.Y. App. Div. LEXIS 8395 (N.Y. App. Div. 3d Dep't 1960).

After a resolution is adopted by a Town Board pursuant to subd. 5 of this section, for standardization of equipment and supplies, nothing in this section requires that an advertisement for bids on equipment, specifying the equipment desired according to standard, call for three bids. People v Bareika, 11 A.D.2d 292, 203 N.Y.S.2d 355, 1960 N.Y. App. Div. LEXIS 8395 (N.Y. App. Div. 3d Dep't 1960).

The advertisement for bids on a fire truck may not specify a particular make of truck where the sole reason is that an official believes it is more economical, or better built, or more durable than other makes. A particular make of equipment may be specified only upon the adoption of a standardization resolution. 1958 Op St Compt No. 58-484.

Discussion of preparing specifications for the purchase of secondhand equipment from a private corporation. 1958 Op St Compt No. 58-1049.

While, pursuant to subd. 5 of this section, added in 1957, noncompetitive bidding specifications may now be drawn for purposes of standardization, the provisions of the Onondaga County Purchasing Act as to procedure to be followed in connection with "standardization purchases" must still be followed in connection with purchases by that county. 1961 Op St Compt No. 61-302.

V. Contract Specifications

87. Sufficiency of specifications

In an Art 78 proceeding by potential bidders on a contract for a "County Impound Garage," the bid specifications set forth in the bid proposal were ambiguous and the county would be enjoined from awarding any contracts based upon the bids submitted pursuant to the proposal, where the specifications created an element of uncertainty with respect to the rights and obligations concerning unclaimed impounded vehicles, which uncertainty raised the danger that bidding would be discouraged or that bids would be unnecessarily inflated. Sagamore Auto Body, Inc. v County of Nassau, 104 A.D.2d 818, 480 N.Y.S.2d 143, 1984 N.Y. App. Div. LEXIS 20304 (N.Y. App. Div. 2d Dep't 1984).

88. Specifications that bar or impede competition

Since a contract awarded without the advertising for bids required by the above statute would be illegal, a contract will also be illegal where the municipality accomplishes the same result by so fixing or manipulating the specifications thereof as to shut out competitive bidding or permit unfair advantage or favoritism. Gerzof v Sweeney, 16 N.Y.2d 206, 264 N.Y.S.2d 376, 211 N.E.2d 826, 1965 N.Y. LEXIS 1040 (N.Y. 1965), reh'g denied, 17 N.Y.2d 549, 1966 N.Y. LEXIS 1945 (N.Y. 1966).

Competitive bidding statutes do not compel unfettered competition, but do demand that specifications that exclude class of would-be bidders be both rational and essential to public interest. Associated Gen. Contrs. v New York State Thruway Auth. (In re New York State Chapter), 88 N.Y.2d 56, 643 N.Y.S.2d 480, 666 N.E.2d 185, 1996 N.Y. LEXIS 314 (N.Y. 1996).

When public entity adopts specification in letting of public work contract that impedes competition to bid for such work, it must be rationally related to twin purposes of protecting public fisc by obtaining best work at lowest possible price, and preventing favoritism, improvidence, fraud, and corruption in awarding of public contracts. Associated Gen. Contrs. v New York State Thruway Auth. (In re New York State Chapter), 88 N.Y.2d 56, 643 N.Y.S.2d 480, 666 N.E.2d 185, 1996 N.Y. LEXIS 314 (N.Y. 1996).

General Municipal Law § 103, subd 1 is violated not only when a contract is awarded without advertisement for bids but also when a municipality accomplishes the same result by so manipulating the specifications as to preclude true competitive bidding. Resco Equipment & Supply Corp. v City Council, Watertown, 34 A.D.2d 1088, 313 N.Y.S.2d 74, 1970 N.Y. App. Div. LEXIS 4374 (N.Y. App. Div. 4th Dep't 1970).

Competitive bidding provisions of general municipal law are violated when municipality manipulates bidding specification so as to preclude true competitive bidding. Atlantic Tug & Equipment Co. v Tonawanda, 45 A.D.2d 916, 357 N.Y.S.2d 303, 1974 N.Y. App. Div. LEXIS 4481 (N.Y. App. Div. 4th Dep't 1974).

Any ordinance, local law, contract requirement or bid specification which establishes precondition to award of contract to lowest responsible bidder is inconsistent with CLS Gen Mun § 103, and therefore invalid, unless its establishment as precondition is expressly authorized by act of legislature or by local law adopted prior to September 1, 1953. Empire State Chapter of the Associated Builders & Contractors v County of Niagara, 161 Misc. 2d 537, 615 N.Y.S.2d 841, 1994 N.Y. Misc. LEXIS 281 (N.Y. Sup. Ct. 1994).

A prime contract entered into between the plaintiff contractor and defendant school board was void and illegal, where after the lowest bidder withdrew its bid, the contract was awarded to plaintiff, the next lowest bidder, and simultaneously and without authority the board changed the specifications of the contract to omit part of the work. Fabrizio & Martin, Inc. v Board of Education, 290 F. Supp. 945, 1968 U.S. Dist. LEXIS 11583 (S.D.N.Y. 1968).

A board of fire commissioners may not properly submit specifications in advertising for bids for a new fire truck which specifications can be met by but one manufacturer. 1954 NY Ops Atty Gen May 24 (Informal), 1954 N.Y. AG LEXIS 283.

Board of Cooperative Educational Services (BOCES) acted within its discretion in awarding spring water bid by category where invitation for bids (IFB) clearly stated that bids would be awarded by category, although BOCES also reserved right to award bids in other formats; also, it was reasonable for BOCES to obtain all of water products from sole vendor who had bid for all 8 items in category, who had submitted matching or lowest bid for 7 out of 8 items, and who was only $0.50 per case higher for one item representing only 22 cases per month or 13 percent of total category. 2004 Op Comm Ed No. 15,032, 2004 NY Educ. Dept. LEXIS 60.

Specifications may not be drawn by a municipality in such a manner as to exclude all but one bidder. 1955 Op St Compt No. 55-7413.

Where specifications are drawn solely for the purpose of insuring that a certain vendor will be the successful bidder, such specifications are illegal. 1967 Op St Compt No. 67-583.

Where equipment is purchased pursuant to competitive bidding requirements, specifications may not be drawn in such a way nor, for purposes of determining the lowest responsible bidder, may bids be weighted in such a way as will reflect the cost and/or incidence of repairs as well as the purchase price. 1978 Op St Compt No. 78-628, 1978 N.Y. Comp. LEXIS 34.

89. —Acceptance of equivalents or substitutes

Unsuccessful bidder on contract for high school athletic field renovations could not persuasively assert that bid proposal's specification was illegal under CLS Gen Mun § 103(1) because it required use of patented sand injection machine where (1) bid proposal stated that listing of items by manufacturer or brand name only specified description and quality, and was not intended to limit competitive bidding, (2) record contained proof that board of education was willing to accept substitute equivalents, and (3)

board's conduct in investigating and evaluating bids was consistent with its expressed intention to entertain bids involving substitutes of equal quality. In re K & M Turf Maintenance, 166 A.D.2d 445, 560 N.Y.S.2d 673, 1990 N.Y. App. Div. LEXIS 11846 (N.Y. App. Div. 2d Dep't 1990).

Unsuccessful vendor's failure to advise Board of Cooperative Educational Services (BOCES) in bid documents that it was submitting substitute "equal" or "equivalent" product for other brand names listed in sports drink category precluded vendor from belatedly challenging award on such basis. 2004 Op Comm Ed No. 15,032, 2004 NY Educ. Dept. LEXIS 60.

90. —Brand name or single source

If competitive bid purports to establish what are essentially single source items within generic category, there must be sound and essential reasons for such discriminatory contracting that are documented in procurement record and based on objective criteria. 2004 Op Comm Ed No. 15,032, 2004 NY Educ. Dept. LEXIS 60.

Where a proper standardization resolution has been duly adopted, a municipality may specify a particular brand name or make in its bid specifications to the exclusion of all others. 1982 Op St Compt No. 82-44, 1982 N.Y. Comp. LEXIS 678.

A municipality, in its bid specifications, may call for services involving a patented process available to only licensed contractors if required in the public interest. If the services may be obtained from only one source, competitive bidding is not required. 1983 Op St Compt No. 83-105, 1983 N.Y. Comp. LEXIS 381.

91. —Discounts for early payment

The practice, whereby a school district includes in its specifications for a schoolhouse a provision for the payment of a bonus of $1,000 for each and every week that the schoolhouse is completed prior to a specified date, is one which this Department cannot recommend. 1958 Op St Compt No. 58-667.

A municipality may include in its specifications a provision requesting a discount to be quoted for payment made within a specified period of time. 1967 Op St Compt No. 67-935.

An unsolicited discount for prompt payment may not be considered in determining the low bid. 1967 Op St Compt No. 67-935.

92. —Domestic materials to be used

Resolution of county legislature requiring that only domestic manufactured steel could be used in the construction of a proposed county building was invalid because of its conflict with the competitive bidding requirements of General Municipal Law § 103. American Institute for Imported Steel, Inc. v County of Erie, 32 A.D.2d 231, 302 N.Y.S.2d 61, 1969 N.Y. App. Div. LEXIS 3571 (N.Y. App. Div. 4th Dep't 1969).

"Buy American" resolution adopted by the county legislature (requiring all steel used in public construction be purchased from manufacturers in the United States, whenever practicable) violated state statute requiring competitive bidding and the award of a public contract to the lowest bidder. American Institute for Imported Steel, Inc. v County of Erie, 58 Misc. 2d 1059, 297 N.Y.S.2d 602, 1968 N.Y. Misc. LEXIS 986 (N.Y. Sup. Ct. 1968), rev'd, 32 A.D.2d 231, 302 N.Y.S.2d 61, 1969 N.Y. App. Div. LEXIS 3571 (N.Y. App. Div. 4th Dep't 1969).

93. —Labor provisions

City failed to make requisite showing to justify use of project labor agreement (PLA) as part of competitive bidding process on public works contract where there was no detailed projection of cost savings as result of PLA, there was no history of labor unrest that threatened success of project, and city's general concern that project be completed in timely manner to comply with funding requirements and deadlines imposed by New York State Department of Environmental Conservation, without more, was insufficient basis on which to impose such exceptional specification as PLA. Empire State Chapter of Associated Builders & Contrs. v City of Oswego, 239 A.D.2d 875, 659 N.Y.S.2d 672, 1997 N.Y. App. Div. LEXIS 6233 (N.Y. App. Div. 4th Dep't 1997).

Project Labor Agreement (PLA) incorporated in bid specifications for county court facilities project did not violate competitive bidding laws or policy where, inter alia, (1) inclusion of no-strike clause in PLA would negate possibility of strike-induced delays that could disrupt abbreviated time schedule of project and thus imperil availability of $29 million in state funds, (2) elimination of potential labor unrest through use of PLA would avoid fixed fees of $41,400 per month payable to project's construction manager and architect, (3) use of PLA would result in savings of $2,111,250 by permitting designation of working forepersons and by excluding morning and afternoon work breaks, and (4) PLA contained no provisions that discriminated against nonunion contractors. Albany Specialties v County of Orange, 240 A.D.2d 739, 662 N.Y.S.2d 773, 1997 N.Y. App. Div. LEXIS 7147 (N.Y. App. Div. 2d Dep't 1997), app. denied, 1997 N.Y. LEXIS 4088 (N.Y. Dec. 2, 1997).

Mere fact that county construction manager's report recommending use of Project Labor Agreement (PLA) in bid specifications for county court facilities project bore strong resemblance to earlier report by him analyzing use of PLA for county correctional facility project did not render report invalid or suspect where similarities between 2 reports were inevitable, given closeness in time and location of 2 projects and their common labor market. Albany Specialties v County of Orange, 240 A.D.2d 739, 662 N.Y.S.2d 773, 1997 N.Y. App. Div. LEXIS 7147 (N.Y. App. Div. 2d Dep't 1997), app. denied, 1997 N.Y. LEXIS 4088 (N.Y. Dec. 2, 1997).

County construction manager's report recommending use of Project Labor Agreement (PLA) in bid specifications for county court facilities project in order to avoid potential labor strife did not suggest "capitulation to extortion," because avoidance of delays and work stoppages occasioned by labor strife is legitimate consideration in deciding whether to enter into PLA. Albany Specialties v County of Orange, 240 A.D.2d 739, 662 N.Y.S.2d 773, 1997 N.Y. App. Div. LEXIS 7147 (N.Y. App. Div. 2d Dep't 1997), app. denied, 1997 N.Y. LEXIS 4088 (N.Y. Dec. 2, 1997).

City of Rochester fair employment practices provisions permitting submission of an alternate proposal for fair employment practices would have to give way to bid conditions adopted pursuant to Executive Law order of United States Secretary of Labor requiring bidders to submit the required affirmative action program as a part of its bid thus, bidder seeking to have award to competitor set aside was ineligible to receive the award where he was not a signatory to city equal opportunities plan. Le Chase Constr. Corp. v Rochester, 74 Misc. 2d 825, 346 N.Y.S.2d 20, 1972 N.Y. Misc. LEXIS 2119 (N.Y. Sup. Ct. 1972).

The law permits a board the discretion of selecting the lowest responsible bidder on a public contract based on any reasonable standards or criteria and a court will not define or limit the standards nor second guess a determination of a board which has the statutory right of accepting or rejecting bids (General Municipal Law, § 103, subd 1), providing there is a reasonable basis for its determination since the board must be allowed to assess its own needs and decide which contractors would be most responsible for the services required; accordingly, respondent board of education which, as the result of a strike by school bus drivers, decided to include wage and hiring labor provisions in its specifications for bus contracts, except for contracts involving "five or fewer" buses, cannot be compelled to immediately award contracts for "five or fewer" buses, to petitioners, the low bidders who have indicated their willingness to accept the smaller contracts, regardless of any assurances the petitioners received from the board, since the court will not substitute its judgment for that of the board as to the number of contracts which would be better serviced by small companies and how many would benefit from the greater resources in equipment and manpower of larger companies. Kings Bay Buses, Inc. v Aiello, 100 Misc. 2d 1, 418 N.Y.S.2d 284, 1979 N.Y. Misc. LEXIS 2981 (N.Y. Sup. Ct. 1979).

Respondent board of education, which initially omitted wage and hiring labor provisions in its specifications for bus contracts, and then following a costly strike by school bus drivers, decided that, in the public interest, said labor provisions must be included in its contract specifications, may properly reject and readvertise bids; the board's offer to all apparent low bidders to accept said labor provisions or rebid, is a sound exercise of discretion and the court will not prohibit it from exercising its discretionary power. Kings Bay Buses, Inc. v Aiello, 100 Misc. 2d 1, 418 N.Y.S.2d 284, 1979 N.Y. Misc. LEXIS 2981 (N.Y. Sup. Ct. 1979).

Rockland County is generally authorized to adopt a local law mandating that at least 50 percent of those hired by contractors on public works projects be bona fide Rockland County residents, so long as application of such a local law does not violate the competitive bidding requirements established by section 103 of the General Municipal Law. 1983 NY Ops Atty Gen 83-46 (Informal), 1983 N.Y. Op. (Inf.) Att'y Gen. 146, 1983 N.Y. AG LEXIS 46.

A provision in bidding specifications which requires contractors to employ local help in the performance of the municipal contract is unreasonably restrictive. 1972 Op St Compt No. 72-912.

A municipality may not, in its bid specifications, require that contractors list their proposed subcontractors. 1979 Op St Compt No. 79-720, 1980 N.Y. Comp. LEXIS 407.

It would appear that the courts in this State would uphold the propriety of a clause in a municipal contract to the effect that any interruption of work arising out of labor strife or unrest shall be considered a breach of contract where such clause is motivated by legitimate concerns in the public interest. However, such a clause may not be used to preclude or inhibit competition from nonunion bidders, nor may its placement in a contract or in bid specifications be prompted by coercion or threats from union groups. Prior opinions holding that municipalities may favor union bidders are hereby superseded to the extent inconsistent. 1983 Op St Compt No. 83-61, 1983 N.Y. Comp. LEXIS 427.

94. —Repair services

Discussion of bid specification which requires successful bidder to have facilities for service and repairs. 1962 Op St Compt No. 62-784.

95. —Residency requirements

Interpretation of specification for bid on furnishing blacktop material for use on roads so as to exclude all bidders whose plants were located outside the purchasing county was illegal and contract let pursuant to such interpretation would be held void. Warren Bros. Co. v Craner, 30 A.D.2d 437, 293 N.Y.S.2d 763, 1968 N.Y. App. Div. LEXIS 3269 (N.Y. App. Div. 4th Dep't 1968).

96. —Subcontract awards

The method set forth in the specifications for bids for construction of a school building for awarding subcontracts whereby the architect was authorized to accept bids and assign the successful bidder to the prime contractor was improper, as an owner such as a Board of Education may not require one prime contractor to supervise the work of other contractors to whom contracts were let by the owner. Op Comm Ed No. 8946.

The method for letting contracts under the system of allowances set forth in the specifications for bids for a school building which required the prime contractor to accept bids from at least three approved sources, and to assign subcontracts to the lowest bidders was improper, as the requirement that the school board approve or disapprove the proposed subcontractors interfered with free competitive bidding. Op Comm Ed No. 8946.

The method set forth in the specification for bids for a school building whereunder the architect was authorized to designate a subcontractor without competitive bidding and assign him to the prime contractor was invalid. Op Comm Ed No. 8946.

It is illegal to impose a prequalification requirement upon bidders that they submit in advance a list of subcontractors whose services will be used by them. 1961 Op St Compt No. 61-590.

97. —Union membership requirements

A bid specification which required that the manufacturers of equipment to be installed in the proposed construction be identified in the bid, and the purpose of which was to avoid delay in the construction by providing for the selection and approval of the equipment at the inception of the contracts, is not illegal, in the absence of proof that it unlawfully restricted competition when enforced. Le Cesse Bros. Contracting, Inc. v Town Board of Williamson, 62 A.D.2d 28, 403 N.Y.S.2d 950, 1978 N.Y. App. Div. LEXIS 10414 (N.Y. App. Div. 4th Dep't 1978), aff'd, 46 N.Y.2d 960, 415 N.Y.S.2d 413, 388 N.E.2d 737, 1979 N.Y. LEXIS 1871 (N.Y. 1979).

Prehire collective bargaining agreement negotiated by county, which required successful bidder on certain county projects to employ union labor, violated CLS Gen Mun § 103(1), which requires that contracts for public works involving expenditures over $20,000 be awarded to lowest responsible bidder, since mandatory compliance with agreement erected barrier which might eliminate or dissuade prospective nonunion contractor from bidding process. Empire State Chapter of the Associated Builders & Contractors v County of Niagara, 161 Misc. 2d 537, 615 N.Y.S.2d 841, 1994 N.Y. Misc. LEXIS 281 (N.Y. Sup. Ct. 1994).

Discussion of legality of clause limiting bidding on municipal contracts to union contractors. 1963 Op St Compt No. 63-887.

The question of whether or not a municipality may legally restrict bidding to union contractors is a question which cannot be categorically answered because of the unsettled state of the law. 1967 Op St Compt No. 67-987.

98. —Miscellaneous

Bid specification in a department's solicitation for pupil transportation services which included employee protection provisions (EPPs) was improper because the department failed to refute the facially anticompetitive features of the EPPs, which invited cost-inflation and discouraged new bidders from trying to compete with long-term contract holders; the EPPs required contractors to give priority in hiring to employees who became unemployed because of reassignment of busing contracts. However, the department's decisions to include a per rider per day pricing scheme and certain payment discounts in the bid specifications were upheld. Matter of L&M Bus Corp. v New York City Dept. of Educ., 17 N.Y.3d 149, 927 N.Y.S.2d 311, 950 N.E.2d 915, 2011 N.Y. LEXIS 1453 (N.Y. 2011).

In Article 78 proceeding, court would annul city's award of contract for disposal of garbage and solid waste since bid specifications failed to state that city would consider distance from city garage to each bidder's disposal site in calculating which bid resulted in lowest cost to city, and thus city acted contrary to law when it awarded contract based in part on undisclosed specification. Browning-Ferris Indus. v City of Lackawanna, 204 A.D.2d 1047, 612 N.Y.S.2d 732, 1994 N.Y. App. Div. LEXIS 6890 (N.Y. App. Div. 4th Dep't 1994).

In Article 78 proceeding, court would annul city's award of contract for disposal of garbage and solid waste since bid specifications failed to state that city would consider distance from city garage to each bidder's disposal site in calculating which bid resulted in lowest cost to city, and thus city acted contrary to law when it awarded contract based in part on undisclosed specification. Browning-Ferris Indus. v City of Lackawanna, 204 A.D.2d 1047, 612 N.Y.S.2d 732, 1994 N.Y. App. Div. LEXIS 6890 (N.Y. App. Div. 4th Dep't 1994).

Order declaring that the specifications of a bid invitation violated, inter alia, N.Y. Gen. Mun. Law § 103, was error because the trial court improperly shifted the burden of proof from the corporation to the county; where public bid specifications were not facially anticompetitive, courts applied ordinary rational basis review and a spectral appearance of impropriety was insufficient proof to disturb a municipality's determination under the competitive bidding statutes. Instead, a party challenging a procurement had the burden to demonstrate actual impropriety, unfair dealing or some other violation of statutory requirements, but the corporation made only conclusory assertions and failed to demonstrate that county's bid specifications were irrational or exclusionary. Brega Transp. Corp. v Brennan, 105 A.D.3d 985, 964 N.Y.S.2d 203, 2013 N.Y. App. Div. LEXIS 2649 (N.Y. App. Div. 2d Dep't 2013).

Where potential bidder drew specifications for contract to computerize city processes, others were given only 10 days in which to bid, and drawer of specifications was only bidder, contract awarded was contrary to public policy, and in public interest, contract should be advertised again for bids; however, it would not be improper for party to whom contract originally awarded to participate in bidding and to accept contract if awarded. McArdle v Board of Estimate, 74 Misc. 2d 1014, 347 N.Y.S.2d 349, 1973 N.Y. Misc. LEXIS 1647 (N.Y. Sup. Ct. 1973),

aff'd, 45 A.D.2d 822, 357 N.Y.S.2d 1009, 1974 N.Y. App. Div. LEXIS 7148 (N.Y. App. Div. 2d Dep't 1974).

Request for proposals (RFP) issued by Long Island Power Authority (LIPA) for design and construction of off-island electrical transmission system was not supportable in reason or law, and court directed LIPA to issue new RFP for actual construction, where original RFP included construction phase of project in addition to evaluation phase, but neither party was obligated to proceed with actual construction of project pursuant to its terms; LIPA's goal of expeditiously obtaining additional power did not justify circumventing public bidding requirements by tying construction phase of project to evaluation phase. AEP Resources Serv. Co. v Long Island Power Auth., 179 Misc. 2d 639, 686 N.Y.S.2d 664, 1999 N.Y. Misc. LEXIS 23 (N.Y. Sup. Ct. 1999).

New York City could include, in contracts for public infrastructure work, specification requiring successful bidder to commence immediate negotiations with affected utility companies regarding compensation for contractor's performance of necessary utility "interference work" and further providing that, if no agreement was reached by 4 weeks after award of contract, dispute with utility company would be submitted to expedited binding arbitration; challenged specification was valid bidding "precondition" which did not impede competition. General Contrs. Ass'n v Tormenta, 180 Misc. 2d 384, 687 N.Y.S.2d 871, 1999 N.Y. Misc. LEXIS 126 (N.Y. Sup. Ct.), aff'd, 259 A.D.2d 177, 696 N.Y.S.2d 155, 1999 N.Y. App. Div. LEXIS 10501 (N.Y. App. Div. 1st Dep't 1999).

Specification requiring successful bidder to commence immediate negotiations with affected utility companies regarding compensation for performance of necessary utility "interference work," and further providing that dispute with any utility company would be submitted to expedited binding arbitration if no agreement was reached by 4 weeks after award of contract, did not unlawfully relieve utilities of their responsibility to perform "interference work" by shifting their obligations to city and city's contractor, where ultimate right to compel performance was specifically reserved to city. General Contrs. Ass'n v Tormenta, 180 Misc. 2d 384, 687 N.Y.S.2d 871, 1999 N.Y. Misc. LEXIS 126 (N.Y. Sup. Ct.), aff'd, 259 A.D.2d 177, 696 N.Y.S.2d 155, 1999 N.Y. App. Div. LEXIS 10501 (N.Y. App. Div. 1st Dep't 1999).

A village may not legally award a contract for the construction of a village garage and shop where the plans and specifications are left to the discretion of the individual bidders and submitted with their bids. 1960 Op St Compt No. 60-846.

Subdivision (1) of this section does not prevent a political subdivision from seeking bids for a purchase in alternate form, such as based on gross price without trade-in and with trade-in of used equipment, or from exercising or accepting either option. 1962 Op St Compt No. 62-810.

A county may provide in its bid specifications that a purchase contract may be extended for a reasonable fixed term at the sole option of the county. 1979 Op St Compt No. 79-355.

VI. Bid Procedure

99. Advertisement for bids; publication required

Petitioner was not entitled to be awarded a sewer contract as low bidder, even though federal notice requirements were complied with, where through inadvertence no advertisements inviting bids on the project appeared in the authorized county newspaper; the controlling statute was to be strictly construed and contracts awarded absent strict compliance were void since the purpose of the statute was to protect the public rather than the competing bidders. Marvec-All State, Inc. v Purcell, 110 Misc. 2d 67, 441 N.Y.S.2d 618, 1981 N.Y. Misc. LEXIS 3041 (N.Y. Sup. Ct. 1981), aff'd, 87 A.D.2d 593, 450 N.Y.S.2d 411, 1982 N.Y. App. Div. LEXIS 15861 (N.Y. App. Div. 2d Dep't 1982).

Where an official newspaper has been designated by a village, advertisements for bids must be published therein. 1956 NY Ops Atty Gen Mar 12 (Informal), 1956 N.Y. AG LEXIS 111.

A town may not enter into a contract for public work or purchase of material above the statutory amount without advertising for bids. The impropriety of such a contract can not be overcome by a provision therein for subsequent public bidding on the several separable portions of the work. 1976 NY Ops Atty Gen Aug 12 (Informal), 1976 N.Y. AG LEXIS 141.

Advertisements for competitive bidding published in a newspaper which is not qualified as the official newspaper of the municipality conducting the bidding are invalid, and the defect can only be remedied by commencing the bidding procedure anew. 1963 Op St Compt No. 63-113.

Where bidding is required pursuant to this section, advertisements for bids must be published in the manner prescribed by this section, though additional coverage may be achieved by publication in additional newspapers or by direct solicitation. 1963 Op St Compt No. 63-627.

Where, without advertising for bids, a town purchased, received and used $6500 worth of stone from a vendor other than the vendor who was awarded the contract for such item, there would appear to be a violation of competitive bidding requirements and it would seem that the vendor would not be entitled to any payment on his claim. 1980 Op St Compt No. 80-776.

Where a village has properly designated two official newspapers, advertisements for bids must be placed in both newspapers. 1982 Op St Compt No. 82-173, 1982 N.Y. Comp. LEXIS 547.

Fire district is not required to advertise for sealed bids to contract for services of physicians to give physicals to volunteer firefighters of fire district fire department; however, contracts would be subject to district's procurement policies and procedures. 1993 Op St Compt No. 93-3, 1992 N.Y. Comp. LEXIS 13.

100. —When readvertisement necessary

Where potential bidder drew specifications for contract to computerize city processes, others were given only 10 days in which to bid, and drawer of specifications was only bidder, contract awarded was contrary to public policy, and in public interest, contract should be advertised again for bids; however, it would not be improper for party to whom contract originally awarded to participate in bidding and to accept contract if awarded. McArdle v Board of Estimate, 74 Misc. 2d 1014, 347 N.Y.S.2d 349, 1973 N.Y. Misc. LEXIS 1647 (N.Y. Sup. Ct. 1973), aff'd, 45 A.D.2d 822, 357 N.Y.S.2d 1009, 1974 N.Y. App. Div. LEXIS 7148 (N.Y. App. Div. 2d Dep't 1974).

A prime contract entered into between the plaintiff contractor and defendant school board was void and illegal, where after the lowest bidder withdrew its bid, the contract was awarded to plaintiff, the next lowest bidder, and simultaneously and without authority the board changed the specifications of the contract to omit part of the work. Fabrizio & Martin, Inc. v Board of Education, 290 F. Supp. 945, 1968 U.S. Dist. LEXIS 11583 (S.D.N.Y. 1968).

If providing service is a legitimate consideration in relation to an item to be purchased and the bids are unsatisfactory in this respect, all bids may be rejected and the invitation for bids may be readvertised, with new specifications, to make it clear to the selling public that ability to provide service for the item is of importance in reaching a determination as to who is the lowest responsible bidder but such a provision cannot be used as a pretext for eliminating unwanted bidders. 1978 NY Ops Atty Gen Jan 25 (Informal), 1978 N.Y. AG LEXIS 191.

Where a possibility of competition exists, although the first letting of a public contract produced no responsive bids, it would be improper to negotiate that contract; strong public policy requires readvertisement pursuant to General Municipal Law, § 103. 1978 NY Ops Atty Gen March 6 (Formal), 1978 N.Y. AG LEXIS 201.

A municipality may, in good faith, in lieu of readvertising for new bids, negotiate downward with a sole bidder, where the bidding specifications, contract terms and conditions are not changed. 1978 Op St Compt No. 78-739, 1978 N.Y. Comp. LEXIS 52.

Where a school district has in good faith advertised for bids twice and, in addition, notified vendors of the items to be purchased and the work to be performed, but received no bids, the district may purchase such items in the open market and have the work performed without readvertising for additional bids. 1978 Op St Compt No. 78-523.

In the event a supplier of fuel oil, being a successful bidder (pursuant to General Municipal Law, § 103), refuses to deliver at the agreed price, the village must readvertise for bids, in accordance with § 103 of the General Municipal Law. 1978 Op St Compt No. 78-1076.

Where a bidder on a public library fuel oil contract in good faith mistakenly submitted a bid with a varying price although the bid specifications called for a firm price, and where the municipality knew or should have known that the bid was not in compliance with the specifications, it would seem that the contract could be rescinded. It would be improper to amend the contract to provide for price adjustments. 1980 Op St Compt No. 80-595, 1980 N.Y. Comp. LEXIS 247.

101. —Miscellaneous

A village is not liable under a public works contract in excess of $2500 to let contrary to the law requiring advertisement for competitive bids. 1967 NY Ops Atty Gen Oct 18 (Informal), 1967 N.Y. AG LEXIS 135.

Public advertisement for bids on highway equipment is not effected by notice pursuant to the repealed language of § 142 of the Highway Law concerning the town board's meeting to approve purchases of over $1,000. 1955 Op St Compt No. 55-7654.

Where there were 3 firms producing paving material in a town and each firm was located a substantial distance from the others, the town could create 3 zones and consider the proximity of vendor to a particular zone as well as the actual bid price, in advertising for bids on paving materials. 1958 Op St Compt No. 58-274.

A village may advertise for bids for the collection of unpaid parking violations where the lowest pecuniary bidder will be determined on the basis of which bidder offers to retain the lowest percentage of moneys collected. 1980 Op St Compt No. 80-664.

If the granting of an additional concession is within the scope of the original grant in a concession agreement entered into after competitive bidding, it may be accomplished without further advertising for bids. Construction of an improvement on municipal property by a licensee may be considered to be a municipal public works project under certain circumstances. 1981 Op St Compt No. 81-754.

102. Formal requirements for bid; signature not necessary

City properly rejected bid package which failed to include detailed declaration of bidder's qualifications, including statements as to bidder's experience and performance history, current and recently completed contracts and amounts thereof, and bank references. A.I. Smith of Long Island, Inc. v Long Beach, 158 A.D.2d 454, 551 N.Y.S.2d 48, 1990 N.Y. App. Div. LEXIS 1243 (N.Y. App. Div. 2d Dep't 1990).

This section contains no requirement that bids on municipal contracts be signed, and, unless the specifications otherwise require, an unsigned bid on the letterhead of the bidder can be legally accepted. 1961 Op St Compt No. 61-42.

A Town Board may legally accept a low bid on a sewer contract notwithstanding the bidder's failure to sign his proposal. 1963 Op St Compt No. 63-520.

103. Calculation of price

Where bid form required bidders on "skill and amusement games" for community college to fill in percentage of revenues which they would retain, inclusion in one bid, in addition to percentage, of guarantee of minimum sum per year varied from specifications and gave bidder a substantial advantage; thus award of contract to that bidder was properly set aside. De Bonis v Hudson Valley Community College, 55 A.D.2d 778, 389 N.Y.S.2d 647, 1976 N.Y. App. Div. LEXIS 15566 (N.Y. App. Div. 3d Dep't 1976).

Board of education had rational basis to award transportation contracts to lowest responsible bidders on aggregate cost basis rather than individual route cost basis, and unsuccessful bidder's Article 78 petition to annul respondent's determination was therefore properly denied. Acme Bus Corp. v Board of Educ., 236 A.D.2d 535, 653 N.Y.S.2d 684, 1997 N.Y. App. Div. LEXIS 1376 (N.Y. App. Div. 2d Dep't), aff'd, 91 N.Y.2d 51, 666 N.Y.S.2d 996, 689 N.E.2d 890, 1997 N.Y. LEXIS 3705 (N.Y. 1997).

"Required Minimum Labor Schedule" contained in district's Request for Proposals, which listed staff positions and hours per day and hourly rates for each position, required bidders to use hourly rate or daily hours listed; commissioner rejected successful bidder's argument that labor schedule in question represented mere staffing schedule of food service workers by job classification, rather than bid specification, since information labeled as "minimum" and "required" did not appear to serve any purpose other than requirements for bids. 2009 Op Comm Ed No. 15,977.

Where a competitive bidding is required by law, contracts may not be awarded on a cost plus basis. 1953 Op St Compt No. 53-6321.

A school district may not legally solicit bids for general school supplies by having a bidder bid a net discount on all items in his catalogue and then award the contract to the low bidder, to be determined by the lowest net total price of some ten or fifteen items selected at random. 1967 Op St Compt No. 67-398.

Discussion of the legality of total cost bidding. 1978 Op St Compt No. 78-315.

A political subdivision may, under certain conditions, solicit bids by using a specified manufacturer's price list as the basis for the bid proposal and award the contract to the bidder who gives the greatest discount from such price list. 1979 Op St Compt No. 79-364, 1979 N.Y. Comp. LEXIS 195.

Where the only bid on a contract for purchase of a fire truck contains a provision, not called for in the specifications, for a deduction from the bid price if a down payment is made at the time of signing the contract, such bid may not be accepted. 1979 Op St Compt No. 79-919, 1980 N.Y. Comp. LEXIS 405.

104. Security requirements

Cost of bid security, insurance, or other security when specified in public contracts, is to be borne by the contractor and not by the political subdivision involved. 1963 Op St Compt No. 63-662.

A municipality or district may in its contract specifications require bidders to submit an "offer of surety". 1968 Op St Compt No. 68-601.

105. —Acceptable forms of security

When bidding specifications call for a "performance bond", the contracting municipality may consider the requirement to have been met when the bidder offers to post a cash deposit and an indemnity agreement permitting the municiaplity to appropriate the collateral directly in the event of a breach. Cataract Disposal, Inc. v Town Bd. of Newfane, 53 N.Y.2d 266, 440 N.Y.S.2d 913, 423 N.E.2d 390, 1981 N.Y. LEXIS 2480 (N.Y. 1981).

Petitioners, as low bidders on garbage collection service for the City of Utica, were entitled to compel the city to accept their bid and award them the contract where the only actual ground for rejecting it was alleged failure of petitioners to comply precisely with the specified requirements as to financial statement to be submitted but those requirements were substantially met, and, as the city officials knew from past dealing with petitioners, their financial situation was excellent and they had been doing the job satisfactorily for the preceding three years. Caruci v Dulan, 41 Misc. 2d 859, 246 N.Y.S.2d 727, 1964 N.Y. Misc. LEXIS 2103 (N.Y. Sup. Ct. 1964), rev'd, 24 A.D.2d 529, 261 N.Y.S.2d 677, 1965 N.Y. App. Div. LEXIS 3837 (N.Y. App. Div. 4th Dep't 1965).

Bid specifications requiring certification by an acceptable insurer of low bidder's ability to secure a performance bond was substantially met where low bidder had submitted a "bid bond" which as a practical matter of customary procedure was issued by the same insurer who would issue the performance bond, and on the same information. Harran Transp. Co. v Board of Education, 71 Misc. 2d 143, 335 N.Y.S.2d 971, 1972 N.Y. Misc. LEXIS 1579 (N.Y. Sup. Ct. 1972).

A municipality may accept an irrevocable letter of credit from a bank in lieu of cash or a performance bond from a low bidder on a public works contract. 1979 Op St Compt No. 79-200.

A municipality may accept a cash bond or an escrow account payable to the municipality in lieu of a performance bond as security on a public works contract and may arrange for a reduction in the amount of security to correspond to the satisfactory completion of certain clearly defined stages of the project. 1979 Op St Compt No. 79-805.

In light of Appellate Division decision in the *Matter of Cataract* v *Town of Newfane,* 77 AD2d 796, 430 NYS2d 744, municipalities may not accept an irrevocable letter of credit instead of performance and labor and material bonds as security on public works projects if the bid specifications required that such bonds be provided. However, bid specifications may call for alternative forms of security. The Matter of Cataract decision has been appealed to the Court of Appeals. Prior opinions superseded to the extent inconsistent. 1981 Op St Compt No. 80-797, 1981 N.Y. Comp. LEXIS 887.

106. —Failure to provide acceptable security

In an Article 78 proceeding reviewing contract awards for the collection, removal and disposal of solid waste within a municipal garbage district, the bid specifications submitted by the lowest bidder would be invalid where the bid submitted in connection with a readvertised notice to bidders was defective and remained uncured until 3 days after the bids were opened, and the vessel specified in the resubmitted bids, for use under the contracts, not only lacked the required United States Coast Guard certification but also was in dry-dock and laid up for repairs at the time bids were opened; the contract awards, therefore, were made in violation of the spirit of the provisions requiring sealed competitive bidding for public contracts under Gen Mun Law §§ 100-A and 103(1). Superior Hydraulic, Inc. v Town Bd. of Islip, 88 A.D.2d 404, 453 N.Y.S.2d 711, 1982 N.Y. App. Div. LEXIS 17088 (N.Y. App. Div. 2d Dep't 1982), app. dismissed, 58 N.Y.2d 824, 1983 N.Y. LEXIS 3890 (N.Y. 1983).

Where the low bidder on a municipal project fails to accompany his bid with security as required by the specifications, and the board rejects his bid for that reason, the board should not be required to reverse its decision and award the contract to such bidder because, subsequently, and before the project is awarded to the next lowest bidder, the low one offers to meet the precise requirements for security, as such a course of conduct could well discourage contractors from bidding on future projects. Stage v Whitehouse, 43 Misc. 2d 703, 252 N.Y.S.2d 142, 1964 N.Y. Misc. LEXIS 1515 (N.Y. Sup. Ct. 1964).

Subdivision 1 of this section provides that the contract shall be awarded to the lowest responsible bidder "furnishing the required security," and where a call for bids requires a certified check for ten percent of the amount bid, the same to be treated as liquidated damages, a bidder's substitution of a bond or undertaking limited to one item of damage permits the board to exercise its discretion to reject the accompanying bid, notwithstanding it is the low bid. Stage v Whitehouse, 43 Misc. 2d 703, 252 N.Y.S.2d 142, 1964 N.Y. Misc. LEXIS 1515 (N.Y. Sup. Ct. 1964).

County officials were not arbitrary and capricious in refusing to award a contract to petitioner for electrical work to be performed on a hospital addition, where petitioner failed to submit a proper performance bond as required by the instructions to bidders and failed to establish financial responsibility with respect to the working capital required of each bidder. Application of P. J. Panzeca, Inc., 56 Misc. 2d 460, 288 N.Y.S.2d 813, 1968 N.Y. Misc. LEXIS 1748 (N.Y. Sup. Ct.), aff'd, 30 A.D.2d 640, 292 N.Y.S.2d 1007, 1968 N.Y. App. Div. LEXIS 6254 (N.Y. App. Div. 2d Dep't 1968).

Where a call for bids on a garbage removal and disposal contract clearly requires the successful bidder to put up a performance bond within 15 days from acceptance of his proposal, and that the deposit made in connection with his bid will be forfeited if he fails to enter into a contract pursuant to the specified requirements within 15 days, his inability to obtain a performance bond within the period specified does not affect forfeiture of his deposit. 1961 Ops St Compt No. 61-155.

107. —Waiver or reduction of security

This section merely provides that contracts shall be awarded to "the lowest responsible bidder furnishing the required security" without stating what the amount of security shall be, and hence the security requirements stated in the call for bids may be waived or lowered in awarding the contract to the low bidder without giving rise to a right in a higher bidder to demand award of the contract to him, particularly where, after the contract is so awarded, the security and performance bond requirement are met by the low bidder. Frank Nowak Constr. Co. v County of Suffolk, 233 N.Y.S.2d 627 (N.Y. Sup. Ct. 1962).

A municipality or district, in good faith, could waive the timely filing of bid security and under certain circumstances it could entirely waive the filing of the bid security or the "offer of surety". 1960 Op St Compt No. 60-601.

108. —Miscellaneous

In successful bidder's action to enjoin county from awarding contract on ground that its bid was $1,000,000 lower than intended due to clerical error, county was not entitled to forfeiture of bid bond in amount of $1,738,500 as liquidated damages, notwithstanding "no plea of mistake" provision of bid documents, since bidder was legally excused from contract by virtue of trial court's grant of rescission of bid (based on its finding that enforcement of bid would be unconscionable), which vitiated any contractual obligations arising therefrom; just as enforcement of bid would be unconscionable in that it would cost bidder $1,000,000, so would be forfeiture of bond, which involved even greater amount. Jobco, Inc. v County of Nassau, 129 A.D.2d 614, 514 N.Y.S.2d 108, 1987 N.Y. App. Div. LEXIS 45300 (N.Y. App. Div. 2d Dep't 1987).

After the bids are opened, bid bonds or guarantee bid deposits submitted by the successful bidder should be retained in the custody of the town supervisor. 1968 Op St Compt No. 68-761.

Because of personal conflicting interests, it is highly improper for a town councilman to sell a performance bond to a contractor with respect to a public works contract with his municipality. 1969 Op St Compt No. 69-81.

109. Timeliness of bid

Article 78 court improperly held that board of education abused its discretion in refusing to accept competitive bid submitted only 2 minutes late since board's decision to strictly enforce time requirement set forth in bid advertisement did not appear irrational, dishonest, or otherwise unlawful. George A. Nole & Son, Inc. v Board of Education, 129 A.D.2d 873, 514 N.Y.S.2d 274, 1987 N.Y. App. Div. LEXIS 45559 (N.Y. App. Div. 3d Dep't 1987).

Subdivision 2 of this section does not authorize a board or agency calling for bids to be submitted in writing to be opened and read aloud at a specified hour and date to consider bids which were not submitted prior to the time limitation, and, even with respect to bids presented only two or three minutes after such time, but after certain bids have already been received and read, there is no violation of law in awarding the contract to the lowest responsible bidder among those complying with the statute. Wiltom Coach Co. v Central High School Dist., 36 Misc. 2d 637, 232 N.Y.S.2d 876, 1962 N.Y. Misc. LEXIS 2696 (N.Y. Sup. Ct. 1962).

In a proceeding to require a Board of Education to award a contract to the low bidder, notwithstanding his bid came in slightly after the appointed hour, the person to whom the bid was awarded as the lowest bidder making a timely bid was a necessary party. Wiltom Coach Co. v Central High School Dist., 36 Misc. 2d 637, 232 N.Y.S.2d 876, 1962 N.Y. Misc. LEXIS 2696 (N.Y. Sup. Ct. 1962).

Service by out-of-state bidder unfamiliar with New York law of a non-collusive bidding certificate after the bids were open to put before the bid was awarded was sufficient to meet the requirements of Gen Mun L § 103, subd d, although the certificate was inexpertly drafted. Bailey v Colonna, 73 Misc. 2d 299, 341 N.Y.S.2d 359, 1972 N.Y. Misc. LEXIS 1344 (N.Y. Sup. Ct. 1972).

Court would dismiss contractor's Article 78 proceeding to enjoin board of cooperative educational services (BOCES) from awarding contract to rival bidder under CLS Gen Mun § 103 where contractor's sole objection was that rival's bid had not been opened and read at time and place specified in bid documents, but bid had been delivered to correct address before deadline, it was opened in presence of 3 BOCES officials, there was no suggestion of favoritism or dishonesty, and public would benefit by savings to be realized from rival's lowest bid; BOCES' award of contract to rival was rational and was not arbitrary or capricious. Statewide Roofing v Eastern Suffolk Bd. of Coop. Educ. Servs., 173 Misc. 2d

514, 661 N.Y.S.2d 922, 1997 N.Y. Misc. LEXIS 337 (N.Y. Sup. Ct. 1997).

A municipality should not accept a bid which is filed late. 1978 Op St Compt No. 78-584.

110. Variation of bid from specifications, generally

While General Municipal Law section relating to award of public work contracts mandates the contract be awarded to lowest responsible bidder, where bidder substantially varies his bid from specification it cannot be considered in determining lowest responsible bid. De Bonis v Hudson Valley Community College, 55 A.D.2d 778, 389 N.Y.S.2d 647, 1976 N.Y. App. Div. LEXIS 15566 (N.Y. App. Div. 3d Dep't 1976).

A municipality may decline bids on a public works project which fail to comply with the literal requirements of the bid specifications, or it may waive a technical noncompliance with bid specifications if the defect is a mere irregularity and it is in the best interests of the municipality to do so. Le Cesse Bros. Contracting, Inc. v Town Board of Williamson, 62 A.D.2d 28, 403 N.Y.S.2d 950, 1978 N.Y. App. Div. LEXIS 10414 (N.Y. App. Div. 4th Dep't 1978), aff'd, 46 N.Y.2d 960, 415 N.Y.S.2d 413, 388 N.E.2d 737, 1979 N.Y. LEXIS 1871 (N.Y. 1979).

If a variance between a bid on a public works project and the bid specifications is material or substantial, the defect may not be waived, and the bid must be rejected. Le Cesse Bros. Contracting, Inc. v Town Board of Williamson, 62 A.D.2d 28, 403 N.Y.S.2d 950, 1978 N.Y. App. Div. LEXIS 10414 (N.Y. App. Div. 4th Dep't 1978), aff'd, 46 N.Y.2d 960, 415 N.Y.S.2d 413, 388 N.E.2d 737, 1979 N.Y. LEXIS 1871 (N.Y. 1979).

The trial court erred in not granting a contractor summary judgment on its claim against a transportation authority for amounts due on a construction contract where the authority had advertised for bids on construction of various parts of a bus garage, the advertisement contained a discrepancy between the drawings and the specifications as to whether the contractor would supply two tanks, the contractor submitted the low bid, the contractor informed the authority before acceptance of its bid that it had not included the costs of the tanks in making its bid, before signing the construction contract the contractor added a paragraph to the contract disclaiming any duty on its part to supply the tanks, and the authority signed the contract with the disclaimer provisions. Maross Constr., Inc. v Central New York Regional Transp. Authority, 107 A.D.2d 1010, 486 N.Y.S.2d 535, 1985 N.Y. App. Div. LEXIS 42825 (N.Y. App. Div. 4th Dep't), rev'd, 66 N.Y.2d 341, 497 N.Y.S.2d 321, 488 N.E.2d 67, 1985 N.Y. LEXIS 17609 (N.Y. 1985).

Governmental agency which seeks bids on public contract has right to determine whether bidder's variance from bid specifications is material or whether to waive it as mere irregularity; determination must be upheld by courts if supported by any rational basis. Varsity Transit, Inc. v Board of Education, 130 A.D.2d 581, 515 N.Y.S.2d 520, 1987 N.Y. App. Div. LEXIS 46582 (N.Y. App. Div. 2d Dep't), app. denied, 70 N.Y.2d 605, 519 N.Y.S.2d 1029, 513 N.E.2d 1309, 1987 N.Y. LEXIS 18238 (N.Y. 1987).

Where the governing body calling for bids is unwilling to waive substantial defects and irregularities in the bids submitted, there is no authoritative precedent for issuance of a court order requiring such waiver. Stage v Whitehouse, 43 Misc. 2d 703, 252 N.Y.S.2d 142, 1964 N.Y. Misc. LEXIS 1515 (N.Y. Sup. Ct. 1964).

Unsuccessful bidder for food services contract failed to demonstrate that bid specifications contained in Request for Proposals (RFP) required staffing and/or hour requirements with which successful bid was noncompliant, even if it was common for new food service companies to continue existing staff and match existing hours and benefits, where there was no indication that list of then-current collective bargaining agreement and staffing schedule contained in attachment to RFP was intended to be "mandatory" or "required," and assistant superintendent asserted that he had informed all prospective bidders during mandatory walk-through of district facilities that no stipulations regarding benefits, salary or hours were being made, that staffing levels were to be determined by each bidder, and that district was not opposed to individual vendors lowering labor costs "as long as the School District received quality service." 2010 Op Comm Ed No. 16,100, 2010 NY Educ. Dept. LEXIS 94.

If a bidder, through error, fails to execute the proper bid forms, these being an essential part of the proposed contract the variance is such that it may not be waived by the awarding political subdivision. 1961 Op St Compt No. 61-826.

111. —Particular instances

Bids may be declined for failure of literal compliance with specifications, and where a bid for the contract for garbage collection failed to include mention of large and bulky articles, included in the specifications, the person submitting such bid was not legally aggrieved by its rejection. Rockland Haulage, Inc. v Upper Nyack, 13 A.D.2d 819, 216 N.Y.S.2d 308, 1961 N.Y. App. Div. LEXIS 10736 (N.Y. App. Div. 2d Dep't 1961).

Refusal of town to award contract for purchase of diesel tractor to petitioner, which was low bidder, but whose bid contained six variations from bid specifications and which refused to subsequently submit a bid in exact compliance with specifications on ground that variations were immaterial, technical and insubstantial, had a rational basis and thus would not be disturbed in Article 78 proceeding. Atlantic Tug & Equipment Co. v Tonawanda, 45 A.D.2d 916, 357 N.Y.S.2d 303, 1974 N.Y. App. Div. LEXIS 4481 (N.Y. App. Div. 4th Dep't 1974).

Where bid form required bidders on "skill and amusement games" for community college to fill in percentage of revenues which they would retain, inclusion in one bid, in addition to percentage, of guarantee of minimum sum per year varied from specifications and gave bidder a substantial advantage; thus award of contract to that bidder was properly set aside. De Bonis v Hudson Valley Community College, 55 A.D.2d 778, 389 N.Y.S.2d 647, 1976 N.Y. App. Div. LEXIS 15566 (N.Y. App. Div. 3d Dep't 1976).

A failure on the part of a bidder on a municipal public works project to state, as required by the bid specifications, the names of manufacturers of equipment to be installed in the proposed construction gave that bidder an unfair competitive advantage over the other bidders, ran counter to the municipality's purpose in using the specifications to avoid delay and uncertainty in the approval of equipment manufacturers, and constituted a material variance from the bid specifications which may not be waived by the municipality. Le Cesse Bros. Contracting, Inc. v Town Board of Williamson, 62 A.D.2d 28, 403 N.Y.S.2d 950, 1978 N.Y. App. Div. LEXIS 10414 (N.Y. App. Div. 4th Dep't 1978), aff'd, 46 N.Y.2d 960, 415 N.Y.S.2d 413, 388 N.E.2d 737, 1979 N.Y. LEXIS 1871 (N.Y. 1979).

In an Article 78 proceeding brought by two unsuccessful bidders for a contract from a city election board for the transportation of voting machine equipment, the trial court erred in annulling the board's award of its contract to the two low bidders on the asserted ground that the board had failed to require such low bidders to meet certain bid qualifications where, though the election board had indicated that bidders had to possess certificates of convenience and necessity or permits for contract carriers of property by motor vehicles from the Commissioner of Transportation, such conditions had not been contained in the bid documents, but rather had been set forth in a supplemental letter that had been issued to the bidders by the president of the board of elections after the bids had been received, where the low bidders appeared to be exempt from such requirements in any event in that one of them had been exempted from the requirements pursuant to Trans Law § 160(3)(a) and the other was licensed by the city in which the subject board of elections was located rather than by the State, and where the board had reserved to itself the right to "waive any informalities in the proposal for bids, and had a rational basis for its waiver of any defect in the low bids in that the economic benefit that had been derived by the municipality in granting the contracts to the lowest bidders far outweighed any technical defects in the low bidders' submissions. Clancy-Cullen Storage Co. v Board of Elections, 98 A.D.2d 635, 469 N.Y.S.2d 391, 1983 N.Y. App. Div. LEXIS 20926 (N.Y. App. Div. 1st Dep't 1983).

Town improperly accepted bid for collection and disposal of refuse and recyclables where (1) successful bidder had not complied with licensing and certification procedures at time it sub-

mitted bid, in direct contravention of bid specification which required compliance, (2) bidder tendered contract security deposit of 1/3 of amount required by bid specification, and (3) bidder was in state of dissolution when it submitted bid for failure to pay corporate franchise taxes. Tony's Barge Serv. v Town Bd., 210 A.D.2d 234, 619 N.Y.S.2d 341, 1994 N.Y. App. Div. LEXIS 12269 (N.Y. App. Div. 2d Dep't 1994), app. denied, 85 N.Y.2d 807, 627 N.Y.S.2d 324, 650 N.E.2d 1326, 1995 N.Y. LEXIS 1250 (N.Y. 1995).

City board of contract and supply had rational basis to award recycle asphalt base contract to particular contractor despite contractor's failure to meet letter of terms of prior work experience requirement in bid specifications where city engineer had inspected contractor's facilities and had concluded that projects performed by contractor were sufficiently similar to allow it to bid on project, and city commissioner of public works had concurred in decision to waive experience requirements of bid specifications. Suit-Kote Corp. v City of Binghamton Bd. of Contract & Supply, 216 A.D.2d 831, 628 N.Y.S.2d 861, 1995 N.Y. App. Div. LEXIS 7448 (N.Y. App. Div. 3d Dep't 1995).

Contractor's gratuitous insertion of name of window company in its bid to replace windows in school district facilities could properly be considered nonmaterial irregularity which board of education was free to waive where there was no showing of unfair advantage, and board's selection resulted in significant savings to school district. N.E.P. Glass Co. v Board of Educ., 233 A.D.2d 570, 649 N.Y.S.2d 537, 1996 N.Y. App. Div. LEXIS 11458 (N.Y. App. Div. 3d Dep't 1996).

In an art. 78 proceeding to have a bid award set aside by a school district attempting to purchase a new school bus, while the specifications for bidding could not be built around a single make of vehicle, the fact that petitioner's proposal differed from specifications in some 21 respects would, of itself, defeat his bid, if the article offered were of lesser quality than that required. Cassel v Board of Education Common School Dist., 220 N.Y.S.2d 262 (N.Y. Sup. Ct. 1961).

Board of education was justified in refusing to consider petitioner's bid on ground that it was incomplete, where contractors were required to submit bids for base bid electrical work, as well as several alternates that included changes that either added or deducted electrical work from base bid amount, and petitioner failed to submit bid figure for 2 alternates included in addenda to bid specifications, which added work to base bid electrical work. 2000 Op Comm Ed No. 14,428, 2000 NY Educ. Dept. LEXIS 222.

112. Amendment of bid

Fuel oil supplier was precluded from modifying its bid on city contract to include right to charge gross receipt tax as separate line item, and thus was bound by terms of original bid, when it did not withdraw its bid prior to being awarded contract; in context of competitive bidding, letter from supplier's counsel notifying city of intention to charge tax could not be viewed as new offer that extinguished and replaced supplier's original bid. Sinram-Marnis Oil Co. v New York, 74 N.Y.2d 13, 544 N.Y.S.2d 119, 542 N.E.2d 337, 1989 N.Y. LEXIS 873 (N.Y. 1989).

If bid form was ambiguous, plumbing contractor should have followed directions in information to bidders, pursuant to which bidders were to request appropriate city commission in writing for interpretation of every patent ambiguity or inconsistency and, where contractor did not make such request in advance of bidding, contractor was bound by reasonable interpretation of bid form by city environmental protection commissioner. James H. Merritt Plumbing, Inc. v New York, 55 A.D.2d 552, 390 N.Y.S.2d 65, 1976 N.Y. App. Div. LEXIS 15231 (N.Y. App. Div. 1st Dep't 1976), app. dismissed, 41 N.Y.2d 806, 1977 N.Y. LEXIS 3101 (N.Y. 1977), app. dismissed, 42 N.Y.2d 825, 1977 N.Y. LEXIS 3977 (N.Y. 1977).

Because city environmental protection agency had authority to declare bid for award of plumbing contract informal, bidder was not injured by fact that agency, upon discovering an apparent arithmetical error on the face of the bid, gave bidder opportunity to accept contract at a lower amount than bidder had indicated on its bid form and this procedure did not violate public bidding statute. James H. Merritt Plumbing, Inc. v New York, 55 A.D.2d 552, 390 N.Y.S.2d 65, 1976 N.Y. App. Div. LEXIS 15231 (N.Y. App. Div. 1st Dep't 1976), app. dismissed, 41 N.Y.2d 806, 1977 N.Y. LEXIS 3101 (N.Y. 1977), app. dismissed, 42 N.Y.2d 825, 1977 N.Y. LEXIS 3977 (N.Y. 1977).

When essential information is missing from a bid at the time of opening, that information may not later be supplied by a private understanding between the bidder and the municipality or otherwise. Le Cesse Bros. Contracting, Inc. v Town Board of Williamson, 62 A.D.2d 28, 403 N.Y.S.2d 950, 1978 N.Y. App. Div. LEXIS 10414 (N.Y. App. Div. 4th Dep't 1978), aff'd, 46 N.Y.2d 960, 415 N.Y.S.2d 413, 388 N.E.2d 737, 1979 N.Y. LEXIS 1871 (N.Y. 1979).

Oil company, which had not included gross receipts tax obligation in its bid on municipal contract because tax was not applicable to it at that time, then advised city by letter, prior to formal award of contract, that it intended to charge tax to city, was not entitled to judgment declaring that city was responsible for payment of gross receipts tax, since (1) contract precluded any modification which would result in net change in cost to city, (2) contract required that gross receipts tax be part of bid price, not separately billed item, and (3) such change would in effect give oil company opportunity to submit entirely new bid, thereby claiming competitive advantage over other potential contractors; thus, city was entitled to summary judgment on its counterclaim for difference between oil company's bid price and cost of obtaining fuel from substituted vendors. Sinram-Marnis Oil Co. v New York, 139 A.D.2d 360, 532 N.Y.S.2d 94, 1988 N.Y. App. Div. LEXIS 8379 (N.Y. App. Div. 1st Dep't), reh'g denied, 143 A.D.2d 1073, 533 N.Y.S.2d 687, 1988 N.Y. App. Div. LEXIS 11595 (N.Y. App. Div. 1st Dep't 1988), aff'd, 74 N.Y.2d 13, 544 N.Y.S.2d 119, 542 N.E.2d 337, 1989 N.Y. LEXIS 873 (N.Y. 1989).

New York City Procurement Policy Board Rule (9 NYCRR) § 3-02(m)(3)(ii) permitted correction of handwritten error in quote for one item of winning bid, reciting price of $294,8499.49 instead of $294,849,949, where (1) corrected figure, when added to quotes for other contract items, equaled total bid price of $304,490,749, and (2) winning bid was not subjected to reformation or renegotiation in violation of CLS Gen Mun § 103(11)(b). Picone/McCullagh v Miele, 283 A.D.2d 501, 724 N.Y.S.2d 473, 2001 N.Y. App. Div. LEXIS 4972 (N.Y. App. Div. 2d Dep't 2001).

Town's determination that a bid was made nonresponsive for N.Y. Gen. Mun. Law § 103(1) purposes by the lowest bidder's pre-bid letter was rational, honest, and lawful because the unequivocal language of the pre-bid letter was such that it was reasonable for the town to conclude it was intended to impose a condition on the later bid proposal regardless of whether the pre-bid letter was attached to or incorporated into that proposal; thus, it was reasonable for the town to determine that the lowest bidder had a substantial advantage or benefit not enjoyed by the other bidders. The lowest bidder had submitted a letter to the town stating that it wished to be held harmless from damages arising from a specific component of the project. Matter of Accadia Site Contr., Inc. v Caruana, 96 A.D.3d 1630, 946 N.Y.S.2d 789, 2012 N.Y. App. Div. LEXIS 4790 (N.Y. App. Div. 4th Dep't 2012).

In action by contractor to recover unpaid balance on school construction contract, whether to permit adjustment of a mathematical error made in contractor's bid or to permit a deduction of work in the amount of the error was a matter for the school board's discretion and the contract awarded after deducting work in the amount of the error was not in violation of the competitive bid statute where the contractor's bid would have been the low bid even without the mathematical error. Fabrizio & Martin, Inc. v Board of Education, 523 F.2d 378, 1975 U.S. App. LEXIS 12813 (2d Cir. N.Y. 1975) (applying New York law).

City's action in correcting mathematical errors made by the second lowest bidder for a municipal contract, which resulted in such bid becoming the lowest one, was reasonable and proper. Schiavone Constr. Co. v Samowitz, 451 F. Supp. 29, 1978 U.S. Dist. LEXIS 20023 (S.D.N.Y.), aff'd, 578 F.2d 1370 (2d Cir. N.Y. 1978).

113. Withdrawal of bid

Bidder who, because of an error in interpreting specifications, failed to include the cost of certain equipment in his bid was permitted to rescind bid where mistake, although due to bidder's negligence, was objectively verifiable in much the same way as a clerical or arithmetical error, and where municipality, having

been promptly notified of the error, could have either awarded the contract to the next lowest bidder or submitted the contract for rebidding. Balaban-Gordon Co. v Brighton Sewer Dist., 41 A.D.2d 246, 342 N.Y.S.2d 435, 1973 N.Y. App. Div. LEXIS 4727 (N.Y. App. Div. 4th Dep't 1973).

Plumbing and heating contractor was entitled to summary judgment rescinding bid and cancelling bid bond, despite provisions of city housing authority's instructions to bidders preventing withdrawal of bids on ground of negligence, where contractor failed to include singlesheet of data when it computed total amount of its bid (thus understating bid by amount on sheet), computational error was subject to objective determination by comparison of work sheets and bid proposal, and contractor discovered error and notified authority's representative approximately 4 hours after opening of bids, which gave authority opportunity to correct condition or to reject bid and award contract to another bidder. Buffalo Municipal Housing Authority v Gross Plumbing & Heating Co., 172 A.D.2d 1030, 569 N.Y.S.2d 289, 1991 N.Y. App. Div. LEXIS 6288 (N.Y. App. Div. 4th Dep't 1991).

New York City Department of Housing Preservation and Development properly refusedpetitioner's request to withdraw its bid to rehabilitate 2 properties owned by city,since petitioner failed to submit adequate evidence to show that alleged unilateralmistake was due to arithmetical or clerical error. In re Huff Enters., 205 A.D.2d 378, 613 N.Y.S.2d 385, 1994 N.Y. App. Div. LEXIS 6313 (N.Y. App. Div. 1st Dep't 1994).

In losing bidder's Article 78 proceeding to compel New York City Department of Environmental Conservation (DEP) to reject another contractor's winning bid, on ground that price quote of $294,8499.49 contained in bid was "indecipherable" error and "sole remedy" was withdrawal of bid, court properly determined that CLS Gen Mun § 103(11)(b) was inapplicable, and that DEP was authorized to correct error pursuant to New York City Procurement Policy Board Rule (9 NYCRR) § 3-02(m)(3)(ii). Picone/McCullagh v Miele, 283 A.D.2d 501, 724 N.Y.S.2d 473, 2001 N.Y. App. Div. LEXIS 4972 (N.Y. App. Div. 2d Dep't 2001).

A prime contract entered into between the plaintiff contractor and defendant school board was void and illegal, where after the lowest bidder withdrew its bid, the contract was awarded to plaintiff, the next lowest bidder, and simultaneously and without authority the board changed the specifications of the contract to omit part of the work. Fabrizio & Martin, Inc. v Board of Education, 290 F. Supp. 945, 1968 U.S. Dist. LEXIS 11583 (S.D.N.Y. 1968).

A county board or agency may in its discretion, reject all bids and readvertise for new bids in the manner provided by the cited section. Where a bidder has made an honest or unintentional mistake in arriving at its bid, the county board or agency, if satisfied that an honest mistake has been made, is authorized to allow withdrawal of the bid. 1973 NY Ops Atty Gen June 12 (informal), 1973 N.Y. AG LEXIS 74.

Where the low bidder promptly advises a city of a mistake in his bid, and the local authorities are convinced that an honest and material mistake was made, the city may permit the withdrawal of the bid and award a contract to the next lowest bidder. 1968 Op St Compt No. 68-630.

114. Rejection of all bids; authority of officers and agencies

Although power to reject any or all bids may not be exercised arbitrarily or for purpose of forgoing public benefit intended to be served by competitive process, discretionary decision ought not to be disturbed by courts unless it is irrational, dishonest or otherwise unlawful; moreover, realistic expectation of obtaining lower contract prices upon second round of bidding constitutes reasonable, bona fide ground for rejecting all first round bids and serves public's interest in economical use of public monies; nor is decision to reject all bids rendered arbitrary and capricious solely on basis of nondiscriminatory post bid changes in contract specifications or postbid communications with individual bidders for bona fide purpose of ascertaining how contract costs might be reduced. Conduit & Foundation Corp. v Metropolitan Transp. Authority, 66 N.Y.2d 144, 495 N.Y.S.2d 340, 485 N.E.2d 1005, 1985 N.Y. LEXIS 17168 (N.Y. 1985).

The board or agency calling for bids has discretion to reject all bids. Wiltom Coach Co. v Central High School Dist., 36 Misc. 2d 637, 232 N.Y.S.2d 876, 1962 N.Y. Misc. LEXIS 2696 (N.Y. Sup. Ct. 1962).

A county board or agency may in its discretion, reject all bids and readvertise for new bids in the manner provided by the cited section. Where a bidder has made an honest or unintentional mistake in arriving at its bid, the county board or agency, if satisfied that an honest mistake has been made, is authorized to allow withdrawal of the bid. 1973 NY Ops Atty Gen June 12 (Informal), 1973 N.Y. AG LEXIS 74.

Fire commissioners may reject all bids and readvertise for new bids. If condemnation proceeding is discontinued, fire district may be ordered to pay damages to owners of realty. Board may not expend in excess of estimate set forth in bond resolution. Board may issue bonds to an amount smaller than approved. Expenses incurred in connection with building construction project disapproved in referendum are legal liabilities and may be paid. 1966 Op St Compt No. 66-751.

115. —Necessity for readvertising for bids after rejection

Where court annulled award of contract for amusement games for community college, award of the contract to petitioner as the only other bidder would have been an improper usurpation of administrative role by prohibiting community college and faculty student association from exercising their discretionary power of rejecting all bids and readvertising. De Bonis v Hudson Valley Community College, 55 A.D.2d 778, 389 N.Y.S.2d 647, 1976 N.Y. App. Div. LEXIS 15566 (N.Y. App. Div. 3d Dep't 1976).

Where municipality has elected to advertise for sale bids, retaining the right to reject all bids, it may not reject all bids and award the contract without re-advertising for bids. Riester v Fleming, 57 Misc. 2d 997, 293 N.Y.S.2d 871, 1968 N.Y. Misc. LEXIS 1153 (N.Y. Sup. Ct. 1968), rev'd, 32 A.D.2d 733, 302 N.Y.S.2d 176, 1969 N.Y. App. Div. LEXIS 3994 (N.Y. App. Div. 4th Dep't 1969).

A municipality having rejected all bids on an advertised contract, may not thereafter accept the lowest bidder, but should readvertise for new bids. 1956 Op St Compt No. 56-8035.

116. —Grounds for rejection; default of low bidder

Where lowest bidder was in default, Board of Education was warranted in rejecting all other bids and readvertising for new bids under this section. Mar-Mes Constr. Co. v Gitlow, 24 A.D.2d 481, 260 N.Y.S.2d 703, 1965 N.Y. App. Div. LEXIS 3944 (N.Y. App. Div. 2d Dep't 1965).

Expectation of obtaining better contract prices at another round of bidding is integral part of public contract process and is reasonable basis for declining all previous bids, and thus city's decision to reject all bids and readvertise for second round of bidding would be deemed unlawful only on showing of actual impropriety, unfair dealing, or other violation of statutory requirements. P & A Bros, Inc. v New York Dep't of Parks & Recreation, 184 A.D.2d 267, 585 N.Y.S.2d 335, 1992 N.Y. App. Div. LEXIS 7826 (N.Y. App. Div. 1st Dep't 1992), limited, Almonte v City of New York, 158 Misc. 2d 290, 601 N.Y.S.2d 245, 1993 N.Y. Misc. LEXIS 252 (N.Y. Civ. Ct. 1993).

In the event a supplier of fuel oil, being a successful bidder (pursuant to General Municipal Law, § 103), refuses to deliver at the agreed price, the village must readvertise for bids, in accordance with § 103 of the General Municipal Law. 1978 Op St Compt No. 78-1076.

117. —Dissatisfaction with price

Rejection of the low bid on a city contract and a determination to reject all bids and readvertise cannot be approved where it is obvious that the low bid obtained is not out of line and it is entirely speculative whether a lower bid can be obtained on readvertising, as such practice has pernicious long-range effect detrimental to the best interests of municipalities. Caruci v Dulan, 41 Misc. 2d 859, 246 N.Y.S.2d 727, 1964 N.Y. Misc. LEXIS 2103 (N.Y. Sup. Ct. 1964), rev'd, 24 A.D.2d 529, 261 N.Y.S.2d 677, 1965 N.Y. App. Div. LEXIS 3837 (N.Y. App. Div. 4th Dep't 1965).

118. —Other grounds for rejection

State Office of General Services abused its discretion in resubmitting bids "in the best interest of the state" after obtaining

information from labor representative that current bidder was involved in a labor dispute involving a strike action where labor representative's threat that state jobsite would be struck was insufficient ground for rejecting all bids absent proof of the nature and extent of the labor dispute, and absent showing that Office of General Services based its determination on an independent investigation of bidder's labor difficulties. M. Cristo, Inc. v State Office of General Services, 42 A.D.2d 481, 349 N.Y.S.2d 191, 1973 N.Y. App. Div. LEXIS 4580 (N.Y. App. Div. 3d Dep't 1973).

A city's award of a landfill supply contract to a contractor other than the low bidder would be annulled where the city's determination that the low bidder's sand was wet and that its pit was not accessible, in contrast to the bid specifications which required that the landfill material be clean and dry and that the roadway to the sand pit be accessible, was not supported by substantial evidence, and where the record demonstrated instead that the low bidder had substantially and materially complied with the bid proposal specifications. Cal's Gear & Auto Parts, Inc. v Rome, 98 A.D.2d 967, 470 N.Y.S.2d 248, 1983 N.Y. App. Div. LEXIS 21297 (N.Y. App. Div. 4th Dep't 1983).

An action against a transportation authority by a disappointed bidder on a public works contract was properly dismissed where the authority had reserved the right to reject all bids, and where, although plaintiff's bid was the lowest at the bid opening, defendant know that another company with which it had previously dealt had timely submitted a lower bid, which had been misplaced by the authority. Tri-State Aggregates Corp. v Metropolitan Transp. Auth., 108 A.D.2d 645, 485 N.Y.S.2d 754, 1985 N.Y. App. Div. LEXIS 42998 (N.Y. App. Div. 1st Dep't 1985).

After city has actively conducted continuous investigation over 19 month period into qualifications and finances of sole bidder on contract to perform emergency tow and repair service, necessitating expenditure of substantial funds by bidder in preparation for award of contract, it is arbitrary for city to reject bid and to readvertise contract based solely on general statement that bid specification may have lacked clarity or somehow excluded competition. Burke's Auto Body, Inc. v Ameruso, 113 A.D.2d 198, 495 N.Y.S.2d 393, 1985 N.Y. App. Div. LEXIS 52351 (N.Y. App. Div. 1st Dep't 1985).

Board of education rationally rejected petitioner's bid on contract to renovate high school athletic field where (1) bid failed to indicate that prebid site inspection in presence of school district representative had been conducted, or identify type of machinery petitioner intended to use, as required by bid specifications, and (2) expert report received by board stated that sand placement machine utilized by petitioner would not produce comparable results to competing bidder's sand injection machine. In re K & M Turf Maintenance, 166 A.D.2d 445, 560 N.Y.S.2d 673, 1990 N.Y. App. Div. LEXIS 11846 (N.Y. App. Div. 2d Dep't 1990).

The City's rejection of initial bids by suppliers, including the lowest bid by the plaintiff, on a contract to fill the City's requirements for chlorine for water treatment, and the reopening of the matter for a second round of bidding in order to obtain lower bids due to the lower market price of chlorine, was arbitrary and capricious where there was already a provision that provided for price adjustments when there were changes in the prices of the materials from supplier to the bidder. Delta Chemical Mfg. Co. v Department of General Services of New York, Div. of Municipal Supplies, 106 Misc. 2d 617, 434 N.Y.S.2d 568, 1980 N.Y. Misc. LEXIS 2741 (N.Y. Sup. Ct. 1980), rev'd, 81 A.D.2d 507, 437 N.Y.S.2d 12, 1981 N.Y. App. Div. LEXIS 10960 (N.Y. App. Div. 1st Dep't 1981).

Where a fire district has advertised for a new oil burning heating system for the firehouse and now wishes to have a gas fuel system, it will have to reject all bids received and draw new specifications for a gas fueled system and advertise for new bids. 1978 Op St Compt No. 78-279.

119. Miscellaneous

To the extent town's use of a "Bidders' List" had the effect of discouraging persons not on the list from bidding, or giving such persons insufficient opportunity to estimate their lowest possible bid, the practice was against the public policy as expressed in the bidding statutes. Orange Front Paint Supply, Inc. v Scaramuccia, 59 A.D.2d 894, 399 N.Y.S.2d 52, 1977 N.Y. App. Div. LEXIS 14084 (N.Y. App. Div. 2d Dep't 1977).

Negotiations between the New York City Transit Authority and an electrical contractor, whose bid was the lowest bid for a construction contract, conducted after all bids were opened, which led to modifications of the contractor's bid whereby duplicative costs were eliminated, costs of certain materials were to be established by market prices at the time of purchase, and a liquidated damage provision was included in the contract, did not violate either the letter or the spirit of Gen Mun Law § 103 or New York City Charter § 343(b), which require competitive bidding on certain public works contracts, where the record contained no evidence of favoritism, fraud or corruption, the public interest was advanced by the modifications by actual or potential savings on the cost of the project, and there was no departure from the contract's original specifications and no concessions to the contractor. Fischbach & Moore, Inc. v New York City Transit Authority, 79 A.D.2d 14, 435 N.Y.S.2d 984, 1981 N.Y. App. Div. LEXIS 9665 (N.Y. App. Div. 2d Dep't 1981).

Where, prior to commencement of performance under a public contract awarded by a board of education for transportation of handicapped children, the disqualification of two of the original seven successful bidders had caused a shortfall in the number of vehicles available to fill the original contract requirements, the board was required to make the award for additional vehicles to the next lowest responsible bidders or to reject all bids and consider new proposals or re-bid the contract. Tufaro Transit Co. v Board of Education, 79 A.D.2d 376, 436 N.Y.S.2d 886, 1981 N.Y. App. Div. LEXIS 9717 (N.Y. App. Div. 2d Dep't 1981).

Contractor's submission of 2 bids was not material irregularity that corrupted competitive bidding process under CLS Gen Mun § 103(1) where 2 bids submitted were separate and distinct, neither was dependent on other, revoked other, or was submitted in alternative form, and there was nothing in either "Advertisement for Bids" or "Instructions to Bidders" prohibiting interested bidder from submitting more than one bid. N.E.P. Glass Co. v Board of Educ., 233 A.D.2d 570, 649 N.Y.S.2d 537, 1996 N.Y. App. Div. LEXIS 11458 (N.Y. App. Div. 3d Dep't 1996).

CLS Gen Mun § 103(11)(b), which was intended to affect parties who submit innocently erroneous low bids and municipal entities that accept such bids, did not enable losing bidder to challenge acceptance of winning bid of another party which contained easily correctable typographical error. Picone/McCullagh v Miele, 283 A.D.2d 501, 724 N.Y.S.2d 473, 2001 N.Y. App. Div. LEXIS 4972 (N.Y. App. Div. 2d Dep't 2001).

Because a triable issue of fact existed regarding whether the parties' contract was unenforceable under N.Y. Gen. Mun. Law § 103(1) and a county charter, a county's successor was not entitled to summary judgment; however, the successor had standing to prosecute the county's claims under N.Y. Pub. Auth. Law §§ 3403, 3406, 3418(1). Sodexho Mgt., Inc. v Nassau Health Care Corp., 23 A.D.3d 370, 805 N.Y.S.2d 551, 2005 N.Y. App. Div. LEXIS 12333 (N.Y. App. Div. 2d Dep't 2005).

A resolution by a county requiring all bidders on county public works contracts to participate in an approved apprentice training program is of questionable propriety. 1982 Op St Compt No. 82-128, 1982 N.Y. Comp. LEXIS 586.

County may not adopt post-1953 law to provide price preference to local vendors and contractors who would not otherwise be entitled to contract award as lowest responsible bidder. 1992 Op St Compt No. 92-50.

VII. Award of Contract

120. Authority to award contract

There is no vested right in award of public works contract; thus, municipality retains discretion to reject one or more bids where good reason to do so exists, and municipality may consider bidder's honesty, integrity, good faith, and fair dealing. Mid-State Indus. v City of Cohoes, 221 A.D.2d 705, 633 N.Y.S.2d 238, 1995 N.Y. App. Div. LEXIS 10693 (N.Y. App. Div. 3d Dep't 1995).

Public money may not be spent without authority which requires that the obligation incurred be lawful, and this section is a restraint not only upon public officials but upon all others, so that persons who deal with a municipality must look to the

authority of the agents with whom they deal or contract at their peril. Gerzof v Sweeney, 52 Misc. 2d 505, 276 N.Y.S.2d 485, 1966 N.Y. Misc. LEXIS 1243 (N.Y. Sup. Ct. 1966), modified, 29 A.D.2d 646, 286 N.Y.S.2d 541, 1968 N.Y. App. Div. LEXIS 4942 (N.Y. App. Div. 2d Dep't 1968).

Insisting upon submission of the canvass of bids for the consideration and approval of the Common Council before making an award is an improper invasion of the power of the Board of Contract and Supply and an award made by such board without the approval of the Common Council was not illegal. Guerriero v Board of Contract & Supply, 60 Misc. 2d 22, 301 N.Y.S.2d 103, 1969 N.Y. Misc. LEXIS 1545 (N.Y. Sup. Ct. 1969).

The Common Council has the right to insist upon compliance with regulations prescribed in the enabling ordinance, but it may not appropriate authority to itself expressly delegated to the Board of Contract and Supply by the legislature. Guerriero v Board of Contract & Supply, 60 Misc. 2d 22, 301 N.Y.S.2d 103, 1969 N.Y. Misc. LEXIS 1545 (N.Y. Sup. Ct. 1969).

The village board, where it is the agency charged with awarding a contract by competitive bidding, should open and read all bids at a duly called and constituted meeting. Neither this function nor the awarding of the contract may be delegated to others. 1954 Op St Compt No. 54-6867.

When a town superintendent of highways advertises and receives bids for the purchase of road oil, it is not necessary that the town board approve the purchase and awarding of contract to the lowest responsible bidder. 1955 Op St Compt No. 55-7339.

Where the county purchasing agent has advertised for bids, he may award the contract without the approval of the board of supervisors. 1957 Op St Compt No. 57-315.

A village may not award a contract after competitive bidding unless an appropriation therefor has been made and moneys are available therefor or have been authorized to be borrowed. 1982 Op St Compt No. 82-173, 1982 N.Y. Comp. LEXIS 547.

The appropriate officer, board or agency of a municipality or political subdivision may not constitute a board of technical specialists as sole judge of the conformance of bids with specifications. 1955 Op St Compt No. 55-7674.

121. Discretion of officials

County's discretion to determine which criteria to consider in assessing bids is limited only by requirements that criteria be rational and that reliance on those criteria be essential to good of taxpayers. Bay Harbour Elec. v County of Chautauqua, 210 A.D.2d 919, 621 N.Y.S.2d 259, 1994 N.Y. App. Div. LEXIS 13392 (N.Y. App. Div. 4th Dep't 1994), app. denied, 85 N.Y.2d 810, 629 N.Y.S.2d 724, 653 N.E.2d 620, 1995 N.Y. LEXIS 2132 (N.Y. 1995).

The board or agency calling for bids has discretion to reject all bids. Wiltom Coach Co. v Central High School Dist., 36 Misc. 2d 637, 232 N.Y.S.2d 876, 1962 N.Y. Misc. LEXIS 2696 (N.Y. Sup. Ct. 1962).

Implicit in determining the lowest responsible bidder is exercise of administrative discretion, in which connection financial responsibility is a legitimate factor for consideration, but if that clearly appears from the low bidder's statement submitted with his bid, the bid cannot properly be rejected because of technical noncompliance with the precise specifications as to the manner in which it is presented. Caruci v Dulan, 41 Misc. 2d 859, 246 N.Y.S.2d 727, 1964 N.Y. Misc. LEXIS 2103 (N.Y. Sup. Ct. 1964), rev'd, 24 A.D.2d 529, 261 N.Y.S.2d 677, 1965 N.Y. App. Div. LEXIS 3837 (N.Y. App. Div. 4th Dep't 1965).

In reviewing the propriety of considering alternates, so long as the municipality is entrusted with the power of awarding the contracts to the person making the lowest favorable proposal, the presumption of official integrity will attach to the action of that body and something more is necessary to impugn its award than mere proof that there was a lower bid (not including alternates) than the one accepted. Fonseca v Board of Education, 58 Misc. 2d 223, 294 N.Y.S.2d 952, 1968 N.Y. Misc. LEXIS 1179 (N.Y. Sup. Ct. 1968).

Unsuccessful bidder failed to show that city had acted in bad faith in awarding insurance contract to another firm. Surdell v Oswego, 91 Misc. 2d 1041, 399 N.Y.S.2d 173, 1977 N.Y. Misc. LEXIS 2476 (N.Y. Sup. Ct. 1977).

Courts will not interfere with discretion of board in rejecting lowest bid where board acted in good faith and best interest of the public. 1954 Op St Compt No. 54-6881.

Where no direct or indirect interest in public contracts exists, a fire district contract may be awarded to the adult son of a member of the board of fire commissioners where the son is the lowest responsible bidder on the contract. 1956 Op St Compt No. 56-8231.

It would appear to be unconstitutional for a county to give preference to county bidders over non-county bidders in the awarding of county purchase or public works contracts. 1979 Op St Compt No. 79-17.

Where bid specifications provide that proximity to the town highway garage is a factor which will be considered in determining low bidder, a contract for the purchase of sand and gravel may be awarded to other than the lowest pecuniary bidder under certain circumstances. 1980 Op St Compt No. 80-440, 1980 N.Y. Comp. LEXIS 284.

When a municipal contract is to be let on competitive bidding, the approving board or agency has broad discretion in determining which bid most nearly answers the specifications and the courts will not ordinarily interfere with the exercise of this discretion. 1961 Op St Compt No. 61-42.

122. —Discretion upheld

Court properly dismissed Article 78 petition in which unsuccessful bidder challenged school board's award of 2 pupil transportation contracts as violative of public bidding statutes, on ground that board solicited bids in 2 alternative categories but awarded contracts to lowest responsible bidders in second category and then sought to obtain further price concessions through postbid negotiations, absent showing of "actual" impropriety, unfair dealing, or some other violation of statutory requirements; laws requiring competitive bidding were designed to benefit taxpayers rather than corporate bidders, and thus should be construed with sole reference to public interest. Acme Bus Corp. v Board of Educ., 91 N.Y.2d 51, 666 N.Y.S.2d 996, 689 N.E.2d 890, 1997 N.Y. LEXIS 3705 (N.Y. 1997).

There was a substantial factual basis for a resolution by the New York City Board of Education disqualifying certain bidders from bidding on contracts for school work and refusing to prequalify them for such bidding; hence a court could not substitute its judgment for that of the Board's. Caristo Constr. Corp. v Rubin, 15 A.D.2d 561, 222 N.Y.S.2d 998, 1961 N.Y. App. Div. LEXIS 6875 (N.Y. App. Div. 2d Dep't 1961), aff'd, 10 N.Y.2d 538, 225 N.Y.S.2d 502, 180 N.E.2d 794, 1962 N.Y. LEXIS 1413 (N.Y. 1962).

In view of evidence that lowest bidder for contract with city was corporation with no employees, no experience in building construction and insufficient financial responsibility, and apparently bid for contract for proscribed purpose, i. e., to assign to another corporation for performance, city properly exercised discretion to reject the bid. Turnkey Constr. Corp. v Peekskill, 51 A.D.2d 729, 379 N.Y.S.2d 133, 1976 N.Y. App. Div. LEXIS 11218 (N.Y. App. Div. 2d Dep't 1976).

Court would affirm determination disqualifying petitioner from award of municipal contract where petitioner could not comply with specific bid requirement, and plan submitted by petitioner varied materially from bid requirements. Schettino Serv. Corp. v Holbrook, 218 A.D.2d 741, 630 N.Y.S.2d 571, 1995 N.Y. App. Div. LEXIS 8806 (N.Y. App. Div. 2d Dep't 1995), app. denied, 87 N.Y.2d 806, 640 N.Y.S.2d 878, 663 N.E.2d 920, 1996 N.Y. LEXIS 23 (N.Y. 1996).

Board of commissioners had a rational basis and acted within its discretion when rejecting a bidder's submission for a public contract to install a radio dispatch system because the bidder did not demonstrate that it had a service location within 20 miles of the fire district, the bidder offered to supply equipment which differed from the bid specifications, and over the life of the contract, the monthly maintenance costs rendered the bidder's bid more expensive than the competitor's. Matter of Hello Alert, Inc. v East Moriches Fire Dist., 129 A.D.3d 966, 13 N.Y.S.3d 113, 2015 N.Y. App. Div. LEXIS 5088 (N.Y. App. Div. 2d Dep't 2015).

A board, which on the evidence before it, had reason to doubt the ability of the petitioner to perform the contract, even though he was the lowest bidder, did not act in an arbitrary or capricious manner in rejecting petitioner's bid. Haskell-Gilroy, Inc. v Young, 20 Misc. 2d 294, 189 N.Y.S.2d 774, 1959 N.Y. Misc. LEXIS 3122 (N.Y. Sup. Ct. 1959), aff'd, 10 A.D.2d 629, 196 N.Y.S.2d 328, 1960 N.Y. App. Div. LEXIS 11951 (N.Y. App. Div. 2d Dep't 1960).

Even though competitive bidding is not required in granting a franchise since the award of the franchise does not involve the payment or expenditure of funds out of the city treasury (General Municipal Law, § 103; New York City Charter, ch 13, § 341), the Board of Estimate of the City of New York did not act arbitrarily and capriciously in declining to extend petitioner's interim three-year franchise to construct bus stop shelters which display advertising material and instead awarding a long-term franchise to the highest bidder upon terms and conditions more advantageous to the city that petitioner could not meet since the board has the duty to obtain the best terms possible for the city and the fact that petitioner pioneered the bus stop shelter program does not entitle it to be granted the franchise on its own terms; in view of the active interest in the bus stop shelter program, the board reasonably determined to seek proposals from those interested based upon the terms and conditions formulated by the board's Bureau of Franchises. BusTop Shelters, Inc. v New York, 99 Misc. 2d 198, 415 N.Y.S.2d 726, 1978 N.Y. Misc. LEXIS 2905 (N.Y. Sup. Ct. 1978).

The law permits a board the discretion of selecting the lowest responsible bidder on a public contract based on any reasonable standards or criteria and a court will not define or limit the standards nor second guess a determination of a board which has the statutory right of accepting or rejecting bids (General Municipal Law, § 103, subd 1), providing there is a reasonable basis for its determination since the board must be allowed to assess its own needs and decide which contractors would be most responsible for the services required; accordingly, respondent board of education which, as the result of a strike by school bus drivers, decided to include wage and hiring labor provisions in its specifications for bus contracts, except for contracts involving "five or fewer" buses, cannot be compelled to immediately award contracts for "five or fewer" buses, to petitioners, the low bidders who have indicated their willingness to accept the smaller contracts, regardless of any assurances the petitioners received from the board, since the court will not substitute its judgment for that of the board as to the number of contracts which would be better serviced by small companies and how many would benefit from the greater resources in equipment and manpower of larger companies. Kings Bay Buses, Inc. v Aiello, 100 Misc. 2d 1, 418 N.Y.S.2d 284, 1979 N.Y. Misc. LEXIS 2981 (N.Y. Sup. Ct. 1979).

The Board of Trustees of the Village of New York Mills may take a reasonable time after receiving bids before awarding a contract to purchase a new fire truck. 1973 NY Ops Atty Gen March 5 (Informal), 1973 N.Y. AG LEXIS 41.

Commissioner dismissed appeal in which petitioner, as former provider of transportation and vehicular maintenance services for city school district, challenged respondent's award of contracts to another bus company as (1) respondent had no legal obligation to accept petitioner's contract renewal offer, (2) petitioner was not lowest responsible bidder, (3) respondent's bid specifications were not ambiguous, and (4) respondent complied with its own specifications in awarding contracts. 1999 Op Comm Ed No. 14,170, 1999 NY Educ. Dept. LEXIS 132.

123. —Discretion not upheld

Urban renewal agency's determination that second lowest bidder was better qualified to perform contract was arbitrary and capricious where lowest bidder, who had never defaulted on any contract, was not accorded a hearing on the issue of his responsibility, and where city engineer's request for a "qualification statement" from bidders did not meet minimal requirements for a meaningful investigation. Seacoast Constr. Corp. v Lockport Urban Renewal Agency, 72 Misc. 2d 372, 339 N.Y.S.2d 188, 1972 N.Y. Misc. LEXIS 1348 (N.Y. Sup. Ct. 1972).

A local law which would permit the City of Jamestown to award contracts for goods and services to a bidder other than the lowest responsible bidder, where such other bidder maintains a place of business in the City or sells goods manufactured in the City and submits a bid within five percent of the low bid, would be inconsistent with the purposes of General Municipal Law, § 103 and may be unconstitutional as violative of the Privileges and Immunities and/or Equal Protection clauses. 1981 Op St Compt No. 81-142, 1981 N.Y. Comp. LEXIS 742.

124. Review

Six-year catch-all limitations period of N.Y. C.P.L.R. 213 governed a town's claim that there was a violation of the competitive bidding requirements of N.Y. Gen. Mun. Law § 103 because the substance of the claim involved both common-law breach of contract and fraud principles because the town sought to recover damages because a renovation agreement allegedly was not awarded to the lowest bidder, and the owners of a warehouse allegedly participated in a fraudulent scheme to structure a sham lease with an option to purchase in order to accomplish that result. Town of Poughkeepsie v Espie, 41 A.D.3d 701, 840 N.Y.S.2d 600, 2007 N.Y. App. Div. LEXIS 7768 (N.Y. App. Div. 2d Dep't), app. dismissed, 9 N.Y.3d 1003, 849 N.Y.S.2d 30, 879 N.E.2d 170, 2007 N.Y. LEXIS 3793 (N.Y. 2007), app. denied, 15 N.Y.3d 715, 915 N.Y.S.2d 216, 940 N.E.2d 922, 2010 N.Y. LEXIS 3536 (N.Y. 2010).

Unsuccessful bidder on construction project for school districts could not maintain action for damages against public officials, since awarding of bids is discretionary function under CLS Gen Mun §§ 100-a and 103, and thus reviewable only through Article 78 proceedings. Di Berardino's, Inc. v Rome Consol. School Dist., 134 Misc. 2d 288, 510 N.Y.S.2d 791, 1986 N.Y. Misc. LEXIS 3101 (N.Y. Sup. Ct. 1986).

125. Award to lowest bidder

In an Article 78 proceeding, the award of a public contract for the administration and operation of the dietary department of a hospital and nursing facility would be annulled, where the county recomputed petitioner's low bid by applying a fixed cost-to-price ratio for nonpatient food that had not been described in the specifications, with the result that petitioner's readjusted bid was higher than that of the bidder to whom the contract was awarded. However, the county would be directed to seek new bids where petitioner did not have a clear legal right to the award of the contract. Progressive Dietary Consultants, Inc. v Wyoming County, 90 A.D.2d 214, 457 N.Y.S.2d 159, 1982 N.Y. App. Div. LEXIS 18829 (N.Y. App. Div. 4th Dep't 1982).

New contract specification included in New York City public improvement contracts which, in effort to control delays and attendant costs caused by disputes between City contractors and utility companies whose facilities must be relocated during City projects, requiring that, on award of contract, City's contractor commence immediate negotiations with affected utility companies as to compensation for contractor's performance of necessary utility "interference work" and further requiring that, if no agreement is reached within 4 weeks after award of contract, dispute with any utility company be submitted to expedited binding arbitration, did not violate mandate that "all contracts for public work . . . be awarded . . . to the lowest responsible bidder" (CLS Gen Mun § 103(1)); new contract specification clearly bifurcated bidding process for public work, which remained sole preserve of City, from negotiations for utility "interference work" in which City had no role except to retain right to insist that its own contracts be timely performed and not made perpetually subject to maneuvering between contractors and utility companies in their private dealings. General Contrs. Ass'n v Tormenta, 259 A.D.2d 177, 696 N.Y.S.2d 155, 1999 N.Y. App. Div. LEXIS 10501 (N.Y. App. Div. 1st Dep't 1999), app. denied, 2000 N.Y. App. Div. LEXIS 2282 (N.Y. App. Div. 1st Dep't Feb. 1, 2000), app. denied, 95 N.Y.2d 754, 711 N.Y.S.2d 156, 733 N.E.2d 228, 2000 N.Y. LEXIS 987 (N.Y. 2000).

Board of Education was required to award contract to low bidder who failed to correct a unilateral error on an alternate bid. Premier Electric Installation Co. v Board of Education, 20 Misc. 2d 286, 191 N.Y.S.2d 187, 1959 N.Y. Misc. LEXIS 3102 (N.Y. Sup. Ct. 1959).

A political subdivision or district therein must award its purchase contracts to the lowest responsible bidder furnishing

the required security who, in the discretion of the board conforms to the specifications of the invitation. 1955 Op St Compt No. 55-7093.

Where a town has advertised for bids on the purchase of highway machinery and all bids are by responsible bidders and all bids meet specifications, the award must be made to the lowest responsible bidder unless all bids are rejected and the contract readvertised. 1956 Op St Compt No. 56-8027.

A town board may, under proper circumstances, after advertising for competitive bids, award the contract to the lone bidder. 1973 Op St Compt No. 73-744.

As a general rule, when a bidder submits two alternative bids, both of which are lower than any other bid and both of which comply with the bid specifications, the municipality must accept the lower dollar bid. 1983 Op St Compt No. 83-22, 1983 N.Y. Comp. LEXIS 463.

Tortious interference claims brought by a manufacturer's authorized dealers against competitors failed because the evidence showed neither prospective business relationships nor wrongful conduct; a state regulation requiring maintenance according to the manufacturer's instructions did not require schools to employ the authorized dealers, nor did the authorized dealers show that they would have been awarded the maintenance contracts as the lowest responsible bidder. Gym Door Repairs, Inc. v Young Equip. Sales, Inc., 331 F. Supp. 3d 221, 2018 U.S. Dist. LEXIS 160442 (S.D.N.Y. 2018).

126. —What constitutes low bid

Under General Municipal Law § 103 requiring that for public works contracts in excess of $2500, the contract be let publicly and to the lowest responsible bidder, the fact that the low bid is the total of two or more separate bids is unimportant. Sweet Associates, Inc. v Gallman, 36 A.D.2d 95, 318 N.Y.S.2d 528, 1971 N.Y. App. Div. LEXIS 4611 (N.Y. App. Div. 3d Dep't 1971), aff'd, 29 N.Y.2d 902, 328 N.Y.S.2d 857, 279 N.E.2d 602, 1972 N.Y. LEXIS 1587 (N.Y. 1972).

School district did not act improperly in rejecting contractor's bid, notwithstanding fact that bid accepted by school district set forth breakdown of unit prices bid rather than total bid amount, since total bid was readily ascertainable by simple mathematical calculation and was lower than petitioner's bid; absence of total bid amount constituted mere irregularity which could be waived by school district. Daniel Finley Allen & Co. v East Williston Union Free School Dist., 143 A.D.2d 662, 533 N.Y.S.2d 19, 1988 N.Y. App. Div. LEXIS 10007 (N.Y. App. Div. 2d Dep't 1988).

Respondent school district did not violate section 103 of the General Municipal Law, which requires that all major governmental purchases be awarded to the lowest responsible bidder, in awarding a fuel requirement contract to the correspondent fuel company and rejecting the bid of petitioner fuel company, whose bid cited a present price per gallon as well as an index to be used in allowing for future price fluctuations without explaining the relationship between the index price and any new prices; the school district rationally selected a company which in their best judgment would be the lowest bidder in the long run, and rejected a company whose bid was improperly drawn and whose prior fuel service had been questioned. Monoco Oil Co. v Collins, 96 Misc. 2d 631, 409 N.Y.S.2d 498, 1978 N.Y. Misc. LEXIS 2652 (N.Y. Sup. Ct. 1978).

Contractors, who were lowest joint bidders for project contracts, were not lowest responsible bidders under CLS Gen Mun § 103(1) because utility work included in project contracts was not "public work" where it directly benefitted, and was on behalf of, privately owned utilities. Diamond Asphalt Corp. v Sander, 171 Misc. 2d 879, 655 N.Y.S.2d 706, 1996 N.Y. Misc. LEXIS 565 (N.Y. Sup. Ct. 1996), aff'd, 238 A.D.2d 197, 656 N.Y.S.2d 248, 1997 N.Y. App. Div. LEXIS 3764 (N.Y. App. Div. 1st Dep't 1997).

Petitioner could not be considered the lowest bidder on a school district contract for a new school bus where the instructions to bidders stated that the board wanted net bids after allowing credit for a vehicle to be turned in, as the controlling price was nevertheless the full amount which the board would have to pay, or gross price, the amount allowed on a trade-in being merely to provide part of the fund needed for purchase of a new bus, and petitioner did not submit the lowest gross price. Cassel v Board of Education Common School Dist., 220 N.Y.S.2d 262 (N.Y. Sup. Ct. 1961).

Petitioner was not lowest bidder, and no basis existed to annul award of contracts to its competitor, where competitor bid at cost plus rate of 6.2 percent versus petitioner's rate of 6.45 percent, and petitioner's costs were same as competitor's costs. 1994 Op Comm Ed No. 13,215, 1994 NY Educ. Dept. LEXIS 128.

127. —Award where bid exceeds contract price

In the absence of a showing of bad faith or fraud by city officials, a city may accept bids which were theretofore received in an amount in excess of the authorized expenditures when and if sufficient funds were made available without advertising for new bids. Riley v Buffalo, 63 Misc. 2d 143, 310 N.Y.S.2d 981, 1970 N.Y. Misc. LEXIS 1661 (N.Y. Sup. Ct. 1970).

Where a Board of Education receives bids exceeding budget appropriation, it may not legally enter into a contract with the low bidder with the understanding that certain items will be eliminated from the specifications so as to bring the contract price within the appropriation. 1962 Op St Compt No. 62-995.

A municipality would appear to be unauthorized to negotiate solely with a "low" bidder in order for such bidder to reduce his bid price to an amount acceptable to the municipality. Opinion State Compt. No. 61-476 (reported as 17 Op. State Compt. 251, 1961) to the contrary is superseded. 1978 Op St Compt No. 78-331.

128. Requirement that lowest bidder be responsible

Agency has obligation to consider responsibility of bidder, including its skill, judgment, and integrity, and may, on basis of prior criminal record of some of its principals, rationally reject that bidder. DeFoe Corp. v New York City DOT, 87 N.Y.2d 754, 642 N.Y.S.2d 588, 665 N.E.2d 158, 1996 N.Y. LEXIS 307 (N.Y. 1996).

Pursuant to N.Y. Gen. Mun. Law § 103 and N.Y. Town Law § 122, it was improper for a town to award a contract to a corporation based on qualitative factors that were not contained in the bidding proposal because a bidder's proposal was the low bid, and, absent a finding of lack of responsibility, there was no authority to support the rejection of the bidder's proposal for one that was considered more responsible. Matter of AAA Carting & Rubbish Removal, Inc. v Town of Southeast, 17 N.Y.3d 136, 927 N.Y.S.2d 618, 951 N.E.2d 57, 2011 N.Y. LEXIS 1397 (N.Y. 2011).

Determination of nonresponsibility did not implicitly extend contract bidder's period of debarment or unlawfully splinter penalties that could be assessed against bidder for prior Labor Law violations. Mid-State Indus. v City of Cohoes, 221 A.D.2d 705, 633 N.Y.S.2d 238, 1995 N.Y. App. Div. LEXIS 10693 (N.Y. App. Div. 3d Dep't 1995).

In requiring the letting of contracts to the lowest "responsible" bidder, the word quoted is the key word, meaning "accountable" or "reliable." Meyer v Board of Education, 31 Misc. 2d 407, 221 N.Y.S.2d 500, 1961 N.Y. Misc. LEXIS 2271 (N.Y. Sup. Ct. 1961). To same effect, W. J. Gaskell, Inc. v Maslanka, 33 Misc. 2d 88, 225 N.Y.S.2d 94, 1962 N.Y. Misc. LEXIS 3988 (N.Y. Sup. Ct. 1962).

The question of which of two low bidders is more qualified to perform a contract is not germane to a determination of lowest bidder's responsibility. Seacoast Constr. Corp. v Lockport Urban Renewal Agency, 72 Misc. 2d 372, 339 N.Y.S.2d 188, 1972 N.Y. Misc. LEXIS 1348 (N.Y. Sup. Ct. 1972).

The municipal agency that awards a public contract to the lowest responsible bidder, as required by Gen Mun Law § 103, has the power to convene a Board of Responsibility after the award has been made to determine whether the awarding agency should perform the contract where facts have come to light after the award which may directly affect the responsiblity of the bidder, and a postaward determination by the Board of lack of responsibility and the resulting rescission of awarded contracts may not be challenged by way of prohibition; but a bidder may not be disqualified on the basis of a determination of the board of any agency other than the awarding agency. Lord Electric Co. v Litke, 122 Misc. 2d 112, 469 N.Y.S.2d 846, 1983 N.Y. Misc. LEXIS 4083 (N.Y. Sup. Ct. 1983).

New York City Board of Responsibility had jurisdiction to continue hearing into whether petitioner was "responsible" bidder for city contracts, even though petitioner had withdrawn its bid, since petitioner was aware that procedure before board was possibility, and to divest board of jurisdiction through unilateral act of bidder would enable bidder to observe evidence introduced against it and then, at later stage of hearing, determine whether it wished decision on issue. Mars Associates, Inc. v Palmer, 140 Misc. 2d 1005, 531 N.Y.S.2d 1017, 1988 N.Y. Misc. LEXIS 528 (N.Y. Sup. Ct. 1988).

Requirement that prospective bidders furnish evidence of responsibility before receiving plans and specifications and at least five days before bid opening is proper. 1962 NY Ops Atty Gen Apr 16 (Informal), 1962 N.Y. AG LEXIS 102.

If village were to find bidder to be not responsible solely because of certain connections with country whose laws are repugnant to many of its citizens, it would be arguable that village was engaging in unconstitutional regulation of interstate commerce or that it was improperly attempting to make its own foreign policy. 1986 Op St Compt No. 86-29, 1986 N.Y. Comp. LEXIS 147.

It is reasonable for municipality to examine certificate of incorporation of lowest dollar bidder in evaluating whether bidder is "responsible" under § 103. 1986 Op State Compt No. 86-19, 1986 N.Y. Comp. LEXIS 156.

129. —Ability to perform contract

In view of evidence that lowest bidder for contract with city was corporation with no employees, no experience in building construction and insufficient financial responsibility, and apparently bid for contract for proscribed purpose, i. e., to assign to another corporation for performance, city properly exercised discretion to reject the bid. Turnkey Constr. Corp. v Peekskill, 51 A.D.2d 729, 379 N.Y.S.2d 133, 1976 N.Y. App. Div. LEXIS 11218 (N.Y. App. Div. 2d Dep't 1976).

Requiring bidders to demonstrate successful completion of comparable work on at least 2 buildings listed in National Register of Historic Places within 5 years of bid on contracts involving renovation of historically significant building on campus of publicly financed, county-operated college violated CLS Gen Mun § 103; even though experience of bidder may be considered, it may not serve to eliminate bidder unless it is of sort which can fairly be viewed as essential to public's interest in seeing particular project brought to successful completion at lowest possible cost. Construction Contractors Ass'n v Board of Trustees, 192 A.D.2d 265, 600 N.Y.S.2d 953, 1993 N.Y. App. Div. LEXIS 7539 (N.Y. App. Div. 2d Dep't 1993).

County properly determined that petitioner was not lowest responsible bidder where (1) county rationally relied on petitioner's unresponsiveness, hostility, and lack of cooperation in response to repeated requests for information, and (2) information sought by county bore directly on petitioner's qualifications, skill, and ability to carry out project. Bay Harbour Elec. v County of Chautauqua, 210 A.D.2d 919, 621 N.Y.S.2d 259, 1994 N.Y. App. Div. LEXIS 13392 (N.Y. App. Div. 4th Dep't 1994), app. denied, 85 N.Y.2d 810, 629 N.Y.S.2d 724, 653 N.E.2d 620, 1995 N.Y. LEXIS 2132 (N.Y. 1995).

County's refusal to award contract for transportation services for disabled children to petitioner, as lowest bidder, was not arbitrary and capricious where fulfilling contract would have required petitioner to rapidly increase size of its operation, and deficiencies in its explanatory submissions raised substantial doubt as to its ability to meet demands of contract. Donson Transp. Servs. v County of Broome, 257 A.D.2d 825, 683 N.Y.S.2d 642, 1999 N.Y. App. Div. LEXIS 366 (N.Y. App. Div. 3d Dep't 1999).

Town's rejection of petitioner's bid, on ground that petitioner was not "responsible bidder," was not arbitrary or capricious or contrary to law where petitioner initially failed to furnish information as to type and duration of its relevant experience as required by bidding documents, town solicited additional information but petitioner's subsequent submissions lacked specificity regarding its experience maintaining lighting system as large as that of town, and it supplied detailed information only in reply papers submitted in response to respondents' opposition in Article 78 proceeding. Eldor Contr. Corp. v Town of Islip, 277 A.D.2d 233, 716 N.Y.S.2d 681, 2000 N.Y. App. Div. LEXIS 11181 (N.Y. App. Div. 2d Dep't 2000).

Respondent school district did not violate section 103 of the General Municipal Law, which requires that all major governmental purchases be awarded to the lowest responsible bidder, in awarding a fuel requirement contract to the correspondent fuel company and rejecting the bid of petitioner fuel company, whose bid cited a present price per gallon as well as an index to be used in allowing for future price fluctuations without explaining the relationship between the index price and any new prices; the school district rationally selected a company which in their best judgment would be the lowest bidder in the long run, and rejected a company whose bid was improperly drawn and whose prior fuel service had been questioned. Monoco Oil Co. v Collins, 96 Misc. 2d 631, 409 N.Y.S.2d 498, 1978 N.Y. Misc. LEXIS 2652 (N.Y. Sup. Ct. 1978).

This law does not authorize the award of equipment purchase contracts to local dealers who are not lowest responsible bidders but who could furnish service and parts for equipment that is purchased. 1955 NY Ops Atty Gen May 5 (Informal), 1955 N.Y. AG LEXIS 217.

Dairy which cannot, under Milk Control Law, sell and deliver milk in every schoolhouse of central school district cannot be lowest responsible bidder for contract to furnish milk to school district. 1955 Op St Compt No. 55-7080.

130. —Criminal activities

Community college board of trustees improperly denied electrical contractor, as unsuccessful low bidder, meaningful and timely opportunity to defend its name and reputation as responsible bidder on public contract where board omitted matter of contract from published meeting agenda, matter was added only after executive session, and matter was quickly resolved before contractor could know of or address its impact; however, because contractor's criminal indictment or stipulation to willful violations of Labor Law might have provided rational basis for board's determination that contractor was not responsible bidder, on remand board should reexamine only its implicit determination of contractor's nonresponsibility, on appropriate notice and opportunity. LaCorte Electrical Constr. & Maintenance, Inc. v County of Rensselaer, 80 N.Y.2d 232, 590 N.Y.S.2d 26, 604 N.E.2d 88, 1992 N.Y. LEXIS 3483 (N.Y. 1992).

It was proper for New York City Comptroller and mayor to refuse to register contract awarded to contractor based on, inter alia, comptroller's objection that 2 of contractor's principals who had previously been convicted by fraud might still play integral part in contractor's operations, and contractor's failure to disclose prior statutory and OSHA violations. DeFoe Corp. v New York City DOT, 87 N.Y.2d 754, 642 N.Y.S.2d 588, 665 N.E.2d 158, 1996 N.Y. LEXIS 307 (N.Y. 1996).

Board of Review of New York City Board of Education did not act arbitrarily or capriciously in denying petitioner corporation status as responsible bidder for asbestos removal contract where petitioner's president, sole stockholder and principal officer had recently been convicted of federal felony on pleading guilty to payment of gratuity to federal Environmental Protection Agency inspector in connection with another asbestos abatement project. A. Grgas Contracting Co. v Mercklowitz, 168 A.D.2d 678, 563 N.Y.S.2d 505, 1990 N.Y. App. Div. LEXIS 15992 (N.Y. App. Div. 2d Dep't 1990).

Determination that corporation, although lowest bidder, was not "responsible bidder" for proposed construction of police precinct jail had rational basis where background check revealed that individual previously listed as principal of corporation had been convicted under federal indictment of labor union racketeering, and fact that he had transferred his 50 percent interest in corporation to his wife without consideration did not alter result, since such fact, along with individual's continuing activities as "consultant" to corporation, supported conclusion that his relationship to corporation was not sufficiently attenuated to dispel appearance of his influence and control. Perna Contracting Co. v City of N.Y., 191 A.D.2d 232, 595 N.Y.S.2d 2, 1993 N.Y. App. Div. LEXIS 2184 (N.Y. App. Div. 1st Dep't 1993).

Court properly upheld determination of New York City Health and Hospitals Corporation (HHC) Panel of Contractor Responsibility that petitioner was not responsible bidder on 2 contracts for electrical work at hospitals administered by HHC, based on information that petitioner's principal pleaded guilty to disorderly conduct in settlement of felony charge of attempted second degree bribery arising from petitioner's principal having bribed city inspector to overlook electrical code violations. N.J.D. Elecs. v New York City Health & Hosps. Corp., 205 A.D.2d 323, 612 N.Y.S.2d 577, 1994 N.Y. App. Div. LEXIS 6046 (N.Y. App. Div. 1st Dep't 1994).

In determining whether petitioner was "responsible bidder," city agency's review of attempted second degree bribery charge against principal of petitioner did not violate CLS CPL §§ 160.50 and 160.60, which govern termination of criminal action in "favor" of accused, since petitioner's principal's acknowledged guilty plea to disorderly conduct in settlement of bribery charge did not constitute favorable termination. N.J.D. Elecs. v New York City Health & Hosps. Corp., 205 A.D.2d 323, 612 N.Y.S.2d 577, 1994 N.Y. App. Div. LEXIS 6046 (N.Y. App. Div. 1st Dep't 1994).

It was rational for city to conclude that petitioner was not lowest responsible bidder given petitioner's prior criminal convictions and willful violations of Labor Law. Mid-State Indus. v City of Cohoes, 221 A.D.2d 705, 633 N.Y.S.2d 238, 1995 N.Y. App. Div. LEXIS 10693 (N.Y. App. Div. 3d Dep't 1995).

New York City Comptroller properly declined to register bus transportation contract due to bus company's involvement in corrupt practices where (1) ex-husband of president of bus company was convicted of giving unlawful gratuity in connection with inspections of buses owned by bus company, and (2) president of bus company made apparently false statements regarding extent of her ex-husband's involvement in affairs of bus company. Dentom Transp., Inc. v New York City Human Resources Admin., 155 Misc. 2d 31, 588 N.Y.S.2d 713, 1992 N.Y. Misc. LEXIS 356 (N.Y. Sup. Ct. 1992).

131. —False or evasive statements; failure to respond

Rational basis existed to find that electrical contractor was non-responsible bidder for purposes of awarding contract under CLS Gen Mun § 103(1) where, in responding to municipal questionnaires, it concealed 7 prior determinations that it was non-responsible due to failure to have its electrical work supervised by licensed master electrician, indicating that it lacked integrity. Deol Elec. Contr. Inc. v Barrios-Paoli, 258 A.D.2d 327, 685 N.Y.S.2d 208, 1999 N.Y. App. Div. LEXIS 1145 (N.Y. App. Div. 1st Dep't 1999).

Board of Responsibility properly found plumbing contractor to be nonresponsible bidder based upon contractor's routine practice of inaccurate and evasive completion of forms, false and misleading answers given on bid applications, indictment of its president and sole shareholder on charges of obstruction of justice, and president's failure to answer questions regarding indictment, since behavior of contractor's employees and its president reflected contractor's judgment and integrity; penalty of 3 years' suspension for all city contracts was not so excessive as to be arbitrary. Arc Plumbing & Heating Corp. v Board of Responsibility of Dep't of General Services, 135 Misc. 2d 413, 515 N.Y.S.2d 685, 1987 N.Y. Misc. LEXIS 2237 (N.Y. Sup. Ct. 1987).

Failure of president of bus company to respond in her sworn statement to material question about involvement of her ex-husband in affairs of bus company was indicative of fact that bus company was not "responsible" bidder within meaning of CLS Gen Mun § 103(1), and supported denial of registration of bus transportation contract by city comptroller. Dentom Transp., Inc. v New York City Human Resources Admin., 155 Misc. 2d 31, 588 N.Y.S.2d 713, 1992 N.Y. Misc. LEXIS 356 (N.Y. Sup. Ct. 1992).

In Article 78 proceeding to challenge denial of registration of bus transportation contract by city comptroller on basis that president of bus company made apparently false statements regarding extent of involvement of her ex-husband (who had been convicted of giving unlawful gratuity in connection with inspections of buses owned by bus company) in affairs of bus company, court would reject contention that bus company was denied equal protection in that certain other contractors had been permitted to extend contracts by stipulating that no indicted employee would be associated with contractor for 5 years, since submission of false statement by president of bus company in attempt to hide material facts as to bus company's operation was not similar to admission of employment of indicted persons coupled with agreement not employ such persons. Dentom Transp., Inc. v New York City Human Resources Admin., 155 Misc. 2d 31, 588 N.Y.S.2d 713, 1992 N.Y. Misc. LEXIS 356 (N.Y. Sup. Ct. 1992).

132. —Financial responsibility

Issues of fact precluded summary judgment as to whether contractor had sufficient assets to be "responsible bidder" under CLS Gen Mun § 103, despite contractor's acknowledgment that its books had been falsified during 8-year period up to year of bid, since such falsification did not necessarily mean that contractor was not "responsible bidder." National States Elec. Corp. v City of New York, 225 A.D.2d 745, 640 N.Y.S.2d 186, 1996 N.Y. App. Div. LEXIS 3226 (N.Y. App. Div. 2d Dep't 1996).

Deposition testimony of contractor's president as to net worth of contractor did not support city's motion for summary judgment on ground that contractor had falsified its books and that its net worth was below financial requirement for "responsible bidder" under CLS Gen Mun § 103, even though president acknowledged falsification and stated that net worth was between $0 and deficit of $10,321, where president had not assumed office until after bid had been accepted, he had no personal knowledge of facts, and he had not spoken to any parties allegedly involved in falsification. National States Elec. Corp. v City of New York, 225 A.D.2d 745, 640 N.Y.S.2d 186, 1996 N.Y. App. Div. LEXIS 3226 (N.Y. App. Div. 2d Dep't 1996).

Respondents' rescission of contract awarded to petitioner, on ground that petitioner lacked financial and business integrity and therefore was nonresponsible bidder, was rationally supported by evidence of petitioner's failure to disclose information about its taxes and corporate status in questionnaires required both before and after contract was awarded, and its lack of candor with respect to ownership of enterprise. Ciprietti- Tolisano Assocs. v Karnovsky, 268 A.D.2d 234, 700 N.Y.S.2d 473, 2000 N.Y. App. Div. LEXIS 56 (N.Y. App. Div. 1st Dep't), app. denied, 95 N.Y.2d 759, 714 N.Y.S.2d 709, 737 N.E.2d 951, 2000 N.Y. LEXIS 2254 (N.Y. 2000).

Implicit in determining the lowest responsible bidder is exercise of administrative discretion, in which connection financial responsibility is a legitimate factor for consideration, but if that clearly appears from the low bidder's statement submitted with his bid, the bid cannot properly be rejected because of technical noncompliance with the precise specifications as to the manner in which it is presented. Caruci v Dulan, 41 Misc. 2d 859, 246 N.Y.S.2d 727, 1964 N.Y. Misc. LEXIS 2103 (N.Y. Sup. Ct. 1964), rev'd, 24 A.D.2d 529, 261 N.Y.S.2d 677, 1965 N.Y. App. Div. LEXIS 3837 (N.Y. App. Div. 4th Dep't 1965).

Where the low bidder on a municipal project fails to accompany his bid with security as required by the specifications, and the board rejects his bid for that reason, the board should not be required to reverse its decision and award the contract to such bidder because, subsequently, and before the project is awarded to the next lowest bidder, the low one offers to meet the precise requirements for security, as such a course of conduct could well discourage contractors from bidding on future projects. Stage v Whitehouse, 43 Misc. 2d 703, 252 N.Y.S.2d 142, 1964 N.Y. Misc. LEXIS 1515 (N.Y. Sup. Ct. 1964).

Subdivision 1 of this section provides that the contract shall be awarded to the lowest responsible bidder "furnishing the required security," and where a call for bids requires a certified check for ten percent of the amount bid, the same to be treated as liquidated damages, a bidder's substitution of a bond or undertaking limited to one item of damage permits the board to exercise its discretion to reject the accompanying bid, notwithstanding it is the low bid. Stage v Whitehouse, 43 Misc. 2d 703, 252 N.Y.S.2d 142, 1964 N.Y. Misc. LEXIS 1515 (N.Y. Sup. Ct. 1964).

County officials were not arbitrary and capricious in refusing to award a contract to petitioner for electrical work to be performed on a hospital addition, where petitioner failed to submit a proper performance bond as required by the instructions to bidders and

failed to establish financial responsibility with respect to the working capital required of each bidder. Application of P. J. Panzeca, Inc., 56 Misc. 2d 460, 288 N.Y.S.2d 813, 1968 N.Y. Misc. LEXIS 1748 (N.Y. Sup. Ct.), aff'd, 30 A.D.2d 640, 292 N.Y.S.2d 1007, 1968 N.Y. App. Div. LEXIS 6254 (N.Y. App. Div. 2d Dep't 1968).

The lowest bidder on a school transportation contract was disqualified for failing to meet the "responsible bidder" requirements of General Municipal Law § 103(1) by not filing current financial data along with its bid as required by the school board's specifications and, although the bidder had data on file from previous bids, this information could not compensate for the lack of adequate current records. Harran Transp. Co. v Board of Education, 71 Misc. 2d 139, 335 N.Y.S.2d 465, 1972 N.Y. Misc. LEXIS 1612 (N.Y. Sup. Ct.), reh'g denied, 71 Misc. 2d 143, 335 N.Y.S.2d 971, 1972 N.Y. Misc. LEXIS 1579 (N.Y. Sup. Ct. 1972).

Where bid specification stated neither a specific time nor a specific form in which to file certain required information, law bidder's submission at "Eleventh Hour" of balance sheet, statements of expenses, statements of income, projected sales and income and historical reports supplied sufficient detail in aggregate so as to constitute an "operating statement" as required by bid specifications, and to meet the "responsible bidder" requirements of General Municipal Law § 103, subd 1. Harran Transp. Co. v Board of Education, 71 Misc. 2d 143, 335 N.Y.S.2d 971, 1972 N.Y. Misc. LEXIS 1579 (N.Y. Sup. Ct. 1972).

A surety would be liable to a city under a contract bid bond issued by the surety to the low bidder on a data processing contract due to the contractor's failure to acquire performance bonds, which were required by the terms of the bid bond as a condition precedent to commencing work, since the city did not waive any claim to the bond proceeds by allowing the low bidder to perform for four and one-half months, since recovery was not precluded by the fact that the city had overlooked the performance bond requirement in that the bid bond provided no exemption from liability under such circumstance and in that parties who contract with the city are compelled to follow the bidding requirements set forth in the applicable city charter provision, since the action against the surety was not precluded by the city's settlement with the contractor for work performed under a theory of quantum meruit, and since no showing of actual damage to the city was necessary to support the claim against the surety in that the penalty sought by the city was similar to a statutory penalty for nonperformance of a statutory duty. New York v United States Fidelity & Guaranty Co., 119 Misc. 2d 725, 464 N.Y.S.2d 659, 1983 N.Y. Misc. LEXIS 3585 (N.Y. Sup. Ct. 1983).

Board of education was entitled to reject petitioner's bids for 2 construction projects based on petitioner's failure to submit bid security with either bid. 1999 Op Comm Ed No. 14,146, 1999 NY Educ. Dept. LEXIS 110.

Where lowest bidder's failure to adhere to stated security requirements was not merely a technical defect, the board of education should have rebid the contract for the reconstruction of school roofs and should not have waived compliance with the advertised conditions. In the Matter of Triple M Roofing Corp., Op Comm Ed No. 9404.

Where a call for bids on a garbage removal and disposal contract clearly requires the successful bidder to put up a performance bond within 15 days from acceptance of his proposal, and that the deposit made in connection with his bid will be forfeited if he fails to enter into a contract pursuant to the specified requirements within 15 days, his inability to obtain a performance bond within the period specified does not affect forfeiture of his deposit. 1961 Op St Compt No. 61-155.

133. —Prior poor performance

Lowest bidder for street rehabilitation contract may be found irresponsible and bid rejected where bidder has provided poor service under prior contract as evidenced by proof that asphalt unraveled, potholes and contaminated surface mats appeared, and city experienced difficulty resolving problems with bidder. Callanan Industries, Inc. v Schenectady, 116 A.D.2d 883, 498 N.Y.S.2d 490, 1986 N.Y. App. Div. LEXIS 51689 (N.Y. App. Div. 3d Dep't 1986).

134. —Burden of proof

A determination by the village board, which determined by a vote of 5-1, that the lowest bidder was not the lowest responsible bidder, would not be set aside in a proceeding under Art. 78 of the CPA, in the absence of any factual showing of fraud, since it would be presumed, that the board acted in good faith and honestly exercised its judgment and discretion in not awarding the contract to the petitioner. Application of Limitone, 21 Misc. 2d 376, 189 N.Y.S.2d 738, 1959 N.Y. Misc. LEXIS 3482 (N.Y. Sup. Ct. 1959).

In a proceeding by the low bidder on a school district project to compel the Board of Education to award him the contract, petitioner has the burden of proof that he is a responsible bidder, and there is no burden on the Board to go out and investigate blindly the bidder's responsibility beyond interviewing persons whose names he has supplied as references. Meyer v Board of Education, 31 Misc. 2d 407, 221 N.Y.S.2d 500, 1961 N.Y. Misc. LEXIS 2271 (N.Y. Sup. Ct. 1961).

A petitioner, who was low bidder for a municipal contract, seeking to compel award of the contract to himself as low bidder and cancellation of an award to the next low bidder, has the burden of showing that he is a "responsible" bidder, and the Board's decision cannot be overturned as long as there was a reasonable and plausible basis for its determination. W. J. Gaskell, Inc. v Maslanka, 33 Misc. 2d 88, 225 N.Y.S.2d 94, 1962 N.Y. Misc. LEXIS 3988 (N.Y. Sup. Ct. 1962).

135. Hearings

City's failure to provide bidder with hearing on rejected bid does not violate due process where bidder is provided informal conferences with city council and other city officers, along with right to file Article 78 proceeding. Callanan Industries, Inc. v Schenectady, 116 A.D.2d 883, 498 N.Y.S.2d 490, 1986 N.Y. App. Div. LEXIS 51689 (N.Y. App. Div. 3d Dep't 1986).

Roofing contractor whose low bid was rejected by city was entitled to remittal of matter, and to notice and opportunity to be heard, so that city could reexamine its implicit determination of contractor's nonresponsibility; procedural safeguards are required because low bidder's commercial good name, honor or integrity is at stake. Horizon Roofing & Sheetmetal v City of Glens Falls, 205 A.D.2d 916, 613 N.Y.S.2d 464, 1994 N.Y. App. Div. LEXIS 6273 (N.Y. App. Div. 3d Dep't 1994).

A bidder is not entitled to a hearing by the board, either statutorily or by implication. If the board does grant a hearing the bidder cannot object to the hearing which is held. Haskell-Gilroy, Inc. v Young, 20 Misc. 2d 294, 189 N.Y.S.2d 774, 1959 N.Y. Misc. LEXIS 3122 (N.Y. Sup. Ct. 1959), aff'd, 10 A.D.2d 629, 196 N.Y.S.2d 328, 1960 N.Y. App. Div. LEXIS 11951 (N.Y. App. Div. 2d Dep't 1960).

A board of education after receiving bids on electrical wiring for a school project, used a common sense approach and method in asking its own architect to investigate and report on the bidders and taking into consideration the architect's report that the references supplied by one of the bidders, who had made the low bid, disclosed difficulties in his obtaining approval for work done and that he was difficult to handle and deal with and thereafter holding a hearing at which this bidder was allowed to appear in person and by his attorney, then, on the basis of the architect's report and its own judgment, awarding the bid to the next lowest bidder. Meyer v Board of Education, 31 Misc. 2d 407, 221 N.Y.S.2d 500, 1961 N.Y. Misc. LEXIS 2271 (N.Y. Sup. Ct. 1961).

A Village Board used a common sense approach and method in appraising the responsibility of bidders on a refuse incinerator project where it appointed its consulting engineer to investigate and report, then held a meeting at which it fully considered testimony of witnesses and the report of the engineer, and its rejection of the lowest bidder and award of the contract to the next low bidder would not be overturned where there was justifiable doubt as to responsibility of the low bidder, after due consideration and deliberation by the Board itself, but none as to the responsibility of the next bidder. W. J. Gaskell, Inc. v Maslanka, 33 Misc. 2d 88, 225 N.Y.S.2d 94, 1962 N.Y. Misc. LEXIS 3988 (N.Y. Sup. Ct. 1962).

An urban renewal agency, in determining the issue of a low bidder's responsibility, exercises a function that is judicial or quasi-judicial in nature, and thus such determination requires a hearing in accord with due process, whether or not such hearing is required by statute. Seacoast Constr. Corp. v Lockport Urban Renewal Agency, 72 Misc. 2d 372, 339 N.Y.S.2d 188, 1972 N.Y. Misc. LEXIS 1348 (N.Y. Sup. Ct. 1972).

Urban renewal agency's determination that second lowest bidder was better qualified to perform contract was arbitrary and capricious where lowest bidder, who had never defaulted on any contract, was not accorded a hearing on the issue of his responsibility, and where city engineer's request for a "qualification statement" from bidders did not meet minimal requirements for a meaningful investigation. Seacoast Constr. Corp. v Lockport Urban Renewal Agency, 72 Misc. 2d 372, 339 N.Y.S.2d 188, 1972 N.Y. Misc. LEXIS 1348 (N.Y. Sup. Ct. 1972).

Plumbing contractor found to be nonresponsible bidder as result of false and misleading answers given on its bid application as well as indictment of its sole stockholder and president on charges of obstruction of justice was not deprived of adequate notice where Board of Responsibility advised contractor that its president's indictment and bid submission as well as specific question on experience questionnaire were at issue. Arc Plumbing & Heating Corp. v Board of Responsibility of Dep't of General Services, 135 Misc. 2d 413, 515 N.Y.S.2d 685, 1987 N.Y. Misc. LEXIS 2237 (N.Y. Sup. Ct. 1987).

At hearing in which Board of Responsibility found plumbing contractor to be nonresponsible bidder, board was entitled to hold contractor accountable for its president's refusal to testify, for even though exercise of privilege could not be used to penalize contractor's president, corporation had no Fifth Amendment right notwithstanding that corporation was owned by president as sole shareholder. Arc Plumbing & Heating Corp. v Board of Responsibility of Dep't of General Services, 135 Misc. 2d 413, 515 N.Y.S.2d 685, 1987 N.Y. Misc. LEXIS 2237 (N.Y. Sup. Ct. 1987).

In Article 78 proceeding to challenge denial of registration of bus transportation contract by city comptroller on basis that president of bus company made apparently false statements regarding extent of involvement of her ex-husband (who had been convicted of giving unlawful gratuity in connection with inspections of buses owned by bus company) in affairs of bus company, court would reject contention that bus company was denied procedural due process in that comptroller relied on information from undercover officer in preparing report regarding bus company, and that bus company was not permitted to interview or cross examine officer, since no statute required city to offer hearing to bus company as to comptroller's determination, and right to bid on contract was not property right. Dentom Transp., Inc. v New York City Human Resources Admin., 155 Misc. 2d 31, 588 N.Y.S.2d 713, 1992 N.Y. Misc. LEXIS 356 (N.Y. Sup. Ct. 1992).

136. Contract payments; escalation clauses

The City of Binghamton, having contracted with a bidder for the purchase of a fire engine for the City at a certain price, is not authorized to amend the contract to include an escalation clause unless the original bidding specifications authorized such a clause. The City is also not authorized to amend the contract to provide for payment of a portion of the purchase price before the fire engine has been delivered. 1974 NY Ops Atty Gen Nov 21 (Informal), 1974 N.Y. AG LEXIS 183.

21. While contracts may be let on a unit bid basis under specifications stating that the amounts indicated for various units are mere estimates and that the ultimate sum paid for any given unit of work will be the amount actually used, governing bodies often fail to take into consideration, when appropriating funds for such contracts, that the contract bid price may not be the ultimate price. 1960 Op St Compt No. 60-971.

A village may award a contract for the purchase of items, with a provision for a delayed delivery date, and for price adjustments in accordance with market conditions. 1967 Op St Compt NO. 67-409.

Discussion of a price escalation clause in a sanitary landfill contract. 1978 Op St Compt No. 78-848.

Discussion of right of municipality to accept a bid which provides for the contract price to be decreased or increased due to an increase or decrease in posted prices at vendor's service station. 1960 Op St Compt NO. 60-295.

137. —Sales taxes

Where bid specifications required bidders to exclude the sales tax cost from their proposals, and provided that the county would later reimburse the contractor for such expense, if it was determined that such taxes were due and payable, the county is required to reimburse the contractor for such cost. 1967 Op St Compt NO. 67-417.

A payment by a municipality to a contractor, after completion of a construction contract, over and above the contract price, predicated on his failure to include sales tax costs in his bid, would be an unconstitutional gift of public funds to an individual. 1969 Op St Compt NO. 69-159.

Sales taxes must be paid on materials purchased by a contractor for a contract with a town water district irrespective of the fact that the contract separately states the labor and material components. 1969 Op St Compt No. 69-289.

138. Contractor's claim for additional work

Where a contract for the paving of certain designated streets has been let after competitive bids have been taken, a claim by the successful bidder, based on the contract, for the paving of additional streets may not be paid. 1956 Op St Compt NO. 56-7851.

Where a contract for the furnishing of a certain quantity "more or less" of a particular material has been let after competitive bids have been taken, not on the basis of the unit price, but for a gross amount, a claim by the successful bidder, based on the contract, for furnishing additional quantities of the material at the unit price may not be paid. 1956 Op St Compt No. 56-7951.

Where a contract has been let to a contractor after competitive bidding and the contractor subsequently performs additional work pursuant to verbal agreement, his claim for such additional work may not be paid. 1956 Op St Compt No. 56-8147.

A village may not pay a claim submitted by a low bidder for an amount in excess of the bid price where the bidder delivered a vehicle which contained additional equipment not called for in the bid specifications nor requested or approved for purchase by the village board of trustees. 1979 Op St Compt NO. 79-842, 1980 N.Y. Comp. LEXIS 398.

139. Conflicts of interest

Contract for furnishing and installation of equipment in county courthouse was void where open competitive bidding was impaired by the reasonable apprehension of prospective bidders that performance of the resulting contract would be supervised by a design consultant employed by county board of supervisors who was also an officer of successful bidder and that such consultant might exercise his powers under the special petitions favorable to the successful bidder, if it obtained the contract and unfavorable to its competitors if they secured it. Olean Standard Equipment Co. v Cattaraugus County Board of Supervisors, 30 A.D.2d 758, 291 N.Y.S.2d 861, 1968 N.Y. App. Div. LEXIS 3673 (N.Y. App. Div. 4th Dep't 1968).

Award of liability insurance contract for city to one agency did not violate statute prohibiting conflict of interest of municipal employee, where it did not appear that the agency was a "municipal employee" within meaning of the statute when it contracted to draw specifications for city's insurance needs. Surdell v Oswego, 91 Misc. 2d 1041, 399 N.Y.S.2d 173, 1977 N.Y. Misc. LEXIS 2476 (N.Y. Sup. Ct. 1977).

It seems that a board of trustees may properly award a contract to purchase equipment to the lowest bidder even though such bidder is the husband of one of the village trustees. 1954 NY Ops Atty Gen June 4 (Informal), 1954 N.Y. AG LEXIS 291.

Where the village trustee is an employee of the lowest bidder on a village purchase contract, such contract should not be awarded to the trustee's employer. 1955 Op St Compt No. 55-7495.

Execution of a contract for the purchase by the town of gravel from a councilman-elect, which contract would be for a long term and entered into prior to his taking office, would not technically, create a prohibited conflict of interest. However, such an arrange-

ment violates the spirit and intent of Article 18. 1967 Op St Compt NO. 67-979.

Although there would be no prohibited conflict of interest if a town were to provide in its bidding specifications that it reserves the option to sell any equipment, to be traded in, to town employees at the trade-in-price, such a procedure could create certain serious problems in determining the low bidder, and might also have the effect of increasing the prices for the items to be purchased. 1968 Op St Compt No. 68-711.

Employment by fire district of professional engineer as independent contractor to prepare plans and specifications, and to supervise work, on construction project when engineer also is one-half owner of construction firm which may bid on building project presents possible violations of ethical and professional conduct standards and of competitive bidding statute. 1989 Op St Compt No. 89-12, 1989 N.Y. Comp. LEXIS 15.

140. Action to compel award

Although trial court may properly find that administrative body has acted in arbitrary or capricious manner in rejecting bid for contract made by sole bidder, court is not authorized to compel award of contract but is limited to remand matter to administrative agency for further proceedings in accordance with court opinion. Burke's Auto Body, Inc. v Ameruso, 113 A.D.2d 198, 495 N.Y.S.2d 393, 1985 N.Y. App. Div. LEXIS 52351 (N.Y. App. Div. 1st Dep't 1985).

Appeal, challenging award of publicly bid contract, was dismissed for failure to join successful bidder as necessary party. 1999 Op Comm Ed No. 14,248, 1999 NY Educ. Dept. LEXIS 288.

141. Post bid activities

School district was not required to rebid contract for bus transportation services by changes in contract made after acceptance of bid where changes were in public interest, with no advantage to low bidder at other bidders' expense, and there was no evidence of favoritism, fraud, or corruption. Decker v Gooley, 212 A.D.2d 893, 622 N.Y.S.2d 374, 1995 N.Y. App. Div. LEXIS 1409 (N.Y. App. Div. 3d Dep't 1995).

Board of education did not commit any impropriety in conducting post-bid negotiations with lowest aggregate bidders in order to procure further cost reductions in connection with subject transportation contracts. Acme Bus Corp. v Board of Educ., 236 A.D.2d 535, 653 N.Y.S.2d 684, 1997 N.Y. App. Div. LEXIS 1376 (N.Y. App. Div. 2d Dep't), aff'd, 91 N.Y.2d 51, 666 N.Y.S.2d 996, 689 N.E.2d 890, 1997 N.Y. LEXIS 3705 (N.Y. 1997).

142. Miscellaneous

A contract which provides for a lesser income to the governmental unit than a competitor's contract might provide is an "expenditure" within the meaning of General Municipal L § 103. Signacon Controls, Inc. v Mulroy, 32 N.Y.2d 410, 345 N.Y.S.2d 527, 298 N.E.2d 670, 1973 N.Y. LEXIS 1214 (N.Y. 1973).

Where, inter alia, it appeared that not all preliminaries had been completed when city environmental protection commissioner wrote letter informing plumbing contractor that it had been awarded plumbing contract for pollution control project and where it also appeared that there was no intent to be bound until a formal agreement was executed in conjunction with other documents, city was not bound by commissioner's lessor and, until other contemplated documents and agreements were signed, city could reconsider award. James H. Merritt Plumbing, Inc. v New York, 55 A.D.2d 552, 390 N.Y.S.2d 65, 1976 N.Y. App. Div. LEXIS 15231 (N.Y. App. Div. 1st Dep't 1976), app. dismissed, 41 N.Y.2d 806, 1977 N.Y. LEXIS 3101 (N.Y. 1977), app. dismissed, 42 N.Y.2d 825, 1977 N.Y. LEXIS 3977 (N.Y. 1977).

In Article 78 proceeding, court erred in holding that minority business enterprise (MBE) affirmative action goals sought to be enforced by respondent county were unconstitutional, and in ordering county to award contract to petitioner which had been rejected by county for failure to comply with MBE requirements, since no constitutional claim was raised in petition, and county's lack of notice of such claim deprived it of opportunity to submit evidence in support of validity of MBE requirements. Ajay Glass & Mirror Co. v County of Erie, 155 A.D.2d 988, 547 N.Y.S.2d 790, 1989 N.Y. App. Div. LEXIS 14879 (N.Y. App. Div. 4th Dep't 1989).

In Article 78 proceeding, court erred in holding that minority business enterprise (MBE) affirmative action goals sought to be enforced by respondent county were unconstitutional, and in ordering county to award contract to install security windows at county holding center to petitioner which had been rejected by county both for failure to comply with MBE requirements and for failure to set forth its qualifications and prior experience in installing jail or prison windows, since court should not decide case on constitutional grounds where decision may be based on alternative, nonconstitutional grounds. Ajay Glass & Mirror Co. v County of Erie, 155 A.D.2d 988, 547 N.Y.S.2d 790, 1989 N.Y. App. Div. LEXIS 14879 (N.Y. App. Div. 4th Dep't 1989).

City had rational basis to reject petitioner's bid to be designated as impounder of vehicles, notwithstanding that petitioner had provided city with towing and impounding services for past 21 years, where petitioner submitted no records in response to city's audit of existing providers, and it stated in its bid that fee required by city for each vehicle towed would create hardship, yet it submitted alternate bid which included such fee. Transit Auto Towing v City of Yonkers, 207 A.D.2d 791, 616 N.Y.S.2d 522, 1994 N.Y. App. Div. LEXIS 8732 (N.Y. App. Div. 2d Dep't 1994).

Bus company was not entitled to compensation from city for services rendered while awaiting registration of transportation contract, which was eventually denied registration, notwithstanding contention that city employee requested that bus company commence operations on temporary basis before registration of contract. Dentom Transp., Inc. v New York City Human Resources Admin., 155 Misc. 2d 31, 588 N.Y.S.2d 713, 1992 N.Y. Misc. LEXIS 356 (N.Y. Sup. Ct. 1992).

11 RCNY 3-09, permitting Chief Procurement Officer to award contract to certified enterprise rather than lowest responsible bidder when, pursuant to NYC Charter § 313, it is in best interests of city, is invalid since (1) CLS Gen Mun § 103 permits exemptions from low bid rule, for statutes adopted after September 1953, only if statute is essentially revision, codification, or restatement of pre-1953 special or local law, and (2) pre-1953 predecessor to NYC Charter § 313 authorized Board of Estimate, rather than mayor, to determine when to bypass lowest bidder in interests of city, and thus § 313, in transferring decision-making process from Board of Estimate to mayor, represented significant departure from predecessor. Seabury Constr. Corp. v Department of Envtl. Protection, 160 Misc. 2d 87, 607 N.Y.S.2d 1017, 1994 N.Y. Misc. LEXIS 18 (N.Y. Sup. Ct. 1994).

For the purpose of meeting the competitive bidding requirements of this statute, some reasonable classification might be justified in awarding contracts for the purchase of school band instruments. 1957 Op St Compt No. 57-762.

A city may not extend its contract prices to school districts or a county, and contract purchases in excess of $1,000 by a city or school district under an extended price clause in a city or school district contract as the case may be would be a violation of this section. 1962 Op St Compt No. 62-803.

A political subdivision may not legally make purchases by having bidders bid on 100 specific items, where the political subdivision will make purchases of other items in the low bidder's catalogue, and will also make purchases of items not obtainable from the low bidder from other unsuccessful bidders. 1967 Op St Compt No. 67-540.

Discussion of ramifications of situation wherein a town highway superintendent, as the result of a "clerical error", ordered sand and gravel from a bidder who was not the lowest responsible bidder. 1978 Op St Compt No. 78-490.

It is doubtful that the mere fact that the low bidder on a town gravel purchase has brought an action against the town in an unrelated matter is sufficient grounds for awarding the contract to other than the low bidder. 1982 Op St Compt No. 82-129, 1982 N.Y. Comp. LEXIS 592.

VIII. Actions Involving Awarded Contracts

143. In general

A contract procured through fraudulent and collusive bidding is void as against public policy and recovery cannot be had upon any theory, even upon quantum meruit or quantum valebant. Jered Contracting Corp. v New York City Transit Authority, 22 N.Y.2d

187, 292 N.Y.S.2d 98, 239 N.E.2d 197, 1968 N.Y. LEXIS 1340 (N.Y. 1968).

In lawsuit challenging bid selection process for reconstruction work on city streets in conjunction with related utility interference work, wherein city asserted in its answer that all contracts were awarded "in accordance with CLS Gen Mun § 103," city's argument that "interference work" constituted "public work" in combined bidding situation was sufficiently preserved for review by Court of Appeals, where it was first made in response to Supreme Court's analysis of city's joint bidding technique, Supreme Court and Appellate Division had both ruled on issue, and everyone was manifestly aware of its potential significance. Diamond Asphalt Corp. v Sander, 92 N.Y.2d 244, 678 N.Y.S.2d 567, 700 N.E.2d 1203, 1998 N.Y. LEXIS 1828 (N.Y. 1998).

In Article 78 proceeding, it was error for court to annul county's award of contracts for supply and delivery of heating oil on ground that successful bidders should have been required to demonstrate how they would ensure prospective compliance with local prevailing wage rate schedules; in considering whether administrative determination rendered without hearing is arbitrary and capricious, proper test is whether challenged determination is supported by rational basis. Robison Oil Corp. v County of Westchester, 236 A.D.2d 542, 653 N.Y.S.2d 674, 1997 N.Y. App. Div. LEXIS 1375 (N.Y. App. Div. 2d Dep't 1997).

As a general rule, failure to comply with statutory requirements for competitive bidding renders a public works contract in excess of specified amount invalid and precludes any recovery by the vendor either on the basis of the contract or on quantum meruit; instead, a municipality is entitled to recover all amounts paid under the illegal contract; however, such general rule does not apply to the case of services to be performed for an indefinite period involving no obligation on the part of the municipality to continue the services and a recovery may be had in such instance even though the aggregate cost of the services exceeds such amount. Lance Investigation Service, Inc. v New York, 88 Misc. 2d 119, 387 N.Y.S.2d 32, 1976 N.Y. Misc. LEXIS 2592 (N.Y. App. Term 1976).

Plaintiffs do not have standing to sue for alleged violation of CLS Gen Mun § 103 where plaintiffs did not bid on contract and, therefore, alleged violation of competitive bidding laws did not injure them. 106 Mile Transport Associates v Koch, 656 F. Supp. 1474, 1987 U.S. Dist. LEXIS 3508 (S.D.N.Y. 1987).

144. Timeliness

It would have been inappropriate to grant Article 78 relief to compel compliance with General Municipal Law §§ 101 and 103 and Labor Law § 220 where delay by petitioner in commencing proceedings and absence of stay or restraining order pendente lite produced a situation where bids had already been received and opened, and construction begun. General Bldg. Contractors, Inc. v Board of Trustees, 42 A.D.2d 660, 345 N.Y.S.2d 195, 1973 N.Y. App. Div. LEXIS 4055 (N.Y. App. Div. 3d Dep't 1973).

Article 78 proceeding challenging validity of contract for management of city's water system as violative of CLS Gen Mun § 103 and other laws was not commenced within 4 months after determination to be reviewed became final and binding, and thus proceeding was time barred, where (1) administrative determination became final and binding on petitioners no later than September 1, 1997, when management contract went into effect, (2) proceeding was not commenced until January 1999, and (3) there was no basis for determining timeliness of proceeding, or for postponing its accrual, based on date on which petitioners' attorney received city corporation counsel's "legal opinion" concerning propriety of determination at issue. Fawcett v City of Buffalo, 275 A.D.2d 954, 713 N.Y.S.2d 610, 2000 N.Y. App. Div. LEXIS 9624 (N.Y. App. Div. 4th Dep't 2000), app. denied, 96 N.Y.2d 701, 722 N.Y.S.2d 793, 745 N.E.2d 1015, 2001 N.Y. LEXIS 20 (N.Y. 2001).

Town's N.Y. Gen. Mun. Law § 103 cause of action was time barred under the governing six-year limitations period, under N.Y. C.P.L.R. 213(1), because (1) the cause of action accrued when a renovation agreement was formally executed on April 20, 1995, since it was on this date that the renovation agreement was allegedly steered to the owners of a warehouse instead of being duly let out for bidding to other potential contractors; (2) the town, as a party to the contract, was in a position to discover improprieties in connection with the award and pricing of the renovation agreement; (3) the town was on notice that the owners might not have provided the lowest price for renovation services, and fraud might have been at play; and (4) all of the facts necessary to the town's cause of action had become manifest by April 20, 1995, but the town did not commence an action until September 4, 2002. Town of Poughkeepsie v Espie, 41 A.D.3d 701, 840 N.Y.S.2d 600, 2007 N.Y. App. Div. LEXIS 7768 (N.Y. App. Div. 2d Dep't), app. dismissed, 9 N.Y.3d 1003, 849 N.Y.S.2d 30, 879 N.E.2d 170, 2007 N.Y. LEXIS 3793 (N.Y. 2007), app. denied, 15 N.Y.3d 715, 915 N.Y.S.2d 216, 940 N.E.2d 922, 2010 N.Y. LEXIS 3536 (N.Y. 2010).

Notice of claim against municipality for goods sold and delivered was timely made where last delivery was made February 27, 1956, seller demanded payment on October 1, 1956, and notice of claim was filed on October 29, 1956. Rason Asphalt, Inc. v Oyster Bay, 8 Misc. 2d 411, 167 N.Y.S.2d 175, 1957 N.Y. Misc. LEXIS 2486 (N.Y. Sup. Ct. 1957), modified, 6 A.D.2d 810, 175 N.Y.S.2d 302, 1958 N.Y. App. Div. LEXIS 5643 (N.Y. App. Div. 2d Dep't 1958).

145. Presumptions

Once a contract is proved to have been awarded without the competitive bidding required by the above statute, a waste of public funds is presumed and a taxpayer is entitled to have it set aside without showing that the municipality suffered any actual injury. It is sufficient in such a situation that the public has been deprived of the protection which the law was intended to afford. Gerzof v Sweeney, 16 N.Y.2d 206, 264 N.Y.S.2d 376, 211 N.E.2d 826, 1965 N.Y. LEXIS 1040 (N.Y. 1965), reh'g denied, 17 N.Y.2d 549, 1966 N.Y. LEXIS 1945 (N.Y. 1966).

Where petitioner's allegations that award of contract was unlawful and in violation of General Municipal Law were unsupported by factual allegations which would overcome presumption that county purchasing agent acted properly, determination that contract was properly awarded after competitive bidding would not be disturbed. Theodore J. Burke & Son, Inc. v County of Dutchess, 50 A.D.2d 918, 377 N.Y.S.2d 585, 1975 N.Y. App. Div. LEXIS 11840 (N.Y. App. Div. 2d Dep't 1975).

146. Contractor's action

In an action by the seller of industrial chemicals to recover the difference between the reasonable value of a quantity of activated carbon sold and delivered to the defendant on different occasions, where the defendant had erroneously been billed at a much lower cost per ton than was customary, it was held that eight separate deliveries did not constitute one contract but eight separate transactions, and that since seven of the disputed purchases even at the corrected price did not exceed $1,000, those purchases did not violate § 103 of the General Municipal Law. Jones Chemicals, Inc. v Binghamton, 26 A.D.2d 710, 271 N.Y.S.2d 507, 1966 N.Y. App. Div. LEXIS 3764 (N.Y. App. Div. 3d Dep't 1966), aff'd, 20 N.Y.2d 808, 284 N.Y.S.2d 702, 231 N.E.2d 288, 1967 N.Y. LEXIS 1180 (N.Y. 1967).

Where city on eight occasions and under separate orders purchased from plaintiff water purifying chemicals which were billed and paid for at an erroneously low price, the eight deliveries did not constitute one contract, and the plaintiff was entitled to recover the difference between the price paid and the correct price for the seven shipments where the correct price did not exceed $1,000; but the eighth shipment for which the correct price exceeded $1,000 was in violation of this section and void. Jones Chemicals, Inc. v Binghamton, 26 A.D.2d 710, 271 N.Y.S.2d 507, 1966 N.Y. App. Div. LEXIS 3764 (N.Y. App. Div. 3d Dep't 1966), aff'd, 20 N.Y.2d 808, 284 N.Y.S.2d 702, 231 N.E.2d 288, 1967 N.Y. LEXIS 1180 (N.Y. 1967).

Contractor's petition to annul determination awarding street rehabilitation contract to another contractor is properly dismissed upon failure of contractor to show good cause for vacating determination, despite city's lack of compliance with Open Meetings Law (Pub O Law § 103). Callanan Industries, Inc. v Schenectady, 116 A.D.2d 883, 498 N.Y.S.2d 490, 1986 N.Y. App. Div. LEXIS 51689 (N.Y. App. Div. 3d Dep't 1986).

In Article 78 proceeding to prohibit city from awarding contract to supply city with garbage trucks, and to compel award to petitioner, Supreme Court improperly dismissed proceeding without first conducting hearing where affidavits raised dispute as to whether competing bidder's proposal failed to comply with specification that cab and chassis of trucks be of proven design presently in production, and whether city improperly waived competing bidder's noncompliance. Jerkens Truck & Equipment, Inc. v Yonkers, 130 A.D.2d 576, 515 N.Y.S.2d 516, 1987 N.Y. App. Div. LEXIS 46576 (N.Y. App. Div. 2d Dep't 1987).

Unsuccessful bidders for job of replacing city sidewalks were not entitled to summary judgment in action for money damages alleging failure to award them contract, even though they had originally made lowest bid and city failed to explain "proper extensions" which had increased their bid, since (1) bidding process was quasi-judicial governmental function, (2) awarding of bid was discretionary act of responsible official, and (3) CLS Gen Mun § 103, prescribing manner in which bids would be requested and contracts awarded, was enacted to protect municipalities and taxpayers, not to benefit bidders. Stride Contracting Corp. v Board of Contract & Supply, 181 A.D.2d 876, 581 N.Y.S.2d 446, 1992 N.Y. App. Div. LEXIS 4978 (N.Y. App. Div. 2d Dep't 1992).

Municipality's decision as to award of bids on public projects does not involve substantial evidence, but rather depends on whether municipality's exercise of discretion as to awarding contract was arbitrary and capricious; thus, Supreme Court improperly transferred to Appellate Division proceeding to review city's determination finding that petitioner was not lowest responsible bidder. Mid-State Indus. v City of Cohoes, 221 A.D.2d 705, 633 N.Y.S.2d 238, 1995 N.Y. App. Div. LEXIS 10693 (N.Y. App. Div. 3d Dep't 1995).

New York City Housing Authority (NYCHA) was entitled to modify plaintiff's contract to rehabilitate 7 buildings by omitting provision for limited asbestos removal in basement areas and engaging another contractor to perform asbestos removal throughout buildings, where site required far more complicated process than that specified in plaintiff's contract; thus, NYCHA was entitled to summary judgment dismissing breach of contract complaint. Seville Constr. v New York City Hous. Auth., 247 A.D.2d 69, 677 N.Y.S.2d 359, 1998 N.Y. App. Div. LEXIS 9330 (N.Y. App. Div. 1st Dep't 1998), app. denied, 93 N.Y.2d 803, 689 N.Y.S.2d 16, 711 N.E.2d 201, 1999 N.Y. LEXIS 740 (N.Y. 1999).

In action to recover cost of additional work under contract for removal of asbestos from municipal psychiatric center, bid documents inviting bidders to submit questions about meaning of drawings or specifications and stating that "[t]he reply to such an inquiry, when deemed necessary, will be communicated by Addendum to all persons who have obtained drawings and specifications" provided basis for triable issue of fact as to municipality's liability where contractor claimed that other bidders made such inquiries that were answered but that addendum was not issued to all prospective bidders; quoted provision meant that although reply to inquiries was discretionary, once reply was made it was mandatory to issue addendum to all prospective bidders. Dobco Inc. v Facilities Dev. Corp., 263 A.D.2d 592, 693 N.Y.S.2d 276, 1999 N.Y. App. Div. LEXIS 7682 (N.Y. App. Div. 3d Dep't 1999).

Town was not entitled to summary judgment, based upon the language of this statute, in a contractor's action for breach of its emergency snow removal contract because the town had already completed the competitive bidding process and awarded a contract to the contractor for emergency snow removal and, as such, this statute did not apply. CTS Contr., Inc. v Town of Cheektowaga, 148 A.D.3d 1642, 51 N.Y.S.3d 738, 2017 N.Y. App. Div. LEXIS 2160 (N.Y. App. Div. 4th Dep't 2017).

In a proceeding to require a Board of Education to award a contract to the low bidder, notwithstanding his bid came in slightly after the appointed hour, the person to whom the bid was awarded as the lowest bidder making a timely bid was a necessary party. Wiltom Coach Co. v Central High School Dist., 36 Misc. 2d 637, 232 N.Y.S.2d 876, 1962 N.Y. Misc. LEXIS 2696 (N.Y. Sup. Ct. 1962).

Unsuccessful bidders were entitled to challenge joint bidding arrangements, as violative of CLS Gen Mun § 103, and did not waive that right by participating in bidding. Diamond Asphalt Corp. v Sander, 171 Misc. 2d 879, 655 N.Y.S.2d 706, 1996 N.Y. Misc. LEXIS 565 (N.Y. Sup. Ct. 1996), aff'd, 238 A.D.2d 197, 656 N.Y.S.2d 248, 1997 N.Y. App. Div. LEXIS 3764 (N.Y. App. Div. 1st Dep't 1997).

Former commissioner of a New York village's community development agency was not entitled to summary judgment on his claim seeking payment for services that he had purportedly provided pursuant to a no-bid consulting agreement because disputed issues of fact were raised as to whether the agreement was valid and enforceable. It was not clear that the agreement was exempt from N.Y. Gen. Mun. Law § 103, which required that, except for contracts involving the provision of professional services, all contracts for public works involving expenditure of more than $20,000 had to be awarded through public bidding. Spiritis v Vill. of Hempstead Cmty. Dev. Agency, 234 N.Y.L.J. 55, 2005 N.Y. Misc. LEXIS 3459 (N.Y. Sup. Ct. Sept. 19, 2005).

County defendants were not entitled to absolute legislative immunity in action by alleged lowest bidders on county contract because (1) CLS Gen Mun § 103, which they had acted under, strictly circumscribed their discretion in awarding contracts, and (2) certain of their complained-of actions were undertaken after whatever contracting discretion they had under § 103 was further circumscribed by 2 orders entered by Supreme Court after plaintiffs sought Article 78 review. Lacorte v Hudacs, 884 F. Supp. 64, 1995 U.S. Dist. LEXIS 5312 (N.D.N.Y. 1995), dismissed, 1996 U.S. Dist. LEXIS 15137 (N.D.N.Y. Oct. 4, 1996).

147. —Standing

Court erred in concluding that unsuccessful bidder lacked standing to pursue proceeding to set aside city contract based on alleged improprieties in bidding process since its interest arguably fell within zone of interest to be protected by CLS Gen Mun § 103, its allegations of improper postbid negotiations between city and successful bidder demonstrated harmful effect, and there was no evidence of legislative intent to bar dissatisfied bidders from challenging competitive bidding process; fact that petitioner was unable to establish its entitlement to contract as result of separate order of preclusion was not dispositive. Jerkens Truck & Equipment, Inc. v Yonkers, 174 A.D.2d 127, 579 N.Y.S.2d 417, 1992 N.Y. App. Div. LEXIS 191 (N.Y. App. Div. 2d Dep't 1992).

Construction industry trade association and nonunion contractor who was prospective bidder had standing to challenge prehire collective bargaining agreement negotiated by county, which required successful bidder on certain county projects to employ union labor, on ground that agreement violated competitive bidding statutes. Empire State Chapter of the Associated Builders & Contractors v County of Niagara, 161 Misc. 2d 537, 615 N.Y.S.2d 841, 1994 N.Y. Misc. LEXIS 281 (N.Y. Sup. Ct. 1994).

Unsuccessful bidder on $200 million public project had standing to challenge contract awarded by Long Island Power Authority (LIPA) to allegedly higher bidder in violation of CLS Gen Mun § 103, although statute was enacted to protect municipalities and their taxpayers rather than disappointed bidders, where complaint alleged that LIPA failed to comply with statutory mandate to award bid to lowest responsible bidder, and plaintiff's injuries differed from those suffered by public at large. AEP Resources Serv. Co. v Long Island Power Auth., 179 Misc. 2d 639, 686 N.Y.S.2d 664, 1999 N.Y. Misc. LEXIS 23 (N.Y. Sup. Ct. 1999).

148. —Injunction

A plaintiff was not entitled to a preliminary injunction prohibiting a city department of general services from awarding contracts based on a round of closed bidding, and ordering the city to award the contracts on the basis of low bids submitted by plaintiff during the original round of closed bidding, where plaintiff could obtain full compensation in a plenary damage suit and thus had an adequate remedy at law. Delta Chemical Mfg. Co. v Department of General Services etc., 81 A.D.2d 507, 437 N.Y.S.2d 12, 1981 N.Y. App. Div. LEXIS 10960 (N.Y. App. Div. 1st Dep't 1981).

149. —Action based on equity

Where contract by board of education for construction work at school was not let in accordance with requirements relating to advertisement for sealed bids, board had no power to enter into contract and was not liable to contractor for work done thereunder; however, contractor was not barred from applying to board of

estimate for consideration of claim on equitable grounds. Prosper Contracting Corp. v Board of Education, 73 Misc. 2d 280, 341 N.Y.S.2d 196, 1973 N.Y. Misc. LEXIS 2237 (N.Y. App. Term 1973), aff'd, 43 A.D.2d 823, 351 N.Y.S.2d 402, 1974 N.Y. App. Div. LEXIS 5903 (N.Y. App. Div. 1st Dep't 1974).

150. —Action based on quantum meruit

Where the prime contract between a central school district and the construction contractor was illegal and void because it had not been let out according to statutory procedures, the contractor could not recover for any claim under the void instrument or on a quantum meruit basis for services performed under the void agreement. Fabrizio & Martin, Inc. v Board of Education, 290 F. Supp. 945, 1968 U.S. Dist. LEXIS 11583 (S.D.N.Y. 1968).

151. Municipality's action

Where generator was purchased by village as a result of illegal bidding and contract resulting therefrom, machinery purchased would be regarded as unreturnable and seller would be required to pay to village the difference between the amount of the low bid which was not accepted by the village trustees and the amount of the purchase price of the machinery plus an additional amount to compensate for increased costs of installation of the machiery purchased. Gerzof v Sweeney, 22 N.Y.2d 297, 292 N.Y.S.2d 640, 239 N.E.2d 521, 1968 N.Y. LEXIS 1299 (N.Y.), reh'g denied, 22 N.Y.2d 884, 1968 N.Y. LEXIS 2257 (N.Y. 1968).

Defendants had not been entitled to summary judgment on a town's claim its contracts with them were void, because evidence submitted by the town that other contractors could have performed the same services as defendants raised a triable fact issue as to whether defendants' services were unique such that N.Y. Gen. Municipal. Law § 103's competitive bid requirements did not apply, Town of Angelica v Smith, 89 A.D.3d 1547, 933 N.Y.S.2d 480, 2011 N.Y. App. Div. LEXIS 8249 (N.Y. App. Div. 4th Dep't 2011).

Payments made by town officials to the defendant for the purchase and installation of a diesel powered electric generator under an illegal contract were unlawful, and the defendant was consequently ordered to make restitution of those sums, even though the village was permitted to retain the generator. Gerzof v Sweeney, 52 Misc. 2d 505, 276 N.Y.S.2d 485, 1966 N.Y. Misc. LEXIS 1243 (N.Y. Sup. Ct. 1966), modified, 29 A.D.2d 646, 286 N.Y.S.2d 541, 1968 N.Y. App. Div. LEXIS 4942 (N.Y. App. Div. 2d Dep't 1968).

As a general rule, failure to comply with statutory requirements for competitive bidding renders a public works contract in excess of specified amount invalid and precludes any recovery by the vendor either on the basis of the contract or on quantum meruit; instead, a municipality is entitled to recover all amounts paid under the illegal contract; however, such general rule does not apply to the case of services to be performed for an indefinite period involving no obligation on the part of the municipality to continue the services and a recovery may be had in such instance even though the aggregate cost of the services exceeds such amount. Lance Investigation Service, Inc. v New York, 88 Misc. 2d 119, 387 N.Y.S.2d 32, 1976 N.Y. Misc. LEXIS 2592 (N.Y. App. Term 1976).

A surety would be liable to a city under a contract bid bond issued by the surety to the low bidder on a data processing contract due to the contractor's failure to acquire performance bonds, which were required by the terms of the bid bond as a condition precedent to commencing work, since the city did not waive any claim to the bond proceeds by allowing the low bidder to perform for four and one-half months, since recovery was not precluded by the fact that the city had overlooked the performance bond requirement in that the bid bond provided no exemption from liability under such circumstance and in that parties who contract with the city are compelled to follow the bidding requirements set forth in the applicable city charter provision, since the action against the surety was not precluded by the city's settlement with the contractor for work performed under a theory of quantum meruit, and since no showing of actual damage to the city was necessary to support the claim against the surety in that the penalty sought by the city was similar to a statutory penalty for nonperformance of a statutory duty. New York v United States Fidelity & Guaranty Co., 119 Misc. 2d 725, 464 N.Y.S.2d 659, 1983 N.Y. Misc. LEXIS 3585 (N.Y. Sup. Ct. 1983).

Fact that contruction contract was illegal because it was not let in compliance with competitive bidding requirements did not prevent school board from recovering against defaulting contractor and surety. Board of Education v Aetna Casualty & Surety Co., 453 F.2d 264, 1971 U.S. App. LEXIS 6596 (2d Cir. N.Y. 1971).

Generally, a municipality is entitled to recover moneys paid on claims for purchases made without compliance with competitive bidding procedures. 1980 Op St Compt No. 80-711, 1980 N.Y. Comp. LEXIS 225.

152. Taxpayer's action

Taxpayers had standing to bring an action challenging the legality of a contract under which a public building was constructed allegedly in violation of the requirements for public bidding under § 103 of the General Municipal Law. Reilly v Brookhaven, 34 A.D.2d 1001, 313 N.Y.S.2d 72, 1970 N.Y. App. Div. LEXIS 4439 (N.Y. App. Div. 2d Dep't 1970).

Petitioners, as taxpayers residing within school district, had standing under CLS Gen Mun § 51 to challenge support management services contract for custodial and maintenance needs entered into by district, as involving expenditure of taxpayers' funds in violation of competitive bidding requirements of CLS Gen Mun § 103; in view of fact that school district is now classified as municipal corporation under CLS Gen Const § 66(2), it is fair and reasonable to remove barrier which previously excluded local citizen-taxpayers from using judicial process to challenge fiscal policies and expenditures of their school districts. Schulz v Cobleskill-Richmondville Cent. Sch. Dist. Bd. of Educ., 197 A.D.2d 247, 610 N.Y.S.2d 694, 1994 N.Y. App. Div. LEXIS 4143 (N.Y. App. Div. 3d Dep't 1994), aff'd, Schulz v State, 217 A.D.2d 393, 634 N.Y.S.2d 780, 1995 N.Y. App. Div. LEXIS 12301 (N.Y. App. Div. 3d Dep't 1995).

A petitioner attacked the validity of a resolution and awarding of publishing contracts by a city school board, on the ground, that there was no advertising for bids. He was not required to show, that he was an aggrieved party, or that he had a special interest, since the proper advertising for bids and the letting of contracts is a matter of public interest. The Court vacated the resolution and set aside the contracts for failure of the Board to advertise for bids. McDonough v Board of Education, 20 Misc. 2d 98, 189 N.Y.S.2d 401, 1959 N.Y. Misc. LEXIS 3188 (N.Y. Sup. Ct. 1959).

A taxpayer's complaint sufficiently alleges waste and injury where it states sufficient facts to indicate that a resolution of a Town Board purporting to bring a certain contract within the emergency provisions of subd. 4 of this section, was unwarranted. Rodin v Director of Purchasing, 38 Misc. 2d 362, 238 N.Y.S.2d 2, 1963 N.Y. Misc. LEXIS 2314 (N.Y. Sup. Ct. 1963).

153. Attorney's fees

In the absence of a "common fund" created by petitioners, a taxpayer and a vendor who successfully sued to compel a municipality to comply with the competitive bidding requirement of section 103 of the General Municipal Law with respect to its purchase of a telephone system, there can be no award of counsel fees in the proceeding. Exley v Endicott, 74 A.D.2d 96, 427 N.Y.S.2d 68, 1980 N.Y. App. Div. LEXIS 10438 (N.Y. App. Div. 3d Dep't), modified, 51 N.Y.2d 426, 434 N.Y.S.2d 922, 415 N.E.2d 913, 1980 N.Y. LEXIS 2887 (N.Y. 1980).

An attorney who estimated that he worked 200 days over a three year period and succeeded in voiding a contract and securing restitution of moneys paid by the town in illegally purchasing and installing a diesel electric generator was entitled to an additional allowance of $25,000 as the reasonable value of the legal services rendered. Gerzof v Sweeney, 52 Misc. 2d 505, 276 N.Y.S.2d 485, 1966 N.Y. Misc. LEXIS 1243 (N.Y. Sup. Ct. 1966), modified, 29 A.D.2d 646, 286 N.Y.S.2d 541, 1968 N.Y. App. Div. LEXIS 4942 (N.Y. App. Div. 2d Dep't 1968).

154. Miscellaneous

Even if letter from city commissioner concerning award of plumbing contract were binding on city environmental protection agency, contract could have been avoided based on the parties' mutual mistake where plumbing contractor had erroneously

interpreted bid form when it concluded that the sum of the price for equipment and material and the price for installation was not required to equal the amount set forth as total price and where city agency had itself been misled by the contractor's mistake into initially granting an award for a higher amount than was justified by the itemized prices. James H. Merritt Plumbing, Inc. v New York, 55 A.D.2d 552, 390 N.Y.S.2d 65, 1976 N.Y. App. Div. LEXIS 15231 (N.Y. App. Div. 1st Dep't 1976), app. dismissed, 41 N.Y.2d 806, 1977 N.Y. LEXIS 3101 (N.Y. 1977), app. dismissed, 42 N.Y.2d 825, 1977 N.Y. LEXIS 3977 (N.Y. 1977).

Since this section, requiring the letting of purchase contracts involving more than $1000, to the lowest responsible bidder, does not exclude school boards, it is deemed applicable to purchases made by them, and a violation of its provisions is subject to judicial review without prior appeal to the Commissioner of Education. Buffalo Audio Center Arrolite Co. v Union Free School Dist., 29 Misc. 2d 871, 208 N.Y.S.2d 760, 1960 N.Y. Misc. LEXIS 1998 (N.Y. Sup. Ct. 1960), aff'd, 15 A.D.2d 991, 226 N.Y.S.2d 1024, 1962 N.Y. App. Div. LEXIS 10696 (N.Y. App. Div. 4th Dep't 1962).

In Article 78 proceeding to annul city's award of contracts on ground that bid selection procedures violated CLS Gen Mn § 103(1), utility companies which were designated as third-party beneficiaries in bidding agreement had direct interest in outcome and thus were granted leave to intervene. Diamond Asphalt Corp. v Sander, 171 Misc. 2d 879, 655 N.Y.S.2d 706, 1996 N.Y. Misc. LEXIS 565 (N.Y. Sup. Ct. 1996), aff'd, 238 A.D.2d 197, 656 N.Y.S.2d 248, 1997 N.Y. App. Div. LEXIS 3764 (N.Y. App. Div. 1st Dep't 1997).

On appeal from respondent school district's public bidding determination, respondent had burden of establishing that its narrow definition of "financial stability" was essential to public interest, where criteria adopted by respondent excluded lowest bidder (petitioner) and effectively assured award of contract to incumbent vendor (who was only other bidder), thus constituting prima facie proof that specification was drawn in manner to shut out competitive bidding. 1998 Op Comm Ed No. 14,087, 1999 NY Educ. Dept. LEXIS 228.

Appeal by unsuccessful bidder for transportation contracts, alleging that bid specifications required respondent to use aggregate base price to determine lowest bidder and that respondent exercised favoritism and manipulated public bidding process by awarding contracts on basis of individual or unit prices, was dismissed where bid specification was not unambiguous and petitioner (and all other bidders) had fair opportunity to submit bids containing their lowest per unit and aggregate prices. 1997 Op Comm Ed No. 13,848, 1997 NY Educ. Dept. LEXIS 328.

Where a part or all of the costs of the purchase of a facility are to be borne by local taxation or revenues from the project, a so-called "turnkey" procedure may not be utilized to avoid the competitive bidding laws. 1975 Op St Compt No. 75-692.

Where an unsuccessful bidder has instituted court proceedings contesting the award of a contract, it would appear that the county and the successful bidder would have to await the outcome of the pending litigation before consummating their contract obligations. 1967 Op St Compt No. 67-670.

Although the city failed to pay the contractor more than $1.5 million under two municipal building contracts, the contractor's attempt to hold the servicer liable was unavailing, as the contracts accurately stated that the servicer was a financial conduit between the contractor and the city, and the servicer merely was obligated to remit payment to the contractor once it received payment from the city. Michael R. Gianatasio, PE, P.C. v City of New York, 53 Misc. 3d 757, 37 N.Y.S.3d 828, 2016 N.Y. Misc. LEXIS 3110 (N.Y. Sup. Ct. 2016), app. dismissed, 2017 N.Y. App. Div. LEXIS 5847 (N.Y. App. Div. 2d Dep't July 5, 2017), aff'd, 159 A.D.3d 659, 70 N.Y.S.3d 834, 2018 N.Y. App. Div. LEXIS 2126 (N.Y. App. Div. 1st Dep't 2018).

Agency Opinions

Analysis

I. Applicability of Bidding Requirements to Particular Contracts

1. Garbage collection and disposal
2. Health care services
3. Rental or lease agreements
4. —Involving real property
5. Transportation services and equipment

II. Exceptions to Bidding Requirements

6. Change orders after award of contract
7. Emergencies
8. —Waste disposal

I. Applicability of Bidding Requirements to Particular Contracts

1. Garbage collection and disposal

A contract for garbage collection and disposal involving an expenditure of more than $2,500 is subject to competitive bidding. 1956 NY Ops Atty Gen June 14 (informal).

2. Health care services

"Public work" as used in this section does not include hospital services. 1963 NY Ops Atty Gen Feb 1.

3. Rental or lease agreements

4. —Involving real property

The leasing of realty by a political subdivision is not subject to the requirements of this section in regard to competitive bidding. 1954 Op St Compt File No. 54-7061.

5. Transportation services and equipment

A city may purchase motor fuel requirements for its city-owned motorbus transportation system, notwithstanding it is being operated by a private individual or corporation, provided it meets the requirements of this section. 1962 NY Ops Atty Gen June 11.

II. Exceptions to Bidding Requirements

6. Change orders after award of contract

Requirements for competitive bidding do not apply to normal change orders issued after construction contracts are let. 1957 NY Ops Atty Gen Oct 9 (informal).

7. Emergencies

8. —Waste disposal

Discussion of public emergency situation with regard to a contract entered into for repair work to a wastewater treatment plant incinerator. 1979 Op St Compt File No. 79-9.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 109-b; CLS County § 408-a; CLS Pub A §§ 1196-p, 1197-p, 1198-q, 1199-qqq, 1680-a; CLS Town § 197; CLS Unconsol Ch 139 § 8-b.

Advertising for bids; letting of contracts, CLS County § 408-a.

Jurisprudences:

15 Am Jur Legal Forms 2d, Public Works and Contracts, Forms 216:11 et seq.

7 Am Jur Pl & Pr Forms (Rev), Conspiracy, Forms 7–12.

20C Am Jur Pl & Pr Forms (Rev), Public Works and Contracts, Forms 7 et seq.

Law Reviews:

Bergman, Reletting the abandoned or defaulted public works project in New York—To bid or not to bid? 3 Fordham Urb. L.J. 451.

Matthew Bender's New York Practice Guides: 2 New York Practice Guide: Business and Commercial §§ 13.03, 13.06, 13.16.

Texts: 4 Bender's New York Evidence § 161.06.

§ 103-d. [Eff until June 1, 2023] Statement of non-collusion in bids and proposals to political subdivision of the state

1. Every bid or proposal hereafter made to a political subdivision of the state or any public department, agency or official thereof where competitive bidding is required by statute, rule, regulation

or local law, for work or services performed or to be performed or goods sold or to be sold, shall contain the following statement subscribed by the bidder and affirmed by such bidder as true under the penalties of perjury: Non-collusive bidding certification.

(a) "By submission of this bid, each bidder and each person signing on behalf of any bidder certifies, and in the case of a joint bid each party thereto certifies as to its own organization, under penalty of perjury, that to the best of knowledge and belief:

(1) The prices in this bid have been arrived at independently without collusion, consultation, communication, or agreement, for the purpose of restricting competition, as to any matter relating to such prices with any other bidder or with any competitor;

(2) Unless otherwise required by law, the prices which have been quoted in this bid have not been knowingly disclosed by the bidder and will not knowingly be disclosed by the bidder prior to opening, directly or indirectly, to any other bidder or to any competitor; and

(3) No attempt has been made or will be made by the bidder to induce any other person, partnership or corporation to submit or not to submit a bid for the purpose of restricting competition."

(a-1) Notwithstanding the foregoing, the statement of non-collusion may be submitted electronically in accordance with the provisions of subdivision one of section one hundred three of the general municipal law.

(b) A bid shall not be considered for award nor shall any award be made where (a) (1) (2) and (3) above have not been complied with; provided however, that if in any case the bidder cannot make the foregoing certification, the bidder shall so state and shall furnish with the bid a signed statement which sets forth in detail the reasons therefor. Where (a) (1) (2) and (3) above have not been complied with, the bid shall not be considered for award nor shall any award be made unless the head of the purchasing unit of the political subdivision, public department, agency or official thereof to which the bid is made, or his designee, determines that such disclosure was not made for the purpose of restricting competition.

The fact that a bidder (a) has published price lists, rates, or tariffs covering items being procured, (b) has informed prospective customers of proposed or pending publication of new or revised price lists for such items, or (c) has sold the same items to other customers at the same prices being bid, does not constitute, without more, a disclosure within the meaning of subparagraph one (a).

2. Any bid hereafter made to any political subdivision of the state or any public department, agency or official thereof by a corporate bidder for work or services performed or to be performed or goods sold or to be sold, where competitive bidding is required by statute, rule, regulation, or local law, and where such bid contains the certification referred to in subdivision one of this section, shall be deemed to have been authorized by the board of directors of the bidder, and such authorization shall be deemed to include the signing and submission of the bid and the inclusion therein of the certificate as to non-collusion as the act and deed of the corporation.

HISTORY:

Add, L 1963, ch 956, § 2; amd, L 1964, ch 645, § 12; L 1965, ch 751, § 1; L 1966, ch 675, § 2, eff Sept 1, 1966; L 2010, ch 56, § 4 (Part FF), eff June 22, 2010.

Editor's Notes Laws 2003, ch 62, § 41(a) (Part X), eff May 15, 2003, provides as follows:

§ 41. This act shall take effect immediately; provided, however,

(a) that sections four, five, six, seven, eight and nine of this act shall expire June 1, 2023 when upon such date the provisions of such sections shall be deemed repealed (Amd, L 2008, ch 133, § 1, eff July 1, 2008, L 2013, ch 298, § 1, eff July 31, 2013, deemed eff on and after June 1, 2013; L 2018, ch 70, § 1, eff June 1, 2018).

Laws 2010, ch 56, § 13, intro and sub 2 (Part FF), eff June 22, 2010, provides as follows:

§ 13. This act shall take effect immediately and shall apply to any contract let or awarded on or after such date; provided, however, that:

2. the amendments to section 103-d of the general municipal law made by section four of this act shall expire and be deemed repealed on the same date and in the same manner as section 4 of part X of chapter 62 of the laws of 2003, as provided in subdivision (a) of section 41 of part X of chapter 62 of the laws of 2003, as amended.

Revision Notes: [1965, ch 751] This act was prepared under the direction of the New York State Department of Law and was introduced at its request.

[1966, ch 675] This act was prepared under the direction of the New York State Department of Law and was introduced at its request.

Amendment Notes 2010. Chapter 56, § 4 (Part FF) amended:

By designating first undesignated par as sub 1.

Sub 1 by adding par (a-1).

Notes to Decisions

A board of education was not justified in rejecting the low bid on the sole ground that the non-collusive bid certificate was not attached to the bid when opened, under evidence that the certificate was not included at the time the sealed bid was filed, the architect, as agent of the board of education, requested that the certificate be filed, and the low bidder on the following day filed such certificate. Consolidated Sheet Metal Works, Inc. v Board of Education, 62 Misc. 2d 445, 308 N.Y.S.2d 773, 1970 N.Y. Misc. LEXIS 1848 (N.Y. Sup. Ct. 1970).

The legislative intent in enacting § 103-d of the General Municipal Law was to require the non-collusive bid certificate to constitute a part of the bid before it could be taken up and acted upon by a municipality and that the omission of the certificate to be supplied in the discretion of the municipality as long as no prejudice to any other bidder resulted and no advantage was gained by the correcting bidder. Consolidated Sheet Metal Works, Inc. v Board of Education, 62 Misc. 2d 445, 308 N.Y.S.2d 773, 1970 N.Y. Misc. LEXIS 1848 (N.Y. Sup. Ct. 1970).

Even though bid did not contain non-collusive certificate as required by law, where such bid was the only one that came within the total cost authorized by city council, the city was not enjoined from awarding the contract to such bidder as such defect could be cured. A. J. Beaudette Constr. Co. v Syracuse, 62 Misc. 2d 564, 309 N.Y.S.2d 517, 1970 N.Y. Misc. LEXIS 1963 (N.Y. Sup. Ct.), aff'd, 34 A.D.2d 734, 313 N.Y.S.2d 356, 1970 N.Y. App. Div. LEXIS 5862 (N.Y. App. Div. 4th Dep't 1970).

Since the competitive bidding requirements of the Public Housing Law and the General Municipal Law are similar in language,

and since amendments to public contract statutes are usually effected by single legislation, the General Municipal Law is applicable to a town housing authority, at least for the limited purpose of evaluating the policies underlying these statutes. Marino v Ramapo, 68 Misc. 2d 44, 326 N.Y.S.2d 162, 1971 N.Y. Misc. LEXIS 1472 (N.Y. Sup. Ct. 1971).

Statute defining crime of making a punishable false written statement was intended to apply to applications or other documents submitted to governmental agencies which would otherwise require oaths before notaries and such statute is only applicable to situations where a specific statute authorizes the use of an affirmation in place of a notarized form. People v Bromley, 85 Misc. 2d 988, 381 N.Y.S.2d 965, 1976 N.Y. Misc. LEXIS 2098 (N.Y. County Ct. 1976).

Discussion of legality of a proposed non-collusion bid form. 1967 Ops St Compt File #679.

A non-collusion certificate should be used only in those transactions which are subject to competitive bidding requirements. 1967 Ops St Compt File #679.

If bids are solicited on a contract which is not required to be let after competitive bidding, such bids need not contain the non-collusion statement. 1968 Ops St Compt File #189.

A municipality may not award a contract to a bidder whose bid does not contain the non-collusion statement, unless the bidder has justified such failure to comply as prescribed. 1968 Ops St Compt File #189; 1968 Ops St Compt File #702.

A municipality may not consider a bid which does not contain a statement of non-collusion, unless the bidder has justified such failure to comply as prescribed. The non-collusion statement must be contained within the bid document itself and may not be separately submitted. 1969 Ops St Compt File #700.

Agency Opinions

A blanket resolution authorizing the execution of the noncollusion certificate by a specified person is sufficient compliance with the statute. Each bid, however, must be accompanied by a separate noncollusion certificate and the statement of the secretary of the corporation appended to the resolution stating that such resolution is in full force and effect at the date of the bid. i1965 NY Ops Atty Gen Sept 24.

A municipality may, generally, accept a non-collusion certificate after the bids are opened but before the contract is awarded. 1979 Op St Compt File #72.

The noncollusion provisions of Laws of 1965, ch 751, amending the General Municipal, State Finance, and Public Authorities Laws, do not apply to contracts not subject to bid or actually awarded on bids. 1965 NY Ops Atty Gen Sept 24.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Perjury and related offenses; definitions of terms, CLS Penal §§ 210.00 et seq.

Jurisprudences:

Matthew Bender's New York Practice Guides: 2 New York Practice Guide: Business and Commercial §§ 13.06, 13.16.

§ 103-d. Statement of non-collusion in bids and proposals to political subdivision of the state [Effective June 1, 2023]

1. Every bid or proposal hereafter made to a political subdivision of the state or any public department, agency or official thereof where competitive bidding is required by statute, rule, regulation or local law, for work or services performed or to be performed or goods sold or to be sold, shall contain the following statement subscribed by the bidder and affirmed by such bidder as true under the penalties of perjury: Non-collusive bidding certification.

(a) "By submission of this bid, each bidder and each person signing on behalf of any bidder certifies, and in the case of a joint bid each party thereto certifies as to its own organization, under penalty of perjury, that to the best of knowledge and belief:

(1) The prices in this bid have been arrived at independently without collusion, consultation, communication, or agreement, for the purpose of restricting competition, as to any matter relating to such prices with any other bidder or with any competitor;

(2) Unless otherwise required by law, the prices which have been quoted in this bid have not been knowingly disclosed by the bidder and will not knowingly be disclosed by the bidder prior to opening, directly or indirectly, to any other bidder or to any competitor; and

(3) No attempt has been made or will be made by the bidder to induce any other person, partnership or corporation to submit or not to submit a bid for the purpose of restricting competition."

(b) A bid shall not be considered for award nor shall any award be made where (a) (1) (2) and (3) above have not been complied with; provided however, that if in any case the bidder cannot make the foregoing certification, the bidder shall so state and shall furnish with the bid a signed statement which sets forth in detail the reasons therefor. Where (a) (1) (2) and (3) above have not been complied with, the bid shall not be considered for award nor shall any award be made unless the head of the purchasing unit of the political subdivision, public department, agency or official thereof to which the bid is made, or his designee, determines that such disclosure was not made for the purpose of restricting competition.

The fact that a bidder (a) has published price lists, rates, or tariffs covering items being procured, (b) has informed prospective customers of proposed or pending publication of new or revised price lists for such items, or (c) has sold the same items to other customers at the same prices being bid, does not constitute, without more, a disclosure within the meaning of subparagraph one (a).

2. Any bid hereafter made to any political subdivision of the state or any public department, agency or official thereof by a corporate bidder for work or services performed or to be performed or goods sold or to be sold, where competitive bidding is required by statute, rule, regulation, or local law, and where such bid contains the certification referred to in subdivision one of this section, shall be deemed to have been authorized by the board of directors of the bidder, and such authorization shall be deemed to include the signing and submission of the bid and the inclusion therein of the certificate as to non-collusion as the act and deed of the corporation.

HISTORY:

Add, L 1963, ch 956, § 2; amd, L 1964, ch 645, § 12; L 1965, ch

751, § 1; L 1966, ch 675, § 2, eff Sept 1, 1966; L 2010, ch 56, § 4 (Part FF), eff June 22, 2010.

§ 104. Purchase through office of general services; purchases from other public contracts; certain federal contracts. [Eff until July 31, 2024]

1. Notwithstanding the provisions of section one hundred three of this article or of any other general, special or local law, any officer, board or agency of a political subdivision, of a district therein, of a fire company or of a voluntary ambulance service authorized to make purchases of commodities, materials, equipment, technology, food products, supplies or services available pursuant to section one hundred sixty-three of the state finance law, may make such purchases through the office of general services or any other department or agency of the state subject to rules promulgated pursuant to article eleven of the state finance law; provided that any such purchase shall exceed five hundred dollars and that the political subdivision, district, fire company or voluntary ambulance service for which such officer, board or agency acts shall accept sole responsibility for any payment due the vendor. All purchases shall be subject to audit and inspection by the political subdivision, district, fire company or voluntary ambulance service for which made. No officer, board or agency of a political subdivision, or a district therein, of a fire company or of a voluntary ambulance service shall make any purchase through such public entity when bids have been received for such purchase by such officer, board or agency, unless such purchase may be made upon the same terms, conditions and specifications at a lower price through such office. Two or more fire companies or voluntary ambulance services may join in making purchases pursuant to this section, and for the purposes of this section such groups shall be deemed "fire companies or voluntary ambulance services."

2. Notwithstanding the provisions of section one hundred three of this article or of any other general, special or local law, any officer, board or agency of a political subdivision, or of a district therein, may make purchases from federal general service administration supply schedules pursuant to section 211 of the federal e-government act of 2002, P.L. 107-347 and the local preparedness acquisition act, P.L. 110-248, and pursuant to section 1122 of the national defense authorization act for fiscal year 1994, P.L. 103-160 and section 833 of the John Warner national defense authorization act for fiscal year 2007, P.L. 109-364, and the federal supply schedule usage act of 2010, P.L. 111-263, or any successor schedules, in accordance with procedures established in connection therewith. Prior to making such purchases the officer, board or agency shall consider whether such purchases will result in cost savings after all factors, including charges for service, material, and delivery, have been considered.

HISTORY:

Add, L 1953, ch 861, § 18, with substance deriving from St Fin L § 179–a; amd, L 1960, ch 104, § 2; L 1962, ch 37, § 11; L 1978, ch 755, § 2; L 1993, ch 490, § 8; L 1994, ch 170, § 209; L 1995, ch 622, § 1; L 2008, ch 137, § 10, eff June 30, 2008; L 2011, ch 97, § 7 (Part C, Subpart A), eff June 24, 2011; L 2012, ch 55, § 6 (Part L), eff March 30, 2012; L 2012, ch 55, § 27 (Part L), eff June 24, 2014; L 2013, ch 497, § 2, eff Nov 13, 2013.

Editor's Notes: Laws 1993, ch 490, § 1, eff Jan 1, 1994, provides as follows:

Section 1. Declaration of legislative findings and intent. It is the declared policy of this state to encourage and improve the business climate within New York to increase the number of job opportunities for all of its citizens. The New York grape and wine industry is the second largest in the nation and presently is experiencing economic difficulties. These economic difficulties have hindered employment opportunities for New Yorkers, particularly persons located in the state's fruit and grape growing areas.

The purpose of this legislation is to reduce unnecessary state mandates and eliminate or simplify redundant reporting requirements, thereby allowing the grape and wine industry to be more productive and profitable. It is the intent of this legislation to comprehensively address the problems faced by the industry, reduce state mandates, and reduce state administrative costs in monitoring the industry in a way that still vigilantly protects the public interest. In addition to providing more job opportunities, stabilization and growth in the industry, this act will promote the conservation, protection and enhancement of the state's agricultural lands and promote tourism.

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Laws 2011, ch 97, § 9 (Part C, Subpart A), eff June 24, 2011, provides as follows:

§ 9. This act shall take effect immediately, provided, however that:

1. sections four, five, six and seven of this act shall expire and be deemed repealed July 31, 2024 (Amd, L 2014, ch 55, § 2 (Part G), eff March 31, 2014; deemed eff on and after April 1, 2014; L 2019, ch 55 § 3 (Part GG), eff April 12, 2019);

2. the amendments to subdivision 4 of section 97-g of the state finance law made by section two of this act shall survive the expiration and reversion of such subdivision as provided in section 3 of chapter 410 of the laws of 2009, as amended;

3. sections four, five, six and seven of this act shall apply to any contract let or awarded on or after such effective date;

4. section one of this act shall expire and be deemed repealed July 31, 2029 (Add, L 2019, ch 55, § 3 (Part GG), eff April 12, 2019).

3. sections four, five, six and seven of this act shall apply to any contract let or awarded on or after such effective date.

Laws 2012, ch 55, § 39 (Part L), eff March 30, 2012, provides as follows:

§ 39. This act shall take effect immediately, provided, however, that procurement contracts for which bid solicitations have been issued prior to the effective date of this act shall be subject to the provisions of law in effect at the time of issuance; provided, however, that the amendments made to section 163 of the state finance law by sections two, three, four, five, seven, nine, ten, twelve and thirty-six of this act shall not affect the repeal of such section and shall be deemed to be repealed therewith; and provided, however, that the amendments to section 104 of the general municipal law made by section six of this act shall be subject to the expiration and reversion of such section pursuant to section 9 of subpart A of part C of chapter 97 of the laws of 2011,

when upon such date the provisions of section twenty-seven of this act shall take effect; and provided, however, that the amendments to paragraph a of subdivision 5 of section 355 of the education law made by section thirty-one of this act shall be subject to the expiration and reversion of such subdivision pursuant to section 4 of subpart B of part D of chapter 58 of the laws of 2011, when upon such date the provisions of section thirty-two of this act shall take effect; and provided that the amendments to subdivision a of section 6218 of the education law made by section thirty-three of this act shall be subject to the expiration and reversion of such subdivision pursuant to section 4 of subpart B of part D of chapter 58 of the laws of 2011, as amended, when upon such date the provisions of section thirty-four of this act shall take effect.

Laws 2013, ch 497, § 3, eff Nov 13, 2013, provides as follows:

§ 3. This act shall take effect immediately; provided, however, that the amendments to subdivision 16 of section 103 of the general municipal law made by section one of this act shall not affect the repeal of such subdivision and shall be deemed repealed therewith; and provided further, however, that the amendments to subdivision 2 of section 104 of the general municipal law made by section two of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith.

Amendment Notes: 2013. Chapter 497, § 2 amended:

Sub 2 by deleting at fig 1 "pursuant thereto" and adding the matter in italics.

2012. Chapter 55, § 6 (Part L) amended:

Section [first setout], section heading by adding the matter in italics.

Sub 1 by deleting at fig 1 "or", at fig 2 a comma", at fig 3 "sections one hundred sixty-one and one hundred sixty-seven", at fig 4 ", except of printed material,", at fig 5 "such", at fig 6 "as may be established from time to time", at fig 7 "sections one hundred sixty-three and one hundred sixty-seven", at fig 8 "office" and adding the matter in italics.

2012. Chapter 55, § 27 (Part L) amended:

Section [second setout] by deleting at fig 1 "materials, equipment, food products, or supplies, or services", at fig 2 "sections one hundred sixty-one and one hundred sixty-seven", at fig 3 ", except of printed material,", at fig 4 "sections", at fig 5 "and one hundred sixty-seven" and adding the matter in italics.

Notes to Decisions

Analysis

1. Applicability to particular entities; community colleges
2. —School districts
3. —Miscellaneous
4. Advertising for bids as unnecessary
5. —Particular purchases
6. —Exceptions
7. Extended price clauses
8. Contract with state's vendor
9. Miscellaneous

1. Applicability to particular entities; community colleges

2. —School districts

Where a school district and a private charitable organization shared the use of certain facilities, the district may purchase under state contract, only such quantities of materials, equipment and supplies as are fairly chargeable to school district activities. 1959 Ops St Compt File #842.

A school district may make purchases through the State Division of Standards and Purchase pursuant to section 104 of the General Municipal Law without advertising for bids under section 103 of such law. 1954 Ops St Compt File #6893.

3. —Miscellaneous

Where a school district and a private charitable organization shared the use of certain facilities, the district may purchase under state contract, only such quantities of materials, equipment and supplies as are fairly chargeable to school district activities. 1959 Ops St Compt File #842.

4. Advertising for bids as unnecessary

All purchase contracts involving an expenditure of more than one thousand dollars shall be awarded to the lowest possible bidder. Purchases of items in this category may also be made through the county or the state, eliminating the need for advertisement for bids. 1967 Ops St Compt File #615.

5. —Particular purchases

A town may purchase gasoline and fuel oil either under State contract or through the facilities of the county (when authorized by the county legislative body) without the necessity of advertising for bids. 1968 Ops St Compt File #490.

Purchases of highway materials made using "CHIPS" (Consolidated Highway Improvement Program) moneys are subject to normal competitive bidding requirements. In order to be exempt from bidding under General Municipal Law, §§ 104, a purchase must be made from a vendor holding a current State contract or from a distributor or agent listed in the State contract. 1982 St Compt File #82-224.

6. —Exceptions

There is no authority for dispensing with competitive bidding in connection with purchases merely because they are made at a price equal to or less than the state or county price, if they are made from vendors other than those which have a state or county contract. 1963 Ops St Compt #157.

7. Extended price clauses

Discussion of municipal purchasing under a state contract which does not contain an extended price clause. 1960 Ops St Compt File #179.

There is no requirement that a municipality obtain consent of the Department of Audit and Control before purchasing materials pursuant to an extended price clause in a state contract, but it has been advised that municipalities contact the office of general services in order to avoid erroneous purchases from vendors whose contract term has expired, and the state contract number should be placed on all documents pertaining to such purposes. 1961 Ops St Compt File #245.

8. Contract with state's vendor

If any doubt exists on the part of a municipality that a vendor does in fact hold a current state contract, or as to the terms of the contract the municipality should obtain a copy of the contract from the Office of General Services, Division of Standards and Purchase. 1968 Ops St Compt File #535.

9. Miscellaneous

County's issuance of an addendum to original bid instructions which eliminated certain contingent items from low bid computation was not contrary to letter or spirit of General Municipal Law provisions governing purchases through office of general services, where it could not be known in advance whether any of the work relating to the contingent items would be required and the bidding procedure did not encourage favoritism or corruption. Edward B. Fitzpatrick, Jr., Associates, Inc. v County of Suffolk, 47 A.D.2d 541, 363 N.Y.S.2d 108, 1975 N.Y. App. Div. LEXIS 8606 (N.Y. App. Div. 2d Dep't 1975).

A municipality purchasing gasoline under a State contract entered into or awarded on or after July 11, 1981 pursuant to a bid submitted on or after that date must pay the amount listed in the vendor's bill for the "Gross Receipts Tax" which is passed through to the consumer under the contract. 1982 St Compt File #82-233.

Exception for purchases made through New York State Office of General Services does not apply to purchase from State Contract Vendor upon terms and conditions which materially or substantially vary from State Contract. Ops St Compt 89-3.

Agency Opinions

Analysis

1. In general
2. Applicability to particular entities; community colleges
3. —Miscellaneous

4. Advertising for bids as unnecessary
5. —Particular purchases
6. —Exceptions
7. Extended price clauses
8. Contract with state's vendor
9. Miscellaneous

1. In general

Where city requests the State to arrange for the purchase of fuel oil, the city is bound by the contract to purchase made by the Division of Standards and Purchase for the term thereof. 1954 NY Ops Atty Gen Dec 16.

Contracts which are entered into under State or county contracts, or pursuant to competitive bidding, are not excepted from the conflicts of interest statutes. 1980 Op St Compt File #633.

2. Applicability to particular entities; community colleges

3. —Miscellaneous

Albany Child Guidance Center for Psychiatric Service, Inc., and Nassau County Chapter of the Association for the Help of Retarded Children are not eligible to participate in State purchase contracts. 1960 NY Ops Atty Gen Aug 19.

Community colleges are eligible to participate in State purchase contracts. 1954 NY Ops Atty Gen July 21.

A community college may not sell at cost gasoline purchased under a State contract to a faculty-student association for use in vans used to transport intercollegiate athletic teams. 1980 Op St Compt File #153.

4. Advertising for bids as unnecessary

5. —Particular purchases

Where past experience shows that the annual expenditure for sand and tar patch exceeds $1,000.00, a town must advertise for bids, unless it buys under State or county contract. 1958 NY Ops Atty Gen Mar 12 (informal).

6. —Exceptions

There is no authority to dispense with competitive bidding where purchases are made from vendors other than the vendors which have the State or county contract. 1978 Op St Compt File #369.

7. Extended price clauses

Public libraries may purchase library books and other library materials under State contracts containing extended price provisions, without advertising for bids. The question of whether library systems purchasing such items for or on behalf of member public libraries may purchase under State contracts should be addressed to the Office of General Services. If they are authorized to make such purchases, they may do so without advertising for bids. 1980 Op St Compt File #290.

8. Contract with state's vendor

A municipality, which is registered to purchase certain materials under a State contract through the State Office of General Services, may purchase such materials from the State's vendor at a lower price than provided under the State contract. 1978 Op St Compt File #660.

9. Miscellaneous

Interest earned by a village's investment of moneys held as retained percentages under contracts belongs to the village rather than the contractor. 1978 Op St Compt File #989.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS County § 850; CLS Gen City § 20-e.

Federal Aspects:

Section 1555 of the Federal Acquisition Streamlining Act of 1994, cited in statutory text, formerly appeared as 40 USCS § 481 prior to the enactment of Title 40 into positive law; similar provisions are now found at 40 USCS §§ 501 et seq.

§ 104. Purchase through office of general services. [Effective July 31, 2024]

Notwithstanding the provisions of section one hundred three of this article or of any other general, special or local law, any officer, board or agency of a political subdivision, of a district therein, of a fire company or of a voluntary ambulance service is authorized to make purchases of commodities and services available pursuant to section one hundred sixty-three of the state finance law, may make such purchases through the office of general services subject to such rules as may be established from time to time pursuant to section one hundred sixty-three of the state finance law or through the general services administration pursuant to section 1555 of the federal acquisition streamlining act of 1994, P.L. 103-355; provided that any such purchase shall exceed five hundred dollars and that the political subdivision, district, fire company or voluntary ambulance service for which such officer, board or agency acts shall accept sole responsibility for any payment due the vendor. All purchases shall be subject to audit and inspection by the political subdivision, district, fire company or voluntary ambulance service for which made. No officer, board or agency of a political subdivision, or a district therein, of a fire company or of a voluntary ambulance service shall make any purchase through such office when bids have been received for such purchase by such officer, board or agency, unless such purchase may be made upon the same terms, conditions and specifications at a lower price through such office. Two or more fire companies or voluntary ambulance services may join in making purchases pursuant to this section, and for the purposes of this section such groups shall be deemed "fire companies or voluntary ambulance services."

HISTORY:

Add, L 1953, ch 861, § 18, with substance deriving from St Fin L § 179–a; amd, L 1960, ch 104, § 2; L 1962, ch 37, § 11; L 1978, ch 755, § 2; L 1993, ch 490, § 8; L 1994, ch 170, § 209; L 1995, ch 622, § 1; L 2008, ch 137, § 10, eff June 30, 2008; L 2011, ch 97, § 7 (Part C, Subpart A), eff June 24, 2011; L 2012, ch 55, § 6 (Part L), eff March 30, 2012; L 2012, ch 55, § 27 (Part L), eff June 24, 2014; L 2013, ch 497, § 2, eff Nov 13, 2013.

§ 104-b. Procurement policies and procedures

1. Goods and services which are not required by law to be procured by political subdivisions or any districts therein pursuant to competitive bidding must be procured in a manner so as to assure the prudent and economical use of public moneys in the best interests of the taxpayers of the political subdivision or district, to facilitate the acquisition of goods and services of maximum quality at the lowest possible cost under the circumstances, and to guard against favoritism, improvidence, extravagance, fraud and corruption. To further these objectives, the governing board of every political subdivision and any district therein, by resolution, shall adopt internal policies and procedures governing all procurements of goods and services which are not required to be made pursuant to the competitive bidding requirements of section one hundred three of this article or of any other general, special or local law. In cities with a population of one million or

more, the procurement policy board shall develop and promulgate such policies and procedures by rule.

2. Such policies and procedures shall contain provisions which, among other things:

a. prescribe a procedure for determining whether a procurement of goods and services is subject to competitive bidding and documenting the basis for any determination that competitive bidding is not required by law;

b. provide that, except for procurements made pursuant to subdivision three of section one hundred three or section one hundred four of this article, section one hundred seventy-five-b of the state finance law, section one hundred eighty-six of the correction law, or the policies and procedures adopted pursuant to paragraph f of this subdivision, alternative proposals or quotations for goods and services shall be secured by use of written requests for proposals, written quotations, verbal quotations or any other method of procurement which furthers the purposes of this section;

c. set forth when each such method of procurement will be utilized, taking into account which method will best further the purposes of this section and the cost-effectiveness of the method;

d. require adequate documentation of actions taken in connection with each such method of procurement;

e. require justification and documentation of any contract awarded to other than the lowest responsible dollar offeror, setting forth the reasons such an award furthers the purpose of this section; and

f. identify the individual or individuals responsible for purchasing and their respective titles. Such information shall be updated biennially.

g. set forth any circumstances when, or types of procurements for which, in the sole discretion of the governing body (or in the case of cities with a population of one million or more, the procurement policy board), the solicitation of alternative proposals or quotations will not be in the best interest of the political subdivision or district therein.

3. Comments concerning the policies and procedures shall be solicited from officers of the political subdivision or district therein involved in the procurement process prior to the enactment of the policies and procedures, and from time to time thereafter.

4. The governing board shall annually review its policies and procedures. In the case of a city with a population of one million or more, the annual review shall be the duty and responsibility of the procurement policy board.

5. The unintentional failure to fully comply with the provisions of this section shall not be grounds to void action taken or give rise to a cause of action against the political subdivision or district or any officer or employee thereof.

6. Notwithstanding any other provisions of this section or any provision of law, boards of education shall have the authority to include in the internal policies and procedures governing procurement of apparel or sports equipment, where such procurement is not required to be made pursuant to the competitive bidding requirements of section one hundred three of this article, a prohibition against the purchase of apparel or sports equipment from any vendor based upon either or both of the following considerations: (a) the labor standards applicable to the manufacture of the apparel or sports equipment, including but not limited to employee compensation, working conditions, employee rights to form unions, and the use of child labor; or (b) the bidder's failure to provide information sufficient for boards of education to determine the labor standards applicable to the manufacture of the apparel or sports equipment.

HISTORY:

Add, L 1991, ch 413, § 56, eff Jan 1, 1992; amd, L 2001, ch 227, § 2; L 2003, ch 562, § 4, eff Sept 1, 2003 (see 2003 note below); L 2007, ch 402, § 1, eff Jan 1, 2009.

Editor's Notes: Laws 2003, ch 562, § 6, eff Sept 1, 2003, provides as follows:

§ 6. This act shall take effect September 1, 2003 and shall respectively apply to bids issued after such date; provided, however, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized and directed to be made and completed on or before such effective date.

Notes to Decisions

Because an award of a contract under N.Y. Gen. Mun. Law § 104-b is arbitrary and capricious if the municipality evaluates a proposal using a standard that deviates from a standard expressly set forth in the request for proposals, an award was arbitrary and capricious when the county's scoring mechanism in the cost category deviated from the formula stated in the request for proposals. 2016 N.Y. LEXIS 3570.

Suffolk County, N.Y. Local Law 4-1993 regarding the award of non-competitive bid contracts was not inconsistent with N.Y. Gen. Mun. Law § 104-b; the county had broad powers to enact local laws under N.Y. Mun. Home Rule Law § 10 so long as the state had not preempted an area of law, and N.Y. Gen. Mun. Law § 104-b was not meant to preempt the entire field regarding non-competitive bid local contracts. Matter of Quest Diagnostics, Inc. v County of Suffolk, 865 N.Y.S.2d 504, 21 Misc. 3d 944, 240 N.Y.L.J. 69, 2008 N.Y. Misc. LEXIS 6041 (N.Y. Sup. Ct. 2008).

In challenging respondent's award of contract to provide environmental consulting engineering services, petitioner failed to show that respondent violated CLS Gen Mun § 104-b or applicable procurement policies, or acted arbitrarily or capriciously where (1) technical criteria used to evaluate proposals included vendor compliance with specifications set forth in respondent's request for proposal (RFP), project management and team experience, and cost, (2) proposals were assessed by committee consisting of respondent's purchasing agent, environmental experts, building services administrator and representative from department of building services, (3) successful bidder's labor costs were $357,000 lower than petitioner's over 5-year period, and (4) there was no showing that petitioner was disadvantaged by telephone interview process, or that respondent improperly negotiated with successful bidder prior to awarding contract, inasmuch as RPF reserved respondent's right to negotiate contract terms with selected vendor prior to entering into formal contract, and purchasing agent affirmed that negotiations took place to obtain further cost reduction only after determination of lowest responsible bidder was made. 2007 Op Comm Ed No. 15,693.

Board of education and superintendent of union free school district violated Education Law and General Municipal Law by

constructing and equipping board room in high school for $79,231.40 without voter approval, without complying with competitive bidding requirements, and without publicly adopting board resolution authorizing construction; project, which involved conversion of electrical shop to board room, was capital project which should not have been funded out of operations and maintenance budget. 2000 Op Comm Ed No. 14319.

Contract for publicity and promotional services involving development and implementation of marketing strategies would fall within professional services exception to competitive bidding; such services, however, must be procured in accordance with municipality's procurement polices and procedures. 1992 Op St Compt No. 92-33.

Procurements made by town superintendent of highways are required to be covered under procurement policies and procedures adopted by town board pursuant to CLS Gen Mun § 104-b, but board may not in such policies and procedures supersede any other provision of law governing contracting process; thus, those policies and procedures may not provide that prior town board approval is required by superintendent for purchase of materials for highway repair and improvement made in accordance with written agreement required by CLS High § 284, or materials for repair and maintenance of bridges and to control snow and ice, but policies and procedures may reference requirement of CLS High § 142 for prior board approval of highway equipment purchase in excess of amounts fixed by board and requirement of CLS High § 143 that rents of machinery and equipment must be at rate approved by board. 1992 Op St Compt No. 92-43.

Town supervisor who places insurance as insurance broker through same insurance agency through which town's insurance is placed, but who does not receive commission on town's insurance and is not officer, director, employee, or stockholder of insurance agency, would not have "interest" in town's insurance contracts; however, supervisor should disclose his or her business relationship with insurance agency and, under circumstances, should not participate in discussion or vote on any matter affecting insurance agency. 1996 Op St Compt No. 96-6.

Competitive bidding requirements of CLS Gen Mun §§ 101 and 103 are not violated by use of town employees to perform work in connection with construction of town salt storage shed, but purchases of materials and supplies for work would be subject to competitive bidding requirements if it is known or reasonably expected that competitive bidding monetary threshold for purchases will be exceeded; if it is not known or reasonably expected that competitive bidding threshold will be exceeded, town would be required to make such purchases in accordance with its procurement policies and procedures. 1999 Op St Compt No. 99-2.

Town may not make gratuitous payment to private individuals who voluntarily assist town in coordinating volunteers from not-for-profit organizations in providing services in connection with town's recycling program; however, town may (in accordance with applicable procurement procedures) contract with individuals for provision of such coordination services in connection with operation of town's recycling center and pay individuals consideration for such services pursuant to contract. 2002 Op St Compt No. 02-9.

County contracts with private bus companies to provide paratransit services in connection with program in compliance with American with Disabilities Act of 1990 fall within professional services exception to competitive bidding requirements and may be procured through request for proposals process (RFP) in accordance with county's procurement policies and procedures. 2007 Op St Compt No. 07-1.

Fire district is not required to advertise for sealed bids to contract for services of physicians to give physicals to volunteer firefighters of fire district fire department; however, contracts would be subject to district's procurement policies and procedures. 1993 Op St Compt No. 93-3.

§ 109. Assignment of public contracts

1. A clause shall be inserted in all specifications or contracts hereafter made or awarded by any officer, board or agency of a political subdivision, or of any district therein, prohibiting any contractor, to whom any contract shall be let, granted or awarded, as required by law, from assigning, transferring, conveying, subletting or otherwise disposing of the same, or of his right, title, or interest therein, or his power to execute such contract, to any other person or corporation without the previous consent in writing of the officer, board or agency awarding the contract.

2. If any contractor, to whom any contract is let, granted or awarded, as required by law, by any officer, board or agency of a political subdivision, or of any district therein, shall without the previous written consent specified in subdivision one of this section, assign, transfer, convey, sublet or otherwise dispose of such contract, or his right, title or interest therein, or his power to execute such contract, to any other person or corporation, the officer, board or agency which let, made, granted or awarded such contract shall revoke and annul such contract, and the political subdivision or district therein, as the case may be, and such officer, board or agency shall be relieved and discharged from any and all liability and obligations growing out of such contract to such contractor, and to the person or corporation to which such contract shall have been assigned, transferred, conveyed, sublet or otherwise disposed of, and such contractor, and his assignees, transferees or sublessees shall forfeit and lose all moneys, theretofore earned under such contract, except so much as may be required to pay his employees. The provisions of this section shall not hinder, prevent, or affect an assignment by any such contractor for the benefit of his creditors made pursuant to the laws of this state.

HISTORY:

Add, L 1953, ch 861, § 18, eff Sept 1, 1953, with substance deriving from former § 86.

Notes to Decisions

In view of evidence that lowest bidder for contract with city was corporation with no employees, no experience in building construction and insufficient financial responsibility, and apparently bid for contract for proscribed purpose, i. e., to assign to another corporation for performance, city properly exercised discretion to reject the bid. Turnkey Constr. Corp. v Peekskill, 51 A.D.2d 729, 379 N.Y.S.2d 133, 1976 N.Y. App. Div. LEXIS 11218 (N.Y. App. Div. 2d Dep't 1976).

In actions brought by assignee of city contract, court erred in granting city's motion for summary judgment on ground that requisite consent to assignment of contract was not given by city, and thus that city was relieved from all liability and obligations pursuant to CLS Gen Mun § 109, where fact issue existed as to whether consent requirement had been waived. National Guardian Sec. Servs. Corp. v City of New York, 218 A.D.2d 549, 630 N.Y.S.2d 319, 1995 N.Y. App. Div. LEXIS 8233 (N.Y. App. Div. 1st Dep't), sub. op., recalled, vacated, 218 A.D.2d 549, 630 N.Y.S.2d 319, 1995 N.Y. App. Div. LEXIS 8656 (N.Y. App. Div. 1st Dep't 1995).

Town was not relieved of liability under an emergency snow removal contract based upon the contractor's use of subcontractors because the contractor used at least seven subcontractors in the course of its emergency snow removal work, and town officials had knowledge that the subcontractors were performing work and did not object, and a question of fact existed as to whether the contractor's use of subcontractors to perform a portion of the work violated the statutes. CTS Contr., Inc. v Town of Cheektowaga,

148 A.D.3d 1642, 51 N.Y.S.3d 738, 2017 N.Y. App. Div. LEXIS 2160 (N.Y. App. Div. 4th Dep't 2017).

The underlying purpose of the statute is to protect a municipality against brokerage activities in city contracts. Guerriero v Board of Contract & Supply, 60 Misc. 2d 22, 301 N.Y.S.2d 103, 1969 N.Y. Misc. LEXIS 1545 (N.Y. Sup. Ct. 1969).

Upon a proper assignment by an incorporated fire company of proceeds due to it under a fire protection contract, the town board which has entered into the fire protection contract is required to make the designated payment to the transferee. 1965 Ops St Compt File #867.

Where the vendor on a town contract has been declared bankrupt, the town may purchase the contract items from the bidder's successor at the contract price, if the town consents in writing to the assignment of the contract by the trustee in bankruptcy to vendor's successor. 1968 Ops St Compt File #413.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

2B Am Jur Legal Forms 2d, Assignments, Forms 25:44 et seq.

§ 109-a. Purchases through the office of general services by certain public associations

The New York State Association of Counties, the Association of Towns of the State of New York, the New York State Town Clerk's Association, Inc., the New York State Conference of Mayors and Other Municipal Officials, the New York State School Boards Association, Inc., the New York Planning Federation and the Association of Fire Districts of the State of New York, the New York State Association of School Business Officials, the New York state council of school superintendents, any nonpublic elementary and/or secondary school of the state of New York, which provides the instruction required by section thirty-two hundred four and article seventeen of the education law, and which is chartered by, registered with or subject to examination and inspection by the department of education and which is a not for profit institution and any public library, association library, library system, cooperative library system, the New York Library Association, and the New York State Association of Library Boards or any other library except those which are operated by for profit entities, may make purchases through the office of general services subject to such rules as may be promulgated pursuant to section one hundred sixty-three of the state finance law and subdivision eight-a of section one hundred three of this article which may establish limitations with respect to commodities and impose such other appropriate conditions upon purchasing as deemed necessary by the commissioner of general services in order to protect the state's own purchasing interests; and that such association, school, library, library system or cooperative library system shall accept sole responsibility for any payment due the vendor. Boards of education may permit such nonpublic schools to make purchases pursuant to this section through the school district in which the nonpublic school is located, provided that any administrative costs incurred by the school district will be paid by the nonpublic school.

HISTORY:

Add, L 1962, ch 975, § 1; amd, L 1976, ch 249, § 1; L 1976, ch 565, § 1; L 1980, ch 444, § 1; L 1993, ch 490, § 9; L 1995, ch 330, § 1; L 1996, ch 25, § 1; L 2000, ch 95, § 5; L 2000, ch 193, § 1; L 2002, ch 502, § 1, eff Sept 17, 2002; L 2012, ch 55, § 28 (Part L), eff March 30, 2012.

Editor's Notes: Laws 1993, ch 490, § 1, eff Jan 1, 1994, provides as follows:

Section 1. Declaration of legislative findings and intent. It is the declared policy of this state to encourage and improve the business climate within New York to increase the number of job opportunities for all of its citizens. The New York grape and wine industry is the second largest in the nation and presently is experiencing economic difficulties. These economic difficulties have hindered employment opportunities for New Yorkers, particularly persons located in the state's fruit and grape growing areas.

The purpose of this legislation is to reduce unnecessary state mandates and eliminate or simplify redundant reporting requirements, thereby allowing the grape and wine industry to be more productive and profitable. It is the intent of this legislation to comprehensively address the problems faced by the industry, reduce state mandates, and reduce state administrative costs in monitoring the industry in a way that still vigilantly protects the public interest. In addition to providing more job opportunities, stabilization and growth in the industry, this act will promote the conservation, protection and enhancement of the state's agricultural lands and promote tourism.

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Laws 2000, ch 95, § 27, subs 2 and 3, eff July 1, 2000, provides as follows:

§ 27. This act shall take effect July 1, 2000; provided, however, that:

2. Procurement contracts for which bid solicitations have been issued prior to the effective date of this act shall be awarded pursuant to the provisions of law in effect at the time of issuance.

3. Nothing contained in sections two through twenty-five of this act shall be deemed to affect the application, qualification, expiration, reversion or repeal of any provision of law amended by any section of this act and the provisions of this act shall be applied or qualified or shall expire or revert or be deemed repealed in the same manner, to the same extent and on the same date as the case may be as otherwise provided by law.

Laws 2012, ch 55, § 39 (Part L), eff March 30, 2012, provides as follows:

§ 39. This act shall take effect immediately, provided, however, that procurement contracts for which bid solicitations have been issued prior to the effective date of this act shall be subject to the provisions of law in effect at the time of issuance; provided, however, that the amendments made to section 163 of the state finance law by sections two, three, four, five, seven, nine, ten, twelve and thirty-six of this act shall not affect the repeal of such section and shall be deemed to be repealed therewith; and provided, however, that the amendments to section 104 of the general municipal law made by section six of this act shall be subject to the expiration and reversion of such section pursuant to section 9 of subpart A of part C of chapter 97 of the laws of 2011, when upon such date the provisions of section twenty-seven of this act shall take effect; and provided, however, that the amendments to paragraph a of subdivision 5 of section 355 of the education law made by section thirty-one of this act shall

be subject to the expiration and reversion of such subdivision pursuant to section 4 of subpart B of part D of chapter 58 of the laws of 2011, when upon such date the provisions of section thirty-two of this act shall take effect; and provided that the amendments to subdivision a of section 6218 of the education law made by section thirty-three of this act shall be subject to the expiration and reversion of such subdivision pursuant to section 4 of subpart B of part D of chapter 58 of the laws of 2011, as amended, when upon such date the provisions of section thirty-four of this act shall take effect.

Amendment Notes: 2012. Chapter 55, § 28 (Part L) amended:

Section by deleting at fig 1 ", except of printed material,", at fig 2 "established from time to time", at fig 3 "sections", at fig 4 "and one hundred sixty-five" and adding the matter in italics.

§ 109-b. [Expires and repealed July 15, 2021] Installment contracts

1. As used in this section:

(a) "Political subdivision" shall mean a municipal corporation, school district, district corporation or board of cooperative educational services.

(b) "Installment purchase contract" shall mean any lease purchase agreement, installment sales agreement or other similar agreement providing for periodic payments between a corporation, person or other entity and a political subdivision which has as its purpose the financing of equipment, machinery or apparatus.

(c) "Certificate of participation" shall mean a security or other instrument representing a proportionate interest or the right to receive a proportionate share in lease, rental, installment or other periodic payments made or to be made by a political subdivision or made by the agency on behalf of a political subdivision pursuant to an installment purchase contract.

(d) "Agency" shall mean the state of New York municipal bond bank agency established by section twenty-four hundred thirty-three of the public authorities law.

(e) "Agency certificates of participation" shall mean certificates of participation executed and delivered by the agency on behalf of, for the benefit of and pursuant to a written agreement with a political subdivision.

(f) Functions performed by a governing board under this section shall, in the city of New York, be performed by the mayor and comptroller, and the approvals of the mayor and the comptroller of any agreement, contract, instrument, arrangement or transaction contemplated by this section shall be the only approvals required therefor, subject to the provisions of the New York state financial emergency act for the city of New York.

2. A political subdivision may enter into an installment purchase contract subject to the following restrictions:

(a) Neither any person, partnership, corporation or other legal entity nor any political subdivision, officer, employee, agency or department nor the agency for agency certificates of participation shall execute and deliver or cause the execution and delivery of certificates of participation except in accordance with the provisions of this section and with express written approval of the governing board of such political subdivision and with the concurrence of the agency for agency certificates of participation. The provisions of this section are hereby made a part of every installment purchase contract entered into by such a political subdivision or by the agency for agency certificates of participation. Every such contract shall contain a clause expressly reciting the provisions of this subdivision, provided, however, that the absence of such clause in such a contract shall not obviate the duty of all parties thereto to comply with the provisions of this subdivision. Neither this provision, nor any other provision of this section, shall be construed to prevent such political subdivisions from entering into installment purchase or lease purchase agreements funded without the use of certificates of participation or similar instruments, as otherwise provided in this section.

(b) Subject to the provisions of subdivision five of this section, the governing board of a political subdivision shall adopt a resolution authorizing the installment purchase contract.

(c) Subject to the provisions of subdivision five of this section, where the financing of equipment, machinery or apparatus pursuant to an installment purchase contract is to be provided by agency certificates of participation, the governing board of a political subdivision shall adopt a resolution authorizing the written contract with the agency setting forth the rights and liabilities of the agency and the political subdivision as provided for in section twenty-four hundred thirty-five-a of the public authorities law.

(d) The term of such installment purchase contract, including all renewals thereof, shall not exceed the period of probable usefulness prescribed by section 11.00 of the local finance law for the equipment, machinery or apparatus being financed under the installment purchase contract.

(e) The installment purchase contract shall separately state the principal and interest component of the periodic payments to be made thereunder. The total of all periodic payments which include both principal and interest components made by the political subdivision during each year throughout the term of the installment purchase contract shall be substantially level or falling.

(f) The installment purchase contract shall contain the following clause: "This contract shall be deemed executory only to the extent of monies appropriated and available for the purpose of the contract, and no liability on account thereof shall be incurred by the political subdivision beyond the amount of such monies. The installment purchase contract is not a general obligation of (insert name of political subdivision(s)). Neither the full faith and credit nor the taxing power of (insert name of political subdivision(s)) are pledged to the payment

of any amount due or to become due under such installment purchase contract. It is understood that neither this contract nor any representation by any public employee or officer creates any legal or moral obligation to appropriate or make monies available for the purpose of the contract." Where agency certificates of participation are the security for such contract, such contract shall also contain the following clause: "Further no liability on account thereof shall be incurred by the state of New York municipal bond bank agency beyond the amount of such monies. It is understood that neither this contract nor any representation by any employee or officer of such agency creates any legal or moral obligation to appropriate or make state monies available for the purpose of the contract."

(g) No payment under the installment purchase contact except payment for the total amount outstanding shall be financed from the proceeds of obligations issued pursuant to the local finance law other than the proceeds of revenue anticipation notes, tax anticipation notes or budget notes.

3. (a) Installment purchase contracts for equipment, machinery or apparatus shall constitute purchase contracts for public bidding purposes and shall be subject to public bidding requirements to the extent applicable by law. For purposes of determining whether the cost of the equipment, machinery or apparatus exceeds the monetary threshold fixed in section one hundred three of this article, the cost of the equipment, machinery or apparatus, exclusive of the cost of financing, shall be considered. If the equipment, machinery or apparatus is to be financed by a party other than the party submitting the bid, the bid specifications may provide that the political subdivision may assign its right to purchase to a third party without the necessity of approval by the other party to the contract. Nothing herein shall preclude a political subdivision from advertising for bids in the alternative with and without financing.

(b) Certificates of participation caused to be executed and delivered by the political subdivision pursuant to this section, in connection with one or more installment purchase contracts entered or expected to be entered into by such political subdivision may be sold at public or private sale, either independently or in connection with a pooled or aggregate program, as determined by the governing board. The governing board may, by resolution, delegate such power to the chief fiscal officer, in which event such chief fiscal officer shall exercise such powers and perform such duties until the governing board shall, by resolution, elect to reassume the same. If certificates of participation are sold at public sale, they shall be sold to the bidder offering the lowest interest cost as computed in accordance with the net interest cost method, taking into consideration any premium or discount, or the actuarial or true interest cost method, whichever is specified in the notice of sale, not less than four nor more than fifteen days, Sundays excepted, after a notice of such sale has been circularized in accordance with any rule or order prescribed by the state comptroller, pursuant to paragraph d of section 57.00 of the local finance law, for the circularization of notices for the sale of bonds. The terms of the sale may not be changed unless a supplemental notice of sale is provided in accordance with the procedure for the sale of bonds in paragraph b of section 58.00 of the local finance law.

(c) Whenever in the judgement of the governing board, or if authorized by the governing board, the chief fiscal officer, the interest of the political subdivision will be served thereby, the governing board, or chief fiscal officer as the case may be, may authorize the sale of such certificates of participation at private sale, including such sale in connection with a pooled or aggregate program.

(d) The state comptroller shall promulgate rules in conformance with the state administrative procedure act governing the procedure which shall be adhered to when entering into installment purchase contracts or authorizing the execution and delivery of certificates of participation pursuant to this section, including guidelines for the private sale of certificates of participation. No private sale of certificates of participation shall be conducted by a political subdivision without prior approval of the state comptroller except as provided in such rules which shall set forth the circumstances under which such approval shall not be required. The state comptroller shall annually deliver to the state division of the budget, the senate finance committee and the assembly ways and means committee a report listing all negotiated sales conducted in the previous year, including the name of the issuer and amount of the issue for each such sale.

4. (a) The proceeds of certificates of participation executed and delivered in connection with the installment purchase contract made pursuant to this section, in addition to being applied towards the cost of the equipment, machinery or apparatus, may also be used for the establishment of reserve funds to secure such certificates, the cost or premium of letters of credit, insurance or other credit enhancements, the costs of bond counsel, a financial advisor, underwriter, trustees and paying agent, and other actual and necessary expenses directly related to the issuance of such certificates. The foregoing shall not be construed to authorize the use of such proceeds for the payment of personal service expenses of the political subdivision. Where agency certificates are executed and delivered, proceeds may be used for payment by the political subdivision of the expenses incurred by the agency in connection with the execution and delivery and sale of such certificates.

(b) Each political subdivision shall have the power to enter into agreements providing credit enhancement with respect to the installment purchase contract and/or certificates of participation, but any reimbursement obligation of the political subdivision shall be subject to appropriation.

(c) The proceeds from certificates of participation may be invested only in obligations of the United States of America, obligations guaranteed by agencies of the United States of America where the payment of principal and interest are guaranteed by the United States of America, obligations of the state of New York, or special time deposit accounts in or certificates of deposit issued by a bank or trust company located and authorized to do business in the state and secured by a pledge of obligations of the United States of America, obligations of the state of New York, or obligation of any political subdivision, school district or district corporation of the state of New York.

(d) All certificates of participation shall contain the following clause: "This certificate shall be deemed executory only to the extent of monies appropriated and available for the purpose of the installment purchase contract to which it relates, and no liability on account thereof shall be incurred by the political subdivision beyond the amount of such monies. The installment purchase contract is not a general obligation of (insert name of political subdivision(s)). Neither the full faith and credit nor the taxing power of (insert name of political subdivision(s)) are pledged to the payment of any amount due or to become due under such installment purchase contract. It is understood that neither this certificate nor any representation by any public employee or officer creates any legal or moral obligation to appropriate or make monies available for the purpose of the contract."

Agency certificates of participation shall also bear the following legend: "Further, the installment purchase contract is not a general obligation of the state of New York municipal bond bank agency. Neither the full faith and credit nor the taxing power of the state of New York are pledged to the payment of any amounts due or to become due under such installment purchase contract."

5. (a) If an authorization for the issuance of obligations to finance the equipment, machinery or apparatus would have been required by law to be subject to a permissive or mandatory referendum, then the authorization to enter into an installment purchase contract shall be subject to a permissive or mandatory referendum, as the case may be, in the same manner as provided for such referendum on the issuance of obligations.

(b) If the authorization for the issuance of obligations to finance the equipment, machinery or apparatus would have been required by law to be subject to: (i) a certain supermajority vote of the governing board, (ii) a mandatory or permissive referendum, or (iii) both, then the authorization to enter into an installment purchase contract for equipment, machinery or apparatus shall be subject to such vote, referendum or such referendum and vote, as the case may be, in the same manner as provided for such vote and/or referendum on the issuance of obligations.

(c) If the authorization for the issuance of obligations would have been subject to a referendum only if the obligations had a maturity of more than five years or not less than some other minimum period, then the authorization to enter into the installment purchase contract shall be subject to referendum only if the term of the contract is equal to or more than such minimum period of maturity.

6. (a) Installment purchase contracts made pursuant to this section, together with any certificates of participation executed and delivered or caused to be executed and delivered in connection therewith, shall not constitute or create indebtedness of the state or a political subdivision for purposes of article seven or eight of the state constitution or section 20.00 of the local finance law, nor shall they constitute a contractual obligation in excess of the amounts appropriated therefor. Neither the state nor a political subdivision has any continuing legal or moral obligation to appropriate money for said payments or other obligations due under the installment purchase contract. No installment purchase contract shall contain any provision which, in the event of non-appropriation, precludes a political subdivision from acquiring equipment, machinery or apparatus for the same or similar purpose as the equipment, machinery or apparatus included in the installment purchase contract for a period of more than sixty days from the date of expiration, termination or cancellation of such contract, provided, however, that in no case shall an installment purchase contract contain any provision which would preclude a political subdivision from performing any statutorily or constitutionally required duties or functions, or require the political subdivision to pay liquidated damages.

(b) In the case of the failure to appropriate, the sole security, apart from any security provided by a credit enhancement, for any remaining periodic payments shall be the equipment, machinery or apparatus subject to the installment purchase contract, and if certificates of participation are executed and delivered or caused to be executed and delivered, reserve funds, if any, or any remaining proceeds from certificates executed and delivered by or on behalf of the political subdivision. Any installment purchase contract or any agreement for the execution and delivery of certificates of participation to fund an installment purchase contract may provide that the installment purchase contract or certificates of participation are secured by the underlying equipment, machinery or apparatus and that, in the event the political subdivision fails to appropriate funds sufficient for payments required under the contract, the financed equipment, machinery or apparatus may be sold on behalf of the holders of the certificates or other person entitled to receive payments under the installment purchase contract, provided that any excess proceeds from such a sale, after deduction for and payment of fees, expenses and any taxes levied on the sale, and distribution to

the holders of the certificates in the amount of the face value of the certificates plus accrued interest shall be paid to the political subdivision.

(c) The aggregate amount of unpaid periodic payments, excluding interest, to be made under any outstanding installment purchase contract shall be deemed to be existing indebtedness for the purpose of determining the power of any political subdivision to contract indebtedness under section 104.00 of the local finance law. No political subdivision shall enter into any installment purchase contract if the amount of unpaid periodic payments, excluding interest, proposed to be made under such installment purchase contract and those outstanding, together with the amount of outstanding indebtedness, would exceed one hundred fifteen percent of the limit prescribed by such section 104.00 or if the total amount of such payments, excluding interest, under such proposed contract and those outstanding would exceed forty percent of such limit.

7. A political subdivision shall not have the power to enter into an installment purchase contract except as authorized in this section or the education law and nothing in this section shall authorize the conveyance or lease of property owned by a political subdivision except as authorized by law.

8. Whether or not certificates of participation are of such form and character as to be negotiable instruments under the terms of the uniform commercial code, the certificates of participation are hereby made negotiable instruments within the meaning of and for all purposes of the uniform commercial code, subject only to the provisions of the certificates of participation for registration.

9. All installment purchase contracts and certificates of participation of a political subdivision and the interest thereon, shall be exempt from taxation for municipal and state purposes.

10. Certificates of participation are hereby made securities in which all public officers and bodies of this state and all municipalities and municipal subdivisions, all insurance companies and associations and other persons carrying on an insurance business, all banks, bankers, trust companies, savings banks and savings associations, including savings and loan associations, building and loan associations, investment companies and other persons carrying on a banking business, all administrators, guardians, executors, trustees and other fiduciaries, and all other persons whatsoever who are now or may hereafter be authorized to invest in bonds or in other obligations of the state, may properly and legally invest funds, including capital, in their control or belonging to them; and are also hereby made securities which may be deposited with and may be received by all public officers and bodies of the state and all municipalities and public corporations for any purpose for which the deposit of bonds or other obligations of the state is now or may hereafter be authorized.

11. Enactment of this section shall not be constructed [construed][*] as invalidating any installment purchase contract for an improvement to real property entered into by a political subdivision prior to the effective date of such enactment.

12. References in this section to the agency and agency certificates of participation shall cease to have force and effect on and after July first, nineteen hundred ninety-two.

HISTORY:

Add, L 1991, ch 413, § 35(b), eff July 19, 1991; amd, L 1994, ch 258, § 6, eff July 6, 1994.

Prior Law: Former § 109-b, add, L 1979, ch 699, § 1; amd, L 1981, ch 327, § 1, L 1983, ch 704, § 1, L 1990, ch 190, § 374, eff May 25, 1990; suspended, L 1991, ch 413, § 35(a) (see 1991 note below); repealed, L 1994, ch 258, § 7, eff July 6, 1994.

Editor's Notes: Laws 1991, ch 413, § 81(c), (d), eff July 19, 1991, provides as follows:

§ 81. This act shall take effect immediately provided, however:

(c) the rules required to be promulgated by section 57.10 of the local finance law, paragraph (d) of subdivision 3 of section 109-b of the general municipal law and subdivision (c) of section 2437-a of the public authorities law, as added by sections seventeen, thirty-five and forty-three of this act, respectively, shall be finalized no later than sixty days after the effective date of this act provided, however, that no sales on a negotiated basis authorized by section 54.90 and subdivision (f) of section 57.00 of the local finance law, section 109-b of the general municipal law or section 2437-a of the public authorities law, as added by sections twelve, sixteen, thirty-five and forty-three, respectively, consummated prior to the initial promulgation of such rules, need comply with such rules; provided further that;

(d) notwithstanding any inconsistent provision of section 57.10 of the local finance law, paragraph (d) of subdivision 3 of section 109-b of the general municipal law or subdivision (c) of section 2437-a of the public authorities law or any other provision of law, the comptroller shall promulgate all rules and regulations as are directed for the implementation of such sections pursuant to the provisions thereof, in a timely manner so that such sections may be effectively implemented on September 1, 1991, provided, however, that any rules and regulations so promulgated shall subsequently comply with the requirements of notice and public hearing as provided in the state administrative procedure act as if such rules and regulations had been adopted, amended, suspended or repealed as an emergency measure. Any rules or regulations which are to be promulgated after the initially promulgated rules and regulations necessary for such effective implementation of such sections on such date shall be promulgated pursuant to the applicable rule making procedure provided for in the state administrative procedure act.

Laws 1991, ch 413, § 81 (e), eff July 19, 1991, provides as follows:

§ 81. This act shall take effect immediately provided, however:

(e) subdivision (b) of section thirty-five of this act shall expire and be deemed repealed on and after July 15, 2021 (Amd, L 1994, ch 258, § 9; L 1997, ch 192, § 5; L 2000, ch 139, § 5; L 2003, ch 137, § 5; L 2006, ch 97, § 6, eff June 7, 2006; L 2009, ch 186, § 5, eff July 11, 2009; L 2012, ch 91, § 5, eff June 29, 2012; L 2015, ch 77, § 5, eff July 13, 2015; L 2018, ch 113, § 5, eff July 10, 2018).

Notes to Decisions

Analysis

1. In general
2. Lease as installment contract

[*]The bracketed word has been inserted by the Publisher.

3. Computer purchases

1. In general

Although a city lease agreement contained an executory clause, to the extent that the city argued it was justified in failing to appropriate the required funds because a sludge facility was not operating properly, the appellate court noted the city nonetheless failed to demonstrate that such funds were unavailable through the ordinary budget process. Rochester Fund Muns. v Amsterdam Mun. Leasing Corp., 296 A.D.2d 785, 746 N.Y.S.2d 512, 2002 N.Y. App. Div. LEXIS 7595 (N.Y. App. Div. 3d Dep't 2002).

Central school district could not determine interest costs for installment purchase contract prior to budget vote, and thus petition to invalidate budget vote was dismissed on its merits; district cannot request bids until purchase is approved by voters, proposal presented to voters listed principal cost of purchase and advised voters that interest would be paid on installments, and CLS Gen Mun § 109-b did not require separate propositions for installment purchase contracts to estimate interest costs. 2007 Op Comm Ed No. 15,585.

Voters were properly informed about proposed school bus installment purchase contract where (1) "budget book" made available to voters prior to election stated total amount of proposed budget and set forth purpose and principal cost of bus purchase contract, disclosed that interest would be paid on purchase contract, and stated estimated cost of principal and interest that would be paid during upcoming school year, (2) language of proposal itself contained principal cost of purchase and stated that interest would be paid on installment contract, and (3) petitioner failed to establish by affidavits or other evidence that voters were confused. 2007 Op Comm Ed No. 15,585.

If energy performance contract is in nature of installment purchase contract, it must be reasonably anticipated that dollar amount of each installment payment will be substantially equal. 1985 Op St Compt No. 85-58.

Term "outstanding indebtedness" as used in CLS Gen Mun § 109-b(6)(c) includes only outstanding indebtedness which is not excludable pursuant to law. 1993 Op St Compt No. 93-11.

Fire district may not enter into lease-purchase agreement under which contractor would build firehouse on concrete slab on fire district property and fire district would make annual payments to contractor during term of agreement, with title to structure passing to fire district for nominal consideration at end of term. 1997 Op St Compt No. 97-10.

Installment purchase contract of fire district is subject to mandatory referendum. 1998 Op St Compt No. 98-19.

Union free school district may not sell building currently in use for school district purposes, to be reacquired by lease-purchase agreement. 2005 Op St Compt No. 05-3.

Exception for purchases made through New York State Office of General Services does not apply to purchase from State Contract Vendor upon terms and conditions which materially or substantially vary from State Contract. Ops St Compt 89-3.

Where a fire district authorized by resolution the installment purchase of a fire truck prior to the effective date of an amendment to section 109-b of the General Municipal Law authorizing installment purchases of equipment generally, the resolution is void for lack of authority and is not validated by the subsequent amendment. 1984 Op St Comp File #84-48.

2. Lease as installment contract

Trial court properly entered a judgment in favor of a sanitary district because, while the district promised to seek appropriations sufficient to make the lease payments, the district's liability for payments was conditioned upon the appropriation of funds, the district did not improperly invoked the lease's executory clause to escape its obligations, and it could reasonably have determined that the expenditure of funds to satisfy the bonds would have been improvident. Frankenmuth Mut. Ins. Co. v Waste Mgt. of N.Y., LLC, 122 A.D.3d 674, 995 N.Y.S.2d 732, 2014 N.Y. App. Div. LEXIS 7592 (N.Y. App. Div. 2d Dep't 2014).

Under certain circumstances, an agreement entitled a "lease" may constitute an installment purchase if the term of the agreement extends over the actual useful life of the item acquired under the agreement, even though title never passes to the lessee. An installment purchase agreement is subject to the provisions of General Municipal Law, § 109-b, including those relating to competitive bidding requirements. Prior inconsistent opinions superseded. 1980 Op St Compt No. 84-57.

A transaction whereby a not-for-profit corporation, without competitive bidding, constructs a public facility for use by a municipal corporation in the performance of its governmental functions and the municipal corporation acquires use of the facility under a lease agreement and has an option to purchase: (a) does not constitute indebtedness for purposes of the State Constitution and Local Finance Law if the lease agreement has an executory clause making the municipal corporation's obligation contingent on annual appropriations, although it is doubtful that a clause providing that, if the municipal corporation fails to appropriate money for the lease payments, the municipal corporation agrees not to purchase, lease or rent property to perform the same functions as the facility, would be enforceable; (b) constitutes a prohibited installment purchase contract if the total character of the transaction is that of a purchase rather than a lease; and (c) violates the competitive bidding requirements of General Municipal Law §§ 101, 103, if the total character of the transaction constitutes a contract for public work of the municipal corporation. 1991 Op St Compt No. 91-13.

3. Computer purchases

Packaged or canned application computer software may be purchased under an installment purchase contract pursuant to the provisions of this section. 1984 Op St Comp File #84-35.

Agency Opinions

Analysis

1. In general
2. Lease as installment contract
3. Computer purchases

1. In general

A board of cooperative educational services may enter into an installment contract to purchase computer equipment. 1979 Op St Compt File #557.

A town may not enter into a "lease" agreement to obtain a tractor where such agreement provides that rental payments be applied to an option purchase price and provides for rental payments to include a principal amount plus a finance charge. 1982 Op St Compt File #82-51.

The terms "equipment, machinery and apparatus" as used in this section include office furniture and certain furnishings, sinks and toilets, but not public works projects such as the construction or reconstruction of bridges or the paving of a highway. As a general rule, it would be impractical to utilize installment purchase contracts for items which become fixtures when attached to real property. The appropriateness of installment purchasing for non-capital items which are of moderate cost and which may readily be paid for with current moneys should be carefully considered by political subdivisions. 1984 Op St Compt File #84-7.

2. Lease as installment contract

If a lease provides for an option price which is not a reasonably accurate estimate of the residual value of the equipment at the time the option to purchase the equipment is to be exercised, the lease is an installment contract within the meaning of section 109-b. 1980 Op St Compt File #187.

3. Computer purchases

Installment purchases of computer equipment are subject to competitive bidding requirements. Such requirements must be complied with prior to entering into the agreement. 1983 Op St Compt File #83-23.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS High § 143; CLS Loc Fin § 20.00.

Types of obligations which may be issued, CLS Loc Fin § 20.00.

Down payment, CLS Loc Fin § 107.00.

Statement of total debt; inclusions in ascertaining gross indebtedness, CLS Loc Fin § 135.00.

Codes, Rules and Regulations:

Installment purchase contracts. 2 NYCRR Part 39.

§ 109-d. Emergency vehicle warranties.

1. Definitions. As used in this section:

a. "Ambulance" means a motor vehicle designed, appropriately equipped and used for the purpose of: (i) transporting emergency medical personnel and equipment to sick or injured persons; and (ii) carrying sick or injured persons by a person or entity registered or certified as an ambulance service by the department of health, that was subject to a manufacturer's express warranty at the time of original delivery and was purchased or transferred in this state within either the first eighteen thousand miles of operation or two years from the date of original delivery, whichever is earlier.

b. "Fire vehicle" means a motor vehicle specially designed and equipped for firefighting purposes which was subject to a manufacturer's express warranty at the time of original delivery and was purchased or transferred in this state within either the first two thousand hours of service or two years from the date of original delivery, whichever is earlier.

c. "Municipal consumer" means a political subdivision or fire company which is the purchaser or transferee of a fire vehicle or ambulance and any other person entitled by the terms of the warranty to enforce the obligations of such warranty.

d. "Warranty" means the written warranty, so labeled, of the manufacturer and any other warranties set forth in the manufacturer's or its agent's bid or offer submitted where competitive bidding is required by statute, rule, regulation or local law, including but not limited to, a bid or offer submitted pursuant to the competitive bidding requirements of section one hundred three of this article, and including any conditions precedent to the enforcement of obligations under such warranties.

2. Warranties. a.

(i) If a new fire vehicle which is sold and registered in this state does not conform to all express warranties during the first two thousand hours of service or during the period of two years following the date of original delivery of the fire vehicle to the municipal consumer, whichever is the earlier date, or if a new ambulance which is sold and registered in this state does not conform to all express warranties during the first eighteen thousand miles of operation or during the period of two years following the date of original delivery of the ambulance to the municipal consumer, whichever is the earlier date, the municipal consumer shall during such period report the nonconformity, defect or condition to the manufacturer, its agent or its authorized dealer. If the notification is received by the manufacturer's agent or authorized dealer, the agent or dealer shall within seven days forward written notice thereof to the manufacturer by certified mail, return receipt requested, and shall include in such notice a statement indicating whether or not such repairs have been undertaken. The manufacturer, its agent or its authorized dealer shall correct said nonconformity, defect or condition at no charge to the municipal consumer, notwithstanding the fact that such repairs are made after the expiration of such period of operation or such two year period.

(ii) If a manufacturer's agent or authorized dealer refuses to undertake repairs within seven days of receipt of the notice by a municipal consumer of a nonconformity, defect or condition pursuant to subparagraph (i) of this paragraph, the municipal consumer may immediately forward written notice of such refusal to the manufacturer by certified mail, return receipt requested. The manufacturer or its authorized agent shall have twenty days from receipt of such notice of refusal to commence such repairs. If within such twenty day period, the manufacturer or its authorized agent fails to commence such repairs, the manufacturer, at the option of the municipal consumer, shall replace the fire vehicle or ambulance with a comparable vehicle, or accept return of the fire vehicle or ambulance from the municipal consumer and refund to the municipal consumer the full purchase price plus fees and charges. Such fees and charges shall include but not be limited to all license fees, registration fees and any similar governmental charges, less a reasonable allowance for any damage not attributable to normal wear or improvements.

b.

(i) If, within the period specified in paragraph a of this subdivision, the manufacturer or its agents or authorized dealers are unable to repair or correct any defect or condition which substantially impairs the value of the fire vehicle or ambulance to the municipal consumer after a reasonable number of attempts, the manufacturer, at the option of the municipal consumer, shall replace the fire vehicle or ambulance with a comparable vehicle, or accept return of the fire vehicle or ambulance from the municipal consumer and refund to the municipal consumer the full purchase price plus fees and charges. Any return of a fire vehicle or ambulance may, at the option of the municipal consumer, be made to the dealer or other authorized agent of the manufacturer who sold such fire vehicle or ambulance to the municipal consumer or to the dealer or other authorized agent who attempted to repair or correct the defect or condition which necessitated the return and shall not be subject to any further shipping charges. Such fees and charges shall include but not be limited to all license fees, registration fees and any similar governmental charges, less a reasonable allowance for any damage not attributable to normal wear or improvements.

(ii) A manufacturer which accepts return of a fire vehicle or ambulance because such vehicle does not conform to its warranty shall notify the commissioner of motor vehicles that the fire vehicle or

ambulance was returned to the manufacturer for nonconformity to its warranty and shall disclose, in accordance with the provisions of section four hundred seventeen-c of the vehicle and traffic law prior to resale either at wholesale or retail, that it was previously returned to the manufacturer for nonconformity to its warranty. Refunds shall be made to the municipal consumer and lienholder, if any, as their interests may appear on the records of ownership kept by the department of motor vehicles.

(iii) It shall be an affirmative defense to any claim under this section that:

(A) the nonconformity, defect or condition does not substantially impair the value of the fire vehicle or ambulance; or

(B) the nonconformity, defect or condition is the result of abuse, neglect, or unauthorized modifications or alterations of the fire vehicle or ambulance.

c. It shall be presumed that a reasonable number of attempts have been undertaken to conform a fire vehicle or ambulance to the applicable express warranties, if:

(i) the same nonconformity, defect or condition has been subject to repair four or more times by the manufacturer or its agents or authorized dealers within the first two thousand hours of service or during the period of two years following the date of original delivery of the fire vehicle to a municipal consumer, whichever is the earlier date, or, within the first eighteen thousand miles of operation or during the period of two years following the date of original delivery of the ambulance to a municipal consumer, whichever is the earlier date, but such nonconformity, defect or condition continues to exist; or

(ii) the fire vehicle or ambulance is out of service by reason of repair of one or more nonconformities, defects or conditions for a cumulative total of thirty or more calendar days during either period, whichever is the earlier date.

d. The term of an express warranty, the two year warranty period and the thirty day out of service period shall be extended by any time during which repair services are not available to the municipal consumer because of a war, invasion or strike, fire, flood or other natural disaster.

3. Informal dispute settlement.

a. (i) If a manufacturer has established an informal dispute settlement mechanism, such mechanism shall comply in all respects with the provisions of this section; provided, however, that the provisions of subdivision two of this section concerning refunds or replacement shall not apply to any municipal consumer who has not first resorted to such mechanism. In the event that an arbitrator in such an informal dispute mechanism awards a refund or replacement fire vehicle or ambulance, he or she shall not reduce the award to an amount less than the full purchase price or a fire vehicle or ambulance of equal value, plus all fees and charges except to the extent such reductions are specifically permitted under subdivision two of this section.

(ii) A manufacturer shall have up to thirty days from the date the municipal consumer notifies the manufacturer of their acceptance of the arbitrator's decision to comply with the terms of that decision. Failure to comply with the thirty day limitation shall also entitle the municipal consumer to recover a fee of twenty-five dollars for each business day of noncompliance up to five hundred dollars. Provided, however, that nothing contained in this paragraph shall impose any liability on a manufacturer where a delay beyond the thirty day period is attributable to a municipal consumer who has requested a replacement fire vehicle or ambulance built to order or with options that are not comparable to the vehicle being replaced or otherwise made compliance impossible within said period. In no event shall a municipal consumer who has resorted to an informal dispute settlement mechanism be precluded from seeking the rights or remedies available by law.

b.

(i) Each municipal consumer shall have the option of submitting any dispute arising under this section upon the payment of a prescribed filing fee to an alternate arbitration mechanism established pursuant to regulations promulgated hereunder by the New York state attorney general. Upon application of the municipal consumer and payment of the filing fee, all manufacturers shall submit to such alternate arbitration. Such alternate arbitration shall be conducted by a professional arbitrator or arbitration firm appointed by and under regulations established by the New York state attorney general. Such mechanism shall insure the personal objectivity of its arbitrators and the right of each party to present its case, to be in attendance during any presentation made by the other party and to rebut or refute such presentation. In all other respects, such alternate arbitration mechanism shall be governed by article seventy-five of the civil practice law and rules; provided, however, that notwithstanding paragraph (i) of subdivision (a) of section seventy-five hundred two of the civil practice law and rules, special proceedings brought before a court pursuant to such article seventy-five in relation to an arbitration hereunder shall be brought only in the county where the municipal consumer is located or where the arbitration was held or is pending.

(ii) A court may award reasonable attorney's fees to a municipal consumer who prevails in any judicial action or proceeding arising out of an arbitration proceeding held pursuant to subparagraph (i) of this paragraph. In the event a municipal consumer is required to retain the services of an attorney to enforce collection of an award granted pursuant to this section, the court may assess against the manufacturer reasonable attorney's fees for services rendered to enforce collection of said award.

c.

(i) Each manufacturer shall require that each informal dispute settlement mechanism used by it provide, at a minimum, the following:

(A) that the arbitrators participating in such mechanism are trained in arbitration and familiar with the provisions of this section, that the arbitrators and municipal consumers who request arbitration are provided with a written copy of the provisions of this section, together with the notice set forth below entitled "NEW EMERGENCY VEHICLE LEMON LAW BILL OF RIGHTS", and that municipal consumers, upon request, are given an opportunity to make an oral presentation to the arbitrator;

(B) that the rights and procedures used in the mechanism comply with federal regulations promulgated by the federal trade commission relating to informal dispute settlement mechanisms; and

(C) that the remedies set forth under paragraph c of subdivision two of this section are awarded if, after a reasonable number of attempts have been undertaken under paragraph d of subdivision two of this section to conform the vehicle to the express warranties, the defect or nonconformity still exists.

(ii) The following notice shall be provided to municipal consumers and arbitrators and shall be printed in conspicuous ten point bold face type:

NEW EMERGENCY VEHICLE LEMON LAW BILL OF RIGHTS

(1) IN ADDITION TO ANY WARRANTIES OFFERED BY THE MANUFACTURER, YOUR NEW FIRE VEHICLE, IF PURCHASED AND REGISTERED IN NEW YORK STATE, IS WARRANTED AGAINST ALL MATERIAL DEFECTS FOR THE FIRST TWO THOUSAND HOURS OF OPERATION OR TWO YEARS, WHICHEVER COMES FIRST AND YOUR NEW AMBULANCE, IF PURCHASED AND REGISTERED IN NEW YORK STATE, IS WARRANTED AGAINST ALL MATERIAL DEFECTS FOR THE FIRST EIGHTEEN THOUSAND MILES OR TWO YEARS, WHICHEVER COMES FIRST.

(2) YOU MUST REPORT ANY PROBLEMS TO THE MANUFACTURER, ITS AGENT OR AUTHORIZED DEALER.

(3) UPON NOTIFICATION, THE PROBLEM MUST BE CORRECTED FREE OF CHARGE.

(4) IF THE SAME PROBLEM CANNOT BE REPAIRED AFTER FOUR OR MORE ATTEMPTS; OR IF YOUR FIRE VEHICLE OR AMBULANCE IS OUT OF SERVICE TO REPAIR A PROBLEM FOR A TOTAL OF THIRTY DAYS DURING THE WARRANTY PERIOD; OR IF THE MANUFACTURER OR ITS AGENT REFUSES TO REPAIR A SUBSTANTIAL DEFECT OR CONDITION WITHIN TWENTY DAYS OF RECEIPT OF NOTICE SENT BY YOU TO THE MANUFACTURER BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED; THEN YOU MAY BE ENTITLED TO EITHER A COMPARABLE FIRE VEHICLE OR AMBULANCE, OR, A REFUND OF YOUR PURCHASE PRICE PLUS LICENSE AND REGISTRATION FEES.

(5) A MANUFACTURER MAY DENY LIABILITY IF THE PROBLEM IS CAUSED BY ABUSE, NEGLECT, OR UNAUTHORIZED MODIFICATIONS OF THE FIRE VEHICLE OR AMBULANCE.

(6) A MANUFACTURER MAY REFUSE TO EXCHANGE A COMPARABLE FIRE VEHICLE OR AMBULANCE, OR, REFUND YOUR PURCHASE PRICE IF THE PROBLEM DOES NOT SUBSTANTIALLY IMPAIR THE VALUE OF YOUR FIRE VEHICLE OR AMBULANCE.

(7) IF A MANUFACTURER HAS ESTABLISHED AN ARBITRATION PROCEDURE, THE MANUFACTURER MAY REFUSE TO EXCHANGE A COMPARABLE FIRE VEHICLE OR AMBULANCE, OR, REFUND YOUR PURCHASE PRICE UNTIL YOU FIRST RESORT TO THE PROCEDURE.

(8) IF THE MANUFACTURER DOES NOT HAVE AN ARBITRATION PROCEDURE, YOU MAY RESORT TO ANY REMEDY BY LAW AND MAY BE ENTITLED TO YOUR ATTORNEY'S FEES IF YOU PREVAIL.

(9) NO CONTRACT OR AGREEMENT CAN VOID ANY OF THESE RIGHTS.

(10) AS AN ALTERNATIVE TO THE ARBITRATION PROCEDURE MADE AVAILABLE THROUGH THE MANUFACTURER, YOU MAY INSTEAD CHOOSE TO SUBMIT YOUR CLAIM TO AN INDEPENDENT ARBITRATOR, APPROVED BY THE ATTORNEY GENERAL. YOU MAY HAVE TO PAY A FEE FOR SUCH AN ARBITRATION. CONTACT THE ATTORNEY GENERAL'S OFFICE TO FIND OUT HOW TO ARRANGE FOR INDEPENDENT ARBITRATION.

(iii) All informal dispute settlement mechanisms shall maintain the following records:

(A) the number of purchase price refunds and fire vehicle and ambulance replacements requested, the number of each awarded in arbitration, the amount of each award and the number of awards that were complied with in a timely manner;

(B) the number of awards where additional repairs or a warranty extension was the most prominent remedy, the amount or value of each award, and the number of such awards that were complied with in a timely manner;

(C) the number and total dollar amount of awards where some form of reimbursement for expenses or compensation for losses was the most prominent remedy, the amount or value of each award and the number of such awards that were complied with in a timely manner; and

(D) the average number of days from the date of a municipal consumer's initial request to arbitrate until the date of the final arbitrator's decision and the average number of days from the date of the final arbitrator's decision to the date on which performance was satisfactorily carried out.

d. Any action brought pursuant to this section shall be commenced within four years of the date of original delivery of the fire vehicle or ambulance to the municipal consumer.

4. Notice of rights. At the time of purchase of a fire vehicle or ambulance, the manufacturer, its

agent or authorized dealer shall provide to the municipal consumer a notice, printed in not less than eight point bold face type, entitled "New Emergency Vehicle Lemon Law Bill of Rights". The text of such notice shall be identical with the notice required by paragraph c of subdivision three of this section.

5. Void agreements. Any agreement entered into by a municipal consumer for the purchase of a new fire vehicle or ambulance which waives, limits or disclaims the rights set forth in this section shall be void as contrary to public policy. Said rights shall inure to a subsequent transferee of such fire vehicle or ambulance. Any provision of any agreement entered into by a municipal consumer for the purchase of a new fire vehicle or ambulance which includes as an additional cost for such vehicle an expense identified as being for the purpose of affording such municipal consumer their rights under this section, shall be void as contrary to public policy.

6. Preservation of rights. Nothing in this section shall in any way limit the rights or remedies which are otherwise available to a municipal consumer under any other law.

HISTORY:

L 2018, ch 387, § 1, effective January 1, 2019.

Editor's Notes Laws 2018, ch 387, § 3, eff January 1, 2019, provides:

§ 3. This act shall take effect on the first of January next succeeding the date on which it shall have become a law. Effective immediately, the attorney general is authorized and directed to promulgate any and all rules and regulations necessary to implement the provisions of this act on or before its effective date.

ARTICLE 5-G Municipal Cooperation

Section
119-o. Performance of municipal cooperative activities; alternative powers; alternative assignment of responsibilities

HISTORY:

Add, L 1960, ch 102, eff Feb 23, 1960.

§ 119-o. Performance of municipal cooperative activities; alternative powers; alternative assignment of responsibilities

1. In addition to any other general or special powers vested in municipal corporations and districts for the performance of their respective functions, powers or duties on an individual, cooperative, joint or contract basis, municipal corporations and districts shall have power to enter into, amend, cancel and terminate agreements for the performance among themselves or one for the other of their respective functions, powers and duties on a cooperative or contract basis or for the provision of a joint service or a joint water, sewage or drainage project. Notwithstanding the foregoing grant of authority, the temporary investment of moneys by more than one municipal corporation or district pursuant to a municipal cooperation agreement which meets the definition of "cooperative investment agreement" as set forth in article three-A of this chapter shall be in compliance with all of the requirements of that article. Any agreement entered into hereunder shall be approved by each participating municipal corporation or district by a majority vote of the voting strength of its governing body. Where the authority of any municipal corporation or district to perform by itself any function, power and duty or to provide by itself any facility, service, activity, project or undertaking or the financing thereof is, by any other general or special law, subject to a public hearing, a mandatory or permissive referendum, consents of governmental agencies, or other requirements applicable to the making of contracts, then its right to participate in an agreement hereunder shall be similarly conditioned. Municipal corporations and districts shall also have the power to enter into, amend, cancel and terminate agreements with a soil and water conservation district established under the soil and water conservation districts law for the performance among themselves or one for the other of their respective functions, powers and duties on a cooperative or contract basis or for the provision of a joint service or a joint project; provided, however, that the exercise of any powers and duties under this article by a soil and water conservation district shall be subject to the powers, duties and limitations in section nine of the soil and water conservation districts law.

2. An agreement may contain provisions relating to:

a. A method or formula for equitably providing for and allocating revenues and for equitably allocating and financing the capital and operating costs, including payments to reserve funds authorized by law and payments of principal and interest on obligations. Such method or formula shall be established by the participating corporations or districts on a ratio of full valuations of real property, or on the basis of the amount of services rendered or to be rendered, or benefits received or conferred or to be received or conferred, or on the increase in taxable assessed value attributable to the function, facility, service, activity or project which is the subject of an agreement, or on any other equitable basis, including the levying of taxes or assessments to pay such costs on the entire area of the corporation or district, or on a part thereof, which is benefited or which receives the service.

b. The manner of employing, engaging, compensating, transferring or discharging necessary personnel, subject, however, to the provisions of the civil service law where applicable; the making of employer's contributions for retirement, social security, health insurance, workmen's compensation and other similar benefits; the approval of attendances at conventions, conferences and schools for public officials and the approval and payment of travel and other expenses incurred in the performance of official duties; the bonding of designated officers and

employees; the filing of oaths of office and resignations consistent with general laws applicable thereto; provisions that for specific purposes designated officers or employees of the joint service or a joint water, sewage or drainage project shall be deemed those of a specified participating corporation or district; and provisions that personnel assigned to a joint service or a joint water, sewage or drainage project shall possess the same powers, duties, immunities and privileges they would ordinarily possess (1) if they performed their duties only in the corporation or district by which they are employed or (2) if they were employed by the corporation or district in which they are required to perform their duties.

c. Responsibility for the establishment, operation and maintenance of the joint service or joint water, sewage or drainage project and the officers responsible for the immediate supervision and control thereof; the fixing and collecting of charges, rates, rents or fees, where appropriate, and the making and promulgation of necessary rules and regulations and their enforcement by or with the assistance of the participating corporations and districts; the conduct of hearings and the determination of issues raised thereat; the making of necessary inspections; the keeping of records and the making of reports including those required by article three of the general municipal law; and limitations or restrictions on individual participating corporations and districts from providing or undertaking similar or competing facilities, services, activities, projects, or undertakings.

d. Purchasing and making of contracts subject to general laws applicable to municipal corporations and school districts.

e. Acquisition, ownership, custody, operation, maintenance, lease or sale of real or personal property.

f. Acceptance of gifts, grants or bequests.

g. Making of claims for federal or state aid payable to the individual or several participants on account of the joint service or a joint water, sewage or drainage project.

h. Custody by the fiscal officer of one participant of any or all moneys made available for expenditure for the joint service or a joint water, sewage or drainage project and authorization to such fiscal officer to make payments on audit of the auditing official or body of the participating corporation or district of which he is the fiscal officer.

i. Manner of responding for any liabilities that might be incurred in the operation of the joint service or a joint water, sewage or drainage project and insuring against any such liability.

j. Procedure for periodic review of the terms and conditions of the agreement, including those relating to its duration, extension or termination. The duration of an agreement hereinafter entered into, unless otherwise provided by law, may extend up to a maximum term of five years. With respect to agreements, the performance of which involves the issuance by the participants of indebtedness, either joint or several, the term of the agreement may extend up to a maximum period of time equal to the period of probable usefulness established by section 11.00 of the local finance law in connection with the object or purpose for which the indebtedness was issued. Nothing herein contained shall prevent or prohibit either the renewal of agreements upon conclusion of the terms established, or amendments, modifications, clarifications, or cancellations of agreements prior to conclusion of the terms established.

k. Adjudication of disputes or disagreements, the effects of failure of participating corporations or districts to pay their shares of the costs and expenses and the rights of the other participants in such cases.

l. Other matters as are reasonably necessary and proper to effectuate and progress the joint service or a joint water, sewage or drainage project.

m. A municipality may contract with another municipality or with a municipal housing authority of another municipality, for the construction, maintenance, operation or management of a public housing project.

3. Municipal corporations are authorized as provided herein to adopt a mutual sharing plan in order to undertake or receive any joint service on behalf of or by another municipal corporation which has adopted a mutual sharing plan. Services provided pursuant to such mutual sharing plan shall be subject to the alternative assignment of responsibility for certain expenses and liabilities relating to such joint service as provided by this subdivision.

a. A governing body may adopt a mutual sharing plan by local law, resolution or bylaw to confer the benefits of this section upon the employees of such municipal corporation and to be held liable for the costs incurred in the event of participation in a joint service with another municipal corporation which has adopted a mutual sharing plan. Such plan shall describe the officers or employees authorized to undertake or authorize receipt of a joint service pursuant to the mutual sharing plan, any limitations upon joint services which may be rendered or received pursuant to it, and how and when notice of joint services rendered or received pursuant to it shall be provided to the governing body.

b. Upon adoption of a mutual sharing plan, a municipal corporation may undertake or receive a joint service with another municipal corporation which has adopted a mutual sharing plan. The municipal corporation requesting the assistance of another municipal corporation pursuant to a mutual sharing plan shall be liable and responsible to the assisting municipal corporation for any loss of or damage to equipment employed in provision of such joint service or use of supplies upon provision of such joint service. Each municipal corporation shall be liable for salaries and other compensation due to

their own employees for the time the employees are undertaking the joint service pursuant to a mutual sharing plan, however the municipal corporation receiving the service shall reimburse the assisting municipal corporation for actual and necessary expenses upon written notice of such claim.

c. The authority to adopt a mutual sharing plan and to undertake joint services pursuant to it shall be in addition to any other power or authority conferred on municipal corporations pursuant to this article or any other general or special law. A joint service may not be rendered pursuant to a mutual sharing plan where another agreement has been entered into pursuant to this section for such service between the assisting and receiving municipal corporations.

4. Any school district or board of cooperative educational services may join a panel established pursuant to article twelve-I of this chapter, and may further participate in any of the activities of such panel, with any participating county, town, city, village, fire district, fire protection district, or special improvement district participating in such panels. For cooperative agreements which involve functions, services, or provisions permitted by this section, school districts and boards of cooperative educational services shall be permitted to create and execute such agreements, when a part of the activity of such panel, without opinion or approval of the state education department.

HISTORY:

Add, L 1960, ch 102, § 1, eff Feb 23, 1960; amd, L 1961, ch 681, § 3, eff April 18, 1961; L 1971, ch 62, § 1; L 1972, ch 407, § 1, eff May 22, 1972; L 1974, ch 236, § 2, eff April 23, 1974; L 1993, ch 605, § 8, eff Nov 2, 1993; L 1996, ch 620, § 4, eff Sept 4, 1996; L 1998, ch 623, § 7, eff Oct 20, 1998 (see 1998 note below); L 2003, ch 62, § 33 (Part X), eff May 15, 2003; L 2013, ch 150, § 5, eff July 12, 2013; L 2018, ch 55, § 2 (Part EE), effective April 12, 2018.

Editor's Notes: Laws 1998, ch 623, § 8, eff Oct 20, 1998, provides as follows:

§ 8.This act shall take effect immediately; provided, however, that every local government that participates in a municipal cooperation agreement, which is currently in existence and would be within the definition of a cooperative investment agreement under this act, shall have one year from such effective date to execute those amendments necessary to comply with the requirements of sections four, five, and six of this act, and until the expiration of that year, nothing in this act shall affect the validity of any municipal cooperation agreement authorizing cooperative investments; provided further that, for purposes of complying with sections two, three and five of this act, any obligation owned by a local government on May 1, 1998, or held on May 1, 1998 pursuant to a municipal cooperation agreement that would be within the definition of a cooperative investment agreement under this act, that provides for the adjustment of its interest rate on set dates shall be deemed to mature on the date on which the interest rate resets; and provided further that, for purposes of complying with section six of this act, contracts for professional services procured on behalf of an existing municipal cooperation agreement that would be within the definition of a cooperative investment agreement under this act shall be awarded pursuant to a request for proposal process upon the expiration of existing contracts or thirty months from the effective date of this act, whichever occurs earlier, provided that the amendments to subdivision 3 of section 11 of the general municipal law made by section two of this act shall be subject to the expiration and reversion of such subdivision pursuant to section 7 of chapter 548 of the laws of 1997, as amended, when upon such date the provisions of section three of this act shall take effect.

Amendment Notes The 2018 amendment by ch 55, § 2 (Part EE), added 4.

Notes to Decisions

Analysis

1. Generally
2. Dual office holding prohibited
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4. Financial considerations
5. Particular cooperative activities
6. —Ambulance services
7. —Animal control
8. —Assessment of property
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11. —Fire stations
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43. — —Regional organizations

1. Generally

In the context of equitable defenses, entities created pursuant to N.Y. Gen. Mun. Law § 119-o have the same status as the individual municipal entities that create them. Madison-Oneida-Herkimer Consortium v N. Am. Adm'rs, Inc., 196 Misc. 2d 365, 765 N.Y.S.2d 184, 2003 N.Y. Misc. LEXIS 755 (N.Y. Sup. Ct. 2003).

Member of legislative body of municipality entering into municipal cooperation agreement may serve on joint board formed to administer project. 1992 NY Ops Atty Gen 92-48 (Informal), 1992 N.Y. AG LEXIS 50.

Municipalities may use CLS Gen Mun Art 5-G to undertake cooperatively activities which they independently have authority to undertake. 1994 NY Ops Atty Gen 94-4 (Informal), 1994 N.Y. Op. Att'y Gen. No. 94-4, 1994 N.Y. AG LEXIS 3.

Joint village and town planning board, formed to consider land use applications relating to property on border between municipalities, may employ weighted voting designed to give majority of votes to municipality in which property lies. 1998 NY Ops Atty Gen 98-54 (Informal), 1998 N.Y. AG LEXIS 117.

A town ordinance is effective only in the area of the town outside of an incorporated village. 1973 Op St Compt No. 73-102.

A village's participation in a municipal cooperation agreement should be preceded by a resolution authorizing such participation. However, where no resolution is adopted in advance, the village board, on a nunc pro tunc basis, may ratify all actions taken pursuant to the contract. 1979 Op St Compt No. 79-800.

Although the town boards and the county legislature did not adopt a resolution approving an unwritten agreement to defray the expenses of the Town of Lockport to institute legal proceedings, the governing board may ratify all actions taken pursuant to the agreement. 1980 Op St Compt No. 80-342.

A town which, on behalf of a village, applies for community development funds in accordance with the HUD Urban City Consortium program, may agree to pay to the village any shortfall of anticipated funds if such shortfall is caused by town fault in processing the application or, otherwise, if the promise to do so is supported by consideration from the village. 1981 Op St Compt No. 81-648.

When property is intersected by boundary line between village and city, village, in absence of municipal corporation agreement, is obligated to continue to provide services to property, including police, fire, ambulance, and sanitation. 1987 Op St Compt No. 87-68, 1987 N.Y. Comp. LEXIS 110.

Village may enter municipal co-operation agreement with town pursuant to which it agrees to construct and maintain town sidewalk. 1986 Op St Compt No. 86-27, 1986 N.Y. Comp. LEXIS 145.

Town improvement district commissioners, as governing body of district, may, by majority vote, authorize district to enter into municipal cooperation agreement with other districts or municipal corporations. 1995 Op St Compt No. 95-7, 1995 N.Y. Comp. LEXIS 4.

2. Dual office holding prohibited

The two offices of Trustee of the Village of Cold Springs and Assistant County Attorney of Putnam County, when held by the same person at the same time, are not incompatible per se; and whenever the Assistant County Attorney would be required to participate in any legal matter relating to the village, the County should be represented by the County Attorney or another Assistant County Attorney, if any, in such matter. 1974 NY Ops Atty Gen May 3 (Informal), 1974 N.Y. AG LEXIS 78.

A village policeman otherwise qualified may be appointed deputy sheriff and the county sheriff may deputize a police officer otherwise qualified, which would authorize that police officer so deputized to perform all of the acts which deputy sheriffs of the county perform. The complications arising from the dual office holding are so great and the implications so serious and the practical difficulties so severe that we deem it inadvisable for a village police officer to be appointed as a deputy sheriff to perform a deputy sheriff's duties outside of the village in which he is a police officer. 1975 NY Ops Atty Gen Dec 24 (Informal), 1975 N.Y. AG LEXIS 206.

One person may not normally serve simultaneously as the town supervisor and as the town building inspector and zoning officer. An inter-municipal agreement may, however, remove the basis for incompatibility. 1987 NY Ops Atty Gen No. 87-81 (Informal), 1987 N.Y. AG LEXIS 21.

A councilman of one of the towns entering into an agreement for the operation of a joint solid waste disposal facility project may not be employed by such project to perform necessary legal work where the town board of each participating town must approve all contracts relating to the joint project. 1974 Op St Compt No. 74-112.

Where two school districts jointly contract to field athletic teams, there is no legal prohibition against a member of the board of education of one district from being hired as a coach by the other district when the only function performed by the member's district in relation to the joint contract is to provide a proportionate share of funds to cover the cost of the program. 1983 Op St Compt No. 83-12, 1983 N.Y. Comp. LEXIS 469.

3. —Different municipalities

The same person may not, at the same time, hold the two offices of a member of a county board of representatives and assistant corporation counsel of a city located in such county. 1969 NY Ops Atty Gen Nov 19 (Informal), 1969 N.Y. AG LEXIS 101.

Where a town and a village located therein enter into a contractual relationship, the resulting conflict of interest makes it inadvisable for a member of such town board to also hold the additional public office of village trustee of such village. 1970 NY Ops Atty Gen Jan 20 (Informal), 1970 N.Y. AG LEXIS 23.

The same person may not hold simultaneously the two offices of member of a town board and member of a village board of trustees. Certain Attorney General opinions superseded. 1980 NY Ops Atty Gen May 29 (Informal), 1980 N.Y. AG LEXIS 118.

The same person may not hold simultaneously the two public offices of member of a village board of trustees and member of the town board of the town in which the village lies. 1980 NY Ops Atty Gen Feb 28 (Informal), 1980 N.Y. AG LEXIS 145.

The offices of county legislator and village trustee of a village within the county are compatible. 1985 NY Ops Atty Gen 85-3 (Informal), 1985 N.Y. AG LEXIS 94.

There is no authority for an arrangement by three villages for the employment of a single individual as village treasurer. 1960 Op St Compt No. 60-458.

The appointment of the village mayor to the position of recreation project director by a joint youth recreation commission, consisting of members appointed by the village and two towns, is contrary to public policy. 1975 Op St Compt No. 75-421.

4. Financial considerations

A town and a village may agree to plan jointly and may apportion costs on any equitable basis. 1967 Op St Compt No. 67-562.

The official undertaking of a county treasurer covers all moneys received by him as county treasurer including moneys in his custody under terms of a joint cooperative agreement executed by participating counties. 1968 Op St Compt No. 68-193.

The provisions in such agreement which purport to vest in the said managers (a) authority to adjust the value of capital assets unilaterally, (b) further delegate the authority to authorize expenditures and certify payrolls, and (c) dispense with the audit and control of the funds of the project by the comptroller of the town, or the office of the commissioner of finance of the city, or both, are invalid. 1968 Op St Compt No. 68-313.

An Article 5-G agreement may not provide that one of the participating municipalities finance all initial capital expenditures with respect to the joint project, with eventual repayment of same by the other parties to the contract. 1969 Op St Compt No. 69-535.

A school district may invest unneeded moneys on a joint basis with towns or villages where it has the power to invest in such instruments or obligations by itself. 1981 Op St Compt No. 81-418, 1981 N.Y. Comp. LEXIS 467.

A rail committee composed of town supervisors may by its adopted by-laws appoint one of the committee member/town supervisors to act as treasurer for the committee to handle the committee's financial transactions or such transactions may be handled proportionately by each committee member/supervisor for each town. 1981 Op St Compt No. 80-629.

Where a county commissioner of finance is authorized to invest municipal and school district moneys pursuant to a joint investment agreement, the securities pledged as collateral may be designated to the credit of the county if the joint investment agreement contains a provision stating that in the event of a default the county will reimburse the participating municipalities and school districts according to the contribution each has made to the investment. 1982 Op St Compt No. 82-337, 1982 N.Y. Comp. LEXIS 388.

A town may pay moneys collected for the support of a school district public library directly to the library treasurer pursuant to a cooperation agreement between the town and the school district. 1983 Op St Compt No. 83-80, 1983 N.Y. Comp. LEXIS 404.

Municipality may not accept pledge of proportionate interest in single pool of obligations as security for its investments or deposits; however, pursuant to Joint investment agreement, municipalities may make joint investments and have obligations pledged to the credit of a single participant if joint investment

agreement contains provisions stating that participant holding collateral will reimburse other participants if investment should fail. 1985 Op St Compt No. 85-47, 1985 N.Y. Comp. LEXIS 96.

A town and village may jointly invest in a certificate of deposit. Any opinions of this Department to the contrary are superseded. 1980 Op St Compt No. 80-202.

5. Particular cooperative activities

The Genesee/Finger Lakes Regional Planning Council has the authority under Article 12-B of the General Municipal Law to establish a revolving loan fund as part of an economic development program under the Federal Public Works and Economic Development Act. The Council may use both federal and municipal funds to establish the revolving loan fund. 1981 NY Ops Atty Gen 81-59 (Informal), 1981 N.Y. AG LEXIS 96.

Mutual aid must be carried out consistent with provisions of General Municipal Law. 1998 NY Ops Atty Gen 98-53 (Informal), 1998 N.Y. AG LEXIS 61.

A county may set up an investment pool for various towns within the county which would be administered by the county treasurer provided that an agreement is entered into governing such an arrangement, which among other things, preserves the right of each town officer having custody of town money and empowered by the town board to make investments, to refuse, after such pooling, the use of his town's money for any particular investment. 1980 Op St Compt No. 80-327.

Pursuant to municipal operation agreement, 2 villages may combine their water, sewer and street departments under supervision of single superintendent of public works, and all officers and employees performing services for combined department (including superintendent) may be designated as officers and employees of one village. 2002 Op St Compt No. 2002-12, 2002 N.Y. Comp. LEXIS 12.

6. —Ambulance services

While towns may not make a gift to a private person, organization, or corporation for undertaking to furnish first aid and ambulance service within the town, they may either separately or jointly contract for performance of such services. 1964 Op St Compt No. 64-141.

A town may contract with a membership corporation for the corporation's operation of the town's ambulance. While the town could enter into a joint contract with other municipalities for the use of the town's ambulance, such other municipalities should contract themselves with the membership corporation for its services. 1968 Op St Compt No. 68-991.

Although towns may not contribute to a private organization furnishing ambulance services, they may singly or jointly contract with an organization of this type to provide such services. 1978 Op St Compt No. 78-827.

There is no general law authorizing a village to transfer an unneeded ambulance to another village without consideration. However, a local law may be adopted to authorize such a transfer. 1979 Op St Compt No. 79-593.

Although town is authorized under CLS Gen Mun § 122-b to enter into contract with private ambulance company to provide advanced life support services on town-wide basis, fire district has no authority to enter into contract with private ambulance company for such services; consequently, town and fire district located therein may not under CLS Gen Mun Art 5-G enter into municipal cooperation agreement under which advanced life support services would be provided by private ambulance company. 1998 Op St Compt No. 98-21, 1998 N.Y. Comp. LEXIS 21.

7. —Animal control

A town and a village located within said town may jointly erect and maintain a dog pound within said village. Such an agreement must be in writing; such an agreement is not subject to a referendum within either municipality; and, each municipality could secure insurance on its respective interest in said dog pound. 1975 NY Ops Atty Gen Nov 13 (Informal), 1975 N.Y. AG LEXIS 184.

Under the authorization in this article for two municipalities to enter into agreements for joint services or facilities, a village could contract with a town for services of the town dog warden and pay the town for such service, but the dog warden would be subject to control of the town board and the town alone would pay his entire salary. 1960 Op St Compt No. 60-831.

8. —Assessment of property

Although, under § 21 of the Town Law, a town and village may combine their assessing functions by appointing one assessor to do the assessing for both, it is nevertheless advisable to keep separate sets of records. 1962 NY Ops Atty Gen Feb 7 (Informal), 1962 N.Y. AG LEXIS 74.

If a town assessor fails to take and file the constitutional oath of office within the prescribed time, the office becomes vacant. 1977 NY Ops Atty Gen Aug 8 (Informal), 1977 N.Y. AG LEXIS 70.

Where the office of assessor becomes vacant through failure to take and file the oath of office and the assessor continues to perform the functions of the office, the officer is a de facto officer whose acts have the same validity as they would if they had been performed by a de jure officer. 1977 NY Ops Atty Gen Aug 8 (Informal), 1977 N.Y. AG LEXIS 70.

9. —Building construction

Town and village may join in the construction of a town and village hall. 1960 NY Ops Atty Gen Sept 19 (Informal), 1960 N.Y. AG LEXIS 169.

A town and village may contract for the acquisition, construction and operation of a building to be used as a joint village and town hall. 1965 Op St Compt No. 65-221.

There is no authority for a school district and a city to share jointly the expense of constructing guard rails on city streets as a safety feature for the benefit of school children walking on the sidewalk. 1972 Op St Compt No. 72-324.

A town may convey real property owned by it, including a portion of the town hall, to a village for village public library expansion, and the village may agree to construct an addition to the town hall at its expense as consideration therefor. 1982 Op St Compt No. 82-305, 1982 N.Y. Comp. LEXIS 425.

In the context of a municipal cooperation agreement with a town, a village may agree to construct a village office building with excess space which will be leased to the town. 1983 Op St Compt No. 83-104, 1983 N.Y. Comp. LEXIS 380.

A town and a village may jointly engage a building inspector to enforce the zoning ordinances of both municipalities and to issue building permits. 1984 Op St Compt No. 84-50, 1984 N.Y. Comp. LEXIS 88.

10. —Data processing

While municipalities may agree to use data processing equipment on a cooperative, joint or contract basis, there is no authority for a municipality to sublease such equipment to a private entity. 1969 NY Ops Atty Gen Nov 3 (informal), 1969 N.Y. AG LEXIS 94.

A county may agree with any municipality or school district, whether or not within the county, to provide that municipality or district with computer services, but it may not provide such services for a private entity. 1968 Op St Compt No. 68-410.

Discussion of the legality of indemnification agreement between village and county in relation to a contract for data processing services in connection with police work. 1979 Op St Compt No. 79-298, 1979 N.Y. Comp. LEXIS 211.

A county may agree to provide computer software services to another municipality. However, it is not a proper county purpose to provide such services to a private entity. 1981 Op St Compt No. 81-89, 1981 N.Y. Comp. LEXIS 794.

A town may not engage a firm to market town computer programs to other municipalities in exchange for a portion of the proceeds from sales. 1983 Op St Compt No. 83-145, 1983 N.Y. Comp. LEXIS 338.

The City of Ithaca may enter into an agreement with the city school district for machine processing of city records, forms, etc. 1962 Op St Compt No. 62-802.

11. —Fire stations

An agreement by a county to construct a fire training tower for the joint use of both a city and the county upon real property conveyed to it by such city, said real property to revert to the city upon its disuse as such joint facility, is a valuable consideration for such conveyance. Joint provision for such municipal facility

may also be accomplished by a municipal cooperation agreement. 1966 NY Ops Atty Gen July 5 (Informal), 1966 N.Y. AG LEXIS 92.

A county and any or all of the towns in the county may enter into agreements under which the county may establish a communications center which would handle all communications for fire districts, including emergency first aid squads of any fire districts maintaining such squads, calls for general ambulance services, calls for highway department operations and for any other purposes which the county is authorized by law to perform and which towns are also authorized by law to perform. Inclusion of the sheriff's department and town police departments in the operation of a county communications center would not be proper, but the board of supervisors may direct that the communications center be operated by sheriff's department personnel and that its facilities be used by and for that department, but it would be unwise if the facility should be located where the sheriff and his personnel cannot observe, control and, if need be, protect the facility. 1974 Ops Atty Gen Sept 11 (Informal), 1974 N.Y. AG LEXIS 147.

Two or more fire districts jointly or cooperatively may purchase, use, maintain and operate non-mobile apparatus and equipment which each fire district separately could purchase, use, maintain and operate. 1976 NY Ops Atty Gen Feb 13 (Informal), 1976 N.Y. AG LEXIS 66.

A fire district may enter into a municipal cooperation agreement with an adjoining fire district under Article 5-G of the General Municipal Law under which it would provide one of its emergency rescue vehicles not needed for rescue operations in the district to the adjoining district at such times when the latter's rescue vehicle is inoperative. 1983 NY Ops Atty Gen 83-41 (Informal), 1983 N.Y. AG LEXIS 53.

Village and town may contract under CLS Gen Mun Law Art. V-G for provision of fire protection services, and agreement may include terms allocating costs and revenue and may provide for rendering of services over useful life of fire station. 1989 NY Ops Atty Gen 89-26 (Informal), 1989 N.Y. AG LEXIS 28.

A fire district may lease unneeded space in one of its substations to a neighboring fire district for the purpose of vehicle storage, either with or without compensation therefor; two fire districts may enter into an agreement pursuant to Article 5-G of the General Municipal Law to effect such purpose. 1979 Op St Compt No. 79-5.

One fire district may permit other fire districts located within or outside the county in which the district is located to utilize its training facilities and personnel for reasonable consideration. 1983 Op St Compt No. 83-241, 1983 N.Y. Comp. LEXIS 244.

Town may not enter into municipal cooperation agreement under CLS Gen Mun Art 5-G to receive fire protection services on behalf of fire protection district; CLS Town § 184 provides exclusive authority for town to contract for fire protection services on behalf of fire protection district. 1993 Op St Compt No. 93-6.

Town and fire district located therein may, under CLS Gen Mun Art 5-G, enter into municipal cooperation agreement to jointly acquire real property and construct building thereon for use as combined town hall and fire station; both town and fire district must comply with all statutory requirements applicable to individual undertaking and financing of such project. 1996 Op St Compt No. 96-19, 1996 N.Y. Comp. LEXIS 16.

Several fire districts may enter into cooperation agreement to implement advertising campaign for purpose of recruiting volunteer firefighters for fire companies of fire departments of districts; costs of campaign may be apportioned by property valuations, population, or any other equitable method or formula as agreed to by parties to agreement. 1996 Op St Compt No. 96-7, 1996 N.Y. Comp. LEXIS 25.

A county may adopt a local law authorizing an appropriation of county moneys to a village and/or fire district fire department which provides emergency rescue services for the benefit of county residents. A county may appropriate money to a village pursuant to a contract for the furnishing of emergency rescue services to village and county residents. 1982 Op St Compt No. 82-154, 1982 N.Y. Comp. LEXIS 569.

12. —Fuel purchases

A town may not sell gasoline to a fire company or fire district. 1963 Op St Compt No. 63-19.

A village may not sell gasoline to a school district, but the two may contract with each other to make such purchases jointly. 1964 Op St Compt No. 64-993.

Drivers of county vehicles engaged in county business could be permitted to purchase gasoline from other municipalities in the county, such as cities, towns and villages, provided that an appropriate municipal cooperation agreement is entered into. 1980 Op St Compt No. 80-494.

Supplier's sales of natural gas to school and municipal energy cooperative were for ultimate consumption and thus were subject to tax under CLS Tax § 186-a where it could not be concluded that cooperative was purchasing and reselling natural gas. NY Adv Op Comm T & F TSB-A-00-(8)C, 2000 N.Y. Tax LEXIS 146.

13. —Highway construction and repair

Two towns may enter into an agreement under which each town will perform certain functions and services in relation to maintenance and repair of a road under the jurisdiction of the other town. 1979 NY Ops Atty Gen Mar 29 (informal), 1979 N.Y. AG LEXIS 142.

A town may enter into a contract with a village whereby the village's public works department performs highway and public works services for the town. 1991 NY Ops Atty Gen 91-74 (Informal), 1991 N.Y. AG LEXIS 90.

Municipalities may avail themselves of the provisions of this article only when the proposed project or activity is one which either might accomplish separately or is one specifically allowed, and there is no authority for a town and county to participate in a Federal Secondary Highway Project, each contributing to cost of engineering, design and acquisition of right of way for a county road. 1962 Op St Compt No. 62-38.

A town has no authority to repair a road in a city park located outside the city in the town. Such road repairs do not come within the ambit of General Municipal Law, Article 5-A. 1967 Op St Compt No. 67-410.

A town and a village therein may agree to the joint care and maintenance of streets and highways. However, the statutory powers and duties of the town superintendent of highways may not be abrogated or diminished as a result of such an agreement. 1975 Op St Compt No. 75-163.

Counties and towns are authorized to install and maintain traffic signals on county roads outside of villages and cities, and may also agree to jointly purchase, install and maintain such signals. 1987 Op St Compt No. 87-52, 1987 N.Y. Comp. LEXIS 128.

Town may not raise town taxes within village to generate revenues to reimburse town for costs of repairs and maintenance of village streets performed by town under contract with village. 1998 Op St Compt No. 98-10, 1998 N.Y. Comp. LEXIS 10.

School and municipal energy cooperative, entity formed under CLS General Municipal Law Art 5-G, could be subject to tax under CLS Tax § 186. NY Adv Op Comm T & F TSB-A-00-(8)C, 2000 N.Y. Tax LEXIS 146.

14. — —Equipment or personnel

Villages may enter into joint agreement whereby one will use its equipment and personnel for street maintenance and repair work for the other, and the cooperation agreement may provide that employees of the joint project be deemed employees of one municipality for social security as well as other purposes, including obtaining insurance coverage to protect against liability. 1964 Op St Compt No. 64-434.

A town and village may jointly purchase a street sweeper. 1969 Op St Compt No. 69-387.

A town and village may jointly purchase highway equipment under an agreement whereby the village will prepare specifications and advertise for bids and the town will contribute 50% of the purchase price. 1979 Op St Compt No. 79-810.

A county, town and village may enter into a cooperation agreement pursuant to which the county will own and operate a blacktop plant and supply blacktop to the town and village in

exchange for monetary consideration. 1980 Op St Compt No. 80-19.

A city school district of a city with less than 125,000 inhabitants may enter into a municipal cooperation agreement with the city for the providing of public transportation and the joint use of snowplowing equipment. 1980 Op St Compt No. 80-578.

A central school district may enter into an agreement with a town for use of school district equipment for town highway purposes. 1962 Op St Compt No. 62-952.

15. — —Miscellaneous

Where certain lighting is to be installed by the town to light a portion of highway, an agreement may be entered into by the town and a school district for jointly lighting the highway and the exterior of the school building. 1968 Op St Compt No. 68-742.

Town, village and school district may enter into cooperative agreement to construct and maintain sidewalk. 1979 Op St Compt No. 79-310.

16. —Historical commemorations

A town and a village within the town may expend funds jointly to celebrate an historical commemoration. 1969 Op St Compt No. 69-1023.

Control of municipal funds appropriated for an historical commemoration may not be turned over to private citizens for administering the program. 1969 Op St Compt No. 69-1023.

A town and a village may agree to expend funds jointly to pay for the cost of publishing a coloring book commemorating the 300th anniversary of the area. 1978 Op St Compt No. 68-264.

The restoration of a covered bridge, recognized to be of historic value, would be an appropriate subject for a municipal cooperation agreement. 1982 Op St Compt No. 82-143, 1982 N.Y. Comp. LEXIS 583.

17. —Insurance

Municipal cooperative health benefit plan established by several education entities under CLS Gen Mun § 119-o(1) and CLS Ins § 4702(e), which provided health insurance benefits to employees and retirees of participating entities pursuant to municipal cooperation agreement, was "agency" subject to Freedom of Information Law, not private entity akin to private insurance company. Passino v Jefferson-Lewis, 277 A.D.2d 1028, 716 N.Y.S.2d 229, 2000 N.Y. App. Div. LEXIS 11436 (N.Y. App. Div. 4th Dep't 2000), app. denied, 96 N.Y.2d 709, 725 N.Y.S.2d 639, 749 N.E.2d 208, 2001 N.Y. LEXIS 1513 (N.Y. 2001).

In an action alleging breach of a contract regarding the administration of a health insurance plan by a municipal cooperative, a school district's counterclaims 1, 2, 5, and 6, which claimed that a 1993 agreement expired in 1998 pursuant to statute, should have been dismissed because General Municipal Law § 119-o(2)(j), regarding the maximum life of an agreement, only applied to those agreements entered into after September 4, 1996. Tompkins-Seneca-Tioga Schools Health Ins. Coop. v Candor Cent. School Dist., 44 A.D.3d 1236, 844 N.Y.S.2d 470, 2007 N.Y. App. Div. LEXIS 10881 (N.Y. App. Div. 3d Dep't 2007), app. dismissed, 10 N.Y.3d 733, 852 N.Y.S.2d 829, 882 N.E.2d 399, 2008 N.Y. LEXIS 158 (N.Y. 2008).

A city and a city school district may not jointly purchase an insurance policy which will cover both for public liability, automobile liability, and workmen's compensation insurance. 1961 Op St Compt No. 61-545.

Moneys contributed to the plan by one participating municipality may not be used to pay benefits to an employee of another participating municipality. 1978 Op St Compt No. 78-405.

Under Art. 5-G of the General Municipal Law, a BOCES and its component school districts may enter into a cooperative agreement whereby each participant would purchase a student accident insurance policy from the same insurance company, and would institute a joint accident prevention program in the expectation of receiving insurance dividends because of improved loss experience. 1980 Op St Compt No. 80-72, 1980 N.Y. Comp. LEXIS 318.

A private civic association may not be included as an additional named insured in a general liability policy purchased by a village, even if the association bears the additional cost. 1981 Op St Compt No. 81-214, 1981 N.Y. Comp. LEXIS 669.

Moneys in the joint reserve fund may not be used to purchase employers' liability insurance (so-called "Type B" coverage in a workers' compensation insurance policy), but the school districts and a BOCES may enter into a separate municipal cooperation agreement to purchase such coverage. 1983 Op St Compt No. 83-202, 1983 N.Y. Comp. LEXIS 282.

School district may not reimburse former school board member who participates in municipal cooperative health benefit plan for Part B Medicare premiums paid by former school board member (1985 Op St Compt No. 85-3 superseded to extent inconsistent). 1997 Op St Compt No. 97-2, 1997 N.Y. Comp. LEXIS 14.

18. — —Municipal cooperative health benefit plan

While CLS Gen Mun § 119-o(2)(j) may limit term of Municipal Cooperation Agreement to 5 years, Agreement may be renewed for subsequent 5-year periods; however, existence of Municipal Cooperative Health Benefit Plan may be perpetual. NY Ins Dept Gen Counsel, Opinion No. 03-08-08, 2003 NY Insurance GC Opinions LEXIS 235.

Only operative requirement for composition of governing board of Municipal Cooperative Health Benefit Plan is found in CLS Ins Art 47. NY Ins Dept Gen Counsel, Opinion No. 03-08-08, 2003 NY Insurance GC Opinions LEXIS 235.

Superintendent of local school district may serve on Governing Board of Municipal Cooperative Health Benefit Plan (MCHBP); fiscal officer of constituent municipality may also serve as chief fiscal officer of MCHBP. NY Ins Dept Gen Counsel, Opinion No. 03-08-08, 2003 NY Insurance GC Opinions LEXIS 235.

So long as funds of Municipal Cooperative Health Benefit Plan, other than surplus and reserve funds, are segregated on its books of account, they may be maintained in common bank or investment account. NY Ins Dept Gen Counsel, Opinion No. 03-08-08, 2003 NY Insurance GC Opinions LEXIS 235.

19. — —Self-insurance

Cooperative self-insurance plan, formed by several school districts pursuant to CLS Gen Mun Art 5-G, was extension or part of each of participating school districts and subject to their control, and, was thus not independent legal entity amenable to suit by qualified employee who sought entitlement to coverage under plan for cost of heart transplant operation and follow-up prescriptions. Rice v Cayuga-Onondaga Healthcare Plan, 190 A.D.2d 330, 599 N.Y.S.2d 344, 1993 N.Y. App. Div. LEXIS 5683 (N.Y. App. Div. 4th Dep't 1993).

Administrator of cooperative self-insurance plan formed by several school districts pursuant to CLS Gen Mun Art 5-G was entitled to dismissal of action commenced by qualified employee who sought entitlement to coverage under plan for cost of heart transplant operation and follow-up prescriptions since administrator had neither fiscal nor governmental authority to accept plaintiff's claims and to pay his benefits. Rice v Cayuga-Onondaga Healthcare Plan, 190 A.D.2d 330, 599 N.Y.S.2d 344, 1993 N.Y. App. Div. LEXIS 5683 (N.Y. App. Div. 4th Dep't 1993).

Two or more counties, cities, villages, towns or school districts may jointly self-insure health care benefits for their employees, but may not establish a joint reserve fund for that purpose. 1978 Op St Compt No. 78-405.

A joint self-insurance plan would not be subject to regulation by Insurance Dept. under Insurance Law, Art. IX-C. 1978 Op St Compt No. 78-405.

Municipalities participating in joint self-insurance plan may not create a separate governmental entity to administer plan; also, contract with private independent contractor, such as an existing health insurance carrier, to administer plan probably would be both unworkable and illegal. 1978 Op St Compt No. 405; 1978 Op St Compt No. 406.

A county and town(s) within the county may enter into a group self-insurance plan, and contract with a private firm to administer the plan, but claims may not be settled and paid by the private firm out of a joint municipal self-insurance fund without first being audited and approved and checks disbursed by the proper municipal officials. This opinion supersedes in part Opns St

Comp, 1978, 1982 N.Y. Comp. LEXIS 528. 1982 Op St Compt No. 82-197, 1982 N.Y. Comp. LEXIS 528.

Two or more school districts may elect to become individual self-insurers of workers' compensation benefits. In order to finance payment of benefits, such districts may enter into a municipal cooperation agreement to establish a joint reserve fund to finance the payment of benefits. A BOCES may not participate in the joint reserve fund. 1983 Op St Compt No. 83-202, 1983 N.Y. Comp. LEXIS 282.

Claims based on employers' liability to a third-party defendant (so-called "Type B" coverage in a workers' compensation insurance policy) may not be paid from moneys in a county self-insurance fund, but participating municipalities may enter into a separate municipal cooperation agreement under General Municipal Law, § 119-o to purchase such coverage. 1983 Op St Compt No. 83-109, 1983 N.Y. Comp. LEXIS 373.

Two or more municipalities may contract jointly with a private firm for administrative services on a liability and casualty self-insurance plan, but individual reserve funds established under GML § 6-n, may not be pooled into a single joint reserve fund. 1985 Op St Compt No. 85-67, 1985 N.Y. Comp. LEXIS 77.

20. —Land acquisition and use

Village may not use proceeds of sale of bonds to defray part of cost of a project more expensive than that for which the bonds were authorized. Village and town may jointly acquire land. 1966 Op St Compt No. 66-683.

A town and a village within that town may establish a joint planning board and may grant to that board the power to approve subdivision plats. 1969 Op St Compt No. 69-16.

A village may contract with the town of which it is a part, for the enforcement of the village use ordinance by the town's enforcement personnel and, by agreement, share the cost of such personnel's compensation. 1973 Op St Compt No. 73-102.

It would appear that a school district may agree to waive or release restrictive covenants it placed in a deed to a city, in exchange for the city agreeing to indemnify the school district and school board members for liability arising out of such waiver or release. 1979 Op St Compt No. 79-414.

A village may use village funds to hire special counsel to defend the village in an action involving claims against village property. The village may, in cooperation with other municipalities, agree to hire a single law firm to present a joint defense against such claims where the interests of all the municipalities are identical. But the village may not pay for the legal services rendered to private litigants although the same law firm could represent both the village and private individuals if they are co-defendants. 1981 Op St Compt No. 80-789.

A town and a village within the town may not, pursuant to an Article 5-G cooperation agreement, extend the territorial application and effect of a town zoning ordinance or local law into the village. The town and village, however, may separately enact the same substantive zoning regulations. 1984 St Compt No. 84-50, 1984 N.Y. Comp. LEXIS 88.

21. —Landfills or garbage disposal

Article 78 proceeding seeking to annul solid waste disposal contract awarded by solid waste management board formed under CLS Gen Mun § 119-o was properly dismissed as time barred insofar as it asserted "causes of action" based exclusively on CLS Gen Mun § 120-w where those "causes of action" were subject to abbreviated 60-day limitations period contained in § 120-w. American Ref-Fuel Co.of Niagara, L.P. v Northeast Southtowns Solid Waste Mgmt. Bd., 275 A.D.2d 891, 713 N.Y.S.2d 792, 2000 N.Y. App. Div. LEXIS 9497 (N.Y. App. Div. 4th Dep't 2000).

Article 78 proceeding seeking to annul solid waste disposal contract awarded by solid waste management board formed under CLS Gen Mun § 119-o was timely insofar as it asserted "causes of action" that could be construed as alleging that board was not properly constituted under § 119-o where those "causes of action" were not subject to abbreviated 60-day limitations period contained in CLS Gen Mun § 120-w, and petition was filed within 4-month period applicable to Article 78 proceedings generally under CLS CPLR § 217(1). American Ref-Fuel Co.of Niagara, L.P. v Northeast Southtowns Solid Waste Mgmt. Bd., 275 A.D.2d 891, 713 N.Y.S.2d 792, 2000 N.Y. App. Div. LEXIS 9497 (N.Y. App. Div. 4th Dep't 2000).

General Municipal Law §§ 119-n, 119-o and 120-w permit a city and town to enter into a cooperative agreement to provide garbage pickup service. 1979 NY Ops Atty Gen Sept 18 (Informal), 1979 N.Y. AG LEXIS 38.

The provisions in a joint agreement between a town refuse and garbage district and an adjoining city to operate a joint incinerator, which designate the town supervisor and city manager as managers of the project and delegate to the managers the administrative functions in the day to day operation and maintenance of the project and personnel on a predetermined budget are valid. 1968 Op St Compt No. 68-313.

There is no statutory authority for a village and a private firm to jointly contract with a third party for waste removal. A village may not enact a local law authorizing such a joint contract. 1981 Op St Compt No. 81-215, 1981 N.Y. Comp. LEXIS 663.

A municipal cooperation agreement whereby one municipality provides garbage collection services to another municipality is not subject to competitive bidding. 1981 Op St Compt No. 81-104, 1981 N.Y. Comp. LEXIS 783.

Where a village finances its refuse collection service through general taxation all properties within the village are entitled to the service, including those properties which are exempt from real property taxation. The village is not required to provide more service to a school district than to other similarly situated properties, but the village may enter a municipal cooperation agreement with the school district to provide additional service to the district for a fee. 1983 Op St Compt No. 83-201, 1983 N.Y. Comp. LEXIS 283.

Villages may provide for refuse collection services on co-operative basis either by jointly acquiring equipment and hiring personnel or by one village acting as "lead agency" and contracting to provide services to others. 1988 Op St Compt No. 88-12, 1988 N.Y. Comp. LEXIS 12.

A town board, on behalf of a refuse and garbage district, may contract with villages located within the town, but excluded from the district, for the collection of village refuse; the town board's resolution authorizing the contract would not be subject to referendum. 1991 Op St Compt No. 91-14, 1991 N.Y. Comp. LEXIS 12.

22. — —Landfill site

A town in the County of Schenectady would not have the power to enact an ordinance prohibiting the County of Schenectady to create a county landfill in such town on county-owned lands either under Section 226-b of the County Law or as a joint venture with another municipal corporation pursuant to Section 119, subdivision m, n and o contained in Article 5-G of the General Municipal Law. 1974 NY Ops Atty Gen Jan 18 (Informal), 1974 N.Y. AG LEXIS 30.

A town and a village may jointly purchase a parcel of land to be used as a combined village and town dump. 1962 Op St Compt No. 62-225.

A town may contract with a village to accept dual financial responsibility for a dump which belongs to the village. 1968 Op St Compt No. 68-576.

Several towns and a village may agree to provide landfill for school district land which is to be developed into athletic fields, in exchange for reasonable use of such fields and conveyance of other athletic fields if unneeded for school purposes. 1978 Op St Compt No. 78-420.

A town may enter into a contract for the use of another town's landfill and compacting apparatus for an amount based on the per ton cost of disposal. 1979 Op St Compt No. 79-295.

Pursuant to agreement with six towns and one village within the county, a county may condemn and operate a landfill site with all costs paid by the towns and village. 1979 Op St Compt No. 79-895.

23. — —Landfill closures

City was entitled to summary judgment dismissing action brought by town seeking share of expense of closing landfill where there was no evidence of legally enforceable agreement to extend

earlier expired contracts for joint use of landfill or of agreement or resolution duly adopted by city to share closure expense. Oneonta v City of Oneonta, 191 A.D.2d 891, 594 N.Y.S.2d 838, 1993 N.Y. App. Div. LEXIS 2371 (N.Y. App. Div. 3d Dep't 1993).

City was not equitably estopped from refusing to share in landfill closure costs, even though it concededly paid 80 percent of landfill costs which were billed by town on pay-as-you-go basis during 10 years following expiration of parties' last contract, since (1) no formal act by city committed it to future participation in landfill, (2) there was nothing to suggest that city, by its continued landfill use, created informal duty to continue payments beyond time it ceased use of landfill, and (3) it was town alone that operated landfill, negotiated and entered into lease and operations agreements, and agreed to consent order of closure with Department of Environmental Conservation. Oneonta v City of Oneonta, 191 A.D.2d 891, 594 N.Y.S.2d 838, 1993 N.Y. App. Div. LEXIS 2371 (N.Y. App. Div. 3d Dep't 1993).

24. —Parks and recreation project

A village and town, agreeing pursuant to this section that each will operate a separate recreation program, may provide in such agreement that each program shall be distinct charge. 1962 NY Ops Atty Gen Oct 29 (Informal), 1962 N.Y. AG LEXIS 273.

A town and a village may enter into a municipal corporation agreement to establish and maintain a public park in such village. 1965 NY Ops Atty Gen Sept 7 (Informal), 1965 N.Y. AG LEXIS 131.

A town may enter into an agreement with a county for the joint development of a recreational park owned by the county. Such an agreement would be subject to a permissive referendum. 1966 Op St Compt No. 66-662.

A school district, because it lacks the power to acquire real property for, or to operate, a recreation project alone, cannot agree to do so with other entities pursuant to Article 5-G. 1968 Op St Compt No. 68-802.

A county, as the appointing authority of a member of the Adirondack Park Local Government Review Board, may join together with the other participating counties to appropriate and expend moneys for operating expenses incurred by the Board. 1974 Op St Compt No. 74-615.

The appointment of the village mayor to the position of recreation project director by a joint youth recreation commission, consisting of members appointed by the village and two towns, is contrary to public policy. 1975 Op St Compt No. 75-421.

A town may contribute to the cost of constructing a building in a village park pursuant to an Article 5-G agreement so long as the town first authorizes itself to establish and equip public parks. 1978 Op St Compt No. 78-259.

Pursuant to this section, a town, without consideration, could agree to permit another municipality to operate its ski area. 1980 Op St Compt No. 80-732, 1980 N.Y. Comp. LEXIS 217.

A town may contract with a school district so that town equipment, operated by town personnel, will be used to install recreation devices on school district property. 1980 Op St Compt No. 80-396.

A town may not enter into an agreement with a private college to install lights on an athletic field owned by the college in exchange for use of the field at certain times. 1981 Op St Compt No. 81-390, 1981 N.Y. Comp. LEXIS 496.

A town, either alone or jointly with a village, may establish a "tree trust" to accept gifts of money to be used for planting and maintaining trees on public property. 1981 Op St Compt No. 80-768.

It would appear that a school district may charge a town or village recreation commission a reasonable rental in excess of the district's tangible out-of-pocket expenses for use of a school district swimming pool. 1981 Op St Compt No. 81-46, 1981 N.Y. Comp. LEXIS 845.

County may enter into agreement with other municipalities to share expenses involved in prosecution of action against Adirondack park agency to challenge constitutionality of land use plan implemented by agency if it is determined that such expenditure is properly in county's interest. 1987 Op St Compt No. 87-83, 1987 N.Y. Comp. LEXIS 132.

25. —Police protection

Because a village had the power under N.Y. Gen. Mun. Law § 119-o to withdraw from a joint protection contract, its decision to do so and to establish its own police department was not arbitrary and capricious or contrary to law. Old Brookville Policeman's Benevolent Assn., Inc. v Incorporated Vil. of Muttontown, 942 N.Y.S.2d 323, 35 Misc. 3d 730, 2012 N.Y. Misc. LEXIS 1296 (N.Y. Sup. Ct. 2012).

Sheriff may not charge to a town the cost of operating road patrol services in the town. An agreement for this under the Municipal Cooperation Statute is not authorized. Towns and villages may form joint police departments under certain conditions. 1974 NY Ops Atty Gen Aug 23 (Informal), 1974 N.Y. AG LEXIS 136.

A town without a police force may contract with a county for police service in addition to that normally provided where the town has a known need for the additional service. 1981 NY Ops Atty Gen 81-89 (Informal), 1981 N.Y. AG LEXIS 63.

A charter county by charter law may limit the sheriff's regular road-patrol service to those municipalities without police forces that contract for the service. Both charter and non-charter counties may decline to appropriate county funds for regular road-patrol service except to the extent that municipalities contract for the service and provide the county with funds necessary to cover the cost of the service. 1981 NY Ops Atty Gen 81-62 (Informal), 1981 N.Y. AG LEXIS 94.

The Port Washington Police District may enter into a municipal cooperation agreement to perform police services for a village located outside the district unless the village, in accordance with the Nassau County Charter, has transferred the police function to the Nassau County Police Department. 1983 NY Ops Atty Gen 83-8 (Informal), 1983 N.Y. AG LEXIS 92.

CLS Gen Mun Art 5-G, not CLS Mun H R § 10, authorizes consolidation of police services of 2 towns in contiguous counties. 2006 NY Ops Atty Gen 2006-11 (Informal), 2006 N.Y. Op. (Inf.) Att'y Gen. 11, 2006 N.Y. AG LEXIS 50.

Discussion of entitlement of village policemen to cash payments for accumulated leave time (sick, personal and vacation) following the abolition of the village police department and the transfer of the policemen to the town police department pursuant to a municipal cooperation agreement. 1978 Op St Compt No. 78-942.

A town constabulary does not constitute a police force or police department. Therefore, outside service cannot be provided pursuant to General Municipal Law, § 209-m. Under an Article 5-G agreement, the constables of one town may provide services within the geographical limits of another town. 1979 Op St Compt No. 79-50.

A town police department may not provide extra police services to private persons or organizations on a contract basis. 1974 NY Ops Atty Gen June 14 (Informal), 1974 N.Y. AG LEXIS 90.

A village which does not have its own police department may not contract with a neighboring village for ordinary police protection since, in that situation, the town within which the village is located is already obligated to provide such police protection to the village. 1979 Op St Compt No. 79-415, 1979 N.Y. Comp. LEXIS 183.

26. — —County and village

A county may contract with a village which lies partly outside the county to provide additional police protection by the sheriff. Such a contract would not have to include the adjoining county as a party. Such police protection is limited to the test enunciated in Opn Nos. 71-651, 76-731 and 78-603 but is not subject to the requirement that such police protection be "specialized". To the extent that those opinions are inconsistent with the views expressed in this opinion, they are superseded. 1980 Op St Compt No. 80-284, 1980 N.Y. Comp. LEXIS 260.

A county may enter a contract to provide a village or town with additional police services which are far more intensive than that usually and normally supplied by the sheriff and involving a considerably greater county outlay in money, manpower, and equipment. 1980 Op St Compt No. 80-611.

27. — —Town and village

Consolidated board of police commissioners of village and town had jurisdiction to discipline petitioner, a police officer, based on

occurrences prior to the formation of the board. Thompson v Lent, 53 A.D.2d 721, 383 N.Y.S.2d 929, 1976 N.Y. App. Div. LEXIS 13491 (N.Y. App. Div. 3d Dep't 1976).

A village police force may patrol an area of a town located outside the village in accordance with a municipal cooperation agreement between the town and the village. 1982 NY Ops Atty Gen 82-25 (Informal), 1982 N.Y. Op. Att'y Gen. No. 82-25, 1982 N.Y. AG LEXIS 83.

A town and village situated within it may enter into a contract pursuant to this article whereby the village will provide police protection for a portion of the town outside the village. 1963 Op St Compt No. 63-237.

Discussion concerning the abolition of a village police department and the transfer of the village policemen to the town police department. 1978 Op St Compt No. 78-351.

A joint town and village police department may be established in accordance with section 121-a or pursuant to a municipal cooperation agreement under section 119-o. 1983 Op St Compt No. 83-239, 1983 N.Y. Comp. LEXIS 247.

28. — —Two villages

Two villages may enter into a municipal cooperation agreement whereby they assist one another in the provision of law enforcement. 1992 NY Ops Atty Gen 92-17 (Informal), 1992 N.Y. AG LEXIS 18.

A village may contract with an adjacent village for police service. 1978 Op St Compt No. 78-727.

Two non-contiguous villages may enter into municipal cooperation agreement under CLS Gen Mun Art 5-G before provision of police protection as joint service. 2000 Op St Compt No. 2000-24, 2000 N.Y. Comp. LEXIS 28.

29. — —Communications equipment

A county and any or all of the towns in the county may enter into agreements under which the county may establish a communications center which would handle all communications for fire districts, including emergency first aid squads of any fire districts maintaining such squads, calls for general ambulance services, calls for highway department operations and for any other purposes which the county is authorized by law to perform and which towns are also authorized by law to perform. Inclusion of the sheriff's department and town police departments in the operation of a county communications center would not be proper, but the board of supervisors may direct that the communications center be operated by sheriff's department personnel and that its facilities be used by and for that department, but it would be unwise if the facility should be located where the sheriff and his personnel cannot observe, control and, if need be, protect the facility. 1974 Ops Atty Gen Sept 11 (Informal), 1974 N.Y. AG LEXIS 147.

The County of Orleans may enter into a contract with a village, whereby the county sheriff would provide a police telephone dispatch service to the police department of the village, in return for which the county would be compensated. 1978 NY Ops Atty Gen July 5 (Informal), 1978 N.Y. AG LEXIS 323.

A county cannot pay any portion of the expense of a State Police satellite station established by agreement between the State Police and five out of sixteen towns within the county, unless the county determines that the station will be beneficial to all of the towns. 1981 Op St Compt No. 81-92, 1981 N.Y. Comp. LEXIS 797.

A village may contract with a county for access to the computerized telecommunications system for police information maintained by the sheriff and may agree to indemnify the county for any damages sustained by reason of negligence of village personnel in the use of the system. 1979 Op St Compt No. 79-11.

30. — —Procedural considerations

Through municipal corporation agreement under Article 5-G of CLS Gen Mun, town may enforce petit offenses for traffic violations on city road located within 100 yards of town, and town police officers' territorial jurisdiction necessary for undertaking of co-operation agreement is extended under CLS CPL § 119-n[c]. 1988 NY Ops Atty Gen 88-39 (Informal), 1988 N.Y. AG LEXIS 41.

An agreement establishing a joint police department under Article 5-G of the General Municipal Law is not subject to voter approval. Such an agreement may establish a board of police commissioners to supervise and control the department. Discussion of apportionment of costs for the operation of such a joint department. 1978 Op St Compt No. 78-613.

A town and village forming a joint police department must proceed under section 121-a of the General Municipal Law if voter approval of the matter is desired. 1978 Op St Compt No. 78-696.

A town in Suffolk County may not agree to exempt property in a village from the assessment for operation and maintenance of the town police department if the village does not maintain a police department as prescribed in Town Law, § 150(1). However, a town and two villages may enter into an Article 5-G agreement under which village A will provide police protection to village B in exchange for the town paying to village A an amount equal to the amount derived from the assessment on the property in village B for operation and maintenance of the town police department. 1979 Op St Compt No. 79-415, 1979 N.Y. Comp. LEXIS 183.

31. —Sand and gravel purchases

A county may enter into agreements with towns, pursuant to the provisions of Article 5-G of the General Municipal Law, for the processing of gravel in the county's processing plant. The consideration for such an agreement could be a fixed charge per yard of processed gravel based on the hourly rental rate, the cost of the operators' salary, and expense of supplies for running the machinery. 1960 Op St Compt No. 60-407.

A county may not sell sand and gravel to a town, but a county and town or towns may jointly own or operate a sand and gravel pit for their respective purposes, or sell, transfer, lease or exchange the real property containing such sand and gravel between themselves. 1968 Op St Compt No. 68-994.

A town may contract with a village, or with a school district, but not with a voluntary non-profit hospital, for the joint purchase of sand and salt. 1971 Op St Compt No. 71-977.

32. —School programs

Two towns may enter into a municipal cooperation agreement to provide school crossing guards. Also, the two towns may appoint a single school crossing guard to act at an unguarded railroad grade crossing of a town highway which is divided longitudinally by the boundary line of the two towns. Under these circumstances, the school crossing guard would not be performing duties outside the municipality making the appointment. 1975 NY Ops Atty Gen Dec 5 (Informal), 1975 N.Y. AG LEXIS 197.

An agreement between school districts to employ jointly may provide that the employee be hired by one school district and half of the compensation be paid to it by the other. 1967 Op St Compt No. 67-793.

A school district, because it lacks the power to acquire real property for, or to operate, a recreation project alone, cannot agree to do so with other entities pursuant to Article 5-G. 1968 Op St Compt No. 68-802.

Several towns and a village may agree to provide landfill for school district land which is to be developed into athletic fields, in exchange for reasonable use of such fields and conveyance of other athletic fields if unneeded for school purposes. 1978 Op St Compt No. 78-420.

A city school district of a city with less than 125,000 inhabitants may enter into a municipal cooperation agreement with the city for the providing of public transportation and the joint use of snowplowing equipment. 1980 Op St Compt No. 80-578.

Several school districts and a BOCES may jointly self-insure health care benefits for their employees, but may not establish a joint reserve fund for that purpose. Furthermore, moneys pooled for a group self-insurance plan would be subject to statutory fiscal requirements in the Education Law relating to custody, investment, and disbursement of funds. 1981 Op St Compt No. 80-487.

It would appear that a school district may charge a town or village recreation commission a reasonable rental in excess of the district's tangible out-of-pocket expenses for use of a school district swimming pool. 1981 Op St Compt No. 81-46, 1981 N.Y. Comp. LEXIS 845.

Where two school districts jointly contract to field athletic teams, there is no legal prohibition against a member of the board of education of one district from being hired as a coach by the

other district when the only function performed by the member's district in relation to the joint contract is to provide a proportionate share of funds to cover the cost of the program. 1982 Op St Compt No. 82-348, 1982 N.Y. Comp. LEXIS 377.

Not-for-profit corporation, wholly owned by municipal cooperative formed by public school districts under CLS Gen Mun § 119-o, could properly be issued insurance broker's license to act as insurance broker for group accident and health insurance policies under cooperative's employee benefits programs, which insurance covered school district employees, retirees, and families, so long as corporation was competent and otherwise qualified to hold such license under CLS Ins § 2104; further, it would not constitute improper rebate of premium under CLS Ins § 4224 for insurer to pay, and corporation to receive, commissions on group accident and health insurance policies that covered school district employees, retirees, and families. NY Ins Dept Gen Counsel Opinion No. 01-10-22, 2001 NY Insurance GC Opinions LEXIS 13.

33. — —Joint purchases

Where a number of school districts join together in advertising for bids for purchase of school buses and the invitations to bid provide for prices on six options or alternates for extra equipment which might be exercised by each district, with each district reserving the right to accept any bid or reject all bids, the districts have the power to select such options as they see fit and the low bid is determined by tabulating the base bid and bids on options selected as submitted by each bidder. Gallagher GMC Sales Corp. v Central School Dist., 43 Misc. 2d 360, 251 N.Y.S.2d 119, 1964 N.Y. Misc. LEXIS 1643 (N.Y. Sup. Ct. 1964).

Several school districts may make joint purchases for items such as milk, bread, and ice cream. 1962 Op St Compt No. 62-23.

34. — —Projects involving police

The only county police departments or police districts in the state are in counties which by charter have established a police department or police district. The boards of supervisors in other counties have no authority to appoint school crossing guards. A sheriff is an independent elected official and may assign a deputy to perform school crossing guard duty but the deputy, when performing this activity, is acting in his capacity as deputy sheriff and not as a school crossing guard. When appropriate, the deputy sheriff may direct a school bus to cross railroad tracks without first coming to a stop. Two towns may enter into a municipal cooperation agreement to provide the service. Also, the two towns may appoint a single school crossing guard to act at an unguarded railroad grade crossing of a town highway which is divided longitudinally by the boundary line of the two towns. Under these circumstances, the school crossing guard would not be performing duties outside the municipality making the appointment. 1975 NY Ops Atty Gen Dec 5 (Informal), 1975 N.Y. AG LEXIS 197.

A city police officer may be assigned to teach a course of instruction on law enforcement in a public school during his regular tour of duty. 1973 Ops St Compt No. 73-767.

A city may contract with a school district composed of five towns plus the city to provide police protection to a school building located in one of the towns just on the outskirts of the city, but it would seem that the town should also be a party to the contract. 1978 Op St Compt No. 78-57.

Under a recent court decision, it would seem that Nassau County may contract with the North Bellmore School District of the Nassau County Auxiliary Police. However, the matter is not free from doubt. To the extent that prior opinions are inconsistent with this opinion, they are superseded. 1980 Op St Compt No. 80-432, 1980 N.Y. Comp. LEXIS 258.

35. —Sewer projects

A county may act in the area of county water, sewer, drainage and refuse districts and watershed protection districts only by the creation of such districts in accordance with statutory provisions regarding same. Thus it may not adopt local laws or ordinances in those areas for the purpose of appointing a County Water Inspector to enforce town ordinances on those subjects. 1973 NY Ops Atty Gen Mar 19 (Informal), 1973 N.Y. AG LEXIS 48.

Village, by local law, may establish penalty provisions for transgressions of its sewer use regulations and may establish that continuing infractions constitute separate offense; village, by contract with town, may provide for enforcement of village's sewer use regulations against users in town outside of village. 1988 NY Ops Atty Gen No. 88-30 (Informal), 1988 N.Y. AG LEXIS 31.

After a sewer district shall have been established, the town board may contract with any person or corporation, municipal or otherwise, for supplying the inhabitants of such district with sanitary sewer facilities and contract for joint disposal of sewage with apportionment of costs between contracting parties. In addition to any other general or special powers vested in municipal corporations and districts, they have the power to enter into agreements among themselves to do jointly all that which they are empowered to do severally. 1968 Op St Compt No. 68-943.

Three villages may enter into an agreement for the purchase of a sewer cleaning machine as a joint venture. 1970 Op St Compt No. 70-10.

A town and a village may, in connection with a joint sewer project, issue bonds for which they are jointly liable, but the governing body of the joint project cannot issue bonds. 1974 Op St Compt No. 74-936.

Where it is proposed that a sewer district be established pursuant to the provisions of Article 12-A of the Town Law, a town board may not contract on behalf of such proposed district until after the time for petitioning for a referendum on the resolution establishing the district has elapsed or, if the referendum is held, until the resolution is approved and, if it is proposed that the town issue obligations to finance the cost of establishing such district, until after approval of the State Comptroller has also been obtained. 1978 Op St Compt No. 78-699, 1978 N.Y. Comp. LEXIS 49.

A joint sewer agency established under a municipal cooperation agreement may be given the power to enter into contracts for the joint sewer project. The agreement may also designate who shall execute such contracts. 1980 Op St Compt No. 80-694.

A county sewer or water district may assist in providing sewer or water improvements by entering into a joint sewer or water project agreement with another municipality or district pursuant to section 119-o(1) of the General Municipal Law. 1984 Op St Compt No. 84-63, 1984 N.Y. Comp. LEXIS 75.

Village may not contract with town sewer district for conveyance, treatment, and disposal of sewage at village treatment plant, if use by district will, during life of contract, render plant inadequate for needs of village or its inhabitants. 1989 Op St Compt No. 89-25, 1989 N.Y. Comp. LEXIS 28.

36. —Traffic control

While a town and a village may establish a "joint public vehicle commission", they may not confer upon such commission the power to jointly regulate and control the operation of taxicabs within the area. 1967 Op St Compt No. 67-660.

A school district may not purchase traffic-control devices for installation on a State highway nor may it agree to do so on a cooperative basis with a town. 1983 Op St Compt No. 83-48, 1983 N.Y. Comp. LEXIS 437.

A town may share with a village in the costs of a traffic control signal at an intersection of a county road with a village street which becomes a county road at the border line of the village and town. 1968 Op St Compt No. 68-367.

37. —Water projects

A county may act in the area of county water, sewer, drainage and refuse districts and watershed protection districts only by the creation of such districts in accordance with statutory provisions regarding same. Thus it may not adopt local laws or ordinances in those areas for the purpose of appointing a County Water Inspector to enforce town ordinances on those subjects. 1973 NY Ops Atty Gen Mar 19 (Informal), 1973 N.Y. AG LEXIS 48.

Subject to the required approval of the Commissioner of Health under section 5-1.4 of the State Sanitary Code a board of health for a county or part-county health district by adoption of an appropriate regulation may require the fluoridation of public water supplies within a county or part-county health district. 1975 NY Ops Atty Gen Feb 28, 1975 N.Y. AG LEXIS 27.

Town Law, § 64(11-a), Village Law, § 4-412(3)(1) and General Municipal Law, § 119-o are permissive statutes and impose no duty on the town or village to make repairs on privately owned streams within such municipalities. 1979 NY Ops Atty Gen Sept 14 (Informal), 1979 N.Y. AG LEXIS 45.

38. —Youth programs

Local legislators and municipal attorney may serve as members of joint youth commission. 1993 NY Ops Atty Gen 93-50 (Informal), 1993 N.Y. AG LEXIS 67.

A town which has the minimum population required for the establishment of a youth bureau may not contract with two villages for the joint establishment and operation of a youth bureau when the villages do not also have the required population. 1969 Op St Compt No. 69-1052.

A town may not advance moneys to villages with which it has established a joint narcotics guidance council, for maintenance thereof, in anticipation of subsequent reimbursement therefor. 1971 Op St Compt No.969.

School districts may, individually or jointly with other municipal corporations, contract with certain private organizations for services in connection with youth programs pursuant to the provisions of General Municipal Law, § 99-h and Executive Law, § 422. 1981 Op St Compt No. 81-777.

39. —Illustrative cases

Labor Department employees serving as members of private industry councils receive defense and indemnification for these activities under CLS Pub O § 17; municipalities in service delivery area may elect to confer benefits of CLS Pub O § 18 upon members of incorporated private industry councils serving their areas. 1987 NY Ops Atty Gen 87-F10, 1987 N.Y. AG LEXIS 2.

A town and a school district may jointly purchase a single voting machine under a municipal cooperation agreement. 1967 Op St Compt No. 67-970.

If a conservation advisory council or conservation board is to perform services for several villages within a town as well as the part of the town outside the villages, a joint agreement among the various municipalities should be entered into. 1978 Op St Compt No. 78-464.

A town and city may enter into a cooperation agreement for the joint operation of a prepared meals program for senior citizens. Such agreement may include provision for joint purchases of food and/or joint contracting for preparation of meals, subject to competitive bidding requirements. 1981 Op St Compt No. 80-764.

A village may use village funds to hire special counsel to defend the village in an action involving claims against village property. The village may, in cooperation with other municipalities, agree to hire a single law firm to present a joint defense against such claims where the interests of all the municipalities are identical. But the village may not pay for the legal services rendered to private litigants although the same law firm could represent both the village and private individuals if they are co-defendants. 1981 Op St Compt No. 80-789.

A county may not own, maintain and operate a cascade vehicle which is to be used at the scene of a fire to replenish the oxygen supply in the firefighter's oxygen tanks since the county would then be actively engaging in fire prevention and protection. 1982 Op St Compt No. 82-280, 1982 N.Y. Comp. LEXIS 453.

County may enter into agreement with other municipalities to share expenses involved in prosecution of action against Adirondack Park Agency to challenge constitutionality of land-use plan implemented by agency if it is determined that such expenditure is properly in county's interests. 1987 Op St Compt No. 87-83, 1987 N.Y. Comp. LEXIS 132.

Municipal housing authority may provide its employees with health and dental benefits, but such authority may not do so jointly with municipality for which authority was established. 1988 Ops St Compt No. 88-64, 1989 N.Y. Comp. LEXIS 1.

Town human rights commission must be established and operated on town wide basis; town and one or more villages may establish joint town wide-village human rights commission. 1994 Op St Compt No. 94-10, 1994 N.Y. Comp. LEXIS 8.

A city laboratory may not serve areas of the county outside of the city except pursuant to contract with the county governing board. 1975 Op St Compt No. 75-1222.

School districts and municipalities are authorized to enter into municipal cooperation agreement to cooperatively undertake investment of monies, with allocation of all income, losses, and expenses relating to cooperative investment of funds among participants on pro rata basis, with fiscal officer of one of participants being given custody of funds for purpose of having that officer invest them on behalf of others; any agreement entered into for joint investment of funds must restrict investments to those investments or obligations in which all participants are permitted to invest, and each participant should be aware of restrictions on investment of particular funds; cooperative agreement can not entail delegation of any statutory duties or responsibilities to investment advisor or administrator, as fiscal officer is responsible for all investment decisions, and investment functions may not be assigned to board of advisors but may be delegated only to officer having custody of monies; each participant must evaluate its individual investment needs to insure that cooperative investments made under agreement are consistent with sound investment policies and procedures. 1988 Op St Compt No. 88-46, 1988 N.Y. Comp. LEXIS 42.

40. — —County and city

A county and city may enter into a municipal cooperation agreement whereby an Assistant District Attorney may perform the prosecuting duties now performed by a city prosecutor, provided the city amends its charter by local law discontinuing the office and duties of the city prosecutor. 1964 NY Ops Atty Gen March 16 (Informal), 1964 N.Y. AG LEXIS 76.

In the absence of some degree of joint control, a county and a city could not agree to the joint operation and maintenance of a city owned airport. 1969 Op St Compt No. 69-57.

A contract between a county and a city under which the city will promote the advantages of the county through promotion and operation of the city's civic center is legal. 1979 Op St Compt No. 79-256.

41. — —County and town

Subject to the approval of the Commissioner of Education, a town may enter into an agreement with a county for the joint storage of public records in a facility located outside the town. 1984 NY Ops Atty Gen 84-F13, 1984 N.Y. AG LEXIS 23.

A county may maintain a joint payroll bank account and prepare payroll checks for seven towns within the county. 1979 Op St Compt No. 79-244, 1979 N.Y. Comp. LEXIS 174.

42. — —Two towns

Where a cemetery association owns a cemetery which is located partly in one town and partly in the adjoining town, either town, or both towns jointly, may accept a conveyance of such property. 1971 Op St Compt No. 71-663.

Pursuant to an Art. 5-G cooperative agreement, a town may contribute funds to a senior citizens program conducted by a village located in two towns, even though the meeting center is in that part of the village located in the other town. 1979 Op St Compt No. 79-713.

A cooperative agreement entered into by several towns may provide that members of a joint planning board shall be compensated at the rate of $10 per meeting attended in addition to reimbursement of actual and necessary expenses. 1980 Op St Compt No. 80-521.

43. — —Regional organizations

Article V-G of the General Municipal Law authorizes the establishment of regional jails through municipal cooperation agreements. 1991 N.Y. Op. Att'y Gen. No. 91-F, 1991 N.Y. AG LEXIS 141.

City could enter into inter-municipal agreements with other similar cities for reciprocal recognition of certifications of employing or master plumbers provided that examinations and qualifications had been standardized to meet needs of participating cities; city could not waive requirement that employing or master plumber be certified even where applicant wished to undertake no more than one job in city in any calendar year. 1996 NY Ops Atty Gen 96-44 (Informal), 1996 N.Y. Op. Att'y Gen. No. 96-44, 1996 N.Y. AG LEXIS 63.

Absence of provision in either CLS Soil & W Con Dist § 10 or CLS Gen Mun § 119-o, which would empower soil and water conservation districts to enter into agreements to cooperate with other entities for provision of health services to employees, is indication that such district may not participate in Municipal Cooperative Health Benefit Plan (Muni-Coop). NY Ins Dept Gen Counsel Opinion No. 04-03-28, 2004 NY Insurance GC Opinions LEXIS 80.

Agency Opinions

Analysis

1. Particular cooperative activities
2. —Insurance

1. Particular cooperative activities

2. —Insurance

Board of Trustees of School Employees Healthcare Plan, which provides health insurance to more than 9,000 persons and conducts public business pursuant to CLS Gen Mun Art 5-G and CLS Ins Art 47, is public body required to comply with Open Meetings Law because it performs governmental function for group of public corporations, in that participants of plan are public educational organizations and board is responsible for management and administration of plan. Comm on Open Gov't OML-AO-2766.

Meetings of Board of Directors of Rochester Area School Health Plan (RASHP) Consortium fall within coverage of Open Meetings Law, since board carries out its duties in accordance with authority conferred by CLS Gen Mun Art 5-G and CLS Ins Art 47. Comm on Open Gov't OML-AO-4183.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Powers of municipalities, CLS ECL § 27-0507.

Allocation of moneys, CLS ECL §§ 51-0901 et seq.

Conflicts of interest of municipal officers and employees, §§ 800 ets seq.

Jurisprudences:

25 NY Jur 2d Counties, Towns, and Municipal Corporations § 315.

26 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 942–944.

27 NY Jur 2d Counties, Towns, and Municipal Corporations § 1271 .

ARTICLE 6 Public Health and Safety

Section

122-b. General ambulance services
122-c. Transport of police work dogs injured in the line of duty

HISTORY:

Add, L 1909, ch 29, eff Feb 17, 1909.

§ 122-b. General ambulance services

1. Any county, city, town or village, acting individually or jointly, may provide an emergency medical service, a general ambulance service or a combination of such services for the purpose of providing prehospital emergency medical treatment or transporting sick or injured persons found within the boundaries of the municipality or the municipalities acting jointly to a hospital, clinic, sanatorium or other place for treatment of such illness or injury, and for that purpose may:

(a) Acquire by gift or purchase one or more motor vehicles suitable for such purpose and supply and equip the same with such materials and facilities as it may consider necessary for prehospital emergency treatment, and may operate, maintain, repair and replace such vehicles and such supplies and equipment;

(b) Contract with one or more individuals, municipal corporations, associations, or other organizations, having sufficient trained and experienced personnel, for operation, maintenance and repair of such emergency medical service or ambulance vehicles and for the furnishing of prehospital emergency treatment;

(c) Contract with one or more individuals, municipal corporations, associations, or other organizations to supply, staff and equip emergency medical service or ambulance vehicles suitable for such purposes and operate such vehicles for the furnishing of prehospital emergency treatment;

(d) Employ any combination of the methods authorized in paragraph (a), (b) or (c);

(e) No contract shall be entered into pursuant to the provisions of this section for the services of an emergency rescue and first aid squad of a fire department or fire company which is subject to the provisions of section two hundred nine-b of the general municipal law;

(f) Consider prehospital emergency treatment as that care provided by certified emergency medical technicians or certified advanced emergency medical technicians certified pursuant to the provisions of article thirty of the public health law.

1-a. As used in this section:

(a) "Emergency medical technician" means an individual who meets the minimum requirements established by regulations pursuant to section three thousand two of the public health law and who is responsible for administration or supervision of initial emergency medical assistance and handling and transportation of sick, disabled or injured persons.

(b) "Advanced emergency medical technician" means an emergency medical technician who has satisfactorily completed an advanced course of training approved by the state council under regulations pursuant to section three thousand two of the public health law.

2. Such municipality shall formulate rules and regulations relating to the use of such apparatus and equipment in the provision of emergency medical services or ambulance service and may fix a schedule of fees or charges to be paid by persons requesting the use of such facilities. Such municipalities may provide for the collection of such fees and charges or may formulate rules and regulations for the collection thereof by the individuals, municipal corporations, associations, or other organizations furnishing service under contract as provided in paragraph (c) of subdivision one of this section.

3. Such municipality may purchase or provide insurance indemnifying against liability for the negligent operation of such emergency medical service or ambulance service and the negligent use of other equipment or supplies incidental to the furnishing of such emergency medical service or ambulance service.

4. Such municipality may provide for the administration and coordination of such emergency medical service or ambulance service including but not limited to operation of an emergency medical communications system and medical control.

5. Fire districts, which, as part of a fire protection contract, may provide general ambulance and/or emergency ambulance service pursuant to section two hundred nine-b of this chapter and article thirty of the public health law where a town or village has not designated itself as the primary provider of or otherwise contracted for an emergency ambulance, a general ambulance service, or a combination of such service acting individually or jointly, may contract with one or more individuals, municipal corporations, or other organizations having sufficient trained personnel, vehicles or combination of personnel and vehicles suitable to provide prehospital emergency treatment, for the furnishing of supplemental personnel, equipment or service to cover instances or periods of time when its service may not be readily available.

HISTORY:

Add, L 1954, ch 598, § 1, eff April 9, 1954; amd, L 1956, ch 292, § 1; L 1957, ch 849, § 2, eff May 1, 1957; L 1977, ch 811, § 1, eff Aug 5, 1977; L 1980, ch 303, § 1, eff June 19, 1980; L 2003, ch 378, § 2, eff Aug 19, 2003; L 2011, ch 471, § 1, eff Aug 17, 2011.

Notes to Decisions

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1. Generally

Discussion of various problems relating to community ambulance services. 1978 Op St Compt No. 78-446, 1978 N.Y. Comp. LEXIS 105.

(1) A city may not enter into a multi-year contract for the provision of ambulance service to its residents where such contract would bind future governing boards. (2) A private ambulance company may contract to provide ambulance service to more than one governmental entity. (3) An ambulance corps which receives an annual fee from a municipality for rendering ambulance service may also collect fees, set by the municipality, for use of the service. 1982 Op St Compt No. 82-182, 1982 N.Y. Comp. LEXIS 539.

A municipality may provide ambulance services. 1954 NY Ops Atty Gen July 20 (Informal), 1954 N.Y. AG LEXIS 328.

Any county, city, town or village may provide a general ambulance service. A municipality under the terms of the contract, may agree to pay to the Hospital the actual net cost of operating the service. 1955 Op St Compt No. 55-7130.

County may not adopt local law which would establish emergency medical services coordinator and advisory board to coordinate the activities of volunteer ambulance corps within county since legislature has evinced intent to pre-empt area of regulation of emergency medical services. 1987 Op St Compt No. 87-55, 1987 N.Y. Comp. LEXIS 125.

2. Constitutionality

Subdivision 1 of this section authorizes a municipality to contract with a private association or individual for ambulance service, and such a contract, where it provides for furnishing ambulance service to the inhabitants, does not violate art. VIII § 1 of the Constitution as subsidization of a private organization; but ambulance service cannot be denied to those covered by provisions of the contract, fees to be collected are within the control of the municipality, and such fees as are collected are to be offset against the total contract price. 1960 Op St Compt No. 60-934.

3. Authority to provide services; police departments

Members of a town police department are not authorized to furnish a general ambulance service outside the town. 1957 Op St Compt No.. 57-13.

The Riverhead Town Police Department may not provide ambulance service to portions of the Towns of Southampton and Brookhaven. 1980 Op St Compt No. 80-313.

An ambulance service providing emergency medical services may leave the service area specified in its statement of registration in order to deliver patients to a hospital. 1982 Op St Compt No. 82-185, 1982 N.Y. Comp. LEXIS 536.

Absent a contrary charter provision, a city may provide general ambulance service through its police department, paid fire department or volunteer fire department emergency rescue and first aid squad. A fee may be charged for general ambulance service provided by the police and paid fire departments. 1983 Op St Compt No. 83-238, 1983 N.Y. Comp. LEXIS 246.

4. —Towns

A town may own an ambulance and hire personnel from another municipal corporation to provide general ambulance service. 1964 NY Ops Atty Gen Oct 28 (Informal), 1964 N.Y. AG LEXIS 149.

Town ambulance districts which have been created by special legislation similar to laws of 1978 chapter 695 have implied authority to contract for ambulance service or to own and operate their own equipment. However, such ambulance districts are not authorized to contract to provide ambulance service outside their boundaries, and a town has no authority to contract to provide ambulance service for only part of town, unless contract is made on behalf of a fire protection, fire alarm or ambulance district. 1986 Op St Compt No. 86-13, 1986 N.Y. Comp. LEXIS 164.

A town which is operating an ambulance service for residents pursuant to this section is not authorized, in the absence of contract, to furnish ambulance service to residents of an adjoining municipality. 1961 Op St Compt No. 61-123.

5. —Villages

A village may provide for general ambulance service either under General Municipal Law § 122-b(1) or Village Law § 4-412(3[9]). 1977 NY Ops Atty Gen Feb 3 (Informal), 1977 N.Y. AG LEXIS 239.

6. —Miscellaneous entities

A fire district may not create, operate or fund an ambulance service and rescue squad to perform the functions authorized by General Municipal Law § 122-b but may do so in the case of a rescue and first aid squad that performs the limited service described in General Municipal Law § 209-b. The squad so created must be run as part of, not independently of, the fire department. 1980 NY Ops Atty Gen Dec 31 (Informal), 1980 N.Y. AG LEXIS 2.

The Joint Pawling Fire District may organize an emergency rescue and first aid squad by following the procedures set forth in General Municipal Law § 209-b subd 1, par a and thereafter, by following the procedure set forth in subdivision b, may provide general ambulance service. 1980 NY Ops Atty Gen June 26 (Informal), 1980 N.Y. AG LEXIS 94.

County may not adopt local law which would establish emergency medical services coordinator and advisory board to coordinate activities of volunteer ambulance corps within county, since legislature has evinced intent to preempt in area of regulation of emergency medical services. 1987 Op St Compt No. 87-55, 1987 N.Y. Comp. LEXIS 125.

7. Authority to contract for services; fire departments or districts

Pursuant to the 1954 amendment to the General Municipal Law, a town may provide general ambulance service or contract with a fire corporation for the furnishing of such service. 1954 Op St Compt No. 54-7057.

A town may not enter into a contract with a fire district for ambulance service. 1956 Op St Compt No. 56-7846.

The board of fire commissioners may not contract for the furnishing of general ambulance service within the fire district. 1957 Op St Compt No. 57-696.

Competitive bidding is not required for ambulance contract. City welfare department may not contract for general ambulance service for city, but may contract for ambulance service as part of medical care for persons under department's care. 1966 Op St Compt No. 66-292.

A town may contract with a fire district to provide general ambulance service only under a fire protection contract entered into under General Municipal Law, Section 209-b. 1967 Op St Compt No. 67-76.

A town may not contract for general ambulance service to the area of the town outside a village. A town may, as part of a fire protection contract, obtain the services of the fire district's emergency relief squad for that area of the town outside a village covered by a fire protection contract. 1967 Op St Compt No. 67-349.

A town may enter into a contract for general ambulance service to be rendered by a volunteer first aid and rescue squad. If the squad is part of a fire department, the contract may be made pursuant to General Municipal Law, section 209-b, and if the first aid squad is not part of a fire department the contract may be made pursuant to section 122-b. 1967 Op St Compt No. 67-448.

A town may contract with a fire district for general ambulance services to be provided to areas within a town fire protection district. Such services may be provided only as part of an overall fire protection contract. A contract for general ambulance services with a volunteer fire company where unrelated to fire protection contract is unauthorized. 1969 Op St Compt No. 69-4.

Legislative histories of both CLS Gen Mun §§ 122-b and 209-b demonstrate that § 209-b is not intended to be sole grant of authority for paid city fire department to render emergency ambulance services. 2005 Op St Compt No. 2005-8, 2005 N.Y. Comp. LEXIS 2.

Fire district with fire department emergency and rescue squad comprised mainly of volunteer firefighters may authorize squad to contract with "ambulance services," as defined in CLS Pub Health § 3000, to provide services when squad is unavailable, and may contract with appropriate private ambulance company for pre-hospital treatment if (1) fire district, as part of fire protection contract, provides general and/or emergency ambulance service under CLS Gen Mun § 209-b and CLS Pub Health Art 30, (2) town or village has not designated itself as primary provider of, or otherwise contracted for, emergency ambulance, general ambulance or combination of such services acting individually or jointly, and (3) contracted-for services are limited to furnishing of supplemental personnel, equipment or service to cover instances or periods of time when fire district's service may not be readily available; however, no fee may be imposed on person served for services provided under contract with private ambulance company. 2010 Op St Compt No. 2010-4, 2010 N.Y. Comp. LEXIS 2.

A town may purchase an ambulance to provide general ambulance service to its inhabitants and may contract with a duly organized volunteer fire department for operation, maintenance and repair thereof. 1955 Op St Compt No. 55-7645.

A fire district may not contract with a private not-for-profit ambulance squad to provide ambulance services to its area. 1979 Op St Compt No. 79-611.

8. —Hospitals

The city may contract with a local hospital to have such hospital furnish emergency ambulance service in said city and may charge fees for the use thereof and, further, may provide methods for the collection of said fees. 1960 Op St Compt No. 60-411.

A city could appropriate funds and convey an ambulance to a private hospital pursuant to a contract for general ambulance service with such hospital. 1978 Op St Compt No. 78-759.

9. —Membership corporations

A town may contract with a membership corporation for the corporation's operation of the town's ambulance. While the town could enter into a joint contract with the municipalities for the use of the town's ambulance, such other municipalities should contract themselves with the membership corporation for its services. 1968 Op St Compt No. 68-991.

10. —Towns

A town and a volunteer ambulance corporation may enter into a contract by which the corporation will provide its services exclusively for the geographic area of the town unless this violates a provision in the ambulance service's certificate of incorporation. 1979 NY Ops Atty Gen Dec 17 (Informal), 1979 N.Y. AG LEXIS 12.

Pursuant to the 1954 amendment to the General Municipal Law, a town may provide general ambulance service or contract with a fire corporation for the furnishing of such service. 1954 Op St Compt No. 54-7057.

A town may contract with a fire district to provide general ambulance service only under a fire protection contract entered into under General Municipal Law, Section 209-b. 1967 Op St Compt No. 67-76.

A town may contract with a membership corporation for the corporation's operation of the town's ambulance. While the town could enter into a joint contract with the municipalities for the use of the town's ambulance, such other municipalities should contract themselves with the membership corporation for its services. 1968 Op St Compt No. 68-991.

General ambulance service contract must be on a town-wide basis and be a town-wide charge. 1979 Op St Compt No. 79-435.

A town may purchase an ambulance to provide general ambulance service to its inhabitants and may contract with a duly organized volunteer fire department for operation, maintenance and repair thereof. 1955 Op St Compt No. 55-7645.

A town may establish a general ambulance service and contract to render such service to other municipalities. The town may contract with a group of private individuals to operate the town's ambulance service. 1968 Op St Compt No. 68-928.

11. — —Fees

Towns may fix fees for ambulance services, to be paid by persons requesting use of such services. 2005 Op St Compt No. 2005-1, 2005 N.Y. Comp. LEXIS 9.

Although town, by rules and regulations, may provide for collection of fees for ambulance services by entity providing services under contract, fees collected belong to town and may not be retained by service provider for its own use. 2005 Op St Compt No. 2005-1, 2005 N.Y. Comp. LEXIS 9.

12. — —Prohibited contracts

A town may not enter into a contract with a fire district for ambulance service. 1956 Op St Compt No. 56-7846.

A town may not contract for general ambulance service to the area of the town outside a village. A town may, as part of a fire protection contract, obtain the services of the fire district's emergency relief squad for that area of the town outside a village covered by a fire protection contract. 1967 Op St Compt No. 67-349.

A town may not contract to provide ambulance service to an adjoining fire district. 1968 Op St Compt No. 68-652.

A town may not contract for an emergency medical service, a general ambulance service or a combination of such services in an area constituting less than the entire town, except in connection with a fire protection contract. 1980 Op St Compt No. 80-85.

13. — —Illustrative cases

Under the above section, the Town of New Windsor is not authorized to purchase an ambulance and lend it for a nominal consideration to a voluntary ambulance corps which serves the town but the town may make such purchase and contract with the voluntary ambulance corps to operate and maintain such vehicle and furnish emergency treatment if such corps is otherwise qualified to enter into such contract and perform such services. 1970 NY Ops Atty Gen Sept 24 (Informal), 1970 N.Y. AG LEXIS 115.

A town of less than 20,000 may contract for invalid coach service. 1967 Op St Compt No. 67-591.

A town may contract with a fire district for general ambulance services to be provided to areas within a town fire protection district. Such services may be provided only as part of an overall fire protection contract. A contract for general ambulance services with a volunteer fire company where unrelated to fire protection contract is unauthorized. 1969 Op St Compt No.. 69-4.

In addition to ambulance service provided as part of a fire protection contract entered into by a town on behalf of fire protection districts, a town may contract for the provision of an additional level or type of ambulance service in the town and may specify the circumstances under which that service is to be available, provided that the service is available on a town-wide basis. The town or, if so provided in the town's rules and regulations, the ambulance service provider, may send to the user's insurance carrier a copy of the bill for the amount of the fee or charge imposed by the town for ambulance services rendered to the insured and may collect the fee or charge directly from the insurance carrier. 1991 Op St Compt No. 91-20, 1991 N.Y. Comp. LEXIS 18.

Although town is authorized under CLS Gen Mun § 122-b to enter into contract with private ambulance company to provide advanced life support services on town-wide basis, fire district has no authority to enter into contract with private ambulance company for such services; consequently, town and fire district located therein may not under CLS Gen Mun Art 5-G enter into municipal cooperation agreement under which advanced life support services would be provided by private ambulance company. 1998 Op St Compt No. 98-21, 1998 N.Y. Comp. LEXIS 21.

14. —Villages

Village wholly contained within town may contract for ambulance service when town also contracts for such service. 1955 Op St Compt No. 55-7100.

A village may not make a gift of funds to a non-profit ambulance corporation. The village may contract for general ambulance service under General Municipal Law, section 122-b. 1967 Op St Compt No. 67-450.

A village need not own an ambulance in order to enter into a general ambulance service contract with a private non-profit corporation under General Municipal Law, § 122-b. 1978 Op St Compt No. 78-1061, 1978 N.Y. Comp. LEXIS 19.

A village may not make a gift of funds to a volunteer ambulance service but may contract with it for the rendering of ambulance service to the village. This assumes, of course, that the volunteer ambulance service possess a valid voluntary ambulance service statement of registration. 1979 Op St Compt No. 79-492.

A village is not required to enter into a contract for the receipt of ambulance services through competitive bidding. 1984 Op St Compt No. 84-59, 1984 N.Y. Comp. LEXIS 79.

Village may contract for services of emergency first-aid rescue squad of village fire department only in context of contract for fire protection; if contract for fire protection provides for furnishing of ambulance services, it should describe services to be provided on specified terms; village may not purchase liability insurance for vehicles owned by village fire department. 1987 Op St Compt No. 87-76, 1987 N.Y. Comp. LEXIS 99.

Village auxiliary police are not authorized to provide routine emergency medical services on an on-going basis. A village may contract to provide emergency medical services to other municipalities. 1978 Op St Compt No. 78-755.

15. —Volunteer organizations

A town and a volunteer ambulance corporation may enter into a contract by which the corporation will provide its services exclusively for the geographic area of the town unless this violates a provision in the ambulance service's certificate of incorporation. 1979 NY Ops Atty Gen Dec 17 (Informal), 1979 N.Y. AG LEXIS 12.

The City of Norwich may contract for the furnishing of a general ambulance service with a duly organized volunteer emergency squad. 1955 Op St Compt No. 55-7321.

A town may enter into a contract for general ambulance service to be rendered by a volunteer first aid and rescue squad. If the squad is part of a fire department, the contract may be made pursuant to General Municipal Law, section 209-b, and if the first aid squad is not part of a fire department the contract may be made pursuant to section 122-b. 1967 Op St Compt No. 67-448.

A town and not the contracting membership corporation must fix and collect charges imposed pursuant to a schedule of charges for general ambulance services provided in the town. Such charges are the property of the town. The town may contract with and compensate a membership corporation for services rendered in operating and maintaining such general ambulance service. 1969 Op St Compt No. 69-145.

Although towns may not contribute to a private organization furnishing ambulance services, they may singly or jointly contract with an organization of this type to provide such services. 1978 Op St Compt No. 78-827.

A county may use federal revenue sharing funds and/or county tax moneys to contract with one or more volunteer ambulance corps for rendering emergency medical service, general ambulance service or a combination of such services within the county. The extent to which such a contract must specify the particular services which are going to be provided is a matter for determination by the contracting parties; however, as a matter of contract law, the terms of the contract must be definite and certain in order for the contract to be enforceable. 1980 Op St Compt No. 80-15, 1980 N.Y. Comp. LEXIS 356.

A town may contract for general ambulance service with a private not-for profit corporation by expending either federal revenue sharing funds or ordinary tax revenues; discussion of procedures in forming such a contract. 1980 Op St Compt No. 80-361.

16. —Miscellaneous entities

Competitive bidding is not required for ambulance contract. City welfare department may not contract for general ambulance service for city, but may contract for ambulance service as part of medical care for persons under department's care. 1966 Op St Compt No. 66-292.

17. Contract for communications services

A county and any or all of the towns in the county may enter into agreements under which the county may establish a communications center which would handle all communications for fire districts, including emergency first aid squads of any fire districts maintaining such squads, calls for general ambulance services, calls for highway department operations and for any other purposes which the county is authorized by law to perform and which towns are also authorized by law to perform. Inclusion of the sheriff's department and town police departments in the operation of a county communications center would not be proper, but the board of supervisors may direct that the communications center be operated by sheriff's department personnel and that its facilities be used by and for that department, but it would be unwise if the facility should be located where the sheriff and his personnel cannot observe, control and, if need be, protect the facility. 1974 Ops Atty Gen Sept 11 (Informal), 1974 N.Y. AG LEXIS 147.

The Tioga County Legislature may direct that the Tioga County Sheriff's Department use its personnel and equipment to dispatch calls received in connection with the American Legion Ambulance

Service for emergency ambulance service within Tioga County. 1976 NY Ops Atty Gen Feb 4 (Informal), 1976 N.Y. AG LEXIS 3.

When a county has formally adopted a mutual aid plan for fire and other public emergencies, it may pay for the cost of replacing radios in the various ambulances and emergency vehicles of local volunteer fire departments participating in the mutual aid plan, in order to make a required frequency change in the radio system. 1978 Op St Compt No. 78-343, 1978 N.Y. Comp. LEXIS 82.

18. Consideration

A village may lease its real property to an ambulance corporation as part of the consideration of a contract for general ambulance services for the village residents. 1973 Op St Compt No. 73-746.

It would seem that a village may not lease a village parking facility to a volunteer ambulance corporation as consideration for the corporation's agreement to provide general ambulance service in the absence of a special act of the State Legislature authorizing such lease. 1978 Op St Compt No. 78-1069.

There is no general law authorizing a village to transfer an unneeded ambulance to another village without consideration. However, a local law may be adopted to authorize such a transfer. 1979 Op St Compt No. 79-593.

The amount of compensation a county may pay to a volunteer ambulance corps pursuant to a contract for general and/or emergency ambulance service is limited only by the discretion of the governing board. In determining the amount which it will pay, the governing board may consider such things as the corps' need to replace its vehicles, supplies and/or equipment. 1980 Op St Compt No. 80-702, 1980 N.Y. Comp. LEXIS 231.

19. —Gift as impermissible

Pursuant to the New York State Comptroller, its highest-ranking fiscal officer, the provisions of N.Y. Gen. Mun. Law § 122-b(1)(c) may not be utilized as a means of circumventing the New York State Constitution's prohibition against gifts of municipal money found in N.Y. Const. art. 8, § 1. Section 122-b(1)(c) does allow a municipality to pay an ambulance corps sufficient sums to permit the ambulance corps to purchase corps ambulances and other vehicles. New Windsor Volunteer Ambulance Corps., Inc v Meyers, 442 F.3d 101, 2006 U.S. App. LEXIS 8180 (2d Cir. N.Y. 2006).

A village may not make a gift of funds to a non-profit ambulance corporation. The village may contract for general ambulance service under General Municipal Law, section 122-b. 1967 Op St Compt No. 67-450.

A village may not make a gift of funds to a volunteer ambulance service but may contract with it for the rendering of ambulance service to the village. This assumes, of course, that the volunteer ambulance service possess a valid voluntary ambulance service statement of registration. 1979 Op St Compt No.. 79-492.

Town, by modification of contract, may pay additional amount to ambulance service provider above amount set forth in service contract, but only in exchange for additional consideration to be provided by service provider. 2005 Op St Compt No. 2005-1, 2005 N.Y. Comp. LEXIS 9.

To avoid contravening constitutional gift prohibition, it is incumbent on town to take reasonable steps to collect unpaid ambulance fees. 2005 Op St Compt No. 2005-1, 2005 N.Y. Comp. LEXIS 9.

20. Costs and fees

The cost of providing ambulance service in a town is a general town charge. 1955 Op St Compt No. 55-7619.

Subdivision 1 of this section authorizes a municipality to contract with a private association or individual for ambulance service, and such a contract, where it provides for furnishing ambulance service to the inhabitants, does not violate art. VIII § 1 of the Constitution as subsidization of a private organization; but ambulance service cannot be denied to those covered by provisions of the contract, fees to be collected are within the control of the municipality, and such fees as are collected are to be offset against the total contract price. 1960 Op St Compt No. 60-934.

An ambulance corps which receives an annual fee from a municipality for rendering ambulance service may also collect fees, set by the municipality, for use of the service. 34 Opns St Comp, 1978, p 204, Opns St Comp, 1975, No. 75-49, unreported, 25 Opns St Comp, 1969, p 90 and any other inconsistent opinions are hereby superseded. 1982 Op St Compt No. 82-26, 1982 N.Y. Comp. LEXIS 698.

Town board, which provides emergency medical service, general ambulance service, or combination thereof on town-wide basis or in ambulance district, may fix schedule of municipal fees for charges to be paid by persons requesting use of those services; absent action by town board to fix such schedule of fees for charges for services to be provided on town-wide basis or within ambulance district, persons within town or ambulance district must receive those services without fee or charge. 1998 Op St Compt No. 98-9, 1998 N.Y. Comp. LEXIS 9.

City may not set fees for provision of emergency medical transport services in amount designed to generate revenue in excess of cost of providing such services. 2005 Op St Compt No. 2005-8, 2005 N.Y. Comp. LEXIS 2.

In considering costs that are reasonably related to providing emergency medical transport service, city may consider both direct and indirect costs, as well as current and future capital needs, in connection with provision of such service. 2005 Op St Compt No. 2005-8, 2005 N.Y. Comp. LEXIS 2.

21. —Contract for services

An individual who contracts to render general ambulance service to a town may not retain any fees collected therefor. 1963 Op St Compt No. 63-39.

A town and not the contracting membership corporation must fix and collect charges imposed pursuant to a schedule of charges for general ambulance services provided in the town. Such charges are the property of the town. The town may contract with and compensate a membership corporation for services rendered in operating and maintaining such general ambulance service. 1969 Op St Compt No. 69-145.

An ambulance company which has a contract with a town to provide a general ambulance service to residents of the town, cannot collect fees from residents for use of the service. 1979 Op St Compt No. 78-1033, 1979 N.Y. Comp. LEXIS 258.

As a general rule, there is no contractual obligation on the part of a city to pay the cost of ambulance charges incurred where city firemen or policemen summon ambulances of independent, private companies to the scene of a fire, accident or other emergency. In such an instance, the city would normally not be liable for the negligent acts or omissions of the ambulance company in rendering the services. 1980 Op St Compt No. 80-596.

In addition to ambulance service provided as part of a fire protection contract entered into by a town on behalf of fire protection districts, a town may contract for the provision of an additional level or type of ambulance service in the town and may specify the circumstances under which that service is to be available, provided that the service is available on a town-wide basis. The town or, if so provided in the town's rules and regulations, the ambulance service provider, may send to the user's insurance carrier a copy of the bill for the amount of the fee or charge imposed by the town for ambulance services rendered to the insured and may collect the fee or charge directly from the insurance carrier. 1991 Op St Compt No. 91-20, 1991 N.Y. Comp. LEXIS 18.

Any county, city, town or village may provide a general ambulance service. A municipality under the terms of the contract, may agree to pay to the Hospital the actual net cost of operating the service. 1955 Op St Compt No. 55-7130.

22. —Payment

A town may add the amount of an unpaid ambulance service bill to the benefited town resident's tax bill if the town has enacted a local law allowing it to do so. 1983 Op St Compt No. 83-132, 1983 N.Y. Comp. LEXIS 351.

Dunning letters in connection with collection of ambulance fees may be sent on behalf of town by service provider as part of service provider's collection role. 2005 Op St Compt No. 2005-1, 2005 N.Y. Comp. LEXIS 9.

Reasonable collection efforts by town for ambulance fees may include, as appropriate, sending dunning letters, imposition of lien on real property, and commencement of civil actions; in determining how to proceed, town may take into consideration analysis of costs involved, as well as whether given claim may be uncollectible as practical or legal matter, such as when claim is barred by statute of limitations, or in case of bankruptcy or lack of attachable assets. 2005 Op St Compt No. 2005-1, 2005 N.Y. Comp. LEXIS 9.

23. Insurance

There is no authority for the purchase of workmen's compensation insurance by a municipality for the benefit of members of an independent non-profit community ambulance corps not affiliated with a volunteer fire department. 1961 NY Ops Atty Gen May 19 (Informal), 1961 N.Y. AG LEXIS 90.

The County of Erie may purchase liability insurance for the purpose of protecting emergency medical technicians who are employed by the County against liability for claims arising from their acts while in good faith purporting to perform their duties, but there is no authority for the County of Erie to provide a complete indemnity to ambulance service agencies and their emergency medical technicians who are not employees of the County of Erie. 1977 NY Ops Atty Gen March 21 (Informal), 1977 N.Y. AG LEXIS 142.

Village which furnishes general ambulance service may insure against liability for negligence. Volunteers operating ambulance are covered for benefits under General Municipal Law, Sec. 205 and Workmen's Compensation Law only if they are volunteer firemen and particular call involves fire, accident, public calamity or other emergency. Village may contract to provide insurance coverage for non-firemen members of first aid squad. 1955 Op St Compt No. 55-7665.

24. Illustrative cases

An invalid coach service need not be licensed by the Department of Health. 1967 Op St Compt NO. 67-591.

Members of an emergency rescue and first aid squad of a volunteer fire company are covered by the Volunteer Firemen's Benefit Law when responding to calls for assistance outside of the fire protection district which the company serves pursuant to contract with a town, whether the call is pursuant to a mutual aid plan or otherwise. A town cannot contract with the company to provide ambulance service for the area of the town outside of the fire protection district. 1981 Op St Compt No. 81-112, 1981 N.Y. Comp. LEXIS 771.

County may not adopt local law which would establish emergency medical services coordinator and advisory board to coordinate activities of volunteer ambulance corps within county since Legislature has evinced intent to pre-empt area of regulation of emergency medical services. 1987 Op St Compt No. 87-55, 1987 N.Y. Comp. LEXIS 125.

Town's proposed "emergency medical transport" service falls within authority of CLS Gen Mun § 122-b. 2005 Op St Compt No. 2005-8, 2005 N.Y. Comp. LEXIS 2.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS Town § 176; CLS Veh & Tr § 375.

Jurisprudences:

26 NY Jur 2d Counties, Towns, and Municipal Corporations § 1038.

27 NY Jur 2d Counties, Towns, and Municipal Corporations § 1233.

65A NY Jur 2d Hospitals and Releated Health Care Facilities §§ 188, 189, 191.

Annotations:

Validity and construction of statute authorizing or requiring governmental unit to procure liability insurance covering public officers or employees for liability arising out of performances of public duties. 71 ALR3d 6.

§ 122-c. Transport of police work dogs injured in the line of duty

An emergency medical service paramedic or emergency medical service technician may transport any police work dog, as defined in section 195.06-a of the penal law, injured in the line of duty to a veterinary clinic or similar such facility provided, however, that there are no persons requiring medical attention or transport at such time.

HISTORY:

L 2015, ch 549, § 1, effective December 11, 2015.

ARTICLE 9-A Local Option for Conduct of Games of Chance by Certain Organizations

Section

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195-n. Manufacturers of bell jars; reports and records
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195-p. Transfer restrictions
195-q. Bell jar compliance and enforcement

HISTORY:

Add, L 1976, ch 960, eff Aug 26, 1976.

§ 186. Definitions

As used in this article, the following terms shall have the following meanings:

1. "Municipality" shall mean any city, town or village within this state.

2. "Board" shall mean New York state gaming commission created pursuant to section one hundred two of the racing, pari-mutuel wagering and breeding law.

3. "Games of chance" shall mean and include only the games known as "merchandise wheels", "coin boards", "merchandise boards", "seal cards", "event games", "raffles", and "bell jars" and such other specific games as may be authorized by the board, in which prizes are awarded on the basis of a designated winning number or numbers, color or colors, symbol or symbols determined by chance, but not including games commonly known as "bingo or lotto" which are controlled under article fourteen-H of this chapter and also not including "bookmaking", "policy or numbers games" and "lottery" as defined in section 225.00 of the penal law. No game of chance shall involve wagering of money by one player against another player.

3-a. "Bell jars" shall mean and include those games in which a participant shall draw a card from a jar, vending machine, or other suitable device or container which contains numbers, colors or symbols that are covered and which, when uncovered, may reveal that a prize shall be awarded on the basis of a designated winning number, color or symbol or combination of numbers, colors or symbols. Bell jars shall also include seal cards, coin boards, event games, and merchandise boards.

3-b. "Raffle" shall mean and include those games of chance in which a participant pays money in return for a ticket or other receipt and in which a prize is awarded on the basis of a winning number or numbers, color or colors, or symbol or symbols designated on the ticket or receipt, determined by chance as a result of:

(a) a drawing from among those tickets or receipts previously sold; or

(b) a random event, the results of which correspond with tickets or receipts previously sold.

3-c. "Coin board" and "merchandise board" shall mean a board used in conjunction with bell jar tickets which contains and displays various coins and/or merchandise as prizes. A player having a bell jar ticket with a number matching a pre-designated number reflected on the board for a prize wins that prize.

3-d. "Seal cards" shall mean a board or placard used in conjunction with a deal of the same serial number which contains one or more concealed areas that, when removed or opened, reveal a predesignated winning number, letter, or symbol located on the board or placard. A seal card used in conjunction with an event game shall not be required to contain lines for prospective seal winners to sign their name.

3-e. "Event game" shall mean a bell jar game in which certain winners are determined by the random selection of one or more bingo numbers, the use of a seal card or by another method approved by the board.

4. "Authorized organization" shall mean and include any bona fide religious or charitable organization or bona fide educational, fraternal or service organization or bona fide organization of veterans or volunteer firefighters, which by its charter, certificate of incorporation, constitution, or act of the legislature, shall have among its dominant purposes one or more of the lawful purposes as defined in this article, provided that each shall operate without profit to its members, and provided that each such organization has engaged in serving one or more of the lawful purposes as defined in this article for a period of three years immediately prior to applying for a license under this article.

No organization shall be deemed an authorized organization which is formed primarily for the purpose of conducting games of chance and which does not devote at least seventy-five percent of its activities to other than conducting games of chance. No political party shall be deemed an authorized organization.

5. "Lawful purposes" shall mean one or more of the following causes, deeds or activities:

(a) Those which shall benefit needy or deserving persons indefinite in number by enhancing their opportunity for religious or educational advancement, by relieving them from disease, suffering or distress, or by contributing to their physical wellbeing, by assisting them in establishing themselves in life as worthy and useful citizens, or by increasing their comprehension of and devotion to the principles upon which this nation was founded and enhancing their loyalty to their governments.

(b) Those which shall initiate, perform or foster worthy public works or shall enable or further the erection or maintenance of public structures.

(c) Those that otherwise lessen the burdens borne by government or that are voluntarily undertaken by an authorized organization to augment or supplement services which government would normally render to the people, including, in the case of volunteer firefighters or voluntary emergency medical service activities, the purchase, erection or maintenance of a building for a fire-house or a volunteer ambulance corps building, activities open to the public for the enhancement of membership and the purchase of equipment that can reasonably be expected to increase the efficiency of response to fires, accidents, medical emergencies, public calamities and other emergencies.

d. Those which shall initiate, perform or foster the provisions of services to veterans by encouraging the gathering of such veterans and shall enable or further the erection or maintenance of facilities for use by such veterans which shall be used primarily for charitable or patriotic purposes, or those purposes which shall be authorized by a bona fide organization of veterans, provided however that such proceeds are disbursed pursuant to section one hundred eighty-nine of this article.

6. "Net proceeds" shall mean (a) in relation to the gross receipts from one or more license periods of games of chance, the amount that shall remain after

deducting the reasonable sums necessarily and actually expended for supplies and equipment, prizes, security-personnel, stated rental if any, bookkeeping or accounting services according to a schedule of compensation prescribed by the board, janitorial services and utility supplies if any, license fees, and the cost of bus transportation, if authorized by the clerk or department and (b) in relation to the gross rent received by an authorized games of chance lessor for the use of its premises by a game of chance licensee, the amount that shall remain after deducting the reasonable sums necessarily and actually expended for janitorial services and utility supplies directly attributable thereto if any.

7. "Net lease" shall mean a written agreement between a lessor and lessee under the terms of which the lessee is entitled to the possession, use or occupancy of the whole or part of any premises from any non-commercial or non-profit authorized games of chance lessor for which the lessee pays rent to the lessor and likewise undertakes to pay substantially all of the regularly recurring expenses incident to the operation and maintenance of such leased premises.

8. "Authorized games of chance lessor" shall mean an authorized organization which has been granted a lessor's license pursuant to the provisions of this article or a municipality.

9. "Single type of game" shall mean the games of chance known as merchandise wheels, coin boards, merchandise boards, event games, raffles, and bell jars and each other specific game of chance authorized by the board.

10. "Operation" shall mean the play of a single type of game of chance necessary to determine the outcome or winners each time wagers are made. A single drawing of a winning ticket or other receipt in a raffle shall be deemed one operation.

11. "Single prize" shall mean the sum of money or fair market value of merchandise or coins awarded to a participant by a games of chance licensee in any one operation of a single type of game of chance in excess of his wager.

12. "Series of prizes" shall mean the total amount of single prizes minus the total amount of wagers lost during the successive operations of a single type of game of chance, except that for merchandise wheels and raffles, "series of prizes" shall mean the sum of cash and the fair market value of merchandise awarded as single prizes during the successive operations of any single merchandise wheel or raffle. In the game of raffle, a series of prizes may include a percentage of the sum of cash received from the sale of raffle tickets.

13. "Authorized supplier of games of chance equipment" shall mean any person, firm, partnership, corporation or organization licensed by the board to sell or lease games of chance equipment or paraphernalia which meets the specifications and regulations established by the board. Nothing herein shall prevent an authorized organization from purchasing common articles, such as cards and dice, from normal sources of supply of such articles or from constructing equipment and paraphernalia for games of chance for its own use. However, no such equipment or paraphernalia, constructed or owned by an authorized organization shall be sold or leased to any other authorized organization, without written permission from the board.

14. "One occasion" shall mean the successive operations of any one single type of game of chance which results in the awarding of a series of prizes amounting to five hundred dollars or four hundred dollars during any one license period, in accordance with the provisions of subdivision eight of section one hundred eighty-nine of this article, as the case may be. For purposes of the game of chance known as a merchandise wheel or a raffle, "one occasion" shall mean the successive operations of any one such merchandise wheel or raffle for which the limit on a series of prizes provided by subdivision six of section one hundred eighty-nine of this article shall apply. For purposes of the game of chance known as a bell jar, "one occasion" shall mean the successive operation of any one such bell jar, seal card, event game, coin board, or merchandise board which results in the awarding of a series of prizes amounting to three thousand dollars. For the purposes of the game of chance known as raffle "one occasion" shall mean a calendar year during which successive operations of such game are conducted.

15. "License period" shall mean a period of time not to exceed fourteen consecutive hours and, for purposes of the game of chance known as a bell jar and a raffle, "license period" shall mean a period of time running from January first to December thirty-first of each year.

16. "Clerk" shall mean the clerk of a municipality outside the city of New York.

17. "Officer" shall mean the chief law enforcement officer of a municipality outside the city of New York, or if such municipality exercises the option set forth in subdivision two of section one hundred ninety-four of this article, the chief law enforcement officer of the county.

18. "Department" shall mean the New York City Department of Consumer Affairs.

19. "Premises" shall mean a designated area within a building, hall, tent, or grounds reasonably identified for the conduct of games of chance. Nothing herein shall require such area to be enclosed.

20. "Games of chance currency" shall mean legal tender or a form of scrip or chip authorized by the board, except for games known as "raffles" whereby payment shall mean legal tender, credit or debit card or personal check, any of which may be used at the discretion of the games of chance licensee.

21. "Flare" shall mean a poster description of the bell jar game, which shall include a declaration of the number of winners and amount of prizes in each deal, the number of prizes available in the deal, the number of tickets in each deal which contain the

stated prize; the manufacturer's game form number, and the serial number of the deal which shall be identical to the serial number imprinted on each ticket contained in the deal.

HISTORY:

Add, L 1976, ch 960, § 1, eff Aug 26, 1976; amd, L 1978, ch 574, § 2, eff Aug 23, 1978; L 1981, ch 881, § 1, eff July 31, 1981; L 1988, ch 46, §§ 1, 2, eff Oct 12, 1988; L 1989, ch 684, § 1, eff Jan 18, 1990; L 1991, ch 480, § 1, eff July 19, 1991; L 1994, ch 177, § 1, eff June 14, 1994; L 1994, ch 550, §§ 2–5, eff Jan 22, 1995; L 1995, ch 386, § 1, eff Aug 2, 1995; L 1996, ch 309, § 428, eff Jan 9, 1997; L 1997, ch 190, § 1, eff July 8, 1997; L 1998, ch 252, §§ 1, 2, eff Nov 4, 1998; L 1998, ch 337, §§ 11–16, eff Jan 10, 1999; L 1999, ch 637, § 1, eff Jan 23, 2000; L 2001, ch 383, § 5 (Part B), eff Oct 29, 2001; L 2011, ch 531, § 1, eff Sept 23. 2011; L 2012, ch 60, § 2 (Part A), eff Feb 1, 2013; L 2017, ch 59, § 10 (Part MM), effective July 9, 2017; L 2017, ch 464, § 3, effective June 16, 2018; L 2018, ch 476, § 35, effective December 28, 2018.

Editor's Notes: Laws 2001, ch 383, § 1 (Part B), eff Oct 29, 2001, provides as follows:

Section 1. Legislative intent. The state legislature finds that the state has a significant interest, subject to negotiation, that the provisions of a tribal-state compact contain terms consistent with certain state laws, including, but not limited to, the labor law, the workers' compensation law, and the human rights law which provide for the granting of benefits, rights and privileges which improve the economic quality of life and personal safety of persons who either: (i) will be engaged in the construction, reconstruction, development, rehabilitation, or maintenance of any such facility which will be the site where such gaming activities are to be conducted, or which are related facilities used to facilitate patronage at the gaming facility; or (ii) will be employed, within any such gaming or related facility, either by the Indian tribe or by any person, corporation, firm or entity engaged by the Indian tribe, to operate, administer or manage any such gaming or related facility. The classification of employees hereinbefore referred to shall include, but not necessarily be limited to, employees engaged in: guest entertainment, security, grounds keeping, gaming activities (limited to slot change employees, booth cashiers, carousel attendants and casino food and beverage service employees), reservations, parking and other guest services, the preparation or service of food and beverages; the rendering of housekeeping, maintenance, cleaning, bell and door services; and those engaged in the provision of laundry services for guests at the gaming facility or any related facility which is used to facilitate patronage at the gaming facility. Persons who are not such employees but who are engaged in the construction, reconstruction, development, rehabilitation or maintenance of any such gaming or related facility should also be extended the protections listed above. Moreover, the legislature finds that gaming should be conducted in a manner which adequately protects the environment and the public health and safety, which is a stated requirement for the conduct of class III gaming activities pursuant to the Indian Gaming Regulatory Act.

Laws 2012, ch 60, § 14 (Part A), eff Feb 1, 2013, provides as follows:

§ 14. This act shall take effect February 1, 2013; provided, however that effective immediately, the addition, amendment and/or repeal of any rules or regulations necessary for the implementation of the foregoing provisions of this act on its effective date are authorized and directed to be made and completed on or before such effective date (Amd, L 2012, ch 457, § 7, eff Sept 28, 2012.).

Laws 2012, ch 457, § 7, eff Sept 28, 2012 amended L 2012, ch 60, § 2 (Part A), so as to change the effective date October 1, 2012 to February 1, 2013.

Laws 2017, ch 464, §§ 1, 2, 7, provide:

§ 1. This act shall be known and may be cited as the "charitable gaming act of 2017".

§ 2. The legislature hereby finds that games of chance, specifically games known as "raffles", conducted by bona fide charitable, educational, scientific, health, religious and patriotic organizations provide vital financial support to many worthwhile programs in the communities in which they serve. Furthermore, conforming current statutory language to address recent technological advances will enhance the ability of the public at large to participate and thusly is deemed to be in the public interest.

§ 7. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided, however that the provisions of paragraph (a) of subdivision 16 of section 189 of the general municipal law made by section four of this act and the amendments to subdivision 3 of section 195-d of the general municipal law made by section five of this act shall take effect on the same date and in the same manner as part MM of chapter 59 of the laws of 2017, takes effect; provided further, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized.

Amendment Notes The 2017 amendment by ch 59, § 10 (Part MM), added the 3-b(a) designation; added 3-b(b); in 5(c), deleted "shall" preceding "otherwise," substituted "firefighters or voluntary emergency medical service activities" for "firemen's activities," and added "or a volunteer ambulance corps building" and "medical emergencies"; and made stylistic changes.

The 2017 amendment by ch 464, § 3, added "except for games known as "raffles" whereby payment shall mean legal tender, credit or debit card or personal check" in 20.

The 2018 amendment by ch 476, § 35, in the first paragraph of 4, substituted "firefighters" for "firemen" and "immediately" for "immediatley."

Notes to Decisions

Analysis

1. Generally
2. Chief law enforcement officer

1. Generally

Article 9-A of the General Municipal Law dealing with games of chance, does not permit the utilization of vending machines to dispense bell jar type gambling tickets or cards. 1990 N.Y. Op. Att'y Gen. No. 90-F5, 1990 N.Y. AG LEXIS 95.

In the absence of a local law or ordinance of a village within a town, the election of the town to permit the conduct of games of chance necessarily includes the villages within its geographic limits. 1976 NY Ops Atty Gen Sept 23 (Informal), 1976 N.Y. AG LEXIS 154.

The Buffalo Convention Center Management Corporation is an authorized games of chance lessor under General Municipal Law, § 186(4)(8). 1980 N.Y. Op. Att'y Gen. No. 27, 1980 N.Y. AG LEXIS 7.

2. Chief law enforcement officer

The town supervisor, of a town which has not established a police department, is not the chief law enforcement officer of the town for purposes of Article 9-A (Local Option for Conduct of Games of Chance by Certain Organizations) of the General Municipal Law. A town which has not established a police department should by following proper procedures authorize the chief law enforcement officer of the county to provide all police control required under Article 9-A. 1977 NY Ops Atty Gen Aug 15 (Informal), 1977 N.Y. AG LEXIS 318.

The chief law enforcement officer for the Town of Smithtown for purposes of Article 9-A of the General Municipal Law is the Commissioner of the Suffolk County Police Department. This chief law enforcement officer may delegate the administrative and inspection responsibilities to the clerk of the town; however, criminal investigations of applicants for licenses and investigations of criminal activity or involvement must be performed by the Commissioner of the Suffolk County Police Department. 1977 NY Ops Atty Gen April 15 (Informal), 1977 N.Y. AG LEXIS 124.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 189, 190, 191, 194.

Gambling offenses; definitions of terms, CLS Penal § 225.00.

Restrictions upon conduct of games of chance § 189.

Codes, Rules and Regulations:

Definitions, delegation of authority and power to supersede or suspend rules. 9 NYCRR §§ 4600.1 et seq.

Jurisprudences:

35C NY Jur 2d Criminal Law Substantive Principles and Offenses § 1746.

62 NY Jur 2d Gambling §§ 10, 58, 59.

§ 187. Local option

Subject to the provisions of this article, and pursuant to the direction contained in subdivision two of section nine of article one of the constitution of the state, the legislature hereby gives and grants to every municipality the right, power and authority to authorize the conduct of games of chance by authorized organizations within the territorial limits of such municipality. A local law or ordinance adopted by a town shall be operative in any village or within any part of any village located within such town if, after adoption of such local law or ordinance, the board of trustees of such village adopts a local law or resolution subject to a permisive [permissive]* referendum as provided in article nine of the village law authorizing the issuance of licenses by the town for games of chance within such village. Such local law or resolution may be repealed only by a local law or resolution which shall also be subject to a permissive referendum, or by enactment of a local law authorizing games of chance as provided in section one hundred eighty-eight of this article.

HISTORY:

Add, L 1976, ch 960, § 1, eff Aug 26, 1976; amd, L 1977, ch 522, § 1; L 1978, ch 194, § 1, eff May 23, 1978.

Notes to Decisions

1. Generally

In the absence of a local law or ordinance of a village within a town, the election of the town to permit the conduct of games of chance necessarily includes the villages within its geographic limits. 1976 NY Ops Atty Gen Sept 23 (Informal), 1976 N.Y. AG LEXIS 154.

The provisions of section 187 of the General Municipal Law as amended by Chapter 194 of the Laws of 1978 should not be applied so as to require a village to adopt a local law authorizing the conduct of games of chance where the games had been lawful under the prior law. 1978 N.Y. Op. Att'y Gen. No. 30, 1978 N.Y. AG LEXIS 214.

A village may authorize games of chance by local law approved by a majority of the electors voting on a proposition submitted at a special or general election. If a town has authorized games of chance, such authorization is effective within a village located within the town if the village board adopts a local law or resolution subject to permissive referendum requirements authorizing the town to license games of chance in the village. 1978 Op St Compt No. 78-754, 1978 N.Y. Comp. LEXIS 54.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Permissive referendum, CLS Vill Art 9, §§ 9-900 et seq.

Right to assemble and petition; divorce; lotteries; pool-selling and gambling; laws to prevent, CLS NY Const Art 1 § 9.

Codes, Rules and Regulations:

Definitions, delegation of authority and power to supersede or suspend rules. 9 NYCRR §§ 4600.1 et seq.

Jurisprudences:

62 NY Jur 2d Gambling §§ 10, 58, 59.

§ 188. Local laws and ordinances

1. The common council or other local legislative body of any municipality may, either by local law or ordinance, provide that it shall be lawful for any authorized organization, upon obtaining a license therefor as hereinafter provided, to conduct games of chance within the territorial limits of such municipality, subject to the provisions of such local law or ordinance, the provisions of this article, and the provisions set forth by the board.

2. No such local law or ordinance shall become operative or effective unless and until it shall have been approved by a majority of the electors voting on a proposition submitted at a general or special election held within such municipality who are qualified to vote for officers of such municipality.

3. The time, method and manner of submission, preparation and provision of ballots and ballot labels, balloting by voting machine and conducting the election, canvassing the result and making and filing the returns and all other procedure with reference to the submission of and action upon any proposition for the approval of any such local law or ordinance shall be the same as in the case of any other proposition to be submitted to the electors of such municipality at a general or special election in such municipality, as provided by law.

HISTORY:

Add, L 1976, ch 960, § 1, eff Aug 26, 1976.

Notes to Decisions

Analysis

1. Generally
2. Submission to electors

1. Generally

A town in which the licensing of games of chance has been authorized pursuant to General Municipal Law, § 188, may not delegate to a village within the town the enforcement duties of the chief legal officer of the town with respect to games of chance conducted in the village. 1980 N.Y. Op. Att'y Gen. No. 25, 1980 N.Y. AG LEXIS 62.

A village may authorize games of chance by local law approved by a majority of the electors voting on a proposition submitted at a special or general election. If a town has authorized games of chance, such authorization is effective within a village located within the town if the village board adopts a local law or resolution subject to permissive referendum requirements authorizing the town to license games of chance in the village. 1978 Op St Compt No. 78-754, 1978 N.Y. Comp. LEXIS 54.

2. Submission to electors

The Common Council of the City of Gloversville, which adopted a local law on October 18, 1977 providing for games of chance in the City of Gloversville pursuant to provisions of Article 9-A of the General Municipal Law and providing for its submission to the

*The bracketed word has been inserted by the Publisher.

electorate at a special election, may amend said local law to provide that it be submitted to the electorate at the general election of 1978 subject to a timely and valid petition being submitted to the City Clerk requesting that the local law be submitted to the electorate at a special election. 1977 NY Ops Atty Gen Nov 2 (Informal), 1977 N.Y. AG LEXIS 324.

Since section 1-102, as amended by Chapter 374 of the Laws of 1978, apply only to question submitted to the voters at the time of a general election there is serious doubt that a person has to be a registered voter in order to vote, at a special election, on a proposition to authorize games of chance. 1980 Op St Compt No. 80-240.

A proposition to authorize games of chance may be submitted to the electors for approval at a general or special election. 1991 NY Ops Atty Gen 91-47 (Informal), 1991 N.Y. AG LEXIS 54.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:
This section referred to in §§ 187, 190, 194.

Jurisprudences:
62 NY Jur 2d Gambling §§ 10, 58, 59, 80.

§ 188-a. Powers and duties of the board

The board shall have the power and it shall be its duty to:

1. Supervise the administration of the games of chance licensing law and to adopt, amend and repeal rules and regulations governing the issuance and amendment of licenses thereunder and the conducting of games under such licenses, which rules and regulations shall have the force and effect of law and shall be binding upon all municipalities issuing licenses, and upon licensees of the board, to the end that such licenses shall be issued to qualified licensees only, and that said games shall be fairly and properly conducted for the purposes and in the manner of the said games of chance licensing law prescribed and to prevent the games of chance thereby authorized to be conducted from being conducted for commercial purposes or purposes other than those therein authorized, participated in by criminal or other undesirable elements and the funds derived from the games being diverted from the purposes authorized, and to provide uniformity in the administration of said law throughout the state, the board shall prescribe forms of application for licenses, licensees, amendment of licenses, reports of the conduct of games and other matters incident to the administration of such law.

2. Conduct, anywhere in the state, investigations of the administration, enforcement and potential or actual violations of the games of chance licensing law and of the rules and regulations of the board.

3. Reveiw [Review]* all determinations and actions of the clerk or department in issuing an initial license and it may review the issuance of subsequent licenses and, after hearing, revoke those licenses which do not in all respects meet the requirements of this article and the rules and regulations of the board.

4. Suspend or revoke a license, after hearing, for any violation of the provisions of this article or the rules and regulations of the board.

5. Hear appeals from the determinations and action of the clerk, department or officer in connection with the refusing to issue licenses, the suspension and revocation of licenses and the imposition of fines in the manner prescribed by law and the action and determination of the board upon any such appeal shall be binding upon the clerk, department or officer and all parties thereto.

6. Carry on continuous study of the operation of the games of chance licensing law to ascertain from time to time defects therein jeopardizing or threatening to jeopardize the purposes of this article, and to formulate and recommend changes in such law and in other laws of the state which the board may determine to be necessary for the realization of such purposes, and to the same end to make a continuous study of the operation and administration of similar laws which may be in effect in other states of the United States.

7. Supervise the disposition of all funds derived from the conduct of games of chance by authorized organizations not currently licensed to conduct such games.

8. Issue an identification number to an applicant authorized organization if it shall determine that the applicant satisfies the requirements of the games of chance licensing law and the rules and regulations of the board.

9. The board shall have the power to approve and establish a standard set of games of chance equipment and shall by its rules and regulations prescribe the manner in which such equipment is to be reproduced and distributed to licensed authorized organizations. The sale or distribution to a licensed authorized organization of any equipment other than that contained in the standard set of games of chance equipment shall constitute a violation of this section.

HISTORY:
Add, L 1976, ch 960, § 1, eff Aug 26, 1976.

Notes to Decisions

1. Generally

A city, town or village that proposes to license games of chance must exercise the option under section 194, subdivision 2 to have the chief law enforcement officer of the County control and supervise the games of chance if the city, town, or village does not have a police department. The New York State Racing and Wagering Board may enforce this requirement by a rule issued under section 188-a. 1979 N.Y. Op. Att'y Gen. No. 26, 1979 N.Y. AG LEXIS 7.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:
This section referred to in § 194.

Jurisprudences:
62 NY Jur 2d Gambling §§ 10, 58, 60, 68, 71–73.

Texts: 1-6 New York Nonprofit Law and Practice § 6.02.

§ 189. Restrictions upon conduct of games of chance

The conduct of games of chance authorized by local law or ordinance shall be subject to the follow-

*The bracketed word has been inserted by the Publisher.

ing restrictions irrespective of whether the restrictions are contained in such local law or ordinance, but nothing herein shall be construed to prevent the inclusion within such local law or ordinance of other provisions imposing additional restrictions upon the conduct of such games:

1. No person, firm, partnership, corporation or organization, other than a licensee under the provisions of section one hundred ninety-one of this article, shall conduct such game or shall lease or otherwise make available for conducting games of chance premises for any consideration whatsoever, direct or indirect.

2. No game of chance shall be held, operated or conducted on or within any leased premises if rental under such lease is to be paid, wholly or partly, on the basis of a percentage of the receipts or net profits derived from the operation of such game.

3. No authorized organization licensed under the provisions of this article shall purchase, lease, or receive any supplies or equipment specifically designed or adapted for use in the conduct of games of chance from other than a supplier licensed by the board or from another authorized organization. Lease terms and conditions shall be subject to rules and regulations promulgated by the board. The provisions of this article shall not be construed to authorize or permit an authorized organization to engage in the business of leasing games of chance, supplies, or equipment. Furthermore, no organization shall purchase bell jar tickets, or deals of bell jar tickets from any other person or organization other than those specifically authorized under sections one hundred ninety-five-n and one hundred ninety-five-o of this article.

4. The entire net proceeds of any game of chance shall be exclusively devoted to the lawful purposes of the organization permitted to conduct the same and the net proceeds of any rental derived therefrom shall be exclusively devoted to the lawful purposes of the authorized games of chance lessor.

5.

(a) No single prize awarded by games of chance other than raffle shall exceed the sum or value of three hundred dollars, except that for merchandise wheels, no single prize shall exceed the sum or value of two hundred fifty dollars, and for bell jar, no single prize shall exceed the sum or value of one thousand dollars.

(b) No single prize awarded by raffle shall exceed the sum or value of three hundred thousand dollars.

(c) No single wager shall exceed six dollars and for bell jars, coin boards or merchandise boards, no single prize shall exceed one thousand dollars, provided, however, that such limitation shall not apply to the amount of money or value paid by the participant in a raffle in return for a ticket or other receipt.

(d) For coin boards and merchandise boards, the value of a prize shall be determined by the cost of such prize to the authorized organization or, if donated, the fair market value of such prize.

6.

(a) No authorized organization shall award a series of prizes consisting of cash or of merchandise with an aggregate value in excess of:

(1) ten thousand dollars during the successive operations of any one merchandise wheel; and

(2) six thousand dollars during the successive operations of any bell jar, coin board or merchandise board.

(b) No series of prizes awarded by raffle shall have an aggregate value in excess of five hundred thousand dollars.

(c) For coin boards and merchandise boards, the value of a prize shall be determined by the cost of such prize to the authorized organization or, if donated, the fair market value of such prize.

7. In addition to merchandise wheels, raffles and bell jars, no more than five other single types of games of chance shall be conducted during any one license period.

8. Except for merchandise wheels and raffles, no series of prizes on any one occasion shall aggregate more than four hundred dollars when the licensed authorized organization conducts five single types of games of chance during any one license period. Except for merchandise wheels, raffles and bell jars, no series of prizes on any one occasion shall aggregate more than five hundred dollars when the licensed authorized organization conducts less than five single types of games of chance, exclusive of merchandise wheels, raffles and bell jars, during any one license period. No authorized organization shall award by raffle prizes with an aggregate value in excess of three million dollars during any one license period.

9. Except for the limitations on the sum or value for single prizes and series of prizes, no limit shall be imposed on the sum or value of prizes awarded to any one participant during any occasion or any license period.

10. No person except a bona fide member of the licensed authorized organization shall participate in the management of such games; no person except a bona fide member of the licensed authorized organization, its auxiliary or affiliated organization, shall participate in the operation of such game, as set forth in section one hundred ninety-five-c of this article.

11. No person shall receive any remuneration for participating in the management or operation of any such game.

12. No authorized organization shall extend credit to a person to participate in playing a game of chance.

13.

(a) No game of chance, other than a raffle that complies with paragraph (b) of this subdivision, shall be conducted on other than the premises of an authorized organization or an authorized games of chance lessor.

(b) Raffle tickets may be sold to the public, and a raffle drawing may occur, outside the premises of an

authorized organization or an authorized games of chance lessor if such sales occur, or such drawing occurs, in a municipality that:

(1) has passed a local law, ordinance or resolution in accordance with sections one hundred eighty-seven and one hundred eighty-eight of this article approving the conduct of games of chance;

(2) is located in the county in which the municipality issuing the raffle license is located or in a county that is contiguous to the county in which the municipality issuing the raffle license is located;

(3) has not objected to such sales after the gaming commission gives notice to such municipality of an authorized organization's request to sell such raffle tickets in such municipality; and

(4) has not objected to the location in such municipality that such drawing is proposed to occur, after the commission gives notice to such municipality of an authorized organization's request to conduct such drawing in such municipality. A location of a drawing may be on state-owned property so long as the authorized organization conducting the raffle obtains all required authorizations to do so and complies with this paragraph.

(c) The gaming commission may by regulation prescribe the advance notice an authorized organization must provide to the gaming commission in order to take advantage of the provisions of paragraph (b) of this subdivision, forms in which such a request shall be made and the time period in which a municipality must communicate an objection to the gaming commission.

(d) No sale of raffle tickets shall be made more than one hundred eighty days prior to the date scheduled for the occasion at which the raffle will be conducted.

(e) The winner of any single prize in a raffle shall not be required to be present at the time such raffle is conducted.

13-a. No person licensed to manufacture, distribute, or sell games of chance supplies or equipment, or their agents, shall conduct, participate in, or assist in the conduct of games of chance. Nothing herein shall prohibit a licensed distributor from selling, offering for sale, or explaining a product to an authorized organization or installing or servicing games of chance equipment upon the premises of games of chance licensees.

14. The unauthorized conduct of a game of chance shall constitute and be punishable as a misdemeanor.

15. No coins or merchandise from a coin board or merchandise board shall be redeemable or convertible into cash directly or indirectly by the authorized organization.

16. Notwithstanding any provision of law to the contrary, games known as "raffles", at the discretion of the games of chance licensee, may be purchased via the internet or mobile application with a debit or credit card, upon the account holder's direct consent, provided, however, that the gaming commission shall promulgate any necessary rules and regulations to ensure, to a reasonable degree of certainty that:

(a) the purchase of the raffle ticket is initiated and received or otherwise made in accordance with subdivision thirteen of this section;

(b) purchasers are not less than eighteen years of age; and

(c) the privacy and online security of participants is protected.

HISTORY:

Add, L 1976, ch 960, § 1; amd, L 1978, ch 574, § 3, eff Aug 23, 1978; L 1988, ch 46, § 3, eff Oct 12, 1988; L 1989, ch 684, § 2, eff Jan 18, 1990; L 1994, ch 177, §§ 2, 3, eff June 14, 1994; L 1994, ch 550, §§ 6, 7, eff Jan 22, 1995; L 1996, ch 309, § 422, eff Jan 9, 1997; L 1998, ch 252, § 3, eff Nov 4, 1998; L 1998, ch 337, §§ 1–3, 6, eff Jan 10, 1999; L 2010, ch 302, § 1, eff July 30, 2010; L 2012, ch 455, § 1, eff Sept 7, 2012; L 2016, ch 434, § 1, effective November 14, 2016; L 2017, ch 59, § 11 (Part MM), effective July 9, 2017; L 2017, ch 464, § 4, effective June 16, 2018.

Editor's Notes Laws 2017, ch 464, §§ 1, 2, 7, provide:

§ 1. This act shall be known and may be cited as the "charitable gaming act of 2017".

§ 2. The legislature hereby finds that games of chance, specifically games known as "raffles", conducted by bona fide charitable, educational, scientific, health, religious and patriotic organizations provide vital financial support to many worthwhile programs in the communities in which they serve. Furthermore, conforming current statutory language to address recent technological advances will enhance the ability of the public at large to participate and thusly is deemed to be in the public interest.

§ 7. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided, however that the provisions of paragraph (a) of subdivision 16 of section 189 of the general municipal law made by section four of this act and the amendments to subdivision 3 of section 195-d of the general municipal law made by section five of this act shall take effect on the same date and in the same manner as part MM of chapter 59 of the laws of 2017, takes effect; provided further, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized.

Amendment Notes The 2016 amendment by ch 434, § 1, substituted "three hundred thousand dollars" for "one hundred thousand dollars" in the second sentence of 5; and substituted "three million dollars" for "two million dollars" in the last sentence of 8.

The 2017 amendment by ch 59, § 11 (Part MM), redesignated and rewrote former 5 as 5(a) through 5(d); redesignated and rewrote former 6 as 6(a) through 6(c); and rewrote 13.

The 2017 amendment by ch 464, § 4, added 16.

Notes to Decisions

Analysis

1. Generally
2. Raffle

1. Generally

The chief law enforcement officer for the Town of Smithtown for purposes of Article 9-A of the General Municipal Law is the Commissioner of the Suffolk County Police Department. The chief law enforcement officer may delegate the administrative and inspection responsibilities to the clerk of the town; however, criminal investigations of applicants for licenses and investigations of criminal activity or involvement must be performed by the Commissioner of the Suffolk County Police Department. 1977 NY Ops Atty Gen April 15 (Informal), 1977 N.Y. AG LEXIS 124.

2. Raffle

Raffle run by charitable institution to raise funds for scholarship fund violated requirement of CLS Gen Mun § 189 that no single prize exceed $100 where prize in raffle was automobile. Harris v Economic Opportunity Comm'n, Inc., 142 Misc. 2d 980, 542 N.Y.S.2d 913, 1989 N.Y. Misc. LEXIS 378 (N.Y. App. Term 1989), aff'd, 171 A.D.2d 223, 575 N.Y.S.2d 672, 1991 N.Y. App. Div. LEXIS 13739 (N.Y. App. Div. 2d Dep't 1991).

Raffle run by charitable institution to raise funds for scholarship fund fell within definition of lottery contained in CLS Penal § 225.00, and thus it was not game of chance which could be conducted pursuant to CLS Gen Mun Art 9-A. Harris v Economic Opportunity Comm'n, Inc., 142 Misc. 2d 980, 542 N.Y.S.2d 913, 1989 N.Y. Misc. LEXIS 378 (N.Y. App. Term 1989), aff'd, 171 A.D.2d 223, 575 N.Y.S.2d 672, 1991 N.Y. App. Div. LEXIS 13739 (N.Y. App. Div. 2d Dep't 1991).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 186.

Codes, Rules and Regulations:

Registration and identification number. 9 NYCRR §§ 4601.1 et seq.

Jurisprudences:

62 NY Jur 2d Gambling §§ 10, 58, 59.

Texts: 1-6 New York Nonprofit Law and Practice § 6.02.

§ 189-a. Authorized supplier of games of chance equipment

No person, firm, partnership, corporation or organization, shall sell or distribute supplies or equipment specifically designed or adapted for use in conduct of games of chance without having first obtained a license therefor upon written application made, verified and filed with the board in the form prescribed by the rules and regulations of the board. As a part of its determination concerning the applicant's suitability for licensing as a games of chance supplier, the board shall require the applicant to furnish to the board two sets of fingerprints. Such fingerprints shall be submitted to the division of criminal justice services for a state criminal history record check, as defined in subdivision one of section three thousand thirty-five of the education law, and may be submitted to the federal bureau of investigation for a national criminal history record check. Manufacturers of bell jar tickets shall be considered suppliers of such equipment. In each such application for a license under this section shall be stated the name and address of the applicant; the names and addresses of its officers, directors, shareholders or partners; the amount of gross receipts realized on the sale and rental of games of chance supplies and equipment to duly licensed authorized organizations during the last preceding calendar or fiscal year, and such other information as shall be prescribed by such rules and regulations. The fee for such license shall be a sum equal to twenty-five dollars plus an amount equal to two per centum of the gross sales and rentals, if any, of games of chance equipment and supplies to authorized organizations or authorized games of chance lessors by the applicant during the preceding calendar year, or fiscal year if the applicant maintains his accounts on a fiscal year basis. No license granted pursuant to the provisions of this section shall be effective for a period of more than one year.

(a) The following shall be ineligible for such a license:

(1) a person convicted of a crime if there is a direct relationship between one or more of the previous criminal offenses and the integrity or safety of charitable gaming, considering the factors set forth in article twenty-three-A of the correction law;

(2) a person who is or has been a professional gambler or gambling promoter or who for other reasons is not of good moral character;

(3) a public officer or employee;

(4) an authorized games of chance lessor;

(5) a firm or corporation in which a person defined in paragraph (1), (2), (3) or (4) of this subdivision has greater than a ten percent proprietary, equitable or credit interest or in which such a person is active or employed.

(b) The board shall have power to examine or cause to be examined the books and records of any applicant for a license, under this section. Any information so received shall not be disclosed except so far as may be necessary for the purpose of carrying out the provisions of this article.

(c) Any solicitation of an organization licensed to conduct games of chance, to purchase or induce the purchase of games of chance supplies and equipment, other than by a person licensed or otherwise authorized pursuant to this section shall constitute a violation of this section.

(d) Any person who willfully shall make any material false statement in any application for a license authorized to be issued under this section or who willfully shall violate any of the provisions of this section or of any license issued hereunder shall be guilty of a misdemeanor and, in addition to the penalties in such case made and provided, shall forfeit any license issued to him or it under this section and be ineligible to apply for a license under this section for one year thereafter.

(e) At the end of such period specified in the license, a recapitulation shall be made as between the licensee and the board in respect of the gross sales and rentals actually recorded during that period and the fee paid therefor, and any deficiency of fee thereby shown to be due shall be paid by the licensee and any excess of fee thereby shown to have been paid shall be credited to said licensee in such manner as the board by the rules and regulations shall prescribe.

HISTORY:

Add, L 1978, ch 574, § 4, eff Aug 23, 1978; amd, L 1996, ch 309, § 427, eff Jan 9, 1997; L 2003, ch 164, § 8, eff July 22, 2003; L 2019, ch 55, § 1 (Part II, Subpart E), effective April 12, 2019.

Editor's Notes Laws 2003, ch 164, § 1, eff July 22, 2003, provides as follows:

Section 1. Legislative findings. There are New York state statutes which authorize the fingerprinting of individuals as a part of an application for employment, license or permit. Some of those statutes also authorize the submission of fingerprints to the New York state division of criminal justice

services and the federal bureau of investigation for the purpose of obtaining national criminal history record information for these same applicants. After reviewing the applicable New York state statutes to determine compliance with Pub. L. 92-544, the federal statute which authorizes the federal bureau of investigation to exchange records with officials of state and local governments for purposes of employment and licensing, the federal bureau of investigation determined that the statutes amended by this act where insufficient to permit reliance on such statutes as a basis for the authority for the federal bureau of investigation to provide national criminal history record information to state or local government officials in connection with an application for employment, license or permit.

Subdivision 8-a of section 837 of the executive law provides that fingerprints may be submitted to the division of criminal justice services only in connection with an application for employment, license or permit. The amendments contained in this act are not intended to alter that provision in any way; they are simply intended to satisfy the requirements of Public Law 92-544.

Amendment Notes The 2019 amendment by ch 55, § 1 (Part II, SubPart E), in (a), substituted "if there is a direct relationship between one or more of the previous criminal offenses and the integrity or safety of charitable gaming, considering the factors set forth in article twenty-three-A of the correction law" for "who has not received a pardon, a certificate of good conduct or a certificate of relief from disabilities" in (1) and in (5), substituted "paragraph (1), (2), (3) or (4) of this subdivision" for "subdivision (1), (2), (3) or (4) above" and "ten percent" for "ten per centum."

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

Games of chance supplier: application and licensing. 9 NYCRR §§ 4607.1 et seq.

Jurisprudences:

62 NY Jur 2d Gambling §§ 10, 58, 69.

§ 189-b. Declaration of state's exemption from operation of provisions of 15 U.S.C. (1172)

Pursuant to section two of an Act of Congress of the United States entitled "An act to prohibit transportation of gambling devices in interstate and foreign commerce," approved January second, nineteen hundred fifty-one, being chapter 1194, 64 Stat. 1134, and also designated as 15 U.S.C. (1171-1177), the state of New York, acting by and through the duly elected and qualified members of its legislature, does hereby, in accordance with and in compliance with the provisions of section two of said Act of Congress, declare and proclaim that it is exempt from the provisions of section two of said Act of Congress.

HISTORY:

Add, L 1989, ch 595, § 1, eff July 21, 1989.

RESEARCH REFERENCES AND PRACTICE AIDS

Federal Aspects:

Section two of an Act of Congress of the United States entitled "An act to prohibit transportation of gambling devices in interstate and foreign commerce," approved January second, nineteen hundred fifty-one, cited in statutory text, appears as 15 USCS § 1172.

Jurisprudences:

62 NY Jur 2d Gambling §§ 7, 10.
38 Am Jur 2d, Gambling §§ 57, 77–79.

Annotations:

What constitutes gambling device within meaning of 15 USCS § 1171(a) so as to be subject to forfeiture under Gambling Devices Act of 1962 (15 USCS §§ 1171-1178). 83 A.L.R. Fed. 177.

§ 189-c. Legal shipments of gaming devices into New York state

All shipments into this state of gaming devices, excluding slot machines and coin operated gambling devices, as defined in subdivision seven-a of section 225.00 of the penal law, the registering, recording and labeling of which has been duly had by the manufacturer or dealer thereof in accordance with sections three and four of an Act of Congress of the United States entitled "An act to prohibit transportation of gambling devices in interstate and foreign commerce," approved January second, nineteen hundred fifty-one, being chapter 1194, 64 Stat. 1134, and also designated as 15 U.S.C. (1171-1177), shall be deemed legal shipments thereof into this state.

HISTORY:

Add, L 1989, ch 595, § 1, eff July 21, 1989.

RESEARCH REFERENCES AND PRACTICE AIDS

Federal Aspects:

Sections three and four of an Act of Congress of the United States entitled "An act to prohibit transportation of gambling devices in interstate and foreign commerce," approved January second, nineteen hundred fifty-one, cited in statutory text, appear as 15 USCS §§ 1173, 1174.

Jurisprudences:

62 NY Jur 2d Gambling §§ 7, 10.
38 Am Jur 2d, Gambling §§ 83, 113-117.

Annotations:

What constitutes gambling device within meaning of 15 USCS § 1171(a) so as to be subject to forfeiture under Gambling Devices Act of 1962 (15 USCS §§ 1171-1178). 83 A.L.R. Fed. 177.

§ 190. Application for license

1. To conduct games of chance. (a) Each applicant for a license shall, after obtaining an identification number from the board, file with the clerk or department, a written application therefor in a form to be prescribed by the board, duly executed and verified, in which shall be stated:

(1) the name and address of the applicant together with sufficient facts relating to its incorporation and organization to enable such clerk or department, as the case may be, to determine whether or not it is a bona fide authorized organization;

(2) the names and addresses of its officers; the place or places where, the date or dates and the time or times when the applicant intends to conduct games under the license applied for;

(3) the amount of rent to be paid or other consideration to be given directly or indirectly for each licensed period for use of the premises of an authorized games of chance lessor;

(4) all other items of expense intended to be incurred or paid in connection with the holding, operating and conducting of such games of chance and the names and addresses of the persons to whom, and the purposes for which, they are to be paid;

(5) the purposes to which the entire net proceeds of such games are to be devoted and in what man-

ner; that no commission, salary, compensation, reward or recompense will be paid to any person for conducting such game or games or for assisting therein except as in this article otherwise provided; and such other information as shall be prescribed by such rules and regulations.

(6) the name of each single type of game of chance to be conducted under the license applied for and the number of merchandise wheels and raffles, if any, to be operated.

(b) In each application there shall be designated not less than four bona fide members of the applicant organization under whom the game or games of chance will be managed and to the application shall be appended a statement executed by the members so designated, that they will be responsible for the management of such games in accordance with the terms of the license, the rules and regulations of the board, this article and the applicable local laws or ordinances.

2. Authorized games of chance lessor: Each applicant for a license to lease premises to a licensed organization for the purposes of conducting games of chance therein shall file with the clerk or department, a written application therefor in a form to be prescribed by the board duly executed and verified, which shall set forth the name and address of the applicant; designation and address of the premises intended to be covered by the license sought; a statement that the applicant in all respects conforms with the specifications contained in the definition of "authorized organization" set forth in section one hundred eighty-six of this article; a statement of the lawful purposes to which the net proceeds from any rental are to be devoted by the applicant, and such other information as shall be prescribed by the board.

3. In counties outside the city of New York, municipalities may, pursuant to section one hundred eighty-eight of this article, adopt an ordinance providing that an authorized organization having obtained an identification number from the board and having applied for no more than one license to conduct games of chance during the period not less than twelve nor more than eighteen months immediately preceding may file with the clerk or department a summary application in a form to be prescribed by the board duly executed and verified, containing the names and addresses of the applicant organization and its officers, the date, time and place or places where the applicant intends to conduct games under the license applied for, the purposes to which the entire net proceeds of such games are to be devoted and the information and statement required by paragraph (b) of subdivision one of this section in lieu of the application required under subdivision one of this section.

4. Notwithstanding and in lieu of the licensing requirements set forth in this article, an authorized organization defined in subdivision four of section one hundred eighty-six of this article may file a verified statement, for which no fee shall be required, with the clerk or department and the board attesting that such organization shall derive net proceeds or net profits from raffles in an amount less than thirty thousand dollars during one occasion or part thereof at which raffles are to be conducted. Such statement shall be on a single page form prescribed by the board and shall be deemed a license to conduct raffles: (a) under this article; and (b) within the municipalities in which the authorized organization are domiciled which have passed a local law, ordinance or resolution in accordance with sections one hundred eighty-seven and one hundred eighty-eight of this article approving the conduct of games of chance, and in municipalities which have passed a local law, ordinance or resolution in accordance with sections one hundred eighty-seven and one hundred eighty-eight of this article approving the conduct of games of chance that are located in the county in which the municipality issuing the license is located and in the counties which are contiguous to the county in which the municipality issuing the raffle license is located, provided those municipalities have authorized the licensee, in writing, to sell such raffle tickets therein. An organization that has filed a verified statement with the clerk or department and the board attesting that such organization shall derive net proceeds or net profits from raffles in an amount less than thirty thousand dollars during one occasion or part thereof that in fact derives net proceeds or net profits exceeding thirty thousand dollars during any one occasion or part thereof shall be required to obtain a license as required by this article and shall be subject to the provisions of section one hundred ninety-five-f of this article.

HISTORY:

Add, L 1976, ch 960, § 1; amd, L 1978, ch 574, § 5, eff Aug 23, 1978; L 1990, ch 566, § 1, eff July 18, 1990; L 1994, ch 550, § 8, eff Jan 22, 1995; L 1998, ch 252, § 4, eff Nov 4, 1998.

Notes to Decisions

Analysis

1. Generally
2. Chief law enforcement officer

1. Generally

Pursuant to Article 9-A of the General Municipal Law, where a fire company operates in more than one town, if the authorized organization otherwise satisfies the requirements for the issuance of a games-of-chance license, it should apply to the clerk of the town in which the games are to be actually conducted for a license, provided that the property where the games are to be held is within the operational boundaries of the organization. 1978 NY Ops Atty Gen June 13 (Informal), 1978 N.Y. AG LEXIS 110.

2. Chief law enforcement officer

The chief law enforcement officer for the Town of Smithtown for purposes of Article 9-A of the General Municipal Law is the Commissioner of the Suffolk County Police Department. This chief law enforcement officer may delegate the administrative and inspection responsibilities to the clerk of the town; however, criminal investigations of applicants for licenses and investigations of criminal activity or involvement must be performed by

the Commissioner of the Suffolk County Police Department. 1977 NY Ops Atty Gen April 15 (Informal), 1977 N.Y. AG LEXIS 124.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 189, 191.

Codes, Rules and Regulations:

Licenses to conduct games of chance: applications. 9 NYCRR §§ 4602.1 et seq.

Jurisprudences:

62 NY Jur 2d Gambling §§ 10, 58, 59, 80.

§ 190-a. Raffles; license not required

1. Notwithstanding the licensing requirements set forth in this article and their filing requirements set forth in subdivision four of section one hundred ninety of this article, an authorized organization may conduct a raffle without complying with such licensing requirements or such filing requirements, provided, that such organization shall derive net proceeds from raffles in an amount less than five thousand dollars during the conduct of one raffle and shall derive net proceeds from raffles in an amount less than thirty thousand dollars during one calendar year.

2.

(a) For the purposes of this section, "authorized organization" shall mean and include any bona fide religious or charitable organization or bona fide educational, fraternal or service organization or bona fide organization of veterans, volunteer firefighters or volunteer ambulance workers that by its charter, certificate of incorporation, constitution, or act of the legislature, has among its dominant purposes one or more of the lawful purposes as defined in this article, provided that each shall operate without profit to its members and provided that each such organization has engaged in serving one or more of the lawful purposes as defined in this article for a period of one year immediately prior to being granted the filing requirement exemption contained in subdivision one of this section.

(b) No organization shall be deemed an authorized organization that is formed primarily for the purpose of conducting games of chance and that does not devote at least seventy-five percent of its activities to other than conducting games of chance. No political party shall be deemed an authorized organization.

3. No person under the age of eighteen shall be permitted to play, operate or assist in any raffle conducted pursuant to this section.

4. No raffle shall be conducted pursuant to this section except within a municipality in which the authorized organization is domiciled that has passed a local law, ordinance or resolution in accordance with sections one hundred eighty-seven and one hundred eighty-eight of this article approving the conduct of games of chance, and in municipalities which have passed a local law, ordinance or resolution in accordance with sections one hundred eighty-seven and one hundred eighty-eight of this article approving the conduct of games of chance that are located within the county or contiguous to the county in which the organization is domiciled.

HISTORY:

Add, L 2004, ch 678, § 1, eff Nov 3, 2004; amd, L 2005, ch 400, § 1, eff Aug 2, 2005; L 2017, ch 59, § 12 (Part MM), effective July 9, 2017.

Amendment Notes The 2017 amendment by ch 59, § 12 (Part MM), substituted "thirty thousand dollars" for "twenty thousand dollars" in 1; in 2(a), substituted "veterans, volunteer fire fighters or volunteer ambulance workers that" for "veterans or volunteer firefighter, which," "has among" for "shall have among," and "one year" for "three years"; and made stylistic changes.

§ 191. Investigation; matters to be determined; issuance of license; fees; duration of license

1. The clerk or department shall make an investigation of the qualifications of each applicant and the merits of each application, with due expedition after the filing of the application.

(a) Issuance of licenses to conduct games of chance. If such clerk or department determines:

(i) that the applicant is duly qualified to be licensed to conduct games of chance under this article;

(ii) that the member or members of the applicant designated in the application to manage games of chance are bona fide active members of the applicant and are persons of good moral character and have never been convicted of a crime if there is a direct relationship between one or more of the previous criminal offenses and the integrity or safety of charitable gaming, considering the factors set forth in article twenty-three-A of the correction law;

(iii) that such games are to be conducted in accordance with the provisions of this article and in accordance with the rules and regulations of the gaming commission and applicable local laws or ordinances and that the proceeds thereof are to be disposed of as provided by this article; and

(iv) that no commission, salary, compensation, reward or recompense whatever will be paid or given to any person managing, operating or assisting therein except as in this article otherwise provided; then such clerk or department shall issue a license to the applicant for the conduct of games of chance upon payment of a license fee of twenty-five dollars for each license period.

(b) Issuance of licenses to authorized games of chance lessors. If such clerk or department shall determine that the applicant seeking to lease premises for the conduct of games of chance to a games of chance licensee is duly qualified to be licensed under this article; that the applicant satisfies the requirements for an authorized organization as defined in section one hundred eighty-six of this article; that the applicant has filed its proposed rent for each license period and that the clerk or department has approved the proposed rent as fair and reasonable; that the net proceeds from any rental will be devoted to the lawful purposes of the applicant; that there is no diversion of the funds of the proposed lessee from

the lawful purposes as defined in this article; and that such leasing of premises for the conduct of such games is to be in accordance with the provisions of this article, with the rules and regulations of the board and applicable local laws and ordinances, it shall issue a license permitting the applicant to lease said premises for the conduct of such games to the games of chance licensee or licensees specified in the application during the period therein specified or such shorter period as such clerk or department shall determine, but not to exceed twelve license periods during a calendar year, upon payment of a license fee of fifty dollars. Nothing herein shall be construed to require the applicant to be licensed under this article to conduct games of chance.

(c) Issuance of license upon summary application. If, upon the basis of a summary application as prescribed under subdivision three of section one hundred ninety of this article, the clerk or department shall determine that the applicant is duly qualified to be licensed to conduct games of chance under this article, said clerk or department shall forthwith issue said license. In the event the clerk or department has reason to believe that the applicant is not so qualified the applicant shall be directed to file an application pursuant to subdivision one of section one hundred ninety of this article.

2. On or before the thirtieth day of each month, the treasurer of the municipality in which the licensed property is located shall transmit to the state comptroller a sum equal to fifty percent of all authorized games of chance lessor license fees and the sum of fifteen dollars per license period for the conduct of games of chance collected by such clerk or department pursuant to this section during the preceding calendar month.

3. No license shall be issued under this section which shall be effective for a period of more than one year.

HISTORY:

Add, L 1976, ch 960, § 1, eff Aug 26, 1976; amd, L 1978, ch 574, § 6, eff Aug 23, 1978; L 1990, ch 566, § 2, eff July 18, 1990; L 2010, ch 56, § 15 (Part LL), eff June 22, 2010; L 2019, ch 55, § 2 (Part II, Subpart E), effective April 12, 2019.

Amendment Notes The 2019 amendment by ch 55, § 2 (Part II, SubPart E), redesignated former 1(a) as the introductory language of 1(a) and 1(a)(i) through 1(a)(iv); and in 1(a), substituted "determines" for "shall determine" in the introductory language, substituted "here is a direct relationship between one or more of the previous criminal offenses and the integrity or safety of charitable gaming, considering the factors set forth in article twenty-three-A of the correction law" for "or, if convicted, have received a pardon, a certificate of good conduct or a certificate of relief from disabilities pursuant to article twenty-three of the correction law" in (ii), substituted "gaming commission" for "board" in (iii), and in (iv), deleted "if such clerk or department is satisfied" at the beginning and substituted "then such clerk or department shall issue" for "it shall issue."

Notes to Decisions

Analysis

1. Generally
2. Chief law enforcement officer

1. Generally

Pursuant to Article 9-A of the General Municipal Law, where a fire company operates in more than one town, if the authorized organization otherwise satisfies the requirements for the issuance of a games-of-chance license, it should apply to the clerk of the town in which the games are to be actually conducted for a license, provided that the property where the games are to be held is within the operational boundaries of the organization. 1978 NY Ops Atty Gen June 13 (Informal), 1978 N.Y. AG LEXIS 110.

2. Chief law enforcement officer

The chief law enforcement officer for the Town of Smithtown for purposes of Article 9-A of the General Municipal Law is the Commissioner of the Suffolk County Police Department. This chief law enforcement officer may delegate the administrative and inspection responsibilities to the clerk of the town; however, criminal investigations of applicants for licenses and investigations of criminal activity or involvement must be performed by the Commissioner of the Suffolk County Police Department. 1977 NY Ops Atty Gen April 15 (Informal), 1977 N.Y. AG LEXIS 124.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 189.

Codes, Rules and Regulations:

Licenses to conduct games of chance: issuance. 9 NYCRR §§ 4603.1 et seq.

Jurisprudences:

62 NY Jur 2d Gambling §§ 10, 68.

§ 192. Hearing; amendment of license

1. No application for the issuance of a license to conduct games of chance or lease premises to an authorized organization shall be denied by the clerk or department, until after a hearing, held on due notice to the applicant, at which the applicant shall be entitled to be heard upon the qualifications of the applicant and the merits of the application.

2. Any license issued under this article may be amended, upon application made to such clerk or department which issued it, if the subject matter of the proposed amendment could lawfully and properly have been included in the original license and upon payment of such additional license fee if any, as would have been payable if it had been so included.

HISTORY:

Add, L 1976, ch 960, § 1, eff Aug 26, 1976; amd, L 1978, ch 574, § 7, eff Aug 23, 1978.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

Games of chance license: amendment. 9 NYCRR §§ 4604.1 et seq.

Jurisprudences:

62 NY Jur 2d Gambling §§ 10, 68.

§ 193. Form and contents of license; display of license

1. Each license to conduct games of chance shall be in such form as shall be prescribed in the rules and regulations promulgated by the board, and shall contain a statement of the name and address of the licensee, of the names and addresses of the members of the licensee under whom the games will be managed, of the place or places where and the date or dates and time or times when such games are to be conducted and of the purposes to which the entire net proceeds of such games are to be devoted; the

name of each single type of game to be conducted under the license and the number of merchandise wheels and raffles, if any, to be operated; and any other information which may be required by said rules and regulations to be contained therein, and each license issued for the conduct of any games shall be conspicuously displayed at the place where same is to be conducted at all times during the conduct thereof.

2. Each license to lease premises for conducting games of chance will be in such form as shall be prescribed in the rules and regulations of the board and shall contain a statement of the name and address of the licensee and the address of the leased premises, the amount of permissible rent and any information which may be required by said rules and regulations to be contained therein, and each such license shall be conspicuously displayed upon such premises at all times during the conduct of games of chance.

HISTORY:

Add, L 1976, ch 960, § 1; amd, L 1978, ch 574, § 8, eff Aug 23, 1978; L 1994, ch 550, § 9, eff Jan 22, 1995.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

Licenses to conduct games of chance: issuance. 9 NYCRR §§ 4603.1 et seq.

Jurisprudences:

62 NY Jur 2d Gambling §§ 10, 68.

§ 194. Control and supervision; suspension of identification numbers and licenses; inspection of premises

1. The officer or department, shall have and exercise rigid control and close supervision over all games of chance conducted under such license, to the end that the same are fairly conducted in accordance with the provisions of such license, the provisions of the rules and regulations promulgated by the board, and the provisions of this article. Such officer or department and the board shall have the power and the authority to temporarily suspend any license issued by the clerk or department and/or impose fines for violations not to exceed one thousand dollars. Temporary suspension of licenses shall be promptly followed by a hearing, and after notice and hearing, the clerk, department, or board may suspend or revoke the same and declare the violator ineligible to apply for a license for a period not exceeding twelve months thereafter. Any fines tendered to the clerk, department, or board shall not be paid from funds derived from the conduct of games of chance. The officer and the department or the board shall additionally have the right of entry, by their respective officers and agents, at all times into any premises where any game of chance is being conducted or where it is intended that any such game shall be conducted, or where any equipment being used or intended to be used in the conduct thereof is found, for the purpose of inspecting the same. Upon suspension or revocation of any license or upon declaration of ineligibility to apply for a license, the board may suspend or revoke the identification number issued pursuant to section one hundred eighty-eight-a of this article. An agent of the appropriate officer or department shall make an on site inspection during the conduct of all games of chance licensed pursuant to this article.

2. A municipality may, by local law or ordinance enacted pursuant to the provisions of section one hundred eighty-eight of this article, provide that the powers and duties set forth in subdivision one of this section, shall be exercised by the chief law enforcement officer of the county. In the event a municipality exercises this option the fees provided for by subdivision two of section one hundred ninety-five-f of this article, shall be remitted to the chief fiscal officer of the county.

3. Subject to the applicable provisions of the alcoholic beverage control law, beer, cider, mead, braggot and wine may be offered for sale during the conduct of games of chance on games of chance premises as such premises are defined in subdivision nineteen of section one hundred eighty-six of this article; provided, however, that nothing herein shall be construed to limit the offering for sale of any other alcoholic beverage in areas other than the games of chance premises or the sale of any other alcoholic beverage in premises where only the games of chance known as bell jar or raffles are conducted.

HISTORY:

Add, L 1976, ch 960, § 1; amd, L 1978, ch 574, § 9, eff Aug 23, 1978; L 1983, ch 278, § 1, eff June 10, 1983; L 1988, ch 46, § 4, eff Oct 12, 1988; L 1994, ch 550, § 10, eff Jan 22, 1995; L 1998, ch 337, § 17, eff Jan 10, 1999; L 2019, ch 188, § 1, effective February 25, 2020.

Editor's Notes Laws 2019, ch 188, § 2, eff February 25, 2020, provides:

§ 2. This act shall take effect on the one hundred eightieth day after it shall have become a law.

Amendment Notes The 2019 amendment by ch 188, § 1, deleted the former subsection heading of 3, which read: "Service of alcoholic beverages"; and added "cider, mead, braggot and wine."

Notes to Decisions

1. Chief law enforcement officer

The town supervisor, of a town which has not established a police department, is not the chief law enforcement officer of the town for purposes of Article 9-A (Local Option for Conduct of Games of Chance by Certain Organizations) of the General Municipal Law. A town which has not established a police department should by following proper procedures authorize the chief law enforcement officer of the county to provide all police control required under Article 9-A. 1977 NY Ops Atty Gen Aug 15 (Informal), 1977 N.Y. AG LEXIS 318.

A city, town or village that proposes to license games of chance must exercise the option under section 194, subdivision 2 to have the chief law enforcement officer of the County control and supervise the games of chance if the city, town, or village does not have a police department. The New York State Racing and Wagering Board may enforce this requirement by a rule issued under section 188-a. 1979 N.Y. Op. Att'y Gen. No. 26, 1979 N.Y. AG LEXIS 7.

The chief law enforcement officer for the Town of Smithtown for purposes of Article 9-A of the General Municipal Law is the Commissioner of the Suffolk County Police Department. This chief law enforcement officer may delegate the administrative and inspection responsibilities to the clerk of the town; however,

criminal investigations of applicants for licenses and investigations of criminal activity or involvement must be performed by the Commissioner of the Suffolk County Police Department. 1977 NY Ops Atty Gen April 15 (Informal), 1977 N.Y. AG LEXIS 124.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 186.

Definitions § 186.

Codes, Rules and Regulations:

Premises open to inspection. 9 NYCRR § 4622.8.

General conduct of games of chance. 9 NYCRR §§ 4622.1 et seq.

Jurisprudences:

62 NY Jur 2d Gambling §§ 10, 60, 61.

§ 195. Sunday; conduct of games on

Except as provided in section one hundred ninety-five-b of this article, no games of chance shall be conducted under any license issued under this article on the first day of the week, commonly known and designated as Sunday, unless it shall be otherwise provided in the license issued for the conducting thereof, pursuant to the provisions of a local law or an ordinance duly adopted by the governing body of the municipality wherein the license is issued, authorizing the conduct of games of chance under this article on that day only between the hours of noon and midnight. Notwithstanding the foregoing provisions of this section no games of chance shall be conducted on Easter Sunday or Christmas Day.

HISTORY:

Add, L 1976, ch 960, § 1, eff Aug 26, 1976; amd, L 1978, ch 574, § 10, eff Aug 23, 1978; L 2003, ch 461, § 1, eff Jan 7, 2004.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

62 NY Jur 2d Gambling §§ 10 76.

§ 195-a. Participation by persons under eighteen

No person under the age of eighteen years shall be permitted to play any game or games of chance conducted pursuant to any license issued under this article. Persons under the age of eighteen years may be permitted to attend games of chance at the discretion of the games of chance licensee. No person under the age of eighteen years shall be permitted to operate any game of chance conducted pursuant to any license issued under this article or to assist therein.

HISTORY:

Add, L 1976, ch 960, § 1, eff Aug 26, 1976; amd, L 1978, ch 574, § 11, eff Aug 23, 1978.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

Minors. 9 NYCRR §§ 4622.2.

Jurisprudences:

62 NY Jur 2d Gambling §§ 10, 74.

§ 195-b. Frequency of games

No game or games of chance, shall be conducted under any license issued under this article more often than twelve times in any calendar year. No particular premises shall be used for the conduct of games of chance on more than twenty-four license periods during any one calendar year. Games shall be conducted only between the hours of noon and midnight on Monday, Tuesday, Wednesday and Thursday, and only between the hours of noon on Friday and two A.M. Saturday, and only between the hours of noon on Saturday and two A.M. Sunday. The two A.M. closing period shall also apply to a legal holiday. The above restrictions shall not apply when only the games of chance known as bell jar and/or raffle are conducted.

HISTORY:

Add, L 1976, ch 960, § 1, eff Aug 26, 1976; amd, L 1978, ch 574, § 12, eff Aug 23, 1978; L 1988, ch 46, § 5, eff Oct 12, 1988; L 1998, ch 252, § 5, eff Nov 4, 1998.

Notes to Decisions

1. Generally

Article 9-A of the General Municipal Law dealing with games of chance, does not permit the utilization of vending machines to dispense bell jar type gambling tickets or cards. 1990 N.Y. Op. Att'y Gen. No. 90-F5, 1990 N.Y. AG LEXIS 95.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 195.

Jurisprudences:

62 NY Jur 2d Gambling §§ 10, 76.

§ 195-c. 1. Persons operating games; equipment; expenses; compensation

[1.] *No person shall operate any game of chance under any license issued under this article except a bona fide member of the authorized organization to which the license is issued, or a bona fide member of an organization or association which is an auxiliary to the licensee or a bona fide member of an organization or association of which such licensee is an auxiliary or a bona fide member of an organization or association which is affiliated with the licensee by being, with it, auxiliary to another organization or association. Nothing herein shall be construed to limit the number of games of chance licensees for whom such persons may operate games of chance nor to prevent non-members from assisting the licensee in any activity other than managing or operating games. No game of chance shall be conducted with any equipment except such as shall be owned or leased by the authorized organization so licensed or used without payment of any compensation therefor by the licensee. However, in no event shall bell jar tickets be transferred from one authorized organization to another, with or without payment of any compensation thereof. The head or heads of the authorized organization shall upon request certify, under oath, that the persons operating any game of chance are bona fide members of such authorized organization, auxiliary or affiliated organization. Upon request by an officer or the department any such person involved in such games

*The bracketed designator has been inserted by the Publisher as the legislature inadvertently inserted the designator in the section heading.

of chance shall certify that he or she has no criminal record. No items of expense shall be incurred or paid in connection with the conducting of any game of chance pursuant to any license issued under this article except those that are reasonable and are necessarily expended for games of chance supplies and equipment, prizes, security personnel, stated rental if any, bookkeeping or accounting services according to a schedule of compensation prescribed by the board, janitorial services and utility supplies if any, and license fees, and the cost of bus transportation, if authorized by such clerk or department. No commission, salary, compensation, reward or recompense shall be paid or given to any person for the sale or assisting with the sale of raffle tickets.

2. For the purpose of the sale of tickets for the game of raffle, the term "operate" shall not include the sale of such tickets by persons of lineal or collateral consanguinity to members of an authorized organization licensed to conduct a raffle.

HISTORY:

Add, L 1976, ch 960, § 1, eff Aug 26, 1976; amd, L 1978, ch 574, § 12, eff Aug 23, 1978; L 1996, ch 309, § 423, eff Jan 9, 1997; L 1998, ch 252, § 6, eff Nov 4, 1998.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 189.

Codes, Rules and Regulations:

Games of chance currency. 9 NYCRR §§ 4621.1 et seq.

Restriction on participation. 9 NYCRR § 4622.3.

Jurisprudences:

62 NY Jur 2d Gambling §§ 10, 58, 59, 80.

§ 195-d. Charge for admission and participation; amount of prizes; award of prizes

1. A fee may be charged by any licensee for admission to any game or games of chance conducted under any license issued under this article. The clerk or department may in its discretion fix a minimum fee.

2. With the exception of bell jars, coin boards, seal cards, merchandise boards and raffles, every winner shall be determined and every prize shall be awarded and delivered within the same calendar day as that upon which the game was played. No alcoholic beverage shall be offered or given as a prize in any game of chance.

3. A player may purchase a chance with cash or, if the authorized organization wishes, with a personal check, credit card or debit card.

HISTORY:

Add, L 1976, ch 960, § 1, eff Aug 26, 1976; amd, L 1978, ch 574, § 12, eff Aug 23, 1978; L 1999, ch 637, § 2, eff Jan 23, 2000; L 2017, ch 59, § 13 (Part MM), effective July 9, 2017; L 2017, ch 464, § 5, effective July 9, 2017.

Editor's Notes Laws 2017, ch 464, §§ 1, 2, 7, provide:

§ 1. This act shall be known and may be cited as the "charitable gaming act of 2017".

§ 2. The legislature hereby finds that games of chance, specifically games known as "raffles", conducted by bona fide charitable, educational, scientific, health, religious and patriotic organizations provide vital financial support to many worthwhile programs in the communities in which they serve. Furthermore, conforming current statutory language to address recent technological advances will enhance the ability of the public at large to participate and thusly is deemed to be in the public interest.

§ 7. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided, however that the provisions of paragraph (a) of subdivision 16 of section 189 of the general municipal law made by section four of this act and the amendments to subdivision 3 of section 195-d of the general municipal law made by section five of this act shall take effect on the same date and in the same manner as part MM of chapter 59 of the laws of 2017, takes effect; provided further, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized.

Amendment Notes The 2017 amendment by ch 59, § 13 (Part MM), added the 1 and 2 designations; added 3; and made a stylistic change.

The 2017 amendment by ch 464, § 5, added "credit card or debit card" in 3.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

Admission of general public; charge optional. 9 NYCRR § 4622.7.

Maximum value of prizes offered. 9 NYCRR § 4622.12.

Value of merchandise prizes. 9 NYCRR § 4622.13.

Admission charge as a requisite to participate. 9 NYCRR § 4622.15.

Property not permitted as prizes. 9 NYCRR § 4622.16.

Jurisprudences:

62 NY Jur 2d Gambling §§ 10, 77, 78.

§ 195-e. Advertising games

A licensee may advertise the conduct of games of chance to the general public by means of newspaper, circular, handbill and poster, and by one sign not exceeding sixty square feet in area, which may be displayed on or adjacent to the premises owned or occupied by a licensed authorized organization, through the internet or television as may be regulated by the rules and regulations of the commission. When an organization is licensed or authorized to conduct games of chance on the premises of an authorized games of chance lessor, one additional such sign may be displayed on or adjacent to the premises in which the games are to be conducted. Additional signs may be displayed upon any firefighting or ambulance equipment belonging to any licensed authorized organization that is a volunteer fire company, volunteer ambulance corps or upon any equipment of a first aid or rescue squad in and throughout the community served by such volunteer fire company, volunteer ambulance corps or such first aid or rescue squad, as the case may be. All advertisements shall be limited to the description of such event as "Games of chance" or "Las Vegas Night", the name of the authorized organization conducting such games, the license number of the authorized organization as assigned by the clerk or department, the prizes offered and the date, location and time of the event.

HISTORY:

Add, L 1976, ch 960, § 1, eff Aug 26, 1976; amd, L 1978, ch 574, § 12, eff Aug 23, 1978; L 1981, ch 94, § 1, eff July 11, 1981; L 2017, ch 59, § 14 (Part MM), effective July 9, 2017.

Amendment Notes The 2017 amendment by ch 59, § 14 (Part MM), rewrote the former first sentence as the first and second sentences; in the third sentence, substituted "firefighting or ambulance equipment" for "fire fighting equipment" and added "volunteer ambulance corps" twice; added "the prizes offered" in the last sentence; and made a stylistic change.

Notes to Decisions

1. Generally

A "Penny Saver" publication is not a "handbill" as identified in General Municipal Law, § 195-e and advertising authorized by means of a handbill in that section is not permitted in a Pennysaver. 1980 N.Y. Op. Att'y Gen. No. 29, 1980 N.Y. AG LEXIS 4.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

62 NY Jur 2d Gambling §§ 10, 79.

§ 195-f. Statement of receipts, expenses; additional license fees

1. Within seven days after the conclusion of any license period other than a license period for a raffle, or as otherwise prescribed by the board, the authorized organization which conducted the same, and its members who were in charge thereof, and when applicable the authorized games of chance lessor which rented its premises therefor, shall each furnish to the clerk or department a statement subscribed by the member in charge and affirmed by him as true, under the penalties of perjury, showing the amount of the gross receipts derived therefrom and each item of expense incurred, or paid, and each item of expenditure made or to be made other than prizes, the name and address of each person to whom each such item of expense has been paid, or is to be paid, with a detailed description of the merchandise purchased or the services rendered therefor, the net proceeds derived from the conduct of games of chance during such license period, and the use to which such proceeds have been or are to be applied and it shall be the duty of each licensee to maintain and keep such books and records as may be necessary to substantiate the particulars of each such statement.

2. Within thirty days after the conclusion of an occasion during which a raffle was conducted, the authorized organization conducting such raffle and the members in charge of such raffle, and, when applicable, the authorized games of chance lessor that rented its premises therefor, shall each furnish to the clerk or department a statement on a form prescribed by the gaming commission, subscribed by the member in charge and affirmed by him or her as true, under the penalties of perjury, showing the number of tickets printed, the number of tickets sold, the price, and the number of tickets returned to or retained by the authorized organization as unsold, a description and statement of the fair market value for each prize actually awarded, the amount of the gross receipts derived therefrom, each item of expenditure made or to be made other than prizes, the name and address of each person to whom each such item of expense has been paid, or is to be paid, a detailed description of the merchandise purchased or the services rendered therefor, the net proceeds derived from the raffle at such occasion, the use to which the proceeds have been or are to be applied. It shall be the duty of each licensee to maintain and keep such books and records as may be necessary to substantiate the particulars of each such statement, provided, however, where the cumulative net proceeds or net profits derived from the conduct of a raffle or raffles are less than thirty thousand dollars during any one occasion, in such case, the reporting requirement shall be satisfied by the filing within thirty days of the conclusion of such occasion a verified statement prescribed by the gaming commission attesting to the amount of such net proceeds or net profits and the distribution thereof for lawful purposes with the clerk or department and a copy with the gaming commission, and provided further, however, where the cumulative net proceeds derived from the conduct of a raffle or raffles are less than five thousand dollars during any one occasion and less than thirty thousand dollars during one calendar year, no reporting shall be required.

3. Any authorized organization required to file an annual report with the secretary of state pursuant to article seven-A of the executive law or the attorney general pursuant to article eight of the estates, powers and trusts law shall include with such annual report a copy of the statement required to be filed with the clerk or department pursuant to subdivision one or two of this section.

4. Upon the filing of such statement of receipts pursuant to subdivision one or two of this section, the authorized organization furnishing the same shall pay to the clerk or department as and for an additional license fee a sum based upon the reported net proceeds, if any, for the license period, or in the case of raffles, for the occasion covered by such statement and determined in accordance with such schedule as shall be established from time to time by the board to defray the actual cost to municipalities or counties of administering the provisions of this article, but such additional license fee shall not exceed five percent of the net proceeds for such license period. The provisions of this subdivision shall not apply to the net proceeds from the sale of bell jar tickets. No fee shall be required where the net proceeds or net profits derived from the conduct of a raffle or raffles are less than thirty thousand dollars during any one occasion.

HISTORY:

Add, L 1976, ch 960, § 1, eff Aug 26, 1976; amd, L 1978, ch 574, § 12, eff Aug 23, 1978; L 1994, ch 550, § 11, eff Jan 22, 1995; L 1996, ch 309, § 424, eff Jan 9, 1997; L 1998, ch 252, § 7, eff Nov 4, 1998; L 2004, ch 678, § 2, eff Nov 3, 2004; L 2017, ch 59, § 15 (Part MM), effective July 9, 2017.

Amendment Notes The 2017 amendment by ch 59, § 15 (Part MM), rewrote the former first sentence of 2 as the first and second sentences.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 194.

Codes, Rules and Regulations:
Report of net profits. 9 NYCRR § 4605.2.
Financial statement of games of chance operations. 9 NYCRR §§ 4624.1 et seq.

Jurisprudences:
62 NY Jur 2d Gambling §§ 10, 71–73, 75.

Texts: 1-6 New York Nonprofit Law and Practice § 6.02.

§ 195-g. Examination of books and records; examination of officers and employees; disclosure of information

The clerk or department and the board shall have power to examine or cause to be examined the books and records of:

1. Any authorized organization which is or has been licensed to conduct games of chance, so far as they may relate to games of chance including the maintenance, control and disposition of net proceeds derived from games of chance or from the use of its premises for games of chance, and to examine any manager, officer, director, agent, member or employee thereof under oath in relation to the conduct of any such game under any such license, the use of its premises for games of chance, or the disposition of net proceeds derived from games of chance, as the case may be.

2. Any authorized games of chance lessor so far as they may relate to leasing premises for games of chance and to examine said lessor or any manager, officer, director, agent or employee thereof under oath in relation to such leasing.

Any information so received shall not be disclosed except so far as may be necessary for the purpose of carrying out the provisions of this article.

HISTORY:
Add, L 1976, ch 960, § 1, eff Aug 26, 1976.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:
Financial statement of games of chance operations. 9 NYCRR §§ 4624.1 et seq.

Jurisprudences:
62 NY Jur 2d Gambling §§ 10, 60.

§ 195-h. Appeals from the decision of an officer, clerk or department to board

Any applicant for, or holder of, any license issued or to be issued under this article aggrieved by any action of an officer, clerk or department, to which such application has been made or by which such license has been issued, may appeal to the board from the determination of said officer, clerk, or department by filing with such officer, clerk, or department a written notice of appeal within thirty days after the determination or action appealed from, and upon the hearing of such appeal, the evidence, if any, taken before such officer, clerk, or department and any additional evidence may be produced and shall be considered in arriving at a determination of the matters in issue, and the action of the board upon said appeal shall be binding upon such officer, clerk, or department and all parties to said appeal.

HISTORY:
Add, L 1976, ch 960, § 1, eff Aug 26, 1976.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:
62 NY Jur 2d Gambling §§ 10, 61.

§ 195-i. Exemption from prosecution

No person, firm, partnership, corporation or organization lawfully conducting, or participating in the conduct of games of chance or permitting the conduct upon any premises owned or leased by him or it under any license lawfully issued pursuant to this article, shall be liable to prosecution or conviction for violation of any provision of article two hundred twenty-five of the penal law or any other law or ordinance to the extent that such conduct is specifically authorized by this article, but this immunity shall not extend to any person or corporation knowingly conducting or participating in the conduct of games of chance under any license obtained by any false pretense or by any false statement made in any application for license or otherwise, or permitting the conduct upon any premises owned or leased by him or it of any game of chance conducted under any license known to him or it to have been obtained by any such false pretense or statement.

HISTORY:
Add, L 1976, ch 960, § 1, eff Aug 26, 1976; amd, L 1978, ch 574, § 12, eff Aug 23, 1978.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:
Gambling offenses, CLS Penal Art 225, §§ 225.00 et seq.

Jurisprudences:
62 NY Jur 2d Gambling §§ 10, 62.

§ 195-j. Offenses; forfeiture of license; ineligibility to apply for license

Any person, firm, partnership, corporation or organization who or which shall:

(1) make any material false statement in any application for any license authorized to be issued under this article;

(2) pay or receive, for the use of any premises for conducting games of chance, a rental in excess of the amount specified as the permissible rent in the license provided for in subdivision two of section one hundred ninety-three of this article;

(3) fail to keep such books and records as shall fully and truly record all transactions connected with the conducting of games of chance or the leasing of premises to be used for the conduct of games of chance;

(4) falsify or make any false entry in any books or records so far as they relate in any manner to the conduct of games of chance, to the disposition of the proceeds thereof and to the application of the rents received by any authorized organization;

(5) divert or pay any portion of the net proceeds of any game of chance to any person, firm, partnership, corporation, except in furtherance of one or more of the lawful purposes defined in this article;

shall be guilty of a misdemeanor and shall forfeit any license issued under this article and be ineli-

gible to apply for a license under this article for at least one year thereafter.

HISTORY:
Add, L 1976, ch 960, § 1, eff Aug 26, 1976; amd, L 1978, ch 574, § 12, eff Aug 23, 1978.

Notes to Decisions

1. Generally

The chief law enforcement officer for the Town of Smithtown for purposes of Article 9-A of the General Municipal Law is the Commissioner of the Suffolk County Police Department. This chief law enforcement officer may delegate the administrative and inspection responsibilities to the clerk of the town; however, criminal investigations of applicants for licenses and investigations of criminal activity or involvement must be performed by the Commissioner of the Suffolk County Police Department. 1977 NY Ops Atty Gen April 15 (Informal), 1977 N.Y. AG LEXIS 124.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Classification and designation of offenses, CLS Penal §§ 55.05 et seq.

Jurisprudences:

35B NY Jur 2d Criminal Law Substantive Principles and Offenses §§ 1174, 1185.

62 NY Jur 2d Gambling §§ 10, 62.

§ 195-k. Unlawful games of chance

1. Any person, association, corporation or organization holding, operating, or conducting a game or games of chance is guilty of a misdemeanor, except when operating, holding or conducting:

(a) In accordance with a valid license issued pursuant to this article;

(b) On behalf of a bona fide organization of persons sixty years of age or over, commonly referred to as senior citizens, solely for the purpose of amusement and recreation of its members where (i) the organization has applied for and received an identification number from the board, (ii) no player or other person furnishes anything of value for the opportunity to participate, (iii) the prizes awarded or to be awarded are nominal, (iv) no person other than a bona fide active member of the organization participates in the conduct of the games, and (v) no person is paid for conducting or assisting in the conduct of the game or games; or

(c) A raffle pursuant to section one hundred ninety-a of this article.

2. The provisions of this section shall apply to all municipalities within this state, including those municipalities where this article is inoperative.

HISTORY:
Add, L 1976, ch 960, § 1, eff Aug 26, 1976; amd, L 2005, ch 400, § 2, eff Aug 2, 2005.

Notes to Decisions

1. Raffle

Raffle run by charitable institution to raise funds for scholarship fund fell within definition of lottery contained in CLS Penal § 225.00, and thus it was not game of chance which could be conducted pursuant to CLS Gen Mun Art 9-A. Harris v Economic Opportunity Comm'n, Inc., 142 Misc. 2d 980, 542 N.Y.S.2d 913, 1989 N.Y. Misc. LEXIS 378 (N.Y. App. Term 1989), aff'd, 171 A.D.2d 223, 575 N.Y.S.2d 672, 1991 N.Y. App. Div. LEXIS 13739 (N.Y. App. Div. 2d Dep't 1991).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 195-l.

Classification and designation of offenses, CLS Penal §§ 55.05 et seq.

Codes, Rules and Regulations:

Authorized games of chance. 9 NYCRR §§ 4620.1 et seq.

Jurisprudences:

62 NY Jur 2d Gambling §§ 10, 58, 59, 80.

§ 195-l. Article inoperative until adopted by voters

Except as provided in section one hundred ninety-five-k of this article, the provisions of this article shall remain inoperative in any municipality unless and until a proposition therefor submitted at a general or special election in such municipality shall be approved by a vote of the majority of the qualified electors in such municipality voting thereon.

HISTORY:
Add, L 1976, ch 960, § 1, eff Aug 26, 1976.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

62 NY Jur 2d Gambling §§ 10, 58, 59, 80.

§ 195-m. Amendment and repeal of local laws and ordinances

Any such local law or ordinance may be amended, from time to time, or repealed by the common council or other local legislative body of the municipality which enacted it by a two-thirds vote of such legislative body and such amendment or repeal, as the case may be, may be made effective and operative not earlier than thirty days following the date of enactment of the local law or ordinance effecting such amendment or repeal, as the case may be; and the approval of a majority of the electors of such municipality shall not be a condition prerequisite to the taking effect of such local law or ordinance.

HISTORY:
Add, L 1976, ch 960, § 1, eff Aug 26, 1976.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

62 NY Jur 2d Gambling §§ 10, 66, 67.

§ 195-n. Manufacturers of bell jars; reports and records

1. Distribution; manufacturers. For business conducted in this state, manufacturers licensed by the board to sell bell jar tickets shall sell only such tickets to distributors licensed by the board. Manufacturers of bell jar tickets, seal cards, merchandise boards, and coin boards may submit samples, artists' renderings, or color photocopies of proposed bell jar tickets, seal cards, merchandise boards, coin boards, payout cards, and flares for review and approval by the board. Within thirty days of receipt of such sample or rendering, the board shall approve or deny such bell jar tickets. Following approval of a rendering of a bell jar ticket, seal card, merchandise board, or coin board by the board, the manufacturer shall submit to the board a sample of the printed bell jar ticket, seal card, merchandise board, coin board, payout card, and flare for such game. Such sample

shall be submitted prior to the sale of the game to any licensed distributor for resale in this state. For coin boards and merchandise boards, nothing herein shall require the submittal of actual coins or merchandise as part of the approval process. Any licensed manufacturer who willfully violates the provisions of this section shall: (a) upon such first offense, have their license suspended for a period of thirty days; (b) upon such second offense, participate in a hearing to be conducted by the board, and surrender their license for such period as recommended by the board; and (c) upon such third or subsequent offense, have their license suspended for a period of one year and shall be guilty of a class E felony. Any unlicensed manufacturer who violates the provisions of this section shall be guilty of a class E felony.

2. Bar codes. The manufacturer shall affix to the flare of each bell jar game a bar code that provides all information prescribed by the board and shall require that the bar code include the serial number of the game the flare describes. A manufacturer shall also affix to the outside of the container or wrapping containing a deal of bell jar tickets a bar code providing all information prescribed by the board and containing the same information as the bar code affixed to the flare. The board may also prescribe additional bar code requirements. No person may alter the bar code that appears on the flare or on the outside of the container or wrapping containing a deal of bell jar tickets. Possession of a deal of bell jar tickets that has a bar code different from the serial number of the deal inside the container or wrapping as evidenced on the flare is prima facie evidence that the possessor has altered the bar code on the container or wrapping.

3. Bell jar flares. (a) A manufacturer shall not ship or cause to be shipped into this state any deal of bell jar tickets that does not have its own individual flare as required for that deal by rule of the board. A person other than a licensed manufacturer shall not manufacture, alter, modify, or otherwise change a flare for a deal of bell jar tickets except as authorized by this article or rules and regulations promulgated by the board.

(b) The flare for each deal of bell jar tickets sold by a manufacturer in this state shall be placed inside the wrapping of the deal which the flare describes.

(c) The bar code affixed to the flare of each bell jar game shall bear the serial number of such game as prescribed by the board.

(d) The flare of each bell jar game shall have affixed a bar code that provides: (1) the game code; (2) the serial number of the game; (3) the name of the manufacturer; and (4) other information the board by rule may require. The serial number included on the bar code shall be the same as the serial number of the tickets included in the deal. A manufacturer who manufactures a deal of bell jar tickets shall affix to the outside of the container or wrapping containing the bell jar tickets the same bar code that is affixed to the flare for that deal.

(e) No person shall alter the bar code that appears on the outside of a container or wrapping containing a deal of bell jar tickets. Possession of a deal of bell jars that has a bar code different from the bar code of the deal inside the container or wrapping is prima facie evidence that the possessor has altered the bar code on the box.

4. Reports of sales. A manufacturer who sells bell jar tickets for resale in this state shall file with the board, on a form prescribed by the board, a report of all bell jar tickets sold to distributors in the state. The report shall be filed quarterly on or before the twentieth day of the month succeeding the end of the quarter in which the sale was made. The board may require that the report be submitted via magnetic media or electronic data transfer.

5. Inspection. The board may inspect the premises, books, records, and inventory of a manufacturer without notice during the normal business hours of the manufacturer.

HISTORY:

Add, L 1996, ch 309, § 426, eff Jan 9, 1997; amd, L 1998, ch 337, § 8, eff Jan 10, 1999; L 1999, ch 637, § 3, eff Jan 23, 2000.

Prior Law: Former § 195-n, add, L 1976, ch 960, § 1; redesignated § 195-r, L 1996, ch 309, § 425, eff Jan 9, 1997.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

Manufacturing and distribution of bell jar tickets. 9 NYCRR §§ 4608.1 et seq.

Jurisprudences:

62 NY Jur 2d Gambling §§ 10, 62, 71–73.

§ 195-o. Distributor of bell jars; reports and records

1. Distribution; distributors. Any distributor licensed in accordance with section one hundred eighty-nine-a of this article to distribute bell jar tickets shall purchase bell jar tickets only from licensed manufacturers and may manufacture coin boards and merchandise boards only as authorized in subdivision one-a of this section. Licensed distributors of bell jar tickets shall sell such tickets only to not-for-profit, charitable or religious organizations registered by the board. Any licensed distributor who willfully violates the provisions of this section shall: (a) upon such first offense, have their license suspended for a period of thirty days; (b) upon such second offense, participate in a hearing to be conducted by the board, and surrender their license for such period as recommended by the board; and (c) upon such third or subsequent offense, have their license suspended for a period of one year and shall be guilty of a class E felony. Any unlicensed distributor who violates this section shall be guilty of a class E felony.

1-a. Coin boards and merchandise boards. Distributors of bell jar tickets may manufacture coin boards and merchandise boards only if such boards have been approved by the board and have a bar code affixed to them setting forth all information required by the board. Except that for coin boards

and merchandise boards, delineation of the prize or prize value need not be included on the game ticket sold in conjunction with a coin board or merchandise board. In lieu of such requirement, the distributor shall be required to disclose the prize levels and the number of winners at each level and shall print clearly on the game ticket that a ticket holder may obtain the prize and prize value for each prize level by referencing the flare. Such coin boards shall only be sold by licensed distributors to licensed authorized organizations registered by the board in accordance with the provisions of this article.

2. Business records. A distributor shall keep at each place of business complete and accurate records for that place of business, including itemized invoices of bell jar tickets held and purchased. The records must show the names and addresses of purchasers, the inventory at the close of each period for which a return is required, all bell jar tickets on hand, and other pertinent papers and documents relating to the purchase, sale, or disposition of bell jar tickets as may be required by the board. Books, records, itemized invoices, and other papers and documents required by this section shall be kept for a period of at least four years after the date of the documents, or the date of the entries appearing in the records, unless the board authorizes in writing their destruction or disposal at an earlier date. A person who violates this section shall be guilty of a misdemeanor.

3. Sales records. A distributor shall maintain a record of all bell jar tickets that it sells. The record shall include, but need not be limited to:

(a) the identity of the manufacturer from whom the distributor purchased the product;

(b) the serial number of the product;

(c) the name, address, and license or exempt permit number of the organization or person to which the sale was made;

(d) the date of the sale;

(e) the name of the person who ordered the product;

(f) the name of the person who received the product;

(g) the type of product;

(h) the serial number of the product;

(i) the account number identifying the sale from the manufacturer to distributor and the account number identifying the sale from the distributor to the licensed organization; and

(j) the name, form number, or other identifying information for each game.

4. Invoices. A distributor shall supply with each sale of a bell jar product an itemized invoice showing the distributor's name and address, the purchaser's name, address, and license number, the date of the sale, the account number identifying the sale from the manufacturer to distributor and the account number identifying the sale from the distributor to the licensed organization, and the description of the deals, including the form number, the serial number and the ideal gross from every deal of bell jar or similar game.

5. Reports. A distributor shall report quarterly to the gaming commission, on a form prescribed by the gaming commission, its sales of each type of bell jar deal or tickets. This report shall be filed quarterly on or before the twentieth day of the month succeeding the end of the quarter in which the sale was made. The gaming commission may require that a distributor submit the quarterly report and invoices required by this section via electronic media or electronic data transfer.

6. The board may inspect the premises, books, records, and inventory of a distributor without notice during the normal business hours of the distributor.

7. Certified physical inventory. The board may, upon request, require a distributor to furnish a certified physical inventory of all bell jar tickets in stock. The inventory shall contain the information requested by the board.

HISTORY:

Add, L 1996, ch 309, § 426, eff Jan 9, 1997; amd, L 1998, ch 337, § 9, eff Jan 10, 1999; L 1999, ch 637, § 4, eff Jan 23, 2000; L 2017, ch 59, § 16 (Part MM), effective July 9, 2017.

Amendment Notes The 2017 amendment by ch 59, § 16 (Part MM), in 5, substituted "gaming commission" for "board" twice in the first sentence and once in the last sentence and substituted "electronic media" for "magnetic media" in the last sentence.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

Manufacturing and distribution of bell jar tickets. 9 NYCRR §§ 4608.1 et seq.

Jurisprudences:

62 NY Jur 2d Gambling §§ 62, 71–73.

§ 195-p. Transfer restrictions

Not-for-profit, charitable or religious organizations authorized to sell bell jar tickets in accordance with this article shall purchase bell jar tickets only from distributors licensed by the board. No not-for-profit, charitable, or religious organization shall sell, donate, or otherwise transfer bell jar tickets to any other not-for-profit, charitable or religious organization.

HISTORY:

Add, L 1996, ch 309, § 426, eff Jan 9, 1997.

§ 195-q. Bell jar compliance and enforcement

In the case of bell jars, the licensee, upon filing financial statements of bell jar operations, shall also tender to the board a sum in the amount of five percent of the net proceeds as defined in this paragraph, from the sale of bell jar tickets, seal cards, merchandise board, and coin boards, if any, for that portion of license period covered by such statement. For the purposes of this section, "net proceeds" shall mean the difference between the ideal handle from the sale of bell jar tickets, seal cards, merchandise boards, and coin boards less the amount of money paid out in prizes and less the purchase price of the

bell jar deal, seal card deal, merchandise board deal, or coin board deal. Additionally, a credit shall be permitted against the net proceeds fee tendered to the board for unsold tickets of the bell jar deal as long as the unsold tickets have the same serial number as the tickets for which the fee is rendered. Such unsold tickets must be kept on file by the selling organization for inspection by the board for a period of one year following the date upon which the relevant financial statement was received by the board.

1. One-half of one percent of such fee received from authorized volunteer fire companies shall be paid to the New York state emergency services revolving loan account established pursuant to section ninety-seven-pp of the state finance law.

2. The state gaming commission shall submit to the director of the division of the budget an annual plan that details the amount of money the state gaming commission deems necessary to maintain operations, compliance and enforcement of the provisions of this article and the collection of the license fee authorized by this section. Contingent upon the approval of the director of the division of the budget, the state gaming commission shall pay into an account, to be known as the bell jar collection account, under the joint custody of the comptroller and the state gaming commission, the total amount of license fees collected pursuant to this section. With the approval of the director of the division of the budget, monies to be utilized to maintain the operations necessary to enforce the provisions of this article and the collection of the license fee imposed by this section shall be paid out of such account on the audit and warrant of the comptroller on vouchers certified or approved by the director of the division of the budget or his or her duly designated official. Those monies that are not utilized to maintain operations necessary to enforce the provisions of this article and the collection of the license fee authorized by this section shall be paid out of such amount on the audit and warrant of the state comptroller and shall be credited to the general fund.

HISTORY:

Add, L 1996, ch 309, § 426, eff Jan 9, 1997; amd, L 1998, ch 337, § 10, eff Jan 10, 1999; L 2020, ch 243, § 160, effective October 7, 2020.

Amendment Notes The 2020 amendment by ch 243, § 160, substituted "state gaming commission" for "racing and wagering board" and similar language through (2); and added "or her" in the third sentence.

ARTICLE 10 Firefighters and Police Officers

Section

200. Defining qualifications of exempt volunteer firefighters.
200-a. Volunteer firefighters serving in more than one fire company or fire department.
200-b. Leaves of absence for volunteer firefighters entering the armed forces of the United States prior to July first, nineteen hundred sixty-six
200-c. Leaves of absence for volunteer firefighters entering the armed forces of the United States on or after July first, nineteen hundred sixty-six
201. Rights and privileges of exempt volunteer firefighters.
202. Certificate to be issued to exempt volunteer firefighter.
202-a. Recording certificates of exempt volunteer firefighter.
203. List of exempt volunteer firefighters to be filed.
204. Qualifications necessary to entitle to certain exemptions.
204-a. Raising of funds for fire company purposes.
204-b. Youth programs
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204-g. Restrictions on the use of firefighting foam containing PFAS chemicals.
205. Payments to injured or representatives of deceased volunteer firefighters.
205-a. Additional right of action to certain injured or representatives of certain deceased firefighters
205-b. Relief of volunteer firefighters engaged in the performance ofduty as such firefighters from civil liability and liability of fire districts for the acts of volunteer firefighters
205-c. Payments pending controversies where volunteer firefighters are killed or injured.
205-cc. Volunteer firefighter enhanced cancer disability benefits
205-f. Removal of civil liability barriers
205-g. Defense and indemnification of volunteer firefighters
206-b. Exemption of benefits payable under blanket accident insurance covering volunteer firefighters.
207-a. Payment of salary, medical and hospital expenses of firefighters with injuries or illness incurred in performance of duties.
207-g. Ordinary death benefits of members of police retirement systems
209. Outside service by local fire departments, companies, ambulance districts and airport crash-fire-rescue units
209-b. Emergency rescue and first aid squads
209-bb. Specialized teams
209-c. Fire police squads of fire departments and fire companies.
209-d. Contracts for outside service by volunteer fire departments and companies.
209-e. Fire mobilization and mutual aid plan
209-ee. Adoption of a code of ethics and disclosure of interests by fire companies
209-f. Outside service by local police forces; mobilization by governor; powers of sheriffs
209-g. Liability for outside aid
209-i. Emergency service by volunteer firefighters.
209-j. Mutual aid programs in counties.
209-l. Removal of volunteer officers and volunteer members of fire departments
209-p. Relay of fire and emergency calls.
209-s. Contracts between municipalities and fire districts for joint fire training centers
209-t. Contracts for joint fire alarm systems
209-u. Notification of presence of hazardous materials

209-w. Permanent appointment of fire fighters; completion of training program
209-y. Establishment of hazardous materials emergency response teams
209-z. Annual independent audits

HISTORY:
Add, L 1909, ch 29, eff Feb 17, 1909; L 2018, ch 476, § 36, effective December 28, 2018.

§ 200. Defining qualifications of exempt volunteer firefighters.

An exempt volunteer firefighter is hereby declared to be a person who as a member of a volunteer fire company duly organized under the laws of the state of New York shall have at any time after attaining the age of eighteen years faithfully actually performed service in the protection of life and property from fire within the territory immediately protected by the company of which he or she is a member, and while a bona fide resident therein, for a period of five years, as provided in this article, or, if such company shall have been sooner disbanded upon the organization of a paid fire department, for a period of at least one year and shall also have been a member of such volunteer fire company at the time it shall have been disbanded; but the limitation of one year's service shall not apply to a volunteer firefighter who was a member of a fire company which was disbanded prior to January first, nineteen hundred two. The foregoing residence requirements shall not apply (1) to a volunteer firefighter who has been duly elected to membership in his or her fire company as a non-resident member residing in territory which is afforded fire protection by his or her fire company pursuant to a contract for fire protection, as authorized by paragraph three of subdivision c of section fourteen hundred two of the not-for-profit corporation law or by subdivisions two and three of either section 10-1006 of the village law, section one hundred seventy-six-b of the town law or section sixteen-a of the general city law, (2) to a volunteer firefighter whose membership has been duly continued in his or her fire company as authorized by paragraph three of subdivision c of section fourteen hundred two of the not-for-profit corporation law or by subdivision five of either section 10-1006 of the village law, section one hundred seventy-six-b of the town law or section sixteen-a of the general city law and (3) to a volunteer firefighter who has been duly elected to membership as a non-resident as authorized by paragraph three of subdivision c of section fourteen hundred two of the not-for-profit corporation law or by subdivision six of either section 10-1006 of the village law, section one hundred seventy-six-b of the town law or section sixteen-a of the general city law. The foregoing requirement of five years' service shall not apply to a volunteer firefighter serving as such at the time of his or her entry into the military service of the United States or of one of its allies in world war II, or during the period of hostilities as defined in subparagraph three or subparagraph four of paragraph (c) of subdivision one of section eighty-five of the civil service law, who, as a result of such military service, shall have become incapacitated for performing the full duties of a volunteer firefighter, or to a volunteer firefighter who, as the result of the performance of his or her duties as such, shall have become likewise incapacitated, but any such volunteer firefighter shall be an exempt volunteer firefighter even though he or she may have served as such for a lesser period than five years, and he or she shall be entitled to a certificate as provided in section two hundred two of this article which, in addition to the specifications contained in said section, shall set forth the facts in reference to his or her military service, if any, as aforesaid and that as a result of such military service, or as the result of service as a volunteer firefighter, he or she was incapacitated for performing the full duties of a volunteer firefighter. The term "military service" as used in this section shall mean the same as the term "military duty" as used in section two hundred forty-three of the military law, except that it shall relate to service for an ally of the United States in world war II as well as to service for the United States.

HISTORY:
Add, L 1909, ch 29; amd, L1937, ch 295, § 1; L 1946, ch 422, § 1; L 1948, ch 364, § 1; L 1958, ch 919, § 1; L 1960, ch 378, § 1; L 1963, ch 946, § 1, eff April 30, 1963; L 1972, ch 892, § 23; L 1972, ch 894, § 13, eff Sept 1, 1973; L 1973, ch 176, § 2, eff Sept 1, 1973; L 1976, ch 954, § 1, eff Sept 1, 1976; L 2018, ch 476, § 37, effective December 28, 2018.

Amendment Notes The 2018 amendment by ch 476, § 37, substituted "firefighters" for "firemen" in the section heading; substituted "firefighter" for "fireman" throughout the section; and made stylistic changes.

Notes to Decisions

Analysis

1. Generally
2. Exempt volunteer firefighters
3. —Five-year period
4. Membership
5. Disciplinary suspension

1. Generally

This section will not be given a retroactive effect so as to deprive the petitioner of accrued rights. Pettit v Boyle, 223 N.Y.S. 521, 129 Misc. 873, 1927 N.Y. Misc. LEXIS 1339 (N.Y. Sup. Ct. 1927).

The by-law of a volunteer fire department, which provides that every member receiving his volunteer fireman exemption certificate shall automatically cease to be a member of the department, violates §§ 200, 200-a, 200-b and 202. Taff v Board of Fire Comm'rs, 2 N.Y.S.2d 851, 166 Misc. 704, 1938 N.Y. Misc. LEXIS 1356 (N.Y. Sup. Ct. 1938).

Where the petitioner, an exempt volunteer fireman, and a police chief for seventeen years annually appointed, was serving during pleasure of the village board, the notice of termination of term was a removal and since petitioner at the time was an exempt fireman he was entitled to a hearing. Dickinson v Monroe, 44 N.Y.S.2d 86, 180 Misc. 714, 1943 N.Y. Misc. LEXIS 2392 (N.Y. Sup. Ct. 1943).

The provisions of this section et seq., in relation to exempt firemen and certificates to be issued for their service, are controlling upon the subject and Village Law, § 209 is without statutory force. 1911 N.Y. Op. Att'y Gen. No. 322, 1911 N.Y. AG LEXIS 195.

It may be possible to vote a chaplain or physician into a fire department as an active member so as to be entitled to the benefits of the Volunteer Firemen's Benefit Law, the number of calls to active duty to be responded to by such a member, in view of his professional duties, being a matter of satisfying the authority having control of the fire department. 1961 NY Ops Atty Gen May 23 (Informal), 1961 N.Y. AG LEXIS 94.

County Veterans' Service Agency Directors are appointed and removed in accordance with the provisions of Executive Law, § 357 (1). The director in each county of the state has been classified as a noncompetitive service with the exception of the Counties of Erie, where the director is unclassified, and Westchester, where the director is in the exempt service. Each Director of a County Veterans' Service Agency is an independent officer and is not protected against removal pursuant to Civil Service Law, § 75 even though he be an honorably discharged veteran or an exempt volunteer fireman. To the extent that County Veterans' Service Agency Directors are classified in noncompetitive service, the inquiry is academic. 1974 N.Y. Op. Att'y Gen. No. 17, 1974 N.Y. AG LEXIS 6.

The position of paid chief engineer may be abolished by resolution of the board of fire commissioners of a fire district. 1957 Op St Compt No. 57-272.

2. Exempt volunteer firefighters

A volunteer fireman, with inactive, exempt status as a member of a volunteer fire company, may vote in an election of company officers, if company by-laws so provide. 1971 Op St Compt No. 71-1034.

3. —Five-year period

The five-year period of service necessary for qualification as an exempt volunteer fireman pursuant to General Municipal Law, § 200 need not be a consecutive five-year period of service. 1977 Op St Compt No. 77-802.

A volunteer fireman who is on a leave of absence pursuant to this section would not continue to accrue seniority credit based on active service unless the constitution, by-laws, or rules and regulations of the fire company or fire department provides otherwise. 1978 Op St Compt No. 78-237.

4. Membership

All members of a volunteer fire company must be active members. The law does not recognize inactive classifications. 1955 Op St Compt No. 55-7510.

In order to be eligible for benefits under the Volunteer Firemen's Benefit Law, a person must be an active member of a volunteer fire company. 1957 Op St Compt No. 57-272.

A paid chief engineer may be restored to his former status as a volunteer fireman, if he still retains membership in the volunteer fire company, by resuming his duties as an active volunteer fireman. 1957 Op St Compt no. 57-272.

It is not necessary that a volunteer fire company shall have rendered firefighting services under a contract in order that a member may qualify as an exempt volunteer fireman. 1957 Op St Compt No. 57-627.

A person is not disqualified from eligibility to active membership in a fire company because he is temporarily disabled by reason of illness. 1960 Op St Compt No. 60-632.

Persons 16 years of age and older may serve as volunteer firemen. 1969 Op St Compt No. 69-40.

5. Disciplinary suspension

Volunteer firefighter serving disciplinary suspension is not in good standing within meaning of CLS Gen Mun § 202 and is not eligible to be certified as exempt volunteer firefighter. 1992 NY Ops Atty Gen 92-38 (Informal), 1992 N.Y. AG LEXIS 37.

A fire company may not issue a certificate of exempt status to a volunteer fireman who was suspended one week before he completed the five-year period of service required by section 200 of the General Municipal Law and has not subsequently been restored to active status. 1980 Op St Compt No. 80-562.

Agency Opinions

1. Exemptions

A person subject to call for firefighting or rescue squad duty, without an option of whether or not to respond, is an active volunteer fireman and eligible to receive an exemption from real property taxes under Real Property Tax Law § 466. 7 Op Counsel SBEA 114 (1983).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 200-a–200-c, 202; CLS N-PCL § 1402.

Additional credit allowed veterans in competitive examinations; preference in retention upon abolition of positions, CLS Civ S § 85.

Fire corporations, CLS N-PCL § 1402.

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1246—1249.

§ 200-a. Volunteer firefighters serving in more than one fire company or fire department.

When any person has served as a volunteer firefighter as provided in section two hundred of this article, for less than five years, and while in good standing in the company or department of which he or she was a member, has resigned therefrom or has been transferred from one company to another, he or she shall be entitled to a certificate as provided in section two hundred two of this article for the time he or she has actually served. And when any person has served five years as a volunteer firefighter in one or more companies or departments, as provided in section two hundred of this article, he or she shall be deemed an exempt volunteer firefighter and entitled to all the rights and privileges of an exempt volunteer firefighter.

HISTORY:

Add, L 1910, ch 119, § 1, eff April 20, 1910; amd, L 1935, ch 771, § 1; L 1937, ch 295, § 2, eff April 30, 1937; L 2018, ch 476, § 38, effective December 28, 2018.

Amendment Notes The 2018 amendment by ch 476, § 38, substituted "firefighters" for "firemen" in the section heading; substituted "firefighter" for "fireman" and "section two hundred of this article" for "section two hundred of this chapter" throughout the section; and made stylistic changes.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1246, 1247, 1249, 1251.

§ 200-b. Leaves of absence for volunteer firefighters entering the armed forces of the United States prior to July first, nineteen hundred sixty-six

1. When, prior to July first, nineteen hundred sixty-six, a volunteer firefighter in good standing in the fire company or department of which he is a member enters upon active duty in the armed forces of the United States (1) during any war between the United States and any other nation, or (2) during the period beginning with the commencement of the military and naval preparedness in the year nineteen hundred forty and continuing on July first, nineteen hundred sixty-six, and by reason of such active duty is prevented from actually performing duty as a volunteer firefighter in his fire company or department, he shall be given a leave of absence from said company or department for a period which, when added to his period of service as a volunteer firefighter, shall not exceed five years. The

fire company or department, however, may grant a volunteer firefighter on such active duty a leave of absence for a period longer than the mandatory period above specified. Any certificate issued to the volunteer firefighter as provided in section two hundred two of this article shall credit him with the period of any such leave of absence in the same manner as if he had served during such period as a member of his fire company or department and had rendered service in all respects as specified in section two hundred of this article. The period of any such leave of absence shall be included in determining the period of service necessary to qualify him as an exempt volunteer firefighter pursuant to section two hundred of this article. During the period of any such leave of absence such volunteer firefighter shall not perform any services or duties as a volunteer firefighter except for services and duties performed pursuant to subdivision one-a of this section.

1-a. A volunteer firefighter on leave of absence, pursuant to this section, may perform services and duties as a volunteer firefighter during any period in which the armed forces of the United States grants the volunteer firefighter a temporary leave from military service, provided that such services and duties would not violate any law, regulation, rule or order of the United States or of the armed forces of the United States. This subdivision shall not be construed to require a volunteer firefighter on such temporary leave to perform services and duties as a volunteer firefighter during any temporary leave from military service.

2. During the period of any such leave of absence the fire company or department may enroll another person as a member to take the place of the volunteer firefighter on such active duty. Any person so enrolled may continue as a member of the company or department until he or she shall have served the time necessary to qualify him or her as an exempt volunteer firefighter, even though the person whose place he or she took may have resumed his or her duties as a volunteer firefighter.

HISTORY:

Add, L 1918, ch 19, § 1, eff Feb 28, 1918; amd, L 1941, ch 252, § 1; L 1951, ch 815, § 1; L 1952, ch 655, § 1; L 1953, ch 174, § 1; L 1954, ch 217, § 1; L 1955, ch 461, § 1, eff April 18, 1955; L 1956, ch 63, § 1; L 1957, ch 99, § 1; L 1958, ch 135, § 1; L 1960, ch 83, § 1; L 1961, ch 98, § 1; L 1962, ch 92, § 1; L 1963, ch 69, § 1; L 1964, ch 107, § 1; L 1966, ch 543, § 1, eff July 1, 1966; L 2005, ch 341, § 2, eff Aug 25, 2005 (see 2005 note below); L 2018, ch 476, § 39, effective December 28, 2018.

Editor's Notes: Laws 2005, ch 341, § 4, eff Aug 25, 2005, provides as follows:

§ 4. This act shall take effect on the thirtieth day after it shall have become a law and shall apply to volunteer firefighters who, on or after the effective date of this act, are on a leave of absence pursuant to section 200-b or 200-c of the general municipal law.

Amendment Notes The 2018 amendment by ch 476, § 39, substituted "firefighters" for "firemen" in the section heading; and in 2, substituted "firefighter" for "fireman" three times, and in the second sentence, substituted "he or she shall served" for "he shall served," "to qualify him or her" for "to qualify him," "he or she took" for "he took" and "his or her duties" for "his duties."

Notes to Decisions

Analysis

1. Generally
2. Leave of absence
3. Return

1. Generally

A member of a volunteer fire company who enters active duty in the Armed Forces is not covered by the Volunteer Firemen's Benefit Law. 1962 NY Ops Atty Gen June 4 (Informal), 1962 N.Y. AG LEXIS 136.

Volunteer firemen who enter military service do not continue to be active volunteer firemen during such service. 1963 Op St Compt No. 63-329.

The board of fire commissioners of a fire district may not approve the election to membership of a person presently serving in the armed forces, regardless of his availability. 1968 Op St Compt No. 68-226.

2. Leave of absence

Where a volunteer fireman enters on active duty with the Armed Forces of the United States, he may be granted leave of absence from his fire company or department. 1962 Op St Compt No. 62-534.

3. Return

A volunteer fireman returning from military service and terminating his leave of absence becomes entitled to coverage afforded by the Volunteer Firemen's Benefit Law, as an active volunteer fireman, without necessity of reporting to any company or department officer. 1963 Op St Compt No. 63-228.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS Vol Fire Ben § 5.

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1246, 1249, 1252, 1253.

§ 200-c. Leaves of absence for volunteer firefighters entering the armed forces of the United States on or after July first, nineteen hundred sixty-six

1. When, on or after July first, nineteen hundred sixty-six, a volunteer firefighter in good standing in the fire company of which he is a member enters upon active duty in the armed forces of the United States (1) during any war between the United States and any other nation, or (2) during the period beginning with the commencement of the military and naval preparedness in the year nineteen hundred forty and ending July first, nineteen hundred seventy-five, he shall be deemed to be on leave of absence from such fire company during such active duty, provided, however, that the fire company, or the authorities having control of the fire company with the concurrence of the fire company, may terminate his membership, by reason of his continued military service, at any time after such a leave of absence shall have continued for five years, and termination for such cause shall constitute an honorable discharge from the fire company, and provided further that during such active duty his membership in such fire company shall terminate as provided by law when by reason of his voluntary change of residence he shall no longer meet the residence requirements for members of such fire company. Any certificate issued to such volunteer

firefighter as provided in section two hundred two of this article shall credit him with the period of any such leave of absence in the same manner as if he had served during such period as a member of his fire company or department and had rendered service in all respects as specified in section two hundred of this article. The period of any such leave of absence shall be included in determining the period of service necessary to qualify him as an exempt volunteer firefighter pursuant to section two hundred of this article. During the period of any such leave of absence such volunteer firefighter shall not perform any services or duties as a volunteer firefighter except for services and duties performed pursuant to subdivision one-a of this section.

1-a. A volunteer firefighter on leave of absence, pursuant to this section, may perform services and duties as a volunteer firefighter during any period in which the armed forces of the United States grants the volunteer firefighter a temporary leave from military service, provided that such services and duties would not violate any law, regulation, rule or order of the United States or of the armed forces of the United States. This subdivision shall not be construed to require a volunteer firefighter on such temporary leave to perform services and duties as a volunteer firefighter during any temporary leave from military service.

2. During the period of any such leave of absence the fire company may elect to membership another person meeting the membership requirements of the fire company to take the place of the volunteer firefighter on such active duty. Any person so elected to membership may continue as a member of the fire company even though the person whose place he or she took may have resumed his or her duties as a volunteer member of such fire company, unless his or her membership shall terminate as provided by law when he or she shall no longer meet the residence requirements for members of such fire company.

HISTORY:

Add, L 1966, ch 543, § 2, eff July 1, 1966; amd, L 1970, ch 193, § 1; L 1972, ch 92, § 1, eff April 5, 1972; L 2005, ch 341, § 1, eff Aug 25, 2005 (see 2005 note below); L 2018, ch 476, § 40, effective December 28, 2018.

Editor's Notes: Laws 2005, ch 341, § 4, eff Aug 25, 2005, provides as follows:

§ 4. This act shall take effect on the thirtieth day after it shall have become a law and shall apply to volunteer firefighters who, on or after the effective date of this act, are on a leave of absence pursuant to section 200-b or 200-c of the general municipal law.

Amendment Notes The 2018 amendment by ch 476, § 40, substituted "firefighters" for "firemen" in the section heading; and in 2, substituted "firefighter" for "fireman" in the first sentence, and in the second sentence, substituted "he or she took may have resumed his or her duties" for "he took may have resumed his duties," "his or her membership" for "his membership" and "he or she shall no longer meet" for "he shall no longer meet."

Notes to Decisions

1. Generally

A volunteer fireman on leave of absence status pursuant to this statute is not qualified to be elected to a fire company office. 1971 NY Ops Atty Gen Dec 8 (Informal), 1971 N.Y. AG LEXIS 137.

The requirement to grant military leave to a volunteer fireman in good standing who entered upon active duty in the Armed Forces of the United States has expired. However, leaves granted before expiration of the statute expire only in accordance with the statute. 1977 NY Ops Atty Gen Feb 2 (Informal), 1977 N.Y. AG LEXIS 168.

The board of fire commissioners of a fire district may not approve the election to membership of a person presently serving in the armed forces, regardless of his availability. 1968 Op St Compt No. 68-226.

While it does not appear that a leave of absence must be given to a volunteer fireman for those days he spends attending military reserve meetings, such fireman may not be dismissed from the fire department on account of absences caused by such military obligations. 1973 Op St Compt No. 73-1007.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS Vol Fire Ben § 5.

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1251, 1252, 1253.

§ 201. Rights and privileges of exempt volunteer firefighters.

In case any city, town or village in this state shall organize a paid fire department and thereby deprive any volunteer firefighter who has faithfully actually performed service in the protection of life and property within the territory protected by his or her company of the right to serve a full term of five years such firefighter shall be entitled to a full and honorable discharge; and to all the rights and privileges granted by the laws of this state to volunteer firefighter, provided, however, that if such paid department has been organized since the first day of January in the year nineteen hundred and two, he or she shall have so served for a consecutive period of at least one year immediately preceding the installation of said paid fire department.

HISTORY:

Add, L 1909, ch 29; amd, L 1958, ch 919, § 2, eff April 22, 1958; L 2018, ch 476, § 41, effective December 28, 2018.

Amendment Notes The 2018 amendment by ch 476, § 41, substituted "firefighters" for "firemen" in the section heading; substituted "firefighter" for "fireman" or variants wherever it appears; substituted "his or her company" for "his company" and "he or she shall have so served" for "he shall have so served."

Notes to Decisions

1. Generally

To be entitled to a certificate issued to exempt volunteer firemen, a person must possess the qualifications set out in § 202. 1954 NY Ops Atty Gen March 22 (Informal), 1954 N.Y. AG LEXIS 254.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 202.

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1248, 1249, 1251.

§ 202. Certificate to be issued to exempt volunteer firefighter.

Any person described in sections two hundred or two hundred one of this article shall be entitled to a

certificate from the company in which he or she served or of which he or she was a member at the time of its disbandment which shall show the date of the entrance of such firefighter upon his or her service, the period of his or her service; if he or she was honorably discharged from such company the certificate shall so state; that he or she was in good standing in his or her company at the time of applying for such certificate or at the time he or she was discharged therefrom; or that he or she was in good standing in his or her company at the time of the disbandment thereof. Such certificate shall be signed by the president, captain, foreman or secretary of the company and shall be acknowledged by such officers before an officer commissioned to take acknowledgments, and shall also have attached thereto a certificate attested by the affidavit of the secretary, clerk or other person having the custody of the company's record of membership, that the statements of fact contained in said certificate are true, and the affidavit and acknowledgment shall be substantially in the following form:

State of New York)
) ss.
County of _____)

On this ____ day of _____, in the year ____, before me personally came _____, to me known and by me known to be the same persons described in and who executed the foregoing certificate and they severally duly acknowledged to me that they executed the same and the said _____ being by me duly sworn, deposes and says, that he/she is _____ of the company aforesaid and is the custodian of the records of its membership and that the facts above stated relating to the service of the person described in such certificate are true.

_____
Notary Public

Such certificate so attested shall in all courts of the state and in the offices of all persons clothed with power of appointment or removal in the service of this state and in the several cities, counties, towns and villages thereof, be presumptive evidence of the facts therein stated.

HISTORY:

Add, L 1909, ch 29; amd, L 1909, ch 240, § 44; L 1935, ch 502, § 1; L 1958, ch 919, § 3, eff April 22, 1958; L 2018, ch 476, § 42, effective December 28, 2018.

Amendment Notes The 2018 amendment by ch 476, § 42, in the first paragraph, substituted "firefighter" for "firemen" in the section heading; added "or she" and "or he" wherever it appears, and substituted "article" for "chapter" and "firefighter" for "fireman"; and substituted "deposes and says, that he/she is" for "deposes and says, that he is" in the form.

Notes to Decisions

Analysis

1. Generally
2. Certificates
3. Suspension
4. Out of state service

1. Generally

The by-law of a volunteer fire department, which provides that every member receiving his volunteer fireman exemption certificate shall automatically cease to be a member of the department, violate §§ 200, 200-a, 200-b and 202. Taff v Board of Fire Comm'rs, 2 N.Y.S.2d 851, 166 Misc. 704, 1938 N.Y. Misc. LEXIS 1356 (N.Y. Sup. Ct. 1938).

Where a person is refused a duly authenticated exempt firemen's certificate and thinks he is entitled thereto, he may commence a proceeding under art. 78 of the Civil Practice Act to enforce his right. 1962 Op St Compt No. 62-912.

A volunteer fireman, with inactive, exempt status as a member of a volunteer fire company, may vote in an election of company officers, if company by-laws so provide. 1971 Op St Compt No. 71-1034.

2. Certificates

Petitioner was reinstated to the position of Principal Park Superintendent and should not have been dismissed from employment except for incompetency or misconduct found after a hearing where evidence showed that he secured a certificate after his dismissal that he was an exempt volunteer fireman and the affidavits of the fire company's officers past and present left no room for triable issue of fact as to whether he was honorably discharged or whether he was not in good standing at the time he applied for his certificate. Badman v Falk, 4 A.D.2d 149, 163 N.Y.S.2d 570, 1957 N.Y. App. Div. LEXIS 5112 (N.Y. App. Div. 3d Dep't 1957), aff'd, 4 N.Y.2d 839, 173 N.Y.S.2d 813, 150 N.E.2d 240, 1958 N.Y. LEXIS 1080 (N.Y. 1958).

The certificate provided for by this section is not exclusive evidence of qualifications necessary to entitle one to exemptions specified in § 204. People ex rel. McBride v Atchinson, 123 N.Y.S. 577, 68 Misc. 115, 1910 N.Y. Misc. LEXIS 362 (N.Y. Sup. Ct. 1910), aff'd, 142 A.D. 927, 126 N.Y.S. 1142, 1911 N.Y. App. Div. LEXIS 503 (N.Y. App. Div. 1911).

To be entitled to a certificate issued to exempt volunteer firemen, a person must possess the qualifications set out in this section. 1954 NY Ops Atty Gen March 22 (Informal), 1954 N.Y. AG LEXIS 254.

3. Suspension

Volunteer firefighter serving disciplinary suspension is not in good standing within meaning of CLS Gen Mun § 202 and is not eligible to be certified as exempt volunteer firefighter. 1992 NY Ops Atty Gen 92-38 (Informal), 1992 N.Y. AG LEXIS 37.

A fire company may not issue a certificate of exempt status to a volunteer fireman who was suspended one week before he completed the five year period of service required by section 200 of the General Municipal Law and has not subsequently been restored to active status. 1980 Op St Compt No. 80-562.

4. Out of state service

Service in a volunteer fire department not located in New York State may not be credited to a person applying for a volunteer fireman's exemption certificate. 1962 Op St Compt No. 62-1026.

Agency Opinions

1. Generally

A person subject to call for firefighting or rescue squad duty, without an option of whether or not to respond, is an active volunteer fireman and eligible to receive an exemption from real property taxes under Real Property Tax Law § 466. 7 Op Counsel SBEA 114 (1983).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 200–200-c, 202-a.

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1246—1253.

§ 202-a. Recording certificates of exempt volunteer firefighter.

A certificate of honorable discharge of an exempt volunteer firefighter, or a certificate issued to an

exempt volunteer firefighter under the provisions of section two hundred two of this article, may be recorded in any county, in the office of the county clerk, and when so recorded shall constitute notice to all public officials of the facts set forth therein. It shall be the duty of the county clerk to record any such certificate, upon presentation thereof without the payment of any fee. This section also applies to the counties within the city of New York. For any purpose for which such original honorable discharge or such exempt volunteer firefighter's certificate may be required in the state of New York, a certified copy of such record shall be deemed sufficient and shall be accepted in lieu thereof. It shall be the duty of the county clerks of the counties within the city of New York upon the payment of one dollar, to furnish a certified copy of any such record of such an exempt volunteer firefighter's certificate to any person applying for the same.

HISTORY:

Add, L 1951, ch 313, § 2, eff March 29, 1951; L 2018, ch 476, § 43, effective December 28, 2018.

Amendment Notes The 2018 amendment by ch 476, § 43, substituted "firefighter" for "firemen" in the section heading; substituted "firefighter" for "fireman" or variants wherever it appears; and substituted "article" for "chapter" in the first sentence.

Notes to Decisions

1. Generally

The certificate provided for by this section is not exclusive evidence of qualifications necessary to entitle one to exemptions specified in § 204. People ex rel. McBride v Atchinson, 123 N.Y.S. 577, 68 Misc. 115, 1910 N.Y. Misc. LEXIS 362 (N.Y. Sup. Ct. 1910), aff'd, 142 A.D. 927, 126 N.Y.S. 1142, 1911 N.Y. App. Div. LEXIS 503 (N.Y. App. Div. 1911).

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1250, 1251.

§ 203. List of exempt volunteer firefighters to be filed.

In case of a company disbanded by the organization of a paid department in lieu thereof, the officers of every volunteer fire, engine, hose and hook and ladder company shall within ninety days after such company has been disbanded file in the office of the clerk of the county in which said company was located a list containing the name of every person who was a member of such volunteer company and who is entitled to the exemption certificate in accordance with the provisions of this article. Upon such list being filed the county clerk of the county in which such company operated shall sign and deliver the exemption certificate provided for in this article to the person entitled thereto whose name appears upon the list filed with him as aforesaid, but the same shall, nevertheless, be attested by the secretary or clerk or other person having the custody of the membership records of the disbanded company and in the manner specified in this article.

HISTORY:

Add, L 1909, ch 29, eff Feb 17, 1909; L 2018, ch 476, § 44, effective December 28, 2018.

Amendment Notes The 2018 amendment by ch 476, § 44, substituted "firefighters" for "firemen" in the section heading.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1250, 1251.

§ 204. Qualifications necessary to entitle to certain exemptions.

No person who became a member of a volunteer fire organization within the state since the first day of January nineteen hundred and two, or who shall have thereafter become such member who shall not possess the qualifications prescribed by this article shall be entitled to any of the exemptions and privileges secured to volunteer firefighters by the civil service law of this state.

HISTORY:

Add, L 1909, ch 29, eff Feb 17, 1909; L 2018, ch 476, § 45, effective December 28, 2018.

Amendment Notes The 2018 amendment by ch 476, § 45, substituted "firefighters" for "firemen."

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Special rights for veterans and exempt volunteer firemen, CLS Civ S §§ 85 et seq.

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1248, 1249, 1251.

§ 204-a. Raising of funds for fire company purposes.

1. Definitions. As used in this section:

a. "Fire company" means:

(1) A volunteer fire company of a county, city, town, village or fire district fire department, whether or not any such company has been incorporated under any general or special law,

(2) A fire corporation the members of which are volunteer firefighters and was incorporated, and which is not included within subparagraph (1) of this paragraph, if such corporation is by law under the general control of, or recognized as a fire corporation by, the governing board of a city, town, village or fire district, or

(3) A fire corporation the members of which are volunteer firefighters and which was incorporated under, or established pursuant to the provisions of, any general or special law, which is not included within this subparagraph and subparagraph (2) of this paragraph, if such corporation is by law under the general control of, or recognized as a fire corporation by, the governing board of a city, town, village, fire district or a district corporation other than a fire district.

b. "Fund raising activity" means a method of raising funds to effectuate the lawful purposes of a fire company, but shall not include any method prohibited by the state constitution or the penal statutes of this state, public fireworks displays unless conducted in compliance with section 405.00 of the penal law, or the conduct of a business or other commercial enterprise except on temporary basis for

a period or periods not to exceed a total of ninety days in any calendar year. Such term "fund raising activity" shall not include drills, parades, inspections, reviews, competitive tournaments, contests or public exhibitions, described in paragraphs e and i of subdivision one of section five of the volunteer firefighters' benefit law, even though prizes are awarded at such events.

c. "Governing board of the political subdivision" means the governing board of the county, city, town, village, fire district or other district corporation, as the case may be, where the fire company is under the general control of, or recognized as a fire corporation, by such governing board.

2. Subject to the provisions of this section, a fire company may engage in a fund raising activity. Two or more fire companies may join in any such activity, and for the purposes of this section such group shall be deemed a "fire company."

3. A fund raising activity shall not be conducted contrary to the by-laws, rules or regulations of the fire company or of the fire department of which it is a part.

4. A fund raising activity must be conducted within the state of New York. It shall be under the exclusive auspices of a fire company and shall not be conducted in partnership with any other person, organization, firm or corporation. This subdivision shall not be deemed to prohibit the letting of concessions, or the entering into of contracts for rides or other attractions, at such activities, or the acceptance of aid and assistance of persons who are not active members of the fire company, or of other organizations, firms or corporations, in connection with such activities. The acceptance of such aid and assistance shall not subject the political subdivision to any liability as an employer under the volunteer firefighters' benefit law, section two hundred seven-a of this article, the workers' compensation law, or any other comparable law.

5. The firehouse, firehouse grounds, fire vehicles and apparatus, or other property, real and personal, generally used by the fire company for its purposes may be used by it in the conduct of any such activity.

6. The governing board of a political subdivision may, by resolution,

(a) prohibit the fire company from engaging in fund raising activities or in any general or specific type of fund raising activity,

(b) require the fire company, at its expense, to provide any insurance protection which such governing board deems necessary to protect the political subdivision against claims and actions for damages by third parties arising out of or in connection with a fund raising activity.

7. Participation by volunteer firefighters in fund raising activities shall not be deemed to constitute "duty as volunteer firefighters" within the meaning of section two hundred five-b of this article.

8. Notwithstanding the foregoing provisions of this section, the provisions of this subdivision shall be applicable only in relation to fund raising activities for which benefits would be paid and provided pursuant to paragraph m of subdivision one of section five of the volunteer firefighters' benefit law:

(a) Before engaging in a fund raising activity the fire company shall cause the governing board of the political subdivision to be notified in writing that it proposes to conduct such activity. Any such notice shall contain a general description of the method which will be used to raise funds and shall specify the time or times when, the place or places where, and the period or periods during which the activity will be conducted and shall set forth the names of the firefighters who will serve on each of the committees or subcommittees in connection with the activity. Any such notice shall be filed with the clerk, secretary or other comparable officer of such governing board. In the event that no action is taken by such governing board prohibiting such activity within thirty days after the filing of such notice, then it shall be deemed that the governing board has no objection to such activity and the fire company may proceed to conduct the same.

(b) Sales of tickets for admission to or in connection with a fund raising activity shall be by persons appointed as a committee for such purpose and shall be for or in relation to a fund raising activity to be held within sixty days after the sale of the tickets commences.

(c) Members of the fire company conducting the fund raising activity who attend or participate in the activity for their own pleasure or convenience, and not as a worker in connection therewith, shall not be deemed to be engaged in the conduct of such activity.

HISTORY:

Add, L 1961, ch 965, § 4, eff July 1, 1961; amd, L 1967, ch 680, § 67, eff Sept 1, 1967; L 2018, ch 476, § 46, effective December 28, 2018.

Editor's Notes: See 1967 note under § 103.

Amendment Notes The 2018 amendment by ch 476, § 46, substituted "firefighters" for "firemen" or variants throughout the section; in 1a(2), deleted "under or is subject to the provisions of article ten of the membership corporations law" following "was incorporated" and substituted "subparagraph (1) of this paragraph" for "subparagraph (1) above"; substituted "this subparagraph and subparagraph (2) of this paragraph" for "subparagraphs (2) and (3) above" in 1a(3); substituted "of this article, the workers' compensation law" for "of the general municipal law, the workmen's compensation law" in the last sentence of 4; substituted "of this article" for "of this chapter" in 7; and made a stylistic and related change.

Notes to Decisions

Analysis

1. Generally
2. Fund raising
3. —Activity not fund raising
4. Expenses
5. Liability
6. Illustrative cases

1. Generally

A town may not allow gratuitous use of a town garage by fire district fire equipment, nor lease same for such if space therein is needed for town purposes. 1967 Op St Compt No. 67-233.

The board of fire commissioners of a fire district may adopt a resolution prohibiting solicitation of funds by fire companies in the district on any State, county, town or village highway within the district. 1979 Op St Compt No.. 79-431.

Under Sections 10-1000 et seq. of the Village Law, a village fire department is a corporation consisting of members of all the fire, hose, protective and hook and ladder companies of a village; it is administered by a board of fire commissioners or, where no board of fire commissioners has been appointed, by the village board of trustees and the council of the fire department. Fire companies in a village are associations or corporations, which must operate in accordance with their certificates of incorporation, bylaws, and statutes; and, although fire companies are separate and distinct from the village, the statutes do permit village authorities to exercise a certain degree of control over their organization, incorporation, governance, and membership, including residency for membership. A fire company must consent to a contract for the provision of fire protection outside the village and the fire chief of the village fire department cannot consent on behalf of members of the company. 1990 Op St Compt No. 90-19, 1990 N.Y. Comp. LEXIS 26.

Moneys raised by a fire company through activities conducted under the authority of General Municipal Law § 204-a belong to the fire company to be used for the lawful purposes of the fire company. 1991 Op St Compt No. 91-12, 1991 N.Y. Comp. LEXIS 11.

Fire protection contract with fire company may include provision requiring outside audit of books and records of fire company and, in connection with its authority over fundraising activities of certain fire companies under CLS Gen Mun § 204-a, town board may require, as condition on conduct of those fund raising activities, submission of financial report on receipts and expenditures of proceeds of such activities, and submission of related books and records of fire company for audit. 2007 Op St Compt No. 2007-8, 2007 N.Y. Comp. LEXIS 8.

2. Fund raising

A fund raising activity conducted by a volunteer fire company must be under the "exclusive auspices" of such fire company to be a covered activity such as is contemplated in the Volunteer Firemen's Benefit Law and the General Municipal Law. 1979 NY Ops Atty Gen August 15 (Informal), 1979 N.Y. AG LEXIS 66.

The chief engineer of a fire district fire department may authorize use of the department's trucks during "Fire Prevention Week" to sell fire extinguishers as a "fund raising activity" if permitted by the Board of Fire Commissioners. 1963 Op St Compt No. 63-720.

3. —Activity not fund raising

Any agreement entered into by a fire district or a fire district company to furnish "stand-by" service at a stock car race track for a nightly fee is unauthorized and improper, not being a "fund raising" activity as defined in this section. 1961 Op St Compt No. 61-317.

4. Expenses

The board of commissioners of a fire district may not pay for long distance telephone calls made by volunteer firemen in connection with a fund raising activity and charged to the district telephone. 1979 Op St Compt No. 79-668.

Unless otherwise provided by special act, members of volunteer fire department may use foreign fire insurance tax monies to make reasonable expenditures to fund fire department softball, billiard and bowling teams, and to pay for expenses for department's annual fund-raising drive. 2002 Op St Compt No. 2002-13, 2002 N.Y. Comp. LEXIS 13.

5. Liability

A participant in an annual fire department parade who had ridden her horse in the parade was riding the horse home afterwards and came upon a parked car causing her to ride onto the lawn of a town resident, across which the owner had strung a wire which touched, and may have been attached to, a utility pole; the horse hit the wire, threw its rider off and ran down the street for about a mile, where it collided head-on with a van and as a result of the collision the plaintiffs, who were passengers in the van, were seriously injured. Plaintiffs need not prove willful negligence or malfeasance on the part of the volunteer fireman who organized the parade since although members of duly organized volunteer fire companies are exempt from civil liability for acts done by them in performance of their duties as volunteer firemen (General Municipal Law, § 205-b), participation in fund-raising activities is not a duty of a volunteer fireman; additionally, although certain parades are not fund-raising activities (General Municipal Law, § 204-a, subd 1, par b), the instant parade is not within the scope of those provisions. Monacelli v Armstrong, 64 A.D.2d 428, 409 N.Y.S.2d 899, 1978 N.Y. App. Div. LEXIS 12745 (N.Y. App. Div. 4th Dep't 1978), app. denied, 46 N.Y.2d 710, 1979 N.Y. LEXIS 2641 (N.Y. 1979), app. denied, 46 N.Y.2d 710, 1979 N.Y. LEXIS 2635 (N.Y. 1979), app. dismissed, app. denied, 46 N.Y.2d 913, 414 N.Y.S.2d 905, 387 N.E.2d 1220, 1979 N.Y. LEXIS 1851 (N.Y. 1979), aff'd, 49 N.Y.2d 971, 428 N.Y.S.2d 949, 406 N.E.2d 804, 1980 N.Y. LEXIS 2321 (N.Y. 1980).

A village can be held vicariously liable for Dram Shop Act violations committed by volunteer firefighters during fundraising events, but not for misconduct during social activities. 1990 NY Atty Ops Gen 90-64 (Informal), 1990 N.Y. Op. Att'y Gen. No. 90-64, 1990 N.Y. AG LEXIS 68.

6. Illustrative cases

City was entitled to summary judgment dismissing consolidated actions for personal injuries and wrongful death arising out of alcohol-related automobile accident which occurred after intoxicated driver consumed beer at fund-raising event to benefit volunteer fire companies, although city was vested with authority to control activities of its volunteer fire company under CLS N-PCL § 1402(e)(1) and CLS Gen Mun § 204-a(6)(b), since participation by volunteer firefighters in fund-raising activities was not deemed to constitute "duty as volunteer firemen" within meaning § 204-a(7); moreover, city submitted evidentiary proof that it had not received prior written notice of fire company's fund-raising activities as required by § 204-a(8)(a). Haskell v Chautauqua County Fireman's Fraternity, Inc., 184 A.D.2d 12, 590 N.Y.S.2d 637, 1992 N.Y. App. Div. LEXIS 14048 (N.Y. App. Div. 4th Dep't 1992), app. dismissed, 81 N.Y.2d 954, 597 N.Y.S.2d 939, 613 N.E.2d 971, 1993 N.Y. LEXIS 5289 (N.Y. 1993).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS N-PCL § 1402; CLS Vol Fire Ben §§ 3, 5.

Permits for public displays of fireworks, CLS Penal § 405.00.

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1237, 1251.

§ 204-b. Youth programs

1. Volunteer fire departments and fire companies may establish, operate and maintain youth programs to provide participants with the opportunity to become familiar with the programs and operations of fire departments, to provide programs in community fire safety, fire prevention, and public fire prevention education, and to curtail false fire alarms by developing community wide respect for the fire service.

2. Volunteer fire departments and fire companies shall establish rules and regulations governing youth programs established pursuant to subdivision one hereof, which shall include the minimum and maximum age for participation, the procedure for participation, removal or expulsion, residence, and provision for adequate supervision of such programs.

3. It shall be an unlawful discriminatory practice for any volunteer fire department or fire company, any member or members thereof, officers, board of

fire commissioners or other body or office having authority to determine eligibility for participation in such programs pursuant to this section, to exclude or expel from participation in such programs any individual because of race, creed, color, sex or national origin, or to discriminate against any participant because of race, creed, color or national origin.

4. No person shall participate in such program without the written consent of his or her parent or guardian. Such consent shall continue until withdrawn. If withdrawn, participation in such program shall automatically terminate.

5. All activities of participants in such program shall be approved in advance by the chief, or his designee. No activities may include emergency duties in connection with fire department or fire company operations or any other hazardous activity.

6. Participants in such programs shall not be eligible for any benefit provided by the volunteer firefighters' benefit law.

7. Volunteer fire departments and fire companies may purchase accident insurance to insure participants in such programs against injury or death resulting from bodily injuries sustained in performance of approved activities. In addition, they may purchase insurance to protect against liability arising from approved activities. The insurance purchased pursuant to this subdivision may include medical and hospital coverage.

8. No youth program shall be established pursuant to subdivision one of this section unless authorized as follows: in a city the youth program must be authorized by the board of fire commissioners or other body or officer having control of fire department; in a village the program must be approved by the board of fire commissioners or, if there is no board of fire commissioners, the village board of trustees; in a fire district the program must be authorized by the board of fire commissioners; in a town outside a village or a fire district the program must be authorized by the town board.

HISTORY:

Add, L 1978, ch 386, § 1, eff Sept 1, 1978; L 2018, ch 476, § 47, effective December 28, 2018.

Amendment Notes The 2018 amendment by ch 476, § 47, substituted "firefighters' benefit law" for "firemen's benefit law" in 6.

Notes to Decisions

1. Generally

Workers' Compensation Board properly determined that claimant, as 16-year-old member of junior corps of town fire department, became active member of department and was entitled to benefits provided by Volunteer Firefighters' Benefit Law following injury incurred while operating his vehicle in response to fire alarm, since members of junior corps were required to respond to alarms once school day was completed, they were under direction and control of chief of department, and their duties at scene were consistent with those of active firefighter save for certain limitations such as not entering building that is scene of fire; furthermore, given these facts, junior corps is not youth program and thus its members are not excluded from benefits by operation of CLS Gen Mun § 204-b. Elander v Pleasantville Fire Dist., 124 A.D.2d 388, 507 N.Y.S.2d 334, 1986 N.Y. App. Div. LEXIS 61399 (N.Y. App. Div. 3d Dep't 1986), app. denied, 69 N.Y.2d 608, 516 N.Y.S.2d 1023, 509 N.E.2d 358, 1987 N.Y. LEXIS 16376 (N.Y. 1987).

A fire district may pay the expenses incurred by firemen under the age of 18, including the expense of travel to drills or for instruction, and may also pay for the purchase of equipment in connection with a properly authorized youth program. 1979 Op St Compt No. 79-877.

A village may not appropriate funds for a youth program sponsored by the village volunteer fire department. To the extent it expresses a contrary opinion, Opns St Comp, 1979, 1984 N.Y. Comp. LEXIS 73.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS Vol Fire Ben § 5.

Jurisprudences:

18A NY Jur 2d Civil Rights § 127.

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1237, 1250, 1251.

§ 204-c. Plan for arson investigation

The governing body of each county except a county contained wholly within a city, and the governing body of any city in which a county is wholly contained shall develop a plan for arson investigation within such county or city. Such plan shall be submitted to the office of fire prevention and control for approval. No plan shall be approved unless it provides for the coordination of fire, law enforcement and prosecutorial services.

HISTORY:

Add, L 1979, ch 225, § 15, eff Sept 1, 1979.

Notes to Decisions

1. Generally

Volunteer fire investigation as to cause and origin of suspicious fire, pursuant to authority of CLS Gen Mun § 204-c, accommodated police objectives and therefore was subject to state and federal constitutional scrutiny with respect to investigatory questioning and seizure of physical evidence at scene. People v Todd, 134 Misc. 2d 988, 513 N.Y.S.2d 941, 1987 N.Y. Misc. LEXIS 2142 (N.Y. County Ct. 1987), aff'd, 149 A.D.2d 826, 540 N.Y.S.2d 349, 1989 N.Y. App. Div. LEXIS 4864 (N.Y. App. Div. 3d Dep't 1989).

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations § 1251.

§ 204-d. Duties of the fire chief

The fire chief of any fire department or company shall, in addition to any other duties assigned to him by law or contract, to the extent reasonably possible determine or cause to be determined the cause of each fire or explosion which the fire department or company has been called to suppress. He shall file with the office of fire prevention and control a report containing such determination and any additional information required by such office regarding the fire or explosion. The report shall be in the form designated by such office. He shall contact or cause to be contacted the appropriate investigatory authority if he has reason to believe the fire or explosion is of incendiary or suspicious origin. For all fires that are suspected to have been ignited by a cigarette, within fourteen days after completing the investigation into such fire, the fire chief shall forward to the office of fire prevention and control

information detailing, to the extent possible: (a) the specific brand and style of the cigarette suspected of having ignited such fire; (b) whether the cigarette package was marked as required by subdivision six of section one hundred fifty-six-c of the executive law; and (c) the location and manner in which such cigarette was purchased.

HISTORY:

Add, L 1979, ch 225, § 15, eff Sept 1, 1979; amd, L 1983, ch 193, § 1, eff June 30, 1983; L 2006, ch 583, § 1, eff Dec 14, 2006 (see 2006 note below); L 2010, ch 56, § 44 (Part B), eff July 1, 2010.

Editor's Notes: Laws 2006, ch 583, § 7, eff Dec 14, 2006, provides as follows:

§ 7. This act shall take effect on the one hundred twentieth day after it shall have become a law; provided, however, that the prohibition against the distribution, sale or offering for sale of any package of cigarettes unless the manufacturer has placed the letters "FSC" as required by subdivision 6 of section 156-c of the executive law on such package; and the testing requirements set forth in paragraph a of subdivision 3 of section 156-c of the executive law as amended by section four of this act shall take effect twelve months after this act shall have become a law. Nothing in this act shall prohibit wholesale dealers or retail dealers from selling their inventory of cigarettes existing on the date that is 12 months after this act takes effect; provided that such cigarettes contain a marking in compliance with section 8 of the office of fire prevention and control regulations at Title 19 NYCRR Part 429, as in existence as of the date this act becomes a law; provided, further, that such wholesale dealer or retail dealer can establish that New York state cigarette tax stamps were affixed to such cigarettes prior to the date that is 12 months after this act takes effect, and provided further that such wholesale dealer or retail dealer can establish that such inventory was purchased prior to such date in comparable quantity to the inventory purchased during the same period in the preceding year.

Notes to Decisions

Analysis

1. Generally
2. Jurisdiction

1. Generally

A fire district may have implied authority to offer a reward for information leading to the apprehension, arrest and conviction of a person responsible for a suspected arson but in light of the General Municipal Law provisions pertaining to rewards and arson investigation, the best course of action may be for the fire district commissioners to discuss with the town officials the possibility of the town offering a reward and to determine what steps the town may be taking to apprehend a suspected arsonist. 1982 Op St Compt No. 82-242.

2. Jurisdiction

In instances of concurrent police department and fire department jurisdiction, the determination as to which of the two has primary jurisdiction over the event in question is dependent upon the circumstances of the particular case. In general, a fire department is in absolute command at the scene of a fire emergency until such time as, in the judgment of the fire chief, the premises are free from immediate danger of fire or explosion and safe for occupancy. 1983 NY Ops Atty Gen 83-67 (Informal), 1983 N.Y. AG LEXIS 25.

A fire alarm at a school creates authority for firemen to enter the school and it is their duty to do so. The school principal has no authority to keep them out or determine when the fire is out and the building is safe for occupancy. A false alarm does not alter the foregoing. 1981 NY Ops Atty Gen 81-13 (Informal), 1981 N.Y. AG LEXIS 147.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

27 NY Jur 2d Counties Towns, and Municipal Corporations §§ 1035, 1251.

§ 204-dd. Qualifications of a fire chief.

No person shall be eligible for appointment or election as the fire chief, or any title or rank that includes the duties of the chief, in any fire department or fire company with six or more paid firefighters, unless he or she meets requirements as established by the most recently developed recommended best practices for incident commanders adopted by the New York state division of homeland security and emergency services, office of fire prevention and control. The state fire administrator shall promulgate rules and regulations based upon requirements established pursuant to the most recently developed recommended best practices for incident commanders. For the purpose of this section, the term firefighter shall mean a member of a fire department whose duties include fire service as defined in paragraph d of subdivision eleven of section three hundred two of the retirement and social security law and has been assigned by his or her department as an interior firefighter.

HISTORY:

L 2019, ch 678, § 2, effective June 13, 2020.

Editor's Notes Laws 2019, ch 678, § 4, eff June 13, 2020, provides:

§ 4. This act shall take effect on the one hundred eightieth day after it shall have become a law. Effective immediately, the addition of any rule or regulation necessary for the implementation of this act on its effective date are authorized to be made and completed on or before such effective date.

§ 204-e. Unauthorized destruction of property

No individual or corporation having a possessory or proprietary interest in a building or motor vehicle within the meaning of section 150.05 of the penal law shall ignite a fire or cause an explosion in such building or motor vehicle without the prior written permission of the chief of the local department or fire company with the responsibility to respond to a fire call, or the chief's designee.

HISTORY:

Add, L 1979, ch 225, § 15, eff Sept 1, 1979.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Arson in the fourth degree, CLS Penal § 150.05.

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations § 151.

§ 204-f. Plan for hazardous materials incidents response

In accordance with rules and regulations promulgated pursuant to subdivision eight of section two hundred nine-e of this chapter, the governing body of a county, except a county wholly contained within a city, and the governing body of a city in which a county is wholly contained shall develop a plan for fire service response to hazardous materials inci-

dents. Such plan shall be submitted to the office of fire prevention and control for approval. No plan shall be approved unless it provides for the coordination of fire service resources consistent with guidelines established by the office.

HISTORY:

Add, L 1987, ch 827, § 1, eff Aug 7, 1987.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1035, 1251.

§ 204-g. Restrictions on the use of firefighting foam containing PFAS chemicals.

1. As used in this section:

(a) "Class B firefighting foam" means foams designed to extinguish ignitable liquid fires.

(b) "Ignitable liquid fire" shall have the same meaning as defined in paragraph (b) of subdivision one of section three hundred ninety-one-u of the general business law.

(c) "Local governments" includes any county, city, town, village, fire district, fire company as defined in section two hundred four-a of this article, regional fire protection authority, or other special purpose district that provides firefighting services.

(d) "Perfluoroalkyl and polyfluoroalkyl substances" or "PFAS chemicals" shall have the same meaning as defined in paragraph (f) of subdivision one of section three hundred ninety-one-u of the general business law.

2. No local government shall discharge or otherwise use for training purposes class B firefighting foam that contains intentionally added perfluoroalkyl and polyfluoroalkyl substances (PFAS chemicals).

HISTORY:

L 2020, ch 88, § 2, effective March 22, 2020.

Editor's Notes Laws 2020, ch 88, § 5, eff April 29, 2020, provides:

§ 5. This act shall take effect immediately, provided, however, that sections one, two and three of this act shall take effect on the same date and in the same manner as a chapter of the laws of 2019, amending the executive law relating to reducing the use of PFAS chemicals in firefighting activities, as proposed in legislative bills numbers S. 439-A and A. 445-A, takes effect.

§ 205. Payments to injured or representatives of deceased volunteer firefighters.

1. If an active member of a volunteer fire company in any city, incorporated village or in any fire district of a town outside of an incorporated village or in any part of a town protected by a volunteer fire company incorporated under the provisions of the membership corporations law, or if an active member of any duly organized volunteer fire company, dies from injuries incurred while in the performance of his or her duties as such firefighter or as a member of a fire department emergency relief squad, a fire police squad or a fire patrol within one year thereafter, the city, village, fire district or town which is responsible as provided in subdivision four of this section shall pay as follows:

a. If such volunteer firefighter is a member of a volunteer fire company located in any city in which a pension fund is maintained, the relatives of such volunteer firefighter shall be entitled to a pension in the same manner and at the same rates as if he or she were a member of the paid fire department of such city.

b. If in any other place the sum of three thousand dollars shall be paid to the widow or widower of such deceased volunteer firefighter or to the executor or administrator of his or her estate if he or she is not survived by a widow or widower. In addition there shall be paid to the widow or widower of such volunteer firefighter for the benefit of such child or children the sum of twenty-five dollars a month for each surviving child, including a posthumous child, of such deceased firefighter under the age of eighteen years, but not more than a total of fifty dollars a month for all such children, or if the decedent be not survived by a widow or widower, or if he or she dies before the payments cease, then such payments for a child or children shall be made to their guardian or to relatives with whom they are living for their benefit.

2. Any such volunteer firefighter who shall become permanently incapacitated for performing the full duties of a volunteer firefighter by reason of disease or disability caused or induced by actual performance of the duties of his or her position, without fault or misconduct on his or her part, shall

a. If a member of a volunteer fire company located in any city in which a pension fund is maintained, be paid a pension in the same manner and at the same rate as if he or she were a member of the paid fire department of such city.

b. If a member of a volunteer fire company in any other place, be paid one-half the amount which would have been payable in case of death to his or her executor or administrator under the provisions of subdivision one of this section;

Provided, however, that if such volunteer firefighter shall at the expiration of the disability payments provided for in subdivision three of this section be totally incapacitated to engage in any occupation for remuneration or profit by reason of disease or disability caused by actual performance of the duties of his or her position, without fault or misconduct on his or her part, he or she shall be paid the sum of fifteen dollars per week during the period thereafter that such total incapacity shall continue and, in addition thereto, during such period there shall be paid to him or her for the benefit of his or her child or children the sum of twelve dollars fifty cents a month for each child under the age of eighteen years, but not more than a total of twenty-five dollars a month for all such children, but no payment on account of a child shall continue after such child shall have attained the age of eighteen years. In the event payments to a volunteer fire-

fighter and his or her children on account of total incapacity, as heretofore in this subdivision provided, shall not have amounted to the sum to which he or she would otherwise have been entitled on account of permanent incapacity for performing the full duties of a volunteer firefighter and he or she shall be found to have recovered to such extent that he or she is no longer totally incapacitated but is still permanently incapacitated for performing the full duties of a volunteer firefighter, there shall be paid to him or her the difference between the payments already made to him or her for his or her own account and for the account of his or her children and the amount to which he or she would be entitled under this subdivision on account of permanent incapacity for performing the full duties of a volunteer firefighter. The authorities having jurisdiction to audit the claim of any volunteer firefighter claiming total disability benefits under this subdivision shall have the right to cause such injured volunteer firefighter to be examined from time to time at reasonable intervals by the municipal health authorities or any physician appointed by them for that purpose to determine whether total disability continues and, in case a volunteer firefighter receiving total disability benefits hereunder shall refuse to permit any such examination to be made, such authorities shall be authorized to discontinue the payment of benefits to him or her until such examination is allowed.

3. Any such volunteer firefighter who shall receive injuries while performing his or her duties as such, while in the fire house, while going to or returning from a fire by any means of travel, transportation, or conveyance whatever, or while working at the fire or answering a call or fire alarm or while officially engaged in testing or inspecting the apparatus, or equipment, or while engaged as a member of a fire department, or fire company, emergency relief squad or fire police squad, or fire patrol or while attending a fire school, or while instructing or being instructed in fire duties or while attending any drill or parade or inspection in which his or her company or department is engaged, or while engaged in emergency work not related to fire extinguishment or prevention or going to or returning therefrom when duly authorized to participate therein, so as to necessitate medical or other lawful remedial treatment or prevent him or her from following his or her usual vocation on account thereof, shall be reimbursed for such sums as are actually and necessarily paid for medical or other lawful remedial treatment, not exceeding five hundred dollars. He or she shall also be compensated for the time he or she was actually and necessarily prevented from following his or her vocation or for the time of his or her disability on account of such injuries, at the rate of thirty-six dollars per week not to exceed one thousand eight hundred dollars.

Notice of an injury or death for which benefits are payable under this section shall be given to the municipal corporation or fire district responsible for the payment thereof within thirty days after receiving such injury, and also in case of the death of the volunteer firefighter resulting from such injury within thirty days after such death. Such notice may be given by any person claiming to be entitled to such benefits or by someone in his or her behalf. The notice shall be in writing, shall contain the name and address of the volunteer firefighter, and state in ordinary language the time, place, nature and cause of the injury and shall be signed by him or her or by a person on his or her behalf or, in case of death, by any one or more of his or her dependents, or by a person on their behalf. The notice shall be given to the comptroller or chief financial officer of the city, the clerk of the village, the secretary of the fire district, or the town clerk of the town, as the case may be, by delivering it to such officer or by registered letter properly addressed to such officer. The failure to give notice of injury or notice of death shall be a bar to any claim under this section. Failure to give notice of such injury or death within such thirty day period may be excused by the county judge who would have jurisdiction of a controversy under this section, upon petition and notice in the manner provided in subdivision five of this section, either upon the ground that for some sufficient reason the notice had not been given, or that any member of a body in charge of, or any officer of the fire department or fire company had knowledge within such thirty day period, of the injuries or death, or that the municipal corporation or fire district has not been prejudiced by a delay in giving such notice.

Any such volunteer firefighter who shall receive injuries as aforesaid shall, when certified by the chief or other executive officer of the fire department or by the appropriate administrative officers under whom he or she serves, be received by any public, private, or semi-private hospital for care and treatment at the usual ward or semi-private patient rates, including charges at the prevailing ward or semi-private patient rates for necessary nursing, laboratory tests, x-ray examinations and physical therapy, or, in case any such hospital has a contract with the municipality served by such volunteer firefighter, then at the rates specified in such contract.

Within two years after receiving the injury, or if death results therefrom within two years after such death, a claim for the benefits under this section shall be filed with the same officer to whom a notice of an injury must be given, as aforesaid. The claim shall be in substantially the same form and shall give substantially the same information as is required to be given in a claim under the provisions of section twenty-eight of the workers' compensation law. Notwithstanding the provisions of any other law, any such claim need not be sworn to, verified or acknowledged.

Payments of weekly benefits under this section shall commence within fifteen days after the filing of

such claim, and payments of lump sum, and monthly, death benefits under this section shall be made or commenced within thirty days after such filing. In the event of a failure to make such payments within any such period or to continue the same for the time required therefor, a controversy shall be presumed to have arisen and a proceeding may thereupon be instituted pursuant to subdivision five of this section to compel such payment.

4. In cities any benefit under this section shall be a city charge and any claim therefor shall be audited and paid in the same manner as other city charges, except that no part of the moneys payable under this section shall be paid from the pension funds of the said departments therein. In villages any such benefit shall be a village charge and any claim therefor shall be audited and paid in the same manner as other village charges, and shall be assessed upon the property liable to taxation in said village, and levied and collected in the same manner as village taxes. In fire districts any such benefit shall be a fire district charge and any claim therefor shall be audited and paid in the same manner as other fire district charges, and shall be assessed upon the property in such fire districts liable to taxation, and levied and collected in the same manner as fire district taxes. If such firefighter was a member of a town fire company or fire department or a member of a fire company incorporated under the membership corporations law, located outside of a city, village or fire district, any such benefit shall be a town charge and any claim therefor shall be audited and paid in the same manner as town charges and shall be assessed upon the property liable to taxation in the territory protected by such fire company and levied and collected in the same manner as town charges therein. If such firefighter was a member of a fire company or fire department operating in, or maintained jointly by two or more villages, or two or more towns, or two or more fire districts, any such benefit shall be a charge against the village, town or fire district, in which the fire occurred. If such injury occur while assistance is being rendered to a neighboring city, town, village, fire district, fire protection district (including a fire protection district served by the company or department of which such firefighter is a member), fire alarm district, or territory outside any such district upon the call of such city, town, village, fire district, fire protection district, fire alarm district, or territory outside any such district, or while going to or returning from the place from whence such call came, or death shall result from any such injury, any such benefit shall be a charge against such neighboring city, town, village, fire district, fire protection district, fire alarm district, or territory outside any such district, so issuing the call for assistance and after audit shall be paid and assessed upon the property liable to taxation in such neighboring city, town, village, fire district, fire protection district, fire alarm district, or territory outside any such district, and levied and collected in the same manner as other charges against the same are levied and collected.

Any city, village, fire district or town may finance the payment of any benefits payable under the provisions of this section by the issuance of serial bonds or capital notes pursuant to the local finance law unless it is required by some other law to pay such benefits from current funds.

Any such city, village, fire district or the town board acting for and on behalf of any fire protection district, fire alarm district or territory outside any such district, may contract for insurance indemnifying against the liability imposed by this section, provided further that such contract of insurance shall also indemnify against the liability imposed by the workers' compensation law in relation to injuries or death of volunteer firefighter, and the cost of such insurance shall be paid and provided in the same manner as benefits are required to be paid and provided in this section.

If any claim under this section is one for which an insurance company might be liable, or if it is a claim for which a mutual self-insurance plan under subdivision three-a of section fifty of the workers' compensation law might be liable, the officer to whom a notice of injury is required to be delivered or mailed and with whom a claim is required to be filed under the provisions of this section shall send a copy of any such notice or claim and a copy of any notice of a proceeding relating to an injury or claim to such insurance company or plan, as the case may be, promptly after receiving the same.

Any money paid to an executor or administrator under any of the provisions of this section shall be distributed in the manner provided by law for the distribution of personal property, and all money paid under this section shall be exempt from any process for the collection of debts either against the volunteer firefighter or any beneficiary to whom the same is paid under the provisions of this section.

No release from the liability imposed by this section shall be valid if it shall appear that the person executing such release has not received the full amount to which he or she is entitled under the provisions of this section.

The words "injury" and "injuries", as used in this section, include any disablement of a volunteer firefighter as the direct result of the performance of his or her duties.

If for the purpose of obtaining any benefit or payment under the provisions of this section, or for the purpose of influencing any determination regarding any benefit or payment under the provisions of this section, either for himself or herself or for any other person, any person willfully makes a false statement or representation, he or she shall be guilty of a misdemeanor.

The provisions of this section relating to giving notice of injury and filing claim, and to the contents of any such notice or claim, shall be construed liberally in order to effectuate the objects and purposes of this section.

5. Any controversy arising at any time under the provisions of this section shall be determined by the county judge of any county in which the city, village, fire district, or town, which would be responsible for payments under this section, is located. For that purpose, any party may present a petition to such county judge, setting forth the facts and rights which are claimed. A copy of such petition and notice of the time and place when the same will be presented shall be served on all persons interested therein, at least eight days prior to such presentation.

6. The provisions of this section shall not apply to volunteer firefighters killed or injured on or after the first day of March, nineteen hundred fifty-seven, or who die from the effects of injuries received on or after such date.

HISTORY:

Add, L 1909, ch 29; amd, L 1938, ch 321, § 1; L 1938, ch 452, § 1; L 1939, ch 313, § 1; L 1939, ch 383; L 1941, ch 724, § 1; L 1941, ch 725, § 1; L 1941, ch 802, § 1; L 1941, ch 803, § 1; L 1942, ch 221, § 1; L 1942, ch 540; L 1943, ch 710, Pt 1, § 815; L 1944, ch 179, § 1; L 1945, ch 838, § 31; L 1947, ch 786, § 1; L 1950, ch 713, § 1; L 1951, ch 836, § 1; L 1953, ch 852, § 1, eff July 1, 1953; L 1954, ch 115, § 1, eff July 1, 1954; L 1956, ch 438, § 1, eff April 9, 1956; L 1956, ch 699, § 3, eff March 1, 1957; L 2018, ch 476, § 48, effective December 28, 2018.

Amendment Notes The 2018 amendment by ch 476, § 48, substituted "firefighters" for "firemen" in the section heading; redesignated former first through sixth as 1 through 6; substituted "firefighter" for "fireman" or variants throughout the section; added "or her" wherever it appears; added "or she" wherever it appears in 1a, 2a, 2b, 3 and 4; substituted "subdivision four" for "subdivision fourth" in the introductory language of 1, in 1b, added "or widower" four times, substituted "he or she is not survived" for "he is not survived" in the first sentence, and substituted "he or she dies" for "she dies" in the second sentence; substituted "one of this section" for "first of this section" in 2b; substituted "five of this section" for "fifth of this section" twice in 3; and made stylistic changes.

Notes to Decisions

1. Generally

Whether or not volunteer firemen are covered under § 205 of the General Municipal Law and § 10 of the Workmen's Compensation Law when engaged in the rescue of cats or other animals from trees and roof depends upon whether or not a public emergency exists, which is a question of fact. 1955 Op St Compt No. 55-7419.

Real Property Tax Law does not define phrase "killed in the line of duty" as used in CLS RPTL § 466-f, but such standard is similar to that in other provisions of law relating to benefits payable to injured firefighters or representatives of deceased volunteer firefighters, such as CLS Gen Mun § 205. 11 Op. Counsel SBRPS 66.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 205-c, 209-a; CLS Vol Fire Ben § 14.

Limitation of right to compensation, CLS Work Comp § 28.

Security for payment of compensation, CLS Work Comp § 50.

Jurisprudences:

25 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 251, 271.

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1029, 1243, 1251.

Texts: Weinstein, Korn, Miller, CPLR Manual (Matthew Bender) § 27.04[m].

§ 205-a. Additional right of action to certain injured or representatives of certain deceased firefighters

1. In addition to any other right of action or recovery under any other provision of law, in the event any accident, causing injury, death or a disease which results in death, occurs directly or indirectly as a result of any neglect, omission, willful or culpable negligence of any person or persons in failing to comply with the requirements of any of the statutes, ordinances, rules, orders and requirements of the federal, state, county, village, town or city governments or of any and all their departments, divisions and bureaus, the person or persons guilty of said neglect, omission, willful or culpable negligence at the time of such injury or death shall be liable to pay any officer, member, agent or employee of any fire department injured, or whose life may be lost while in the discharge or performance at any time or place of any duty imposed by the fire commissioner, fire chief or other superior officer of the fire department, or to pay to the wife and children, or to pay to the parents, or to pay to the brothers and sisters, being the surviving heirs-at-law of any deceased person thus having lost his life, a sum of money, in case of injury to person, not less than ten thousand dollars, and in case of death not less than forty thousand dollars, such liability to be determined and such sums recovered in an action to be instituted by any person injured or the family or relatives of any person killed as aforesaid.

2. Notwithstanding any other provision of law, including sections fifty-e and fifty-i of this chapter, section thirty-eight hundred thirteen of the education law, section ten of the court of claims act and the provisions of any general, special or local law or charter requiring as a condition precedent to commencement of an action or special proceeding that a notice of claim be filed or present, every cause of action for the personal injury or wrongful death of a firefighter which was pending on or after January first, nineteen hundred eighty-seven, or which was dismissed on or after January first, nineteen hundred eighty-seven, because this section was not yet effective, or which would have been actionable on or after January first, nineteen hundred eighty-seven had this section been effective is hereby revived and an action thereon may be commenced at any time provided that such action is commenced on or before June thirtieth, two thousand.

3. This section shall be deemed to provide a right of action regardless of whether the injury or death is caused by the violation of a provision which codifies a common-law duty and regardless of whether the injury or death is caused by the violation of a provision prohibiting activities or conditions which increase the dangers already inherent in the work of any officer, member, agent or employee of any fire department.

HISTORY:

Add, L 1935, ch 800, § 2, eff May 8, 1935; amd, L 1936, ch 251, § 1, eff April 4, 1936; L 1992, ch 583, § 1, eff July 24, 1992; L 1996, ch 703, § 4, eff Oct 9, 1996 (see 1996 note below); L 1999, ch 466, § 1, eff Sept 7, 1999.

Prior Law: Former § 205-a, add, L 1934, ch 489, § 1; renumbered § 205-b, L 1935, ch 800, § 1.

Editor's Notes: Laws 1996, ch 703, §§ 3 and 6, eff Oct 9, 1996, provide as follows:

§ 3. Legislative intent. The legislature finds that the nature of the work of modern fire fighting in this state has exposed our firefighters to an unprecedented risk of death and physical injury. In view of this fact, the legislature gave injured firefighters and representatives of deceased firefighters a right of action against individuals found liable for such deaths or injuries.

The legislature concludes that the duties of our state's firefighters are performed in a variety of contexts and that the liability imposed should not be limited to violations pertaining to the safe maintenance and control of premises. Since our firefighters are required to confront dangerous conditions under many and varied circumstances, there is a need to ensure that a right of action exists regardless of where the violation causing injury or death occurs.

The legislature further concludes that a right of action should exist regardless of whether the person whose negligence leads directly or indirectly to the violation causing injury or death owns or controls the premises where such violation occurs.

§ 6. This act shall take effect immediately and shall apply to all actions commenced or pending on and after such date.

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1. Generally

N.Y. Gen. Mun. Law § 205-a creates a cause of action for firefighters who, while in the line of duty, suffer line-of-duty injuries directly or indirectly as a result of violations of statutes or regulations. Specifically, it provides that firefighters or representatives of deceased firefighters have a right of action in situations where the negligence of any person in failing to comply with the requirements of any of the statutes, ordinances, rules, orders, and requirements of the federal, state, or local governments directly or indirectly causes the firefighter's injury or death during the discharge of his or her duties. Giuffrida v Citibank Corp., 100 N.Y.2d 72, 760 N.Y.S.2d 397, 790 N.E.2d 772, 2003 N.Y. LEXIS 989 (N.Y. 2003).

Notice is material to recovery by firefighter under CLS Gen Mun § 205-a; however, to be sufficient under statute, it is not necessary that firefighter prove such notice as he would be required to demonstrate in order to recover under theory of common law negligence, and firefighter need show only that circumstances surrounding violation of statute or ordinance indicate that violation was result of neglect, omission, or willful or culpable negligence on part of defendant. Lusenskas v Axelrod, 183 A.D.2d 244, 592 N.Y.S.2d 685, 1992 N.Y. App. Div. LEXIS 12837 (N.Y. App. Div. 1st Dep't 1992), app. dismissed, 81 N.Y.2d 300, 598 N.Y.S.2d 166, 614 N.E.2d 729, 1993 N.Y. LEXIS 1174 (N.Y. 1993).

Since CLS Gen Mun § 205-e was enacted to provide police officers same rights accorded firefighters under CLS Gen Mun § 205-a, provisions of no-fault law (CLS Ins § 5104) also limit recovery under CLS Gen Mun § 205-e. Village of Suffern v Baels, 215 A.D.2d 751, 627 N.Y.S.2d 420, 1995 N.Y. App. Div. LEXIS 5778 (N.Y. App. Div. 2d Dep't 1995).

Alleged violations of Penal Law by fellow police officer create hazards additional to those that police officers already face in their profession. Carlson v City of Tonawanda, 221 A.D.2d 1011, 635 N.Y.S.2d 365, 1995 N.Y. App. Div. LEXIS 13525 (N.Y. App. Div. 4th Dep't 1995).

Injured firefighter's receipt of disability benefits under CLS Gen Mun § 207-a constituted his exclusive remedy, barring common-law negligence claims and CLS Gen Mun § 205-a claims against his municipal employer. Petendree v City of Yonkers, 270 A.D.2d 403, 704 N.Y.S.2d 646, 2000 N.Y. App. Div. LEXIS 3238 (N.Y. App. Div. 2d Dep't 2000).

Failure to comply with N.Y. Comp. Codes R. & Regs. tit. 27, §§ 127, 128, constitutes a sufficient predicate for liability under N.Y. Gen. Mun. Law § 205-a. Terranova v New York City Tr. Auth., 49 A.D.3d 10, 850 N.Y.S.2d 123, 2007 N.Y. App. Div. LEXIS 12901 (N.Y. App. Div. 2d Dep't 2007), app. denied, 11 N.Y.3d 708, 868 N.Y.S.2d 600, 897 N.E.2d 1084, 2008 N.Y. LEXIS 3263 (N.Y. 2008).

Widow's claims against a village and a fire department to recover for the death of her husband, a volunteer firefighter, were barred by N.Y. Vol. Fire. Ben. Law § 19 because the widow sought to recover both as the estate administrator and in her individual capacity, and the village and the fire department were among the respondents enumerated in the statute; N.Y. Gen. Mun. Law § 205-a did not provide for a recovery in addition to that provided by the various provisions of the Volunteer Firefighters' Benefit Law. Brady v Village of Malverne, 76 A.D.3d 691, 907 N.Y.S.2d 68, 2010 N.Y. App. Div. LEXIS 6621 (N.Y. App. Div. 2d Dep't 2010).

City was entitled to dismissal of the claim of an emergency medical technician (EMT) for work-related injuries pursuant to N.Y. Gen. Mun. Law § 205-a because the provisions of § 205-a(1) had to yield to the exclusivity provisions of the Workers' Compensation Law, N.Y. Workers' Comp. Law § 11 and, thus, the EMT's claim against the city under § 205-a was barred. Weiner v City of New York, 84 A.D.3d 140, 922 N.Y.S.2d 160, 2011 N.Y. App. Div. LEXIS 3573 (N.Y. App. Div. 2d Dep't 2011), aff'd, 19 N.Y.3d 852, 947 N.Y.S.2d 404, 970 N.E.2d 427, 2012 N.Y. LEXIS 1242 (N.Y. 2012).

This section gives a cause of action to a fireman injured in course of duty by failure of persons to comply with the requirements of an ordinance or statute, giving rise to a liability imposed specially and apart from any ordinary liability based upon negligence. Healy v Rennert, 33 Misc. 2d 897, 226 N.Y.S.2d 876, 1962 N.Y. Misc. LEXIS 3679 (N.Y. Sup. Ct. 1962), aff'd, 20 A.D.2d 682, 246 N.Y.S.2d 1017, 1964 N.Y. App. Div. LEXIS 4665 (N.Y. App. Div. 2d Dep't 1964).

While Gen Mun Law § 205-a, which gives injured firemen a cause of action against persons whose negligence in failing to comply with requirements of any statute or ordinance causes his injuries, specifies that it is in addition to any other remedy, there is no intent to impose an additional amount of damages on an employer, and a city fireman forfeits his rights to relief under the statute when he accepts workers' compensation benefits for injuries sustained in the course of employment. Traver v Saratoga Springs, 122 Misc. 2d 63, 470 N.Y.S.2d 100, 1983 N.Y. Misc. LEXIS 4073 (N.Y. Sup. Ct. 1983).

2. Purpose

Affirmative defense alleging that plaintiff fireman's injuries were caused in whole or in part by his own culpable conduct was properly dismissed to extent it was addressed to statutory cause of action; General Municipal Law § 205-a is special statute which applies standard of absolute liability on building owner for any

violation which is reasonably connected to firefighter's injury. It expresses legislative intent to protect firefighters from special hazards arising from fighting fires in buildings with violations by creating statute which imposes absolute liability on building owner, irrespective of considerations of negligence, in same way as Labor Law § 240 imposes such liability on owners and contractors in course of construction; rationale which holds defense of comparative negligence to be antithetical to intended purposes of Labor Law § 240 is equally applicable with respect to parallel intended purpose of General Municipal Law § 205-a. Johnson v Riggio Realty Corp., 153 A.D.2d 485, 544 N.Y.S.2d 589, 1989 N.Y. App. Div. LEXIS 10613 (N.Y. App. Div. 1st Dep't), app. dismissed, 74 N.Y.2d 945, 550 N.Y.S.2d 279, 549 N.E.2d 481, 1989 N.Y. LEXIS 3325 (N.Y. 1989).

The intent of this section seems to have been to give an injured fireman, who might not otherwise have a cause of action in negligence, a right of action for damages based upon failure of defendant to comply with the requirements of some ordinance or statute, and it was never intended to give plaintiff fireman an additional right to recover damages for ordinary negligence arising out of the same conduct by the same persons. Healy v Rennert, 33 Misc. 2d 897, 226 N.Y.S.2d 876, 1962 N.Y. Misc. LEXIS 3679 (N.Y. Sup. Ct. 1962), aff'd, 20 A.D.2d 682, 246 N.Y.S.2d 1017, 1964 N.Y. App. Div. LEXIS 4665 (N.Y. App. Div. 2d Dep't 1964).

This is a special statute enacted for the benefit of injured or deceased firemen or their relatives, designed to afford additional compensation to firemen injured or their families when killed, and is not penal in nature. Carroll v New York, 37 Misc. 2d 563, 234 N.Y.S.2d 954, 1962 N.Y. Misc. LEXIS 2306 (N.Y. Sup. Ct. 1962), aff'd, 25 A.D.2d 841, 270 N.Y.S.2d 146, 1966 N.Y. App. Div. LEXIS 4191 (N.Y. App. Div. 1st Dep't 1966).

The predominant purpose of this statute is to give a cause of action to firemen injured by failure of persons to comply with the requirements of any ordinance or statute, and thereby to afford additional compensation to firemen so injured. Burigo v Di Leo, 38 Misc. 2d 851, 239 N.Y.S.2d 166, 1963 N.Y. Misc. LEXIS 2213 (N.Y. County Ct. 1963).

It was not the legislative intent to limit the statutory liability imposed by this section to instances of injuries sustained by firemen while in performance of their duties at or upon premises on fire or in danger of burning, the predominant purpose being to give a cause of action to firemen injured by failure of anyone to comply with the requirements of any ordinance or statute. Burigo v Di Leo, 38 Misc. 2d 851, 239 N.Y.S.2d 166, 1963 N.Y. Misc. LEXIS 2213 (N.Y. County Ct. 1963).

3. Construction

CLS Gen Mun § 205-a is remedial statute and should be construed liberally; however, scope is limited to property owners and to maintenance of premises in safe condition for firefighters. Kenavan v New York, 70 N.Y.2d 558, 523 N.Y.S.2d 60, 517 N.E.2d 872, 1987 N.Y. LEXIS 19265 (N.Y. 1987).

Although General Municipal Law § 205-a is to be construed liberally, the administratrix of a deceased fireman, who was killed as a burning building collapsed while he was on the roof attempting to open a scuttle in order to ventilate the building, failed to state a statutory cause of action by alleging that the evidence disclosed violations of law as to illegal smoking, an illegal employee's recreation room, and the illegally maintained scuttle. McGee v Adams Paper & Twine Co., 26 A.D.2d 186, 271 N.Y.S.2d 698, 1966 N.Y. App. Div. LEXIS 3598 (N.Y. App. Div. 1st Dep't 1966), aff'd, 20 N.Y.2d 921, 286 N.Y.S.2d 274, 233 N.E.2d 289, 1967 N.Y. LEXIS 1115 (N.Y. 1967).

General Municipal Law § 205-a is to be construed liberally. Lyden v Rasa, 39 A.D.2d 716, 331 N.Y.S.2d 982, 1972 N.Y. App. Div. LEXIS 4738 (N.Y. App. Div. 2d Dep't 1972).

Violation of NYC Admin Code § 27-4272, which requires that "[l]ighted matches, cigars [or] cigarettes" must be deposited in "metal or other non-combustible material provided for the reception thereof," does not trigger exception to "firefighter's rule" in CLS Gen Oblig § 205-a. Boardman v Vin-Al Corp., 228 A.D.2d 631, 646 N.Y.S.2d 26, 1996 N.Y. App. Div. LEXIS 7410 (N.Y. App. Div. 2d Dep't 1996).

Neither assumption of risk nor contributory negligence may be asserted in defense to action brought under CLS Gen Mun § 295-a. O'Connell v Kavanagh, 231 A.D.2d 29, 662 N.Y.S.2d 1, 1997 N.Y. App. Div. LEXIS 7832 (N.Y. App. Div. 1st Dep't 1997).

Amendment to CLS Gen Mun § 205-a (L 1996, ch 703) revived plaintiff's action, and thus it was not barred by 3-year statute of limitations under CLS CPLR § 214 (5) or (2), where plaintiff's complaint alleged violation of NYC Admin Code §§ 27-127 and 27-128, which merely restate common-law duties as to premises maintenance. Hart v DiPiazza, 262 A.D.2d 283, 691 N.Y.S.2d 109, 1999 N.Y. App. Div. LEXIS 5895 (N.Y. App. Div. 2d Dep't 1999).

Negligence or a failure on the part of a municipal corporation in maintenance of an intersection and in enforcement of rules and regulations does not result in liability under Gen Mun Law § 205-a, which gives injured firemen a cause of action against persons whose negligence in failing to comply with requirements of any statute or ordinance causes his injuries, since the thrust of the statute is to impose liability on property owners only, and thus a city fireman has no cause of action under the statute for injuries sustained as a result of an intersection collision between a fire truck on which he was riding and another vehicle. Traver v Saratoga Springs, 122 Misc. 2d 63, 470 N.Y.S.2d 100, 1983 N.Y. Misc. LEXIS 4073 (N.Y. Sup. Ct. 1983).

4. Constitutionality

Revival clause added in 1996 amendment of CLS Gen Mun § 205-a precluded dismissal of firefighter's personal injury action against defendants, even though Court of Appeals had affirmed dismissal of that action before 1996 amendment, where § 205-a was enacted to ameliorate harsh effects of common-law firefighters rule and to expand right of injured firefighters, serious injustice would result to plaintiffs not guilty of any fault if intention of legislature were not effectuated, and thus application of revival clause did not deprive defendants of property without due process of law. Raquet v J.M. Braun Builders, Inc., 273 A.D.2d 850, 709 N.Y.S.2d 292, 2000 N.Y. App. Div. LEXIS 6845 (N.Y. App. Div. 4th Dep't), app. denied, 95 N.Y.2d 902, 716 N.Y.S.2d 642, 739 N.E.2d 1147, 2000 N.Y. LEXIS 2898 (N.Y. 2000).

This section is not unconstitutional as constituting improper class legislation. Dessner v MJR Realty Co., 40 Misc. 2d 229, 242 N.Y.S.2d 690, 1963 N.Y. Misc. LEXIS 1752 (N.Y. Sup. Ct. 1963).

5. Penal nature of statute

This statute is quasi-penal, if not entirely penal, and sui generis. How a claim under the statute might be handled when submitted to a jury in conjunction with an ordinary cause of action based on negligence is a question. But with due regard to the special and separate nature of the cause of action created by this section, such cause of action thereunder must be separately stated and submitted. Gannon v Royal Properties, Inc., 285 A.D. 131, 136 N.Y.S.2d 129, 1954 N.Y. App. Div. LEXIS 3294 (N.Y. App. Div. 1954), aff'd, 309 N.Y. 819, 130 N.E.2d 616, 309 N.Y. (N.Y.S.) 819, 1955 N.Y. LEXIS 1572 (N.Y. 1955).

This is a special statute enacted for the benefit of injured or deceased firemen or their relatives, designed to afford additional compensation to firemen injured or their families when killed, and is not penal in nature. Carroll v New York, 37 Misc. 2d 563, 234 N.Y.S.2d 954, 1962 N.Y. Misc. LEXIS 2306 (N.Y. Sup. Ct. 1962), aff'd, 25 A.D.2d 841, 270 N.Y.S.2d 146, 1966 N.Y. App. Div. LEXIS 4191 (N.Y. App. Div. 1st Dep't 1966).

6. Persons liable; property owners

Statute giving an additional right of action for injury or death of fireman as result of failure to comply with statutes or ordinances is directed at property owners and those in control of property which is involved in a fire-fighting operation. Gerhart v New York, 56 A.D.2d 790, 393 N.Y.S.2d 6, 1977 N.Y. App. Div. LEXIS 11069 (N.Y. App. Div. 1st Dep't), app. denied, 42 N.Y.2d 810, 1977 N.Y. LEXIS 3889 (N.Y. 1977).

Where agreement between third-party plaintiff and third-party respondent afforded the latter the right to cancel until October 30 and the latter cancelled on October 28th, and lease portion of the agreement was not to commence until the following May 1, the third-party defendant had no duty with respect to condition of the premises prior to October 4 and, hence, was not subject to liability

under statute giving additional right of action to certain injured or representatives of certain deceased firemen. Adams v Acker, 57 A.D.2d 741, 394 N.Y.S.2d 8, 1977 N.Y. App. Div. LEXIS 11871 (N.Y. App. Div. 1st Dep't), app. dismissed, 42 N.Y.2d 809, 1977 N.Y. LEXIS 3882 (N.Y. 1977), app. dismissed, 42 N.Y.2d 965, 398 N.Y.S.2d 147, 367 N.E.2d 654, 1977 N.Y. LEXIS 2288 (N.Y. 1977), app. dismissed, 42 N.Y.2d 1050, 399 N.Y.S.2d 212, 369 N.E.2d 769, 1977 N.Y. LEXIS 2384 (N.Y. 1977), app. dismissed, 42 N.Y.2d 1101, 1977 N.Y. LEXIS 4880 (N.Y. 1977).

Gen Mun Law § 205-a applies only to property owners or those who are in control of property, and so would not support an action against a contractor based on demolition work the contractor had performed on real property three years prior to an accident on the property on which plaintiff was injured. Kiernan v New York, 102 A.D.2d 731, 476 N.Y.S.2d 568, 1984 N.Y. App. Div. LEXIS 18896 (N.Y. App. Div. 1st Dep't 1984), sub. op., in part, 107 A.D.2d 608, 484 N.Y.S.2d 790, 1985 N.Y. App. Div. LEXIS 42604 (N.Y. App. Div. 1st Dep't 1985).

CLS Gen Mun § 205-a, which affords to firefighters statutorily created right of action for injuries suffered while combatting fires, may be asserted against nonowners of premises on which particular fire occurred when those nonowners are charged with having violated some statute, ordinance or rule respecting maintenance and safety of premises in question. Andreaccio v Unique Parking Corp., 158 A.D.2d 222, 1990 N.Y. App. Div. LEXIS 8368 (N.Y. App. Div. 1st Dep't 1990).

Firefighter who was injured in fire at parking garage could assert cause of action under CLS Gen Mun § 205-a against firm which performed demolition activity adjacent to garage which might have caused fire, and against second firm which had contract with garage operator to maintain and inspect automatic sprinkler system, since statute reaches beyond owners of premises, and it was alleged that demolition firm violated ordinance regarding demolition safety and that sprinkler firm violated ordinances regarding maintenance of sprinkler systems. Andreaccio v Unique Parking Corp., 158 A.D.2d 222, 1990 N.Y. App. Div. LEXIS 8368 (N.Y. App. Div. 1st Dep't 1990).

Former property owner should have been granted summary judgment in action brought against it under CLS Gen Mun § 205-a; liability under statute is limited to those with control over premises at time of injury. Patsos v Suffolk Charles Assocs., 226 A.D.2d 608, 641 N.Y.S.2d 370, 1996 N.Y. App. Div. LEXIS 4363 (N.Y. App. Div. 2d Dep't), app. denied, 88 N.Y.2d 812, 649 N.Y.S.2d 379, 672 N.E.2d 605, 1996 N.Y. LEXIS 2979 (N.Y. 1996).

In firefighter's action under CLS Gen Mun § 205-a predicated on alleged violation of 12 NYCRR § 23-1.7(b)(1)(i) which requires "substantial cover fastened in place" over every hazardous opening into which person may step or fall, testimony of general contractor's superintendent that he moved plywood drain covering but then replaced it as it had been, coupled with fact that owner was compelled to move its office to another floor during renovation of premises, raised issue of fact as to extent of general contractor's control of premises, warranting denial of its summary judgment motion. Scollin v Theater for the New City Found., 229 A.D.2d 355, 646 N.Y.S.2d 323, 1996 N.Y. App. Div. LEXIS 7976 (N.Y. App. Div. 1st Dep't 1996).

Landowner was entitled to summary judgment in action by firefighter who slipped on plastic bag on roof of premises while fighting fire, absent evidence that presence of plastic bag on roof was created by or known to landowner. McCullagh v McJunkin, 240 A.D.2d 713, 659 N.Y.S.2d 309, 1997 N.Y. App. Div. LEXIS 7111 (N.Y. App. Div. 2d Dep't 1997).

Defendant building owners were not entitled to summary judgment on plaintiff firefighter's CLS Gen Mun § 205-a claim because, even as successor landlords, they were responsible for narrow-tread spiral staircase leading to attic which violated building code, notice of violation was not required, affidavits of plaintiff and his expert raised fact issue as to whether there was reasonable connection between plaintiff's injury and dimensions of steps on which he fell, and any inconsistency between plaintiff's affidavit that he had difficulty maintaining his footing up staircase and his deposition testimony that he fell near top on wet step merely presented issue of credibility for fact finder. Meyer v Moreno, 258 A.D.2d 315, 685 N.Y.S.2d 218, 1999 N.Y. App. Div. LEXIS 1158 (N.Y. App. Div. 1st Dep't 1999).

Trial court erred in granting summary judgment to the owner of a building as to plaintiffs' claim under N.Y. Gen. Mun. Law § 205-a, because plaintiffs raised triable issues of fact as to whether alleged violations of the Administrative Code by the owner bore a practical or reasonable causal connection to a firefighter's injuries during a rescue operation in the building. Doherty v Sparacio, 35 A.D.3d 530, 826 N.Y.S.2d 402, 2006 N.Y. App. Div. LEXIS 15053 (N.Y. App. Div. 2d Dep't 2006).

Trial court properly granted a motion and cross-motion filed by a property owner and its lessee for summary judgment dismissing a firefighter's cause of action predicated on a violation of an Occupational Safety and Health Administration regulation because such a cause of action could only be maintained against a plaintiff's employer and there was no dispute that neither the owner nor the lessee was the firefighter's employer. Gallagher v 109-02 Dev., LLC, 137 A.D.3d 1073, 28 N.Y.S.3d 387, 2016 N.Y. App. Div. LEXIS 2049 (N.Y. App. Div. 2d Dep't 2016).

Trial court erred in denying a motion for summary judgment by a property owner and its lessee in a firefighter's cause of action predicated on a violation of a provision of the Administrative Code of the City of New York because the firefighter cited only to a provision of the Code that was repealed in 1968, many years before the accident in question occurred. Gallagher v 109-02 Dev., LLC, 137 A.D.3d 1073, 28 N.Y.S.3d 387, 2016 N.Y. App. Div. LEXIS 2049 (N.Y. App. Div. 2d Dep't 2016).

A firefighter's suit against a homeowner for personal injuries resulting from slipping on a snowy roof during a rescue was properly dismissed via summary judgment because the house was a private dwelling, not a multiple dwelling requiring fire-resistant enclosures, and no purported ordinance violation for failing to obtain permits for work performed inside the home caused or contributed to the firefighter's injuries. Metzger v Lazala, 171 A.D.3d 1287, 97 N.Y.S.3d 350, 2019 N.Y. App. Div. LEXIS 2605 (N.Y. App. Div. 3d Dep't 2019).

This section is not directed to imposing liability upon a municipality for permitting violations of its Building Code and other ordinances, but to impose liability on property owners who have violated such local laws and ordinances, with resultant death or injury of a fireman. Carroll v New York, 37 Misc. 2d 563, 234 N.Y.S.2d 954, 1962 N.Y. Misc. LEXIS 2306 (N.Y. Sup. Ct. 1962), aff'd, 25 A.D.2d 841, 270 N.Y.S.2d 146, 1966 N.Y. App. Div. LEXIS 4191 (N.Y. App. Div. 1st Dep't 1966).

7. —Municipalities

Emergency medical technician's causes of action for common law negligence and N.Y. Gen. Mun. Law § 205-a were properly dismissed because the technician's injuries arose from and were connected with the technician's employment with a city, the technician received workers' compensation benefits, and the technician could not sue the city in its landlord role. Weiner v City of New York, 19 N.Y.3d 852, 947 N.Y.S.2d 404, 970 N.E.2d 427, 2012 N.Y. LEXIS 1242 (N.Y. 2012).

Section 19 of the Volunteer Firemen's Benefit Law prescribes the exclusive remedy of volunteer firemen against municipalities enumerated therein for injuries sustained in line of duty, and, where they have a remedy under that section, they have none under § 205-a of the General Municipal Law. Gresis v Garth Manor Corp., 20 A.D.2d 726, 248 N.Y.S.2d 118, 1964 N.Y. App. Div. LEXIS 4331 (N.Y. App. Div. 2d Dep't), app. denied, 14 N.Y.2d 488, 1964 N.Y. LEXIS 1868 (N.Y. 1964).

Judgment dismissing complaints against city in consolidated actions for wrongful death of six city firemen and personal injuries of seventh fireman allegedly caused by city's failure to effect compliance with charter and code provisions relating to construction of parapet wall which fell on firemen, would be affirmed in view of fact that General Municipal Law § 205-a imposed liability for "failing to comply" with requirements of statute, ordinance, rules, orders and requirements of various governmental agencies and in the instant case, the duty of compliance was on the owner and other persons responsible for the erection of the parapet wall. Infosino v New York, 25 A.D.2d 841, 270 N.Y.S.2d 146, 1966 N.Y. App. Div. LEXIS 4191 (N.Y. App.

Div. 1st Dep't), app. denied, 18 N.Y.2d 583, 1966 N.Y. LEXIS 2258 (N.Y. 1966), app. denied, 18 N.Y.2d 583, 1966 N.Y. LEXIS 2266 (N.Y. 1966).

Plaintiff's argument that city retained significant ownership interest in property sufficient to serve as predicate for liability under General Municipal Law § 205-a or under principles of common-law negligence is rejected; pursuant to land disposition agreement executed at time city conveyed full title to property to codefendant, city reserved right to reenter and take possession of premises in event of default by codefendant and to terminate estate conveyed; these rights may be likened to those of mortgagee and not to those of landlord, and were insufficient to impose liability upon city as co-owner of premises at time of fire. Bittrolff v Ho's Dev. Corp., 160 A.D.2d 315, 553 N.Y.S.2d 400, 1990 N.Y. App. Div. LEXIS 3955 (N.Y. App. Div. 1st Dep't 1990), aff'd, 77 N.Y.2d 896, 568 N.Y.S.2d 902, 571 N.E.2d 72, 1991 N.Y. LEXIS 314 (N.Y. 1991).

City was entitled to summary judgment dismissing actions by firefighters and their estates arising out of injuries or deaths sustained in gas explosion which occurred while firefighters were responding to report that propane gas was escaping from tank in warehouse, although municipality may be held liable for negligence of fellow firefighters, since liability cannot be imposed where firefighters' conduct involves exercise of professional judgment or making of tactical decisions. Austin v Buffalo, 179 A.D.2d 1075, 580 N.Y.S.2d 604, 1992 N.Y. App. Div. LEXIS 2440 (N.Y. App. Div. 4th Dep't), modified, 179 A.D.2d 1079, 580 N.Y.S.2d 679, 1992 N.Y. App. Div. LEXIS 2444 (N.Y. App. Div. 4th Dep't 1992).

Failure of state agencies to properly maintain premises in violation of local administrative code and fire department rules was proprietary, rather than governmental, in nature; thus, state agencies would be as liable as any other landlord under CLS Gen Mun § 205-a when alleged violation had reasonable connection to injury sustained by firefighter. Dempsey v Manhattan & Bronx Surface Transit Operating Auth., 214 A.D.2d 334, 625 N.Y.S.2d 133, 1995 N.Y. App. Div. LEXIS 3689 (N.Y. App. Div. 1st Dep't 1995).

Firefighter proved his cause of action under CLS Gen Mun § 205-a by showing that violation of NYC Admin Code § 26-235 caused him harm, either directly or indirectly. Tobin v City of New York, 256 A.D.2d 177, 681 N.Y.S.2d 527, 1998 N.Y. App. Div. LEXIS 13748 (N.Y. App. Div. 1st Dep't 1998), app. denied, 93 N.Y.2d 803, 688 N.Y.S.2d 493, 710 N.E.2d 1092, 1999 N.Y. LEXIS 95 (N.Y. 1999).

City firefighter who was injured when part of firehouse ceiling collapsed on top of him as he was lifting weights did not prove city's negligence as matter of law where (1) there was evidence that prior inspection of premises had revealed no water damage and that all reported problems had been promptly repaired, (2) firehouse had 3 separate roofs and had experienced problems with several different ceilings, (3) it was unclear whether city had received complaints specifically regarding ceiling of weight room, and (4) thus, triable issue of fact remained as to whether city had notice of alleged ceiling defect. Shy v City of New York, 266 A.D.2d 275, 699 N.Y.S.2d 423, 1999 N.Y. App. Div. LEXIS 13087 (N.Y. App. Div. 2d Dep't 1999).

City firefighter who was injured when part of firehouse ceiling collapsed on top of him as he was lifting weights did not prove that ceiling collapse was proximate cause of his injuries as matter of law, even though his expert opined that firefighter's head, neck, and back injuries were direct result of firehouse accident, where (1) other documentation, including medical history and sick leave records, indicated that firefighter had suffered from extensive and similar injuries over several years, (2) his bill of particulars stated that his current back injury "ha[s] aggravated and [is] superimposed upon underlying significant pre-existent history as plaintiff had undergone a previous repair of internal dislocation of shoulder," and (3) thus, his injuries might have resulted from progressive degenerative disease related to previous medical conditions. Shy v City of New York, 266 A.D.2d 275, 699 N.Y.S.2d 423, 1999 N.Y. App. Div. LEXIS 13087 (N.Y. App. Div. 2d Dep't 1999).

The U.S. Occupational Safety and Health Administration regulations that require protective clothing for a firefighter's head, body, and extremities, 29 C.F.R. § 1910-156(e)(2), (3), can serve as a predicate to a claim under N.Y. Gen. Mun. Law § 205-a because they are part of a well-developed body of law and regulation and they impose a clear legal duty. McGovern v City of New York, 294 A.D.2d 148, 742 N.Y.S.2d 218, 2002 N.Y. App. Div. LEXIS 4780 (N.Y. App. Div. 1st Dep't 2002).

Liability of defendant New York City Transit Authority for plaintiff firefighter's injuries under N.Y. Gen. Mun. Law § 205-a was not affected by N.Y. Pub. Auth. Law § 1266(8) as there was no issue of "jurisdiction" and neither was there any conflict between the Authority's regulations and those of a local government; but even if the exemption applied to the Authority, it would not have applied to facilities that were devoted to purposes other than transit. The Authority could not have been exempt from liability with respect to the maintenance of its non-transportation facilities; the Authority was subject to the same duty of care as any other potential tortfeasor and, therefore, like any other landlord, was liable under N.Y. Gen. Mun. Law § 205-a when its failure to comply had a reasonable connection to the firefighter's injuries. Terranova v New York City Tr. Auth., 49 A.D.3d 10, 850 N.Y.S.2d 123, 2007 N.Y. App. Div. LEXIS 12901 (N.Y. App. Div. 2d Dep't 2007), app. denied, 11 N.Y.3d 708, 868 N.Y.S.2d 600, 897 N.E.2d 1084, 2008 N.Y. LEXIS 3263 (N.Y. 2008).

This section is not directed to imposing liability upon a municipality for permitting violations of its Building Code and other ordinances, but to impose liability on property owners who have violated such local laws and ordinances, with resultant death or injury of a fireman. Carroll v New York, 37 Misc. 2d 563, 234 N.Y.S.2d 954, 1962 N.Y. Misc. LEXIS 2306 (N.Y. Sup. Ct. 1962), aff'd, 25 A.D.2d 841, 270 N.Y.S.2d 146, 1966 N.Y. App. Div. LEXIS 4191 (N.Y. App. Div. 1st Dep't 1966).

In an action against New York City to recover damages for death of a fireman due to collapse of the wall of a building which was insufficiently supported to meet the building code requirements, it was error for the trial judge to submit the case to the jury on the basis of this section as imposing liability on the city because a certificate of occupancy for the building was issued by one of its officials notwithstanding the wall defects. Carroll v New York, 37 Misc. 2d 563, 234 N.Y.S.2d 954, 1962 N.Y. Misc. LEXIS 2306 (N.Y. Sup. Ct. 1962), aff'd, 25 A.D.2d 841, 270 N.Y.S.2d 146, 1966 N.Y. App. Div. LEXIS 4191 (N.Y. App. Div. 1st Dep't 1966).

8. Scope of liability; condition of premises

A city fireman filed a complaint for injuries sustained while fighting a fire on the defendant's premises. The complaint alleged the violation of § C19-161.1 of the New York City Administrative Code which forbids under certain circumstances the use of draperies or curtains made of combustible materials. Held: the complaint stated a cause of action under § 205-a. Also, the statute of limitations applicable is the six year period of limitations provided by § 48, subd 2 of the CPA, since such a suit is not a suit for a penalty. Sicolo v Prudential Sav. Bank, 5 N.Y.2d 254, 184 N.Y.S.2d 100, 157 N.E.2d 284, 1959 N.Y. LEXIS 1522 (N.Y. 1959).

Although General Municipal Law § 205-a is to be construed liberally, the administratrix of a deceased fireman, who was killed as a burning building collapsed while he was on the roof attempting to open a scuttle in order to ventilate the building, failed to state a statutory cause of action by alleging that the evidence disclosed violations of law as to illegal smoking, an illegal employee's recreation room, and the illegally maintained scuttle. McGee v Adams Paper & Twine Co., 26 A.D.2d 186, 271 N.Y.S.2d 698, 1966 N.Y. App. Div. LEXIS 3598 (N.Y. App. Div. 1st Dep't 1966), aff'd, 20 N.Y.2d 921, 286 N.Y.S.2d 274, 233 N.E.2d 289, 1967 N.Y. LEXIS 1115 (N.Y. 1967).

Where volunteer fireman sustained injuries when rubble on which he was standing gave way and he fell into a hole while he was fighting a fire which had been deliberately set by the defendant, who had not obtained permission to do so, for the purposes of demolishing a building, injury was one resulting directly or indirectly as a result of defendant's violation of a town ordinance prohibiting any open fire where such fire may endanger other property, and also was in violation of town ordinance prohibiting burning of any trash, lumber or other combustible material, except in a metal incinerator or container without the

written permission of the building inspector of the town, and therefore liability was properly predicated upon § 205-a of the General Municipal Law. Carroll v Roman Catholic Diocese of Rockville Centre, 26 A.D.2d 552, 271 N.Y.S.2d 7, 1966 N.Y. App. Div. LEXIS 4009 (N.Y. App. Div. 2d Dep't), app. dismissed, 18 N.Y.2d 708, 274 N.Y.S.2d 144, 220 N.E.2d 793, 1966 N.Y. LEXIS 1124 (N.Y. 1966), aff'd, 19 N.Y.2d 658, 278 N.Y.S.2d 626, 225 N.E.2d 217, 1967 N.Y. LEXIS 1783 (N.Y. 1967).

Where defect arising from use of combustible wooden straps instead of metal hangers to hang ceiling from roof of school building was a hidden one and could not have been discovered by layman, even by inspection, and owner of building was never put on actual or constructive notice of existence of defect, owner could not be held liable for injuries sustained by firemen when ceiling of building collapsed during fire. Marquart v Yeshiva Machezikel Torah D'Chasidel Belz, 53 A.D.2d 688, 385 N.Y.S.2d 319, 1976 N.Y. App. Div. LEXIS 13439 (N.Y. App. Div. 2d Dep't 1976).

It was error to dismiss firefighter's action against owner of building under CLS Gen Mun § 205-a for injuries firefighter sustained when plastic flowerpot hanging from skylight fell on him as he was exiting burning building, since (1) local fire prevention code prohibited "obstructions to or on...stairs, halls, passageways, doors or windows, liable to interfere with" fire department operations, (2) flowerpot was made entirely of plastic including plastic straps which melt in very high temperatures, (3) pot was hanging directly over stairs, (4) one firefighter testified that he had bumped into hanging object which felt like pot in same area just prior to accident, and (5) large plastic flowerpot was found in vicinity where firefighter was struck; such evidence was sufficient to establish prima facie showing of code violation, which warranted submitting cause of action to jury. Cotter v Spear, 139 A.D.2d 555, 527 N.Y.S.2d 55, 1988 N.Y. App. Div. LEXIS 3856 (N.Y. App. Div. 2d Dep't 1988).

In action brought under CLS Gen Mun § 205-a by firefighter for injuries allegedly caused by landlord's failure to comply with building code requirement that doors be equipped and maintained with self-closing hinges, court would reverse jury verdict in favor of landlord, despite landlord's lack of notice of condition of door to apartment in question, since there was ample evidence to indicate that landlord was fully cognizant of fact that many tenants disabled self-closing hinges. Lusenskas v Axelrod, 183 A.D.2d 244, 592 N.Y.S.2d 685, 1992 N.Y. App. Div. LEXIS 12837 (N.Y. App. Div. 1st Dep't 1992), app. dismissed, 81 N.Y.2d 300, 598 N.Y.S.2d 166, 614 N.E.2d 729, 1993 N.Y. LEXIS 1174 (N.Y. 1993).

Defendants (construction company et al.) were entitled to summary judgment dismissing action brought by firefighter under CLS Gen Mun § 205-a for injuries received while fighting fire which broke out when backhoe operated by one of construction company's employee's made contact with electrical line, despite allegation that defendants violated, among other provisions, Rule 53 of New York State Industrial Code governing "construction, excavation and demolition operations at or near underground facilities," since such regulations related only tangentially, if at all, to fire prevention, and violation of such regulations would not necessarily "create hazards additional to those that firefighters already face in their profession." Sutherland v Hallen Constr. Co., 183 A.D.2d 887, 585 N.Y.S.2d 55, 1992 N.Y. App. Div. LEXIS 7845 (N.Y. App. Div. 2d Dep't 1992), app. dismissed, 81 N.Y.2d 783, 594 N.Y.S.2d 719, 610 N.E.2d 392, 1993 N.Y. LEXIS 41 (N.Y. 1993).

Where firefighter is injured as result of ordinary risks inherent in firefighting, or by foreseeable consequences of emergency that firefighter was summoned to control, firefighter is barred by common-law "fireman's rule" from recovering damages from property owner based on latter's negligence, regardless of whether firefighter is paid public servant or unpaid volunteer. Fiola v Korman, 189 A.D.2d 798, 592 N.Y.S.2d 429, 1993 N.Y. App. Div. LEXIS 333 (N.Y. App. Div. 2d Dep't 1993).

Hospital was entitled to summary judgment dismissing action by firefighter to recover under CLS Gen Mun § 205-a for injuries sustained when he slipped on towel while fighting fire at hospital; to extent that claim was not purely conjectural (e.g., assertion that automatic smoke dampers failed to operate), it was based on allegations of violations of safety rules that would not have created hazards additional to those that firefighters normally face (e.g., assertion that hospital did not enforce no-smoking rules). Murphy v Mount Sinai Hosp., 202 A.D.2d 238, 608 N.Y.S.2d 448, 1994 N.Y. App. Div. LEXIS 1992 (N.Y. App. Div. 1st Dep't 1994).

Firefighter, who was allegedly burned by spray-back from hot tar after responding to fire concerning tar kettle on roof, could not maintain action based on statutory negligence under CLS Gen Mun § 205-a since injury complained of was not reasonably or practically related to statute, ordinance, rule, order or requirement allegedly violated. Billups v Wickers, 205 A.D.2d 723, 613 N.Y.S.2d 706, 1994 N.Y. App. Div. LEXIS 6604 (N.Y. App. Div. 2d Dep't 1994), app. denied, 84 N.Y.2d 812, 622 N.Y.S.2d 915, 647 N.E.2d 121, 1995 N.Y. LEXIS 107 (N.Y. 1995).

12 NYCRR § 23-1.7(b)(1)(i), requiring "substantial cover fastened in place" over every hazardous opening into which person may step or fall, is sufficient predicate for liability under CLS Gen Mun § 205-a. Scollin v Theater for the New City Found., 229 A.D.2d 355, 646 N.Y.S.2d 323, 1996 N.Y. App. Div. LEXIS 7976 (N.Y. App. Div. 1st Dep't 1996).

Fire department report stating that open door contributed to intensity and extent of fire, and that warped parquet floor had rendered self-closing mechanism of door inoperative, raised issue of fact as to whether there was any connection between defendants' violation of NYC Admin Code § 27-371 and injury suffered by firefighter while fighting fire in defendants' cooperative apartment building, precluding summary judgment in firefighter's action under CLS Gen Mun § 205-a. Sollecito v 360 E. 72nd St. Owners, 234 A.D.2d 200, 651 N.Y.S.2d 865, 1996 N.Y. App. Div. LEXIS 12833 (N.Y. App. Div. 1st Dep't 1996).

Firefighter, who was injured while ascending stairs in response to alarm at defendant's apartment building when he slipped on liquid leaking from open bag of garbage, stated viable claims under CLS Gen Mun § 205-a, NYC Admin Code title 27 and common-law theories of recovery in that defendant had constructive notice of recurrent condition that tenants would leave garbage in bags in common areas, and that vagrants who slept in those hallways and stairwells at night would break open those bags in search of usable items. O'Grady v New York City Hous. Auth., 259 A.D.2d 442, 687 N.Y.S.2d 352, 1999 N.Y. App. Div. LEXIS 3236 (N.Y. App. Div. 1st Dep't 1999).

Building owners' duty to keep their buildings in good repair pursuant to CLS Mult D § 78, being no more general than city's duty to keep its streets in good repair pursuant to NYC Charter § 2903(b), was valid predicate for CLS Gen Mun § 205-a liability. Hayes v City of New York, 264 A.D.2d 610, 695 N.Y.S.2d 328, 1999 N.Y. App. Div. LEXIS 9094 (N.Y. App. Div. 1st Dep't 1999).

In action under CLS Gen Mun § 205-a alleging violations of CLS Veh & Tr § 1224, NYC Admin Code former § 755(4)-3.0, now § 16-128(a), and General Order No. 5 of New York City Department of Sanitation, court improperly granted plaintiff's summary judgment motion, reinstated original jury verdict on issue of liability, and directed trial on issue of damages, where fatal injuries sustained by plaintiff's decedent (firefighter) did not result from City's failure to remove abandoned vehicle but rather from firefighter's being struck by vehicle operated by driver who was found criminally responsible for misconduct in striking firefighter and other firefighters while they were fighting fire in abandoned car; even assuming that any of various provisions that served as predicate for plaintiff's action did impose affirmative statutory duty on City to remove abandoned vehicles from streets, requisite causal connection between alleged violations relied on and firefighter's injuries was absent. Kenavan v City of New York, 267 A.D.2d 353, 700 N.Y.S.2d 69, 1999 N.Y. App. Div. LEXIS 13191 (N.Y. App. Div. 2d Dep't 1999), app. denied, 95 N.Y.2d 756, 712 N.Y.S.2d 448, 734 N.E.2d 760, 2000 N.Y. LEXIS 1660 (N.Y. 2000).

In CLS Gen Mun § 205-a action for injuries sustained by firefighter in building undergoing renovation, allegedly due to debris in stairwell in violation of 12 NYCRR § 23-1.7(e)(1), defendant building owner and general contractor were not entitled to summary judgment based on court's prior grant of summary judgment to third-party defendant demolition contractor, on ground that court's finding that demolition contractor used freight elevators rather than stairways to remove debris and thus could not have discarded pipe over which plaintiff fell necessarily

required finding that defendants did not have notice of pipe in question, as such argument incorrectly assumed that pipe could have been discarded only by third-party defendant, and overlooked deposition testimony that there was debris throughout building, including stairwell where accident occurred. Bongiovanni v KMO-361 Realty Assocs., 268 A.D.2d 365, 702 N.Y.S.2d 263, 2000 N.Y. App. Div. LEXIS 720 (N.Y. App. Div. 1st Dep't 2000).

Current version of Code of City of Buffalo § 242-5, respecting electrical wiring of apartment building and structural integrity of its attic and roof, provided independent basis for asserting claims under CLS Gen Mun § 205-a. Herbert v Carter, 283 A.D.2d 971, 724 N.Y.S.2d 918, 2001 N.Y. App. Div. LEXIS 4535 (N.Y. App. Div. 4th Dep't 2001).

1996 amendments to N.Y. Gen. Mun. Law § 205-a added a new subdivision which provided injured firefighters with a right of recovery regardless of whether the injury was caused by the violation of a provision which codified a common-law duty and regardless of whether the injury was caused by the violation of a provision prohibiting activities or conditions which increased the dangers already inherent in the work of any officer, member, agent or employee of any fire department, and accordingly, both N.Y. Comp. Codes R. & Regs. tit. 9, § 1196.1(b) and New York City, N.Y., Admin. Code §§ 27-127, 27-128 were sufficient predicates for a N.Y. Gen. Mun. Law § 205-a cause of action; a common-law negligence cause of action was no longer barred by the so-called "firefighters' rule," and where a fireman's expert raised a triable fact issue as to whether there was a connection between the building owner's alleged failure to respond to tenants' complaints of a gas odor and the injuries sustained by the fireman in responding to an explosion and fire at the building, the denial of summary judgment for the building owner was affirmed. Brennan v N.Y. City Hous. Auth., 302 A.D.2d 483, 756 N.Y.S.2d 73, 2003 N.Y. App. Div. LEXIS 1644 (N.Y. App. Div. 2d Dep't 2003).

Summary judgment was improperly denied as there was no evidence that the realty company either created or knew of the condition which allegedly constituted the building violation and thus, the requisite culpability for the applicable violation was lacking and the firefighter and his wife did not meet their burden for the recovery of damages against it pursuant to N.Y. Gen. Mun. § 205-a; although the firefighter testified at an examination before trial that the photograph depicted the site of his accident, he did not testify that the condition of the wall as shown in the photograph was substantially the same as its condition on the date of his accident or N.Y. Admin. Code §§ 27-127 and 27-128. Lustenring v 98-100 Realty, LLC, 1 A.D.3d 574, 768 N.Y.S.2d 20, 2003 N.Y. App. Div. LEXIS 12446 (N.Y. App. Div. 2d Dep't 2003), app. dismissed, app. denied, 2 N.Y.3d 791, 781 N.Y.S.2d 277, 814 N.E.2d 448, 2004 N.Y. LEXIS 1062 (N.Y. 2004).

In an action by plaintiff firefighter against defendant New York City Transit Authority, there was no question that the potentially dangerous condition- -the accumulation of waste and debris in a pump room resulting from the absence of a door sweep- -was apparent, that the Authority had sufficient time to remedy it, and that the Authority had failed to do so. There was, thus, ample evidence upon which the jury could reasonably have concluded that an omission on the part of the Authority was responsible for the firefighter's injuries and to demonstrate both a culpable failure on the part of the Authority to comply with N.Y. Comp. Codes R. & Regs. tit. 27, §§ 127, 128, and a practical or reasonable connection between that omission and the injury sustained by the firefighter; thus, the firefighter established his claim for damages pursuant to N.Y. Gen. Mun. Law § 205-a. Terranova v New York City Tr. Auth., 49 A.D.3d 10, 850 N.Y.S.2d 123, 2007 N.Y. App. Div. LEXIS 12901 (N.Y. App. Div. 2d Dep't 2007), app. denied, 11 N.Y.3d 708, 868 N.Y.S.2d 600, 897 N.E.2d 1084, 2008 N.Y. LEXIS 3263 (N.Y. 2008).

Firefighters' claims against a hot water heater manufacturer under N.Y. Gen. Mun. Law § 205-a were properly dismissed on summary judgment because they were premised on an alleged breach of warranty under N.Y. U.C.C. Law § 2-314, which did not prescribe the performance or nonperformance of a specific act by the seller nor impose the type of clear legal duty necessary to support a § 205-a claim. Fahey v A.O. Smith Corp. (2010, 2d Dept) 77 App Div 3d 612, 908 NYS2d 719, companion case (2011, NY Sup) 2011 NY Slip Op 30660- U, 2011 NY Misc LEXIS 1130 and companion case (2011, NY Sup) 2011 NY Slip Op 31716- U, 2011 N.Y. Misc. LEXIS 3090.

Defendants were entitled to summary judgment in a firefighter's N.Y. Gen. Mun. Law § 205-a claim because testimony, post-fire reports, and other evidence indicated that there were no violations, specifically holes in the floor and accumulated debris, that directly caused firefighter's injuries, or that increased inherent dangers of firefighting, and the firefighter failed to rebut this showing; the firefighter's assertion that a hole in the floor directly caused the injuries was pure conjecture. The firefighter conceded that he could not see the floor and did not know what trapped his foot and the firemen who entered the building with him were similarly unable to describe the condition of the floor. Cotter v Pal & Lee Inc, 86 A.D.3d 463, 928 N.Y.S.2d 262, 2011 N.Y. App. Div. LEXIS 5865 (N.Y. App. Div. 1st Dep't), app. denied, 17 N.Y.3d 716, 934 N.Y.S.2d 374, 958 N.E.2d 553, 2011 N.Y. LEXIS 3236 (N.Y. 2011).

Supreme Court erred in setting aside the jury verdict finding the City liable in a personal injury action by a firefighter and his wife under N.Y. Gen. Mun. Law § 205-a; the jury could have rationally concluded that the defective nature of the handrail constituted a factor that played a part in producing the accident so as to establish liability under General Municipal Law § 205-a. The City's contention that New York City Admin. Code §§ 27-127 and 27-128 may not form a predicate for liability under General Municipal Law § 205-a is without merit. Cusumano v City of New York, 104 A.D.3d 639, 960 N.Y.S.2d 194, 2013 N.Y. App. Div. LEXIS 1322 (N.Y. App. Div. 2d Dep't 2013).

A motion for summary judgment in favor of plaintiff fireman whose injuries were sustained while fighting a fire in a building which was allegedly allowed to remain standing by defendant owners in a dangerous and dilapidated condition after service of notice that it was in violation of the local building code could not be granted where there was an issue of fact as to whether notice of violation had actually been served upon the defendants. Dessner v MJR Realty Co., 40 Misc. 2d 229, 242 N.Y.S.2d 690, 1963 N.Y. Misc. LEXIS 1752 (N.Y. Sup. Ct. 1963).

General Municipal Law § 205-a creates an additional cause of action for purpose of liability and damages, and thus fireman injured when wall of dilapidated building collapsed was entitled to bring cause of action for common-law damages as well as pursuant to statute against owner and city. Mazelis v Wallerstein, 77 Misc. 2d 335, 353 N.Y.S.2d 633, 1974 N.Y. Misc. LEXIS 1133 (N.Y. Sup. Ct. 1974), modified, 51 A.D.2d 579, 378 N.Y.S.2d 750, 1976 N.Y. App. Div. LEXIS 10869 (N.Y. App. Div. 2d Dep't 1976).

Violation of CLS Mult D § 78 is not of type contemplated by CLS Gen Mun § 205-a. Hayes v City of New York, 169 Misc. 2d 170, 649 N.Y.S.2d 772, 1995 N.Y. Misc. LEXIS 708 (N.Y. Sup. Ct. 1995), aff'd, 231 A.D.2d 402, 647 N.Y.S.2d 74, 1996 N.Y. App. Div. LEXIS 8801 (N.Y. App. Div. 1st Dep't 1996).

Violation of statutes requiring owners of multiple dwellings to keep their premises in good condition cannot form basis of firefighter's claim against person whose noncompliance with statute causes injury, as such violations do not increase degree of risk to which firefighter is normally exposed. Martinez v Federal Home Loan Mortg. Corp., 943 F. Supp. 280, 1996 U.S. Dist. LEXIS 9175 (S.D.N.Y. 1996).

9. —Vehicle accidents

Provisions of CLS Veh & Tr § 1224, New York City Administrative Code Ch 31 § 755(4)-3.0(a), and New York City Department of Sanitation General Order No. 5—which discourage abandoning of vehicles on public roads—did not provide predicate for city liability for firefighters' injury and death under CLS Gen Mun § 205-a, even though firefighters were struck by traffic while putting out fire in abandoned vehicle that city had not removed from road, since provisions were not related to safety of premises and failure to comply with provisions' requirements did not increase risks already inherent in fighting fires generally, or in fighting vehicle fires specifically. Kenavan v New York, 70 N.Y.2d 558, 523 N.Y.S.2d 60, 517 N.E.2d 872, 1987 N.Y. LEXIS 19265 (N.Y. 1987).

Statute giving an additional right of action for injury or death of fireman as result of failure to comply with statutes or ordinances was not available to fireman injured while en route to a fire in a pumper truck manufactured by defendant manufacturer, owned by defendant city and operated by a fellow fireman, also a defendant. Gerhart v New York, 56 A.D.2d 790, 393 N.Y.S.2d 6, 1977 N.Y. App. Div. LEXIS 11069 (N.Y. App. Div. 1st Dep't), app. denied, 42 N.Y.2d 810, 1977 N.Y. LEXIS 3889 (N.Y. 1977).

In a personal injury action brought by four firefighters pursuant to Gen Mun Law § 205-a, based upon an incident in which the firefighters were injured when their fire truck collided with defendants' automobile, the trial court erred in denying defendants' motion for summary judgment dismissing the complaint on the ground that it failed to allege that plaintiffs had suffered "serious injury" within the meaning of Ins Law § 673, on the asserted basis that the rights provided to firefighters under Gen Mun Law § 205-a are not limited by the provisions of the no-fault law, since Ins Law § 673(1) plainly prohibits any recovery in personal injury actions for non-economic loss, absent a showing of serious injury, "[n]otwithstanding any other law." Blake v Ford, 98 A.D.2d 972, 470 N.Y.S.2d 255, 1983 N.Y. App. Div. LEXIS 21306 (N.Y. App. Div. 4th Dep't 1983).

This section is broad enough to serve as basis for a cause of action by an injured fireman against a motorist for injury sustained by negligence of the latter in violating provisions of the Vehicle and Traffic Law by failing to yield the right of way to fire equipment at a street or highway intersection, resulting in a collision of vehicles in course of which the fireman is injured. Burigo v Di Leo, 38 Misc. 2d 851, 239 N.Y.S.2d 166, 1963 N.Y. Misc. LEXIS 2213 (N.Y. County Ct. 1963).

This section was not available to plaintiffs in an action by a fireman against an automobile owner and operator to recover for injuries sustained by the fireman allegedly by reason of defendant's failure to yield right of way to an emergency vehicle. McAvoy v Di Leo, 43 Misc. 2d 164, 250 N.Y.S.2d 444, 1964 N.Y. Misc. LEXIS 1848 (N.Y. App. Term 1964).

The language of section 205-a of the General Municipal Law, which gives a right of action to a fireman injured in the course of duty by failure of persons to comply with the requirements of an ordinance or statute, is broad enough to cover a motor vehicle accident allegedly resulting from the neglect or omission of defendants in violation of specified sections of the Vehicle and Traffic Law, it not being limited to a fireman sustaining injury on the premises where he is fighting a fire. Donovan v Rapid Ray's Printing & Copying, Inc., 93 Misc. 2d 750, 403 N.Y.S.2d 407, 1978 N.Y. Misc. LEXIS 2130 (N.Y. City Ct. 1978).

A fireman injured in a vehicular accident while responding to a fire alarm has a right of action pursuant to section 205-a of the General Municipal Law, as well as a common-law negligence action as modified by the no-fault statutes. Donovan v Rapid Ray's Printing & Copying, Inc., 93 Misc. 2d 750, 403 N.Y.S.2d 407, 1978 N.Y. Misc. LEXIS 2130 (N.Y. City Ct. 1978).

In action against city by firefighter who was injured in accident which occurred while fire truck was being relocated to different fire station, fireman's rule did not bar recovery since firefighter was not engaged in activity which required him to confront hazard for which he was trained and compensated. Weyant v City of New York, 162 Misc. 2d 132, 616 N.Y.S.2d 428, 1994 N.Y. Misc. LEXIS 359 (N.Y. Sup. Ct. 1994).

10. Other causes of action

Statute does not authorize recovery for loss of consortium by spouse of firefighter injured in line of duty. Korfman v Parkway Village Associates, 110 A.D.2d 886, 488 N.Y.S.2d 438, 1985 N.Y. App. Div. LEXIS 48791 (N.Y. App. Div. 2d Dep't 1985).

Where plaintiff, a fireman who was seriously and permanently injured while fighting fire, commenced action based on negligence against respondents and three years later commenced second negligence action against appellant, the two actions were consolidated, and then plaintiff moved to amend his complaint to include cause of action under General Municipal Law § 205-a, there is relation back such that new claim is deemed to have been interposed at time claim in original pleading was first asserted since earlier pleading sufficiently notifies adverse party of underlying facts out of which new claim arises (see, CPLR 203 [e]); all allegations in amended pleading are duplicative of allegations in first pleading, and amended pleading only adds new theory of recovery based on identical facts alleged in original pleading; appellant has not proved that it has been prejudiced; prejudice is not found in mere exposure of defendant to greater liability. Panto v J & M Salvage Co., 157 A.D.2d 582, 550 N.Y.S.2d 327, 1990 N.Y. App. Div. LEXIS 574 (N.Y. App. Div. 1st Dep't 1990).

In actions by firefighters and their estates for injuries and deaths sustained in gas explosion which occurred while firefighters were responding to report that propane gas was escaping from tank in warehouse, summary judgment should have been granted to defendant purchaser of radiators manufactured by independent contractor which occupied warehouse, in view of Fireman's rule, rule that employer of independent contractor is not liable for injury to third party caused by contractor's acts or omissions, fact that defendant exercised no control over warehouse, and fact that manufacturing process was unrelated to storage of tank that exploded. Austin v Buffalo, 179 A.D.2d 1075, 580 N.Y.S.2d 604, 1992 N.Y. App. Div. LEXIS 2440 (N.Y. App. Div. 4th Dep't), modified, 179 A.D.2d 1079, 580 N.Y.S.2d 679, 1992 N.Y. App. Div. LEXIS 2444 (N.Y. App. Div. 4th Dep't 1992).

In suits by firefighters and their estates for injuries and deaths sustained in gas explosion which occurred while firefighters were responding to report that propane gas was escaping from tank in warehouse, summary judgment was properly denied to defendant occupier of warehouse on causes of action under CLS Gen Mun § 205-a, notwithstanding Fireman's rule, since factual questions existed as to whether defendants violated ordinances, statutes or codes designed for benefit of firefighters. Austin v Buffalo, 179 A.D.2d 1075, 580 N.Y.S.2d 604, 1992 N.Y. App. Div. LEXIS 2440 (N.Y. App. Div. 4th Dep't), modified, 179 A.D.2d 1079, 580 N.Y.S.2d 679, 1992 N.Y. App. Div. LEXIS 2444 (N.Y. App. Div. 4th Dep't 1992).

In actions by firefighters and their estates for injuries and deaths sustained in gas explosion which occurred while firefighters were responding to report that propane gas was escaping from tank in warehouse, summary judgment should have been granted to defendants who placed emergency call notifying authorities of leaking propane, notwithstanding their alleged negligence in failing to provide further information that there was lighted stove on premises, since defendants did all they could to notify firefighters of existence of stove when they arrived, and public policy dictates against imposing liability on citizen who places emergency call merely because he fails to give all pertinent information. Waszkielewicz v Buffalo, 179 A.D.2d 1078, 580 N.Y.S.2d 608, 1992 N.Y. App. Div. LEXIS 2441 (N.Y. App. Div. 4th Dep't), app. dismissed, app. denied, 79 N.Y.2d 1039, 584 N.Y.S.2d 445, 594 N.E.2d 939, 1992 N.Y. LEXIS 1350 (N.Y. 1992).

Neither comparative negligence nor assumption of risk may be interposed as affirmative defense to claim that is asserted under CLS Gen Mun § 205-a. Mullen v Zoebe, Inc., 205 A.D.2d 598, 613 N.Y.S.2d 272, 1994 N.Y. App. Div. LEXIS 6145 (N.Y. App. Div. 2d Dep't 1994), aff'd, 86 N.Y.2d 135, 630 N.Y.S.2d 269, 654 N.E.2d 90, 1995 N.Y. LEXIS 1807 (N.Y. 1995).

Plaintiff, firefighter who was injured while participating in rescue operation following plane crash, was barred by so-called Fireman's Rule from bringing action against airline; CLS Gen Bus § 245(1) did not trigger statutory exception under CLS Gen Mun § 205-a since former statute is not concerned with safety of premises, avoidance of fire hazards, or enhancement of building safety, and its violation, even if shown, would not create more hazards than those that firefighters already face in performance of their profession. Gardner v U.S. Air, 221 A.D.2d 589, 634 N.Y.S.2d 499, 1995 N.Y. App. Div. LEXIS 12436 (N.Y. App. Div. 2d Dep't 1995).

Alleged violation of police department's rules and regulations could support claim under CLS Gen Mun § 205-a against fellow officer. Carlson v City of Tonawanda, 221 A.D.2d 1011, 635 N.Y.S.2d 365, 1995 N.Y. App. Div. LEXIS 13525 (N.Y. App. Div. 4th Dep't 1995).

Court erred in granting summary judgment to defendant in action for injuries sustained when firefighter repeatedly threw his body against apartment door in order to open it and rescue

occupants of apartment from fire where firefighter alleged that defendant violated municipal ordinance prohibiting storage of combustible materials under stairway, resolution of which was for fact finder at trial. O'Connell v Kavanagh, 231 A.D.2d 29, 662 N.Y.S.2d 1, 1997 N.Y. App. Div. LEXIS 7832 (N.Y. App. Div. 1st Dep't 1997).

Court improperly denied plaintiffs' motion to amend complaint to assert cause of action under CLS Gen Mun § 205-a where defendant did not oppose motion on ground relied on by court, and leave to amend complaint to add action based on that statute may be granted even when such action is not specifically mentioned in notice of claim. Reilly v City of New York, 271 A.D.2d 425, 706 N.Y.S.2d 124, 2000 N.Y. App. Div. LEXIS 3737 (N.Y. App. Div. 2d Dep't 2000).

By commencing one action under CLS Gen Mun § 205-a joining 66 plaintiffs rather than 66 separate actions, plaintiffs defeated Legislature's main reason for converting from commencement-by-service to commencement-by-filing system under CLS CPLR § 304; to extent various circumstances concerning various plaintiffs might be similar enough to warrant joinder, such issue would be addressed by motion court after remaining 65 plaintiffs had had fair opportunity to commence separate actions. Bellew v City of New York, 272 A.D.2d 104, 708 N.Y.S.2d 609, 2000 N.Y. App. Div. LEXIS 5430 (N.Y. App. Div. 1st Dep't 2000).

In personal injury action alleging violation of CLS Gen Mun § 205-a, verdict in favor of defendant building owner was contrary to weight of evidence, warranting new trial, where proof supported jury's finding that defendant failed to install self-closing door in apartment where fire began, thereby violating NYC Admin Code § 27-371, and defendant's expert failed to clearly rebut opinion of plaintiff's expert that absence of self-closing door was reasonably connected to plaintiff's injury. Malzacher v 100 Audubon Corp., 276 A.D.2d 402, 715 N.Y.S.2d 47, 2000 N.Y. App. Div. LEXIS 10740 (N.Y. App. Div. 1st Dep't 2000).

Trial court erred in granting summary judgment to defendant corporation in an action by an individual who was injured in an apartment fire, as there were material questions of fact as to whether the corporation installed and/or maintained smoke detectors in the apartment as required by New York City, N.Y. Admin. Code § 27-2045(b), and, if it did not, whether the presence of smoke detectors would have obviated the individual's injury. Baker v Riverhouse Realty Co., 300 A.D.2d 214, 751 N.Y.S.2d 361, 2002 N.Y. App. Div. LEXIS 13324 (N.Y. App. Div. 1st Dep't 2002).

Owner and manager of residential premises would be liable to firefighter who fell down steps while responding to fire if jury found that owner and manager violated any statute governing lighting and stairs in multiple dwellings, and that those violations increased likelihood of firefighter's being injured on premises. Martinez v Federal Home Loan Mortg. Corp., 943 F. Supp. 280, 1996 U.S. Dist. LEXIS 9175 (S.D.N.Y. 1996).

11. Causation

Lower courts improperly granted summary judgment to a building owner in a firefighter's suit under N.Y. Gen. Mun. Law § 205-a to recover damages for injuries the firefighter sustained while fighting a fire on the building owner's property, as the firefighter raised a triable issue of fact as to whether the building owner's code violations directly or indirectly caused the firefighter's injuries. Giuffrida v Citibank Corp., 100 N.Y.2d 72, 760 N.Y.S.2d 397, 790 N.E.2d 772, 2003 N.Y. LEXIS 989 (N.Y. 2003).

In personal injury action brought by firemen who were injured while fighting fire in abandoned car on city street, city could not be held liable under CLS Gen Mun § 205-a on theory that its failure to remove abandoned car constituted noncompliance with CLS Veh & Tr § 1224 and certain administrative regulations, since legal requirements for removing abandoned cars were not fire preventive in nature and city's violation of such requirements were not practically or reasonably connected to firemen's injuries. Kenavan v New York, 120 A.D.2d 24, 507 N.Y.S.2d 193, 1986 N.Y. App. Div. LEXIS 59000 (N.Y. App. Div. 2d Dep't 1986), aff'd, 70 N.Y.2d 558, 523 N.Y.S.2d 60, 517 N.E.2d 872, 1987 N.Y. LEXIS 19265 (N.Y. 1987).

Where plaintiff firefighters were injured while attempting to enter an adjacent structure while fighting a fire, the plaintiffs' causes of action cannot be predicated upon alleged negligence that created need for their fire-fighting services; neither plaintiffs, whose statutory cause of action permitted showing of causation less burdensome than that normally required, nor defendant established any causal connection between adjacent property owner's alleged negligence and injuries sustained. Rogan v Giannotto, 151 A.D.2d 655, 542 N.Y.S.2d 716, 1989 N.Y. App. Div. LEXIS 8182 (N.Y. App. Div. 2d Dep't 1989).

Firefighter, who was allegedly injured when he jumped off rapidly sliding unsecured 35-foot ladder that had been angled against premises on fire, did not have cause of action for violation of CLS Gen Mun § 205-a, despite contention that premises had building code violations, where there was no reasonable connection between violations and his injuries. Schwarzrock v Thurcon Dev. Co., 193 A.D.2d 357, 597 N.Y.S.2d 41, 1993 N.Y. App. Div. LEXIS 4489 (N.Y. App. Div. 1st Dep't), app. dismissed, 82 N.Y.2d 846, 606 N.Y.S.2d 597, 627 N.E.2d 519, 1993 N.Y. LEXIS 3917 (N.Y. 1993).

Property owner should have been granted summary judgment in action brought against it under CLS Gen Mun § 205-a where plaintiffs (firefighters) failed to present any evidence of causal connection between statutes and ordinances that were allegedly violated and their injuries. Patsos v Suffolk Charles Assocs., 226 A.D.2d 608, 641 N.Y.S.2d 370, 1996 N.Y. App. Div. LEXIS 4363 (N.Y. App. Div. 2d Dep't), app. denied, 88 N.Y.2d 812, 649 N.Y.S.2d 379, 672 N.E.2d 605, 1996 N.Y. LEXIS 2979 (N.Y. 1996).

Recovery under CLS Gen Mun § 205-a does not require proximate causation or even direct connection between safety violation alleged and resulting injury; criterion for recovery is simply whether connection between statutory violation and resultant injury is sufficiently "practical or reasonable." O'Connell v Kavanagh, 231 A.D.2d 29, 662 N.Y.S.2d 1, 1997 N.Y. App. Div. LEXIS 7832 (N.Y. App. Div. 1st Dep't 1997).

In action under CLS Gen Mun § 205-a, it is not necessary to show same degree of proximate cause as that required in common-law negligence action. Dillon v City of New York, 238 A.D.2d 302, 656 N.Y.S.2d 51, 1997 N.Y. App. Div. LEXIS 3392 (N.Y. App. Div. 2d Dep't), app. denied, 90 N.Y.2d 811, 666 N.Y.S.2d 100, 688 N.E.2d 1382, 1997 N.Y. LEXIS 3592 (N.Y. 1997).

Even if sprinkler system failed to operate, there was no reasonable or practical connection between that failure and injuries to firefighter who was thrown to ground when fire hose, which he was using to extinguish fire, burst. Dillon v City of New York, 238 A.D.2d 302, 656 N.Y.S.2d 51, 1997 N.Y. App. Div. LEXIS 3392 (N.Y. App. Div. 2d Dep't), app. denied, 90 N.Y.2d 811, 666 N.Y.S.2d 100, 688 N.E.2d 1382, 1997 N.Y. LEXIS 3592 (N.Y. 1997).

Both village and plumbing contractor, which had installed pipe for use as temporary water and sewer connection to police department trailer while police headquarters were undergoing renovations, were entitled to summary judgment in CLS Gen Mun § 205-a action by police officer who, while reporting to trailer after his tour, walked over pipe, which he had done on many prior occasions, tripped, fell and was injured; alleged statutory and code violations did not meet requisite proximate cause standard and, moreover, pipe was open and obvious and could have been avoided by exercise of reasonable care. Brasca v Jessup, 258 A.D.2d 490, 684 N.Y.S.2d 633, 1999 N.Y. App. Div. LEXIS 1019 (N.Y. App. Div. 2d Dep't), app. denied, 93 N.Y.2d 809, 694 N.Y.S.2d 631, 716 N.E.2d 696, 1999 N.Y. LEXIS 1302 (N.Y. 1999).

Demolition contractor was not entitled to summary judgment in firefighter's action under CLS Gen Mun § 205-a, since there was issue of fact as to whether partial building collapse allegedly caused by its failure to properly shore up building had practical or reasonable relationship to firefighter's use of defective ladder in attempting to rescue worker. Grawin v Tudor Place Assocs., 260 A.D.2d 314, 689 N.Y.S.2d 79, 1999 N.Y. App. Div. LEXIS 4363 (N.Y. App. Div. 1st Dep't 1999).

Summary judgment for an owner and a tenant dismissing a firefighter's N.Y. Gen. Mun. Law § 205-a claim for injuries suffered during fire search operations in the owner's building was proper under circumstances in which the owner and the tenant demonstrated, prima facie, that the firefighter's injuries were not

proximately caused by any breach of duty on their part and the building superintendent testified that there was a working smoke detector in the office; the firefighter failed to raise a triable fact issue in opposition. The firefighter's expert failed to state that the conversion of an apartment in the building into an office made the fire more likely or firefighting operations more dangerous, or that any alleged violations in the conversion caused the firefighter's injuries, and the opinion of the firefighter's expert as to causation relating to the alleged lack of a smoke detector was speculative and its theory of causation was too attenuated to raise a triable fact issue. Downey v Beatrice Epstein Family Partnership, L.P., 48 A.D.3d 616, 853 N.Y.S.2d 108, 2008 N.Y. App. Div. LEXIS 1569 (N.Y. App. Div. 2d Dep't), app. denied, 11 N.Y.3d 702, 864 N.Y.S.2d 390, 894 N.E.2d 654, 2008 N.Y. LEXIS 2583 (N.Y. 2008).

Because there was an issue of fact as to whether a fire control coordinator gave an order that violated the National Interagency Incident Management System Incident Command System and caused a volunteer firefighter's death, the coordinator and the county were not entitled to summary judgment in the administratrix's N.Y. Gen. Mun. Law § 205-a cause of action. Donna Prince L. v Waters, 48 A.D.3d 1137, 850 N.Y.S.2d 803, 2008 N.Y. App. Div. LEXIS 874 (N.Y. App. Div. 4th Dep't 2008).

Trial court did not abuse its discretion by denying the property and business owners' motions for summary judgment and to dismiss for failure to state a claim because the delay by the injured firefighter (and his wife) was excusable given that the bowling alley had been demolished by the time they retained an expert, thereby inhibiting their investigation into the cause and origin of the fire. The firefighter raised a question of fact as to the cause and origin of the fire, thereby warranting denial of the owners' respective motions. Dryer v Musacchio, 117 A.D.3d 1115, 985 N.Y.S.2d 302, 2014 N.Y. App. Div. LEXIS 2918 (N.Y. App. Div. 3d Dep't 2014).

A plaintiff, who seeks to recover under statute affording injured fireman and representatives of deceased fireman a cause of action against persons violating statutes, ordinances, rules and orders, is not required to show the same degree of proximate causal connection as is required in common-law negligence cases, but is required to show some practical or reasonable connection between a violation and the injury. Utica v Holt, 88 Misc. 2d 206, 387 N.Y.S.2d 377, 1976 N.Y. Misc. LEXIS 2652 (N.Y. Sup. Ct. 1976).

12. Statute of limitations

A city fireman filed a complaint for injuries sustained while fighting a fire on the defendant's premises. The complaint alleged the violation of § C19-161.1 of the New York City Administrative Code which forbids under certain circumstances the use of draperies or curtains made of combustible materials. Held: the complaint stated a cause of action under § 205-a. Also, the statute of limitations applicable is the six year period of limitations provided by § 48, subd 2 of the CPA, since such a suit is not a suit for a penalty. Sicolo v Prudential Sav. Bank, 5 N.Y.2d 254, 184 N.Y.S.2d 100, 157 N.E.2d 284, 1959 N.Y. LEXIS 1522 (N.Y. 1959).

There was no abuse of discretion in Supreme Court's decision to permit plaintiff firefighters to add cause of action based upon General Municipal Law § 205-a in a suit for injuries related to exposure to polychlorinated biphenyls (PCBs), because original complaint gave defendants sufficient notice of transaction out of which new claim arose. Avery v Shulman, 171 A.D.2d 912, 566 N.Y.S.2d 785, 1991 N.Y. App. Div. LEXIS 2642 (N.Y. App. Div. 3d Dep't 1991).

Discovery accrual rule of CLS CPLR § 214-c applied to cause of action under CLS Gen Mun § 205-a. Scherrer v Time Equities, 218 A.D.2d 116, 634 N.Y.S.2d 680, 1995 N.Y. App. Div. LEXIS 12617 (N.Y. App. Div. 1st Dep't 1995).

In action by firefighters who sustained latent injuries as result of inhaling toxic smoke while performing firefighting duties, defendants were not entitled to summary judgment on ground that complaints were time-barred under CLS CPLR § 214-c because each plaintiff should have known of his injury on date of fire alleged to have been proximate cause thereof, where plaintiffs continued to perform full range of firefighting duties after they were treated for smoke inhalation, and assertion that seriousness of each plaintiff's impairment only became manifest when he was afflicted with disabling symptoms was uncontradicted by record on appeal. Scherrer v Time Equities, 218 A.D.2d 116, 634 N.Y.S.2d 680, 1995 N.Y. App. Div. LEXIS 12617 (N.Y. App. Div. 1st Dep't 1995).

Action by city against architect, who had supervised construction of premises involved in fire and who was alleged to have contributed to conditions resulting in the fire, for reimbursement for salary, wages and medical and hospital expenses incurred by city on behalf of fireman injured when ladder collapsed during fire was not barred by three-year statute of limitations, in light of fact that statute ran from date of fireman's injury rather than from date of completion of architect's services. Utica v Holt, 88 Misc. 2d 206, 387 N.Y.S.2d 377, 1976 N.Y. Misc. LEXIS 2652 (N.Y. Sup. Ct. 1976).

In action by firefighter for damages relating to air pack malfunction, relation back doctrine for statute of limitations purposes did not apply to revive claims under CLS Gen Mun § 205-a(2) based on violations of applicable statutes, ordinances, rules, orders and requirements, where motion to amend complaint to add such claims was not made until October 7, 1997. Wayne v City of New York, 176 Misc. 2d 943, 675 N.Y.S.2d 514, 1998 N.Y. Misc. LEXIS 208 (N.Y. Sup. Ct. 1998).

13. Pleading; specificity required

A city fireman filed a complaint for injuries sustained while fighting a fire on the defendant's premises. The complaint alleged the violation of § C19-161.1 of the New York City Administrative Code which forbids under certain circumstances the use of draperies or curtains made of combustible materials. Held: the complaint stated a cause of action under § 205-a. Also, the statute of limitations applicable is the six year period of limitations provided by § 48, subd 2 of the CPA, since such a suit is not a suit for a penalty. Sicolo v Prudential Sav. Bank, 5 N.Y.2d 254, 184 N.Y.S.2d 100, 157 N.E.2d 284, 1959 N.Y. LEXIS 1522 (N.Y. 1959).

To make out a valid claim under N.Y. Gen. Mun. Law § 205-a and survive a motion to dismiss, a plaintiff must (1) identify the statute or ordinance with which the defendant failed to comply, (2) describe the manner in which the firefighter was injured, and (3) set forth those facts from which it may be inferred that the defendant's negligence directly or indirectly caused the harm to the firefighter. Giuffrida v Citibank Corp., 100 N.Y.2d 72, 760 N.Y.S.2d 397, 790 N.E.2d 772, 2003 N.Y. LEXIS 989 (N.Y. 2003).

The liability imposed by this section is something special and apart from any ordinary liability grounded in negligence and requires specific assertion and submission. Hence, when the specific cause of action under this section was abandoned in a trial of a cause of action based on negligence, there was an abandonment of any claim of liability under this section and no cause of action thereafter remained. Gannon v Royal Properties, Inc., 285 A.D. 131, 136 N.Y.S.2d 129, 1954 N.Y. App. Div. LEXIS 3294 (N.Y. App. Div. 1954), aff'd, 309 N.Y. 819, 130 N.E.2d 616, 309 N.Y. (N.Y.S.) 819, 1955 N.Y. LEXIS 1572 (N.Y. 1955).

In action for injuries sustained by firefighter while extinguishing fire in defendants' vacant building, cause of action under CLS Gen Mun § 205-a was legally insufficient and thus was properly dismissed where firefighter did not identify statute, ordinance, rule, order or regulation allegedly violated by defendants. Brophy v Generoso, 137 A.D.2d 478, 524 N.Y.S.2d 226, 1988 N.Y. App. Div. LEXIS 751 (N.Y. App. Div. 2d Dep't 1988).

Complaint in special action based on CLS Gen Mun § 205-a must specify or identify statute, ordinances, rules, orders, or requirements with which defendant allegedly failed to comply, manner in which injuries complained of occurred, and facts from which it appears that said neglect or failure directly or indirectly caused injuries; thus, defendant was within its rights to seek such information through bill of particulars. Brannigan v City of New York, 224 A.D.2d 340, 638 N.Y.S.2d 59, 1996 N.Y. App. Div. LEXIS 1467 (N.Y. App. Div. 1st Dep't 1996).

A firefighter's action under the Firefighter's Law was improperly subjected to summary judgment in favor of a building owner because the firefighter had sufficiently pleaded that the owner violated New York City, N.Y., Admin. Code §§ 27-217 and 27-2081

by failing to obtain a certificate of occupancy and by failing to make alterations to a basement apartment to allow additional light and ventilation. The firefighter also demonstrated that his knee injury was a direct result of those violations due to poor visibility in the basement apartment where he was searching for victims of a fire. Foiles v V.L.J. Constr. Corp., 17 A.D.3d 297, 794 N.Y.S.2d 27, 2005 N.Y. App. Div. LEXIS 4497 (N.Y. App. Div. 1st Dep't 2005).

Injured firefighter could not recover from either a landlord or a tenant where the evidence showed that the fire resulted from overloading a single removable power strip; the landlord had not been shown to have violate any laws at all, the building code provision (New York City, N.Y., Admin. Code § 27-127) that the tenant had violated was not applicable to lessees, and there was no reason, in any case, to believe that the violation had caused the fire. Zvinys v Richfield Inv. Co., 25 A.D.3d 358, 808 N.Y.S.2d 640, 2006 N.Y. App. Div. LEXIS 98 (N.Y. App. Div. 1st Dep't 2006), app. denied, 2006 N.Y. App. Div. LEXIS 4430 (N.Y. App. Div. 1st Dep't Apr. 11, 2006), app. denied, 7 N.Y.3d 706, 819 N.Y.S.2d 873, 853 N.E.2d 244, 2006 N.Y. LEXIS 1881 (N.Y. 2006).

In action by fireman for personal injuries resulting from defendant's negligence with respect to Christmas decorations, the complaint did not state a cause of action where it did not specifically allege that recovery was sought under the statute or that defendant had failed to comply with the Administrative Code, and that defendant caused plaintiff's injury. Sicolo v Prudential Sav. Bank, 2 Misc. 2d 289, 151 N.Y.S.2d 295, 1956 N.Y. Misc. LEXIS 2063 (N.Y. Sup. Ct. 1956), aff'd, 4 A.D.2d 790, 165 N.Y.S.2d 222 (N.Y. App. Div. 2d Dep't 1957).

Defendants were entitled to summary judgment on causes of action based on CLS Gen Mun § 205-a in action brought by firefighters for injuries caused by latent effects of exposure to polyvinylchloride while fighting fire since plaintiffs did not specify any statute, ordinance or rule violated by defendants; plaintiffs could not make broad allegation of violation and then hope to use discovery to determine what statute, ordinance or rule had been violated by defendants. McGowan v New York Tel. Co., 144 Misc. 2d 625, 544 N.Y.S.2d 423, 1989 N.Y. Misc. LEXIS 456 (N.Y. Sup. Ct. 1989).

Court would dismiss firefighter's action under CLS Gen Mun § 205-a brought against construction company, which had performed construction work on firehouse, arising from injury sustained when he slid down fire pole, where firefighter failed to specify statutes with which company failed to comply. Strahl v Dale Constr., 171 Misc. 2d 330, 658 N.Y.S.2d 164, 658 N.Y.S.2d 165, 1997 N.Y. Misc. LEXIS 166 (N.Y. App. Term 1997).

14. —Amendment of pleadings

Court improperly denied plaintiffs' motion for leave to amend their bill of particulars and complaint to assert action under CLS Gen Mun § 205-a against individual defendant in order to identify statutes or ordinances which defendant allegedly violated, and court should not have granted defendant's motion to dismiss plaintiffs' action under CLS Gen Mun § 205-a on ground that plaintiffs failed to identify such statutes or ordinances. Shelton v City of New York, 256 A.D.2d 611, 683 N.Y.S.2d 123, 1998 N.Y. App. Div. LEXIS 14102 (N.Y. App. Div. 2d Dep't 1998).

Portions of New York City Police Department Patrol Guide Procedure that were not part of well-developed body of law and did not impose clear legal duties mandating performance of certain acts could not serve as basis for cause of action under CLS Gen Mun § 205-a, and thus leave to amend personal injury complaint to add such cause of action was properly denied. Malenczak v City of New York, 265 A.D.2d 532, 697 N.Y.S.2d 138, 1999 N.Y. App. Div. LEXIS 10791 (N.Y. App. Div. 2d Dep't 1999).

Because the motion court properly conformed the pleadings to evidence that a firefighter was left alone at the fire scene for several minutes without a response to the firefighter's attempt to notify a superior of defective equipment, in violation of N.Y. Gen. Mun. Law § 205-a, leave to amend the complaint was appropriate. Fisher v City of New York, 48 A.D.3d 303, 851 N.Y.S.2d 497, 2008 N.Y. App. Div. LEXIS 1390 (N.Y. App. Div. 1st Dep't 2008).

An action for damages by city firemen for injuries sustained in fighting a fire on defendant's premises accrued on June 15, 1954. The plaintiffs could not amend their complaint on April 30, 1958 by including a cause of action under this section, since, to do so, would be prejudicial to the defendant. Izzillo v Mulkor Warehousing Co., 14 Misc. 2d 609, 182 N.Y.S.2d 606, 1958 N.Y. Misc. LEXIS 2475 (N.Y. Sup. Ct. 1958).

15. Comparative negligence

Culpability of injured or deceased firefighter in contributing to happening of injury-producing accident may not be invoked by defendant property owner or occupier to reduce damages claimed under CLS Gen Mun § 205-a. Mullen v Zoebe, Inc., 86 N.Y.2d 135, 630 N.Y.S.2d 269, 654 N.E.2d 90, 1995 N.Y. LEXIS 1807 (N.Y. 1995).

Comparative fault principles cannot be applied in defense of a N.Y. Gen. Mun. Law § 205-a action. Giuffrida v Citibank Corp., 100 N.Y.2d 72, 760 N.Y.S.2d 397, 790 N.E.2d 772, 2003 N.Y. LEXIS 989 (N.Y. 2003).

A participant in an annual fire department parade who had ridden her horse in the parade was riding the horse home afterwards and came upon a parked car causing her to ride onto the lawn of a town resident, across which the owner had strung a wire which touched, and may have been attached to, a utility pole; the horse hit the wire, threw its rider off and ran down the street for about a mile, where it collided head-on with a van and as a result of the collision the plaintiffs, who were passengers in the van, were seriously injured. Plaintiffs need not prove willful negligence or malfeasance on the part of the volunteer fireman who organized the parade since although members of duly organized volunteer fire companies are exempt from civil liability for acts done by them in performance of their duties as volunteer firemen (General Municipal Law, § 205-b), participation in fund-raising activities is not a duty of a volunteer fireman; additionally, although certain parades are not fund-raising activities (General Municipal Law, § 204-a, subd 1, par b), the instant parade is not within the scope of those provisions. Monacelli v Armstrong, 64 A.D.2d 428, 409 N.Y.S.2d 899, 1978 N.Y. App. Div. LEXIS 12745 (N.Y. App. Div. 4th Dep't 1978), app. denied, 46 N.Y.2d 710, 1979 N.Y. LEXIS 2641 (N.Y. 1979), app. denied, 46 N.Y.2d 710, 1979 N.Y. LEXIS 2635 (N.Y. 1979), app. dismissed, app. denied, 46 N.Y.2d 913, 414 N.Y.S.2d 905, 387 N.E.2d 1220, 1979 N.Y. LEXIS 1851 (N.Y. 1979), aff'd, 49 N.Y.2d 971, 428 N.Y.S.2d 949, 406 N.E.2d 804, 1980 N.Y. LEXIS 2321 (N.Y. 1980).

Defense of comparative negligence does not apply to statutory cause of action under CLS Gen Mun § 205-a, and thus in action by injured firefighter, trial court properly dismissed building owners' affirmative defense that injuries were caused by firefighter's own culpable conduct. Johnson v Riggio Realty Corp., 153 A.D.2d 485, 544 N.Y.S.2d 589, 1989 N.Y. App. Div. LEXIS 10613 (N.Y. App. Div. 1st Dep't), app. dismissed, 74 N.Y.2d 945, 550 N.Y.S.2d 279, 549 N.E.2d 481, 1989 N.Y. LEXIS 3325 (N.Y. 1989).

A defendant who is sued on a cause of action accruing after September 1, 1975 brought pursuant to section 205-a of the General Municipal Law, which provides for liability of any person who by violation of any statute, ordinance, or rule, directly or indirectly causes a fireman's injury or death, may prove the comparative negligence of a plaintiff under CPLR 1411 since a cause of action under section 205-a depends on proof of some neglect, omission, willful or culpable negligence on the part of the defendant; CPLR 1411 is applicable to all causes of action for personal injury or death regardless of the theory upon which the actions are brought. Koehler v New York, 102 Misc. 2d 398, 423 N.Y.S.2d 431, 1979 N.Y. Misc. LEXIS 2882 (N.Y. Sup. Ct. 1979).

16. Contributory negligence and assumption of risk

The plaintiff does not have to establish freedom from contributory negligence in an action under General Municipal Law § 205-a. Lyden v Rasa, 39 A.D.2d 716, 331 N.Y.S.2d 982, 1972 N.Y. App. Div. LEXIS 4738 (N.Y. App. Div. 2d Dep't 1972).

In action by federal agent who was injured when he accidentally stepped into chemical-filled drum while investigating possible fraud fire on defendant's premises, in which it was alleged that defendant negligently failed to warn of hazardous chemicals stored on premises and dangers posed by those chemicals, defendant was not entitled to summary judgment on basis of plaintiff's assumption of risk since triable fact issues existed as to whether,

under circumstances, defendant had duty to warn and, if so, whether he failed in that duty. Galgano v FDR Servs. Corp., 206 A.D.2d 453, 614 N.Y.S.2d 447, 1994 N.Y. App. Div. LEXIS 7481 (N.Y. App. Div. 2d Dep't 1994).

Where a fireman is injured as the result of fire set by defendant in violation of a fire prevention or smoke ordinance, the plaintiff has a right to compensation for his injuries under the above statute, and need not prove freedom from contributory negligence and assumption of risk is not a defense. Carroll v Pellicio Bros., Inc., 44 Misc. 2d 832, 255 N.Y.S.2d 771, 1964 N.Y. Misc. LEXIS 1234 (N.Y. Sup. Ct. 1964), modified, 26 A.D.2d 552, 271 N.Y.S.2d 7, 1966 N.Y. App. Div. LEXIS 4009 (N.Y. App. Div. 2d Dep't 1966).

Under section 205-a of the General Municipal Law, which permits a fireman injured or killed in the performance of his duty to bring a separate cause of action for damages against any person in violation of a Federal, State or local statute, ordinance or rule where such noncompliance directly or indirectly results in the injury or death complained of, liability may be imposed in any case where there is any practical or reasonable connection between a violation and the injury or death of a fireman; in addition, a plaintiff in a section 205-a action accruing before September 1, 1975 does not have to establish freedom from contributory negligence, nor is assumption of risk a defense to a section 205-a action accruing before September 1, 1975. Koehler v New York, 102 Misc. 2d 398, 423 N.Y.S.2d 431, 1979 N.Y. Misc. LEXIS 2882 (N.Y. Sup. Ct. 1979).

Traditional affirmative defenses of assumption of risk and contributory negligence do not apply to cause of action under CLS Gen Mun § 205-a, enacted to allow firefighter injured in performance of his duties to recover damages if causal connection is shown between his injury and violation of statute, law or ordinance, for inasmuch as § 205-a was designed to protect definite class of persons from hazard of definable orbit, which they themselves are incapable of avoiding, it possesses necessary characteristics of strict liability statute. Johnson v Riggio Realty Corp., 141 Misc. 2d 607, 533 N.Y.S.2d 809, 1988 N.Y. Misc. LEXIS 647 (N.Y. Sup. Ct. 1988), aff'd, 153 A.D.2d 485, 544 N.Y.S.2d 589, 1989 N.Y. App. Div. LEXIS 10613 (N.Y. App. Div. 1st Dep't 1989).

Fireman's rule does not encompass every potential risk of injury, but only those risks inherent in firefighter's work. Weyant v City of New York, 162 Misc. 2d 132, 616 N.Y.S.2d 428, 1994 N.Y. Misc. LEXIS 359 (N.Y. Sup. Ct. 1994).

"Firefighter's rule," which bars firefighters injured in line of duty from suing property owners whose negligence occasioned their injury, operates only where performance of firefighter's duties increased risk of injury happening and did not merely furnish occasion for injury. Martinez v Federal Home Loan Mortg. Corp., 943 F. Supp. 280, 1996 U.S. Dist. LEXIS 9175 (S.D.N.Y. 1996).

Firefighter may not recover for injuries in common-law negligence claim if some act taken in furtherance of specific firefighting function imposed officer to heightened risk of sustaining particular injury. Martinez v Federal Home Loan Mortg. Corp., 943 F. Supp. 280, 1996 U.S. Dist. LEXIS 9175 (S.D.N.Y. 1996).

Firefighter was barred under "firefighter's rule" from recovery on common-law negligence claim against owner and manager of premises where firefighter fell backwards after stepping on allegedly defective top step; performance of duties increased risk of injury happening and did not merely furnish occasion for injury as firefighter was wearing heavy protective gear that increased likelihood that step would crumble, his vision was limited by smoky conditions and his face mask, and he was ascending staircase by feeling his way with 6-foot hook in accordance with his training. Martinez v Federal Home Loan Mortg. Corp., 943 F. Supp. 280, 1996 U.S. Dist. LEXIS 9175 (S.D.N.Y. 1996).

17. Jury matters

This statute is quasi-penal, if not entirely penal, and sui generis. How a claim under the statute might be handled when submitted to a jury in conjunction with an ordinary cause of action based on negligence is a question. But with due regard to the special and separate nature of the cause of action created by this section, such cause of action thereunder must be separately stated and submitted. Gannon v Royal Properties, Inc., 285 A.D. 131, 136 N.Y.S.2d 129, 1954 N.Y. App. Div. LEXIS 3294 (N.Y. App. Div. 1954), aff'd, 309 N.Y. 819, 130 N.E.2d 616, 309 N.Y. (N.Y.S.) 819, 1955 N.Y. LEXIS 1572 (N.Y. 1955).

In an action based on this section and brought by a member of the New York City Fire Department against the city for injuries sustained while fighting a fire in a condemned building owned by the city, judgment on a jury verdict for $40,239.50 in favor of plaintiff was affirmed without passing upon a contention of the city that the trial court erred in instructing the jury that plaintiff's disability pension was irrelevant on the question of damages. Nykanen v New York, 19 A.D.2d 535, 240 N.Y.S.2d 67, 1963 N.Y. App. Div. LEXIS 3832 (N.Y. App. Div. 2d Dep't 1963), aff'd, 14 N.Y.2d 697, 250 N.Y.S.2d 53, 199 N.E.2d 155, 1964 N.Y. LEXIS 1190 (N.Y. 1964).

Remarks by counsel for injured firemen, inter alia, that if jury absolved city of common-law liability the firemen might have no one to look to for payment of damages except a corporation which has been dissolved and remarks that shareholder-president was a wealthy and successful businessman were prejudicial and required new trial of common-law crimes asserted against city and claim asserted against the president-shareholder under statute giving additional right of action to certain injured firemen. Adams v Acker, 57 A.D.2d 741, 394 N.Y.S.2d 8, 1977 N.Y. App. Div. LEXIS 11871 (N.Y. App. Div. 1st Dep't), app. dismissed, 42 N.Y.2d 809, 1977 N.Y. LEXIS 3882 (N.Y. 1977), app. dismissed, 42 N.Y.2d 965, 398 N.Y.S.2d 147, 367 N.E.2d 654, 1977 N.Y. LEXIS 2288 (N.Y. 1977), app. dismissed, 42 N.Y.2d 1050, 399 N.Y.S.2d 212, 369 N.E.2d 769, 1977 N.Y. LEXIS 2384 (N.Y. 1977), app. dismissed, 42 N.Y.2d 1101, 1977 N.Y. LEXIS 4880 (N.Y. 1977).

Under section 205-a of the General Municipal Law, which permits a fireman injured or killed in the performance of his duty to bring a separate cause of action for damages against any person in violation of a Federal, State or local statute, ordinance or rule where such noncompliance directly or indirectly results in the injury or death complained of, liability may be imposed in any case where there is any practical or reasonable connection between a violation and the injury or death of a fireman; in addition, a plaintiff in a section 205-a action accruing before September 1, 1975 does not have to establish freedom from contributory negligence, nor is assumption of risk a defense to a section 205-a action accruing before September 1, 1975. Koehler v New York, 102 Misc. 2d 398, 423 N.Y.S.2d 431, 1979 N.Y. Misc. LEXIS 2882 (N.Y. Sup. Ct. 1979).

18. Miscellaneous

Party that is properly held liable to injured firefighter under CLS Gen Mun former § 205-a may maintain third-party action for indemnification or contribution from contractors who were not in possession or control of premises but were allegedly responsible in whole or part for accident, even though firefighter does not have direct cause of action against them. Raquet v Braun, 90 N.Y.2d 177, 659 N.Y.S.2d 237, 681 N.E.2d 404, 1997 N.Y. LEXIS 1354 (N.Y. 1997).

In action against New York City by plaintiff who was injured when he fell on defective sidewalk while performing his duties as sanitation worker, it was error for court to set aside jury verdict finding city 83 percent negligent on ground that firefighter's rule articulated in Santangelo v State of New York, 71 NY2d 393, precluded plaintiff's recovery as matter of law; common-law firefighter's rule should not be extended to New York City sanitation workers. Ciervo v City of New York, 93 N.Y.2d 465, 693 N.Y.S.2d 63, 715 N.E.2d 91, 1999 N.Y. LEXIS 773 (N.Y. 1999).

In action under CLS Gen Mun § 205-a for injuries sustained when plastic flowerpot hanging from skylight fell on firefighter as he was exiting from burning building, court erred in excluding testimony of deputy fire chief as to dangers posed by hanging plastic flowerpots and possible hindrance which they could cause in firefighters' performance of their duties, since his testimony would assist jury in comprehending, inter alia, melting qualities of plastic in fire, relative force of water stream from fire hoses, and chances that hanging objects could be dislodged as result of that force, matters not necessarily within knowledge of ordinary jury. Cotter v Spear, 139 A.D.2d 555, 527 N.Y.S.2d 55, 1988 N.Y. App. Div. LEXIS 3856 (N.Y. App. Div. 2d Dep't 1988).

In action by firefighters against various people and companies involved in construction of office building, for injuries sustained

by exposure to toxic substances during fire extinguishing and clean-up operations at building, prime electrical contractor was entitled to dismissal of cause of action based upon alleged violation of CLS Gen Mun § 205-a since statute imposes liability upon persons guilty of neglect, omission or negligence "at the time of such injury" and cause of action alleged actions by contractor at time of building construction, about 8 years prior to fire. Furch v General Electric Co., 142 A.D.2d 8, 535 N.Y.S.2d 182, 1988 N.Y. App. Div. LEXIS 10989 (N.Y. App. Div. 3d Dep't 1988), app. dismissed, 74 N.Y.2d 792, 545 N.Y.S.2d 106, 543 N.E.2d 749, 1989 N.Y. LEXIS 2346 (N.Y. 1989).

Under Fireman's rule, summary judgment should have been granted to defendant warehouse occupiers in action for injury and death of firefighters in gas explosion while responding to report that propane gas was escaping from tank in warehouse, since negligence of defendants in storing propane tank and causing it to leak was not separate and apart from negligence which occasioned emergency for which firefighters were summoned. Austin v Buffalo, 179 A.D.2d 1075, 580 N.Y.S.2d 604, 1992 N.Y. App. Div. LEXIS 2440 (N.Y. App. Div. 4th Dep't), modified, 179 A.D.2d 1079, 580 N.Y.S.2d 679, 1992 N.Y. App. Div. LEXIS 2444 (N.Y. App. Div. 4th Dep't 1992).

Fireman's rule does not bar recovery when negligence that caused injury is separate and apart from negligent acts which occasioned firefighters' presence. Austin v Buffalo, 179 A.D.2d 1075, 580 N.Y.S.2d 604, 1992 N.Y. App. Div. LEXIS 2440 (N.Y. App. Div. 4th Dep't), modified, 179 A.D.2d 1079, 580 N.Y.S.2d 679, 1992 N.Y. App. Div. LEXIS 2444 (N.Y. App. Div. 4th Dep't 1992).

In action for injuries sustained when volunteer firefighter responded to fire call at farm and encountered thick fog of pesticide applied by farmer, court properly denied motion by plaintiff to amend complaint to include cause of action against farmer predicated on CLS Gen Mun § 205-a, notwithstanding contention that farmer committed second degree reckless endangerment, third degree assault and second degree criminal nuisance, and that farmer violated CLS ECL § 33-1301(8) and 6 NYCRR § 325.2, since those statutes were not primarily concerned with averting of fire hazards or with enhancing of fire safety of buildings. June v Laris, 205 A.D.2d 166, 618 N.Y.S.2d 138, 1994 N.Y. App. Div. LEXIS 10857 (N.Y. App. Div. 3d Dep't 1994), app. dismissed, in part, app. denied, 85 N.Y.2d 955, 628 N.Y.S.2d 47, 651 N.E.2d 915, 1995 N.Y. LEXIS 1421 (N.Y. 1995).

Demolition contractor, which allegedly violated NYC Admin Code § 27-127 in failing to properly shore up building that collapsed, resulting in injury to firefighter while he attempted to rescue worker, was not entitled to summary judgment in firefighter's action under CLS Gen Mun § 205-a on basis that violation had not been issued to it, but to another entity, since statute imposes liability for violations of regulations relating to safety of premises regardless of violator's ownership or occupancy of premises. Grawin v Tudor Place Assocs., 260 A.D.2d 314, 689 N.Y.S.2d 79, 1999 N.Y. App. Div. LEXIS 4363 (N.Y. App. Div. 1st Dep't 1999).

Court properly granted defendant city's motion to dismiss plaintiff firefighter's complaint under CLS Gen Mun § 205-a for failure to state cause of action, notwithstanding plaintiff's argument that issue of whether his disabling lung condition was result of "accident" previously was decided in his favor when he was granted accidental disability pension, and that city was collaterally estopped from relitigating issue, as plaintiff's application for accidental disability pension enjoyed presumption under NYC Admin Code § 13-354 ("Lung Bill") that his condition was accidental in origin, which presumption did not exist under § 205-a. Foulkes v City of New York, 261 A.D.2d 283, 690 N.Y.S.2d 254, 1999 N.Y. App. Div. LEXIS 5520 (N.Y. App. Div. 1st Dep't 1999).

In a personal injury action filed under N.Y. Gen. Mun. Law § 205-a by a fire marshal alleging violations of both New York City, N.Y., Admin. Code §§ 27-127 and 128, the supreme court erroneously granted summary judgment to the city and to a contractor, as clear questions of fact existed as to whether the contractor violated its duty of keeping its construction site clean each day, conflicting testimony was presented as to whether it was on notice of the presence of construction debris before the accident, and it was clear that the accident occurred when the fire marshal fell in the same area that the contractor was responsible for cleaning up; further, the fact that the accident did not take place at the site of the fire did not preclude the applicability of N.Y. Gen. Mun. Law § 205a. Lynch v City of New York, 14 A.D.3d 347, 787 N.Y.S.2d 308, 2005 N.Y. App. Div. LEXIS 53 (N.Y. App. Div. 1st Dep't 2005).

Award of $1.2 million to a firefighter for past pain and suffering in a case under N.Y. Gen. Mun. Law § 205-a based on injuries to, inter alia, his left wrist, left shoulder, and right knee due to a fall down a stairwell deviated materially from what would be reasonable compensation under N.Y. C.P.L.R. § 5501(c); the court suggested a reduction to $755,000, or a new trial would be awarded to the city under N.Y. C.P.L.R. § 4404(a). Cusumano v City of New York, 63 A.D.3d 5, 877 N.Y.S.2d 153, 2009 N.Y. App. Div. LEXIS 2644 (N.Y. App. Div. 2d Dep't 2009), rev'd, 15 N.Y.3d 319, 910 N.Y.S.2d 410, 937 N.E.2d 74, 2010 N.Y. LEXIS 2899 (N.Y. 2010).

Safety device manufacturer's motion for summary judgment was properly denied because a question of fact existed as to whether the alleged defect in the firefighter's safety device was a substantial factor in causing or exacerbating his injuries. At best, the firefighters involved in the rescue had only a general idea as to the injured firefighter's approximate location within the debris field, an area that measured approximately 12 feet by 40 feet and was roughly four to six feet deep Dryer v Musacchio, 117 A.D.3d 1115, 985 N.Y.S.2d 302, 2014 N.Y. App. Div. LEXIS 2918 (N.Y. App. Div. 3d Dep't 2014).

Where an injured fireman has already recovered damages in an action based upon negligence of defendants in disregarding the statutory right of way for fire equipment and colliding with the equipment upon which he was riding, he is precluded from bringing a second action under this section against the same defendants for further damages based upon the same occurrence. Healy v Rennert, 33 Misc. 2d 897, 226 N.Y.S.2d 876, 1962 N.Y. Misc. LEXIS 3679 (N.Y. Sup. Ct. 1962), aff'd, 20 A.D.2d 682, 246 N.Y.S.2d 1017, 1964 N.Y. App. Div. LEXIS 4665 (N.Y. App. Div. 2d Dep't 1964).

Volunteer firemen are covered by the Volunteer Firemen's Benefit Law while engaged in selling fire extinguishers for benefit of the fire company, if such activity has been duly authorized as a fund-raising activity. 1964 Op St Compt No. 64-55.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

23 NY Jur 2d Contribution, Indemnity, and Subrogation § 31.

25 NY Jur 2d Counties, Towns, and Municipal Corporations § 230 .

27 NY Jur 2d Counties, Towns, and Municipal Corporations § 1251.

62A NY Jur 2d Government Tort Liability § 444.

57B Am Jur 2d, Negl § 1595.

62 Am Jur 2d, Premises Liability §§ 104, 105.

Matthew Bender's New York Civil Practice:

3 Rohan, New York Civil Practice: EPTL ¶¶ 5-4.1, 5-4.2.

Annotations:

Liability of owner or occupant of premises to firefighter coming thereon in discharge of his duty. 11 ALR4th 597.

Liability of owner or occupant of premises to police officer coming thereon in discharge of officer's duty 30 ALR4th 81.

Matthew Bender's New York Practice Guides: LexisNexis AnswerGuide New York Negligence § 2.09[2][b] Identifying Applicable Theories of Liability in Motor Vehicle Cases.

LexisNexis AnswerGuide New York Negligence § 3.18 Arguing That Condition Is De Minimis.

LexisNexis AnswerGuide New York Negligence § 6.09[3][a] Choosing Appropriate Basis of Liability.

LexisNexis AnswerGuide New York Negligence § 2.09 Identifying Applicable Theories of Liability in Motor Vehicle Cases.

LexisNexis AnswerGuide New York Negligence § 3.19 Examining Defense Based on Limitation on recovery for Firefighters and Police Officers.

LexisNexis AnswerGuide New York Negligence § 6.09 Choosing Appropriate Basis of Liability.

Texts: 2-27 New Appleman New York Insurance Law § 27.09.

1-6 New York Nonprofit Law and Practice § 6.02.

1-11 Warren's Negligence in the New York Courts § 11.07; 2-45 Warren's Negligence in the New York Courts § 45.02; 4-92 Warren's Negligence in the New York Courts § 92.02; 5-193 Warren's Negligence in the New York Courts § 193.03; 5-214 Warren's Negligence in the New York Courts § 214.03.

§ 205-b. Relief of volunteer firefighters engaged in the performance of duty as such firefighters from civil liability and liability of fire districts for the acts of volunteer firefighters

Members of duly organized volunteer fire companies in this state shall not be liable civilly for any act or acts done by them in the performance of their duty as volunteer firefighters, except for wilful negligence or malfeasance. Nothing in this section contained shall in any manner affect the liability imposed upon cities, towns and villages by sections fifty-a and fifty-b of this chapter, but fire districts created pursuant to law shall be liable for the negligence of volunteer firefighters duly appointed to serve therein in the operation of vehicles owned by the fire district upon the public streets and highways of the fire district, provided such volunteer firefighters, at the time of any accident or injury, were acting in the discharge of their duties. Judgments recovered against a fire district pursuant to this section shall be levied upon the taxable property of such district in the same manner as moneys raised for the support of the district.

HISTORY:

Formerly § 250–a, add, L 1934, ch 489, § 1, eff May 10, 1934; renumbered § 205–b, L 1935, ch 800, § 1; L 1936, ch 384, § 1, eff May 2, 1936; L 1987, ch 31, § 1, eff April 21, 1987.

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1. Generally

Indication of legislative policy toward actions in negligence against fire district may be found in the enactment of this section which creates liability against such district by reason of negligence of a volunteer fireman in performance of his duties, and directs that judgments recovered thereunder shall be levied upon taxable property of district. Miller v Irondequoit, 243 A.D. 240, 276 N.Y.S. 497, 1935 N.Y. App. Div. LEXIS 7041 (N.Y. App. Div.), aff'd, 268 N.Y. 578, 198 N.E. 412, 268 N.Y. (N.Y.S.) 578, 1935 N.Y. LEXIS 1043 (N.Y. 1935).

This section has a twofold purpose one of which is to exonerate members of duly organized volunteer fire companies from liability except for willful negligence or malfeasance and the other of which is to impute legal liability to fire districts for negligence of volunteer firemen in operation of vehicles of the district, and it accordingly applies only to vehicles owned by the fire district, not to privately owned vehicles, and imposes no liability upon an incorporated village. Sikora v Steinberg, 40 Misc. 2d 649, 243 N.Y.S.2d 766, 1963 N.Y. Misc. LEXIS 1586 (N.Y. Sup. Ct. 1963), aff'd, 20 A.D.2d 852, 249 N.Y.S.2d 401, 1964 N.Y. App. Div. LEXIS 5056 (N.Y. App. Div. 2d Dep't 1964).

A village may purchase liability insurance covering fire-fighting apparatus owned by a village fire company. 1968 Op St Compt No. 68-672.

2. Construction

A fire district may be held liable for the negligent acts of one of its volunteer firemen committed in the course of duty while operating a privately owned vehicle outside the borders of the fire district; section 205-b of the General Municipal Law, which provides that fire districts shall be liable for the negligence of volunteer firemen in the operation of vehicles owned by the fire district upon the public streets of the district if, at the time of any accident or injury, they were acting in the discharge of their duties, should not be read as an exemption statute which, by implication, would exempt fire districts from liability except as provided by that section, since said statute was enacted to expand, rather than limit, the liability of fire districts and, where the Legislature acts to extend liability, the courts should not reach for such a limiting distinction absent inescapable evidence that there was such a legislative intent. Accordingly, it was error to grant a motion by defendant fire district for summary judgment dismissing a complaint brought by the administratrix of the estate of a seven-year-old girl who was struck and killed by a privately owned car operated by a volunteer fireman answering an alarm, in an accident which took place outside the borders of the fire district. Thomas v Consolidated Fire Dist. No. 1, 50 N.Y.2d 143, 428 N.Y.S.2d 443, 405 N.E.2d 1009, 1980 N.Y. LEXIS 2276 (N.Y. 1980).

3. Scope of protection

This section is intended to protect the fireman from all kinds of claims while in the performance of his duties, such as a decision as to the manner and method of fighting a fire, an order for demolition of the whole or part of a building or its contents and other duties too numerous to mention. Cox v Du Chaine, 29 A.D.2d 814, 287 N.Y.S.2d 106, 1968 N.Y. App. Div. LEXIS 4652 (N.Y. App. Div. 3d Dep't 1968).

4. —Volunteer firefighters

Volunteer firemen of a fire company organized as an unincorporated association under the laws of this state are relieved from liability for negligent acts in the performance of duty as such by virtue of this section. Hence, a valid defense was asserted in an action resulting from a collision between a motor vehicle in which plaintiffs were riding and one owned by the defendant fire department and operated by the individual defendant when it was alleged that the fire department vehicle was being operated by its members in the performance of their duties as volunteer firemen. Heifetz v Rockaway Point Volunteer Fire Dep't, 282 A.D. 1062, 126 N.Y.S.2d 604, 1953 N.Y. App. Div. LEXIS 5825 (N.Y. App. Div. 1953).

Such exemption applies while volunteer firemen are in the performance of their duties and is not restricted to any particular place such as a public street or highway. 1969 NY Ops Atty Gen May 27 (Informal), 1969 N.Y. AG LEXIS 53.

5. —Emergency rescue squads

In an action to recover for personal injuries resulting from a collision between an automobile owned by plaintiff and an ambulance operated by defendant who pleaded as a defense that, at the time of the accident, the driver was a volunteer fireman and that

the ambulance was being driven by him in exercise of his duties as a voluntary fireman, evidence was insufficient to establish that the driver in operation of the ambulance was performing his duty as a volunteer fireman within the meaning of § 205-b of the General Municipal Law. Bush v Smith, 276 A.D. 923, 94 N.Y.S.2d 431, 1950 N.Y. App. Div. LEXIS 5152 (N.Y. App. Div. 1950).

Article 30 of the Public Health Law applies to an emergency rescue squad whose members are volunteer firemen that transport sick, disabled or injured persons to or from facilities providing hospital services. A fire department rescue squad providing volunteer ambulance service is required to obtain an ambulance service statement of registration pursuant to section 3004 of the Public Health Law. A fire department rescue squad is not required to obtain an ambulance service certificate pursuant to section 3006 of the Public Health Law. Volunteer firemen who render emergency medical assistance are protected by section 205-b of the General Municipal Law, which relieves volunteer firemen engaged in the performance of duty from civil liability except for willful negligence or malfeasance. 1975 NY Ops Atty Gen May 13 (Informal), 1975 N.Y. AG LEXIS 120.

The immunity granted a voluntary ambulance service in Public Health Law § 3013, subdivision 1 does not apply to a squad. The liability or immunity of the squad, as such, is derived from and through the fire department or company of which it is a part. For this purpose, a squad is not a legal entity and the question is irrelevant. 1976 NY Ops Atty Gen Dec 6 (Informal), 1976 N.Y. AG LEXIS 186.

An emergency medical technician who is not a member of a squad has immunity under Public Health Law § 3013 only for acts in rendering emergency medical assistance to a person who is unconscious, ill or injured. However, if, during the course of transportation of a sick, disabled or injured person under conditions which are not an emergency, that person's condition develops into or reverts to an emergency condition, the technician would receive immunity for the acts done relating to the emergency condition. 1976 NY Ops Atty Gen Dec 6 (Informal), 1976 N.Y. AG LEXIS 186.

A certified emergency medical technician, whether or not a member of a squad, has immunity when rendering medical assistance in an emergency to a person who is unconscious, ill or injured anywhere within the State. 1976 NY Ops Atty Gen Dec 6 (Informal), 1976 N.Y. AG LEXIS 186.

Members of emergency relief squads not personally liable for injuries for patient in ambulance not due to wilful negligence or malfeasance where services rendered in case of accident, public calamity, or other emergency as determined by person designated to receive calls for emergency service unless they proceed after seeing that no emergency exists. 1953 Op St Compt No. 53-6369.

All members of duly organized volunteer fire companies, as well as members of squads, have immunity when transporting patients under emergency conditions and, if general ambulance service has been authorized, they also have immunity for transporting non-emergency patients. 1976 NY Ops Atty Gen Dec 6 (Informal), 1976 N.Y. AG LEXIS 186.

6. —Fire police

A volunteer fireman, who is not a member of a fire police squad, may not be held personally liable for damages resulting from his negligence in directing traffic as part of a firemanic operation. 1975 NY Ops Atty Gen Jan 17 (Informal), 1975 N.Y. AG LEXIS 57.

The members of a fire police squad are covered against civil liability and may perform services as peace officers when the fire department or fire company is attending a convention, participating in fire drills, tournaments and parades and inspections, answering calls for outside assistance or attending at a public emergency other than a fire. 1953 Op St Compt No. 53-6019.

Barring willful negligence or malfeasance on the part of an individual fire policeman in case of accident occurring while he is directing traffic at an intersection to allow passage of fire apparatus, he is not personally liable for injury or damage sustained, and it is a question of fact whether or not the fire district is liable. 1961 Op St Compt No. 61-328.

7. Entities liable, generally

Town had no vicarious liability under CLS Veh & Tr § 388 as owner of ambulance involved in accident since vicarious liability cannot be imposed on owner unless there is liability on part of driver, and volunteer fireman who was driving ambulance had immunity for his acts of ordinary negligence under CLS Gen Mun § 205-b. Nelson v Garcia, 152 A.D.2d 22, 548 N.Y.S.2d 963, 1989 N.Y. App. Div. LEXIS 14856 (N.Y. App. Div. 4th Dep't 1989).

Trial court erred in granting fire departments' summary judgment motions in a wrongful death action because the fire departments were not immune from liability pursuant to N.Y. Gen. Mun. Law § 205-b, and also erred in denying the administratrix's cross motion to dismiss the fire departments' affirmative defenses pursuant to § 205-b; section 205-b immunity applied only to individual volunteer firefighters, not their municipal employers, and the trial court thus properly granted those parts of the summary judgment motions dismissing the complaint against the individual defendants. The plain language of the statute reflected the legislature's dual purposes in enacting § 205-b: first, to immunize volunteer firefighters from civil liability for ordinary negligence and, second, to shift liability for such negligence to the fire districts that employed them. Lynch v Waters, 82 A.D.3d 1719, 922 N.Y.S.2d 884, 2011 N.Y. App. Div. LEXIS 2304 (N.Y. App. Div. 4th Dep't 2011).

Although members of volunteer fire companies are not civilly liable for any acts done by them in the performance of their duty, except for wilful negligence or malfeasance, liability for negligence against towns, villages, and fire districts is imposed for the negligence of volunteer firemen in the operation of vehicles owned by the fire district while in the discharge of their duties. Hopkins v East Syracuse Fire Dist., 49 Misc. 2d 197, 267 N.Y.S.2d 61, 1966 N.Y. Misc. LEXIS 2216 (N.Y. City Ct. 1966).

8. —Fire companies

Volunteer firemen of a fire company organized as an unincorporated association under the laws of this state are relieved from liability for negligent acts in the performance of duty as such by virtue of this section. Hence, a valid defense was asserted in an action resulting from a collision between a motor vehicle in which plaintiffs were riding and one owned by the defendant fire department and operated by the individual defendant when it was alleged that the fire department vehicle was being operated by its members in the performance of their duties as volunteer firemen. Heifetz v Rockaway Point Volunteer Fire Dep't, 282 A.D. 1062, 126 N.Y.S.2d 604, 1953 N.Y. App. Div. LEXIS 5825 (N.Y. App. Div. 1953).

Section 205-b of the General Municipal Law does not exempt volunteer fire companies incorporated under Article 10 of the Membership Corporation Law from civil liability. Rosenberg v Fuller Road Fire Dept., Inc., 34 A.D.2d 653, 310 N.Y.S.2d 212, 1970 N.Y. App. Div. LEXIS 5205 (N.Y. App. Div. 2d Dep't 1970), aff'd, 28 N.Y.2d 816, 321 N.Y.S.2d 916, 270 N.E.2d 732, 1971 N.Y. LEXIS 1379 (N.Y. 1971).

Fire company could not be held vicariously liable for alleged negligence of firefighter in operating her vehicle in response to emergency since, under statute, (1) fire district, not fire company, employs, supervises and controls individual firefighters, (2) district is responsible for prevention and extinguishment of fires, (3) district possesses virtually total supervision and control over all aspects of creation and staffing of fire companies as well as over rules and regulations governing firefighting practices and procedures, and (4) district is answerable for negligence of its firefighters committed in course of their duties. Knapp v Union Vale Fire Co., 141 A.D.2d 509, 529 N.Y.S.2d 132, 1988 N.Y. App. Div. LEXIS 6348 (N.Y. App. Div. 2d Dep't 1988).

A municipality or district being aided by an outside fire company is not liable to third parties for torts of firemen rendering assistance where such firemen are not under the control of the officials of the municipality or district being aided. 1956 Op St Compt No. 56-7984.

A town which contracts on behalf of a fire protection district for fire protection is not liable for injuries to a third person caused by the negligent act of a member of an incorporated fire company, located within the fire protection district, in answering an alarm

pursuant to contract. However, if the tort was committed by a member of a village fire company under contract, located outside the fire protection district, the village would be liable. 1956 Op St Compt No. 56-7984.

9. —Fire districts

The statute erased any immunity formerly extended to fire districts and replaced it with the common-law rule of master and servant and the doctrine of respondeat superior. Nardone v Milton Fire Dist., 261 A.D. 717, 27 N.Y.S.2d 489, 1941 N.Y. App. Div. LEXIS 7419 (N.Y. App. Div. 1941), aff'd, 288 N.Y. 654, 42 N.E.2d 746, 288 N.Y. (N.Y.S.) 654, 1942 N.Y. LEXIS 1494 (N.Y. 1942).

This section, in providing that members of duly organized volunteer fire companies shall not be civilly liable, in the absence of willful negligence or malfeasance, for acts in performance of duty, will sustain a defense, against certain types of causes of action, not only by individual members of a fire company, but likewise by incorporated fire companies. Ruppel v Middleport Volunteer Fire Co., 12 A.D.2d 871, 210 N.Y.S.2d 67, 1961 N.Y. App. Div. LEXIS 13489 (N.Y. App. Div. 4th Dep't), app. denied, 12 A.D.2d 1004, 212 N.Y.S.2d 1022, 1961 N.Y. App. Div. LEXIS 12503 (N.Y. App. Div. 4th Dep't 1961).

Town was not liable under doctrine of respondeat superior as owner of ambulance involved in accident, even though CLS Gen Mun §§ 50-a, 50-b, and 205-b provide that town is liable for negligence of town "appointee" while operating municipally owned vehicle in discharge of his duties, since town had established fire district, thereby creating wholly independent political subdivision whose "members," including voluntary fireman who was driving ambulance, were employees of district and not town. Nelson v Garcia, 152 A.D.2d 22, 548 N.Y.S.2d 963, 1989 N.Y. App. Div. LEXIS 14856 (N.Y. App. Div. 4th Dep't 1989).

A property damage negligence action brought against an oil burner repair service, a district fire department, and a town, would be dismissed as against the town which could not be held liable for the negligence of members of the fire district, having no control over or responsibility for the acts and conduct of the fire district under Town Law § 176(19) and Gen Mun Law § 205-b. Harland Enterprises, Inc. v Commander Oil Corp., 108 Misc. 2d 511, 437 N.Y.S.2d 506, 1981 N.Y. Misc. LEXIS 2231 (N.Y. Sup. Ct. 1981).

The term "fire districts" as used in this section has a distinct meaning in law and does not include a fire department. Heifetz v Rockaway Point Volunteer Fire Dep't, 124 N.Y.S.2d 257, 1953 N.Y. Misc. LEXIS 2150 (N.Y. Sup. Ct.), aff'd, 282 A.D. 1062, 126 N.Y.S.2d 604, 1953 N.Y. App. Div. LEXIS 5825 (N.Y. App. Div. 1953).

10. —Villages

This section has a twofold purpose one of which is to exonerate members of duly organized volunteer fire companies from liability except for willful negligence or malfeasance and the other of which is to impute legal liability to fire districts for negligence of volunteer firemen in operation of vehicles of the district, and it accordingly applies only to vehicles owned by the fire district, not to privately owned vehicles, and imposes no liability upon an incorporated village. Sikora v Steinberg, 40 Misc. 2d 649, 243 N.Y.S.2d 766, 1963 N.Y. Misc. LEXIS 1586 (N.Y. Sup. Ct. 1963), aff'd, 20 A.D.2d 852, 249 N.Y.S.2d 401, 1964 N.Y. App. Div. LEXIS 5056 (N.Y. App. Div. 2d Dep't 1964).

A village is liable for the negligent acts of a volunteer fireman in the discharge of his firemanic duties. 1978 NY Ops Atty Gen Aug 2 (Informal), 1978 N.Y. AG LEXIS 338.

A town which contracts on behalf of a fire protection district for fire protection is not liable for injuries to a third person caused by the negligent act of a member of an incorporated fire company, located within the fire protection district, in answering an alarm pursuant to contract. However, if the tort was committed by a member of a village fire company under contract, located outside the fire protection district, the village would be liable. 1956 Op St Compt No. 56-7984.

11. Liability for vehicle accidents

This section exonerates a volunteer fireman driving a vehicle in response to a fire alarm from personal liability for damage caused in operation of the vehicle. Sikora v Steinberg, 40 Misc. 2d 649, 243 N.Y.S.2d 766, 1963 N.Y. Misc. LEXIS 1586 (N.Y. Sup. Ct. 1963), aff'd, 20 A.D.2d 852, 249 N.Y.S.2d 401, 1964 N.Y. App. Div. LEXIS 5056 (N.Y. App. Div. 2d Dep't 1964).

12. —Vehicle owned by fire district

This section has a twofold purpose one of which is to exonerate members of duly organized volunteer fire companies from liability except for willful negligence or malfeasance and the other of which is to impute legal liability to fire districts for negligence of volunteer firemen in operation of vehicles of the district, and it accordingly applies only to vehicles owned by the fire district, not to privately owned vehicles, and imposes no liability upon an incorporated village. Sikora v Steinberg, 40 Misc. 2d 649, 243 N.Y.S.2d 766, 1963 N.Y. Misc. LEXIS 1586 (N.Y. Sup. Ct. 1963), aff'd, 20 A.D.2d 852, 249 N.Y.S.2d 401, 1964 N.Y. App. Div. LEXIS 5056 (N.Y. App. Div. 2d Dep't 1964).

In personal injury action arising from collision between car and fire truck driven by volunteer firefighter, defendant volunteer fire department was not entitled CLS CPLR § 4401 dismissal on ground that firefighter had been granted summary judgment due to lack of proof that he acted with reckless disregard for safety of others and only claim against fire department was based on vicarious liability for his conduct, as immunity granted to volunteer firefighters by CLS Gen Mun § 205-b does not extend to volunteer fire departments, which remain liable for negligence of volunteer firefighters while operating department vehicles in discharge of their duties. Tobacco v North Babylon Volunteer Fire Dep't, 182 Misc. 2d 480, 696 N.Y.S.2d 340, 1999 N.Y. Misc. LEXIS 403 (N.Y. Sup. Ct. 1999), app. dismissed, 276 A.D.2d 551, 714 N.Y.S.2d 450, 2000 N.Y. App. Div. LEXIS 10154 (N.Y. App. Div. 2d Dep't 2000).

13. —Accident outside fire district

Fire district may be held liable for negligent acts of one of its volunteer firemen committed in course of duty answering an alarm while operating privately owned vehicle outside borders of fire district. Thomas v Consolidated Fire Dist. No. 1, 50 N.Y.2d 143, 428 N.Y.S.2d 443, 405 N.E.2d 1009, 1980 N.Y. LEXIS 2276 (N.Y. 1980).

Volunteer firemen en route to and attending a fire outside of the fire district, pursuant to an actual call for assistance, are covered by the Volunteer Firemen's Disability Benefits Law and amendments to the General Municipal Law dealing with the liability to the municipality for damages due to negligence of volunteer firemen. 1959 NY Ops Atty Gen March 31 (Informal), 1959 N.Y. AG LEXIS 123.

14. —Willful negligence

Evidence which shows that a collision resulted at an intersection from volunteer fireman's violation of traffic signal is sufficient to establish "wilful negligence" under § 205-b. Pauli v Carncross, 276 N.Y. 509, 12 N.E.2d 453, 276 N.Y. (N.Y.S.) 509, 1937 N.Y. LEXIS 1092 (N.Y. 1937).

Allegations that a volunteer fireman in responding to a fire alarm failed to heed a stop sign; drove at excessive and illegal rate of speed; gave no signal or warning of his approach; and operated his vehicle without regard for the safety of others would warrant a finding that the acts of the fireman were sufficient to constitute wilful negligence or malfeasance. Cox v Du Chaine, 29 A.D.2d 814, 287 N.Y.S.2d 106, 1968 N.Y. App. Div. LEXIS 4652 (N.Y. App. Div. 3d Dep't 1968).

In action by passenger injured when vehicle in which she was riding was struck in rear by fire engine, driver of fire engine was entitled to summary judgment dismissing all cross claim against him where (1) as member of volunteer fire company, he could not be held liable for act done in performance of his duties "except for wilful negligence or malfeasance," (2) on observing vehicle stopped about 200 feet in front of him, fire engine driver repeatedly applied brakes and slowed to 5 to 7 miles per hour when he skidded into stopped vehicle, (3) there was no evidence that his failure to avoid accident was wilful negligence or malfeasance, and (4) he was also entitled to privilege under CLS Veh & Tr § 1104 because there was no evidence that he acted with "reckless disregard for the safety of others." Tobacco v North Babylon

Fire Dep't, 251 A.D.2d 398, 674 N.Y.S.2d 125, 1998 N.Y. App. Div. LEXIS 6646 (N.Y. App. Div. 2d Dep't 1998).

Where plaintiff, a volunteer firefighter, suffered injuries in a traffic accident on the way to a structure fire, his complaint against the driver (another volunteer firefighter) was dismissed, as he failed to demonstrate a triable issue as to whether the conduct of the driver constituted willful negligence or malfeasance, as his driving did not bespeak conscious indifference to a highly probable risk that calamity would ensue. Plaintiff's claims against the town were dismissed, as the benefits of Vehicle and Traffic Law § 19 were the exclusive remedy of a volunteer firefighter for a line of duty injury as against the town. Lee v Verstraete, 65 Misc. 3d 531, 109 N.Y.S.3d 594, 2019 N.Y. Misc. LEXIS 4781 (N.Y. Sup. Ct. 2019).

15. —Privately-owned vehicle

A fire district may be held liable for the negligent acts of one of its volunteer firemen committed in the course of duty while operating a privately owned vehicle outside the borders of the fire district; section 205-b of the General Municipal Law, which provides that fire districts shall be liable for the negligence of volunteer firemen in the operation of vehicles owned by the fire district upon the public streets of the district if, at the time of any accident or injury, they were acting in the discharge of their duties, should not be read as an exemption statute which, by implication, would exempt fire districts from liability except as provided by that section, since said statute was enacted to expand, rather than limit, the liability of fire districts and, where the Legislature acts to extend liability, the courts should not reach for such a limiting distinction absent inescapable evidence that there was such a legislative intent. Accordingly, it was error to grant a motion by defendant fire district for summary judgment dismissing a complaint brought by the administratrix of the estate of a seven-year-old girl who was struck and killed by a privately owned car operated by a volunteer fireman answering an alarm, in an accident which took place outside the borders of the fire district. Thomas v Consolidated Fire Dist. No. 1, 50 N.Y.2d 143, 428 N.Y.S.2d 443, 405 N.E.2d 1009, 1980 N.Y. LEXIS 2276 (N.Y. 1980).

Use of private vehicles by volunteer firefighters does not vitiate application of CLS Gen Mun § 205-b. Skinner v Scobbo, 221 A.D.2d 334, 633 N.Y.S.2d 208, 1995 N.Y. App. Div. LEXIS 11602 (N.Y. App. Div. 2d Dep't 1995).

This section has a twofold purpose one of which is to exonerate members of duly organized volunteer fire companies from liability except for willful negligence or malfeasance and the other of which is to impute legal liability to fire districts for negligence of volunteer firemen in operation of vehicles of the district, and it accordingly applies only to vehicles owned by the fire district, not to privately owned vehicles, and imposes no liability upon an incorporated village. Sikora v Steinberg, 40 Misc. 2d 649, 243 N.Y.S.2d 766, 1963 N.Y. Misc. LEXIS 1586 (N.Y. Sup. Ct. 1963), aff'd, 20 A.D.2d 852, 249 N.Y.S.2d 401, 1964 N.Y. App. Div. LEXIS 5056 (N.Y. App. Div. 2d Dep't 1964).

Under this section, a fire district is not responsible for the negligent operation of privately-owned automobiles by volunteer firemen. Mott v Baldwin Fire Dep't, 45 Misc. 2d 813, 257 N.Y.S.2d 630, 1965 N.Y. Misc. LEXIS 2216 (N.Y. Sup. Ct. 1965).

16. —Liability of absentee owner of private vehicle

This section, exempting volunteer firemen from liability for ordinary negligence in operation of motor vehicles, transfers their liability to the municipality, thereby effecting a substitution of remedies and parties, and an absentee owner of the vehicle which the fireman is operating at the time in course of duty cannot be held liable for injuries inflicted, because of absence of liability on the part of the fireman, notwithstanding the provisions of § 388 of the Vehicle and Traffic Law. Sikora v Keillor, 17 A.D.2d 6, 230 N.Y.S.2d 571, 1962 N.Y. App. Div. LEXIS 8567 (N.Y. App. Div. 2d Dep't 1962), aff'd, 13 N.Y.2d 610, 240 N.Y.S.2d 601, 191 N.E.2d 88, 1963 N.Y. LEXIS 1220 (N.Y. 1963).

In an action against an automobile owner for damages sustained by reason of its negligent operation by a volunteer fireman acting in course of duty, in the owner's absence, it was error to strike defendant owner's affirmative defense of freedom from liability by reason of this section. Sikora v Keillor, 17 A.D.2d 6, 230 N.Y.S.2d 571, 1962 N.Y. App. Div. LEXIS 8567 (N.Y. App. Div. 2d Dep't 1962), aff'd, 13 N.Y.2d 610, 240 N.Y.S.2d 601, 191 N.E.2d 88, 1963 N.Y. LEXIS 1220 (N.Y. 1963).

17. —Illustrative cases

In an action against fire district on the theory of respondeat superior for the death of plaintiff's testate who was killed while riding on a fire truck owned by defendant and operated by the chief of local fire company, complaint was dismissed where at time of accident plaintiff's testate and the chief, who was operating the truck, were intoxicated, the truck was being driven in a reckless and dangerous manner, and the occupants were shouting and gesticulating in a manner which carried with it much more than the mere suggestion of a test run conducted in the interest of efficiency. Nardone v Milton Fire Dist., 261 A.D. 717, 27 N.Y.S.2d 489, 1941 N.Y. App. Div. LEXIS 7419 (N.Y. App. Div. 1941), aff'd, 288 N.Y. 654, 42 N.E.2d 746, 288 N.Y. (N.Y.S.) 654, 1942 N.Y. LEXIS 1494 (N.Y. 1942).

Volunteer Firemen are not covered by the provisions of the Volunteer Firemen's Benefit Law when attending a funeral, whether such attendance is pursuant to orders or by permission from the chief or fire district commissioners. 1977 NY Ops Atty Gen Dec 7 (Informal), 1977 N.Y. AG LEXIS 361.

18. Liability for other conduct

This section limiting liability to wilful negligence or malfeasance is not confined to motor vehicle litigation. Cox v Du Chaine, 29 A.D.2d 814, 287 N.Y.S.2d 106, 1968 N.Y. App. Div. LEXIS 4652 (N.Y. App. Div. 3d Dep't 1968).

Although this section would appear to involve only vehicular torts, the general rule of Bernardine v New York (1945) 294 NY 361, 62 NE2d 604, 161 ALR 364, would appear to impose a basis for liability upon the charge that volunteer firemen caused injury to, or further injury to a motorist when they attempted to extricate him from a position where he was pinned in his damaged automobile. Hopkins v East Syracuse Fire Dist., 49 Misc. 2d 197, 267 N.Y.S.2d 61, 1966 N.Y. Misc. LEXIS 2216 (N.Y. City Ct. 1966).

A volunteer fireman, who is not a member of a fire police squad, may not be held personally liable for damages resulting from his negligence in directing traffic as part of a firemanic operation. 1975 NY Ops Atty Gen Jan 17 (Informal), 1975 N.Y. AG LEXIS 57.

It is questionable whether use of fire department apparatus to transport the body of a deceased fireman for burial is authorized by statute. If a court held that there is no such authorization, the immunity statute would not apply, the Volunteer Firemen's Benefit Law would not provide protection and personal liability might result. 1977 NY Ops Atty Gen Dec 7 (Informal), 1977 N.Y. AG LEXIS 361.

There is no authority in this section, or elsewhere, for a fire district to stand the expenses of defending against an action brought against an individual member of the fire department based upon injuries sustained by plaintiff by reason of the diseased condition of a dog which the individual fireman donated for a raffle held at the district fire house. 1960 Op St Compt No. 60-877.

A fire district may not pay the legal expenses of a volunteer fireman charged with criminally assaulting a bystander at a fire. 1967 Op St Compt No. 67-359.

19. Notice of claim

General Municipal Law § 205-b specifically casts liability upon fire districts for the negligence of volunteer firemen in the operation of vehicles owned by the district "upon the public streets and highways of the fire district" but it contains no requirement that a notice of claim be served as a prerequisite to an action. In an action by decedent's administrator for wrongful death, a fire district claimed that it was within the purview of Gen Mun L § 50-b and that by operation of § 50-c thereof, the complaint must allege compliance with § 50-e. Held: §§ 50-b, 50-c, and 50-e do not apply to fire districts nor was § 205-b repealed thereby by implication. Moreover § 50-e(7) by clear exception says that § 50-e shall not be applicable to the article of law containing § 205-b. Seyer v Schoen, 6 A.D.2d 177, 175

N.Y.S.2d 1003, 1958 N.Y. App. Div. LEXIS 5122 (N.Y. App. Div. 4th Dep't 1958).

General Municipal Law § 50-i, which provided that no action shall be maintained for personal injury by reason of the negligence of any volunteer fireman whose services have been accepted pursuant to § 209-i, unless a notice is served pursuant to General Municipal Law § 50-e is misleading, because prior to September 1, 1963, the requirements of General Municipal Law § 50-e did not apply to a claim against a fire district which arose out of the negligence of volunteer firemen pursuant to General Municipal Law § 205-b. Hopkins v East Syracuse Fire Dist., 49 Misc. 2d 197, 267 N.Y.S.2d 61, 1966 N.Y. Misc. LEXIS 2216 (N.Y. City Ct. 1966).

20. Pleading

In negligence action, court properly dismissed third-party complaint on ground that, at time of accident, third-party defendant was performing his duty as volunteer firefighter and, because complaint contained no allegation of willful negligence or malfeasance, it failed to state cause of action under CLS Gen Mun § 205-b, which provides immunity to firefighters under such circumstances. Lotito v Lund, 129 A.D.2d 776, 514 N.Y.S.2d 770, 1987 N.Y. App. Div. LEXIS 45471 (N.Y. App. Div. 2d Dep't 1987).

The immunity provisions contained in the cited statutes may both apply to a volunteer fireman and in the event of suit, both should be pleaded as separate, affirmative defenses unless it is clear that only one applies. 1976 NY Ops Atty Gen Dec 6 (Informal), 1976 N.Y. AG LEXIS 186.

21. Illustrative cases

A servant, agent or officer of a municipality is required to do his work in a reasonably careful manner and if he fails to do so and another is injured because of his negligence he is personally responsible, the same as any other person who has by his misconduct caused injury. Ottmann v Rockville Centre, 275 N.Y. 270, 9 N.E.2d 862, 275 N.Y. (N.Y.S.) 270, 1937 N.Y. LEXIS 1426 (N.Y. 1937).

In action to recover damages for personal injuries when volunteer firefighter, while en route to firehouse in response to alarm, struck and seriously injured pedestrian, summary judgment should not be granted where defendants failed to sustain burden of demonstrating, as matter of law, that there was no issue of facts as to whether they were guilty of "willful negligence or malfeasance", and defendant driver's self-serving allegations that he obeyed all traffic rules, did not drive at excessive speed, and ascertain that intersection where accident occurred was clear before turning, did not sustain his burden of proof. Metropolitan Property & Liability Ins. Co. v State Farm Mut. Auto. Ins. Co., 119 A.D.2d 558, 500 N.Y.S.2d 369, 1986 N.Y. App. Div. LEXIS 55484 (N.Y. App. Div. 2d Dep't 1986).

Court properly granted defendants' motion for leave to serve amended answer to allege that driver of offending vehicle, at time of alleged accident, was volunteer firefighter responding to fire call, and thus was under protection of CLS Gen Mun § 205-b; neither heightened proof requirement under statute nor shortened limitation period against relevant fire district constituted prejudice to plaintiff sufficient to deny motion to amend. Skinner v Scobbo, 221 A.D.2d 334, 633 N.Y.S.2d 208, 1995 N.Y. App. Div. LEXIS 11602 (N.Y. App. Div. 2d Dep't 1995).

Where a member of a volunteer fire company is liable for wilful negligence or malfeasance under the exception contained in this section, assuming that fire district could also be held responsible for such act although the statute does not so indicate, it does not follow that such district would have the right to recover over as in the usual case of derivative liability in view of the further provision of the statute that any judgment against fire district shall be levied on its taxable property. Mott v Baldwin Fire Dep't, 45 Misc. 2d 813, 257 N.Y.S.2d 630, 1965 N.Y. Misc. LEXIS 2216 (N.Y. Sup. Ct. 1965).

An employer may deduct for the unauthorized absence of a volunteer fireman employee engaged in fireman duties. 1955 NY Ops Atty Gen Oct 20 (Informal), 1955 N.Y. AG LEXIS 317.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 204-a, 209-i; CLS Town § 176.

§ 205-c. Payments pending controversies where volunteer firefighters are killed or injured.

In order to provide for the prompt payment of benefits under sections two hundred five and two hundred nine-a of this article, and under the workers' compensation law, where such benefits are conceded to be due to any person because of the death of or injuries to a volunteer firefighter but controversy exists as to which city, village, town or fire district is liable for the payment thereof, the municipalities and districts involved in such controversy and their insurance carriers, if any, may agree that any one or more of such municipalities or districts or its insurance carrier shall pay the benefits to, or in relation to, the person conceded to be entitled to such benefits without waiting for a final determination of the controversy, and may carry out the provisions of such an agreement. Notwithstanding any such payment, any party to the agreement may seek a final determination of the controversy in the same manner as if such payment had not been made. After a final determination the parties to the agreement shall make any necessary and proper reimbursement to conform to the determination. The term "insurance carrier" as used herein shall mean an insurance company, or a county mutual self-insurance plan in accordance with subdivision three-a of section fifty of the workers' compensation law, or any plan which shall be provided for by law in amendment of or substitution for such a plan.

HISTORY:

Add, L 1955, ch 127, § 1, eff March 21, 1955; L 2018, ch 476, § 49, effective December 28, 2018.

Revision Notes: Where a volunteer fireman is killed or injured in line of duty there may be no question that he or his family are entitled to certain benefits provided by law; yet there may be a question as to which of two municipalities or fire districts is liable for the benefits. These cases generally arise where service is being rendered outside the "home" area of the fireman's own fire department. The controversies often involve substantial sums and the litigation may be carried to the appellate courts. In some cases firemen and their families have waited for extended periods until the courts decided which of two political subdivisions should pay the benefits. This act permits the parties to pay the fireman or his family and litigate the question of liability between themselves. Insurance companies were doing this by administrative arrangement but there was no statutory authority for municipalities, fire districts and county mutual workmen's compensation plans to enter into such agreements. This act furnishes such authority.

Amendment Notes The 2018 amendment by ch 476, § 49, substituted "firefighters" for "firemen" in the section heading; substituted "workers' compensation law" for "workmen's compensation law" in the first and last sentences; and in the first sentence, substituted "of this article" for "of this chapter" and "firefighter" for "fireman."

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations § 1251.

12 Am Jur Pl & Pr Forms (Rev), Fires, Forms 46–49.

§ 205-cc. Volunteer firefighter enhanced cancer disability benefits

A legally organized fire district, department or company shall provide and maintain for each eli-

gible volunteer firefighter, an enhanced cancer disability benefit insurance program.

1. Definitions. As used in this section:

a. "Eligible volunteer firefighter" means:

(i) [Eff until December 23, 2029] A volunteer firefighter having five or more years of faithful and actual service in the protection of life and property from fire in the interior of buildings subsequent to having successfully passed a physical examination which failed to reveal any evidence of cancers as defined in paragraph b of this subdivision; and

(i) [Eff December 23, 2029] A volunteer firefighter having five or more years of faithful and actual service in the protection of life and property from fire in the interior of buildings and having successfully passed a physical examination on entry to the firefighter service, which examination failed to reveal any evidence of cancers as defined in paragraph b of this subdivision; and

(ii) [Eff until December 23, 2029] Having submitted proof of five years of interior firefighting service by providing verification that he or she has passed at least five yearly certified mask fitting tests as set forth in 29 CFR 1910.134 or the applicable National Fire Protection Association standards for mask fit testing or, for firefighters who entered the fire service prior to January first, two thousand twenty, documentation identified by the office of fire prevention and control in rules and regulations promulgated pursuant to subdivision seven of this section which shall include, but not be limited to, training or certification records, health care provider records, internal fire department records, or any combination of official documents capable of evidencing that the firefighter meets the requirements of this section.

(ii) [Eff December 23, 2029] Having submitted proof of five years of interior firefighting service by providing verification that he or she has passed at least five yearly certified mask fitting tests as set forth in 29 CFR 1910.134 or the current National Fire Protection Association standards for mask fit testing.

b. "Cancer" means:

(i) A disease caused by an uncontrolled division of abnormal cells in a part of the body or a malignant growth or tumor resulting from the division of abnormal cells; and

(ii) Affecting the prostate or breast, lymphatic, hematological digestive, urinary, neurological, or reproductive systems, or melanoma.

2. An eligible volunteer firefighter shall be entitled to payment of enhanced cancer benefits as follows:

a. A lump sum benefit of twenty-five thousand dollars for each diagnosis payable to such firefighter upon acceptable proof to the insurance carrier or other payor of a diagnosis by a board certified physician in the medical specialty appropriate for the type of cancer diagnosed that there are one or more malignant tumors characterized by the uncontrollable and abnormal growth and spread of malignant cells with invasion of normal tissue and that either:

(i) There is metastasis; and

(1) surgery, radiotherapy, or chemotherapy is medically necessary; or

(2) there is a tumor of the prostate, provided that it is treated with radical prostatectomy or external beam therapy; or

(ii) The firefighter has terminal cancer, his or her life expectancy is twenty-four months or less from the date of diagnosis, and will not benefit from, or has exhausted, curative therapy.

b. A lump sum benefit of six thousand two hundred fifty dollars for each diagnosis payable to such firefighter upon acceptable proof to the insurance carrier or other payor of a diagnosis by a board certified physician in the medical specialty appropriate for the type of cancer involved that either:

(i) There is carcinoma in situ such that surgery, radiotherapy, or chemotherapy has been determined to be medically necessary;

(ii) There are malignant tumors which are treated by endoscopic procedures alone; or

(iii) There are malignant melanomas.

c. A monthly benefit of one thousand five hundred dollars, of which the first payment shall be made six months after total disability and submission of acceptable proof of said disability to the insurance carrier or other payor that such disability is caused by cancer and that such cancer precludes the firefighter from serving as a firefighter. Such benefit shall continue for up to thirty-six consecutive monthly payments.

(i) Such monthly benefit shall be subordinate to any other benefit actually paid to the firefighter solely for such disability from any other source, not including private insurance purchased solely by the firefighter, and shall be limited to the difference between the amount of such other paid benefit and the amount specified herein; and

(ii) Any firefighter receiving such monthly benefits may be required to have his or her condition reevaluated. In the event any such reevaluation reveals that such person has regained the ability to perform duties as a firefighter, then his or her monthly benefits shall cease the last day of the month of reevaluation.

(iii) In the event that there is a subsequent reoccurrence of a disability caused by cancer which precludes the firefighter from serving as a firefighter, he or she shall be entitled to receive any remaining monthly payments.

d. An eligible volunteer firefighter shall also be entitled to an additional payment of enhanced cancer death benefits in the amount of fifty thousand dollars which is payable to such volunteer or his or her beneficiary upon acceptable proof by a board certified physician that such firefighter's death resulted from complications associated with cancer.

e. Provided however, an eligible volunteer firefighter shall be ineligible for these benefits if they

are already provided paid firefighter benefits under this article.

3. The combined total of all benefits received by any eligible volunteer firefighter pursuant to paragraphs a and b of subdivision two of this section during his or her lifetime shall not exceed fifty thousand dollars.

4. An eligible volunteer firefighter shall remain eligible for benefits pursuant to paragraphs a, b and d of subdivision two of this section for sixty months after the formal cessation of the volunteer firefighter's status as an active volunteer firefighter. The fire district, department or company in which such firefighter served shall be responsible for payment of all premiums or other costs associated with benefits provided under paragraphs a, b and d of subdivision two of this section throughout the duration of the eligible volunteer firefighter's coverage.

5. A fire district, department or company shall, no later than January first, two thousand nineteen, show proof of insurance coverage that meets the requirements of this section or shall show satisfactory proof of the ability to pay such compensation to ensure adequate coverage for all eligible volunteer firefighters. Such coverage shall remain in effect until sixty months after the fire district, department or company no longer has any volunteer firefighters who could qualify for this benefit.

6. Any fire district, department or company that has had a volunteer firefighter file a claim for or receive an enhanced cancer disability benefit under the provisions of this section shall report such claims filed, claims paid and types of claims to the office of fire prevention and control. Beginning on January first, two thousand twenty, the office of fire and prevention control shall report annually to the governor, the temporary president of the senate, the speaker of the assembly, the chair of the senate finance committee and the chair of the assembly ways and means committee the number of firefighters who have filed claims pursuant to this section and the number of firefighters who have received benefits under the provisions of this section.

7. The office of fire prevention and control, in consultation with the department of financial services and the workers' compensation board, shall adopt such rules and regulations as are reasonable and necessary to implement the provisions of this section. Such regulations shall include establishing acceptable documentation for proof of eligibility, the process by which a firefighter files a claim for the enhanced cancer disability benefit, how the beneficiary of such eligible volunteer firefighter files a claim for the enhanced cancer death benefit, the process by which claimants can appeal a denial of benefits and what proof is deemed acceptable to qualify for such benefits.

8. [Repealed]

HISTORY:

L 2017, ch 334, § 2, effective January 1, 2019; L 2019, ch 738, § 1, effective December 23, 2019; L 2020, ch 55, §§ 1–3 (Part XX, Subpart P)., effective December 23, 2019.

Editor's Notes Laws 2017, ch 334, §§ 1, 4, eff Jan 1, 2019, provide:

Section 1. Short title. This act shall be known and may be cited as the "New York State Volunteer Firefighter Enhanced Cancer Disability Benefits Act".

§ 4. This act shall take effect January 1, 2019; provided, however, that effective immediately, the addition and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized and directed to be made and completed on or before such effective date; and provided further, however, that the regulations required pursuant to subdivision 7 of section 205-cc of the general municipal law as added by section two of this act shall be finalized no later than June 1, 2018.

Laws 2019, ch 738, § 2, eff December 23, 2019, provides:

§ 2. This act shall take effect immediately and shall expire and be deemed repealed 10 years after such date.

Laws 2020, ch 55, § 4 (Part XX, Subpart P), eff December 23, 2019, provides:

§ 4. This act shall take effect on the same date and in the same manner as a chapter of the laws of 2019 amending the general municipal law relating to proof of eligibility for volunteer firefighter enhanced cancer disability benefits, as proposed in legislative bills numbers S. 4173-A and A. 5957-A, takes effect.

Amendment Notes The 2019 amendment by ch 738, § 1, substituted "applicable" for "current" in 1(a)(ii); and added 8.

The 2020 amendments by ch 55, §§ 1—3 (Part XX, Subpart P), in (1)(i), substituted "buildings subsequent to" for "buildings and" and "examination which failed" for "examination in entry to the firefighter service which examination failed" in (1)(i); added "or, for firefighters who entered the fire service prior to January first, two thousand twenty, documentation identified by the office of fire prevention and control in rules and regulations promulgated pursuant to subdivision seven of this section which shall include, but not be limited to, training or certification records, health care provider records, internal fire department records, or any combination of official documents capable of evidencing that the firefighter meets the requirements of this section" in (1)(ii); added "establishing acceptable documentation for proof of eligibility" in the second sentence of 7; and deleted former 8.

§ 205-f. Removal of civil liability barriers

1. (a) Liability protection. (1) A fire company or political subdivision as defined in section three of the volunteer firefighters' benefit law, including a person acting as an agent thereof, that acts reasonably in donating qualified fire control or fire rescue equipment to a volunteer fire company shall not be liable in civil damages under any state law for personal injuries, property damage, or death proximately caused after the donation by a defect in the equipment.

(2) Any state or local agency, including a person acting as an agent of such an agency, that acts reasonably in administering the distribution of qualified fire control or fire rescue equipment to a volunteer fire company or political subdivision as defined in section three of the volunteer firefighters' benefit law, shall not be liable for civil damages under any state law for personal injuries, property damage, or death proximately caused after the distribution by a defect in the equipment.

(b) Exceptions to liability protection. Paragraph (a) of this subdivision shall not apply to a person or agency if:

(1) the defect that proximately causes the injury, damage, or loss resulted from an act or omission of the person or agency, that constitutes malice, gross negligence, recklessness, or intentional misconduct;

(2) the person or agency is the manufacturer of the qualified fire control or fire rescue equipment; or

(3) the person or agency modified or altered the equipment after it had been recertified by an authorized technician as meeting the manufacturer's specifications.

2. For the purposes of this section the following words and phrases shall have the following meanings:

(a) "Person" means any individual and any governmental or other entity.

(b) "Qualified fire control or rescue equipment" means fire control or fire rescue equipment that has been recertified by an authorized technician as meeting the manufacturer's specifications and has been distributed through a state or local agency to the volunteer fire company.

(c) "Authorized technician" means a technician that has been certified by the manufacturer of fire control or fire rescue equipment to inspect such equipment. The technician need not be employed by the state or local agency administering the distribution of the fire control or fire rescue equipment.

HISTORY:

Add, L 2004, ch 641, § 1, eff Oct 26, 2004, deemed eff on and after May 15, 2003.

§ 205-g. Defense and indemnification of volunteer firefighters

1. As used in this section:

a. "Volunteer firefighter" means an active member of a fire company.

b. "Fire company" means:

(i) A fire company of a city, town, village or fire district fire department, whether or not any such company has been incorporated under any general or special law,

(ii) A fire corporation incorporated under or subject to the provisions of article ten of the not-for-profit corporation law, which is not included within subparagraph (i) of this paragraph, if such corporation is, by law, under the general control of, or recognized as a fire corporation by, the governing board of a city, town, village or fire district; or

(iii) A fire corporation incorporated under, or established pursuant to the provision of, any general or special law, which is not included within subparagraphs (i) or (ii) of this paragraph, if such corporation is, by law, under the general control of, or recognized as a fire corporation by, the governing board of a city, town, village or fire district or Indian reservation. A "fire department" may be composed of one or more fire companies.

c. "Line of duty" means the performance by a volunteer firefighter of the duties and activities described in subdivision one of section five of the volunteer firefighters' benefit law and the same such duties and activities performed for a specialized team established pursuant to the provisions of section two hundred nine-bb of this article for which the volunteer firefighter does not receive any remuneration or a gratuity and shall be deemed to include any date of injury as determined by the workers' compensation board pursuant to the provisions of section forty-one of the volunteer firefighters' benefit law. The following shall not be deemed to be remuneration or a gratuity: reimbursement of expenses for meals, lodging and actual and necessary travel; the receipt of a mileage allowance in lieu of travel expense; reimbursement of expenses for registration and tuition fees payable under section seventy-two-g of this chapter, and the acceptance of transportation, food, drink, shelter, clothing and similar items while on duty or engaged in such activities.

d. "Public entity" means the city, town, village or fire district having general control of the fire company.

2. The public entity shall provide for the defense of the volunteer firefighter in any civil action or proceeding, state or federal, arising out of any alleged act or omission which occurred or allegedly occurred while the volunteer firefighter was acting in the line of duty if the volunteer firefighter is in compliance with the provisions of subdivision seven of this section. This duty to provide for a defense shall not arise where such civil action or proceeding is brought by or at the behest of the public entity.

3. Subject to the conditions set forth in subdivision two of this section, the volunteer firefighter shall be entitled to be represented by private counsel of his or her choice in any civil action or proceeding whenever the chief legal officer of the public entity or other counsel designated by the public entity determines that a conflict of interest exists, or whenever a court, upon appropriate motion or otherwise by a special proceeding, determines that a conflict of interest exists and that the volunteer firefighter is entitled to be represented by counsel of his or her choice, provided, however, that the chief legal officer or other counsel designated by the public entity may require, as a condition to payment of the fees and expenses of such representation, that appropriate groups of such volunteer firefighters be represented by the same counsel. Reasonable attorneys' fees and litigation expenses shall be paid by the public entity to such private counsel from time to time during the pendency of the civil action or proceeding with the approval of the governing body of the public entity.

4. Any dispute with respect to representation of multiple volunteer firefighters by a single counsel or the amount of litigation expenses or the reasonableness of attorneys' fees shall be resolved by the court upon motion or by way of a special proceeding.

5. Where the volunteer firefighter delivers process and a written request for a defense to the public entity under subdivision seven of this section, the public entity shall take the necessary steps on behalf of the volunteer firefighter to avoid entry of a default

judgment pending resolution of any question pertaining to the obligation to provide for a defense.

6. a. The public entity shall indemnify and save harmless its volunteer firefighters in the amount of any judgment obtained against such volunteer firefighters in a state or federal court, or in the amount of any settlement of a claim, provided that the act or omission from which such judgment or claim arose occurred while the volunteer firefighter was acting in the line of duty; provided further that in the case of a settlement the duty to indemnify and save harmless shall be conditioned upon the approval of the amount of settlement by the governing body of the public entity.

b. The duty to indemnify and save harmless shall be construed in the same manner as provided in section two hundred five-b of this article.

c. Nothing in this subdivision shall authorize a public entity to indemnify or save harmless a volunteer firefighter with respect to punitive or exemplary damages, fines or penalties, or money recovered from a volunteer firefighter pursuant to section fifty-one of this chapter; provided, however, that the public entity shall indemnify and save harmless its volunteer firefighters in the amount of any costs, attorneys' fees, damages, fines or penalties which may be imposed by reason of an adjudication that a volunteer firefighter, acting in the line of duty, has, without willfulness or intent on his or her part, violated a prior order, judgment, consent decree or stipulation of settlement entered in any court of this state or of the United States.

d. Upon entry of a final judgment against the volunteer firefighter, or upon the settlement of the claim, the volunteer firefighter shall serve a copy of such judgment or settlement, personally or by certified or registered mail within thirty days of the date of entry or settlement, upon the chief administrative officer of the public entity; and if not inconsistent with the provisions of this section, the amount of such judgment or settlement shall be paid by the public entity.

7. The duty to defend or indemnify and save harmless prescribed by this section shall be conditioned upon:

a. delivery by the volunteer firefighter to the chief legal officer of the public entity or to its chief administrative officer of a written request to provide for his or her defense together with the original or a copy of any summons, complaint, process, notice, demand or pleading within ten days after he or she is served with such document;

b. the full cooperation of the volunteer firefighter in the defense of such action or proceeding and in defense of any action or proceeding against the public entity based upon the same act or omission, and in the prosecution of any appeal; and

c. the volunteer firefighter maintaining at least the minimum level of training required by the public entity.

8. The benefits of this section shall inure only to volunteer firefighters as defined in this section and shall not enlarge or diminish the rights of any other party nor shall any provision of this section be construed to affect, alter or repeal any provision of the workers' compensation law or volunteer firefighters' benefit law.

9. This section shall not in any way affect the obligation of any claimant to give notice to the public entity under section ten of the court of claims act, section fifty-e of this chapter, or any other provision of law.

10. Any public entity is hereby authorized and empowered to purchase insurance from any insurance company created by or under the laws of this state, or authorized by law to transact business in this state, against any liability imposed by the provisions of this section, or to act as a self-insurer with respect thereto.

11. All payments made under the terms of this section, whether for insurance or otherwise, shall be deemed to be for a public purpose and shall be audited and paid in the same manner as other public charges.

12. The provisions of this section shall not be construed to impair, alter, limit or modify the rights and obligations of any insurer under any policy of insurance.

13. Except as otherwise specifically provided in this section, the provisions of this section shall not be construed in any way to impair, alter, limit, modify, abrogate or restrict any immunity to liability available to or conferred upon any unit, entity, officer or volunteer firefighter of any public entity by, in accordance with, or by reason of, any other provision of state or federal statutory or common law.

HISTORY:
Add, L 2006, ch 559, § 1, eff Feb 12, 2007.

§ 206-b. Exemption of benefits payable under blanket accident insurance covering volunteer firefighters.

Not only shall the benefits payable or allowable under any blanket accident insurance policy or contract purchased (1) by a fire department pursuant to section four thousand two hundred thirty-seven of the insurance law, or (2) by a municipal corporation or fire district pursuant to any general, special or local law, to insure active volunteer firefighters against injury or death resulting from bodily injuries sustained by such firefighters in the performance of their duties be exempt from execution as provided in subsection (c) of section three thousand two hundred twelve of the insurance law, but also any benefits payable or allowable under any such policy or contract in the event of the death of an insured volunteer firefighter shall be exempt from execution for the purpose of satisfying any debt or liability of the beneficiary designated in the policy or contract, or in the event that the insured volunteer firefighter is a minor shall be exempt from execution for the purpose of satisfying any debt or liability of

the person to whom such benefits are payable pursuant to subsection (b) of section four thousand two hundred thirty-seven of the insurance law.

HISTORY:

Add, L 1955, ch 98, § 1, eff March 21, 1955; amd, L 1958, ch 164, § 1, eff March 12, 1958; L 1984, ch 805, § 35, eff Sept 1, 1984; L 2018, ch 476, § 52, effective December 28, 2018.

Revision Notes: This act provided that when blanket accident insurance for volunteer firemen was purchased at the expense of a municipal corporation or fire district, the benefit should not be subject to execution for claims against a beneficiary or, in the case of a minor volunteer fireman, for claims against a parent, guardian, person supporting him or chiefly dependent upon him. Exemption from claims against the insured was provided in the Insurance Law, § 166(2). Provisions comparable to those of this act are contained in the General Municipal Law, § 205 (Fourth) and Workmen's Compensation Law, § 33.

Amendment Notes The 2018 amendment by ch 476, § 52, substituted "firefighters" for "firemen" in the section heading; and substituted "firefighter" for "fireman" or variants throughout the section.

§ 207-a. Payment of salary, medical and hospital expenses of firefighters with injuries or illness incurred in performance of duties.

1. Any paid firefighter which term as used in this section shall mean any paid officer or member of an organized fire company or fire department of a city of less than one million population, or town, village or fire district, or any paid employee of a county airport or county aviation department which performs fire response or fire rescue duties, who is injured in the performance of his or her duties or who is taken sick as a result of the performance of his or her duties so as to necessitate medical or other lawful remedial treatment, shall be paid by the municipality or fire district by which he or she is employed the full amount of his or her regular salary or wages until his or her disability arising therefrom has ceased, and, in addition, such municipality or fire district shall be liable for all medical treatment and hospital care furnished during such disability. Provided, however, and notwithstanding the foregoing provisions of this section, the municipal health authorities or any physician appointed for the purpose by the municipality or fire district, may attend any such injured or sick firefighter, from time to time, for the purpose of providing medical, surgical or other treatment, or for making inspections and the municipality or fire district shall not be liable for salary or wages payable to such a firefighter, or for the cost of medical or hospital care or treatment furnished, after such date as the health authorities or such physician shall certify that such injured or sick firefighter has recovered and is physically able to perform his or her regular duties in the company or department. Any injured or sick firefighter who shall refuse to accept such medical treatment or hospital care or shall refuse to permit medical inspections as herein authorized, including examinations resulting from the application of subdivision two hereof, shall be deemed to have waived his or her rights under this section in respect to expenses incurred for medical treatment or hospital care or salary or wages payable after such refusal.

Notwithstanding any provision of law to the contrary, a provider of medical treatment or hospital care furnished pursuant to the provisions of this section shall not collect or attempt to collect reimbursement for such treatment or care from any such member of the fire department of any such city.

2. Payment of the full amount of regular salary or wages, as provided by subdivision one of this section, shall be discontinued with respect to any firefighter who is permanently disabled as a result of an injury or sickness incurred or resulting from the performance of his or her duties if such firefighter is granted an accidental disability retirement allowance pursuant to section three hundred sixty-three of the retirement and social security law, a retirement for disability incurred in performance of duty allowance pursuant to section three hundred sixty-three-c of the retirement and social security law or similar accidental disability pension provided by the pension fund of which he or she is a member; provided, however, that in any such case such firefighter shall continue to receive from the municipality or fire district by which he or she is employed, until such time as he or she shall have attained the mandatory service retirement age applicable to him or her or shall have attained the age or performed the period of service specified by applicable law for the termination of his or her service, the difference between the amounts received under such allowance or pension and the amount of his or her regular salary or wages. Any payment made by a municipal corporation or fire district pursuant to the provisions of this subdivision shall be deemed to have been made for a valid and lawful public purpose. If application for such retirement allowance or pension is not made by such firefighter, application therefor may be made by the head of the fire company or fire department or as otherwise provided by the fire district or by the chief executive officer or local legislative body of the municipality by which such firefighter is employed. If such application for accidental disability retirement allowance or retirement for disability incurred in performance of duty allowance is denied, the fire district or municipal corporation by which such firefighter is employed may appeal such determination.

3. If such a firefighter is not eligible for or is not granted such accidental disability retirement allowance or retirement for disability incurred in performance of duty allowance or similar accidental disability pension and is nevertheless, in the opinion of such health authorities or physician, unable to perform his or her regular duties as a result of such injury or sickness but is able, in their opinion, to perform specified types of light duty, payment of the full amount of regular salary or wages, as provided by subdivision one of this section, shall be discontinued with respect to such firefighter if he or she shall refuse to perform such light duty if the same is

available and offered to him or her, provided, however, that such light duty shall be consistent with his or her status as a firefighter and shall enable him or her to continue to be entitled to his or her regular salary or wages, including increases thereof and fringe benefits, to which he or she would have been entitled if he or she were able to perform his or her regular duties.

4. If such a firefighter is not eligible for or is not granted an accidental disability retirement allowance or retirement for disability incurred in performance of duty allowance or similar accidental disability pension, he or she shall not be entitled to further payment of the full amount of regular salary or wages, as provided by subdivision one of this section, after he or she shall have attained the mandatory service retirement age applicable to him or her or shall have attained the age or performed the period of service specified by applicable law for the termination of his or her service. Where such a firefighter retires or is retired under any procedure applicable to him or her, including but not limited to circumstances described in subdivision two of this section or in this subdivision, he or she shall thereafter, in addition to any portion of regular wages or salary and/or any retirement allowance or pension to which he or she is then entitled, continue to be entitled to medical treatment and hospital care necessitated by reason of such injury or illness.

4-a. Any benefit payable pursuant to subdivision two of this section to a person who is granted retirement for disability incurred in performance of duty pursuant to section three hundred sixty-three-c of the retirement and social security law shall be reduced by the amount of the benefits that are finally determined payable under the workers' compensation law by reason of accidental disability.

5. The appropriate municipal or fire district officials may transfer such a firefighter to a position in the same or another agency or department where they are able to do so pursuant to applicable civil service requirements and provided the firefighter shall consent thereto.

6. Any firefighter receiving payments or benefits pursuant to this section, who engages in any employment other than as provided in subdivision three or five of this section shall on the commencement of such employment, forfeit his or her entitlement to any payments and benefits hereunder, and any such payment or benefit unlawfully received by such firefighter shall be refunded to and may be recovered by the municipal corporation or fire district employing such firefighter in a civil action. For the purposes of this section, employment shall not include income derived from passive involvement with: gains derived from dealings in property, interest income, rents from real property, royalties, dividends, alimony and separate maintenance payments, annuities, income from life insurance and endowment contracts, other pensions, income from the discharge of indebtedness, income in the respect of a decedent, and income from an interest in an estate or trust.

7. Notwithstanding any provision of law contrary thereto contained herein or elsewhere, a cause of action shall accrue to the municipality or fire district aforesaid for reimbursement in such sum or sums actually paid as a salary or wages and/or for medical or hospital treatment, as against any third party against whom the firefighter shall have a cause of action for the injuries sustained.

HISTORY:

Add, L 1941, ch 15, § 2, eff Feb 7, 1941; amd, L 1946, ch 919, § 1; L 1951, ch 812, § 1, eff May 1, 1951; L 1977, ch 965, § 1, eff Jan 1, 1978; L 1984, ch 661, §§ 3, 4, eff Aug 1, 1984; L 1986, ch 806, § 2, eff Sept 1, 1986; L 1998, ch 481, § 1, eff July 29, 1998; L 2018, ch 476, § 53, effective December 28, 2018; L 2020, ch 325, § 1, effective December 15, 2020.

Amendment Notes The 2018 amendment by ch 476, § 53, substituted "firefighters" for "firemen" in the section heading; substituted "firefighter" for "fireman" wherever it appears; and added "or her" and "or she" wherever it appears.

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1. Generally

Municipal employees were not required to show more than a direct causal relationship between job duties and the resulting illness or injury, such that they were "injured in the performance of their duties" in order to be eligible for benefits under N.Y. Gen. Mun. Law § 207-c, as there was no heightened risk showing

required of them in order to qualify for such benefits; the purpose of creating § 207-c was to create parity between police officers and firefighters, who had been eligible for those same types of benefits under N.Y. Gen. Mun. Law § 207-a. Theroux v Reilly, 1 N.Y.3d 232, 771 N.Y.S.2d 43, 803 N.E.2d 364, 2003 N.Y. LEXIS 4029 (N.Y. 2003).

Statute governing disability benefits for firefighters guarantees that any firefighter who suffers employment connected disability will receive a full annual wage not to be interrupted in any respect. Pease v Colucci, 59 A.D.2d 233, 399 N.Y.S.2d 519, 1977 N.Y. App. Div. LEXIS 13550 (N.Y. App. Div. 4th Dep't 1977).

Collective bargaining provision which under certain circumstances confers upon private physician selected by mutual agreement of parties power to decide whether firefighter has sustained job related illness or injury for purposes of establishing eligibility for benefits pursuant to § 207-a is valid. Local 589, International Asso. of Fire Fighters v Newburgh, 116 A.D.2d 396, 501 N.Y.S.2d 369, 1986 N.Y. App. Div. LEXIS 51030 (N.Y. App. Div. 2d Dep't 1986).

In order to obtain benefits under CLS Gen Mun § 207-a, firefighter must show that he was injured in or became sick as result of performance of his or her duties, and he was disabled from performing his regular duties as result of such injury or illness. Flynn v Zaleski, 212 A.D.2d 706, 622 N.Y.S.2d 791, 1995 N.Y. App. Div. LEXIS 1662 (N.Y. App. Div. 1st Dep't), app. denied, 87 N.Y.2d 802, 638 N.Y.S.2d 425, 661 N.E.2d 999, 1995 N.Y. LEXIS 4975 (N.Y. 1995).

Article 78 proceeding challenging city's denial of benefits under CLS Gen Mun § 207-a is not in nature of mandamus to compel performance of continuing statutory duty, but rather is proceeding to review, subject to 4-month statute of limitations, because city is allowed to make its own determination as to whether petitioner is entitled to § 207-a benefits. Dearman v City of White Plains, 237 A.D.2d 603, 655 N.Y.S.2d 599, 1997 N.Y. App. Div. LEXIS 3023 (N.Y. App. Div. 2d Dep't 1997).

CLS Gen Mun § 207-a does not give firefighter right to seek "status" determination from municipality in absence of current need for benefits. Lewis v City of Gloversville, 246 A.D.2d 804, 667 N.Y.S.2d 796, 1998 N.Y. App. Div. LEXIS 298 (N.Y. App. Div. 3d Dep't 1998).

An action by a firefighter for an injunction restraining a fire chief from terminating his employment would be converted to a CPLR article 78 proceeding to compel an administrative hearing and the firefighter would be reinstated to the payroll until a determination was made pursuant to said hearing, where the firefighter allegedly injured his back in the performance of his duties but received his full regular salary without objection for five years, which both the firefighter and the fire department understood was paid pursuant to Gen Mun L § 207-a, and where the fire chief terminated the firefighter's employment at the end of that time pursuant to Civ S Law § 73 following a physical examination, which termination appeared to be in connection with the firefighter's unsuccessful applications for benefits under § 363 of the Retirement and Social Security Law and the Workers' Compensation Law, since termination of the firefighter's employment for these reasons is inconsistent with Gen Mun L § 207-a. Legg v Fitzmaurice, 112 Misc. 2d 283, 446 N.Y.S.2d 961, 1981 N.Y. Misc. LEXIS 3423 (N.Y. Sup. Ct. 1981).

Because a fire district's reclassification of all captains as deputy chiefs except a retired captain, the retired captain was essentially demoted in violation of N.Y. Gen. Mun. Law § 207-a(2); therefore, pursuant to N.Y. C.P.L.R. art. 78, the district's determination was annulled and set aside; the issue was a question of law that required no evidentiary hearing. Gresis v Fairview Fire Dist., 831 N.Y.S.2d 874, 15 Misc. 3d 209, 237 N.Y.L.J. 21, 2007 N.Y. Misc. LEXIS 122 (N.Y. Sup. Ct. 2007).

Firemen and policemen injured in performance of their duties are not limited as to remedies exclusively by §§ 207-a and 207-c of this law. 1963 Op St Compt No. 63-248.

Supplemental benefit payments made by a municipality to a permanently disabled fireman who is granted an accidental disability retirement allowance or pension are subject to withholding for income tax purposes but are exempt from social security withholding. 1979 Op St Compt No. 79-767.

Village which has terminated its paid fire department is still obligated to pay village firefighter, who was disabled prior to termination of department, his full salary under CLS Gen Mun § 207-a unless there is voluntary agreement to contrary. 1988 Op St Compt No. 88-27, 1988 N.Y. Comp. LEXIS 23.

A city may not waive its right to reimbursement for additional expenditures made pursuant to this section and § 207-c. 1964 Op St Compt No. 64-340.

2. Constitutionality

Chapter 965 of the Laws of 1977, which amended section 207-a of the General Municipal Law by providing that a fireman who became disabled because of injury or illness incurred as a result of the performance of his duties is no longer entitled to receive the full amount of his regular salary or wages until his disability has ceased but shall receive instead his regular salary or wages only until he reaches his mandatory retirement age or attains the age or performs the period of service specified by applicable law for the termination of his service, does not work an impairment of rights guaranteed by the contract clause of the Federal Constitution (USCS Const, art I, § 10), since the statute contains no words of contract but rather expresses a public policy as determined by the Legislature and the matters addressed by the statute are among those classes of legislative acts long presumed to create no private contractual rights, and since no consummated unilateral contract arose at the moment of the injuries to plaintiffs, firemen disabled by illness or injury incurred in the line of duty who were receiving full salary and medical expenses pursuant to former section 207-a of the General Municipal Law prior to the effective date of chapter 965; moreover, the operation of chapter 965 does not impair plaintiffs' rights as members of a public pension system in violation of section 7 of article V of the State Constitution, which construes membership in any pension or retirement system as a contractual relationship which shall not be diminished or impaired, since the fact that there can be no constitutional impairment of pension system benefits does not create a constitutional right to stay in public employment. Cook v Binghamton, 48 N.Y.2d 323, 422 N.Y.S.2d 919, 398 N.E.2d 525, 1979 N.Y. LEXIS 2402 (N.Y. 1979).

Former city firemen who had become disabled as a result of injuries sustained in the performance of their duties who were receiving their regular salaries and wages pursuant to Gen Mun Law § 207-a, were not entitled to payment for unused vacation time based upon their collective bargaining agreement with the city or upon any theory of statutory entitlement, where the agreement was silent regarding the status of disabled employees and where their rights under § 207-a were expressly limited to regular salary or wages. Chalachan v Binghamton, 55 N.Y.2d 989, 449 N.Y.S.2d 187, 434 N.E.2d 256, 1982 N.Y. LEXIS 3162 (N.Y. 1982).

Disabled firefighter's right to receive CLS Gen Mun § 207-a disability payments is property interest giving rise to procedural due process protection under Fourteenth Amendment before those payments are terminated. Uniform Firefighters, Local 2562 v City of Cohoes, 94 N.Y.2d 686, 709 N.Y.S.2d 481, 731 N.E.2d 137, 2000 N.Y. LEXIS 901 (N.Y. 2000).

Section of General Municipal Law governing disability benefits for firefighter was intended to treat firefighter who was injured in the performance of his duties as a member of a special class, as such a firefighter receives full salary without being required to perform any work for so long as his disability continues and such a fireman receives special treatment from moment of his injury and disability, and thus continuation of benefits to disabled firefighter does not constitute unequal treatment of employees similarly situated even if others of same rank and comparable seniority are demoted and reduced in salary as the result of abolition of positions for economy reasons. Pease v Colucci, 59 A.D.2d 233, 399 N.Y.S.2d 519, 1977 N.Y. App. Div. LEXIS 13550 (N.Y. App. Div. 4th Dep't 1977).

Chapter 965 of the Laws of 1977, which amended section 207-a of the General Municipal Law by providing, *inter alia,* that a fireman who became disabled because of injury or illness incurred as a result of the performance of his duties is no longer entitled to receive the full amount of his regular salary or wages until his disability has ceased but shall receive instead his regular salary

or wages only until he reaches his mandatory retirement age or attains the age or performs the period of service specified by applicable law for the termination of his service, is constitutional inasmuch as it was enacted as a remedial statute to alleviate what were deemed to be the excessively costly and undesirable effects of section 207-a, and, as a remedial statute, it can be given retrospective application to the extent that it does not impair vested rights; accordingly, plaintiffs, disabled firemen receiving benefits pursuant to section 207-a prior to the amendment, may be required to accept the reduced retirement benefits upon their reaching retirement age or the termination of their service inasmuch as the Legislature, in providing for the retirement or termination from service of disabled firemen upon the happening of certain specified events and for the consequent reduction in the payments which they as retirees will receive, was not impairing any vested right of said firemen, whether contractual or otherwise, but rather was merely altering the terms and conditions of the firemen's employment, an action which was clearly within its power. Cook v Binghamton, 67 A.D.2d 469, 416 N.Y.S.2d 349, 1979 N.Y. App. Div. LEXIS 10132 (N.Y. App. Div. 3d Dep't), modified, 48 N.Y.2d 323, 422 N.Y.S.2d 919, 398 N.E.2d 525, 1979 N.Y. LEXIS 2402 (N.Y. 1979).

1984 amendments to CLS Gen Mun § 207-a and CLS Retire & S S § 363-c, which added "duty disability retirement" benefit to Retirement and Social Security Law, did not reduce retirement benefits of firefighter who became disabled in 1969, within purview of nonimpairment clause (CLS NY Const Art V § 7), and state comptroller was properly granted summary judgment in action wherein fireman claimed that their application would result in his ultimately receiving less than maximum benefits of 75 percent of his final average salary, which he might have received had he remained on public payroll pursuant to § 207-a, since (1) § 207-a was enacted as matter of public policy and could be amended without violating nonimpairment clause, (2) firefighter's expectation that he would have remained in public employment was not within protection of nonimpairment clause, and (3) 1984 amendments were expressly made retroactive. Lake v Regan, 135 A.D.2d 312, 525 N.Y.S.2d 425, 1988 N.Y. App. Div. LEXIS 2063 (N.Y. App. Div. 3d Dep't), app. dismissed, 72 N.Y.2d 840, 530 N.Y.S.2d 555, 526 N.E.2d 46, 1988 N.Y. LEXIS 1047 (N.Y. 1988), app. denied, 72 N.Y.2d 807, 533 N.Y.S.2d 56, 529 N.E.2d 424, 1988 N.Y. LEXIS 2618 (N.Y. 1988).

3. Retroactive effect

Chapter 965 of the Laws of 1977, which amended section 207-a of the General Municipal Law by providing, *inter alia,* that a fireman who became disabled because of injury or illness incurred as a result of the performance of his duties is no longer entitled to receive the full amount of his regular salary or wages until his disability has ceased but shall receive instead his regular salary or wages only until he reaches his mandatory retirement age or attains the age or performs the period of service specified by applicable law for the termination of his service, is constitutional inasmuch as it was enacted as a remedial statute to alleviate what were deemed to be the excessively costly and undesirable effects of section 207-a, and, as a remedial statute, it can be given retrospective application to the extent that it does not impair vested rights; accordingly, plaintiffs, disabled firemen receiving benefits pursuant to section 207-a prior to the amendment, may be required to accept the reduced retirement benefits upon their reaching retirement age or the termination of their service inasmuch as the Legislature, in providing for the retirement or termination from service of disabled firemen upon the happening of certain specified events and for the consequent reduction in the payments which they as retirees will receive, was not impairing any vested right of said firemen, whether contractual or otherwise, but rather was merely altering the terms and conditions of the firemen's employment, an action which was clearly within its power. Cook v Binghamton, 67 A.D.2d 469, 416 N.Y.S.2d 349, 1979 N.Y. App. Div. LEXIS 10132 (N.Y. App. Div. 3d Dep't), modified, 48 N.Y.2d 323, 422 N.Y.S.2d 919, 398 N.E.2d 525, 1979 N.Y. LEXIS 2402 (N.Y. 1979).

This statute is for the benefit of a fireman of a paid fire department, while he remains a member of the fire department. It does not contemplate payment when he ceases to be an employee of the city and a member of the department. It does not cover him after he retires from city employment. Robinson v Cole, 84 N.Y.S.2d 514, 193 Misc. 717, 1948 N.Y. Misc. LEXIS 3615 (N.Y. Sup. Ct. 1948).

As a general rule, amendatory statutes are presumed to operate prospectively and not retroactively unless the language of the statute indicates a legislative intent to the contrary; accordingly, plaintiffs, who are partially disabled and thereby incapable of performing active firefighting duties, are entitled to continue receiving disability benefits (General Municipal Law, § 207-a) and may not be forced to perform light duty as a condition to receiving benefits, as their rights became vested as of the dates of their respective injuries and as such remain unaffected by a later amendment (L 1977, ch 965) which permits the termination of benefits for refusing to perform light duty while only partially disabled. Ring v Langdon, 94 Misc. 2d 415, 404 N.Y.S.2d 835, 1978 N.Y. Misc. LEXIS 2260 (N.Y. Sup. Ct. 1978), rev'd, 69 A.D.2d 998, 416 N.Y.S.2d 137, 1979 N.Y. App. Div. LEXIS 11776 (N.Y. App. Div. 4th Dep't 1979).

Section 207-a of the General Municipal Law, which, in its amended form, effective June 1, 1978, allows a permanently disabled fireman whose injuries were the result of performance of his duties to obtain the difference between his retirement benefits and his full salary from the employing municipality, may not be applied retroactively to include firemen who retired prior to the effective date of the amendment, since a statute granting a new remedy should not be given retroactive effect unless express words or necessary implication require such an interpretation, and the remedial intent of section 207-a is to relieve a financial burden on municipalities which were, prior to amendment, required to pay disabled firemen their full salaries, and if section 207-a were given retroactive effect, the result would be an increased burden upon them, which is not the intent of the statute. Luisi v Department of Fire, 101 Misc. 2d 529, 421 N.Y.S.2d 338, 1979 N.Y. Misc. LEXIS 2717 (N.Y. Sup. Ct. 1979).

Village which has terminated its paid fire department is still obligated to pay village firefighter, who was disabled prior to termination of department, his full salary under CLS Gen Mun § 207-a unless there is voluntary agreement to contrary. 1988 Op St Compt No. 88-27, 1988 N.Y. Comp. LEXIS 23.

Whether firefighter waives his rights under § 207-a is a question of fact, not for this Department's determination; § 207-a is applied as it existed at time of disability, not as amended retroactively. 1979 Op St Compt No. 79-127.

4. Construction

Statute governing disability benefits to firefighters is a remedial statute enacted for benefit of firefighters and should be liberally construed in their favor. Pease v Colucci, 59 A.D.2d 233, 399 N.Y.S.2d 519, 1977 N.Y. App. Div. LEXIS 13550 (N.Y. App. Div. 4th Dep't 1977).

Village was not entitled under CLS Gen Mun § 207-a(3) to make independent determination of firefighter's eligibility for accidental disability retirement allowance or performance of duty disability allowance; Comptroller has exclusive authority under CLS Retire & S S § 374(b) to determine retirement applications, and language of § 207-a(3) permits determination only in event firefighter is either not eligible for, or not granted, accidental disability allowance. Crocker v Endicott, 184 A.D.2d 820, 584 N.Y.S.2d 675, 1992 N.Y. App. Div. LEXIS 7656 (N.Y. App. Div. 3d Dep't 1992).

Since this statute was enacted for the benefit of firemen who were disabled in the performance of their duties it is remedial in nature and must be liberally construed. Tyler v Gadwood, 89 N.Y.S.2d 126, 195 Misc. 674, 1949 N.Y. Misc. LEXIS 2225 (N.Y. Sup. Ct. 1949), rev'd, 279 A.D. 1138, 112 N.Y.S.2d 890, 1952 N.Y. App. Div. LEXIS 6089 (N.Y. App. Div. 1952).

5. —Wages

Term "wages" within statute, which requires a municipality of less than one-million to pay fireman the full amount of his regular salary or wages until disability arising from performance of his duties has ceased, does not include, fringe benefits. Geremski v Department of Fire, 78 Misc. 2d 555, 357 N.Y.S.2d 975, 1974 N.Y. Misc. LEXIS 1445 (N.Y. Sup. Ct. 1974), aff'd, 49 A.D.2d 1013, 375

N.Y.S.2d 500, 1975 N.Y. App. Div. LEXIS 11366 (N.Y. App. Div. 4th Dep't 1975).

The terms "salary and wages" as used in these sections do not include a uniform allowance. 1982 Op St Compt No. 82-352, 1982 N.Y. Comp. LEXIS 376.

The phrase "regular salary or wages" as used in General Municipal Law, § 207-a(2) includes longevity increments. 1982 Op St Compt No. 82-316, 1982 N.Y. Comp. LEXIS 414.

6. Relationship to other laws

In enacting this section, the legislature intended no conflict with Civil Service Law § 79, but on the contrary, adopted it in furtherance of its public policy to protect firemen injured and disabled while in the performance of their duties. The legislature did not intend to repeal or make this section ineffective in any way by reason of its amendment in 1946 and again in 1951. Birmingham v Mirrington, 284 A.D. 721, 134 N.Y.S.2d 456, 1954 N.Y. App. Div. LEXIS 3480 (N.Y. App. Div. 1954).

Section of Civil Service Law was intended to implement agreement between city and its firefighters to permit layoffs on basis of service in grade or title rather than on basis of total seniority with employer and was not intended to abrogate or diminish effect of disability benefits provisions of section of General Municipal Law, and thus rights of disabled lieutenant in fire department to disability benefits vested at time of his disability and he could not be divested of those rights by city's abolition of several lieutenants' positions for economy reasons. Pease v Colucci, 59 A.D.2d 233, 399 N.Y.S.2d 519, 1977 N.Y. App. Div. LEXIS 13550 (N.Y. App. Div. 4th Dep't 1977).

It was improper for city to deny application for benefits under CLS Gen Mun § 207-a(2) on ground that firefighter was not permanently disabled as result of his performance of duties, where State Comptroller had granted his application for performance of duty disability retirement. Delahunt v City of Oswego, 222 A.D.2d 1078, 636 N.Y.S.2d 238, 1995 N.Y. App. Div. LEXIS 14154 (N.Y. App. Div. 4th Dep't 1995), app. denied, 88 N.Y.2d 801, 644 N.Y.S.2d 688, 667 N.E.2d 338, 1996 N.Y. LEXIS 1048 (N.Y. 1996).

Fire department was subject to liability for alleged negligence in hiring, retaining, training, or supervising firefighter who struck plaintiff firefighter in back, and fact that plaintiff could not sue fire department directly because plaintiff had received benefits under CLS Gen Mun § 207-a did not foreclose offending firefighter from seeking apportionment of liability and contribution from fire department. Mrowczynski v Kerruish, 238 A.D.2d 924, 661 N.Y.S.2d 570, 1997 N.Y. App. Div. LEXIS 4729 (N.Y. App. Div. 4th Dep't), app. denied, 90 N.Y.2d 806, 663 N.Y.S.2d 511, 686 N.E.2d 223, 1997 N.Y. LEXIS 2976 (N.Y. 1997).

Injured firefighter's receipt of disability benefits under CLS Gen Mun § 207-a constituted his exclusive remedy, barring common-law negligence claims and CLS Gen Mun § 205-a claims against his municipal employer. Petendree v City of Yonkers, 270 A.D.2d 403, 704 N.Y.S.2d 646, 2000 N.Y. App. Div. LEXIS 3238 (N.Y. App. Div. 2d Dep't 2000).

Firefighter could not prohibit a city from making a determination under N.Y. Gen. Mun. Law § 207-a(2) as to whether the firefighter was permanently disabled prior to the receipt of supplemental benefits because receipt of a retirement disability allowance under N.Y. Retire. & Soc. Sec. Law § 363-c did not preclude the city's separate determination of permanent disability. Matter of Solano v City of Mount Vernon, 49 A.D.3d 762, 853 N.Y.S.2d 641, 2008 N.Y. App. Div. LEXIS 2557 (N.Y. App. Div. 2d Dep't 2008).

Provisions of special law Ch. 767 of the laws of 1948, enacted April 3, 1948, amending charter of city of Rochester in relation to compensation for injuries of members of police and fire department of the city, prevail over provisions of this section, insofar, as the two are in conflict. Adam v Farbo, 16 Misc. 2d 614, 184 N.Y.S.2d 772, 1959 N.Y. Misc. LEXIS 3929 (N.Y. Sup. Ct. 1959).

7. —Retirement and Social Security Law

Line-of-duty presumption for firefighters' heart-related retirement disability benefits set forth in CLS Retire & S S § 363-a should not be read into CLS Gen Mun § 207-a, since the two statutes represent separate disability systems with differing coverage and consequences. Sutka v Conners, 73 N.Y.2d 395, 541 N.Y.S.2d 191, 538 N.E.2d 1012, 1989 N.Y. LEXIS 466 (N.Y. 1989).

Comptroller's determination that firefighter was permanently incapacitated for performance of duty as result of his service, and was entitled to benefits under CLS Retire & S S § 363-c, was not binding on municipality in separate proceeding to determine firefighter's eligibility for benefits under CLS Gen Mun § 207-a; § 363-c and § 207-a represent separate disability systems with differing coverage and consequences, there is no specific statutory language or history suggesting that eligibility determinations thereunder were not intended to be separately made, and principles of collateral estoppel are inapplicable because municipalities are not parties to proceedings before Comptroller. Cook v City of Utica, 88 N.Y.2d 833, 644 N.Y.S.2d 479, 666 N.E.2d 1352, 1996 N.Y. LEXIS 682 (N.Y. 1996).

Comptroller's determination granting firefighter retirement benefits pursuant to CLS Retire & SS § 363-c did not mandate that fire district pay him benefits under CLS Gen Mun § 207-a. Barson v Regan, 177 A.D.2d 21, 580 N.Y.S.2d 567, 1992 N.Y. App. Div. LEXIS 2835 (N.Y. App. Div. 3d Dep't 1992).

Firefighter who qualifies for disability pension under CLS Retire § S S § 363-c is not automatically entitled to supplemental wage benefits under CLS Gen Mun § 207-a, and determination of whether firefighter is entitled to benefits under § 207-a must be made, in first instance, by municipal employer. Bernhard v Hartsdale Fire Dist., 226 A.D.2d 715, 641 N.Y.S.2d 868, 1996 N.Y. App. Div. LEXIS 4688 (N.Y. App. Div. 2d Dep't 1996).

Petitioner, a disabled firefighter receiving disability retirement benefits under N.Y. Gen. Mun. Law § 207-a(2) sued respondents, a city and its employee benefits coordinator (city), from reducing those benefits by supplemental retirement benefits the firefighter received pursuant to N.Y. Retire. & Soc. Sec. Law § 378; in reversing dismissal of counterclaim, appeals court reinstated city's counterclaim to recoup disability retirement plan benefits it paid to the firefighter for amounts firefighter received under supplemental state plan; city had common law right to recoup overpayments. Farber v City of Utica, 1 A.D.3d 942, 767 N.Y.S.2d 758, 2003 N.Y. App. Div. LEXIS 12254 (N.Y. App. Div. 4th Dep't 2003).

It was not arbitrary, capricious or abuse of discretion for respondent to terminate, at age 62, supplemental benefits paid to petitioner under CLS Gen Mun § 207-a(2) where petitioner had chosen 62-year age retirement option under CLS Retire & S S § 384-d; fact that petitioner was receiving accidental disability retirement benefits under CLS Retire & S S § 363, as well as supplemental benefits under CLS Gen Mun § 207-a, was not controlling. Farrell v Dolce, 170 Misc. 2d 333, 648 N.Y.S.2d 511, 1996 N.Y. Misc. LEXIS 372 (N.Y. Sup. Ct. 1996).

Age Discrimination in Employment Act (29 USCS § 623) did not preempt 62-year age retirement option under CLS Retire & S S chosen by former firefighter who, prior to retirement, was rendered permanently disabled and eligible for accidental disability retirement benefits under CLS Retire & S S § 363 and supplemental benefits under CLS Gen Mun § 207-a, as his work-related injuries terminated his membership in retirement system. Farrell v Dolce, 170 Misc. 2d 333, 648 N.Y.S.2d 511, 1996 N.Y. Misc. LEXIS 372 (N.Y. Sup. Ct. 1996).

8. Scope of coverage

A disabled city fireman, once his entitlement to disabled fire fighter's benefits is established, remains entitled to them for the rest of his life if his disability should last so long. Weber v Department of Fire, 54 A.D.2d 164, 388 N.Y.S.2d 397, 1976 N.Y. App. Div. LEXIS 13745 (N.Y. App. Div. 4th Dep't 1976).

Where the retired firefighters acted in accordance with the statutory scheme of N.Y. Gen. Mun. Law § 207-a(2) and N.Y. Retire. & Soc. Sec. Law § 384-d (b), they did not act in contravention of public policy by selecting a retirement package that they perceived as being the most advantageous; therefore, the trial court properly granted their N.Y.C.P.L.R. art. 78 petition against the city. Bobby v City of Niagara Falls, 5 A.D.3d 997, 774 N.Y.S.2d 899, 2004 N.Y. App. Div. LEXIS 2836 (N.Y. App. Div. 4th Dep't 2004).

9. —Paid firefighters

Since the county airport's fire rescue unit did not fall within any of the statutory categories which could be considered a "fire company" under N.Y. CLS Gen. Mun. § 100, as it was not organized by a county, city, town, village, or fire district department, the employee was not an officer or member of a fire company entitled to benefits under § 207-a. Robbins v County of Broome, 87 N.Y.2d 831, 637 N.Y.S.2d 679, 661 N.E.2d 151, 1995 N.Y. LEXIS 4430 (N.Y. 1995).

Action against county by plaintiff who served on county's crash fire rescue unit at airport, predicated on plaintiff's status as "paid fireman" under CLS Gen Mun § 207-a (which defines term as "any paid officer or member of an organized fire company or fire department"), should not have been dismissed for failure to state cause of action on basis of court's prior holding that airport crash fire rescue personnel are not members of organized "fire department," since definition of "department" is more restrictive than definition of "company," and it was yet to be determined whether plaintiff was member of organized "fire company." Robbins v County of Broome, 186 A.D.2d 973, 589 N.Y.S.2d 116, 1992 N.Y. App. Div. LEXIS 12396 (N.Y. App. Div. 3d Dep't 1992).

That a disabled firefighter was retired and had been absent from duty over 30 days did not preclude his entitlement to a schedule adjustment, equivalent to an additional 5.5 work hours per week, as provided for in the collective bargaining agreement because he was receiving the adjustment when he retired, and an active firefighter currently employed at his rank would likewise have received the adjustment. Matter of McKay v Village of Endicott, 161 A.D.3d 1340, 77 N.Y.S.3d 537, 2018 N.Y. App. Div. LEXIS 3348 (N.Y. App. Div. 3d Dep't 2018), app. denied, 32 N.Y.3d 913, 117 N.E.3d 817, 93 N.Y.S.3d 258, 2019 N.Y. LEXIS 28 (N.Y. 2019).

Disabled firefighter's base salary used to determine his "regular salary or wages" under N.Y. Gen. Mun. Law § 207-a(2) was that of a current firefighter employed at the First Grade/emergency medical services (EMS) rank; thus, the EMS payment was part of his regular salary or wages for the purpose of calculating the amount of his supplemental disability benefits. Matter of McKay v Village of Endicott, 161 A.D.3d 1340, 77 N.Y.S.3d 537, 2018 N.Y. App. Div. LEXIS 3348 (N.Y. App. Div. 3d Dep't 2018), app. denied, 32 N.Y.3d 913, 117 N.E.3d 817, 93 N.Y.S.3d 258, 2019 N.Y. LEXIS 28 (N.Y. 2019).

This statute is for the benefit of a fireman of a paid fire department, while he remains a member of the fire department. It does not contemplate payment when he ceases to be an employee of the city and a member of the department. It does not cover him after he retires from city employment. Robinson v Cole, 84 N.Y.S.2d 514, 193 Misc. 717, 1948 N.Y. Misc. LEXIS 3615 (N.Y. Sup. Ct. 1948).

10. —Temporary and call firefighters

Petitioner was appointed a temporary fireman pursuant to chapter 47 of the laws of 1943 and if he received injuries or became ill as a result of the performance of his duties he was entitled to benefits under § 207-a, but defendants should be permitted to answer since affidavits submitted on the motion to dismiss the petition raised questions of fact which must be determined. Tyler v Gadwood, 279 A.D. 1138, 112 N.Y.S.2d 890, 1952 N.Y. App. Div. LEXIS 6089 (N.Y. App. Div. 1952).

A substitute or temporary fireman, who was employed as a substitute for a regular fireman on military service, is entitled to the benefits provided for by this section. Tyler v Gadwood, 89 N.Y.S.2d 126, 195 Misc. 674, 1949 N.Y. Misc. LEXIS 2225 (N.Y. Sup. Ct. 1949), rev'd, 279 A.D. 1138, 112 N.Y.S.2d 890, 1952 N.Y. App. Div. LEXIS 6089 (N.Y. App. Div. 1952).

Call firemen compensated on an hourly basis whenever called to duty are covered by this section. In addition to medical treatment and hospital care such a fireman is entitled to be paid at the applicable hourly rate for such occasions when he would have been called but is not called because his injuries or sickness incapacitate him from performing his functions as a call fireman. 1958 NY Ops Atty Gen Jun 18 (Informal), 1958 N.Y. AG LEXIS 169.

11. Injuries constituting disability

In a proceeding in which firefighter sought benefits pursuant to General Municipal Law § 207-a, the parties' collective bargaining agreement (CBA) and State Administrative Procedure Act § 306 required hearing officer to defer to fire district's denial of the firefighter's benefits if that determination was supported by substantial evidence. Therefore, in accordance with that standard and in light of the CBA's terms, the independent hearing officer was required to give deference to the employer's decision, and the firefighter bore the burden of establishing that his employer's denial determination had not been supported by substantial evidence. Matter of Ridge Rd. Fire Dist. v Schiano, 16 N.Y.3d 494, 922 N.Y.S.2d 249, 947 N.E.2d 140, 2011 N.Y. LEXIS 558 (N.Y. 2011).

In an Article 78 proceeding brought by a city fireman to review the denial of his application for salary, medical, and hospital expense benefits pursuant to Gen Mun Law § 207-a, benefits were properly denied where the fireman suffered from a diseased condition of his knee that existed prior to his being hired as a fireman, and where the continuing disease was not a residue of any injury inasmuch as its cause was unknown. Callas v Elmira, 88 A.D.2d 1015, 451 N.Y.S.2d 922, 1982 N.Y. App. Div. LEXIS 17430 (N.Y. App. Div. 3d Dep't 1982).

Firefighter was not entitled to benefits under CLS Gen Mun § 207-a where his coronary artery disease was not job-related and, instead, was caused by fact that he smoked for decades, had high cholesterol, and was overweight. Flynn v Zaleski, 212 A.D.2d 706, 622 N.Y.S.2d 791, 1995 N.Y. App. Div. LEXIS 1662 (N.Y. App. Div. 1st Dep't), app. denied, 87 N.Y.2d 802, 638 N.Y.S.2d 425, 661 N.E.2d 999, 1995 N.Y. LEXIS 4975 (N.Y. 1995).

Denial of supplemental wage benefits to firefighter under CLS Gen Mun § 207-a was supported by facts that he continued to work performing his regular duties for 5 years after his second injury and for 15 years following his first injury until he voluntarily retired. Bernhard v Hartsdale Fire Dist., 226 A.D.2d 715, 641 N.Y.S.2d 868, 1996 N.Y. App. Div. LEXIS 4688 (N.Y. App. Div. 2d Dep't 1996).

In Article 78 proceeding by firefighter seeking disability benefits under CLS Gen Mun § 207-a(1), city manager had authority to evaluate equivocal testimony of petitioner's medical experts regarding cause of petitioner's disability and properly determined that nerve damage to petitioner's leg was not causally related to performance of his duties as firefighter. Curtis v Hiller, 242 A.D.2d 950, 663 N.Y.S.2d 460, 1997 N.Y. App. Div. LEXIS 10555 (N.Y. App. Div. 4th Dep't 1997), app. dismissed, app. denied, 91 N.Y.2d 883, 668 N.Y.S.2d 554, 691 N.E.2d 626, 1998 N.Y. LEXIS 43 (N.Y. 1998).

Firefighter was entitled to supplementary benefits under CLS Gen Mun § 207-a where unrebutted medical evidence, including opinions of 2 examining physicians, proved that firefighter was suffering from posttraumatic stress disorder directly related to or aggravated by his work as firefighter. Dembowski v Hanna, 245 A.D.2d 1039, 678 N.Y.S.2d 174, 1997 N.Y. App. Div. LEXIS 13783 (N.Y. App. Div. 4th Dep't 1997), app. denied, 91 N.Y.2d 813, 674 N.Y.S.2d 278, 697 N.E.2d 179, 1998 N.Y. LEXIS 1261 (N.Y. 1998).

When disability is attributable to both line-of-duty injury and preexisting nonwork-related condition, benefits under CLS Gen Mun § 207-a must be provided if job caused or contributed to disability to substantial degree. Dembowski v Hanna, 245 A.D.2d 1039, 678 N.Y.S.2d 174, 1997 N.Y. App. Div. LEXIS 13783 (N.Y. App. Div. 4th Dep't 1997), app. denied, 91 N.Y.2d 813, 674 N.Y.S.2d 278, 697 N.E.2d 179, 1998 N.Y. LEXIS 1261 (N.Y. 1998).

A fireman was injured within the meaning of this section, when, as a result of a slip while standing on a piece of hose, a prior diseased condition of the eye was aggravated and blindness resulted. Adam v Farbo, 16 Misc. 2d 614, 184 N.Y.S.2d 772, 1959 N.Y. Misc. LEXIS 3929 (N.Y. Sup. Ct. 1959).

Where expert medical evidence presented by firefighter indicated that he had suffered a coronary occlusion which severely blocked one of the coronary arteries and that such occlusion was caused or contributed to by his strenuous activity as a firefighter, firefighter was disabled within the provisions of General Municipal Law § 207-a. Geremski v Department of Fire, 72 Misc. 2d 166, 338 N.Y.S.2d 543, 1972 N.Y. Misc. LEXIS 2351 (N.Y. Sup. Ct.

1972), aff'd, Geremski v Department of Fire of Syracuse, 42 A.D.2d 1050, 1973 N.Y. App. Div. LEXIS 7989 (N.Y. App. Div. 4th Dep't 1973).

Municipal fire district that had paid N.Y. Gen. Mun. Law § 207-a(2) disability benefits to a firefighter who had been granted a performance of duty disability retirement was enjoined from terminating the firefighter's § 207-a(2) benefits on the basis of any alleged change in the firefighter's medical condition because § 207-a(2) did not provide a municipality with authority to continue to monitor the medical condition of retired firefighters who were deemed permanently disabled. Matter of McGowan v Fairview Fire Dist., 823 N.Y.S.2d 649, 14 Misc. 3d 270, 2006 N.Y. Misc. LEXIS 3105 (N.Y. Sup. Ct. 2006), aff'd, 51 A.D.3d 796, 858 N.Y.S.2d 278, 2008 N.Y. App. Div. LEXIS 4296 (N.Y. App. Div. 2d Dep't 2008).

The protections provided by General Municipal Law, §§ 50-c and 207-a apply to a paid city fireman who is occasionally assigned non-firemanic duties and is injured while performing such duties. 1978 Op St Compt No. 78-349, 1978 N.Y. Comp. LEXIS 83.

12. —Injuries occurring in another municipality

Village paid firemen (injured while answering call for outside assistance) entitled to benefits of this section from village. No provision of law required outside territory from which call is made to reimburse village. 1953 Op St Compt No. 53-6036.

13. Payment of salary or wages

The phrased "amounts received" in N.Y. Gen. Mun. Law § 207-a(2) includes both base pension benefits and supplemental entitlements received by a disabled firefighter pursuant to New York's Retirement and Social Security Law; therefore, the amount of a pensioner's regular salary or wages is calculated based on the current salary of an active firefighter at the same grade the pensioner held upon retirement. Farber v City of Utica, 97 N.Y.2d 476, 743 N.Y.S.2d 42, 769 N.E.2d 799, 2002 N.Y. LEXIS 490 (N.Y.), cert. denied, 537 U.S. 823, 123 S. Ct. 109, 154 L. Ed. 2d 33, 2002 U.S. LEXIS 6032 (U.S. 2002).

Parties to collective bargaining agreement empowered arbitrator to define "regular salary" as used in statute even though he did so in manner which was at variance with judicial interpretation where, although arbitrator initially exceeded his authority, parties returned to him for sole purpose of having arbitrator ascertain and compute petitioner's damages, and there was no strong public policy issue which would warrant modification. Philson v Philson, 110 A.D.2d 830, 488 N.Y.S.2d 78, 1985 N.Y. App. Div. LEXIS 48729 (N.Y. App. Div. 2d Dep't 1985).

Court would annul city's determination denying firefighter's application for wage supplement benefits under CLS Gen Mun § 207-a(2) where Comptroller's determination, upon firefighter's timely application made within 2 years from date of his injury (CLS Retire & S S §§ 363(a)(2), 363-c(b)(2)), that firefighter was "permanently incapacitated for the performance of duties...as the natural and proximate result of an accident sustained in service," necessarily decided issue of whether firefighter was "permanently disabled as a result of an injury...incurred or resulting from the performance of his duties" under CLS Gen Mun § 207-a(2). Pidel v City of Yonkers, 208 A.D.2d 845, 617 N.Y.S.2d 844, 1994 N.Y. App. Div. LEXIS 10002 (N.Y. App. Div. 2d Dep't 1994), app. denied, 85 N.Y.2d 812, 631 N.Y.S.2d 288, 655 N.E.2d 401, 1995 N.Y. LEXIS 2196 (N.Y. 1995).

Trial court properly denied the disabled firefighters' petition to annul a city's determination to exclude compensation for night differential, check-in pay, and holiday pay from their prospective benefit payments because they did not sustain their burden of establishing their entitlement to compensation for such pay as part of their disability benefits. Matter of Borelli v City of Yonkers, 187 A.D.3d 897, 134 N.Y.S.3d 41, 2020 N.Y. App. Div. LEXIS 5937 (N.Y. App. Div. 2d Dep't 2020).

Retired/disabled firefighters were not entitled to N.Y. C.P.L.R. art. 78 relief in their action to compel wage payments under N.Y. Gen. Mun. Law § 207-a(1) because a city did not demote or otherwise reclassify them, a salary decrease was applicable to all active firefighters, and the retired/disabled firefighters proffered no persuasive argument why they should not be subject to the same salary decrease as active firefighters. Whitted v City of Newburgh, 961 N.Y.S.2d 727, 39 Misc. 3d 212, 2013 N.Y. Misc. LEXIS 319 (N.Y. Sup. Ct. 2013), aff'd, 126 A.D.3d 910, 5 N.Y.S.3d 510, 2015 N.Y. App. Div. LEXIS 2124 (N.Y. App. Div. 2d Dep't 2015).

Municipality's erroneous withholding of taxes from non-taxable disability payments paid to disabled firefighter does not state cause of action under 42 USCS § 1983. DiGiovanni v City of Rochester, 680 F. Supp. 80, 1988 U.S. Dist. LEXIS 1726 (W.D.N.Y. 1988).

A city is obligated to pay full salary to a paid fireman injured in the line of duty. 1962 NY Ops Atty Gen June 22 (Informal), 1962 N.Y. AG LEXIS 160.

Under this section, a city with a population of less than one million must pay a fireman his full salary during his period of disablement from injuries or illness incurred while in the performance of his duties necessitating medical or other lawful treatment. There is no authority permitting the city to assign him to duties outside the fire department during such period. 1966 NY Ops Atty Gen Dec 2 (Informal), 1966 N.Y. AG LEXIS 142.

Salary payments made to disabled firefighter pursuant to subdivision (1) of section 207-a are subject to social security withholding taxes; payments made under subdivision (2) are not so subject. 1980 Op St Compt No. 80-426.

14. —Period of entitlement

Inasmuch as chapter 965 of the Laws of 1977 amended section 207-a of the General Municipal Law by providing that a fireman who became disabled because of injury or illness incurred as a result of the performance of his duties is no longer entitled to receive the full amount of his regular salary or wages until his disability has ceased but shall receive instead his regular salary or wages only until he reaches his mandatory retirement age or attains the age or performs the period of service specified by applicable law for the termination of his service, disabled firemen receiving benefits under section 207-a of the General Municipal Law may not be separated from service until they reach the mandatory retirement age of 70, unless they have voluntarily elected additional benefits under section 384 of the Retirement and Social Security Law, since apart from an accidental disability retirement, the only age specified for involuntary retirement occurs at age 70, or at age 62 in the case of those who have voluntarily elected certain additional benefits, and if the additional benefit is not chosen, the member is not subject to separation from service at age 62 and is not subject to mandatory retirement until age 70. Cook v Binghamton, 48 N.Y.2d 323, 422 N.Y.S.2d 919, 398 N.E.2d 525, 1979 N.Y. LEXIS 2402 (N.Y. 1979).

Chapter 965 of the Laws of 1977, which amended section 207-a of the General Municipal Law by providing that a fireman who became disabled because of injury or illness incurred as a result of the performance of his duties is no longer entitled to receive the full amount of his regular salary or wages until his disability has ceased but shall receive instead his regular salary or wages only until he reaches his mandatory retirement age or attains the age or performs the period of service specified by applicable law for the termination of his service, does not work an impairment of rights guaranteed by the contract clause of the Federal Constitution (US Const, art I, § 10), since the statute contains no words of contract but rather expresses a public policy as determined by the Legislature and the matters addressed by the statute are among those classes of legislative acts long presumed to create no private contractual rights, and since no consummated unilateral contract arose at the moment of the injuries to plaintiffs, firemen disabled by illness or injury incurred in the line of duty who were receiving full salary and medical expenses pursuant to former section 207-a of the General Municipal Law prior to the effective date of chapter 965; moreover, the operation of chapter 965 does not impair plaintiffs' rights as members of a public pension system in violation of section 7 of article V of the State Constitution, which construes membership in any pension or retirement system as a contractual relationship which shall not be diminished or impaired, since the fact that there can be no constitutional impairment of pension system benefits does not create a constitutional right to stay in public employment. Cook v Bing-

hamton, 48 N.Y.2d 323, 422 N.Y.S.2d 919, 398 N.E.2d 525, 1979 N.Y. LEXIS 2402 (N.Y. 1979).

A fireman who applied for an accidental disability retirement allowance before his voluntary retirement became effective was entitled to receive from the municipality, upon the granting of the accidental disability retirement allowance, the difference between his regular salary and the disability retirement allowance granted him from and after the date of voluntary retirement, since Gen Mun Law § 207-a, as amended, requires payment to a disabled fireman, whether he voluntarily retires or is involuntarily retired, of the "regular wages or salary" to which he was entitled at the time of retirement, except as reduced by the disability allowance or pension; such entitlement runs from the time of retirement, subject only to a subsequent finding that the disabled fireman was in fact eligible for the accidental disability allowance or pension. Klonowski v Department of Fire, 58 N.Y.2d 398, 461 N.Y.S.2d 756, 448 N.E.2d 423, 1983 N.Y. LEXIS 2933 (N.Y. 1983).

If a disabled fireman does not voluntarily retire, he is entitled to compensation under the provisions of the above statute so long as he has not recovered from his injury, even if such recovery does not take place during the rest of his life. Cook v Binghamton, 24 A.D.2d 122, 264 N.Y.S.2d 466, 1965 N.Y. App. Div. LEXIS 2991 (N.Y. App. Div. 3d Dep't 1965).

Once firefighter is qualified for disability benefits pursuant to statute, firefighter is entitled to his compensation as long as he has not recovered from his injury, even if such remains for the rest of his life, and such compensation must include any subsequent raises in salary given to those in the same grade or title held by the injured fireman at the time of his injury. Pease v Colucci, 59 A.D.2d 233, 399 N.Y.S.2d 519, 1977 N.Y. App. Div. LEXIS 13550 (N.Y. App. Div. 4th Dep't 1977).

This statute is for the benefit of a fireman of a paid fire department, while he remains a member of the fire department. It does not contemplate payment when he ceases to be an employee of the city and a member of the department. It does not cover him after he retires from city employment. Robinson v Cole, 84 N.Y.S.2d 514, 193 Misc. 717, 1948 N.Y. Misc. LEXIS 3615 (N.Y. Sup. Ct. 1948).

A disabled policeman, employed by a city of under one million population, shall receive his salary plus increments accrued during the period of disability until he reaches mandatory retirement age or voluntarily retires prior to such time. 1976 NY Ops Atty Gen Feb 6 (Informal), 1976 N.Y. AG LEXIS 65.

If a city fireman is certified as being recovered and physically fit to return to duty, the city is no longer liable for payment of his salary. 1955 Op St Compt No. 55-7494.

A paid fireman of a city other than New York City who is injured and disabled in line of duty must be paid full salary until his disability has ceased or until he voluntarily retires, and he cannot be retired otherwise than voluntarily. 1962 Op St Compt No. 62-399.

15. —Salary increases

A fireman disabled in the course of his duties is entitled to receive his "regular salary" including increments and cost of living bonuses. Barber v Lupton, 307 N.Y. 770, 121 N.E.2d 614, 307 N.Y. (N.Y.S.) 770, 1954 N.Y. LEXIS 1479 (N.Y. 1954).

Phrase "regular salary or wages" under General Municipal Law § 207-a(2) includes increases in annual salary, even after retirement of injured fireman. Mashnouk v Miles, 55 N.Y.2d 80, 447 N.Y.S.2d 889, 432 N.E.2d 761, 1982 N.Y. LEXIS 3070 (N.Y. 1982); Binghamton v Regan, 114 A.D.2d 551, 494 N.Y.S.2d 165, 1985 N.Y. App. Div. LEXIS 53260 (N.Y. App. Div. 3d Dep't 1985).

Once firefighter is qualified for disability benefits pursuant to statute, firefighter is entitled to his compensation as long as he has not recovered from his injury, even if such remains for the rest of his life, and such compensation must include any subsequent raises in salary given to those in the same grade or title held by the injured fireman at the time of his injury. Pease v Colucci, 59 A.D.2d 233, 399 N.Y.S.2d 519, 1977 N.Y. App. Div. LEXIS 13550 (N.Y. App. Div. 4th Dep't 1977).

In an Article 78 proceeding, the trial court properly held that benefits paid to disabled firemen under Gen Mun Law § 207-a include salary increases paid to active firemen. Drahos v Johnson City, 80 A.D.2d 106, 438 N.Y.S.2d 394, 1981 N.Y. App. Div. LEXIS 9753 (N.Y. App. Div. 3d Dep't 1981).

Because a firefighter was injured while still a probationary employee, the firefighter was not eligible for the salary increases and benefits due to a permanent employee under N.Y. Gen. Mun. Law § 207-a. Matter of Stimpson v DeLong, 30 A.D.3d 532, 817 N.Y.S.2d 112, 2006 N.Y. App. Div. LEXIS 8000 (N.Y. App. Div. 2d Dep't 2006).

The rights of a disabled fireman, receiving his regular salary by reason of injuries sustained in course of duty, are the same as those of any active member of the department, and he is entitled to the benefits of any salary increases based upon length of service without being judged by subjective tests, such as his attitude toward his work, whether he attempts to do more than the minimum assigned to him, or the like. Ellis v Fire Chief of Ithaca, 29 Misc. 2d 37, 215 N.Y.S.2d 520, 1961 N.Y. Misc. LEXIS 3131 (N.Y. Sup. Ct. 1961).

Where a fireman becomes disabled and thereafter receives his regular salary, pursuant to the provisions of this section, he is entitled to increments or increases given since the time of his disability. 1959 Op St Compt No. 59-979.

A paid fireman receiving his full salary under General Municipal Law, § 207-a is also entitled to any salary increases granted the collective bargaining unit of which he is a member. 1978 Op St Compt No. 78-926.

A disabled fireman or policeman who is receiving his regular salary or wages during the period of his disability is also entitled to negotiated longevity increments where entitlement to such increments accrues during the period of disability. 1979 Op St Compt No. 79-80.

A disabled retired firefighter receiving payments pursuant to General Municipal Law § 207-a(2) is entitled to longevity salary increments or steps, but not to holiday pay; a firefighter receiving payments pursuant to § 207-a(2) is subject to the employment restrictions in § 207-a(6). 1991 Op St Compt No. 91-25, 1991 N.Y. Comp. LEXIS 23.

16. Medical and hospital expenses

Liability imposed on city under statute, which provides that a municipality of less than one million population shall be liable for all medical treatment and hospital care furnished fireman during disability resulting from performance of his duties, can be discharged by payment directly to doctor or hospital furnishing the treatment. Geremski v Department of Fire, 78 Misc. 2d 555, 357 N.Y.S.2d 975, 1974 N.Y. Misc. LEXIS 1445 (N.Y. Sup. Ct. 1974), aff'd, 49 A.D.2d 1013, 375 N.Y.S.2d 500, 1975 N.Y. App. Div. LEXIS 11366 (N.Y. App. Div. 4th Dep't 1975).

Discussion of liability of villages for medical and drug expenses. 1962 Op St Compt No. 62-796.

Where a paid fireman is injured or becomes sick in performance of duty and subsequently is granted an accidental disability retirement allowance, the municipality by which he was employed continues to remain liable for expenses incurred for medical treatment and hospital care. 1963 Op St Compt No. 63-49.

A paid city fireman, injured in the course of his duties, is entitled to payment by the city of the full amount of his regular salary or wages and to costs for medical treatment and hospital care, at any time subsequent to the date of the injury, so long as he remains an employee and he shows that his absence from duty or the incurring of costs for medical treatment and hospital care is causally related or attributed to such injury. 1968 Op St Compt No. 68-95.

17. Sick leave

Court properly remitted matter to city fire department for de novo determination as to whether firefighter was entitled to benefits under CLS Gen Mun § 207-a where firefighter had been placed on "non-line-of-duty" sick leave, without benefit of any investigation, after his physician wrote letter to fire department which stated that he was being treated for coronary artery disease, but fire department had never made proper determination that firefighter was not entitled to such benefits. Flynn v

McLaughlin, 169 A.D.2d 768, 565 N.Y.S.2d 134, 1991 N.Y. App. Div. LEXIS 926 (N.Y. App. Div. 2d Dep't 1991).

When a paid city fireman, who is injured in performance of duty or is taken sick as the result of duty, is compelled thereby to absent himself from duty, the city may not properly charge his absence to sick leave. 1961 Op St Compt No. 61-60.

Discussion of whether a city fireman accumulates sick leave and vacation leave during the time of a job-related illness or injury which keeps him out of work. 1978 Op St Compt No. 78-489.

The payment to him of the full amount of his regular salary or wages, during such absence from duty, does not constitute a payment on account of sickness and is not chargeable to his sick leave credits. 1968 Op St Compt No. 68-95.

18. Vacation leave

In a proceeding to compel a city to pay holiday pay benefits under a collective bargaining agreement to disabled firemen currently receiving their regular salary or wages pursuant to Gen Mun Law § 207-a, the petition was properly denied and dismissed, since case law holds that disabled firemen receiving their regular salary and wages pursuant to § 207-a are not entitled to vacation benefits under the collective bargaining agreement, and since the public policy considerations referred to in that case applied equally when the issue concerned holiday pay. Binghamton Firefighters, etc. v Binghamton, 56 N.Y.2d 731, 451 N.Y.S.2d 739, 436 N.E.2d 1341, 1982 N.Y. LEXIS 3384 (N.Y. 1982).

Firemen disabled as a result of injuries sustained in the performance of their duties, and therefore receiving their regular salary, were not entitled to vacation benefits under the collective bargaining agreement where the agreement made no provision for the payment of vacation benefits to disabled firemen and since the firemen were already paid for the full term of each year. Chalachan v Binghamton, 81 A.D.2d 973, 439 N.Y.S.2d 754, 1981 N.Y. App. Div. LEXIS 11713 (N.Y. App. Div. 3d Dep't 1981), aff'd, 55 N.Y.2d 989, 449 N.Y.S.2d 187, 434 N.E.2d 256, 1982 N.Y. LEXIS 3162 (N.Y. 1982).

Municipality was correct in rejecting demands of disabled firefighter for unused vacation time where such demand is grounded upon collective bargaining agreement and not upon any theory of entitlement under CLS Gen Mun § 207-a, as collective bargaining agreement should not be construed to implicitly expand whatever compensation rights are provided disabled firefighters under statute. Bett v Lackawanna, 132 Misc. 2d 630, 505 N.Y.S.2d 488, 1986 N.Y. Misc. LEXIS 2749 (N.Y. Sup. Ct. 1986), aff'd, 132 A.D.2d 951, 518 N.Y.S.2d 367, 1987 N.Y. App. Div. LEXIS 49409 (N.Y. App. Div. 4th Dep't 1987).

A disabled paid city fireman is entitled to accrue vacation credits, at not less than the minimum prescribed by statute, during his disability, but he is not entitled to additional holiday pay for holidays falling during such period. 1973 Op St Compt No. 73-888.

A city may provide by collective bargaining agreement that only those paid firemen actually performing their regular duties shall be entitled to vacation accruals in excess of the minimum vacation benefits prescribed by statute. 1973 Op St Compt No. 73-888.

Discussion of whether a city fireman accumulates sick leave and vacation leave during the time of a job-related illness or injury which keeps him out of work. 1978 Op St Compt No. 78-489.

CLS General Municipal Law § 207-a does not require that firefighter receiving benefits under that section forfeit vacation credits accrued prior to time of disability. 1985 Op St Compt No. 85-54, 1985 N.Y. Comp. LEXIS 89.

19. Workers' compensation

Firefighters are entitled to benefits pursuant to CLS Gen Mun § 207-a based on determinations made in workers' compensation proceedings. Fedorczak v Dolce, 202 A.D.2d 668, 609 N.Y.S.2d 292, 1994 N.Y. App. Div. LEXIS 2899 (N.Y. App. Div. 2d Dep't 1994).

Ruling of Workers' Compensation Board in favor of firefighter precluded city from denying benefits under CLS Gen Mun § 207-a(1) on ground that firefighter was not injured as result of his performance of duties. Delahunt v City of Oswego, 222 A.D.2d 1078, 636 N.Y.S.2d 238, 1995 N.Y. App. Div. LEXIS 14154 (N.Y. App. Div. 4th Dep't 1995), app. denied, 88 N.Y.2d 801, 644 N.Y.S.2d 688, 667 N.E.2d 338, 1996 N.Y. LEXIS 1048 (N.Y. 1996).

20. —Eligibility to receive

New York State Public Employment Relations Board did not act irrationally in finding that the union's proposed procedure for arbitral review of N.Y. Gen. Mun. Law § 207-a eligibility determinations was not mandatorily negotiable; the proposal, calling for an arbitrator to resolve a firefighter's § 207-a claim, could have been interpreted as a redetermination of the City of Poughkeepsie's initial determination, which was not mandatorily negotiable. Matter of Poughkeepsie Professional Firefighters' Assn., Local 596, IAFF, AFL-CIO-CLC v New York State Pub. Empl. Relations Bd., 6 N.Y.3d 514, 814 N.Y.S.2d 572, 847 N.E.2d 1146, 2006 N.Y. LEXIS 569 (N.Y. 2006).

Ruling of Workers' Compensation Board in favor of firefighter was not basis for determining that firefighter was entitled to benefits under CLS Gen Mun § 207-a(2) as it did not necessarily determine that he was permanently disabled as result of his performance of duties. Delahunt v City of Oswego, 222 A.D.2d 1078, 636 N.Y.S.2d 238, 1995 N.Y. App. Div. LEXIS 14154 (N.Y. App. Div. 4th Dep't 1995), app. denied, 88 N.Y.2d 801, 644 N.Y.S.2d 688, 667 N.E.2d 338, 1996 N.Y. LEXIS 1048 (N.Y. 1996).

Firefighter could not bring Article 78 proceeding to compel city to pay him wage supplement and all benefits under CLS Gen Mun § 207-a(2) where he initially followed collectively-bargained procedures for determining entitlement to such benefits, but those procedures were never followed through to determination. D'Onofrio v City of Mount Vernon, 226 A.D.2d 719, 641 N.Y.S.2d 870, 1996 N.Y. App. Div. LEXIS 4569 (N.Y. App. Div. 2d Dep't 1996).

Paid city firemen (other than in New York City) entitled to benefits of workmen's compensation in addition to benefits pursuant to section 207-a of the General Municipal Law. 1947 Op St Compt 210.

21. —Reimbursement of municipality

Where pursuant to section 207-a of the General Municipal Law, a city paid the full wages of an injured fireman during the entire period of his disability and in addition thereto the fireman collected compensation, the city was entitled to reimbursement under section 25 of the Workmen's Compensation Law for "payments to an employee in like manner as wages" even though such payments were made under compulsion of the General Municipal Law. Birmingham v Niagara Falls, 282 A.D. 970, 125 N.Y.S.2d 692, 1953 N.Y. App. Div. LEXIS 5597 (N.Y. App. Div. 1953).

Village, which was paying benefits to retired firemen pursuant to CLS Gen Mun § 207-a, was not entitled to reimbursement out of firemen's unpaid installments of workers' compensation benefits since (1) CLS Work Comp §§ 25 and 30 provide only for reimbursement of "wages," (2) CLS Gen Mun § 207-a does not characterize benefit payments as "wages," and (3) firemen were not rendering services to village at time they received payments, but were in fact retired. Harzinski v Endicott, 126 A.D.2d 56, 512 N.Y.S.2d 525, 1987 N.Y. App. Div. LEXIS 41030 (N.Y. App. Div. 3d Dep't 1987).

Medical and hospital care furnished firemen and policemen pursuant to this section and § 207-c are to be credited against any award of workmen compensation benefits to them. 1964 Op St Compt No. 64-532.

Where the City of Middletown pays a disabled fireman his full salary pursuant to General Municipal Law, § 207-a, it must contribute to the fireman's retirement system on the basis of his full salary without regard to the reimbursement it received from Workers' Compensation payments. 1980 Op St Compt No. 80-97.

22. —Illustrative cases

Court should have dismissed petition to compel city to pay firefighter difference between his disability retirement benefits and his regular salary or wages retroactive to his date of retirement since city's denial of firefighter's demand was not final determination, in that no definite position was ever expressed as to firefighter's eligibility for benefits under CLS Gen Mun § 207-a(2), and any harm could have been ameliorated or prevented by further administrative action that firefighter could have re-

quested. Putnam v City of Watertown, 213 A.D.2d 974, 625 N.Y.S.2d 384, 1995 N.Y. App. Div. LEXIS 3753 (N.Y. App. Div. 4th Dep't 1995).

In Article 78 proceeding by petitioner who was diagnosed as suffering from unstable angina, never returned to his job as firefighter, and was initially paid benefits under CLS Gen Mun § 207-a by city on assumption that injury was work-related, court properly annulled city's decision to terminate § 207-a benefits without giving petitioner opportunity to be heard after Workers' Compensation Board had notified city that right to compensation was being controverted on issue of whether injury was work-related; workers' compensation board eventually awarded benefits, and petitioner's treating cardiologist and 2 physicians, who conducted 3 independent medical examinations of petitioner at board's request, found disability to be work-related. McDonough v City of Oneonta, 237 A.D.2d 692, 654 N.Y.S.2d 213, 1997 N.Y. App. Div. LEXIS 2229 (N.Y. App. Div. 3d Dep't), app. denied, 90 N.Y.2d 803, 660 N.Y.S.2d 869, 683 N.E.2d 775, 1997 N.Y. LEXIS 2216 (N.Y. 1997).

Workers' Compensation Board's finding that firefighter's injury was causally related to his employment did not automatically make firefighter eligible for future CLS Gen Mun § 207-a benefits. Lewis v City of Gloversville, 246 A.D.2d 804, 667 N.Y.S.2d 796, 1998 N.Y. App. Div. LEXIS 298 (N.Y. App. Div. 3d Dep't 1998).

Determination of Workers' Compensation Law Judge (WCLJ), finding that petitioner's myocardial infarction was causally related to his employment as firefighter, was not entitled to preclusive effect as to respondents, city mayor and commissioner of public safety, where such determination was not "final" because respondents had sought timely review under CLS Work Comp § 23; moreover, underlying determination was clearly nonfinal inasmuch as full Board had rescinded Board panel's decision, which reversed findings of WCLJ, and referred matter for further consideration. Furch v Bucci, 254 A.D.2d 642, 679 N.Y.S.2d 186, 1998 N.Y. App. Div. LEXIS 11477 (N.Y. App. Div. 3d Dep't 1998), app. denied, app. dismissed, 93 N.Y.2d 833, 687 N.Y.S.2d 623, 710 N.E.2d 269, 1999 N.Y. LEXIS 138 (N.Y. 1999).

The right of a fireman injured in the performance of his duties while employed by a city of less than one million who received his regular salary from the time of such injuries was not abrogated by any statute nor was it affected by the city's request that he retire under § 65 of the Civil Service Law where the injured employee protested against such retirement, nor was such right abrogated by the fact that he had accepted Workmen's Compensation. Birmingham v Mirrington, 123 N.Y.S.2d 72, 204 Misc. 821, 1953 N.Y. Misc. LEXIS 1918 (N.Y. Sup. Ct. 1953), modified, 284 A.D. 721, 134 N.Y.S.2d 456, 1954 N.Y. App. Div. LEXIS 3480 (N.Y. App. Div. 1954).

A letter written to Commissioner of Public Safety by surgeon of fire bureau of city of Rochester, who had examined injured fireman, which stated that in the opinion of the doctor, the fireman would never be able to return to duty as a fireman, was not a "certificate," as required by Ch. 767, 1948 Acts amending charter for Rochester. Adam v Farbo, 16 Misc. 2d 614, 184 N.Y.S.2d 772, 1959 N.Y. Misc. LEXIS 3929 (N.Y. Sup. Ct. 1959).

23. Accidental disability retirement allowance

In a proceeding by retired city firemen seeking to compel a city to restore them to the payroll and to reinstate their disability benefits, the trial court correctly dismissed the fireman's application for relief where it was clear that the firemen voluntarily elected to take the early retirement advantages of Retire & S S Law § 384(h) and where it was also proved clear that the firemen had the opportunity to withdraw that election when Gen Mun Law § 207-a was amended, despite the firemen's contention that their election was not voluntary since they were not afforded an opportunity to withdraw the election when the courts ultimately declared the amendment to be constitutional, after they had reached or passed the age of 62. Conomikes v Binghamton, 81 A.D.2d 992, 440 N.Y.S.2d 71, 1981 N.Y. App. Div. LEXIS 11736 (N.Y. App. Div. 3d Dep't 1981).

Appellate Division would reverse judgment which granted Article 78 petition and directed city to pay petitioner wage supplement benefits under CLS Gen Mun § 207-a(2), where petitioner did not exhaust his administrative remedies before instituting proceeding. Hoffman v City of Yonkers, 231 A.D.2d 520, 647 N.Y.S.2d 263, 1996 N.Y. App. Div. LEXIS 8813 (N.Y. App. Div. 2d Dep't 1996).

Fact that petitioner was awarded accident disability retirement under CLS Retire & S S § 363 did not automatically entitle him to disability differential payments under CLS Gen Mun § 207-a(2). Hoffman v City of Yonkers, 231 A.D.2d 520, 647 N.Y.S.2d 263, 1996 N.Y. App. Div. LEXIS 8813 (N.Y. App. Div. 2d Dep't 1996).

Firefighter's eligibility for wage supplemental benefits under CLS Gen Mun § 207-a(2) from municipality or fire district does not arise until firefighter "is granted an accidental disability retirement allowance" under Retirement and Social Security Law. Brzostek v City of Syracuse, 238 A.D.2d 947, 661 N.Y.S.2d 142, 1997 N.Y. App. Div. LEXIS 14158 (N.Y. App. Div. 4th Dep't 1997), app. denied, 1997 N.Y. App. Div. LEXIS 7995 (N.Y. App. Div. 4th Dep't July 3, 1997), app. dismissed, 92 N.Y.2d 1026, 684 N.Y.S.2d 490, 707 N.E.2d 445, 1998 N.Y. LEXIS 4303 (N.Y. 1998).

February 1996 decision denying petitioner's request for CLS Gen Mun § 207-a(2) benefits was not "redetermination" of December 1994 decision regarding petitioner's request for CLS Gen Mun § 207-a(1) benefits; those subdivisions, although similar, require separate substantive determinations. Brzostek v City of Syracuse, 238 A.D.2d 947, 661 N.Y.S.2d 142, 1997 N.Y. App. Div. LEXIS 14158 (N.Y. App. Div. 4th Dep't 1997), app. denied, 1997 N.Y. App. Div. LEXIS 7995 (N.Y. App. Div. 4th Dep't July 3, 1997), app. dismissed, 92 N.Y.2d 1026, 684 N.Y.S.2d 490, 707 N.E.2d 445, 1998 N.Y. LEXIS 4303 (N.Y. 1998).

In Article 78 proceeding by city firefighter to compel restoration of his disability retirement benefits under CLS Gen Mun § 207-a, matter was ripe for appellate review because hearing officer's decision upholding administrative termination of benefits was final and binding, and termination inflicted concrete injury on firefighter, even though he remained on city's payroll, where his accumulated leave time was being exhausted in interim. Giorgio v Bucci, 246 A.D.2d 711, 667 N.Y.S.2d 484, 1998 N.Y. App. Div. LEXIS 97 (N.Y. App. Div. 3d Dep't), app. denied, 91 N.Y.2d 814, 676 N.Y.S.2d 127, 698 N.E.2d 956, 1998 N.Y. LEXIS 1391 (N.Y. 1998).

Although city firefighter had right to administrative appeal from administrative termination of his disability retirement benefits, he was entitled to seek judicial review without exhausting his administrative remedies where he challenged administrative action as unconstitutional. Giorgio v Bucci, 246 A.D.2d 711, 667 N.Y.S.2d 484, 1998 N.Y. App. Div. LEXIS 97 (N.Y. App. Div. 3d Dep't), app. denied, 91 N.Y.2d 814, 676 N.Y.S.2d 127, 698 N.E.2d 956, 1998 N.Y. LEXIS 1391 (N.Y. 1998).

City firefighter was denied his right to full evidentiary hearing before termination of his disability retirement benefits, in violation of due process of law, where he was not allowed to confront and cross-examine witnesses or offer evidence in his own behalf. Giorgio v Bucci, 246 A.D.2d 711, 667 N.Y.S.2d 484, 1998 N.Y. App. Div. LEXIS 97 (N.Y. App. Div. 3d Dep't), app. denied, 91 N.Y.2d 814, 676 N.Y.S.2d 127, 698 N.E.2d 956, 1998 N.Y. LEXIS 1391 (N.Y. 1998).

Where, after returning to work after an injury, a firefighter was receiving his regular wages for a full duty assignment that he was capable of performing within the fire department when he applied for and received accidental disability retirement benefits, a city was not required to provide supplemental benefits pursuant to N.Y. Gen. Mun. Law § 207-a(2). Henry v City of Cortland, 19 A.D.3d 988, 797 N.Y.S.2d 649, 2005 N.Y. App. Div. LEXIS 7221 (N.Y. App. Div. 3d Dep't 2005).

Since the trial court erred in determining that the arbitrator's decision concerning N.Y. Gen. Mun. Law § 207-a(1) benefits was binding with respect to the deputy fire chief's application for N.Y. Gen. Mun. Law § 207-a(2) benefits as different issues were involved, it erred in dismissing the petition on that ground. Matter of Viscomi v Village of Herkimer, 23 A.D.3d 1049, 803 N.Y.S.2d 873, 2005 N.Y. App. Div. LEXIS 12695 (N.Y. App. Div. 4th Dep't 2005).

Section 207-a of the General Municipal Law, which, in its amended form, effective June 1, 1978, allows a permanently

disabled fireman whose injuries were the result of performance of his duties to obtain the difference between his retirement benefits and his full salary from the employing municipality, may not be applied retroactively to include firemen who retired prior to the effective date of the amendment, since a statute granting a new remedy should not be given retroactive effect unless express words or necessary implication require such an interpretation, and the remedial intent of section 207-a is to relieve a financial burden on municipalities which were, prior to amendment, required to pay disabled firemen their full salaries, and if section 207-a were given retroactive effect, the result would be an increased burden upon them, which is not the intent of the statute. Luisi v Department of Fire, 101 Misc. 2d 529, 421 N.Y.S.2d 338, 1979 N.Y. Misc. LEXIS 2717 (N.Y. Sup. Ct. 1979).

24. —Municipal liability

Where city agreed that if fireman would retire and apply for state retirement benefits, the city would pay him the difference between his regular pay and the amount received from retirement, and the city could not legally make such payments, the agreement was made under mistake of law and the court directed petitioner's restoration to the city payroll. Robida v Mirrington, 1 Misc. 2d 968, 149 N.Y.S.2d 152, 1956 N.Y. Misc. LEXIS 2110 (N.Y. Sup. Ct. 1956).

Where a paid fireman is injured or becomes sick in performance of duty and subsequently is granted an accidental disability retirement allowance, the municipality by which he was employed continues to remain liable for expenses incurred for medical treatment and hospital care. 1963 Op St Compt No. 63-49.

An employer is required to pay to a permanently disabled fireman receiving an accidental disability retirement allowance the difference between the amount of such allowance and the amount of such fireman's regular salary. 1978 Op St Compt No. 78-842, 1978 N.Y. Comp. LEXIS 75.

Where a city fireman is injured in the performance of his duties prior to Jan. 1, 1978, even if eligibility determination as to disability retirement benefits is made after Jan. 1, 1978, the city is obligated to pay such fireman the difference between his disability allowance and regular salary for so long as his disability continues, even for the duration of his life. 1979 Op St Compt No. 79-36.

Under this section, a city must pay a permanently disabled fireman who has been granted an accidental disability retirement allowance the difference between his regular salary and the amount of his disability retirement allowance prior to the exercise of any retirement options. 1979 Op St Compt No. 79-771.

25. —Salary increase for firefighters receiving allowance

A fireman disabled during the course of duty who was granted an accidental disability retirement allowance was entitled to receive the difference between his accidental disability allowance and his regular salary, including increases in annual salary, since the phrase "regular salary or wages" contained in General Municipal Law § 207-a(2) as amended encompassed salary increases paid to active firemen including such increases negotiated after the award of the disability allowance. Mashnouk v Miles, 55 N.Y.2d 80, 447 N.Y.S.2d 889, 432 N.E.2d 761, 1982 N.Y. LEXIS 3070 (N.Y. 1982).

In two actions brought by disabled retired firemen seeking declarations determining the amounts of their disability retirement benefits, the firemen's benefits would be entitled to be computed using the "zero option" retirement allowance (the difference between the firemen's salaries at the time of their retirement and the amounts they received under a "zero option" benefit plan, in which the electing retiree choses to receive a maximum amount during his life and no death benefits) inasmuch as the amount received in Gen Mun Law § 207-a included the package of benefits received by the firemen upon retirement. Harzinski v Endicott, 57 N.Y.2d 614, 454 N.Y.S.2d 54, 439 N.E.2d 863, 1982 N.Y. LEXIS 3580 (N.Y. 1982).

N.Y. Gen. Mun. Law § 207-a(1) guarantees a firefighter pensioner the full amount of regular salary or wages; if a firefighter is granted an accidental disability retirement allowance, pursuant to N.Y. Retire. & Soc. Sec. Law §§ 363, 363-c, or a similar accidental disability pension, however, the municipal employer is liable only for the difference between the amounts received under such allowance or pension and the amount of his or her regular salary or wages. Farber v City of Utica, 97 N.Y.2d 476, 743 N.Y.S.2d 42, 769 N.E.2d 799, 2002 N.Y. LEXIS 490 (N.Y.), cert. denied, 537 U.S. 823, 123 S. Ct. 109, 154 L. Ed. 2d 33, 2002 U.S. LEXIS 6032 (U.S. 2002).

City had rational basis to deny city firefighter supplementary wage benefits under CLS Gen Mun § 207-a(2), on ground that his alleged disability was not caused by "on-line" injury, where he continued to work for approximately 20 years after he first complained of back pain following 1969 on-line injury, and there was no evidence that he missed work or underwent any medical treatment due to his second on-line injury in 1987, prior to his voluntary retirement in 1989. Collins v City of Yonkers, 207 A.D.2d 830, 616 N.Y.S.2d 630, 1994 N.Y. App. Div. LEXIS 8859 (N.Y. App. Div. 2d Dep't 1994).

Because retired firefighters who were receiving benefits pursuant to N.Y. Gen. Mun. Law § 207-a(2) were entitled to the benefit of longevity increases provided by contract to active firefighters, the trial court erred in granting summary judgment to the city. Matter of Whitted v City of Newburgh, 65 A.D.3d 1365, 886 N.Y.S.2d 207, 2009 N.Y. App. Div. LEXIS 6677 (N.Y. App. Div. 2d Dep't 2009).

A permanently disabled fireman who is granted an accidental disability retirement allowance and is also receiving the difference between such allowance and his regular salary or wages pursuant to section 207-a(2) of the General Municipal Law is also entitled to salary increases received by the fire department. 1978 Op St Compt No. 78-924.

A permanently disabled fireman who has been granted an accidental disability retirement allowance is not entitled to negotiated salary increases which are granted after this retirement. 1979 Op St Compt No. 79-771.

It would seem that a permanently disabled fireman who is receiving an accidental disability retirement allowance and who is also receiving the difference between such allowance and his regular salary pursuant to the provisions of this section is not entitled to salary increases received by the fire department after the effective date of his retirement. Opn No. 80-133 superseded. 1980 Op St Compt No. 80-133-a.

A fireman who has applied for and been granted an accidental disability retirement is not entitled to continue to receive fringe benefits or negotiated salary increases granted to active members of the fire department after the date of his retirement. 1981 Op St Compt No. 81-12, 1981 N.Y. Comp. LEXIS 882.

A permanently disabled fireman receiving a disability retirement allowance and the difference between such allowance and his regular salary or wages pursuant to General Municipal Law, § 207-a(2) is entitled to salary increases granted to other firemen after the date of his disability retirement and, where such salary increase is granted in terms of a percentage, that percentage should be applied to the salary for the position from which the fireman has retired. 1982 Op St Compt No. 82-96, 1982 N.Y. Comp. LEXIS 627.

A permanently disabled fireman who is receiving an accidental disability retirement allowance and who is also receiving the difference between such allowance and his regular salary pursuant to the provisions of this section is entitled to salary increases received by the fire department until such time as he reaches mandatory retirement age unless he himself voluntarily applied for accidental disability retirement. 1980 Op St Compt No. 80-133.

26. —Illustrative cases

An Article 78 proceeding by a former fireman, who suffered a heart attack during a tour of duty, seeking payment of one-quarter of his salary in addition to accidental disability retirement benefits of three-quarters of his salary would be set down for a hearing to determine whether city officials formally or informally determined that the fireman was eligible for full salary benefits under former Gen Mun Law § 207-a when the fireman retired in 1976 but nevertheless wrongfully forced his retirement in order to avoid the financial burden of paying his full

salary and, if so, whether payments to the fireman of said one-quarter difference that were made after a complete reconsideration of whether he had been wrongfully forced to retire in 1979 would revive the statute of limitations to apply to the instant proceeding, which was commenced within four months of the termination of those one-quarter salary payments by the city. King v Newburgh, 84 A.D.2d 388, 446 N.Y.S.2d 329, 1982 N.Y. App. Div. LEXIS 14934 (N.Y. App. Div. 2d Dep't 1982).

A city properly deducted a state-mandated cost of living adjustment (COLA) from the supplemental income benefits paid to a firefighter by the city; since the payment of the adjustment by the city was dependent upon the right to receive a disability retirement allowance, the COLA adjustment was generated through that income stream, and with N.Y. Gen. Mun. Law § 207-a permitting the city to supplement only the difference between the amounts received under such allowance or pension and the amount of the firefighters' regular salary or wages, N.Y. Gen. Mun. Law § 207-a(2), the deduction of the COLA adjustment was proper. Wise v Jennings, 290 A.D.2d 702, 736 N.Y.S.2d 171, 2002 N.Y. App. Div. LEXIS 80 (N.Y. App. Div. 3d Dep't), app. denied, 97 N.Y.2d 612, 742 N.Y.S.2d 604, 769 N.E.2d 351, 2002 N.Y. LEXIS 468 (N.Y. 2002).

When a firefighters' union proposed, during contract negotiations, a procedure for reviewing a firefighter's entitlement to disability benefits which would submit the issue to binding arbitration by an arbitrator who (1) decided the nature of the claim, (2) decided who had the burden of proof on the nature of the claim, (3) took evidence with respect to the claim, and (4) made a determination as to whether the employee was entitled to benefits, this invaded a municipality's prerogative to initially make this determination, which was not subject to collective bargaining, as it did not merely seek review of the municipality's initial determination but sought a redetermination which, in effect, made the municipality's right to make the initial determination illusory, as it replaced the determination, rather than reviewing it. Poughkeepsie Prof'l Firefighters' Ass'n, Local 596 v N.Y. State Pub. Empl. Rels. Bd., 16 A.D.3d 797, 792 N.Y.S.2d 637, 2005 N.Y. App. Div. LEXIS 2393 (N.Y. App. Div. 3d Dep't 2005).

Where a city fireman was injured in the line of duty prior to January 1, 1978 and such fireman applies for and receives an accidental disability retirement after January 1, 1978, the city is obligated to pay such fireman the difference between his disability retirement allowance and his regular salary for the remainder of the fireman's life. 1978 Op St Compt No. 78-828.

27. Light duty assignments

Although administrative hearing might ultimately be required before CLS Gen Mun § 207-a payments are terminated, disabled firefighters are not entitled to hearing before issuance of order to report for light duty following medical determination of capability, unless they bring that determination into issue by submission of report by personal physician expressing contrary opinion. Uniform Firefighters, Local 2562 v City of Cohoes, 94 N.Y.2d 686, 709 N.Y.S.2d 481, 731 N.E.2d 137, 2000 N.Y. LEXIS 901 (N.Y. 2000).

City was not compelled to submit disputed orders directing disabled firefighters to report for light duty assignments to arbitration on union's demand, where parties' collective bargaining agreement was entirely silent as to whether contractual rights accorded regular duty firefighters applied to disabled firefighters on CLS Gen Mun § 207-a status. Uniform Firefighters, Local 2562 v City of Cohoes, 94 N.Y.2d 686, 709 N.Y.S.2d 481, 731 N.E.2d 137, 2000 N.Y. LEXIS 901 (N.Y. 2000).

In an action in which a fireman who was receiving disability benefits under Gen Mun Law § 207-a from the municipality by which he had been employed sought to hold the municipality, which had terminated his benefits upon his refusal to perform light work which the municipality had offered him pursuant to Gen Mun Law § 207-a(3), in contempt of a prior court judgment ordering the municipality to continue to mail him his benefit checks, the trial court properly rendered judgment in favor of the municipality since Gen Mun Law § 207-a(3), which had been enacted subsequent to the prior court judgment, was retroactive. Thayer v Plattsburgh, 80 A.D.2d 938, 437 N.Y.S.2d 765, 1981 N.Y. App. Div. LEXIS 10837 (N.Y. App. Div. 3d Dep't), app. denied, in part, app. dismissed, 53 N.Y.2d 608, 1981 N.Y. LEXIS 3547 (N.Y. 1981), app. dismissed, 53 N.Y.2d 1011, 442 N.Y.S.2d 495, 425 N.E.2d 883, 1981 N.Y. LEXIS 2544 (N.Y. 1981).

In a workers' compensation case, village firemen were properly determined not to have voluntarily withdrawn from the labor market by failing to return to work after receiving letters directing them to return for light duty, where the village attorney withdrew the offer of employment for light duty on being advised by the firemen's attorney that a temporary order restraining the village from directing the firemen to report for work would be sought in view of the firemen's pending action to declare the "light duty" provision of Gen Mun Law § 207-a to be unconstitutional. Pezzuti v Endicott, 91 A.D.2d 787, 458 N.Y.S.2d 76, 1982 N.Y. App. Div. LEXIS 19682 (N.Y. App. Div. 3d Dep't 1982).

Village was not entitled to hearing to determine firefighter's ability to perform light duty after Comptroller had determined that he was physically incapacitated for performance of duty, and had granted him benefits for accidental disability retirement and retirement for disability incurred in performance of duty. Crocker v Endicott, 184 A.D.2d 820, 584 N.Y.S.2d 675, 1992 N.Y. App. Div. LEXIS 7656 (N.Y. App. Div. 3d Dep't 1992).

Due process did not require that disabled firefighters receiving statutory benefits for line-of-duty injuries under CLS Gen Mun § 207-a be given hearing before issuance of orders to return to work; however, once firefighters provided medical documentation contesting their physical capability to return to work, enforcement of return to work orders was effectively postponed, and their § 207-a benefits could not be withheld or terminated pending hearings. Uniform Firefighters of Cohoes, Local 2562 v City of Cohoes, 258 A.D.2d 24, 692 N.Y.S.2d 750, 1999 N.Y. App. Div. LEXIS 6537 (N.Y. App. Div. 3d Dep't 1999), aff'd, 94 N.Y.2d 686, 709 N.Y.S.2d 481, 731 N.E.2d 137, 2000 N.Y. LEXIS 901 (N.Y. 2000).

Administrative determination which ordered disabled firefighter receiving benefits under CLS Gen Mun § 207-a to return to light-duty work after obtaining fitness opinion from city's health authority was within city's managerial discretion and not subject to mandatory bargaining or arbitration under Taylor Law, and thus court properly granted city's application to stay arbitration of resulting dispute where arbitration was not mandated by parties' collective bargaining agreement. Uniform Firefighters of Cohoes, Local 2562 v City of Cohoes, 258 A.D.2d 24, 692 N.Y.S.2d 750, 1999 N.Y. App. Div. LEXIS 6537 (N.Y. App. Div. 3d Dep't 1999), aff'd, 94 N.Y.2d 686, 709 N.Y.S.2d 481, 731 N.E.2d 137, 2000 N.Y. LEXIS 901 (N.Y. 2000).

Although a prior litigation precluded a city from discharging a firefighter for the firefighter's failure to report for light duty work, res judicata or collateral estoppel did not preclude the city from later evaluating the firefighter's medical condition under N.Y. Gen. Mun. Law § 207-a(1), (3), since the firefighter was required to undergo periodic medical evaluations; accordingly, the firefighter was not entitled to N.Y. C.P.L.R. art. 78 relief. Matter of Bett v City of Lackawanna, 53 A.D.3d 1097, 862 N.Y.S.2d 682, 2008 N.Y. App. Div. LEXIS 5880 (N.Y. App. Div. 4th Dep't 2008).

As a general rule, amendatory statutes are presumed to operate prospectively and not retroactively unless the language of the statute indicates a legislative intent to the contrary; accordingly, plaintiffs, who are partially disabled and thereby incapable of performing active firefighting duties, are entitled to continue receiving disability benefits (General Municipal Law, § 207-a) and may not be forced to perform light duty as a condition to receiving benefits, as their rights became vested as of the dates of their respective injuries and as such remain unaffected by a later amendment (L 1977, ch 965) which permits the termination of benefits for refusing to perform light duty while only partially disabled. Ring v Langdon, 94 Misc. 2d 415, 404 N.Y.S.2d 835, 1978 N.Y. Misc. LEXIS 2260 (N.Y. Sup. Ct. 1978), rev'd, 69 A.D.2d 998, 416 N.Y.S.2d 137, 1979 N.Y. App. Div. LEXIS 11776 (N.Y. App. Div. 4th Dep't 1979).

A complaint would be upheld in which a municipality sought to recover those wages and disability benefits which had been paid to a disabled fireman during the period subsequent to his refusal to obey an order to report for light duty, notwithstanding the fact that such refusal had been based upon a constitutional challenge

to Gen Mun Law § 207-a, and notwithstanding the fact that the fireman had initially succeeded in obtaining a preliminary injunction against his removal from the payroll, where the granting of the preliminary injunction had subsequently been reversed on appeal and the constitutionality of the challenged statute upheld. Johnson City v Glanville, 108 Misc. 2d 531, 437 N.Y.S.2d 499, 1981 N.Y. Misc. LEXIS 2234 (N.Y. Sup. Ct. 1981).

Denial of CLS Retire & S S § 363 benefits to disabled firefighter who is receiving benefits under CLS Gen Mun § 207-a does not automatically entitle municipality to order firefighter to light duty, as standards required by CLS Retire & S S Law § 363 and Gen Mun Law § 207-a for proof of service related injuries are not alike, and firefighter can be ordered to light duty only if he is medically able to work such light duty. Bett v Lackawanna, 132 Misc. 2d 630, 505 N.Y.S.2d 488, 1986 N.Y. Misc. LEXIS 2749 (N.Y. Sup. Ct. 1986), aff'd, 132 A.D.2d 951, 518 N.Y.S.2d 367, 1987 N.Y. App. Div. LEXIS 49409 (N.Y. App. Div. 4th Dep't 1987).

Firefighters who were out of work for extended periods while receiving their salaries under CLS Gen Mun § 207-a were not entitled to hearing prior to city's issuance of orders to return to light duty, where city complied with § 207-a(3) by obtaining medical opinion of fitness. Uniform Firefighters, Local 2562 v City of Cohoes, 175 Misc. 2d 726, 669 N.Y.S.2d 492, 1998 N.Y. Misc. LEXIS 33 (N.Y. Sup. Ct. 1998).

"Nonworking firefighters" who were out of work for extended periods while receiving their salaries under CLS Gen Mun § 207-a, and then were ordered to return to light duty work, had no due process right to have their return dates automatically adjourned until after administrative hearing and determination of their objections to light-duty work, as (1) they had exercised their right to refuse to return to work pending administrative determination, and thus were not actually forced to perform work, (2) employer continued to pay them their salaries, only charging their absence against their available leave credits, and (3) if their claims of complete incapacity had merit, their leave credits would be restored to them. Uniform Firefighters, Local 2562 v City of Cohoes, 175 Misc. 2d 726, 669 N.Y.S.2d 492, 1998 N.Y. Misc. LEXIS 33 (N.Y. Sup. Ct. 1998).

Firefighters who were out of work for extended periods while receiving their salaries under CLS Gen Mun § 207-a, and subsequently filed labor grievance challenging employment terms stated in employer's order to return to light-duty work under § 207-a(3), were not entitled to preliminary injunction staying enforcement of return-to-work order pending arbitration decision on their labor grievance because they failed to establish likelihood of success on merits of their grievance or their objections to light-duty work where, inter alia, their labor grievance contradicted their claim that they were too disabled to perform any work by claiming that they, like their able-bodied colleagues, were entitled (and presumably fit enough) to work for 24 hours straight rather than mere 8-hour shifts; § 207-a(3) does not give employees on light duty any right to increase or select their hours of employment. Uniform Firefighters, Local 2562 v City of Cohoes, 175 Misc. 2d 726, 669 N.Y.S.2d 492, 1998 N.Y. Misc. LEXIS 33 (N.Y. Sup. Ct. 1998).

Provision of CLS Gen Mun § 207-a(3) for returning employees to "light duty" work was outside terms of collective bargaining agreement between city and its firefighters, as matter of strong public policy and decisional law, and thus city was entitled to permanent stay of arbitration of contract grievance filed by members of firefighters' union. City of Cohoes v Uniform Firefighters, Local 2562, 177 Misc. 2d 242, 675 N.Y.S.2d 781, 1998 N.Y. Misc. LEXIS 244 (N.Y. Sup. Ct. 1998), aff'd, 258 A.D.2d 24, 692 N.Y.S.2d 750, 1999 N.Y. App. Div. LEXIS 6537 (N.Y. App. Div. 3d Dep't 1999).

Under this section a city with a population of less than one million must pay a fireman his full salary during his period of disablement from injuries or illness incurred while in the performance of his duties necessitating medical or other lawful treatment. There is no authority permitting the city to assign him to duties outside the fire department during such period. 1966 NY Ops Atty Gen Dec 2 (Informal), 1966 N.Y. AG LEXIS 142.

Where a fireman is injured and thereafter seeks to return to work, but is declared to have a ten per cent disability by the city medical examiner, as a result of which the city will not accept him for full duty, the city may not require the fireman to accept limited duty (thereby limiting his advancement opportunities within the department) and the fireman does not lose the statutory benefits by refusing to perform such limited duties. 1968 Op St Compt No. 68-432.

28. —jIllustrative cases

An applicant for an accident disability pension was entitled to have his case presented and determined by an unprejudiced and impartial board of trustees, and those motivated by bias or duress would be disqualified; therefore, the remaining members would have the power to decide the issue. O'Hagan v Board of Trustees, 81 A.D.2d 818, 439 N.Y.S.2d 374, 1981 N.Y. App. Div. LEXIS 11473 (N.Y. App. Div. 1st Dep't), aff'd, 55 N.Y.2d 784, 447 N.Y.S.2d 249, 431 N.E.2d 974, 1981 N.Y. LEXIS 3305 (N.Y. 1981).

Firefighter was not denied due process at administrative hearing to determine his eligibility for supplemental wage benefits under CLS Gen Mun § 207-a where he was given meaningful opportunity to present evidence and cross-examine opposing witnesses, and there was no indication that hearing officer, who was city's Director of Personnel and Safety, was biased or that he considered evidence outside record. Furch v Bucci, 245 A.D.2d 749, 666 N.Y.S.2d 300, 1997 N.Y. App. Div. LEXIS 12950 (N.Y. App. Div. 3d Dep't 1997), app. dismissed, 91 N.Y.2d 953, 671 N.Y.S.2d 711, 694 N.E.2d 880, 1998 N.Y. LEXIS 998 (N.Y. 1998).

Firefighter waived doctor-patient privilege by filing application for supplemental wage benefits under CLS Gen Mun § 207-a and contending that his diagnosed arteriosclerosis and myocardial infarction were job related, and thus hearing officer properly allowed testimony by firefighter's treating physicians despite their alleged violation of doctor-patient privilege. Furch v Bucci, 245 A.D.2d 749, 666 N.Y.S.2d 300, 1997 N.Y. App. Div. LEXIS 12950 (N.Y. App. Div. 3d Dep't 1997), app. dismissed, 91 N.Y.2d 953, 671 N.Y.S.2d 711, 694 N.E.2d 880, 1998 N.Y. LEXIS 998 (N.Y. 1998).

Substantial evidence supported hearing officer's finding that firefighter's arteriosclerosis was not causally related to performance of his duties as firefighter, for purposes of his eligibility for supplemental wage benefits under CLS Gen Mun § 207-a, where, even accepting that testimony by firefighter's expert was sufficient to support claim that firefighter's arteriosclerosis was caused by job-related stress, there was conflicting medical proof on that issue, and it was exclusive province of hearing officer to evaluate such evidence. Furch v Bucci, 245 A.D.2d 749, 666 N.Y.S.2d 300, 1997 N.Y. App. Div. LEXIS 12950 (N.Y. App. Div. 3d Dep't 1997), app. dismissed, 91 N.Y.2d 953, 671 N.Y.S.2d 711, 694 N.E.2d 880, 1998 N.Y. LEXIS 998 (N.Y. 1998).

29. Termination of benefits

Section of Civil Service Law was intended to implement agreement between city and its firefighters to permit layoffs on basis of service in grade or title rather than on basis of total seniority with employer and was not intended to abrogate or diminish effect of disability benefits provisions of section of General Municipal Law, and thus rights of disabled lieutenant in fire department to disability benefits vested at time of his disability and he could not be divested of those rights by city's abolition of several lieutenants' positions for economy reasons. Pease v Colucci, 59 A.D.2d 233, 399 N.Y.S.2d 519, 1977 N.Y. App. Div. LEXIS 13550 (N.Y. App. Div. 4th Dep't 1977).

It was improper to terminate firefighter's disability benefits on ground that he was engaged in "employment" within meaning of CLS Gen Mun § 207-a(6), even though he was both shareholder and officer of corporation that he and partner had formed, and despite fact that he owned real estate that was leased to corporation, since there was no evidence that he was actively working for corporation or improving real estate; as indicated by recent amendment to statute, forfeiture of disability benefits was not intended to apply to those disabled firefighters who earned income through passive involvement with income-producing activities. Penree v City of Utica, 262 A.D.2d 1075, 692 N.Y.S.2d 569, 1999 N.Y. App. Div. LEXIS 7336 (N.Y. App. Div. 4th Dep't 1999).

Court would affirm determination terminating firefighter's benefits under CLS Gen Mun § 207-a on basis that firefighter's injury was result of causes unrelated to his duties as firefighter, notwithstanding conflicting evidence as to causal relationship of firefighter's injuries to his duties as firefighter. Giorgio v Bucci, 267 A.D.2d 924, 700 N.Y.S.2d 561, 1999 N.Y. App. Div. LEXIS 13592 (N.Y. App. Div. 3d Dep't 1999).

Under Taylor Law, procedures to be used in determining whether to terminate firefighter's CLS Gen Mun § 207-a benefits are subject of mandatory bargaining, and thus city's unilateral implementation of such procedures over union's objection constituted improper practice under CLS Civ S § 209-a(1)(d). City of Syracuse v Public Empl. Rels. Bd., 279 A.D.2d 98, 719 N.Y.S.2d 401, 2000 N.Y. App. Div. LEXIS 13514 (N.Y. App. Div. 4th Dep't 2000), app. denied, 96 N.Y.2d 717, 730 N.Y.S.2d 790, 756 N.E.2d 78, 2001 N.Y. LEXIS 1926 (N.Y. 2001).

District lacked the statutory authority to terminate a firefighter's N.Y. Gen. Mun. Law § 207-a(2) supplemental benefits from a work-related injury on the basis of alleged improvements in his medical condition because N.Y. Gen. Mun. Law § 207-a did not contain any language authorizing termination of those benefits on the basis of an improved medical condition; the trial court properly enjoined the district from terminating the firefighter's benefits. Matter of McGowan v Fairview Fire Dist., 51 A.D.3d 796, 858 N.Y.S.2d 278, 2008 N.Y. App. Div. LEXIS 4296 (N.Y. App. Div. 2d Dep't), app. denied, 11 N.Y.3d 705, 866 N.Y.S.2d 608, 896 N.E.2d 94, 2008 N.Y. LEXIS 2617 (N.Y. 2008).

Because a city failed to comply with proper procedures in giving notice to a firefighter, its termination of benefits under N.Y. Gen. Mun. Law § 207-a was invalid; accordingly, the firefighter was entitled to N.Y. C.P.L.R. art. 78 relief. Matter of Richards v City of Binghamton, 80 A.D.3d 1022, 915 N.Y.S.2d 396, 2011 N.Y. App. Div. LEXIS 302 (N.Y. App. Div. 3d Dep't 2011).

Benefits under CLS Gen Mun § 207-a constitute employee benefits that fall within "continued benefit payments" exception of Older Workers Benefit Protection Act (Pub L 101-433, 104 US Stat 978); thus, in Article 78 proceeding by former firefighter who opted for retirement benefits under CLS Retire & S S § 384-d but was rendered permanently disabled prior to retirement, termination of supplemental benefits under CLS Gen Mun § 207-a(2) at age 62 was not shown to violate Age Discrimination in Employment Act (29 USCS § 623). Farrell v Dolce, 170 Misc. 2d 333, 648 N.Y.S.2d 511, 1996 N.Y. Misc. LEXIS 372 (N.Y. Sup. Ct. 1996).

30. —Removal from employment

Member of municipal airport's Crash Fire Rescue (CFR) unit was not officer or member of "fire company" entitled to benefits under CLS Gen Mun § 207-a where airport's CFR unit was not organized by any county, city, town, village or fire district department, it was not "Type B" not-for-profit fire corporation recognized by local entity under CLS N-PCL § 1402, and it was not incorporated under any other law. Robbins v County of Broome, 87 N.Y.2d 831, 637 N.Y.S.2d 679, 661 N.E.2d 151, 1995 N.Y. LEXIS 4430 (N.Y. 1995).

It was error for court to annul respondents' decision to terminate firefighter's CLS Gen Mun § 207-a benefits on ground that respondents should have commenced action in Supreme Court to terminate such benefits; rather, court should have transferred proceeding pursuant to CLS CPLR § 7804(g). Wiley v Hiller, 277 A.D.2d 1024, 716 N.Y.S.2d 226, 2000 N.Y. App. Div. LEXIS 11362 (N.Y. App. Div. 4th Dep't 2000), app. dismissed, 96 N.Y.2d 852, 729 N.Y.S.2d 667, 754 N.E.2d 769, 2001 N.Y. LEXIS 1832 (N.Y. 2001).

Four-month period to challenge a decision to terminate a former fire department dispatcher's disability retirement benefits did not begin to run until the department rejected the dispatcher's demand for a hearing on the decision, so a subsequent mandamus action was timely; after receiving benefits for three years, the dispatcher had a vested property right in continued payments, so payments could not be discontinued without a hearing on the merits. Heck v Keane, 6 A.D.3d 95, 774 N.Y.S.2d 214, 2004 N.Y. App. Div. LEXIS 3116 (N.Y. App. Div. 4th Dep't 2004).

The words, "municipality in which he is employed," refer, not to the time of payment, but to the time when the injuries were received and the benefits provided by this section cannot be nullified by terminating the employment of the injured fireman after the injuries are received. Tyler v Gadwood, 89 N.Y.S.2d 126, 195 Misc. 674, 1949 N.Y. Misc. LEXIS 2225 (N.Y. Sup. Ct. 1949), rev'd, 279 A.D. 1138, 112 N.Y.S.2d 890, 1952 N.Y. App. Div. LEXIS 6089 (N.Y. App. Div. 1952).

Mayor's action of removing petitioner, a city fireman who sustained a massive heart attack ten days after fighting a fire in which he inhaled smoke and engaged in strenuous physical exertion, from the payroll of the city fire department solely by virtue of the findings of fact established in a New York state hearing officer's decision on petitioner's application for accidental disability retirement was improper, since the city was required to follow the relevant provisions of the General Municipal Law insofar as it relates to the removal of an employee from the payroll of the city fire department. Kieper v Fitzgibbons, 91 Misc. 2d 1067, 399 N.Y.S.2d 376, 1977 N.Y. Misc. LEXIS 2482 (N.Y. Sup. Ct. 1977).

31. —Forced retirement

Inasmuch as chapter 965 of the Laws of 1977 amended section 207-a of the General Municipal Law by providing that a fireman who became disabled because of injury or illness incurred as a result of the performance of his duties is no longer entitled to receive the full amount of his regular salary or wages until his disability has ceased but shall receive instead his regular salary or wages only until he reaches his mandatory retirement age or attains the age or performs the period of service specified by applicable law for the termination of his service, disabled firemen receiving benefits under section 207-a of the General Municipal Law may not be separated from service until they reach the mandatory retirement age of 70, unless they have voluntarily elected additional benefits under section 384 of the Retirement and Social Security Law, since apart from an accidental disability retirement, the only age specified for involuntary retirement occurs at age 70, or at age 62 in the case of those who have voluntarily elected certain additional benefits, and if the additional benefit is not chosen, the member is not subject to separation from service at age 62 and is not subject to mandatory retirement until age 70. Cook v Binghamton, 48 N.Y.2d 323, 422 N.Y.S.2d 919, 398 N.E.2d 525, 1979 N.Y. LEXIS 2402 (N.Y. 1979).

Municipal Home Rule Law § 10 does not authorize a city to prescribe a mandatory retirement age for firemen which infringes on the rights of injured firemen under the above statute. Cook v Binghamton, 24 A.D.2d 122, 264 N.Y.S.2d 466, 1965 N.Y. App. Div. LEXIS 2991 (N.Y. App. Div. 3d Dep't 1965).

Where city fireman was not retired against his will, and his retirement was not prompted by erroneous advice from city official, fireman's retirement was voluntary, and therefore, retired fireman was not entitled to disabled fireman's benefits. Weber v Department of Fire, 54 A.D.2d 164, 388 N.Y.S.2d 397, 1976 N.Y. App. Div. LEXIS 13745 (N.Y. App. Div. 4th Dep't 1976).

The right of a fireman injured in the performance of his duties while employed by a city of less than one million who received his regular salary from the time of such injuries was not abrogated by any statute nor was it affected by the city's request that he retire under § 65 of the Civil Service Law where the injured employee protested against such retirement, nor was such right abrogated by the fact that he had accepted Workmen's Compensation. Birmingham v Mirrington, 123 N.Y.S.2d 72, 204 Misc. 821, 1953 N.Y. Misc. LEXIS 1918 (N.Y. Sup. Ct. 1953), modified, 284 A.D. 721, 134 N.Y.S.2d 456, 1954 N.Y. App. Div. LEXIS 3480 (N.Y. App. Div. 1954).

Under a city ordinance authorizing the discharge of any fireman who failed to comply with the rules and regulations of the bureau of fire, the chief engineer of the fire bureau could not discharge a fireman for his refusal to execute medical waivers to be used by the state retirement system in connection with his involuntary retirement following his disablement while in attendance at a fire. Birmingham v Mirrington, 127 N.Y.S.2d 109, 205 Misc. 28, 1953 N.Y. Misc. LEXIS 2534 (N.Y. Sup. Ct. 1953), modified, 284 A.D. 721, 134 N.Y.S.2d 456, 1954 N.Y. App. Div. LEXIS 3480 (N.Y. App. Div. 1954).

It is doubted that a city may compel the retirement of a disabled paid city fireman by compelling him to accept a pension

from the city's fire and police pension fund. 1954 NY Ops Atty Gen June 29 (Informal), 1954 N.Y. AG LEXIS 309.

A paid fireman of a city other than New York City who is injured and disabled in line of duty must be paid full salary until his disability has ceased or until he voluntarily retires, and he cannot be retired otherwise than voluntarily. 1962 Op St Compt No. 62-399.

32. Waiver of benefits

Firefighter was not entitled to summary judgment against employer (city) in action for breach of contract and improper termination of his full salary following retirement where material issue of fact existed as to whether firefighter's retirement was other than voluntary; if retirement were voluntary, firefighter would not be entitled to benefits under CLS Gen Mun § 207-a. Dempsey v Troy, 146 A.D.2d 931, 537 N.Y.S.2d 329, 1989 N.Y. App. Div. LEXIS 481 (N.Y. App. Div. 3d Dep't 1989).

A disabled firefighter forfeits his or her entitlement to payments and benefits provided pursuant to General Municipal Law § 207-a upon becoming self-employed, but not upon engaging in uncompensated volunteer work. 1992 Op St Compt No. 92-12, 1992 N.Y. Comp. LEXIS 8.

Whether firefighter waives his rights under § 207-a is a question of fact, not for this Department's determination; § 207-a is applied as it existed at time of disability, not as amended retroactively. 1979 Op St Compt No. 79-127.

33. —Engaging in other employment

Firefighter injured in motorcycle accident and again later while mowing lawn at fire station forfeited his right to benefits under CLS Gen Mun § 207-a by virtue of his sporadic post-disability outside employment as independent contractor and messenger, despite his claim that § 207-a had to be construed literally and that disabled firefighter could forfeit such benefits only after municipality or fire district had begun payment of benefits; under § 207-a, only those firefighters who are disabled from all employment are entitled to benefits, and forfeiture applies when disability and outside employment occur at same time. Ryan v Brighton Fire Dist., 255 A.D.2d 886, 680 N.Y.S.2d 353, 1998 N.Y. App. Div. LEXIS 12074 (N.Y. App. Div. 4th Dep't 1998), app. denied, 93 N.Y.2d 802, 687 N.Y.S.2d 626, 710 N.E.2d 273, 1999 N.Y. LEXIS 162 (N.Y. 1999).

City's termination of disabled firefighter's CLS Gen Mun § 207-a benefits was not arbitrary, abuse of discretion, or erroneous as matter of law where firefighter owned dry-cleaning business and performed such tasks as cleaning and pressing clothes and waiting on customers, and thus he forfeited his right to benefits by engaging in outside employment while collecting full disability benefits from city. Sawyer v City of Oneonta, 273 A.D.2d 685, 709 N.Y.S.2d 252, 2000 N.Y. App. Div. LEXIS 7235 (N.Y. App. Div. 3d Dep't 2000).

Firefighter's forfeiture of CLS Gen Mun § 207-a benefits by engaging in outside employment while collecting full disability benefits from city was not permanent where he later returned to full-time status without restriction, disposed of his family business, suffered another injury that resulted in award of disability retirement, and did not engage in disqualifying employment during latter disability. Sawyer v City of Oneonta, 273 A.D.2d 685, 709 N.Y.S.2d 252, 2000 N.Y. App. Div. LEXIS 7235 (N.Y. App. Div. 3d Dep't 2000).

Substantial evidence supported termination of firefighter's CLS Gen Mun § 207-a benefits where firefighter stated, in submissions to United States Coast Guard, that he was operating boat "for hire" while receiving benefits. Wiley v Hiller, 277 A.D.2d 1024, 716 N.Y.S.2d 226, 2000 N.Y. App. Div. LEXIS 11362 (N.Y. App. Div. 4th Dep't 2000), app. dismissed, 96 N.Y.2d 852, 729 N.Y.S.2d 667, 754 N.E.2d 769, 2001 N.Y. LEXIS 1832 (N.Y. 2001).

Determination that petitioner was engaged in self-employment as car dealer in violation of CLS Gen Mun § 207-a was supported by evidence, inter alia, that he was registered with Department of Motor Vehicles as car dealer, had sign on his garage advertising same with his business hours, had maintained cars without license plates on his property for purpose of sale, had sold cars subsequent to his receipt of disability benefits, and filed profit and loss statements for such business with his tax returns. Williamson v City of Troy, 284 A.D.2d 649, 726 N.Y.S.2d 178, 2001 N.Y. App. Div. LEXIS 6009 (N.Y. App. Div. 3d Dep't 2001).

A person may jeopardize his right to benefits as a paid city fireman if he also serves as a volunteer member of the city fire department. 1962 Op St Compt No. 62-944.

A disabled retired firefighter receiving payments pursuant to General Municipal Law § 207-a(2) is entitled to longevity salary increments or steps, but not to holiday pay; a firefighter receiving payments pursuant to § 207-a(2) is subject to the employment restrictions in § 207-a(6). 1991 Op St Compt No. 91-25, 1991 N.Y. Comp. LEXIS 23.

Subject to any applicable collective bargaining or confidentiality requirements, municipality may monitor compliance with employment restriction in CLS Gen Mun § 207-a(6) by requiring disabled firefighters to certify periodically that they are not engaged in prohibited employment or to file copies of their most recent income tax returns; termination of payments and benefits for engaging in prohibited employment requires adversarial hearing at which municipality has burden of proof. 1994 Op St Compt No. 94-13, 1994 N.Y. Comp. LEXIS 11.

A village fireman who was injured in course of duty and has been receiving wages pursuant to this section and working for another employer is still entitled to receive wages unless the municipal health authorities or a physician certifies that he has recovered and is physically able to perform regular duties or he refuses to submit to an examination. 1964 Op St Compt No. 64-30.

34. —Refusal to accept medical treatment

Firefighter's refusal to undergo second surgery did not constitute waiver of his right to benefits under CLS Gen Mun § 207-a in light of his previous unsuccessful surgery and steroid treatments and lack of likelihood of success of proposed surgery. Kauffman v Dolce, 216 A.D.2d 298, 627 N.Y.S.2d 750, 1995 N.Y. App. Div. LEXIS 5914 (N.Y. App. Div. 2d Dep't 1995).

A forfeiture of statutory benefits to an injured, ill or disabled fireman may be founded upon an unreasonable refusal to submit to surgical treatment. 1967 Op St Compt No. 67-476.

A village fireman who was injured in course of duty and has been receiving wages pursuant to this section and working for another employer is still entitled to receive wages unless the municipal health authorities or a physician certifies that he has recovered and is physically able to perform regular duties or he refuses to submit to an examination. 1964 Op St Compt No. 64-30.

35. —Other acts constituting waiver

Where an injured city fireman first learned of his rights under this section when he consulted an attorney in 1953, delay until 1955 in instituting proceedings in the nature of mandamus to compel reinstatement in employment with full pay precluded him from obtaining such relief. Devens v Gokey, 12 A.D.2d 135, 209 N.Y.S.2d 94, 1961 N.Y. App. Div. LEXIS 13462 (N.Y. App. Div. 4th Dep't), aff'd, 10 N.Y.2d 898, 223 N.Y.S.2d 515, 179 N.E.2d 516, 1961 N.Y. LEXIS 931 (N.Y. 1961).

In action by retired fireman seeking difference between his current pension and his full salary until age 62 and difference between his current pension and three-quarter disability pay he would have received from age 62 had his application for accidental disability retirement benefits been accepted, plaintiff has failed to state cause of action in negligence; at time of plaintiff's injury, Retirement and Social Security Law § 363 (former [c]) provided that no application for accidental disability retirement benefits would be approved unless written notice was filed with Comptroller within 30 days of accident; plaintiff failed to file such notice and, despite his claim to contrary, defendant municipality had no obligation to act for him. Moreover, defendant contends that plaintiff voluntarily retired, thereby losing any rights to General Municipal Law § 207-a benefits, and since plaintiff avers that his retirement was other than voluntary, there exists material issue of fact which precludes grant of summary judgment in plaintiff's favor. Dempsey v Troy, 146 A.D.2d 931, 537 N.Y.S.2d 329, 1989 N.Y. App. Div. LEXIS 481 (N.Y. App. Div. 3d Dep't 1989).

A voluntary application by a fireman, disabled in course of duties, for disability retirement, constitutes a waiver of all rights to benefits under this section. 1963 NY Ops Atty Gen March 15 (Informal), 1963 N.Y. AG LEXIS 102.

36. Insurance

Payment of city fireman's hospital and medical bills by insurer under policy, which was paid for by city on fireman's behalf, were payments "for or on his behalf" within judgment requiring that city, which was ordered to reimburse fireman for medical and hospital costs attributable to his heart condition, be credited with "any and all medical and hospital costs paid to" fireman "or for or on his behalf attributable to his heart condition." Geremski v Department of Fire, 78 Misc. 2d 555, 357 N.Y.S.2d 975, 1974 N.Y. Misc. LEXIS 1445 (N.Y. Sup. Ct. 1974), aff'd, 49 A.D.2d 1013, 375 N.Y.S.2d 500, 1975 N.Y. App. Div. LEXIS 11366 (N.Y. App. Div. 4th Dep't 1975).

The town board of a town may insure against the liability imposed by section 207-a of the General Municipal Law arising from injuries to paid town firemen. 1947 Op St Compt 358.

A village may insure against liability imposed by this section. 1953 Op St Compt No. 53-6307.

37. Procedure

Where firemen instituted negligence actions against city, city was permitted to plead as an affirmative defense in mitigation of damages, the amounts paid by city for salary, medical, surgical, hospital and associated expenses arising out of the injury. Szybura v Elmira, 28 A.D.2d 1154, 284 N.Y.S.2d 190, 1967 N.Y. App. Div. LEXIS 3073 (N.Y. App. Div. 3d Dep't 1967).

Supreme Court properly held trial de novo to decide city firefighter's eligibility for benefits under CLS Gen Mun § 207-a since (1) city denied benefits on basis of doctor's report without conducting hearing, (2) statute does not require that municipality be primary arbiter of eligibility, and (3) Supreme Court found there to be triable fact issues as to cause of firefighter's injury. Kirley v Department of Fire, 138 A.D.2d 842, 526 N.Y.S.2d 240, 1988 N.Y. App. Div. LEXIS 2974 (N.Y. App. Div. 3d Dep't 1988).

Former firefighter, who opted for retirement at age 62 under CLS Retire & S S § 384-d but was rendered permanently disabled prior to retirement and eligible for benefits under CLS Retire & S S § 363 and CLS Gen Mun § 207-a(2), was not denied due process of law when respondent commissioner terminated his § 207-a(2) benefits without pretermination hearing when he reached age 62, based solely on interpretation and application of law. Farrell v Dolce, 170 Misc. 2d 333, 648 N.Y.S.2d 511, 1996 N.Y. Misc. LEXIS 372 (N.Y. Sup. Ct. 1996).

38. Illustrative cases

In personal injury action by city firefighter against suppliers of piece of firefighting equipment called "rescue saw," cross claim asserted by city, as third-party defendant, against manufacturer of rescue saw, for reimbursement of medical expenses and salary benefits paid to firefighter under CLS Gen Mun § 207-a, should not have been dismissed on ground that firefighter did not possess viable cause of action against manufacturer since (1) city's cross claim alleged breach of warranties in design, manufacture and sale of saw, (2) as city employee, firefighter was third-party beneficiary of those warranties and possessed cause of action for their breach, and (3) record failed to show when saw was delivered to city, or whether any warranty expressly extended to future performance, and thus manufacturer failed to show that cause of action for breach of warranty, if asserted by firefighter, would have been barred by 4-year statute of limitations. Kurtz v Sanford Fire Apparatus Corp., 147 A.D.2d 952, 537 N.Y.S.2d 407, 1989 N.Y. App. Div. LEXIS 1415 (N.Y. App. Div. 4th Dep't 1989).

Court should have granted city respondents' motion to dismiss petition on ground that petitioner, city firefighter, failed to exhaust his administrative remedies where he was granted performance of duty disability retirement benefits under CLS Retire & S S § 363-c, he thereafter applied to city for supplemental wage benefits under CLS Gen Mun § 207-a(2), and he commenced instant proceeding before respondents determined his application for § 207-a(2) benefits. Lefford v City of Jamestown, 244 A.D.2d 895, 665 N.Y.S.2d 230, 1997 N.Y. App. Div. LEXIS 12231 (N.Y. App. Div. 4th Dep't 1997).

Article 78 proceeding would be remitted to city respondents for initial determination of petitioner's application for benefits under CLS Gen Mun § 207-a(2) where parties did not create administrative record but submitted set of stipulated facts to Supreme Court, which reviewed matter de novo, and thus there was no administrative decision on merits in first instance. Brzostek v City of Syracuse, 266 A.D.2d 836, 697 N.Y.S.2d 423, 1999 N.Y. App. Div. LEXIS 11776 (N.Y. App. Div. 4th Dep't 1999).

Decision by the board of commissioners of a fire district denying petitioner's application for benefits was supported by substantial evidence. The board was entitled to make a finding contrary to the hearing officer's recommendation and was free to credit the fire district's expert over petitioner's expert. Matter of Delgrande v Greenville Fire Dist., 132 A.D.3d 987, 18 N.Y.S.3d 178, 2015 N.Y. App. Div. LEXIS 7903 (N.Y. App. Div. 2d Dep't 2015), app. denied, 26 N.Y.3d 918, 47 N.E.3d 93, 26 N.Y.S.3d 763, 2016 N.Y. LEXIS 158 (N.Y. 2016).

Petitioner's renewal motion was timely, because a final judgment had not been entered and the petitioner had made the instant motion to renew prior to the entry of a final judgment, and the Diegelman decision reflected a change in the law that would permit the petitioner, who was receiving disability benefits pursuant to this provision, to commence an action against his employer. Lockwood v City of Yonkers, 57 Misc. 3d 728, 60 N.Y.S.3d 798, 2017 N.Y. Misc. LEXIS 3369 (N.Y. Sup. Ct. 2017), rev'd, 179 A.D.3d 688, 116 N.Y.S.3d 383, 2020 N.Y. App. Div. LEXIS 123 (N.Y. App. Div. 2d Dep't 2020), app. dismissed, 179 A.D.3d 660, 113 N.Y.S.3d 598, 2020 N.Y. App. Div. LEXIS 100 (N.Y. App. Div. 2d Dep't 2020).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 204-a, 207-k; CLS Retire & SS §§ 363-c, 530; CLS Town §§ 176, 176-a; CLS Vill § 10-1000; CLS Work Comp § 30.

Retirement for disability incurred in performance of duty, CLS Retire & SS § 363-c.

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations § 1214.

57 Am Jur 2d, Municipal, School, and State Tort Liability § 5.

Law Reviews:

1977 Survey of New York Law: Insurance. 29 Syracuse L. Rev. 385.

Annotations:

Causal connection between fireman's or policeman's performance of official duties and his disability, for purpose of recovering disability benefits. 27 ALR2d 974.

Determination whether firefighter's disability is service-connected for disability pension purposes. 7 ALR4th 799.

Matthew Bender's New York Practice Guides: LexisNexis AnswerGuide New York Negligence § 3.19 Examining Defense Based on Limitation on recovery for Firefighters and Police Officers.

Texts: 4 Bender's New York Evidence § 160.03.

§ 207-g. Ordinary death benefits of members of police retirement systems

1. As used in this section:

(a) "Member" means a contributor to the pension system of any city maintaining a police pension fund based upon the accumulation of deductions from the compensation or the contributions of the members thereof and payments made by such city to pension reserves for such members, and such pension system provides for optional retirement allowances.

(b) "Accumulated deductions" shall mean the sum of all the amounts, deducted from the compensation of a member of such pension system or contributed by him, standing to his credit therein; together with

the interest thereon, if any, as provided by the law, charter or administrative code governing such system.

(c) "Pension" shall mean payments for life derived from appropriations for and payments into such pension system by such city.

(d) "Minimum period of service" shall mean a fixed number of years of service specified in a plan or option provided by such police pension system and elected by such member, as a necessary pre-requisite for a pension or retirement allowance upon retirement from service.

(e) "Minimum age" means the age specified in a plan or option provided by such police pension system and elected by such member, as a necessary pre-requisite for a pension or retirement allowance upon retirement from service.

2. Notwithstanding the provisions of any general, special or local law, charter or administrative code, and in lieu of any lesser amount therein prescribed, upon the death of a member, prior to the first payment of a retirement benefit, who has attained the minimum age or completed the minimum period of service, as elected by him for retirement, and whether or not such member shall have filed application for retirement, there shall be paid to his estate, or to such person as he has nominated or shall nominate by written designation duly executed and filed in accordance with the requirements of such respective police pension systems:

(a) His accumulated deductions; and in addition thereto,

(b) The amount of the reserve equal to the present value of the pension he would have received, under the provisions of the law, charter or administrative code governing such police pension system, if he had retired and become entitled to a pension on the day immediately preceding the day of his death.

The beneficiary of such deceased member shall have the right to accept such benefits in lump sums or in such periodic payments, on an annuity basis, as such beneficiary shall elect.

3. Nothing contained in the foregoing provisions of this section shall be held or deemed to affect or to lessen any benefits greater than those set forth in the foregoing paragraph two which are or shall be provided for by any such police pension system in respect of a member or members thereof dying in the course of or as the result of the performance of his duties.

4. The provisions of this section shall not apply to members of the New York state and local police and fire retirement system.

HISTORY:

Add, L 1964, ch 953, § 1, eff April 24, 1964; amd, L 1973, ch 721, § 7, eff June 11, 1973; L 2018, ch 476, § 61, effective December 28, 2018.

Amendment Notes The 2018 amendment by ch 476, § 61, substituted "New York state and local police and fire retirement system" for "New York state policemen's and firemen's retirement system" in 4.

Notes to Decisions

1. Generally

Board of trustees of police pension fund had no authority or discretion to consider unused vacation time and/or accrued terminal leave in determining eligibility for death gamble benefits or to reduce the statutory period of service required therefor. Keane v Leary, 34 A.D.2d 771, 311 N.Y.S.2d 349, 1970 N.Y. App. Div. LEXIS 4814 (N.Y. App. Div. 1st Dep't 1970), aff'd, 29 N.Y.2d 713, 325 N.Y.S.2d 752, 275 N.E.2d 334, 1971 N.Y. LEXIS 1023 (N.Y. 1971).

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

Payment of the ordinary death benefit upon death of certain retirees. 2 NYCRR §§ 322.1 et seq.

§ 209. Outside service by local fire departments, companies, ambulance districts and airport crash-fire-rescue units

1. The fire department of any city, village or fire district, the fire companies serving territory outside of villages and fire districts in any town and the fire departments of any town which has a town fire department, an ambulance district and a county or public authority which operates an airport crash-fire-rescue unit, may answer calls for assistance outside the area regularly served and protected by such fire department or fire companies, ambulance district or crash-fire-rescue unit and may engage and participate in fire training programs in territory outside the area regularly served and protected by such fire department, fire companies, ambulance districts or crash-fire-rescue unit. While in the performance of their duties under this subdivision, the members of such departments, companies, districts or crash-fire-rescue units shall have the same immunities and privileges as if such duties were performed within the area regularly served and protected by such departments, companies, districts or crash-fire-rescue units. While responding to a call for assistance under this subdivision a city, village, fire district, ambulance district, town or county or public authority operating an airport crash-fire-rescue unit shall be liable for the negligence of firefighters of the city fire department, village fire department, fire district fire department, town fire department, ambulance district or crash-fire-rescue unit, respectively, occurring in the performance of their duties in the same manner and to the same extent as if such negligence occurred in the performance of their duties within the area regularly served and protected by such departments, districts or units. The legislative body of any county, city or village, the board of fire commissioners or other governing board of any fire district, ambulance district or public authority or the town board of any town in relation to the fire companies serving territory outside of villages and fire districts or in relation to a town fire department, or ambulance district, as the case may be, by resolution may restrict such outside service and training to such extent as it shall deem advisable. Any such resolution shall continue in effect until amended or repealed by the adoption of a subsequent resolution. The officer in

charge of any fire department or fire company or ambulance district shall be notified promptly of the adoption of any such resolution and of any amendment or repeal thereof. In a county, city, or in a village or town, such action may be taken by local law or by ordinance instead of by resolution. As used in this section, the terms "fire department", "fire companies", "ambulance service" and "crash-fire-rescue unit" shall include all companies, squads, patrols or other units of such departments, companies or units, or volunteer ambulance services organized pursuant to section one hundred twenty-two-b of this chapter, and the term "assistance" includes the services of firefighting forces, fire police squads, ambulance services, emergency rescue and first aid squads rendered in case of a fire or other emergency, including stand-by service, to aid (1) a fire department or fire company, and (2) owners or occupants of property, and other persons, whether or not such owners, occupants or persons are receiving fire or other emergency service from another fire department or fire company or ambulance service. Except as otherwise provided by law in the case of natural disaster emergencies, a call to furnish assistance may be made by any person aware of the peril involved and the need for assistance or pursuant to any legally authorized or recognized plan for the furnishing of mutual aid in cases of fire or other emergency. The call need not originate in the municipal corporation, district or area liable for the payment of financial benefits in the event of the death or injury of a firefighter or ambulance or rescue squad member engaged in rendering such assistance. The call may be relayed through one or more persons or mediums of communication. The provisions of this subdivision shall supersede the provisions of any general, special or local law to the extent that there is a conflict between the provisions of this subdivision and such law, except that if (1) any city had, prior to April fifteenth, nineteen hundred fifty, restricted in any manner the fire department of the city from engaging in service outside the city or (2) any city, village, fire district or town has heretofore restricted in any manner a fire department or fire company or ambulance service from engaging in service or training pursuant to the provisions of this subdivision, such restrictions shall continue in effect until changed pursuant to the provisions of this subdivision.

2. Any loss or damage to, or expense incurred in the operation of, fire apparatus or other equipment answering a call for assistance from outside territory, as provided for in subdivision one of this section or otherwise, and the cost of any materials used in connection with such call, shall be a charge against and paid by the city, village, fire district, ambulance district or by the town in relation to territory in the town located in (1) a fire protection district, (2) a fire alarm district, (3) or ambulance district or (4) the territory in the town outside of any village, fire district or any such fire protection district or fire alarm district, ambulance district, which issued the call for assistance. No such claim, however, shall be allowed unless, within sixty days after such loss or damage has been sustained, or such expense has been incurred, or such materials have been used, written notice thereof be served by mail or otherwise on the comptroller or chief financial officer of the city, the village clerk of the village, the secretary of the fire district, the clerk of the ambulance district or the town clerk of the town in relation to the territory in the town located as aforesaid, from which issued the call for assistance.

3. In cities such loss, damage, expense or cost shall be a city charge and audited and paid as other city charges. In villages such loss, damage, expense or cost shall be a village charge and shall be audited and paid in the same manner as village charges, and shall be assessed upon the property liable to taxation in said village, and levied and collected in the same manner as village taxes. In fire districts or ambulance districts such loss, damage, expense or cost shall be audited and paid in the same manner as other fire district or ambulance district charges, and shall be assessed and levied upon the property liable to taxation in such district and collected in the same manner as other fire or ambulance district charges. The limitations on fire district expenditures set forth in subdivision eighteen of section one hundred seventy-six of the town law shall not be applicable to appropriations or expenditures for the purpose of paying any such loss, damage, expense or cost.

4. In towns which do not contain a city, village, fire district, fire protection district, ambulance district or fire alarm district, such loss, damage, expense or cost shall be a town charge audited and paid in the same manner as town charges. In fire protection districts, fire alarm districts, or territory outside of cities, villages, fire districts, ambulance districts or any such fire protection or fire alarm district, such loss, damage, expense or cost shall be a town charge, audited and paid in the same manner as town charges, and shall be assessed upon the property liable to taxation in such fire protection district, fire alarm district or territory outside of cities, villages, fire districts, ambulance districts or such fire protection and fire alarm districts, as the case may be.

5. Provided, however, that nothing contained in this section shall preclude a city, village, fire district, ambulance district or town from entering into a reciprocal fire protection agreement with the state of New York and the head of any military department of the United States government, which agreement shall waive all compensation for any loss, damage, personal injury, or death occurring in consequence of the performance of said reciprocal fire protection agreement. Provided further, however, that any reciprocal fire protection agreement entered into under the authority of this subdivision may provide for the reimbursement for any and all costs incurred by the party issuing the call for assistance.

HISTORY:

Add, L 1931, ch 332, § 1, eff April 8, 1931; amd, L 1940, ch 342, § 1; L 1950, ch 710, §§ 1, 2; L 1956, ch 438, § 2; L 1957, ch 663, § 4; L 1958, ch 124, § 1; L 1961, ch 867, § 1; L 1962, ch 863, § 1; L 1964, ch 520, § 2; L 1965, ch 755, § 11, eff July 1, 1965; L 1966, ch 267, § 1, eff Nov 1, 1966; L 1980, ch 374, § 1, eff June 23, 1980; L 1980, ch 411, § 1, eff June 23, 1980; L 1983, ch 793, § 1, eff July 30, 1983; L 1990, ch 907, §§ 1–4, eff July 30, 1990; L 2006, ch 191, § 1, eff July 26, 2006; L 2018, ch 476, § 71, effective December 28, 2018.

Editor's Notes: [Laws 1961, ch 867] This act was recommended by the Joint Legislative Committee on Municipal Tort Liability. Under former law the location of liability for the negligence of firemen engaged in answering a call for assistance was left uncertain (see, e.g., Tilson v Kuhner, 1954, 283 App Div 604). It is vital to the fire services and to the development of the mutual aid program authorized by § 209 of the General Municipal Law that liability be located with certainty. Only thus can liability be adequately insured against and costly litigation avoided. This act establishes that certainty by placing liability upon the responding company. Thus each fire department or company is responsible for the negligence of its own firemen—at home and abroad. A contrary rule would place a crushing burden upon the aided district under the broad assistance provisions of § 209.

Amendment Notes The 2018 amendment by ch 476, § 71, in 1, substituted "firefighters" for "firemen" in the third and tenth sentences.

Notes to Decisions

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1. Generally

After a hearing to determine the town's liability for damage to a fire truck during a mutual aid call to the town, it was determined that the fire commissioner was not capable of providing a proper foundation to admit the repair invoice as its maker and the fire department did not show that it routinely relied upon the business records of another entity in performance of its business. W. Valley Fire Dist. No. 1 v Vill. of Springville, 294 A.D.2d 949, 743 N.Y.S.2d 215, 2002 N.Y. App. Div. LEXIS 4551 (N.Y. App. Div. 4th Dep't 2002).

The offices of village trustee and chief engineer of the village fire department may not be held by the same person at the same time. 1964 NY Ops Atty Gen Sept 25 (Informal), 1964 N.Y. AG LEXIS 139.

Municipality or district issuing call for assistance is liable for benefits to firemen injured or killed and for equipment damaged and materials used. 1953 Op St Compt No. 53-6285.

A volunteer fireman providing service outside the State pursuant to a fire protection contract is covered by volunteer firemen's benefits payable by his "home area". 1975 Op St Compt No. 75-160.

2. Construction

The word "includes" as used in the phrase that the term "call for assistance includes any call for aid resulting from" the operation of a recognized mutual aid plan, was used as a word of enlargement, specifying a particular case inserted out of abundant caution, and not as a word of restriction. Watertown v Watertown, 139 N.Y.S.2d 198, 207 Misc. 433, 1952 N.Y. Misc. LEXIS 3002 (N.Y. Sup. Ct. 1952).

3. Relationship to other laws

This section in no way modifies or changes § 205. In re Young's Estate, 266 N.Y.S. 532, 148 Misc. 431, 1933 N.Y. Misc. LEXIS 1298 (N.Y. County Ct. 1933), rev'd, 241 A.D. 188, 272 N.Y.S. 167, 1934 N.Y. App. Div. LEXIS 8204 (N.Y. App. Div. 1934).

The village board of trustees, on the recommendation of the council of a fire department in a village having no board of fire commissioners, determines the style of uniforms and the type of equipment to be purchased for use by members of the fire department. The procedures for receiving calls for assistance and responding to such calls by participants in a county mutual aid plan would be those described in the plan. Section 10-1006(16) of the Village Law does not affect the limitation under section 10-1006(7) that not more than thirty percent of the members of a fire company may be non-residents of the village or of the area served by the fire department or a fire company. 1981 NY Ops Atty Gen 81-36 (Informal), 1981 N.Y. AG LEXIS 122.

A fire district fire department is authorized to answer calls for assistance from a county park facility located outside the boundaries of the fire department. Volunteer firemen injured while answering a call for assistance from such area are covered by the provisions of the Volunteer Firemen's Benefit Law. 1980 Op St Compt No. 80-793.

4. Authority to provide outside service

A village fire company, under the direction of the chief, may respond to emergency calls from outside the area regularly protected, until such outside service is restricted by action of the governing board of the village. 1957 NY Ops Atty Gen Oct 4 (Informal), 1957 N.Y. AG LEXIS 210.

A village fire department may respond to a call for assistance from an Indian Reservation unless there is a resolution restricting such response. Volunteer firemen injured in the course of such response are covered under the Volunteer Firemen's Benefit Law. 1959 NY Ops Atty Gen Sept 10 (Informal), 1959 N.Y. AG LEXIS 203.

The village board of trustees, on the recommendation of the council of a fire department in a village having no board of fire commissioners, determines the style of uniforms and the type of equipment to be purchased for use by members of the fire department. The procedures for receiving calls for assistance and responding to such calls by participants in a county mutual aid plan would be those described in the plan. Section 10-1006(16) of the Village Law does not affect the limitation under section 10-1006(7) that not more than thirty percent of the members of a fire company may be non-residents of the village or of the area served by the fire department or a fire company. 1981 NY Ops Atty Gen 81-36 (Informal), 1981 N.Y. AG LEXIS 122.

A village fire department may legally respond to calls for assistance from persons residing in the Commonwealth of Pennsylvania, if such outside service has not been restricted or prohibited by the village board. 1954 Op St Compt No. 54-6910.

A fire district may answer calls for assistance from town territory outside the area regularly served unless restricted by resolution of the board of fire commissioners. No notice need be given to the taxpayers of an unprotected area before a fire district can render assistance to it. 1955 Op St Compt No. 55-7638.

Under Sections 10-1000 et seq. of the Village Law, a village fire department is a corporation consisting of members of all the fire, hose, protective and hook and ladder companies of a village; it is administered by a board of fire commissioners or, where no board of fire commissioners has been appointed, by the village board of

trustees and the council of the fire department. Fire companies in a village are associations or corporations, which must operate in accordance with their certificates of incorporation, bylaws, and statutes; and, although fire companies are separate and distinct from the village, the statutes do permit village authorities to exercise a certain degree of control over their organization, incorporation, governance, and membership, including residency for membership. A fire company must consent to a contract for the provision of fire protection outside the village and the fire chief of the village fire department cannot consent on behalf of members of the company. 1990 Op St Compt No. 90-19, 1990 N.Y. Comp. LEXIS 26.

5. —Restriction upon outside service

No restriction may be made, on a local level, as to the source or origin of mutual aid calls to which a village volunteer fire company may respond. 1961 NY Ops Atty Gen Oct 23 (Informal), 1961 N.Y. AG LEXIS 191.

The expenses incurred by a village fire company in answering a call for assistance must be paid by the town which issued the call, although the answering of said call was supposedly prohibited by a resolution of the village board. 1967 Op St Compt No. 67-1006.

6. —Ambulance services

Emergency ambulance service may be rendered outside of the fire district unless limited by the Board of Fire Commissioners, and the village is liable for operation of an ambulance when such ambulance is engaged in duly authorized activities. 1961 NY Ops Atty Gen April 25 (Informal), 1961 N.Y. AG LEXIS 72.

The emergency relief squad of a village fire department may respond to calls for assistance from territory outside the area regularly protected by the fire department. The decision of the dispatcher that the occurrence is a fire, accident, public calamity or other emergency may not be final if the fireman, after arrival at the scene, knows or should know that no emergency exists. 1954 Op St Compt No. 54-6736.

Pursuant to the 1954 amendment to the General Municipal Law, a town may provide general ambulance service or contract with a fire corporation for the furnishing of such service. 1954 Op St Compt No. 54-7057.

There is no authority for a town to contract with a fire company or a fire district to provide for general ambulance service on a town-wide basis. General ambulance service may be provided to fire protection districts within the town pursuant to fire protection contracts. 1980 Op St Compt No. 80-684.

An emergency rescue and first aid squad of a village fire department may answer calls for assistance originating in an adjoining village, even though that village contracts with an independent volunteer ambulance corps for ambulance service. The village is liable for the negligence of its emergency rescue and first aid squad while answering such calls for assistance. 1981 Op St Compt No. 81-405, 1981 N.Y. Comp. LEXIS 475.

An emergency rescue and first aid squad of a fire department or fire company may answer a call for assistance from an adjacent fire district in cases of fire or other emergency. It may not answer a call from outside the area normally served for general ambulance service in a non-emergency situation—Opns St Comp, 1980, No. 80-465 clarified. Whether a request to transport a person from a hospital located outside the area regularly served to another hospital in an emergency situation is a question of fact which must be determined on the basis of the relevant facts in each situation. 1982 Op St Compt No. 82-147, 1982 N.Y. Comp. LEXIS 573.

Fire district with fire department emergency and rescue squad comprised mainly of volunteer firefighters may authorize squad to contract with "ambulance services," as defined in CLS Pub Health § 3000, to provide services when squad is unavailable, and may contract with appropriate private ambulance company for pre-hospital treatment if (1) fire district, as part of fire protection contract, provides general and/or emergency ambulance service under CLS Gen Mun § 209-b and CLS Pub Health Art 30, (2) town or village has not designated itself as primary provider of, or otherwise contracted for, emergency ambulance, general ambulance or combination of such services acting individually or jointly, and (3) contracted-for services are limited to furnishing of supplemental personnel, equipment or service to cover instances or periods of time when fire district's service may not be readily available; however, no fee may be imposed on person served for services provided under contract with private ambulance company. 2010 Op St Compt No. 2010-4, 2010 N.Y. Comp. LEXIS 2.

A fire district may not contract with a private not-for-profit ambulance squad to provide ambulance services to its area. 1979 Op St Compt No. 79-611.

7. Outside service; answering call for assistance

(1) A village fire department or a volunteer fire company serving territory outside a village may respond to a call for assistance to a fire outside its designated area even if the call is not made pursuant to a mutual aid agreement. However, there is no authority to respond to a fire outside the area usually served when no call for assistance is made. (2) A village fire department or volunteer fire company has no authority to contract to provide fire protection to a business establishment or school located outside its designated area. 1979 Op St Compt No. 79-568, 1979 N.Y. Comp. LEXIS 137.

8. —Persons protected; fire police

Members of fire police squads are covered under § 205 of the General Municipal Law and section 10 of the Workmen's Compensation Law and other sections related thereto when injured outside of the village while rendering services pursuant to a mutual aid arrangement or while rendering services pursuant to a contract between the fire protection district and the village of which their fire company and fire police squad is a part. 1955 Op St Compt No. 55-7238.

Fire police are appointed at the pleasure of the appointing authority. 1955 Op St Compt No. 55-7659.

9. — —Paid firefighters

Payments by a city for medical and hospital care furnished and salaries paid to three paid firemen injured in a collision of a city fire pumper being used to answer a call for assistance in fighting fire in a nearby town were not expenses incurred in the operation of fire apparatus within the meaning of § 209. Watertown v Watertown, 139 N.Y.S.2d 198, 207 Misc. 433, 1952 N.Y. Misc. LEXIS 3002 (N.Y. Sup. Ct. 1952).

Municipality or district issuing call for assistance is liable for benefits to firemen injured or killed and for equipment damaged and materials used. 1953 Op St Compt No. 53-6285.

10. — —Volunteer firefighters

Volunteer firemen en route to and attending a fire outside of the fire district, pursuant to an actual call for assistance, are covered by the Volunteer Firemen's Disability Benefits Law and amendments to the General Municipal Law dealing with the liability of the municipality for damages due to negligence of volunteer firemen. 1959 NY Ops Atty Gen March 31 (Informal), 1959 N.Y. AG LEXIS 123.

A volunteer fire company may answer calls for assistance outside the area regularly served and the members are covered under the Volunteer Firemen's Benefit Law while answering such calls. 1961 NY Ops Atty Gen Oct 20 (Informal), 1961 N.Y. AG LEXIS 189.

Volunteer firemen are covered by volunteer firemen's benefits while answering calls outside of areas regularly served by fire companies. Gratuities accepted by a fire company do not affect firemen's benefits. 1965 NY Ops Atty Gen March 8 (Informal), 1965 N.Y. AG LEXIS 61.

Unprotected area in town from which call for assistance is issued is liable for expense of fire department answering such call and for benefits payable to volunteer firemen under the General Municipal and Workmen's Compensation Laws. 1953 Op St Compt No. 53-6403.

The area which calls for assistance is liable for damages to the fire equipment and also cost of workmen's compensation for volunteer firemen injured at a fire. 1955 Op St Compt No. 55-7638.

Volunteer firemen who are specially trained in scuba diving and under-water recovery work are covered by the Volunteer Firemen's Benefit Law when they are called out to assist neigh-

boring volunteer fire companies in diving to recover the bodies of victims of drowning and similar incidents. 1966 Op St Compt No. 66-745.

A fire district fire department is authorized to answer calls for assistance from a county park facility located outside the boundaries of the fire department. Volunteer firemen injured while answering a call for assistance from such area are covered by the provisions of the Volunteer Firemen's Benefit Law. 1980 Op St Compt No. 80-793.

Members of an emergency rescue and first aid squad of a volunteer fire company are covered by the Volunteer Firemen's Benefit Law when responding to calls for assistance outside of the fire protection district which the company serves pursuant to contract with a town, whether the call is pursuant to a mutual aid plan or otherwise. A town cannot contract with the company to provide ambulance service for the area of the town outside of the fire protection district. 1981 Op St Compt No. 81-112, 1981 N.Y. Comp. LEXIS 771.

Where volunteer firemen are covered by a county self-insurance plan, they are entitled to benefits if injured while responding to a call for assistance from outside the fire district notwithstanding that the request for assistance is not a mutual aid call. 1981 Op St Compt No. 81-77, 1981 N.Y. Comp. LEXIS 809.

A volunteer fireman acting in that capacity is covered by the VFBL while engaged in assisting in the containment of a spill of hazardous substances. The insurance carrier, of course, would make a determination of coverage in the first instance. 1982 Op St Compt No. 82-266, 1982 N.Y. Comp. LEXIS 464.

A fire company of a fire district may respond to an emergency mutual aid call for firemanic or ambulance assistance without depriving the volunteer members of such company of statutorily provided benefits. 1969 Op St Compt No. 69-4.

11. — —Other persons

Call firemen who receive compensation for executing firemanic duties are not volunteer firemen. 1954 Op St Compt No. 54-6872.

12. —Liability for loss or damage sustained while answering outside call

Municipality or district issuing call for assistance is liable for benefits to firemen injured or killed and for equipment damaged and materials used. 1953 Op St Compt No. 53-6285.

Unprotected area in town from which call for assistance is issued is liable for expense of fire department answering such call and for benefits payable to volunteer firemen under the General Municipal and Workmen's Compensation Laws. 1953 Op St Compt No. 53-6403.

The area which calls for assistance is liable for damages to the fire equipment and also cost of workmen's compensation for volunteer firemen injured at a fire. 1955 Op St Compt No. 55-7638.

Any loss or damage to, or expenses incurred in operation of, equipment used in answering call for assistance to fire protection district is charge against and paid by fire protection district, however, "home area" is responsible for Volunteer Firefighters' Benefit Law coverage under those circumstances. 1989 Op St Compt No. 89-15, 1989 N.Y. Comp. LEXIS 18.

13. —Claims for services; timeliness

Where written notice of claim brought by village fire department against town for damage to its fire engine while responding to call in town was mailed to a member of the town board and thereafter presented by that member to the town board at its next regularly scheduled meeting which occurred within the 60 day time limitation, such action constituted timely service upon the town clerk, since the town clerk is required by law to attend all board meetings. Cuba Village v New Hudson, 42 A.D.2d 829, 345 N.Y.S.2d 809, 1973 N.Y. App. Div. LEXIS 3883 (N.Y. App. Div. 4th Dep't 1973).

Where a city sent its fire pumper to fight a fire in a nearby town, the city could not recover from the town the amount of a claim filed against the city by the owner of a truck involved in an accident with the pumper when the claim was barred by the statute of limitations. Nor could it recover the amount of a claim brought by the owner and operator of a truck for personal injuries and damages to the truck when the action was pending and no expense had yet been incurred. Watertown v Watertown, 139 N.Y.S.2d 198, 207 Misc. 433, 1952 N.Y. Misc. LEXIS 3002 (N.Y. Sup. Ct. 1952).

Claims submitted pursuant to this section must be itemized and must be submitted within 60 days after the claim arises. 1957 Op St Compt No. 57-200.

14. — —Claims against cities

Where a city, which had sent its fire pumper to fight a fire in a nearby town, had paid a judgment in an action brought against the city for wrongful death of its firemen under Decedent Estate Law §§ 119, 130, the city could not recover the amount paid from the town under this section. Watertown v Watertown, 139 N.Y.S.2d 198, 207 Misc. 433, 1952 N.Y. Misc. LEXIS 3002 (N.Y. Sup. Ct. 1952).

Where city fire department answers call for outside assistance, claim for cost of city water used should be made in manner prescribed in subdivisions 2 and 4 of this section. 1953 Op St Compt No. 53-6203.

15. — —Claims against towns

Where written notice of claim brought by village fire department against town for damage to its fire engine while responding to call in town was mailed to a member of the town board and thereafter presented by that member to the town board at its next regularly scheduled meeting which occurred within the 60 day time limitation, such action constituted timely service upon the town clerk, since the town clerk is required by law to attend all board meetings. Cuba Village v New Hudson, 42 A.D.2d 829, 345 N.Y.S.2d 809, 1973 N.Y. App. Div. LEXIS 3883 (N.Y. App. Div. 4th Dep't 1973).

A town may pay a claim for loss, damage, expense or cost incurred by a fire department or fire company in rendering aid to territory of a town outside of a city, village, fire district, fire protection district or fire alarm district as provided by Sections 205 and 209 of the General Municipal Law. 1945 Op St Compt 122.; 1945 Op St Compt 215.

Town may not pay volunteer firemen value of clothing damaged while answering a call for assistance in territory of the town outside of the fire district. 1946 Op St Compt 187.

When a claim is submitted to the town board of a town for payment for services in fighting a fire in unorganized territory of the town, the claim is a town charge, and may be paid from the general fund. However, the amount of such claim must be assessed upon the unorganized territory of the town. 1947 Op St Compt 17.

Where an incorporated fire company suffers damage to its apparatus and equipment in responding to a call for assistance from a fire district situated in two towns, notice of claim should be served upon the town clerk of the town from which issued the call for assistance. Claim should be made by the incorporated fire company and not by the town board on behalf of the fire protection district. 1953 Op St Compt No. 53-6208.

Where a fire district furnishes outside assistance to unorganized territory of a town, it may submit a claim for reimbursement of the cost of furnishing such assistance within sixty days, by serving notice of the claim upon the town clerk whether the fire consumes personal property or real property. 1954 Op St Compt No. 54-6552.

16. — —Claims against villages

Section 209 of the General Municipal Law does not authorize a village to reimburse incorporated fire companies for loss or damage of apparatus or equipment belonging to fire companies but the village may purchase, in the name of the village, all necessary apparatus, equipment and supplies. 1945 Op St Compt 215.

Claims for services outside of village limits are not authorized by § 209 of General Municipal Law but claims for loss or damage or expense incurred are authorized by said section. 1945 Op St Compt 215.

Village of Castleton-on-Hudson has no responsibility or liability to incorporated fire companies which constitute fire department other than that imposed by statute. 1945 Op St Compt 215.

Where a village requests outside assistance from a fire company or department, the village is responsible for any damage to fire apparatus or equipment resulting from an accident which occurs before the company or department reaches the scene of the fire; the "home area" of the fire company or department is responsible for providing benefits to a volunteer fireman injured in such an accident. Where a village requests outside assistance from a fire company or department, the village is liable for the cost of any damage to equipment occurring at the fire scene and the cost of supplies needed to fight the fire; the village may, in its discretion, purchase mutual aid insurance to insure itself against such liability. 1981 Op St Compt No. 81-99, 1981 N.Y. Comp. LEXIS 787.

17. —Negligence claims

As long as a volunteer fireman is in the course of performing a statutorily authorized duty (General Municipal Law, § 209, subd 1) of providing mutual aid as a member of his volunteer fire company, the place of an automobile collision allegedly caused by the negligence of the fireman is irrelevant and the town which established a fire protection district and entered into a contract with the volunteer fire department, of which the fireman was a member, for fire protection within the district may be held liable even though the accident took place in a city which is not part of the town. Cuddy v Amsterdam, 62 A.D.2d 119, 403 N.Y.S.2d 590, 1978 N.Y. App. Div. LEXIS 10426 (N.Y. App. Div. 3d Dep't 1978).

Subdivision 1 of this section, as amended in 1961, does not impose liability upon a city, village, town or fire district when a volunteer member of the fire department thereof offers his services to the chief engineer of another fire department for firefighting in a place not regularly served by his own fire department and commits some negligent act. 1961 Op St Compt No. 61-438.

18. —Miscellaneous matters

Boards of commissioners of a fire district may permit its fire companies and departments to engage and participate in fire training programs outside the area regularly served by them and may contribute toward the cost of improvements made necessary by such use within the appropriations approved by the taxpayers of the district or within the statutory limitations specified in Town Law, § 176. 1972 NY Ops Atty Gen Aug 31 (Informal), 1972 N.Y. AG LEXIS 127.

A fire district may enter into a municipal cooperation agreement with an adjoining fire district under Article 5-G of the General Municipal Law under which it would provide one of its emergency rescue vehicles not needed for rescue operations in the district to the adjoining district at such times when the latter's rescue vehicle is inoperative. 1983 N.Y. AG LEXIS 53.

Two fire districts may enter into an "automatic mutual aid plan" pursuant to which both fire departments would automatically respond to alarms from certain defined areas within their respective boundaries. Liability for loss or damage to equipment incurred while responding to such alarms would be governed by the provisions of General Municipal Law, § 209(2) and benefits to a fireman injured while responding to such alarms would be the responsibility of the fireman's "home" district. 1982 Op St Compt No. 82-164, 1982 N.Y. Comp. LEXIS 561.

One fire district may permit other fire districts located within or outside the county in which the district is located to utilize its training facilities and personnel for reasonable consideration. 1983 Op St Compt No. 83-241, 1983 N.Y. Comp. LEXIS 244.

19. Fire protection contracts; generally

A contract for fire protection between a town and a village is not affected by Section 209-g which applies in case of mobilization of fire forces to meet war-born emergencies or similar general dangers, nor by this section, which applies only to a situation in which no contract has been made. 1957 NY Ops Atty Gen May 28 (Informal), 1957 N.Y. AG LEXIS 178.

This section does not authorize participation by fire districts in joint enterprises generally. 1963 Op St Compt No. 63-626.

20. —Authority of cities to enter contract

City empowered to acquire fire apparatus by gift or otherwise, to pay cost of maintenance and operation thereof, to pay rent for housing such apparatus and to have volunteer firemen fight fires. Contract may be made for such fire-fighting force to serve area in another city. 1947 Op St Compt 445.

A town may contract with a city to provide fire protection for fire protection or fire alarm districts within the town. 1954 Op St Compt No. 54-6872.

21. —Authority of towns to enter contract

Town may not contract to pay a fixed sum to a fire district for each call answered in unorganized territory. 1946 Op St Compt 346.

The town board, during the period intervening between the dissolution of a fire district and the establishment of the fire protection district, may not contract for the furnishing of fire protection in the area. 1947 Op St Compt 486.

A town in which there is no fire district or fire protection district may not pay a stipulated sum for call for fire protection furnished such town. 1953 Op St Compt No.. 53-6281.

A town may contract with a city to provide fire protection for fire protection or fire alarm districts within the town. 1954 Op St Compt No. 54-6872.

Towns may not contract with unincorporated fire companies to provide fire protection for fire protection or fire alarm districts within such towns. 1954 Op St Compt No. 54-6872.

A fire protection contract may not be entered into between a town board, on behalf of a fire protection district, and a village whereby the town at large is required to assume the responsibility for any loss or damage sustained to the fire apparatus of the village in answering, attending or returning from calls in the fire protection district and whereby the town will reimburse the village for such damage and also assume the cost of all materials used by the village in its fire department in connection with such calls excepting gasoline and transportation charges. 1956 Op St Compt No. 56-8266.

22. —Authority of villages to enter contract

Incorporation of a volunteer fire company of a village will not affect the control which the village exercises over the fire company. The making of a contract between an incorporated fire company and the village will not operate to make the fire company a paid fire company. Incorporation of a volunteer fire company will not affect the duties and liabilities of the village in regard to its volunteer firemen. An incorporated fire company of a village cannot contract to furnish fire protection outside of the village independently of the village board of trustees. 1947 Op St Compt 414.

Fire department of the village of Bergen may operate outside of the village limits only if the village has authorized such operation. The town of Bergen may contract with the village of Bergen for the furnishing of fire protection outside of the village limits only if a fire protection or fire alarm district has been established. 1947 Op St Compt 441.

A fire protection contract may not be entered into between a town board, on behalf of a fire protection district, and a village whereby the town at large is required to assume the responsibility for any loss or damage sustained to the fire apparatus of the village in answering, attending or returning from calls in the fire protection district and whereby the town will reimburse the village for such damage and also assume the cost of all materials used by the village in its fire department in connection with such calls excepting gasoline and transportation charges. 1956 Op St Compt No. 56-8266.

(1) A village fire department or a volunteer fire company serving territory outside a village may respond to a call for assistance to a fire outside its designated area even if the call is not made pursuant to a mutual aid agreement. However, there is no authority to respond to a fire outside the area usually served when no call for assistance is made. (2) A village fire department or volunteer fire company has no authority to contract to provide fire protection to a business establishment or school located outside its designated area. 1979 Op St Compt No. 79-568, 1979 N.Y. Comp. LEXIS 137.

Under Sections 10-1000 et seq. of the Village Law, a village fire department is a corporation consisting of members of all the fire, hose, protective and hook and ladder companies of a village; it is administered by a board of fire commissioners or, where no board

of fire commissioners has been appointed, by the village board of trustees and the council of the fire department. Fire companies in a village are associations or corporations, which must operate in accordance with their certificates of incorporation, bylaws, and statutes; and, although fire companies are separate and distinct from the village, the statutes do permit village authorities to exercise a certain degree of control over their organization, incorporation, governance, and membership, including residency for membership. A fire company must consent to a contract for the provision of fire protection outside the village and the fire chief of the village fire department cannot consent on behalf of members of the company. 1990 Op St Compt No. 90-19, 1990 N.Y. Comp. LEXIS 26.

23. —Liabilities under contract

This section imposes no liability upon a fire protection district for loss or damage to the apparatus or equipment of the fire company serving the district pursuant to contract. 1955 Op St Compt No. 55-7094.

Unless otherwise provided in the contract, a town which contracts on behalf of a fire protection district is not liable for loss or damage to equipment of the fire companies serving the district. 1956 Op St Compt No. 56-7984.

A town is not liable for damage to the apparatus or equipment of a volunteer fire company answering a call in a fire protection district of such town pursuant to contract. However, the contract for fire protection may include a provision whereby the fire protection district assumes such liability. 1956 Op St Compt No. 56-8086.

A fire district which has contracted with the village for fire protection is not liable for damage to apparatus or equipment of such village fire department while the village fire department is answering a call in the fire district. 1960 Op St Compt No. 60-201.

Where, pursuant to a mutual aid plan, a town, which constitutes a fire protection district served by contract, requests assistance in fighting a fire, such town is liable and responsible for damages occurring to the responding fire apparatus and equipment. 1960 Op St Compt No. 60-970.

A fire district may not contract with a private not-for-profit ambulance service to provide emergency ambulance service to their respective service areas on a mutual aid basis. 1982 Op St Compt No. 82-310, 1982 N.Y. Comp. LEXIS 422.

The provisions of section 209 of the General Municipal Law relating to answering calls for assistance outside the area regularly served and protected and financial liability for expenses incurred in use of fire equipment when responding to such calls have no application where fire protection is provided pursuant to contract. 1982 Op St Compt No. 82-276, 1982 N.Y. Comp. LEXIS 460.

24. —Noncontractual liabilities

A city whose fire pumper was sent to fight a fire in a nearby town might recover under this section even though the city and the town had not adopted a recognized plan for the furnishing of mutual aid. Watertown v Watertown, 139 N.Y.S.2d 198, 207 Misc. 433, 1952 N.Y. Misc. LEXIS 3002 (N.Y. Sup. Ct. 1952).

Absent contract or federal mandate to provide fire protection services to Fire Island National Seashore, fire district has no legal obligation to provide such services to Seashore. 2003 NY Ops Atty Gen 2003-12 (Informal), 2003 N.Y. Op. (Inf.) Att'y Gen. 12, 2003 N.Y. AG LEXIS 15.

Where a town board has contracted with three fire districts to furnish fire protection to a fire protection district, it is nevertheless obligated to pay a claim by a fourth fire department which answered legitimate calls for assistance from the fire protection district. 1956 Op St Compt No. 56-8177.

Where a fire company answers a call for assistance from territory protected by contract with another fire company, the territory is liable for damage to equipment or apparatus of the assisting company. 1954 Op St Compt No. 54-6897.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 72-g, 209-a, 209-c; CLS CPL § 2.10.

Policemen and firemen on boards of education, CLS Educ § 2103-a.

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1029, 1031, 1032, 1158.

56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 542.

12 Am Jur Pl & Pr Forms (Rev), Fires, Forms 1 et seq.

Annotations:

Liability for personal injury or damage from operation of fire department vehicle. 82 ALR2d 312.

§ 209-b. Emergency rescue and first aid squads

1. Emergencies. a. The authorities having control of fire departments and fire companies may organize within such departments or companies emergency rescue and first aid squads composed of firefighters who are members of such departments or companies. Such squads, so organized, may render services in case of accidents, calamities or other emergencies in connection with which their services may be required, as well as in case of alarms of fire. Whether or not such squads have been organized, any firefighter may render service in case of accidents, calamities or other emergencies in connection with which the services of firefighters may be required, as well as in case of alarms of fire, unless he or she shall have been duly ordered not to render such service by the authorities having control of the fire department or company of which he or she is a member. If a request for emergency service is made by, or originates from a doctor or peace officer, acting pursuant to his or her special duties, or police officer, and there is any doubt as to whether an emergency exists, the judgment of the doctor or officer that there is, in fact, an emergency may be accepted as conclusive by such squad, or the firefighter responding, or who has responded to such call. The person designated to receive calls for such emergency services, for the purpose of dispatching such squads or firefighters, shall determine in the first instance from the information furnished to him or her whether an emergency exists and his or her decision, if in good faith, as to whether or not there is an emergency shall be final in relation to dispatching such squads or firefighters. Any such preliminary determination shall not be deemed to authorize the rendition of services if, upon arriving at the place to which dispatched, it is found that there is no emergency.

b. The governing board of any city, town, village or fire district which has a fire department but which has not authorized such fire department to render emergency ambulance service, may contract for the furnishing to it of emergency ambulance service with another city, town, village or fire district which has in its fire department an emergency rescue and first aid squad duly authorized to render emergency ambulance service. Before any contract to furnish emergency ambulance service is entered into, the consents of the fire department, the fire company and the emergency rescue and first aid squad to furnish such emergency ambulance service

shall be obtained. Each consent shall be evidenced by a copy of a resolution certified respectively by the secretary of the fire department and fire company and by the officer then in command of the emergency rescue and first aid squad.

2. General ambulance service. a. The governing board of any city, town which has a fire department, village or fire district which has in its fire department an emergency rescue and first aid squad composed mainly of volunteer firefighters, by resolution, may authorize any such squad to furnish general ambulance service for the purpose of (1) transporting any sick, injured or disabled resident or person found within the city, town, village or fire district to a hospital, clinic, sanatorium or other place for treatment and care and returning any such person therefrom if still sick, injured or disabled and (2) transporting any sick, injured or disabled resident of the city, town, village or fire district from a hospital, clinic, sanatorium or other place where such person has received treatment and care to any other place for treatment and care or to such person's home whether such hospital, clinic, sanatorium or other place where such person has received treatment and care is within or without the city, town, village or fire district or the territory listed on the ambulance service certificate or certificate of registration as the usual territory within which the ambulance service operates.

b. The town board of a town which does not have a fire department but in which there is a fire corporation located outside any village, fire district, fire alarm district or fire protection district, by resolution, may authorize the emergency rescue and first aid squad of such fire corporation to furnish general ambulance service for the purpose of (1) transporting any sick, injured or disabled resident or person found within the area described in the certificate of incorporation of the fire corporation to a hospital, clinic, sanatorium or other place for treatment and care and returning any such person therefrom if still sick, injured or disabled and (2) transporting any sick, injured or disabled resident of such described area from a hospital, clinic, sanatorium or other place where such person has received treatment and care to any other place for treatment and care or to such person's home whether such hospital, clinic, sanatorium or other place where such person has received treatment and care is within or without the area described in the certificate of incorporation of such fire corporation or the territory listed on the ambulance service certificate or certificate of registration as the usual territory within which the ambulance service operates.

c. The governing board of a city, village or fire district which by law is authorized to contract to have fire protection furnished for any district or area thereof by the fire department or fire company of another city, town, village or fire district, or a town board on behalf of a fire protection district or fire alarm district, may include in any fire protection contract a provision for the furnishing of general ambulance service by the emergency rescue and first aid squad of the fire department or fire company which furnishes such fire protection. Such general ambulance service shall be for the purpose of (1) transporting any sick, injured or disabled resident or person found within the contract district or area to a hospital, clinic, sanatorium or other place for treatment and care and returning any such person therefrom if still sick, injured or disabled and (2) transporting any sick, injured or disabled resident of such contract district or area from a hospital, clinic, sanatorium or other place where such person has received treatment and care to any other place for treatment and care or to such person's home whether such hospital, clinic, sanatorium or other place where such person has received treatment and care is within or without the contract district or area or the territory listed on the ambulance service certificate or certificate of registration as the usual territory within which the ambulance service operates. The city, town, village, fire district or the fire department or fire company thereof which is authorized to furnish such fire protection pursuant to contract shall have power to contract to furnish such general ambulance service.

d. Before any authorization is granted under paragraphs a and b of this subdivision, or before any contract to furnish general abmulance service is entered into pursuant to paragraph c of this subdivision, and before any public hearing is conducted as herein provided, the consents of the fire department, the fire company and the emergency rescue and first aid squad to furnish the general ambulance service shall be obtained. Each consent shall be evidenced by a copy of a resolution certified, respectively, by the secretary of the fire department and fire company and by the officer then in command of the emergency rescue and first aid squad.

e. Before authorizing general ambulance service under paragraphs a and b of this subdivision the governing board of a city, town, village or fire district shall conduct a public hearing. Before the governing board of a city, town, village or fire district enters into a contract for fire protection which contract, for the first time for a specific district or area, provides for the furnishing of general ambulance service pursuant to paragraph c of this subdivision, it shall conduct a public hearing in the manner required by law, if any, for the entering into of a fire protection contract therefor, but if a public hearing is not required in any such case, then the public hearing shall be held as herein provided and the procedure for publishing notice under this paragraph shall be applicable. Notice of such hearing shall be published at least once in a newspaper or newspapers having general circulation in the city, town, village or fire district, or, in the case of contracts, in the fire alarm district, fire protection district, or other contract area. In all cases the notice of hearing shall, in general terms, (1) describe the general ambulance

service which is proposed to be furnished, (2) describe the area to be served, (3) state the names of the fire department, fire companies and emergency rescue and first aid squad affected, (4) state the time and place within the city, town, village or fire district, or, in the case of contracts, the fire alarm district, fire protection district, or other contract area, where such hearing will be held and (5) state that all persons residing within the area to be served, all persons, firms and corporations owning real property within the area to be served, and all persons, firms and corporations whose business interests or employment would either be benefited or adversely affected, whether or not a resident or owner of real property within the area to be served, shall have the right to be heard in person or by representative at the public hearing. Such notice shall be published at least ten days prior to the date fixed for the hearing.

f. After the hearing and after considering the statements made at the hearing the governing board shall determine whether authorizing the furnishing of general ambulance service, or the entering into of a contract for general ambulance service, is in the public interest. If the governing board determines that it is in the public interest to authorize the furnishing of general ambulance service, or to enter into a contract for general ambulance service, it shall adopt the resolution authorizing the same and within ten days thereafter cause a certified copy of the resolution and the determination on which it is based to be filed in the office of the clerk of the county or counties in which the city, town, village or fire district is located. The consents required by paragraph d of this subdivision shall be filed with such resolution and determination.

g. The determination of the governing board in relation to the furnishing of general ambulance service shall be subject to review in the manner provided in article seventy-eight of the civil practice law and rules provided that application has been made therefor within thirty days from the date of the filing thereof. Such determination shall become final and conclusive and the resolution shall become effective at the expiration of such thirty days or, if application for review be made, upon the final determination thereof.

h. When general ambulance service is authorized pursuant to this subdivision, the emergency rescue and first aid squad shall answer all calls and demands for such service to be furnished to sick, injured or disabled persons entitled thereto, subject to such rules and regulations as shall be prescribed by authorities having control of such squad, and subject at all times to the emergency needs of the fire department and any limitations upon such service specified in a fire protection contract. Such rules and regulations may establish limitations on the distances which may be traveled outside the area to be served in order to reach hospitals, clinics, sanatoriums or other places where care and treatment is to be or has been furnished.

i. Any action taken pursuant to this subdivision may be rescinded by resolution of the governing board which has taken such action. The term "resolution", as used in this subdivision two, means resolution, ordinance, act or local law.

j. The provisions of this subdivision two shall apply to all cities, towns, villages and fire districts, except where the provisions of a general or special law expressly prohibit the rendition of general ambulance service by an emergency rescue and first aid squad of the fire department thereof.

3. Transportation of persons. Squads and persons authorized to render service pursuant to this section shall transport sick, injured or disabled persons only in vehicles owned by or under the control of a city, town, village, fire district, a fire department or a fire company unless ordered or permitted to transport such persons in other vehicles by the authorities having control of the fire department or fire company of which he is a member.

3-a. Mutual aid. a. The governing board of any city, town which has a fire department, village or fire district which has in its fire department an emergency rescue and first aid squad composed mainly of volunteer firefighters, may, by resolution authorize any such squad to enter into one or more mutual aid agreements as defined in subdivision twenty of section three thousand one of the public health law, and/or to contract with ambulance services as defined in subdivisions two and three of section three thousand one of the public health law to provide services when the emergency rescue and first aid squad is unavailable.

b. The town board of a town which does not have a fire department but in which there is a fire corporation located outside any village, fire district, fire alarm district or fire protection district may, by resolution, authorize the emergency rescue and first aid squad of such fire corporation to enter into one or more mutual aid agreements as defined in subdivision twenty of section three thousand one of the public health law, and/or to contract with ambulance services as defined in subdivisions two and three of section three thousand one of the public health law to provide services when the emergency rescue and first aid squad is unavailable.

4. Fees and charges prohibited. Emergency and general ambulance service authorized pursuant to this section shall be furnished without cost to the person served. The acceptance by any firefighter of any personal remuneration or gratuity, directly or indirectly, from a person served shall be a ground for his or her expulsion or suspension as a member of the fire department or fire company.

5. The term "emergency", as used in this chapter, or in any other law of general application, in relation to the operations of fire departments, includes, unless a contrary intent is clearly expressed or indi-

cated, the search for persons and the search for, and attempts to recover or the recovery of, bodies of persons even though it is posible [possible]* or is known that all hope of life is gone.

HISTORY:

Add, L 1939, ch 508, § 1; amd, L 1951, ch 835, § 1; L 1953, ch 175, § 1; L 1956, ch 438, § 3; L 1957, ch 849, § 1, eff May 1, 1957; L 1958, ch 214, § 1; L 1958, ch 473, § 2, eff April 8, 1958; L 1958, ch 718, § 1; L 1964, ch 520, § 1, eff April 10, 1964; L 1967, ch 705, § 4, eff Sept 1, 1967; L 1969, ch 922, § 1, eff Sept 1, 1969; L 1980, ch 843, § 151, eff Sept 1, 1980; L 1982, ch 162, § 1, eff June 8, 1982; L 1989, ch 735, § 1, eff July 24, 1989; L 2003, ch 378, § 1, eff Aug 19, 2003; L 2018, ch 476, § 73, effective December 28, 2018.

Amendment Notes The 2018 amendment by ch 476, § 73, in 1a, substituted "firefighters" for "firemen" or variants throughout the section and added "or she" twice and "or her" three times; and in 4, substituted "firefighter" for "fireman" and added "or her."

Notes to Decisions

Analysis

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2. Provision of general ambulance service
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4. Procedure for establishing service
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6. Scope of services
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9. Police request for emergency services
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17. Volunteer Firefighters' Benefit Law
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19. Insurance

1. Generally

There is no authority for the fixing of a mileage charge for ambulance service conducted by a village fire department pursuant to subd. 1 of this section. 1961 NY Ops Atty Gen April 25 (Informal), 1961 N.Y. AG LEXIS 72.

Depending upon circumstances, "authorities" referred to in this section means the Board of Fire Commissioners, or in their absence the council of the fire department, and the Board of Trustees of the village. 1962 NY Ops Atty Gen July 11 (Informal), 1962 N.Y. AG LEXIS 184.

Article 30 of the Public Health Law applies to an emergency rescue squad whose members are volunteer firemen that transport sick, disabled or injured persons to or from facilities providing hospital services. A fire department rescue squad providing volunteer ambulance service is required to obtain an ambulance service statement of registration pursuant to section 3004 of the Public Health Law. A fire department rescue squad is not required to obtain an ambulance service certificate pursuant to section 3006 of the Public Health Law. Volunteer firemen who render emergency medical assistance are protected by section 205-b of the General Municipal Law, which relieves volunteer firemen engaged in the performance of duty from civil liability except for willful negligence or malfeasance. 1975 NY Ops Atty Gen May 13 (Informal), 1975 N.Y. AG LEXIS 120.

Officers of an emergency rescue and first aid squad may wear badges of rank. A fire district may purchase such badges at the squad's request, but it is not mandatory that it do so. 1983 NY Ops Atty Gen 83-26 (Informal), 1983 N.Y. AG LEXIS 73.

While individual firemen and emergency relief squads are prohibited from accepting financial donations, even for purchase of coffee or to pay for occasional parties, the fire company or fire department may accept such donations for such purposes. 1962 Op St Compt No. 62-769.

While an emergency rescue and first aid squad within a village fire department is not entitled to receive foreign fire insurance tax moneys, such tax moneys may be expended for the use and benefit of a fire department or company receiving the same, as determined by the members. This would include the purpose of an emergency rescue squad, if the membership of the department or company reasonably determined that the expenditure is for the use and benefit of the department or company. Members of emergency and rescue first aid squads, as members of the fire department or company, may participate in the decision. 1990 Op St Compt No. 90-34, 1990 N.Y. Comp. LEXIS 46.

Fee may not be imposed for service of emergency rescue and first aid squad of fire district fire department. 1992 Op St Compt No. 92-45.

Legislative histories of both CLS Gen Mun §§ 122-b and 209-b demonstrate that § 209-b is not intended to be sole grant of authority for paid city fire department to render emergency ambulance services. 2005 Op St Compt No. 2005-8, 2005 N.Y. Comp. LEXIS 2.

2. Provision of general ambulance service

The emergency relief squad of a fire district volunteer fire department may operate an ambulance. Such ambulance may not be used to operate a general ambulance service for hire even though all proceeds therefrom are used for the maintenance of the ambulance. 1953 NY Ops Atty Gen Sept 25 (Informal), 1953 N.Y. AG LEXIS 309.

The authorities having control of fire departments may organize emergency relief squads to render services in case of accident, calamity or other emergency as well as in case of fire alarms. 1961 NY Ops Atty Gen April 27 (Informal), 1961 N.Y. AG LEXIS 74.

The governing body of any fire district which has an emergency relief squad in its fire department may authorize such squad to furnish general ambulance service for the purposes mentioned in par. 2 of this section, and the district would be liable for operation of the ambulance when engaged in duly authorized activities, but the Board of Fire Commissioners may limit such activities. 1961 NY Ops Atty Gen April 27 (Informal), 1961 N.Y. AG LEXIS 74.

General Municipal Law, § 209-b does not permit establishment of a separate volunteer fire company consisting solely of ambulance and rescue personnel. The statute does authorize a squad within a fire company for such purpose. 1979 NY Ops Atty Gen Sept 21 (Informal), 1979 N.Y. AG LEXIS 36.

A fire district may not create, operate or fund an ambulance service and rescue squad to perform the functions authorized by General Municipal Law § 122-b but may do so in the case of a rescue and first aid squad that performs the limited service described in General Municipal Law § 209-b. The squad so created must be run as part of, not independently of, the fire department. 1980 NY Ops Atty Gen Dec. 31 (Informal), 1980 N.Y. AG LEXIS 2.

The Joint Pawling Fire District may organize an emergency rescue and first aid squad by following the procedures set forth in General Municipal Law § 209-b subd 1, par a and thereafter, by following the procedure set forth in subdivision b, may provide general ambulance service. 1980 NY Ops Atty Gen June 26 (Informal), 1980 N.Y. AG LEXIS 94.

Authorities having control of village volunteer fire department may organize all firemen thereof as emergency relief squad and not be liable for damage by fire within village while firemen are serving in squad. 1951 Op St Compt No. 51-5074.

There is no authority for a fire district to operate a general ambulance service and where the fire district ambulance is used in cases other than authorized by this section the volunteer

*The bracketed word has been inserted by Publisher.

fireman may lose his right to benefits in case of injury or death. 1954 Op St Compt No. 54-6747.

Furnishing of general ambulance service is not a firemanic function. 1954 Op St Compt No. 54-7016.

3. Membership in emergency rescue squad

Members of a fire police squad aiding the members of an emergency relief squad in an emergency are performing proper duties as volunteer firemen. 1954 NY Ops Atty Gen July 20 (Informal), 1954 N.Y. AG LEXIS 329.

Membership in a fire company is prerequisite to appointment to the emergency relief squad. 1962 Op St Compt No. 62-161.

Members of a ladies' auxiliary of a fire company may not become members of an emergency rescue and first aid squad unless they are members of the fire company and active volunteer firemen. 1969 Op St Compt No. 69-498.

An individual must be a member of a volunteer fire company before he can become a member of the fire company's emergency rescue and first aid squad. 1978 Op St Compt No. 78-870.

Enclosure of Opn No. 81-25, to effect that emergency rescue and first aid squad cannot be formed as a separate company within the fire department. Members of squad, if so provided in rules of fire department or company by-laws, need not be trained in firefighting or respond to alarms of fire. 1981 Op St Compt No. 81-119, 1981 N.Y. Comp. LEXIS 765.

While an emergency rescue and first aid squad within a village fire department is not entitled to receive foreign fire insurance tax moneys, such tax moneys may be expended for the use and benefit of a fire department or company receiving the same, as determined by the members. This would include the purpose of an emergency rescue squad, if the membership of the department or company reasonably determined that the expenditure is for the use and benefit of the department or company. Members of emergency and rescue first aid squads, as members of the fire department or company, may participate in the decision. 1990 Op St Compt No. 90-34, 1990 N.Y. Comp. LEXIS 46.

Non-residents of a village who live in an area which is furnished fire protection and ambulance service by the village fire department (i.e. a fire protection district) are eligible for membership in the emergency rescue and first aid squad of the village fire department and are entitled to volunteer firemen's benefits for injuries incurred in the line of duty. 1980 Op St Compt No. 79-773, 1980 N.Y. Comp. LEXIS 373.

4. Procedure for establishing service

The governing board of a fire district must conduct a public hearing before authorizing a general ambulance service and the district may furnish such service only if it has an emergency relief squad. Such service is restricted to assistance of disabled persons within the district or residents thereof and the area receiving assistance is liable for injury or death of the volunteer firemen. 1957 NY Ops Atty Gen Oct 7 (Informal), 1957 N.Y. AG LEXIS 211.

The proper procedure to be followed in establishing a general ambulance service in the fire district is set forth generally in § 209-b of the General Municipal Law. Volunteer firemen are covered for injuries they receive in rendering such service under the Volunteer Firemen's Benefit Law §§ 3, 5. 1959 Op St Compt No. 59-38.

An emergency rescue and first aid squad cannot be organized as a separate company within a fire district fire department. Members of a rescue squad must be members of a fire district fire company. The rescue squad may have its own officers if so provided in company by-laws or department or district rules and regulations. 1981 Op St Compt No. 81-25, 1981 N.Y. Comp. LEXIS 874.

Absent a contrary charter provision, a city may provide general ambulance service through its police department, paid fire department or volunteer fire department emergency rescue and first aid squad. A fee may be charged for general ambulance service provided by the police and paid fire departments. 1983 Op St Compt No. 83-238, 1983 N.Y. Comp. LEXIS 246.

5. Purchase of ambulance

Three fire districts may not jointly purchase and operate an ambulance. 1957 Op St Compt No. 57-180.

A fire district may purchase an ambulance and authorize the emergency relief squad of its fire department to render, in conjunction with its operation, general ambulance service in the fire district. 1960 Op St Compt No. 60-423.

6. Scope of services

Extreme caution dictates the use of emergency relief squads of fire department in bringing a person from a hospital in a fire department ambulance. 1955 NY Ops Atty Gen Oct 20 (Informal), 1955 N.Y. AG LEXIS 318.

A fire district has a duty to provide fire protection services to the general public in all areas of the district, including that portion of a river located within the district, and to render rescue services in that area where emergency rescue services have been organized under General Municipal Law, § 209-b(1). A fire district is not liable for failure to provide fire protection or rescue services. 1983 NY Ops Atty Gen 83-1 (Informal), 1983 N.Y. AG LEXIS 100.

The emergency rescue and first aid squad of a fire district fire department which has been authorized to provide general ambulance service may not transport a non-resident of the district from his home outside the district to a hospital nor may it return a non-resident from a hospital to his home or transport him from a hospital to any other institution unless such non-resident resides in an area receiving general ambulance service from the fire department pursuant to a fire protection contract; A person who has been delivered to a fire district fire department by another rescue squad may be transported from the fire house to the hospital by the department emergency rescue and first aid squad. 1980 Op St Compt No. 80-485.

Village may contract for services of emergency first aid rescue squad of village fire department only in context of contract for fire protection; if contract for fire protection provides for furnishing of ambulance services, it should describe services to be provided on specified terms; village may not purchase liability insurance for vehicles owned by village fire department. 1987 Op St Comp No. 87-76, 1987 N.Y. Comp. LEXIS 99.

7. —Distance limitations

The governing board of a fire district must conduct a public hearing before authorizing a general ambulance service and the district may furnish such service only if it has an emergency relief squad. Such service is restricted to assistance of disabled persons within the district or residents thereof and the area receiving assistance is liable for injury or death of the volunteer firemen. 1957 NY Ops Atty Gen Oct 7 (Informal), 1957 N.Y. AG LEXIS 211.

The emergency relief squad of a village fire department may respond to calls for assistance from territory outside the area regularly protected by the fire department. The decision of the dispatcher that the occurrence is a fire, accident, public calamity or other emergency may not be final if the fireman, after arrival at the scene, knows or should know that no emergency exists. 1954 Op St Compt No. 54-6736.

There is no limit to the distance which an ambulance may travel when operated by fire district personnel pursuant to this subdivision, as service is not limited to fire district taxpayers; in certain instances it is limited to fire district residents, but, in others, it is available to any person without reference to residence. 1961 Op St Compt No. 61-713.

An emergency rescue and first aid squad of a village fire department may answer calls for assistance originating in an adjoining village, even though that village contracts with an independent volunteer ambulance corps for ambulance service. The village is liable for the negligence of its emergency rescue and first aid squad while answering such calls for assistance. 1981 Op St Compt No. 81-405, 1981 N.Y. Comp. LEXIS 475.

An emergency rescue and first aid squad of a fire department or fire company may answer a call for assistance from an adjacent fire district in cases of fire or other emergency. It may not answer a call from outside the area normally served for general ambulance service in a non-emergency situation—Opns St Comp, 1980, No. 80-465 clarified. Whether a request to transport a person from a hospital located outside the area regularly served to another hospital in an emergency situation is a question of fact which must be determined on the basis of the relevant facts in

each situation. 1982 Op St Compt No. 82-147, 1982 N.Y. Comp. LEXIS 573.

8. —Underwater rescue teams

Members of a rescue team organized within a volunteer fire department to conduct underwater rescue missions and to search for victims are covered by the New York State Volunteer Firemen's Benefit Law when acting in the performance of such duties. 1973 NY Ops Atty Gen April 5 (Informal), 1973 N.Y. AG LEXIS 54.

A group of volunteer firemen from the volunteer fire companies of several municipalities or districts cannot organize an underwater rescue team to operate as a separate entity. 1966 Op St Compt No. 66-745.

Volunteer firemen who are specially trained in scuba diving and underwater recovery work are covered by the Volunteer Firemen's Benefit Law when they are called out to assist neighboring volunteer fire companies in diving to recover the bodies of victims of drowning and similar incidents. 1966 Op St Compt No. 66-745.

9. Police request for emergency services

Permission of the police authorities is unnecessary as a prerequisite to rendering emergency ambulance service to an injured person, unless the person is in the custody of such police authorities. 1960 Op St Compt No. 60-632.

An emergency relief squad at the scene of an accident or emergency as part of a volunteer fire department may, at the direction or request of a police officer, transport an injured or ill person to the hospital. 1960 Op St Compt No. 60-824.

10. Contract for general ambulance services

Fire district may not enter into contract with hospital to furnish ambulance service for hospital. 1954 Op St Compt No. 54-6553.

The board of fire commissioners may not contract for the furnishing of general ambulance service within the fire district. 1957 Op St Compt No. 57-696.

11. —Authority of fire districts

Emergency rescue and first aid squad of fire district's fire department may provide emergency ambulance services and general ambulance services by contract to municipality or fire district in accordance with CLS Gen Mun L § 209-b. 1989 NY Ops Atty Gen 89-31 (Informal), 1989 N.Y. AG LEXIS 38.

A fire district, as part of a fire protection contract with a volunteer fire company located outside its boundaries, may also contract for general ambulance service within the area of the fire district. 1963 Op St Compt No. 63-390.

A town may contract with a fire district to provide general ambulance service only under a fire protection contract entered into under General Municipal Law, section 209-b. 1967 Op St Compt No. 67-76.

A fire district may contract for the furnishing of general ambulance service to the district by another district, municipality or other outside agency only where the fire district receives fire protection by contract with another district, municipality or outside agency. 1968 Op St Compt No. 68-224.

A town board on behalf of a fire protection district, may contract with a village for the furnishing of general ambulance service by the village fire department emergency rescue and first aid squad where the entity providing fire protection to the fire protection district does not maintain and operate an ambulance, but such contract must first be approved by the fire department and the rescue squad. 1978 Op St Compt No. 78-546, 1978 N.Y. Comp. LEXIS 128.

A fire district may contract for the furnishing of general ambulance service to the town in which it is situated or to an adjoining fire district only pursuant to a fire protection contract with the town on behalf of a fire protection or fire alarm district or with the adjoining fire district, unless another entity is furnishing fire protection to the fire protection or fire alarm district or the adjoining fire district and does not operate and maintain an ambulance, in which case a separate contract for general ambulance service may be entered into. 1979 Op St Compt No. 79-201.

A town board on behalf of a fire protection district may contract with a village for the furnishing of general ambulance service by the village fire department emergency rescue and first aid squad when the entity providing fire protection to the fire protection district does not maintain and operate an ambulance, but such contract must first be approved by the fire department and the rescue squad. 1979 Op St Compt No. 79-48, 1979 N.Y. Comp. LEXIS 234.

Three fire districts may enter into a contract pursuant to which one of the districts, which has a fire department containing an emergency rescue and first aid squad, will provide emergency ambulance service to the other districts, provided that the fire department and emergency rescue and first aid squad consent to such contract. 1979 Op St Compt No. 79-448.

Fire district, fire department of which does not have emergency rescue and first aid squad, may contract with any city, town, village, or fire district which has in its fire department emergency rescue and first aid squad duly authorized to render emergency ambulance service to receive emergency ambulance service, but fire district may not contract to receive general ambulance service unless it also contracts to receive fire protection. 1987 Op St Compt No. 87-39, 1987 N.Y. Comp. LEXIS 142.

Provision of CLS Pub Health § 3008(7) does not provide alternative means for fire district to establish emergency or general ambulance services; fire districts continue to be subject to prohibition under CLS Gen Mun § 209-b(4) against imposition of fees and charges for either general or emergency ambulance service provided by emergency rescue and first aid squad. 1998 Op St Compt No. 98-18, 1998 N.Y. Comp. LEXIS 18.

Fire district may not impose fees for emergency rescue services provided by emergency rescue and first aid squad of fire district fire department, irrespective of whether services involve ambulance. 2004 Op St Compt No. 2004-1, 2004 N.Y. Comp. LEXIS 1.

12. —Authority of towns

A town cannot contract with a fire district in the town to furnish ambulance service outside of the fire district and outside of the area in which the fire district has contracted to furnish fire protection. 1961 NY Ops Atty Gen Oct 18 (Informal), 1961 N.Y. AG LEXIS 185.

Pursuant to the 1954 amendment to the General Municipal Law, a town may provide general ambulance service or contract with a fire corporation for the furnishing of such service. 1954 Op St Compt No. 54-7057.

A town may not enter into a contract with a fire district for ambulance service. 1956 Op St Compt No. 56-7846.

A town, on behalf of a fire protection district, may include in a fire protection contract a provision for furnishing general ambulance service for the same fire protection district area, but not to the entire town. 1963 Op St Compt No. 63-390.

A town contract for furnishing general ambulance service by a fire department emergency relief squad can be made only as part of a fire protection contract. 1963 Op St Compt No. 63-511.

A town may not contract for general ambulance service to the area of the town outside a village. A town may, as part of a fire protection contract, obtain the services of the fire district's emergency relief squad for that area of the town outside a village covered by a fire protection contract. 1967 Op St Compt No. 67-349.

A town may enter into a contract for general ambulance service to be rendered by a volunteer first aid and rescue squad. If the squad is part of a fire department, the contract may be made pursuant to General Municipal Law, section 209-b, and if the first aid squad is not part of a fire department the contract may be made pursuant to section 122-b. 1967 Op St Compt No. 67-448.

A town may not contract to provide ambulance service to an adjoining fire district. 1968 Op St Compt No. 68-652.

A town may contract with a fire district for general ambulance services to be provided to areas within a town fire protection district. Such services may be provided only as part of an overall fire protection contract. A contract for general ambulance services with a volunteer fire company where unrelated to fire protection contract is unauthorized. 1969 Op St Compt No. 69-4.

There is no statutory authority for a town to contract with a fire district or the emergency rescue and first aid squad of a fire company for emergency ambulance service to be provided to the town on a town-wide basis. 1980 Op St Compt No. 80-539.

Although town is authorized under CLS Gen Mun § 122-b to enter into contract with private ambulance company to provide advanced life support services on town-wide basis, fire district has no authority to enter into contract with private ambulance company for such services; consequently, town and fire district located therein may not under CLS Gen Mun Art 5-G enter into municipal cooperation agreement under which advanced life support services would be provided by private ambulance company. 1998 Op St Compt No. 98-21, 1998 N.Y. Comp. LEXIS 21.

13. —Authority of villages

A village may not contract to furnish emergency relief squad or general ambulance service pursuant to this section unless such service is included in a fire protection contract. 1962 Op St Compt No. 62-769.

Village may contract for services of emergency first-aid rescue squad of village fire department only in context of contract for fire protection; if contract for fire protection provides for furnishing of ambulance services, it should describe services to be provided on specified terms; village may not purchase liability insurance for vehicles owned by village fire department. 1987 Op St Compt No. 87-76, 1987 N.Y. Comp. LEXIS 99.

Village is prohibited by CLS Gen Mun § 209-b(4) from imposing fees on users of emergency or general ambulance services provided by village fire department, and may not supersede prohibition contained in that stature pursuant to its home rule powers. 1994 Op St Compt No. 94-7, 1994 N.Y. Comp. LEXIS 5.

14. Liability of volunteer firefighters

Article 30 of the Public Health Law applies to an emergency rescue squad whose members are volunteer firemen that transport sick, disabled or injured persons to or from facilities providing hospital services. A fire department rescue squad providing volunteer ambulance service is required to obtain an ambulance service statement of registration pursuant to section 3004 of the Public Health Law. A fire department rescue squad is not required to obtain an ambulance service certificate pursuant to section 3006 of the Public Health Law. Volunteer firemen who render emergency medical assistance are protected by section 205-b of the General Municipal Law, which relieves volunteer firemen engaged in the performance of duty from civil liability except for willful negligence or malfeasance. 1975 NY Ops Atty Gen May 13 (Informal), 1975 N.Y. AG LEXIS 120.

The immunity provisions contained in the cited statutes may both apply to a volunteer fireman and in the event of suit, both should be pleaded as separate, affirmative defenses unless it is clear that only one applies. 1976 NY Ops Atty Gen Dec 6 (Informal), 1976 N.Y. AG LEXIS 186.

All members of duly organized volunteer fire companies, as well as members of squads, have immunity when transporting patients under emergency conditions and, if general ambulance service has been authorized, they also have immunity for transporting non-emergency patients. 1976 NY Ops Atty Gen Dec 6 (Informal), 1976 N.Y. AG LEXIS 186.

15. —Liability of emergency relief squads

The immunity granted a voluntary ambulance service in Public Health Law § 3013, subdivision 1 does not apply to a squad. The liability or immunity of the squad, as such, is derived from and through the fire department or company of which it is a part. For this purpose, a squad is not a legal entity and the question is irrelevant. 1976 NY Ops Atty Gen Dec 6 (Informal), 1976 N.Y. AG LEXIS 186.

An emergency medical technician who is not a member of a squad had immunity under Public Health Law § 3013 only for acts in rendering emergency medical assistance to a person who is unconscious, ill or injured. However, if, during the course of transportation of a sick, disabled or injured person under conditions which are not an emergency, that person's condition develops into or reverts to an emergency condition, the technician would receive immunity for the acts done relating to the emergency condition. 1976 NY Ops Atty Gen Dec 6 (Informal), 1976 N.Y. AG LEXIS 186.

A certified emergency medical technician, whether or not a member of a squad, has immunity when rendering medical assistance in an emergency to a person who is unconscious, ill or injured anywhere within the State. 1976 NY Ops Atty Gen Dec 6 (Informal), 1976 N.Y. AG LEXIS 186.

Members of emergency relief squads are not personally liable for injuries to patient in ambulance not due to wilful negligence or malfeasance where services rendered in case of accident, public calamity, or other emergency are determined by person designated to receive calls for emergency service unless they proceed after seeing that no emergency exists. 1953 Op St Compt No. 53-6369.

16. —Liability of others

The governing body of any fire district which has an emergency relief squad in its fire department may authorize such squad to furnish general ambulance service for the purposes mentioned in par. 2 of this section, and the district would be liable for operation of the ambulance when engaged in duly authorized activities, but the Board of Fire Commissioners may limit such activities. 1961 NY Ops Atty Gen April 27 (Informal), 1961 N.Y. AG LEXIS 74.

Whether the members of a fire police squad would be covered by volunteer firemen's benefit insurance and would be free from civil liability for negligence to the extent provided in section 205-b of the General Municipal Law when directing traffic at an intersection following a blackout of a traffic light, or during a parade or marathon depends upon the particular facts and circumstances involved. Prior inconsistent opinions superseded. 1979 Op St Compt NO. 79-853.

17. Volunteer Firefighters' Benefit Law

Members of a rescue team organized within a volunteer fire department to conduct underwater rescue missions and to search for victims are covered by the New York State Volunteer Firemen's Benefit Law when acting in the performance of such duties. 1973 NY Ops Atty Gen April 5 (Informal), 1973 N.Y. AG LEXIS 54.

The proper procedure to be followed in establishing a general ambulance service in the fire district is set forth generally in § 209-b of the General Municipal Law. Volunteer firemen are covered for injuries they receive in rendering such service under the Volunteer Firemen's Benefit Law §§ 3, 5. 1959 Op St Compt No. 59-38.

Volunteer firemen who are specially trained in scuba diving and underwater recovery work are covered by the Volunteer Firemen's Benefit Law when they are called out to assist neighboring volunteer fire companies in diving to recover the bodies of victims of drowning and similar incidents. 1966 Op St Compt No. 66-745.

Discussion of entitlement of volunteer members of an emergency rescue and first aid squad established prior to the enactment of section 209-b(2)(e), and authorized to provide general ambulance service, to benefits under the Volunteer Firemen's Benefit Law. 1978 Op St Compt No. 78-207.

Whether the members of a fire police squad would be covered by volunteer firemen's benefit insurance and would be free from civil liability for negligence to the extent provided in section 205-b of the GML when directing traffic at an intersection following a blackout of a traffic light, or during a parade or marathon depends upon the particular facts and circumstances involved. Prior inconsistent opinions superseded. 1980 Op St Compt No. 79-853.

Active member of volunteer fire department emergency first aid and rescue squad who has not received firefighting training is not precluded from receiving benefits under VFVL for injuries incurred while performing duty or activity enumerated in § 5 of Volunteer Firefighters' Benefit Law. 1987 Op St Compt No. 87-15, 1987 N.Y. Comp. LEXIS 170.

Non-residents of a village who live in an area which is furnished fire protection and ambulance service by the village fire department (i.e. a fire protection district) are eligible for membership in the emergency rescue and first aid squad of the village fire department and are entitled to volunteer firemen's benefits

for injuries incurred in the line of duty. 1980 Op St Compt No. 79-773, 1980 N.Y. Comp. LEXIS 373.

18. —Other benefits

Emergency services duly authorized and performed by volunteer firemen in emergency situations occasioned by the recent hurricanes are covered by the Workmen's Compensation Law. 1955 N.Y. Op. Att'y Gen. No. 250, 1955 N.Y. AG LEXIS 99.

The governing board of a fire district must conduct a public hearing before authorizing a general ambulance service and the district may furnish such service only if it has an emergency relief squad. Such service is restricted to assistance of disabled persons within the district or residents thereof and the area receiving assistance is liable for injury or death of the volunteer firemen. 1957 NY Ops Atty Gen Oct 7 (Informal), 1957 N.Y. AG LEXIS 211.

There is no authority for a fire district to operate a general ambulance service and where the fire district ambulance is used in cases other than authorized by this section the volunteer fireman may lose his right to benefits in case of injury or death. 1954 Op St Compt No. 54-6747.

Village which furnishes general ambulance service may insure against liability for negligence. Volunteers operating ambulance are covered for benefits under General Municipal Law § 205 and Workmen's Compensation Law only if they are volunteer firemen and particular call involves fire, accident, public calamity or other emergency. Village may contract to provide insurance coverage for non-firemen members of first aid squad. 1955 Op St Compt No. 55-7665.

19. Insurance

A fire district may contract, at district expense, for liability insurance covering an ambulance owned by a fire company and operated by an emergency relief squad. 1953 Op St Compt No. 53-6135.

Village which furnishes general ambulance service may insure against liability for negligence. Volunteers operating ambulance are covered for benefits under General Municipal Law § 205 and Workmen's Compensation Law only if they are volunteer firemen and particular call involves fire, accident, public calamity or other emergency. Village may contract to provide insurance coverage for non-firemen members of first aid squad. 1955 Op St Compt No. 55-7665.

A town which has not undertaken to furnish general ambulance service to the entire town may not contribute to the cost of public liability insurance covering fire district ambulances. 1961 Op St Compt No. 61-632.

Village may contract for services of emergency first aid rescue squad of village fire department only in context of contract for fire protection; if contract for fire protection provides for furnishing of ambulance services, it should describe services to be provided on specified terms; village may not purchase liability insurance for vehicles owned by village fire department. 1987 Op St Comp No. 87-76, 1987 N.Y. Comp. LEXIS 99.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 122-b, 209-d; CLS N-PCL § 1402; CLS Town §§ 176, 184; CLS Vill § 4-412; CLS Vol Fire Ben §§ 5, 30.

Proceeding against body or officer, CLS CPLR § 7801 et seq.

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1037—1041.

Annotations:

Liability for personal injury or damage from operation of fire department vehicle. 82 ALR2d 312.

Liability for personal injury or property damage from operation of ambulance. 84 ALR2d 121.

Liability of operator of ambulance service for personal injuries to person being transported. 68 ALR4th 14.

§ 209-bb. Specialized teams; volunteer wilderness/inland search and rescue teams

1. a. By resolution, after a public hearing the governing body of each county, city and town is authorized, respectively, to establish, maintain and supervise municipal-wide and inter-municipal specialized teams.

b. Counties, cities and towns are authorized to appropriate and expend such sums as are deemed necessary to establish and maintain specialized teams pursuant to this section.

c. Municipalities and organizations that insure volunteer firefighters, volunteer ambulance workers or municipal employees, as the term "employee" is defined under section eighteen of the public officers law, may extend such insurance coverage to members of a specialized team by resolution.

d. For the purposes of this section, "specialized teams" shall mean any emergency team or squad composed of volunteer firefighters, volunteer ambulance workers or municipal employees, who shall have attained the minimum level of training or experience to meet qualifying standards established by the office of fire prevention and control, and which is administered by the state, a county, city or town for the purposes of training for or responding to a man made or natural disaster by carrying out any activities which are within the relevant training and expertise of such municipal employees or are authorized pursuant to the volunteer firefighters' benefit law or the volunteer ambulance workers' benefit law but which are not normally provided by such entities.

2. a. The governing body of each county, city, town and village is authorized, respectively, to contract for the assistance of a volunteer wilderness/inland search and rescue team for the purpose of locating and rescuing an individual or individuals.

b. No municipality shall be liable for the injury, death or damage to a volunteer wilderness/inland search and rescue team or its members occurring during the performance of the activities authorized by this section. Such team and its members shall indemnify and hold harmless the municipality that contracted for assistance with such volunteer wilderness/inland search and rescue team pursuant to this section against any claim of liability for any injury, death or property damage that may occur as a result of an act of such team and its members, including, but not limited to, any indemnity paid, attorneys' fees, costs and litigation expenses. The provisions of this subdivision shall not apply when the municipality has engaged in willful misconduct, gross negligence or recklessness.

c. For purposes of this section, "volunteer wilderness/inland search and rescue team" or "team" shall mean an organization: whose members have obtained a minimum level of training or experience as may be established by the department of environmental conservation's office of public protection; that is formed for the purpose of locating and rescuing, or recovering, a known individual or known individuals, in an unknown location, whose safety may be threatened by conditions related to the environment or other factors; that is incorporated under the laws

of New York state; and that operates not for pecuniary profit or financial gain.

d. For the purposes of this section, "volunteer wilderness/inland search and rescue team member" shall mean an active volunteer member of a volunteer search and rescue team who meets the minimum level of training or experience pursuant to paragraph c of this subdivision and is specified on a list regularly maintained by the volunteer wilderness/inland search and rescue team. Such list shall be provided to a requesting municipality. In addition, for purposes of this section, a volunteer wilderness/inland search and rescue team member shall be an independent contractor and shall not be considered an officer or employee of the contracting municipality.

3. Whenever a law enforcement agency or other state agency is engaged in a search or rescue operation, any volunteer wilderness/inland search and rescue team involved in such operation shall be subject to the command and control of the law enforcement or other state agency conducting such operation.

HISTORY:

Add, L 1996, ch 458, § 3, eff Aug 8, 1996; amd, L 1997, ch 482, § 1, eff Aug 26, 1997; L 2012, ch 115, § 1, eff July 18, 2012; L 2013, ch 25, § 1, eff May 2, 2013.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations § 1042.

§ 209-c. Fire police squads of fire departments and fire companies.

The authorities having control of fire departments and fire companies may organize within such departments or companies fire police squads composed of volunteer firefighters who are members of such departments or companies. Members of fire police squads, so organized, at such times as the fire department, fire company or an emergency rescue and first aid squad of the fire department or fire company are on duty, or when, on orders of the chief of the fire department or fire company of which they are members, they are separately engaged in response to a call for assistance pursuant to the provisions of section two hundred nine of this article, shall have the powers of and render service as peace officers. A member of a fire police squad shall take an oath of office as a fire police officer in the following form: "I do solemnly swear (or affirm) that I will support the constitution of the United States, and the constitution of the State of New York, and that I will faithfully discharge the duties of the office of fire police officer of the ..... fire company (or fire department), according to the best of my ability." Such oath shall be filed in the office of the city clerk in the case of a firefighter of a fire company or fire department in a city, in the office of the village clerk in the case of a firefighter of a fire company or fire department in a village, and in the office of the town clerk in all other cases. Notwithstanding any other provision of law to the contrary, a member of a fire police squad shall have satisfied any requirement for training as provided by any general or local law if the person has satisfactorily completed a training course offered by the state office of fire prevention and control, or an equivalent course as approved by the state office of fire prevention and control.

HISTORY:

Add, L 1939, ch 583, § 1, eff May 29, 1939; amd, L 1956, ch 438, § 4; L 1964, ch 625, § 1; L 1973, ch 175, § 1, eff April 10, 1973; L 1980, ch 843, § 152, eff Sept 1, 1980; L 2018, ch 476, § 74, effective December 28, 2018.

Amendment Notes The 2018 amendment by ch 476, § 74, in the introductory paragraph, substituted "firefighters" for "firemen" in the first sentence, "this article" for "the general municipal law" in the second sentence and "police officer" for "policeman" in the last sentence; and in the second paragraph, substituted "police officer" for "policeman" in the first sentence; and substituted "firefighter" for "fireman" twice in the second sentence.

Notes to Decisions

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1. Generally
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14. —Liability of others
15. Volunteer Firefighters' Benefit Law
16. —Other laws protecting fire police

1. Generally

Fire policemen may not affix red lights to their own vehicles, regardless of what duties they are engaged in. 1976 NY Ops Atty Gen June 4 (Informal), 1976 N.Y. AG LEXIS 122.

Determination whether member of fire police squad is public officer requires evaluation of whether powers and duties of that member meet standards for public officer status. 1992 NY Ops Atty Gen 92-47 (Informal), 1992 N.Y. AG LEXIS 48.

Fire police are not required to execute and file an official bond or undertaking. 1955 Op St Compt No. 55-7659.

A fire police squad may not incorporate as a membership corporation. 1961 Op St Compt No. 61-257.

A fire police squad may not be incorporated as a separate not-for-profit corporation. 1991 Op St Compt No. 91-22, 1991 N.Y. Comp. LEXIS 20.

2. Authority to organize fire police squad

Authorities having control of fire departments or fire companies may organize within such departments or companies fire police squads composed of their volunteer members and, if they are properly ordered to duty to direct traffic at fires, they are covered under Volunteer Firemen's Benefit Law while in performance of such. 1966 NY Ops Atty Gen Sept 15 (Informal), 1966 N.Y. AG LEXIS 112.

3. Appointment of fire police

Fire police are appointed at the pleasure of the appointing authority. 1955 Op St Compt No. 55-7659.

Otherwise qualified individual may be assigned to fire police squad immediately on becoming member of fire company of fire district fire department; however, board of fire commissioners

may establish reasonable minimum service requirement for appointment to fire police squad, if board determines that such requirement is reasonably related to functions to be performed and is in best interest of fire district. 1998 Op St Compt No. 98-20, 1998 N.Y. Comp. LEXIS 20.

4. —Age qualifications

Members of village fire police squads must be at least twenty-one years of age. 1967 NY Ops Atty Gen April 20 (Informal), 1967 N.Y. AG LEXIS 65.

Where the by-laws of a volunteer fire company permit persons between eighteen and twenty-one years of age to be admitted to membership, persons under twenty-one years of age may not be appointed to the fire police squad. 1965 Op St Compt No. 65-426.

5. —Other qualifications

The doctrine of legal incompatibility would preclude a town justice of the peace from being a member of the fire police squad of a fire company located within the town. 1968 Op St Compt No. 68-190.

6. Oath of office

Members of a fire police squad are required to take and file the constitutional oath of office. 1955 Op St Compt No. 55-7153.

The form of oath of office required of members of fire police squads, is prescribed by the Constitution, Art. XIII, Sec. 1. It may be administered by the persons designated in Public Officers Law, Sec. 10, and should be filed in the office of the clerk of the county where he resides. If a member of a fire police squad fails to take such oath, he holds office in a de facto capacity and is not prevented from discharging his duties as a fire policeman. 1955 Op St Compt No. 55-7585.

A fire policeman is required to take and file the constitutional oath of office. 1957 Op St Compt No. 57-420.

7. —Administering oath

The form of oath of office required of members of fire police squads, is prescribed by the Constitution, Art. XIII, Sec. 1. It may be administered by the persons designated in Public Officers Law, Sec. 10, and should be filed in the office of the clerk of the county where he resides. If a member of a fire police squad fails to take such oath, he holds office in a de facto capacity and is not prevented from discharging his duties as a fire policeman. 1955 Op St Compt No. 55-7585.

Members of a fire district fire police squad may take the constitutional oath of office before any notary public, the county clerk, or a judge of the Court of Appeals. 1955 Op St Compt No. 55-7659.

8. —Filing of oath

The form of oath of office required of members of fire police squads, is prescribed by the Constitution, Art. XIII, Sec. 1. It may be administered by the persons designated in Public Officers Law, Sec. 10, and should be filed in the office of the clerk of the county where he resides. If a member of a fire police squad fails to take such oath, he holds office in a de facto capacity and is not prevented from discharging his duties as a fire policeman. 1955 Op St Compt No. 55-7585.

While section 209-c of the General Municipal Law requires the filing of an oath in certain designated offices, those fire policemen who were appointed prior to April 16, 1964 should have filed with the county clerk. It is the individual's responsibility to file the necessary oath of office. 1967 Op St Compt No. 67-451.

9. Scope of authority

A member of a fire police squad has the powers of and may render service as a peace officer at such times as the fire department within which the fire police squad was organized is on duty. 1955 NY Ops Atty Gen Oct 24 (Informal), 1955 N.Y. AG LEXIS 322.

Fire police properly ordered to a duty at functions at which their department, company, or emergency relief squad is working in "line of duty," have the powers of peace officers and are covered under the Volunteer Firemen's Benefit Law. 1962 NY Ops Atty Gen Jan 8 (Informal), 1962 N.Y. AG LEXIS 45.

Whether or not a particular event or occurrence constitutes an emergency is a question of fact, although the authorities having control of the fire department or company may declare the types of events or occurrences to which the fire department or company shall respond or may order the fire department or company not to respond to particular kinds of events or occurrences. The members of a fire police squad may act as such at any time when the fire department or company or emergency relief squad is on duty. Its authority does not depend upon the giving of a signal or alarm. 1953 Op St Compt No. 53-6019.

10. —Traffic control

Driver violated N.Y. Veh. & Traf. Law § 1102 where he failed to yield to the directions of volunteer firefighters who were directing traffic at the scene of an automobile accident, as the firefighters had authority to act pursuant to the instructions given to them by their fire chief, who had properly delegated his authority to regulate traffic at such incidents pursuant to the emergency doctrine contained in N.Y. Veh. & Traf. Law § 1602; although the firefighters were not fire police officers, pursuant to N.Y. Gen. Mun. Law § 209-c, they were acting under the direction and control of their chief pursuant to N.Y. Village Law § 10-1018. People v Loren, 4 N.Y.3d 411, 796 N.Y.S.2d 26, 828 N.E.2d 983, 2005 N.Y. LEXIS 1039 (N.Y. 2005).

Fire police attending convention in another fire district may not direct traffic on public highways, unless a call for assistance is made to their department or company, but may direct traffic on convention grounds. As individual firemen they may volunteer their services to such fire district under § 209-i. 1953 Op St Compt No. 53-6341.

The fire-police squad of a village volunteer fire department may not direct traffic outside a fire house if the department is not engaged in a firemanic function. 1959 Op St Compt No. 59-673.

When the fire department or a fire company or an emergency relief squad thereof is responding to an alarm or call for assistance, the fire police squad may, within the fire district, halt traffic at an intersection so as to allow fire apparatus to pass through. 1961 Op St Compt No. 61-328.

11. —Other duties

Members of a fire police squad aiding the members of an emergency relief squad in an emergency are performing proper duties as volunteer firemen. 1954 NY Ops Atty Gen July 20 (Informal), 1954 N.Y. AG LEXIS 329.

Where various civic organizations use a central school building for meetings and functions, and the village fire company has been requested to furnish members of its fire police squad to supervise activities with regard to smoking regulations and exits, squad members while rendering such service are "on duty" and have all the powers and duties of peace officers. 1961 Op St Compt No. 61-311.

Investigations of crimes and apprehension of criminals are not firemanic duties, and a volunteer fireman is not entitled to benefits for injuries received by reason of furnishing floodlights for apprehension of burglars at the request of the police. 1961 Op St Compt No. 61-824.

12. Relationship to police

In this State the police system is a state affair. There is no statutory authority for the establishment of a volunteer police force. 1959 NY Ops Atty Gen Jan 27 (Informal), 1959 N.Y. AG LEXIS 89.

Members of fire police squads have no authority over, above and independent of the police officers of the police department. They are subject to and subordinate to the authority of the members of the village police department. 1955 Op St Compt No. 55-7260.

The jurisdiction of the regular police forces is paramount to that of fire police in the performance of police functions. However, in the performance of purely firefighting functions the jurisdiction of the fire police is paramount. 1957 Op St Compt No. 57-420.

13. Negligence liability of fire police

Appointment of volunteer firemen as members of a fire police squad will not affect the tort liability for their negligent acts. 1955 Op St Compt No. 55-7153.

Whether the members of a fire police squad would be covered by volunteer firemen's benefit insurance and would be free from civil liability for negligence to the extent provided in section 205-b of the GML when directing traffic at an intersection following a

blackout of a traffic light, or during a parade or marathon depends upon the particular facts and circumstances involved. Prior inconsistent opinions superseded. 1980 Op St Compt No. 79-853.

14. —Liability of others

A volunteer fireman, who is not a member of a fire police squad, may not be held personally liable for damages resulting from his negligence in directing traffic as part of a firemanic operation. 1975 NY Ops Atty Gen Jan 17 (Informal), 1975 N.Y. AG LEXIS 57.

Town is not liable for negligent acts of fire district fire policeman. 1955 Op St Compt No. 55-7659.

15. Volunteer Firefighters' Benefit Law

Fire police properly ordered to a duty at functions at which their department, company, or emergency relief squad is working in "line of duty," have the powers of peace officers and are covered under the Volunteer Firemen's Benefit Law. 1962 NY Ops Atty Gen Jan 8 (Informal), 1962 N.Y. AG LEXIS 45.

Authorities having control of fire departments or fire companies may organize within such departments or companies fire police squads composed of their volunteer members and, if they are properly ordered to duty to direct traffic at fires, they are covered under Volunteer Firemen's Benefit Law while in performance of such. 1966 NY Ops Atty Gen Sept 15 (Informal), 1966 N.Y. AG LEXIS 112.

16. —Other laws protecting fire police

Members of fire police squads are covered under § 205 of the General Municipal Law and § 10 of the Workmen's Compensation Law and other sections related thereto when injured outside of the village while rendering services pursuant to a mutual aid arrangement or while rendering services pursuant to a contract between the fire protection district and the village of which their fire company and fire police squad is a part. 1955 Op St Compt No. 55-7238.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS CPL § 2.10.

Jurisprudences:

26 NY Jur 2d Counties, Towns, and Municipal Corporations § 959.

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1038, 1244.

§ 209-d. Contracts for outside service by volunteer fire departments and companies.

Notwithstanding any other provision of law, no contract shall be made by a municipality or fire district whereby the services of a volunteer fire department or company are to be supplied outside of such municipality or fire district to provide (1) fire protection, (2) emergency service in case of accidents, calamities or other emergencies, or (3) general ambulance service pursuant to the provisions of section two hundred nine-b of this article, unless such volunteer fire department or company consents thereto. Any such contract may provide for the payment of a portion of the consideration expressed therein to such volunteer fire department or company to be expended for fire department or company purposes only. If the municipality or fire district owns all of the fire apparatus to be used in carrying out the contract, the portion of the consideration which may be paid to such volunteer fire department or company shall not exceed thirty-five per centum, unless a greater portion was being so paid on March fifteenth, nineteen hundred forty-one, under a contract entered into on or before that date, in which event a not greater portion than was being paid on said date may be paid to such volunteer fire department or company in respect to any contract entered into on or after such date. No payments shall be made to individual volunteer firefighters as compensation for rendering such outside service.

HISTORY:

Add, L 1941, ch 721, § 1; amd, L 1952, ch 145, § 1; L 1958, ch 190, § 1, eff March 14, 1958; L 2018, ch 476, § 75, effective December 28, 2018.

Amendment Notes The 2018 amendment by ch 476, § 75, substituted "article" for "chapter" in the second sentence; and substituted "firefighters" for "firemen" in the last sentence.

Notes to Decisions

Analysis

1. Generally
2. Construction of terms
3. Authority to enter contract
4. Necessary parties to contract
5. Disposition of moneys received under contract
6. —Provision in contract for payment to fire company
7. —Limitation on amount payable to fire company

1. Generally

Call firemen who receive compensation for executing firemanic duties are not volunteer firemen. 1954 Op St Compt No. 54-6872.

A village may construct an addition to the village owned fire house for the purpose of housing fire equipment, owned by the incorporated fire company and to be used outside of the village. Providing the arrangement is provident for the village, rental need not be charged the fire company for such use. 1965 Op St Compt No. 65-320.

A statutory conflict of interest does not occur where a village volunteer fire department provides fire protection to a town fire protection district when a town councilman is also a village fire department fire warden. However, he should refrain from participation in any proceedings relating thereto, either as councilman or as fire warden. 1974 Op St Compt No. 74-507.

2. Construction of terms

The term "fire apparatus" as used in section 209-d of the General Municipal Law would not seem to include such items as an air pack, smoke ejector, rescue saw, radios or hydraulic extrication equipment. 1980 Op St Compt No. 80-575.

3. Authority to enter contract

Contract to furnish fire protection to fire protection district may be made by village upon consent of fire companies constituting fire department. Such contract may not be made with the individual fire companies located in village. 1945 Op St Compt 215.

City empowered to acquire fire apparatus by gift or otherwise, to pay cost of maintenance and operation thereof, to pay rent for housing such apparatus and to have volunteer firemen fight fires. Contract may be made for such fire-fighting force to serve area in another city. 1947 Op St Compt 445.

A town may contract with a city to provide fire protection to fire protection or fire alarm districts within the town. 1954 Op St Compt No. 54-6872.

Towns may not contract with unincorporated fire companies to provide protection for fire protection or fire alarm districts within such towns. 1954 Op St Compt No. 54-6872.

The Wantagh Fire District may contract with the State Office of Parks and Recreation to provide fire protection outside the district to a State park (Jones Beach) not within a fire alarm or fire protection district. 1979 Op St Compt No. 79-887, 1979 N.Y. Comp. LEXIS 126.

A village may not contract separately with a central school district to provide fire protection to two school buildings, one within the village and the other outside the village in a fire protection district. 1980 Op St Compt No. 80-45, 1980 N.Y. Comp. LEXIS 335.

While there is no statute requiring fire company which constitutes village fire department to submit its books and records pertaining to receipt and expenditure of proceeds from fire protection contracts and fund raising to village board for audit, village board may make such requirement condition to entering into fire protection contracts for outside service or to allowing company to undertake fund raising activities; financial information concerning fire department may also be obtained under provisions of CLS Not-For-Profit Corporation Law and Freedom of Information Law; board of fire commissioners or, if there is no board of fire commissioners, board of trustees of village may require submission of report by chief of fire department. 1988 Op St Compt No. 88-55, 1988 N.Y. Comp. LEXIS 51.

4. Necessary parties to contract

Incorporation of a volunteer fire company of a village will not affect the control which the village exercises over the fire company. The making of a contract between an incorporated fire company and the village will not operate to make the fire company a paid fire company. Incorporation of a volunteer fire company will not affect the duties and liabilities of the village in regard to its volunteer firemen. An incorporated fire company of a village cannot contract to furnish fire protection outside of the village independently of the village board of trustees. 1947 Op St Compt 414.

Both village and fire department or fire company should be parties to contract to furnish fire protection outside of village. Village may retain moneys received pursuant to such contract or pay over a portion to the fire department or fire company. 1954 Op St Compt No. 54-6769.

A village must be a party to all contracts to provide fire protection outside the limits of said village between a fire company, located in said village, and those desiring fire protection outside said village. 1956 Op St Compt No. 56-7934.

A fire district in which a fire company is located is a necessary party to a fire protection contract under which such company provides protection to a fire protection district, notwithstanding the fact that the fire company owns all the buildings and equipment necessary in connection with such fire protection contract. 1978 Op St Compt No. 78-300, 1978 N.Y. Comp. LEXIS 179.

Under Sections 10-1000 et seq. of the Village Law, a village fire department is a corporation consisting of members of all the fire, hose, protective and hook and ladder companies of a village; it is administered by a board of fire commissioners or, where no board of fire commissioners has been appointed, by the village board of trustees and the council of the fire department. Fire companies in a village are associations or corporations, which must operate in accordance with their certificates of incorporation, bylaws, and statutes; and, although fire companies are separate and distinct from the village, the statutes do permit village authorities to exercise a certain degree of control over their organization, incorporation, governance, and membership, including residency for membership. A fire company must consent to a contract for the provision of fire protection outside the village and the fire chief of the village fire department cannot consent on behalf of members of the company. 1990 Op St Compt No. 90-19, 1990 N.Y. Comp. LEXIS 26.

5. Disposition of moneys received under contract

Moneys received for furnishing fire protection in territory outside of the fire district are not required to be kept in a separate account. Such moneys may be expended in addition to the $1,000 which may be expended without a referendum. A portion of such moneys may be paid to the fire department or fire company. 1947 Op St Compt 84.

Both village and fire department or fire company should be parties to contract to furnish fire protection outside of village. Village may retain moneys received pursuant to such contract or pay over a portion to the fire department or fire company. 1954 Op St Compt No. 54-6769.

The word "purposes" as used in that part of this section providing that a certain portion of money received by a municipality from fire protection contracts may be paid to its volunteer fire department for "fire department or company purposes only," includes social and recreational functions, and the fire department is not obliged to account to the board of trustees as to the precise "purposes" for which such money was used. 1960 Op St Compt No. 60-799.

The phrase "for fire department or company purposes only" in this section is not a limitation to specific purposes, but it excludes any use which would be a municipal or fire district charge, and, with respect to volunteer fire companies, the purposes are necessarily confined to those set forth in the company charter and by-laws for expenditure of company funds. 1962 Op St Compt No. 62-172.

6. —Provision in contract for payment to fire company

A fire protection contract made between a village and a town board on behalf of a fire protection district may provide for payment of a portion of the consideration to the village and a portion to the fire department, as limited in § 209-d of the General Municipal Law. 1955 Op St Compt No. 55-7141.

Where a village which owns all of the fire equipment has entered into a contract with a town to furnish fire protection to a fire protection district in the town and the contract does not provide for a payment of any portion of the consideration thereof to the volunteer fire department of the village furnishing the protection, the village may not pay any portion of the contract price to the volunteer fire company if the volunteer fire company has consented to the execution of the contract. 1957 Op St Compt No. 57-461.

A contract for fire protection between Town and Village Boards may provide for payment of a portion of the consideration directly to the fire company furnishing the protection. 1964 Op St Compt No. 64-90.

Moneys received by a village from fire protection contracts may not be paid over to the village volunteer fire company furnishing the fire protection unless such contracts so provide. 1968 Op St Compt No. 68-515.

7. —Limitation on amount payable to fire company

Where a municipality contracts to furnish fire protection to an outside area, there is no limitation on the portion of the contract price which may be paid to the fire company furnishing the fire protection unless the municipality owns all of the equipment used in furnishing the protection. 1960 NY Ops Atty Gen May 6 (Informal), 1960 N.Y. AG LEXIS 102.

Where a fire district contracts to furnish fire protection to a fire protection district, the portion of the consideration which may be paid to the fire company depends upon whether or not the fire district owns all of the apparatus to be used in carrying out the contract. 1954 Op St Compt No. 54-6781.

Where a fire district contracts to furnish fire protection to an outside area, there is no limitation on the portion of the contract price which may be paid to the fire company furnishing the fire protection unless the fire district owns all of the equipment used in furnishing the protection. 1955 Op St Compt No. 55-7588.

Where all of the apparatus used in furnishing fire protection pursuant to contract is owned by the fire district, the portion of the contract price which may be paid over to the volunteer fire department which furnishes the protection may not exceed 35%, unless a greater portion was being paid over to the department on March 15, 1941. 1957 Op St Compt No. 57-227.

Where a fire district contracts with two towns for fire protection, the district may pay a portion of the contract prices equal to or greater than 35%, if the fire department owns part of the apparatus used. If the district owns all the apparatus, the fire department may be paid not in excess of 35% of the contract price. Either such amount may be paid in addition to rental paid for district use of fire department buildings. 1960 Op St Compt No. 60-197.

Where a fire district contracts to furnish fire protection to an outside area, there is no limitation on the portion of the contract price which may be paid to the fire company furnishing the fire protection, unless the fire district owns all of the equipment used in furnishing the protection. 1960 Op St Compt No. 60-359.

Where a village does not own all of the fire apparatus to be used in carrying out a contract for outside service by the village fire department, the portion of consideration for such contract to be

paid to the fire company may exceed 35 percent. 1961 Op St Compt No. 61-28.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS Town §§ 176, 184; CLS Vill § 4-412.

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations § 1233, 1242.

§ 209-e. Fire mobilization and mutual aid plan

1. Plan. The state fire administrator shall prepare a state fire mobilization and mutual aid plan which may provide for the establishment of fire mobilization and mutual aid zones of the state. Upon filing of the plan in the office of fire prevention and control such plan shall become the state fire mobilization and mutual aid plan. Such plan may be amended from time to time in the same manner as originally adopted.

2. Regional fire administrators. The state fire administrator may appoint and remove a regional fire administrator for each fire mobilization and mutual aid zone established pursuant to the state fire mobilization and mutual aid plan. Before he or she enters on the duties of the office, each regional fire administrator shall take and subscribe before an officer authorized by law to administer oaths the constitutional oath of office, which shall be administered and certified by the officer taking the same without compensation and shall be filed in the office of the secretary of state.

3. Regulations. The commissioner of the division of homeland security and emergency services, in consultation with the state fire administrator, may make regulations and issue orders which he or she may deem necessary to implement the state fire mobilization and mutual aid plan and carry out the purposes of this section.

4. Powers. Whenever a county, city, town, village or fire district shall request, or whenever the governor shall determine that the public interest so requires, the state fire administrator shall possess and exercise the powers, functions and duties set forth in the state fire mobilization and mutual aid plan.

5. Standard thread. The state fire mobilization and mutual aid plan shall prescribe a standard hose thread for the state, and each county, city, town, village or fire district not equipped with the same may be required either to recut its threads to such standard or provide adapters whereby the same may be brought to such standards.

6. Records. The state fire administrator shall keep a permanent public record of the activations of the state fire mobilization and mutual aid plan, showing how, when and where it was activated and when such activation was terminated.

7. Reimbursement of assisting municipal corporations or fire districts. Whenever the governor activates the state fire mobilization and mutual aid plan pursuant to subdivision four of this section, claims submitted by an assisting municipal corporation or fire district for expenses allowed by subdivision two of section two hundred nine-g of this article made in performance of its duties on behalf of a receiving municipality or fire district pursuant to such plan may be reimbursed in the first instance by the state from any local assistance appropriation established for such purpose. Reimbursements of such claims from such appropriation may be made only upon certification of such claim by the state fire administrator to the state comptroller and audit of such claim by the state comptroller prior to payment. Expenditures for such reimbursements from such appropriation shall be considered a liability for outside aid as described in section two hundred nine-g of this article and shall be repaid by the municipality or fire district receiving assistance pursuant to the state fire mobilization and mutual aid plan.

8. Hazardous materials incident plan. The state fire administrator shall prepare a hazardous materials incident plan which shall complement and become a part of the plan required by subdivision one of this section. The plan shall provide for the mobilization and coordination of fire service resources in response to emergencies which involve or may involve hazardous materials and shall establish hazardous materials incidents response zones and criteria for recognized regional hazardous materials incidents response teams. The office of fire prevention and control, by and through the state fire administrator or his or her duly authorized officers and employees, is authorized to approve grants of funds from monies allocated and appropriated therefor for expenditures of municipal corporations for hazardous materials incidents planning and equipment, pursuant to applicable rules and regulations promulgated by the commissioner of the division of homeland security and emergency services, in consultation with the state fire administrator, and approved by the director of the budget.

HISTORY:

Add, L 1946, ch 834, § 1, eff April 1, 1946; amd, L 1956, ch 698, § 1; L 1964, ch 358, § 1; L 1975, ch 464, § 44; L 1978, ch 64, § 1; L 1979, ch 225, § 16, eff Sept 1, 1979; L 1987, ch 827, § 2, eff Aug 7, 1987; L 2010, ch 56, § 45 (Part B), eff July 1, 2010; L 2013, ch 101, § 7 (Part A), eff July 11, 2013.

Notes to Decisions

Analysis

1. Generally
2. Liability of municipality

1. Generally

A standard thread for use on hydrants in this State has been prescribed. 1958 NY Ops Atty Gen April 3 (Informal), 1958 N.Y. AG LEXIS 127.

Members of fire police squads are covered under section 205 of the General Municipal Law and section 10 of the Workmen's Compensation Law and other sections related thereto when injured outside of the village while rendering services pursuant to a mutual aid arrangement or while rendering services pursuant to a contract between the fire protection district and the village of

which their fire company and fire police squad is a part. 1955 Op St Compt No. 55-7238.

A fire protection contract may not be entered into between a town board, on behalf of a fire protection district, and a village whereby the town at large is required to assume the responsibility for any loss or damage sustained to the fire apparatus of the village in answering, attending or returning from calls in the fire protection district and whereby the town will reimburse the village for such damage and also assume the cost of all materials used by the village in its fire department in connection with such calls excepting gasoline and transportation charges. 1956 Op St Compt No. 56-8266.

A person who is both a regional fire administrator and a county fire coordinator, who performs services pursuant to the state fire mobilization and mutual aid plan, in either capacity, is not entitled to reimbursement, from the State, the county, or the municipality or fire district requesting assistance for salary lost because of his absence from his regular employment. 1957 Op St Compt No. 57-520.

2. Liability of municipality

Municipality or district issuing call for assistance is liable for benefits to firemen injured or killed and for equipment damaged and materials used. 1953 Op St Compt No. 53-6285.

A town is not liable for damage to the apparatus or equipment of a volunteer fire company answering a call in a fire protection district of such town pursuant to contract. However, the contract for fire protection may include a provision whereby the fire protection district assumes such liability. 1956 Op St Compt No. 56-8086.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 209-g; CLS Vol Fire Ben § 30.

Definitions, § 119-n.

Oath of office; no other test for public office, CLS Const Art XIII § 1.

Official oaths, CLS Pub Off § 10.

Codes, Rules and Regulations:

Fire mobilization and mutual aid plan, 9 NYCRR §§ 205.1 et seq.

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1034, 1035.

§ 209-ee. Adoption of a code of ethics and disclosure of interests by fire companies

1. Notwithstanding any provision of general, special or local law to the contrary, every fire company that contracts with or is under the control of a county, city, town, village or fire district to provide fire protection or other emergency service, shall adopt a code of ethics. Such code shall set forth the standards of conduct reasonably expected.

2. Any elected and/or appointed officer of a volunteer fire company responsible for governance, including but not limited to a line officer, treasurer, president, vice president and secretary, who has, will have, or later acquires an interest in or whose spouse has, will have, or later acquires an interest in any actual or proposed contract, purchase agreement, lease agreement or other agreement, including oral agreements, with the fire company of which he or she is a member, shall publicly disclose the nature and extent of such interest in writing to his or her immediate supervisor and to the governing body thereof as soon as he or she has knowledge of such actual or prospective interest. Such written disclosure shall be made part of and set forth in the official record of the proceedings of such body.

3. a. For the purpose of this section the term fire company shall have the same meaning as defined in section three of the volunteer firefighters' benefit law.

b. For the purpose of this section the term interest shall mean a direct or indirect pecuniary or material benefit accruing to an elected and/or appointed officer of a volunteer company as the result of a contract with the fire entity which he or she serves. For the purposes of this article an elected and/or appointed officer of a volunteer company shall be deemed to have an interest in the contract of (i) his or her spouse, minor children and dependents, (ii) a firm, partnership or association of which such individual is a member or employee, (iii) a corporation of which such individual is an officer, director or employee and (iv) a corporation any stock of which is owned or controlled directly or indirectly by such individual.

c. The disclosure requirement of subdivision two of this section shall not apply to the following:

(i) a contract with a corporation in which an individual has an interest by reason of stockholdings when less than five per centum of the outstanding stock of the corporation is owned or controlled directly or indirectly by such individual; or

(ii) a contract in which an individual has an interest if the total consideration payable thereunder, when added to the aggregate amount of all consideration payable under contracts in which such person had an interest during the fiscal year, does not exceed the sum of seven hundred fifty dollars.

HISTORY:

Add, L 2006, ch 243, § 1, eff June 1, 2007.

§ 209-f. Outside service by local police forces; mobilization by governor; powers of sheriffs

1. Whenever the public interest requires it, the governor may, in his discretion, authorize and direct the superintendent of state police, the sheriff of a county, the commissioner of the Nassau county police department and the head of the police department or force of any county, city, town or village of the state, to detail, assign, and make available for duty and use in any county, town, city or village of the state requesting their aid, assistance and use, under the direction and command of such officer as the governor may designate, all or any part of the deputies, forces, equipment and supplies under the command and control of such superintendent, sheriff, commissioner or head, as the case may be. While engaged in duty and rendering service in such county, town, city or village, the deputies, officers and members of such police forces shall have the same powers, duties, rights, privileges and immunities as if they were performing their duties in the civil or political subdivision in or by which they are normally employed.

2. a. Notwithstanding any inconsistent provision of law, general, special or local, the sheriff of any county may, when the public interest requires it,

declare a state of special emergency in any part or parts of his county where the public peace is threatened or where life or property may be endangered, after first advising the governor, by telegram, facsimile or other electronic means that he is about to do so.

b. During the continuance of any such emergency so declared and until it has been terminated by the sheriff who declared it or by the governor, the sheriff who declared such emergency: (1) May, after having received a request for aid from the chief executive officer of a city, town or village located within his county, request the chief executive officer of any other city, town or village located within his county, and the administrative head of any parkway police force and any state park police force which operates within his county, and the head of a county police department in his county, to detail, assign and make available for duty and use in the city, town or village requesting the aid, a part of the forces, equipment and supplies of the police department or police force of the municipality, parkway and state park police force, and county police department whose aid is requested, and the chief executive officer of such city, town or village, and the administrative head of such parkway and state park police force, and the head of a county police department, is hereby authorized and empowered to grant any request so made, and (2) shall have the power to request any or any number of sheriffs in the state to aid him by detailing, assigning and making available to him, for duty and use in his county, such number of their deputy sheriffs as may be available, together with equipment and supplies, and to deputize as emergency special deputy sheriffs of his county any or all personnel so supplied by the sheriff of any other county, and the sheriff of any county to whom such a request is made is hereby authorized and empowered to grant any request so made.

c. All or any part of the personnel, equipment and supplies furnished by the sheriff of another county in response to a request therefor, as aforesaid, may be detailed, assigned and made available for duty and use, by the requesting sheriff, (1) in a city, town or village which had requested aid, as aforesaid, provided there is need therefor to supplement the aid already provided by another municipality or by a parkway and/or state park police force, or a county police department, or any combination thereof, or if there is need therefor because no such aid was provided, or pending the arrival of such other aid, and (2) in any part of the county of the requesting sheriff which is outside a city or incorporated village and which, in the opinion of the requesting sheriff, is in need thereof to maintain the public peace or to prevent life or property becoming endangered.

d. While engaged in duty and rendering service in any city, town, village or elsewhere, as aforesaid, the officers and members of any such police department or police force, and any responding sheriff and his deputies, so assigned and made available for duty and use shall have the same powers, duties, rights, benefits, privileges and immunities as if they were performing their duties in the civil or political subdivision in or by which they are normally employed, and all thereof, for the purpose of the workmen's compensation law, shall be deemed to be engaged in the course of their employment from the time they report for such duty until they return to the civil or political subdivision in or by which they are normally employed.

e. The chief executive officer of a municipality who requested aid, as aforesaid, with the consent of the chief of police of his police department or police force if any such there be, may deactivate any or all of the manpower furnished, upon his request for aid, by another municipality, parkway and/or state park police force, and/or a county police department. Manpower so furnished as aid to a municipality not having a police department or force may be deactivated by the chief executive officer thereof with the consent of the sheriff of the county in which it is located.

f. A municipality may, by local law, delegate to the chief of police of its police department or police force the power hereby granted to its chief executive officer to request aid.

g. If the chief executive officer of any such city, town or village is absent or disabled, the chief of police thereof may make such request for aid, grant a request therefor, and deactivate manpower furnished in response to request therefor. If any such municipality does not have a chief of police a person empowered by the local legislative body may so act, except with respect to deactivating manpower furnished upon request.

h. As used in this section: (a) The term "chief executive officer" shall mean: (1) In the case of a city the mayor, except in a city having a city manager where it shall mean such city manager, and (2) in the case of a town the supervisor or presiding supervisor, and (3) in the case of a village the mayor, except in a village having a president or manager where it shall mean such president or manager; (b) The term "municipality" shall mean a city, town or village.

(i) All powers vested in the sheriff by this section shall only be exercised in the county of Nassau by the county executive of Nassau county.

HISTORY:

Add, L 1946, ch 834, § 1, eff April 1, 1946; amd, L 1965, ch 1003, § 1, eff July 19, 1965; L 2013, ch 101, § 8 (Part A), eff July 11, 2013.

Notes to Decisions

Analysis

1. Generally
2. Authority to provide aid

1. Generally

Section 209-g was intended to apply only to cases of general danger, such as war-born emergencies. Tillson v Kuhner, 283 A.D.

604, 129 N.Y.S.2d 59, 1954 N.Y. App. Div. LEXIS 4742 (N.Y. App. Div. 1954).

Provisions of CLS Gen Mun § 209-m governing requests for police assistance between local governments is not applicable to requests involving State law enforcement entities. 1987 NY Ops Atty Gen 87-49 (Informal), 1987 N.Y. AG LEXIS 55.

Mutual aid must be carried out consistent with provisions of General Municipal Law. 1998 NY Ops Atty Gen 98-53 (Informal), 1998 N.Y. AG LEXIS 61.

Members of a town police department are not authorized to furnish a general ambulance service outside the town. 1957 Op St Compt No. 57-13.

2. Authority to provide aid

The police force of a local government may render assistance outside the boundaries of the local government in accordance with sections 209-f and 209-m of the General Municipal Law. The local government receiving aid is liable for all damages arising out of the acts of the assisting forces. 1981 NY Ops Atty Gen 81-111 (Informal), 1981 N.Y. AG LEXIS 35.

Under certain specified circumstances county sheriff may request that police officers of village respond to law enforcement matters outside village; however, it is discretionary as to whether local government provides assistance. 1989 NY Ops Atty Gen 89-3 (Informal), 1989 N.Y. AG LEXIS 6.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 209-g; CLS County § 655; CLS Pub O §§ 3, 3-b.

Jurisprudences:

26 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 942–944.

85 NY Jur 2d Police Sheriffs, and Related Officers §§ 57, 88, 109, 117.

13C Am Jur Legal Forms 2d, Municipal Corporations, Counties, and Other Political Subdivisions, Form 180:121.

18A Am Jur Pl & Pr Forms (Rev), Municipal, School, and State Tort Liability, Form 83.

Annotations:

Liability of municipality or other governmental unit for failure to provide police protection from crime. 90 ALR5th 273.

§ 209-g. Liability for outside aid

1. Notwithstanding any inconsistent provision of law, general, special or local, any county, city, town, village or fire district requesting fire aid pursuant to section two hundred nine-e of this article or any county, city, town or village requesting police aid pursuant to section two hundred nine-f of this article, shall be liable and responsible to the assisting municipal corporation or fire district for any loss of or damage to apparatus or equipment or supplies and shall bear and pay the expense incurred in the operation and maintenance of any apparatus or equipment and the cost of materials and supplies used or consumed in rendering such aid and assistance, but such liability and responsibility shall not apply or extend to apparatus, equipment, materials and supplies owned or supplied by the state.

2. The state or assisting municipal corporation or fire district in such case shall be liable for salaries or other compensation to the assisting forces furnished during the time they shall not be performing their duties for the state or for the assisting municipal corporation or fire district and shall defray the actual traveling and maintenance expense of such assisting forces while they are rendering such aid and assistance, but the receiving municipal corporation or fire district shall reimburse the assisting municipal corporation or fire district for any moneys paid for such salaries or other compensation and traveling and maintenance expense. Any such claim for loss, damage, expense or cost shall not be allowed unless within sixty days after the same shall have been sustained or incurred a written notice of such claim, under oath, itemizing such loss, damage, expense or cost, is served by mail or otherwise upon the comptroller or chief fiscal officer of such receiving municipal corporation or fire district. An assisting municipal corporation or fire district may assume any such loss, damage, expense or cost or loan such equipment and apparatus or donate such services to the receiving municipal corporation or fire district without charge or cost.

3. A county, city, town, village or fire district shall be liable for all payments to be made to or on behalf of injured volunteer firefighters or to representatives of deceased volunteer firefighters pursuant to and in accordance with the provisions of the volunteer firefighters' benefit law. The amount so paid by a town shall be assessed in the manner provided in such law.

4. Neither the state nor the civil or political subdivision of the state whose police or fire forces or employees are engaged in rendering such outside aid and assistance pursuant to any request for aid and assistance or pursuant to direction of the governor or other official or agency authorized by, or pursuant to law so to direct shall be liable or accountable in any way or on account of any act or omission on the part of any officer or member of such forces or of any such employee while so engaged or for or on account of the operation, maintenance or use of any apparatus, equipment, materials or supplies in connection therewith, nor shall any sheriff be held liable or accountable in any way for or on account of any act or omission on the part of any of his or her deputies within or without the county of their appointment where such deputies are under the command of an officer other than himself or herself.

5. Notwithstanding any inconsistent provision of law, general, special or local, (a) any county whose sheriff, or in the county of Nassau the county executive, declared a state of special emergency within his or her county pursuant to section two hundred nine-f of this article, which resulted in men or women and/or equipment being furnished by the sheriff of another county for use in the county of the sheriff, or in the county of Nassau the county executive, declaring the state of emergency, shall be liable and responsible to the county of the assisting sheriff for salaries or other compensation paid or due the persons comprising the assisting forces during the time they were engaged in performing services in the county of the requesting sheriff, or in the county of Nassau the county executive, and for all loss or damage to apparatus, equipment and supplies used

or consumed by the persons comprising such assisting forces in rendering aid and assistance in the county of the requesting sheriff, or in the county of Nassau the county executive, provided an itemized claim therefor is submitted in writing to the chief fiscal officer of the county of the requesting sheriff, or in the county of Nassau the county executive, within sixty days after the termination of such an emergency. An assisting county may, however, assume any such cost, loss or damage, and all payments made or to be made to or on behalf of such persons comprising such assisting forces or to representatives of deceased persons who comprised such assisting forces pursuant to and in accordance with the provisions of any applicable law, rule or ordinance, including the workmen's compensation law which shall be deemed to be applicable. Neither the county whose sheriff responded with men and/or equipment to a request for assistance made by another sheriff who declared a state of special emergency, or in the county of Nassau the county executive, nor a responding sheriff or employee of the responding county, shall be liable or accountable in any way for any act or omission on the part of any person during the continuance of any such emergency, including but not restricted to the operation, maintenance or use of any apparatus, equipment or supplies in connection therewith, nor shall any sheriff be held liable or accountable in any way for or on account of any act or omission on the part of any of his or her deputies within or without the county of their appointment where such deputies are under the command of any person other than himself or herself, and (b) the city, town or village receiving police aid pursuant to section two hundred nine-f of this article shall assume the liability for all damages arising out of any act performed in rendering such aid and shall reimburse the assisting city, town, village, parkway police force, state park police force and/or county police department for any moneys paid by it for salaries or for other expenses incurred by it, including damage to or loss of equipment and supplies. An assisting city, town, village, parkway police force, state park police force and/or county police department may, however, assume in whole or in part any such cost, loss, damage or other cost or charge sustained or suffered by it which is applicable to its rendering such aid, by taking appropriate action to accomplish the same, and the county of the receiving city, town or village may, by appropriate action, elect to obligate itself to pay all or part of any money which such receiving municipality is obliged to pay arising out of and applicable to its having received such aid, and (c) a regular, part time or special deputy sheriff of a county shall not, for any reason, lose or forfeit any right, benefit or privilege which he or she would have had in the county of his or her residence by becoming and/or acting as an emergency special deputy sheriff of another county during an emergency.

6. The commissioner of the division of homeland security and emergency services, in consultation with the state fire administrator, may promulgate rules and regulations necessary to carry out the purpose and provisions of this section.

HISTORY:

Add, L 1946, ch 834, § 1, eff April 1, 1946; amd, L 1956, ch 699, § 5, eff March 1, 1956; L 1963, ch 312, § 1, eff April 16, 1963; L 1965, ch 1003, § 2; L 1968, ch 1003, § 2, eff June 22, 1968; L 2013, ch 101, § 9 (Part A), eff July 11, 2013.

Notes to Decisions

Analysis

1. Generally
2. Liability

1. Generally

This section exempting political subdivisions from liability for acts of fire forces while engaged in assisting another district was intended to apply only to cases of general danger such as war-born emergencies and was not applicable to a case where, pursuant to a mutual aid agreement, a fire district asked for help from an adjoining district and the latter's chief directed one of his volunteer firemen to come to his home for equipment. Such fireman in his own truck and district as a result of a collision caused the death of plaintiff's husband. Hence, she could maintain an action against the fireman's district but her complaint against the requesting district should have been dismissed. Tillson v Kuhner, 283 A.D. 604, 129 N.Y.S.2d 59, 1954 N.Y. App. Div. LEXIS 4742 (N.Y. App. Div. 1954).

This section was intended to apply only to cases of general danger, such as war-born emergencies. Tillson v Kuhner, 283 A.D. 604, 129 N.Y.S.2d 59, 1954 N.Y. App. Div. LEXIS 4742 (N.Y. App. Div. 1954).

CLS Gen Mun § 209-g grants immunity to state and political subdivisions in rendering aid pursuant to state-wide mutual aid plan and not in rendering aid to fire district during routine fire; thus, county was not entitled to dismissal of complaint alleging property damage caused by county employee on neighboring premises while aiding fire department in cleanup of fire debris. Advance Food Service Equipment, Inc. v County of Nassau, 128 A.D.2d 658, 512 N.Y.S.2d 898, 1987 N.Y. App. Div. LEXIS 44350 (N.Y. App. Div. 2d Dep't 1987).

A contract for fire protection between a town and a village is not affected by this section which applies in case of mobilization of fire forces to meet war-born emergencies or similar general dangers, nor by Section 209, which applies only to a situation in which no contract has been made. 1957 NY Ops Atty Gen May 28 (Informal), 1957 N.Y. AG LEXIS 178.

Mutual aid must be carried out consistent with provisions of General Municipal Law. 1998 NY Ops Atty Gen 98-53 (Informal), 1998 N.Y. AG LEXIS 61.

A person who is both a regional fire administrator and a county fire coordinator, who performs services pursuant to the state fire mobilization and mutual aid plan, in either capacity, is not entitled to reimbursement, from the State, the county, or the municipality or fire district requesting assistance for salary lost because of his absence from his regular employment. 1957 Op St Compt No. 57-520.

Where volunteer firemen are covered by a county self-insurance plan, they are entitled to benefits if injured while responding to a call for assistance from outside the fire district notwithstanding that the request for assistance is not a mutual aid call. 1981 Op St Compt No. 81-77, 1981 N.Y. Comp. LEXIS 809.

2. Liability

A fire district or municipality sponsoring a fire training session and permitting the participation of volunteer firemen of other fire districts or municipalities does not become liable to the latter trainees in the event of injuries sustained at such training session. 1950 N.Y. Op. Att'y Gen. No. 116, 1950 N.Y. AG LEXIS 20.

The police force of a local government may render assistance outside the boundaries of the local government in accordance

with sections 209-f and 209-m of the General Municipal Law. The local government receiving aid is liable for all damages arising out of the acts of the assisting forces. 1981 NY Ops Atty Gen 81-111 (Informal), 1981 N.Y. AG LEXIS 35.

Municipality or district issuing call for assistance is liable for benefits to firemen injured or killed and for equipment damaged and materials used. 1947 Op St Compt 44.; 1953 Op St Compt No. 53-6285.

Where an outside fire department pursuant to a local mutual aid plan responds to a call for assistance from a village and a private individual who is not a member of either fire department is injured through negligence of a member of the assisting department, the village is not responsible for such negligence. 1963 Op St Compt No. 63-217.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 209-e.

Jurisprudences:

26 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 942–944.

§ 209-i. Emergency service by volunteer firefighters.

1. Whenever a volunteer firefighter is within this state, but outside the area regularly served by the fire company or fire department of which he or she is a member and has knowledge of a fire or other emergency at or near the place where he or she is for the time being, such volunteer firefighter may report to the officer in command of the paid or volunteer fire company or paid or volunteer fire department, or in command of one of the paid or volunteer fire companies or one of the paid or volunteer fire departments, engaged in the handling of any such fire or other emergency and, on an individual basis, offer his or her services to assist such fire company or fire department. After his or her services are so accepted, the volunteer firefighter shall then be entitled to all powers, rights, privileges and immunities granted by law to volunteer firefighters during the time such services are rendered, in the same manner and to the same extent as if he or she were a volunteer member of the fire company or fire department which he or she is assisting, including benefits under the volunteer firefighters' benefit law. Any such commanding officer shall have power, in his or her discretion, to so accept the services of a volunteer firefighter unless the legislative body of the city or the village, the board of fire commissioners or other governing board of the fire district, or the town board of the town in relation to (a) the fire companies serving territory outside villages and fire districts or (b) a town fire department, as the case may be, by resolution heretofore or hereafter adopted, has forbidden the acceptance of any such services pursuant to this section. Any such resolution shall continue in effect until amended or repealed by the adoption of a subsequent resolution. The officer in charge of any fire company or fire department shall be notified promptly of the adoption of any such resolution and of any amendment or repeal thereof.

1-a. A volunteer firefighter who, because of his residence or usual occupation, is regularly in the area served by a volunteer fire company or department of which he is not a member may nevertheless volunteer his services on an on-going basis to the officer in command thereof to assist such fire company or fire department for the purpose of assisting such company or department's general or emergency ambulance services, or for the purpose of assisting such fire company or fire department at a fire or other emergency scene or for the purpose of training with such fire company or fire department. After his services are so accepted, the volunteer firefighter shall then be entitled to all powers, rights, privileges and immunities granted by law to volunteer firefighters during the time such services are rendered, in the same manner and to the same extent as if he were a volunteer member of the fire company or fire department which he is assisting, including benefits under the volunteer firefighters' benefit law. Any such commanding officer when authorized by the legislative body of the city or the village, the board of fire commissioners or other governing board of the fire district, or the town board of the town in relation to (a) the fire companies serving territory outside villages and fire districts or (b) a town fire department, as the case may be, shall have power, in his discretion, to so accept the services of a volunteer firefighter.

1-b. In the event that an active volunteer firefighter provides services under subdivision one of this section when there is no jurisdictional officer in command present, such volunteer firefighter shall be entitled to coverage under the volunteer firefighters' benefit law provided the fire company or municipality the volunteer serves adopts a resolution granting coverage for the provision of such services. Upon arrival of a jurisdictional officer in command, such volunteer shall be entitled to benefits in the manner set forth in subdivision one of this section.

1-c. A member of a fire company or department of another state who is regularly in an area served by a volunteer fire company or fire department may volunteer their services on an on-going basis to such fire company or fire department for the purpose of assisting such company or department's general or emergency ambulance services, or for the purpose of assisting such fire company or fire department at a fire or other emergency scene or for the purpose of training with such fire company or fire department, provided that such company or department is authorized to accept such services by the governing body of the city or the village, the board of fire commissioners or other governing board of the fire district, or the town board of the town in relation to (a) the fire companies serving territory outside villages and fire districts or (b) a town fire department, as the case may be. Upon application by an out-of-state firefighter, a fire company or fire department shall determine whether such out-of-state firefighter meets state and local requirements for active members of their company or department, including, but not limited to, compliance with a background check

pursuant to section eight hundred thirty-seven-o of the executive law, and whether such out-of-state firefighter is in good standing with the fire company or department in which they normally serve. If a volunteer fire company or fire department accepts the services of such an out-of-state firefighter, such firefighter shall be entitled to all powers, rights, privileges and immunities granted by law to volunteer firefighters during the time such services are rendered, in the same manner and to the same extent as if such firefighter were a volunteer member of the fire company or fire department being assisted, including benefits under the volunteer firefighters' benefit law, provided, however, such firefighter shall not be eligible to participate in a service award program as authorized by articles eleven-A and eleven-AAAA of this chapter nor shall such firefighter be eligible for coverage under section eleven-c of the volunteer firefighters' benefit law relating to diseases of the lung and section sixty-one of the volunteer firefighters' benefit law relating to disease or malfunction of heart or coronary arteries and any other presumptive coverage for impairment of health or death. Upon acceptance of such out-of-state firefighter to a fire company or fire department, such company or department shall provide to the applicant, and the applicant shall acknowledge receipt of, the following written statement: If a volunteer fire company or fire department accepts the services of a firefighter who is a member of a fire department or a company of another state, such firefighter shall be entitled to all powers, rights, privileges and immunities granted by law to volunteer firefighters during the time such services are rendered, in the same manner and to the same extent as if such firefighter were a volunteer member of the fire company or fire department being assisted, including benefits under the volunteer firefighters' benefit law, provided, however, such firefighter shall not be eligible to participate in a service award program as authorized by articles 11-A and 11-AAAA of the general municipal law, nor shall such firefighters be eligible for coverage under section eleven-c of the volunteer firefighters' benefit law, relating to diseases of the lung, and section 61 of the volunteer firefighters' benefit law, relating to disease or malfunction of heart or coronary arteries, and any other presumptive coverage for impairment of health or death.

2. The municipal corporation or fire district which would be liable for the negligence of any volunteer members of the fire company or fire department which has accepted the services of the volunteer firefighter pursuant to this section shall be liable for the negligence of such volunteer firefighter while acting, after such acceptance and during the time such services were rendered, in the discharge of his or her duties as a volunteer firefighter in the same manner and to the same extent as if he or she were a volunteer member of the fire company or fire department which he or she assisted. If the fire company or fire department which has so accepted the services of a volunteer firefighter pursuant to this section is a paid fire company or paid fire department, such paid fire company or paid fire department shall, for the purposes of this subdivision and section two hundred five-b of this article, be deemed to be a "duly organized volunteer fire company" within the meaning of such section two hundred five-b.

3. As used in this section, the term "volunteer firefighter" means a "volunteer firefighter" as such term is defined in section three of the volunteer firefighters' benefit law; the term "area regularly served" means the home area of the volunteer firefighter as described in subdivisions one, two, three, four or five of section thirty of the volunteer firefighters' benefit law and, in addition, any other area served pursuant to a contract for fire protection and the terms "fire company" and "fire department" shall include emergency rescue and first aid squads or other squads or units of a fire company or fire department.

HISTORY:

Add, L 1947, ch 643, § 1; amd, L 1956, ch 699, § 6; L 1959, ch 866, § 1; L 1964, ch 495, § 1; L 1965, ch 967, § 1, eff July 19, 1965; L 1984, ch 639, § 1, eff July 27, 1984; L 1985, ch 894, § 1, eff Aug 2, 1985; L 1993, ch 387, § 1, eff July 21, 1993; L 1999, ch 354, § 1, eff July 27, 1999; L 2014, ch 496, § 1, effective June 15, 2015; L 2017, ch 155, § 1, effective July 25, 2017; L 2018, ch 476, § 76, effective December 28, 2018.

Editor's Notes Laws 1956, ch 699, eff March 1, 1957, provided:

§ 26. It is the intent of the legislature, in enacting the amendments contained in this act, to harmonize the statutes of the state and the charter of the city of Rome with the volunteer firemen's benefit law so as to avoid ambiguity and uncertainty in construing the laws by amending or eliminating those provisions of law which are inconsistent with the provisions of the volunteer firemen's benefit law. If in this act there shall have been incorporated or omitted in any provision any grant of power or imposition of a duty which incorporation or omission is not required to harmonize such provision with the volunteer firemen's benefit law, such incorporation or omission shall not become effective but shall be deemed an inadvertence or error.

§ 27. No action, suit or proceeding, pending at the time when this act shall take effect, brought by or against a municipal corporation or a fire district, or any agency, board, commission or official thereof, shall be affected or abated by the adoption of this act or by anything therein contained, and such action, suit or proceeding shall be continued as if this act shall not have taken effect.

§ 28. The provisions of the workmen's compensation law relating to compensation and other benefits when volunteer firemen are killed or injured, and for the securing of such compensation, which were in effect on or prior to the twenty-eighth day of February, nineteen hundred fifty-seven, shall continue to apply in relation to volunteer firemen killed or injured prior to the first day of March, nineteen hundred fifty-seven, or die from the effects of injuries received prior to such latter date, even though such provisions are deleted from the workmen's compensation law by this act.

§ 29. If any clause, sentence, paragraph, subdivision, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, subdivision, section or part thereof directly involved

in the controversy in which such judgment shall have been rendered.

[Laws 1959, ch 866] This act was recommended by the Joint Legislative Committee on Municipal Tort Liability. It is part of the Committee's program of fixing with certainty the liability for negligence arising in the operation of the mutual aid plan in the fire services.

Amendment Notes The 2014 amendment by ch 496, § 1, added 1-b.

The 2017 amendment by ch 155, § 1, added 1-c.

The 2018 amendment by ch 476, § 76, substituted "firefighters" for "firemen" in the section heading; substituted "firefighter" for "fireman" or variants throughout the section; substituted "article" for "chapter" in the last sentence of 2; and made stylistic changes.

Notes to Decisions

Analysis

1. Generally
2. Legislative intent
3. Construction of terms
4. Liability for benefits
5. Workers' compensation
6. Illustrative cases

1. Generally

CLS Town § 176-b(10) prohibits person from becoming member of more than one fire company, whether company is formed for firefighting or emergency and general ambulance services; member of one company may assist another company or department in provision of emergency and general ambulance services. 1999 NY Ops Atty Gen 99-2 (Informal), 1999 N.Y. AG LEXIS 1.

Governing body of fire company or department may permit commanding officer to accept services of volunteer firefighter who is member of another company. 1999 NY Ops Atty Gen 99-41 (Informal), 1999 N.Y. AG LEXIS 46.

This section imposes liability upon the municipal corporation served by the fire department fighting a fire for negligence of a volunteer from a different fire department whose services are accepted by the chief engineer in fighting the fire. 1961 Op St Compt No. 61-438.

Volunteer firefighter from out-of-state fire company may not volunteer to assist fire district fire department within New York State on on-going basis under CLS Gen Mun § 209-i. 2000 Op St Compt No. 2000-15, 2000 N.Y. Comp. LEXIS 7.

The Village Law prohibits one person from becoming member of more than one fire company; member of company may assist another company or department in provision of emergency and general ambulance services. 1987 NY Ops Atty Gen 87-40 (Informal), 1987 N.Y. AG LEXIS 66.

Members of a volunteer fire company or department may not be compensated for services rendered fighting forest fires. 1955 Ops St Compt No. 55-7507.

2. Legislative intent

This section manifests legislative intent to place an injured volunteer fireman, who offers to render emergency aid to a fire department unit in fighting a fire outside the territory protected by his own company or department, and who is injured after his services are accepted and while so engaged, in the same legal position, as to rights and liabilities, as a member of the unit with which he is temporarily acting. Smith v Plandome, 28 Misc. 2d 793, 213 N.Y.S.2d 119, 1961 N.Y. Misc. LEXIS 3311 (N.Y. Sup. Ct. 1961).

3. Construction of terms

Volunteer firefighter who lives on mainland but berths his boat at marina near fire department pursuant to transient permit does not have "residence" in area of fire department for purposes of CLS Gen Mun § 209-i(1-a). 2008 NY Ops Atty Gen 2008-7 (Informal), 2008 N.Y. AG LEXIS 7.

4. Liability for benefits

Fire district which, under CLS Gen Mun § 209-i(1-a), accepts services of volunteer firefighter who is member of fire company in bordering area, is liable for Volunteer Firefighters' Benefit Law benefits accruing to volunteer firefighter injured during time such services are rendered. 1998 Op St Compt No. 98-24, 1998 N.Y. Comp. LEXIS 24.

A volunteer fireman, who responds to a request for assistance outside the area regularly served by his department is entitled to volunteer firemen's benefits if his injury occurred after his assistance was accepted by a department or company commander engaged in handling a fire. 1968 Op St Compt No. 68-665.

Un-remarried surviving spouse of volunteer firefighter or ambulance worker killed in performance of duties on behalf of another company, which accepted his or her service, may benefit from exemption offered by CLS RPTL § 466-f. 11 Op. Counsel SBRPS 66.

5. Workers' compensation

A volunteer fireman, rendering emergency service outside the territory protected by the department of which he is a member, is afforded workmen's compensation coverage to the same extent as if he were a member of the fire department which he assists. 1953 NY Ops Atty Gen Aug 6 (Informal), 1953 N.Y. AG LEXIS 292.

6. Illustrative cases

Where a volunteer fireman from the Village of Smyrna, while attending a volunteer firemen's convention in the Village of Bainbridge, was injured while attempting to volunteer his services to the Bainbridge Fire Department on the occasion of a fire during the convention, since his services had not been accepted by the Village of Bainbridge, he is not entitled to recovery from them, but since he was attending the convention under the terms of § 205 of the General Municipal Law, the Village of Smyrna is liable for his compensation. Stevens v Smyrna, 93 N.Y.S.2d 775, 196 Misc. 944, 1949 N.Y. Misc. LEXIS 2991 (N.Y. County Ct. 1949), aff'd, 281 A.D. 918, 119 N.Y.S.2d 807, 1953 N.Y. App. Div. LEXIS 3767 (N.Y. App. Div. 1953).

Fire police attending convention in another fire district may not direct traffic on public highways, unless a call for assistance is made to their department or company, but may direct traffic on convention grounds. As individual firemen they may volunteer their services to such fire district under this section. 1953 Op St Compt No. 53-6341.

Under CLS Gen Mun § 209-i, volunteer firefighter, who happens to be outside area served by his or her company, may offer his or her services to officer in charge of responding to fire or other emergency, and, if those services are accepted, such volunteer is entitled to various benefit programs available to members of company responding to emergency. 11 Op. Counsel SBRPS 66.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 50-i; CLS Vol Fire Ben § 30.

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1029, 1243.

62 NY Jur 2d Government Tort Liability §§ 26, 27.

62A NY Jur 2d Government Tort Liability § 374.

§ 209-j. Mutual aid programs in counties.

The board of supervisors in any county may appropriate and expend such sums as it may deem necessary and proper for the establishment and maintenance of a county mutual aid plan in cases of fire and other emergencies in which the services of firefighters would be used and may prescribe the method of auditing or approving expenditures under any such appropriation. Expenses incurred by any city, town, village or fire district participating in such mutual aid plan shall be a lawful municipal or fire district charge to be paid in the same manner as other like charges.

HISTORY:

Add, L 1949, ch 250, § 1; amd, L 1950, ch 711, § 1; L 1956, ch

449, § 1, eff April 9, 1956; L 2018, ch 476, § 77, effective December 28, 2018.

Amendment Notes The 2018 amendment by ch 476, § 77, substituted "firefighters" for "firemen" in the first sentence.

Notes to Decisions

Analysis

1. Generally
2. Replacement of equipment
3. Communications center

1. Generally

In connection with the mutual aid program of fire protection and under proper restrictions and safeguards, the Conservation Department [now DEC] may grant revocable permits to county authorities for the construction, maintenance, and operation of radio towers on State lands acquired for reforestation purposes within the forest preserve, provided, however, that if such construction is to be on forest preserve lands within the Adirondack and Catskill Parks there may be no interference with the wild forest character of the land. 1950 N.Y. Op. Att'y Gen. No. 148, 1950 N.Y. AG LEXIS 39.

The village board of trustees, on the recommendation of the council of a fire department in a village having no board of fire commissioners, determines the style of uniforms and the type of equipment to be purchased for use by members of the fire department. The procedures for receiving calls for assistance and responding to such calls by participants in a county mutual aid plan would be those described in the plan. Section 10-1006(16) of the Village Law does not affect the limitation under section 10-1006(7) that not more than thirty percent of the members of a fire company may be non-residents of the village or of the area served by the fire department or a fire company. 1981 NY Ops Atty Gen 81-36 (Informal), 1981 N.Y. AG LEXIS 122.

Volunteer firemen rendering mutual aid assistance to municipality or area served by paid firemen are entitled to compensation coverage. 1951 Op St Compt No. 51-5456.

A county may accept a gift of a cascade vehicle and expend funds for its operation and maintenance if the county determines that such expenditure is necessary and proper for the county's mutual aid plan. Opns St Comp, 1982, 1983 N.Y. Comp. LEXIS 356.

Members of fire police squads are covered under section 205 of the General Municipal Law and § 10 of the Workmen's Compensation Law and other sections related thereto when injured outside of the village while rendering services pursuant to a mutual aid arrangement or while rendering services pursuant to a contract between the fire protection district and the village of which their fire company and fire police squad is a part. 1955 Op St Compt No. 55-7238.

Member of volunteer firefighting company or volunteer ambulance corps who resides in town which receives services from such company only on mutual aid basis is not eligible for partial exemption based on minimum of 5 years' service in volunteer firefighting company or volunteer ambulance corps. 11 Op. Counsel SBRPS 79.

2. Replacement of equipment

When a county has formally adopted a mutual aid plan for fire and other public emergencies, it may pay for the cost of replacing radios in the various ambulances and emergency vehicles of local volunteer fire departments participating in the mutual aid plan, in order to make a required frequency change in the radio system. 1978 Op St Compt No. 78-343, 1978 N.Y. Comp. LEXIS 82.

3. Communications center

A county and any or all of the towns in the county may enter into agreements under which the county may establish a communications center which would handle all communications for fire districts, including emergency first aid squads of any fire districts maintaining such squads, calls for general ambulance services, calls for highway department operations and for any other purposes which the county is authorized by law to perform and which towns are also authorized by law to perform. Inclusion of the sheriff's department and town police departments in the operation of a county communications center would not be proper, but the board of supervisors may direct that the communications center be operated by sheriff's department personnel and that its facilities be used by and for that department, but it would be unwise if the facility should be located where the sheriff and his personnel cannot observe, control and, if need be, protect the facility. 1974 Ops Atty Gen Sept 11 (Informal), 1974 N.Y. AG LEXIS 147.

§ 209-l. Removal of volunteer officers and volunteer members of fire departments

1. The authorities having control of fire departments of cities, towns, villages and fire districts may make regulations governing the removal of volunteer officers and volunteer members of such departments and the companies thereof.

2. Such officers and members of such departments and companies shall not be removed from office, or membership, as the case may be, by such authorities or by any other officer or body, except for incompetence or misconduct.

3. Removals on the ground of incompetence or misconduct, except for absenteeism at fires or meetings, shall be made only after a hearing upon due notice and upon stated charges and with the right to such officer or member to a review pursuant to article seventy-eight of the civil practice law and rules. Such charges shall be in writing and may be made by any such authority. The burden of proving incompetency or misconduct shall be upon the person alleging the same.

4. a. Hearings upon such charges shall be held by the officer or body having the power to remove the person charged with incompetency or misconduct or by a deputy or employee of such officer, or body designated in writing for that purpose. In a case where a deputy or other employee is so designated, he or she shall, for the purpose of such hearing, be vested with all the powers of such officer or body, and shall make a record of such hearing, which shall be referred to such officer or body for review within ninety days from the close of such hearing along with his or her recommendations.

b. The notice of such hearing shall specify the time and place of such hearing and state the body or person before whom the hearing will be held.

c. Such notice and a copy of such charges shall be served personally upon the accused officer or member at least ten days but not more than thirty days before the date of the hearing.

d. A stenographer may be employed for the purpose of taking testimony at the hearing.

5. The officer or body having the power to remove the person charged with incompetence or misconduct may suspend such person after charges are filed and pending disposition of the charges, and after the hearing may remove such person or may suspend him or her for a period of time not to exceed one year.

The provisions of this section shall not affect the right of members of any fire company to remove a

volunteer officer or voluntary member of such company for failure to comply with the constitution and by-laws of such company.

HISTORY:

Add, L 1952, ch 785, § 1; amd, L 1962, ch 310, § 178, eff Sept 1, 1963; L 2002, ch 591, § 1, eff Nov 23, 2002 (see 2002 note below); L 2003, ch 551, § 1, eff Sept 17, 2003.

Notes to Decisions

Analysis

1. Generally
2. Construction
3. Rules and regulations; attendance at fires and meetings
4. —Hair grooming
5. Suspension
6. Hearing procedure
7. Removal by membership
8. Procedure
9. Illustrative cases

1. Generally

The delegation to a fire department under its constitution and bylaws to impose limited discipline is a grant of concurrent authority, and does not deprive the board of fire commissioners of its power to remove a volunteer fireman for misconduct after a proper hearing. Acker v Board of Fire Comm'rs, 25 A.D.2d 282, 269 N.Y.S.2d 628, 1966 N.Y. App. Div. LEXIS 4481 (N.Y. App. Div. 2d Dep't 1966).

Summary suspension of petitioner fire company for violation of fire department's "Communications Rule" did not violate CLS Gen Mun § 209-l and was not arbitrary or capricious, as § 209-l did not apply where fire department was authorized by its constitution and bylaws to investigate and discipline its members, including petitioner, and discipline imposed was not unfairly disproportionate. Empire Hook & Ladder Co. No. 1 v Nyack Fire Dep't, 176 Misc. 2d 616, 673 N.Y.S.2d 1, 1998 N.Y. Misc. LEXIS 150 (N.Y. Sup. Ct. 1998).

It may be possible to vote a chaplain or physician into a fire department as an active member so as to be entitled to the benefits of the Volunteer Firemen's Benefit Law, the number of calls to active duty to be responded to by such a member, in view of his professional duties, being a matter of satisfying the authority having control of the fire department. 1961 NY Ops Atty Gen May 23 (Informal), 1961 N.Y. AG LEXIS 94.

Removal of members of a volunteer fire company must be based on incompetency or misconduct, except in instances of absenteeism, and the charges must be filed, notice of hearing given, and a hearing held to establish them. 1962 NY Ops Atty Gen July 31 (Informal), 1962 N.Y. AG LEXIS 201.

Procedure prescribed in this section must be followed in order to remove a fire district officer or employee. 1954 Op St Compt No. 54-7056.

When a volunteer fireman is removed from membership in a volunteer fire company by vote of the members themselves based on the company's constitution and by-laws, rather than by village fire authorities, then the village may not provide a legal defense to the fire department when sued by the discharged fireman for wrongful removal. 1980 Op St Compt No. 80-366, 1980 N.Y. Comp. LEXIS 295.

A non-resident of a fire district may be allowed membership in a fire company of the fire district fire department if such membership is authorized by the fire company. Where such membership is permitted, the non-resident member shall have all the powers, duties, immunities, and privileges of resident members, including the right to hold a fire company office, unless the nonresident is also a non-resident of the State. A volunteer fireman may belong to only one fire company at a time and where such fireman joins a second company, he may be removed from membership in the original company. 1985 Op St Compt No. 85-31, 1985 N.Y. Comp. LEXIS 113.

2. Construction

There is no inconsistency between the main body of this section and the last sentence, giving members of a fire company right to remove an officer or member for failure to comply with the company's constitution and by-laws, and the fact that the members of the company might, under the last sentence, get rid of one of their number for unspecified and general reasons does not extend or expand the powers of the fire council, which can only proceed to oust or suspend a volunteer fireman pursuant to specific charges and a hearing. Schenck v Fire Council of Sea Cliff Fire Dep't, 35 Misc. 2d 685, 231 N.Y.S.2d 511, 1962 N.Y. Misc. LEXIS 3004 (N.Y. Sup. Ct. 1962).

3. Rules and regulations; attendance at fires and meetings

A board of fire commissioners had the power and discretion to approve the recommendation of the board of officers of a fire district to dismiss the appellants (volunteer firemen) for absenteeism at fires and meetings, without serving charges on the appellants and without granting them a hearing. So, summary judgment was granted dismissing a complaint which had sought for a judgment declaring (1) that the rules and regulations of the board of commissioners of the fire district governing the removal of volunteer members were null and void, (2) that their dismissal by the board of fire commissioners (which approved the action of the board of officers of the fire department was null and void), and (3) that they were members in good standing. Iannucci v Summa, 8 A.D.2d 841, 190 N.Y.S.2d 560, 1959 N.Y. App. Div. LEXIS 7887 (N.Y. App. Div. 2d Dep't 1959).

A board of fire commissioners may adopt a rule or regulation providing that membership in a fire company is dependent upon attendance at fires. 1955 NY Ops Atty Gen June 9 (Informal), 1955 N.Y. AG LEXIS 244.

The board of fire commissioners may adopt rules and regulations governing all fire companies and fire departments in its fire district. At the same time, a fire company, may adopt a by-law more stringent, as respects attendance at fires by members of the company, than is provided in rules and regulations of the fire commissioner. 1959 NY Ops Atty Gen Nov 25 (Informal), 1959 N.Y. AG LEXIS 240.

4. —Hair grooming

In Article 78 proceeding voluntary fireman was reinstated to position on basis that chief's bulletin purporting to control the grooming of hair, not intended as an amendment of the by-laws nor adopted as a regulation by the Board of Fire Commissioners, was invalid. Thompson v Bd. of Fire Comm'rs, 64 Misc. 2d 477, 315 N.Y.S.2d 480, 1970 N.Y. Misc. LEXIS 1345 (N.Y. Sup. Ct. 1970).

As to a regulation by a board of fire commissioners with reference to the length of hair of firemen, there is, as a matter of substantive due process, a constitutional right to determine one's own hair style and the burden is upon the board of fire commissioners to show substantial justification for the regulation it seeks to impose. Hunt v Board of Fire Comm'rs, 68 Misc. 2d 261, 327 N.Y.S.2d 36, 1971 N.Y. Misc. LEXIS 1096 (N.Y. Sup. Ct. 1971).

The evidence presented by a board of fire commissioners with regard to a regulation as to the length of hair of a volunteer fireman did not show any necessity or justification for such regulation and a volunteer fireman, who had been suspended for violation of such regulation, was ordered reinstated as a member of the department. Hunt v Board of Fire Comm'rs, 68 Misc. 2d 261, 327 N.Y.S.2d 36, 1971 N.Y. Misc. LEXIS 1096 (N.Y. Sup. Ct. 1971).

5. Suspension

Board of fire commissioners had authority to suspend volunteer firefighter for misconduct although it occurred when he was off-duty and was not directly related to his duties with fire district. Black v Board of Fire Comm'rs, 191 A.D.2d 551, 595 N.Y.S.2d 692, 1993 N.Y. App. Div. LEXIS 2267 (N.Y. App. Div. 2d Dep't 1993).

Where it did not appear that a Board of Fire Commissioners of a town had adopted any particular rules or regulations, it had no power to suspend a volunteer member on the ground of allegedly giving out false information as to condition of the electrical

system at the main fire house without establishing that any of its rules were thereby violated or that the information given out was, in fact, false. Burkart v Board of Fire Comm'rs, 28 Misc. 2d 64, 219 N.Y.S.2d 289, 1960 N.Y. Misc. LEXIS 1947 (N.Y. Sup. Ct. 1960).

A volunteer fireman may be suspended from duty involving operation of fire vehicles without affecting his other duties, and without first granting him a due process hearing. 1978 Op St Compt No. 78-1086.

6. Hearing procedure

A city fire department sufficiently complied with the requirements of Gen Mun Law § 209-l in its disciplinary proceeding against a volunteer fireman based on the fireman's refusal of a direct order from his officer in charge where the fact that the fire department excluded witnesses from the hearing on the charges until it was their turn to testify did not violate the requirement that such hearings be public, and where, though no transcript of the hearing was kept, the keeping of such transcripts is not a statutory requirement when hearings are held by boards of fire commissioners. Bigando v Quick, 97 A.D.2d 609, 468 N.Y.S.2d 92, 1983 N.Y. App. Div. LEXIS 20232 (N.Y. App. Div. 3d Dep't 1983).

Notice of discipline served on firefighter did not contain sufficient information to apprise firefighter of charges against him, although charges described specific actions by firefighter that apparently constituted alleged misconduct, since no specific rule or regulation which prohibited such actions was cited or provided. Bigando v Heitzman, 187 A.D.2d 917, 590 N.Y.S.2d 553, 1992 N.Y. App. Div. LEXIS 13449 (N.Y. App. Div. 3d Dep't 1992).

Although CLS Gen Mun § 209-l did not require vote of membership of volunteer fire company to remove firefighter for violating company's bylaws, which provided that power to remove member rested with board of directors, firefighter's due process rights were nevertheless violated when 2 members of board of directors, who were fact-finders, testified against him at removal hearing, thus depriving firefighter of impartial decision maker. Ferrara v Magee Volunteer Fire Dep't, Inc., 191 A.D.2d 967, 594 N.Y.S.2d 506, 1993 N.Y. App. Div. LEXIS 2914 (N.Y. App. Div. 4th Dep't 1993).

Hearing is required under CLS Gen Mun § 209-l only for removal of volunteer firefighter on ground of incompetence or misconduct; no hearing is necessary for discharge based on absenteeism. Leahy v Jordan, 207 A.D.2d 385, 615 N.Y.S.2d 706, 1994 N.Y. App. Div. LEXIS 8222 (N.Y. App. Div. 2d Dep't 1994).

In a N.Y. C.P.L.R. art. 78 proceeding, the former member was entitled to a hearing under N.Y. Gen. Mun. Law § 209-l with respect to the charge that the member lied to the volunteer fire company's board of inquiry where (1) the fire company contended that such conduct violated the fire company's code of ethics and conduct, (2) the bylaws that were in the record did not address such conduct, and the fire company's constitution was not in the record, (3) therefore, the charge of lying alleged misconduct pursuant to § 209-l, entitling the member to a hearing, and (4) the member was denied due process because the member was not afforded those fundamental rights. Pawlowski v Big Tree Volunteer Firemen's Co., 12 A.D.3d 1030, 784 N.Y.S.2d 785, 2004 N.Y. App. Div. LEXIS 14059 (N.Y. App. Div. 4th Dep't 2004).

Trial court properly remitted a disciplinary matter to a fire department for further proceedings because, while a volunteer firefighter's exempt status, standing alone, did not entitle him to the Civil Service Law protection where he was neither a permanent employee nor a permanent appointee, and the fire department officials were required to comply with the procedures set forth in the General Municipal Law. Matter of McEvoy v Oyster Bay Fire Co. No. 1, 117 A.D.3d 953, 986 N.Y.S.2d 187, 2014 N.Y. App. Div. LEXIS 3628 (N.Y. App. Div. 2d Dep't 2014).

A hearing on charges of misconduct against a volunteer fireman under this section is very different from that held by administrative agencies as an aid to performing their functions, being quasi-judicial in character and essentially adversary in nature, and the opportunity to confront and cross-examine witnesses is a fundamental part of it. Busking v Kronimus, 41 Misc. 2d 985, 247 N.Y.S.2d 149, 1963 N.Y. Misc. LEXIS 1711 (N.Y. Sup. Ct. 1963), aff'd, 22 A.D.2d 888, 255 N.Y.S.2d 312, 1964 N.Y. App. Div. LEXIS 2631 (N.Y. App. Div. 2d Dep't 1964).

A volunteer fireman was not accorded such a hearing as contemplated by this section on charges of misconduct where his counsel was not afforded a chance to cross-examine witnesses called to testify against him. Busking v Kronimus, 41 Misc. 2d 985, 247 N.Y.S.2d 149, 1963 N.Y. Misc. LEXIS 1711 (N.Y. Sup. Ct. 1963), aff'd, 22 A.D.2d 888, 255 N.Y.S.2d 312, 1964 N.Y. App. Div. LEXIS 2631 (N.Y. App. Div. 2d Dep't 1964).

The procedure outlined in this section, including taking of testimony under oath, must be followed in an investigation by the board of fire wardens of misconduct charges against volunteer members of a fire department, otherwise penalties imposed are subject to annulment. Gardner v Ward, 199 N.Y.S.2d 953 (N.Y. Sup. Ct. 1960).

Removal of members of a volunteer fire company must be based on incompetency or misconduct, except in instances of absenteeism, and the charges must be filed, notice of hearing given, and a hearing held to establish them. 1962 NY Ops Atty Gen July 31 (Informal), 1962 N.Y. AG LEXIS 201.

7. Removal by membership

The board of fire commissioners of a fire district had jurisdiction, pursuant to Gen Mun Law § 209-l, to entertain removal proceedings based on the misconduct of a volunteer fireman who had the status of a life member of the fire department, and his pleas of guilty to the crimes of filing a false instrument in the second degree and petty larceny, as evidenced by a certified copy of the transcript of minutes of the plea proceedings and a certified copy of the disposition, were sufficient to support the board's determination of misconduct; moreover, the penalty of removal was not so disproportionate to the offenses as to be shocking to one's sense of fairness, where the crimes to which the fireman had pled guilty had been committed against the fire district while he had been a fire commissioner of the fire district. Sommers v Board of Fire Comm'rs, 99 A.D.2d 784, 472 N.Y.S.2d 33, 1984 N.Y. App. Div. LEXIS 17167 (N.Y. App. Div. 2d Dep't 1984).

CLS Gen Mun § 209-l, which preserves right of members of fire company to remove volunteer officer or voluntary member for failure to comply with company's constitution and by-laws, did not necessitate hearing before majority of members of fire company could vote to expel petitioner as volunteer member and secretary. Armstrong v Centerville Fire Co., 195 A.D.2d 723, 599 N.Y.S.2d 939, 1993 N.Y. App. Div. LEXIS 7081 (N.Y. App. Div. 3d Dep't 1993), aff'd, 83 N.Y.2d 937, 615 N.Y.S.2d 314, 638 N.E.2d 959, 1994 N.Y. LEXIS 1298 (N.Y. 1994).

Fire department member was not entitled to N.Y. C.P.L.R. art. 78 relief because the board of fire commissioners was justified in finding that the member of a fire department had engaged in misconduct under N.Y. Gen. Mun. Law § 209-l and expelling the member from membership where the member repeatedly violated direct orders, sent unprofessional emails to other members, and continued to do so even after receiving warnings about the consequences. Matter of Shafer v Board of Fire Commr., Selkirk Fire Dist., 107 A.D.3d 1229, 967 N.Y.S.2d 491, 2013 N.Y. App. Div. LEXIS 4323 (N.Y. App. Div. 3d Dep't 2013).

When a volunteer fireman is removed from membership in a volunteer fire company by vote of the members themselves based on the company's constitution and by-laws, rather than by village fire authorities, then the village may not provide a legal defense to the fire department when sued by the discharged fireman for wrongful removal. 1980 Op St Compt No. 80-366, 1980 N.Y. Comp. LEXIS 295.

8. Procedure

Doctrine of res judicata did not bar plaintiff from bringing 42 USCS § 1983 civil rights action following court's dismissal "without prejudice" of his § 1983 damage claims in Article 78 proceeding for reinstatement as firefighter, although Article 78 proceeding was ultimately dismissed on merits, where (1) plaintiff did not seek restoration of any economic benefits derivable from his status as member of respondent's volunteer fire company, but rather sought $1 million in damages plus attorneys' fees for embarrassment, loss of reputation and mental anguish, and (2) court had expressly reserved plaintiff's right to maintain plenary

action on § 1983 damage claims. Parker v Blauvelt Volunteer Fire Co., 93 N.Y.2d 343, 690 N.Y.S.2d 478, 712 N.E.2d 647, 1999 N.Y. LEXIS 775 (N.Y. 1999).

Plaintiff was collaterally estopped from relitigating, in 42 USCS § 1983 civil rights action, claims of deprivation of his constitutional rights to due process and free speech which were identical to allegations of constitutional violations that he asserted as basis for annulment of CLS Gen Mun § 209-l disciplinary determinations in his prior Article 78 proceeding seeking reinstatement as firefighter. Parker v Blauvelt Volunteer Fire Co., 93 N.Y.2d 343, 690 N.Y.S.2d 478, 712 N.E.2d 647, 1999 N.Y. LEXIS 775 (N.Y. 1999).

Order transferring the N.Y. C.P.L.R. art. 78 proceeding to the appellate court was vacated and the matter was remitted to the trial court for further proceedings where (1) the petition was improperly transferred because the former members were charged with violating a provision of the volunteer fire company's bylaws with respect to fuel use, and the members were not entitled to a hearing on those charges, and (2) although the appellate court had the authority to address the merits of that part of the petition in the interest of judicial economy, it could not have, on the record, resolved the contention of the members that they were denied due process because the record did not contain the written charges filed with the fire company and the appellate court was unable to determine whether the charges were filed by members of the board of inquiry, thereby denying the members the right to impartial decision makers. Pawlowski v Big Tree Volunteer Firemen's Co., 12 A.D.3d 1030, 784 N.Y.S.2d 785, 2004 N.Y. App. Div. LEXIS 14059 (N.Y. App. Div. 4th Dep't 2004).

9. Illustrative cases

Discipline of volunteer fireman by imposition of 6-month suspension, 6-month probation, and prohibition against holding position as company line officer for 2 years did not constitute impermissible suspension beyond one-year limit fixed by CLS Gen Mun § 209-l, since fireman was suspended for only 6 months; 2-year prohibition affected only his rank or grade. Bigando v Schreiber, 124 A.D.2d 878, 508 N.Y.S.2d 646, 1986 N.Y. App. Div. LEXIS 62211 (N.Y. App. Div. 3d Dep't 1986).

A volunteer fire company located entirely within city limits would be held covered under the city's excess liability policy in an action to recover for personal injuries sustained in an automobile accident while plaintiff was a passenger in a car owned and operated by a volunteer fireman responding to a fire in the city, since, although the city's three volunteer fire companies were otherwise independent corporations free to carry on their internal affairs without interference by the city, once a fire alarm sounded, the fire chief, a paid civil service employee of the city, by virtue of the city charter assumed command of the city's volunteer companies to coordinate and direct the firefighting efforts (see also, N-PCL § 1402[e][1]; Gen Mun Law § 209-l), thus making the volunteer company a "named insured" as an organization under the "control and management" of the city during a fire; such holding is consistent with the rule that fire districts may be held liable for the negligence of volunteer fireman while operating privately-owned vehicles in responding to an alarm; even if the volunteer company were not a "named insured," it would nevertheless be entitled to coverage as an insured under the city's primary policy. Cook v Geneva, 127 Misc. 2d 261, 485 N.Y.S.2d 497, 1985 N.Y. Misc. LEXIS 2583 (N.Y. Sup. Ct. 1985).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS Vol Fire Ben § 5.

Proceeding against body or officer, CLS CPLR § 7801 et seq.

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations § 1259.

56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 298 et seq.

§ 209-p. Relay of fire and emergency calls.

The fire department of any city may accept any calls for aid in cases of fire or other emergencies made to its fire headquarters from territory outside the city and may relay such calls for aid in fires or other emergencies by such means as may be expedient to the fire department, fire company or fire district serving said territory. This section shall apply only to cities participating in any legally authorized or recognized plan for furnishing mutual aid in cases of fire and other emergencies in which the services of firefighters would be used. Any city, village or fire district, any town which has a town fire department, or any town board on behalf of a fire protection district, fire alarm district or territory outside any such municipal corporation or district, for which aid is to be furnished, may contract with a city to accept and relay such calls, as aforesaid, and the amounts payable under any such contract shall be a lawful charge against and paid as contracted for by the city, village, fire district, town which has a town fire department, fire protection district, fire alarm district or territory outside any such municipal corporation or district. Any city accepting and transmitting fire calls from territory outside the city, pursuant to any such contract, shall not be liable for any injury or death to persons or damage to property as the result thereof, when it, in good faith, complies with or attempts to comply with the provisions of this section.

HISTORY:

Formerly § 209–o, add, L 1957, ch 615, § 1; renumbered § 209–p, L 1958, ch 40, § 1, eff Feb 18, 1958; renumbered and amd, L 1958, ch 97, § 1, eff June 1, 1958; L 2018, ch 476, § 78, effective December 28, 2018.

Amendment Notes The 2018 amendment by ch 476, § 78, substituted "firefighters" for "firemen" in the second sentence.

Notes to Decisions

1. Generally

The Tioga County Legislature may direct that the Tioga County Sheriff's Department use its personnel and equipment to dispatch calls received in connection with the American Legion Ambulance Service for Emergency ambulance service within Tioga County. 1976 NY Ops Atty Gen Feb 4 (Informal), 1976 N.Y. AG LEXIS 3.

A fire district has a duty to provide fire protection services to the general public in all areas of the district, including that portion of a river located within the district, and to render rescue services in that area where emergency rescue services have been organized under General Municipal Law, § 209-b(1). A fire district is not liable for failure to provide fire protection or rescue services. 1983 NY Ops Atty Gen 83-1 (Informal), 1983 N.Y. AG LEXIS 100.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

26 NY Jur 2d Counties, Towns, and Municipal Corporations § 1036.

§ 209-s. Contracts between municipalities and fire districts for joint fire training centers

The local governing bodies of the several cities, towns, villages and fire districts of the state, are hereby authorized on behalf of their respective cities, towns, villages and fire districts to enter into contracts with any other municipality or municipalities or fire districts for the construction, operation and maintenance and joint use of fire training cen-

ters at their joint expense. Any such contract may provide for the apportionment and allocation of expenses among the parties and, in the case of expenses of a town, may make provision for the elimination of dual liability of taxable real property within the boundaries of the contracting parties; provided however, that unless the governing board of any village within the town shall agree otherwise, the expenses of a town shall not be charged against the taxable real property within such village.

HISTORY:

Add, L 1967, ch 551, § 1; amd, L 1973, ch 970, § 1, eff June 22, 1973.

Notes to Decisions

1. Generally

Interests in a fire training center may be sold by a city to fire districts and town boards but not to volunteer fire companies; and an agreement may be entered into by the parties which would provide for the sharing of the maintenance and operation costs of the center. 1972 NY Ops Atty Gen Feb 23 (Informal), 1972 N.Y. AG LEXIS 55.

Although towns are authorized to contract with a city, village or fire district for the construction and joint use of a fire training center, a town may not do this on its own because this type of municipal corporation has no authority to conduct firemanic activities. 1978 Op St Compt No. 78-526.

One fire district may permit other fire districts located within or outside the county in which the district is located to utilize its training facilities and personnel for reasonable consideration. 1983 Op St Compt No. 83-241, 1983 N.Y. Comp. LEXIS 244.

Towns may join with other municipalities in the construction, operation and maintenance of a fire training center. 1983 Op St Compt No. 83-7, 1983 N.Y. Comp. LEXIS 477.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations § 1029.

§ 209-t. Contracts for joint fire alarm systems

The local governing bodies of the several villages and fire districts of the state are hereby authorized on behalf of their respective villages and fire districts to enter into contracts with any other village or fire district for the construction, operation and maintenance and joint use of a fire alarm system at their joint expense (each village or fire district bearing a part of the expense in proportion to the assessed valuation of real estate in such village or fire district, or on such other basis or division as may be jointly agreed upon).

HISTORY:

Add, L 1968, ch 558, § 1, eff June 5, 1968.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

26 NY Jur 2d Counties, Towns, and Municipal Corporations § 1021.

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1093, 1220.

§ 209-u. Notification of presence of hazardous materials

1. The knowledge of the presence of hazardous materials is vital to meeting the contingencies of a fire or other emergency. It is the purpose of this section to secure the health, safety and welfare of the public, protect those called upon to respond to the emergency, encourage preparedness to meet any danger, and promote planning for future demands for emergency services by requiring the reporting of the presence of hazardous materials.

2. As used in this section:

(a) the term "insured" or "policyholder" means the policyholder of a fire insurance policy insuring against a risk located in this state; and

(aa) the term "person" means any individual, partnership, corporation or association; and

(b) the term "insurer" means any insurance company authorized to do the business of fire insurance in this state; and

(c) for the purpose of this section hazardous materials shall be those which bear a label under requirements of the United States Department of Transportation or those listed on the form prescribed by the state fire administrator.

3. Every person engaged in commerce in this state, excepting those operating as a farm, as defined by subdivision one of section six hundred seventy-one of the labor law who, based upon the experience of the business in the use of hazardous materials during the previous year, may have possession of hazardous materials at a permanent place of business, a construction site or a temporary storage depot, shall report the presence of such hazardous materials to the chief of the appropriate fire department, fire corporation, or fire company having responsibility for fire protection of each location at which any such hazardous material may be found. Upon receipt thereof, in counties which have an office of county fire coordinator, the fire department, fire corporation or fire company, shall forward a copy of said report to the office of the county fire coordinator.

4. A separate report shall be filed for each street address at which any such hazardous materials may be found. Such report shall be filed annually with such fire chief on a date to be determined by the state fire administrator in the manner prescribed by the state fire administrator. Upon receipt thereof, in counties which have an office of county fire coordinator, the fire department, fire corporation or fire company, shall forward a copy of said report to the office of the county fire coordinator. Such report shall be printed by and supplied to insurers upon their request by the office of fire prevention and control. Failure to file as required in this section shall not be the basis for denial by an insurer of an insured's claim under any policy in force for said property. The filing by the person of a single report to any one fire department, fire corporation, or fire company shall be sufficient to meet the requirements of this section where hazardous materials may be found at more than one location at each street address for which he must report.

5. An exemption from the provisions of subdivision three of this section may be granted by the chief of the fire department, fire corporation, or fire com-

pany where, in cooperation with or at the invitation of the person, he chooses to make or causes his representative to make an inspection of the person's place of business. At the time of such inspection the person is required to inform the chief or his representative of any hazardous materials which are subject to the provisions of this section. Failure to inform shall constitute a violation as set forth in subdivision eight of this section.

6. Exemptions from the provisions of subdivision three of this section may also be granted by said chief as follows: (a) a general exemption if the firefighting capability of the person is sufficient to defend against an emergency involving such hazardous material; (b) an exemption, based upon the need for confidentiality, from the reporting of specific hazardous materials. Requests for exemptions shall be in writing and shall be filed annually with said chief. Such exemptions shall be filed with said chief and in counties which have an office of county fire coordinator, a copy of said exemption shall be forwarded by said chief to the office of county fire coordinator on a date to be determined by the state fire administrator in the manner prescribed by the state fire administrator. Exemptions shall be in writing and shall expire one year from the date granted. An exemption may be revoked if the conditions provided in paragraph (a) or (b) of this subdivision no longer exist.

7. The state fire administrator shall provide that the report form required in subdivision four of this section shall indicate the manner in which the exemption procedures granted herein shall be followed and also that the form shall make provision for the signature of the fire chief for the purpose of certifying that an exemption to subdivision three has been granted.

8. Any person who fails to report the presence of hazardous materials as required in this section shall be subject to a fine of not more than two hundred fifty dollars for the first offense, and upon being found guilty of a second or subsequent offense, by a fine of not less than two hundred fifty dollars or more than one thousand dollars. Except as otherwise provided by law, such a violation shall not be a crime and the penalty or punishment imposed therefor shall not be deemed for any purpose a criminal penalty or punishment and shall not impose any disability upon or affect or impair the credibility as a witness, or otherwise, of a person found guilty thereof.

HISTORY:

Add, L 1980, ch 870, § 1, eff Jan 1, 1981; amd, L 1983, ch 963, § 1, eff Oct 7, 1983; L 1986, ch 594, §§ 1, 2, eff Jan 1, 1987; L 1991, ch 23, § 1, eff Jan 1, 1992.

Notes to Decisions

1. Engaged in commerce

Wording "engaged in commerce" has same meaning under both CLS Ins § 3409 and CLS Gen Mun § 209-u since both were written in conjunction with each other. NY Ins Dept Gen Counsel Op No. 04-12-10, 2004 NY Insurance GC Opinions LEXIS 303.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS Ins § 3409.

Codes, Rules and Regulations:

Reporting of the presence of hazardous materials. 19 NYCRR §§ 428.1 et seq.

§ 209-w. Permanent appointment of fire fighters; completion of training program

1. Notwithstanding the provisions of any general, special, or local law or charter to the contrary, no person shall, after the effective date of regulations adopted by the state fire administrator pursuant to section one hundred fifty-eight of the executive law, receive an original appointment on a permanent basis as a fire fighter of any county, city, town, village, or fire district unless such person has previously been awarded a certificate by the state fire administrator attesting to his or her satisfactory completion of an approved fire basic training program; and every person who is appointed on a temporary basis or for a probationary term or on other than a permanent basis as a fire fighter of any county, city, town, village or fire district shall forfeit his or her position as such unless he or she previously has satisfactorily completed, or within the time prescribed by regulations promulgated by the state fire administrator pursuant to section one hundred fifty-eight of the executive law, satisfactorily completes, a fire basic training program for temporary or probationary fire fighters and is awarded a certificate by the state fire administrator attesting thereto.

2. The term fire fighter, as used in this section, shall mean a member of a fire department whose duties include fire service as the phrase fire service is defined in paragraph d of subdivision eleven of section three hundred two of the retirement and social security law.

3. Nothing in this section shall be construed to exempt any fire fighter or other officer or employee from the provisions of the civil service law.

4. The provisions of this section shall not prevent the establishment of more restrictive local requirements for appointment of fire fighters.

5. Any person whose name was on an eligible list for appointment in the competitive class of the civil service as a fire fighter on the effective date of any rules and regulations promulgated by the state fire administrator pursuant to section one hundred fifty-eight of the executive law shall continue to remain eligible for permanent appointment from such list during the life of such list without satisfying the requirements set forth in subdivision one of this section, provided he or she would otherwise have remained eligible for permanent appointment from such list if this section had not been enacted.

6. The provisions of this section shall not apply to appointments made by any county, city, town, village or fire district which employs five or fewer fire fighters.

HISTORY:

Add, L 1976, ch 369, § 3, eff Sept 1, 1976; amd, L 1979, ch 225,

§ 6, eff Sept 1, 1979; L 2013, ch 101, § 10 (Part A), eff July 11, 2013.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Advisory council for fire prevention and control, CLS Exec § 159.

Definitions, CLS Retire & S S § 302.

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations § 1138.

§ 209-y. Establishment of hazardous materials emergency response teams

1. By resolution, the governing body of each county is authorized to establish a hazardous materials emergency response team. Such teams shall be coordinated in accordance with a plan developed pursuant to section two hundred four-f of this chapter.

2. The governing bodies of two or more counties may by mutual agreement form one or more regional hazardous materials emergency response teams. Such regional teams shall be coordinated in accordance with a plan developed pursuant to section two hundred four-f of this chapter.

3. Counties are authorized to appropriate and expend such sums as are deemed necessary to establish or maintain hazardous materials emergency response teams pursuant to this section.

4. Notwithstanding any other provision of law to the contrary, any person who is by training or experience and attainment qualified to participate as a member of a hazardous materials incidents response team recognized under this section and who voluntarily and without expectation of monetary compensation serves as a member of such team shall not be subject to a penalty or to civil liability for damages or injuries alleged to have been sustained by any person or entity by reason of an act or omission in the course of such service. Nothing in this section shall be deemed or construed to relieve from liability for damages or injuries any person who (a) is alleged to have caused said damages or injuries as the result of gross negligence or reckless, wanton, or intentional conduct, (b) is under a legal duty to respond to a particular incident, or (c) receives compensation other than reimbursement for out-of-pocket expenses for services in response to a particular incident.

HISTORY:

Add, L 1987, ch 827, § 1, eff Aug 7, 1987.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS Work Comp § 2.

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations § 1035.

§ 209-z. Annual independent audits

1. Notwithstanding any provision of general or special law to the contrary, any fire company with revenues of four hundred thousand dollars, or such lesser amount as the state comptroller shall designate, that contracts with a city, town, village or fire district to provide fire service shall obtain an annual audit of its records by an independent certified public accountant or an independent public accountant. Such audit shall be an examination of the revenues and expenditures in connection with such contract or contracts. Such audit shall indicate whether the fire company has filed Internal Revenue Service Form 990 and any report required pursuant to section thirty-three-a of this chapter. If such filings are required and have not been made, the audit shall include an examination of all revenues, expenditures and resources from any source. For purposes of this section, the term "fire company" shall have the same meaning as set forth for such term in section three of the volunteer firefighters' benefit law.

2. A copy of the audit report in the form prescribed by the state comptroller and certified by the accountant shall be furnished to the entity, and the municipal corporation with which the entity contracts, within one hundred eighty days following the end of the fiscal year audited.

HISTORY:

Add, L 2006, ch 237, § 3, eff Aug 1, 2007; amd, L 2007, ch 555, § 2, eff July 18, 2007 (see 2007 note below); L 2013, ch 470, § 1, eff Nov 13, 2013; L 2020, ch 262, § 1, effective November 11, 2020.

Prior Law Former § 209-z, add, L 1990, ch 921, § 2, eff April 1, 1991, expired and repealed April 1, 1996.

Amendment Notes The 2020 amendment by ch 262, § 1, substituted "four hundred thousand dollars" for "three hundred thousand dollars" in the first sentence of 1.

Notes to Decisions

1. Generally

Under CLS Gen Mun § 209-z, any fire company that contracts with city, town, village or fire district to provide fire protection service and that has revenues of at least $200,000 must obtain annual audit of its records as they pertain to revenues and expenditures in connection with such contract or contracts. 2007 Op St Compt No. 2007-8, 2007 N.Y. Comp. LEXIS 8.

In CLS Gen Mun § 209-z, reference to "report required pursuant to" CLS Gen Mun § 33-a is intended to be reference, instead, to report required by CLS Gen Mun § 30-a. 2007 Op St Compt No. 2007-8, 2007 N.Y. Comp. LEXIS 8.

ARTICLE 11-A Service Award Programs

Section

214. Purpose
215. Definitions
216. Authorization to establish service award programs for volunteer firefighters of political subdivisions of the state and for volunteer firefighters other than of political subdivisions of the state
216-a. Authorization to establish service award programs for special fire companies and departments
216-b. Continuation of service award programs
216-c. State administration of service award programs
217. General requirements of a service award program
217-a. Public information website
218. Requirements and benefits under a defined contribution plan service award program

219. Requirements and benefits under a defined benefit plan service award program
219-a. Administration, reporting and disclosure

HISTORY:
Add, L 1988, ch 775, § 1, eff Sept 1, 1989.

§ 214. Purpose

1. It is hereby declared that this article is intended to effectuate the objects and purposes of section eighteen of article one of the constitution and that the relationship between the political subdivision liable for payments of service awards under this article and a volunteer firefighter entitled to such payments is that of employer and employee within the meaning of such provision of the constitution. In no event shall the receipt of a service award under the provisions of this article be deemed to constitute membership in any pension or retirement system of the state or of a civil division thereon within the purview of section seven of article five of the constitution.

2. It is hereby further declared that this article is also intended to provide service awards for volunteer firefighters of incorporated fire companies or departments which are not otherwise part of a political subdivision of this state and who do not fall within the purview of subdivision one of this section.

HISTORY:
Add, L 1988, ch 775, § 1, eff Sept 1, 1989; amd, L 1995, ch 550, § 1, eff Aug 8, 1995.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

State-administered defined contribution service award programs for volunteer firefighters. 2 NYCRR §§ 154.1 et seq.

State-administered defined benefit service award programs for volunteer firefighters. 2 NYCRR §§ 155.1 et seq.

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1255, 1256.

§ 215. Definitions

As used in this article:

1. "Active volunteer firefighter" means a person who has been approved by the authorities in control of a duly organized volunteer fire company or volunteer fire department as an active volunteer firefighter of such fire company or department and who is faithfully and actually performing service in the protection of life and property from fire or other emergency, accident or calamity in connection with which the services of such fire company or fire department are required.

2. "Defined benefit plan" means any service award program that provides to eligible volunteer firefighters, a benefit that is definitely determinable under the program without reference to the amount contributed to the program on the participant's behalf or to any income, expenses, gains or losses or forfeitures of other participants under the program.

3. "Defined contribution plan" means any service award program that provides to eligible volunteer firefighters a benefit as the result of definite and determinable contributions under the program, and without reference to any income, expense, gains or losses or forfeitures of other participants under the program.

4. "Entitlement age" means the age designated by the sponsor at which a program participant is entitled to begin receiving an unreduced service award. In no event shall the entitlement age under a program be earlier than age fifty-five nor later than the age at which the participant can receive an unreduced benefit under Title II of the Social Security Act (Public Law 74-271 U.S.C. 306 et seq.). No service award program may provide for the payment of benefits (except in the case of death or disability) before age fifty-five.

5. "Fiduciary" means any person who exercises discretionary authority or control with respect to the administration of the program or the management or disposition of program assets or who renders investment advice for a fee to the program.

5-a. "Fire service area" means a portion of a village that receives fire protection from a special fire department pursuant to a contract with the governing board of the village when the cost of the contract is charged to such area of the village.

6. "Nonforfeitable" means the unconditional and legally enforceable right to receive benefits attributable to service as an active volunteer firefighter under the program that will begin at the entitlement age specified in the program.

7. "Participant" means an active volunteer firefighter who is eligible for a benefit under a service award program.

7-a. "Political subdivision" means a county, city, town, town on behalf of a fire protection district, village, village on behalf of fire service area or fire district.

8. "Service award" means the benefit payable to a participant in a service award program.

9. "Service award program" or "program" means a defined benefit plan or defined contribution plan established or maintained under this article to provide service awards for active volunteer firefighters, pursuant to the benefit options specified by the sponsoring organization.

9-a. "Special fire company or department" means a fire company or department for which a service award program cannot be established pursuant to subdivision one or two of section two hundred sixteen of this article which provides fire protection services to two or more political subdivisions under contracts with the governing boards thereof.

10. "Sponsor" or "sponsoring organization" means a political subdivision which has established or jointly established a service award program, a volunteer fire company or department, or any other entity responsible for fire protection.

11. "Year of firefighting service" means a twelve month period during which an active volunteer firefighter participates in the fire service and satisfies the minimum requirements of participation es-

tablished by the sponsoring organization maintaining the program which shall be applied on a consistent and uniform basis, subject to the minimum standards established by the sponsoring organization.

12. "Elected or appointed position" means line officers, department or company officers and president, vice president, treasurer and secretary of a fire company or department.

13. "Administrator" or "plan administrator" means the state comptroller, or an administrative service agency or financial organization selected by the state comptroller to perform all or a portion of the functions required to administer service award programs.

14. "Administrative service agency" means an organization duly authorized to do business in the state and which is qualified to administer and maintain records and accounts of plans which meet the requirements for qualification under the internal revenue code and governmental plans.

15. "Financial organization" means an organization duly authorized to do business in the state and which is (i) registered as an investment adviser under the Investment Advisers Act of 1940, as such provisions may be amended from time to time; (ii) licensed or chartered by the state department of financial services; (iii) chartered by an agency of the federal government; or (iv) subject to the jurisdiction and regulation of the securities and exchange commission of the federal government.

HISTORY:

Add, L 1988, ch 775, § 1, eff Sept 1, 1989; amd, L 1995, ch 550, §§ 2, 3, eff Aug 8, 1995; L 2006, ch 714, § 1, eff June 1, 2007 (see 2006 note below); L 2011, ch 62, § 104 (Part A), eff Oct 3, 2011; L 2012, ch 155, § 54, eff July 18, 2012.

Editor's Notes: Laws 2006, ch 714, § 13, eff June 1, 2007, provides as follows:

§ 13. This act shall take effect June 1, 2007, provided, however, that effective immediately, the addition, amendment, and/or repeal of any rule or regulation necessary for the timely implementation of this act on its effective date are authorized and directed to be made and completed by the state comptroller on or before such effective date.

Notes to Decisions

Analysis

1. Generally
2. Construction

1. Generally

While N.Y. Gen. Mun. Law § 215(4) required an eligibility age for length of service award programs (LOSAPs) for volunteer firefighters, it did not require that volunteer firefighters, who reached the eligibility age, could not continue to earn firefighting service; thus, a village was not constrained by § 215(4) to either adopt a LOSAP that did not provide benefits to firefighters age 54 or older, or adopt no LOSAP at all, and compliance with § 215(4) did not provide a defense to allegations by the Equal Employment Opportunity Commission that the village discriminated against volunteer firefighters based on their age, in violation of the Age Discrimination in Employment Law, 29 U.S.C.S. § 621 et seq. EEOC v Inc. Vill. of Valley Stream, 535 F. Supp. 2d 323, 2008 U.S. Dist. LEXIS 9316 (E.D.N.Y. 2008).

Joint fire district may establish service award program for volunteer firefighters of joint fire district fire department, but service award program may not provide prior service credit for activities performed under auspices of village fire department. 2000 Op St Compt No. 2000-18, 2000 N.Y. Comp. LEXIS 22.

When village that has established service award program is included within joint fire district, village lacks authority to transfer its fiscal and administrative responsibilities for program to joint fire district. 2000 Op St Compt No. 2000-18, 2000 N.Y. Comp. LEXIS 22.

Service award program may provide for participant to earn service credit after attaining program's entitlement age, subject to 40-year maximum provided for in CLS Gen Mun Law Art 11-A; to implement such feature, program may allow participant to waive voluntarily right to begin receiving his or her service award on reaching entitlement age in order to continue to earn credit after entitlement age, but program should not be structured so as to allow participant to begin receiving payment of his or her service award at program's entitlement age and to continue to earn service credit while receiving such payment. 2002 Op St Compt No. 2002-2, 2002 N.Y. Comp. LEXIS 5.

2. Construction

Municipality may define "enrolled member" for purposes of volunteer firefighters and ambulance workers exemption available to members who have served for 5 years and continue to so serve (CLS RPTL § 466-g(2), added L 2005 ch 419) as one who is eligible under municipality's length of service award program (LOSAP). 11 Op. Counsel SBRPS 82.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

State-administered defined contribution service award programs for volunteer firefighters. 2 NYCRR §§ 154.1 et seq.

State-administered defined benefit service award programs for volunteer firefighters. 2 NYCRR §§ 155.1 et seq.

Federal Aspects:

The Investment Advisers Act of 1940, cited in statutory text, appears as 15 USCS §§ 80b-1 et seq.

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1255, 1256.

§ 216. Authorization to establish service award programs for volunteer firefighters of political subdivisions of the state and for volunteer firefighters other than of political subdivisions of the state

1. a. A service award program may be adopted only by resolution of the governing board of a political subdivision, receiving the affirmative vote of at least sixty percent of the governing board of the political subdivision having control of the fire departments and fire companies, and the approval of a mandatory referendum authorizing the adopting of the program by the eligible voters within such political subdivision.

b. The resolution authorizing the adoption of a service award program shall state:

(i) the name of each fire company having volunteer firefighters who are potential participants in the program;

(ii) whether the program will be administered by the political subdivision or the state;

(iii) the entitlement age under the program;

(iv) the estimated annual cost of program, including the estimated annual administration fee;

(v) the number of years of fire service required to obtain a nonforfeitable right to a service award;

(vi) the activities for which points shall be granted toward a year of fire service;

(vii) the amount of the contribution to the program to be made on behalf of each participant credited with a year of fire service;

(viii) the extent to which the program provides for contributions for fire service rendered by a participant during one or more of the five calendar years immediately preceding the adoption of the program;

(ix) in the case of a service award program which provides for contributions for fire service rendered by a participant during one or more of the five calendar years immediately preceding the adoption of the program, the timing and method of financing such contributions;

(x) the date as of which the program shall take effect; in the case of a service award program to take effect on a day other than the first day of January, whether points toward a year of fire service shall be granted for activities performed prior to the effective date of the program and on or after the immediately preceding first day of January; and

(xi) the date on which the proposition authorizing the adoption of the program shall be submitted to referendum.

2. Upon the affirmative vote of at least sixty percent of the governing board of the political subdivision, which political subdivision has contracted with volunteer fire departments or fire companies located in a fire protection district of such political subdivision, there shall be held a mandatory referendum of the eligible voters residing within such fire protection districts to determine whether such governing board shall establish a service award program for the volunteer firefighters of such volunteer fire departments or fire companies.

3. (a) The referendum described in subdivision one or two of this section shall state the type of service award program selected, whether a defined contribution program described in section two hundred eighteen or a defined benefit program described in section two hundred nineteen of this article.

(b) The referendum described in subdivision one or two of this section shall state the estimated annual cost of the service award program, including the estimated annual administration fee, the projected monthly award to be paid to eligible volunteer firefighters and the estimated annual cost per covered participant.

(c) The referendum described in subdivision one or two of this section shall state whether the service award program will be administered by the political subdivision or the state of New York.

(d) Payments under the service award program if adopted, shall not impair any rights of the volunteer firefighters under the volunteer firefighters' benefit law or any other law.

(e) Except as otherwise provided in this paragraph once a service award program has been established, it may be abolished or amended in the same manner as it was created in accordance with the provisions of this article by following the procedures set forth in subdivision one or two of this section. The point system adopted by the governing board of the sponsor of a service award program pursuant to subdivision (c) of section two hundred seventeen of this article may be amended by the affirmative vote of at least sixty percent of such governing board, without referendum, provided, that, consistent with the provisions of subdivision (c) of section two hundred seventeen, the only effect of the amendment is to decrease the number of points granted for the performance of an activity, increase the amount of an activity required to earn the points granted for the performance of the activity, or both. Any amendment to a service award program shall only take effect as of the first day of January next succeeding completion of the proceedings required for adoption of the amendment and shall only apply prospectively.

4. Within thirty days of voter approval of the referendum described in subdivisions one and two of this section, the governing board of the political subdivision shall notify the state comptroller of the adoption of the service award program, whether such service award program will be a defined contribution plan or a defined benefit plan, and whether the plan will be administered by the political subdivision or the state of New York.

5. Notwithstanding any inconsistent provision of law, no member of the governing board of a political subdivision of the state is prohibited by virtue of being a member of a volunteer fire company or department from voting upon a resolution authorizing a referendum on the establishment of a service award program if more than forty percent of the governing board would otherwise be prohibited from voting upon such resolution. Any member of such governing board voting upon such a resolution who serves as a member of a volunteer fire company or department shall publicly disclose in writing to the governing board such status. Such written disclosure shall be part of and set forth in the official record of the proceedings of such governing board.

HISTORY:

Add, L 1988, ch 775, § 1, eff Sept 1, 1989; amd, L 1993, ch 626, § 1, eff Aug 4, 1993; L 1995, ch 550, § 4, eff Aug 8, 1995; L 2002, ch 469, § 1, eff Aug 20, 2002; L 2004, ch 452, § 5, eff Sept 14, 2004 (see 2004 note below); L 2006, ch 714, § 2, eff June 1, 2007 (see 2006 note below).

Editor's Notes: Laws 2004, ch 452, § 8, eff Sept 14, 2004, provides as follows:

§ 8. This act shall take effect immediately; provided, however, any change or amendment to a service award program made by this act shall only take effect as of the first of January next succeeding completion of the proceedings required for adoption of the change or amendment, and shall only apply prospectively; and provided further that the governing board of any political subdivision with an existing service award program authorized by section 216 or 216-a of the general municipal law shall have 180 days from the effective date of this act to notify the state comptroller of the existence of such service award program and whether such service award program is a defined contribution plan or a defined benefit plan.

Laws 2006, ch 714, § 13, eff June 1, 2007, provides as follows:

§ 13. This act shall take effect June 1, 2007, provided, however, that effective immediately, the addition, amendment, and/or repeal of any rule or regulation necessary for the timely implementation of this act on its effective date are authorized and directed to be made and completed by the state comptroller on or before such effective date.

Notes to Decisions

Analysis

1. Generally
2. Standing to challenge
3. Authority to establish program
4. Mandatory referendum

1. Generally

Trustees of a village who are also volunteer firefighters must recuse themselves from acting with respect to the establishment of a service award program for volunteer firefighters and with respect to the funding of the fire department. 1991 NY Ops Atty Gen 91-21 (Informal), 1991 N.Y. AG LEXIS 23.

Members of boards of fire commissioners who are volunteer firefighters may participate in voting on whether to submit a service award program to the voters for approval. 1991 NY Ops Atty Gen 91-70 (Informal), 1991 N.Y. AG LEXIS 81.

There is no authority for village to transfer its responsibilities in connection with service award program to fire company. 1994 Op St Compt No. 94-32, 1994 N.Y. Comp. LEXIS 30.

Village is required to continue service award program established for village fire department in event that fire department ceases to provide service under contract to area outside village; dissolution of village fire department for which service award program has been established would preclude former members of department from earning service credit under program on basis of activities performed after dissolution. 1994 Op St Compt No. 94-32, 1994 N.Y. Comp. LEXIS 30.

When establishing service award program for volunteer firefighters, if program is to provide credit for up to 5 years of firefighting service rendered prior to establishment of program, proposition authorizing establishment of program must state, in addition to certain other information, extent to which prior service credit will be provided; however, there is no requirement that proposition contain statement of maximum service credit that may be turned under program, program's entitlement age, or coverage and amount of any life insurance utilized in program. 2002 Op St Compt No. 2002-1, 2002 N.Y. Comp. LEXIS 6.

2. Standing to challenge

New York State Conference of Mayors and Other Municipal Officials (NYCOM), as unincorporated voluntary association whose membership consisted of most of New York's cities and villages, lacked standing to bring declaratory judgment action challenging constitutionality of CLS Gen Mun Art 11-A, which authorizes municipalities to provide their volunteer firefighters with certain financial incentives in form of service award programs, since NYCOM members, as political subdivisions, could not themselves raise constitutional challenges to act of state legislature. Caruso v State, 188 A.D.2d 874, 591 N.Y.S.2d 614, 1992 N.Y. App. Div. LEXIS 14337 (N.Y. App. Div. 3d Dep't 1992).

New York State Conference of Mayors and Other Municipal Officials (NYCOM), as unincorporated voluntary association whose membership consisted of most of New York's cities and villages, lacked standing to bring declaratory judgment action challenging constitutionality of CLS Gen Mun Art 11-A, which authorizes municipalities to provide their volunteer firefighters with certain financial incentives in form of service award programs, on ground that it permits creation of unauthorized local pension in violation of CLS Retire & S S § 113, since NYCOM failed to demonstrate that any of its members had adopted award program and thereby suffered injury in fact or aggrievement. Caruso v State, 188 A.D.2d 874, 591 N.Y.S.2d 614, 1992 N.Y. App. Div. LEXIS 14337 (N.Y. App. Div. 3d Dep't 1992).

3. Authority to establish program

Joint fire district may establish service award program for volunteer firefighters of joint fire district fire department, but service award program may not provide prior service credit for activities performed under auspices of village fire department. 2000 Op St Compt No. 2000-18, 2000 N.Y. Comp. LEXIS 22.

When village that has established service award program is included within joint fire district, village lacks authority to transfer its fiscal and administrative responsibilities for program to joint fire district. 2000 Op St Compt No. 2000-18, 2000 N.Y. Comp. LEXIS 22.

4. Mandatory referendum

A mandatory referendum to establish a service award program for volunteer firefighters of a fire district, pursuant to CLS Gen Mun Law § 216, may be conducted at a special election or at the fire district's annual election, pursuant to CLS Town Law § 179, but in either case, board of fire commissioners is not required to hold public hearing before establishment of service award program. 1989 Op St Compt No. 89-41.

Town board is not required to conduct mandatory referendum on proposal to establish service award program selected by fire company located within fire protection district in town, unless proposal has been approved by vote of at least 60 percent of town board. 1993 Op St Compt No. 93-18, 1993 N.Y. Comp. LEXIS 12.

Amendments to service award program for volunteer firefighters are subject to mandatory referendum, regardless of effect of amendment on cost of program. 2002 Op St Compt No. 2002-1, 2002 N.Y. Comp. LEXIS 6.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Requirements and benefits under a defined benefit plan service award program, § 219.

Codes, Rules and Regulations:

State-administered defined contribution service award programs for volunteer firefighters. 2 NYCRR §§ 154.1 et seq.

State-administered defined benefit service award programs for volunteer firefighters. 2 NYCRR §§ 155.1 et seq.

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1255, 1256.

§ 216-a. Authorization to establish service award programs for special fire companies and departments

1. The political subdivisions which contract to receive fire protection services from a special fire company or department may jointly establish a service award program for the volunteer firefighters of such special fire company or department, provided, however, that no such service award program shall be established unless each and every political subdivision which contracts to receive fire protection services from the special fire company or department joins in establishing the program.

2. A service award program for the volunteer firefighters of a special fire company or department shall be jointly established by the political subdivisions which contract to receive fire protection services from such fire company or department only if:

(a) the governing board of each and every such political subdivision approves an agreement to jointly sponsor the program by an affirmative vote of at least sixty percent of the governing board; and

(b) the eligible voters of each and every such political subdivision separately approve a proposition authorizing their political subdivision to jointly sponsor the program to be administered by the political subdivision or the state of New York.

3. An agreement between or among political subdivisions to jointly sponsor a service award program

for a special fire company or department may contain any provision which could be included in an agreement entered into pursuant to article five-G of this chapter and shall contain provisions specifying the following:

(a) the manner in which the several political subdivisions shall exercise and perform the powers and duties that are conferred by other sections of this article on the governing board of a single political subdivision that individually establishes and sponsors a service award program;

(b) the effect of the addition of other political subdivisions as parties to the agreement;

(c) the effect of the withdrawal of political subdivisions from the agreement;

(d) the entitlement age under the program;

(e) the age and length of service requirements to participate in the service award program;

(f) the number of years of firefighting service required to obtain a nonforfeitable right to a service award;

(g) the activities for which points will be granted toward a year of firefighting service;

(h) the extent to which the program provides credit for years of firefighting service rendered during one or more of the five calendar years immediately preceding the establishment of the program;

(i) in the case of a defined contribution plan,

(i) the amount of the contribution to be made on behalf of each participant credited with a year of firefighting service, and

(ii) the amount of any additional disability or death benefit;

(j) in the case of a defined benefit plan,

(i) the amount of the monthly payment to be made to each participant for each year of firefighting service credited to the participant, and

(ii) if the plan is to provide for payment of benefits prior to the tenth anniversary of the establishment of the plan, the date on which the plan is to provide for the payment of benefits;

(k) the date as of which the service award program shall take effect which shall be either the first day of January next succeeding the date of the last voter approval required to establish the program or, if sufficient funds are or will be available to each political subdivision to fund the program, the first day of January next preceding such last voter approval; and

(*l*) whether the service award program is to be administered by the political subdivision or the state of New York; and

(m) any other provisions as may be necessary for the implementation, operation, administration and funding of the program.

4. A proposition authorizing a political subdivision to jointly sponsor a service award program for the volunteer firefighters of a special fire company or department shall be submitted to referendum not less than thirty days and not more than ninety days after the governing board votes to approve the agreement to jointly sponsor the program. Notice of the referendum shall be published at least once, not less than fourteen days prior to the date of the referendum, in the official newspaper of the political subdivision or, if the political subdivision does not have an official newspaper, in one or more newspapers having general circulation in the political subdivision. The referendum shall be conducted in the same manner as other referenda held by the political subdivision and the cost thereof shall be charged to the political subdivision.

5. A proposition authorizing a political subdivision to jointly sponsor a service award program for the volunteer firefighters of a special fire company or department shall state:

(a) whether the service award program to be established is a defined contribution plan or a defined benefit plan;

(b) whether the service award program is to be administered by the political subdivision or the state of New York;

(c) the estimated annual cost of the service award program, including the estimated annual administration fee, and the estimated annual cost per participant, for all the political subdivisions establishing the program and for the political subdivision submitting the proposition to referendum;

(d) the extent to which the program provides credit for years of firefighting service rendered during one or more of the five calendar years immediately preceding the establishment of the program;

(e) in the case of a defined contribution plan, the amount of any additional disability or death benefit; and

(f) in the case of a defined benefit plan,

(i) the projected monthly award to be paid to participants, and

(ii) if the plan is to provide for the payment of benefits prior to the tenth anniversary of the establishment of the plan, the date on which payment of benefits shall begin.

6. Upon the last voter approval required to jointly establish a service award program for the volunteer firefighters of a special fire company or department, the agreement to jointly sponsor the service award program shall take effect and the program shall take effect as set forth in the agreement.

7. Within thirty days after the last voter approval required to jointly establish a service award program for the volunteer firefighters of a special fire company or department, the governing boards of the political subdivisions which established the program shall notify the state comptroller of the adoption of the service award program and whether such service award program will be a defined contribution plan or a defined benefit plan, and whether the plan will be administered by the political subdivision or the state of New York.

8. Within sixty days after the last voter approval required to jointly establish a service award program for the volunteer firefighters of a special fire

company or department, the governing boards of the political subdivisions which established the program shall jointly adopt a program document. The program document shall be consistent with the provisions of this article and the agreement to jointly sponsor the service award program, as amended, and shall set forth the obligations and rights of the sponsors, the special fire company or department, and the volunteer firefighters for whom the program is established, and establish standards and procedures for the administration of the program provided, however, that in the case of a state-administered program the procedures for administration shall be consistent with the rules and regulations governing the state program.

9. Except as otherwise provided in this subdivision, any provision of an agreement to jointly sponsor a service award program for the volunteer firefighters of a special fire company or department may be amended upon the affirmative vote of at least sixty percent of the governing board of each political subdivision which is a party to the agreement without referendum. Amendments to the provisions of the agreement required by paragraphs (h), (i) and (j) of subdivision three of this section shall only be made upon the affirmative vote of at least sixty percent of the governing board of each such political subdivision, subject to a mandatory referendum of the eligible voters within each such political subdivision.

10. In the event that the governing board of a political subdivision which is a party to an agreement to jointly sponsor a service award program for the volunteer firefighters of a special fire company or department ceases to contract to receive fire protection services from the special fire company or department, the political subdivision shall cease to be a sponsor of the service award program and shall be deemed to have withdrawn from the agreement in accordance with the terms of the agreement without further action by the governing board or voters of any political subdivision.

11. A service award program for the volunteer firefighters of a special fire company or department shall remain in effect until terminated by the political subdivisions which are parties to the agreement to jointly sponsor the program. The service award program shall be terminated only if:

(a) the governing board of each and every such political subdivision approves a resolution to terminate the program by an affirmative vote of at least sixty percent of the governing board; and

(b) the eligible voters of each and every such political subdivision separately approve a proposition to terminate the program.

HISTORY:

Add, L 1995, ch 550, § 5, eff Aug 8, 1995; amd, L 2004, ch 452, § 6, eff Sept 14, 2004; L 2006, ch 714, §§ 3–7, eff June 1, 2007.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

State-administered defined contribution service award programs for volunteer firefighters. 2 NYCRR §§ 154.1 et seq.

State-administered defined benefit service award programs for volunteer firefighters. 2 NYCRR §§ 155.1 et seq.

§ 216-b. Continuation of service award programs

1. (a) In the event that a town establishes a service award program for the volunteer firefighters of a fire company located within a fire protection district and, subsequently, the fire protection district is dissolved and the entire area thereof is included in or added to a fire district established pursuant to article eleven of the town law, and the fire district neither has established a service award program nor includes the area of any other jurisdiction which has established a service award program, the service award program established by the town shall be continued as provided in this subdivision.

(b) Except as otherwise provided in this subdivision, as of the date of completion of the proceedings described in paragraph (a) of this subdivision or, in the case of a newly established fire district, as of the date of the first organization meeting of the board of fire commissioners, the town shall have no further responsibility for administering or funding the service award program and the fire district shall assume responsibility for those functions. As of that date, the fire district shall succeed the town as the sponsor of the service award program and the board of fire commissioners shall exercise and perform all of the powers and duties of the sponsor of the program under this article and under any agreements or contracts entered into by the town pursuant thereto in furtherance of its powers and duties as sponsor of the program, including but not limited to the program trust agreement and any contracts relating to the custody, control, investment, or disbursement of program assets. The fire district shall be responsible for funding any unfunded liability of the sponsor of the program existing as of the date the fire district succeeds the town as sponsor of the program.

(c) Upon the fire district's succeeding the town as sponsor of the service award program, the town shall retain responsibility for administering the assets of the program until discharged from such responsibility as provided in this subdivision. Except for those records required for the continued administration of program assets, the town shall turn over immediately to the fire district all records maintained by the town as sponsor of the program.

(d) Within sixty days after the date on which the fire district succeeds the town as sponsor of the service award program, the board of fire commissioners of the fire district shall develop a plan for the continued administration of program assets. Subject to the provisions of the program trust agreement and any contracts entered into by the town in furtherance of its powers and duties as sponsor of the program, such plan may provide for the custody, control, transfer, investment, or disbursement of program assets. Such plan, however, shall provide for the replacement of any individual serving in his or her official capacity as a town officer or employee

as trustee or in any other position involving the administration of program assets. In developing such plan, the board of fire commissioners may request from the town information concerning the town's administration of program assets, and the town shall provide promptly such information as the board may reasonably request. Upon completion of the plan, the board of fire commissioners shall submit to the supervisor of the town a copy of the plan and a list of actions required to be taken by the town for implementation of the plan, including but not limited to execution of documents and the transfer of assets. Immediately after receiving such plan and list, the supervisor shall cause the actions on the list to be taken. Upon completion of the actions on the list and submission to the board of fire commissioners of all town records relating to the administration of program assets, the town shall be discharged from any further responsibility for administering the assets of the program. In the event that the board of fire commissioners fails to submit to the supervisor such plan and list within sixty days after the date on which the fire district succeeds the town as sponsor of the program, the supervisor may submit to the board of fire commissioners all town records relating to the administration of program assets, and upon such submission the town shall be discharged from any further responsibility for administering the assets of the program, and the board of fire commissioners shall assume responsibility for administering the assets of the program.

(e) The participants in the service award program as of the date that the fire district succeeds the town as sponsor of the program shall retain all point totals, service credit, contributions, and benefits earned prior to that date, irrespective of whether or not a participant has acquired a nonforfeitable right to a percentage of a service award on or before such date; provided, however, that nothing in this subdivision shall be construed as modifying or eliminating any requirement that a participant obtain a nonforfeitable right to a percentage of a service award in accordance with the provisions of the program. Any other active volunteer firefighters of the fire district fire department shall be eligible to participate in the service award program. Such active volunteer firefighters shall earn credit for years of firefighting service commencing with the calendar year in which the fire district succeeds the town as sponsor of the program, based on activities performed on or after the date that the fire district succeeds the town as sponsor.

(f) Except as provided in this subdivision, the service award program shall continue to be governed by the provisions of this article.

2. (a) In the event that either a town establishes a service award program for the volunteer firefighters of a fire company located within a fire protection district or a village establishes a service award program for the volunteer firefighters of the village fire department or a fire district establishes a service award program for the volunteer firefighters of the fire district fire department and, subsequently, the entire area of the fire protection district, village, or fire district is included in or added to a joint fire district established pursuant to article eleven-A of the town law and article twenty-two-A of the village law, and the joint fire district neither has established a service award program nor includes the area of any other jurisdiction which has established a service award program, the service award program established by the town, village, or fire district shall be continued as provided in this subdivision.

(b) Except as otherwise provided in this subdivision, as of the date of completion of the proceedings described in paragraph (a) of this subdivision or, in the case of a newly established joint fire district, as of the date of the first organization meeting of the board of fire commissioners of the joint fire district, the town, village, or fire district which established the service award program shall have no further responsibility for administering or funding the program and the joint fire district shall assume responsibility for those functions. As of that date, the joint fire district shall succeed the town, village, or fire district as the sponsor of the service award program, and the board of fire commissioners of the joint fire district shall exercise and perform all of the powers and duties of the sponsor of the program under this article and under any agreements entered into by the town, village, or fire district pursuant thereto in furtherance of its powers and duties as sponsor of the program, including but not limited to the program trust agreement and any contracts relating to the custody, control, investment, or disbursement of program assets. The joint fire district shall be responsible for funding any unfunded liability of the sponsor of the program existing as of the date that the joint fire district succeeds the town, village, or fire district as sponsor of the program.

(c) Upon the joint fire district's succeeding the town, village, or fire district which established the service award program as sponsor of the program, the town, village, or fire district shall retain responsibility for administering the assets of the program until discharged from such responsibility as provided in this subdivision. Except for those records required for the continued administration of program assets, the town, village, or fire district shall turn over immediately to the joint fire district all records it maintained as sponsor of the program.

(d) Within sixty days after the date on which the joint fire district succeeds the town, village, or fire district which established the service award program as sponsor of the program, the board of fire commissioners of the joint fire district shall develop a plan for the continued administration of program assets. Subject to the provisions of the program trust agreement and any contracts entered into by the town, village, or fire district in furtherance of its powers and duties as sponsor of the program, such

plan may provide for the custody, control, transfer, investment, or disbursement of program assets. Such plan, however, shall provide for the replacement of any individual serving in his or her official capacity as a town, village, or fire district officer or employee as trustee or in any other position involving the administration of program assets. In developing such plan, the board of fire commissioners may request from the town, village, or fire district information concerning the town, village, or fire district's administration of program assets, and the town, village, or fire district shall provide promptly such information as the board may reasonably request. Upon completion of the plan, the board of fire commissioners shall submit to the supervisor of the town, the mayor of the village, or the chairperson of the board of fire commissioners of the fire district a copy of the plan and a list of actions required to be taken by the town, village, or fire district for implementation of the plan, including but not limited to execution of documents and the transfer of assets. Immediately after receiving such plan and list, the supervisor, mayor, or chairperson of the board of fire commissioners shall cause the actions on the list to be taken. Upon completion of the actions on the list and submission to the board of fire commissioners of the joint fire district of all town, village, or fire district records relating to the administration of program assets, the town, village, or fire district shall be discharged from any further responsibility for administrating the assets of the program. In the event that the board of fire commissioners of the joint fire district fails to submit such plan and list within sixty days after the date on which the joint fire district succeeds the town, village, or fire district as sponsor of the program, the supervisor, mayor, or chairperson of the board of fire commissioners may submit to the board of fire commissioners of the joint fire district all town, village, or fire district records relating to the administration of program assets and upon such submission the town, village, or fire district shall be discharged from any further responsibility for administering the assets of the program, and the board of fire commissioners of the joint fire district shall assume responsibility for administering the assets of the program.

(e) The participants in the service award program as of the date that the joint fire district succeeds the town, village or fire district which established the service award program as sponsor of the program shall maintain all point totals, service credit, contributions, and benefits earned prior to that date, irrespective of whether or not a participant has acquired a nonforfeitable right to a percentage of a service award on or before such date; provided, however, that nothing in this subdivision shall be construed as modifying or eliminating any requirement that a participant obtain a nonforfeitable right to a percentage of a service award in accordance with the provisions of the program. Any other active volunteer firefighters of the joint fire district fire department shall be eligible to participate in the service award program. Such active volunteer firefighters shall earn credit for years of firefighting service commencing with the calendar year in which such proceedings are completed, based on activities performed on or after the date of completion of such proceedings.

(f) Except as provided in this subdivision, the service award program shall continue to be governed by the provisions of this article.

HISTORY:

Add, L 2004, ch 631, § 1, eff April 24, 2005.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

State-administered defined contribution service award programs for volunteer firefighters. 2 NYCRR §§ 154.1 et seq.

State-administered defined benefit service award programs for volunteer firefighters. 2 NYCRR §§ 155.1 et seq.

§ 216-c. State administration of service award programs

1. On or before the fifteenth day of November, two thousand eight and of each succeeding calendar year, the administrator shall determine the amount that each participating program sponsor is required to pay for the state-administered service award programs. The administrator shall submit to the fiscal officer of each political subdivision a statement of the amount so payable. Such amount shall consist of the amount deemed necessary to provide for payment in full of all estimated obligations of the current fiscal year of the fire service awards program and any additional obligations, plus interest on such amount, for fiscal years proceeding the current fiscal year. If, as a result of the amount determined to be paid for any fiscal year, a participating program sponsor over-paid its actual obligation for that year, the amount to be determined by the administrator for the next succeeding November fifteenth shall reflect the amount of the over payment, plus interest, as a reduction in the amount otherwise required to be paid by such participant political subdivision.

2. State-administered service award programs may be centrally administered by the state comptroller, or the comptroller may enter into one or more of the following contracts:

(a) a contract with an administrative service agency or financial organization to serve as program administrator and to perform all or any portion of the functions required to establish and administer such programs including, but not limited to, preparation of a plan document, record keeping, reporting, payment of service awards, and having custody of program moneys and assets;

(b) contracts with one or more financial organizations to invest program moneys; or

(c) a contract with an actuary for the performance of all actuarial calculations required by the program.

If the comptroller contracts for the performance of any function as provided in this subdivision, the comptroller shall be liable only for the exercise of due care in the selection of the administrative service agency, financial organization or actuary performing the function.

3. The state comptroller shall promulgate rules and regulations, as appropriate, for the service award programs. Such rules shall include, but not be limited to, standards for the selection of service providers, the method and timing of the payments required to be made by the sponsor, reporting requirements, matters relating to the preparation of a plan document, application procedures for transfer into the state-administered program, and any other matter relating to the service award programs.

4. (a) The state comptroller, or an administrative service agency or financial organization serving as program administrator, shall prepare and may amend a single plan document setting forth the obligations of sponsors, the rights of the volunteer firefighters, and standards and procedures for the administration of all state-administered service award programs. The plan document and any amendments thereto shall be consistent with the provisions of this article, the rules and regulations promulgated by the comptroller and any amendments thereto. If the plan document or any amendment thereto is prepared by an administrative service agency or financial organization, it shall not take effect until approved by the comptroller.

(b) The program administrator shall cause a summary of the plan document to be provided to each participant within six months from the date that program participation commences. The program administrator shall also cause a summary of any material amendment of the plan document to be provided to each participant within six months of the date the amendment takes effect.

(c) The plan document and the summary of the plan document shall be made available for public inspection and copying.

5. All program assets shall be held in trust for the exclusive purpose of providing service awards to participants and their beneficiaries or for the purpose of defraying the reasonable expenses of the operation and administration of the program. The trust shall be established and may be amended by the state comptroller. The comptroller may designate himself or herself, an administrative service agency, or a financial organization as trustee, and may substitute trustees. If the service award programs and the trust are not tax qualified within the meaning of sections 401 and 501 of the Internal Revenue Code of 1954 (68A Stat. 3.26 U.S.C. 401 and 501), the trust may provide that assets apportioned to an individual sponsor may be subject to the claims of general creditors, if any, of the sponsor or may contain such other terms and provisions as are necessary to ensure that participation in a service award program does not result in taxable income under any provision of the Internal Revenue Code of 1986, as amended.

6. There is hereby established in the custody of the state comptroller a special fund to be known as the volunteer firefighter service award fund. Such fund shall consist of any money of service award programs held by the comptroller. Moneys may be paid from such fund without an appropriation by law. All payments from such fund shall be made only in accordance with the provisions of this article, the rules and regulations promulgated thereto and the plan document.

7. The moneys held for the sponsor of each service award program shall be accounted for separately. The administrator shall cause a statement of contributions to be provided to sponsors at least once annually.

8. The administrator and every fiduciary of a service award program shall be required to act solely in the interest of the program's participants and beneficiaries. Notwithstanding the provisions of any general or special law restricting the power or duty of the state comptroller to invest moneys belonging to a fund which the comptroller is authorized to invest, a fiduciary may accept, hold, invest in and retain any investment if purchased or retained with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aim.

9. (a) All contracts or agreements with an administrative service agency, financial organization or actuary shall be awarded only after receiving competitive proposals. In addition to other statutory requirements, the state comptroller shall cause to be published in the state register and in the official newspaper or newspapers, if any, or otherwise in an appropriate newspaper designated for such purposes, at least sixty days prior to the date on which the contract or agreement will be awarded and shall request proposals within thirty days of publications.

(b) All contracts and agreements entered into with an administrative service agency, financial organization or actuary shall be in writing, shall not exceed five years in duration, and shall impose no penalties or surrender charges for the transfer of assets or responsibilities on termination of the contract or agreement. Such contracts and agreements shall be available for public inspection and copying.

HISTORY:

Add, L 2006, ch 714, § 8, eff June 1, 2007 (see 2006 note below).

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

State-administered defined contribution service award programs for volunteer firefighters. 2 NYCRR §§ 154.1 et seq.

§ 217. General requirements of a service award program

No volunteer fire department, volunteer fire company, fire district, fire protection district, village,

town or city, shall be required under this article to provide service award benefits for its active volunteer firefighters. Any service awards provided to an active volunteer firefighter under this article shall be governed by the provisions of section two hundred eighteen in the case of defined contribution plans, section two hundred nineteen in the case of defined benefit plans and in either case by the provisions of sections two hundred fourteen, two hundred fifteen, two hundred sixteen and two hundred nineteen-a of this article. No service award program may be provided under this article unless the following requirements are met:

(a) An active volunteer firefighter must be eligible to participate in any service award program provided under this article if the active volunteer firefighter has reached the age of eighteen and has completed at least one year of firefighting service. The sponsor of the service award program may impose younger age or shorter length of service requirements for participation in the service award program.

(b) A participant shall have a nonforfeitable right to a percentage of a service award that is not less than the percentage determined under the following table:

Years of Firefighting Service	Nonforfeitable Percentage
Less than 5	0
5 or more	100

Notwithstanding the preceding table, a participant shall have a one hundred percent nonforfeitable right to his service award upon his attainment of the entitlement age under the program. Each sponsor may establish a percentage table that provides for a faster rate of becoming nonforfeitable. Any amounts attributable to forfeiture of a participant's service award shall be used to reduce contributions for other service award program participants and shall not in any case be used to increase benefits for other participants. The preceding shall not preclude amendment of a service award program to provide for an increase in benefits.

(c) A year of firefighting service shall be credited under a service award program for each calendar year after establishment of the program in which an active volunteer firefighter accumulates at least fifty points. Points shall be granted in accordance with a system adopted by the program sponsor. Such system shall provide that points shall be granted for activities designated by the program sponsor, which activities shall be selected from the following:

(i) Training courses — twenty-five points maximum.

(A) Courses under twenty hours duration — one point per hour, with a maximum of five points.

(B) Courses of twenty to forty-five hours duration — one point per hour for each hour over initial twenty hours, with a maximum of ten points.

(C) Courses over forty-five hours to one hundred hours duration — fifteen points per course.

(D) Courses over one hundred hours duration — twenty-five points per course.

(ii) Drills—twenty points maximum. One point per drill (minimum two hour drill).

(iii) Sleep-in or stand-by—twenty points maximum.

(A) Sleep-in–one point each full night.

(B) Stand-by—one point each. A stand-by is defined as line of duty activity of the volunteer fire company, lasting for four hours, not falling under one of the other categories.

(iv) Elected or appointed position (see definition) —twenty-five points maximum.

(A) Completion of one year term in an elected or appointed position. If the term of office for a firefighter who has been elected or appointed to a position in a fire company or fire department commences during the month of May, the participant shall receive credit for the full year notwithstanding the fact that the participant has not completed one year in the elected or appointed position at the end of the calendar year in which he or she was elected or appointed.

(B) An active volunteer firefighter elected to serve as a delegate to a firefighters' convention shall also be eligible to receive one point per meeting.

(v) Attendance at meetings—twenty points maximum.

Attendance at any official meetings of the volunteer fire company—one point per meeting.

(vi) Participation in department responses–twenty-five points for responding on the minimum number of calls, as outlined below:

(A)	Total number of calls volunteer fire company responds to annually other than emergency rescue and first aid squad calls (ambulance calls)	0 to 500	500 to 1000	1000 to 1500	1500 and up
	Minimum number of calls volunteer firefighter must run annually in order to receive twenty-five points credit	10%	7.5%	5%	2.5%
(B)	Total number of calls emergency rescue and first	0 to	500 to	1000 to	1500 and

aid squad (ambulance)	500	1000	1500	up
Minimum number of calls volunteer firefighter must run annually in order to receive twenty-five points credit	10%	7.5%	5%	2.5%

(vii) Miscellaneous activities—maximum fifteen points. Participation in inspections and other activities covered by the volunteer firefighters' benefit law and not otherwise listed—one point per activity.

(viii) In the event that any active volunteer firefighter is either totally and temporarily disabled, or partially and permanently disabled, as certified by the workers' compensation board or other competent authority approved by the sponsor of the service award program, and the disability occurs during the course of service as a volunteer, while actively engaged in providing line of duty services, as defined in subdivision one of section five of the volunteer firefighters' benefit law, the firefighter shall receive five points for each full month of such disability.

(ix) Teaching fire prevention classes—five points maximum. An active volunteer firefighter who at the direction of his company, district or department, and for no remuneration, presents a public education class on fire prevention to a school, not-for-profit corporation, or civic organization organized and existing under the laws of this state or authorized to conduct activities in this state—one point per class.

The program sponsor may designate less than all the activities specified in this subdivision as activities for which points may be earned.

(d) An active volunteer firefighter's service award program may provide for the crediting of years of active firefighting service for periods prior to the establishment of such program to a maximum of five years of active firefighting service per participant but only to the extent authorized pursuant to section two hundred sixteen of this article.

(e) In order to provide credit for service prior to the establishment of the service award program, each sponsor shall review its prior membership rosters to determine the number of years credit for each participant who is entitled to credit. In making the analysis, the standards for active service set forth in subdivision (c) of this section and adopted by the sponsor shall be used. Approval for such prior service shall require certification by the president, secretary and chief of the volunteer fire company. In the event an active volunteer firefighter requests credit for service in more than one volunteer fire company, each such company shall provide a certification for the appropriate number of years.

(f) [Repealed]

(g) An active volunteer firefighter whose name does not appear on the approved certified list or who is denied credit for service prior to the establishment of the service award program shall have the right to appeal within thirty days of posting of the list or within thirty days of denial of past service credit. The appeal shall be in writing and mailed to the clerk or secretary of the governing board of such political subdivision, which shall investigate the appeal. The decision of the authorities in control of each volunteer fire company shall be subject to appropriate judicial review.

(h) An active volunteer firefighter's service award program may designate that benefits thereunder may be paid in the form of a lump sum, a life annuity with or without survivor benefits, period certain annuities, or any other form provided under the program. All forms of benefit payments shall be actuarially equivalent to each other. The sponsor may limit the forms of benefit payment under a service award program or impose conditions concerning the availability of such benefits. Nothing in this subdivision shall require a sponsor of a service award program to purchase annuity contracts from an insurance company.

(i) A participant whose volunteer fire service is interrupted by full-time extended obligatory military service or by a single voluntary enlistment not to exceed four years in the armed forces of the United States shall be considered on military leave. During such period of military leave, the participant shall receive active volunteer service credit of fifty points for each full year, prorated for service of less than a year.

(j) All program assets shall be held in trust for the exclusive purpose of providing benefits to participants and their beneficiaries or for the purpose of defraying the reasonable expenses of the operation and administration of the program. If the service award program and the related trust are not tax qualified within the meaning of sections 401 and 501 of the Internal Revenue Code of 1954 (68A Stat 3, 26 U.S.C. 401 and 501), the trust referred to in this subdivision may provide that the assets held thereunder may be subject to the claims of general creditors, if any, of the sponsor or may contain such other terms and provisions as are necessary to insure that the participation by an active volunteer firefighter in the service award program does not result in taxable income to such volunteer firefighter under any provision of the Internal Revenue Code of 1986, as amended.

(k) Every fiduciary of a service award program will be required to act solely in the interest of the program's participants and beneficiaries. Subject only to the provisions of the program document, a fiduciary may accept, hold, invest in and retain any investment if purchased or retained in the exercise of the degree of judgment and care, under the circumstances then prevailing, which persons of prudence and intelligence exercise in the management of their own affairs, not in regard to speculation, but in regard to permanent disposition of their funds, considering the probable income to be derived therefrom as well as the probable safety of their capital.

(*l*) No service award provided under the program may be assigned or alienated except to provide for

the legally obligated support of minor children or spouse.

(m) A participant who is convicted of the crime of arson in any degree as defined in the penal law shall not be eligible to receive benefits from a service award program and shall forfeit any and all rights he or she may have had to past or future benefits pursuant to a service award program.

(n) An active volunteer firefighters' service award program may provide for the crediting of years of active firefighting service for periods after an active volunteer firefighter has reached the entitlement age and is receiving a service award.

(o) In the case of a state-administered service award program, the state comptroller may promulgate rules and regulations prescribing procedures and forms for the compilation and maintenance of records of the points accumulated by each volunteer firefighter. Each fire company participating in the state-administered program shall compile and maintain such records in the manner prescribed.

(p) [Expires and repealed December 31, 2022] For purposes of determining total points earned for a calendar year in which a state disaster emergency, as defined in section twenty of the executive law, has been declared pursuant to executive order number two hundred two of two thousand twenty, as amended, to address the outbreak of novel coronavirus, COVID-19, an active volunteer firefighter service award program may provide for the crediting of up to five additional points per month, prorated for periods of less than one month, to each active volunteer firefighter for each month that special emergency response rules were in place restricting firefighter responses to emergency responses and/or restricting the holding of activities for which points could be earned due to guidelines related to the state disaster emergency. A political subdivision electing to provide the additional points authorized under this subdivision shall adopt a resolution by April thirtieth, two thousand twenty-one determining the number of additional points to be credited per month, provided that any additional points credited pursuant to this subdivision shall be in addition to any other points earned pursuant to this section during the state disaster emergency.

HISTORY:

Add, L 1988, ch 775, § 1, eff Sept 1, 1989; amd, L 1993, ch 44, § 1, eff May 21, 1993; L 1993, ch 573, § 1, eff Jan 1, 1994; L 1995, ch 199, § 1, eff Sept 1, 1995; L 1995, ch 617, § 1, eff Aug 8, 1995; L 2002, ch 559, § 1, eff Sept 24, 2002; L 2003, ch 514, § 1, eff Sept 17, 2003; L 2003, ch 647, § 1, eff Oct 7, 2003; L 2004, ch 452, § 7, eff Sept 14, 2004; L 2006, ch 714, § 9, eff June 1, 2007; L 2015, ch 534, § 1, effective December 11, 2015; L 2020, ch 113, § 1, effective June 17, 2020.

Editor's Notes: Laws 2015, ch 534, § 2, eff December 11, 2015, provides:

§ 2. Notwithstanding the provisions of any service award program adopted pursuant to article eleven-a of the general municipal law prior to the effective date of this act, the repeal of subdivision (f) of section 217 of the general municipal law made by section one of this act shall apply to every such service award program.

Laws 2020, ch 113, § 4, eff June 17, 2020, provides:

§ 4. This act shall take effect immediately and shall expire and be deemed repealed December 31, 2022.

Amendment Notes: The 2015 amendment by ch 534, § 1, repealed (f), which read: "In computing credit for those active volunteer firefighters who also serve as paid employees within a political subdivision of the state, credit shall not be given for activities performed during the individual's regularly assigned work periods."

The 2020 amendment by ch 113, § 1, added (p).

Notes to Decisions

Analysis

1. Generally
2. Construction of terms
3. Eligibility to participate
4. Attending meetings
5. Attending training courses
6. Illustrative cases

1. Generally

Service award program may not provide for pro rating number of points credited if firefighter participates in less than minimum number of calls set forth in CLS Gen Mun § 217(c)(vi). 1995 Op St Compt No. 95-9, 1995 N.Y. Comp. LEXIS 6.

Assets of service award program for volunteer firefighters must be held in trust. 1999 Op St Compt No. 99-1, 1999 N.Y. Comp. LEXIS 3.

Service award program may provide death benefits only in case of active volunteer firefighter who has nonforfeitable right to service award. 1999 Op St Compt No. 99-1, 1999 N.Y. Comp. LEXIS 3.

When village that has established service award program is included within joint fire district, village lacks authority to transfer its fiscal and administrative responsibilities for program to joint fire district. 2000 Op St Compt No. 2000-18, 2000 N.Y. Comp. LEXIS 22.

Amendments to service award program for volunteer firefighters are subject to mandatory referendum, regardless of effect of amendment on cost of program. 2002 Op St Compt No. 2002-1, 2002 N.Y. Comp. LEXIS 6.

2. Construction of terms

Municipality may define "enrolled member" for purposes of volunteer firefighters and ambulance workers exemption available to members who have served for 5 years and continue to so serve (CLS RPTL § 466-g(2), added L 2005 ch 419) as one who is eligible under municipality's length of service award program (LOSAP). 11 Op. Counsel SBRPS 82.

3. Eligibility to participate

Volunteer firefighters who also serve as paid employees of political subdivision may not earn credit under service award program for responding to fire alarms during their "regularly assigned work periods" (those times during which individual is ordinarily required to be at work under terms and conditions of his or her employment); permitting volunteer firefighter to take time off to respond to fire alarms does not alter periods when, in fact, volunteer ordinarily is expected to be at work. 1993 Op St Compt No. 93-16, 1993 N.Y. Comp. LEXIS 10.

"Retired" members of fire department may not participate in service award program unless they are subject to being called to duty under department's rules and regulations. 1994 Op St Compt No. 94-33, 1994 N.Y. Comp. LEXIS 31.

Members of "auxiliary" of incorporated volunteer fire company located in fire district may not participate in service award program established for members of fire company unless they have been approved as members of fire company and are subject to call for whatever duties may be assigned under rules and regulations of department or company. 1998 Op St Compt No. 97-24, 1998 N.Y. Comp. LEXIS 25.

Joint fire district may establish service award program for volunteer firefighters of joint fire district fire department, but service award program may not provide prior service credit for

activities performed under auspices of village fire department. 2000 Op St Compt No. 2000-18, 2000 N.Y. Comp. LEXIS 22.

4. Attending meetings

There is no authorization under CLS Gen Mun § 217(c)(v) for credit to be granted towards year of firefighting service under service award program for attendance at "meetings" of emergency rescue and first aid squad, fire police squad, or "executive board" of fire company. 1994 Op St Compt No. 94-25, 1994 N.Y. Comp. LEXIS 23.

Fire district commissioner who is also active volunteer firefighter may not be granted points toward year of firefighting service under length of service award program for attending fire district governing board meetings. 1995 Op St Compt No. 95-9, 1995 N.Y. Comp. LEXIS 6.

Points toward year of firefighting service may not be granted under CLS Gen Mun § 217(c)(v) to active volunteer firefighters for attending meetings of committees of fire company. 1995 Op St Compt No. 95-9, 1995 N.Y. Comp. LEXIS 6.

5. Attending training courses

Volunteer firefighter serving disciplinary suspension may not earn points for training courses taken during suspension. 1997 Op St Compt No. 97-13, 1997 N.Y. Comp. LEXIS 2.

Volunteer firefighter in fire district department may not be granted points for training unless training is approved by chief or board of fire commissioners. 1997 Op St Compt No. 97-13, 1997 N.Y. Comp. LEXIS 2.

6. Illustrative cases

Service award program sponsor may not require accumulation of more than 50 points as condition precedent to crediting active volunteer firefighter with year of firefighting service, sponsor may not require participation in number of calls greater than statutory minimum in order to qualify for 25 points for that activity, and sponsor may not create priorities among activities by conditioning granting of points for one activity on accumulation of points in another category. 2001 Op St Compt No. 2001-2, 2001 N.Y. Comp. LEXIS 1.

When establishing service award program for volunteer firefighters, if program is to provide credit for up to 5 years of firefighting service rendered prior to establishment of program, proposition authorizing establishment of program must state, in addition to certain other information, extent to which prior service credit will be provided; however, there is no requirement that proposition contain statement of maximum service credit that may be turned under program, program's entitlement age, or coverage and amount of any life insurance utilized in program. 2002 Op St Compt No. 2002-1, 2001 N.Y. Comp. LEXIS 1.

Service award program may provide for participant to earn service credit after attaining program's entitlement age, subject to 40-year maximum provided for in CLS Gen Mun Law Art 11-A; to implement such feature, program may allow participant to waive voluntarily right to begin receiving his or her service award on reaching entitlement age in order to continue to earn credit after entitlement age, but program should not be structured so as to allow participant to begin receiving payment of his or her service award at program's entitlement age and to continue to earn service credit while receiving such payment. 2002 Op St Compt No. 2002-2, 2002 N.Y. Comp. LEXIS 5.

For purpose of earning year of firefighting service under fire district service award program that provides points for participation in department responses, volunteer firefighter must be credited with 25 points for responding to minimum number of calls of emergency rescue and first aid squad, as set forth in CLS Gen Mun § 217(c)(vi)(B), and additional 25 points for responding to minimum number of fire company calls other than emergency rescue and first aid squad calls, as set forth in § 217(c)(vi)(A). 2002 Op St Compt No. 2002-11, 2002 N.Y. Comp. LEXIS 11.

Maximum benefit that may be provided under defined benefit plan service award program cannot exceed monthly payment for life of $20 for each year of firefighting service credited under such program, subject to maximum of 40 years of service; fire district may not establish defined benefit plan service award program that provides service award equivalent to $40 per month for each year of firefighting service based on no more than 20 years of service. 2003 Op St Compt No. 2003-3, 2003 N.Y. Comp. LEXIS 1.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Authorization to establish service award programs for volunteer firefighters of political subdivisions of the state and for volunteer firefighters other than of political subdivisions of the state, § 216.

Requirements and benefits under a defined contribution plan service award program, § 218.

Requirements and benefits under a defined benefit plan service award program, § 219.

Codes, Rules and Regulations:

State-administered defined contribution service award programs for volunteer firefighters. 2 NYCRR §§ 154.1 et seq.

State-administered defined benefit service award programs for volunteer firefighters. 2 NYCRR §§ 155.1 et seq.

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1255, 1256.

§ 217-a. Public information website

1. The comptroller is hereby authorized to make available to the public on its website information about vendors of service award programs, both defined contribution programs and defined benefit programs, for volunteer firefighters. Such information shall include, but need not be limited to:

(a) categorization by class of all costs, fees and commissions of any type;

(b) rate of return on investment for one, three, five and ten year periods ending December thirty-first, including gross of all costs and net of all costs;

(c) length of time the company has been in business;

(d) information regarding management stability including the length of tenure of board members;

(e) description of investment structure including its ten largest holdings;

(f) statement of investment philosophy;

(g) list of all representatives and their relationship to any program sponsor;

(h) percentage of investments bought or sold during each year.

2. The comptroller is hereby authorized to develop and distribute to every vendor, not more than sixty days after the effective date of this section, a form that shall be used for the purpose of collecting the information required by subdivision one of this section and any other information the comptroller may deem desirable to accomplish the purposes of this section. Every vendor shall return such forms to the comptroller no later than ninety days after the effective date of this section and annually thereafter, but no later than March first of each year commencing in two thousand eight. The comptroller is hereby authorized to publish the information obtained from such forms and make it available to New York residents on the office of the comptroller website by July first, two thousand eight and annually thereafter.

3. As used in this section, "vendor" shall mean an organization duly authorized to do business in the

state and which is qualified to administer and maintain records and accounts of defined benefit and defined contribution plans which meet the requirements for qualification under the internal revenue code and governmental defined benefit and defined contribution plans.

HISTORY:

Add, L 2006, ch 262, § 1, eff Jan 22, 2007 (see 2006 note below).

Editor's Notes: Laws 2006, ch 262, § 2, eff Jan 22, 2007, provides as follows:

§ 2. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided, however, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized and directed to be made and completed by the state comptroller on or before such effective date.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

State-administered defined contribution service award programs for volunteer firefighters. 2 NYCRR §§ 154.1 et seq.

State-administered defined benefit service award programs for volunteer firefighters. 2 NYCRR §§ 155.1 et seq.

§ 218. Requirements and benefits under a defined contribution plan service award program

(a) An active volunteer firefighter's service award program that is a defined contribution plan shall be subject to minimum and maximum contribution requirements as set forth in subdivision (b) of this section. In determining whether such minimum and maximum contribution requirements have been satisfied, all benefits provided under all service award programs instituted by a sponsor shall be considered as one program.

(b) The sponsor of a defined contribution plan shall contribute to the plan a fixed amount of money, as determined by the sponsor, on behalf of each participant who is credited with a year of service. The minimum and maximum contribution requirements for a defined contribution service award program shall be as follows. The minimum contribution shall be one hundred twenty dollars per year of service. The maximum contribution shall be twelve hundred dollars per year of service. The maximum number of years of service for which a participant may receive a contribution shall be forty years. The sponsor shall appropriate annually an amount sufficient to pay the contributions.

(c) The benefit payable to a participant in a defined contribution plan shall be the resulting amount from a defined annual contribution made by the sponsor less necessary administrative costs and shall include interest and/or other earnings resulting from investment of the annual contribution. The governing board of the sponsor may retain an actuary to provide advice with respect to the investment of annual contributions or any other aspect of the program and the cost thereof shall constitute a necessary administrative cost of the program. Benefits shall be available when the participating volunteer firefighter reaches entitlement age or at the time permanent total disability is established.

(d) In the event that any active volunteer firefighter becomes disabled and in the event that the disability prevents the active volunteer firefighter from pursuing such volunteer's normal occupation and if the disability is total and of a permanent nature as certified by the workers' compensation board or other competent authority approved by the sponsor of the service award program, the volunteer firefighter is entitled to receive the benefits described in this section, regardless of age or length of service. Such benefits shall begin on the first day of the first month following the establishment of such disability.

At the option of the sponsor of the service award program, the sponsor may provide an additional disability benefit in the event that any active volunteer firefighter becomes disabled during the course of service as a volunteer while actively engaged in providing a line of duty services, as defined in subdivision one of section five of the volunteer firefighters' benefit law. The additional disability benefit shall be an amount equal to an amount stated in the referendum under which the program was established or amended and payable to the disabled firefighter monthly for life. The plan sponsor shall provide the plan annually with the additional funds necessary to accommodate this additional disability benefit or the sponsor may purchase an annuity or make other provisions to effectuate the additional disability benefit.

(e) A volunteer firefighter's retirement income plan shall provide that, in the event of the death of an active volunteer firefighter who has a right to a nonforfeitable percentage of retirement income pursuant to subdivision (b) of this section, the designated beneficiaries of such active volunteer firefighter (or his estate if no beneficiary is so designated) shall be entitled to receive death benefits under the service award plan. Such benefits shall be equal to the amount of benefits earned by the volunteer firefighter under the plan at the date of death.

At the option of the sponsor of the services award program, if the active volunteer firefighter dies during the course of service as a volunteer while actively engaged in providing line of duty services, as defined in subdivision one of section five of the volunteer firefighters' benefit law, additional death benefits may be provided by the sponsor. The amount of such death benefit shall be stated in the referendum under which the program was established or amended. In the event of the death of an active volunteer firefighter during the course of service as a volunteer while actively engaged in providing line of duty services, as defined in subdivision one of section five of the volunteer firefighters' benefit law, such death benefit amount shall be paid by the sponsor to the plan for distribution to the beneficiary or the estate if no beneficiary is designated.

(f) In the case of a state-administered service award program, a service award shall be paid only

after an application is made to the program administrator and the administrator approves the application.

HISTORY:

Add, L 1988, ch 775, § 1, eff Sept 1, 1989; amd, L 2003, ch 648, § 1, eff Oct 7, 2003; L 2004, ch 452, § 1, eff Sept 14, 2004; L 2006, ch 714, § 10, eff June 1, 2007; L 2019, ch 474, § 1, effective November 8, 2019.

Editor's Notes Laws 2019, ch 474, § 3, eff November 8, 2019, provides:

§ 3. This act shall take effect immediately; provided, however, any change or amendment to a service award program made by this act shall only take effect as of the first of January next succeeding completion of the proceedings required for adoption of such change or amendment and shall only apply prospectively.

Amendment Notes The 2019 amendment by ch 474, § 1, substituted "twelve hundred dollars" for "seven hundred dollars" in (b).

Notes to Decisions

1. Generally

Assets of service award program for volunteer firefighters must be held in trust. 1999 Op St Compt No. 99-1, 1999 N.Y. Comp. LEXIS 3.

Service award program may provide death benefits only in case of active volunteer firefighter who has nonforfeitable right to service award. 1999 Op St Compt No. 99-1, 1999 N.Y. Comp. LEXIS 3.

Foreign fire insurance tax monies received by village treasurer may be used to fund length of service award program for volunteer firefighters of village fire department. 2000 Op St Compt No. 2000-6, 2000 N.Y. Comp. LEXIS 19.

Service award program may provide for participant to earn service credit after attaining program's entitlement age, subject to 40-year maximum provided for in CLS Gen Mun Law Art 11-A; to implement such feature, program may allow participant to waive voluntarily right to begin receiving his or her service award on reaching entitlement age in order to continue to earn credit after entitlement age, but program should not be structured so as to allow participant to begin receiving payment of his or her service award at program's entitlement age and to continue to earn service credit while receiving such payment. 2002 Op St Compt No. 2002-2, 2002 N.Y. Comp. LEXIS 5.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

State-administered defined contribution service award programs for volunteer firefighters. 2 NYCRR §§ 154.1 et seq.

State-administered defined benefit service award programs for volunteer firefighters. 2 NYCRR §§ 155.1 et seq.

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1255, 1256.

§ 219. Requirements and benefits under a defined benefit plan service award program

(a) An active volunteer firefighter's service award program that is a defined benefit plan shall be subject to minimum and maximum retirement benefit requirements as set forth in subdivision (b) of this section. In determining whether such minimum and maximum benefit requirements have been satisfied, all benefits provided under all service award programs instituted by a sponsor shall be considered as one program.

(b) The minimum and maximum retirement benefit requirements for a service award program that is a defined benefit plan shall be defined as follows. Each participating active volunteer firefighter shall be entitled to a minimum service award benefit of five dollars per month for each year of firefighting service completed after satisfying the program's eligibility requirement and after establishment of the program. The maximum benefit amount payable to a participating active volunteer firefighter entitled to a benefit shall be determined on the basis of an actuarial valuation. The valuation shall take into account the age, and such other factors as the actuary deems appropriate, of the eligible participating active volunteer firefighters and the amount of available financing available per active covered volunteer firefighter. The maximum service award under a service award program shall be a monthly payment, payable for life, that does not exceed an amount equal to thirty dollars for each year of firefighting service credited under the terms of the program to a maximum of forty years of firefighting service.

(c) No benefit payments may be made under any service award program that is a defined benefit plan until the tenth anniversary of the establishment of the service award program. The foregoing sentence shall not preclude a service award program from providing for additional benefit payments after the tenth anniversary of the establishment of the service award program to reflect the fact that the payment of benefits could not commence until that date.

Notwithstanding the preceding paragraph, if a program sponsor has been authorized pursuant to section two hundred sixteen or two hundred sixteen-a of this article to provide benefits prior to the tenth anniversary of the establishment of the service award program, it may provide for the payment of service awards from the date of establishment of the service award program or from such other date as is set forth in the authorization.

(d) The governing board shall engage the services of an actuary for the purpose of determining the annual amount required to be contributed to a defined benefit service award program, which amount shall be based on the interest and mortality tables or other appropriate assumptions and methods selected by actuary. The sum so determined shall be appropriated annually by the political subdivision. The governing board may also retain an actuary to provide advice with respect to any other aspect of the program.

(e) In the event that any active volunteer firefighter becomes disabled and in the event that the disability prevents the active volunteer firefighter from pursuing such volunteer's normal occupation and if the disability is total and of a permanent nature as certified by the workers' compensation board or other competent authority as approved by the program sponsor, the volunteer firefighter is entitled to receive the benefits described in this section, regardless of age or length of service. Such benefits shall begin on the first day of the first

month following the establishment of such disability.

At the option of the sponsor of the service award program, if the active volunteer firefighter becomes disabled during the course of service as a volunteer while actively engaged in providing line of duty services as defined in subdivision one of section five of the volunteer firefighters' benefit law, an additional disability benefit may be authorized. Additional disability benefit shall be equal to the amount of additional benefits that the volunteer firefighter would have been entitled to had he continued to earn years of firefighting service through his entitlement age if the rate of benefits being provided under the service award program at the time of disability continued to be provided through the entitlement age.

(f) A volunteer firefighter's retirement income plan may provide that, in the event of the death of an active volunteer firefighter who has a right to a nonforfeitable percentage of retirement income pursuant to subdivision (b) of this section, the designated beneficiaries of such active volunteer firefighter (or his estate if no beneficiary is so designated) shall be entitled to receive death benefits under the service award plan. Such death benefits shall be payable in the form of a lump sum amount designated by the sponsor as payable at death or a percentage of the retirement benefits otherwise payable. Such benefits shall be equal to the amount of benefits earned by the volunteer firefighter under the plan at the date of death.

At the option of the sponsor of the service award program, if the active volunteer firefighter dies during the course of service as a volunteer while actively engaged in providing line of duty services, as defined in subdivision one of section five of the volunteer firefighters' benefit law, additional death benefits may be provided.

(g) In the case of a state-administered service award program, a service award shall be paid only after an application is made to the program administrator and the administrator approves the application.

HISTORY:

Add, L 1988, ch 775, § 1, eff Sept 1, 1989; amd, L 1995, ch 550, § 6, eff Aug 8, 1995; L 2003, ch 648, § 2, eff Oct 7, 2003; L 2004, ch 452, § 2, eff Sept 14, 2004; L 2006, ch 714, § 11, eff June 1, 2007.

Notes to Decisions

1. Generally

There is no authority for village to transfer its responsibilities in connection with service award program to fire company. 1994 Op St Compt No. 94-32, 1994 N.Y. Comp. LEXIS 30.

Village is required to continue service award program established for village fire department in event that fire department ceases to provide service under contract to area outside village; dissolution of village fire department for which service award program has been established would preclude former members of department from earning service credit under program on basis of activities performed after dissolution. 1994 Op St Compt No. 94-32, 1994 N.Y. Comp. LEXIS 30.

Assets of service award program for volunteer firefighters must be held in trust. 1999 Op St Compt No. 99-1, 1999 N.Y. Comp. LEXIS 3.

Service award program may provide death benefits only in case of active volunteer firefighter who has nonforfeitable right to service award. 1999 Op St Compt No. 99-1, 1999 N.Y. Comp. LEXIS 3.

Foreign fire insurance tax monies received by village treasurer may be used to fund length of service award program for volunteer firefighters of village fire department. 2000 Op St Compt No. 2000-6, 2001 N.Y. Comp. LEXIS 19.

Service award program may provide for participant to earn service credit after attaining program's entitlement age, subject to 40-year maximum provided for in CLS Gen Mun Law Art 11-A; to implement such feature, program may allow participant to waive voluntarily right to begin receiving his or her service award on reaching entitlement age in order to continue to earn credit after entitlement age, but program should not be structured so as to allow participant to begin receiving payment of his or her service award at program's entitlement age and to continue to earn service credit while receiving such payment. 2002 Op St Compt No. 2002-2, 2002 N.Y. Comp. LEXIS 5.

Maximum benefit that may be provided under defined benefit plan service award program cannot exceed monthly payment for life of $20 for each year of firefighting service credited under such program, subject to maximum of 40 years of service; fire district may not establish defined benefit plan service award program that provides service award equivalent to $40 per month for each year of firefighting service based on no more than 20 years of service. 2003 Op St Compt No. 2003-3, 2003 N.Y. Comp. LEXIS 1.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Authorization to establish service award programs for volunteer firefighters of political subdivisions of the state and for volunteer firefighters other than of political subdivisions of the state, § 216.

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1255, 1256.

§ 219-a. Administration, reporting and disclosure

1. [As amended L 2006, ch 620 and ch 714] The sponsor or the designated program administrator shall provide each active volunteer firefighter who participates in a service award program maintained under this article with a summary of the program's provisions, including the program's provisions relating to the participation requirements, the rate at which a nonforfeitable interest in program benefits increases and the program's service awards formula. This summary shall be provided to each service award program participant within six months from the date the program participation commences. In addition, any material modification to such program provisions shall be communicated in writing to each participant within six months after the later of the date modification is adopted or the date it is effective. The designated program administrator shall cause a statement of contributions to be provided to sponsors at least once annually. A copy of this program, the summary of the program, and documents related to the funding or investment of the assets of the program and of any contracts or agreements with service providers to the program shall be provided to participants annually and a copy shall be made available for inspection or copying by a program participant or beneficiary at the sponsor's main office. The plan document and the summary of

the plan document shall be made available for public inspection and copying.

2. (a) This program shall be administered by such political subdivisions in accordance with standards and procedures established by them. Payment shall be made when certified by such political subdivisions; provided, however, that in the case of a state-administered program, the procedures for administration and payment shall be consistent with the rules and regulations governing the state-administered program.

(b) It shall be the responsibility of each participating volunteer fire company to maintain all required records on forms prescribed by the governing board of such political subdivision of the state; provided, however, that in the case of a state-administered program, each participating fire company shall compile and maintain such records in a manner consistent with the rules and regulations governing the state-administered program.

(c) Each volunteer fire company shall furnish to the governing board of such political subdivision a list of all volunteer members, certified under oath, and shall identify those volunteer members who have qualified for credit under the award program for the previous year. Such list shall be submitted annually by March thirty-first. In the case of state-administered plans, such list shall be submitted annually by March thirty-first or otherwise as provided in the rules and regulations governing the state-administered program. Notwithstanding the provisions of this paragraph a volunteer firefighter may request that his name be deleted from said list as a "participant" in said "defined benefit plan" or "defined contribution plan". Such request for deletion shall be in writing and shall remain effective until withdrawn in the same manner.

(d) The governing board of each such political subdivision shall review the list of each volunteer fire company and approve the final annual certification. The approved list of certified members shall then be returned to each company and posted for at least thirty days for review by members.

3. The sponsor or designated program administrator shall obtain an annual audit of its records by an independent certified public accountant or an independent public accountant. Such audit shall examine the program's financial conditions, actuarial assumptions, fiduciary investment and control, and asset allocations, including whether current assets are adequate to fund future liabilities. A copy of the audit shall be presented to the program sponsor and to the state comptroller by such accountant. Copies of the audit shall also be made available for public inspection and copying. The audit must be completed within two hundred seventy days of the program sponsor's fiscal year.

HISTORY:

Add, L 1988, ch 775, § 1, eff Sept 1, 1989; amd, L 2003, ch 648, § 3, eff Oct 7, 2003; L 2006, ch 620, § 1, eff Jan 1, 2007,2, eff June 30, 2007; L 2006, ch 714, § 12, eff June 1, 2007 (see 2006 note below); L 2008, ch 458, § 1, eff Aug 5, 2008, deemed eff on and after June 30, 2008.

Notes to Decisions

1. Generally

Foreign fire insurance tax monies received by village treasurer may be used to fund length of service award program for volunteer firefighters of village fire department. 2000 Op St Compt No. 2000-6, 2001 N.Y. Comp. LEXIS 6.

Joint fire district may establish service award program for volunteer firefighters of joint fire district fire department, but service award program may not provide prior service credit for activities performed under auspices of village fire department. 2000 Op St Compt No. 2000-18, 2000 N.Y. Comp. LEXIS 22.

When village that has established service award program is included within joint fire district, village lacks authority to transfer its fiscal and administrative responsibilities for program to joint fire district. 2000 Op St Compt No. 2000-18, 2000 N.Y. Comp. LEXIS 22.

Service award program may provide for participant to earn service credit after attaining program's entitlement age, subject to 40-year maximum provided for in CLS Gen Mun Law Art 11-A; to implement such feature, program may allow participant to waive voluntarily right to begin receiving his or her service award on reaching entitlement age in order to continue to earn credit after entitlement age, but program should not be structured so as to allow participant to begin receiving payment of his or her service award at program's entitlement age and to continue to earn service credit while receiving such payment. 2002 Op St Compt No. 2002-2, 2002 N.Y. Comp. LEXIS 5.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

State-administered defined contribution service award programs for volunteer firefighters. 2 NYCRR §§ 154.1 et seq.

State-administered defined benefit service award programs for volunteer firefighters. 2 NYCRR §§ 155.1 et seq.

ARTICLE 11-AA Defined Contribution Service Award Programs for Volunteer Ambulance Workers

Section

219-e. Participation, vesting and service credit
219-f. Contributions and benefits

HISTORY:

Add, L 1993, ch 447, § 1, eff July 26, 1993 (see 1993 note below); amd, L 1998, ch 514, § 1, eff July 29, 1998; L 1998, ch 558, § 1, eff Aug 5, 1998.

§ 219-e. Participation, vesting and service credit

1. A volunteer ambulance worker must be eligible to participate in any service award program provided under this article if the volunteer ambulance worker has reached the age of eighteen and has completed at least one year of ambulance service.

2. A participant shall have a nonforfeitable right to a service award upon completing five years of ambulance service, provided, however, that a sponsor may reduce the number of years of ambulance service required to obtain a nonforfeitable right to a service award. Any amounts attributable to forfeiture of a participant's service award shall be used to reduce contributions for other service award program participants and shall not in any case be used to increase benefits for other participants. The preceding shall not preclude amendment of a service

award program to provide for an increase in benefits.

3. A year of ambulance service shall be credited under a service award program for each calendar year, beginning with the year in which the program is adopted, in which a volunteer ambulance worker accumulates at least fifty points. Except as provided in subdivision five of this section and subdivision eight of section two hundred nineteen-d of this article, points shall be granted for activities performed after the effective date of the program in accordance with a system adopted by the sponsor which shall be applied on a consistent and uniform basis. Such system shall provide that points shall be granted for activities designated by the sponsor, which activities shall be selected from the following:

(a) Training courses–twenty-five points maximum.

(i) Courses under twenty hours duration–one point per hour, with a maximum of five points.

(ii) Courses of twenty to forty-five hours duration–one point per hour for each hour over initial twenty hours, with a maximum of ten points.

(iii) Courses over forty-five hours duration–fifteen points per course.

For purposes of this paragraph, the term "training course" shall mean a course of instruction having a prescribed topic and syllabus. Points for a training course shall be awarded only upon the successful completion of the course and only in the year in which the course is successfully completed.

(b) Drills and seminars – twenty points maximum. One point per minimum two hour drill or seminar. For purposes of this paragraph, the term "drill" shall mean a skills practice or skills training session related to emergency medical service and the term "seminar" shall mean a lecture on a topic relating to the emergency medical service.

(c) Sleep-in or stand-by – twenty points maximum.

(i) Sleep-in – one point each full night.

(ii) Stand-by – one point each. A stand-by is defined as line of duty activity of the volunteer ambulance company, lasting for four hours, not falling under one of the other categories. A service award program may not provide points pursuant to this paragraph if the program provides points for tours of duty pursuant to paragraph (d) of this subdivision.

(d) Tours of duty. A maximum of twenty points may be granted for serving tours of duty at a rate equal to no more than one-sixth of a point per hour served as determined by the sponsor. For purposes of this paragraph, the term "tour of duty" shall mean a line of duty activity, not falling under one of the other paragraphs of this subdivision, involving a period of time scheduled or assigned by an ambulance company during which a volunteer ambulance worker is responsible for providing emergency medical service or general ambulance service, including sleep-ins, stand-bys and backup duty, by reason of being stationed at an event, as part of a rostered duty crew or as otherwise provided by the regular procedures of the ambulance company. A sponsor may also define two or more activities included within the meaning of the term tour of duty and provide for points to be granted for the performance of such activities at different rates, provided, that points for such activities shall not be granted at a rate in excess of one-sixth of a point per hour served and no more than twenty points shall be granted for all such activities. A service award program may not provide points pursuant to this paragraph if the program provides points for sleep-ins or stand-bys pursuant to paragraph (c) of this subdivision.

(e) Elected or appointed position – twenty-five points maximum.

(i) Completion of one year term in an elected or appointed position.

(ii) A volunteer ambulance worker elected to serve as a delegate to an ambulance workers' convention shall also be eligible to receive one point per meeting.

(iii) A volunteer ambulance worker appointed to serve on the New York state emergency medical services council, the state emergency medical advisory committee, a regional emergency medical services council or a regional emergency medical advisory committee, established pursuant to article thirty of the public health law shall also be eligible to receive one point per meeting.

(f) Attendance at meetings – twenty points maximum.

(i) Attendance at any official meetings of the ambulance company – one point per meeting.

(ii) Attendance at official meetings of a standing committee of the ambulance company by a member of the committee — one point per meeting.

(g) Participation in ambulance company responses – twenty-five points for responding on the minimum number of calls, as outlined below:

Total number of calls ambulance company responds to annually	0 to 500	500 to 1000	1000 to 1500	1500 and over
Minimum number of calls volunteer ambulance worker must run annually in order to receive twenty-five points credit	10%	7.5%	5%	2.5%

A volunteer ambulance worker who is granted points toward a year of ambulance service pursuant to this paragraph may not be granted points toward the same year of ambulance service for alternative participation company responses pursuant to paragraph (h) of this subdivision.

(h) Alternative participation in company responses. A maximum of twenty-five points may be

granted for participation in company responses at a rate equal to no more than one-half point per response as determined by the sponsor. A volunteer ambulance worker who is granted points toward a year of ambulance service pursuant to this paragraph may not be granted points toward the same year of ambulance service for participation in company responses pursuant to paragraph (g) of this subdivision.

(i) Miscellaneous activities – maximum fifteen points. Participation in inspections and other activities covered by the volunteer ambulance workers' benefit law and not otherwise listed – one point per activity.

(j) The sponsor may designate less than all the activities specified in this subdivision as activities for which points may be earned.

(k) [Expires and repealed December 31, 2022] Determination of points. For purposes of determining total points earned for a calendar year in which a state disaster emergency, as defined in section twenty of the executive law, has been declared pursuant to executive order number two hundred two of two thousand twenty, as amended, to address the outbreak of novel coronavirus, COVID-19, an active volunteer ambulance worker award program may provide for the crediting of up to five additional points per month, prorated for periods of less than one month, to each volunteer ambulance worker for each month that special emergency response rules were in place restricting ambulance workers responses to emergency responses and/or restricting the holding of activities for which points could be earned due to guidelines related to the state disaster emergency. A political subdivision electing to provide the additional points authorized under this subdivision shall adopt a resolution by April thirtieth, two thousand twenty-one determining the number of additional points to be credited per month, provided that any additional points credited pursuant to this paragraph shall be in addition to any other points earned pursuant to this section during the state disaster emergency.

4. Points toward a year of ambulance service may be granted for activities performed after a participant reaches entitlement age, but shall not be granted for activities performed after a participant applies for a service award.

5. A service award program which is to take effect on a day other than the first day of January may provide for points to be granted toward a year of ambulance service for activities performed prior to the effective date of the program and on or after the immediately preceding first day of January, provided, the proposition authorizing adoption of the program contains a statement authorizing points to be granted for such activities. Points attributable to such activities shall be granted in accordance with the point system adopted by the sponsor pursuant to subdivision three of this section.

6. In computing credit for those volunteer ambulance workers who also serve as paid employees within a political subdivision of the state, credit shall not be given for activities performed during the individual's regularly assigned work periods.

7. A participant whose ambulance service is interrupted by full-time extended obligatory military service or by a single voluntary enlistment not to exceed four years in the armed forces of the United States shall be considered on military leave. During such period of military leave, the participant shall receive fifty points for each full year of military service, prorated for military service of less than a year.

7-a. An active volunteer ambulance worker's service award program may provide for the crediting of years of and points for volunteer ambulance service for periods after an active volunteer ambulance worker has reached the entitlement age and is receiving a service award.

8. The state comptroller may promulgate rules and regulations prescribing procedures and forms for the compilation and maintenance of records of the points accumulated by each volunteer ambulance worker. Each ambulance company shall compile and maintain such records in the manner prescribed.

9. The president, secretary and chief or comparable officers of each ambulance company shall submit to the governing board of the sponsor a list of all volunteer members, certified under oath, which shall identify those volunteer members who have qualified for credit under the award program for the previous year. Such list shall be submitted annually by March thirty-first or otherwise as provided in the rules and regulations of the state comptroller and shall be accompanied by such membership records and records of point accumulations as the governing board may require to substantiate the accuracy of the list. Notwithstanding the provisions of this subdivision a volunteer ambulance worker may request that his name be deleted from said list as a "participant". Such request for deletion shall be in writing and shall remain effective until withdrawn in the same manner.

10. The governing board of the sponsor shall review the list of each ambulance company and may delete the name of any person who was not a volunteer ambulance worker during the preceding calendar year or the name of any volunteer ambulance worker who did not earn fifty points during the preceding calendar year or whose point accumulation has not been adequately documented. Thereafter, the governing board shall approve the list and return a copy of the list to the ambulance company and forward a certified copy of the approved list to the program administrator.

11. Upon receipt of the approved list, the ambulance company shall post the list at its principal headquarters for at least thirty days. A volunteer ambulance worker whose name does not appear on the approved list shall have the right to appeal within thirty days of posting of the list. The appeal

shall be in writing and mailed to the clerk or secretary of the governing board of the sponsor, which shall investigate the appeal. The decision of the governing board shall be subject to judicial review pursuant to article seventy-eight of the civil practice law and rules.

12. In the event that a volunteer ambulance worker is either totally and temporarily disabled or partially and permanently disabled as certified by the workers' compensation board or other competent authority approved by the state comptroller, and the disability occurs during the course of service as a volunteer while actively engaged in providing line-of-duty services as defined in the volunteer ambulance workers benefit law, the volunteer shall be credited with five points for each full month of such disability; provided, however, such volunteer shall cease to be credited with such line of duty disability points after attaining the entitlement age.

HISTORY:

Add, L 1993, ch 447, § 1, eff July 26, 1993 (see 1993 note below); amd, L 1994, ch 317, §§ 2, 3, eff July 20, 1994, deemed eff July 26, 1993; L 1998, ch 514, § 1, eff July 29, 1998; L 2003, ch 647, § 2, eff Oct 7, 2003; L 2008, ch 261, § 1, eff July 7, 2008; L 2020, ch 113, § 2, effective June 17, 2020.

Editor's Notes: Laws 1993, ch 447, § 3, eff July 26, 1993, provides as follows:

§ 3. This act shall take effect immediately; provided, however, that the service award program shall not commence prior to the first day of January next succeeding the date on which it shall have become a law.

Laws 2020, ch 113, § 4, eff June 17, 2020, provides:

§ 4. This act shall take effect immediately and shall expire and be deemed repealed December 31, 2022.

Amendment Notes The 2020 amendment by ch 113, § 2, added 3(k).

Notes to Decisions

1. Generally

Municipality may define "enrolled member" for purposes of volunteer firefighters and ambulance workers exemption available to members who have served for 5 years and continue to so serve (CLS RPTL § 466-g(2), added L 2005 ch 419) as one who is eligible under municipality's length of service award program (LOSAP). 11 Op. Counsel SBRPS 82.

§ 219-f. Contributions and benefits

1. The sponsor of a service award program shall contribute to the program a fixed amount of money, as determined by the sponsor, on behalf of each participant who is credited with a year of ambulance service. The minimum contribution shall be one hundred twenty dollars per year of ambulance service. The maximum contribution shall be twelve hundred dollars per year of ambulance service.

2. A service award program may provide for contributions for ambulance service rendered by a participant during one or more of the five calendar years immediately preceding the year in which the program is adopted, but only to the extent authorized pursuant to section two hundred nineteen-d of this article. In order to determine eligibility for such contributions, each ambulance company shall review its prior membership rosters and service records to determine the number of years for which each participant is entitled to a contribution. In making such determination, the point system established pursuant to subdivision three of section two hundred nineteen-e of this article shall be used. The president, secretary and chief or comparable officers of the ambulance company shall submit to the governing board of the sponsor a certified list of participants who are entitled to such contributions and the number of years for which each participant is entitled to a contribution, and such membership and service records as the governing board may require. The list shall be submitted to and approved by the governing board, and posted by the ambulance company, at the same time and in the same manner as provided in subdivisions nine through eleven of section two hundred nineteen-e of this article, and each person named on the list approved by the governing board shall be entitled to the number of contributions indicated thereon. A person whose name does not appear on the list as submitted to or approved by the governing board shall have the administrative and judicial remedies set forth in subdivision eleven of section two hundred nineteen-e of this article.

3. The maximum number of years for which a participant may receive a contribution shall be forty years.

4. A service award shall be the amount resulting from the contributions made by the sponsor on behalf of a participant less necessary administrative costs and shall include interest and/or other earnings resulting from investment of the contributions, determined as of the valuation date or dates provided for in the program. Service awards shall be paid in the form of a lump sum, a life annuity with or without survivor benefits, a period certain annuity, or any other form provided under the program, provided, that all forms of payment shall be actuarially equivalent to each other. The program may limit the forms of payment or impose conditions concerning the availability of a form of payment.

5. Except as otherwise provided in this section, a participant shall be entitled to apply for and receive a service award only when the participant has acquired a nonforfeitable right to a service award and has reached entitlement age.

6. In the event that a participant becomes totally and permanently disabled, as certified by the workers' compensation board or other competent authority approved by the administrator, and the disability prevents the participant from pursuing his or her normal occupation, the participant shall be entitled to apply for and receive a service award, regardless of whether the participant has reached entitlement age or has acquired a nonforfeitable right to a service award.

7. In the event of the death of a participant who has acquired a nonforfeitable right to a service award and who has not previously received all or a portion of a service award, the beneficiaries designated by the participant or, if no beneficiaries have

been so designated, the participant's estate, shall be entitled to apply for and receive the participant's service award, regardless of whether the participant reached entitlement age before death.

8. A service award shall be paid only after an application is made to the program administrator and the administrator approves the application. In the event that a participant dies after receiving a portion of a service award, the remaining portion, if any, shall be paid in accordance with the terms and conditions of the form of payment selected by the participant prior to death.

9. No service award may be assigned or alienated except to provide for the legally obligated support of minor children or a spouse.

10. Payment of a service award shall not impair any rights of volunteer ambulance workers under the volunteer ambulance workers' benefit law or any other law.

HISTORY:

Add, L 1993, ch 447, § 1, eff July 26, 1993 (see 1993 note below); amd, L 1998, ch 514, § 1, eff July 29, 1998; L 2004, ch 452, § 3, eff Sept 14, 2004 (see 2004 note below); L 2019, ch 474, § 2, effective November 8, 2019.

Editor's Notes: Laws 1993, ch 447, § 3, eff July 26, 1993, provides as follows:

§ 3. This act shall take effect immediately; provided, however, that the service award program shall not commence prior to the first day of January next succeeding the date on which it shall have become a law.

Laws 2004, ch 452, § 8, eff Sept 14, 2004, provides as follows:

§ 8. This act shall take effect immediately; provided, however, any change or amendment to a service award program made by this act shall only take effect as of the first of January next succeeding completion of the proceedings required for adoption of the change or amendment, and shall only apply prospectively; and provided further that the governing board of any political subdivision with an existing service award program authorized by section 216 or 216-a of the general municipal law shall have 180 days from the effective date of this act to notify the state comptroller of the existence of such service award program and whether such service award program is a defined contribution plan or a defined benefit plan.

Laws 2019, ch 474, § 3, eff November 8, 2019, provides:

§ 3. This act shall take effect immediately; provided, however, any change or amendment to a service award program made by this act shall only take effect as of the first of January next succeeding completion of the proceedings required for adoption of such change or amendment and shall only apply prospectively.

Amendment Notes The 2019 amendment by ch 474, § 2, substituted "twelve hundred dollars" for "seven hundred dollars" in 1.

Notes to Decisions

1. Generally

Person may simultaneously participate in, and receive benefits from, service award program for volunteer ambulance workers and State Employees' Retirement System. 1996 Op St Compt No. 96-13, 1996 N.Y. Comp. LEXIS 10.

ARTICLE 11-AAA Defined Benefit Service Award Program for Volunteer Ambulance Workers

Section

219-m. Participation, vesting and service credit
219-n. Benefits

HISTORY:

Add, L 1998, ch 558, § 3, eff Aug 5, 1998 (see 1998 note below).

§ 219-m. Participation, vesting and service credit

1. A volunteer ambulance worker must be eligible to participate in any service award program provided under this article if the volunteer ambulance worker has reached the age of eighteen and has completed at least one year of ambulance service.

2. A participant shall have a nonforfeitable right to a service award upon completing five years of ambulance service. Any amounts attributable to forfeiture of a participant's service award shall be used to reduce contributions for all other service award program participants and shall not in any case be used to increase benefits for any other participants. The provisions of this subdivision shall not preclude amendment of a service award program to provide for an increase in benefits.

3. A year of ambulance service shall be credited under a service award program for each calendar year, beginning with the year in which the program is adopted, in which a volunteer ambulance worker accumulates at least fifty points. Except as provided in subdivision five of this section and subdivision eight of section two hundred nineteen-l of this article, points shall be granted for activities performed after the effective date of the program in accordance with a system adopted by the sponsor which shall be applied on a consistent and uniform basis. Such system shall provide that points shall be granted for activities designated by the sponsor, which activities shall be selected from the following:

(a) Training courses — twenty-five points maximum.

(i) Courses under twenty hours duration — one point per hour, with a maximum of five points.

(ii) Courses of twenty to forty-five hours duration — one point per hour for each hour over initial twenty hours, with a maximum of ten points.

(iii) Courses over forty-five hours duration — fifteen points per course.

For purposes of this paragraph, the term "training course" shall mean a course of instruction having a prescribed topic and syllabus. Points for a training course shall be awarded only upon the successful completion of the course and only in the year in which the course is successfully completed.

(b) Drills and seminars — twenty points maximum. One point per minimum two hour drill or seminar. For purposes of this paragraph, the term "drill" shall mean a skills practice or skills training session related to emergency medical service and the term "seminar" shall mean a lecture on a topic relating to the emergency medical service.

(c) Sleep-in or stand-by — twenty points maximum.

(i) Sleep-in — one point each full night.

(ii) Stand-by — one point each. A stand-by is defined as line of duty activity of the volunteer

ambulance company, lasting for four hours, not falling under one of the other categories.

A service award program may not provide points pursuant to this paragraph if the program provides points for tours of duty pursuant to paragraph (d) of this subdivision.

(d) Tours of duty. A maximum of twenty points may be granted serving tours of duty at a rate equal to no more than one-sixth of a point per hour served as determined by the sponsor. For purposes of this paragraph, the term "tour of duty" shall mean a line of duty activity, not falling under one of the other paragraphs of this subdivision, involving a period of time scheduled or assigned by an ambulance company during which a volunteer ambulance worker is responsible for providing emergency medical service or general ambulance service, including sleep-ins, stand-bys and backup duty, by reason of being stationed at an event, as part of a rostered duty crew or as otherwise provided by the regular procedures of the ambulance company. A sponsor may also define two or more activities included within the meaning of the term tour of duty and provide for points to be granted for the performance of such activities at different rates, provided, that points for such activities shall not be granted at a rate in excess of one-sixth of a point per hour served and no more than twenty points shall be granted for all such activities. A service award program may not provide points pursuant to this paragraph if the program provides points for sleep-ins or stand-bys pursuant to paragraph (c) of this subdivision.

(e) Elected or appointed position, as defined in subdivision sixteen of section two hundred nineteen-k of this article — twenty-five points maximum.

(i) Completion of one year term in an elected or appointed position.

(ii) A volunteer ambulance worker elected to serve as a delegate to an ambulance workers' convention shall also be eligible to receive one point per meeting.

(iii) A volunteer ambulance worker appointed to serve on the New York state emergency medical services council, the state emergency medical advisory committee, a regional emergency medical services council or a regional emergency medical advisory committee, established pursuant to article thirty of the public health law shall also be eligible to receive one point per meeting.

(f) Attendance at meetings — twenty points maximum.

(i) Attendance at any official meetings of the ambulance company — one point per meeting.

(ii) Attendance at official meetings of a standing committee of the ambulance company by a member of the committee — one point per meeting.

(g) Participation in ambulance company responses — twenty-five points for responding on the minimum number of calls, as outlined below:

Total number of calls ambulance company responds to annually	0 to 500	500 to 1000	1000 to 1500	1500 and over
Minimum number of calls volunteer ambulance worker must run annually in order to receive twenty-five points credit	10%	7.5%	5%	2.5%

A volunteer ambulance worker who is granted points toward a year of ambulance service pursuant to this paragraph may not be granted points toward the same year of ambulance service for alternative participation company responses pursuant to paragraph (h) of this subdivision.

(h) Alternative participation in company responses. A maximum of twenty-five points may be granted for participation in company responses at a rate equal to no more than one-half point per response as determined by the sponsor. A volunteer ambulance worker who is granted points toward a year of ambulance service pursuant to this paragraph may not be granted points toward the same year of ambulance service for participation in company responses pursuant to paragraph (g) of this subdivision.

(i) Miscellaneous activities — maximum fifteen points. Participation in inspections and other activities covered by the volunteer ambulance workers' benefit law and not otherwise listed — one point per activity.

(j) Activities; designation. The sponsor may designate less than all the activities specified in this subdivision as activities for which points may be earned.

(k) [Expires and repealed December 31, 2022] Determination of points. For purposes of determining total points earned for a calendar year in which a state disaster emergency, as defined in section twenty of the executive law, has been declared pursuant to executive order number two hundred two of two thousand twenty, as amended, to address the outbreak of novel coronavirus, COVID-19, an active volunteer ambulance worker award program may provide for the crediting of up to five additional points per month, prorated for periods of less than one month, to each volunteer ambulance worker for each month that special emergency response rules were in place restricting ambulance workers responses to emergency responses and/or restricting the holding of activities for which points could be earned due to guidelines related to the state disaster emergency. A political subdivision electing to provide the additional points authorized under this subdivision shall adopt a resolution by April thirtieth, two thousand twenty-one determining the number of additional points to be credited per month, provided that any additional points credited pursuant to this paragraph shall be in addition to any other points earned pursuant to this section during the state disaster emergency.

4. Points toward a year of ambulance service may be granted for activities performed after a participant reaches entitlement age, but shall not be granted for activities performed after a participant applies for a service award. The maximum number of years for which a participant may receive credit for a year of ambulance service shall be forty years.

5. A service award program which is to take effect on a day other than the first day of January may provide for points to be granted toward a year of ambulance service for activities performed prior to the effective date of the program and on or after the immediately preceding first day of January, provided, the proposition authorizing adoption of the program contains a statement authorizing points to be granted for such activities. Points attributable to such activities shall be granted in accordance with the point system adopted by the sponsor pursuant to subdivision three of this section.

6. In computing credit for those volunteer ambulance workers who also serve as paid employees within a political subdivision of the state, credit shall not be given for activities performed during the individual's regularly assigned work periods.

7. A participant whose ambulance service is interrupted by full-time extended obligatory military service or by a single voluntary enlistment not to exceed four years in the armed forces of the United States shall be considered on military leave. During such period of military leave, the participant shall receive fifty points for each full year of military service, prorated for military service of less than a year.

7-a. An active volunteer ambulance worker's service award program may provide for the crediting of years of and points for volunteer ambulance service for periods after an active volunteer ambulance worker has reached the entitlement age and is receiving a service award.

8. The state comptroller may promulgate rules and regulations prescribing procedures and forms for the compilation and maintenance of records of the points accumulated by each volunteer ambulance worker. Each ambulance company shall compile and maintain such records in the manner prescribed.

9. The president, secretary and chief or comparable officers of each ambulance company shall submit to the governing board of the sponsor a list of all volunteer members, certified under oath, which shall identify those volunteer members who have qualified for credit under the award program for the previous year. Such list shall be submitted annually by March thirty-first or otherwise as provided in the rules and regulations of the state comptroller and shall be accompanied by such membership records and records of point accumulations as the governing board may require to substantiate the accuracy of the list. Notwithstanding the provisions of this subdivision a volunteer ambulance worker may request that his name be deleted from said list as a "participant". Such request for deletion shall be in writing and shall remain effective until withdrawn in the same manner.

10. The governing board of the sponsor shall review the list of each ambulance company and may delete the name of any person who was not a volunteer ambulance worker during the preceding calendar year or the name of any volunteer ambulance worker who did not earn fifty points during the preceding calendar year or whose point accumulation has not been adequately documented. Thereafter, the governing board shall approve the list and return a copy of the list to the ambulance company and forward a certified copy of the approved list to the program administrator.

11. Upon receipt of the approved list, the ambulance company shall post the list at its principal headquarters for at least thirty days. A volunteer ambulance worker whose name does not appear on the approved list shall have the right to appeal within thirty days of posting of the list. The appeal shall be in writing and mailed to the clerk or secretary of the governing board of the sponsor, which shall investigate the appeal. The decision of the governing board shall be subject to judicial review pursuant to article seventy-eight of the civil practice law and rules.

12. A service award program may provide credit for years of ambulance service rendered by a participant during the five calendar years immediately preceding the year in which the program is adopted, but only if authorized pursuant to section two hundred nineteen-l of this article. In order to determine eligibility for such credit, each ambulance company shall review its prior membership rosters and service records to determine the number of years for which each participant is entitled to a contribution. In making such determination, the point system established pursuant to subdivision three of this section shall be used. The president, secretary and chief or comparable officers of the ambulance company shall submit to the governing board of the sponsor a certified list of participants who are entitled to such credit and the number of years for which each participant is entitled to such credit, and such membership and service records as the governing board may require. The list shall be submitted to and approved by the governing board, and posted by the ambulance company, at the same time and in the same manner as provided in subdivisions nine through eleven of this section, and each person named on the list approved by the governing board shall be entitled to the credit indicated thereon. A person whose name does not appear on the list as submitted to or approved by the governing board shall have the administrative and judicial remedies set forth in subdivision eleven of this section.

13. In the event that a volunteer ambulance worker is either totally and temporarily disabled or

partially and permanently disabled as certified by the workers' compensation board or other competent authority approved by the state comptroller, and the disability occurs during the course of service as a volunteer while actively engaged in providing line-of-duty services as defined in the volunteer ambulance workers benefit law, the volunteer shall be credited with five points for each full month of such disability; provided, however, such volunteer shall cease to be credited with such line of duty disability points after attaining the entitlement age.

HISTORY:
Add, L 1998, ch 558, § 3, eff Aug 5, 1998; amd, L 2003, ch 647, § 3, eff Oct 7, 2003; L 2008, ch 261, § 2, eff July 7, 2008; L 2020, ch 113, § 3, effective June 17, 2020.

Editor's Notes Laws 2020, ch 113, § 4, eff June 17, 2020, provides:

§ 4. This act shall take effect immediately and shall expire and be deemed repealed December 31, 2022.

Amendment Notes The 2020 amendment by ch 113, § 3, added 3(k).

§ 219-n. Benefits

1. The benefit payable under a service award program shall be the actuarial equivalent of an annual payment for life in one of the following amounts as selected by the sponsor:

(a) sixty dollars per year of ambulance service;

(b) one hundred twenty dollars per year of ambulance service;

(c) one hundred eighty dollars per year of ambulance service;

(d) two hundred forty dollars per year of ambulance service; or

(e) three hundred sixty dollars per year of ambulance service.

2. Service awards shall be paid in the form of a lump sum, a life annuity with or without survivor benefits, a period certain annuity, or any other form provided under the program, provided, that all forms of payment shall be actuarially equivalent to each other. The program may limit the forms of payment or impose conditions concerning the availability of a form of payment.

3. Except as otherwise provided in this section, a participant shall be entitled to apply for and receive a service award only when the participant has acquired a nonforfeitable right to a service award and has reached entitlement age.

4. In the event that a participant becomes totally and permanently disabled, as certified by the workers' compensation board or other competent authority approved by the administrator, and the disability prevents the participant from pursuing his or her normal occupation, the participant shall be entitled to apply for and receive a service award, regardless of whether the participant has reached entitlement age or has acquired a nonforfeitable right to a service award.

5. In the event of the death of a participant who has acquired a nonforfeitable right to a service award, the beneficiaries designated by the participant or, if no beneficiaries have been so designated, the participant's estate, shall be entitled to apply for and receive a lump sum death benefit, regardless of whether the participant reached entitlement age before death. Such benefit shall be equal to the lump sum equivalent of the service award earned by the participant at the date of death, provided that the benefit provided pursuant to this subdivision shall not be paid following commencement of payment of a service award.

6. A service award shall be paid only after an application is made to the program administrator and the administrator approves the application.

7. No service award may be assigned or alienated except to provide for the legally obligated support of minor children or a spouse.

8. Payment of a service award shall not impair any rights of volunteer ambulance workers under the volunteer ambulance workers' benefit law or any other law.

HISTORY:
Add, L 1998, ch 558, § 3, eff Aug 5, 1998; amd, L 2004, ch 452, § 4, eff Sept 14, 2004 (see 2004 note below).

Editor's Notes: Laws 2004, ch 452, § 8, eff Sept 14, 2004, provides as follows:

§ 8. This act shall take effect immediately; provided, however, any change or amendment to a service award program made by this act shall only take effect as of the first of January next succeeding completion of the proceedings required for adoption of the change or amendment, and shall only apply prospectively; and provided further that the governing board of any political subdivision with an existing service award program authorized by section 216 or 216-a of the general municipal law shall have 180 days from the effective date of this act to notify the state comptroller of the existence of such service award program and whether such service award program is a defined contribution plan or a defined benefit plan.

ARTICLE 11-AAAA Supplemental Service Awards for Volunteer Ambulance Workers and Firefighters

Section

219-q. Definitions
219-r. Authorization to adopt supplemental award programs
219-s. Participation and service credit
219-t. Contributions and benefits

HISTORY:
Add, L 2003, ch 357, § 1, eff Oct 18, 2003.

§ 219-q. Definitions

1. "Participant" means a participant as defined in subdivision six of section two hundred nineteen-c of this chapter, subdivision seven of section two hundred fifteen of this chapter and subdivision eight of section two hundred nineteen-k of this chapter. Participant also includes individuals who served as volunteer firefighters or ambulance workers in the timeframe specified by the program sponsor, prior to the enactment of the service award program.

2. "Supplemental award" means the benefit payable pursuant to a supplemental award program.

3. "Supplemental award program" or "program" means a plan established, adopted and maintained under this article to provide awards for volunteer firefighters and ambulance workers.

4. "Decade of service" means:

(a) ten calendar years during which a participant accumulates at least fifty points in accordance with the service awards program established pursuant to article eleven-A, eleven-AA or eleven-AAA of this chapter; or

(b) ten calendar years for which the participant can demonstrate, to the satisfaction of the sponsor, that he or she substantially met the standards for active service during those ten years.

HISTORY:
Add, L 2003, ch 357, § 1, eff Oct 18, 2003.

§ 219-r. Authorization to adopt supplemental award programs

1. No political subdivision shall be required to adopt a supplemental award program. Any supplemental award program adopted pursuant to this section shall be governed by the provisions of this article.

2. (a) A political subdivision may adopt a supplemental award program for volunteer firefighters only if that political subdivision has previously established a service award program for volunteer firefighters under article eleven-A or eleven-AA of this chapter.

(b) A political subdivision may adopt a supplemental award program for volunteer ambulance workers only if that political subdivision has previously established a service award program for volunteer ambulance workers under article eleven-AAA of this chapter.

3. A supplemental award program may be adopted only in the same manner as the service award program was adopted by a resolution of the governing board following the affirmative vote of at least sixty percent of the governing board and the approval of a proposition authorizing the adoption of the program at a referendum of the electors of the political subdivision. A proposition for the approval of such local resolution shall be submitted at the next general election of state or local government officers held in such local government not less than sixty days after the passage of such resolution.

4. The resolution authorizing adoption of a supplemental award program shall state:

(a) the amount of the contribution to the program to be made by the sponsor on behalf of each participant credited with at least one decade of service;

(b) the maximum number of years for which service may be granted;

(c) the date on which the proposition authorizing the adoption of the program shall be submitted to referendum;

(d) the date as of which the program shall take effect.

5. The proposition authorizing the adoption of the supplemental award program shall be submitted to referendum in the same manner as the service award program.

6. The proposition shall state:

(a) the estimated annual cost of the supplemental service award program;

(b) the portion of the estimated annual cost of the program, if any, to be paid by any other political subdivisions;

(c) annual cost per participant;

(d) whether the program provides credit for years of service rendered by a participant preceding the adoption of the supplemental service award program and the estimated cost of providing such credit.

7. Upon approval of the proposition, the supplemental award program shall be deemed adopted by the political subdivision in accordance with the terms of the resolution adopted by the governing board. The supplemental award program shall take effect January first next succeeding the date at which the proposition was approved.

8. Once a supplemental award program has been adopted, participation therein by the sponsor may be terminated, or the benefits under the program may be changed by resolution of the governing board of the sponsor receiving the affirmative vote of at least sixty percent of the governing board and the approval of a proposition at a referendum of the electors of the sponsor.

9. Payments under the supplemental program, if adopted, shall not impair any rights of the participants under the volunteer firefighters' benefit law or volunteer ambulance workers' benefit law or any other law.

HISTORY:
Add, L 2003, ch 357, § 1, eff Oct 18, 2003.

§ 219-s. Participation and service credit

1. A participant must be eligible to participate in a supplemental award program provided under this article if the participant has reached entitlement age and has completed at least one decade of service in the timeframe designated by the sponsor.

2. A decade of service shall be credited under a supplemental award program for each calendar year in the timeframe designated by the sponsor.

3. In order to provide credit each sponsor shall review its prior membership rosters to determine the number of decades of credit for each participant who is entitled to credit. In making this analysis, the standards for active service set forth in subdivision (c) of section two hundred seventeen or subdivision three of section two hundred nineteen-m of this chapter and adopted by the sponsor shall be used. Approval for such prior service shall require certification by the president, secretary and chief of the volunteer fire company.

4. In computing credit for those participants who also serve as paid employees within a political

subdivision of the state, credit shall not be given for activities performed during the individual's regularly assigned work periods.

5. Sponsors may provide credit to participants whose service was interrupted by full-time extended obligatory military service or by a single voluntary enlistment not to exceed four years in the armed forces of the United States.

6. The president, secretary and chief or comparable officers of each volunteer company shall submit to the governing board of the sponsor a list of all participants, certified under oath, which shall identify those participants who have qualified for credit under the award program for the previous year. Such list shall be submitted annually by March thirty-first or otherwise as provided by local resolution and shall be accompanied by such membership records as the governing board may require to substantiate the accuracy of the list. Notwithstanding the provision of this subdivision a participant may request that his or her name be deleted from said list as a "participant." Such request for deletion shall be in writing and shall remain effective until withdrawn in the same manner.

7. The governing board of the sponsor shall review the list and may delete the name of any person whose point accumulation has not been adequately documented. Thereafter, the governing board shall approve the list and return a copy of the list to the appropriate company and forward a certified copy of the approved list to the program administrator.

8. Upon receipt of the approved list the company shall post the list at its principal headquarters for at least thirty days. A participant whose name does not appear on the approved list shall have the right to appeal within thirty days of posting of the list. The appeal shall be in writing and mailed to the clerk or secretary of the governing board of the sponsor, which shall investigate the appeal. The decision of the governing board shall be subject to judicial review pursuant to article seventy-eight of the civil practice law and rules.

HISTORY:
Add, L 2003, ch 357, § 1, eff Oct 18, 2003.

§ 219-t. Contributions and benefits

1. The sponsor of a supplemental award program shall contribute to the program a fixed amount of money, as determined by the sponsor, on behalf of each participant who is credited with a decade of service. The minimum contribution shall be twenty-five dollars per decade of service. The maximum contribution shall be one hundred dollars per decade of service.

2. The maximum number of years for which a participant may receive a contribution shall be determined by the sponsor, but in no event may a participant receive a contribution of more than fifty years.

3. Supplemental awards shall be paid in the form of a lump sum. The program may limit the forms of payment or impose conditions concerning the availability of a form of payment.

4. Except as otherwise provided in this section, a participant shall be entitled to apply for and receive a supplemental award only when the participant has acquired a nonforfeitable right to a service award established pursuant to article eleven-A, eleven-AA or eleven-AAA of this chapter and has reached entitlement age. A participant who served as a volunteer firefighter or ambulance worker in the timeframe specified by the program sponsor shall be entitled to apply for and receive a supplemental award only when the participant has reached entitlement age.

5. In the event that a participant becomes totally and permanently disabled, as certified by the workers' compensation board or other competent authority approved by the administrator, and the disability prevents the participant from pursuing his or her normal occupation, the participant shall be entitled to apply for and receive a supplemental award, regardless of whether the participant has reached entitlement age or has acquired a nonforfeitable right to a service award.

6. A supplemental award shall be paid only after an application is made to the program administrator and the administrator approves the application.

7. No supplemental award may be assigned or alienated except to provide for the legally obligated support of minor children or spouse.

8. Notwithstanding any inconsistent provision of law, no member of the governing board of a political subdivision of the state is prohibited by virtue of being a member of a volunteer fire or ambulance company or department from voting upon a resolution authorizing a referendum on the establishment of a service award program if more than forty percent of the governing board would otherwise be prohibited from voting upon such resolution. Any member of such governing board voting upon such a resolution who serves as a member of a volunteer fire or ambulance company or department shall publicly disclose in writing to the governing board such status. Such written disclosure shall be part of and set forth in the official record of the proceedings of such governing board.

HISTORY:
Add, L 2003, ch 357, § 1, eff Oct 18, 2003.

ARTICLE 14-G Interlocal Agreements with Governmental Units of Other States

Section
460. Purpose
461. Definitions
462. Interlocal agreements authorized
469. Approval of attorney general and other state officials

HISTORY:
Add, L 1957, ch 859, § 1, eff Jan 1, 1958.

§ 460. Purpose

It is the purpose of this article to permit local governmental units to make the most efficient use of their powers by enabling them to cooperate with governmental units of other states on a basis of mutual advantage and thereby to provide services and facilities in a manner that will accord best with geographic, economic, population and other factors influencing the needs and development of local communities.

HISTORY:

Add, L 1957, ch 859, § 1, eff Jan 1, 1958.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

25 NY Jur 2d Counties, Towns, and Municipal Corporations § 319.

§ 461. Definitions

As used or referred to in this article, unless a different meaning clearly appears from the context,

1. The term "public agency" shall mean any county, city, town, village, school district, improvement district or district corporation of the state of New York; and any local governmental unit, subdivision, or special district of another state.

2. The term "interlocal agreement" shall mean an agreement entered into pursuant to this article.

3. The term "interlocal advisory board" shall mean a board established pursuant to this article.

4. The term "contracting public agency" shall mean a party to an interlocal agreement.

5. The term "comptroller" shall mean the comptroller of the state of New York.

6. The term "attorney general" shall mean the attorney general of the state of New York.

HISTORY:

Add, L 1957, ch 859, eff Jan 1, 1958; amd, L 1963, ch 851, § 1, eff April 30, 1963.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS Priv Hous Fin §§ 31, 85-a; CLS Pub Hous § 156.

Jurisprudences:

25 NY Jur 2d Counties, Towns, and Municipal Corporations § 319.

§ 462. Interlocal agreements authorized

1. Any public agency of this state may enter into interlocal agreements with any public agency or agencies of any other state or states providing for any of the following:

(a) The exchange, furnishing or providing by one or more of the contracting public agencies to one or more of the other contracting public agencies of services, personnel, facilities, equipment, or any other property or resources for any one or more of the following purposes or uses:

(1) Fire prevention and fire fighting
(2) Supply of water, gas or electricity
(3) Garbage collection and disposal
(4) Sewage disposal
(5) Refuse collection and disposal, and public dumps
(6) Storm drainage
(7) Airports or landing fields
(8) Parks, playgrounds, swimming pools, recreation centers, or other recreational areas or facilities
(9) Youth counselling and guidance
(10) Municipal planning services
(11) Engineering services
(12) Lighting
(13) Ambulance service
(14) Fire and police radio and communication systems
(15) Hospital service
(16) Public health services
(17) Mental health services
(18) Cemeteries
(19) Libraries or bookmobiles
(20) Suppression or control of plant and animal pests or diseases
(21) Propagation of game, game birds or fish
(22) Publicizing the advantages of the region
(23) Roads and highways.

(b) The establishment of an interlocal advisory board or boards to recommend programs and policies for cooperative or uniform action in any fields of activity enumerated in paragraph (a) of this subdivision and permitted or authorized for each contracting public agency, and from time to time to advise with the appropriate officials of the contracting public agencies in respect to such programs, policies or fields of activity.

2. Nothing contained in this article shall be construed to authorize or permit any public agency of this state to receive, obtain, furnish or provide services, facilities, personnel, equipment, or any other property or resources, or to engage in or perform any function or activity by means of an interlocal agreement if it does not have constitutional or statutory power or authorization to receive, obtain, furnish or provide the same or substantially similar services, facilities, personnel, equipment, other property or resources, or to engage in or perform the same or a substantially similar function or activity on its own account.

HISTORY:

Add, L 1957, ch 859, § 1, eff Jan 1, 1958; amd, L 1963, ch 851, § 2, eff April 30, 1963; L 1969, ch 741, § 1, eff May 22, 1969.

Notes to Decisions

Analysis

1. Generally
2. Applicability

1. Generally

Interlocal agreements may be made between public agencies of this state and those of another state, but the statute does not permit nor appear to authorize such agreements with public agencies of the Dominion of Canada or any other country. 1964 NY Ops Atty Gen May 15 (Informal), 1964 N.Y. AG LEXIS 101.

County may enter mutual aid agreement with county from another state under CLS Gen Mun Art 14-G, which permits

interlocal agreements in specified circumstances. 1995 NY Ops Atty Gen 95-47 (Informal), 1995 N.Y. AG LEXIS 104.

Volunteer firefighter from out-of-state fire company may not volunteer to assist fire district fire department within New York State on on-going basis under CLS Gen Mun § 209-i. 2000 Op St Compt No. 2000-15, 2000 N.Y. Comp. LEXIS 7.

2. Applicability

The sale of surplus electricity by a municipality to a private public utility situate in another state is not subject to the provisions of General Municipal Law, Article 14-G. 1980 Op St Compt No. 80-110.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Joint contracts for services in preparing plans for solid waste management facilities, CLS Pub Health § 1383.

Jurisprudences:

25 NY Jur 2d Counties, Towns, and Municipal Corporations § 319.

75 NY Jur 2d Libraries § 32.

§ 469. Approval of attorney general and other state officials

Prior to and as a condition precedent to its entry into force,

1. An interlocal agreement or any amendment thereto shall be submitted to the attorney general, who shall determine whether the agreement or amendment is in proper form and compatible with the laws and public policy of this state. The attorney general shall approve the interlocal agreement or amendment unless he shall find that it does not meet the conditions and requirements set forth herein. He shall report in writing to the governing boards of the contracting public agencies the specific respects in which the proposed agreement or amendment fails to meet the conditions or requirements of law or of public policy. The failure of the attorney general to disapprove an interlocal agreement or amendment within ninety days after receipt of the approvals required by subdivision two of this section, or within such longer period as shall be consented to by the contracting public agencies, shall constitute approval thereof.

2. In the event that an interlocal agreement or amendment thereto shall deal in whole or in part with the receiving, obtaining, providing or furnishing of services, facilities, personnel, equipment, or other property or resources, or the engaging in or performance of functions or activities with regard to which the attorney general shall certify that a department, officer or agency of this state has constitutional or statutory responsibilities, powers, functions or duties or acts as agent of the state in connection with any federal or interstate program, the agreement or amendment shall be submitted to such department, officer or agency, and shall be approved or disapproved by it or him as to all matters within its or his jurisdiction. This approval shall be subject to the same requirements governing the action of the attorney general under subdivision one of this section. This requirement of submission and approval shall be in addition to and not in substitution for the requirement of submission to and approval by the attorney general.

3. A legal opinion or opinions must be submitted to the attorney general, in such form as shall be prescribed or approved by him, concerning the authority of the contracting public agency or agencies of the other state or states to enter into the interlocal agreement or any amendment thereto.

4. A copy of the interlocal agreement and of any amendment thereto, certified by the clerk or other appropriate officer of the governing board of the contracting public agency of this state, shall be filed with the county clerk of each of the counties of this state in which such contracting public agency is located; and another copy, similarly certified, shall be filed with the secretary of state of this state.

HISTORY:

Add, L 1957, ch 859, § 1; amd, L 1963, ch 851, § 3, eff April 30, 1963.

Notes to Decisions

1. Generally

County may enter mutual aid agreement with county from another state under CLS Gen Mun Art 14-G, which permits interlocal agreements in specified circumstances. 1995 NY Ops Atty Gen 95-47, (Informal), 1995 N.Y. AG LEXIS 104.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

25 NY Jur 2d Counties, Towns, and Municipal Corporations § 319.

ARTICLE 14-H Local Option for Conduct of Bingo by Certain Organizations

Section

476. Definitions
477. Local option
478. Local laws and ordinances
479. Restrictions upon conduct of bingo games
480. Application for license
481. Investigations; matters to be determined; issuance of license; fees; duration of license
482. Hearing; amendment of license
483. Form and contents of license; display of license
484. Control and supervision; suspension of licenses; inspection of premises
485. Sunday; conduct of games on
486. Participation by persons under the age of eighteen
487. Frequency of game; sale of alcoholic beverages
488. Persons operating and conducting games; equipment; expenses; compensation
489. Charge for admission and participation; amount of prizes; award of prizes
490. Advertising of bingo games
491. Statement of receipts, expenses; additional license fees
492. Examination of books and records; examination of managers, etc.; disclosure of information
493. Appeals from municipal governing body to control commission
494. Exemption from prosecution
495. Offenses; forfeiture of license; ineligibility to apply for license
495-a. Unlawful bingo or game
496. Article inoperative until adopted by voters

497. Amendment and repeal of local laws and ordinances
498. Delegation of authority
498-a. Powers and duties of mayors or managers of certain cities

HISTORY:
Formerly Aricclet 14–G, add, L 1957, ch 854; renumbered Article 14–H and amd, L 1962, ch 438, § 1, eff June 1, 1962.

§ 476. Definitions

As used in this article, the following terms shall have the following meanings:

1. "Municipality" shall mean any city, town or village within this state.

2. "Control commission" or "commission" shall mean the New York state gaming commission created pursuant to section one hundred two of the racing, pari-mutuel wagering and breeding law.

3. "Bingo" or "game" shall mean and include a specific game of chance, commonly known as bingo or lotto, in which prizes are awarded on the basis of designated numbers or symbols on a card conforming to numbers or symbols selected at random.

4. "Authorized organization" shall mean and include any bona fide religious or charitable organization or bona fide educational, fraternal, civic or service organization or bona fide organization of veterans, volunteer firefighters, or volunteer ambulance workers, which by its charter, certificate of incorporation, constitution, or act of the legislature, shall have among its dominant purposes one or more of the lawful purposes as defined in this article, provided that each shall operate without profit to its members, and provided that each such organization has engaged in serving one or more of the lawful purposes as defined in this article for a period of one year immediately prior to applying for a license under this article.

5. "Bingo control law" shall mean article nineteen-B of the executive law.

6. "Lawful purposes" shall mean one or more of the following causes, deeds or activities:

(a) Those which shall benefit needy or deserving persons indefinite in number by enhancing their opportunity for religious or educational advancement, by relieving them from disease, suffering or distress, or by contributing to their physical well-being, by assisting them in establishing themselves in life as worthy and useful citizens, or by increasing their comprehension of and devotion to the principles upon which this nation was founded and enhancing their loyalty to their governments;

(b) Those which shall initiate, perform or foster worthy public works or shall enable or further the erection or maintenance of public structures;

(c) Those which shall initiate, perform or foster the provisions of services to veterans by encouraging the gathering of such veterans and shall enable or further the erection or maintenance of facilities for use by such veterans which shall be used primarily for charitable or patriotic purposes, or those purposes which shall be authorized by a bona fide organization of veterans, provided however that such proceeds are disbursed in accordance with the rules and regulations of the state gaming commission.

(d) Those which shall otherwise lessen the burdens borne by government or which are voluntarily undertaken by an authorized organization to augment or supplement services which government would normally render to the people.

7. "Net proceeds" shall mean (a) in relation to the gross receipts from one or more occasions of bingo, the amount that shall remain after deducting the reasonable sums necessarily and actually expended for bingo supplies and equipment, prizes, stated rental if any, bookkeeping or accounting services according to a schedule of compensation prescribed by the commission, janitorial services and utility supplies if any, license fees, and the cost of bus transportation, if authorized by the control commission, and (b) in relation to the gross rent received by an organization licensed to conduct bingo for the use of its premises by another licensee, the amount that shall remain after deducting the reasonable sums necessarily and actually expended for janitorial services and utility supplies directly attributable thereto if any.

8. "Net lease" shall mean a written agreement between a lessor and lessee under the terms of which the lessee is entitled to the possession, use or occupancy of the whole or part of any commercial premises for which the lessee pays rent to the lessor and likewise undertakes to pay substantially all of the regularly recurring expenses incident to the operation and maintenance of such leased premises.

9. "Authorized commercial lessor" shall mean a person, firm or corporation other than a licensee to conduct bingo under the provisions of this article, who or which owns or is a net lessee of premises and offer the same for leasing by him, her or it to an authorized organization for any consideration whatsoever, direct or indirect, for the purpose of conducting bingo therein, provided that he, she or it, as the case may be, shall not be

(a) a person convicted of a crime if there is a direct relationship between one or more of the previous criminal offenses and the integrity or safety of bingo, considering the factors set forth in article twenty-three-A of the correction law;

(b) a person who is or has been a professional gambler or gambling promoter or who for other reasons is not of good moral character;

(c) a public officer who receives any consideration, direct or indirect, as owner or lessor of premises offered for the purpose of conducting bingo therein;

(d) a firm or corporation in which a person defined in paragraph (a), (b) or (c) of this subdivision or a person married or related in the first degree to such a person has greater than a ten percent proprietary, equitable or credit interest or in which such a person is active or employed.

Nothing contained in this subdivision shall be construed to bar any firm or corporation that is not

organized for pecuniary profit and no part of the net earnings of which inure to the benefit of any individual, member, or shareholder, from being an authorized commercial lessor solely because a public officer, or a person married or related in the first degree to a public officer, is a member of, active in or employed by such firm or corporation.

10. "Limited period bingo" shall mean the conduct of bingo by a licensed authorized organization, for a period of not more than seven of twelve consecutive days in any one year, at a festival, bazaar, carnival or similar function conducted by such licensed authorized organization. No authorized organization licensed to conduct limited period bingo shall be otherwise eligible to conduct bingo pursuant to this article in the same year.

11. "Supercard" shall mean a bingo card on which prizes are awarded, which card is selected by the player, containing five designated numbers, colors or symbols, corresponding to the letters B, I, N, G, O, displayed on the bingo board of the bingo premises operator, which can be played concurrently with the other bingo cards played during the game of bingo.

11-a. "Early bird" shall mean a bingo game which is played as a special game, conducted not more than twice during a bingo occasion, in which prizes are awarded based upon a percentage not to exceed seventy-five percent of the sum of money received from the sale of the early bird cards and which is neither subject to the prize limits imposed by subdivisions five and six of section four hundred seventy-nine and paragraph (a) of subdivision one of section four hundred eighty-one, nor the special game opportunity charge limit imposed by section four hundred eighty-nine of this article. The percentage shall be specified both in the application for bingo license and the license. Not more than one dollar shall be charged per card with the total amount collected from the sale of the early bird cards and the prize for each game to be announced before the commencement of each game.

11-b. "Bonus ball" shall mean a bingo game that is played in conjunction with one or more regular or special bingo games designated as bonus ball games by the licensed authorized organization during one or more consecutive bingo occasions in which a prize is awarded to the player obtaining a specified winning bingo pattern when the last number called by the licensed authorized organization is the designated bonus ball number. The bonus ball prize shall be based upon a percentage of the sales from opportunities to participate in bonus ball games not to exceed seventy-five percent of the sum of money received from the sale of bonus ball opportunities or six thousand dollars, whichever shall be less, and which is not subject to the prize limits imposed by subdivisions five and six of section four hundred seventy-nine and paragraph (a) of subdivision one of section four hundred eighty-one of this article. The percentage shall be specified both in the application for the bingo license and the license. Notwithstanding section four hundred eighty-nine of this article, not more than one dollar shall be charged per player for an opportunity to participate in all bonus ball games conducted during a single bingo occasion, and the total amount collected from the sale of bonus ball opportunities and the amount of the prize to be awarded shall be announced prior to the start of each bingo occasion.

12. "Prize", where supercard is played as set forth in subdivision eleven of this section, shall mean the sum of money or actual value of merchandise awarded to the winner or winners on a game card during a game of bingo and the sum of money or actual value of merchandise awarded to the winner or winners on a supercard in excess of the total receipts derived from the sale of supercards for that specific game.

13. "Ancillary non-gaming activity" shall mean any activity not directly related to the conduct or outcome of any game of bingo, and shall include assisting at any food concession, cleaning, maintenance and site preparation at the location where games of bingo are conducted.

HISTORY:

Add, L 1957, ch 854, § 1; amd, L 1962, ch 438, § 1, eff June 1, 1962; L 1964, ch 859, § 1; L 1965, ch 1057, § 1, eff July 21, 1965; L 1968, ch 364, § 1, eff July 1, 1968; L 1977, ch 46, § 4, eff April 1, 1977; L 1988, ch 24, § 14, eff Jan 1, 1989; L 1988, ch 347, § 1, eff July 25, 1988; L 1991, ch 117, § 1, eff May 17, 1991; L 1991, ch 480, § 2, eff July 19, 1991; L 1994, ch 160, § 1, eff Sept 5, 1994; L 1997, ch 190, § 2, eff July 8, 1997; L 2007, ch 162, § 1, eff July 3, 2007; L 2010, ch 56, § 16 (Part LL), eff June 22, 2010; L 2012, ch 60, § 3 (Part A), eff Feb 1, 2013; L 2017, ch 59, § 2 (Part MM), effective July 9, 2017; L 2019, ch 55, § 3 (Part II, Subpart E), effective April 12, 2019; L 2020, ch 243, § 161, effective October 7, 2020.

Editor's Notes Laws 1977, ch 46, § 5, provides as follows:

§ 5. Whenever the state bingo control commission is referred to or designated in any general, special or local law or in any rule, regulation, executive order, contract or other document, such reference or designation shall be deemed to refer to the state racing and wagering board. For the purpose of succession to all functions, powers, duties, rights and obligations transferred and assigned to, devolved upon and assumed by the state racing and wagering board, the state racing and wagering board shall be deemed and held to constitute the continuation of the state bingo control commission and not a different agency or authority.

Laws 2012, ch 60, § 14 (Part A), eff Feb 1, 2013, provides as follows:

§ 14. This act shall take effect February 1, 2013; provided, however that effective immediately, the addition, amendment and/or repeal of any rules or regulations necessary for the implementation of the foregoing provisions of this act on its effective date are authorized and directed to be made and completed on or before such effective date (Amd, L 2012, ch 457, § 7, eff Sept 28, 2012.).

Laws 2012, ch 457, § 7, eff Sept 28, 2012 amended L 2012, ch 60, § 3 (Part A), so as to change the effective date October 1, 2012 to February 1, 2013.

Amendment Notes The 2017 amendment by ch 59, § 2 (Part MM), added 13.

The 2019 amendment by ch 55, § 3 (Part II, Subpart E), in the introductory paragraph of 9, substituted "owns or is" for "shall own or be" and added "her" and "she"; substituted "if there is a district relationship between one or more of the previous criminal offenses and the integrity or safety of

bingo, considering the factors set forth in article twenty-three-A" for "who has not received a pardon or a certificate of good conduct or a certificate of relief from disabilities pursuant to article twenty-three" in 9(a); in, 9(d), substituted "paragraph (a), (b) or (c) of this subdivision" for "subdivision (a), (b) or (c) above" and "percent" for "percentum (10%)"; and substituted "that is not organized" for "which is not organized" in the last paragraph.

The 2020 amendment by ch 243, § 161, substituted "state gaming commission" for "racing and wagering board" at the end of (6)(c).

Notes to Decisions

Analysis

1. Generally
2. Bingo
3. Limited period bingo

1. Generally

A police officer is ineligible to receive a license to lease for consideration a hall or premises to be used by the lessee for the conduct of bingo. 1983 NY Ops Atty Gen 83-79 (Informal), 1983 N.Y. AG LEXIS 7.

2. Bingo

Use of word "bingo" by television game show broadcast into New York State does not itself bring that show within purview of bingo licensing law; however, if use of word "bingo" is accompanied by bingo type game which involves participation by home viewers, such activity creates impression that home participant is playing state sanctioned bingo which would bring activity within purview of state regulation. 1987 N.Y. Op. Att'y Gen. No. 87-F6.

3. Limited period bingo

A municipality may enact a local law or ordinance authorizing qualified organizations to conduct "limited period Bingo" without thereby authorizing the conduct of other forms of the game. 1985 NY Ops Atty Gen 85-F17, 1985 N.Y. AG LEXIS 3.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:
This section referred to in §§ 480, 481.

Codes, Rules and Regulations:
Definition of terms. 9 NYCRR § 4800.1.

Jurisprudences:
62 NY Jur 2d Gambling §§ 63–65, 85.

§ 477. Local option

Subject to the provisions of this article, and pursuant to the direction contained in subdivision two of section nine of article one of the constitution of the state, the legislature hereby gives and grants to every municipality the right, power and authority to authorize the conduct of bingo games by authorized organizations within the territorial limits of such municipality provided, however, that where the electors of a village shall hereafter approve a local law or ordinance pursuant to section four hundred seventy-eight of this article, the right, power and authority under this article of any town in which such village is located shall not extend to such village during such time as such village local law or ordinance is in effect.

HISTORY:

Add, L 1957, ch 854, § 1; amd, L 1962, ch 438, § 1, eff June 1, 1962.

Notes to Decisions

Analysis

1. Generally
2. Local law or ordinance

1. Generally

It is clear from the reading of this article that the Legislature intended to make bingo licensing a local matter and to give to every municipality the right, power and authority to authorize the conduct of bingo games by authorized organizations within its territorial limits by means of local option. Local 320 Club, Inc. v Wackerle, 24 Misc. 2d 679, 206 N.Y.S.2d 957, 1960 N.Y. Misc. LEXIS 2322 (N.Y. Sup. Ct. 1960).

2. Local law or ordinance

A municipality may enact a local law or ordinance authorizing qualified organizations to conduct "limited period Bingo" without thereby authorizing the conduct of other forms of the game. 1985 NY Ops Atty Gen 85-F17, 1985 N.Y. AG LEXIS 3.

A town ordinance permitting the playing of bingo would not affect the playing of bingo under an ordinance legally adopted by a village wholly within the town (General Municipal Law, § 477; Town Law, § 132); electors of the entire town are authorized to vote on a proposed town bingo ordinance (New York State Constitution, Art I, § 9; General Municipal Law, § 478[2]). 1974 N.Y. Op. Att'y Gen. No. 28, 1974 N.Y. AG LEXIS 132.

A bingo ordinance duly enacted by a Town Board in 1958 is effective within an incorporated village situated within the town unless and until the village has enacted a village bingo ordinance. 1963 Op St Compt No. 63-291.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:
Definitions. 9 NYCRR §§ 4800.1 et seq.

Jurisprudences:
62 NY Jur 2d Gambling §§ 63–65, 85.

Annotations:
Validity and construction of statute exempting gambling operations carried on by religious, charitable, or other nonprofit organizations from general prohibitions against gambling. 42 ALR3d 663.

§ 478. Local laws and ordinances

1. The common council or other local legislative body of any municipality may, either by local law or ordinance, provide that it shall be lawful for any authorized organization, upon obtaining a license therefor as hereinafter provided, to conduct the game of bingo within the territorial limits of such municipality, subject to the provisions of such local law or ordinance, the provisions of this article, and the provisions of the bingo control law.

2. No such local law or ordinance shall become operative or effective unless and until it shall have been approved by a majority of the electors voting on a proposition submitted at a general or special election held within such municipality who are qualified to vote for officers of such municipality.

3. The time, method and manner of submission, preparation and provision of ballots and ballot labels, balloting by voting machine and conducting the election, canvassing the result and making and filing the returns and all other procedure with reference to the submission of and action upon any proposition for the approval of any such local law or ordinance shall be the same as in the case of any other proposition to be submitted to the electors of such municipality at a general or special election in such municipality, as provided by law.

HISTORY:

Add, L 1957, ch 854, § 1; amd, L 1958, ch 143, § 1, eff March 7, 1958; L 1958, ch 245, § 1, eff March 18, 1958; L 1962, ch 438, § 1, eff June 1, 1962.

Notes to Decisions

Analysis

1. Generally; approval
2. Referendum procedure
3. Eligibility to vote
4. Filing local law with lottery commission
5. Free bingo
6. Political subdivision affected by authorization

1. Generally; approval

Under the State Constitution and implementing statutes, the game of bingo may not be conducted in the absence of affirmative referendum. It is not necessary to show that consideration was paid or agreed to be paid to play bingo. The game itself is controlled and the old lottery statute, Penal Law § 1370 et seq., is not in effect and prosecutions for unauthorized bingo must now be made under the General Municipal Law. Italian Community Home Federation, Inc. v Kelly, 12 Misc. 2d 33, 178 N.Y.S.2d 694, 1958 N.Y. Misc. LEXIS 2968 (N.Y. Sup. Ct. 1958).

No bingo, free or otherwise, is legally permissible unless the local area votes approval. Fedin v Hanifin, 22 Misc. 2d 570, 198 N.Y.S.2d 453, 1959 N.Y. Misc. LEXIS 3287 (N.Y. Sup. Ct. 1959).

A municipality may enact a local law or ordinance authorizing qualified organizations to conduct "limited period Bingo" without thereby authorizing the conduct of other forms of the game. 1985 NY Ops Atty Gen 85-F17, 1985 N.Y. AG LEXIS 3.

2. Referendum procedure

A referendum with respect to the authorization of the playing of bingo in the City of Buffalo could be held at the general election in November, 1958. Section 15 of Article IX of the State Constitution limiting the election of local officers to odd-numbered years did not preclude submission of questions or propositions of a local nature. Moreover, bingo amendments specifically authorize submission at general or special election without limitation as to odd-numbered years. Buffalo v Lawley, 6 A.D.2d 66, 175 N.Y.S.2d 547, 1958 N.Y. App. Div. LEXIS 5469 (N.Y. App. Div. 4th Dep't 1958).

Procedure in reference to submission of and action upon any proposition for approval of a local law or ordinance authorizing bingo shall be the same as in the case of any other proposition to be submitted at a general or special election. A city is authorized to enact as local law the provisions of any general law or special act conferring "authority" on the city, and may hold a special election for submission of a bingo referendum. Provisions dealing with registration for a special election should be followed. A board of inspectors of elections need not be set up in each city election district to take registrations of electors, but there must be four inspectors of election in each election district. 1958 NY Ops Atty Gen Apr 1 (Informal), 1958 N.Y. AG LEXIS 125.

A town board, upon receipt of a petition, must cause to be submitted at a town election a proposition upon any question or resolution which may lawfully be submitted, pursuant to law. A proposition in reference to authorizing bingo is of the kind which must be submitted upon receipt of a petition. Following a favorable vote, the board must thereafter enact a bingo ordinance and submit a proposition thereon to referendum. 1958 NY Ops Atty Gen Apr 28 (Informal), 1958 N.Y. AG LEXIS 143.

An ordinance to approve bingo may be submitted to the voters not less than 20 days after its adoption, but a local law may not be submitted less than 60 days after its adoption. 1967 Op St Compt No. 67-856.

3. Eligibility to vote

The legislative body of a municipality should first enact an ordinance authorizing bingo and then submit a proposition thereon to the voters. Any person entitled to vote for officers of a municipality may vote on a proposition authorizing bingo. An ordinance to authorize bingo should be published in full. 1958 NY Ops Atty Gen March 17 (Informal), 1958 N.Y. AG LEXIS 112.

Any qualified elector of a town may vote on a proposition authorizing bingo in the town. It is not required that he be registered to vote at the last general election. 1958 NY Ops Atty Gen March 17 (Informal), 1958 N.Y. AG LEXIS 112.

A town elector, otherwise qualified, may vote on a bingo proposition although not a property owner in the town. 1959 NY Ops Atty Gen May 13 (Informal), 1959 N.Y. AG LEXIS 151.

4. Filing local law with lottery commission

Following disapproval of a bingo proposition at a town election, the board of trustees of a village located within the town may enact an ordinance authorizing bingo within the village, which will become effective if a proposition thereon is approved at a village election. A public hearing should be held prior to enactment of an ordinance legalizing bingo and a copy of such ordinance must be filed with the Lottery Control Commission within 10 days after its adoption. 1958 NY Ops Atty Gen March 18 (Informal), 1958 N.Y. AG LEXIS 115.

The common council of a city desiring to authorize bingo should first enact a local law and then submit a proposition thereon to the voters at a general or special election. A municipality must file with the State Lottery Control Commission a copy of a local law authorizing bingo within 10 days after said law was enacted. 1958 NY Ops Atty Gen March 31 (Informal), 1958 N.Y. AG LEXIS 124.

5. Free bingo

No bingo, free or otherwise, is legally permissible unless the local area votes approval. Fedin v Hanifin, 22 Misc. 2d 570, 198 N.Y.S.2d 453, 1959 N.Y. Misc. LEXIS 3287 (N.Y. Sup. Ct. 1959).

6. Political subdivision affected by authorization

A village board of trustees may exercise its discretion as to whether to submit a proposition to authorize the conduct of bingo to the village electors. 1959 NY Ops Atty Gen Sept 4 (Informal), 1959 N.Y. AG LEXIS 201.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 477, 498-a.

Jurisprudences:

62 NY Jur 2d Gambling §§ 63–65, 85.

Annotations:

Validity and construction of statute exempting gambling operations carried on by religious, charitable, or other nonprofit organizations from general prohibitions against gambling. 42 ALR3d 663.

§ 479. Restrictions upon conduct of bingo games

The conduct of bingo games authorized by local law or ordinance shall be subject to the following restrictions irrespective of whether the restrictions are contained in such local law or ordinance; but nothing herein shall be construed to prevent the inclusion within such local law or ordinance of other provisions imposing additional restrictions upon the conduct of bingo games:

1. No person, firm, association, corporation or organization, other than a licensee under the provisions of this article, shall conduct such game or shall lease or otherwise make available for conducting bingo a hall or other premises for any consideration whatsoever, direct or indirect.

2. No bingo games shall be held, operated or conducted on or within any leased premises if rental under such lease is to be paid, wholly or partly, on the basis of a percentage of the receipts or net profits derived from the operation of such game.

3. No authorized organization licensed under the provisions of this article shall purchase, lease, or receive any supplies or equipment specifically designed or adapted for use in the conduct of bingo games from other than a supplier licensed under the bingo control law or from another authorized organization.

4. The entire net proceeds of any game of bingo and of any rental shall be exclusively devoted to the lawful purposes of the organization permitted to conduct the same.

5. No prize shall exceed the sum or value of five thousand dollars in any single game of bingo.

6. No series of prizes on any one bingo occasion shall aggregate more than fifteen thousand dollars.

7. No person except a bona fide member of any such organization shall participate in the management or operation of such game.

8. No person shall receive any remuneration for participating in the management or operation of any game of bingo.

9. The unauthorized conduct of a bingo game and any wilful violation of any provision of any local law or ordinance shall constitute and be punishable as a misdemeanor.

9-a. No person licensed to sell bingo supplies or equipment, or their agents, shall conduct, participate in, or assist in the conduct of bingo. Nothing herein shall prohibit a licensed distributor from selling, offering for sale, or explaining a product to an authorized organization, or installing, or servicing bingo equipment, upon the premises of a bingo game licensee.

10. Limited period bingo shall be conducted in accordance with the provisions of this article and the rules and regulations of the commission.

HISTORY:

Add, 1957, ch 854, § 1; amd, L 1962, ch 438, § 1, L 1964, ch 814, eff April 1, 1964, L 1964, ch 859, § 2, eff July 1, 1964, L 1994, ch 328, § 1, eff July 20, 1994, L 1998, ch 337, §§ 5, 7, eff Jan 10, 1999; L 2017, ch 59, § 3 (Part MM), effective July 9, 2017.

Editor's Notes: Laws 1958, ch 379, § 2, provides:

This act shall take effect immediately and the provisions of subdivision one-a of section four hundred seventy-nine of the general municipal law, as added by this act, shall be retroactive to and shall be deemed to have been in full force and effect from and after the first day of January, nineteen hundred fifty-eight.

Laws 1964, ch 814, § 2, provide as follows:

§ 2. The provisions of section four hundred seventy-nine of the general municipal law, as amended by this act, and as from time to time amended, shall supersede inconsistent provisions of any local law or ordinance, and shall be controlling.

Laws 1998, ch 337, § 19, eff Jan 10, 1999, provides as follows:

§ 19. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided that the state racing and wagering board is authorized to promulgate any and all rules and regulations and take any other measures necessary to implement this act on its effective date on or before such date.

Amendment Notes The 2017 amendment by ch 59, § 3 (Part MM), substituted "five thousand dollars" for "one thousand dollars" in 5; and substituted "fifteen thousand dollars" for "three thousand dollars" in 6.

Notes to Decisions

Analysis

1. Generally
2. Restrictions
3. Limited period bingo

1. Generally

Where the plaintiff, who proposed to conduct a supermarket promotional game called "Super-Bingo" sought to enjoin state officials from interfering with the scheme, defendant's motion for summary judgment was granted, since Bingo could only be played in municipalities which had adopted a local law or ordinance legalizing it and then only by duly licensed authorized organizations. Kayden Industries, Inc. v Lefkowitz, 46 Misc. 2d 423, 259 N.Y.S.2d 704, 1965 N.Y. Misc. LEXIS 1997 (N.Y. Sup. Ct.), aff'd, 24 A.D.2d 935, 263 N.Y.S.2d 1005, 1965 N.Y. App. Div. LEXIS 6674 (N.Y. App. Div. 1st Dep't 1965).

As amended by ch 814 of the Laws of 1964 this section corrects omissions which might have existed in local laws governing playing of bingo prior to April 1, 1964. 1964 N.Y. Op. Att'y Gen. No. 48, 1964 N.Y. AG LEXIS 34.

Licenses may not be withheld from otherwise duly authorized and qualified bingo applicants for the sole reason that if additional licenses are issued, the economic impact on those organizations already licensed will be detrimental. Provision is made by Executive Law, § 435, for the State Bingo Control Commission to recommend appropriate legislation. 1974 N.Y. Op. Att'y Gen. No. 25, 1974 N.Y. AG LEXIS 12.

The proposed Bingo Bucks advertising program is outside the scope of existing statutory authority. 1981 N.Y. Op. Att'y Gen. No. 30, 1981 N.Y. AG LEXIS 34.

2. Restrictions

An ordinance to authorize bingo must contain the eight restrictions upon conduct of the game, as required by this section and the ordinance may contain additional restrictions. 1958 NY Ops Atty Gen April 16 (Informal), 1958 N.Y. AG LEXIS 134.

A church duly licensed by the General Municipal Law may not rent a hall for the playing of bingo unless the lessor is also a bingo licensee. 1971 NY Ops Atty Gen April 30 (Informal), 1971 N.Y. AG LEXIS 73.

3. Limited period bingo

A municipality may enact a local law or ordinance authorizing qualified organizations to conduct "limited period Bingo" without thereby authorizing the conduct of other forms of the game. 1985 NY Ops Atty Gen 85-F17, 1985 N.Y. AG LEXIS 3.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

Restriction on participation. 9 NYCRR § 4820.3.

Payment of person conducting games; gifts, donations prohibited. 9 NYCRR § 4820.6.

Maximum value of prizes offered. 9 NYCRR § 4820.25.

Use of net proceeds. 9 NYCRR § 4820.36.

Conduct of bingo in leased premises. 9 NYCRR §§ 4822.1 et seq.

Jurisprudences:

62 NY Jur 2d Gambling §§ §§ 63–65.

Annotations:

Validity and construction of statute or ordinance prohibiting promotional games in connection with sale of gasoline. 57 ALR3d 1288.

§ 480. Application for license

1. To conduct bingo. (a) Each applicant for a license to conduct bingo shall, after obtaining an identification number from the control commission, file with the clerk of the municipality a written or electronic application therefor in the form prescribed in the rules and regulations of the control commission, duly executed and verified, in which such applicant shall state:

(1) the name and address of the applicant together with sufficient facts relating to such applicant's incorporation and organization to enable the governing body of the municipality to determine whether or not the applicant is a bona fide authorized organization;

(2) the names and addresses of the applicant's officers; the place or places where, and the date or dates and the time or times when, the applicant intends to conduct bingo under the license applied for;

(3) in case the applicant intends to lease premises for this purpose from other than an authorized organization, the name and address of the licensed commercial lessor of such premises, and the capacity or potential capacity for public assembly purposes of space in any premises presently owned or occupied by the applicant;

(4) the amount of rent to be paid or other consideration to be given directly or indirectly for each occasion for use of the premises of another authorized organization licensed under this article to conduct bingo or for use of the premises of a licensed commercial lessor;

(5) all other items of expense intended to be incurred or paid in connection with the holding, operating and conducting of such games of bingo and the names and addresses of the persons to whom, and the purposes for which, they are to be paid;

(6) the specific purposes to which the entire net proceeds of such games of bingo are to be devoted and in what manner; that no commission, salary, compensation, reward or recompense will be paid to any person for conducting such bingo game or games or for assisting therein except as in this article otherwise provided; and such other information as shall be prescribed by the rules and regulations of the commission.

(b) In each application there shall be designated an active member or members of the applicant organization under whom the game or games of bingo will be conducted and to the application shall be appended a statement executed by the member or members so designated, that he, she or they will be responsible for the conduct of such bingo games in accordance with the terms of the license, the rules and regulations of the commission and this article.

2. Commercial lessor. (a) Each applicant for a license to lease premises to a licensed organization for the purposes of conducting bingo therein shall file with the clerk of the municipality an application therefor in a form prescribed in the rules and regulations of the control commission duly executed and verified, which shall set forth the name and address of the applicant; designation and address of the premises intended to be covered by the license sought; lawful capacity for public assembly purposes; cost of premises and assessed valuation for real estate tax purposes, or annual net lease rent, whichever is applicable; gross rentals received and itemized expenses for the immediately preceding calendar or fiscal year, if any; gross rentals, if any, derived from bingo during the last preceding calendar or fiscal year; computation by which proposed rental schedule was determined; number of occasions on which applicant anticipates receiving rent for bingo during the ensuing year or shorter period if applicable; proposed rent for each such occasion; estimated gross rental income from all other sources during the ensuing year; estimated expenses itemized for ensuing year and amount of each item allocated to bingo rentals; a statement that the applicant in all respects conforms with the specifications contained in the definition of "authorized commercial lessor" set forth in section four hundred seventy-six of this article, and such other information as shall be prescribed by the rules and regulations of the commission.

(b) At the end of the license period, a recapitulation, in a manner prescribed in the rules and regulations of the commission, shall be made as between the licensee and the municipal governing body in respect of the gross rental actually received during the license period and the fee paid therefor. The licensee shall pay any deficiency of fee thereby shown to be due and any excess of fee thereby shown to have been paid shall be credited to such licensee, in such manner as the commission by rules and regulations shall prescribe.

HISTORY:

Add, L 1957, ch 854, § 1; amd, L 1962, ch 438, § 1, eff June 1, 1962; L 1963, ch 413, eff April 16, 1963; L 1963, ch 611, § 2, eff April 23, 1963; L 2017, ch 59, § 4 (Part MM), effective July 9, 2017.

Amendment Notes The 2017 amendment by ch 59, § 4 (Part MM), in the introductory language of 1(a), substituted "license to conduct bingo" for "license," "written or electronic application" for "written application" and "such applicant shall state" for "shall be stated"; in 1(a)(1); substituted "such applicant's" for "its," and "the applicant" for "it"; substituted "the applicant's" for "its" in 1(a)(2); substituted "games of bingo" for "games" in 1(a)(6); substituted "the rules and regulations of the commission" for "such rules and regulations" in 1(a)(6) and 2(a); in 1(b), substituted "he or they" for "he, she or they," and deleted "and" preceding "the rules and regulations" and "of" preceding "this article"; substituted "an application" for "a written application" in 2(a); and rewrote 2(b); and made stylistic changes.

Notes to Decisions

1. Generally

It is clear from provisions of §§ 480 and 481 that the issuance of local bingo licenses is up to the governing body of the municipality, or its clerk, if so designated, and the State Lottery Commission, under the authority given it by § 435 of the Executive Law to make rules and regulations governing issuance of such licenses gives that Commission no authority to adopt a rule which in effect invades the licensing power of the local authority. Local 320 Club, Inc. v Wackerle, 24 Misc. 2d 679, 206 N.Y.S.2d 957, 1960 N.Y. Misc. LEXIS 2322 (N.Y. Sup. Ct. 1960).

In view of the provisions of this section, it can be presumed that an organization granted a bingo license by a local town clerk qualified as a "charity" and eligible to obtain such a license. Febish v New York State Lottery Control Com., 32 Misc. 2d 558, 224 N.Y.S.2d 520, 1961 N.Y. Misc. LEXIS 1840 (N.Y. Sup. Ct. 1961).

The proposed Bingo Bucks advertising program is outside the scope of existing statutory authority. 1981 N.Y. Op. Att'y Gen. No. 30, 1981 N.Y. AG LEXIS 34.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 495.

Definitions, CLS Men Hyg § 15.01.

Codes, Rules and Regulations:

Bingo licenses: applications. 9 NYCRR §§ 4811.1 et seq.

Commercial lessor: application and licensing. 9 NYCRR §§ 4814.1 et seq.
Bingo supplier: application and licensing. 9 NYCRR §§ 4815.1 et seq.
Hearings. 9 NYCRR §§ 4830.2 et seq.
Appeals to the commission. 9 NYCRR §§ 4831.1 et seq.
Jurisprudences:
62 NY Jur 2d Gambling §§ 63–65, 85, 87.

§ 481. Investigations; matters to be determined; issuance of license; fees; duration of license

1. The governing body of the municipality shall make an investigation of the qualifications of each applicant and the merits of each application, with due expedition after the filing of the application.

(a) Issuance of licenses to conduct bingo. If the governing body of the municipality determines:

(i) that the applicant is duly qualified to be licensed to conduct bingo under this article;

(ii) that the member or members of the applicant designated in the application to conduct bingo are bona fide active members or auxiliary members of the applicant and are persons of good moral character and have never been convicted of a crime if there is a direct relationship between one or more of the previous criminal offenses and the integrity or safety of bingo, considering the factors set forth in article twenty-three-A of the correction law;

(iii) that such games of bingo are to be conducted in accordance with the provisions of this article and in accordance with the rules and regulations of the commission;

(iv) that the proceeds thereof are to be disposed of as provided by this article;

(v) that no commission, salary, compensation, reward or recompense whatsoever will be paid or given to any person holding, operating or conducting or assisting in the holding, operation and conduct of any such games of bingo except as in this article otherwise provided; and

(vi) that no prize will be offered and given in excess of the sum or value of five thousand dollars in any single game of bingo and that the aggregate of all prizes offered and given in all of such games of bingo conducted on a single occasion under said license shall not exceed the sum or value of fifteen thousand dollars, then the municipality shall issue a license to the applicant for the conduct of bingo upon payment of a license fee of eighteen dollars and seventy-five cents for each bingo occasion.

Notwithstanding anything to the contrary in this paragraph, the governing body shall refuse to issue a license to an applicant seeking to conduct bingo in premises of a licensed commercial lessor where such governing body determines that the premises presently owned or occupied by such applicant are in every respect adequate and suitable for conducting bingo games.

(b) Issuance of licenses to commercial lessors. If the governing body of the municipality shall determine that the applicant seeking to lease a hall or premises for the conduct of bingo to an authorized organization is duly qualified to be licensed under this article; that the applicant satisfies the requirements for an authorized commercial lessor as defined in section four hundred seventy-six that at the time of the issuance of an initial license, the governing body of the municipality shall find and determine that there is a public need and that public advantage will be served by the issuance of such license; that the applicant has filed its proposed rent for each bingo occasion; that the commission has approved as fair and reasonable a schedule of maximum rentals for each such occasion; that there is no diversion of the funds of the proposed lessee from the lawful purposes as defined in this article; and that such leasing of a hall or premises for the conduct of bingo is to be in accordance with the provisions of this article and in accordance with the rules and regulations of the commission, it shall issue a license permitting the applicant to lease said premises for the conduct of bingo to the authorized organization or organizations specified in the application during the period therein specified or such shorter period as the governing body of the municipality shall determine, but not to exceed one year, upon payment of a license fee of ten dollars plus an amount based upon the aggregate rent specified in the license and determined in accordance with the following schedule:

aggregate rental of	$100 to	$499...	$5.00
aggregate rental of	$500 to	$999...	$25.00
aggregate rental of	$1,000 to	$2,499...	$50.00
aggregate rental of	$2,500 to	$4,999...	$125.00
aggregate rental of	$5,000 to	$9,999...	$250.00
aggregate rental of	$10,000 to	$49,999...	$500.00
aggregate rental of	$50,000 to	$100,000...	$2,500.00
aggregate rental in excess of		$100,000...	$5,000.00

2. On or before the thirtieth day of each month, the treasurer of the municipality shall transmit to the state comptroller a sum equal to fifty percent of all commercial lessor license fees and the sum of eleven dollars and twenty-five cents per occasion of all license fees for the conduct of bingo collected by such municipality pursuant to this section during the preceding calendar month.

3. No license shall be issued under this article which shall be effective for a period of more than one year. In the case of limited period bingo, no license shall be issued authorizing the conduct of such games on more than two occasions in any one day nor shall any license be issued under this article which shall be effective for a period of more than seven of twelve consecutive days in any one year. No license for the conduct of limited period bingo shall be issued in cities having a population of one million or more.

HISTORY:

Add, L 1957, ch 854, § 1; amd, L 1962, ch 438, § 1, eff June 1, 1962; L 1963, ch 611, § 3; L 1964, ch 859, § 3, eff July 1, 1964; L 1967, ch 454, § 1; L 1968, ch 451, § 1, eff Jan 1, 1969; L 1969, ch 284, § 1, eff April 27, 1969; L 1973, ch 142, § 3; L 1981, ch 103, § 137, eff June 1, 1981; L 1994, ch 328, § 2, eff July 20, 1994; L 1995, ch 629, § 1, eff Aug 8, 1995; L 2010, ch 56, § 17 (Part LL), eff June 22, 2010; L 2017, ch 59, § 5 (Part MM), effective July 9, 2017; L 2019, ch 55, § 4 (Part II, Subpart E), effective April 12, 2019.

Editor's Notes Laws 1973, ch 142, §§ 1, 2, provides as follows:

Section 1. The legislature hereby finds and declares that the conduct of the game of bingo and all attendant activities should be so regulated and adequate controls so instituted as to discourage commercialization in all its forms, including the rental of commercial premises for bingo games, and to ensure a maximum availability of the net proceeds of bingo exclusively for application to the worthy causes and undertakings specified in the laws of this state regulating the conduct of bingo.

§ 2. The legislature hereby further declares that there presently exists an emergency with regard to the licensing of new commercial lessors to lease premises for the conduct of bingo in the city of New York caused by the proliferation of commercial bingo halls and the consequent diversion of the net proceeds of bingo from the charitable, educational, scientific, health, religious, civic and patriotic causes and undertakings sponsored by the authorized organizations conducting bingo to and for the profit of such commercial lessors\.

Amendment Notes The 2017 amendment by ch 59, § 5 (Part MM), in 1(a), substituted "municipality determines" for "municipality shall determine," "such games of bingo" for "such games" twice, "reward of recompense what so ever" for "reward or recompese whatever," "five thousand dollars" for "one thousand dollars," "fifteen thousand dollars, then the municipality shall" for "three thousand dollars, it shall," "such governing body" for "it" and "such applicant" for "said applicant."

The 2019 amendment by ch 55, § 4 (Part II, Subpart E), redesignated former 1(a) as the introductory language and 1(a)(i) through 1(a)(vi); in 1(a)(ii), added "or auxiliary members" and substituted "if there is a direct relationship between one or more of the previous criminal offenses and the integrity or safety of bingo, considering the factors set forth in article twenty-three-A" for "or, if convicted, have received a pardon or a certificate of good conduct or a certificate of relief from disabilities pursuant to article twenty-three"; deleted "and if the governing body is satisfied" at the end of 1(a)(iv); in 1(a)(vi), added "of bingo" twice and deleted "provided, however, that" at the end; and added "Notwithstanding anything to the contrary in this paragraph" at the beginning of the last paragraph; and made related and stylistic changes.

Notes to Decisions

Analysis

1. Generally
2. License to conduct bingo
3. License to commercial lessor

1. Generally

Holders of bingo licenses as authorized organizations had standing to seek nullification of a bingo license issued to a commercial lessor. Our Lady of Good Counsel, Roman Catholic Church & School v Ball, 45 A.D.2d 66, 356 N.Y.S.2d 641, 1974 N.Y. App. Div. LEXIS 4703 (N.Y. App. Div. 2d Dep't 1974), app. dismissed, 37 N.Y.2d 809, 375 N.Y.S.2d 572, 338 N.E.2d 328, 1975 N.Y. LEXIS 2131 (N.Y. 1975), aff'd, 38 N.Y.2d 780, 381 N.Y.S.2d 866, 345 N.E.2d 338, 1975 N.Y. LEXIS 2379 (N.Y. 1975).

A Town Justice who is a member of the Town Board may not become a bingo worker. 1970 N.Y. Op. Att'y Gen. No. 25, 1970 N.Y. AG LEXIS 11.

Bingo games may be played by a duly licensed organization in a portion of the school auditorium which is wholly within a village, assuming all of the requirements of law are met. 1970 NY Ops Atty Gen Dec 17 (Informal), 1970 N.Y. AG LEXIS 142.

2. License to conduct bingo

Amendment of statute governing issuance of bingo license to require finding of public need and public advantage was not applicable, where city department's unexplained failure to notify state commission that its preliminary investigation had been completed was sole cause for nonissuance of license prior to effective date of the amendment. Our Lady of Good Counsel, Roman Catholic Church & School v Ball, 45 A.D.2d 66, 356 N.Y.S.2d 641, 1974 N.Y. App. Div. LEXIS 4703 (N.Y. App. Div. 2d Dep't 1974), app. dismissed, 37 N.Y.2d 809, 375 N.Y.S.2d 572, 338 N.E.2d 328, 1975 N.Y. LEXIS 2131 (N.Y. 1975), aff'd, 38 N.Y.2d 780, 381 N.Y.S.2d 866, 345 N.E.2d 338, 1975 N.Y. LEXIS 2379 (N.Y. 1975).

It is clear from provisions of §§ 480 and 481 that the issuance of local bingo licenses is up to the governing body of the municipality, or its clerk, if so designated, and the State Lottery Commission, under the authority given it by § 435 of the Executive Law to make rules and regulations governing issuance of such licenses gives that Commission no authority to adopt a rule which in effect invades the licensing power of the local authority. Local 320 Club, Inc. v Wackerle, 24 Misc. 2d 679, 206 N.Y.S.2d 957, 1960 N.Y. Misc. LEXIS 2322 (N.Y. Sup. Ct. 1960).

Licenses may not be withheld from otherwise duly authorized and qualified bingo applicants for the sole reason that if additional licenses are issued, the economic impact on those organizations already licensed will be detrimental. Provision is made by Executive Law, § 435, for the State Bingo Control Commission to recommend appropriate legislation. 1974 N.Y. Op. Att'y Gen. No. 25, 1974 N.Y. AG LEXIS 12.

3. License to commercial lessor

The statute which empowers the Bingo Commission to withhold approval of rental charges proposed by commercial lessors, if it finds them not to be "fair and reasonable", is a valid exercise of the police power. Intercounty Associates v Ball, 25 A.D.2d 671, 268 N.Y.S.2d 412, 1966 N.Y. App. Div. LEXIS 4730 (N.Y. App. Div. 2d Dep't 1966), aff'd, 21 N.Y.2d 859, 288 N.Y.S.2d 1011, 236 N.E.2d 165, 1968 N.Y. LEXIS 1574 (N.Y. 1968).

Initial license fees for commercial bingo lessors may not be assessed until the license is issued. 1963 N.Y. Op. Att'y Gen. No. 52, 1963 N.Y. AG LEXIS 42.

A police officer is ineligible to receive a license to lease for consideration a hall or premises to be used by the lessee for the conduct of bingo. 1983 NY Ops Atty Gen 83-79 (Informal), 1983 N.Y. AG LEXIS 7.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

Bingo license: issuance. 9 NYCRR §§ 4812.1 et seq.

Bingo supplier: application and licensing. 9 NYCRR §§ 4815.1 et seq.

Jurisprudences:

62 NY Jur 2d Gambling §§ 63–65, 85, 87.

§ 482. Hearing; amendment of license

1. No application for the issuance of a license shall be denied by the governing body until after a hearing, held on due notice to the applicant, at which the applicant shall be entitled to be heard upon the qualifications of the applicant and the merits of the application.

2. Any license issued under this article may be amended, upon application made to the governing body of the municipality which issued it, if the subject matter of the proposed amendment could lawfully and properly have been included in the original license and upon payment of such addi-

tional license fee if any, as would have been payable if it had been so included.

HISTORY:
Add, L 1957, ch 854, § 1; amd, L 1962, ch 438, § 1, eff June 1, 1962.

RESEARCH REFERENCES AND PRACTICE AIDS
Codes, Rules and Regulations:
Bingo licenses: amendment. 9 NYCRR §§ 4813.1 et seq.
Appeals to the commission. 9 NYCRR §§ 4831.1 et seq.
Jurisprudences:
62 NY Jur 2d Gambling §§ 63–65, 85. 87.

§ 483. Form and contents of license; display of license

1. Eeach [Each]* license to conduct bingo shall be in such form as shall be prescribed in the rules and regulations promulgated by the control commission, and shall contain a statement of the name and address of the licensee, of the names and addresses of the member or members of the licensee under whom the games will be conducted, of the place or places where and the date or dates and time or times when such games are to be conducted and of the specific purposes to which the entire net proceeds of such games are to be devoted; if any prize or prizes are to be offered and given in cash, a statement of the amounts of the prizes authorized so to be offered and given; and any other information which may be required by said rules and regulations to be contained therein, and each license issued for the conduct of any game shall be conspicuously displayed at the place where same is to be conducted at all times during the conduct thereof.

2. Each license to lease premises for conducting bingo shall be in such form as shall be prescribed in the rules and regulations of the control commission and shall contain a statement of the name and address of the licensee and the address of the leased premises, the amount of permissible rent and any other information which may be required by said rules and regulations to be contained therein, and each such license shall be conspicuously displayed upon such premises at all times during the conduct of bingo.

HISTORY:
Add, L 1957, ch 854, § 1, eff Jan 1, 1958; amd, L 1962, ch 438, § 1, eff June 1, 1962.

Notes to Decisions

1. Generally

Since this section requires a bingo license obtained from the local town clerk by an authorized organization to describe the place where and the date or dates when the games will be conducted, a summary order by the State Lottery Control Commission that no bingo shall thereafter be played at a designated hall, with respect to which local bingo licenses have already been issued for games to be played, amounts to an illegal revocation of the local license without notice and hearing, as required by § 484. Febish v New York State Lottery Control Com., 32 Misc. 2d 558, 224 N.Y.S.2d 520, 1961 N.Y. Misc. LEXIS 1840 (N.Y. Sup. Ct. 1961).

*Bracketed language inserted by Publisher.

RESEARCH REFERENCES AND PRACTICE AIDS
Jurisprudences:
62 NY Jur 2d Gambling §§ 10, 82, 94, 97.

§ 484. Control and supervision; suspension of licenses; inspection of premises

1. The governing body of any municipality issuing any license under this article shall have and exercise rigid control and close supervision over all games of bingo conducted under such license, to the end that the same are fairly conducted in accordance with the provisions of such license, the provisions of the rules and regulations promulgated by the control commission and the provisions of this article and such governing body and the control commission shall have the power and the authority to suspend any license issued by such governing body and to revoke the same, and, additionally, in the case of an authorized commercial lessor, to impose a fine in an amount not exceeding one thousand dollars, after notice and hearing, for violation of any such provisions, and shall have the right of entry, by their respective officers and agents, at all times into any premises where any game of bingo is being conducted or where it is intended that any such game shall be conducted, or where any equipment being used or intended to be used in the conduct thereof is found, for the purpose of inspecting the same.

2. In addition to the authority granted pursuant to subdivision one of this section, the governing body and the control commission, in a city having a population of one million or more, may impose a fine in an amount not exceeding one thousand dollars, after notice and hearing, on any licensee under this article for violation of any provision of such license, this article or rules and regulations promulgated pursuant thereto.

HISTORY:
Add, L 1957, ch 854, § 1; amd, L 1962, ch 438, § 1; L 1969, ch 1088, § 2, eff Sept 1, 1969; L 1981, ch 900, § 1, eff July 31, 1981.

Notes to Decisions

Analysis

1. Generally
2. Governing body
3. Bingo inspector
4. Notice and hearing
5. Suspension or revocation of license

1. Generally

Bingo games may be played by a duly licensed organization in a portion of the school auditorium which is wholly within a village, assuming all of the requirements of law are met. 1970 NY Ops Atty Gen Dec 17 (Informal), 1970 N.Y. AG LEXIS 142.

2. Governing body

Since the governing body of the City of Jamestown is the city council which is charged with issuance or refusal of bingo Licenses, a member thereof may not engage in activities as a bingo worker for a licensed organization within that city. 1974 NY Ops Atty Gen Aug 7 (Informal), 1974 N.Y. AG LEXIS 122.

3. Bingo inspector

A Town Board may not appoint one of its members town bingo inspector. 1964 N.Y. Op. Att'y Gen. No. 47, 1964 N.Y. AG LEXIS 32.

A chief or member of a volunteer fire department which conducts licensed bingo may not at the same time serve as a bingo inspector for the licensing authority. 1975 N.Y. Op. Att'y Gen. No. 38, 1975 N.Y. AG LEXIS 39.

A person may serve simultaneously as a city bingo inspector and as a member of a city police commission. 1992 NY Ops Atty Gen 92-24 (Informal), 1992 N.Y. AG LEXIS 26.

4. Notice and hearing

The only authority to suspend or revoke bingo licenses under this section is "after notice and hearing," and there is no authority in the State Lottery Control Commission to simply order that no further bingo games shall be played in a particular hall, without any notice or hearing, after various organizations have been granted local licenses to operate bingo games at that hall. Febish v New York State Lottery Control Com., 32 Misc. 2d 558, 224 N.Y.S.2d 520, 1961 N.Y. Misc. LEXIS 1840 (N.Y. Sup. Ct. 1961).

5. Suspension or revocation of license

In determining upon such revocation Commission is entitled to rely on circumstantial evidence as basis for such findings. Inwood Post American Legion v State Bingo Control Com., 22 A.D.2d 884, 254 N.Y.S.2d 603, 1964 N.Y. App. Div. LEXIS 2454 (N.Y. App. Div. 1st Dep't 1964), aff'd, 17 N.Y.2d 699, 269 N.Y.S.2d 712, 216 N.E.2d 707, 1966 N.Y. LEXIS 1473 (N.Y. 1966).

Where certain occasions were selected as basis for determining approximate attendance for each evening of bingo, it was held that the Commission was entitled to find that dates selected were properly representative and fully suitable for such purpose, and that licensee had falsified its attendance reports. Inwood Post American Legion v State Bingo Control Com., 22 A.D.2d 884, 254 N.Y.S.2d 603, 1964 N.Y. App. Div. LEXIS 2454 (N.Y. App. Div. 1st Dep't 1964), aff'd, 17 N.Y.2d 699, 269 N.Y.S.2d 712, 216 N.E.2d 707, 1966 N.Y. LEXIS 1473 (N.Y. 1966).

Judicial review of the determination of the State Bingo Control Commission in revoking a Bingo license is limited to a consideration of whether or not there was substantial evidence to support its essential findings. Inwood Post American Legion v State Bingo Control Com., 22 A.D.2d 884, 254 N.Y.S.2d 603, 1964 N.Y. App. Div. LEXIS 2454 (N.Y. App. Div. 1st Dep't 1964), aff'd, 17 N.Y.2d 699, 269 N.Y.S.2d 712, 216 N.E.2d 707, 1966 N.Y. LEXIS 1473 (N.Y. 1966).

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

Hearings. 9 NYCRR §§ 4830.2 et seq.

Appeals to the commission. 9 NYCRR §§ 4831.1 et seq.

Jurisprudences:

62 NY Jur 2d Gambling §§ 10, 82, 94, 96, 97.

§ 485. Sunday; conduct of games on

No games of bingo shall be conducted under any license issued under this article on the first day of the week, commonly known as [and]* designated as Sunday, unless it shall be otherwise provided in the license issued for the holding, operating and conducting thereof, pursuant to the provisions of a local law or an ordinance duly adopted by the governing body of the municipality issuing the license, authorizing the conduct of bingo under this article on that day.

HISTORY:

Add, L 1957, ch 854, § 1; amd, L 1962, ch 438, § 1, eff June 1, 1962.

Notes to Decisions

1. Generally

Bingo may not be played on Sunday, unless specifically provided in the ordinance and license. 1958 NY Ops Atty Gen Apr 16 (Informal), 1958 N.Y. AG LEXIS 134.

The General Municipal Law prohibits the playing of bingo "on the first day of the week" unless otherwise permitted by local law or ordinance. The Village of Schuylerville has an amended bingo ordinance permitting licensing of any organization on any day of the week and thus there appears to be no legal prohibition to the playing of bingo on Sunday, the "first day of the week." This opinion does not pass on the validity of the ordinance of the Village of Schuylerville. 1969 N.Y. Op. Att'y Gen. No. 40, 1969 N.Y. AG LEXIS 9.

A license duly issued pursuant to Ordinance #4753 of the City of Cohoes may lawfully authorize Sunday bingo. 1971 N.Y. Op. Att'y Gen. No. 13, 1971 N.Y. AG LEXIS 6.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

62 NY Jur 2d Gambling §§ 10, 82, 89.

§ 486. Participation by persons under the age of eighteen

No person under the age of eighteen years shall be permitted to play any game or games of bingo conducted pursuant to any license issued under this article. No person under the age of eighteen years shall be permitted to conduct, operate or assist in the conduct of any game of bingo conducted pursuant to any license issued pursuant to this article. Nothing in this section shall prevent a person sixteen years of age or older from performing ancillary non-gaming activities conducted in conjunction with any game of bingo conducted pursuant to any license pursuant to this article.

HISTORY:

Add, L 1957, ch 854, § 1; amd, L 1960, ch 393, § 1; L 1962, ch 438, § 1, eff June 1, 1962; L 2017, ch 59, § 6 (Part MM), effective July 9, 2017.

Amendment Notes The 2017 amendment by ch 59, § 6 (Part MM), added "the age of" in the section heading; deleted "unless accompanied by an adult" at the end of the first sentence; in the second sentence, added "operate" and substituted "pursuant to this article" for "under this article," and added the third sentence.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

Responsibility for children. 9 NYCRR § 5820.2.

Jurisprudences:

62 NY Jur 2d Gambling §§ 10, 82, 94.

§ 487. Frequency of game; sale of alcoholic beverages

No game or games of bingo, except limited period bingo, shall be conducted under any license issued under this article more often than on eighteen days in any three successive calendar months. No game or games of limited period bingo shall be conducted between the hours of twelve midnight postmeridian and noon, and no more than sixty games may be conducted on any single occasion of limited period bingo. No game or games of bingo shall be conducted in any room or outdoor area where alcoholic beverages are sold, served or consumed during the progress of the game or games.

HISTORY:

Add, L 1957, ch 854, § 1; amd, L 1962, ch 438, § 1; L 1964, ch 859, § 4, eff July 1, 1964; L 1982, ch 72, § 1, eff May 3, 1982.

*The bracketed word has been inserted by the Publisher.

Notes to Decisions

1. Generally

The game may not be played more often than on six days in any one calendar month. 1958 NY Ops Atty Gen Apr 16 (Informal), 1958 N.Y. AG LEXIS 134.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:
62 NY Jur 2d Gambling §§ 10, 82, 89.

§ 488. Persons operating and conducting games; equipment; expenses; compensation

1. No person shall hold, operate or conduct any game of bingo under any license issued under this article except a bona fide member of the authorized organization to which the license is issued, and no person shall assist in the holding, operating or conducting of any game of bingo under such license except such a bona fide member or a bona fide member of an organization or association which is an auxiliary to the licensee or a bona fide member of an organization or association of which such licensee is an auxiliary or a bona fide member of an organization or association which is affiliated with the licensee by being, with it, auxiliary to another organization or association and except bookkeepers or accountants as hereinafter provided. Provided, however, any person may assist the licensed organization in any activity related to the game of bingo which does not actually involve the holding, conducting, managing or operating of such game of bingo. No game of bingo shall be conducted with any equipment except such as shall be owned absolutely or leased by the authorized organization so licensed or used without payment of any compensation therefor by the licensee. Lease terms and conditions shall be subject to rules and regulations promulgated by the board. This article shall not be construed to authorize or permit an authorized organization to engage in the business of leasing bingo supplies or equipment. No items of expense shall be incurred or paid in connection with the conducting of any game of bingo pursuant to any license issued under this article, except those that are reasonable and are necessarily expended for bingo supplies and equipment, prizes, stated rental if any, bookkeeping or accounting services according to a schedule of compensation prescribed by the commission, janitorial services and utility supplies if any, and license fees, and the cost of bus transportation, if authorized by the control commission.

2. Notwithstanding any provision of this article to the contrary, a person who is a bona fide member of an organization licensed to conduct the game of bingo and is also a bona fide member of one or more other organizations which are also licensed to conduct the game of bingo, and such organizations are not affiliates or auxiliaries of the others, shall be authorized to operate, conduct or assist in the operation or conduct of games of bingo held by any of such organizations licensed to conduct bingo.

HISTORY:

Add, L 1957, ch 854, § 1; amd, L 1962, ch 438, § 1, eff June 1, 1962 (see note to Article 14–H); L 1994, ch 176, § 1, eff June 14, 1994; L 1998, ch 337, § 18, eff Jan 10, 1999 (see 1998 note below).

Notes to Decisions

1. Generally

The proposed Bingo Bucks advertising program is outside the scope of existing statutory authority. 1981 N.Y. Op. Att'y Gen. No. 30, 1981 N.Y. AG LEXIS 34.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:
Restrictions on participation. 9 NYCRR § 4820.3.
Kind of equipment used for games. 9 NYCRR § 4820.15.
Qualifications of person calling game. 9 NYCRR § 4820.35.

Jurisprudences:
62 NY Jur 2d Gambling §§ 10, 82, 89.

§ 489. Charge for admission and participation; amount of prizes; award of prizes

Except in the conduct of limited period bingo, not more than five dollars shall be charged by any licensee for admission to any room or place in which any game or games of bingo are to be conducted under any license issued under this article, which admission fee, upon payment thereof, shall entitle the person paying the same to participate without additional charge in all regular games of bingo to be played under such license on such occasion. In the conduct of limited period bingo: (a) no admission fee shall be charged, (b) not more than twenty-five cents shall be charged for a single opportunity to participate in any one game, which charge, upon payment thereof, shall entitle the person paying the same to one card for participation in one such game, and (c) no licensee shall sell more than five opportunities to each player participating in any one game. Every winner shall be determined and every prize shall be awarded and delivered within the same calendar day as that upon which the game was played. No alcoholic beverage shall be offered or given as a prize in any game of bingo.

HISTORY:

Add, L 1957, ch 854, § 1; amd, L 1962, ch 438, § 1; L 1964, ch 859, § 5; L 1970, ch 239, § 1, eff April 24, 1970; L 1980, ch 720, § 1, eff June 30, 1980; L 1982, ch 334, § 1, eff June 21, 1982; L 1983, ch 330, § 1, eff June 21, 1983; L 1994, ch 328, § 3, eff July 20, 1994; L 2000, ch 524, § 1, eff Nov 3, 2000.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:
Maximum value of prizes offered. 9 NYCRR § 4820.25.
Admission charge as requisite to participate. 9 NYCRR § 4820.30.

Jurisprudences:
62 NY Jur 2d Gambling §§ 10, 82, 89.

Annotations:
Private rights and remedies growing out of prize-winning contests. 87 ALR2d 649.

Matthew Bender's New York Practice Guides: 2 New York Practice Guide: Real Estate § 16.14.

§ 490. Advertising of bingo games

A licensee may advertise the conduct of an occasion of bingo to the general public by means of newspaper, radio, circular, handbill and poster, by one sign not exceeding sixty square feet in area, which may be displayed on or adjacent to the premises owned or occupied by a licensed authorized

organization, and through the internet or television as may be regulated by the rules and regulations of the commission. When an organization is licensed to conduct bingo occasions on the premises of another licensed authorized organization or of a licensed commercial lessor, one additional such sign may be displayed on or adjacent to the premises in which the occasions are to be conducted. Additional signs may be displayed upon any firefighting or ambulance equipment belonging to any licensed authorized organization which is a volunteer fire company, volunteer ambulance corps or upon any equipment of a first aid or rescue squad in and throughout the community served by such volunteer fire company, volunteer ambulance corps or such first aid or rescue squad, as the case may be. All advertisements shall be limited to the description of such event as "bingo", the name of the licensed authorized organization conducting such bingo occasions, the license number of the authorized organization as assigned by the clerk; the prizes offered and the date, location and time of the bingo occasion.

HISTORY:

Add, L 1979, ch 147, § 1, eff June 28, 1979; amd, L 1981, ch 95, § 1, eff July 11, 1981; L 1988, ch 99, § 1, eff May 27, 1988; L 2017, ch 59, § 8 (Part MM), effective July 9, 2017.

Prior Law: Former § 490, add, L 1957, ch 854, § 1; amd, L 1962, ch 438, § 1, L 1971, ch 251, § 1, eff June 10, 1971; repealed, L 1979, ch 147, § 1, eff June 28, 1979.

Amendment Notes The 2017 amendment by ch 59, § 8 (Part MM), rewrote the former first sentence as the first and second sentences; in the third sentence, added "or ambulance" once and "volunteer ambulance corps" twice; and in the last sentence, substituted "such bingo occasions" for "such occasions" and added "the prizes offered."

Repeal Notes: [L 1979, ch 147] Former § 490 of the General Municipal Law was repealed by this act. This change allows advertising of bingo games by means of handbills not presently allowed under § 490.

Notes to Decisions

1. Generally

Bingo games may not be advertised except in accordance with the statutory provisions. 1963 N.Y. Op. Att'y Gen. No. 41, 1963 N.Y. AG LEXIS 33.

The proposed Bingo Bucks advertising program is outside the scope of existing statutory authority. 1981 N.Y. Op. Att'y Gen. No. 30, 1981 N.Y. AG LEXIS 34.

The provisions of this section with respect to the size of signs advertising bingo games supersede inconsistent provisions of local zoning ordinances or local laws. 1980 Op St Compt No. 80-579.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

62 NY Jur 2d Gambling §§ 10, 82, 89.

§ 491. Statement of receipts, expenses; additional license fees

1. Within seven days after the conclusion of any occasion of bingo, the authorized organization that conducted the same, and such authorized organization's members who were in charge thereof, and when applicable the authorized organization that rented its premises therefor, shall each furnish to the clerk of the municipality a statement subscribed by the member in charge and affirmed by such person as true, under the penalties of perjury, showing the amount of the gross receipts derived therefrom and each item of expense incurred, or paid, and each item of expenditure made or to be made, the name and address of each person to whom each such item has been paid, or is to be paid, with a detailed description of the merchandise purchased or the services rendered therefor, the net proceeds derived from such game or rental, as the case may be, and the use to which such proceeds have been or are to be applied and a list of prizes offered and given, with the respective values thereof. A clerk may make provisions for the option for the electronic filing of such statement. It shall be the duty of each licensee to maintain and keep such books and records as may be necessary to substantiate the particulars of each such statement and within fifteen days after the end of each calendar quarter during which there has been any occasion of bingo, a summary statement of such information, in form prescribed by the commission, shall be furnished in the same manner to the commission.

2. Upon the filing of such statement of receipts, the authorized organization furnishing the same shall pay to the clerk of the municipality as and for an additional license fee a sum based upon the reported net proceeds, if any, for the occasion covered by such statement and determined in accordance with such schedule as shall be established from time to time by the commission to defray the cost to municipalities of administering the provisions of this article and of article nineteen-B of the executive law.

HISTORY:

Add, L 1957, ch 854, § 1, eff Jan 1, 1958; amd, L 1962, ch 438, § 1, eff June 1, 1962; L 1965, ch 845, § 71; L 1974, ch 323, § 1, eff Jan 1, 1975; L 1980, ch 667, § 1, eff June 30, 1980; L 2017, ch 59, § 9 (Part MM), effective July 9, 2017.

Amendment Notes The 2017 amendment by ch 59, § 9 (Part MM), in 1, rewrote the former first sentence as the first and last sentences, and added the second sentence.

Notes to Decisions

Analysis

1. Generally
2. Use of license fees

1. Generally

State Bingo Control Commission may reduce or increase license fee collected from authorized organizations in order to carry out the intent and purpose of the statute. 1964 N.Y. Op. Att'y Gen. No. 47, 1964 N.Y. AG LEXIS 32.

A town may not modify the additional license fee which it receives from bingo operations, a fee set by the State Bingo Control Commission at three per centum of reported net proceeds. 1976 Op St Compt No. 76-99.

2. Use of license fees

A municipality receiving a share of the net proceeds of bingo occasions shall use this money to defray the cost of licensing and regulating bingo. Any excess not needed for this purpose is surplus revenue to be used for any lawful municipal purpose. 1980 Op St Compt No. 80-602.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

Financial statement of bingo operations. 9 NYCRR §§ 4821.1 et seq.

Jurisprudences:
62 NY Jur 2d Gambling §§ 10, 82, 89.

§ 492. Examination of books and records; examination of managers, etc.; disclosure of information

The governing body of the municipality and the control commission shall have power to examine or cause to be examined the books and records of

1. Any authorized organization which is or has been licensed to conduct bingo, so far as they may relate to bingo including the maintenance, control and disposition of net proceeds derived from bingo or from the use of its premises for bingo, and to examine any manager, officer, director, agent, member or employee thereof under oath in relation to the conduct of any such game under any such license, the use of its premises for bingo, or the disposition of net proceeds derived from bingo, as the case may be.

2. Any licensed authorized commercial lessor so far as they may relate to leasing premises for bingo and to examine said lessor or any manager, officer, director, agent or employee thereof under oath in relation to such leasing.

Any information so received shall not be disclosed except so far as may be necessary for the purpose of carrying out the provisions of this article, and article nineteen-B of the executive law.

HISTORY:
Add, L 1957, ch 854, § 1; amd, L 1962, ch 438, § 1, eff June 1, 1962; L 1968, ch 289, § 1, eff May 14, 1968.

Notes to Decisions

Since the governing body of the City of Jamestown is the city council which is charged with issuance or refusal of bingo Licenses, a member thereof may not engage in activities as a bingo worker for a licensed organization within that city. 1974 NY Ops Atty Gen Aug 7 (Informal), 1974 N.Y. AG LEXIS 122.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:
Financial statement of bingo operations. 9 NYCRR §§ 5821.1 et seq.

Jurisprudences:
62 NY Jur 2d Gambling §§ 10, 82, 96.

§ 493. Appeals from municipal governing body to control commission

Any applicant for, or holder of, any license issued or to be issued under this article aggrieved by any action of the governing body of the municipality to which such application has been made or by which such license has been issued, may appeal to the control commission from the determination of said governing body by filing with the governing body a written notice of appeal within thirty days after the determination or action appeal [appealed]* from, and upon the hearing of such appeal, the evidence, if any, taken before the governing body and any additional evidence may be produced and shall be considered in arriving at a determination of the matters in issue, and the action of the control commission upon said appeal shall be binding upon said governing body and all parties to said appeal.

HISTORY:
Add, L 1957, ch 854, § 1; amd, L 1962, ch 438, § 1, eff June 1, 1962.

Notes to Decisions

1. Generally

Judicial review under CLS CPLR Art 78 was not available from decision by State Racing and Wagering Board on petitioners' appeal from city's denial of their applications for amendments to their bingo licenses where board remitted case to city for further proceedings, and thus board's decision was not final. Syracuse Brigadiers, Inc. v Racing & Wagering Bd., 275 A.D.2d 918, 715 N.Y.S.2d 177, 2000 N.Y. App. Div. LEXIS 9574 (N.Y. App. Div. 4th Dep't 2000).

Court erred in converting part of Article 78 proceeding to declaratory judgment action and granting declaratory relief where declaratory judgment action was inappropriate vehicle to challenge decision by State Racing and Wagering Board on petitioners' appeal from city's denial of their applications for amendments to their bingo licenses, and there was no need for declarations regarding petitioners' alleged entitlement to requested license amendments. Syracuse Brigadiers, Inc. v Racing & Wagering Bd., 275 A.D.2d 918, 715 N.Y.S.2d 177, 2000 N.Y. App. Div. LEXIS 9574 (N.Y. App. Div. 4th Dep't 2000).

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:
62 NY Jur 2d Gambling §§ 10, 82, 97.

§ 494. Exemption from prosecution

No person or corporation lawfully conducting, or participating in the conduct of bingo or permitting the conduct upon any premises owned or leased by him or it under any license lawfully issued pursuant to this article, shall be liable to prosecution or conviction for violation of any provision of article two hundred twenty-five of the penal law or any other law or ordinance to the extent that such conduct is specifically authorized by this article, but this immunity shall not extend to any person or corporation knowingly conducting or participating in the conduct of bingo under any license obtained by any false pretense or by any false statement made in any application for license or otherwise, or permitting the conduct upon any premises owned or leased by him or it of any game of bingo conducted under any license known to him or it to have been obtained by any such false pretense or statement.

HISTORY:
Add, L 1957, ch 854, § 1; amd, L 1962, ch 438, § 1, eff June 1, 1962; L 1967, ch 680, § 68, eff Sept 1, 1967.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:
Gambling offenses, CLS Penal Art 225, §§ 225.00 et seq.

Jurisprudences:
62 NY Jur 2d Gambling §§ 10, 82, 98.

Annotations:
Validity and construction of statute exempting gambling operations carried on by religious, charitable, or other nonprofit organizations from general prohibitions against gambling. 42 ALR3d 663.

§ 495. Offenses; forfeiture of license; ineligibility to apply for license

Any person, association or corporation who or which shall:

*The bracketed word has been inserted by the Publisher.

(1) make any false statement in any application for any license authorized to be issued under this article;

(2) pay or receive, for the use of any premises for conducting bingo, a rental in excess of the amount specified as the permissible rent in the license provided for in subdivision two of section four hundred eighty of this article;

(3) fail to keep such books and records as shall fully and truly record all transactions connected with the conducting of bingo or the leasing of premises to be used for the conduct of bingo;

(4) falsify or make any false entry in any books or records so far as they relate in any manner to the conduct of bingo, to the disposition of the proceeds thereof and to the application of the rents received by any authorized organization;

(5) divert or pay any portion of the net proceeds of any game of bingo to any person, association or corporation, except in furtherance of one or more of the lawful purposes defined in this article; or

(6) violate any of the provisions of this article or of any term of any license issued under this article;

shall be guilty of a misdemeanor and shall forfeit any license issued under this article and be ineligible to apply for a license under this article for one year thereafter.

HISTORY:

Add, L 1957, ch 854, § 1; amd, L 1962, ch 438, § 1, eff June 1, 1962.

Notes to Decisions

Analysis

1. Generally
2. Offenses
3. Judicial review

1. Generally

The entry of a "no contest" plea does not entitle an offender against subd 5 of the above statute to lenient treatment. The diversion of bingo proceeds from lawful purposes is a serious offense in the operation of this form of gambling which the Legislature exempts from prohibitions otherwise existing solely because the proceeds derived therefrom are to be applied to worthwhile causes. S/Sgt. Vincent J. Barbella Post v State Bingo Control Com., 46 Misc. 2d 1054, 261 N.Y.S.2d 611, 1965 N.Y. Misc. LEXIS 2084 (N.Y. Sup. Ct. 1965).

2. Offenses

Six-month suspension for falsification of bingo records and diversion of funds by treasurer was not so disproportionate to the offense as to shock one's sense of fairness where the licensee exercised no real control over its treasurer over five-year period, performing only perfunctory audits at annual meetings and making no examination of bank statements to verify balances. Scranton Volunteer Fire Co. v Ball, 37 A.D.2d 757, 323 N.Y.S.2d 463, 1971 N.Y. App. Div. LEXIS 3595 (N.Y. App. Div. 4th Dep't 1971), aff'd, 30 N.Y.2d 589, 330 N.Y.S.2d 802, 281 N.E.2d 848, 1972 N.Y. LEXIS 1454 (N.Y. 1972).

The Bingo Commission is not restricted to instances of intentional fraud as grounds for suspension of license and may suspend a bingo license if books and records kept by the organization in question do not fully and truly record all transactions. In re Disabled American Veterans, 41 Misc. 2d 206, 246 N.Y.S.2d 234, 1963 N.Y. Misc. LEXIS 1804 (N.Y. Sup. Ct. 1963).

Where falsification of receipts of bingo games is established it may reasonably be inferred that the unreported receipts have been diverted to purposes other than those specified in the above statute. S/Sgt. Vincent J. Barbella Post v State Bingo Control Com., 46 Misc. 2d 1054, 261 N.Y.S.2d 611, 1965 N.Y. Misc. LEXIS 2084 (N.Y. Sup. Ct. 1965).

3. Judicial review

A licensee who files a plea of "no contest" waives the right of review of its guilt of the charge to which it pleads under the above statute. S/Sgt. Vincent J. Barbella Post v State Bingo Control Com., 46 Misc. 2d 1054, 261 N.Y.S.2d 611, 1965 N.Y. Misc. LEXIS 2084 (N.Y. Sup. Ct. 1965).

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

62 NY Jur 2d Gambling §§ 10, 82, 99.

§ 495-a. Unlawful bingo or game

1. For the purposes of this section, "bingo" or "game" shall mean and include a specific game or [of][*] chance, commonly known as bingo or lotto, in which prizes are awarded on the basis of designated numbers or symbols on a card conforming to numbers or symbols selected at random, whether or not a person who participates as a player furnishes something of value for the opportunity to participate.

2. Any person, firm, partnership, association, corporation or organization holding, operating, or conducting bingo or a game is guilty of a misdemeanor, except when operating, holding or conducting:

(a) In accordance with a valid license issued pursuant to this article; or

(b) (i) Within a municipality that has authorized the conduct of bingo games by authorized organizations:

(A) within the confines of a home for purposes of amusement or recreation where (I) no player or other person furnishes anything of value for the opportunity to participate, and (II) the prizes awarded or to be awarded are nominal.

(B) within any apartment, condominium or cooperative complex, retirement community, or other group residential complex or facility where (I) sponsored by the operator of or an association related to such complex, community or facility, (II) such games are conducted solely for the purpose of amusement and recreation of its residents, (III) no player or other person furnishes anything of value for the opportunity to participate, (IV) the value of the prizes shall not exceed ten dollars for any one game or a total of one hundred fifty dollars in any calendar day, (V) such games are not conducted on more than one day per week and not more than thirty times during any calendar year, and (VI) no person other than an employee or volunteer of such complex, community or facility conducts or assists in conducting the game or games.

(C) on behalf of any bona fide social, charitable, educational, recreational, fraternal, religious, not-for-profit or age group organization, club or association solely for the purpose of amusement and recre-

[*]The bracketed word has been inserted by the Publisher.

ation of its members or beneficiaries where (I) no player or other person furnishes anything of value for the opportunity to participate, (II) the value of the prizes shall not exceed ten dollars for any one game or a total of one hundred fifty dollars in any calendar day, (III) such games are not conducted on more than one day per week and not more than thirty times during any calendar year, (IV) no person other than a bona fide active member of the organization, club or association participates in the conduct of the games, and (V) no person is paid for conducting or assisting in the conduct of the game or games.

(D) as a hotel's, motel's, recreational or entertainment facility's or common carrier's social activity solely for the purpose of amusement and recreation of its patrons where (I) no player or other person furnishes anything of value for the opportunity to participate, (II) the value of the prizes shall not exceed ten dollars for any one game or a total of one hundred fifty dollars in any calendar day, (III) such games are not conducted on more than fifteen days during any calendar year, (IV) no person other than an employee or volunteer conducts or assists in conducting the game or games, and (V) the game or games are not conducted in the same room where alcoholic beverages are sold.

(ii) The control commission and the governing body of the municipality in which bingo games are conducted pursuant to this paragraph shall have the authority to regulate the conduct of such games. Any bingo game or games, in which no participant or other person furnishes anything of value for the opportunity to participate, which is operated in violation of this paragraph, a civil penalty of not more than one hundred dollars may be imposed for the first such violation, a civil penalty of not more than one hundred fifty dollars may be imposed for the second such violation in a period of three years, and a civil penalty of not more than two hundred dollars may be imposed for the third or subsequent such violation in a period of five years.

3. The provisions of this section shall apply to all municipalities within this state, including those municipalities where this article is inoperative.

HISTORY:

Add, L 1967, ch 491, § 1, eff Sept 1, 196; amd, L 1970, ch 965, § 1, eff June 1, 1970; L 1981, ch 332, § 1, eff June 29, 1981; L 1984, ch 838, § 1, eff Dec 3, 1984; L 2007, ch ch 441, § 1, eff Jan 1, 2008; L 2019, ch 470, § 1, effective November 8, 2019.

Amendment Notes The 2019 amendment by ch 470, § 1, substituted "one day per week and not more than thirty times" for "fifteen days" in 2(b)(i)(B) and 2(b)(i)(C); and added "religious, not-for-profit" in in 2(b)(i)(C).

Notes to Decisions

1. Generally

Use of word "bingo" by television game show broadcast into New York State does not itself bring that show within purview of bingo licensing law; however, if use of word "bingo" is accompanied by bingo type game which involves participation by home viewers, such activity creates impression that home participant is playing state sanctioned bingo which would bring activity within purview of state regulation. 1987 N.Y. Op. Att'y Gen. No. 87-F6.

Indians on a reservation must obtain a bingo identification number and a license issued by the State Bingo Control Commission prior to conducting any game of bingo. They may not award prizes in excess of the amounts set forth in Article I, § 9 of the Constitution of the State of New York. 1973 N.Y. Op. Att'y Gen. No. 16, 1973 N.Y. AG LEXIS 6.

Notwithstanding compliance with the requirements of section 369-e of the General Business Law, the operation of bingo by a profit-seeking commercial establishment is a misdemeanor pursuant to General Municipal Law, § 495-a(2), and it is our further opinion that the contest known as "Gamerama" constitutes bingo. 1977 N.Y. Op. Att'y Gen. No. 18, 1977 N.Y. AG LEXIS 193.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 496.

Designation of offenses, CLS Penal § 55.10.

Jurisprudences:

62 NY Jur 2d Gambling §§ 10, 82, 96, 100.

§ 496. Article inoperative until adopted by voters

Except as provided in section 495-a, the provisions of this article shall remain inoperative in any municipality unless and until a proposition therefor submitted at a general or special election in such municipality shall be approved by a vote of the majority of the qualified electors in such municipality voting thereon.

HISTORY:

Add, L 1957, ch 854, § 1; amd, L 1962, ch 438, § 1; L 1967, ch 491, § 2, eff Sept 1, 1967.

Notes to Decisions

1. Generally

In a community which has approved bingo licensing by referendum vote, the game can only be played in conformity with the "Bingo Licensing Law," but in one in which either no referendum has been held, or wherein bingo licensing has been defeated, playing of bingo is not in itself a violation of the General Municipal Law as long as the game is conducted as a "free" or "entertainment" game and does not amount to a lottery. People v Burns, 23 Misc. 2d 636, 207 N.Y.S.2d 762, 1959 N.Y. Misc. LEXIS 2397 (N.Y. County Ct. 1959), app. dismissed, 10 A.D.2d 809, 202 N.Y.S.2d 1010, 1960 N.Y. App. Div. LEXIS 11394 (N.Y. App. Div. 4th Dep't 1960).

Where the plaintiff, who proposed to conduct a supermarket promotional game called "Super-Bingo" sought to enjoin state officials from interfering with the scheme, defendant's motion for summary judgment was granted, since Bingo could only be played in municipalities which had adopted a local law or ordinance legalizing it and then only by duly licensed authorized organizations. Kayden Industries, Inc. v Lefkowitz, 46 Misc. 2d 423, 259 N.Y.S.2d 704, 1965 N.Y. Misc. LEXIS 1997 (N.Y. Sup. Ct.), aff'd, 24 A.D.2d 935, 263 N.Y.S.2d 1005, 1965 N.Y. App. Div. LEXIS 6674 (N.Y. App. Div. 1st Dep't 1965).

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

62 NY Jur 2d Gambling §§ 10, 82.

§ 497. Amendment and repeal of local laws and ordinances

Any such local law or ordinance may be amended, from time to time, or repealed by the common council or other local legislative body of the municipality which enacted it and such amendment or repeal, as the case may be, may be made effective and operative not earlier than thirty days following the date of enactment of the local law or ordinance effecting such amendment or repeal, as the case may be; and the approval of a majority of the electors of

such municipality shall not be a condition prerequisite to the taking effect of such local law or ordinance.

HISTORY:
Add, L 1957, ch 854, § 1; amd, L 1962, ch 438, § 1, eff June 1, 1962.

Notes to Decisions

Analysis

1. Amendment
2. Repeal

1. Amendment

An amendment to a town ordinance, relative to the conduct of bingo, is not required to be submitted to referendum. 1958 NY Ops Atty Gen Jul 21 (Informal), 1958 N.Y. AG LEXIS 192.

A village may, by local law, amend its original ordinance permitting the playing of bingo within the municipality to include the playing of bingo on Sunday without the approval of the majority of electors of the village. 1974 NY Ops Atty Gen Dec 18 (Informal), 1974 N.Y. AG LEXIS 199.

2. Repeal

This section authorizes repeal of a local bingo ordinance by the Town Board without the necessity for a referendum. 1963 NY Ops Atty Gen Apr 17 (Informal), 1963 N.Y. AG LEXIS 115.

A town bingo ordinance may be repealed only by enactment of another ordinance and is not subject to referendum. 1963 Op St Compt No. 63-430.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:
62 NY Jur 2d Gambling §§ 10, 82, 86.

§ 498. Delegation of authority

The governing body of a municipality may delegate to an officer or officers thereof designated by it for that purpose any of the authority granted to it hereby in relation to the issuance, amendment and cancellation of licenses, the conduct of investigations and hearings, the supervision of the operation of the games and the collection and transmission of fees.

HISTORY:
Add, L 1957, ch 854, § 1; amd, L 1962, ch 438, § 1, eff June 1, 1962.

Notes to Decisions

1. Generally

Where, pursuant to this section, a Town Board invests the Town Clerk with authority granted to its governing body to issue bingo licenses, the Town Clerk becomes vested with all the authority and discretion of the governing body in that respect and his field of authority cannot be invaded by rules promulgated by the State Lottery Commission. Local 320 Club, Inc. v Wackerle, 24 Misc. 2d 679, 206 N.Y.S.2d 957, 1960 N.Y. Misc. LEXIS 2322 (N.Y. Sup. Ct. 1960).

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:
62 NY Jur 2d Gambling §§ 10, 82, 87.

§ 498-a. Powers and duties of mayors or managers of certain cities

Notwithstanding any other provision of this article, whenever the charter of any city, or any special or local law, provides that the mayor or manager of such city is the chief law enforcement officer thereof, then and in that event such mayor or manager, as the case may be, shall have, exercise and perform all the powers and duties otherwise prescribed by this article to be exercised and performed by the governing body of such city except those prescribed by section four hundred seventy-eight hereof, and in any such case, the term "governing body of a municipality" as used in this article shall be deemed to mean and include the mayor or manager of any such city.

HISTORY:
Add, L 1960, ch 736, § 1; amd, L 1962, ch 438, § 1, eff June 1, 1962.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:
62 NY Jur 2d Gambling §§ 10, 82.

ARTICLE 17 Municipal Annexation Law

Section
709. Annexation by a city of territory in fire, fire protection, or fire alarm districts; assumption of indebtedness; property rights
716. Restrictions and prohibitions

HISTORY:
Add, L 1963, ch 844, § 1, eff Jan 1, 1964.

§ 709. Annexation by a city of territory in fire, fire protection, or fire alarm districts; assumption of indebtedness; property rights

1. If an annexation of territory by a city includes the entire area of a fire district, the city, as of the date of such annexation, shall become the owner of all of the property and property rights of the fire district and shall assume all of the indebtedness and contract or other liabilities of the fire district, and shall furnish fire protection, and other emergency service which would require the services of firefighters, in the area so annexed in the same manner as in other similar areas of the city.

2. If an annexation of territory by a city includes only a part of the area of a fire district, the indebtedness and any contract or other liabilities, and interest thereon, shall be a charge upon and shall be paid by the city, as the same shall become due and payable, to the fire district in the same proportion to the whole of any such indebtedness or any such liability as the full valuation of the taxable real property of the territory which is annexed bears to the full valuation of the taxable real property of the fire district prior to the annexation. Such full valuation shall be determined in the manner provided in subdivision twenty-one-a of section 2.00 of the local finance law. If the fire district owns any real property or rights in real property in the territory which is annexed, the city may purchase any such property, including any personal property used in connection therewith, from the fire district for a fair and reasonable price to be agreed upon by the governing boards of the city and the fire district and the board of commissioners of the fire district shall have power to execute any necessary instruments in relation thereto. Any such sale shall not be subject to approval at a fire district election. If such real property is a firehouse owned by the fire district, the city shall

be required to purchase such real property and any rights in real property appurtenant thereto from the fire district. If the governing boards of the city and the fire district cannot agree on a fair and reasonable price therefor, the city shall proceed to acquire such real property and any such rights by condemnation in the same manner as if the property was owned by an individual. The city shall furnish fire protection, and other emergency service which would require the services of firefighters, in the area so annexed in the same manner as in other similar areas of the city.

3. If an annexation of territory of a city includes the entire area of a fire protection district or of a fire alarm district, the city shall furnish fire protection, and other emergency service which would require the services of firefighters, in the area so annexed in the same manner as in other similar areas of the city.

4. If an annexation of territory to a city includes only a part of the area of a fire district, a fire protection district or a fire alarm district, the governing boards of the city, the fire district and of the town, as the case may be, shall provide for the carrying out and fulfillment of any contract for the furnishing of fire protection to the area of such fire district, fire protection district or fire alarm district which is outside the city.

HISTORY:

Add, L 1963, ch 844, eff Jan 1, 1964; L 2018, ch 476, § 80, effective December 28, 2018.

Amendment Notes The 2018 amendment by ch 476, § 80, substituted "firefighters" for "firemen" in 1, in the last sentence of 2 and in 3.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

25 NY Jur 2d Counties, Towns, and Municipal Corporations § 56.

56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 96 et seq.

§ 716. Restrictions and prohibitions

Notwithstanding any other provision of this article or of any other law:

1. An annexation shall not affect the boundaries of any congressional district, senate district or assembly district.

2. The date on which any such annexation shall take effect shall be such that it will not deprive a qualified elector of his right to vote at the general election to be held on the first Tuesday next succeeding the first Monday in November of the year in which the annexation is to become effective.

3. A county shall not annex territory situated in another county unless the territory so annexed shall on the same date be annexed to either a city situated in whole or in part, or to a town situated in the county to which the territory is annexed.

4. A city shall not annex territory situated in a county other than a county in which such city is situated unless the territory so annexed shall on the same date be annexed to the county, or one of the counties, in which such city is situated.

5. A town shall not annex territory situated in a county other than the county in which such town is situated unless the territory so annexed shall on the same date be annexed to the county in which such town is situated.

6. A village shall not annex territory of a city unless the territory so annexed shall on the same date be annexed to the town, or to one or more of the towns, in which the village is situated.

7. A village may annex territory of another village, but such annexation shall not result in any change of the boundaries of any county or town. This provision shall not be deemed to prevent any such annexation simultaneously with an annexation of the same territory by a county and the town or towns in which the village to which such territory is to be annexed is situated in whole or in part or, when the territory so annexed is situated in the same county as such village, with an annexation of the same territory by the town or towns in which such village is situated in whole or in part.

8. A town may annex territory of a city, but such annexation shall not result in any change of the boundaries of a village. This provision shall not be deemed to prevent any such annexation by a town simultaneously with an annexation of the same territory by a county and by a village or villages situated in whole or in part in such town or with an annexation by a village or villages situated in whole or in part in such town.

9. A town may annex territory of another town, but such annexation shall not result in any change in the boundaries of a village. This provision shall not be deemed to prevent any such annexation by a town simultaneously with an annexation of the same territory by a village or villages situated in whole or in part in either or both of such towns.

10. An annexation by a county shall not increase the area of any county improvement district in such county. If a county annexes territory in another county and such territory includes in whole or in part the area of a county improvement district situated in the other county, the area of the county improvement district located in the territory annexed shall cease to be a part of such district when such annexation becomes effective.

11. If a city annexes territory of a town and such territory includes in whole or in part the area of any fire district, fire protection district or fire alarm district or of any town special district or of any town improvement district, the area of any such district located in the territory annexed shall cease to be a part of such district when such annexation becomes effective.

12. If a village annexes territory of the town in which it is situated or of another village located in such town or in another town, any such annexation shall not affect the boundaries of any town special or improvement district in such town or the boundaries of any fire district, fire protection district or fire alarm district.

13. If a town annexes territory of another town, such annexation shall not affect the boundaries of any fire district, fire protection district or fire alarm district, but the territory so annexed shall cease to be a part of any town special or improvement district in such other town when the annexation becomes effective.

HISTORY:
Add, L 1963, ch 844, § 1, eff Jan 1, 1964.

Notes to Decisions

Analysis

1. Generally
2. Agricultural district
3. Congressional, senate, or assembly district
4. Fire, fire protection, or fire alarm district
5. Highway
6. Water district

1. Generally

Territory may be annexed to an existing village which will, when so added, cause the total area of the village to exceed three square miles. 1965 Op St Compt No. 65-931.

Separate propositions to annex different areas contiguous to a village and contiguous to each other may be submitted simultaneously. 1967 Op St Compt No. 67-1017.

2. Agricultural district

Where a farm located within an agricultural district is part of territory annexed to a city, such farm remains part of the agricultural district after such annexation. 1976 Op St Compt No. 76-751.

3. Congressional, senate, or assembly district

Town board erred in denying property owners' petition for annexation, because, contrary to the board's conclusion, under N.Y. Gen. Mun. Law § 716(1), the annexation would not affect the boundaries of state legislative districts. Matter of City of Middletown v Town Bd. of Town of Wallkill, 54 A.D.3d 333, 863 N.Y.S.2d 52, 2008 N.Y. App. Div. LEXIS 6421 (N.Y. App. Div. 2d Dep't 2008).

4. Fire, fire protection, or fire alarm district

Annexation of territory in town by village has no effect on boundaries of fire district located within that territory. 1989 NY Ops Atty Gen 89-19 (Informal), 1989 N.Y. AG LEXIS 14.

The exclusive firefighting jurisdiction of a village fire department does not automatically expand upon annexation by the village of territory in a neighboring fire district; an agreement by which a village fire department would provide services to the annexed portion of a fire district is possible under Town Law § 176(22). 1990 NY Ops Atty Gen 90-59 (Informal), 1990 N.Y. Op. (Inf.) Att'y Gen. 59, 1990 N.Y. AG LEXIS 63.

Fire district created in 1952 by town had responsibility for providing fire protection to territory annexed to town in 1998 following 1996 judicial decision which determined that disputed territory was within boundaries of neighboring town where, prior to 1996, fire district boundary included disputed territory; under facts presented, neither annexation of territory in 1998, nor 1996 judicial decision, affected boundaries of fire district. 2002 NY Ops Atty Gen 2002-14 (Informal), 2002 N.Y. Op. (Inf.) Att'y Gen. 14, 2002 N.Y. AG LEXIS 18.

An area within a fire district which has been annexed by a village may be excluded from the fire district under the procedure prescribed by section 182 of the Town Law. 1983 Op St Compt No. 83-177, 1983 N.Y. Comp. LEXIS 305.

5. Highway

General Municipal Law § 716, which specifically contains restrictions and prohibitions relative to proposed annexations, does not prohibit annexation of a state highway by a local government. Common Council of Gloversville v Town Board of Johnstown, 32 N.Y.2d 1, 342 N.Y.S.2d 841, 295 N.E.2d 644, 1973 N.Y. LEXIS 1434 (N.Y. 1973).

Presence of state highway on land of town to be annexed by city did not prevent proposed annexation, as the highway, although state property, was not separate and apart from, but was within, the territory of the town government. Common Council of Gloversville v Town Board of Johnstown, 32 N.Y.2d 1, 342 N.Y.S.2d 841, 295 N.E.2d 644, 1973 N.Y. LEXIS 1434 (N.Y. 1973).

When village annexes property which encompasses county highway, it does not automatically assume responsibility for maintenance of county highway, and road can be transferred from county highway system to village within which it lies, but only pursuant to procedures established in CLS High Law § 115-b. 1989 NY Ops Atty Gen 88-69 (Informal), 1989 N.Y. AG LEXIS 78.

6. Water district

When village annexes territory of town in which it is situate and such territory includes portion of water district, district boundaries are unaffected by annexation and property therein continues to be subject to district assessments. 1986 Op St Compt No. 86-39, 1986 N.Y. Comp. LEXIS 136.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:
25 NY Jur 2d Counties, Towns, and Municipal Corporations § 45.

ARTICLE 17-A Consolidation and Dissolution of Local Government

Title 1. Definitions

Section
750. Definitions

Title 2. Consolidation of Local Government Entities

751. Commencing the proceeding
752. Proposed joint consolidation agreement
753. Publication of proposed joint consolidation agreement
754. Public hearings on proposed joint consolidation agreement
755. Referendum resolution for consolidation of towns or villages
756. Effective date of joint consolidation agreement
757. Initiative of electors seeking consolidation
758. Conduct of referendum
759. Canvassing of vote; moratorium on further referendum
760. Duty to approve proposed elector initiated consolidation plan
761. Publication of proposed elector initiated consolidation plan
762. Public hearings on proposed elector initiated consolidation plan
763. Effective date of elector initiated consolidation plan; permissive referendum
764. Court-ordered consolidation; mediation; judicial hearing officer
765. General effect of consolidation
766. Election and appointment of officials
767. Effect of transition on employees
768. Debts, liabilities and obligations
769. Effect on existing laws; transition period
770. Effect on actions and proceedings
771. Registration of electors
772. Determination of rights

Title 3. Dissolution of Local Government Entities

773. Commencing the proceeding
774. Proposed dissolution plan
775. Publication of proposed dissolution plan

776. Public hearings on proposed dissolution plan
777. Referendum resolution for dissolution of villages
778. Effective date of dissolution plan
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HISTORY:
Add, L 2009, ch 74, § 2, eff March 21, 2010 (see 2009 note below).

TITLE 1 Definitions

HISTORY:
Add, L 2009, ch 74, § 2, eff March 21, 2010 (see 2009 note below).

§ 750. Definitions

As used in this article, the following terms shall have the following meanings:

1. "Component local government entity" shall mean a local government entity that, as a result of successful consolidation proceedings, is combined into a consolidated local government entity.

2. "Consolidation" shall mean either (a) the combination of two or more local government entities resulting in the termination of the existence of each of the entities to be consolidated and the creation of a new entity which assumes jurisdiction over all of the terminated entities, or (b) the combination of two or more local government entities resulting in the termination of the existence of all but one of the entities which shall absorb the terminated entity or entities.

3. "Consolidated local government entity" shall mean a local government entity resulting from successful consolidation proceedings conducted pursuant to this article.

4. "Contiguous" shall mean when a portion of a town or village abuts the boundary of another town or village, including a town or village separated from the exact boundary of another town or village by a street, road, railroad, highway, river or other natural or artificial stream or body of water.

5. "Dissolution" shall mean the termination of the existence of a local government entity.

6. "Dissolution plan" shall mean a written document that contains terms and information regarding the dissolution of a local government entity and that has been finalized and approved by such entity's governing body pursuant to this article.

7. "Elector" shall mean a registered voter of this state registered to vote in the local government entity subject to consolidation or dissolution proceedings conducted pursuant to this article.

8. "Elector initiated consolidation plan" shall mean a written document that contains terms and information regarding the consolidation of two or more local government entities, a majority of whose electors have voted to consolidate, and that has been finalized and approved by the governing body or bodies of such entities or a judicial hearing officer pursuant to this article.

9. "Elector initiated dissolution plan" shall mean a written document that contains terms and information regarding the dissolution of a local government entity, a majority of whose electors have voted to dissolve, that has been finalized and approved by such entity's governing body or a judicial hearing officer pursuant to this article.

10. "Governing body" shall mean the body in which the general legislative, governmental and/or public powers of a local government entity are vested and by authority of which the official business of such entity is conducted.

11. "Initiative" shall mean the filing of the petition containing a proposal for a referendum to be placed on the ballot for an election.

12. "Joint consolidation agreement" shall mean a written document that contains terms and information regarding the consolidation of two or more local government entities and that has been finalized and approved by the governing body or bodies of such entities pursuant to this article.

13. "Local government entity" or "entity" shall mean a town, village, district, special improvement district or other improvement district, including, but not limited to, special districts created pursuant to articles eleven, twelve, twelve-A or thirteen of the town law, library districts, and other districts created by law; provided, however, that a local government entity shall not include school districts, city districts or special purpose districts created by counties under county law.

14. "Proposed dissolution plan" shall mean a written document that contains terms and information regarding the dissolution of a local government entity, and that has been proposed, but not yet finalized and approved, by such entity's governing body pursuant to this article.

15. "Proposed elector initiated consolidation plan" shall mean a written document that contains terms and information regarding the consolidation of two or more local government entities, a majority of whose respective electors have voted to consoli-

date such entities, that has been proposed, but not yet finalized and approved, by the governing body or bodies of such entities pursuant to this article.

16. "Proposed elector initiated dissolution plan" shall mean a written document that contains terms and information regarding the dissolution of a local government entity, a majority of whose electors have voted to dissolve such entity, and that has been proposed, but not yet finalized and approved, by such entity's governing body pursuant to this article.

17. "Proposed joint consolidation agreement" shall mean a written document that contains terms and information regarding the consolidation of two or more local government entities and that has been proposed, but not yet finalized and approved, by such entities' governing body or bodies pursuant to this article.

18. "Referendum" shall mean a vote seeking approval by a majority of electors of a local government entity or entities voting on a question of consolidation or dissolution placed on the ballot by initiative.

HISTORY:

Add, L 2009, ch 74, § 2, eff March 21, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

§ 18. Savings clause. Notwithstanding the repeal or amendment of any law by this act, nothing in this act shall be construed to impair the consolidation or dissolution of any local government entity pursuant to any such repealed or amended law if there was commenced in or for such local government entity prior to the effective date of this act a consolidation or dissolution proceeding pursuant to such law, in which event the provisions of such former law shall govern such proceeding as though such former law had not been repealed hereby.

TITLE 2 Consolidation of Local Government Entities

HISTORY:

Add, L 2009, ch 74, § 2, eff March 21, 2010 (see 2009 note below).

§ 751. Commencing the proceeding

1. Two or more local government entities, whether within the same county or different counties, may be consolidated into a single local government entity if each of the local government entities is contiguous to at least one of the other consolidating local government entities and if together the local government entities would form a consolidated local government entity of a kind or class that is authorized under the laws of the state of New York. The requirement that local government entities be contiguous to consolidate does not apply to entities other than towns and villages.

2. Consolidation proceedings may be commenced by either:

(a) a joint resolution by the governing body or bodies of the local government entities to be consolidated endorsing a proposed joint consolidation agreement; or

(b) elector initiative.

HISTORY:

Add, L 2009, ch 74, § 2, eff March 21, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

§ 18. Savings clause. Notwithstanding the repeal or amendment of any law by this act, nothing in this act shall be construed to impair the consolidation or dissolution of any local government entity pursuant to any such repealed or amended law if there was commenced in or for such local government entity prior to the effective date of this act a consolidation or dissolution proceeding pursuant to such law, in which event the provisions of such former law shall govern such proceeding as though such former law had not been repealed hereby.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

56 Am Jur 2d, , Municipal Corporations, Counties, and Other Political Subdivisions §§ 74, 75.

§ 752. Proposed joint consolidation agreement

1. The governing body or bodies of two or more local government entities may, by joint resolution, endorse a proposed joint consolidation agreement for the purpose of commencing consolidation proceedings under this article.

2. The proposed joint consolidation agreement shall specify:

(a) the name of each local government entity to be consolidated;

(b) the name of the proposed consolidated local government entity, which name shall be such as to distinguish it from the name of any other like unit of government in the state of New York (except the name of any one of the entities to be consolidated);

(c) the rights, duties and obligations of the proposed consolidated local government entity;

(d) the territorial boundaries of the proposed consolidated local government entity;

(e) the type and/or class of the proposed consolidated local government entity;

(f) the governmental organization of the proposed consolidated local government entity insofar as it concerns elected and appointed officials and public employees, along with a transitional plan and schedule for elections and appointments of officials;

(g) a fiscal estimate of the cost of and savings which may be realized from consolidation;

(h) each entity's assets, including, but not limited to, real and personal property, and the fair value thereof in current money of the United States;

(i) each entity's liabilities and indebtedness, bonded and otherwise, and the fair value thereof in current money of the United States;

(j) terms for the disposition of existing assets, liabilities and indebtedness of each local government entity, either jointly, separately or in certain defined proportions;

(k) terms for the common administration and uniform enforcement of local laws, ordinances, resolutions, orders and the like, within the proposed consolidated local government entity, consistent with section seven hundred sixty-nine of this title;

(*l*) the effective date of the proposed consolidation; and

(m) the time and place or places for the public hearing or hearings on such proposed joint consolidation agreement pursuant to section seven hundred fifty-four of this title.

HISTORY:

Add, L 2009, ch 74, § 2, eff March 21, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

§ 18. Savings clause. Notwithstanding the repeal or amendment of any law by this act, nothing in this act shall be construed to impair the consolidation or dissolution of any local government entity pursuant to any such repealed or amended law if there was commenced in or for such local government entity prior to the effective date of this act a consolidation or dissolution proceeding pursuant to such law, in which event the provisions of such former law shall govern such proceeding as though such former law had not been repealed hereby.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

56 Am Jur 2d, , Municipal Corporations, Counties, and Other Political Subdivisions §§ 74, 75.

§ 753. Publication of proposed joint consolidation agreement

No later than five business days after commencement of consolidation proceedings pursuant to section seven hundred fifty-two of this title, the governing body or bodies of the local government entities to be consolidated shall:

1. cause a copy of the proposed joint consolidation agreement, along with a descriptive summary thereof, to be displayed and readily accessible to the public for inspection in a public place or places within each entity;

2. cause the proposed joint consolidation agreement, along with a descriptive summary thereof and a reference to the public place or places within each entity where a copy thereof may be examined, to be displayed on a website maintained by each entity or otherwise on a website maintained by the village, town and/or county in which the entities are located; and

3. arrange to be published a descriptive summary of the proposed joint consolidation agreement and a reference to the public place or places within the entities where a copy thereof may be examined, at least once each week for four successive weeks, in a newspaper having a general circulation within each entity.

HISTORY:

Add, L 2009, ch 74, § 2, eff March 21, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

§ 18. Savings clause. Notwithstanding the repeal or amendment of any law by this act, nothing in this act shall be construed to impair the consolidation or dissolution of any local government entity pursuant to any such repealed or amended law if there was commenced in or for such local government entity prior to the effective date of this act a consolidation or dissolution proceeding pursuant to such law, in which event the provisions of such former law shall govern such proceeding as though such former law had not been repealed hereby.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

56 Am Jur 2d, , Municipal Corporations, Counties, and Other Political Subdivisions §§ 74, 75.

§ 754. Public hearings on proposed joint consolidation agreement

1. The governing body or bodies of the local government entities to be consolidated shall set a time and place or places for one or more public hearings on the proposed joint consolidation agreement. The hearing or hearings shall be held no less than thirty-five days and no more than ninety days after commencement of consolidation proceedings pursuant to section seven hundred fifty-two of this title. The hearing or hearings may be held jointly or separately by the governing body or bodies of the entities. Any interested person shall be given a reasonable opportunity to be heard on any aspect of the proposed consolidation.

2. The public hearing or hearings shall be held on notice of at least ten days, but not more than twenty days, published in a newspaper or newspapers having general circulation within each local government entity to be consolidated and displayed on a website maintained by each entity or otherwise on a website maintained by the village, town and/or county in which the entities are located. The notice of the hearing or hearings shall provide a descriptive summary of the proposed joint consolidation agreement and a reference to the public place or places within the entities where a copy of such agreement may be examined.

3. After completion of the final hearing, the governing body or bodies of the local government entities to be consolidated may amend the proposed joint consolidation agreement, provided that the amended version complies with the provisions of subdivision two of section seven hundred fifty-two of this title and is publicized pursuant to subdivision four of this section, and/or approve a final version of the joint consolidation agreement, or decline to proceed further with consolidation proceedings. Any approval by the entities' governing body or bodies of the final version of the joint consolidation agreement must occur within one hundred eighty days of such final hearing.

4. No later than five business days after amending the proposed joint consolidation agreement, the

governing body or bodies of the local government entities to be consolidated shall:

(a) cause a copy of the amended version of the proposed joint consolidation agreement, along with a descriptive summary thereof, to be displayed and readily accessible to the public for inspection in a public place or places within each entity; and

(b) cause the amended version of the proposed joint consolidation agreement, along with a descriptive summary thereof and a reference to the public place or places within each such entity where a copy thereof may be examined, to be displayed on a website maintained by each entity or otherwise on a website maintained by the village, town and/or county in which the entities are located.

HISTORY:

Add, L 2009, ch 74, § 2, eff March 21, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

§ 18. Savings clause. Notwithstanding the repeal or amendment of any law by this act, nothing in this act shall be construed to impair the consolidation or dissolution of any local government entity pursuant to any such repealed or amended law if there was commenced in or for such local government entity prior to the effective date of this act a consolidation or dissolution proceeding pursuant to such law, in which event the provisions of such former law shall govern such proceeding as though such former law had not been repealed hereby.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

56 Am Jur 2d, , Municipal Corporations, Counties, and Other Political Subdivisions §§ 74, 75.

§ 755. Referendum resolution for consolidation of towns or villages

1. If a joint consolidation agreement calls for the consolidation of two or more towns, two or more villages or one or more towns and villages, then contemporaneous with the final approval of the joint consolidation agreement pursuant to subdivision three of section seven hundred fifty-four of this title, the governing body or bodies of the local government entities to be consolidated shall enact a resolution calling for a referendum on the proposed consolidation by the electors in each of the entities.

2. The resolution calling for the referendum on the proposed consolidation shall:

(a) provide (i) the name of each of the towns and/or villages proposed to be consolidated, (ii) a statement fully describing the territory to be included within the proposed consolidated local government entity, (iii) the name of the proposed consolidated local government entity, and (iv) the date for the referendum, in accordance with subdivision one of section seven hundred fifty-eight of this title;

(b) state the substance of the question to be submitted to the electors; and

(c) set forth such other matters as may be necessary to call, provide for and give notice of the referendum and to provide for the conduct thereof and the canvass of the returns thereupon.

3. The resolution calling for a referendum on the proposed consolidation shall have attached to it the final approved version of the joint consolidation agreement.

HISTORY:

Add, L 2009, ch 74, § 2, eff March 21, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

§ 18. Savings clause. Notwithstanding the repeal or amendment of any law by this act, nothing in this act shall be construed to impair the consolidation or dissolution of any local government entity pursuant to any such repealed or amended law if there was commenced in or for such local government entity prior to the effective date of this act a consolidation or dissolution proceeding pursuant to such law, in which event the provisions of such former law shall govern such proceeding as though such former law had not been repealed hereby.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 74, 75.

§ 756. Effective date of joint consolidation agreement

Local government entities consolidated pursuant to a joint consolidation agreement shall continue to be governed as before consolidation until the effective date of the consolidation specified in the joint consolidation agreement; provided, however, that no joint consolidation agreement consolidating two or more towns, two or more villages or one or more towns and villages shall take effect unless approved by a majority of electors in each such town and/or village at a referendum called through a resolution enacted pursuant to section seven hundred fifty-five of this title.

HISTORY:

Add, L 2009, ch 74, § 2, eff March 21, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

§ 18. Savings clause. Notwithstanding the repeal or amendment of any law by this act, nothing in this act shall be construed to impair the consolidation or dissolution of any local government entity pursuant to any such repealed or amended law if there was commenced in or for such local government entity prior to the effective date of this act a consolidation or dissolution proceeding pursuant to such law, in which event the provisions of such former law shall govern such proceeding as though such former law had not been repealed hereby.

§ 757. Initiative of electors seeking consolidation

1. The electors of two or more local government entities may commence a consolidation proceeding by filing an original petition, containing not less than the number of signatures provided for in sub-

division two of this section and in the form provided for in subdivision three of this section, with the clerk of the town in which the entities or the greater portion of their territory are located, except that if one or more of the entities to be consolidated is a village the original petition of electors from the village shall be filed with the clerk of the village. Accompanying the filed petition shall be a cover sheet containing the name, address and telephone number of an individual who signed the petition and who will serve as a contact person.

2. The petition shall contain the signatures of at least ten percent of the number of electors or five thousand electors, whichever is less, in each local government entity to be consolidated; provided, however, that where the local government entity to be consolidated contains five hundred or fewer electors, the petition shall contain the signatures of at least twenty percent of the number of electors. No signature on a petition is valid unless it is the original signature of an elector.

3. The petition shall substantially comply with, and be circulated in, the following form:

PETITION FOR LOCAL GOVERNMENT CONSOLIDATION

We, the undersigned electors and legal voters of (insert type of local government entity - e.g., town, village or district) of (insert name of local government entity), New York, qualified to vote at the next general or special election, respectfully petition that there be submitted to the electors and legal voters of (insert type and name of local government entities proposed to be consolidated), for their approval or rejection at a referendum held for that purpose, a proposal to consolidate (insert type and name of local government entity) with (insert type and name of local government entity or entities).

In witness whereof, we have signed our names on the dates indicated next to our signatures.

Date	Name - print name under signature	Home Address
1. _____	_____	_____
2. _____	_____	_____
3. _____	_____	_____

(On the bottom of each page of the petition, after all of the numbered signatures, insert a signed statement of a witness who is a duly qualified elector of the state of New York. Such a statement shall be accepted for all purposes as the equivalent of an affidavit, and if it contains a material false statement, shall subject the person signing it to the same penalties as if he or she has been duly sworn. The form of such statement shall be substantially as follows:

I, (insert name of witness), state that I am a duly qualified voter of the state of New York. Each of the persons that have signed this petition sheet containing (insert number) signatures have signed their names in my presence on the dates indicated above and identified themselves to be the same person who signed the sheet. I understand that this statement will be accepted for all purposes as the equivalent of an affidavit, and if it contains a materially false statement, shall subject me to the penalties of perjury.

_____ _____
Date Signature of Witness)

(In lieu of the signed statement of a witness who is a duly qualified voter of the state of New York, the following statement signed by a notary public or a commissioner of deeds shall be accepted:

On the date indicated above before me personally came each of the electors and legal voters whose signatures appear on this petition sheet containing (insert number) signatures, who signed the petition in my presence and who, being by me duly sworn, each for himself or herself, identified himself or herself as the one and same person who signed the petition and that the foregoing information they provided was true.

_____ _____
Date Notary Public or Commissioner of Deeds)

4. An alteration or correction of information appearing on a petition's signature line, other than an un-initialed signature and date, shall not invalidate such signature.

5. In matters of form, this section shall be liberally construed, not inconsistent with substantial compliance thereto and the prevention of fraud.

6. Within ten days of the filing of the petition seeking consolidation pursuant to subdivision one of this section, the clerk with whom the petition was filed shall make a final determination regarding the sufficiency of the number of signatures on the petition and provide timely written notice of such determination to the contact person named in the cover sheet accompanying the petition. The contact person or any individual who signed the petition may seek judicial review of such determination in a proceeding pursuant to article seventy-eight of the civil practice laws and rules.

7. Upon the clerk's determination that the petition contains not less than the number of signatures of electors required in subdivision two of this section, the governing body or bodies of the local government entities to be consolidated shall, no later than thirty days thereafter, enact a resolution in accordance with subdivision two of section seven hundred fifty-five of this title calling for a referendum on the proposed consolidation by the electors in each of the entities and set a date for such referendum.

HISTORY:

Add, L 2009, ch 74, § 2, eff March 21, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

§ 18. Savings clause. Notwithstanding the repeal or amendment of any law by this act, nothing in this act shall be construed to impair the consolidation or dissolution of any local government entity pursuant to any such repealed or amended law if there was commenced in or for such local government entity prior to the effective date of this act a consolidation or dissolution proceeding pursuant to such law, in which event the provisions of such former law shall govern such proceeding as though such former law had not been repealed hereby.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

42 Am Jur 2d, Initiative and Referendum §§ 1–40.

56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 74, 75.

§ 758. Conduct of referendum

1. A referendum required by sections [section]* seven hundred fifty-five or seven hundred fifty-seven of this title shall be placed before the electors of each of the local government entities to be consolidated at a special election to be held not less than sixty or more than ninety days after the enactment of a resolution calling for such referendum, provided, however, that in cases where a town or village general election falls within such period, the question may be considered during a town or village general election.

2. The referendum may be held in each local government entity on the same day, or on different days, however, not more than twenty days apart.

3. Notice of the referendum shall be given to the electors of each local government entity to be consolidated by publication in a newspaper having a general circulation within the boundaries of each entity at least once a week for four consecutive weeks immediately prior to the referendum. The notice shall include, but not be limited to:

(a) a summary of the contents of the resolution and joint consolidation agreement or petition for consolidation, as the case may be;

(b) a statement as to where may be examined a copy of the resolution and joint consolidation agreement or petition for consolidation, as the case may be;

(c) the names of the local government entities to be consolidated and a description of their territory;

(d) with respect to a resolution calling for a referendum under section seven hundred fifty-five of this title only, the name of the proposed consolidated local government entity;

(e) the time and place or places at which the referendum will be held; and

(f) such other matters as may be necessary to call, provide for and give notice of the referendum and to provide for the conduct thereof and the canvass of the returns thereupon.

4. The referendum question placed before the electors of each local government entity to be consolidated shall be in a form reading substantially as follows:

"Shall (insert type and name of local government entity) be consolidated with (insert type and name of local government entity or entities)?

YES

NO "

5. In any referendum held pursuant to this title, each local government entity to be consolidated shall bear only the costs of holding such referendum in its respective entity and shall not be required to bear the costs of a referendum held in any other entity.

6. In any referendum held pursuant to this title, and except as otherwise specified herein, the referendum shall be conducted in the same manner as other municipal elections or referendums for the local government entities to be consolidated.

HISTORY:

Add, L 2009, ch 74, § 2, eff March 21, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

§ 18. Savings clause. Notwithstanding the repeal or amendment of any law by this act, nothing in this act shall be construed to impair the consolidation or dissolution of any local government entity pursuant to any such repealed or amended law if there was commenced in or for such local government entity prior to the effective date of this act a consolidation or dissolution proceeding pursuant to such law, in which event the provisions of such former law shall govern such proceeding as though such former law had not been repealed hereby.

§ 759. Canvassing of vote; moratorium on further referendum

1. In any referendum held pursuant to this title, the ballots cast shall be counted, returns made and canvassed and results certified in the same manner as other municipal elections or referendums for the local government entities to be consolidated.

2. Consolidation shall not take effect unless a majority of the electors voting in each local government entity to be consolidated vote in favor of consolidation. If in any one of the entities such a majority vote does not result, the referendum shall fail and consolidation shall not take effect.

3. If consolidation is approved by a majority of the electors voting in each local government entity to be consolidated, certificates of such result shall be immediately filed with the secretary of state and with the clerks of the entities and county in which any part of the entities is situated.

4. If the referendum shall fail, the consolidation process specified by this title shall not be initiated for the same purpose within four years of the date of such referendum. This subdivision, however, does not apply to a permissive referendum conducted

*The bracketed word has been inserted by the Publisher.

pursuant to section seven hundred sixty-three of this title.

HISTORY:

Add, L 2009, ch 74, § 2, eff March 21, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

§ 18. Savings clause. Notwithstanding the repeal or amendment of any law by this act, nothing in this act shall be construed to impair the consolidation or dissolution of any local government entity pursuant to any such repealed or amended law if there was commenced in or for such local government entity prior to the effective date of this act a consolidation or dissolution proceeding pursuant to such law, in which event the provisions of such former law shall govern such proceeding as though such former law had not been repealed hereby.

§ 760. Duty to approve proposed elector initiated consolidation plan

1. In the case of a proposed consolidation of local government entities properly initiated by petition of electors pursuant to section seven hundred fifty-seven of this title, if a majority of the electors voting in a referendum held in each of the local government entities to be consolidated vote in favor of consolidation, the entities' governing body or bodies shall meet within thirty days after certification of the favorable vote and, within one hundred eighty days of such meeting, prepare and approve by resolution a proposed elector initiated consolidation plan.

2. The proposed elector initiated consolidation plan shall include:

(a) the name of each local government entity to be consolidated;

(b) the name of what will be the consolidated local government entity, which name shall be such as to distinguish it from the name of any other like unit of government in the state of New York (except the name of any one of the entities to be consolidated);

(c) the rights, duties and obligations of the consolidated local government entity;

(d) the territorial boundaries of the consolidated local government entity;

(e) the type and/or class of the consolidated local government entity;

(f) the governmental organization of the consolidated local government entity insofar as it concerns elected and appointed officials and public employees, along with a transitional plan and schedule for elections and appointments of officials;

(g) a fiscal estimate of the cost of and savings which may be realized from consolidation;

(h) each entity's assets, including, but not limited to, real and personal property, and the fair value thereof in current money of the United States;

(i) each entity's liabilities and indebtedness, bonded and otherwise, and the fair value thereof in current money of the United States;

(j) terms for the disposition of existing assets, liabilities and indebtedness of each local government entity, either jointly, separately or in certain defined proportions;

(k) terms for the common administration and uniform enforcement of local laws, ordinances, resolutions, orders and the like, within the consolidated local government entity, consistent with section seven hundred sixty-nine of this title;

(*l*) the effective date of the consolidation; and

(m) the time and place or places for the public hearing or hearings on such proposed elector initiated consolidation plan pursuant to section seven hundred sixty-two of this title.

HISTORY:

Add, L 2009, ch 74, § 2, eff March 21, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

§ 18. Savings clause. Notwithstanding the repeal or amendment of any law by this act, nothing in this act shall be construed to impair the consolidation or dissolution of any local government entity pursuant to any such repealed or amended law if there was commenced in or for such local government entity prior to the effective date of this act a consolidation or dissolution proceeding pursuant to such law, in which event the provisions of such former law shall govern such proceeding as though such former law had not been repealed hereby.

§ 761. Publication of proposed elector initiated consolidation plan

No later than five business days after approving a proposed elector initiated consolidation plan pursuant to section seven hundred sixty of this title, the governing body or bodies of the local government entities to be consolidated shall:

1. cause a copy of the proposed elector initiated consolidation plan, along with a descriptive summary thereof, to be displayed and readily accessible to the public for inspection in a public place or places within each entity;

2. cause the proposed elector initiated consolidation plan, along with a descriptive summary thereof and a reference to the public place or places within each entity where a copy thereof may be examined, to be displayed on a website maintained by each entity or otherwise on a website maintained by the village, town and/or county in which the entities are located; and

3. arrange to be published a descriptive summary of the proposed elector initiated consolidation plan and a reference to the public place or places within the entities where a copy thereof may be examined, at least once each week for four successive weeks, in a newspaper having a general circulation within each entity.

HISTORY:

Add, L 2009, ch 74, § 2, eff March 21, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

§ 18. Savings clause. Notwithstanding the repeal or amendment of any law by this act, nothing in this act shall be construed to impair the consolidation or dissolution of any local government entity pursuant to any such repealed or amended law if there was commenced in or for such local government entity prior to the effective date of this act a consolidation or dissolution proceeding pursuant to such law, in which event the provisions of such former law shall govern such proceeding as though such former law had not been repealed hereby.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

42 Am Jur 2d, Initiative and Referendum § 40.

56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 74, 75.

§ 762. Public hearings on proposed elector initiated consolidation plan

1. The governing body or bodies of the local government entities to be consolidated shall set a time and place or places for one or more public hearings on the proposed elector initiated consolidation plan. The hearing or hearings shall be held no less than thirty-five days and no more than ninety days after the proposed elector initiated consolidation plan is approved pursuant to section seven hundred sixty of this title. The hearing or hearings may be held jointly or separately by the governing body or bodies of the entities. Any interested person shall be given a reasonable opportunity to be heard on any aspect of the proposed consolidation.

2. The public hearing or hearings shall be held on notice of at least ten days, but not more than twenty days, published in a newspaper or newspapers having general circulation within each local government entity to be consolidated and displayed on a website maintained by each entity or otherwise on a website maintained by the village, town and/or county in which the entities are located. The notice of the hearing or hearings shall provide a descriptive summary of the proposed elector initiated consolidation plan and a reference to the public place or places within the entities where a copy of such agreement may be examined.

3. After completion of the final hearing, the governing body or bodies of the local government entities to be consolidated may amend the proposed elector initiated consolidation plan, provided that the amended version complies with the provisions of subdivision two of section seven hundred sixty of this title and is publicized pursuant to subdivision four of this section. The entities' governing body or bodies must approve a final version of the elector initiated consolidation plan within sixty days of such final hearing.

4. No later than five business days after amending the proposed elector initiated consolidation plan, the governing body or bodies of the local government entities to be consolidated shall:

(a) cause a copy of the amended version of the proposed elector initiated consolidation plan, along with a descriptive summary thereof, to be displayed and readily accessible to the public for inspection in a public place or places within each entity; and

(b) cause the amended version of the proposed elector initiated consolidation plan, along with a descriptive summary thereof and a reference to the public place or places within each entity where a copy thereof may be examined, to be displayed on a website maintained by each entity or otherwise on a website maintained by the village, town and/or county in which the entities are located.

HISTORY:

Add, L 2009, ch 74, § 2, eff March 21, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

§ 18. Savings clause. Notwithstanding the repeal or amendment of any law by this act, nothing in this act shall be construed to impair the consolidation or dissolution of any local government entity pursuant to any such repealed or amended law if there was commenced in or for such local government entity prior to the effective date of this act a consolidation or dissolution proceeding pursuant to such law, in which event the provisions of such former law shall govern such proceeding as though such former law had not been repealed hereby.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

42 Am Jur 2d, Initiative and Referendum § 40.

56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 74, 75.

§ 763. Effective date of elector initiated consolidation plan; permissive referendum

1. Local government entities consolidated pursuant to an elector initiated consolidated plan shall continue to be governed as before consolidation until the effective date of the consolidation specified in such plan, which date shall be no less than forty-five days after final approval of such plan pursuant to subdivision three of section seven hundred sixty-two or subdivision four of section seven hundred sixty-four of this title.

2. Notwithstanding subdivision one of this section, the elector initiated consolidation plan shall not take effect if, no later than forty-five days after final approval thereof pursuant to subdivision three of section seven hundred sixty-two or subdivision four of section seven hundred sixty-four of this title, electors of a local government entity to be consolidated pursuant to such plan shall:

(a) file an original petition, containing not less than the number of signatures provided for in subdivision three of this section, seeking a referendum on the question whether the elector initiated consolidation plan shall take effect, with the clerk of the town in which the entity or the greater portion of its territory is located, except that if the entity is a village the original petition of electors from the village shall be filed with the clerk of the village; and

(b) thereafter less than a majority of the electors in the entity vote in the affirmative on such question at a referendum.

3. The petition shall be circulated, signed and authenticated in substantial compliance with the provisions of section seven hundred fifty-seven of this title, shall contain the signatures of at least twenty-five percent of the number of electors or fifteen thousand electors, whichever is less, in the local government entity to be consolidated, and shall be accompanied by a cover sheet containing the name, address and telephone number of an individual who signed the petition and who will serve as a contact person.

4. Within ten days of the filing of the petition seeking a referendum on whether the elector initiated dissolution plan shall take effect, the clerk with whom the petition was filed shall make a final determination regarding the sufficiency of the number of signatures on the petition and provide timely written notice of such determination to the contact person named in the cover sheet accompanying the petition. The contact person or any individual who signed the petition may seek judicial review of such determination in a proceeding pursuant to article seventy-eight of the civil practice law and rules. Upon the clerk's determination that the petition contains no less than the required number of signatures, the governing body of the local government entity to which such petition applies shall within thirty days enact a resolution calling for a referendum by the electors of such entity on the question whether to approve the elector initiated consolidation plan and set a date for such referendum in accordance with subdivision five of this section.

5. The referendum on the question whether the elector initiated consolidation plan shall take effect shall be submitted at a special election to be held not less than sixty or more than ninety days after enactment of a resolution pursuant to subdivision four of this section, provided, however, that in cases where a town or village general election falls within such period, the referendum question may be considered during a town or village general election.

6. Notice of the referendum shall be given to the electors of the local government entity to which the petition applies by publication in a newspaper having a general circulation within the boundaries of the entity at least once a week for four consecutive weeks immediately prior to the referendum. The notice shall include, but not be limited to:

(a) a summary of the contents of the resolution and elector initiated consolidation plan;

(b) a statement as to where may be examined a copy of the resolution and elector initiated consolidation plan;

(c) the time and place or places at which the referendum will be held, in accordance with subdivision five of this section; and

(d) such other matters as may be necessary to call, provide for and give notice of the referendum and to provide for the conduct thereof and the canvass of the returns thereupon.

7. In a referendum held pursuant to this section, the referendum question shall be placed before the electors of the local government entity to which the petition applies in a form reading substantially as follows:

"The voters of the (insert type and name of each local government entity to which the consolidation plan applies) having previously voted to consolidate, shall the elector initiated consolidation plan take effect?

YES

NO"

8. The elector initiated consolidation plan shall not take effect unless a majority of the electors voting in the local government entity to which the petition applies vote in favor of such plan taking effect. If such a majority vote does not result, the referendum shall fail and consolidation shall not take effect.

HISTORY:

Add, L 2009, ch 74, § 2, eff March 21, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

§ 18. Savings clause. Notwithstanding the repeal or amendment of any law by this act, nothing in this act shall be construed to impair the consolidation or dissolution of any local government entity pursuant to any such repealed or amended law if there was commenced in or for such local government entity prior to the effective date of this act a consolidation or dissolution proceeding pursuant to such law, in which event the provisions of such former law shall govern such proceeding as though such former law had not been repealed hereby.

§ 764. Court-ordered consolidation; mediation; judicial hearing officer

1. If the governing body or bodies of local government entities with a duty to prepare and approve a proposed elector initiated consolidation plan pursuant to section seven hundred sixty of this title fail to prepare and approve such plan or are otherwise unable or unwilling to accomplish and complete the consolidation pursuant to the provisions of this title, then any five electors who signed the petition seeking consolidation may commence a special proceeding against the entities pursuant to article seventy-eight of the civil practice law and rules, in the supreme court within the judicial district in which the consolidated local government entity or the greater portion of its territory will be located, to compel compliance with the provisions of this article.

2. If the court finds that the governing body or bodies attempted in good faith to prepare and approve a proposed elector initiated consolidation plan but were nevertheless unsuccessful, then the court may refer such matter to mediation pursuant to law, with costs of such mediation to be borne by the entities in such proportion as the court shall determine based on appropriate factors including population and the good faith efforts of the respective entities. If the governing body or bodies thereupon

prepare and approve a proposed elector initiated consolidation plan conforming to the requirements of subdivision two of section seven hundred sixty of this title, then the provisions of sections seven hundred sixty-one, seven hundred sixty-two and seven hundred sixty-three of this title shall apply as if the governing body or bodies had proposed such plan without the benefit of court-ordered mediation.

3. In all other cases, if the petitioners in such special proceeding shall substantially prevail, then the court shall issue an injunction ordering the governing body or bodies of the local government entities to comply with the applicable provisions of this article. If the governing body or bodies shall violate the injunction, then the court shall appoint a judicial hearing officer pursuant to article forty-three of the civil practice law and rules to hear and determine an elector initiated consolidation plan for the entities that complies with the provisions of subdivision two of section seven hundred sixty of this title.

4. The final determination of the judicial hearing officer shall constitute final approval of the elector initiated consolidation plan and provide such plan takes effect forty five [forty-five]* days after the filing of such determination with the clerk of the court, unless a petition for a permissive referendum is properly filed pursuant to section seven hundred sixty-three of this title.

5. In any proceeding pursuant to this section in which the petitioners substantially prevail, the costs of such proceeding, including the costs of any judicial hearing officer appointed pursuant to subdivision three of this section, shall be borne by the local government entities proportionately, at the rate provided for in article twenty-two of the judiciary law and regulations promulgated pursuant thereto based on appropriate factors, including, but not limited to, population and the court's findings regarding the good faith efforts of the respective entities.

HISTORY:

Add, L 2009, ch 74, § 2, eff March 21, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

§ 18. Savings clause. Notwithstanding the repeal or amendment of any law by this act, nothing in this act shall be construed to impair the consolidation or dissolution of any local government entity pursuant to any such repealed or amended law if there was commenced in or for such local government entity prior to the effective date of this act a consolidation or dissolution proceeding pursuant to such law, in which event the provisions of such former law shall govern such proceeding as though such former law had not been repealed hereby.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 74, 75.

18 Am Jur Pl & Pr Forms, Rev, Municipal Corporations, Counties, and Other Political Subdivisions, § 23.

§ 765. General effect of consolidation

1. On and after the effective date of a consolidation, the consolidating local government entities shall be treated and considered for all purposes as one local government entity, under the name and on the terms and conditions set forth in the joint consolidation agreement or the elector initiated consolidation plan, as the case may be.

2. All rights, privileges and franchises of each component local government entity and all assets, real and personal property, books, records, papers, seals and equipment, as well as other things in action, belonging to each component local government entity shall be deemed as transferred to and vested in the consolidated local government entity without further act or deed.

3. All property, rights-of-way and other interests shall be as effectually the property of the consolidated local government entity as they were of the component local government entities prior to their consolidation. The title to real estate, either by deed or otherwise, under the laws of the state of New York vested in any of the component local government entities shall not be deemed to revert or be in any way impaired by reason of the consolidation.

4. The consolidated local government entity shall in all respects be subject to all the obligations and liabilities imposed and shall possess all the rights, powers, and privileges vested by law in other similar entities.

5. Upon the effective date of the consolidation, the joint consolidation agreement or the elector initiated consolidation plan, as the case may be, shall be subordinate in all respects to the contract rights of all holders of any securities or obligations of the local government entities outstanding at the effective date of the consolidation.

6. If a joint consolidation agreement or elector initiated consolidation plan provides for the dissolution of a local justice court, all court records of such court shall be deposited with a justice court judge to be designated by the administrative judge of the judicial district within which the dissolving justice court is located. The designated justice court judge shall have authority to execute and complete all unfinished business.

HISTORY:

Add, L 2009, ch 74, § 2, eff March 21, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

§ 18. Savings clause. Notwithstanding the repeal or amendment of any law by this act, nothing in this act shall be construed to impair the consolidation or dissolution of any local government entity pursuant to any such repealed or

*The bracketed word has been inserted by the Publisher.

amended law if there was commenced in or for such local government entity prior to the effective date of this act a consolidation or dissolution proceeding pursuant to such law, in which event the provisions of such former law shall govern such proceeding as though such former law had not been repealed hereby.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 84, 85, 86.

§ 766. Election and appointment of officials

New officials of the consolidated local government entity required to be elected shall take office on the first Monday of January following the election designated in the joint consolidation agreement or elector initiated consolidation plan, as the case may be. At such election, the necessary officials of the consolidated local government entity shall be elected in accordance with the terms of the general law affecting entities of the kind or class of the consolidated local government entity. Except as otherwise specified in the joint consolidation agreement or elector initiated consolidation plan, all appointive officials of the consolidated local government entity thereafter shall be appointed by the individual or entity upon whom the power to appoint such officials is conferred by the terms of the general law affecting entities of the kind or class of the consolidated local government entity. Successors in office for such elected or appointed positions shall thereafter be elected or appointed at the time, in the manner and for the terms provided by the general law affecting entities of the kind or class of the consolidated local government entity.

HISTORY:

Add, L 2009, ch 74, § 2, eff March 21, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

§ 18. Savings clause. Notwithstanding the repeal or amendment of any law by this act, nothing in this act shall be construed to impair the consolidation or dissolution of any local government entity pursuant to any such repealed or amended law if there was commenced in or for such local government entity prior to the effective date of this act a consolidation or dissolution proceeding pursuant to such law, in which event the provisions of such former law shall govern such proceeding as though such former law had not been repealed hereby.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 74, 75.

§ 767. Effect of transition on employees

Except as otherwise provided by law and except for those officials and employees protected by tenure of office, civil service provisions or collective bargaining agreement, upon the effective date of consolidation, all appointive offices and positions then existing in all component local government entities involved in the consolidation shall be subject to the terms of the joint consolidation agreement or elector initiated consolidation plan, as the case may be. Such agreement or plan may provide for instances in which there is duplication of positions and for other matters such as varying length of employee contracts, different civil service regulations in the constituent entities and differing ranks and position classifications for similar positions.

HISTORY:

Add, L 2009, ch 74, § 2, eff March 21, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

§ 18. Savings clause. Notwithstanding the repeal or amendment of any law by this act, nothing in this act shall be construed to impair the consolidation or dissolution of any local government entity pursuant to any such repealed or amended law if there was commenced in or for such local government entity prior to the effective date of this act a consolidation or dissolution proceeding pursuant to such law, in which event the provisions of such former law shall govern such proceeding as though such former law had not been repealed hereby.

§ 768. Debts, liabilities and obligations

1. All valid and lawful debts and liabilities existing against a consolidated local government entity, or which may thereafter arise or accrue against the consolidated local government entity, which but for consolidation would be valid and lawful debts or liabilities against one or more of the component local government entities, shall be deemed and taken to be like debts against or liabilities of the consolidated local government entity and shall accordingly be defrayed and answered to by it to the same extent, and no further than, the component local government entities would have been bound if no consolidation had taken place.

2. The rights of creditors and all liens upon the property of any of the component local government entities of a consolidation shall be preserved unimpaired. The respective component entities shall be deemed to continue in existence to preserve such rights and liens, and all debts, liabilities and duties of any of the component entities shall thenceforth attach to the consolidated local government entity and be enforced against it to the same extent as if such debts, liabilities and duties had been incurred or contracted by the consolidated local government entity.

3. All bonds, contracts and obligations of the component entities which exist as legal obligations shall be deemed like obligations of the consolidated local government entity, and all such obligations as are authorized or required to be issued or entered into shall be issued or entered into by and in the name of the consolidated local government entity.

HISTORY:

Add, L 2009, ch 74, § 2, eff March 21, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

§ 18. Savings clause. Notwithstanding the repeal or amendment of any law by this act, nothing in this act shall be construed to impair the consolidation or dissolution of any local government entity pursuant to any such repealed or amended law if there was commenced in or for such local government entity prior to the effective date of this act a consolidation or dissolution proceeding pursuant to such law, in which event the provisions of such former law shall govern such proceeding as though such former law had not been repealed hereby.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 84, 85, 86.

§ 769. Effect on existing laws; transition period

Subject to the provisions of the joint consolidation agreement or elector initiated consolidation plan, as the case may be, pertaining to the common administration and uniform enforcement of laws in the consolidated local government entity, all local laws, ordinances, rules or regulations of the component local government entities in effect on the effective date of consolidation shall remain in full force and effect within the respective areas of the component local government entities that existed prior to consolidation, insofar as the local laws, ordinances, rules or regulations are not repugnant to law, until repealed or amended. As soon as practicable but not later than two years after the effective date of consolidation, the governing body of the consolidated local government entity shall adopt new local laws, ordinances, rules and regulations as necessary to redress conflicts and otherwise redress ambiguities arising among the then-existing laws, ordinances, rules or regulations for the common administration and uniform governance of the consolidated local government entity.

HISTORY:

Add, L 2009, ch 74, § 2, eff March 21, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

§ 18. Savings clause. Notwithstanding the repeal or amendment of any law by this act, nothing in this act shall be construed to impair the consolidation or dissolution of any local government entity pursuant to any such repealed or amended law if there was commenced in or for such local government entity prior to the effective date of this act a consolidation or dissolution proceeding pursuant to such law, in which event the provisions of such former law shall govern such proceeding as though such former law had not been repealed hereby.

§ 770. Effect on actions and proceedings

1. Suits may be brought and maintained against a consolidated local government entity in any of the courts of the state in the same manner as against any other local government entity.

2. In any action or proceeding pending on the effective date of consolidation to which any component local government entity is a party, the consolidated local government entity may be substituted in its place and the action or proceeding may be prosecuted to judgment as if consolidation had not taken place.

HISTORY:

Add, L 2009, ch 74, § 2, eff March 21, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

§ 18. Savings clause. Notwithstanding the repeal or amendment of any law by this act, nothing in this act shall be construed to impair the consolidation or dissolution of any local government entity pursuant to any such repealed or amended law if there was commenced in or for such local government entity prior to the effective date of this act a consolidation or dissolution proceeding pursuant to such law, in which event the provisions of such former law shall govern such proceeding as though such former law had not been repealed hereby.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 85, 86.

§ 771. Registration of electors

No new registration of electors shall be necessary in case of consolidation, but all elector registrations of the component local government entities shall be transferred to the proper registration books of the consolidated local government entity, and new registrations shall be made as provided by law as if no consolidation had taken place.

HISTORY:

Add, L 2009, ch 74, § 2, eff March 21, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

§ 18. Savings clause. Notwithstanding the repeal or amendment of any law by this act, nothing in this act shall be construed to impair the consolidation or dissolution of any local government entity pursuant to any such repealed or amended law if there was commenced in or for such local government entity prior to the effective date of this act a consolidation or dissolution proceeding pursuant to such law, in which event the provisions of such former law shall govern such proceeding as though such former law had not been repealed hereby.

§ 772. Determination of rights

If any right, title, interest or claim shall arise out of any consolidation or by reason thereof that is not determinable by reference to the provisions of this article, by the joint consolidation agreement or elector initiated consolidation plan, as the case may be, or otherwise under the laws of this state, then the governing body of the consolidated local government

entity may provide therefore [therefor][*] in a manner conforming to law.

HISTORY:
Add, L 2009, ch 74, § 2, eff March 21, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

§ 18. Savings clause. Notwithstanding the repeal or amendment of any law by this act, nothing in this act shall be construed to impair the consolidation or dissolution of any local government entity pursuant to any such repealed or amended law if there was commenced in or for such local government entity prior to the effective date of this act a consolidation or dissolution proceeding pursuant to such law, in which event the provisions of such former law shall govern such proceeding as though such former law had not been repealed hereby.

TITLE 3 Dissolution of Local Government Entities

HISTORY:
Add, L 2009, ch 74, § 2, eff March 21, 2010 (see 2009 note below).

§ 773. Commencing the proceeding

1. A local government entity other than a town may be dissolved and terminated by the procedure described in this title.

2. Dissolution proceedings may be commenced by:

(a) a resolution of the governing body of the local government entity to be dissolved endorsing a proposed dissolution plan; or

(b) elector initiative.

HISTORY:
Add, L 2009, ch 74, § 2, eff March 21, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

§ 18. Savings clause. Notwithstanding the repeal or amendment of any law by this act, nothing in this act shall be construed to impair the consolidation or dissolution of any local government entity pursuant to any such repealed or amended law if there was commenced in or for such local government entity prior to the effective date of this act a consolidation or dissolution proceeding pursuant to such law, in which event the provisions of such former law shall govern such proceeding as though such former law had not been repealed hereby.

NOTES TO DECISIONS

1. In general

Appellate court properly affirmed the trial court's dismissal of the electors' referendum petition challenging the dissolution of the existing fire protection district (FPD) and the creation of two new FPDs because the town board fully and properly complied with all the requirements of the New N.Y. Government Reorganization and Citizen Empowerment Act in dissolving the existing FPD, no wind down was necessary as it had no employees, assets, or liabilities, the town board was empowered to create the new FPDs, and its decision to deliver the services formerly provided by the existing FPD by creating two new FPDs was a proper exercise of that authority. Matter of Waite v Town of Champion, 31 N.Y.3d 586, 106 N.E.3d 1167, 81 N.Y.S.3d 807, 2018 N.Y. LEXIS 1544 (N.Y. 2018).

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 82.

§ 774. Proposed dissolution plan

1. The governing body of a local government entity may, by resolution, endorse a proposed dissolution plan for the purpose of commencing dissolution proceedings under this article.

2. The proposed dissolution plan shall specify:

(a) the name of the local government entity to be dissolved;

(b) the territorial boundaries of the entity;

(c) the type and/or class of the entity;

(d) a fiscal estimate of the cost of dissolution;

(e) any plan for the transfer or elimination of public employees;

(f) the entity's assets, including but not limited to real and personal property, and the fair value thereof in current money of the United States;

(g) the entity's liabilities and indebtedness, bonded and otherwise, and the fair value thereof in current money of the United States;

(h) any agreements entered into with the town or towns in which the entity is situated in order to carry out the dissolution;

(i) the manner and means by which the residents of the entity will continue to be furnished municipal services following the entity's dissolution;

(j) terms for the disposition of the entity's assets and the disposition of its liabilities and indebtedness, including the levy and collection of the necessary taxes and assessments therefor;

(k) findings as to whether any local laws, ordinances, rules or regulations of the entity shall remain in effect after the effective date of the dissolution or shall remain in effect for a period of time other than as provided by section seven hundred eighty-nine of this title;

(*l*) the effective date of the proposed dissolution;

(m) the time and place or places for a public hearing or hearings on the proposed dissolution plan pursuant to section seven hundred seventy-six of this title; and

(n) any other matter desirable or necessary to carry out the dissolution.

HISTORY:
Add, L 2009, ch 74, § 2, eff March 21, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

§ 18. Savings clause. Notwithstanding the repeal or amendment of any law by this act, nothing in this act shall be

[*]The bracketed word has been inserted by the Publisher.

construed to impair the consolidation or dissolution of any local government entity pursuant to any such repealed or amended law if there was commenced in or for such local government entity prior to the effective date of this act a consolidation or dissolution proceeding pursuant to such law, in which event the provisions of such former law shall govern such proceeding as though such former law had not been repealed hereby.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 82.

§ 775. Publication of proposed dissolution plan

No later than five business days after commencement of dissolution proceedings pursuant to section seven hundred seventy-four of this title, the governing body of the local government entity to be dissolved shall:

1. cause a copy of the proposed dissolution plan, along with a descriptive summary thereof, to be displayed and readily accessible to the public for inspection in a public place or places within the entity;

2. cause the proposed dissolution plan, along with a descriptive summary thereof and a reference to the public place or places within the entity where a copy thereof may be examined, to be displayed on a website maintained by the entity or otherwise on a website maintained by the village, town and/or county in which the entity is located;

3. arrange to be published a descriptive summary of the proposed dissolution plan and a reference to the public place or places within the entity where a copy thereof may be examined, at least once each week for four successive weeks in a newspaper having a general circulation within the entity; and

4. in the case of a proposed dissolution of a village, the governing body of the village shall cause the proposed dissolution plan to be mailed by certified or registered mail to the supervisor of the town or towns in which the village is situated.

HISTORY:

Add, L 2009, ch 74, § 2, eff March 21, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

§ 18. Savings clause. Notwithstanding the repeal or amendment of any law by this act, nothing in this act shall be construed to impair the consolidation or dissolution of any local government entity pursuant to any such repealed or amended law if there was commenced in or for such local government entity prior to the effective date of this act a consolidation or dissolution proceeding pursuant to such law, in which event the provisions of such former law shall govern such proceeding as though such former law had not been repealed hereby.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 82.

§ 776. Public hearings on proposed dissolution plan

1. The governing body of the local government entity to be dissolved shall set a time and place or places for one or more public hearings on the proposed dissolution plan. The hearing or hearings shall be held no less than thirty-five days and no more than ninety days after commencement of dissolution proceedings pursuant to section seven hundred seventy-four of this title. Any interested person shall be given a reasonable opportunity to be heard on any aspect of the proposed dissolution.

2. The public hearing or hearings shall be held on notice of at least ten days, but not more than twenty days, published in a newspaper or newspapers having general circulation within the local government entity to be dissolved and displayed on a website maintained by the entity or otherwise on a website maintained by the village, town and/or county in which the entity is located. The notice of the hearing or hearings shall provide a descriptive summary of the proposed dissolution plan and a reference to the public place or places within the entity where a copy of such plan may be examined.

3. After completion of the final hearing, the governing body of the local government entity to be dissolved may amend the proposed dissolution plan, provided that the amended version complies with the provisions of subdivision two of section seven hundred seventy-four of this title and is publicized pursuant to subdivision four of this section, and/or approve a final version of the dissolution plan, or decline to proceed further with dissolution proceedings. Any approval by the governing body of a final version of the dissolution plan must occur within one hundred eighty days of the final hearing.

4. No later than five business days after amending the proposed dissolution plan, the governing body of the entity to be dissolved shall:

(a) cause a copy of the amended version of the proposed dissolution plan, along with a descriptive summary thereof, to be displayed and readily accessible to the public for inspection in a public place or places within the entity; and

(b) cause the amended version of the proposed dissolution plan, along with a descriptive summary thereof and a reference to the public place or places within the entity where a copy thereof may be examined, to be displayed on a website maintained by the entity or otherwise on a website maintained by the village, town and/or county in which the entity is located.

HISTORY:

Add, L 2009, ch 74, § 2, eff March 21, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

§ 18. Savings clause. Notwithstanding the repeal or amendment of any law by this act, nothing in this act shall be construed to impair the consolidation or dissolution of any local government entity pursuant to any such repealed or amended law if there was commenced in or for such local

government entity prior to the effective date of this act a consolidation or dissolution proceeding pursuant to such law, in which event the provisions of such former law shall govern such proceeding as though such former law had not been repealed hereby.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 82.

§ 777. Referendum resolution for dissolution of villages

1. If a dissolution plan calls for the dissolution of a village, then contemporaneous with the final approval of the dissolution plan pursuant to subdivision three of section seven hundred seventy-six of this title, the governing body of the village shall enact a resolution calling for a referendum on the proposed dissolution by the electors in the village.

2. The resolution calling for the referendum on the proposed dissolution shall:

(a) provide (i) the name of the village to be dissolved; and (ii) the date for the referendum, in accordance with subdivision one of section seven hundred eighty of this title;

(b) state the substance of the question to be submitted to the electors; and

(c) set forth such other matters as may be necessary to call, provide for and give notice of the referendum and to provide for the conduct thereof and the canvass of the returns thereupon.

3. The resolution calling for the referendum on the proposed dissolution shall have attached to it the final approved version of the dissolution plan.

HISTORY:

Add, L 2009, ch 74, § 2, eff March 21, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

§ 18. Savings clause. Notwithstanding the repeal or amendment of any law by this act, nothing in this act shall be construed to impair the consolidation or dissolution of any local government entity pursuant to any such repealed or amended law if there was commenced in or for such local government entity prior to the effective date of this act a consolidation or dissolution proceeding pursuant to such law, in which event the provisions of such former law shall govern such proceeding as though such former law had not been repealed hereby.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

42 Am Jur 2d, Initiative and Referendum §§ 18 et seq.

56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 82.

§ 778. Effective date of dissolution plan

A local government entity dissolved pursuant to a dissolution plan shall continue to be governed as before dissolution until the effective date of the dissolution specified in the dissolution plan; provided, however, that no dissolution plan for a village shall take effect unless approved by a majority of electors of the village at a referendum called through a resolution enacted pursuant to section seven hundred seventy-seven of this title.

HISTORY:

Add, L 2009, ch 74, § 2, eff March 21, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

§ 18. Savings clause. Notwithstanding the repeal or amendment of any law by this act, nothing in this act shall be construed to impair the consolidation or dissolution of any local government entity pursuant to any such repealed or amended law if there was commenced in or for such local government entity prior to the effective date of this act a consolidation or dissolution proceeding pursuant to such law, in which event the provisions of such former law shall govern such proceeding as though such former law had not been repealed hereby.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

42 Am Jur 2d, Initiative and Referendum §§ 18 et seq.

56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 82.

§ 779. Initiative of electors seeking dissolution

1. The electors of a local government entity may commence a dissolution proceeding by filing an original petition, containing not less than the number of signatures provided for in subdivision two of this section and in the form provided for in subdivision three of this section, with the clerk of the town in which the entity or the greater portion of its territory is located, except that if the entity is a village the original petition of electors from the village shall be filed with the clerk of the village. Accompanying the filed petition shall be a cover sheet containing the name, address and telephone number of an individual who signed the petition and who will serve as a contact person.

2. The petition shall contain the signatures of at least ten percent of the number of electors or five thousand electors, whichever is less, in the local government entity to be dissolved; provided, however, that where the local government entity to be dissolved contains five hundred or fewer electors, the petition shall contain the signatures of at least twenty percent of the number of electors. No signature on a petition is valid unless it is an original signature of an elector.

3. The petition shall substantially comply with, and be circulated in, the following form:

PETITION FOR LOCAL GOVERNMENT DISSOLUTION

We, the undersigned, electors and legal voters of (insert type of local government entity — e.g., town, village or district) of (insert name of local government entity), New York, qualified to vote at the next general or special election, respectfully petition that there be submitted to the electors of (insert type and name of local government entity proposed to be dissolved), for their approval or rejection at a refer-

endum held for that purpose, a proposal to dissolve and terminate (insert type and name of local government entity).

In witness whereof, we have signed our names on the dates indicated next to our signatures.

Date	Name - print name under signature	Home Address
1. _____	_____	_____
2. _____	_____	_____
3. _____	_____	_____

(On the bottom of each page of the petition, after all of the numbered signatures, insert a signed statement of a witness who is a duly qualified elector of the state of New York. Such a statement shall be accepted for all purposes as the equivalent of an affidavit, and if it contains a material false statement, shall subject the person signing it to the same penalties as if he or she has been duly sworn. The form of such statement shall be substantially as follows:

I, (insert name of witness), state that I am a duly qualified voter of the state of New York. Each of the persons that have signed this petition sheet containing (insert number) signatures, have signed their names in my presence on the dates indicated above and identified themselves to be the same person who signed the sheet. I understand that this statement will be accepted for all purposes as the equivalent of an affidavit, and if it contains a materially false statement, shall subject me to the penalties of perjury.

_____ _____
Date Signature of Witness)

(In lieu of the signed statement of a witness who is a duly qualified voter of the state of New York, the following statement signed by a notary public or a commissioner of deeds shall be accepted:

On the date indicated above before me personally came each of the electors and legal voters whose signatures appear on this petition sheet containing (insert number) signatures, who signed the petition in my presence and who, being by me duly sworn, each for himself or herself, identified himself or herself as the one and same person who signed the petition and that the foregoing information they provided was true.

_____ _____
Date Notary Public or Commissioner of Deeds)

4. An alteration or correction of information appearing on a petition's signature line, other than an un-initialed signature and date, shall not invalidate such signature.

5. In matters of form, this section shall be liberally construed, not inconsistent with substantial compliance thereto and the prevention of fraud.

6. Within ten days of the filing of the petition seeking dissolution pursuant to subdivision one of this section, the clerk with whom the petition was filed shall make a final determination regarding the sufficiency of the signatures on the petition and provide timely written notice of such determination to the contact person named in the cover sheet accompanying the petition. The contact person or any individual who signed the petition may seek judicial review of such determination in a proceeding pursuant to article seventy-eight of the civil practice law and rules.

7. Upon the clerk's determination that the petition contains not less than the number of signatures of electors required in subdivision two of this section, the governing body of the local government entity to be dissolved shall, no later than thirty days thereafter, enact a resolution in accordance with subdivision two of section seven hundred seventy-seven of this title calling for a referendum on the proposed dissolution by the electors in the entity and set a date for such referendum.

HISTORY:

Add, L 2009, ch 74, § 2, eff March 21, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

§ 18. Savings clause. Notwithstanding the repeal or amendment of any law by this act, nothing in this act shall be construed to impair the consolidation or dissolution of any local government entity pursuant to any such repealed or amended law if there was commenced in or for such local government entity prior to the effective date of this act a consolidation or dissolution proceeding pursuant to such law, in which event the provisions of such former law shall govern such proceeding as though such former law had not been repealed hereby.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

42 Am Jur 2d, Initiative and Referendum §§ 18 et seq.

56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 82.

§ 780. Conduct of referendum

1. A referendum on a proposed dissolution required by sections [section]* seven hundred seventy-seven or seven hundred seventy-nine of this title shall be placed before the electors in the local government entity to be dissolved at a special election to be held not less than sixty or more than ninety days after the enactment of a resolution calling for the referendum, provided, however, that in cases where a town or village general election falls within such period, the referendum question may be considered during a town or village general election.

2. Notice of the referendum shall be given to the electors of the local government entity to be dissolved by publication in a newspaper having a

*The bracketed word has been inserted by the Publisher.

general circulation within the boundaries of the entity at least once a week for four consecutive weeks immediately prior to the referendum. The notice shall include, but not be limited to:

(a) a summary of the contents of the resolution and dissolution plan or petition for dissolution, as the case may be;

(b) a statement as to where may be examined copies of the resolution and dissolution plan or petition for dissolution, as the case may be;

(c) the name of the local government entity to be dissolved and a statement fully describing its territory;

(d) the time and place or places at which the referendum will be held; and

(e) such other matters as may be necessary to call, provide for and give notice of the referendum and to provide for the conduct thereof and the canvass of the returns thereupon.

3. The referendum question placed before the electors of the local government entity to be dissolved shall be in a form reading substantially as follows:

"Shall (insert type and name of local government entity) be dissolved?

YES

NO"

4. In any referendum held pursuant to this title, the local government entity to be dissolved shall bear the costs associated with the conduct of such referendum.

5. In any referendum held pursuant to this title, and except as otherwise specified herein, the referendum shall be conducted in the same manner as other municipal elections or referendums for the local government entity affected by the proposed dissolution.

HISTORY:

Add, L 2009, ch 74, § 2, eff March 21, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

§ 18. Savings clause. Notwithstanding the repeal or amendment of any law by this act, nothing in this act shall be construed to impair the consolidation or dissolution of any local government entity pursuant to any such repealed or amended law if there was commenced in or for such local government entity prior to the effective date of this act a consolidation or dissolution proceeding pursuant to such law, in which event the provisions of such former law shall govern such proceeding as though such former law had not been repealed hereby.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

42 Am Jur 2d, Initiative and Referendum §§ 18 et seq.

56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 82.

§ 781. Canvassing of vote; moratorium on further referendum

1. In any referendum held pursuant to this title, the ballots cast shall be counted, returns made and canvassed and results certified in the same manner as other municipal elections or referendums for the local government entity affected by the proposed dissolution.

2. Dissolution shall not take effect unless a majority of the electors voting in the local government entity in which the referendum is held vote in favor of dissolution. If such a majority vote does not result, the referendum shall fail and dissolution shall not take effect.

3. If dissolution is approved by a majority of the electors voting in the local government entity in which the referendum is held, certificates of such result immediately shall be filed with the secretary of state and with the clerks of the local government entity or entities and county in which is situated any part of the entity to be dissolved.

4. If the referendum shall fail, the dissolution process specified by this title shall not be initiated for the local government entity within four years of the date of such referendum. This subdivision, however, does not apply to a permissive referendum conducted pursuant to section seven hundred eighty-five of this title.

HISTORY:

Add, L 2009, ch 74, § 2, eff March 21, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

§ 18. Savings clause. Notwithstanding the repeal or amendment of any law by this act, nothing in this act shall be construed to impair the consolidation or dissolution of any local government entity pursuant to any such repealed or amended law if there was commenced in or for such local government entity prior to the effective date of this act a consolidation or dissolution proceeding pursuant to such law, in which event the provisions of such former law shall govern such proceeding as though such former law had not been repealed hereby.

§ 782. Duty to approve proposed elector initiated dissolution plan

1. In the case of a proposed dissolution of a local government entity properly initiated by petition of electors pursuant to section seven hundred seventy-nine of this title, if a majority of the electors voting at a referendum vote in favor of dissolution, the entity's governing body shall meet within thirty days after certification of the favorable vote and, within one hundred eighty days of such meeting, prepare and approve a proposed elector initiated dissolution plan.

2. The proposed elector initiated dissolution plan shall specify:

(a) the name of the local government entity to be dissolved;

(b) the territorial boundaries of the entity;

(c) the type and/or class of the entity;

(d) a fiscal estimate of the cost of dissolution;

(e) any plan for the transfer or elimination of public employees;

(f) the entity's assets, including but not limited to real and personal property, and the fair value thereof in current money of the United States;

(g) the entity's liabilities and indebtedness, bonded and otherwise, and the fair value thereof in current money of the United States;

(h) any agreements entered into with the town or towns in which the entity is situated in order to carry out the dissolution;

(i) the manner and means by which the residents of the entity will continue to be furnished municipal services following the entity's dissolution;

(j) terms for the disposition of the entity's assets and the disposition of its liabilities and indebtedness, including the levy and collection of the necessary taxes and assessments therefor;

(k) findings as to whether any local laws, ordinances, rules or regulations of the entity shall remain in effect after the effective date of the dissolution or shall remain in effect for a period of time other than as provided by section seven hundred eighty-nine of this title;

(*l*) the effective date of the dissolution;

(m) the time and place or places for a public hearing or hearings on such proposed dissolution plan pursuant to section seven hundred eighty-four of this title; and

(n) any other matter desirable or necessary to carry out the dissolution.

HISTORY:

Add, L 2009, ch 74, § 2, eff March 21, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

§ 18. Savings clause. Notwithstanding the repeal or amendment of any law by this act, nothing in this act shall be construed to impair the consolidation or dissolution of any local government entity pursuant to any such repealed or amended law if there was commenced in or for such local government entity prior to the effective date of this act a consolidation or dissolution proceeding pursuant to such law, in which event the provisions of such former law shall govern such proceeding as though such former law had not been repealed hereby.

§ 783. Publication of proposed elector initiated dissolution plan

No later than five business days after approving an elector initiated dissolution plan pursuant to section seven hundred eighty-two of this title, the governing body of the local government entity to be dissolved shall:

1. cause a copy of the proposed elector initiated dissolution plan, along with a descriptive summary thereof, to be displayed and readily accessible to the public for inspection in a public place or places within the entity;

2. cause the proposed elector initiated dissolution plan, along with a descriptive summary thereof and a reference to the public place or places within the entity where a copy thereof may be examined, to be displayed on a website maintained by the entity or otherwise on a website maintained by the village, town and/or county in which the entity is located; and

3. arrange to be published a descriptive summary of the proposed elector initiated dissolution plan and a reference to the public place or places within the entity where a copy thereof may be examined, at least once each week for four successive weeks in a newspaper having a general circulation within the entity; and

4. in the case of a proposed dissolution of a village, the governing body of the village shall cause the proposed elector initiated dissolution plan to be mailed by certified or registered mail to the supervisor of the town or towns in which the village is situated.

HISTORY:

Add, L 2009, ch 74, § 2, eff March 21, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

§ 18. Savings clause. Notwithstanding the repeal or amendment of any law by this act, nothing in this act shall be construed to impair the consolidation or dissolution of any local government entity pursuant to any such repealed or amended law if there was commenced in or for such local government entity prior to the effective date of this act a consolidation or dissolution proceeding pursuant to such law, in which event the provisions of such former law shall govern such proceeding as though such former law had not been repealed hereby.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

42 Am Jur 2d, Initiative and Referendum § 40.

56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 74, 75.

§ 784. Public hearings on proposed elector initiated dissolution plan

1. The governing body of the local government entity to be dissolved shall set a time and place or places for one or more public hearings on the proposed elector initiated dissolution plan. The hearing or hearings shall be held no less than thirty-five days and no more than ninety days after the proposed elector initiated dissolution plan is approved pursuant to section seven hundred eighty-two of this title. Any interested person shall be given a reasonable opportunity to be heard on any aspect of the proposed dissolution.

2. The public hearing or hearings shall be held on notice of at least ten days, but not more than twenty days, published in a newspaper or newspapers having general circulation within the local government entity to be dissolved and displayed on a website maintained by the entity or otherwise on a website maintained by the village, town and/or county in which the entity is located. The notice of the hearing or hearings shall provide a descriptive summary of the proposed elector initiated dissolution plan, and a

reference to the public place or places within the entity where a copy of such plan may be examined.

3. After completion of the final hearing, the governing body of the local government entity to be dissolved may amend the proposed elector initiated dissolution plan, provided that the amended version complies with the provisions of subdivision two of section seven hundred eighty-two of this title and is publicized pursuant to subdivision four of this section. The governing body must approve a final version of the elector initiated dissolution plan within sixty days of such final hearing.

4. No later than five business days after amending the proposed elector initiated dissolution plan, the governing body of the local government entity to be dissolved shall:

(a) cause a copy of the amended version of the proposed elector initiated dissolution plan, along with a descriptive summary thereof, to be displayed and readily accessible to the public for inspection in a public place or places within the entity; and

(b) cause the amended version of the proposed elector initiated dissolution plan, along with a descriptive summary thereof and a reference to the public place or places within the entity where a copy thereof may be examined, to be displayed on a website maintained by the entity or otherwise on a website maintained by the village, town and/or county in which the entity is located.

HISTORY:

Add, L 2009, ch 74, § 2, eff March 21, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

§ 18. Savings clause. Notwithstanding the repeal or amendment of any law by this act, nothing in this act shall be construed to impair the consolidation or dissolution of any local government entity pursuant to any such repealed or amended law if there was commenced in or for such local government entity prior to the effective date of this act a consolidation or dissolution proceeding pursuant to such law, in which event the provisions of such former law shall govern such proceeding as though such former law had not been repealed hereby.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

42 Am Jur 2d, Initiative and Referendum § 40.

56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 74, 75.

§ 785. Effective date of elector initiated dissolution plan; permissive referendum

1. A local government entity dissolved pursuant to an elector initiated dissolution plan shall continue to be governed as before dissolution until the effective date of the dissolution specified in the elector initiated dissolution plan, which date shall be no less than forty-five days after final approval of such plan pursuant to subdivision three of section seven hundred eighty-four or subdivision three of section seven hundred eighty-six of this title.

2. Notwithstanding subdivision one of this section, the elector initiated dissolution plan shall not take effect if, no later than forty-five days after final approval of such plan pursuant to subdivision three of section seven hundred eighty-four or subdivision three of section seven hundred eighty-six of this title, electors of the local government entity to be dissolved shall:

(a) file an original petition, containing not less than the number of signatures provided for in subdivision three of this section, seeking a referendum on the question whether the elector initiated dissolution plan shall take effect, with the clerk of the town in which the entity or the greater portion of its territory is located, except that if the entity is a village the original petition of electors from the village shall be filed with the clerk of the village; and

(b) thereafter less than a majority of the electors vote in the affirmative on such question at a referendum.

3. The petition shall be circulated, signed and authenticated in substantial compliance with the provisions of section seven hundred seventy-nine of this title, shall contain the signatures of at least twenty-five percent of the number of electors or fifteen thousand electors, whichever is less, in the local government entity to be dissolved, and shall be accompanied by a cover sheet containing the name, address and telephone number of an individual who signed the petition and who will serve as a contact person.

4. Within ten days of the filing of the petition seeking a referendum on whether the elector initiated dissolution plan shall take effect, the clerk with whom the petition was filed shall make a final determination regarding the sufficiency of the number of signatures on the petition and provide timely written notice of such determination to the contact person named in the cover sheet accompanying the petition. The contact person or any individual who signed the petition may seek judicial review of such determination in a proceeding pursuant to article seventy-eight of the civil practice law and rules. Upon the clerk's determination that the petition contains no less than the required number of signatures, the governing body of the local government entity to be dissolved shall within thirty days enact a resolution calling for a referendum by the electors on the question whether the elector initiated dissolution plan shall take effect and set a date for such referendum in accordance with subdivision five of this section.

5. The referendum on the question whether the elector initiated dissolution plan shall take effect shall be submitted at a special election to be held not less than sixty or more than ninety days after enactment of a resolution pursuant to subdivision four of this section, provided, however, that in cases where a town or village general election falls within such period, the referendum question may be considered during a town or village general election.

6. Notice of the referendum shall be given to the electors of the local government entity to be dissolved by publication in a newspaper having a general circulation within the boundaries of the entity at least once a week for four consecutive weeks immediately prior to the referendum. The notice shall include, but not be limited to:

(a) a summary of the contents of the resolution and elector initiated dissolution plan;

(b) a statement as to where may be examined a copy of the resolution and elector initiated dissolution plan;

(c) the time and place or places at which the referendum will be held, in accordance with subdivision five of this section; and

(d) such other matters as may be necessary to call, provide for and give notice of the referendum and to provide for the conduct thereof and the canvass of the returns thereupon.

7. In a referendum held pursuant to this section, the referendum question shall be placed before the electors of the local government entity to be dissolved in a form reading substantially as follows:

"The voters of the (insert type and name of local government entity to be dissolved) having previously voted to dissolve, shall the elector initiated dissolution plan take effect?

YES

NO

8. The elector initiated dissolution plan shall not take effect unless a majority of the electors voting in the local government entity to which the petition applies votes in favor of dissolution. If such a majority vote does not result, the referendum shall fail and dissolution shall not take effect.

HISTORY:

Add, L 2009, ch 74, § 2, eff March 21, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

§ 18. Savings clause. Notwithstanding the repeal or amendment of any law by this act, nothing in this act shall be construed to impair the consolidation or dissolution of any local government entity pursuant to any such repealed or amended law if there was commenced in or for such local government entity prior to the effective date of this act a consolidation or dissolution proceeding pursuant to such law, in which event the provisions of such former law shall govern such proceeding as though such former law had not been repealed hereby.

§ 786. Court-ordered dissolution; judicial hearing officer

1. If the governing body of a local government entity with a duty to prepare and approve a proposed elector initiated dissolution plan pursuant to section seven hundred eighty-two of this title fails to prepare and approve such plan or is otherwise unable or unwilling to accomplish and complete the dissolution pursuant to the provisions of this article, then any five electors who signed the petition seeking dissolution may commence a special proceeding against the entity pursuant to article seventy-eight of the civil practice law and rules, in the supreme court within the judicial district in which the entity or the greater portion of its territory is located, to compel compliance with the provisions of this article.

2. If the petitioners in such special proceeding shall substantially prevail, then the court shall issue an injunction ordering the governing body to comply with the applicable provisions of this article. If the governing body violates the injunction, the court shall appoint a hearing officer pursuant to article forty-three of the civil practice law and rules to hear and determine an elector initiated dissolution plan for the entity that complies with the provisions of subdivision two of section seven hundred eighty-two of this title.

3. The final determination of the judicial hearing officer shall constitute the final approval of the elector initiated dissolution plan and provide that such plan takes effect forty-five days after the filing of such determination, unless a petition for a permissive referendum is properly filed pursuant to section seven hundred eighty-five of this title.

4. In any proceeding pursuant to this section in which the petitioners substantially prevail, the costs of such proceeding, including the costs of any judicial hearing officer appointed pursuant to subdivision two of this section, shall be borne by the local government entity at the rate provided for in article twenty-two of the judiciary law and regulations promulgated pursuant thereto.

HISTORY:

Add, L 2009, ch 74, § 2, eff March 21, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

§ 18. Savings clause. Notwithstanding the repeal or amendment of any law by this act, nothing in this act shall be construed to impair the consolidation or dissolution of any local government entity pursuant to any such repealed or amended law if there was commenced in or for such local government entity prior to the effective date of this act a consolidation or dissolution proceeding pursuant to such law, in which event the provisions of such former law shall govern such proceeding as though such former law had not been repealed hereby.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 77.

18 Am Jur Pl & Pr Forms, Rev, Municipal Corporations, Counties, and Other Political Subdivisions, § 28.

§ 787. Winding down the affairs of a dissolved local government entity

1. Upon the successful completion of dissolution proceedings pursuant to this title, the governing body of the dissolving local government entity shall wind down the affairs thereof, dispose of its property

as provided by law, make provisions for the payment of all indebtedness thereof and for the performance of its contracts and obligations, and, if applicable and appropriate under law, levy taxes and assessments as necessary to accomplish the dissolution.

2. In furtherance of its duty to wind down the affairs of the local government entity, the governing body shall cause notice to be given, in the same manner as notice for a proposed dissolution plan pursuant to section seven hundred seventy-five of this title, requiring all claims against the dissolving local government entity, excluding any of its outstanding securities, to be filed within a time fixed in the notice, but not less than three months or more than six months, and all claims not so filed shall be forever barred. At the expiration of such time the governing body shall adjudicate claims so filed, and any resident of the entity at the time of the effective date of the dissolution may appear and defend against any claim so filed, or the governing body may in its discretion appoint some person for that purpose.

HISTORY:

Add, L 2009, ch 74, § 2, eff March 21, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

§ 18. Savings clause. Notwithstanding the repeal or amendment of any law by this act, nothing in this act shall be construed to impair the consolidation or dissolution of any local government entity pursuant to any such repealed or amended law if there was commenced in or for such local government entity prior to the effective date of this act a consolidation or dissolution proceeding pursuant to such law, in which event the provisions of such former law shall govern such proceeding as though such former law had not been repealed hereby.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 80–84.

§ 788. Effect on actions and proceedings; disposition of records, books and papers

1. Except as otherwise provided for in this title, no action for or against the local government entity to be dissolved shall abate, nor shall any claim for or against it be affected by reason of its dissolution.

2. Upon the dissolution of a local government entity, all its records, books and papers shall be deposited with the town clerk of the town in which the principal portion of such entity is situated, and they shall thereupon become a part of the records of the town.

3. Upon the dissolution of a local justice court, all court records of such court shall be deposited with a justice court judge to be designated by the administrative judge of the judicial district within which the dissolving justice court is located. The designated justice court judge shall have authority to execute and complete all unfinished business.

HISTORY:

Add, L 2009, ch 74, § 2, eff March 21, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

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RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 82, 83.

§ 789. Effect on existing laws of village

1. Except as otherwise provided in the dissolution plan or elector initiated dissolution plan, as the case may be, all local laws, ordinances, rules and regulations of a village in effect on the date of the dissolution of such village, including but not limited to zoning ordinances, shall remain in effect for a period of two years following dissolution, as if same had been duly adopted by the town board and shall be enforced by the town within the limits of the dissolved village, except that the town board shall have the power at any time to amend or repeal such local laws, ordinances, rules or regulations in the manner as other local laws, ordinances, rules or regulations of the town.

2. If the village has a zoning board of appeals, or a planning board, or both, and the town does not, then upon dissolution the town board shall act in place of such board or boards until the town board shall have appointed such board or boards for the town in accordance with the provisions of the town law. Such appointments may be made prior to dissolution, to become effective upon the effective date of dissolution.

HISTORY:

Add, L 2009, ch 74, § 2, eff March 21, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

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§ 790. Debts, liabilities and obligations

The outstanding debts, liabilities and obligations of the dissolved local government entity shall be

assumed by the town in which the dissolved entity was situated and shall be a charge upon the taxable property within the limits of the dissolved entity, collected in the same manner as town taxes. The town board shall have all powers with respect to the debts, liabilities and obligations as the governing body of the dissolved entity possessed prior to its dissolution, including the power to issue town bonds to redeem bond anticipation notes issued by the dissolved entity.

HISTORY:
Add, L 2009, ch 74, § 2, eff March 21, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

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RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:
56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 83, 84.

TITLE 4 Miscellaneous Provisions

HISTORY:
Add, L 2009, ch 74, § 2, eff March 21, 2010 (see 2009 note below).

§ 791. Liability of officials and employees

In the absence of fraud, gross negligence or willful misfeasance, no officer or employee of a local government entity shall be held personally liable upon any claim arising from the consolidation or dissolution of a local government entity pursuant to this article or any circumstances connected with such consolidation or dissolution.

HISTORY:
Add, L 2009, ch 74, § 2, eff March 21, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

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§ 792. Supersession

This article shall supersede and replace all other state and local laws relating to the procedures and requirements for the consolidation and dissolution of local government entities to the extent such laws are not consistent with this article, provided, however, that the provisions of any other state or local law now in effect or hereafter enacted that are less restrictive or burdensome than those provided in this chapter shall govern during the period in which such provisions are in effect. A state or local law that imposes procedures and requirements for consolidation and dissolution not addressed by this article is deemed inconsistent.

HISTORY:
Add, L 2009, ch 74, § 2, eff March 21, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

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§ 793. Separability

If any title, section, subdivision, paragraph or other part of this article shall be adjudged invalid by any court of competent jurisdiction, such judgment shall not invalidate the remainder thereof, but shall be confined in its operation to the part directly involved in the controversy wherein such judgment shall have been rendered.

HISTORY:
Add, L 2009, ch 74, § 2, eff March 21, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

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ARTICLE 18 Conflicts of Interest of Municipal Officers and Employees

Section

800. Definitions
801. Conflicts of interest prohibited
802. Exceptions
803. Disclosure of interest
804. Contracts void
805-a. Certain action prohibited

806. Code of ethics
807. Posting of statute

HISTORY:
Add, L 1964, ch 946, § 2, eff Sept 1, 1964.

§ 800. Definitions

When used in this article and unless otherwise expressly stated or unless the context otherwise requires:

1. "Chief fiscal officer" means a comptroller, commissioner of finance, director of finance or other officer possessing similar powers and duties, except that in a school district the term shall not mean a member of the board of education or a trustee thereof.

2. "Contract" means any claim, account or demand against or agreement with a municipality, express or implied, and shall include the designation of a depository of public funds and the designation of a newspaper, including but not limited to an official newspaper, for the publication of any notice, resolution, ordinance, or other proceeding where such publication is required or authorized by law.

3. "Interest" means a direct or indirect pecuniary or material benefit accruing to a municipal officer or employee as the result of a contract with the municipality which such officer or employee serves. For the purposes of this article a municipal officer or employee shall be deemed to have an interest in the contract of (a) his spouse, minor children and dependents, except a contract of employment with the municipality which such officer or employee serves, (b) a firm, partnership or association of which such officer or employee is a member or employee, (c) a corporation of which such officer or employee is an officer, director or employee and (d) a corporation any stock of which is owned or controlled directly or indirectly by such officer or employee.

4. "Municipality" means a county, city, town, village, school district, consolidated health district, county vocational education and extension board, public library, board of cooperative educational services, urban renewal agency, a joint water works system established pursuant to chapter six hundred fifty-four of the laws of nineteen hundred twenty-seven, or a town or county improvement district, district corporation, or other district or a joint service established for the purpose of carrying on, performing or financing one or more improvements or services intended to benefit the health, welfare, safety or convenience of the inhabitants of such governmental units or to benefit the real property within such units, an industrial development agency but shall have no application to a city having a population of one million or more or to a county, school district, or other public agency or facility therein.

5. "Municipal officer or employee" means an officer or employee of a municipality, whether paid or unpaid, including members of any administrative board, commission or other agency thereof and in the case of a county, shall be deemed to also include any officer or employee paid from county funds. No person shall be deemed to be a municipal officer or employee solely by reason of being a volunteer firefighter or civil defense volunteer, except a fire chief or assistant fire chief.

6. "Treasurer" means a county treasurer, city treasurer, town supervisor, village treasurer, school district treasurer, fire district treasurer, improvement district treasurer, president of a board of health of a consolidated health district, county vocational educational and extension board treasurer, treasurer of a board of cooperative educational services, public general hospital treasurer, or other officer possessing similar powers and duties.

HISTORY:
Add, L 1964, ch 946, § 2; amd, L 1965, ch 1043, § 1, eff July 1, 1965; L 1971, ch 179, § 1, eff Sept 1, 1971; L 1980, ch 88, § 3, eff April 28, 1980; L 2018, ch 476, § 81, effective December 28, 2018.

Prior Law: Former § 800, formerly § 700, add, L 1963, ch 844, § 1; renumbered § 900, L 1964, ch 946, § 3, eff Sept 1, 1964.

See 1964 note under Art 18.

Amendment Notes The 2018 amendment by ch 476, § 81, substituted "firefighter" for "fireman" in the second sentence of 5.

Notes to Decisions

Analysis

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24. —School district employees
25. Miscellaneous employment; conflict of interest found
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27. Spouse or relative of municipal officer as municipal employee
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1. Generally; construction

A declaratory judgment action was appropriate to determine whether the potential or actual conflicts of interest of a negotiator of a public sector collective bargaining agreement violated Gen Mun Law §§ 800 et seq. Stettine v County of Suffolk, 105 A.D.2d 109, 482 N.Y.S.2d 818, 1984 N.Y. App. Div. LEXIS 20681 (N.Y. App. Div. 2d Dep't 1984), aff'd, 66 N.Y.2d 354, 497 N.Y.S.2d 329, 488 N.E.2d 75, 1985 N.Y. LEXIS 17611 (N.Y. 1985).

N.Y. Gen. Mun. Law § 800, et seq. did not preempt local law in the field of financial disclosure; therefore, although Suffolk County, N.Y., Admin. Code § A30-10, which required local political officers to file financial disclosure forms, was more stringent than the state law, it did not inhibit operation of the state law and was enforceable against a local republican party chairman. Suffolk County Ethics Comm'n v Neppell, 307 A.D.2d 961, 762 N.Y.S.2d 915, 2003 N.Y. App. Div. LEXIS 8689 (N.Y. App. Div. 2d Dep't 2003).

A county legislator does not have a statutory interest in a contract between the county and a corporation of which his spouse is a major stockholder, when he is an employee of the corporation, provided section 802(1)(b) is applicable. There is an apparent tendency for courts to liberally construe Article 18 and hold municipal officers and employees strictly accountable for conduct which, although not literally prohibited by the Article, is borderline. 1979 Op St Compt No. 79-868.

Contracts which are entered into under State or county contracts, or pursuant to competitive bidding, are not excepted from the conflicts of interest statutes. 1980 Op St Compt No. 80-633, 1980 N.Y. Comp. LEXIS 244.

A claim for reimbursement of expenses incurred by a municipal officer or employee in the performance of his municipal functions is not a "contract" within the meaning of that term as defined in the said section. 1981 Op St Compt No. 81-138, 1981 N.Y. Comp. LEXIS 749.

Whether a member of a city council who is vice-president of a corporation operating a service station, has a conflict of interest when the city does business with the station depends upon pertinent facts. Section 801(1)(c) is not applicable when the commissioner of finance, who is responsible for entering into contracts on behalf of the city, is an appointee of the mayor and his appointment is subject to the approval of the common council. 1984 Op St Compt No. 84-16, 1984 N.Y. Comp. LEXIS 123.

In connection with the state comptroller's authority to oversee the accounts of political subdivisions, the comptroller may request officers and employees of a city to complete a form listing certain outside employment and business interests in order for the comptroller to determine the possible existence of conflicts of interest. 1991 Op St Compt No. 91-60, 1990 N.Y. Comp. LEXIS 61.

2. Contracts within scope of article; contract for deposit of public funds

No conflict of interest results from the designation of a bank as a depository of a county sewer district even though one member of said district is also a member of the Advisory Board of a branch of said bank and another member of said district is the President in charge of a branch of said bank, provided that neither of them is the chief fiscal officer, treasurer, or his deputy or employee of the sewer district. However, disclosure of interest must be made in accordance with General Municipal Law, § 803. 1972 NY Ops Atty Gen Nov 2 (Informal), 1972 N.Y. AG LEXIS 154.

A prohibited interest in contract does not occur where: (a) A town supervisor owns less than 5% of the stock of a bank which is a depository of town funds; (b) The wife of the supervisor is part owner of a newspaper in which the town publishes legal notices. 1972 Op St Compt No. 72-4.

A town may designate a bank as depository of town funds, where the town supervisor is an assistant cashier of such bank. 1972 Op St Compt No. 72-9.

Where the president of a central school district board of education is a director of a bank, a prohibited interest in a contract does not occur when the district (1) designates the bank as a depository and (2) sells obligations to the bank in accordance with Local Finance Law, § 60.10. 1972 Op St Compt No. 72-747.

Where a member of a school district board of education is an officer of a bank and employed in the main office thereof, he does not have a prohibited interest in the designation by the school district of a branch office of such bank as the depository of district funds. 1977 Op St Compt No. 77-504.

A county attorney who is director, counsel and stockholder of a bank does not have a prohibited interest where the bank acts as a depository of county funds or purchases county obligations pursuant to Local Finance Law, § 60.10. He would have a prohibited interest in all other transactions between the county and the bank. 1978 Op St Compt No. 78-306.

Member of community college board of trustees who is also president, director and stockholder holding in excess of 5 percent of stock of corporation engaged in printing business would have conflict of interest if college enters into contract with corporation; nonparticipation by trustee in board matters relating to such contracts would not be curative. 1987 Op St Compt No. 87-75, 1987 N.Y. Comp. LEXIS 100.

A prohibited interest in contract does not result where a county legislator is the vice president of a bank which is designated as the depository of county funds. However, disclosure is necessary. 1973 Op St Compt No. 73-1201.

A member of a school district board of education does not have a statutory interest in the designation of a bank, of which her spouse is a director and stockholder, as a depository of district funds. 1979 Op St Compt No. 79-549.

3. —Insurance contracts

The local chapter of a civil service employees association was a voluntary nonprofit association as defined under Gen Mun Law § 802(1)(f) and was exempt from the conflict of interest provisions of Gen Mun Law § 801. A public sector collective bargaining agreement is not the type of contract covered by Gen Mun Law Art 18. Stettine v County of Suffolk, 105 A.D.2d 109, 482 N.Y.S.2d 818, 1984 N.Y. App. Div. LEXIS 20681 (N.Y. App. Div. 2d Dep't 1984), aff'd, 66 N.Y.2d 354, 497 N.Y.S.2d 329, 488 N.E.2d 75, 1985 N.Y. LEXIS 17611 (N.Y. 1985).

A prohibited interest in contract does not occur where a town justice in a town of the first class owns an insurance agency and shares in commissions paid by the town to an insurance agency with which he is not associated. 1971 Op St Compt No. 71-1005.

A village justice is not prohibited from selling group life and hospitalization insurance to the village for employees of the village in which he is an officer, but he must publicly disclose the nature and extent of his interest in the contract. 1973 Op St Compt No. 73-762.

A town supervisor has a prohibited interest in any insurance contracts between the town and an insurance agency which he acquires, where he receives a material or pecuniary benefit as a result of such contracts, and he has the powers and duties enumerated in General Municipal Law, § 801 with respect thereto. 1973 Op St Compt No. 73-979.

A member of a county board of supervisors, who is employed by an insurance firm which sells insurance to the county soil and water conservation district, does not have a statutory interest in such contracts. 1976 Op St Compt No. 76-1024.

A municipal officer does not have a conflict of interest when his insurance firm sells insurance to municipalities other than the one which he serves. 1979 Op St Compt No. 79-206.

The members, officers and employees of a municipal housing authority are not subject to conflicts of interest statutes. However, common law principles relative to interests in contracts are applicable. There is no legal prohibition against firm of which city mayor is officer selling insurance to city housing authority. Auburn Industrial Development Authority members are subject to common law conflicts of interest rules. Firm of Authority member cannot sell insurance to Authority. 1979 Op St Compt no. 79-267.

A member of a village board of appeals, who is also an insurance salesmen, does not have a prohibited interest in the sale of insurance to the village. Disclosure is required. A member of the village board of trustees has a prohibited conflict of interest if a firm of which he is a member sells supplies to the village. 1980 Op St Compt No. 80-623, 1980 N.Y. Comp. LEXIS 233.

Two members of a village board of trustees do not have prohibited conflicts of interest in insurance contracts between the village and an insurance company of which they are officers if, as employees of the company, they have nothing to do with the preparation, procurement or performance of the insurance contracts and their remuneration is not directly affected as a result of the contract. 1980 Op St Compt No. 80-443, 1980 N.Y. Comp. LEXIS 269.

A village justice, who is an insurance agent, does not have a prohibited conflict of interest in the sale of insurance to the village. Disclosure is required. 1980 Op St Compt No. 80-444.

There is no prohibited conflict of interest where a village mayor or trustee is employed by an insurance agency and is not, in the course of his employment, directly involved in the procurement, preparation or performance of any insurance contract with the village or will not have his remuneration directly affected by such a contract. Likewise, if the mayor or trustee owns stock in an insurance agency which provides insurance to the village but the extent of such stockholders are less than five per cent of the outstanding stock, there is no prohibited interest. If the extent of stockholdings exceeds five per cent of the outstanding stock, the interest will not be prohibited provided that the contract was entered into prior to the time the mayor or trustee was elected, and the contract may not be renewed upon expiration. 1981 Op St Compt No. 81-430.

A town supervisor, who is an employee of an incorporated insurance agency which sells insurance to the town, does not have a prohibited interest in the contracts of insurance when her duties as an employee do not directly involve the procurement, preparation or performance of the insurance contracts and her remuneration is not directly affected as a result of such contracts. 1982 Op St Compt No. 82-12, 1982 N.Y. Comp. LEXIS 712.

A planning board member is prohibited from receiving or agreeing to receive compensation for engineering services, such as percolation test and other design work for individuals who are subdividing their property, where such subdivision applications in the future could come before the planning board. Although there is no statutory prohibition against a planning board member performing uncompensated work in connection with such matter before the board, the board member should not participate in the discussion or vote on any such matter. 1990 Op St Compt No. 90-28, 1990 N.Y. Comp. LEXIS 35.

4. —Contract for newspaper publication of official notices

A prohibited interest in contract does not occur where: (a) A town supervisor owns less than 5— of the stock of a bank which is a depository of town funds; (b) The wife of the supervisor is part owner of a newspaper in which the town publishes legal notices. 1972 Op St Compt No. 72-4.

5. —Purchase or sale of municipal obligations

Where the president of a central school district board of education is a director of a bank, a prohibited interest in a contract does not occur when the district (1) designates the bank as a depository and (2) sells obligations to the bank in accordance with Local Finance Law, § 60.10. 1972 Op St Compt No. 72-747.

A prohibited interest in contract exists when a city auditor, or his spouse, minor children or other dependents purchase city obligations directly from the city and when he has any of the powers or duties enumerated in General Municipal Law, § 801(1) with respect to the issuance and sale of such bonds and notes. A somewhat different concept applies when he purchases city obligations from a bank which has purchased such obligations in the first instance from the city. 1976 Op St Compt No. 76-610.

A village attorney, who is a stockholder, counsel and director of a bank would have a prohibited conflict of interest in the sale of village bond anticipation notes in the sum of $100,000 to such bank, but not if the sale involved *any* amount up to $100,000. 1978 Op St Compt No. 78-175, 1979 N.Y. Comp. LEXIS 269.

A county attorney who is director, counsel and stockholder of a bank does not have a prohibited interest where the bank acts as a depository of county funds or purchases county obligations pursuant to Local Finance Law, § 60.10. He would have a prohibited interest in all other transactions between the county and the bank. 1978 Op St Compt No. 78-306.

A bank, of which a village attorney is a director, may purchase a bond anticipation note issued by the village and agree to extend the date of maturity, so long as the village attorney does not have the power or duty to perform any of the functions listed in General Municipal Law, § 801(1). This opinion supersedes Opn No. 78-175 to the extent it is inconsistent herewith. 1982 Op St Compt No. 82-251, 1982 N.Y. Comp. LEXIS 483.

When a village attorney is a director and stockholder of a bank, he has a conflict of interest if the bank should purchase a statutory installment bond from the village only if he has any of the powers and duties set forth in section 801(1) in relation to the transaction. If he has a conflict of interest, the sale nevertheless would be permissible if made pursuant to Local Finance Law, § 60.10 and the restrictions set forth therein. 1985 Op St Compt No. 85-34, 1985 N.Y. Comp. LEXIS 108.

When a secretary-treasurer of a fire district performs the functions of executing the district's bonds and issuing checks for the payment of principal and interest, and has no other powers and duties with respect to the sale, issuance or payment of bonds, the secretary-treasurer would not have a contractual interest prohibited by article 18 of the General Municipal Law if he or she purchased bonds issued by the district. 1991 Op St Compt No. 91-8, 1991 N.Y. Comp. LEXIS 7.

6. —Purchase or sale of public property

There was conflict of interest when town board member acquired realty in his town at county tax sale and sale was voidable where, although contract of sale in form concerned only county, by implication it also involved town and was within general municipal law precluding municipal officer from having interest in contract with his municipality when he has power or duty to authorize or approve contract or to appoint officer who has such power or duty, inasmuch as town board's action in preparing town budget was part of approval and authorization culminating in county tax sale and town board fixed salary of collecting officer and filled vacancies in that office. Rose v Eichhorst, 42 N.Y.2d 92, 396 N.Y.S.2d 837, 365 N.E.2d 868, 1977 N.Y. LEXIS 2108 (N.Y. 1977).

No prohibited conflict of interest arises from the sale of real property by an Urban Renewal Agency to a corporation of which a member of such Agency is an officer and director but not a shareholder, provided the conditions set forth in the cited statute are met and disclosure of interest is made. In the public interest the person involved herein should not participate in any transaction between the Agency and the corporation. If a County Board of Ethics has been created, its advisory opinion should be sought. 1969 NY Ops Atty Gen Dec 2 (Informal), 1969 N.Y. AG LEXIS 106.

Under General Municipal Law §§ 801, 802, 804, the proposed sale of a building owned by the Town Supervisor of the Town of Crown Point to the Town of Crown Point would constitute a prohibited conflict of interest unless the purchase and the consideration therefor is approved by the Supreme Court upon petition of the Town Board. 1975 NY Ops Atty Gen Feb 10 (Informal), 1975 N.Y. AG LEXIS 71.

The employment of an alderman, as a real estate sales agent, does not automatically create a conflict of interest even if he is also chairman of the Land Sales Committee of the Common Council. A conflict would exist if the alderman represented another party in a real estate transaction with the city and the commissions were over one hundred dollars. 1978 NY Ops Atty Gen Dec 7 (Informal), 1978 N.Y. AG LEXIS 387.

Whether a prohibited interest in contract occurs where a town contracts to purchase real property from the wife of the superintendent of highways and two highway department employees, who are tenants in common of the parcel, depends upon the powers and duties of the superintendent and the employees with respect to the contract. 1972 Op St Compt No. 72-294.

A city officer or employee may purchase either city real property or tax sale certificates at city tax sales, under certain circumstances. 1973 Op St Compt No. 73-768.

A member of the administrative body of a county sewer district would have a prohibited interest in contract should he purchase personal property sold by the district at public auction, when the sale is authorized or approved by the said body. 1974 Op St Compt No. 74-439.

When a deputy town attorney represents a client in the purchase by that client of a parcel of property from the town, he has a statutory interest in the purchase contract. It is a prohibited interest only if the deputy town attorney performs one or more of the functions set forth in section 801(1) in connection with

the contract. 1981 Op St Compt No. 81-387, 1981 N.Y. Comp. LEXIS 487.

That an employee of a village who is also a licensed real estate salesman is responsible for acquiring property in connection with the Federal Community Development Block Grant Program does not, in itself, create a statutory conflict of interest. However, a conflict of interest would occur if he should act as salesman for a seller from whom the village purchases property. The village code of ethics should be examined to determine the applicability of any provisions thereof under the circumstances. 1981 Op St Compt No. 81-370, 1981 N.Y. Comp. LEXIS 515.

Unless the exception provided by General Municipal Law, § 802(1)(b) is applicable, a member of a school district board of education, who is also an officer of a corporation, would have a prohibited conflict of interest in the sale by the district to the corporation of district real property. 1981 Op St Compt No. 81-65, 1981 N.Y. Comp. LEXIS 826.

When a village purchases materials and supplies for the use of its fire department from a corporation of which the fire chief is vice-president, whether the chief has a conflict of interest depends upon pertinent facts and circumstances. 1983 Op St Compt No. 83-211, 1983 N.Y. Comp. LEXIS 273.

A city councilperson has a prohibited interest in the sale by the city of property owned by it to a partnership of which she is a partner. The exception contained in section 802(1)(b) is inapplicable. 1984 Op St Compt No. 84-12, 1984 N.Y. Comp. LEXIS 124.

7. —Lease of real property

A member of a board of fire commissioners has a prohibited conflict of interest in any agreement between the board and himself as a private businessman, for rental of a portion of the firehouse for use as a barber shop. 1978 Op St Compt No. 78-995.

Where a vice-president and treasurer of a corporation authorize payment of rent under a lease, on behalf of his corporation as lessee, to the Steuben County Industrial Department Agency of which he is a member as lessor, by affixing his name to a corporate check, he is directly involved in the performance of the corporation's contract of lease and has a prohibited conflict of interest in the contract. General Municipal Law, § 802(1)(b) is not applicable as an exception to the provision of General Municipal Law, § 801(1) in this case. 1980 Op St Compt No. 80-214.

A town councilman from whom the town rents a building on a month to month tenancy, does not have a prohibited conflict of interest where the tenancy commenced prior to his election and has continued without interruption. 1980 Op St Compt No. 80-250, 1980 N.Y. Comp. LEXIS 345.

8. —Miscellaneous contracts

The extension of the boundaries of a town water district to include real property owned by a town board member does not involve a contract and, therefore, could not give rise to a prohibited conflict of interest. 1979 Op St Compt No. 79-228.

There is no prohibited conflict of interest if a school board member is involved in the sale of trophies to student organizations since there is no contract with a municipality. However, there is potential for abuse and there may be a code of ethics violation in such a situation. 1979 Op St Compt No. 79-444.

A member of a county board of health would have a conflict of interest if he or she is retained as a consultant at $60 per hour to the county health department where an appointee of the board has the power or duty to negotiate the consulting contract, unless and to the extent that one of the exceptions in the General Municipal Law § 802 is applicable. 1990 Op St Compt No. 90-16, 1990 N.Y. Comp. LEXIS 18.

Intermunicipal agreement, whereby village agreed to provide use of its mechanics to repair town-owned trucks and equipment if town's highway department was unable to do so, did not fall within definition of "contract" in CLS Gen Mun § 800, and thus member of town board who also served as head village mechanic did not have prohibited interest in such agreement. 2001 Op St Compt No. 2001-14, 2001 N.Y. Comp. LEXIS 14.

9. Interest in municipal contracts; generally

Competitive bidding does not cure the prohibition against a municipal officer or employee having an interest in a contract when such officer or employee has power to approve the contract. 1979 NY Ops Atty Gen Sept 14 (Informal), 1979 N.Y. AG LEXIS 44.

City councilman who is employee of corporation does not have conflict of interest in relation to contract between city and corporation when his remuneration is not directly affected as result of such contract and duties of his employment do not directly involve procurement, preparation or performance of any part of such contract. 1987 Op St Compt No. 87-91, 1987 N.Y. Comp. LEXIS 143.

Whether a part-time town water superintendent, who is also a contractor, has a prohibited interest in contracts between himself, in his private capacity, and the town for repair of the town water system, depends upon his powers and duties with respect to such contracts. 1978 Op St Compt No. 78-1072.

10. —Contract with official's private business

A prohibited conflict of interest arises where a town supervisor, operator of a mechanical repair shop, performs work on machinery and equipment owned by the town or by the county. 1971 NY Ops Atty Gen July 7 (Informal), 1971 N.Y. AG LEXIS 92.

County Law, § 214(2) requires the publication of the complete text of each local law, and there is no statutorily prohibited conflict of interest where a member of the Orleans County Planning Board has a contract with the County for the disposition of solid waste material in a landfill. 1978 NY Ops Atty Gen August 7 (Informal), 1978 N.Y. AG LEXIS 340.

A prohibited conflict of interest arises when either a town supervisor or a town councilman performs services or sell supplies to the town through their own private businesses. 1979 NY Ops Atty Gen June 5 (Informal), 1979 N.Y. AG LEXIS 112.

In a county which has a director of purchasing who is an appointee of the elected county executive, and an elective county comptroller who is responsible for audit and approval of bills, a county legislator does not have a prohibited interest in contracts between the county and himself as a private businessman. 1973 Op St Compt No. 73-980.

A county supervisor does not have a conflict of interest in a contract between the county and an asphalt company for the supplying of asphalt for county road improvement, where the company hires the supervisor's trucking firm to haul the asphalt to the job site. 1979 Op St Compt No. 79-691.

A village trustee, who is an engineer, would have a prohibited conflict of interest if he should enter into a contract with his village in implementation of a feasibility study on the use of heat pumps in the area, which study is sponsored by a grant to him by the Federal Government. 1980 Op St Compt No. 80-585.

A district commissioner, who is also the proprietor of a travel agency, has a prohibited conflict of interest if the governing board of the district should do business with the agency in connection with travel arrangements for district employees and officers. A conflict of interest does not result if the individual travelers deal with the agency and are reimbursed by the district for travel expenses. 1981 Op St Compt No. 81-138, 1981 N.Y. Comp. LEXIS 749.

A community development agency which functions as an urban renewal agency is subject to the provisions of General Municipal Law, art 18. An employee of the sponsoring municipality does not have a conflict of interest in contracts between himself, as an independent contractor in his private capacity, and the community development agency, provided that he is not assigned by the municipality to perform services of the agency. 1981 Op St Compt No. 81-117, 1981 N.Y. Comp. LEXIS 775.

A superintendent of a town sewer improvement area, who also owns a construction business, may be retained to perform services for the town, such as snow-plowing and excavation, provided that he, in his town position, does not possess any of the powers or duties enumerated in section 801(1). Disclosure under section 803(1) is required. 1981 Op St Compt No. 81-45, 1981 N.Y. Comp. LEXIS 844.

A town highway superintendent, who services sewer systems as a private contractor, does not have a conflict of interest when he supplies such services to the town provided that he does not have any powers or duties enumerated in section 801(1) relative to his

contract with the town. 1982 Op St Compt No. 82-301, 1982 N.Y. Comp. LEXIS 429.

A member of a hospital board of a city public hospital does not have a prohibited interest in a contract between the city and his accounting firm for the annual audit of city books other than hospital records. Disclosure is required. 1982 Op St Compt No. 82-247, 1982 N.Y. Comp. LEXIS 477.

A village mayor does not have a conflict of interest when a company which he owns is engaged in the business of providing consulting services to municipalities and provides such services at no cost to the village provided that the mayor otherwise does not receive a direct or indirect pecuniary or material benefit therefrom. 1982 Op St Compt No. 82-105, 1982 N.Y. Comp. LEXIS 620.

When a town councilman's company performs services and supplies parts in connection with the repair of the heating system for a town building, the councilman does not have a conflict of interest if the company receives no pecuniary profit or other material benefit, direct or indirect, as a result of such contract. 1985 Op St Compt No. 85-1, 1985 N.Y. Comp. LEXIS 142.

Town supervisor who places insurance as insurance broker through same insurance agency through which town's insurance is placed, but who does not receive commission on town's insurance and is not officer, director, employee, or stockholder of insurance agency, would not have "interest" in town's insurance contracts; however, supervisor should disclose his or her business relationship with insurance agency and, under circumstances, should not participate in discussion or vote on any matter affecting insurance agency. 1996 Op St Compt No. 96-6, 1996 N.Y. Comp. LEXIS 8.

In a county which has a director of purchasing who is an appointee of the elective county executive and also an elective county comptroller who is responsible for audit and approval of vouchers, a county legislator does not have a prohibited interest in contracts between the county and himself, but he must disclose his interest in the same. :0298*1978 Op St Compt No. 78-525.

A member of a county legislature does not have a statutory interest in a transaction which involves the loan of funds by the county industrial development agency to himself (or his firm). :0299*1978 Op St Compt No. 78-614.

11. —Contract with official's spouse or relatives

The town justice is an officer of the town. 1990 NY Ops Atty Gen 90-46 (Informal), 1990 N.Y. AG LEXIS 31.

Votes by respondent board member, approving appointment of her 27-year-old son as soccer coach and granting tenure to teacher who had recommended him for coaching position, did not violate General Municipal Law's conflict of interest provisions as (1) respondent's son was not "a minor" under CLS Gen Mun § 2(3) and he was not respondent's dependent merely because he resided in her home, and (2) petitioner failed to prove that respondent derived any pecuniary or material benefit from fact that her son resided in her home. 2001 Op Comm Ed No. 14,826, 2002 NY Educ. Dept. LEXIS 12.

Conflict of interest provisions of General Municipal Law did not prohibit board members whose spouses were employed by respondent school district from participating in contract negotiations and votes. 2004 Op Comm Ed No. 15,135, 2004 NY Educ. Dept. LEXIS 20.

Under the circumstances, there is no prohibited conflict of interest by virtue of the fact that the owners of an excavating firm are brothers of the town superintendent of highways. 1979 Op St Compt No. 79-90.

A town policeman does not have a conflict of interest when a corporation owned by his father performs towing services for the town, provided the policeman does not receive a direct or indirect pecuniary or material benefit as a result of contracts between the town and the corporation. 1981 Op St Compt No. 81-91, 1981 N.Y. Comp. LEXIS 796.

A school district clerk does not have an interest in a contract between the district and an accountant firm of which his brother-in-law is a partner if the clerk receives no direct or indirect pecuniary or material benefit as a result of such contract. 1981 Op St Compt No. 81-66, 1981 N.Y. Comp. LEXIS 827.

The mayor of a city does not have a statutory interest in insurance contracts between the city and his brother's insurance agency unless he derives a direct or indirect pecuniary or material benefit as a result of such contracts. 1982 Op St Compt No. 82-365, 1982 N.Y. Comp. LEXIS 364.

Where the spouse of a town clerk is a printer, the town clerk has a prohibited conflict of interest in contracts between the town and the spouse for printing work done for the clerk's office only if the clerk has any powers and duties set forth in section 801(1) relative to such contracts. 1982 Op St Compt No. 82-264, 1982 N.Y. Comp. LEXIS 462.

A town supervisor has a prohibited interest in a contract of his spouse for the preparation of the annual financial report. The contract is void and payment of her voucher should not be approved by the town board. 1985 Op St Compt No. 85-9, 1985 N.Y. Comp. LEXIS 134.

A member of a county board of supervisors has a conflict of interest when his spouse, as owner of an apartment house, rents units therein to public assistance recipients and is paid therefor upon vouchers submitted to the county. 1985 Op St Compt No. 85-4, 1985 N.Y. Comp. LEXIS 140.

Member of city school district board of education does not have prohibited interest in contract for purchase by district of real property from his father-in-law unless he received direct or indirect benefit as result of contract. 1987 Op St Compt No. 87-23, 1987 N.Y. Comp. LEXIS 158.

A planning board member is prohibited from receiving or agreeing to receive compensation for engineering services, such as percolation test and other design work for individuals who are subdividing their property, where such subdivision applications in the future could come before the planning board. Although there is no statutory prohibition against a planning board member performing uncompensated work in connection with such matter before the board, the board member should not participate in the discussion or vote on any such matter. 1990 Op St Compt No. 90-28, 1990 N.Y. Comp. LEXIS 35.

A clerk in a town highway superintendent's office, whose duties include checking invoices for accuracy, would not have an interest prohibited by Article 18 of the General Municipal Law if the highway superintendent were to award contracts for the repair of town highway equipment to the clerk's spouse. 1992 Op St Compt No. 92-6.

If real property owned by town board member's spouse is leased to vendor which supplies gravel from property to town, and (1) lease was entered into in anticipation or as direct consequence of vendor's contract with town, or (2) rental payment required by lease varies on basis of amount of gravel removed from premises, then spouse would receive pecuniary benefit "as the result of" vendor's contract with town. 2004 Op St Compt No. 2004-2, 2004 N.Y. Comp. LEXIS 2.

If benefit from property lease to vendor which supplies gravel from property to town serves to enhance overall finances of household of board member and his or her spouse (owner of property), then board member would receive at least indirect pecuniary benefit as result of contract between vendor and town and, therefore, have "interest" in contract prohibited by CLS Gen Mun Art 18. 2004 Op St Compt No. 2004-2, 2004 N.Y. Comp. LEXIS 2.

If property lease was not entered into in anticipation or as direct consequence of vendor's contract with town to supply gravel from property, and if rental payment required by lease does not vary on basis of amount of gravel removed from premises, then board member (spouse of property's owner) would not have interest in vendor's contract with town "as the result of" spouse's lease with vendor. 2004 Op St Compt No. 2004-2, 2004 N.Y. Comp. LEXIS 2.

Even if board member (spouse of property owner) does not have "interest" in contract between town and vendor (by which vendor, as lessee of property, supplies gravel to town), town's code of ethics should be reviewed to ascertain whether it contains any pertinent provisions; if contract between vendor and town is permissible under CLS Gen Mun Art 18 and code of ethics is silent, board member should recuse himself or herself from

discussions, and abstain from voting, on matters relating to any current or future town contracts with vendor, at least while vendor leases property from board member's spouse, as well as matters relating to any permissible town contract involving indirectly supply of goods and services by board member's spouse. 2004 Op St Compt No. 2004-2, 2004 N.Y. Comp. LEXIS 2.

No prohibited conflict of interest exists where a Village Trustee participates and votes on certain matters involving the Kenmore Police Department when the husband of the Trustee is a desk lieutenant in that Department who has a direct monetary interest and is directly affected by the actions of the Board of Trustees with respect thereto. 1976 NY Ops Atty Gen July 12 (Informal), 1976 N.Y. AG LEXIS 132.

12. —Contracts of employment

Brothers do not enjoy the degree of consanguinity which would make the interest of one the interest of the other. Where a member of a partnership is appointed as a condemnation commissioner in a county acquisition of real property, and thereafter the other partner is elected as a supervisor in that county, and no fees of the condemnation commissioner are received by the partnership, and this is not in violation of the partnership agreement, there is no prohibited conflict of interest. However, where the partners are brothers, there may be the appearance of a conflict of interest but as the appointment of the commissioner was made before the supervisor was elected, disclosure by the supervisor and the condemnation commissioner would eliminate any question of an improper conflict. 1975 NY Ops Atty Gen March 13 (Informal), 1975 N.Y. AG LEXIS 90.

An attorney may be appointed school district attorney even though the attorney's spouse is a member of the board of education of the school district. The authorization contained in General Municipal Law § 800 subdivision 3 constitutes a waiver of the prohibition of such a contract when the contract relates to a spouse of a board member; it is so broad in its terms that there is no reason why the spouse of the attorney may not vote upon the question of the attorney's employment and upon matters relating to the attorney's salary and/or expense vouchers. 1977 NY Ops Atty Gen Dec 27 (Informal), 1977 N.Y. AG LEXIS 370.

There is no legal impropriety where the daughter of a school board member is employed as both clerk and business manager of the school district. 1978 Op St Compt No. 78-391.

The town board fixes the salaries of all town employees and it is not required that a town board member abstain from voting when the board votes on fixing the salary of an employee who happens to be his spouse. 1979 Op St Compt No. 79-68.

There is no legal impropriety where a husband and wife simultaneously serve as town supervisor and town clerk, respectively. However, from a practical point of view, there is a question of the advisability of such an arrangement. 1979 Op St Compt No. 79-171.

A member of a central school district board of education does not have a statutory interest in a collective bargaining agreement between the district and a teachers' union in which his spouse is a member. 1979 Op St Compt No. 79-313, 1979 N.Y. Comp. LEXIS 189.

Where a teacher is the child of a member of the board of education of a central school district, a two-thirds vote of the entire board is required when any contract of employment relating to the teacher is renewed, including a contract granting tenure. The board member may vote on such contracts and on matters involving teacher's salary. 1980 Op St Compt No. 80-34, 1980 N.Y. Comp. LEXIS 342.

A member of a county board of health would have a conflict of interest if he or she is retained as a consultant at $60 per hour to the county health department where an appointee of the board has the power or duty to negotiate the consulting contract, unless and to the extent that one of the exceptions in the General Municipal Law § 802 is applicable. 1990 Op St Compt No. 90-16, 1990 N.Y. Comp. LEXIS 18.

13. —Official as member of contracting firm, partnership or association

A town planning board member does not have a prohibited conflict of interests in the purchase, by the town, of paving materials from a firm in which the planning board member is a partner. 1966 NY Ops Atty Gen Dec 14 (Informal), 1966 N.Y. AG LEXIS 155.

Brothers do not enjoy the degree of consanguinity which would make the interest of one the interest of the other. Where a member of a partnership is appointed as a condemnation commissioner in a county acquisition of real property, and thereafter the other partner is elected as a supervisor in that county, and no fees of the condemnation commissioner are received by the partnership, and this is not in violation of the partnership agreement, there is no prohibited conflict of interest. However, where the partners are brothers, there may be the appearance of a conflict of interest but as the appointment of the commissioner was made before the supervisor was elected, disclosure by the supervisor and the condemnation commissioner would eliminate any question of an improper conflict. 1975 NY Ops Atty Gen March 13 (Informal), 1975 N.Y. AG LEXIS 90.

A member of a central school district board of education does not have a statutory interest in a collective bargaining agreement between the school district and the local chapter of a state-wide teachers union where he is an employee of the regional office of the union. However, he should not participate in board proceedings in connection with the contract, as a matter of policy. 1973 Op St Compt No. 73-952.

A village trustee does not have a statutory interest in contracts between the village municipal housing authority and a firm of which he is a partner. 1974 Op St Compt No. 74-682.

Whether an accounting clerk for a municipal electric service has a prohibited interest in a contract for a computer program between the city and a computer firm, where she has assisted in the development of the program for the firm, depends upon certain facts. 1978 Op St Compt No. 78-840.

City attorney who is officer, employee, director or shareholder of law firm which is professional corporation and which represents city in law suit would have prohibited interest in contract between firm and city if city attorney has power or duty to negotiate, prepare, authorize or approve contract, or to appoint someone with those powers, unless exceptions in CLS Gen Mun § 802 are applicable. 1988 Op St Compt No. 88-75, 1988 N.Y. Comp. LEXIS 68.

Member of town board of assessment review who is sole proprietor of company that sells highway-related products has interest in contracts between company and town to sell products for use by town highway department; such interest is not prohibited, but board member must disclose it in accordance with CLS Gen Mun § 803. 2012 Op St Compt No. 2012-1, 2012 N.Y. Comp. LEXIS 1.

School board member would not have prohibited conflict of interest under CLS Gen Mun Art 18 if he or she also served as trustee on board of trustees of not-for-profit foundation that raises money and makes gifts to school district; however, board member should not participate in school board discussions or decisions relating to gifts from, or other matters involving, not-for-profit foundation for which board member serves as trustee and, assuming disclosure is not otherwise required by CLS Gen Mun § 803, should disclose his or her relationship with not-for-profit entity. 2008 Op St Compt No. 2008-1, 2008 N.Y. Comp. LEXIS 1.

14. —Official as member of law firm

Where a village mayor, who is an attorney, shares offices with another attorney who is personally retained by the village under an arrangement pursuant to which moneys paid by the village to the attorney do not inure to the benefit of any of the others, there is no illegal interest in contract on the part of the village mayor. 1966 Op St Compt No. 66-646.

An interest in contract does not arise where the City of Mount Vernon Urban Renewal Agency contracts for special legal services with a law firm with which two city aldermen are associated. 1969 Op St Compt No. 69-474.

A prohibited conflict of interest: (1) Does not arise where a county treasurer is the owner of less than 5% of the outstanding stock of a bank with which the county does business; (2) Does

occur where the law firm of which the treasurer is a member is general counsel for the said bank. 1969 Op St Compt No. 69-1069.

A conflict of interest occurs where the law partner of a town justice in a town of the second class is retained to provide legal services for the town, if the justice receives a direct or indirect material or pecuniary benefit as the result of such contract. There is no legal prohibition against the appointment of the law partner as town attorney. 1971 Op St Compt No. 71-961.

The conflicts of interest statutes do not apply where a village attorney advises the board of trustees with respect to a proposed retainer agreement with a law firm of which the attorney is a member, where the agreement is to be executed subsequent to his retirement from village employment. 1978 Op St Compt No. 78-793.

The conflicts of interest statutes do not apply where the law partner of a member of a county board of supervisors serves as assistant county attorney, because there is no contract with the county in which the supervisor can have an interest. 1980 Op St Compt No. 80-39.

Where a village attorney is paid on a salary basis, and also receives compensation on vouchers for additional work, whether the mayor, who is the father of the village attorney and also associated with him in the practice of law as either a partner or as a member of a professional corporation, has a prohibited interest in contracts between the attorney and the village, depends upon pertinent facts. 1980 Op St Compt No. 80-164.

Where a law partner of the town attorney is retained by the town to perform services on a contractual basis, the town attorney has a conflict of interest only if he derives a direct or indirect pecuniary or material benefit as a result of the contract. 1980 Op St Compt No. 80-712.

While it is not a conflict of interest under Article 18 where a member of a village board of trustees is an attorney whose firm stands to obtain business from a party which has an interest in an application submitted to the board for the approval of the construction of a microwave tower, nevertheless, a court could construe an affirmative vote of the board member as against public policy and invalidate the proceedings. It is recommended that the board member refrain from voting and from other board involvement concerning the application. 1982 Op St Compt No. 82-285, 1982 N.Y. Comp. LEXIS 439.

Whether a member of an industrial development agency, who is an attorney, has a prohibited conflict of interest in contracts between the agency and a client, depends upon the circumstances. 1982 Op St Compt No. 82-250, 1982 N.Y. Comp. LEXIS 478.

Village attorney does not have conflict of interest when his law firm represents client applying to village for subdivision approval unless application procedure results in § 800(2) contract with village and attorney possesses § 801(1) functions relative thereto; disclosure under § 809 is required even though there is no conflict of interest. 1985 Op St Compt No. 85-60, 1985 N.Y. Comp. LEXIS 83.

Village mayor does not have "interest" in contract of employment of law partner of village mayor as village attorney within meaning of CLS Gen Mun § 800(3), if mayor's partner is hired independently of partnership and is paid directly as individual so that none of compensation goes to partnership. 1988 Op St Compt No. 88-67, 1988 N.Y. Comp. LEXIS 60.

If compensation paid to law partner of school board member, who is engaged by school district as its attorney, is not mixed with other revenues of partnership, and if board member, directly or indirectly, receives no benefit from monies paid by district, then board member would not have interest in contract between district and law partner, irrespective of whether law partner is engaged as independent contractor or employee. 2004 Op St Compt No. 2004-4, 2004 N.Y. Comp. LEXIS 4.

In light of board member's business relationship with school district's attorney as law partner, board member should recuse himself or herself from discussions, and abstain from voting, on matters pertaining to compensation, and other terms and conditions of engagement by school district, of his or her law partner. 2004 Op St Compt No. 2004-4, 2004 N.Y. Comp. LEXIS 4.

15. —Official as officer or director of contracting corporation

Fact that former commissioner of public works, charged with having conflict of interest in connection with snow plowing contract and failing to disclose such interest, was both an officer and more than five per cent stockholder in corporation which obtained the contract did not bring him within the exemption provision of conflict of interest law where the individual's interest arises by reason of employment as an officer or employee of a firm contracting with municipality since not only would such result lead to an absurdity but argument ignored statutory requirement that the conflict arise "solely" by reason of employment as an officer or employee. People v Speach, 49 A.D.2d 210, 374 N.Y.S.2d 210, 1975 N.Y. App. Div. LEXIS 10626 (N.Y. App. Div. 4th Dep't 1975).

If a county superintendent of highways is a director of a corporation, a contract for goods or services for his department may not be entered into between the county and that corporation or between any town in that county and that corporation for goods or services to be provided for the function of a town superintendent of highways. 1974 NY Ops Atty Gen Dec 17 (Informal), 1974 N.Y. AG LEXIS 195.

The chief engineer of a village electric department who also formed a cable television company which sought a franchise from the village would have a conflicting interest prohibited by General Municipal Law, § 801, in view of the nature of his duties as chief engineer. 1975 NY Ops Atty Gen Aug 12 (Informal), 1975 N.Y. AG LEXIS 148.

The village attorney has a prohibited interest in a contract between the village and a corporation of which he is a director. The interest of a village trustee in the same contract (arising solely by reason of his ownership of corporate stock) is not prohibited where he owns less than five percent of the outstanding stock of the corporation. 1969 Op St Compt No. 583-A.

A village may purchase supplies and equipment from various stores owned by a corporation of which the village justice is an officer and stockholder. 1973 Op St Compt No. 73-805.

A county legislator does not have a statutory conflict of interest in contracts between a corporation, of which he is president and a stockholder, and the Western Regional Off-Track Betting Corporation, where a director thereof is an appointee of the county legislature. 1974 Op St Compt No. 74-582.

A school board member who is president of a corporation does not have a prohibited interest in a contract for the purchase of buses from said corporation if the exception contained in General Municipal Law, § 802(1)(b) is applicable. 1978 Op St Compt No. 78-133.

If a superintendent of a town water district, who is also the president of a firm which supplies propane gas to the district, has a prohibited interest in contracts between his firm and the town, the fact that the water district is situate on an island apart from the mainland of the town and cannot obtain gas from another supplier, does not create a circumstance which provides an exception to the prohibited interest. 1980 Op St Compt No. 80-586.

Where a town councilman is the president and major stockholder of a corporation which manufactures septic tanks and the corporation sells such tanks to a contractor for use in connection with the performance of a contract with the town for the construction of a sewer system after competitive bidding, there is no conflict of interest in the absence of a commitment between the corporation and the contractor for the purchase of the tanks prior to the award of the contract by the town board. 1982 Op St Compt No. 82-207, 1982 N.Y. Comp. LEXIS 507.

Except for the applicability of one or more of the exceptions contained in section 802, a town councilman who is also the vice-president and branch manager of a bank would have a prohibited interest in any contracts between the town and the bank. 1982 Op St Compt No. 82-48, 1982 N.Y. Comp. LEXIS 674.

A member of the board of trustees of a community college has a conflict of interest in any contracts between the college and a bank of which he is a director, president and chief executive officer except to the extent that any of the exceptions enumerated

in General Municipal Law, § 802 are applicable. 1983 Op St Compt No. 83-143, 1983 N.Y. Comp. LEXIS 341.

A councilman on the town board who is the secretary/treasurer and a major stockholder of a truck center business has a prohibited conflict of interest in contracts between the town and the truck center business involving the purchase, by the town, of highway supplies unless the total consideration payable under the contract, when added to the aggregate amount of all consideration payable under contracts in which the councilman had an interest during the fiscal year does not exceed $100. 1983 Op St Compt No. 83-95, 1983 N.Y. Comp. LEXIS 391.

Fire district commissioner who is also president and chief stockholder of automotive dealership would have conflict of interest if fire district vehicles are serviced by his company unless pertinent exceptions in CLS Gen Mun § 802 apply; extension for voting on rules relating to contracts between district and his company would not be curative. 1988 Op St Compt No. 88-8, 1988 N.Y. Comp. LEXIS 8.

A town councilman has no statutory interest in contracts between the town and a corporation which, together with another corporation of which he is a director and officer, is family owned and closely held. 1972 Op St Compt No. 72-1069.

A city cannot include in its city charter a provision which is inconsistent with any section of General Municipal Law, art 18. A city attorney does not have a prohibited conflict of interest in a contract between the city and a not-for-profit corporation of which she is president. 1980 Op St Compt No. 80-234.

Unless additional pertinent facts necessitate a different conclusion, it would seem that a county supervisor, who is also the vice-president of a corporation, would have a prohibited conflict of interest in a construction contract between the corporation and the county when he is entitled to share in a corporate deferred profit-sharing compensation program. 1981 Op St Compt No. 81-188, 1981 N.Y. Comp. LEXIS 705.

16. —Spouse or relative of official as officer or director

The town justice is an officer of the town. 1990 NY Ops Atty Gen 90-46 (Informal), 1990 N.Y. AG LEXIS 31.

Petitioners, two board members, seek a determination annulling that part of the code of ethics adopted by the Board of Education which prohibits board members from voting on employment contracts of their spouses. Sections 800(3) of the General Municipal Law carves out an exception to the conflict of interest rule that prohibits a board member from having an interest in any contact of a spouse which the board has the power or duty to negotiate, authorize, or approve. By expressly exempting spousal contracts from § 801's prohibition against contracts of interest, the Legislature has adjudged it permissible for a school board member to vote on the employment contract of a spouse. The Board of Education may not override this plain intent by enacting ethical codes at odd with the General Municipal Law. The Board of Education's prohibition is also inconsistent with § 3016(2) of the Education Law, which allows school districts to employ as teachers a relative of board members, so long as such employment is approved by two-thirds of the members of the board. Conspicuously absent from this provision is any restriction on the exercise of power by board members whose spouses are employed by the district as teachers. The reasonable inference drawn from this omission is that the Legislature did not intend to restrict board members from voting on their spouses' employment contracts. By enacting a standard which does precisely that, the Board of Education has contravened the plain intent of § 3016, and has, in effect, prevented certain board members from substantially performing the duties of office. Accordingly, the provision of the Board of Education's ethics code which prohibit board members from voting on the employment contract of their spouses is an excess of the authority of the Board of Education, and is null and void. Appeal of Behuniak and Lattimore, 1991 Op Comm Ed No. 12,447.

A member of county board of supervisors has a prohibited interest in contracts between the county and a closely held corporation of which her husband is a major stockholder and president. 1974 Op St Compt No. 74-400.

A county department head is not deemed to have an interest in purchases of supplies made by him for his department pursuant to a general contract with the county between the county and his spouse's corporation. Whether a statutory interest otherwise exists depends upon the circumstances; if so, he would have a prohibited interest in purchases of departmental supplies. 1982 Op St Compt No. 82-291, 1982 N.Y. Comp. LEXIS 433.

17. —Official as employee of contracting corporation

The prohibition of these sections is not applicable to a village trustee who is only a salaried employee of a corporation which contracts with the village. 1966 NY Ops Atty Gen Apr 7 (Informal), 1966 N.Y. AG LEXIS 54.

The execution of contracts between a board of cooperative educational services and a county does not give rise to a conflict of interest where a county legislator is an instructor in the employ of the said board. 1969 Op St Compt No. 69-1012.

A prohibited conflict of interest occurs where a member of a county industrial development agency, who is also the attorney for a corporation, represents the corporation in connection with the negotiation of a contract with the industrial development agency. The county code of ethics is inapplicable to the members, officers and employees of the county industrial development agency. 1973 Op St Compt No. 73-919.

Subject to certain exceptions contained in General Municipal Law, § 802, whether a town water and sewer superintendent has a prohibited interest in contracts for the installation of water and sewer connections between the town and the firm by which he is employed depends upon whether inspection of such work by him constitutes approval thereof or is a prerequisite to payment therefor by the town. 1975 Op St Compt No. 75-48.

A county legislator, who is an employee of one of two family-owned and closely held corporations which have common business interests, has a prohibited interest in contracts between the county and either corporation. Whether the exception contained in General Municipal Law, § 802(1)(b) is applicable depends upon pertinent facts. 1975 Op St Compt No. 75-84.

A prohibited interest in contract does not occur where a county legislator is an employee of a not-for-profit hospital corporation which provides services to the county pursuant to contract. 1975 Op St Compt No. 75-1273.

A town councilman does not have a statutory interest in a contract between the town and a firm which has engaged him to perform services as an independent contractor. 1979 Op St Compt No. 79-172.

Whether a town director of the department of solid waste has a prohibited interest in a contract for the operation of the town landfill by a firm by which he is employed, depends upon the pertinent facts. Applicability of town code of ethics should be determined. 1979 Op St Compt No. 79-265.

A county legislator does not have a statutory interest in a contract between the county and a corporation of which his spouse is a major stockholder, when he is an employee of the corporation, provided section 802(1)(b) is applicable. There is an apparent tendency for courts to liberally construe Article 18 and hold municipal officers and employees strictly accountable for conduct which, although not literally prohibited by the Article, is borderline. 1979 Op St Compt No. 79-868.

A village trustee, who is an employee of an automobile dealership, does not have a prohibited conflict of interest in contracts between the village and the dealer involving the purchase of parts for, and the servicing of, village vehicles, if the exception contained in General Municipal Law, § 802(1)(b) has application. 1980 Op St Compt No. 80-730, 1980 N.Y. Comp. LEXIS 212.

A "contract", as defined in General Municipal Law, § 800(2), exists between the contractor and the municipality where a municipality approves a grant of Federal moneys to an applicant for home rehabilitation based upon a bid submitted by the contractor. A city alderman, who is an employee of the contractor, has a prohibited interest in that contract unless the exception contained in General Municipal Law, § 802(1)(b) is applicable. 1980 Op St Compt No. 80-216.

A town councilman does not have a conflict of interest where a contractor by which he is employed contracts with a corporation

to build a facility for the corporation in the town, and the facility is financed by a loan from the town industrial development agency. 1980 Op St Compt No. 80-574.

The assistant chief of a city fire department consisting of volunteer firemen would not have a prohibited interest in contracts between the city and a company by which he is employed unless he has one or more of the powers or duties enumerated in section 801(1) with respect to such contracts. 1982 Op St Compt No. 82-343, 1982 N.Y. Comp. LEXIS 393.

There is no prohibited conflict of interest where a village purchases insurance from an insurance company of which a village trustee is an employee, if the trustee's remuneration will not be directly affected by the transaction and, as an employee of the company, the trustee will have nothing to do with the preparation, procurement or performance of the insurance contracts. 1982 St Compt No. 82-234, 1982 N.Y. Comp. LEXIS 496.

A city clerk-chamberlain has a statutory interest in contracts between the city and a contractor for which he performs services as an independent contractor only if he receives a direct or indirect pecuniary or material benefit as a result of the contracts. 1982 Op St Compt No. 82-208, 1982 N.Y. Comp. LEXIS 519.

A town supervisor, who is an employee of an incorporated insurance agency which sells insurance to the town, does not have a prohibited interest in the contracts of insurance when her duties as an employee do not directly involve the procurement, preparation or performance of the insurance contracts and her remuneration is not directly affected as a result of such contracts. 1982 Op St Compt No. 82-12, 1982 N.Y. Comp. LEXIS 712.

The conflicts of interest statutes are inapplicable when an employee of a town water district is employed as a consultant by applicants for variances, zoning changes and special permits and presents the applications before various boards of the town government. Disclosure by the applicant pursuant to section 809 may be necessary. 1983 Op St Compt No. 83-108, 1983 N.Y. Comp. LEXIS 376.

A fire district commissioner who is an employee of a business which services district vehicles has a conflict of interest in any contracts between the district and the business unless the exception contained in section 802(1)(b) is applicable. 1984 Op St Compt No. 84-37, 1984 N.Y. Comp. LEXIS 100.

City councilman who is employee of corporation does not have conflict of interest in relation to contract between city and corporation when his remuneration is not directly affected as result of such contract and duties of his employment do not directly involve procurement, preparation or performance of any part of such contract. 1987 Op St Compt No. 87-91, 1987 N.Y. Comp. LEXIS 143.

It is existence of statutory power or duty of officer or employee to perform functions specified in CLS Gen Mun § 801 which gives rise to conflict of interest under that section without regard to whether those functions are actually performed, do that, abstention by town official of voting on matters relating to company which employs such town official will not cure prohibited conflict of interest. 1988 Op St Compt No. 88-44, 1988 N.Y. Comp. LEXIS 40.

Fire district commissioner, who is salaried employee of firm doing business with district, does not have prohibited conflict of interest in purchase contracts between firm and district if exception contained in CLS Gen Mun Law § 802(1)(b) is applicable. 1988 Op St Compt No. 88-56, 1988 N.Y. Comp. LEXIS 52.

A town board member who is employed as a sales representative for a corporation which holds state and county contracts and whose duties as sales representatives require direct involvement in the procurement of contracts with the town would have a prohibited contract of interest if the town purchases materials in excess of 100 dollars under the state or county contract. 1991 Op St Compt No. 91-30, 1991 N.Y. Comp. LEXIS 28.

18. —Official as stockholder of contracting corporation

Fact that former commissioner of public works, charged with having conflict of interest in connection with snow plowing contract and failing to disclose such interest, was both an officer and more than five per cent stockholder in corporation which obtained the contract did not bring him within the exemption provision of conflict of interest law where the individual's interest arises by reason of employment as an officer or employee of a firm contracting with municipality since not only would such result lead to an absurdity but argument ignored statutory requirement that the conflict arise "solely" by reason of employment as an officer or employee. People v Speach, 49 A.D.2d 210, 374 N.Y.S.2d 210, 1975 N.Y. App. Div. LEXIS 10626 (N.Y. App. Div. 4th Dep't 1975).

A contracting firm, in which a town police commissioner is the majority stockholder, may bid upon, or accept local contracts upon which no bid is required, so long as the commissioner does not have a municipal function defined in General Municipal Law, § 801. Compliance should be had with the applicable code of ethics of the town established by General Municipal Law § 806. Interpretations of the code may be requested of the board of ethics of Westchester County if such a board has been established under General Municipal Law § 808. 1974 NY Ops Atty Gen Nov 18 (Informal), 1974 N.Y. AG LEXIS 180.

The village attorney has a prohibited interest in a contract between the village and a corporation of which he is a director. The interest of a village trustee in the same contract (arising solely by reason of his ownership of corporate stock) is not prohibited where he owns less than five percent of the outstanding stock of the corporation. 1969 Op St Compt No. 69-583-A.

A prohibited conflict of interest: (1) Does not arise where a county treasurer is the owner of less than 5% of the outstanding stock of a bank with which the county does business; (2) Does occur where the law firm of which the treasurer is a member is general counsel for the said bank. 1969 Op St Compt No. 69-1069.

A village may purchase supplies and equipment from various stores owned by a corporation of which the village justice is an officer and stockholder. 1973 Op St Compt No. 73-805.

A county legislator does not have a statutory conflict of interest in contracts between a corporation, of which he is president and a stockholder, and the Western Regional Off-Track Betting Corporation, where a director thereof is an appointee of the county legislature. 1974 Op St Compt No. 74-582.

A county legislator has a prohibited interest in contracts between the county and a corporation of which he is a major stockholder for services provided for the county home and infirmary when he, as a member of the county board, has any of the powers and duties enumerated in section 801(1). 1979 Op St Compt No. 79-844.

Where a county supervisor had executed a trust agreement whereby title to all stock which he owns in a corporation is transferred to a trustee but he retains the legal right to receive stock dividends from the trust, the stock nevertheless is "owned indirectly" by him and he is deemed to have an interest in contracts between the corporation and the county; that interest is prohibited. 1980 Op St Compt No. 80-151, 1980 N.Y. Comp. LEXIS 339.

A town councilman who is the sole stockholder of an insurance corporation has a conflict of interest when the town purchases insurance from his corporation. 1983 Op St Compt No. 83-169, 1983 N.Y. Comp. LEXIS 314.

When a village attorney is a director and stockholder of a bank, he has a conflict of interest if the bank should purchase a statutory installment bond from the village only if he has any of the powers and duties set forth in section 801(1) in relation to the transaction. If he has a conflict of interest, the sale nevertheless would be permissible if made pursuant to Local Finance Law, § 60.10 and the restrictions set forth therein. 1985 Op St Compt No. 85-34, 1985 N.Y. Comp. LEXIS 108.

Fire district commissioner who is also president and chief stockholder of automotive dealership would have conflict of interest if fire district vehicles are serviced by his company unless pertinent exceptions in CLS Gen Mun § 802 apply; extension for voting on rules relating to contracts between district and his company would not be curative. 1988 Op St Compt No. 88-8, 1988 N.Y. Comp. LEXIS 8.

19. —Spouse or relative of official as stockholder

A prohibited conflict of interest would arise in a contract between a town and a private corporation when the spouse of the

deputy comptroller of the town is a majority stockholder of that corporation, unless the total consideration payable under the contract does not exceed one hundred dollars. 1975 NY Ops Atty Gen July 7 (Informal), 1975 N.Y. AG LEXIS 133.

A member of county board of supervisors has a prohibited interest in contracts between the county and a closely held corporation of which her husband is a major stockholder and president. 1974 Op St Compt No. 74-400.

A city attorney has a prohibited interest in any "contracts" between the city and a corporation in which his wife owns 25% of the stock. 1978 Op St Compt No. 78-156.

When a village mayor previously has transferred ownership of his stock in a water works company to his son and wife, whether the mayor has a prohibited interest in the purchase by the village of the company assets depends upon whether he receives any pecuniary benefit from the moneys paid to the wife and son as stockholders of the corporation upon the sale of the corporate assets. 1979 Op St Compt No. 79-528.

A county legislator does not have a statutory interest in a contract between the county and a corporation of which his spouse is a major stockholder, when he is an employee of the corporation, provided section 802(1)(b) is applicable. There is an apparent tendency for courts to liberally construe Article 18 and hold municipal officers and employees strictly accountable for conduct which, although not literally prohibited by the Article, is borderline. 1979 Op St Compt No. 79-868.

20. —Contracts involving fire department or district

A statutory conflict of interest does not occur where a village volunteer fire department provides fire protection to a town fire protection district when a town councilman is also a village fire department fire warden. However, he should refrain from participation in any proceedings relating thereto, either as councilman or as fire warden. 1974 Op St Compt No. 74-507.

A member of a board of fire commissioners who is also a private businessman has a prohibited conflict of interest in any contracts between himself and the fire district. 1979 Op St Compt No. 79-4.

Where a village exercises direct financial control over its volunteer fire department, it may contract for repair of its fire trucks with a garage owned, in part, by the chief of its volunteer fire department. Enclosure of Op. No. 70-785. 1979 Op St Compt No. 79-122.

A conflict of interest does not occur where a fire district commissioner, who is a physician, is paid fees for providing medical services to volunteer firemen under the Volunteer Firemen's Benefit Law, when the payments are made by an insurance carrier pursuant to a contract with the district. 1979 Op St Compt No. 79-537, 1979 N.Y. Comp. LEXIS 148.

A fire chief of a fire district volunteer fire department does not have a prohibited interest in contracts between the district and a business in which he has a partnership interest unless he exercises certain functions, as fire chief, with respect to such contracts. However, disclosure is required. 1979 Op St Compt No. 79-76, 1979 N.Y. Comp. LEXIS 225.

Whether an assistant chief of a village volunteer fire department has a prohibited conflict of interest in contracts between the village and a firm which employs him as a sales representative depends upon his powers and duties, as assistant chief, relative to such contracts. 1979 Op St Compt No. 79-740.

A captain of a volunteer fire company of a village fire department does not have a conflict of interest when the village purchases firemanic supplies from a company of which he is president. 1982 Op St Compt No. 82-60, 1982 N.Y. Comp. LEXIS 665.

A fire district commissioner does not have a conflict of interest when the fire district contracts with his adult son for electrical services, providing that the commissioner receives no direct or indirect pecuniary or material benefit as a result of such contracts. 1983 Op St Compt No. 83-40, 1983 N.Y. Comp. LEXIS 444.

An assistant chief of a fire district fire department does not have a prohibited interest in purchases of firematic equipment made by the district from a company owned by him, even though he makes recommendations to the board with respect to such equipment needed by the department. 1983 Op St Compt No. 83-30, 1983 N.Y. Comp. LEXIS 450.

21. —Miscellaneous interests

While it is doubtful that a material benefit would enure to a Village Trustee by virtue of the granting of a special permit by the Village Board of Trustees to an applicant who is the landlord of such Trustee simply because such Trustee, as a tenant, may thereupon become entitled to use the recreational facility to be constructed by his landlord, it is recommended that disclosure of such possible interest be made and that the Village Code of Ethics be examined and the question submitted to the County Board of Ethics, provided one has been established by the County. 1973 NY Ops Atty Gen March 6 (Informal), 1973 N.Y. AG LEXIS 43.

A prohibited conflict of interest arises where the board of managers of a county public general hospital contracts with a bank for the rental of personal property therefrom, when the president of the said board is also a vice-president of the bank, unless the facts are such to render applicable section 802(1)(b). 1969 Op St Compt No. 69-44.

An individual who serves as a town recreation commissioner and also as a trustee of a village situate within the town does not have a statutory interest in contracts between the town and the village involving joint recreational projects. However, he should not participate in matters relating to such contracts either on behalf of the town or the village. 1978 Op St Compt No. 78-362, 1978 N.Y. Comp. LEXIS 86.

Whether the conflicts of interest statutes are applicable when a town highway superintendent sells dry wells, which he has designed, to a distributor, and the distributor sells the wells to other municipalities, including the town, to be used for drainage of highways, depends upon certain facts and circumstances. 1979 Op St Compt No. 79-387.

Whether a water maintenance supervisor of a city water department, who has loaned money to the owners of a plumbing supply company for business purposes, has a statutory interest in the purchase by the city of plumbing supplies from the company, which supplies are used by the water department, depends upon pertinent facts and circumstances. 1981 Op St Compt No. 81-403, 1981 N.Y. Comp. LEXIS 484.

The fact that a town councilman, who is also a contractor, performs services for a professional engineer as an independent contractor, does not in itself create a conflict of interest if the town should do business with the engineer. The councilman is not prohibited by statute from voting on a resolution authorizing a contract between the engineer and the town. The councilman need not file a disclosure statement. 1981 Op St Compt No. 81-216, 1981 N.Y. Comp. LEXIS 666.

A mayor of a village who is also the owner of an office building, does not have a statutory interest in contracts between the village and an office supply company, which is a lessor of offices in his building, merely because the company is a tenant. In order for a municipal officer or employee to have a conflict of interest, he must derive, directly or indirectly, a pecuniary or material benefit from a contract with his municipality (except to extent that he is "deemed" to have an interest under section 800(3)(a), (b), (c) or (d)). 1981 Op St Compt No. 81-206, 1981 N.Y. Comp. LEXIS 680.

A municipal officer or employee does not have a statutory interest by reason of the fact that he is the lessor of property to an individual or firm which is an applicant for a zoning change on other property owned by such individual or firm. It is the position of this Office that the application for, and the granting of, a zoning change by a municipality does not constitute a contract under section 800(2). Disclosure pursuant to section 809 is advisable when a municipal officer or employee is the lessor of property to an applicant for a zoning change, even though the leased property is not involved in the rezoning. 1983 Op St Compt No. 83-114, 1983 N.Y. Comp. LEXIS 361.

A contract between a city and a church would not be prohibited on the basis of a councilman's membership in the church because contracts between municipalities and not-for-profit corporations, such as churches, are excepted from the conflict of interest provisions of the General Municipal Law. The conflict of interest statutes does not require the councilman to abstain from voting

on the authorization for such contract but he may be required to do so by the local Code of Ethics or by local rules of procedure. (2) A contract between a city fire department and a local business is not prohibited on the basis of a firefighter's spouse's ownership of that business unless the firefighter has the power or duty to negotiate, prepare, authorize or approve the contract or authorize or approve payment thereunder. In both cases, disclosure of the interest must be made, in writing, to the city council. 1983 Op St Compt No. 83-112, 1983 N.Y. Comp. LEXIS 372.

The obligation of a municipal officer or employee for care and treatment received by him or by a person for whom he is financially responsible in a hospital or facility operated by his municipality, does not constitute a contract for purposes of the conflicts of interest statutes. Therefore, the said statutes are inapplicable. 1985 Op St Compt No. 85-28, 1985 N.Y. Comp. LEXIS 117.

Officers and employees of county community college who are also members of board of directors for not-for-profit corporation which intends to purchase real property held by county for community college will have interest in purchase contract for purposes of CLS Gen Mun §§ 800 et seq., and interest must be disclosed as soon as officer or employee has knowledge of prospective interests; however, such interest would not be prohibited. 1988 Op St Compt No. 88-52, 1988 N.Y. Comp. LEXIS 48.

A planning board chairman who borrows money from the board's consulting engineer has a prohibited interest in the engineer's contracts with the town if the loan is determined to be a direct or indirect pecuniary benefit accruing to the chairman as a result of the contracts; to avoid the appearance of impropriety, the chairman should not participate in the discussion or vote on matters affecting the engineer or undertake to approve the engineer's vouchers, as long as the loan is outstanding. 1992 Op St Compt No. 92-3, 1985 N.Y. Comp. LEXIS 110.

County public health commissioner who has real estate partnership with member of not-for-profit corporation that provides home health care services to county would not have prohibited interest in not-for-profit corporation's contract with county, but county should review its code of ethics to ascertain whether it contains any pertinent provisions; further, commissioner should consider recusing himself from performance of functions in connection with award of contract for home health care services, with those functions instead being performed by deputy. 2000 Op St Compt No. 2000-8, 2000 N.Y. Comp. LEXIS 21.

22. Entities outside scope of article

Trial court properly granted the motions by a town board members and a consultant to dismiss a taxpayer's General Municipal Law action and denied his motion to reargue and/or renew because the taxpayer did not make allegations of fraud or illegality that would support the action where the consultant was not a municipal officer or employee subject to the statutory disclosure requirements, the taxpayer did not allege any interest that the consultant failed to disclose to the town, the town's payment to the consultant for services rendered was not made in reliance upon any representation that a valid contract existed, and the taxpayer did not identify any new facts or change in the law that required a different determination. Budin v Davis, 172 A.D.3d 1676, 101 N.Y.S.3d 487, 2019 N.Y. App. Div. LEXIS 3838 (N.Y. App. Div. 3d Dep't 2019).

Since the officers, directors, and employees of a county cooperative extension association are not subject to the conflict of interest statutes, there is no illegality where an association leases land from a director thereof. 1972 Op St Compt No. 72-930.

The conflicts of interest statutes are not applicable to contracts between volunteer fire departments and officers or members thereof. 1979 Op St Compt No. 79-96.

The members, officers and employees of a municipal housing authority are not subject to conflicts of interest statutes. However, common law principles relative to interests in contracts are applicable. There is no legal prohibition against firm of which city mayor is officer selling insurance to city housing authority. Auburn Industrial Development Authority members are subject to common law conflicts of interest rules. Firm of Authority member cannot sell insurance to Authority. 1979 Op St Compt No. 79-267.

A member of a public housing authority does not have a common law conflict of interest when his son and law partner is appointed authority counsel unless he derives a material or pecuniary benefit as a result thereof. The conflicts of interest statutes are not applicable to municipal housing authorities. 1982 Op St Compt No. 82-166, 1982 N.Y. Comp. LEXIS 552.

Whether the conflicts of interest statutes are applicable where a county sheriff is a principal in a corporation constructing senior citizens housing with federal funds depends upon the existence of a contract between the county and the corporation. 1983 Op St Compt No. 83-89, 1983 N.Y. Comp. LEXIS 395.

A private industry council established under Federal statute to service a county is not a county agency, and its members are not county officers or employees for purposes of the conflicts of interest statutes. 1983 Op St Compt No. 83-102, 1983 N.Y. Comp. LEXIS 375.

23. Employment conflicts; attorneys

An assistant district attorney may properly hold the position of general counsel to a hospital in the county. He must disclose the fact of his employment to the county. 1966 NY Ops Atty Gen April 19 (Informal), 1966 N.Y. AG LEXIS 62.

A prohibited conflict of interest does not result where a town justice of a town of the first class performs services for such town as attorney for special improvement districts created by such town. Nevertheless, disclosure of such interest is mandated by General Municipal Law, § 803. 1973 NY Ops Atty Gen April 4 (Informal), 1973 N.Y. AG LEXIS 53.

A conflict of interest would result if the same person, at the same time, served as both a member of, and attorney for, a Municipal Housing Authority. 1973 NY Ops Atty Gen Feb 13 (Informal), 1978 N.Y. AG LEXIS 399.

A prohibited conflict of interest in a contract arose under section 801 of the General Municipal Law when the Acting Town Attorney of the Town of Greenburgh prepared a draft of a proposed contract between him and said Town for his future employment as Special Counsel to the Town's Urban Renewal Commission, even though said contract was to take effect after the Acting Town Attorney had resigned from his position as Acting Town Attorney. 1975 NY Ops Atty Gen Feb 27 (Informal), 1975 N.Y. AG LEXIS 77.

The attorney for a county sewer district who is later elected to the position of part-time district attorney and who intends to hold both positions, must make a disclosure of interest under section 803 of Article 18 of the General Municipal Law. 1983 N.Y. Op. Att'y Gen. No. 83-45, 1983 N.Y. AG LEXIS 49.

Respondent did not neglect his duty as member of board of education by acting as the trial attorney for plaintiffs in a lawsuit against a school district while he was a member of the board of education, since purely personal transactions, such as respondent's handling of divorce proceedings and private real estate transactions as attorney on behalf of school employee, do not constitute a prohibited conflict of interest because they do not involve a contract with school district. Application of Ackerberg et al., 1985 Op Comm Ed No. 11,561.

A statutory conflict of interest does not occur where a deputy town attorney represents a developer in connection with development of land within the town, where it is necessary to obtain town board and town planning board approval of subdivision plats. Any impropriety from an ethical standpoint depends upon pertinent facts. 1975 Op St Compt No. 75-112.

A county legislator may provide free legal services to county by representing county without compensation in utility rate case. 1979 Op St Compt No. 79-507.

The City of Saratoga Springs may engage a law clerk on an independent contract basis to assist the City Attorney in certain unanticipated legal matters. It would appear that the Assistant City Attorney may not receive additional compensation other than his fixed salary, although a local law or charter amendment may provide for additional compensation for certain specified services under certain circumstances. 1980 Op St Compt No. 80-673.

A statutory conflict of interest does not occur where an attorney and his employee simultaneously serve as part-time county attorney and administrator of the assigned counsel plan, respectively, when the county attorney (in his private practice) receives no direct or indirect pecuniary or material benefit as a result of his employee's position with the county. 1981 Op St Compt No. 81-406, 1981 N.Y. Comp. LEXIS 476.

A village attorney does not have a conflict of interest when his law partner is appointed to the office of deputy village attorney. 1981 Op St Compt No. 81-40, 1981 N.Y. Comp. LEXIS 855.

City attorney who is officer, employee, director or shareholder of law firm which is professional corporation and which represents city in law suit would have prohibited interest in contract between firm and city if city attorney has power or duty to negotiate, prepare, authorize or approve contract, or to appoint someone with those powers, unless exceptions in CLS Gen Mun § 802 are applicable. 1988 Op St Compt No. 88-75, 1988 N.Y. Comp. LEXIS 68.

In a situation where an attorney is a real estate broker; a non-attorney is an insurance agent and a real estate broker; the two operate a real estate brokerage business; the attorney's income from practice of law is not credited to the real estate brokerage business; the insurance agent's income from the insurance business is not credited to the real estate brokerage business; other income of the two, except real estate brokerage commissions and fees, is not credited to the real estate brokerage business; and the insurance agent is a town supervisor, the attorney may be appointed town attorney of the same town as neither would receive direct or indirect pecuniary or material benefit from the receipt by the other of town salary. 1977 NY Ops Atty Gen Dec 21 (Informal), 1977 N.Y. AG LEXIS 367.

24. —School district employees

In a Civil Service Law § 75-b case, the court erred procedurally and substantively in dismissing the school bus driver's complaint based upon documentary evidence purportedly demonstrating that he violated General Municipal Law § 800, therefore vitiating his retaliation claim; the evidence failed to conclusively establish that he possessed any of the authority enumerated in General Municipal Law § 801, thereby creating a conflict of interest. Lilley v Greene Cent. Sch. Dist., 168 A.D.3d 1180, 90 N.Y.S.3d 661, 2019 N.Y. App. Div. LEXIS 42 (N.Y. App. Div. 3d Dep't 2019).

Petitioner, in seeking removal of respondent board president, failed to establish that respondent's ratification of collective bargaining agreement between local teachers' association and school district, while his spouse was member of local teachers' association, constituted conflict of interest and/or wilful violation or neglect of duty; CLS Gen Mun § 802(1)(f) exempts from prohibited conflicts of interest "contract[s] with a membership corporation or other voluntary non-profit corporation or association," and CLS Gen Mun § 800(3) "explicitly excludes a spouse's employment contract from coverage under the conflict of interest provision and therefore, does not bar a board member from negotiating or voting on the contract of a spouse." 2009 Op Comm Ed No. 15,892, 2009 NY Educ. Dept. LEXIS 34.

Respondent did not neglect his duty as member of board of education by acting as the trial attorney for plaintiffs in a lawsuit against a school district while he was a member of the board of education, since purely personal transactions, such as respondent's handling of divorce proceedings and private real estate transactions as attorney on behalf of school employee, do not constitute a prohibited conflict of interest because they do not involve a contract with school district. Application of Ackerberg et al., 1985 Op Comm Ed No. 11,561.

Provision of code of ethics of central school district, which required members of board of education to recuse themselves from voting on collective bargaining agreements between district and unions if they had family member covered by collective bargaining agreement, was unlawful because it conflicted with express exemptions from conflict of interest coverage in General Municipal Law. 1998 Op Comm Ed No. 13,914.

A conflict of interest does not occur where a member of a central school district board of education is employed by the school district public library. 1973 Op St Compt No. 73-820.

Certain improprieties would attach if a teacher in a county-sponsored community college were to be a county legislator at the same time. 1974 Op St Compt No. 74-935.

A retired school administrator, if he should be elected to the board of education of the school district, would have a prohibited interest as a board member in any collective bargaining agreement executed subsequent to his taking office which provides for the payment of the full cost of health insurance for him as a retiree. 1983 Op St Compt No. 83-122, 1983 N.Y. Comp. LEXIS 363.

A school district employee does not have a conflict of interest when the district leases space in a former school building to a corporation of which his wife is an officer and stockholder. 1983 Op St Compt No. 83-110, 1983 N.Y. Comp. LEXIS 377.

25. Miscellaneous employment; conflict of interest found

In an action to set aside determinations and proceedings of a town board with respect to approval of a proposed shopping center development, plaintiffs failed to show any action on the part of the town board chairman, individually, that would provide a basis for setting aside town board approval of a preliminary development plan for construction of the shopping center and a declaration by the town board of its intent to rezone the site where plaintiffs alleged that the chairman made public statements before and after his election to the town board expressing support for defendant's project and criticism of a similar proposal by another developer in that the prohibitions against conflicts of interest by public officials outlined in Gen Mun Law Art 18 involve pecuniary and material interests rather than expressions of personal opinion. Webster Associates v Webster, 59 N.Y.2d 220, 464 N.Y.S.2d 431, 451 N.E.2d 189, 1983 N.Y. LEXIS 3120 (N.Y. 1983).

Employee of bank with title of Assistant Cashier is not eligible for position of Treasurer of School District where bank has been named depository of funds for the school district and there is another eligible banking institution located within the district. 1966 NY Ops Atty Gen Oct 4 (Informal), 1966 N.Y. AG LEXIS 125.

Member of town board is ineligible to serve as town constable since the incumbent of each position is a town officer and since town board may confer powers on a constable not inconsistent with those conferred by general laws of the State and a town constable, when appointed, serves for an indefinite term at the pleasure of the board. 1966 NY Ops Atty Gen Oct 13 (Informal), 1966 N.Y. AG LEXIS 130.

A town councilwoman may not serve simultaneously as bookkeeper for the town supervisor except within the confines of the exception contained in General Municipal Law § 802(2[f]). 1977 NY Ops Atty Gen Nov 18 (Informal), 1977 N.Y. AG LEXIS 355.

A vice president or stockholder of more than five percent of the outstanding stock of a cable T.V. company granted a franchise by the village has a conflicting interest prohibited by General Municipal Law, § 801, if he were also to serve as village trustee. There would be no conflict if he were merely an employee of the corporation and received remuneration pursuant to General Municipal Law, § 802, subdivision 1(b). 1978 NY Ops Atty Gen Nov 8 (Informal), 1978 N.Y. AG LEXIS 378.

The simultaneous holding of the two positions of clerk of the board of assessors and member of the board of assessors (or sole assessor) by the same person would constitute an incompatibility in function and a conflict of interest and if a clerk is successful in a campaign for election as assessor she must then choose which of the positions she wishes to hold; she cannot hold both at the same time. 1979 NY Ops Atty Gen Oct 18 (Informal), 1979 N.Y. AG LEXIS 24.

A member of a Library Board of Trustees may not simultaneously hold the position of paid custodian of the library. 1979 NY Ops Atty Gen September 14 (Informal), 1979 N.Y. AG LEXIS 42.

A retired teacher who receives retirement benefits under a collective bargaining agreement, and who retains the right to vote for union officials and to approve future collective bargaining agreements may not serve as a member of the school board in that school district. Furthermore, resignation from the union would not change our finding that a conflict of interest exists. 1985 NY Ops Atty Gen 85-33 (Informal), 1985 N.Y. AG LEXIS 64.

Person may not simultaneously serve as mayor of City of Little Falls and as employee of city's recreation commission. 1988 NY Ops Atty Gen 88-12 (Informal), 1988 N.Y. AG LEXIS 12.

A member of a community college board of trustees would have a prohibited conflict of interest if he should be retained, as an independent contractor, to serve as an adjunct professor. 1981 Op St Compt No. 81-93, 1981 N.Y. Comp. LEXIS 798.

A city council member who is a partner in a firm of consulting engineers has a conflict of interest when the city sells a parcel of property to physicians who have retained his firm to prepare site development plans in connection with the construction of an office complex thereon. 1983 Op St Compt No. 83-180, 1983 N.Y. Comp. LEXIS 308.

Where two school districts jointly contract to field athletic teams, there is no legal prohibition against a member of the board of education of one district from being hired as a coach by the other district when the only function performed by the member's district is relation to the joint contract is to provide a proportionate share of funds to cover the cost of the program. 1983 Op St Compt No. 83-12, 1983 N.Y. Comp. LEXIS 469.

Section 73(4) of the Public Officers Law is not applicable to officers and employees of a community college. A community college is an instrumentality of its local sponsor and its officers and employees are subject to the conflicts of interest statutes. A faculty member, who is in charge of purchasing for the college, and who also operates a business as a sole proprietorship, would have a conflict of interest if the college should purchase equipment from his business and he, in his college position, possesses the power or duty to perform one or more of the functions enumerated in section 801(1). 1983 Op St Compt No. 83-6, 1983 N.Y. Comp. LEXIS 476.

A member of a county board of health would have a conflict of interest if he or she is retained as a consultant at $60 per hour to the county health department where an appointee of the board has the power or duty to negotiate the consulting contract, unless and to the extent that one of the exceptions in the General Municipal Law § 802 is applicable. 1990 Op St Compt No. 90-16, 1990 N.Y. Comp. LEXIS 18.

A conflict of interests exists when a town assessor also serves as an appraiser under contract with the county for a county-wide revaluation program. 3 Op Counsel, SB & A 85.

26. —Official as both officer or director and stockholder

No statutory conflict of interest would be created in the appointment of an assistant vice president of a banking trust company with which an urban renewal agency does business to membership on such agency. 1966 NY Ops Atty Gen June 28 (Informal), 1966 N.Y. AG LEXIS 90.

There is no conflict of interest for a lobbyist who practices before the New York State Legislature on behalf of the Building Contractors Employers Association which represents independent building contractors within the City of New York to serve as Councilman for the Town of North Hempstead. 1973 NY Ops Atty Gen July 31 (Informal), 1973 N.Y. AG LEXIS 95.

One person simultaneously may hold the offices of town councilman and county director of weights and measures of a county in which the town lies. 1980 NY Ops Atty Gen April 14 (Informal), 1980 N.Y. AG LEXIS 132.

School board member's voting for appointment of person who has supervised family member is not prohibited as conflict of interest. 1988 Op Comm Ed No. 12,091.

A prohibited conflict of interest does not arise where the same individual holds two city employments. Disclosure is required. 1979 Op St Compt No. 79-20.

When a town contracts with a consultant to administer a HUD program, the town building inspector does not have a conflict of interest if he is retained and paid by the consultant to perform services in relation to the program. 1980 Op St Compt No. 80-713.

27. Spouse or relative of municipal officer as municipal employee

A city may appoint as city attorney or enter into a contract of employment with a person whose spouse is an Alderman of that city even though the spouse, as such Alderman, may have the power or duty to approve such appointment or contract of employment or the payments made thereunder. 1972 NY Ops Atty Gen Nov 30 (Informal), 1972 N.Y. AG LEXIS 163.

Under the above sections, there was no violation of General Municipal Law, Article 18, where a three-member Civil Service Commission of the City of Middletown appointed the wife of one of said members as Secretary of said Commission by a two to nothing vote when one of the affirmative votes was cast by the Secretary's husband. 1974 NY Ops Atty Gen April 23 (Informal), 1974 N.Y. AG LEXIS 72.

The Town Board of the Town of Danube may employ the spouse of one of the Town Justices as clerk to that Justice. 1974 NY Ops Atty Gen Nov 15 (Informal), 1974 N.Y. AG LEXIS 179.

There is no illegality in the appointment by the county board of supervisors of the spouse of a member of the board to a county office or employment. 1972 Op St Compt No. 72-81.

The same impropriety would not seem to exist where the spouse of a faculty member of such community college becomes a county legislator. 1974 Op St Compt No. 74-935.

A member of a school district board of education does not have a statutory interest in the contract of employment between the school district and a blood relative of the said member hired as a schoolteacher, and there is no prohibition against his voting in favor of hiring such blood relative. 1974 Op St Compt No. 74-964.

A village trustee does not have a statutory interest when his spouse is appointed as clerk of the village justice court. 1980 Op St Compt No. 80-492.

A town councilman does not have a statutory interest in a collective bargaining agreement between the town and a union to which his son, an employee of the town highway department belongs, unless it can be established that he derives a direct or indirect pecuniary benefit as a result of the agreement. 24 Opn St Comp, 1968, p 60 and any other inconsistent opinions superseded. 1981 Op St Compt No. 81-415, 1981 N.Y. Comp. LEXIS 471.

A town supervisor would not have a statutory conflict of interest if the supervisor's spouse were appointed confidential secretary or bookkeeper; the town's code of ethics, however, should address the subject of employment of relatives or dependents of town officers, and the town supervisor should abstain from discussions and votes of the town board on matters relating to the confidential secretary or bookkeeper. 1991 Op St Compt No. 91-18, 1991 N.Y. Comp. LEXIS 16.

A member of a public library board of trustees does not have an interest in a contract between the library and an architectural firm which employs the board member's daughter, but the board member should recuse himself or herself from any discussions and votes on matters relating to the contract. A public library may adopt a code of ethics which should provide standards of conduct in relation to, among other things, contracts between the library and firms which employ relatives of library officers and employees. 1991 Op St Compt No. 91-26, 1991 N.Y. Comp. LEXIS 24.

28. Miscellaneous

Special Term properly dismissed a proceeding to annul a determination by a Town Board concerning the creation of water and sewage districts and the acquisition of undeveloped real property, which proceedings challenged the method used to create the special districts since, under Town Law § 209-g, the town could choose either of the procedures described by Arts 12-A and 12-C of the Town Law. However, petitioners should have been granted leave to serve an amended complaint alleging that the real estate contracts between the town and the sellers was void by reason of the presence of an impermissible conflict of interest, in that the same attorney represented both the town and the sellers, so as to permit the resolution of the question of whether the attorney was the town's "employee" and if so, whether he possessed an "interest" in the contract. Finally, the petition of a party who sought relief under Town Law § 209-g was properly dismissed for lack of standing where petitioner had no special rights or interests other than those common to all taxpayers and citizens. MacFarlane v Budine, 86 A.D.2d 731, 446 N.Y.S.2d 592, 1982 N.Y. App. Div. LEXIS 15289 (N.Y. App. Div. 3d Dep't), app. denied, 56 N.Y.2d 506, 1982 N.Y. LEXIS 5397 (N.Y. 1982).

While no technical violation of N.Y. Gen. Mun. Law §§ 800(3), 809(2) occurred, three members of a village planning board

appeared to have impermissibly prejudged an application for rezoning for the development of a multifamily project inasmuch as the members signed a petition in favor of the rezoning and the project; thus, the site plan approval had to be annulled based on the appearance of bias. Matter of Schweichler v Village of Caledonia, 45 A.D.3d 1281, 845 N.Y.S.2d 901, 2007 N.Y. App. Div. LEXIS 11560 (N.Y. App. Div. 4th Dep't 2007), app. denied, 10 N.Y.3d 703, 854 N.Y.S.2d 103, 883 N.E.2d 1010, 2008 N.Y. LEXIS 263 (N.Y. 2008).

Award of liability insurance contract for city to one agency did not violate statute prohibiting conflict of interest of municipal employee, where it did not appear that the agency was a "municipal employee" within meaning of the statute when it contracted to draw specifications for city's insurance needs. Surdell v Oswego, 91 Misc. 2d 1041, 399 N.Y.S.2d 173, 1977 N.Y. Misc. LEXIS 2476 (N.Y. Sup. Ct. 1977).

No conflict of interest under Article 18 of the General Municipal Law arises when a town councilman who resides in an incorporated village within the town votes, as a member of the town board, on the question of whether the village in which he resides should be allowed to participate in the operation of a recreational facility which is owned by the town and has theretofore been operated only for the benefit of the unincorporated areas of the town. 1975 NY Ops Atty Gen Nov 18 (Informal), 1975 N.Y. AG LEXIS 186.

Discussion of conflict of interest statutes in regard to the employment by a county Community Services Board clinic of a psychiatrist who is acting director of a non-profit hospital's in-patient psychiatric unit, when he provides services to patients referred there by the county clinic. 1978 Op St Compt No. 78-807.

When a member of a village committee which acts in an advisory capacity to the village board of trustees relative to the implementation and administration of Federal grants for commercial revitalization, is a recipient of a grant, whether the member has a prohibited conflict of interest depends upon pertinent facts. 1981 Op St Compt No. 81-39, 1981 N.Y. Comp. LEXIS 854.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Joint waterworks, CLS Unconsol ch 140 §§ 1 et seq.

Jurisprudences:

18A NY Jur 2d Civil Servants and Other Public Officers and Employees § 218.

26 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 473, 484, 486, 506, 623.

75 NY Jur 2d Libraries § 24.

63 Am Jur 2d, Public Officers and Employees §§ 314 et seq.

Law Reviews:

Davies, Article 18 of New York's General Municipal Law: the state conflicts of interest law for municipal officials. 59 Alb. L. Rev. 1321.

Davies, 1987 ethics in government act: financial disclosure provisions for municipal officials and proposals for reform. 11 Pace L. Rev. 243.

§ 801. Conflicts of interest prohibited

Except as provided in section eight hundred two of this chapter, (1) no municipal officer or employee shall have an interest in any contract with the municipality of which he is an officer or employee, when such officer or employee, individually or as a member of a board, has the power or duty to (a) negotiate, prepare, authorize or approve the contract or authorize or approve payment thereunder (b) audit bills or claims under the contract, or (c) appoint an officer or employee who has any of the powers or duties set forth above and (2) no chief fiscal officer, treasurer, or his deputy or employee, shall have an interest in a bank or trust company designated as a depository, paying agent, registration agent or for investment of funds of the municipality of which he is an officer or employee. The provisions of this section shall in no event be construed to preclude the payment of lawful compensation and necessary expenses of any municipal officer or employee in one or more positions of public employment, the holding of which is not prohibited by law.

HISTORY:

Add, L 1964, ch 946, § 2; amd, L 1965, ch 1043, § 2, eff July 1, 1965.

Prior Law: Former § 801, formerly § 701, add, L 1963, ch 844, § 1; renumbered § 901, L 1964, ch 946, § 3, eff Sept 1, 1964.

Editor's Notes: Laws 1964, ch 946, §§ 1 and 13–17, provide as follows:

Section 1. Declaration of policy and purpose. As government becomes increasingly complex, as our democratic processes draw citizens from every walk of life, there is increasing need for known standards of ethical conduct as a guide for public officers. These standards must rest primarily on personal integrity and on community vigilance: law cannot in itself create moral fiber, nor can law quicken the civic conscience. In support of these basic standards, it is the purpose of this chapter to define areas of conflicts of interest in municipal transactions, leaving to each community the expression of its own code of ethics.

The need for the statute does not spring from widespread malfeasance on the part of municipal officers; rather, the Legislature recognizes their integrity as a group, their culpability in only a few instances. But lest the few brand the many, the discernment of the offending case must be made certain, its elimination sure. Existing law is too complex, too inconsistent, too overgrown with exceptions, for such a clarity of understanding to be possible. Basic concepts must be retained, but something more than recodification is needed.

There is another and equally important objective: a formula of conduct which is not only clear but reasonable, one which will permit governmental employees to share the normal benefits of the democratic society and economy they serve. If government is to attract and hold competent administrators, public service must not require a complete divesting of all proprietary interests. Real conflict must be rooted out, without condemning the inconsequential.

The chapter, then, has a trinity of purposes: to protect the public from municipal contracts influenced by avaricious officers, to protect innocent public officers from unwarranted assaults on their integrity and to encourage each community to adopt an appropriate code of ethics to supplement this chapter. The Legislature declares that each purpose is a matter of State concern and adopts the following chapter accordingly, with the intention that it shall be the generic law in relation to conflicts of interest in municipal transactions, not to be superseded by local law of any municipality subject to its provisions.

§ 13. Laws superseded. The provisions of article eighteen of the general municipal law, as added by this act, shall supersede any local law, charter, ordinance, resolution, rule or regulation of any municipality to the extent that such local law, charter, ordinance, resolution, rule or regulation is inconsistent with the provisions thereof. No local law, ordinance, resolution, rule or regulation shall modify or dispense with any provision of article eighteen of the general municipal law, as added by this act; provided, however, that nothing herein contained shall prohibit a code of ethics adopted pursuant thereto from supplementing the provisions of this act.

§ 14. Pending actions and proceedings. No action or proceeding pending at the time when this act shall take effect shall be affected by any provision of this act, but the same

may be prosecuted, defended or enforced as if this act had not been enacted.

§ 15. Existing rights and remedies preserved. No existing right or remedy of any character shall be lost, impaired or affected by reason of this act, nor shall the validity of any action taken by any public official under the law in force immediately prior to the time this act shall take effect be affected by the enactment of this act.

§ 16. Laws repealed. Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is hereby repealed.

§ 17. Effective date. This act shall take effect September first, nineteen hundred sixty-four.

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I. Generally

1. In general

Town's furnishing of defense to town assessors and town board members in 2 lawsuits arising out of those officials' public employment, in accordance with local law and CLS Pub O § 18, did not violate constitutional prohibition against municipality giving or lending money or property to individual (CLS NY Const

Art VIII § 1) or laws governing municipal conflicts of interest (CLS Gen Mun §§ 800 et seq.) as amounts expended were viewed as additional remuneration for officials' services to town, which constituted lawful public expense. Bauernfeind v Doetsch (In re Schulz), 217 A.D.2d 861, 629 N.Y.S.2d 841, 1995 N.Y. App. Div. LEXIS 8171 (N.Y. App. Div. 3d Dep't 1995).

Fire district commissioners and district treasurers may hold any office in a volunteer fire company that is not in line of firefighting. 1983 NY Ops Atty Gen 83-25 (Informal), 1983 N.Y. AG LEXIS 75.

Prohibited conflict of interest exists when town employee charged with arranging tourist travel on behalf of town's senior citizens accepts free trip from travel agency that sponsors trip. 1987 NY Ops Atty Gen 87-18 (Informal), 1987 N.Y. AG LEXIS 97.

Official of municipality may have private financial interest provided that interest does not violate provisions of state law or provisions of municipality's code of ethics. 1993 NY Ops Atty Gen 93-19 (Informal), 1993 N.Y. AG LEXIS 22.

A member of a city school district board of education should not participate in board business relating to matters involving a restaurant business of which his spouse is co-owner. Conflicts of interest statutes are applicable in the instant case. 1978 Op St Compt No. 78-1013.

A chief of a fire district is not deemed to have an interest in contracts between the district and a corporation of which his spouse is a director and officer. The existence of a statutory interest depends on whether he receives a pecuniary or material benefit as a result of the contract. Courts may find conflicts of interest where facts indicate violation of spirit, but not letter, of Article 18 legislation. 1980 Op St Compt No. 80-38.

A city cannot include in its city charter a provision which is inconsistent with any section of General Municipal Law, art 18. A city attorney does not have a prohibited conflict of interest in a contract between the city and a not-for-profit corporation of which she is president. 1980 Op St Compt No. 80-234.

Contracts which are entered into under State or county contracts, or pursuant to competitive bidding, are not excepted from the conflicts of interest statutes. 1980 Op St Compt No. 80-633, 1980 N.Y. Comp. LEXIS 244.

While there is probably no prohibited conflict of interest under Article 18 of the General Municipal Law when a village building inspector and a village trustee develop property and construct buildings in a village, even though the building inspector must review and approve his own applications for building permits, such arrangement could be held to be inconsistent with the spirit of Article 18 and, therefore, void. In addition, there may be a violation of General Municipal Law, § 805-a(1)(c) or of the local Code of Ethics. 1980 Op St Compt No. 80-437.

A village mayor or a village trustee would have a prohibited conflict of interest if he should sell insurance or building supplies to the village, assuming the inapplicability of an exception contained in General Municipal Law, § 802. 1980 Op St Compt No. 80-481.

A village trustee, who is an engineer, would have a prohibited conflict of interest if he should enter into a contract with his village in implementation of a feasibility study on the use of heat pumps in the area, which study is sponsored by a grant to him by the Federal Government. 1980 Op St Compt No. 80-585.

When a town assessor also is a land developer, contractor, home builder and realtor; whether any given transaction results in a statutory conflict of interest depends upon the facts. Whether it is advisable for a town board to appoint such a person as town assessor when there is a potential for lawsuits by him against the town involving his business undertakings, is questionable, but for determination by the town board. 1981 Op St Compt No. 81-64, 1981 N.Y. Comp. LEXIS 825.

When a member of a village committee which acts in an advisory capacity to the village board of trustees relative to the implementation and administration of Federal grants for commercial revitalization, is a recipient of a grant, whether the member has a prohibited conflict of interest depends upon pertinent facts. 1981 Op St Compt No. 81-39, 1981 N.Y. Comp. LEXIS 854.

A member of a public housing authority does not have a common law conflict of interest when his son and law partner is appointed authority counsel unless he derives a material or pecuniary benefit as a result thereof. The conflicts of interest statutes are not applicable to municipal housing authorities. 1982 Op St Compt No. 82-166, 1982 N.Y. Comp. LEXIS 552.

In connection with the state comptroller's authority to oversee the accounts of political subdivisions, the comptroller may request officers and employees of a city to complete a form listing certain outside employment and business interests in order for the comptroller to determine the possible existence of conflicts of interest. 1992 Op St Compt No. 91-60, 1992 N.Y. Comp. LEXIS 2.

No conflict of interest on the part of a town supervisor made it error to affirm the town board's denial of a special use permit because the supervisor's ownership of land near the proposed use and opposition to the use as a candidate for public office did not create a prohibited conflict of interest. Matter of Troy Sand & Gravel Co., Inc. v Fleming, 156 A.D.3d 1295, 68 N.Y.S.3d 540, 2017 N.Y. App. Div. LEXIS 9270 (N.Y. App. Div. 3d Dep't 2017), app. denied, 2018 N.Y. App. Div. LEXIS 8984 (N.Y. App. Div. 3d Dep't Apr. 12, 2018), app. denied, 31 N.Y.3d 913, 106 N.E.3d 756, 81 N.Y.S.3d 373, 2018 N.Y. LEXIS 1632 (N.Y. 2018).

Court rejected petitioners' challenge to a town board's negative declaration issued under the State Environmental Quality Review Act (SEQRA) with respect to respondents' casino project, as a board member's public statements and correspondence with respondents, and the speed by which the SEQRA process was completed, did not amount to prohibited bias under N.Y. Gen. Mun. Law art. 18. Casino Free Tyre v Town Bd. of Town of Tyre, 51 Misc. 3d 665, 27 N.Y.S.3d 350, 2016 N.Y. Misc. LEXIS 320 (N.Y. Sup. Ct.), aff'd, 140 A.D.3d 1711, 31 N.Y.S.3d 906, 2016 N.Y. App. Div. LEXIS 4417 (N.Y. App. Div. 4th Dep't 2016).

2. Constitutionality

Since there was reasonable basis for legislation prohibiting municipal officers and employees from having interest in any contract with municipality if they have power to authorize contract or payment thereunder, it was constitutional. Dykeman v Symonds, 54 A.D.2d 159, 388 N.Y.S.2d 422, 1976 N.Y. App. Div. LEXIS 13744 (N.Y. App. Div. 4th Dep't 1976).

II. Prohibited Interests in Municipal Contracts

3. Generally; contract defined

Application for a building permit and subsequent issuance thereof is a "contract" between applicant and municipality by the terms of which municipality confers upon applicant a valuable property right, and, as such, falls within provision of General Municipal Code prohibiting any municipal officer from having an interest in any contract with municipality when such officer has a power or duty to negotiate, prepare, authorize or approve contract. People v Pinto, 88 Misc. 2d 303, 387 N.Y.S.2d 385, 1976 N.Y. Misc. LEXIS 2669 (N.Y. City Ct. 1976).

Word "contract," within provision of General Municipal Law that no municipal officers shall have an interest in any contract with the municipality when such officer has the power or duty to negotiate, prepare, authorize or approve the contract, includes an agreement with a municipality, express or implied. People v Pinto, 88 Misc. 2d 303, 387 N.Y.S.2d 385, 1976 N.Y. Misc. LEXIS 2669 (N.Y. City Ct. 1976).

A street excavation permit is not a contract prohibited by General Municipal Law, Art. 18, and may, therefore, be issued to a municipal officer or employee or to a corporation in which he is a stockholder. 1965 NY Ops Atty Gen May 26 (Informal), 1965 N.Y. AG LEXIS 91.

A village trustee, who is an employee of an automobile dealership, does not have a prohibited conflict of interest in contracts between the village and the dealer involving the purchase of parts for, and the servicing of, village vehicles, if the exception contained in General Municipal Law, § 802(1)(b) has application. 1980 Op St Compt No. 80-730, 1980 N.Y. Comp. LEXIS 212.

A "contract", as defined in General Municipal Law, § 800(2), exists between the contractor and the municipality where a municipality approves a grant of Federal moneys to an applicant for home rehabilitation based upon a bid submitted by the contractor. A city alderman, who is an employee of the contractor,

has a prohibited interest in that contract unless the exception contained in General Municipal Law, § 802(1)(b) is applicable. 1980 Op St Compt No. 80-216.

If a superintendent of a town water district, who is also the president of a firm which supplies propane gas to the district, has a prohibited interest in contracts between his firm and the town, the fact that the water district is situate on an island apart from the mainland of the town and cannot obtain gas from another supplier, does not create a circumstance which provides an exception to the prohibited interest. 1980 Op St Compt No. 80-586.

A municipal officer or employee does not have a statutory interest by reason of the fact that he is the lessor of property to an individual or firm which is an applicant for a zoning change on other property owned by such individual or firm. It is the position of this Office that the application for, and the granting of, a zoning change by a municipality does not constitute a contract under section 800(2). Disclosure pursuant to section 809 is advisable when a municipal officer or employee is the lessor of property to an applicant for a zoning change, even though the leased property is not involved in the rezoning. 1983 Op St Compt No. 83-114, 1983 N.Y. Comp. LEXIS 361.

A contract between a city and a church would not be prohibited on the basis of a councilman's membership in the church because contracts between municipalities and not-for-profit corporations, such as churches, are excepted from the conflict of interest provisions of the General Municipal Law. The conflict of interest statutes do not require the councilman to abstain from voting on the authorization for such contract but he may be required to do so by the local Code of Ethics or by local rules of procedure. (2) A contract between a city fire department and a local business is not prohibited on the basis of a firefighter's spouse's ownership of that business unless the firefighter has the power or duty to negotiate, prepare, authorize or approve the contract or authorize or approve payment thereunder. In both cases, disclosure of the interest must be made, in writing, to the city council. 1983 Op St Compt No. 83-112, 1983 N.Y. Comp. LEXIS 469.

The obligation of a municipal officer or employee for care and treatment received by him or by a person for whom he is financially responsible in a hospital or facility operated by his municipality, does not constitute a contract for purposes of the conflicts of interest statutes. Therefore, the said statutes are inapplicable. 1985 Op St Compt No. 85-28, 1985 N.Y. Comp. LEXIS 117.

4. Power to approve contract

Statute providing that no municipal officer or employee shall have interest in any contract with municipality of which he is officer or employee when such officer or employee individually or as member of a board has power or duty to negotiate, prepare, authorize or approve contract or authorize or approve payment thereunder was enacted for benefit of community in general and citizen who alleged violation thereof had standing to present issue in court. Dykeman v Symonds, 54 A.D.2d 159, 388 N.Y.S.2d 422, 1976 N.Y. App. Div. LEXIS 13744 (N.Y. App. Div. 4th Dep't 1976).

After new city manager assumed office, former acting city manager was without authority, real or apparent, to execute consultant contract on behalf of city with new city manager, and new city manager's act of signing contract which resulted in retaining himself was void as involving prohibited conflict of interest. De Santis v Troy, 83 Misc. 2d 195, 371 N.Y.S.2d 310, 1975 N.Y. Misc. LEXIS 2876 (N.Y. Sup. Ct. 1975).

A member of a town planning board, who is a partner in an engineering firm, has a prohibited conflict of interest in contracts between his firm and the town for engineering services in relation to water and sewer projects, when the planning board approves such projects, if that action constitutes approval of the work done by the firm or is prerequisite to payment by the town for the services performed. 1980 Op St Compt No. 80-790.

Competitive bidding does not cure the prohibition against a municipal officer or employee having an interest in a contract when such officer or employee has power to approve the contract. 1979 NY Ops Atty Gen Sept 14 (Informal), 1979 N.Y. AG LEXIS 44.

5. Contracts involving consideration of less than $100

A member of a town board may not have an interest in a contract of insurance with such town except where the total consideration payable thereunder, together with all other considerations payable under contracts with such town in which he has an interest during the fiscal year, does not exceed $100.00; or where his interest is only that of a stockholder owning or controlling less than 5— of the stock of the corporation entering into such contract with the town. In any event, disclosure under § 803 must be made. 1969 NY Ops Atty Gen July 16 (Informal), 1969 N.Y. AG LEXIS 65.

The board of managers of a village public general hospital may not contract for the purchase of supplies with a corporation of which the mayor is a stockholder and officer except to the extent of $100 in the aggregate during any fiscal year. 1964 Op St Compt No. 64-871.

A prohibited conflict of interest does not exist where a town purchases supplies from a business owned by a member of the town board, provided the amount does not exceed the total sum of $100 for any fiscal year. 1968 Op St Compt No. 68-617.

Where a town of the second class sells a parcel of land worth less than $100 to a town justice: (1) a permissive referendum is required without regard to the value of the land; (2) The town justice would not have a prohibited interest in the transaction. 1974 Op St Compt No. 74-477.

6. —Contracts in excess of $100

The sale of hearing aids by a County Legislator to the Department of Social Services of his county, the aggregate value of which during the fiscal year exceeds the sum of $100, results in a prohibited conflict of interest. 1972 NY Ops Atty Gen May 1 (Informal), 1972 N.Y. AG LEXIS 92.

A prohibited conflict of interest exists where a village purchases supplies from a business owned by a member of the board of trustees in excess of $100 during any one fiscal year. This Department has no authority to provide an exception to that statute. 1968 Op St Compt No. 68-536.

Member of board of trustees of community college would have prohibited conflict of interest if, in any fiscal year, college purchased supplies from hardware store owned by trustee and sum of purchases plus consideration under other contracts with college in which trustee had interest exceed $100. 1996 Op St Compt No. 96-14, 1996 N.Y. Comp. LEXIS 11.

7. Contracts executed prior to election or appointment of official; contracts for goods and services

The existence of a contract to supply gravel to a town does not disqualify the contracting party from being appointed town attorney. The contract would have to be disclosed in writing to the town board and could be continued until its normal termination date but could not be renewed while the contracting individual holds the office of town attorney. 1980 NY Ops Atty Gen Jan 31 (Informal), 1980 N.Y. AG LEXIS 154.

A village trustee who entered into a contract with the village for professional surveying services prior to his election as trustee, does not have a prohibited conflict of interest in that contract. Disclosure is required. 1980 Op St Compt No. 80-233, 1980 N.Y. Comp. LEXIS 331.

Attorney who is appointed town attorney would not have prohibited interest in pre-existing contract between town and his or her law firm, but attorney would be required to disclose his or her interest in contract, and attorney should also recuse him or herself from any matter affecting his or her law firm, with those functions instead being performed by deputy, if any. 2000 Op St Compt No. 2000-22, 2000 N.Y. Comp. LEXIS 26.

8. —Insurance contracts

No prohibited conflict of interest arises when a mayor-elect of a city, who is also an officer of an insurance firm from which the city has previously purchased an insurance policy, takes office on January 1, 1968, and the insurance policy expires on June 30, 1968. However, it would be illegal for the city thereafter to

purchase any further insurance from the firm. 1967 Op St Compt No. 67-957.

No prohibited conflict of interest arises when an officer of an insurance firm, from which firm a town has purchased insurance policies, is subsequently elected and takes office as town supervisor. However, any renewal of such policies or the purchase of new or other policies from such firm during his tenure of office would be illegal. 1968 Op St Compt No. 68-112.

9. —Lease agreements

A prohibited conflict of interest would arise should a county renew an agreement for the lease of premises for county purposes where the property is owned by a member of the board of supervisors, even though the lease was executed prior to the election of the said supervisor. 1968 Op St Compt No. 68-553.

A town councilman from whom the town rents a building on a month to month tenancy, does not have a prohibited conflict of interest where the tenancy commenced prior to his election and has continued without interruption. 1980 Op St Compt No. 80-250, 1980 N.Y. Comp. LEXIS 345.

10. —Other contracts

A prohibited conflict of interest in a contract arose under section 801 of the General Municipal Law when the Acting Town Attorney of the Town of Greenburgh prepared a draft of a proposed contract between him and said Town for his future employment as Special Counsel to the Town's Urban Renewal Commission, even though said contract was to take effect after the Acting Town Attorney had resigned from his position as Acting Town Attorney. 1975 NY Ops Atty Gen Feb 27 (Informal), 1975 N.Y. AG LEXIS 77.

County treasurer may have prohibited conflict of interest in lease pursuant to which county rents gravel pit from corporation of which treasurer owns more than 5 percent of stock, even though original lease was entered into before treasurer was elected to office and treasurer does not have power or duty to negotiate, prepare, authorize or approve contemplated lease renewal, or to approve payments or audit bills or claims under either original lease or renewal, but even if treasurer does not have prohibited interest in lease, treasurer's interest must be disclosed. 1989 Op St Compt No. 89-32, 1989 N.Y. Comp. LEXIS 35.

11. Municipal official or employee as contracting party; county official or employee

CLS General Municipal Law § 801 is not violated by collective bargaining agreement between county and county chapter of Civil Service Employees Association despite fact that it was negotiated by county employee at time when local county laws provided that all exempt county employees, including defendant, would be granted same salary adjustments as members of bargaining units of Association, thereby creating in defendant "prohibited interest" in contract that would render it void under CLS General Municipal Law § 804, since Civil Service Employees Association is voluntary nonprofit association within meaning of CLS General Municipal Law § 802(1)(f) and therefore excepted from proscriptions of § 801. Stettine v County of Suffolk, 66 N.Y.2d 354, 497 N.Y.S.2d 329, 488 N.E.2d 75, 1985 N.Y. LEXIS 17611 (N.Y. 1985).

The sale of hearing aids by a County Legislator to the Department of Social Services of his county, the aggregate value of which during the fiscal year exceeds the sum of $100, results in a prohibited conflict of interest. 1972 NY Ops Atty Gen May 1 (Informal), 1972 N.Y. AG LEXIS 92.

County Law, § 214(2) requires the publication of the complete text of each local law, and there is no statutorily prohibited conflict of interest where a member of the Orleans County Planning Board has a contract with the County for the disposition of solid waste material in a landfill. 1978 NY Ops Atty Gen August 7 (Informal), 1978 N.Y. AG LEXIS 340.

A prohibited conflict of interest arises where a member of a county board of supervisors submits a claim to the county for board and other incidental expenses of children placed at his home pursuant to the Social Services Law, when the county offices of commissioner of social services and auditor are appointive. The conclusion is the same whether he or his wife is the licensee. 1967 Op St Compt No. 67-1038.

A prohibited conflict of interest occurs where a county makes purchases from a businessman who is also a member of the county legislature. 1968 Op St Compt No. 68-12.

Any fee paid to a county director of mental health for conducting the mental examination of criminal defendants pursuant to Chapter V of the Code of Criminal Procedure must be turned over to the county treasurer. However, he is entitled to travel expenses. 1969 Op St Compt No. 69-796.

In a county which has a director of purchasing who is an appointee of the elected county executive, and an elective county comptroller who is responsible for audit and approval of bills, a county legislator does not have a prohibited interest in contracts between the county and himself as a private businessman. 1973 Op St Compt No. 73-980.

A county coroner who has a statutory interest in contracts between his private undertaking business and the county, would not have a prohibited interest in such contracts unless he performs functions enumerated in section 801 relative to such contracts. However, disclosure is required. 1979 Op St Compt No. 79-927.

When a county manager is an appointee of the county board of representatives and is empowered by the county charter to award all purchase contracts, a member of the board has a conflict of interest with respect to any contracts for the sale of equipment or materials to the county. 1983 Op St Compt No. 83-185, 1983 N.Y. Comp. LEXIS 300.

A prohibited conflict of interest arises where a member of county board of supervisors, who is also a pharmacist, submits vouchers to the county for payment based upon purchases made at his store by recipients of county welfare and assistance, when the county has the appointive offices of county commissioner of social services and county auditor. 1967 Op St Compt No. 67-1012.

In a county which has a director of purchasing who is an appointee of the elective county executive and also an elective county comptroller who is responsible for audit and approval of vouchers, a county legislator does not have a prohibited interest in contracts between the county and himself, but he must disclose his interest in the same. 1978 Op St Compt No. 78-525.

12. —Fire district officials or employees

Where defendant sent a board of fire commissioners a letter falsely stating that plaintiff, a fire district commissioner, had received a commission from the sale of a rescue vehicle to the district, as receiving the commission constituted a violation of N.Y. Gen. Mun. Law § 801, a misdemeanor, the jury was properly instructed on defamation per se. Geraci v Probst, 15 N.Y.3d 336, 912 N.Y.S.2d 484, 938 N.E.2d 917, 2010 N.Y. LEXIS 2901 (N.Y. 2010).

Where the fire department chief engineer is responsible for the servicing of fire district vehicles, a prohibited conflict of interest occurs when such vehicles are serviced at a service station owned by him. 1969 Op St Compt No. 69-942.

A fire district may have a deputy treasurer and, furthermore, there would be no prohibited interest in contract if the fire district treasurer were an insurance agent who sells insurance to the fire district. 1978 Op St Compt No. 78-670.

A member of a board of fire commissioners who is also a private businessman has a prohibited conflict of interest in any contracts between himself and the fire district. 1979 Op St Compt No. 79-4.

Where a village exercises direct financial control over its volunteer fire department, it may contract for repair of its fire trucks with a garage owned, in part, by the chief of its volunteer fire department. Enclosure of Op. No. 70-785. 1979 Op St Compt No. 79-122.

An assistant chief of a fire district fire department does not have a prohibited interest in purchases of firematic equipment made by the district from a company owned by him, even though he makes recommendations to the board with respect to such equipment needed by the department. 1983 Op St Compt No. 83-30, 1983 N.Y. Comp. LEXIS 450.

Fire district commissioner who is also president and chief stockholder of automotive dealership would have conflict of interest if fire district vehicles are serviced by his company unless pertinent exceptions in CLS Gen Mun § 802 apply; extension for voting on rules relating to contracts between district and his company would not be curative. 1988 Op St Compt No. 88-8, 1988 N.Y. Comp. LEXIS 8.

Fire district treasurer who is officer and stockholder of insurance agency with which fire district contracts has interest in contract; interest must be disclosed under CLS Gen Mun § 803, but is not prohibited. 1997 Op St Compt No. 97-19, 1997 N.Y. Comp. LEXIS 9.

Member of board of fire commissioners of fire district located within county having population of more than 200,000 who is officer and owner of $33^1/_3$ percent of stock of corporation would have prohibited interest in contract for snow plowing and lawn maintenance between fire district and corporation, even if fire district solicits bids for work, corporation is sole bidder, commissioner recuses himself from discussions relative to contract and abstains from voting on matters relating to contract. 2000 Op St Compt No. 2000-7, 2000 N.Y. Comp. LEXIS 20.

13. —Town officials or employees

A town building inspector may be paid additional compensation for work performed in revising and recodifying the town's zoning ordinance. However, the town attorney may not receive additional compensation for such work. 1964 Ops St Compt No. 64-935.

A prohibited conflict of interest does not arise where a town constable, who also owns a garage business, services town vehicles and submits a claim therefor, provided that he has no section 801 responsibilities and duties with respect to the contract between himself (in his private capacity) and the town. 1969 Op St Compt No. 69-495.

A member of a town planning board does not have a prohibited interest in a contract with the town to renovate the town hall. If such contract were awarded to the building inspector, the existence of a prohibited interest would depend upon whether certain powers or duties are assigned to him by the town board in connection with the construction. 1973 Op St Compt No. 73-235.

When a town supervisor, who is also a construction contractor, undertakes without town board approval to use his construction equipment to remove ice in a creek under a town highway bridge during an emergency, the supervisor may not recover payment for the work from the town. 1978 Op St Compt No. 78-992.

A member of a town board has a prohibited conflict of interest where the town purchases sand from him for use on town highways. 1978 Op St Compt No. 78-1005.

A prohibited conflict of interest does not occur where a town purchases supplies from a store owned by a town justice (not a member of the town board). Disclosure is required. 1980 Op St Compt No. 80-12.

A town assessor, who is also a plumber, may bid on and be awarded a contract involving a town building, but a written public disclosure of the assessor's interest in the contract is required. 1980 Op St Compt No. 80-129, 1980 N.Y. Comp. LEXIS 310.

A superintendent of a town sewer improvement area, who also owns a construction business, may be retained to perform services for the town, such as snow-plowing and excavation, provided that he, in his town position, does not possess any of the powers or duties enumerated in section 801(1). Disclosure under section 803(1) is required. 1981 Op St Compt No. 81-45, 1981 N.Y. Comp. LEXIS 844.

A town highway superintendent, who services sewer systems as a private contractor, does not have a conflict of interest when he supplies such services to the town provided that he does not have any powers or duties enumerated in section 801(1) relative to his contract with the town. 1982 Op St Compt No. 82-301, 1982 N.Y. Comp. LEXIS 429.

A town supervisor, who also owns the only service station in town, would have a conflict of interest if the town should purchase products and services at his station. The filing of a disclosure statement by the supervisor would not obviate the prohibited interest. 1983 Op St Compt No. 83-168, 1983 N.Y. Comp. LEXIS 313.

When a town councilman's company performs services and supplies parts in connection with the repair of the heating system for a town building, the councilman does not have a conflict of interest if the company receives no pecuniary profit or other material benefit, direct or indirect, as a result of such contract. 1985 Op St Compt No. 85-1, 1985 N.Y. Comp. LEXIS 142.

Whether electrical contractor who also is chair of town planning board has prohibited interested in contract with town to perform electrical services must be determined on case-by-case basis by examining chair's powers and duties in connection with specific contract; even if interest is not prohibited, disclosure would be required. 1993 Op St Compt No. 93-23.

Whether a part-time town water superintendent, who is also a contractor, has a prohibited interest in contracts between himself, in his private capacity, and the town for repair of the town water system, depends upon his powers and duties with respect to such contracts. 1978 Op St Compt No. 78-1072.

14. —Village officials or employees

No prohibited conflict of interest will arise under General Municipal Law, § 801, when the Building Inspector of the Village of Fishkill, who is also a private contractor, is engaged by a Trustee of the Village, who also serves as Commissioner of Water Lines and Sewers (as authorized by Village Law, § 3-300[3]), to repair breaks in water and sewer lines and such "repair" is inspected and approved by the Commissioner. 1976 NY Ops Atty Gen Oct 13 (Informal), 1976 N.Y. AG LEXIS 161.

A prohibited conflict of interest exists where a village purchases supplies from a business owned by a member of the board of trustees in excess of $100 during any one fiscal year. This Department has no authority to provide an exception to that statute. 1968 Op St Compt No. 78-536.

Two members of a village board of trustees do not have prohibited conflicts of interest in insurance contracts between the village and an insurance company of which they are officers if, as employees of the company, they have nothing to do with the preparation, procurement or performance of the insurance contracts and their remuneration is not directly affected as a result of the contract. 1980 Op St Compt No. 80-443.

A village justice, who is an insurance agent, does not have a prohibited conflict of interest in the sale of insurance to the village. Disclosure is required. 1980 Op St Compt No. 80-444.

A member of a village board of appeals, who is also an insurance salesmen, does not have a prohibited interest in the sale of insurance to the village. Disclosure is required. A member of the village board of trustees has a prohibited conflict of interest if a firm of which he is a member sells supplies to the village. 1980 Op St Compt No. 80-623.

15. —Other officials or employees

A retired teacher who receives retirement benefits under a collective bargaining agreement, and who retains the right to vote for union officials and to approve future collective bargaining agreements may not serve as a member of the school board in that school district. Furthermore, resignation from the union would not change our finding that a conflict of interest exists. 1985 NY Ops Atty Gen 85-33 (Informal), 1985 N.Y. AG LEXIS 64.

A prohibited conflict of interest arises when a city councilman is a co-owner of a nursing home used by the Board of Public Welfare to house some of its patients. 1966 Op St Compt No. 66-711.

A physician who is employed by a public general hospital does not have a prohibited conflict of interest in a contract, between the hospital and a firm of which he is a partner, for emergency room services when he has none of the powers and duties enumerated in Section 801 of the General Municipal Law with respect to such contract. 1978 Op St Compt No. 78-1027.

Except as permitted by the exceptions contained in General Municipal Law, § 802, a member of the board of education of a "special act" school district, who is also a director of a bank, would have a prohibited conflict of interest in any business transactions between the district and the bank. 1980 Op St Compt No. 80-514.

There is no illegality in the sale of insurance by an insurance corporation to an industrial development authority when a mem-

ber of the authority, who formerly was a stockholder and officer of the corporation, sells all of his stock and resigns his corporate office, and is not otherwise associated with the corporation nor receives a pecuniary or material benefit as a result of the sale. 1981 Op St Compt No. 81-114, 1981 N.Y. Comp. LEXIS 779.

A member of a hospital board of a city public hospital does not have a prohibited interest in a contract between the city and his accounting firm for the annual audit of city books other than hospital records. Disclosure is required. 1982 Op St Compt No. 82-247, 1982 N.Y. Comp. LEXIS 477.

An employee of a board of cooperative educational services does not have a prohibited conflict of interest in a contract between the BOCES and herself and her spouse relative to the use of a swimming pool owned by them in connection with a summer program for handicapped children when she does not have any section 801 powers or duties relative thereto. 1982 Op St Compt No. 82-58, 1982 N.Y. Comp. LEXIS 664.

Section 73(4) of the Public Officers Law is not applicable to officers and employees of a community college. A community college is an instrumentality of its local sponsor and its officers and employees are subject to the conflicts of interest statutes. A faculty member, who is in charge of purchasing for the college, and who also operates a business as a sole proprietorship, would have a conflict of interest if the college should purchase equipment from his business and he, in his college position, possesses the power or duty to perform one or more of the functions enumerated in section 801(1). 1983 Op St Compt No. 83-6, 1983 N.Y. Comp. LEXIS 476.

A member of a county board of health would have a conflict of interest if he or she is retained as a consultant at $60 per hour to the county health department where an appointee of the board has the power or duty to negotiate the consulting contract, unless and to the extent that one of the exceptions in the General Municipal Law § 802 is applicable. 1990 Op St Compt No. 90-16, 1990 N.Y. Comp. LEXIS 18.

16. —Contract involving another municipality

Where a town rents snow removal equipment to a county for use on state highways and the town superintendent of highways operates such equipment and is compensated strictly as a county employee, he is entitled to retain such compensation, although such arrangement may constitute a prohibited interest in the prime contract between the town and the county. 1965 Op St Compt No. 65-154.

A member of a county civil service commission is not prohibited from having an interest in a contract with a town or village within the county. 1965 Op St Compt No. 65-259.

There is no conflict of interest where a mayor of a city submits to a county embracing the city vouchers for audit and payment of expenses incurred by county welfare recipients for the purchase of merchandise at a store operated by the mayor. 1967 Op St Compt No. 67-315.

17. Municipal official or employee as employee of contracting party; city official or employees

No prohibited conflict of interest exists where a mayor is employed, as a salesclerk and bookkeeper, in a hardware store, which transacts business with this city in the absence of a showing that this remuneration is directly affected or that his duties directly involve the effecting of such contracts on the store's behalf. 1970 NY Ops Atty Gen Feb 16 (Informal), 1970 N.Y. AG LEXIS 32.

A prohibited interest in contract exists where the mayor of the City of North Tonawanda is employed by a hardware store with which the city does business. Whether the exception provided by section 802(1)(b) is applicable depends upon the nature of his duties as a store employee. 1969 Op St Compt No. 69-402.

Whether an accounting clerk for a municipal electric service has a prohibited interest in a contract for a computer program between the city and a computer firm, where she has assisted in the development of the program for the firm, depends upon certain facts. 1978 Op St Compt No. 78-840.

A "contract", as defined in General Municipal Law, § 800(2), exists between the contractor and the municipality where a municipality approves a grant of Federal moneys to an applicant for home rehabilitation based upon a bid submitted by the contractor. A city alderman, who is an employee of the contractor, has a prohibited interest in that contract unless the exception contained in General Municipal Law, § 802(1)(b) is applicable. 1980 Op St Compt No. 80-216.

A city clerk-chamberlain has a statutory interest in contracts between the city and a contractor for which he performs services as an independent contractor only if he receives a direct or indirect pecuniary or material benefit as a result of the contracts. 1982 Op St Compt No. 82-208, 1982 N.Y. Comp. LEXIS 519.

A city council member who is a partner in a firm of consulting engineers has a conflict of interest when the city sells a parcel of property to physicians who have retained his firm to prepare site development plans in connection with the construction of an office complex thereon. 1983 Op St Compt No. 83-180, 1983 N.Y. Comp. LEXIS 308.

City councilman who is employee of corporation does not have conflict of interest in relation to contract between city and corporation when his remuneration is not directly affected as result of such contract and duties of his employment do not directly involve procurement, preparation or performance of any part of such contract. 1987 Op St Compt No. 87-91, 1987 N.Y. Comp. LEXIS 143.

18. —County officials or employees

No prohibited conflict of interest exists in the following situations: (1) A member of the board of supervisors of a county is vice-president of a corporation from which the county purchases materials, and (2) A member of the planning department of a county is also an employee of a firm which contracts with the county; if in both of the above situations, the remuneration of the municipal employee and/or officer is not directly affected as a result of the contracts of their employer (firm and corporation) with the municipality, and the duties of their employment do not directly involve the procurement, preparation, or performance of any part of such contracts, provided their duties with the firm or corporation do not normally include such functions. (3) The wife of the head of the county planning department is employed by a planning firm which does business with the county, if the remuneration of the wife is not directly affected as a result of the contracts of her employer with the municipality and the duties of her employment do not directly involve the procurement, preparation, or performance of any part of such contracts, provided her duties with the firm do not normally include such functions. 1967 Op St Compt No. 67-513.

A prohibited conflict of interest occurs where a pharmacist employed part-time by a county welfare department checks prescriptions submitted by a pharmacy by which he is employed and which participates in the Medicaid program. 1968 Op St Compt No. 68-670.

The execution of contracts between a board of cooperative educational services and a county does not give rise to a conflict of interest where a county legislator is an instructor in the employ of the said board. 1969 Op St Compt No. 69-1012.

A member of a county board of supervisors who is employed by the county extension service association does not have a prohibited interest in contracts between the county and the association. 1975 Op St Compt No. 75-736.

A prohibited interest in contract does not occur where a county legislator is an employee of a not-for-profit hospital corporation which provides services to the county pursuant to contract. 1975 Op St Compt No. 75-1273.

Generally, elective county corner, who is also funeral director, would not have prohibited interest in contract if he or she submitted bills to county department of social services for payment of costs of burying deceased public assistance recipient; 10 Opns St Compt 1954, p 217 superseded to extent inconsistent with this opinion. 1998 Op St Compt No. 98-5, 1998 N.Y. Comp. LEXIS 5.

A county legislator, who is an employee of one of two family-owned and closely held corporations which have common business interests, has a prohibited interest in contracts between the county and either corporation. Whether the exception contained

in General Municipal Law, § 802(1)(b) is applicable depends upon pertinent facts. 1975 Op St Compt No. 75-84.

Member of county governing board who also serves on board of not-for-profit agency does not have prohibited interest in contract between county and agency, but member must disclose any interest in such contract and should not participate in discussion or vote on contract. 1992 Op St Compt No. 92-30, 1992 N.Y. Comp. LEXIS 17.

19. —Fire department or district officials or employees

The chief engineer of a fire district does not have a prohibited interest in contracts for the purchase of firefighting equipment between the district and a firm by which he is employed unless, as a fire district officer, he performs certain functions enumerated in General Municipal Law, § 801(1) in connection with such contracts. 1975 Op St Compt No. 75-459.

Whether an assistant chief of a village volunteer fire department has a prohibited conflict of interest in contracts between the village and a firm which employs him as a sales representative depends upon his powers and duties, as assistant chief, relative to such contracts. 1979 Op St Compt No. 79-740.

The assistant chief of a city fire department consisting of volunteer firemen would not have a prohibited interest in contracts between the city and a company by which he is employed unless he has one or more of the powers or duties enumerated in section 801(1) with respect to such contracts. 1982 Op St Compt No. 82-343, 1982 N.Y. Comp. LEXIS 393.

A fire district commissioner who is an employee of a business which services district vehicles has a conflict of interest in any contracts between the district and the business unless the exception contained in section 802(1)(b) is applicable. 1984 Op St Compt No. 84-37, 1984 N.Y. Comp. LEXIS 100.

Fire district commissioner who is also president and chief stockholder of automotive dealership would have conflict of interest if fire district vehicles are serviced by his company unless pertinent exceptions in CLS Gen Mun § 802 apply; extension for voting on rules relating to contracts between district and his company would not be curative. 1988 Op St Compt No. 88-8, 1988 N.Y. Comp. LEXIS 8.

Fire district commissioner, who is salaried employee of firm doing business with district, does not have prohibited conflict of interest in purchase contracts between firm and district if exception contained in CLS Gen Mun Law § 802(1)(b) is applicable. 1988 Ops St Compt No. 88-56, 1988 N.Y. Comp. LEXIS 52.

When a secretary-treasurer of a fire district performs the functions of executing the district's bonds and issuing checks for the payment of principal and interest, and has no other powers and duties with respect to the sale, issuance or payment of bonds, the secretary-treasurer would not have a contractual interest prohibited by article 18 of the General Municipal Law if he or she purchased bonds issued by the district. 1991 Op St Compt No. 91-8, 1991 N.Y. Comp. LEXIS 7.

20. —Library officials or employees

A prohibited conflict of interest does not exist where a salesman employed by a publishing company is also a trustee of a public library which is a member of a cooperative library system, and the public library places orders for books through said system which in turn purchases the books from the publishing company, if (a) the remuneration of the salesman is not directly affected as a result of the contract between the company and the library system and (b) the duties of the salesman do not directly involve the procurement, preparation or performance of any part of the contract. 1967 Op St Compt No. 67-385.

However, a prohibited conflict of interest would exist if the salesman's normal duties involve handling the account of the particular library system and he intentionally refrains from assuming such duties. 1967 Op St Compt No. 67-385.

21. —Town official or employees

A prohibited conflict of interest arises on behalf of a town supervisor when a town purchases equipment from a firm by which he is employed, unless an exception afforded by Section 802 of the General Municipal Law is applicable to the circumstances of any given transaction. 1968 Op St Compt No. 68-8.

A prohibited interest in contract exists where a town board purchases a vehicle from a company which employs a member of the board as a salesman, unless the exception afforded by section 802(1)(b) is applicable. 1968 Op St Compt No. 68-810.

There is no prohibited conflict of interest where a town clerk, acting as sales agent, sells cleaning supplies to the town, but disclosure of the interest in contract is required. 1972 Op St Compt No. 72-879.

Subject to certain exceptions contained in General Municipal Law, § 802, whether a town water and sewer superintendent has a prohibited interest in contracts for the installation of water and sewer connections between the town and the firm by which he is employed depends upon whether inspection of such work by him constitutes approval thereof or is a prerequisite to payment therefor by the town. 1975 Op St Compt No. 75-48.

A councilman on the town board who is the secretary/treasurer and a major stockholder of a truck center business has a prohibited conflict of interest in contracts between the town and the truck center business involving the purchase, by the town, of highway supplies unless the total consideration payable under the contract, when added to the aggregate amount of all consideration payable under contracts in which the councilman had an interest during the fiscal year does not exceed $100. 1983 Op St Compt No. 83-95, 1983 N.Y. Comp. LEXIS 391.

Newly-elected town board member who is also an employee of the insurance agency with which the town contracts for insurance coverage would have a prohibited conflict of interest in the contract unless the exception contained in either CLS Gen Mun Law § 802(1)(b) or (1)(h) is applicable, as board member, as employee of insurance agency, is deemed to have an interest in any insurance contract between the agency and the town, regardless of whether he receives a direct or indirect pecuniary or material benefit from such contracts. 1989 Op St Compt No. 89-39.

Arrangement whereby recording secretary of town planning board is employed by consulting engineer who regularly represents developers in matters before planning board would not appear to raise questions as to potential prohibited interests in town contracts; however, secretary would be prohibited from performing services for engineering firm in relation to any matter before, or to come before planning board, and he or she would be prohibited from disclosing any confidential information acquired in course of his or her duties as secretary to planning board, or using any such information to further personal interests. 1997 Op St Compt No. 97-12, 1997 N.Y. Comp. LEXIS 7.

22. —Village officials or employees

The prohibition of these sections is not applicable to a village trustee who is only a salaried employee of a corporation which contracts with the village. 1966 NY Ops Atty Gen Apr 7 (Informal), 1966 N.Y. AG LEXIS 54.

A village trustee may be employed by a hardware store contracting with the village provided that his salary as such employee will not be directly affected as a result of such contract and provided that the duties of such employment do not directly involve the procurement, preparation or performance of any part of such contract. However, disclosure of such employment must be made by the village trustee in accordance with the General Municipal Law, § 803. 1971 NY Ops Atty Gen Feb 24 (Informal), 1971 N.Y. AG LEXIS 45.

The chief engineer of a village electric department who also formed a cable television company which sought a franchise from the village would have a conflicting interest prohibited by General Municipal Law, § 801, in view of the nature of his duties as chief engineer. 1975 NY Ops Atty Gen Aug 12 (Informal), 1975 N.Y. AG LEXIS 148.

A vice president or stockholder of more than five percent of the outstanding stock of a cable T.V. company granted a franchise by the village has a conflicting interest prohibited by General Municipal Law, § 801, if he were also to serve as village trustee. There would be no conflict if he were merely an employee of the corporation and received remuneration pursuant to General Municipal Law, § 802, subdivision 1(b). 1978 NY Ops Atty Gen Nov 8 (Informal), 1978 N.Y. AG LEXIS 378.

Village mayor, employed full-time as technical sheriff in county sheriff's department, had conflict of interest in negotiating or voting on proposed contract with county for provision of law enforcement services by sheriff's department to village. 1998 NY Ops Atty Gen 98-34 (Informal), 1998 N.Y. AG LEXIS 31.

Under certain circumstances, there is no prohibited conflict of interest where the chairman of a village planning board is also employed by an architectural firm which is retained by the village to render services in connection with the construction of municipal buildings. 1967 Op St Compt No. 67-999.

A prohibited conflict of interest does not arise on behalf of a member of a village planning board where the village contracts to obtain the services of a firm of planning experts by whom the planning board member is employed, provided the planning board does not have the power or duty to do any of the things mentioned in section 801 with respect to the said contract. 1968 Op St Compt No. 68-265.

There is no prohibited conflict of interest where a village mayor or trustee is employed by an insurance agency and is not, in the course of his employment, directly involved in the procurement, preparation or performance of any insurance contract with the village or will not have his remuneration directly affected by such a contract. Likewise, if the mayor or trustee owns stock in an insurance agency which provides insurance to the village but the extent of such stockholdings are less than five per cent of the outstanding stock, there is no prohibited interest. If the extent of stockholdings exceeds five per cent of the outstanding stock, the interest will not be prohibited provided that the contract was entered into prior to the time the mayor or trustee was elected, and the contract may not be renewed upon expiration. 1981 Op St Compt No. 81-430, 1981 N.Y. Comp. LEXIS 454.

There is no prohibited conflict of interest where a village purchases insurance from an insurance company of which a village trustee is an employee, if the trustee's remuneration will not be directly affected by the transaction and, as an employee of the company, the trustee will have nothing to do with the preparation, procurement or performance of the insurance contracts. 1982 Op St Compt No. 82-234, 1982 N.Y. Comp. LEXIS 496.

A village clerk may enter into a contract with the village for the plowing of village streets but must disclose his statutory interest in the contract in writing to the board of trustees. 1983 Op St Compt No. 83-35, 1983 N.Y. Comp. LEXIS 454.

Village trustee who is officer, employee and stockholder of construction corporation would have prohibited interest in any contract between corporation and village unless (a) his or her stock ownership amounts to less than 5 percent of outstanding stock and (b) is employee and officer of corporation, his or her duties do not involve procurement, preparation or performance of village contracts in his or her remuneration is not affected by such contract; there is no exception to conflict of interest provisions of CLS Gen Mun Art 18 for contracts entered into in emergency situations. 1988 Op St Compt No. 88-23, 1988 N.Y. Comp. LEXIS 19.

23. Official's spouse or relative as employee of contracting party

Conflict of interest provisions of General Municipal Law did not prohibit board members whose spouses were employed by respondent school district from participating in contract negotiations and votes. 2004 Op Comm Ed No. 15,135, 2004 NY Educ. Dept. LEXIS 20.

Award of contract to firm which employed son of respondent board member did not constitute conflict of interest under CLS Gen Mun § 800(3) as (1) respondent's son was not his "dependent" merely because he resided in respondent's home after graduation and prior to his marriage, where he was at least 23 years old, had salaried position and assumed his own responsibility for taxes, clothing, insurance, medical expenses and entertainment, among other things, and (2) petitioner failed to prove that respondent derived direct or indirect pecuniary or material benefit from having his son reside in his home. 2001 Op Comm Ed No. 14,672, 2001 NY Educ. Dept. LEXIS 143.

Petitioners, two board members, seek a determination annulling that part of the code of ethics adopted by the Board of Education which prohibits board members from voting on employment contracts of their spouses. Sections 800(3) of the General Municipal Law carves out an exception to the conflict of interest rule that prohibits a board member from having an interest in any contract of a spouse which the board has the power or duty to negotiate, authorize, or approve. By expressly exempting spousal contracts from § 801's prohibition against conflicts of interest, the Legislature has adjudged it permissible for a school board member to vote on the employment contract of a spouse. The Board of Education may not override this plain intent by enacting ethical codes at odd with the General Municipal Law. The Board of Education's prohibition is also inconsistent with § 3016(2) of the Education Law, which allows school districts to employ as teachers a relative of board members, so long as such employment is approved by two-thirds of the members of the board. Conspicuously absent from this provision is any restriction on the exercise of power by board members whose spouses are employed by the district as teachers. The reasonable inference drawn from this omission is that the Legislature did not intend to restrict board members from voting on their spouses' employment contracts. By enacting a standard which does precisely that, the Board of Education has contravened the plain intent of § 3016, and has, in effect, prevented certain board members from substantially performing the duties of office. Accordingly, the provision of the Board of Education's ethics code which prohibit board members from voting on the employment contract of their spouses is an excess of the authority of the Board of Education, and is null and void. Appeal of Behuniak and Lattimore, 1991 Op Comm Ed No. 12,447.

No prohibited conflict of interest exists in the following situations: (1) A member of the board of supervisors of a county is vice-president of a corporation from which the county purchases materials, and (2) A member of the planning department of a county is also an employee of a firm which contracts with the county; if in both of the above situations, the remuneration of the municipal employee and/or officer is not directly affected as a result of the contracts of their employer (firm and corporation) with the municipality, and the duties of their employment do not directly involve the procurement, preparation, or performance of any part of such contracts, provided their duties with the firm or corporation do not normally include such functions. (3) The wife of the head of the county planning department is employed by a planning firm which does business with the county, if the remuneration of the wife is not directly affected as a result of the contracts of her employer with the municipality and the duties of her employment do not directly involve the procurement, preparation, or performance of any part of such contracts, provided her duties with the firm do not normally include such functions. 1967 Op St Compt No. 67-513.

A clerk in a town highway superintendent's office, whose duties include checking invoices for accuracy, would not have an interest prohibited by Article 18 of the General Municipal Law if the highway superintendent were to award contracts for the repair of town highway equipment to the clerk's spouse. 1992 Op St Compt No. 92-6.

24. Corporate interest in contract; official as officer or director of corporation

A county employee who held none of the authoritative powers enumerated in Gen Mun Law § 801(1) could not be indicted under that statute but could be indicted under a county law prohibiting conflicts of interest. People v Wendel, 116 Misc. 2d 91, 455 N.Y.S.2d 322, 1982 N.Y. Misc. LEXIS 3838 (N.Y. County Ct. 1982).

No prohibited conflict of interest arises from the sale of real property by an Urban Renewal Agency to a corporation of which a member of such Agency is an officer and director but not a shareholder, provided the conditions set forth in the cited statute are met and disclosure of interest is made. In the public interest the person involved herein should not participate in any transaction between the Agency and the corporation. If a County Board of Ethics has been created, its advisory opinion should be sought.

1969 NY Ops Atty Gen Dec 2 (Informal), 1969 N.Y. AG LEXIS 106.

A city fireman who is also president of a cable TV company granted a franchise by the city, does not have a conflicting interest prohibited by General Municipal Law, Section 801, but is required by Section 803 to publicly disclose his interest in the cable TV company. 1970 NY Ops Atty Gen July 30 (Informal), 1970 N.Y. AG LEXIS 98.

No prohibited conflict of interest exists in the following situations: (1) A member of the board of supervisors of a county is vice-president of a corporation from which the county purchases materials, and (2) A member of the planning department of a county is also an employee of a firm which contracts with the county; if in both of the above situations, the remuneration of the municipal employee and/or officer is not directly affected as a result of the contracts of their employer (firm and corporation) with the municipality, and the duties of their employment do not directly involve the procurement, preparation, or performance of any part of such contracts, provided their duties with the firm or corporation do not normally include such functions. (3) The wife of the head of the county planning department is employed by a planning firm which does business with the county, if the remuneration of the wife is not directly affected as a result of the contracts of her employer with the municipality and the duties of her employment do not directly involve the procurement, preparation, or performance of any part of such contracts, provided her duties with the firm do not normally include such functions. 1967 Op St Compt No. 67-513.

A county legislator does not have a prohibited interest in purchase contracts between the county and a corporation of which he is president and secretary, where the county officer in charge of purchasing and the auditing officer are appointees of the elective county executive and their appointments are subject to confirmation by the county legislature. 1975 Op St Compt No. 75-484.

A school board member who is president of a corporation does not have a prohibited interest in a contract for the purchase of buses from said corporation if the exception contained in General Municipal Law, § 802(1)(b) is applicable. 1978 Op St Compt No. 78-133.

A county commissioner of health does not have a prohibited interest in contracts between the county and a not-for-profit corporation of which he is a member of the board of directors; however, disclosure is required. 1980 Op St Compt No. 80-73.

Except for the applicability of one or more of the exceptions contained in section 802, a town councilman who is also the vice-president and branch manager of a bank would have a prohibited interest in any contracts between the town and the bank. 1982 Op St Compt No. 82-48, 1982 N.Y. Comp. LEXIS 674.

When a village purchases materials and supplies for the use of its fire department from a corporation of which the fire chief is vice-president, whether the chief has a conflict of interest depends upon pertinent facts and circumstances. 1983 Op St Compt No. 83-211, 1983 N.Y. Comp. LEXIS 273.

A member of the board of trustees of a community college has a conflict of interest in any contracts between the college and a bank of which he is a director, president and chief executive officer except to the extent that any of the exceptions enumerated in General Municipal Law, § 802 are applicable. 1983 Op St Compt No. 83-143, 1983 N.Y. Comp. LEXIS 341.

Whether a member of a city council who is vice-president of a corporation operating a service station, has a conflict of interest when the city does business with the station depends upon pertinent facts. Section 801(1)(c) is not applicable when the commissioner of finance, who is responsible for entering into contracts on behalf of the city, is an appointee of the mayor and his appointment is subject to the approval of the common council. 1984 Op St Compt No. 84-16, 1984 N.Y. Comp. LEXIS 123.

Member of county governing board who served as officer of 2 not-for-profit corporations, as well as director of one of those corporations, would have prohibited interest in contracts between county and either corporation, but must disclose any interest he may have in such contract under CLS Gen Mun § 803, and must avoid contravening statutory prohibitions against disclosure of confidential information and compensated appearances before county agencies under CLS Gen Mun § 805-a; furthermore, even if not required by county's code of ethics, county board member should not participate in county board discussions or decisions relating to county contracts with not-for profit corporations for which board member serves as officer, employee or director. 2001 Op St Compt No. 2001-9, 2001 N.Y. Comp. LEXIS 9.

25. —Official as stockholder of corporation

A prohibited conflict of interest exists where a village trustee is the owner of more than 5% of the outstanding stock of a corporation whose sales to the village average $2,000 to $3,000 per year. 1965 NY Ops Atty Gen Feb 1 (Informal), 1965 N.Y. AG LEXIS 52.

A street excavation permit is not a contract prohibited by General Municipal Law, Art. 18, and may, therefore, be issued to a municipal officer or employee or to a corporation in which he is a stockholder. 1965 NY Ops Atty Gen May 26 (Informal), 1965 N.Y. AG LEXIS 91.

A city is not precluded from entering into a contract for the purchase of merchandise from a corporation in which a city employee is a stockholder. Proper disclosure of interest must be made. 1965 NY Ops Atty Gen Aug 26, (Informal), 1965 N.Y. AG LEXIS 126.

A town board member who owns more than 10— of the stock of an abstract company which contracts with the town will have a prohibited conflict of interest in such contract. 1966 NY Ops Atty Gen Jan 17 (Informal), 1966 N.Y. AG LEXIS 20.

No conflict of interest ensues where a member of the Fire Commission of the City of Geneva, who has neither the power nor the duty to authorize or approve a contract between said City and a corporation in which he is a stockholder, or any payments to be made thereunder. However, disclosure of such interest in accordance with General Municipal Law, section 803, must be made. 1973 NY Ops Atty Gen May 23 (Informal), 1973 N.Y. AG LEXIS 69.

A contracting firm, in which a town police commissioner is the majority stockholder, may bid upon, or accept local contracts upon which no bid is required, so long as the commissioner does not have a municipal function defined in General Municipal Law, § 801. Compliance should be had with the applicable code of ethics of the town established by General Municipal Law § 806. Interpretations of the code may be requested of the board of ethics of Westchester County if such a board has been established under General Municipal Law § 808. 1974 NY Ops Atty Gen Nov 18 (Informal), 1974 N.Y. AG LEXIS 180.

A town board member who is the principal stockholder of a corporation which contracts with an oil company to deliver oil on a per gallon basis, will have a prohibited conflict of interest in a contract between the town and the oil company for the purchase of oil. 1964 Op St Compt No. 64-1030.

A prohibited conflict of interest arises where a village purchases supplies and equipment from a hardware store operated by a corporation of which a village trustee is the principal stockholder. 1968 Op St Compt No. 68-323.

A prohibited conflict of interest will result if a community college purchases supplies from a corporation in which a member of the board of trustees is a major stockholder, notwithstanding that the corporation has been awarded a State contract pursuant to section 104 of the General Municipal Law. 1968 Op St Compt No. 68-382.

A county legislator has a prohibited interest in contracts between the county and a corporation of which he is a major stockholder for services provided for the county home and infirmary when he, as a member of the county board, has any of the powers and duties enumerated in section 801(1). 1979 Op St Compt No. 79-844.

When a village attorney is a director and stockholder of a bank, he has a conflict of interest if the bank should purchase a statutory installment bond from the village only if he has any of the powers and duties set forth in section 801(1) in relation to the transaction. If he has a conflict of interest, the sale nevertheless would be permissible if made pursuant to Local Finance Law,

§ 60.10 and the restrictions set forth therein. 1985 Op St Compt No. 85-34, 1985 N.Y. Comp. LEXIS 108.

County treasurer may have prohibited conflict of interest in lease pursuant to which county rents gravel pit from corporation of which treasurer owns more than 5 percent of stock, even though original lease was entered into before treasurer was elected to office and treasurer does not have power or duty to negotiate, prepare, authorize or approve contemplated lease renewal, or to approve payments or audit bills or claims under either original lease or renewal, but even if treasurer does not have prohibited interest in lease, treasurer's interest must be disclosed. 1989 Op St Compt No. 89-32, 1989 N.Y. Comp. LEXIS 35.

Village mayor who is also officer and stockholder of more than 5 percent of outstanding stock of insurance agency would have prohibited conflict of interest if agency sells insurance to village. 1988 Op St Compt No. 88-13, 1988 N.Y. Comp. LEXIS 13.

Assistant chief of fire district's fire department who owns more than 5 percent of stock of private corporation contracting with fire district for sale and repair of radios to district does not have prohibited interest in contract if, as assistant chief, he or she does not have any powers and duties listed in CLS Gen Mun § 801 in connection with contract; if assistant chief, on behalf of corporation, exercises direction and control over any corporate employees involved in contract, such fact must be disclosed under CLS Gen Mun § 803(1). 2001 Op St Comp No. 2001-11, 2001 N.Y. Comp. LEXIS 11.

26. —Official as both officer or director and stockholder

Conviction of former commissioner of public works on count charging failure to disclose an interest in snow plowing contract awarded to corporation of which Commissioner was officer and stockholder could not be reconciled with verdict of not guilty on count charging a conflict of interest regarding the contract; hence, conviction on the former count was required to be reversed and the charge dismissed; conviction on either charge required a basic finding that the commissioner had an interest in the contract. People v Speach, 49 A.D.2d 210, 374 N.Y.S.2d 210, 1975 N.Y. App. Div. LEXIS 10626 (N.Y. App. Div. 4th Dep't 1975).

There is a prohibited conflict of interest in a contract between a village and a business corporation of which the mayor is a substantial shareholder and an officer. 1964 Op St Compt No. 64-808.

There is a prohibited conflict of interest where members of the village board of trustees are shareholders, directors and an officer of the contracting corporation. 1964 Op St Compt No. 64-808.

The board of managers of a village public general hospital may not contract for the purchase of supplies with a corporation of which the mayor is a stockholder and officer except to the extent of $100 in the aggregate during any fiscal year. 1964 Op St Compt No. 64-871.

An interest in contract does not arise where a person is retained as a consultant by a municipality on an independent contractual basis, and the municipality purchases equipment from a corporation of which he is a stockholder, director and president. 1969 Op St Compt No. 69-17.

The interest in contract is not prohibited where a member of a town conservation advisory council is a stockholder and an officer of a corporation which has contracted to perform alterations on a town building. 1970 Op St Compt No. 70-51.

A village may purchase supplies and equipment from various stores owned by a corporation of which the village justice is an officer and stockholder. 1973 Op St Compt No. 73-805.

A town councilman who is the sole stockholder of an insurance corporation has a conflict of interest when the town purchases insurance from his corporation. 1983 Op St Compt No. 83-169, 1983 N.Y. Comp. LEXIS 314.

Fire district commissioner who is also president and chief stockholder of automotive dealership would have conflict of interest if fire district vehicles are serviced by his company unless pertinent exceptions in CLS Gen Mun § 802 apply; extension for voting on rules relating to contracts between district and his company would not be curative. 1988 Op St Compt No. 88-8, 1988 N.Y. Comp. LEXIS 8.

Where a town councilman is the president and major stockholder of a corporation which manufactures septic tanks and the corporation sells such tanks to a contractor for use in connection with the performance of a contract with the town for the construction of a sewer system after competitive bidding, there is no conflict of interest in the absence of a commitment between the corporation and the contractor for the purchase of the tanks prior to the award of the contract by the town board. 1982 Op St Compt No. 82-207, 1982 N.Y. Comp. LEXIS 507.

27. —Corporate interest of spouse or relatives

A prohibited conflict of interest would arise in a contract between a town and a private corporation when the spouse of the deputy comptroller of the town is a majority stockholder of that corporation, unless the total consideration payable under the contract does not exceed one hundred dollars. 1975 NY Ops Atty Gen July 7 (Informal), 1975 N.Y. AG LEXIS 133.

A member of county board of supervisors has a prohibited interest in contracts between the county and a closely held corporation of which her husband is a major stockholder and president. 1974 Op St Compt No. 74-400.

A city attorney has a prohibited interest in any "contracts" between the city and a corporation in which his wife owns 25% of the stock. 1978 Op St Compt No. 78-156.

When a village mayor previously has transferred ownership of his stock in a water works company to his son and wife, whether the mayor has a prohibited interest in the purchase by the village of the company assets depends upon whether he receives any pecuniary benefit from the moneys paid to the wife and son as stockholders of the corporation upon the sale of the corporate assets. 1979 Op St Compt No. 79-528.

A chief of a fire district is not deemed to have an interest in contracts between the district and a corporation of which his spouse is a director and officer. The existence of a statutory interest depends on whether he receives a pecuniary or material benefit as a result of the contract. Courts may find conflicts of interest where facts indicate violation of spirit, but not letter, of Article 18 legislation. 1980 Op St Compt No. 80-38.

Where a village attorney is paid on a salary basis, and also receives compensation on vouchers for additional work, whether the mayor, who is the father of the village attorney and also associated with him in the practice of law as either a partner or as a member of a professional corporation, has a prohibited interest in contracts between the attorney and the village, depends upon pertinent facts. 1980 Op St Compt No. 80-164.

The mayor of a city does not have a statutory interest in insurance contracts between the city and his brother's insurance agency unless he derives a direct or indirect pecuniary or material benefit as a result of such contracts. 1982 Op St Compt No. 82-365, 1982 N.Y. Comp. LEXIS 364.

A conflict of interest does not exist when a county purchases materials and supplies from a corporation owned by the spouse of a department head when the county adopts a resolution relieving the department head from certain functions relative to those contracts and assigning those functions to other county personnel. 1982 Op St Compt No. 82-332, 1982 N.Y. Comp. LEXIS 400.

A county department head is not deemed to have an interest in purchases of supplies made by him for his department pursuant to a general contract with the county between the county and his spouse's corporation. Whether a statutory interest otherwise exists depends upon the circumstances; if so, he would have a prohibited interest in purchases of departmental supplies. 1982 Op St Compt No. 82-291, 1982 N.Y. Comp. LEXIS 433.

A school district employee does not have a conflict of interest when the district leases space in a former school building to a corporation of which his wife is an officer and stockholder. 1983 Op St Compt No. 83-110, 1983 N.Y. Comp. LEXIS 377.

A fire district commissioner does not have a conflict of interest when the fire district contracts with his adult son for electrical services, providing that the commissioner receives no direct or indirect pecuniary or material benefit as a result of such contracts. 1983 Op St Compt No. 83-40, 1983 N.Y. Comp. LEXIS 444.

28. —Miscellaneous corporate interests

There is no legal prohibition against a town assessor's having a financial interest in a corporation which sells and constructs swimming pools within the town. 1970 Op St Compt no.. 70-28.

29. Contract for goods or services; municipal purchases which present conflict

The chairman of the Board of Fire Commissioners of a fire district may not sell fuel oil to the district unless the total cost is $100 or less for the fiscal year. 1964 Op St Compt No. 64-765.

A central school district may not purchase automobiles and trucks from a partnership where the spouse of a member of the Board of Education is a partner in the firm, nor may it contract to purchase parts and material for repair for presently-owned school buses from such firm unless the total consideration payable under all contracts with the firm during the fiscal year is less than $100. 1964 Op St Compt No. 64-806.

A county may not legally purchase highway equipment and parts from an automobile agency in which a member of the board of supervisors owns a substantial interest, and the fact that the county had standardized two vehicles sold by the agency would not cure an otherwise illegal interest in contracts. 1964 Op St Compt No. 64-840.

A town board member has a prohibited conflict of interest when the town purchases sand from him. 1979 Op St Compt No. 79-690.

A member of a county board of supervisors has a conflict of interest when his spouse, as owner of an apartment house, rents units therein to public assistance recipients and is paid therefor upon vouchers submitted to the county. 1985 Op St Compt No. 85-4, 1985 N.Y. Comp. LEXIS 140.

Member of board of trustees of community college would have prohibited conflict of interest if, in any fiscal year, college purchased supplies from hardware store owned by trustee and sum of purchases plus consideration under other contracts with college in which trustee had interest exceed $100. 1996 Op St Compt No. 96-14, 1996 N.Y. Comp. LEXIS 11.

Whether a water maintenance supervisor of a city water department, who has loaned money to the owners of a plumbing supply company for business purposes, has a statutory interest in the purchase by the city of plumbing supplies from the company, which supplies are used by the water department, depends upon pertinent facts and circumstances. 1981 Op St Compt No. 81-403, 1981 N.Y. Comp. LEXIS 484.

30. —Municipal purchases which do not present conflict

A firm that is wholly owned by a County Legislator of the County of Herkimer who represents the Town of Danube, as well as other areas in the County of Herkimer, may sell materials and supplies in amounts less than those requiring public bidding to the Town of Danube without creating a prohibited conflict of interest. 1976 NY Ops Atty Gen Dec 15 (Informal), 1976 N.Y. AG LEXIS 192.

A village water superintendent is not prohibited from selling a truck owned by him to the village by which he is employed, after September 1, 1964. 1964 Op St Compt No. 64-725.

A town assessor may sell a truck to a town of which he is an assessor, but must disclose his interest as vendor in writing, to be recorded in the town board minutes. 1967 Op St Compt No. 67-965.

A village clerk-treasurer does not have a prohibited conflict of interest in a contract between her husband and the village in relation to the construction of a shed. However, disclosure is required. 1979 Op St Compt No. 79-147, 1979 N.Y. Comp. LEXIS 217.

A town planning board member does not have a prohibited conflict of interests in the purchase, by the town, of paving materials from a firm in which the planning board member is a partner. 1966 NY Ops Atty Gen Dec 14 (Informal), 1966 N.Y. AG LEXIS 155.

31. —Municipality as vendor

Although there would be no prohibited conflict of interest if a town were to provide in its bidding specifications that it reserves the option to sell any equipment, to be traded in, to town employees at the trade-in price, such a procedure could create certain serious problems in determining the low bidder, and might also have the effect of increasing the prices for the items to be purchased. 1968 Op St Compt No. 68-711.

A member of the administrative body of a county sewer district would have a prohibited interest in contract should be purchase personal property sold by the district at public auction, when the sale is authorized or approved by the said body. 1974 Op St Compt No. 74-439.

32. —Miscellaneous contracts

An engineer retained by the Town of Wawarsing to act as engineering consultant to the town, given the nature of his relationship to the town as described herein, is not an "officer or employee" of the town. Therefore, his representation of private clients before the various town boards and the performance of other engineering services involving property within the town is not proscribed by either section 801 of the General Municipal Law or Local Law No. 2 of 1970 of the Town of Wawarsing. 1976 NY Ops Atty Gen Aug 3 (Informal), 1976 N.Y. AG LEXIS 137.

An interest in contract does not arise on behalf of a village trustee where the board of trustees contracts with a general contractor relative to village improvements, and the contractor purchases materials needed therefor from a firm of which the trustee is president. 1968 Op St Compt No. 68-476.

Where the spouse of a town clerk is a printer, the town clerk has a prohibited conflict of interest in contracts between the town and the spouse for printing work done for the clerk's office only if the clerk has any powers and duties set forth in section 801(1) relative to such contracts. 1982 Op St Compt No. 82-264, 1982 N.Y. Comp. LEXIS 462.

Where a town supervisor has a prohibited conflict of interest in contracts relating to the maintenance of a town generator, it is possible that he would be required by a court to return to the town moneys received for services performed. 1982 Op St Compt No. 82-244, 1982 N.Y. Comp. LEXIS 488.

33. Insurance; municipal purchases which are prohibited

Member of City Board of Aldermen has an interest which comes under the statutory prohibition, where he is an officer and employee of a corporation which has a contract or agreement to procure all insurance required by the city, and receives commissions thereon. 1965 NY Ops Atty Gen March 19 (Informal), 1965 N.Y. AG LEXIS 64.

A prohibited interest in contract exists in a transaction involving the sale of insurance by an insurance broker who also is town attorney, to the town for which he is such officer. 1967 Op St Compt No. 67-329.

A prohibited interest in contract arises where an insurance agency (corporation) by which the mayor of a village is employed sells insurance to the village, unless section 802(1)(b) is applicable. 1968 Op St Compt No. 68-719.

A town auditor generally may not sell insurance to his town. 1969 Op St Compt No. 69-778.

A town supervisor has a prohibited interest in any insurance contracts between the town and an insurance agency which he acquires, where he receives a material or pecuniary benefit as a result of such contracts, and he has the powers and duties enumerated in General Municipal Law, § 801 with respect thereto. 1973 Op St Compt No. 73-979.

Subject to the applicability of the exception contained in General Municipal Law, § 802(1)(b), a director of a regional off-track betting corporation, who is also a principal of an insurance firm, has a prohibited interest in contracts between the corporation and his firm for the purchase of insurance. 1976 Op St Compt No. 76-122.

34. —Municipal purchases which are not prohibited

No prohibited conflict of interest exists where a village police justice sells group hospitalization and life insurance to the village in which he is such officer for the benefit of its employees and officers. 1967 Op St Compt No. 67-397.

A prohibited conflict of interest does not exist where a police surgeon of a city is also the director of Blue Cross-Blue Shield of Northeastern New York, Inc., a corporation through which the city purchases insurance coverage for its employees. 1967 Op St Compt No. 67-407.

A village justice is not prohibited from selling group life and hospitalization insurance to the village for employees of the village in which he is an officer, but he must publicly disclose the

nature and extent of his interest in the contract. 1973 Op St Compt No. 73-762.

A fire district may have a deputy treasurer and, furthermore, there would be no prohibited interest in contract if the fire district treasurer were an insurance agent who sells insurance to the fire district. 1978 Op St Compt No. 78-670.

There is no prohibited conflict of interest where a village mayor or trustee is employed by an insurance agency and is not, in the course of his employment, directly involved in the procurement, preparation or performance of any insurance contract with the village or will not have his remuneration directly affected by such a contract. Likewise, if the mayor or trustee owns stock in an insurance agency which provides insurance to the village but the extent of such stockholdings are less than five per cent of the outstanding stock, there is no prohibited interest. If the extent of stockholdings exceeds five per cent of the outstanding stock, the interest will not be prohibited provided that the contract was entered into prior to the time the mayor or trustee was elected, and the contract may not be renewed upon expiration. 1981 Op St Compt No. 81-430, 1981 N.Y. Comp. LEXIS 454.

A town supervisor, who is an employee of an incorporated insurance agency which sells insurance to the town, does not have a prohibited interest in the contracts of insurance when her duties as an employee do not directly involve the procurement, preparation or performance of the insurance contracts and her remuneration is not directly affected as a result of such contracts. 1982 Op St Compt No. 82-12, 1982 N.Y. Comp. LEXIS 712.

A city supervisor who is an insurance broker does not have a prohibited interest and may participate with other brokers and agencies in the writing of various insurance policies covering the city. 1968 Op St Compt No. 68-424.

A prohibited conflict of interest does not arise where a member of a town planning board sells insurance to the town. 1968 Op St Compt No. 68-819.

35. —Sale of insurance to party contracting with municipality

There is no conflict of interest where a member of a school board writes insurance for a transportation corporation which has a contract with the school to provide transportation for pupils. 1964 Op St Compt No. 64-823.

An interest in contract does not occur where a town councilman sells insurance to a corporation which leases real property from the town. 1969 Op St Compt No. 69-97.

Because of personal conflicting interests, it is highly improper for a town councilman to sell a performance bond to a contractor with respect to a public works contract with his municipality. 1969 Op St Compt No. 69-81.

36. —Receipt of commissions by official

Removal of town supervisor was warranted where his personally owned insurance agency brokered town's insurance, he shared commissions therein, he took steps to disguise situation by having another broker named as broker of record, he was aware prior to being elected that there was conflict of interest, and he was convicted on his guilty plea to violation of CLS §§ 801 and 805 for willful and knowing violation of conflict of interest provisions as to his personal interest in town's insurance business. West v Grant, 243 A.D.2d 815, 662 N.Y.S.2d 863, 1997 N.Y. App. Div. LEXIS 10114 (N.Y. App. Div. 3d Dep't 1997).

Removal of town supervisor was appropriate, even though his conviction for violation of CLS Gen Mun §§ 801 and 805 occurred and was well publicized prior to his last reelection, since he conveniently pleaded guilty 4 days prior to election, and he had no opponent. West v Grant, 243 A.D.2d 815, 662 N.Y.S.2d 863, 1997 N.Y. App. Div. LEXIS 10114 (N.Y. App. Div. 3d Dep't 1997).

Member of City Board of Aldermen has an interest which comes under the statutory prohibition, where he is an officer and employee of a corporation which has a contract or agreement to procure all insurance required by the city, and receives commissions thereon. 1965 NY Ops Atty Gen March 19 (Informal), 1965 N.Y. AG LEXIS 64.

A town councilman who is a member of an insurance brokerage firm may not share in the pooling of commissions with other brokers with respect to the commissions on the premiums for town insurance. 1965 Op St Compt No. 65-246.

No prohibited conflict of interest exists where a town assessor shares commissions on insurance purchased by the town from an agency with which he is not associated. 1967 Op St Compt No. 67-857.

A prohibited conflict of interest exists where a town attorney, who is also an insurance broker, shares in commissions on insurance placed by the town with an agency other than the one which he owns. 1967 Op St Compt No. 67-947.

A prohibited interest in contract does not occur where a town justice in a town of the first class owns an insurance agency and shares in commissions paid by the town to an insurance agency with which he is not associated. 1971 Op St Compt No. 71-1005.

37. —Election or appointment of member of contracting insurance firm to municipal office

No prohibited conflict of interest arises when a mayor-elect of a city, who is also an officer of an insurance firm from which the city has previously purchased an insurance policy, takes office on January 1, 1968, and the insurance policy expires on June 30, 1968. However, it would be illegal for the city thereafter to purchase any further insurance from the firm. 1967 Op St Compt No. 67-957.

No prohibited conflict of interest arises when an officer of an insurance firm, from which firm a town has purchased insurance policies, is subsequently elected and takes office as town supervisor. However, any renewal of such policies or the purchase of new or other policies from such firm during his tenure of office would be illegal. 1968 Op St Compt No. 68-112.

38. —Miscellaneous interests in insurance contracts

Award of liability insurance contract for city to one agency did not violate statute prohibiting conflict of interest of municipal employee, where it did not appear that the agency was a "municipal employee" within meaning of the statute when it contracted to draw specifications for city's insurance needs. Surdell v Oswego, 91 Misc. 2d 1041, 399 N.Y.S.2d 173, 1977 N.Y. Misc. LEXIS 2476 (N.Y. Sup. Ct. 1977).

A member of a town board may not have an interest in a contract of insurance with such town except where the total consideration payable thereunder, together with all other considerations payable under contracts with such town in which he has an interest during the fiscal year, does not exceed $100.00; or where his interest is only that of a stockholder owning or controlling less than 5% of the stock of the corporation entering into such contract with the town. In any event, disclosure under § 803 must be made. 1969 NY Ops Atty Gen July 16 (Informal), 1969 N.Y. AG LEXIS 65.

A prohibited conflict of interest under section 801 of the General Municipal Law does not arise when a county civil service commissioner receives a pecuniary benefit as the result of services performed for an insurance agency relating to a contract which the agency has with the county in which the commissioner serves. 1975 NY Ops Atty Gen May 8 (Informal), 1975 N.Y. AG LEXIS 115.

A prohibited conflict of interest does not arise where a city commissioner of public safety sells group life insurance to participating city employees. Disclosure is, nevertheless, required. 1968 Op St Compt No. 68-55.

An interest in contract does not arise when a county legislator sells insurance to a town within the county. 1969 Op St Compt No. 69-200.

The interest in contract is not prohibited where a corporation, stock of which is owned by a fire district secretary-treasurer, sells insurance to the district. Disclosure is required. 1970 Op St Compt No. 70-52.

Village trustee who is also comptroller of insurance company would have prohibited conflict of interest if village purchases insurance from that company; school district attorney who is also comptroller of insurance company would have prohibited conflict of interest if school district purchased insurance from that company and school district attorney had any of powers or duties listed in CLS General Municipal § 801. 1988 Op St Compt No. 88-15, 1988 N.Y. Comp. LEXIS 4.

39. Lease agreements; lease from official or employee

Statute, not violated by a contract or agreement by a justice of the peace who is a member of the town board, to construct on land owned by him in the town, and to lease to the State of New York, a barracks for use by members of the Division of State Police. 1965 NY Ops Atty Gen April 26 (Informal), 1965 N.Y. AG LEXIS 76.

A Town Attorney may not lease real property owned by him to his Town unless (1) it is for office space to be occupied by him in the performance of his official duties or (2) the consideration for all such contracts in which he has an interest during a fiscal year does not exceed one hundred dollars; in either of which events disclosure under General Municipal Law § 803, must be made. 1969 NY Ops Atty Gen Dec 16 (Informal), 1969 N.Y. AG LEXIS 113.

A Town may rent or sub-lease premises owned or leased by its Town Clerk for use in the performance of his official duties. A Town may also rent or sub-lease premises owned or leased by its Town Clerk for other Town purposes but disclosure of the Town Clerk's interest should be made in accordance with Section 803. 1970 NY Ops Atty Gen Sept 8 (Informal), 1970 N.Y. AG LEXIS 111.

A prohibited conflict of interest does not occur where a town rents space from the town historian in the basement of his business establishment for the storage (under proper circumstances) of items of historical significance. 1968 Op St Compt No. 68-320.

A town may rent space in the home or other property of a town officer for use as that officer's town office. 1968 Op St Compt No. 68-442.

A prohibited conflict of interest would arise should a county renew an agreement for the lease of premises for county purposes where the property is owned by a member of the board of supervisors, even though the lease was executed prior to the election of the said supervisor. 1968 Op St Compt No. 68-553.

A member of a city examining board of plumbers is not prohibited from leasing his property to the city which he serves. 1968 Op St Compt No. 68-674.

A mayor of a village who is also the owner of an office building, does not have a statutory interest in contracts between the village and an office supply company, which is a lessor of offices in his building, merely because the company is a tenant. In order for a municipal officer or employee to have a conflict of interest, he must derive, directly or indirectly, a pecuniary or material benefit from a contract with his municipality (except to extent that he is "deemed" to have an interest under section 600(3)(a), (b), (c) or (d)). 1981 Op St Compt No. 81-206, 1981 N.Y. Comp. LEXIS 680.

A reasonable rental may be paid by a town to a town officer or employee for a room or rooms owned or leased by the officer or employee and used for the performance of official duties. 1969 Op St Compt No. 69-623.

40. —Lease to official or employee

No conflict of interest under this section exists so as to prohibit a city fireman from leasing city owned real property from such city. 1968 NY Ops Atty Gen Feb 19 (Informal), 1968 N.Y. AG LEXIS 33.

School board president (retired Monsignor) did not negotiate lease between school district and Roman Catholic diocese, nor was he employee of diocese, where his retirement benefits were not directly affected as result of lease and his duties as vicar involved spiritual, not temporal matters, and did not involve procurement, preparation or performance of any part of lease, and thus he did not violate conflict of interest provision of CLS Gen Mun § 801. 1993 Op Comm Ed No. 13,015, 1993 NY Educ. Dept. LEXIS 142.

A member of a board of fire commissioners has a prohibited conflict of interest in any agreement between the board and himself as a private businessman, for rental of a portion of the firehouse for use as a barber shop. 1978 Op St Compt No. 78-995.

There is no prohibited conflict of interest where a county leases an airport hangar to a company which is owned by the commissioner of aviation, if the commissioner does not possess any section 801 duties with respect to the lease. 1979 Op St Compt No. 79-582.

Where a vice-president and treasurer of a corporation authorize payment of rent under a lease, on behalf of his corporation as lessee, to the Steuben County Industrial Department Agency of which he is a member as lessor, by affixing his name to a corporate check, he is directly involved in the performance of the corporation's contract of lease and has a prohibited conflict of interest in the contract. General Municipal Law, § 802(1)(b) is not applicable as an exception to the provision of General Municipal Law, § 801(1) in this case. 1980 Op St Compt No. 80-214.

A member of a central school district board of education, who is also an officer, a 40% stockholder and director of a corporation, would have a prohibited interest in the lease by the corporation of vacant space in a building owned by the district. 1983 Op St Compt No. 83-83, 1983 N.Y. Comp. LEXIS 398.

41. —Sales by official's or employee's lessee to municipality

Depending upon the terms of the rental agreement and the performance thereunder, a lease of a farm on which gravel is found, owned by a town councilman, for a fixed rental to a third party and then the sale of the gravel by the third party to the town may or may not constitute a conflict of interest. 1967 Op St Compt No. 67-979.

A prohibited conflict of interest occurs when a town highway superintendent purchases stone from the lessee of a quarry owned by him, and the terms of the lease require payment to the superintendent of a percentage of the moneys received by the lessee for the sale of the stone. 1969 Op St Compt No. 69-286.

42. Legal services; instances in which municipal officer may not provide legal services to municipality

In citizen-taxpayer action to recover funds paid by county to defendant and his law firm for legal services rendered to county while defendant was county attorney, allegedly in violation of CLS Gen Mun § 801 and CLS Pub O § 67, plaintiffs were not required to show proof of fraud, collusion or motivation by personal gain in order to impose personal liability on former county attorney, but were required to do so with respect to his law firm. Clowes v Pulver, 258 A.D.2d 50, 691 N.Y.S.2d 649, 1999 N.Y. App. Div. LEXIS 6500 (N.Y. App. Div. 3d Dep't), app. dismissed, 94 N.Y.2d 858, 704 N.Y.S.2d 533, 725 N.E.2d 1095, 1999 N.Y. LEXIS 3988 (N.Y. 1999).

Bar Association Plan counsel for representation of indigent defendants has conflict of interest if he is member of County Board of Supervisors. 1966 NY Ops Atty Gen Sept 16 (Informal), 1966 N.Y. AG LEXIS 114.

The attorney for a county sewer district who is later elected to the position of part-time district attorney and who intends to hold both positions, must make a disclosure of interest under section 803 of Article 18 of the General Municipal Law. 1983 N.Y. Op. Att'y Gen. No. 83-45, 1983 N.Y. AG LEXIS 49.

An associate corporation counsel, who, by virtue of his office, is counsel to an urban renewal agency, cannot contract with the agency to render additional legal services. 1967 Op St Compt No. 67-690.

A prohibited conflict of interest arises where a member of the county board of supervisors, who is also a practicing attorney, receives compensation for services rendered to indigent defendants under the county assigned counsel plan. 1967 Op St Compt No. 67-952.

A prohibited interest in contract arises where a county attorney is retained by a county sewer agency as an independent contractor to render legal services to the agency. 1968 Op St Compt No. 68-1012.

A prohibited conflict of interest arises when a village trustee, an attorney employed by the village attorney participates in his capacity as such associate in any legal matters involving village affairs, on behalf of the village attorney. 1971 Op St Compt No. 71-909.

A county attorney may have a prohibited conflict of interest in an agreement between himself and a county sewer district to represent the district as an independent contractor, depending upon whether he has any section 801 powers or duties in relation

to the agreement. 1979 Op St Compt No.. 79-738, 1980 N.Y. Comp. LEXIS 388.

Town attorney would have prohibited interest in contract for additional legal services pursuant to CLS Town Law § 20(2)(a) between town and his or her law firm, if town attorney has any of powers or duties listed in CLS Gen Mun Law § 801, unless one of the exceptions in CLS Gen Mun Law § 802 applies. 1989 Op St Compt No. 89-65, 1989 N.Y. Comp. LEXIS 52.

43. —Instances in which municipal officer may provide legal services to municipality

A prohibited conflict of interest does not result where a town justice of a town of the first class performs services for such town as attorney for special improvement districts created by such town. Nevertheless, disclosure of such interest is mandated by General Municipal Law, Sec. 803. 1973 NY Ops Atty Gen April 4 (Informal), 1973 N.Y. AG LEXIS 53.

A village clerk, who is also an attorney, may be retained by the village to render legal services relating to the expansion of its sewage treatment facilities. 1967 Op St Compt No. 67-1009.

A prohibited conflict of interest does not occur where a firm of lawyers, of which the village police justice is a member, is retained by the village to render legal services. 1968 Op St Compt No. 68-544.

An interest in contract does not arise where the City of Mount Vernon Urban Renewal Agency contracts for special legal services with a law firm with which two city aldermen are associated. 1969 Op St Compt No. 69-474.

A county legislator may provide free legal services to county by representing county without compensation in utility rate case. 1979 Op St Compt No. 79-507.

44. —Provision of legal services to other municipalities

A prohibited conflict of interest does not result where a town justice of a town of the first class performs services for such town as attorney for special improvement districts created by such town. Nevertheless, disclosure of such interest is mandated by General Municipal Law, § 803. 1973 NY Ops Atty Gen April 4 (Informal), 1973 N.Y. AG LEXIS 53.

There is no statutory or common law impediment to a town attorney's representing both the town and fire districts therein. However, consideration should be given to the provisions of Canon No. 6 of the Canons of Professional Ethics. 1967 Op St Compt No. 67-1010.

A councilman of one of the towns entering into an agreement for the operation of a joint solid waste disposal facility project may not be employed by such project to perform necessary legal work where the town board of each participating town must approve all contracts relating to the joint project. 1974 Op St Compt No. 74-112.

There is no legal prohibition against the same individual being attorney for both a village and a school district which includes the village. However, due regard should be accorded Canon 6 of the Canons of Professional Ethics of the New York State Bar Association. 1968 Op St Compt No. 68-987.

45. —Provision of legal services to firm contracting with municipality

A village mayor does not have an "interest" in a contract for engineering services entered into by the village board, where he has rendered occasional legal services to the engineering firm but is not on retainer and has not represented the firm with respect to the making of particular contract or the performance thereof. 1967 Op St Compt No. 67-394.

Whether a prohibited conflict of interest arises as to a town officer or employee who, as an attorney, represents persons, firms, or corporations doing business with the town, or on behalf of a member of the planning board who is retained by a developer to engineer a subdivision, depends upon the nature of his duties and powers as a town officer or employee with respect to the contracts. 1968 Op St Compt No. 68-569.

An interest in contract does not occur where a city assistant corporation counsel represents a builder which contracts with the municipal housing authority of the same city. 1970 Op St Compt No. 70-65.

A conflict of interest does not occur where a town supervisor who is also a practicing attorney occasionally represents a town depository bank for the sole purpose of closing a mortgage loan which in no way involves the town, but disclosure is recommended. 1972 Op St Compt No. 72-11.

Village attorney does not have conflict of interest when his law firm represents client applying to village for subdivision approval unless application procedure results in § 800(2) contract with village and attorney possesses § 801(1) functions relative thereto; disclosure under § 809 is required even though there is no conflict of interest. 1985 Op St Compt No. 85-60, 1985 N.Y. Comp. LEXIS 83.

46. —Provision of legal services to private individuals

No prohibited conflict of interest foreseen from assignment of part-time assistant county attorney as private counsel for an indigent defendant. 1968 NY Ops Atty Gen Jan 31 (Informal), 1968 N.Y. AG LEXIS 27.

Where a Village Urban Renewal Agency is represented by counsel other than the Village Attorney no conflict of interest prohibited by the General Municipal Law will result from the Village Attorney representing clients whose real property is being acquired by the Agency whether by negotiation or condemnation. However, in view of the dependency of the Agency upon this village and the cooperation necessary between the officers and employees of both, questions of professional ethics may arise. 1969 NY Ops Atty Gen Dec 15 (Informal), 1969 N.Y. AG LEXIS 111.

No constitutional or statutory bar nor any incompatibility or conflict of interest prohibits a part-time county attorney from representing a client in an action against a city within said county, assuming no conflict with respect to the time devoted to official duties. 1971 NY Ops Atty Gen March 30 (Informal), 1971 N.Y. AG LEXIS 59.

Attorney who is appointed town attorney, and possibly his or her law firm, may not perform compensated services for private clients in relation to any matter before any town agency for which town attorney serves as attorney, or any services for contingent compensation in relation to any matter before any town agency. 2000 Op St Compt No. 2000-22, 2000 N.Y. Comp. LEXIS 26.

A prohibited conflict of interest occurs where the law associate of the administrator of a county assigned counsel plan is paid a fee for representing indigent defendants under the said plan. 1969 Op St Compt No. 69-873.

47. —Matters involving municipal officer's law associates

Under the above section a conflict of interest does not arise when the Town Attorney of the Town of Pelham is a member of a law firm negotiating a contract for a private client with a village within the town when such town is not a party to said contract. 1970 NY Ops Atty Gen July 8 (Informal), 1970 N.Y. AG LEXIS 92.

Where a village mayor, who is an attorney, shares offices with another attorney who is personally retained by the village under an arrangement pursuant to which moneys paid by the village to the attorney do not inure to the benefit of any of the others, there is no illegal interest in contract on the part of the village mayor. 1966 Op St Compt No. 66-646.

A prohibited conflict of interest does not occur where a firm of lawyers, of which the village police justice is a member, is retained by the village to render legal services. 1968 Op St Compt No. 68-544.

The conflicts of interest statutes do not apply where a village attorney advises the board of trustees with respect to a proposed retainer agreement with a law firm of which the attorney is a member, where the agreement is to be executed subsequent to his retirement from village employment. 1978 Op St Compt No. 78-793.

Where a law partner of the town attorney is retained by the town to perform services on a contractual basis, the town attorney has a conflict of interest only if he derives a direct or indirect pecuniary or material benefit as a result of the contract. 1980 Op St Compt No. 80-712.

City attorney who is officer, employee, director or shareholder of law firm which is professional corporation and which represents city in law suit would have prohibited interest in contract

between firm and city if city attorney has power or duty to negotiate, prepare, authorize or approve contract, or to appoint someone with those powers, unless exceptions in CLS Gen Mun § 802 are applicable. 1988 Op St Compt No. 88-75, 1988 N.Y. Comp. LEXIS 68.

Town attorney would have prohibited interest in contract for additional legal services pursuant to CLS Town Law § 20(2)(a) between town and his or her law firm, if town attorney has any of powers or duties listed in CLS Gen Mun Law § 801, unless one of the exceptions in CLS Gen Mun Law § 802 applies. 1989 Op St Compt No. 89-65, 1989 N.Y. Comp. LEXIS 52.

No prohibited conflict of interest exists where the law partner of a county legislator is employed as an instructor at the county sponsored community college when the compensation received for such services does not become part of the income of the partnership. 1978 NY Ops Atty Gen Aug 17 (Informal), 1978 N.Y. AG LEXIS 347.

A conflict of interest occurs where the law partner of a town justice in a town of the second class is retained to provide legal services for the town, if the justice receives a direct or indirect material or pecuniary benefit as the result of such contract. There is no legal prohibition against the appointment of the law partner as town attorney. 1971 Op St Compt No. 71-961.

48. Real estate sales; sales by municipality to its officials or employees

Mere fact that participant in public auction conducted by village held position as building inspector and village engineer did not constitute violation of CLS Gen Mun §§ 801 and 803 so as to void his bids and obligate village to accept plaintiff's original bid on property since there was no proof that engineer had power or duty to negotiate, prepare, authorize or approve, on behalf of village, contract for sale of real property on which he was bidding to trigger application of § 801, and as mere bidder at auction, engineer never actually had interest in any contract to which village was party and thus had no duty under § 803 to make any formal disclosure of his interest; even assuming engineer had some duty to disclose his potential interest in contract with village, his appearance at public auction served as disclosure of that potential interest. D.E.P. Resources, Inc. v Monroe, 131 A.D.2d 719, 516 N.Y.S.2d 953, 1987 N.Y. App. Div. LEXIS 48178 (N.Y. App. Div. 2d Dep't 1987).

A county which acquires real property pursuant to Highway Law, § 62 for highway purposes may dispose of property which is no longer necessary for such purposes only to owners of property abutting the highway. This property may be sold to a county officer who is a qualified landowner and who is not a county officer described in General Municipal Law, § 801. 1977 NY Ops Atty Gen April 14 (Informal), 1977 N.Y. AG LEXIS 271.

Urban renewal real property owned by a city may be sold only in accordance with the provisions of General Municipal Law § 507. Real property which has been purchased by a city at tax sale is not "city real estate" such as is contemplated in General City Law § 23 and not subject to the inhibitions of that statute regarding the sale of city real estate. The Administrator, Community Development and Administrative Services of the City of Port Jervis is disqualified from purchasing real property from that city regardless of the method of conducting the sale or the purpose for which the city acquired the real property. 1978 NY Ops Atty Gen Dec 28, 1978 N.Y. AG LEXIS 397.

A prohibited conflict of interest occurs where a village trustee purchases a parcel of tax-delinquent property at a village tax sale. 1969 Op St Compt No. 69-303.

A city officer or employee may purchase either city real property or tax sale certificates at city tax sales, under certain circumstances. 1973 Op St Compt No. 73-768.

A town board may not sell a parcel of real property to the town supervisor where the value of the property exceeds $100. 1973 Op St Compt No. 73-803.

Where a town of the second class sells a parcel of land worth less than $100 to a town justice: (1) a permissive referendum is required without regard to the value of the land; (2) The town justice would not have a prohibited interest in the transaction. 1974 Op St Compt No. 74-477.

There is no prohibited interest in contract where a town contracts to sell real property to the town clerk; however, the clerk's interest in such contract must be publicly disclosed in writing. 1975 Op St Compt No. 75-961.

County officers and employees are not precluded from purchasing tax sale properties from the county by bidding unless they have the power or duty to perform any of the functions enumerated in the said section in connection with the sale by the county. 1979 Op St Compt No. 79-808.

A village trustee would have a prohibited conflict of interest if he purchases real property from the village. 1980 Op St Compt No. 80-479.

A city officer or employee may purchase city real property at public auction except that if he performs any functions enumerated in General Municipal Law, § 801(1) in connection with the sale, he would have a prohibited conflict of interest. 1980 Op St Compt No. 80-500.

A village mayor has a prohibited conflict of interest in the purchase of a parcel of real property from the village. It is immaterial that sealed bids were solicited by public notice, that the mayor submitted the highest bid, and that he refrained from voting on the acceptance thereof. 1981 Op St Compt No. 81-113, 1981 N.Y. Comp. LEXIS 772.

Unless the exception provided by General Municipal Law, § 802(1)(b) is applicable, a member of a school district board of education, who is also an officer of a corporation, would have a prohibited conflict of interest in the sale by the district to the corporation of district real property. 1981 Op St Compt No. 81-65, 1981 N.Y. Comp. LEXIS 826.

49. —Sales by officials or employees to municipality

A county may purchase real property owned by a membership corporation even though county employees are directors of such membership corporation. 1965 NY Ops Atty Gen Aug 25 (Informal), 1965 N.Y. AG LEXIS 123.

Under the above sections a prohibited conflict of interest would not arise if the appointive Zoning Inspector for the Town of Rochester sold a gravel bank to the Town, provided that full disclosure was made of such transaction and that such sale was not violative of the Code of Ethics adopted by the Town of Rochester. 1973 NY Ops Atty Gen Feb 27 (Informal), 1973 N.Y. AG LEXIS 37.

Under General Municipal Law §§ 800, 802, 804, the proposed sale of a building owned by the Town Supervisor of the Town of Crown Point to the Town of Crown Point would constitute a prohibited conflict of interest unless the purchase and the consideration therefor is approved by the Supreme Court upon petition of the Town Board. 1975 NY Ops Atty Gen Feb 10 (Informal), 1975 N.Y. AG LEXIS 71.

Whether a prohibited interest in contract occurs where a town contracts to purchase real property from the wife of the superintendent of highways and two highway department employees who are tenants in common of the parcel, depends upon the powers and duties of the superintendent and the employees with respect to the contract. 1972 Op St Compt No. 72-294.

That an employee of a village who is also a licensed real estate salesman is responsible for acquiring property in connection with the Federal Community Development Block Grant Program does not, in itself, create a statutory conflict of interest. However, a conflict of interest would occur if he should act as salesman for a seller from whom the village purchases property. The village code of ethics should be examined to determine the applicability of any provisions thereof under the circumstances. 1981 Op St Compt No. 81-370, 1981 N.Y. Comp. LEXIS 515.

50. —Sales involving another municipality

There was conflict of interest when town board member acquired realty in his town at county tax sale and sale was voidable where, although contract of sale in form concerned only county, by implication it also involved town and was within general municipal law precluding municipal officer from having interest in contract with his municipality when he has power or duty to authorize or approve contract or to appoint officer who has such power or duty, inasmuch as town board's action in preparing town budget was part of approval and authorization culminating in

county tax sale and town board fixed salary of collecting officer and filled vacancies in that office. Rose v Eichhorst, 42 N.Y.2d 92, 396 N.Y.S.2d 837, 365 N.E.2d 868, 1977 N.Y. LEXIS 2108 (N.Y. 1977).

In tax sale conducted by County of Chenango pursuant to procedures set forth in CLS RPTL Art 10, conflict of interest did not arise based on fact that purchaser at tax sale was employed by County of Coventry. Metz v Dorsey, 146 A.D.2d 845, 536 N.Y.S.2d 250, 1989 N.Y. App. Div. LEXIS 34 (N.Y. App. Div. 3d Dep't), app. dismissed, 74 N.Y.2d 714, 543 N.Y.S.2d 400, 541 N.E.2d 429, 1989 N.Y. LEXIS 737 (N.Y. 1989), app. denied, 77 N.Y.2d 807, 569 N.Y.S.2d 610, 572 N.E.2d 51, 1991 N.Y. LEXIS 579 (N.Y. 1991).

Neither the statutory conflict of interest rules nor the doctrine of incompatibility of public officers would prohibit a town from selling real property to a village where a town board member is also the mayor of the village; however, in the public interest, such board member should disqualify himself from participation in the transaction. 1967 Op St Compt No. 67-962.

51. —Sales involving spouse or relatives

There would be a conflict of interest if an Urban Renewal Agency Attorney purchased property from the Agency either directly or indirectly by means of a corporation owned and/or operated by the attorney's spouse. 1980 NY Ops Atty Gen Feb 27 (Informal), 1980 N.Y. AG LEXIS 146.

Whether a prohibited interest in contract occurs where a town contracts to purchase real property from the wife of the superintendent of highways and two highway department employees who are tenants in common of the parcel, depends upon the powers and duties of the superintendent and the employees with respect to the contract. 1972 Op St Compt No. 72-294.

Where the mayor of a city has the power to veto resolutions enacted by the city council and the duty to sign contracts and deeds, those functions do not constitute approval or authorization of contracts within section 801 so as to create a prohibited interest in a contract between the city and his spouse for the sale of a parcel of city property to his spouse. 1982 Op St Compt No. 82-319, 1982 N.Y. Comp. LEXIS 416.

Member of city school district board of education does not have prohibited interest in contract for purchase by district of real property from his father-in-law unless he received direct or indirect benefit as result of contract. 1987 Op St Compt No. 87-23, 1987 N.Y. Comp. LEXIS 158.

52. —Miscellaneous real estate transactions

There is a conflict of interest when a city corporation counsel makes a contract for purchase of property from an estate of which he is executor or attorney. 1964 NY Ops Atty Gen Sept 17 (Informal), 1964 N.Y. AG LEXIS 137.

A councilman may vote on matters relating to urban renewal projects where he owns real property in the area designated for slum clearance and the taking of his property is by condemnation or by purchase subject to court approval; however, written disclosure of the nature and extent of his interest must be made to the governing body. 1964 Op St Compt No. 64-929.

The extension of the boundaries of a town water district to include real property owned by a town board member does not involve a contract and, therefore, could not give rise to a prohibited conflict of interest. 1979 Op St Compt No. 79-228.

An acting city judge does not have a prohibited conflict of interest when he is a preferred developer in an unassisted city urban renewal project. 1980 Op St Compt No. 80-480.

A village board resolution providing for improved drainage for private land does not involve a conflict of interest because a village trustee, as real estate broker, has negotiated an option between third parties for purchase of the land to which the village is not a party. 1964 Op St Compt No. 64-750.

When a deputy town attorney represents a client in the purchase by that client of a parcel of property from the town, he has a statutory interest in the purchase contract. It is a prohibited interest only if the deputy town attorney performs one or more of the functions set forth in section 801(1) in connection with the contract. 1981 Op St Comp No. 81-387, 1981 N.Y. Comp. LEXIS 487.

A city councilperson has a prohibited interest in the sale by the city of property owned by it to a partnership of which she is a partner. The exception contained in section 802(1)(b) is inapplicable. 1984 Op St Compt No. 84-12, 1984 N.Y. Comp. LEXIS 124.

53. Sale of municipal obligations

Whether a prohibited interest in contract results where a school district sells notes at private sale to a bank of which a member of the board of education is an officer, depends upon certain facts and circumstances. 1972 Op St Compt No. 72-71.

A prohibited interest in contract exists when a city auditor, or his spouse, minor children or other dependents purchase city obligations directly from the city and when he has any of the powers or duties enumerated in General Municipal Law, § 801(1) with respect to the issuance and sale of such bonds and notes. A somewhat different concept applies when he purchases city obligations from a bank which has purchased such obligations in the first instance from the city. 1976 Op St Compt No. 76-610.

54. —Prohibited interests in purchasing bank

A town attorney who is director, stockholder and attorney for a bank may not be interested in the sale of obligations to the bank at public sale if his duties as town attorney involve any work in connection with the issuance or sale of the obligations. In the absence of the applicability of Local Finance Law, § 60.10, a town attorney may not have an interest in such a bank in the sale of obligations if his duties as town attorney involve work in relation to the issuance or sale of obligations. If Local Finance Law, § 60.10 is in effect in the town, the town attorney may have an interest in the sale of obligations to the bank at private sale within the limitation set forth in § 60.10. 1965 Op St Compt No. 65-136.

A village attorney, who is a stockholder, counsel and director of a bank would have a prohibited conflict of interest in the sale of village bond anticipation notes in the sum of $100,000 to such bank, but not if the sale involved *any* amount up to $100,000. 1979 Op St Compt No. 78-175, 1979 N.Y. Comp. LEXIS 269.

55. —Permissible interests in purchasing bank

The village may sell bonds and notes to a bank at private sale within certain limitations as to interest rate and amount, if, in addition to being a stockholder, the Mayor is also a director of the bank. 1966 Op St Compt No. 66-99.

A village may sell bonds and notes to a bank at private sale where the Mayor owns less than five per centum of the stock in the bank. 1966 Op St Compt No. 66-99.

Notwithstanding the interest of a school district treasurer in a bank, a school district may sell bonds and notes to such bank pursuant to Section 60.10 of the Local Finance Law. 1967 Op St Compt No. 67-304.

A county attorney who is director, counsel and stockholder of a bank does not have a prohibited interest where the bank acts as a depository of county funds or purchases county obligations pursuant to Local Finance Law, § 60.10. He would have a prohibited interest in all other transactions between the county and the bank. 1978 Op St Compt No. 78-306.

56. Other municipal contracts

A conflict of interest occurs when a town board member acquires premises, located in the town in which he serves, at a county tax sale. Rose v Eichhorst, 42 N.Y.2d 92, 396 N.Y.S.2d 837, 365 N.E.2d 868, 1977 N.Y. LEXIS 2108 (N.Y. 1977).

A successful bidder's former position on Urban Renewal agency, which terminated well prior to the letting of a second contract, did not create any conflict of interest prohibited by statute as the second contract so substantially differed from the first with respect to changes in the contract that the award was not in violation of the prohibition. Mulligan v Lackey, 34 A.D.2d 732, 312 N.Y.S.2d 451, 1970 N.Y. App. Div. LEXIS 5162 (N.Y. App. Div. 4th Dep't), app. denied, 26 N.Y.2d 614, 1970 N.Y. LEXIS 1849 (N.Y. 1970).

In a defamation suit filed by a commissioner of a fire district against his business partner after the partner made allegations that the commissioner had illegally profited from a business transaction involving the district, the trial court properly charged the jury that the partner's statement constituted defamation per

se as it tended to injure the commissioner in his trade, business, or profession under N.Y. Gen. Mun. Law §§ 801 and 805. Geraci v Probst, 61 A.D.3d 717, 877 N.Y.S.2d 386, 2009 N.Y. App. Div. LEXIS 2881 (N.Y. App. Div. 2d Dep't 2009), aff'd in part, modified, 15 N.Y.3d 336, 912 N.Y.S.2d 484, 938 N.E.2d 917, 2010 N.Y. LEXIS 2901 (N.Y. 2010).

While it is doubtful that a material benefit would enure to a Village Trustee by virtue of the granting of a special permit by the Village Board of Trustees to an applicant who is the landlord of such Trustee simply because such Trustee, as a tenant, may thereupon become entitled to use the recreational facility to be constructed by his landlord, it is recommended that disclosure of such possible interest be made and that the Village Code of Ethics be examined and the question submitted to the County Board of Ethics, provided one has been established by the County. 1973 NY Ops Atty Gen March 6 (Informal), 1973 N.Y. AG LEXIS 43.

No conflict of interest under Article 18 of the General Municipal Law arises when a town councilman who resides in an incorporated village within the town votes, as a member of the town board, on the question of whether the village in which he resides should be allowed to participate in the operation of a recreational facility which is owned by the town and has theretofore been operated only for the benefit of the unincorporated areas of the town. 1975 NY Ops Atty Gen Nov 18 (Informal), 1975 N.Y. AG LEXIS 186.

Under the circumstances, there is no prohibited conflict of interest by virtue of the fact that the owners of an excavating firm are brothers of the town superintendent of highways. 1979 Op St Compt No. 79-90.

Whether the conflicts of interest statutes are applicable when a town highway superintendent sells dry wells, which he has designed, to a distributor, and the distributor sells the wells to other municipalities, including the town, to be used for drainage of highways, depends upon certain facts and circumstances. 1979 Op St Compt No. 79-387.

Town board members who are also members of village fire council do not have conflict of interest with respect to fire protection contract between village and town. 1980 Op St Compt No. 80-101.

Member of community college board of trustees who is also president, director and stockholder holding in excess of 5 percent of stock of corporation engaged in printing business would have conflict of interest if college enters into contract with corporation; nonparticipation by trustee in board matters relating to such contracts would not be curative. 1987 Op St Compt No. 87-75, 1987 N.Y. Comp. LEXIS 100.

A town councilman who resides with the owner and president of a hardware store and maintains office space in the same building in which the store is located, but has no relationship with the corporation which owns the hardware store, could have a prohibited interest in contracts between the town and corporation if he or she receives a direct or indirect pecuniary or material benefit as a result of such contracts. 1991 Op St Compt No. 91-63, 1992 N.Y. Comp. LEXIS 5.

A planning board chairman who borrows money from the board's consulting engineer has a prohibited interest in the engineer's contracts with the town if the loan is determined to be a direct or indirect pecuniary benefit accruing to the chairman as a result of the contracts; to avoid the appearance of impropriety, the chairman should not participate in the discussion or vote on matters affecting the engineer or undertake to approve the engineer's vouchers, as long as the loan is outstanding. 1992 Op St Compt No. 92-3.

57. Miscellaneous matters

In a Civil Service Law § 75-b case, the court erred procedurally and substantively in dismissing the employee's complaint based upon documentary evidence purportedly demonstrating that he violated General Municipal Law § 800, therefore vitiating his retaliation claim; the evidence failed to conclusively establish that he possessed any of the authority enumerated in General Municipal Law § 801, thereby creating a conflict of interest. Lilley v Greene Cent. Sch. Dist., 168 A.D.3d 1180, 90 N.Y.S.3d 661, 2019 N.Y. App. Div. LEXIS 42 (N.Y. App. Div. 3d Dep't 2019).

Where statute under which defendant was indicted provided that, "except as provided" in another specified statute of same chapter, no municipal officer shall have interest in contract with municipality, "exception" in statute was actually a "proviso" since it referred to another section of statute for modification, and was not required to be negatively pleaded. People v Raffa, 90 Misc. 2d 97, 393 N.Y.S.2d 852, 1976 N.Y. Misc. LEXIS 2865 (N.Y. County Ct. 1976).

The obligation of a municipal officer or employee for care and treatment received by him or by a person for whom he is financially responsible in a hospital or facility operated by his municipality, does not constitute a contract for purposes of the conflicts of interest statutes. Therefore, the said statutes are inapplicable. 1985 Op St Compt No. 85-28, 1985 N.Y. Comp. LEXIS 117.

Village board member who has financial interest in business which may be negatively impacted by zoning change under consideration by board should publicly disclose his or her interest in matter; if potential negative financial impact of proposed zoning change on board member is not merely speculative and more than de minimus, board member should not participate in discussion or vote on zoning change. 1997 Op St Compt No. 97-9, 1997 N.Y. Comp. LEXIS 21.

There is nothing prohibiting town board member from voting on salaries for family members who are elected or appointed town officials; however, under CLS Gen Mun § 806, town board may require in its code of ethics that town board members abstain from voting on resolutions fixing salaries of relatives who are town officials and, even if code of ethics does not require abstention, affected board members should recuse themselves from discussion and abstain from voting on matters relating solely or primarily to salaries of family members. 2000 Op St Compt No. 2000-12, 2000 N.Y. Comp. LEXIS 4.

III. Prohibited Interests in Bank Designated as Depository

58. Fiscal officer's interest in bank

A county treasurer may not have any interest in a bank or trust company designated as depository for county funds unless there is no other banking facility available within the county. 1964 NY Ops Atty Gen Aug 24 (Informal), 1964 N.Y. AG LEXIS 132.

This article would not prohibit designation, as a depository of town funds, of any qualified banks in a town where the chief fiscal officer, treasurer, or his deputy or employee has an interest in all of the banks which may be so designated. 1964 NY Ops Atty Gen Oct 1 (Informal), 1964 N.Y. AG LEXIS 141.

Where there are only two banks in a village and the village treasurer has an interest in both, either may be designated as depository, but a written public disclosure of the nature and extent of the treasurer's interest in the banks must be made. 1964 Op St Compt No. 64-833.

59. —Officer as member of bank advisory board

A bank may be designated as a depository for municipal funds where the chief fiscal officer is a member of the advisory board thereof, if his remuneration is in no way affected by such designation and he has nothing to do with the designation of the bank in his capacity as member of the advisory board thereof. 1964 Op St Compt No. 64-710.

A prohibited interest in contract does not result where a county treasurer is appointed to the advisory board of a bank with which the county does business, provided the conditions of section 802(1)(b) are observed. 1969 Op St Compt No. 69-165.

60. —Employment with bank

A bank may not be designated as depository of funds of a joint public hospital in which the hospital treasurer has an interest by reason of employment as assistant cashier and manager of the local branch. 1965 Op St Compt No. 65-413.

There is no prohibited conflict of interest where a school district, the treasurer of which is employed by a bank as a bank teller, designates such bank as depository of school district funds, sells bonds and notes to the bank and otherwise transacts business with said bank, provided the duties of treasurer, as a bank employee, do not directly involve the procurement, preparation or performance of the contract between the bank and the

school district and her remuneration as an employee will not be directly affected as a result of such transactions. 1967 Op St Compt No. 67-304.

61. —Miscellaneous interests

A prohibited interest does not arise where a village invests municipal funds in a bank which employs the spouse of the clerk-treasurer, provided it is the only bank for such investment located within the village. 1968 Op St Compt No. 68-800.

A prohibited conflict of interest: (1) Does not arise where a county treasurer is the owner of less than 5% of the outstanding stock of a bank with which the county does business; (2) Does occur where the law firm of which the treasurer is a member is general counsel for the said bank. 1969 Op St Compt No. 69-1069.

Individual who is member of governing board and treasurer of industrial development agency (IDA) does not have prohibited conflict of interest solely because he or she owns less than one percent of stock of bank named as depository of IDA, and disclosure of interest under CLS Gen Mun § 803 is not required; however, individual should not participate in discussion or vote on matters affecting IDA's relationship with bank. 1994 Op St Compt No. 94-16, 1994 N.Y. Comp. LEXIS 14.

62. Interest of other municipal officers or employees; member of bank advisory board

No conflict of interest results from the designation of a bank as a depository of a county sewer district even though one member of said district is also a member of the Advisory Board of a branch of said bank and another member of said district is the President in charge of a branch of said bank, provided that neither of them is the chief fiscal officer, treasurer, or his deputy or employee of the sewer district. However, disclosure of interest must be made in accordance with General Municipal Law, § 803. 1972 NY Ops Atty Gen Nov 2 (Informal), 1972 N.Y. AG LEXIS 154.

A prohibited conflict of interest does not occur when a village board designates a bank as the depository of village funds, notwithstanding the membership of a trustee on the bank's advisory board. Disclosure, however, is necessary. 1968 Op St Compt No. 68-323.

A prohibited conflict of interest does not arise: (a) where a superintendent of a central school district is appointed to the advisory board of a bank with which the district does business; (b) where a member of the board of education of a central school district is appointed to the same advisory board, provided certain provisions of section 802 are applicable. 1968 Op St Compt No. 68-941.

A bank, of which a village attorney is a director, may purchase a bond anticipation note issued by the village and agree to extend the date of maturity, so long as the village attorney does not have the power or duty to perform any of the functions listed in General Municipal Law, § 801(1). This opinion supersedes Opn No. 78-175 to the extent it is inconsistent herewith. 1982 Op St Compt No. 82-251, 1982 N.Y. Comp. LEXIS 483.

Except for the applicability of one or more of the exceptions contained in section 802, a town councilman who is also the vice-president and branch manager of a bank would have a prohibited interest in any contracts between the town and the bank. 1982 Op St Compt No. 82-48, 1982 N.Y. Comp. LEXIS 674.

63. —Employment with bank

No conflict of interest results from the designation of a bank as a depository of a county sewer district even though one member of said district is also a member of the Advisory Board of a branch of said bank and another member of said district is the President in charge of a branch of said bank, provided that neither of them is the chief fiscal officer, treasurer, or his deputy or employee of the sewer district. However, disclosure of interest must be made in accordance with General Municipal Law, § 803. 1972 NY Ops Atty Gen Nov 2 (Informal), 1972 N.Y. AG LEXIS 154.

A prohibited interest in a contract does not result where a member of the Rochester Housing Authority is a vice-president of a local commercial bank and the Authority makes deposits with that bank from time to time or places in a certificate of deposit certain funds of the Authority in that bank if that particular bank is the highest bidder. 1975 NY Ops Atty Gen March 27 (Informal), 1975 N.Y. AG LEXIS 100.

Where the president of a central school district board of education is a director of a bank, a prohibited interest in contract does not occur when the district (1) designates the bank as a depository and (2) sells obligations to the bank in accordance with Local Finance Law, § 60.10. 1972 Op St Compt No. 72-747.

Town supervisor who is director of bank has prohibited interest in designation of bank as town depository unless exception in CLS Gen Mun L § 802(1)(a) applies; exception does not apply if only reason town could not designate another bank within town as depository is because other bank refused to comply with town's preferred policy of requiring securities pledged as collateral to be held by third party custodian; town may sell obligations to bank of which town supervisor is director only in accordance with CLS Loc Fin L § 60.10. 1989 Op St Compt No. 89-4, 1989 N.Y. Comp. LEXIS 7.

A prohibited interest in contract does not result where a county legislator is the vice president of a bank which is designated as the depository of county funds. However, disclosure is necessary. 1973 Op St Compt No. 73-1201.

64. —Stockholder of bank

A prohibited conflict of interest will arise under this article in case a confidential secretary to a town supervisor and a civil service employee of the supervisor both own shares of stock in banks designated as depositories for town funds, unless the bank is the only bank or trust company in town. 1964 Op St Compt No. 64-446.

A school district may designate as depository for school district funds a bank in which the assistant to the Superintendent for Business Affairs own stock. 1964 Op St Compt No. 64-801.

There is no prohibited interest where a school board member owns stock in a bank designated as depository for funds of the school district, but he must make disclosure of his interest. 1964 Op St Compt No. 64-823.

A prohibited interest in contract does not occur where: (a) A town supervisor owns less than 5% of the stock of a bank which is a depository of town funds; (b) The wife of the supervisor is part-owner of a newspaper in which the town publishes legal notices. 1972 Op St Compt No. 72-4.

When a village attorney is a director and stockholder of a bank, he has a conflict of interest if the bank should purchase a statutory installment bond from the village only if he has any of the powers and duties set forth in section 801(1) in relation to the transaction. If he has a conflict of interest, the sale nevertheless would be permissible if made pursuant to Local Finance Law, § 60.10 and the restrictions set forth therein. 1985 Op St Compt No. 85-34, 1985 N.Y. Comp. LEXIS 108.

65. —Municipal officer as employee and stockholder of bank

A town may designate as a depository for its funds a bank in which a town councilman is an officer, director and stockholder, and may also sell bonds and notes to such bank, within the limitations of § 60.10 of the Local Finance Law. 1964 NY Ops Atty Gen Nov 20 (Informal), 1964 N.Y. AG LEXIS 155.

A prohibited conflict of interest would arise if a town of the second class were to designate as a depository of town funds a bank of which the appointed deputy town supervisor is an officer and stockholder unless it were the only bank in the town. 1965 Op St Compt No. 65-20.

Where there is no bank or trust company located in a town, the town board may designate a bank as depositary even though the supervisor owns stock in the bank and is employed by the bank, provided that his stock ownership is less than five per cent of outstanding stock, his remuneration is not affected as a result of the designation and his duties as a bank officer or employee do not involve the procurement, preparation or performance of the contract. 1968 Op St Compt No. 68-223.

A county attorney who is director, counsel and stockholder of a bank does not have a prohibited interest where the bank acts as a depository of county funds or purchases county obligations pursuant to Local Finance Law, § 60.10. He would have a prohibited interest in all other transactions between the county and the bank. 1978 Op St Compt No. 78-306.

Prospective appointee to fill vacancy in office of town supervisor who is officer and stockholder of bank would have prohibited interest in designation of bank as town depository, renewal of town obligations presently held by bank, and future sale of obligations by town to bank, unless one or more exceptions of CLS Gen Mun § 802 is applicable. 1992 Op St Compt No. 92-54.

66. Eligibility of bank employee for municipal employment

Employee of bank with title of Assistant Cashier is not eligible for position of Treasurer of School District where bank has been named depository of funds for the school district and there is another eligible banking institution located within the district. 1966 NY Ops Atty Gen Oct 4 (Informal), 1966 N.Y. AG LEXIS 125.

However, where duties of school district treasurer, as an employee or officer of the bank, normally involve handling of municipal accounts, treasurer may not intentionally refrain from performance of such duties to avoid prohibited conflict of interest. 1967 Op St Compt No. 67-304.

A person who is employed by a bank which is designated as the depository of the funds of a BOCES would have a prohibited conflict of interest if he should serve as treasurer of BOCES unless an exception contained in section 802 is applicable. 1979 Op St Compt No. 79-500, 1979 N.Y. Comp. LEXIS 167.

IV. Employment Conflicts

67. In general

No rule of law prohibits a former member of the New York City Council from the Borough of The Bronx from being selected to fill the vacancy in the office of Bronx Borough President by vote of a majority of city council members representing Bronx Borough (New York City Charter, § 81) following his resignation as a city councilman; provisions of law governing the ethical behavior of members of the city council in the appointment of a member to another post are intended to deal with abuses such as dual office holding and do not prohibit a council member from being chosen by his fellow members to another office at which time he automatically forfeits his position as a council member; common-law principles under prior case law which may be read as prohibiting a governmental body from appointing one of its own members to office have been codified and where different from applicable statutory law, specifically abrogated by legislative enactment (New York City Charter, §§ 33, 1115, 2604; Town Law, § 64, subd 5; General Municipal Law, art 18) and, in any event, respondent was not a "member" of the city council at the time the vacancy in the office of Borough President occurred nor was he a member of the special body of electors convened by the Mayor to elect an interim Borough President. Valentin v Simon, 98 Misc. 2d 5, 413 N.Y.S.2d 266, 1979 N.Y. Misc. LEXIS 2037 (N.Y. Sup. Ct. 1979).

Dual employment by the same municipality of the same person in full-time and part-time positions is not prohibited per se under General Municipal Law, § 801, if not otherwise prohibited. 1978 Op St Compt No. 78-946.

Whether a member of an industrial development agency, who is an attorney, has a prohibited conflict of interest in contracts between the agency and a client, depends upon the circumstances. 1982 Op St Compt No. 82-250, 1982 N.Y. Comp. LEXIS 478.

Where two school districts jointly contract to field athletic teams, there is no legal prohibition against a member of the board of education of one district from being hired as a coach by the other district when the only function performed by the member's district in relation to the joint contract is to provide a proportionate share of funds to cover the cost of the program. 1983 Op St Compt No. 83-12, 1983 N.Y. Comp. LEXIS 469.

68. Appointment or election of private persons to municipal positions

No statutory conflict of interest would be created in the appointment of an assistant vice president of a banking trust company with which an urban renewal agency does business to membership on such agency. 1966 NY Ops Atty Gen June 28 (Informal), 1966 N.Y. AG LEXIS 90.

A physician member of the medical staff of Lewis County General Hospital may not also serve as a member of the Board of Managers of that hospital. 1979 NY Ops Atty Gen Sept 21 (Informal), 1979 N.Y. AG LEXIS 34.

A teacher in a community college may be a member of the board of education of the city school district which sponsors the college. 1966 Op St Compt No. 66-188.

With stated reservations, there is no illegality or impropriety to the appointment of a person engaged in the building industry to a town zoning or planning board. 1969 Op St Compt No. 69-101.

69. Employment of municipal official's spouse or relative

A municipality may enter into a contract of employment with a spouse, minor children or dependents of an officer or employee of such municipality who has the power or duty to approve same or the payments made thereunder. However, teachers related to any member of a board of education may be employed by said board only on consent of two-thirds of the members thereof. 1968 NY Ops Atty Gen Nov 4 (Informal), 1968 N.Y. AG LEXIS 113.

70. —Authority of municipal official over employment

A councilman of the City of Lackawanna is not disqualified by reason of conflict of interest from voting on a resolution granting a salary increase to his wife, who is a properly appointed and properly promoted Senior Stenographer in the city. 1978 NY Ops Atty Gen March 8 (Informal), 1978 N.Y. AG LEXIS 167.

No prohibited conflict of interest exists where a Village Trustee participates and votes on certain matters involving the Kenmore Police Department when the husband of the Trustee is a desk lieutenant in that Department who has a direct monetary interest and is directly affected by the actions of the Board of Trustees with respect thereto. 1976 NY Ops Atty Gen July 12 (Informal), 1976 N.Y. AG LEXIS 132.

71. —City employment

A city may appoint as city attorney or enter into a contract of employment with a person whose spouse is an Alderman of that city even though the spouse, as such Alderman, may have the power or duty to approve such appointment or contract of employment or the payments made thereunder. 1972 NY Ops Atty Gen Nov 30 (Informal), 1972 N.Y. AG LEXIS 163.

A member of the city council must recuse herself from participating in a matter concerning the salary and terms and conditions of employment of her son who serves as the head of the department of public works. 1992 NY Ops Atty Gen 92-18 (Informal), 1992 N.Y. AG LEXIS 19.

There is no illegality where the son of the city director of public works is appointed corporation counsel for the city. Where town attorney and city corporation counsel are law partners, ethical problems may result when there is business between the city and town requiring legal counsel. 1980 Op St Compt No. 80-127.

Under the above sections, there was no violation of General Municipal Law, Article 18, where a three-member Civil Service Commission of the City of Middletown appointed the wife of one of said members as Secretary to said Commission by a two to nothing vote when one of the affirmative votes was cast by the Secretary's husband. 1974 NY Ops Atty Gen Apr 23 (Informal), 1974 N.Y. AG LEXIS 72.

72. —County employment

Sheriff may appoint his wife matron of county jail. 1967 NY Ops Atty Gen Dec 21 (Informal), 1967 N.Y. AG LEXIS 151.

Brothers do not enjoy the degree of consanguinity which would make the interest of one the interest of the other. Where a member of a partnership is appointed as a condemnation commissioner in a county acquisition of real property, and thereafter the other partner is elected as a supervisor in that county, and no fees of the condemnation commissioner are received by the partnership, and this is not in violation of the partnership agreement, there is no prohibited conflict of interest. However, where the partners are brothers, there may be the appearance of a conflict of interest but as the appointment of the commissioner was made before the supervisor was elected, disclosure by the supervisor and the condemnation commissioner would eliminate any question of an improper conflict. 1975 NY Ops Atty Gen March 13 (Informal), 1975 N.Y. AG LEXIS 90.

There is no illegality in the appointment by the county board of supervisors of the spouse of a member of the board to a county office or employment. 1972 Op St Compt No. 72-81.

No conflict of interest arises where the spouse of the person serving as health commissioner of three county health districts is the environmental health engineer of the same health districts. 1967 Op St Compt No. 67-686.

73. —School district employment

A municipality may enter into a contract of employment with a spouse, minor children or dependents of an officer or employee of such municipality who has the power or duty to approve same or the payments made thereunder. However, teachers related to any member of a board of education may be employed by said board only on consent of two-thirds of the members thereof. 1968 NY Ops Atty Gen Nov 4 (Informal), 1968 N.Y. AG LEXIS 113.

An attorney may be appointed school district attorney even though the attorney's spouse is a member of the board of education of the school district. The authorization contained in General Municipal Law § 800 subdivision 3 constitutes a waiver of the prohibition of such a contract when the contract relates to a spouse of a board member; it is so broad in its terms that there is no reason why the spouse of the attorney may not vote upon the question of the attorney's employment and upon matters relating to the attorney's salary and/or expense vouchers. 1977 NY Ops Atty Gen Dec 27 (Informal), 1977 N.Y. AG LEXIS 370.

Votes by respondent board member, approving appointment of her 27-year-old son as soccer coach and granting tenure to teacher who had recommended him for coaching position, did not violate General Municipal Law's conflict of interest provisions as (1) respondent's son was not "a minor" under CLS Gen Mun § 2(3) and he was not respondent's dependent merely because he resided in her home, and (2) petitioner failed to prove that respondent derived any pecuniary or material benefit from fact that her son resided in her home. 2001 Op Comm Ed No. 14,826, 2002 NY Educ. Dept. LEXIS 12.

There was no prohibited conflict of interest when president of central school district's board of education ratified agreement between local teachers' association and district, even though his spouse was member of local teachers' association. 2009 Op Comm Ed No. 15,892, 2009 NY Educ. Dept. LEXIS 34.

Provision of code of ethics of central school district, which required members of board of education to recuse themselves from voting on collective bargaining agreements between district and unions if they had family member covered by collective bargaining agreement, was unlawful because it conflicted with express exemptions from conflict of interest coverage in General Municipal Law. 1998 Op Comm Ed No. 13,914, 1998 NY Educ. Dept. LEXIS 236.

Where a teacher is the child of a member of the board of education of a central school district, a two-thirds vote of the entire board is required when any contract of employment relating to the teacher is renewed, including a contract granting tenure. The board member may vote on such contracts and on matters involving teacher's salary. 1980 Op St Compt No. 80-34, 1980 N.Y. Comp. LEXIS 342.

Member of school district board of education who is also employee of not-for-profit corporation would not have prohibited interests in contract between district and corporation for provision by corporation of arts and education programs to district; however, disclosure would be required under CLS Gen Mun L § 803. 1988 Op St Compt No. 88-77, 1988 N.Y. Comp. LEXIS 70.

74. —Town employment

Under the above sections the Supervisor of the Town of Milan, Dutchess County, a town of the second class, may designate his wife as a bookkeeper provided that the town board by resolution authorizes him to make a designation for the position and fixes the compensation therefor. 1970 NY Ops Atty Gen March 25 (Informal), 1970 N.Y. AG LEXIS 53.

A member of a town board must recuse herself from acting with respect to the terms and conditions of employment of her spouse, the chairperson of the zoning board of appeals. 1992 NY Ops Atty Gen 92-20 (Informal), 1992 N.Y. AG LEXIS 21.

The spouse of a justice of the peace of a town of the second class may not be employed as clerical assistant to the justice of the peace. 1964 Op St Compt No. 64-850.

In a town of the second class, wherein a justice of the peace is a member of the town board, such board may not fix the said justice's salary at an amount higher than that specified in the notice of hearing on the preliminary budget. The wife, minor children and dependents of a justice of the peace in a town of the second class may not be employed as clerical assistants to such justice. In policy matters relating to the volume of clerical help needed and the mode of compensating such help, the town board must be expected to exercise its own sound discretion. 1964 Op St Compt No. 64-1036.

There is no conflict of interest where a town supervisor appoints his wife as bookkeeper. 1970 Op St Compt No. 70-62.

A town board may not appoint one of its members to the position of custodian of the water district but it may appoint the wife of one of its members. 1980 Op St Compt No. 80-114.

A town councilman does not have a statutory interest in a collective bargaining agreement between the town and a union to which his son, an employee of the town highway department belongs, unless it can be established that he derives a direct or indirect pecuniary benefit as a result of the agreement. 24 Opn St Comp, 1968, p 60 and any other inconsistent opinions superseded. 1981 Op St Compt No. 81-415, 1981 N.Y. Comp. LEXIS 471.

The Town Board of the Town of Danube may employ the spouse of one of the Town Justices as clerk to that Justice. 1974 NY Ops Atty Gen Nov 15 (Informal), 1974 N.Y. AG LEXIS 179.

75. —Village employment

The wife of a village clerk may contract with the village for operation of an answering service under subd. (3) of this section after September 1, 1964. 1964 Op St Compt No. 64-506.

A village may employ the minor child of a village trustee as a swimming instructor. No disclosure is required. 1965 Op St Compt No. 67-587.

Position of village auditor is not inherently incompatible with spouse's holding of office of deputy clerk-treasurer of same village. 1979 Op St Compt No. 79-173.

76. —Other employment

The same impropriety would not seem to exist where the spouse of a faculty member of such community college becomes a county legislator. 1974 Op St Compt No. 74-935.

77. Employment of municipal official's business associate; law partner

A village trustee's law partner may not serve as village attorney unless his compensation cannot find its way into partnership funds. 1967 Op St Compt No. 67-666.

A prohibited conflict of interest arises where the law partners of the supervisor receive fees for services rendered county indigents under the same plan, assuming such fees are paid into the partnership treasury. There is no interest in contract if the fees are kept by the partners (other than the supervisor) for their individual benefits. 1967 Op St Compt No. 67-952.

There is no illegality in the holding of the office of assistant public defender by the law partner of the assistant county attorney. 1969 Op St Compt No. 69-100.

There is no illegality where the son of the city director of public works is appointed corporation counsel for the city. Where town attorney and city corporation counsel are law partners, ethical problems may result when there is business between the city and town requiring legal counsel. 1980 Op St Compt No. 80-127.

A village attorney does not have a conflict of interest when his law partner is appointed to the office of deputy village attorney. 1981 Op St Compt No. 81-40, 1981 N.Y. Comp. LEXIS 855.

No prohibited conflict of interest exists where the law partner of a county legislator is employed as an instructor at the county sponsored community college when the compensation received for such services does not become part of the income of the partnership. 1978 NY Ops Atty Gen Aug 17 (Informal), 1978 N.Y. AG LEXIS 347.

A conflict of interest occurs where the law partner of a town justice in a town of the second class is retained to provide legal services for the town, if the justice receives a direct or indirect material or pecuniary benefit as the result of such contract. There

is no legal prohibition against the appointment of the law partner as town attorney. 1971 Op St Compt No. 71-961.

If there is no prohibited conflict of interest, the law firm in which the town attorney is a partner may be retained by the town board as special counsel for litigation; a law firm so retained would be an independent contractor and no payroll deductions would be made from payment to the firm; if there is no prohibited conflict of interest, a town board may ratify a contract with a law firm as special counsel where there was no prior resolution engaging the services of the firm; a claim submitted by the law firm in 1980 for litigation services performed in 1979 and 1980 may be paid in the current fiscal year under certain circumstances; a town attorney may receive a prospective salary increase for services not anticipated prior to the time salaries are set; payroll deductions would be made from salary paid. 1981 Op St. Compt No. 81-102, 1981 N.Y. Comp. LEXIS 781.

78. —Others

Brothers do not enjoy the degree of consanguinity which would make the interest of one the interest of the other. Where a member of a partnership is appointed as a condemnation commissioner in a county acquisition of real property, and thereafter the other partner is elected as a supervisor in that county, and no fees of the condemnation commissioner are received by the partnership, and this is not in violation of the partnership agreement, there is no prohibited conflict of interest. However, where the partners are brothers, there may be the appearance of a conflict of interest but as the appointment of the commissioner was made before the supervisor was elected, disclosure by the supervisor and the condemnation commissioner would eliminate any question of an improper conflict. 1975 NY Ops Atty Gen March 13 (Informal), 1975 N.Y. AG LEXIS 90.

In a situation where an attorney is a real estate broker; a non-attorney is an insurance agent and a real estate broker; the two operate a real estate brokerage business; the attorney's income from practice of law is not credited to the real estate brokerage business; the insurance agent's income from the insurance business is not credited to the real estate brokerage business; other income of the two, except real estate brokerage commissions and fees, is not credited to the real estate brokerage business; and the insurance agent is a town supervisor, the attorney may be appointed town attorney of the same town as neither would receive direct or indirect pecuniary or material benefit from the receipt by the other of town salary. 1977 NY Ops Atty Gen Dec 21 (Informal), 1977 N.Y. AG LEXIS 367.

79. Compatible employment for city officers or employees

Court would annul determination terminating petitioner's employment as city firefighter for engaging in allegedly proscribed political activity in violation of CLS Gen Mun § 801, CLS Gen City § 3, and unnamed "common-law rules" since (1) it was conceded that literal terms of statutes were not violated, (2) petitioner fell within exception to CLS Gen Mun § 801 provided by CLS Gen Mun § 802, (3) petitioner was appointed as firefighter not by common council, as described in CLS Gen City § 3, but by municipal board of public safety, and (4) there was no satisfactory explanation of what was meant by claim that petitioner violated "common-law rules." Girard v Glens Falls, 173 A.D.2d 113, 577 N.Y.S.2d 496, 1991 N.Y. App. Div. LEXIS 16338 (N.Y. App. Div. 3d Dep't 1991).

The office of Deputy Corporation Counsel of the City of Cohoes and the position of counsel to the Cohoes Model Cities Demonstration Agency may be held simultaneously. 1970 NY Ops Atty Gen April 13 (Informal), 1970 N.Y. AG LEXIS 60.

A person in litigation against a city over a contract claim is not thereby disqualified from running for the office of alderman of the city. If elected he may assume the office but must file a disclosure statement and may not participate, as an alderman, in deliberations or action by the city relating to the defense or settlement of the litigation. 1975 NY Ops Atty Gen Oct 10 (Informal), 1975 N.Y. AG LEXIS 169.

The positions of City Personnel Officer and Affirmative Action Program Administrator for the City of Geneva are compatible and may be held simultaneously by the same person. 1976 NY Ops Atty Gen April 8 (Informal), 1976 N.Y. AG LEXIS 200.

The employment of an alderman, as a real estate sales agent, does not automatically create a conflict of interest even if he is also chairman of the Land Sales Committee of the Common Council. A conflict would exist if the alderman represented another party in a real estate transaction with the city and the commissions were over one hundred dollars. 1978 NY Ops Atty Gen Dec 7 (Informal), 1978 N.Y. AG LEXIS 387.

Municipality by local law may establish exception to common law prohibition on holding incompatible offices where public interest would be served. 1994 NY Ops Atty Gen 94-2 (Informal), 1994 N.Y. Op. Att'y Gen. No. 94-2, 1994 N.Y. AG LEXIS 5.

Under commission form of government in City of Mechanicville, commissioner of finance may also hold office of treasurer of Mechanicville fire department. 1994 NY Ops Atty Gen 94-7 (Informal), 1994 N.Y. AG LEXIS 12.

City of Yonkers' Director of Capital Projects was not precluded from also serving as member of City of Yonkers board of education, and thus petition seeking his removal was dismissed where (1) his affidavit and job description indicated that Director of Capital Projects could not interfere with any action taken by school district and had no power over funding for school district, and (2) as member of board of education, he could not interfere with any action taken by city; conclusory allegations that inherent conflict of interest existed because Director of Capital Projects reported directly to mayor (who allegedly wanted to limit board's funding) was insufficient to prove inconsistency with position on board inasmuch as all board members were mayoral appointees. 1999 Op Comm Ed No. 14,181, 1999 NY Educ. Dept. LEXIS 143.

A prohibited conflict of interest does not arise when a court stenographer employed by a city is paid by it for transcribing minutes of hearings conducted by the corporation counsel, where his services are rendered as an independent contractor outside of his regular working hours. 1968 Op St Compt No. 68-54.

There is no prohibition against a member of the city council of Watervliet being employed by the Watervliet Housing Authority as a clerk-typist. 1969 Op St Compt No. 69-124.

A prohibited conflict of interest does not arise where a city retains the services of two employees (heads of public works and water departments) for the purpose of designing a new sewer installation. Disclosure, however, is required, as provided in section 803. 1969 Op St Compt No. 69-294.

City councilman who is employee of corporation does not have conflict of interest in relation to contract between city and corporation when his remuneration is not directly affected as result of such contract and duties of his employment do not directly involve procurement, preparation or performance of any part of such contract. 1987 Op St Compt No. 87-91, 1987 N.Y. Comp. LEXIS 143.

There is no state statute which would prohibit a city auditor in the classified, competitive civil service from holding the position of county committeeman of a political party. Whether the Hatch Political Activities Act (a federal statute) is applicable is a matter for the consideration of the United States Attorney General's Office. 1968 Op St Compt No. 68-484.

80. —Imcompatible employment

In the absence of statutory authorization, the appointment by a city council of one of its members to a position of employment which was created and for which the salary was provided by the council of which he is a member, is violative of General Municipal Law § 801 even though he resigns from the council prior to such appointment. 1966 NY Ops Atty Gen Apr 18 (Informal), 1966 N.Y. AG LEXIS 60.

Under the provisions of the Charter of the City of Geneva § 172, a conflict of interest would exist where the City Assessor continues in the real estate business within the city while serving as such Assessor. 1970 NY Ops Atty Gen Dec 9 (Informal), 1970 N.Y. AG LEXIS 139.

A prohibited conflict of interest, under section 801 of the General Municipal Law, arose when the former City Attorney of the City of Glens Falls approved a contract between himself and the City for his employment to provide legal services to the Community Development Office, a City of Glens Falls agency.

1978 NY Ops Atty Gen May 23 (Informal), 1978 N.Y. AG LEXIS 125.

The employment of an alderman, as a real estate sales agent, does not automatically create a conflict of interest even if he is also chairman of the Land Sales Committee of the Common Council. A conflict would exist if the alderman represented another party in a real estate transaction with the city and the commissions were over one hundred dollars. 1978 NY Ops Atty Gen Dec 7 (Informal), 1978 N.Y. AG LEXIS 387.

Positions of member of city council and city firefighter are incompatible. 1995 NY Ops Atty Gen 95-12 (Informal), 1995 N.Y. AG LEXIS 12.

A prohibited conflict of interest occurs if the city corporation counsel, who is also counsel to the city school district board of education pursuant to the terms of a contract between the school district and the city, is hired by the district as an independent contractor to render services as a labor negotiator. 1968 Op St Compt No. 68-694.

81. Compatible employment for county officers or employees

Positions of assistant district attorney and member of panel of 3 special counsels (to substitute for town attorney, planning board attorney, or zoning board attorney in event any are not available to serve due to conflicts of interests or other disqualifications) are compatible. 1996 NY Ops Atty Gen 96-43 (Informal), 1996 N.Y. AG LEXIS 64.

Positions of member of county economic development agency, industrial development agency, and director of county planning board were compatible. 1998 NY Ops Atty Gen 98-45 (Informal), 1998 N.Y. AG LEXIS 50.

A conflict of interest does not occur where the owner of a tree service company, who is also a member of the county board of representatives, is employed by a town within the county for the purpose of tree removal. 1968 Op St Compt No. 68-25.

There is no impropriety in the holding, by a county legislator, of the office of treasurer of a city within the county. 1969 Op St Compt No. 69-304.

A director of the county laboratory, who is not required by the county board to perform autopsies for coroner's as part of the duties of the office, may contract with the county for a fee in addition to salary to perform autopsies for coroners, provided that the contract is not prohibited by the county code of ethics. 1978 Op St Compt No. 78-4.

Apart from conflicts of interest considerations, there is no legal prohibition against the executive director of an association for retarded children serving as a member of a county community services board which passes upon the association's budget. Whether a prohibited conflict of interest exists where the county contracts for services to be provided by the association depends upon relevant facts. 1978 Op St Compt No. 78-425.

A statutory conflict of interest does not occur where an attorney and his employee simultaneously serve as part-time county attorney and administrator of the assigned counsel plan, respectively, when the county attorney (in his private practice) receives no direct or indirect pecuniary or material benefit as a result of his employee's position with the county. 1981 Op St Compt No. 81-406, 1981 N.Y. Comp. LEXIS 476.

A prohibited conflict of interest would not arise if the clerk of a county board of supervisors should be appointed as secretary to the county civil service commission. However, such appointment may be violative of the common law rule enunciated in Wood v Town of Whitehall. 1968 Op St Compt No. 68-478.

No conflict of interest exists where a county legislator is a professional optometrist who, in connection with his private practice, provides optometrical services for Medicaid recipients. However, disclosure is required pursuant to General Municipal Law, § 803(1). 1981 Op St Compt No. 81-407, 1981 N.Y. Comp. LEXIS 480.

82. —Incompatible employment

County motor vehicle supervisor appointed by county clerk and whose salary was fixed by county legislature, who thereafter was elected to seat on county legislature, could not serve in both positions and accordingly was required to either resign from office of county legislator or from position of motor vehicle supervisor; fact that supervisor might be able to resist temptation to act in manner incompatible with best interests of county and might actually refrain from her duty of participating in fixation of salary of motor vehicle supervisor was not enough to permit her to hold both positions at same time. Dykeman v Symonds, 54 A.D.2d 159, 388 N.Y.S.2d 422, 1976 N.Y. App. Div. LEXIS 13744 (N.Y. App. Div. 4th Dep't 1976).

Court decision requiring county motor vehicle supervisor to either resign from that office or from her position as county legislator to which she was thereafter elected did not result in her disenfranchisement or that of voters in district. Dykeman v Symonds, 54 A.D.2d 159, 388 N.Y.S.2d 422, 1976 N.Y. App. Div. LEXIS 13744 (N.Y. App. Div. 4th Dep't 1976).

In action for declaratory judgment invalidating county water authority's "Policy Governing Conflict of Interest and Disclosure" and related rules of conduct which prohibited water authority employees from providing private plumbing services requiring inspection and/or approval by water authority, water authority was properly granted summary judgment because policy was rationally based and reasonably related to maintaining public confidence in government, and it was sufficiently narrow in scope so as not to eliminate other opportunities for plaintiffs to engage in outside work. Reichel v Suffolk County Water Auth., 283 A.D.2d 475, 724 N.Y.S.2d 886, 2001 N.Y. App. Div. LEXIS 5006 (N.Y. App. Div. 2d Dep't 2001).

Since individual as a member of county legislature had power or duty to fix compensation for office of motor vehicle supervisor which he also held because the office was paid out of county funds, conflict was inherent and inescapable within meaning of statute so that she could not properly serve concurrently in both capacities, notwithstanding fact that she had refrained from the past in participating with negotiations with collective bargaining agent and was willing to abstain from the future from voting upon any and all salary matters coming before the legislative body. Dykeman v Symonds, 85 Misc. 2d 289, 380 N.Y.S.2d 567, 1976 N.Y. Misc. LEXIS 1993 (N.Y. Sup. Ct.), aff'd, 54 A.D.2d 159, 388 N.Y.S.2d 422, 1976 N.Y. App. Div. LEXIS 13744 (N.Y. App. Div. 4th Dep't 1976).

The offices of Jefferson County Treasurer and member of the Thousand Island Bridge Authority are, when held by the same person, incompatible. 1971 NY Ops Atty Gen April 26 (Informal), 1971 N.Y. AG LEXIS 68.

A county Legislator may not be employed on the teaching staff of a county sponsored community college located within that county. 1975 NY Ops Atty Gen Jan 22 (Informal), 1975 N.Y. AG LEXIS 60.

The governing body of a county may not appoint one of its members as a director of a regional off-track betting corporation. 1979 NY Ops Atty Gen Sept 13 (Informal), 1979 N.Y. AG LEXIS 47.

County fire investigator should not also serve as building inspector in county. 1998 NY Ops Atty Gen 98-44 (Informal), 1998 N.Y. AG LEXIS 51.

A prohibited conflict of interest occurs where a county coroner, who is also a physician, is paid on a fee basis for performing autopsies. 1969 Op St Compt No. 69-280.

Certain improprieties would attach if a teacher in a county-sponsored community college were to be a county legislator at the same time. 1974 Op St Compt No. 74-935.

83. Compatibility of employment for housing authority officers or employees

A common law conflict of interest would ensue if the same person at the same time served as an officer or employee and commissioner for a municipal housing authority. Pursuant to Public Housing Law, § 30(5), a tenant of the Buffalo Municipal Housing Authority, who is also an employee of said Authority, may lawfully seek the office of commissioner of said Authority and if successful may become a commissioner upon resigning his position of employment. 1978 NY Ops Atty Gen Feb 22 (Informal), 1978 N.Y. AG LEXIS 178.

A conflict of interest would result if the same person, at the same time, served as both a member of, and attorney for, a

Municipal Housing Authority. 1978 NY Ops Atty Gen Feb 13 (Informal), 1978 N.Y. AG LEXIS 399.

Housing authority commissioner may serve as employee of entity providing services to authority provided that he or she recuses himself or herself when necessary to avoid conflict of interests. 1994 NY Ops Atty Gen 94-11 (Informal), 1994 N.Y. AG LEXIS 8.

A member of a housing authority is precluded by section 36 and the common law rules relating to conflicts of interest from being hired by the owner of a laundry concession, which concession is located in an authority apartment building, to service and maintain the machines. 1983 Op St Compt No. 83-13, 1983 N.Y. Comp. LEXIS 470.

84. Compatibility of employment for school district officers or employees

There is no incompatibility between the office of school board member and village trustee of a village in the school district and there is no inherent conflict of interest in the simultaneous holding of the two offices by the same person, which would disqualify him from voting on a plan, *inter alia,* to move the school district administrative offices to a school located in the village. 1981 NY Ops Atty Gen 81-17 (Informal), 1981 N.Y. AG LEXIS 142.

Respondent did not neglect his duty as member of board of education by acting as the trial attorney for plaintiffs in a lawsuit against a school district while he was a member of the board of education, since purely personal transactions, such as respondent's handling of divorce proceedings and private real estate transactions as attorney on behalf of school employee, do not constitute a prohibited conflict of interest because they do not involve a contract with school district. Application of Ackerberg et al., 1985 Op Comm Ed No. 11,561.

There is no illegality where the attorney for a school district is also a trustee of a village within the district. However, he should avoid involvement in any controversies between the district and the village. 1969 Op St Compt No. 69-70.

A prohibited interest in contract will exist if a dentist, engaged under a State-sponsored pre-school program and paid with school district funds on a per-patient basis, is elected to the board of education and continues to treat program patients, where a separate contract with the school district is entered into for each patient treated. 1971 Op St Compt No. 71-936.

A member of a school district board of education who is also on the faculty of a community college may not be engaged by the district to teach a course, either as an employee of the district or as an independent contractor, in a district school. 1979 Op St Compt No. 79-626.

A retired school administrator, if he should be elected to the board of education of the school district, would have a prohibited interest as a board member in any collective bargaining agreement executed subsequent to his taking office which provides for the payment of the full cost of health insurance for him as a retiree. 1983 Op St Compt No. 83-122, 1983 N.Y. Comp. LEXIS 363.

A member of a school district board of education does not have a conflict of interest when he, as a retired teacher, is covered by a health insurance contract paid by the district pursuant to a collective bargaining agreement with the school district notwithstanding that as a board member he has the power to approve the agreement and the insurance contract. Similarly, he has no conflict of interest when he is the beneficiary of a health insurance plan by virtue of his spouse's employment by the district. However, the board member should consider refraining from voting on matters impacting upon benefits paid to him as a retired employee. Opn No. 83-122 superseded. 1986 Op St Compt No. 86-5, 1986 N.Y. Comp. LEXIS 168.

School board member does not have conflict of interest pursuant to CLS Gen Mun Law Art 18 solely by virtue of either holding position in state teachers association or owning college entrance and counseling business, however, one or both activities may be regulated by school district's code of ethics. 1989 Op St Compt No. 89-24, 1989 N.Y. Comp. LEXIS 27.

There is no legal prohibition against the same individual being attorney for both a village and a school district which includes the village. However, due regard should be accorded Canon 6 of the Canons of Professional Ethics of the New York State Bar Association. 1968 Op St Compt No. 68-987.

Since there was no statutory provision prohibiting teacher of one school district from holding board membership in another district, there was no conflict of interest where said teacher participated in teacher salary negotiations while a member of said board. Op Ed Comm No. 8565.

85. Compatibility of employment for town officers or employees; administrative board members

Supervisor of town may not also serve as town librarian. 1999 NY Ops Atty Gen 99-39 (Informal), 1999 N.Y. AG LEXIS 45.

No prohibited conflict of interest occurs when an accountant, who is a member of a town insurance advisory committee, renders bookkeeping and accounting services to a town either as: (1) an employee of the town, or (2) as an independent contractor. 1968 Op St Compt No. 68-24.

No prohibited conflict of interest occurs when a member of a town historical area board of review contracts with the town for the rendering of his professional services in connection with a building for the town public library district. 1968 Op St Compt No. 68-213.

Generally, there is no legal prohibition against a member of an administrative board of a town appearing before such board in his professional capacity. However, this Department feels that such would not be in the public interest. 1968 Op St Compt No. 68-246.

A conflict of interest would not arise if the director of youth activities of a town should be elected to the office of trustee of the school district within which the town is located. 1968 Op St Compt No. 68-477.

There is no prohibition against the holding, by a member of a town conservation advisory council, of membership on the town planning board. 1969 Op St Compt No. 69-115.

86. —Clerks

A town clerk may be legally employed as stenographer for the town's justice of the peace. 1964 Op St Compt No. 64-753.

An individual may hold the positions of town building inspector and clerk to the town planning board. 1968 Op St Compt No. 68-174.

While there is no legal prohibition against the appointment of the secretary to the town board to the office of deputy town clerk, whether it is advisable is a matter for local determination. 1968 Op St Compt No. 68-191.

A town clerk may receive extra compensation for acting as stenographer for town justice, and, outside office hours, as stenographer for other town agencies. 1968 Op St Compt No. 68-657.

87. —Council members

Member of town board is ineligible to serve as town constable since the incumbent of each position is a town officer and since town board may confer powers on a constable not inconsistent with those conferred by general laws of the State and a town constable, when appointed, serves for an indefinite term at the pleasure of the board. 1966 NY Ops Atty Gen Oct 13 (Informal), 1966 N.Y. AG LEXIS 130.

The dual holding of the two public offices of town councilman and village patrolman is compatible, as is the dual holding of the public office of village trustee and the public employment of custodian of a town, assuming, of course, that there is no conflict with respect to time. Other questions should be referred to local boards of ethics. 1970 NY Ops Atty Gen Aug 13 (Informal), 1970 N.Y. AG LEXIS 103.

A town councilwoman may not serve simultaneously as bookkeeper for the town supervisor except within the confines of the exception contained in General Municipal Law § 802(2[f]). 1977 NY Ops Atty Gen Nov 18 (Informal), 1977 N.Y. AG LEXIS 355.

A town councilman of the town of the second class may be appointed by the town supervisor as secretary to the town supervisor. 1965 Op St Compt No. 65-361.

A prohibited conflict of interest would occur if a town councilman should be hired as an independent contractor to work for the

town; and his appointment to a position of employment by the town board would be contrary to public policy. 1968 Op St Compt No. 68-53.

There is no prohibition against the appointment of a town councilman as "liaison" between the town board and the board of education of a school district by which he is employed. 1968 Op St Compt No. 68-291.

Statutory conflicts of interest do not arise by reason of membership of town councilmen and village trustees in the Civil Service Employees Association, notwithstanding that it is the bargaining agent for officers and employees of their respective towns and villages. 1968 Op St Compt No. 68-529.

A town councilman may not receive compensation for services rendered to a town water district. 1969 Op St Compt No. 69-682.

A town board may not appoint one of its members to the position of custodian of the water district but it may appoint the wife of one of its members. 1980 Op St Compt No. 80-114.

A prohibited conflict of interest does not exist where a town councilman is an officer of a volunteer fire company with which the town contracts to receive fire protection and ambulance service. 1968 Op St Compt No. 68-190.

88. —Fire personnel

There is no apparent incompatibility per se between the offices of town fire district fire company line officer and town fire prevention officer. 1968 Op St Compt No. 68-18.

A town board member may also be volunteer fireman. Furthermore, as a board member he may vote on the amount of a contract with his fire company. 1979 Op St Compt No. 79-445.

89. —Highway personnel

The same person simultaneously may hold the two offices of appointed assessor and elected superintendent of highways in a town. 1975 NY Ops Atty Gen Nov 25 (Informal), 1975 N.Y. AG LEXIS 193.

A town superintendent of highways who receives an annual salary cannot be employed to work in the highway department at a fixed hourly rate. 1966 Op St Compt No. 66-43.

A prohibited conflict of interest does not arise where a town highway superintendent is appointed by the town board to the newly created position of park superintendent. 1968 Op St Compt No. 68-56.

A town highway superintendent may legally be employed by the town to work for the water and sewer districts provided that his duties, as highway superintendent, do not include those to be performed as an employee. 1969 Op St Compt No. 69-171.

The employment, by a town, of the town assessor as a full-time employee of the highway department is not violative of the conflicts of interest statutes, nor any other provision of law. 1969 Op St Compt No. 69-193.

There is no legal prohibition against an employee of a town highway department serving as a part-time town policeman. 1974 Op St Compt No. 74-141.

90. —Justices

A prohibited conflict of interest does not result where a town justice of a town of the first class performs services for such town as attorney for special improvement districts created by such town. Nevertheless, disclosure of such interest is mandated by General Municipal Law, Sec. 803, 1973 NY Ops Atty Gen Apr 4 (Informal), 1973 N.Y. AG LEXIS 53.

The same person may simultaneously hold the two offices of town justice, who would not be serving as a member of the town board, and an employee of the town highway department. 1978 NY Ops Atty Gen March 16 (Informal), 1978 N.Y. AG LEXIS 162.

The same person may simultaneously serve as Scio Town Justice and be employed by the Town of Scio to run the town water and refuse disposal systems. 1979 NY Ops Atty Gen Jan 9 (Informal), 1979 N.Y. AG LEXIS 168.

A prohibited interest in contract arises where a justice of the peace of a town of the second class is employed as the private law associate of the attorney retained by the town on a contractual basis to render legal services. 1969 Op St Compt No. 69-54.

In a town of the second class, an elected justice is a member of the town board and, therefore, may not be appointed town assessor by the board. 1969 Op St Compt No. 69-951.

91. —Receivers of taxes

A prohibited conflict of interest does not arise where a town receiver of taxes submits a claim for payment in connection with accounting services rendered to a town water district. 1967 Op St Compt No. 67-1035.

There is no legal prohibition against holding the position of business manager of the town purchasing department by the deputy receiver of taxes. 1968 Op St Compt No. 68-425.

92. —Village employment

A Town Justice may be appointed as an Acting Police Justice for a village located in the town even though he is a contractor who removes snow for the village and does backhoeing at the village dump. 1970 NY Ops Atty Gen May 19 (Informal), 1970 N.Y. AG LEXIS 76.

A Town supervisor may serve concurrently as a village clerk in a village located within the town. 1979 NY Ops Atty Gen Sept 14 (Informal), 1979 N.Y. AG LEXIS 43.

This article does not preclude a Deputy Town Attorney from assuming the concurrent office of member of the Village Zoning Board of Appeals located within the Town he serves; but should an instance of conflict arise, the public attorney must avoid same. 1979 NY Ops Atty Gen May 31 (Informal), 1979 N.Y. AG LEXIS 114.

There is no legal prohibition against the retaining of a town councilman, as an independent contractor, by a village situated within the town, for the purpose of rendering advice to the village on fiscal matters. 1969 Op St Compt No. 69-655.

93. —Other town personnel

The fact that a member of the town's planning and zoning board is a building contractor by occupation in said town does not, per se, create a conflict of interest. 1971 NY Ops Atty Gen Dec 1 (Informal), 1971 N.Y. AG LEXIS 132.

Where substantial conflicts would result, elected or appointed assessor may not serve as real estate broker in municipality where his or her official duties are performed. 1994 NY Ops Atty Gen 94-49 (Informal), 1994 N.Y. AG LEXIS 50.

Person may serve simultaneously as member of zoning board of appeals and member of board of assessment review of town. 1995 NY Ops Atty Gen 95-9 (Informal), 1995 N.Y. AG LEXIS 9.

Positions of assistant district attorney and member of panel of 3 special counsels (to substitute for town attorney, planning board attorney, or zoning board attorney in event any are not available to serve due to conflicts of interests or other disqualifications) are compatible. 1996 NY Ops Atty Gen 96-43 (Informal), 1996 N.Y. AG LEXIS 64.

Positions of town supervisor and director of county veterans agency were compatible, and thus could be held by same person. 1997 NY Ops Atty Gen 97-46 (Informal), 1997 N.Y. AG LEXIS 69.

Person may not hold both positions of master mechanic of fire district and fire district commissioner. 1997 NY Ops Atty Gen 97-44 (Informal), 1997 N.Y. AG LEXIS 74.

Positions of town attorney and director of local development corporation are compatible; office of town board member also is compatible with director position. 1998 NY Ops Atty Gen 98-23 (Informal), 1998 N.Y. AG LEXIS 30.

The same individual may legally render services simultaneously to a town as town engineer, salaried superintendent of a water district, and a non-engineering consultant with respect to water district matters on a fee basis. 1968 Op St Compt No. 68-684.

A town policeman may accept part-time employment with a town water department during his off-duty hours, provided that such employment does not interfere with his official duties. 1969 Op St Compt no. 69-844.

A planning board member is prohibited from receiving or agreeing to receive compensation for engineering services, such as percolation test and other design work for individuals who are subdividing their property, where such subdivision applications in the future could come before the planning board. Although there is no statutory prohibition against a planning board member performing uncompensated work in connection with such matter before the board, the board member should not participate

in the discussion or vote on any such matter. 1990 Op St Compt No. 90-28, 1990 N.Y. Comp. LEXIS 35.

94. Compatibility of employment for village officers or employees; police

Although there appears to be no statutorily prohibited conflict of interest, the operation of a collection agency by a village police officer is fraught with the possibility of abuse. 1973 NY Ops Atty Gen Sept 24 (Informal), 1973 N.Y. AG LEXIS 111.

Positions of village police officer and member of village zoning board of appeals are compatible. 1999 NY Ops Atty Gen 99-8 (Informal), 1999 N.Y. AG LEXIS 8.

No conflict of interest would arise if a village policeman were to be employed by the village hall custodian. 1967 Op St Compt No. 67-516.

Unless the rules and regulations of a village police department provide otherwise, the holding of the office of part-time village policeman and part-time employee in the village street or water department by the same person may be permissible. 1968 Op St Compt No. 68-578.

95. —Trustees

A village trustee, upon assuming that office, may not retain his employment as a mechanic in that village's highway department, unless his total remuneration for such latter employment does not exceed $100 during any fiscal year. 1970 NY Ops Atty Gen March 25 (Informal), 1970 N.Y. AG LEXIS 54.

The dual holding of the two public offices of town councilman and village patrolman is compatible, as is the dual holding of the public office of village trustee and the public employment of custodian of a town, assuming, of course, that there is no conflict with respect to time. Other questions should be referred to local boards of ethics. 1970 NY Ops Atty Gen Aug 13 (Informal), 1970 N.Y. AG LEXIS 103.

A member of the Board of Trustees of the Village of Greenport may serve as an Assessor or Chairman of a Board of Assessors without compensation if the Village Board of Trustees complies with the provisions of Village Law, Sec. 4-418. 1973 NY Ops Atty Gen May 14 (Informal), 1973 N.Y. AG LEXIS 65.

The spouse of a village clerk-treasurer may be a village trustee of the same village without a conflict of interest resulting. 1981 NY Ops Atty Gen 81-23 (Informal), 1981 N.Y. AG LEXIS 135.

Village trustee may also serve as auxiliary police officer. 1994 NY Ops Atty Gen 94-1 (Informal), 1994 N.Y. AG LEXIS 6.

A village trustee may be employed as a teacher by a central school district, and no disclosure need be made. 1964 Op St Compt No. 64-903.

Statutory conflicts of interest do not arise by reason of membership of town councilmen and village trustees in the Civil Service Employees Association, notwithstanding that it is the bargaining agent for officers and employees of their respective towns and villages. 1968 Op St Compt No. 68-529.

Village trustees may not employ themselves for the purpose of conducting a special appraisal of real property within the village. 1969 Op St Compt No. 69-744.

A village trustee does not have a prohibited conflict of interest when he also serves as Activities Administrator of a joint town/village recreation commission. If he is village employee, disclosure is necessary under General Municipal Law. § 803(1). 1980 Op St Compt No. 80-597.

96. —Others

No conflict of interest or incompatibility arises when a member of a village zoning board of appeals also serves as an officer of a corporation which holds a New York State liquor license. 1976 NY Ops Atty Gen March 3 (Informal), 1976 N.Y. AG LEXIS 73.

One person simultaneously may hold the two village offices of building inspector and village engineer. 1981 NY Ops Atty Gen 81-79 (Informal), 1981 N.Y. AG LEXIS 74.

Village mayor may also serve as chairperson of town zoning board of appeals, but must recuse himself or herself from acting on zoning board of appeals as to matters affecting interests of village or village residents. 1996 NY Ops Atty Gen 96-20 (Informal), 1996 N.Y. AG LEXIS 26.

A Village Board may not employ its mayor for part-time work, such as street repair and mowing lawns. 1964 Op St Compt No. 64-422.

The police justice of a village may enter into a contract of employment as a laborer with the village, but disclosure of the nature and extent of his interest in such a contract is required. 1964 Op St Compt No. 64-814.

The holding by the same person of the positions of chief of a village fire department, part-time village fire station employee and chief fire warden is not permissible. 1968 Op St Compt No. 68-752.

There is no conflict of interest or incompatibility in a member of a village planning board also holding the office of village assessor. 1968 Op St Compt No. 68-880.

There are no provisions of law preventing a person from being a village assessor and simultaneously appraising property in the village for a fee. The holding of these two positions does not, of itself, present a question of ethics or public policy, although, in certain situations, an ethical and public policy issue might be raised. 1968 Op St Compt No. 68-896.

A prohibited interest in contract does not arise should a person retained as publicity agent for a village be appointed deputy village clerk. 1969 Op St Compt No. 68-389.

Where a lessee alleges violation of village building code by lessor with respect to construction work on leased premises, and village attorney, in his private capacity, represents lessor in controversy, whether there is any impropriety or illegality is not a question of municipal law. 1980 Op St Compt No. 80-94.

Positions of assistant town building inspector and part-time building inspector of village are compatible. 1994 NY Ops Atty Gen 94-8 (Informal), 1994 N.Y. AG LEXIS 11.

Specific duties of positions of fire marshal and fire chief in village of Southampton make those positions incompatible so that same person may not simultaneously serve in both positions. 2000 NY Ops Atty Gen 2000-20 (Informal), 2000 N.Y. AG LEXIS 60.

There is no legal prohibition against the same individual being attorney for both a village and a school district which includes the village. However, due regard should be accorded Canon 6 of the Canons of Professional Ethics of the New York State Bar Association. 1968 Op St Compt No. 68-987.

97. Miscellaneous employment conflicts

A collective bargaining agreement between a county and a local chapter of the Civil Service Employees Association (CSEA) was not invalidated by the county negotiator's conflict of interest where the particular conflict (the fact that the negotiator's own salary adjustments would be the same as CSEA members under the agreement being negotiated) was the type of interest exempted from the conflict of interest statute (Gen Mun Law §§ 801). Stettine v County of Suffolk, 105 A.D.2d 109, 482 N.Y.S.2d 818, 1984 N.Y. App. Div. LEXIS 20681 (N.Y. App. Div. 2d Dep't 1984), aff'd, 66 N.Y.2d 354, 497 N.Y.S.2d 329, 488 N.E.2d 75, 1985 N.Y. LEXIS 17611 (N.Y. 1985).

Under New York Const Art IX §§ 2, 3; Gen Mun §§ 801, 802, 806; Mun Home Rule §§ 2, 10, the Town of East Hampton is not authorized to amend the East Hampton Code of Ethics to require that, once every year, certain of its officers and employees fully disclose and itemize their financial status to include all of their assets and all of their liabilities when there is no apparent or potential conflict of interest in the standard of conduct of such officer or employee as it relates to his employment with the municipality. 1974 NY Ops Atty Gen Nov 12 (Informal), 1974 N.Y. AG LEXIS 173.

The wife of a stockholder in a corporation that holds a liquor license is not thereby disqualified from holding the office of town justice in the Town of Inlet. 1976 NY Ops Atty Gen April 20 (Informal), 1976 N.Y. AG LEXIS 98.

The simultaneous holding of the two positions of clerk of the board of assessors and member of the board of assessors (or sole assessor) by the same person would constitute an incompatibility in function and a conflict of interest and if a clerk is successful in a campaign for election as assessor she must then choose which of the positions she wishes to hold; she cannot hold both at the same

time. 1979 NY Ops Atty Gen Oct 18 (Informal), 1979 N.Y. AG LEXIS 24.

A member of a Library Board of Trustees may not simultaneously hold the position of paid custodian of the library. 1979 NY Ops Atty Gen Sept 14 (Informal), 1979 N.Y. AG LEXIS 42.

A member of a Plumber's Examining Board, who also holds the office of plumbing inspector, may receive separate pay for each position, provided that the two positions really are separate. 1964 Op St Compt No. 64-962.

There is no prohibition against the appointment of a town councilman as "liaison" between the town board and the board of education of a school district by which he is employed. 1968 Op St Compt No. 68-291.

There is no conflict of interest or other legal impropriety where an accountant retained by a fire district to prepare its annual financial report is also the owner of a computer firm which is engaged by the district to perform data processing services. 1981 Op St Compt No. 81-373, 1981 N.Y. Comp. LEXIS 513.

Member of community college board of trustees who was also president, director and stockholder holding in excess of 5 percent of stock of corporation engaged in printing business would have conflict of interest if college enters into contract with corporation; nonparticipation by trustee and board matters relating to such contracts would not be curative. 1987 Op St Compt No. 87-75, 1987 N.Y. Comp. LEXIS 100.

Employment by fire district of professional engineer as independent contractor to prepare plans and specifications, and to supervise work, on construction project when engineer also is one-half owner of construction firm which may bid on building project presents possible violations of ethical and professional conduct standards and of competitive bidding statute. 1989 Op St Compt No. 89-12, 1989 N.Y. Comp. LEXIS 15.

A member of a public library board of trustees does not have an interest in a contract between the library and an architectural firm which employs the board member's daughter, but the board member should recuse himself or herself from any discussions and votes on matters relating to the contract. A public library may adopt a code of ethics which should provide standards of conduct in relation to, among other things, contracts between the library and firms which employ relatives of library officers and employees. 1991 Op St Compt No. 91-26, 1991 N.Y. Comp. LEXIS 24.

A member of a community college board of trustees would have a prohibited conflict of interest if he should be retained, as an independent contractor, to serve as an adjunct professor. 1981 Op St Compt No. 81-93, 1981 N.Y. Comp. LEXIS 798.

Notes to Unpublished Decisions

57. Miscellaneous matters

Unpublished decision: Although title to Smallacre was taken by the company, as plaintiff was the sole owner of the company, he had an interest in the transaction. Accordingly, N.Y. Gen. Mun. Law § 801 was implicated. Lexjac, LLC v Bd. of Trs. of the Inc. Vill. of Muttontown, 708 Fed. Appx. 722, 2017 U.S. App. LEXIS 17439 (2d Cir. N.Y. 2017).

Unpublished decision: Even if plaintiff recused himself from the vote, he was in a position to influence the Board's decision by virtue of his village board membership. Thus, his recusal did not cure the violation. Lexjac, LLC v Bd. of Trs. of the Inc. Vill. of Muttontown, 708 Fed. Appx. 722, 2017 U.S. App. LEXIS 17439 (2d Cir. N.Y. 2017).

Agency Opinions

Analysis

I. Prohibited Interests in Municipal Contracts

1. Real estate sales; sales by municipality to its officials or employees

I. Prohibited Interests in Municipal Contracts

1. Real estate sales; sales by municipality to its officials or employees

When a town assessor acquires title to tax delinquent real property located within the town which he serves, it is a conflict of interest and such sale is void ab initio. 7 Op Counsel SBEA 41 (1979).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 802.

Jurisprudences:

18A NY Jur 2d Civil Servants and Other Public Officers and Employees § 218.

26 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 473, 489, 492—494, 498, 514, 523.

75 NY Jur 2d Libraries § 24.

63 Am Jur 2d, Public Officers and Employees §§ 309 et seq.

Law Reviews:

Davies, Article 18 of New York's General Municipal Law: the state conflicts of interest law for municipal officials. 59 Alb. L. Rev. 1321.

§ 802. Exceptions

The provisions of section eight hundred one of this chapter shall not apply to:

1. a. The designation of a bank or trust company as a depository, paying agent, registration agent or for investment of funds of a municipality except when the chief fiscal officer, treasurer, or his deputy or employee, has an interest in such bank or trust company; provided, however, that where designation of a bank or trust company outside the municipality would be required because of the foregoing restriction, a bank or trust company within the municipality may nevertheless be so designated;

b. A contract with a person, firm, corporation or association in which a municipal officer or employee has an interest which is prohibited solely by reason of employment as an officer or employee thereof, if the remuneration of such employment will not be directly affected as a result of such contract and the duties of such employment do not directly involve the procurement, preparation or performance of any part of such contract;

c. The designation of a newspaper, including but not limited to an official newspaper, for the publication of any notice, resolution, ordinance or other proceeding where such publication is required or authorized by law;

d. The purchase by a municipality of real property or an interest therein, provided the purchase and the consideration therefor is approved by order of the supreme court upon petition of the governing board;

e. The acquisition of real property or an interest therein, through condemnation proceedings according to law;

f. A contract with a membership corporation or other voluntary nonprofit corporation or association including, but not limited to, rural electric cooperatives. For purposes of this paragraph, the term "rural electric cooperative" shall have the same meaning as the term "cooperative" as defined in subdivision (a) of section two of the rural electric cooperative law;

g. The sale of bonds and notes pursuant to section 60.10 of the local finance law;

h. A contract in which a municipal officer or employee has an interest if such contract was en-

tered into prior to the time he was elected or appointed as such officer or employee, but this paragraph shall in no event authorize a renewal of any such contract;

i. Employment of a duly licensed physician as school physician for a school district upon authorization by a two-thirds vote of the board of education of such school district, notwithstanding the fact that such physician shall have an interest, as defined in section eight hundred one of this chapter, in such employment.

j. Purchases or public work by a municipality, other than a county, located wholly or partly within a county with a population of two hundred thousand or less pursuant to a contract in which a member of the governing body or board has a prohibited interest, where:

(1) the member of the governing body or board is elected and serves without salary;

(2) the purchases, in the aggregate, are less than five thousand dollars in one fiscal year and the governing body or board has followed its procurement policies and procedures adopted in accordance with the provisions of section one hundred four-b of this chapter and the procurement process indicates that the contract is with the lowest dollar offer;

(3) the contract for the purchases or public work is approved by resolution of the body or board by the affirmative vote of each member of the body or board except the interested member who shall abstain.

2. a. A contract with a corporation in which a municipal officer or employee has an interest by reason of stockholdings when less than five per centum of the outstanding stock of the corporation is owned or controlled directly or indirectly by such officer or employee;

b. A contract for the furnishing of public utility services when the rates or charges therefor are fixed or regulated by the public service commission;

c. A contract for the payment of a reasonable rental of a room or rooms owned or leased by an officer or employee when the same are used in the performance of his official duties and are so designated as an office or chamber;

d. A contract for the payment of a portion of the compensation of a private employee of an officer when such employee performs part time service in the official duties of the office;

e. A contract in which a municipal officer or employee has an interest if the total consideration payable thereunder, when added to the aggregate amount of all consideration payable under contracts in which such person had an interest during the fiscal year, does not exceed the sum of seven hundred fifty dollars.

f. A contract with a member of a private industry council established in accordance with the federal job training partnership act or any firm, corporation or association in which such member holds an interest, provided the member discloses such interest to the council and the member does not vote on the contract.

HISTORY:

Add, L 1964, ch 946, § 2; amd, L 1965, ch 1043, § 3, eff July 1, 1965; L 1966, ch 135, § 1; L 1968, ch 105, § 1, eff April 2, 1968; L 1970, ch 1019, § 1, eff July 1, 1970; L 1977, ch 28, § 1, eff July 1, 1978; L 1983, ch 440, § 1, eff July 12, 1983; L 1996, ch 364, §§ 1, 2, eff Oct 28, 1996; L 2009, ch 249, § 1, eff July 28, 2009.

Editor's Notes: Laws 1964, ch 946, §§ 1 and 13–17, provide as follows:

Section 1. Declaration of policy and purpose. As government becomes increasingly complex, as our democratic processes draw citizens from every walk of life, there is increasing need for known standards of ethical conduct as a guide for public officers. These standards must rest primarily on personal integrity and on community vigilance: law cannot in itself create moral fiber, nor can law quicken the civic conscience. In support of these basic standards, it is the purpose of this chapter to define areas of conflicts of interest in municipal transactions, leaving to each community the expression of its own code of ethics.

The need for the statute does not spring from widespread malfeasance on the part of municipal officers; rather, the Legislature recognizes their integrity as a group, their culpability in only a few instances. But lest the few brand the many, the discernment of the offending case must be made certain, its elimination sure. Existing law is too complex, too inconsistent, too overgrown with exceptions, for such a clarity of understanding to be possible. Basic concepts must be retained, but something more than recodification is needed.

There is another and equally important objective: a formula of conduct which is not only clear but reasonable, one which will permit governmental employees to share the normal benefits of the democratic society and economy they serve. If government is to attract and hold competent administrators, public service must not require a complete divesting of all proprietary interests. Real conflict must be rooted out, without condemning the inconsequential.

The chapter, then, has a trinity of purposes: to protect the public from municipal contracts influenced by avaricious officers, to protect innocent public officers from unwarranted assaults on their integrity and to encourage each community to adopt an appropriate code of ethics to supplement this chapter. The Legislature declares that each purpose is a matter of State concern and adopts the following chapter accordingly, with the intention that it shall be the generic law in relation to conflicts of interest in municipal transactions, not to be superseded by local law of any municipality subject to its provisions.

§ 13. Laws superseded. The provisions of article eighteen of the general municipal law, as added by this act, shall supersede any local law, charter, ordinance, resolution, rule or regulation of any municipality to the extent that such local law, charter, ordinance, resolution, rule or regulation is inconsistent with the provisions thereof. No local law, ordinance, resolution, rule or regulation shall modify or dispense with any provision of article eighteen of the general municipal law, as added by this act; provided, however, that nothing herein contained shall prohibit a code of ethics adopted pursuant thereto from supplementing the provisions of this act.

§ 14. Pending actions and proceedings. No action or proceeding pending at the time when this act shall take effect shall be affected by any provision of this act, but the same may be prosecuted, defended or enforced as if this act had not been enacted.

§ 15. Existing rights and remedies preserved. No existing right or remedy of any character shall be lost, impaired or affected by reason of this act, nor shall the validity of any action taken by any public official under the law in force immediately prior to the time this act shall take effect be affected by the enactment of this act.

§ 16. Laws repealed. Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is hereby repealed.

§ 17. Effective date. This act shall take effect September first, nineteen hundred sixty-four.

Repeal Notes: [1977, ch 28] Paragraph b of subdivision 2 of Section 802 of the General Municipal Law, repealed by this act, provided that contracts pursuant to Article 11 of the Mental Hygiene Law (entitled "Local and Unified Services") be excepted from the provisions of section 801 of the General Municipal Law which prohibits conflicts of interest by municipal officers or employees.

Notes to Decisions

Analysis

1. Generally
2. Designation of depository; municipal official as member of bank advisory board
3. Official as employee of bank
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5. —Official as stockholder of bank
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10. Municipal official as officer or employee of contracting party; city officials
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32. Lease of official's property
33. Contracts involving consideration of less than $100
34. —Insurance contracts
35. —Real estate contracts
36. —Other contracts
37. Employment conflicts; county officials
38. —School district officials
39. —Town officials
40. —Other officials
41. —Spouse or relatives of official
42. Miscellaneous

1. Generally

A county legislator does not have a statutory interest in a contract between the county and a corporation of which his spouse is a major stockholder, when he is an employee of the corporation, provided section 802(1)(b) is applicable. There is an apparent tendency for courts to liberally construe Article 18 and hold municipal officers and employees strictly accountable for conduct which, although not literally prohibited by the Article, is borderline. 1979 Op St Compt No. 79-868.

In connection with the state comptroller's authority to oversee the accounts of political subdivisions, the comptroller may request officers and employees of a city to complete a form listing certain outside employment and business interests in order for the comptroller to determine the possible existence of conflicts of interest. 1991 Op St Compt No. 91-60, 1992 N.Y. Comp. LEXIS 2.

A contract between a city and a church would not be prohibited on the basis of a councilman's membership in the church because contracts between municipalities and not-for-profit corporations, such as churches, are excepted from the conflict of interest provisions of the General Municipal Law. The conflict of interest statutes do not require the councilman to abstain from voting on the authorization for such contract but he may be required to do so by the local Code of Ethics or by local rules of procedure. 1983 Op St Compt No. 83-112, 1983 N.Y. Comp. LEXIS 372.

2. Designation of depository; municipal official as member of bank advisory board

No conflict of interest results from the designation of a bank as a depository of a county sewer district even though one member of said district is also a member of the Advisory Board of a branch of said bank and another member of said district is the President in charge of a branch of said bank, provided that neither of them is the chief fiscal officer, treasurer, or his deputy or employee of the sewer district. However, disclosure of interest must be made in accordance with General Municipal Law, § 803. 1972 NY Ops Atty Gen Nov 2 (Informal), 1972 N.Y. AG LEXIS 154.

A prohibited conflict of interest does not occur when a village board designates a bank as the depository of village funds, notwithstanding the membership of a trustee on the bank's advisory board. Disclosure, however, is necessary. 1968 Op St Compt No. 68-323.

A town councilman, who is a member of the advisory board of a bank, does not have a prohibited interest in the designation of the bank as a depository of town funds. 1979 Op St Compt No. 79-427.

3. Official as employee of bank

Employee of bank with title of Assistant Cashier is not eligible for position of Treasurer of School District where bank has been named depository of funds for the school district and there is another eligible banking institution located within the district. 1966 NY Ops Atty Gen Oct 4 (Informal), 1966 N.Y. AG LEXIS 125.

A town may designate a bank as depository in which the town attorney is a director, stockholder and bank attorney on an annual retainer. 1965 Op St Compt No. 65-136.

A bank may not be designated as depository of funds of a joint public hospital in which the hospital treasurer has an interest by reason of employment as assistant cashier and manager of the local branch. 1965 Op St Compt No. 65-413.

There is no prohibited conflict of interest where a school district, the treasurer of which is employed by a bank as a bank teller, designates such bank as depository of school district funds, sells bonds and notes to the bank and otherwise transacts business with said bank, provided the duties of treasurer, as a bank employee, do not directly involve the procurement, preparation or performance of the contract between the bank and the school district and her remuneration as an employee will not be directly affected as a result of such transactions. 1967 Op St Compt No. 67-304.

Where there is no bank or trust company located in a town, the town board may designate a bank as depository even though the supervisor owns stock in the bank and is employed by the bank, provided that his stock ownership is less than five per cent of outstanding stock, his remuneration is not affected as a result of the designation and his duties as a bank officer or employee do not involve the procurement, preparation or performance of the contract. 1968 Op St Compt No. 68-223.

A town may designate a bank as depository of town funds, where the town supervisor is an assistant cashier of such bank. 1972 Op St Compt No. 72-9.

A county attorney who is director, counsel and stockholder of a bank does not have a prohibited interest where the bank acts as a depository of county funds or purchases county obligations pursuant to Local Finance Law, § 60.10. He would have a prohibited interest in all other transactions between the county and the bank. 1978 Op St Compt No. 78-306.

A person who is employed by a bank which is designated as the depository of the funds of a BOCES would have a prohibited conflict of interest if he should serve as treasurer of BOCES

unless an exception contained in section 802 is applicable. 1979 Op St Compt No. 79-500, 1979 N.Y. Comp. LEXIS 167.

4. —Official as officer or director of bank

A town may designate as a depository for its funds a bank in which a town councilman is an officer, director and stockholder and may also sell bonds and notes to such bank within the limitations of Local Finance Law, § 60.10. 1964 NY Ops Atty Gen Nov 20 (Informal), 1964 N.Y. AG LEXIS 155.

No conflict of interest results from the designation of a bank as a depository of a county sewer district even though one member of said district is also a member of the Advisory Board of a branch of said bank and another member of said district is the President in charge of a branch of said bank, provided that neither of them is the chief fiscal officer, treasurer, or his deputy or employee of the sewer district. However, disclosure of interest must be made in accordance with General Municipal Law, § 803. 1972 NY Ops Atty Gen Nov 2 (Informal), 1972 N.Y. AG LEXIS 154.

A prohibited interest in a contract does not result where a member of the Rochester Housing Authority is a vice-president of a local commercial bank and the Authority makes deposits with that bank from time to time or places in a certificate of deposit certain funds of the Authority in that bank if that particular bank is the highest bidder. 1975 NY Ops Atty Gen March 27 (Informal), 1975 N.Y. AG LEXIS 100.

A prohibited conflict of interest would arise if a town of the second class were to designate as a depository of town funds a bank of which the appointed deputy town supervisor is an officer and stockholder, unless it were the only bank in the town. 1965 Op St Compt No. 65-20.

A town may designate a bank as depository in which the town attorney is a director, stockholder and bank attorney on an annual retainer. 1965 Op St Compt No. 65-136.

Where a member of a school district board of education is an officer of a bank and employed in the main office thereof, he does not have a prohibited interest in the designation by the school district of a branch office of such bank as the depository of district funds. 1977 Op St Compt No. 77-504.

A county attorney who is director, counsel and stockholder of a bank does not have a prohibited interest where the bank acts as a depository of county funds or purchases county obligations pursuant to Local Finance Law, § 60.10. He would have a prohibited interest in all other transactions between the county and the bank. 1978 Op St Compt No. 78-306.

Except for the applicability of one or more of the exceptions contained in section 802, a town councilman who is also the vice-president and branch manager of a bank would have a prohibited interest in any contracts between the town and the bank. 1982 Op St Compt No. 82-48, 1982 N.Y. Comp. LEXIS 674.

Town supervisor who is director of bank has prohibited interest in designation of bank as town depository unless exception in CLS Gen Mun L § 802(1)(a) applies; exception does not apply if only reason town could not designate another bank within town as depository is because other bank refused to comply with town's preferred policy of requiring securities pledged as collateral to be held by third party custodian; town may sell obligations to bank of which town supervisor is director only in accordance with CLS Loc Fin L § 60.10. 1989 Op St Compt No. 89-4, 1989 N.Y. Comp. LEXIS 7.

Where the president of a central school district board of education is a director of a bank, a prohibited interest in contract does not occur when the district (1) designates the bank as a depository and (2) sells obligations to the bank in accordance with Local Finance Law, § 60.10. 1972 Op St Compt No. 72-747.

5. —Official as stockholder of bank

A town may designate as a depository for its funds a bank in which a town councilman is an officer, director and stockholder and may also sell bonds and notes to such bank within the limitations of Local Finance Law, § 60.10. 1964 NY Ops Atty Gen Nov 20 (Informal), 1964 N.Y. AG LEXIS 155.

Where there is more than one bank in a union free school district, holding of stock by the treasurer of the school district as custodian for her infant children in one such bank precludes it from being designated depository for school district funds. 1964 Op St Compt No. 64-741.

A prohibited conflict of interest would arise if a town of the second class were to designate as a depository of town funds a bank of which the appointed deputy town supervisor is an officer and stockholder, unless it were the only bank in the town. 1965 Op St Compt No. 65-20.

A town may designate a bank as depository in which the town attorney is a director, stockholder and bank attorney on an annual retainer. 1965 Op St Compt No. 65-136.

Where there is no bank or trust company located in a town, the town board may designate a bank as depository even though the supervisor owns stock in the bank and is employed by the bank, provided that his stock ownership is less than five per cent of outstanding stock, his remuneration is not affected as a result of the designation and his duties as a bank officer or employee do not involve the procurement, preparation or performance of the contract. 1968 Op St Compt No. 68-223.

A prohibited interest in contract does not occur where: (a) A town supervisor owns less than 5% of the stock of a bank which is a depository of town funds; (b) The wife of the supervisor is part-owner of a newspaper in which the town publishes legal notices. 1972 Op St Compt No. 72-4.

A county attorney who is director, counsel and stockholder of a bank does not have a prohibited interest where the bank acts as a depository of county funds or purchases county obligations pursuant to Local Finance Law, § 60.10. He would have a prohibited interest in all other transactions between the county and the bank. 1978 Op St Compt No. 78-306.

When a village attorney is a director and stockholder of a bank, he has a conflict of interest if the bank should purchase a statutory installment bond from the village only if he has any of the powers and duties set forth in section 801(1) in relation to the transaction. If he has a conflict of interest, the sale nevertheless would be permissible if made pursuant to Local Finance Law, § 60.10 and the restrictions set forth therein. 1985 Op St Compt No. 85-34, 1985 N.Y. Comp. LEXIS 108.

Prospective appointee to fill vacancy in office of town supervisor who is officer and stockholder of bank would have prohibited interest in designation of bank as town depository, renewal of town obligations presently held by bank, and future sale of obligations by town to bank, unless one or more exceptions of CLS Gen Mun § 802 is applicable. 1992 Op St Compt No. 92-54.

6. —Other interests in depository

A prohibited interest does not arise where a village invests municipal funds in a bank which employs the spouse of the clerk-treasurer, provided it is the only bank for such investment located within the village. 1968 Op St Compt No. 68-800.

7. Municipal official as contracting party; county official

The sale of hearing aids by a County Legislator to the Department of Social Services of his county, the aggregate value of which during the fiscal year exceeds the sum of $100, results in a prohibited conflict of interest. 1972 NY Ops Atty Gen May 1 (Informal), 1972 N.Y. AG LEXIS 92.

Where a town rents snow removal equipment to a county for use on state highways and the town superintendent of highways operates such equipment and is compensated strictly as a county employee, he is entitled to retain such compensation, although such arrangement may constitute a prohibited interest in the prime contract between the town and the county. 1965 Op St Compt No. 65-154.

A prohibited conflict of interest arises where a member of county board of supervisors, who is also a pharmacist, submits vouchers to the county for payment based upon purchases made at his store by recipients of county welfare and assistance, when the county has the appointive offices of county commissioner of social services and county auditor. 1967 Op St Compt No. 67-1012.

Member of board of fire commissioners of fire district located within county having population of more than 200,000 who is officer and owner of $33^1/_3$ percent of stock of corporation would have prohibited interest in contract for snow plowing and lawn maintenance between fire district and corporation, even if fire

district solicits bids for work, corporation is sole bidder, commissioner recuses himself from discussions relative to contract and abstains from voting on matters relating to contract. 2000 Op St Compt No. 2000-7, 2000 N.Y. Comp. LEXIS 20.

8. —Town official

A town planning board member does not have a prohibited conflict of interests in the purchase, by the town, of paving materials from a firm in which the planning board member is a partner. 1966 NY Ops Atty Gen Dec 14 (Informal), 1966 N.Y. AG LEXIS 155.

A justice of the peace of a town of the second class may sell gravel in its natural state and condition to the town upon approval of the consideration by the Supreme Court. 1964 Op St Compt No. 64-625.

Where a town rents snow removal equipment to a county for use on state highways and the town superintendent of highways operates such equipment and is compensated strictly as a county employee, he is entitled to retain such compensation, although such arrangement may constitute a prohibited interest in the prime contract between the town and the county. 1965 Op St Compt No. 65-154.

A town supervisor has a prohibited interest in any insurance contracts between the town and an insurance agency which he acquires, where he receives a material or pecuniary benefit as a result of such contracts, and he has the powers and duties enumerated in General Municipal Law, § 801 with respect thereto. 1973 Op St Compt No. 73-979.

Appointment of town supervisor's business partner to office of town comptroller, by itself, did not constitute prohibited conflict of interest, but supervisor and comptroller would have prohibited interest in contracts between town and partnership, unless exception in CLS Gen Mun § 802 applied; compensated appearances, or performance of other compensated services on behalf of clients of partnership in connection with matters before town may violate CLS Gen Mun § 805-a, depending on particular circumstances. 1998 Op St Compt No. 98-3, 1998 N.Y. Comp. LEXIS 3.

9. —Other officials

A prohibited conflict of interest exists where a village purchases supplies from a business owned by a member of the board of trustees in excess of $100 during any one fiscal year. This Department has no authority to provide an exception to that statute. 1968 Op St Compt No. 68-536.

Where the fire department chief engineer is responsible for the servicing of fire district vehicles, a prohibited conflict of interest occurs when such vehicles are serviced at a service station owned by him. 1969 Op St Compt No. 69-942.

10. Municipal official as officer or employee of contracting party; city officials

No prohibited conflict of interest exists where a mayor is employed, as a salesclerk and bookkeeper, in a hardware store, which transacts business with this city in the absence of a showing that his remuneration is directly affected or that his duties directly involve the effecting of such contracts on the store's behalf. 1970 NY Ops Atty Gen Feb 16 (Informal), 1970 N.Y. AG LEXIS 32.

City councilman who is employee of corporation does not have conflict of interest in relation to contract between city and corporation when his remuneration is not directly affected as result of such contract and duties of his employment do not directly involve procurement, preparation or performance of any part of such contract. 1987 Op St Compt No. 87-91, 1987 N.Y. Comp. LEXIS 143.

Fire district commissioner who is also president and chief stockholder of automotive dealership would have conflict of interest if fire district vehicles are serviced by his company unless pertinent exceptions in CLS Gen Mun § 802 apply; extension for voting on rules relating to contracts between district and his company would not be curative. 1988 Op St Compt No. 88-8, 1988 N.Y. Comp. LEXIS 8.

City attorney who is officer, employee, director or shareholder of law firm which is professional corporation and which represents city in law suit would have prohibited interest in contract between firm and city if city attorney has power or duty to negotiate, prepare, authorize or approve contract, or to appoint someone with those powers, unless exceptions in CLS Gen Mun § 802 are applicable. 1988 Op St Compt No. 88-75, 1988 N.Y. Comp. LEXIS 68.

A prohibited interest in contract exists where the mayor of the City of North Tonawanda is employed by a hardware store with which the city does business. Whether the exception provided by section 802(1)(b) is applicable depends upon the nature of his duties as a store employee. 1969 Op St Compt No. 69-402.

11. —County officials

No prohibited conflict of interest exists in the following situations: (1) A member of the board of supervisors of a county is vice-president of a corporation from which the county purchases materials, and (2) A member of the planning department of a county is also an employee of a firm which contracts with the county; if in both of the above situations, the remuneration of the municipal employee and/or officer is not directly affected as a result of the contracts of their employer (firm and corporation) with the municipality, and the duties of their employment do not directly involve the procurement, preparation, or performance of any part of such contracts, provided their duties with the firm or corporation do not normally include such functions. (3) The wife of the head of the county planning department is employed by a planning firm which does business with the county, if the remuneration of the wife is not directly affected as a result of the contracts of her employer with the municipality and the duties of her employment do not directly involve the procurement, preparation, or performance of any part of such contracts, provided her duties with the firm do not normally include such functions. 1967 Op St Compt No. 67-513.

A prohibited conflict of interest occurs where a pharmacist employed part time by a county welfare department checks prescriptions submitted by a pharmacy by which he is employed and which participates in the Medicaid program. 1968 Op St Compt No. 68-670.

A prohibited conflict of interest arises where the board of managers of a county public general hospital contracts with a bank for the rental of personal property therefrom, when the president of the said board is also a vice-president of the bank, unless the facts are such to render applicable section 802(1)(b). 1969 Op St Compt No. 69-44.

A prohibited conflict of interest occurs where a member of a county industrial development agency, who is also the attorney for a corporation, represents the corporation in connection with the negotiation of a contract with the industrial development agency. The county code of ethics is inapplicable to the members, officers and employees of the county industrial development agency. 1973 Op St Compt No. 73-919.

A county legislator, who is an employee of one of two family-owned and closely held corporations which have common business interests, has a prohibited interest in contracts between the county and either corporation. Whether the exception contained in General Municipal Law, § 802(1)(b) is applicable depends upon pertinent facts. 1975 Op St Compt No. 75-84.

A member of a county board of supervisors who is employed by the county extension service association does not have a prohibited interest in contracts between the county and the association. 1975 Op St Compt No. 75-736.

A county legislator does not have a statutory interest in a contract between the county and a corporation of which his spouse is a major stockholder, when he is an employee of the corporation, provided section 802(1)(b) is applicable. There is an apparent tendency for courts to liberally construe Article 18 and hold municipal officers and employees strictly accountable for conduct which, although not literally prohibited by the Article, is borderline. 1979 Op St Compt No. 79-868.

A vice-president and treasurer of a corporation, who is also a member of the Steuben County Industrial Development Agency, does not have a prohibited interest in a lease between the corporation and the Agency when he refrains from signing corporate checks in payment of the rental. 1980 Op St Compt No. 80-422.

Generally, elective county corner, who is also funeral director, would not have prohibited interest in contract if he or she submitted bills to county department of social services for payment of costs of burying deceased public assistance recipient; 10 Opns St Compt 1954, p 217 superseded to extent inconsistent with this opinion. 1998 Op St Compt No. 98-5, 1998 N.Y. Comp. LEXIS 5.

Unless additional pertinent facts necessitate a different conclusion, it would seem that a county supervisor, who is also the vice-president of a corporation, would have a prohibited conflict of interest in a construction contract between the corporation and the county when he is entitled to share in a corporate deferred profit-sharing compensation program. 1981 Op St Compt No. 81-188, 1981 N.Y. Comp. LEXIS 705.

12. —Town officials

A prohibited interest in contract exists where a town board purchases a vehicle from a company which employs a member of the board as a salesman, unless the exception afforded by section 802(1)(b) is applicable. 1968 Op St Compt No. 68-810.

A prohibited interest in contract arises where a justice of the peace of a town of the second class is employed as the private law associate of the attorney retained by the town on a contractual basis to render legal services. 1969 Op St Compt No. 69-54.

Where a town of the second class does business with a corporation which employs the town justice and his spouse, whether the interest of the justice in town contracts with such corporation is prohibited depends upon the applicability of the statute. 1969 Op St Compt No. 69-659.

Subject to certain exceptions contained in General Municipal Law, § 802, whether a town water and sewer superintendent has a prohibited interest in contracts for the installation of water and sewer connections between the town and the firm by which he is employed depends upon whether inspection of such work by him constitutes approval thereof or is a prerequisite to payment therefor by the town. 1975 Op St Compt No. 75-48.

A member of a town planning board, who is a partner in an engineering firm, has a prohibited conflict of interest in contracts between his firm and the town for engineering services in relation to water and sewer projects, when the planning board approves such projects, if that action constitutes approval of the work done by the firm or is prerequisite to payment by the town for the services performed. 1980 Op St Compt No. 80-790, 1980 N.Y. Comp. LEXIS 213.

If a superintendent of a town water district, who is also the president of a firm which supplies propane gas to the district, has a prohibited interest in contracts between his firm and the town, the fact that the water district is situate on an island apart from the mainland of the town and cannot obtain gas from another supplier, does not create a circumstance which provides an exception to the prohibited interest. 1980 Op St Compt No. 80-586.

A town supervisor, who is an employee of an incorporated insurance agency which sells insurance to the town, does not have a prohibited interest in the contracts of insurance when her duties as an employee do not directly involve the procurement, preparation or performance of the insurance contracts and her remuneration is not directly affected as a result of such contracts. 1982 Op St Compt No. 82-12, 1982 N.Y. Comp. LEXIS 712.

A councilman on the town board who is the secretary/treasurer and a major stockholder of a truck center business has a prohibited conflict of interest in contracts between the town and the truck center business involving the purchase, by the town, of highway supplies unless the total consideration payable under the contract, when added to the aggregate amount of all consideration payable under contracts in which the councilman had an interest during the fiscal year does not exceed $100. 1983 Op St Compt No. 83-95, 1983 N.Y. Comp. LEXIS 391.

13. —Village officials

The prohibition of these sections is not applicable to a village trustee who is only a salaried employee of a corporation which contracts with the village. 1966 NY Ops Atty Gen Apr 7 (Informal), 1966 N.Y. AG LEXIS 54.

A village trustee may be employed by a hardware store contracting with the village provided that his salary as such employee will not be directly affected as a result of such contract and provided that the duties of such employment do not directly involve the procurement, preparation or performance of any part of such contract. However, disclosure of such employment must be made by the village trustee in accordance with General Municipal Law, § 803. 1971 NY Ops Atty Gen Feb 24 (Informal), 1971 N.Y. AG LEXIS 45.

A vice president or stockholder of more than five percent of the outstanding stock of a cable T.V. company granted a franchise by the village has a conflicting interest prohibited by General Municipal Law, § 801, if he were also to serve as village trustee. There would be no conflict if he were merely an employee of the corporation and received remuneration pursuant to General Municipal Law, § 802, subdivision 1(b). 1978 NY Ops Atty Gen Nov 8 (Informal), 1978 N.Y. AG LEXIS 378.

Village mayor, employed full-time as technical sheriff in county sheriff's department, had conflict of interest in negotiating or voting on proposed contract with county for provision of law enforcement services by sheriff's department to village. 1998 NY Ops Atty Gen 98-34 (Informal), 1998 N.Y. AG LEXIS 31.

There is a prohibited conflict of interest where members of the village board of trustees are shareholders, directors and an officer of the contracting corporation. 1964 Op St Compt No. 64-808.

The board of managers of a village public general hospital may not contract for the purchase of supplies with a corporation of which the mayor is a stockholder and officer except to the extent of $100 in the aggregate during any fiscal year. 1964 Op St Compt No. 64-871.

A prohibited conflict of interest exists where a village trustee is employed by an engineering firm retained to perform services for the village when the trustee's duties, as an employee of the firm, involve performance of some part of the firm-village contract. 1968 Op St Compt No. 68-80.

A prohibited conflict of interest does not arise on behalf of a member of a village planning board where the village contracts to obtain the services of a firm of planning experts by whom the planning board member is employed, provided the planning board does not have the power or duty to do any of the things mentioned in section 801 with respect to the said contract. 1968 Op St Compt No. 68-265.

A prohibited interest in contract arises where an insurance agency (corporation) by which the mayor of a village is employed sells insurance to the village, unless section 802(1)(b) is applicable. 1968 Op St Compt No. 68-719.

The village attorney has a prohibited interest in a contract between the village and a corporation of which he is a director. The interest of a village trustee in the same contract (arising solely by reason of his ownership of corporate stock) is not prohibited where he owns less than five percent of the outstanding stock of the corporation. 1969 Op St Compt No. 69-583-A.

A prohibited conflict of interest arises when a village trustee, an attorney employed by the village attorney participates in his capacity as such associate in any legal matters involving village affairs, on behalf of the village attorney. 1971 Op St Compt No. 71-909.

A village may purchase supplies and equipment from various stores owned by a corporation of which the village justice is an officer and stockholder. 1973 Op St Compt No. 73-805.

A village trustee, who is an employee of an automobile dealership, does not have a prohibited conflict of interest in contracts between the village and the dealer involving the purchase of parts for, and the servicing of, village vehicles, if the exception contained in General Municipal Law, § 802(1)(b) has application. 1980 Op St Compt No. 80-730, 1980 N.Y. Comp. LEXIS 212.

Two members of a village board of trustees do not have prohibited conflicts of interest in insurance contracts between the village and an insurance company of which they are officers if, as employees of the company, they have nothing to do with the preparation, procurement or performance of the insurance contracts and their remuneration is not directly affected as a result

of the contract. 1980 Op St Compt no. 80-443, 1980 N.Y. Comp. LEXIS 269.

There is no prohibited conflict of interest where a village mayor or trustee is employed by an insurance agency and is not, in the course of his employment, directly involved in the procurement, preparation or performance of any insurance contract with the village or will not have his remuneration directly affected by such a contract. Likewise, if the mayor or trustee owns stock in an insurance agency which provides insurance to the village but the extent of such stockholdings are less than five per cent of the outstanding stock, there is no prohibited interest. If the extent of stockholdings exceeds five per cent of the outstanding stock, the interest will not be prohibited provided that the contract was entered into prior to the time the mayor or trustee was elected, and the contract may not be renewed upon expiration. 1981 Op St Compt No. 81-430, 1981 N.Y. Comp. LEXIS 454.

There is no prohibited conflict of interest where a village purchases insurance from an insurance company of which a village trustee is an employee, if the trustee's remuneration will not be directly affected by the transaction and, as an employee of the company, the trustee will have nothing to do with the preparation, procurement or performance of the insurance contracts. 1982 St Compt No. 82-234, 1982 N.Y. Comp. LEXIS 496.

Village trustee who is officer, employee and stockholder of construction corporation would have prohibited interest in any contract between corporation and village unless (a) his or her stock ownership amounts to less than 5 percent of outstanding stock and (b) is employee and officer of corporation, his or her duties do not involve procurement, preparation or performance of village contracts in his or her remuneration is not affected by such contract; there is no exception to conflict of interest provisions of CLS Gen Mun Art 18 for contracts entered into in emergency situations. 1988 Op St Compt No. 88-23, 1988 N.Y. Comp. LEXIS 19.

14. —Other officials

Fact that former commissioner of public works, charged with having conflict of interest in connection with snow plowing contract and failing to disclose such interest, was both an officer and more than five per cent stockholder in corporation which obtained the contract did not bring him within the exemption provision of conflict of interest law where the individual's interest arises by reason of employment as an officer or employee of a firm contracting with municipality since not only would such result lead to an absurdity but argument ignored statutory requirement that the conflict arise "solely" by reason of employment as an officer or employee. People v Speach, 49 A.D.2d 210, 374 N.Y.S.2d 210, 1975 N.Y. App. Div. LEXIS 10626 (N.Y. App. Div. 4th Dep't 1975).

There is no prohibited conflict of interest where a school district, the treasurer of which is employed by a bank as a bank teller, designates such bank as depository of school district funds, sells bonds and notes to the bank and otherwise transacts business with said bank, provided the duties of treasurer, as a bank employee, do not directly involve the procurement, preparation or performance of the contract between the bank and the school district and her remuneration as an employee will not be directly affected as a result of such transactions. 1967 Op St Compt No. 67-304.

A school board member who is president of a corporation does not have a prohibited interest in a contract for the purchase of buses from said corporation if the exception contained in General Municipal Law, § 802(1)(b) is applicable. 1978 Op St Compt No. 78-133.

A member of the board of trustees of a community college has a conflict of interest in any contracts between the college and a bank of which he is a director, president and chief executive officer except to the extent that any of the exceptions enumerated in General Municipal Law, § 802 are applicable. 1983 Op St Compt No. 83-143, 1983 N.Y. Comp. LEXIS 341.

Fire district commissioner, who is salaried employee of firm doing business with district, does not have prohibited conflict of interest in purchase contracts between firm and district if exception contained in CLS Gen Mun Law § 802(1)(b) is applicable. 1988 Op St Compt No. 88-56, 1988 N.Y. Comp. LEXIS 52.

15. Designation of official newspaper

A prohibited interest in contract does not occur where: (a) A town supervisor owns less than 5% of the stock of a bank which is a depository of town funds; (b) The wife of the supervisor is part owner of a newspaper in which the town publishes legal notices. 1972 Op St Compt No. 72-4.

16. Real estate transactions; municipal purchases

Under General Municipal Law §§ 800, 801, 804, the proposed sale of a building owned by the Town Supervisor of the Town of Crown Point to the Town of Crown Point would constitute a prohibited conflict of interest unless the purchase and the consideration therefor is approved by the Supreme Court upon petition of the Town Board. 1975 NY Ops Atty Gen Feb 10 (Informal), 1975 N.Y. AG LEXIS 71.

The exception contained in section 802(1)(d) of the General Municipal Law does not apply to the purchase by a town of gravel in its natural state unless title to the land in which the gravel is contained is acquired by the town. 1967 Op St Compt No. 67-979.

A village may purchase real property from a village trustee provided the purchase and consideration therefor are approved by the supreme court upon petition by the trustees. 1974 Op St Compt No. 74-269.

17. —Municipal sales

There was conflict of interest when town board member acquired realty in his town at county tax sale and sale was voidable where, although contract of sale in form concerned only county, by implication it also involved town and was within general municipal law precluding municipal officer from having interest in contract with his municipality when he has power or duty to authorize or approve contract or to appoint officer who has such power or duty, inasmuch as town board's action in preparing town budget was part of approval and authorization culminating in county tax sale and town board fixed salary of collecting officer and filled vacancies in that office. Rose v Eichhorst, 42 N.Y.2d 92, 396 N.Y.S.2d 837, 365 N.E.2d 868, 1977 N.Y. LEXIS 2108 (N.Y. 1977).

A county which acquires real property pursuant to Highway Law, § 62 for highway purposes may dispose of property which is no longer necessary for such purposes only to owners of property abutting the highway. This property may be sold to a county officer who is a qualified landowner and who is not a county officer described in General Municipal Law, § 801. 1977 NY Ops Atty Gen April 14 (Informal, 1977 N.Y. AG LEXIS 133.

A town board may not sell a parcel of real property to the town supervisor where the value of the property exceeds $100. 1973 Op St Compt No. 73-803.

Officers and employees of county community college who are also members of board of directors for not-for-profit corporation which intends to purchase real property held by county for community college will have interest in purchase contract for purposes of CLS Gen Mun §§ 800 et seq., and interest must be disclosed as soon as officer or employee has knowledge of prospective interests; however, such interest would not be prohibited. 1988 Op St Compt No. 88-52, 1988 N.Y. Comp. LEXIS 48.

18. —Corporate interest in contracting party

A county may purchase real property owned by a membership corporation even though county employees are directors of such membership corporation. 1965 NY Ops Atty Gen Aug 25 (Informal), 1965 N.Y. AG LEXIS 123.

No prohibited conflict of interest arises upon the sale of real property by an Urban Renewal Agency to a corporation of which a member of such Agency is an officer and director but not a shareholder, provided the conditions set forth in § 802(1)(b) are met and disclosure of interest under § 803 is made. In the public interest the person involved herein should not participate in any transaction between the Agency and the corporation. If a County Board of Ethics has been created pursuant to § 808 its advisory opinion should be sought. 1969 NY Ops Atty Gen Dec 2 (Informal), 1969 N.Y. AG LEXIS 106.

A central school district may acquire real property from a corporation in which two members of the law firm which acts as school district attorney are stockholders, and such law firm is attorney for the corporation. Section 803 requires a written disclosure of the nature and extent of the attorneys' interests in the contracts in question. 1965 Op St Compt No. 65-97.

Unless the exception provided by General Municipal Law, § 802(1)(b) is applicable, a member of a school district board of education, who is also an officer of a corporation, would have a prohibited conflict of interest in the sale by the district to the corporation of district real property. 1981 Op St Compt No. 81-65, 1981 N.Y. Comp. LEXIS 826.

19. —Interest of spouse or relatives

Only if the appropriate procedures are followed, as set forth in art. 18 of the General Municipal Law, may a town purchase real property from the estate of the mother of the wife of a town councilman. 1964 Op St Compt No. 64-684.

A school district may acquire real property from a corporation, a stockholder of which is the brother of a member of the Board of Education. 1965 Op St Compt No. 65-97.

20. —Miscellaneous

Where a vice-president and treasurer of a corporation authorize payment of rent under a lease, on behalf of his corporation as lessee, to the Steuben County Industrial Department Agency of which he is a member as lessor, by affixing his name to a corporate check, he is directly involved in the performance of the corporation's contract of lease and has a prohibited conflict of interest in the contract. General Municipal Law, § 802(1)(b) is not applicable as an exception to the provision of General Municipal Law, § 801(1) in this case. 1980 Op St Compt No. 80-214.

21. Contract with membership or non-profit corporation; hospitals

Contracts may be made between a voluntary, nonprofit hospital corporation and a county welfare district or county laboratory, although the county judge is an unpaid officer of the hospital corporation. 1960 Op St Compt No. 60-319.

A prohibited interest in contract does not occur where a county pays the cost of medical care for eligible patients under the Social Services Law for services rendered by a non-profit hospital corporation when the county commissioner of social services is a member of its board of directors. 1973 Op St Compt No. 73-37.

A prohibited interest in contract does not occur where a county legislator is an employee of a not-for-profit hospital corporation which provides services to the county pursuant to contract. 1975 Op St Compt No. 75-1273.

County public health commissioner who has real estate partnership with member of not-for-profit corporation that provides home health care services to county would not have prohibited interest in not-for-profit corporation's contract with county, but county should review its code of ethics to ascertain whether it contains any pertinent provisions; further, commissioner should consider recusing himself from performance of functions in connection with award of contract for home health care services, with those functions instead being performed by deputy. 2000 Op St Compt No. 2000-8, 2000 N.Y. Comp. LEXIS 21.

Member of county governing board who served as officer of 2 not-for-profit corporations, as well as director of one of those corporations, would have prohibited interest in contracts between county and either corporation, but must disclose any interest he may have in such contract under CLS Gen Mun § 803, and must avoid contravening statutory prohibitions against disclosure of confidential information and compensated appearances before county agencies under CLS Gen Mun § 805-a; furthermore, even if not required by county's code of ethics, county board member should not participate in county board discussions or decisions relating to county contracts with not-for profit corporations for which board member serves as officer, employee or director. 2001 Op St Compt No. 2001-9, 2001 N.Y. Comp. LEXIS 9.

County code of ethics may not prohibit county officials from serving as members of boards of not-for-profit agencies with which county contracts (such prohibition would be inconsistent with CLS Gen Mun # 802(l)(f)), but code may prohibit county officials from participating in discussion and vote on contracts with not-for-profit agencies for which they serve. 1992 Op St Compt No. 92-30, 1992 N.Y. Comp. LEXIS 17.

Member of county governing board who also serves on board of not-for-profit agency does not have prohibited interest in contract between county and agency, but member must disclose any interest in such contract and should not participate in discussion or vote on contract. 1992 Op St Compt No. 92-30, 1992 N.Y. Comp. LEXIS 17.

22. —Other corporations

CLS General Municipal Law § 801 is not violated by collective bargaining agreement between county and county chapter of Civil Service Employees Association despite fact that it was negotiated by county employee at time when local county laws provided that all exempt county employees, including defendant, would be granted same salary adjustments as members of bargaining units of Association, thereby creating in defendant "prohibited interest" in contract that would render it void under CLS General Municipal Law § 804, since Civil Service Employees Association is voluntary nonprofit association within meaning of CLS General Municipal Law § 802(1)(f) and therefore excepted from proscriptions of § 801. Stettine v County of Suffolk, 66 N.Y.2d 354, 497 N.Y.S.2d 329, 488 N.E.2d 75, 1985 N.Y. LEXIS 17611 (N.Y. 1985).

The local chapter of a civil service employees association was a voluntary nonprofit association as defined under Gen Mun Law § 802(1)(f) and was exempt from the conflict of interest provisions of Gen Mun Law § 801. A public sector collective bargaining agreement is not the type of contract covered by Gen Mun Law Art 18. Stettine v County of Suffolk, 105 A.D.2d 109, 482 N.Y.S.2d 818, 1984 N.Y. App. Div. LEXIS 20681 (N.Y. App. Div. 2d Dep't 1984), aff'd, 66 N.Y.2d 354, 497 N.Y.S.2d 329, 488 N.E.2d 75, 1985 N.Y. LEXIS 17611 (N.Y. 1985).

A county may purchase real property owned by a membership corporation even though county employees are directors of such membership corporation. 1965 NY Ops Atty Gen Aug 25 (Informal), 1965 N.Y. AG LEXIS 123.

Provision of central school district's code of ethics which required members of board of education to recuse themselves from voting on contracts involving "a collective bargaining agreement of the District, when under the employ of another School District and/or having been or being a member of a similar unit," was unlawful because it conflicted with express exemption from conflict of interest coverage found in CLS Gen Mun § 802(1)(f), and because it was unreasonably broad. 1998 Op Comm Ed No. 13,914, 1998 NY Educ. Dept. LEXIS 236.

A county commissioner of health does not have a prohibited interest in contracts between the county and a not-for-profit corporation of which he is a member of the board of directors. However, disclosure is required. 1980 Op St Compt No. 80-73.

Officers and employees of county community college who are also members of board of directors for not-for-profit corporation which intends to purchase real property held by county for community college will have interest in purchase contract for purposes of CLS Gen Mun §§ 800 et seq., and interest must be disclosed as soon as officer or employee has knowledge of prospective interests; however, such interest would not be prohibited. 1988 Op St Compt No. 88-52, 1988 N.Y. Comp. LEXIS 48.

A town dog control officer, who has an interest in a not-for-profit corporation which operates an animal shelter, does not have a prohibited conflict of interest in a contract between the corporation and the town which he serves for the lease of space to be used as a dog pound. 1981 Op St Compt No. 81-115, 1981 N.Y. Comp. LEXIS 773.

23. Sale of bond or notes; sale by school district

There is no prohibited conflict of interest where a school district, the treasurer of which is employed by a bank as a bank teller, designates such bank as depository of school district funds, sells bonds and notes to the bank and otherwise transacts business with said bank, provided the duties of treasurer, as a bank employee, do not directly involve the procurement, preparation or performance of the contract between the bank and the school district and her remuneration as an employee will not be

directly affected as a result of such transactions. 1967 Op St Compt No. 67-304.

Notwithstanding the interest of a school district treasurer in a bank, a school district may sell bonds and notes to such bank pursuant to Section 60.10 of the Local Finance Law. 1967 Op St Compt No. 67-304.

Whether a prohibited interest in contract results where a school district sells notes at private sale to a bank of which a member of the board of education is an officer, depends upon certain facts and circumstances. 1972 Op St Compt No. 72-71.

Section 60.10 of the Local Finance Law controls a private sale of notes by a school district to a bank of which a board of education member is a director, and that section may control a similar sale of notes to a bank of which a board of education member is an officer. 1973 Op St Compt No. 73-52.

Where the president of a central school district board of education is a director of a bank, a prohibited interest in contract does not occur when the district (1) designates the bank as a depository and (2) sells obligations to the bank in accordance with Local Finance Law, § 60.10. 1972 Op St Compt No. 72-747.

24. —Sale by village

A village may sell bonds and notes to a bank at private sale where the Mayor owns less than five per centum of the stock in the bank. 1966 Op St Compt No. 66-99.

The village may sell bonds and notes to such bank at private sale within certain limitations as to interest rate and amount, if, in addition to being a stockholder, the Mayor is also a director of the bank. 1966 Op St Compt No.. 66-99.

A prohibited conflict of interest arises where a village sells notes to a bank which employs the spouse of the clerk-treasurer, unless section 802(1)(b) is applicable. In any case, section 802(1)(g) provides a limited exception. 1968 Op St Compt No. 68-800.

25. —Sale by other municipalities

A town may designate as a depository for its funds a bank in which a town councilman is an officer, director and stockholder and may also sell bonds and notes to such bank within the limitations of Local Finance Law, § 60.10. 1964 NY Ops Atty Gen Nov 20 (Informal), 1964 N.Y. AG LEXIS 155.

A prohibited interest in contract exists when a city auditor, or his spouse, minor children or other dependents purchase city obligations directly from the city and when he has any of the powers or duties enumerated in General Municipal Law, § 801(1) with respect to the issuance and sale of such bonds and notes. A somewhat different concept applies when he purchases city obligations from a bank which has purchased such obligations in the first instance from the city. 1976 Op St Compt No. 76-610.

26. Contract made prior to election or appointment; lease agreements

A prohibited conflict of interest would arise should a county renew an agreement for the lease of premises for county purposes where the property is owned by a member of the board of supervisors, even though the lease was executed prior to the election of the said supervisor. 1968 Op St Compt No. 68-553.

A town councilman from whom the town rents a building on a month to month tenancy, does not have a prohibited conflict of interest where the tenancy commenced prior to his election and has continued without interruption. 1980 Op St Compt No. 80-250, 1980 N.Y. Comp. LEXIS 345.

Attorney who is appointed town attorney would not have prohibited interest in pre-existing contract between town and his or her law firm, but attorney would be required to disclose his or her interest in contract, and attorney should also recuse him or herself from any matter affecting his or her law firm, with those functions instead being performed by deputy, if any. 2000 Op St Compt No. 2000-22, 2000 N.Y. Comp. LEXIS 26.

27. —Other contracts

No prohibited conflict of interest arises when an officer of an insurance firm, from which firm a town has purchased insurance policies, is subsequently elected and takes office as town supervisor. However, any renewal of such policies or the purchase of new or other policies from such firm during his tenure of office would be illegal. 1968 Op St Compt No. 68-112.

A village trustee who entered into a contract with the village for professional surveying services prior to his election as trustee, does not have a prohibited conflict of interest in that contract. Disclosure is required. 1980 Op St Compt No. 80-233, 1980 N.Y. Comp. LEXIS 331.

Where newly elected town board member has interest in contract between town and board member, as sole proprietor, under which board member picks up road salt and delivers salt to town storage facility, if contract for road salt delivery between town and town board member were entered into before board member was elected to office, exception in CLS Gen Mun § 802(1)(h) applies and interest is not prohibited; however, board member would be required to disclose such interest in accordance with CLS Gen Mun § 803. 2008 Op St Compt No. 2008-2, 2008 N.Y. Comp. LEXIS 2.

Even if not required by town's code of ethics, board member who has existing contract with town for road salt delivery should not participate in town board discussions or decisions relating to such hauling contract, including but not limited to, discussions or decisions pertaining to auditing claims under contract. 2008 Op St Compt No. 2008-2, 2008 N.Y. Comp. LEXIS 2.

Newly elected town board member would have prohibited interest in renewals of existing contract for road salt delivery, or in subsequent contracts between town and himself or herself as sole proprietor, unless another exception in CLS Gen Mun § 802 were to apply. 2008 Op St Compt No. 2008-2, 2008 N.Y. Comp. LEXIS 2.

28. Stock ownership in contracting corporation; town officials

A member of a town board may not have an interest in a contract of insurance with such town except where the total consideration payable thereunder, together with all other considerations payable under contracts with such town in which he has an interest during the fiscal year, does not exceed $100.00; or where his interest is only that of a stockholder owning or controlling less than 5— of the stock of the corporation entering into such contract with the town. In any event, disclosure under § 803 must be made. 1969 NY Ops Atty Gen July 16 (Informal), 1969 N.Y. AG LEXIS 65.

A contracting firm, in which a town police commissioner is the majority stockholder, may bid upon, or accept local contracts upon which no bid is required, so long as the commissioner does not have a municipal function defined in General Municipal Law, § 801. Compliance should be had with the applicable code of ethics of the town established by General Municipal Law § 806. Interpretations of the code may be requested of the board of ethics of Westchester County if such a board has been established under General Municipal Law § 808. 1974 NY Ops Atty Gen Nov 18 (Informal), 1974 N.Y. AG LEXIS 180.

Fire district commissioner who is also president and chief stockholder of automotive dealership would have conflict of interest if fire district vehicles are serviced by his company unless pertinent exceptions in CLS Gen Mun § 802 apply; extension for voting on rules relating to contracts between district and his company would not be curative. 1988 Op St Compt No. 88-8, 1988 N.Y. Comp. LEXIS 8.

29. —Village officials

A vice president or stockholder of more than five percent of the outstanding stock of a cable T.V. company granted a franchise by the village has a conflicting interest prohibited by General Municipal Law, § 801, if he were also to serve as village trustee. There would be no conflict if he were merely an employee of the corporation and received remuneration pursuant to General Municipal Law, § 802, subdivision 1(b). 1978 NY Ops Atty Gen Nov 8 (Informal), 1978 N.Y. AG LEXIS 378.

There is a prohibited conflict of interest where members of the village board of trustees are shareholders, directors and an officer of the contracting corporation. 1964 Op St Compt No. 64-808.

There is a prohibited conflict of interest in a contract between a village and a business corporation of which the mayor is a

substantial shareholder and an officer. 1964 Op St Compt No. 64-808.

There is a conflict of interest where a village trustee is a shareholder in the contracting corporation, but, if his holdings are less than five per cent of the outstanding shares, his interest is not prohibited. 1964 Op St Compt No. 64-808.

The board of managers of a village public general hospital may not contract for the purchase of supplies with a corporation of which the mayor is a stockholder and officer except to the extent of $100 in the aggregate during any fiscal year. 1964 Op St Compt No. 64-871.

A prohibited conflict of interest arises where a village purchases supplies and equipment from a hardware store operated by a corporation of which a village trustee is the principal stockholder. 1968 Op St Compt No. 68-323.

The village attorney has a prohibited interest in a contract between the village and a corporation of which he is a director. The interest of a village trustee in the same contract (arising solely by reason of his ownership of corporate stock) is not prohibited where he owns less than five percent of the outstanding stock of the corporation. 1969 Op St Compt No. 69-583-A.

A village may purchase supplies and equipment from various stores owned by a corporation of which the village justice is an officer and stockholder. 1973 Op St Compt No. 73-805.

30. —Other officials

Fact that former commissioner of public works, charged with having conflict of interest in connection with snow plowing contract and failing to disclose such interest, was both an officer and more than five per cent stockholder in corporation which obtained the contract did not bring him within the exemption provision of conflict of interest law where the individual's interest arises by reason of employment as an officer or employee of a firm contracting with municipality since not only would such result lead to an absurdity but argument ignored statutory requirement that the conflict arise "solely" by reason of employment as an officer or employee. People v Speach, 49 A.D.2d 210, 374 N.Y.S.2d 210, 1975 N.Y. App. Div. LEXIS 10626 (N.Y. App. Div. 4th Dep't 1975).

A city is not precluded from entering into a contract for the purchase of merchandise from a corporation in which a city employee is a stockholder. Proper disclosure of interest must be made. 1965 NY Ops Atty Gen Aug 26 (Informal), 1965 N.Y. AG LEXIS 126.

A central school district may acquire real property from a corporation in which two members of the law firm which acts as school district attorney are stockholders, and such law firm is attorney for the corporation. Section 803 requires a written disclosure of the nature and extent of the attorneys' interests in the contracts in question. 1965 Op St Compt No. 65-97.

A prohibited conflict of interest will result if a community college purchases supplies from a corporation in which a member of the board of trustees is a major stockholder, notwithstanding that the corporation has been awarded a State contract pursuant to section 104 of the General Municipal Law. 1968 Op St Compt No. 68-382.

31. —Spouse or relatives of official

A prohibited conflict of interest would arise in a contract between a town and a private corporation when the spouse of the deputy comptroller of the town is a majority stockholder of that corporation, unless the total consideration payable under the contract does not exceed one hundred dollars. 1975 NY Ops Atty Gen July 7 (Informal), 1975 N.Y. AG LEXIS 133.

A school district may acquire real property from a corporation, a stockholder of which is the brother of a member of the Board of Education. 1965 Op St Compt No. 65-97.

A prohibited interest in contract does not occur where: (a) A town supervisor owns less than 5% of the stock of a bank which is a depository of town funds; (b) the wife of the supervisor is part owner of a newspaper in which the town publishes legal notices. 1972 Op St Compt No. 72-4.

A county legislator does not have a statutory interest in a contract between the county and a corporation of which his spouse is a major stockholder, when he is an employee of the corporation, provided section 802(1)(b) is applicable. There is an apparent tendency for courts to liberally construe Article 18 and hold municipal officers and employees strictly accountable for conduct which, although not literally prohibited by the Article, is borderline. 1979 Op St Compt No. 79-868.

32. Lease of official's property

A Town Attorney may not lease real property owned by him to his Town unless (1) it is for office space to be occupied by him in the performance of his official duties or (2) the consideration for all such contracts in which he has an interest during a fiscal year does not exceed one hundred dollars; in either of which events disclosure under General Municipal Law § 803, must be made. 1969 NY Ops Atty Gen Dec 16 (Informal), 1969 N.Y. AG LEXIS 113.

A Town may rent or sub-lease premises owned or leased by its Town Clerk for use in the performance of his official duties. A Town may also rent or sub-lease premises owned or leased by its Town Clerk for other Town purposes but disclosure of the Town Clerk's interest should be made in accordance with Section 803. 1970 NY Ops Atty Gen Sept 8 (Informal), 1970 N.Y. AG LEXIS 111.

A town may rent space in the home or other property of a town officer for use as that officer's town office. 1968 Op St Compt No. 68-442.

A reasonable rental may be paid by a town to a town officer or employee for a room or rooms owned or leased by the officer or employee and used for the performance of official duties. 1969 Op St Compt No. 69-623.

Under certain circumstances, a city board of education may pay a claim by a superintendent of schools, for rental of office space in his home. 1980 Op St Compt No. 80-59.

Town board may enter into agreement for payment of reasonable rental to town officer who utilizes portion of his or her home as office in connection with performance of his or her official town duties. 1992 Op St Compt No. 92-16.

33. Contracts involving consideration of less than $100

Where consideration of a contract is under $100, the contract is not prohibited by conflict of interest. 1969 Op St Compt No. 69-444.

A member of a county board of health would have a conflict of interest if he or she is retained as a consultant at $60 per hour to the county health department where an appointee of the board has the power or duty to negotiate the consulting contract, unless and to the extent that one of the exceptions in the General Municipal Law § 802 is applicable. 1990 Op St Compt No. 90-16, 1990 N.Y. Comp. LEXIS 18.

34. —Insurance contracts

A member of a town board may not have an interest in a contract of insurance with such town except where the total consideration payable thereunder, together with all other considerations payable under contracts with such town in which he has an interest during the fiscal year, does not exceed $100,00; or where his interest is only that of a stockholder owning or controlling less than 5– of the stock of the corporation entering into such contract with the town. In any event, disclosure under § 803 must be made. 1969 NY Ops Atty Gen July 16 (Informal), 1969 N.Y. AG LEXIS 65.

A city alderman cannot participate in the sharing of commissions for city insurance to the extent of $100 per year where the yearly premiums exceed $100. 1964 Op St Compt No. 64-847.

35. —Real estate contracts

A town board may not sell a parcel of real property to the town supervisor where the value of the property exceeds $100. 1973 Op St Compt No. 73-803.

Where a town of the second class sells a parcel of land worth less than $100 to a town justice: (1) A permissive referendum is required without regard to the value of the land; (2) The town justice would not have a prohibited interest in the transaction. 1974 Op St Compt No. 74-477.

36. —Other contracts

The board of managers of a village public general hospital may not contract for the purchase of supplies with a corporation of

which the mayor is a stockholder and officer except to the extent of $100 in the aggregate during any fiscal year. 1964 Op St Compt No. 64-871.

A prohibited conflict of interest does not exist where a town purchases supplies from a business owned by a member of the town board, provided the amount does not exceed the total sum of $100 for any fiscal year. 1968 Op St Compt No. 68-617.

Member of board of trustees of community college would have prohibited conflict of interest if, in any fiscal year, college purchased supplies from hardware store owned by trustee and sum of purchases plus consideration under other contracts with college in which trustee had interest exceed $100. 1996 Op St Compt No. 96-14, 1996 N.Y. Comp. LEXIS 11.

37. Employment conflicts; county officials

An assistant district attorney may property hold the position of general counsel to a hospital in the county. He must disclose the fact of his employment to the county. 1966 NY Ops Atty Gen April 19 (Informal), 1966 N.Y. AG LEXIS 62.

A prohibited interest in contract does not result where a county treasurer is appointed to the advisory board of a bank with which the county does business, provided the conditions of section 802(1)(b) are observed. 1969 Op St Compt No. 69-165.

Apart from conflicts of interest considerations, there is no legal prohibition against the executive director of an association for retarded children serving as a member of a county community services board which passes upon the association's budget. Whether a prohibited conflict of interest exists where the county contracts for services to be provided by the association depends upon relevant facts. 1978 Op St Compt No. 78-425.

38. —School district officials

Employee of bank with title of Assistant Cashier is not eligible for position of Treasurer of School District where bank has been named depository of funds for the school district and there is another eligible banking institution located within the district. 1966 NY Ops Atty Gen Oct 4 (Informal), 1966 N.Y. AG LEXIS 125.

There is no conflict of interest under Article 18 of the General Municipal Law when the attorney for a school district is the law partner of the mayor of a village which comprises a portion of the school district, nor is there an incompatibility under the common law. 1975 NY Ops Atty Gen June 25 (Informal), 1975 N.Y. AG LEXIS 131.

An attorney may be appointed school district attorney even though the attorney's spouse is a member of the board of education of the school district. The authorization contained in General Municipal Law § 800 subdivision 3 constitutes a waiver of the prohibition of such a contract when the contract relates to a spouse of a board member; it is so broad in its terms that there is no reason why the spouse of the attorney may not vote upon the question of the attorney's employment and upon matters relating to the attorney's salary and/or expense vouchers. 1977 NY Ops Atty Gen Dec 27 (Informal), 1977 N.Y. AG LEXIS 370.

A retired teacher who receives retirement benefits under a collective bargaining agreement, and who retains the right to vote for union officials and to approve future collective bargaining agreements may not serve as a member of the school board in that school district. Furthermore, resignation from the union would not change our finding that a conflict of interest exists. 1985 NY Ops Atty Gen 85-33 (Informal), 1985 N.Y. AG LEXIS 64.

CLS Gen Mun § 802(1)(b) specifically authorizes contracts where school board enters into lease agreement with Roman Catholic Church Diocese for portion of former nonpublic school building. 1993 Op Comm Ed No. 13,015, 1993 NY Educ. Dept. LEXIS 142.

Provision of code of ethics of central school district, which required members of board of education to recuse themselves from voting on collective bargaining agreements between district and unions if they had family member covered by collective bargaining agreement, was unlawful because it conflicted with express exemptions from conflict of interest coverage in General Municipal Law. 1998 Op Comm Ed No. 13,914, 1998 NY Educ. Dept. LEXIS 236.

In proceeding for order to set aside results of school district election upon ground that successful candidate, as a retired teacher receiving insurance benefits, had a prohibited conflict of interest and could not serve as member of board of education, such receipt of insurance benefits pursuant to collective bargaining agreement approved by board of education before election did not give rise to prohibited conflict of interest; if statutory conflict of interest existed at all, it would not exist until after teacher took office, at which time her insurance benefits were cancelled; in addition, to extent that teacher's husband retained family health insurance coverage after teacher took office, there was no prohibited interest in spouse's benefits because a municipal officer is not deemed to have an interest in employment contract of his or her spouse; moreover, there was no merit in argument that teacher, as retired member of teachers' union, had a prohibited conflict of interest by reason of her voting rights as union member. in re Zohn, 1985 Op Comm Ed No. 11,560.

There is no prohibited conflict of interest where a school district, the treasurer of which is employed by a bank as a bank teller, designates such bank as depository of school district funds, sells bonds and notes to the bank and otherwise transacts business with said bank, provided the duties of treasurer, as a bank employee, do not directly involve the procurement, preparation or performance of the contract between the bank and the school district and her remuneration as an employee will not be directly affected as a result of such transactions. 1967 Op St Compt No. 67-304.

Where duties of school district treasurer, as an employee or officer of the bank, normally involve handling of municipal accounts, treasurer may not intentionally refrain from performance of such duties to avoid prohibited conflict of interest. 1967 Op St Compt No. 67-304.

A prohibited conflict of interest does not arise: (a) where a superintendent of a central school district is appointed to the advisory board of a bank with which the district does business; (b) where a member of the board of education of a central school district is appointed to the same advisory board, provided certain provisions of section 802 are applicable. 1968 Op St Compt No. 68-941.

A prohibited interest in contract will exist if a dentist, engaged under a State-sponsored pre-school program and paid with school district funds on a per-patient basis, is elected to the board of education and continues to treat program patients, where a separate contract with the school district is entered into for each patient treated. 1971 Op St Compt No. 71-936.

A retired school administrator, if he should be elected to the board of education of the school district, would have a prohibited interest as a board member in any collective bargaining agreement executed subsequent to his taking office which provides for the payment of the full cost of health insurance for him as a retiree. 1983 Op St Compt No. 83-122, 1983 N.Y. Comp. LEXIS 363.

Member of school district board of education who is also employee of not-for-profit corporation would not have prohibited interests in contract between district and corporation for provision by corporation of arts and education programs to district; however, disclosure would be required under CLS Gen Mun L § 803. 1988 Op St Compt No. 88-77, 1988 N.Y. Comp. LEXIS 70.

School board member does not have conflict of interest pursuant to CLS Gen Mun Law Art 18 solely by virtue of either holding position in state teachers association or owning college entrance and counseling business, however, one or both activities may be regulated by school district's code of ethics. 1989 Op St Compt No. 89-24, 1989 N.Y. Comp. LEXIS 27.

School board member would not have prohibited conflict of interest under CLS Gen Mun Art 18 if he or she also served as trustee on board of trustees of not-for-profit foundation that raises money and makes gifts to school district; however, board member should not participate in school board discussions or decisions relating to gifts from, or other matters involving, not-for-profit foundation for which board member serves as trustee and, assuming disclosure is not otherwise required by CLS Gen Mun § 803, should disclose his or her relationship with not-for-profit entity. 2008 Op St Compt No. 2008-1, 2008 N.Y. Comp. LEXIS 1.

39. —Town officials

The same person simultaneously may hold the two offices of appointed assessor and elected superintendent of highways in a town. 1975 NY Ops Atty Gen Nov 25 (Informal), 1975 N.Y. AG LEXIS 193.

A town councilwoman may not serve simultaneously as bookkeeper for the town supervisor except within the confines of the exception contained in General Municipal Law § 802(2[f]). 1977 NY Ops Atty Gen Nov 18 (Informal), 1977 N.Y. AG LEXIS 355.

A member of the town board should not be employed as a laborer in the town highway department. 1973 Op St Compt No. 73-203.

Town board member who is officer of incorporated volunteer fire company does not have prohibited interest in contract between town and fire company to provide fire protection for fire protection district in town; however, member is required to disclose interest to board. 1986 Op St Compt No. 86-78, 1986 N.Y. Comp. LEXIS 95.

A justice in a town of the second class should not be employed simultaneously as a laborer in the town highway department. 1972 Op St Compt No. 72-326.

40. —Other officials

Court would annul determination terminating petitioner's employment as city firefighter for engaging in allegedly proscribed political activity in violation of CLS Gen Mun § 801, CLS Gen City § 3, and unnamed "common-law rules" since (1) it was conceded that literal terms of statutes were not violated, (2) petitioner fell within exception to CLS Gen Mun § 801 provided by CLS Gen Mun § 802, (3) petitioner was appointed as firefighter not by common council, as described in CLS Gen City § 3, but by municipal board of public safety, and (4) there was no satisfactory explanation of what was meant by claim that petitioner violated "common-law rules." Girard v Glens Falls, 173 A.D.2d 113, 577 N.Y.S.2d 496, 1991 N.Y. App. Div. LEXIS 16338 (N.Y. App. Div. 3d Dep't 1991).

No statutory conflict of interest would be created in the appointment of an assistant vice president of a banking trust company with which an urban renewal agency does business to membership on such agency. 1966 NY Ops Atty Gen June 28 (Informal), 1966 N.Y. AG LEXIS 90.

Where no village tax funds are involved and the village is only the fiscal officer to disburse funds of other municipalities for a joint recreation project, and employment of personnel and fixing of salaries is done by another municipality, there is no incompatibility where an employee of such a program is also a trustee of the village which is the fiscal officer of the joint program. 1975 NY Ops Atty Gen May 21 (Informal), 1975 N.Y. AG LEXIS 123.

A common law conflict of interest would ensue if the same person at the same time served as an officer or employee and commissioner for a municipal housing authority. Pursuant to Public Housing Law, § 30(5), a tenant of the Buffalo Municipal Housing Authority, who is also an employee of said Authority, may lawfully seek the office of commissioner of said Authority and if successful may become a commissioner upon resigning his position of employment. 1978 NY Ops Atty Gen Feb 22 (Informal), 1978 N.Y. AG LEXIS 178.

The simultaneous holding of the two positions of clerk of the board of assessors and member of the board of assessors (or sole assessor) by the same person would constitute an incompatibility in function and a conflict of interest and if a clerk is successful in a campaign for election as assessor she must then choose which of the positions she wishes to hold; she cannot hold both at the same time. 1979 NY Ops Atty Gen Oct 18 (Informal), 1979 N.Y. AG LEXIS 24.

A member of a Library Board of Trustees may not simultaneously hold the position of paid custodian of the library. 1979 NY Ops Atty Gen Sept 14 (Informal), 1979 N.Y. AG LEXIS 42.

When a village purchases materials and supplies for the use of its fire department from a corporation of which the fire chief is vice-president, whether the chief has a conflict of interest depends upon pertinent facts and circumstances. 1983 Op St Compt No. 83-211, 1983 N.Y. Comp. LEXIS 273.

A fire district commissioner who is an employee of a business which services district vehicles has a conflict of interest in any contracts between the district and the business unless the exception contained in section 802(1)(b) is applicable. 1984 Op St Compt No. 84-37, 1984 N.Y. Comp. LEXIS 100.

41. —Spouse or relatives of official

Brothers do not enjoy the degree of consanguinity which would make the interest of one the interest of the other. Where a member of a partnership is appointed as a condemnation commissioner in a county acquisition of real property, and thereafter the other partner is elected as a supervisor in that county, and no fees of the condemnation commissioner are received by the partnership, and this is not in violation of the partnership agreement, there is no prohibited conflict of interest. However, where the partners are brothers, there may be the appearance of a conflict of interest but as the appointment of the commissioner was made before the supervisor was elected, disclosure by the supervisor and the condemnation commissioner would eliminate any question of an improper conflict. 1975 NY Ops Atty Gen March 13 (Informal), 1975 N.Y. AG LEXIS 90.

There is no conflict of interest where the wife of a teacher at a community college is elected as a non-voting trustee of such college. 1975 NY Ops Atty Gen Dec 16 (Informal), 1975 N.Y. AG LEXIS 202.

Petitioner, in seeking removal of respondent board president, failed to establish that respondent's ratification of collective bargaining agreement between local teachers' association and school district, while his spouse was member of local teachers' association, constituted conflict of interest and/or wilful violation or neglect of duty; CLS Gen Mun § 802(1)(f) exempts from prohibited conflicts of interest "contract[s] with a membership corporation or other voluntary non-profit corporation or association," and CLS Gen Mun § 800(3) "explicitly excludes a spouse's employment contract from coverage under the conflict of interest provision and therefore, does not bar a board member from negotiating or voting on the contract of a spouse." 2009 Op Comm Ed No. 15,892, 2009 NY Educ. Dept. LEXIS 34.

42. Miscellaneous

Under New York Const Art IX §§ 2, 3; Gen Mun §§ 801, 802, 806; Mun Home Rule §§ 2, 10, the Town of East Hampton is not authorized to amend the East Hampton Code of Ethics to require that, once every year, certain of its officers and employees fully disclose and itemize their financial status to include all of their assets and all of their liabilities when there is no apparent or potential conflict of interest in the standard of conduct of such officer or employee as it relates to his employment with the municipality. 1974 NY Ops Atty Gen Nov 12 (Informal), 1974 N.Y. AG LEXIS 173.

When a village attorney is a director and stockholder of a bank, he has a conflict of interest if the bank should purchase a statutory installment bond from the village only if he has any of the powers and duties set forth in section 801(1) in relation to the transaction. If he has a conflict of interest, the sale nevertheless would be permissible if made pursuant to Local Finance Law, § 60.10 and the restrictions set forth therein. 1985 Op St Compt No. 85-34, 1985 N.Y. Comp. LEXIS 108.

A town supervisor has a prohibited interest in a contract of his spouse for the preparation of the annual financial report. The contract is void and payment of her voucher should not be approved by the town board. 1985 Op St Compt No. 85-9, 1985 N.Y. Comp. LEXIS 134.

Town attorney would have prohibited interest in contract for additional legal services pursuant to CLS Town Law § 20(2)(a) between town and his or her law firm, if town attorney has any of powers or duties listed in CLS Gen Mun Law § 801, unless one of the exceptions in CLS Gen Mun Law § 802 applies. 1989 Op St Compt No. 89-65, 1989 N.Y. Comp. LEXIS 52.

There is no exception in CLS Gen Mun § 802 for contracts let pursuant to competitive bidding. 2004 Op St Compt No. 2004-2, 2004 N.Y. Comp. LEXIS 2.

A city councilperson has a prohibited interest in the sale by the city of property owned by it to a partnership of which she is a

partner. The exception contained in section 802(1)(b) is inapplicable. 1984 Op St Compt No. 84-12, 1984 N.Y. Comp. LEXIS 124.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 801, 803.

Federal Aspects:

The Federal Job Training Partnership Act, cited in statutory text, formerly appeared generally as 29 USCS §§ 1501 et seq. prior to its repeal by Act Aug. 7, 1998, P. L. 105-220, Title I, Subtitle F, § 199(b)(2), 112 Stat. 1059.

Jurisprudences:

18A NY Jur 2d Civil Servants and Other Public Officers and Employees § 218.

26 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 473, 474, 489, 492, 493, 499—513, 523.

75 NY Jur 2d Libraries § 24.

Law Reviews:

Davies, Article 18 of New York's General Municipal Law: the state conflicts of interest law for municipal officials. 59 Alb. L. Rev. 1321.

§ 803. Disclosure of interest

1. Any municipal officer or employee who has, will have, or later acquires an interest in or whose spouse has, will have, or later acquires an interest in any actual or proposed contract, purchase agreement, lease agreement or other agreement, including oral agreements, with the municipality of which he or she is an officer or employee, shall publicly disclose the nature and extent of such interest in writing to his or her immediate supervisor and to the governing body thereof as soon as he or she has knowledge of such actual or prospective interest. Such written disclosure shall be made part of and set forth in the official record of the proceedings of such body.

2. Notwithstanding the provisions of subdivision one of this section, disclosure shall not be required in the case of an interest in a contract described in subdivision two of section eight hundred two hereof.

HISTORY:

Add, L 1964, ch 946, § 2, eff Sept 1, 1964; amd, L 1965, ch 1043, § 4, eff July 1, 1965; L 2005, ch 499, § 1, eff Aug 16, 2005.

Editor's Notes: Laws 1964, ch 946, §§ 1 and 13–17, provide as follows:

Section 1. Declaration of policy and purpose. As government becomes increasingly complex, as our democratic processes draw citizens from every walk of life, there is increasing need for known standards of ethical conduct as a guide for public officers. These standards must rest primarily on personal integrity and on community vigilance: law cannot in itself create moral fiber, nor can law quicken the civic conscience. In support of these basic standards, it is the purpose of this chapter to define areas of conflicts of interest in municipal transactions, leaving to each community the expression of its own code of ethics.

The need for the statute does not spring from widespread malfeasance on the part of municipal officers; rather, the Legislature recognizes their integrity as a group, their culpability in only a few instances. But lest the few brand the many, the discernment of the offending case must be made certain, its elimination sure. Existing law is too complex, too inconsistent, too overgrown with exceptions, for such a clarity of understanding to be possible. Basic concepts must be retained, but something more than recodification is needed.

There is another and equally important objective: a formula of conduct which is not only clear but reasonable, one which will permit governmental employees to share the normal benefits of the democratic society and economy they serve. If government is to attract and hold competent administrators, public service must not require a complete divesting of all proprietary interests. Real conflict must be rooted out, without condemning the inconsequential.

The chapter, then, has a trinity of purposes: to protect the public from municipal contracts influenced by avaricious officers, to protect innocent public officers from unwarranted assaults on their integrity and to encourage each community to adopt an appropriate code of ethics to supplement this chapter. The Legislature declares that each purpose is a matter of State concern and adopts the following chapter accordingly, with the intention that it shall be the generic law in relation to conflicts of interest in municipal transactions, not to be superseded by local law of any municipality subject to its provisions.

§ 13. Laws superseded. The provisions of article eighteen of the general municipal law, as added by this act, shall supersede any local law, charter, ordinance, resolution, rule or regulation of any municipality to the extent that such local law, charter, ordinance, resolution, rule or regulation is inconsistent with the provisions thereof. No local law, ordinance, resolution, rule or regulation shall modify or dispense with any provision of article eighteen of the general municipal law, as added by this act; provided, however, that nothing herein contained shall prohibit a code of ethics adopted pursuant thereto from supplementing the provisions of this act.

§ 14. Pending actions and proceedings. No action or proceeding pending at the time when this act shall take effect shall be affected by any provision of this act, but the same may be prosecuted, defended or enforced as if this act had not been enacted.

§ 15. Existing rights and remedies preserved. No existing right or remedy of any character shall be lost, impaired or affected by reason of this act, nor shall the validity of any action taken by any public official under the law in force immediately prior to the time this act shall take effect be affected by the enactment of this act.

§ 16. Laws repealed. Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is hereby repealed.

§ 17. Effective date. This act shall take effect September first, nineteen hundred sixty-four.

Notes to Decisions

Analysis

1. Generally; municipal official as contracting party
2. Official as officer or employee of contracting party
3. Official as stockholder of contracting party
4. Designation of depository
5. Contracts involving fire districts
6. Insurance contracts
7. Lease of office space
8. Legal services
9. Real estate transactions; municipal purchases
10. —Municipal sales
11. Employment conflicts
12. —City officials
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1. Generally; municipal official as contracting party

Trial court properly granted the motions by a town board members and a consultant to dismiss a taxpayer's General Municipal Law action and denied his motion to reargue and/or renew because the taxpayer did not make allegations of fraud or illegality that would support the action where the consultant was not a municipal officer or employee subject to the statutory disclosure requirements, the taxpayer did not allege any interest that the consultant failed to disclose to the town, the town's payment to the consultant for services rendered was not made in reliance upon any representation that a valid contract existed,

and the taxpayer did not identify any new facts or change in the law that required a different determination. Budin v Davis, 172 A.D.3d 1676, 101 N.Y.S.3d 487, 2019 N.Y. App. Div. LEXIS 3838 (N.Y. App. Div. 3d Dep't 2019).

Under the cited sections a prohibited conflict of interest would not arise if the appointive Zoning Inspector for the Town of Rochester sold a gravel bank to the town, provided that full disclosure was made of such transaction and that such sale was not violative of the Code of Ethics adopted by the Town of Rochester. 1973 NY Ops Atty Gen Feb 27 (Informal), 1973 N.Y. AG LEXIS 37.

Matters relating to the Judiciary in the State of New York are of State concern and Chapter VIII, section 90, subdivision 5, of the Ordinances of the City of Buffalo relating to disclosures by certain officers or employees of the City of Buffalo does not apply to a Judge of the City Court of Buffalo. 1975 NY Ops Atty Gen Feb 20 (Informal), 1975 N.Y. AG LEXIS 73.

A town assessor, who is also a plumber, may bid on and be awarded a contract involving a town building, but a written public disclosure of the assessor's interest in the contract is required. 1980 Op St Compt No. 80-129, 1980 N.Y. Comp. LEXIS 310.

A superintendent of a town sewer improvement area, who also owns a construction business, may be retained to perform services for the town, such as snow-plowing and excavation, provided that he, in his town position, does not possess any of the powers or duties enumerated in section 801(1). Disclosure under section 803(1) is required. 1981 Op St Compt No. 81-45, 1981 N.Y. Comp. LEXIS 844.

A village clerk may enter into a contract with the village for the plowing of village streets but must disclose his statutory interest in the contract in writing to the board of trustees. 1983 Op St Compt No. 83-35, 1983 N.Y. Comp. LEXIS 454.

A member of a county board of health would have a conflict of interest if he or she is retained as a consultant at $60 per hour to the county health department where an appointee of the board has the power or duty to negotiate the consulting contract, unless and to the extent that one of the exceptions in the General Municipal Law § 802 is applicable. 1990 Op St Compt No. 90-16, 1990 N.Y. Comp. LEXIS 18.

Member of town board of assessment review who is sole proprietor of company that sells highway-related products has interest in contracts between company and town to sell products for use by town highway department; such interest is not prohibited, but board member must disclose it in accordance with CLS Gen Mun § 803. 2012 Op St Compt No. 2012-1, 2012 N.Y. Comp. LEXIS 2.

In a county which has a director of purchasing who is an appointee of the elective county executive and also an elective county comptroller who is responsible for audit and approval of vouchers, a county legislator does not have a prohibited interest in contracts between the county and himself, but he must disclose his interest in the same. 1978 Op St Compt No. 78-525.

Whether electrical contractor who also is chair of town planning board has prohibited interested in contract with town to perform electrical services must be determined on case-by-case basis by examining chair's powers and duties in connection with specific contract; even if interest is not prohibited, disclosure would be required. 1993 Op St Compt No. 93-23.

2. Official as officer or employee of contracting party

Conviction of former commissioner of public works on count charging failure to disclose an interest in snow plowing contract awarded to corporation of which Commissioner was officer and stockholder could not be reconciled with verdict of not guilty on count charging a conflict of interest regarding the contract; hence, conviction on the former count was required to be reversed and the charge dismissed; conviction on either charge required a basic finding that the commissioner had an interest in the contract. People v Speach, 49 A.D.2d 210, 374 N.Y.S.2d 210, 1975 N.Y. App. Div. LEXIS 10626 (N.Y. App. Div. 4th Dep't 1975).

The prohibition of these sections is not applicable to a village trustee who is only a salaried employee of a corporation which contracts with the village. 1966 NY Ops Atty Gen April 7 (Informal), 1966 N.Y. AG LEXIS 54.

A city fireman who is also president of a cable TV company granted a franchise by the city, does not have a conflicting interest prohibited by General Municipal Law, Section 801, but is required by Section 803 to publicly disclose his interest in the cable TV company. 1970 NY Ops Atty Gen July 30 (Informal), 1970 N.Y. AG LEXIS 98.

A village trustee may be employed by a hardware store contracting with the village provided that his salary as such employee will not be directly affected as a result of such contract and provided that the duties of such employment do not directly involve the procurement, preparation or performance of any part of such contract. However, disclosure of such employment must be made by the village trustee in accordance with General Municipal Law, § 803. 1971 NY Ops Atty Gen Feb 24 (Informal), 1971 N.Y. AG LEXIS 45.

There is no prohibited conflict of interest where a town clerk, acting as sales agent, sells cleaning supplies to the town, but disclosure of the interest in contract is required. 1972 Op St Compt No. 72-879.

A member of a county board of supervisors who is employed by the county extension service association does not have a prohibited interest in contracts between the county and the association. 1975 Op St Compt No. 75-736.

There is no prohibited conflict of interest where a village mayor or trustee is employed by an insurance agency and is not, in the course of his employment, directly involved in the procurement, preparation or performance of any insurance contract with the village or will not have his remuneration directly affected by such a contract. Likewise, if the mayor or trustee owns stock in an insurance agency which provides insurance to the village but the extent of such stockholdings are less than five per cent of the outstanding stock, there is no prohibited interest. If the extent of stockholdings exceeds five per cent of the outstanding stock, the interest will not be prohibited provided that the contract was entered into prior to the time the mayor or trustee was elected, and the contract may not be renewed upon expiration. 1981 Op St Compt No. 81-430, 1981 N.Y. Comp. LEXIS 454.

There is no prohibited conflict of interest where a village purchases insurance from an insurance company of which a village trustee is an employee, if the trustee's remuneration will not be directly affected by the transaction and, as an employee of the company, the trustee will have nothing to do with the preparation, procurement or performance of the insurance contracts. 1982 Op St Compt No. 82-234, 1982 N.Y. Comp. LEXIS 496.

Fire district treasurer who is officer and stockholder of insurance agency with which fire district contracts has interest in contract; interest must be disclosed under CLS Gen Mun § 803, but is not prohibited. 1997 Op St Compt No. 97-19, 1997 N.Y. Comp. LEXIS 9.

Attorney who is appointed town attorney would not have prohibited interest in pre-existing contract between town and his or her law firm, but attorney would be required to disclose his or her interest in contract, and attorney should also recuse him or herself from any matter affecting his or her law firm, with those functions instead being performed by deputy, if any. 2000 Op St Compt No. 2000-22, 2000 N.Y. Comp. LEXIS 26.

Member of county governing board who served as officer of 2 not-for-profit corporations, as well as director of one of those corporations, would have prohibited interest in contracts between county and either corporation, but must disclose any interest he may have in such contract under CLS Gen Mun § 803, and must avoid contravening statutory prohibitions against disclosure of confidential information and compensated appearances before county agencies under CLS Gen Mun § 805-a; furthermore, even if not required by county's code of ethics, county board member should not participate in county board discussions or decisions relating to county contracts with not-for profit corporations for which board member serves as officer, employee or director. 2001 Op St Compt No. 2001-9, 2001 N.Y. Comp. LEXIS 9.

Member of county governing board who also serves on board of not-for-profit agency does not have prohibited interest in contract

between county and agency, but member must disclose any interest in such contract and should not participate in discussion or vote on contract. 1992 Op St Compt No. 92-30, 1992 N.Y. Comp. LEXIS 17.

3. Official as stockholder of contracting party

A city is not precluded from entering into a contract for the purchase of merchandise from a corporation in which a city employee is a stockholder. Proper disclosure of interest must be made. 1965 NY Ops Atty Gen Aug 26 (Informal), 1965 N.Y. AG LEXIS 126.

No conflict of interest ensues where a member of the Fire Commission of the City of Geneva, who has neither the power nor the duty to authorize or approve a contract between said City and a corporation in which he is a stockholder, or any payments to be made thereunder. However, disclosure of such interest in accordance with General Municipal Law, section 803, must be made. 1973 NY Ops Atty Gen May 23 (Informal), 1973 N.Y. AG LEXIS 69.

Newly elected town board member would have prohibited interest in renewals of existing contract for road salt delivery, or in subsequent contracts between town and himself or herself as sole proprietor, unless another exception in CLS Gen Mun § 802 were to apply. 2008 Op St Compt No. 2008-2, 2008 N.Y. Comp. LEXIS 2.

4. Designation of depository

No conflict of interest results from the designation of a bank as a depository of a county sewer district even though one member of said district is also a member of the Advisory Board of a branch of said bank and another member of said district is the President in charge of a branch of said bank, provided that neither of them is the chief fiscal officer, treasurer, or his deputy or employee of the sewer district. However, disclosure of interest must be made in accordance with General Municipal Law, § 803. 1972 NY Ops Atty Gen Nov 2 (Informal), 1972 N.Y. AG LEXIS 154.

A prohibited conflict of interest does not occur when a village board designates a bank as the depository of village funds, notwithstanding the membership of a trustee on the bank's advisory board. Disclosure, however, is necessary. 1968 Op St Compt No. 68-323.

A conflict of interest does not occur where a town supervisor who is also a practicing attorney occasionally represents a town depository bank for the sole purpose of closing a mortgage loan which in no way involves the town, but disclosure is recommended. 1972 Op St Compt No. 72-11.

5. Contracts involving fire districts

A fire district whose commissioners are members of a volunteer fire company may contract with such company, but a disclosure of such contract is required. 1969 Op St Compt No. 69-522.

A fire chief of a fire district volunteer fire department does not have a prohibited interest in contracts between the district and a business in which he has a partnership interest unless he exercises certain functions, as fire chief, with respect to such contracts. However, disclosure is required, 1979 Op St Compt No. 79-76, 1979 N.Y. Comp. LEXIS 225.

Assistant chief of fire district's fire department who owns more than 5 percent of stock of private corporation contracting with fire district for sale and repair of radios to district does not have prohibited interest in contract if, as assistant chief, he or she does not have any powers and duties listed in CLS Gen Mun § 801 in connection with contract; if assistant chief, on behalf of corporation, exercises direction and control over any corporate employees involved in contract, such fact must be disclosed under CLS Gen Mun § 803(1). 2001 Op St Compt No. 2001-11, 2001 N.Y. Comp. LEXIS 11.

6. Insurance contracts

A member of a town board may not have an interest in a contract of insurance with such town except where the total consideration payable thereunder, together with all other considerations payable under contracts with such town in which he has an interest during the fiscal year, does not exceed $100.00; or where his interest is only that of a stockholder owning or controlling less than 5— of the stock of the corporation entering into such contract with the town. In any event, disclosure under § 803 must be made. 1969 NY Ops Atty Gen July 16 (Informal), 1969 N.Y. AG LEXIS 65.

A prohibited conflict of interest does not arise where a city commissioner of public safety sells group life insurance to participating city employees. Disclosure is, nevertheless, required. 1968 Op St Compt No. 68-55.

A village justice is not prohibited from selling group life and hospitalization insurance to the village for employees of the village in which he is an officer, but he must publicly disclose the nature and extent of his interest in the contract. 1973 Op St Compt No. 73-762.

There is no prohibited conflict of interest where a village mayor or trustee is employed by an insurance agency and is not, in the course of his employment, directly involved in the procurement, preparation or performance of any insurance contract with the village or will not have his remuneration directly affected by such a contract. Likewise, if the mayor or trustee owns stock in an insurance agency which provides insurance to the village but the extent of such stockholdings are less than five per cent of the outstanding stock, there is no prohibited interest. If the extent of stockholdings exceeds five per cent of the outstanding stock, the interest will not be prohibited provided that the contract was entered into prior to the time the mayor or trustee was elected, and the contract may not be renewed upon expiration. 1981 Op St Compt No. 81-430, 1981 N.Y. Comp. LEXIS 454.

7. Lease of office space

A Town Attorney may not lease real property owned by him to his Town unless (1) it is for office space to be occupied by him in the performance of his official duties or (2) the consideration for all such contracts in which he has an interest during a fiscal year does not exceed one hundred dollars; in either of which events disclosure under General Municipal Law § 803, must be made. 1969 NY Ops Atty Gen Dec 16 (Informal), 1969 N.Y. AG LEXIS 113.

A Town may rent or sub-lease premises owned or leased by its Town Clerk for use in the performance of his official duties. A Town may also rent or sub-lease premises owned or leased by its Town Clerk for other Town purposes but disclosure of the Town Clerk's interest should be made in accordance with Section 803. 1970 NY Ops Atty Gen Sept 8 (Informal), 1970 N.Y. AG LEXIS 111.

8. Legal services

A district attorney of a county having a population of less than one hundred thousand is not precluded from the practice of law and consequently may, as a part of such private law practice, represent the county self-insurance workmen's compensation plan on a fee basis. Disclosure of such contract pursuant to General Municipal Law, § 803 must, however, be made. 1972 NY Ops Atty Gen Sept 6 (Informal), 1972 N.Y. AG LEXIS 132.

A prohibited conflict of interest does not result where a town justice of a town of the first class performs services for such town as attorney for special improvement districts created by such town. Nevertheless, disclosure of such interest is mandated by General Municipal Law, § 803. 1973 NY Ops Atty Gen April 4 (Informal), 1973 N.Y. AG LEXIS 53.

A conflict of interest does not occur where a town supervisor who is also a practicing attorney occasionally represents a town depository bank for the sole purpose of closing a mortgage loan which in no way involves the town, but disclosure is recommended. 1972 Op St Compt No. 72-11.

9. Real estate transactions; municipal purchases

Defendants, the County of Putnam and the members of the Board of Supervisors of the county, are entitled to rescind a contract for the purchase of realty where it is established that a county officer had an undisclosed interest as a real estate broker in the performance of the contract in violation of section 803 of the General Municipal Law; despite the fact that the officer held no powers or duties with respect to the purchase of the land by the county, any undisclosed interest of a municipal officer or employee is prohibited by article 18 of the General Municipal Law and renders a contract willfully entered into by or with a municipality unenforceable. (General Municipal Law, § 804.) Furthermore, inasmuch as section 805 of the General Municipal Law provides

that it is a misdemeanor for public officers and employees to willfully and knowingly neglect to disclose their interests, the statute's plain purpose of protecting the public is effectuated by inflicting criminal sanctions, and the legislative recognition of the criminality must be accompanied by the judicial refusal to enforce a contract which is derived from a criminal act. Landau v Percacciolo, 66 A.D.2d 80, 412 N.Y.S.2d 378, 1978 N.Y. App. Div. LEXIS 13907 (N.Y. App. Div. 2d Dep't 1978), aff'd, 50 N.Y.2d 430, 429 N.Y.S.2d 566, 407 N.E.2d 412, 1980 N.Y. LEXIS 2387 (N.Y. 1980).

A central school district may acquire real property from a corporation in which two members of the law firm which acts as school district attorney are stockholders, and such law firm is attorney for the corporation. Section 803 requires a written disclosure of the nature and extent of the attorneys' interests in the contracts in question, and such a school district may acquire real property from a corporation, a stockholder of which is the brother of a member of the Board of Education. 1965 Op St Compt No. 65-97.

10. —Municipal sales

Mere fact that participant in public auction conducted by village held position as building inspector and village engineer did not constitute violation of CLS Gen Mun §§ 801 and 803 so as to void his bids and obligate village to accept plaintiff's original bid on property since there was no proof that engineer had power or duty to negotiate, prepare, authorize or approve, on behalf of village, contract for sale of real property on which he was bidding to trigger application of § 801, and as mere bidder at auction, engineer never actually had interest in any contract to which village was party and thus had no duty under § 803 to make any formal disclosure of his interest; even assuming engineer had some duty to disclose his potential interest in contract with village, his appearance at public auction served as disclosure of that potential interest. D.E.P. Resources, Inc. v Monroe, 131 A.D.2d 719, 516 N.Y.S.2d 953, 1987 N.Y. App. Div. LEXIS 48178 (N.Y. App. Div. 2d Dep't 1987).

No prohibited conflict of interest arises upon the sale of real property by an Urban Renewal Agency to a corporation of which a member of such Agency is an officer and director but not a shareholder, provided the conditions set forth in § 802(1)(b) are met and disclosure of interest under § 803 is made. In the public interest the person involved herein should not participate in any transaction between the Agency and the corporation. If a County Board of Ethics has been created pursuant to § 808 its advisory opinion should be sought. 1969 NY Ops Atty Gen Dec 2 (Informal), 1969 N.Y. AG LEXIS 106.

There is no prohibited interest in contract where a town contracts to sell real property to the town clerk; however, the clerk's interest in such contract must be publicly disclosed in writing. 1975 Op St Compt No. 75-961.

11. Employment conflicts

Effective September 1, 1964, dual employment by the same municipality of the same person in full-time and part-time positions is not prohibited under this law if not otherwise prohibited, but disclosure of such employment must be made in accordance with this section. 1964 NY Ops Atty Gen Sept 29 (Informal), 1964 N.Y. AG LEXIS 140.

The attorney for a county sewer district who is later elected to the position of part-time district attorney and who intends to hold both positions, must make a disclosure of interest under section 803 of Article 18 of the General Municipal Law. 1983 NY Ops Atty Gen 83-45 (Informal), 1983 N.Y. Op. Att'y Gen. No. 83-45, 1983 N.Y. AG LEXIS 49.

Dual employment by the same municipality of the same person in full-time and part-time positions is not prohibited per se under General Municipal Law, § 801, if not otherwise prohibited. 1978 Op St Compt No. 78-946.

School board member would not have prohibited conflict of interest under CLS Gen Mun Art 18 if he or she also served as trustee on board of trustees of not-for-profit foundation that raises money and makes gifts to school district; however, board member should not participate in school board discussions or decisions relating to gifts from, or other matters involving, not-for-profit foundation for which board member serves as trustee and, assuming disclosure is not otherwise required by CLS Gen Mun § 803, should disclose his or her relationship with not-for-profit entity. 2008 Op St Compt No. 2008-1, 2008 N.Y. Comp. LEXIS 1.

12. —City officials

While it is doubtful that a material benefit would enure to a Village Trustee by virtue of the granting of a special permit by the Village Board of Trustees to an applicant who is the landlord of such Trustee simply because such Trustee, as a tenant, may thereupon become entitled to use the recreational facility to be constructed by his landlord, it is recommended that disclosure of such possible interest be made and that the Village Code of Ethics be examined and the question submitted to the County Board of Ethics, provided one has been established by the County. 1973 NY Ops Atty Gen March 6 (Informal), 1973 N.Y. AG LEXIS 43.

A person in litigation against a city over a contract claim is not thereby disqualified from running for the office of alderman of the city. If elected he may assume the office but must file a disclosure statement and may not participate, as an alderman, in deliberations or action by the city relating to the defense or settlement of the litigation. 1975 NY Ops Atty Gen Oct 10 (Informal), 1975 N.Y. AG LEXIS 169.

A prohibited conflict of interest does not arise where a city retains the services of two employees (heads of public works and water departments) for the purpose of designing a new sewer installation. Disclosure, however, is required, as provided in section 803. 1968 Op St Compt No. 68-294.

A prohibited conflict of interest does not arise where the same individual holds two city employments. Disclosure is required. 1979 Op St Compt No. 79-20.

A contract between a city and a church would not be prohibited on the basis of a councilman's membership in the church because contracts between municipalities and not-for-profit corporations, such as churches, are excepted from the conflict of interest provisions of the General Municipal Law. The conflict of interest statutes do not require the councilman to abstain from voting on the authorization for such contract but he may be required to do so by the local Code of Ethics or by local rules of procedure. (2) A contract between a city fire department and a local business is not prohibited on the basis of a firefighter's spouse's ownership of that business unless the firefighter has the power or duty to negotiate, prepare, authorize or approve the contract or authorize or approve payment thereunder. In both cases, disclosure of the interest must be made, in writing, to the city council. 1983 Op St Compt No. 83-112, 1983 N.Y. Comp. LEXIS 372.

Where newly elected town board member has interest in contract between town and board member, as sole proprietor, under which board member picks up road salt and delivers salt to town storage facility, if contract for road salt delivery between town and town board member were entered into before board member was elected to office, exception in CLS Gen Mun § 802(1)(h) applies and interest is not prohibited; however, board member would be required to disclose such interest in accordance with CLS Gen Mun § 803. 2008 Op St Compt No. 2008-2, 2008 N.Y. Comp. LEXIS 2.

13. —County officials

Although the person who negotiated a public sector collective bargaining agreement on behalf of the county did not have a prohibited interest in the resulting collective bargaining agreement by virtue of a county law extending to the negotiator the same salary adjustment as would be received by the members of the local union under the agreement, the negotiator did have a statutory interest which had to be disclosed in writing pursuant to Gen Mun Law § 803. However, the negotiator's interest was adequately disclosed where his role in negotiating the agreement was publicly known and unconcealed. The public purpose underlying the statute was sufficiently protected since the County Executive and County Legislature knew of his interest when they approved and ratified the agreement. Stettine v County of Suffolk, 105 A.D.2d 109, 482 N.Y.S.2d 818, 1984 N.Y. App. Div. LEXIS 20681 (N.Y. App. Div. 2d Dep't 1984), aff'd, 66 N.Y.2d 354, 497 N.Y.S.2d 329, 488 N.E.2d 75, 1985 N.Y. LEXIS 17611 (N.Y. 1985).

An assistant district attorney may properly hold the position of general counsel to a hospital in the county. He must disclose the fact of his employment to the county. 1966 NY Ops Atty Gen April 19 (Informal), 1966 N.Y. AG LEXIS 62.

One person may simultaneously serve as a county legislator and as the Executive Director of the Adirondack Park Local Government Review Board so long as he avoids conflicts of interest in discrete situations as they may arise. 1981 NY Ops Atty Gen 81-101 (Informal), 1981 N.Y. AG LEXIS 51.

Where the full-time secretary to the sheriff accepts a part-time position as a jail matron, work performed as a matron after the completion of the eight-hour workday as a secretary is not to be compensated on an overtime basis. Disclosure is necessary pursuant to General Municipal Law, § 803(1). 1981 Op St Compt No. 81-118, 1981 N.Y. Comp. LEXIS 776.

Officers and employees of county community college who are also members of board of directors for not-for-profit corporation which intends to purchase real property held by county for community college will have interest in purchase contract for purposes of CLS Gen Mun §§ 800 et seq., and interest must be disclosed as soon as officer or employee has knowledge of prospective interests; however, such interest would not be prohibited. 1988 Op St Compt No. 88-52, 1988 N.Y. Comp. LEXIS 48.

14. —Other officials

A retired teacher who receives retirement benefits under a collective bargaining agreement, and who retains the right to vote for union officials and to approve future collective bargaining agreements may not serve as a member of the school board in that school district. Furthermore, resignation from the union would not change our finding that a conflict of interest exists. 1985 NY Ops Atty Gen 85-33 (Informal), 1985 N.Y. AG LEXIS 64.

Although member of board of education who was also an attorney was held not to have violated the provisions of General Municipal Law § 801 by acting as the trial attorney for plaintiffs in a lawsuit against the school district while he was member of board of education, nonetheless, such member had a duty to publicly disclose his interest in the lawsuit to board of education in writing pursuant to General Municipal Law § 803(1). In re Ackerberg et al., 1985 Op Comm Ed No. 11,561.

A village trustee does not have a prohibited conflict of interest when he also serves as Activities Administrator of a joint town/village recreation commission. If he is village employee, disclosure is necessary under General Municipal Law. § 803(1). 1980 Op St Compt No. 80-597.

Member of school district board of education who is also employee of not-for-profit corporation would not have prohibited interests in contract between district and corporation for provision by corporation of arts and education programs to district; however, disclosure would be required under CLS Gen Mun L § 803. 1988 Op St Compt No. 88-77, 1988 N.Y. Comp. LEXIS 70.

Individual who is member of governing board and treasurer of industrial development agency (IDA) does not have prohibited conflict of interest solely because he or she owns less than one percent of stock of bank named as depository of IDA, and disclosure of interest under CLS Gen Mun § 803 is not required; however, individual should not participate in discussion or vote on matters affecting IDA's relationship with bank. 1994 Op St Compt No. 94-16, 1994 N.Y. Comp. LEXIS 14.

No conflict of interest exists where a county legislator is a professional optometrist who, in connection with his private practice, provides optometrical services for Medicaid recipients. However, disclosure is required pursuant to General Municipal Law, § 803(1). 1981 Op St Compt No. 81-407, 1981 N.Y. Comp. LEXIS 480.

Town board member who is officer of incorporated volunteer fire company does not have prohibited interest in contract between town and fire company to provide fire protection for fire protection district in town; however, member is required to disclose interest to board. 1986 Op St Compt No. 86-78, 1986 N.Y. Comp. LEXIS 95.

15. —Official's spouse or relatives

Brothers do not enjoy the degree of consanguinity which would make the interest of one the interest of the other. Where a member of a partnership is appointed as a condemnation commissioner in a county acquisition of real property, and thereafter the other partner is elected as a supervisor in that county, and no fees of the condemnation commissioner are received by the partnership, and this is not in violation of the partnership agreement, there is no prohibited conflict of interest. However, where the partners are brothers, there may be the appearance of a conflict of interest but as the appointment of the commissioner was made before the supervisor was elected, disclosure by the supervisor and the condemnation commissioner would eliminate any question of an improper conflict. 1975 NY Ops Atty Gen March 13 (Informal), 1975 N.Y. AG LEXIS 90.

A village may employ the minor child of a village trustee as a swimming instructor. No disclosure is required. 1965 Op St Compt No. 65-587.

A clerk in a town highway superintendent's office, whose duties include checking invoices for accuracy, would not have an interest prohibited by Article 18 of the General Municipal Law if the highway superintendent were to award contracts for the repair of town highway equipment to the clerk's spouse. 1992 Op St Compt No. 92-6.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS Loc Fin § 60.10.

Jurisprudences:

18A NY Jur 2d Civil Servants and Other Public Officers and Employees § 218.

26 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 443, 473, 501, 514, 515, 523.

75 NY Jur 2d Libraries § 24.

Law Reviews:

Davies, Article 18 of New York's General Municipal Law: the state conflicts of interest law for municipal officials. 59 Alb. L. Rev. 1321.

Comment, Conflict of interests and the municipal employee. 20 Buff. L. Rev. 487.

§ 804. Contracts void

Any contract willfully entered into by or with a municipality in which there is an interest prohibited by this article shall be null, void and wholly unenforceable.

HISTORY:

Add, L 1964, ch 946, § 2, eff Sept 1, 1964.

Editor's Notes: Laws 1964, ch 946, §§ 1 and 13–17, provide as follows:

Section 1. Declaration of policy and purpose. As government becomes increasingly complex, as our democratic processes draw citizens from every walk of life, there is increasing need for known standards of ethical conduct as a guide for public officers. These standards must rest primarily on personal integrity and on community vigilance: law cannot in itself create moral fiber, nor can law quicken the civic conscience. In support of these basic standards, it is the purpose of this chapter to define areas of conflicts of interest in municipal transactions, leaving to each community the expression of its own code of ethics.

The need for the statute does not spring from widespread malfeasance on the part of municipal officers; rather, the Legislature recognizes their integrity as a group, their culpability in only a few instances. But lest the few brand the many, the discernment of the offending case must be made certain, its elimination sure. Existing law is too complex, too inconsistent, too overgrown with exceptions, for such a clarity of understanding to be possible. Basic concepts must be retained, but something more than recodification is needed.

There is another and equally important objective: a formula of conduct which is not only clear but reasonable, one which will permit governmental employees to share the normal benefits of the democratic society and economy they serve. If government is to attract and hold competent admin-

istrators, public service must not require a complete divesting of all proprietary interests. Real conflict must be rooted out, without condemning the inconsequential.

The chapter, then, has a trinity of purposes: to protect the public from municipal contracts influenced by avaricious officers, to protect innocent public officers from unwarranted assaults on their integrity and to encourage each community to adopt an appropriate code of ethics to supplement this chapter. The Legislature declares that each purpose is a matter of State concern and adopts the following chapter accordingly, with the intention that it shall be the generic law in relation to conflicts of interest in municipal transactions, not to be superseded by local law of any municipality subject to its provisions.

§ 13. Laws superseded. The provisions of article eighteen of the general municipal law, as added by this act, shall supersede any local law, charter, ordinance, resolution, rule or regulation of any municipality to the extent that such local law, charter, ordinance, resolution, rule or regulation is inconsistent with the provisions thereof. No local law, ordinance, resolution, rule or regulation shall modify or dispense with any provision of article eighteen of the general municipal law, as added by this act; provided, however, that nothing herein contained shall prohibit a code of ethics adopted pursuant thereto from supplementing the provisions of this act.

§ 14. Pending actions and proceedings. No action or proceeding pending at the time when this act shall take effect shall be affected by any provision of this act, but the same may be prosecuted, defended or enforced as if this act had not been enacted.

§ 15. Existing rights and remedies preserved. No existing right or remedy of any character shall be lost, impaired or affected by reason of this act, nor shall the validity of any action taken by any public official under the law in force immediately prior to the time this act shall take effect be affected by the enactment of this act.

§ 16. Laws repealed. Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is hereby repealed.

§ 17. Effective date. This act shall take effect September first, nineteen hundred sixty-four.

Notes to Decisions

Analysis

1. Generally
2. Exempt entities
3. Remedies
4. Sanctions

1. Generally

After new city manager assumed office, former acting city manager was without authority, real or apparent, to execute consultant contract on behalf of city with new city manager, and new city manager's act of signing contract which resulted in retaining himself was void as involving prohibited conflict of interest. De Santis v Troy, 83 Misc. 2d 195, 371 N.Y.S.2d 310, 1975 N.Y. Misc. LEXIS 2876 (N.Y. Sup. Ct. 1975).

Under General Municipal Law §§ 800, 801, 802, the proposed sale of a building owned by the Town Supervisor of the Town of Crown Point to the Town of Crown Point would constitute a prohibited conflict of interest unless the purchase and the consideration therefor is approved by the Supreme Court upon petition of the Town Board. 1975 NY Ops Atty Gen Feb 10 (Informal), 1975 N.Y. AG LEXIS 71.

A prohibited conflict of interest in a contract arose under section 801 of the General Municipal Law when the Acting Town Attorney of the Town of Greenburgh prepared a draft of a proposed contract between him and said Town for his future employment as Special Counsel to the Town's Urban Renewal Commission, even though said contract was to take effect after the Acting Town Attorney had resigned from his position as Acting Town Attorney. 1975 NY Ops Atty Gen Feb 27 (Informal), 1975 N.Y. AG LEXIS 77.

A prohibited conflict of interest, under section 801 of the General Municipal Law, arose when the former City Attorney of the City of Glens Falls approved a contract between himself and the City for his employment to provide legal services to the Community Development Office, a City of Glens Falls agency. 1978 NY Ops Atty Gen May 23 (Informal), 1978 N.Y. AG LEXIS 300.

The attorney for a county sewer district who is later elected to the position of part-time district attorney and who intends to hold both positions, must make a disclosure of interest under section 803 of Article 18 of the General Municipal Law. 1983 NY Ops Atty Gen 83-45 (Informal), 1983 N.Y. Op. Att'y Gen. No. 83-45, 1983 N.Y. AG LEXIS 49.

A prohibited conflict of interest arises when a city councilman is a co-owner of a nursing home used by the Board of Public Welfare to house some of its patients. 1966 Op St Compt No. 66-711.

A member of a county board of health would have a conflict of interest if he or she is retained as a consultant at $60 per hour to the county health department where an appointee of the board has the power or duty to negotiate the consulting contract, unless and to the extent that one of the exceptions in the General Municipal Law § 802 is applicable. 1990 Op St Compt No. 90-16, 1990 N.Y. Comp. LEXIS 18.

2. Exempt entities

CLS General Municipal Law § 801 is not violated by collective bargaining agreement between county and county chapter of Civil Service Employees Association despite fact that it was negotiated by county employee at time when local county laws provided that all exempt county employees, including defendant, would be granted same salary adjustments as members of bargaining units of Association, thereby creating in defendant "prohibited interest" in contract that would render it void under CLS General Municipal Law § 804, since Civil Service Employees Association is voluntary nonprofit association within meaning of CLS General Municipal Law § 802(1)(f) and therefore excepted from proscriptions of § 801. Stettine v County of Suffolk, 66 N.Y.2d 354, 497 N.Y.S.2d 329, 488 N.E.2d 75, 1985 N.Y. LEXIS 17611 (N.Y. 1985).

In proceeding to, inter alia, enjoin town from purchasing property with intention of conveying it to defendant corporation, court properly dismissed cause of action alleging that individual defendants who acted on behalf of defendant corporation violated CLS Gen Mun § 804 and thus were guilty of misdemeanor under CLS Gen Mun § 805 as (1) record did not support petitioners' conclusory assertions that corporate defendant failed to qualify as not-for-profit corporation and that individual defendants had unspecified interest in corporate defendant which was prohibited by CLS Gen Mun Art 18, and (2) no valid and sufficient accusatory instrument, which is nonwaivable jurisdictional prerequisite to criminal prosecution, was filed. Schulz v Town of Kingsbury, 229 A.D.2d 707, 645 N.Y.S.2d 567, 1996 N.Y. App. Div. LEXIS 7717 (N.Y. App. Div. 3d Dep't), app. dismissed, 89 N.Y.2d 859, 653 N.Y.S.2d 281, 675 N.E.2d 1234, 1996 N.Y. LEXIS 4252 (N.Y. 1996).

A town councilwoman may not serve simultaneously as bookkeeper for the town supervisor except within the confines of the exception contained in General Municipal Law § 802(2[f]). 1977 NY Ops Atty Gen Nov 18 (Informal), 1977 N.Y. AG LEXIS 355.

An attorney may be appointed school district attorney even though the attorney's spouse is a member of the board of education of the school district. The authorization contained in General Municipal Law § 800 subdivision 3 constitutes a waiver of the prohibition of such a contract when the contract relates to a spouse of a board member; it is so broad in its terms that there is no reason why the spouse of the attorney may not vote upon the question of the attorney's employment and upon matters relating to the attorney's salary and/or expense vouchers. 1977 NY Ops Atty Gen Dec 27 (Informal), 1977 N.Y. AG LEXIS 370.

3. Remedies

Defendants, the County of Putnam and the members of the Board of Supervisors of the county, are entitled to rescission of a contract for the purchase of realty where it is established that a county officer had an undisclosed interest as a real estate broker

in the performance of the contract in violation of section 803 of the General Municipal Law, and a majority of the board, upon becoming aware of that interest, acted promptly to disaffirm the contract. Landau v Percacciolo, 66 A.D.2d 80, 412 N.Y.S.2d 378, 1978 N.Y. App. Div. LEXIS 13907 (N.Y. App. Div. 2d Dep't 1978), aff'd, 50 N.Y.2d 430, 429 N.Y.S.2d 566, 407 N.E.2d 412, 1980 N.Y. LEXIS 2387 (N.Y. 1980).

Where a town supervisor has a prohibited conflict of interest in contracts relating to the maintenance of a town generator, it is possible that he would be required by a court to return to the town moneys received for services performed. 1982 Op St Compt No. 82-244, 1982 N.Y. Comp. LEXIS 488.

4. Sanctions

Defendants, the County of Putnam and the members of the Board of Supervisors of the county, are entitled to rescind a contract for the purchase of realty where it is established that a county officer had an undisclosed interest as a real estate broker in the performance of the contract in violation of section 803 of the General Municipal Law; despite the fact that the officer held no powers or duties with respect to the purchase of the land by the county, any undisclosed interest of a municipal officer or employee is prohibited by article 18 of the General Municipal Law and renders a contract willfully entered into by or with a municipality unenforceable. (General Municipal Law, § 804.) Furthermore, inasmuch as section 805 of the General Municipal Law provides that it is a misdemeanor for public officers and employees to willfully and knowingly neglect to disclose their interests, the statute's plain purpose of protecting the public is effectuated by inflicting criminal sanctions, and the legislative recognition of the criminality must be accompanied by the judicial refusal to enforce a contract which is derived from a criminal act. Landau v Percacciolo, 66 A.D.2d 80, 412 N.Y.S.2d 378, 1978 N.Y. App. Div. LEXIS 13907 (N.Y. App. Div. 2d Dep't 1978), aff'd, 50 N.Y.2d 430, 429 N.Y.S.2d 566, 407 N.E.2d 412, 1980 N.Y. LEXIS 2387 (N.Y. 1980).

A town supervisor has a prohibited interest in a contract of his spouse for the preparation of the annual financial report. The contract is void and payment of her voucher should not be approved by the town board. 1985 Op St Compt No. 85-9, 1985 N.Y. Comp. LEXIS 134.

Notes to Unpublished Decisions

1. Generally

Unpublished decision: Court was not persuaded that a contract is void under N.Y. Gen. Mun. Law § 804 only when a party to the relevant contract knows that the contract he or she is entering into violates N.Y .Gen. Mun. Law § 801. Lexjac, LLC v Bd. of Trs. of the Inc. Vill. of Muttontown, 708 Fed. Appx. 722, 2017 U.S. App. LEXIS 17439 (2d Cir. N.Y. 2017).

Agency Opinions

1. Remedies

When a town assessor acquires title to tax delinquent real property located within the town which he serves, it is a conflict of interest and such sale is void ab initio. 7 Op Counsel SBEA 41 (1979).

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

18A NY Jur 2d Civil Servants and Other Public Officers and Employees § 218.

26 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 473, 519, 523.

75 NY Jur 2d Libraries § 24.

Law Reviews:

Davies, Article 18 of New York's General Municipal Law: the state conflicts of interest law for municipal officials. 59 Alb. L. Rev. 1321.

Comment, Conflict of interests and the municipal employee. 20 Buff. L. Rev. 487.

§ 805-a. Certain action prohibited

1. No municipal officer or employee shall: a. directly or indirectly, solicit any gift, or accept or receive any gift having a value of seventy-five dollars or more, whether in the form of money, service, loan, travel, entertainment, hospitality, thing or promise, or in any other form, under circumstances in which it could reasonably be inferred that the gift was intended to influence him, or could reasonably be expected to influence him, in the performance of his official duties or was intended as a reward for any official action on his part;

b. disclose confidential information acquired by him in the course of his official duties or use such information to further his personal interests;

c. receive, or enter into any agreement, express or implied, for compensation for services to be rendered in relation to any matter before any municipal agency of which he is an officer, member or employee or of any municipal agency over which he has jurisdiction or to which he has the power to appoint any member, officer or employee; or

d. receive, or enter into any agreement, express or implied, for compensation for services to be rendered in relation to any matter before any agency of his municipality, whereby his compensation is to be dependent or contingent upon any action by such agency with respect to such matter, provided that this paragraph shall not prohibit the fixing at any time of fees based upon the reasonable value of the services rendered.

2. In addition to any penalty contained in any other provision of law, any person who shall knowingly and intentionally violate this section may be fined, suspended or removed from office or employment in the manner provided by law.

HISTORY:

Add, L 1970, ch 1019, § 2, eff July 1, 1970; amd, L 1987, ch 813, § 21, eff Dec 31, 1987.

Editor's Notes: Laws 1987, ch 813, § 1, eff Aug 7, 1987, provides as follows:

Section 1. Short title. Sections two through seventeen of this act shall be known and may be cited as the "Ethics in Government Act".

Notes to Decisions

Analysis

1. Generally
2. Constitutionality
3. Applicability
4. Municipal contractors
5. Municipal agents
6. Conflicts
7. Confidential information

1. Generally

Section 805-a of the General Municipal Law, which prohibits a municipal officer from accepting a gift under circumstances where the inference could be drawn that the gift was intended to influence the performance of his official duties, does not inflexibly mandate the discharge of an employee in violation of its proscriptions. Binghamton Civil Service Forum v Binghamton, 44 N.Y.2d 23, 403 N.Y.S.2d 482, 374 N.E.2d 380, 1978 N.Y. LEXIS 1791 (N.Y. 1978).

Donations given to city alderman to pay legal expenses he incurred by bringing legal proceeding in his individual capacity against another city official are "gifts" subject to restrictions of

CLS Gen Mun § 805-a. 2005 NY Ops Atty Gen 2005-10 (Informal), 2005 N.Y. Op. (Inf.) Att'y Gen. 10, 2005 N.Y. AG LEXIS 11.

Discussion of the question of a real estate attorney, who is active in the buying and selling of homes, serving on a village planning board. 1978 Op St Compt No. 78-774.

Discussion of propriety of village attorney's law firm appearing before agencies of village. 1985 Op St Compt No. 85-60, 1985 N.Y. Comp. LEXIS 83.

2. Constitutionality

Constitutionally valid General Municipal Law provision prohibiting municipal officer or employee from soliciting any gift was severable from constitutionally defective section prohibiting such officer or employee from accepting any gift having value of $25 or more under circumstances in which it could reasonably be inferred or expected that the gift was intended to influence him. People v Moore, 85 Misc. 2d 4, 377 N.Y.S.2d 1005, 1975 N.Y. Misc. LEXIS 3269 (N.Y. County Ct. 1975).

Other than the said statute, which has been declared unconstitutional by a lower court, there is no statute applicable state-wide which precludes a municipal officer or employee from accepting gifts from the general community in recognition of birthdays and other holidays. However, utmost discretion should be exercised in accepting such gifts. 1983 Op St Compt No. 83-64, 1983 N.Y. Comp. LEXIS 417.

3. Applicability

Acting as counsel to an organization representing property owners' interest while a member of a Rent Guidelines Board would constitute a violation of the ethics provisions of the General Municipal Law. 1984 NY Ops Atty Gen 84-F11, 1984 N.Y. AG LEXIS 24.

A member of a town planning board may not receive compensation to represent a party in an application before that board. A local government should act to prohibit such representation, whether with or without compensation. 1984 NY Ops Atty Gen 84-3 (Informal), 1984 N.Y. AG LEXIS 86.

Record supported removal of petitioner as member of board of education where (1) she sent complaint letter to State Education Department's Office of Vocational and Educational Services for Individuals with Disabilities (VESID) alleging that district was in violation of federal and state laws and regulations and requesting that VESID investigate respondent's special education programs, (2) documents that accompanied complaint letter contained student numbers, which were personal identifiers that district assigned to each student in order to access to variety of data in district's computer programs, (3) she sent those documents to various media sources and newspapers, and (4) even after board's attorney advised her that student numbers were considered confidential, she refused to disclose identity of persons to whom she had revealed student numbers, and she refused to return to respondent's attorney copies of documents containing student numbers obtained in her capacity as board member, thereby violating her duty to district and board; petitioner had no right to retain information or copies of documents that she obtained in course of her duties as board member, and she did not appeal respondent's actions, but unilaterally defied its directives. 2009 Op Comm Ed No. 15,964, 2009 NY Educ. Dept. LEXIS 111.

Board member's surreptitious taping and disclosure of executive sessions, and her unilateral disclosure of executive session material. violated her fiduciary duties as board member, her oath of office and General Municipal Law, despite her claim that she acted in interest of justice; while individual board members are free to express their opinions and to vote separately, only majority of board can relinquish protection afforded once executive session is convened. 2005 Op Comm Ed No. 15,315, 2005 NY Educ. Dept. LEXIS 153.

While no precise legal impropriety exists where a member of a town planning board is employed with a local engineering and surveying design firm which does 95— of the subdivision work reviewed by the board and where the duties of such employment are unrelated to the preparation of subdivision plans, ethical considerations militate against such individual continuing to serve on the planning board, and this is so notwithstanding the possible applicability of a town code of ethics. 1978 Op St Compt No.. 78-218.

While there is probably no prohibited conflict of interest under Article 18 of the General Municipal Law when a village building inspector and a village trustee develop property and construct buildings in a village, even though the building inspector must review and approve his own applications for building permits, such arrangement could be held to be inconsistent with the spirit of Article 18 and, therefore, void. In addition, there may be a violation of General Municipal Law, § 805-a(1)(c) or of the local Code of Ethics. 1980 Op St Compt No. 80-437.

4. Municipal contractors

Member of town planning board may not be compensated or enter into agreement to be compensated for preparation of test borings, data from which would be incorporated into subdivision maps and site plans to be presented to planning board for review. 1995 NY Ops Atty Gen 95-14 (Informal), 1995 N.Y. AG LEXIS 69.

Representation of town board by municipal attorney in matter before zoning board of appeals is not violation of CLS Gen Mun § 805-a(1)(c); zoning board of appeals has implied authority to employ legal services regarding matter. 1997 NY Ops Atty Gen 97-41 (Informal), 1997 N.Y. AG LEXIS 137.

Independent contractor who defends town in real property tax certiorari proceedings should not serve as deputy supervisor. 2000 NY Ops Atty Gen 2000-11 (Informal), 2000 N.Y. AG LEXIS 51.

Part-time assistant town attorney whose work is limited to matters relating to town plumber's examining board may represent private clients before other town agencies so long as compensation is fixed according to reasonable value of services rendered, rather than contingent on any agency action on matter before it, and so long as individual facts of any such representation do not create appearance of impropriety or violate common-law conflict of interest standards. 2003 NY Ops Atty Gen 2003-8 (Informal), 2003 N.Y. Op. (Inf.) Att'y Gen. 8, 2003 N.Y. AG LEXIS 10.

It would be a violation of the General Municipal Law § 805-a(1)(c), (2) if a town planning board member receives compensation as a land surveyor for services involving an application to this board, even if he disqualifies himself when the board considers the application. 1978 Op St Compt No. 78-318.

A planning board member is prohibited from receiving or agreeing to receive compensation for engineering services, such as percolation test and other design work for individuals who are subdividing their property, where such subdivision applications in the future could come before the planning board. Although there is no statutory prohibition against a planning board member performing uncompensated work in connection with such matter before the board, the board member should not participate in the discussion or vote on any such matter. 1990 Op St Compt No. 90-28, 1990 N.Y. Comp. LEXIS 35.

Member of county governing board who served as officer of 2 not-for-profit corporations, as well as director of one of those corporations, would have prohibited interest in contracts between county and either corporation, but must disclose any interest he may have in such contract under CLS Gen Mun § 803, and must avoid contravening statutory prohibitions against disclosure of confidential information and compensated appearances before county agencies under CLS Gen Mun § 805-a; furthermore, even if not required by county's code of ethics, county board member should not participate in county board discussions or decisions relating to county contracts with not-for profit corporations for which board member serves as officer, employee or director. 2001 Op St Compt No. 2001-9, 2001 N.Y. Comp. LEXIS 9.

5. Municipal agents

Provisions of CLS Gen Mun § 805-a were inapplicable to law firm employed as counsel for town as to firm's representation of town in matter before town's zoning board of appeals. Lake Anne Realty Corp. v Planning Bd., 172 Misc. 2d 972, 660 N.Y.S.2d 641, 1997 N.Y. Misc. LEXIS 253 (N.Y. Sup. Ct. 1997).

The attorney for a planning board may not represent a client before that board. 1987 NY Ops Atty Gen 87-67 (Informal), 1987 N.Y. AG LEXIS 42.

Counsel to city board of water supply may not represent developer in applications for subdivision approval before planning board and zoning board of appeals of city. 1992 NY Ops Atty Gen 92-54 (Informal), 1992 N.Y. AG LEXIS 55.

Architects serving on board of zoning appeals should not represent persons making their initial application for approval of construction with building department. 1994 NY Ops Atty Gen 94-51 (Informal), 1994 N.Y. AG LEXIS 48.

While it is not a conflict of interest under Article 18 where a member of a village board of trustees is an attorney whose firm stands to obtain business from a party which has an interest in an application submitted to the board for the approval of the construction of a microwave tower, nevertheless, a court could construe an affirmative vote of the board member as against public policy and invalidate the proceedings. It is recommended that the board member refrain from voting and from other board involvement concerning the application. 1982 Op St Compt No. 82-285, 1982 N.Y. Comp. LEXIS 439.

Comptroller of village which prepares its own assessment roll may maintain private tax certiorari practice limited to representing owners of property located outside village without violating CLS Gen Mun Art 18. 1992 Op St Compt No. 92-22.

Code of ethics may require member of municipal agency to represent that he or she will not agree to perform compensated services for applicant to agency until after agency approves application. 1997 Op St Compt No. 97-25, 1998 N.Y. Comp. LEXIS 26.

Attorney who is appointed town attorney, and possibly his or her law firm, may not perform compensated services for private clients in relation to any matter before any town agency for which town attorney serves as attorney, or any services for contingent compensation in relation to any matter before any town agency. 2000 Op St Compt No. 2000-22, 2000 N.Y. Comp. LEXIS 26.

6. Conflicts

There is no per se conflict of interest for the director of county planning to serve on the board of directors of a savings bank located within the county. However, that person should not take advantage of information acquired during the course of his public duties to benefit the bank, and that person should not participate in reviewing proposed zoning action involving property in which the bank has a financial interest. 1975 NY Ops Atty Gen Sept 8 (Informal), 1975 N.Y. AG LEXIS 158.

One person may simultaneously serve as a county legislator and as the Executive Director of the Adirondack Park Local Government Review Board so long as he avoids conflicts of interest in discrete situations as they may arise. 1981 NY Ops Atty Gen 81-101 (Informal), 1981 N.Y. AG LEXIS 51.

A retired teacher who receives retirement benefits under a collective bargaining agreement, and who retains the right to vote for union officials and to approve future collective bargaining agreements may not serve as a member of the school board in that school district. Furthermore, resignation from the union would not change our finding that a conflict of interest exists. 1985 NY Ops Atty Gen 85-33 (Informal), 1985 N.Y. AG LEXIS 64.

Prohibited conflict of interest exists when town employee charged with arranging tourist travel on behalf of town's senior citizens accepts free trip from travel agency that sponsors trip. 1987 NY Ops Atty Gen No. 87-18 (Informal), 1987 N.Y. AG LEXIS 97.

Attorney for planning board may not represent clients for compensation before that board; conflicts of interest may not be waived by planning board. 1993 NY Ops Atty Gen 93-36 (Informal), 1993 N.Y. AG LEXIS 35.

Receipt of free trip by teacher planning trip for students creates conflict of interest. 1995 NY Ops Atty Gen 95-10 (Informal), 1995 N.Y. AG LEXIS 10.

School board member does not have conflict of interest pursuant to CLS Gen Mun Law Art. 18 solely by virtue of either holding position in state teachers association or owning college entrance and counseling business, however, one or both activities may be regulated by school district's code of ethics. 1989 Op St Compt No. 89-24, 1989 N.Y. Comp. LEXIS 27.

Appointment of town supervisor's business partner to office of town comptroller, by itself, did not constitute prohibited conflict of interest, but supervisor and comptroller would have prohibited interest in contracts between town and partnership, unless exception in CLS Gen Mun § 802 applied; compensated appearances, or performance of other compensated services on behalf of clients of partnership in connection with matters before town may violate CLS Gen Mun § 805-a, depending on particular circumstances. 1998 Op St Compt No. 98-3, 1998 N.Y. Comp. LEXIS 3.

Attorney who is appointed town attorney would not have prohibited interest in pre-existing contract between town and his or her law firm, but attorney would be required to disclose his or her interest in contract, and attorney should also recuse him or herself from any matter affecting his or her law firm, with those functions instead being performed by deputy, if any. 2000 Op St Compt No. 2000-22, 2000 N.Y. Comp. LEXIS 26.

7. Confidential information

In tort action against board of education brought by principal who had been suspended from his position pending disciplinary hearing under CLS Educ § 3020-a, court properly denied board's motion to strike certain purportedly privileged letters under CLS CPLR § 4503 and CLS Gen Mun § 805-a, both of which prohibit disclosure of confidential information, since neither statute provides for such relief once documents are made public. Sullivan v Board of Education, 131 A.D.2d 836, 517 N.Y.S.2d 197, 1987 N.Y. App. Div. LEXIS 48280 (N.Y. App. Div. 2d Dep't 1987).

Removal of board of education member was not warranted based merely on conclusory assertions that he violated CLS Gen Mun § 805-a(1)(b) by disclosing confidential information. 1994 Op Comm Ed No. 13,132, 1994 NY Educ. Dept. LEXIS 45.

Board of education did not abuse discretion by refusing to disclose identity of a member who released confidential information in violation of General Municipal Law 805-a(1)(b). In re Teufel, Op Comm Ed No. 11,178.

In proceeding under CLS Educ § 306, petitioners' conclusory assertions did not provide basis to find that any board member revealed confidential information contained in special counsel's report to candidate for election to board in violation of CLS Gen Mun § 805-a(1)(b), where all board members stated in sworn affidavits that they never shared report with candidate, and candidate attested that no board member showed report to him. 1995 Op Comm Ed No. 13,314, 1994 NY Educ. Dept. LEXIS 227.

The applicability of the said statute when a town supervisor utilizes a town vendors list as a source of invitees for a fund raising affair depends upon whether the list is considered as "confidential information." 1982 Op St Compt No. 82-246, 1982 N.Y. Comp. LEXIS 480.

Electrical contractor who is chair of town planning board and performs work for private parties may not disclose confidential information acquired in course of his or her official duties, use such information to further his or her personal interests, or agree to be paid for electrical services rendered in relation to any matter which is pending or must be brought before planning board. 1993 Op St Compt No. 93-23.

Arrangement whereby recording secretary of town planning board is employed by consulting engineer who regularly represents developers in matters before planning board would not appear to raise questions as to potential prohibited interests in town contracts; however, secretary would be prohibited from performing services for engineering firm in relation to any matter before, or to come before planning board, and he or she would be prohibited from disclosing any confidential information acquired in course of his or her duties as secretary to planning board, or using any such information to further personal interests. 1997 Op St Compt No. 97-12, 1997 N.Y. Comp. LEXIS 7.

Statements made by a particular member of a Town Board to a representative of the news media in opposition to a bid on property received by the Board despite the Board's holding of an executive session, does not represent a violation of Public Officers Law § 98 but may be a violation of General Municipal Law § 805-a in that one may argue that the information under discussion in the executive session was "confidential" and the Town Board member's disclosure might have jeopardized the

Town's position in the bidding process. NY Comm Pub Acc Rec, OML—Ad Op 561.

Commissioner of Education's removal of a board member from his school board position was proper because he was removed for violating the statute by disclosing confidential information from a Board executive session, not as a result of allegedly protected speech, there was a break in the causal connection between his speech and the filing of the removal application, and he would have been removed despite his protected comments. Matter of Paladino v Board of Educ. for the City of Buffalo Pub. Sch. Dist., 183 A.D.3d 1043, 124 N.Y.S.3d 409, 2020 N.Y. App. Div. LEXIS 2937 (N.Y. App. Div. 3d Dep't 2020).

Agency Opinions

1. Confidential information

Matters properly discussed by board of education in executive session, although not public knowledge, were not "confidential" under CLS Gen Mun § 805-a(1)(b), and board member could not be prohibited from disclosing information acquired in executive sessions, since information is "confidential" only when government has no discretion and must withhold records or discuss matter in private, and matters appropriate for executive sessions could be discussed in open meetings at option of board; school district matters are "confidential" only rarely, e.g., when information involves student records or records subject to attorney-client privilege. Comm on Open Gov't OML-AO-3449.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

Law Reviews:

Davies, Article 18 of New York's General Municipal Law: the state conflicts of interest law for municipal officials. 59 Alb. L. Rev. 1321.

§ 806. Code of ethics

1. (a) The governing body of each county, city, town, village, school district and fire district shall and the governing body of any other municipality may by local law, ordinance or resolution adopt a code of ethics setting forth for the guidance of its officers and employees the standards of conduct reasonably expected of them. Notwithstanding any other provision of this article to the contrary, a fire district code of ethics shall also apply to the volunteer members of the fire district fire department. Codes of ethics shall provide standards for officers and employees with respect to disclosure of interest in legislation before the local governing body, holding of investments in conflict with official duties, private employment in conflict with official duties, future employment and such other standards relating to the conduct of officers and employees as may be deemed advisable. Such codes may regulate or prescribe conduct which is not expressly prohibited by this article but may not authorize conduct otherwise prohibited. Such codes may provide for the prohibition of conduct or disclosure of information and the classification of employees or officers.

(b) Effective on and after January first, nineteen hundred ninety-one, such codes of political subdivisions, as defined in section eight hundred ten of this article, may contain provisions which require the filing of completed annual statements of financial disclosure with the appropriate body, as defined in section eight hundred ten of this article. Nothing herein shall be construed to restrict any political subdivision or any other municipality from requiring such a filing prior to January first, nineteen hundred ninety-one. Other than as required by subdivision two of section eight hundred eleven of this article, the governing body of any such political subdivision or other municipality may at any time subsequent to the effective date of this paragraph, adopt a local law, ordinance or resolution pursuant to subdivision one of section eight hundred eleven of this article and any such political subdivision or municipality, acting by its governing body, may take such other action as is authorized in such subdivision. Any political subdivision or other municipality to which all of the provisions of section eight hundred twelve of this article apply may elect to remove itself from the ambit of all (but not some) provisions of such section in the manner authorized in subdivision three of such section eight hundred twelve. In such event any such political subdivision or municipality shall be subject to certain conditions and limitations set forth in paragraphs (a), (b) and (c) of such subdivision three which shall include, but not be limited to, the promulgation of a form of an annual statement of financial disclosure described in subdivision one of such section eight hundred eleven.

2. The chief executive officer of a municipality adopting a code of ethics shall cause a copy thereof to be distributed to every officer and employee of his municipality. The fire district commissioners shall cause a copy of the fire district's code of ethics to be posted publicly and conspicuously in each building under such district's control. Failure to distribute any such copy or failure of any officer or employee to receive such copy shall have no effect on the duty of compliance with such code, nor the enforcement of provisions thereof.

3. [Repealed]

HISTORY:

Add, L 1964, ch 946, § 2; amd, L 1969, ch 646, § 2, eff Sept 1, 1969; L 1970, ch 1019, § 3, eff July 1, 1970; L 1987, ch 813, §§ 10, 11, eff Jan 1, 1989; L 1989, ch 813, § 10, eff Jan 1, 1989; L 2006, ch 238, § 1, eff June 1, 2006 (see 2006 note below); L 2014, ch 490, § 3, effective December 17, 2014.

Editor's Notes: Laws 1964, ch 946, §§ 1 and 13–17, provide as follows:

Section 1. Declaration of policy and purpose. As government becomes increasingly complex, as our democratic processes draw citizens from every walk of life, there is increasing need for known standards of ethical conduct as a guide for public officers. These standards must rest primarily on personal integrity and on community vigilance: law cannot in itself create moral fiber, nor can law quicken the civic conscience. In support of these basic standards, it is the purpose of this chapter to define areas of conflicts of interest in municipal transactions, leaving to each community the expression of its own code of ethics.

The need for the statute does not spring from widespread malfeasance on the part of municipal officers; rather, the Legislature recognizes their integrity as a group, their culpability in only a few instances. But lest the few brand the many, the discernment of the offending case must be made certain, its elimination sure. Existing law is too complex, too inconsistent, too overgrown with exceptions, for such a clarity of understanding to be possible. Basic concepts must be retained, but something more than recodification is needed.

There is another and equally important objective: a formula of conduct which is not only clear but reasonable, one which will permit governmental employees to share the normal benefits of the democratic society and economy they serve. If government is to attract and hold competent administrators, public service must not require a complete divesting of all proprietary interests. Real conflict must be rooted out, without condemning the inconsequential.

The chapter, then, has a trinity of purposes: to protect the public from municipal contracts influenced by avaricious officers, to protect innocent public officers from unwarranted assaults on their integrity and to encourage each community to adopt an appropriate code of ethics to supplement this chapter. The Legislature declares that each purpose is a matter of State concern and adopts the following chapter accordingly, with the intention that it shall be the generic law in relation to conflicts of interest in municipal transactions, not to be superseded by local law of any municipality subject to its provisions.

§ 13. Laws superseded. The provisions of article eighteen of the general municipal law, as added by this act, shall supersede any local law, charter, ordinance, resolution, rule or regulation of any municipality to the extent that such local law, charter, ordinance, resolution, rule or regulation is inconsistent with the provisions thereof. No local law, ordinance, resolution, rule or regulation shall modify or dispense with any provision of article eighteen of the general municipal law, as added by this act; provided, however, that nothing herein contained shall prohibit a code of ethics adopted pursuant thereto from supplementing the provisions of this act.

§ 14. Pending actions and proceedings. No action or proceeding pending at the time when this act shall take effect shall be affected by any provision of this act, but the same may be prosecuted, defended or enforced as if this act had not been enacted.

§ 15. Existing rights and remedies preserved. No existing right or remedy of any character shall be lost, impaired or affected by reason of this act, nor shall the validity of any action taken by any public official under the law in force immediately prior to the time this act shall take effect be affected by the enactment of this act.

§ 16. Laws repealed. Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is hereby repealed.

§ 17. Effective date. This act shall take effect September first, nineteen hundred sixty-four.

Laws 1987, ch 813, § 1, eff Aug 7, 1987, provides as follows:

Section 1. Short title. Sections two through seventeen of this act shall be known and may be cited as the "Ethics in Government Act".

Amendment Notes: The 2014 amendment by ch 490, § 3, deleted 3.

Notes to Decisions

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1. Generally

Federal Election Campaign Act (2 USCS §§ 453 et seq.) does not preempt New York City Charter's conflict of interest rules, or limit jurisdiction of New York City Conflicts of Interest Board over ethical violations allegedly committed by New York City Comptroller. Holtzman v Oliensis, 91 N.Y.2d 488, 673 N.Y.S.2d 23, 695 N.E.2d 1104, 1998 N.Y. LEXIS 1020 (N.Y. 1998).

In enacting section 806 of the General Municipal Law, which mandates the governing body of each county, city, town, village and school district, and authorizes the governing body of any other municipality, to adopt a code of ethics setting forth standards of conduct for its officers and employees with respect to specified matters "and such other standards relating to the conduct of officers and employees as may be deemed advisable", and also provides that such codes "may regulate or prescribe conduct which is not expressly prohibited by this article . . . [and] may provide for the prohibition of conduct", the State has clearly expressed an intention not to occupy the field of ethical standards for officers and employees of local governments. Belle v Town Bd. of Onondaga, 61 A.D.2d 352, 402 N.Y.S.2d 677, 1978 N.Y. App. Div. LEXIS 9745 (N.Y. App. Div. 4th Dep't 1978).

One person may not simultaneously serve as a member of a board of trustees of a community college and as an adjunct professor at that college. 1981 NY Ops Atty Gen 81-102 (Informal), 1981 N.Y. AG LEXIS 49.

A local government should include in its code of ethics standards that define and prohibit private conduct in conflict with official duties. Where substantial conflicts are inevitable, a town should act to prohibit a director of real property tax services from engaging in business as a real estate broker in the county. 1984 NY Ops Atty Gen 84-58 (Informal), 1984 N.Y. Op. Att'y Gen. No. 84-58, 1984 N.Y. AG LEXIS 28.

A private secretary to the town attorney who is also a member of the town board should avoid participating in matters affecting the employment, salary, and other conditions of employment, of the town attorney and in decisions on advice offered by the town attorney. Further, if these situations occur pervasively the person should not hold both positions. 1984 NY Ops Atty Gen 84-34 (Informal), 1984 N.Y. AG LEXIS 56.

A local government should include in its code of ethics standards that define and prohibit private conduct in conflict with official duties. Where substantial conflicts are inevitable, a town should act to prohibit assessors from engaging in the business of home construction in the town. 1984 NY Ops Atty Gen 84-11 (Informal), 1984 N.Y. AG LEXIS 82.

Prohibited conflict of interest exists when town employee charged with arranging tourist travel on behalf of town's senior citizens accepts free trip from travel agency that sponsors trip. 1987 NY Ops Atty Gen No. 87-18 (Informal), 1987 N.Y. AG LEXIS 97.

Members of city council with disqualifying conflicts of interests should recuse themselves from participating in proposed legislation which would amend city's electrical code and plumbing code. 1992 NY Ops Atty Gen 92-59 (Informal), 1992 N.Y. AG LEXIS 66.

Member of city council had to recuse himself from participating in any matter concerning salary of her husband (city firefighter) and terms and conditions of his employment. 1992 NY Ops Atty Gen 92-61 (Informal), 1992 N.Y. AG LEXIS 68.

Official of municipality may have private financial interest provided that interest does not violate provisions of state law or provisions of municipality's code of ethics. 1993 NY Ops Atty Gen 93-19 (Informal), 1993 N.Y. AG LEXIS 22.

School district may include, within its code of ethics, prohibition on gifts to officers and employees of district that is more stringent than provisions of state law. 1999 NY Ops Atty Gen 99-16 (Informal), 1999 N.Y. AG LEXIS 16.

Municipality need not limit itself to provisions of CLS Gen Mun Art 18 in its adoption of code of ethics. 2005 NY Ops Atty Gen 2005-10 (Informal), 2005 N.Y. Op. (Inf.) Att'y Gen. 10, 2005 N.Y. AG LEXIS 11.

Respondent board members' good faith efforts to test scope of CLS Gen Mun Art 18 was not basis for finding that they willfully violated law when they adopted code of ethics containing 4

unlawful provisions, and thus commissioner denied petition for their removal under CLS Educ § 306 and granted their request to certify under CLS Educ § 3811(1) that they appeared to have exercised their powers and performed their duties in good faith. 1998 Op Comm Ed No. 13,914, 1998 NY Educ. Dept. LEXIS 236.

While municipalities are mandated by law to adopt codes of ethics, the establishment of a board of ethics is permissive. 1976 Op St Compt No. 76-175.

A code of ethics must contain standards of conduct relating to matters enumerated in the said statute. Otherwise, the governing body may include any provisions it deems advisable provided that there is no inconsistency with General Municipal Law, article 18. 1982 Op St Compt No. 82-189, 1982 N.Y. Comp. LEXIS 534.

A member of a public library board of trustees does not have an interest in a contract between the library and an architectural firm which employs the board member's daughter, but the board member should recuse himself or herself from any discussions and votes on matters relating to the contract. A public library may adopt a code of ethics which should provide standards of conduct in relation to, among other things, contracts between the library and firms which employ relatives of library officers and employees. 1991 Op St Compt No. 91-26, 1991 N.Y. Comp. LEXIS 24.

County code of ethics may not prohibit county officials from serving as members of boards of not-for-profit agencies with which county contracts (such prohibition would be inconsistent with CLS Gen Mun # 802(l)(f)), but code may prohibit county officials from participating in discussion and vote on contracts with not-for-profit agencies for which they serve. 1992 Op St Compt No. 92-30, 1992 N.Y. Comp. LEXIS 17.

Local legislative body has statutory authority to prohibit legislator from disclosing matters discussed in executive session. 2000 NY Ops Atty Gen 2000-2 (Informal), 2000 N.Y. AG LEXIS 67.

2. Applicability

Respondent properly interpreted New York City Charter's conflict of interest provisions as applying to comptroller's imposition of "quiet period," during which she and her staff could have no communications with firms that responded to request for proposals (RFP) for selection of new co-management team to underwrite city's general obligations and water bonds, as comptroller thereby obtained advantage through her public office in that she had debtor-creditor relationship with bank that responded to RFP and she deferred collection of her debt to bank during pendency of selection process. Holtzman v Oliensis, 91 N.Y.2d 488, 673 N.Y.S.2d 23, 695 N.E.2d 1104, 1998 N.Y. LEXIS 1020 (N.Y. 1998).

In upholding respondent's determination that comptroller was guilty of ethical violations, court properly dismissed argument that comptroller's conduct was exempt from conflict of interest rules pursuant to New York City Charter § 2604(c)(3), which states that public servant is not prohibited from obtaining loan from any financial institution on terms and conditions available to general public, as comptroller was sanctioned for failing to recuse herself from selection of new co-management team to underwrite city obligations after bank with which she had debtor-credit relationship responded to her request for proposals (RFP), not for obtaining loan, and for availing herself of "quiet period" during which she and her staff could have no communications with firms that applied, thereby delaying her payment on loan. Holtzman v Oliensis, 91 N.Y.2d 488, 673 N.Y.S.2d 23, 695 N.E.2d 1104, 1998 N.Y. LEXIS 1020 (N.Y. 1998).

Town board's determination that Superintendent of Water and Sewer Department had violated code of ethics by accepting stereo as gift from chemical supplier and then replacing chemicals of other suppliers with donor's chemicals and that superintendent had been derelict and incompetent in the performance of his official duties in failing to notify town supervisor or county health department of fact that malfunctioning pumping station was causing raw sewage to be dumped into river was supported by substantial evidence. Merrin v Town Board of Kirkwood, 48 A.D.2d 992, 369 N.Y.S.2d 878, 1975 N.Y. App. Div. LEXIS 10299 (N.Y. App. Div. 3d Dep't 1975).

While it is doubtful that a material benefit would enure to a Village Trustee by virtue of the granting of a special permit by the Village Board of Trustees to an applicant who is the landlord of such Trustee simply because such Trustee, as a tenant, may thereupon become entitled to use the recreational facility to be constructed by his landlord, it is recommended that disclosure of such possible interest be made and that the Village Code of Ethics be examined and the question submitted to the County Board of Ethics, provided one has been established by the County. 1973 NY Ops Atty Gen March 6 (Informal), 1973 N.Y. AG LEXIS 43.

Matters relating to the Judiciary in the State of New York are of State concern and Chapter VIII, section 90, subdivision 5, of the Ordinances of the City of Buffalo relating to disclosures by certain officers or employees of the City of Buffalo does not apply to a Judge of the City Court of Buffalo. 1975 NY Ops Atty Gen Feb 20 (Informal), 1975 N.Y. AG LEXIS 73.

Local government is authorized to include in its code of ethics standards regulating appearances before municipality by officers and employees after they have left government service. 1988 NY Ops Atty Gen No. 88-2 (Informal), 1988 N.Y. AG LEXIS 2.

The town justice is an officer of the town. 1990 NY Ops Atty Gen 90-46 (Informal), 1990 N.Y. AG LEXIS 31.

Pending litigation against municipal board or board members does not as matter of law require that board members recuse themselves in separate application by party that commenced lawsuit; however, recusal may be appropriate in particular cases. 2000 NY Ops Atty Gen 2000-22 (Informal), 2000 N.Y. AG LEXIS 62.

Petitioners, two board members, seek a determination annulling that part of the code of ethics adopted by the Board of Education which prohibits board members from voting on employment contracts of their spouses. Sections 800(3) of the General Municipal Law carves out an exception to the conflict of interest rule that prohibits a board member from having an interest in any contract of a spouse which the board has the power or duty to negotiate, authorize, or approve. By expressly exempting spousal contracts from § 801's prohibition against conflicts of interest, the Legislature has adjudged it permissible for a school board member to vote on the employment contract of a spouse. The Board of Education may not override this plain intent by enacting ethical codes at odd with the General Municipal Law. The Board of Education's prohibition is also inconsistent with § 3016(2) of the Education Law, which allows school districts to employ as teachers a relative of board members, so long as such employment is approved by two-thirds of the members of the board. Conspicuously absent from this provision is any restriction on the exercise of power by board members whose spouses are employed by the district as teachers. The reasonable inference drawn from this omission is that the Legislature did not intend to restrict board members from voting on their spouses' employment contracts. By enacting a standard which does precisely that, the Board of Education has contravened the plain intent of § 3016, and has, in effect, prevented certain board members from substantially performing the duties of office. Accordingly, the provision of the Board of Education's ethics code which prohibit board members from voting on the employment contract of their spouses is an excess of the authority of the Board of Education, and is null and void. 1991 Op Comm Ed No. 12,447.

The City of Batavia code of ethics may not, by local legislation, be made applicable to the officers and employees of the Batavia Urban Renewal Agency or the Batavia Housing Authority. 1969 Op St Compt No. 69-649.

The county code of ethics is inapplicable to the members, officers and employees of the county industrial development agency. 1973 Op St Compt No. 73-919.

A city code of ethics does not have application to a physician who is an employee of a professional corporation which contracts with a city hospital for pathology services. 1978 Op St Compt No. 78-825.

While there is probably no prohibited conflict of interest under Article 18 of the General Municipal Law when a village building inspector and a village trustee develop property and construct buildings in a village, even though the building inspector must review and approve his own applications for building permits,

such arrangement could be held to be inconsistent with the spirit of Article 18 and, therefore, void. In addition, there may be a violation of General Municipal Law, § 805-a(1)(c) or of the local Code of Ethics. 1980 Op St Compt No. 80-437.

The propriety of a County Assistant Sealer of Weights and Measures engaging in the business of selling to merchants weighing devices which are subject to inspection (after purchase by the merchants) by the County Office of Sealer of Weights and Measures, is a matter for local determination. 1980 Op St Compt No. 80-697.

A member of a town board who, as a renter of a house located on a parcel of property for which re-zoning is sought, would be forced to re-locate if the zoning change is granted, is not legally precluded from voting on the application. However, the town code of ethics may be pertinent. 1982 Op St Compt 82-200, 1982 N.Y. Comp. LEXIS 727.

Town's code of ethics does not apply to officers and employees of fire district located within town, and town's board of ethics may not act with respect to officers and employees of fire district located within town. 1989 Op St Compt No. 89-20, 1989 N.Y. Comp. LEXIS 23.

3. Authority of board

A local government, through enactment of a local law, may grant to its board of ethics the authority to receive complaints alleging violations of ethics regulations, to investigate these complaints, and to conduct investigations on its own initiative as to whether violations of ethics standards have occurred; moreover, the board may be given enforcement authority and the local law may provide for the administering of penalties. 1991 NY Ops Atty Gen 91-68 (Informal), 1991 N.Y. AG LEXIS 80.

CLS High § 140(4) does not prohibit town board from enacting ethics regulation prohibiting officers and employees from hiring relatives. 1993 NY Ops Atty Gen 93-48 (Informal), 1993 N.Y. AG LEXIS 65.

A village board of ethics may not be authorized by local legislation to render opinions at the request of the general public. 1974 Op St Compt No. 74-583.

Failure of a municipality to advise the State Comptroller of the establishment of a board of ethics does not affect the legality of the board or of acts performed by it. 1974 Op St Compt No. 74-719.

Town's code of ethics does not apply to officers and employees of fire district located within town, and town's board of ethics may not act with respect to officers and employees of fire district located within town. 1989 Op St Compt No. 89-20, 1989 N.Y. Comp. LEXIS 23.

4. Filing and distribution

Alleged failure to serve copy of code of ethics on town employee did not excuse employee from complying with code nor did it affect enforcement of code's provisions. Merrin v Town Board of Kirkwood, 48 A.D.2d 992, 369 N.Y.S.2d 878, 1975 N.Y. App. Div. LEXIS 10299 (N.Y. App. Div. 3d Dep't 1975).

The filing of a municipal or school district code of ethics with the State Comptroller, as required by the said statute, is not a prerequisite to the validity thereof. 1978 Op St Compt No. 78-245.

5. Appointment of municipal officials

No patent conflict of interest ensues from the appointment of a licensed real estate broker to the office of town assessor. A member of a town board may be appointed by that board to the town board of assessment review in accordance with Real Property Tax Law § 1524. 1972 NY Ops Atty Gen Apr 6 (Informal), 1972 N.Y. AG LEXIS 81.

An attorney may be appointed school district attorney even though the attorney's spouse is a member of the board of education of the school district. The authorization contained in General Municipal Law § 800 subdivision 3 constitutes a waiver of the prohibition of such a contract when the contract relates to a spouse of a board member; it is so broad in its terms that there is no reason why the spouse of the attorney may not vote upon the question of the attorney's employment and upon matters relating to the attorney's salary and/or expense vouchers. 1977 NY Ops Atty Gen Dec 27 (Informal), 1977 N.Y. AG LEXIS 370.

A town councilman simultaneously may hold a position with the county purchasing department of the county within which the town lies. 1980 NY Ops Atty Gen Oct. 21 (Informal), 1980 N.Y. AG LEXIS 51.

One person simultaneously may hold the two village offices of building inspector and village engineer. 1981 NY Ops Atty Gen June 2 (Informal), 1981 N.Y. AG LEXIS 74.

A village code of ethics may include a provision barring any village officer or employee from appearing before a board or commission on behalf of a client if such former officer or employee was instrumental in the appointment of a member of the board or commission, although the enforceability of such a provision is open to question. 1974 Op St Compt No. 74-583.

When a town assessor also is a land developer, contractor, home builder and realtor; whether any given transaction results in a statutory conflict of interest depends upon the facts. Whether it is advisable for a town board to appoint such a person as town assessor when there is a potential for lawsuits by him against the town involving his business undertakings, is questionable, but for determination by the town board. 1981 Op St Compt No. 81-64, 1981 N.Y. Comp. LEXIS 825.

Appointment of town supervisor's business partner to office of town comptroller, by itself, did not constitute prohibited conflict of interest, but supervisor and comptroller would have prohibited interest in contracts between town and partnership, unless exception in CLS Gen Mun § 802 applied; compensated appearances, or performance of other compensated services on behalf of clients of partnership in connection with matters before town may violate CLS Gen Mun § 805-a, depending on particular circumstances. 1998 Op St Compt No. 98-3, 1998 N.Y. Comp. LEXIS 3.

6. Attorneys subject to code of ethics

Where a Village Urban Renewal Agency is represented by counsel other than the Village Attorney no conflict of interest prohibited by the General Municipal Law will result from the Village Attorney representing clients whose real property is being acquired by the Agency whether by negotiation or condemnation. However, in view of the dependency of the Agency upon the village and the cooperation necessary between the officers and employees of both, questions of professional ethics may arise. 1969 NY Ops Atty Gen Dec 15 (Informal), 1969 N.Y. AG LEXIS 111.

In the absence of a provision in the retainer agreement, the town code of ethics can and may govern private practice of a special town counsel and the county board of ethics may issue opinions as to propriety of such practice. 1971 NY Ops Atty Gen Aug 24 (Informal), 1971 N.Y. AG LEXIS 105.

The attorney for a county sewer district who is later elected to the position of part-time district attorney and who intends to hold both positions, must make a disclosure of interest under section 803 of Article 18 of the General Municipal Law. 1983 NY Ops Atty Gen 83-45 (Informal), 1983 N.Y. Op. Att'y Gen. No. 83-45, 1983 N.Y. AG LEXIS 49.

A community college sponsored by a county is considered as an agency of the county. A county legislator would be in violation of the county code of ethics should the law firm of which he is a partner represent a client involved in litigation against the county community college. 1974 Op St Compt No. 74-768.

There is no legal prohibition against an attorney, who is a village trustee, accepting a fee for work done in representing a private client in an action against the village prior to the time he assumed office. 1980 Op St Compt No. 80-421.

7. Contract interests

School board member who voted to approve paid services of insurance consultant with whom he had preexisting fee sharing arrangement, and voted to approve contracts with insurance provider from which he benefited financially, while supposedly acting under CLS Educ § 1709(34-a), was properly charged with official misconduct where grand jury evidence indicated that he was aware of his statutory duties, including his ethical obligation to perform those duties free from conflicts and disclose such conflicts; mere fact that conduct charged was also prohibited by rules of ethical conduct adopted by school board under CLS Gen Mun § 806 did not preclude criminal prosecution. People v Lynch,

176 Misc. 2d 430, 674 N.Y.S.2d 894, 1998 N.Y. Misc. LEXIS 117 (N.Y. County Ct. 1998).

No conflict of interest results from the designation of a bank as a depository of a county sewer district even though one member of said district is also a member of the Advisory Board of a branch of said bank and another member of said district is the President in charge of a branch of said bank, provided that neither of them is the chief fiscal officer, treasurer, or his deputy or employee of the sewer district. However, disclosure of interest must be made in accordance with General Municipal Law § 803. 1972 NY Ops Atty Gen Nov 2 (Informal), 1972 N.Y. AG LEXIS 154.

Under the above sections a prohibited conflict of interest would not arise if the appointive Zoning Inspector for the Town of Rochester sold a gravel bank to the Town, provided that full disclosure was made of such transaction and that such sale was not violative of the Code of Ethics adopted by the Town of Rochester. 1973 NY Ops Atty Gen Feb 27 (Informal), 1973 N.Y. AG LEXIS 37.

A contracting firm, in which a town police commissioner is the majority stockholder, may bid upon, or accept local contracts upon which no bid is required, so long as the commissioner does not have a municipal function defined in General Municipal Law, § 801. Compliance should be had with the applicable code of ethics of the town established by General Municipal Law § 806. Interpretations of the code may be requested of the board of ethics of Westchester County if such a board has been established under General Municipal Law § 808. 1974 NY Ops Atty Gen Nov 18 (Informal), 1974 N.Y. AG LEXIS 180.

A prohibited conflict of interest under section 801 of the General Municipal Law does not arise when a county civil service commissioner receives a pecuniary benefit as the result of services performed for an insurance agency relating to a contract which the agency has with the county in which the commissioner serves. 1975 NY Ops Atty Gen May 8 (Informal), 1975 N.Y. AG LEXIS 115.

County Law, § 214(2) requires the publication of the complete text of each local law, and there is no statutorily prohibited conflict of interest where a member of the Orleans County Planning Board has a contract with the County for the disposition of solid waste material in a landfill. 1978 NY Ops Atty Gen August 7 (Informal), 1978 N.Y. AG LEXIS 340.

A retired teacher who receives retirement benefits under a collective bargaining agreement, and who retains the right to vote for union officials and to approve future collective bargaining agreements may not serve as a member of the school board in that school district. Furthermore, resignation from the union would not change our finding that a conflict of interest exists. 1985 NY Ops Atty Gen 85-33 Informal), 1985 N.Y. AG LEXIS 64.

Building contractor who undertakes construction work in town should not serve as that town's code enforcement officer. 1989 NY Ops Atty Gen 89-22 (Informal), 1989 N.Y. AG LEXIS 24.

Local law which would prohibit award of municipal contracts to persons who have made political contributions to town officials or candidates for town office is preempted by state law. 1995 NY Ops Atty Gen 95-46 (Informal), 1995 N.Y. AG LEXIS 103.

Local government is not authorized to enact local legislation requiring written disclosure of political contributions by vendors and private businesses that enter contracts to perform county work; such subject has been preempted by provisions of election law. 1998 NY Ops Atty Gen 98-3 (Informal), 1998 N.Y. AG LEXIS 3.

Code of ethics may require member of municipal agency to represent that he or she will not agree to perform compensated services for applicant to agency until after agency approves application. 1997 Op St Compt No. 97-25, 1998 N.Y. Comp. LEXIS 26.

Generally, elective county corner, who is also funeral director, would not have prohibited interest in contract if he or she submitted bills to county department of social services for payment of costs of burying deceased public assistance recipient; 10 Opns St Compt 1954, p 217 superseded to extent inconsistent with this opinion. 1998 Op St Compt No. 98-5, 1998 N.Y. Comp. LEXIS 5.

8. Employment conflicts; assessors

Evidence supported determination that comptroller obtained personal advantage from imposition of "quiet period" during which (to avoid appearance of bias or preferential treatment) she and her staff could have no communications with firms that responded to request for proposals (RFP) for selection of new co-management team to underwrite city's general obligations and water bonds, where she had debtor-creditor relationship with bank that responded to RFP, she did not recuse herself from participation in selection process or disclose her debtor-creditor relationship with bank, and she was able to defer repayment of loan during quiet period. Holtzman v Oliensis, 91 N.Y.2d 488, 673 N.Y.S.2d 23, 695 N.E.2d 1104, 1998 N.Y. LEXIS 1020 (N.Y. 1998).

The fact that one engages in the contracting business within a city does not disqualify such person from being an assessor in said city, provided, however, that such person does not participate in the assessment of property upon which he has performed any contracting work. 1975 NY Ops Atty Gen March 3 (Informal), 1975 N.Y. AG LEXIS 82.

The question of whether or not an individual who is an active real estate broker in the Town of Brunswick and is also involved in residential construction in that township ought to be barred from serving on that Town's Board of Assessment Review because of possible conflicts of interest is primarily a consideration involving a question of ethics, and, there being no express statutory proscription against simultaneous involvement in these endeavors, should be decided by applying the local code of ethics and, if necessary, referring such question to an appropriate local board of ethics. 1978 NY Ops Atty Gen Jan 25 (Informal), 1978 N.Y. AG LEXIS 252.

The simultaneous holding of the two positions of clerk of the board of assessors and member of the board of assessors (or sole assessor) by the same person would constitute an incompatibility in function and a conflict of interest and if a clerk is successful in a campaign for election as assessor she must then choose which of the positions she wishes to hold; she cannot hold both at the same time. 1979 NY Ops Atty Gen Oct 18 (Informal), 1979 N.Y. AG LEXIS 24.

One person may simultaneously serve as an elected town assessor and as a village justice or village zoning officer, unless prohibited by the local code of ethics. 1983 NY Ops Atty Gen 83-53 (Informal), 1983 N.Y. Op. Att'y Gen. No. 83-53, 1983 N.Y. AG LEXIS 38.

Village tax assessor should not engage in business as real estate broker in the village. 1986 NY Ops Atty Gen 86-66 (Informal), 1986 N.Y. AG LEXIS 20.

Village assessor may act as part-time consultant to neighboring city's assessment department; part-time appraisal consultant to city is independent contractor and therefore not subject to rules governing compatibility of office. 1988 NY Ops Atty Gen 88-52 (Informal), 1988 N.Y. AG LEXIS 57.

A member of the city council must recuse herself from participating in a matter concerning the salary and terms and conditions of employment of her son who serves as the head of the department of public works. 1992 NY Ops Atty Gen 92-18 (Informal), 1992 N.Y. AG LEXIS 19.

It is conflict of interest for assessor to represent, in his or her private capacity, taxpayer in another town where that taxpayer also owns property within assessor's jurisdiction. 1995 NY Ops Atty Gen 95-7 (Informal), 1995 N.Y. AG LEXIS 7.

Positions of county treasurer and sole appointed town assessor are incompatible; positions of county treasurer and school board member are compatible. 2002 NY Ops Atty Gen 2002-21 (Informal), 2002 N.Y. Op. (Inf.) Att'y Gen. 21, 2002 N.Y. AG LEXIS 54.

It is questionable whether there is statutory authority for a central school district board of education to adopt, as policy, a rule which would prohibit relatives of members of the board of education from holding non-teaching positions with the school district. 1981 Op St Compt No. 81-395, 1981 N.Y. Comp. LEXIS 489.

Any firefighter who is also licensed as public adjuster should review municipal code of ethics, if any, for particular municipality and his or her department's policies; firefighter who is found by

municipality or fire department to have engaged in violation of municipal code of ethics or fire department policy, respectively, could be found by Superintendent to be acting in untrustworthy manner under CLS Ins § 2110. NY Ins Dept Gen Counsel Op No. 05-05-04, 2005 NY Insurance GC Opinions LEXIS 106.

9. —Police

Whether active participation of a town or village police officer in a "watch guard or patrol agency" presents a conflict of interest is a matter governed by article 18 of the General Municipal Law and the regulations of the police department involved. 1973 NY Ops Atty Gen March 5 (Informal), 1973 N.Y. AG LEXIS 40.

Although there appears to be no statutorily prohibited conflict of interest, the operation of a collection agency by a village police officer is fraught with the possibility of abuse. 1973 NY Ops Atty Gen Sept 24 (Informal), 1973 N.Y. AG LEXIS 111.

Police officers may not act as security guards in potentially volatile strike situation. 1985 NY Ops Atty Gen 85-45 (Informal), 1985 N.Y. AG LEXIS 53.

There is no statutory prohibition against a village police chief (or village clerk) conducting the business of licensed private investigator. However, the applicability of the village code of ethics should be ascertained. 1980 Op St Compt No. 80-126.

10. —County officials

Positions of county legislator and senior clerk of county board of elections were incompatible, and thus one person could not occupy both positions, since legislator would be in position to vote on budget and personnel of board of elections, as well as salary of commissioners who were clerk's supervisors and who could remove clerk at their pleasure; such conflict could not be ameliorated by legislator recusing herself from any votes on budget of board of elections since budget was established in consideration of needs of other county agencies and departments and resources of county, so that legislator would have to recuse herself from entire budgetary process to remove any suggestion of conflict of interest or appearance of impropriety, which would deprive constituents of voice in significant aspect of legislature's responsibilities. Dupras v County of Clinton, 213 A.D.2d 952, 624 N.Y.S.2d 309, 1995 N.Y. App. Div. LEXIS 3343 (N.Y. App. Div. 3d Dep't 1995).

The two offices of Mayor of the Village of Malone and Financial Advisor to the Franklin County Board of Legislators, when held by the same person at the same time, are not incompatible per se. 1974 NY Ops Atty Gen Jan 22 (Informal), 1974 N.Y. AG LEXIS 31.

The two offices of Trustee of the Village of Cold Springs and Assistant County Attorney of Putnam County, when held by the same person at the same time, are not incompatible per se; and, whenever the Assistant County Attorney would be required to participate in any legal matter relating to the Village, the County should be represented by the County Attorney or another Assistant County Attorney, if any, in such matter. 1974 NY Ops Atty Gen May 3 (Informal), 1974 N.Y. AG LEXIS 78.

Under New York State Constitution Art IX § 1 and the Municipal Home Rule Law § 33, the Niagara County Charter may provide for the abolishment of the office of County Treasurer and the creation of the elective office of Commissioner of Finance, who would also be the Chief Accounting and Auditing Officer of the County of Niagara, provided that none of the duties to be performed by such Commissioner of Finance would be conflicting and subordinate to each other per se and provided that the County of Niagara is protected in its fiscal matter by an independent audit by a certified public accountant. 1974 NY Ops Atty Gen Aug 6 (Informal), 1974 N.Y. AG LEXIS 118.

There is no per se conflict of interest for the director of county planning to serve on the board of directors of a savings bank located within the county. However, that person should not take advantage of information acquired during the course of his public duties to benefit the bank, and that person should not participate in reviewing proposed zoning action involving property in which the bank has a financial interest. 1975 NY Ops Atty Gen Sept 8 (Informal), 1975 N.Y. AG LEXIS 158.

The two offices of Town Councilman of the Town of North Salem and Estate Tax Attorney for Westchester County when held by the same person at the same time are not incompatible, per se. 1975 NY Ops Atty Gen Nov 7 (Informal), 1975 N.Y. AG LEXIS 182.

One person may simultaneously serve as a county legislator and as the Executive Director of the Adirondack Park Local Government Review Board so long as he avoids conflicts of interest in discrete situations as they may arise. 1981 NY Ops Atty Gen 81-101 (Informal), 1981 N.Y. AG LEXIS 51.

Service of husband as county treasurer and his wife as deputy county auditor would erode fiscal checks and balances designed to maintain public confidence in government. 1994 NY Ops Atty Gen 94-12 (Informal), 1994 N.Y. AG LEXIS 7.

Service of husband as county treasurer and his wife as deputy county auditor would erode fiscal checks and balances designed to maintain public confidence in government. 1995 NY Ops Atty Gen 95-11 (Informal), 1995 N.Y. AG LEXIS 11.

Assuming appropriate legislative findings have been made establishing legitimate governmental interest, proposed amendment to county code of ethics, which would prohibit any person appointed to county office by legislature or chairman of legislature from holding executive office in political party organization, is authorized and lawful. 1997 NY Ops Atty Gen 97-50 (Informal), 1997 N.Y. AG LEXIS 84.

Conflict of interest arises when member of county board of supervisors, acting in his or her private capacity, installs septic systems for private individuals and systems are subject to review by county employees. 1998 NY Ops Atty Gen 98-30 (Informal), 1998 N.Y. AG LEXIS 40.

Employees of county water authority should not accept off-duty employment to install private service lines for homeowners where those service lines have to be approved by authority prior to connection with authority mains. 1998 NY Ops Atty Gen 98-51 (Informal), 1998 N.Y. AG LEXIS 59.

11. —Town officials

The two offices of Town Constable and Superintendent of Highways in the Town of Van Etten, when held by the same person at the same time, are not incompatible per se. 1974 NY Ops Atty Gen Oct 28 (Informal), 1974 N.Y. AG LEXIS 170.

The two offices of Town Councilman of the Town of North Salem and Estate Tax Attorney for Westchester County when held by the same person at the same time are not incompatible, per se. 1975 NY Ops Atty Gen Nov 7 (Informal), 1975 N.Y. AG LEXIS 182.

A town councilwoman may not serve simultaneously as bookkeeper for the town supervisor except within the confines of the exception contained in General Municipal Law § 802(2[f]). 1977 NY Ops Atty Gen Nov 18 (Informal), 1977 N.Y. AG LEXIS 355.

A member of a town planning board may not receive compensation to represent a party in an application before that board. A local government should act to prohibit such representation, whether with or without compensation. 1984 NY Ops Atty Gen 84-3 (Informal), 1984 N.Y. AG LEXIS 86.

Town supervisor may take part in determination of town highway department budget even though his brother is superintendent of highways; supervisor must, however, take no part in determination of salary of his brother, town superintendent of highways. 1988 NY Ops Atty Gen 88-34 (Informal), 1988 N.Y. AG LEXIS 36.

Person running for or holding elective town office should not serve as voting machine custodian in town elections, and county has ample authority to prohibit persons running for office and holding elective offices from service as voting machine custodians. 1988 NY Ops Atty Gen 88-49 (Informal), 1988 N.Y. AG LEXIS 52.

Building contractor who undertakes construction work in town should not serve as that town's code enforcement officer. 1989 NY Ops Atty Gen 89-22 (Informal), 1989 N.Y. AG LEXIS 24.

Positions of village planning board member and town code enforcement officer are compatible. 1989 NY Ops Atty Gen 89-29 (Informal), 1989 N.Y. AG LEXIS 36.

The town justice is an officer of the town. 1990 NY Ops Atty Gen 90-46 (Informal), 1990 N.Y. AG LEXIS 31.

The chairman of the town planning board must recuse himself from acting with respect to applications by a developer who does

business with the corporation of which the chairman is president. 1990 NY Ops Atty Gen 90-38 (Informal), 1990 N.Y. AG LEXIS 39.

A town board member must recuse himself from participating in any matters relating to a contract for fire protection services between the town and a private fire company for which he serves as president. 1990 NY Ops Atty Gen 90-30 (Informal), 1990 N.Y. AG LEXIS 47.

A member of a town board must recuse herself from acting with respect to the terms and conditions of employment of her spouse, the chairperson of the zoning board of appeals. 1992 NY Ops Atty Gen 92-20 (Informal), 1992 N.Y. AG LEXIS 21.

Absent prohibition in local code of ethics, person may be appointed to town planning board even though his father currently serves as member of zoning board of appeals. 1993 NY Ops Atty Gen 93-37 (Informal), 1993 N.Y. AG LEXIS 36.

Member of town planning board who has given testimony in opposition to development of forested area should recuse himself or herself from participating as member of planning board in applications for development of that area. 1993 NY Ops Atty Gen 93-6 (Informal), 1993 N.Y. AG LEXIS 43.

Town supervisor must recuse herself from taking actions as to town police department which affect terms and conditions of employment of her son, sergeant in department. 1996 NY Ops Atty Gen 96-17 (Informal), 1996 N.Y. AG LEXIS 22.

12. —Village officials

The two offices of Mayor of the Village of Malone and Financial Advisor to the Franklin County Board of Legislators, when held by the same person at the same time, are not incompatible per se. 1974 NY Ops Atty Gen Jan 22 (Informal), 1974 N.Y. AG LEXIS 31.

The two offices of Trustee of the Village of Cold Springs and Assistant County Attorney of Putnam County, when held by the same person at the same time, are not incompatible per se; and, whenever the Assistant County Attorney would be required to participate in any legal matter relating to the Village, the County should be represented by the County Attorney or another Assistant County Attorney, if any, in such matter. 1974 NY Ops Atty Gen May 3 (Informal), 1974 N.Y. AG LEXIS 78.

Member of village board of trustees who is also employed by town in which village is located must recuse himself from participating in matters involving balancing of interest of village and town. 1989 NY Ops Atty Gen 89-46 (Informal), 1989 N.Y. AG LEXIS 54.

A member of the village board of trustees should recuse himself from participating in an application for a change of zoning that would benefit the industry for which he is employed. 1990 NY Ops Atty Gen 90-57 (Informal), 1990 N.Y. AG LEXIS 61.

No conflict of interests exists under state law where tenants of the mayor's spouse make application for HUD rental assistance funds, where the village is under contract with a community action agency to administer the program. 1992 NY Ops Atty Gen 92-15 (Informal), 1992 N.Y. AG LEXIS 16.

Members of village board of trustees who have entered into agreement entitling them to priority in obtaining housing units for sale have disqualifying conflicts of interest in application before board of trustees for approval of planned unit development by corporation to build that housing. 1993 NY Ops Atty Gen 93-1 (Informal), 1993 N.Y. AG LEXIS 1.

Members of village board of trustees who also are affiliated with volunteer fire department should recuse themselves from voting on those portions of budget that affect fire department; board may, however, establish exceptions to such rule if public interest would be served. 1994 NY Ops Atty Gen 94-31 (Informal), 1994 N.Y. AG LEXIS 33.

Architects serving on board of zoning appeals should not represent persons making their initial application for approval of construction with building department. 1994 NY Ops Atty Gen 94-51 (Informal), 1994 N.Y. AG LEXIS 48.

Person may serve simultaneously as chairperson of village zoning board of appeals and as member of town board; as member of zoning board of appeals, however, such individual may find it necessary to recuse him or herself from actions which affect interests of town residents. 1996 NY Ops Atty Gen 96-16 (Informal), 1996 N.Y. AG LEXIS 23.

Member of village board of trustees could also serve as volunteer member of village volunteer fire department and as vice-president of separate corporate entity acting in supportive capacity to volunteer fire department; however, trustee would be required to recuse himself from participating in approval of volunteer fire department's budget. 1996 NY Ops Atty Gen I 96-21 (Informal), 1996 N.Y. AG LEXIS 27.

Conflict of interest did not result from village attorney's private practice before town planning board, of which mayor was member. 1997 NY Ops Atty Gen 97-38 (Informal), 1997 N.Y. AG LEXIS 55.

Village mayor, employed full-time as technical sheriff in county sheriff's department, had conflict of interest in negotiating or voting on proposed contract with county for provision of law enforcement services by sheriff's department to village. 1998 NY Ops Atty Gen 98-34 (Informal), 1998 N.Y. AG LEXIS 31.

There is no conflict of interests when tenant who rents property from village clerk-treasurer applies for rent subsidy through HUD, given that county agency administers HUD program under contract with village. 1999 NY Ops Atty Gen 99-14 (Informal), 1999 N.Y. AG LEXIS 14.

Specific duties of positions of fire marshal and fire chief in village of Southampton make those positions incompatible so that same person may not simultaneously serve in both positions. 2000 NY Ops Atty Gen 2000-20 (Informal), 2000 N.Y. AG LEXIS 60.

There is no statutory prohibition against a village police chief (or village clerk) conducting the business of licensed private investigator. However, the applicability of the village code of ethics should be ascertained. 1980 Op St Compt No. 80-126.

That an employee of a village who is also a licensed real estate salesman is responsible for acquiring property in connection with the Federal Community Development Block Grant Program does not, in itself, create a statutory conflict of interest. However, a conflict of interest would occur if he should act as salesman for a seller from whom the village purchases property. The village code of ethics should be examined to determine the applicability of any provisions thereof under the circumstances. 1981 Op St Compt No. 81-370, 1981 N.Y. Comp. LEXIS 515.

13. Financial disclosures

Under New York Const Art IX §§ 2, 3; Gen Mun §§ 801, 802, 806; Mun Home Rule §§ 2, 10, the Town of East Hampton is not authorized to amend the East Hampton Code of Ethics to require that, once every year, certain of its officers and employees fully disclose and itemize their financial status to include all of their assets and all of their liabilities when there is no apparent or potential conflict of interest in the standard of conduct of such officer or employee as it relates to his employment with the municipality. 1974 NY Ops Atty Gen Nov 12 (Informal), 1974 N.Y. AG LEXIS 173.

Provision of school district's code of ethics, requiring candidates for board membership to file financial disclosure form with district's ethics board when they filed their designating petitions, was unlawful because board of education has no authority to create additional qualification for members of board. 1998 Op Comm Ed No. 13,914, 1998 NY Educ. Dept. LEXIS 236.

School board had no authority under Gen Mun L § 806 to adopt code of ethics for school board candidates requiring disclosure of campaign finances, even if such candidates were presently members of board. 1974 Op Comm Ed No. 8829.

Discussion of requirement that town officers and employees file with the town board a general financial disclosure of their assets. 1978 Op St Compt No. 78-1070.

Village board member who has financial interest in business which may be negatively impacted by zoning change under consideration by board should publicly disclose his or her interest in matter; if potential negative financial impact of proposed zoning change on board member is not merely speculative and more than de minimus, board member should not participate in discussion or vote on zoning change. 1997 Op St Compt No. 97-9, 1997 N.Y. Comp. LEXIS 21.

14. Restraints on political activity

Municipalities may enact local laws restricting municipal officers, employees and board members from holding offices in political parties, under the authority of section 806 of the General Municipal Law, which mandates the governing body of each county, city, town, village and school district, and authorizes the governing body of any other municipality, to adopt a code of ethics setting forth standards of conduct for its officers and employees with respect to specified matters "and such other standards relating to the conduct of officers and employees as may be deemed advisable", and also provides that such codes "may regulate or prescribe conduct which is not expressly prohibited by this article . . . [and] may provide for the prohibition of conduct". Belle v Town Bd. of Onondaga, 61 A.D.2d 352, 402 N.Y.S.2d 677, 1978 N.Y. App. Div. LEXIS 9745 (N.Y. App. Div. 4th Dep't 1978).

Regulation and promulgation of ethical standards for public employees serve a legitimate public purpose, and restrictions on partisan political activity of public officers in this State have been sustained as necessary and proper methods of maintaining public confidence in government. Belle v Town Bd. of Onondaga, 61 A.D.2d 352, 402 N.Y.S.2d 677, 1978 N.Y. App. Div. LEXIS 9745 (N.Y. App. Div. 4th Dep't 1978).

Subparagraph of town code of ethics providing that no member of town zoning board of appeals or any other town administrative board, commission or agency may be a political committeeman or committeewoman or chairman or vice-chairman of a political party, is valid under authority of General Municipal Law, § 806, subd 1, granting municipalities power to enact such local laws. Belle v Town Bd. of Onondaga, 61 A.D.2d 352, 402 N.Y.S.2d 677, 1978 N.Y. App. Div. LEXIS 9745 (N.Y. App. Div. 4th Dep't 1978).

Absent a prohibition in a local code of ethics, city employees may serve as coordinators of an election campaign on behalf of a political party. 1991 NY Ops Atty Gen 91-32 (Informal), 1991 N.Y. AG LEXIS 58.

Member of town planning board who had given testimony in opposition to development of forested area should recuse herself from participating as member of planning board in applications for development of that area. 1993 NY Ops Atty Gen 93-6 (Informal), 1993 N.Y. AG LEXIS 43.

If mayor and trustee have divided interests which could affect their ability to act impartially, or create appearance of impropriety, they should not participate in deliberations and voting as to whether to sell village properties to joint fire district. 1998 NY Ops Atty Gen 98-26 (Informal), 1998 N.Y. AG LEXIS 36.

Member of board of assessment review who owns property before board for review is obligated to recuse himself from participating in board proceedings as to that property to preserve validity of action taken by board and maintain public confidence in integrity of government. 1999 NY Ops Atty Gen 99-42 (Informal), 1999 N.Y. AG LEXIS 47.

15. Employment conflicts; family

A local legislator should recuse herself from participating in matters affecting the compensation, employment and other conditions of employment of her husband, the superintendent of public works. 1985 NY Ops Atty Gen 85-22 (Informal), 1985 N.Y. AG LEXIS 77.

County legislator should recuse himself or herself from participating in matters affecting not-for-profit corporation in which he or she is employed and where his or her spouse is director. 1994 NY Ops Atty Gen 94-32 (Informal), 1994 N.Y. AG LEXIS 34.

Provision of code of ethics adopted by board of education pursuant to Gen. Mun. § 806(1), whereby members of immediate family of any board member are precluded from full-time employment with school district, cannot be applied as additional eligibility requirement for board membership, since Educ. § 2102 establishes the qualifications for board membership, and statutory provisions dealing with conflict of interest specifically except from the definition of "interest" the employment of immediate family members (Gen. Mun. § 800). 1984 Op Comm Ed No. 11,211.

There is nothing prohibiting town board member from voting on salaries for family members who are elected or appointed town officials; however, under CLS Gen Mun § 806, town board may require in its code of ethics that town board members abstain from voting on resolutions fixing salaries of relatives who are town officials and, even if code of ethics does not require abstention, affected board members should recuse themselves from discussion and abstain from voting on matters relating solely or primarily to salaries of family members. 2000 Op St Compt No. 2000-12.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

26 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 474, 517, 518.

Law Reviews:

1978 Survey of New York Law: Local Government. 30 Syracuse L Rev, No. 1, p. 197, Winter, 1979.

Davies, Article 18 of New York's General Municipal Law: the state conflicts of interest law for municipal officials. 59 Alb. L. Rev. 1321.

§ 807. Posting of statute

The chief executive officer of each municipality shall cause a copy of sections eight hundred through eight hundred nine of this article to be kept posted in each public building under the jurisdiction of his or her municipality in a place conspicuous to its officers and employees. Failure to post any such copy shall have no effect on the duty of compliance with this article, nor with the enforcement of the provisions thereof.

HISTORY:

Add, L 1964, ch 946, § 2; amd, L 1970, ch 1019, § 4, eff July 1, 1970; L 2008, ch 236, § 1, eff July 7, 2008.

Editor's Notes: Laws 1964, ch 946, §§ 1 and 13–17, provide as follows:

Section 1. Declaration of policy and purpose. As government becomes increasingly complex, as our democratic processes draw citizens from every walk of life, there is increasing need for known standards of ethical conduct as a guide for public officers. These standards must rest primarily on personal integrity and on community vigilance: law cannot in itself create moral fiber, nor can law quicken the civic conscience. In support of these basic standards, it is the purpose of this chapter to define areas of conflicts of interest in municipal transactions, leaving to each community the expression of its own code of ethics.

The need for the statute does not spring from widespread malfeasance on the part of municipal officers; rather, the Legislature recognizes their integrity as a group, their culpability in only a few instances. But lest the few brand the many, the discernment of the offending case must be made certain, its elimination sure. Existing law is too complex, too inconsistent, too overgrown with exceptions, for such a clarity of understanding to be possible. Basic concepts must be retained, but something more than recodification is needed.

There is another and equally important objective: a formula of conduct which is not only clear but reasonable, one which will permit governmental employees to share the normal benefits of the democratic society and economy they serve. If government is to attract and hold competent administrators, public service must not require a complete divesting of all proprietary interests. Real conflict must be rooted out, without condemning the inconsequential.

The chapter, then, has a trinity of purposes: to protect the public from municipal contracts influenced by avaricious officers, to protect innocent public officers from unwarranted assaults on their integrity and to encourage each community to adopt an appropriate code of ethics to supplement this chapter. The Legislature declares that each purpose is a matter of State concern and adopts the following chapter accordingly, with the intention that it shall be the generic law in relation to conflicts of interest in municipal transactions,

not to be superseded by local law of any municipality subject to its provisions.

§ 13. Laws superseded. The provisions of article eighteen of the general municipal law, as added by this act, shall supersede any local law, charter, ordinance, resolution, rule or regulation of any municipality to the extent that such local law, charter, ordinance, resolution, rule or regulation is inconsistent with the provisions thereof. No local law, ordinance, resolution, rule or regulation shall modify or dispense with any provision of article eighteen of the general municipal law, as added by this act; provided, however, that nothing herein contained shall prohibit a code of ethics adopted pursuant thereto from supplementing the provisions of this act.

§ 14. Pending actions and proceedings. No action or proceeding pending at the time when this act shall take effect shall be affected by any provision of this act, but the same may be prosecuted, defended or enforced as if this act had not been enacted.

§ 15. Existing rights and remedies preserved. No existing right or remedy of any character shall be lost, impaired or affected by reason of this act, nor shall the validity of any action taken by any public official under the law in force immediately prior to the time this act shall take effect be affected by the enactment of this act.

§ 16. Laws repealed. Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is hereby repealed.

§ 17. Effective date. This act shall take effect September first, nineteen hundred sixty-four.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

26 NY Jur 2d Counties, Towns, and Municipal Corporations § 476.

Law Reviews:

Davies, Article 18 of New York's General Municipal Law: the state conflicts of interest law for municipal officials. 59 Alb. L. Rev. 1321.

GENERAL OBLIGATIONS LAW

Article
3. Capacity; Effect of Status or of Certain Relationships or Occupations upon the Creation, Definition or Enforcement of Obligations
11. Obligations to Make Compensation or Restitution

HISTORY:
Add, L 1963, ch 576, § 1, eff Sept 27, 1964.

ARTICLE 3 Capacity; Effect of Status or of Certain Relationships or Occupations upon the Creation, Definition or Enforcement of Obligations

Title 1. Infancy

Section
3-112. Liability of parents and legal guardians having custody of an infant for certain damages caused by such infant

HISTORY:
Add, L 1963, ch 576, § 1, eff Sept 27, 1964.

TITLE 1 Infancy

HISTORY:
Add, L 1963, ch 576, § 1, eff Sept 27, 1964.

§ 3-112. Liability of parents and legal guardians having custody of an infant for certain damages caused by such infant

1. The parent or legal guardian, other than the state, a local social services department or a foster parent, of an infant over ten and less than eighteen years of age, shall be liable to any public officer, organization or authority, having by law the care and/or custody of any public property of the state or of any political subdivision thereof, or to any private individual or organization having by law the care, custody and/or ownership of any private property, for damages caused by such infant, where such infant has willfully, maliciously, or unlawfully damaged, defaced or destroyed such public or private property, whether real or personal, or, where such infant, with intent to deprive the owner and/or custodian of such property or to appropriate the same to himself or herself or to a third person, has knowingly entered or remained in a building and has wrongfully taken, obtained or withheld such public or private personal property from such building which personal property is owned or maintained by the state or any political subdivision thereof or which is owned or maintained by any individual, organization or authority, or where such infant has falsely reported an incident or placed a false bomb as defined in section 240.50, subdivision one or two of section 240.55, section 240.60 or section 240.61 of the penal law. Such public officer, organization or authority, or private individual or organization, as the case may be, may bring an action for civil damages in a court of competent jurisdiction for a judgment to recover such damages from such parent or legal guardian other than the state or a local social services department or a foster parent. For the purposes of this subdivision, damages for falsely reporting an incident or placing a false bomb shall mean the funds reasonably expended by a victim in responding to such false report, as set forth in subdivision eleven of section 60.27 of the penal law. In no event shall such damages portion of a judgment authorized by this section, as described in this subdivision, exceed the sum of five thousand dollars.

2. Notwithstanding the provisions of subdivision one of this section, prior to the entering of a judgment under this section in the sum total of five hundred dollars or more, the court shall provide such parent or legal guardian of such infant with an opportunity to make an application to the court based upon such parent's or legal guardian's financial inability to pay any portion or all of the amount of such sum total which is in excess of five hundred dollars, and upon the return date of such application, or any adjournment thereof, the court shall, in summary fashion, hear and consider all evidence of financial hardship presented tending to establish the inability of such parent or legal guardian to pay any or all of the amount of the sum total in excess of five hundred dollars, and the court shall render its decision as to such party's inability to make such payment based upon a preponderance of the evidence presented. Upon a decision that such party has established his or her inability to make such payment, the court shall enter the judgment authorized by this section but in an amount within the financial capacity of such parent or legal guardian, provided, however, that since the original of the sum total exceeded five hundred dollars, no such judgment shall be entered for an amount which is less than five hundred dollars.

3. It shall be a defense to an action brought under this section that restitution has been paid pursuant to section seven hundred fifty-eight-a or 353.6 of the family court act, or paragraph (g) of subdivision two of section 65.10 of the penal law. It shall also be a defense to an action brought under this section that such infant had voluntarily and without good cause abandoned the home of the parent or guardian and without good cause refused to submit to the guidance and control of the parent or guardian prior to and at the time of the occurrence of such damages or destruction. In no event shall it be a defense that the parent or legal guardian has exercised due diligent supervision over the activities of such infant, provided, however, that in the interests of justice, the court may consider mitigating circumstances that

bear directly upon the actions of the parent or legal guardian in supervising such unemancipated infant.

4. For the purposes of this section the following definitions shall apply:

a. The terms "enters or remains unlawfully" and "building" shall have the same meaning as ascribed to such terms in section 140.00 of the penal law.

b. "Public officer, organization or authority" shall include but not be limited to: those having by law the care and custody of a municipal district or corporation; those having by law the care and custody of the public property of the state or of any agency, department, board, bureau, commission, division, office, council, committee of the state, or of a public benefit corporation or public authority; and the board of education or trustees of any city, union free or common school district or the city board of any New York City community school district.

c. "Private individual or organization" shall include, but not be limited to: any individual, private or public corporation or partnership or sole proprietorship, organized church, synagogue or temple, not-for-profit organization or corporation, cemetery corporation, or, if such liability is as a result of damage upon any cemetery plot or mausoleum, the next of kin of a person upon whose gravesite such damage or destruction occurred.

HISTORY:

Add, L 1995, ch 398, § 1, eff Oct 31, 1995; amd, L 1999, ch 207, § 3, eff July 6, 1999 (see 1999 note below).

Prior Law: Former § 3–112, add, L 1970, ch 993, § 2; amd, L 1977, ch 478, § 1, L 1979, ch 138, § 2, L 1981, ch 896, § 2, L 1981, ch 972, § 2, L 1981, ch 1045, § 2, L 1982, ch 920, § 50, L 1985, ch 731, § 2; repealed, L 1995, ch 398, § 1, eff Oct 31, 1995.

Editor's Notes: Laws 1999, ch 207, § 1, eff July 6, 1999, provides as follows:

Section 1. Short title. This act shall be known and may be cited as the "false reporting act of 1999".

Notes to Decisions

Fifteen-year-old boy's act in striking at another teenager constituted an assault and thus a willful and unlawful act within meaning of statute making parent or legal guardian liable civilly for damage caused by willful and unlawful act of minor. Izzo v Gratton, 86 Misc. 2d 233, 383 N.Y.S.2d 523, 1976 N.Y. Misc. LEXIS 2125 (N.Y. City Ct. 1976).

Where legal guardian of 15-year-old boy had no control over boy's assault of another teenage and had no warning or notice of boy's altercations with others or his continuing dispute with assaulted teenager, guardian could not be held liable for property damage caused during the assault. Izzo v Gratton, 86 Misc. 2d 233, 383 N.Y.S.2d 523, 1976 N.Y. Misc. LEXIS 2125 (N.Y. City Ct. 1976).

Where, in a paternity proceeding, in which the respondent, who was an infant, 17 years old, at the time the proceeding was commenced, the defects in service, which was made on the respondent only, were cured when he made a voluntary, general appearance after reaching majority, where no guardian ad litem was appointed for the respondent prior to his reaching majority, where the respondent's parents never appeared with him in court, and where the motion for an order requiring the respondent's parents to pay the cost for the blood-grouping test, which had been moved for by respondent, were never served on them, the parents could not be ordered to pay for the blood-grouping tests. Richardson v Gibson, 110 Misc. 2d 20, 441 N.Y.S.2d 641, 1981 N.Y. Misc. LEXIS 3035 (N.Y. Fam. Ct. 1981).

Although their 11-year-old child acted negligently when he threw a set of keys onto a street in the course of playing a game with other children, no liability would attach to the parents under Gen Oblig Law § 3-112 for the resulting property damage to a passing car, where the infant did not act with wilful or malicious intent. Deliso v Cangialosi, 117 Misc. 2d 105, 457 N.Y.S.2d 396, 1982 N.Y. Misc. LEXIS 4028 (N.Y. Civ. Ct. 1982), aff'd, 124 Misc. 2d 822, 480 N.Y.S.2d 315, 1984 N.Y. Misc. LEXIS 3344 (N.Y. App. Term 1984).

A father could be held liable up the statutory maximum of $1,500 for his son's unlawful act of maliciously destroying an automobile, causing $2,500 in damages, even though his son had made restitution in the amount of $479.21 as ordered by the court as a condition of being treated as a youthful offender and receiving a sentence of probation, since the amount of court-ordered compensation was limited by Penal L § 65.10 to the amount defendant's son could afford to pay, while the father's responsibility as a parent to reimburse the insured party for his son's act up to a maximum of $1,500 under Gen Oblig Law § 3-112 was separate and distinct and under that statute the wrongdoer's parent was entitled to benefit from any court-ordered restitution only to the extent by which it reduced the actual damages remaining unpaid below the statutory liability limit. A. v B., 121 Misc. 2d 750, 468 N.Y.S.2d 992, 1983 N.Y. Misc. LEXIS 3995 (N.Y. Sup. Ct. 1983).

Court would dismiss small claims action brought by mother of 17-year-old girl under Parental Liability Act (CLS Gen Oblig § 3-112) seeking damages for injuries and loss of personal property sustained by her child during fight with defendant's daughter, also 17 years old, since Act was unconstitutional bill of attainder in substantial intent and practical effect inasmuch as it imposed tort liability on parents or legal guardians for malicious and destructive acts of minor children in their custody, predicated solely on blood relation (or its legal equivalent) of parent and child. Owens v Ivey, 138 Misc. 2d 671, 525 N.Y.S.2d 508, 1988 N.Y. Misc. LEXIS 151 (N.Y. City Ct. 1988).

Defendant, who had joint but not physical custody of his 17-year-old daughter at time she took plaintiff's vehicle, was not liable under CLS Gen Oblig § 3-112 for any portion of damages arising from his daughter's unauthorized use of vehicle; it would be unfair to impose such liability where parent, such as defendant, could not have done anything to prevent incident from taking place. Leonard v O'Neil, 159 Misc. 2d 1029, 608 N.Y.S.2d 618, 1994 N.Y. Misc. LEXIS 7 (N.Y. J. Ct. 1994).

Agency Opinions

The State Legislature, by enacting and/or amending statutes such as General Obligations Law § 3-112; Executive Law § 171; Family Court Act §§ 755, 756, 757 and 758-a; General Municipal Law § 78-a; Education Law §§ 1604(35), 1709(36), 2503(18), 2554(16-b), 2590-g(15), and Penal Law § 260.10(2), has preempted the field of legislation on the subject of parental responsibility for the acts of a minor and a municipality has no authority to legislate in this field. 1977 NY Ops Atty Gen Dec 27 (Informal), 1977 N.Y. AG LEXIS 369.

A town has no authority to enact a juvenile curfew that holds parents responsible for their children's violation of the curfew. A town does have authority to enact a juvenile curfew under its police power if the curfew is necessary for the protection or preservation of the public health, safety and welfare. However, such curfew must be reasonable in relation to the ends sought to be achieved and should be narrowly drawn to avoid infringing on the fundamental rights of juveniles. 1980 NY Ops Atty Gen Dec. 15 (informal).

Repeal of various statutes concerning parental responsibility of acts of minor does not necessarily indicate, for purposes of determining permissible extent of local authority, that Legislature intended to narrow scope of state legislation with respect to civil liability of parents for acts of their children, since such repeal was consolidation of those provisions into current CLS Gen Oblig § 3-112. 2005 NY Ops Atty Gen I 05-13.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Conditions of probation and of conditional discharge, CLS Penal § 65.10.

Powers and duties of trustees, CLS Educ § 1604.
Powers and duties of boards of education, CLS Educ §§ 1709., 2503., 2554.
Restitution, CLS Family Ct Act §§ 353.6., 758-a.
Criminal trespass in the third degree, CLS Penal § 140.00.
Powers and duties of the city board, CLS Educ § 2590-g.

Jurisprudences:

35C NY Jur 2d Criminal Law Substantive Principles and Offenses § 1995.
59 Am Jur 2d, Parent and Child §§ 93 et seq.

Annotations:

Construction and Application of U.S. Const. Art. I, § 10, cl. 1, and State Constitutional Provisions Proscribing State Bills of Attainder. 63 ALR6th 1.

ARTICLE 11 Obligations to Make Compensation or Restitution

Title 1. Compensation

Section
11-106. Compensation for injury or death to police officers and firefighters or their estates

HISTORY:
Add, L 1963, ch 576, § 1, eff Sept 27, 1964.

TITLE 1 Compensation

HISTORY:
Add, L 1963, ch 576, § 1, eff Sept 27, 1964.

§ 11-106. Compensation for injury or death to police officers and firefighters or their estates

1. In addition to any other right of action or recovery otherwise available under law, whenever any police officer or firefighter suffers any injury, disease or death while in the lawful discharge of his official duties and that injury, disease or death is proximately caused by the neglect, willful omission, or intentional, willful or culpable conduct of any person or entity, other than that police officer's or firefighter's employer or co-employee, the police officer or firefighter suffering that injury or disease, or, in the case of death, a representative of that police officer or firefighter may seek recovery and damages from the person or entity whose neglect, willful omission, or intentional, willful or culpable conduct resulted in that injury, disease or death.

2. Nothing in this section shall be deemed to expand or restrict the existing liability of an employer or co-employee at common-law or under sections two hundred five-a and two hundred five-e of the general municipal law for injuries or death sustained in the line-of-duty by any police officer or firefighter.

HISTORY:
Add, L 1996, ch 703, § 5, eff Oct 9, 1996 (see 1996 note below).

Editor's Notes: Laws 1996, ch 703, §§ 1, 3 and 6, eff Oct 9, 1996, provide as follows:

Section 1. Legislative intent. The legislature finds that the nature of modern police work in this state has exposed our police officers to an unprecedented risk of death and physical injury. In view of this fact, chapter 346 of the laws of 1989 gave injured officers and representatives of deceased officers a right of action against individuals found liable for such deaths or injuries.

The legislature concludes that the duties of our state's police officers are performed in a variety of contexts and that the liability imposed pursuant to chapter 346 of the laws of 1989 should not be limited to violations pertaining to the safe maintenance and control of premises. Since our police officers are required to confront dangerous conditions under many and varied circumstances, there is a need to ensure that a right of action exists regardless of where the violation causing injury or death occurs.

Since the enactment of chapter 474 of the laws of 1992, our courts have continued to differ on the scope of the remedy afforded by chapter 346 of the laws of 1989. This act is intended to ensure once and for all that section 205-e of the general municipal law is applied by the courts in accordance with its original legislative intent to offer an umbrella of protection for police officers, who, in the course of their many and varied duties, are injured by the negligence of anyone who violates any relevant statute, ordinance, code, rule and/or regulation.

§ 3. Legislative intent. The legislature finds that the nature of the work of modern fire fighting in this state has exposed our firefighters to an unprecedented risk of death and physical injury. In view of this fact, the legislature gave injured firefighters and representatives of deceased firefighters a right of action against individuals found liable for such deaths or injuries.

The legislature concludes that the duties of our state's firefighters are performed in a variety of contexts and that the liability imposed should not be limited to violations pertaining to the safe maintenance and control of premises. Since our firefighters are required to confront dangerous conditions under many and varied circumstances, there is a need to ensure that a right of action exists regardless of where the violation causing injury or death occurs.

The legislature further concludes that a right of action should exist regardless of whether the person whose negligence leads directly or indirectly to the violation causing injury or death owns or controls the premises where such violation occurs.

§ 6. This act shall take effect immediately and shall apply to all actions commenced or pending on and after such date.

Notes to Decisions

Analysis

1. In general
2. Firefighters rule
3. Employer or coemployee
4. Liability shown
5. Liability not shown

1. In general

Common-law firefighter's rule, which was partially abrogated in 1996 by enactment of CLS Gen Oblig § 11-106, does not apply to sanitation workers, since such workers are not experts engaged, trained, and compensated by public to deal on its behalf with emergencies and hazards. Ciervo v City of New York, 240 A.D.2d 693, 659 N.Y.S.2d 320, 1997 N.Y. App. Div. LEXIS 7105 (N.Y. App. Div. 2d Dep't 1997), aff'd, 93 N.Y.2d 465, 693 N.Y.S.2d 63, 715 N.E.2d 91, 1999 N.Y. LEXIS 773 (N.Y. 1999).

General construction contractor and subcontractor were not entitled to summary judgment dismissing city police detective's action under CLS Gen Mun § 205-e and CLS Gen Oblig § 11-106 for personal injuries sustained at construction site when he tried to rescue 2 homeless men from fire set with construction debris where (1) general contractor had overall responsibility for coordinating safety, including removal of construction debris, (2) its construction manager had deemed area of fire to be "attractive nuisance" and "dangerous situation," (3) subcontractor had been repeatedly reprimanded for its handling of debris, knew that homeless persons camped out and set fires at site, and was not absolved of liability by general contractor's assumption of contractual duty to remove debris, and (4) thus, there were triable issues of fact as to whether those defendants violated NYC Admin Code § 27-1019, requiring removal of combustible debris from

construction sites at reasonable intervals, and, if so, whether such violation directly or indirectly caused detective's harm. Johnson v George A. Fuller Co., 266 A.D.2d 158, 699 N.Y.S.2d 348, 1999 N.Y. App. Div. LEXIS 12353 (N.Y. App. Div. 1st Dep't 1999).

Security guard company was not entitled to summary judgment dismissing city police detective's action under CLS Gen Mun § 205-e and CLS Gen Oblig § 11-106 for personal injuries sustained at construction site when he tried to rescue 2 homeless men from fire set with construction debris where there was evidence indicating that company's employees failed to observe fire, crowd around fire, or police and firefighters responding to fire, and thus there was triable issue of fact as to whether company violated NYC Admin Code § 27-1024, requiring competent watchmen at construction sites. Johnson v George A. Fuller Co., 266 A.D.2d 158, 699 N.Y.S.2d 348, 1999 N.Y. App. Div. LEXIS 12353 (N.Y. App. Div. 1st Dep't 1999).

Intervening act of homeless persons in setting fire with construction debris at construction site was reasonably foreseeable, and thus did not preclude liability of general construction contractor, subcontractor, and security guard company under CLS Gen Mun § 205-e and CLS Gen Oblig § 11-106 for personal injuries sustained at site by police detective when he tried to rescue 2 homeless men from fire set with construction debris, where defendants knew that homeless persons camped out at site and set fires to keep warm. Johnson v George A. Fuller Co., 266 A.D.2d 158, 699 N.Y.S.2d 348, 1999 N.Y. App. Div. LEXIS 12353 (N.Y. App. Div. 1st Dep't 1999).

Trial court erred in granting partial summary judgment to a realty company in an action by an individual who was injured in an apartment fire, as material questions of fact existed as to whether the realty company's employees were negligent in giving incorrect instructions to the firefighters regarding the location of the fire, and, if so, whether correct instructions would have obviated the individual's injury. Baker v Riverhouse Realty Co., 300 A.D.2d 214, 751 N.Y.S.2d 361, 2002 N.Y. App. Div. LEXIS 13324 (N.Y. App. Div. 1st Dep't 2002).

Supreme Court erred in granting those parts of a motion for summary judgment filed by two farm owners seeking dismissal of common-law negligence and N.Y. Gen. Oblig. Law § 11-106 causes of action against them, where although they could not be held liable for the manner in which the silo was razed by the independent contractors, a triable issue of fact existed concerning whether the owners were negligent in creating and allowing a dangerous condition on their property and whether such alleged negligence caused a volunteer firefighter's injuries. Green v Peterson, 13 A.D.3d 1157, 787 N.Y.S.2d 759, 2004 N.Y. App. Div. LEXIS 16344 (N.Y. App. Div. 4th Dep't 2004).

Trial court erred in granting a motion filed by a county, its sheriff's department, and a part-time SWAT team (the defendants), for summary judgment in a personal injury action filed by a candidate for the team and his wife because they failed to establish, prima facie, that the candidate was their special employee, failed to establish governmental immunity by showing that there was a set procedure for administering the physical test and that they did not violate accepted practices, their reliance on the "firefighter's rule" was misplaced in light of the fact that they failed to establish that the candidate was their special employee, and they failed to establish, prima facie, that the doctrine of primary assumption of risk was applicable under the circumstances of the case. Dube v County of Rockland, 160 A.D.3d 807, 75 N.Y.S.3d 239, 2018 N.Y. App. Div. LEXIS 2635 (N.Y. App. Div. 2d Dep't 2018).

Widow's wrongful death action under General Obligations Law § 11-106 and General Municipal Law § 205-e, which sought to recover for the death of a state trooper, was dismissed; no wrongful death claim can be made under § 11-106 because the purpose of the statute is to revive a police officer's right to sue for injuries sustained in the line-of-duty caused by the tortious conduct of third-party wrongdoers. Brinkerhoff v County of St. Lawrence, 875 N.Y.S.2d 877, 24 Misc. 3d 426, 241 N.Y.L.J. 71, 2009 N.Y. Misc. LEXIS 649 (N.Y. Sup. Ct. 2009), aff'd, 70 A.D.3d 1272, 897 N.Y.S.2d 269, 2010 N.Y. App. Div. LEXIS 1540 (N.Y. App. Div. 3d Dep't 2010).

Policeman's complaint against a village and a county based on an assault by a suspect during an undercover drug buy was proper because, inter alia, the complaint failed to state a N.Y. Gen. Oblig. Law § 11-106 violation claim; the policeman's participation in a joint task force made the policeman's relationship with the village and the county akin to his relationship with his employer. Rodriguez v County of Rockland, 43 A.D.3d 1026, 842 N.Y.S.2d 488, 2007 N.Y. App. Div. LEXIS 9830 (N.Y. App. Div. 2d Dep't 2007).

2. Firefighters rule

N.Y. Gen. Oblig. Law § 11-106 largely abolishes the firefighter's rule by giving firefighters and police officers a cause of action in negligence for injuries suffered while in the line of duty. Giuffrida v Citibank Corp., 100 N.Y.2d 72, 760 N.Y.S.2d 397, 790 N.E.2d 772, 2003 N.Y. LEXIS 989 (N.Y. 2003).

Firefighter rule, N.Y. Gen. Oblig. Law § 11-106(1), barred an officer's claim for injuries suffered while entering a police department parking lot because the cause of the injury, a high-security device protecting the police headquarters parking lot, was plainly a risk associated with the particular dangers inherent in police work; whether the officer was on duty or not was not dispositive. What was dispositive is the nature of the risk. Wadler v City of New York, 14 N.Y.3d 192, 899 N.Y.S.2d 73, 925 N.E.2d 875, 2010 N.Y. LEXIS 30 (N.Y. 2010).

Although, by virtue of CLS Gen Oblig § 11-106, "firefighter's rule" no longer barred recovery by police officer injured in performance of his duties on defendants' premises, defendants were entitled to summary judgment where there was no evidence that they either created or had notice of alleged defect, in form of paint can on steps leading from roof to sixth floor of defendants' building. Scheddin v Stein, 240 A.D.2d 720, 660 N.Y.S.2d 1008, 1997 N.Y. App. Div. LEXIS 7110 (N.Y. App. Div. 2d Dep't 1997).

Defendants, owner and operator of van which rear-ended 3-wheeled "scooter" in which police officer was seated while on scene investigating unrelated accident, were improperly granted summary judgment in officer's common-law negligence claim since such claim was no longer barred by so-called "firefighter's rule," and fact issues existed, inter alia, as to whether van operator should have seen alleged oil spill before he collided with officer's vehicle. Cammilleri v S & W Realty Assocs., 243 A.D.2d 530, 663 N.Y.S.2d 222, 1997 N.Y. App. Div. LEXIS 9807 (N.Y. App. Div. 2d Dep't 1997).

In action under CLS Gen Mun § 205-e(1) by police officer whose patrol car, parked on shoulder of thruway, was struck by car that skidded off thruway in severe snow storm, officer was entitled to have stricken affirmative defense based on "firefighters rule" where that defense was rendered meritless by enactment of CLS Gen Oblig § 11-106. Dubois v Vanderwalker, 245 A.D.2d 758, 665 N.Y.S.2d 460, 1997 N.Y. App. Div. LEXIS 12940 (N.Y. App. Div. 3d Dep't 1997).

Police officer, who was performing function of "recorder" in patrol car, was at increased risk of being injured in motor vehicle accident, and thus her common-law claims against city and city police department were barred; CLS Gen Oblig § 11-106 which partially abrogated the so-called firefighter rule, applies only where the police officer's or the firefighter's injury, disease, or death "is proximately caused by the neglect, willful omission, or intentional, willful or culpable conduct of any person or entity, other than that police officer's or firefighter's employer or co-employee". Thus, the firefighter rule continues to bar a police officer or firefighter from asserting a common-law negligence cause of action against his or her employer or a fellow officer where the performance of the police officer's or firefighter's duties increased the risk of the injury happening, and did not merely furnish the occasion for the injury. Melendez v City of New York, 271 A.D.2d 416, 706 N.Y.S.2d 132, 2000 N.Y. App. Div. LEXIS 3739 (N.Y. App. Div. 2d Dep't 2000).

Since the enactment of N.Y. Gen. Oblig. Law § 11-106, a common-law negligence cause of action was no longer barred by the so-called "firefighters' rule," and the new legislation provided for a common-law cause of action against negligent landowners in certain situations; in a case brought by a fireman against a building owner, alleging that the building owner was negligent in failing to promptly respond to tenants' complaints of a gas odor,

the denial of the building owner's motion for summary judgment was affirmed where the fireman's expert raised a triable fact issue as to whether there was a connection between the alleged violations and the fireman's injuries sustained while responding to a gas explosion and fire at the building. Brennan v N.Y. City Hous. Auth., 302 A.D.2d 483, 756 N.Y.S.2d 73, 2003 N.Y. App. Div. LEXIS 1644 (N.Y. App. Div. 2d Dep't 2003).

Where a decedent police officer was killed by a mental health clinic outpatient, the firefighter's rule was inapplicable by reason of N.Y. Gen. Oblig. Law § 11-106(1) under which the police officer could seek recovery and damages for on-duty injuries caused by the negligence of the county in failing to prevent the outpatient from harming the officer. Padula v County of Tompkins, 303 A.D.2d 804, 756 N.Y.S.2d 664, 2003 N.Y. App. Div. LEXIS 2208 (N.Y. App. Div. 3d Dep't 2003).

Trial court did not err in preventing the movie theater and movie theater owner from presenting an assumption of the risk defense in a case where the security guard, an off-duty police officer, sued them for injuries he sustained when patrons assaulted him as he tried to prevent an assault by one patron upon another; N.Y. Gen. Oblig. Law § 11-106 abrogated the "firefighter's rule," which had precluded firefighters and police officer from commencing negligence actions. Gerbino v Tinseltown USA, 13 A.D.3d 1068, 788 N.Y.S.2d 538, 2004 N.Y. App. Div. LEXIS 16269 (N.Y. App. Div. 4th Dep't 2004).

Since there was an indicia of joint employment for purposes of N.Y. Gen. Oblig. Law § 11-106 when a city and county worked together on a drug operation, and since N.Y. Agric. & Mkts. Law § 121(2) did not support a city police officer's N.Y. Gen. Mun. Law § 205-e claim, the county and the investigators were entitled to summary judgment. Connery v County of Albany, 73 A.D.3d 198, 898 N.Y.S.2d 298, 2010 N.Y. App. Div. LEXIS 2634 (N.Y. App. Div. 3d Dep't), app. denied, 15 N.Y.3d 702, 906 N.Y.S.2d 816, 933 N.E.2d 215, 2010 N.Y. LEXIS 1355 (N.Y. 2010).

Safety device manufacturer's motion for summary judgment was properly denied because a question of fact existed as to whether the alleged defect in the firefighter's safety device was a substantial factor in causing or exacerbating his injuries. At best, the firefighters involved in the rescue had only a general idea as to the injured firefighter's approximate location within the debris field, an area that measured approximately 12 feet by 40 feet and was roughly four to six feet deep Dryer v Musacchio, 117 A.D.3d 1115, 985 N.Y.S.2d 302, 2014 N.Y. App. Div. LEXIS 2918 (N.Y. App. Div. 3d Dep't 2014).

A firefighter's suit against a homeowner for personal injuries resulting from slipping on a snowy roof during a rescue was properly dismissed via summary judgment because the house was a private dwelling, not a multiple dwelling requiring fire-resistant enclosures, and no purported ordinance violation for failing to obtain permits for work performed inside the home caused or contributed to the firefighter's injuries. Metzger v Lazala, 171 A.D.3d 1287, 97 N.Y.S.3d 350, 2019 N.Y. App. Div. LEXIS 2605 (N.Y. App. Div. 3d Dep't 2019).

Court denied sergeant's motion for summary judgment on the negligence/wrongful death claims where (1) the sergeant owed a duty of care to decedent and decedent's death arose from risks within the scope of that duty; and (2) a rational jury could conclude that the sergeant should have known that decedent had passed by officers without incident, and, thus, that decedent was a plainclothes officer. Breitkopf v Gentile, 41 F. Supp. 3d 220, 2014 U.S. Dist. LEXIS 121581 (E.D.N.Y. 2014).

3. Employer or coemployee

Under CLS Gen Oblig § 11-106, no tortfeasor other than employer of injured or deceased police officer or firefighter may challenge claim of common-law negligence; thus, police officer could not be prevented from maintaining cause of action founded on common-law negligence with respect to sidewalk defect over which he tripped and fell, except insofar as claim was asserted against city as his employer. Cosgriff v City of New York, 241 A.D.2d 382, 659 N.Y.S.2d 888, 1997 N.Y. App. Div. LEXIS 7422 (N.Y. App. Div. 1st Dep't 1997), aff'd sub. nom., Gonzalez v Iocovello, 93 N.Y.2d 539, 693 N.Y.S.2d 486, 715 N.E.2d 489, 1999 N.Y. LEXIS 1422 (N.Y. 1999).

City police officer's personal injury action against city under CLS Gen Mun § 205-e was barred by CLS Gen Oblig § 11-106 where officer was injured when he tripped and fell on public sidewalk while attempting to apprehend suspect. Jackson v City of New York, 251 A.D.2d 457, 674 N.Y.S.2d 721, 1998 N.Y. App. Div. LEXIS 6843 (N.Y. App. Div. 2d Dep't 1998).

New York City police officer, under CLS Gen Oblig § 11-106, could not sue City in its capacity as owner of premises abutting sidewalk on which he was injured since statute specifically precludes claims against municipal employer, generally and without exception, not just claims against employer in its capacity as such; moreover, in view of fiscal considerations underlying employer exemption, there is no basis to conclude that statute was intended to expand common-law liability of municipalities so as to afford injured police officer cause of action against city for negligent maintenance of city-owned property. Grogan v City of New York, 259 A.D.2d 240, 699 N.Y.S.2d 12, 1999 N.Y. App. Div. LEXIS 12054 (N.Y. App. Div. 1st Dep't 1999).

Plaintiffs were properly denied leave to amend their complaint nunc pro tunc to assert cause of action under CLS Gen Oblig § 11-106 against agency of plaintiffs' employer (New York City), since § 11-106(2) specifically precludes assertion of cause of action against employees' municipal employer and fellow municipal employees. Plunkett v Emergency Med. Servs. Corp., 260 A.D.2d 193, 687 N.Y.S.2d 375, 1999 N.Y. App. Div. LEXIS 3634 (N.Y. App. Div. 1st Dep't 1999).

N.Y. Gen. Oblig. Law § 11-106 allowed the policeman to have a common law negligence claim against a builder for the policeman's on-duty slip and fall on construction debris as the builder was not the policeman's employer or co-employee. Jones v Fried, 21 A.D.3d 1057, 803 N.Y.S.2d 590, 2005 N.Y. App. Div. LEXIS 9540 (N.Y. App. Div. 2d Dep't 2005).

4. Liability shown

Police officer was entitled to summary judgment on the issue of a truck driver's liability because prior to beginning his turn, the driver was aware that there was a police officer conducting a traffic stop on foot and a police car parked on the northbound side of the road, and although the driver believed he could make the turn safely, the rear of the trailer hit the officer; thus, the driver's failure to exercise due care in operating the truck proximately caused the officer's injuries. Cioffi v S.M. Foods, Inc., 178 A.D.3d 1006, 116 N.Y.S.3d 306, 2019 N.Y. App. Div. LEXIS 9339 (N.Y. App. Div. 2d Dep't 2019).

5. Liability not shown

Defendants established their prima facie entitlement to summary on plaintiff's negligence cause of action because defendants did not own or control the subject premises, or assume any duty to plaintiff police officer, which might serve as a predicate for liability, and, in opposition, plaintiff failed to raise a triable issue of fact. Maher v White, 184 A.D.3d 630, 125 N.Y.S.3d 445, 2020 N.Y. App. Div. LEXIS 3318 (N.Y. App. Div. 2d Dep't 2020).

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Practice Guides: LexisNexis AnswerGuide New York Negligence § 2.09.Identifying Applicable Theories of Liability in Motor Vehicle Cases.

Matthew Bender's New York Practice Guides: LexisNexis AnswerGuide New York Negligence § 2.09[1][g].Identifying Applicable Theories of Liability in Motor Vehicle Cases.

Matthew Bender's New York Practice Guides: LexisNexis AnswerGuide New York Negligence § 3.19.Examining Defense Based on Limitation on Recovery for Firefighters and Police Officers.

Matthew Bender's New York Practice Guides: LexisNexis AnswerGuide New York Negligence § 6.09[3][a].Choosing Appropriate Basis of Liability.

Matthew Bender's New York Practice Guides: Warren's Negligence in the New York Courts § 92.03.Elimination of firefighter's rule.

HIGHWAY LAW

Article
VII. Town Superintendents

HISTORY:
Add, L 1936, ch 63, eff March 4, 1936.

ARTICLE VII Town Superintendents

Section
142-b. Removal of snow and ice, making of repairs, and rental of town highway machinery; school and other districts

HISTORY:
Add, L 1936, ch 63, with substance transferred from Article IV.

§ 142-b. Removal of snow and ice, making of repairs, and rental of town highway machinery; school and other districts

The town board of any town may authorize the town superintendent to

(1) remove snow and ice from any property within the town belonging to a school district, upon such terms as may be agreed upon by the town board and governing board of any such school district.

(2) Repair roads and sidewalks within the town belonging to a school district, upon such terms as may be agreed upon by the town board and the governing board of any such school district.

(3) Permit the use of town highway machinery, tools and equipment within the town by any fire district, special improvement district or school district, located in whole or in part in any such town, upon such terms and conditions as may be agreed upon by the town board and the governing board or governing body of any such district.

(4) Except as otherwise provided in section one hundred forty-two-c of this chapter with respect to the use of town highway machinery, snow and ice removal equipment, tools and equipment by a village located wholly or partly within the town, permit the use of town highway machinery, snow and ice removal equipment, tools and equipment during an emergency by any city, village, town, county, fire district, special improvement district or school district, upon such terms and conditions as may be agreed upon by the town board and the governing board or governing body of any such district.

(5) Moneys received by a town pursuant to the provisions of this section shall be first applied to the credit of the fund authorized by subdivision four of section one hundred forty-one of this chapter to the extent that any expense incurred was originally charged thereto, and the balance of such moneys, if any, shall be credited to the fund authorized by subdivision three of section one hundred forty-one of this chapter.

HISTORY:
Add, L 1945, ch 743; amd, L 1946, ch 417; L 1954, ch 692, § 7; L 1960, ch 635, § 6; L 1962, ch 561, § 1, eff April 18, 1962; L 1965, ch 604, § 1, eff Jan 1, 1966, applicable to all such moneys received by a town on and after such date; L 1971, ch 1110, § 94; L 1973, ch 534, eff June 5, 1973.

Notes to Decisions

Analysis

1. Generally
2. School district snow and ice removal
3. Use of town machinery
4. —By fire district
5. —By special improvement district
6. —By soil conservation district
7. —By refuse and garbage district
8. —On private property
9. Negligent operation of leased machinery
10. Charges
11. —Funds applied

1. Generally

The town superintendent of highways may not retain for his own use and benefit moneys paid by the county to the town under an agreement concerning the rental of town highway machinery with operator for his services on county roads unless he is employed by the county. 1954 Op St Compt No. 54-6775.

2. School district snow and ice removal

A town board may authorize the town superintendent to remove snow from a parking lot within the town belonging to a school district and may direct the town clerk to give any necessary notice to the school district; such a service may only be given pursuant to a contract between the town board and governing board of the school district and supported by fair consideration. 1966 Op St Compt No. 66-381.

A town board may enter into an agreement with a school board for the town to plow snow on school district property located within the town and the town board may direct that the town superintendent of highways perform such plowing. 1983 Op St Compt No. 82-340, 1982 N.Y. Comp. LEXIS 383.

3. Use of town machinery

Once authorization is given to the highway superintendent to permit the use of town highway equipment, only the town highway superintendent or his deputy may agree to such a rental. 1967 Op St Compt No. 67-879.

A town may not rent its highway equipment to a private corporation. 1980 Op St Compt No. 80-63, 1980 N.Y. Comp. LEXIS 348.

The Town Superintendent, with the approval of the Town Board and the County Superintendent, may permit the Soil Conservation District to use town highway machinery at a rate not less than that fixed by the State Comptroller for the rental of highway machinery; its use is not required to be confined to the boundaries of the town as is the case under this section. 1945 Op St Compt No. 45-451.

4. —By fire district

Upon compliance with the terms of this section, a town board may authorize the town superintendent of highways to permit the use of town highway machinery, tools, and equipment by a fire district within the town. 1953 NY Ops Atty Gen June 23 (Informal), 1953 N.Y. AG LEXIS 274.

The town board of any town may authorize the town superintendent to remove snow and ice from any property within the town belonging to a fire district, and to construct a driveway to a pond in the vicinity, upon such terms as may be agreed upon by the town board and governing board of any such fire district. 1958 NY Ops Atty Gen Mar 13 (Informal), 1958 N.Y. AG LEXIS 109.

Town highway machinery, tools, and equipment may be rented to a Fire District for the purpose of removing snow from a road giving access to the water supply of the fire district. 1947 Op St Compt No. 47-12.

A town may agree with a fire district to use town salt trucks to salt a private driveway which provides access to a fire house. 1979 Op St Compt No. 79-105.

A town may authorize the town highway superintendent to lease town highway equipment to a fire district located within the town. 1967 Op St Compt No. 67-879.

5. —By special improvement district

A Town Board may authorize the rental of town highway machinery and equipment by a special improvement district in the town. 1946 Op St Compt No. 46-147.

6. —By soil conservation district

The Town Superintendent, with the approval of the Town Board and the County Superintendent, may permit the Soil Conservation District to use town highway machinery at a rate not less than that fixed by the State Comptroller for the rental of highway machinery; its use is not required to be confined to the boundaries of the town as is the case under this section. 1945 Op St Compt No. 45-451.

7. —By refuse and garbage district

The Town Board of any town may authorize the use of town highway machinery, tools, and equipment for the collection of garbage in a Refuse and Garbage District upon such terms as it may see fit, subject to the minimum daily rental prescribed by the State Comptroller. 1945 Op St Compt No. 45-285.

8. —On private property

Towns may not rent or permit the use of machinery, etc. for plowing snow on private driveways unless authorized by statute. 1946 Op St Compt No. 46-43.

The Superintendent of Highways is not authorized to permit the use of town highway machinery and equipment to remove snow from a private road leased by the United States. 1946 Op St Compt No. 46-147.

9. Negligent operation of leased machinery

A town that leases its highway equipment to a fire district may still be liable for the negligent operation of such equipment. 1967 Op St Compt No. 67-879.

10. Charges

The Town Board of any town may authorize the use of town highway machinery, tools, and equipment for the collection of garbage in a Refuse and Garbage District upon such terms as it may see fit, subject to the minimum daily rental prescribed by the State Comptroller. 1945 Op St Compt No. 45-285.

The Town Superintendent, with the approval of the Town Board and the County Superintendent, may permit the Soil Conservation District to use town highway machinery at a rate not less than that fixed by the State Comptroller for the rental of highway machinery; its use is not required to be confined to the boundaries of the town as is the case under this section. 1945 Op St Compt No. 45-451.

11. —Funds applied

Moneys received from such a snow removal contract must first be credited to snow removal fund to the extent of charges incurred, and the remainder to the machinery fund. 1966 Op St Compt No. 66-381.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

40 Am Jur 2d, Highways, Streets, and Bridges §§ 495–510.

INSURANCE LAW

Article

3.	Administrative and Procedural Provisions
21.	Agents, Brokers, Adjusters, Consultants and Intermediaries
23.	Property/casualty Insurance Rates
32.	Insurance Contracts—life, Accident and Health, Annuities
34.	Insurance Contracts-Property/casualty
42.	Life Insurance Companies and Accident and Health Insurance Companies and Legal Services Insurance Companies
45.	Fraternal Benefit Societies
91.	Taxes and Fees

HISTORY:
Add, L 1984, ch 367, eff Sept 1, 1984.

ARTICLE 3 Administrative and Procedural Provisions

Section

318.	Reports of fire losses; availability of information

HISTORY:
Add, L 1984, ch 367, § 1, eff Sept 1, 1984.

§ 318. Reports of fire losses; availability of information

(a) Insurers shall report all fire losses in excess of five hundred dollars or such larger amount as prescribed by the superintendent, arising under policies covering property located in this state to a central organization engaged in property loss registration, as designated by the superintendent, in accordance with regulations promulgated by the superintendent.

(b) The information contained in such reports shall, in accordance with such regulations, be available to law enforcement agencies, to tax districts which have, pursuant to the provisions of section twenty-two of the general municipal law, filed with the superintendent a notice of intention to claim against the proceeds of a policy of fire insurance, to the office of fire prevention and control and to appropriate governmental agencies charged with the responsibility for demolition of structures.

HISTORY:
Add, L 1984, ch 367, § 1, eff Sept 1, 1984; amd, L 2010, ch 56, § 46 (Part B), eff July 1, 2010.

Derivation Notes: This section formerly appeared, in part, as Ins § 336-a as added L 1981, ch 711, § 6; amd, L 1982, ch 164, § 1, L 1983, ch 99, § 1.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:
This section referred to in § 3432.
Claims against fire insurance proceeds; procedure, CLS Gen Mun § 22.

Jurisprudences:
68 NY Jur 2d Insurance §§ 18, 48, 50.

Appleman on Insurance:
1-13 New Appleman New York Insurance Law § 13.04, Special Requirements Regarding Fire Claims.

ARTICLE 21 Agents, Brokers, Adjusters, Consultants and Intermediaries

Section

2105.	Excess line brokers; licensing
2118.	Excess line brokers; duties

HISTORY:
Add, L 1984, ch 367, § 1, eff Sept 1, 1984.

§ 2105. Excess line brokers; licensing

(a) The superintendent may issue an excess line broker's license to any person, firm, association or corporation who or which is licensed as an insurance broker under section two thousand one hundred four of this article, or who or which is licensed as an excess line broker in the licensee's home state, provided, however, that the applicant's home state grants non-resident licenses to residents of this state on the same basis, except that reciprocity is not required in regard to the placement of liability insurance on behalf of a purchasing group or any of its members; authorizing such person, firm, association or corporation to procure, subject to the restrictions herein provided, policies of insurance from insurers which are not authorized to transact business in this state of the kind or kinds of insurance specified in paragraphs four through fourteen, sixteen, seventeen, nineteen, twenty, twenty-two, twenty-seven, twenty-eight, thirty-one, and thirty-two of subsection (a) of section one thousand one hundred thirteen of this chapter and in subsection (h) of this section, provided, however, that the provisions of this section and section two thousand one hundred eighteen of this article shall not apply to ocean marine insurance and other contracts of insurance enumerated in subsections (b) and (c) of section two thousand one hundred seventeen of this article. Such license may be suspended or revoked by the superintendent whenever in his or her judgment such suspension or revocation will best promote the interests of the people of this state.

(b) Before the superintendent issues any such license or renewal, there shall be filed in the superintendent's office an application by the person, firm, association or corporation desiring such license, in such form or forms, and supplements thereto, and containing information the superintendent prescribes. For each business entity, the sub-licensee or sub-licensees named in the application shall be designated responsible for the business entity's compliance with the insurance laws, rules and regulations of this state. A person or entity licensed as an excess line broker in his, her or its home state may receive a non-resident excess line broker license pursuant to subsection (a) of this section with the submission of the application.

(c) (1) At the time of application for every such license, and for every renewal, each applicant shall pay the superintendent the following fees:

(A) Two hundred dollars for each year or fraction of a year in which a license shall be valid, if the applicant maintains an office in, or acts as an excess line broker in placing insurance on risks located in, any county in this state having a population of one hundred thousand or more inhabitants.

(B) Twenty-five dollars for each year or fraction of a year in which a license shall be valid in all other cases.

(2) The population of any county shall be determined by the most recent official census, whether by the United States or by this state.

(d) Every license issued pursuant to this section shall be for a term expiring with the expiration of the qualifying broker license and may be renewed for the ensuing period of twenty-four months upon the filing of an application in conformity with subsection (b) of this section and paying the fee prescribed by subsection (c) of this section. In the case of a license issued to a new applicant, the superintendent may issue a license for a term of more than two years, provided however, such term shall not exceed thirty months.

(e) Any such license issued to a firm, association or corporation shall authorize as sub-licensee only the sub-licensees named in its license as insurance broker, and each such sub-licensee may act thereunder only in the name of and on behalf of the licensee.

(f) [Repealed]

(g) The superintendent may issue a replacement for a currently in force license which has been lost or destroyed. Before such replacement license shall be issued, there shall be on file in the office of the superintendent a written application for such replacement license, affirming under penalty of perjury that the original license has been lost or destroyed, together with a fee of fifteen dollars.

(h) Pursuant to subsection (a) of this section, an excess line broker may procure policies of insurance from insurers which are not authorized to transact business in this state for personal accident insurance and accident disability insurance, in which the insured is a non-resident of this state, and the nature of the risk to be insured is related to the operation of motor vehicles at high speeds for the enjoyment of spectators, is unusual and difficult to place and where such broker, after diligent effort, could not procure substantially similar coverage from an insurer authorized to do business in this state.

(i) Pursuant to subsection (a) of this section, an excess line broker may procure policies of salary protection insurance from insurers that are not authorized to transact business in this state.

HISTORY:

Add, L 1984, ch 367, § 1, eff Sept 1, 1984; amd, L 1984, ch 368, § 1, eff Sept 1, 1984; L 1993, ch 285, §§ 4, 5, eff July 21, 1993; L 1997, ch 239, §§ 1, 2, eff July 21, 1997; L 1997, ch 294, § 2, eff July 29, 1997; L 2000, ch 578, § 2, eff Dec 8, 2000; L 2001, ch 74, § 4, eff June 29, 2001; L 2003, ch 687, § 27, eff Oct 21, 2003; L 2005, ch 59, § 5 (Part F), eff Jan 1, 2007; L 2006, ch 626, § 2, eff Aug 16, 2006; L 2011, ch 61, §§ 7, 9, eff July 21, 2011 (see 2011 note below); L 2012, ch 442, § 3, eff Nov 15, 2012; L 2020, ch 56, § 24 (Part L), effective February 15, 2021.

Editor's Notes: Laws 2011, ch 61, § 19(4) (Part I), eff July 21, 2011, provides as follows:

§ 19. This act shall take effect July 21, 2011; provided, however, that:

(4) effective immediately, the addition, amendment, or repeal of any rules and regulations necessary for the implementation of this act on its effective date are authorized and directed to be made and completed on or before such effective date.

Laws 2020, ch 56, § 29 (Part L), eff February 15, 2021, provides:

§ 29. This act shall take effect February 15, 2021, provided, however, that the amendments to subdivision (a) of section 439 of the family court act made by section twenty-one of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith. Effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized to be made and completed on or before such effective date.

Derivation Notes: This section formerly appeared, in part, as Ins § 122 as added by L 1939, ch 882, § 122; amd, L 1948, ch 497, § 1, L 1951, ch 214, § 1, L 1952, ch 115, § 1, L 1953, ch 370, § 1, L 1955, ch 223, § 1, L 1957, ch 265, § 1, L 1958, ch 787, § 1, L 1960, ch 502, § 1, L 1964, ch 38, § 1.

Amendment Notes: 2012. Chapter 442, § 3 amended: Sub (d) by adding the matter in italics.

The 2020 amendment by ch 56, § 24 (Part L), added "thirty-two" in the first sentence of (a) and made related changes.

Notes to Decisions

Analysis

1. Generally
2. Excess line insurance
3. —Repossession insurance
4. —Legal services insurance
5. —Kidnap and ransom insurance
6. —Political risk insurance
7. —Marine insurance
8. —Terrorism exclusion
9. —Lead paint exclusion
10. —Mold exclusion
11. Excess line insurer
12. Excess line broker
13. Surplus lines
14. Foreign insurance company
15. Licensing
16. —Revocation
17. —Third party administrator
18. Bonds
19. Excess line tax
20. Fees

1. Generally

Former § 122 [now §§ 2105, 2118] in some circumstances permits placing of insurance with companies not authorized to insure in this state. I. Tanenbaum Son & Co. v Rothenberg & Co., 201 A.D. 272, 194 N.Y.S. 315, 1922 N.Y. App. Div. LEXIS 6302 (N.Y. App. Div. 1922), aff'd, 236 N.Y. 520, 142 N.E. 267, 236 N.Y. (N.Y.S.) 520, 1923 N.Y. LEXIS 938 (N.Y. 1923).

A policy of insurance signed and sealed in Massachusetts by a corporation organized and doing business in that state, and mailed to the insured in this state pursuant to an order by mail, is a Massachusetts contract and not void under former § 137 [predecessor to former § 122, now §§ 2105, 2118]. Hammond v International R. Co., 116 N.Y.S. 854, 63 Misc. 437, 1909 N.Y. Misc.

LEXIS 151 (N.Y. Sup. Ct.), aff'd, 134 A.D. 995, 119 N.Y.S. 1127, 1909 N.Y. App. Div. LEXIS 3882 (N.Y. App. Div. 1909).

One who has received premiums for an insurance company as its agent is estopped from claiming in an action brought to recover the moneys thus received that the company has not procured authority to do business here. Factors Fire Ins. Co. v Whilden, 156 N.Y.S. 362, 92 Misc. 558, 1915 N.Y. Misc. LEXIS 1120 (N.Y. Sup. Ct. 1915).

While former § 122 [now §§ 2105, 2118] allows insurance brokers to secure policies from unauthorized or unadmitted companies in special circumstances, it does not admit the insuring companies to the state or authorize the carrier to transact business here. Empire Mut. Ins. Co. v International Tram-Po-Line Mfrs., Inc., 39 Misc. 2d 810, 242 N.Y.S.2d 28, 1963 N.Y. Misc. LEXIS 1950 (N.Y. Sup. Ct. 1963).

Weather authorized insurer that issues commercial general liability policy may charge minimum and deposit premium is dependent on insurer's ability to prove that minimum and deposit premium filed equals costs associated with issuing policy, and to cover expenses of writing business; unauthorized insurer that issues commercial general liability policy through licensed excess line broker under CLS Ins §§ 2105 and 2118 is not prohibited from issuing minimum and deposit premium. NY Ins Dep't Gen Counsel, Opinion No. 02-06-04, 2002 NY Insurance GC Opinions LEXIS 26.

All sales activities by unlicensed entity were in violation of Insurance Law. NY Ins Dep't Gen Counsel, Opinion No. 03-07-21, 2003 NY Insurance GC Opinions LEXIS 220.

Proposed electronic exchange, whereby investors and insureds would negotiate sale of life insurance policies, would not be contrary to Insurance Law. NY Ins Dep't Gen Counsel, Opinion No. 03-07-24, 2003 NY Insurance GC Opinions LEXIS 217.

Surety bond required from debt collection agency that collects child support payments may be sold by unauthorized insurer, absent requirement by New York City Department of Consumer Affairs (DCA). NY Ins Dep't Gen Counsel, Opinion No. 04-08-24, 2004 NY Insurance GC Opinions LEXIS 206.

Proceedings against unauthorized foreign or alien insurers, including unauthorized reinsurers, arising out of insurance policies effectuated in accordance with CLS Ins § 2117(b) or (c) or § 2105 where insurance contract designates Superintendent of Insurance to be served with legal process on behalf of such insurer, are exempt from CLS Ins § 1213 pursuant to subparagraph (e). NY Ins Dep't Gen Counsel, Opinion No. 04-12-17, 2004 NY Insurance GC Opinions LEXIS 312.

Regulation 41 (11 NYCRR Part 27), which was effective January 1, 1994, does not apply to trust agreement that was entered into prior to promulgation of regulation, where company was placed into liquidation and ceased writing new business prior to promulgation of regulation. NY Ins Dep't Gen Counsel, Opinion No. 08-03-17, 2008 NY Insurance GC Opinions LEXIS 65.

It would constitute acting as insurance agent or broker for which licensing would be required where owner of web site that was unrelated to insurance solicited users of web site for information about their insurance needs, and then sold information to specific insurance brokers and insurers, with whom web site owner had contracted to gather information, and who would subsequently contact insureds directly with offers to sell insurance. NY Ins Dep't Gen Counsel, Opinion No. 01-02-10, 2001 NY Insurance GC Opinions LEXIS 204.

2. Excess line insurance

Former § 122 [now §§ 2105, 2118] was clearly enacted to cure some of the problems raised by prior practice of brokers placing excess-line insurance with companies not subject to the regulatory powers of this state, and was aimed at protecting the insured. People v Condor of Americas, Inc., 43 Misc. 2d 899, 252 N.Y.S.2d 619, 1964 N.Y. Misc. LEXIS 1587 (N.Y. Sup. Ct. 1964), aff'd, 23 A.D.2d 822, 258 N.Y.S.2d 338, 1965 N.Y. App. Div. LEXIS 5667 (N.Y. App. Div. 1st Dep't 1965).

Superintendent of Insurance does not hold hearings to determine whether particular coverage is eligible for procurement from unauthorized insurer in excess line market, since Insurance Law expressly delineates permissible kinds of insurance that excess line broker may procure through excess line market. NY Ins Dep't Gen Counsel, Opinion No. 06-08-05, 2006 NY Insurance GC Opinions LEXIS 146.

Unauthorized insurer that provides coverage in excess line market may not offer insureds "accident" coverage as endorsement to insurer's basic general liability policy, since such coverage would fall within parameters of accident and health insurance or workers' compensation insurance, and unauthorized insurer doing business in excess line market may not write such coverage in New York under CLS Ins Law § 2105. NY Ins Dep't Gen Counsel, Opinion No. 08-04-12, 2008 NY Insurance GC Opinions LEXIS 16.

New York-licensed excess line broker may procure coverage for electronic media liability, computer information security liability and privacy liability under group insurance policy (Master Policy) for New York members of proposed Identity Theft Purchasing Group Insurance Program, whose risks are resident in New York; such coverage constitutes liability insurance under federal Liability Risk Retention Act, 15 USCS §§ 3901 et seq. NY Ins Dep't Gen Counsel, Opinion No. 10-12-14, 2010 NY Insurance GC Opinions LEXIS 92.

Broker licensed under either CLS Ins § 2104(b)(1)(A) (life insurance) or CLS Ins § 2104(B) (property/casualty insurance) may act as retail broker with respect to salary protection insurance transaction in excess line market; Insurance Department considers salary protection insurance to be type of accident and health insurance, which both life insurance broker and property/casualty insurance broker are authorized to place. NY Ins Dep't Gen Counsel, Opinion No. 11-09-01, 2011 NY Insurance GC Opinions LEXIS 38.

3. —Repossession insurance

"Repossession insurance," although insurance, was kind that could not be offered in New York either by authorized multi-line property/casualty Company or by excess lines broker on behalf of unauthorized insurer. NY Ins Dep't Gen Counsel, Opinion No. 00-09-10, 2000 NY Insurance GC Opinions LEXIS 29.

Nothing in Insurance Law or regulations thereunder precludes endorsement in excess line policy that excludes coverage for employees of subcontractor. NY Ins Dep't Gen Counsel, Opinion No. 03-11-05, 2003 NY Insurance GC Opinions LEXIS 306.

4. —Legal services insurance

Excess line broker may not procure legal services insurance from unauthorized insurer; CLS Ins § 2105(1) restricts kinds of insurance which excess line broker may procure from unauthorized insurer, and legal services insurance as defined in CLS Ins § 1113(a)(29) is not among those kinds. NY Ins Dep't Gen Counsel, Opinion No. 01-09-09, 2001 NY Insurance GC Opinions LEXIS 27.

Excess line broker may not place legal services insurance because excess line brokers are not so authorized under CLS Ins § 2105(a). NY Ins Dep't Gen Counsel, Opinion No. 06-05-04, 2006 NY Insurance GC Opinions LEXIS 103.

5. —Kidnap and ransom insurance

Kidnap and ransom insurance may be written on excess line basis, provided that is done in compliance with applicable statutory requirements; there are no special or compulsory clauses that must be included in such coverage. NY Ins Dep't Gen Counsel, Opinion No. 02-01-35, 2002 NY Insurance GC Opinions LEXIS 154.

6. —Political risk insurance

As to regulation of excess line insurance, situs of risk depends on particular facts of situation for which coverage is sought; procuring political risk coverage policy directly from unauthorized insurer without having to use excess line market would not be permissible. NY Ins Dep't Gen Counsel, Opinion No. 03-01-37, 2003 NY Insurance GC Opinions LEXIS 110.

Where political risk insurance coverage is considered to constitute one or more of types of coverage referenced in CLS Ins § 2105(a), then coverage could be placed by excess line broker with unauthorized insurer that is in compliance with requirements contained in CLS Ins § 2118 and 11 NYCRR § 27 (Regulation 41). NY Ins Dep't Gen Counsel, Opinion No. 03-01-37, 2003 NY Insurance GC Opinions LEXIS 110.

7. —Marine insurance

Marine insurance may be procured from unauthorized insurer only by licensed excess lines broker and is subject to excess line premium taxes, except that to extent specifically provided for in CLS Ins § 2117, licensed insurance broker may place certain classes of marine insurance exempt from excess lines premium tax. NY Ins Dep't Gen Counsel, Opinion No. 03-03-18, 2003 NY Insurance GC Opinions LEXIS 45.

Marine protection and indemnity insurance is not subject to excess line taxes in connection with ocean going vessels; any other contract of marine protection and indemnity insurance would be subject to excess line taxes. NY Ins Dep't Gen Counsel, Opinion No. 03-03-18, 2003 NY Insurance GC Opinions LEXIS 45.

8. —Terrorism exclusion

There is no general prohibition against terrorism exclusion in policy written on excess line basis, but such exclusion would not be permissible as to peril of fire and certain statutorily required coverages. NY Ins Dep't Gen Counsel, Opinion No. 02-05-19, 2002 NY Insurance GC Opinions LEXIS 36.

9. —Lead paint exclusion

Nothing in New York Insurance Law would have prevented unauthorized insurer from issuing liability insurance policy through excess lines broker containing "Lead Paint Exclusion." NY Ins Dep't Gen Counsel, Opinion No. 03-03-12, 2003 NY Insurance GC Opinions LEXIS 51.

10. —Mold exclusion

Nothing in New York Insurance Law or regulations thereunder specifically prohibit mold exclusion in insurance policy; however, in policy issued by authorized insurer written on risks or operations in New York State, exclusion that is misleading or violative of public policy is not permissible (Superintendent of Insurance has not approved any mold-related exclusions). NY Ins Dep't Gen Counsel, Opinion No. 03-04-04, 2003 NY Insurance GC Opinions LEXIS 31.

11. Excess line insurer

Appeals court reversed and declared that an excess line insurer did not have to defend or indemnify a building owner insured in an underlying action since the policy clearly excluded lead-based paint injuries; under N.Y. Ins. Law § 2105(a), the broker, not the excess line insurer, was required to be licensed in New York. But, even so, requiring the insurer to provide coverage greater than the policy allowed would have been too great a penalty to impose under N.Y. Ins. Law § 1102(a).3405 Putnam Realty Corp. v Chubb Custom Ins. Co., 14 A.D.3d 310, 788 N.Y.S.2d 64, 2005 N.Y. App. Div. LEXIS 12 (N.Y. App. Div. 1st Dep't 2005).

Unauthorized insurer who transacts insurance business through excess line market must adhere to 11 NYCRR § 27 and CLS Ins §§ 2105, 2118, and 2130; financial and other requirements including prohibited activities do not change by virtue of fact that portion of risk is subsequently reinsured with large insurance company such as Lloyds of London. NY Ins Dep't Gen Counsel, Opinion No. 01-11-12, 2001 NY Insurance GC Opinions LEXIS 278.

As to regulation of excess line insurance, situs of risk depends on particular facts of situation for which coverage is sought; procuring political risk coverage policy directly from unauthorized insurer without having to use excess line market would not be permissible. NY Ins Dep't Gen Counsel, Opinion No. 03-01-37, 2003 NY Insurance GC Opinions LEXIS 110.

CLS Ins § 1213(e) would apply to formerly listed excess line insurer where policy that is subject of lawsuit was placed on excess lines basis under CLS Ins § 2105, excess line insurer was on Excess Lines Association of New York's (ELANY) list of eligible excess lines insurers when policy was written, and insurer continued to maintain excess line trust fund under 11 NYCRR Part 27 (Regulation 41), provided (1) excess line insurer has complied with all applicable provisions of Insurance Law and Regulations and its contract designates Superintendent of Insurance as its attorney on whom lawful process in any proceeding instituted by or on behalf of insured may be served, and (2) insurer has sufficient funds in its excess line trust fund that is available to satisfy any final judgment. NY Ins Dep't Gen Counsel, Opinion No. 06-08-12, 2006 NY Insurance GC Opinions LEXIS 162.

12. Excess line broker

Insurance broker violated Insurance Department Regulation 121 (11 NYCRR § 73.2) by placing in New York, through excess line broker, claims-made liquor liability policies; fact that insurer issuing policies was unauthorized insurer beyond reach of Insurance Department was irrelevant to applicability of Regulation 121's prohibition of claims-made policies to procuring broker. John Paterno, Inc. by & Through Paterno v Curiale, 88 N.Y.2d 328, 645 N.Y.S.2d 424, 668 N.E.2d 395, 1996 N.Y. LEXIS 1191 (N.Y. 1996).

Although the New York Insurance Law generally prohibits the sale in New York of insurance underwritten by insurers not authorized to conduct business in New York, N.Y. Ins. Law § 1102(a); N.Y. Ins. Law § 2117(a), which is an exception to this rule permits certain licensed brokers, known as excess line brokers, to procure insurance from unauthorized insurers under limited circumstances, N.Y. Ins. Law § 2105(a), 2117(h). Under the excess line statutory scheme, it is the excess line broker, not the unauthorized insurer, that must be licensed, N.Y. Ins. Law § 2105(a).3405 Putnam Realty Corp. v Chubb Custom Ins. Co., 14 A.D.3d 310, 788 N.Y.S.2d 64, 2005 N.Y. App. Div. LEXIS 12 (N.Y. App. Div. 1st Dep't 2005).

It is well established that New York residents may properly procure insurance from unlicensed and unadmitted insurance companies through excess-line brokers, and that such contracts are enforceable in this state and assessments levied by insurance companies not licensed to do business in New York are valid and enforceable therein against New York policy holders. Kelly v Bremmerman, 42 Misc. 2d 148, 247 N.Y.S.2d 655, 1964 N.Y. Misc. LEXIS 2029 (N.Y. Sup. Ct. 1964), rev'd, 23 A.D.2d 346, 260 N.Y.S.2d 971, 1965 N.Y. App. Div. LEXIS 3783 (N.Y. App. Div. 4th Dep't 1965).

Only licensed excess line broker may procure insurance policies from insurers not authorized to transact business in New York State as described in CLS Ins § 2105, or licensed broker under CLS Ins § 2117(b) or (c). NY Ins Dep't Gen Counsel, Opinion No. 01-02-08, 2001 NY Insurance GC Opinions LEXIS 205.

There is no specific obligation on excess line broker under CLS Insurance Law to advise, whether in writing or orally, why unauthorized insurer has increased its premium; however, such broker should make effort to determine cause, and to advise insured of his findings, in accordance with CLS Ins § 2110, which requires excess line broker to act in competent, honest, and trustworthy manner. NY Ins Dep't Gen Counsel, Opinion No. 02-07-02, 2002 NY Insurance GC Opinions LEXIS 264.

Insured, which is tax-exempt unit of another state government, is not required to pay excess line premium taxes to Superintendent of Insurance and stamping fees imposed by Excess Line Association of New York; said taxes and fees in New York are imposed on New York licensed excess line broker, although such brokers commonly pass on cost to insured by means of written service fee memorandum signed by insurer. NY Ins Dep't Gen Counsel, Opinion No. 02-10-07, 2002 NY Insurance GC Opinions LEXIS 318.

Excess line broker may accept Part C affidavit sent to it by producing broker by means of facsimile transmission and use it in order to satisfy requirements in Regulation 41 that there be proof of declinations before business may be placed by excess line broker with unauthorized insurer. NY Ins Dep't Gen Counsel, Opinion No. 03-01-39, 2003 NY Insurance GC Opinions LEXIS 108.

As to placement of insurance with unauthorized insurer for risk located on Indian Reservation physically within New York State, such risk would be considered to be inside New York, and excess line broker must be utilized in placing risk with unauthorized insurer. NY Ins Dep't Gen Counsel, Opinion No. 03-04-23, 2003 NY Insurance GC Opinions LEXIS 12.

New York may license Illinois corporate non-resident excess line broker that does not maintain office in New York although Illinois, broker's home state, does not license corporations as excess line brokers, since Illinois permits New York corporate

excess line broker to operate in Illinois through licensed employee of corporation acting in name of corporation. NY Ins Dep't Gen Counsel, Opinion No. 04-08-09, 2004 NY Insurance GC Opinions LEXIS 192.

Excess line broker may not procure liability insurance from unauthorized alien insurer that is not eligible to issue insurance coverage through excess line market. NY Ins Dep't Gen Counsel, Opinion No. 06-01-19, 2006 NY Insurance GC Opinions LEXIS 19.

In placing excess line insurance, excess line broker must comply with requirements of 11 NYCRR Part 27 (Regulation 41) and CLS Ins §§ 2105, 2118 and 2130; onus is on excess line broker to ensure that unauthorized insurer satisfies financial and other requirements contained in Part 27. NY Ins Dep't Gen Counsel, Opinion No. 06-01-19, 2006 NY Insurance GC Opinions LEXIS 19.

13. Surplus lines

Former § 137 [predecessor to former § 122, now §§ 2105, 2118] in relation to "surplus line" does not have the effect of authorizing foreign companies to transact business in this state, but allows brokers to procure such insurance from a foreign company. When the agreement of an insured to procure other insurance is conditional upon the fact that the insurer is not authorized to do business in this state, it cannot contend that it had a limited authority to do business in this state, by force of former § 137 [now §§ 2105, 2118], so as to make the contract one which was perfected here. Friedland v Commonwealth Fire Ins. Co., 143 A.D. 570, 128 N.Y.S. 705, 1911 N.Y. App. Div. LEXIS 878 (N.Y. App. Div. 1911), aff'd, 207 N.Y. 705, 101 N.E. 1102, 207 N.Y. (N.Y.S.) 705, 1913 N.Y. LEXIS 1361 (N.Y. 1913).

14. Foreign insurance company

Since foreign insurance companies are made subject to suit in New York with respect to policies issued and secured from them pursuant to former § 122 [now §§ 2105, 2118], it would seem that equal protection of the law demands that such unauthorized carriers be permitted to sue here with respect to policies so issued, such as to obtain a judicial declaration of nonliability on the policy, without complying with the requirements of § 210 of the General Corporation Law. Empire Mut. Ins. Co. v International Tram-Po-Line Mfrs., Inc., 39 Misc. 2d 810, 242 N.Y.S.2d 28, 1963 N.Y. Misc. LEXIS 1950 (N.Y. Sup. Ct. 1963).

15. Licensing

16. —Revocation

Where the petitioner, a principal in a Florida insurance company not approved by the Superintendent of Insurance, placed business with that company with full knowledge of its precarious financial condition, he was therefore properly deemed by the Superintendent to be an untrustworthy licensee, and his license was properly revoked. B & R Excess Corp. v Stewart, 36 A.D.2d 812, 320 N.Y.S.2d 146, 1971 N.Y. App. Div. LEXIS 4285 (N.Y. App. Div. 1st Dep't), app. denied, 29 N.Y.2d 481, 1971 N.Y. LEXIS 2056 (N.Y. 1971).

17. —Third party administrator

Insurance Department does not issue license that is denominated "third party administrator" license, nor are their registration requirements under Insurance Law as to "third party administrators"; however, entity that engages in activities that would require licensing (e.g., acting as insurer, agent, broker, or adjuster), or registration (e.g., service contract providers, purchasing groups and risk retention groups, among others), must obtain appropriate license from, or register with, Insurance Department. NY Ins Dep't Gen Counsel, Opinion No. 01-11-05, 2001 NY Insurance GC Opinions LEXIS 286.

18. Bonds

Where a bond is given to satisfy the requirements of former § 122 [now § 2105], that the licensee faithfully comply with all requirements, and specifically provides for recovery of the penal sum by the people of the State of New York, the bond is not simply an indemnification bond but a forfeiture bond and the state is entitled to recover the full amount if it establishes fraudulent conduct on the part of the licensee or sub-licensee. People v Condor of Americas, Inc., 43 Misc. 2d 899, 252 N.Y.S.2d 619, 1964 N.Y. Misc. LEXIS 1587 (N.Y. Sup. Ct. 1964), aff'd, 23 A.D.2d 822, 258 N.Y.S.2d 338, 1965 N.Y. App. Div. LEXIS 5667 (N.Y. App. Div. 1st Dep't 1965).

19. Excess line tax

If broker does not use its New York excess line license to place insurance on New York risks but insurance transaction is negotiated in California between insured domiciled there and California office of nationwide broker, there would be no New York excess line tax and stamping fee if such were non-New York transaction; however, CLS Tax § 1551 imposes tax on insured that obtains insurance from insurer not authorized in New York covering risks in New York, and if policy covers risks located both in New York and out-of-state, § 1551 taxes are allocated based on amount of premiums pertaining to New York risks. NY Ins Dep't Gen Counsel, Opinion No. 02-10-07, 2002 NY Insurance GC Opinions LEXIS 318.

Where corporation has locations in more than one state, and policy is placed in New York by excess line broker, excess line premium tax is to be allocated in accordance with allocation schedules in 11 NYCRR Part 27 (Regulation 41); method of allocation varies depending on nature of risk and type of insurance. NY Ins Dep't Gen Counsel, Opinion No. 03-04-15, 2003 NY Insurance GC Opinions LEXIS 20.

Where insurance policy is principally negotiated, issued, and delivered outside of New York, it is not subject to New York's excess line laws, and excess line premium tax is not due; however, insured may be required to pay tax to New York in regard to New York risks. NY Ins Dep't Gen Counsel, Opinion No. 03-04-15, 2003 NY Insurance GC Opinions LEXIS 20.

Tax-exempt status of Indian tribe does not exempt excess line broker from paying excess line premium tax on insurance policy. NY Ins Dep't Gen Counsel, Opinion No. 03-04-23, 2003 NY Insurance GC Opinions LEXIS 12.

20. Fees

Law concerning fees is same for "retail agents," "managing general agents," and "surplus lines" brokers as it is for insurance agents and brokers; however, brokers, unlike agents, may also charge insured service fee, in addition to, not in lieu of, commission, provided there is written memorandum signed by insured specifying amount of fee under CLS Ins § 2119(c). NY Ins Dep't Gen Counsel, Opinion No. 03-05-21.

Agency Opinions

Analysis

1. Generally
2. Surplus lines
3. Agent
4. Licensing

1. Generally

Contracts for insurance on steamers, placed with unauthorized foreign corporations, are not subject to regulation. 1909 N.Y. Op. Att'y Gen. No. 752.

2. Surplus lines

Residents who have received certificates authorizing them to write surplus lines may place such insurance in foreign or unauthorized Lloyds without becoming liable for criminal misdemeanor. 1910 N.Y. Op. Att'y Gen. No. 871.

3. Agent

Agents authorized to procure insurance are agents of insured and not of insurers, and where insurance was actually procured, though afterwards cancelled, agent should pay tax of three per cent. 1910 N.Y. Op. Att'y Gen. No. 880.

4. Licensing

Former § 137 [predecessor to former § 122, now § 2105] permits the licensing of persons only for the purpose of obtaining from nonadmitted companies insurance policies against fire, bombardment, invasion, insurrection, riot, civil war or commotion, or military or usurped power on property located in the state; hence it does not permit the licensing of persons to obtain

householders comprehensive policy from London Lloyds. 1923 NY Ops Atty Gen June 7.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 331, 1101, 1213, 2117, 2118, 2130, 5909, 9109; CLS Tax § 1510.

Kinds of insurance authorized, § 1113.

Acting for or aiding unlicensed or unauthorized insurers or health maintenance organizations, § 2117.

Excess line brokers; duties, § 2118.

Insurance brokers; licensing, 2104.

Codes, Rules and Regulations:

Insurance brokers and excess line brokers, applications. 11 NYCRR §§ 21.1, 21.2.

Excess line placements governing standards; definitions. 11 NYCRR § 27.1.

Excess line broker license application and renewal. 11 NYCRR § 27.2.

Binding authority. 11 NYCRR § 27.4.

Reports to be filed by excess line association. 11 NYCRR § 27.7.

Excess line placement governing standards; service fees. 11 NYCRR § 27.12.

Excess line placement governing standards; recordkeeping requirements. 11 NYCRR § 27.21.

Advice to insureds and evidence of coverage. 11 NYCRR § 27.17.

Assessment policies. 11 NYCRR § 27.18.

Assessment policies. 11 NYCRR § 27.19.

Return premiums. 11 NYCRR § 27.20.

Excess line placement governing standards. 11 NYCRR §§ 27.0 et seq.

Special prohibitions. 11 NYCRR §§ 29.1 et seq. (Regulation 87.

Jurisprudences:

68 NY Jur 2d Insurance §§ 25, 100, 104, 437, 443, 447, 453.

68A NY Jur 2d Insurance § 550.

70A NY Jur 2d Insurance § 1713.

9B Am Jur Legal Forms 2d, Indemnity, § 142:3 et seq.

Appleman on Insurance:

1-16 New Appleman New York Insurance Law § 16.13, Regulation of Coverage and Brokers.

1-17 New Appleman New York Insurance Law § 17.03, Professional Liability Insurers.

2-24 New Appleman New York Insurance Law § 24.05, Authority to Insure.

2-29 New Appleman New York Insurance Law § 29.09, License/Permit Bonds.

3-32 New Appleman New York Insurance Law § 32.06, Statutory Exceptions.

3-36 New Appleman New York Insurance Law § 36.09, Jurisdiction over Unauthorized Alien or Foreign Insurers.

3-43 New Appleman New York Insurance Law § 43.12, Excess Line Insurance: Related Laws and Regulations.

4-48 New Appleman New York Insurance Law § 48.04, Licenses.

4-48 New Appleman New York Insurance Law § 48.07, Other Rights and Responsibilities of Agents, Brokers and Other Insurance Intermediaries.

4-48 New Appleman New York Insurance Law § 48.09, Regulation of Excess Line Brokers.

4-52 New Appleman New York Insurance Law § 52.08, Risk Retention Groups; Purchasing Groups.

Annotations:

Public regulation or control of insurance agents or brokers. 10 ALR2d 950.

§ 2118. Excess line brokers; duties

(a) (1) Every licensee licensed pursuant to section two thousand one hundred five of this article shall be required to use due care in selecting the unauthorized insurer from whom policies are procured under his license.

(2) (A) No policy of insurance may be procured by a licensee from any foreign or alien insurer which is controlled, by a foreign government or by a political subdivision thereof, or which is an agency of any such government or subdivision if the superintendent determines that: (i) such insurer receives a subsidy or other competitive advantage, as a result of such control or status, that would enable it to compete unfairly with similarly situated insurers which are not so controlled or constituted; (ii) such insurer is entitled to claim sovereign immunity as a result of such control and the insurer has not waived the sovereign immunity; or (iii) the use of such insurer would be detrimental to the interests of the people of this state.

(B) No licensee shall be deemed to be in noncompliance with this subsection unless: (i) the superintendent has made a prior determination that the foreign or alien insurer from which the licensee procured a policy of insurance should not be used as an excess line insurer in this state in accordance with the provisions of this subsection; or (ii) the licensee knew or should have known that such insurer should not be used as an excess line insurer in accordance with the provisions of this subsection. The superintendent may promulgate regulations to provide guidance to the licensee.

(C) Every such insurer shall otherwise satisfy all applicable requirements for placement by an excess line broker.

(b) [Eff until July 1, 2024] (1) Within forty-five days after a policy is procured, a licensee shall submit the declarations page or cover note of every policy procured under his or her license to the excess line association established pursuant to section two thousand one hundred thirty of this article for recording and stamping. In the event that no declarations page or cover note is available to the licensee, within forty-five days after the policy is procured, the licensee shall submit a binder to the excess line association in lieu of such declarations page or cover note. In the event that a binder is submitted to the excess line association, the licensee shall submit the declarations page or cover note to the excess line association promptly upon receipt. Every insurance document submitted to the excess line association pursuant to this subsection shall set forth:

(A) the name and address of the insured;

(B) the gross premium charged;

(C) the name of the unauthorized insurer; and

(D) the kind of insurance procured.

(2) Subsequent endorsements which do not affect the premium charged are exempted from stamping.

(3)

(A) Except as provided in subparagraph (F) of this paragraph, submission of insurance documents to the excess line association shall be accompanied by a statement subscribed to, and affirmed by, the

licensee or sublicensee as true under the penalties of perjury that, after diligent effort, the full amount of insurance required could not be procured, from authorized insurers, each of which is authorized to write insurance of the kind requested and which the licensee has reason to believe might consider writing the type of coverage or class of insurance involved, and further showing that the amount of insurance procured from an unauthorized insurer is only the excess over the amount procurable from an authorized insurer. The licensee, however, shall be excused from affirming that a diligent effort, as defined above, was made to procure the coverage from authorized insurers if the licensee's affidavit is accompanied by the affidavit of another broker involved in the placement affirming as true under the penalties of perjury that, after diligent effort by the affirming broker, the required insurance could not be procured from an authorized insurer which the affirming broker had reason to believe might consider writing the type of coverage or class of insurance involved. The licensee and the affirming broker shall be excused from affirming that a diligent effort was made if the superintendent determines, pursuant to paragraph four of this subsection, that no declinations are required.

(B) A licensee or affirming broker shall be considered to have the reason to believe required by subparagraph (A) of this paragraph if the decision to offer the risk to the authorized insurer was based on any of the following:

(i) Recent acceptance by the authorized insurer of a type of coverage or class of insurance similar to that for which coverage is presently being sought;

(ii) Advertising by the authorized insurer or its agent indicating that the authorized insurer is willing to consider acceptance of this or a similar type of coverage or class of insurance;

(iii) Media communications (i.e., newspaper or magazine articles, trade publications, television and radio programming) indicating that the authorized insurer is writing, or is considering writing, this type of coverage or class of insurance;

(iv) Communications with other insurance professionals, risk managers, trade associations, the excess line association or the department of financial services which indicates that the authorized insurer might consider writing this type of coverage or class of insurance; or

(v) Any other valid basis for making such decision.

(C) Every licensee, or affirming broker, in connection with the placement of each risk pursuant to this section, shall record on the affidavit required pursuant to subparagraph (A) of this paragraph the information relied upon that formed the basis of such licensee's or affirming broker's reason to believe that the authorized insurer might consider writing the type of coverage or class of insurance involved.

(D) Declinations obtained from authorized insurers which are affiliates of, or, as defined in article fifteen of this chapter, under common control with, each other or the unauthorized insurer shall not meet the requirements of this subsection unless such related insurers operate as distinct and autonomous entities, and for underwriting purposes, compete with each other for the same type of coverage or class of insurance.

(E) The superintendent, in a regulation, may determine whether there are circumstances where it may be appropriate, due to the unavailability from an authorized insurer of the leading type of coverage or the leading class of insurance required by the insured, to waive the requirement in subparagraph (A) of this paragraph that a licensee may procure from an unauthorized insurer only the amount of insurance which is excess over the amount procurable from an authorized insurer, and to instead permit the licensee to procure from an unauthorized insurer the full amount of insurance required by the insured.

(F) A licensee seeking to procure or place insurance in this state for an exempt commercial purchaser shall not be required to satisfy any requirement of this state to make a due diligence search to determine whether the full amount or type of insurance sought by the exempt commercial purchaser can be obtained from authorized insurers if:

(i) the licensee procuring or placing the excess line insurance has disclosed to the exempt commercial purchaser that the insurance may or may not be available from the authorized market that may provide greater protection with more regulatory oversight; and

(ii) the exempt commercial purchaser has subsequently requested in writing that the licensee procure or place the insurance from an unauthorized insurer.

(4) The number of declinations constituting diligent effort in regard to placement of coverage with authorized insurers for purposes of paragraph three of this subsection shall be three, unless the superintendent after a hearing, on a record, upon findings and conclusions, determines that another number of such declinations is appropriate in regard to particular coverages. In making such determinations, the superintendent shall consider relevant market conditions, including unavailability of particular coverages from authorized insurers, and may conduct market surveys. Any such determination shall be reviewed at least annually by the superintendent.

(5) Before placing business with an unauthorized insurer, each licensee shall ascertain and verify the fact that such insurer is authorized in its domiciliary jurisdiction to write the insurance policy proposed to be procured from it by the licensee. No unauthorized insurer shall be deemed unacceptable for placement of business solely on the ground that it has been so authorized to write such business in its domiciliary jurisdiction for a period of less than three years preceding the placement of such risk by the licensee. In determining whether business may be placed

with such unauthorized insurer, the superintendent shall consider such factors as: the interests of the public and policyholders, the length of time such insurer has been authorized in its domiciliary jurisdiction and elsewhere, its financial condition, and unavailability of particular coverages from authorized insurers.

(6) It shall be unlawful for a licensee as defined in section two thousand one hundred one of this article and pursuant to sections two thousand one hundred four and two thousand one hundred five of this article to deliver in this state any declarations page of an insurance policy or cover note evidencing insurance unless such insurance document is stamped by the excess line association or is exempt from such requirements; provided, however, that a licensee's failure to comply with the requirements of this subsection shall not affect the validity of the coverage.

(7) Compliance by a licensee with the requirements set forth in this section in connection with submitting for recording and stamping declarations pages, cover notes, binders, endorsements, affidavits, notices of excess line placement and other excess line insurance documents may be accomplished by means of electronic or other media transmission, provided the superintendent first approves such methods of submitting for recording and stamping.

(b) [Eff July 1, 2024] (1) When any policy of insurance is procured under the authority of a license issued pursuant to section two thousand one hundred five of this article, there shall be submitted, both by the licensee or sub-licensee and by the insured, statements subscribed and affirmed by them as true under the penalties of perjury setting forth facts showing that such insured and such licensee were unable after diligent effort to procure, from authorized insurers, each authorized to write coverages of the kind requested, the full amount of insurance required to protect the interest of such insured, and further showing that the amount of insurance procured from an unauthorized insurer or insurers is only the excess over the amount so procurable from authorized insurers; provided, however, that the licensee shall be excused from affirming that a diligent effort was made to procure the coverage from such authorized insurers if the licensee's affidavit is accompanied by the affidavit of another broker involved in the placement affirming as true under the penalties of perjury that, after diligent effort by the affirming broker, the required insurance could not be procured from such authorized insurers.

(2) The number of declinations constituting diligent effort in regard to placement of coverage with authorized insurers for purposes of paragraph one of this subsection shall be three, unless the superintendent after a hearing, on a record, upon findings and conclusions, determines that another number of such declinations is appropriate in regard to particular coverages. In making such determinations, the superintendent shall consider relevant market conditions, including unavailability of particular coverages from authorized insurers, and may conduct market surveys. Any such determination shall be reviewed at least annually by the superintendent.

(3) Before placing business with an unauthorized insurer, each licensee shall ascertain and verify the fact that such insurer is authorized in its domiciliary jurisdiction to write the insurance policy proposed to be procured from it by the licensee. No unauthorized insurer shall be deemed unacceptable for placement of business solely on the ground that it has been so authorized to write such business in its domiciliary jurisdiction for a period of less than three years preceding the placement of such risk by the licensee. In determining whether business may be placed with an unauthorized insurer, the superintendent shall consider such factors as: the interests of the public and policyholders, the length of time such insurer has been authorized in its domiciliary jurisdiction and elsewhere, its financial condition, and unavailability of particular coverages from authorized insurers.

(4) The statements required pursuant to paragraph one of this subsection shall be filed by such licensee with the superintendent within thirty days after such policies have been procured.

(c) [Eff until July 1, 2024] (1) The licensee shall keep a complete and separate record of all policies procured from unauthorized insurers under such license. The licensee shall also maintain files supporting declinations by authorized insurers. An authorized insurer need not maintain underwriting submissions or other records with respect to any declination, unless the superintendent, after a hearing on a record, finds substantial abuses of the provisions of this section and determines that recordkeeping or reporting requirements in regard to authorized insurers are necessary to redress or eliminate such abuses.

(2) Such records shall be open to examination by the excess line association as provided for in section two thousand one hundred thirty of this article and by the superintendent, as provided in section three hundred ten of this chapter, at all reasonable times and shall show:

(A) the exact amount of each kind of insurance permitted under this section which has been procured for each insured;

(B) the gross premiums charged by the insurers for each kind of insurance permitted under this section;

(C) the amount of each kind of premiums of insurance permitted by this section which were returned to each insured;

(D) the name of the insurer or insurers which issued each of said policies;

(E) the effective dates of such policies;

(F) the terms for which they were issued; and

(G) the cities and villages within this state in which the insured risks, respectively, are located.

(c) [Eff July 1, 2024] (1) The licensee shall keep a complete and separate record of all policies procured from unauthorized insurers under such license. The licensee shall also maintain files supporting declinations by authorized insurers. An authorized insurer need not maintain underwriting submissions or other records with respect to any declination, unless the superintendent, after a hearing on a record, finds substantial abuses of the provisions of this section and determines that recordkeeping or reporting requirements in regard to authorized insurers are necessary to redress or eliminate such abuses. The superintendent shall review recordkeeping requirements applicable to this section and, by October first, nineteen hundred eighty-six, shall take measures in order to simplify forms and other aspects of compliance with such requirements.

(2) Such records shall be open to examination by the superintendent, as provided in section three hundred ten of this chapter, at all reasonable times and shall show:

(A) the exact amount of each kind of insurance permitted under this section which has been procured for each insured;

(B) the gross premiums charged by the insurers for each kind of insurance permitted under this section;

(C) the amount of each kind of premiums of insurance permitted by this section which were returned to each insured;

(D) the name of the insurer or insurers which issued each of said policies;

(E) the effective dates of such policies;

(F) the terms for which they were issued; and

(G) the cities and villages within this state in which the insured risks, respectively, are located.

(d)

(1) Where this state is the insured's home state, a person, firm, association or corporation licensed pursuant to the provisions of section two thousand one hundred five of this article shall pay to the superintendent a sum equal to three and six-tenths percent of the gross premiums charged the insureds by the insurers for insurance procured by such licensee pursuant to such license, less the amount of such premiums returned to such insureds.

(2) The amount of such payments which represents a sum equal to three percent of fire insurance premiums shall be distributed by the superintendent as prescribed in section nine thousand one hundred five of this chapter, and the balance thereof shall be paid over by the superintendent to the state treasurer.

(3) Such licensee shall be required to make such payments to the superintendent on the fifteenth day of March of each year for the taxes on all policies procured by such licensee, pursuant to such license, during the next preceding calendar year, and on such date such licensee shall also file with the superintendent a return in the form prescribed by the superintendent, showing such information as may be necessary for the proper distribution of such payments.

(e) (1) Except as provided in paragraph two of this subsection, no licensee shall be required to obtain a declination from an association established pursuant to article fifty-four or fifty-five of this chapter, or to apply for insurance through a plan established pursuant to article fifty-three of this chapter, as a condition of procuring insurance pursuant to this section.

(2) (A) Unless the licensee obtains a declination from the appropriate association, or from an insurer pursuant to an application for coverage through a plan, no diligent effort shall be considered to have been made if the insurance is available from the plan or association in connection with the placement of:

(i) a policy of non-commercial motor vehicle liability insurance;

(ii) medical malpractice insurance for a general hospital, as defined in subdivision ten of section two thousand eight hundred one of the public health law, a physician or dentist; or

(iii) insurance which by law must be provided by an authorized insurer.

(B) In connection with the placement of any other kind of insurance, a declination from the appropriate association, or from an insurer pursuant to an application for coverage through a plan, shall be required unless prior to the placement the insured has been advised of the availability of insurance from the plan or association.

(C) The affirming broker shall provide written notice to the insured that the placement was made with an unauthorized insurer. A copy of this notice shall be attached to the affirming broker's affidavit. The affidavits required by this section to be completed by the affirming broker shall include a statement that the affirming broker advised the insured in writing:

(i) that the unauthorized insurer with which the coverage is being placed is not authorized to do an insurance business in this state and is not subject to supervision by this state;

(ii) that in the event of the insolvency of the unauthorized insurer, losses will not be covered by any New York state insolvency fund;

(iii) that the policy may not be subject to all of the regulations of the superintendent pertaining to policy forms; and

(iv) such other information as the superintendent may, by regulation, require.

(f) (1) An excess line broker licensed pursuant to section two thousand one hundred five of this article may execute an authority to bind coverage and may exercise binding authority on behalf of an insurer not licensed or authorized to do business in this state pursuant to the provisions of this subsection.

(2) As used in this subsection:

(A) an "authority to bind coverage" means the written agreement between an excess line broker

and an insurer not licensed or authorized to do business in this state and shall set forth the terms, conditions, and limitations governing the exercise of binding authority by the excess line broker;

(B) a "binder" means written evidence of a temporary insurance contract; and

(C) "binding authority" means the authority to issue and deliver binders, and to issue and deliver insurance policies on behalf of an insurer not licensed or authorized to do business in this state.

(3) (A) Every excess line broker who exercises binding authority shall have filed an authority to bind coverage, the contents of which shall not be public, with the excess line association established pursuant to section two thousand one hundred thirty of this article.

(B) Such authority shall be valid until (i) terminated by the appointing insurer after termination in accordance with the contract between the broker and the insurer; (ii) the excess line license is suspended or revoked by the superintendent; or (iii) the excess line license expires and is not renewed.

(4) Notwithstanding any other provision of law to the contrary, the execution or filing of an authority to bind coverage and the exercise of binding authority by an authorized excess line broker shall not constitute the doing of insurance business by an insurer not licensed or authorized to do business in this state.

(5) Any coverage so written must be in compliance with this section.

(6) Every binder shall contain a description and location of the subject of insurance, coverage, conditions and term of insurance, the premium, the name and address of the excess line broker, the name and address of the producing broker, the name of the insurer and the name and address of the insured.

(7) Any binding authority agreement made and filed pursuant to this section may authorize an excess line broker to bind coverage for risks located within or outside of the state of New York, notwithstanding any other provision of this chapter.

(8) Any binding authority agreement made and filed pursuant to this section may authorize an excess line broker to issue notice of cancellation of any insurance policy bound pursuant to such agreement (A) for non-payment of premium, (B) for a material increase in the hazard insured, or (C) upon discovery of a material misrepresentation in the application for insurance. The excess line broker shall not be deemed an agent of the insurer solely for issuing such notice of cancellation.

HISTORY:

Add, L 1984, ch 367, § 1, eff Sept 1, 1984; amd, L 1986, ch 220, § 38, eff June 28, 1986; L 1988, ch 630, § 3, eff Jan 1, 1989; L 1990, ch 190, § 195, eff July 1, 1990; L 1993, ch 663, § 3, eff Aug 4, 1993; L 1993, ch 684, §§ 3, 4, eff Oct 1, 1993; L 1996, ch 498, §§ 1, 2, eff Sept 7, 1996; L 1997, ch 225, § 2, eff Jan 17, 1998; L 1998, ch 282, § 1, eff Aug 9, 1998; L 2001, ch 74, § 2, eff June 29, 2001; L 2002, ch 587, § 1, eff Sept 24, 2002; L 2003, ch 687, § 42, eff Oct 21, 2003; L 2011, ch 61, §§ 11–13 (Part I), eff July 21, 2011; L 2011, ch 62, § 104 (Part A), eff Oct 3, 2011.

Editor's Notes: Laws 1986, ch 220, § 1, eff June 28, 1986, applicable to contracts in force and effect on and amended, executed, modified, renewed or altered on June 28, 1986, provides as follows:

Section 1. Legislative intent. The legislature hereby finds and declares that the state is in the midst of an insurance crisis which affects all aspects of the public and private sectors. Day care centers, not-for-profit organizations, volunteer groups, businesses, governmental entities, housing and transit authorities, professionals and others have experienced sudden and inexplicable cancellations and nonrenewals of their liability insurance policies with little, if any, notice. In other cases, policyholders and the public have been confronted by skyrocketing premiums or reductions in coverage. These events have disastrous effects on a multitude of public entities, groups and individuals, and threaten to undermine economic development and the delivery of essential and necessary services to residents, consumers and businesses throughout New York state. Because critical coverages have become unavailable or unaffordable, a comprehensive, balanced approach is imperative to provide stability and safeguard the public interest.

The legislature further finds and declares that, by the enactment of the provisions of this act, it is the intent of the legislature to fulfill its constitutional obligation to provide for the health, safety and welfare of the people of this state. It is imperative that this state provide stability, security and certainty for commercial risk, public entity and professional liability insurance policyholders and the public at-large by the enactment of this act.

This act is intended to alleviate the problems of unaffordability and unavailability of such insurance, to provide for increased security of rates and rating procedures, and to provide for increased disclosure and knowledge of insurance company financial practices, by, among other measures:

(a) establishing a flexible rating system, with prior approval of rate changes beyond flexibility bands, for certain liability insurance;.

(b) preventing unwarranted mid-term cancellations and affording policyholders minimum notice of nonrenewal of policies, reductions in coverage and premium increases;.

(c) allowing New York counties, towns, cities, villages, district corporations, school districts and boards of cooperative educational services to organize and subscribe to statewide municipal reciprocal insurers;.

(d) authorizing the issuance of property/casualty insurance policies on a group basis for public entities and not-for-profit organizations;.

(e) establishing stand-by joint underwriting authority by expanding the powers of the New York property insurance underwriting association;.

(f) instituting qualified immunity for uncompensated officers and directors of not-for-profit organizations;.

(g) increasing capacity by expediting access to alternative voluntary markets where appropriate;.

(h) providing for annual reports to the governor and legislature of insurance company rating and financial practices;.

(i) authorizing costs upon frivolous claims and counterclaims; and.

(j) authorizing the admissibility of recovery from collateral sources.

Laws 1988, ch 630, § 5, eff Jan 1, 1989, provides as follows:

§ 5. This act shall take effect January 1, 1989 and shall cease to be of any force or effect after July 1, 2024 (Amd, L 1992, ch 284, § 1, eff June 30, 1992; L 1995, ch 104, § 1, eff June 30, 1995; L 1998, ch 122, § 2, eff June 29, 1998; L 2001, ch 74, § 1, eff June 29, 2001; L 2005, ch 90, § 1, eff June 7, 2005; L 2008, ch 130, § 1, eff June 30, 2008; L 2013, ch 20, § 1, eff April 30, 2013; L 2018, ch 488, § 1, eff Dec 28, 2018).

Laws 1990, ch 190, § 385(p), eff May 25, 1990, provides as follows:

§ 385. This act shall take effect immediately, provided that:

(p) sections one hundred ninety-five through two hundred seven of this act shall take effect July 1, 1990 and shall apply to policies purchased or renewed on or after such date, provided that the amendment to subsection (a) of section 2130 of the insurance law made by section one hundred ninety-six of this act shall not affect the expiration as provided by section 5 of chapter 630 of the laws of 1988;.

Laws 1993, ch 663, § **1,** eff Aug 4, 1993, provides as follows:

Section 1. Legislative findings and declaration. The legislature hereby finds and declares that a principal goal of effective insurance regulation must be to allow citizens of this state reasonable access to financially sound and reliable insurers for their insurance coverage needs. Under current law, citizens are denied access to certain insurers which are financially sound and reliable because the insurers are controlled by a governmental entity. The legislature hereby declares that certain of these insurers should be allowed to provide coverage to citizens of this state, either as licensed insurers or as eligible excess line insurers, provided certain conditions and safeguards are met.

Laws 1993, ch 684, §§ **1, 6,** eff Oct 1, 1993, provide as follows:

Section 1. Legislative intent. Chapter 220 of the laws of 1986 recognized the importance of the excess line insurance market to New York consumers. In chapter 630 of the laws of 1988, the legislature further determined that access to financially sound unauthorized insurers was of importance to this state and established the excess line association to better ensure that excess line brokers were procuring coverage with financially sound unauthorized insurers. This act is intended to reaffirm the importance of the excess line insurance market to New York insurance buyers.

§ 6. This act shall take effect October 1, 1993; provided, however, that the amendments to subsection (b) of section 2118 of the insurance law made by section three of this act shall not affect and shall be subject to the expiration of such subsection (b) as provided by section 5 of chapter 630 of the laws of 1988 as amended.

Laws 1996, ch 498, § **4,** eff Sept 7, 1996, provides as follows:

§ 4. This act shall take effect thirty days after it shall have become a law; provided, however, that the amendments to certain provisions of the insurance law made by sections one and three of this act shall not affect the expiration of such provisions and shall be deemed to expire therewith.

Laws 2001, ch 74, § **5,** eff June 29, 2001, provides as follows:

§ 5. This act shall take effect immediately; provided, however, that the amendments to section 2130 of the insurance law made by section two of this act and the amendments to subsection (b) of section 2118 of the insurance law made by section three of this act shall not affect the expiration of such provisions as provided by section 5 of chapter 630 of the laws of 1988, as amended, and shall be deemed repealed therewith.

Laws 2003, ch 687, § **49,** eff Oct 21, 2003, provides as follows:

§ 49. This act shall take effect immediately; provided that sections two through twenty-one, forty-one and forty-three through forty-eight of this act shall take effect January 1, 2004; and provided further that the amendments to subsection (b) of section 2118 of the insurance law made by section forty-two of this act shall not affect the expiration of such subsection and shall be deemed to expire therewith.

Laws 2011, ch 61, § **19, sub (2)–(4) (Part I),** eff July 21, 2011, provides as follows:

(2) the amendments to subsection (b) of section 2118 of the insurance law made by section twelve of this act shall not affect the expiration and reversion of such subsection and shall be deemed to expire therewith;.

(3) sections thirteen and fourteen of this act shall apply to insurance contracts that have an effective date on or after July 21, 2011 and sections fifteen through eighteen of this act shall apply to taxable insurance contracts that have an effective date on or after July 21, 2011; and.

(4) effective immediately, the addition, amendment, or repeal of any rules and regulations necessary for the implementation of this act on its effective date are authorized and directed to be made and completed on or before such effective date.

Derivation Notes: This section formerly appeared, in part, as Ins § 122 as added by L 1939, ch 882, § 122; amd, L 1948, ch 497, § 1, L 1951, ch 214, § 1, L 1953, ch 370, § 1, L 1955, ch 223, § 1, L 1957, ch 265, § 1, L 1958, ch 787, § 1, L 1960, ch 502, § 1, L 1962, ch 1012, § 11, L 1964, ch 38, § 1, L 1965, ch 845, § 17, L 1968, ch 247, § 13, L 1971, ch 70, § 1, L 1971, ch 1020, § 1, L 1976, ch 620, § 2.

Amendment Notes: 2011. Chapter 62, § 104 (Part A) amended:

Sub (b), par (3), subpar (B), cl (iv) at fig 1 by substituting "department of financial services" for "insurance department".

Notes to Decisions

Analysis

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1. Generally

Former § 137 [predecessor to former § 122, now §§ 2105, 2118] in relation to "surplus line" does not have the effect of authorizing foreign companies to transact business in this state, but allows brokers to procure such insurance from a foreign company. When the agreement of an insured to procure other insurance is conditional upon the fact that the insurer is not authorized to do business in this state, it cannot contend that it had a limited authority to do business in this state, by force of former § 137 [now §§ 2105, 2118], so as to make the contract one which was perfected here. Friedland v Commonwealth Fire Ins. Co., 143 A.D. 570, 128 N.Y.S. 705, 1911 N.Y. App. Div. LEXIS 878 (N.Y. App. Div. 1911), aff'd, 207 N.Y. 705, 101 N.E. 1102, 207 N.Y. (N.Y.S.) 705, 1913 N.Y. LEXIS 1361 (N.Y. 1913).

Former § 122 [now §§ 2105, 2118] in some circumstances permits placing of insurance with companies not authorized to insure in this state. I. Tanenbaum Son & Co. v Rothenberg & Co., 201 A.D. 272, 194 N.Y.S. 315, 1922 N.Y. App. Div. LEXIS 6302 (N.Y. App. Div. 1922), aff'd, 236 N.Y. 520, 142 N.E. 267, 236 N.Y. (N.Y.S.) 520, 1923 N.Y. LEXIS 938 (N.Y. 1923).

It is well established that New York residents may properly procure insurance from unlicensed and unadmitted insurance companies through excess-line brokers, and that such contracts are enforceable in this state and assessments levied by insurance companies not licensed to do business in New York are valid and enforceable therein against New York policy holders. Kelly v Bremmerman, 42 Misc. 2d 148, 247 N.Y.S.2d 655, 1964 N.Y. Misc. LEXIS 2029 (N.Y. Sup. Ct. 1964), rev'd, 23 A.D.2d 346, 260 N.Y.S.2d 971, 1965 N.Y. App. Div. LEXIS 3783 (N.Y. App. Div. 4th Dep't 1965).

Former § 122 [now §§ 2105, 2118] was clearly enacted to cure some of the problems raised by prior practice of brokers placing excess-line insurance with companies not subject to the regulatory powers of this state, and was aimed at protecting the insured. People v Condor of Americas, Inc., 43 Misc. 2d 899, 252 N.Y.S.2d 619, 1964 N.Y. Misc. LEXIS 1587 (N.Y. Sup. Ct. 1964),

aff'd, 23 A.D.2d 822, 258 N.Y.S.2d 338, 1965 N.Y. App. Div. LEXIS 5667 (N.Y. App. Div. 1st Dep't 1965).

As to regulation of excess line insurance, situs of risk depends on particular facts of situation for which coverage is sought; procuring political risk coverage policy directly from unauthorized insurer without having to use excess line market would not be permissible. NY Ins Dep't Gen Counsel, Opinion No. 03-01-37, 2003 NY Insurance GC Opinions LEXIS 110.

As to regulation of excess line insurance, situs of risk depends on particular facts of situation for which coverage is sought; procuring political risk coverage policy directly from unauthorized insurer without having to use excess line market would not be permissible. NY Ins Dep't Gen Counsel, Opinion No. 03-01-37, 2003 NY Insurance GC Opinions LEXIS 110.

It would be impossible, under any circumstances, for excess line broker to comply with CLS Ins § 2118 when New York authorized insurer conditions renewal of covered policy subject to CLS Ins § 3426 on policy's placement with unauthorized insurer, be it affiliate or not. NY Ins Dep't Gen Counsel, Opinion No. 05-11-03, 2005 NY Insurance GC Opinions LEXIS 238.

Superintendent of Insurance does not hold hearings to determine whether particular coverage is eligible for procurement from unauthorized insurer in excess line market, since Insurance Law expressly delineates permissible kinds of insurance that excess line broker may procure through excess line market. NY Ins Dep't Gen Counsel, Opinion No. 06-08-05, 2006 NY Insurance GC Opinions LEXIS 146.

Under CLS Ins § 2118(b)(8), when portion of risk is in New York, only New York licensed excess line broker may procure policy in New York from unauthorized insurer; however, CLS Ins § 2118(b)(9) allows excess line licensee to place excess line insurance in another state when property or risk exposure is both in New York and in another state, provided that certain other requirements are met. NY Ins Dep't Gen Counsel, Opinion No. 07-08-12, 2007 NY Insurance GC Opinions LEXIS 126.

2. Rights and obligations

Since foreign insurance companies are made subject to suit in New York with respect to policies issued and secured from them pursuant to former § 122 [now §§ 2105, 2118], it would seem that equal protection of the law demands that such unauthorized carriers be permitted to sue here with respect to policies so issued, such as to obtain a judicial declaration of nonliability on the policy, without complying with the requirements of § 210 of the General Corporation Law. Empire Mut. Ins. Co. v International Tram-Po-Line Mfrs., Inc., 39 Misc. 2d 810, 242 N.Y.S.2d 28, 1963 N.Y. Misc. LEXIS 1950 (N.Y. Sup. Ct. 1963).

While former § 122 [now §§ 2105, 2118] allows insurance brokers to secure policies from unauthorized or unadmitted companies in special circumstances, it does not admit the insuring companies to the state or authorize the carrier to transact business here. Empire Mut. Ins. Co. v International Tram-Po-Line Mfrs., Inc., 39 Misc. 2d 810, 242 N.Y.S.2d 28, 1963 N.Y. Misc. LEXIS 1950 (N.Y. Sup. Ct. 1963).

Excess line broker or producing broker may deliver ACORD or similar form of certificate of insurance to third party without legend required by 11 NYCRR § 27.17(b). NY Ins Dep't Gen Counsel, Opinion No. 01-08-11, 2001 NY Insurance GC Opinions LEXIS 60.

As to policy written by unauthorized insurer, CLS Ins § 2118(b)(1) requires excess line broker to submit to Excess Line Association of New York (ELANY) copy of policy's declarations page, cover note, or binder within 45 days after coverage is bound, and thereafter endorsements exhibiting changing premium are to be sent by excess line broker to ELANY. NY Ins Dep't Gen Counsel, Opinion No. 02-07-02, 2002 NY Insurance GC Opinions LEXIS 264.

There is no specific obligation on excess line broker under CLS Insurance Law to advise, whether in writing or orally, why unauthorized insurer has increased its premium; however, such broker should make effort to determine cause, and to advise insured of his findings, in accordance with CLS Ins § 2110, which requires excess line broker to act in competent, honest, and trustworthy manner. NY Ins Dep't Gen Counsel, Opinion No. 02-07-02, 2002 NY Insurance GC Opinions LEXIS 264.

Insurance broker may not cancel, mid-term, in-force property insurance policy with New York authorized insurer in order to place same risk with unauthorized insurer, even if insured consents. NY Ins Dep't Gen Counsel, Opinion No. 07-09-13, 2007 NY Insurance GC Opinions LEXIS 144.

New York-licensed broker may not lawfully place insurance coverage in excess line market on risks located in New York State that would cover punitive damages. NY Ins Dep't Gen Counsel, Opinion No. 08-08-09, 2008 NY Insurance GC Opinions LEXIS 201.

3. Standards of conduct

In concluding that insurance broker violated CLS Ins § 2118 by failing to personally verify that kind of insurance sought by insured was unobtainable in New York prior to agreeing to act as excess line broker, Superintendent of Insurance reasonably determined that broker was not relieved from doing so because "another broker" had secured necessary declinations and completed affidavit to that effect where other broker was not licensed to do business in New York; allowing use of affidavits from brokers who are not licensed in New York to satisfy statutory mandate would not comport with legislature's intent to maintain accountability by requiring signed affidavits from parties over whom Department of Insurance has regulatory authority. Cleveland v Department of Ins., 206 A.D.2d 659, 614 N.Y.S.2d 620, 1994 N.Y. App. Div. LEXIS 7392 (N.Y. App. Div. 3d Dep't 1994).

In legislating the standard of conduct required of excess-line brokers, adoption of general requirements of "due care" and "diligent effort" was sufficient basis for implementation by administrative regulation. B. & R. Excess Corp. v Thacher, 37 Misc. 2d 307, 234 N.Y.S.2d 486, 1962 N.Y. Misc. LEXIS 2374 (N.Y. Sup. Ct. 1962), aff'd, 18 A.D.2d 1137, 239 N.Y.S.2d 531, 1963 N.Y. App. Div. LEXIS 5434 (N.Y. App. Div. 1st Dep't 1963).

Unauthorized insurer who transacts insurance business through excess line market must adhere to 11 NYCRR § 27 and CLS Ins §§ 2105, 2118, and 2130; financial and other requirements including prohibited activities do not change by virtue of fact that portion of risk is subsequently reinsured with large insurance company such as Lloyds of London. NY Ins Dep't Gen Counsel, Opinion No. 01-11-12, 2001 NY Insurance GC Opinions LEXIS 278.

As to policy written by unauthorized insurer, if declarations page or cover note has been filed with Excess Line Association of New York (ELANY), and policy premium is thereafter increased or decreased, premium change endorsement must be sent to ELANY, and where binder has been filed with ELANY, amended binder exhibiting premium change must be sent to ELANY; however, there is no requirement under CLS Ins § 2118 for endorsement to state reason for changing premium. NY Ins Dep't Gen Counsel, Opinion No. 02-07-02, 2002 NY Insurance GC Opinions LEXIS 264.

New York-licensed broker may not lawfully hire third party to place insurance coverage in excess line market on risks located in New York State that would cover punitive damages. NY Ins Dep't Gen Counsel, Opinion No. 08-08-09, 2008 NY Insurance GC Opinions LEXIS 201.

4. Application of other regulations

Regulation 41 promulgated by the Insurance Commissioner is not violative of petitioner's constitutional rights in imposing specific requirements on "excess line" brokers with respect to placement of risks, compensation, etc., and represents a proper continuation of legislative policies in this field. B. & R. Excess Corp. v Thacher, 37 Misc. 2d 307, 234 N.Y.S.2d 486, 1962 N.Y. Misc. LEXIS 2374 (N.Y. Sup. Ct. 1962), aff'd, 18 A.D.2d 1137, 239 N.Y.S.2d 531, 1963 N.Y. App. Div. LEXIS 5434 (N.Y. App. Div. 1st Dep't 1963).

Where political risk insurance coverage is considered to constitute one or more of types of coverage referenced in CLS Ins § 2105(a), then coverage could be placed by excess line broker with unauthorized insurer that is in compliance with requirements in CLS Ins § 2118 and 11 NYCRR § 27 (Regulation 41).

NY Ins Dep't Gen Counsel, Opinion No. 03-01-37, 2003 NY Insurance GC Opinions LEXIS 110.

Excess line broker may accept Part C affidavit sent to it by producing broker by means of facsimile transmission and use it in order to satisfy requirements in Regulation 41 that there be proof of declinations before business may be placed by excess line broker with unauthorized insurer. NY Ins Dep't Gen Counsel, Opinion No. 03-01-39, 2003 NY Insurance GC Opinions LEXIS 108.

Where political risk insurance coverage is considered to constitute one or more of types of coverage referenced in CLS Ins § 2105(a), then coverage could be placed by excess line broker with unauthorized insurer that is in compliance with requirements contained in CLS Ins § 2118 and 11 NYCRR § 27 (Regulation 41). NY Ins Dep't Gen Counsel, Opinion No. 03-01-37, 2003 NY Insurance GC Opinions LEXIS 110.

Excess line broker may accept Part C affidavit sent to it by producing broker by means of facsimile transmission and use it in order to satisfy requirements in 11 NYCRR Part 27 (Regulation 41) that there be proof of declinations before business may be placed by excess line broker with unauthorized insurer. NY Ins Dep't Gen Counsel, Opinion No. 03-01-39, 2003 NY Insurance GC Opinions LEXIS 108.

Where corporation has locations in more than one state, and policy is placed in New York by excess line broker, excess line premium tax is to be allocated in accordance with allocation schedules in 11 NYCRR Part 27 (Regulation 41); method of allocation varies depending on nature of risk and type of insurance. NY Ins Dep't Gen Counsel, Opinion No. 03-04-15, 2003 NY Insurance GC Opinions LEXIS 20.

Regulation 107 (11 NYCRR § 71.4) does not apply to excess line policies and does not preclude issuance of such policies on basis that liability policies may not provide separate limits for defense costs. NY Ins Dep't Gen Counsel, Opinion No. 05-12-14, 2006 NY Insurance GC Opinions LEXIS 54.

In placing excess line insurance, excess line broker must comply with requirements of 11 NYCRR Part 27 (Regulation 41) and CLS Ins §§ 2105, 2118 and 2130; onus is on excess line broker to ensure that unauthorized insurer satisfies financial and other requirements contained in Part 27. NY Ins Dep't Gen Counsel, Opinion No. 06-01-19, 2006 NY Insurance GC Opinions LEXIS 19.

Under CLS Ins § 2118, 11 NYCRR § 27.13(a), (b) & (g) (Regulation 41) and other applicable sections of the Insurance Law and Regulation, company must be in compliance with, among other things, solvency requirements of New York and be on list of eligible insurers to renew policies, even if renewal is only for limited period. NY Ins Dep't Gen Counsel, Opinion No. 06-08-12, 2006 NY Insurance GC Opinions LEXIS 162.

Where claims-made liability insurance policy issued by unauthorized insurer on New York risk has been properly placed through excess line broker under CLS Ins § 2118 and 11 NYCRR Part 27 (Regulation 41), policy is exempt from 11 NYCRR Part 73 (Regulation 121) extended reporting period requirements. NY Ins Dep't Gen Counsel, Opinion No. 06-11-15, 2006 NY Insurance GC Opinions LEXIS 203.

Regulation 41 (11 NYCRR Part 27), which was effective January 1, 1994, does not apply to trust agreement that was entered into prior to promulgation of regulation, where company was placed into liquidation and ceased writing new business prior to promulgation of regulation. NY Ins Dep't Gen Counsel, Opinion No. 08-03-17, 2008 NY Insurance GC Opinions LEXIS 65.

5. Taxes

Insurance Superintendent was permitted to independently calculate amount of taxes due where petitioners had failed to maintain records and to provide records during audit, as required by CLS Ins § 2118(c)(1) and (2). V.P. Mgmt. Corp. v Levin, 257 A.D.2d 490, 684 N.Y.S.2d 211, 1999 N.Y. App. Div. LEXIS 425 (N.Y. App. Div. 1st Dep't 1999).

Insured, which is tax-exempt unit of another state government, is not required to pay excess line premium taxes to Superintendent of Insurance and stamping fees imposed by Excess Line Association of New York; said taxes and fees in New York are imposed on New York licensed excess line broker, although such brokers commonly pass on cost to insured by means of written service fee memorandum signed by insurer. NY Ins Dep't Gen Counsel, Opinion No. 02-10-07, 2002 NY Insurance GC Opinions LEXIS 318.

If broker does not use its New York excess line license to place insurance on New York risks but insurance transaction is negotiated in California between insured domiciled there and California office of nationwide broker, there would be no New York excess line tax and stamping fee if such were non-New York transaction; however, CLS Tax § 1551 imposes tax on insured that obtains insurance from insurer not authorized in New York covering risks in New York, and if policy covers risks located both in New York and out-of-state, § 1551 taxes are allocated based on amount of premiums pertaining to New York risks. NY Ins Dep't Gen Counsel, Opinion No. 02-10-07, 2002 NY Insurance GC Opinions LEXIS 318.

Marine insurance may be procured from unauthorized insurer only by licensed excess lines broker and is subject to excess line premium taxes, except that to extent specifically provided for in CLS Ins § 2117, licensed insurance broker may place certain classes of marine insurance exempt from excess lines premium tax. NY Ins Dep't Gen Counsel, Opinion No. 03-03-18, 2003 NY Insurance GC Opinions LEXIS 45.

Where insurance policy is principally negotiated, issued, and delivered outside of New York, it is not subject to New York's excess line laws, and excess line premium tax is not due; however, insured may be required to pay tax to New York in regard to New York risks. NY Ins Dep't Gen Counsel, Opinion No. 03-04-15, 2003 NY Insurance GC Opinions LEXIS 20.

Excess line brokers are responsible for 3.6 percent premium tax on each policy procured pursuant to excess line license; no additional fire tax is imposed. NY Ins Dep't Gen Counsel, Opinion No. 06-08-05, 2006 NY Insurance GC Opinions LEXIS 146.

Fees that are charged by insurer, such as policy fees and inspection fees, are considered part of "premium" and are subject to excess line premium tax. NY Ins Dep't Gen Counsel, Opinion No. 06-09-16, 2006 NY Insurance GC Opinions LEXIS 177.

Commercial liability insurance policy is not subject to New York excess line tax and ELANY stamping fees where New Jersey domiciled insurance broker who has New York nonresident broker's license, and is licensed as excess line broker in both New York and New Jersey, plans to negotiate and place commercial liability insurance policy in New Jersey for New Jersey domiciled insured (construction firm with its parent company based in People's Republic of China); such transaction does not constitute doing of insurance business in New York. NY Ins Dep't Gen Counsel, Opinion No. 06-09-18, 2006 NY Insurance GC Opinions LEXIS 179.

6. Fees

Fees that are charged by insurer, such as policy fees and inspection fees, are considered part of "premium" and are subject to stamping fee. NY Ins Dep't Gen Counsel, Opinion No. 06-09-16, 2006 NY Insurance GC Opinions LEXIS 177.

Under CLS Ins § 9108, fire insurance fee does not apply to excess line insurance companies in New York; however, excess line premium tax paid by broker does include component representing fire premium tax. NY Ins Dep't Gen Counsel, Opinion No. 06-11-10, 2006 NY Insurance GC Opinions LEXIS 198.

If inspection is conducted by insurer itself or on behalf of insurer, and insured pays fee directly to insurer or insurer's inspector for that inspection, then that fee is considered part of premium, even if such fee is separate charge from premium, and as such, fee is subject to excess line premium tax; on other hand, if insurer requires inspection but does not dictate who performs it, and insured pays inspection fee directly to party who performs inspection, then that fee is not part of premium and is not subject to excess line premium tax. NY Ins Dep't Gen Counsel, Opinion No. 07-03-08, 2007 NY Insurance GC Opinions LEXIS 28.

Both installment payment fee and reinstatement fee are subject to excess line premium tax, because under broad definition of "premium" set forth in CLS Ins § 9101(b), such fees constitute "consideration" and "compensation" to insurer for insurance con-

tract. NY Ins Dep't Gen Counsel, Opinion No. 07-03-08, 2007 NY Insurance GC Opinions LEXIS 28.

7. Premiums

Whether authorized insurer that issues commercial general liability policy may charge minimum and deposit premium is dependent on insurer's ability to prove that minimum and deposit premium filed equals costs associated with issuing policy, and to cover expenses of writing business; unauthorized insurer that issues commercial general liability policy through licensed excess line broker under CLS Ins §§ 2105 and 2118 is not prohibited from issuing minimum and deposit premium. NY Ins Dep't Gen Counsel, Opinion No. 02-06-04, 2002 NY Insurance GC Opinions LEXIS 26.

Unauthorized insurer that issues commercial property/casualty insurance policy on excess line basis is not subject to rating requirements contained CLS Insurance Law Art 23 and CLS Ins § 3426; thus, whether such unauthorized insurer may increase premium after coverage is bound depends on terms of insurance contract. NY Ins Dep't Gen Counsel, Opinion No. 02-07-02, 2002 NY Insurance GC Opinions LEXIS 264.

As to policy written by unauthorized insurer, such unauthorized insurer is not subject to policy form filing provisions contained in CLS Insurance Law Art 23; thus, whether endorsement, or other writing, must denote reason why such insurer has increased premium is dependent on terms of insurance contract. NY Ins Dep't Gen Counsel, Opinion No. 02-07-02, 2002 NY Insurance GC Opinions LEXIS 264.

If same coverage is available by authorized insurer, even though premium is higher, excess line broker must obtain coverage from authorized insurer, under requirements of CLS Ins § 2118(b). NY Ins Dep't Gen Counsel, Opinion No. 03-04-27, 2003 NY Insurance GC Opinions LEXIS 8.

Price is not sufficient reason to place insurance otherwise available in authorized market in excess line market. NY Ins Dep't Gen Counsel, Opinion No. 05-12-14, 2006 NY Insurance GC Opinions LEXIS 54.

8. Declination

If authorized insurer has offered to issue coverage then excess line broker may not place business with unauthorized insurer even if 3 or more other authorized insurers declined to issue coverage. NY Ins Dep't Gen Counsel, Opinion No. 05-12-14, 2006 NY Insurance GC Opinions LEXIS 54.

Requirement for 3 declinations in CLS Ins § 2118(b)(4) is only relevant to whether diligent effort has been made if no authorized insurer has offered to place insurance. NY Ins Dep't Gen Counsel, Opinion No. 05-12-14, 2006 NY Insurance GC Opinions LEXIS 54.

Excess line broker that has obtained quote from authorized insurer for liability policy that contains defense within limits offset provision and quote from eligible excess line insurer for liability policy with unlimited defense outside liability limit, may place policy with excess line insurer where excess line broker has also received 3 declinations from other authorized insurers. NY Ins Dep't Gen Counsel, Opinion No. 06-03-08, 2006 NY Insurance GC Opinions LEXIS 54.

Failure of authorized insurer to respond to solicitation for insurance coverage does not constitute declination for purpose of determining that insurance is unobtainable in whole or in part from insurers authorized to write such insurance in New York State. NY Ins Dep't Gen Counsel, Opinion No. 06-08-05, 2006 NY Insurance GC Opinions LEXIS 146.

In determining that insurance is unobtainable from authorized insurer, excess line broker may not rely on declinations obtained with respect to other insureds in lieu of obtaining separate declinations for insured. NY Ins Dep't Gen Counsel, Opinion No. 06-08-05, 2006 NY Insurance GC Opinions LEXIS 146.

Excess line broker may place business for New York hospital that is in excess of that available through Medical Malpractice Insurance Pool from unauthorized insurer, provided that broker adheres to New York's excess line rules, including declination requirement of CLS Ins § 2118 and 11 NYCRR § 27.3(a). NY Ins Dep't Gen Counsel, Opinion No. 06-08-10, 2006 NY Insurance GC Opinions LEXIS 160.

9. Electronic submission

CLS Ins §§ 2118(b)(7) and 2130(i) specifically provide that submission and filing of excess line documents may be accomplished by electronic or other media transmission, providing Superintendent of Insurance first approves proposed methods of electronically submitting, receiving, recording and stamping such documents. NY Ins Dep't Gen Counsel, Opinion No. 05-06-01, 2005 NY Insurance GC Opinions LEXIS 136.

Insurance Law permits Excess Line Association of New York (ELANY) to accept electronic signatures on submitted broker affidavits. NY Ins Dep't Gen Counsel, Opinion No. 05-06-01, 2005 NY Insurance GC Opinions LEXIS 136.

CLS Ins § 2118(b)(7) specifically permits electronic or other media transmission of excess line documents by excess line brokers. NY Ins Dep't Gen Counsel, Opinion No. 06-04-02, 2006 NY Insurance GC Opinions LEXIS 82.

New York-licensed excess line broker that procures certificates of insurance under group insurance policy (Master Policy) covering New York members of proposed Identity Theft Purchasing Group Insurance Program may submit and file excess line documents required by CLS Ins § 2118 electronically with Excess Line Association of New York. NY Ins Dep't Gen Counsel, Opinion No. 10-12-14, 2010 NY Insurance GC Opinions LEXIS 92.

Insurance transaction under proposed "Identity Theft Purchasing Group Insurance Program," involving interactions between Purchasing Group, New York licensed excess line broker and Purchasing Group's New York members, may be conducted entirely by electronic means from application through issuance of certificate of insurance; however, only those New York members of Purchasing Group who have consented to engage in electronic transaction to obtain identity-theft insurance coverage through Program may be required to participate by electronic means; Program must accommodate needs of those New York members of Purchasing Group who have not consented to engage in electronic transaction, and transactions involving those members must be conducted using paper and non-electronic means of communication, such as postal service mailings. NY Ins Dep't Gen Counsel, Opinion No. 10-12-14, 2010 NY Insurance GC Opinions LEXIS 92.

10. Exclusions

There is no general prohibition against terrorism exclusion in policy written on excess line basis, but such exclusion would not be permissible as to peril of fire and certain statutorily required coverages. NY Ins Dep't Gen Counsel, Opinion No. 02-05-19, 2002 NY Insurance GC Opinions LEXIS 36.

Nothing in New York Insurance Law would have prevented unauthorized insurer from issuing liability insurance policy through excess lines broker containing "Lead Paint Exclusion." NY Ins Dep't Gen Counsel, Opinion No. 03-03-12, 2003 NY Insurance GC Opinions LEXIS 51.

Nothing in New York Insurance Law or regulations thereunder specifically prohibit mold exclusion in insurance policy; however, in policy issued by authorized insurer written on risks or operations in New York State, exclusion that is misleading or violative of public policy is not permissible (Superintendent of Insurance has not approved any mold-related exclusions). NY Ins Dep't Gen Counsel, Opinion No. 03-04-04, 2003 NY Insurance GC Opinions LEXIS 31.

Nothing in Insurance Law or regulations thereunder precludes endorsement in excess line policy that excludes coverage for employees of subcontractor. NY Ins Dep't Gen Counsel, Opinion No. 03-11-05, 2003 NY Insurance GC Opinions LEXIS 306.

Surety bond required from debt collection agency that collects child support payments may be sold by unauthorized insurer, absent requirement by New York City Department of Consumer Affairs (DCA). NY Ins Dep't Gen Counsel, Opinion No. 04-08-24, 2004 NY Insurance GC Opinions LEXIS 206.

Product or system group insurance policy, such as automobile anti-theft reimbursement policy, may not be procured by excess line broker. NY Ins Dep't Gen Counsel, Opinion No. 04-10-09, 2004 NY Insurance GC Opinions LEXIS 248.

Excess line broker may not place business with unauthorized insurer that provides separate limit for defense costs when

authorized insurer offers same coverage except that defense costs are covered within policy's limits of liability. NY Ins Dep't Gen Counsel, Opinion No. 05-12-14, 2006 NY Insurance GC Opinions LEXIS 54.

If insurance is available through Medical Malpractice Insurance Pool, then excess line broker may not place medical malpractice insurance for New York hospital with unauthorized insurer. NY Ins Dep't Gen Counsel, Opinion No. 06-08-10, 2006 NY Insurance GC Opinions LEXIS 160.

11. Records

Under CLS Ins § 2118(c)(1), excess line broker must maintain complete and separate record of all policies procured from unauthorized insurers and files supporting declinations by authorized insurers. NY Ins Dep't Gen Counsel, Opinion No. 06-04-02, 2006 NY Insurance GC Opinions LEXIS 82.

CLS Ins § 2118(c)(2) specifies that records are subject to examination by Excess Line Association of New York (ELANY) as provided in CLS Ins § 2130 and by Superintendent of Insurance as provided in CLS Ins § 310. NY Ins Dep't Gen Counsel, Opinion No. 06-04-02, 2006 NY Insurance GC Opinions LEXIS 82.

12. Illustrative cases

Insurance broker violated Insurance Department Regulation 121 (11 NYCRR § 73.2) by placing in New York, through excess line broker, claims-made liquor liability policies; fact that insurer issuing policies was unauthorized insurer beyond reach of Insurance Department was irrelevant to applicability of Regulation 121's prohibition of claims-made policies to procuring broker. John Paterno, Inc. by & Through Paterno v Curiale, 88 N.Y.2d 328, 645 N.Y.S.2d 424, 668 N.E.2d 395, 1996 N.Y. LEXIS 1191 (N.Y. 1996).

An Article 78 proceeding seeking to annul a regulation and a form issued to comply therewith, which regulation and form were promulgated to establish procedures essential to meet the standards of due care and diligent efforts set forth in Ins Law § 122 [now § 2118], was improperly dismissed as untimely commenced under CPLR § 217 since that section provides that a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon petitioner, and notwithstanding that the regulation was promulgated more than four months prior to the commencement of the proceeding, the form that was adopted to comply with the regulation contained a requirement which represented a material addition to the regulation so that it was not until after the form was adopted that the petitioner had a final determination from which to ascertain the possible consequences of the regulation and, accordingly, the four-month limitation period did not start to run until the adoption of the form, which time period was less than four months prior to the inception of the Article 78 proceeding. New York Excess & Surplus Lines Asso. v Lewis, 92 A.D.2d 839, 460 N.Y.S.2d 557, 1983 N.Y. App. Div. LEXIS 17215 (N.Y. App. Div. 1st Dep't), aff'd, 61 N.Y.2d 650, 472 N.Y.S.2d 87, 460 N.E.2d 228, 1983 N.Y. LEXIS 3640 (N.Y. 1983).

In an action by a professional corporation against professional liability insurers for a declaration that defendants were obligated to defend and indemnify with respect to a malpractice action instituted against plaintiff by a former client, the complaint would be dismissed without prejudice to an application for leave to serve an amended complaint where the complaint failed to allege that movant ever issued a policy or had any obligation to do so and where movant was at most an excess line broker, not an insurer and dismissal would be required for failure to state a cause of action since the only liability sought to be imposed against movant was as an insurer. Raskin v Nassau Ins. Co., 93 A.D.2d 774, 461 N.Y.S.2d 804, 1983 N.Y. App. Div. LEXIS 17619 (N.Y. App. Div. 1st Dep't 1983).

In an action by a pawnbroker, whose business was destroyed by fire, to recover on an excess line insurance policy for damages to the premises and contents, and damages from business interruption, the insurance company, an out-of-state corporation, was not required to post a bond to cover plaintiff's possible damages, even though Ins Law § 59-a [now § 1213] requires the posting of a bond by an insurer not authorized to do business within the state, where that requirement was not applicable to any suit arising out of any contract of insurance effectuated in accordance with Ins Law § 122 [now § 2118] when the contract contained a provision designating the superintendent as the insurance company's attorney upon whom service could be made, where § 59-a [now § 1213] also allowed a broker to place insurance with a foreign insurer if the extent of the insurance was only the excess of the amount procurable from authorized insurers, where plaintiff had been unable to obtain any insurance from authorized insurers, where the amount procurable thus was zero, where any amount obtainable from an excess line insurance company thus was over the amount procurable, and where the insurance contract contained an explicit statement that the superintendent of insurance was the insurance company's agent for the service of process. Willis Pawnbrokers, Inc. v Ambassador Ins. Co., 100 A.D.2d 771, 474 N.Y.S.2d 44, 1984 N.Y. App. Div. LEXIS 17868 (N.Y. App. Div. 1st Dep't 1984).

A policy of insurance signed and sealed in Massachusetts by a corporation organized and doing business in that state, and mailed to the insured in this state pursuant to an order by mail, is a Massachusetts contract and not void under former § 137 [predecessor to former § 122, now §§ 2105, 2118]. Hammond v International R. Co., 116 N.Y.S. 854, 63 Misc. 437, 1909 N.Y. Misc. LEXIS 151 (N.Y. Sup. Ct.), aff'd, 134 A.D. 995, 119 N.Y.S. 1127, 1909 N.Y. App. Div. LEXIS 3882 (N.Y. App. Div. 1909).

Insurance agent that failed to strictly comply with all the requirements of N.Y. Ins. Law § 2118 could not claim the protection of that section for violation of N.Y. Ins. Law § 2117 by obtaining liability insurance for its customer, a motel owner, with an insurer not admitted in New York, so that when the insurer became insolvent, the customer was required to pay its own expenses in a premises liability action; this non-compliance established the broker's breach of contract and breach of fiduciary responsibilities as a matter of law, and the customer was entitled to indemnification, but not punitive damages. East Coast Mgt. Ltd. v Genatt Assoc., Inc., 801 N.Y.S.2d 705, 9 Misc. 3d 440, 234 N.Y.L.J. 14, 2005 N.Y. Misc. LEXIS 1594 (N.Y. Sup. Ct. 2005).

Even though the evidence clearly indicated that two insurance brokers involved in procuring excess line coverage for a group of affiliated nightclubs had not complied with N.Y. Ins. Law § 2118 and with N.Y. Comp. Codes R. & Regs. tit. 11, §§ 27.17 and 27.18, violation of those provisions could not be the basis for an argument of negligence per se where private causes of action had never been recognized for violations of the Insurance Law and the existence of such a cause of action could not be implied from the statutory scheme. Polly Esther's S., Inc. v Bogdanoff, 807 N.Y.S.2d 799, 10 Misc. 3d 375, 234 N.Y.L.J. 55, 2005 N.Y. Misc. LEXIS 1923 (N.Y. Sup. Ct. 2005).

Unauthorized foreign insurer was subject to personal jurisdiction in New York under CLS CPLR § 301 where it had delegated authority to excess line brokers in New York, services performed by those brokers were "essential part" of foreign insurer's business rather than "mere solicitation," and foreign insurer demonstrated its desire to do business in New York by taking deliberate steps to comply with applicable insurance regulations. Anglo Am. Ins. Group, P.L.C. v CalFed, Inc., 899 F. Supp. 1070, 1995 U.S. Dist. LEXIS 12414 (S.D.N.Y. 1995).

13. —Indian tribes

As to placement of insurance with unauthorized insurer for risk located on Indian Reservation physically within New York State, such risk would be considered to be inside New York, and excess line broker must be utilized in placing risk with unauthorized insurer. NY Ins Dep't Gen Counsel, Opinion No. 03-04-23, 2003 NY Insurance GC Opinions LEXIS 12.

Tax-exempt status of Indian tribe does not exempt excess line broker from paying excess line premium tax on insurance policy. NY Ins Dep't Gen Counsel, Opinion No. 03-04-23, 2003 NY Insurance GC Opinions LEXIS 12.

Tax-exempt status of Indian tribe does not exempt excess line broker from paying excess line premium tax on excess line insurance policy insuring tribe or member of tribe, since tax burden is on broker and not insured and whether broker is to be reimbursed for tax amount is purely contractual arrangement between insured and broker. NY Ins Dep't Gen Counsel, Opinion No. 05-05-27, 2005 NY Insurance GC Opinions LEXIS 128.

14. —Municipalities

There is no New York insurance law that prohibits municipality from purchasing insurance from unauthorized insurer; however, statutes other than Insurance Law may require insurance that is purchased only from New York authorized insurers (such as CLS Veh & Tr Law § 311), and municipality purchasing insurance may have laws or regulations with requirements for purchasing insurance. NY Ins Dep't Gen Counsel, Opinion No. 04-07-06, 2004 NY Insurance GC Opinions LEXIS 182.

CLS Ins § 2118, which permits, in certain situations, excess line broker to procure insurance from unauthorized insurer, would not conflict with requirement by municipality that contractor bidding on public project must use insurer that is authorized to do insurance business in New York, since CLS Ins § 2118(b) and 11 NYCRR Part 27 require that diligent effort be made to procure insurance from authorized insurer and generally permits placement with unauthorized insurer only after broker first obtains 3 declinations from authorized insurers. NY Ins Dep't Gen Counsel, Opinion No. 04-11-01, 2004 NY Insurance GC Opinions LEXIS 255.

Agency Opinions

Analysis

1. Generally
2. Taxes
3. Exclusions

1. Generally

Residents who have received certificates authorizing them to write surplus lines may place such insurance in foreign or unauthorized Lloyds without becoming liable for criminal misdemeanor. 1910 N.Y. Op. Att'y Gen. No. 871.

2. Taxes

Agents authorized to procure insurance are agents of insured and not of insurers, and where insurance was actually procured, though afterwards cancelled, agent should pay tax of three per cent. 1910 N.Y. Op. Att'y Gen. No. 880.

3. Exclusions

Contracts for insurance on steamers, placed with unauthorized foreign corporations, are not subject to regulation. 1909 N.Y. Op. Att'y Gen. No. 752.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 1101, 2105, 2117, 2130, 5909, 7903, 9102, 9109; CLS Gen Bus §§ 89-g, 89-iii; CLS Tax §§ 1510, 1553.

Examinations; how conducted, § 310.

Definitions, insurance brokers, § 2101.

Insurance brokers; licensing, § 2104.

Excess line brokers; licensing, § 2105.

Acting for or aiding unlicensed or unauthorized insurers or health maintenance organizations, § 2117.

Excess line association, § 2130.

Allocation of premiums, § 9102.

Fire insurance premium tax; foreign mutual fire insurance companies, § 9105.

Definitions, CLS Pub Health § 2801.

Codes, Rules and Regulations:

Insurance and excess line brokers; original applications and examinations. 11 NYCRR § 21.1.

Insurance and excess line brokers; renewal applications. 11 NYCRR § 21.2.

Excess line broker license application and renewal. 11 NYCRR § 27.2.

Binding authority. 11 NYCRR § 27.4.

orts to be filed by excess line association. 11 NYCRR § 27.7.

Service fees. 11 NYCRR § 27.12.

Recordkeeping requirements. 11 NYCRR § 27.21.

Advice to insureds and evidence of coverage. 11 NYCRR § 27.17.

Delivery of policy or other documents and required legend; required notification. 11 NYCRR § 27.18.

Assessment policies. 11 NYCRR § 27.19.

Return premiums. 11 NYCRR § 27.20.

Excess line placements governing standards, 11 NYCRR §§ 27.1 et seq.

Special prohibitions. 11 NYCRR §§ 29.1 et seq. (Regulation 87).

Jurisprudences:

14A NY Jur 2d Business Relationships § 660.

68 NY Jur 2d Insurance §§ 25, 443, 444, 447, 453.

68A NY Jur 2d Insurance § 550.

70A NY Jur 2d Insurance §§ 1711, 1713.

102 NY Jur 2d Taxation and Assessment § 2601.

10 Am Jur Legal Forms 2d, Insurance, §§ 149:3 et seq.

Appleman on Insurance:

1-16 New Appleman New York Insurance Law § 16.13, Regulation of Coverage and Brokers.

1-16 New Appleman New York Insurance Law § 16.14, Excess Line Advisory Association.

2-24 New Appleman New York Insurance Law § 24.05, Authority to Insure.

3-32 New Appleman New York Insurance Law § 32.06, Statutory Exceptions.

3-35 New Appleman New York Insurance Law § 35.06, Other Taxes and Assessments.

3-43 New Appleman New York Insurance Law § 43.12, Excess Line Insurance: Related Laws and Regulations.

4-48 New Appleman New York Insurance Law § 48.04, Licenses.

4-48 New Appleman New York Insurance Law § 48.07, Other Rights and Responsibilities of Agents, Brokers and Other Insurance Intermediaries.

4-48 New Appleman New York Insurance Law § 48.09, Regulation of Excess Line Brokers.

4-49 New Appleman New York Insurance Law § 49.04, Statutory Provisions Relating to Banks Entering Insurance Industry.

4-52 New Appleman New York Insurance Law § 52.08, Risk Retention Groups; Purchasing Groups.

ARTICLE 23 Property/casualty Insurance Rates

Section

2335. Motor vehicle liability insurance rates; prohibition of surcharges for certain accidents and traffic infractions
2335-a. Prohibition of rate increases for persons involved in emergency use of vehicles
2342. Expiration of certain provisions.
2346. Reduction in rates of fire insurance, homeowners insurance or property/casualty premiums for residential property

HISTORY:

Add, L 1984, ch 367, § 1, eff Sept 1, 1984.

§ 2335. [For expiration date, see § 2342] Motor vehicle liability insurance rates; prohibition of surcharges for certain accidents and traffic infractions

No insurer authorized to transact or transacting business in this state, or controlling or controlled by or under common control by or with an insurer authorized to transact or transacting business in this state, which sells a policy providing motor vehicle liability insurance coverage in this state shall increase the policy premium in connection with the insurance permitted or required by this chapter solely because the insured or any other person who

customarily operates an automobile covered by the policy:

(a) has had an accident that does not result in aggregate damage to property in excess of two thousand dollars, provided that any policy surcharge shall be permissible for any accident which results in bodily injury or if the insured has more than one accident in the merit rating experience period. Nothing in this subsection shall change the dollar amount of the accident reporting threshold required under paragraph one of subdivision (a) of section six hundred five of the vehicle and traffic law.

(b) has been found guilty of a traffic infraction under any of the provisions of the vehicle and traffic law provided, however, that this provision shall not apply to a conviction for a violation which occurred during the thirty-six month period ending on the last day of the fourth month preceding the month of the effective date of the policy if such conviction consisted of:

(1) operating a motor vehicle at a speed of more than fifteen miles per hour in excess of the legal limit;

(2) operating a motor vehicle in excess of the speed limit, or in a reckless manner, where injury or death results therefrom;

(3) operating a motor vehicle in excess of the speed limit, or reckless driving, or any combination thereof, on three or more occasions;

(4) operating a motor vehicle while intoxicated or impaired by the consumption of alcohol;

(5) operating a motor vehicle while impaired by the use of a drug, within the meaning of section one thousand one hundred ninety-two of the vehicle and traffic law;

(6) homicide or assault arising out of the use or operation of a motor vehicle, or criminal negligence in the use or operation of a motor vehicle resulting in the injury or death of another person, or use or operation of a motor vehicle directly or indirectly in the commission of a felony;

(7) operating a motor vehicle while seeking to avoid apprehension or arrest by a law enforcement officer;

(8) filing or attempting to file a false or fraudulent automobile insurance claim, or knowingly aiding or abetting in the filing or attempted filing of any such claim;

(9) leaving the scene of an incident without reporting;

(10) filing a false document with the department of motor vehicles, or using a license or registration obtained by filing a false document with the department of motor vehicles;

(11) operating a motor vehicle in a race or speed test;

(12) knowingly permitting or authorizing an unlicensed driver to operate a motor vehicle insured under the policy;

(13) operating a motor vehicle insured under the policy without a valid license or registration in effect, except when the person convicted had possessed a valid license or registration which had expired and was subsequently renewed, or during a period of revocation or suspension thereof, or in violation of the limitations applicable to a license issued pursuant to article twenty-one or article twenty-one-a of the vehicle and traffic law; or

(14) two or more moving violations of any other provision of the vehicle and traffic law;

(c) has had a temporary suspension of a driver's license pending a hearing, prosecution or investigation or an indefinite suspension of a driver's license which is issued because of the failure of the person suspended to perform an act, which suspension will be terminated by the performance of the act by the person suspended, or has had more than one such temporary or indefinite suspension arising out of the same incident issued against him or her, provided that the foregoing provisions of this section shall not apply if such suspension or suspensions has or have not been terminated on or before the effective date of the policy; or

(d) with respect to a non-commercial private passenger automobile insurance policy, has had an accident while operating a commercial vehicle in the course of employment and in the discharge of the employee's duties at the time of the accident, unless the accident is determined to have been caused by the intentional action or gross negligence of the insured.

HISTORY:

Add, L 1984, ch 367, § 1, eff Sept 1, 1984; amd, L 1990, ch 747, §§ 2, 3, eff Oct 20, 1990; L 1990, ch 932, § 2, eff Nov 1, 1990; L 1998, ch 152, § §§ 1, 2, eff Jan 1, 1999; L 2010, ch 277, § 1, eff Nov 27, 2010.

Editor's Notes: Laws 1990, ch 747, § 4, eff Oct 20, 1990, provides as follows:

§ 4. This act shall take effect on the ninetieth day after it shall have become a law provided that the amendment to section 2335 of the insurance law made by section three of this act shall expire on the same date as such section expires and shall not affect the expiration of such section as provided in section 2342 of the insurance law, as amended by chapter 185 of the laws of 1988.

Laws 1990, ch 932, § 3, eff Nov 1, 1990, provides as follows:

§ 3. This act shall take effect immediately, provided that the amendment made to section 2335 of the insurance law made by section two of this act shall expire on the same date as such section expires and shall not affect the expiration of such section as provided in section 2342 of the insurance law, as amended by chapter 185 of the laws of 1988.

Laws 2010, ch 277, § 2, eff Nov 27, 2010, provides as follows:

§ 2. This act shall take effect on the one hundred twentieth day after it shall have become a law provided that the amendments to section 2335 of the insurance law made by section one of this act shall expire on the same date as such section expires; and provided, further, that this act shall only apply to policies entered into, modified, or renewed on or after such effective date.

Derivation Notes: This section formerly appeared, in part, as Ins § 176 as added by L 1969, ch 189; amd, L 1978, ch 426 § 4, L 1979, ch 387, § 1, L 1980, ch 778, § 1.

Notes to Decisions

Analysis

1. Rate changes and surcharges generally
2. Construction
3. Surcharges due to DWI

1. Rate changes and surcharges generally

Insurer may not waive surcharge when 3-year period for surcharge with respect to accident will expire within approximately first 30-40 days of new policy with 12-month term. NY Ins Dep't Gen Counsel, Opinion No. 06-11-02, 2006 NY Insurance GC Opinions LEXIS 191.

Premiums charged by insurance companies, including surcharges, are required to be in accordance with rate/rule filings and may not summarily be changed by insurer in disregard of its filings. NY Ins Dep't Gen Counsel, Opinion No. 06-11-02, 2006 NY Insurance GC Opinions LEXIS 191.

2. Construction

Insurance Department, in interpreting Insurance Law, has generally construed term "motor vehicle" to include motorcycles, except where there is specific exclusion of motorcycles from definition of motor vehicle, such as can be found in CLS Ins § 5102; in addition, department also construes term "automobile," as used in CLS Ins § 2335, to have same meaning as motor vehicle. NY Ins Dep't Gen Counsel, Opinion No. 04-10-06, 2004 NY Insurance GC Opinions LEXIS 245.

3. Surcharges due to DWI

CLS Ins § 2335 permits insurer to surcharge insured for certain traffic infractions, and specifically, CLS Ins § 2335(a)(4) permits surcharges for DWI convictions; however, insurer may not surcharge client under CLS Ins § 2335(a)(4) where there was no DWI conviction. NY Ins Dep't Gen Counsel, Opinion No. 04-09-02, 2004 NY Insurance GC Opinions LEXIS 223.

CLS Ins § 2335(a)(4) permits insurer, with respect to insurance policy covering motor vehicle, including motorcycle, to impose surcharge for DWI conviction "which occurred during the thirty-six month period ending on the last day of the fourth month preceding the month of the effective date of the policy." NY Ins Dep't Gen Counsel, Opinion No. 04-10-06, 2004 NY Insurance GC Opinions LEXIS 245.

Insurer transacting business in New York may not increase automobile insurance policy premium as result of violation of CLS Veh & Tr § 1192-a, since individual under age of 21 is not necessarily legally intoxicated or impaired if individual's blood alcohol content (BAC) is between 0.02 percent and 0.07 percent and thus CLS Ins § 2335 would not apply; however, insurer may cancel policy under CLS Ins § 3425(c)(1)(B), if underage driver's license is revoked or suspended as result of violation and driver is named insured under policy or person who customarily operates vehicle insured under policy. NY Ins Dep't Gen Counsel, Opinion No. 07-05-08, 2007 NY Insurance GC Opinions LEXIS 46.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 2342.

Report required upon accident, CLS Veh & Tr § 605.

Operating a motor vehicle while under the influence of alcohol or drugs, CLS Veh & Tr § 1192.

Alcohol and drug rehabilitation program, CLS Veh & Tr Art 21.

Restricted use licenses, CLS Veh & Tr Art 21-A.

Codes, Rules and Regulations:

Responsibilities in construction and application of rates. 11 NYCRR §§ 160.0 et seq. (Regulation 57).

Noncommercial private passenger automobile insurance merit rating plans. 11 NYCRR § 169.1 et seq. (Regulation 100).

Jurisprudences:

68 NY Jur 2d Insurance §§ 108. 243, 257.

69 NY Jur 2d Insurance § 1045.

Appleman on Insurance:

2-26 New Appleman New York Insurance Law § 26.05, Private Passenger Automobile Rates.

3-43 New Appleman New York Insurance Law § 43.10, Regulation of Forms and Rates.

§ 2335-a. Prohibition of rate increases for persons involved in emergency use of vehicles

No insurer authorized to transact or transacting business in this state, or controlling or controlled by or under common control by or with an insurer authorized to transact or transacting business in this state, which sells a policy providing motor vehicle liability insurance coverage in this state shall increase the policy premium in connection with the insurance permitted or required by this chapter solely because the insured or any other person who customarily operates an automobile covered by the policy has had an accident while operating a motor vehicle in response to an emergency, where the insured was either responding to a call to duty as a paid or volunteer member of any police or fire department or first aid squad; or was performing any other function on behalf of the state, any political subdivision thereof, a public authority, public benefit corporation, or any other governmental agency or instrumentality in a public emergency.

HISTORY:

Add, L 1998, ch 152, § 3, eff Jan 1, 1999.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

68 NY Jur 2d Insurance §§ 108. 243, 257.

69 NY Jur 2d Insurance § 1045.

§ 2342. Expiration of certain provisions.

The provisions of subsection (c) of section two thousand three hundred seven, section two thousand three hundred eight, subsection (a) of section two thousand three hundred ten, sections two thousand three hundred sixteen, two thousand three hundred twenty, two thousand three hundred twenty-three, two thousand three hundred twenty-six, and two thousand three hundred thirty-five, and subsection (b) of section two thousand three hundred thirty-six of this article shall cease to be of any force or effect during the period August third, two thousand one through the day before the effective date of the property/casualty insurance availability act, and after June thirtieth, two thousand twenty-three.

HISTORY:

Add, L 1984, ch 367, § 1, eff Sept 1, 1984; amd, L 1984, ch 805, § 142, eff Sept 1, 1984; L 1985, ch 916, § 3, eff Dec 20, 1985; L 1986, ch 75, § 3, eff May 14, 1986; L 1986, ch 147, § 3, eff June 11, 1986; L 1986, ch 220, § 7, eff June 28, 1986 and deemed eff June 18, 1986; L 1988, ch 185, § 4, eff June 30, 1988; L 1991, ch 207, § 5, eff June 28, 1991; L 1991, ch 653, § 1, eff July 26, 1991; L 1995, ch 113, § 5, eff June 30, 1995; L 1998, ch 134, § 3, eff June 30, 1998; L 2001, ch 63, § 5 (Part K), eff June 25, 2001; L 2001, ch 105, § 6 (Part I), eff July 25, 2001; L 2003, ch 85, § 9, eff June 26, 2003 (see 2003 note below); L 2006, ch 115, § 5, eff June 30, 2006; L 2007, ch 268, § 5, eff July 18, 2007; L 2008, ch 136, § 10, eff June 30, 2008; L 2011, ch 102, § 6, eff June 28, 2011; L 2014, ch 78, § 6, effective June 30, 2014; L 2017, ch 69, § 1, effective June 29, 2017; L 2020, ch 58, § 1 (Part XXX, Subpart B, Item JJ), effective April 3, 2020.

Editor's Notes: Laws 2003, ch 85, §§ 1 and 11, eff June 26, 2003, provide as follows:

Section 1. Short title. This act shall be known and may be cited as the "property/casualty insurance availability act".

§ 11. This act shall take effect immediately, provided that sections five through ten of this act shall apply to insurance contracts issued or renewed on or after such effective date, and shall apply at the next required policy period, commencing on or after such date, to any insurance contract written prior to the effective date of this act.

Amendment Notes The 2014 amendment by ch 78, (Part B) § 6 deleted "section two thousand three hundred forty-one" preceding "of this article" and "substituted "June thirtieth, two thousand seventeen" for "June thirtieth, two thousand fourteen"; and made a related change.

The 2017 amendment by ch 69, § 1, substituted "June thirtieth, two thousand twenty" for "June thirtieth, two thousand seventeen."

The 2020 amendment by ch 58, § 1 (Part XXX, Subpart B, Item JJ), substituted "two thousand twenty-three" for "two thousand twenty."

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Rating classifications or territories; policy forms, § 2307.

Imposition of prior approval, § 2308.

Informational filings, § 2310.

Prohibition of anti-competitive behavior, § 2316.

Enforcement and penalties; where prior approval is not required, § 2320.

Profitability and rates of return; where prior approval is not required, § 2323.

Evaluation of competitive rating provisions, § 2326.

Motor vehicle liability insurance rates; prohibition of surcharges for certain accidents and traffic infractions, § 2335.

Motor vehicle liability, comprehensive and collision insurance rates; premium reductions in certain cases, § 2336.

Consumers advisory council; business advisory council, § 2341.

Jurisprudences:

68 NY Jur 2d Insurance §§ 46, 108. 239, 243, 257.

69 NY Jur 2d Insurance § 1045.

Appleman on Insurance:

2-19 New Appleman New York Insurance Law § 19.05, Rates.

3-43 New Appleman New York Insurance Law § 43.10, Regulation of Forms and Rates.

§ 2346. Reduction in rates of fire insurance, homeowners insurance or property/casualty premiums for residential property

1. The superintendent may provide for a reduction in the rates of fire insurance premiums or the fire insurance component of homeowners insurance premiums applicable to residential real property equipped with smoke detecting alarm devices, approved sprinkler systems or fire extinguishers, should a statistically valid study of insurer experience indicate an actuarially significant decrease in losses in the aforementioned circumstances. The reductions provided for shall be proportionally related to the actuarially calculable decrease in losses in the aforementioned circumstances.

2. The superintendent may provide for a reduction in the rates of homeowners insurance premiums applicable to residential real property equipped with dead-bolt locks, should a statistically valid study of insurer experience indicate an actuarially significant decrease in losses attributable to the use of such a device. The superintendent shall by regulation establish standards for dead-bolt locks for which a reduction may be approved. The reductions provided for shall be proportionally related to the actuarially calculable decrease in losses attributable to the use of such a device.

3. The superintendent shall provide for an actuarially appropriate reduction in the rates of homeowner's insurance premiums applicable to residential real property fitted or retrofitted with hurricane/storm shutters. The superintendent shall by regulation establish standards for hurricane/storm shutters, including the safe and secure installation thereof.

4. The superintendent shall provide for an actuarially appropriate reduction in the rates of homeowner's insurance premiums applicable to residential real property fitted or retrofitted with hurricane resistant laminated glass windows or doors. The superintendent shall by regulation establish standards for hurricane resistant laminated glass windows and doors, including the safe and secure installation thereof.

5. (a) Definitions. For the purposes of this subsection, the following terms shall have the following meanings:

(1) "Completion certificate" means a document which cannot be altered and which is provided to a person who successfully completes a homeowner natural disaster preparedness, home safety and loss prevention course.

(2) "Natural disaster" means the occurrence or imminent threat of widespread catastrophic or severe damage, injury, or loss of life or property resulting from any natural cause including, but not limited to, fire, flood, earthquake, hurricane, tornado, high water, landslide, mudslide, wind, storm, wave action, ice storm, epidemic, air contamination, blight, drought, infestation, explosion, water contamination, bridge failure, or bridge collapse.

(3) "Homeowner natural disaster preparedness, home safety and loss prevention course" means a natural disaster preparedness, home safety and loss prevention course that has been submitted to the superintendent for their information and review by an applicant. Such course may provide useful information to participants on items including, but not limited to: courses of action that can be taken before, during and after the occurrence of a natural disaster, strategies to reduce risk exposure to insured residential property owners and renters, and information about the installation of equipment, devices or other capital improvements to real property which can help to eliminate or mitigate damage to real or personal property, personal injury or the loss of life caused by a natural disaster or other insurable event or occurrence of a fire, theft, burglary, personal injury or property damage.

(4) "Applicant" means an insurer, or any other person, agency or organization which submits a proposed homeowner natural disaster preparedness, home safety and loss prevention course to the

superintendent for their information and review, and who or which is prepared and able to offer such course to insureds upon the approval thereof.

(b) The superintendent may provide for an actuarially appropriate reduction for a period of three years in rates of homeowner's insurance and property/casualty insurance premiums applicable to residential real property for each triennial completion of a homeowner natural disaster preparedness, home safety and loss prevention course by the insured occupant of such residential real property. In addition, the superintendent may also provide for actuarially appropriate reductions in such rates for the installation of equipment, devices or other capital improvements to real property which can help to eliminate or mitigate natural disaster damage, improve home safety or prevent other losses.

(c) An insurer, upon approval of the superintendent, may upon submission of a completion certificate by an insured, provide an actuarially appropriate reduction, for a period of three years, of the premium for such insured's homeowner's insurance or property/casualty insurance on the residential real property which is the insured's place of residence.

(d) The superintendent may establish, by rule or otherwise, standards or guidelines to be used by the superintendent when reviewing the proposed homeowner natural disaster preparedness, home safety and loss prevention courses.

HISTORY:

Formerly § 2303–a, add, L 1990, ch 13, § 1, eff Sept 1, 1990; renumbered § 2346, L 1991, ch 207, § 1, eff June 28, 1991; L 1993, ch 637, § 1, eff Jan 31, 1994; L 1994, ch 454, § 1, eff July 20, 1994; L 1995, ch 363, § 1, eff Jan 1, 1996; L 1997, ch 44, § 1, eff Jan 1, 1998; L 2016, ch 54, § 2 (Part BB), effective January 1, 2017.

Editor's Notes Laws 2016, ch 54, §§ 1 and 3 (Part BB), eff Jan 1, 2017, provide:

Section 1. Legislative intent. The legislature declares that the purpose of this act is to clearly provide in statute for insurers to offer and for homeowners, condominium owners, cooperative apartment owners, and renters to obtain a financial incentive if they complete a course of instruction on how to make their residence more resilient to a natural disaster, reduce the potential loss of life or property damage that could result from a natural disaster, reduce the risk of fire, theft, burglary, personal injury or property damage, and raise their awareness of natural disaster preparedness by offering property/casualty insurance premium reductions.

§ 3. This act shall take effect on the first of January next succeeding the date on which it shall have become a law; provided, however, that effective immediately, any actions necessary to be taken for the implementation of the provisions of this act on its effective date are authorized and directed to be completed on or before such effective date.

Amendment Notes The 2016 amendment by ch 54, § 2 (Part BB), added "or property/casualty" in the section heading; added 5; and made a related change.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

Premium reductions for loss prevention measures. 11 NYCRR § 160.6.

Jurisprudences:

68 NY Jur 2d Insurance §§ 108. 243, 257.

69 NY Jur 2d Insurance § 1045.

ARTICLE 32 Insurance Contracts—life, Accident and Health, Annuities

Section
3216. Individual accident and health insurance policy provisions
3221. Group or blanket accident and health insurance policies; standard provisions.

HISTORY:

Add, L 1984, ch 367, § 1, eff Sept 1, 1984.

§ 3216. Individual accident and health insurance policy provisions

* * * * *

(i) Every person insured under a policy of accident and health insurance delivered or issued for delivery in this state shall be entitled to the reimbursements and coverages specified below.

* * * * *

(24) (A) Every policy which provides major medical or similar comprehensive-type coverage shall include coverage for prehospital emergency medical services for the treatment of an emergency condition when such services are provided by an ambulance service issued a certificate to operate pursuant to section three thousand five of the public health law.

(B) Payment by an insurer pursuant to this section shall be payment in full for the services provided. An ambulance service reimbursed pursuant to this section shall not charge or seek any reimbursement from, or have any recourse against an insured for the services provided pursuant to this paragraph, except for the collection of copayments, coinsurance or deductibles for which the insured is responsible for under the terms of the policy.

(C) An insurer shall provide reimbursement for those services prescribed by this section at rates negotiated between the insurer and the provider of such services. In the absence of agreed upon rates, an insurer shall pay for such services at the usual and customary charge, which shall not be excessive or unreasonable.

(D) The provisions of this paragraph shall have no application to transfers of patients between hospitals or health care facilities by an ambulance service as described in subparagraph (A) of this paragraph.

(E) As used in this paragraph:

(i) "Prehospital emergency medical services" means the prompt evaluation and treatment of an emergency medical condition, and/or non-airborne transportation of the patient to a hospital, provided however, where the patient utilizes non-air-borne emergency transportation pursuant to this paragraph, reimbursement shall be based on whether a prudent layperson, possessing an average knowledge of medicine and health, could reasonably expect the absence of such transportation to result in (I) placing the health of the person afflicted with such condition in serious jeopardy, or in the case of a behavioral condition placing the health of such person or others in serious jeopardy; (II) serious impair-

ment to such person's bodily functions; (III) serious dysfunction of any bodily organ or part of such person; (IV) serious disfigurement of such person; or (V) a condition described in clause (i), (ii), or (iii) of section 1867(e)(1)(A) of the Social Security Act.

(ii) "Emergency condition" means a medical or behavioral condition that manifests itself by acute symptoms of sufficient severity, including severe pain, such that a prudent layperson, possessing an average knowledge of medicine and health, could reasonably expect the absence of immediate medical attention to result in (I) placing the health of the person afflicted with such condition in serious jeopardy, or in the case of a behavioral condition placing the health of such person or others in serious jeopardy; (II) serious impairment to such person's bodily functions; (III) serious dysfunction of any bodily organ or part of such person; (IV) serious disfigurement of such person; or (V) a condition described in clause (i), (ii), or (iii) of section 1867(e)(1)(A) of the Social Security Act.

(25) (A) Every policy which provides coverage for hospital or surgical coverage shall not exclude coverage for screening, diagnosis and treatment of medical conditions otherwise covered by the policy solely because the treatment is provided to diagnose or treat autism spectrum disorder.

(B) Every policy that provides physician services, medical, major medical or similar comprehensive-type coverage shall provide coverage for the screening, diagnosis and treatment of autism spectrum disorder in accordance with this paragraph and shall not exclude coverage for the screening, diagnosis or treatment of medical conditions otherwise covered by the policy because the individual is diagnosed with autism spectrum disorder. Such coverage may be subject to annual deductibles, copayments and coinsurance as may be deemed appropriate by the superintendent and shall be consistent with those imposed on other benefits under the policy. This paragraph shall not be construed as limiting the benefits that are otherwise available to an individual under the policy, provided however that such policy shall not contain any limitations on visits that are solely applied to the treatment of autism spectrum disorder. No insurer shall terminate coverage or refuse to deliver, execute, issue, amend, adjust, or renew coverage to an individual solely because the individual is diagnosed with autism spectrum disorder or has received treatment for autism spectrum disorder. Coverage shall be subject to utilization review and external appeals of health care services pursuant to article forty-nine of this chapter as well as case management and other managed care provisions.

(C) For purposes of this paragraph:

(i) "autism spectrum disorder" means any pervasive developmental disorder as defined in the most recent edition of the diagnostic and statistical manual of mental disorders.

(ii) "applied behavior analysis" means the design, implementation, and evaluation of environmental modifications, using behavioral stimuli and consequences, to produce socially significant improvement in human behavior, including the use of direct observation, measurement, and functional analysis of the relationship between environment and behavior.

(iii) "behavioral health treatment" means counseling and treatment programs, when provided by a licensed provider, and applied behavior analysis, when provided by a person licensed, certified or otherwise authorized to provide applied behavior analysis, that are necessary to develop, maintain, or restore, to the maximum extent practicable, the functioning of an individual.

(iv) "diagnosis of autism spectrum disorder" means assessments, evaluations, or tests to diagnose whether an individual has autism spectrum disorder.

(v) "pharmacy care" means medications prescribed by a licensed health care provider legally authorized to prescribe under title eight of the education law.

(vi) "psychiatric care" means direct or consultative services provided by a psychiatrist licensed in the state in which the psychiatrist practices.

(vii) "psychological care" means direct or consultative services provided by a psychologist licensed in the state in which the psychologist practices.

(viii) "therapeutic care" means services provided by licensed or certified speech therapists, occupational therapists, social workers, or physical therapists.

(ix) "treatment of autism spectrum disorder" shall include the following care and assistive communication devices prescribed or ordered for an individual diagnosed with autism spectrum disorder by a licensed physician or a licensed psychologist:

(1) behavioral health treatment;

(2) psychiatric care;

(3) psychological care;

(4) medical care provided by a licensed health care provider;

(5) therapeutic care, including therapeutic care which is deemed habilitative or nonrestorative, in the event that the policy provides coverage for therapeutic care; and

(6) pharmacy care in the event that the policy provides coverage for prescription drugs.

(D) Coverage may be denied on the basis that such treatment is being provided to the covered person pursuant to an individualized education plan under article eighty-nine of the education law. The provision of services pursuant to an individualized family service plan under section twenty-five hundred forty-five of the public health law, an individualized education plan under article eighty-nine of the education law, or an individualized service plan pursuant to regulations of the office for persons with developmental disabilities shall not affect coverage under the policy for services provided on a supplemental basis outside of an educational setting if

such services are prescribed by a licensed physician or licensed psychologist.

(E) Nothing in this paragraph shall be construed to affect any obligation to provide services to an individual under an individualized family service plan under section twenty-five hundred forty-five of the public health law, an individualized education plan under article eighty-nine of the education law, or an individualized service plan pursuant to regulations of the office for persons with developmental disabilities.

(F) Nothing in this paragraph shall be construed to affect any obligation to provide coverage for otherwise-covered services solely on the basis that the services constitute early intervention program services pursuant to section three thousand two hundred thirty-five-a of this article or an individualized service plan pursuant to regulations of the office for persons with developmental disabilities.

(G) Nothing in this paragraph shall be construed to prevent a policy from providing services through a network of participating providers who shall meet certain requirements for participation, including provider credentialing.

(H) Coverage under this paragraph shall not apply financial requirements or treatment limitations to autism spectrum disorder benefits that are more restrictive than the predominant financial requirements and treatment limitations applied to substantially all medical and surgical benefits covered by the policy.

(I) The criteria for medical necessity determinations under the policy with respect to autism spectrum disorder benefits shall be made available by the insurer to any insured, prospective insured, or in-network provider upon request.

(J) For purposes of this paragraph:

(i) "financial requirement" means deductible, copayments, coinsurance and out-of-pocket expenses;

(ii) "predominant" means that a financial requirement or treatment limitation is the most common or frequent of such type of limit or requirement; and

(iii) "treatment limitation" means limits on the frequency of treatment, number of visits, days of coverage, or other similar limits on the scope or duration of treatment and includes nonquantitative treatment limitations such as: medical management standards limiting or excluding benefits based on medical necessity, or based on whether the treatment is experimental or investigational; formulary design for prescription drugs; network tier design; standards for provider admission to participate in a network, including reimbursement rates; methods for determining usual, customary, and reasonable charges; fail-first or step therapy protocols; exclusions based on failure to complete a course of treatment; and restrictions based on geographic location, facility type, provider specialty, and other criteria that limit the scope or duration of benefits for services provided under the policy.

(K) An insurer shall provide coverage under this paragraph, at a minimum, consistent with the federal Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (29 U.S.C. § 1185a).

(26) (A) No managed care health insurance policy that provides coverage for hospital, medical or surgical care shall provide that services of a participating hospital will be covered as out-of-network services solely on the basis that the health care provider admitting or rendering services to the insured is not a participating provider.

(B) No managed care health insurance policy that provides coverage for hospital, medical or surgical care shall provide that services of a participating health care provider will be covered as out-of-network services solely on the basis that the services are rendered in a nonparticipating hospital.

(C) For purposes of this paragraph, a "health care provider" is a health care professional licensed, registered or certified pursuant to title eight of the education law or a health care professional comparably licensed, registered or certified by another state.

(D) For purposes of this paragraph, a "managed care health insurance policy" is a policy that requires that services be provided by a provider participating in the insurer's network in order for the insured to receive the maximum level of reimbursement under the policy.

(27) [There are two paragraphs (27)] (A) Every policy that includes coverage for dialysis treatment that requires such services to be provided by an in-network provider and that does not provide coverage for out-of-network dialysis treatment shall not deny coverage of such services because the services are provided by an out-of-network provider, provided that each of the following conditions are met:

(i) The out-of-network provider is duly licensed to practice and authorized to provide such treatment;

(ii) The out-of-network provider is located outside the service area of the insurer;

(iii) The in-network healthcare provider treating the insured for the condition issues a written order for dialysis treatment stating that in his or her opinion such treatment is necessary;

(iv) The insured has notified, in writing, the insurer at least thirty days in advance of the proposed date or dates of such out-of-network dialysis treatment. The notice shall include the authorization required by clause (iii) of this subparagraph. In the event the insured must travel on sudden notice due to family or other emergency, shorter notice may be permitted, provided that the insurer has reasonable opportunity to review the travel and treatment plans of the insured;

(v) The insurer shall have the right to pre-approve the dialysis treatment and schedule; and

(vi) Such coverage is limited to no greater than ten out-of-network treatments in a calendar year.

(B) Where coverage for out-of-network dialysis treatment is provided pursuant to subparagraph (A) of this paragraph, no insurer shall be obligated to

reimburse the out-of-network provider at an amount greater than it would have paid for the same treatment within a network, including all drugs and ancillary services tied to dialysis treatment, and any amount charged by a provider in excess of the amount reimbursed by the insurer shall be the responsibility of the insured receiving the out-of-network services.

(C) Such coverage of out-of-network dialysis services required by subparagraph (A) of this paragraph shall otherwise be subject to the limitations, exclusions and terms of the policy, including, but not limited to, utilization review, annual deductibles, copayments, and coinsurance, consistent with those required for other similar benefits under the policy.

(27) [There are two paragraphs (27)] No policy delivered or issued for delivery in this state which provides coverage for prescription drugs and for which cost-sharing, deductibles or co-insurance obligations are determined by category of prescription drugs shall impose cost-sharing, deductibles or co-insurance obligations for any prescription drug that exceeds the dollar amount of cost-sharing, deductibles or co-insurance obligations for non-preferred brand drugs or its equivalent (or brand drugs if there is no non-preferred brand drug category).

(28) [There are two paragraphs (28)] Notwithstanding title eleven of article five of the social services law or any other law to the contrary, every policy which provides coverage for prescription drugs shall, with regard to eye drop medication requiring a prescription that has been approved by the insurer for coverage, allow for the limited refilling of the prescription prior to the last day of the approved dosage period without regard to any coverage restrictions on early refill of renewals. Provided, however, that any refill dispensed prior to the expiration of the prescribed and approved coverage period pursuant to this paragraph, shall, to the extent practicable, be limited in quantity so as not to exceed the remaining dosage initially approved for coverage. Provided, further, that such limited refilling shall not limit or restrict coverage with regard to any previously or subsequently approved prescription for eye drop medication and shall be subject to the terms and conditions of the policy otherwise applicable to this coverage. Provided, further, that a pharmacist may contact the prescribing physician or health care provider to verify the prescription.

(28) [There are two paragraphs (28)] Any policy that provides coverage for prescription drugs shall permit each insured to fill any covered prescription that may be obtained at a network participating mail order or other non-retail pharmacy, at the insured's option, at a network participating non-mail order retail pharmacy provided that the network participating non-mail order retail pharmacy agrees in advance, through a contractual network agreement, to the same reimbursement amount, as well as the same applicable terms and conditions, that the insurer has established for the network participating mail order or other non-retail pharmacy. In such a case, the policy shall not impose a co-payment fee or other condition on any insured who elects to purchase prescription drugs from a network participating non-mail order retail pharmacy which is not also imposed on insureds electing to purchase drugs from a network participating mail order or other non-retail pharmacy.

(29) Every individual policy which provides medical, major medical or similar comprehensive-type coverage that includes coverage for a physical or well care visit once in every three hundred sixty-five days shall be interpreted to mean that such physical or well care visit can be had once every calendar year, regardless of whether or not a period of three hundred sixty-five days has passed since the previous physical or well care visit.

(30)

(A) Every policy that provides hospital, major medical or similar comprehensive coverage shall provide inpatient coverage for the diagnosis and treatment of substance use disorder, including detoxification and rehabilitation services. Such inpatient coverage shall include unlimited medically necessary treatment for substance use disorder treatment services provided in residential settings. Further, such inpatient coverage shall not apply financial requirements or treatment limitations, including utilization review requirements, to inpatient substance use disorder benefits that are more restrictive than the predominant financial requirements and treatment limitations applied to substantially all medical and surgical benefits covered by the policy.

(B) Coverage provided under this paragraph may be limited to facilities in New York state that are licensed, certified or otherwise authorized by the office of alcoholism and substance abuse services and, in other states, to those which are accredited by the joint commission as alcoholism, substance abuse, or chemical dependence treatment programs and are similarly licensed, certified or otherwise authorized in the state in which the facility is located.

(C) Coverage provided under this paragraph may be subject to annual deductibles and co-insurance as deemed appropriate by the superintendent and that are consistent with those imposed on other benefits within a given policy.

(D) This subparagraph shall apply to facilities in this state that are licensed, certified or otherwise authorized by the office of alcoholism and substance abuse services that are participating in the insurer's provider network. Coverage provided under this paragraph shall not be subject to preauthorization. Coverage provided under this paragraph shall also not be subject to concurrent utilization review during the first twenty-eight days of the inpatient admission provided that the facility notifies the insurer of both the admission and the initial treatment plan within two business days of the admis-

sion. The facility shall perform daily clinical review of the patient, including periodic consultation with the insurer at or just prior to the fourteenth day of treatment to ensure that the facility is using the evidence-based and peer reviewed clinical review tool utilized by the insurer which is designated by the office of alcoholism and substance abuse services and appropriate to the age of the patient, to ensure that the inpatient treatment is medically necessary for the patient. Prior to discharge, the facility shall provide the patient and the insurer with a written discharge plan which shall describe arrangements for additional services needed following discharge from the inpatient facility as determined using the evidence-based and peer-reviewed clinical review tool utilized by the insurer which is designated by the office of alcoholism and substance abuse services. Prior to discharge, the facility shall indicate to the insurer whether services included in the discharge plan are secured or determined to be reasonably available. Any utilization review of treatment provided under this subparagraph may include a review of all services provided during such inpatient treatment, including all services provided during the first twenty-eight days of such inpatient treatment. Provided, however, the insurer shall only deny coverage for any portion of the initial twenty-eight day inpatient treatment on the basis that such treatment was not medically necessary if such inpatient treatment was contrary to the evidence-based and peer reviewed clinical review tool utilized by the insurer which is designated by the office of alcoholism and substance abuse services. An insured shall not have any financial obligation to the facility for any treatment under this subparagraph other than any copayment, coinsurance, or deductible otherwise required under the policy.

(E) An insurer shall make available to any insured, prospective insured, or in-network provider, upon request, the criteria for medical necessity determinations under the policy with respect to inpatient substance use disorder benefits.

(F) For purposes of this paragraph:

(i) "financial requirement" means deductible, copayments, coinsurance and out-of-pocket expenses;

(ii) "predominant" means that a financial requirement or treatment limitation is the most common or frequent of such type of limit or requirement;

(iii) "treatment limitation" means limits on the frequency of treatment, number of visits, days of coverage, or other similar limits on the scope or duration of treatment and includes nonquantitative treatment limitations such as: medical management standards limiting or excluding benefits based on medical necessity, or based on whether the treatment is experimental or investigational; formulary design for prescription drugs; network tier design; standards for provider admission to participate in a network, including reimbursement rates; methods for determining usual, customary, and reasonable charges; fail-first or step therapy protocols; exclusions based on failure to complete a course of treatment; and restrictions based on geographic location, facility type, provider specialty, and other criteria that limit the scope or duration of benefits for services provided under the policy; and

(iv) "substance use disorder" shall have the meaning set forth in the most recent edition of the diagnostic and statistical manual of mental disorders or the most recent edition of another generally recognized independent standard of current medical practice, such as the international classification of diseases.

(G) An insurer shall provide coverage under this paragraph, at a minimum, consistent with the federal Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (29 U.S.C. § 1185a).

(30) Every policy that provides medical coverage that includes coverage for physician services in a physician's office and every policy that provides major medical or similar comprehensive-type coverage shall include coverage for equipment and supplies used for the treatment of ostomies, if prescribed by a physician or other licensed health care provider legally authorized to prescribe under title eight of the education law. Such coverage shall be subject to annual deductibles and coinsurance as deemed appropriate by the superintendent. The coverage required by this paragraph shall be identical to, and shall not enhance or increase the coverage required as part of essential health benefits as defined in subsection (a) of section three thousand two hundred seventeen-i of this article.

(31)

(A) Every policy that provides medical, major medical or similar comprehensive-type coverage shall provide outpatient coverage for the diagnosis and treatment of substance use disorder, including detoxification and rehabilitation services. Such coverage shall not apply financial requirements or treatment limitations to outpatient substance use disorder benefits that are more restrictive than the predominant financial requirements and treatment limitations applied to substantially all medical and surgical benefits covered by the policy.

(B) Coverage under this paragraph may be limited to facilities in New York state that are licensed, certified or otherwise authorized by the office of alcoholism and substance abuse services to provide outpatient substance use disorder services and, in other states, to those which are accredited by the joint commission as alcoholism or chemical dependence substance abuse treatment programs and are similarly licensed, certified, or otherwise authorized in the state in which the facility is located.

(C) Coverage provided under this paragraph may be subject to annual deductibles and co-insurance as deemed appropriate by the superintendent and that are consistent with those imposed on other benefits within a given policy.

(D) A policy providing coverage for substance use disorder services pursuant to this paragraph shall

provide up to twenty outpatient visits per policy or calendar year to an individual who identifies him or herself as a family member of a person suffering from substance use disorder and who seeks treatment as a family member who is otherwise covered by the applicable policy pursuant to this paragraph. The coverage required by this paragraph shall include treatment as a family member pursuant to such family member's own policy provided such family member:

(i) does not exceed the allowable number of family visits provided by the applicable policy pursuant to this paragraph; and

(ii) is otherwise entitled to coverage pursuant to this paragraph and such family member's applicable policy.

(E) This subparagraph shall apply to facilities in this state that are licensed, certified or otherwise authorized by the office of alcoholism and substance abuse services for the provision of outpatient, intensive outpatient, outpatient rehabilitation and opioid treatment that are participating in the insurer's provider network. Coverage provided under this paragraph shall not be subject to preauthorization. Coverage provided under this paragraph shall not be subject to concurrent review for the first four weeks of continuous treatment, not to exceed twenty-eight visits, provided the facility notifies the insurer of both the start of treatment and the initial treatment plan within two business days. The facility shall perform clinical assessment of the patient at each visit, including periodic consultation with the insurer at or just prior to the fourteenth day of treatment to ensure that the facility is using the evidence-based and peer reviewed clinical review tool utilized by the insurer which is designated by the office of alcoholism and substance abuse services and appropriate to the age of the patient, to ensure that the outpatient treatment is medically necessary for the patient. Any utilization review of the treatment provided under this subparagraph may include a review of all services provided during such outpatient treatment, including all services provided during the first four weeks of continuous treatment, not to exceed twenty-eight visits, of such outpatient treatment. Provided, however, the insurer shall only deny coverage for any portion of the initial four weeks of continuous treatment, not to exceed twenty-eight visits, for outpatient treatment on the basis that such treatment was not medically necessary if such outpatient treatment was contrary to the evidence-based and peer reviewed clinical review tool utilized by the insurer which is designated by the office of alcoholism and substance abuse services. An insured shall not have any financial obligation to the facility for any treatment under this subparagraph other than any copayment, coinsurance, or deductible otherwise required under the policy.

(F) The criteria for medical necessity determinations under the policy with respect to outpatient substance use disorder benefits shall be made available by the insurer to any insured, prospective insured, or in-network provider upon request.

(G) For purposes of this paragraph:

(i) "financial requirement" means deductible, copayments, coinsurance and out-of-pocket expenses;

(ii) "predominant" means that a financial requirement or treatment limitation is the most common or frequent of such type of limit or requirement;

(iii) "treatment limitation" means limits on the frequency of treatment, number of visits, days of coverage, or other similar limits on the scope or duration of treatment and includes nonquantitative treatment limitations such as: medical management standards limiting or excluding benefits based on medical necessity, or based on whether the treatment is experimental or investigational; formulary design for prescription drugs; network tier design; standards for provider admission to participate in a network, including reimbursement rates; methods for determining usual, customary, and reasonable charges; fail-first or step therapy protocols; exclusions based on failure to complete a course of treatment; and restrictions based on geographic location, facility type, provider specialty, and other criteria that limit the scope or duration of benefits for services provided under the policy; and

(iv) "substance use disorder" shall have the meaning set forth in the most recent edition of the diagnostic and statistical manual of mental disorders or the most recent edition of another generally recognized independent standard of current medical practice such as the international classification of diseases.

(H) An insurer shall provide coverage under this paragraph, at a minimum, consistent with the federal Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (29 U.S.C. § 1185a).

(31-a) (A) No policy that provides medical, major medical or similar comprehensive-type coverage and provides coverage for prescription drugs for medication for the treatment of a substance use disorder shall require prior authorization for an initial or renewal prescription for all buprenorphine products, methadone or long acting injectable naltrexone for detoxification or maintenance treatment of a substance use disorder except where otherwise prohibited by law.

(B) Coverage provided under this paragraph may be subject to copayments, coinsurance, and annual deductibles that are consistent with those imposed on other benefits within the policy.

(32) No policy delivered or issued for delivery in this state that provides reimbursement for non-physician surgical first assistant services when the services are provided by a non-physician surgical first assistant shall exclude such coverage on the basis that the non-physician surgical first assistant services were performed by a registered nurse first assistant provided that: (A) the registered nurse

first assistant is certified in operating room nursing; (B) the services are within the scope of practice of a non-physician surgical first assistant; and (C) the terms and conditions of the policy otherwise provide for the coverage of the services. Nothing in this paragraph shall be construed to prevent the medical management or utilization review of the services or prevent a policy from requiring that services are to be provided through a network of participating providers who meet certain requirements for participation, including provider credentialing.

(33) [There are two paragraphs (33)] Every policy delivered or issued for delivery in this state that provides coverage for prescription drugs subject to a copayment shall charge a copayment for a limited initial prescription of an opioid drug, which is prescribed in accordance with paragraph (b) of subdivision five of section thirty-three hundred one of the public health law, that is either (i) proportional between the copayment for a thirty-day supply and the amount of drugs the patient was prescribed; or (ii) equivalent to the copayment for a full thirty-day supply of the opioid drug, provided that no additional copayments may be charged for any additional prescriptions for the remainder of the thirty-day supply.

(33) [There are two paragraphs (33)] Whenever in this section an insurer is required to provide benefits with no coinsurance or deductible, the requirement only applies with respect to participating providers in the insurer's network, or with respect to non-participating providers, if the insurer does not have a participating provider in the in-network benefits portion of its network with the appropriate training and experience to meet the particular health care needs of the insured pursuant to subsection (d) of section three thousand two hundred seventeen-d of this article.

(34) [There are two paragraphs (34)] Health care forensic examinations performed pursuant to section twenty-eight hundred five-i of the public health law covered under the policy shall not be subject to annual deductibles or coinsurance.

(34) [There are two paragraphs (34)] Every policy that provides coverage for hospital, surgical or medical care shall provide the following coverage for pasteurized donor human milk (PDHM), which may include fortifiers as medically indicated, for inpatient use, for which a licensed medical practitioner has issued an order for an infant who is medically or physically unable to receive maternal breast milk or participate in breast feeding or whose mother is medically or physically unable to produce maternal breast milk at all or in sufficient quantities or participate in breast feeding despite optimal lactation support. Such infant shall: (i) have a documented birth weight of less than one thousand five hundred grams; or (ii) have a congenital or acquired condition that places the infant at a high risk for development of necrotizing enterocolitis.

(35)

(A) Every policy delivered or issued for delivery in this state that provides coverage for inpatient hospital care or coverage for physician services shall provide coverage for the diagnosis and treatment of mental health conditions as follows:

(i) where the policy provides coverage for inpatient hospital care, benefits for inpatient care in a hospital as defined by subdivision ten of section 1.03 of the mental hygiene law and benefits for outpatient care provided in a facility issued an operating certificate by the commissioner of mental health pursuant to the provisions of article thirty-one of the mental hygiene law, or in a facility operated by the office of mental health, or, for care provided in other states, to similarly licensed or certified hospitals or facilities; and

(ii) where the policy provides coverage for physician services, benefits for outpatient care provided by a psychiatrist or psychologist licensed to practice in this state, a licensed clinical social worker who meets the requirements of subparagraph (D) of paragraph four of subsection (1) of section three thousand two hundred twenty-one of this article, a nurse practitioner licensed to practice in this state, or a professional corporation or university faculty practice corporation thereof.

(B) Coverage required by this paragraph may be subject to annual deductibles, copayments and coinsurance as may be deemed appropriate by the superintendent and shall be consistent with those imposed on other benefits under the policy.

(C) Coverage under this paragraph shall not apply financial requirements or treatment limitations to mental health benefits that are more restrictive than the predominant financial requirements and treatment limitations applied to substantially all medical and surgical benefits covered by the policy.

(D) The criteria for medical necessity determinations under the policy with respect to mental health benefits shall be made available by the insurer to any insured, prospective insured, or in-network provider upon request.

(E) For purposes of this paragraph:

(i) "financial requirement" means deductible, copayments, coinsurance and out-of-pocket expenses;

(ii) "predominant" means that a financial requirement or treatment limitation is the most common or frequent of such type of limit or requirement;

(iii) "treatment limitation" means limits on the frequency of treatment, number of visits, days of coverage, or other similar limits on the scope or duration of treatment and includes nonquantitative treatment limitations such as: medical management standards limiting or excluding benefits based on medical necessity, or based on whether the treatment is experimental or investigational; formulary design for prescription drugs; network tier design; standards for provider admission to participate in a network, including reimbursement rates; methods for determining usual, customary, and reasonable charges; fail-first or step therapy protocols; exclu-

sions based on failure to complete a course of treatment; and restrictions based on geographic location, facility type, provider specialty, and other criteria that limit the scope or duration of benefits for services provided under the policy; and

(iv) "mental health condition" means any mental health disorder as defined in the most recent edition of the diagnostic and statistical manual of mental disorders or the most recent edition of another generally recognized independent standard of current medical practice such as the international classification of diseases.

(F) An insurer shall provide coverage under this paragraph, at a minimum, consistent with the federal Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (29 U.S.C. § 1185a).

(G) This subparagraph shall apply to hospitals in this state that are licensed by the office of mental health that are participating in the insurer's provider network. Where the policy provides coverage for inpatient hospital care, benefits for inpatient hospital care in a hospital as defined by subdivision ten of section 1.03 of the mental hygiene law provided to individuals who have not attained the age of eighteen shall not be subject to preauthorization. Coverage provided under this subparagraph shall also not be subject to concurrent utilization review during the first fourteen days of the inpatient admission, provided the facility notifies the insurer of both the admission and the initial treatment plan within two business days of the admission, performs daily clinical review of the patient, and participates in periodic consultation with the insurer to ensure that the facility is using the evidence-based and peer reviewed clinical review criteria utilized by the insurer which is approved by the office of mental health and appropriate to the age of the patient, to ensure that the inpatient care is medically necessary for the patient. All treatment provided under this subparagraph may be reviewed retrospectively. Where care is denied retrospectively, an insured shall not have any financial obligation to the facility for any treatment under this subparagraph other than any copayment, coinsurance, or deductible otherwise required under the policy.

(j) (1) Every insurer issuing a policy of accident and health insurance for delivery in this state which provides coverage for in-patient hospital care must make available and, if requested by the policyholder, provide coverage for care in a nursing home. Such coverage shall be made available at the inception of all new policies and, with respect to all other policies at any anniversary date of the policy subject to evidence of insurability.

(A) In this paragraph nursing home care means the continued care and treatment of a covered person who is under the care of a physician but only if (i) the care is provided in a nursing home as defined in section twenty-eight hundred one of the public health law or a skilled nursing facility as defined in subchapter XVIII of the federal Social Security Act, 42 U.S.C. §§ 1395 et seq, (ii) the covered person has been in a hospital for at least three days immediately preceding admission, and (iii) further hospitalization would otherwise be necessary. The aggregate of the number of covered days of care in a hospital and the number of covered days of care in a nursing home, with two days of care in a nursing home equivalent to one day of care in a hospital, may not exceed the number of covered days of hospital care provided under the contract in a benefit period. The level of benefits to be provided for nursing home care must be reasonably related to the benefits provided for hospital care.

(B) Ambulatory care means care in hospital outpatient facilities, as a hospital is defined in section twenty-eight hundred one of the public health law or subchapter XVIII of the federal Social Security Act, 42 U.S.C. §§ 1395 et seq, and physicians' offices. Ambulatory care in hospital out-patient facilities means services for diagnostic X-rays, laboratory and pathological examinations, physical therapy and radiation therapy, and services and medications used for nonexperimental cancer chemotherapy and cancer hormone therapy, provided that such services and medications are (i) related to and necessary for the treatment or diagnosis of the patient's illness or injury, (ii) ordered by a physician and (iii) in the case of physical therapy, services are to be furnished in connection with the same illness for which the patient had been hospitalized or in connection with surgical care, but in no event need benefits be provided for physical therapy which commences more than six months after discharge from a hospital or the date surgical care was rendered, and in no event need benefits for physical therapy be provided after three hundred sixty-five days from the date of discharge from a hospital or the date surgical care was rendered. Ambulatory care in physicians' offices means services for diagnostic X-rays, radiation therapy, laboratory and pathological examinations, and services and medications used for nonexperimental cancer chemotherapy and cancer hormone therapy, provided that such services and medications are related to and necessary for the treatment or diagnosis of the patient's illness or injury, and ordered by a physician. Such coverage shall be made available at the inception of all new policies and, with respect to all other policies, at any anniversary date of the policy subject to evidence of insurability.

(2) Every insurer issuing a policy of accident and health insurance for delivery in this state which provides coverage supplementing part A and part B of subchapter XVIII of the federal Social Security Act, 42 U.S.C. §§ 1395 et seq, must make available and, if requested by the insured, provide coverage of supplemental home care visits beyond those provided by part A and part B, sufficient to produce an aggregate coverage of three hundred sixty-five home case visits per policy year. Such coverage shall be provided pursuant to regulations prescribed by the superintendent.

(3) Consistent with federal law, every insurer issuing a policy of accident and health insurance for delivery in this state which provides coverage supplementing part A and part B of subchapter XVIII of the federal Social Security Act, 42 USC §§ 1395 et seq., shall make available and, if requested by the insured, provide coverage for at least ninety days of care in a nursing home as defined in section twenty-eight hundred one of the public health law, except where such coverage would duplicate coverage that is available under the aforementioned subchapter XVIII. Such coverage shall be made available at the inception of all new policies and, with respect to all other policies, at each anniversary date of the policy.

(A) Coverage shall be subject to a copayment of twenty-five dollars per day.

(B) Brochures describing such coverage must be provided to all applicants at the time of application for all new policies and thereafter on each anniversary date of the policy, and with respect to all other policies annually at each anniversary date of the policy. Such brochures must be approved by the superintendent in consultation with the commissioner of health.

(C) The commensurate rate for the coverage must be approved by the superintendent.

(D) Such insurers shall report to the superintendent each year the number of contract holders to whom such insurers have issued such policies for nursing home coverage and the approximate number of persons covered by such policies.

(k) Any person, partnership or corporation willfully violating any provision of this section, regulation or order of the superintendent made in accordance with this section, shall forfeit to the people of the state a sum not to exceed one hundred dollars for each such violation. The superintendent may also suspend or revoke the license of an insurer or agent or broker for any such willful violation.

(*l*) An insurer shall not offer individual hospital, medical or surgical expense insurance policies unless the policies meet the requirements of subsection (b) of section four thousand three hundred twenty-eight of this chapter. Such policies that are offered within the health benefit exchange established by this state also shall meet any requirements established by the health benefit exchange.

(m) An insurer shall not be required to offer the policyholder any benefits that must be made available pursuant to this section if the benefits must be covered as essential health benefits. For any policy issued within the health benefit exchange established by this state, an insurer shall not be required to offer the policyholder any benefits that must be made available pursuant to this section. For purposes of this subsection, "essential health benefits" shall have the meaning set forth in subsection (a) of section three thousand two hundred seventeen-i of this article.

HISTORY:

Add, L 1984, ch 367, § 1, eff Sept 1, 1984; amd, L 1984, ch 369, § 1, eff Jan 1, 1985; L 1984, ch 404, § 2, eff Jan 1, 1985 and applicable to policies and contracts issued, renewed or amended on or after such date; L 1984, ch 805, § 145, eff Sept 1, 1984; L 1985, ch 534, § 15, eff July 24, 1985; L 1988, ch 692, § 1; L 1989, ch 93, §§ 1, 2, eff Sept 1, 1989; L 1989, ch 417, § 1, 2, eff Jan 1, 1990; L 1989, ch 689, § 4; L 1990, ch 853, § 1, eff Jan 1, 1991; L 1990, ch 897, § 1; L 1991, ch 165, § 3, eff Dec 8, 1991; L 1991, ch 467, § 22, eff Jan 1, 1992; L 1992, ch 131, §§ 3, 5; L 1992, ch 293, § 13, eff June 30, 1992; L 1992, ch 464, § 1, eff Jan 1, 1993; L 1992, ch 771, § 2; L 1993, ch 43, § 1, eff May 17, 1993; L 1993, ch 378, § 1, eff Jan 1, 1994; L 1993, ch 380, § 2; L 1993, ch 456, § 1, eff Sept 1, 1993; L 1993, ch 728, § 1, eff April 1, 1994; L 1994, ch 344, §§ 4–6, eff Sept 1, 1994; L 1995, ch 504, § 2, eff Aug 2, 1995; L 1996, ch 56, § 2; L 1996, ch 705, § 17, eff April 1, 1997; L 1997, ch 20, § 1, eff Jan 1, 1998; L 1997, ch 21, § 1, eff Jan 1, 1998; L 1997, ch 177, §§ 1, 2, eff Jan 4, 1998; L 1997, ch 426, § 2, eff Jan 1, 1998; L 1997, ch 659, § 76, eff Sept 24, 1997; L 1997, ch 661, §§ 1, 2, eff Sept 24, 1997, deemed eff on and after July 1, 1997; L 1998, ch 495, § 1, eff July 29, 1998; L 1998, ch 586, § 39, eff July 1, 1999; L 2000, ch 557, § 1, eff March 1, 2001; L 2000, ch 593, § 7, eff Sept 1, 2001; L 2000, ch 601, § 1, eff Jan 1, 2001; L 2001, ch 506, § 1, eff Jan 1, 2002; L 2002, ch 13, § 4, eff March 19, 2002; L 2002, ch 213, § 1, eff July 30, 2002; L 2002, ch 312, § 7, eff Aug 6, 2002; L 2003, ch 338, §§ 1, 2, eff Jan 1, 2004; L 2004, ch 58, § 31 (Part B), eff Nov 18, 2004; L 2006, ch 557, § 1, eff Jan 1, 2007; L 2007, ch 58, § 65-d (Part A), eff April 9, 2007, deemed eff on and after April 1, 2007; L 2009, ch 237, § 2, eff Jan 1, 2011; L 2009, ch 237, § 12, eff Jan 1, 2010; L 2009, ch 240, § 1, eff Sept 1, 2009; L 2010, ch 238, § 2, eff Oct 28, 2010; L 2010, ch 357, § 1, eff Jan 1, 2011; L 2010, ch 457, § 1, eff Jan 1, 2011; L 2010, ch 536, § 3, eff Oct 31, 2010; L 2011, ch 219, §§ 2–7, eff July 20, 2011; L 2011, ch 559, § 2, eff Jan 1, 2012; L 2011, ch 589, § 1, eff Oct 14, 2011; L 2011, ch 595, § 1, eff Nov 1, 2012; L 2011, ch 596, § 1, eff Nov 1, 2012; L 2011, ch 597, § 1, eff Jan 11, 2012; L 2011, ch 598, § 1, eff Jan 11, 2012; L 2012, ch 10, § 1, eff Jan 11, 2012; L 2012, ch 11, § 1, eff Jan 11, 2012; L 2012, ch 12, § 1, eff Jan 1, 2012; L 2012, ch 273, § 1, eff Oct 30, 2012; L 2012, ch 302, § 1, eff Aug 1, 2012; L 2013, ch 56, § 42 (Part D), eff March 28, 2013, deemed eff on and after Jan 1, 2013; L 2013, ch 56, §§ 38, 46-b, 53 (Part D), eff Jan 1, 2014; L 2013, ch 388, § 2, eff Jan 1, 2014; L 2014, ch 41, § 1, effective April 1, 2015; L 2014, ch 364, § 1, effective January 1, 2015; L 2014, ch 377, § 1, effective January 1, 2015; L 2014, ch 388, §§ 1, 2, effective September 23, 2014; L 2014, ch 550, § 2, effective January 1, 2016; L 2015, ch 6, § 3, effective January 1, 2016; L 2015, ch 536, § 1, effective June 8, 2016; L 2016, ch 23, § 1, effective June 8, 2016; L 2016, ch 69, § 1 (Part B), effective January 1, 2017; L 2016, ch 71, § 1 (Part B), effective January 1, 2017; L 2016, ch 71, § 2 (Part C), effective July 22, 2016; L 2016, ch 74, §§ 1–3, effective June 27, 2016; L 2017, ch 414, § 1, effective January 28, 2018; L 2018, ch 57, § 4 (Part HH), effective April 12, 2018; L 2018, ch 57, §§ 3, 10 (Part MM), effective April 12, 2018; L 2018, ch 335, § 2, effective November 5, 2018; L 2018, ch 469, § 1, effective January 1, 2019; L 2019, ch 25, § 4, effective January 1, 2020; L 2019, ch 57, §§ 1, 2, 6–9 (Part J, Subpart B)., effective January 1, 2020; L 2019, ch 57, § 3 (Part L), effective January 1, 2020; L 2019, ch 57, § 3 (Part M), effective January 1, 2020; L 2019, ch 57, §§ 1–8 (Part BB, Subpart A)., effective January 1, 2020; L 2019, ch 748, § 1, effective February 29, 2020; L 2020, ch 56, § 1 (Part DDD), effective April 3, 2020.

Editor's Notes This section formerly appeared, in part, as Ins §§ 164, 164-a as added by L 1951, ch 630; L 1976, ch 843; amd, L 1956, ch 548; L 1958, chs 943, 945, 946; L 1960, ch 518; L 1963, chs 132, 181; L 1965, ch 1026; L 1966, ch 387; L 1968, ch 40; L 1969, ch 765; L 1970, ch 986; L 1971, chs 899, 1211; L 1972, ch 918; L 1973, ch 101; L 1975, ch 647; L 1976, chs 811, 928, 929, 955; L 1977, chs 166, 663, 895; L 1979, chs 407, 671; L 1980, chs 67, 246; L 1982, chs 721, 741, 772; L 1984, chs 300, 869.

Laws 1988, ch 692, § 4, eff Jan 15, 1989, provides as follows:

§ 4. This act shall take effect on the fifteenth day of January next succeeding the date on which it shall have become a law and shall apply according to its terms to all

policies and contracts issued or renewed on or after such date.

Laws 1989, ch 93, § 7, eff Sept 1, 1989, provides as follows:

§ 7. This act shall take effect September 1, 1989 and shall apply to all policies and certificates delivered or issued for delivery on or after such date, and as to those policies and certificates delivered or issued for delivery prior to such date, on the date such policies and certificates are renewed, modified, altered or amended.

Laws 1989, ch 417, § 5, eff Jan 1, 1990, provides as follows:

§ 5. This act shall take effect on the first day of January next succeeding the date on which it shall have become a law and shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after such date.

Laws 1989, ch 689, § 11, eff July 22, 1989, provides as follows:

§ 11. This act shall take effect immediately; except that section 4600 and sections 4605 through 4619 of the public health law, as added by section one of this act, and sections three through ten of this act shall take effect January 1, 1990; and provided further that any regulations that are necessary to effectuate the purposes of this act may be promulgated in accordance with the provisions of this act prior to such date.

Laws 1990, ch 853, § 4, eff Jan 1, 1991, provides as follows:

§ 4. This act shall take effect on the first day of January next succeeding the date on which it shall have become a law and shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after such effective date.

Laws 1990, ch 897, § 4, eff Jan 1, 1991, provides as follows:

§ 4. This act shall take effect the first day of January next succeeding the date on which it shall have become a law and shall apply according to its terms to all policies and contracts issued or renewed on or after such date, provided, however, effective immediately the superintendent of insurance is authorized to promulgate regulations to implement the provisions of this act.

Laws 1991, ch 467, § 30, eff July 19, 1991, provides as follows:

§ 30. This act shall take effect immediately; provided, however, that no person who is receiving any benefit on such effective date by reason of his or her active duty in the armed forces of the United States during the period of the Korean conflict shall suffer any diminution of such benefit because of amendments made by this act; and provided further that sections one and two of this act shall take effect on August 1, 1991; and provided further that sections twenty-two through twenty-five of this act shall take effect on January 1, 1992 and shall apply to contracts, policies, and certificates of insurance renewed, issued, modified, altered, or amended on and after such date; sections twenty-seven and twenty-eight of this act shall take effect on the sixtieth day after they have become a law; and provided further that sections eighteen, nineteen, twenty and twenty-one of this act shall be deemed to have been in full force and effect on and after August 2, 1990.

Laws 1992, ch 131, § 7, eff June 8, 1992, provides as follows:

§ 7. This act shall take effect immediately, except that sections one, two, three and four of this act shall take effect on the first day of January next succeeding the date on which this act shall have become a law and shall apply to all policies, contracts and certificates issued, renewed, modified, altered or amended on or after such January first effective date.

Laws 1992, ch 771, §§ 1, 5, eff Jan 1, 1993, provide as follows:

Section 1. Legislative findings. The legislature finds and determines that there are thousands of cases of cervical cancer each year and that thousands of women die from the disease; that if detected early, cervical cancer is curable; that there is a general consensus among medical professionals that women who have reached eighteen years of age should have an annual pelvic examination and cervical cytology screening ("Pap smear") to detect the presence of cancerous and pre-cancerous cells; and that if women are not promptly diagnosed and treated, it may ultimately lead to prolonged hospitalization or death from cervical cancer.

§ 5. This act shall take effect on the first day of January next succeeding the date on which it shall have become a law and shall apply according to its terms to all policies and contracts issued or renewed on or after such date.

Laws 1993, ch 378, § 4, eff Jan 1, 1994, provides as follows:

§ 4. This act shall take effect on the first day of January next succeeding the date on which it shall have become a law and shall apply according to its terms to all policies and contracts issued, renewed, modified, altered or amended on, or after, such date.

Laws 1993, ch 380, §§ 1, 5, 6, eff Jan 1, 1994, provide as follows:

Section 1. Legislative intent and findings. The legislature recognizes that the following aminoacidopathies are rare hereditary genetic metabolic disorders: phenylketonuria (PKU), branched-chain ketonuria, galactosemia and homocystinuria. Lacking in these aminoacidopathies is the body's ability to process or metabolize amino acids. If left untreated or without proper therapeutic management, these disorders cause severe mental retardation and chronic physical disabilities. The only form of treatment is by restricting food intake in order to remove the problem amino acids (which are necessary in the diet) and then replenishing them in carefully controlled measured amounts of a nutritional food substitute. For purposes of this section, nutritional food substitute is defined as any specially formulated food substitute (formula) that is medically necessary to enable the body to process or metabolize needed amino acids, used for the therapeutic treatment of rare aminoacidopathies and administered under close medical supervision.

It is the finding of the legislature that in an attempt to encourage the development of new products, increase availability and reduce cost, formulas were removed from the Federal prescription list and reclassified as "medical foods". An unfortunate side effect has been the reluctance of many insurance companies to cover the cost of these formulas. In instances where coverage is provided, it is random and subject to inconsistent interpretation.

It is not the intent of this legislation to require insurance coverage for normal food products used in the dietary management of these disorders, but to provide for such coverage of formulas that are equivalent to a prescription drug, medically necessary for the therapeutic treatment of such rare hereditary genetic metabolic disorders and administered under the direction of a physician.

In recognition by the legislature that such formulas are medically necessary and critical to the well-being of individuals afflicted with rare hereditary genetic metabolic disorders, it shall be required that every health insurance policy issued in this state shall include such coverage.

§ 5. The superintendent of insurance is authorized to promulgate regulations to implement the provisions of this act.

§ 6. This act shall take effect on the first day of January next succeeding the date on which it shall have become a law and shall apply according to its terms to all policies and contracts issued or renewed on or after such date.

Laws 1993, ch 456, § 5, eff Sept 1, 1993, provides as follows:

§ 5. This act shall take effect on the first day of September next succeeding the date on which it shall have become a law and shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after such date.

Laws 1993, ch 728, § 4, eff April 1, 1994, provides as follows:

§ 4. This act shall take effect on the first day of April next succeeding the date on which it shall have become a law and

shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after such date.

Laws 1996, ch 56, §§ 1 and 8, eff Jan 1, 1997, provide as follows:

Section 1. Legislative findings and intent. The legislature finds that certain health insurance carriers, health maintenance organizations, health plans, and hospitals have been restricting maternity coverage and care with respect to the length of hospital stay following delivery in ways that jeopardize the life and health of mothers and newborns and violate reasonable professional standards. The provisions of this act are necessary to provide a reasonable and uniform standard of coverage and care to protect the public health.

The provisions of this act relating to home visits are intended to insure that in those instances where a mother chooses to leave the hospital earlier than the time periods specified in the act, she and the newborn will still receive the full scope of appropriate professional maternity care.

The intent of this act is to require maternity inpatient care providers to offer care, and third-party payers to provide coverage for care, as set out in this act. This act shall not be construed (i) to limit a mother's choice of care for herself and her newborn, (ii) to permit the mother's maternity care coverage to be affected by her choice of care, or (iii) to limit a provider's ability to make reasonable arrangements for care consistent with this act.

§ 8. This act shall take effect January 1, 1997 and shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after such effective date; provided, however, that any regulations necessary for the implementation of this act on its effective date shall be promulgated on or before such effective date.

Laws 1996, ch 705, § 21, eff Oct 9, 1996, provides as follows:

§ 21. This act shall take effect immediately; provided, however that:

1. Sections three, four, twelve and fourteen of this act, sections 4801 and 4803 of the insurance law, as added by section fifteen of this act, and section twenty of this act shall take effect January 1, 1997.

2. Sections one, two, six, seven, eight, nine, ten, eleven, and thirteen of this act, sections 4802 and 4804 of the insurance law, as added by section fifteen of this act, and sections sixteen, seventeen, eighteen, and nineteen of this act shall take effect April 1, 1997, and shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after such effective date.

Laws 1997, ch 20, § 6, eff Jan 1, 1998, provides as follows:

§ 6. This act shall take effect January 1, 1998, and sections one through three of this act shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after such date.

Laws 1997, ch 21, § 4, eff Jan 1, 1998, provides as follows:

§ 4. This act shall take effect January 1, 1998, and sections one through three of this act shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after such date.

Laws 1997, ch 177, § 7, eff Dec 25, 1997, provides as follows:

§ 7. This act shall take effect on the one hundred eightieth day after it shall have become a law, and shall apply to all policies and contracts issued, renewed, modified, altered, or amended on or after such date.

Laws 1997, ch 426, §§ 1 and 7, eff Jan 1, 1998, provide as follows:

Section 1. Legislative intent. The legislature recognizes that multiple health professions are trained and licensed to diagnose and treat the same or similar conditions through the use of modalities, therapies, services and philosophies that vary from profession to profession. It is the specific intent of this legislature to assure that health insurance policies, plans and contracts that provide coverage for the diagnosis and treatment of conditions, complaints, ailments, disorders or injuries by any health care profession, that may be diagnosed and treated by a doctor of chiropractic, must provide access to and equivalent coverage for the diagnosis and treatment of those conditions, complaints, ailments, disorders or injuries by a duly licensed doctor of chiropractic, within the lawful scope of chiropractic practice even if different terminology, philosophy, services, treatments or modalities are used by the various health professions; and such equivalent coverage shall not be abridged by any regulation heretofore promulgated or to be promulgated.

§ 7. This act shall take effect January 1, 1998 and shall apply to policies and contracts issued, renewed, modified, altered or amended on or after such date; provided, however, that subparagraph (B) of paragraph 21 of subsection (i) of section 32l6, subparagraph (B) of paragraph 11 of subsection (k) of section 3221 and of paragraph (2) of subsection (y) of section 4303 of the insurance law, as added by sections two, three and four of this act shall expire and be deemed repealed on December 31, 1999; and upon such date the provisions of subparagraph (C) of paragraph 21 of subsection (i) of section 3216, subparagraph (C) of paragraph 11 of subsection (k) of section 3221 and of paragraph (3) of subsection (y) of section 4303 of the insurance law, as added by sections two, three and four of this act, shall take effect.

Laws 1997, ch 659, §§ 1 and 2, eff Sept 24, 1997, provide as follows:

Section 1. Legislative purpose. The purpose of this act is to facilitate the creation of the necessary components for the development of a broader and more integrated continuum of long term care, financed by a range of private, public and public/private options.

§ 2. This act may be cited as the "Long Term Care Integration and Finance Act of 1997".

§ 2. This act may be cited as the "Long Term Care Integration and Finance Act of 1997".

Laws 1997, ch 661, § 23, eff Sept 24, 1997, provide as follows:

§ 23. This act shall take effect immediately and shall be deemed to have been in full force and effect on and after July 1, 1997 and sections two through nine, eleven, thirteen through twenty, and twenty-two of this act shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after such date.

Laws 1998, ch 495, § 4, eff July 29, 1998, provides as follows:

§ 4. This act shall take effect immediately and shall apply to all policies and contracts issued, renewed, altered or modified on and after such date.

Laws 1998, ch 586, §§ 42, 43 and 45 subs 1(a), (b), 2 and 3, eff Aug 5, 1998, provides as follows:

§ 42. Nothing in this act shall bar, limit, impair, diminish or affect in any way any rights or remedies in any judicial or other forum pursuant to state or federal law of any enrollee, whether or not eligible to elect external appeal under this act, for coverage of a health service, including but not limited to an experimental or investigational service, a clinical trial treatment, or provision of a pharmaceutical product pursuant to prescription for a use other than those uses for which such pharmaceutical product has been approved for marketing by the federal Food and Drug Administration. No enrollee may be required to pursue or exhaust external appeal prior to seeking judicial relief.

§ 43. The provisions of this act shall not apply to claims under the workers' compensation law nor shall the provisions of this act be construed to alter, limit, modify, or repeal any provision of such law.

§ 45. This act shall take effect immediately, provided:

1. Sections one through forty-one-e of this act shall take effect July 1, 1999; provided that:

(a) the commissioner of health and the superintendent of insurance may promulgate regulations prior to such date;.

(b) a standard or expedited appeal in progress on the effective date of this act shall be subject to the provisions of law in effect when such an appeal was initiated, provided that any final adverse determination pursuant to such an appeal made after the effact may be externally appealed pursuant to the provisions of this act;.

2. Sections thirty-nine through forty-one-a of this act shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after such date; and.

3. Notwithstanding any contrary provisions of sections 3216, 3221, 3231, 4304, 4305 and 4317 of the insurance law, or of any later amendments or success or provision or regulations or rules that implement said sections, an insurer, company, organization or other entity subject to article forty-nine of the public health law or article forty-nine of the insurance law may elect to unilaterally modify the coverage for a policy or contract of hospital, surgical or medical expense insurance, effective April 1, 2000, to comply with the requirements of sections thirty-nine through forty-one-a of this act without regard to the time of coverage renewal and without providing for the termination, non-renewal or discontinuance of said coverage.

Laws 2000, ch 557, § **5,** eff March 1, 2000, provides as follows:

§ 5. This act shall take effect 120 days after it shall have become a law and shall apply to policies or contracts issued, renewed, modified, altered, or amended on or after such date (Amd, L 2003, ch 170, § 1, eff July 22, 2003, deemed eff on and after Dec 31, 2003.).

Laws 2000, ch 593, § **8,** eff Sept 1, 2001, provides as follows:

§ 8. This act shall take effect on the first day of September next succeeding the date on which it shall have become a law and shall apply to all policies and contracts issued, renewed, modified, altered, or amended on or after such date.

Laws 2001, ch 506, § **4,** eff Jan 1, 2002, provides as follows:

§ 4. This act shall take effect January 1, 2002 and shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after such date.

Laws 2003, ch 170, § **1,** eff July 22, 2003, amended L 2000, ch 557, § 5, so as to delete and expiration provision of Dec 31, 2003, applicable to amendment of subdivision (i).

Laws 2003, ch 338, § **5,** eff Jan 1, 2004, provides as follows:

§ 5. This act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after such date.

Laws 2004, ch 58, § **56, sub 5 (Part B),** eff Aug 20, 2004, provides as follows:

§ 56. This act shall take effect immediately, provided, however, that:

5. Sections thirty-one and thirty-two of this act shall take effect on the ninetieth day after it shall have become a law and shall apply to all policies and contracts issued on or after such date;

Laws 2006, ch 557, § **4,** eff Jan 1, 2007, provides as follows:

§ 4. This act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to all policies or contracts issued, renewed, modified, altered or amended on and after such effective date.

Laws 2007, ch 58, § **69, subs 1–5,** eff April 9, 2007, deemed eff on and after April 1, 2007, provides as follows:

§ 69. This act shall take effect immediately and shall be deemed to have been in full force and effect on and after April 1, 2007; provided, however, that:

1. Any rules or regulations necessary to implement the provisions of this act may be promulgated and any procedures, forms, or instructions necessary for such implementation may be adopted and issued on or after the date this act shall have become a law;

2. This act shall not be construed to alter, change, affect, impair or defeat any rights, obligations, duties or interests accrued, incurred or conferred prior to the enactment of this act;

3. The commissioner of health and the superintendent of insurance and any appropriate council may take any steps necessary to implement this act prior to its effective date;

4. Notwithstanding any inconsistent provision of the state administrative procedure act or any other provision of law, rule or regulation, the commissioner of health and the superintendent of insurance and any appropriate council is authorized to adopt or amend or promulgate on an emergency basis any regulation he or she or such council determines necessary to implement any provision of this act on its effective date;

5. The provisions of this act shall become effective notwithstanding the failure of the commissioner of health or the superintendent of insurance or any council to adopt or amend or promulgate regulations implementing this act;

Laws 2009, ch 240, § **8,** eff Sept 1, 2009, provides as follows:

§ 8. This act shall take effect September 1, 2009 and shall apply to contracts issued, renewed, modified, altered or amended on or after such date.

Laws 2010, ch 357, § **5,** eff Jan 1, 2011, provides as follows:

§ 5. This act shall take effect on the first of January next succeeding the date on which it shall have become a law, and shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after such effective date.

Laws 2010, ch 457, § **5,** eff Jan 1, 2011, provides as follows:

§ 5. This act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to insurance policies and contracts issued, renewed, modified or altered on or after such effective date.

Laws 2010, ch 536, § **1,** eff Oct 31, 2010, provides as follows:

Section 1. Legislative findings. The cost-sharing, deductibles and co-insurance obligations for certain drugs are becoming cost prohibitive for persons trying to overcome serious and often life-threatening diseases and conditions such as cancer, multiple sclerosis, rheumatoid arthritis, hepatitis C, hemophilia and psoriasis. These drugs are typically new, produced in lesser quantities than other drugs, and not available as less expensive brand name or generic prescription drugs. Some health insurance plans and policies in other states as well as some self-insured plans in New York have established unique categories or specialty tiers for these drugs, sometimes referred to as Tier IV or Tier V. Patients under these plans are required to pay a percentage of the cost of these high-priced drugs, rather than the traditional co-payment amounts for generic, preferred brand, and non-preferred brand prescription drugs, often covered by Tier I, Tier II, and Tier III plans and policies, respectively. As a result, patients covered under plans with specialty tiers must pay thousands of dollars in out-of-pocket costs for drugs critical for their treatment.

It is in the public interest to help patients to afford necessary prescription drugs by prohibiting cost-sharing, deductibles and co-insurance obligations by patients that exceed payments for non-preferred brand prescription drugs or the equivalent thereof. It is not the intent of this legislation to preclude plans or policies from categorizing drugs used in the treatment of these common diseases as brand name prescription drugs or generic prescription drug equivalents.

The extraordinary disparity in cost-sharing, deductible and co-insurance burdens imposed on patients whose life and health depend on these drugs places serious and unjustified hardships on individuals based on their disease or disability.

This legislation is intended to provide patients more affordable access to prescription drugs essential for their treatment of cancer, multiple sclerosis, rheumatoid arthritis, hepatitis C, hemophilia, psoriasis, and other diseases (Amd, L 2010, ch 565, § 1, eff Oct 31, 2010.).

Laws 2011, ch 219, § **70, sub 1,** eff July 20, 2011, provides as follows:

§ 70. This act shall take effect immediately:

1. provided, that for policies renewed on or after such date but before September 23, 2011, this act shall take effect upon the renewal date;

Laws 2011, ch 559, §§ 1 and 5, eff Jan 1, 2012, provide as follows:

Section 1. Legislative findings. The legislature finds that advances in medical research have led to significant new developments of various medical treatments. These treatments offer patients a wide range of new choices to combat very serious diseases. The area of cancer treatment has been one of the fields that has seen these significant new medical advancements. In recent years, oral chemotherapy treatments have been developed that provide viable alternatives to traditional intravenous cancer treatments for patients. This oral chemotherapy treatment offers the treating physician and the patient a choice in relation to treatment options. However, this choice is sometimes limited as the oral chemotherapy treatments are, in most cases, covered under the prescription drug benefit of an insurance plan rather than under the major medical insurance benefit of an insurance plan. This discrepancy in coverage can limit a patient's ability to choose the oral chemotherapy treatment because of the cost associated with the disparate treatment.

§ 5. This act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after such effective date.

Laws 2011, ch 589, § 4, eff Oct 14, 2011, provides as follows:

§ 4. This act shall take effect immediately and shall apply to policies issued, reissued, renewed, modified or amended on and after such date.

Laws 2011, ch 595, § 5, eff Nov 1, 2012, provides as follows:

§ 5. This act shall take effect one year after it shall have become a law and shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after such date (Amd, L 2011, ch 596, § 4, eff Nov 1, 2012.).

Laws 2011, ch 597, § 5, eff Jan 11, 2012, provides as follows:

§ 5. This act shall take effect on the thirtieth day after it shall have become a law and shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after such effective date.

Laws 2011, ch 598, § 5, eff Jan 11, 2012, provides as follows:

§ 5. This act shall take effect on the thirtieth day after it shall have become a law and shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after such effective date.

Laws 2012, ch 273, § 4, eff Oct 30, 2012, provides as follows:

§ 4. This act shall take effect on the ninetieth day after it shall have become a law and shall apply to policies and contracts issued, renewed, modified, altered or amended on or after such date.

Laws 2012, ch 302, § 4, eff Aug 1, 2012, provides as follows:

§ 4. This act shall take effect immediately and shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after such date.

Laws 2013, ch 56, § 76, subs a, b, k–o (Part D), eff March 28, 2013, deemed eff on and after Jan 1, 2013, provides as follows:

§ 76. This act shall take effect immediately and shall be deemed to have been in full force and effect on and after January 1, 2013; provided that:

a. sections seventeen, thirty-eight, thirty-nine, forty, forty-a, forty-one, forty-six-a, forty-six-b forty-seven, forty-eight, forty-nine, fifty, fifty-one, fifty-two, fifty-three, fifty-four and fifty-five of this act shall take effect January 1, 2014, and shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after such date.

b. sections forty-two, forty-three, forty-three-a, forty-four, forty-five and forty-six of this act shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after October 1, 2013;

k. any rules or regulations necessary to implement the provisions of this act may be promulgated and any procedures, forms, or instructions necessary for implementation may be adopted and issued on or after the date this act shall have become a law;

l. this act shall not be construed to alter, change, affect, impair or defeat any rights, obligations, duties or interests accrued, incurred or conferred prior to the effective date of this act;

m. the commissioner of health and the superintendent of financial services and any appropriate council may take any steps necessary to implement this act prior to its effective date;

n. notwithstanding any inconsistent provision of the state administrative procedure act or any other provision of law, rule or regulation, the commissioner of health and the superintendent of financial services and any appropriate council is authorized to adopt or amend or promulgate on an emergency basis any regulation he or she or such council determines necessary to implement any provision of this act on its effective date;

o. the provisions of this act shall become effective notwithstanding the failure of the commissioner of health or the superintendent of financial services or any council to adopt or amend or promulgate regulations implementing this act; and

Laws 2013, ch 388, §§ 1 and 6, eff Jan 1, 2014, provide as follows:

Section 1. Short title. This act shall be known and may be cited as "Hannah's law".

§ 6. This act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to all policies and contracts issued, renewed, modified, altered, or amended on or after such date.

Laws 2015, ch 6, § 12, eff Jan 1, 2016, provides:

§ 12. This act shall take effect immediately, provided that sections one through ten of this act shall take effect on the same date and in the same manner as chapter 550 of the laws of 2014, takes effect, provided, however, that sections four, eight and nine of this act shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after January 1, 2016, and provided further that, effective immediately, the commissioner of health is authorized to issue, amend or repeal any regulations as necessary to implement this act on or before such effective date.

Laws 2014, ch 41, §§ 11 and 12, eff June 23, 2014, provide:

§ 11. 1. Within thirty days of the effective date of this act, the commissioner of the office of alcoholism and substance abuse services, superintendent of the department of financial services, and the commissioner of health, shall jointly convene a workgroup to study and make recommendations on improving access to and availability of substance use disorder treatment services in the state. The workgroup shall be co-chaired by such commissioners and superintendent, and shall also include, but not be limited to, representatives of health care providers, insurers, additional professionals, individuals and families who have been affected by addiction. The workgroup shall include, but not be 3 limited to, a review of the following:

a. Identifying barriers to obtaining necessary substance use disorder treatment services for across the state;

b. Recommendations for increasing access to and availability of substance use disorder treatment services in the state, including underserved areas of the state;

c. Identifying best clinical practices for substance use disorder treatment services;

d. A review of current insurance coverage requirements and recommendations for improving insurance coverage for substance use disorder treatment;

e. Recommendations for improving state agency communication and collaboration relating to substance use disorder treatment services in the state;

f. Resources for affected individuals and families who are having difficulties obtaining necessary substance use disorder treatment services; and

g. Methods for developing quality standards to measure the performance of substance use disorder treatment facilities in the state.

2. The workgroup shall submit a report of its findings and recommendations to the governor, the temporary president of the senate, the speaker of the assembly, the chairs of the senate and assembly insurance committees, and the chairs of the senate and assembly health committees no later than December 31, 2015.

§ 12. This act shall take effect immediately; provided, however that sections one, two, three, three-a, four, five, six, six-a, seven, eight and nine of this act shall take effect April 1, 2015 and shall apply to policies and contracts issued, renewed, modified, altered or amended on and after such date.

Laws 2014, ch 364, § **4**, eff Jan 1, 2015, provides:

§ 4. This act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after such effective date.

Laws 2014, ch 550, § **7**, eff Jan 1, 2016, provides:

§ 7. This act shall take effect January 1, 2016. (Amd, L 2015, ch 6, § 11, eff Jan 1, 2016.)

Laws 2015, ch 536, § **6**, eff June 8, 2016, provides:

§ 6. This act shall take effect on the one hundred eightieth day after it shall have become a law and shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after such effective date.

Laws 2016, ch 69, § **6 (Part B)**, eff January 1, 2017, provides:

§ 6. This act shall take effect immediately; provided, sections one, two, and three of this act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to policies and contracts issued, renewed, modified, altered or amended on and after such date; and provided further that the amendments to section 364-j of the social services law made by section four of this act shall not affect the repeal of such section and shall be deemed to be repealed therewith.

Laws 2016, ch 71, § **4 (Part B)**, eff January 1, 2017, provides:

§ 4. This act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to policies and contracts issued, renewed, modified, altered or amended on and after such date.

Laws 2016, ch 71, § **6 (Part C)**, eff July 22, 2016, provides:

§ 6. This act shall take effect on the thirtieth day after it shall have become a law; provided, that the amendments to paragraph (c) of subdivision 6 of section 367-a of the social services law made by section five of this act shall not affect the repeal of such paragraph and shall expire and be deemed repealed therewith.

Laws 2016, ch 74, § **12**, eff June 27, 2016, provides:

§ 12. This act shall take effect immediately and shall apply to policies and contracts issued, renewed, modified or amended on or after January 1, 2017; provided, however, that section eleven of this act shall take effect on the ninetieth day after it shall have become a law; and provided, further, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date is authorized and directed to be made and completed on or before such effective date.

Laws 2017, ch 414, § **5,** eff January 28, 2018, provides:

§ 5. This act shall take effect on the sixtieth day after it shall have become a law and shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after such date.

Laws 2018, ch 57, § **7 (Part HH),** eff April 12, 2018, provides:

§ 7. This act shall take effect immediately, and shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after the first of January next succeeding such effective date.

Laws 2018, ch 335, § **5,** eff November 5, 2019, provides:

§ 5. This act shall take effect immediately, and sections two, three and four of this act shall apply to all policies and contracts issued, renewed, modified or amended on or after January 1, 2019.

Laws 2018, ch 469, § **4,** eff January 1, 2019, provides:

§ 4. This act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to all policies and contracts issued, renewed, modified, altered, or amended on or after such date.

Laws 2019, ch 57, § **42 (Part J, Subpart B),** eff January 1, 2020, provides:

§ 42. This act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after such date.

Laws 2019, ch 57, § **4 (Part J),** eff April 12, 2019, provides:

§ 4. Legislative intent. It is hereby declared to be the intent of the legislature in enacting this act, that the laws of this state provide consumer and market protections at least as robust as those under the federal Patient Protection and Affordable Care Act, public law 111-148, as that law existed and was interpreted on January 19, 2017.

Laws 2019, ch 57, § **4 (Part L),** eff January 1, 2020, provides:

§ 4. This act shall take effect January 1, 2020 and shall apply to policies and contracts issued, renewed, modified, altered or amended on or after such date.

Laws 2019, ch 57, § **4 (Part M),** eff January 1, 2020, provides:

§ 4. This act shall take effect on the same date and in the same manner as a chapter of the laws of 2019, amending the insurance law and the social services law relating to requiring health insurance policies to include coverage of all FDA-approved contraceptive drugs, devices, and products, as well as voluntary sterilization procedures, contraceptive education and counseling, and related follow up services and prohibiting a health insurance policy from imposing any cost-sharing requirements or other restrictions or delays with respect to this coverage, as proposed in legislative bills numbers S. 659-a and A. 585-a, takes effect.

Laws 2019, ch 57, § **44 (Part BB, Subpart A),** eff January 1, 2020, provides:

§ 44. This act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after such date; provided, however, notwithstanding any provision of law to the contrary, nothing in this act shall limit the rights accruing to employees pursuant to a collective bargaining agreement with any state or local government employer for the unexpired term of such agreement where such agreement is in effect on the effective date of this act and so long as such agreement remains in effect thereafter or the eligibility of any member of an employee organization to join a health insurance plan open to him or her pursuant to such a collectively negotiated agreement.

Laws 2019, ch 748, § **4,** eff February 29, 2020, provides:

§ 4. This act shall take effect on the sixtieth day after it shall have become a law.

Laws 2020, ch 56, § **4 (Part DDD),** eff April 3, 2020, provides:

§ 4. This act shall take effect immediately and shall apply to any policy or contract issued or renewed on or after January 1, 2021.

Amendment Notes The 2015 amendment by ch 6, § **3**, repealed (i)(30) [third setout].

The 2014 amendment by ch 41, § **1**, added (i)(30) [first setout] and (i)(31).

The 2014 amendment by ch 364, § **1**, added (i)(30) [second setout].

The 2014 amendment by ch 377, § **1**, in (i)(30) [second setout], in the first sentence, substituted "for equipment and supplies" for "for the following equipment and supplies,"

substituted "if prescribed by a physician" for "if recommend or prescribed by a physician" and deleted "flanges, collection bags, clamps, irrigation devices, sanitizing products, ostomy rings and ostomy belts" ate the end; deleted the former second sentence, which read: "In addition, the commissioner of the department of health shall provide and periodically update by rule or regulation a list of additional ostomy equipment and related supplies such as are medically necessary for the treatment of ostomies for which there shall also be coverage"; and added the last two sentences.

The 2014 amendment by ch 388, §§ 1, 2, added the fourth sentence of (c)(5)(A); and added (g)(2)(E).

The 2014 amendment by ch 550, § 2, added (i)(30) [third setout].

2013. Chapter 56, § 38 (Part D) amended:

Sub (i), par (25), subpar (B) by deleting at fig 1 "which", at fig 2 "forty-five thousand dollars", at fig 3 "and such maximum annual benefit will increase by the amount calculated from the average ten year rolling average increase of the medical component of the consumer price index" and adding the matter in italics.

2013. Chapter 56, § 42 (Part D) amended:

By repealing former sub (l) and adding sub (l).

2013. Chapter 56, § 46-b (Part D) amended:

Sub (c), par (5), subpar (A) by deleting at fig 1 "him", at fig 2 "thirty-one" and adding the matter in italics.

Sub (c), par (5), subpar (B) by deleting at fig 1 "his" and adding the matter in italics.

Sub (c), par (5), subpar (C), cl (i) by deleting at fig 1 "class of risk to which such person belongs, to the age of such person and to the".

By deleting former sub (c), par (5), subpar (C), cls (ii), (iv) and (vi).

By redesignating former sub (c), par (5), subpar (C), cls (iii) and (v) as sub (c), par (5), subpar (C), cls (ii) and (iii), repsectively.

2013. Chapter 56, § 53 (Part D) amended:

By adding sub (m).

2013. Chapter 388 § 2 amended:

Sub (i), par (21) by adding the matter in italics.

2012. Chapter 10, § 1 amended:

Sub (i), par (13-a) by deleting at fig 1 "that is not a mail order pharmacy", at fig 2 "Such", at fig 3 "additional", at fig 4 "does not elect", at fig 5 "mail order" and adding the matter in italics.

2012. Chapter 11, § 1 amended:

Sub (i), par (28) [second setout] by deleting at fig 1 "which", at fig 2 "participant", at fig 3 "mail order", at fig 4 "his or her", at fig 5 "any mail order pharmacy or", at fig 6 "if the network participating non-mail order retail pharmacy offers to accept a price that is comparable to that of the mail order pharmacy", at fig 7 "Any policy which provides coverage for prescription drugs", at fig 8 "designated", at fig 9 "; provided, however, that the provisions of this section shall not supersede the terms of a collective bargaining agreement or apply to a policy that is the result of a collective bargaining agreement between an employer and a recognized or certified employee organization" and adding the matter in italics.

2012. Chapter 12, § 1 amended:

Sub (i), par (12-a), subpar (A) by deleting at fig 1 "provide", at fig 2 "a", at fig 3 "medication", at fig 4 "and shall apply the lower cost sharing of either (i) anticancer medication under the prescription drug benefit or (ii)", at fig 5 "For the purposes of this section" cost sharing "shall include co-pays, coinsurance, and deductibles as deemed appropriate by the superintendent." and adding the matter in italics.

2012. Chapter 273, § 1 amended:

By adding sub (i), par (29).

2012. Chapter 302, § 1 amended:

Sub (i), par (20), subpar (A), opening par by adding the matter in italics.

Sub (i), par (20), subpar (A), cl (i) by adding the matter in italics.

2011. Chapter 219, § 2 amended:

Sub (a), par (3) by deleting at fig 1 "husband, wife" and adding the matter in italics.

Sub (a), par (4), subpar (A), cl (i) by deleting at fig 1 a period and adding the matter in italics.

Sub (a), par (4), subpar (A), cl (ii) by deleting at fig 1 a period and adding the matter in italics.

By adding sub (a), par (4), subpar (A), cl (iii).

Sub (a), par (4), subpar (B) by adding the matter in italics.

Sub (a), par (4), subpar (C) by deleting at fig 1 "sponsored", at fig 2 "covering them", at fig 3 "and at the first anniversary date of a policy following the effective date of this subparagraph", at fig 4 "group", at fig 5 "and thirty days prior to the first anniversary date following the effective date of this subparagraph" and adding the matter in italics.

2011. Chapter 219, § 3 amended:

By redesignating part of sub (i), par (9) as sub (i), par (9), subpar (A), opening par and sub (i), par (9), subpar (C).

Sub (i), par (9), subpar (A), opening par by deleting at fig 1 "which", at fig 2 ". An" and adding the matter in italics.

By adding sub (i), par (9), subpar (A), cls (i)–(iv).

By adding sub (i), par (9), subpar (B).

Sub (i), par (9), subpar (C) by deleting at fig 1 ", the onset of which is sudden,", at fig 2 "(A)", at fig 3 ", or (B)", at fig 4 "(C)", at fig 5 "or (D)" and adding the matter in italics.

By adding sub (i), par (9), subpar (D).

By adding sub (i), par (9), subpar (E).

2011. Chapter 219, § 4 amended:

Sub (i), par (11), subpar (A), opening par by deleting at fig 1 "which" and adding the matter in italics.

Sub (i), par (11), subpar (A), cl (i) by deleting at fig 1 "whose mother or sister has" and adding the matter in italics.

Sub (i), par (11), subpar (A), cl (ii) by adding the matter in italics.

By deleting former sub (i), par (11), subpar (A), cl (iii).

By redesignating sub (i), par (11), subpar (A), cl (iv) as sub (i), par (11), subpar (A), cl (iii).

Sub (i), par (11), subpar (A), cl (iii) by deleting at fig 1 "fifty" and adding the matter in italics.

Sub (i), par (11), subpar (B) by adding the matter in italics.

Sub (i), par (11), subpar (C) by adding the matter in italics.

By adding sub (i), par (11), subpar (D).

By adding sub (i), par (11), subpar (E).

2011. Chapter 219, § 5 amended:

Sub (i), par (15), subpar (A), opening par by deleting at fig 1 "which" and adding the matter in italics.

Sub (i), par (15), subpar (B) by adding the matter in italics.

Sub (i), par (15), subpar (C) by adding the matter in italics.

By adding sub (i), par (15), subpar (D).

By adding sub (i), par (15), subpar (E).

2011. Chapter 219, § 6 amended:

Sub (i), par (17), subpar (A) by deleting at fig 1 "which" and adding the matter in italics.

Sub (i), par (17), subpar (B), opening par by deleting at fig 1 "dependent" and adding the matter in italics.

Sub (i), par (17), subpar (C) by deleting at fig 1 "and/or" and adding the matter in italics.

Sub (i), par (17), subpar (D) by adding the matter in italics.

By adding sub (i), par (17), subpar (D).

By adding sub (i), par (17), subpar (E).

By adding sub (i), par (17), subpar (F).

2011. Chapter 219, § 7 amended:

Sub (i), par (24), subpar (E), cl (i) by deleting at fig 1 "will", at fig 2 "(1)", at fig 3 "(2)", at fig 4 "(3)", at fig 5 "or (4)" and adding the matter in italics.

Sub (i), par (24), subpar (E), cl (ii) by deleting at fig 1 ", the onset of which is sudden,", at fig 2 "(1)", at fig 3 "(2)", at fig 4 "(3)", at fig 5 "or (4)" and adding the matter in italics.

2011. Chapter 589, § 1 amended:

By adding sub (i), par (28) [first setout].

2011. Chapter 595, § 1 amended:

By redesignating entire sub (i), par (25) as sub (i), par (25), subpar (A).

Sub (i), par (25), subpar (A) by deleting at fig 1 a comma, at fig 2 ", or medical care", at fig 3 "For purposes of this section," autism spectrum disorder "means a neurobiological condition

that includes autism, Asperger syndrome, Rett's syndrome, or pervasive developmental disorder." and adding the matter in italics.

By adding sub (i), par (25), subpar (D).

By adding sub (i), par (25), subpar (E).

By adding sub (i), par (25), subpar (F).

By adding sub (i), par (25), subpar (G).

2011. Chapter 596, § 1 amended:

Sub (i), par (25), subpar (C), cl (iii) by deleting at fig 1 "commissioner" and adding the matter in italics.

Sub (i), par (25), subpar (C), cl (ix), opening par by deleting at fig 1 "related equipment and adding the matter in italics.

2010. Chapter 238, § 2 amended:

Sub (i), par (10), subpar (A), cl (i) by deleting at fig 1 "a written agreement pursuant to".

2010. Chapter 357, § 1 amended:

By deleting sub (i), par (12), subpars (i)–(iii).

By adding sub (i), par (12), subpars (i)–(iv).

2010. Chapter 457, § 1 amended:

By adding sub (i), par (27) [first setout].

2010. Chapter 536, § 3 amended:

By adding sub (i), par (27) [second setout].

2009. Chapter 237, § 2 amended:

Sub (d), par (1), subpar (G) by deleting at fig 1 "ninety" and adding the matter in italics.

2009. Chapter 237, § 12 amended:

By adding sub (i), par (26).

2004. Chapter 58, § 31 (Part B) amended:

Sub (c), par (10) by adding the matter in italics.

2003. Chapter 338, § 1 amended:

By redesignating another sub (i), par (16) as sub (i), par (15-a).

Sub (i), par (15-a), subpar (A) by deleting at figs 1 and 2 "legally blind".

2002. Chapter 13, § 4 amended:

Sub (d), par (1), subpar (A) by adding the matter in italics.

Sub (d), par (1), subpar (D), first undesignated par by adding the matter in italics.

Sub (d), par (1), subpar (E) by adding the matter in italics.

Sub (k) by adding the matter in italics.

2002. Chapter 213, § 1 amended:

By redesignating sub (g), par (1), entire subpar (C) as sub (g), par (1), subpar (C), opening par and adding the matter in italics.

By adding sub (g), par (1), subpar (C), cl (i).

By adding sub (g), par (1), subpar (C), cl (ii).

By adding sub (g), par (1), subpar (C), cl (iii).

2002. Chapter 312, § 7 amended:

Sub (c), par (4), subpar (C) by deleting at fig 1 "natural" and adding the matter in italics.

2000. Chapter 557, § 1 amended:

Sub (i), par (6), subpar (A), opening par by deleting at fig 1 "skilled", at fig 2 "a certified home health" and adding the matter in italics.

Sub (i), par (6), subpar (A), cl (iv) by adding the matter in italics.

2000. Chapter 593, § 7 amended:

By adding sub (i), par (23).

2000. Chapter 601, § 1 amended:

By adding sub (i), par (11-a).

The 2014 amendment by ch 41, § 1 added (i)(30) and (i)(31).

The 2015 amendment by ch 536, § 1, added (i)(32).

The 2016 amendment by ch 23, § 1, rewrote (i)(32).

The 2016 amendment by ch 69, § 1 (Part B), added (i)(31-a).

The 2016 amendment by ch 71, §§ 1 (Part B), 2 (Part C), in (i)(30)(A), added "inpatient coverage shall include unlimited medically necessary treatment for substance use disorder treatment services provided in residential settings as required by the Mental Health Parity and Addiction Equity Act of 2008 (29 U.S.C. § 1185a)" in the second sentence and in the third sentence, added "Further, such inpatient" and "including utilization review requirements"; added (i)(30)(D); and added (i)(33).

The 2016 amendment by ch 74, §§ 1, 2, in (i)(11)(B), substituted "shall not" for "may" and "or coinsurance" for "and coinsurance as may be deemed appropriate by the superintendent and as are consistent with those established for other benefits within a given policy" and added (i)(11)(F).

The 2016 amendment by ch 74, § 3, second setout, added (i)(33).

The 2017 amendment by ch 414, § 1, added "which may be provided by breast tomosynthesis" wherever it appears in (i)(11)(A); and added "provided, however, that mammography screening shall also include breast tomosynthesis" in (i)(11)(C).

The 2018 amendment by ch 57, § 4 (Part HH), added (i)(34).

The 2018 amendment by ch 57, §§ 3, 10 (Part MM), added (i)(31)(E) and (i)(34).

The 2018 amendment by ch 335, § 2, in (i)(11-a)(B), substituted "shall not" for "may" and "or coinsurance" for "and coinsurance as may be deemed appropriate by the superintendent and as are consistent with those established for other benefits within a given policy."

The 2018 amendment by ch 469, § 1, in (i)(21)[first setout], deleted "for those individuals who are or will become malnourished or suffer from disorders, which if left untreated, cause chronic physical disability, mental retardation or death" following "treatment regimen" in the second sentence, in the third sentence, added "and disorders," deleted "with failure to thrive" following "gastroesophageal reflux" and substituted "including, but not limited to immunoglobulin E and nonimmunoglobulin E-mediated allergies to multiple food proteins; severe food protein induced enterocolitis syndrome; eosinophilic disorders; and impaired absorption of nutrients caused by disorders affecting the absorptive surface, function, length, and motility of the gastrointestinal tracy" for "which if left untreated will cause malnourishment, chronic physical disability, mental retardation or death" and in the last sentence, added "as well as severe protein allergic conditions" and "or are amino acid based."

The 2019 amendment by ch 25, § 4, added (i)(17)(E)(v).

The 2019 amendments by ch 57, §§ 1, 2, 6-9 (Part J, Subpart B), in (c)(5)(A), rewrote the first sentence, deleted the second sentence and added the third sentence; rewrote (g)(2)(E); in (i)(21) [first setout], substituted "policy that provides" for "policy which provides" in the first sentence, "formulas that are" for "formulas which are" in the fourth sentence and in the last sentence, substituted "based that are" for "based which are" and deleted "and such coverage for such modified solid food products for any calendar year or for any continuous period of twelve months for any insured individual shall not exceed two thousand five hundred dollars" at the end; in (i)(30), substituted "policy that provides" for "policy which provides" twice in the first sentence, and rewrote the third sentence; in (l), deleted "On and after October first, two thousand thirteen" at the beginning of the first sentence and rewrote the second sentence; rewrote (m); and made a stylistic change.

The 2019 amendment by ch 57, § 3 (Part L), added (i)(13)(C).

The 2019 amendment by ch 57, § 3 (Part M), in (i)(17)(E)(v), added "pursuant to 42 U.S.C. 18022 and identified in the comprehensive guidelines supported by the health resources and services administration and thereby incorporated in the essential health benefits benchmark plan" in the firt sentence and added (d).

The 2019 amendments by ch 57, §§ 1-8 (Part BB, Subpart A), in (i)(4), substituted "health conditions" for "nervous, or emotional disorders or ailments" and added "or a nurse practitioner"; deleted the third sentence of (i)(25)(B); deleted "including autistic disorder, Asperger's disorder, Rett's disorder, childhood disintegrative disorder, or pervasive developmental disorder not otherwise specified (PDD-NOS)" at the end of (i)(25)(C)(i); rewrote (i)(25)(C)(iii); added (i)(25)(H) through (i)(25)(K); rewrote (i)(30); rewrote (i)(31); in (i)(31-a), deleted the (A) designation, in the first sentence, substituted "the formulary forms" for "a five day emergency

supply" and deleted "where an emergency condition exists" following "substance use disorder," in the second sentence, substituted "without prior authorization shall include formulary forms of" for "of an emergency supply shall include" and added "or dispensed" and deleted (B) and (C); added (35); and made related changes.

The 2019 amendment by ch 748, § 1, rewrote (i)(31-a).

The 2020 amendment by ch 56, § 1 (Part DDD), added "provided however, the total amount that a covered person is required to pay out of pocket for covered prescription insulin drugs shall be capped at an amount not to exceed one hundred dollars per thirty-day supply, regardless of the amount or type of insulin needed to fill such covered person's prescription and regardless of the insured's deductible, copayment, coinsurance or any other cost sharing requirement" in (i)(15-a)(B).

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1. In general

The law does not look with favor upon forfeitures in insurance policies, and refuses to give that effect to them unless the case is brought squarely within the provisions of the policy. Press Pub. Co. v General Acci. Fire & Life Assurance Corp., 160 A.D. 537, 145 N.Y.S. 711, 1914 N.Y. App. Div. LEXIS 4767 (N.Y. App. Div. 1914), aff'd, 217 N.Y. 648, 112 N.E. 1072, 217 N.Y. (N.Y.S.) 648, 1916 N.Y. LEXIS 1407 (N.Y. 1916).

Individual chiropractors and chiropractic association did not have standing to maintain action for declaratory and injunctive relief, alleging that defendant health maintenance organizations (HMOs) violated CLS Ins § 3216(i)(21)(A) whose purpose was to secure coverage for chiropractic services to HMO enrollees, as statute was not adopted for benefit of chiropractors. Hudes v Vytra Health Plans Long Island, Inc., 187 Misc. 2d 861, 724 N.Y.S.2d 278, 2001 N.Y. Misc. LEXIS 84 (N.Y. Sup. Ct. 2001), aff'd, 295 A.D.2d 788, 744 N.Y.S.2d 80, 2002 N.Y. App. Div. LEXIS 6503 (N.Y. App. Div. 3d Dep't 2002).

Action alleging that defendant health maintenance organizations (HMOs) violated CLS Ins § 3216(i)(21)(A), whose purpose was to secure coverage for chiropractic services to HMO enrollees, was dismissed although plaintiff HMO enrollee fell within class for whose benefit statute was enacted, as private right of action would not promote legislative purpose and would be inconsistent with legislative scheme, which contained its own review mechanism for this kind of dispute. Hudes v Vytra Health Plans Long Island, Inc., 187 Misc. 2d 861, 724 N.Y.S.2d 278, 2001 N.Y. Misc. LEXIS 84 (N.Y. Sup. Ct. 2001), aff'd, 295 A.D.2d 788, 744 N.Y.S.2d 80, 2002 N.Y. App. Div. LEXIS 6503 (N.Y. App. Div. 3d Dep't 2002).

Conversion policy or contract need not provide same benefits as were provided in former group policy or contract. Insurance Department, Opinions of General Counsel, Opinion Number 02-03-16.

Insurer may consider health-related history when individual is applying for increase in existing disability insurance coverage. Insurance Department, Opinions of General Counsel, Opinion Number 02-04-35.

2. Applicability of section to various types of insurance

Section 164 [now § 3216] is not applicable to medical expense indemnity corporations organized under § 250 (provisions of which now appear in Article 43). Shapira v United Medical Service, Inc., 15 N.Y.2d 200, 257 N.Y.S.2d 150, 205 N.E.2d 293, 1965 N.Y. LEXIS 1581 (N.Y. 1965).

This section [now § 3216] did not apply to renewals of a policy expiring in 1903. Hodgson v Preferred Acci. Ins. Co., 188 A.D. 981, 176 N.Y.S. 903, 1919 N.Y. App. Div. LEXIS 7389 (N.Y. App. Div. 1919).

This section [now § 3216] does not apply to mutual companies doing business on assessment basis. Nigro v Commercial Travelers Mut. Acci. Ass'n, 267 A.D. 915, 47 N.Y.S.2d 169, 1944 N.Y. App. Div. LEXIS 5490 (N.Y. App. Div. 1944).

In an action by a patient seeking benefits under his hospital insurance policy for his stay at an alcoholism treatment facility that was located in the same hospital in which the patient had undergone withdrawal from alcohol addiction, benefits would be denied in view of an exclusion for costs that were incurred in admission to a hospital "primarily for . . . convalescent . . . care," where the longer-term care that the patient elected after withdrawal treatment consisted of group therapy and counseling, and did not require the use of full hospital facilities. Riggs v Blue Cross of Western New York, Inc., 92 A.D.2d 365, 460 N.Y.S.2d 677, 1983 N.Y. App. Div. LEXIS 16629 (N.Y. App. Div. 4th Dep't 1983).

This section [now § 3216] is not applicable to insurance companies generally, as appears from the fact, inter alia, that § 168 [now § 3404], providing for a standard fire insurance policy provides for a 12-month period of limitation, while subd 3, ¶ 11, of this section [now § 3216(d)(1)(K)] provides for three-year limitation. Estock v Associated Hospital Service, Inc., 45 Misc. 2d 504, 257 N.Y.S.2d 559, 1964 N.Y. Misc. LEXIS 1685 (N.Y. Civ. Ct. 1964).

Insurance carrier was entitled to declaratory judgment that facility which provided independent and enhanced living programs for older adults in residential setting was not "nursing home" under long-term care insurance nursing home indemnity policy issued to insured, where facility was not licensed to provide nursing care, did not have medical doctor available, and was not shown to keep clinical records on each resident. Gregg by & Through Gregg v IDS Life Ins. Co., 178 Misc. 2d 895, 681 N.Y.S.2d 451, 1998 N.Y. Misc. LEXIS 573 (N.Y. Sup. Ct. 1998), aff'd, 261 A.D.2d 799, 692 N.Y.S.2d 182, 1999 N.Y. App. Div. LEXIS 5551 (N.Y. App. Div. 3d Dep't 1999).

3. Construction of insurance provisions, generally

Insured was entitled to reimbursement for cost of surgery-related anesthesiologist's services under insurance policy that covered cost of certain medical and surgical care, but specifically excluded "anesthesia," as exclusion did not unambiguously apply to medical services associated with administration of anesthetic agents, and could just as readily be construed to only exclude cost of agents themselves. Tanzer v Health Ins. Plan, 91 N.Y.2d 850, 668 N.Y.S.2d 151, 690 N.E.2d 1257, 1997 N.Y. LEXIS 3712 (N.Y. 1997), cert. denied, Terio v Terio, 522 U.S. 1129, 118 S. Ct. 1080, 140 L. Ed. 2d 138, 1998 U.S. LEXIS 1161 (U.S. 1998).

An action to recover on an accident and sickness disability income insurance policy that was commenced more than 3 years following inception of the cause of action was barred by the 3-year limitation period stated in the policy and in Ins Law § 164 [now § 3216], even though the policy also referred to the 6-year period for breach of contract actions in CPLR § 213, where the 3-year limitation period was mandated by the legislature, and where the policy contained a standard provision covering conformity with

state statutes, and where no ambiguity thus existed despite the inclusion of both periods of limitation in the contract. Rodriguez v Nationwide Ins. Co., 97 A.D.2d 817, 468 N.Y.S.2d 693, 1983 N.Y. App. Div. LEXIS 20592 (N.Y. App. Div. 2d Dep't 1983).

Court properly dismissed breach of contract action against insurance company in which insured sought disability benefits for life because he was no longer able to perform duties of police officer, since policy clearly stated that insured would receive benefits for 2 years if he were unable to perform his former duties, and that benefits would continue thereafter only for as long as insured was unable to be otherwise gainfully employed; where terms of policy are clear and unambiguous, they must be enforced as written. Ellis v Metlife Sec. Ins. Co., 130 A.D.2d 951, 515 N.Y.S.2d 935, 1987 N.Y. App. Div. LEXIS 46932 (N.Y. App. Div. 4th Dep't 1987).

Health insurance policy clause, excluding preexisting condition for which "medical advice was given, treatment was recommended by or received from a health care provider" within 12 months before commencement of coverage, was ambiguous since it could be interpreted to exclude coverage if insured received both medical advice and medical treatment, or recommendation as to treatment, during preceding 12-month period; thus, clause would be construed in favor of insured to exclude coverage only if insured was actually treated or given recommendation as to treatment during such period. Mannino v Agway, Inc. Group Trust, 192 A.D.2d 131, 600 N.Y.S.2d 723, 1993 N.Y. App. Div. LEXIS 7405 (N.Y. App. Div. 2d Dep't 1993).

Health insurance policy clause excluding preexisting condition for which "medical advice was given, treatment was recommended by or received from a health care provider" within 12 months before commencement of coverage, was ambiguous since term "condition" could mean either actually diagnosed disease or any distinct symptom of undiagnosed disease; under either interpretation, clause would be construed to cover insured's leukemia, which she had contracted before effective date of policy, since medical advice received by insured prior to such effective date was given neither for leukemia nor for any symptom distinctly related to leukemia, in that neither physical symptoms exhibited by insured nor test results obtained prior to effective date of policy would have permitted physician to make reasonably accurate diagnosis of leukemia. Mannino v Agway, Inc. Group Trust, 192 A.D.2d 131, 600 N.Y.S.2d 723, 1993 N.Y. App. Div. LEXIS 7405 (N.Y. App. Div. 2d Dep't 1993).

Health insurance policy clause, excluding preexisting condition for which "medical advice was given, treatment was recommended by or received from a health care provider" within 12 months before commencement of coverage, was ambiguous since term "treatment" could be broadly defined to encompass not only rendition of services to alleviate pain or suffering but rendition of services to investigate cause of particular symptom; thus, clause would be construed in favor of insured to apply only to medical services designed to alleviate disease, illness or symptom thereof, rather than to diagnostic testing. Mannino v Agway, Inc. Group Trust, 192 A.D.2d 131, 600 N.Y.S.2d 723, 1993 N.Y. App. Div. LEXIS 7405 (N.Y. App. Div. 2d Dep't 1993).

Health insurance policy clause excluding preexisting condition for which "medical advice was given, treatment was recommended by or received from a health care provider" within 12 months before commencement of coverage, applied only when (1) insured received both medical advice and medical treatment, or recommendation as to treatment, (2) such advice and treatment or recommendation of treatment was related to actual disease or illness for which insured was seeking indemnification, or to symptom directly related to that disease, and (3) advice and treatment or recommendation as to treatment included rendition or recommendation of medical services designed to alleviate such disease, illness or symptom. Mannino v Agway, Inc. Group Trust, 192 A.D.2d 131, 600 N.Y.S.2d 723, 1993 N.Y. App. Div. LEXIS 7405 (N.Y. App. Div. 2d Dep't 1993).

Provision of health insurance policy covering "newborn children" from date of "birth" until 31st day following birth or first day of second month following birth, whichever is longer, was clear and unambiguous, and for purposes of coverage required measurement of relevant time period from date of plaintiff's child's birth, rather than from date order of filiation was issued determining his paternity of child. Locascio v Mutual of Omaha Ins. Co., 198 A.D.2d 403, 603 N.Y.S.2d 580, 1993 N.Y. App. Div. LEXIS 10913 (N.Y. App. Div. 2d Dep't 1993).

In action by disability insurer for judgment declaring that insured was not entitled to benefits under 2 reinstated noncancelable policies, based solely on reinstated policies' exclusion of coverage for disabilities caused by pre-existing conditions, insured was entitled to summary judgment and declaration in his favor on ground that insurer was precluded by 2-year incontestability clause required by CLS Ins § 3216(d)(1)(B)(ii) from disclaiming coverage; statutory language and legislative intent indicate that § 3210 is to be read as limiting § 3216(d)(1)(D), which dictates policy language relating to reinstatement. Equitable Life Assur. Soc'y of the United States v Madis, 240 A.D.2d 100, 669 N.Y.S.2d 599, 1998 N.Y. App. Div. LEXIS 2459 (N.Y. App. Div. 1st Dep't), app. dismissed, 92 N.Y.2d 919, 680 N.Y.S.2d 459, 703 N.E.2d 271, 1998 N.Y. LEXIS 2847 (N.Y. 1998).

Insured injured when baseball bat broke and struck him in eye was covered by disability insurance policy where policy language "loss of sight" was ambiguous as to whether it meant loss of sight in one eye or both eyes, and ambiguity had to be resolved against insurer as drafter of policy. Scalia v Equitable Life Assur. Soc'y of U.S., 263 A.D.2d 537, 693 N.Y.S.2d 218, 1999 N.Y. App. Div. LEXIS 8385 (N.Y. App. Div. 2d Dep't 1999).

In an action in Small Claims Court by an insured under an insurance contract for medical bills and hospital costs to recover for the costs of a second attending physician, the Small Claims Court judgment granting costs to the insured was affirmed, where the insured's contract was ambiguous in that it provided that the insurer would reimburse the insured for one attending physician and one consulting physician but did not explicitly state that the insured was entitled to recovery for only one attending physician, the insured drafted the contract containing the ambiguity, and the contract did not with certainty limit the policy's coverage to only one attending physician. Goldbas v Medical & Surgical Care, Inc., 120 Misc. 2d 324, 466 N.Y.S.2d 107, 1981 N.Y. Misc. LEXIS 3516 (N.Y. County Ct. 1981).

Claimant suffering from bone cancer was entitled to reimbursement under health insurance policy for expense of compatibility tests performed at his doctor's direction on sibling to determine her potential as bone marrow donor, notwithstanding sibling was not covered person under policy, since expense of tests was not excluded under language of policy, and claimant demonstrated tests were conducted for his benefit and as part of treatment of his illness within meaning of "General Medical Care" coverage provision of insurance contract. Zwerin v Group Health, Inc., 143 Misc. 2d 679, 541 N.Y.S.2d 1014, 1989 N.Y. Misc. LEXIS 296 (N.Y. Civ. Ct. 1989).

Claimant suffering from bone cancer was not entitled to reimbursement under health insurance policy for expense of sperm bank procedures undertaken due to potential of infertility from chemotherapy, since such procedures were not part of actual treatment of claimant's illness and did not fall within any other stated coverages of policy. Zwerin v Group Health, Inc., 143 Misc. 2d 679, 541 N.Y.S.2d 1014, 1989 N.Y. Misc. LEXIS 296 (N.Y. Civ. Ct. 1989).

Combination of chemotherapy and bone marrow transplant procedure for HIV-infected plaintiff, followed by treatment with antiviral drug AZT, did not constitute experimental or investigative procedure falling within health insurance policy exclusion, especially since availability of noninfected bone marrow from plaintiff's twin brother removed most serious obstacle to successful transplant, "graft-versus-host" disease. Bradley v Empire Blue Cross & Blue Shield, 149 Misc. 2d 20, 562 N.Y.S.2d 908, 1990 N.Y. Misc. LEXIS 460 (N.Y. Sup. Ct. 1990).

Placement of a disability insurer's Relation of Earnings to Insurance (REI) clause with the policy's general provisions rather than with the total disability benefit provisions was not inappropriate under N.Y. Ins. Law § 3216(c)(7), which would entitle the insured to a statutory penalty under N.Y. Ins. Law § 4226, as N.Y. Ins. Law § 3216(c)(7) explicitly excepted exceptions and reductions of indemnity set forth in § 3216(d); the insurer's REI clause was in the precise wording of § 3216(d)(2)(F) and, thus,

was excepted. Friedman v Connecticut Gen. Life Ins. Co., 9 N.Y.3d 105, 846 N.Y.S.2d 64, 877 N.E.2d 281, 2007 N.Y. LEXIS 2718 (N.Y. 2007).

There are no provisions in CLS Pub Health Art 44, 10 NYCRR Part 98, or CLS Ins Art 32 mandating time period for participating providers to submit claims to HMOs; any such time limitation should be contained in applicable participating provider contract between provider and HMO. Insurance Department, Opinions of General Counsel, Opinion Number 02-06-21.

There is no provision in CLS Insurance Law permitting physician to submit "revised" claim to HMO for up to 6 years after date of service. Insurance Department, Opinions of General Counsel, Opinion Number 02-06-21.

Group contract issued by health service corporation must cover annual mammography screening for individuals over age 50, except for contract issued to cover employees employed in more than one state. Insurance Department, Opinions of General Counsel, Opinion Number 02-09-09.

4. Effect of policy not in compliance with legal requirements

The rider to a policy of accident insurance is part thereof and, therefore, within the requirement that no policy shall be issued until a copy of its form shall have been filed with the superintendent. Failure to file the rider, however, does not invalidate the policy, but whenever its provisions conflict with statute, latter is to govern rights of parties. Hopkins v Connecticut General Life Ins. Co., 225 N.Y. 76, 121 N.E. 465, 225 N.Y. (N.Y.S.) 76, 1918 N.Y. LEXIS 822 (N.Y. 1918).

A provision in a policy of health and accident insurance, although not in the order or words as set forth in the statute, is valid. Equitable Life Assurance Soc. v Mait, 279 A.D. 194, 109 N.Y.S.2d 82, 1951 N.Y. App. Div. LEXIS 2896 (N.Y. App. Div. 1951).

5. Incontestability clause

Under rule that ambiguities in contract must be construed against drafter, insured was entitled to inference that term "in force" as used, but not defined, in incontestability clause of disability policy, referred to earlier "date of issue" rather than later "effective date" of policy, and policy thus became incontestable 2 years after its "date of issue." Guardian Life Ins. Co. v Schaefer, 70 N.Y.2d 888, 524 N.Y.S.2d 377, 519 N.E.2d 288, 1987 N.Y. LEXIS 19936 (N.Y. 1987).

Defendant insurer was not entitled to summary judgment in action for breach of policies providing for payment of $1,000 per month in event of "total disability," on ground that action was time barred because limitations period was triggered when insurer ceased paying benefits to insured; considering interpretation that most closely comported to literal terms of policies, 90-day proof of loss requirements in policies and, by extension, 3-year limitations periods, commenced on termination of insured's disability as objective medical fact. Panepinto v New York Life Ins. Co., 90 N.Y.2d 717, 665 N.Y.S.2d 385, 688 N.E.2d 241, 1997 N.Y. LEXIS 3694 (N.Y. 1997).

Incontestability clause of disability insurance policy precluded insurer from denying benefits to policyholder based on exclusion for pre-existing conditions not disclosed on insurance application. New England Mut. Life Ins. Co. v Doe, 93 N.Y.2d 122, 688 N.Y.S.2d 459, 710 N.E.2d 1060, 1999 N.Y. LEXIS 223 (N.Y. 1999).

The statutory incontestability clause in an accident and health insurance policy, providing that after the policy has been in force for two years during lifetime of the insured (excluding any period during which the insured is disabled) it shall become incontestable as to statements contained in the application, cannot serve as basis for granting summary judgment dismissing the complaint in an action by the insurer for rescission of the policy for concealment, by insured, in his application, that he had suffered a disabling heart attack, where it appears that he had suffered subsequent disabling heart attacks since the policy became in force, the duration of disability under which presents a triable issue of fact. Union Mut. Life Ins. Co. v Kevie, 13 A.D.2d 755, 215 N.Y.S.2d 298, 1961 N.Y. App. Div. LEXIS 10658 (N.Y. App. Div. 1st Dep't 1961).

Disclaimer based on previous manifestation of illness is perforce also based on previous existence and, as such, not permitted by incontestability clause. White v Massachusetts Casualty Ins. Co., 96 A.D.2d 732, 465 N.Y.S.2d 345, 1983 N.Y. App. Div. LEXIS 19314 (N.Y. App. Div. 4th Dep't), app. dismissed, 60 N.Y.2d 702, 1983 N.Y. LEXIS 6264 (N.Y. 1983).

Insured was entitled to partial summary judgment declaring that his heart condition and coronary artery disease were risks insured against, even though he had been hospitalized for those conditions prior to issuance of disability policy and had failed to mention either conditions or treatments on his policy application, since insured had heart attack more than 2 years after issuance of policy, and statutory incontestability clause covered all preexisting conditions notwithstanding policy language limiting coverage to sickness "which first makes itself known" while policy is in force. Monarch Life Ins. Co. v Brown, 125 A.D.2d 75, 512 N.Y.S.2d 99, 1987 N.Y. App. Div. LEXIS 40743 (N.Y. App. Div. 1st Dep't 1987).

Court properly determined that incontestability clause of disability policy barred insurer from raising defense that insured's multiple sclerosis condition first manifested itself prior to date on which policy was issued; incontestability clause did not incorporate exception for "fraudulent misstatements." Favata v Paul Revere Life Ins. Co., 254 A.D.2d 804, 678 N.Y.S.2d 197, 1998 N.Y. App. Div. LEXIS 10521 (N.Y. App. Div. 4th Dep't 1998).

The incontestability clause clearly limited the effect of the loss coverage restrictions to loss incurred during the first two years, and the insured could recover for an illness that had not been mentioned in the application for the policy after it had been effect for over two years. Rackear v Springfield Fire & Marine Ins. Co., 48 Misc. 2d 707, 265 N.Y.S.2d 715, 1965 N.Y. Misc. LEXIS 1285 (N.Y. App. Term 1965).

Incontestability clause, which is mandated in all accident and sickness policies and which provides that no claim for loss incurred or disability commencing after two years from date of issuance of policy shall be reduced or denied on ground that disease or physical condition existed prior to effective date of policy coverage, did not bar disability insurer from denying insured's claim for benefits even though claim was made more than two years after issuance of policies where claim sought benefits for total disability from date only three months after issuance of policies. Mutual Life Ins. Co. v Hayden, 87 Misc. 2d 1039, 386 N.Y.S.2d 978, 1976 N.Y. Misc. LEXIS 2356 (N.Y. Sup. Ct. 1976), disapproved, White v Massachusetts Casualty Ins. Co., 96 A.D.2d 732, 465 N.Y.S.2d 345, 1983 N.Y. App. Div. LEXIS 19314 (N.Y. App. Div. 4th Dep't 1983).

Incontestability clause, which is mandated in all accident and sickness policies and which provides that no claim for loss incurred or disability as defined in policy commencing after two years from date of issue of policy shall be reduced or denied on ground that disease or physical condition existed prior to effective date of policy coverage, only prohibits denials of claims based on prior existence of disease and does not bar disability insurer from denying claim where disease existed and was manifested prior to disability policies' issuance. Mutual Life Ins. Co. v Hayden, 87 Misc. 2d 1039, 386 N.Y.S.2d 978, 1976 N.Y. Misc. LEXIS 2356 (N.Y. Sup. Ct. 1976), disapproved, White v Massachusetts Casualty Ins. Co., 96 A.D.2d 732, 465 N.Y.S.2d 345, 1983 N.Y. App. Div. LEXIS 19314 (N.Y. App. Div. 4th Dep't 1983).

Where insurance policy provided that benefits would be paid for period of 5 years due to total disability as result of "sickness" and paid for insured's lifetime for total disability resulting from "accident", insurance company properly limited benefits to 5 years under "sickness" provision where insured suffered disability due to accident occurring prior to effective date of policy, but where injuries did not manifest themselves until policy was in effect for more than 2 years, as incontestability clause of policy is not applicable and was not rendered null by insurance company's actions, and further, incontestability clause does not affect limitation provision otherwise applicable. Fuller v Massachusetts Indem. & Life Ins. Co., 680 F. Supp. 128, 1988 U.S. Dist. LEXIS 1651 (S.D.N.Y. 1988).

Incontestability clause did not comply with CLS Ins Law § 3216(d) and was void, where incontestability clause of disabil-

ity insurance policy permitted insurer to void policy at any time for innocent or negligent misrepresentation in application if insurer contested such by letter within 2 years after issuance of policy, because clause was less favorable to insured than statutory clause. Burke v First UNUM Life Ins. Co., 975 F. Supp. 310, 1997 U.S. Dist. LEXIS 13015 (S.D.N.Y. 1997).

Incontestability clause was void and unenforceable where it permitted carrier to rescind disability insurance policy based on insured's innocent or negligent misrepresentations in her application for policy at any time provided carrier had contested such misrepresentations by letter within 2 years after issuance of policy; Superintendent of Insurance's approval of policy form did not save clause, and invalidating clause did not violate Contract Clause (CLS US Const Art I § 10). Burke v First UNUM Life Ins. Co., 975 F. Supp. 310, 1997 U.S. Dist. LEXIS 13015 (S.D.N.Y. 1997).

Whether or not individual long term care insurance policy is incontestable after being in force during life of insured for period of 2 years depends on whether or not policy is tax qualified for federal income tax purposes. Insurance Department, Opinions of General Counsel, Opinion Number 02-02-04.

6. Misrepresentation by insured

A renewal certificate is simply a contract to continue in force a pre-existing policy of insurance. Statute providing that the falsity of any statement in the application for any policy shall not bar a right to recover unless it was made with intent to deceive or materially affects acceptance of risk, applies only to policies issued after statute's effective date. Baumann v Preferred Acci. Ins. Co., 225 N.Y. 480, 122 N.E. 628, 225 N.Y. (N.Y.S.) 480, 1919 N.Y. LEXIS 1148 (N.Y. 1919).

Statutory provision that every policy of insurance issued or delivered "on or after January 1, 1907, by any life insurance corporation shall contain the entire contract between the parties . . . and all statements purporting to be made by the insured shall in the absence of fraud be deemed representations and not warranties," is by its express words limited to policies issued "by any life insurance corporation," and has no application to accident insurance. Baumann v Preferred Acci. Ins. Co., 225 N.Y. 480, 122 N.E. 628, 225 N.Y. (N.Y.S.) 480, 1919 N.Y. LEXIS 1148 (N.Y. 1919).

Insurance carrier may, compatibly with incontestability clause, protect itself by including provision in its incontestability clause creating exception for "fraudulent misstatements." New England Mut. Life Ins. Co. v Doe, 93 N.Y.2d 122, 688 N.Y.S.2d 459, 710 N.E.2d 1060, 1999 N.Y. LEXIS 223 (N.Y. 1999).

Whether an applicant's representations as to conditions of his health constituted a material misrepresentation so as to avoid the policy under former § 107 and provision of the application, is properly left to the jury. Denler v Continental Casualty Co., 213 A.D. 30, 209 N.Y.S. 629, 1925 N.Y. App. Div. LEXIS 8425 (N.Y. App. Div. 1925).

Misrepresentation by the plaintiff that his weekly earnings exceeded the amount of weekly indemnity was not, as matter of law, immaterial to company's acceptance of risk, especially in view of the provisions of former § 107. Wicklow v United States Fidelity & Guaranty Co., 220 A.D. 199, 221 N.Y.S. 157, 1927 N.Y. App. Div. LEXIS 9267 (N.Y. App. Div. 1927).

Subdivision 3 of this section [now § 3216(d)], reserves to an insurer the right to defend on the ground of false and fraudulent representations in the policy application relating to medical treatment, etc., and permits the insurer to raise issues of fact as to making of misrepresentations and their materiality, and it would be improper for a court to grant a summary judgment to plaintiffs without a hearing on such defenses. Greenhaus v American Progressive Health Ins. Co., 18 A.D.2d 1076, 239 N.Y.S.2d 406, 1963 N.Y. App. Div. LEXIS 4055 (N.Y. App. Div. 2d Dep't 1963).

Provisions in a hospital insurance policy which, in accordance with this section [now § 3216], are prescribed by law, the first, precluding, after two years from date of issuance of the policy, a defense of misstatements, other than fraudulent, by the applicant for the policy, and the second precluding a defense, after like period, of nondisclosure of a disease or physical condition within the coverage of the policy, do not bar a defense of fraudulent nondisclosure with respect to pre-existing conditions or treatment. Greenhaus v American Progressive Health Ins. Co., 33 Misc. 2d 280, 225 N.Y.S.2d 590, 1962 N.Y. Misc. LEXIS 3790 (N.Y. Sup. Ct. 1962), aff'd, 18 A.D.2d 1076, 239 N.Y.S.2d 406, 1963 N.Y. App. Div. LEXIS 4055 (N.Y. App. Div. 2d Dep't 1963).

Material misrepresentations made by insured about his medical history in applying for highest, nonguaranteed level of monthly payments available under disability insurance policy precluded him from recovering any benefits at all, even if he would have been entitled to lowest level of benefits without regard to his medical condition; denying lower benefits which insured could have obtained without making misrepresentations would discourage misrepresentation in insurance applications. Jackson v Travelers Ins. Co., 113 F.3d 367, 1997 U.S. App. LEXIS 11325 (2d Cir. N.Y. 1997).

A mistake in naming the company with which an applicant for insurance had a policy could not have been made with the intent to deceive nor was it material to the risk and therefore it should not give the right to abatement under subd. (F) of former § 107. Solez v Zurich General Acci. & Liability Ins. Co., 54 F.2d 523, 1931 U.S. App. LEXIS 3961 (2d Cir. N.Y. 1931).

The materiality of an answer to risk is of no moment under either [former] § 58 or this section [former § 107] if applicant means to deceive. Solez v Zurich General Acci. & Liability Ins. Co., 54 F.2d 523, 1931 U.S. App. LEXIS 3961 (2d Cir. N.Y. 1931).

No privilege protected hospital's peer review and quality assurance records from disclosure to disability insurer in insured physician's breach of contract action in which insurer sought rescission of policy based on physician's alleged failure to disclose his history of drug and alcohol abuse. Tartaglia v Paul Revere Life Ins. Co., 948 F. Supp. 325, 1996 U.S. Dist. LEXIS 18773 (S.D.N.Y. 1996).

Interests of justice significantly outweighed need for confidentiality of patient records, justifying disclosure in insured physician's breach of contract action wherein disability insurer sought rescission of policy based on physician's alleged failure to disclose his history of drug and alcohol abuse. Tartaglia v Paul Revere Life Ins. Co., 948 F. Supp. 325, 1996 U.S. Dist. LEXIS 18773 (S.D.N.Y. 1996).

Insurer is denied summary dismissal of claim under disability policy, even though it alleges that insured made fraudulent misrepresentations in his answers to certain questions in insurance application and did not correct them upon date of his first premium payment, because, under Ins § 3216(d), absent fraud, condition precedent to contract of insurance, which requires insured to have provided true and complete statements in application for insurance as of date on which initial premium is paid, cannot operate to void policy where insurer's disclaimer is made more than 2 years after policy was issued. Carden v First UNUM Life Ins. Co., 46 F. Supp. 2d 240, 1999 U.S. Dist. LEXIS 5703 (S.D.N.Y. 1999).

An insurance carrier may, compatibly with the incontestability clause, protect itself by including a provision in its incontestability clause creating an exception for fraudulent misstatements. The supreme court properly dismissed an insured person's claims that an insurer's incontestability clause was in violation of the law and void because the insurer was allowed to create an exception in that clause for fraudulent misrepresentation; the insured had been diagnosed with Parkinson's disease before applying for insurance, had failed to state that he was diagnosed with the disease prior to applying for insurance, had submitted a claim based on Parkinson's disease, and the insurer had rescinded the policy based on his fraudulent misrepresentation. Weinberger v Berkshire Life Ins. Co. of Am., 7 A.D.3d 789, 776 N.Y.S.2d 849, 2004 N.Y. App. Div. LEXIS 7248 (N.Y. App. Div. 2d Dep't 2004).

Life insurance policy issued to the insured was rescinded ab initio because a material misrepresentation in the application intended to defraud the insurer under N.Y. Ins. Law §§ 3105(b), 3216(d)(1)(B)(I) was made; the insured knew that the answers were false, and the insured's failure to disclose his condition of chronic back pain, which had resulted in the insured's hospitalization within five years of the application, affected his insurable

risk. Dwyer v First Unum Life Ins. Co., 41 A.D.3d 115, 837 N.Y.S.2d 635, 2007 N.Y. App. Div. LEXIS 6707 (N.Y. App. Div. 1st Dep't 2007).

7. Limitation on actions

If disability insurer is actually prejudiced by insured's delay in asserting claim within 3 year limitations period following termination of insured's disability as objective medical fact, insured's claim may be barred by principles similar to those underlying doctrine of laches. Panepinto v New York Life Ins. Co., 90 N.Y.2d 717, 665 N.Y.S.2d 385, 688 N.E.2d 241, 1997 N.Y. LEXIS 3694 (N.Y. 1997).

Actions upon accident insurance policies commenced approximately five years after the death of insured were time barred. Ross v Continental Casualty Co., 25 A.D.2d 702, 268 N.Y.S.2d 92, 1966 N.Y. App. Div. LEXIS 4707 (N.Y. App. Div. 3d Dep't 1966).

The legality of a limitation period in a life insurance policy prohibiting commencement of an action more than 12 months after the date of the accident causing insured's loss of life was determinable by the law as it existed at the time of the issuance of the policy. Schmuckler v Commer. Travelers Mut. Accident Ass'n, 32 A.D.2d 560, 300 N.Y.S.2d 199, 1969 N.Y. App. Div. LEXIS 4189 (N.Y. App. Div. 2d Dep't 1969).

Subd 3, ¶ 11, of this section [now § 3216(d)(1)(B)] does not mandate a three-year statute of limitation as against shorter period established by contract, but merely provides maximum period in respect to commencement of actions on accident and health insurance policies. Estock v Associated Hospital Service, Inc., 45 Misc. 2d 504, 257 N.Y.S.2d 559, 1964 N.Y. Misc. LEXIS 1685 (N.Y. Civ. Ct. 1964).

District court erred in holding that the three year time limit set out in a disability insurance policy was applicable to an insured's breach of contract and wrongful rescission claims under N.Y. C.P.L.R. 201 (2004) because the policy's provision was less favorable to the insured than New York law: (1) although N.Y. Ins. Law § 3216(d)(1)(K) allowed insurers to impose a three year time limit on actions arising out of their policies, the time limit applied only to actions to recover benefits under the policy and did not impose the time limit as to other types of claims; (2) the policy's three year time limit was unenforceable as to the insured's claims because she was seeking, in her suit,to undo the insurer's decision to rescind her policy; and (3) N.Y. C.P.L.R. 213(2) (2004), which imposed a six year time limit for bringing breach of contract claims, applied to an insured's claims against an insurer. Terry v Unum Life Ins. Co. of Am., 394 F.3d 108, 2005 U.S. App. LEXIS 345 (2d Cir. N.Y. 2005).

8. Particular causes of death or injury within scope of policy coverage

Plaintiff, who lost an eye by the explosion of a bottle, seeks to recover upon a policy of insurance against accident and sickness, one article of which provides for payment of a fixed sum for the loss of the eye and another makes separate and distinct provision for a weekly indemnity for total disability. He suffered as the result of the loss of the eye an affliction of the heart resulting in disability to transact the kind of business transacted by him in the past, and seeks to ignore the specific provision as to the indemnity for the loss of the eye and recover the weekly indemnity for total disability. The total disability provided for is one that is not in consequence of an injury within the purview of the provision for specific injury. If disability follows an injury within the purview of the specific provision, payment is not to exceed the principal sum, or a prescribed fraction thereof, except that there may be weekly indemnity up to the date of death, dismemberment or loss of sight. The promise of compensation for the injuries specifically enumerated, such as for the loss of an eye, excludes the promise of compensation for their secondary consequences. Goldstein v Standard Acc. Ins. Co., 236 N.Y. 178, 140 N.E. 235, 236 N.Y. (N.Y.S.) 178, 1923 N.Y. LEXIS 872 (N.Y.), reh'g denied, 236 N.Y. 637, 142 N.E. 315, 236 N.Y. (N.Y.S.) 637, 1923 N.Y. LEXIS 1081 (N.Y. 1923).

An accident and health insurance policy insured against death caused by accidental injury independently and exclusively of all other causes. Insured was injured in an elevated railroad collision. The action was brought on the theory that the injury produced pleurisy which, in turn, aggravated a heart condition. Death was caused directly by acute dilatation of the heart. It was error to charge that the insurer is liable if the injury, by aggravating heart disease, accelerated death, but the complaint is not dismissed since the plaintiff may show that the heart condition was caused by the injury. Waiver of filing proof of loss must be pleaded. Smith v Massachusetts Bonding & Ins. Co., 241 N.Y. 558, 150 N.E. 554, 241 N.Y. (N.Y.S.) 558, 1925 N.Y. LEXIS 637 (N.Y. 1925).

In an action to recover under a policy of indemnity insurance for liability incurred by plaintiff as the result of an automobile accident, where the policy provided for payment of "interest accrued on the judgment rendered" against plaintiff, the inclusion in the judgment of an item of interest on the principal sum found due, from the date when the accident occurred to the date when the judgment for damages was entered against the plaintiff, is erroneous. The effect of a provision of the policy cannot be overcome by the statutory provision (Decedent Estate Law § 132) requiring clerk on rendition of verdict to add interest from date of death of person injured. The two provisions are written from entirely different viewpoints, and each one is independent of the other. Cleghorn v Ocean Acci. & Guarantee Corp., 244 N.Y. 166, 155 N.E. 87, 244 N.Y. (N.Y.S.) 166, 1926 N.Y. LEXIS 636 (N.Y. 1926).

If insured under accident insurance policy voluntarily and deliberately engages in fight as aggressor, and receives injuries which are natural and probable consequences of his acts, there can be no recovery under policy since injuries cannot be said to have been produced by accident or accidental means. Krulls v Hartford Accident & Indem. Co., 144 A.D.2d 744, 535 N.Y.S.2d 157, 1988 N.Y. App. Div. LEXIS 10910 (N.Y. App. Div. 3d Dep't 1988).

One armed with deadly weapon who attacks police officer performing his duty must expect deadly resistance, so his death at hands of officer is foreseeable and, therefore, not accidental within meaning of accident insurance policy. Krulls v Hartford Accident & Indem. Co., 144 A.D.2d 744, 535 N.Y.S.2d 157, 1988 N.Y. App. Div. LEXIS 10910 (N.Y. App. Div. 3d Dep't 1988).

Beneficiary of insurance policy bears burden of proving that death of insured was covered by terms of policy. Lachter v Insurance Co. of North America, 145 A.D.2d 540, 536 N.Y.S.2d 93, 1988 N.Y. App. Div. LEXIS 13613 (N.Y. App. Div. 2d Dep't 1988).

Whether occurrence constitutes "accident" within meaning of insurance policy is generally for trier of fact to determine. Lachter v Insurance Co. of North America, 145 A.D.2d 540, 536 N.Y.S.2d 93, 1988 N.Y. App. Div. LEXIS 13613 (N.Y. App. Div. 2d Dep't 1988).

Beneficiary under accident insurance policy was not entitled to summary judgment since issues of whether occurrence constituted "accident" and whether occurrence caused insured's death were questions of fact for jury where (1) insured died of massive pulmonary emboli shortly after returning from business trip to Japan, (2) beneficiary claimed that insured's immobilization during approximately 14-hour flight from Japan caused blood clot to form in his knee, which ultimately traveled to his lung and caused death, and that such occurrence was "accident" within meaning of policy, and (3) insurance company claimed that occurrence was caused by illness or disease rather than by accident. Lachter v Insurance Co. of North America, 145 A.D.2d 540, 536 N.Y.S.2d 93, 1988 N.Y. App. Div. LEXIS 13613 (N.Y. App. Div. 2d Dep't 1988).

Summary judgment would be granted against health insurer for cost of insured's daughter's hospitalization, and insurer's claim that coverage for hospitalization was excluded under psychiatric care limitation of policy would be rejected, where (1) daughter was admitted to hospital for malnutrition and hypotension resulting from anorexia nervosa, but was not admitted to psychiatric unit of hospital in order to have her psychiatric disorder treated, and (2) she was given same treatment as any person suffering from malnutrition and was released from hospital when her physical condition was stabilized. Simons v Blue Cross & Blue Shield, 144 A.D.2d 28, 536 N.Y.S.2d 431, 1989 N.Y. App. Div. LEXIS 75 (N.Y. App. Div. 1st Dep't), app. denied, 74

N.Y.2d 603, 542 N.Y.S.2d 518, 540 N.E.2d 713, 1989 N.Y. LEXIS 645 (N.Y. 1989).

Insurance company which issued homeowners policy would not be required to defend and indemnify defendants in personal injury action arising from incident in which defendant (who was son of defendant insureds) raped and stabbed plaintiff behind high school, since incident fell within exclusion for intentional acts where defendant pleaded guilty to second degree attempted murder and stated that he meant to kill plaintiff. Nancie D. v New York Cent. Mut. Fire Ins. Co., 195 A.D.2d 535, 600 N.Y.S.2d 472, 1993 N.Y. App. Div. LEXIS 7346 (N.Y. App. Div. 2d Dep't 1993).

Plaintiff was entitled to recover medical payments under an insurance policy covering injury to persons "while in or upon . . . automobile, if the injury arises out of a use thereof" where the injury was sustained after he had stopped the car to investigate a noise and while he was attempting to fix the front bumper which had fallen off. Lokos v New Amsterdam Casualty Co., 93 N.Y.S.2d 825, 197 Misc. 40, 1949 N.Y. Misc. LEXIS 3004 (N.Y. Mun. Ct. 1949), aff'd, 96 N.Y.S.2d 153, 197 Misc. 43, 1950 N.Y. Misc. LEXIS 1523 (N.Y. App. Term 1950).

A beneficiary can recover on an insurance policy where the insured died by electrocution at the hands of the state for conviction of murder, by interpretation of § 155 [now § 3203] and § 164 [now § 3216]. Prudential Ins. Co. v Goldstein, 43 F. Supp. 765, 1942 U.S. Dist. LEXIS 3083 (D.N.Y. 1942).

9. —Autopsy to determine cause

Fact that the only justification for request by insurer for a postinterment autopsy of insured was a four-day hospitalization for some relatively minor heart pains seven years prior to insured's death, with no suggestion of any subsequent heart trouble, coupled with fact that insured's automobile slid on icy pavement and struck concrete steps, causing insured's neck to be broken, raised question of whether request for autopsy was reasonable which issue could only be resolved by trier of fact upon proper instructions; if jury were to find that the demand was unreasonably made, the failure to comply with demand for autopsy would not bar recovery on accident policy. Saperstein v Commer. Travelers Mut. Accident Ass'n, 36 N.Y.2d 79, 365 N.Y.S.2d 154, 324 N.E.2d 539, 1975 N.Y. LEXIS 1653 (N.Y. 1975).

The exhumation of a body for purpose of performing an autopsy pursuant to terms and conditions of a contract of insurance is not, in and of itself, forbidden by law. Saperstein v Commer. Travelers Mut. Accident Ass'n, 36 N.Y.2d 79, 365 N.Y.S.2d 154, 324 N.E.2d 539, 1975 N.Y. LEXIS 1653 (N.Y. 1975).

In action by beneficiary to recover proceeds of life and accidental death insurance policies, court should have granted insurer's application to exhume cremated remains of person alleged to be insured, to permit forensic examination, although application was made after note of issue and statement of readiness were filed, since (1) evidence supported reasonable doubt as to veracity of beneficiary's representation that cremated remains were those of insured, (2) insurer submitted pathologist's affirmation stating that sufficient number of teeth customarily survive cremation process to permit identification by deceased's dental records, and that insured's dental X-rays would be satisfactory for intended purpose, and (3) written permission to open grave was given by insured's daughters, who were his sole distributees. Buntin v Guardian Life Ins. Co., 134 A.D.2d 473, 521 N.Y.S.2d 258, 1987 N.Y. App. Div. LEXIS 50668 (N.Y. App. Div. 2d Dep't 1987).

10. Injury or death while engaged in unlawful act

Under a life or accident insurance policy which by its terms provides that the company shall not be liable for accidental injuries or death while the insured is engaged in an unlawful or illegal act if such act is a statutory offense, the answer setting up such defense must set out all the statutory elements thereof, and it must allege a causative connection between the offense and the injury sustained. An independent legal contract of insurance, founded upon a good and valid consideration, is not made void by an incidental violation of the Highway Law. Messersmith v American Fidelity Co., 187 A.D. 35, 175 N.Y.S. 169, 1919 N.Y. App. Div. LEXIS 6446 (N.Y. App. Div. 1919), aff'd, 232 N.Y. 161, 133 N.E. 432, 232 N.Y. (N.Y.S.) 161, 1921 N.Y. LEXIS 487 (N.Y. 1921).

Where an insured died as the result of injuries sustained during the course of an attempted escape from jail, his beneficiary will not be permitted to recover on the ground that he was engaged in the commission of a felony, and also on the ground that his injuries were self-inflicted since he engaged in a deliberate and reckless act of jumping from the roof of a building 45 feet above the ground. Udisky v Metropolitan Life Ins. Co., 32 N.Y.S.2d 579, 177 Misc. 960, 1941 N.Y. Misc. LEXIS 2562 (N.Y. Sup. Ct. 1941), rev'd, 264 A.D. 890, 35 N.Y.S.2d 1021, 1942 N.Y. App. Div. LEXIS 5264 (N.Y. App. Div. 1942).

Where the insured died as a result of being stabbed in self defense by his wife while he was choking her, his death resulted from his commission of the crime of assault and consequently the policy on his life is not collectible. Kaminsky v Home Life Ins. Co., 45 Misc. 2d 819, 258 N.Y.S.2d 266, 1965 N.Y. Misc. LEXIS 2133 (N.Y. App. Term 1965).

11. Notice of accident or injury

The requirement of former § 107 [now § 3216] that notice of injury must be given an insurer "within twenty days after date of accident causing such injury," may be extended by necessity, so that such notice may be given as soon as reasonably possible; but affirmative proof of loss must be given within the ninety-day limit after the loss, as prescribed by the statute. Mackay v Metropolitan Life Ins. Co., 281 N.Y. 42, 22 N.E.2d 154, 281 N.Y. (N.Y.S.) 42, 1939 N.Y. LEXIS 977 (N.Y. 1939).

A motion to dismiss the complaint in an action to recover a death benefit under an insurance policy containing a provision for immediate notice of accidental death was properly denied. Kempfner v Guardian Life Ins. Co., 280 A.D. 967, 116 N.Y.S.2d 461, 1952 N.Y. App. Div. LEXIS 4398 (N.Y. App. Div. 1952).

The provision of subd 3 (A, 7) of this section [now § 3216(d)(1)(G)] that failure to furnish proofs of loss within 90 days shall not invalidate claim if it was not reasonably possible to give proof within such time, only became effective on July 1, 1951, and consequently a policy entered into before that time requiring affirmative proof of loss within 90 days after date of loss is not subject to such provision. Bland v Trevvett, 23 A.D.2d 534, 256 N.Y.S.2d 644, 1965 N.Y. App. Div. LEXIS 5036 (N.Y. App. Div. 4th Dep't 1965), aff'd, 19 N.Y.2d 915, 281 N.Y.S.2d 102, 227 N.E.2d 896, 1967 N.Y. LEXIS 1494 (N.Y. 1967).

While less demanding standards of notice apply to the plaintiff injured party than to an insured, the record was inadequate to determine whether the notice given to defendant by the injured party was given "as soon as practicable" under the provisions of the policy, and the lower judgment was reversed and a new trial granted. Rogers v Merchants Mut. Casualty Co., 28 A.D.2d 919, 282 N.Y.S.2d 29, 1967 N.Y. App. Div. LEXIS 3568 (N.Y. App. Div. 2d Dep't 1967).

In an action by an insurer seeking a declaration that the insurer was not obligated to defend or indemnify insured construction firm in a personal injury action involving the firm's truck driver, the trial court erred in not permitting the insurer to inquire into a worker's conversation with the construction firm's foreman regarding the underlying accident, since the insurer was entitled to such information in order to attempt to show that the information given to the foreman was imputed to the construction firm's president, to show that the president's belief that the firm was not liable for the driver's injuries was unreasonable, and to show there was no excuse for the firm's failure to give timely notice to the insurer of the driver's injuries. Holyoke Mut. Ins. Co. v B.T.B. Realty Corp., 83 A.D.2d 603, 441 N.Y.S.2d 301, 1981 N.Y. App. Div. LEXIS 14891 (N.Y. App. Div. 2d Dep't 1981).

Insurer was entitled to summary judgment dismissing action to recover on disability insurance policy, which required notice of disability within 20 days after occurrence or "as soon thereafter as is reasonably possible," where it was undisputed that insured did not give notice of disability until 8 months after accident and offered no credible excuse for such delay. Gresham v American General Life Ins. Co., 135 A.D.2d 1121, 523 N.Y.S.2d 282, 1987 N.Y. App. Div. LEXIS 52986 (N.Y. App. Div. 4th Dep't 1987).

Disability insurer was entitled to summary judgment dismissing insured's claim where unambiguous policy required written notice to insurer within 45 days of possibility of claim, and there was no excuse for delay of over 4 years in giving such notice. Roche v G.E. Capital Life Assur. Co., 281 A.D.2d 932, 722 N.Y.S.2d 456, 2001 N.Y. App. Div. LEXIS 2822 (N.Y. App. Div. 4th Dep't), review or reh'g denied, 726 N.Y.S.2d 43, 2001 N.Y. App. Div. LEXIS 5744 (N.Y. App. Div. 4th Dep't 2001).

It is not a legal duty of the insured under an accident policy to notify the beneficiary of the existence of the policy and his failure to do so is not chargeable against the beneficiary, as respects the duty of the beneficiary to give notice of death. Trieger v Commercial Travelers Mut. Acc. Ass'n, 202 N.Y.S. 410, 122 Misc. 159, 1923 N.Y. Misc. LEXIS 1414 (N.Y. Sup. Ct. 1923).

Insured was required to give notice of injury but not of accident under health and accident policy requiring written notice of injury. Turner v Mutual Ben. Health & Accident Ass'n, 5 Misc. 2d 524, 160 N.Y.S.2d 883, 1957 N.Y. Misc. LEXIS 3319 (N.Y. Sup. Ct. 1957), aff'd, 5 A.D.2d 951, 172 N.Y.S.2d 571, 1958 N.Y. App. Div. LEXIS 6757 (N.Y. App. Div. 4th Dep't 1958).

As soon as reasonably possible simply means within a reasonable time under all of the circumstances; New York courts have noted that a determination of reasonable time necessarily includes a determination of the diligence of claimant, but have not otherwise delineated the circumstances to be considered. Ajnoha v JC Penney Life Ins. Co., 480 F. Supp. 2d 663, 2007 U.S. Dist. LEXIS 23734 (E.D.N.Y. 2007).

12. —Proof of loss

Proof that death of the insured was caused by his possession and usage of a hypodermic needle, does not establish negligence as a matter of law and prevent a recovery by reason of a provision of the policy that it does not extend to or cover injuries or death caused by negligence of insured. The health law was not intended to provide protection for insurance companies, but to prevent the constant use of any habit-forming drug, and to protect "habitual drug users." It does not provide that the use of hypodermic needle is a crime, therefore it cannot be said as a matter of law that the insured was guilty of negligence. Townsend v Commercial Travelers' Mut. Accident Ass'n, 231 N.Y. 148, 131 N.E. 871, 231 N.Y. (N.Y.S.) 148, 1921 N.Y. LEXIS 618 (N.Y. 1921).

In action arising out of insurance policies providing for payment of $1,000 per month in event of "total disability," insurer was not entitled to summary judgment due to insured's failure to submit notice of claim and proof of loss 5 years into her alleged disability, although policies provided that definition of "total disability" changed after 5 years of disability, where nothing in policies suggested that insured was required to file new claim or proof of loss at that point. Panepinto v New York Life Ins. Co., 90 N.Y.2d 717, 665 N.Y.S.2d 385, 688 N.E.2d 241, 1997 N.Y. LEXIS 3694 (N.Y. 1997).

Although this section [now § 3216] provides that acceptance of proofs of loss shall not waive defensive claims made under a policy, it does not provide for a waiver of defects in the proof of loss itself. Binder v Commercial Travelers Mut. Acci. Asso., 165 F.2d 896, 1947 U.S. App. LEXIS 2084 (2d Cir. N.Y. 1947).

Beneficiary did not make a loss of sight claim until nearly two years after his wife was pronounced dead; even assuming the beneficiary could not reasonably have been expected to know of the grounds for a loss of sight claim until the autopsy was performed, he offered no justification for the additional 19 months that elapsed before he asserted a loss of sight claim. Therefore, the claim was untimely. Ajnoha v JC Penney Life Ins. Co., 480 F. Supp. 2d 663, 2007 U.S. Dist. LEXIS 23734 (E.D.N.Y. 2007).

With respect to the accidental death claim, the beneficiary's attorney's representation that he had difficulty in obtaining certain reports was a valid excuse for his failure to provide proof of loss within 90 days; indeed, the insurer did not dispute that its agents told the attorney that there would be no problem as long as he submitted proof of loss as soon as he could. Therefore, whether proof of loss was submitted within a "reasonable time" presented a question of fact. Ajnoha v JC Penney Life Ins. Co., 480 F. Supp. 2d 663, 2007 U.S. Dist. LEXIS 23734 (E.D.N.Y. 2007).

13. Exceptions in policy renewals

Where an insurance company which had issued to the same person for a series of years, policies against injury or death by accident, each of which policies was based upon a new application by the insured which became part of the yearly contract, reinsured one-half of the risk with the defendant, another insurance company each policy was a new, separate and independent contract and not a renewal of the preceding. Hence, where former policies of insurance and reinsurance provided that they did not cover injury or death in the territory of Alaska, that provision was not carried forward so as to become part of policies of reinsurance subsequently issued to the same person, but containing no exception as to the territory of Alaska, and, therefore, where the original insurer paid the amount of the policy to the beneficiary of the insured, who was killed in Alaska, it can recover of the defendant who reinsured the risk. This is true, although plaintiff's letter asking for reinsurance referred to the proposed contract as a "renewal" of a former contract, and although the insured when applying for a prior policy stated that he did not contemplate any special journey or hazardous undertaking. Casualty Co. of America v United States Casualty Co., 161 A.D. 591, 146 N.Y.S. 957, 1914 N.Y. App. Div. LEXIS 5436 (N.Y. App. Div. 1914), aff'd, 221 N.Y. 560, 116 N.E. 1039, 221 N.Y. (N.Y.S.) 560, 1917 N.Y. LEXIS 1416 (N.Y. 1917).

Each renewal of an expired policy is a separate and distinct contract. The provision of (former) § 107 that an exception is invalid if printed in the policy in a less prominent type than the beneficial clause therein is printed, applies to renewals of expired policies. Hodgson v Preferred Acc. Ins. Co., 182 A.D. 381, 169 N.Y.S. 28, 1918 N.Y. App. Div. LEXIS 4389 (N.Y. App. Div. 1918).

14. Renewal of policy; payment of premium

Where, in an action upon an accident insurance policy, it appears that the plaintiff was injured five years and two days after the issuance of the policy, which was "a continuous policy" and subject to lapse upon but one contingency, namely, the failure of the plaintiff to pay each premium within the month on the first of which it became due, whether the month was before or after the expiration of five years from the date of issue, the plaintiff is entitled to recover on the policy, although he had not paid the premium for the month on the third day of which he was injured. In a "continuous policy" of accident insurance, a clause providing against the payment of benefits "for illness or death occurring before the policy has been in force two months," applies only to the first two months following the issuance of the policy. Turner v New York Safety Reserve Fund, 158 A.D. 835, 144 N.Y.S. 261, 1913 N.Y. App. Div. LEXIS 8114 (N.Y. App. Div. 1913).

A provision in an insurance policy that the policy is issued for the period of twelve months to commence a certain day and to end a certain day and that it may be renewed by payment of premiums in advance from term to term of twelve months each, provided the insured shall not have attained the age of sixty, is not an age limitation of the policy. Provision relates to the term and termination of the policy which in accordance with this section [now § 3216] must be stated in a portion of the policy preceding its execution by the insurer, which is not otherwise prescribed in formal wording. Equitable Life Assurance Soc. v Mait, 279 A.D. 194, 109 N.Y.S.2d 82, 1951 N.Y. App. Div. LEXIS 2896 (N.Y. App. Div. 1951).

An accident policy by its terms, extending to a specified date, "and for such further time as may be stated in renewal receipts," and providing that premiums were payable the first of each month in advance, constituted a continuing offer by the company to renew the policy whenever an additional premium was paid, and on insured's failure to pay the renewal premium in advance, the policy terminated, precluding recovery for the insured's accidental death thereafter and before tendering premium, notwithstanding the insurer had previously accepted delayed premiums. Raynor v National Casualty Co., 210 N.Y.S. 586, 125 Misc. 174, 1925 N.Y. Misc. LEXIS 882 (N.Y. App. Term 1925).

When plaintiff insured's major medical policy lapsed for nonpayment of premiums without notification to the insured, the insured was not entitled to reinstatement of the policy 18 months later retroactive to the date of lapse so as to cover accrued claims where the insured's policy provided for a 90-day grace period for

reinstatement, in that Ins Law § 164 [now § 3216] requires only that a grace period of 31 days minimum be given for semiannual or annual policies for reinstatement in the event of default, and since the default in question was not caused by fraud or deception on behalf of the insurer. Margulis v William Penn Ass'n, 123 Misc. 2d 216, 472 N.Y.S.2d 848, 1984 N.Y. Misc. LEXIS 2977 (N.Y. Civ. Ct. 1984).

15. Cancellation of policy

An insurer is entitled to a judgment in an action cancelling a policy of accident insurance as to future coverage while the insured was recovering from injuries suffered in an accident for which he had received a lump sum settlement on his executing a general release to insurer for any further liability growing out of the accident, where it appears that the insurer served written notice of cancellation of the policy on the insured and tendered to him a refund of the unearned portion of the premium in conformity with the provisions of the policy, which refund the insured accepted without objection or protest. Friedman v Connecticut General Life Ins. Co., 251 A.D. 292, 296 N.Y.S. 146, 1937 N.Y. App. Div. LEXIS 6920 (N.Y. App. Div. 1937).

Although defendant health insurers' prior practice of retroactive termination without advance notice violated parties' contract and CLS Gen Bus § 349, plaintiff insureds were not entitled, in class action, to injunctive relief from insurers' revised procedures where (1) insurers presently provided advance notice with their billing statements, (2) that notice included clear explanation of subscriber's right to remit any overdue payment during ensuing 30-day grace period and of fact that, if payment were not received, coverage would be terminated retroactive to end of day before premium due date, and (3) that notice was not sort of deceptive act that was likely to mislead reasonable consumer who was acting reasonably under circumstances. Makastchian v Oxford Health Plans, Inc., 281 A.D.2d 197, 721 N.Y.S.2d 351, 2001 N.Y. App. Div. LEXIS 2208 (N.Y. App. Div. 1st Dep't 2001).

Individualized notice of termination of health insurance policies, sent only after default by insureds, was not required, and retroactive termination was not prohibited by contract or law, even though CLS Ins § 3216(d)(1)(C) requires that coverage remain in effect during any grace period to pay premiums, where (1) under subject policies, it was only after grace period expired and premiums were not paid that coverage terminated to end of last month for which subscriber paid, and (2) although State Department of Insurance's decision—that retroactive termination of coverage back to last day for which premium was paid was allowed when premium was not received during grace period—was not binding on Appellate Division, it was entitled to deference. Makastchian v Oxford Health Plans, Inc., 281 A.D.2d 197, 721 N.Y.S.2d 351, 2001 N.Y. App. Div. LEXIS 2208 (N.Y. App. Div. 1st Dep't 2001).

A clause in an accident insurance policy by which members of a travel club were insured, premiums on the policy being paid by each individual member and the club merely acting as an agent for the insurance company in the collection and paying over of said premiums, which provides that the policy may be cancelled at any time by the company by giving five days' written notice to the club, that cancellation of the policy shall have the effect of cancelling the insurance as to every member, and that notice of cancellation in writing delivered to the club or mailed to the club, shall be a sufficient notice, violates provisions of (former) § 107 [now § 3216] which permits insurer to cancel policy of insurance, "at any time by written notice delivered to the insured or mailed to his last address," and is direct contravention of said statute which expressly forbids such substitution for the purpose of notice of cancellation as adopted in defendant's policy. Grossman v London Guarantee & Accident Co., 208 N.Y.S. 582, 124 Misc. 520, 1925 N.Y. Misc. LEXIS 693 (N.Y. Sup. Ct. 1925).

Health plan was not (1) required to cover one-person groups under N.Y. Ins. Law §§ 3216(g)(2)(B), 3221(p)(3)(A), since "group" meant more than one person under N.Y. Ins. Law § 4235, (2) N.Y. Ins. Law § 4237 blanket policy, (3) N.Y. Ins. Law § 3216(g)(2) individual plan, or (4) terminated, so statutory termination notice to solo member "group" was not required. Bentley v JLT Servs. Corp., 18 A.D.3d 205, 794 N.Y.S.2d 46, 2005 N.Y. App. Div. LEXIS 4763 (N.Y. App. Div. 1st Dep't 2005), app. denied, 2005 N.Y. App. Div. LEXIS 8742 (N.Y. App. Div. 1st Dep't Aug. 18, 2005).

16. Change in insured's occupation or employment

Where plaintiff stated in his application that he was a "financial writer and reporter," and the policy provided for reduced liability if insured were injured in more hazardous occupation than that stated, "except . . . while engaged in recreation," and where the classification manual filed prior to plaintiff's application pursuant to this section [now § 3216] stated that an airship operator, builder, owner, experimenter or inventor was not insurable, the plaintiff was not engaged in "recreation" when he was injured while operating a plane which he had constructed with the view to renting it on shares to aviators. Ridgely v Aetna Life Ins. Co., 160 A.D. 719, 145 N.Y.S. 1075, 1914 N.Y. App. Div. LEXIS 4820 (N.Y. App. Div. 1914), aff'd, 217 N.Y. 720, 112 N.E. 1073, 217 N.Y. (N.Y.S.) 720, 1916 N.Y. LEXIS 1501 (N.Y. 1916).

In an action on an accident insurance policy, it appeared that the policy was issued to insured at a time when he was employed in a nonhazardous business; that an army officer in field service was not insurable by the defendant; that the insured entered the army as an officer after he had taken out the policy and was killed in field service; that the policy contained a provision that in case a policyholder should change his occupation to a more hazardous one than that stated in the policy, such change would not forfeit the policy but the company's liability thereafter should not exceed such proportion of the principal sum or other indemnity under the policy as the premium paid would purchase at the rate fixed by the company for such increased hazard, in accordance with the classification of risks and rates, and that under said classification the limits of the risk of the company applicable to an army officer in field service were stated. Under defendant's classification of occupation of army officer in full service as an extra hazardous risk, plaintiff was entitled to recover the amount of insurance which the premiums paid would purchase under a schedule for extra hazardous employment. Gillies v Preferred Acc. Ins. Co., 203 A.D. 588, 197 N.Y.S. 51, 1922 N.Y. App. Div. LEXIS 7252 (N.Y. App. Div. 1922).

A physician's action to recover proceeds pursuant to disability insurance policies would be dismissed where, after his heart attack and stroke, the physician had been limited to teaching, administration, and supervisory responsibilities, and where he could not be deemed totally disabled despite the fact that he no longer engaged in private practice. Taterka v Nationwide Mut. Ins. Co., 91 A.D.2d 568, 457 N.Y.S.2d 53, 1982 N.Y. App. Div. LEXIS 19395 (N.Y. App. Div. 1st Dep't 1982), aff'd, 59 N.Y.2d 743, 463 N.Y.S.2d 441, 450 N.E.2d 247, 1983 N.Y. LEXIS 3095 (N.Y. 1983).

Insured was not entitled to recover under disability policy after she developed rheumatoid arthritis and was forced to discontinue her occupation as flight attendant where she thereafter engaged in occupation as restaurant manager; although insured claimed that she received no wages or compensation, that she managed restaurant for therapeutic gain, and that she was supported by family members, she obtained SBA loan for restaurant, lived above restaurant, and negotiated lease whereby restaurant paid all expenses of building. Centennial Life Ins. Co. v Scherrer, 191 A.D.2d 298, 594 N.Y.S.2d 768, 1993 N.Y. App. Div. LEXIS 2590 (N.Y. App. Div. 1st Dep't 1993).

17. Effect of other benefits covering same or similar losses

Where a policy of insurance against a disability preventing plaintiff from carrying on his occupation as a physician contains a clause practically identical with subd (d) ¶ (2) clause 17 [now § 3216(d)(2)(D)], the clause does not cover life insurance policies in other companies with disability clauses, where such policies carried by plaintiff do not cover same loss as policy in suit. Oglesby v Massachusetts Acc. Co., 230 A.D. 361, 244 N.Y.S. 576, 1930 N.Y. App. Div. LEXIS 8615 (N.Y. App. Div. 1930).

Hospital patient, eligible for medicare as well as benefits under private policy which paid for other medical charges not covered by medicare benefits which were paid to the hospital, was not entitled to recover from his private insurer for the amount that medicare paid directly to hospital even though patient was nominal debtor to hospital in event medicare defaulted in pay-

ment, since insurance contract called for insured to pay only those charges for which patient was legally obligated to pay. Seligman v Guardian Life Ins. Co., 59 A.D.2d 859, 399 N.Y.S.2d 121, 1977 N.Y. App. Div. LEXIS 14018 (N.Y. App. Div. 1st Dep't 1977), app. dismissed, 44 N.Y.2d 646, 1978 N.Y. LEXIS 4371 (N.Y. 1978), app. dismissed, 44 N.Y.2d 838, 406 N.Y.S.2d 759, 378 N.E.2d 122, 1978 N.Y. LEXIS 2037 (N.Y. 1978), app. dismissed, 44 N.Y.2d 851, 1978 N.Y. LEXIS 4706 (N.Y. 1978).

In action to determine which of 2 health insurance plans was primarily liable to reimburse medical expenses incurred by patient during period of time when he was retired and eligible for Medicaid, court erred in granting summary judgment to plan which covered patient as dependent under his wife's insurance, thereby effectively declaring that plan administrator had properly determined that such plan was secondary to plan that covered patient in connection with his former employment, where both plans excluded coverage in event of patient's eligibility for Medicaid, and triable questions of fact existed as to who was at fault for administrator's lack of awareness of patient's status as retired and eligible for Medicaid. Cooperative Health Ins. Fund v Blue Cross & Blue Shield, 237 A.D.2d 963, 654 N.Y.S.2d 895, 1997 N.Y. App. Div. LEXIS 3562 (N.Y. App. Div. 4th Dep't 1997), reh'g denied, 1997 N.Y. App. Div. LEXIS 6465 (N.Y. App. Div. 4th Dep't May 30, 1997).

A life insurance policy providing for double indemnity in the case of accidental death does not cover the "same loss" as a health and accident policy containing the standard provision that the payment of death benefits thereunder shall be pro-rated where the insured carried other insurance with another company "covering the same loss". Thomas v Mutual Ben. Health & Acci. Asso., 123 F. Supp. 167, 1954 U.S. Dist. LEXIS 3125 (D.N.Y. 1954), aff'd, 220 F.2d 17, 1955 U.S. App. LEXIS 3296 (2d Cir. N.Y. 1955).

18. Maternity care

Insurance carriers and their trade association, challenging the constitutionality of chapter 843 of the Laws of 1976 [now § 3216(i)(10)], which mandates the inclusion of maternity care coverage in health and accident insurance policies issued after January 1, 1977, and which was enacted to remedy the absence of adequate insurance coverage for rapidly rising maternity care costs falling on young families usually of moderate income, have failed to establish that the chapter is unfair, unjust or arbitrary and thus a deprivation of due process; the choice of means to meet the objective of making maternity care coverage widely available was within the legislative prerogative, and, absent an unconstitutional selection, the wisdom of the Legislature in exercising its discriminating authority is beyond the scope of judicial review. Health Ins. Asso. v Harnett, 44 N.Y.2d 302, 405 N.Y.S.2d 634, 376 N.E.2d 1280, 1978 N.Y. LEXIS 1940 (N.Y. 1978).

Chapter 843 of the Laws of 1976 [now § 3216(i)(10)], which mandates the inclusion of maternity care coverage in health and accident insurance policies issued after January 1, 1977, is not unconstitutional as to its substantive provisions, but may not constitutionally require the addition of such coverage to policies in existence before that date and thereafter renewed, if the renewal is at the option of the insured alone without the consent of the insurer. Health Ins. Asso. v Harnett, 44 N.Y.2d 302, 405 N.Y.S.2d 634, 376 N.E.2d 1280, 1978 N.Y. LEXIS 1940 (N.Y. 1978).

Chapter 843 of the Laws of 1976 [now § 3216(i)(10)], which mandates the inclusion of maternity care coverage in health and accident insurance policies written, altered, amended or renewed after January 1, 1977, may not constitutionally be applied to policies issued before its effective date as "guaranteed renewable policies", i.e., policies renewable at the sole option of the insured, because of the constitutional restrictions on impairment of obligations of contracts. Health Ins. Asso. v Harnett, 44 N.Y.2d 302, 405 N.Y.S.2d 634, 376 N.E.2d 1280, 1978 N.Y. LEXIS 1940 (N.Y. 1978).

If parent does not add newborn infant within prescribed 30-day period following delivery, HMO is only required to provide inpatient hospital coverage for mother and newborn infant for at least 48 hours after vaginal birth and at least 96 hours after caesarean birth. Insurance Department, Opinions of General Counsel, Opinion Number 08-04-15.

19. Nursing care

Insurer was entitled to summary judgment declaring that insured was not entitled to benefits under "long term care insurance nursing home indemnity policy," where facility to which she moved after suffering stroke was not licensed to operate as nursing home and thus did not meet policy definition of "nursing home," but rather operated as apartment building offering apartments with range of amenities and optional in-home care services at additional charge. Gregg by Gregg v IDS Life Ins. Co., 261 A.D.2d 799, 692 N.Y.S.2d 182, 1999 N.Y. App. Div. LEXIS 5551 (N.Y. App. Div. 3d Dep't 1999).

Plaintiff was entitled to preliminary injunction, compelling health insurer to pay for nursing care required by plaintiff as result of 1989 stroke, and to provide such coverage pending action, on basis that insurer was equitably estopped from claiming that its 1983 group policy with plaintiff's employer and corresponding benefits booklet, under which lifetime benefits vested on onset of covered disability, were superseded by 1989 insurance contract terminating disability benefits within year or 2 of termination of contract, since (1) irreparable injury to be sustained by plaintiff from lack of nursing care would be more burdensome than defendant's payments, and (2) preliminary injunction would not alter status quo, in that defendant initially paid full benefits and plaintiff was simply seeking to have them continued. Kimm v Blue Cross & Blue Shield, 160 Misc. 2d 97, 608 N.Y.S.2d 385, 1993 N.Y. Misc. LEXIS 575 (N.Y. Sup. Ct. 1993).

In action to compel defendant health insurer to pay for nursing care required by plaintiff as result of 1989 stroke, defendant was equitably estopped to claim that its 1983 group policy with plaintiff's employer and corresponding benefits booklet, under which lifetime benefits vested on onset of covered disability, were superseded by 1989 insurance contract terminating disability benefits within year or 2 of termination of contract, where plaintiff was not provided with copy of 1989 contract or new benefits booklet conforming thereto which would have alerted covered members to important difference between 1983 and 1989 coverages. Kimm v Blue Cross & Blue Shield, 160 Misc. 2d 97, 608 N.Y.S.2d 385, 1993 N.Y. Misc. LEXIS 575 (N.Y. Sup. Ct. 1993).

20. Medically prescribed procedures

Health insurer should have been granted summary judgment dismissing action by insured to recover reimbursement for cost of massage therapy since applicable plan expressly excluded coverage for medical expenses that insurer determined were not medically necessary, and insured's affidavit merely contended that therapy was prescribed for neck and back problems but did not argue that any medical diagnosis existed to support such conclusion. Wait v Metropolitan Life Ins. Co., 168 A.D.2d 867, 564 N.Y.S.2d 535, 1990 N.Y. App. Div. LEXIS 15762 (N.Y. App. Div. 3d Dep't 1990).

Insurer was obligated to pay for blood laboratory work ordered by insured's physician as aid to ordering treatment or therapy where (1) health insurance policy provided for coverage of "reasonable and customary charges" for covered medical services performed or supplies prescribed by doctor due to sickness, (2) it was shown that insured displayed symptoms requiring treatment by physician, (3) insured's physician was duly licensed, and (4) there was no claim that physician's approach of treating whole person, with biochemical methods and emphasis on elemental deficiencies and food allergies, was experimental or that he was not practicing medicine; however, insurer had right to prove that charges for services were excessive. Tudor v Metropolitan Life Ins. Co., 143 Misc. 2d 180, 539 N.Y.S.2d 690, 1989 N.Y. Misc. LEXIS 189 (N.Y. Dist. Ct. 1989).

Claimants were entitled to reimbursement under their health insurance policies for medically prescribed visual stimulation therapy provided to their visually impaired child at their home by special education teacher of blind and partially sighted, notwithstanding insurers' assertions that teacher was not licensed to render such therapy, that her services could only be rendered in public school, and that such therapy was not covered medical service, since teacher's certification was sufficiently broad to encompass rendering of visual stimulation therapy and did not

mandate that services be rendered only at schools, and claimants' medical experts established that early intervention of visual stimulation therapy was medically necessary for child. Saxe v Metropolitan Life Ins. Co., 152 Misc. 2d 635, 577 N.Y.S.2d 570, 1991 N.Y. Misc. LEXIS 694 (N.Y. Civ. Ct. 1991).

Terms of health insurance policy were sufficiently broad to provide coverage for replacement hairpiece prescribed by plaintiff's treating physician where policy provided coverage for prosthetic appliances to support or replace part or all of body function. Zuckerman v Empire Blue Cross & Blue Shield, 155 Misc. 2d 271, 598 N.Y.S.2d 665, 1993 N.Y. Misc. LEXIS 183 (N.Y. App. Term 1993).

Insured was entitled to recover under health insurance policy for cost of special visual therapy teacher for his daughter where insurer denied coverage on ground that such teacher was not "Provider" as defined in policy, but did not controvert insured's allegation that daughter's condition could be treated only by visual therapy, which could be provided only by visual therapy teacher; insurer's denial of coverage violated 11 NYCRR § 52.16, which does not list daughter's condition among permissible exclusions. Saxe v Metropolitan Life Ins. Co., 169 Misc. 2d 363, 650 N.Y.S.2d 66, 1996 N.Y. Misc. LEXIS 415 (N.Y. App. Term 1996).

CaminoPro drink (used to treat Phenylketonuria, or "PKU") is "enteral formula" under CLS Ins § 4303(y), not modified solid food; while § 4303(y) does not specifically define "enteral formula," common definitions do not exclude orally administered formulas, and include both formulas "taken" by mouth and formulas administered via feeding tube. NY Ins Dep't Gen Counsel, Opinion No. 10-12-03, 2010 NY Insurance GC Opinions LEXIS 79.

21. Consequential damages

Plaintiff's request for consequential damages arising out of need to sell home and incur relocation costs in order to pay medical and hospital bills would be denied in action for breach of health insurance contract since such damages were not foreseeable or within contemplation of parties at time of contract. White v Blue Cross & Blue Shield, 146 Misc. 2d 125, 549 N.Y.S.2d 598, 1989 N.Y. Misc. LEXIS 821 (N.Y. Sup. Ct. 1989).

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Plaintiff's request for damages for emotional distress and loss of reputation would be stricken from complaint in action for breach of health insurance contract, since such damages are not recoverable in breach of contract suits. White v Blue Cross & Blue Shield, 146 Misc. 2d 125, 549 N.Y.S.2d 598, 1989 N.Y. Misc. LEXIS 821 (N.Y. Sup. Ct. 1989).

22. Punitive damages

In action for reimbursement of portion of expense of 3-month hospitalization for treatment of eating disorder, depression and drug abuse which was commenced after insurer reimbursed insured for first 30 days of hospitalization but denied reimbursement for remainder of hospital stay, insurer was entitled to summary judgment dismissing claim for punitive damages since there was nothing to support plaintiff's assertion that insurer systematically denied reimbursement for treatment of eating disorders, and insurer's general practice was to reimburse eating disorder claims insofar as they required acute medical treatment but to deny reimbursement for nonacute treatment. DiBlasi v Blue Cross of Western New York, Inc., 156 A.D.2d 986, 548 N.Y.S.2d 829, 1989 N.Y. App. Div. LEXIS 16174 (N.Y. App. Div. 4th Dep't 1989).

In class action for wrongful termination of health insurance coverage, plaintiffs were not entitled to amend complaint to add claim for punitive damages where (1) punitive damages could not be sought for those causes of action that were based on insurers' failure to provide advance notice of termination or, because of class nature of action, in connection with plaintiffs' CLS Gen Bus § 349 claim, (2) although plaintiffs might have shown that termination of coverage could have devastating results, their assertions of reckless procedures by insurers were essentially claims that insurers did not deal with them and other members of their class in good faith, and (3) such claims were insufficient to allege separate tort, independent of plaintiffs' breach of contract claims, on which claim for punitive damages might be based. Makastchian v Oxford Health Plans, Inc., 281 A.D.2d 197, 721 N.Y.S.2d 351, 2001 N.Y. App. Div. LEXIS 2208 (N.Y. App. Div. 1st Dep't 2001).

Plaintiff's claim for punitive damages would be sustained in action for breach of health insurance contract where defendant's admittedly improper denial of reimbursement for medical and hospital expenses resulted in plaintiff's loss of home and car and eventual need to leave country, and flawed review procedures pursuant to which defendant denied plaintiff's claim constituted wrong not merely to plaintiff but to public in general. White v Blue Cross & Blue Shield, 146 Misc. 2d 125, 549 N.Y.S.2d 598, 1989 N.Y. Misc. LEXIS 821 (N.Y. Sup. Ct. 1989).

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23. Attorneys' fees

In action for breach of health insurance contract, under which defendant insurer admitted improperly denying coverage, plaintiff's request for attorneys' fees would not be stricken, notwithstanding rule that such fees are generally not available in breach of contract suits, since plaintiff had viable claim for punitive damages and attorneys' fees may be recovered as part of such claim. White v Blue Cross & Blue Shield, 146 Misc. 2d 125, 549 N.Y.S.2d 598, 1989 N.Y. Misc. LEXIS 821 (N.Y. Sup. Ct. 1989).

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24. Miscellaneous

Insurance company was entitled to summary judgment in action for payment of benefits under accident insurance policy where insured was killed by police when they attempted to execute arrest warrant after identifying themselves, and returned fire after insured shot at them; plaintiff's contention that insurer's cross motion for summary judgment should have been denied because she had not yet deposed officers would be rejected since, having moved for summary judgment herself, she could not be heard to complain that cross motion was premature, and assertion that testimony of officers at examination before trial might vary from their sworn statements was highly speculative and improbable. Krulls v Hartford Accident & Indem. Co., 144 A.D.2d 744, 535 N.Y.S.2d 157, 1988 N.Y. App. Div. LEXIS 10910 (N.Y. App. Div. 3d Dep't 1988).

Defendant insurance company was entitled to summary judgment in action to recover insurance proceeds under casualty insurance policy where plaintiff executor refused to appear for examination under oath and thereby materially breached insurance contract. Silver v General Accident Ins. Co., 203 A.D.2d 354, 609 N.Y.S.2d 674, 1994 N.Y. App. Div. LEXIS 3743 (N.Y. App. Div. 2d Dep't 1994).

Plaintiff's health insurance carrier was not entitled to intervene in plaintiff's personal injury action under CLS CPLR §§ 1012 or 1013 where insurance policy limited its right to recover from third parties to amounts paid to insured through settlements or satisfied judgments, which specifically identified amounts paid for health care services; intervention of medical

providers could unduly complicate and delay determination of personal injury actions, and submission of issues to jury relating to plaintiff's compensation from collateral sources could prejudice plaintiff's case. Humbach v Goldstein, 229 A.D.2d 64, 653 N.Y.S.2d 950, 1997 N.Y. App. Div. LEXIS 1603 (N.Y. App. Div. 2d Dep't 1997), app. dismissed, 91 N.Y.2d 921, 669 N.Y.S.2d 263, 692 N.E.2d 132, 1998 N.Y. LEXIS 149 (N.Y. 1998).

Where subscribers to health care policy offered by defendant insurers sought declaratory and injunctive relief on theories of breach of contract, negligent misrepresentation, promissory estoppel, waiver, common-law fraud and deceptive trade practices, court properly determined that action should be prosecuted as class action because (1) all policyholders were affected by question of whether defendants' general practice of terminating policies for nonpayment of premiums without notice violated policies, and (2) any questions relating to individual reliance, causation and damages were relatively insignificant in view of essentially declaratory nature of relief sought. Makastchian v Oxford Health Plans, Inc., 270 A.D.2d 25, 704 N.Y.S.2d 44, 2000 N.Y. App. Div. LEXIS 2581 (N.Y. App. Div. 1st Dep't 2000).

Plaintiffs, who were members of defendants' health maintenance organization and whose son had Crohn's Disease, failed to state cause of action under CLS Gen Bus § 349 based on fact that, after putting on television commercial featuring case in which they flew child with Crohn's Disease to "The Cleveland Clinic," defendants told plaintiffs that "The Cleveland Clinic" was not available to enrollees in New York; ad in question would not have conveyed to reasonable consumer that treatment at "The Cleveland Clinic" would be considered for every enrollee with Crohn's Disease. Maltz v Aetna U. S. Healthcare, Inc., 270 A.D.2d 68, 704 N.Y.S.2d 562, 2000 N.Y. App. Div. LEXIS 2608 (N.Y. App. Div. 1st Dep't 2000).

Insurance broker was not entitled to summary judgment dismissing disability insurer's cause of action for indemnification, and judgment would be modified to reinstate it, even though broker was not responsible for making disability payments to insured, where (1) key element of common-law action for indemnification is not duty running from indemnitor to injured party but, rather, separate duty owed indemnitee by indemnitor, and (2) at least, broker, as insurer's agent, owed insurer duty to report truthfully regarding information requested on applications, which specifically included existence of other disability policies held by prospective insured. Equitable Life Assur. Soc'y of the U.S. v Werner, 286 A.D.2d 632, 730 N.Y.S.2d 329, 2001 N.Y. App. Div. LEXIS 8816 (N.Y. App. Div. 1st Dep't 2001).

In a discovery proceeding, where executrix, widow of deceased airplane pilot, seeks payment of $25,000 under insurance policy, naming no beneficiaries, and where insurer is acting as stakeholder because of controversy between widow and guardian ad litem on behalf of decedent's two children, Court rejected widow's contention that the policy was an "accident and health insurance" policy with indemnity for loss of life payable, in the absence of a designated beneficiary, to decedent's estate, and agreed with guardian ad litem's position that policy was within statutory definition of "motor vehicle and aircraft insurance", which, by providing benefits for crew member and providing that persons having a cause of action for death shall execute a release of all claims, was interpreted as meaning that the payment was one for the wrongful death of decedent and the proceeds were payable to those who suffered a pecuniary loss, the widow and children. In re Gilly's Estate, 66 Misc. 2d 894, 322 N.Y.S.2d 742, 1971 N.Y. Misc. LEXIS 1484 (N.Y. Sur. Ct. 1971).

Court would order insurer to reimburse insured for cost of special teacher as medically necessary expense for insured's child who suffered from cortical visual impairment, even though special teacher was not "provider" within meaning of policy as "any doctor, dentist, nurse, chiropractor, certified nurse service, or facility legally licensed to perform a covered medical service," since (1) no provider who would be covered by insured's definition existed for such special problem, (2) insurer had never said that medically necessary expenses required for treatment of such problem were excluded from policy, and (3) services required by insured's child could be provided only by special education teacher who was specially trained to provide necessary visual therapy services. Saxe v Metropolitan Life Ins. Co., 162 Misc. 2d 513, 618 N.Y.S.2d 180, 1994 N.Y. Misc. LEXIS 453 (N.Y. Civ. Ct. 1994), aff'd, 169 Misc. 2d 363, 650 N.Y.S.2d 66, 1996 N.Y. Misc. LEXIS 415 (N.Y. App. Term 1996).

Health insurer that paid medical benefits to injured plaintiff under her father's group health insurance plan, for injuries sustained in accident allegedly caused by defendants, was not entitled to intervene in personal injury action against defendants for purpose of pursuing its equitable subrogation rights to recoup covered medical expenses awarded by jury, because plaintiffs would be precluded under CLS CPLR § 4545 from recovering from defendants any medical benefits previously provided to injured plaintiff from collateral sources; however, insurer would be allowed to intervene for limited purpose of asserting its equitable subrogation rights as to covered medical expenses, if any, included in terms of any settlement, and would have concomitant right to appear and be heard on proceeding brought to obtain court approval of any settlement. Niemann v Luca, 168 Misc. 2d 1023, 645 N.Y.S.2d 401, 1996 N.Y. Misc. LEXIS 218 (N.Y. Sup. Ct.), amended, 168 Misc. 2d 1023 (N.Y. Sup. Ct. 1996).

Adult care facility was required to credit decedent's estate for difference between daily rate of $457 guaranteed by respondent (decedent's spouse) and daily rate of $1,278 billed to and received from respondent's insurance carrier, even though insurance carrier was not party to contract between respondent and facility, as respondent's insurance coverage had enabled facility to collect higher payments, and facility would receive windfall of difference between its agreed daily rate with respondent and daily rate received from insurance carrier, unless amount received from carrier were applied to reduce obligation of decedent's estate. In re Estate of Breen, 171 Misc. 2d 905, 656 N.Y.S.2d 122, 1997 N.Y. Misc. LEXIS 81 (N.Y. Sur. Ct. 1997).

Plaintiff's insurer was not entitled or permitted to intervene in medical malpractice action wherein plaintiff asked court to approve proposed compromise and settlement of her claim and declare what percentage of settlement insurer should receive as subrogor, as insurer's interests were adequately represented by plaintiff, consolidation of plaintiff's personal injury claim with insurer's contractual indemnification claim would dehumanize plaintiff's sufferings, and consolidation could also prejudice defendants by introducing evidence of insurer's payment of medical expenses. Johnson v Edwards, 173 Misc. 2d 907, 662 N.Y.S.2d 443, 1997 N.Y. Misc. LEXIS 407 (N.Y. Sup. Ct. 1997).

Insurer's alleged breach of obligation to pay disability insurance benefits, and its use of agent on 2 occasions to contact health care professionals in alleged effort to interfere with physician-patient relationship, did not demonstrate that it had national policy to terminate unprofitable disability policies, and thus did not support insured's claim under CLS Gen Bus 349. Magee v Paul Revere Life Ins. Co., 954 F. Supp. 582, 1997 U.S. Dist. LEXIS 1803 (E.D.N.Y. 1997)).

New York Insurance Law does not prohibit for-profit insurers that issue accident and health insurance from paying brokers or agents bonuses or other compensation in addition to ordinary commissions paid for facilitating sale of insurance; however, bonuses or other additional compensation to be paid, and criteria established for making such pay ments, must be filed with Insurance Department for Superintendent's approval, in accordance with statutes and regulations relating thereto. Insurance Department, Opinions of General Counsel, Opinion Number 00-10-02.

Neither New York Insurance Law nor regulations promulgated thereunder obligated insurer to honor assignment of benefits request made by insured, wherein payment of health services under health insurance policy would go directly to provider of health services, and not to insured; however, New York common law might place duty on insurer to adhere to assignment of benefits request. Insurance Department, Opinions of General Counsel, Opinion Number 00-11-06.

Whether physician group could charge administrative fee to patient for collection of patient's co-payment fee that was charged at time of delivery of service which was not paid would depend on whether or not charging of administrative fee was stated in "certificate of coverage" which was approved by Insurance De-

partment; if certificate of coverage did not state that administrative fee could be charged in event that patient neglected to pay co-payment at time of service, then it could not be charged to patient. Insurance Department, Opinions of General Counsel, Opinion Number 01-03-21.

Managed care organization that issues contract in New York is not required to cover court ordered services (i.e. psychological evaluations) for at-risk juvenile beyond limits of its policy or contract. Insurance Department, Opinions of General Counsel, Opinion Number 01-04-02.

Privacy regulations under 11 NYCRR Parts 410 and 421 do not apply to Prepaid Health Service Plan (PHSP) providing coverage to Medicaid beneficiaries, or to PHSP providing coverage under Family Health Plus program, but they do apply to PHSP issuing coverage under Child Health Plus program. Insurance Department, Opinions of General Counsel, Opinion Number 02-04-29.

"Prudent layperson" standard of CLS Ins § 4303(a)(2) would apply to all services rendered in emergency department; however, since statute by its terms only regulates coverage decisions in policies and contracts insuring in-patient hospital care, standard does not serve to provide coverage that would not otherwise exist. Insurance Department, Opinions of General Counsel, Opinion Number 02-07-10.

Whether denial such as "physician build emergency room services are not covered, except for CPR when performed in the emergency room" would be in contravention of Regulation 62 is dependent on coverage provided under policy or contract. Insurance Department, Opinions of General Counsel, Opinion Number 02-07-10.

There is no prohibition in New York Insurance Law against use of credit card to pay premium on long-term care insurance policy. Insurance Department, Opinions of General Counsel, Opinion Number 02-09-08.

Group contract issued by health service corporation must cover annual mammography screening for individuals over age 50, except for contract issued to cover employees employed in more than one state. Insurance Department, Opinions of General Counsel, Opinion Number 02-09-09.

Existing individual health insurance policy will automatically provide coverage to adopted child, provided insured purchased, or now purchases, family coverage. Insurance Department, Opinions of General Counsel, Opinion Number 02-09-10.

Recognition of same sex marriages and civil unions lawfully entered into in other jurisdictions will have no impact on criteria applied to individuals seeking coverage as domestic partners. Insurance Department, Opinions of General Counsel, Opinion Number 04-05-25.

Registration of domestic partnership, such as is authorized in New York City (NYC Admin Code §§ 3-240 et seq.) would constitute strong evidence of mutual interdependence for purposes of policies that extend coverage to those "dependent" or "chiefly dependent" on insured (i.e., in case of group policies written by commercial insurer, non-profit insurer or HMO, or in case of individual policies written by commercial insurer). Insurance Department, Opinions of General Counsel, Opinion Number 04-05-25.

Coverage of either in-patient or out-patient hospital care is not necessary condition precedent for imposition of mandated benefits in accident and health insurance policies since there are mandated benefits that do not have such condition, for which see CLS Ins §§ 3216, 3221, and 4235. Insurance Department, Opinions of General Counsel, Opinion Number 04-07-09.

With respect to disability income insurance, insurer may, in lieu of declining application, exclude disabilities caused by preexisting chronic condition. Insurance Department, Opinions of General Counsel, Opinion Number 05-06-10.

While insurer may impose preexisting condition exclusion in disability income policy, it may decide in exercise of its underwriting judgment that increased morbidity from particular preexisting condition is so much in excess of other causes of disability that exclusion would swallow coverage and, in such situations, insurer may decide to reject all applicants with that preexisting condition; in alternative, insurer may validly decide that cost of determining whether disability was caused by preexisting condition outweighs premium being charged for disability income policy and opt to reject all applicants with that preexisting condition. Insurance Department, Opinions of General Counsel, Opinion Number 05-06-10.

Different standard for determining whether to admit chiropractor to HMO network would not be violative of L 1997, ch 426 given limited range of services that may be provided by chiropractor (CLS Educ § 6551), as contrasted with scope of practice of physician (CLS Educ § 6521). Insurance Department, Opinions of General Counsel, Opinion Number 05-06-12.

"Withholds" as defined by 11 NYCRR § 101.3(l), are recognized form of sharing of financial risk between managed care organizations and participating health care providers; since they are utilized with wide range of health care providers, they are not violation of L 1997, ch 426. Insurance Department, Opinions of General Counsel, Opinion Number 05-06-12.

Managed care organization would not be in violation of L 1997, ch 426 if it reimburses participating health care providers at level less than that utilized by Center for Medicare and Medicaid Services (CMS) of United States Department of Health and Human Services since there is no methodology or fee schedule mandated by statute or regulation for calculation of reimbursement by health insurers or Health Maintenance Organizations (HMOs) of chiropractors. Insurance Department, Opinions of General Counsel, Opinion Number 05-06-12.

Insurer which provides prescription drug coverage may not refuse to reimburse insured or subscriber for prescription drug because health care provider prescribing drug (optometrist) does not have registration number issued by federal Drug Enforcement Administration (DEA), since optometrists are not authorized to prescribe controlled substances in New York, and thus they are not subject to registration by DEA. Insurance Department, Opinions of General Counsel, Opinion Number 05-10-11.

Trial court erred in granting an insured's cross-motion for summary judgment as to two claims concerning a disability insurance policy, because a relation of earnings to insurance clause in the policy complied with all of the requirements of N.Y. Ins. Law § 3216, thus defeating the insured's claims. Friedman v Connecticut Gen. Life Ins. Co., 30 A.D.3d 349, 818 N.Y.S.2d 201, 2006 N.Y. App. Div. LEXIS 8531 (N.Y. App. Div. 1st Dep't 2006), app. denied, 2006 N.Y. App. Div. LEXIS 12070 (N.Y. App. Div. 1st Dep't Oct. 3, 2006), app. dismissed, 8 N.Y.3d 875, 832 N.Y.S.2d 485, 864 N.E.2d 615, 2007 N.Y. LEXIS 195 (N.Y. 2007), aff'd in part, modified, 9 N.Y.3d 105, 846 N.Y.S.2d 64, 877 N.E.2d 281, 2007 N.Y. LEXIS 2718 (N.Y. 2007).

Under CLS Ins §§ 3216(h)(24), 3221(l)(15) and 4303(aa), ambulance company issued certificate to operate under CLS Pub Health § 3005 may not bill patient directly for prehospital emergency ambulance services where New York authorized insurer or HMO has made partial payment of bill under insurance contract that provides major medical or similar comprehensive-type coverage; however, if such contract is not involved, these provisions do not apply and there is no prohibition in Insurance Law against ambulance company billing patient directly for balance of bill. Insurance Department, Opinions of General Counsel, Opinion Number 06-06-02.

Medical provider, such as ambulance company issued certificate to operate under CLS Pub Health § 3005, may bill patient directly for prehospital emergency ambulance services where New York authorized insurer or health maintenance organization has denied payment entirely, subject to remedies available to patient. Insurance Department, Opinions of General Counsel, Opinion Number 06-06-02.

If person were admitted to hospital through emergency room for mental health and chemical dependency and remains in hospital for period of days, there would need to be case-by-case determination by insurer or HMO as to whether to apply medically necessary standard for utilization review rather than prudent lay person standard. Insurance Department, Opinions of General Counsel, Opinion Number 06-10-02.

Insurance Law and corresponding regulations do not specifically require insurer or HMO to provide ambulance company (which is non-participating provider that renders emergency

medical services to patient) with copy of insurance policy or contract so that ambulance company will know amount of copayment and deductible that patient is responsible for under insurance policy or contract and can bill patient accordingly. Insurance Department, Opinions of General Counsel, Opinion Number 07-02-13.

Although CLS Ins §§ 3216(i)(24), 3221(l)(15), and 4303(aa) refer to term "usual and customary charge," nowhere does Insurance Law or its corresponding regulations define such term; rather, definition of that term ordinarily is set forth in insurance contract between insurer or HMO and insured. Insurance Department, Opinions of General Counsel, Opinion Number 07-02-13.

Insurance Department has not amended its regulations to permit or require employers to provide health insurance coverage to same-sex couples married outside of New York State. Insurance Department, Opinions of General Counsel, Opinion Number 07-09-27.

Insurance company that issues managed care product is required to include coverage for chiropractic care if product includes either coverage for physician services in physician's office, or major medical or similar comprehensive-type coverage. Insurance Department, Opinions of General Counsel, Opinion Number 07-09-29.

Managed care plan, HMO or insurer may not deny claim for covered service after predetermined number of visits to doctor of chiropractic, or impose pre-authorization requirements, if managed care plan, HMO or insurer would not deny same claim, or impose pre-authorization requirements where service was rendered by practitioner other than doctor of chiropractic. Insurance Department, Opinions of General Counsel, Opinion Number 08-05-16.

Third party administrator, utilization review agent, IPA or other contract entity acting as agent for managed care plan, HMO or insurer may not issue adverse determination to doctor of chiropractic, whereby denial is made or prior approval is required after certain number of visits for doctor of chiropractic when, under similar circumstances, denial would not be made or preapproval would not otherwise be required for another health care provider rendering same or similar services. Insurance Department, Opinions of General Counsel, Opinion Number 08-05-16.

CLS Ins § 4303(x)(1) and related statutes do not require insurer to pay claim for facility fee for post-mastectomy breast reconstruction surgery performed in physician's office. Insurance Department, Opinions of General Counsel, Opinion Number 08-06-07.

In determining whether to cover visit to hospital Emergency Department, insurer, including health maintenance organization (HMO), must utilize "prudent lay person" standard; in determining whether to cover in-patient admission and subsequent hospital stay, insurer must utilize "medical necessity" standard. Insurance Department, Opinions of General Counsel, Opinion Number 08-07-07.

CLS Ins § 4303(x) and related statutes prohibit insurer from applying its utilization review process to post-mastectomy breast reconstruction because statute mandates coverage for breast reconstruction surgery that is performed in manner determined by attending physician and patient to be appropriate. Insurance Department, Opinions of General Counsel, Opinion Number 08-07-18.

CLS Ins § 4303(x) and related statutes apply to request or claim for breast reconstruction surgery that follows successful completion of all stages of initial post-mastectomy breast reconstruction. Insurance Department, Opinions of General Counsel, Opinion Number 08-07-18.

CLS Ins §§ 3216(i)(24), 3221(l)(15) and 4303(aa) require insurer, in absence of participating provider contract, to pay for certain ambulance services at usual and customary or reasonable (UCR) rate, which insurers typically establish using claims data collected by insurer (or data purchased by data collection agency) and set forth in insurance policy or contract. Insurance Department, Opinions of General Counsel, Opinion Number 08-07-20.

Insurance Law explicitly prohibits ambulance company from "balance billing" patient when authorized New York insurer or HMO that provides major medical or similar comprehensive-type coverage has made to it partial payment. Insurance Department, Opinions of General Counsel, Opinion Number 08-07-20.

Agency Opinions

1. In general

Section 107 [now § 3216] prescribing standard provisions for accident and health policies was enacted in 1910, that is four years after the statutes of 1906 required participation by all policies in a surplus of any corporation which did participating business. We have, therefore, a legislative interpretation in 1910 that the provisions § 107 [now § 3216] do not require participation by accident and health policies. 1919 NY Ops Atty Gen Jan. 2.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 3201, 3221, 4235.

Definitions, CLS Pub Health § 2801.

Hospitals, CLS Pub Health Art 28.

Codes, Rules and Regulations:

Insurance department: minimum standards for the form, content and sale of health insurance; dental care exclusion. 11 NYCRR § 52.16 (Regulation 62).

Minimum standards for form, content and sale of health insurance. 11 NYCRR §§ 52.1 et seq.

Disclosure requirements for health insurance. 11 NYCRR §§ 52.54 et seq.

Forms of certificates issued or for delivery within state by fraternal benefit societies; accident and health insurance certificates. 11 NYCRR 49.1.

Total and permanent disability benefit provisions in or supplemental to life insurance or annuity certificates. 11 NYCRR 49.2.

Insurance department: external appeals of adverse determinations of health care plans. 11 NYCRR Part 410 (Regulation 166).

Insurance department: the Health New York and Direct Payment Market Stop-Loss Relief Programs. 11 NYCRR Part 362 (Regulation 172).

Insurance department: rules relating to the processing of claims. 11 NYCRR Part 56 (Regulation 183).

Federal Aspects:

The Health Insurance Portability and Accountability Act of 1996, cited in statutory text, appears generally as 42 USCS §§ 1320a-7 et seq.

Jurisprudences:

35B NY Jur 2d Criminal Law Substantive Principles and Offenses § 1205.

68 NY Jur 2d Insurance §§ 12, 18, 25, 97.

68A NY Jur 2d Insurance §§ 585, 589, 596–602, 605, 722, 869, 901, 923.

69 NY Jur 2d Insurance §§ 1013, 1014, 1023, 1053, 1114, 1157, 1167, 1196, 1170, 1322, 1347, 1366, 1367, 1385, 1394, 1395.

70 NY Jur 2d Insurance §§ 1414, 1420, 1448, 1453.

70A NY Jur 2d Insurance §§ 1832, 1835, 1848, 1854, 1867, 1868, 1881, 1882, 1894, 1997.

71 NY Jur 2d Insurance §§ 2083, 2137, 2120, 2121, 2149, 2159, 2168, 2217, 2230, 2327, 2330.

9B Am Jur Legal Forms 2d, Indemnity §§ 142:11 et seq.

14A Am Jur Pl & Pr Forms (Rev ed), Insurance, Forms 271–274, 291–298.

1 Am Jur Proof of Facts 507, Amnesia.

1 Am Jur Proof of Facts 641, Ankle Injuries.

1 Am Jur Proof of Facts 755, Appendicitis.

2 Am Jur Proof of Facts 33, Arteriosclerosis.

2 Am Jur Proof of Facts 261, Autopsy.

2 Am Jur Proof of Facts 291, Back Injuries.

2 Am Jur Proof of Facts 547, Bladder Injuries.

2 Am Jur Proof of Facts 2d 49, Accidental Death–Food Asphyxiation.

3 Am Jur Proof of Facts 67, Bronchitis.

3 Am Jur Proof of Facts 79, Buerger's Disease.
3 Am Jur Proof of Facts 97, Burn Injuries.
3 Am Jur Proof of Facts 195, Chest Injuries.
3 Am Jur Proof of Facts 423, Coronary Occlusions.
4 Am Jur Proof of Facts 283, Dementia Praecox.
4 Am Jur Proof of Facts 315, Dental Injuries.
4 Am Jur Proof of Facts 453, Diabetes.
4 Am Jur Proof of Facts 473, Diathermy.
4 Am Jur Proof of Facts 561, Ear Injuries.
4 Am Jur Proof of Facts 595, Elbow Injuries.
4 Am Jur Proof of Facts 613, Electrical Injuries.
4 Am Jur Proof of Facts 627, Electrocardiograms.
4 Am Jur Proof of Facts 641, Electroencephlaograms.
5 Am Jur Proof of Facts 1, Eye Injuries.
5 Am Jur Proof of Facts 185, Foot Injuries.
5 Am Jur Proof of Facts 243, Fractures.
5 Am Jur Proof of Facts 383, Frostbite.
5 Am Jur Proof of Facts 395, Gall Badder.
5 Am Jur Proof of Facts 411, Glass.
5 Am Jur Proof of Facts 591, Heart Injuries.
5 Am Jur Proof of Facts 657, Heat Stroke.
5 Am Jur Proof of Facts 679, Heel Injuries.
5 Am Jur Proof of Facts 699, Hernia.
6 Am Jur Proof of Facts 449, Intestinal Injuries.
6 Am Jur Proof of Facts 553, Jaw and Facial Fractures.
6 Am Jur Proof of Facts 611, Kidney Injuries and Diseases.
6 Am Jur Proof of Facts 665, Knee Injuries.
7 Am Jur Proof of Facts 1, Lacerations.
7 Am Jur Proof of Facts 141, Leg Injuries.
7 Am Jur Proof of Facts 267, Lip Injuries.
7 Am Jur Proof of Facts 281, Liver Injuries.
7 Am Jur Proof of Facts 399, Lung Injuries.
7 Am Jur Proof of Facts 659, Meningitis.
7 Am Jur Proof of Facts 677, Menopause (Climacterium).
8 Am Jur Proof of Facts 179, Muscle and Tendon Injuries.
8 Am Jur Proof of Facts 221, Neck and Throat Injuries.
8 Am Jur Proof of Facts 249, Nerve Injuries.
8 Am Jur Proof of Facts 375, Neuritis.
8 Am Jur Proof of Facts 499, Nose Injuries.
8 Am Jur Proof of Facts 643, Paralysis.
8 Am Jur Proof of Facts 691, Parkinson's Disease.
9 Am Jur Proof of Facts 29, Pelvic Injuries.
9 Am Jur Proof of Facts 83, Peritonitis.
9 Am Jur Proof of Facts 103, Phantom Pain.
9 Am Jur Proof of Facts 375, Plastic Surgery.
9 Am Jur Proof of Facts 471, Pneumonia.
9 Am Jur Proof of Facts 593, Pulmonary Embolism and Infarction.
9 Am Jur Proof of Facts 617, Pulmonary Emphysema.
10 Am Jur Proof of Facts 225, Rectal Injuries and Disorders.
10 Am Jur Proof of Facts 351, Rib Injuries.
10 Am Jur Proof of Facts 407, Sexual Organ Injuries.
10 Am Jur Proof of Facts 517, Shoulder Injuries.
10 Am Jur Proof of Facts 609, Silicosis.
10 Am Jur Proof of Facts 639, Sinus Injuries.
10 Am Jur Proof of Facts 767, Skull Injuries.
10 Am Jur Proof of Facts 2d 319, Inability to Engage in Substantial Gainful Activity–Social Security Act.
11 Am Jur Proof of Facts 89, Spleen Injuries.
11 Am Jur Proof of Facts 117, Staphylococcal Infections.
11 Am Jur Proof of Facts 273, Tetanus (Lockjaw).
11 Am Jur Proof of Facts 313, Toe Injuries.
12 Am Jur Proof of Facts 559, Thalidomide.
13 Am Jur Proof of Facts 49, Traumatic Glaucoma.
13 Am Jur Proof of Facts 257, Heart Arrest and Cardiac Massage.
13 Am Jur Proof of Facts 515, Grinding Wheel Explosions and Hazards.
14 Am Jur Proof of Facts 115, Hepatitis.
15 Am Jur Proof of Facts 269, Power Lawn Mower Accidents.
16 Am Jur Proof of Facts 701, Proof of Lost Earning Capacity and Future Expenses.
17 Am Jur Proof of Facts 683, Ladder Accidents.
18 Am Jur Proof of Facts 291, Farm Machinery Accidents.
19 Am Jur Proof of Facts 683, Hand Tool Accidents.
22 Am Jur Proof of Facts 287, Football Injuries.
27 Am Jur Proof of Facts 707, Malingering-Heart Disease.
27 Am Jur Proof of Facts 2d 361, Anosmia.
29 Am Jur Proof of Facts 529, Depression Following Trauma.
30 Am Jur Proof of Facts 1, Anxiety Neurosis Following Trauma.
30 Am Jur Proof of Facts 2d 95, Brain Injuries Due to Trauma.
30 Am Jur Proof of Facts 2d 341, Aphasia.
30 Am Jur Proof of Facts 2d 511, Traumatic Cause or Aggravation of Condition Affecting Mobility of Joints.
31 Am Jur Proof of Facts 2d 265, Rupture of Blood Vessel Due to Trauma.
31 Am Jur Proof of Facts 2d 611, Cardiovascular Shock.
32 Am Jur Proof of Facts 2d 559, Peptic Ulcer.
36 Am Jur Proof of Facts 2d 335, Hip Injuries.
37 Am Jur Proof of Facts 2d 223, Neck Injuries.
9 Am Jur Trials 131, Actions on Health and Accident Insurance Policies.

Appleman on Insurance:

1 Holmes' Appleman on Insurance 2d, Nature of Insurance § 1.18.

1 Appleman, Insurance Law and Practice, Personal Insurance-Types-In General § 24.

Annotations:

Admissibility against beneficiary of life or accident insurance policy of statements of third persons included in or with proof of death. 1 ALR2d 365.

Accident insurance policy provisions for diminution of indemnity where insured engages in, or does act pertaining to, a more hazardous occupation. 8 ALR2d 481.

Theory of waiver as applicable where provisions of policy or acts of insurer are inconsistent with statutory requirements. 9 ALR2d 1436.

Public regulation or control of insurance agents or brokers. 10 ALR2d 950.

Clause in life, accident, or health policy excluding or limiting liability in case of insured's use of intoxicants or narcotics. 13 ALR2d 987.

Time for making autopsy or demand therefor under insurance policy. 30 ALR2d 837.

Construction of incontestable clause applicable to disability insurance. 13 ALR3d 1383.

Disability insurance or provision: clause requiring notice of claim within specified time or as soon as reasonably possible, or the like. 17 ALR3d 530.

Construction of express insurance policy provision restricting insurer's right to cancel or otherwise terminate coverage. 19 ALR3d 1429.

Beneficiary's ignorance of existence of life or accident policy as excusing failure to give notice, make proofs of loss, or bring action within time limited by policy or statute. 28 ALR3d 292.

Construction and effect of "visible sign of injury" and similar clause in accident provision of insurance policy. 28 ALR3d 413.

What constitutes "serious illness," "serious disease," or equivalent language used in insurance application. 28 ALR3d 1255.

Remedies and measure of damages for wrongful cancellation of life, health, and accident insurance. 34 ALR3d 245.

Suicide clause of life or accident insurance as affected by incontestable clause. 37 ALR3d 337.

Validity and construction of provision in accident insurance policy limiting coverage for death or loss of member to death or loss occurring within specified period after accident. 39 ALR3d 1311.

Insured's receipt of or right to workmen's compensation benefits as affecting recovery under accident, hospital, or medical expense policy. 40 ALR3d 1012.

Insurer's failure to pay amount of admitted liability as precluding reliance on statute of limitations. 41 ALR3d 1111.

Person to whom renewal premium may be paid or tendered so as to bind insurer. 42 ALR3d 751.

Validity and construction of prescription drug insurance plans. 42 ALR3d 897.

Validity, construction, and application of provision of automobile liability policy excluding from coverage injury or death of member of family or household of insured. 46 ALR3d 1024.

Validity, construction and application of provision of automoible liability policy excluding from coverage injury or death of insured. 46 ALR3d 1061.

What constitutes a "hospital" within coverage or exclusionary clauses of hospitalization policy. 46 ALR3d 1244.

Liability insurance: timeliness of notice of accident by additional insured. 47 ALR3d 199.

What is "conveyance," "passenger conveyance" or "public conveyance" within coverage of accident policy. 60 ALR3d 858.

Who is "fare-paying passenger" within coverage provision of life or accident insurance policy. 60 ALR3d 1273.

What conditions constitute "disease" within terms of life, accident, disability, or hospitalization insurance policy. 61 ALR3d 822.

What constitutes "one accident" or "one sickness" or related conditions or recurrences within provisions of health, accident, and disability insurance. 61 ALR3d 884.

Construction of provision in health or accident policy extending coverage to persons "actually in the employ of" the policyholder. 64 ALR3d 1178.

Elimination of particular coverage, or termination, of health, hospitalization, or medical care insurance policy as affecting insurer's liability for insured's continuing hospitalization or medical expenses relating to previously covered illness. 66 ALR3d 1205.

Right of named beneficiary, upon change of beneficiary, to recover premiums paid on life insurance policy. 92 ALR3d 1330.

Construction and application of provision in health or hospitalization policy excluding or postponing coverage of illness originating prior to issuance of policy or within stated time. 94 ALR3d 990.

Construction and application of provision in health or hospitalization policy excluding or postponing coverage of illness for which medical care or treatment was received within stated time preceding or following issuance of policy. 95 ALR3d 1290.

Effectiveness of change of named beneficiary of life or accident insurance policy by will. 25 ALR4th 1164.

Accident insurance: death or disability incident to partaking of food or drink as within provision as to external, violent, and accidental means. 29 ALR4th 1230.

Modern status of rules requiring liability insurer to show prejudice to escape liability because of insured's failure or delay in giving notice of accident or claim, or in forwarding suit papers. 32 ALR4th 141.

Accident insurance: what is "loss" of body member. 51 ALR4th 156.

Accident or life insurance: death by autoerotic asphyxiation as accidental. 62 ALR4th 823.

Policy provision limiting time within which action may be brought on the policy as applicable to tort action by insured against insurer. 66 ALR4th 859.

Texts: NY Pattern Jury Instructions 3d, PJI 4:56, 4:77.

New York Insurance Law (Matthew Bender's New York Practice Series) §§ 1.05[1][b], [2][a], 12.03[2][a], 21.03[2][c], 29.10[2][b], [3], 30.04[7], 33.02[1], 35.02[1][b][ii], 35.03[2][e], 35.04[1][d], [8][d].

§ 3221. Group or blanket accident and health insurance policies; standard provisions.

* * * * *

(j) No policy of group or blanket accident and health insurance shall be issued as excess coverage for volunteer firefighters over and above the coverage provided for pursuant to the volunteer firefighters' benefit law unless such excess policy provides for each of the types of coverages set forth in subdivision one of section five of such law. Any excess policy which does not contain such provisions shall be construed as if such coverages were embodied therein.

(k) (1) (A) Every group policy delivered or issued for delivery in this state which provides coverage for in-patient hospital care shall provide coverage for home care to residents in this state, except that this provision shall not apply to a policy which covers persons employed in more than one state or the benefit structure of which was the subject of collective bargaining affecting persons who are employed in more than one state. Such home care coverage shall be included at the inception of all new policies and, with respect to all other policies, added at any anniversary date of the policy subject to evidence of insurability.

(B) Such coverage may be subject to an annual deductible of not more than fifty dollars for each person covered under the policy and may be subject to a coinsurance provision which provides for coverage of not less than seventy-five percent of the reasonable charges for such services.

(C) Home care means the care and treatment of a covered person who is under the care of a physician but only if hospitalization or confinement in a nursing facility as defined in subchapter XVIII of the federal Social Security Act, 42 U.S.C. §§ 1395 et seq, would otherwise have been required if home care was not provided, and the plan covering the home health service is established and approved in writing by such physician.

(D) Home care shall be provided by an agency possessing a valid certificate of approval or license issued pursuant to article thirty-six of the public health law and shall consist of one or more of the following:

(i) Part-time or intermittent home nursing care by or under the supervision of a registered professional nurse (R.N.).

(ii) Part-time or intermittent home health aide services which consist primarily of caring for the patient.

(iii) Physical, occupational or speech therapy if provided by the home health service or agency.

(iv) Medical supplies, drugs and medications prescribed by a physician, and laboratory services by or on behalf of a certified home health agency or licensed home care services agency to the extent such items would have been covered under the contract if the covered person had been hospitalized or confined in a skilled nursing facility as defined in subchapter XVIII of the federal Social Security Act, 42 U.S.C. §§ 1395 et seq.

* * * * *

(7) (A) Every group or blanket accident and health insurance policy issued or issued for delivery

in this state which provides medical coverage that includes coverage for physician services in a physician's office and every policy which provides major medical or similar comprehensive-type coverage shall include coverage for the following equipment and supplies for the treatment of diabetes, if recommended or prescribed by a physician or other licensed health care provider legally authorized to prescribe under title eight of the education law: blood glucose monitors and blood glucose monitors for the visually impaired, data management systems, test strips for glucose monitors and visual reading and urine testing strips, insulin, injection aids, cartridges for the visually impaired, syringes, insulin pumps and appurtenances thereto, insulin infusion devices, and oral agents for controlling blood sugar. In addition, the commissioner of the department of health shall provide and periodically update by rule or regulation a list of additional diabetes equipment and related supplies such as are medically necessary for the treatment of diabetes, for which there shall also be coverage. Such policies shall also include coverage for diabetes self-management education to ensure that persons with diabetes are educated as to the proper self-management and treatment of their diabetic condition, including information on proper diets. Such coverage for self-management education and education relating to diet shall be limited to visits medically necessary upon the diagnosis of diabetes, where a physician diagnoses a significant change in the patient's symptoms or conditions which necessitate changes in a patient's self-management, or where reeducation or refresher education is necessary. Such education may be provided by the physician or other licensed health care provider legally authorized to prescribe under title eight of the education law, or their staff, as part of an office visit for diabetes diagnosis or treatment, or by a certified diabetes nurse educator, certified nutritionist, certified dietitian or registered dietitian upon the referral of a physician or other licensed health care provider legally authorized to prescribe under title eight of the education law. Education provided by the certified diabetes nurse educator, certified nutritionist, certified dietitian or registered dietitian may be limited to group settings wherever practicable. Coverage for self-management education and education relating to diet shall also include home visits when medically necessary.

(B) Such coverage may be subject to annual deductibles and coinsurance as may be deemed appropriate by the superintendent and as are consistent with those established for other benefits within a given policy; provided however, the total amount that a covered person is required to pay out of pocket for covered prescription insulin drugs shall be capped at an amount not to exceed one hundred dollars per thirty-day supply, regardless of the amount or type of insulin needed to fill such covered person's prescription and regardless of the insured's deductible, copayment, coinsurance or any other cost sharing requirement.

(C) This paragraph shall not apply to a policy which covers persons employed in more than one state or the benefit structure of which was the subject of collective bargaining affecting persons employed in more than one state unless such policy is issued under the New York state health insurance plan established under article eleven of the civil service law or issued to or through a local government.

* * * * *

HISTORY:

Add, L 1984, ch 367, § 1, eff Sept 1, 1984; amd, L 1984, ch 370, § 1, eff Jan 1, 1985; L 1984, ch 404, § 1, eff Jan 1, 1985; L 1984, ch 805, § 146, eff Sept 1, 1984; L 1984, ch 806, § 1, eff Sept 1, 1984; L 1984, ch 869, § 2, eff Aug 5, 1984; L 1984, ch 990, § 1, eff Jan 1, 1985; L 1984, ch 996, § 1; L 1985, ch 268, § 1; L 1985, ch 369, §§ 4, 5, eff Jan 1, 1986; L 1985, ch 569, § 1, eff Jan 1, 1986; L 1987, ch 210, § 1, eff Aug 6, 1987; L 1987, ch 306, § 1, eff Sept 1, 1987; L 1988, ch 692, § 2, eff Jan 15, 1989; L 1989, ch 417 § 3, eff Jan 1, 1990; L 1989, ch 689, § 5; L 1990, ch 21, § 1, eff Sept 12, 1990; L 1990, ch 853, § 2, eff Jan 1, 1991; L 1990, ch 897, § 2, eff Jan 1, 1991; L 1991, ch 165, § 4, eff Dec 8, 1991; L 1991, ch 467, § 23, eff Jan 1, 1992; L 1992, ch 501, § 3, eff Jan 1, 1993; L 1992, ch 771, § 3; L 1993, ch 43, § 2, eff May 17, 1993; L 1993, ch 378, § 2, eff Jan 1, 1994; L 1993, ch 380, § 3; L 1993, ch 555, § 10, eff July 28, 1993; L 1993, ch 677, §§ 1, 2, eff Aug 4, 1993; L 1993, ch 677, §§ 3, 4, eff Sept 1, 1993; L 1993, ch 728, § 2, eff April 1, 1994; L 1994, ch 344, §§ 7, 8, eff Sept 1, 1994; L 1996, ch 56, § 3; L 1996, ch 705, § 18, eff April 1, 1997; L 1997, ch 20, § 2, eff Jan 1, 1998; L 1997, ch 21, § 2, eff Jan 1, 1998; L 1997, ch 177, §§ 3, 4, eff Jan 4, 1998; L 1997, ch 426, § 3, eff Jan 1, 1998; L 1997, ch 659, § 77, eff Sept 24, 1997; L 1997, ch 661, §§ 3–7, eff Sept 24, 1997, deemed eff on and after July 1, 1997; L 1998, ch 495, § 2, eff July 29, 1998; L 1998, ch 586, § 40, eff July 1, 1999; L 2000, ch 557, § 2, eff March 1, 2001; L 2000, ch 565, § 2, eff Jan 20, 2001; L 2000, ch 593, § 1, eff Sept 1, 2001; L 2000, ch 601, § 2, eff Jan 1, 2001; L 2001, ch 391, § 1, eff Dec 30, 2001; L 2001, ch 506, § 2, eff Jan 1, 2002; L 2002, ch 82, § 1 (Part K), eff Sept 1, 2002; L 2002, ch 420, § 6, eff Sept 1, 2004; L 2002, ch 554, §§ 5, 10, 12, 15, eff Jan 1, 2003; L 2003, ch 338, § 3, eff Jan 1, 2004; L 2004, ch 114, § 4, eff June 21, 2004; L 2004, ch 230, § 16, eff Sept 1, 2004; L 2006, ch 557, § 1, eff Jan 1, 2007; L 2006, ch 748, § 3, eff Jan 1, 2007; L 2007, ch 502, § 1, eff Aug 1, 2007, deemed eff on and after Jan 1, 2007; L 2009, ch 7, § 1, eff March 20, 2009; L 2009, ch 236, § 1, eff July 1, 2009; L 2009, ch 237, § 5, eff Jan 1, 2011; L 2009, ch 237, § 13, eff Jan 1, 2010; L 2009, ch 240, § 2, eff Sept 1, 2009; L 2009, ch 498, § 1, eff Nov 19, 2009; L 2010, ch 238, § 3, eff Oct 28, 2010; L 2010, ch 357, § 2, eff Jan 1, 2011; L 2010, ch 398, § 2, eff Jan 1, 2011; L 2010, ch 457, § 2, eff Jan 1, 2011; L 2010, ch 536, § 4, eff Oct 31, 2010; L 2011, ch 219, §§ 11–13, 19–22, eff July 20, 2011; L 2011, ch 219, §§ 14–18, eff Jan 1, 2012; L 2011, ch 559, § 3, eff Jan 1, 2012; L 2011, ch 589, § 2, eff Oct 14, 2011; L 2011, ch 595, § 2, eff Nov 1, 2012; L 2011, ch 596, § 2, eff Nov 1, 2012; L 2011, ch 597, § 2, eff Jan 11, 2012; L 2011, ch 598, § 2, eff Jan 11, 2012; L 2012, ch 10, § 1, eff Jan 11, 2012; L 2012, ch 11, § 2, eff Jan 11, 2012; L 2012, ch 12, § 2, eff Jan 1, 2012; L 2012, ch 273, § 2, eff Oct 30, 2012; L 2012, ch 302, § 2, eff Aug 1, 2012; L 2013, ch 56, §§ 55-a, 64, 65 (Part D), eff March 28, 2013, deemed eff on and after Jan 1, 2013; L 2013, ch 56, §§ 39, 40-a, 47, 48, 49, 50, 54 (Part D), eff Jan 1, 2014; L 2013, ch 388, § 3, eff Jan 1, 2014; L 2014, ch 41, § 2, effective April 1, 2015; L 2014, ch 364, § 2, effective January 1, 2015; L 2014, ch 377, § 2, effective January 1, 2015; L 2014, ch 388, § 3, effective September 23, 2014; L 2014, ch 550, § 3, effective January 1, 2016; L 2015, ch 6, § 5, effective January 1, 2016; L 2015, ch 536, § 2, effective June 8, 2016; L 2016, ch 23, § 2, effective June 8, 2016; L 2016, ch 69, § 2 (Part B), effective January 1, 2017; L 2016, ch 71, § 2 (Part B), effective January 1, 2017; L 2016, ch 71, § 3 (Part C), effective July 22, 2016; L 2016, ch 74, §§ 4–6, effective June 27, 2016; L 2017, ch 414, § 2, effective January 28, 2018; L 2018, ch 57, § 5 (Part HH), effective April 12, 2018; L 2018, ch 57, §§ 4, 11 (Part

MM), effective April 12, 2018; L 2018, ch 335, § 3, effective November 5, 2018; L 2018, ch 469, § 2, effective January 1, 2019; L 2018, ch 476, § 229, effective December 28, 2018; L 2019, ch 25, § 2, effective January 1, 2020; L 2019, ch 57, § 1 (Part J, Subpart A), effective April 12, 2019; L 2019, ch 57, §§ 11–14, 16 (Part J, Subpart B)., effective January 1, 2020; L 2019, ch 57, § 1 (Part L), effective January 1, 2020; L 2019, ch 57, § 1 (Part M), effective January 1, 2020; L 2019, ch 57, §§ 11–21 (Part BB, Subpart A)., effective January 1, 2020; L 2019, ch 143, § 2, effective September 1, 2019; L 2019, ch 748, § 2, effective February 29, 2020; L 2020, ch 56, § 11 (Part AA), effective April 3, 2020; L 2020, ch 56, § 2 (Part DDD), effective April 3, 2020.

Editor's Notes This section formerly appeared, in part, as Ins §§ 162, 162-a as added by L 1939, ch 882; 1976, ch 843; amd, L 1941, ch 144; L 1949, ch 600; L 1951, ch 630; L 1958, chs 357, 944; L 1959, ch 583; L 1960, chs 660, 820; L 1961, chs 483, 763, L 1962, ch 475; L 1966, ch 624; L 1971, chs 860, 899; L 1972, ch 918; L 1973, ch 101; L 1975, chs 49, 647; L 1976, chs 928, 929, 955; L 1977, chs 166, 893, 894, 895; L 1979, ch 671; L 1980, ch 246; L 1981, chs 28, 438; L 1982, chs 509, 721, 772; L 1983, ch 595; L 1984, chs 245, 869, 990, 996.

Laws 1985, ch 369, §§ 18, 19, eff Jan 1, 1986, provides as follows:

§ 18. This act shall apply to a group policy issued outside the state to a trustee or trustees of a fund established or participated in by two or more employers not in the same industry, of the type described in paragraph four of subsection (b) of section four thousand two hundred sixteen or subparagraph (D) of paragraph one of subsection (c) of section four thousand two hundred thirty-five, with respect to an employer principally located within the state, when the coverage for such employer becomes effective under the policy on or after January first, nineteen hundred eighty-six. For employers principally located within the state covered under such a group policy on the effective date of this act, this act shall apply to all certificate holders of that employer on the anniversary date of the effective date of coverage of the employer under the policy occurring on or after January first, nineteen hundred eighty-seven.

§ 19. This act shall take effect January first, nineteen hundred eighty-six and shall be applicable to all policies and contracts issued or delivered on or after such date and to all certificates except as stated in section eighteen of this act, issued or delivered on or after such date, regardless of the effective date of the policies or contracts.

Laws 1987, ch 210, § 3, provides as follows:

§ 3. This act shall take effect on the thirtieth day after it shall have become a law and shall be applicable to all group policies and contracts issued or delivered on or after such effective date and, with respect to those group policies and contracts issued or delivered prior to such effective date, on the date such policies and contracts are renewed, modified, altered or amended.

Laws 1987, ch 306, § 6, eff Sept 1, 1987, provides as follows:

§ 6. This act shall take effect on the first day of September next succeeding the date on which it shall have become a law and shall apply to policies and contracts issued, renewed, modified, altered or amended on or after such date.

Laws 1987, ch 444, § 4, eff Jan 1, 1988, provides in part as follows:

§ 4. This act shall take effect on the first day of January next succeeding the date on which it shall have become a law and shall apply to policies and contracts issued, renewed, modified, altered or amended on or after such date. . . .

Laws 1988, ch 692, § 4, eff Jan 15, 1989, provides as follows:

§ 4. This act shall take effect on the fifteenth day of January next succeeding the date on which it shall have become a law and shall apply according to its terms to all policies and contracts issued or renewed on or after such date.

Laws 1989, ch 417, § 5, eff Jan 1, 1990, provides as follows:

§ 5. This act shall take effect on the first day of January next succeeding the date on which it shall have become a law and shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after such date.

Laws 1989, ch 689, § 11, eff July 22, 1989, provides as follows:

§ 11. This act shall take effect immediately; except that section 4600 and sections 4605 through 4619 of the public health law, as added by section one of this act, and sections three through ten of this act shall take effect January 1, 1990; and provided further that any regulations that are necessary to effectuate the purposes of this act may be promulgated in accordance with the provisions of this act prior to such date.

Laws 1990, ch 853, § 4, eff Jan 1, 1991, provides as follows:

§ 4. This act shall take effect on the first day of January next succeeding the date on which it shall have become a law and shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after such effective date.

Laws 1990, ch 897, § 4, eff Jan 1, 1991, provides as follows:

§ 4. This act shall take effect the first day of January next succeeding the date on which it shall have become a law and shall apply according to its terms to all policies and contracts issued or renewed on or after such date, provided, however, effective immediately the superintendent of insurance is authorized to promulgate regulations to implement the provisions of this act.

Laws 1991, ch 467, § 30, eff July 19, 1991, provides as follows:

§ 30. This act shall take effect immediately; provided, however, that no person who is receiving any benefit on such effective date by reason of his or her active duty in the armed forces of the United States during the period of the Korean conflict shall suffer any diminution of such benefit because of amendments made by this act; and provided further that sections one and two of this act shall take effect on August 1, 1991; and provided further that sections twenty-two through twenty-five of this act shall take effect on January 1, 1992 and shall apply to contracts, policies, and certificates of insurance renewed, issued, modified, altered, or amended on and after such date; sections twenty-seven and twenty-eight of this act shall take effect on the sixtieth day after they have become a law; and provided further that sections eighteen, nineteen, twenty and twenty-one of this act shall be deemed to have been in full force and effect on and after August 2, 1990.

Laws 1992, ch 501, §§ 18, 21, eff July 17, 1992, provide as follows:

§ 18. Notwithstanding any other provision of law, and specifically those sections of this act that may be applicable to labor organizations or insurers thereof, nothing contained in this act shall be applicable to organizations, associations or trusts maintained pursuant to one or more collective bargaining agreements, including, but not limited to, any trust which qualifies as a Taft Hartley Trust pursuant to Title 29 of the United States Code.

§ 21. This act shall take effect immediately; provided, however, that sections three, five, seven, eight, nine, ten and fifteen shall take effect January 1, 1993 and shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after such date; provided further, that sections two, four, thirteen, fourteen and seventeen shall take effect April 1, 1993, except that (i) these sections shall apply to new policies and contracts delivered and coverage effectuated in this state on or after such date, (ii) new policies and contracts delivered in this state and new coverage effectuated in this state on or after the date this act is signed into law, but on or before March 31, 1993, shall have initial rating periods which terminate March 31, 1993 so that these sections will apply to such policies, contracts and coverages as of April 1, 1993, (iii) these sections shall apply to existing policies and contracts delivered in this state and existing coverage effectuated in this state on or after April 1, 1992 but

before the date this act is signed into law at their next renewal rating period, (iv) existing policies and contracts delivered in this state and existing coverage effectuated in this state before April 1, 1992 shall have their next renewal rating period terminate March 31, 1993 so that these sections will apply to such policies, contracts and coverages as of April 1, 1993, and (v) in the case of multi-year rating periods which began prior to the effective date of this act, such sections shall apply as of the next renewal rating period, but if the next renewal rating period begins prior to April 1, 1993 that rating period shall terminate March 31, 1993 so that these sections will apply to such policies and contracts as of April 1, 1993 instead; and provided further, that the superintendent of insurance and the commissioner of health may take all actions necessary prior to the effective date of this act for the purposes of timely implementation of this act.

Laws 1992, ch 771, §§ **1, 5,** eff Jan 1, 1993, provide as follows:

Section 1. Legislative findings. The legislature finds and determines that there are thousands of cases of cervical cancer each year and that thousands of women die from the disease; that if detected early, cervical cancer is curable; that there is a general consensus among medical professionals that women who have reached eighteen years of age should have an annual pelvic examination and cervical cytology screening ("Pap smear") to detect the presence of cancerous and pre-cancerous cells; and that if women are not promptly diagnosed and treated, it may ultimately lead to prolonged hospitalization or death from cervical cancer.

§ 5. This act shall take effect on the first day of January next succeeding the date on which it shall have become a law and shall apply according to its terms to all policies and contracts issued or renewed on or after such date.

Laws 1993, ch 378, § **4,** eff Jan 1, 1994, provides as follows:

§ 4. This act shall take effect on the first day of January next succeeding the date on which it shall have become a law and shall apply according to its terms to all policies and contracts issued, renewed, modified, altered or amended on, or after, such date.

Laws 1993, ch 380, §§ **1, 5, 6,** eff Jan 1, 1994, provide as follows:

Section 1. Legislative intent and findings. The legislature recognizes that the following aminoacidopathies are rare hereditary genetic metabolic disorders: phenylketonuria (PKU), branched-chain ketonuria, galactosemia and homocystinuria. Lacking in these aminoacidopathies is the body's ability to process or metabolize amino acids. If left untreated or without proper therapeutic management, these disorders cause severe mental retardation and chronic physical disabilities. The only form of treatment is by restricting food intake in order to remove the problem amino acids (which are necessary in the diet) and then replenishing them in carefully controlled measured amounts of a nutritional food substitute. For purposes of this section, nutritional food substitute is defined as any specially formulated food substitute (formula) that is medically necessary to enable the body to process or metabolize needed amino acids, used for the therapeutic treatment of rare aminoacidopathies and administered under close medical supervision.

It is the finding of the legislature that in an attempt to encourage the development of new products, increase availability and reduce cost, formulas were removed from the Federal prescription list and reclassified as "medical foods". An unfortunate side effect has been the reluctance of many insurance companies to cover the cost of these formulas. In instances where coverage is provided, it is random and subject to inconsistent interpretation.

It is not the intent of this legislation to require insurance coverage for normal food products used in the dietary management of these disorders, but to provide for such coverage of formulas that are equivalent to a prescription drug, medically necessary for the therapeutic treatment of such rare hereditary genetic metabolic disorders and administered under the direction of a physician.

In recognition by the legislature that such formulas are medically necessary and critical to the well-being of individuals afflicted with rare hereditary genetic metabolic disorders, it shall be required that every health insurance policy issued in this state shall include such coverage.

§ 5. The superintendent of insurance is authorized to promulgate regulations to implement the provisions of this act.

§ 6. This act shall take effect on the first day of January next succeeding the date on which it shall have become a law and shall apply according to its terms to all policies and contracts issued or renewed on or after such date.

Laws 1993, ch 677, § **6,** eff Aug 4, 1993, provides as follows:

§ 6. This act shall take effect immediately, except that sections one and five of this act shall apply to all contracts, policies and certificates issued, renewed, modified, altered or amended on or after such date; and sections three and four of this act shall take effect September 1, 1993 and shall apply to all contracts, policies and certificates issued, renewed, modified, altered or amended on or after such date.

Laws 1993, ch 728, § **4,** eff April 1, 1994, provides as follows:

§ 4. This act shall take effect on the first day of April next succeeding the date on which it shall have become a law and shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after such date.

Laws 1996, ch 56, §§ **1 and 8,** eff Jan 1, 1997, provide as follows:

Section 1. Legislative findings and intent. The legislature finds that certain health insurance carriers, health maintenance organizations, health plans, and hospitals have been restricting maternity coverage and care with respect to the length of hospital stay following delivery in ways that jeopardize the life and health of mothers and newborns and violate reasonable professional standards. The provisions of this act are necessary to provide a reasonable and uniform standard of coverage and care to protect the public health.

The provisions of this act relating to home visits are intended to insure that in those instances where a mother chooses to leave the hospital earlier than the time periods specified in the act, she and the newborn will still receive the full scope of appropriate professional maternity care.

The intent of this act is to require maternity inpatient care providers to offer care, and third-party payers to provide coverage for care, as set out in this act. This act shall not be construed (i) to limit a mother's choice of care for herself and her newborn, (ii) to permit the mother's maternity care coverage to be affected by her choice of care, or (iii) to limit a provider's ability to make reasonable arrangements for care consistent with this act.

§ 8. This act shall take effect January 1, 1997 and shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after such effective date; provided, however, that any regulations necessary for the implementation of this act on its effective date shall be promulgated on or before such effective date.

Laws 1996, ch 705, § **21,** eff Oct 9, 1996, provides as follows:

§ 21. This act shall take effect immediately; provided, however that:

1. Sections three, four, twelve and fourteen of this act, sections 4801 and 4803 of the insurance law, as added by section fifteen of this act, and section twenty of this act shall take effect January 1, 1997.

2. Sections one, two, six, seven, eight, nine, ten, eleven, and thirteen of this act, sections 4802 and 4804 of the insurance law, as added by section fifteen of this act, and sections sixteen, seventeen, eighteen, and nineteen of this act shall take effect April 1, 1997, and shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after such effective date.

Laws 1997, ch 20, § **6,** eff Jan 1, 1998, provides as follows:

§ 6. This act shall take effect January 1, 1998, and sections one through three of this act shall apply to all policies and

contracts issued, renewed, modified, altered or amended on or after such date.

Laws 1997, ch 21, § 4, eff Jan 1, 1998, provides as follows:

§ 4. This act shall take effect January 1, 1998, and sections one through three of this act shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after such date.

Laws 1997, ch 177, § 7, eff Dec 25, 1997, provides as follows:

§ 7. This act shall take effect on the one hundred eightieth day after it shall have become a law, and shall apply to all policies and contracts issued, renewed, modified, altered, or amended on or after such date.

Laws 1997, ch 426, §§ 1 and 7, eff Jan 1, 1998, provide as follows:

Section 1. Legislative intent. The legislature recognizes that multiple health professions are trained and licensed to diagnose and treat the same or similar conditions through the use of modalities, therapies, services and philosophies that vary from profession to profession. It is the specific intent of this legislature to assure that health insurance policies, plans and contracts that provide coverage for the diagnosis and treatment of conditions, complaints, ailments, disorders or injuries by any health care profession, that may be diagnosed and treated by a doctor of chiropractic, must provide access to and equivalent coverage for the diagnosis and treatment of those conditions, complaints, ailments, disorders or injuries by a duly licensed doctor of chiropractic, within the lawful scope of chiropractic practice even if different terminology, philosophy, services, treatments or modalities are used by the various health professions; and such equivalent coverage shall not be abridged by any regulation heretofore promulgated or to be promulgated.

§ 7. This act shall take effect January 1, 1998 and shall apply to policies and contracts issued, renewed, modified, altered or amended on or after such date; provided, however, that subparagraph (B) of paragraph 21 of subsection (i) of section 3216, subparagraph (B) of paragraph 11 of subsection (k) of section 3221 and of paragraph (2) of subsection (y) of section 4303 of the insurance law, as added by sections two, three and four of this act shall expire and be deemed repealed on December 31, 1999; and upon such date the provisions of subparagraph (C) of paragraph 21 of subsection (i) of section 3216, subparagraph (C) of paragraph 11 of subsection (k) of section 3221 and of paragraph (3) of subsection (y) of section 4303 of the insurance law, as added by sections two, three and four of this act, shall take effect.

Laws 1997, ch 659, §§ 1 and 2, eff Sept 24, 1997, provide as follows:

Section 1. Legislative purpose. The purpose of this act is to facilitate the creation of the necessary components for the development of a broader and more integrated continuum of long term care, financed by a range of private, public and public/private options.

§ 2. This act may be cited as the "Long Term Care Integration and Finance Act of 1997".

§ 2. This act may be cited as the "Long Term Care Integration and Finance Act of 1997".

Laws 1997, ch 661, § 23, eff Sept 24, 1997, provide as follows:

§ 23. This act shall take effect immediately and shall be deemed to have been in full force and effect on and after July 1, 1997 and sections two through nine, eleven, thirteen through twenty, and twenty-two of this act shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after such date.

Laws 1998, ch 495, § 4, eff July 29, 1998, provides as follows:

§ 4. This act shall take effect immediately and shall apply to all policies and contracts issued, renewed, altered or modified on and after such date.

Laws 1998, ch 586, §§ 42, 43 and 45 subs 1(a), (b), 2 and 3, eff Aug 5, 1998, provides as follows:

§ 42. Nothing in this act shall bar, limit, impair, diminish or affect in any way any rights or remedies in any judicial or other forum pursuant to state or federal law of any enrollee, whether or not eligible to elect external appeal under this act, for coverage of a health service, including but not limited to an experimental or investigational service, a clinical trial treatment, or provision of a pharmaceutical product pursuant to prescription for a use other than those uses for which such pharmaceutical product has been approved for marketing by the federal Food and Drug Administration. No enrollee may be required to pursue or exhaust external appeal prior to seeking judicial relief.

§ 43. The provisions of this act shall not apply to claims under the workers' compensation law nor shall the provisions of this act be construed to alter, limit, modify, or repeal any provision of such law.

§ 45. This act shall take effect immediately, provided:

1. Sections one through forty-one-e of this act shall take effect July 1, 1999; provided that:

(a) the commissioner of health and the superintendent of insurance may promulgate regulations prior to such date;.

(b) a standard or expedited appeal in progress on the effective date of this act shall be subject to the provisions of law in effect when such an appeal was initiated, provided that any final adverse determination pursuant to such an appeal made after the effective date of this act may be externally appealed pursuant to the provisions of this act;.

2. Sections thirty-nine through forty-one-a of this act shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after such date; and.

3. Notwithstanding any contrary provisions of sections 3216, 3221, 3231, 4304, 4305 and 4317 of the insurance law, or of any later amendments or success or provision or regulations or rules that implement said sections, an insurer, company, organization or other entity subject to article forty-nine of the public health law or article forty-nine of the insurance law may elect to unilaterally modify the coverage for a policy or contract of hospital, surgical or medical expense insurance, effective April 1, 2000, to comply with the requirements of sections thirty-nine through forty-one-a of this act without regard to the time of coverage renewal and without providing for the termination, non-renewal or discontinuance of said coverage.

Laws 1999, ch 558, §§ 55–57, eff Oct 5, 1999, provide as follows:

§ 55. Existing rules, policies, and regulations for the reimbursement of alcohol, substance abuse, or chemical dependence costs under the medical assistance program shall remain unchanged until an affirmative action is taken by the department of health, in consultation with the office of alcoholism and substance abuse services, and approved by the division of budget.

§ 56. Continuity of rules, regulations, and other acts. All rules, regulations, acts, orders, determinations, licenses, operating certificates, and decisions of the office of alcoholism and substance abuse services in force at the time of the effective date of this act shall continue in force and effect as rules, regulations, orders, determinations, licenses, operating certificates, and decisions of the office of alcoholism and substance abuse services until duly modified, abrogated, or repealed by such office or the commissioner of alcoholism and substance abuse services.

§ 57. This act shall take effect immediately; provided, however, that nothing contained in this act shall be deemed to affect the application, qualification, expiration, reversion or repeal of any provision of law amended by any section of this act and the provisions of this act shall be applied or qualified or shall expire or revert or be deemed repealed in the same manner, to the same extent and on the same date as the case may be as otherwise provided by law.

Laws 2000, ch 557, § 5, eff March 1, 2000, provides as follows:

§ 5. This act shall take effect 120 days after it shall have become a law and shall apply to policies or contracts issued, renewed, modified, altered, or amended on or after such date (Amd, L 2003, ch 170, § 1, eff June 22, 2003, deemed eff on and after Dec 31, 2003.).

Laws 2000, ch 593, § 8, eff Sept 1, 2001, provides as follows:

§ 8. This act shall take effect on the first day of September next succeeding the date on which it shall have become a law and shall apply to all policies and contracts issued, renewed, modified, altered, or amended on or after such date.

Laws 2001, ch 506, § 4, eff Jan 1, 2002, provides as follows:

§ 4. This act shall take effect January 1, 2002 and shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after such date.

Laws 2002, ch 82, § 5 (Part K), eff Sept 1, 2002, provides as follows:

§ 5. This act shall take effect September 1, 2002 and shall apply to all policies and contracts issued, renewed or modified on or after such date; provided, however, effective immediately the superintendent of insurance is authorized and directed to promulgate any regulations necessary for the implementation of the provisions of this act.

Laws 2002, ch 420, § 9, eff Sept 1, 2004, provides as follows:

§ 9. a. Nothing in this act shall prohibit or limit the activities or services on the part of any person in the employ of a program or service operated, regulated, funded, or approved by the department of mental hygiene, the office of children and family services, the office of temporary and disability assistance, the department of corrections and community supervision, the state office for the aging, the department of health, or a local governmental unit as that term is defined in article 41 of the mental hygiene law or a social services district as defined in section 61 of the social services law, provided, however, this section shall not authorize the use of any title authorized pursuant to article 154 of the education law, except that this section shall be deemed repealed one year from the date that the regulations issued in accordance with section six of part Y of the chapter of the laws of 2018 which amended this subdivision appear in the state register, or the date such regulations are adopted, whichever is later; provided however that the state education department shall notify the legislative bill drafting commission upon the occurrence of the date such regulations appear in the state register and the date of their adoption in order that the commission may maintain an accurate and timely effective database of the official text of the laws of the state of New York in furtherance of effectuating the provisions of section 44 of the legislative law and section 70-b of the public officers law (Amd, L 2016, ch 59, § 1 (Part J), eff April 13, 2016; L 2018, ch 57, § 8 (Part Y), eff April 12, 2018).

Laws 2002, ch 420, § 11, eff Sept 1, 2004, provides as follows:

§ 11. This act shall take effect September 1, 2004; and provided, further, however, that the commissioner of education and the board of regents are authorized, prior to such effective date, to promulgate such rules or regulations as may be necessary for the timely implementation of this act.

Laws 2002, ch 554, § 18, eff Jan 1, 2003, provides as follows:

§ 18. This act shall take effect on the first day of January next succeeding the date on which it shall have become a law and shall apply to all policies issued, renewed, modified or altered on or after such date.

Laws 2003, ch 170, § 1, eff July 22, 2003, amended L 2000, ch 557, § 5, so as to delete and expiration provision of Dec 31, 2003, applicable to amendments of subdivision (k), paragraph (1), subparagraphs (C) and (D).

Laws 2003, ch 338, § 5, eff Jan 1, 2004, provides as follows:

§ 5. This act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after such date.

Laws 2006, ch 557, § 4, eff Jan 1, 2007, provides as follows:

§ 4. This act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to all policies or contracts issued, renewed, modified, altered or amended on and after such effective date.

Laws 2006, ch 748, §§ 1, 2, 6 and 8, eff Jan 1, 2007, provide as follows:

Section 1. Legislative finding and intent. The legislature hereby declares that health insurance policies and health maintenance organization contracts have not provided comparable coverage for adults and children with biologically based mental illness or serious emotional disturbance disorders affecting children under the same terms and conditions as provided for medical treatment for physical illnesses. Although federal law has prohibited the imposition of lower annual and lifetime dollar limits by certain plans on mental health coverage, it is the intent of this legislation to strengthen and enhance those protections, and to ensure that mental health coverage is provided by insurers and health maintenance organizations, and is provided on terms comparable to other health care and medical services. Nothing in this act is intended to limit or restrict the right of health maintenance organizations and health insurers to require that all services covered by them satisfy reasonable and appropriate utilization review requirements, in accordance with their contracts, and applicable laws and regulations, provided that such utilization review requirements are applied in a consistent fashion to all services covered by such contracts.

§ 2. Short title. This act shall be known and may be cited as "Timothy's law".

§ 6. The superintendent of insurance shall monitor the implementation of the coverage required pursuant to subparagraph (A) of paragraph 5 of subsection (l) of section 3221, paragraph (1) of subsection (g) of section 4303 and paragraph 1 of subsection (h) of section 4303 of the insurance law, and take such action as may be necessary, to ensure that insurers' contracts or policies do not contain an unreasonable definition of mental, nervous or other emotional disorders or ailments in their contracts or policies. In determining whether such definition may be unreasonable, the superintendent of insurance shall ensure that any exclusions and limitations on covered benefits are consistent with benefits provided to public officers and employees pursuant to article 11 of the civil service law.

§ 8. This act shall take effect on the first of January next succeeding the date on which it shall have become a law; and the provisions of this act shall apply to policies and contracts issued, renewed, modified, altered or amended on or after such effective date (Amd, L 2009, ch 181, § 1, eff July 11, 2009.).

Laws 2007, ch 502, § 4, eff Aug 1, 2007, deemed eff on and after Jan 1, 2007, provides as follows:

§ 4. This act shall take effect immediately and shall be deemed to have been in full force and effect on and after January 1, 2007, and shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after such date; provided, however, that the notice of availability of coverage requirements provided in sections one, two and three of this act and the amendments relating to school blanket contracts made by sections two and three of this act shall take effect immediately and shall apply to all contracts issued, renewed, modified, altered or amended on or after such effective date; and provided further, that the amendments to paragraph 5 of subsection (l) of section 3221 and subsections (g) and (h) of section 4303 of the insurance law made by sections one, two and three of this act shall not affect the expiration of such provisions and shall expire therewith.

Laws 2009, ch 181, § 1, eff July 11, 2009, amended L 2008, ch 748, § 8, so as to delete an expiration provision of Dec 31, 2009, applicable to amendments of subdivison (l), paragraph 5, subparagraph (A).

Laws 2009, ch 236, § 4, eff July 1, 2009, provides as follows:

§ 4. This act shall take effect on July 1, 2009 and shall apply to policies and contracts issued, renewed, modified, altered or amended between July 1, 2009 and October 31, 2009, and shall apply to all policies and contracts on and

after November 1, 2009 (Amd, L 2009, ch 498, § 4, eff Nov 19, 2009, deemed eff on and after July 1, 2009.).

Laws 2009, ch 240, § 8, eff Sept 1, 2009, provides as follows:

§ 8. This act shall take effect September 1, 2009 and shall apply to contracts issued, renewed, modified, altered or amended on or after such date.

Laws 2009, ch 498, § 5, sub (a), eff Nov 19, 2009, expires and repealed July 1, 2010, priovides as follows:

§ 5. This act shall take effect immediately; provided, that:

(a) sections one, two and three of this act shall expire and be deemed repealed July 1, 2010; and

Laws 2010, ch 130, § 16, eff June 18, 2010, deemed eff on and after June 1, 2010, provides as follows:

§ 16. [Formerly § 15, as renumbered § 16, L 2010, ch 132, § 5] This act shall take effect immediately; provided that sections thirteen, fourteen and fifteen of this act shall take effect immediately and shall be deemed to have been in full force and effect on and after June 1, 2010 and such sections shall be deemed repealed one year from the date that the regulations issued in accordance with section six of part Y of the chapter of the laws of 2018 which amended this section appear in the state register, or the date such regulations are adopted, whichever is later; provided however that the state education department shall notify the legislative bill drafting commission upon the occurrence of the date such regulations appear in the state register and the date of their adoption in order that the commission may maintain an accurate and timely effective database of the official text of the laws of the state of New York in furtherance of effectuating the provisions of section 44 of the legislative law and section 70-b of the public officers law; provided further that the amendments to section 9 of chapter 420 of the laws of 2002 amending the education law relating to the profession of social work made by section thirteen of this act shall repeal on the same date as such section repeals; provided further that the amendments to section 17-a of chapter 676 of the laws of 2002 amending the education law relating to the practice of psychology made by section fourteen of this act shall repeal on the same date as such section repeals (Amd, L 2010, ch 132, § 6, eff June 18, 2010, deemed eff on and after June 1, 2010, L 2013, ch 57, § 3 (Part AA), eff March 29, 2013, deemed eff on and after April 1, 2013; L 2016, ch 59, § 3 (Part J), eff April 13, 2016; L 2018, ch 57, § 10, eff April 12, 2018).

Laws 2010, ch 357, § 5, eff Jan 1, 2011, provides as follows:

§ 5. This act shall take effect on the first of January next succeeding the date on which it shall have become a law, and shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after such effective date.

Laws 2010, ch 398, § 1, eff Jan 1, 2011, provides as follows:

Section 1. Short title. This act shall be known and may be cited as "Ian's law".

Laws 2010, ch 457, § 5, eff Jan 1, 2011, provides as follows:

§ 5. This act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to insurance policies and contracts issued, renewed, modified or altered on or after such effective date.

Laws 2010, ch 536, § 1, eff Oct 31, 2010, provides as follows:

Section 1. Legislative findings. The cost-sharing, deductibles and co-insurance obligations for certain drugs are becoming cost prohibitive for persons trying to overcome serious and often life-threatening diseases and conditions such as cancer, multiple sclerosis, rheumatoid arthritis, hepatitis C, hemophilia and psoriasis. These drugs are typically new, produced in lesser quantities than other drugs, and not available as less expensive brand name or generic prescription drugs. Some health insurance plans and policies in other states as well as some self-insured plans in New York have established unique categories or specialty tiers for these drugs, sometimes referred to as Tier IV or Tier V. Patients under these plans are required to pay a percentage of the cost of these high-priced drugs, rather than the traditional co-payment amounts for generic, preferred brand, and non-preferred brand prescription drugs, often covered by Tier I, Tier II, and Tier III plans and policies, respectively. As a result, patients covered under plans with specialty tiers must pay thousands of dollars in out-of-pocket costs for drugs critical for their treatment.

It is in the public interest to help patients to afford necessary prescription drugs by prohibiting cost-sharing, deductibles and co-insurance obligations by patients that exceed payments for non-preferred brand prescription drugs or the equivalent thereof. It is not the intent of this legislation to preclude plans or policies from categorizing drugs used in the treatment of these common diseases as brand name prescription drugs or generic prescription drug equivalents.

The extraordinary disparity in cost-sharing, deductible and co-insurance burdens imposed on patients whose life and health depend on these drugs places serious and unjustified hardships on individuals based on their disease or disability.

This legislation is intended to provide patients more affordable access to prescription drugs essential for their treatment of cancer, multiple sclerosis, rheumatoid arthritis, hepatitis C, hemophilia, psoriasis, and other diseases (Amd, L 2010, ch 565, § 1, eff Oct 31, 2010.).

Laws 2011, ch 219, § 70, subs 1 and 2, eff July 20, 2011, provides as follows:

§ 70. This act shall take effect immediately:

1. provided, that for policies renewed on or after such date but before September 23, 2011, this act shall take effect upon the renewal date;

2. provided, however, that sections eight, nine, ten, fourteen, fifteen, sixteen, seventeen, eighteen, twenty-three, twenty-six, twenty-seven, twenty-eight, twenty-nine, thirty, forty, forty-one, forty-two and forty-three of this act shall, with respect to blanket policies of hospital, medical, surgical or prescription drug expense insurance covering students pursuant to subparagraph (C) of paragraph 3 of subsection (a) of section 4237 of the insurance law, take effect January 1, 2012 and apply to policies issued or renewed on and after such date; and

Laws 2011, ch 559, §§ 1 and 5, eff Jan 1, 2012, provide as follows:

Section 1. Legislative findings. The legislature finds that advances in medical research have led to significant new developments of various medical treatments. These treatments offer patients a wide range of new choices to combat very serious diseases. The area of cancer treatment has been one of the fields that has seen these significant new medical advancements. In recent years, oral chemotherapy treatments have been developed that provide viable alternatives to traditional intravenous cancer treatments for patients. This oral chemotherapy treatment offers the treating physician and the patient a choice in relation to treatment options. However, this choice is sometimes limited as the oral chemotherapy treatments are, in most cases, covered under the prescription drug benefit of an insurance plan rather than under the major medical insurance benefit of an insurance plan. This discrepancy in coverage can limit a patient's ability to choose the oral chemotherapy treatment because of the cost associated with the disparate treatment.

§ 5. This act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after such effective date.

Laws 2011, ch 589, § 4, eff Oct 14, 2011, provides as follows:

§ 4. This act shall take effect immediately and shall apply to policies issued, reissued, renewed, modified or amended on and after such date.

Laws 2011, ch 595, § 5, eff Nov 1, 2012, provides as follows:

§ 5. This act shall take effect one year after it shall have become a law and shall apply to all policies and contracts

issued, renewed, modified, altered or amended on or after such date (Amd, L 2011, ch 596, § 4, eff Nov 1, 2012.).

Laws 2011, ch 597, § **5,** eff Jan 11, 2012, provides as follows:

§ 5. This act shall take effect on the thirtieth day after it shall have become a law and shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after such effective date.

Laws 2011, ch 598, § **5,** eff Jan 11, 2012, provides as follows:

§ 5. This act shall take effect on the thirtieth day after it shall have become a law and shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after such effective date.

Laws 2012, ch 273, § **4,** eff Oct 30, 2012, provides as follows:

§ 4. This act shall take effect on the ninetieth day after it shall have become a law and shall apply to policies and contracts issued, renewed, modified, altered or amended on or after such date.

Laws 2012, ch 302, § **4,** eff Aug 1, 2012, provides as follows:

§ 4. This act shall take effect immediately and shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after such date.

Laws 2013, ch 56, § **76, subs a, b, k–o (Part D),** eff March 28, 2013, deemed eff on and after Jan 1, 2013, provides as follows:

§ 76. This act shall take effect immediately and shall be deemed to have been in full force and effect on and after January 1, 2013; provided that:

a. sections seventeen, thirty-eight, thirty-nine, forty, forty-a, forty-one, forty-six-a, forty-six-b forty-seven, forty-eight, forty-nine, fifty, fifty-one, fifty-two, fifty-three, fifty-four and fifty-five of this act shall take effect January 1, 2014, and shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after such date.

b. sections forty-two, forty-three, forty-three-a, forty-four, forty-five and forty-six of this act shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after October 1, 2013;

k. any rules or regulations necessary to implement the provisions of this act may be promulgated and any procedures, forms, or instructions necessary for implementation may be adopted and issued on or after the date this act shall have become a law;

l. this act shall not be construed to alter, change, affect, impair or defeat any rights, obligations, duties or interests accrued, incurred or conferred prior to the effective date of this act;

m. the commissioner of health and the superintendent of financial services and any appropriate council may take any steps necessary to implement this act prior to its effective date;

n. notwithstanding any inconsistent provision of the state administrative procedure act or any other provision of law, rule or regulation, the commissioner of health and the superintendent of financial services and any appropriate council is authorized to adopt or amend or promulgate on an emergency basis any regulation he or she or such council determines necessary to implement any provision of this act on its effective date;

o. the provisions of this act shall become effective notwithstanding the failure of the commissioner of health or the superintendent of financial services or any council to adopt or amend or promulgate regulations implementing this act; and

Laws 2013, ch 388, §§ **1 and 6,** eff Jan 1, 2014, provide as follows:

Section 1. Short title. This act shall be known and may be cited as "Hannah's law".

§ 6. This act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to all policies and contracts issued, renewed, modified, altered, or amended on or after such date.

Laws 2014, ch 41, §§ **11 and 12**, eff June 23, 2014, provide:

§ 11. 1. Within thirty days of the effective date of this act, the commissioner of the office of alcoholism and substance abuse services, superintendent of the department of financial services, and the commissioner of health, shall jointly convene a workgroup to study and make recommendations on improving access to and availability of substance use disorder treatment services in the state. The workgroup shall be co-chaired by such commissioners and superintendent, and shall also include, but not be limited to, representatives of health care providers, insurers, additional professionals, individuals and families who have been affected by addiction. The workgroup shall include, but not be 3 limited to, a review of the following:

a. Identifying barriers to obtaining necessary substance use disorder treatment services for across the state;

b. Recommendations for increasing access to and availability of substance use disorder treatment services in the state, including underserved areas of the state;

c. Identifying best clinical practices for substance use disorder treatment services;

d. A review of current insurance coverage requirements and recommendations for improving insurance coverage for substance use disorder treatment;

e. Recommendations for improving state agency communication and collaboration relating to substance use disorder treatment services in the state;

f. Resources for affected individuals and families who are having difficulties obtaining necessary substance use disorder treatment services; and

g. Methods for developing quality standards to measure the performance of substance use disorder treatment facilities in the state.

2. The workgroup shall submit a report of its findings and recommendations to the governor, the temporary president of the senate, the speaker of the assembly, the chairs of the senate and assembly insurance committees, and the chairs of the senate and assembly health committees no later than December 31, 2015.

§ 12. This act shall take effect immediately; provided, however that sections one, two, three, three-a, four, five, six, six-a, seven, eight and nine of this act shall take effect April 1, 2015 and shall apply to policies and contracts issued, renewed, modified, altered or amended on and after such date.

Laws 2014, ch 364, § **4**, eff Jan 1, 2015, provides:

§ 4. This act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after such effective date.

Laws 2014, ch 550, § **7**, eff Jan 1, 2016, provides:

§ 7. This act shall take effect January 1, 2016. (Amd, L 2015, ch 6, § 11, eff Jan 1, 2016.)

Laws 2015, ch 6, § **12**, eff Jan 1, 2016, provides:

§ 12. This act shall take effect immediately, provided that sections one through ten of this act shall take effect on the same date and in the same manner as chapter 550 of the laws of 2014, takes effect, provided, however, that sections four, eight and nine of this act shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after January 1, 2016, and provided further that, effective immediately, the commissioner of health is authorized to issue, amend or repeal any regulations as necessary to implement this act on or before such effective date.

Laws 2015, ch 536, § **6**, eff June 8, 2016, provides:

§ 6. This act shall take effect on the one hundred eightieth day after it shall have become a law and shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after such effective date.

Laws 2016, ch 69, 6 (Part B), eff June 22, 2016, provides:

§ 6. This act shall take effect immediately; provided, sections one, two, and three of this act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to policies and contracts

issued, renewed, modified, altered or amended on and after such date; and provided further that the amendments to section 364-j of the social services law made by section four of this act shall not affect the repeal of such section and shall be deemed to be repealed therewith.

Laws 2016, ch 71, § 4 (Part B), eff January 1, 2017, provides:

§ 4. This act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to policies and contracts issued, renewed, modified, altered or amended on and after such date.

Laws 2016, ch 71, § 6 (Part C), eff July 22, 2016, provides:

§ 6. This act shall take effect on the thirtieth day after it shall have become a law; provided, that the amendments to paragraph (c) of subdivision 6 of section 367-a of the social services law made by section five of this act shall not affect the repeal of such paragraph and shall expire and be deemed repealed therewith.

Laws 2016, ch 74, § 12, eff June 27, 2016, provides:

§ 12. This act shall take effect immediately and shall apply to policies and contracts issued, renewed, modified or amended on or after January 1, 2017; provided, however, that section eleven of this act shall take effect on the ninetieth day after it shall have become a law; and provided, further, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date is authorized and directed to be made and completed on or before such effective date.

Laws 2017, ch 414, § 5, eff January 28, 2018, provides:

§ 5. This act shall take effect on the sixtieth day after it shall have become a law and shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after such date.

Laws 2018, ch 57, § 7 (Part HH), eff April 12, 2018, provides:

§ 7. This act shall take effect immediately, and shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after the first of January next succeeding such effective date.

Laws 2018, ch 335, § 5, eff November 5, 2019, provides:

§ 5. This act shall take effect immediately, and sections two, three and four of this act shall apply to all policies and contracts issued, renewed, modified or amended on or after January 1, 2019.

Laws 2018, ch 469, § 4, eff January 1, 2019, provides:

§ 4. This act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to all policies and contracts issued, renewed, modified, altered, or amended on or after such date.

Laws 2019, ch 57, § 11 (Part J, Subpart A), eff April 12, 2019, provide:

§ 11. This act shall take effect immediately, provided that:

(1) sections one, three, four, six, eight and nine of this act shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after January 1, 2020; and

(2) sections two and seven of this act shall take effect on the same date as the reversion of paragraph 1 of subsection (g) of section 3231 and paragraph 1 of subsection (d) of section 4317 of the insurance law, as provided in section 5 of chapter 588 of the laws of 2015, as amended.

Laws 2019, ch 57, § 42 (Part J, Subpart B), eff January 1, 2020, provides:

§ 42. This act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after such date.

Laws 2019, ch 57, § 4 (Part J), eff April 12, 2019, provides:

§ 4. Legislative intent. It is hereby declared to be the intent of the legislature in enacting this act, that the laws of this state provide consumer and market protections at least as robust as those under the federal Patient Protection and Affordable Care Act, public law 111-148, as that law existed and was interpreted on January 19, 2017.

Laws 2019, ch 57, § 4 (Part L), eff January 1, 2020, provides:

§ 4. This act shall take effect January 1, 2020 and shall apply to policies and contracts issued, renewed, modified, altered or amended on or after such date.

Laws 2019, ch 57, § 4 (Part M), eff January 1, 2020, provides:

§ 4. This act shall take effect on the same date and in the same manner as a chapter of the laws of 2019, amending the insurance law and the social services law relating to requiring health insurance policies to include coverage of all FDA-approved contraceptive drugs, devices, and products, as well as voluntary sterilization procedures, contraceptive education and counseling, and related follow up services and prohibiting a health insurance policy from imposing any cost-sharing requirements or other restrictions or delays with respect to this coverage, as proposed in legislative bills numbers S. 659-a and A. 585-a, takes effect.

Laws 2019, ch 57, § 44 (Part BB, Subpart A), eff January 1, 2020, provides:

§ 44. This act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to all policies and contracts issued, renewed, modified, altered or amended on or after such date; provided, however, notwithstanding any provision of law to the contrary, nothing in this act shall limit the rights accruing to employees pursuant to a collective bargaining agreement with any state or local government employer for the unexpired term of such agreement where such agreement is in effect on the effective date of this act and so long as such agreement remains in effect thereafter or the eligibility of any member of an employee organization to join a health insurance plan open to him or her pursuant to such a collectively negotiated agreement.

Laws 2019, ch 143, § 1, eff September 1, 2019, provides:

Section 1. This act shall be known and may be cited as "Shannon's Law".

Laws 2019, ch 143, § 4, eff September 1, 2019, provides:

§ 4. This act shall take effect on the thirtieth day after it shall have become a law, and shall apply to policies and contracts issued, renewed, modified, altered or amended on or after such effective date.

Laws 2019, ch 748, § 4, eff February 29, 2020, provides:

§ 4. This act shall take effect on the sixtieth day after it shall have become a law.

Laws 2020, ch 56, § 15 (Part AA), eff April 3, 2020, provides:

§ 15. This act shall take effect immediately and shall be deemed to have been in full force and effect on and after April 1, 2020.

Laws 2020, ch 56, § 4 (Part DDD), eff April 3, 2020, provides:

§ 4. This act shall take effect immediately and shall apply to any policy or contract issued or renewed on or after January 1, 2021.

Amendment Notes The 2014 amendment by ch 41, § 2, rewrote (l)(6) and (l)(7).

The 2014 amendment by ch 364, § 2, added (k)(19) [first setout].

The 2014 amendment by ch 377, § 2, in (k)(19) [first setout], in the first sentence, substituted "policy delivered or issued for delivery" for "policy issued or issued for delivery," substituted "if prescribed by a physician" for "if recommended or prescribed by a physician," and deleted "flanges, collection bags, clamps, irrigation devices, sanitizing products, ostomy rings and ostomy belts" at the end; deleted the former second sentence, which read: "In addition, the commissioner of the department of health shall provide and periodically update by rule or regulation a list of additional ostomy equipment and related supplies such as are medically necessary for the treatment of ostomies for which there shall also be coverage"; and added the last two sentences.

The 2014 amendment by ch 388, § 3, added the second sentence of (g).

The 2014 amendment by ch 550, § 3, added (k)(19) [second setout].

2013. Chapter 56, § 39 (Part D) amended:

Sub (l), par (17), subpar (B) by deleting at fig 1 "which", at fig 2 "forty-five thousand dollars", at fig 3 "and such maximum annual benefit will increase by the amount calculated from the average ten year rolling average increase of the medical component of the consumer price index" and adding the matter in italics.

2013. Chapter 56, § 40-a (Part D) amended:

Sub (d), par (1) by deleting at fig 1 "he", and adding the matter in italics.

2013. Chapter 56, § 47 (Part D) amended:

By repealing sub (e), pars (4), (6), (9) and (10).

By redesignating sub (e), pars (5), (7), (8), (11) and (12) as sub (e), pars (4)–(8), respectively.

Sub (e), par (1) by deleting at fig 1 "(I)", at fig 2 "(II)", at fig 3 "for at least three months", at fig 4 "him", at fig 5 "forty-five", at fig 5 "class of risk to which the person belongs, the age of such person, and the", at fig 7 a comma, at fig 8 ", (h) or (i) hereof", at fig 9 "whichever is applicable and," and adding the matter in italics.

2013. Chapter 56, § 48 (Part D) amended:

Sub (e), par (3) by deleting at fig 1 "The converted policy need not provide benefits in excess of those provided for such persons under the group policy from which conversion is made and may contain any exclusion or benefit limitation contained in the group policy or customarily used in individual policies."

2013. Chapter 56, § 49 (Part D) amended:

By repealing former subs (f) and (g).

By adding subs (f) and (g).

2013. Chapter 56, § 50 (Part D) amended:

Sub (l), par (4), subpar (D) by deleting at figs 1 and 3 "which", at fig 2 "must", at fig 4 ", or", at fig 5 "(H)" and adding the matter in italics.

By designating part of sub (l), par (4), subpar (D) as sub (l), par (4), subpar (E).

Sub (l), par (4), subpar (E) by deleting at fig 1 "this" and adding the matter in italics.

2013. Chapter 56, § 54 (Part D) amended:

By repealing former subs (h) and (i).

By adding sub (h).

By adding sub (i).

2013. Chapter 56, § 55-a (Part D) amended:

By adding sub (s).

2013. Chapter 56, § 64 (Part D) amended:

Sub (p), par (2), subpar (D) by adding the matter in italics.

2013. Chapter 56, § 65 (Part D) amended:

By adding sub (p), par (7).

2013. Chapter 388 § 3 amended:

Sub (k), par (11) by adding the matter in italics.

2012. Chapter 10, § 2 amended:

Sub (k), par (6), subpar (D) by deleting at fig 1 "that is not a mail order pharmacy", at fig 2 "Such", at fig 3 "additional", at fig 4 "does not elect", at fig 5 "mail order" and adding the matter in italics.

2012. Chapter 11, § 2 amended:

Sub (l), par (18) by deleting at fig 1 "which", at fig 2 "participant", at fig 3 "mail order", at fig 4 "his or her", at fig 5 "any mail order pharmacy or", at fig 6 "if the network participating non-mail order retail pharmacy offers to accept a price that is comparable to that of the mail order pharmacy", at fig 7 "Any policy which provides coverage for prescription drugs", at fig 8 "designated" and adding the matter in italics.

2012. Chapter 12, § 2 amended:

Sub (l), par (12-a), subpar (A) by deleting at fig 1 "a", at fig 2 "medication", at fig 3 "and shall apply the lower cost sharing of either (i) anticancer medication under the prescription drug benefit or (ii)", at fig 4 "For the purposes of this section" cost sharing "shall include co-pays, coinsurance, and deductibles as deemed appropriate by the superintendent." and adding the matter in italics.

2012. Chapter 273, § 2 amended:

By adding sub (k), par (18).

2012. Chapter 302, § 2 amended:

Sub (k), par (10), subpar (A), opening par by adding the matter in italics.

Sub (k), par (10), subpar (A), cl (i) by adding the matter in italics.

2011. Chapter 219, § 13 amended:

By redesignating part of sub (k), par (4), subpar (A) as sub (K), par (4), subpar (A), opening par and sub (K), par (4), subpar (A), opening par (4), subpar (A), opening par by deleting at fig 1 "which", at fig 2 "cover" and adding the matter in italics.

By adding sub (k), par (4), subpar (A), cl (i).

By adding sub (k), par (4), subpar (A), cl (ii).

By adding sub (k), par (4), subpar (A), cl (iii).

By adding sub (k), par (4), subpar (A), cl (iv).

By adding sub (k), par (4), subpar (B).

By redesignating part of sub (k), par (4), subpar (A) as sub (K), par (4), subpar (C).

Sub (k), par (4), subpar (C) by deleting at fig 1 ", the onset of which is sudden,", at fig 2 ", or", at fig 3 "or" and adding the matter in italics.

By adding sub (k), par (4), subpar (D).

By adding sub (k), par (4), subpar (E).

2011. Chapter 219, § 14 amended:

Sub (k), par (13), opening par by deleting at figs 1 and 2 "which", at fig 3 "medicare" and adding the matter in italics.

Sub (k), par (13), subpar (A) by adding the matter in italics.

Sub (k), par (13), subpar (B) by adding the matter in italics.

By redesignating sub (k), par (13), closing par as sub (k), par (13), subpar (C).

Sub (k), par (13), subpar (C) by adding the matter in italics.

By adding sub (k), par (13), subpar (D).

By adding sub (k), par (13), subpar (E).

2011. Chapter 219, § 15 amended:

Sub (l), par (8), subpar (A), opening par by deleting at fig 1 "which", at fig 2 "must" and adding the matter in italics.

Sub (l), par (8), subpar (B), opening par by deleting at fig 1 "dependent" and adding the matter in italics.

Sub (l), par (8), subpar (C) by deleting at fig 1 "and/or" and adding the matter in italics.

Sub (l), par (8), subpar (D) by adding the matter in italics.

By adding sub (l), par (8), subpar (E).

By adding sub (l), par (8), subpar (F).

By adding sub (l), par (8), subpar (G).

2011. Chapter 219, § 16 amended:

Sub (l), par (11), subpar (A), opening par by deleting at fig 1 "which" and adding the matter in italics.

Sub (l), par (11), subpar (B) by adding the matter in italics.

Sub (l), par (11), subpar (C) by adding the matter in italics.

By adding sub (l), par (11), subpar (D).

By adding sub (l), par (11), subpar (E).

2011. Chapter 219, § 17 amended:

Sub (l), par (14), subpar (A), opening par by deleting at fig 1 "which" and adding the matter in italics.

Sub (l), par (14), subpar (B) by adding the matter in italics.

Sub (l), par (14), subpar (C) by adding the matter in italics.

By adding sub (l), par (14), subpar (D).

By adding sub (l), par (14), subpar (E).

2011. Chapter 219, § 18 amended:

Sub (l), par (15), subpar (E), cl (i) by deleting at fig 1 "will", at fgi 2 "(1)", at fig 3 "(2)", at fig 4 "(3)", at fig 5 "or (4)" and adding the matter in italics.

Sub (l), par 15), subpar (E), cl (ii) by deleting at fig 1 ", the onset of which is sudden,", at fig 2 "(1)", at fig 3 "(2)", at fig 4 "3)", at fig 5 "or" and adding the matter in italics.

2011. Chapter 219, § 19 amended:

By adding sub (m), par (8).

2011. Chapter 219, § 20 amended:

By adding sub (p), par (6).

2011. Chapter 219, § 21 amended:

By adding sub (q), par (7).

2011. Chapter 219, § 22 amended:

Sub (r), par (1) by deleting at fig 1 " 'dependent child' ", at fig 2 "employee" and adding the matter in italics.

Sub (r), par (2), opening par by deleting at fig 1 "surgical or medical coverage", at figs 2, 3 and 5 "dependent", at fig 4 "subparagraphs (B) or (C)" and adding the matter in italics.

Sub (r), par (2), subpar (A) by deleting at fig 1 "dependent" an adding the matter in italics.

Sub (r), par (2), subpar (B), opening par by deleting at fig 1 "dependent" and adding the matter in italics.

Sub (r), par (2), subpar (B), cl (ii) by deleting at figs 1 and 2 "dependent" and adding the matter in italics.

By deleting former sub (r), par (2), subpar (C).

By redesignating sub (r), par (2), subpars (D)–(H) as sub (r), par (2), subpars (C)–(G), respectively.

Sub (r), par (2), subpar (C) by deleting at fig 1 "dependent", at fig 2 "subparagraphs (B) and (C)" and adding the matter in italics.

Sub (r), par (2), subpar (D) by deleting at figs 1–3 "dependent", at fig 4 "or during the twelve-month initial open enrollment period described in subparagraph (C) of this paragraph".

Sub (r), par (2), subpar (E) by deleting at figs 1 and 2 "dependent".

Sub (r), par (2), subpar (F), cl (i) by deleting at fig 1 "dependent".

Sub (r), par (2), subpar (F), cl (ii) by deleting at fig 1 "(D)" and adding the matter in italics.

Sub (r), par (2), subpar (G), cl (i) by adding the matter in italics.

Sub (r), par (2), subpar (G), cl (ii) by deleting at fig 1 "; and".

By deleting sub (r), par (2), subpar (G), cl (iii).

2011. Chapter 589, § 2 amended:

By adding sub (k), par (17).

2011. Chapter 595, § 2 amended:

By redesignating entire sub (l), par (17) as sub (l), par (17), subpar (A).

Sub (l), par (A) by deleting at fig 1 "A", at fig 2 "or", at fig 3 "or issuing a group or blanket policy", at fig 4 a comma, at fig 5 ", or medical", at fig 6 "For purposes of this section, " autism spectrum disorder "means a neurobiological condition that includes autism, Asperger syndrome, Rett's syndrome, or pervasive developmental disorder." and adding the matter in italics.

By adding sub (l), par (17), subpar (D).

By adding sub (l), par (17), subpar (E).

By adding sub (l), par (17), subpar (F).

By adding sub (l), par (17), subpar (G).

2011. Chapter 596, § 2 amended:

Sub (l), par (17), subpar (C), cl (iii) by deleting at fig 1 "commissioner" and adding the matter in italics.

Sub (l), par (17), subpar (C), cl (ix), opening par by deleting at fig 1 "related equipment and adding the matter in italics.

2010. Chapter 238, § 3 amended:

Sub (k), par (5), subpar (A), cl (i) by deleting at fig 1 "a written agreement pursuant to".

2010. Chapter 357, § 2 amended:

By deleting sub (l), par (12), subpars (i)–(iii).

By adding sub (l), par (12), subpars (i)–(iv).

2010. Chapter 398, § 2 amended:

Sub (p), par (3), subpar (A), cl (i) opening par by deleting at fig 1 "participants", at fig 2 "beneficiaries" and adding the matter in italics.

By adding sub (p), par (3), subpar (A), cl (i), subcls (I) and (II).

Sub (p), par (3), subpar (A), cl (ii) by deleting at fig 1 "and".

Sub (p), par (3), subpar (A), cl (iii) by deleting at fig 1 "insureds covered or new insureds" and adding the matter in italics.

By adding sub (p), par (3), subpar (A), cl (iv).

By redesignating sub (p), par (3), subpar (B) as sub (p), par (3), subpar (E).

By adding sub (p), par (3), subpar (B).

By redesignating sub (p), par (3), subpar (C) as sub (p), par (3), subpar (F).

By adding sub (p), par (3), subpar (C).

By adding sub (p), par (3), subpar (D).

Sub (p), par (3), subpar (E), cl (i) by deleting at fig 1 "participants and beneficiaries" and adding the matter in italics.

Sub (p), par (3), subpar (E), cl (iii) by deleting at fig 1 "must", at fig 2 "its" and adding the matter in italics.

Sub (p), par (3), subpar (F) by deleting at fig 1 "(B)" and adding the matter in italics.

2010. Chapter 457, § 2 amended:

By adding sub (k), par (16).

2010. Chapter 536, § 4 amended:

By adding sub (a), par (16).

2009. Chapter 7, § 1 amended:

By adding sub (m), par (7).

2009. Chapter 236, § 1 amended:

Sub (m), par (4), subpar (A) by deleting at fig 1 "eighteen" and adding the matter in italics.

By deleting former sub m, par (4), subpar D and redesignating sub (m), par (4) subpar (E) as sub (m), par (4), subpar (D).

By adding sub (m), par (6).

2009. Chapter 237, § 5 amended:

Sub (a), par (9) by deleting at fig 1 "ninety" and adding the matter in italics.

2009. Chapter 237, § 13 amended:

By adding sub (k), par (15).

2009. Chapter 503, § 1 (Part A) amended:

Sub (l), par (5), subpar (D), cl (ii) by deleting at fig 1 "fully", at fig 2 "funds", at fig 3 "purpose" and adding the matter in italics.

2007. Chapter 502, § 1 amended:

Sub (l), par (5), subpar (A), opening par by deleting at fig 1 a comma, at fig 2 ", broad based", at fig 3 "shall include" and adding the matter in italics.

By redesignating sub (l), par (5), subpar (A), cl (i) and part of sub (l), par (5), subpar (A), cl (ii) as sub (l), par (5), subpar (A), cl (i) and deleting at fig 1 "such", at fig 2 a period, at fig 3 "or" and adding the matter in italics.

Sub (l), par (5), subpar (A), cl (ii) by deleting at fig 1 ", such", at fig 2 "days of active treatment" and adding the matter in italics.

Sub (l), par (5), subpar (A), cl (iii), by deleting at fig 1 "within a given" and adding the matter in italics.

Sub (l), par (5), subpar (B), cl (i) by deleting at fig 1 "coverage", at fig 2 "to medical", at fig 3 "provided under the policy" and adding the matter in italics.

Sub (l), par (5), subpar (B), cl (ii) by deleting at fig 1 "disorder" and adding the matter in italics.

Sub (l), par (5), subpar (C), opening par by deleting at fig 1 "subsection" and adding the matter in italics.

By redesignating sub (l), par (5), subpar (D) as sub (l), par (5), subpar (D), cl (i) by deleting at fig 1 ", and provided further however that" and adding the matter in italics.

2006. Chapter 748, § 3 amended:

By redesignating sub (l), par (5), subpar (D) as sub (l), par (5), subpar (A), cl (iv).

By adding sub (l), par (5), subpar (B).

2004. Chapter 114, § 4 amended:

By adding sub (k), par (14).

2004. Chapter 230, § 16 amended:

Sub (l), par (4), subpar (A) by deleting at fig 1 "and in addition shall have either: three years post degree experience in psychotherapy, which for the purposes of this paragraph shall mean the use of verbal methods in interpersonal relationships with the intent of assisting a person or persons to modify attitudes and behavior which are intellectually, socially or emotionally maladaptive, under supervision, satisfactory to the state board for social work, in a facility, licensed or incorporated by an appropriate governmental department, providing services for diagnosis or treatment of mental, nervous or emotional disorders or ailments; or three years post degree experience in psychotherapy under the supervision, satisfactory to the state board for social work, of a psychiatrist, a licensed and registered psychologist or a

licensed clinical social worker qualified for reimbursement" and adding the matter in italics.

2003. Chapter 388, § 3 amended:

Sub (k), par (7), subpar (A) by deleting at figs 1 and 2 "legally blind", at fig 3 "legall", at fig 4 "cre" and adding the matter in italics.

Sub (k), par (7), subpar (C) by adding the matter in italics.

2002. Chapter 82, § 1 (Part K) amended:

By redesignating entire sub (k), par (6), subpar (A) as sub (k), par (6), subpar (A), opening par and adding the matter in italics.

By adding sub (k), par (6), subpar (A), cl (i).

By adding sub (k), par (6), subpar (A), cl (ii).

By adding sub (k), par (6), subpar (A), cl (iii).

By redesignating entire sub (k), par (6), subpar (B) as sub (k), par (6), subpar (B), opening par and adding the matter in italics.

By adding sub (k), par (6), subpar (B), cl (i).

By adding sub (k), par (6), subpar (B), cl (ii).

By adding sub (k), par (6), subpar (B), cl (iii).

By adding sub (k), par (6), subpar (C).

2002. Chapter 420, § 6 amended:

Sub (l), par (4), subpar (B) by deleting at fig 1 "certified" and adding the matter in italics.

2002. Chapter 554, § 15 amended:

By adding sub (l), par (16).

2001. Chapter 391, § 1 amended:

Sub (m), par (1) by deleting at fig 1 "not be available for", at fig 2 "any person who is covered, becomes covered or could be covered by", at fig 3 "an employee, member or dependent who is covered, becomes covered or could become" and adding the matter in italics.

2001. Chapter 506, § 2 amended:

By adding sub (l), par (15).

2000. Chapter 557, § 2 amended:

Sub (k), par (1), subpar (C) by deleting at fig 1 "skilled" and adding the matter in italics.

Sub (k), par (1), subpar (D), opening par by deleting at fig 1 "a certified home health" and adding the matter in italics.

Sub (k), par (1), subpar (D), subpar (iv) by adding the matter in italics.

2000. Chapter 565, § 2 amended:

Sub (l), par (7) by deleting at fig 1 "which are" and adding the matter in italics.

2000. Chapter 601, § 2 amended:

By adding sub (l), par (11-a).

The 2015 amendment by ch 6, § 5, repealed (k)(19) [second setout].

The 2014 amendment by ch 41, § 2 rewrote (l)(6) and (l)(7).

The 2015 amendment by ch 536, § 2, added (k)(20).

The 2016 amendment by ch 23, § 2, rewrote (k)(20).

The 2016 amendment by ch 69, § 2 (Part B), added (l)(7-a) and (l)(7-b).

The 2016 amendment by ch 71, §§ 2 (Part B), 3 (Part C), added (k)(21); in (l)(6)(A), added "inpatient coverage shall include unlimited medically necessary treatment for substance use disorder treatment services provided in residential settings as required by the Mental Health Parity and Addiction Equity Act of 2008 (29 U.S.C. § 1185a)" in the second sentence and in the third sentence, added "Further, such inpatient" and "including utilization review requirements"; and added (l)(6)(D).

The 2016 amendment by ch 74, §§ 4-6, in (1)(11)(B), substituted "shall not" for "may" and "or coinsurance" for "and coinsurance as may be deemed appropriate by the superintendent and as are consistent with those established for other benefits within a given policy" and added (1)(11)(F) and (1)(19).

The 2017 amendment by ch 414, § 2, added "which may be provided by breast tomosynthesis" wherever it appears in (l)(1)(A); and added "provided, however, that mammography screening shall also include breast tomosynthesis" in (l)(11)(C).

The 2018 amendment by ch 57, § 5 (Part HH), added (l)(20).

The 2018 amendment by ch 57, §§ 4, 11 (Part MM), added (l)(7)(E) and (l)(20).

The 2018 amendment by ch 335, § 3, in (1)(11-a)(B), substituted "shall not" for "may" and "or coinsurance" for "and coinsurance as may be deemed appropriate by the superintendent and as are consistent with those established for other benefits within a given policy."

The 2018 amendment by ch 469, § 2, in (k)(11) [first setout], deleted "for those individuals who are or will become malnourished or suffer from disorders, which if left untreated, cause chronic physical disability, mental retardation or death" following "treatment regimen" in the second sentence, in the third sentence, added "and disorders," deleted "with failure to thrive" following "gastroesophageal reflux" and substituted "including, but not limited to immunoglobulin E and nonimmunoglobulin E-mediated allergies to multiple food proteins; severe food protein induced enterocolitis syndrome; eosinophilic disorders; and impaired absorption of nutrients caused by disorders affecting the absorptive surface, function, length, and motility of the gastrointestinal tracy" for "which if left untreated will cause malnourishment, chronic physical disability, mental retardation or death" and in the last sentence, added "as well as severe protein allergic conditions" and "or are amino acid based."

The 2018 amendment by ch 476, § 229, substituted "for volunteer firefighters" for "for volunteer firemen" and "firefighters' benefit law" for "fire-men's benefit law" in the first sentence of (j).

The 2019 amendment by ch 25, § 2, redesignated and rewrote the former first paragraph of (l)(16) as the introductory language of (l)(16)(A); added (l)(16)(A)(1) through (l)(16)(A)(4); added (l)(16)(B) through (l)(16)(D); redesignated former (l)(16)(A) through (l)(16)(C) as (l)(16)E) through (l)(16)(G); substituted "subparagraph (E)" for "subparagraph (A)" in (l)(16)(F)(1) and in the first sentence of (l)(16)(F)(2); deleted former (l)(16)(D); and made stylistic changes.

The 2019 amendment by ch 57, § 1 (Part J, Subpart A), added (t).

The 2019 amendments by ch 57, §§ 11-14, 16 (Part J, Subpart B), rewrote the first sentence of (g); rewrote (h); substituted "by this state" for "pursuant to secion 1311 of the affordable care act 42 U.S.C § 18031" in the second sentence of (i); in (k)(11) [first setout], substituted "policy that provides" for "policy which provides" in the first sentence, "formulas that are" for "formulas which are" in the fourth sentence and "based that are medically necessary" for "based which are medically necessary, and such coverage for such modified solid food products for any calendar year or for any continuous period of twelve months for any insured individual shall not exceed two thousand five hundred dollars" in the last sentence; in (k)(19), substituted "that provides" for "which provides" twice in the first sentence and "defined in subsection (a) of section three thousand two hundred seventeen-i of this article" for "required pursuant to section 2707 (a) of the public health services act 42 U.S.C. 300 gg-6(a)" in the last sentence; and made a related change.

The 2019 amendment by ch 57, § 1 (Part L), in (k)(6)(C), deleted former (i), redesignated former (ii) and (iii) as (i) and (ii), deleted former (iv), redesignated former (v) and (vi) as (iii) and (iv), in (iii), added "Except as provided in items (vi) and (vii) of this subparagraph" and substituted "item (iv)" for "clause (vi)," in (iv), deleted former (I), and redesignated former (II) through (IV) as (I) through (III) and added (v) through (viii).

The 2019 amendment by ch 57, § 1 (Part M), in (l)(16)(A), added "that provides medical, major medical, or similar comprehensive type coverage" in the introductory language, "pursuant to 42 U.S.C. 18022 and identified in the comprehensive guidelines supported by the health resources and services administration and thereby incorporated in the essential health benefits benchmark plan" in (2) and added (H).

The 2019 amendments by ch 57, §§ 11-21 (Part BB, Subpart A), substituted "health conditions" for "nervous or emotional disorders and ailments" in the first sentence of (l)(4)(A), the introductory language of (l)(4)(D) and in (l)(4)(D)(i); in (l)(4)(A), in the first sentence, substituted "that provides" for "which provides" and "psychologists, shall" for "psychologists must"; rewrote (l)(5)(A); rewrote (l)(5)(B); deleted former (l)(5)(C) through (l)(5)(E); added (l)(5)(C) through (l)(5)(G); in (l)(6)(A), substituted "shall provide" for "must provide" in the first sentence, deleted "as required by the Mental Health Parity and Addiction Act of 2008 (29 U.S.C. § 1185a)" at the end of the second paragraph and deleted the former last sentence; rewrote (l)(6)(B); rewrote (l)(6)(D); added (l)(6)(E) through (l)(6)(G); in (l)(7), in (A), substituted "shall provide" for "must provide" in the first sentence and deleted the former last sentence, rewrote (B), added (C-1), rewrote (E) and added (F) through (H); in (l)(7-b), rewrote (A) and deleted (B); in (l)(17), deleted the former third sentence of (B), rewrote (C)(i), rewrote (C)(iii) and added (H) through (K); and made stylistic changes.

The 2019 amendment by ch 143, § 1, added (l)(11)(A)(iv); and made a related change.

The 2019 amendment by ch 748, § 2, rewrote (l)(7-a) and deleted former (l)(7-b).

The 2020 amendment by ch 56, § 11 (Part AA), substituted "article thirty of the mental hygiene" for "article twenty-seven-J of the public health" in (k)(14).

The 2020 amendment by ch 56, § 2 (Part DDD), added "provided however, the total amount that a covered person is required to pay out of pocket for covered prescription insulin drugs shall be capped at an amount not to exceed one hundred dollars per thirty-day supply, regardless of the amount or type of insulin needed to fill such covered person's prescription and regardless of the insured's deductible, co-payment, coinsurance or any other cost sharing requirement" in (k)(7)(B).

NOTES TO DECISIONS

1. Generally

Trial court properly granted the insurers' motion to dismiss an insured's cause of action for violations of New York's mental health parity law, also known as Timothy's Law, because no intent to create a private right of action could fairly be implied from the statutory language and legislative history of Timothy's Law. Kamins v United Healthcare Ins. Co. of N.Y., Inc., 171 A.D.3d 715, 98 N.Y.S.3d 96, 2019 N.Y. App. Div. LEXIS 2504 (N.Y. App. Div. 2d Dep't 2019).

ARTICLE 34 Insurance Contracts-Property/casualty

Section

3420. Liability insurance; standard provisions; right of injured person.

3425. Certain property/casualty insurance policies; cancellation and renewal provisions; agents' contracts and brokers' accounts

3429-a. Geographical location of risks in area serviced by a volunteer fire department; fire, fire and extended coverage policies

3430. Right of insured, agent or broker aggrieved on basis of geographical location of property or risks

HISTORY:

Add, L 1984, ch 367, § 1; amd, L 1984, ch 805, § 148, eff Sept 1, 1984.

§ 3420. Liability insurance; standard provisions; right of injured person.

* * * * *

(f) * * * * *

(5) This paragraph shall apply to a policy that provides supplementary uninsured/underinsured motorist insurance coverage for bodily injury and is a policy: (A) issued or delivered in this state that insures against liability arising out of the ownership, maintenance, and use of a fire vehicle, as defined in section one hundred fifteen-a of the vehicle and traffic law, where the fire vehicle is principally garaged or used in this state; or (B) as specified in paragraph one of this subsection. Every such policy that insures a fire department, fire company, as defined in section one hundred of the general municipal law, an ambulance service, or a voluntary ambulance service, as defined in section three thousand one of the public health law, shall provide such supplementary uninsured/underinsured motorist insurance coverage to an individual employed by or who is a member of the fire department, fire company, ambulance service, or voluntary ambulance service and who is injured by an uninsured or underinsured motor vehicle while acting in the scope of the individual's duties for the fire department, fire company, ambulance service, or voluntary ambulance service covered under the policy, except with respect to the use or operation by such an individual of a motor vehicle not covered under the policy.

* * * * *

HISTORY:

Add, L 1984, ch 367, § 1, eff Sept 1, 1984; amd, L 1994, ch 425, § 2, eff Oct 18, 1994; L 1995, ch 305, § 1, eff Jan 1, 1996; L 1997, ch 547, § 2, eff Jan 8, 1998; L 1997, ch 568, § 1, eff March 9, 1998; L 2002, ch 584, §§ 1, 2, eff Sept 24, 2002; L 2008, ch 388, §§ 2–6, eff Jan 17, 2009; L 2012, ch 496, § 1, eff April 16, 2013; L 2013, ch 11, § 1, eff April 16, 2013; L 2017, ch 490, § 1, effective June 16, 2018; L 2018, ch 15, § 1, effective June 16, 2018; L 2019, ch 59, § 19 (Part III), effective January 1, 2020.

Editor's Notes This section formerly appeared, in part, as Ins § 167 which was added by L 1939, ch 882; amd, L 1940, ch 507; L 1941, ch 627; L 1945, ch 409; L 1958, ch 577, 759; L 1959, chs 162, 649; L 1962, ch 825; L 1965, ch 322; L 1967, ch 139; L 1975, ch 775; L 1976, ch 616; L 1977, ch 892; L 1979, ch 665; L 1981, ch 435; L 1984, ch 540.

Laws 1994, ch 425, § 1, eff Oct 18, 1994, provides as follows:

Section 1. Legislative intent. The legislature hereby finds and declares that a substantial segment of the public labors under certain misconceptions regarding automobile liability insurance. Many people fail to realize that their own liability insurance does not provide them with certain coverages. Too many people are unaware that what they really need to be protected in the event of loss sustained by themselves caused by an uninsured or underinsured motorist is uninsured motorist coverage on their own policies. To remedy this, policyholders should be given notice of the availability of such coverage.

Laws 1995, ch 305, § 12, eff July 26, 1995, provides as follows:

§ 12. This act shall take effect immediately, except that sections one through eleven of this act shall take effect January 1, 1996 and shall apply to all accidents occurring on or after such date.

Laws 2008, ch 388, § 8, eff Jan 17, 2009, provides as follows:

§ 8. This act shall take effect on the one hundred eightieth day after it shall have become a law, and shall apply to policies issued or delivered in this state on or after such date

and to any action maintained under such a policy; provided, however, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized and directed to be made and completed by the superintendent of insurance on or before such effective date.

Laws 2012, ch 496, § 2, eff April 16, 2013, provides as follows:

§ 2. This act shall take effect on the one hundred twentieth day after it shall have become a law and shall apply to any policies issued or renewed on or after such date. Effective immediately, the addition, amendment and/or repeal of any rules or regulations necessary for the implementation of this act on its effective date is authorized to be made on or before such effective date.

Laws 2017, ch 490, § 2, eff June 16, 2018, provides:

§ 2. This act shall take effect on the one hundred eightieth day after it shall have become a law, and shall apply to new insurance policies and contracts issued on and after such effective date and shall expire and be deemed repealed June 30, 2023 (Amd, L 2020, ch 58, § 1 (Part XXX, Subpart B, Item S), eff April 3, 2020).

Laws 2018, ch 15, § 2, eff June 16, 2018, provides:

§ 2. This act shall take effect on the same date and in the same manner as chapter 490 of the laws of 2017 takes effect; provided, however, that the amendments to paragraph (2-a) of subsection (f) of section 3420 of the insurance law made by section one of this act shall not affect the repeal of such paragraph and shall be deemed repealed therewith.

Laws 2019, ch 59, § 20 (Part III), eff April 12, 2019, provides:

§ 20. This act shall take effect immediately; provided, however, that sections eight, ten, eleven and fourteen of this act shall take effect on the first of November next succeeding the date on which it shall have become a law; provided, however, sections nine and twelve of this act shall take effect on the one hundred eightieth day after it shall have become a law; provided, however, sections thirteen and nineteen of this act shall take effect on the first day of January next succeeding the date on which it shall have become a law and shall apply to all policies issued, renewed, altered, or modified on or after such date; provided, however, section fifteen of this act shall take effect on the thirtieth day after it shall have become a law; provided, however, section eighteen of this act shall take effect October 1, 2019; provided, further, that effective immediately, the department of transportation and the department of motor vehicles are authorized and directed to promulgate such rules and regulations as are necessary for the implementation of this act on its effective date.

2002 Recommendations of the Law Revision Committee: Insurance Law § 3420(g) is an apparent anomaly in insurance statutes nationwide. Its continued survival is at odds with the Legislature's clear intent to protect all other persons from losses resulting from accidents, regardless of their relationship. Moreover, Insurance Law § 3420(g) is the only exclusion which need not be disclosed in the insurance contract. These distinctions, coupled with the fact that optional spousal coverage is universally unavailable in New York, bring into doubt the propriety of the statute. The policy justification underlying the statute — the danger of collusion — has been consistently rejected by many courts and jurisdictions, including the Court of Appeals.

The Commission recommends that Insurance Law § 3420 be amended to include two mutually dependent requirements. The recommendation is loosely based on the current scheme for supplemental underinsured and uninsured motorist coverage whereby every insurer is required to provide notice to its insured of the benefits of SUM coverage and the cost of a SUM endorsement.

Thus, in the context of Insurance Law § 3420(g), the recommended amendment requires insurers, first, to disclose the existence and operation of Insurance Law § 3420(g) each time a liability policy is issued. The public's ignorance of the effect of Insurance Law § 3420(g) on coverage for injuries caused by an insured to his or her spouse is a serious defect, particularly when every other type of policy exclusion must be brought to the insured's attention "in clear and unmistakable language." Thus, providing notice is a critical part of any reform effort.

Secondly, coverage for injuries to spouses must be available. As noted in this report, the language of Insurance Law § 3420(g) reflects an intent by the Legislature to allow an insured to contract for spousal coverage, but such coverage is unavailable in New York. Thus, to ensure compliance with the intent of the statute, the Commission determined that insurers should be compelled to offer such coverage upon request. The Commission recommends, therefore, that the Insurance Law be amended to include a provision requiring licensed insurers to provide supplemental liability coverage for injuries to spouses when it is (1) requested by the insured and (2) a premium is paid for such coverage.

This recommendation benefits both consumers and insurance companies. Although insurers would have to make the coverage available and provide notice, a premium will be received to offset the associated cost and exposure. At the same time, married persons will benefit as they will be able to choose whether the additional coverage and cost is appropriate to their individual circumstances. Moreover, this approach is completely consistent with the Legislature's clear intention to permit spouses to contract for coverage.

However, the Commission recommends limiting the notice and optional coverage requirements to automobile liability insurance. The bar to recovery created by Insurance Law § 3420(g) has had little effect on a spouse's right to recover under homeowners policies in light of the willingness of the Legislature and courts to permit household exclusions in homeowners' policies. It appears that a household exclusion is permissible because homeowners' insurance is not mandatory. In contrast, an insurer is not permitted to exclude household members (other than spouses) in an automobile liability policy or an uninsured policy because such coverage is mandatory and its provisions prescribed by law. Accordingly, the need for reform lies in the automobile liability insurance context.

Amendment Notes 2013. Chapter 11, § 1 amended:

Sub (f), par (5) by deleting at fig 1 "A", at fig 2 "names", at fig 3 "volunteer", at fig 4 "as a named insured", at fig 5 "be deemed to", at fig 6 "the maximum uninsured or underinsured", at fig 7 "available under the provisions of the policy", at fig 8 "a member of the volunteer fire department or", at fig 9 "or a member of the board of directors of such ambulance service, volunteer fire department or voluntary ambulance service", at fig 10 "volunteer", at fig 11 "listed as the named insured" and adding the matter.

2008. Chapter 388, § 2 amended:

Sub (a), opening par by deleting at fig 1 "hereof", at fig 2 "which" and adding the matter in italics.

Sub (a), par (1) by deleting at fig 1 "his" and adding the matter in italics.

Sub (a), par (2) by deleting at fig 1 "his" and adding the matter in italics.

Sub (a), par (4) by deleting at fig 1 "by" and adding the matter in italics.

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[1] See, Insurance Law § 3420(f)(2)(A), (B); 11 NYCRR 60-2.1, 60-2.2.

[2] See, section IV(A), supra.

[3] See, IV(B), supra.

[4] Insurers are already providing spousal coverage in other states.

[53][5] See, Suba v. State Farm Fire & Cas. Co., 114 AD2d 280, supra; 9 Couch on Ins. § 128:2, supra.

[54][6] See, Insurance Law 3420; Vehicle and Traffic Law § 311(4)(a), § 388; 11 NYCRR 60-1.1; 11 NYCRR 60-2.1.

By adding sub (a), par (5).

By adding sub (a), par (6).

2008. Chapter 388, § 3 amended:

Sub (b), opening par by deleting at fig 1 "hereof", at fig 2 "which" and adding the matter in italics.

Sub (b), par (1) by deleting at fig 1 "his" and adding the matter in italics.

Sub (b), par (2) by deleting at fig 1 "his" and adding the matter in italics.

2008. Chapter 388, § 4 amended:

By redesignating entire sub (c) as sub (c), par (1) and adding the matter in italics.

By adding sub (c), par (2).

2008. Chapter 388, § 5 amended:

By adding sub (d), par (1).

By redesignating entire sub (d) as sub (d), par (2).

2008. Chapter 388, § 6 amended:

Sub (j), par (1) by deleting at fig 1 "renewed", at fig 2 "the effective date of this subsection" and adding the matter in italics.

Sub (d), par (2) by deleting at fig 1 "or issued for delivery" and adding the matter in italics.

2002. Chapter 584, § 2 amended:

Sub (g), opening par by adding the matter in italics.

By adding sub (g), par (1).

By adding sub (g), par (2).

The 2017 amentment by ch 490, § 1, added (f)(2-a).

The 2018 amendment by ch 15, § 1, in (f)(2-a)(A), added "subject to this subsection" in the first sentence, added "or to any policy of commercial risk insurance" in the second sentence, in the third sentence, substituted "the first named insured" for "the insured" and substituted "a first named insured" for "any named insured", substituted "a duly authorized representative" for "his duly authorized representative" in the fifth sentence; substituted "first named insured" for "named insured" in the fourth sentence of (f)(2-a)(B); rewrote (f)(2-a)(B)(i); substituted "any first named" for "any one named" in (f)(2-a)(B)(iii); and made a stylistic change.

The 2019 amendment by ch 59, § 19 (Part III), added "or an altered motor vehicle commonly referred to as a 'stretch limousine' having a seating capacity of eight or more passengers used in the business of carrying or transporting passengers for hire" twice in the first sentence of (f)1; and rewrote the first two sentences of (f)2(A).

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I. General Considerations

1. In general

In an action by a cooperative apartment corporation against its

bankrupt management agent, the insurer who had issued the agent a fidelity bond providing coverage for loss sustained by the agent through fraudulent or dishonest acts by its employees, and others, the insurer was entitled to summary judgment since the fidelity bond could not be considered a "policy or contract insuring against liability for injuries to persons or property," within the meaning of Ins Law former § 167(1) [now § 3420], so as to allow the corporation's direct claim against the agent's insurer. 175 East 74th Corp. v Hartford Acci. & Indem. Co., 51 N.Y.2d 585, 435 N.Y.S.2d 584, 416 N.E.2d 584, 1980 N.Y. LEXIS 2737 (N.Y. 1980).

Where provisions of insurance policy are clear and unambiguous, courts should not strain to superimpose unnatural or unreasonable construction. Maurice Goldman & Sons v Hanover Ins. Co., 80 N.Y.2d 986, 592 N.Y.S.2d 645, 607 N.E.2d 792, 1992 N.Y. LEXIS 3887 (N.Y. 1992).

Unless some statute imposes different liability, the Vehicle and Traffic Law § 17 and predecessor to § 3420 are liberally interpreted by the courts in favor of persons injured by acts of those insured despite provisions in indemnity policies which seek to limit coverage. Baron v Auto Mut. Indem. Co., 247 A.D. 731, 285 N.Y.S. 486, 1936 N.Y. App. Div. LEXIS 8533 (N.Y. App. Div. 1936).

No liability clause operates unless there is sufficient insurance to meet the minimum set by the financial responsibility laws. Davis v De Frank, 33 A.D.2d 236, 306 N.Y.S.2d 827, 1970 N.Y. App. Div. LEXIS 5724 (N.Y. App. Div. 4th Dep't), aff'd, 27 N.Y.2d 924, 318 N.Y.S.2d 142, 266 N.E.2d 822, 1970 N.Y. LEXIS 946 (N.Y. 1970).

Liability insurer was not required to defend or indemnify son of insureds where clear language of policy limited coverage to 2 named insureds and other categories of persons into which their son did not fit; to expand coverage to include son would require rewriting of policy. D'Angelo v Empire Mut. Ins. Co., 125 A.D.2d 533, 509 N.Y.S.2d 611, 1986 N.Y. App. Div. LEXIS 62833 (N.Y. App. Div. 2d Dep't 1986).

"All Risk Armored Car Coverage Premises and Transit Policy" was liability policy under CLS Ins § 3420(a), not indemnification policy, where it provided that insurance company would be "liable to the Insured for the Insured's liability to others as the result of loss or damage to Property"; fact that policy did not include provisions specified by § 3420 did not require contrary result, but merely triggered CLS Ins § 3103(a), and inclusion of required provisions would be made by implication. State v Federal Ins. Co., 189 A.D.2d 4, 594 N.Y.S.2d 445, 1993 N.Y. App. Div. LEXIS 2085 (N.Y. App. Div. 3d Dep't 1993).

N.Y. Ins. Law § 3420(a)(5) was enacted in January 2009 and does not apply retroactively to an insurer's 2006 policy. Tower Ins. Co. of N.Y. v Classon Hgts., LLC, 82 A.D.3d 632, 920 N.Y.S.2d 58, 2011 N.Y. App. Div. LEXIS 2409 (N.Y. App. Div. 1st Dep't 2011).

Trial court properly granted an insurer's motion to dismiss a lessee's complaint against it because the lessee lacked standing and failed to state a cause of action inasmuch as it was not a named insured under the policy and did not obtain a judgment against the lessor. GM Broadcasting, Inc. v Cornelius Enters., LLC, 156 A.D.3d 1038, 66 N.Y.S.3d 548, 2017 N.Y. App. Div. LEXIS 8634 (N.Y. App. Div. 3d Dep't 2017).

A liability policy incorporating the provisions of former § 167 [now § 3420] permits the holder of a policy to recover from the insurer if specific provisions are followed. Specht v Bankers Indem. Ins. Co., 140 F.2d 30, 1944 U.S. App. LEXIS 3869 (2d Cir. N.Y. 1944).

CLS Ins § 3420 did not apply to insurance policy issued by out-of-state insurer through agent in that state to corporation in that state which was not policy specific to corporation's New York building contract or to other work in New York; moreover, fact that insurer issued certificate of insurance to New York corporation to prove that its insured had insurance did not bring policy within statute, since certificate was not policy, it did not purport to alter rights of parties, and, in fact, it did not do so. Marino v New York Tel. Co., 944 F.2d 109, 1991 U.S. App. LEXIS 22013 (2d Cir. N.Y. 1991).

CLS Ins § 3420 did not govern insurance contract issued by out-of-state insurer to out-of-state insured, even though insurer stipulated that New York law governed case, since it is matter of "common sense" that when parties stipulate to application of New York law they agree to application of "appropriate" New York laws; statute, by its terms, applies only to liability policies "delivered or issued for delivery" in New York. Marino v New York Tel. Co., 944 F.2d 109, 1991 U.S. App. LEXIS 22013 (2d Cir. N.Y. 1991).

N.Y. Ins. Law § 3420 creates a statutory cause of action for an injured third party against an insurer, that; (1) compliance with the prerequisites of the statute allows a third party the right to litigate coverage issues; (2) the statute must be strictly construed because it creates a cause of action in derogation of the common law; and (3) compliance with the prerequisites under the statute, entry of a judgment and a 30 day waiting period, are conditions precedent. Vargas v Boston Chicken, Inc., 269 F. Supp. 2d 92, 2003 U.S. Dist. LEXIS 10900 (E.D.N.Y. 2003).

There is no requirement under New York Insurance Law for auto insurer to provide its insureds with certificates of insurance of ACORD-form type. Insurance Department, Opinions of General Counsel, Opinion Number 00-06-09.

Umbrella liability insurance policy sold in New York by insurance agent representing authorized insurer generally is valid to cover those exposures located in other states where insurer is not licensed; most local coverages are recognizable and enforceable in all states giving full faith and credit and due process to insurance contract but there are exceptions. Insurance Department, Opinions of General Counsel, Opinion Number 02-01-27.

There is nothing in Insurance Law and regulations that prohibits insurance company from sending personal homeowners or automobile insurance policies electronically to insureds who agree to receive their insurance policies electronically, as long as insurance policies delivered to consenting insureds on-line meet requirements contained in Insurance Law and regulations and forms have been filed with Department for use in New York. Insurance Department, Opinions of General Counsel, Opinion Number 04-03-24.

There is no law that prohibits insurance company from offering to its insureds insurance records management on-line. Insurance Department, Opinions of General Counsel, Opinion Number 04-03-24.

Establishment licensed to sell liquor at retail for consumption on premises is not required to procure liquor liability insurance. NY Ins Dep't Gen Counsel, Opinion No. 10-09-09, 2010 NY Insurance GC Opinions LEXIS 44.

Stature requiring insurers to demonstrate prejudice to disclaim coverage based on untimely notice was not applicable to an insurance policy because the statute applied only to liability insurance, not property insurance. Therefore, the insurer was not required to demonstrate that it was prejudiced by the insureds' alleged delay in providing prompt notice of a loss. Sunrise One, LLC v Harleysville Ins. Co. of N.Y., 293 F. Supp. 3d 317, 2018 U.S. Dist. LEXIS 53383 (E.D.N.Y. 2018).

2. Construction with other laws

Plaintiff insurer, which paid first-party no-fault benefits to passenger injured in automobile insured by it could not recover such benefits from tort-feasor's insurer in action brought pursuant to Ins Law § 3420, since plaintiff's sole remedy was arbitration proceeding pursuant to Ins Law § 5105; although plaintiff had claim to recover first-party benefits against tort-feasor's insurer, Ins Law § 5105 provides that sole remedy of any insurer to recover on claim arising under provision shall be submission of controversy to mandatory arbitration. State-Wide Ins. Co. v Buffalo Ins. Co., 105 A.D.2d 315, 483 N.Y.S.2d 393, 1984 N.Y. App. Div. LEXIS 20700 (N.Y. App. Div. 2d Dep't 1984), app. dismissed, 64 N.Y.2d 1041, 489 N.Y.S.2d 467, 1985 N.Y. LEXIS 19740 (N.Y. 1985).

Court properly granted insurer's motion for summary judgment declaring that it had no duty to indemnify or further defend insureds in pending underlying action in federal court where it was undisputed that subject policy had exclusion for liability under Federal Employee Retirement Income Security Act of 1974 (ERISA), and insureds were seeking indemnification for judgment expressly based on ERISA liability only, and continuing defense in litigation that could not include state common-law claims; thus, it was error to deny summary judgment on insureds'

counterclaim alleging that insurer acted in bad faith in refusing to settle underlying action. Zurich Ins. Co. v Texasgulf, Inc., 233 A.D.2d 180, 649 N.Y.S.2d 153, 1996 N.Y. App. Div. LEXIS 11678 (N.Y. App. Div. 1st Dep't 1996).

Municipality, by extending protection of CLS Pub O § 18 to municipal hospital, did not thereby assume role of primary insurer and effectively relegate hospital's liability insurance carriers to roles of excess insurance carriers, where statutory right of indemnification would be triggered if and only if insurance policies were insufficient to indemnify insureds, and policies issued to hospital referred to other insurance coverage in describing themselves as "excess" coverage, but did not explicitly refer to right of indemnification afforded by CLS Pub O § 18. Town of Massena v Healthcare Underwriters Mut. Ins. Co., 281 A.D.2d 107, 724 N.Y.S.2d 107, 2001 N.Y. App. Div. LEXIS 4180 (N.Y. App. Div. 3d Dep't 2001), aff'd in part, modified, 98 N.Y.2d 435, 749 N.Y.S.2d 456, 779 N.E.2d 167, 2002 N.Y. LEXIS 2729 (N.Y. 2002).

The phrase "injuries to person," as used in former § 109 [predecessor to former § 167, now § 3420] is in harmony with reference to the definition of "personal injury" as found in General Construction Law, § 37-a. Brustein v New Amsterdam Casualty Co., 238 N.Y.S. 313, 135 Misc. 352, 1929 N.Y. Misc. LEXIS 1029 (N.Y. Sup. Ct. 1929), aff'd, 230 A.D. 716, 243 N.Y.S. 770, 1930 N.Y. App. Div. LEXIS 8832 (N.Y. App. Div. 1930).

Plaintiff's motion for summary judgment against an insurer should be granted in the amount of its judgment against the carrier, where the indorsement to the contract of cargo of the insurance of carrier provides that the indorsement is to assure compliance by the carrier with § 215 of the Motor Carrier Act, which provides for insurance coverage as security for protection of the public, and these provisions of indorsement are controlling even to the exclusion of former § 109 [predecessor to former § 167, now § 3420]. William Atkin Co. v National Liberty Ins. Co., 5 N.Y.S.2d 863, 168 Misc. 334, 1938 N.Y. Misc. LEXIS 1751 (N.Y. Mun. Ct. 1938).

Administratrix for a deceased pedestrian was entitled to sue the Motor Vehicle Accident Indemnification Corporation (MVAIC) under N.Y. Ins. Law § 5201 et seq. because, even though one of the vehicles that struck the pedestrian was insured, her estate was entitled to an independent recovery against the unidentified vehicle that also struck her based on an analogy to N.Y. Ins. Law § 3420(f)(1)(2). Matter of Fragoso v Motor Veh. Acc. Indem. Corp., 870 N.Y.S.2d 902, 23 Misc. 3d 430, 241 N.Y.L.J. 13, 2009 N.Y. Misc. LEXIS 77 (N.Y. Sup. Ct. 2009).

Any construction of this section that would permit its application to a risk retention group chartered in another state was preempted pursuant to 15 U.S.C.S. § 3902 because such application would thwart the efficient interstate operation of risk retention groups. Wadsworth v Allied Prof'ls Ins. Co., 748 F.3d 100, 2014 U.S. App. LEXIS 6212 (2d Cir. N.Y. 2014).

Where a creditor sought to declare a state court judgment nondischargeable under 11 U.S.C.S. § 523(a)(6) and alternatively sought to recover the unsatisfied judgment from the debtor's insurer, which alleged that its policies excluded coverage because the debtor's actions in injuring the creditor were intentional, although the insurer demanded a jury trial and indicated that it would not consent under 28 U.S.C.S. § 157(e), that did not override other factors that weighed in favor of exercising jurisdiction over the coverage dispute and declining to abstain under 28 U.S.C.S. § 1334(c)(1). Hough v Margulies (In re Margulies), 476 B.R. 393, 2012 Bankr. LEXIS 3768 (Bankr. S.D.N.Y. 2012).

When general and special, or specific, statute are antagonistic, courts must respect time honored tenet of statutory construction, that special statute prevails over general statute, accordingly, CLS, Insurance Law former § 167(4) [now § 3420(i)] prevails over CLS, CPLR § 5201(a), and as result, money judgment may not be enforced against judgment debtor's marine liability insurance policy pursuant to § 5201(a). WABCO Trade Co. v SS Inger Skou, 663 F.2d 369, 1981 U.S. App. LEXIS 16522 (2d Cir. N.Y. 1981).

State law governs interpretation of insurance policies implicated by liability under Comprehensive Environmental Response, Compensation and Liability Act. City of Utica v Genesee Mgmt., 934 F. Supp. 510, 1996 U.S. Dist. LEXIS 10723 (N.D.N.Y. 1996).

Ins § 3420 is substantive, not procedural, and thus must be applied in diversity suits under Erie doctrine. Richards v Select Ins. Co., 40 F. Supp. 2d 163, 1999 U.S. Dist. LEXIS 2875 (S.D.N.Y. 1999).

Federal declaratory judgment action against insurer is dismissed, where manufacturer sues bankrupt supplier and its commercial general liability insurer seeking damages stemming from purchase of lace that allegedly was not machine-washable as warranted, but lacks present right to sue insurer under Ins § 3420 since there has been no entry of judgment against supplier, because this court, sitting in diversity, must make delicate accommodation between state substantive and federal procedural law. NAP, Inc. v Shuttletex, Inc., 112 F. Supp. 2d 369, 2000 U.S. Dist. LEXIS 13062 (S.D.N.Y. 2000).

Private passenger automobile insurance coverage and homeowner's insurance coverage can be bound on Internet by authorized New York insurer following completion on Internet of electronic application that has been electronically signed by applicant; it is acceptable for insurer that binds such insurance coverage on Internet to give insured option to print insurance binder off Internet, and insurer need not separately file electronic version of binder that will be transmitted over Internet. Insurance Department, Opinions of General Counsel, Opinion Number 00-05-15.

Insurer may non-renew or conditionally renew 2 percent of its business written on or before August 1, 2001 based on total number of insurer's covered policies in force at last year's-end of each year in each of insurer's rating territories in use in New York. Insurance Department, Opinions of General Counsel, Opinion Number 02-06-32.

Insurer may non-renew or conditionally renew one additional policy written in territory on or before August 1, 2001, in excess of 2 percent limit, for every 2 new automobile policies written on or after August 2, 2001, in that particular territory. Insurance Department, Opinions of General Counsel, Opinion Number 02-06-32.

Neither federal Electronic Signatures in Global and National Commerce Act ("E-Sign," 15 USCS §§ 7001-7013) nor New York Electronic Signatures and Records Act ("ESRA," which is contained in CLS St Tech §§ 101-109) supersedes requirements of Insurance Law or regulations applicable to insurance company doing business in New York. Insurance Department, Opinions of General Counsel, Opinion Number 04-03-24.

3. Regulatory power of superintendent

Regulation of superintendent of insurance which permits limitation of coverage of liability to others to "a lessee or borrower" of a vehicle where injuries are sustained in the process of loading or unloading does not apply to ambulatory passengers of a motor vehicle. Association for Help of Retarded Children, Inc. v Insurance Co. of North America, 59 A.D.2d 518, 397 N.Y.S.2d 109, 1977 N.Y. App. Div. LEXIS 13297 (N.Y. App. Div. 2d Dep't 1977).

No effective cancellation of assigned risk automobile insurance policy was shown, and thus stay of arbitration of uninsured motorist claim should have been granted, where carrier who issued policy conceded at hearing before court that its final premium bill did not contain statement advising policyholder that payment could be made directly to insurance company or to "producer of record" as required by Rules of New York Automobile Insurance Plan § 14(E)(2)(b). State Farm Mut. Auto. Ins. Co. v McLean, 228 A.D.2d 510, 643 N.Y.S.2d 680, 1996 N.Y. App. Div. LEXIS 6570 (N.Y. App. Div. 2d Dep't 1996).

4. Miscellaneous

Under the terms of a comprehensive liability insurance policy, issued by the insurer to a contractor engaged in certain demolition work, providing that nothing therein contained should give any person a right to join the insurer as co-defendant in any action against the insured to determine the insured's liability, an oil company for whom the contractor was doing demolition work under a contract requiring him to indemnify the oil company against any and all claims of negligence, including the oil company's own negligence, in connection with the work, and to provide insurance coverage, not being the named insured, had no right of action against the insurer to require it to defend a

negligence action brought against it, the oil company, assertable against the insurer by way of third-party complaint, notwithstanding the policy had been indorsed to cover the demolition job. Jefferson v Sinclair Refining Co., 10 N.Y.2d 422, 223 N.Y.S.2d 863, 179 N.E.2d 706, 1962 N.Y. LEXIS 1511 (N.Y. 1962).

Subcontractor's liability insurance carrier was not collaterally estopped from seeking declaratory judgment that it was entitled to contribution from general contractor's liability carrier based on prior lawsuit in which Supreme Court ruled that it was obligated to defend and indemnify general contractor in underlying wrongful death action, because "identicality of issue" was lacking, where dispositive issue in prior lawsuit was its obligation to defend and indemnify general contractor, not whether general contractor's liability carrier was coinsurer with duty of contribution. National Union Fire Ins. Co. v Hartford Ins. Co., 93 N.Y.2d 983, 695 N.Y.S.2d 740, 717 N.E.2d 1077, 1999 N.Y. LEXIS 1426 (N.Y. 1999).

Landlord, granted summary judgment holding that tenant breached its agreement to obtain liability insurance for landlord's benefit, was not entitled to recover full amount of loss on underlying personal injury claim where it had procured its own insurance; recovery was limited to out-of-pocket damages caused by tenant's breach, including purchase cost of substitute insurance, deductibles, co-payments and increased future premiums. Inchaustegui v 666 5th Ave. Ltd. P'ship, 96 N.Y.2d 111, 725 N.Y.S.2d 627, 749 N.E.2d 196, 2001 N.Y. LEXIS 1050 (N.Y. 2001).

Assuming that insurer's unaccepted offer of payment under a policy requires the insurer to pay the insured that sum, the duty to do so does not arise if the insured has failed to perform an act constituting a condition precedent to that duty, such as the filing of proofs of loss. Mass v Great American Ins. Co., 33 A.D.2d 912, 307 N.Y.S.2d 604, 1970 N.Y. App. Div. LEXIS 5784 (N.Y. App. Div. 2d Dep't 1970).

Although actions of defendant in changing grade or property and permitting vehicles to drive thereon over objections of adjacent landowner were purposive, and where alleged as willful in original complaint, resulting collapse of adjacent landowner's garage was accidental within coverage provisions of defendant's insurance policy; thus garage owner was entitled to judgment against defendant's insurer for damages recovered on basis of defendant's negligence alleged in amended complaint. McGroarty v Great American Ins. Co., 43 A.D.2d 368, 351 N.Y.S.2d 428, 1974 N.Y. App. Div. LEXIS 5848 (N.Y. App. Div. 2d Dep't 1974), aff'd, 36 N.Y.2d 358, 368 N.Y.S.2d 485, 329 N.E.2d 172, 1975 N.Y. LEXIS 1814 (N.Y. 1975).

Where automobile liability insurer elected to take the risk of insuring applicant for more than the minimum required by statute without first investigating her application, and where it was only after suit was brought against her for negligent operation of the insured vehicle that the insurer made an investigation which disclosed the falsity of key statements in the policy application, it was much too late for the insurer, which sought to reform the policy to bring it down to the statutory required minimum amounts, to visit upon the innocent injured plaintiffs the effects of its failure to shoulder its burden of prompt investigation to discover the applicant's fraud. Olivio v Government Employees Ins. Co., 46 A.D.2d 437, 362 N.Y.S.2d 873, 1975 N.Y. App. Div. LEXIS 8512 (N.Y. App. Div. 2d Dep't 1975).

In action by manufacturer of mercury thermometers for declaration that insurers were obligated to indemnify it in completed actions arising from mercury spill in its plant in Vermont, there was insufficient evidence in record to make choice of law determination regarding applicability of pollution exclusion clause in policies where (1) policies did not appear in record in their entirety, (2) no evidence in record resolved issues such as location of insured risk, residence of parties, and place where contracts were issued and negotiated, and (3) no evidence in record established Vermont law as to pollution exclusion clause. Munzer v St. Paul Fire & Marine Ins. Co., 145 A.D.2d 193, 538 N.Y.S.2d 633, 1989 N.Y. App. Div. LEXIS 1978 (N.Y. App. Div. 3d Dep't 1989).

In negligence actions arising from automobile accident in which each driver was represented by privately retained counsel as plaintiff and represented by counsel provided by his or her insurance company as defendant, parties were denied right to be represented by counsel of their own choosing by court ruling that only counsels provided by insurance companies would be permitted to participate in trial since (1) strategy of attorney representing one party was to avoid payment of any money damages by his carrier regardless of consequences to driver, which course of conduct was in derogation of attorney's duty to driver, and (2) mother-in-law of one driver, who was passenger in vehicle, was afforded no representation at all. Rosenzweig v Blinshteyn, 149 A.D.2d 280, 544 N.Y.S.2d 865, 1989 N.Y. App. Div. LEXIS 11067 (N.Y. App. Div. 2d Dep't 1989).

Daughter, who had lived with but was estranged from mother and who was residing with father at time she negligently injured person at mother's residence, was insured person under both mother's and father's liability insurance policies since (1) she continued to receive mail at mother's home, ate meals there, and retained and used mother's house key, (2) she used mother's address on driver's license, registration, and for school purposes, (3) she visited mother nearly every day, and (4) she never expressed desire to permanently leave mother's home. Nationwide Ins. Co. v Allstate Ins. Co., 181 A.D.2d 1022, 581 N.Y.S.2d 955, 1992 N.Y. App. Div. LEXIS 4622 (N.Y. App. Div. 4th Dep't 1992).

Supreme Court properly dismissed, on forum non conveniens grounds, declaratory judgment action brought by insurance company regarding its obligation to defend and indemnify environmental claims against its insured since (1) New York had no involvement with sites covered by relevant insurance policies, and (2) 3 sites at issue, and 2 suits concerning personal injury claims, were located in New Jersey, and New Jersey had been determined to be appropriate forum for those matters. Employers Ins. of Wausau Mut. Co. v UniDynamics Corp., 183 A.D.2d 657, 584 N.Y.S.2d 55, 1992 N.Y. App. Div. LEXIS 7377 (N.Y. App. Div. 1st Dep't), app. denied, 80 N.Y.2d 757, 589 N.Y.S.2d 308, 602 N.E.2d 1124, 1992 N.Y. LEXIS 3236 (N.Y. 1992).

Two insurance companies provided concurrent insurance to general contractor where (1) general contractor was named as "additional insured" under first company's policy of subcontractor, (2) first company's policy contained endorsement providing that general contractor was insured only as to liability arising out of operations performed for general contractor by or on behalf of subcontractor, (3) general contractor also obtained its own policy from second company, (4) both policies provided coverage in event that general contractor was to become legally obligated to pay damages because of "personal injuries," and (5) both policies purported to be primary insurance; companies' status as coinsurers was not affected by fact that second company's policy provided general contractor with coverage against liability beyond that by first company. B.K. Gen. Contractors v Michigan Mut. Ins. Co., 204 A.D.2d 584, 612 N.Y.S.2d 198, 1994 N.Y. App. Div. LEXIS 5465 (N.Y. App. Div. 2d Dep't 1994).

In action by general liability insurer for judgment declaring that it was not obligated to cover insured for costs associated with closure of hazardous waste landfill in New York, dismissal was not warranted on forum non conveniens grounds since environmental offense originated in New York, regulatory agency connected with offense was located in New York, majority of witnesses resided in New York, and insured would not suffer extreme hardship because it was incorporated in New York and proof necessary for litigation was mainly in New York. Price v Brown Group, 206 A.D.2d 195, 619 N.Y.S.2d 414, 1994 N.Y. App. Div. LEXIS 11916 (N.Y. App. Div. 4th Dep't 1994), app. denied, 1995 N.Y. App. Div. LEXIS 3992 (N.Y. App. Div. 4th Dep't Mar. 17, 1995).

Insureds' son was not resident of their household for purposes of coverage under homeowners insurance policy, which specifically provided coverage to insureds and residents of their household if such residents were, inter alia, their relatives, where son had moved all his clothing and furniture to second residence owned by insureds that was covered by rental dwelling property insurance policy, he received his mail at second residence, motorcycle and hunting licenses reflected such address, and that was where he and his family resided for more than 14 months prior to accident in question. Walburn v State Farm Fire & Casualty Co.,

215 A.D.2d 837, 626 N.Y.S.2d 315, 1995 N.Y. App. Div. LEXIS 4816 (N.Y. App. Div. 3d Dep't 1995).

In action seeking declaration that insurer was not obligated to defend or indemnify insureds' son and others in underlying personal injury action arising from incident which resulted in son having been adjudicated youthful offender after having been charged with third degree assault following minor automobile accident, insurer could not utilize any disclosure devices to compel son to divulge contents of his otherwise confidential youthful offender records; requiring such disclosure would undermine grant of confidentiality under CLS CPL § 720.35(2). State Farm Fire & Cas. Co. v Bongiorno, 237 A.D.2d 31, 667 N.Y.S.2d 378, 1997 N.Y. App. Div. LEXIS 12886 (N.Y. App. Div. 2d Dep't 1997).

Litigation conducted by excess professional liability insurer against its own insured to recover cost of litigation and settlement of third-party action against insured arising from failed real estate transaction was absolutely barred as against public policy where insurer had transformed potential liability, involving questions of policy coverage, into potential for recovery against counsel to its insured, and this end was achieved not only by direct action against insured but also by agreement between insurer and insured, in which insured waived appeal from award of summary judgment to insurer (which might have obviated malpractice claim against insured's former counsel) and assigned to insurer whatever claim insured might have against its former counsel; thus, insurer's manipulation of litigation conflicted with public interest in assuring integrity of insurers' relations with their insureds and in averting even potential for conflict of interest. Jones Lang Wootton USA v LeBoeuf, Lamb, Greene & MacRae, 243 A.D.2d 168, 674 N.Y.S.2d 280, 1998 N.Y. App. Div. LEXIS 4053 (N.Y. App. Div. 1st Dep't), app. dismissed, 92 N.Y.2d 962, 683 N.Y.S.2d 172, 705 N.E.2d 1213, 1998 N.Y. LEXIS 4090 (N.Y. 1998).

In action by insured for breach of contract and related claims arising from insurer's denial of coverage, where Supreme Court granted summary judgment to insurer on ground that coverage was excluded under certain section of policy and insured appealed, insurer could not raise its contention that coverage was excluded under different section of policy where, although it raised both exclusions as affirmative defense in its answer, it only raised exclusion ruled on by Supreme Court in its motion papers before Supreme Court. Oot v Home Ins. Co., 244 A.D.2d 62, 676 N.Y.S.2d 715, 1998 N.Y. App. Div. LEXIS 8459 (N.Y. App. Div. 4th Dep't 1998).

Policy should have been reformed to include as named insured claimants, who were owners of and only parties with insurable interest in building, where policy had been issued in name of business owned by claimants rather than in their individual names, policy had clearly been intended to be issued to owner of building, and claimants' broker testified that name on application for policy had been amended 3 times, and that he had assumed building was owned by corporation but never sought to clarify matter. In re Liquidation of Galaxy Ins. Co., 257 A.D.2d 351, 683 N.Y.S.2d 59, 1999 N.Y. App. Div. LEXIS 566 (N.Y. App. Div. 1st Dep't 1999).

Although not sufficient, standing alone, to prove insurance coverage as matter of law, certificate of insurance representing agreed coverage raised triable issue of fact in opposition to claim of breach of duty to procure insurance coverage as additional insured. DiMaggio v Chase Manhattan Bank, 266 A.D.2d 89, 698 N.Y.S.2d 656, 1999 N.Y. App. Div. LEXIS 11641 (N.Y. App. Div. 1st Dep't 1999).

Construction contractor that employed injured plaintiff in underlying tort action was entitled to summary judgment declaring that it fulfilled its contractual duty to procure liability insurance for construction manager and owner of project where documentary evidence and insurer's admissions proved that manager and owner were named as additional insureds under commercial general liability policy for relevant period issued to contractor. Lehrer McGovern Bovis, Inc. v Component Assembly Sys., 266 A.D.2d 94, 698 N.Y.S.2d 648, 1999 N.Y. App. Div. LEXIS 11675 (N.Y. App. Div. 1st Dep't 1999).

In action under CLS Ins § 3420(a)(2), it was abuse of discretion to deny defendant insurers' motion to vacate default judgment where motion was made within few weeks of receiving notice of default, there was no prejudice to plaintiff, defendants' failure to forward summons and complaint to their attorney and his subsequent default on motion were not willful, and they offered proof that judgment exceeded limits of insurance policy at issue. Burgos v Allcity Ins. Co., 272 A.D.2d 195, 707 N.Y.S.2d 438, 2000 N.Y. App. Div. LEXIS 5667 (N.Y. App. Div. 1st Dep't 2000).

There was no merit in plaintiff's challenge to constitutionality of marital exclusion in CLS Ins § 3420(g). Mathieu v Commercial Mut. Ins. Co., 275 A.D.2d 613, 713 N.Y.S.2d 471, 2000 N.Y. App. Div. LEXIS 9183 (N.Y. App. Div. 1st Dep't 2000).

Given plain import of CLS Ins § 3420(g), there was no basis for claim that it was legislature's intention that coverage be provided for interspousal liability. Mathieu v Commercial Mut. Ins. Co., 275 A.D.2d 613, 713 N.Y.S.2d 471, 2000 N.Y. App. Div. LEXIS 9183 (N.Y. App. Div. 1st Dep't 2000).

Liability insurer was entitled to summary judgment dismissing third-party claim by insurance agent for fraud in causing agent and employer of injured worker to rely on alleged promises that underlying defendant in personal injury action had been named as additional insured under employer's liability policy where agent did not prove justifiable reliance on insurer's alleged promises, fraud claim stemmed from parties' contractual relationship, and breach of contract claims previously had been dismissed. Maheu v Long Island R.R., 275 A.D.2d 695, 713 N.Y.S.2d 354, 2000 N.Y. App. Div. LEXIS 9149 (N.Y. App. Div. 2d Dep't 2000).

General rule is that commercial general liability insurance policy does not afford coverage for breach of contract; to hold otherwise would render insurer surety for performance of its insured's work. Structural Bldg. Prods. Corp. v Business Ins. Agency, Inc., 281 A.D.2d 617, 722 N.Y.S.2d 559, 2001 N.Y. App. Div. LEXIS 3055 (N.Y. App. Div. 2d Dep't 2001).

Assignor's N.Y. Ins. Law § 3420 suit against an excess insurer was not barred by res judicata based on a declaratory judgment in a prior action; the determinative issue in the declaratory judgment action was whether notice of the underlying claims given to the insured's insurance broker could have been imputed to the excess insurer, but in the case at bar, no contract, agency, or insurance coverage issues were involved. Rather, this was a statutory action to collect an unpaid settlement in which the only defense available was that the assignor did not satisfy the statutory obligation to provide notice as soon as reasonably possible in light of the opportunities to do so afforded under the circumstances. Cicero v Great Am. Ins. Co., 53 A.D.3d 461, 863 N.Y.S.2d 395, 2008 N.Y. App. Div. LEXIS 6272 (N.Y. App. Div. 1st Dep't 2008).

Cause of action based on negligent spoliation of evidence may be asserted by insured in third-party action against its insurer based on insurer's alleged loss or destruction of key evidence crucial to insured's defense in underlying action. Fada Indus. v Falchi Bldg. Co., L.P., 189 Misc. 2d 1, 730 N.Y.S.2d 827, 2001 N.Y. Misc. LEXIS 225 (N.Y. Sup. Ct. 2001).

Since the tortfeasors' policy limits for bodily injury liability were identical to the insurer's policy limits for bodily injury liability, pursuant to N.Y. Ins. Law § 3420(f)(2)(A), the tortfeasors' vehicle was not underinsured. Matter of Government Empls. Ins. Co. v Young, 39 A.D.3d 751, 835 N.Y.S.2d 283, 2007 N.Y. App. Div. LEXIS 4745 (N.Y. App. Div. 2d Dep't 2007).

It was unavailing for insureds to argue that an excess policy was issued for delivery in New York pursuant to N.Y. Ins. Law § 3420(d); the insureds were not specified or expressly mentioned in the policy. Thus, Ohio law governed the dispute. FC Bruckner Assoc., L.P. v Fireman's Fund Ins. Co., 95 A.D.3d 556, 944 N.Y.S.2d 84, 2012 N.Y. App. Div. LEXIS 3646 (N.Y. App. Div. 1st Dep't 2012).

N.Y. Ins. Law § 3420(d), which applies to coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within the state, has nothing to do with liability under a directors and officers policy, and only applies within the State of New York; therefore, it did not apply to the determination in an Illinois bankruptcy court of whether an

excess insurer of a debtor's officers and directors had a duty to timely respond to the debtor's notice of circumstances. Chatz v Nat'l Union Fire Ins. Co. (In re Nanovation Techs., Inc.), 347 B.R. 314, 2006 Bankr. LEXIS 1614 (Bankr. N.D. Ill. 2006), aff'd in part and rev'd in part, 372 B.R. 368, 2007 U.S. Dist. LEXIS 27536 (N.D. Ill. 2007).

It was undisputed that the at-issue boat was a "vessel," and the court declined to address the physical capacities of the boat and focused instead upon the express geographical limits expressed in the marine insurance policy at issue to conclude that the boat was not an "ocean going vessel" for purposes of N.Y. Ins. Law § 2117(b)(3)(B); accordingly, N.Y. Ins. Law § 3420 applied to the policy. Jefferson Ins. Co. v Cassella, 261 F. Supp. 2d 160, 2003 U.S. Dist. LEXIS 7882 (E.D.N.Y. 2003).

Since N.Y. Ins. Law § 3420 creates a statutory cause of action where one did not exist under common law, it is strictly construed and does not create any rights which are not expressly provided in it. Vargas v Boston Chicken, Inc., 269 F. Supp. 2d 92, 2003 U.S. Dist. LEXIS 10900 (E.D.N.Y. 2003).

Court dismissed injured parties' direct action against insurers, which was brought under Cal. Ins. Code § 11580, because New York law applied; the relevant automobile insurance policies contained references to New York law, N.Y. Ins. Law § 3420(a)(2) imposed limits on insurers' liability and notice requirements not included in Cal. Ins. Code § 11580, and the mere fact that the collision involving the injured parties occurred in California did not outweigh New York's interests. Van Winkle v Allstate Ins. Co., 290 F. Supp. 2d 1158, 2003 U.S. Dist. LEXIS 19855 (C.D. Cal. 2003).

Ocean-going vessels are statutorily exempt from the requirements of N.Y. Ins. Law § 3420. Ins. Co. of N. Am. v Zaglool, 526 F. Supp. 2d 361, 2007 U.S. Dist. LEXIS 90339 (E.D.N.Y. 2007).

On renewal of insurance policy, insurance company may forward to insured declaration sheet; however, if there are any changes in policy, insurance company must send either new policy or new endorsements. Insurance Department, Opinions of General Counsel, Opinion Number 00-01-09.

As to those insurance policies which are subject to Insurance Department Regulation No. 90 (fire insurance, fire and extended coverage insurance, and private passenger automobile insurance subject to CLS Ins § 3425), if insurer chooses to send more than one notice of refusal to issue coverage, all notices of refusal to issue coverage mailed or delivered to applicant by insurer, including notice over Internet, must contain anti-redlining notice as prescribed in regulation; neither anti-redlining statute nor regulation applies to homeowner's insurance, and redlining statement is not required in connection with such policies. Insurance Department, Opinions of General Counsel, Opinion Number 00-05-15.

As to those insurance policies which are subject to Insurance Department Regulation No. 90 (fire insurance, fire and extended coverage insurance, and private passenger automobile insurance subject to CLS Ins § 3425), notices of refusal to issue coverage must be mailed or delivered to applicant, which can be done by electronic means if applicant consents to use of electronic technology, not more than 30 days after application is received by insurance agent or broker; regulatory requirements for mailing or delivery of notice of refusal to issue does not apply to homeowner's policies. Insurance Department, Opinions of General Counsel, Opinion Number.

Insurer is required under 11 NYCRR § 243.2 to retain all pertinent information on claim for personal injury or property damage for at least 6 years after claim is closed or after completion of statutory examination covering period in which claim arose, whichever is later. Insurance Department, Opinions of General Counsel, Opinion Number 00-07-04.

Requirement for motor vehicle insurers to disclose policy limits when requested in writing by claimant's attorney would be covered under CLS Ins §§ 3420(f)(2)(A) and 2601(a)(6). Insurance Department, Opinions of General Counsel, Opinion Number 02-05-10.

Terrorism exclusion in general liability insurance policy is not permissible if it is misleading or violative of public policy. Insurance Department, Opinions of General Counsel, Opinion Number 02-07-16.

Provided that applicable regulatory approvals have been secured in jurisdiction where property is located, authorized insurer's policy form that has been approved in New York may be endorsed to exclude terrorism coverage for property or risk located outside New York where endorsement is not otherwise acceptable in New York so long as such endorsement does not apply to New York property or risk and does not modify New York policy provisions or render them misleading or violative of public policy; such conclusion is not dependent on whether policy was issued in New York or elsewhere. Insurance Department, Opinions of General Counsel, Opinion Number 02-07-17.

It is permissible under New York Insurance Law for insurer to include coverage for workers compensation and employers liability insurance and homeowner's insurance policy that insurers co-operatively own apartment. Insurance Department, Opinions of General Counsel, Opinion Number 02-09-01.

When insurance carrier terminates medical benefits for eligible injured person in motor vehicle accident, medical provider generally may not be reimbursed under that person's health insurance policy for additional services provided at provider's usual and customary fees, which exceed those established under no-fault fee schedule. Insurance Department, Opinions of General Counsel, Opinion Number 02-09-24.

When there is disputed claim for supplementary uninsured/underinsured motorist benefits available under motor vehicle liability policy, insured has right, under Insurance Department Regulation 35-D, to request arbitration or alternately, may choose to initiate court action. Insurance Department, Opinions of General Counsel, Opinion Number 03-03-27.

Under Rules of New York Automobile Insurance Plan § 14(E)(2)(b), insured must be advised that it has option of remitting premium payment either to his producer or to insurer directly; thus, insurance agent or broker must always take premium payment proffered to it in acceptable form by insured of Assigned Risk Plan. Insurance Department, Opinions of General Counsel, Opinion Number 05-02-19.

Short time period for submission of information to central organization ISO under 11 NYCRR § 216.8(d)(2) (Regulation 64) makes electronic submission of information pragmatic and acceptable. Insurance Department, Opinions of General Counsel, Opinion Number 05-05-28.

Although there is no statutory requirement for insurance agent or broker to personally meet individual to whom insurance policy is being sold, individual insurers may require it, and New York Automobile Insurance Plan (NYAIP) requires producer to meet in person with individual to whom insurance policy is being sold. Insurance Department, Opinions of General Counsel, Opinion Number 06-11-13.

If authorized insurer issues, in New York, policy that is delivered to insured principally headquartered outside of New York, and policy covers multiple-affiliated corporate entities with operations in various states including New York, policy form is subject to form filing requirements in CLS Ins Art 23, and may be subject to other applicable provisions of Insurance Law and regulations promulgated thereunder. Insurance Department, Opinions of General Counsel, Opinion Number 10-01-04.

Where liquidating trustee and debtors' motor vehicle insurer entered into a stipulation and memorandum of understanding (MOU) to make clear how insurance claims would be handled, claimant had not identified anything about the plan, the MOU, or the pre-petition insurance agreements that violated applicable law because both the liquidating trustee and the insurer represented that the statutory minimums would be paid by the insurer. In re Metro Affiliates, Inc., 2016 Bankr. LEXIS 324 (Bankr. S.D.N.Y. Feb. 3, 2016).

II. Provisions Regarding Injuries To Persons Or Property Generally

5. In general

A legal obligation created by former § 109 [predecessor to former § 167, now § 3420] attaches itself to those policies which insure against liability for bodily injury and property damage or

against either type of liability as separate risk. Skenandoa Rayon Corp. v Halifax Fire Ins. Co., 245 A.D. 279, 281 N.Y.S. 193, 1935 N.Y. App. Div. LEXIS 10281 (N.Y. App. Div. 1935), aff'd, 272 N.Y. 457, 3 N.E.2d 867, 272 N.Y. (N.Y.S.) 457, 1936 N.Y. LEXIS 951 (N.Y. 1936).

An insured's obligation is then "finally determined" when a jury has brought in a verdict which includes, with other items, that obligation. Bogardus v United States Fidelity & Guaranty Co., 269 A.D. 615, 58 N.Y.S.2d 217, 1945 N.Y. App. Div. LEXIS 3051 (N.Y. App. Div. 1945), reh'g denied, 270 A.D. 801, 60 N.Y.S.2d 270, 1946 N.Y. App. Div. LEXIS 3983 (N.Y. App. Div. 1946).

In an action to recover damages for personal injuries arising out of an auto accident, summary judgment was properly granted to defendant dismissing the complaint on the ground that there were no triable issues of fact, where plaintiff failed to show that he had sustained a "serious injury" in view of the fact that he received only emergency treatment at the hospital before being discharged within two hours, the fact that the physician's report noted gradual improvement to the point when plaintiff was able to return to work in less than two months, and the fact that most of plaintiff's complaints were subjective. Salisbury v St. Louis, 91 A.D.2d 745, 457 N.Y.S.2d 985, 1982 N.Y. App. Div. LEXIS 19631 (N.Y. App. Div. 3d Dep't 1982).

In action by insured to compel insurance companies to indemnify it in completed action and proceeding arising from mercury spill at its factory, insured had burden of establishing that general provisions of policies provided coverage. Munzer v St. Paul Fire & Marine Ins. Co., 145 A.D.2d 193, 538 N.Y.S.2d 633, 1989 N.Y. App. Div. LEXIS 1978 (N.Y. App. Div. 3d Dep't 1989).

N.Y. Ins. Law § 3420(d), by its terms, was limited to disclaimers for death or bodily injury and was therefore inapplicable to a contractor's suit seeking indemnification under a commercial general liability policy for negligence and contractual claims brought against it. J. Lucarelli & Sons, Inc. v Mountain Val. Indem. Co., 64 A.D.3d 856, 881 N.Y.S.2d 708, 2009 N.Y. App. Div. LEXIS 5315 (N.Y. App. Div. 3d Dep't 2009).

Former § 109 [predecessor to former § 167, now § 3420] requires the defendant to insure for liability and "for damages for death or for injuries to person or property." The requirement of former § 109 is valid and within the police power of the state, so that an insurance company is bound by the provisions thereof and it was without power to limit or vary the prescribed liability by inconsistent contractual provisions. Brustein v New Amsterdam Casualty Co., 238 N.Y.S. 313, 135 Misc. 352, 1929 N.Y. Misc. LEXIS 1029 (N.Y. Sup. Ct. 1929), aff'd, 230 A.D. 716, 243 N.Y.S. 770, 1930 N.Y. App. Div. LEXIS 8832 (N.Y. App. Div. 1930).

A third party bringing an action by virtue of the provisions of former § 109 [predecessor to former § 167, now § 3420] can only avail himself of the effect of such provisions if the policy in question was in full force and effect for the benefit of the insurer. Searle v Southern Surety Co., 247 N.Y.S. 340, 138 Misc. 699, 1930 N.Y. Misc. LEXIS 1737 (N.Y. Sup. Ct. 1930).

Purpose of former § 109 [predecessor to former § 167, now § 3420] is to protect an injured person. Larkin v Munson S.S. Line, 100 F.2d 393, 1938 U.S. App. LEXIS 2659 (2d Cir. N.Y. 1938).

Unless there has been actual physical damage to property other than property of insured, there can be no recovery for intangible losses under New York Insurance Law. Aetna Casualty & Surety Co. v General Time Corp., 704 F.2d 80, 1983 U.S. App. LEXIS 29267 (2d Cir. N.Y. 1983).

Insurance Law, which requires owners of all motor vehicles operating in New York to maintain minimum of $25,000/$50,000 in third party liability coverage on their vehicles, does not require owner of livery vehicle operating in New York City to maintain minimum $100,000/$300,000 in third party liability coverage; rather, it is Taxi and Limousine Commission that requires livery vehicles to maintain $100,000/$300,000 of such coverage. Insurance Department, Opinions of General Counsel, Opinion Number 02-03-07.

Even though specific language of standard fire policy is not mandated, no insurance policy may provide coverage as to peril of fire that is not at least as favorable to insured as provided in standard fire policy; thus, as to peril of fire, no insurer may issue policy on any property in New York containing exclusion not specifically allowed under CLS Ins § 3404. Insurance Department, Opinions of General Counsel, Opinion Number 02-05-19.

Terrorism exclusion is not one of permissible exclusions that are specified in standard fire policy, and addition of such exclusion would have effect of narrowing coverage otherwise provided under standard fire policy; thus, no fire insurance policy made, issued, or delivered on any property in New York may contain terrorism exclusion as to peril of fire. Insurance Department, Opinions of General Counsel, Opinion Number 02-05-19.

As to perils other than fire, there is nothing in CLS Insurance Law that specifically restricts or otherwise limits exclusions that may be contained in property insurance policy in that regard or that would otherwise require special risk insurer to provide coverage for damage or loss resulting from acts of terrorism; however, CLS Ins § 2307(b) states that policy may not be misleading or violative of public policy and, although special risk insurer is exempt from filing policy forms for approval by Superintendent of Insurance, those standards are nonetheless applicable since CLS Ins Art 63 exempts special risk insurers from only filing requirements, not compliance and standards requirements as expressed in CLS Insurance Law and regulations promulgated thereunder. Insurance Department, Opinions of General Counsel, Opinion Number 02-05-19.

New York State Insurance Law does not require insurance policy, which provides comprehensive personal liability insurance on one, 2-, 3-, or 4-family owner-occupied dwelling, to include workers' compensation coverage for domestic worker who works fewer than 40 hours per week for same policyholder. Insurance Department, Opinions of General Counsel, Opinion Number 03-05-22.

Policyholder under comprehensive personal liability insurance for one, 2-, 3-, or 4-family owner-occupied dwelling may obtain workers' compensation coverage for domestic worker if policyholder elects to secure compensation to such employee by (1) "insuring and keeping insured the payment of such compensation in the state fund," or (2) "insuring and keeping insured the payment of such compensation with any stock corporation, mutual corporation or reciprocal insurer authorized to transact the business of workmen's compensation insurance in the state." Insurance Department, Opinions of General Counsel, Opinion Number 03-05-22.

Homeowners policy must provide coverage for obligations that homeowner incurs pursuant to provisions of Workers' Compensation Law. Insurance Department, Opinions of General Counsel, Opinion Number 05-11-13.

6. Particular happenings as injuries to persons or property

The loss of a wife's services does not fall within the category of injuries to persons as those words are used in former § 109 [predecessor to former § 167, now § 3420]. Brustein v New Amsterdam Casualty Co., 255 N.Y. 137, 174 N.E. 304, 255 N.Y. (N.Y.S.) 137, 1931 N.Y. LEXIS 657 (N.Y. 1931).

A policy of insurance indemnifying a physician against loss from claim for damages "on account of any malpractice, error or mistake committed" by the insured does not cover liability in an action for breach of an express agreement by the insured to remove certain markings from a patient's face and restore it to normal. Safian v Aetna Life Ins. Co., 260 A.D. 765, 24 N.Y.S.2d 92, 1940 N.Y. App. Div. LEXIS 4712 (N.Y. App. Div. 1940), aff'd, 286 N.Y. 649, 36 N.E.2d 692, 286 N.Y. (N.Y.S.) 649, 1941 N.Y. LEXIS 2195 (N.Y. 1941).

In action by infants to recover directly from defendant father for unsatisfied personal injury judgment entered against father, who is defendant's insured under homeowners insurance policy, for injuries suffered in skiing accident, summary judgment dismissing complaint was properly granted because interfamily exclusion in policy issued to plaintiff's father relieved defendant of any duty to indemnify him for his liability to his daughter; exclusion is clear, unambiguous and plainly applicable, and is neither prohibited by Insurance Law nor void as against public policy. Suba v State Farm Fire & Casualty Co., 114 A.D.2d 280,

498 N.Y.S.2d 656, 1986 N.Y. App. Div. LEXIS 49981 (N.Y. App. Div. 4th Dep't), app. denied, 67 N.Y.2d 610, 504 N.Y.S.2d 1023, 495 N.E.2d 356, 1986 N.Y. LEXIS 18707 (N.Y. 1986), app. dismissed, 68 N.Y.2d 665, 505 N.Y.S.2d 1029, 496 N.E.2d 242, 1986 N.Y. LEXIS 19077 (N.Y. 1986).

Exclusions in policy issued to gas station for damages caused by release of petroleum into "any body of water" did not apply where soil and underground water was contaminated by gasoline leaking from service station's underground storage tanks and where there were no underground lakes, rivers, or ponds in area, but only percolating water in various rock strata; such water does not fall within common understanding of term "body of water." State v Travelers Indem. Co., 120 A.D.2d 251, 508 N.Y.S.2d 698, 1986 N.Y. App. Div. LEXIS 60012 (N.Y. App. Div. 3d Dep't 1986), app. dismissed, 70 N.Y.2d 669, 518 N.Y.S.2d 962, 512 N.E.2d 545, 1987 N.Y. LEXIS 17318 (N.Y. 1987).

Action brought by employee injured at work in fall from ladder, alleging that employer deprived her of potential recovery against manufacturer by negligently discarding ladder, could rationally be construed as one falling within provisions of insurance policy which obligated employer's workers' compensation and employer liability carrier to defend any proceeding "alleging personal injuries" sustained in course of employment and "seeking damages on account thereof"; thus, employer was entitled to summary judgment in its action against carrier seeking recovery for counsel fees expended in defending against employee's claim after carrier had refused to do so. Arnot Ogden Memorial Hospital v Unigard Mut. Ins. Co., 128 A.D.2d 960, 512 N.Y.S.2d 924, 1987 N.Y. App. Div. LEXIS 44623 (N.Y. App. Div. 3d Dep't 1987).

Allegations of injury from exposure to asbestos installed or applied by insulation contractor fell within "products hazard" coverage of contractor's insurance policies where (1) first policy covered "any bodily injury or property damage arising out of the named insured's products" away from insured's premises and after insured's relinquishment of physical possession of products, (2) second policy covered "the handling or use of, the existence of any condition in or a warranty of...goods or products manufactured, sold, handled or distributed by the named insured," (3) underlying complaints sought to impose liability for hazardous and injurious nature of "asbestos containing products" allegedly negligently installed and applied by contractor, and thus negligent installation claims would require proof that insulation material itself was injurious, and (4) installation was handling or distribution of product installed, even though product was supplied in combination with service of installation. Frontier Insulation Contrs. v Merchants Mut. Ins. Co., 238 A.D.2d 894, 660 N.Y.S.2d 768, 1997 N.Y. App. Div. LEXIS 4684 (N.Y. App. Div. 4th Dep't), reh'g denied, 1997 N.Y. App. Div. LEXIS 7990 (N.Y. App. Div. 4th Dep't July 3, 1997), modified, aff'd, 91 N.Y.2d 169, 667 N.Y.S.2d 982, 690 N.E.2d 866, 1997 N.Y. LEXIS 3722 (N.Y. 1997), in part, 1997 N.Y. LEXIS 3081 (N.Y. Sept. 18, 1997).

In action involving 3 insurers which issued consecutive policies on building in which child suffered injuries due to continuous exposure to lead based paint, insurer whose policy was in effect from February 1987 to February 1988 was not entitled to summary judgment on its claim for full reimbursement of share of settlement amount (which it had paid on advance basis) where, although child was born in May 1987 and was not seen ingesting lead paint until May 1990, child already had increased lead level in November 1988 when he was 18 months old, and mother complained about paint in apartment from before child's birth through his diagnosis in September 1990. American Empire Ins. Co. v PSM Ins. Cos., 259 A.D.2d 341, 687 N.Y.S.2d 32, 1999 N.Y. App. Div. LEXIS 2767 (N.Y. App. Div. 1st Dep't 1999).

Seizure and impounding of plaintiff's vehicle by sheriff did not constitute "theft" within comprehensive loss provision of plaintiff's insurance policy. Pangburn v Travelers Ins. Co., 259 A.D.2d 1044, 688 N.Y.S.2d 339, 1999 N.Y. App. Div. LEXIS 3481 (N.Y. App. Div. 4th Dep't 1999), app. denied, 1999 N.Y. App. Div. LEXIS 7373 (N.Y. App. Div. 4th Dep't June 18, 1999), app. dismissed, 94 N.Y.2d 782, 700 N.Y.S.2d 419, 722 N.E.2d 498, 1999 N.Y. LEXIS 3596 (N.Y. 1999).

A comprehensive clause in an automobile insurance policy that provided coverage "for direct and accidental loss to [the] covered" vehicle, afforded protection to the insured for damages caused by negligence allegedly committed by defendant automobile repair shop, where the clause was designed to afford protection against all causes of loss, damage or destruction not specifically excluded, and where the policy's exclusion for damages resulting from mechanical breakdowns or failures was inapplicable, in that it applied only when the damage was caused solely by mechanical defects, not when the alleged negligence was an intervening proximate cause of the damage. Caccioppo v United Services Auto. Ass'n, 125 Misc. 2d 698, 479 N.Y.S.2d 688, 1984 N.Y. Misc. LEXIS 3472 (N.Y. Civ. Ct. 1984).

Claim of state against landowner responsible for discharge of petroleum into creek which ran through his property, for amounts expended by state in cleanup effort, constituted property damage covered under landowner's liability policy, since statute imposing cost of cleanup, CLS Nav § 170, is not punitive in nature but rather reflects state's power to establish damages for injury to public resources. Don Clark, Inc. v United States Fidelity & Guaranty Co., 145 Misc. 2d 218, 545 N.Y.S.2d 968, 1989 N.Y. Misc. LEXIS 618 (N.Y. Sup. Ct. 1989).

Claim of state against landowner responsible for discharge of petroleum into creek which ran through his property, for amounts expended by state in cleanup effort, constituted property damage covered under landowner's liability policy, although policy did not cover damage to landowner's own property, since creek was not property owned by landowner. Don Clark, Inc. v United States Fidelity & Guaranty Co., 145 Misc. 2d 218, 545 N.Y.S.2d 968, 1989 N.Y. Misc. LEXIS 618 (N.Y. Sup. Ct. 1989).

Where a plaintiff suffered a "wry neck" as the result of opening windows to clear an apartment of coal gas escaping from the heating system, she sustained bodily injuries accidentally suffered. Cohen v National Casualty Co., 29 N.Y.S.2d 999, 1941 N.Y. Misc. LEXIS 2200 (N.Y. Mun. Ct. 1941).

Malpractice policy was a policy or contract insurance liability for injury to person under N.Y. Ins. Law § 3420(a) as the policy covered personal injury claims, notwithstanding its exclusion for bodily injury claims; injury to person in § 3420(a) overlapped the concept of personal injury in N.Y. Gen. Constr. Law § 37-a and the concept of personal injury in the policy. McCabe v St. Paul Fire & Mar. Ins. Co., 884 N.Y.S.2d 634, 25 Misc. 3d 726, 2009 N.Y. Misc. LEXIS 2153 (N.Y. Sup. Ct. 2009), app. dismissed, 79 A.D.3d 1611, 913 N.Y.S.2d 616, 2010 N.Y. App. Div. LEXIS 9970 (N.Y. App. Div. 4th Dep't 2010).

Securities frauds claims, alleging that investors suffered emotional distress from loss of value of their investments, were not within bodily injury coverage provided by business comprehensive general liability policy. First Investors Corp. v Liberty Mut. Ins. Co., 955 F. Supp. 274, 1997 U.S. Dist. LEXIS 2391 (S.D.N.Y. 1997), aff'd, 152 F.3d 162, 1998 U.S. App. LEXIS 18227 (2d Cir. N.Y. 1998).

Term "personal injury" encompasses any injury contemplated as "personal injury liability" under CLS Ins § 1113(a)(13), including injury arising out of professional liability. Insurance Department, Opinions of General Counsel, Opinion Number 10-01-09.

III. Insolvency of Insured

7. In general

An action cannot be maintained under former § 109 [predecessor to former § 167, now § 3420] to recover from an insurer, which had issued a policy covering accidents resulting in "bodily injuries or death" the amount of the judgment against the insured, who was insolvent, for loss of services, resulting from injuries to plaintiff's wife in automobile accident, occasioned through negligence of insured. Brustein v New Amsterdam Casualty Co., 255 N.Y. 137, 174 N.E. 304, 255 N.Y. (N.Y.S.) 137, 1931 N.Y. LEXIS 657 (N.Y. 1931).

An insurer is liable under former § 167 [now § 3420] for the amount of the judgment plaintiff obtained against the insolvent assured and the fact that the accident happened after the cancellation of the policy does not bar the action. Kelley v Indemnity Ins. Co., 252 A.D. 58, 297 N.Y.S. 228, 1937 N.Y. App. Div. LEXIS 5580 (N.Y. App. Div.), aff'd, 276 N.Y. 606, 12 N.E.2d 599, 276 N.Y. (N.Y.S.) 606, 1937 N.Y. LEXIS 1164 (N.Y. 1937).

Former § 167 [now § 3420] confines the remedy given in the event of insolvency of a judgment debtor solely to the person injured or his personal representative. Jackson v Citizens Casualty Co., 252 A.D. 393, 299 N.Y.S. 644, 1937 N.Y. App. Div. LEXIS 5676 (N.Y. App. Div. 1937), aff'd, 277 N.Y. 385, 14 N.E.2d 446, 277 N.Y. (N.Y.S.) 385, 1938 N.Y. LEXIS 993 (N.Y. 1938).

Client was not entitled to summary judgment in a legal malpractice suit arising out of the lawyers' failure to to preserve the client's N.Y. Lab. Law § 240 claim during the site owner's bankruptcy because there was no proof that the client's employer included the site owner as an additional insured as required by contract, and the client thus failed to establish that a potential claim existed under N.Y. Ins. Law § 3420 against the insurer. Lue v Finkelstein & Partners, LLP, 94 A.D.3d 1386, 943 N.Y.S.2d 636, 2012 N.Y. App. Div. LEXIS 3264 (N.Y. App. Div. 3d Dep't 2012).

While N.Y. Ins. Law § 3420(a)(1) provided that an insured's bankruptcy did not limit or diminish the insurer's exposure to a customer's personal injury claims, the customer's professed confusion regarding the applicable law was insufficient to constitute a reasonable excuse for a 38-month delay in notifying the insurer of an accident and the customer's claims. Kalthoff v Arrowood Indem. Co., 95 A.D.3d 1413, 943 N.Y.S.2d 645, 2012 N.Y. App. Div. LEXIS 3505 (N.Y. App. Div. 3d Dep't), app. denied, 19 N.Y.3d 815, 955 N.Y.S.2d 553, 979 N.E.2d 814, 2012 N.Y. LEXIS 3306 (N.Y. 2012).

Under former New York common law, insurer under indemnity insurance policy was not liable to injured person who has obtained judgment against insured even though insured is insolvent and cannot pay judgment; CLS Ins § 3420(i) expressly preserves application of such common-law rule to marine insurance contracts, such as protection and indemnity (P&I) policies. Dicola v American S.S. Owners Mut. Protection & Indem. Assoc. (In re Prudential Lines), 158 F.3d 65, 1998 U.S. App. LEXIS 24614 (2d Cir. N.Y. 1998).

Former § 109 [predecessor to former § 167, now § 3420] required that any policy issued by an insurance corporation, in the future, to indemnify the owner of a motor vehicle against liability to persons injured through negligence in its operation, shall provide that the insolvency or bankruptcy of the insured shall not release the company from the payment of damages for an injury sustained during the life of the policy, and that, in case execution against the insured in an action brought by a person so injured shall be returned unsatisfied because of such insolvency or bankruptcy, the injured person may maintain an action against the company on the policy for the amount of the judgment not exceeding the amount of the policy: Held (1) that the regulation is reasonable and within the police power; it cannot be said to deprive the insurance company of property without due process of law. (2) That it does not conflict with the bankruptcy act by providing for illegal preference. Merchants Mut. Auto. Liability Ins. Co. v Smart, 267 U.S. 126, 45 S. Ct. 320, 69 L. Ed. 538, 1925 U.S. LEXIS 817 (U.S. 1925).

The provision of former § 109 [predecessor to former § 167, now § 3420] "that the insolvency or bankruptcy of the person insured or the insolvency of his estate, shall not release the insurance carrier from the payment of damages for injury sustained" is not "in conflict with" provisions of a policy under which as between the insured and insurer the insured bears the loss. Larkin v Munson S.S. Line, 100 F.2d 393, 1938 U.S. App. LEXIS 2659 (2d Cir. N.Y. 1938).

Insurance Law former § 167(1) [now § 3420(a)] was designed to insure that injured persons with unsatisfied claims against a bankrupt receive the proceeds of insurance before they enrich the bankrupt's general creditors. The legislative history makes it clear that the section was not intended to establish any difference in the substantive rights of one who has procured a judgment against his injuror before bankruptcy and one who has not. Thus, the subrogee of the injured person has the right to satisfy its claim against the insured out of the proceeds of the insurance policy, subject to the limitations only that the subrogee could not recover from the insurer more than the a face value of the policy, and that rights acquired by the insured by virtue of its own payments to the injured person would be taken into account. In re F. O. Baroff Co., 555 F.2d 38, 1977 U.S. App. LEXIS 13414 (2d Cir. N.Y. 1977).

8. What constitutes insolvency

Under former § 109 [predecessor to former § 167, now § 3420] providing that the insolvency or bankruptcy of an insured shall not release the liability insurer, where an execution against insured is returned unsatisfied, it was held that "insolvency" is not limited to judicially declared insolvency, but must be given its usual broad meaning of general financial irresponsibility. Miller v Union Indem. Co., 209 A.D. 455, 204 N.Y.S. 730, 1924 N.Y. App. Div. LEXIS 8653 (N.Y. App. Div. 1924).

Debtor and Creditor Law, § 271 furnishes a satisfactory definition in determining what is meant by the term "insolvency" in the policy and in former § 109 [predecessor to former § 167, now § 3420]. Gullo v Commercial Casualty Ins. Co., 226 A.D. 429, 235 N.Y.S. 584, 1929 N.Y. App. Div. LEXIS 8741 (N.Y. App. Div. 1929).

Where execution against the defendant's insured was returned unsatisfied, such return was prima facie evidence of the insured's insolvency. Under such circumstances, an action under former § 109 [predecessor to former § 167, now § 3420] may be maintained against the insurance company. Shaw v Citizens' Casualty Co., 241 A.D. 399, 273 N.Y.S. 153, 1934 N.Y. App. Div. LEXIS 8261 (N.Y. App. Div. 1934).

The word "insolvency," as used in former § 109 [predecessor to former § 167, now § 3420], means general financial irresponsibility and should not be construed as referring only to judicially declared insolvency. Weiss v New Jersey Fidelity & Plate Glass Ins. Co., 228 N.Y.S. 314, 131 Misc. 836, 1928 N.Y. Misc. LEXIS 806 (N.Y. Sup. Ct. 1928).

9. Necessity of execution and levy

The return of an execution unsatisfied, even if occasioned by a restraining order of a Federal court, because of a judgment based on insolvency, is the same as a return unsatisfied because of insolvency, for the purpose of this section. Gullo v Commercial Casualty Ins. Co., 226 A.D. 429, 235 N.Y.S. 584, 1929 N.Y. App. Div. LEXIS 8741 (N.Y. App. Div. 1929).

The fact that no levy was made under execution was immaterial, where the execution was returned unsatisfied because of insolvency, particularly where the defendant established the fact that the assured has other unsatisfied judgments against him. Perlman v Independence Indem. Co., 235 N.Y.S. 194, 134 Misc. 499, 1929 N.Y. Misc. LEXIS 849 (N.Y. App. Term 1929).

10. Insurer's defenses

Plaintiffs' actions to recover for personal injuries received through the negligent operation of an automobile, who, the owner being insolvent, bring their actions against the insurance company, can recover only when the insured has complied with the condition of the policy. Seltzer v Indemnity Ins. Co., 252 N.Y. 330, 169 N.E. 403, 252 N.Y. (N.Y.S.) 330, 1929 N.Y. LEXIS 564 (N.Y. 1929).

In an action to recover the amount of the unsatisfied judgment from an insurance company, the trial court properly denied the insurance company summary judgment as while it made diligent efforts to bring about the insured's cooperation, its submissions failed to demonstrate that the conduct of the insured constituted willful and avowed obstruction for the insurance company to avoid liability. Foddrell v Utica First Ins. Co., 178 A.D.3d 901, 116 N.Y.S.3d 59, 2019 N.Y. App. Div. LEXIS 9076 (N.Y. App. Div. 2d Dep't 2019).

Former § 109 [predecessor to former § 167, now § 3420], providing that an insured's bankruptcy shall not release the insurer from liability to an injured person, does not deprive the insurer of any defense which it could urge against the insured under the policy. An insured's refusal to give the insurer information respecting claim against the insured for improperly filling prescription was held a breach of liability policy requiring the insured to co-operate with the insurer in defending actions. What constitutes "co-operation" within a policy requiring the insured to co-operate with the insurer in defense of an action against him, is usually a question of fact. Coleman v New Amsterdam Casualty Co., 213 N.Y.S. 522, 126 Misc. 380, 1926 N.Y. Misc. LEXIS 572 (N.Y. Sup. Ct. 1926), aff'd, 220 A.D. 748, 222 N.Y.S. 788, 1927 N.Y. App. Div. LEXIS 9854 (N.Y. App. Div. 1927).

Although subd. 1 of former § 167 [now § 3420(a)] prohibits use of the insured's insolvency or bankruptcy as a defense to the insurance company and gives the injured person a direct cause of action against the insurer if his judgment against the insured remains unsatisfied for 30 days, where the insured is insolvent at the time of the accident and subsequently goes into bankruptcy, thereby discharging any possibility of collecting from him the excess amount of the judgment obtained against him over his insurance coverage, his trustee in bankruptcy has no cause of action against the insurer for bad faith in failing to settle the claim of the injured person within the limits of the policy coverage, as, in such case, the insured can establish no damage suffered as the result of the insurer's failure to settle. Harris v Standard Acci. & Ins. Co., 297 F.2d 627, 1961 U.S. App. LEXIS 3036 (2d Cir. N.Y. 1961), cert. denied, 369 U.S. 843, 82 S. Ct. 875, 7 L. Ed. 2d 847, 1962 U.S. LEXIS 2217 (U.S. 1962).

11. Other matters

Where an execution upon a judgment, recovered in an action by a member of the crew against the owner for personal injuries received upon vessel, is returned unsatisfied by reason of the insolvency of the owner, an action may be maintained under former § 109 [predecessor to former § 167, now § 3420] to recover upon policy of marine insurance, as defined in former § 150 [predecessor to former § 46, now § 1113] insuring against liability for personal injuries suffered by any person while on the vessel. Provisions of former § 109 [predecessor to former § 167, now § 3420] apply to any policy issued by a stock company authorized to insure against liability for personal injuries, whether on land or sea. Hansen v Continental Ins. Co., 262 N.Y. 136, 186 N.E. 420, 262 N.Y. (N.Y.S.) 136, 1933 N.Y. LEXIS 926 (N.Y. 1933).

Under § 109 (1) [predecessor to former § 167, now § 3420] a cause of action may not be assigned where a judgment against insured, recovered in an action for personal injuries, remains unsatisfied. Royal Indem. Co. v Travelers' Ins. Co., 244 A.D. 582, 280 N.Y.S. 485, 1935 N.Y. App. Div. LEXIS 5877 (N.Y. App. Div. 1935), aff'd, 270 N.Y. 574, 1 N.E.2d 337, 270 N.Y. (N.Y.S.) 574, 1936 N.Y. LEXIS 1635 (N.Y. 1936).

Court properly stayed arbitration of uninsured motorist claim where claimant, who had access to policy in that named insured was his wife with whom he resided, failed to comply with condition precedent to coverage under uninsured motorist endorsement of policy requiring that he file statement under oath within 90 days of accident. American Home Assurance Co. v Ceballos, 224 A.D.2d 612, 639 N.Y.S.2d 397, 1996 N.Y. App. Div. LEXIS 1369 (N.Y. App. Div. 2d Dep't), app. denied, 88 N.Y.2d 809, 647 N.Y.S.2d 714, 670 N.E.2d 1346, 1996 N.Y. LEXIS 2076 (N.Y. 1996).

In an action under former § 109 [predecessor to former § 167, now § 3420], the statutory right of action against an insurer, on judgment recovered against a bankrupt insured and the return of unsatisfied execution thereon is not postponed to determination of appeal from such judgment. This conclusion is fortified by the language of policy and provisions of Vehicle & Traffic Law, § 17. Materazzi v Commercial Casualty Ins. Co., 283 N.Y.S. 942, 157 Misc. 365, 1935 N.Y. Misc. LEXIS 1606 (N.Y. Sup. Ct.), aff'd, 246 A.D. 522, 283 N.Y.S. 430, 1935 N.Y. App. Div. LEXIS 8869 (N.Y. App. Div. 1935).

Trial court erred in granting insurer's petition to stay arbitration on insured's demand for supplementary uninsured motorist ("SUM") benefits where the insured, as a purchaser of SUM benefits allowed by N.Y. Ins. Law § 3420(f)(2), was entitled to seek those benefits on the insolvency of an alleged tortfeasor's insurer and was not required to proceed against the New York Public Motor Vehicle Liability Security Fund. Metro. Prop. & Cas. Ins. Co. v Carpentier, 7 A.D.3d 627, 777 N.Y.S.2d 146, 2004 N.Y. App. Div. LEXIS 6874 (N.Y. App. Div. 2d Dep't 2004).

Insurer was not liable to the liquidator of an insurance company under N.Y. Ins. Law § 3420(a)(2) and a directors and officers policy where the president had diverted the insurance company's premiums to his other entities as part of an integrated transaction designed to benefit his entities and the policy contained exclusions for personal profit or advantage and for dishonesty. Serio v National Union Fire Ins. Co. of Pittsburgh, Pa., 18 A.D.3d 319, 795 N.Y.S.2d 529, 2005 N.Y. App. Div. LEXIS 5242 (N.Y. App. Div. 1st Dep't 2005), app. denied, 2005 N.Y. App. Div. LEXIS 9305 (N.Y. App. Div. 1st Dep't Sept. 22, 2005), app. denied, 6 N.Y.3d 703, 811 N.Y.S.2d 335, 844 N.E.2d 790, 2006 N.Y. LEXIS 33 (N.Y. 2006).

Asbestosis claimants received nothing of value from trustee of insolvent shipping line when trustee (with approval by Bankruptcy Court) disbursed damages payment to each claimant, who then returned money to trustee as non-recourse loan so that it would be on hand to pay next claimant, and so on; thus, trustee sustained no true loss and such sham transaction failed to trigger indemnification obligation on part of trustee's insurer under pay first provision requiring that trustee pay any claims prior to seeking indemnification from insurer. Dicola v American S.S. Owners Mut. Protection & Indem. Assoc. (In re Prudential Lines), 158 F.3d 65, 1998 U.S. App. LEXIS 24614 (2d Cir. N.Y. 1998).

Marine insured's lack of assets to satisfy claims against bankrupt estate typically leaves insured unable to sustain loss and pay claim; this is simply one consequence of purchasing marine policy of indemnity rather than liability policy. Dicola v American S.S. Owners Mut. Protection & Indem. Assoc. (In re Prudential Lines), 158 F.3d 65, 1998 U.S. App. LEXIS 24614 (2d Cir. N.Y. 1998).

Where a debtor had consented to the lifting of the automatic stay under 11 U.S.C.S. § 365 so that certain personal injury claims could proceed as long as recovery was limited to insurance proceeds, the debtor's failure to pay a retrospective premium claimed to be due, or failure to fund the costs of, or any awards resulting from, the personal injury actions to the extent of the self-insured retention amount, did not relieve an insurance company of its obligation to pay claims under a pre-petition policy. This conclusion did not violate the term of the self-insured retention endorsement and was consistent with N.Y. Ins. Law § 3420's requirement that the insurance company would not be relieved of its obligations because of the debtor's bankruptcy. Admiral Ins. Co., v Grace Indus. (In re Grace Indus.), 341 B.R. 399, 2006 Bankr. LEXIS 473 (Bankr. E.D.N.Y. 2006), aff'd, 409 B.R. 275, 2009 U.S. Dist. LEXIS 63785 (E.D.N.Y. 2009).

Bankruptcy court found that cause existed under 11 U.S.C.S. § 362(d) to allow two insurers that issued director and officer liability insurance and errors and omissions insurance to a commodities firm that declared Chapter 11 bankruptcy to pay costs the firm's directors and officers incurred in defending lawsuits that were filed by customers who did business with the firm and an affiliated business, and entities that held securities the firm issued. The insurers remained liable under the policies, pursuant to N.Y. Ins. Law § 3420, even though the firm had declared bankruptcy, and although the policies were property of the firm's bankruptcy estate under 11 U.S.C.S. § 541, the purpose of the policies was to protect the firm's officers and directors and they had a present need to receive the benefit of their contractual rights. In re MF Global Holdings Ltd., 469 B.R. 177, 2012 Bankr. LEXIS 1543 (Bankr. S.D.N.Y. 2012), app. dismissed, 566 Fed. Appx. 81, 2014 U.S. App. LEXIS 9188 (2d Cir. N.Y. 2014).

Where bankrupt was insured under former § 109 [predecessor to former § 167, now § 3420] a claimant could not be allowed to continue an action in a state court under stipulation that he should not use any judgment obtained against estate in bankruptcy and execution being unsatisfied the claimant could then proceed under § 109 [Now § 3420] against the insurance carrier. Foust v Munson S.S. Lines, 299 U.S. 77, 57 S. Ct. 90, 81 L. Ed. 49, 1936 U.S. LEXIS 943 (U.S. 1936).

Where the bankrupt was insured at the time of the wrongful death of claimant's deceased and an action was pending in state court, that action should be completed to liquidate claim and give claimant the added assurance that the debt, if established, would be paid by the insurance company. In re Adolf Gobel, Inc., 89 F.2d 171, 1937 U.S. App. LEXIS 3416 (2d Cir. N.Y. 1937).

In action by injured third party against bankruptcy trustee for insured debtor, Insurance Law former § 167 [now § 3420] permits recovery by third party against funds paid by insurer to insured debtor for indemnification up to policy limits for partial satisfaction of judgment obtained by third party. In re F. O. Baroff Co., 555 F.2d 38, 1977 U.S. App. LEXIS 13414 (2d Cir. N.Y. 1977).

Under New York common law, insurer under indemnity insurance contract is not liable to injured person who has obtained judgment against insured, even though insured is insolvent and cannot pay judgment; while New York has changed this common law rule by statute permitting direct action by injured person against insurer, statute is made expressly inapplicable to marine insurance contracts. Ahmed v American S.S. Owners Mut. Protection & Indem. Asso., 444 F. Supp. 569, 1978 U.S. Dist. LEXIS 19910 (N.D. Cal. 1978), aff'd in part, 640 F.2d 993, 1981 U.S. App. LEXIS 19525 (9th Cir. Cal. 1981).

IV. Rights of Judgment Creditor of Insured

12. In general

An action by the injured person against the tortfeasor's liability insurer as authorized by statute is not an action in the nature of one brought on a judgment. Holmes v Allstate Ins. Co., 33 A.D.2d 96, 305 N.Y.S.2d 563, 1969 N.Y. App. Div. LEXIS 2779 (N.Y. App. Div. 1st Dep't 1969).

The judgment rendered against the insured is binding upon the insurer in an action by the judgment creditor only to the extent of the matters necessarily adjudged therein. Holmes v Allstate Ins. Co., 33 A.D.2d 96, 305 N.Y.S.2d 563, 1969 N.Y. App. Div. LEXIS 2779 (N.Y. App. Div. 1st Dep't 1969).

Former § 109 [predecessor to former § 167, now § 3420] makes a return of execution unsatisfied on a judgment against the insured the sole condition precedent to an action against the insurer under the statute. Youknot v United States Fidelity & Guaranty Co., 283 N.Y.S. 902, 158 Misc. 83, 1935 N.Y. Misc. LEXIS 1602 (N.Y. Sup. Ct.), aff'd, 245 A.D. 705, 281 N.Y.S. 968, 1935 N.Y. App. Div. LEXIS 10429 (N.Y. App. Div. 1935).

Former § 167 [now § 3420] is not limited to the insured person named in the policy but extends to third-party judgment creditors of the insured. Kaye v Doe, 125 N.Y.S.2d 135, 204 Misc. 719, 1953 N.Y. Misc. LEXIS 2292 (N.Y. Sup. Ct. 1953).

Except as Insurance Law former § 167 [now § 3420] gives the judgment creditor a right of action, he is not a third-party beneficiary of the contract of insurance obtained by the insured; injured party has no right of action against the insurer, after having obtained a judgment in excess of the policy limits, for failure of the insurer to settle the claim within the policy limits prior or during the action. Browdy v State-Wide Ins. Co., 56 Misc. 2d 610, 289 N.Y.S.2d 711, 1968 N.Y. Misc. LEXIS 1557 (N.Y. Sup. Ct. 1968).

In plaintiffs' action pursuant to N.Y. Ins. Law § 3420(a)(2) to recover an unsatisfied judgment against an insured of defendant, an insurance company, the trial court erred in converting plaintiffs' motion for summary judgment in lieu of complaint pursuant to N.Y. C.P.L.R. 3213 to one for summary judgment pursuant to N.Y. C.P.L.R. 3212, as the facts and circumstances did not support such a conversion, and the use of a "motion-action" pursuant to N.Y. C.P.L.R. 3213 was not appropriate, as the insurance company was not named in the judgment, a prima facie case against the company was not made out by the judgment itself, and the outside evidence needed to demonstrate the liability of the company for the judgment required more than a de minimis deviation from the face of the judgment. Gottlieb v Blue Ridge Ins. Co., 300 A.D.2d 541, 752 N.Y.S.2d 565, 2002 N.Y. App. Div. LEXIS 12713 (N.Y. App. Div. 2d Dep't 2002).

Where the insurer cited the failure of its insureds to provide it notice, but the injured person furnished notice of the accident shortly after the occurrence of the automobile accident, summary judgment should have been granted in favor of the injured person in his N.Y. Ins. Law § 3420(a)(2) and (b)(1) action. Vacca v State Farm Ins. Co., 15 A.D.3d 473, 790 N.Y.S.2d 177, 2005 N.Y. App. Div. LEXIS 1590 (N.Y. App. Div. 2d Dep't 2005).

Nothing in CLS Ins L § 3420 suggests that judgment creditor can execute on judgment against judgment debtor's insurer, but rather, statute merely provides for liability in event that judgment creditor, as third-party beneficiary of insurance contract, brings separate suit against insurer. Matthews v CTI Container Transport International, Inc., 689 F. Supp. 348, 1988 U.S. Dist. LEXIS 7960 (S.D.N.Y. 1988).

13. Liability in event policy does not contain provision of subsection (a)(2)

Plaintiffs' claim under this section failed since defendant one did not issue or deliver an insurance policy in New York State. Carlson v American Intl. Group, Inc., 130 A.D.3d 1479, 12 N.Y.S.3d 715, 2015 N.Y. App. Div. LEXIS 5693 (N.Y. App. Div. 4th Dep't), app. denied, 132 A.D.3d 1331, 17 N.Y.S.3d 346, 2015 N.Y. App. Div. LEXIS 7149 (N.Y. App. Div. 4th Dep't 2015), modified, 30 N.Y.3d 288, 89 N.E.3d 490, 67 N.Y.S.3d 100, 2017 N.Y. LEXIS 3280 (N.Y. 2017), in part, 28 N.Y.3d 1163, 71 N.E.3d 583, 49 N.Y.S.3d 90, 2017 N.Y. LEXIS 181 (N.Y. 2017).

Claim under this section against defendant two failed as the insured (I) hired the driver's employer (DE) under a cartage agreement as an independent contractor, and the fact that I required the DE vehicles to have a certain appearance did not show the requisite control over the vehicle for a hired automobile; the vehicle was not being used at the time of the accident by I's employee or in its behalf, but was being used by the DE's employee under an independent contract, and I did not have control over the DE's vehicle and could not grant the DE permission to use it. Carlson v American Intl. Group, Inc., 130 A.D.3d 1479, 12 N.Y.S.3d 715, 2015 N.Y. App. Div. LEXIS 5693 (N.Y. App. Div. 4th Dep't), app. denied, 132 A.D.3d 1331, 17 N.Y.S.3d 346, 2015 N.Y. App. Div. LEXIS 7149 (N.Y. App. Div. 4th Dep't 2015), modified, 30 N.Y.3d 288, 89 N.E.3d 490, 67 N.Y.S.3d 100, 2017 N.Y. LEXIS 3280 (N.Y. 2017), in part, 28 N.Y.3d 1163, 71 N.E.3d 583, 49 N.Y.S.3d 90, 2017 N.Y. LEXIS 181 (N.Y. 2017).

Inasmuch as former § 109 [predecessor to former § 167, now § 3420] requires that no policy of liability insurance shall be issued or delivered in this state unless it contains a provision making an insurance carrier liable for judgment for damages recovered against an insured, it must be presumed that the policy sold to an insured did contain that provision. Searle v Southern Surety Co., 247 N.Y.S. 337, 139 Misc. 175, 1930 N.Y. Misc. LEXIS 1736 (N.Y. Sup. Ct. 1930).

Since former § 167 [now § 3420] requires that policies of motor vehicle liability insurance contain a provision that in case judgment against the insured in an action brought to recover damages remains unsatisfied an action may be maintained against the insurer under the terms of the policy for the amount of such judgment, such a provision is deemed to be part of, and will be read into, every policy of automobile liability insurance upon its issuance in this state. Mireider v New Hampshire Fire Ins. Co., 24 Misc. 2d 765, 204 N.Y.S.2d 504, 1960 N.Y. Misc. LEXIS 2561 (N.Y. City Ct. 1960).

14. Nature and extent of insurer's liability

Under a policy in which the defendant insurer agreed to pay the insured "all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages . . . caused by accident" arising out of the use of his automobile, the defendant's liability became fixed on the happening of such an accident to the plaintiff. Stonborough v Preferred Acci. Ins. Co., 292 N.Y. 154, 54 N.E.2d 342, 292 N.Y. (N.Y.S.) 154, 1944 N.Y. LEXIS 1386 (N.Y. 1944).

Where a judgment has been obtained by an injured person against the operator of a motor vehicle, this judgment limits the liability of the insurer in any action brought thereafter against the owner of the motor vehicle. Sarine v American Lumbermen's Mut. Casualty Co., 258 A.D. 653, 17 N.Y.S.2d 754, 1940 N.Y. App. Div. LEXIS 8263 (N.Y. App. Div. 1940).

In an action pursuant to former § 167 [now § 3420] by husband and wife as judgment creditors of the assured under an automobile liability insurance policy, to require payment of the judgments obtained by plaintiffs against the assured, amount of the judgment obtained against the insurer could not exceed the policy limits for the insurer's liability with respect to each person and each accident, and must be reduced to accord with such limitations. Wasserman v Glens Falls Ins. Co., 19 A.D.2d 552, 240 N.Y.S.2d 917, 1963 N.Y. App. Div. LEXIS 3750 (N.Y. App. Div. 2d Dep't 1963).

Former § 167 [now § 3420], in giving the injured person the right to sue the insurer after judgment unsatisfied, does not enlarge the insurer's liability. Spadaro v Newark Ins. Co., 21 A.D.2d 226, 249 N.Y.S.2d 753, 1964 N.Y. App. Div. LEXIS 3722 (N.Y. App. Div. 4th Dep't 1964), aff'd, 15 N.Y.2d 1000, 260 N.Y.S.2d 16, 207 N.E.2d 611, 1965 N.Y. LEXIS 1460 (N.Y. 1965).

An action could not be maintained by an insured against his insurer for the balance of a verdict recovered against him over

and above the policy limit, where the plaintiff contended that the insurer refused to settle the action for the policy limit, which the insured claimed could have been done prior to the commencement of the trial of the negligence action, where the insured's actions and statements influenced the insurance carrier to reject the offer of settlement. Colbert v Home Indem. Co., 35 A.D.2d 326, 315 N.Y.S.2d 949, 1970 N.Y. App. Div. LEXIS 3291 (N.Y. App. Div. 4th Dep't 1970), app. denied, 28 N.Y.2d 483, 1971 N.Y. LEXIS 1749 (N.Y. 1971).

Where limits of liability under automobile liability insurance policy were $20,000 and insurer had already paid $10,000 in settlement with other parties injured in collision, insurer was liable to remaining injured parties in amount of only $10,000 even though those parties had obtained judgment against insured in amount of $122,000. Negron v Eveready Ins. Co., 53 A.D.2d 815, 385 N.Y.S.2d 87, 1976 N.Y. App. Div. LEXIS 13635 (N.Y. App. Div. 1st Dep't), app. dismissed, 40 N.Y.2d 970, 390 N.Y.S.2d 921, 359 N.E.2d 429, 1976 N.Y. LEXIS 3177 (N.Y. 1976).

Motorist was properly awarded judgment against a driver's purported insurer pursuant to N.Y. Ins. Law § 3420(a)(2) for the motorist's injuries from a vehicle collision, despite the insurer's claim that the insurer did not insure the driver's vehicle at the time of the collision, because the insurer was notified of a prior proceeding in which the motorist's insurer claimed the driver's insurer did insure the driver's vehicle at the time of the collision, yet the driver's insurer declined to participate in that prior proceeding, so, when it was determined, in that prior proceeding, that the driver's insurer covered the driver's vehicle, the driver's insurer was collaterally estopped, in the subsequent proceeding initiated under § 3420(a)(2), from denying coverage. Creinis v Hanover Ins. Co., 59 A.D.3d 371, 872 N.Y.S.2d 544, 2009 N.Y. App. Div. LEXIS 740 (N.Y. App. Div. 2d Dep't), app. denied, 12 N.Y.3d 710, 881 N.Y.S.2d 660, 909 N.E.2d 583, 2009 N.Y. LEXIS 976 (N.Y. 2009).

When a driver's insurer was found liable to a motorist, in a proceeding initiated under N.Y. Ins. Law § 3420(a)(2), for the driver's negligence, the insurer's liability was limited to the statutory minimum coverage required for personal injury liability under N.Y. Veh. & Traf. Law § 311(4)(a) because the insurer met the insurer's burden to show that the insurer had no relevant coverage in effect at the time of the subject vehicle collision. Creinis v Hanover Ins. Co., 59 A.D.3d 371, 872 N.Y.S.2d 544, 2009 N.Y. App. Div. LEXIS 740 (N.Y. App. Div. 2d Dep't), app. denied, 12 N.Y.3d 710, 881 N.Y.S.2d 660, 909 N.E.2d 583, 2009 N.Y. LEXIS 976 (N.Y. 2009).

To the extent that the trial court determined that an insurer failed to provide timely notice of its disclaimer to an owner and/or an engineer as claimants, such a determination was premature because, pursuant to N.Y. Ins. Law § 3420(a)(2), an injured claimant had a direct cause of action against an insurer only after the injured claimant first obtains a judgment against the insured; neither the owner nor the engineer had obtained a judgment against the insured, and thus both the owner and the engineer failed to fulfill the condition precedent to seek relief directly from the insurer. Sevenson Envtl. Servs., Inc. v Sirius Am. Ins. Co., 74 A.D.3d 1751, 902 N.Y.S.2d 279, 2010 N.Y. App. Div. LEXIS 4955 (N.Y. App. Div. 4th Dep't 2010).

Where an automobile liability policy did not obligate the insurer either by express terms, or when read in connection with former § 109 [predecessor to former § 167, now § 3420], to distribute the amount of the insurer's liability ratably between the estates of two persons killed in a single accident, the insurer, on exhausting the amount of policy by payment of judgment first recovered was discharged from further liability by reason of the accident. Stolove v Fidelity & Casualty Co., 282 N.Y.S. 263, 157 Misc. 106, 1935 N.Y. Misc. LEXIS 1419 (N.Y. Sup. Ct. 1935).

An action against the liability insurer of a car owner, based upon an unsatisfied judgment for damages against the owner, cannot succeed where the policy binds insurer to pay damages "caused by accident," but the judgment in question arose out of the insured's deliberate action in running into the plaintiff's car in an attempt to stop it for personal reasons. McCarthy v United Services Auto. Ass'n, 24 Misc. 2d 79, 204 N.Y.S.2d 420, 1960 N.Y. Misc. LEXIS 2503 (N.Y. Sup. Ct. 1960).

Insurer is not liable for order of costs against insured executed by county clerk pursuant to remittitur from Court of Appeals following adjudication of jurisdictional matter, such order not being a judgment within meaning of former § 167 [now § 3420] since it did not determine the rights of the parties on the substantive issue. Seider v Hartford Accident & Indem. Co., 51 Misc. 2d 645, 273 N.Y.S.2d 639, 1966 N.Y. Misc. LEXIS 1489 (N.Y. Dist. Ct. 1966).

To require an automobile liability insurer to pay an award of punitive damages would be against public policy. Teska v Atlantic Nat'l Ins. Co., 59 Misc. 2d 615, 300 N.Y.S.2d 375, 1969 N.Y. Misc. LEXIS 1649 (N.Y. Dist. Ct. 1969).

Where an insurer failed to defend its insured and failed to settle litigation within the policy limits, and an excess judgment was rendered against the insured over and above the amount paid by the insurer, in an action by the insured against the insurer based on failure to defend and to settle, the insured was not entitled to punitive damages. Gordon v Nationwide Mut. Ins. Co., 62 Misc. 2d 689, 309 N.Y.S.2d 420, 1970 N.Y. Misc. LEXIS 1756 (N.Y. Sup. Ct. 1970), aff'd, 37 A.D.2d 265, 323 N.Y.S.2d 550, 1971 N.Y. App. Div. LEXIS 3514 (N.Y. App. Div. 2d Dep't 1971).

The statute barring direct actions against an insurance company unless and until there is a judgment unsatisfied against the insured for 30 days in the underlying liability action (Insurance Law, former § 167, subd 1, par [b] [now § 3420(a)(2)]) applies only where indemnification of a judgment in the underlying liability action is sought and does not apply to an impleader action by the defendant insured for breach of the insurer's duty to defend a pending liability action so that a declaratory judgment action to establish an insurer's obligation to defend (CPLR 3001; CCA, § 212-a) need not await the outcome of the underlying liability action. Galpern v General Motors Corp., 102 Misc. 2d 975, 425 N.Y.S.2d 1008, 1980 N.Y. Misc. LEXIS 2047 (N.Y. Civ. Ct. 1980).

An automobile liability insurance policy issued to a Pennsylvania resident which provided a $75,000 limit of liability to be used to satisfy all claims against the insured but included a provision permitting adjustments above that limit if an accident occurred in a state whose law required a higher minimum limit of liability, would meet the minimum requirements of New York for an accident involving a vehicle driven by the insured in which one person died and three were injured since New York law requires minimum coverage of $50,000 for one death, $20,000 for bodily injury to two or more individuals and $5,000 to compensate for property damage arising out of any one accident and, therefore, since the $75,000 coverage meets the maximum cumulative exposure of the insured arising from the accident, the policy as it stands would not be modified to provide greater coverage since the court does not have the authority to modify a contract that is clear and unambiguous on its face. Harleysville Mut. Ins. Co. v Boerst, 115 Misc. 2d 1006, 454 N.Y.S.2d 826, 1982 N.Y. Misc. LEXIS 3804 (N.Y. Sup. Ct. 1982), aff'd, 101 A.D.2d 686, 475 N.Y.S.2d 809, 1984 N.Y. App. Div. LEXIS 18226 (N.Y. App. Div. 4th Dep't 1984).

In an action pursuant to N.Y. Ins. Law § 3420(a)(2) to collect an unpaid judgment an injured party and his wife obtained in a personal injury action upon the default in answering or appearing of the alleged insured of an insurer, the trial court properly granted the insurer's motion for summary judgment pursuant to N.Y. C.P.L.R. 3212, as the alleged insured was not a resident of his parents' home at the time of the accident in question, and therefore was not covered under the insurance policy at issue. Fennell v N.Y. Cent. Mut. Fire Ins. Co., 305 A.D.2d 452, 759 N.Y.S.2d 533, 2003 N.Y. App. Div. LEXIS 5367 (N.Y. App. Div. 2d Dep't 2003).

Trial court properly granted a subcontractor's insurer's motion for summary judgment as: (1) the contractor did not seek recovery as an additional insured under the insurance policy issued to the subcontractor, (2) the only basis for the indemnification claim was the indemnification provision in the subcontract between the contractor and the subcontractor, to which the insurer was not a party, and (3) under N.Y. Ins. Law § 3420, the contractor could recover against the insurer only if a judgment was obtained against the subcontractor, which remained unsatisfied for more

than 30 days. Northland Assocs. v Joseph Baldwin Constr. Co., 6 A.D.3d 1214, 776 N.Y.S.2d 663, 2004 N.Y. App. Div. LEXIS 6256 (N.Y. App. Div. 4th Dep't 2004).

Insurer bore the burden of proving that an alleged policy limited coverage to the statutory minimum. When the insurer denied that a policy existed, the insurer was liable for the full amount of the default judgment against its alleged insured. Kleynshvag v GAN Ins. Co., 13 A.D.3d 588, 789 N.Y.S.2d 160, 2004 N.Y. App. Div. LEXIS 15696 (N.Y. App. Div. 2d Dep't 2004).

Trial court properly granted summary judgment to a driver in his action under N.Y. Ins. Law § 3420(a)(2) against another car owner's insurer, arising from an unsatisfied judgment obtained by the driver against the other car owner after the driver was struck by the other owner's car, as the insurer had failed to assert that there was no coverage of the owner in an earlier proceeding and accordingly, it was estopped to deny coverage; the judgment against the insurer should not have been limited to the statutory minimum limit of N.Y. Veh. & Traf. Law § 311(4)(a), as the driver was entitled to the full amount of the judgment obtained where the insurer had failed to offer evidence as to any limitation on coverage. Kleynshvag v GAN Ins. Co., 21 A.D.3d 999, 801 N.Y.S.2d 383, 2005 N.Y. App. Div. LEXIS 9198 (N.Y. App. Div. 2d Dep't 2005).

Insurer was entitled to summary judgment dismissing an accident victim's complaint to recover an unsatisfied judgment against the insured, brought pursuant to N.Y. Ins. Law § 3420(a)(2), because an exclusion contained in an endorsement form to the commercial general liability policy the insurer issued to the insured did not violate N.Y. Gen. Oblig. Law § 5-322.1. Wilson v Sirius Am. Ins. Co., 44 A.D.3d 754, 844 N.Y.S.2d 349, 2007 N.Y. App. Div. LEXIS 10566 (N.Y. App. Div. 2d Dep't 2007).

Judgment creditor may recover value of 22 tons of pepper from debtor's insurer since debtor would have been entitled to indemnity under insurance policy, despite clause excluding from coverage "unexplained loss" or "mysterious disappearance," since such language is ambiguous. McCormick & Co. v Empire Ins. Group, 878 F.2d 27, 1989 U.S. App. LEXIS 8382 (2d Cir. N.Y. 1989).

15. Status as judgment creditor

Rights of automobile lessee, injured in an accident caused by the negligent operation of the leased vehicle while being driven by a friend, against the lessor relative to an unsatisfied judgment obtained by the lessee against the driver, could be enforced under either Insurance Law provision [now § 3420] allowing a direct action against an insurer where an insured fails to pay a judgment, or under CPLR article 52, since the lessor was an insurer of the driver, obligated to pay judgments against him, and was thus a judgment debtor of the driver on his debt to the lessee. Guercio v Hertz Corp., 40 N.Y.2d 680, 389 N.Y.S.2d 568, 358 N.E.2d 261, 1976 N.Y. LEXIS 3087 (N.Y. 1976).

A person residing with the insured may recover under former § 109 [predecessor to former § 167, now § 3420] against the insurer under a policy indemnifying the insured against loss on account of injuries suffered by any person within or upon certain premises of which they were owners, where such person has recovered judgment against the insured which is unsatisfied on return of execution. Hall v Columbia Casualty Co., 246 A.D. 756, 283 N.Y.S. 950, 1935 N.Y. App. Div. LEXIS 10068 (N.Y. App. Div. 1935).

Agreement between automobile accident victim's administratrix and owner of automobile involved in accident under which administratrix obtained a contingent security interest in owner's stock pending outcome of litigation begun by owner against its excess insurer did not deprive administratrix of her status as a judgment creditor within meaning of the Insurance Law. Preisch v Continental Casualty Co., 55 A.D.2d 117, 389 N.Y.S.2d 700, 1976 N.Y. App. Div. LEXIS 14553 (N.Y. App. Div. 4th Dep't 1976), app. denied, 41 N.Y.2d 802, 1977 N.Y. LEXIS 2978 (N.Y. 1977).

16. Rights of judgment creditor in relation to rights of insured

The plaintiffs, in actions brought under predecessor to former § 167 [now § 3420] to enforce a policy of indemnity insurance issued to one against whom the plaintiffs have recovered judgments upon which executions have been returned unsatisfied, stand in the shoes of the insured and forfeit the insurance if there has been a breach of conditions in the policy. Weatherwax v Royal Indem. Co., 250 N.Y. 281, 165 N.E. 293, 250 N.Y. (N.Y.S.) 281, 1929 N.Y. LEXIS 878 (N.Y. 1929).

Where execution has been returned unsatisfied on a judgment for personal injuries sustained in an automobile accident, the injured party stands "in the shoes" of the insured, and may bring an action on the policy. Wenig v Glens Falls Indem. Co., 294 N.Y. 195, 61 N.E.2d 442, 294 N.Y. (N.Y.S.) 195, 1945 N.Y. LEXIS 811 (N.Y. 1945).

Plaintiff, in suing insurer under CLS Ins § 3420(b)(1) on judgment plaintiff has recovered against insured, is in legal privity with insured for purpose of application of collateral estoppel; by proceeding directly against insurer, plaintiff does so as subrogee of insured's rights and is subject to whatever rules of estoppel would apply to insured. D'Arata v New York Cent. Mut. Fire Ins. Co., 76 N.Y.2d 659, 563 N.Y.S.2d 24, 564 N.E.2d 634, 1990 N.Y. LEXIS 3484 (N.Y. 1990).

It was error to dismiss an administrator's N.Y. Ins. Law § 3420(a)(2) and (b) claims against a contractor's insurer because (1) the administrator adequately pled a vehicle owner was an "insured" under the contractor's policies, as the administrator showed the industry practice for the owner's trucks to be hired autos the policies were priced to cover, (2) a relevant schedule of hire was not produced, and (3) the fact-specific degree of the contractor's control of the trucks was pivotal to whether the trucks were hired autos. Carlson v American Intl. Group, Inc., 30 N.Y.3d 288, 89 N.E.3d 490, 67 N.Y.S.3d 100, 2017 N.Y. LEXIS 3280 (N.Y. 2017).

A judgment creditor, seeking recovery against a liability insurer, stands in the shoes of the insured and can recover against the insurer only if the insured could recover under the terms of the policy. Holmes v Allstate Ins. Co., 33 A.D.2d 96, 305 N.Y.S.2d 563, 1969 N.Y. App. Div. LEXIS 2779 (N.Y. App. Div. 1st Dep't 1969).

Judgment creditor's right to collect under policy of insurance is no greater than that of the insured. Bache & Co. v Liberty Mut. Ins. Co., 47 A.D.2d 885, 367 N.Y.S.2d 11, 1975 N.Y. App. Div. LEXIS 9290 (N.Y. App. Div. 1st Dep't 1975).

The right of the judgment creditor to proceed against the insurer is no greater than the right given to the insured. O'Dwyer v Grove Service Corp., 15 Misc. 2d 154, 181 N.Y.S.2d 338, 1958 N.Y. Misc. LEXIS 2543 (N.Y. Sup. Ct. 1958), aff'd, 15 A.D.2d 457, 222 N.Y.S.2d 683, 1961 N.Y. App. Div. LEXIS 7375 (N.Y. App. Div. 1st Dep't 1961).

Former § 167 [now § 3420], in setting up a direct cause of action against the insurer after recovery of judgment against the insured, and providing that the action may be maintained against the insurer "under the terms of the policy," clearly intends to provide a right of action to the injured judgment-creditor, in an action brought pursuant thereto, for determination of the issue of whether a judgment-debtor is or is not an insured. Mireider v New Hampshire Fire Ins. Co., 24 Misc. 2d 765, 204 N.Y.S.2d 504, 1960 N.Y. Misc. LEXIS 2561 (N.Y. City Ct. 1960).

A judgment creditor, seeking to enforce a policy insuring the judgment debtor against liability, stands in the shoes of the assured and can recover against the insurer only if the assured could recover under the terms of the policy. Fadden v Cambridge Mut. Fire Ins. Co., 51 Misc. 2d 858, 274 N.Y.S.2d 235, 1966 N.Y. Misc. LEXIS 1552 (N.Y. Sup. Ct. 1966), aff'd, 27 A.D.2d 487, 280 N.Y.S.2d 209, 1967 N.Y. App. Div. LEXIS 4018 (N.Y. App. Div. 3d Dep't 1967).

Judgment creditors of a default judgment against a condominium unit owner that was premised on personal injuries suffered by a tenant of the unit owner could not recover any more than the unit owner could recover against an insurer that issued a liability insurance policy to the condominium complex itself. Since the claims in the personal injury action required that the insurance policy at issue be construed, as a matter of law, to exclude the unit owner from coverage, the judgment creditors could not meet their burden of establishing coverage and the insurer established, as a matter of law, its claims that it was not responsible for the unpaid default judgment; summary judgment dismissal of the judgment creditors' suit under N.Y. Ins. Law

§ 3420(a)(2), (b), was affirmed. Fliegman v Traveler's Prop. Cas. Ins. Co., 15 A.D.3d 536, 790 N.Y.S.2d 683, 2005 N.Y. App. Div. LEXIS 1845 (N.Y. App. Div. 2d Dep't 2005).

With respect to an indemnity claim, plaintiff (standing in the shoes of insured) failed to prove that an incident was an accident where the insured continued to roll forward at a slow speed even after he was substantially certain that plaintiff could no longer get out of the way and would be struck, but did not apply his brakes until after he struck plaintiff and thus, hitting and injuring plaintiff was not unforeseen or unexpected from the insured's point of view. Even though the insured did not intend to harm him, plaintiff's injury was inherent in the nature of the act; nor was the incident fortuitous, as plaintiff's injury flowed directly and immediately from the insured's actions and was not beyond the control of either party. Hough v Margulies (In re Margulies), 541 B.R. 156, 2015 Bankr. LEXIS 3908 (Bankr. S.D.N.Y. 2015), aff'd, app. denied, 566 B.R. 318, 2017 U.S. Dist. LEXIS 39765 (S.D.N.Y. 2017).

17. Notice to insurer of entry of judgment

Service of notice of entry of judgment against insured upon attorney retained by the insurer to defend the insured fulfills the requirements of former § 167 [now § 3420]. Thrasher v United States Liability Ins. Co., 19 N.Y.2d 159, 278 N.Y.S.2d 793, 225 N.E.2d 503, 1967 N.Y. LEXIS 1703 (N.Y. 1967).

In a direct action suit against an insurer provided for by former § 167 of the Insurance Law [now § 3420], the plaintiff's failure to plead and prove that notice of entry of judgment had been served on the insured and the insurer does not affect the Supreme Court's competence to entertain the suit, but only affects the Supreme Court's power to render a judgment on the merits in plaintiff's favor because they fail to state a cause of action upon which relief could be granted. In other words, notice of entry of judgment is a substantive element of the cause of action and not a jurisdictional element, and if the service of notice does not comply with the statutory requirement that the insurance company be served, plaintiff's action should be dismissed for failure to state a complaint upon which relief can be granted, rather than on the ground that the complaint was jurisdictionally defective. Thrasher v United States Liability Ins. Co., 19 N.Y.2d 159, 278 N.Y.S.2d 793, 225 N.E.2d 503, 1967 N.Y. LEXIS 1703 (N.Y. 1967).

Since Insurance Law former § 167 [now § 3420] does not specifically provide a method for giving notice of entry of judgment to the insurer, any method of service which is reasonably calculated to do so ought to be sufficient to comply with the statutory requirement, and while service upon an officer of the insurance company may be preferable to service upon an attorney retained by the insurance company, it cannot be said that service upon the attorney is not reasonably calculated to give notice. Thrasher v United States Liability Ins. Co., 19 N.Y.2d 159, 278 N.Y.S.2d 793, 225 N.E.2d 503, 1967 N.Y. LEXIS 1703 (N.Y. 1967).

Plaintiff's failure to plead and prove that notice of entry of judgment had been served on the insured and the insurer did not affect the Supreme Court's competence to entertain the suit, but only affected the Supreme Court's power to render a judgment on the merits in plaintiffs' favor because they failed to state a cause of action upon which relief could be granted; in other words, notice of entry of judgment is a substantive element of the cause of action and not a jurisdictional element. Thrasher v United States Liability Ins. Co., 19 N.Y.2d 159, 278 N.Y.S.2d 793, 225 N.E.2d 503, 1967 N.Y. LEXIS 1703 (N.Y. 1967).

The provisions of subd. 1(b) of former § 167 [now § 3420(a)(2)] are mandatory. A judgment creditor of the assured under a policy of liability insurance may not prevail in an action against the insurer where he failed to serve notice of entry of judgment either upon the assured or his attorney. McNamara v Allstate Ins. Co., 3 A.D.2d 295, 160 N.Y.S.2d 51, 1957 N.Y. App. Div. LEXIS 6226 (N.Y. App. Div. 4th Dep't 1957).

With respect to a claim based upon judgment obtained in an automobile accident case against the defendant's liability insurer, under subd. 1(b) of former § 167 [now § 3420(a)(2)] the insurance policy in question must be deemed to contain a provision requiring that a copy of the judgment with notice of entry be served upon the insurer, and, accordingly, an allegation of performance of all terms and conditions of the policy by the person seeking to enforce it in effect alleges that such service was made upon the insurer. Price v Allstate Ins. Co., 12 A.D.2d 911, 210 N.Y.S.2d 945, 1961 N.Y. App. Div. LEXIS 12596 (N.Y. App. Div. 1st Dep't 1961).

Where the insurer could not locate its insured, its contention that under the terms of subd 1(b) of former § 167 [now § 3420(a)(2)] it is a condition precedent to recovery by the injured person that he must effect service of his judgment with notice of entry thereof in some manner reasonably calculated to bring notice to such insured does violence to the manifest purpose of such statute. Surely it was never intended that an individual claimant must trace an insured who cannot be found by an insurance company with vast and expert investigative resources. The State's solicitude for the victims of automobile accidents is far too great to permit such interpretation in view of the plain wording of the statute. Fortis v Glens Falls Ins. Co., 23 A.D.2d 88, 258 N.Y.S.2d 753, 1965 N.Y. App. Div. LEXIS 4384 (N.Y. App. Div. 1st Dep't 1965), aff'd, 18 N.Y.2d 779, 275 N.Y.S.2d 265, 221 N.E.2d 807, 1966 N.Y. LEXIS 1084 (N.Y. 1966).

For the purpose of serving notice of entry of judgment upon the insured under the provision of subd 1(b) of former § 167 [now § 3420(a)(2)], the action in which the judgment was obtained is still pending at the time of such service and hence service may be had under the provisions of CPLR § 2103 which applies to the service of papers in a pending action. Fortis v Glens Falls Ins. Co., 23 A.D.2d 88, 258 N.Y.S.2d 753, 1965 N.Y. App. Div. LEXIS 4384 (N.Y. App. Div. 1st Dep't 1965), aff'd, 18 N.Y.2d 779, 275 N.Y.S.2d 265, 221 N.E.2d 807, 1966 N.Y. LEXIS 1084 (N.Y. 1966).

Claim filed in court of claims prior to service of judgment with notice of entry is jurisdictionally defective, not amenable to amendment and must be dismissed. Manshul Constr. Corp. v State Ins. Fund, 118 A.D.2d 983, 500 N.Y.S.2d 87, 1986 N.Y. App. Div. LEXIS 54791 (N.Y. App. Div. 3d Dep't 1986).

Denial of an insurer's summary judgment motion was improper in a claim seeking to recover a judgment against its insured pursuant to N.Y. Ins. Law § 3420 because the insurer showed that plaintiff failed to serve it with a copy of the unsatisfied judgment and notice of entry 30 days before she brought the direct action against the insurer, and, in opposition, plaintiff failed to raise a triable fact issue; contrary to plaintiff's contention, she did not comply with the service requirements by sending a letter to the broker of the insured, rather than to the insurer, informing the broker that the judgment enclosed with the letter had been entered against the insured and requesting the broker to satisfy the judgment, despite the fact that the letter and the judgment apparently were forwarded by the broker to the insurer. Plaintiff's contention that the broker would not cooperate with her in identifying the insurer, standing alone, did not demonstrate that it was impossible for her to learn the insurer's identity and directly serve it. Guayara v Hudson Ins. Co., 48 A.D.3d 628, 852 N.Y.S.2d 359, 2008 N.Y. App. Div. LEXIS 1567 (N.Y. App. Div. 2d Dep't 2008).

Judgment creditors were entitled to summary judgment in their N.Y. Ins. Law § 3420(a)(2) action to recover an unsatisfied judgment against the insured because the creditors were reasonably diligent in ascertaining the identity of an excess insurer and in providing notice to it, and the insurer did not raise a triable issue of fact in opposition. Golebiewski v National Union Fire Ins. Co. of Pittsburgh, Pa., 101 A.D.3d 1074, 958 N.Y.S.2d 161, 2012 N.Y. App. Div. LEXIS 8953 (N.Y. App. Div. 2d Dep't 2012).

Under subd. 1(b) of former § 167 [now § 3420(a)(2)], plaintiff, seeking to require a liability insurer of the defendant to pay a judgment obtained in an action for damages, must, before commencing suit against the insurer, have served a copy of the judgment on the insurer as well as on the insured or his attorney and permitted 30 days to elapse prior to instituting suit against the insurer, otherwise he has no right of action under this section. Clark v Utica Mut. Ins. Co., 31 Misc. 2d 1005, 222 N.Y.S.2d 239, 1961 N.Y. Misc. LEXIS 1899 (N.Y. Mun. Ct. 1961).

18. Effect of prior failure to notify insurer of claim

Plaintiff, seeking to enforce judgment in a negligence action against the judgment debtor's insurer, could not recover as against the insurer's defense that timely notice was not given to it by the insured or by plaintiff, and, it being established that the insured gave insurer no notice at all and the trial court having

reached the conclusion that plaintiff failed to give notice within the time prescribed or as soon thereafter as reasonably possible, from the evidence, in accordance with subd. 1(d) of former § 167 [now § 3420(a)(4)], the complaint must be dismissed. Allen v Allstate Ins. Co., 20 A.D.2d 763, 247 N.Y.S.2d 489, 1964 N.Y. App. Div. LEXIS 4243 (N.Y. App. Div. 1st Dep't 1964).

In an action against an insurer to recover upon an unsatisfied judgment previously rendered against the defendant's insured, the complaint should have been dismissed where the record did not establish that proper notice of the accident was given by either the insured or the plaintiff prior to entry of the judgment against the defendant's insured. Feigelson v Allstate Ins. Co., 38 A.D.2d 535, 327 N.Y.S.2d 115, 1971 N.Y. App. Div. LEXIS 2684 (N.Y. App. Div. 1st Dep't 1971), aff'd, 31 N.Y.2d 913, 340 N.Y.S.2d 646, 292 N.E.2d 787, 1972 N.Y. LEXIS 884 (N.Y. 1972).

Personal injury plaintiff who obtained default judgment against insured tortfeasor, but neither entered judgment against tortfeasor's insurer nor served copy of judgment with notice of entry on insurer, was not entitled to execution with notice to garnishee and sheriff's levy against insurer seeking to satisfy default judgment out of proceeds of insurance policy, since as stranger to insurance agreement and not third-party beneficiary thereof, plaintiff's only remedy against insurer arising out of insurance agreement was direct action against it pursuant to CLS Ins § 3420, which requires as condition precedent that copy of judgment with notice of entry be served on insurer. Rodriguez v JLF Properties, Inc., 191 A.D.2d 211, 594 N.Y.S.2d 206, 1993 N.Y. App. Div. LEXIS 1859 (N.Y. App. Div. 1st Dep't 1993).

Because the injured parties did not notify an insurer of their action against its purported insured until they sought to recover an unsatisfied default judgment against the insured under N.Y. Ins. Law § 3420(a)(2), the injured parties were not entitled to summary judgment regardless of the sufficiency of the opposing papers. Lopez v State Farm Fire & Cas. Co., 51 A.D.3d 640, 858 N.Y.S.2d 252, 2008 N.Y. App. Div. LEXIS 4109 (N.Y. App. Div. 2d Dep't 2008).

Pedestrian's N.Y. Ins. Law § 3420(a)(2) suit failed as: (1) the pedestrian failed to notify the insurer of the accident or of the underlying suit against the insured; (2) the insured failed to timely notify the insurer of the accident and did not forward the pleadings in the underlying suit to the insurer until four months after the insured was served; (3) the pedestrian failed to prove that the insured did not have notice of the underlying action until it received the insurer's disclaimer letter as the insured's principal merely denied having prior notice of the suit without giving an explanation; and (4) the disclaimer letter bound the pedestrian. Konig v Hermitage Ins. Co., 93 A.D.3d 643, 940 N.Y.S.2d 116, 2012 N.Y. App. Div. LEXIS 1662 (N.Y. App. Div. 2d Dep't 2012).

There is no basis for a motion for summary judgment against the liability insurer, in an action brought under former § 167 [now § 3420] following recovery by plaintiffs of default judgment against the insured, where there is no proof that the insurer had notice or knowledge of the action against the insured or an opportunity to defend such action. Zappia v Allstate Ins. Co., 28 Misc. 2d 723, 212 N.Y.S.2d 698, 1961 N.Y. Misc. LEXIS 3276 (N.Y. Sup. Ct. 1961).

Where an action is brought against a motorist carrying liability insurance for damage sustained in an accident covered by such insurance, and plaintiff's attorney knows of the insurance and has opened negotiations with the insurer looking to settlement of plaintiff's claim, a default judgment later obtained against the insured motorist, without giving timely notice of such suit to the insurer that such an action has been brought or is pending, so as to give the insurer an opportunity to come in and defend or at least to make timely motion to vacate a default judgment, defeats any right of action under former § 167 [now § 3420] to collect the judgment from the insurer. Clark v Utica Mut. Ins. Co., 31 Misc. 2d 1005, 222 N.Y.S.2d 239, 1961 N.Y. Misc. LEXIS 1899 (N.Y. Mun. Ct. 1961).

Although an individual failed to file a notice of a personal injury claim pursuant to 11 U.S.C.S. § 524(e) during one of the theaters' bankruptcy proceedings, the failure did not prevent the individual from proceeding against the non-bankrupt theaters and an insurer under N.Y. Ins. Law § 3420(a)(1). Minafri v UA Theatres, Inc., 782 N.Y.S.2d 177, 5 Misc. 3d 474, 2004 N.Y. Misc. LEXIS 1449 (N.Y. Sup. Ct. 2004).

Despite the insured's three-year delay in notifying the insurers of the incident in which a judgment creditor was assaulted and battered by an employee of the insured, the insurers' failure to disclaim coverage over a year after they received notice was unreasonable as a matter of law. Therefore, the failure of the insurers to timely disclaim coverage under N.Y. Ins. Law § 3420(d) precluded them from raising that bar to the judgment creditor's claims against the insurers. NYAT Operating Corp. v Gan Natl. Ins. Co., 800 N.Y.S.2d 272, 8 Misc. 3d 975, 2005 N.Y. Misc. LEXIS 1279 (N.Y. Sup. Ct. 2005).

19. Burden of proof as to effectiveness of policy and breach of conditions

The complaint in an action by judgment creditors against an insurance company was dismissed for failure of the policy to cover the automobile involved in the accident. Schaller v Aetna Casualty & Surety Co., 280 A.D. 988, 116 N.Y.S.2d 729, 1952 N.Y. App. Div. LEXIS 4512 (N.Y. App. Div. 1952), aff'd, 306 N.Y. 725, 117 N.E.2d 908, 306 N.Y. (N.Y.S.) 725, 1954 N.Y. LEXIS 1080 (N.Y. 1954).

In order that the judgment creditor may recover against the insurer, he must establish that, at the time of the accident, there was in full force and effect an agreement of insurance between the insurer and the judgment debtor covering the latter for the liability merged in the judgment. Holmes v Allstate Ins. Co., 33 A.D.2d 96, 305 N.Y.S.2d 563, 1969 N.Y. App. Div. LEXIS 2779 (N.Y. App. Div. 1st Dep't 1969).

In action pursuant to Insurance Law former § 167, subd 1(b) [now § 3420(a)(2)], insurer could not rely on its earlier disclaimer under policy provision excluding coverage for damage resulting from insured's change in grade of property where insurer offered no proof that collapse of plaintiff's garage resulted from an excluded cause. McGroarty v Great American Ins. Co., 43 A.D.2d 368, 351 N.Y.S.2d 428, 1974 N.Y. App. Div. LEXIS 5848 (N.Y. App. Div. 2d Dep't 1974), aff'd, 36 N.Y.2d 358, 368 N.Y.S.2d 485, 329 N.E.2d 172, 1975 N.Y. LEXIS 1814 (N.Y. 1975).

In an action brought by a judgment creditor on an automobile liability policy the burden of proving a breach of the policy that the automobile should be kept and used principally at a designated place or area was upon the defendant. Arbuckle v (American) Lumbermens Mut. Casualty Co., 129 F.2d 791 (CA2 NY 1942).

20. Claims against partnerships

A complaint, alleging that an automobile was being operated by one individual defendant for and on behalf of another, does not import a partnership use of the automobile by operator at the time of accident, and, where judgment was recovered against them, the plaintiff cannot recover the amount thereof, under former § 109 [predecessor to former § 167, now § 3420] in action on policy of indemnity insurance protecting them against loss by reason of automobile accidents for which their partnership is liable and to that extent individually as members of firm but not otherwise. Geitner v United States Fidelity & Guaranty Co., 251 N.Y. 205, 167 N.E. 222, 251 N.Y. (N.Y.S.) 205, 1929 N.Y. LEXIS 705 (N.Y. 1929).

A policy issued to two individuals contemplates separate and distinct obligations to the various named assured rather than a single obligation to all of the assured. Hence, plaintiff who held an unsatisfied judgment against two partners individually and as partners, for personal injuries suffered when he was assaulted by one of them while acting in the course of the partnership business, was entitled to judgment against the insurer on a public liability policy issued to the partners individually, for although the policy exclusion of wilful assault applied to one of them, the other was not guilty of wilful assault. Morgan v Greater New York Taxpayers Mut. Ins. Ass'n, 305 N.Y. 243, 112 N.E.2d 273, 305 N.Y. (N.Y.S.) 243, 1953 N.Y. LEXIS 819 (N.Y. 1953), limited, Admiral Ins. Co. v Joy Contrs., Inc., 19 N.Y.3d 448, 948 N.Y.S.2d 862, 972 N.E.2d 103, 2012 N.Y. LEXIS 1352 (N.Y. 2012).

21. Relationship to other laws

The statutory right conferred upon a judgment creditor against an insurer by the provisions of former § 167 [now § 3420], did

not flow to the judgment creditor from the rights which accrued to the policyholder. Hence, such a judgment creditor was not a person deriving his title through or under the policyholder by assignment or otherwise, within the provisions of the Civil Practice Act § 347. Friedman v United States Fidelity & Guaranty Co., 9 Misc. 2d 306, 170 N.Y.S.2d 226, 1957 N.Y. Misc. LEXIS 1934 (N.Y. App. Term 1957).

Action against insurer under Insurance L former § 167 [now § 3420] is not an action in the nature of an action on a judgment within the meaning of CPLR 3213. Feuer v Insurance Co. of North America, 66 Misc. 2d 931, 323 N.Y.S.2d 178, 1971 N.Y. Misc. LEXIS 1600 (N.Y. App. Term 1971).

It was unnecessary for claimant to proceed separately against insurance carriers to recover amount of default judgment entered against insureds in primary action, and the trial court, acting under CPLR §§ 103(c) and 5240, initiated an action pursuant to Insurance Law former § 167 subd 1(b) [now § 3420(a)(2)], where each essential ingredient of such action was present, and the liability insurance carriers were actively present in the defense of the primary litigation, having full notice of the proceedings. Brown v Reid, 72 Misc. 2d 237, 339 N.Y.S.2d 204, 1972 N.Y. Misc. LEXIS 1244 (N.Y. Sup. Ct. 1972).

In the absence of specific guidelines for proceedings pursuant to Insurance Law former § 167, subd 1(b) [now § 3420(a)(2)], the general declaratory judgment rules of the CPLR, read through CPLR §§ 103(c) and 104, applied to claimant's action to recover from insurers the amount of a declaratory judgment entered against insureds. Brown v Reid, 72 Misc. 2d 237, 339 N.Y.S.2d 204, 1972 N.Y. Misc. LEXIS 1244 (N.Y. Sup. Ct. 1972).

22. Defenses available to insurer against judgment creditor

In an action under former § 109 [predecessor to former § 167, now § 3420] against an insurer after unsatisfied judgment against the insured, the defense of release is not binding on the plaintiff where such is not permitted by the policy. Rushing v Commercial Casualty Ins. Co., 225 A.D. 49, 232 N.Y.S. 255, 1928 N.Y. App. Div. LEXIS 8739 (N.Y. App. Div. 1928), rev'd, 251 N.Y. 302, 167 N.E. 450, 251 N.Y. (N.Y.S.) 302, 1929 N.Y. LEXIS 719 (N.Y. 1929).

In an action against an insurer under former § 109 [predecessor to former § 167, now § 3420], after a return wholly unsatisfied of execution duly issued against the insured, the defense and counterclaim that the plaintiff and her attorney and defendant's insured and his attorney in previous action for the purpose of procuring a much larger verdict, and to enforce the payment of it against the defendant, entered into a conspiracy to waive jury trial of issues in that action, after the verdict had been set aside, and to submit such issues, upon the evidence presented at trial, to the trial justice who presided, is insufficient and should be stricken out. Rhodes v Ocean Acci. & Guarantee Corp., 235 A.D. 340, 257 N.Y.S. 214, 1932 N.Y. App. Div. LEXIS 7960 (N.Y. App. Div. 1932).

The right of a judgment creditor to recover in an action brought under former § 109 [predecessor to former § 167, now § 3420] is identical with the insured's right to recover on the policy where he has paid the judgment and is seeking indemnity from the insurance company, and any defense to the action brought by the insured is available to one brought under the statute. Fox v Employers' Liability Assurance Corp., 243 A.D. 325, 276 N.Y.S. 917, 1935 N.Y. App. Div. LEXIS 7062 (N.Y. App. Div.), aff'd, 267 N.Y. 609, 196 N.E. 604, 267 N.Y. (N.Y.S.) 609, 1935 N.Y. LEXIS 1331 (N.Y. 1935).

In an action against an insurer based on a refusal of the insurer to honor its obligation under an insurance contract to pay the amount due on a judgment, a default was properly entered against the insurer, where the insurer's excuse that a partner in its counsel's law firm underwent heart surgery did not excuse the insurer's failure to file an answer, in that the partner was not an active participant in the defense of the action, and where the insurer failed to show a meritorious defense, in that for five years, from the time the claim arose until after jury selection and commencement of proof, the insurer failed to honestly and accurately advise any of the parties or the court of its insurance coverage limits. Fredericks v Home Indem. Co., 101 A.D.2d 614, 474 N.Y.S.2d 870, 1984 N.Y. App. Div. LEXIS 18154 (N.Y. App. Div. 3d Dep't 1984).

Manufacturer was entitled to summary judgment against shipper's insurance company in manufacturer's action directly against insurer pursuant to CLS Ins § 3420, where manufacturer's goods had been lost in transit, shipper had settled with insurance company for far less than full value of loss, in earlier suit manufacturer had won judgment against shipper for full value, and where insurer, who had at first been impleaded by shipper into prior action but later dismissed from that suit, opposed summary judgment on grounds that (1) it was released from liability based on its settlement with shipper and (2) collateral estoppel barred manufacturer from seeking relief in current action; manufacturer was not bound by settlement agreement between shipper and insurance company since manufacturer was not party to that settlement and such holdings would encourage collusion between insurers and insureds to limit their liability to injured third-parties, and collateral estoppel did not apply since in first action manufacturer sought relief solely against shipper and did not have full and fair opportunity to contest issue of insurance company's liability. Smith & Wesson v Birmingham Fire Ins. Co., 123 A.D.2d 135, 510 N.Y.S.2d 606, 1987 N.Y. App. Div. LEXIS 39891 (N.Y. App. Div. 1st Dep't 1987).

Insurer was not estopped from asserting that its insured acted intentionally by virtue of finding of negligence in underlying action brought against insured where underlying judgment was entered on default, and issue of negligence was not actually litigated in prior action. Rourke v Travelers Ins. Co., 254 A.D.2d 730, 678 N.Y.S.2d 195, 1998 N.Y. App. Div. LEXIS 10411 (N.Y. App. Div. 4th Dep't 1998).

Insurer was entitled to summary judgment in a pedestrian's action to recover the amount of an unsatisfied judgment against the insured because the insured's partial premium payment for a $ 2 million umbrella policy resulted in the insurer's valid cancellation of the policy after the prorated period covered by her payment expired, and the umbrella policy, and the insured's coverage, terminated upon cancellation a few hours before the pedestrian was injured. Garcia v Government Empls. Ins. Co., 151 A.D.3d 1020, 58 N.Y.S.3d 428, 2017 N.Y. App. Div. LEXIS 5123 (N.Y. App. Div. 2d Dep't), aff'd, 30 N.Y.3d 1033, 91 N.E.3d 1185, 69 N.Y.S.3d 206, 2017 N.Y. LEXIS 3725 (N.Y. 2017).

Failure of a judgment creditor to litigate a bad faith claim against the insurer in the earlier Insurance Law § 3420(a)(2) action did not bar litigation of that claim in the instant action because the insureds' assigned all of their rights and claims against the insurer to the judgment creditor after he had recovered in the direct action; thus, res judicata did not bar the judgment creditor's action. Corle v Allstate Ins. Co., 162 A.D.3d 1489, 79 N.Y.S.3d 414, 2018 N.Y. App. Div. LEXIS 4192 (N.Y. App. Div. 4th Dep't 2018).

Defendant was obligated to satisfy a judgment that plaintiff obtained against defendant's insured, as defendant had not shown that the insured failed to cooperate; rather, defendant's contention that the insured's principal refused to respond to certain telephone calls and letters was insufficient to show an attitude of willful and avowed obstruction, and although there was evidence that the principal said before a trial date was set that he would not attend any trial, defendant did not allege that he actually failed to appear. DeLuca v RLI Ins. Co., 187 A.D.3d 709, 131 N.Y.S.3d 716, 2020 N.Y. App. Div. LEXIS 5644 (N.Y. App. Div. 2d Dep't 2020).

The plaintiff, after obtaining judgment against taxicab corporation for personal injuries, and execution having been returned unsatisfied, commenced an action against defendant insurance company to recover the face value of the policy of insurance issued by defendant company for the benefit of the public pursuant to Highway Law, § 282-b. Defendant interposed defense that it was not liable on policy as judgment was not recovered after trial of issues but after assessment of damages by sheriff's jury. Interposition of such a defense by the insurance company was unethical and questionable and that it should not be permitted, even under the statute itself, to avoid liability on its policy on such a slight or technical ground. Devlin v New York Mut. Casualty Taxicab Ins. Co., 206 N.Y.S. 365, 123 Misc. 784, 1924 N.Y. Misc. LEXIS 1208

(N.Y. Sup. Ct. 1924), modified, 213 A.D. 152, 210 N.Y.S. 57, 1925 N.Y. App. Div. LEXIS 8453 (N.Y. App. Div. 1925).

The defense of release is available to an insurer where it would have been available to the judgment debtor had he defended the action. Moulton v Utica Mut. Ins. Co., 76 N.Y.S.2d 34, 190 Misc. 878, 1948 N.Y. Misc. LEXIS 2042 (N.Y. Sup. Ct. 1948).

An insurer paid its assured $50.00 dollars in full satisfaction of a claim for loss of goods by the plaintiff. Held: this satisfaction did not constitute a defense to an action by the plaintiff, as judgment creditor of the insured against the insurer, on the theory that in such action the plaintiff stood in the shoes of the insured and could recover only if insured could himself do so. Karan Knitwear, Inc. v National Ben Franklin Ins. Co., 12 Misc. 2d 93, 174 N.Y.S.2d 480, 1958 N.Y. Misc. LEXIS 3528 (N.Y. App. Term 1958).

Where an action is brought under former § 167 [now § 3420] against the liability insurer upon the basis of judgment obtained and remaining unsatisfied against the operator of the automobile, who is not the owner thereof, and the question arises whether the liability insurance policy covers the operator as one who was driving the automobile with the owner's permission, which issue has not been adjudicated, a motion by defendant insurer for summary judgment should not be granted merely upon affidavit of the owner and the unverified statement of the operator alleging that the latter was operating the automobile without the owner's permission. Mireider v New Hampshire Fire Ins. Co., 24 Misc. 2d 765, 204 N.Y.S.2d 504, 1960 N.Y. Misc. LEXIS 2561 (N.Y. City Ct. 1960).

Where a liability insurer, after receiving summons in an action against it by a judgment creditor of the insured, did not move to vacate the inquest judgment obtained against the insured and, instead, interposed an answer to the complaint in the second action, it surrendered any right to reopen the default judgment against the insured and must stand or fall on the issue of whether plaintiff's attorneys were required to give the company notice of the prior litigation before starting suit against the insurer under former § 167 [now § 3420]. Clark v Utica Mut. Ins. Co., 31 Misc. 2d 1005, 222 N.Y.S.2d 239, 1961 N.Y. Misc. LEXIS 1899 (N.Y. Mun. Ct. 1961).

In an action by an automobile passenger to recover an unsatisfied judgment against the driver of the vehicle involved in a collision with another vehicle, the Canadian liability insurer, which had been given a full opportunity to defend the action and had made a deliberate determination not to do so was estopped from raising defenses that the accident occurred through the sole negligence of the driver of the other automobile, that the statute of limitations had expired, and that plaintiff had released the insured defendant. Bonde v General Sec. Ins. Co., 55 Misc. 2d 588, 285 N.Y.S.2d 675, 1967 N.Y. Misc. LEXIS 979 (N.Y. Sup. Ct. 1967).

The statutory right to sue, giving an injured person an action against the insurer of the tortfeasor, is remedial for the correction of injustice, since prior to the enactment of the statute an injured person possessed no cause of action against such an insurer because of lack of privity of contract. However, since the judgment creditor's rights against the insurer are no greater than those of the insured, defenses good against the insured are also good against the injured person. Bonde v General Sec. Ins. Co., 55 Misc. 2d 588, 285 N.Y.S.2d 675, 1967 N.Y. Misc. LEXIS 979 (N.Y. Sup. Ct. 1967).

In injured party's direct action against the insurance company after an unsatisfied judgment against insured, the insurance company cannot go behind judgment and raise defenses going to merits of injured party's claim against driver. Di Martile v Country-Wide Ins. Co., 86 Misc. 2d 36, 381 N.Y.S.2d 579, 1975 N.Y. Misc. LEXIS 3356 (N.Y. Sup. Ct. 1975), aff'd, 51 A.D.2d 869, 379 N.Y.S.2d 685, 1976 N.Y. App. Div. LEXIS 11488 (N.Y. App. Div. 4th Dep't 1976), aff'd, 51 A.D.2d 869, 379 N.Y.S.2d 684 (N.Y. App. Div. 4th Dep't 1976).

In an action pursuant to Ins Law former § 167(5) [now § 3420(c)], defendant insurer would not be able to disclaim coverage under its casualty policy on the ground that its insured failed to notify defendant of the incident or cooperate in the defense of the action and that the insured could not be located, where defendant had failed to meet its burden of demonstrating due diligence in locating its insured, and where plaintiff provided defendant with sufficient and reasonable notice of the accident and ample opportunity to inspect its insured's vehicle and to investigate the accident. Banner Casualty Co. v Nationwide Ins. Co., 115 Misc. 2d 453, 454 N.Y.S.2d 264, 1982 N.Y. Misc. LEXIS 3707 (N.Y. Civ. Ct. 1982).

23. Other matters

A plaintiff is entitled to judgment in an action under former § 109 [predecessor to former § 167, now § 3420] to recover from the defendant insurer the amount due on an unsatisfied judgment entered in an action for personal injuries suffered while the plaintiff was a passenger in an automobile owned and driven by the defendant's insured, where it appears that after the accident but before judgment the plaintiff and the insured were married; the insurer's obligation under the policy became fixed upon the happening of the accident. Stonborough v Preferred Acci. Ins. Co., 292 N.Y. 154, 54 N.E.2d 342, 292 N.Y. (N.Y.S.) 154, 1944 N.Y. LEXIS 1386 (N.Y. 1944).

Plaintiff, in action brought directly against liability insurer for personal injuries suffered when he was shot by insured, was collaterally estopped to relitigate question of whether shooting was intentional (and thus excluded from policy coverage) where criminal jury had previously found insured guilty of first degree assault. D'Arata v New York Cent. Mut. Fire Ins. Co., 76 N.Y.2d 659, 563 N.Y.S.2d 24, 564 N.E.2d 634, 1990 N.Y. LEXIS 3484 (N.Y. 1990).

Where a casualty insurance company fails to give a bond or undertaking on appeal to stay the execution of a judgment procured against the insured for injuries to its employees, and the insured in order to prevent the sale of his property pays the judgment, he may immediately bring an action against the insurer, although the policy provides that no action shall lie under the policy "unless it shall be brought for loss or expense actually sustained and paid in satisfaction of a final judgment." When levy under the execution was discharged by the insured, the judgment then was final, within the meaning of the policy, for it had finally resulted in loss or expense to him, which the policy covered. Where a casualty company fails to defend actions brought against the insured by surgeons employed by him to render necessary services to injured employees, the insured may recover the amount of such judgments, where it is bound by the policy to "render to the company at all times all co-operation and assistance in his power." E. M. Upton Cold Storage Co. v Pacific Coast Casualty Co., 162 A.D. 842, 147 N.Y.S. 765, 1914 N.Y. App. Div. LEXIS 6052 (N.Y. App. Div. 1914).

Defendant insurance company has no right to prefer claim which it paid as an insurer for a general employer against a general liability policy which it issued to a contractor and take that sum out of the fund in priority to judgment which the plaintiff obtained against the contractor, the execution of which was returned unsatisfied. Haberman v Hartford Acci. & Indem. Co., 230 A.D. 314, 244 N.Y.S. 161, 1930 N.Y. App. Div. LEXIS 8605 (N.Y. App. Div. 1930).

In an action brought under former § 109 [predecessor to former § 167, now § 3420] by guest riders to recover from the insurer under the terms of its policy issued to insured amount of judgments against insured returned unsatisfied, and not exceeding limits specified in said policy, an order granting plaintiff's motion for summary judgment was proper. Mastruzzi v United States Casualty Co., 246 A.D. 593, 284 N.Y.S. 808, 1935 N.Y. App. Div. LEXIS 9279 (N.Y. App. Div. 1935).

In an action pursuant to former § 167 [now § 3420] to compel defendant insurance company to pay a judgment recovered by plaintiffs in an action for damages for assault and battery, the insurer's alleged liability being under a "comprehensive personal liability policy" which excluded coverage of injuries caused intentionally or by direction of the insured, defendant's motion for summary judgment, based on the exclusion clause, was properly denied. Baldinger v Consolidated Mut. Ins. Co., 15 A.D.2d 526, 222 N.Y.S.2d 736, 1961 N.Y. App. Div. LEXIS 7088 (N.Y. App. Div. 2d Dep't 1961), aff'd, 11 N.Y.2d 1026, 230 N.Y.S.2d 25, 183 N.E.2d 908, 1962 N.Y. LEXIS 1088 (N.Y. 1962).

In action for wilful damage to property, defendant insured's failure to notify insurer of amended complaint asserting negli-

gence cause of action did not abrogate insurer's liability and duty to defend under policy where original complaint forwarded to insurer alleged collapse of plaintiff's garage, which, though caused by defendant's purposive conduct in raising grade and permitting vehicles to drive thereon over adjacent landowner's objections, was accidental within coverage provisions of defendant's insurance policy; thus garage owner was entitled to recover under Insurance Law former § 167, subd 1(b) [now § 3420(a)(2)] based on insurer's liability. McGroarty v Great American Ins. Co., 43 A.D.2d 368, 351 N.Y.S.2d 428, 1974 N.Y. App. Div. LEXIS 5848 (N.Y. App. Div. 2d Dep't 1974), aff'd, 36 N.Y.2d 358, 368 N.Y.S.2d 485, 329 N.E.2d 172, 1975 N.Y. LEXIS 1814 (N.Y. 1975).

While plaintiff established her compliance with the requirements of N.Y. Ins. Law § 3420(a)(2) in attempting to recover an unsatisfied judgment from a personal injury action against an alleged insured and the driver of the insured vehicle, the insurer raised a triable issue of fact as to the existence of coverage for the driver under the particular policy at issue; however, the insurer was not entitled to summary judgment based on its conducting an exhaustive search of the driver's and the insured's names in the insurer's records. Marsala v Travelers Indem. Co., 50 A.D.3d 864, 855 N.Y.S.2d 669, 2008 N.Y. App. Div. LEXIS 3384 (N.Y. App. Div. 2d Dep't 2008).

Judgment creditor failed to sufficiently plead a claim under this statute against a claims administrator (CA) for a policy because the CA did not have independent authority to issue the disclaimer and only did so at the insurer's direction, the CA was not an insurance company and did not participate in any way in the underwriting, issuance, or binding of the policy, and the CA had no contractual privity with the insured or the creditor. S.P. v Dongbu Ins. Co., 174 A.D.3d 911, 106 N.Y.S.3d 365, 2019 N.Y. App. Div. LEXIS 5882 (N.Y. App. Div. 2d Dep't 2019).

In an action by an insurer of the owner of premises and the owner against a coal supply company and its insurer to recover the sum paid by plaintiff insurer in settlement of an action by third party against the owner and coal supply company as joint tort feasors to recover for personal injuries alleged to have been caused by negligence in replacing coal hole cover, it seems, that plaintiffs may have a cause of action, under former § 109 [predecessor to former § 167, now § 3420] against defendant insurer, provided it is established that the judgment has been recovered and that execution has been returned unsatisfied against the defendant insured. Greater New York Taxpayers' Mut. Ins. Ass'n v Sinram Bros., Inc., 267 N.Y.S. 796, 149 Misc. 223, 1933 N.Y. Misc. LEXIS 1725 (N.Y. City Ct. 1933).

Where liability for damages pursuant to Insurance Law former § 167 subd 1(b) [now § 3420(a)(2)] was sharply contested as between the Motor Vehicle Accident Indemnification Corporation and a commercial insurance carrier which was being liquidated under the supervision of the State Insurance Department, the state could have made some arrangement for payment of damages recovered by injured motorist in default judgment previously entered against insured owner and uninsured operator. Brown v Reid, 72 Misc. 2d 237, 339 N.Y.S.2d 204, 1972 N.Y. Misc. LEXIS 1244 (N.Y. Sup. Ct. 1972).

Where a liability policy provides that an action be started within twelve months from the time of loss, the time begins to run from the time of the recovery of the judgment against insured. Oakley v Firemen's Ins. Co., 70 N.Y.S.2d 458, 1947 N.Y. Misc. LEXIS 2419 (N.Y. Sup. Ct. 1947).

Worker's N.Y. C.P.L.R. art. 78 proceeding was an improper basis to compel the state insurance fund (SIF) to pay a judgment issued in favor of the worker against his former employer because there was no evidence that the SIF was enjoined by law to do so, there was no undisputed agreement for it to do so, and it was exempt from having to do so under Insurance Law; the SIF was entitled to an order to show cause for an order dismissing the petition. The court lacked subject matter jurisdiction over the action, which should have been brought in the Court of Claims, because the worker was trying to collect money damages against a state agency. Miraglia v State Ins. Fund, 920 N.Y.S.2d 633, 32 Misc. 3d 471, 2011 N.Y. Misc. LEXIS 1454 (N.Y. Sup. Ct. 2011).

New York State Insurance Fund is exempt from the requirements of N.Y. Ins. Law § 3420(a), (b) due to N.Y. Ins. Law § 1108(c). Town of Amherst v Hilger, 106 A.D.3d 120, 962 N.Y.S.2d 837, 2013 N.Y. App. Div. LEXIS 1901 (N.Y. App. Div. 4th Dep't 2013).

As N.Y. Ins. Law § 3420(a)(1) required, the policy provided that the bankruptcy or insolvency of the rental company would not relieve the insurer of its obligations under the policy; the insurer therefore would have to provide indemnification to plaintiffs in the underlying action if the rental company declared bankrupt or became insolvent. Sunbelt Rentals, Inc. v Charter Oak Fire Ins. Co., 839 F. Supp. 2d 680, 2012 U.S. Dist. LEXIS 37613 (S.D.N.Y. 2012).

V. Procedure for Giving Notice of Accident

24. In general

When the legislature, in 1939, added the words providing for "written notice by or on behalf of the insured person", it did not intend to change the rule of Weatherwax v Royal Indem. Co. (1929) 250 NY 281, 165 NE 293, which held that the provision for "notice" by the insured as described in the statute authorized a policy provision requiring written notice by the insured. Bazar v Great American Indem. Co., 306 N.Y. 481, 119 N.E.2d 346, 306 N.Y. (N.Y.S.) 481, 1954 N.Y. LEXIS 1019 (N.Y. 1954).

Requirement that insured notify its liability insurance carrier of potential claim "as soon as practicable" operates as condition precedent to coverage, and insured has burden of showing reasonableness of any excuse for delay in giving notice. White v New York, 81 N.Y.2d 955, 598 N.Y.S.2d 759, 615 N.E.2d 216, 1993 N.Y. LEXIS 1127 (N.Y. 1993).

The provision of subd. 1(c) of former § 167 [now § 3420(a)(3)] that notice given by the insured to any licensed agent of the insurer shall be deemed notice to the insurer does not exempt the insured from compliance with the provision of an insurance policy that notice shall be in writing and as soon as practicable. Nothhelfer v American Surety Co., 277 A.D. 1009, 100 N.Y.S.2d 331, 1950 N.Y. App. Div. LEXIS 4265 (N.Y. App. Div. 1950), aff'd, 302 N.Y. 910, 100 N.E.2d 184, 302 N.Y. (N.Y.S.) 910, 1951 N.Y. LEXIS 1010 (N.Y. 1951).

Plaintiff insurance company, which insured the corporate defendant's building, is under no obligation to defend or indemnify the corporate defendant in a negligence action against the latter brought by an infant plaintiff and his mother after the infant, then one and one-half years old, ingested lead paint chips while in his apartment in the building, where the corporate defendant was apprised of the occurrence several days after its occurrence, but no notice of claim was served upon the insurer for some four and one-half years; the mother was immediately aware that her son had ingested the lead paint and as a matter of law failed in her obligation to inform the insurer of the occurrence as soon as was reasonably possible (see Insurance Law, former § 167, subd 1, par [d] [now § 3420(a)(4)]) thereby prejudicing the insurer in its investigation and defense of the claim. A court should not judicially legislate a tolling provision for an infant's minority into former section 167 [now § 3420]. Insurance Co. of Greater New York v 156 Hamilton Realty Corp., 72 A.D.2d 403, 424 N.Y.S.2d 683, 1980 N.Y. App. Div. LEXIS 9695 (N.Y. App. Div. 1st Dep't 1980).

The contractual requirement of notice contained in an insurance policy was satisfactorily met by appellant's written communications with insurance company detailing the claim, where there was no statutory requirement that a specific notice of claim form be used and where there was no contractual requirement that a specific form be used. Metropolitan Property & Liability Ins. Co. v Torcivia, 90 A.D.2d 811, 455 N.Y.S.2d 666, 1982 N.Y. App. Div. LEXIS 19043 (N.Y. App. Div. 2d Dep't 1982).

Insureds could not avoid provisions of insurance policy requiring written notice of accident by claiming that policy was never delivered to them since no legitimate reason was given for their lack of diligence in ascertaining extent of their coverage. Losi v Hanover Ins. Co., 139 A.D.2d 702, 527 N.Y.S.2d 458, 1988 N.Y. App. Div. LEXIS 4546 (N.Y. App. Div. 2d Dep't), app. dismissed, 72 N.Y.2d 950, 533 N.Y.S.2d 54, 529 N.E.2d 422, 1988 N.Y. LEXIS 2659 (N.Y. 1988).

Insured's notice to broker did not constitute notice to authorized agent where broker was retained by insureds to handle

their insurance needs. Kamyr, Inc. v St. Paul Surplus Lines Ins. Co., 152 A.D.2d 62, 547 N.Y.S.2d 964, 1989 N.Y. App. Div. LEXIS 14347 (N.Y. App. Div. 3d Dep't 1989).

Insurance company was not relieved of duty to defend and indemnify physician in medical malpractice action on basis that physician failed to notify insurance company of action in timely manner where (1) insurance company issued policy to university health service, (2) complaint alleged that physician treated plaintiff both in his individual capacity and in his capacity as employee of health service, and (3) health service, which was also named as defendant, forwarded copy of complaint to insurance company in timely manner; insofar as physician was employee of health service, he and health service were united in interest and notice by health service was sufficient. National Union Fire Ins. Co. v Insurance Co. of N. Am., 188 A.D.2d 259, 590 N.Y.S.2d 463, 1992 N.Y. App. Div. LEXIS 13509 (N.Y. App. Div. 1st Dep't 1992), app. denied, 81 N.Y.2d 709, 599 N.Y.S.2d 803, 616 N.E.2d 158, 1993 N.Y. LEXIS 1270 (N.Y. 1993).

General liability insurer properly disclaimed coverage for injuries sustained by parishioner on premises of insured church, on ground that written notice of accident, which had been delivered 9 months thereafter, was not given "as soon as practicable" as required by policy, notwithstanding fact that church had telephonically informed its insurance broker of accident on morning after it happened and policy contained sticker advising church to notify its broker in case of loss, since there was no evidence of existence of agency relationship between broker and insurer, or proof that insurer authorized placement of broker's sticker on policy or in any way empowered broker to modify policy's written notice requirement. Shaw Temple A.M.E. Zion Church v Mount Vernon Fire Ins. Co., 199 A.D.2d 374, 605 N.Y.S.2d 370, 1993 N.Y. App. Div. LEXIS 12170 (N.Y. App. Div. 2d Dep't 1993).

Former § 167 [now § 3420] does not require the injured person to give written notice when one has already been given by or on behalf of the insured. Hence, a written notice from the insurance broker of the insured satisfied the requirements of this section. The statute intended to provide (1) that the insured company should receive written notice and (2) that, if the insured failed to give written notice, the injured person must do so. Pitts v Aetna Casualty & Surety Co., 218 F.2d 58, 1954 U.S. App. LEXIS 3229 (2d Cir. N.Y. 1954), cert. denied, 348 U.S. 973, 75 S. Ct. 535, 99 L. Ed. 757, 1955 U.S. LEXIS 1035 (U.S. 1955).

Insurer could not rely on the date of issuance of an insurance policy to show that an insured's claim that N.Y. Ins. Law § 3420(a)(5) applied was invalid, as that provision applied to policies that were either issued or delivered after January 17, 2009; although the policy was issued prior to that time, the insured alleged that it was delivered thereafter. B&A Demolition & Removal, Inc. v Markel Ins. Co., 818 F. Supp. 2d 592, 2011 U.S. Dist. LEXIS 88196 (E.D.N.Y. 2011).

25. Right of injured party to give notice

In an action by an insurance company against an insureds, owners of a barn that was destroyed by a fire, and the insurance company of those owners, in which the plaintiff sought a declaration that it had no duty to defend or indemnify its insureds, the plaintiff's disclaimer of coverage was ineffective against the owners of the barn since the disclaimer was grounded solely on its assertion that its insureds had failed to give timely notice under the policy and since an injured party had the independent right to give notice to the insurer and may not be charged vicariously with the insured's delay in giving notice. Metropolitan Property & Liability Ins. Co. v Horner, 79 A.D.2d 869, 434 N.Y.S.2d 556, 1980 N.Y. App. Div. LEXIS 14284 (N.Y. App. Div. 4th Dep't 1980).

In an action by an injured party against a liability insurer for the amount of an unsatisfied judgment that the injured party had obtained on stipulation against an insured aviation company, the insurer's motion for summary judgment based on its insured's failure to comply with the notice provisions of Ins Law former § 167 [now § 3420] would have been denied had the case been decided under New York law since the failure of an insured to give proper notice does not bar the injured party, at least if the injured party has given notice with as much diligence as is reasonably possible, and since an injured third party may seek recovery from an insured's carrier despite the failure of the insured to provide timely notice of the accident; under the "grouping of contracts" rule, however, the rights of the parties under the policy were governed by the law of New Hampshire where the location of the insured risk and most of the contacts was indisputably New Hampshire, where the parties clearly understood that the principal location of the insured risk was New Hampshire, where the accident took place in that state and the injured party, although a resident of New York, was in fact a summer camper in New Hampshire at the time of the accident, and where the policy was issued through brokers apparently in New Hampshire. Steinbach v Aetna Casualty & Surety Co., 81 A.D.2d 382, 440 N.Y.S.2d 637, 1981 N.Y. App. Div. LEXIS 10922 (N.Y. App. Div. 1st Dep't 1981).

Injured third party may directly give notice to insurer for claim of no-fault benefits where insured has failed to do so; timely notice requirement will not be held as strictly against injured party as it would be against insured, but diligence in giving notice to insurer is still required; 3-year delay of injured party in notifying insurer of claim for no-fault benefits is not excused merely by injured party's unawareness of possible eligibility for such benefits. Koretnicki v Firemen's Ins. Co., 109 A.D.2d 993, 486 N.Y.S.2d 491, 1985 N.Y. App. Div. LEXIS 47488 (N.Y. App. Div. 3d Dep't 1985).

Stipulation by an injured party, along with the insured, to allowing the insurer extra time to respond to the injured party's complaint did not constitute notice to the insured entitling the injured party to a response; the untimely notice given earlier by the insured controlled, and relieved the insured of its obligations under the insurance contract. Ringel v Blue Ridge Ins. Co., 293 A.D.2d 460, 740 N.Y.S.2d 109, 2002 N.Y. App. Div. LEXIS 3349 (N.Y. App. Div. 2d Dep't 2002).

In a coverage dispute, an insurer was entitled to summary judgment declaring it was not obligated to defend or indemnify an insured in an underlying personal injury action because neither the insured nor the injured party, who received notice of the insured's policy renewal after the underlying incident occurred, ever notified the insurer of the underlying incident or the ensuing lawsuit, N.Y. Ins. Law § 3420(a)(3); the injured party neither contacted the insurer nor took any other action to investigate whether a policy had been in effect on the date of the incident. Tower Ins. Co. of N.Y. v Rong Rong Sun, 105 A.D.3d 561, 963 N.Y.S.2d 225, 2013 N.Y. App. Div. LEXIS 2578 (N.Y. App. Div. 1st Dep't 2013).

It is now settled that former § 167 [now § 3420] of the Insurance Law confers on the injured person an independent right to give notice to the liability insurer of the vehicle, and that, if he gives notice as soon as reasonably possible, he may maintain an action against the insurer despite the insured's failure to give notice. Zurich Ins. Co. v Martinez, 24 Misc. 2d 437, 201 N.Y.S.2d 810, 1960 N.Y. Misc. LEXIS 2796 (N.Y. Sup. Ct. 1960), aff'd, 14 A.D.2d 754, 218 N.Y.S.2d 526, 1961 N.Y. App. Div. LEXIS 8447 (N.Y. App. Div. 1st Dep't 1961).

Although former § 167 [now § 3420] places on the insured the obligation to notify his liability insurer of any litigation, it likewise gives the plaintiff in an action involving liability covered by the insurance policy the right to notify the company of the litigation, and the giving of such notice by plaintiff is impliedly an obligation if he intends to enforce liability against the insurer for payment of any judgment obtained. Clark v Utica Mut. Ins. Co., 31 Misc. 2d 1005, 222 N.Y.S.2d 239, 1961 N.Y. Misc. LEXIS 1899 (N.Y. Mun. Ct. 1961).

A person injured by operation of an insured motor vehicle can preserve his rights to proceed directly against the insurer by, himself, giving notice of injury to the insurer, as he has a statutory interest in the policy, although he is not privy to it. De Abreu v Lumbermans Mut. Casualty Co., 32 Misc. 2d 634, 223 N.Y.S.2d 953, 1961 N.Y. Misc. LEXIS 2121 (N.Y. Sup. Ct. 1961).

Subd 1(c) of former § 167 [now § 3420(a)(3)] confers on injured person independent right to give notice to the insurance carrier and if he gives notice as soon as was reasonably possible under former subd 1(d) [now subd (a)(4)] he may maintain action against insurer despite insured's failure to give notice. And standards of what is reasonably possible are less rigorous in his case than those applied to notice by insured. National Grange Mut. Ins. Co. v Ogassian, 45 Misc. 2d 729, 257 N.Y.S.2d 451, 1965

N.Y. Misc. LEXIS 2332 (N.Y. Sup. Ct. 1965), aff'd, 26 A.D.2d 908, 274 N.Y.S.2d 1013, 1966 N.Y. App. Div. LEXIS 6342 (N.Y. App. Div. 1st Dep't 1966).

Obligation of insured under a policy to give notice of details of accident to insurer is separate and distinct from that of an injured claimant who seeks to obtain the benefits of policy issue to the insured. Pensky v Aetna Life & Casualty Co., 84 Misc. 2d 270, 375 N.Y.S.2d 780, 1975 N.Y. Misc. LEXIS 3120 (N.Y. Sup. Ct. 1975), rev'd, 55 A.D.2d 640, 390 N.Y.S.2d 162, 1976 N.Y. App. Div. LEXIS 15386 (N.Y. App. Div. 2d Dep't 1976).

Trial court erred in denying an insurer's petition pursuant to N.Y. C.P.L.R. art. 75 to permanently stay arbitration of an uninsured motorist claim by injured parties; because a company's insurer was properly notified of the accident by the injured parties pursuant to N.Y. Ins. Law § 3420(a)(3), the company's vehicle was insured at the time of an accident. Gov't Emples. Ins. Co. v Jones, 6 A.D.3d 534, 774 N.Y.S.2d 435, 2004 N.Y. App. Div. LEXIS 4435 (N.Y. App. Div. 2d Dep't 2004).

Motor vehicle insurer was required to defend and indemnify its insureds in an accident victim's tort action although the insureds did not notify it of the accident or the action; the purposes of the notice requirement were served because the victim notified the insurer of the accident under N.Y. Ins. Law § 3420(a)(3), his attorney advised the insurer that he had been retained to pursue accident-related claims, and the insurer suffered no prejudice. American Tr. Ins. Co. v B.O. Astra Mgt. Corp., 814 N.Y.S.2d 849, 12 Misc. 3d 740, 235 N.Y.L.J. 91, 2006 N.Y. Misc. LEXIS 1011 (N.Y. Sup. Ct. 2006), aff'd in part, modified, 39 A.D.3d 432, 835 N.Y.S.2d 106, 2007 N.Y. App. Div. LEXIS 5172 (N.Y. App. Div. 1st Dep't 2007).

Motor vehicle insurer was not entitled to a default judgment against its insureds in its action for a declaration that it was not required to defend or indemnify them in a tort action filed by an accident victim because of their failure to notify the insurer of the accident or of the victim's action; the insurer's duty to indemnify them was preserved by the notice given to the insurer of the accident by the victim under N.Y. Ins. Law § 3420(a)(3). American Tr. Ins. Co. v B.O. Astra Mgt. Corp., 814 N.Y.S.2d 849, 12 Misc. 3d 740, 235 N.Y.L.J. 91, 2006 N.Y. Misc. LEXIS 1011 (N.Y. Sup. Ct. 2006), aff'd in part, modified, 39 A.D.3d 432, 835 N.Y.S.2d 106, 2007 N.Y. App. Div. LEXIS 5172 (N.Y. App. Div. 1st Dep't 2007).

Insurer was not obligated to defend and indemnify its insured in a patron's underlying slip and fall claim because the insured's nine-month delay in notifying the insurer of the claim was unreasonable, and the patron also failed to act diligently in attempting to ascertain the identity of the insurer or notifying the insurer of the claim for purposes of N.Y. Ins. Law § 3420(a)(3); no request for information regarding the insurer of the licensee was requested from public agencies or anyone else. Additionally, a letter from the patron's counsel to the insured simply suggested that the insured forward the letter to its insurance carrier. Tower Ins. Co. of N.Y. v Lin Hsin Long Co., 50 A.D.3d 305, 855 N.Y.S.2d 75, 2008 N.Y. App. Div. LEXIS 2925 (N.Y. App. Div. 1st Dep't 2008).

If the injured party may provide notice to protect its right to sue the insurer when the insured party never gives notice, then it would make no sense to say that the injured party's notice becomes "superfluous" for the purpose of protecting its right to sue simply because the insured party gave the insurer prior notice. Cont'l Ins. Co. v Atl. Cas. Ins. Co., 603 F.3d 169, 2010 U.S. App. LEXIS 8867 (2d Cir. 2010).

In a home insurer's suit against a contractor's liability insurer for satisfaction of a default judgment against the contractor, N.Y. Ins. Law § 3420(a) permitted the home insurer to give the liability insurer independent notice of its claim after the contractor had given untimely notice, but the liability insurer was entitled to summary judgment because the roofing limitation endorsement in the liability insurance policy excluded coverage of the fire. Cont'l Ins. Co. v Atl. Cas. Ins. Co., 603 F.3d 169, 2010 U.S. App. LEXIS 8867 (2d Cir. 2010).

Because the pedestrians' efforts in making a claim under N.Y. Ins. Law § 3420(a)(2) to facilitate proper notice to the insurer were sufficient in light of the opportunities to do so afforded them under the circumstances, the motion court properly found that their personal injury action was not barred. Cirone v Tower Ins. Co. of N.Y., 39 A.D.3d 435, 835 N.Y.S.2d 111, 2007 N.Y. App. Div. LEXIS 5145 (N.Y. App. Div. 1st Dep't), app. denied, 9 N.Y.3d 808, 844 N.Y.S.2d 784, 876 N.E.2d 513, 2007 N.Y. LEXIS 2807 (N.Y. 2007).

26. Notice to agent of insurer

Although the owners of an automobile involved in an accident fail to give timely notice thereof to their liability insurer, where they give such notice and forward summons and complaint to a different insurer, who forwards the papers to the proper insurer, the complaint gives adequate notice in writing to the latter of the accident and the circumstances, leaving, however, the question of whether such notice was timely. Mason v Allstate Ins. Co., 12 A.D.2d 138, 209 N.Y.S.2d 104, 1960 N.Y. App. Div. LEXIS 6284 (N.Y. App. Div. 2d Dep't 1960).

Decision below dismissing complaint at close of plaintiff's case reversed on the ground that plaintiff's proof made out a prima facie case as to giving written notice of accident. Morgan v Travelers Ins. Co., 23 A.D.2d 797, 258 N.Y.S.2d 943, 1965 N.Y. App. Div. LEXIS 4378 (N.Y. App. Div. 2d Dep't 1965).

Oral notification of accident given by insured to insurance company's authorized agent at informal social function did not constitute proper notice where policy provisions required written notice. Losi v Hanover Ins. Co., 139 A.D.2d 702, 527 N.Y.S.2d 458, 1988 N.Y. App. Div. LEXIS 4546 (N.Y. App. Div. 2d Dep't), app. dismissed, 72 N.Y.2d 950, 533 N.Y.S.2d 54, 529 N.E.2d 422, 1988 N.Y. LEXIS 2659 (N.Y. 1988).

In third-party action by gasoline service station owner for declaration that its liability insurer had duty to defend and indemnify him in connection with underlying suit to recover cost of cleaning up underground gasoline leak, there was no merit in owner's claim that insurer received actual or constructive notice of leak within several months of its occurrence, either by communication between owner and his insurance agent or through insurer's annual inspection of premises, where his contention based on constructive notice had no foundation in law, and evidence did not support contention that he satisfied notice requirement by informing his agent of incident. State v Ackley, 245 A.D.2d 668, 664 N.Y.S.2d 876, 1997 N.Y. App. Div. LEXIS 12582 (N.Y. App. Div. 3d Dep't 1997).

A person who is merely an insurance broker has no authority to receive a notice of accident from an insured person for and on behalf of the liability insurer, and his receipt of such a notice is not due notice to the carrier under the terms of the policy or of former § 167 [now § 3420]. Curreri v Allstate Ins. Co., 37 Misc. 2d 557, 236 N.Y.S.2d 719, 1963 N.Y. Misc. LEXIS 2383 (N.Y. Sup. Ct. 1963).

Where an insurance claimant personally notified an insurance agent of his accident and one month thereafter talked with the manager of the insurance company's claim division who referred the matter back to the agent, there was sufficient notice to comply with former § 167 [now § 3420]. Barrett v Century Indem. Co., 115 N.Y.S.2d 729, 1952 N.Y. Misc. LEXIS 1745 (N.Y. Sup. Ct. 1952).

Individual asbestos injury related claimants giving of notice by serving their summonses and complaints on counsel for the insured insulation company was sufficient notice of occurrences. This was especially so where the insurance companies were made aware of occurrences as soon as the first asbestos actions were commenced (after N.Y. C.P.L.R. 214-c was enacted in 1986, thousands of asbestos-caused personal injury actions were filed in New York between that year and 1992, the year that the products aggregates in the insurance polices were exhausted), and thus the insurance companies could have begun investigating immediately thereafter. Continental Cas. Co. v Employers Ins. Co. of Wausau, 839 N.Y.S.2d 403, 16 Misc. 3d 223, 237 N.Y.L.J. 92, 2007 N.Y. Misc. LEXIS 3336 (N.Y. Sup. Ct. 2007), rev'd, 60 A.D.3d 128, 871 N.Y.S.2d 48, 2008 N.Y. App. Div. LEXIS 9966 (N.Y. App. Div. 1st Dep't 2008).

Summary judgment for an insurer in a daughter's claim for supplementary uninsured/underinsured motorists coverage was error because, inter alia, the agency relationship between the

agent and the insurer resulted in the insured's notice to the agent about the accident being notice to the insurer under N.Y. Ins. Law § 3420(a)(3); the evidence that the insured had left New York to be with the daughter following the serious injuries she suffered in the accident was sufficient to raise a factual issue as to whether the delay of about one month beyond the 30-day notice requirement was sufficiently justified. Further, the insurer did not submit proof that it was prejudiced by the delay. Waldron v New York Cent. Mut. Fire Ins. Co., 84 A.D.3d 1480, 922 N.Y.S.2d 609, 2011 N.Y. App. Div. LEXIS 3610 (N.Y. App. Div. 3d Dep't), superseded, vacated, 88 A.D.3d 1053, 930 N.Y.S.2d 687, 2011 N.Y. App. Div. LEXIS 7023 (N.Y. App. Div. 3d Dep't 2011).

Defendant insurer was denied summary judgment on the direct action claim of plaintiff whose house had burned down, brought pursuant to N.Y. Ins. Law § 3420, where the insurer had accepted notice of loss in a routine manner from the insured contractor's broker, who was cloaked in apparent authority to act on the insurer's behalf. Cohen v Utica First Ins. Co., 436 F. Supp. 2d 517, 2006 U.S. Dist. LEXIS 44411 (E.D.N.Y. 2006).

27. Other matters

The rule of CPLR 3015 requiring a defendant to deny the performance of any condition precedent specifically and with particularity, is not immune from the policy of New York law that the allegations of a pleading shall be liberally construed with a view to substantial justice between the parties, and where a plaintiff pleads as her sole cause of action a right of recovery as one standing in the shoes of the insured, it being alleged that the latter "duly performed all the conditions of said policy of insurance on its part", an answer that the "insured" had failed to give notice should have been liberally construed as applicable to the cause of action brought to recover under Insurance Law former § 167 [now § 3420]. Frazier v Fidelity & Casualty Co., 27 A.D.2d 922, 279 N.Y.S.2d 599, 1967 N.Y. App. Div. LEXIS 4400 (N.Y. App. Div. 1st Dep't 1967).

In an action against an insurer under a liability policy, Special Term erred in granting plaintiff's motion for summary judgment on the issue of the insurer's liability and for an assessment of damages where it erred in holding, as a matter of law, that the insurer's disclaimer of coverage for the plaintiff was ineffective pursuant to former Subd 8 of Ins Law § 167 [now § 3420(d)] in that former Subd 8 was inapplicable when there was no "death or bodily injury arising out of . . . any other type of accident occuring within this state." The allegations of tort against the plaintiff encompassed acts requiring intent so that they did not fall within the meaning of "accident" as used in Ins Law former § 167 [now § 3420] since "accident" connotes something unexpected or unintended. Spinosa v Hartford Fire Ins. Co., 90 A.D.2d 574, 456 N.Y.S.2d 140, 1982 N.Y. App. Div. LEXIS 18639 (N.Y. App. Div. 3d Dep't 1982).

Landlords' receipt of health department's order to abate nuisance, which did not apprise them that particular child in their building had been injured by elevated lead levels in his apartment, did not place them on notice of "a concrete threat of litigation" and thus did not trigger their obligation to notify their insurance carrier of potential claim. Scharf v Generali - U.S. Branch, 259 A.D.2d 349, 687 N.Y.S.2d 47, 1999 N.Y. App. Div. LEXIS 2751 (N.Y. App. Div. 1st Dep't 1999).

State was entitled to summary judgment declaring that third party insurer was obligated to defend and indemnify it, although coverage had been disclaimed for state's failure to provide timely notice of occurrence, since insurer had received timely notice from nonparty construction company, which was required to procure and maintain insurance for state. Rose v State, 265 A.D.2d 473, 696 N.Y.S.2d 527, 1999 N.Y. App. Div. LEXIS 10620 (N.Y. App. Div. 2d Dep't 1999).

Notice of accident provided by insured construction company to its general liability insurer was not effective notice of same accident on behalf of insured city under second policy with same insurer, even though company had bought second policy naming city as insured, where company and city held adverse positions in litigation. National Union Fire Ins. Co. v State Ins. Fund, 266 A.D.2d 518, 699 N.Y.S.2d 111, 1999 N.Y. App. Div. LEXIS 12246 (N.Y. App. Div. 2d Dep't 1999).

Notice by alleged additional insured to insurer, of accident involving injury to primary insured's employee while working on roofing project at alleged additional insured's gas station, would not be imputed to primary insured where alleged additional insured was not claimant but merely sought indemnification from insurer based on its belief that it was additional insured under primary insured's policy; neither notice provided by another insured nor insurer's actual knowledge of claim satisfies contractual duty of insured to give timely notice. Roofing Consultants, Inc. v Scottsdale Ins. Co., 273 A.D.2d 933, 709 N.Y.S.2d 782, 2000 N.Y. App. Div. LEXIS 6715 (N.Y. App. Div. 4th Dep't), app. denied, 95 N.Y.2d 770, 722 N.Y.S.2d 473, 745 N.E.2d 393, 2000 N.Y. LEXIS 3859 (N.Y. 2000).

Alleged lack of specificity of notice of accident could not be raised on appeal by insurer as basis for denying no-fault insurance benefits where insurer's belated claim that insured's notice was insufficiently specific to satisfy 11 NYCRR § 65.11(m)(2) was not raised as basis for denying benefits either in initial denial of claim sent to insured or in later denial of claim sent to insured' assignee, and insurer did not raise that claim until it became apparent that its claim of untimeliness of notice was not viable. N.Y. & Presbyterian Hosp. v Enter. Rent-A-Car, 281 A.D.2d 526, 721 N.Y.S.2d 823, 2001 N.Y. App. Div. LEXIS 2568 (N.Y. App. Div. 2d Dep't 2001).

Notice given to a liability insurer of an accident and claim against the policy was considered adequate "to identify the insured" from the fact that the insurer immediately thereafter and without delay took statements from the assureds. Allstate Ins. Co. v Alford, 25 Misc. 2d 707, 206 N.Y.S.2d 388, 1960 N.Y. Misc. LEXIS 2282 (N.Y. Sup. Ct. 1960), aff'd, 14 A.D.2d 650, 218 N.Y.S.2d 313, 1961 N.Y. App. Div. LEXIS 9437 (N.Y. App. Div. 3d Dep't 1961).

Nothing in Insurance Law creates automatic right for insurer to request and receive copy of accident report from police department on behalf of insured; in addition, nothing in Insurance Law requires police department to provide copy of police accident report to insurer. Insurance Department, Opinions of General Counsel, Opinion Number 05-05-21.

In an insurance coverage dispute, even if the automotive insurer had not been provided with timely notice by the insured, it was not entitled to relief because there was no showing of prejudice in the absence of evidence of something it would have done differently during the course of litigation, a utilization of different defenses, or pursuit of a different course of strategy. Harleysville Worcester Ins. Co. v Wesco Ins. Co., 752 Fed. Appx. 90, 2019 U.S. App. LEXIS 3349 (2d Cir. N.Y. 2019).

VI. Requirement that Notice be Timely

28. In general

Notice provisions in insurance policies afford the insurer an opportunity to protect itself. Security Mut. Ins. Co. v Acker-Fitzsimons Corp., 31 N.Y.2d 436, 340 N.Y.S.2d 902, 293 N.E.2d 76, 1972 N.Y. LEXIS 880 (N.Y. 1972), limited, Brandon v Nationwide Mut. Ins. Co., 97 N.Y.2d 491, 743 N.Y.S.2d 53, 769 N.E.2d 810, 2002 N.Y. LEXIS 977 (N.Y. 2002).

The term "denial of coverage" in Ins Law former § 167 [now § 3420] refers to those instances in which insurance covering the event could be said to exist but for some nonpayment of premiums, cancellation, or other exclusion that would arguably defeat such coverage. Therefore, where there never was any coverage in insurance contracts because the car involved was neither an "owned vehicle" nor a "non-owned" vehicle, a 15-month delay in giving a notice of disclaimer was not unreasonable, and the disclaimer, in fact, was not required at all. Zappone v Home Ins. Co., 80 A.D.2d 661, 436 N.Y.S.2d 402, 1981 N.Y. App. Div. LEXIS 10365 (N.Y. App. Div. 3d Dep't 1981), aff'd, 55 N.Y.2d 131, 447 N.Y.S.2d 911, 432 N.E.2d 783, 1982 N.Y. LEXIS 3077 (N.Y. 1982).

A determination that an insurance company was not required to defend or indemnify defendants in an action instituted by a foster child who, while under defendants' custody, was injured when his arm went into a hay baler being driven by defendants' son, on the ground that defendant failed to give the insurance company written notice of the occurrence as soon as practicable, would be reversed where defendants demonstrated a good faith

belief in nonliability and were not required to notify their insurer, inasmuch as the injury appeared to have been a relatively minor fracture and the child's residence in defendant's home terminated a few months after the accident without further problems occurring. Merchants Mut. Ins. Co. v Hoffman, 86 A.D.2d 779, 448 N.Y.S.2d 68, 1982 N.Y. App. Div. LEXIS 15360 (N.Y. App. Div. 4th Dep't), aff'd, 56 N.Y.2d 799, 452 N.Y.S.2d 398, 437 N.E.2d 1155, 1982 N.Y. LEXIS 3443 (N.Y. 1982).

Insureds lacked standing to assert violation of CLS Ins § 3420, despite assertion that insurer failed to give injured parties prompt notice of its denial of coverage, where insureds had not suffered injury as result thereof and they were not within zone of interest which statutory requirement of notice to injured parties seeks to protect. Batchie v Travelers Ins. Co., 130 A.D.2d 536, 515 N.Y.S.2d 271, 1987 N.Y. App. Div. LEXIS 46540 (N.Y. App. Div. 2d Dep't 1987).

Injured party has independent right to provide written notice to insurer and cannot be bound by insured's late notice. Walters v Atkins, 179 A.D.2d 1067, 579 N.Y.S.2d 525, 1992 N.Y. App. Div. LEXIS 2427 (N.Y. App. Div. 4th Dep't 1992).

Insurer was not entitled to summary judgment in its suit seeking a declaration that it had no duty to defend or indemnify the insured in an underlying claim because issues remained as to the effectiveness of the insurer's disclaimer of coverage such that it could not have been determined whether the insurer was obligated to defend and indemnify; the insured plausibly claimed that it was prejudiced by the disclaimer delay and the insurer failed to rebut that claim. Where, as here, the underlying claim involved only economic injury, the timeliness, and thus effectiveness, of an insurer's disclaimer was not governed by Insurance Law § 3420(d)(2) but rather was governed by the common law, under which prejudice had to generally be established as the result of an unreasonable delay in disclaiming before an insurer was to have been estopped from asserting noncoverage. Penn Millers Ins. Co. v C.W. Cold Stor., Inc., 103 A.D.3d 1132, 959 N.Y.S.2d 315, 2013 N.Y. App. Div. LEXIS 652 (N.Y. App. Div. 4th Dep't 2013).

Whether notice of claim against a liability policy is given to the insurer within a reasonable time under the circumstances is a question of law for the court where no excuse for delay is offered, but one of fact where an excuse is offered. Lukin v Massachusetts Bonding & Ins. Co., 28 Misc. 2d 876, 218 N.Y.S.2d 322, 1961 N.Y. Misc. LEXIS 2759 (N.Y. Sup. Ct. 1961).

The provision in subsection 1(d) of former § 167 [now § 3420(a)(4)] that failure to give any notice required to be given by a policy of liability insurance within the time prescribed shall not invalidate any claim if it is shown not to have been reasonably possible to give such notice within the prescribed time and notice was given as soon as reasonably possible, is construed as requiring notice to be given within a reasonable time under all the circumstances. Lukin v Massachusetts Bonding & Ins. Co., 28 Misc. 2d 876, 218 N.Y.S.2d 322, 1961 N.Y. Misc. LEXIS 2759 (N.Y. Sup. Ct. 1961).

Where the victim was injured while driving the owner's vehicle, the victim's insurer's petition to stay underinsured motorist benefits arbitration was properly denied, as the insurer's filing of the disclaimer four months after consenting to the settlement of the personal injury action against the owner was untimely under N.Y. Ins. Law § 3420(d). Aull v Progressive Cas. Ins. Co., 300 A.D.2d 302, 751 N.Y.S.2d 292, 2002 N.Y. App. Div. LEXIS 11623 (N.Y. App. Div. 2d Dep't 2002).

While a party is entitled to a rebuttable presumption of receipt of notice based on proof of regular mailing, where the party fails to submit sufficient evidence attesting to the mailing of a letter or to the existence of an office practice geared to ensure the proper addressing or mailing of the letter, then the party has failed to establish that the party provided timely written notice of an underinsured motorist claim. Phoenix Ins. Co. v Tasch, 306 A.D.2d 288, 762 N.Y.S.2d 99, 2003 N.Y. App. Div. LEXIS 6216 (N.Y. App. Div. 2d Dep't 2003).

In a liquidation proceeding pursuant to N.Y. Ins. Law art. 74, an injured person's claim against an insurance company was properly disallowed where the injured person did not notify the insurance company of the accident until over four after it occurred and two years after filing suit against the insured; the injured person did not exercise his right pursuant to N.Y. Ins. Law § 3420(a)(3) to provide independent notification to insurance company, and notice to the insured's insurance broker was not notice to the insurance company. First Cent. Ins. Co. v Malave, 3 A.D.3d 494, 771 N.Y.S.2d 141, 2004 N.Y. App. Div. LEXIS 261 (N.Y. App. Div. 2d Dep't), app. denied, 2 N.Y.3d 704, 780 N.Y.S.2d 310, 812 N.E.2d 1260, 2004 N.Y. LEXIS 940 (N.Y. 2004).

Liability insurer need not show prejudice to avoid coverage based on late notice. City of Utica v Genesee Mgmt., 934 F. Supp. 510, 1996 U.S. Dist. LEXIS 10723 (N.D.N.Y. 1996).

Under New York law, insured's duty to notify its excess carrier of occurrence was triggered when circumstances suggested reasonable possibility that claim would trigger excess insurer's coverage. City of Utica v Genesee Mgmt., 934 F. Supp. 510, 1996 U.S. Dist. LEXIS 10723 (N.D.N.Y. 1996).

Since the insurer failed to address the issue of the injured person's independent right to give notice and the injured person failed to offer any proof as to when he first provided notice to the insurer or as to his alleged due diligence in attempting to ascertain the insurer's identity, summary judgment was not appropriate as to either party where the injured person obtained a default judgment against the insured. Becker v Colonial Coop. Ins. Co., 24 A.D.3d 702, 806 N.Y.S.2d 720, 2005 N.Y. App. Div. LEXIS 14756 (N.Y. App. Div. 2d Dep't 2005).

29. Criteria for judging timeliness of notice by injured or insured distinguished

With respect to reasonableness of notice given by the injured party to the defendant's liability insurer, the standards are different from those applied to the insured. Price v Allstate Ins. Co., 12 A.D.2d 911, 210 N.Y.S.2d 945, 1961 N.Y. App. Div. LEXIS 12596 (N.Y. App. Div. 1st Dep't 1961).

In a medical malpractice action brought by defendant physician's former patient 16 years after defendant had treated her, the insurer that had carried defendant's malpractice insurance at the time of such treatment would be required to defend and to indemnify the physician in the action where, though the physician had not notified such insurer of the claim against him for more than a year after the malpractice action was filed, defendant had promptly notified his current malpractice carrier of such claim, and had later promptly notified his prior carrier after the current carrier notified him that the treatment dates were not within the period of coverage of its policy, whereupon defendant had taken steps to determine the existence of the prior coverage. Van Buren v Employers Ins. of Wausau, 98 A.D.2d 774, 469 N.Y.S.2d 488, 1983 N.Y. App. Div. LEXIS 21099 (N.Y. App. Div. 2d Dep't 1983).

The courts in determining the question of notice apply a more liberal standard to the injured party suing under former § 167 [now § 3420] of the Insurance Law than is applied to the insured suing under the policy. Matthews v Glens Falls Ins. Co., 21 Misc. 2d 1079, 192 N.Y.S.2d 811, 1959 N.Y. Misc. LEXIS 2942 (N.Y. Sup. Ct. 1959).

In determining whether notice of claim or accident has been given as soon as reasonably possible, the standards to which the injured party is held are less rigorous than those applied to the insured, the question of whether notice was timely is ordinarily one of fact, and only when the delay is found to be wholly unexcused is the notice held too late as matter of law. Zurich Ins. Co. v Martinez, 24 Misc. 2d 437, 201 N.Y.S.2d 810, 1960 N.Y. Misc. LEXIS 2796 (N.Y. Sup. Ct. 1960), aff'd, 14 A.D.2d 754, 218 N.Y.S.2d 526, 1961 N.Y. App. Div. LEXIS 8447 (N.Y. App. Div. 1st Dep't 1961).

The provisions of subsection 1(c) of former § 167 [now § 3420(a)(3)] giving the injured party the right to give notice of claim to the liability insurer permits a more liberal standard to be applied as to reasonableness of delay in giving notice on the part of the injured party than on that of the insured. Lukin v Massachusetts Bonding & Ins. Co., 28 Misc. 2d 876, 218 N.Y.S.2d 322, 1961 N.Y. Misc. LEXIS 2759 (N.Y. Sup. Ct. 1961).

A provision in an automobile liability policy requiring the insured to give written notice to the insurer "as soon as practi-

cable" after the occurrence of an accident, requires the insured, for his own protection, to give such notice within a reasonable time under all the circumstances, and while an injured person may preserve his rights against the insurer by giving his own notice, pursuant to subd. 1(d) of former § 167 [now § 3420(a)(4)], such notice must also be given within a reasonable time under all the circumstances. Allstate Ins. Co. v Manger, 30 Misc. 2d 326, 213 N.Y.S.2d 901, 1961 N.Y. Misc. LEXIS 3168 (N.Y. Sup. Ct. 1961).

A person damaged or injured by negligence of an insured motorist can protect his rights against the negligent driver's insurer by giving notice as soon as "reasonably possible" after discovery of the identity of the insurance carrier, and the standard for judging reasonableness of delay on his part in notifying the carrier is necessarily more liberal than that applicable to the insureds themselves. Charney v Stypukowski, 35 Misc. 2d 662, 231 N.Y.S.2d 364, 1962 N.Y. Misc. LEXIS 3047 (N.Y. Sup. Ct. 1962).

With respect to timeliness of notice of accident given to a motor vehicle liability insurer, although the courts are inclined to take a more lenient attitude toward tardiness of notice from the injured party, even in such case if notice is late it must be shown that the notice could not have been given sooner. Curreri v Allstate Ins. Co., 37 Misc. 2d 557, 236 N.Y.S.2d 719, 1963 N.Y. Misc. LEXIS 2383 (N.Y. Sup. Ct. 1963).

With respect to giving of notice by an injured person to the insurer of the offending motorist pursuant to subds. (1)(c) and (d) of former § 167 [now § 3420(a)(3), (4)], the test of reasonable timeliness is not as stringent as in case of the insured's delay and is to be judged in the light of what was reasonably possible in view of information obtainable by due diligence. Pereyma v Safeguard Ins. Co., 38 Misc. 2d 759, 238 N.Y.S.2d 834, 1963 N.Y. Misc. LEXIS 2166 (N.Y. Civ. Ct. 1963), aff'd, 42 Misc. 2d 164, 247 N.Y.S.2d 789, 1964 N.Y. Misc. LEXIS 2062 (N.Y. App. Term 1964).

While lateness of notice given by the insured may support a carrier's disclaimer against the insured, in an action by the injured party the criteria is different and the injured party may sustain its action even if the insured could not. Hartogs v Employers Mut. Liability Ins. Co., 89 Misc. 2d 468, 391 N.Y.S.2d 962, 1977 N.Y. Misc. LEXIS 1888 (N.Y. Sup. Ct. 1977).

30. Circumstances justifying delay in giving notice

It was error to deny insured's motion for summary judgment declaring that excess insurance policy provided coverage to plaintiff in connection with 1984 claim, even though notice of claim was not given until 1987, since it was not until then that insured could reasonably conclude that potential damages were large enough to reach excess insurance policy. Paramount Communs. v Gibraltar Cas. Co., 204 A.D.2d 241, 612 N.Y.S.2d 156, 1994 N.Y. App. Div. LEXIS 5788 (N.Y. App. Div. 1st Dep't 1994), reh'g denied, 1994 N.Y. App. Div. LEXIS 11150 (N.Y. App. Div. 1st Dep't Nov. 10, 1994).

Defendant insurance carrier was entitled to judgment declaring that it was not obligated to defend and indemnify its insured under auto business liability policy in action arising from collision between injured party's car and van leased by insured and driven by its employee in course of his employment, as insured's claim that it did not inform defendant of accident because it assumed that it would be covered under liability insurance policy issued to lessor of van did not provide legally cognizable excuse for its lengthy delay in providing notice of accident to its own carrier. Metropolitan N.Y. Coordinating Council on Jewish Poverty v National Union Ins. Co., 222 A.D.2d 420, 634 N.Y.S.2d 730, 1995 N.Y. App. Div. LEXIS 12569 (N.Y. App. Div. 2d Dep't 1995).

Insurer of owners, general contractors, and construction managers (insureds) of project on which worker was injured was entitled to summary judgment declaring that insurer of project subcontractor was obligated to reimburse it for costs incurred in defending worker's underlying personal injury action against subcontractor, his employer, for negligence and violation of CLS Labor §§ 240 and 241(6), as well as third-party action, where (1) insureds were held liable in underlying action, even though subcontractor was found solely negligent, because subcontractor was by then officially dissolved, (2) plaintiff insurer was subrogee of insureds because it had paid loss for which they were entitled to be indemnified by subcontractor, (3) plaintiff insurer's notice to defendant insurer under CLS Ins § 3420(a)(3) was timely because delay resulting from subcontractor's dissolution was not attributable to plaintiff insurer, and (4) even if notice were late, defendant insurer did not mention it in its disclaimer and thus could not assert it on appeal. Aetna Cas. & Sur. Co. v National Union Fire Ins. Co., 251 A.D.2d 216, 674 N.Y.S.2d 685, 1998 N.Y. App. Div. LEXIS 7704 (N.Y. App. Div. 1st Dep't 1998).

Because the reasonableness of the injured party's actions in attempting to provide notice to the insurer under N.Y. Ins. Law § 3420(a)(3) presented a question of fact for a jury to resolve, the insurer was not entitled to summary judgment. Nationwide Mut. Fire Ins. Co. v Maitland, 79 A.D.3d 1348, 915 N.Y.S.2d 180, 2010 N.Y. App. Div. LEXIS 9176 (N.Y. App. Div. 3d Dep't 2010).

Trial court properly denied an insurer's motion for summary judgment in the insured's action for defense and indemnification in an underlying action because the trial court correctly determined that the insured's liability had not actually been "determined" by a court of competent jurisdiction or by binding arbitration where a prior action was vacated more than a year before the insurer raised the issue, and the insurer failed meet its burden to prove that it was prejudiced by the delay in receiving notice. Castillo v Prince Plaza, LLC, 142 A.D.3d 1127, 38 N.Y.S.3d 74, 2016 N.Y. App. Div. LEXIS 6077 (N.Y. App. Div. 2d Dep't 2016).

The diligence of an attorney for an injured person in giving notice of claim to the liability insurer of the owner and operator of the car is to be tested in the light of circumstances facing him at the time, not by those disclosed by later proof. Zurich Ins. Co. v Martinez, 24 Misc. 2d 437, 201 N.Y.S.2d 810, 1960 N.Y. Misc. LEXIS 2796 (N.Y. Sup. Ct. 1960), aff'd, 14 A.D.2d 754, 218 N.Y.S.2d 526, 1961 N.Y. App. Div. LEXIS 8447 (N.Y. App. Div. 1st Dep't 1961).

The rule that if the trier of facts has found that it was reasonable under the circumstances for the person insured under a liability policy to believe that no injury was sustained, even though he knew of the accident, he is justified in not notifying the insurer until he becomes aware that there is injury, has never been abrogated. Lukin v Massachusetts Bonding & Ins. Co., 28 Misc. 2d 876, 218 N.Y.S.2d 322, 1961 N.Y. Misc. LEXIS 2759 (N.Y. Sup. Ct. 1961).

The absence of the word "infancy" from Insurance Law former § 167(1)(d) [now § 3420(a)(4)] does not require the court to ignore the fact of infancy. If by virtue, of infancy—or any other disability—it is not "reasonably possible to give such notice within the prescribed time" the claim is not invalidated. Ferguson v Nationwide Mut Ins. Co., 61 Misc. 2d 912, 307 N.Y.S.2d 347, 1970 N.Y. Misc. LEXIS 1954 (N.Y. Civ. Ct. 1970).

Landlord's receipt of administrative order stating, inter alia, that "a person residing at the above dwelling unit has a blood-lead level of 30 micrograms per deciliter" did not sufficiently notify landlord of tenant's personal injury claim for insurance purposes where order used technical language in describing occurrence and did not definitively identify injured party, tenant never notified landlord of any injury or claim, and landlord had owned building for only 2 months when it received order; since order did not suggest possibility of lawsuit, landlord's obligation to notify its liability insurer was not triggered until it received tenant's summons and complaint. Mount Vernon Fire Ins. Co. v East Side Renaissance Assocs., 893 F. Supp. 242, 1995 U.S. Dist. LEXIS 8261 (S.D.N.Y. 1995).

31. —Absence of knowledge of insurance coverage

Ten-year delay by insured, New York City Housing Authority (NYCHA), in notifying its liability insurer of accidental injury to child on NYCHA playground could not be excused by NYCHA's asserted lack of knowledge of incident where incident report had been filled out in triplicate by NYCHA police officer, who filed one copy with his precinct command and sent 2 copies to his superiors in housing police department, even though NYCHA received no other notice of incident. White v New York, 81 N.Y.2d 955, 598 N.Y.S.2d 759, 615 N.E.2d 216, 1993 N.Y. LEXIS 1127 (N.Y. 1993).

Insured is required to make diligent efforts to determine whether there is coverage under insurance policy, and ignorance

of policy provisions, which insured has in her possession, is inexcusable. Allstate Ins. Co. v Frank, 57 A.D.2d 950, 394 N.Y.S.2d 902, 1977 N.Y. App. Div. LEXIS 12230 (N.Y. App. Div. 2d Dep't 1977), rev'd, 44 N.Y.2d 897, 407 N.Y.S.2d 696, 379 N.E.2d 222, 1978 N.Y. LEXIS 2083 (N.Y. 1978).

Mere ignorance of coverage does not by itself excuse late notice for purposes of policy requirement that notice be given "as soon as practicable"; the lack of knowledge must be reasonable under all the circumstances. Aetna Cas. & Sur. Co. v Pa. Mfrs. Ass'n Ins. Co., 57 A.D.2d 982, 394 N.Y.S.2d 330, 1977 N.Y. App. Div. LEXIS 12278 (N.Y. App. Div. 3d Dep't 1977).

Insured's untimely notice of claim more than 5 months after loss was not excused on ground that insured did not know that additional insurance coverage was issued where it was shown that letter confirming additional coverage was sent to insured and that insured paid premium for such coverage several months before loss. Omni Commercial Corp. v The Travelers, 210 A.D.2d 107, 621 N.Y.S.2d 840, 1994 N.Y. App. Div. LEXIS 12685 (N.Y. App. Div. 1st Dep't 1994).

Absence of knowledge of insurance coverage by the insured may excuse delay in giving notice of claim against the insured to the insurer. Zurich Ins. Co. v Martinez, 24 Misc. 2d 437, 201 N.Y.S.2d 810, 1960 N.Y. Misc. LEXIS 2796 (N.Y. Sup. Ct. 1960), aff'd, 14 A.D.2d 754, 218 N.Y.S.2d 526, 1961 N.Y. App. Div. LEXIS 8447 (N.Y. App. Div. 1st Dep't 1961).

Denial by malpractice insurer of coverage to the clients was not operative against them under N.Y. Ins. Law § 3420(a) as the insurer did not disclaim coverage due to the timeliness of the clients' notice to the insurer until a declaratory judgment suit was filed, and the clients acted with due diligence in attempting to discover the insurer's identity from an attorney by sending four certified letters to the attorney, making numerous phone calls to the attorney, and seeking a court order compelling the attorney to disclose the attorney's malpractice carrier. McCabe v St. Paul Fire & Mar. Ins. Co., 884 N.Y.S.2d 634, 25 Misc. 3d 726, 2009 N.Y. Misc. LEXIS 2153 (N.Y. Sup. Ct. 2009), app. dismissed, 79 A.D.3d 1611, 913 N.Y.S.2d 616, 2010 N.Y. App. Div. LEXIS 9970 (N.Y. App. Div. 4th Dep't 2010).

Insurer's disclaimer of liability was not dilatory because it only learned sufficient facts that defendant's policy provided coverage when defendant produced its policy during discovery, it was reasonable for the insurer to delay disclaimer until it determined the existence of alternate insurance sources, and it had effectively disclaimed coverage by filing its declaratory judgment action. United Fin. Cas. Co. v Country-Wide Ins. Co., 779 Fed. Appx. 761, 2019 U.S. App. LEXIS 19581 (2d Cir. N.Y. 2019).

32. —Belief of nonliability

While a good-faith belief of nonliability may excuse or explain a seeming failure to give timely notice, the insured's belief must be reasonable under all the circumstances, and it may be relevant on the issue of reasonableness, whether and to what extent, the insured has inquired into the circumstances of the accident or occurrence. Security Mut. Ins. Co. v Acker-Fitzsimons Corp., 31 N.Y.2d 436, 340 N.Y.S.2d 902, 293 N.E.2d 76, 1972 N.Y. LEXIS 880 (N.Y. 1972), limited, Brandon v Nationwide Mut. Ins. Co., 97 N.Y.2d 491, 743 N.Y.S.2d 53, 769 N.E.2d 810, 2002 N.Y. LEXIS 977 (N.Y. 2002).

New York City Housing Authority (NYCHA) did not demonstrate reasonable belief of nonliabilty as excuse for its delay in giving notice of accident to its liability insurance carrier in light of seriousness of injury (fractured skull requiring 6 days' hospitalization) and apparent lack of adult supervision on playground at which 3-year-old fell from slide. White v New York, 81 N.Y.2d 955, 598 N.Y.S.2d 759, 615 N.E.2d 216, 1993 N.Y. LEXIS 1127 (N.Y. 1993).

Insured was not entitled to summary judgment in action to require insurance company to defend and indemnify him in underlying personal injury action, arising from incident which occurred while insured was high school student, where there was more than 6-year delay in giving notice of incident to insurance company, and there was question of fact as to whether incident was only trivial high school scuffle that would not lead reasonable person to believe in potential for liability, especially as insured admitted that he was aware at time of incident that his conduct could result in criminal complaint. Winstead v Uniondale Union Free Sch. Dist., 170 A.D.2d 500, 565 N.Y.S.2d 845, 1991 N.Y. App. Div. LEXIS 2049 (N.Y. App. Div. 2d Dep't 1991).

Insured building owner's delay in notifying insurer of claim would be excused, even though manager learned of assault on tenant in basement of building on day it occurred but did not report it to insurer until 22 months later, since owner had good-faith belief that he would not be liable for assault given that he had never been sued civilly for damages incurred by criminal acts of third party, and such suits were relatively rare when assault occurred. Beach Haven Apartments, No. 6, Inc. v Allcity Ins. Co., 182 A.D.2d 658, 581 N.Y.S.2d 689, 1992 N.Y. App. Div. LEXIS 6052 (N.Y. App. Div. 2d Dep't), app. denied, 80 N.Y.2d 761, 592 N.Y.S.2d 670, 607 N.E.2d 817, 1992 N.Y. LEXIS 3915 (N.Y. 1992).

Insurer was entitled to judgment declaring that it was not required to defend its insureds in action brought against them for personal injuries sustained in altercation where insureds did not notify insurer of occurrence until they were served with summons and complaint in action about one year after occurrence, notwithstanding contention that insureds did not honestly believe that civil claim would be made against them or that personal injury had occurred, since insureds' excuse for delay in notification of insurer was not reasonable under circumstances. Allstate Ins. Co. v Grant, 185 A.D.2d 911, 587 N.Y.S.2d 382, 1992 N.Y. App. Div. LEXIS 10101 (N.Y. App. Div. 2d Dep't 1992).

Fact that injured party voiced intent not to sue anyone will not excuse insured's delay in giving notice to insurer under homeowners policy when facts and circumstances surrounding event are such that reasonable person would envision liability; although mere number or frequency of lawsuits in similar circumstances is not relevant, existence of lawsuits in which property owner was actually found liable in similar circumstances may be relevant in determining whether reasonable person could envision liability. Vradenburg v Prudential Property & Casualty Ins. Co., 212 A.D.2d 913, 622 N.Y.S.2d 623, 1995 N.Y. App. Div. LEXIS 1633 (N.Y. App. Div. 3d Dep't 1995).

Insurer was obligated under homeowners insurance policy to defend and indemnify its insured in underlying personal injury action which arose from incident in which friend of insured's son accidentally shot another friend of insured's son while playing with gun that was part of insured's gun collection, despite insured's delay in giving notice of incident, where insured had reasonable good faith belief in nonliability given facts that (1) injury was caused by reckless conduct of son's friend, who was sole person charged with criminal responsibility for incident, (2) neither insured nor his son (who was asleep at time of incident) participated in, permitted, or condoned conduct, and (3) insured was not at home at time of incident and did not know that his son and his friends would be there. Vradenburg v Prudential Property & Casualty Ins. Co., 212 A.D.2d 913, 622 N.Y.S.2d 623, 1995 N.Y. App. Div. LEXIS 1633 (N.Y. App. Div. 3d Dep't 1995).

Court properly denied insurer's motion for summary judgment in action brought by insured seeking judgment declaring, inter alia, that it gave insurers notice of potential claim against insured "as soon as practical" as required by policy, even though insured was immediately aware of accident but waited until injured individual commenced underlying action almost 3 years later to notify insurer of accident, since fact issue existed as to whether insured had reasonable belief in nonliability so as to excuse its delay in notifying insurer. G.L.G. Contracting Corp. v Aetna Casualty & Sur. Co., 215 A.D.2d 821, 626 N.Y.S.2d 307, 1995 N.Y. App. Div. LEXIS 4811 (N.Y. App. Div. 3d Dep't 1995).

Insurance carrier was entitled to judgment declaring that it was not obligated to defend and indemnify its insured under auto business liability policy in action arising from collision between injured party's car and vehicle driven by its employee in course of his employment, as insured failed to show that its lengthy delay in providing notice of accident to its carrier was reasonable, notwithstanding its assertion that it had good faith belief of nonliability because it was not originally named as defendant in underlying accident; reasonable and prudent corporate employer could not have believed itself to be free from potential liability for

injuries allegedly caused by negligence of its employee. Metropolitan N.Y. Coordinating Council on Jewish Poverty v National Union Ins. Co., 222 A.D.2d 420, 634 N.Y.S.2d 730, 1995 N.Y. App. Div. LEXIS 12569 (N.Y. App. Div. 2d Dep't 1995).

Insureds had reasonable good-faith belief in their nonliability for injuries caused by third party's criminal attack on visitor to their apartment building, and thus they were entitled to judgment declaring that their delay in giving notice of incident to insurer was excused, and that insurer was required to defend and indemnify them in underlying action. Condren Realty Mgmt. Corp. v Insurance Co. of N. Am., 222 A.D.2d 1089, 635 N.Y.S.2d 844, 1995 N.Y. App. Div. LEXIS 14169 (N.Y. App. Div. 4th Dep't 1995).

Insurance company was entitled to summary judgment declaring that it was not obligated to defend and indemnify insured on negligence and Labor Law causes of action brought by independent contractor, where insured failed to timely notify insurer of accident and its only excuse was that it was unaware of strict liability provisions of Labor Law and believed that it could not be used by independent contractor, which was unreasonable as matter of law in light of fact that it previously had been sued under Labor Law by another independent contractor for injuries sustained in almost identical accident. Can-Am Roofing v American States Ins. Co., 229 A.D.2d 973, 645 N.Y.S.2d 253, 1996 N.Y. App. Div. LEXIS 9020 (N.Y. App. Div. 4th Dep't 1996).

Insureds, as matter of law, had reasonable belief in nonliability where accident occurred on property they did not own, occupy, control, or make special use of; thus, they were entitled to summary judgment declaring that their insurer had duty to defend them in underlying action where they immediately forwarded summons and complaint in underlying action to insurer after receipt thereof some 14 months after accident. New Pines v North River Ins. Co., 233 A.D.2d 563, 649 N.Y.S.2d 250, 1996 N.Y. App. Div. LEXIS 11456 (N.Y. App. Div. 3d Dep't 1996).

In action for injuries allegedly sustained by tenants as result of having been exposed to lead paint, landlords did not have reasonable belief in nonliability prior to commencement of action against them which would excuse their furnishing late notice to their liability insurer as matter of law, because their receipt of 2 health department notices (indicating that lead paint was present on their property and that tenant children's blood lead levels were elevated while they were living there) raised question as to reasonableness of their asserted failure to recognize possibility that claim might be asserted against them, or to make further inquiry. Seals by Seals v Powell, 236 A.D.2d 700, 653 N.Y.S.2d 452, 1997 N.Y. App. Div. LEXIS 1131 (N.Y. App. Div. 3d Dep't 1997).

Actual knowledge of occurrence is substantively distinct from reasonableness of delay in giving insurer notice of occurrence based on good-faith belief in nonliability. Hudson City Sch. Dist. v Utica Mut. Ins. Co., 241 A.D.2d 641, 659 N.Y.S.2d 948, 1997 N.Y. App. Div. LEXIS 7333 (N.Y. App. Div. 3d Dep't 1997).

Under insurance policy provision requiring notice of claim to insurer as soon as practicable, claim of deceased insured's executrix was timely because she gave insurer notice within few days after she learned of claim, where executrix stated in her affidavit that she did not believe that claim would be made against insured's estate because she knew of no one who would benefit from death of insured's stepchild, who was adopted, had no dependents, earned meager wages, and was predeceased by his adoptive mother and stepfather. Randolph v Nationwide Mut. Fire Ins. Co., 242 A.D.2d 889, 662 N.Y.S.2d 650, 1997 N.Y. App. Div. LEXIS 10441 (N.Y. App. Div. 4th Dep't 1997).

In third-party action by gasoline service station owner for declaration that its liability insurer had duty to defend and indemnify him in connection with underlying suit to recover cost of cleaning up underground gasoline leak, owner's claim that his delay in notifying insurer of loss was reasonable, because he was unaware that he had suffered loss until plaintiff in underlying suit for cleanup costs demanded reimbursement in 1993, was belied by evidence that owner was told of his ultimate liability for cleanup costs, and of plaintiff's intent to seek reimbursement, just days after spill occurred in 1986; thus, he could not have had reasonable belief in his nonliability thereafter. State v Ackley, 245 A.D.2d 668, 664 N.Y.S.2d 876, 1997 N.Y. App. Div. LEXIS 12582 (N.Y. App. Div. 3d Dep't 1997).

Restaurant owner, who had been sued 4 or 5 times before, failed to establish reasonable good-faith belief of nonliability sufficient to excuse his delay in notifying his insurer of potential personal injury claim, where he was aware that plaintiff was involved in altercation at his restaurant, he observed plaintiff on floor following altercation and later on crutches, and he was informed that plaintiff had obtained medical treatment for his injury. Duffin v Colonial Indem. Ins. Co., 270 A.D.2d 942, 706 N.Y.S.2d 559, 2000 N.Y. App. Div. LEXIS 3585 (N.Y. App. Div. 4th Dep't 2000).

33. Timeliness of notice by injured party, particular cases

Notice of suit given to the insurer, not by the insured, but by an injured party 83 days after the accident and 40 days after the commencement of the action were given within a reasonable time, and the insurer was not entitled to a declaratory judgment that it was not obligated to provide coverage for its insured by reason of the failure to give timely notice of the accident or of the subsequent legal proceedings. Aetna Ins. Co. v Millard, 25 A.D.2d 341, 269 N.Y.S.2d 588, 1966 N.Y. App. Div. LEXIS 4327 (N.Y. App. Div. 3d Dep't 1966).

Woman who hired counsel to file insurance claim 4 ½ months after she was injured in automobile collision was properly found to have acted on her claim "as soon as practicable" where her estranged husband, the driver of the car in which the woman was riding, had failed to "take care of the details" as he had promised at the time of the accident. Dalrymple v Nationwide Mut. Ins. Co., 40 A.D.2d 814, 338 N.Y.S.2d 149, 1972 N.Y. App. Div. LEXIS 3283 (N.Y. App. Div. 1st Dep't 1972).

Any and all notice of accident, first of which was given insurer by injured party some 2 ½ years after accident, were untimely as a matter of law and were properly rejected by insurer for that reason. Pensky v Aetna Life & Casualty Co., 55 A.D.2d 640, 390 N.Y.S.2d 162, 1976 N.Y. App. Div. LEXIS 15386 (N.Y. App. Div. 2d Dep't 1976).

An insurer was not obligated to defend or indemnify its insured in a negligence action arising out of an automobile accident, where the only written notice the insurer received was given by the injured party one year and ten months after the accident and one year and eight months after the injured party was apprised by the Department of Motor Vehicles of the insurance coverage, and where no excuse or mitigating circumstances was offered for the delay; testimony by the injured party's attorney that he had given the insurer telephone notice of the accident was not the written notice required by Ins Law § 167(1)(c) and by the policy and was insufficient as a matter of law, where the record did not reflect that the insurer was apprised of all relevant particulars as to the accident and the claim, and no follow-up correspondence was sent for almost one year and eight months thereafter. Jenkins v Burgos, 99 A.D.2d 217, 472 N.Y.S.2d 373, 1984 N.Y. App. Div. LEXIS 16543 (N.Y. App. Div. 1st Dep't 1984).

In declaratory judgment action determining that insurer received timely notice of incident giving rise to plaintiffs' cause of action against its insured, court did not err in finding that plaintiffs acted reasonably in providing notice to insurer, although such notice was not sent until one year after plaintiffs learned insured had coverage, where plaintiffs were repeatedly told by insured that insurer had been notified. Walters v Atkins, 179 A.D.2d 1067, 579 N.Y.S.2d 525, 1992 N.Y. App. Div. LEXIS 2427 (N.Y. App. Div. 4th Dep't 1992).

Defendant insurer should have been granted summary judgment where plaintiff, as sole distributee of her mother's estate, was only one who would benefit from any damages recovered by estate, she was fully aware of accident, which occurred in her own home, and she learned cause of her mother's death within days thereafter, yet failed to provide notice to defendant for over 21 months; lack of personal representative for estate did not excuse delay in providing notice. Kramer v Government Emples. Ins. Co., 269 A.D.2d 567, 703 N.Y.S.2d 514, 2000 N.Y. App. Div. LEXIS 2120 (N.Y. App. Div. 2d Dep't 2000).

Insured's failure to provide liability insurer with timely notice of underlying action by injured party did not preclude injured party's direct claim against insurer, but questions of fact concern-

ing exactly when her attorney became aware of insurer's identity, and whether her attorney gave written notice to insurer as soon as reasonably practicable, precluded finding as matter of law that her notice to insurer was or was not timely. GA Ins. Co. v Simmes, 270 A.D.2d 664, 704 N.Y.S.2d 700, 2000 N.Y. App. Div. LEXIS 2909 (N.Y. App. Div. 3d Dep't 2000).

Insurer's action to stay arbitration of a motorist's supplemental underinsured motorist claim was proper because a show cause order was irrelevant under N.Y. C.P.L.R. 304; the insurer's disclaimer of the motorist's claim was timely because the claim form originally submitted by the motorist to the insurer did not make it readily apparent that the claim was being made under his father's policy as opposed to motorist's own policy. Because the insurer timely disclaimed coverage under the father's policy in response to the motorist's first notice of a claim under that policy, the determination granting the petition to stay arbitration was proper. Matter of New York Cent. Mut. Fire Ins. Co. v Gordon, 46 A.D.3d 1296, 850 N.Y.S.2d 653, 2007 N.Y. App. Div. LEXIS 13214 (N.Y. App. Div. 3d Dep't 2007).

Summary judgment for a judgment creditor was improper in her N.Y. Ins. Law § 3420(a)(2) suit against an insurer seeking to recover for a judgment against the insurer's insured because the insurer rebutted the presumption of proper service with the affidavit of its claims manager denying that it received a copy of the underlying judgment before commencement of instant action, and, further, although the insurer was entitled to disclaim coverage because of the almost two-year delay in receiving notice of the commencement of the underlying action against its insured, a triable fact issue existed as to the timeliness of the disclaimer; the insurer asserted it did not receive notice of the underlying action until after the entry of judgment against its insured, and, thus, the insurer was not collaterally estopped from litigating the merits of the underlying action, as it was not provided a full and fair opportunity to contest the decision. In any event, the award of summary judgment in the judgment creditor's favor was premature. Jimenez v New York Cent. Mut. Fire Ins. Co., 71 A.D.3d 637, 897 N.Y.S.2d 143, 2010 N.Y. App. Div. LEXIS 1738 (N.Y. App. Div. 2d Dep't 2010).

Paragraph (d) of subdivision 1 of former § 167 [now § 3420(a)(4)], requiring written notice of injury to be given as soon as practicable by the insured or by the injured person to the insured's insurance company, was sufficiently complied with where the injured person's attorney used due diligence in attempting to notify the insured and his insurance company. Delay in giving written notice to the insurance company was caused by new system of the Motor Vehicle Bureau and the misspelling of insured's name. Jamestown Mut. Ins. Co. v Valentine, 10 Misc. 2d 606, 172 N.Y.S.2d 9, 1958 N.Y. Misc. LEXIS 3788 (N.Y. Sup. Ct. 1958).

With respect to a claim for injuries sustained by an infant in falling out of a swing on premises covered by liability insurance, where the insured property owner did not give notice of claim to her insurer because she believed no injuries were sustained, the injured infant's attorney did not have access to the insurance policy or any direct information regarding the name of the insurance carrier, the insured gave prompt notice to her insurance broker after she was advised that a claim would be made, but the broker mistakenly notified a later insurer rather than the one whose policy was in force at time of the occurrence, and the later insurer promptly contacted plaintiff's lawyer and continued correspondence with him until it became aware that it was not on the risk, and plaintiff's attorney immediately notified the insurer whose policy covered the risk when advised of the mistake, the latter was notified "as soon as was reasonably possible," within the requirements of this section. Lukin v Massachusetts Bonding & Ins. Co., 28 Misc. 2d 876, 218 N.Y.S.2d 322, 1961 N.Y. Misc. LEXIS 2759 (N.Y. Sup. Ct. 1961).

Delay of 68 days in giving notice of accident and claim by an injured pedestrian to the car owner's liability insurer was prejudicial to the insurer where it established that its normal procedure was to investigate accidents possibly involving its insurance coverage immediately upon being advised of them, by diligent inquiry at the scene, locating and interrogating witnesses, attempting an early settlement of any claim, etc. Allstate Ins. Co. v Manger, 30 Misc. 2d 326, 213 N.Y.S.2d 901, 1961 N.Y. Misc. LEXIS 3168 (N.Y. Sup. Ct. 1961).

Where the plaintiff, who had been injured in an automobile collision on October 12, 1961 while riding as a passenger, was unable to notify the insurance carrier of the car that had collided with the one in which plaintiff was riding of the existence of plaintiff's claim until February 2, 1963, despite a diligent effort to do so, and the driver of the insured car had not notified the company of the accident, the notice had been given as soon as was reasonably possible and the insurer's attempted disclaimer of liability because of the lack of timely notice was improper, especially where the insurer issued a policy covering the car in which plaintiff was riding and had been notified of the accident by the driver of that vehicle. Cousins v Liberty Mut. Ins. Co., 47 Misc. 2d 413, 262 N.Y.S.2d 760, 1965 N.Y. Misc. LEXIS 2027 (N.Y. Sup. Ct. 1965), aff'd, 276 N.Y.S.2d 839 (N.Y. App. Div. 1966), aff'd, 26 A.D.2d 992, 1966 N.Y. App. Div. LEXIS 6613 (N.Y. App. Div. 1st Dep't 1966).

Notice given to the insurer of a tortfeasor with reference to injuries to a 13-year-old child, was given as soon as "reasonably possible" so as to permit the collection of a default judgment, rendered against the insured, even though the mother could not collect damages in her own behalf since notice was not given to the insurer until 28 months had elapsed after the accident. Ferguson v Nationwide Mut Ins. Co., 61 Misc. 2d 912, 307 N.Y.S.2d 347, 1970 N.Y. Misc. LEXIS 1954 (N.Y. Civ. Ct. 1970).

Where mother of infant, injured in automobile accident, waited 19 months to retain an attorney, and 28 months elapsed before any notice was given to the insurer of the tortfeasor, the mother of the infant could not collect a default judgment entered against the insured from his insurer. Ferguson v Nationwide Mut Ins. Co., 61 Misc. 2d 912, 307 N.Y.S.2d 347, 1970 N.Y. Misc. LEXIS 1954 (N.Y. Civ. Ct. 1970).

Where automobile liability insurer of motorcycle owner was not notified of accident, in which a motorcyclist, not the motorcycle owner, was injured by uninsured motorist, until 215 days after the accident, the insurer was not notified of the accident "as soon as practicable" and, even if the motorcyclist were an insured under the uninsured motorist endorsement of the policy, the insurer could not be called upon to pay. Summit Ins. Co. v Beach, 80 Misc. 2d 382, 363 N.Y.S.2d 210, 1974 N.Y. Misc. LEXIS 1899 (N.Y. Sup. Ct. 1974).

Trial court erred in denying an injured party's motion for summary judgment pursuant to N.Y. C.P.L.R. 3212 seeking a declaration that the insurer had to defend and/or indemnify it insured in an underlying personal injury action, as the injured party provided adequate notice of the claim to the insurer, and therefore the disclaimer did not meet the requirements of N.Y. Ins. Law § 3420(d). Hereford Ins. Co. v Mohammod, 7 A.D.3d 490, 776 N.Y.S.2d 87, 2004 N.Y. App. Div. LEXIS 6388 (N.Y. App. Div. 2d Dep't 2004).

When default judgment was entered against an insurer's insureds in a dog bite case, after which the insureds notified the insurer of the claim and the insurer notified its insureds and the injured party who obtained judgment against the insureds that it disclaimed coverage, there was a genuine fact issue as to whether the injured party acted diligently in attempting to learn who the insureds' insurer was and to provide notice to the insurer, given the injured party's counsel's affirmation that he only became aware of who the insureds' insurer was two days before receiving the insurer's disclaimer, so it was error to grant the insurer summary judgment in the injured party's suit against it under N.Y. Ins. Law § 3420(b). Appel v Allstate Ins. Co., 20 A.D.3d 367, 799 N.Y.S.2d 467, 2005 N.Y. App. Div. LEXIS 8120 (N.Y. App. Div. 1st Dep't 2005).

Insurer made out an unrebutted prima facie case of unreasonable delay under N.Y. Ins. Law § 3420 by insureds in notifying the insurer of a hunting accident in which an insured killed another hunter, but summary judgment in favor of the insurer in its declaratory judgment action was improper as issues of fact existed as to whether notice by decedent's counsel to the insurer regarding the incident was reasonable. Allstate Ins. Co. v Marcone, 29 A.D.3d 715, 815 N.Y.S.2d 235, 2006 N.Y. App. Div. LEXIS

6530 (N.Y. App. Div. 2d Dep't), app. dismissed, 7 N.Y.3d 841, 824 N.Y.S.2d 208, 857 N.E.2d 529, 2006 N.Y. LEXIS 2669 (N.Y. 2006).

As estate and wife of a decedent who was killed in a hunting accident had an independent interest in the protection afforded by the liability coverage of the shooter, the reasonableness of the notice of the accident given by counsel for the estate to the insurer was an issue independent of the reasonableness of the notice given by the insured to the insurer. Thus, although the insured failed to give reasonable notice of the accident, questions of fact regarding the reasonableness of counsel's notice to the insurer existed, which precluded summary judgment in favor of the insurer. Allstate Ins. Co. v Marcone, 29 A.D.3d 715, 815 N.Y.S.2d 235, 2006 N.Y. App. Div. LEXIS 6530 (N.Y. App. Div. 2d Dep't), app. dismissed, 7 N.Y.3d 841, 824 N.Y.S.2d 208, 857 N.E.2d 529, 2006 N.Y. LEXIS 2669 (N.Y. 2006).

Trial court properly granted petitioner's motion in an action pursuant to N.Y. C.P.L.R. art. 75 to permanently stay arbitration of an action to collect uninsured motorist benefits, because the disclaimer of coverage by the insurer of the offending vehicle was unreasonable, as the insurer received timely notice of the claim from parties allegedly injured in the crash as required by N.Y. Ins. Law § 3420. Matter of Allstate Ins. Co. v Cruz, 30 A.D.3d 511, 817 N.Y.S.2d 129, 2006 N.Y. App. Div. LEXIS 8025 (N.Y. App. Div. 2d Dep't 2006).

Summary judgment for a judgment creditor was improper in her N.Y. Ins. Law § 3420(a)(2) suit against an insurer seeking to recover for a judgment against the insurer's insured because the insurer rebutted the presumption of proper service with the affidavit of its claims manager denying that it received a copy of the underlying judgment before commencement of instant action, and, further, although the insurer was entitled to disclaim coverage because of the almost two-year delay in receiving notice of the commencement of the underlying action against its insured, a triable fact issue existed as to the timeliness of the disclaimer; the insurer asserted it did not receive notice of the underlying action until after the entry of judgment against its insured, and, thus, the insurer was not collaterally estopped from litigating the merits of the underlying action, as it was not provided a full and fair opportunity to contest the decision. In any event, the award of summary judgment in the judgment creditor's favor was premature. Jimenez v New York Cent. Mut. Fire Ins. Co., 71 A.D.3d 637, 897 N.Y.S.2d 143, 2010 N.Y. App. Div. LEXIS 1738 (N.Y. App. Div. 2d Dep't 2010).

34. —Delay due to difficulty in ascertaining identity of insurer or insured

Plaintiff who was injured when his automobile collided with a truck and who had obtained judgment against a firm which had rented the truck gave timely notice to the firm's liability insurers where the firm refused to disclose the name of its insurer and plaintiff did not discover the name of the insurer until 13 months after the accident and then gave immediate notice. Lauritano v American Fidelity Fire Ins. Co., 3 A.D.2d 564, 162 N.Y.S.2d 553, 1957 N.Y. App. Div. LEXIS 5601 (N.Y. App. Div. 1st Dep't 1957), aff'd, 4 N.Y.2d 1028, 177 N.Y.S.2d 530, 152 N.E.2d 546, 1958 N.Y. LEXIS 944 (N.Y. 1958).

Although delay of the insured in giving notice of accident to the liability insurer does not preclude the injured party from enforcing his rights under former § 167 [now § 3420] against the insurer, and the timeliness of notice given by the injured party to the insurer is judged by somewhat different standards than those imposed upon the insured, where it appears that neither the insured nor the injured party gave notice to the insurer within a reasonable time after the accident, and the record fails to show lack of knowledge on the part of the injured person of the insurance coverage, recovery of judgment by the latter against the insurer as against a defense of lack of timely notice cannot be sustained. Mason v Allstate Ins. Co., 12 A.D.2d 138, 209 N.Y.S.2d 104, 1960 N.Y. App. Div. LEXIS 6284 (N.Y. App. Div. 2d Dep't 1960).

Where plaintiff residents of Connecticut injured in a New York automobile accident on November 9, 1963 failed to bring in a New York attorney until May 18, 1964, although their Connecticut attorney was unsuccessful in contacting the defendants by mail or by phone, and after the appearance of the New York attorney considerable time was allowed to pass until an insurance search was made and the defendant's carrier notified of the accident; the insurer's disclaimer of liability for failure of proper notification of the claim was valid. Richter v Fireman's Fund American Ins. Co., 27 A.D.2d 223, 277 N.Y.S.2d 737, 1967 N.Y. App. Div. LEXIS 4706 (N.Y. App. Div. 1st Dep't 1967).

Where a pedestrian was struck by an automobile driven by insured's son, remained unconscious for 4 weeks and died, and where deceased's son-in-law before death had attempted to discover insured's carrier; had succeeded after death when he also became executor under deceased's will; then had made a claim on behalf of deceased's estate to the family liability insurer less than 3 months after the accident, son-in-law, as executor, had duly notified insurer of the accident on behalf of the injured person and on behalf of his next-of-kin as required by statute "as soon as was reasonably possible." Globe Indem. Co. v Agate, 37 A.D.2d 595, 323 N.Y.S.2d 9, 1971 N.Y. App. Div. LEXIS 3849 (N.Y. App. Div. 2d Dep't 1971).

Plaintiff, who was struck by defendant's automobile, was entitled to judgment declaring that defendant's insurer was obligated to defend and indemnify him in plaintiff's personal injury action, despite insurer's assertion that defendant failed to notify it of any claims as required under policy, since (1) plaintiff's 2-month delay in ascertaining defendant's identify and insurance coverage, and notifying insurer, was not unreasonable given hit-and-run nature of accident, and (2) defendant voluntarily signed 2 statements detailing his involvement in accident as soon as he was located. Elmuccio v Allstate Ins. Co., 149 A.D.2d 653, 540 N.Y.S.2d 465, 1989 N.Y. App. Div. LEXIS 5333 (N.Y. App. Div. 2d Dep't 1989).

Insureds' 15-month delay in providing insurer with notice of underlying action due to insureds' error as to who their insurer was constituted failure to act "promptly" under notice provision of insurance policy and relieved insurer of obligation to defend or indemnify insureds. People v Helinski, 203 A.D.2d 672, 610 N.Y.S.2d 378, 1994 N.Y. App. Div. LEXIS 3877 (N.Y. App. Div. 3d Dep't), app. denied, 84 N.Y.2d 804, 618 N.Y.S.2d 6, 642 N.E.2d 325, 1994 N.Y. LEXIS 3111 (N.Y. 1994).

Because a Public Administrator contacted the insured within a short time after an incident and demanded that the insurer be notified of a claim, pursuant to N.Y. Ins. Law § 3420(a)(3), the insurer was not entitled to summary judgment in the Administrator's action declaring that it was obligated to defend and indemnify the insured in an underlying action. Malik v Charter Oak Fire Ins. Co., 60 A.D.3d 1013, 877 N.Y.S.2d 114, 2009 N.Y. App. Div. LEXIS 2554 (N.Y. App. Div. 2d Dep't 2009).

Insurer was not obligated to defend or indemnify the occupant of the insured premises or the named insured in the underlying action because the occupant failed to act diligently in attempting to ascertain the insurer's identity and in expeditiously notifying the insurer. Hawley v Seville, 139 A.D.3d 921, 33 N.Y.S.3d 314, 2016 N.Y. App. Div. LEXIS 3718 (N.Y. App. Div. 2d Dep't 2016), app. denied, 29 N.Y.3d 902, 80 N.E.3d 398, 57 N.Y.S.3d 705, 2017 N.Y. LEXIS 717 (N.Y. 2017).

Trial court properly granted an insurer's cross-motion for summary judgment in an injured patron's Insurance Law action to recover the amount of an unsatisfied judgment because the insurer was not required to show that it was prejudiced by the insured's untimely notice, the insurer demonstrated that the patron did not act diligently in attempting to ascertain the identity of the insurer, the insured, in failing to keep its address current with the Secretary of State, foreclosed the possibility of receiving service of process, and its four-month delay in doing so was unreasonable as a matter of law, and the patron failed to raise a triable issue of fact in opposition to the insurer's prima facie showing. Dritsanos v Mt. Hawley Ins. Co., 180 A.D.3d 753, 118 N.Y.S.3d 664, 2020 N.Y. App. Div. LEXIS 1072 (N.Y. App. Div. 2d Dep't 2020).

Delay by the injured party in giving notice of claim to the liability insurer was excusable where the attorney for claimant was unable at first to ascertain from the Bureau of Motor Vehicles the names and addresses of the owner and operator of the vehicle, turned to the police department for information, by whom he was informed that the owner of the car was a certain corporation,

telephoned an officer of that corporation and was told by him that the corporation was familiar with the accident, was insured, and had notified the insurance company, notwithstanding it later developed that the corporation had leased the car to another who was operating it at the time of the accident and had taken out independent liability insurance of which the lessor corporation was unaware. Similarly where an automobile was leased by one corporation to another, and the contract of lease called for the lessee to take out liability insurance for protection of the lessor in a stipulated amount, but the vehicle was already covered by a fleet policy taken out by lessor, and lessor was not advised at the time of being notified of a claim for personal injuries sustained by a third person from operation of the vehicle that the lessee had taken out insurance for its benefit, its delay in notifying the liability insurer on the policy taken out by the lessee, until after it became aware of issuance and existence of that policy, was excusable. Zurich Ins. Co. v Martinez, 24 Misc. 2d 437, 201 N.Y.S.2d 810, 1960 N.Y. Misc. LEXIS 2796 (N.Y. Sup. Ct. 1960), aff'd, 14 A.D.2d 754, 218 N.Y.S.2d 526, 1961 N.Y. App. Div. LEXIS 8447 (N.Y. App. Div. 1st Dep't 1961).

Delay on the part of the injured party in giving notice of accident to the liability insurer may be excused where he had difficulty in ascertaining the identity of the insured or the insurer, but he must, in any event, show that he exercised diligence, and if no excuse whatsoever is offered the question of whether notice was timely is one of law for the court. Allstate Ins. Co. v Manger, 30 Misc. 2d 326, 213 N.Y.S.2d 901, 1961 N.Y. Misc. LEXIS 3168 (N.Y. Sup. Ct. 1961).

An injured person's claim of rights against the liability insurer of the allegedly negligent motorist was given as soon as reasonably possible, under former § 167 [now § 3420], where it was given immediately after ascertainment of identity of the insurer and within only 51 days following the accident. Charney v Stypukowski, 35 Misc. 2d 662, 231 N.Y.S.2d 364, 1962 N.Y. Misc. LEXIS 3047 (N.Y. Sup. Ct. 1962).

Notice of claim, pursuant to subd. 1(d) of former § 167 [now § 3420(a)(4)], was given to the insurer of the offending motorist "as soon as practicable" by the injured person where he retained counsel three days after the accident who, thereafter, was diligent in attempting to locate the offending motorist for service of process but was unable to locate him and discover whether or not he had insurance coverage for about four months, whereupon prompt notice was given to the insurer. Pereyma v Safeguard Ins. Co., 38 Misc. 2d 759, 238 N.Y.S.2d 834, 1963 N.Y. Misc. LEXIS 2166 (N.Y. Civ. Ct. 1963), aff'd, 42 Misc. 2d 164, 247 N.Y.S.2d 789, 1964 N.Y. Misc. LEXIS 2062 (N.Y. App. Term 1964).

Held that under following circumstances injured person gave notice as soon as reasonably possible within terms of subd 1(d) of former § 167 [now § 3420(a)(4)]: (1) the accident in which he was injured took place on December 7; (2) he retained counsel on December 17; (3) his attorneys mailed claim letters to owner and to driver of automobile which injured him on January 17; (4) successive requests for information as to identity of carrier of insurance on such automobile were sent to Motor Vehicle Department on January 21 and March 6; (5) letter to such owner requesting information as to his insurance carrier was sent on March 5; (6) successive acknowledgments were received from Motor Vehicle Department, first indicating that search of its records was begun on March 8, and second that it was begun on April 17; (7) summons and complaint was served on such owner on May 11; (8) a letter to such owner informing him that no answer had been received to such complaint was sent on May 31; (9) a copy of this last letter was sent to his insurer which acknowledged receipt thereof on June 4 and requested information as to date and place of the accident; (10) injured person's counsel supplied such required information on June 5; (11) it was assumed that information as to identity of such carrier was received by such counsel sometime between May 11 and May 31; and (12) it appeared that delay in ascertaining such identity was due to slow processing machinery in Motor Vehicle Department. National Grange Mut. Ins. Co. v Ogassian, 45 Misc. 2d 729, 257 N.Y.S.2d 451, 1965 N.Y. Misc. LEXIS 2332 (N.Y. Sup. Ct. 1965), aff'd, 26 A.D.2d 908, 274 N.Y.S.2d 1013, 1966 N.Y. App. Div. LEXIS 6342 (N.Y. App. Div. 1st Dep't 1966).

The proof might sustain a finding that notice of accident was given "as soon as practicable," where the accident occurred May 22, 1961, summons in an action against the insured was served June 14, 1961 and forwarded to the insurer on July 13, under a pleading detailing efforts made by the injured parties to communicate with the insurer prior to service of the summons. National Union Fire Ins. Co. v Martes, 229 N.Y.S.2d 78 (N.Y. Sup. Ct. 1962).

In an action arising out of an automobile accident occurring in 1949 at which time there was no public record of auto liability insurance coverage, it was possible under former § 167, subd 1(d) [now § 3420(a)(4)] of the Insurance Law for the plaintiff to give timely notice of the accident and suit to the insurer, even after judgment had been obtained against the insured, so long as the plaintiff had been reasonably diligent in attempting to learn the identity of the insurer and the notice given 15 years after the occurrence of the accident was as soon as practicable. Florio v General Acci. Fire & Life Assurance Corp., 396 F.2d 510, 1968 U.S. App. LEXIS 6402 (2d Cir. N.Y. 1968).

35. Timeliness of notice by insured, particular cases

Negligence of the insured owner of a motor vehicle, in giving notice of accident or claim on liability insurance to the wrong insurer, will not excuse his failure to give notice to the proper insurer. Mason v Allstate Ins. Co., 12 A.D.2d 138, 209 N.Y.S.2d 104, 1960 N.Y. App. Div. LEXIS 6284 (N.Y. App. Div. 2d Dep't 1960).

A company, to whom an insurer issued an excess reinsurance contract with respect to amounts the company would be required to pay under Workers' Compensation in excess of an amount for which the company was self-insured, was required to give notice of an accident that might involve liability on the part of the insurer when the company knew or reasonably should have known that it was likely that excess coverage would be involved, where the policy provided for immediate written notice upon any accident "which in the opinion" of the company would involve liability on the part of the insurer. Loblaw, Inc. v Employers' Liability Assurance Corp., 85 A.D.2d 880, 446 N.Y.S.2d 743, 1981 N.Y. App. Div. LEXIS 16717 (N.Y. App. Div. 4th Dep't 1981), aff'd, 57 N.Y.2d 872, 456 N.Y.S.2d 40, 442 N.E.2d 438, 1982 N.Y. LEXIS 3760 (N.Y. 1982).

In an action brought by an insured for a declaration that her insurer was obligated to defend and indemnify her in a lawsuit arising out of a traffic accident, the trial court erred in granting summary judgment to the insurer on the basis that the insured's notice of the accident, which the insurer learned of almost a year after it had occurred, did not constitute notification of the occurrence "as soon as practicable" as required by the policy, where plaintiff's affidavit, in which she stated that the accident had been minor, that she had not thought she was liable, that she did not know the difference between an insurance agent and an insurance broker and thought that her insurance broker, to whom she had reported the accident, was the insurer's authorized agent, and that she thought notice to the insurance broker was notice to the insurer, and had relied on the broker to handle the claim and protect her interests, were sufficient to raise a question of fact as to whether, under all the circumstances, notice had been given to the insurer in a timely manner. Nowicki v Insuramerica, 103 A.D.2d 1013, 478 N.Y.S.2d 214, 1984 N.Y. App. Div. LEXIS 19701 (N.Y. App. Div. 4th Dep't 1984).

Insured which notified insurer of accident as soon as it received summons and complaint gave notice within reasonable time as matter of law (and thus insurer was obligated to defend or indemnify insured in underlying personal injury action) since insured had conducted investigation at time of accident and had been assured by child's father that child only required few stitches and was otherwise alright; subsequent letter from child's attorney did not place insured on notice that claim was going to be asserted since father had different last name than child. Rosen-Michaels, Inc. v Hartford Acci. & Indem. Co., 129 A.D.2d 871, 514 N.Y.S.2d 139, 1987 N.Y. App. Div. LEXIS 45558 (N.Y. App. Div. 3d Dep't 1987).

Insurer was not required to defend and indemnify insureds in negligence action commenced on behalf of insureds' infant grandchildren where policy required that notice be given "as soon as

practicable" since (1) neither insureds' inability to understand English language nor their unfamiliarity with United States legal system permitting interfamilial suits constituted legally cognizable excuse for 22-month delay in notifying carrier of accident, (2) fact of claimants' infancy did not toll notice requirement contained in policy, and (3) claimants' assertion that they did not know that children could sue their grandparents did not relieve them from notifying insurer when insureds failed to do so. Virtuoso v Aetna Casualty & Surety Co., 134 A.D.2d 252, 520 N.Y.S.2d 439, 1987 N.Y. App. Div. LEXIS 50440 (N.Y. App. Div. 2d Dep't 1987).

Insurance company was not entitled to summary judgment dismissing action by state under CLS Nav § 190 to recover cost of cleanup of oil spill, notwithstanding that policy required immediate notice of claim and that no notice was forwarded to insurance company until state obtained judgment against insured, since state presented adequate excuse for delay where, although insured had informed state that insurance company was its insurer, insured also mistakenly advised state that insurance company had already disclaimed coverage. State v Zurich Ins. Co., 199 A.D.2d 916, 605 N.Y.S.2d 575, 1993 N.Y. App. Div. LEXIS 12389 (N.Y. App. Div. 3d Dep't 1993).

Insurer was not entitled to summary judgment in action seeking declaration that it must defend and indemnify insured in underlying tort action where fact issues existed as to whether insured's delay in notifying insurer of alleged occurrence was reasonable and premised on good faith belief that claim would not be made against insured, and whether alleged occurrence fell within completed operations hazard or products hazard exclusion of liability policy. Mill Basin Flower Shop v U.S. Underwriters Ins. Co., 207 A.D.2d 387, 616 N.Y.S.2d 50, 1994 N.Y. App. Div. LEXIS 8245 (N.Y. App. Div. 2d Dep't 1994).

Notice of occurrence to insureds' employee was imputable to insureds where (1) employee was ranking supervisory-level employee on duty at time of accident involving infant plaintiff, (2) employee testified at examination before trial that he received notice of occurrence, went to view scene, observed plaintiff lying on floor, and watched as plaintiff was taken from site by ambulance, (3) it was within scope of employee's duties to notify his employer of accident which he had notice of and was witness to, and (4) employee admittedly had duty to notify his employer's front office of accident. Bauer v Whispering Hills Assocs., 210 A.D.2d 569, 620 N.Y.S.2d 147, 1994 N.Y. App. Div. LEXIS 11847 (N.Y. App. Div. 3d Dep't 1994), app. denied, 86 N.Y.2d 701, 631 N.Y.S.2d 605, 655 N.E.2d 702, 1995 N.Y. LEXIS 2695 (N.Y. 1995).

In action by plaintiff who was injured on premises owned by defendant power authority which sought contribution and indemnification from plaintiff's employer, insurer that provided workers' compensation and employer's liability coverage to plaintiff's employer was entitled to summary judgment declaring that it was not obligated to defend or indemnify plaintiff's employer in third-party action, where employer's liability policy required insured to "immediately forward...every demand, notice, summons or other process received by him," and where insurer received notice of accident and began paying workers' compensation before plaintiff's lawsuit was commenced, but was not notified of lawsuit and third-party action against plaintiff's employer until 3 ½ years after third-party action was commenced. Thomson v Power Auth., 217 A.D.2d 495, 629 N.Y.S.2d 760, 1995 N.Y. App. Div. LEXIS 8122 (N.Y. App. Div. 1st Dep't 1995).

Insureds failed to meet their burden of demonstrating that 10-month delay in giving notice to liability insurance carrier was reasonable where there was no substantiation for insureds' assertions that insurer refused several requests to take over defense and that someone must have independently told insurer about accident, and insureds offered no excuse for delay, citing merely "time required for ordinary litigation and investigation procedures." Holmes v Morgan Guar. & Trust Co., 223 A.D.2d 441, 636 N.Y.S.2d 778, 1996 N.Y. App. Div. LEXIS 509 (N.Y. App. Div. 1st Dep't 1996).

Insured's delay in notifying insurer of incident until more than one month after he was served with underlying amended complaint was unreasonable as matter of law; thus, it was error to grant insured's summary judgment motion declaring that insurer must defend and indemnify insured in underlying action. Safer v Government Emples. Ins. Co., 254 A.D.2d 344, 678 N.Y.S.2d 667, 1998 N.Y. App. Div. LEXIS 10800 (N.Y. App. Div. 2d Dep't 1998).

Defendant did not have reasonable explanation for his delay in complying with liability policy's notice requirement where he contended that he believed it would be "useless act" to forward summons and complaint to insurer because of earlier denial of coverage to other parties for same accident, since that denial had been based on determination that other parties were not proper insureds, and insurer had given no indication that it would not afford coverage to defendant. Centenniel Ins. Co. v Hoffman, 265 A.D.2d 629, 695 N.Y.S.2d 774, 1999 N.Y. App. Div. LEXIS 10331 (N.Y. App. Div. 3d Dep't 1999).

Insurance company was entitled to judgment declaring that it was not obligated to defend or indemnify its insureds in wrongful death action due to untimely notice of accident, as insureds' 7-month delay in obtaining police report of accident after they became aware of potential for wrongful death action was unreasonable, no satisfactory explanation was given for their subsequent delay in contacting Department of Motor Vehicles to obtain insurance information, and fact that insurance company was notified within one month of appointment of personal representative of decedent's estate did not excuse delay. American Home Assur. Co. v State Farm Mut. Auto. Ins. Co., 277 A.D.2d 409, 717 N.Y.S.2d 224, 2000 N.Y. App. Div. LEXIS 12282 (N.Y. App. Div. 2d Dep't 2000).

Pursuant to N.Y. Ins. Law § 3420(c)(2)(A), an insurer was not obligated to defend and indemnify its insured in an underlying dog-bite case because the insured had not complied with the policy's notice provisions; the insured knew within 48 hours that a complaint had been made about the incident, even if he did not know the claimant's identity. However, the insured did not notify the insurer of the incident until he was served with the summons and complaint in the underlying action, six months after the incident. Zimmerman v Peerless Ins. Co., 85 A.D.3d 1021, 926 N.Y.S.2d 124, 2011 N.Y. App. Div. LEXIS 5414 (N.Y. App. Div. 2d Dep't 2011).

The insurers were not required to defend or indemnify the subrogee with respect to the employee's underlying personal injury action because the subrogee failed to give the insurers timely notice of the underlying action. Nationwide Ins. Co. v Empire Ins. Group, 294 A.D.2d 546, 742 N.Y.S.2d 387, 2002 N.Y. App. Div. LEXIS 5565 (N.Y. App. Div. 2d Dep't 2002).

Appeals court concluded that the insured did not prove that he gave to the insured timely notice of the insured's underinsured motorist claim by regular mail; therefore, the underinsured motorist claim was barred and, under N.Y. C.P.L.R. art. 75, so was the arbitration claim. Phoenix Ins. Co. v Tasch, 306 A.D.2d 288, 762 N.Y.S.2d 99, 2003 N.Y. App. Div. LEXIS 6216 (N.Y. App. Div. 2d Dep't 2003).

City was not entitled to defense and indemnity under a contractor's commercial umbrella liability excess coverage policy. Since the city was an additional insured, it had an independent duty to provide the insurer with a timely notice of claim against the insurer and its demand for coverage by the insurer even if the insurer got a notice of the claim from the primary insured or from another source. City of New York v St. Paul Fire & Mar. Ins. Co., 21 A.D.3d 978, 801 N.Y.S.2d 362, 2005 N.Y. App. Div. LEXIS 9191 (N.Y. App. Div. 2d Dep't 2005).

Summary judgment was awarded to the insurers dismissing the complaint because the insurers timely disclaimed coverage following a thorough and diligent investigation and, contrary to the insured's contention, the insurers did not have all the information they needed to disclaim coverage and properly commenced an investigation to determine the specifics surrounding the incident and to verify when knowledge of the claim was first acquired. Plotkin v Republic-Franklin Ins. Co., 177 A.D.3d 790, 113 N.Y.S.3d 133, 2019 N.Y. App. Div. LEXIS 8234 (N.Y. App. Div. 2d Dep't), app. dismissed, 177 A.D.3d 794, 110 N.Y.S.3d 305, 2019 N.Y. App. Div. LEXIS 8237 (N.Y. App. Div. 2d Dep't 2019).

Under N.Y. Ins. Law § 3420, insurers who disclaimed coverage for bodily injury claims had to do so in writing as soon as reasonably possible after they learn of the grounds on which to deny coverage. N.Y. Ins. Law§ 3420(d)(2). However, because the

court could not decide as a matter of law whether the excess insurer's delay in disclaiming coverage was the product of a reasonably diligent investigation, summary judgment on that point was inappropriate. Homestead Vill. Assoc., L.P. v Diamond State Ins. Co., 818 F. Supp. 2d 642, 2011 U.S. Dist. LEXIS 105545 (E.D.N.Y. 2011).

Summary judgment in favor of the insurer was affirmed because the insured did not provide the insurer with notice of the slip and fall accident for 57 days after it had become aware of the incident that gave rise to the claim, and plaintiffs' claim that the delay was justified by the insured's "good faith belief" that it was not liable for injuries was belied by evidence establishing that upon a reasonable investigation the insured should have realized that there was a reasonable possibility of liability. Steinberg v Hermitage Ins. Co., 26 A.D.3d 426, 809 N.Y.S.2d 569, 2006 N.Y. App. Div. LEXIS 2119 (N.Y. App. Div. 2d Dep't 2006).

36. —Delay due to age or condition of insured

In connection with a claim for damages sustained by insured against the casualty insurer of her automobile, there was ample evidence to support a conclusion that written notice was given to the insurer within a reasonable time, under all the circumstances, where it appeared that the insurer had written notice of the accident from its authorized agent on October 28 following occurrence of the accident on September 8, as a sequel of oral notice given by her attorney to the agent on September 11, was confined in a hospital for a considerable time after the accident, had never received a copy of the policy because it was missent by the underwriting agency, and her requests for a duplicate were ignored. Holubetz v National Fire Ins. Co., 13 A.D.2d 228, 215 N.Y.S.2d 986, 1961 N.Y. App. Div. LEXIS 10427 (N.Y. App. Div. 3d Dep't 1961).

Where notice of accident and claim is given to the liability insurer by or on behalf of the insured, and is considered to have been given "as soon as practicable" within the policy requirements in view of the age and condition of the named insured it will also be considered timely notice in behalf of the injured person or claimant. Allstate Ins. Co. v Alford, 14 A.D.2d 650, 218 N.Y.S.2d 313, 1961 N.Y. App. Div. LEXIS 9437 (N.Y. App. Div. 3d Dep't 1961).

Where the time limitation in an automobile liability insurance policy for giving notice to the insurer was only "as soon as practicable" after occurrence of the accident, notice to the insurer was timely given where the accident was reported to its agent 65 days after the accident, by letter enclosing summonses served only one or two days before on the named insured and the operator of the vehicle, the named insured, owner of the car, being more than 70 years of age and in bad health, and the operator being about 19 years of age and laboring under the impression that, under the circumstances surrounding the accident, no claim would result therefrom. Allstate Ins. Co. v Alford, 25 Misc. 2d 707, 206 N.Y.S.2d 388, 1960 N.Y. Misc. LEXIS 2282 (N.Y. Sup. Ct. 1960), aff'd, 14 A.D.2d 650, 218 N.Y.S.2d 313, 1961 N.Y. App. Div. LEXIS 9437 (N.Y. App. Div. 3d Dep't 1961).

37. —Delay due to doubt as to liability or policy coverage

In an action for a declaration that defendant insurance company had received timely notice from plaintiff, the owner of a trailer park, of an injury to one of its tenants, despite more than 13 months having elapsed between the time of the injury and the time notice was given, the court erred in directing a verdict in plaintiff's favor where, although evidence showed that the tenant informed the owner's manager that her fall occurred on her own driveway, which the manager reasonably believed would not be covered by the policy, the manager's letter giving the insurer notice of the tenant's lawsuit indicated he was aware the tenant claimed plaintiff was liable in that it stated that the tenant asked for compensation from the owner at the time of her fall. Mobile Home Estates, Inc. v Preferred Mut. Ins. Co., 105 A.D.2d 883, 482 N.Y.S.2d 355, 1984 N.Y. App. Div. LEXIS 21010 (N.Y. App. Div. 3d Dep't 1984).

Dental corporation's former malpractice insurer was not obligated to defend and indemnify insured who failed to give notice of suit "as soon as practicable," even though insured claimed that its 3-year delay was based on its reasonable reliance on coverage by its present insurer, since unexplained failure to exercise due diligence to ascertain coverage manifests failure to meet notice requirement as matter of law; moreover, even after present insurer notified insured that alleged malpractice might have occurred during period of former policy, insured's unexplained failure to give notice to former insurer for almost 5 months failed to satisfy notice requirement. Young v New York State Dep't of Ins., Liquidation Bureau, 152 A.D.2d 835, 543 N.Y.S.2d 768, 1989 N.Y. App. Div. LEXIS 9404 (N.Y. App. Div. 3d Dep't 1989).

Court erred in finding that insureds' 9 ½ -year delay in notifying their liability insurer of serious eye injury suffered by their granddaughter when she slipped on defective staircase on their premises was excusable under policy provision requiring notice of occurrence "as soon as practicable," even though insureds notified insurer promptly when they were served with summons and complaint in personal injury action brought on behalf of granddaughter, since (1) delay in notification is not excusable where reasonable and prudent insured would have concluded that there existed strong possibility that liability claim would be made, and seriousness of granddaughter's eye injury would have caused reasonable and prudent insured to give notice under circumstances, and (2) fact that insured is unaware that interfamilial lawsuit can be commenced is not legally cognizable reason to delay notifying insurer of accident. Greater New York Mut. Ins. Co. v Farrauto, 158 A.D.2d 514, 551 N.Y.S.2d 277, 1990 N.Y. App. Div. LEXIS 1804 (N.Y. App. Div. 2d Dep't), app. denied, 76 N.Y.2d 701, 557 N.Y.S.2d 878, 557 N.E.2d 114, 1990 N.Y. LEXIS 1274 (N.Y. 1990).

Insurance company was not required to defend or indemnify owners of apartment building in connection with action by employee of roofing contractor who fell from ladder at building where (1) owners were aware that employee was taken to hospital by ambulance following fall, and thus could not have had reasonable belief of nonliability, and (2) although insurance policy required prompt notice, owners did not notify insurance company of accident until 4 months after fall, when they received written claim letter from employee's attorney. Zadrima v PSM Ins. Cos., 208 A.D.2d 529, 616 N.Y.S.2d 817, 1994 N.Y. App. Div. LEXIS 9358 (N.Y. App. Div. 2d Dep't 1994), app. denied, 85 N.Y.2d 807, 627 N.Y.S.2d 324, 650 N.E.2d 1326, 1995 N.Y. LEXIS 1258 (N.Y. 1995).

Insured (commercial landlord) should not have been granted summary judgment declaring that its insurer was obligated to defend and indemnify insured in underlying action brought by tenant for property damage where fact question existed as to reasonableness of insured's investigation into its tenant's complaints and its resulting conclusion that there was no basis for liability so as to excuse its delay in giving notice of claim. Kreger Truck Renting Co. v American Guar. & Liab. Ins. Co., 213 A.D.2d 453, 623 N.Y.S.2d 623, 1995 N.Y. App. Div. LEXIS 2717 (N.Y. App. Div. 2d Dep't 1995).

In action for declaration as to whether liability insurer was obligated to defend and indemnify insured in connection with loss arising from its operation of warehouse, insurer was entitled to summary judgment based on insured's failure to give timely written notice of loss, as required by policy, where documentary evidence established that insured knew about loss 4 ½ -years before it gave notice; insured's obligation to give written notice of "every loss" that might give rise to liability under policy was not rendered ambiguous by policy provision authorizing insured to itself adjust any claim for less than $750, and insured's excuse that there was no reason to believe that possible liability exceeded $750 until customer provided statement of loss was insufficient as matter of law to excuse delay. Morgan & Brother Manhattan Storage Co. v GRE Ins. Group, 220 A.D.2d 236, 632 N.Y.S.2d 17, 1995 N.Y. App. Div. LEXIS 9817 (N.Y. App. Div. 1st Dep't 1995), app. denied, 87 N.Y.2d 811, 644 N.Y.S.2d 144, 666 N.E.2d 1058, 1996 N.Y. LEXIS 635 (N.Y. 1996).

Court erred in granting insureds' motion for partial summary judgment declaring that insurer was obligated to defend them in underlying action where fact issue existed as to whether insureds had reasonable good faith belief in nonliability so as to excuse their failure to provide timely notice of accident. Collins v

Isaksen, 221 A.D.2d 403, 633 N.Y.S.2d 539, 1995 N.Y. App. Div. LEXIS 11975 (N.Y. App. Div. 2d Dep't 1995).

It was announcement of jury verdict in underlying personal injury action that marked insured's obligation to give written notice of claim within 90 days after accident "or as soon as practicable," where insured notified insurer of accident immediately after it happened, pursuant to request for first-party benefits, but could not at that or any other time prior to jury's verdict know that school district and school bus driver, who were insured for one million dollars, would be absolved of all liability for accident, leaving her with only $25,000 policy of automobile driver. Allstate Ins. Co. v Sala, 226 A.D.2d 172, 640 N.Y.S.2d 517, 1996 N.Y. App. Div. LEXIS 3645 (N.Y. App. Div. 1st Dep't), app. denied, 89 N.Y.2d 801, 653 N.Y.S.2d 278, 675 N.E.2d 1231, 1996 N.Y. LEXIS 4212 (N.Y. 1996).

Insurer could not disclaim coverage on ground that insureds, building owners, had been advised by Health Department that there were lead paint violations in apartment, and that insureds had not given notice of "occurrence" that might result in claim "as soon as practicable" as required by policy, where there was sufficient evidence that insureds did not receive notices from Health Department as to alleged injury to tenants and that insureds' had reasonable belief in nonliability. Public Serv. Mut. Ins. Co. v Hollander, 228 A.D.2d 283, 644 N.Y.S.2d 214, 1996 N.Y. App. Div. LEXIS 7123 (N.Y. App. Div. 1st Dep't), app. denied, 88 N.Y.2d 816, 651 N.Y.S.2d 17, 673 N.E.2d 1244, 1996 N.Y. LEXIS 3307 (N.Y. 1996).

Premises liability insurer was not entitled to summary judgment declaring that it was not obligated to defend and indemnify landlord in personal injury action arising from lead based paint condition in apartment due to landlord's alleged failure to notify it of "occurrence" as soon as practicable as required by insurance policy, where "Order to Landlord/Agent" from New York City Department of Health Bureau of Lead Poisoning Control, on which insurer relied as having placed landlord on notice of "occurrence," did not indicate that affected tenant was infant, that tenant's blood-lead level was caused by exposure to conditions in apartment, or that injury had occurred; such order, in itself, did not necessarily suggest potential liability. Public Serv. Mut. Ins. Co. v AYFAS Realty Corp., 234 A.D.2d 226, 651 N.Y.S.2d 513, 1996 N.Y. App. Div. LEXIS 12908 (N.Y. App. Div. 1st Dep't 1996), reh'g denied, app. denied, 1997 N.Y. App. Div. LEXIS 3264 (N.Y. App. Div. 1st Dep't Mar. 6, 1997), app. dismissed, 90 N.Y.2d 844, 660 N.Y.S.2d 870, 683 N.E.2d 776, 1997 N.Y. LEXIS 1576 (N.Y. 1997).

Insurer was entitled to judgment declaring that it was not obligated to defend or indemnify insured, whose car hit another vehicle from behind, where insurer timely disclaimed coverage due to insured's failure to "promptly" notify it of accident as required by policy; insured's delay in giving notice of accident to insurer was not shown to be reasonable merely because no one had complained of bodily injury at time of accident, and insured should have immediately realized that accident was more than minor occurrence when he was unable to drive his car from scene until he tied his front bumper to tree in order to free bumper from wheel. New York Cent. Mut. Fire Ins. Co. v Riley, 234 A.D.2d 279, 650 N.Y.S.2d 308, 1996 N.Y. App. Div. LEXIS 12789 (N.Y. App. Div. 2d Dep't 1996).

Primary and excess insurers were properly granted summary judgment declaring that they had no duty to defend or indemnify defendant insureds under their respective policies, where insureds' delayed notification of underlying lawsuits precluded timely investigation of claims and chance to effect early settlement, and insureds' assertion that they did not promptly notify insurers of underlying suits because they mistakenly believed that coverage did not exist did not excuse their delay absent showing that they made reasonably diligent efforts to ascertain whether coverage existed. Hartford Fire Ins. Co. v Baseball Office of the Comm'r, 236 A.D.2d 334, 654 N.Y.S.2d 21, 1997 N.Y. App. Div. LEXIS 1685 (N.Y. App. Div. 1st Dep't), app. denied, 90 N.Y.2d 803, 661 N.Y.S.2d 179, 683 N.E.2d 1053, 1997 N.Y. LEXIS 2246 (N.Y. 1997).

Liability insurer which disclaimed coverage due to plaintiff's 6-month delay in notifying it of incident at his tavern was not entitled to summary judgment dismissing complaint because issue of fact existed as to plaintiff's asserted good-faith belief in nonliability where (1) he maintained that he was not present when altercation took place, and that he first learned of it when he received police report accusing 2 patrons of assault, and (2) police report and accusatory documents did not indicate that plaintiff or his employees had participated in, permitted or condoned assault or that alcohol served at tavern played any role therein. Marinello v Dryden Mut. Ins. Co., 237 A.D.2d 795, 655 N.Y.S.2d 156, 1997 N.Y. App. Div. LEXIS 2432 (N.Y. App. Div. 3d Dep't 1997).

Insured school district that demonstrated it did not know that student hit his head at school or that his subsequent brain injury was in any way related to fall at school raised question of fact, precluding summary judgment for insurer on ground of untimely notice of claim. Hudson City Sch. Dist. v Utica Mut. Ins. Co., 241 A.D.2d 641, 659 N.Y.S.2d 948, 1997 N.Y. App. Div. LEXIS 7333 (N.Y. App. Div. 3d Dep't 1997).

Insured sprinkler system company's alleged belief that it was not liable for fire and thus did not have to give timely notice of claim to its excess liability insurer was unreasonable as matter of law where (1) insured caused its agent to immediately notify primary insurer, (2) number and size of claims asserted against insured, as evidenced by claims service reports regularly mailed to it by primary insurer, made it virtually impossible that it was unaware of its potential liability, (3) counsel acknowledged insured's potential liability, and (4) excess liability policy required that notice be given when it became likely that excess policy would be involved "without regard to legal liability."319 McKibben St. Corp. v General Star Nat'l Ins. Co., 245 A.D.2d 26, 664 N.Y.S.2d 785, 1997 N.Y. App. Div. LEXIS 12510 (N.Y. App. Div. 1st Dep't 1997).

Insurer was not obligated to defend and indemnify law firm against legal malpractice claims where firm failed to report claims within policy period of claims-made policy, or within 60-day extended reporting period, in the mistaken belief that claims were covered by successor insurer. Gomez v Feder, Connick & Goldstein, P.C., 260 A.D.2d 348, 687 N.Y.S.2d 679, 1999 N.Y. App. Div. LEXIS 3648 (N.Y. App. Div. 2d Dep't 1999).

Insured's notice of claim was timely, under underinsurance liability policy provision requiring that such notice be given "as soon as possible," where insured discovered limits of underinsured motorist's policy on or about July 1 and gave notice to insurer on July 16; although insurer speculated that insured might have learned of limits earlier if his attorney had been more aggressive in pursuing matter, attorney was diligent in requesting information, and there was no indication that further requests would have produced information any sooner. Travelers Prop. Cas. Corp. v Fusilli, 266 A.D.2d 48, 698 N.Y.S.2d 641, 1999 N.Y. App. Div. LEXIS 11596 (N.Y. App. Div. 1st Dep't 1999).

Liability insurer which denied coverage in connection with claim by Department of Environmental Conservation (DEC) for reimbursement under CLS Nav § 192 was not entitled to summary judgment on ground that disclaimer was justified because insured failed to give timely notice of occurrence and promptly forward legal papers received in DEC action, or because policy's pollution exclusion barred coverage, as (1) insured's sworn statement that she promptly notified insurer by telephone when she learned of fuel oil discharge, but was told that there was nothing insurer could do because "contamination" was not covered by her policy, made out prima facie showing on issues of prompt notice and good-faith belief in noncoverage excusing her subsequent failure to provide insurer with legal papers, and (2) DEC employee's deposition testimony indicated that oil spill involved "sudden and accidental" discharge expressly falling outside policy exclusion. Strand v Pioneer Ins. Co., 270 A.D.2d 600, 704 N.Y.S.2d 683, 2000 N.Y. App. Div. LEXIS 2636 (N.Y. App. Div. 3d Dep't 2000).

Insurer was not entitled to summary judgment in action by insured under homeowner's liability policy on ground that it was not notified of claim until 9 months after accident, in violation of requirement that insured notify it of claim "as soon as practicable," where undisputed facts established that failure of sooner notice was reasonably based on ignorance of existence of coverage or possible claim by estate of injured party, as established by

uncontroverted affidavit in which deceased policyholder's executrix stated that she had no basis to believe that claim would be made on behalf of injured party (who was policyholder's adult stepson). Randolph v Nationwide Mut. Ins. Co., 170 Misc. 2d 364, 650 N.Y.S.2d 964, 1996 N.Y. Misc. LEXIS 437 (N.Y. Sup. Ct. 1996), aff'd, 242 A.D.2d 889, 662 N.Y.S.2d 650, 1997 N.Y. App. Div. LEXIS 10441 (N.Y. App. Div. 4th Dep't 1997).

Where an insured and its insurers disputed whether an intentional act by the insured's employee fell within the exclusionary language of a business insurance policy, the insurers' delay in disclaiming was reasonable as a matter of law pursuant to N.Y. Ins. Law § 3420(d). RJC Realty Holding Corp. v Republic Franklin Ins. Co., 303 A.D.2d 573, 756 N.Y.S.2d 631, 2003 N.Y. App. Div. LEXIS 2658 (N.Y. App. Div. 2d Dep't 2003), rev'd, 2 N.Y.3d 158, 777 N.Y.S.2d 4, 808 N.E.2d 1263, 2004 N.Y. LEXIS 601 (N.Y. 2004).

Insurer's disclaimer under the livery vehicle exclusion was timely as a matter of law, under N.Y. Ins. Law § 3420(d), because it was issued contemporaneously upon the completion of its investigation, which was reasonable due to the contradictory evidence regarding whether the driver had paying passengers in his vehicle at the time of the accident. Halloway v State Farm Ins. Cos., 23 A.D.3d 617, 805 N.Y.S.2d 107, 2005 N.Y. App. Div. LEXIS 13463 (N.Y. App. Div. 2d Dep't 2005), app. denied, 6 N.Y.3d 708, 813 N.Y.S.2d 44, 846 N.E.2d 475, 2006 N.Y. LEXIS 522 (N.Y. 2006).

38. —"As soon as practicable"

Insureds were entitled to judgment declaring that their insurance carrier was obligated to defend and indemnify them in underlying dog bite action, although they did not give notice of action until after they received summons and complaint, nearly 3 years after incident, since notice was given "as soon as possible" in light of fact that injured party's parents had initially declined insureds' offer to pay medical expenses and indicated they did not intend to sue. D'Aloia v Travelers Ins. Co., 85 N.Y.2d 825, 623 N.Y.S.2d 837, 647 N.E.2d 1345, 1995 N.Y. LEXIS 124 (N.Y. 1995).

Cases involving inquiry into whether policyholder notified liability insurer "as soon as practicable" of occurrence that might give rise to claim by third person against policyholder, while useful to extent that they deal with reasonableness of excuses in general, are not directly controlling in underinsurance situation, because underinsurance has unique conditions and features for ripening of claims that do not exist in primary insurance cases; underinsurance analyses are intensely fact specific and therefore particularly well-suited for determinations of timeliness of notice on case-by-case basis. Metropolitan Prop. & Cas. Ins. Co. v Mancuso, 93 N.Y.2d 487, 693 N.Y.S.2d 81, 715 N.E.2d 107, 1999 N.Y. LEXIS 1296 (N.Y. 1999).

Where a period of only 2 months and 14 days elapsed from the time of the accident to the time of the actual notice to the insurer, the notice was given "as soon as was reasonably possible" even though the defendants in the negligence action instituted by the passenger did give their insurer timely and proper notice, and insurer was required to defend action brought by passenger against the insureds. Manhattan Casualty Co. v Hoynacky, 33 A.D.2d 919, 307 N.Y.S.2d 251, 1970 N.Y. App. Div. LEXIS 5710 (N.Y. App. Div. 2d Dep't 1970).

Viewing facts most favorably to defendant manufacturer in whose favor judgment was entered in declaratory judgment action, information transmitted to manufacturer through self-employed manufacturer's representative regarding incident in which plant employee caught hand in machine manufactured by it, resulting in serious injury, coupled with information of similar incident at different plant, while not sufficient predicate for giving immediate notice to manufacturer's insurer, should have caused reasonably and prudent person to investigate and evaluate potential liability and having failed to do so, manufacturer, thus armed with notice of claimed defect and two mishaps, could not later rely upon belief of nonliability to justify its failure for almost 11 months to give required notice to liability insurer, pursuant to policy requiring notice "as soon as practicable" after occurrence. Utica Mut. Ins. Co. v C. L. Haines Mfg. Co., 55 A.D.2d 834, 390 N.Y.S.2d 320, 1976 N.Y. App. Div. LEXIS 15649 (N.Y. App. Div. 4th Dep't 1976).

In action by insurer for judgment declaring that it had no duty to defend or indemnify insureds in personal injury action because they did not give written notice of occurrence "as soon as practicable" as required by their policy, judgment in favor of insureds would be reversed in light of trial court's erroneous holding that insurer was precluded from disclaiming coverage because policy did not expressly warn insureds that noncompliance with notice provision might result in forfeiture of coverage; new trial was warranted in interest of justice to allow insureds to demonstrate whether they had provided notice "as soon as practicable" since it was possible that they had failed to adduce proof relative to this issue because of trial court's ruling in their favor. Greater New York Mut. Ins. Co. v Farrauto, 136 A.D.2d 598, 523 N.Y.S.2d 853, 1988 N.Y. App. Div. LEXIS 415 (N.Y. App. Div. 2d Dep't 1988).

Notice of loss given by insureds to excess insurers almost 2 years after accident was untimely as matter of law where (1) insureds had no good-faith belief of their nonliability regarding accident, (2) policy required notification to insurers "as soon as practicable," (3) insureds were aware that accident involved goods which they supplied and that damages exceeded limits of primary policy within 2 days following accident, and (4) insureds' general counsel was aware of potential liability one year before notice was given. Kamyr, Inc. v St. Paul Surplus Lines Ins. Co., 152 A.D.2d 62, 547 N.Y.S.2d 964, 1989 N.Y. App. Div. LEXIS 14347 (N.Y. App. Div. 3d Dep't 1989).

Notice of claim was given to insurer "as soon as possible," albeit 7 months after incident, and court properly declared that insurer was obligated to defend and indemnify insured, where incident occurred in May 1994, allegedly injured parties never indicated any intention to sue until they served summons and complaint on insured in December 1994, and insured promptly notified insurer after suit was instituted. Sphere Drake Ins. Co. v Aspen Tree Specialists, 234 A.D.2d 358, 651 N.Y.S.2d 881, 1996 N.Y. App. Div. LEXIS 12989 (N.Y. App. Div. 2d Dep't 1996), app. denied, in part, app. dismissed, 91 N.Y.2d 831, 666 N.Y.S.2d 562, 689 N.E.2d 532, 1997 N.Y. LEXIS 4105 (N.Y. 1997).

Court should have granted insurer's motion for summary judgment declaring that it was not obligated to defend or indemnify its insured in underlying action where policy required insured to give insurer notice "as soon as reasonably possible," insured did not notify insurer of action until year after it was brought, and insured's allegation that it failed to give notice earlier because it thought that complaint was untrue was unreasonable excuse for its delay as matter of law. Edmund J. Bergassi Agency v Employers Reinsurance Corp., 247 A.D.2d 577, 669 N.Y.S.2d 345, 1998 N.Y. App. Div. LEXIS 1782 (N.Y. App. Div. 2d Dep't), app. denied, 92 N.Y.2d 803, 677 N.Y.S.2d 73, 699 N.E.2d 433, 1998 N.Y. LEXIS 1739 (N.Y. 1998).

Insureds' unexplained delay of over 10 months in providing insurer with notice of underlying action was not reasonable where policy required written notice of occurrence "as soon as it is practical"; thus, insurer should have been granted summary judgment declaring that it did not have duty to defend and indemnify insureds in underlying action. Boutin v Aetna Cas. & Sur. Co., 264 A.D.2d 434, 694 N.Y.S.2d 134, 1999 N.Y. App. Div. LEXIS 8698 (N.Y. App. Div. 2d Dep't 1999).

Plaintiff was entitled to summary judgment declaring that it complied with terms of its commercial liability policy requiring it to notify insurer of potential claim "as soon as practicable," although it failed to notify defendant insurer of underlying action by contractor's employee, who was injured when bundle of steel rebar being unloaded from plaintiff's truck fell on his foot, until service of third-party summons and complaint 2 years after incident as (1) it had good-faith belief of nonliability based on union restrictions prohibiting truck drivers from loading or unloading materials and its own truck driver's sworn statement that he did not participate in unloading rebar, and that first bundle was unloaded without incident, and (2) inquiry by investigator for contractor's insurance carrier, regarding its loading and unloading practices, was insufficient to put it on notice of potential third-party claim. Spa Steel Prods. Co. v Royal Ins., 282 A.D.2d 864, 722 N.Y.S.2d 827, 2001 N.Y. App. Div. LEXIS 3675 (N.Y. App. Div. 3d Dep't 2001).

Insurance carrier was improperly granted summary judgment declaring that it was not obligated to indemnify insureds in underlying personal injury action where (1) affidavit stating that insureds did not receive notice of claim until more than 3 years after incident, and that they notified insurer 5 weeks later, raised issue of fact as to whether they provided requisite notice "as soon as practicable," and (2) conclusory statement in affidavit of insurer's liability specialist, that policy limits had been exhausted, was insufficient to establish exhaustion of policy as matter of law. Hoverson v Herbert Constr. Co., 283 A.D.2d 237, 725 N.Y.S.2d 320, 2001 N.Y. App. Div. LEXIS 5106 (N.Y. App. Div. 1st Dep't 2001).

The insured's delay in notifying the insurer of the occurrence giving rise to the claim, the sole ground on which the insurer disclaimed coverage, was obvious from the face of the notice of claim and the accompanying complaint, and the insurer had no need to conduct an investigation before determining whether to disclaim. The insurer's 30-day delay in disclaiming coverage was therefore unreasonable as a matter of law under N.Y. Ins. Law § 3420(d). W. 16th St. Tenants Corp. v Pub. Serv. Mut. Ins. Co., 290 A.D.2d 278, 736 N.Y.S.2d 34, 2002 N.Y. App. Div. LEXIS 161 (N.Y. App. Div. 1st Dep't 2002).

Because questions of fact existed concerning the reasonableness of an insured's actions in waiting to notify the insurer that the insured might be subject to liability, and because the insurer's disclaimer was not untimely, pursuant to N.Y. Ins. Law § 3420(a), (d), the parties' motion and cross-motion for summary judgment on the notice issue were properly denied. U.S. Underwriters Ins. Co. v Carson, 49 A.D.3d 1061, 853 N.Y.S.2d 700, 2008 N.Y. App. Div. LEXIS 2466 (N.Y. App. Div. 3d Dep't 2008).

Where the relevant provision of the subject insurance policy requires that an insured give written notice of an underinsured motorist claim as soon as practicable, the insured is required to provide timely written notice of the claim for underinsurance benefits as soon as practicable from the date he knows or should know that the tortfeasor is underinsured. Phoenix Ins. Co. v Tasch, 306 A.D.2d 288, 762 N.Y.S.2d 99, 2003 N.Y. App. Div. LEXIS 6216 (N.Y. App. Div. 2d Dep't 2003).

As a hospital did not notify its 1975 primary/excess policy insurers of an underlying medical malpractice suit by an incapacitated person, who was born in 1975 with brain damage, for 11 months after the 1996 suit, notice was not "as soon as practicable" under the policy and the insurers' disclaimer a little over 30 days later was timely under N.Y. Ins. Law § 3420(d), the court declared, by summary judgment, that the insurers did not have to indemnify the hospital. St. Charles Hosp. & Rehab. Ctr. v Royal Globe Ins. Co., 18 A.D.3d 735, 795 N.Y.S.2d 343, 2005 N.Y. App. Div. LEXIS 5651 (N.Y. App. Div. 2d Dep't), app. denied, 5 N.Y.3d 710, 804 N.Y.S.2d 35, 837 N.E.2d 734, 2005 N.Y. LEXIS 2593 (N.Y. 2005).

Insurer had the burden of establishing prejudice from any untimely lack of notice since notice was provided as soon as practicable within two years of the time the insured became aware of the claim, and notice was not required within two years of the incident giving rise to the claim. Hernandez Castillo v Prince Plaza, LLC, 981 N.Y.S.2d 906, 43 Misc. 3d 335, 2014 N.Y. Misc. LEXIS 828 (N.Y. Sup. Ct. 2014), aff'd, 142 A.D.3d 1127, 38 N.Y.S.3d 74, 2016 N.Y. App. Div. LEXIS 6077 (N.Y. App. Div. 2d Dep't 2016).

39. —Particular periods of delay; less than one year

Where an insured fails to show a reasonable excuse or the existence of circumstances which could justify a protracted delay in notifying his insurer, a court should as a matter of law, hold that there had been a breach of the policy condition requiring the insured to give prompt notice. So, a restaurant owner failed to give timely notice to its insurer of an assault on one of his customers by a third party where 8 months elapsed between the assault and the notice. During this period, the owner had seen his lawyer and notified the ABC Board, the customer had demanded money from him and the customer's lawyer had asked for the name of his insurer. Zurich General Acci. & Liability Ins. Co. v Harbil Restaurant, Inc., 7 A.D.2d 433, 184 N.Y.S.2d 51, 1959 N.Y. App. Div. LEXIS 9349 (N.Y. App. Div. 1st Dep't 1959), app. dismissed, 8 N.Y.2d 751, 201 N.Y.S.2d 767, 168 N.E.2d 104, 1960 N.Y. LEXIS 1351 (N.Y. 1960).

Notice of accident, which was mailed six months after the occurrence of the accident, was not given "as soon as was reasonably possible," and precluded recovery by insured under the policy. Goldson v Traveler's Ins. Co., 27 A.D.2d 539, 275 N.Y.S.2d 95, 1966 N.Y. App. Div. LEXIS 2949 (N.Y. App. Div. 2d Dep't 1966).

Notice to the insurer of an accident was timely, under evidence that a child fell out a window on July 16 on premises owned by the insured; that the insured was informed on September 13 of a claim of liability; and the insured informed the insurer of the claim on September 16. 875 Forest Ave. Corp. v Aetna Cas. & Sur. Co., 37 A.D.2d 11, 322 N.Y.S.2d 53, 1971 N.Y. App. Div. LEXIS 3835 (N.Y. App. Div. 1st Dep't 1971), aff'd, 30 N.Y.2d 726, 332 N.Y.S.2d 896, 283 N.E.2d 768, 1972 N.Y. LEXIS 1335 (N.Y. 1972).

Insurer was required to defend and indemnify insured in personal injury action brought by passenger in insured's car, even though insurer did not receive written notice of accident until 5 months later, since (1) insured had immediately reported accident to its broker, who mistakenly notified wrong carrier, (2) on discovery of error, necessary documentation of accident was sent to insurer, and (3) there was uncontradicted testimony by injured passenger that insurer's investigator visited her home approximately 3 months after accident; under circumstances, insured complied with police requirement that notice be provided "as soon as practicable." Universal Underwriters Ins. Co. v Patriot Ambulette, Inc., 149 A.D.2d 500, 539 N.Y.S.2d 981, 1989 N.Y. App. Div. LEXIS 4860 (N.Y. App. Div. 2d Dep't 1989).

Insurance company was entitled to summary judgment declaring that it had no obligation to defend or indemnify its insured in underlying action brought to recover for personal injuries sustained in motor vehicle accident on basis of lack of timely notice of accident where (1) accident occurred in July 1984, (2) nonresident injured party promptly retained counsel and counsel obtained police report of accident, which contained insurance code for insurance company, in December 1984, (3) nonresident injured party commenced action in February 1985 in hope that insured would forward process with notice to insurance company, (4) after default by insured in appearing in action, nonresident injured party's counsel requested insurance search on insured's vehicle in April 1985, and (5) in July 1985, within 2 weeks of receiving insurance information, nonresident injured party's counsel sent written notice of accident to insurance company. Eveready Ins. Co. v Chavis, 150 A.D.2d 332, 540 N.Y.S.2d 860, 1989 N.Y. App. Div. LEXIS 5688 (N.Y. App. Div. 2d Dep't 1989).

Insured's 10-month delay in notifying liability insurer of claim was unreasonable as matter of law, even though at time claim occurred claimant indicated to insured that she did not intend to sue anyone, where claimant, who was close personal friend of insured, was injured on insured's boat, injury was immediately reported to Coast Guard and claimant was taken to hospital, and claimant served summons and complaint on insured 10 months later. Platsky v Government Employees Ins. Co., 181 A.D.2d 764, 581 N.Y.S.2d 235, 1992 N.Y. App. Div. LEXIS 3740 (N.Y. App. Div. 2d Dep't 1992).

Insurer was entitled to summary judgment declaring that it had no duty to defend or indemnify its insured in underlying action brought by property owners to recover for property damage they sustained as result of insured's installation of new roof on their home since policy specifically required that insurer be "promptly" notified if insured became "aware of anything that indicates that there might be a claim under the (policy)," and insured failed to advance explanation for his approximate 4-month delay in notifying insurer following owners' affidavit to city court stating that they were going to sue insured for damages. McCarthy v Nova Cas. Co., 239 A.D.2d 851, 657 N.Y.S.2d 466, 1997 N.Y. App. Div. LEXIS 5579 (N.Y. App. Div. 3d Dep't), app. denied, 90 N.Y.2d 807, 664 N.Y.S.2d 268, 686 N.E.2d 1363, 1997 N.Y. LEXIS 3025 (N.Y. 1997).

Insured's unexcused 8-month delay in notifying insurer of claim was breach of its contractual obligations and vitiated any coverage afforded by policy, which required insured to provide notice of claim "as soon as practicable" and to "immediately"

forward copy of summons and complaint to insurer. International Furniture Rentals of NY/CT, Inc. v United States Fid. & Guar. Co., 256 A.D.2d 308, 681 N.Y.S.2d 326, 1998 N.Y. App. Div. LEXIS 13193 (N.Y. App. Div. 2d Dep't 1998).

Court erred in granting insureds' summary judgment motion declaring that insurer was obligated to defend and indemnify insureds in underlying personal injury action where reasonableness of insureds' actions in failing to notifying insurer of Order to Abate Nuisance and in not forwarding notice of legal proceedings against them to insurer until 4 months after they received it were fact issues in light of insurer's requirement that insureds must give prompt notice of "anything that indicates there might be a claim under this policy." Kaliandasani v Otsego Mut. Fire Ins. Co., 256 A.D.2d 310, 681 N.Y.S.2d 323, 1998 N.Y. App. Div. LEXIS 13178 (N.Y. App. Div. 2d Dep't 1998).

Insurance carrier was entitled to summary judgment dismissing action to collect proceeds of homeowner's insurance policy, as insureds' 9-month delay in giving notice of accident and 5-month delay in giving notice of underlying lawsuit was unreasonable as matter of law in absence of excuse or mitigating factors, and in light of close family relationship between injured plaintiff and insureds. Serravillo v Sterling Ins. Co., 261 A.D.2d 384, 689 N.Y.S.2d 521, 1999 N.Y. App. Div. LEXIS 4524 (N.Y. App. Div. 2d Dep't 1999), app. denied, 95 N.Y.2d 758, 713 N.Y.S.2d 2, 734 N.E.2d 1213, 2000 N.Y. LEXIS 1722 (N.Y. 2000).

Defendant insurer was properly granted summary judgment declaring that it was not obligated to defend and indemnify plaintiff in underlying action, despite plaintiff's assertion that it did not learn of underlying action until conditional default order was served on person designated as its agent with Secretary of State, for even though such circumstance might have been sufficient to raise fact issue as to whether plaintiff complied with its obligation under policy to give defendant notice of suit as soon as practicable, it was not sufficient to raise fact issue as to whether plaintiff complied with its obligation under policy to immediately send defendant copies of any legal papers received, and no valid reason was given for plaintiff's almost 2-month delay in notifying defendant of its receipt of conditional default order. Viles Contr. Corp. v Hartford Fire Ins. Co., 271 A.D.2d 349, 708 N.Y.S.2d 281, 2000 N.Y. App. Div. LEXIS 4573 (N.Y. App. Div. 1st Dep't 2000).

In action to recover no-fault insurance benefits, insurer did not raise triable issue of fact as to whether it received timely notice of accident where its initial denial of claim was within relevant 90-day period after accident, and thus insured's notice of accident was necessarily timely. N.Y. & Presbyterian Hosp. v Enter. Rent-A-Car, 281 A.D.2d 526, 721 N.Y.S.2d 823, 2001 N.Y. App. Div. LEXIS 2568 (N.Y. App. Div. 2d Dep't 2001).

Even if "loss run" report otherwise satisfied requirement of commercial general liability insurance policy that insured, as condition precedent to coverage, give insurer notice of any occurrence within 15 days of learning about it or as soon as was reasonably practicable thereafter, report was untimely where it would have been received at least one month after insured learned of incident, insured gave insurer's claims administrator written notice of incident on day after it occurred, nothing made it impracticable to give insurer notice before expiration of 15-day period, and it would have been apparent to insured and administrator from outset that potential exposure arising from claim at issue exceeded $25,000 limit of insured's self-insured retentions. Steadfast Ins. Co. v Sentinel Real Estate Corp., 283 A.D.2d 44, 727 N.Y.S.2d 393, 2001 N.Y. App. Div. LEXIS 5695 (N.Y. App. Div. 1st Dep't 2001).

Insurer was not entitled to a stay of the N.Y. C.P.L.R. art. 75 arbitration proceedings, as it failed to give notice of the disclaimer to the insured party within a reasonable time under N.Y. Ins. Law § 3420(d); the insurer had sufficient knowledge of the facts as of February 21, 2003, to disclaim, yet it failed to do so until April 10, 2003. Am. Express Prop. Cas. Co. v Vinci, 18 A.D.3d 655, 795 N.Y.S.2d 329, 2005 N.Y. App. Div. LEXIS 5276 (N.Y. App. Div. 2d Dep't 2005).

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Insurer's motion for summary judgment should have been granted in a county public administrator's suit seeking a declaration that the insurer was obligated to defend insureds in an underlying wrongful death suit because, while N.Y. Ins. Law § 3420(a)(3) provided an injured party with an independent right to provide an insurance carrier with written notice of an accident, the injured party was required to demonstrate that he or she acted diligently in attempting to learn the identity of the insurer and expeditiously notify it, and the insurer established its prima facie entitlement to judgment as a matter of law by establishing that the administrator did not provide any explanation for the five-month delay in ascertaining the insurer's identity or in notifying the insurer of the accident after the administrator was appointed to represent the decedent's estate. Trepel v Asian Pac. Express Corp., 16 A.D.3d 405, 791 N.Y.S.2d 161, 2005 N.Y. App. Div. LEXIS 2296 (N.Y. App. Div. 2d Dep't 2005).

40. — —One year or more

Where insureds, having information of personal injuries arising from a fire in building against which structural violations had been posted by municipality, failed to exercise reasonable care and diligence in ascertaining facts about alleged accident and in evaluating potential liability, delay of 19 months in giving notice was inexcusable. Security Mut. Ins. Co. v Acker-Fitzsimons Corp., 31 N.Y.2d 436, 340 N.Y.S.2d 902, 293 N.E.2d 76, 1972 N.Y. LEXIS 880 (N.Y. 1972), limited, Brandon v Nationwide Mut. Ins. Co., 97 N.Y.2d 491, 743 N.Y.S.2d 53, 769 N.E.2d 810, 2002 N.Y. LEXIS 977 (N.Y. 2002).

Fact that split limestone manufacturer's liability insurer, which sought to have truck dealer's liability insurer's policy declared primary with respect to action arising out of accident occurring when automobile struck "cement brick" on roadway, did not give such insurer notice of accident and pending lawsuit until almost 13 months after manufacturer's insurer knew that manufacturer's truck had not come within three miles of accident and that truck, which dealer loaned to manufacturer, had passed scene short time before or after accident, was not an "excusable delay" for purposes of policy provisions requiring that notice be given as soon as practicable. Aetna Cas. & Sur. Co. v Pa. Mfrs. Ass'n Ins. Co., 57 A.D.2d 982, 394 N.Y.S.2d 330, 1977 N.Y. App. Div. LEXIS 12278 (N.Y. App. Div. 3d Dep't 1977).

In action for declaratory judgment regarding insurance company's duty to defend insured in personal injury action arising out of motor vehicle accident, where insured did not notify insurance company of accident until approximately 18 months after accident when he first found out that other party involved claimed personal injuries, insured failed to satisfy burden of establishing that there was no reasonable ground for believing, prior to his receipt of summons and complaint for personal injuries, that bodily injury had resulted from accident; bare reliance on fact that no one complained of personal injury at time of accident was insufficient where manner in which accident occurred and extent of damage to other party's vehicle should have suggested to reasonable and prudent person that there existed strong possibility that personal injury claim would eventually be made. Eveready Ins. Co. v Levine, 145 A.D.2d 526, 536 N.Y.S.2d 87, 1988 N.Y. App. Div. LEXIS 13642 (N.Y. App. Div. 2d Dep't 1988).

Insurance company was entitled to judgment declaring that it had no duty to defend insured in personal injury action arising out of motor vehicle accident since insured breached duty to notify insurance company of accident as soon as reasonably practical when he did not notify insurance company of accident until 18 months after accident, when he was served with summons and complaint. Eveready Ins. Co. v Levine, 145 A.D.2d 526, 536 N.Y.S.2d 87, 1988 N.Y. App. Div. LEXIS 13642 (N.Y. App. Div. 2d Dep't 1988).

Service of summons and complaint on insureds by injured party, which were then forwarded to insurer almost 12 months after accident, was insufficient to constitute notice on behalf of injured party "as soon as was reasonably possible" under CLS Ins

§ 3420(a)(4), and thus insurer was not obligated to defend and indemnify insureds in underlying action. Government Employees Ins. Co. v Blecker, 150 A.D.2d 428, 541 N.Y.S.2d 39, 1989 N.Y. App. Div. LEXIS 6427 (N.Y. App. Div. 2d Dep't 1989).

Ten-year delay by insured New York City Housing Authority in reporting personal injury claim to its liability insurer constituted breach of authority's obligation under policy to give notice of pertinent occurrence "as soon as practicable" and entitled insurer to disclaim any duty to defend or indemnify authority, notwithstanding fact that authority itself received no notice of occurrence giving rise to injury other than that contained in police accident report; even if notice of claim provisions of CLS Gen Mun § 50-e were interpreted to mean that its police department's knowledge of accident could not be imputed to municipality, authority's duty of notification was controlled by insurance policy rather than by statute. White v New York, 180 A.D.2d 324, 585 N.Y.S.2d 41, 1992 N.Y. App. Div. LEXIS 8146 (N.Y. App. Div. 1st Dep't 1992), aff'd, 81 N.Y.2d 955, 598 N.Y.S.2d 759, 615 N.E.2d 216, 1993 N.Y. LEXIS 1127 (N.Y. 1993).

Insurer was not required to defend third-party action against its insured arising out of injuries sustained by independent contractor who fell from ladder while working for insured as painter, notwithstanding painter's assertion to insured shortly after accident that he did not intend to sue anyone for injuries, since insured's 15-month delay in notifying insurer only after third-party action was commenced was unreasonable as matter of law. E.B. Gen. Contracting v Nationwide Ins. Co., 189 A.D.2d 796, 592 N.Y.S.2d 455, 1993 N.Y. App. Div. LEXIS 328 (N.Y. App. Div. 2d Dep't 1993).

Insurer properly disclaimed coverage based on late notice of loss where policy required insured to "give immediate written notice of...loss to the Company," and insurer was not formally notified in writing of insured's claim until more than 13 months had passed after accident. Town Bd. v Continental Ins. Co., 213 A.D.2d 475, 623 N.Y.S.2d 894, 1995 N.Y. App. Div. LEXIS 2733 (N.Y. App. Div. 2d Dep't), app. denied, 86 N.Y.2d 712, 635 N.Y.S.2d 949, 659 N.E.2d 772, 1995 N.Y. LEXIS 4498 (N.Y. 1995).

Plaintiff failed to give notice of his claim as soon as was reasonably possible as required by CLS Ins § 3420(a)(4) where policy was listed on multiple dwelling registration form filed by insured in 1982, injury was sustained in June 1985, underlying action was commenced in June 1988, plaintiff's default judgment in underlying action was entered in August 1991, and plaintiff's attorney first gave notice of claim when he informed insurer of default judgment in October 1991. Rodriguez v Liberty Mut. Ins. Co., 214 A.D.2d 366, 625 N.Y.S.2d 489, 1995 N.Y. App. Div. LEXIS 4156 (N.Y. App. Div. 1st Dep't 1995).

In action by plaintiff who was injured on premises owned by defendant power authority which sought contribution and indemnification from plaintiff's employer, general liability insurance carrier was entitled to summary judgment declaring that it was not obligated to defend or indemnify plaintiff's employer in third-party action as notice given to it by plaintiff's employer was untimely as matter of law, where it did not receive notice until 5 years after accident, almost 4 years after plaintiff's employer was first impleaded by power authority. Thomson v Power Auth., 217 A.D.2d 495, 629 N.Y.S.2d 760, 1995 N.Y. App. Div. LEXIS 8122 (N.Y. App. Div. 1st Dep't 1995).

Absent valid excuse, 28-month delay in providing notice of accident was unreasonable. Collins v Isaksen, 221 A.D.2d 403, 633 N.Y.S.2d 539, 1995 N.Y. App. Div. LEXIS 11975 (N.Y. App. Div. 2d Dep't 1995).

Insured did not give notice of occurrence "as soon as practical," as required by excess liability policy, where notice was not provided until May 1994, and insured must have known as early as September 1992 that claims submitted in connection with fire were likely to involve excess policy because claims reports from primary insurer were mailed to it describing lawsuit seeking damages of $5 million and stating that "the appropriate excess letter has been forwarded to [insured] in response to a review of this lawsuit."319 McKibben St. Corp. v General Star Nat'l Ins. Co., 245 A.D.2d 26, 664 N.Y.S.2d 785, 1997 N.Y. App. Div. LEXIS 12510 (N.Y. App. Div. 1st Dep't 1997).

General liability insurance policy was vitiated by insured's failure, without valid excuse, to notify insurer of accident or seek coverage under policy until 4 years after accident. National Union Fire Ins. Co. v State Ins. Fund, 266 A.D.2d 518, 699 N.Y.S.2d 111, 1999 N.Y. App. Div. LEXIS 12246 (N.Y. App. Div. 2d Dep't 1999).

Insureds' 17-month delay in notifying insurer of relevant claims was unreasonable and vitiated coverage under policy; it was no excuse that delay was caused by error of insureds' broker in initially notifying wrong insurer. Martini v Lafayette Studio Corp., 273 A.D.2d 112, 710 N.Y.S.2d 39, 2000 N.Y. App. Div. LEXIS 7176 (N.Y. App. Div. 1st Dep't 2000).

Insurer was not required to defend or indemnify insured regarding underlying action by insured's injured employee where insurer properly disclaimed coverage based on insured's failure to provide timely notice of claim, insured's delay of 2 years and 10 months in providing notice of claim was unreasonable as matter of law, insurer was not obligated to disclaim coverage until insured provided notice of accident or claim, and disclaimer in insurer's answer was timely notice of disclaimer. Roofing Consultants, Inc. v Scottsdale Ins. Co., 273 A.D.2d 933, 709 N.Y.S.2d 782, 2000 N.Y. App. Div. LEXIS 6715 (N.Y. App. Div. 4th Dep't), app. denied, 95 N.Y.2d 770, 722 N.Y.S.2d 473, 745 N.E.2d 393, 2000 N.Y. LEXIS 3859 (N.Y. 2000).

Insurer was entitled to summary judgment dismissing action under CLS Ins § 3420(b)(1) to recover amount of judgment obtained against insured where insurer first received notice of motor vehicle accident about 2 years and 7 months after it occurred, and plaintiff failed to present any evidence that delay was reasonable. Centrone v State Farm Fire & Cas., 275 A.D.2d 728, 713 N.Y.S.2d 211, 2000 N.Y. App. Div. LEXIS 9265 (N.Y. App. Div. 2d Dep't 2000), app. denied, 96 N.Y.2d 704, 723 N.Y.S.2d 131, 746 N.E.2d 186, 2001 N.Y. LEXIS 260 (N.Y. 2001).

Under insurance policy provision requiring notice of supplemental uninsured motorist claim "as soon as practicable"—that is, with reasonable promptness after insured knew or should have known that tortfeasor was underinsured—delay of over 2 years was unreasonable as matter of law and shifted burden to insured to provide reasonable excuse for delay or due diligence in ascertaining insurance coverage of vehicles involved in accident. State Farm Mut. Auto. Ins. Co. v Hernandez, 275 A.D.2d 989, 713 N.Y.S.2d 618, 2000 N.Y. App. Div. LEXIS 9545 (N.Y. App. Div. 4th Dep't 2000).

Insurer was not obligated to defend insured in underlying claim because insured failed to notify insurer of the accident for over 14 months without a reasonable excuse. Insurer established that it validly disclaimed coverage based on late notice, and provided timely written notice of disclaimer in accordance with N.Y. Ins. Law § 3420(d). Sevenson Envtl. Servs., Inc. v Sirius Am. Ins. Co., 64 A.D.3d 1234, 883 N.Y.S.2d 423, 2009 N.Y. App. Div. LEXIS 5647 (N.Y. App. Div. 4th Dep't 2009).

Named insured was entitled to coverage under this statute because she provided notice within two years of the time required under the policy and the insurer failed to show that its ability to investigate or defend the claim had been "materially impaired" by the delay; the named insured became aware of the limits of the tortfeasor's policy in September 2012, and notified the insurer in August 2014 of her supplemental uninsured/underinsured claims. Slocum v Progressive Northwestern Ins. Co., 137 A.D.3d 1634, 28 N.Y.S.3d 181, 2016 N.Y. App. Div. LEXIS 2187 (N.Y. App. Div. 4th Dep't), reh'g denied, app. denied, 140 A.D.3d 1715, 32 N.Y.S.3d 524, 2016 N.Y. App. Div. LEXIS 4491 (N.Y. App. Div. 4th Dep't 2016).

Liability insurer had no obligation to satisfy a judgment against an insured who knew of the occurrence immediately but waited more than a year to give notice, absent evidence that the insured had a good faith belief in nonliability, and a former version of this section did not require the insurer to show that it was prejudiced by the insured's failure to give timely notice. A delay in disclaiming coverage was excusable as reasonably related to the insurer's completion of its investigation. Ramlochan v Scottsdale Ins. Co., 150 A.D.3d 1166, 55 N.Y.S.3d 369, 2017 N.Y. App. Div. LEXIS 4090 (N.Y. App. Div. 2d Dep't 2017).

Commercial general liability insurer which provided coverage during period in which claim was made was nevertheless entitled

to summary judgment declaring that it was not obligated to defend or indemnify insured, where policy required insured to give written notice as soon as practicable, and insurance broker notified wrong insurer, thereby delaying proper notice for 17 months; fact that delay was due to broker's error did not relieve insured of its obligation to timely notify insurer of claim. Martini v Lafayette Studios Corp., 177 Misc. 2d 383, 676 N.Y.S.2d 808, 1998 N.Y. Misc. LEXIS 302 (N.Y. Sup. Ct. 1998).

Insurer made out a prima facie case of unreasonable notice under N.Y. Ins. Law § 3420(a)(4) where an insured was involved in an incident in which he killed another deer hunter, but he failed to advise the insurer of the incident until more than two years later after he had been served with a complaint in a wrongful death action. Allstate Ins. Co. v Marcone, 29 A.D.3d 715, 815 N.Y.S.2d 235, 2006 N.Y. App. Div. LEXIS 6530 (N.Y. App. Div. 2d Dep't), app. dismissed, 7 N.Y.3d 841, 824 N.Y.S.2d 208, 857 N.E.2d 529, 2006 N.Y. LEXIS 2669 (N.Y. 2006).

Because an insurer was not notified of a property damage claim for more than one year after the insured received notice of such claim from its tenant, the insured's belief in nonliability was unreasonable; accordingly, the trial court properly granted the insurer's motion for summary judgment. Ponok Realty Corp. v United Natl. Specialty Ins. Co., 69 A.D.3d 596, 893 N.Y.S.2d 125, 2010 N.Y. App. Div. LEXIS 132 (N.Y. App. Div. 2d Dep't 2010).

Prior insurer properly disclaimed coverage for an underlying personal injury claim on the basis of untimely notice because its policy predated the effective date of the amendments to N.Y. Ins. Law § 3420(a)(5) which required a showing of prejudice and the later insurer knew of the incorrect date of underlying accident at least one year before the prior insurer was notified, which notice happened five years after the accident; although this tender, made on behalf of the insured, was sufficient to fulfill the policy's notice of claim requirements so as to trigger the insurer's obligation to issue a timely disclaimer pursuant to § 3420(d), the delay in giving such notice of claim was clearly unreasonable. 25 Ave. C New Realty, LLC v Alea N. Am. Ins. Co., 96 A.D.3d 489, 949 N.Y.S.2d 2, 2012 N.Y. App. Div. LEXIS 4599 (N.Y. App. Div. 1st Dep't 2012).

District court's conclusion that insured failed to notify insurer "promptly" of claim as required by policy was not clearly erroneous where it was conceded that insured did not provide notice to insurer until 17 months after accident which gave rise to claim. Marino v New York Tel. Co., 944 F.2d 109, 1991 U.S. App. LEXIS 22013 (2d Cir. N.Y. 1991).

Delay of more than 6 months in giving notice of claim to liability insurer, after insured was clearly notified that city would sue unless it assumed cleanup costs for polluted site, was unreasonable as matter of law, particularly where there were prior indications that environmental claims would be made and insured had furnished information to environmental agency 4 years earlier. City of Utica v Genesee Mgmt., 934 F. Supp. 510, 1996 U.S. Dist. LEXIS 10723 (N.D.N.Y. 1996).

41. Timeliness of notice of accident involving uninsured motorist, particular cases

Court did not err as matter of law in granting insurer's petition to stay arbitration of insured's underinsurance claim, on ground that insured did not give notice of underinsurance claim "as soon as practicable" pursuant to his policy, where he commenced action shortly after accident but did not learn of limits of tortfeasor's policy until 10 months later, in connection with settlement offer. Metropolitan Prop. & Cas. Ins. Co. v Mancuso, 93 N.Y.2d 487, 693 N.Y.S.2d 81, 715 N.E.2d 107, 1999 N.Y. LEXIS 1296 (N.Y. 1999).

Court properly granted insurer's petition to stay arbitration of insured's underinsurance claim, on ground that insured did not give notice of underinsurance claim "within 90 days or as soon as practicable" as required by his policy, where he did not file underinsurance claim until 14 months after he began his personal injury action and 3 years after accident. Metropolitan Prop. & Cas. Ins. Co. v Mancuso, 93 N.Y.2d 487, 693 N.Y.S.2d 81, 715 N.E.2d 107, 1999 N.Y. LEXIS 1296 (N.Y. 1999).

Hearing is required to determine factual issues presented in proceeding to compel the MVAIC to accept, as timely filed, notice of claim filed by petitioner under an automobile accident insurance policy containing the usual indemnification endorsement against uninsured motorists required by former § 167 [now § 3420]. Ryan v Motor Vehicle Acci. Indemnification Corp., 22 A.D.2d 949, 255 N.Y.S.2d 908, 1964 N.Y. App. Div. LEXIS 2385 (N.Y. App. Div. 2d Dep't 1964).

An order which stayed arbitration of a claim for damages for personal injuries asserted against the MVAIC and directed a jury trial on the issue whether the filing of notice of claim by the injured 17-year-old infant 120 days after the accident satisfied the condition precedent prescribed by the policy that notice be given within 90 days "or as soon as practicable" was proper, since it could not be held as a matter of law that by reason of claimant's infancy the filing was timely. Gardner v Motor Vehicle Acci. Indemnification Corp., 27 A.D.2d 783, 277 N.Y.S.2d 239, 1967 N.Y. App. Div. LEXIS 4863 (N.Y. App. Div. 3d Dep't 1967).

It was error for Special Term to deny petitioner's application for permanent stay of arbitration since although respondents, who sustained injuries in automobile accident on June 15, 1981, acted promptly in retaining counsel and procuring copy of police accident report, counsel's subsequent delay, over 2 years, in notifying petitioner of their claim was patently excessive. Nassau Ins. Co. v Doyle, 114 A.D.2d 899, 495 N.Y.S.2d 72, 1985 N.Y. App. Div. LEXIS 53930 (N.Y. App. Div. 2d Dep't 1985).

Insurer was not entitled to permanent stay of arbitration of uninsured motorist claim, despite its assertion that insureds failed to comply with policy provision requiring notice to police within 24 hours or as soon as practicable after accident, where insureds made repeated efforts to seek assistance from police but, through no fault of their own, they were unable to obtain written police report verifying such contacts until some time after accident. Lumbermen's Mut. Casualty Co. v Crivello, 210 A.D.2d 177, 621 N.Y.S.2d 20, 1994 N.Y. App. Div. LEXIS 13218 (N.Y. App. Div. 1st Dep't 1994).

Insureds' willful breach of cooperation clause barred their recovery under homeowner's policy where (1) they had filed for bankruptcy and were on verge of losing their home at foreclosure sale on date of fire, (2) they refused to provide insurer with personal and corporate tax returns requested because of suspicious nature of fire, and (3) although their son, who was college student residing at insured premises, was home several hours before fire broke out, they refused to produce him for examination under oath or to respond to interrogatory seeking his current address. Weissberg v Royal Ins. Co., 240 A.D.2d 733, 659 N.Y.S.2d 505, 1997 N.Y. App. Div. LEXIS 7134 (N.Y. App. Div. 2d Dep't 1997).

Court improperly denied insurer's petition for permanent stay of arbitration and directed that arbitration proceed in accordance with insured's demand for supplemental uninsured motorist coverage where fact issue existed as to whether, under circumstances, notice of claim was given to insurer as soon as practicable 4 months after insured knew or should have known he had potential serious injury. Travelers Ins. Co. v DeLosh, 249 A.D.2d 924, 672 N.Y.S.2d 219, 1998 N.Y. App. Div. LEXIS 5008 (N.Y. App. Div. 4th Dep't 1998).

Insured's delay in ascertaining offending vehicle's policy limits for more than 15 months after accident constituted lack of due diligence which justified insurer's disclaimer of coverage on ground of late notice. Owen v Allstate Ins. Co., 250 A.D.2d 1018, 673 N.Y.S.2d 477, 1998 N.Y. App. Div. LEXIS 5916 (N.Y. App. Div. 3d Dep't 1998).

Notice of claim for underinsured motorist coverage, served on insurer more than 4 years after accident, was untimely as matter of law in absence of valid excuse for delay. LaBella v Allstate Ins. Co., 261 A.D.2d 367, 689 N.Y.S.2d 197, 1999 N.Y. App. Div. LEXIS 4506 (N.Y. App. Div. 2d Dep't 1999).

Respondent had reasonable excuse for failing to provide notice of her supplemental underinsured motorist (SUM) claim until 9 months after February 1997 accident, where she was initially diagnosed with relatively minor injury, extent of injury became apparent in June, she underwent surgery in August and then retained attorney, attorney's efforts to discover extent of tortfeasor's insurance coverage were frustrated due to fact that police accident report did not state vehicle owner's identity, and her attorney gave petitioner written notice of potential SUM claim in

November 1997 in event vehicle owner was underinsured or uninsured. Nationwide Ins. Enter. v Leavy, 268 A.D.2d 661, 700 N.Y.S.2d 582, 2000 N.Y. App. Div. LEXIS 146 (N.Y. App. Div. 3d Dep't 2000).

Insured did not prove reasonable excuse for his delay in notifying insurer of supplemental uninsured motorist claim, even if he did not know true extent of his injuries until second surgery 17 months after accident, where his additional delay of 9 months was without excuse. State Farm Mut. Auto. Ins. Co. v Hernandez, 275 A.D.2d 989, 713 N.Y.S.2d 618, 2000 N.Y. App. Div. LEXIS 9545 (N.Y. App. Div. 4th Dep't 2000).

Hearing was required to determine whether insured acted with due diligence in trying to ascertain policy limits where (1) his supplemental uninsured motorist (SUM) coverage was excess after deduction of any amounts recovered from tortfeasor or other SUM insurer, (2) carrier insuring vehicle that insured was driving went into bankruptcy, and its debts were taken over by Liquidation Bureau of State Insurance Department, and (3) although insured's second attorney was retained in 1998, record did not show what, if any, efforts prior attorney made to ascertain limits. State Farm Mut. Auto. Ins. Co. v Hernandez, 275 A.D.2d 989, 713 N.Y.S.2d 618, 2000 N.Y. App. Div. LEXIS 9545 (N.Y. App. Div. 4th Dep't 2000).

Where an injured person covered by liability insurance was injured by an uninsured motorist, being a pedestrian struck by the motorist after January 1, 1959, and sought to require his own insurer to arbitrate the claim as provided in the original policy, likewise issued after January 1, 1959, promptly so notified his insurer, and the insurance company failed to deny coverage and assert that liability, if any, rested on the Motor Vehicle Accident Indemnification Corporation only after it was too late to file notice of claim against the corporation, the liability insurer would be compelled to arbitrate the claim pursuant to the policy, regardless of whether liability could have been imposed upon the corporation. Gallagher v Government Employees Ins. Co., 25 Misc. 2d 777, 207 N.Y.S.2d 555, 1960 N.Y. Misc. LEXIS 2520 (N.Y. Sup. Ct. 1960), rev'd, 12 A.D.2d 981, 212 N.Y.S.2d 575, 1961 N.Y. App. Div. LEXIS 12436 (N.Y. App. Div. 2d Dep't 1961).

An application by the father of an infant, who was struck by a hit and run vehicle, to compel the MVAIC to arbitrate the claim was granted, where filing the claim one year and six days after the accident and approximately one month after retention of an attorney constituted filing as soon as practicable. McNulty v Motor Vehicle Accident Indemnification Corp., 51 Misc. 2d 1, 272 N.Y.S.2d 514, 1966 N.Y. Misc. LEXIS 1736 (N.Y. Sup. Ct. 1966), aff'd, 28 A.D.2d 1209, 284 N.Y.S.2d 858, 1967 N.Y. App. Div. LEXIS 8019 (N.Y. App. Div. 2d Dep't 1967).

The phrase "as soon as practicable," in the MVAIC's indorsement relating to the giving of notice, required that notice be given within a reasonable time under all circumstances, and the MVAIC had to accept a notice of claim made within such reasonable time. Timbone v Stuyvesant Ins. Co., 51 Misc. 2d 916, 274 N.Y.S.2d 489, 1966 N.Y. Misc. LEXIS 1421 (N.Y. Sup. Ct. 1966).

Special patrolman in hospital was a "peace officer" within former § 608 [now § 5208] of the Insurance Law, so that non-English speaking litigant who reported accident to said officer upon arriving at the hospital after the accident would be granted leave to sue the MVAIC. Rodriguez v Motor Vehicle Accident Indemnification Corp., 54 Misc. 2d 361, 282 N.Y.S.2d 625, 1967 N.Y. Misc. LEXIS 1451 (N.Y. Sup. Ct. 1967), aff'd, 29 A.D.2d 846, 288 N.Y.S.2d 588, 1968 N.Y. App. Div. LEXIS 5741 (N.Y. App. Div. 1st Dep't 1968).

In view of the fact that claimant filed her notice under the uninsured motorist indorsement within 10 days after receiving notice of disclaimer of liability by insurer, no good faith assertion could be made that claimant's notice was untimely. Murphy v Criterion Ins. Co., 57 Misc. 2d 52, 293 N.Y.S.2d 851, 1968 N.Y. Misc. LEXIS 1680 (N.Y. Sup. Ct. 1968).

The failure of a claimant to report a hit-and-run accident as required by the uninsured motorist clause was not excused by the fact that he did not discover that there was a hit-and-run automobile involved until some seven months after the accident when his attorney received a copy of a motor vehicle report submitted by the driver of a vehicle which was propelled by an alleged hit-and-run motorist into the rear of a preceding vehicle which vehicle was, in turn, propelled into claimant's vehicle. Shamrock Casualty Co. v Mack, 61 Misc. 2d 240, 305 N.Y.S.2d 525, 1969 N.Y. Misc. LEXIS 1062 (N.Y. Sup. Ct. 1969).

42. —Delay due to time lag in discovering uninsured status

The extension of coverage afforded by former § 167, subd. 2-a [now § 3420(f)] to damage sustained from operation of an uninsured vehicle is not available unless and until it can be established that the vehicle in question, or its operator, was not insured at the time of the incident. Whether or not notice of claim against MVAIC was given within a reasonable time depends upon whether there was due diligence in investigating possible or asserted insurance coverage, and in serving notice of claim on MVAIC after it became clear that such coverage did not exist. Motor Vehicle Accident Indem. Corp. v Brown, 15 A.D.2d 578, 223 N.Y.S.2d 309, 1961 N.Y. App. Div. LEXIS 6818 (N.Y. App. Div. 2d Dep't 1961), app. dismissed, 11 N.Y.2d 968, 229 N.Y.S.2d 416, 183 N.E.2d 696, 1962 N.Y. LEXIS 1194 (N.Y. 1962).

The March 14, 1966 claim of a motorist injured in an accident with an uninsured vehicle on May 19, 1965 was untimely, since the inaction of claimant's first lawyer was charged to claimant and it appeared that claimant did not request information from the Motor Vehicle Department as to whether the other car carried insurance until February 8, 1966 which was almost nine months after the date of the accident, and did not serve his notice of claim until approximately 10 months after the date of the accident. De Jesus v Motor Vechicle Acci Indemnification Corp., 31 A.D.2d 917, 298 N.Y.S.2d 458, 1969 N.Y. App. Div. LEXIS 4351 (N.Y. App. Div. 1st Dep't 1969).

Claimant who has not complied with 90-day notice requirement in policy must shown that he diligently sought to determine whether insurance coverage existed during critical period preceding giving of notice, and expeditious service of notice after receipt of disclaimer of insurance company named by other party does not demonstrate diligence from time of accident; failure to request insurance information from department of motor vehicles demonstrates lack of diligence and conclusive reliance on accuracy of other party's representations is unreasonable; unexplained failure to make attempt to ascertain other party's insurance status for period of 11 months forecloses finding that notice had been filed as soon as practicable. State Farm Mut. Auto. Ins. Co. v Romero, 109 A.D.2d 786, 486 N.Y.S.2d 297, 1985 N.Y. App. Div. LEXIS 47282 (N.Y. App. Div. 2d Dep't 1985).

Where the attorney for an injured motorist did everything which could be expected to ascertain the insurance status of the owner and operator of the other vehicle, and was not informed, until March 23, 1960, that there was no insurance coverage, then filed the claim with the Motor Vehicle Accident Indemnification Corporation on March 24, 1960, it could be determined as matter of law that the claim was filed as soon as practicable under the circumstances. Brown v Motor Vehicle Accident Indemnification Corp., 24 Misc. 2d 550, 206 N.Y.S.2d 294, 1960 N.Y. Misc. LEXIS 2651 (N.Y. Sup. Ct. 1960).

Where petitioners, injured in a collision with an uninsured motor vehicle, retained counsel six days following the accident and clearly established that a diligent effort was made to determine whether or not the other vehicle was insured but did not receive a final letter from the Motor Vehicle Bureau advising them that the other vehicle was not insured until seven months later, at which time their attorneys immediately notified MVAIC of the accident and claim against it, their claims were filed as soon as reasonably possible as matter of law. Gorgoni v O'Boyle, 33 Misc. 2d 788, 227 N.Y.S.2d 709, 1961 N.Y. Misc. LEXIS 2367 (N.Y. Sup. Ct. 1961).

Notice of claim against MVAIC was given "as soon as practicable" where the claimant, an infant, sustained injuries in an accident on June 21, 1959, his parents retained counsel on July 2, who immediately started to investigate the facts and who were advised by MVAIC that the offending motorist was insured, whereupon they started suit against such motorist in which he failed to appear and defend and only then found out by inquiry that his insurance had been cancelled long prior to the accident, following which his former insurer affirmed the cancellation and

disclaimed liability in December, 1959. Motor Vehicle Acci. Indemnification Corp. v Soister, 33 Misc. 2d 704, 227 N.Y.S.2d 979, 1962 N.Y. Misc. LEXIS 3583 (N.Y. Sup. Ct. 1962).

Where the accident in which petitioner was injured occurred October 2, 1961, petitioner was advised at all times that the negligent motorist causing the accident was covered by liability insurance, started suit against that motorist, and did not discover that there was a claim of cancellation of defendant's liability insurance, or the identity of his alleged insurer, until late in March, 1962, following disclaimer of liability by the insurer, whether notice of claim against MVAIC was given "as soon as practicable" was a question of fact to be determined by the court prior to granting a demand for arbitration against MVAIC. Kaiser v Motor Vehicle Acci. Indemnification Corp., 35 Misc. 2d 636, 231 N.Y.S.2d 178, 1962 N.Y. Misc. LEXIS 3137 (N.Y. Sup. Ct. 1962).

In connection with a motorist's application to compel MVAIC to arbitrate a claim for damages sustained by petitioner in a collision with an allegedly uninsured automobile, notice of claim was given to MVAIC as soon as practicable after occurrence of the accident on October 2, 1961, where the driver of the other car informed plaintiff's attorney on October 23, 1961 that he had insurance and the attorney did not further find out that such insurance had been cancelled until March 18, 1962, whereupon after attempting to verify this, on March 31, 1962, he filed notice of intent to sue MVAIC. Kaiser v Motor Vehicle Acci. Indemnification Corp., 36 Misc. 2d 724, 233 N.Y.S.2d 944, 1962 N.Y. Misc. LEXIS 2631 (N.Y. Sup. Ct. 1962).

Where the accident in which plaintiff, an infant, was allegedly injured by negligence of an uninsured motorist, occurred June 11, 1960, and the first notice was not given to MVAIC until February 23, 1961, more than five months after plaintiff was first notified by a purported insurance company, to whom his attorney was referred by the Motor Vehicle Bureau, that the offending motorist had no insurance coverage, the notice of claim against MVAIC was not given "as soon as practicable," and no cause of action existed against MVAIC. Sorrentino v Motor Vehicle Acci. Indemnification Corp., 37 Misc. 2d 550, 236 N.Y.S.2d 123, 1962 N.Y. Misc. LEXIS 2162 (N.Y. Sup. Ct. 1962).

Reasonableness of a delay by an insured in giving MVAIC notice of a claim under the uninsured motorist indorsement depends upon the insured's diligence in ascertaining the insurance status of the other operator, and giving notice once his lack of insurance is discovered. A notice given 140 days after a collision had occurred was held to be reasonable applying the standard of a reasonably diligent attorney, not that of a most diligent attorney. Merchants Mut. Ins. Co. v Anziano, 59 Misc. 2d 673, 300 N.Y.S.2d 187, 1969 N.Y. Misc. LEXIS 1606 (N.Y. Sup. Ct. 1969).

Where an insured had attempted to enforce his personal injury claim and was assisted by his insurer, which had notice the other automobile was uninsured, a notice given by insured to his company two days after he found out the other motorist was uninsured was given as soon as it was reasonably practicable for him to do so and precluded a stay of arbitration under the uninsured motorist indorsement. It was also held that settlement negotiations of the claim under the "uninsured motorist" indorsement conducted by claimant's insurer constituted a waiver of any alleged defect in the notice. Cuozzo v Lumbermens Mut. Casualty Co., 60 Misc. 2d 294, 303 N.Y.S.2d 12, 1969 N.Y. Misc. LEXIS 1395 (N.Y. Sup. Ct. 1969).

Where an insured had attempted to enforce his personal injury claim and was assisted by his insurer, which had notice the other automobile was uninsured, a notice given by insured to his company two days after he found out the other motorist was uninsured was given as soon as it was reasonably practicable for him to do so and precluded a stay of arbitration under the uninsured motorist indorsement. It was also held that settlement negotiations of the claim under the "uninsured motorist" indorsement conducted by claimant's insurer constituted a waiver of any alleged defect in the notice. Cuozzo v Lumbermens Mut. Casualty Co., 60 Misc. 2d 294, 303 N.Y.S.2d 12, 1969 N.Y. Misc. LEXIS 1395 (N.Y. Sup. Ct. 1969).

43. Burden of proof as to reasonableness of delay

Where, in giving notice of an accident, there has been a delay of twenty-two days, which is not the immediate notice called for by the policy of indemnity insurance, the burden of proof to show delay was reasonable rests on the insured, and his judgment creditor, suing under former § 167 [now § 3420], stands in his shoes and is chargeable with breach of condition. She is not affected, however, by a compromise between insurer and insured. Rushing v Commercial Casualty Ins. Co., 251 N.Y. 302, 167 N.E. 450, 251 N.Y. (N.Y.S.) 302, 1929 N.Y. LEXIS 719 (N.Y. 1929).

Requirement that insured notify its liability insurance carrier of potential claim "as soon as practicable" operates as condition precedent to coverage, and insured has burden of showing reasonableness of any excuse for delay in giving notice. White v New York, 81 N.Y.2d 955, 598 N.Y.S.2d 759, 615 N.E.2d 216, 1993 N.Y. LEXIS 1127 (N.Y. 1993).

Where a judgment creditor of the insured in an automobile liability policy seeks to impose liability upon the insurer, and it appears that there was delay in giving notice of accident and claim to the insurer with respect to the accident or occurrence out of which plaintiff's cause of action arose, plaintiff has the burden of excusing the delay. Mason v Allstate Ins. Co., 12 A.D.2d 138, 209 N.Y.S.2d 104, 1960 N.Y. App. Div. LEXIS 6284 (N.Y. App. Div. 2d Dep't 1960).

In action for declaratory judgment regarding insurance company's duty to defend insured in personal injury action arising out of motor vehicle accident, where insured did not notify insurance company of accident until approximately 18 months after accident when he first found out that other party involved claimed personal injuries, insured bore burden to establish that there was no reasonable ground for believing, prior to his receipt of summons and complaint for personal injuries, that bodily injury had resulted from accident. Eveready Ins. Co. v Levine, 145 A.D.2d 526, 536 N.Y.S.2d 87, 1988 N.Y. App. Div. LEXIS 13642 (N.Y. App. Div. 2d Dep't 1988).

Although a more liberal standard is applied to what delay is reasonable in the giving of notice of an accident by an injured person to the liability insurer, the burden of proving that delay was reasonable is still upon the injured person. Allstate Ins. Co. v Manger, 30 Misc. 2d 326, 213 N.Y.S.2d 901, 1961 N.Y. Misc. LEXIS 3168 (N.Y. Sup. Ct. 1961).

The requirement that the injured motorist give notice of claim against MVAIC "as soon as practicable" requires giving of notice to MVAIC within a reasonable time under all the circumstances, and the burden of proving that any delay was reasonable is upon the injured motorist. Kaiser v Motor Vehicle Acci. Indemnification Corp., 35 Misc. 2d 636, 231 N.Y.S.2d 178, 1962 N.Y. Misc. LEXIS 3137 (N.Y. Sup. Ct. 1962).

With respect to an insured's claim for property damage due to water damage that occurred when a fire in the residential unit above the insured premises was put out, as personal injury was not involved, the matter did not fall within the ambit of N.Y. Ins. Law § 3420(d); further, where the insured failed to show proof of prejudice from the delay, the insurer was not estopped from disclaiming coverage or rescinding the policy based on the insured's misrepresentation regarding lack of smoke detectors. Nunez v U.S. Underwriters Ins. Co., 921 N.Y.S.2d 462, 31 Misc. 3d 418, 2011 N.Y. Misc. LEXIS 394 (N.Y. Sup. Ct. 2011).

Insured bears burden of showing reasonableness of delay in giving notice of claim and occurrence for purposes of coverage under liability policy; where no valid excuse is given for delay, even short delay will be unreasonable and void coverage. City of Utica v Genesee Mgmt., 934 F. Supp. 510, 1996 U.S. Dist. LEXIS 10723 (N.D.N.Y. 1996).

In a dispute between two insurers regarding a duty to defend, an insurer failed to show that late notice of the claim materially impaired its ability to investigate or defend the claim because there is no support in the record for either the claim that the passage of time materially impaired its ability to conduct such an investigation and there was no explanation of why pre-suit negotiations would have been more effective at resolving the dispute than the negotiations in which it could have engaged after notice, particularly as there was no claim that the insurer ever engaged in negotiations with the claimant. Wausau Underwriters Ins. Co. v Old Republic Gen. Ins. Co., 122 F. Supp. 3d 44, 2015 U.S. Dist. LEXIS 103954 (S.D.N.Y. 2015).

44. Lack of required notice as vitiation of policy

Absent a valid excuse, a failure to satisfy the notice requirement vitiates the policy and the insurer need not show prejudice before it can assert the defense of noncompliance. Security Mut. Ins. Co. v Acker-Fitzsimons Corp., 31 N.Y.2d 436, 340 N.Y.S.2d 902, 293 N.E.2d 76, 1972 N.Y. LEXIS 880 (N.Y. 1972), limited, Brandon v Nationwide Mut. Ins. Co., 97 N.Y.2d 491, 743 N.Y.S.2d 53, 769 N.E.2d 810, 2002 N.Y. LEXIS 977 (N.Y. 2002).

Insurance carrier may assert that it has the right to reject claim of injured person, who seeks to secure the benefits of policy issued to the insured, on basis of failure of injured person to give notice within a reasonable time. Pensky v Aetna Life & Casualty Co., 55 A.D.2d 640, 390 N.Y.S.2d 162, 1976 N.Y. App. Div. LEXIS 15386 (N.Y. App. Div. 2d Dep't 1976).

Giving of required notice is condition of insurer's liability, and failure to comply with notice requirements vitiates the policy, but requirement that notice be given as soon as practicable after accident merely requires that notice be given within reasonable time under all circumstances. Hartford Fire Ins. Co. v Masternak, 55 A.D.2d 472, 390 N.Y.S.2d 949, 1977 N.Y. App. Div. LEXIS 10003 (N.Y. App. Div. 4th Dep't 1977).

Unexplained delay by insured under automobile liability policy in furnishing written notice of claim to insurer constituted breach of notice provision of policy, and such provision was not satisfied by insured's cooperation in giving recorded statement to insurer one week after accident. Gizzi v State Farm Mut. Ins. Co., 56 A.D.2d 973, 393 N.Y.S.2d 107, 1977 N.Y. App. Div. LEXIS 11386 (N.Y. App. Div. 3d Dep't 1977).

Policy requirement that notice be given "as soon as practicable" requires that notice be given within a reasonable time under all the circumstances; failure to give such notice vitiates the contract as to both the insured and party recovering a judgment against him. Aetna Cas. & Sur. Co. v Pa. Mfrs. Ass'n Ins. Co., 57 A.D.2d 982, 394 N.Y.S.2d 330, 1977 N.Y. App. Div. LEXIS 12278 (N.Y. App. Div. 3d Dep't 1977).

Application to permanently stay arbitration was properly granted where court found that written notice of automobile accident was mailed some 6 months after accident and insured failed to establish valid excuse for failure to comply with policy's 90-day notice provision; absent valid excuse, failure to satisfy notice requirement in insurance policy vitiates coverage. Allstate Ins. Co. v Kashkin, 130 A.D.2d 744, 516 N.Y.S.2d 43, 1987 N.Y. App. Div. LEXIS 46756 (N.Y. App. Div. 2d Dep't), app. denied, 70 N.Y.2d 608, 521 N.Y.S.2d 224, 515 N.E.2d 909, 1987 N.Y. LEXIS 18926 (N.Y. 1987).

Disclaimer of coverage under comprehensive general liability policy was effective where insurer clearly and unambiguously indicated that reason for disclaiming coverage was insureds' unexcused 22-month delay in notifying carrier of accident; failure to itemize prejudice suffered as result of delay did not invalidate disclaimer, and disclaimer letter was properly sent to claimants' attorney rather than to claimants directly, as authorized by CLS CPLR § 2103. Virtuoso v Aetna Casualty & Surety Co., 134 A.D.2d 252, 520 N.Y.S.2d 439, 1987 N.Y. App. Div. LEXIS 50440 (N.Y. App. Div. 2d Dep't 1987).

Insurance company was entitled to summary judgment declaring that it had no duty to defend or indemnify insureds where company had not received timely written notice of accident as required under policy and valid disclaimer of coverage was sent to insureds. Losi v Hanover Ins. Co., 139 A.D.2d 702, 527 N.Y.S.2d 458, 1988 N.Y. App. Div. LEXIS 4546 (N.Y. App. Div. 2d Dep't), app. dismissed, 72 N.Y.2d 950, 533 N.Y.S.2d 54, 529 N.E.2d 422, 1988 N.Y. LEXIS 2659 (N.Y. 1988).

Insurance company was entitled to summary judgment dismissing action to recover under fire insurance policy where insured received 60-day demand to file statements of loss on October 9, but proofs of loss were not filed by insured's retained adjuster until December 10; theory of waiver was not available to insured as he could not have properly relied on any prior representations which adjuster made to him, nor could insured rely on doctrine of equitable estoppel since there was no evidence of conduct by insurance company which could have reasonably lulled him into inaction. Brostowin v Hanover Ins. Co., 154 A.D.2d 418, 546 N.Y.S.2d 4, 1989 N.Y. App. Div. LEXIS 12430 (N.Y. App. Div. 2d Dep't 1989).

Insurer was entitled to summary judgment declaring that it was not obligated to defend or indemnify insured in underlying action, even though insurer was timely notified of accident on which action was based and it conducted investigation, where insured failed to satisfy notice requirement in policy to forward to insurer legal process, which caused insurer irreparable harm by depriving it of opportunity to meaningfully participate in pretrial discovery proceedings. Melhado v Catsimatidis, 182 A.D.2d 576, 582 N.Y.S.2d 434, 1992 N.Y. App. Div. LEXIS 6369 (N.Y. App. Div. 1st Dep't 1992).

Insurance company was entitled to summary judgment in action by insured to recover under "claims made" policy, regardless of whether it was prejudiced by insured's short delay in giving notice of claim, since insured under "claims made" policy knows in advance that there is applicable date that cuts off claims, this being distinct characteristic of such policy that directly relates to rate setting. Rochwarger v National Union Fire Ins. Co., 192 A.D.2d 305, 595 N.Y.S.2d 459, 1993 N.Y. App. Div. LEXIS 3241 (N.Y. App. Div. 1st Dep't 1993).

Insurers were not required to defend or indemnify city housing authority in action arising from fall of child, even though housing authority had promptly forwarded notice of claim to insurers, where authority later incorrectly advised them that no action had been commenced, authority waited 4 years before answering complaint, nearly 3 years passed before it finally advised insurers of pendency of action, and their ability to defend was prejudiced by destruction of documents and by inability to locate witnesses. New York City Hous. Auth. v Insurance Co. of N. Am., 210 A.D.2d 152, 620 N.Y.S.2d 347, 1994 N.Y. App. Div. LEXIS 12975 (N.Y. App. Div. 1st Dep't 1994).

Failure to file sworn statement of claim within 90 days after accident vitiated coverage, even though insurance policy contained ambiguous provision as to furnishing of notice of claim, where police report relative to accident was not forwarded to carrier until more than 6 months after accident. American Home Assurance Co. v Joseph, 213 A.D.2d 633, 624 N.Y.S.2d 250, 1995 N.Y. App. Div. LEXIS 3131 (N.Y. App. Div. 2d Dep't 1995).

Court properly granted insurer application to stay arbitration of uninsured motorist claim based on insured's failure to provide timely written notice of claim as required by policy even though insured's letter to insured 3 days after accident, informing him of his no-fault insurance options, demonstrated that it had actual notice of accident; fact that insurer receives notice of accident does not vitiate breach of policy requirement, and insurer does not have to show prejudice before it can advance claim for noncompliance. Progressive Ins. Co. v Morales, 236 A.D.2d 672, 653 N.Y.S.2d 193, 1997 N.Y. App. Div. LEXIS 1112 (N.Y. App. Div. 3d Dep't 1997).

In action for declaratory judgment that insurer was not obligated to defend and indemnify its insured in underlying personal injury action, court's denial of insurer's prior motion for summary judgment, on ground that issue of fact existed as to whether policy contained condition requiring insured to give written notice of accident to insurer as soon as practicable, did not bar consideration of plaintiff's subsequent renewed motion for same relief where court granted renewed motion on ground that notice, which was not received by insurer until 3 years after accident, was not given within reasonable time as matter of law. Mount Vernon Fire Ins. Co. v Timm, 237 A.D.2d 586, 655 N.Y.S.2d 611, 1997 N.Y. App. Div. LEXIS 3056 (N.Y. App. Div. 2d Dep't), app. denied, 90 N.Y.2d 806, 663 N.Y.S.2d 511, 686 N.E.2d 223, 1997 N.Y. LEXIS 2974 (N.Y. 1997).

New York law, under which insurer need not show that it was prejudiced by insured's failure to comply with policy's notice conditions in order to disclaim coverage based on such noncompliance, applied to insurer's action for declaration that it had no duty to defend or indemnify insured under commercial general liability policy in connection with underlying action for sexual assault in insured's Nevada apartment complex where (1) although insured's operations were national in scope, New York was its place of incorporation and principal place of business, from which it had negotiated special terms of policy and to which policy

presumably was delivered, and (2) thus, New York was state in which contract was made and was main location of insured risk. Steadfast Ins. Co. v Sentinel Real Estate Corp., 283 A.D.2d 44, 727 N.Y.S.2d 393, 2001 N.Y. App. Div. LEXIS 5695 (N.Y. App. Div. 1st Dep't 2001).

"MCS-90" endorsement to policy issued to registered interstate motor carrier required defendant insurer to pay damages to plaintiff pursuant to default judgment obtained against driver and owner of tractor leased to carrier, as it was undisputed that driver and owner of tractor fell within policy's definition of "insured" and, even if they failed to give insurer prompt notice of loss as required by subject policy, MCS-90 endorsement (mandated by 49 USCS § 13906(a)(1) and 49 CFR 387.15) created duty running from insurer to members of public such as plaintiff, without regard to policy limitation between insurer and insured. Pierre v Providence Wash. Ins. Co., 286 A.D.2d 139, 730 N.Y.S.2d 550, 2001 N.Y. App. Div. LEXIS 9195 (N.Y. App. Div. 2d Dep't 2001), aff'd, 99 N.Y.2d 222, 754 N.Y.S.2d 179, 784 N.E.2d 52, 2002 N.Y. LEXIS 3782 (N.Y. 2002).

When claimants under an insurance policy sought a declaratory judgment that an insurer was obligated to defend its insured in an underlying action, the insurer was entitled to summary judgment because the insured did not comply with the policy's notice requirements, thereby vitiating it, and its disclaimer of coverage for this reason was effective against other claimants under the policy, as they did not exercise their rights to independently notify the insurer, under N.Y. Ins. Law § 3420(a)(3), Viggiano v Encompass Ins. Co., 6 A.D.3d 695, 775 N.Y.S.2d 533, 2004 N.Y. App. Div. LEXIS 4903 (N.Y. App. Div. 2d Dep't 2004).

Because neither the insured nor the injured party timely notified the insurer about the injured party's claim against the insured for injuries that resulted from an accident at the insured's facility in accordance with N.Y. Ins. Law § 3420(a), the trial court improperly denied the insurer's motion for summary judgment. Seneca Ins. Co. v W.S. Distrib., Inc., 40 A.D.3d 1068, 838 N.Y.S.2d 99, 2007 N.Y. App. Div. LEXIS 8540 (N.Y. App. Div. 2d Dep't 2007).

Although an insurer was timely notified of an automobile accident, it was not timely notified of the underlying litigation in accordance with N.Y. Ins. Law § 3420(a)(3); therefore, because the insurer had no duty to defend or indemnify the insureds, it was entitled to summary judgment. Am. Transit Ins. Co. v Rechev of Brooklyn, 238 N.Y.L.J. 38, 2007 N.Y. Misc. LEXIS 6131 (N.Y. Sup. Ct. July 27, 2007), aff'd, 57 A.D.3d 257, 867 N.Y.S.2d 914, 2008 N.Y. App. Div. LEXIS 9338 (N.Y. App. Div. 1st Dep't 2008).

Irrebuttable presumption of prejudice to an insurer for lack of timely notice of a claim did not apply since a default judgment which entered against the insured prior to the notice was subsequently vacated after the notice, and thus the insured's liability was not finally established prior to the notice and the insurer was not precluded from defending against the claim. Hernandez Castillo v Prince Plaza, LLC, 981 N.Y.S.2d 906, 43 Misc. 3d 335, 2014 N.Y. Misc. LEXIS 828 (N.Y. Sup. Ct. 2014), aff'd, 142 A.D.3d 1127, 38 N.Y.S.3d 74, 2016 N.Y. App. Div. LEXIS 6077 (N.Y. App. Div. 2d Dep't 2016).

Even if the untimeliness of the notice of occurrence did not become clear until June 26, that did not explain why the insurer waited another 32 days to notify the insured that it was denying coverage; the insurer waited to notify the insured that it was denying coverage until after the insurer had conducted an investigation into matters that ultimately played no role in the insurer's decision to deny coverage. The insurer's proffered excuse for its delay was thus unrelated to its own decision to disclaim, and as such, the insurer's 48-day delay in giving written notice was unreasonable as a matter of law. McAlpin v RLI Ins. Co., 509 F. Supp. 2d 242, 2007 U.S. Dist. LEXIS 65675 (W.D.N.Y. 2007).

Obligation to provide prompt notice under N.Y. Ins. Law § 3420(d) is triggered when the insurer has a reasonable basis upon which to disclaim coverage, and cannot be delayed indefinitely until all issues of fact regarding the insurer's coverage obligations have been resolved. McAlpin v RLI Ins. Co., 509 F. Supp. 2d 242, 2007 U.S. Dist. LEXIS 65675 (W.D.N.Y. 2007).

Duty to disclaim promptly is imposed by N.Y. Ins. Law § 3420(d); an insurer should not be permitted to avoid this mandate simply by issuing a letter reserving its right to disclaim at some point in the future, regardless of when or whether the insurer is in possession of facts showing that there are grounds for disclaimer. McAlpin v RLI Ins. Co., 509 F. Supp. 2d 242, 2007 U.S. Dist. LEXIS 65675 (W.D.N.Y. 2007).

Under N.Y. Ins. Law § 3420(a)(3), an injured party must provide notice to an insurer in order to preserve its right to collect against a financially responsible defendant; thus, where insureds did not tender their defense to an insurer in a reasonable manner, they subjected themselves to the insurer's timely disclaimer. United States Underwriters Ins. Co. v Kum Gang, Inc., 443 F. Supp. 2d 348, 2006 U.S. Dist. LEXIS 52299 (E.D.N.Y. 2006).

45. —Waiver by insurer

In an action against an insurance company for the amount of judgment obtained against an insolvent policyholder in a negligence action arising out of an automobile accident, the notice of accident was not duly given by assured to company; the company by assuming control and defending negligence action thereby waived notice, and duty of the company was to elect whether to disclaim liability or waive defense of lack of notice. Farrell v Merchants' Mut. Auto. Liability Ins. Co., 203 A.D. 118, 196 N.Y.S. 383, 1922 N.Y. App. Div. LEXIS 7142 (N.Y. App. Div. 1922).

In an action seeking a declaration that a doctor's insurer was obligated to defend a nurse employed by the doctor in a medical malpractice action against the doctor and his nurse, the trial court properly determined that the coverage of the doctor's policy did not extend to the nurse where the policy clearly provided for the defense and indemnification of the doctor but did not provide for the defense or indemnification of an employee. Further, any contention that the insurer's denial of coverage was untimely pursuant to Ins Law former § 167 subd. 8 [now § 3420(d)], and therefore waived, was without merit in that the doctrine of waiver is inapplicable in deciding the issue of the existence of coverage, and since in the present case the denial of coverage was made less than a month after the demand, and no contractual relationship ever existed between the insurer and the nurse, no denial of coverage was necessary. Since the action was one for a declaratory judgment, the proper procedure would have been to declare the rights of the parties and not to dismiss the action, and thus, the trial court would be directed to enter a judgment declaring that the insurer was not obligated to defend the nurse under the insurance policy it had issued to the doctor. National Union Fire Ins. Co. v Medical Liability Mut. Ins. Co., 85 A.D.2d 851, 446 N.Y.S.2d 480, 1981 N.Y. App. Div. LEXIS 16681 (N.Y. App. Div. 3d Dep't 1981).

Written notice of accident requirement under policy was not waived when insureds allegedly orally notified insurer's agent of accident where there was no evidence that agent signified, by words or conduct, that oral notice would suffice. Collins v Isaksen, 221 A.D.2d 403, 633 N.Y.S.2d 539, 1995 N.Y. App. Div. LEXIS 11975 (N.Y. App. Div. 2d Dep't 1995).

In action against insurer by plaintiff who was injured while riding in insured vehicle, insurer was estopped from raising plaintiff's alleged untimely notice as defense, where it originally disclaimed coverage based solely on its insured's failure to provide timely notice, and it did not assert as affirmative defense in underlying action that plaintiff also failed to give timely notice; furthermore, plaintiff did all he reasonably could to provide notice. Wraight v Exchange Ins. Co., 234 A.D.2d 916, 651 N.Y.S.2d 803, 1996 N.Y. App. Div. LEXIS 13639 (N.Y. App. Div. 4th Dep't 1996), app. denied, 89 N.Y.2d 813, 657 N.Y.S.2d 406, 679 N.E.2d 645, 1997 N.Y. LEXIS 467 (N.Y. 1997).

Purported "course of dealing" under commercial general liability insurance policy did not alter clear terms of policy requiring insured, as condition precedent to coverage, to give insurer notice of any occurrence within 15 days of learning about it or as soon as was reasonably practicable thereafter where (1) insured did not cite any instance in which insurer accepted tender of claim despite insured's failure to comply with notice conditions, (2) contemporaneous correspondence concerning claim proved that insured and its claims administrator understood that policy required that insurer be given specific notice of particular occur-

rence and of commencement of litigation in accordance with policy, and (3) fact that insurer did not choose to become actively involved in claims until they approached limit of insured's self-insured retentions did not estop it from disclaiming coverage based on insured's noncompliance with express notice conditions. Steadfast Ins. Co. v Sentinel Real Estate Corp., 283 A.D.2d 44, 727 N.Y.S.2d 393, 2001 N.Y. App. Div. LEXIS 5695 (N.Y. App. Div. 1st Dep't 2001).

Court properly concluded that insurer waived its defense of lack of timely notice where disclaimer letter did not discuss occurrence of "collapse" but rather talked about slab conditions that were "of long duration"; insurer's failure to disclaim based on late notice of "collapse" rendered underlying issue of timeliness of notification irrelevant. Benjamin Shapiro Realty Co. v Agric. Ins. Co., 287 A.D.2d 389, 731 N.Y.S.2d 453, 2001 N.Y. App. Div. LEXIS 9931 (N.Y. App. Div. 1st Dep't 2001).

Liability insurer was precluded from disclaiming coverage on the ground that personal injury claimants had not provided timely notice of their action because the insurer's notice of disclaimer addressed only the insured's failure to provide notice of a slip and fall occurrence and neither asserted that a notice of the underlying action provided directly by the claimants was untimely nor disclaimed coverage as to the claimants based on failure to provide timely notice. Pollack v Scottsdale Ins. Co., 143 A.D.3d 794, 39 N.Y.S.3d 211, 2016 N.Y. App. Div. LEXIS 6592 (N.Y. App. Div. 2d Dep't 2016), app. denied, 29 N.Y.3d 908, 80 N.E.3d 405, 57 N.Y.S.3d 712, 2017 N.Y. LEXIS 1343 (N.Y. 2017).

In an action brought under former § 167 [now § 3420] against an automobile insurer, any defect in timeliness of notice given to the insurer was waived by delay in advising plaintiff of a reservation, in answering, of any right to disclaim under the policy, constituting a failure to reserve effectively such rights insofar as plaintiff's action under former § 167 was concerned. Matthews v Glens Falls Ins. Co., 21 Misc. 2d 1079, 192 N.Y.S.2d 811, 1959 N.Y. Misc. LEXIS 2942 (N.Y. Sup. Ct. 1959).

Insurer did not waive its late notice defense when, in response to insured's letter seeking coverage, it sent insured letter which requested more information from insured, including copies of other contracts and other information; insurer's letter, which did not explicitly disclaim coverage or assume defense, specifically reserved right to disclaim on basis of any unmet condition in policy. City of Utica v Genesee Mgmt., 934 F. Supp. 510, 1996 U.S. Dist. LEXIS 10723 (N.D.N.Y. 1996).

46. Other matters

Paragraph [d] of subd. 1 of former § 167 [now § 3420(a)(4)], in providing that failure to give any notice required by a liability policy within the time prescribed is not to invalidate any claim if such notice is given as soon as as reasonably possible embraces "the entire notice complex", and there is no justification for differentiating between notice of accident, notice of claim, and notice of suit. Holubetz v National Fire Ins. Co., 13 A.D.2d 228, 215 N.Y.S.2d 986, 1961 N.Y. App. Div. LEXIS 10427 (N.Y. App. Div. 3d Dep't 1961).

Where record which concentrated on issue of whether insured gave timely notice of claim was insufficient for determining whether injured party gave timely notice of claim under Insurance Law former § 167, subd 1(c), (d) [now § 3420(a)(3), (4)], new trial was granted for determination of all issues, including issue of whether insurer's notice of disclaimer was sufficient under Insurance Law former § 167, subd 8 [now § 3420(d)]. Cosmopolitan Mut. Ins. Co. v Vasquez, 40 A.D.2d 796, 338 N.Y.S.2d 121, 1972 N.Y. App. Div. LEXIS 3335 (N.Y. App. Div. 1st Dep't 1972).

Third-party plaintiff's failure to timely notify its insurer of plaintiff's underlying claim, which resulted in loss of its own insurance coverage, would not defeat its separate right to indemnification from third-party defendant. Katz v City of New York, 203 A.D.2d 179, 610 N.Y.S.2d 521, 1994 N.Y. App. Div. LEXIS 4213 (N.Y. App. Div. 1st Dep't 1994).

Injured party or other claimant, having been statutorily granted independent right to give notice and recover directly from insurer, is not charged vicariously with insured's delay. Aetna Cas. & Sur. Co. v National Union Fire Ins. Co., 251 A.D.2d 216, 674 N.Y.S.2d 685, 1998 N.Y. App. Div. LEXIS 7704 (N.Y. App. Div. 1st Dep't 1998).

Monthly "loss run" reports sent to insurer's Illinois office and reporting hundreds of claims against insured without designating which claims would be tendered to insurer as allegedly covered by commercial general liability policy did not satisfy policy's requirement that insured, as condition precedent to coverage, give insurer notice of any occurrence within 15 days of learning about it or as soon as was reasonably practicable thereafter. Steadfast Ins. Co. v Sentinel Real Estate Corp., 283 A.D.2d 44, 727 N.Y.S.2d 393, 2001 N.Y. App. Div. LEXIS 5695 (N.Y. App. Div. 1st Dep't 2001).

Even if "loss run" report satisfied requirement of commercial general liability insurance policy that insured, as condition precedent to coverage, give insurer notice of any occurrence within 15 days of learning about it or as soon as was reasonably practicable thereafter, insurer's denial of coverage was independently justified where insured failed to comply with separate policy condition that action papers of underlying claim against insured be "immediately forward[ed]" to insurer, and no valid reason for that failure was given. Steadfast Ins. Co. v Sentinel Real Estate Corp., 283 A.D.2d 44, 727 N.Y.S.2d 393, 2001 N.Y. App. Div. LEXIS 5695 (N.Y. App. Div. 1st Dep't 2001).

A notice by employer's compensation insurer of employee's injury, to public liability insurer, was not a notice in behalf of the injured person, but was solely in behalf of the compensation insurer, in order to protect its claim against a possible third party, who might be liable to the injured employe. Zurich Gen. Accident & Liab. Ins. Co. v Chesterford Homes, Inc., 18 Misc. 2d 470, 188 N.Y.S.2d 891, 1959 N.Y. Misc. LEXIS 3725 (N.Y. Sup. Ct. 1959).

An injured claimant is not required to go to the trouble of notifying the defendant's insurance company before suit is commenced or before the claimant knows that the insurer is disclaiming under its policy. Matthews v Glens Falls Ins. Co., 21 Misc. 2d 1079, 192 N.Y.S.2d 811, 1959 N.Y. Misc. LEXIS 2942 (N.Y. Sup. Ct. 1959).

Declaratory judgment was properly entered for a general liability carrier in a suit brought by the insured's workers' compensation carrier seeking common-law and contractual indemnification in an underlying third-party suit arising out of an employee's injuries as the general liability carrier specifically excluded claims arising out of employees' injuries, the disclaimer was not untimely under N.Y. Ins. Law § 3420(d), the general liability carrier did not waive reliance on the exclusionary language, and the disclaimer was not rendered ineffective by the general liability insurer's quotation of only part of the exclusion. Realm Nat'l Ins. Co. v Hermitage Ins. Co., 8 A.D.3d 110, 778 N.Y.S.2d 492, 2004 N.Y. App. Div. LEXIS 8364 (N.Y. App. Div. 1st Dep't 2004).

Where insured provided notice that was unreasonable as a matter of law and did not show that the delay was reasonable under the circumstances, the insurer was not required to show that it was prejudiced by the delay because the provision that eliminated the "no prejudice" rule did not apply since the policy was issued outside of New York since the parties' signatures were affixed in Pennsylvania. Indian Harbor Ins. Co. v City of San Diego, 972 F. Supp. 2d 634, 2013 U.S. Dist. LEXIS 137873 (S.D.N.Y. 2013), aff'd, 586 Fed. Appx. 726, 2014 U.S. App. LEXIS 18986 (2d Cir. N.Y. 2014).

VII. Policy Coverage for Operation or Use of Motor Vehicle

47. In general

Although the owners of private motor vehicles are free to remain uninsured and contract of insurance may restrict its coverage as to time and place and use and as to injuries covered, if the owner of a motor vehicle takes out policy of liability insurance, the provisions of former § 109 [predecessor to former § 167, now § 3420] will be read into policy. Bakker v Aetna Life Ins. Co., 264 N.Y. 150, 190 N.E. 327, 264 N.Y. (N.Y.S.) 150, 1934 N.Y. LEXIS 1408 (N.Y. 1934), limited, Conte v Yorkshire Ins. Co., 5 Misc. 2d 670, 163 N.Y.S.2d 28, 1957 N.Y. Misc. LEXIS 3223 (N.Y. Sup. Ct. 1957).

Assault on infant while passenger on school bus did not arise out of use of that vehicle. Calvert Ins. Co. v CIGNA Ins. Co., 239 A.D.2d 243, 658 N.Y.S.2d 12, 1997 N.Y. App. Div. LEXIS 5201 (N.Y. App. Div. 1st Dep't 1997).

No statute prohibits a provision in a policy to the effect that, in consideration of a reduced rate, the automobile will be operated only by named persons and if injury is caused by operation of other than named persons the insured will reimburse the company for payments made by reason of subd. 2 of former § 167 [now § 3420(e)]. Standard Acci. Ins. Co. v Solomon, 88 N.Y.S.2d 667, 195 Misc. 48 (1949).

Incorporation of the provisions of Vehicle & Traffic Law § 59 into an insurance policy pursuant to Insurance Law former § 167(2) [now § 3420(e)] did not give any specific primary action on the contract against an insurer to an injured party. Liability can only be fixed in an action against the owner of the vehicle involved. Bornhurst v Massachusetts Bonding & Ins. Co., 12 Misc. 2d 149, 175 N.Y.S.2d 542, 1958 N.Y. Misc. LEXIS 3115 (N.Y. Sup. Ct. 1958), rev'd, 11 A.D.2d 632, 200 N.Y.S.2d 955, 1960 N.Y. App. Div. LEXIS 10055 (N.Y. App. Div. 4th Dep't 1960).

Subdivision (2) of former § 167 [now § 3420(e)] of the Insurance Law as well as § 388 of the Vehicle and Traffic Law require that all liability insurance cover the insured against liability incurred under § 388, but as long as the policy provides that coverage nothing in either of these sections require that it use the precise language of the statutes. Singerman Bus Corp. v American Fidelity Fire Ins. Co., 44 Misc. 2d 4, 252 N.Y.S.2d 780, 1964 N.Y. Misc. LEXIS 1620 (N.Y. Sup. Ct. 1964).

Additional insureds to an automobile liability insurance policy who become such by virtue of the statutorily required omnibus clause which provides protection to other persons operating a motor vehicle with the named insured's consent (Insurance Law, former § 167, subd 2 [now § 3420(e)]), must take the policy as they find it, subject to all conditions, limitations, and exceptions that exist with respect to the original named insured. Pelych v Potomac Ins. Co., 91 Misc. 2d 973, 401 N.Y.S.2d 374, 1977 N.Y. Misc. LEXIS 2460 (N.Y. Sup. Ct. 1977).

"Coverage" as used in Ins Law provision requiring notice of disclaimer when coverage is denied pursuant to an exclusion contained in the policy means not only what is found under the heading "insurance agreement" but also what the "exclusion" clause expressly says is not covered; "denial of coverage" refers to those instances in which insurance covering the event could be said to exist but for some non-payment of premiums, cancellation, or other exclusion that would arguably defeat such coverage. Blackmer v Travelers Indem. Co., 110 Misc. 2d 704, 442 N.Y.S.2d 923, 1981 N.Y. Misc. LEXIS 3145 (N.Y. Sup. Ct. 1981).

New York Department of Motor Vehicles form MV-104, required to be filed following accident in which person is killed or injured or damage exceeds $600, does not constitute prima facie evidence of insurance coverage so as to shift burden of proving lack of coverage to insurer since (1) form is unsupported by any independent proof of insurance coverage, (2) form is not certificate or affidavit as to fact ascertained or act performed by public officer in course of official duty (CLS CPLR § 4520), and (3) form is unlike police report containing insurance information based on insurance identification card, which does shift burden of proof to named insurer. Mona Leasing, Inc. v Travelers Indem. Co., 148 Misc. 2d 877, 564 N.Y.S.2d 665, 1990 N.Y. Misc. LEXIS 636 (N.Y. Dist. Ct. 1990).

New York Department of Motor Vehicles (DMV) form MV-104, required to be filed following accident in which person is killed or injured or damage exceeds $600, does not constitute prima facie evidence of insurance coverage so as to shift burden of proving lack of coverage to insurer since form is unsupported by any independent proof of insurance coverage and is thus unlike either DMV form FS-25, which does constitute prima facie evidence of insurance coverage, or registration application, which has been held barely adequate to shift burden of proof to named insurer. Mona Leasing, Inc. v Travelers Indem. Co., 148 Misc. 2d 877, 564 N.Y.S.2d 665, 1990 N.Y. Misc. LEXIS 636 (N.Y. Dist. Ct. 1990).

Opinion addressing concerns about compliance with Third Amendment to Regulation 29 (11 NYCRR § 20.4) as to minimum details for receipts, which requires description of risk as it relates to automobile insurance policies; opinion addresses situations where vehicles are frequently being added, subtracted, or substituted on insurance policies and that, if too much detail is required, office may make error. Insurance Department, Opinions of General Counsel, Opinion Number 02-01-01.

Insurer may decline coverage based on insufficient mileage. Insurance Department, Opinions of General Counsel, Opinion Number 02-02-06.

Insurance company may not contract with insured to provide less than legally mandated personal injury protection coverage in automobile insurance policy in exchange for lower premium; there are number of other possible ways to reduce costs of total automobile insurance premium (e.g., one can choose not to purchase optional automobile insurance coverages, one can request higher deductible, and one can purchase automobile safety or security devices or take driver safety course). Insurance Department, Opinions of General Counsel, Opinion Number 02-02-11.

New York Insurance Law does not specifically require insurers to send notice of cancellation or nonrenewal of automobile insurance policy to automobile lienholder; however, if automobile insurance policy contains provision that requires insurer to send notice of cancellation or nonrenewal to automobile lienholder, such notice must be provided in accordance with provisions of insurance policy. Insurance Department, Opinions of General Counsel, Opinion Number 02-08-20.

There are number of factors that insurers may use to determine automobile insurance premium, including applicant's driving record, place of residence, use of vehicle, and creditworthiness. Insurance Department, Opinions of General Counsel, Opinion Number 06-01-10.

48. Construction and purpose

The contention that the policy must be deemed, by operation of law, to include a provision insuring the owner against liability for the death or injuries to person or property without limitation or qualification, so as to cover loss of services cannot be sustained. The reasonable construction of the statute is that the policy must be read as if it contained an extended liability clause, but that it may be limited in amount and coverage as the parties may agree. Brustein v New Amsterdam Casualty Co., 255 N.Y. 137, 174 N.E. 304, 255 N.Y. (N.Y.S.) 137, 1931 N.Y. LEXIS 657 (N.Y. 1931).

The primary purpose of the extended liability clause in former § 109 [predecessor to former § 167, now § 3420] is to meet the defense in an action on a policy that the owner was not at the time of the accident operating the car personally or by his agent, although it was being operated by a member of his family or another with his consent, express or implied. Purpose is not to make insurance compulsory or to prevent limitation of coverage. Lavine v Indemnity Ins. Co., 260 N.Y. 399, 183 N.E. 897, 260 N.Y. (N.Y.S.) 399, 1933 N.Y. LEXIS 769 (N.Y. 1933).

Under automobile insurance policy defining "occupying" as "in, on, entering, or alighting from" insured vehicle, worker who had just finished repair job and deposited tools in back of van and was walking toward locked driver's door of van when he was hit by another vehicle was not "entering" van at time of injury where he had not yet reached side door of van, and his departure from van was not mere temporary interruption of continuing journey. State Farm Auto. Ins. Co. v Antunovich, 160 A.D.2d 1009, 555 N.Y.S.2d 231, 1990 N.Y. App. Div. LEXIS 5022 (N.Y. App. Div. 2d Dep't 1990).

Automobile insurance policy was valid where it provided limited compulsory bodily injury liability coverage for tractor, even though it contained endorsement excluding coverage for, inter alia, claims arising when tractor or any trailer attached to it was "used to carry property in any business," since policy also provided that endorsement was "not applicable to any compulsory coverages," and it provided excess liability coverage for nontrucking operations. Hanover Ins. Co. v Connor, 232 A.D.2d 925, 648 N.Y.S.2d 839, 1996 N.Y. App. Div. LEXIS 11263 (N.Y. App. Div. 3d Dep't 1996).

Because an endorsement in a marine insurance policy violated N.Y. Ins. Law § 3420(e) (2002) by excluding coverage for a permissive user who was operating defendant insured's boat, the

endorsement was void and unenforceable. Jefferson Ins. Co. v Cassella, 261 F. Supp. 2d 160, 2003 U.S. Dist. LEXIS 7882 (E.D.N.Y. 2003).

49. Extraterritorial application of section

Former § 109 [predecessor to former § 167, now § 3420] has an extraterritorial effect and applies to an accident occurring in another state. Kobryn v Travelers Ins. Co., 279 N.Y. 623, 17 N.E.2d 680, 279 N.Y. (N.Y.S.) 623, 1938 N.Y. LEXIS 875 (N.Y. 1938).

Where a policy of motor vehicle liability insurance was issued to the owner of the vehicle in Iowa and the vehicle was not principally garaged or used in New York State, § 388 of the Vehicle and Traffic Law, dealing with owner's liability for negligence of a person operating the car with his consent, was inapplicable and Iowa law governed coverage of the policy, so that where, under that law, the owner was not liable because neither driving the car himself nor accompanying the driver at the time of the occurrence of the New York accident, neither was the insurer. Stobinsky v Kyser, 42 Misc. 2d 53, 247 N.Y.S.2d 567, 1964 N.Y. Misc. LEXIS 2036 (N.Y. Sup. Ct. 1964).

50. Effect of distinction between liability and collision insurance

A so-called "Family Combination Automobile Policy" covering medical expenses of the insured and each named relative in connection with accidental injuries sustained while occupying or being struck by an automobile is essentially a "liability" policy, governed as to certain standard provisions by this section. Black v Hanover Ins. Co., 30 Misc. 2d 1081, 220 N.Y.S.2d 168, 1961 N.Y. Misc. LEXIS 2281 (N.Y. Mun. Ct. 1961).

The provisions of former § 167 [now § 3420] apply only to liability policies or coverage and do not control collision insurance situations. John F. Welgan, Inc. v Government Employees Ins. Co., 49 Misc. 2d 816, 268 N.Y.S.2d 700, 1966 N.Y. Misc. LEXIS 2007 (N.Y. County Ct. 1966).

51. Insured person

Automobile insurance policy stating that "covered person" included "any person using your covered automobile" would not be construed to require that driver must have permission of insured to drive automobile, since policy was clear and unambiguous and such limitation could have been provided by defining "covered person" as "any person using your covered automobile with your permission;" fact that policy provided more favorable coverage than required by CLS Ins § 3420(e) could not be ignored. Kenyon v Newton, 144 A.D.2d 901, 534 N.Y.S.2d 600, 1988 N.Y. App. Div. LEXIS 14344 (N.Y. App. Div. 4th Dep't 1988).

Automobile insurance policy covered driver of insured vehicle where (1) automobile was purchased by son of insured, registered in insured's name and added to insured's policy, and (2) driver was friend of son's, with whose permission she was driving automobile, although she might not have had permission of insured to drive it; policy did not require that driver have permission of insured to drive vehicle and court would not rewrite policy to so state. Kenyon v Newton, 144 A.D.2d 901, 534 N.Y.S.2d 600, 1988 N.Y. App. Div. LEXIS 14344 (N.Y. App. Div. 4th Dep't 1988).

Insurance company was required to defend and indemnify insured under homeowners insurance policy in underlying actions involving automobile accident, notwithstanding that insured was sued in his capacity as treasurer of political committee associated with campaign, since political committee was unincorporated association, and members of committee were liable for their actions as individuals. Heleniak v Blue Ridge Ins. Co., 162 A.D.2d 1041, 557 N.Y.S.2d 229, 1990 N.Y. App. Div. LEXIS 9828 (N.Y. App. Div. 4th Dep't 1990).

Insurer was entitled to stay of arbitration of uninsured motorist claim on basis that decedent was not resident of insured's household at time of accident, and thus did not fall within policy's definition of "insured," where (1) decedent was citizen of Portugal who was visiting insured, who was his daughter, as well as other family members, and (2) decedent's immigration status required him to return to Portugal before specified date. State Farm Mut. Ins. Co. v Leonardo, 166 A.D.2d 601, 560 N.Y.S.2d 888, 1990 N.Y. App. Div. LEXIS 12538 (N.Y. App. Div. 2d Dep't 1990).

Insurance company was entitled to summary judgment declaring that it had no duty to defend or indemnify state in claim pending before Court of Claims for damages resulting from construction-related flooding along state highway, since state, which issued highway work permits to mall developer with requirement that state be named as insured in liability insurance policy covering work which was issued by defendant, was not so named and it was not established that state was intended beneficiary under policy's broad-form but unambiguous "contractual liability coverage" clause. State v American Mfrs. Mut. Ins. Co., 188 A.D.2d 152, 593 N.Y.S.2d 885, 1993 N.Y. App. Div. LEXIS 1093 (N.Y. App. Div. 3d Dep't 1993).

Automobile liability policy provided coverage to son of insureds where son was listed as "named driver" along with insureds; failure of policy to define "named driver" or to exclude it from coverage gave rise to ambiguity that would be construed in favor of insured. Kennedy v Valley Forge Ins. Co., 203 A.D.2d 930, 612 N.Y.S.2d 712, 1994 N.Y. App. Div. LEXIS 4932 (N.Y. App. Div. 4th Dep't), aff'd, 84 N.Y.2d 963, 621 N.Y.S.2d 512, 645 N.E.2d 1212, 1994 N.Y. LEXIS 4217 (N.Y. 1994).

Court would uphold clause in insurance policy for leased truck which limited coverage to lessees, borrowers, and employees of named insured during loading and unloading of truck. Coburn v Aetna Casualty & Sur. Co., 212 A.D.2d 752, 623 N.Y.S.2d 599, 1995 N.Y. App. Div. LEXIS 2194 (N.Y. App. Div. 1st Dep't 1995).

Insured's daughter-in-law, who was involved in accident while driving loaner car obtained by insured while his car was being repaired, came within "Insured Persons" provision of insurance policy where loaner car was "insured auto" under terms of policy, and "you" and "your" were defined in policy as meaning insured and insured's spouse, and "your," when added to "insured auto" for purposes of defining "insured persons," referred to insured's or his resident wife's insured automobile. Nationwide Mut. Ins. Co. v Allstate Ins. Co., 218 A.D.2d 880, 630 N.Y.S.2d 591, 1995 N.Y. App. Div. LEXIS 8248 (N.Y. App. Div. 3d Dep't 1995).

Insurer was properly awarded judgment declaring that auto liability policy did not cover insureds' son because, at time of accident, he was not "resident" of insureds' household, where he had been living with his girlfriend and her children for more than one year prior to accident, his residence at his girlfriend's home had been periodically interrupted due to domestic disputes when he would temporarily move back in with insureds until he and his girlfriend reconciled, he had been living at insureds' home for 3 weeks at time of accident only because of domestic dispute, and both he and insureds expected that he would resume cohabitation with his girlfriend as soon as they had reconciled. New York Cent. Mut. Fire Ins. Co. v Kowalski, 222 A.D.2d 859, 634 N.Y.S.2d 894, 1995 N.Y. App. Div. LEXIS 13002 (N.Y. App. Div. 3d Dep't 1995).

Passengers of taxicab, who opened door in path of bicyclist when they alighted from cab, were not entitled to indemnity or defense under taxicab owner's business auto policy, as they were not additional insureds under policy. Swee v Vals Trans, 225 A.D.2d 113, 649 N.Y.S.2d 146, 1996 N.Y. App. Div. LEXIS 11499 (N.Y. App. Div. 1st Dep't 1996), app. denied, 90 N.Y.2d 802, 660 N.Y.S.2d 712, 683 N.E.2d 335, 1997 N.Y. LEXIS 1635 (N.Y. 1997).

Insurer was entitled to hearing and stay of arbitration as to whether son was "insured person" under his parents' automobile insurance policy where it contended that son was not living in same household at time of accident, as policy required; evidence that son's driver's license, voter's registration card and previous year's income tax returns listed his parents' address as his residence was insufficient to establish that he was "living with" parents. American Nat'l Prop. & Cas. Co. v Chulack, 265 A.D.2d 550, 697 N.Y.S.2d 153, 1999 N.Y. App. Div. LEXIS 10806 (N.Y. App. Div. 2d Dep't 1999).

In an action by a judgment-creditor against the liability insurer under this section, the judgment having been obtained, not against the owner of the vehicle, but against the one who was driving it, but the policy providing that the word "insured" includes the named insured and any person using the car with his permission, the driver of the car, if he was using it with the insured's permission, must be considered an "additional" insured and, the issue of permission not having already been adjudicated, plaintiff is entitled to have it adjudicated in the statutory action.

Mireider v New Hampshire Fire Ins. Co., 24 Misc. 2d 765, 204 N.Y.S.2d 504, 1960 N.Y. Misc. LEXIS 2561 (N.Y. City Ct. 1960).

Wife who had separated from husband at time automobile which husband had transferred to her was destroyed was not a named insured and was thus not entitled to recover insurance proceeds paid to husband for loss of said vehicle, even though husband obtained proceeds by displaying a certificate of registration which he fraudulently procured from Department of Motor Vehicles on an application for lost registration, knowing that he had earlier transferred the vehicle to wife. Moran v Moran, 74 Misc. 2d 384, 346 N.Y.S.2d 424, 1973 N.Y. Misc. LEXIS 1774 (N.Y. Dist. Ct. 1973).

Since, under one definition, the injured person was covered, but, under the other, she was not, that was a classic "ambiguity" in its purest etymological sense. Resolution of the inconsistency against the drafter of the inconsistent language resulted in coverage for the injured person. Matter of Preferred Mut. Ins. Co. v Bath, 881 N.Y.S.2d 629, 25 Misc. 3d 175, 2009 N.Y. Misc. LEXIS 1450 (N.Y. Sup. Ct. 2009).

Subsection (2) of § 167 [now § 3420] is patterned after CLS Veh & Tr § 388, and mandates that policy contain provision insuring named insured against liability for injury resulting from negligence in operation or use of automobiles by any person using it with permission of named insured; provision concerns derivative liability and does not require coverage in favor of lessor as to liability resulting from defects or faulty workmanship. Taylor v Kinsella, 742 F.2d 709, 1984 U.S. App. LEXIS 19477 (2d Cir. N.Y. 1984).

Insurer that writes single vehicle motor vehicle policies rather than one policy for all of vehicles in household may not require insured to obtain Supplemental Spousal Liability coverage for all of policies issued to single household when insured requests coverage under just one of policies. Insurance Department, Opinions of General Counsel, Opinion Number 03-04-22.

Owner or officer of business may not be excluded from coverage on commercial liability automobile insurance policy even if that person is not going to drive insured vehicle. Insurance Department, Opinions of General Counsel, Opinion Number 08-07-23.

52. Vehicles to which section applies

Where the plaintiffs' property was damaged by a tugboat covered by marine insurance and judgment was obtained against the owner of the boat, but execution thereon was returned unsatisfied because of the owner's insolvency, the insurance carrier is liable since the tugboat was vehicle propelled by motive power within the meaning of this section. Hinkle v Globe & Rutgers Fire Ins. Co., 271 N.Y. 585, 3 N.E.2d 197, 271 N.Y. (N.Y.S.) 585, 1936 N.Y. LEXIS 1309 (N.Y. 1936).

The exclusion of guest coverage in an insurance policy provided by a corporation renting motor vehicles did not violate subdivision 2 of former section 167 [now § 3420(e)] of the Insurance Law where a van was rented in New York by a New York resident who was to deliver the van three days later to the lessor in Maine, inasmuch as the mandatory provisions of subdivision 2 of former section 167 [now § 3420(e)], one of which required coverage for injuries suffered by a passenger in the vehicle (Vehicle and Traffic Law, § 311; 11 NYCRR 60.1), are applicable only to policies issued on vehicles principally garaged or used in this State and the vehicle in question was registered in Massachusetts and was only temporarily in New York. Travelers Indem. Co. v Ryder Truck Rental, Inc., 47 N.Y.2d 139, 417 N.Y.S.2d 53, 390 N.E.2d 771, 1979 N.Y. LEXIS 1992 (N.Y. 1979).

Provisions of automobile liability policy issued to vehicle owner's husband could be construed to extend coverage to situation in which owner's son might be held liable because of his use of vehicle and owner might be held liable because of her ownership, despite language that purportedly limited coverage in situations in which "the person...does not own or hire the auto," where policy was ambiguous as to whether such language was intended to modify or narrow coverage contemplated in general clause that defined "insured" as "you or your family member for the ownership, maintenance or use of any auto"; thus, fact that one family member to be covered owned accident vehicle did not negate insurer's obligations to defend and indemnify that family member. Handelsman v Sea Ins. Co., 85 N.Y.2d 96, 623 N.Y.S.2d 750, 647 N.E.2d 1258, 1994 N.Y. LEXIS 3371 (N.Y. 1994).

Self-insured automobile rental company is subject to same minimum liability insurance requirements as companies that purchase insurance policies or post surety bonds under CLS Veh & Tr § 370(1). ELRAC, Inc. v Ward, 96 N.Y.2d 58, 724 N.Y.S.2d 692, 748 N.E.2d 1, 2001 N.Y. LEXIS 695 (N.Y. 2001).

The words "vehicle drawn, propelled or operated by any motive power" in former § 109 [predecessor to former § 167, now § 3420] include tugboats. Hinkle v Globe & Rutgers Fire Ins. Co., 246 A.D. 737, 283 N.Y.S. 870, 1935 N.Y. App. Div. LEXIS 9990 (N.Y. App. Div. 1935), aff'd, 271 N.Y. 585, 3 N.E.2d 197, 271 N.Y. (N.Y.S.) 585, 1936 N.Y. LEXIS 1309 (N.Y. 1936).

Insurance company could not deny coverage on insured's automobile involved in accident on December 4, 1982 on basis of "New York Automobile Insurance Plan Policy Change Request" form completed and signed by insured's broker on December 1, 1982 for purpose of securing replacement coverage under policy on second vehicle, since form declared that coverage requested would only become effective "in accordance with the provisions of the policy or upon the issuance of a legal registration by an issuing office of [the Department of Motor Vehicles] whichever is earlier" (15 NYCRR 32.13) and registration for insured's replacement vehicle was not issued until on or after December 6, 1982, and company made no showing that its policy contained provision making coverage on replacement vehicle effective prior to registration date. Farrant v State Farm Ins. Co., 131 A.D.2d 538, 516 N.Y.S.2d 481, 1987 N.Y. App. Div. LEXIS 47995 (N.Y. App. Div. 2d Dep't 1987).

Court erred in declaring that policy issued to insured provided excess coverage for accidents arising out of her use of vehicle owned by her husband where policy provided coverage for accident arising from use of "other cars," extending coverage "to the use, by an insured, of a newly acquired car, a temporary substitute car or a non-owned car," there was no suggestion that vehicle owned by insured's husband was "newly acquired," and policy defined "temporary substitute car" as "car not owned by your or your spouse," and "non-owned car" as "a car not...owned by...you, your spouse, or any relatives. Crull v State Farm Fire & Cas. Co., 225 A.D.2d 1071, 639 N.Y.S.2d 601, 1996 N.Y. App. Div. LEXIS 2911 (N.Y. App. Div. 4th Dep't 1996).

Defendant, which issued commercial automobile insurance policy and Form E Motor Carrier Certificate of Insurance to individual who had been granted certificate of public conveyance and necessity by Department of Transportation to operate as common carrier of passengers, was obligated to provide coverage to its insured for accident involving vehicle being operated as livery van under lease agreement with insured but which was not specified in policy; on issuing policy and Form E to its insured, authorized carrier, defendant undertook risk of insuring every vehicle operated under its insured's certificate of public convenience and necessity. Gish v Allstate Ins. Co., 171 Misc. 2d 294, 654 N.Y.S.2d 558, 1997 N.Y. Misc. LEXIS 9 (N.Y. Sup. Ct. 1997), rev'd, 248 A.D.2d 435, 668 N.Y.S.2d 942, 1998 N.Y. App. Div. LEXIS 2311 (N.Y. App. Div. 2d Dep't 1998).

Whether insurer is required to provide automobile liability insurance coverage where member of named insureds' household is involved in accident while driving automobile that is not owned by named insureds or household member depends on whether or not vehicle not owned by named insureds or household member was furnished or made available to household member for regular use; if automobile was not provided for household member's regular use, mandatory liability coverage for non-owned automobile applies and there is coverage, but if automobile was provided for household member's regular use, mandatory coverage for non-owned automobile does not apply and there is no coverage. Insurance Department, Opinions of General Counsel, Opinion Number 02-07-21.

53. Activities constituting operation of motor vehicle

Regulation of Superintendent of Insurance permitting an insurer to limit liability coverage as to bodily injury or property damage sustained in the process of loading or unloading a vehicle to a lessee or borrower of vehicle or an employee of the named insured does not conflict with Vehicle and Traffic Law and

Insurance Law mandating liability coverage for any party either using a vehicle with permission of named insured or responsible for the vehicle. Breen v Cunard Lines S.S. Co., 33 N.Y.2d 508, 355 N.Y.S.2d 333, 311 N.E.2d 478, 1974 N.Y. LEXIS 1676 (N.Y. 1974).

Under provisions of policy by which insurer agrees to pay on behalf of the insured all sums which insured shall become legally obligated to pay as damages because of bodily injury caused by an occurrence arising out of "use or operation" of any automobile, "use or operation" encompasses more than just driving a car, and the phrase "use or operation" includes all activities necessarily part of driving a car, such as getting in and getting out. Nassau County Chapter of Asso. for Help of Retarded Children, Inc. v Insurance Co. of North America, Inc., 59 A.D.2d 525, 397 N.Y.S.2d 107, 1977 N.Y. App. Div. LEXIS 13308 (N.Y. App. Div. 2d Dep't 1977).

Insurance company was not obligated to defend or indemnify insured ambulance service under its business automobile insurance policy for claim asserted by party who was injured when she slipped and fell inside doors to entrance of hospital after being transported to hospital by insured, regardless of whether insurance company was aware that insured's duties included escorting patients in and out of hospital, since accident was outside scope of policy's coverage as matter of law because it did not arise from use or operation of insured's vehicle. Wausau Underwriters Ins. Co. v St. Barnabas Hospital, 145 A.D.2d 314, 534 N.Y.S.2d 982, 1988 N.Y. App. Div. LEXIS 12936 (N.Y. App. Div. 1st Dep't 1988).

Appellant was not "occupant" of automobile within meaning of automobile insurance policy where (1) appellant's automobile broke down and she moved automobile out of traffic and parked it, (2) after making telephone calls to try to find someone to help her, she returned to automobile, gathered her belongings, and left automobile to go home, and (3) while crossing road, she was struck by another vehicle and injured. Travelers Ins. Co. v Wright, 202 A.D.2d 680, 609 N.Y.S.2d 642, 1994 N.Y. App. Div. LEXIS 2909 (N.Y. App. Div. 2d Dep't 1994).

Accident did not occur from "use or operation" of vehicle where insured and 2 companions and had been driving 4-wheel vehicle on service road that paralleled railroad track when vehicle became stuck in gap between track and plank road as it passed over trestle, whereupon insured walked around vehicle, ostensibly to assess situation, and fell through hole in trestle. New York Cent. Mut. Fire Ins. Co. v Hayden, 209 A.D.2d 927, 619 N.Y.S.2d 910, 1994 N.Y. App. Div. LEXIS 11917 (N.Y. App. Div. 4th Dep't 1994).

Passenger of taxicab was not "operator" under CLS Veh & Tr § 113; thus, while taxicab owner's business auto policy provided liability coverage for owner and its drivers in personal injury action resulting from passenger's negligent opening of taxicab door in path of bicyclist, policy's liability coverage did not extend to passenger. Swee v Vals Trans, 225 A.D.2d 113, 649 N.Y.S.2d 146, 1996 N.Y. App. Div. LEXIS 11499 (N.Y. App. Div. 1st Dep't 1996), app. denied, 90 N.Y.2d 802, 660 N.Y.S.2d 712, 683 N.E.2d 335, 1997 N.Y. LEXIS 1635 (N.Y. 1997).

Actions of insured's wife in turning vehicle around, accelerating, and striking decedent with enough force to crush his skull could not be deemed "an accident" within meaning of automobile insurance policy; thus, insurer was entitled to summary judgment declaring that it had no duty to defend and indemnify wife in wrongful death action. Allstate Ins. Allstate Ins. Co. v Bostic, 228 A.D.2d 628, 646 N.Y.S.2d 128, 1996 N.Y. App. Div. LEXIS 7430 (N.Y. App. Div. 2d Dep't 1996).

Liability insurer was properly granted summary judgment declaring that it was not obligated to defend or indemnify insureds in personal injury action involving alleged negligent operation of ride known as "the Whip," which was secured to rear of truck covered by auto policy, where ride ran on truck's engine but was operated by clutch in rear of truck, and there were no allegations that truck was used negligently. Progressive Cas. Ins. Co. v Yodice, 276 A.D.2d 540, 714 N.Y.S.2d 715, 2000 N.Y. App. Div. LEXIS 10151 (N.Y. App. Div. 2d Dep't 2000).

Where an accident happended during the unloading process, any person or corporation engaged in that process was using the vehicle with permission of the named insured and, therefore, was an insured under the omnibus clause of the policy. Commercial Pipe & Supply Corp. v Allstate Ins. Co., 63 Misc. 2d 870, 313 N.Y.S.2d 846, 1970 N.Y. Misc. LEXIS 1516 (N.Y. Sup. Ct. 1970), rev'd, 36 A.D.2d 412, 321 N.Y.S.2d 219, 1971 N.Y. App. Div. LEXIS 3977 (N.Y. App. Div. 4th Dep't 1971).

Person may "use" vehicle, even if he or she was not behind steering wheel, so long as there was purposeful exercise of control by person claiming to be covered under automobile liability insurance policy; one covered party may be "mechanical" driver of vehicle while another party directed and "controlled" route, speed, and manner of operation. Excelsior Ins. Co. v Progressive Cas. Ins. Co., 170 Misc. 2d 78, 649 N.Y.S.2d 331, 1996 N.Y. Misc. LEXIS 392 (N.Y. Sup. Ct. 1996).

54. Liability of insurer in particular circumstances

Where the injuries sustained resulted from conduct of a 16-year-old girl having only a learner's permit, in ramming another car while driving a stolen out-of-state automobile at excessive speed, the liability insurer of the girl's mother could not escape liability under a policy which covered nonowned automobiles operated by "relatives" except as to vehicles "not regularly furnished for the use of such relative," merely because the girl had stolen the car and it was not voluntarily furnished to her. Sperling v Great American Indem. Co., 7 N.Y.2d 442, 199 N.Y.S.2d 465, 166 N.E.2d 482, 1960 N.Y. LEXIS 1399 (N.Y.), reh'g denied, 8 N.Y.2d 785, 1960 N.Y. LEXIS 1932 (N.Y. 1960).

In an insurer's declaratory judgment action, the insurer would not be required to defend and indemnify the insured in connection with a negligence action brought against the insured where the policy obligated the insurer with respect to accidents arising out of the ownership, maintenance, or use of an automobile, and where the injury had resulted from a fall in an icy parking lot. Lumbermen's Mut. Casualty Co. v Logan, 88 A.D.2d 971, 451 N.Y.S.2d 804, 1982 N.Y. App. Div. LEXIS 17345 (N.Y. App. Div. 2d Dep't 1982).

In an insured's action against his automobile insurance company for bad faith refusal to settle a liability claim within the policy limits, the insured's cause of action against the insurance company would not be dismissed where the insured had alleged that the insurance company first had offered the insured's deceased passenger's estate only $500 less than the $10,000 policy limit, that the insurance company then offered to settle for the policy limit on the condition that the deceased's parents furnish the company with information as to the assistance and payments that the deceased had furnished for the parents, and that the company had finally offered an unconditional settlement for the policy limit more than five months after the estate's initial demand. Reifenstein v Allstate Ins. Co., 92 A.D.2d 715, 461 N.Y.S.2d 104, 1983 N.Y. App. Div. LEXIS 17006 (N.Y. App. Div. 4th Dep't 1983).

Insurer of operator of vehicle, who was involved in accident while driving another person's vehicle because his own vehicle was not operational, was properly determined to be obligated to provide primary coverage in view of policy's inclusion of "temporary substitute" within definition of "covered auto" and fact that "other insurance" clause of policy was clearly intended to provide secondary or excess coverage in situations where insured was involved in accident while driving unowned vehicle other than one being used as "temporary substitute." Utica Mut. Ins. Co. v Preferred Mut. Ins. Co., 180 A.D.2d 195, 583 N.Y.S.2d 986, 1992 N.Y. App. Div. LEXIS 7868 (N.Y. App. Div. 3d Dep't 1992).

Insurer of owner of vehicle which, at time of accident, was being driven by another whose policy provided primary coverage for vehicle as "temporary substitute," was likewise obligated to provide primary coverage as primary insurer of accident vehicle specifically named in policy; concurrent coverage was established since each carrier was providing coverage of same interest and against same risk. Utica Mut. Ins. Co. v Preferred Mut. Ins. Co., 180 A.D.2d 195, 583 N.Y.S.2d 986, 1992 N.Y. App. Div. LEXIS 7868 (N.Y. App. Div. 3d Dep't 1992).

Insurance company would be required to defend and indemnify driver and his father in underlying action arising from motor vehicle accident which occurred when driver was operating automobile that had been left with his family by his uncle, notwithstanding exclusion with regard to any nonowned vehicle furnished or available for regular use of family member, where (1)

driver and his father testified that driver used automobile about 5 times over 6-week period and that, on each occasion, it was necessary for driver to obtain permission of father before he was given keys to automobile, and (2) automobile belonged to uncle who lived in Florida, and it was left with family for repairs. New York Cent. Mut. Fire Ins. Co. v Jennings, 195 A.D.2d 541, 600 N.Y.S.2d 486, 1993 N.Y. App. Div. LEXIS 7406 (N.Y. App. Div. 2d Dep't 1993).

Assault on infant while passenger on school bus did not come within coverage of defendant's policy, which extended only to bodily injury "caused by an accident." Calvert Ins. Co. v CIGNA Ins. Co., 239 A.D.2d 243, 658 N.Y.S.2d 12, 1997 N.Y. App. Div. LEXIS 5201 (N.Y. App. Div. 1st Dep't 1997).

Insurer was entitled to summary judgment declaring that it was not obligated to defend or indemnify driver of car involved in accident, even though driver claimed that she was authorized driver of "non owned" car under insurance policies issued to her parents, where certificate of title and "Vehicle Registration/Title Application" showed that ownership of subject car was transferred to driver in 1993, and there was no evidence of later transfer. Westchester Fire Ins. Co. v Canceleno, 245 A.D.2d 286, 664 N.Y.S.2d 829, 1997 N.Y. App. Div. LEXIS 12088 (N.Y. App. Div. 2d Dep't 1997), app. denied, 92 N.Y.2d 801, 677 N.Y.S.2d 71, 699 N.E.2d 431, 1998 N.Y. LEXIS 1443 (N.Y. 1998).

Plaintiff insurer was properly granted summary judgment declaring that defendant insurer had issued farmowner's insurance policy under which it must cover liability of defendant's insured and his employee arising out of ownership, use, and operation of pick-up truck that was involved in accident with vehicle driven by plaintiff's insured where truck was properly registered as farm vehicle under CLS Veh & Tr § 401(13), was used exclusively for farm purposes, and, at time of accident, was traveling along most direct route between 2 farms operated by insured; moreover, under policy, highway where accident occurred was part of "insured premises." Nationwide Mut. Ins. Co. v Erie & Niagara Ins. Ass'n, 249 A.D.2d 898, 672 N.Y.S.2d 596, 1998 N.Y. App. Div. LEXIS 4977 (N.Y. App. Div. 4th Dep't 1998).

Insurer was precluded by a default judgment from litigating whether it provided coverage to an offending vehicle pursuant to N.Y. Ins. Law § 3420(a)(2) to recover the amount of an unsatisfied judgment entered against the owner and operator of the offending vehicle. Gaston v American Tr. Ins. Co., 40 A.D.3d 578, 835 N.Y.S.2d 369, 2007 N.Y. App. Div. LEXIS 5620 (N.Y. App. Div. 2d Dep't 2007), aff'd in part, modified, 11 N.Y.3d 866, 873 N.Y.S.2d 250, 901 N.E.2d 743, 2008 N.Y. LEXIS 3722 (N.Y. 2008).

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Both Vehicle and Traffic Law § 388 and Insurance Law former § 167, subd 2 [now § 3420(e)] require coverage of the owner only, and not of the user with permission of the named insured. Neither statute mandates nor projects coverage of users with permission into policies issued to owners. Hiscock v Kuinlan, 62 Misc. 2d 842, 310 N.Y.S.2d 331, 1970 N.Y. Misc. LEXIS 1741 (N.Y. Sup. Ct. 1970).

In an action by an insurer seeking a declaratory judgment concerning its obligations under an automobile insurance policy, the insurer would not be obligated with respect to an accident that occurred two days after an automobile that was equipped with transporter plates had been given by the insured to another person for delivery to a nearby body shop, where the policy had provided for coverage for automobiles that were not owned by the named insured only while the automobiles were operated with transporter plates for the purpose of delivery, and where the automobile had not been operated for the purpose of delivery at the time of the accident. Interboro Mut. Indem. Ins. Co. v Karpowic, 116 Misc. 2d 947, 456 N.Y.S.2d 967, 1982 N.Y. Misc. LEXIS 3983 (N.Y. Sup. Ct. 1982).

In a declaratory judgment action by a motorist injured in an automobile accident against her insurer to determine the insurer's obligation under an underinsured motorist endorsement in plaintiff's policy, the amount payable on the policy would be the limits of the policy reduced by the payment from the underinsured motorist, where plaintiff carried liability coverage of $100,000, and where the value of the accident would probably far exceed the $10,000 liability policy limits offered in settlement by the insurer of the other vehicle. Further, plaintiff would be entitled to such judgment before trial, where the underinsured endorsement was not applicable if plaintiff made any settlement without the insurer's consent, and where the prejudice to plaintiff in having to proceed to trial without judicial construction of the endorsement's provision reducing the amount payable under the endorsement by all sums paid on behalf of the underinsured vehicle would overcome arguments of prematurity. Gull v General Accident Fire & Life Assurance Corp., 121 Misc. 2d 721, 469 N.Y.S.2d 1004, 1983 N.Y. Misc. LEXIS 3990 (N.Y. Sup. Ct. 1983).

Provision in automobile liability insurance policy which excluded from coverage anyone driving covered vehicle "while employed or otherwise engaged in the business or occupation of parking" was valid, and permitted insurer to refuse to defend parking attendant who allegedly struck plaintiff while parking her car; CLS Veh & Tr § 345 does not require coverage of permissive drivers as additional insureds. Strizik v Home Indem. Co., 137 Misc. 2d 12, 519 N.Y.S.2d 600, 1987 N.Y. Misc. LEXIS 2576 (N.Y. Sup. Ct. 1987).

In action arising out of accident which occurred while repossessed automobile was being transported, garage liability policy of entity performing repossession and business automobile policy of secured party directing repossession would each be construed to provide primary insurance, and proportionate share provisions of each policy would be applied. Hartford Ins. Co. v Nationwide Mut. Ins. Co., 143 Misc. 2d 897, 542 N.Y.S.2d 920, 1989 N.Y. Misc. LEXIS 368 (N.Y. Sup. Ct. 1989).

Insurance company would be required to defend and indemnify owner of motor vehicle in regard to action arising from motor vehicle accident, although accident occurred on day before owner registered and obtained plates for vehicle, since (1) owner filed application for insurance coverage with New York Automobile Insurance Plan and application was assigned to, and accepted by, insurance company about 3 weeks prior to accident, and (2) vehicle was "for hire," and therefore provision of Plan, which provided that insurance coverage is ineffective until vehicle is registered, did not apply. Eagle Ins. Co. v Barraeau, 150 Misc. 2d 831, 569 N.Y.S.2d 1019, 1991 N.Y. Misc. LEXIS 264 (N.Y. Sup. Ct. 1991).

Plaintiff, issuer of automobile liability insurance policy covering individual van operator in which defendant motor carrier, which authorized van owner to operate route under lease agreement, was named as additional insured, was obligated to provide coverage to carrier for accident involving van not specified in policy since plaintiff, having issued requisite Form E Uniform Motor Carrier Bodily Injury and Property Damage Liability Certificate of Insurance to Department of Transportation, certifying that it had issued policy to carrier, undertook risk of insuring every vehicle operated under carrier's certificate of public convenience and necessity. American Nat'l Fire Ins. Co. v Levy, 156 Misc. 2d 608, 594 N.Y.S.2d 118, 1992 N.Y. Misc. LEXIS 618 (N.Y. Sup. Ct. 1992).

In action to determine insurance coverage of family automobile operated by owner's son while employed as pizza deliveryman, insurance company which insured automobile could not disclaim on basis of provision of policy which excluded coverage for "any vehicle while being used to carry persons or property for a fee," although deliveryman was paid (in addition to hourly wage) 50 cents per delivery for gas and related costs and sometimes received tips for deliveries, since exclusion, which was authorized by 11 NYCRR § 60-1.2(a), only extended to automobile used without limitation to convey general public. American Motorists Ins. Co. v Travelers Ins. Co., 158 Misc. 2d 257, 604 N.Y.S.2d 475, 1993 N.Y. Misc. LEXIS 562 (N.Y. Sup. Ct. 1993).

Supreme court's decision that granted a permanent stay of arbitration to the underinsured motorist insurer was reversed

because the driver's action of hitting a utility pole was the proximate cause of respondent's injuries sustained while respondent was attempting to run away from wires falling from the damaged pole and respondent was thus covered under the provisions of the policy provided by the insurer. Farm Family Cas. Ins. Co. v Trapani, 301 A.D.2d 740, 753 N.Y.S.2d 198, 2003 N.Y. App. Div. LEXIS 5 (N.Y. App. Div. 3d Dep't 2003).

In order for coverage under automobile insurance policy to apply to person being transported by ambulance who is injured prior to boarding or after removal from ambulance, injury must be result of act or omission related to use or operation of ambulance. Insurance Department, Opinions of General Counsel, Opinion Number 05-01-13.

If licensed driver has permission from insured owner to operate motor vehicle in New York, insurance policy for vehicle would provide coverage in event that its operator is involved in accident. Insurance Department, Opinions of General Counsel, Opinion Number 08-02-02.

Insurer may charge additional premium (including retroactively on personal lines automobile insurance policy) to cover licensed driver in household who should have been, but was not, listed on policy as named operator. Insurance Department, Opinions of General Counsel, Opinion Number 08-02-02.

55. —Accident after owner transferred vehicle

In consolidated declaratory judgment actions brought by two insurers to determine coverage for an underlying personal injury action arising out of an accident involving a tanker truck, in which action a verdict was returned against both the purchaser and the seller of the truck, and the seller had judgment over against the purchaser, the tanker was, at the time of the accident, an owned automobile covered by a business automobile policy issued to the purchaser, where the policy provided liability insurance for any auto and the annexed "Schedule of Covered Autos You Own" listed the tanker, among others; the policy protected the seller as well, where its definition of "insured" included the statement that, "Anyone liable for the conduct of an insured described above is an insured but only to the extent of that liability;" moreover, it was of no consequence that the policy excluded liability assumed under any contract, since the seller's judgment over against the purchaser was based not only on the hold-harmless agreement between them, but also on the seller's common-law right to indemnification, which depended not on contract but on the fact that the seller had been held vicariously liable for the negligence of the purchaser; because the policy stated that, "For any covered auto you own this policy provides primary insurance," there could be no question that its coverage was primary. The seller's insurer, whose comprehensive liability policy covered no more than the liability of its insured, was not obligated to provide coverage for the accident, which occurred while the tanker was being operated by one of the purchasers subsequent to the execution of sale and security agreements and a promissory note, since it is only when the policy by its terms covers the operator as an insured that the insurer of a vehicle's former owner will be liable to pay a judgment obtained against an operator-transferee after execution of a bill of sale or similar document, since by its terms the policy excluded as an insured "the owner of a non-owned automobile," and since the sale and security agreements and note, which were executed 22 days prior to the accident, left no question that at the time of the accident the tanker was not owned by the seller within the meaning of the policy, notwithstanding that it still carried plates issued to the seller. Dairylea Cooperative, Inc. v Rossal, 64 N.Y.2d 1, 483 N.Y.S.2d 1001, 473 N.E.2d 251, 1984 N.Y. LEXIS 4754 (N.Y. 1984).

The statutory requirement imposed by former § 167 [now § 3420] that automobile liability insurance policies extend protection to car owners against liability for negligent operation of the insured vehicle in the insured's business or with his consent does not extend existing liability insurance coverage of a car owner after he has parted with title to and control over the vehicle, by sale or gift, and the car is being operated by, or with the consent of, the new owner, unless the policy specifically covers such a situation. Mason v Allstate Ins. Co., 12 A.D.2d 138, 209 N.Y.S.2d 104, 1960 N.Y. App. Div. LEXIS 6284 (N.Y. App. Div. 2d Dep't 1960).

The original insured in a motor vehicle liability policy was entitled to a declaratory judgment requiring his insurer to defend an action against him and his brother, who was operating the car at the time of an accident with the insured's consent, notwithstanding title to the vehicle had been transferred by insured to a corporation which was operating a camp for pupils of the institution at which both brothers were teaching, and insured had transferred title to the vehicle to the corporation without notifying or obtaining consent of the insurer, insured still retaining possession and control of the vehicle notwithstanding the transfer by way of gift. Tyrnauer v Travelers Ins. Co., 15 A.D.2d 293, 223 N.Y.S.2d 151, 1961 N.Y. App. Div. LEXIS 6804 (N.Y. App. Div. 2d Dep't 1961), aff'd, 13 N.Y.2d 613, 240 N.Y.S.2d 603, 191 N.E.2d 89, 1963 N.Y. LEXIS 1222 (N.Y. 1963).

The emphasis on liability coverage, not only as written in a policy but as mandated by statute, under subd. 2 of former § 167 [now § 3420(e)], relates to more than nominal ownership and continues as long as an insured owner continues to have possession and control of the car, and an interest therein, notwithstanding transfer of title to another. Tyrnauer v Travelers Ins. Co., 15 A.D.2d 293, 223 N.Y.S.2d 151, 1961 N.Y. App. Div. LEXIS 6804 (N.Y. App. Div. 2d Dep't 1961), aff'd, 13 N.Y.2d 613, 240 N.Y.S.2d 603, 191 N.E.2d 89, 1963 N.Y. LEXIS 1222 (N.Y. 1963).

Where insureds fail to remove license plates from automobile when they sold automobile and in fact consented to buyer's use of them, they were estopped to deny ownership and thereby escape liability for damages resulting from accident in which buyer became involved; however, where insurer was neither aware of nor consented to transfer and policy neither permitted nor contemplated coverage under such circumstances, estoppel did not prevent insurer from disclaiming liability. State Farm Mut. Auto. Ins. Co. v Elgot, 48 A.D.2d 362, 369 N.Y.S.2d 719, 1975 N.Y. App. Div. LEXIS 9893 (N.Y. App. Div. 1st Dep't 1975).

Insurance company was not insurer of automobile that was being driven without permission or authority when it was involved in accident with claimant on April 2, 1984, since insured had signed and tendered certificate of title to buyer on March 31, 1984 without notifying company, notwithstanding that insured's license plates had not been removed; thus, court erred in ordering company to defend and indemnify insured and driver of automobile and in ordering stay of arbitration demanded by claimant under uninsured motorist endorsement of policy issued by her insurer. Feliciano v Hanover Ins. Co., 140 A.D.2d 607, 528 N.Y.S.2d 653, 1988 N.Y. App. Div. LEXIS 5693 (N.Y. App. Div. 2d Dep't 1988).

Plaintiff was not insured under motor vehicle insurance policy issued by defendant insurer to former owner since coverage under that policy terminated when former owner transferred automobile to plaintiff. Warzinski v Travelers Ins. Co., 182 A.D.2d 1125, 583 N.Y.S.2d 94, 1992 N.Y. App. Div. LEXIS 7017 (N.Y. App. Div. 4th Dep't), app. denied, 80 N.Y.2d 760, 591 N.Y.S.2d 138, 605 N.E.2d 874, 1992 N.Y. LEXIS 3863 (N.Y. 1992).

For purposes of determining whether insurance policy issued to former owner of car was in effect on date of accident when car was still registered to him, record supported conclusion that title of car was transferred to purchaser 2 days prior to accident when he paid most of purchase price to former owner's brother, received bill of sale and certificate of title executed by former owner, and took possession of car from which license plates had been removed. Potter v Keefe, 261 A.D.2d 864, 690 N.Y.S.2d 361, 1999 N.Y. App. Div. LEXIS 4898 (N.Y. App. Div. 4th Dep't 1999).

Failure of insurer to notify Department of Motor Vehicles pursuant to CLS Veh & Tr § 313 that insured substituted one vehicle for another under same policy did not render ineffective insurer's deletion of originally insured vehicle from policy, since notification requirement of § 313 applies only to termination or cancellation of policy itself. Huertas v Pino, 143 Misc. 2d 776, 542 N.Y.S.2d 484, 1989 N.Y. Misc. LEXIS 297 (N.Y. Sup. Ct. 1989).

56. —Driver of stolen vehicle

Automobile insurer, whose omnibus clause extended coverage to named insured or to "any person operating or using * * the

vehicle with the permission, express or implied, of the named insured," had no duty to defend driver who admittedly had stolen insured vehicle before driver was involved in accident while driving insured vehicle. Robb v Royal Globe Ins. Co., 48 A.D.2d 935, 369 N.Y.S.2d 809, 1975 N.Y. App. Div. LEXIS 10227 (N.Y. App. Div. 2d Dep't 1975).

Where it appeared that underlying personal injury and property damage actions had been tried, and that jury returned verdict in favor of owner of insured vehicle which absolved him of liability, finding was therefore negated that insured had given driver, who admittedly stole insured vehicle, permission and consent to use the vehicle, so as to require insurer to defend driver under omnibus clause which extended policy's coverage to the named insured or to any person operating or using the vehicle with permission of named insured. Robb v Royal Globe Ins. Co., 48 A.D.2d 935, 369 N.Y.S.2d 809, 1975 N.Y. App. Div. LEXIS 10227 (N.Y. App. Div. 2d Dep't 1975).

An insurer was not liable for injuries arising out of an automobile accident between plaintiffs and a thief who had stolen its insured's vehicle, notwithstanding its failure to send plaintiffs a denial of coverage or disclaimer of liability after receiving notice of their action, against the thief and others in which they had alleged that the thief had operated the vehicle wth the owner's consent in spite of their knowledge that the thief had been convicted of grand larceny as a result of his theft of the vehicle, where the policy expressly excluded all coverage while the vehicle was operated or used without permission, express or implied, of the owner, where Ins L § 167(8) [now § 3420] did not require written notice of disclaimer of liability or denial of coverage when no coverage for the person involved in the accident had ever existed under the policy, and where plaintiffs were aware from the inception that the vehicle had been stolen and was being operated by the thief. Katz v Allstate Ins. Co., 96 A.D.2d 930, 466 N.Y.S.2d 376, 1983 N.Y. App. Div. LEXIS 19567 (N.Y. App. Div. 2d Dep't 1983), app. denied, 61 N.Y.2d 608, 1984 N.Y. LEXIS 7198 (N.Y. 1984).

Entitlement exclusion of automobile liability policy that excluded coverage to "any person...using a vehicle without a reasonable belief that that person is entitled to do so" excluded liability coverage for "family member" who used vehicle without permission, and thus insurance carrier was entitled to summary judgment declaring that it had no obligation to defend and indemnify insureds' son, who broke into his parents' house while they were away on vacation, searched for keys which had been hidden, and took covered vehicle against his parents' express wishes; court would overrule its prior decision in Paychex, Inc. v Covenant Ins. Co., 156 AD2d 936. Hartford Ins. Co. v Halt, 223 A.D.2d 204, 646 N.Y.S.2d 589, 1996 N.Y. App. Div. LEXIS 9006 (N.Y. App. Div. 4th Dep't 1996), app. denied, 89 N.Y.2d 813, 658 N.Y.S.2d 243, 680 N.E.2d 617, 1997 N.Y. LEXIS 487 (N.Y. 1997).

Disclaimer was required when a denial of coverage was based on a policy exclusion without which the claim would have been covered and failure to comply with N.Y. Ins. Law § 3420(d) precluded the denial of coverage based on a policy exclusion; since policy provisions were in the nature of exclusions, where insured was driving a vehicle without the owner's permission at the time of the accident, the insurer's failure to give notice of disclaimer that the vehicle was not covered precluded it from denying coverage based on that exclusion. Miceli v State Farm Mut. Auto. Ins. Co., 306 A.D.2d 903, 762 N.Y.S.2d 199, 2003 N.Y. App. Div. LEXIS 6776 (N.Y. App. Div. 4th Dep't 2003), rev'd, 3 N.Y.3d 725, 786 N.Y.S.2d 379, 819 N.E.2d 995, 2004 N.Y. LEXIS 2444 (N.Y. 2004).

Order denying petition to stay arbitration was affirmed, as insurer could not avoid its obligation to provide the mandatory coverage required by N.Y. Ins. Law § 3420(f)(1) by relying on definitions in the supplementary uninsured motorist (SUM) endorsement, as that provided the terms and conditions governing the SUM coverage required by § 3420(f)(2), not the basic uninsured motorist coverage required by § 3420(f)(1). Matter of Hartford Acc. & Indem. Co. v Dellegrazie, 2021 N.Y. App. Div. LEXIS 321 (N.Y. App. Div. 2d Dep't 2021).

57. —Driver under legal age limit

The provision of former § 167 [now § 3420] that every policy of automobile liability insurance shall insure the owner against liability for death or injury to person or property resulting from the negligent operation of his car by another person, while legally using or operating same with his permission, does not prevent a limitation of coverage and coverage may be limited by a provision for the exclusion from liability for an accident occurring while the car was being operated by person "under age limit fixed by law." Operator being under that age, the policy did not cover. Taylor v United States Casualty Co., 269 N.Y. 360, 199 N.E. 620, 269 N.Y. (N.Y.S.) 360, 1936 N.Y. LEXIS 1396 (N.Y.), reh'g denied, 270 N.Y. 611, 1 N.E.2d 354, 270 N.Y. (N.Y.S.) 611, 1936 N.Y. LEXIS 1658 (N.Y. 1936).

Former § 109 [predecessor to former § 167, now § 3420] does not prohibit an insurer from limiting its coverage and excluding its liability under a policy, where the person driving with owner's consent is under age and driving illegally. Devitt v Continental Casualty Co., 269 N.Y. 474, 199 N.E. 765, 269 N.Y. (N.Y.S.) 474, 1936 N.Y. LEXIS 1413 (N.Y. 1936).

Former § 167 [now § 3420] does not prevent a limitation of coverage and coverage may be limited by a provision for the exclusion from liability for an accident occurring while the car was being operated by a person "under the age limit fixed by law." The operator being under that age, the policy did not cover. Devitt v Continental Casualty Co., 269 N.Y. 474, 199 N.E. 765, 269 N.Y. (N.Y.S.) 474, 1936 N.Y. LEXIS 1413 (N.Y. 1936).

A junior licensee operating a car with the knowledge and consent of the owner was not a person under the age fixed by law as a prerequisite of the operation of automobiles within the meaning of former § 167 [now § 167, now § 3420]. Smith v American Auto. Fire Ins. Co., 274 N.Y. 626, 10 N.E.2d 583, 274 N.Y. (N.Y.S.) 626, 1937 N.Y. LEXIS 1009 (N.Y.), reh'g denied, 275 N.Y. 532, 11 N.E.2d 734, 275 N.Y. (N.Y.S.) 532, 1937 N.Y. LEXIS 1505 (N.Y. 1937).

An action may not properly be maintained by an aggrieved third party against the automobile liability insurance carrier, pursuant to former § 109 [predecessor to former § 167, now § 3420], on the unsatisfied judgment recovered against the assured not compelled by law to carry insurance, where the injury resulted from collision with an automobile driven by the assured's unlicensed sixteen-year-old son, and policy provided that insurer should not be liable for a loss occurring while the automobile was being operated by a person "under the age fixed by law for drivers of automobiles." Letson v Sun Indem. Co., 264 N.Y.S. 519, 147 Misc. 690, 1933 N.Y. Misc. LEXIS 1169 (N.Y. Sup. Ct. 1933), aff'd, 241 A.D. 629, 269 N.Y.S. 965, 1934 N.Y. App. Div. LEXIS 8479 (N.Y. App. Div. 1934).

The provision in a policy excluding defendant insurer from liability where the automobile is driven "by any person under age fixed by law" is not in violation of former § 109 [predecessor to former § 167, now § 3420]. Taylor v United States Casualty Co., 281 N.Y.S. 361, 156 Misc. 607, 1935 N.Y. Misc. LEXIS 1309 (N.Y. Sup. Ct.), aff'd, 245 A.D. 800, 281 N.Y.S. 705, 1935 N.Y. App. Div. LEXIS 10940 (N.Y. App. Div. 1935).

In actions under this section to recover from an insurer the amount of certain judgments recovered against insured operation of automobile, at the time of the accident, by one who was over the age of fourteen years but under the age of eighteen years, who was the holder of a junior operator's license, but was concededly operating the car in violation of the terms and restrictions of such license, is not excluded from coverage of the policy although it provides that policy does not apply while the automobile is operated by any person "in violation of a State, Federal or Provincial law as to age applicable to such person." Dibble v Travelers Ins. Co., 298 N.Y.S. 48, 163 Misc. 540, 1937 N.Y. Misc. LEXIS 1442 (N.Y. Sup. Ct. 1937).

Liability policy on insured's all-terrain vehicle, covering claims based on "ownership, maintenance or use" of vehicle, provided coverage for claim based on insured's negligent entrustment of vehicle to 16-year-old who was thereby injured since (1) any claim for injury sustained by person operating vehicle was clearly covered by plain language of policy, and (2) any ambiguity as to whether claim for negligent entrustment fell within policy language would be resolved against insurer. Progressive Casualty Ins. Co. v Jackson, 151 Misc. 2d 479, 573 N.Y.S.2d 556, 1991 N.Y. Misc. LEXIS 419 (N.Y. Sup. Ct. 1991), aff'd, 181 A.D.2d 1035, 585

N.Y.S.2d 716, 1992 N.Y. App. Div. LEXIS 4635 (N.Y. App. Div. 4th Dep't 1992).

58. —Leased vehicle

The exclusion of guest coverage in an insurance policy provided by a corporation renting motor vehicles did not violate subdivision 2 of former section 167 [now § 3420(f)] of the Insurance Law where a van was rented in New York by a New York resident who was to deliver the van three days later to the lessor in Maine, inasmuch as the mandatory provisions of subdivision 2 of former section 167 [now § 3420(f)], one of which required coverage for injuries suffered by a passenger in the vehicle (Vehicle and Traffic Law, § 311; 11 NYCRR 60.1), are applicable only to policies issued on vehicles principally garaged or used in this State and the vehicle in question was registered in Massachusetts and was only temporarily in New York. Travelers Indem. Co. v Ryder Truck Rental, Inc., 47 N.Y.2d 139, 417 N.Y.S.2d 53, 390 N.E.2d 771, 1979 N.Y. LEXIS 1992 (N.Y. 1979).

Excess and primary carriers of insurance purchased by owner of leased van could recover against lessee's comprehensive insurance carrier, on ground that lessee's comprehensive carrier was primary co-insurer of van, where business auto portion of comprehensive policy did not contain "additional insured" clause but contained specific change endorsement that made "Hired and Non-Owned Coverage" applicable in New York. Jefferson Ins. Co. v Travelers Indem. Co., 92 N.Y.2d 363, 681 N.Y.S.2d 208, 703 N.E.2d 1221, 1998 N.Y. LEXIS 3664 (N.Y. 1998).

Non-trucking-use exclusion referring to lessee's contractual obligation to obtain business coverage, but not expressly providing that exclusion was only operative if lessee had business use liability coverage in effect for accident in question, was not valid because lessee's contractual obligation might be insufficient to provide coverage if lessee breached contract by not having insurance in effect at time of accident. Royal Indem. Co. v Providence Wash. Ins. Co., 92 N.Y.2d 653, 684 N.Y.S.2d 470, 707 N.E.2d 425, 1998 N.Y. LEXIS 4141 (N.Y. 1998).

After disregarding truck lessor's invalid insurance policy provision excluding coverage for liability when truck was being used in business of any person to whom it was rented, since lessor's policy was self-denominated as primary insurance and lessee's policy was denominated as excess, lessor's insurer was liable for full amount of stipulated damages resulting from operation of leased truck. Randazzo v Cunningham, 56 A.D.2d 702, 392 N.Y.S.2d 740, 1977 N.Y. App. Div. LEXIS 10864 (N.Y. App. Div. 4th Dep't 1977), aff'd, 43 N.Y.2d 937, 403 N.Y.S.2d 894, 374 N.E.2d 1245, 1978 N.Y. LEXIS 1833 (N.Y. 1978).

In a declaratory judgment action to determine the respective rights of insurers under their policies, summary judgment would be granted directing each insurer to contribute in proportion to its limit amount of insurance in order to pay that portion of a settlement that remained unsatisfied where the insured vehicle had struck an infant pedestrian, where one insurer had issued its policy to the lessee of the vehicle, where the other insurer had issued its policy to the lessor, and where the excess coverage clauses of both policies had cancelled out each other inasmuch as each policy purported to have been excess to the other. Jefferson Ins. Co. v Glens Falls Ins. Co., 88 A.D.2d 925, 450 N.Y.S.2d 888, 1982 N.Y. App. Div. LEXIS 17268 (N.Y. App. Div. 2d Dep't 1982).

Step-down provision in automobile insurance policy, which provided specific amount of over-all coverage to owner-lessor of automobile andprovided that coverage to lessee was subject to any limit of liability contained in lease agreement, was valid even though provision created 2-tiered coverage since no statute or rule prohibited such coverage. Liberty Mut. Ins. Co. v Aetna Casualty & Surety Co., 168 A.D.2d 121, 571 N.Y.S.2d 735, 1991 N.Y. App. Div. LEXIS 8047 (N.Y. App. Div. 2d Dep't 1991).

In declaratory judgment action to determine obligations of various insurance companies with regard to underlying personal injury action, first layer of insurance available to satisfy judgment was $100,000 of policy issued to vicariously liable owner-lessor of vehicle at fault, but remainder of $1 million policy was excess to policy issued to lessee-employer of operator of vehicle at fault where owner-lessor's policy contained step-down provision whereby lessee of vehicle was subject to $100,000 limit of liability contained in lease agreement. Liberty Mut. Ins. Co. v Aetna Casualty & Surety Co., 168 A.D.2d 121, 571 N.Y.S.2d 735, 1991 N.Y. App. Div. LEXIS 8047 (N.Y. App. Div. 2d Dep't 1991).

In personal injury action brought by pedestrian who was struck by truck owned by rental company, which was leased to trucking company and driven by employee of trucking company pursuant to trucking service contract between trucking company and motion picture company, insurance policies of rental company and trucking company were primary policies; insurance policy of motion picture company was only excess policy, as motion picture company did not hire truck. Federal Ins. Co. v Ryder Truck Rental, 189 A.D.2d 582, 592 N.Y.S.2d 38, 1993 N.Y. App. Div. LEXIS 64 (N.Y. App. Div. 1st Dep't 1993), aff'd, 82 N.Y.2d 909, 609 N.Y.S.2d 173, 631 N.E.2d 115, 1994 N.Y. LEXIS 2 (N.Y. 1994).

Term "same limits," within provision of automobile liability insurance policy stating that "where the law extends coverage to a non-permitted driver, the same limits shall apply," was sufficiently ambiguous to bar insurer from denying coverage within limits of "additional liability insurance" for accident involving injuries to passengers in rental car where limits of liability were raised by purchase of additional liability insurance, and paragraph entitled "additional liability insurance" stated that those limits applied "instead of the limits in the preceding paragraph on liability insurance." Ozturk v Taskiran, 245 A.D.2d 355, 665 N.Y.S.2d 420, 1997 N.Y. App. Div. LEXIS 12777 (N.Y. App. Div. 2d Dep't 1997).

Defendant was not primary insurer of rental car which its insured had used while his van, which was policy's designated vehicle, was being repaired, and it was therefore not obligated to indemnify rental agency for liability arising from accident which occurred while insured's friend was driving rental car, where insured had loaned rental car to his friend after his van was repaired, thereby indicating his intention to resume regular use of his van, at which point "temporary substitute" provision of policy issued by defendant ceased to serve its purpose and coverage for insured's van was restored. ELRAC, Inc. v Mehlinger, 258 A.D.2d 500, 684 N.Y.S.2d 625, 1999 N.Y. App. Div. LEXIS 1038 (N.Y. App. Div. 2d Dep't 1999).

Six-wheeled box truck with load capacity in excess of 2,000 pounds and separate storage area was not "private passenger auto" as defined by motor vehicle insurance policy issued to defendant lessee by third-party defendant insurer, and thus insurer was entitled to summary judgment declaring that it was not obligated to defend or indemnify plaintiff lessor in underlying negligence action pursuant to lessee-insured's agreement to indemnify lessor for losses above required statutory limit. Gardner v Ryder Truck Rental, Inc., 261 A.D.2d 505, 690 N.Y.S.2d 614, 1999 N.Y. App. Div. LEXIS 5427 (N.Y. App. Div. 2d Dep't 1999), overruled in part, Reyes v Diamond State Ins. Co., 35 A.D.3d 830, 827 N.Y.S.2d 263, 2006 N.Y. App. Div. LEXIS 15887 (N.Y. App. Div. 2d Dep't 2006).

The fact that the driver of a leased automobile was under age, in violation of the lease agreement does not necessarily relieve the lessor of responsibility for payment of damages to the driver and lessee measured in part by such judgment as the injured parties might obtain where there was an alleged breach of an insurance clause requiring lessor to obtain a standard policy of insurance protecting the lessee. Location Auto Leasing Corp. v Lembo Corp., 62 Misc. 2d 856, 310 N.Y.S.2d 365, 1970 N.Y. Misc. LEXIS 1689 (N.Y. Sup. Ct. 1970).

Automobile liability policy issued by petitioner insurer, which provided coverage for vehicle rented when insured's vehicle was stolen, was not excess over insurance purchased pursuant to rental agreement, where petitioner committed itself to liability coverage for insured's stolen vehicle and any rental replacement of it, and rental agreement was tailored to save renter cost of duplicating extant coverage by not providing liability coverage. Allstate Ins. Co. v Mark, 156 Misc. 2d 188, 592 N.Y.S.2d 212, 1992 N.Y. Misc. LEXIS 559 (N.Y. Sup. Ct. 1992).

CLS Ins § 3420 deals with what must be provided in automobile liability insurance policies and does not require that rented vehicle already insured through lessee's own policy also be insured through lessor. Allstate Ins. Co. v Mark, 156 Misc. 2d 188, 592 N.Y.S.2d 212, 1992 N.Y. Misc. LEXIS 559 (N.Y. Sup. Ct. 1992).

Truck lessee's liability insurance did not cover accident occurring when lessor dispatched truck from terminal for purpose of transporting goods for third party, as truck was not operating in furtherance of lessee's business when accident occurred where lessor failed to obtain lessee's authorization or consent to sublease truck to third party, thereby placing use of truck outside scope of agency relationship. R. E. Turner, Inc. v Connecticut Indem. Co., 925 F. Supp. 139, 1996 U.S. Dist. LEXIS 6647 (W.D.N.Y. 1996).

Exclusion in "bobtail" policy which (under facts of case) operated to defeat coverage because subleasing carrier's insurers refused to extend coverage, thereby creating "gap" in coverage for legal liability accruing to owner under CLS Veh & Tr § 388, was invalid given potential disclaimer of coverage by third party sublessor whose load truck was going to pick up at time of accident. R. E. Turner, Inc. v Connecticut Indem. Co., 925 F. Supp. 139, 1996 U.S. Dist. LEXIS 6647 (W.D.N.Y. 1996).

59. — —Operation with lessee's permission

Under the doctrine of constructive consent, lessor's insurer could not disclaim coverage on basis that lessee had breached provision of car rental agreement that lessee would not surrender use of car to another without obtaining lessor's consent. Motor Vehicle Accident Indemnification Corp. v Cont'l Nat'l Am. Group Co., 35 N.Y.2d 260, 360 N.Y.S.2d 859, 319 N.E.2d 182, 1974 N.Y. LEXIS 1294 (N.Y. 1974).

While an automobile lessor, as a self-insurer, would not without more be liable for injuries sustained by lessee in accident caused by negligence of friend who, with lessee's permission, was driving at time of accident, the lessor was liable because of rental agreement's additional provision that any self-insurance would be subject to same terms as prior liability policy, which included a provision insuring named insured against damages occasioned by negligence of persons operating the vehicle with is consent; moreover, the lessor was not relieved of liability because of lessee's apparent violation of rental agreement prohibition against others operating the vehicle, since a prior civil court finding that lessor gave lessee permission to allow underage friends to operate the vehicle was binding. Guercio v Hertz Corp., 40 N.Y.2d 680, 389 N.Y.S.2d 568, 358 N.E.2d 261, 1976 N.Y. LEXIS 3087 (N.Y. 1976).

It was error to dismiss an administrator's N.Y. Ins. Law § 3420 claims against a contractor's insurer on the ground the contractor could not grant the owner of a relevant vehicle permission to use the vehicle because, under industry practice, public policy, and the insurance policy, permission in the context of motor vehicle liability insurance turned not on whether a driver had permission to use the vehicle for the particular activity at issue, but on whether the driver had permission to use the vehicle at all. Carlson v American Intl. Group, Inc., 30 N.Y.3d 288, 89 N.E.3d 490, 67 N.Y.S.3d 100, 2017 N.Y. LEXIS 3280 (N.Y. 2017).

Where lessee of automobile was injured in accident while riding with another person who was operating the vehicle with the actual permission of the lessor, and where, if lessor had secured standard policy of liability insurance, its insurer would have been financially responsible for the negligence of the driver, against whom the lessee had obtained a judgment which was unsatisfied, the lessor, in its status as a self-insurer, was required to satisfy the judgment within the limits of its self-insurance. Guercio v Hertz Corp., 50 A.D.2d 830, 377 N.Y.S.2d 103, 1975 N.Y. App. Div. LEXIS 11685 (N.Y. App. Div. 2d Dep't 1975), aff'd, 40 N.Y.2d 680, 389 N.Y.S.2d 568, 358 N.E.2d 261, 1976 N.Y. LEXIS 3087 (N.Y. 1976).

An automobile lessor's insurer was liable on its policy for the defense of a lawsuit for personal injuries caused by a vehicle covered by its policy and leased to the operator of a day camp where, despite the operator's violation of the lease by allowing the vehicle to be driven by a 19-year-old counselor, on camp business, without a chauffeur's license, public policy prevented insurer's of automobile rental companies from availing themselves of a lessee's violation of a rental agreement for the purpose of escaping the duty to indemnify persons covered by the policy for liability for injuries to innocent third parties (see Veh & Tr Law §§ 128, 388; Ins Law [former] § 167[2], [2-a], now § 3420[e], [f]). Tom Sawyer Country Day School v Providence Washington Ins. Co., 108 A.D.2d 810, 485 N.Y.S.2d 126, 1985 N.Y. App. Div. LEXIS 43130 (N.Y. App. Div. 2d Dep't), app. denied, 65 N.Y.2d 608, 494 N.Y.S.2d 1028, 484 N.E.2d 671, 1985 N.Y. LEXIS 14577 (N.Y. 1985).

In action to determine which insurance company was responsible for second $500,000 of $1 million settlement in personal injury action, defendant, which was insurer of driver's employer, was entitled to summary judgment where (1) defendant insured employer for automobile liability to maximum of $500,000 and provided general liability policy that excluded automobile liability, and there was contractual liability endorsement that did not exclude automobile liability, (2) any liability of employer to leasing company which owned vehicle was obviated when leasing company waived its cross-claim against employer on settlement of personal injury action, and (3) settlement thus solely represented employer's liability to injured party, which did not arise from contract. Federal Ins. Co. v Michigan Mutual Ins. Co., 173 A.D.2d 387, 570 N.Y.S.2d 17, 1991 N.Y. App. Div. LEXIS 7586 (N.Y. App. Div. 1st Dep't 1991).

Liability insurers of partnership could not be held liable for judgment arising from rental car accident in which driver of car was son of partner, although partner had used partnership credit card to rent car, since son's use of car was not for carrying on of business pursuant to CLS Partn law § 20, and policies covered only partnership's use of vehicle and liabilities imposed on partnership by law or contract. Lanera v Hertz Corp., 180 A.D.2d 667, 579 N.Y.S.2d 720, 1992 N.Y. App. Div. LEXIS 1461 (N.Y. App. Div. 2d Dep't 1992).

Insurer was obligated to defend and indemnify insured in action brought against him by individual hired to transport insured's grader, who was injured in loading grader onto his trailer, since insured was "lessee or borrower" engaged in "moving property to or from a covered auto"—i.e., injured party's trailer —within meaning of applicable policy. Tarolli v Continental Casualty Co., 181 A.D.2d 1021, 581 N.Y.S.2d 510, 1992 N.Y. App. Div. LEXIS 4621 (N.Y. App. Div. 4th Dep't 1992).

Insurance company was not liable for damages awarded in action by bicyclist for injuries sustained when he was struck by car where (1) insurance company insured employer of husband of motor vehicle operator, (2) husband leased motor vehicle and was reimbursed for cost of lease by his employer on submission of his credit card statement, (3) although husband listed employer's name on preprinted rental agreement as designated customer, rental agency looked to husband's credit for payment, (4) there was no evidence that employer knew that its name was listed on rental agreement or that husband had authority to list its name on rental agreement, and (5) agreement of employer to reimburse husband for lease was based on special circumstances pertaining to friendship between husband and employer, and fact that husband was dying of cancer. Liberty Mut. Ins. Co. v CNA Ins. Cos., 189 A.D.2d 1060, 593 N.Y.S.2d 92, 1993 N.Y. App. Div. LEXIS 786 (N.Y. App. Div. 3d Dep't 1993).

Plaintiff car rental agency was entitled to summary judgment directing defendant insurer to pay proportionate share of its litigation expenses in defending underlying personal injury action, where defendant's insured had rented van from plaintiff to transport her family members to family reunion and, although she informed plaintiff that she would not actually be traveling in van and she was not in van at time of accident, complained-of injuries arose out of her "use" of non-owned vehicle within meaning of policy issued by defendant in that she had agreed with her friend (who was sole authorized driver) and other passengers to use van for purpose for which it was rented. Hertz Corp. v GEICO, 250 A.D.2d 181, 683 N.Y.S.2d 483, 1998 N.Y. App. Div. LEXIS 12917 (N.Y. App. Div. 1st Dep't 1998), app. denied, 1999 N.Y. App. Div. LEXIS 5215 (N.Y. App. Div. 1st Dep't Apr. 22, 1999), app. dismissed, 93 N.Y.2d 1040, 697 N.Y.S.2d 568, 719 N.E.2d 929, 1999 N.Y. LEXIS 2181 (N.Y. 1999).

60. —Vehicle operated by employee of owner

A policy of insurance under which the defendant agreed to pay all damages which assured, county, might become liable to pay through negligent operation of automobile mentioned in policy, and also agreed that "The insurance granted by the foregoing provisions shall apply to additional assured as follows: (a) any

person while riding in any automobile described in said declarations or while operating any automobile described in said declarations with the permission of the assured," should be construed to cover the sheriff of the county for whose use the automobiles had been purchased and for whose protection the insurance was taken, and a judgment for the plaintiff in an action under former § 109 [predecessor to former § 167, now § 3420] is affirmed, where proof shows that the plaintiff had recovered in a prior action for personal injuries suffered in the automobile accident through the negligence of the sheriff of the county. Hammond v New York Casualty Co., 239 A.D. 627, 269 N.Y.S. 290, 1934 N.Y. App. Div. LEXIS 10905 (N.Y. App. Div. 1934).

In an action brought under former § 109 [predecessor to former § 167, now § 3420], the terms and conditions of an omnibus coverage clause extending coverage afforded by the policy to named assured, "to any person . . . legally responsible for the operation of such automobiles, provided such use or operation is with the permission of the named Assured," were not changed or modified by rider attached to comply with requirements of former § 109 [predecessor to former § 167, now § 3420], and Vehicle and Traffic Law, § 59, which extends the policy to protect named assured "against liability and responsibility for damages resulting from negligence in the operation of such motor vehicle . . ., in the business of such owner or otherwise, by any person legally using or operating the same with the permission, express or implied, of such owner." The clauses insure the operator of a vehicle only when he is lawfully using the vehicle in the business of the owner municipality or with the municipality's permission, express or implied. Fox v Employers' Liability Assurance Corp., 243 A.D. 325, 276 N.Y.S. 917, 1935 N.Y. App. Div. LEXIS 7062 (N.Y. App. Div.), aff'd, 267 N.Y. 609, 196 N.E. 604, 267 N.Y. (N.Y.S.) 609, 1935 N.Y. LEXIS 1331 (N.Y. 1935).

The implied consent to use of an automobile for individual purposes, binding on municipality, cannot be spelled out from the fact that the employer's superior knew the employee was using the automobile as if it were individual property, and that he failed to protest, and that the chief of the fire department and other municipal employees also had knowledge of such use. Fox v Employers' Liability Assurance Corp., 243 A.D. 325, 276 N.Y.S. 917, 1935 N.Y. App. Div. LEXIS 7062 (N.Y. App. Div.), aff'd, 267 N.Y. 609, 196 N.E. 604, 267 N.Y. (N.Y.S.) 609, 1935 N.Y. LEXIS 1331 (N.Y. 1935).

In an action under former § 109 [predecessor to former § 167, now § 3420], a defendant insurance company may not be held liable on the theory that an automobile was being employed in the business of the municipality at the time of the collision because while at a resort an employee saw the owner of the apartment house concerning a complaint relating to the absence of lights in the hall of his building. Fox v Employers' Liability Assurance Corp., 243 A.D. 325, 276 N.Y.S. 917, 1935 N.Y. App. Div. LEXIS 7062 (N.Y. App. Div.), aff'd, 267 N.Y. 609, 196 N.E. 604, 267 N.Y. (N.Y.S.) 609, 1935 N.Y. LEXIS 1331 (N.Y. 1935).

Former § 109 [predecessor to former § 167, now § 3420] does not provide coverage to an employee or permittee of the owner of an automobile. Kuhn v Auto Cab Mut. Indem. Co., 244 A.D. 272, 279 N.Y.S. 60, 1935 N.Y. App. Div. LEXIS 5806 (N.Y. App. Div. 1935), aff'd, 270 N.Y. 587, 1 N.E.2d 343, 270 N.Y. (N.Y.S.) 587, 1936 N.Y. LEXIS 1643 (N.Y. 1936).

An insurer is not liable for personal injuries suffered when the plaintiff was struck by a truck operated by insured's employees while engaged in removing snow from a county highway, where the policy covered the truck when in "commercial use . . . usual to business" of insured, which was described in policy as that of "sand and gravel dealer." Euto v (American) Lumbermens Mut. Casualty Co., 247 A.D. 613, 288 N.Y.S. 232 (1936).

Comprehensive automobile liability insurance policy issued to company did not cover liability arising out of woman's accident while driving her father's car while engaged in company's business, since policy excluded coverage for employees. Mead v Fidelity & Casualty Co., 155 A.D.2d 896, 547 N.Y.S.2d 491, 1989 N.Y. App. Div. LEXIS 14732 (N.Y. App. Div. 4th Dep't 1989).

In declaratory judgment action to determine obligations of various insurance companies with regard to underlying personal injury action, summary judgment was not available to determine that operator of motor vehicle at fault was operating vehicle in course of her employment where (1) operator averred in affidavit that accident occurred while she was employed by store but did not specifically aver that she was operating vehicle in course of employment at time of accident, (2) operator also averred that accident occurred immediately after leaving shopping plaza where she had been conducting comparison shopping for her employer, but "immediately" was ambiguous and did not make clear exact amount of time between comparison shopping and accident, (3) operator did not reveal whether her employment was exclusive, or even principal, reason for trip toshopping center, and (4) evidence existed to show that vehicle was not generally used in course of employment and was used as second family car by operator, who was wife of principal officer of store. Liberty Mut. Ins. Co. v Aetna Casualty & Surety Co., 168 A.D.2d 121, 571 N.Y.S.2d 735, 1991 N.Y. App. Div. LEXIS 8047 (N.Y. App. Div. 2d Dep't 1991).

61. —Poicy cancelled

Misrepresentation made by insured as to her true address did not render automobile insurance policy void ab initio; cancellation of automobile insurance policy may be prospective only. Interboro Mut. Indem. Ins. Co. v Cermak, 187 A.D.2d 513, 590 N.Y.S.2d 746, 1992 N.Y. App. Div. LEXIS 12698 (N.Y. App. Div. 2d Dep't 1992).

Motorcycle insurance policy remained in force as of date of accident where insurance company failed to comply with strict statutory notice of termination requirements set forth in CLS Veh & Tr § 313(1)(a), even though insured permitted his registration to lapse prior to date of accident. Public Serv. Mut. Ins. Co. v Foley, 190 A.D.2d 800, 593 N.Y.S.2d 847, 1993 N.Y. App. Div. LEXIS 1527 (N.Y. App. Div. 2d Dep't), app. dismissed, 82 N.Y.2d 712, 602 N.Y.S.2d 808, 622 N.E.2d 309, 1993 N.Y. LEXIS 5264 (N.Y. 1993).

While New York's compulsory automobile insurance laws provide only for prospective cancellation of automobile insurance policies, thus abrogating insurer's common-law right to void policy from its inception on ground that it was obtained through fraud or misrepresentation, such rule is designed to protect innocent victims of motor vehicle accidents and does not bar action to void policy ab initio where it is alleged that claimant himself participated in fraudulent issuance of policy. Travelers Indem. Co. v Avelino, 191 A.D.2d 229, 594 N.Y.S.2d 249, 1993 N.Y. App. Div. LEXIS 2133 (N.Y. App. Div. 1st Dep't 1993).

Court properly dismissed action for judgment declaring that plaintiffs' assigned risk automobile insurance policy was in full force and effect, having been unlawfully canceled by defendant insurer, where record showed that after having received adverse determination on cancellation issue from Governing Committee of New York Automobile Insurance Plan, which was administrator of assigned risk plan, plaintiffs failed to appeal determination to New York Superintendent of Insurance, as they were entitled to do under CLS Ins § 5304, and thus failed to pursue available administrative remedy. Ingber v New Hampshire Ins. Co., 198 A.D.2d 266, 603 N.Y.S.2d 547, 1993 N.Y. App. Div. LEXIS 10439 (N.Y. App. Div. 2d Dep't 1993).

Plaintiff was entitled to summary judgment declaring that his current insurer was obligated to defend and indemnify him in action by injured party who was hit by his car on October 16, where parties stipulated that plaintiff's application for new insurance was mailed by certified mail on October 15 to New York Automobile Insurance Plan and plaintiff submitted unrebutted deposition testimony stating that certified mail receipt number was placed on envelope and date on certified mail receipt was October 15; plaintiff's failure to place certified receipt number on application, which is sole condition precedent to fixing effective date of coverage as 12:01 a.m. of day following postmark date, was apparently inadvertent and should not operate to interrupt plaintiff's coverage, in light of public policy in favor of uninterrupted insurance coverage of all automobiles. Fogarty v Boston Old Colony Ins. Co., 222 A.D.2d 484, 635 N.Y.S.2d 647, 1995 N.Y. App. Div. LEXIS 12808 (N.Y. App. Div. 2d Dep't 1995).

62. Other matters

Where non-trucking-use endorsement in insurance policy obtained by owner of commercial vehicle was void as against public

policy due to absence of express language stating that exclusion was effective only if vehicle's lessee was required to obtain insurance coverage, it was also ineffective to limit liability to financial security minima required by New York law; owner's policy was to be read as if exclusion did not exist. Royal Indem. Co. v Providence Wash. Ins. Co., 92 N.Y.2d 653, 684 N.Y.S.2d 470, 707 N.E.2d 425, 1998 N.Y. LEXIS 4141 (N.Y. 1998).

Insurance carrier was entitled to judgment declaring that car involved in accident was not covered by primary liability insurance policy covering business corporation's fleet of vehicles where (1) corporation already owned car when original policy commenced and car was not listed in schedules of covered vehicles which either formed part of original policy or constituted modifications of original policy, (2) policy did not provide for "blanket" or "fleet" coverage, and (3) car was concededly covered by another insurance company's primary policy. Dairy Maid Food Corp. v Home Indem. Co., 135 A.D.2d 774, 522 N.Y.S.2d 886, 1987 N.Y. App. Div. LEXIS 52718 (N.Y. App. Div. 2d Dep't 1987), app. denied, 72 N.Y.2d 802, 530 N.Y.S.2d 554, 526 N.E.2d 45, 1988 N.Y. LEXIS 1123 (N.Y. 1988).

Plaintiff was entitled to summary judgment granting her claim for recovery under collision provision of her automobile policy where her affidavit, admission in insurance company's answer, and report of insurance company's expert clearly indicated that her automobile struck object in road, causing puncture in oil pan, rapid loss of motor oil, and immediate engine seizure. Bekermus v State Farm Mut. Ins. Co., 154 A.D.2d 323, 545 N.Y.S.2d 799, 1989 N.Y. App. Div. LEXIS 12251 (N.Y. App. Div. 2d Dep't 1989).

Insurance company was collaterally estopped from litigating whether vehicle in question was covered by policy it had issued where (1) same issue was decided in prior arbitration proceeding at which insurance company was represented by counsel and had opportunity to present its position, and (2) although arbitration related to relatively small claim, insurance company was or reasonably should have been aware that personal injury action had been or likely would be commenced. Allstate Ins. Co. v Toussaint, 163 A.D.2d 444, 558 N.Y.S.2d 579, 1990 N.Y. App. Div. LEXIS 8778 (N.Y. App. Div. 2d Dep't 1990).

11 NYCRR § 65.10(d)(5)(iii) applies where there are companion cases arising out of same accident and issue submitted to arbitration is fault of drivers of respective vehicles involved; it is not intended to deny preclusive effect to arbitration determination concerning disclaimer of coverage where coverage was issue before arbitrator. Allstate Ins. Co. v Toussaint, 163 A.D.2d 444, 558 N.Y.S.2d 579, 1990 N.Y. App. Div. LEXIS 8778 (N.Y. App. Div. 2d Dep't 1990).

Disclaimer of coverage by car dealer's liability insurer was invalid where it was based on fact that insured vehicle—"loaner" car that dealer was permitting its customer to use at no charge while his own car was being repaired—was being driven by customer's son at time of accident; dealer's loan of vehicle to customer constituted constructive consent for its use by his son, even though son's use was allegedly in violation of "rental agreement" signed by customer. Liberty Mut. Ins. Co. v Clench, 180 A.D.2d 684, 579 N.Y.S.2d 725, 1992 N.Y. App. Div. LEXIS 1453 (N.Y. App. Div. 2d Dep't 1992).

Where insurer offered 2 separate vehicle liability policies to insured tortfeasor (garage policy and business auto policy) each of which provided that if insured had other insurance covering loss with insurer, limit of its liability for loss under all such polices would be highest limit for applicable coverage in any one such policy, insurer could not deny coverage under garage policy after paying amount equal to limits of liability under business auto policy, since policies applied to same loss, and no clear "no liability" clause was present. Hough v United States Fidelity & Guar. Co., 192 A.D.2d 1035, 596 N.Y.S.2d 903, 1993 N.Y. App. Div. LEXIS 4470 (N.Y. App. Div. 3d Dep't 1993).

Insurance company was entitled to summary judgment dismissing action which alleged its bad faith refusal to settle underlying tort action within policy limits since plaintiffs had been paid full amount of compensatory damages awarded by jury in underlying action and plaintiffs, as assignees of insured, were not entitled to recover unpaid punitive damages award as (1) there was no evidence that insurance company acted with malice or intent to harm insured, and (2) punitive damages award was not insurable. Soto v State Farm Ins. Co., 195 A.D.2d 992, 600 N.Y.S.2d 407, 1993 N.Y. App. Div. LEXIS 7781 (N.Y. App. Div. 4th Dep't 1993), aff'd, 83 N.Y.2d 718, 613 N.Y.S.2d 352, 635 N.E.2d 1222, 1994 N.Y. LEXIS 1034 (N.Y. 1994).

In action against homeowners arising from incident in which party was injured while exiting from motor vehicle which began to slide down driveway, homeowners' insurer was not entitled to have its retained counsel substituted on cause of action for negligent maintenance of driveway where insurer had improperly refused to defend homeowners, who were thus required to obtain judgment that insurer had obligation to defend, and insurer's interest in defending action was in conflict with homeowners' interest since it would be in insurer's interest to develop motor vehicle negligence claims in derogation of homeowners' interest to either defeat claims entirely or to involve both homeowners' insurer and motor vehicle insurance carrier to cover liability for party's injury. Wiley v New York Cent. Mut. Fire Ins. Co., 210 A.D.2d 829, 620 N.Y.S.2d 592, 1994 N.Y. App. Div. LEXIS 13258 (N.Y. App. Div. 3d Dep't 1994).

In declaratory judgment action brought by first insurer against second insurer, it was error to grant summary judgment to second insurer on ground that second insurer's amended endorsement providing coverage on vehicle in question was void because it effectuated coverage after loss of which insurer had no knowledge, since insurer in its disclaimer letter and answer did not assert that policy was void because of fraud, mistake, or its agent's lack of authority, nor did it commence action to rescind or reform policy based on those grounds. Reliance Ins. Co. v National Grange Mut. Ins. Co., 225 A.D.2d 1046, 639 N.Y.S.2d 615, 1996 N.Y. App. Div. LEXIS 2870 (N.Y. App. Div. 4th Dep't 1996).

It was error for court to issue declaration construing terms of policy issued by automobile insurance carrier in action where that carrier had not been joined as party defendant. Wrobel v La Ware, 229 A.D.2d 861, 646 N.Y.S.2d 391, 1996 N.Y. App. Div. LEXIS 7992 (N.Y. App. Div. 3d Dep't 1996).

Plaintiff, administratrix of estate of individual who was operating automobile insured by defendant, was not entitled to summary judgment declaring that defendant was obligated to provide coverage for her claim for uninsurance or underinsurance benefits since fact issues existed as to whether decedent or named insured, in seeking to obtain insurance coverage, made material misrepresentations. Taradena v Nationwide Mut. Ins. Co., 239 A.D.2d 876, 659 N.Y.S.2d 646, 1997 N.Y. App. Div. LEXIS 6234 (N.Y. App. Div. 4th Dep't 1997).

On summary judgment motion, it could be determined as matter of law that provisions of 1983 personal liability umbrella policy were still in effect and provided coverage for accident, notwithstanding insurer's claim that policy had been amended in 1986 and 1989, where insured denied having received amended policy jackets or inserts and insurer failed to proffer sufficient evidence that such items were properly mailed to insured. Allstate Ins. Co. v Young, 265 A.D.2d 278, 696 N.Y.S.2d 189, 1999 N.Y. App. Div. LEXIS 9670 (N.Y. App. Div. 2d Dep't 1999).

Court erred in declaring that assigned risk auto policy was void ab initio based on claimant's fraudulent concealment of material fact in applying for coverage, where policy was not cancelled in compliance with CLS Veh & Tr § 313 prior to accident; policy remained in effect, and insurer was responsible to any innocent third parties injured in accident. Insurance Co. of N. Am. v Kaplun, 274 A.D.2d 293, 713 N.Y.S.2d 214, 2000 N.Y. App. Div. LEXIS 9274 (N.Y. App. Div. 2d Dep't 2000).

Insurer was not entitled to summary judgment discharging it from any obligation under auto policy due to insured's substantial misrepresentation that vehicle was stolen at time of accident because, although insured pleaded guilty to filing false police report in connection with accident and insurer could utilize his admission of guilt as basis to disclaim coverage sought for himself, innocent third parties seeking recovery under policy were shielded from effects of insured's wrongful conduct where section of policy dealing with fraud stated "we will provide coverage to such insured for damages sustained by any person who has not made fraudulent statements or engaged in fraudulent conduct if such damages result from accident which is

otherwise covered under this policy." Avonmark Ins. Co. v Allstate Ins. Co., 188 Misc. 2d 867, 729 N.Y.S.2d 842, 2001 N.Y. Misc. LEXIS 285 (N.Y. Sup. Ct. 2001), aff'd, 294 A.D.2d 941, 741 N.Y.S.2d 640, 2002 N.Y. App. Div. LEXIS 4548 (N.Y. App. Div. 4th Dep't 2002).

Insurer of an offending vehicle in an automobile accident had an obligation to defend and/or provide coverage to an accident victim under N.Y. Ins. Law § 3420(f)(1) (formerly N.Y. Ins. Law § 167(2)(a)), even though the offending driver had given the police fraudulent identity information, because the insurer's defense of fraudulent inducement was outweighed by the public policy of protecting innocent, injured victims of the fraud. Anderson v Baker, 194 Misc. 2d 228, 750 N.Y.S.2d 466, 2002 N.Y. Misc. LEXIS 1457 (N.Y. Sup. Ct. 2002), rev'd, 2 A.D.3d 376, 769 N.Y.S.2d 549, 2003 N.Y. App. Div. LEXIS 12839 (N.Y. App. Div. 2d Dep't 2003).

In action by South Carolina automobile insurer to rescind South Carolina insurance policy ab initio following New York automobile accident, on basis that insured had fraudulently misrepresented that he resided in South Carolina, South Carolina law permitting rescission (rather than New York law prohibiting rescission) applied under New York's choice of law rules; New York's strong public policy of compulsory insurance would not be substantially compromised by choice of South Carolina law, whereas application of New York law would effectively undermine South Carolina's interest by placing same burden on South Carolina insurers to uncover misrepresentations that New York insurers bear. American Centennial Ins. Co. v Sinkler, 903 F. Supp. 408, 1995 U.S. Dist. LEXIS 15991 (E.D.N.Y. 1995).

In action to recover for environmental damage caused when truck owned by New York resident was involved in accident in New York, court would apply New York law for purposes of determining whether coverage existed under insurance policy issued to owner, even if policy were not issued in New York, where insurer was authorized to do business in New York. R. E. Turner, Inc. v Connecticut Indem. Co., 925 F. Supp. 139, 1996 U.S. Dist. LEXIS 6647 (W.D.N.Y. 1996).

Insurer with respect to New York Automobile Insurance Plan policy must make policy limit above $500,000 available, if application contains documentation from appropriate federal authority, state authority, municipal authority, school district or other political subdivision stating that such higher policy limits are required by law. Insurance Department, Opinions of General Counsel, Opinion Number 04-10-21.

VIII. Protection Against Uninsured Motorists

63. In general

Object of compulsory automobile insurance is to assure the protection of members of the public who are innocent victims of motor vehicle accidents by providing compensation for and protection from tortious wrongs committed against them. Rosado v Eveready Ins. Co., 34 N.Y.2d 43, 356 N.Y.S.2d 8, 312 N.E.2d 153, 1974 N.Y. LEXIS 1587 (N.Y. 1974).

Provision of family automobile policy excluding any accident with an uninsured automobile occurring within state of New York was inapplicable where policy contained required New York automobile accident indemnification endorsement providing coverage for accidents involving uninsured automobiles occurring in New York. Public Service Mut. Ins. Co. v Katcher, 36 N.Y.2d 295, 367 N.Y.S.2d 752, 327 N.E.2d 799, 1975 N.Y. LEXIS 1763 (N.Y. 1975).

Purpose of uninsured motor vehicle endorsement required by Insurance Law is to extend insurance coverage to insured persons who are victims of automobile accidents involving a negligent, financially irresponsible motorist. Country-Wide Ins. Co. v Wagoner, 45 N.Y.2d 581, 412 N.Y.S.2d 106, 384 N.E.2d 653, 1978 N.Y. LEXIS 2362 (N.Y. 1978).

Insurer's uninsured motorist policy endorsement must be construed as if all provisions of CLS Ins § 3420(f)(1) were embodied therein. Rowell v Utica Mut. Ins. Co., 77 N.Y.2d 636, 569 N.Y.S.2d 399, 571 N.E.2d 707, 1991 N.Y. LEXIS 628 (N.Y. 1991).

Motor vehicle accident indemnification corporation law does not supplement coverage of insured automobiles or protect insured persons against risks not covered by standard policy. Moffitt v Moffitt, 46 A.D.2d 944, 362 N.Y.S.2d 229, 1974 N.Y. App. Div. LEXIS 3290 (N.Y. App. Div. 3d Dep't 1974).

Although uninsured motorist endorsement is required by Insurance Law, the obligation of the insurance company is contractual rather than statutory in nature. State Farm Mut. Auto Ins. Co. v Basile, 48 A.D.2d 868, 368 N.Y.S.2d 584, 1975 N.Y. App. Div. LEXIS 10099 (N.Y. App. Div. 2d Dep't 1975).

In order to be covered against "underinsured" motorist, insured must purchase optional supplementary uninsured motorist insurance. Metropolitan Property & Liability Ins. Co. v Villarrubia, 119 A.D.2d 576, 500 N.Y.S.2d 744, 1986 N.Y. App. Div. LEXIS 55503 (N.Y. App. Div. 2d Dep't 1986).

Provisions of CLS Ins § 3420(f)(2), made mandatory at insured's option, require insurer to provide underinsured motorists coverage to extent of insured's liability coverage, and insurer may not limit such protection, through terms of automobile insurance policy, to amount of insured's underinsurance coverage; statute specifies that proper measure is whether other vehicle's underinsurance coverage is for lesser amount than claimant's bodily injury liability insurance limits of coverage, and statute does not confine measure to amount of insured's underinsurance coverage but rather calls for measure to be taken against insured's over- all liability insurance coverage. Automobile Ins. Co. v Stillway, 165 A.D.2d 572, 568 N.Y.S.2d 727, 1991 N.Y. App. Div. LEXIS 4469 (N.Y. App. Div. 1st Dep't 1991).

Automobile insurance policy did not provide underinsurance coverage, notwithstanding that policy applied to certain accidents where allegedly offending vehicle had insurance, since (1) such coverage only applied where coverage for allegedly offending vehicle was less than minimum limits of liability under state law, and (2) language used in policy was consistent with statutory requirement for providing uninsured coverage for accidents involving financially irresponsible motorists. Liberty Mut. Ins. Co. v Annunziatio, 187 A.D.2d 429, 589 N.Y.S.2d 551, 1992 N.Y. App. Div. LEXIS 12474 (N.Y. App. Div. 2d Dep't 1992).

Injured party may not combine its liability coverage from several policies to determine whether or not underinsurance benefits of one policy is triggered. State Farm Mut. Auto. Ins. Co. v Roth, 206 A.D.2d 376, 613 N.Y.S.2d 713, 1994 N.Y. App. Div. LEXIS 7091 (N.Y. App. Div. 2d Dep't 1994), app. denied, 84 N.Y.2d 812, 622 N.Y.S.2d 915, 647 N.E.2d 121, 1995 N.Y. LEXIS 33 (N.Y. 1995).

Insurer was entitled to stay of arbitration of underinsurance claim despite insured's contention that she should be excused for failing to obtain insurer's consent as condition precedent to coverage before releasing her claim against tortfeasors and their insurer in derogation of insurer's subrogation rights, on ground that wording of declaration sheet was misleading and ambiguous, as insurer's use of phrase "uninsured motorist" to denote, generically, separate categories of coverage that legislature labeled as "uninsured" and "supplementary uninsured" motorist coverage was not misleading. Travelers Ins. Co. v Magyar, 217 A.D.2d 954, 629 N.Y.S.2d 900, 1995 N.Y. App. Div. LEXIS 8379 (N.Y. App. Div. 4th Dep't 1995).

CLS Ins § 3420(f)(2) requires only that insurance company make available uninsured motorist insurance if insured requests it, and prohibits only refusal of insurance company to provide supplementary uninsured motorist insurance if insured requests it; insurance company is not required to specifically offer supplementary uninsured motorist insurance coverage to insured unless insured requests it. Downey v Allstate Ins. Co., 638 F. Supp. 322, 1986 U.S. Dist. LEXIS 22450 (S.D.N.Y. 1986).

Insurer would not have right to seek to enforce its rights under policy to demand physical examination or oral examination once insured had filed lawsuit if insurer had sufficient time to enforce its rights and failed to exercise them; if insurer presented justifiable excuse for its failure to enforce its rights, court of competent jurisdiction could stay proceedings to allow for discovery. Insurance Department, Opinions of General Counsel, Opinion Number 01-12-02.

64. Construction with other laws

Statutory exemption for police vehicles under uninsured motorist statute does not relieve governmental entities from liability

for injuries sustained in police vehicles that are caused by uninsured motorists, since police vehicles are expressly included under "no-fault" provisions of Insurance Law, requiring municipality to provide first-party benefits for loss arising out of use or operation of vehicles. State Farm Mut. Auto. Ins. Co. v Amato, 72 N.Y.2d 288, 532 N.Y.S.2d 239, 528 N.E.2d 162, 1988 N.Y. LEXIS 1670 (N.Y. 1988).

The power delegated to MVAIC by the provision of former § 606(b) [now § 5206] authorizing it to prescribe, subject to the approval of the superintendent, the endorsement form to be issued embodying the coverage required by subd 2-a of former § 167 [now § 3420(f)] is confined to the drafting of an endorsement which carries out the spirit and intention of the statute. And the approval by the Superintendent of Insurance does not render the endorsement invulnerable. Any endorsement which places an additional legal impediment on the right of an otherwise qualified person to avail himself of the remedies under former Article 17-A [now §§ 5201-5225] is contrary to the intention of that statute and is therefore void. Consequently the provision of Condition 4 of the Motor Vehicle Accident Indemnification endorsement requiring that if before MVAIC makes payment of loss under the policy, the insured or his legal representative institutes any action for bodily injury a copy of the summons and complaint or other process served in connection with such action shall be forwarded immediately to MVAIC is null and void. Brown v Motor Vehicle Accident Indemnification Corp., 48 Misc. 2d 170, 264 N.Y.S.2d 671, 1965 N.Y. Misc. LEXIS 1345 (N.Y. Sup. Ct. 1965).

As between liquidated commercial insurance company and the Motor Vehicle Accident Indemnification Corporation, the latter was not liable for amount of default judgment recovered against insured motor vehicle owner and uninsured operator as joint tort-feasors, where there was no indication that commercial insurer would have been unable to pay the damages under the supervision of the State Insurance Department pursuant to Insurance Law former § 510 [now § 7401]. Brown v Reid, 72 Misc. 2d 237, 339 N.Y.S.2d 204, 1972 N.Y. Misc. LEXIS 1244 (N.Y. Sup. Ct. 1972).

In dispute between insured and insurer arising out of accident in Ontario, Canada, in which insured was injured by uninsured Ohio vehicle, insured could recover Canadian limit of uninsured first-party benefits, which was higher than New York limit, since 11 NYCRR 60.1 mandates reading of such higher minimal coverage limits into New York policies not containing them. Smith v Nationwide Mut. Ins. Co., 145 Misc. 2d 318, 546 N.Y.S.2d 522, 1989 N.Y. Misc. LEXIS 639 (N.Y. Sup. Ct. 1989), aff'd, 181 A.D.2d 342, 585 N.Y.S.2d 899, 1992 N.Y. App. Div. LEXIS 9142 (N.Y. App. Div. 4th Dep't 1992).

Respondent, Montana resident who purchased automobile liability insurance there providing for maximum of $100,000 for bodily injury to one person in one accident and uninsured motorist coverage of $25,000/$50,000, was not entitled to underinsured motorist coverage for accident in New York caused by insured motor vehicle with liability limit of $50,000 since Montana, unlike New York, does not statutorily require that insurers offer underinsured motorist coverage, and respondent's uninsured motorist coverage, being viable amount of protection under Montana law, could not be deemed to also provide underinsured motorist protection. Allstate Ins. Co. v Richards, 148 Misc. 2d 759, 561 N.Y.S.2d 362, 1990 N.Y. Misc. LEXIS 510 (N.Y. Sup. Ct. 1990), aff'd, 178 A.D.2d 142, 576 N.Y.S.2d 577, 1991 N.Y. App. Div. LEXIS 15236 (N.Y. App. Div. 1st Dep't 1991).

Automobile rental company had no statutory or contractual duty to offer supplemental uninsured motorist insurance in its lease agreement, where company's lease agreement promises no more than bare "self-insurance" required by CLS Veh. & Tr. Law § 370. Danner v Hertz Corp., 584 F. Supp. 293, 1984 U.S. Dist. LEXIS 17691 (D. Del. 1984).

65. Liability policy distinguished

The indorsement required by Insurance Law former § 167 [now § 3420] exists independently from the standard policy to which it is annexed and remains viable even though liability under the main policy has been disclaimed by the insurer. Knickerbocker Ins. Co. v Faison, 22 N.Y.2d 554, 293 N.Y.S.2d 538, 240 N.E.2d 34, 1968 N.Y. LEXIS 1184 (N.Y.), reh'g denied, 22 N.Y.2d 973, 295 N.Y.S.2d 1033, 242 N.E.2d 499, 1968 N.Y. LEXIS 2305 (N.Y. 1968), cert. denied, 393 U.S. 1055, 89 S. Ct. 692, 21 L. Ed. 2d 696, 1969 U.S. LEXIS 2817 (U.S. 1969).

In a proceeding by an excess insurer to stay arbitration demanded by claimants who alleged that an uninsured motorist indorsement containing an arbitration clause was either incorporated by reference in the umbrella policy from the underlying automobile liability policy or was mandated by Ins Law former § 167 [now § 3420], the trial court correctly granted the insurer's petition to stay arbitration where the umbrella policy clearly provided excess protection and incorporated the underlying policies only as they provided for protection against liability for damages to third parties, where the uninsured motorist coverage provided by the underlying automobile liability policy did not involve claims of liability against the claimants from third parties and was not incorporated by the umbrella policy, and where the claimants received the protection of Ins Law former § 167 [now § 3420] through their primary underlying automobile liability insurance policy and were not left without any relief. Matarasso v Continental Casualty Co., 82 A.D.2d 861, 440 N.Y.S.2d 40, 1981 N.Y. App. Div. LEXIS 14550 (N.Y. App. Div. 2d Dep't 1981), aff'd, 56 N.Y.2d 264, 451 N.Y.S.2d 703, 436 N.E.2d 1305, 1982 N.Y. LEXIS 3358 (N.Y. 1982).

The endorsement required pursuant to former § 167 [now § 3420] has frequently and mistakenly been viewed as a liability policy, but it is evident there is a major difference between the insurance agreement contained in a liability policy and the indemnification indorsement, whereby the former protects the insured owner for any fault on his part which results in injuries to others, whereas the latter indorsement protects the insured owner or any person in his automobile for any injuries sustained by the negligent operation of an "uninsured motor vehicle." Shumate v Motor Vehicle Accident Indemnification Corp., 50 Misc. 2d 31, 269 N.Y.S.2d 639, 1966 N.Y. Misc. LEXIS 1927 (N.Y. Sup. Ct. 1966).

66. Extraterritorial application

Insureds who were injured in accident in New Jersey with uninsured motorist were not entitled to recover under automobile policy which expressly limited uninsured motorist coverage to accidents occurring within New York. Sentry Ins. Co. v Amsel, 36 N.Y.2d 291, 367 N.Y.S.2d 480, 327 N.E.2d 635, 1975 N.Y. LEXIS 1754 (N.Y. 1975).

Former § 167 [now § 3420] requiring inclusion of uninsured motorist coverage does not obligate an insurer to provide uninsured motorist coverage for accidents occurring outside the state. Sentry Ins. Co. v Amsel, 36 N.Y.2d 291, 367 N.Y.S.2d 480, 327 N.E.2d 635, 1975 N.Y. LEXIS 1754 (N.Y. 1975).

Insured was covered by uninsured motorist provisions of automobile insurance policy issued on automobile principally garaged or principally used in this state for injuries resulting from accident while a passenger in uninsured motor vehicle occurring in Canada, notwithstanding the language of Insurance Law former § 167 [now § 3420] requiring such uninsured motorist coverage for "accident occurring in this state." Askey v General Accident Fire & Life Assur. Corp., 30 A.D.2d 632, 290 N.Y.S.2d 759, 1968 N.Y. App. Div. LEXIS 3994 (N.Y. App. Div. 4th Dep't 1968), aff'd, 24 N.Y.2d 937, 302 N.Y.S.2d 576, 250 N.E.2d 65, 1969 N.Y. LEXIS 1319 (N.Y. 1969).

Injured party was not entitled to uninsured motorist benefits under CLS Ins § 3420(f)(1) where accident occurred outside of state. Transport Ins. Co. v Tedesco, 147 A.D.2d 936, 537 N.Y.S.2d 390, 1989 N.Y. App. Div. LEXIS 1174 (N.Y. App. Div. 4th Dep't 1989).

New York resident, who was involved in automobile accident while driving in New Jersey, was entitled to coverage under uninsured motorist provision of his automobile insurance policy, notwithstanding that policy explicitly stated that coverage was limited to accidents in New York, since (1) CLS Ins § 5103(e) requires that policy provide benefits in at least minimum amount prescribed by law of any state in which vehicle was operated, (2) 11 NYCRR § 60.1(e) provided that policy must provide at least minimum amount and type of coverage required by any other state, and (3) New Jersey law required uninsured motorist coverage. American Transit Ins. Co. v Abdelghany, 173 A.D.2d

611, 570 N.Y.S.2d 191, 1991 N.Y. App. Div. LEXIS 7606 (N.Y. App. Div. 2d Dep't 1991), aff'd, 80 N.Y.2d 162, 589 N.Y.S.2d 842, 603 N.E.2d 947, 1992 N.Y. LEXIS 3492 (N.Y. 1992).

New York residents, who were injured in automobile accident in province of Quebec, Canada, when their car collided with vehicle operated by Quebec resident, could not recover under uninsured motorist endorsement contained in policy of motor vehicle liability insurance on their car issued by New York insurance carrier since offending vehicle was insured for bodily injury liability under Quebec Automobile Insurance Act (QAIA), mandatory system of insurance reparations that compensates nonresident claimants to extent they are not responsible for accident to maximum of $20,000; offending vehicle was not "uninsured" simply because coverage was provided by governmental reparation program, and QAIA coverage applicable to offending vehicle, being tantamount to "owner's policy of liability insurance" (CLS Veh & Tr § 311(4)(a)), and clearly enabling offending driver "to respond in damages" (CLS Veh & Tr § 311(3)), constituted requisite proof of financial security. Federal Ins. Co. v Watnick, 176 A.D.2d 38, 578 N.Y.S.2d 624, 1992 N.Y. App. Div. LEXIS 738 (N.Y. App. Div. 2d Dep't), aff'd, modified, 80 N.Y.2d 539, 592 N.Y.S.2d 624, 607 N.E.2d 771, 1992 N.Y. LEXIS 4225 (N.Y. 1992).

Motorist who was injured while driving rental truck in Connecticut was not entitled to recover underinsured motorist benefits under policy, issued in New York to rental agency, in which agency elected supplementary uninsured motorist coverage of $10,000 per person as minimum amount allowable "extended out-of-state," where applicable Connecticut statute providing that uninsured and underinsured coverage be equal to that purchased for bodily injury liability did not make latter required "minimum amount" of coverage under CLS Ins § 5103(e), and unambiguous provisions of underinsured motorist endorsement made motorist's entitlement to benefits subject to offset by $100,000 that he recovered from other driver's insurer. Roberts v Eveready Ins Co., 245 A.D.2d 239, 666 N.Y.S.2d 627, 1997 N.Y. App. Div. LEXIS 13428 (N.Y. App. Div. 1st Dep't 1997).

Motorist who was injured while driving rental truck in Connecticut was not entitled to recover underinsured motorist benefits under policy, issued in New York to rental agency, in which agency elected supplementary uninsured motorist coverage of $d10,000 per person as minimum amount allowable "extended out-of-state," where applicable Connecticut statute providing that uninsured and underinsured coverage be equal to that purchased for bodily injury liability did not make latter required "minimum amount" of coverage under CLS Ins § 5103(e), and unambiguous provisions of underinsured motorist endorsement made motorist's entitlement to benefits subject to offset by $d100,000 that he recovered from other driver's insurer. Roberts v Eveready Ins Co., 245 A.D.2d 239, 666 N.Y.S.2d 627, 1997 N.Y. App. Div. LEXIS 13428 (N.Y. App. Div. 1st Dep't 1997).

Nonresident operator of Florida-registered vehicle was not uninsured within meaning of New York driver's uninsured motorist endorsement where nonresident operator was "subject to the financial responsibility law...of [this] state," so that her policy furnished bodily injury liability protection under its "Out of State Insurance" clause, and such protection conformed to that required by version of New York's Financial Security Act (CLS Veh & Tr § 311(3) and (4)(a)) in effect at time of accident, irrespective of whether such coverage must be read into policy under CLS Ins § 5107(a). General Accident Ins. Co. v Loi Tran, 246 A.D.2d 543, 667 N.Y.S.2d 417, 1998 N.Y. App. Div. LEXIS 204 (N.Y. App. Div. 2d Dep't 1998).

Motor Vehicle Accident Indemnification Corporation may be required to proceed to arbitration of a claim for damages submitted against it by one injured by the operator of a stolen automobile which was covered by insurance in favor of its owner issued in another state if the out-of-state insurance policy was not the equivalent of a standard New York policy or did not additionally provide for coverage of negligent acts of an insured while operating a stolen vehicle or intentional acts of the insured. Motor Vehicle Accident Indemnification Corp. v Kilgallon, 40 Misc. 2d 822, 244 N.Y.S.2d 123, 1963 N.Y. Misc. LEXIS 1453 (N.Y. Sup. Ct. 1963).

The fact that Ins Law § 167(2-a) [now § 3420] provides $50,000 uninsured motorist coverage for wrongful death within the state did not require that an optional supplementary insurance policy be construed to provide that amount of coverage, where voluntary supplemental uninsured motorist insurance for bodily injury occurring outside of the state, pursuant to the policy's uninsured motorist indorsement and Ins Law § 167(2-a) [now § 3420], had a maximum amount of coverage of $10,000 for each person on account of bodily injury, sickness or disease, including death. Home Indem. Co. v Allwood, 122 Misc. 2d 757, 471 N.Y.S.2d 824, 1984 N.Y. Misc. LEXIS 2943 (N.Y. Sup. Ct. 1984).

New York resident, who sustained injuries in New York accident when leased vehicle in which she was passenger was struck by another vehicle, was not entitled to underinsurance coverage from insurer of leased vehicle, which was registered in Rhode Island and leased to New Jersey resident, where underinsurance coverage was made available to but declined by lessee, and policy provided underinsurance coverage "only in those states where such coverage is statutory," since although Rhode Island law, unlike New York law, mandated underinsurance coverage for vehicles registered in that State, it did so only for liability policies delivered or issued for delivery in Rhode Island, and instant policy was issued and delivered in New Jersey. Lumbermen's Mut. Casualty Co. v Morse, 152 Misc. 2d 482, 577 N.Y.S.2d 566, 1991 N.Y. Misc. LEXIS 666 (N.Y. Sup. Ct. 1991).

New York resident, who sustained injuries in New York accident when leased vehicle in which she was passenger was struck by another vehicle, was not entitled to underinsurance coverage from insurer of leased vehicle, which was registered in Rhode Island and leased to New Jersey resident, where underinsurance coverage was made available to but declined by lessee, and policy provided underinsurance coverage "only in those states where such coverage is statutory," since although Rhode Island law, unlike New York law, mandated underinsurance coverage for vehicles registered in that State, it did so only for liability policies delivered or issued for delivery in Rhode Island, and instant policy was issued and delivered in New Jersey. Lumbermen's Mut. Casualty Co. v Morse, 152 Misc. 2d 482, 577 N.Y.S.2d 566, 1991 N.Y. Misc. LEXIS 666 (N.Y. Sup. Ct. 1991).

67. Types of vehicles to which provisions apply

Former § 167 [now § 3420] is not applicable in the construction of the term "uninsured automobile" as defined in a policy issued by a private liability insurance company, since plaintiff's suit was not against MVAIC and the accident occurred outside of the state. Vanguard Ins. Co. v Polchlopek, 18 N.Y.2d 376, 275 N.Y.S.2d 515, 222 N.E.2d 383, 1966 N.Y. LEXIS 986 (N.Y. 1966).

Where an insured was struck by an uninsured motorist while operating his motorcycle and maintained a liability policy on the motorcycle although he also qualified as an "insured" under a policy issued by a second insurer, the issuer of the policy on the motorcycle is a primary insurer and the second insurer's exposure is limited to that of an excess insurer, since the term "automobile", as it appears in an automobile accident indemnification endorsement, includes the term "motorcycle"; the endorsement, in compliance with subdivision 2-a of former § 167 [now § 3420(f)] of the Insurance Law, forms a part of New York State motor vehicle liability policies, and provides that with respect to bodily injury to an insured while occupying an automobile not owned by the named insured, the insurance shall apply only as excess insurance over any primary insurance in the amount by which the limit of liability exceeds the applicable limit of liability of the other insurance, and except as previously provided, if the insured has other similar insurance available, the company will not be liable for a greater proportion of any loss than the liability limit bears to the sum of the limits of liability of the policy and the other insurance. Country-Wide Ins. Co. v Wagoner, 45 N.Y.2d 581, 412 N.Y.S.2d 106, 384 N.E.2d 653, 1978 N.Y. LEXIS 2362 (N.Y. 1978).

The term "automobile", as it appears in an automobile accident indemnification endorsement which, in compliance with subdivision 2-a of former § 167 [now § 3420] of the Insurance Law, forms a part of New York State motor vehicle liability policies, and provides that with respect to bodily injury to an insured while

occupying an automobile not owned by the named insured, the insurance shall apply only as excess insurance over any primary insurance in the amount by which the limit of liability exceeds the applicable limit of liability of the other insurance, and, except as previously provided, if the insured has other similar insurance available, the company will not be liable for a greater proportion of any loss than the liability limit bears to the sum of the limits of liability of the policy and the other insurance, includes the term "motorcycle", since the purpose of the endorsement is to provide coverage to insured persons who suffer automobile accident injuries at the hands of financially irresponsible motorists, and calls for a policy of inclusion rather than exclusion in determining whom it covers; the principal Insurance Law provisions from which the endorsement is derived confirm this policy as it applies to motorcycles, inasmuch as each policy must contain an endorsement making payable to an insured certain amounts "as damages from an owner or operator of an uninsured motor vehicle" (Insurance Law, § 167, subd 2-a [now § 3420(f)]), and "motor vehicle" encompasses "motorcycle" Country-Wide Ins. Co. v Wagoner, 45 N.Y.2d 581, 412 N.Y.S.2d 106, 384 N.E.2d 653, 1978 N.Y. LEXIS 2362 (N.Y. 1978).

Municipality, as unregulated self-insurer, was not required to provide uninsured motorist coverage to police officers who were injured when their police vehicles were struck by uninsured vehicles, since police vehicle is specifically excluded from definition of "motor vehicle" in CLS Veh & Tr § 388, and thus CLS Ins § 3420(f) has no application to such vehicle. State Farm Mut. Auto. Ins. Co. v Amato, 72 N.Y.2d 288, 532 N.Y.S.2d 239, 528 N.E.2d 162, 1988 N.Y. LEXIS 1670 (N.Y. 1988).

Court would decline to endorse exclusion which purports to exclude from uninsured motor vehicle endorsement vehicles used "to carry persons or property for a fee" since neither CLS Ins § 3420(f)(1) nor any applicable regulations mentions any exclusions, and any such exclusions should be expressly authorized. Liberty Mut. Ins. Co. v Hogan, 82 N.Y.2d 57, 603 N.Y.S.2d 409, 623 N.E.2d 536, 1993 N.Y. LEXIS 3359 (N.Y. 1993).

Failure of Superintendent of Insurance to withdrawal approval of uninsured motor vehicle policy which contained "livery exclusion" would not be construed as approval of exclusion since inaction does not divest court of its duty to interpret statutes so as to reach reasonable result wherever possible. Liberty Mut. Ins. Co. v Hogan, 82 N.Y.2d 57, 603 N.Y.S.2d 409, 623 N.E.2d 536, 1993 N.Y. LEXIS 3359 (N.Y. 1993).

Where plaintiff was injured while riding in a police vehicle driven by a fellow officer that was struck by an underinsured vehicle, the fellow officer's insurer was not required to provide plaintiff supplementary uninsured/underinsured motorist coverage because a police vehicle was not a "motor vehicle" for purposes of mandatory underinsured motorist coverage under this section. Matter of State Farm Mut. Auto. Ins. Co. v Fitzgerald, 25 N.Y.3d 799, 38 N.E.3d 325, 16 N.Y.S.3d 796, 2015 N.Y. LEXIS 1526 (N.Y. 2015).

Supplementary uninsured/underinsured motorist (SUM) endorsement prescribed by this section exempts police vehicles from its definition of the term "motor vehicle" absent a specific provision to the contrary in a given SUM endorsement. Matter of State Farm Mut. Auto. Ins. Co. v Fitzgerald, 25 N.Y.3d 799, 38 N.E.3d 325, 16 N.Y.S.3d 796, 2015 N.Y. LEXIS 1526 (N.Y. 2015).

Insurance Law former § 167, subd 2-a [now § 3420(f)] includes uninsured motorcycles in the term "uninsured motor vehicles." Askey v General Acci. Askey v General Accident Fire & Life Assur. Corp., 30 A.D.2d 632, 290 N.Y.S.2d 759, 1968 N.Y. App. Div. LEXIS 3994 (N.Y. App. Div. 4th Dep't 1968), aff'd, 24 N.Y.2d 937, 302 N.Y.S.2d 576, 250 N.E.2d 65, 1969 N.Y. LEXIS 1319 (N.Y. 1969).

Where an infant claimant was injured by a motor scooter operated by a boy who found it in the woods, without license plates and apparently abandoned, plaintiff's application for leave to submit his claim to arbitration under the uninsured motorist's endorsement in her father's automobile liability insurance policy was granted, since it was sufficiently established the motor scooter was uninsured, or stolen, or operated without the owner's consent and the policy endorsement's coverage of "uninsured automobiles" included an uninsured motor scooter. Early v Motor Vehicle Acci. Indemnification Corp., 32 A.D.2d 1042, 303 N.Y.S.2d 709, 1969 N.Y. App. Div. LEXIS 3294 (N.Y. App. Div. 3d Dep't 1969).

An insurer was liable under term of uninsured motorist endorsement contained in policy issued to deceased wife referring to "uninsured automobiles", as it was deemed to cover all uninsured motor vehicles and the motor driven cycle involved in the accident was an "uninsured motor vehicle" within the meaning of the endorsement. Lalomia v Bankers & Shippers Ins. Co., 35 A.D.2d 114, 312 N.Y.S.2d 1018, 1970 N.Y. App. Div. LEXIS 3949 (N.Y. App. Div. 2d Dep't), app. dismissed, 27 N.Y.2d 796, 315 N.Y.S.2d 856, 264 N.E.2d 349, 1970 N.Y. LEXIS 1068 (N.Y. 1970), app. denied, 27 N.Y.2d 490, 1970 N.Y. LEXIS 2235 (N.Y. 1970), aff'd, 31 N.Y.2d 830, 339 N.Y.S.2d 680, 291 N.E.2d 724, 1972 N.Y. LEXIS 961 (N.Y. 1972), limited, New Hampshire Ins. Co. v Jefferson Ins. Co., 213 A.D.2d 325, 624 N.Y.S.2d 392, 1995 N.Y. App. Div. LEXIS 3290 (N.Y. App. Div. 1st Dep't 1995).

Automobile liability insurer was obligated to provide plaintiff insureds with uninsured motorist benefits for injuries caused by uninsured all-terrain vehicle operator, since policy coverage extended, as matter of law, to all motor vehicles as defined by CLS Veh & Tr § 125, which, at time of accident, did not specifically exclude all-terrain vehicles (although it was subsequently amended to exclude them). Harper v Lumbermens Mut. Casualty Co., 174 A.D.2d 1031, 572 N.Y.S.2d 195, 1991 N.Y. App. Div. LEXIS 8976 (N.Y. App. Div. 4th Dep't), app. dismissed, 78 N.Y.2d 1110, 578 N.Y.S.2d 873, 586 N.E.2d 56, 1991 N.Y. LEXIS 4975 (N.Y. 1991).

Automobile liability insurance policy with standard New York uninsured motorist endorsement provided uninsured motorist coverage to minor daughter of insured where she was injured while riding as passenger on uninsured all-terrain vehicle (ATV) since ATVs are treated on par with motorcycles for insurance purposes and policy did not expressly exclude either ATVs or motorcycles from definition of uninsured automobile. Nationwide Mut. Ins. Co. v Riccadulli, 183 A.D.2d 111, 589 N.Y.S.2d 356, 1992 N.Y. App. Div. LEXIS 12211 (N.Y. App. Div. 2d Dep't 1992).

In action by insured whose child was pinned between bumpers of pickup truck and car being manually pushed toward truck, insurer was not entitled to summary judgment dismissing uninsured motorist claim on ground that car, because it was temporarily inoperable at time of accident, did not qualify as motor vehicle under CLS Veh & Tr § 125 and thus was not "uninsured motor vehicle" under subject policy as matter of law; factual issues existed whether accident arose out of maintenance or use of vehicle within meaning of policy. Dupra v Benoit, 270 A.D.2d 856, 705 N.Y.S.2d 781, 2000 N.Y. App. Div. LEXIS 3490 (N.Y. App. Div. 4th Dep't 2000).

Motorcycle was not "automobile" within uninsured motorist endorsement of family automobile policy issued to motorcycle owner which defined "insured" as named insured and any other person while occupying an automobile owned by the named insured and thus, driver of owner's motorcycle was not an "insured" and could not recover from the insurer for injuries sustained in a collision with an uninsured motorist. Summit Ins. Co. v Beach, 80 Misc. 2d 382, 363 N.Y.S.2d 210, 1974 N.Y. Misc. LEXIS 1899 (N.Y. Sup. Ct. 1974).

Ins Law § 601(a) excludes police vehicles from the definition of motor vehicles for purposes of claims against the Motor Vehicle Accident Indemnification Corporation, and such exclusion is incorporated into Ins Law § 167(2-a), which governs actions involving insurers or self-insurers. Accordingly, the City of New York, a self-insurer, would not be obligated to provide uninsured motorist benefits to employee police officers who were injured in a collision between their police vehicle and an uninsured automobile. New York v Collins, 126 Misc. 2d 377, 482 N.Y.S.2d 422, 1984 N.Y. Misc. LEXIS 3625 (N.Y. Sup. Ct. 1984), disapproved, State Farm Mut. Auto. Ins. Co. v Amato, 129 A.D.2d 221, 517 N.Y.S.2d 728, 1987 N.Y. App. Div. LEXIS 44895 (N.Y. App. Div. 2d Dep't 1987).

There is no requirement in Insurance Law or Vehicle and Traffic Law that cab companies, or any other self-insured entity, maintain supplemental uninsured motorist (SUM) coverage in

excess of mandatory limits. Insurance Department, Opinions of General Counsel, Opinion Number 04-04-28.

68. Qualified and insured person

Although former § 167 [now § 3420] is not controlling in the construction of the term "uninsured motorist" as defined in a policy issued by a private liability insurer, it does express the public policy of New York that motorists should be protected against damages inflicted by a financially irresponsible party and should not be ignored. Vanguard Ins. Co. v Polchlopek, 18 N.Y.2d 376, 275 N.Y.S.2d 515, 222 N.E.2d 383, 1966 N.Y. LEXIS 986 (N.Y. 1966).

Phrase "occupying the automobile" as used in defining whether person is "insured" under both uninsured motorist endorsement and CLS Ins § 3420(f)(3) should be interpreted liberally due to expansive definition in statute ("in or upon or entering into or alighting from" automobile) and in standard policy endorsements. Rowell v Utica Mut. Ins. Co., 77 N.Y.2d 636, 569 N.Y.S.2d 399, 571 N.E.2d 707, 1991 N.Y. LEXIS 628 (N.Y. 1991).

"Use" of automobile, for purpose of determining whether person is "insured" under both uninsured motorist endorsement and CLS Ins § 3420(f)(3), encompasses more than simply its driving and includes all necessary incidental activities such as entering and leaving its confines. Rowell v Utica Mut. Ins. Co., 77 N.Y.2d 636, 569 N.Y.S.2d 399, 571 N.E.2d 707, 1991 N.Y. LEXIS 628 (N.Y. 1991).

Plaintiff's act of opening vehicle door and trying to enter as it was being stolen fit within broad definition of "occupying" and "using" vehicle under both standard uninsured motorist policy endorsement and CLS Ins § 3420(f)(3) for purpose of determining whether plaintiff was "insured" under endorsement and statute. Rowell v Utica Mut. Ins. Co., 77 N.Y.2d 636, 569 N.Y.S.2d 399, 571 N.E.2d 707, 1991 N.Y. LEXIS 628 (N.Y. 1991).

Reasonable interpretation of scope of permission given by insured to her brother to use her vehicle, for purpose of determining whether brother was "insured" under standard uninsured motorist policy endorsement, included brother's attempt to stop thief from stealing vehicle while it was in his trust. Rowell v Utica Mut. Ins. Co., 77 N.Y.2d 636, 569 N.Y.S.2d 399, 571 N.E.2d 707, 1991 N.Y. LEXIS 628 (N.Y. 1991).

Bicyclist injured by uninsured motorist was not "family member" covered by his father's insurance policy where policy defined "family member" as person related to insured who was resident of insured's household, whereas bicyclist resided in his own Manhattan apartment more than 80 percent of time, although he stored some belongings in his parents' New Jersey house and occasionally spent night there. Aetna Casualty & Surety Co. v Gutstein, 80 N.Y.2d 773, 587 N.Y.S.2d 268, 599 N.E.2d 672, 1992 N.Y. LEXIS 1530 (N.Y. 1992).

Insurer's application for stay of arbitration was properly denied where insurer contended that policy purchased by husband of accident victim involving uninsured motorist did not extend coverage to her; regardless of specific terms of policy, coverage would be deemed to extend to spouse of insured, who was resident in same household as insured, under 11 NYCRR § 60.1(c). Insurance Co. of North America v Lyman, 148 A.D.2d 456, 538 N.Y.S.2d 829, 1989 N.Y. App. Div. LEXIS 2472 (N.Y. App. Div. 2d Dep't 1989).

Appellant was not covered person entitled to underinsured motorist benefits under her father's motor vehicle insurance policy where policy provided coverage only for persons related to insured by blood, marriage, or adoption who were residents of insured's household, and appellant merely stored some belongings in her father's house and visited about once per month. Aetna Casualty & Sur. Co. v Panetta, 202 A.D.2d 662, 609 N.Y.S.2d 631, 1994 N.Y. App. Div. LEXIS 2895 (N.Y. App. Div. 2d Dep't 1994).

Appellant was not shown to be "family member" within meaning of policy, and thus he was not entitled to arbitration of his claim for underinsured motorist benefits under his uncle's insurance policy, where he offered no documentary evidence regarding residence in his uncle's house, and hearing court determined that his testimony, and that of his mother, was incredible. Koback v Commercial Union Ins. Co., 223 A.D.2d 708, 637 N.Y.S.2d 424, 1996 N.Y. App. Div. LEXIS 665 (N.Y. App. Div. 2d Dep't), app. denied, 88 N.Y.2d 807, 647 N.Y.S.2d 164, 670 N.E.2d 448, 1996 N.Y. LEXIS 1603 (N.Y. 1996).

Insurer was not entitled to summary judgment in action alleging, inter alia, that it was estopped from denying supplemental underinsured motorist (SUM) coverage, on ground it had previously failed to dispute plaintiff's eligibility and made representations that SUM coverage would be available, since correspondence between plaintiff and insurer suggested that during course of their dealings insurer recognized plaintiff's claim to SUM coverage, and whether plaintiff could show that she relied to her detriment on insurer's representations sufficiently to establish estoppel presented triable fact issue; change in state of law resulting from Matter of Prudential Property & Casualty Co. v Szeli, 83 NY2d 681, did not constitute detrimental reliance. Reeve v General Accident Ins. Co., 239 A.D.2d 759, 658 N.Y.S.2d 143, 1997 N.Y. App. Div. LEXIS 5227 (N.Y. App. Div. 3d Dep't 1997).

Insurer was properly granted summary judgment declaring that plaintiff was not covered under underinsured provisions of named insured's automobile policy, even if word "spouse" in policy could be understood to include same-sex partners living together in spousal-type relationship, since plaintiff failed to raise fact issue as to whether such was nature of his relationship with insured. Ortiz v New York City Transit Auth., 267 A.D.2d 33, 699 N.Y.S.2d 370, 1999 N.Y. App. Div. LEXIS 12635 (N.Y. App. Div. 1st Dep't 1999).

Former wife was not covered person entitled to supplementary uninsured motorist benefits under her former husband's insurance policy where policy provided such coverage only for "named insured and, while residents of the same household (the insured's) spouse and the relatives of either of (the named insured or spouse)," notwithstanding that former wife stored some belongings in her then-estranged husband's home, had key, and would visit to obtain clothing, since she admitted in sworn documents and in police accident report that she had been living separate and apart from her husband at time of accident and that her resident address was not marital address. Nationwide Ins. Co. v Smaller, 271 A.D.2d 537, 706 N.Y.S.2d 140, 2000 N.Y. App. Div. LEXIS 4015 (N.Y. App. Div. 2d Dep't 2000).

A person who is covered by a policy of insurance issued pursuant to this section recovers under the terms of the policy as set forth therein, without regard to the rights of a "qualified person" to recover in other circumstances under the provisions of former art. Motor Vehicle Accident Indemnification Corp. v Morera, 31 Misc. 2d 51, 219 N.Y.S.2d 553, 1961 N.Y. Misc. LEXIS 2449 (N.Y. Sup. Ct. 1961).

Insurance carrier was not liable for claim under uninsured motorist endorsement of policy covering only injury to persons "occupying" or "upon" insured vehicle where injured party had one foot on ground and other on runningboard of insured vehicle, which was parked with motor on when struck by vehicle which left scene, since more than mere intent to occupy vehicle is required to alter status of individual from pedestrian to one "occupying" vehicle. Colonial Penn Ins. Co. v Curry, 157 Misc. 2d 282, 596 N.Y.S.2d 317, 1993 N.Y. Misc. LEXIS 109 (N.Y. Sup. Ct. 1993).

Registered domestic partner did not fall within definition of insured under prescribed endorsement except as occupant of motor vehicle insured for supplemental uninsured motorist under policy. Insurance Department, Opinions of General Counsel, Opinion Number 00-07-08.

69. —Qualified or insured status of particular vehicles and motorists

Person who left her vehicle to change places with driver behind her, injured when impact of uninsured third vehicle pinned her between the two autos being exchanged, was not, regardless of her interrupted intent to enter second vehicle, an occupant of either vehicle, and thus, although not an "insured" entitled to uninsured motorist coverage pursuant to Insurance Law former § 167, subd 2-a [now § 3420], was a "qualified person" as defined by Insurance Law former § 601, subd b [now § 5202(b)], and as such entitled to proceed against the MVAIC. Rice v Allstate Ins.

Co., 32 N.Y.2d 6, 342 N.Y.S.2d 845, 295 N.E.2d 647, 1973 N.Y. LEXIS 1435 (N.Y. 1973).

Uninsured motorist policy endorsement required by CLS Ins § 3420(f)(1)should be considered to be embodied in policy where insured was injured while attempting to stop theft of vehicle, which coincidentally was vehicle that was insured under policy in question; thus, insured would be declared entitled to make claim only against insurer, even though policy purported to exclude coverage for damages caused by "an automobile owned by named insured." Rowell v Utica Mut. Ins. Co., 77 N.Y.2d 636, 569 N.Y.S.2d 399, 571 N.E.2d 707, 1991 N.Y. LEXIS 628 (N.Y. 1991).

Vehicle owned by Quebec citizen in automobile accident occurring in Quebec was not "uninsured" within meaning of either Insurance Law or policy issued to New York accident victims where Quebec vehicle was covered by province's mandatory system of insurance reparations which is "tantamount to an owner's policy of liability insurance" in that it permits its insureds to respond in damages for any bodily injury which they may cause to others, and thus provides its insureds with proof of financial security. Federal Ins. Co. v Watnick, 80 N.Y.2d 539, 592 N.Y.S.2d 624, 607 N.E.2d 771, 1992 N.Y. LEXIS 4225 (N.Y. 1992).

In a proceeding by a sanitation worker who had been injured in the scope of his employment when his sanitation truck was struck by unidentified motor vehicle which left scene of accident wherein the worker sought arbitration of his uninsured motorist claim, the trial court erred in finding that the city was required to afford uninsured motorist protection to the worker, where the city, although subject to tort liability, was statutorily exempt from the requirement of providing proof of financial security on its motor vehicles by virtue of the statutory exemption granted to political entities, and where, since the city had not voluntarily obtained liability coverage for its vehicles, it was an unregulated self-insurer, and in such capacity was not required to furnish uninsured motorist coverage. Nassau Ins. Co. v Guarascio, 82 A.D.2d 505, 442 N.Y.S.2d 83, 1981 N.Y. App. Div. LEXIS 11384 (N.Y. App. Div. 2d Dep't 1981).

A taxicab driver who, while exchanging credentials with the driver of a vehicle with which he had a minor collision, was struck by a third uninsured motorist did not cease to be qualified to recover under the uninsured motorist endorsement of his policy, where the taxicab driver, upon completion of the exchange of credentials, had every intention to return to his cab, and when a departure from a vehicle is occasioned by or is incident to some temporary interruption and the occupant remains in the immediate vicinity of the vehicle and intends to resume his place in the vehicle upon completion of the objective, he does not cease to be a covered person under the uninsured motorist endorsement. In re Nassau Ins. Co., 103 A.D.2d 780, 477 N.Y.S.2d 415, 1984 N.Y. App. Div. LEXIS 19396 (N.Y. App. Div. 2d Dep't 1984).

Hearing was required when issue of fact was raised as to whether daughter lived with her father, so as to be included in father's household as insured under father's policy, where daughter gave, as her permanent address, address different than her father's when she was admitted to hospital following accident, she subsequently submitted affidavit asserting that she resided with father on day of accident, but she failed to submit affidavit from father confirming that assertion. Aetna Casualty & Surety Co. v Facciponti, 133 A.D.2d 60, 519 N.Y.S.2d 3, 1987 N.Y. App. Div. LEXIS 49586 (N.Y. App. Div. 1st Dep't 1987).

Insurance carrier was entitled to permanent stay of arbitration of uninsured motorist claim under policy issued to closed corporation since individual who was officer, director and shareholder of corporation was not covered thereunder for injuries sustained when he was struck by car while riding his bicycle; policy language covered only automobiles owned by corporation and occupants thereof, and it would reach beyond plain meaning of policy to hold that persons not mentioned in policy were nonetheless covered when not occupying corporate vehicles. Continental Ins. Co. v Velez, 134 A.D.2d 348, 520 N.Y.S.2d 824, 1987 N.Y. App. Div. LEXIS 50525 (N.Y. App. Div. 2d Dep't 1987).

Insurer was entitled to stay of arbitration of underinsured motorist claim brought by daughter of insureds, who was listed as "driver" on face sheet and declarations page of her parents' auto policy but was not listed as "insured" and did not reside in her parents' household at time she was injured, since she was excluded from coverage by plain language of policy, which provided for insurer to pay all sums that "insured" was legally entitled to recover as damages from owner of underinsured vehicle, and which defined "insured" as "named insured and, while residents of the same household, his spouse and the relative of either." Metropolitan Property & Liability Co. v Feduchka, 135 A.D.2d 715, 522 N.Y.S.2d 616, 1987 N.Y. App. Div. LEXIS 52654 (N.Y. App. Div. 2d Dep't 1987).

Motor Vehicle Accident Indemnification Corporation was not entitled to stay of arbitration for no-fault benefits where respondent, who was driver of uninsured vehicle, was involved in accident with another uninsured vehicle since he fit definition of qualified person under CLS Ins § 5221, even assuming that vehicle driven by him was owned by his wife. Motor Vehicle Accident Indemnification Corp. v Mitchell, 155 A.D.2d 296, 547 N.Y.S.2d 60, 1989 N.Y. App. Div. LEXIS 14017 (N.Y. App. Div. 1st Dep't 1989), app. denied, 76 N.Y.2d 703, 559 N.Y.S.2d 982, 559 N.E.2d 676, 1990 N.Y. LEXIS 1406 (N.Y. 1990).

Offending vehicle was underinsured within meaning of claimant's policy where (1) policy stated that underinsured vehicle meant vehicle to which bodily injury liability policy applied at time of accident, "but its limit for bodily injury liability is less than the bodily injury liability limits provided under this policy," and (2) limit of bodily injury liability of offending vehicle was $50,000/$100,000, and limit of bodily injury liability of insured's vehicle was $300,000; issue would not be resolved by comparison of bodily injury liability limits of offending vehicle's policy with limits of underinsured motorist coverage of claimant's policy. Liberty Mut. Ins. Co. v Balaran, 163 A.D.2d 314, 557 N.Y.S.2d 159, 1990 N.Y. App. Div. LEXIS 8272 (N.Y. App. Div. 2d Dep't 1990).

Automobile driver's insurance company was entitled to summary judgment dismissing action by automobile owner's insurance company for reimbursement of amount of settlement in action by injured third person against driver and owner since driver's insurance company was prejudiced by 2-year delay by owner's insurance company in notifying it of accident and action, and driver's insurance company was not estopped from disclaiming liability under CLS Ins § 3420(d). Allstate Ins. Co. v Aetna Cas. & Sur. Co., 191 A.D.2d 665, 595 N.Y.S.2d 552, 1993 N.Y. App. Div. LEXIS 3150 (N.Y. App. Div. 2d Dep't), app. dismissed, in part, app. denied, 82 N.Y.2d 744, 602 N.Y.S.2d 798, 622 N.E.2d 299, 1993 N.Y. LEXIS 3193 (N.Y. 1993).

Automobile was not insured on date of accident, since policy had automatically expired when insured failed to notify insurer of her acquisition of vehicle within 30 days of such acquisition as required by terms of policy. St. Paul Fire & Marine Ins. Co. v Nocca, 207 A.D.2d 457, 615 N.Y.S.2d 766, 1994 N.Y. App. Div. LEXIS 8318 (N.Y. App. Div. 2d Dep't 1994).

Plaintiff, who was passenger in uninsured vehicle which collided with insured vehicle, was not covered by uninsured motorist portion of automobile liability policy issued to corporation owned by plaintiff's father since policy expressly provided that "uninsured motorist coverage" (which included both uninsured and underinsured coverage) applied to "owned autos only." Truncali v Fireman's Fund Ins. Co., 208 A.D.2d 826, 618 N.Y.S.2d 50, 1994 N.Y. App. Div. LEXIS 10078 (N.Y. App. Div. 2d Dep't 1994).

Insurer should have been granted summary judgment declaring that supplemental underinsured motorist (SUM) coverage did not extend to injuries sustained by insured's spouse while operating motorcycle, despite contention that SUM coverage for injuries "incurred while occupying a motor vehicle" under subject policy should be read to include any injuries sustained while occupying motorcycle, where personal injury portion of policy expressly excluded from its ambit injury to "any person while occupying a motorcycle." Cohen v Chubb Indem. Ins. Co., 286 A.D.2d 264, 729 N.Y.S.2d 105, 2001 N.Y. App. Div. LEXIS 8056 (N.Y. App. Div. 1st Dep't 2001).

Where at the time his daughter was struck by a hit and run vehicle the petitioner had in effect a policy of automobile liability insurance, the benefits of which extended to the members of his household, the infant claimant was covered by the policy and was an "insured" person whose rights were governed solely by the

contract. McNulty v Motor Vehicle Accident Indemnification Corp., 51 Misc. 2d 1, 272 N.Y.S.2d 514, 1966 N.Y. Misc. LEXIS 1736 (N.Y. Sup. Ct. 1966), aff'd, 28 A.D.2d 1209, 284 N.Y.S.2d 858, 1967 N.Y. App. Div. LEXIS 8019 (N.Y. App. Div. 2d Dep't 1967).

Insured's daughter, who was injured while a passenger in a non-owned automobile being operated without the owner's implied or express consent, was an "insured person" for the purposes of insured's uninsured motorist coverage under Insurance L former § 167, subd 2-a [now § 3420(f)]. Dingsor v Merchants Mut. Ins. Co., 72 Misc. 2d 862, 340 N.Y.S.2d 562, 1973 N.Y. Misc. LEXIS 2241 (N.Y. Sup. Ct. 1973).

Coverage afforded bus driver under uninsured motorist endorsement of his personal automobile policy could not be extended to afford coverage under policy to a bus passenger injured as a result of a collision between bus and an admittedly uninsured vehicle. Empire Mut. Ins. Co. v Brown, 80 Misc. 2d 712, 363 N.Y.S.2d 713, 1975 N.Y. Misc. LEXIS 2242 (N.Y. Sup. Ct. 1975).

Supplementary uninsured/underinsured motorist (SUM) endorsement issued to church under business motor vehicle liability insurance policy covered church employee when employee was driving her own personal motor vehicle in course of her employment and while acting within scope of her duties as church employee; further, passengers in church employee's personal motor vehicle were covered as insureds under church's SUM endorsement. Insurance Department, Opinions of General Counsel, Opinion Number 02-02-07.

Individual who had personal auto insurance policy with Uninsured Motorist (UM) coverage of $25,000, but had not purchased Supplementary Uninsured Motorist (SUM) Coverage, could file SUM claim under his brother's policy for up to $75,000 in SUM coverage where individual suffered injuries in excess of $25,000, and brother, who lived in same household, had separate personal auto insurance policy with SUM coverage of $100,000. Insurance Department, Opinions of General Counsel, Opinion Number 04-10-10.

70. Situations in which provision becomes operative

Some involvement of another vehicle is prerequisite to uninsured motorist coverage under both New York and New Jersey law. Metropolitan Property & Liability Ins. Co. v Falkovitz, 73 N.Y.2d 798, 537 N.Y.S.2d 23, 533 N.E.2d 1052, 1988 N.Y. LEXIS 3370 (N.Y. 1988).

Insured under automobile insurance policy could not recover from insurer pursuant to underinsured motor vehicle coverage where (1) his policy defined "underinsured motor vehicle" as one having lower limit of liability than insured's vehicle, (2) insured's limit of liability was $10,000, and (3) other vehicle involved in accident also had $10,000 limit of liability; underinsured motor vehicle coverage was definitionally not available under policy terms despite fact that one who purchases minimum $10,000 coverage may never have occasion to recover on underinsured motorist endorsement. Maurizzio v Lumbermens Mut. Casualty Co., 73 N.Y.2d 951, 540 N.Y.S.2d 982, 538 N.E.2d 334, 1989 N.Y. LEXIS 371 (N.Y. 1989).

Where the driver admitted that he was uninsured when the accident occurred and the driver's insurance broker testified that he had received a copy of the cancellation notice, the weight of credible evidence established that the liability policy had already been cancelled when the accident occurred and thus there was proper recourse to the uninsured motorist clause under the other driver's policy. Empire Mut. Ins. Co. v Insurance Co. of North America, 83 A.D.2d 822, 442 N.Y.S.2d 776, 1981 N.Y. App. Div. LEXIS 15185 (N.Y. App. Div. 1st Dep't 1981), aff'd, 55 N.Y.2d 837, 447 N.Y.S.2d 703, 432 N.E.2d 596, 1982 N.Y. LEXIS 3046 (N.Y. 1982).

Uninsured motorist provision permitting payments made under mandatory uninsured motorist endorsement to be offset by amounts paid in lieu of first-party benefits under Workers' Compensation Law would be violative of Insurance Law, since qualified person injured by uninsured motorist is guaranteed at least $10,000 worth of coverage available to compensate him for pain and suffering (noneconomic loss); however, covered person's entitlement to any greater benefits would depend solely on terms of insurance contract, since additional uninsured motorist protection may be purchased in order to afford higher level of coverage. Fox v Atlantic Mut. Ins. Co., 132 A.D.2d 17, 521 N.Y.S.2d 442, 1987 N.Y. App. Div. LEXIS 49535 (N.Y. App. Div. 2d Dep't 1987).

Court should have granted insurer's motion to stay arbitration of claim by its insured for benefits under underinsured motorist endorsement of policy, since definition of "underinsured motor vehicle" under policy was limited to vehicles covered by "bodily injury liability bond or policy" at time of accident, and thus offending vehicle—which carried no insurance at all—was not "underinsured" within meaning of policy; under CLS Ins § 3420(f)(2), underinsured motorist coverage may properly be limited to situations involving underinsured, but not uninsured, vehicles. Continental Ins. Co. v Reilly, 143 A.D.2d 64, 531 N.Y.S.2d 316, 1988 N.Y. App. Div. LEXIS 8163 (N.Y. App. Div. 2d Dep't 1988).

Offending vehicle was underinsured within meaning of insured's policy, and thus insurance company was not entitled to stay of underinsured motorist arbitration, where (1) offending vehicle was insured with single limit liability coverage in amount of $100,000, and (2) insured had bodily injury liability in amount of $300,000 and uninsured/underinsured coverage in amount of $100,000 per person, not to exceed $300,000 per accident; proper comparison was between bodily injury limits of policies and not between underinsured motorist provisions. Prudential Property & Casualty Ins. Co. v Cooper, 192 A.D.2d 935, 597 N.Y.S.2d 205, 1993 N.Y. App. Div. LEXIS 4045 (N.Y. App. Div. 3d Dep't 1993).

Insured motorist could not maintain action against his insurer to recover uninsured motorist benefits for injury resulting from "the actions of an unidentified motorist," since it was mere conjecture that tree in roadway, which caused insured to swerve and collide with another car, resulted from actions of unidentified motorist. Don v MGM Transp. Corp., 279 A.D.2d 446, 718 N.Y.S.2d 867, 2001 N.Y. App. Div. LEXIS 177 (N.Y. App. Div. 2d Dep't 2001).

Insured was not entitled to uninsured motorist benefits where passing motorist had grabbed her purse, causing her to be pulled alongside accelerating vehicle and ultimately thrown to ground, and thus her injury was not result of accident; insurer's application to stay arbitration should have been granted. Progressive Northwestern Ins. Co. v Van Dina, 282 A.D.2d 680, 724 N.Y.S.2d 431, 2001 N.Y. App. Div. LEXIS 4002 (N.Y. App. Div. 2d Dep't 2001).

Former § 167 [now § 5201] specifies the several situations, enumerated in Insurance Law § 600(2), in which the MVAIC indorsement becomes operative so as to render proper the making of a claim against the MVAIC. Gonzalez v Motor Vehicle Accident Indemnification Corp., 48 Misc. 2d 958, 266 N.Y.S.2d 640, 1966 N.Y. Misc. LEXIS 2307 (N.Y. Sup. Ct. 1966).

Automobile liability insurer would be held liable for accident to insured hit by uninsured vehicle while traveling on bicycle, since law of both New York and Ontario, Canada, where accident occurred, mandated coverage in situations where covered vehicle is not directly involved in accident. Smith v Nationwide Mut. Ins. Co., 145 Misc. 2d 318, 546 N.Y.S.2d 522, 1989 N.Y. Misc. LEXIS 639 (N.Y. Sup. Ct. 1989), aff'd, 181 A.D.2d 342, 585 N.Y.S.2d 899, 1992 N.Y. App. Div. LEXIS 9142 (N.Y. App. Div. 4th Dep't 1992).

Insured motorist was entitled to order directing his insurance company to submit to arbitration of uninsured motorist claim arising from incident in which sand or dirt fell from unidentified dump truck onto roadway and precipitated collision between insured and another vehicle which was traveling next to him, even though there was no contact between insured's vehicle and dump truck; physical contact with material carried on dump truck was sufficient to trigger coverage under uninsured motorist provision of policy. Bajrami v General Accident Ins. Co., 156 Misc. 2d 435, 593 N.Y.S.2d 405, 1993 N.Y. Misc. LEXIS 8 (N.Y. Sup. Ct. 1993), dismissed, 206 A.D.2d 527, 615 N.Y.S.2d 281, 1994 N.Y. App. Div. LEXIS 7576 (N.Y. App. Div. 2d Dep't 1994).

71. —Accidents involving assault or battery

Plaintiff could not recover against MVAIC for personal injuries sustained when the owner and operator of an insured automobile deliberately and intentionally ran into the car in which she was riding, her injuries being the result of an assault and battery and

not an "accident," and both the driver and the assaulting car being covered by a standard policy of liability insurance. McCarthy v Motor Vehicle Acci. Indemnification Corp., 16 A.D.2d 35, 224 N.Y.S.2d 909, 1962 N.Y. App. Div. LEXIS 11299 (N.Y. App. Div. 4th Dep't 1962), aff'd, 12 N.Y.2d 922, 238 N.Y.S.2d 101, 188 N.E.2d 405, 1963 N.Y. LEXIS 1448 (N.Y. 1963).

There is no provision in the Motor Vehicle Financial Responsibility Act indicating legislative intent to protect all victims of motor vehicles, regardless of how the vehicle may have been used as an instrument of injury, the legislative intent being only to protect victims of "motor vehicle accidents," and the standard "assault and battery clause" being part of the provisions prescribed for an owner's policy of liability insurance. McCarthy v Motor Vehicle Acci. Indemnification Corp., 16 A.D.2d 35, 224 N.Y.S.2d 909, 1962 N.Y. App. Div. LEXIS 11299 (N.Y. App. Div. 4th Dep't 1962), aff'd, 12 N.Y.2d 922, 238 N.Y.S.2d 101, 188 N.E.2d 405, 1963 N.Y. LEXIS 1448 (N.Y. 1963).

An intentional assault is not an "accident" within the meaning of the MVAIC provisions and if an assault were proved, MVAIC could not be held liable to a policeman injured while attempting to apprehend a stolen vehicle. Fuscaldo v Motor Vehicle Acci. Indemnification Corp., 24 A.D.2d 744, 263 N.Y.S.2d 919, 1965 N.Y. App. Div. LEXIS 3284 (N.Y. App. Div. 1st Dep't 1965).

The function of MVAIC is not to indemnify a wrongdoer, but to compensate an innocent victim, and it would not be against public policy of the State of New York to permit recovery against MVAIC for willful vehicular assaults, but the provisions limiting its liability to injury sustained by "accident" preclude MVAIC from being found liable in assault cases. Application of Motor Vehicle Accident Indemnification Corp., 32 Misc. 2d 946, 228 N.Y.S.2d 508, 1962 N.Y. Misc. LEXIS 3845 (N.Y. Sup. Ct. 1962), rev'd, Motor Vehicle Acci. Indemnification Corp. v Jerman, 18 A.D.2d 810, 238 N.Y.S.2d 507, 1963 N.Y. App. Div. LEXIS 5015 (N.Y. App. Div. 2d Dep't 1963), rev'd, Motor Vehicle Accident Indemnification Corp. v Brinson, 18 A.D.2d 809, 236 N.Y.S.2d 567, 1963 N.Y. App. Div. LEXIS 5014 (N.Y. App. Div. 2d Dep't 1963).

The word "accident" as used in former §§ 167 and 600 [now §§ 3420 and 5201] of the Insurance Law has a precise judicial interpretation and intentional assaults are not within the range of its meaning. Application of Motor Vehicle Accident Indemnification Corp., 32 Misc. 2d 946, 228 N.Y.S.2d 508, 1962 N.Y. Misc. LEXIS 3845 (N.Y. Sup. Ct. 1962), rev'd, Motor Vehicle Acci. Indemnification Corp. v Jerman, 18 A.D.2d 810, 238 N.Y.S.2d 507, 1963 N.Y. App. Div. LEXIS 5015 (N.Y. App. Div. 2d Dep't 1963), rev'd, Motor Vehicle Accident Indemnification Corp. v Brinson, 18 A.D.2d 809, 236 N.Y.S.2d 567, 1963 N.Y. App. Div. LEXIS 5014 (N.Y. App. Div. 2d Dep't 1963).

72. —Disclaimer of liability by insurer

Subdivision 2-a of former § 167 [now § 3420(f)] requires all liability policies to contain a provision insuring against loss "where the insurer disclaims liability or denies coverage," but it is not sufficient to give an injured person a right of action against MVAIC under coverage of the required statutory indorsement that an insurer has disclaimed, without judicial investigation of validity of the disclaimer and of whether the policy even provided effective coverage. Motor Vehicle Accident Indemnification Corp. v Malone, 16 N.Y.2d 1027, 265 N.Y.S.2d 906, 213 N.E.2d 316, 1965 N.Y. LEXIS 1013 (N.Y. 1965).

Referee properly granted petition to stay arbitration of uninsured motorist claim, on ground that offending vehicle was insured as of date of accident, where petitioner produced certified copy of vehicle registration record indicating that vehicle was insured as of date of accident, and respondent insurer failed to produce any evidence indicating that it filed cancellation notice with Commissioner of Motor Vehicles as required by CLS Veh & Tr § 313(2) and (3). State Farm Mut. Auto. Ins. Co. v Kanter, 217 A.D.2d 633, 629 N.Y.S.2d 786, 1995 N.Y. App. Div. LEXIS 7802 (N.Y. App. Div. 2d Dep't 1995).

Insurer waived its right to rely on policy clause excluding plaintiffs from uninsured motorist coverage when such coverage was available to them under another policy, where insurer did not refer to this exclusion in its disclaimer letter but rather disclaimed coverage on ground that stacking was not permitted under New York law. Cain v Allstate Ins. Co., 234 A.D.2d 775, 650 N.Y.S.2d 886, 1996 N.Y. App. Div. LEXIS 12470 (N.Y. App. Div. 3d Dep't 1996).

MVAIC has no right to demand that the injured person first establish prima facie validity of the disclaimer before proceeding directly against MVAIC, where it is not in a position to contest the fact of disclaimer or denial of liability by the alleged insurer. Application of Motor Vehicle Acci. Indemnification Corp., 33 Misc. 2d 567, 227 N.Y.S.2d 864, 1962 N.Y. Misc. LEXIS 3634 (N.Y. Sup. Ct. 1962).

Although the New York Automobile Accident Indemnification Indorsement which is required by subd. 2-a of former § 167 [now § 3420(f)] to be included in every automobile liability policy issued in New York State, makes no specific reference to a disclaimer of liability by the insurer of the offending vehicle, under the clear language of this section the indorsement clearly and as matter of law is deemed to include protection for an insured "where the insurer disclaims liability or denies coverage." Application of Motor Vehicle Acci. Indemnification Corp., 33 Misc. 2d 567, 227 N.Y.S.2d 864, 1962 N.Y. Misc. LEXIS 3634 (N.Y. Sup. Ct. 1962).

Where it appears, in connection with an application to require MVAIC to submit to arbitration, under the Standard Statutory Motor Vehicle Accident Indemnification Indorsement on a motorist's policy, that the offending motorist was insured at the time of the accident and that his insurer has not disclaimed, or denied coverage, there is no present basis for a proceeding against MVAIC. Application of Di Stefano, 34 Misc. 2d 68, 228 N.Y.S.2d 404, 1962 N.Y. Misc. LEXIS 3508 (N.Y. Sup. Ct. 1962).

With respect to a petition by an injured motorist to require MVAIC to submit to arbitration, under the Statutory Standard Indemnification Indorsement, following a denial of coverage by the negligent motorist's insurer, MVAIC was not entitled to raise an objection that the negligent motorist was covered by insurance. Kaiser v Motor Vehicle Acci. Indemnification Corp., 35 Misc. 2d 636, 231 N.Y.S.2d 178, 1962 N.Y. Misc. LEXIS 3137 (N.Y. Sup. Ct. 1962).

Where MVAIC challenges status of an injured person in seeking to enforce its liability on the basis of disclaimer by the liability insurer, the court need not consider the fact that the injured person has theretofore asserted status as a "qualified" person in attempting to make a claim pursuant to former § 608 [now § 5208]. In re Motor Vehicle Acci. Indemnification Corp., 37 Misc. 2d 97, 232 N.Y.S.2d 443, 1962 N.Y. Misc. LEXIS 2857 (N.Y. Sup. Ct. 1962).

Subdivision 2-a of former § 167 [now § 3420(f)] imposes no requirement that a liability insurer's disclaimer of liability be valid before an injured person is entitled to impose liability upon MVAIC, and MVAIC accordingly has no right to challenge validity of the disclaimer as a matter for determination in advance of submission of its liability to arbitration. In re Motor Vehicle Acci. Indemnification Corp., 37 Misc. 2d 97, 232 N.Y.S.2d 443, 1962 N.Y. Misc. LEXIS 2857 (N.Y. Sup. Ct. 1962).

The insured automobile in which the claimant was riding as a passenger at the time she was injured in a one-car accident did not become an uninsured vehicle by virtue of the insurance carrier's disclaimer based upon the failure of the insured to give timely notice of the accident. Shumate v Motor Vehicle Accident Indemnification Corp., 50 Misc. 2d 31, 269 N.Y.S.2d 639, 1966 N.Y. Misc. LEXIS 1927 (N.Y. Sup. Ct. 1966).

Where passenger was injured in a single vehicle collision and insurer disclaimed liability on ground of failure of insured to give timely notice, claimant had coverage under MVAIC indorsement to insured's driver's liability policy. Murphy v Criterion Ins. Co., 57 Misc. 2d 52, 293 N.Y.S.2d 851, 1968 N.Y. Misc. LEXIS 1680 (N.Y. Sup. Ct. 1968).

In action by plaintiff who was injured in one-car accident while riding in defendants' vehicle, wherein defendants' insurer disclaimed coverage and brought separate action against defendants and plaintiff for judgment declaring that it was not obligated to defend and indemnify defendants, plaintiff was not entitled to amend his complaint to assert, as against insurer, that he was covered by uninsured motorist provision of policy issued to defendants, as such claim was patently lacking in merit; insured vehicle cannot itself qualify as uninsured vehicle for coverage

purposes based on insurer's own disclaimer of coverage. Brociner v Mann, 184 Misc. 2d 789, 711 N.Y.S.2d 691, 2000 N.Y. Misc. LEXIS 258 (N.Y. Sup. Ct. 2000).

Court erred in declining to permit an insurance company to submit evidence that the use of its insured's vehicle at the time of the accident was nonpermissive and focusing solely on the timeliness of the insurance company's disclaimer under N.Y. Ins. Law § 3420. Only if the nonpermissive use falls within a policy exclusion must the court address the timeliness of the disclaimer. Liberty Mut. Ins. Co. v McDonald, 6 A.D.3d 614, 775 N.Y.S.2d 83, 2004 N.Y. App. Div. LEXIS 4721 (N.Y. App. Div. 2d Dep't 2004).

73. —Hit and run accident

The insurer's motion for an order permanently staying arbitration must be granted in an action brought to recover for damages sustained when ice and snow dislodged from an unidentified truck approaching from the opposite direction struck and broke plaintiff's windshield, since there was no "physical contact" within the contemplation of the Insurance Law with respect to "hit and run" cases. Smith v Great American Ins. Co., 29 N.Y.2d 116, 324 N.Y.S.2d 15, 272 N.E.2d 528, 1971 N.Y. LEXIS 1162 (N.Y. 1971).

The remedy of a pedestrian struck by a hit-and-run driver is under former § 167 [now § 3420], not under former § 618 [now § 5218], if any he has, where, although he does not himself own an automobile, he is covered by insurance carried by his wife on her automobile as a member of the family. Balletti v Motor Vehicle Accident Indemnification Corp., 16 A.D.2d 814, 228 N.Y.S.2d 768, 1962 N.Y. App. Div. LEXIS 9574 (N.Y. App. Div. 2d Dep't 1962).

References in MVAIC legislation to unidentified or unascertainable motor vehicle and operator does not limit application of such legislation to situations in which the automobile leaves the scene of the accident before the operator's identity could be determined, but also includes the situation where, at the time of the accident, there is no need to inquire into the identity of the operator since there is no apparent injury, and the failure to inquire results in inability to ascertain the identity of the operator at a later time. Riemenschneider v Motor Vehicle Acci. Indemnification Corp., 26 A.D.2d 309, 274 N.Y.S.2d 71, 1966 N.Y. App. Div. LEXIS 3260 (N.Y. App. Div. 1st Dep't 1966), aff'd, 20 N.Y.2d 547, 285 N.Y.S.2d 593, 232 N.E.2d 630, 1967 N.Y. LEXIS 1094 (N.Y. 1967).

Where an unidentified car struck the vehicle of defendant, thence propelling such vehicle into that of claimant, a hit-and-run automobile was involved within the meaning of the uninsured motorist statute. Powers v Continental Ins. Co., 29 A.D.2d 1041, 289 N.Y.S.2d 467, 1968 N.Y. App. Div. LEXIS 4167 (N.Y. App. Div. 3d Dep't), app. denied, 22 N.Y.2d 645, 1968 N.Y. LEXIS 2099 (N.Y. 1968).

Plaintiff denied leave to sue the Motor Vehicle Accident Indemnification Corporation under evidence that plaintiff was injured when the taxicab in which she was a passenger was struck by a hit-and-run vehicle; that at the time of the accident the wife of the taxicab driver owned still another automobile and was the holder of a liability insurance policy covering it; that the policy contained the standard indorsement required by subdivision 2-a of former § 167 [now § 3420(f)] of the Insurance Law, under which indorsement an "insured" included a person occupying any automobile which was operated by the named insured or her spouse; and that therefore the plaintiff was occupying an automobile driven by the insured's spouse and thus was an "insured" and therefore could not sue the Motor Vehicle Accident Indemnification Corporation. Gorskie v Motor Vehicle Acci. Indemnification Corp., 33 A.D.2d 1045, 308 N.Y.S.2d 805, 1970 N.Y. App. Div. LEXIS 5429 (N.Y. App. Div. 2d Dep't 1970).

Passengers who were injured when the bus on which they were riding was involved in an accident with a hit-and-run automobile were "insured persons within the definition of that term in the standard indemnification indorsment and therefore could not sue the Motor Vehicle Accident Indemnification Corporation since they had an adequate remedy against the insurer of the bus. Saitz v Motor Vehicle Acci. Indemnification Corp., 33 A.D.2d 1048, 308 N.Y.S.2d 763, 1970 N.Y. App. Div. LEXIS 5433 (N.Y. App. Div. 2d Dep't 1970).

Uninsured motorist provision in insurance policy providing coverage where there cannot be ascertained the "identity of either the operator or the owner of such hit-and-run automobile" would be construed to permit arbitration in situation in which owner of hit and run vehicle was known but operator thereof was not and owner was not liable to plaintiff for injuries. Allstate Ins. Co. v McGouey, 42 A.D.2d 730, 346 N.Y.S.2d 115, 1973 N.Y. App. Div. LEXIS 3830 (N.Y. App. Div. 2d Dep't 1973).

Arbitration of insurance coverage was stayed pending determination upon trial of whether there was in fact "contact" with a "hit and run vehicle" where insured's failure to mention "contact" with another vehicle either in police report of accident or in motor vehicle report raised questions of insured's credibility and whether there actually was "contact". Allstate Ins. Allstate Ins. Co. v Morales, 42 A.D.2d 951, 348 N.Y.S.2d 148 (N.Y. App. Div. 1st Dep't 1973).

It was apparent from language used in definition of "hit and run automobile" in uninsured motorist endorsement in automobile insurance policy that insured would not be apt to consider it to mean that both owner and operator of car must be unknown in order to constitute hit and run vehicle and ambiguity should be resolved in favor of insured; accordingly, insured's automobile, which rolled forward injuring her after stranger was seen reaching into car and doing something with his hands immediately before accident, was not excluded from definition of "hit and run" automobile. Carmichael v Government Employees Ins. Co., 54 A.D.2d 140, 388 N.Y.S.2d 354, 1976 N.Y. App. Div. LEXIS 13739 (N.Y. App. Div. 3d Dep't 1976).

On a claim under an uninsured motorist indorsement arising from claimant's alleged accident with a hit-and-run vehicle, the trial court erred in denying the insurer's application to stay arbitration, where a factual issue was clearly presented as to whether there was physical contact between claimant and the alleged hit-and-run vehicle. Allstate Ins. Co. v Jacobs, 85 A.D.2d 542, 444 N.Y.S.2d 665, 1981 N.Y. App. Div. LEXIS 16322 (N.Y. App. Div. 1st Dep't 1981).

Motorist involved in automobile collision with vehicle driven by unknown man was not entitled to uninsured motorist benefits because his injuries were not caused by accident, and did not arise from physical contact between vehicles, where he was not injured as result of collision but was shot with handgun by other driver after both he and other driver exited their vehicles; therefore, insurer was entitled to summary judgment dismissing motorist's complaint. Locascio v Atlantic Mut. Ins. Co., 127 A.D.2d 746, 511 N.Y.S.2d 934, 1987 N.Y. App. Div. LEXIS 43231 (N.Y. App. Div. 2d Dep't 1987), app. denied, 70 N.Y.2d 616, 526 N.Y.S.2d 436, 521 N.E.2d 443, 1988 N.Y. LEXIS 144 (N.Y. 1988).

Insurer was entitled to stay of arbitration of bicycle commuter who claimed uninsured motorist benefits for injury he sustained when truck passed so close as to graze portfolio strapped to bicycle's rear carrier, causing fall, since truck never came in contact with insured or his bicycle, bicycle is not within definition of "motor vehicle," and contact did not originate in "collision" that could enable insured to proceed on theory of indirect physical contact. General Accident Ins. Co. v Gladstone, 260 A.D.2d 855, 687 N.Y.S.2d 830, 1999 N.Y. App. Div. LEXIS 4031 (N.Y. App. Div. 3d Dep't 1999).

Plaintiff was precluded from recovering uninsured motorist benefits, and thus court properly granted insurer's motion to stay arbitration of uninsured motorist claim, where insured failed to report alleged hit-and-run accident to police within 24 hours or as soon as reasonably possible, as insurance policy required. Gov't Emples. Ins. Co. v Snell, 286 A.D.2d 682, 729 N.Y.S.2d 779, 2001 N.Y. App. Div. LEXIS 8445 (N.Y. App. Div. 2d Dep't 2001).

The definition of "hit-and-run" automobile in the uninsured motorist indorsement required by law in New York State automobile liability policies, not only requires that the accident be reported within 24 hours or as soon as reasonably possible to police, etc., officials or to the Commissioner of Motor Vehicles, but also that the injuries sustained arise out of physical contact of the hit-and-run car with the insured car, both conditions being prerequisite to filing of a claim against MVAIC. Motor Vehicle Acci. Indemnification Corp. v Stein, 35 Misc. 2d 1007, 231 N.Y.S.2d 727, 1962 N.Y. Misc. LEXIS 2896 (N.Y. Sup. Ct. 1962).

An insured motorist, seeking arbitration of a claim against MVAIC on the basis of injury sustained in an accident involving a hit-and-run vehicle, is not bound by the police records concerning the report of the accident not showing that a hit-and-run car was involved, and neither is MVAIC bound to accept, without a hearing, petitioner's version of the accident as occasioned by being sideswiped by such a vehicle, and in such case arbitration should be stayed pending determination of the issues raised. Motor Vehicle Acci. Indemnification Corp. v Reuter, 36 Misc. 2d 65, 232 N.Y.S.2d 835, 1962 N.Y. Misc. LEXIS 2822 (N.Y. Sup. Ct. 1962).

74. —Insolvency of insurer

The uninsured motorist coverage of former section 167 (subd 2-a) [now § 3420(f)] of the Insurance Law does not provide an alternative remedy to that prescribed in former sections 333 and 334 [now §§ 7601 et seq.] of the Insurance Law, which create a fund for the payment of claims against insolvent domestic insurers, and, where a person is injured in an automobile accident and the person allegedly responsible for the accident is insured by a domestic insurer which becomes insolvent subsequent to the accident, the injured person may not elect between the two remedies. State-Wide Ins. Co. v Curry, 43 N.Y.2d 298, 401 N.Y.S.2d 196, 372 N.E.2d 31, 1977 N.Y. LEXIS 2464 (N.Y. 1977).

A vehicle insured by a domestic insurer which becomes insolvent after the vehicle is involved in an accident is neither "an uninsured motor vehicle" nor "an insured motor vehicle where the insurer disclaims liability or denies coverage" within the meaning of former section 167 (subd 2-a) [now § 3420(f)] of the Insurance Law, requiring that insurers provide the New York Automobile Accident Indemnification Endorsement. State-Wide Ins. Co. v Curry, 43 N.Y.2d 298, 401 N.Y.S.2d 196, 372 N.E.2d 31, 1977 N.Y. LEXIS 2464 (N.Y. 1977).

Where an insolvent insurer apparently was not licensed to do business in New York and, therefore, had not contributed to the Security Fund created by statute (Insurance Law, former § 333 [now § 7601]) to pay claims against insolvent insurers, and, as a result, claimants could not seek compensation from that fund, the insureds of that insolvent insurer were uninsured motorists, and the New York Automobile Accident Indemnification Endorsement (Insurace Law, former § 167, subd 2-a [now § 3420(f)]) was properly held applicable, not as an alternative remedy to the Security Fund, but as the exclusive remedy. State-Wide Ins. Co. v Curry, 43 N.Y.2d 298, 401 N.Y.S.2d 196, 372 N.E.2d 31, 1977 N.Y. LEXIS 2464 (N.Y. 1977).

The insolvency of an insurance carrier caused a vehicle insured by it to become an "uninsured vehicle" within the meaning of subd 2-a of former § 167 [now § 3420(f)] of the Insurance Law and the petitioner was held entitled to arbitrate her claim against the insurer of one of the other defendants. Travis v General Acci. Group, 31 A.D.2d 20, 294 N.Y.S.2d 874, 1968 N.Y. App. Div. LEXIS 2906 (N.Y. App. Div. 3d Dep't 1968).

The standard uninsured motorist indorsement extends coverage to an injured innocent "insured" victim of an automobile accident, where the alleged tortfeasor at the time of the accident was covered by liability insurance which subsequently became ineffective by reason of the insolvency of the tortfeasor's insurer. In re Taub, 31 A.D.2d 378, 298 N.Y.S.2d 212, 1969 N.Y. App. Div. LEXIS 4408 (N.Y. App. Div. 1st Dep't 1969).

Insolvency of insurer, resulting in failure of insurer to defend insured, held to constitute a "denial of coverage" within terms of uninsured motorist clause of policy so that injured motorist was entitled to arbitration of claim under his own policy. Bendelow v Travelers Indem. Co., 57 Misc. 2d 327, 293 N.Y.S.2d 629, 1968 N.Y. Misc. LEXIS 1298 (N.Y. Sup. Ct. 1968).

The insolvency and liquidation of the insurer of the offending vehicle is tantamount to a disclaimer or denial of coverage, permitting a claimant to proceed to arbitration under the arbitration indorsement under his own policy. Motor Vehicle Accident Indemnification Corp. v Goldberg, 65 Misc. 2d 778, 317 N.Y.S.2d 846, 1970 N.Y. Misc. LEXIS 1210 (N.Y. Sup. Ct. 1970).

Insurance carrier's subsequent insolvency did not render offending vehicle uninsured for purposes of arbitration under respondents' insurance policy where respondents had available remedy through Public Motor Vehicle Liability Security Fund; thus, permanent stay of arbitration was granted. Government Emples. Ins. Co. v Silber, 178 Misc. 2d 451, 679 N.Y.S.2d 552, 1998 N.Y. Misc. LEXIS 500 (N.Y. Sup. Ct. 1998).

Motorist carrying supplementary uninsured motorist coverage may apply that coverage toward an accident with a vehicle which is insured but whose insurance company subsequently becomes insolvent. Am. Mfrs. Mut. Ins. Co. v Morgan, 296 A.D.2d 491, 746 N.Y.S.2d 726, 2002 N.Y. App. Div. LEXIS 7506 (N.Y. App. Div. 2d Dep't 2002).

Insolvency of an insurer whose insured vehicle collided with a passenger's vehicle did not entitle the passenger to uninsured motorist coverage because the insured vehicle did not fall into any of the uninsured motorist classifications established in N.Y. Ins. Law § 3420(f)(1) in that the vehicle was insured and registered in New York, it was not stolen or unidentified, it was operated with the owner's permission, and the insurer's insolvency did not constitute a disclaimer of liability or a denial of coverage; the policy survived the insolvency because coverage was available from the New York Public Motor Vehicles Liability Security Fund (PMV fund) established by N.Y. Ins. Law § 7604(a), and, since the passenger had not sought coverage from the PMV fund, she could not claim that coverage had been denied. Am. Tr. Ins. v Barger, 819 N.Y.S.2d 654, 13 Misc. 3d 386, 2006 N.Y. Misc. LEXIS 2028 (N.Y. Sup. Ct. 2006).

Passenger who was injured when her vehicle collided with another vehicle covered by an insurer that later became insolvent was not entitled to uninsured motorist coverage because coverage was available through the New York Public Motor Vehicles Liability Security Fund under N.Y. Ins. Law § 7604 and the passenger did not show that she was covered by supplemental uninsured motorist coverage; the expanded definition of an uninsured motorist in N.Y. Comp. Codes R. & Regs. tit. 11, § 60-2.3, known as Regulation 35-D, that included motorists covered by insolvent insurers came into play only when a claimant had purchased supplemental uninsured motorist coverage available through N.Y. Ins. Law 3420(f)(2), and there was no evidence that the passenger had purchased such coverage. Am. Tr. Ins. v Barger, 819 N.Y.S.2d 654, 13 Misc. 3d 386, 2006 N.Y. Misc. LEXIS 2028 (N.Y. Sup. Ct. 2006).

75. —Vehicle used without owner's permission

Fraud of automobile lessee in obtaining use of the vehicle from lessor, i.e., by use of stolen credit card and forged or stolen identification card and license, was not the equivalent of theft and did not render the vehicle a "stolen" vehicle within meaning of provision of liability policy covering other vehicle involved in collision and obligating such insurer to furnish coverage in event an operator of the insured vehicle was involved in an accident with a stolen vehicle. Allstate Ins. Co. v Dailey, 47 A.D.2d 375, 367 N.Y.S.2d 87, 1975 N.Y. App. Div. LEXIS 9249 (N.Y. App. Div. 2d Dep't 1975), aff'd, 39 N.Y.2d 759, 384 N.Y.S.2d 776, 349 N.E.2d 876, 1976 N.Y. LEXIS 2702 (N.Y. 1976).

In reference to uninsured motorist endorsement in automobile insurance policy which specifically excluded automobile owned by named insured from its coverage for uninsured automobiles, exclusion from coverage as "uninsured automobile" of insured's automobile, which rolled forward injuring insured after stranger was seen reaching into car and doing something with his hands, was contrary to her status as insured; exclusion could not be held to encompass situation where insured's own automobile was used by person without her permission. Carmichael v Government Employees Ins. Co., 54 A.D.2d 140, 388 N.Y.S.2d 354, 1976 N.Y. App. Div. LEXIS 13739 (N.Y. App. Div. 3d Dep't 1976).

Evidence established that offending vehicle was uninsured where (1) it was stolen prior to accident, and theft was reported to police 3 days prior to accident and after term of rental agreement for vehicle had expired without return of vehicle, and (2) at time of accident, vehicle, which had been rented under false pretenses, was being driven by someone other than individual who rented it. State-Wide Ins. Co. v Morales, 204 A.D.2d 336, 614 N.Y.S.2d 146, 1994 N.Y. App. Div. LEXIS 4515 (N.Y. App. Div. 2d Dep't 1994), app. denied, 84 N.Y.2d 812, 622 N.Y.S.2d 915, 647 N.E.2d 121, 1995 N.Y. LEXIS 34 (N.Y. 1995).

Nonpermissive use exclusion in uninsured motorists insurance endorsement of motor vehicle liability policy did not violate CLS Ins § 3420(f)(1). Graphic Arts Mut. Ins. Co. v Leno ex rel. Leno, 251 A.D.2d 981, 674 N.Y.S.2d 535, 1998 N.Y. App. Div. LEXIS 6992 (N.Y. App. Div. 4th Dep't), app. denied, 92 N.Y.2d 814, 681 N.Y.S.2d 474, 704 N.E.2d 227, 1998 N.Y. LEXIS 4009 (N.Y. 1998).

Insurers were entitled to permanent stay of arbitration where insureds' knowing and active participation in unauthorized use of vehicle precluded their recovery for injuries resulting from that conduct, under nonpermissive use exclusion in uninsured motorists insurance endorsement of motor vehicle liability policy. Graphic Arts Mut. Ins. Co. v Leno ex rel. Leno, 251 A.D.2d 981, 674 N.Y.S.2d 535, 1998 N.Y. App. Div. LEXIS 6992 (N.Y. App. Div. 4th Dep't), app. denied, 92 N.Y.2d 814, 681 N.Y.S.2d 474, 704 N.E.2d 227, 1998 N.Y. LEXIS 4009 (N.Y. 1998).

76. Burden of proof

For an injured person to recover against MVAIC on the basis of its compulsory statutory indorsement of every automobile liability insurance policy with respect to damage caused by the owner or operator of an "uninsured" automobile "by accident," plaintiff has the burden of establishing (1) that the automobile which caused her injury was an uninsured one, and (2) that her injury was "caused by accident." McCarthy v Motor Vehicle Acci. Indemnification Corp., 16 A.D.2d 35, 224 N.Y.S.2d 909, 1962 N.Y. App. Div. LEXIS 11299 (N.Y. App. Div. 4th Dep't 1962), aff'd, 12 N.Y.2d 922, 238 N.Y.S.2d 101, 188 N.E.2d 405, 1963 N.Y. LEXIS 1448 (N.Y. 1963).

The party seeking to stay arbitration has the burden of showing the existence of sufficient evidentiary facts to establish a genuine issue as to whether an uninsured vehicle was involved. O'Brien v Aetna Casualty & Surety Co., 33 A.D.2d 1085, 307 N.Y.S.2d 689, 1970 N.Y. App. Div. LEXIS 5477 (N.Y. App. Div. 3d Dep't 1970).

A denial of a claim to recover for damages allegedly sustained in a collision with an uninsured motor vehicle was proper, where on claimant's request for insurance information, claimant listed an incorrect plate number, where due to that error claimant failed to prove that the automobile that struck him was uninsured, and where it was incumbent upon the claimant, not the insurer, to establish by competent evidence that the vehicle involved was uninsured. Superintendent of Ins. as Liquidator of Resources Ins. Co. v Lilley, 100 A.D.2d 807, 474 N.Y.S.2d 736, 1984 N.Y. App. Div. LEXIS 17912 (N.Y. App. Div. 1st Dep't 1984).

In proceeding to determine uninsured motorist claim, proof of insurance offered by claimant's insurer in form of Department of Motor Vehicles DP-37 form is sufficient prima facie evidence of coverage to shift burden of going forward with proof to company disclaiming coverage. American Transit Ins. Co. v Glaude, 208 A.D.2d 376, 617 N.Y.S.2d 7, 1994 N.Y. App. Div. LEXIS 9403 (N.Y. App. Div. 1st Dep't 1994).

In proceeding to determine uninsured motorist claim, court erred when it deemed introduction of Department of Motor Vehicles DP-37 form by claimant's insurer to be conclusive evidence of coverage, thereby failing to properly credit disclaiming company's rebuttal evidence that exhaustive search was made and no policy could be located. American Transit Ins. Co. v Glaude, 208 A.D.2d 376, 617 N.Y.S.2d 7, 1994 N.Y. App. Div. LEXIS 9403 (N.Y. App. Div. 1st Dep't 1994).

Summary judgment was improperly denied on ground that evidence did not prove whether plaintiff's damages exceeded $10,000 prerequisite for recovery under underinsurance provision in CLS Ins § 3420(f)(2)(A) where plaintiff's moving papers included his medical and hospital records and his verified bill of particulars, his settlement for $10,000 maximum under policy had been approved by insurer, there was no dispute as to extensive nature of his injuries, and IAS Court was not required to calculate damages but simply to find that coverage existed and direct hearing on damages. Gorgone v Regency Agency, 238 A.D.2d 265, 656 N.Y.S.2d 622, 1997 N.Y. App. Div. LEXIS 4320 (N.Y. App. Div. 1st Dep't 1997).

Where an injured person who is an "insured person" seeks to require MVAIC, under the New York Automobile Accident Indemnification Indorsement, to submit liability arising out of an accident involving an allegedly uninsured vehicle to arbitration, and MVAIC opposes the application, petitioner has the preliminary burden of establishing that such other vehicle was uninsured and is not entitled to have its demand for arbitration granted unless he so establishes, as there is no presumption whatsoever that the other vehicle was uninsured. Application of Motor Vehicle Acci. Indemnification Corp., 36 Misc. 2d 985, 234 N.Y.S.2d 445, 1962 N.Y. Misc. LEXIS 2920 (N.Y. Sup. Ct. 1962).

Although a lack of insurance will not be presumed in a proceeding for arbitration of a claim against MVAIC, where the automobile alleged to be uninsured was registered in another state which keeps no record of automobile liability insurance, lack of such insurance was sufficiently proved by testimony of counsel for such claimant that the owner of such automobile had stated to him that he had no such insurance. Motor Vehicle Accident Indemnification Corp. v Mahoney, 46 Misc. 2d 3, 258 N.Y.S.2d 801, 1965 N.Y. Misc. LEXIS 2007 (N.Y. Sup. Ct. 1965), aff'd, 25 A.D.2d 821, 270 N.Y.S.2d 381, 1966 N.Y. App. Div. LEXIS 7078 (N.Y. App. Div. 2d Dep't 1966).

A claimant has the burden of establishing the noninsured status of the other vehicle by a fair preponderance of the evidence, and is neither assisted by any presumption of noninsurance nor is burdened by any contrary affirmative presumption of insurance. Foster v Motor Vehicle Accident Indemnification Corp., 55 Misc. 2d 784, 286 N.Y.S.2d 775, 1967 N.Y. Misc. LEXIS 1253 (N.Y. Sup. Ct. 1967).

The claimant, who sustained personal injuries when the taxicab he was driving was struck by an automobile owned by a Pennsylvania resident and driven by a resident of New York City, by presenting uncontradicted evidence showing that the New York State Department of Motor Vehicles had revoked the nonresident motor vehicle privileges of the owner of the Pennsylvania automobile for failure to submit evidence that he was properly insured at the time of the accident and in addition evidence that the driver of the Pennsylvania car was not covered by the requisite liability insurance on the date of the accident had sufficiently sustained his burden of establishing the uninsured status of the other vehicle and was entitled to proceed to arbitration. Foster v Motor Vehicle Accident Indemnification Corp., 55 Misc. 2d 784, 286 N.Y.S.2d 775, 1967 N.Y. Misc. LEXIS 1253 (N.Y. Sup. Ct. 1967).

Where the claimant offered proof that the vehicle which struck the automobile in which he was riding as a passenger was driven by an l8-year-old AWOL sailor, who was driving while intoxicated and without a license, and that the sailor had never filed a report of the accident, the motion by the insurer to stay arbitration proceedings was denied since to require more proof of the lack of insurance coverage would be to propose an impossible burden upon the innocent victim of an automobile accident and entirely frustrate the purpose of the law. Merchants Mut. Ins. Co. v Schmid, 56 Misc. 2d 360, 288 N.Y.S.2d 822, 1968 N.Y. Misc. LEXIS 1821 (N.Y. Sup. Ct. 1968).

Although the burden of proof is on the injured party to establish the existence of coverage by the offending motorist's insurer in order to recover from such insurer, and the burden is likewise on the injured party to establish the lack of such coverage in order to recover from his own insurer under his uninsured motorist clause, in a declaratory proceeding to which both insurers were parties the injured person's claim could not be defeated by his inability to prove either the existence or the lack of coverage of the offending motorist. Olenick v Government Employees Ins. Co., 68 Misc. 2d 764, 328 N.Y.S.2d 50, 1971 N.Y. Misc. LEXIS 1115 (N.Y. Sup. Ct. 1971), modified, 42 A.D.2d 760, 346 N.Y.S.2d 320, 1973 N.Y. App. Div. LEXIS 3757 (N.Y. App. Div. 2d Dep't 1973).

In a proceeding by a passenger on a public transit authority bus who was injured when the bus collided with another vehicle and who demanded arbitration, the passenger would not be required to prove that the other vehicle was uninsured, since the burden of proving uninsurance was on the insurer, and a preliminary hearing on the lack of insurance would be required only in the absence of a positive statement by the passenger that the vehicle was uninsured coupled with a supportable contention by the insurer that the status of insurance was in doubt. Manhattan & Bronx Surface Transit Operating Authority v Coccia, 118 Misc. 2d

378, 460 N.Y.S.2d 446, 1983 N.Y. Misc. LEXIS 3324 (N.Y. Sup. Ct. 1983).

One who claims uninsured motorist benefits is neither assisted by presumption that adverse vehicle was not insured nor burdened by presumption that it was. Eagle Ins. Co. v Ruiz, 141 Misc. 2d 815, 535 N.Y.S.2d 294, 1988 N.Y. Misc. LEXIS 705 (N.Y. Sup. Ct. 1988).

77. Limitations on amount of liability

Terms of underinsured motorist coverage, providing that $100,000 per person policy limit "is the amount of coverage for all damages due to bodily injury to one person" and that $300,000 limits of liability for "'Each Accident' is the total amount of coverage for all damages due to bodily injury to 2 or more persons in the same accident," were ambiguous where policy did not contain any language deeming $300,000 per accident limit "subject to" per-person limit; thus, policy terms would be construed in favor of insureds. Mostow v State Farm Ins. Cos., 88 N.Y.2d 321, 645 N.Y.S.2d 421, 668 N.E.2d 392, 1996 N.Y. LEXIS 1169 (N.Y. 1996).

Where insured, who was injured when his car collided with another car, recovered policy limits of other driver's insurance, but alleged injuries exceeding policy limits and sought to recover from his own insurer under his policy's supplementary underinsured motorist endorsement, authorized by CLS Insurance § 3420(f)(2), insured could not recover under supplementary underinsured motorist coverage since driver of other car and insured's policies have same bodily injuries limits, and thus other driver cannot be deemed either underinsured motorist under insured's policy or one who would trigger coverage under § 3420(f)(2). Hanover Ins. Co. v St. Louis, 119 A.D.2d 529, 501 N.Y.S.2d 347, 1986 N.Y. App. Div. LEXIS 55462 (N.Y. App. Div. 1st Dep't), app. dismissed, 68 N.Y.2d 751, 506 N.Y.S.2d 336, 497 N.E.2d 703, 1986 N.Y. LEXIS 19509 (N.Y. 1986).

Supreme Court erred in granting insurer permanent stay of arbitration based on ground that underinsured motorist coverage was not available to insured because bodily injury coverage provided in insurance policies issued to operator and owner of motor vehicle involved in accident equaled or exceeded state's minimum financial responsibility requirements since, under CLS Ins § 3420(f)(2), applicability of underinsured motorist coverage is governed not by state's financial responsibility requirements but by whether bodily injury liability coverage applicable to motor vehicle in question is less than limit of bodily injury liability coverage in policy issued by insurer to insured. Fireman's Fund Ins. Co. v Freda, 156 A.D.2d 364, 548 N.Y.S.2d 319, 1989 N.Y. App. Div. LEXIS 15418 (N.Y. App. Div. 2d Dep't 1989).

New York residents, who were injured in automobile accident in province of Quebec, Canada, when their car collided with vehicle operated by Quebec resident, could recover under underinsured motorist endorsement contained in policy of motor vehicle liability insurance on their car issued by New York State insurance carrier since (1) offending vehicle was insured for bodily injury liability under Quebec Automobile Insurance Act (QAIA), mandatory system of insurance reparations that compensates nonresident claimants to extent they are not responsible for accident to maximum of $20,000, (2) instant policy, in compliance with CLS Ins § 3420(f)(2), defined underinsured vehicle as one to which bodily injury liability bond or policy applied but where its limit of liability was less than limit of liability provided in policy, and (3) limit of QAIA bodily injury liability coverage was less than that provided under underinsured motorist endorsement of policy; moreover, since policy coverage expressly included provinces of Canada, insurance laws of which carrier was presumed to have knowledge, carrier could not be allowed to collect premiums therefor and then deny liability. Federal Ins. Co. v Watnick, 176 A.D.2d 38, 578 N.Y.S.2d 624, 1992 N.Y. App. Div. LEXIS 738 (N.Y. App. Div. 2d Dep't), aff'd, modified, 80 N.Y.2d 539, 592 N.Y.S.2d 624, 607 N.E.2d 771, 1992 N.Y. LEXIS 4225 (N.Y. 1992).

Underinsured motorist provision providing coverage of $11,000 was not "null and void" on ground that it was not equal to amount of liability coverage provided by policy. Morrison by Morrison v Worldwide Ins. Group, 212 A.D.2d 518, 622 N.Y.S.2d 120, 1995 N.Y. App. Div. LEXIS 1099 (N.Y. App. Div. 2d Dep't 1995).

Insured could not seek $20,000 per accident limit of her supplementary uninsured motorist endorsement on ground that 2 people were injured in accident since only insured had made claim under such endorsement, and thus she was limited by $10,000 per person limit of endorsement. Nationwide Ins. Co. v Riley, 244 A.D.2d 337, 665 N.Y.S.2d 533, 1997 N.Y. App. Div. LEXIS 11018 (N.Y. App. Div. 2d Dep't 1997).

An arbitrator's award directing an insurer to pay the insured's wife the sum of $20,000 and to pay the insured the sum of $16,500 was based on an error of law with the arbitrator exceeding his power and would be vacated where, even though the insured and his wife were both injured in the same automobile accident involving an uninsured motorist, and the uninsured motorist coverage provided to the insured by the insurer was under separate automobile liability insurance policies for which the insured paid separate premiums, the insureds were not entitled to aggregate or "stack" coverage under the two policies. Nationwide Mut. Ins. Co. v Miller, 124 Misc. 2d 561, 476 N.Y.S.2d 761, 1984 N.Y. Misc. LEXIS 3240 (N.Y. Sup. Ct. 1984), aff'd, 111 A.D.2d 438, 488 N.Y.S.2d 497, 1985 N.Y. App. Div. LEXIS 51530 (N.Y. App. Div. 3d Dep't 1985).

Insured would be declared entitled to full $50,000 amount of his underinsured motorist coverage where policy provided liability coverage of $100,000/$300,000 and his injuries exceeded $50,000 liability limit in settling tortfeasor's policy, since in determining extent of underinsured motorist coverage under CLS Ins § 3420(f)(2), tortfeasor's limit is to be compared with insured's liability limit rather than with insured underinsurance coverage limit. Gullo v Hartford Ins. Co., 145 Misc. 2d 330, 547 N.Y.S.2d 187, 1989 N.Y. Misc. LEXIS 637 (N.Y. Sup. Ct. 1989).

Arbitration of claim for underinsured motorist coverage in amount of $10,000 would be directed to proceed where claimant's automobile liability policy had bodily injury coverage in amount of $100,000/$300,000, with supplementary underinsurance coverage with limits of $10,000/$20,000, and insurer for other party to accident tendered policy liability limit of $10,000; reference point triggering availability of underinsurance coverage pursuant to CLS Ins § 3420 (f) (2) is bodily injury limit of insured's policy compared to policy limit of other vehicle, not amount of insured's underinsurance coverage. Tetteris v Travelers Ins. Co., 146 Misc. 2d 140, 549 N.Y.S.2d 585, 1989 N.Y. Misc. LEXIS 824 (N.Y. Sup. Ct. 1989).

In uninsured motorist arbitration, wherein question existed as to whether insurer's limit of liability was $25,000 to each claimant less that claimant's setoff or $50,000 less combined setoff, principle enunciated in Matter of Mostow v State Farm Insurance Companies, 88 NY2d 321, that such endorsement was ambiguous, was applicable; adoption of regulation 35-D (11 NYCRR subpart 60-2) and its mandatory form of subject endorsement has not done away with any presumption that might be made in favor of insured, since ambiguous language does not become less so because it is repeated elsewhere. State Farm Mut. Auto. Ins. Co. v Aponte, 182 Misc. 2d 372, 702 N.Y.S.2d 747, 1999 N.Y. Misc. LEXIS 486 (N.Y. Sup. Ct. 1999).

78. —Apportionment of recovery among various claimants

Where automobile liability policy is written for minimum $20,000 amount in case of injury or death to more than one person in any one accident as required by subd 2-a of former § 167 [now § 3420(f)], it is permissible for insurer to settle with one of several claimants although result is that the insurer is unable to pay full amount of judgments subsequently obtained by other claimants. Duprey v Security Mut. Casualty Co., 22 A.D.2d 544, 256 N.Y.S.2d 987, 1965 N.Y. App. Div. LEXIS 4678 (N.Y. App. Div. 3d Dep't 1965).

Insurance law § 3420 limits recovery of insured under uninsured motorist endorsement to $10,000 per person and $20,000 per occurrence and case law prohibits "stacking" of such insurance coverage; therefore, despite fact that husband and wife both hold separate automobile liability policies, $20,000 limitation is clearly applicable where there is only one "occurrence." Nationwide Mut. Ins. Co. v Miller, 111 A.D.2d 438, 488 N.Y.S.2d 497, 1985 N.Y. App. Div. LEXIS 51530 (N.Y. App. Div. 3d Dep't 1985).

There is no authority for issuing a stay of execution against enforcement of a judgment obtained against MVAIC by arbitration, notwithstanding inability to obtain such a stay may result in an inequitable exhaustion of MVAIC's maximum liability with respect to any one accident before other claimants of damages for injuries sustained in the same accident, can perfect their claims against MVAIC. Steinitz v Motor Vehicle Accident Indemnification Corp., 33 Misc. 2d 228, 225 N.Y.S.2d 147, 1962 N.Y. Misc. LEXIS 3744 (N.Y. Sup. Ct. 1962).

Since the accident indemnification endorsement in New York is limited to $20,000 for any one accident, where two "qualified" persons and one "insured" person brought an action against the MVAIC for injuries sustained while passengers in an uninsured vehicle, it was held that only $20,000 was available to the three claimants, and that each claimant was limited to $10,000 of that amount. The court held the insured individual must establish the amount owed to him through arbitration with his insurer, and the qualified claimants must establish the amount of their damages in a court against the MVAIC. Richter v Vitale, 59 Misc. 2d 374, 299 N.Y.S.2d 293, 1969 N.Y. Misc. LEXIS 1666 (N.Y. Sup. Ct. 1969).

In case of multiple liability claims against limited liability policy, carrier who has notice of multiple claims must consolidate such claims in interest of dividing as fairly as possible limited assets available, and if carrier fails to consolidate claims, then carrier must be prepared to pay each claim that is awarded within policy limits, even if cumulatively awards exceed such limits. Belizaire v Aetna Cas. & Sur. Co., 171 Misc. 2d 473, 654 N.Y.S.2d 982, 1997 N.Y. Misc. LEXIS 21 (N.Y. Sup. Ct. 1997).

Court would confirm arbitration award of $10,000 where petitioner was injured while one of 4 passengers in car involved in hit-and-run car accident, even though 2 of other passengers had been awarded damages in prior arbitration proceedings, which left only $2,500 of $10,000 per person, $20,000 per incident coverage available under uninsured motorist endorsement of policy for disposition of petitioner's claim and that of fourth passenger who also filed claim, since insurer was aware of but failed to consolidate multiple claims. Belizaire v Aetna Cas. & Sur. Co., 171 Misc. 2d 473, 654 N.Y.S.2d 982, 1997 N.Y. Misc. LEXIS 21 (N.Y. Sup. Ct. 1997).

79. —Other awards which offset amount recoverable

Workmen's compensation benefits paid to a decedent during his lifetime should be set off against an award payable to the next of kin for wrongful death in an action against the MVAIC, and where decedent had collected more than $10,000 in compensation benefits before expiring from the results of a collision with an uninsured motorist, the MVAIC was entitled to a permanent stay of arbitration. Napolitano v Motor Vehicle Acci. Indemnification Corp., 21 N.Y.2d 281, 287 N.Y.S.2d 393, 234 N.E.2d 438, 1967 N.Y. LEXIS 981 (N.Y. 1967).

Unlike minimum coverage mandated by CLS Ins § 3420(f)(1), supplemental uninsured motorist coverage is optional and nothing in CLS Ins § 3420(f)(2) prohibits parties from agreeing to reduce supplemental recovery by amounts received pursuant to workers' compensation laws. Valente v Prudential Property & Casualty Ins. Co., 77 N.Y.2d 894, 568 N.Y.S.2d 901, 571 N.E.2d 71, 1991 N.Y. LEXIS 313 (N.Y. 1991).

Where decedent's car was first hit by first motorist's car, casting him to pavement where he was hit by unknown second motorist and then by third motorist and Motor Vehicle Accident Indemnification Corporation paid claim against second motorist, corporation had right to reimbursement out of recovery against first and third motorists but could not intervene in death action against them because there were no common issues of law or fact. McGee v Horvat, 23 A.D.2d 271, 260 N.Y.S.2d 345, 1965 N.Y. App. Div. LEXIS 4008 (N.Y. App. Div. 2d Dep't 1965).

Where decedent's car was first hit by first motorist's car, casting him to pavement where he was hit by unknown second motorist and then by third motorist and Motor Vehicle Accident Indemnification Corporation paid claim against second motorist, first and third motorists could not claim corporation's payment in mitigation of damages. McGee v Horvat, 23 A.D.2d 271, 260 N.Y.S.2d 345, 1965 N.Y. App. Div. LEXIS 4008 (N.Y. App. Div. 2d Dep't 1965).

Since insurance companies and the Motor Vehicle Accident Indemnification Corporation are separate corporations, separately funded, and provide protection for separate classes of persons, indemnification by insurance company of its own insured does not reduce the $20,000 MVAIC fund available to those victims of uninsured motorists who are not themselves insured. Rittenhouse v Motor Vehicle Acci. Indemnification Corp., 48 A.D.2d 1, 366 N.Y.S.2d 488, 1975 N.Y. App. Div. LEXIS 9528 (N.Y. App. Div. 4th Dep't 1975).

Owner and operator of vehicle which was hit by vehicle in which plaintiff was passenger after unidentified vehicle allegedly sideswiped passenger's vehicle was entitled to include $10,000 payment by host driver's insurer under uninsured motorist provision in mitigation of alleged damages. Brink v Killeen, 48 A.D.2d 823, 368 N.Y.S.2d 547, 1975 N.Y. App. Div. LEXIS 10030 (N.Y. App. Div. 2d Dep't 1975).

Insured, who was injured while passenger on uninsured motorcycle which collided with automobile, and who accepted $10,000 in settlement of claim against motorist, could not recover on uninsured motorist endorsement which limited insurer's liability to $10,000 and which provided for reduction of amount payable by amounts received by insured from persons jointly or severally liable with owner or operator of uninsured vehicle. State Farm Mut. Auto Ins. Co. v Basile, 48 A.D.2d 868, 368 N.Y.S.2d 584, 1975 N.Y. App. Div. LEXIS 10099 (N.Y. App. Div. 2d Dep't 1975).

Arbitrator acted improperly in determining to offset amount of damages awarded under supplementary uninsured motorist endorsement, by deducting workers' compensation benefits insured had received, since offset violated strong public policy to provide injured person with right to obtain compensation for losses other than basic economic loss; however, since parties had agreed that any supplementary coverage payments would be reduced by any amounts paid for workers' compensation, benefits that exceeded $10,000 could properly be offset. Prudential Property & Casualty Ins. Co. v Carleton, 145 A.D.2d 492, 535 N.Y.S.2d 738, 1988 N.Y. App. Div. LEXIS 13258 (N.Y. App. Div. 2d Dep't 1988).

Mandatory provision for offset of amounts recovered from third party tortfeasors and anti-stacking provisions required to be set forth in underinsured motorist endorsements pursuant to 11 NYCRR subpart 60-2 are not arbitrary, capricious or irrational as violative of public policy. National Ass'n of Independent Insurers v Curiale, 190 A.D.2d 597, 593 N.Y.S.2d 812, 1993 N.Y. App. Div. LEXIS 1542 (N.Y. App. Div. 1st Dep't), app. denied, 81 N.Y.2d 711, 600 N.Y.S.2d 442, 616 N.E.2d 1104, 1993 N.Y. LEXIS 1809 (N.Y. 1993).

Insurance company would be required to proceed to arbitration on claim for underinsurance benefits where (1) insurance company for driver at fault settled insured's claim for full $10,000 limit of its policy, and (2) insured's policy had limits of $10,000/$20,000 and insurance company claimed that it was entitled to offset for amount already paid to insured, but (3) face sheet of policy did not indicate that underinsured benefits were subject to reduction, as it did for comprehensive and collision. Nationwide Mut. Ins. Co. v Davis, 195 A.D.2d 561, 600 N.Y.S.2d 482, 1993 N.Y. App. Div. LEXIS 7354 (N.Y. App. Div. 2d Dep't 1993), app. denied, 82 N.Y.2d 664, 610 N.Y.S.2d 152, 632 N.E.2d 462, 1994 N.Y. LEXIS 54 (N.Y. 1994).

Where motor vehicle insurance policy covering vehicle involved in accident did not provide bodily injury coverage equivalent to that provided under decedent passenger's policy, coverage provided under supplementary underinsured motorist coverage of passenger's policy was available to cover decedent's claims; although applicable limit of each policy was $100,000, coverage available under policy covering involved vehicle had to be reduced to account for at least minimal amount of property damage insurance required by law. Estate of Schutowich v Allstate Ins. Co., 211 A.D.2d 747, 621 N.Y.S.2d 690, 1995 N.Y. App. Div. LEXIS 675 (N.Y. App. Div. 2d Dep't 1995).

Court erred in enforcing reduction in coverage clause of insurance policy where policy did not contain single combined endorsement for uninsured and underinsurance motorist coverage. Paolilli v Aetna Ins. Co., 228 A.D.2d 683, 645 N.Y.S.2d 815, 1996 N.Y. App. Div. LEXIS 7513 (N.Y. App. Div. 2d Dep't 1996).

In proceeding by insurer under CLS CPLR Art 75, permanent stay of arbitration of underinsured motorist claim would be granted where policy contained single combined limit of uninsured and underinsured motorist coverage of $10,000, and insurer was entitled to offset of $10,000, which was amount that insured recovered from tortfeasor; there was nothing left to arbitrate, because insured had exhausted his policy limit. Nationwide Ins. Co. v Kuchta, 238 A.D.2d 510, 657 N.Y.S.2d 927, 1997 N.Y. App. Div. LEXIS 4010 (N.Y. App. Div. 2d Dep't 1997).

In proceeding by insurer under CLS CPLR Art 75, arbitration award to insured of $9,000 would be vacated, because policy limit was exhausted, where policy contained single combined limit of uninsured and underinsured motorist coverage of $10,000, and insurer was entitled to offset of $10,000 that insured recovered from tortfeasor. Nationwide Mut. Ins. Co. v Damaskinos, 238 A.D.2d 511, 657 N.Y.S.2d 928, 1997 N.Y. App. Div. LEXIS 3997 (N.Y. App. Div. 2d Dep't 1997).

In proceeding under CLS CPLR Art 75 to permanently stay arbitration of underinsured motorist claim, offset provision relied on by petitioning insurer was enforceable where policy contained single, combined limit of uninsurance/underinsurance covered by one premium and combined endorsement of uninsured and underinsured coverage. Commerce & Indus. Ins. Co. v Weber, 240 A.D.2d 742, 660 N.Y.S.2d 1001, 1997 N.Y. App. Div. LEXIS 7130 (N.Y. App. Div. 2d Dep't 1997).

Policy's offset provision authorized by 11 NYCRR § 60-4.1(c) effectively reduced insured's underinsured motorist claim to zero where it was undisputed that insured received $10,000 from carrier of tortfeasor's vehicle, and policy's supplementary uninsured motorist endorsement had $10,000 per person limit. Nationwide Ins. Co. v Riley, 244 A.D.2d 337, 665 N.Y.S.2d 533, 1997 N.Y. App. Div. LEXIS 11018 (N.Y. App. Div. 2d Dep't 1997).

Motorist who was injured while driving rental truck in Connecticut was not entitled to recover underinsured motorist benefits under policy, issued in New York to rental agency, in which agency elected supplementary uninsured motorist coverage of $10,000 per person as minimum amount allowable "extended out-of-state," where applicable Connecticut statute providing that uninsured and underinsured coverage be equal to that purchased for bodily injury liability did not make latter required "minimum amount" of coverage under CLS Ins § 5103(e), and unambiguous provisions of underinsured motorist endorsement made motorist's entitlement to benefits subject to offset by $100,000 that he recovered from other driver's insurer. Roberts v Eveready Ins Co., 245 A.D.2d 239, 666 N.Y.S.2d 627, 1997 N.Y. App. Div. LEXIS 13428 (N.Y. App. Div. 1st Dep't 1997).

Motorist who was injured while driving rental truck in Connecticut was not entitled to recover underinsured motorist benefits under policy, issued in New York to rental agency, in which agency elected supplementary uninsured motorist coverage of $d10,000 per person as minimum amount allowable "extended out-of-state," where applicable Connecticut statute providing that uninsured and underinsured coverage be equal to that purchased for bodily injury liability did not make latter required "minimum amount" of coverage under CLS Ins § 5103(e), and unambiguous provisions of underinsured motorist endorsement made motorist's entitlement to benefits subject to offset by $d100,000 that he recovered from other driver's insurer. Roberts v Eveready Ins Co., 245 A.D.2d 239, 666 N.Y.S.2d 627, 1997 N.Y. App. Div. LEXIS 13428 (N.Y. App. Div. 1st Dep't 1997).

80. —Statutory limits

CLS Ins § 3420(f)(2), which requires insureds to "exhaust...by payment" limits of all applicable bodily injury insurance policies before insurer is required to pay under underinsurance endorsement, requires primary insurers to pay every last dollar, and requires insureds to accept no less, prior to initiation of underinsurance claim. Federal Ins. Co. v Watnick, 80 N.Y.2d 539, 592 N.Y.S.2d 624, 607 N.E.2d 771, 1992 N.Y. LEXIS 4225 (N.Y. 1992).

Limit to be used in comparison under CLS Ins § 3420(f)(2) between "limits of liability under all bodily injury liability bonds and insurance policies of another motor vehicle liable for damages" and "bodily injury liability insurance limits of coverage" is insured's bodily injury limit, not limit contained in insured's supplementary uninsured/underinsured motorist endorsement. Prudential Property & Casualty Co. v Szeli, 83 N.Y.2d 681, 613 N.Y.S.2d 113, 635 N.E.2d 282, 1994 N.Y. LEXIS 1282 (N.Y. 1994).

By its terms, CLS Ins § 3420(f)(2) calls for facial comparison of policy limits without reduction from judgment of other claims arising from any given accident. Prudential Property & Casualty Co. v Szeli, 83 N.Y.2d 681, 613 N.Y.S.2d 113, 635 N.E.2d 282, 1994 N.Y. LEXIS 1282 (N.Y. 1994).

With regard to injuries sustained by Massachusetts insured in automobile accident which involved uninsured motorist and which occurred in New York after July 1, 1973, applicable limit of such insured's recovery under uninsured motorist coverage of automobile liability policy, which provided for all the coverages mandated under Massachusetts law including uninsured motorist coverage of $5,000 per person/$10,000 per occurrence, was the higher $10,000 New York State limit. O'Wyatt v New Hampshire Ins. Co., 53 A.D.2d 454, 385 N.Y.S.2d 627, 1976 N.Y. App. Div. LEXIS 13075 (N.Y. App. Div. 2d Dep't 1976).

Bodily injury liability limits contained in insured's policy are relevant to determine whether insurer must provide underinsured motorist insurance coverage to insured under CLS Ins § 3420(f)(2), but do not limit such coverage, and thus pedestrian, injured by driver who carried bodily injury liability limits of $10,000, was covered to extent of $50,000 pursuant to underinsurance provisions of his own and his parents' auto policies, and coverage was not limited to $25,000 based on bodily injury liability insurance limits contained in his own policy; under statute, applicable bodily injury liability insurance limits must be exhausted as condition precedent to insurer's obligation to pay, but insured is covered if other driver's bodily injury liability insurance limits are less than his own. Di Stasi v Nationwide Mut. Ins. Co., 132 A.D.2d 305, 522 N.Y.S.2d 340, 1987 N.Y. App. Div. LEXIS 51562 (N.Y. App. Div. 3d Dep't 1987).

Since CLS Ins § 3420(f)(1) prescribes minimum of $20,000 in uninsured motorist coverage when more than one person is injured in single occurrence, and further states that payment of benefits shall be subject to $10,000 "limit for any one person so injured," insurer which paid one claimant $17,500 under uninsured motorist endorsement after being informed that petitioner intended to file claim could not deduct its overpayment from coverage which should have been available to petitioner. Michigan Mut. Ins. Co. v Miller, 170 A.D.2d 102, 573 N.Y.S.2d 305, 1991 N.Y. App. Div. LEXIS 10942 (N.Y. App. Div. 2d Dep't 1991).

State employee, who was allegedly injured in accident with uninsured driver while he was driving vehicle owned by state, was not entitled to dismissal of state's affirmative defense that, as self-insurer, it was only required to maintain "uninsured motorist coverage not exceeding maximum amount of limit set forth on account of injury in CLS Ins § 3420(f)(1)," since obligations imposed by legislative history and public policy on self-insureds are coextensive with those of other insureds. Krieg v State, 183 A.D.2d 1025, 583 N.Y.S.2d 621, 1992 N.Y. App. Div. LEXIS 6860 (N.Y. App. Div. 3d Dep't 1992).

Court erred in confirming arbitration award which exceeded $10,000 per person statutory limit of New York City Transit Authority's uninsured motorist coverage that was in effect at time of accident. Spears v New York City Transit Auth., 262 A.D.2d 493, 692 N.Y.S.2d 100, 1999 N.Y. App. Div. LEXIS 6671 (N.Y. App. Div. 2d Dep't 1999), app. denied, 94 N.Y.2d 761, 707 N.Y.S.2d 142, 728 N.E.2d 338, 2000 N.Y. LEXIS 232 (N.Y. 2000).

Where the insured parties made a claim for uninsured motorist coverage based on the inability of the bus company to pay the deductible under its insurance policy, the insured parties failed to establish a meritorious defense under N.Y. C.P.L.R. 5015(a)(1) and N.Y. C.P.L.R. 317 as required to vacate the default in favor of the insurer on the insurer's motion to stay arbitration; in order to oppose a stay of arbitration, the insured parties had to demonstrate that the bus was uninsured, and the insured parties were not uninsured because they had recourse to the fund administered by the New York Motor Vehicle Accident Indemnification Corporation Act, N.Y. Ins. Law § 5201 et seq., since the uninsured motorist limits in the policy did not exceed fund limits under N.Y. Ins. Law §§ 3420(f)(1), 5210(a)(1). Matter of Nationwide Mut. Ins. Co. v Carlini, 814 N.Y.S.2d 856, 12 Misc. 3d 718, 2006 N.Y. Misc. LEXIS 960 (N.Y. Sup. Ct. 2006).

81. —Contractual limits

Tortfeasor in multiple-victim automobile accident should be deemed underinsured under CLS Ins § 3420(f)(2) where he had "single limit" policy providing $300,000 limit per accident for both bodily injury and property damage liability, while insured had "split limit" policy containing bodily injury limit of $100,000 per person and $300,000 per accident, and separate limit for property damage liability. Prudential Property & Casualty Co. v Szeli, 83 N.Y.2d 681, 613 N.Y.S.2d 113, 635 N.E.2d 282, 1994 N.Y. LEXIS 1282 (N.Y. 1994).

Per accident limit in supplementary uninsured/underinsured motorist endorsement, not per person limit, should be employed in underinsurance comparison under CLS Ins § 3420(f)(2) when there is multiple-victim accident but only one underinsurance claimant. Prudential Property & Casualty Co. v Szeli, 83 N.Y.2d 681, 613 N.Y.S.2d 113, 635 N.E.2d 282, 1994 N.Y. LEXIS 1282 (N.Y. 1994).

An uninsured motorist indorsement, unequivocally providing that damages recoverable thereunder were not to include any amount for medical expenses paid or payable under the medical payment provisions of the policy, did not violate either statute or public policy and was enforceable. Miller v Cosmopolitan Mut. Ins. Co., 33 A.D.2d 917, 307 N.Y.S.2d 592, 1970 N.Y. App. Div. LEXIS 5707 (N.Y. App. Div. 2d Dep't 1970).

Passenger in automobile was entitled to underinsured motorist coverage contained in owner's policy without offset pursuant to reduction in coverage clause since endorsement provisions of policy were misleading as they deceptively reduced stated underinsurance coverage and prevented insurance company from ever having to pay underinsurance coverage limit. CNA Ins. Cos. v Grandstaff, 188 A.D.2d 965, 591 N.Y.S.2d 900, 1992 N.Y. App. Div. LEXIS 14757 (N.Y. App. Div. 3d Dep't 1992), app. denied, 81 N.Y.2d 711, 600 N.Y.S.2d 442, 616 N.E.2d 1104, 1993 N.Y. LEXIS 1802 (N.Y. 1993).

Condition contained in uninsured motorist endorsement, providing that uninsured motorist benefits would be reduced by any sums paid by or on behalf of any "person or persons jointly or severally liable" with uninsured driver, was enforceable. Automobile Ins. Co. v Klein, 205 A.D.2d 685, 613 N.Y.S.2d 663, 1994 N.Y. App. Div. LEXIS 6394 (N.Y. App. Div. 2d Dep't 1994).

Offset provision of insurance policy was valid and enforceable because policy contained single, combined limit of uninsurance/underinsurance covered by one premium and combined endorsement for uninsurance and underinsurance. Arnold v Nationwide Mut. Ins. Co., 238 A.D.2d 415, 657 N.Y.S.2d 362, 1997 N.Y. App. Div. LEXIS 3798 (N.Y. App. Div. 2d Dep't 1997).

Insurer was entitled to permanent stay of arbitration of underinsured motorist claim where amount that insured received from tortfeasor's insurer exceeded amount of underinsured motorist benefits provided under subject policy. Commerce & Indus. Ins. Co. v Weber, 240 A.D.2d 742, 660 N.Y.S.2d 1001, 1997 N.Y. App. Div. LEXIS 7130 (N.Y. App. Div. 2d Dep't 1997).

Court erred in determining that underinsurance offset provision of respondents' insurance policy was unenforceable where that provision provided single, combined liability limit for both uninsurance and underinsurance; thus, respondents, who recovered $10,000 from tortfeasor's insurer, were entitled to no more than $15,000 in underinsurance coverage from petitioner, not full $25,000 policy limit. New York Cent. Mut. Fire Ins. Co. v Smith, 244 A.D.2d 958, 665 N.Y.S.2d 994, 1997 N.Y. App. Div. LEXIS 12354 (N.Y. App. Div. 4th Dep't 1997).

Insured was not entitled to temporary stay of arbitration of uninsured motorist claim in order to obtain discovery where insured had ample time to seek discovery of insurer as provided for in underlying insurance policy, and insured's failure to do so was unjustified. Mudd v State, 255 A.D.2d 386, 679 N.Y.S.2d 844, 1998 N.Y. App. Div. LEXIS 11795 (N.Y. App. Div. 2d Dep't 1998).

Limit of insured's bodily injury liability coverage was greater than that in tortfeasor's policy, and thus insured was entitled to judgment declaring that he could pursue supplemental uninsured motorist claim against his insurer, where (1) insured had single limit coverage of $100,000 for both bodily injury and property damage, (2) tortfeasor had split liability limit of $50,000 per person and $100,000 per accident for bodily injury, (3) insured was sole person injured in accident, and (4) insured settled his personal injury liability claim with tortfeasor for $50,000. Jones v Peerless Ins. Co., 281 A.D.2d 888, 721 N.Y.S.2d 890, 2001 N.Y. App. Div. LEXIS 2658 (N.Y. App. Div. 4th Dep't 2001).

In an insured's action to recover supplementary uninsured/underinsured motorists (SUM) coverage, the supreme court erred in denying the insurer's motion for summary judgment because it demonstrated that the insured's personal umbrella policy did not include SUM coverage; the insured received $ 100,000 from the tortfeasor, which was equal to the limit of the SUM coverage he purchased, and thus, the amount he was entitled to recover under the automobile insurance policy's SUM coverage was zero Nafash v Allstate Ins. Co., 137 A.D.3d 1088, 28 N.Y.S.3d 381, 2016 N.Y. App. Div. LEXIS 2052 (N.Y. App. Div. 2d Dep't 2016).

Supplementary uninsured/underinsured motorists (SUM) endorsement contained in an insured's automobile policy did not violate statute; while an insured has the option of purchasing SUM coverage in an amount up to the bodily injury liability insurance limits of coverage, he or she is not required to purchase SUM coverage at that maximum amount, and the statute does not prohibit insurers from offering SUM coverage with limits less than the bodily injury liability limits of coverage in the policy. Nafash v Allstate Ins. Co., 137 A.D.3d 1088, 28 N.Y.S.3d 381, 2016 N.Y. App. Div. LEXIS 2052 (N.Y. App. Div. 2d Dep't 2016).

Insured was entitled to summary judgment declaring that his auto policy provided $10,000/$20,000 underinsured motorist coverage, as written, for accident with vehicle having identical coverage, although policy defined "underinsured motor vehicle" as one whose limit for bodily injury liability was less than insured's liability limit, since policy would otherwise preclude underinsurance coverage, and it would violate public policy to deny coverage paid for by insured. Drapak v Aetna Casualty & Surety Co., 137 Misc. 2d 156, 520 N.Y.S.2d 303, 1987 N.Y. Misc. LEXIS 2663 (N.Y. Sup. Ct. 1987).

Provisions in a motor vehicle policy and "drive other car" endorsement were reasonably subject to two interpretations as to whether an insured was entitled to $50,000 or $1 million in supplemental UM coverage for an accident; because the ambiguity was construed against the insurer, the insured was entitled to $1 million in supplemental UM coverage. Penna v Federal Ins. Co., 28 A.D.3d 731, 814 N.Y.S.2d 226, 2006 N.Y. App. Div. LEXIS 4882 (N.Y. App. Div. 2d Dep't 2006).

82. — —Other insurance coverage

Where insured had separate policies on his automobile and on motorcycle he was operating at time of accident with uninsured motorist, and both policies contained required New York automobile accident indemnification endorsement provided, in case of other insurance, that "company shall not be liable for a greater proportion of any loss to which this coverage applies than the limit of liability hereunder bears to the sum of the applicable limits of liability of this insurance and such other insurance," insurers were coinsurers with regard to insured's claim arising from accident with uninsured vehicle and, as limits of both policies were identical, both insurers were required to contribute equally to sum to be determined at arbitration. Public Service Mut. Ins. Co. v Katcher, 36 N.Y.2d 295, 367 N.Y.S.2d 752, 327 N.E.2d 799, 1975 N.Y. LEXIS 1763 (N.Y. 1975).

Exemption provisions of CLS Work Comp § 29(1-a), which apply to recovery of compensation or medical benefits paid in lieu of first-party benefits under CLS Ins § 5104(a), do not apply to proceeds of claims made against insured's own uninsured motorist benefits under CLS Ins § 3420(f)(1) and (2). Shutter v Philips Display Components Co., 90 N.Y.2d 703, 665 N.Y.S.2d 379, 688 N.E.2d 235, 1997 N.Y. LEXIS 3684 (N.Y. 1997).

Uninsured motorist provision of host driver's insurance policy, upon which driver paid premiums and under which passenger in host driver's vehicle recovered for injuries sustained when unidentified vehicle allegedly sideswiped passenger's vehicle causing passenger's vehicle to hit another vehicle, was not a "collateral source" exempt from use for purposes of mitigation of damages in suit by passenger against driver of vehicle hit by passenger's vehicle. Brink v Killeen, 48 A.D.2d 823, 368 N.Y.S.2d

547, 1975 N.Y. App. Div. LEXIS 10030 (N.Y. App. Div. 2d Dep't 1975).

In an action by a wife's insurer seeking a declaration that its uninsured motorist coverage was excess insurance, secondary to the uninsured motorist coverage provided by the husband's primary insurer, and that the husband and wife could not therefore recover under the wife's uninsured motorist indorsement, the trial court erred in denying the wife's insurer's requested relief where the "other insurance" clause of the wife's uninsured motorist indorsement provided that it would be only excess insurance in the event of an accident while occupying an automobile not owned by the wife, and where the husband's motorcycle, on which the husband and wife were riding when the accident occurred, was considered an "automobile" for the purposes of the clause. State Farm Mut. Auto. Ins. Co. v Drysdale, 81 A.D.2d 1011, 440 N.Y.S.2d 94, 1981 N.Y. App. Div. LEXIS 11765 (N.Y. App. Div. 4th Dep't 1981).

Special Term properly dismissed insured's complaint seeking recovery under underinsured motorists indorsement of his automobile liability insurance policy where limits of liability of policy held by other motorist were same as, not less than, limits of liability provided by insured's coverage, even though insured's prior judgment from other motorist exceeded other motorist's policy limits due to multiple recoveries by other parties, since definition of "underinsured motorist" expressed in CLS Ins § 3420 applies only where motorist responsible for damages holds policy with liability limits less than those of injured insured's underinsured indorsement. Manfredo v Centennial Ins. Co., 124 A.D.2d 979, 508 N.Y.S.2d 811, 1986 N.Y. App. Div. LEXIS 62292 (N.Y. App. Div. 4th Dep't 1986).

Pedestrian who was struck by underinsured vehicle was insured to extent of aggregate limits of underinsured motorist coverage under his own auto policy and policy covering his parents' cars, since 2 policies were separate contracts, each containing underinsured motorist provision which expressly covered him, and his purchase of underinsurance coverage in connection with his own auto policy did not remove him from underinsurance provision in his parents' policy in absence of evidence that carrier reduced parents' premium accordingly or notified them that their policy would be modified to their detriment if family member purchased separate policy; fact that insured's attempt to make use of more than one policy provision could be labeled "stacking" was not determinative. Di Stasi v Nationwide Mut. Ins. Co., 132 A.D.2d 305, 522 N.Y.S.2d 340, 1987 N.Y. App. Div. LEXIS 51562 (N.Y. App. Div. 3d Dep't 1987).

Where limits of uninsured motorist coverage available to respondent, who was injured while riding in insured vehicle which was involved in accident with uninsured vehicle, was less than limits of policy issued to respondent's husband, respondent was entitled to supplementary uninsured motorist coverage under husband's policy, under which she was also covered. State Farm Mut. Ins. Co. v Amarosa, 208 A.D.2d 545, 617 N.Y.S.2d 35, 1994 N.Y. App. Div. LEXIS 9277 (N.Y. App. Div. 2d Dep't 1994).

It was not inequitable to enforce unambiguous provision precluding stacking of supplementary uninsured motorist (SUM) coverage, even though insured and his wife paid separate premiums, since each premium was reduced by multi-car discount in amount that far exceeded premium for SUM coverage. State Farm Mut. Auto. Ins. Co. v Hill, 213 A.D.2d 976, 625 N.Y.S.2d 387, 1995 N.Y. App. Div. LEXIS 3756 (N.Y. App. Div. 4th Dep't), app. dismissed, 86 N.Y.2d 779, 631 N.Y.S.2d 611, 655 N.E.2d 708, 1995 N.Y. LEXIS 5668 (N.Y. 1995).

Arbitrator's award of underinsurance benefits would be vacated where $50,000 limit on underinsurance benefits contained in insured's policy was completely offset by $50,000 that she received in settlement from insurer of negligent tortfeasor. Arnold v Nationwide Mut. Ins. Co., 238 A.D.2d 415, 657 N.Y.S.2d 362, 1997 N.Y. App. Div. LEXIS 3798 (N.Y. App. Div. 2d Dep't 1997).

In granting petition to permanently stay arbitration of underinsured motorist claim after monetary limits applicable to bodily injury liability protection covering underinsured motorist were exhausted by settlement, court erred in considering payments received by claimant from insurer of second, adequately insured tortfeasor in determining whether claimant was entitled to pursue underinsured motorist claim against petitioner. Allstate Ins. Co. v Charno, 276 A.D.2d 552, 714 N.Y.S.2d 309, 2000 N.Y. App. Div. LEXIS 10184 (N.Y. App. Div. 2d Dep't 2000), app. denied, 96 N.Y.2d 705, 725 N.Y.S.2d 277, 748 N.E.2d 1073, 2001 N.Y. LEXIS 242 (N.Y. 2001).

In action by insured decedent's estate for judgment declaring its entitlement to $100,000 as limit of coverage under supplementary uninsured motorists endorsement of decedent's automobile insurance policy, insurer was entitled to $50,000 offset for amount previously paid to estate by another insurer under higher priority policy where lower priority policy with defendant insurer provided that coverage under lower priority policy "applies only to the extent that it exceeds the coverage" provided by the higher priority policy. Dudley v Allstate Ins. Co., 281 A.D.2d 941, 722 N.Y.S.2d 448, 2001 N.Y. App. Div. LEXIS 2702 (N.Y. App. Div. 4th Dep't 2001).

In an action arising out of a hit-and-run incident, where a separate premium for uninsured motorist coverage was charged that each of two vehicles owned by the injured person, said person was not twice insured for that regard so as to allow a "stacking" of the coverage afforded each vehicle since, in the absence of supplementary uninsured motorist insurance, Ins Law former § 167 [now § 3420] limits an insured person's recovery to a maximum of $10,000 regardless of how many such endorsements or policies may be otherwise available. Sission v Travelers Ins. Cos., 114 Misc. 2d 594, 452 N.Y.S.2d 133, 1982 N.Y. Misc. LEXIS 3526 (N.Y. Sup. Ct. 1982), modified, 94 A.D.2d 953, 464 N.Y.S.2d 77, 1983 N.Y. App. Div. LEXIS 18431 (N.Y. App. Div. 4th Dep't 1983).

Defendant driver's primary liability insurer, which provided coverage of $50,000 per person and $100,000 per accident, would be required to make total of $150,000 available for one-car accident in which plaintiff's husband was killed and plaintiff sustained paraplegia, since CLS Ins § 3420(f)(1) requires primary insurer to have available policy limit of $50,000 for each injured party up to maximum of $100,000 for personal injuries and additional $50,000 for wrongful death. Oto v Ogtong, 143 Misc. 2d 905, 542 N.Y.S.2d 953, 1989 N.Y. Misc. LEXIS 363 (N.Y. Sup. Ct. 1989).

Defendant insurance company was entitled to judgment declaring that any claim for damages to which vehicle operator was entitled for single accident pursuant to terms of supplemental underinsured motorist endorsements in 2 automobile policies issued to vehicle owner, each of which provided maximum of $100,000, would be covered by each policy equally, up to total maximum of $100,000, even though there is no statutory proscription against stacking supplemental uninsured motorist coverage, since maximum amount set forth in CLS Ins § 3420(f)(2) operated as ceiling, limiting insurer's liability to $100,000 in any one accident. Rifkin v State Farm Mut. Auto. Ins. Co., 157 Misc. 2d 141, 595 N.Y.S.2d 846, 1993 N.Y. Misc. LEXIS 88 (N.Y. Sup. Ct. 1993).

Court would enforce provisions in separate automobile policies issued by same insurer to husband and wife prohibiting "stacking" of benefits where wife's policy provided for multi-vehicle premium discount, in effect insuring 2 vehicles for one premium; thus, where both husband's and wife's policies provided supplementary underinsured motorist coverage benefits of $50,000 per person, and husband was injured while operating wife's vehicle, recovery would only be $50,000 and not $100,000. State Farm Mut. Auto. Ins. Co. v Raglan, 164 Misc. 2d 790, 626 N.Y.S.2d 356, 1995 N.Y. Misc. LEXIS 177 (N.Y. Sup. Ct. 1995).

83. Notice requirement for claim involving uninsured motorist

Held that the language of the uninsured motorist indorsement under the former § 167 [now § 3420] and the provisions of the statute itself indicate clearly that the filing of a notice of intention to make claim against the MVAIC is not the equivalent of giving notice of intention to arbitrate. Motor Vehicle Acci. Indemnification Corp. v McDonnell, 23 A.D.2d 773, 258 N.Y.S.2d 735, 1965 N.Y. App. Div. LEXIS 4459 (N.Y. App. Div. 2d Dep't 1965).

In a petition by an insurance company to stay arbitration demanded by an insured under a policy covering a car that allegedly was involved in a hit-and-run accident, in which the

insurer asserted that the insured failed to furnish it with sufficient proof that the hit-and-run accident actually occurred, and in which the insured opposed the petition, asserting that the insurer was precluded from asserting that the insured was not entitled to uninsured motorist coverage because it failed to issue a timely notice of disclaimer pursuant to Ins Law § 167(8), an order dismissing the petition was erroneous, since, in the absence of a showing that the accident arose through involvement with an uninsured automobile as defined in the endorsement to the policy, it could not be said that the policy covered the vehicle involved, absent which there would be no duty upon the insurer to deny coverage pursuant to the statute and since the issue of whether there was physical contact between the insured vehicle and the alleged hit-and-run automobile required a hearing. In re Prudential Property & Casualty Ins. Co., 104 A.D.2d 557, 479 N.Y.S.2d 262, 1984 N.Y. App. Div. LEXIS 20012 (N.Y. App. Div. 2d Dep't 1984).

Insurer had sufficient evidence of noninsurance of defendant so as to bring insured's claim under uninsured motorist indorsement, and so as to require insurer to send insured prompt written notice of its intent to deny liability on stated grounds, where (1) defendant's attorney submitted letter stating that defendant was uninsured, (2) report from state division of motor vehicle states that defendant's vehicle's license plate had expired prior to accident and had not been renewed, and (3) New York had suspended defendant's driving privileges in state because of his refusal to file accident report which would have included insurance information. Empire Mut. Ins. Co. v Mahmud, 114 A.D.2d 324, 494 N.Y.S.2d 316, 1985 N.Y. App. Div. LEXIS 53006 (N.Y. App. Div. 1st Dep't 1985).

Notice to insurance company of insured's intent to pursue uninsured motorist claim sent 16 days after receiving notice from another insurance company that vehicle involved in accident was not insured by it, was timely notice given "as soon as was reasonably possible" as required by CLS Insurance § 3420(a)(4), and insured had no reason to serve notice of intent to pursue uninsured motorist claim prior to receipt of insurance company's disclaimer since Department of Motor Vehicles' FS-25 form had initially indicated that other automobile involved in accident was insured. State Farm Mut. Auto. Ins. Co. v Santarpia, 119 A.D.2d 825, 501 N.Y.S.2d 450, 1986 N.Y. App. Div. LEXIS 55767 (N.Y. App. Div. 2d Dep't 1986).

In action seeking arbitration under uninsured motorist endorsement, insurance company's contention that notice of claim from insured was not received in timely manner would be rejected where (1) postal receipts introduced by insured's attorneys provided clear proof of mailing of 2 items to insurance company within 3 weeks of accident and receipt by insurance company of those items, (2) lawyer from firm produced mailing book which demonstrated that items were notices of claim, and (3) insurance company's assertion of nonreceipt was unaccompanied by any knowledgeable and clear indication as to contents of mailings from insured's attorneys. Allstate Ins. Co. v Patrylo, 144 A.D.2d 243, 533 N.Y.S.2d 436, 1988 N.Y. App. Div. LEXIS 10836 (N.Y. App. Div. 1st Dep't 1988).

Notices of intention to make claim under uninsured motorist endorsement which did not denote insured's policy number or effective and expiration dates of policy were not defective for not containing enough information to process claim, since notices contained insured's name and address and insurance company could not reasonably assert that it was unable to locate policy in files based upon data given. Allstate Ins. Co. v Patrylo, 144 A.D.2d 243, 533 N.Y.S.2d 436, 1988 N.Y. App. Div. LEXIS 10836 (N.Y. App. Div. 1st Dep't 1988).

Motorist's attorney properly served demand for arbitration of uninsured motorist claim on insurance company's California office where policy indicated that it was issued by California company, and all of motorist's previous correspondence was sent to California office, which had established file for her claim and arranged for payment of her medical bills. Colonial Penn Ins. Co. v Ennab, 168 A.D.2d 494, 562 N.Y.S.2d 736, 1990 N.Y. App. Div. LEXIS 15429 (N.Y. App. Div. 2d Dep't 1990), app. denied, 78 N.Y.2d 851, 573 N.Y.S.2d 69, 577 N.E.2d 60, 1991 N.Y. LEXIS 847 (N.Y. 1991), app. dismissed, 78 N.Y.2d 953, 573 N.Y.S.2d 648, 578 N.E.2d 446, 1991 N.Y. LEXIS 6149 (N.Y. 1991).

Court erred in finding that insured had failed to report hit-and-run accident to police within 24 hours after accident where police were on scene within minutes of accident, and police accident report was completed on same day; it was immaterial that report failed to make reference to physical contact or failed to specifically label accident as "hit-and-run." Aetna Casualty & Surety Co. v Stone, 170 A.D.2d 599, 566 N.Y.S.2d 374, 1991 N.Y. App. Div. LEXIS 2293 (N.Y. App. Div. 2d Dep't 1991).

Insurance company was entitled to permanent stay of arbitration of uninsured motorist claim based on failure of insured to give timely notice of claim where insured had made numerous inquiries as to whereabouts of owner and driver of other vehicle involved in collision and as to existence of insurance coverage for such individuals, and results of those inquiries should have alerted him to fact that he had potential uninsured motorist claim. Nova Casualty Co. v Helmstadt, 204 A.D.2d 330, 611 N.Y.S.2d 271, 1994 N.Y. App. Div. LEXIS 4510 (N.Y. App. Div. 2d Dep't 1994).

Insurance company did not waive requirement that proof of uninsured motorist claim be given as soon as practicable after written request therefor by company by letter it wrote to respondents' attorney, 2 years after its receipt of respondents' notice of claims and numerous requests of their attorney to provide proof of claims, stating that although it had not yet received proof of claims, it would, should respondents pursue matter, exercise its right under endorsement to examination under oath, physical examinations, and inspection of insured vehicle. Lumbermens Mut. Cas. Co. v Fadeyeva, 243 A.D.2d 368, 663 N.Y.S.2d 177, 1997 N.Y. App. Div. LEXIS 10309 (N.Y. App. Div. 1st Dep't 1997).

Insured claimants' notice of their intent to seek underinsured motorist benefits was timely where they first became aware of amount of other available coverage not long before they served notice, in course of presenting their personal injury actions, uninsured portion of insurer's policy did not specifically set forth any time limits for giving of such notice, and insurer had timely notice of accident and was able to conduct investigation. Travelers Ins. v Torres, 245 A.D.2d 82, 665 N.Y.S.2d 86, 1997 N.Y. App. Div. LEXIS 12793 (N.Y. App. Div. 1st Dep't 1997).

Breach of terms of insurance policy requiring written notice of claim for underinsurance benefits by insured, who was injured in collision with vehicle driven by defendant in underlying negligence action, was not negated by fact that insurer had potential knowledge of such claim because it insured both injured insured and defendant and was aware of extent of injuries and defendant's limited coverage where injured insured learned of defendant's limited coverage on November 30, 1995, but did not provide insurer with written notice of his claim until March 18, 1996. Allstate Ins. Co. v Dewyea, 245 A.D.2d 667, 664 N.Y.S.2d 684, 1997 N.Y. App. Div. LEXIS 12588 (N.Y. App. Div. 3d Dep't 1997).

Defendant insurer was entitled to protective order where plaintiffs sought to depose its employees and employees of insurance agent to determine their interpretation of policy requirement that plaintiffs give notice of claim on supplemental uninsured motorist coverage "as soon as practicable," since defendant's interpretation of phrase was irrelevant. Dixon v New York Cent. Mut. Fire Ins. Co., 265 A.D.2d 914, 695 N.Y.S.2d 826, 1999 N.Y. App. Div. LEXIS 10039 (N.Y. App. Div. 4th Dep't 1999).

Even if insurer had actual notice of accident, such notice did not vitiate policy requirement that insured provide notice of claim on supplemental uninsured motorist coverage. Dixon v New York Cent. Mut. Fire Ins. Co., 265 A.D.2d 914, 695 N.Y.S.2d 826, 1999 N.Y. App. Div. LEXIS 10039 (N.Y. App. Div. 4th Dep't 1999).

After October 27 1995 accident, insured gave notice of claim under supplemental uninsured motorist coverage "as soon as practicable," and thus insurer was not entitled to stay of arbitration, where insured reasonably believed that she had not sustained "serious injury" within meaning of CLS Ins § 5102(d) until June 1997, then promptly commenced action against tortfeasor, and gave notice to insurer on July 17, 1997. Nationwide Ins. Co. v Brown-Young, 265 A.D.2d 918, 695 N.Y.S.2d 823, 1999 N.Y. App. Div. LEXIS 10044 (N.Y. App. Div. 4th Dep't 1999).

Request for uninsured motorist benefits was not made as soon as reasonably possible through exercise of ordinary diligence where insured waited almost 16 months following accident before requesting uninsured motorist benefits. Fatima Cab Corp. v Sharma, 267 A.D.2d 237, 699 N.Y.S.2d 461, 1999 N.Y. App. Div. LEXIS 12534 (N.Y. App. Div. 2d Dep't 1999).

In action involving issue of whether insurer was entitled to judgment declaring that it had no duty to provide supplementary uninsured motorist (SUM) coverage to insured, there was no merit to insured's claim that he did not try to ascertain other driver's policy limits during period of his delay in giving notice of claim because insurer failed to provide relevant information about insured's coverage when insured asked for it shortly after accident where (1) insured did not ask insurer about SUM coverage until 16 months after accident, (2) when insured asked insured for policy information shortly after accident, seriousness of insured's injuries was not apparent, and insurer had no reason to believe that insured had SUM claim, and (3) absent fraud or other wrongful conduct by insurer, insured was conclusively presumed to know contents of policy and to assent them. Ciaramella v State Farm Ins. Co., 273 A.D.2d 831, 709 N.Y.S.2d 296, 2000 N.Y. App. Div. LEXIS 6839 (N.Y. App. Div. 4th Dep't 2000).

In action involving issue of whether insurer was entitled to judgment declaring that it had no duty to provide supplementary uninsured motorist (SUM) coverage to insured, insurer's potential knowledge of insured's SUM claim because insurer was also insured's no-fault carrier did not alter fact that insured did not provide timely written notice of claim; insurer's actual notice of accident does not vitiate requirement that insurer provide timely notice of claim. Ciaramella v State Farm Ins. Co., 273 A.D.2d 831, 709 N.Y.S.2d 296, 2000 N.Y. App. Div. LEXIS 6839 (N.Y. App. Div. 4th Dep't 2000).

Insured's failure to comply with legal notice provision of insurance policy did not afford insurer basis for disclaimer where insurer had not claimed any prejudice, nor was any prejudice shown. Brandon v Nationwide Mut. Ins. Co., 284 A.D.2d 886, 727 N.Y.S.2d 727, 2001 N.Y. App. Div. LEXIS 6855 (N.Y. App. Div. 3d Dep't 2001), aff'd, 97 N.Y.2d 491, 743 N.Y.S.2d 53, 769 N.E.2d 810, 2002 N.Y. LEXIS 977 (N.Y. 2002).

Respondent's notice to its insurer of supplemental uninsured motorist claim did not constitute notice to second insurer, which insured vehicle which respondent was driving at time of accident, even though copy of respondent's letter was sent to second insurer. Allstate Ins. Co. v Earl, 284 A.D.2d 1002, 726 N.Y.S.2d 522, 2001 N.Y. App. Div. LEXIS 5810 (N.Y. App. Div. 4th Dep't 2001).

Insurance responsibility under Automobile Accident Indemnification Indorsement exists independently of standard policy provisions, and plaintiffs who were injured in one-car accident in which insured vehicle was involved could not be deprived of coverage by failure of named insured to give proper notice of accident. Colbert v Hill, 75 Misc. 2d 258, 347 N.Y.S.2d 635, 1973 N.Y. Misc. LEXIS 1879 (N.Y. Sup. Ct. 1973).

Insured's declaratory judgment action which sought entitlement to supplementary underinsured motorist (SUM) coverage against his insurer should not have been dismissed, pursuant to the insurer's motion under N.Y. C.P.L.R. 3211(a)(7), because the 90-day notice provision in the personal injury coverage provision of the policy was inapplicable to the SUM endorsement; there could also be no determination as a matter of law, without a factual review, that the insured's late notice of the pendency of a legal action against the tortfeasor, or the settlement thereof, vitiated the SUM coverage entitlement under N.Y. Ins. Law § 3420, absent a showing that the insurer had been prejudiced by the delay. Banks v Am. Mfrs. Mut. Ins. Co., 306 A.D.2d 120, 762 N.Y.S.2d 588, 2003 N.Y. App. Div. LEXIS 6987 (N.Y. App. Div. 1st Dep't 2003).

Trial court properly denied an insurer's petition under N.Y. C.P.L.R. art. 75 to permanently stay arbitration of an insured's uninsured motorist claim, as N.Y. Ins. Law § 3420(a)(3) did not impose a duty on the insured to provide notice of an accident to an alleged tortfeasor's insurance carrier. Matter of Progressive Northeastern Ins. Co. v Yeger, 30 A.D.3d 524, 817 N.Y.S.2d 119, 2006 N.Y. App. Div. LEXIS 7994 (N.Y. App. Div. 2d Dep't 2006).

Occupant who was injured in police vehicle owned by his city employer, and which vehicle was struck by uninsured motor vehicle, was required to file notice of claim with city prior to making claim for uninsured motorist coverage. Insurance Department, Opinions of General Counsel, Opinion Number 01-07-05.

84. —Notice requirement imposed by particular policy indorsements

In underinsurance context, phrase "as soon as practicable" means that insured must give notice with reasonable promptness after insured knew or should reasonably have known that tortfeasor was underinsured, employing objective standard as to what constitutes reasonable ascertainment; this test, however, does not lend itself to mathematic precision. Metropolitan Prop. & Cas. Ins. Co. v Mancuso, 93 N.Y.2d 487, 693 N.Y.S.2d 81, 715 N.E.2d 107, 1999 N.Y. LEXIS 1296 (N.Y. 1999).

Where provision of policy as to injury by uninsured motor vehicle operator provided for by subd 2-a of former § 167 [now § 3420(f)] requires that notice of claim be filed with the MVAIC "within 90 days or as soon as practicable," it may be interpreted to provide only that notice of claim must be filed within a reasonable time. Whether or not notice has been given within such time, necessarily includes determination of diligence of claimant, and is basically a factual issue. Question of timeliness of such notice should not be decided on basis of affidavits but plenary hearing should be held to determine such issue by means of jury trial. Motor Vehicle Accident Indemnification Corp. v Stein, 23 A.D.2d 526, 255 N.Y.S.2d 483, 1965 N.Y. App. Div. LEXIS 5103 (N.Y. App. Div. 4th Dep't 1965).

Where terms of policy covering injury by uninsured motor vehicle operator required by subd 2-a of former § 167 [now § 3420(f)] provide for notice "within 90 days or as soon as practicable," whether notice is given as soon as practicable requires a determination whether it was given within reasonable time under all circumstances. But in absence of a satisfactory explanation, delay in giving notice may be unreasonable as matter of law. Claimant or his counsel must be diligent in trying to ascertain whether other vehicle involved in accident was insured, and where it is indisputably demonstrated that inquiries were not made at proper source, lack of any diligent effort to determine existence of insurance until many months had passed was held to require directed verdict that notice was not given as soon as practicable. Application of Motor Vehicle Accident Indemnification Corp., 23 A.D.2d 546, 256 N.Y.S.2d 427, 1965 N.Y. App. Div. LEXIS 4936 (N.Y. App. Div. 1st Dep't 1965).

The purpose of subd 2-a of former § 167 [now § 3420(f)] and of the uninsured motorist endorsement thereunder is to allow recovery against MVAIC where the insurer of the offending automobile disclaims liability or denies coverage because of acts or omissions of the named or any additional insureds under the policy covering the automobile which caused the injury. And to obtain the benefits of such statute and of the policy, the insured is allowed 90 days within which to give written notice of claim to MVAIC. To give effect to such purposes, the limitation period of the policy should be contrued to run from the time of the accrual of the petitioner's right to relief against MVAIC. American Arbitration Asso. v Motor Vehicle Acci. Indemnification Corp., 24 A.D.2d 541, 261 N.Y.S.2d 356 (4th Dept 1965).

Insurer was entitled to permanent stay of arbitration of dispute as to coverage under automobile liability policy where neither insured nor his attorney informed insurer of hit and run accident until nearly one month beyond 90-day period required under policy, especially since insured had retained counsel shortly after accident and had timely filed notice with Motor Vehicle Accident Indemnification Corporation. Eveready Ins. Co. v Saunders, 149 A.D.2d 456, 539 N.Y.S.2d 957, 1989 N.Y. App. Div. LEXIS 4617 (N.Y. App. Div. 2d Dep't 1989).

Insured exercised due diligence in asserting claim against owner of automobile for injuries sustained in accident, and thus owner's insurance company would be required to proceed to arbitration on claim for underinsured motorist benefits, notwithstanding that claim for benefits was not made within 90-day time limit specified in policy, where (1) insured retained attorney and attempted to ascertain limits of insurance policy issued to owner of automobile, but insurance company refused to divulge limits

until after suit was commenced, (2) after commencement of suit, insurance company revealed that limits were $10,000/$20,000 and offered to settle for full $10,000, and (3) insured then sought underinsured benefits from his insurance company. Nationwide Mut. Ins. Co. v Edgerson, 195 A.D.2d 560, 600 N.Y.S.2d 483, 1993 N.Y. App. Div. LEXIS 7355 (N.Y. App. Div. 2d Dep't 1993).

Insured exercised due diligence in asserting claim against owner of automobile for injuries sustained in accident, and thus owner's insurance company would be required to proceed to arbitration on claim for underinsured motorist benefits, notwithstanding that claim for benefits was not made within 90-day time limit specified in policy, where (1) insured retained attorney and attempted to ascertain limits of insurance policy issued to owner of automobile, but insurance company refused to divulge limits until after suit was commenced, (2) after commencement of suit, insurance company revealed that limits were $10,000/$20,000 and offered to settle for full $10,000, and (3) insured then sought underinsured benefits from his insurance company. Nationwide Mut. Ins. Co. v Edgerson, 195 A.D.2d 560, 600 N.Y.S.2d 483, 1993 N.Y. App. Div. LEXIS 7355 (N.Y. App. Div. 2d Dep't 1993).

Notice provisions of uninsured motorist endorsement were ambiguous where one portion required claimant to file statement under oath within 90 days after accident, while endorsement also contained contradictory clause requiring claimant to furnish sworn written proof of claim "after written request by the company"; thus, since it was undisputed that claimants provided insurer with notice of their claim within time limit provided in policy, their failure to additionally file sworn statement under oath within 90 days after accident did not vitiate coverage. Eveready Ins. Co. v Ruiz, 208 A.D.2d 923, 618 N.Y.S.2d 80, 1994 N.Y. App. Div. LEXIS 10592 (N.Y. App. Div. 2d Dep't 1994).

Submission of unsworn and undated application for no-fault benefits in connection with hit-and-run accident did not comply with condition precedent to coverage under uninsured motorist endorsement that insureds submit, within 90 days of accident, statement under oath that they had cause of action arising out of accident against person whose identity was unascertainable. State Farm Ins. Co. v Velasquez, 211 A.D.2d 636, 621 N.Y.S.2d 357, 1995 N.Y. App. Div. LEXIS 101 (N.Y. App. Div. 2d Dep't 1995).

Insured's notification to insurer of accident with detailed statement containing diagram of accident and fact that it was "hit and run," forwarded to insurer with 90 days of occurrence, was sufficient to put insurer on notice that insured was seeking to file uninsured motorist claim, where standard policy issued to insured required that sworn statement be provided within 90 days of occurrence, but uninsured coverage section of supplemental policy contained no written notice requirement; thus, insurer's application to permanently stay arbitration was denied. Lumbermens Mut. Cas. Co. v Schrem, 227 A.D.2d 280, 642 N.Y.S.2d 666, 1996 N.Y. App. Div. LEXIS 5397 (N.Y. App. Div. 1st Dep't 1996).

Insureds were properly granted summary judgment in declaratory judgment action to recover underinsured motorist benefits where they gave insurer written notice of their potential claim for such benefits before they received actual notice of policy limits, based on fact that insured's injuries appeared to be more significant than they were at time claim for no-fault benefits was filed, insureds gave timely notice of accident, and policy phrase "as soon as practicable" as to event which triggered duty to provide notice was ambiguous. Matan v Nationwide Mut. Ins. Co., 243 A.D.2d 978, 663 N.Y.S.2d 906, 1997 N.Y. App. Div. LEXIS 10359 (N.Y. App. Div. 3d Dep't 1997).

Insurer received notice of claim as soon as practicable, in compliance with notice provision in uninsured motorist endorsement, even though insureds did not notify insurer of their intention to make uninsured motorist claim until 5 ½ years after hit-and-run accident that allegedly caused subject injuries, where insurer was informed of accident on day after it occurred and of nature of injuries only 3 months after insureds first learned of causal connection between accident and injuries. Travelers Ins. Co. v Lianides, 246 A.D.2d 490, 668 N.Y.S.2d 200, 1998 N.Y. App. Div. LEXIS 693 (N.Y. App. Div. 1st Dep't 1998).

Insurer was not entitled to permanent stay of arbitration of uninsured motorist claim on ground that insured failed to notify it of her claim "as soon as practicable" under terms of her policy where time to notify insurer of that claim did not begin to run until underlying defendant's vehicle became uninsured, which occurred when defendant's insurer disclaimed coverage of accident. State Farm Mut. Auto. Ins. Co. v Pantina, 255 A.D.2d 592, 681 N.Y.S.2d 82, 1998 N.Y. App. Div. LEXIS 12869 (N.Y. App. Div. 2d Dep't 1998).

Defendant insurer was properly granted summary judgment dismissing uninsured motorist claim on ground that plaintiff failed to give notice of his claim "as soon as practicable," where notice was not given until 23 months after March 1994 accident, plaintiff failed to show that he did not know or could not reasonably have known that tortfeasor's vehicle was underinsured prior to February 1996 when he first undertook to determine liability limits of tortfeasor's insurance, and he failed to show that he was not reasonably aware of severity of his condition until February 1996, given that he was referred to neurosurgeon in September 1995 and underwent spinal fusion in January 1996. Unwin v New York Cent. Mut. Fire Ins. Co., 268 A.D.2d 669, 700 N.Y.S.2d 580, 2000 N.Y. App. Div. LEXIS 111 (N.Y. App. Div. 3d Dep't 2000).

Unexplained 2 ½ -year delay in serving notice of underinsurance claim was unreasonable as matter of law, where policy required insured to serve notice "as soon as practicable." State Farm Mut. Auto. Ins. Co. v Tremaine, 270 A.D.2d 962, 705 N.Y.S.2d 477, 2000 N.Y. App. Div. LEXIS 3541 (N.Y. App. Div. 4th Dep't 2000).

Court properly granted insurer's motion to stay arbitration of claim for underinsured motorist benefits where relevant provision of insurance policy required that insured give notice of claim to insurer "as soon as practicable," insured provided notice of possible underinsurance claim more than 18 months after accident, and he failed to show that he acted with due diligence in ascertaining insurance status of offending vehicles. American Cas. Ins. Co. v Silverman, 271 A.D.2d 528, 705 N.Y.S.2d 676, 2000 N.Y. App. Div. LEXIS 4034 (N.Y. App. Div. 2d Dep't 2000).

Insurer was entitled to judgment declaring that it had no duty to provide supplementary uninsured motorist coverage to insured where policy required insured to give notice of such claim "as soon as practicable," insured did not give notice until 1 ½ years after accident, and even if insured were excused from providing timely notice until true extent of his injury was known, he did not explain subsequent 8-month delay. Ciaramella v State Farm Ins. Co., 273 A.D.2d 831, 709 N.Y.S.2d 296, 2000 N.Y. App. Div. LEXIS 6839 (N.Y. App. Div. 4th Dep't 2000).

85. Insurer's rights against uninsured motorist

Insured's execution of general release to tortfeasor responsible for automobile accident, for full limit of tortfeasor's liability coverage, did not prejudice subrogation rights of insured's insurer, entitling it to stay of arbitration of insured's claim for underinsurance benefits, where release expressly reserved "any and all rights under the underinsured coverage portion" of insured's policy; even assuming arguendo that release did not expressly reserve insurer's subrogation rights, its execution did not preclude insurer from enforcing its right of subrogation against tortfeasor because tortfeasor knew of those rights at time of release. United States Fidelity & Guaranty Co. v Mitchell, 168 A.D.2d 941, 564 N.Y.S.2d 894, 1990 N.Y. App. Div. LEXIS 16486 (N.Y. App. Div. 4th Dep't 1990).

Section 7 of the standard accident indemnification provisions which are made part of every motor vehicle liability policy does not create a trust for the benefit of MVAIC to the extent of conferring upon it any right of action against a "financially irresponsible motorist" by reason of settlement of claims of "insured persons" against such motorist, without requiring the claimant to sue them, but MVAIC nevertheless has a right of action against the irresponsible motorist for indemnification by right of subrogation. Ackerman v Motor Vehicle Acci. Indemnification Corp., 36 Misc. 2d 1048, 234 N.Y.S.2d 303, 1962 N.Y. Misc. LEXIS 2506 (N.Y. Sup. Ct. 1962), aff'd, 18 A.D.2d 307, 239 N.Y.S.2d 463, 1963 N.Y. App. Div. LEXIS 3911 (N.Y. App. Div. 1st Dep't 1963).

Although this section makes no provision for a written assignment of the claim of an "insured" person against a financially

irresponsible motorist to MVAIC, that corporation, following settlement of such a claim without requiring the "insured person" to sue the financially irresponsible motorist, can proceed against the latter for indemnification or by right of subrogation. Ackerman v Motor Vehicle Acci. Indemnification Corp., 36 Misc. 2d 1048, 234 N.Y.S.2d 303, 1962 N.Y. Misc. LEXIS 2506 (N.Y. Sup. Ct. 1962), aff'd, 18 A.D.2d 307, 239 N.Y.S.2d 463, 1963 N.Y. App. Div. LEXIS 3911 (N.Y. App. Div. 1st Dep't 1963).

Any right which MVAIC may have to sue a "financially irresponsible motorist," after making financial settlement of the claim of an "insured person" against the irresponsible motorist, without requiring the claimant to sue such motorist, stems from this former § 167 [now § 3420]. Ackerman v Motor Vehicle Acci. Indemnification Corp., 36 Misc. 2d 1048, 234 N.Y.S.2d 303, 1962 N.Y. Misc. LEXIS 2506 (N.Y. Sup. Ct. 1962), aff'd, 18 A.D.2d 307, 239 N.Y.S.2d 463, 1963 N.Y. App. Div. LEXIS 3911 (N.Y. App. Div. 1st Dep't 1963).

Under N.Y. Ins. Law § 5104(b), an insurer has only a limited right to pursue a subrogation claim against a non-covered person for basic first party no-fault benefits; to the extent an insurer acquires additional subrogation rights by paying supplementary uninsured motorist benefits pursuant to N.Y. Ins. Law § 3420(f), such payments are properly made only in cases involving serious injuries. Consequently, an insurer suing a non-covered person upon such a subrogated claim for supplementary uninsured motorist benefits is required to plead and prove the serious injury in order to obtain a judgment against the defendant on the latter cause of action. Utica Mut. Ins. Co. v Lynton, 918 N.Y.S.2d 332, 31 Misc. 3d 804, 2011 N.Y. Misc. LEXIS 891 (N.Y. Dist. Ct. 2011).

86. Waiver of right to proceed under uninsured motorist provision

Respondent's failure to file statement under oath with insurance company pertaining to specifics of hit and run accident did not, as matter of law, bar his request to seek coverage under uninsured motorist coverage provision of policy on vehicle he was driving where (1) he forwarded police report prepared at scene of accident to insurance company, together with written report of accident, (2) he was neither owner of car nor insured under policy, and (3) insurance company did not seek sworn statement for more than one year. Eveready Ins. Co. v Schwartzberg, 203 A.D.2d 101, 611 N.Y.S.2d 1, 1994 N.Y. App. Div. LEXIS 3809 (N.Y. App. Div. 1st Dep't 1994).

While commencement of an action by an "insured person" against the person or persons who are alleged to have been the cause of his injuries or damage may constitute an irrevocable waiver and abandonment by plaintiff of any right to arbitration of a claim against MVAIC arising out of the same accident, the question of waiver and abandonment depends upon the facts of the particular case. Mailman v Motor Vehicle Acci. Indemnification Corp., 36 Misc. 2d 825, 235 N.Y.S.2d 14, 1962 N.Y. Misc. LEXIS 2827 (N.Y. Sup. Ct. 1962).

No prejudice results to MVAIC where an "insured person" proceeds to sue a person deemed legally liable for his injuries without the written consent of MVAIC and carries his action through to the point of obtaining verdict against such person, which involves a finding that the latter is not an "insured motorist," as long as the plaintiff in such action does not proceed to have judgment entered in his favor on the verdict so obtained. Diamond v Motor Vehicle Acci. Indemnification Corp., 37 Misc. 2d 714, 235 N.Y.S.2d 505, 1962 N.Y. Misc. LEXIS 2126 (N.Y. Sup. Ct. 1962), aff'd, 19 A.D.2d 590, 240 N.Y.S.2d 954, 1963 N.Y. App. Div. LEXIS 5662 (N.Y. App. Div. 4th Dep't 1963).

Passenger in insured vehicle, who commenced an action to recover damages for her personal injuries against her driver, did not waive her right to proceed in arbitration against insurer to recover damages under the uninsured motorist provision in a separate proceeding. Alston v Amalgamated Mut. Casualty Co., 53 Misc. 2d 390, 278 N.Y.S.2d 906, 1967 N.Y. Misc. LEXIS 1644 (N.Y. Sup. Ct. 1967).

If a claimant commences an action at law on the contract against the insurer, such action would constitute a waiver of the right to arbitrate an uninsured motorist claim, but the commencement of a negligence action against the uninsured motorist, standing alone, does not constitute a waiver to make a claim under the insurance contract, in the absence of some provision therein to the contrary. Alston v Amalgamated Mut. Casualty Co., 53 Misc. 2d 390, 278 N.Y.S.2d 906, 1967 N.Y. Misc. LEXIS 1644 (N.Y. Sup. Ct. 1967).

Commencement of action against alleged tort-feasor did not constitute waiver of right to arbitrate claim under uninsured motorist endorsement, where discovery of claimed lack of insurance occurred after the action was begun. Allcity Ins. Co. v Di Noto, 80 Misc. 2d 1022, 364 N.Y.S.2d 712, 1975 N.Y. Misc. LEXIS 2308 (N.Y. Sup. Ct. 1975).

87. Effect of action against uninsured motorist on right to recovery

In negligence actions for personal injuries suffered by a husband and wife arising out of an automobile collision with a "hit-and-run" automobile, the husband's action was barred by a previous arbitration award of $100,000, but the wife's action, as well as the husband's derivative action based on her injuries, was not barred by a previous award of $10,000; since the wife's award was a statutory limit under Ins Law former § 167 [now § 3420], it was not considered to be the total damages due for noneconomic loss, in absence of a determination by the arbitrator that it was the full extent of such damages. Leto v Petruzzi, 81 A.D.2d 296, 440 N.Y.S.2d 343, 1981 N.Y. App. Div. LEXIS 10529 (N.Y. App. Div. 2d Dep't 1981).

Insured was precluded from asserting claim for benefits under underinsured motorist provision where policy provided as condition of coverage that insured could not settle with any person or organization who might be liable for insured's bodily injury without insurer's written consent, and insured failed to obtain written consent prior to settling with underinsured offending driver and executing general release without limitation or reservation, thus depriving insurer of its subrogation rights against offending driver. State Farm Mut. Ins. Co. v Donath, 164 A.D.2d 889, 559 N.Y.S.2d 567, 1990 N.Y. App. Div. LEXIS 10569 (N.Y. App. Div. 2d Dep't), app. dismissed, 76 N.Y.2d 1016, 565 N.Y.S.2d 765, 566 N.E.2d 1070, 1990 N.Y. LEXIS 4459 (N.Y. 1990).

Where plaintiff who sustained injuries in automobile accident involving taxicab obtained arbitration award of $8,500 under uninsured motorist endorsement of her husband's automobile policy after commencing action against taxicab defendants and receiving no response from their insurer, and plaintiff thereafter executed general release in favor of taxicab defendants on accepting late $3,000 settlement offer, insurer was entitled to partial summary judgment on issue of liability on its counterclaim to recover face amount of arbitration award, since plaintiff breached her obligations under uninsured motorist endorsement by releasing tortfeasors and thereby impairing insurer's subrogation rights, but plaintiff would merely be directed to pay insurer $3,000 she received from tortfeasors. Desiderato v N & A Taxi, Inc., 190 A.D.2d 250, 597 N.Y.S.2d 958, 1993 N.Y. App. Div. LEXIS 5018 (N.Y. App. Div. 1st Dep't 1993).

Insured who accepts settlement of claim against third-party tortfeasor without protecting insurer's subrogation rights or complying with consent to settlement provision of insurance policy generally is precluded from asserting uninsured motorist claim against insurer. Devereaux v Agway Ins. Co., 190 A.D.2d 1050, 594 N.Y.S.2d 1009, 1993 N.Y. App. Div. LEXIS 1265 (N.Y. App. Div. 4th Dep't 1993).

Insurance carrier was not entitled to stay of arbitration of supplementary underinsured motorist claim on ground that insureds' attorney, who was unaware of 30-day provision of policy, initially provided it with only 10 days to object to settlement offered by tortfeasor's liability insurer, where insureds' attorney took prompt curative action on learning that carrier was entitled to 30 days, and settlement funds were not released until 30 days from carrier's receipt of notice of settlement. Allstate Ins. Co. v Mannuci, 258 A.D.2d 869, 686 N.Y.S.2d 149, 1999 N.Y. App. Div. LEXIS 1949 (N.Y. App. Div. 3d Dep't 1999).

The provision in the Standard Indemnification Indorsement that it shall not apply to bodily injury suffered by an insured if, without written consent of MVAIC he "prosecutes to judgment" any action against the person legally liable therefor means prosecuting such an action up to and including obtaining judgment, and where an insurer prosecutes such an action only to the

point of obtaining verdict against the person he deems legally liable, but does not cause judgment to be entered against such person upon such verdict, he is not barred from proceeding against MVAIC because of his failure to obtain written consent of MVAIC to the proceedings up to that point. Diamond v Motor Vehicle Acci. Indemnification Corp., 37 Misc. 2d 714, 235 N.Y.S.2d 505, 1962 N.Y. Misc. LEXIS 2126 (N.Y. Sup. Ct. 1962), aff'd, 19 A.D.2d 590, 240 N.Y.S.2d 954, 1963 N.Y. App. Div. LEXIS 5662 (N.Y. App. Div. 4th Dep't 1963).

A claim against MVAIC for injury sustained through negligence of an uninsured motorist is not precluded by the Standard Accident Indemnification Indorsement provision requiring written consent of MVAIC for the prosecution "to judgment" of an action against the person legally liable for the injury where the injured person merely brings an action against the person asserted to be liable in which the latter's insurer disclaims liability and the judge signs a decision awarding damages to plaintiff and authorizing submission of judgment for signatures, no judgment in fact being entered. Di Maria v Motor Vehicle Acci. Indemnification Corp., 37 Misc. 2d 617, 236 N.Y.S.2d 443, 1963 N.Y. Misc. LEXIS 2377 (N.Y. Sup. Ct. 1963).

88. Arbitrability of particular issues

New York victims of Quebec automobile accident were not entitled to arbitrate their underinsured motorist endorsement claim with their New York insurer where Quebec automobile insurance board, under province's mandatory system of insurance reparations, awarded one victim only $82.12 out of possible $20,000 for his injuries, and denied second victim's claim entirely in finding her 100 percent at fault for accident, and thus neither victim had "exhausted by payment" limits of all applicable bodily insurance policies as required by their policy and CLS Ins § 3420(f)(2). Federal Ins. Co. v Watnick, 80 N.Y.2d 539, 592 N.Y.S.2d 624, 607 N.E.2d 771, 1992 N.Y. LEXIS 4225 (N.Y. 1992).

"Livery exclusion" contained in uninsured motorists coverage endorse ment of personal automobile liability policy was invalid, and thus required arbitration of uninsured motorist claim, since exclusion is not based on statute or regulation and is inconsistent with purpose of mandatory uninsured motor vehicle statutes and public policy. Liberty Mut. Ins. Co. v Hogan, 82 N.Y.2d 57, 603 N.Y.S.2d 409, 623 N.E.2d 536, 1993 N.Y. LEXIS 3359 (N.Y. 1993).

MVAIC, by answer to a demand for arbitration under the Standard Statutory Liability Indorsement, and examining plaintiff before trial, may waive any right to object to scope of the arbitration as going beyond issues of fault and damages. Stroud v Motor Vehicle Acci. Indemnification Corp., 17 A.D.2d 616, 231 N.Y.S.2d 18, 1962 N.Y. App. Div. LEXIS 8530 (N.Y. App. Div. 1st Dep't 1962), aff'd, 13 N.Y.2d 611, 240 N.Y.S.2d 602, 191 N.E.2d 89, 1963 N.Y. LEXIS 1221 (N.Y. 1963).

The question of timely notice is not within the scope of the arbitration clause of uninsured motorist coverage and cannot be submitted to the arbitrators, a hearing being required to determine the preliminary issue concerning timely filing. Sorg v Motor Vehicle Acci. Indemnification Corp., 30 A.D.2d 540, 291 N.Y.S.2d 385, 1968 N.Y. App. Div. LEXIS 4092 (N.Y. App. Div. 2d Dep't 1968).

The Transit Operating Authority, a self-insured public benefit corporation, was bound to proceed to arbitration with respect to an uninsured motorist claim asserted by a claimant who was injured in a collision involving an uninsured motor vehicle and the Authority's bus on which the claimant was a passenger. Manhattan & Bronx Surface Transit Operating Authority v Evans, 95 A.D.2d 470, 467 N.Y.S.2d 387, 1983 N.Y. App. Div. LEXIS 19643 (N.Y. App. Div. 2d Dep't 1983).

Arbitrator did not exceed authority granted him under arbitration clause of motor vehicle insurance policy when he went beyond determination of amount of damages under supplementary uninsured motorist endorsement and also determined amounts by which those damages should be offset under terms of policy. Prudential Property & Casualty Ins. Co. v Carleton, 145 A.D.2d 492, 535 N.Y.S.2d 738, 1988 N.Y. App. Div. LEXIS 13258 (N.Y. App. Div. 2d Dep't 1988).

Where underinsured motorist provision of auto insurance policy specifically provided for arbitration of issue of whether insured was entitled to damages, insurer was not entitled to stay of arbitration proceeding commenced by insured despite insurer's claim that insured had prejudiced insurer by signing general release with offending party without reserving insurer's subrogation rights. Gen. Accident Ins. Co. v Ramee, 157 A.D.2d 877, 549 N.Y.S.2d 880, 1990 N.Y. App. Div. LEXIS 46 (N.Y. App. Div. 3d Dep't 1990).

Claimant for underinsurance benefits failed to satisfy conditions precedent to arbitration, and thus insurer's petition to stay arbitration was properly granted, where, prior to demand for arbitration, claimant failed to advise insurer of offer to settle underlying action and to seek insurer's consent to settle, and claimant did not show that insurer's right of subrogation would be preserved under settlement agreement. State Farm Mut. Auto. Ins. Co. v Hardina, 225 A.D.2d 486, 639 N.Y.S.2d 374, 1996 N.Y. App. Div. LEXIS 3089 (N.Y. App. Div. 1st Dep't 1996).

Issue of whether underinsured motorist provisions of insurance policy apply is for court to determine in first instance, not arbitrator, when arbitration clause of policy limits arbitration to essentially 2 questions—right to recover from alleged tortfeasor and amount of insured's damages. Government Emples. Ins. Co. v DePietto, 226 A.D.2d 723, 641 N.Y.S.2d 403, 1996 N.Y. App. Div. LEXIS 4589 (N.Y. App. Div. 2d Dep't 1996).

Court erred in referring issue of discovery to arbitrator where parties agreed to arbitrate only whether respondent was entitled to supplemental uninsured motorist benefits and, if so, in what amount. State Farm Ins. Co. v Hiney, 262 A.D.2d 1076, 691 N.Y.S.2d 804, 1999 N.Y. App. Div. LEXIS 7341 (N.Y. App. Div. 4th Dep't 1999).

Permanent stay of arbitration of claim for underinsured motorist benefits was properly granted where insured failed to comply with policy provisions requiring him to give insurer written notice of claim as soon as practicable, and to provide copy of summons and complaint in underlying action immediately on commencement of that action, since satisfaction of those requirements constituted condition precedent to arbitration. Lancer Ins. Company/Teachers' Ins. Plan v Sciandra, 282 A.D.2d 535, 722 N.Y.S.2d 764, 2001 N.Y. App. Div. LEXIS 3572 (N.Y. App. Div. 2d Dep't 2001).

Judgment in an N.Y. C.P.L.R. art. 75 proceeding denying an insurer's challenge to a change of venue in an uninsured motorist (UM) claim arbitration was error because UM arbitrations were to have been conducted pursuant to American Arbitration Association (AAA) rules, and the arbitrator violated AAA rules by placing the venue of the hearing over 100 miles from the insured's home. Matter of Erie Ins. Co. (Malcolm), 50 A.D.3d 1459, 857 N.Y.S.2d 393, 2008 N.Y. App. Div. LEXIS 4664 (N.Y. App. Div. 4th Dep't 2008).

With respect to the claim of an insured person against MVAIC seeking to compel arbitration on the basis of the standard statutory indorsement on his insurance policy because the insurer of the offending motorist has disclaimed liability for failure to give timely notice of accident, determination of whether the claimant is or is not insured is for the courts, not subject to arbitration, and arbitration should be stayed until this question is determined. Application of Motor Vehicle Acci. Indemnification Corp., 33 Misc. 2d 703, 227 N.Y.S.2d 882, 1961 N.Y. Misc. LEXIS 2009 (N.Y. Sup. Ct. 1961).

The Manhattan and Bronx Surface Transit Operating Authority would be required to submit an uninsured motorist claim to arbitration, because it is required to provide uninsured motorist coverage, and the right to arbitrate is guaranteed in the terms and conditions for inclusion in the uninsured motorist coverage indorsement of the standard automobile liability policy and would apply to all claimants entitled to uninsured motorist coverage regardless of whether they deal with a self-insurer or an insurer. Manhattan & Bronx Surface Transit Operating Authority v Evans, 117 Misc. 2d 614, 459 N.Y.S.2d 374, 1983 N.Y. Misc. LEXIS 3192 (N.Y. Sup. Ct.), aff'd, 95 A.D.2d 470, 467 N.Y.S.2d 387, 1983 N.Y. App. Div. LEXIS 19643 (N.Y. App. Div. 2d Dep't 1983).

A passenger in an uninsured automobile who was injured in a collision with an insured automobile in a hit-and-run accident was entitled to seek arbitration under the uninsured motorist coverage of the uninsured vehicle (former Ins Law § 167(2-a)),

and was not obligated to proceed against the driver of the other car. Country Wide Ins. Co. v Eber, 126 Misc. 2d 1084, 484 N.Y.S.2d 764, 1984 N.Y. Misc. LEXIS 3716 (N.Y. Sup. Ct. 1984).

In context of motor vehicle accident involving unidentified motorist, failure to report accident to proper authorities, within specified and limited parameters of time, may be raised as bar to uninsured motorist arbitration. Eagle Ins. Co. v Ruiz, 141 Misc. 2d 815, 535 N.Y.S.2d 294, 1988 N.Y. Misc. LEXIS 705 (N.Y. Sup. Ct. 1988).

Despite language of CLS Ins § 3420(f)(2), requiring that underlying limits of liability insurance have been exhausted by payment of judgments or settlements before any claim may be made for arbitration under underinsurance endorsement of policy, statutory aim of safeguarding underinsurer's right of subrogation is satisfied where underinsurer has consented to settlement of underlying action for full amount of available liability insurance, even if actual payment of settlement amount has yet to be made; thus, judicial approval of proposed settlement of infant's personal injury claim for full amount of tortfeasor's liability insurance was unnecessary as condition precedent to arbitration. Guerra v Fernandez, 149 Misc. 2d 25, 562 N.Y.S.2d 1020, 1990 N.Y. Misc. LEXIS 587 (N.Y. Sup. Ct. 1990).

1992 demand for arbitration of claim for underinsured motorist benefits arising out of 1983 automobile accident was not time barred by 6-year arbitration statute of limitations of CLS CPLR § 213 since claim for underinsured motorist benefits does not accrue until exhaustion of all insurance policies covering underinsured vehicle, and primary insurance involved here was not exhausted until payment of settlement in 1992. Westchester Fire Ins. Co. v Imperiale, 157 Misc. 2d 721, 598 N.Y.S.2d 685, 1993 N.Y. Misc. LEXIS 188 (N.Y. Sup. Ct. 1993).

Insured was entitled to judgment declaring that arbitration requirement of uninsured motorist provision of his policy was inapplicable, and insurer was not entitled to order under CLS CPLR § 7503 or medical examination of insured under prearbitration terms of policy on basis that it disagreed with damages claimed by insured, because insurer was bound by jury verdict and subsequent judgment in insured's prior action against uninsured driver of offending vehicle where it was notified of trial and participated therein; judgment after trial as to amount of damages due to plaintiff is most unequivocal and decisive determination of amount insured is legally entitled to recover. New York Cent. Mut. Fire Ins. Co. v Matteson, 170 Misc. 2d 957, 652 N.Y.S.2d 199, 1996 N.Y. Misc. LEXIS 473 (N.Y. Sup. Ct. 1996).

Where the maximum uninsured motorist (UM) coverage in an endorsement of plaintiff insureds' insurance policy equaled the minimum amount of coverage required by N.Y. Ins. Law § 3420(f)(1), arbitration of the insureds' dispute with defendant insurer regarding the insureds' entitlement to UM benefits for a certain accident involving an uninsured vehicle was mandatory pursuant to 11 NYCRR § 60-2.3(f) upon the insurer's demand, and the trial court properly granted the insurer's cross motion to dismiss the insureds' complaint against the insurer. Mahmood v Fid. & Guar. Ins. Co., 303 A.D.2d 385, 755 N.Y.S.2d 667, 2003 N.Y. App. Div. LEXIS 2109 (N.Y. App. Div. 2d Dep't 2003).

When a dispute arises between an insurer and an insured with regard to the right of an insured to payment of Supplementary Uninsured/Underinsured Motorists Endorsement benefits under N.Y. Ins. Law § 3420(f)(2), the insured has the option to decide whether to proceed to arbitration or litigation to resolve the dispute; the option is the insured's only and the Supreme Court of New York has subject-matter jurisdiction of such claims. Sclafani v Allstate Ins. Co., 777 N.Y.S.2d 251, 3 Misc. 3d 634, 2004 N.Y. Misc. LEXIS 227 (N.Y. Sup. Ct. 2004).

Insured can decide whether to proceed to arbitration or litigation of uninsured motorist coverage claim. Insurance Department, Opinions of General Counsel, Opinion Number 00-05-05.

Under 11 NYCRR § 60-2, only insured can decide whether or not to proceed to arbitration for supplemental uninsured/underinsured motorist (SUM) claims or to litigation, except in instance where SUM coverage is equal to minimum limits amount of uninsured motorist coverage required to be provided by CLS Ins § 3420(f)(1), in which case either insured or insurer can request arbitration of disputed claims. Insurance Department, Opinions of General Counsel, Opinion Number 00-05-05.

As to supplementary uninsured/underinsured motorists (SUM) coverage, Insurance Department Regulation No. 35-D (11 NYCRR § 60-2.3) specifically provides that insured may arbitrate issue of whether it is "legally entitled to recover damages from the owner or operator of an uninsured motor vehicle" or "the amount of payment that may be owing under this SUM coverage"; while language of regulation would seem to indicate that demand for arbitration may limit issue(s) to be decided by arbitrator, in practice 2 issues are almost always indivisible. Insurance Department, Opinions of General Counsel, Opinion Number 01-12-02.

Carrier may request that court stay judicial action and enforce insurer's contractual right to submit controversy to arbitration and court may so order where, in minimum coverage situation, insured commences litigation against insurance company as to supplementary uninsured/underinsured motorists coverage, and on receipt of court papers, carrier decides to opt for arbitration by serving written demand as required under policy provisions. Insurance Department, Opinions of General Counsel, Opinion Number 01-12-02.

89. Stay of arbitration

In proceeding to stay uninsured motorist claim arbitration, insurance company failed to establish that it did not insure offending vehicle at time of accident where (1) petitioner introduced into evidence copy of registration plate record from Department of Motor Vehicles which indicated insurance coverage for vehicle, (2) registration plate record did not indicate that assigned risk policy rather than voluntary policy had been issued for offending vehicle, and (3) insurance company's underwriter searched only assigned risk files before concluding that no policy covered offending vehicle at time of accident. State Farm Mut. Auto. Ins. Co. v Fenelon, 202 A.D.2d 436, 608 N.Y.S.2d 709, 1994 N.Y. App. Div. LEXIS 1888 (N.Y. App. Div. 2d Dep't 1994).

In proceeding under CLS CPLR Art 75 to stay arbitration of uninsured motorist claim, in which threshold question of fact was raised as to whether offending vehicle was being driven with owner's permission, and thus whether it was insured, court should have directed hearing on issue and permitted joinder of owner of offending vehicle and his insurance carrier. Aetna Casualty & Sur. Co. v Arhaniotis, 202 A.D.2d 497, 609 N.Y.S.2d 31, 1994 N.Y. App. Div. LEXIS 2380 (N.Y. App. Div. 2d Dep't 1994).

Insured was entitled to arbitration of uninsured motorist claim, notwithstanding that document issued by Department of Motor Vehicles indicated that offending vehicle was insured by another insurance company, and despite testimony that document may have resulted from business practice of other insurance company of issuing pre-signed insurance identification cards to brokers so that they could issue card to individual who wished to register his or her car even though insurance policy had not been issued, since (1) it was undisputed that offending vehicle was uninsured, (2) there was no indication that other insurance company or agent actually issued insurance card to offending driver, and (3) other insurance company was not negligent in issuing pre-signed insurance cards to brokers. Wiggan v Allstate Ins. Co., 203 A.D.2d 468, 610 N.Y.S.2d 320, 1994 N.Y. App. Div. LEXIS 3929 (N.Y. App. Div. 2d Dep't 1994).

Court erred in granting insurance company's application to stay arbitration of uninsured motorist claim where company offered no evidence in support of its initial burden, but merely cross-examined representative of alleged insurer of offending vehicle; by voluntarily offering testimony of its representative, alleged insurer of offending vehicle did not assume or undertake to carry burden of proof, thereby casting upon it ultimate responsibility of proving that its policy was properly canceled. Nationwide Mut. Ins. Co. v Wausau Underwriters Ins. Co., 203 A.D.2d 805, 610 N.Y.S.2d 411, 1994 N.Y. App. Div. LEXIS 4110 (N.Y. App. Div. 3d Dep't), app. denied, 84 N.Y.2d 802, 617 N.Y.S.2d 136, 641 N.E.2d 157, 1994 N.Y. LEXIS 2622 (N.Y. 1994).

Court erred in compelling arbitration of uninsured motorist claim since preliminary factual question existed as to whether vehicle that struck insured's automobile was itself struck by debris from back of unidentified dump truck and, if so, whether

that contact constituted "physical contact" for purpose of uninsured motorist coverage. Bajrami v General Accident Ins. Co., 206 A.D.2d 527, 615 N.Y.S.2d 281, 1994 N.Y. App. Div. LEXIS 7576 (N.Y. App. Div. 2d Dep't 1994).

Court erred in granting insurer's application for stay of arbitration of insured's claim for underinsured motorist benefits where language of policy did not clearly distinguish between 2 types of coverage; thus, it was for arbitrator to determine whether underinsured coverage in policy provided benefits when accident involved vehicle that had no insurance. Utica Mut. Ins. Co. v Hurd, 221 A.D.2d 903, 634 N.Y.S.2d 320, 1995 N.Y. App. Div. LEXIS 13383 (N.Y. App. Div. 4th Dep't 1995).

Court erred in dismissing insurer's petition for stay of arbitration of uninsured motorists claim where insured had received insurance proceeds from insurer of tortfeasor's vehicle, there was no proof that policy insuring vehicle driven by insured provided supplementary uninsured motorists coverage, or underinsurance, and demand for arbitration made no claim for underinsurance coverage. Travelers Ins. Co. v Kelly, 221 A.D.2d 931, 634 N.Y.S.2d 302, 1995 N.Y. App. Div. LEXIS 13417 (N.Y. App. Div. 4th Dep't 1995).

In action by insurer to stay arbitration of underinsured motorist claim, court erred in considering issue of insurer's maximum liability under policy; courts have no authority to grant stay of arbitration on ground that damages sought under auto policy are excessive. Allstate Ins. Co. v Olsen, 222 A.D.2d 579, 634 N.Y.S.2d 773, 1995 N.Y. App. Div. LEXIS 12907 (N.Y. App. Div. 2d Dep't 1995).

Question of whether disclaimer of coverage issued by insurer of offending vehicle was effective against injured claimant was proper issue for consideration in proceeding to permanently stay arbitration of uninsured motorist claim. Eagle Ins. Co. v Collado, 222 A.D.2d 587, 636 N.Y.S.2d 641, 1995 N.Y. App. Div. LEXIS 12912 (N.Y. App. Div. 2d Dep't 1995).

Court properly granted insurance company's petition to stay arbitration of uninsured motorist claim because there was no "physical contact" between insured's vehicle and unidentified vehicle which allegedly cut off police car, causing police car to strike insured's vehicle, which was then propelled into unoccupied parked car. Federal Ins. Co. v Luhmann, 229 A.D.2d 438, 645 N.Y.S.2d 86, 1996 N.Y. App. Div. LEXIS 7677 (N.Y. App. Div. 2d Dep't 1996).

Insurer did not waive its right to offset by failing to seek stay of arbitration for underinsured motorist benefits where only issues before arbitrator, pursuant to pertinent endorsement provision and insured's demand for arbitration, were those of fault for accident and amount of damages caused by tortfeasor. Deckaj v State Farm Mut. Ins. Co., 230 A.D.2d 735, 646 N.Y.S.2d 173, 1996 N.Y. App. Div. LEXIS 8299 (N.Y. App. Div. 2d Dep't 1996).

Court erred in denying petition to stay arbitration of underinsured motorist claim, even though policy at issue contained agreement to arbitrate uninsured motorist claims, since there was no such agreement as to underinsured motorist claims. American Centennial Ins. Co. v Williams, 233 A.D.2d 320, 649 N.Y.S.2d 190, 1996 N.Y. App. Div. LEXIS 11576 (N.Y. App. Div. 2d Dep't 1996).

In denying petitioner's application to permanently stay arbitration of uninsured motorist claim, it was error for court to determine that offending vehicle was uninsured without holding hearing and joining alleged insurance carrier as necessary party, as petitioner established prima facie case as to existence of insurance coverage by producing police accident report which contained offending vehicle's insurance code designation, and letter from claim department of offending vehicle's alleged carrier, stating in conclusory fashion that it did not insure offending vehicle, was insufficient to overcome petitioner's prima facie case. Eagle Ins. Co. v Sadiq, 237 A.D.2d 605, 655 N.Y.S.2d 601, 1997 N.Y. App. Div. LEXIS 3042 (N.Y. App. Div. 2d Dep't 1997).

Arbitration of insured claimants' underinsured motorist claims, and any disclosure therein, would be temporarily stayed pending resolution of their personal injury actions; availability of underinsured benefits depends on exhaustion of every last dollar payable under any applicable bodily injury liability policy, and issue of such exhaustion could not be determined until claimants' personal injury actions were resolved. Travelers Ins. v Torres, 245 A.D.2d 82, 665 N.Y.S.2d 86, 1997 N.Y. App. Div. LEXIS 12793 (N.Y. App. Div. 1st Dep't 1997).

Court erred in granting petition to permanently stay arbitration of uninsured motorist claim on ground that petition was governed by Florida statute of limitations and thus was time-barred, even though insurance broker who sold policy was in Florida and insured vehicle was registered in Florida, since contract was negotiated over telephone from insureds' primary New York residence, and they garaged their automobile at their New York home. Allstate Ins. Co. v Conigliaro, 248 A.D.2d 293, 670 N.Y.S.2d 469, 1998 N.Y. App. Div. LEXIS 3264 (N.Y. App. Div. 1st Dep't 1998).

In proceeding to stay arbitration of uninsured motorist claim, court improperly denied petitioner's motion for leave under CLS CPLR § 401 to join proposed additional respondents, on ground that notice of petition and petitioner were improperly served on them, since petitioner was not required to serve proposed additional respondents inasmuch as court had not yet joined them as parties; only by court-ordered service on proposed additional respondents of supplemental notice of petition and supplemental petition under CLS CPLR § 1003, once they had been added as additional respondents, could proper service be effectuated. Liberty Mut. Ins. Co. v Bohl, 262 A.D.2d 645, 694 N.Y.S.2d 72, 1999 N.Y. App. Div. LEXIS 7663 (N.Y. App. Div. 2d Dep't 1999).

Omission of date of notary's jurat in affidavit of petitioner's counsel in support of petition to stay arbitration of uninsured motorist claim was technical defect of verification insufficient to warrant denial of petition. Liberty Mut. Ins. Co. v Bohl, 262 A.D.2d 645, 694 N.Y.S.2d 72, 1999 N.Y. App. Div. LEXIS 7663 (N.Y. App. Div. 2d Dep't 1999).

Court erred in summarily denying insurer's application for stay of arbitration of uninsured motorist claim on ground that insurer failed to timely disclaim coverage, as coverage did not attach until it was established that offending vehicle was uninsured at time of accident, insurer was under no obligation to disclaim coverage before coverage attached, and evidentiary hearing was necessary to determine whether vehicles identified as having caused accident were actually involved in accident and whether alleged offending vehicle was insured on date of accident. State Farm Mut. Auto. Ins. Co. v Campbell, 268 A.D.2d 524, 701 N.Y.S.2d 654, 2000 N.Y. App. Div. LEXIS 701 (N.Y. App. Div. 2d Dep't 2000).

Proceeding to stay arbitration, commenced more than 20 days after petitioner was served with demand for arbitration, was barred by CLS CPLR § 7503(c) since petitioner's claim, that there was no physical contact between respondents' vehicle and allegedly offending vehicle, related to whether certain conditions of contract had been complied with and not whether parties had agreed to arbitrate, and thus such contention was outside exception articulated in Matter of Matarasso (Continental Casualty Company), 56 NY2d 264. Allstate Ins. Co. v Taylor, 271 A.D.2d 443, 706 N.Y.S.2d 135, 2000 N.Y. App. Div. LEXIS 3802 (N.Y. App. Div. 2d Dep't 2000).

Petitioner's application to stay arbitration of uninsured motorist claim should have been brought within 20-day limitation period of CLS CPLR § 7503(c) where issue of physical contact with uninsured vehicle related to whether certain conditions of coverage were satisfied; thus, since proceeding was commenced more than 4 months after demand was served, it was untimely and should have been dismissed. Merchants Mut. Ins. Co. v Anemone, 271 A.D.2d 690, 707 N.Y.S.2d 865, 2000 N.Y. App. Div. LEXIS 4517 (N.Y. App. Div. 2d Dep't 2000).

Issue of whether court erred in permanently staying arbitration of uninsured motorist claim, on ground that insurance policy was void ab initio, could be raised for first time on appeal as it presented issue of law which appeared on face of record and could not have been avoided if raised at proper juncture. Insurance Co. of N. Am. v Kaplun, 274 A.D.2d 293, 713 N.Y.S.2d 214, 2000 N.Y. App. Div. LEXIS 9274 (N.Y. App. Div. 2d Dep't 2000).

Petition to stay arbitration of uninsured motorist claim was properly granted, without prejudice to service of new demand for arbitration should court in pending personal injury action determine that vehicle involved in collision with claimant's vehicle was stolen prior to accident and was being driven without permission

at time of accident, as alleged by its owner and owner's insurer in personal injury action. Eagle Ins. Co. v Nowaz, 276 A.D.2d 628, 714 N.Y.S.2d 313, 2000 N.Y. App. Div. LEXIS 10337 (N.Y. App. Div. 2d Dep't 2000).

In proceeding to stay arbitration of uninsured motorist claim, issue of fact existed as to whether cancellation of insurance on offending vehicle was invalid due to noncompliance with CLS Bank § 576 and, since such issue could not be properly litigated without joinder of alleged insurer of offending vehicle, hearing was warranted, preceded by order joining alleged insurer, as well as owner and driver of offending vehicle. Eagle Ins. Co. v Lucero, 276 A.D.2d 695, 716 N.Y.S.2d 317, 2000 N.Y. App. Div. LEXIS 10880 (N.Y. App. Div. 2d Dep't 2000).

In proceeding to stay arbitration of uninsured motorist claim, it was abuse of discretion to grant respondents' motion to vacate their default in appearing or opposing petition where their counsel conceded at hearing that she was served with petition, and there was no evidence of reasonable excuse for default. State Farm Ins. Co. v Aroutiqunian, 284 A.D.2d 337, 725 N.Y.S.2d 885, 2001 N.Y. App. Div. LEXIS 5630 (N.Y. App. Div. 2d Dep't 2001).

While specific venue provisions of CLS CPLR § 7502(a)(i) supersede general venue provisions for special proceedings (CLS CPLR § 506), CLS CPLR Art 5 procedures for changing venue were applicable to instant proceeding to stay arbitration of uninsured motorist claim; thus, in absence of motion or consent, court had no authority to sua sponte change venue. Phoenix Ins. Co. v Casteneda, 287 A.D.2d 507, 731 N.Y.S.2d 224, 2001 N.Y. App. Div. LEXIS 9419 (N.Y. App. Div. 2d Dep't 2001).

Insurer would not be entitled to stay of arbitration if it had sufficient time to enforce its rights under policy to demand physical examination or oral examination and failed to exercise those rights; if insurer presents justifiable excuse for its failure, temporary stay of arbitration may be granted to allow insurer to obtain discovery, with either determination being made by court of competent jurisdiction. Insurance Department, Opinions of General Counsel, Opinion Number 01-12-02.

90. —Stay warranted

Insurance company was entitled to stay of uninsured motorist arbitration to recover benefits for accident in which driver abandoned and fled offending vehicle and was never identified where insured did not file required statement under oath pertaining to hit and run accident until long after policy limit of 90 days had passed, and provided no reasonable excuse for such failure. Liberty Mut. Ins. Co. v Mancuso, 202 A.D.2d 428, 608 N.Y.S.2d 527, 1994 N.Y. App. Div. LEXIS 1879 (N.Y. App. Div. 2d Dep't 1994).

Insurance company was entitled to permanent stay of arbitration of claim for uninsured motorist benefits where policy provided that company was entitled to reduce amount payable under uninsured motorist coverage by all sums paid to insured for workers' compensation, and insured had received workers' compensation benefits exceeding policy limit for uninsured motorist benefits. United States Fire Ins. Co. v Fotinakos, 203 A.D.2d 296, 609 N.Y.S.2d 672, 1994 N.Y. App. Div. LEXIS 3138 (N.Y. App. Div. 2d Dep't 1994).

Insurance company was entitled to permanent stay of arbitration of uninsured motorist claim based on failure of insured to give timely notice of claim where insured had made numerous inquiries as to whereabouts of owner and driver of other vehicle involved in collision and as to existence of insurance coverage for such individuals, and results of those inquiries should have alerted him to fact that he had potential uninsured motorist claim. Nova Casualty Co. v Helmstadt, 204 A.D.2d 330, 611 N.Y.S.2d 271, 1994 N.Y. App. Div. LEXIS 4510 (N.Y. App. Div. 2d Dep't 1994).

Court properly granted insurer's petition to stay arbitration of underinsured motorist claim, since plaintiff's decedent (insured) was not entitled to underinsured motorist benefits under excess policy issued by insurer where terms of supplementary uninsured motorist endorsement provided that insured's primary underinsurance coverage would be deducted from maximum amount he could recover under excess policy. Progressive Casualty Ins. Co. v Dursi, 206 A.D.2d 484, 615 N.Y.S.2d 998, 1994 N.Y. App. Div. LEXIS 7457 (N.Y. App. Div. 2d Dep't 1994).

Court properly granted insurer's application to permanently stay arbitration of claim for underinsured motorist benefits where insured failed to offer any valid excuse for her failure to comply with notice requirements of policy. Travelers Ins. Co. v Littleton, 218 A.D.2d 661, 630 N.Y.S.2d 353, 1995 N.Y. App. Div. LEXIS 8280 (N.Y. App. Div. 2d Dep't 1995).

Court properly granted insurer's petition to permanently stay arbitration of uninsured motorist claim where there was prior unimpeached arbitration award in favor of insurer, and insurer agreed to submit to no more than one single arbitration relative to one single injury claimed to have been caused by one single uninsured motor vehicle involved in case. Aetna Casualty & Sur. Co. v Bonilla, 219 A.D.2d 708, 631 N.Y.S.2d 438, 1995 N.Y. App. Div. LEXIS 9533 (N.Y. App. Div. 2d Dep't 1995).

Insurer was entitled to permanent stay of arbitration of claim for underinsured motorist coverage where insured was aware of policy limitations of offending vehicle prior to trial and could have provided required notice before any possibility of prejudice to insurer's rights arose, and notice was not received by insurer until nearly 3 years after accident, with no reasonable excuse offered for delay. Nationwide Mut. Ins. Co. v Oglesby, 219 A.D.2d 771, 646 N.Y.S.2d 63, 1995 N.Y. App. Div. LEXIS 9253 (N.Y. App. Div. 3d Dep't 1995).

Supreme Court properly granted petition to permanently stay arbitration of uninsured motorist claim on evidence of permissive use of insured vehicle. Eagle Ins. Co. v Suarez, 223 A.D.2d 542, 636 N.Y.S.2d 1013, 1996 N.Y. App. Div. LEXIS 180 (N.Y. App. Div. 2d Dep't 1996).

Application to permanently stay arbitration of uninsured motorist claim was properly granted where insureds failed to comply with notice requirement in uninsured motorist endorsement of policy or establish valid excuse for their failure to do so; insureds' failing of claim for no-fault benefits did not satisfy notice requirement. Nationwide Ins. Co. v Bietsch, 224 A.D.2d 623, 639 N.Y.S.2d 707, 1996 N.Y. App. Div. LEXIS 1388 (N.Y. App. Div. 2d Dep't 1996).

Insurer was not liable for uninsured motorist benefits to estate of decedent, who was killed while passenger in vehicle insured by insurer, where offset provision of uninsured motorist endorsement contained in insured's policy was enforceable, and amount of estate's settlement with insurer exceeded amount of uninsured motorist benefits payable under policy; thus, court should have granted insurer's motion to stay arbitration of uninsured motorist claim. American Mfrs. Mut. Ins. Co. v Lucenti, 228 A.D.2d 495, 644 N.Y.S.2d 294, 1996 N.Y. App. Div. LEXIS 6622 (N.Y. App. Div. 2d Dep't 1996).

No effective cancellation of assigned risk automobile insurance policy was shown, and thus stay of arbitration of uninsured motorist claim should have been granted, where carrier who issued policy conceded at hearing before court that its final premium bill did not contain statement advising policyholder that payment could be made directly to insurance company or to "producer of record" as required by Rules of New York Automobile Insurance Plan § 14(E)(2)(b). State Farm Mut. Auto. Ins. Co. v McLean, 228 A.D.2d 510, 643 N.Y.S.2d 680, 1996 N.Y. App. Div. LEXIS 6570 (N.Y. App. Div. 2d Dep't 1996).

Insurer was entitled to stay of arbitration of claim for uninsured motorist benefits where insured was injured while passenger in uninsured vehicle owned by his foster brother, who was "family member" within meaning of insured's policy, which excluded coverage to insured individual who was injured while occupying vehicle owned by "family member." New York Cent. Mut. Fire Ins. Co. v Prehoda by Prehoda, 231 A.D.2d 829, 647 N.Y.S.2d 66, 1996 N.Y. App. Div. LEXIS 9350 (N.Y. App. Div. 3d Dep't 1996).

Court properly granted insurer's application to stay arbitration of uninsured motorist claim where insureds did not serve notice of intention to file such claim within 90 days after accident or as soon as practicable, having failed to diligently attempt to determine whether driver of other vehicle was insured, and then also failing to serve insurer with notice of intention as soon as they should have been aware that other vehicle was alleged to have

been stolen. Country-Wide Ins. Co. v Aubry, 233 A.D.2d 189, 649 N.Y.S.2d 155, 1996 N.Y. App. Div. LEXIS 11668 (N.Y. App. Div. 1st Dep't 1996).

Court erred in denying insurer's application to stay arbitration of underinsured motorist claim where insureds' notice to insurer of their intention to file claim under insured or underinsured motorist endorsement of their insurance policy was untimely as matter of law, and insurer's 3 ½ -month delay in giving notice of its disclaimer was not unreasonable in light of insureds' unexcused failure to complete and return requested forms. Liberty Mut. Ins. Co. v Dombroski, 235 A.D.2d 606, 651 N.Y.S.2d 711, 1997 N.Y. App. Div. LEXIS 13 (N.Y. App. Div. 3d Dep't 1997).

Insurer was entitled to stay of arbitration on underinsured motorist claim of passenger in insured car that had been involved in collision, since passenger's delay of more than one year in giving insurer written notice of her claim was unreasonable where she had been notified months earlier of low limits of liability on policy of other driver involved in collision, whose fault was apparent, and it was also apparent that other injured parties would seek recovery on same policy. Nationwide Ins. Co. v De Rose, 241 A.D.2d 607, 659 N.Y.S.2d 342, 1997 N.Y. App. Div. LEXIS 7213 (N.Y. App. Div. 3d Dep't 1997).

Court improperly denied insurer's petition for permanent stay of arbitration and directed that arbitration proceed in accordance with insured's demand for supplemental uninsured motorist coverage where fact issue existed as to whether, under circumstances, notice of claim was given to insurer as soon as practicable 4 months after insured knew or should have known he had potential serious injury. Travelers Ins. Co. v DeLosh, 249 A.D.2d 924, 672 N.Y.S.2d 219, 1998 N.Y. App. Div. LEXIS 5008 (N.Y. App. Div. 4th Dep't 1998).

Court erred in dismissing, without hearing, so much of insurer's petition to stay arbitration of uninsured motorist claim pending, inter alia, addition of second insurer as respondent and determination as to whether offending vehicle at issue was "uninsured," where insurer established prima facie case as to existence of insurance coverage for subject vehicle by, inter alia, production of police accident report which contained offending vehicle's insurance code designation, and letters proffered by insured from second insurer as to purported disclaimer of coverage merely raised fact issue as to whether second insurer's disclaimer was proper. Lumbermens Mut. Cas. Co. v Beliard, 256 A.D.2d 579, 682 N.Y.S.2d 430, 1998 N.Y. App. Div. LEXIS 14002 (N.Y. App. Div. 2d Dep't 1998).

Insurer was entitled to permanent stay of arbitration of underinsured motorist claim based on insured's substantial delay in providing notice of claim, failure to act with due diligence in ascertaining insurance status of other vehicles involved in collision, and lack of excuse for delay, where accident occurred on May 20, 1995, insured commenced action against 3 tortfeasors in June of 1996, she learned in June of 1997 that one tortfeasor was insured for "only $35,000," and she did not notify insurer of her underinsured motorist claim until July 8, 1997. State Farm Mut. Auto. Ins. Co. v Adams, 259 A.D.2d 551, 686 N.Y.S.2d 438, 1999 N.Y. App. Div. LEXIS 2212 (N.Y. App. Div. 2d Dep't 1999).

Insurer was entitled to permanent stay of arbitration of underinsured motorist claim where declarations page of car insurance policy contained single, combined limit of uninsured/underinsured motorist coverage, offset provision of policy was thus valid and enforceable, and amount to be offset equaled policy limit. General Accident Ins. Co. v Brown, 263 A.D.2d 542, 693 N.Y.S.2d 223, 1999 N.Y. App. Div. LEXIS 8380 (N.Y. App. Div. 2d Dep't 1999).

Insured did not notify insurer of uninsured motorist claim "as soon as practicable" as required by liability policy, and thus insurer was entitled to permanent stay of arbitration of that claim, where insured was involved in motor vehicle accident with alleged uninsured vehicle in February 1997 but did not provide insurer with notice of her intent to file uninsured motorist claim until December 1997, 2 months after she received notice of disclaimer from tortfeasor's insurance company, and insured offered no evidence of any efforts to acquire information regarding insurance coverage. Eagle Ins. Co. v Bernardine, 266 A.D.2d 543, 699 N.Y.S.2d 85, 1999 N.Y. App. Div. LEXIS 12285 (N.Y. App. Div. 2d Dep't 1999).

Insurer was entitled to stay of arbitration of uninsured motorist claim where such coverage would not attach under insured's liability policy unless and until it was established that offending vehicle was uninsured on date of accident, and thus insurer was not yet required to timely disclaim such coverage. Nationwide Ins. Co. v Sillman, 266 A.D.2d 551, 699 N.Y.S.2d 98, 1999 N.Y. App. Div. LEXIS 12293 (N.Y. App. Div. 2d Dep't 1999).

Arbitration of uninsured motorist claim would be stayed, and case would be remitted to Supreme Court to conduct evidentiary hearing on issue of whether offending vehicle was insured on date of accident, where petitioning insurer of insured's vehicle proved prima facie case of existence of coverage of offending vehicle by producing police accident report containing offending vehicle's insurance code designation, and letter offered by offending vehicle's alleged insurer concerning purported disclaimer of coverage merely raised triable issue of fact as to whether disclaimer was proper. Nationwide Ins. Co. v Sillman, 266 A.D.2d 551, 699 N.Y.S.2d 98, 1999 N.Y. App. Div. LEXIS 12293 (N.Y. App. Div. 2d Dep't 1999).

Court properly granted insurer's application to permanently stay arbitration of supplementary uninsured motorist benefits where insured offered no excuse for failure to comply with policy provision requiring as condition of payment of uninsured motorist benefits that "(i)f the insured ... brings any lawsuit against any person or organization legally responsible for the use of a motor vehicle involved in the accident, a copy of the summons and complaint or other process served in connection with the lawsuit shall be forwarded immediately to us by the insured or the insured's legal representative." Nationwide Mut. Ins. Co. v Vivas, 267 A.D.2d 105, 699 N.Y.S.2d 410, 1999 N.Y. App. Div. LEXIS 12998 (N.Y. App. Div. 1st Dep't 1999).

Court properly granted insurer's motion to stay arbitration of claim for underinsured motorist benefits where relevant provision of insurance policy required that insured give notice of claim to insurer "as soon as practicable," insured provided notice of possible underinsurance claim more than 18 months after accident, and he failed to show that he acted with due diligence in ascertaining insurance status of offending vehicles. American Cas. Ins. Co. v Silverman, 271 A.D.2d 528, 705 N.Y.S.2d 676, 2000 N.Y. App. Div. LEXIS 4034 (N.Y. App. Div. 2d Dep't 2000).

Former wife was not covered person entitled to supplementary uninsured motorist benefits under her former husband's insurance policy where policy provided such coverage only for "named insured and, while residents of the same household (the insured's) spouse and the relatives of either of (the named insured or spouse)," notwithstanding that former wife stored some belongings in her then-estranged husband's home, had key, and would visit to obtain clothing, since she admitted in sworn documents and in police accident report that she had been living separate and apart from her husband at time of accident and that her resident address was not marital address. Nationwide Ins. Co. v Smaller, 271 A.D.2d 537, 706 N.Y.S.2d 140, 2000 N.Y. App. Div. LEXIS 4015 (N.Y. App. Div. 2d Dep't 2000).

Insurer was entitled to permanent stay of arbitration of uninsured motorist claim on basis of res judicata where insurer's prior petition to permanently stay arbitration of underinsured/uninsured motorist claim was granted on respondents' default in appearing, and respondents did not move to vacate default. Eagle Ins. Co. v Facey, 272 A.D.2d 399, 707 N.Y.S.2d 238, 2000 N.Y. App. Div. LEXIS 5118 (N.Y. App. Div. 2d Dep't 2000).

Court properly granted petition to permanently stay arbitration of respondents' supplemental uninsured motorist claim where, immediately following accident, respondents were aware of severity of respondent's injuries and identity of culpable driver, but they waited 30 months before considering action against driver for damages and filing claim with petitioner, and respondents offered no reasonable explanation for their delay. Nationwide Mut. Ins. Co. v Steber, 272 A.D.2d 940, 712 N.Y.S.2d 712, 2000 N.Y. App. Div. LEXIS 5195 (N.Y. App. Div. 4th Dep't 2000).

Court properly granted insurer's petition for permanent stay of arbitration of claim for uninsured motorist benefits where insured failed to timely complete and return claim forms or to offer

reasonable excuse for her failure to do so, which was condition precedent to coverage under policy, and insured's claim that insurer had not proffered such claim forms was contrary to insured's implicit admissions. New York Cent. Mut. Fire Ins. Co. v Daley, 273 A.D.2d 315, 709 N.Y.S.2d 849, 2000 N.Y. App. Div. LEXIS 6540 (N.Y. App. Div. 2d Dep't 2000).

Although it was error for court to hold that insurance policy was void ab initio due to claimant's fraudulent concealment of material fact in applying for coverage, because insurer never cancelled policy under CLS Veh & Tr § 313, insurer was entitled to permanent stay of uninsured motorist claim on ground that claimant's participation in fraud barred his recovery of benefits under policy; claimant was not innocent party that CLS Veh & Tr § 313 was intended to protect. Insurance Co. of N. Am. v Kaplun, 274 A.D.2d 293, 713 N.Y.S.2d 214, 2000 N.Y. App. Div. LEXIS 9274 (N.Y. App. Div. 2d Dep't 2000).

Court properly granted insurer's petition to permanently stay arbitration of claim for underinsured motorist benefits where policy endorsement required insured to "immediately" forward copies of summons and complaint to insurer in event that insured commenced lawsuit against tortfeasor, and it was undisputed that insured waited more than 2 ½ years after commencement of underlying lawsuit before forwarding to insurer copies of summons and complaint. Nationwide Ins. Co. v Shedlick, 274 A.D.2d 519, 711 N.Y.S.2d 181, 2000 N.Y. App. Div. LEXIS 8202 (N.Y. App. Div. 2d Dep't 2000).

Insurer was entitled to stay of arbitration where insured had not sent it copy of summons and complaint in his pending action against uninsured motorist until 9 months after he demanded arbitration of his uninsured motorist claim, thus violating condition precedent to uninsured motorist coverage. Nationwide Mut. Ins. Co. v Charles, 275 A.D.2d 324, 712 N.Y.S.2d 578, 2000 N.Y. App. Div. LEXIS 8571 (N.Y. App. Div. 2d Dep't 2000).

Arbitration claim against insurer was properly stayed where insured failed to demonstrate that there had been physical contact between his vehicle and vehicle that had assertedly "cut off" his vehicle, causing him to lose control, leave road, and strike building. Countrywide Ins. Co. v Colon, 279 A.D.2d 427, 720 N.Y.S.2d 71, 2001 N.Y. App. Div. LEXIS 882 (N.Y. App. Div. 1st Dep't 2001).

Insurer was entitled to permanent stay of arbitration demanded by insureds under supplementary uninsured/underinsured motorist (SUM) provision of their policy where (1) under that policy, insurer was entitled to offset any liability under SUM endorsement by amount received by insureds from tortfeasor's insurer, (2) limits of insureds' policy did not exceed amount received by them from tortfeasor's insurer, which paid full amount of tortfeasor's liability coverage, and (3) thus, insureds were not entitled to recover under their policy's SUM endorsement. Metropolitan Prop. & Cas. Ins. Co. v Barriga, 281 A.D.2d 200, 727 N.Y.S.2d 304, 2001 N.Y. App. Div. LEXIS 2206 (N.Y. App. Div. 1st Dep't 2001).

Insurer's motion to stay arbitration would be granted to extent of remanding case to motion court to conduct framed issue hearing as to whether insured was involved in hit-and-run accident where insurer identified enough inconsistencies in insured's descriptions of accident to raise triable issues of fact as to exactly how accident happened and, specifically, whether another vehicle made contact with insured's motorcycle. Lumbermens Mut. Cas. Co. v Nespolini, 281 A.D.2d 365, 722 N.Y.S.2d 166, 2001 N.Y. App. Div. LEXIS 3185 (N.Y. App. Div. 1st Dep't 2001).

Insurer was entitled to permanent stay of arbitration where (1) insured failed to file, within 90 days of accident, statement under oath that he had cause of action arising from accident with "hit-and-run vehicle" as required for coverage under uninsured motorist endorsement of insurance policy, (2) insured's unsworn and undated application for no-fault benefits was not such statement, (3) failure to comply with that requirement vitiated coverage, and (4) insurer timely disclaimed coverage on first learning of grounds for disclaimer. Legion Ins. Co. v Estevez, 281 A.D.2d 420, 721 N.Y.S.2d 273, 2001 N.Y. App. Div. LEXIS 2115 (N.Y. App. Div. 2d Dep't 2001).

Insured was not entitled to vacatur of his default in failing to appear in opposition to insurer's petition to permanently stay arbitration of uninsured motorist claim where insured did not show reasonable excuse for his default. AIU Ins. Co. v Fernandez, 281 A.D.2d 542, 721 N.Y.S.2d 840, 2001 N.Y. App. Div. LEXIS 2606 (N.Y. App. Div. 2d Dep't 2001).

Plaintiff was precluded from recovering uninsured motorist benefits, and thus court properly granted insurer's motion to stay arbitration of uninsured motorist claim, where insured failed to report alleged hit-and-run accident to police within 24 hours or as soon as reasonably possible, as insurance policy required. Gov't Emples. Ins. Co. v Snell, 286 A.D.2d 682, 729 N.Y.S.2d 779, 2001 N.Y. App. Div. LEXIS 8445 (N.Y. App. Div. 2d Dep't 2001).

Judgment staying the arbitration of an insured's claim for uninsured motorist benefits was proper because the liability insurer failed to establish the absence of coverage and the record supported the trial court's finding that, due to the lack of notice of the claim arising from the underlying traffic accident, the liability insurer's disclaimer of coverage was invalid; further, since the owner and the driver of the vehicle involved in the underlying accident did not breach their obligation to provide the liability insurer with timely notice, the insured's failure to exercise his "independent right" under N.Y. Ins. Law § 3420(a)(3) to give the liability insurer that notice did not require a different result. Matter of Allstate Ins. Co. v Berger, 47 A.D.3d 708, 851 N.Y.S.2d 584, 2008 N.Y. App. Div. LEXIS 238 (N.Y. App. Div. 2d Dep't 2008).

Petitioner provided the appellate court with an alternatve ground for affirmance where the trial court had granted petitioner's N.Y. C.P.L.R. art. 75 petition to stay uninsured motorist arbitration, as additional respondent failed to comply with N.Y. Ins. Law § 3420(e) by providing a notice of disclaimer to the driver of its insured party's vehicle. Allstate Ins. Co. v Leach, 15 A.D.3d 649, 789 N.Y.S.2d 910, 2005 N.Y. App. Div. LEXIS 2050 (N.Y. App. Div. 2d Dep't 2005).

Insurer's motion to stay arbitration of an uninsured motorist claim was properly granted and N.Y. Ins. Law § 3420(d), requiring timely notice of denial of coverage after a notice of claim was filed, was properly found to be inapplicable because the insurer's denial of coverage was based on the insured's fraudulent misrepresentation that he was driving a covered vehicle during the accident. Since the denial was based on the fraudulent misrepresentation, the concerns of prejudice to the insured from the lack of timely notice were not present; the insurer's motion for a stay of arbitration was properly granted. Utica Mut. Ins. Co. v Reid, 22 A.D.3d 127, 799 N.Y.S.2d 509, 2005 N.Y. App. Div. LEXIS 8469 (N.Y. App. Div. 1st Dep't 2005).

Permanent stay of the arbitration of insureds' uninsured motorist claim was properly ordered because the insureds failed to complete and return a sworn claim form and the insurer made a timely, sufficient denial of coverage and disclaimer, N.Y. Ins. Law § 3420(d), within 30 days of the insureds' notice of intention to arbitrate. Matter of New York Cent. Mut. Fire Ins. Co. v Gonzalez, 34 A.D.3d 816, 825 N.Y.S.2d 132, 2006 N.Y. App. Div. LEXIS 14318 (N.Y. App. Div. 2d Dep't 2006).

91. — —By proof motorist or vehicle not underinsured

Insurer was entitled to permanently stay arbitration of claim for underinsured motorist benefits, even though policy at issue was ambiguous as to whether insured had purchased merely uninsured coverage or whether he had also purchased underinsured coverage, since policy had $10,000 limit for bodily injury for "each person" and $20,000 limit for "each accident," and policy covering other vehicle had limit of $25,000; under circumstances, underinsured coverage was unavailable by definition. Aetna Casualty & Surety Co. v Kunz, 182 A.D.2d 685, 582 N.Y.S.2d 272, 1992 N.Y. App. Div. LEXIS 5989 (N.Y. App. Div. 2d Dep't 1992).

Court properly granted insurer's application to stay arbitration of uninsured motorist claim where bodily injury limits of insureds' policy were same as bodily injury limits of tortfeasor's policy, and thus tortfeasor's vehicle was not underinsured. State Farm Mut. Auto. Ins. Co. v Roth, 206 A.D.2d 376, 613 N.Y.S.2d 713, 1994 N.Y. App. Div. LEXIS 7091 (N.Y. App. Div. 2d Dep't 1994), app. denied, 84 N.Y.2d 812, 622 N.Y.S.2d 915, 647 N.E.2d 121, 1995 N.Y. LEXIS 33 (N.Y. 1995).

Court properly granted insurer's application to stay arbitration of uninsured motorist claim where bodily injury liability limits to

insured's policy were equal to bodily injury liability limits of offending vehicle's policy. State Farm Mut. Auto. Ins. Co. v Hollis, 228 A.D.2d 685, 646 N.Y.S.2d 29, 1996 N.Y. App. Div. LEXIS 7439 (N.Y. App. Div. 2d Dep't 1996).

Court properly granted insurer's motion to permanently stay arbitration of underinsured motorist claim where policy at issue contained single combined $10,000 limit of uninsured and underinsured motorist coverage, entitling insurer to offset of $10,000, which was amount that insured recovered from tortfeasor. Travelers Ins. Co. v Holt, 235 A.D.2d 428, 652 N.Y.S.2d 97, 1997 N.Y. App. Div. LEXIS 166 (N.Y. App. Div. 2d Dep't 1997).

Insurer was entitled to permanent stay of arbitration of uninsured motorist claim where amount of insured's settlement with tortfeasor equaled amount of policy's supplementary uninsured motorist coverage, and policy's offset provision specified that supplementary uninsured motorist payments to insured would be offset by payments "from or on behalf of all persons that may be legally liable for the bodily injury sustained by the insured"; insurer was not equitably estopped from asserting offset provision by virtue of fact that it approved of insured's settlement with tortfeasor's insurer and remained silent as to offset provision. Liberty Mut. Ins. Co. v Staltare, 236 A.D.2d 539, 654 N.Y.S.2d 154, 1997 N.Y. App. Div. LEXIS 1352 (N.Y. App. Div. 2d Dep't 1997).

Insurer was entitled to stay of arbitration where insured, who was injured in collision with vehicle driven by defendant in underlying negligence action, did not ascertain amount of defendant's policy limits until over one year after start of negligence action, and he failed to prove any reasonable excuse for his delay in notifying insurer of his claim for underinsurance benefits. Allstate Ins. Co. v Dewyea, 245 A.D.2d 667, 664 N.Y.S.2d 684, 1997 N.Y. App. Div. LEXIS 12588 (N.Y. App. Div. 3d Dep't 1997).

Underinsured motorist endorsement of policy issue to underlying plaintiff's husband was not triggered, and thus insurer under that policy was entitled to permanent stay of arbitration, where bodily injury liability limits in that policy were equal to those limits in policy covering offending vehicle. Liberty Mut. Ins. Co. v D'Antonio, 266 A.D.2d 393, 697 N.Y.S.2d 532, 1999 N.Y. App. Div. LEXIS 11499 (N.Y. App. Div. 2d Dep't 1999).

Since the tortfeasor's and the insurer's policy limits for bodily injury liability were identical, pursuant to N.Y. Ins. Law § 3420(f)(2)(A), the tortfeasor's vehicle was not underinsured; consequently, the insurer's N.Y. C.P.L.R. art. 75 petition to permanently stay arbitration of the insured's claim for underinsured motorist benefits should have been granted. Matter of Clarendon Natl. Ins. Co. v Nunez, 48 A.D.3d 460, 850 N.Y.S.2d 639, 2008 N.Y. App. Div. LEXIS 1059 (N.Y. App. Div. 2d Dep't 2008), aff'd sub. nom., Allstate Ins. Co. v Rivera, 12 N.Y.3d 602, 883 N.Y.S.2d 755, 911 N.E.2d 817, 2009 N.Y. LEXIS 1750 (N.Y. 2009).

Passenger was not entitled to supplementary uninsured/underinsured motorists benefits under an insurance company's policy because the insurance company's policy provided $300,000 in coverage for bodily injuries less amounts for property damage, while the tortfeasor's policy provided $300,000 for bodily injuries plus amounts for property damage; thus, the tortfeasor was not underinsured for purposes of N.Y. Ins. Law § 3420(f)(2)(A). Matter of Automobile Ins. Co. of Hartford v Ray, 51 A.D.3d 788, 858 N.Y.S.2d 288, 2008 N.Y. App. Div. LEXIS 4306 (N.Y. App. Div. 2d Dep't 2008).

92. — —By proof motorist or vehicle not uninsured

Insurance company was entitled to permanent stay of uninsured motorist arbitration since it came forward with proof that offending vehicle was insured, and insured failed to meet burden to then show that vehicle lacked insurance where (1) language of notice of cancellation did not comply with CLS Veh & Tr § 313 and implementing regulations, and (2) there was no showing that notice was duly addressed and mailed or that there was office procedure used in regular course of business that ensured likelihood that notice was addressed and mailed. Insurance Co. of North America v Castro, 163 A.D.2d 313, 557 N.Y.S.2d 442, 1990 N.Y. App. Div. LEXIS 8270 (N.Y. App. Div. 2d Dep't 1990).

Insurer was entitled to permanently stay arbitration of uninsured motorist claim where it established that driver of offending vehicle was insured by other insurer, which failed to establish that it had properly cancelled offending vehicle's policy prior to accident; proof of cancellation was insufficient where (1) "cancellation mailing register" merely indicated that piece of mail was received by post office and addressed to offending driver, (2) assigned risk technician stated that she did not have copy of notice because file had been destroyed in accordance with standard office procedures, (3) certificate of mailing did not reflect whether alleged notice was received, or what its contents were, and (4) testimony of technician who produced specimen cancellation notice and testified as to mailing practices generally did not give testimony as to reason for cancellation of policy. Worldwide Underwriters Ins. Co. v Lumbermans Mut. Casualty Co., 181 A.D.2d 784, 581 N.Y.S.2d 93, 1992 N.Y. App. Div. LEXIS 3701 (N.Y. App. Div. 2d Dep't 1992).

Insurance company was entitled to permanent stay of arbitration sought by its insured pursuant to uninsured motorist coverage where (1) insurance company met burden of showing identity of owner of offending vehicle, and that it was insured at time of accident, by offering police report and testimony of insured, who was able to recall license number of offending vehicle, and (2) insurer of offending vehicle produced no evidence to establish that offending vehicle was not registered to person it insured or that vehicle was driven without his consent. Allstate Ins. Co. v Rock, 183 A.D.2d 616, 584 N.Y.S.2d 36, 1992 N.Y. App. Div. LEXIS 7462 (N.Y. App. Div. 1st Dep't 1992).

Automobile insurance company was entitled to temporary stay of uninsured motorist arbitration where (1) company presented Department of Motor Vehicles Form DP-37 (registration plate record) which showed that offending vehicle was insured by other insurance company, (2) other insurance company submitted no papers, and (3) insured merely submitted letter from other insurance company in which it disclaimed coverage; letter did not conclusively establish lack of coverage of offending vehicle and hearing was required. Eagle Ins. Co. v Tichman, 185 A.D.2d 884, 586 N.Y.S.2d 1010, 1992 N.Y. App. Div. LEXIS 9974 (N.Y. App. Div. 2d Dep't 1992).

In proceeding to stay uninsured motorist claim arbitration, insurance company met its initial burden to show that offending vehicle had insurance coverage by copy of registration plate record from Department of Motor Vehicles which indicated insurance coverage for vehicle. State Farm Mut. Auto. Ins. Co. v Fenelon, 202 A.D.2d 436, 608 N.Y.S.2d 709, 1994 N.Y. App. Div. LEXIS 1888 (N.Y. App. Div. 2d Dep't 1994).

Court erred in denying petition to stay arbitration of uninsured motorist claim where record of Department of Motor Vehicles submitted by petitioner was sufficient to raise fact issue as to whether vehicle which allegedly was involved in underlying accident with respondents was insured at that time. Allstate Ins. Co. v Moore, 228 A.D.2d 437, 643 N.Y.S.2d 419, 1996 N.Y. App. Div. LEXIS 6241 (N.Y. App. Div. 2d Dep't 1996).

Insurer's petition to stay arbitration of uninsured motorist claim was properly granted where insurer submitted records of Department of Motor Vehicles indicating that offending vehicle was insured and letter from another insurer admitting that it insured vehicle on date of accident, and insured offered nothing to contradict those facts. Interboro Mut. Indem. Ins. Co. v Quichiz, 238 A.D.2d 421, 657 N.Y.S.2d 352, 1997 N.Y. App. Div. LEXIS 3850 (N.Y. App. Div. 2d Dep't 1997).

Arbitration of uninsured motorist claim would be stayed where hearing was required to determine whether alleged offending vehicle was insured on date of accident; thus, matter would be remitted to Supreme Court for that purpose. Allstate Ins. Co. v Frederick, 266 A.D.2d 283, 698 N.Y.S.2d 266, 1999 N.Y. App. Div. LEXIS 11316 (N.Y. App. Div. 2d Dep't 1999).

Underlying plaintiff's insurer was entitled to permanent stay of arbitration of uninsured motorist claim where 41-day delay of underlying defendant's insurer in disclaiming coverage for its insured's vehicle was unreasonable, and thus insurance coverage for that vehicle still existed. Colonial Penn Ins. Co. v Pevzner, 266 A.D.2d 391, 698 N.Y.S.2d 310, 1999 N.Y. App. Div. LEXIS 11547 (N.Y. App. Div. 2d Dep't 1999).

Purported insurer of driver of second vehicle involved in underlying collision was necessary party that plaintiff insurer of

first driver's vehicle was entitled to have added as respondent to petition for stay of arbitration of policy's uninsured motorist endorsement where petitioner submitted DMV records and police accident report indicating that purported insurer was second driver's insurer at time of collision, and purported insurer's bald disclaimer of coverage merely created triable issue of fact as to validity of disclaimer. N.Y. Cent. Mut. Fire Ins. Co. v Rozenberg, 281 A.D.2d 330, 723 N.Y.S.2d 9, 2001 N.Y. App. Div. LEXIS 3197 (N.Y. App. Div. 1st Dep't 2001).

Petitioner was properly granted permanent stay of arbitration of uninsured motorist benefits claim on ground that offending vehicle was insured at time of accident, where insurer of offending vehicle disclaimed coverage solely to its insureds based on their failure to comply with their obligation to give prompt written notice of accident, and such disclaimer was not effective as against petitioner's insureds. State Farm Mut. Auto. Ins. Co. v Joseph, 287 A.D.2d 724, 732 N.Y.S.2d 66, 2001 N.Y. App. Div. LEXIS 10044 (N.Y. App. Div. 2d Dep't 2001).

In a case dealing with a multi-vehicle collision, the exhaustion of the alleged tortfeasors' policy limits in satisfaction of prior claims did not render that vehicle uninsured for purposes of the uninsured motorist endorsement of the injured party's policy with his insurer; thus, the trial court rejected the injured party's argument that he was entitled to uninsured motorist arbitration with his insurer as the alleged tortfeasors' vehicle was not, in effect, uninsured under N.Y. Ins. Law § 3420(f)(2), and it permanently stayed the arbitration. Lancer Ins. Co. v Nechamkus, 5 A.D.3d 599, 774 N.Y.S.2d 63, 2004 N.Y. App. Div. LEXIS 2684 (N.Y. App. Div. 2d Dep't 2004).

93. — —By unauthorized settlement by insured

Insurance company was entitled to permanent stay of arbitration of underinsured motorist benefits where (1) policy provided that no bodily injury coverage would be furnished if insured settled with tortfeasor without consent of insurance company, and (2) insured settled with offending driver and signed release which stated that release did not include any underinsured motorist claim relating to insured's policy; since it was not clear whether release was intended to preserve insurance company's subrogation rights, insured's failure to obtain insurance company's consent was prejudicial given that litigation would be required to determine meaning of release. State Farm Mut. Ins. Co. v Lopez, 163 A.D.2d 390, 558 N.Y.S.2d 118, 1990 N.Y. App. Div. LEXIS 8888 (N.Y. App. Div. 2d Dep't 1990).

Insurance company's papers in support of application to stay arbitration of underinsured motorist claim clearly informed plaintiff in writing of disclaimer of liability and complied with requirements of CLS Ins § 3420(d); in view of circumstances giving rise to disclosure of plaintiff's settlement with other driver without consent of insurance company, it could not be said that insurance company's actions constituted waiver of right to disclaim, as disclaimer was made as soon as insurance company became aware of relevant facts. Aetna Casualty & Surety Co. v Scirica, 170 A.D.2d 448, 565 N.Y.S.2d 557, 1991 N.Y. App. Div. LEXIS 1426 (N.Y. App. Div. 2d Dep't), app. denied, 78 N.Y.2d 851, 573 N.Y.S.2d 465, 577 N.E.2d 1057, 1991 N.Y. LEXIS 953 (N.Y. 1991).

Insurer's application for permanent stay of arbitration of its denial of underinsured motorist benefits was properly granted where insured failed to obtain insurer's consent to settling his claim against, and releasing from all liability, motorist who allegedly caused his injuries, in contravention of pertinent policy provisions. Continental Ins. Co. v Canni, 192 A.D.2d 651, 596 N.Y.S.2d 471, 1993 N.Y. App. Div. LEXIS 3866 (N.Y. App. Div. 2d Dep't 1993).

Court properly granted insurer's application to permanently stay arbitration of insured's claim for underinsured motorist benefits where insured prejudiced insurer's subrogation rights by signing general release in favor of tortfeasor, and petition to stay arbitration provided sufficient and timely notice of disclaimer on that ground. Glens Falls Ins. Co. v Smith, 221 A.D.2d 529, 634 N.Y.S.2d 395, 1995 N.Y. App. Div. LEXIS 11844 (N.Y. App. Div. 2d Dep't 1995), app. denied, 87 N.Y.2d 809, 642 N.Y.S.2d 195, 664 N.E.2d 1258, 1996 N.Y. LEXIS 267 (N.Y. 1996).

Insured's failure to obtain insurer's consent prior to settlement with driver of other vehicle warranted granting of insurer's application to permanently stay arbitration of claim for underinsured motorist benefits. Allstate Ins. Co. v Palermo, 226 A.D.2d 457, 641 N.Y.S.2d 51, 1996 N.Y. App. Div. LEXIS 3551 (N.Y. App. Div. 2d Dep't 1996).

Court properly granted insurer's petition to permanently stay of uninsured motorist arbitration where it was undisputed that insured breached condition of her policy by instituting personal injury action against owner of other vehicle involved in accident without forwarding to insurer copy of summons and complaint. Allstate Ins. Co. v Kruger, 264 A.D.2d 443, 694 N.Y.S.2d 132, 1999 N.Y. App. Div. LEXIS 8694 (N.Y. App. Div. 2d Dep't 1999).

Neither waiver nor estoppel applied to prevent insurer from staying arbitration of claim under supplementary uninsured/underinsured motorist (SUM) coverage of policy, since insurer's letter to insured's counsel, calling attention to requirement that all other available policy limits be exhausted before SUM coverage would be triggered, did not constitute waiver of other conditions of policy, and thus insurer was entitled to deny coverage on basis of insured's failure to obtain its consent before settling with other party. New York Cent. Mut. Fire Ins. Co. v Cavanagh, 265 A.D.2d 787, 697 N.Y.S.2d 193, 1999 N.Y. App. Div. LEXIS 10942 (N.Y. App. Div. 3d Dep't 1999), app. denied, 94 N.Y.2d 760, 706 N.Y.S.2d 80, 727 N.E.2d 577, 2000 N.Y. LEXIS 110 (N.Y. 2000).

Insurer was entitled to stay of insured's arbitration seeking benefits under supplemental uninsured motorists (SUM) endorsement, since letter advising insurer that insured was injured in accident and might have potential claim under SUM endorsement was insufficient to apprise insurer of pendency and settlement of action, and insurer properly disclaimed coverage one day after learning that insured had prosecuted and settled action against other party. Nationwide Mut. Ins. Co. v Tarsia, 265 A.D.2d 936, 695 N.Y.S.2d 811, 1999 N.Y. App. Div. LEXIS 10088 (N.Y. App. Div. 4th Dep't), app. denied, 94 N.Y.2d 757, 704 N.Y.S.2d 532, 724 N.E.2d 770, 1999 N.Y. LEXIS 4037 (N.Y. 1999).

94. —Stay not warranted

Where insurance policy undisputedly contained agreement to arbitrate, insurer's claim that maximum coverage of tortfeasor driver's policy exceeded petitioner's insurance coverage was not basis to permanently stay arbitration of petitioner's underinsured motorist claim. Steck v State Farm Ins. Co., 89 N.Y.2d 1082, 659 N.Y.S.2d 839, 681 N.E.2d 1285, 1996 N.Y. LEXIS 667 (N.Y.), reh'g denied, 88 N.Y.2d 1018, 649 N.Y.S.2d 384, 672 N.E.2d 610, 1996 N.Y. LEXIS 3045 (N.Y. 1996).

Insurer was not entitled to permanent stay of arbitration under uninsured motorist provision of motor vehicle insurance policy where (1) Department of Motor Vehicles form indicated that offending vehicle was registered several days prior to accident and that it was insured by specified company at that time, (2) owner of offending vehicle testified that he submitted no application for insurance and paid sum of money to person he didn't really know, for which he received insurance card, (3) representative of specified insurance company stated that several searches of computer records revealed no policy written to operator of offending vehicle or anyone with similar name, and (4) insurance company failed to come forward with additional evidence of insured status of offending vehicle. Allstate Ins. Co. v Holmes, 173 A.D.2d 260, 569 N.Y.S.2d 658, 1991 N.Y. App. Div. LEXIS 7100 (N.Y. App. Div. 1st Dep't 1991).

Automobile insurance company was not entitled to stay arbitration of uninsured motorist claim, notwithstanding contention that insured failed to inform police that accident involved hit-and-run driver, where (1) insured testified that unknown vehicle hit vehicle he was driving after he swerved in attempt to avoid collision, (2) insured could not recall whether he told police that there was actual physical contact between vehicles, and (3) police report indicated only that accident occurred when insured swerved in attempt to avoid collision; policy did not require that insured notify police of actual physical contact with unknown vehicle, and insured's description of accident was sufficient. Aetna Casualty & Surety Co. v Laing, 173 A.D.2d 610, 570 N.Y.S.2d 190, 1991 N.Y. App. Div. LEXIS 7615 (N.Y. App. Div. 2d Dep't 1991).

Insurer was not entitled to stay arbitration of uninsured motorist claim where insurer of offending vehicle could disclaim coverage since (1) vehicle had been stolen and was being driven by thief at time of accident, and (2) offending vehicle's owner had not left vehicle unattended in violation of CLS Veh & Tr § 1210(a) since acquaintance of owner remained in vehicle after owner left. Hartford Ins. Co. v Aquaviva, 179 A.D.2d 546, 578 N.Y.S.2d 568, 1992 N.Y. App. Div. LEXIS 477 (N.Y. App. Div. 1st Dep't 1992).

Insurer was not entitled to stay arbitration of underinsured motorist benefits claim by its insured, who was injured while riding in vehicle struck from behind, after insured had recovered full amount available under policy covering offending vehicle; insured was not required to exhaust underinsurance benefits of policy held by driver of vehicle in which she was passenger, since bodily injury coverage limits on driver's policy were less than such limits on offending vehicle, and thus underinsurance provisions on driver's policy were never triggered. Federal Ins. Co. v Reingold, 181 A.D.2d 769, 581 N.Y.S.2d 249, 1992 N.Y. App. Div. LEXIS 3746 (N.Y. App. Div. 2d Dep't), app. denied, 80 N.Y.2d 755, 588 N.Y.S.2d 823, 602 N.E.2d 231, 1992 N.Y. LEXIS 3110 (N.Y. 1992).

Arbitration of underinsured motorist benefits should not have been permanently stayed in light of factual issue as to whether claims representative had been informed of offending driver's policy limit offer prior to insured's acceptance where insured allegedly sent copy of offer to representative and discussed matter over phone, and representative did not object to either settlement or issuance of general release; although policy stated that underinsured motorist coverage would not be provided if action was settled without insurer's consent, policy did not require insured to obtain written consent, and thus representative's silence could be deemed acquiescence. Aetna Casualty & Surety Co. v Crown, 181 A.D.2d 883, 581 N.Y.S.2d 418, 1992 N.Y. App. Div. LEXIS 5249 (N.Y. App. Div. 2d Dep't 1992).

Court properly dismissed insurer's proceeding to stay arbitration of underinsured motorist claim arising out of accident in which insured and 2 friends were walking along road when automobile struck and injured them, where record showed that tortfeasor-driver had single policy limit of $300,000, whereas insurer offered bodily injury coverage limits of $250,000 per person and $500,000 per accident, since determination of whether vehicle is underinsured is made by comparing bodily injury limits of claimant's insurance policy with bodily injury limits of tortfeasor's policy, and court correctly found that $500,000 per accident limit of insured's policy was controlling and exceeded tortfeasor's single policy limit. Allstate Ins. Co. v Hager, 199 A.D.2d 383, 605 N.Y.S.2d 310, 1993 N.Y. App. Div. LEXIS 12063 (N.Y. App. Div. 2d Dep't 1993), app. denied, 83 N.Y.2d 757, 615 N.Y.S.2d 874, 639 N.E.2d 415, 1994 N.Y. LEXIS 1333 (N.Y. 1994).

Court erroneously granted petitioner's motion to stay arbitration of uninsured motorist claim where (1) petitioner offered copy of police report identifying offending vehicle as having been insured by insurance company, and copy of Department of Motor Vehicles Registration Plate Record, (2) insurance company's underwriting manager testified that 5 separate searches of company's records revealed no evidence that any policy of insurance had ever been issued to individual in question, and (3) petitioner failed to overcome company's rebuttal of its prima facie case. Allstate Ins. Co. v Karadag, 205 A.D.2d 531, 614 N.Y.S.2d 24, 1994 N.Y. App. Div. LEXIS 6000 (N.Y. App. Div. 2d Dep't 1994).

Court erred in permanently staying arbitration of uninsured motorist claim arising out of accident which occurred on August 6, 1990, since demand for arbitration dated June 24, 1992 was made within 90 days of date when offending vehicle became "uninsured," and thus was timely under policy, where offending vehicle was insured on date of accident but insurer disclaimed coverage on June 4, 1992 due to insured's failure to report claim or fact that he had been served with legal documents. Colonial Penn Ins. Co. v Morin, 206 A.D.2d 531, 614 N.Y.S.2d 765, 1994 N.Y. App. Div. LEXIS 7580 (N.Y. App. Div. 2d Dep't 1994).

"Bobcat"—machine used for plowing snow or in connection with landscaping work—was "motor vehicle" being operated on "public highway" when its owner-operator was moving it "on the sidewalk" when it "slid right into the side of" county-owned bus; thus, county was not entitled to stay arbitration of uninsured motorist claim on grounds, inter alia, that uninsured bobcat was neither "motor vehicle" nor was being operated on "public highway." County of Westchester v Winstead, 231 A.D.2d 630, 647 N.Y.S.2d 536, 1996 N.Y. App. Div. LEXIS 9471 (N.Y. App. Div. 2d Dep't 1996).

Court erred in permanently staying arbitration of insured's claim for underinsured motorist benefits where policy required that claim be made within 90 days "or as soon as practicable," and insured notified insurer of his claim immediately after determining that insurance on other vehicle was inadequate to compensate insured for his injuries. Allstate Ins. Co. v White, 231 A.D.2d 950, 647 N.Y.S.2d 640, 1996 N.Y. App. Div. LEXIS 10921 (N.Y. App. Div. 4th Dep't 1996).

Petition under CLS CPLR Art 75 to permanently stay arbitration of uninsured motorist claim was properly dismissed without hearing where Department of Motor Vehicles document showed that insurance coverage applicable to offending vehicle had terminated several weeks before accident, there was additional proof that insurer had mailed valid notice of cancellation to vehicle owner, there was no evidence of any defect in cancellation, and mere speculation by counsel that insurer might have failed to mail premium bill to owner before cancellation did not raise triable issue of fact. Eagle Ins. Co. v Awawadeh, 245 A.D.2d 372, 665 N.Y.S.2d 590, 1997 N.Y. App. Div. LEXIS 12878 (N.Y. App. Div. 2d Dep't 1997).

Insurer waived its right to insist on prior written notice of insured's settlement with tortfeasor in underlying action, and thus insurer was not entitled to stay arbitration of insured's underinsured motorist claim, where insurer denied that claim 6 days after accident and never retreated from that denial despite extensive efforts by insured's attorney to keep insurer informed concerning progress of underlying action and insured's continuing intent to pursue underinsurance claim. State Farm Mut. Auto. Ins. Co. v Callisto, 255 A.D.2d 876, 680 N.Y.S.2d 39, 1998 N.Y. App. Div. LEXIS 12063 (N.Y. App. Div. 4th Dep't 1998).

It was error to grant petition to permanently stay arbitration of uninsured motorist claim where there was one-year delay between date of accident and date insurer was notified, neither insured, offending driver, nor injured party presented any evidence showing reasonable excuse for delay, and insurer promptly (within 10 days of receiving notice of accident) disclaimed coverage. State Farm Ins. Co. v Archer, 256 A.D.2d 348, 681 N.Y.S.2d 338, 1998 N.Y. App. Div. LEXIS 13188 (N.Y. App. Div. 2d Dep't 1998).

Plaintiff was entitled to supplementary uninsured motorist benefits in amount to be determined after arbitration proceedings as prescribed by insurance policy where deduction of $10,000 paid to other persons injured in accident left offending vehicle with only $290,000 in available coverage, which was less than $300,000 provided under single limit policy covering vehicle in which plaintiff was passenger; thus, court erred in granting insurer's motion to stay arbitration. New York Cent. Mut. Fire Ins. Co. v White, 262 A.D.2d 415, 691 N.Y.S.2d 134, 1999 N.Y. App. Div. LEXIS 6271 (N.Y. App. Div. 2d Dep't), app. denied, 94 N.Y.2d 751, 699 N.Y.S.2d 6, 721 N.E.2d 22, 1999 N.Y. LEXIS 3471 (N.Y. 1999).

Petition to permanently stay arbitration of underinsured motorist claim should have been denied where claimant's uninsured motorist policy had limit of $100,000, which exceeded tortfeasor's policy limit of $25,000, and there was no applicable policy exclusion. Allstate Ins. Co. v DeMorato, 262 A.D.2d 557, 694 N.Y.S.2d 67, 1999 N.Y. App. Div. LEXIS 7061 (N.Y. App. Div. 2d Dep't 1999).

Insurer was not entitled to permanent stay of arbitration of underinsured motorist claim where present case was indistinguishable from Matter of Federal Ins. Co. v Stechman, 192 AD2d 531, in which there was similar policy provision requiring insured to promptly forward to insurer copies of legal papers served in connection with any action brought by insured against owner or driver of offending vehicle, and Stechman court held that term "legal papers" was ambiguous, that compliance with that provision was not condition precedent to underinsured motorist coverage, and that insured's failure to comply did not result in

forfeiture of right to underinsurance benefits. Nationwide Ins. Co. v Sobiesiuk, 263 A.D.2d 510, 691 N.Y.S.2d 925, 1999 N.Y. App. Div. LEXIS 8108 (N.Y. App. Div. 2d Dep't 1999).

In proceeding by insurer to permanently stay arbitration of uninsured motorist claim, insurer's unsubstantiated conjecture that there might have been some defect in cancellation of policy covering offending vehicle did not warrant hearing on issue of whether that vehicle was insured on date of collision. Allstate Ins. Co. v Lopez, 266 A.D.2d 209, 697 N.Y.S.2d 684, 1999 N.Y. App. Div. LEXIS 11116 (N.Y. App. Div. 2d Dep't 1999).

Son was resident of his mother's household and thus insured person under supplementary uninsured motorists endorsement to automobile liability policy issued to mother, and thus insurer was not entitled to stay of arbitration under CLS CPLR § 7503(b), where son had his own key to mother's house and was free to come and go at will, he kept clothing and received mail there, and he spent 3 to 4 nights per week there and remainder of his time at home of mother's former boyfriend; person may have more than one residence for insurance coverage purposes. Prudential Prop. & Cas. Ins. Co. v Galioto, 266 A.D.2d 926, 697 N.Y.S.2d 415, 1999 N.Y. App. Div. LEXIS 11741 (N.Y. App. Div. 4th Dep't 1999).

Court improperly granted petition to permanently stay arbitration of uninsured motorist claim where parties' documents raised fact issues as to whether offending vehicle was uninsured within meaning of policy issued by petitioner insurer to respondent, and whether alleged insurer of offending vehicle had properly disclaimed coverage; it was improper for court to determine that offending vehicle was insured without joinder of alleged insurer of offending vehicle and additional proposed respondents and, if necessary, hearing. New York Cent. Mut. Fire Ins. Co. v Paillant, 269 A.D.2d 451, 702 N.Y.S.2d 883, 2000 N.Y. App. Div. LEXIS 1402 (N.Y. App. Div. 2d Dep't 2000).

In uninsured motorist (UM) arbitration proceeding by petitioner who was injured in hit-and-run accident while driving car leased from respondent rental company which argued that, because petitioner signed rental agreement waiving UM benefits, it was absolved of providing UM benefits and insurer of petitioner's own vehicle was required to provide primary UM benefits although that vehicle was not involved in accident, court properly declined to permanently stay arbitration or, in alternative, join petitioner's insurer as additional respondent and direct petitioner to secure primary UM coverage from its insurer, because respondent, as self-insured automobile rental company, was required to provide primary UM benefits. ELRAC, Inc. v Edwards, 270 A.D.2d 414, 705 N.Y.S.2d 265, 2000 N.Y. App. Div. LEXIS 2965 (N.Y. App. Div. 2d Dep't 2000).

In uninsured motorist (UM) arbitration proceeding by petitioner who was involved in collision with unknown driver while operating car that she rented from self-insured automobile rental company, court erred in permanently staying arbitration against respondent rental company on ground that parties' rental agreement waived personal injury and UM protection, and in directing that arbitration proceed against insurer of petitioner's own vehicle although that vehicle was not involved in accident, as respondent rental company was obligated by law to provide primary UM benefits and, consequently, waiver in rental agreement was unenforceable. ELARC, Inc. v Fajardo, 270 A.D.2d 415, 705 N.Y.S.2d 264, 2000 N.Y. App. Div. LEXIS 2959 (N.Y. App. Div. 2d Dep't 2000).

Court properly denied petition to permanently stay uninsured motorist arbitration where, in response to petitioner's submission of copy of police accident report and "registration record expansion" from Department of Motor Vehicles (DMV) indicating that offending vehicle was insured by "Allstate," respondent submitted letter in which Allstate denied coverage, and letter from DMV stating that driving privileges of owner and operator of offending vehicle had been revoked because vehicle was uninsured, which was sufficient to establish that offending vehicle was uninsured at time of accident. State Farm Mut. Auto. Ins. Co. v Youngblood, 270 A.D.2d 493, 705 N.Y.S.2d 619, 2000 N.Y. App. Div. LEXIS 3252 (N.Y. App. Div. 2d Dep't 2000).

Insurer was not entitled to permanent stay of arbitration where respondent was "resident of the same household" as holder of policy issued by insurer and thus was insured person for purposes of uninsured motorist endorsement of that policy. Interboro Mut. Indem. Ins. Co. v Johannesen, 273 A.D.2d 237, 709 N.Y.S.2d 445, 2000 N.Y. App. Div. LEXIS 6259 (N.Y. App. Div. 2d Dep't 2000).

Insurer waived its right to seek permanent stay of arbitration by participating in arbitration proceeding instead of moving to temporarily stay it. Interboro Mut. Indem. v Johnson, 273 A.D.2d 238, 709 N.Y.S.2d 833, 2000 N.Y. App. Div. LEXIS 6260 (N.Y. App. Div. 2d Dep't 2000).

Insurer was not entitled to permanent stay of arbitration of uninsured motorist claim where direct contact between respondents' vehicle and unidentified hit-and-run vehicle is not necessary to satisfy physical contact requirement of CLS Ins § 5217, collision involved multiple vehicles, and accident originated from collision with unidentified vehicle. Allstate Ins. Co. v Basdeo, 273 A.D.2d 466, 710 N.Y.S.2d 111, 2000 N.Y. App. Div. LEXIS 7404 (N.Y. App. Div. 2d Dep't 2000).

Insurer was not entitled to permanent stay of arbitration of uninsured motorist coverage dispute on ground that insured persistently failed to comply with certain policy conditions where there was no support in policy language for insurer's claims that (1) insured was required to provide both recorded statement and examination under oath, and (2) written proof of loss had to be given by insured personally, not by letter from counsel. State Farm Mut. Auto. Ins. Co. v Hernandez, 275 A.D.2d 989, 713 N.Y.S.2d 618, 2000 N.Y. App. Div. LEXIS 9545 (N.Y. App. Div. 4th Dep't 2000).

Prior arbitration decision, awarding appellant maximum amount of tortfeasor's liability coverage, did not preclude appellant from pursuing arbitration of underinsured motorist claim against her insurance carrier, where parties to prior arbitration had consented to provision limiting collateral estoppel effect of that determination to appellant's damages claim against tortfeasor. State Farm Ins. Co. v Smith, 277 A.D.2d 390, 717 N.Y.S.2d 210, 2000 N.Y. App. Div. LEXIS 12070 (N.Y. App. Div. 2d Dep't 2000).

In proceeding to permanently stay arbitration of uninsured motorist claim on ground that policy issued to other driver in Virginia provided coverage for accident, where Virginia insurer argued that it cancelled policy in question retroactively under Virginia law based on material misrepresentations in application for insurance (namely that owner-applicant resided in Virginia and subject vehicle would be principally garaged in Virginia when in fact owner resided and garaged vehicle in New York at all relevant times), court resolved conflict of law question regarding validity of retroactive cancellation in favor of applying Virginia law, which permitted retroactive cancellation; New York's governmental interests, when balanced against Virginia's significant contacts with contract and legitimate governmental interest in protecting honest policyholders from bearing burden of paying claim incurred by dishonest policyholders, was not sufficiently compelling to warrant application of New York law, which does not permit retroactive cancellation. Eagle Ins. Co. v Singletary, 279 A.D.2d 56, 717 N.Y.S.2d 351, 2000 N.Y. App. Div. LEXIS 13230 (N.Y. App. Div. 2d Dep't 2000).

Insurer was not entitled to stay of arbitration of underinsured motorist claim, there being no merit in its claims that, inter alia, underinsurance was not covered under "supplementary uninsured motorist endorsement," where (1) endorsement defined "uninsured motor vehicle" as one having bodily injury liability insurance that was less than third-party bodily injury liability limit of insured's policy at time of accident, and (2) insurer's claims related to whether certain conditions of policy had been complied with and not whether parties had agreed to arbitration; insurer's motion to renew, in which it sought to adduce evidence that policy's declarations page would have expressly mentioned "underinsurance" coverage if insured had purchased it, was properly denied for lack of explanation as to why such evidence was not presented on original motion. Empire Ins. Co. v Busse, 281 A.D.2d 377, 722 N.Y.S.2d 543, 2001 N.Y. App. Div. LEXIS 3208 (N.Y. App. Div. 1st Dep't 2001).

Rhode Island had most significant contacts with parties and subject automobile insurance policy, and thus Rhode Island's 10-day notice provision for cancellation of coverage based on

nonpayment of premiums applied, rather than 15-day provision in CLS Veh & Tr § 313(1)(a), where (1) alleged insured was Rhode Island resident with Rhode Island driver's license and car registered in Rhode Island, (2) insurer, which was doing business in Rhode Island, issued insurance policy in Rhode Island through Rhode Island Assigned Risk Unit, (3) policy provided for application of Rhode Island law, (4) notice of cancellation adhered to Rhode Island law, and (5) New York was merely situs of accident and domicile of other parties involved; thus, notice of cancellation was effective, alleged insured did not have insurance coverage at time of accident, and another motorist's insurer was not entitled to stay of arbitration of uninsured motorist claim Integon Ins. Co. v Garcia, 281 A.D.2d 480, 721 N.Y.S.2d 660, 2001 N.Y. App. Div. LEXIS 2385 (N.Y. App. Div. 2d Dep't 2001).

In proceeding to compel arbitration of claims for underinsured and uninsured motorist benefits under policies issued to petitioner and his parents, court properly denied petition with respect to uninsured benefits based on petitioner's failure to inform respondent insurer of his potential claim, but erred in denying petition with respect to underinsured motorist claim, because insurer was estopped from denying underinsured motorist coverage on ground that petitioner did not exhaust benefits payable under policy covering tortfeasor's vehicle where it failed to respond to numerous letters from petitioner concerning settlement of underinsured motorist claim, and it clearly had notice of that claim. Brasco v Nationwide Mut. Ins. Co., 283 A.D.2d 492, 724 N.Y.S.2d 488, 2001 N.Y. App. Div. LEXIS 5030 (N.Y. App. Div. 2d Dep't 2001).

Court improperly stayed arbitration of uninsured motorist claim where insured showed that he acted with due diligence in ascertaining insurance status of vehicles involved in accident, and in providing timely notice to insurer. Cont'l Ins. Co. v Boyar, 284 A.D.2d 332, 725 N.Y.S.2d 564, 2001 N.Y. App. Div. LEXIS 5651 (N.Y. App. Div. 2d Dep't 2001).

Insurer was not entitled to stay of underinsured motorist arbitration on ground that respondents colluded to wrongfully compromise its rights by deceptively allocating total proceeds of underlying personal injury action against tortfeasor to other family members who were also injured in accident, where there was no allegation that injuries sustained by settling family members were not severe enough to warrant their receipt of full amount of tortfeasor's policy, and advanced age of settling family members (who were in their 80's and much older than respondents) provided reason to allocate proceeds so that elderly parties were paid immediately. Travelers Prop. Cas. Co. v Schoenheimer, 177 Misc. 2d 825, 676 N.Y.S.2d 902, 1998 N.Y. Misc. LEXIS 366 (N.Y. Sup. Ct. 1998).

Petitioner was not entitled to stay of arbitration of underinsurance claim arising out of December 1997 automobile collision, on ground that respondent failed to make underinsurance claim "as soon as practicable" and failed to timely notify petitioner of her underlying lawsuit against tortfeasor, where respondent's counsel made diligent efforts to ascertain tortfeasor's insurance coverage but tortfeasor's insurer failed to disclose that no excess coverage existed until October 12, 2000 after it offered to settle respondent's personal injury claim for policy limit of $100,000, and petitioner would not honor underinsurance claim until question of excess insurance was resolved; under circumstances, toll in CLS Ins § 3420(f)(2)(A) remained intact until respondent's counsel notified petitioner in September 2000 about tortfeasor's liability coverage and potential for underinsurance claim which awaited response concerning excess insurance. CGU Ins. Co. v Nardelli, 188 Misc. 2d 560, 729 N.Y.S.2d 365, 2001 N.Y. Misc. LEXIS 233 (N.Y. Sup. Ct. 2001).

Where an insurer provided absolutely no explanation for its delay in commencing its investigation, the delay was unreasonable as a matter of law under N.Y. Ins. Law § 3420(d) and the trial court erred by granting the insured's N.Y. C.P.L.R. art. 75 petition to permanently stay the underinsured motorist arbitration sought by an insured. Progressive Northeastern Ins. Co. v Cirocco, 4 A.D.3d 530, 771 N.Y.S.2d 717, 2004 N.Y. App. Div. LEXIS 1826 (N.Y. App. Div. 2d Dep't 2004).

Trial court properly denied a petition to stay arbitration of a claim for underinsured motorist benefits where the underinsured motorist benefits provision of the policy for the injured insured was triggered when the injured insured exhausted the bodily injury policy limits under the tortfeasor's policy, which was less than the liability coverage provided under the policy of the injured insured's insurer. The injured insured was not also required to exhaust the liability coverage limits under a separate policy for the tortfeasor prior to bringing a claim for underinsured motorist benefits. Liberty Mut. Ins. Co. v Doherty, 13 A.D.3d 629, 789 N.Y.S.2d 55, 2004 N.Y. App. Div. LEXIS 15758 (N.Y. App. Div. 2d Dep't 2004).

95. — —Waived by delay

Insurer's petition for stay of arbitration of underinsured motorist coverage was untimely were it was filed nearly 2 months after insured's request for arbitration; fact that insureds were unsuccessful in their request to have arbitration conducted by American Arbitration Association did not render entire request nullity so as to toll running of time to petition for stay. Gen. Accident Ins. Co. v Ramee, 157 A.D.2d 877, 549 N.Y.S.2d 880, 1990 N.Y. App. Div. LEXIS 46 (N.Y. App. Div. 3d Dep't 1990).

Insurer's application to stay uninsured motorist claim was properly dismissed since insurer was estopped to deny benefits on ground that insured settled with other tortfeasors without its consent where ground was raised for first time more than one year from date insurer had access to sufficient information to alert it to necessity of disclaimer based on particular policy exclusion invoked. Liberty Mut. Ins. Co. v Lapicola, 184 A.D.2d 322, 584 N.Y.S.2d 834, 1992 N.Y. App. Div. LEXIS 8103 (N.Y. App. Div. 1st Dep't 1992).

Insurance company was not entitled to stay of arbitration of claim for uninsured motorist benefits, despite claim that insured was injured while operating automobile in violation of order of suspension, where insurance company had all information it needed to investigate status of insured's license at time it received claim, and it did not attempt to disclaim liability until 6 months later. Eagle Ins. Co. v Morel, 202 A.D.2d 1064, 609 N.Y.S.2d 128, 1994 N.Y. App. Div. LEXIS 3556 (N.Y. App. Div. 4th Dep't 1994).

Insurance carrier, by failing to move to stay arbitration within 20-day period under CLS CPLR § 7503, forfeited its right to stay arbitration on ground that insured improperly failed to exhaust available primary underinsured motorist coverage from owner-operator of vehicle in which she was passenger before claiming excess coverage under carrier's policy. Aetna Casualty & Sur. Co. v Bondy, 203 A.D.2d 561, 611 N.Y.S.2d 33, 1994 N.Y. App. Div. LEXIS 4224 (N.Y. App. Div. 2d Dep't 1994).

It was error to grant petitioner's application to stay arbitration of respondents' uninsured motorist claim where instant proceeding was not commenced until 2 months after petitioner was served with demand for arbitration under uninsured motorist provision of insurance policy in question, and valid arbitration agreement existed, conditions of which had not been complied with. Travelers Indem. Co. v Balthazar, 224 A.D.2d 303, 638 N.Y.S.2d 36, 1996 N.Y. App. Div. LEXIS 1248 (N.Y. App. Div. 1st Dep't 1996).

Court erred in granting insurer's petition to permanently stay arbitration of underinsured motorist claim, even though insured settled his claim against third-party tortfeasor for maximum limit of tortfeasor's insurance without first obtaining insurer's consent, since insured made several efforts to obtain insurer's consent, to which insurer never responded. Allstate Ins. Co. v Sullivan, 230 A.D.2d 732, 646 N.Y.S.2d 359, 1996 N.Y. App. Div. LEXIS 8271 (N.Y. App. Div. 2d Dep't 1996).

Court erred in granting insurer's application to stay arbitration of claim for uninsured motorist benefits, which was brought more than 20 days after it was served with demand for arbitration, where parties did not dispute that policy contained agreement to arbitrate, and insurer's claim, that there was no coverage under uninsurance provisions because there was no physical contact between insureds' vehicle and alleged offending vehicle, related to whether certain conditions of policy had been complied with and not whether parties had agreed to arbitrate, so that 20-day period under CLS CPLR § 7503 (c) applied. CNA Ins. Co. v Carsley, 243 A.D.2d 474, 663 N.Y.S.2d 92, 1997 N.Y. App. Div. LEXIS 9636 (N.Y. App. Div. 2d Dep't 1997).

Issue of physical contact with uninsured vehicle related to whether certain conditions of coverage were satisfied, and thus insurer's application for stay of arbitration of uninsured motorist claim, instituted 7 months after insured demanded arbitration, was untimely and should have been denied. CNA Ins. Co. v Rosa, 253 A.D.2d 494, 676 N.Y.S.2d 500, 1998 N.Y. App. Div. LEXIS 8896 (N.Y. App. Div. 2d Dep't 1998), app. denied, 92 N.Y.2d 818, 685 N.Y.S.2d 420, 708 N.E.2d 177, 1999 N.Y. LEXIS 2019 (N.Y. 1999).

Court should have denied insurer's application to permanently stay underinsured motorist arbitration where (1) it timely filed application for stay but failed to file proof of service within 15 days of expiration of 20-day limitations period, resulting in automatic dismissal of application 36 days after injured party's service of arbitration demand, and (2) it did not commence new proceeding within 15 days of automatic dismissal as required by CLS CPLR former § 306-b(a) then in effect. Travelers Indem. Company/Aetna Cas. & Sur. Co. v Roth, 258 A.D.2d 341, 685 N.Y.S.2d 228, 1999 N.Y. App. Div. LEXIS 1340 (N.Y. App. Div. 1st Dep't 1999).

In action for injuries sustained by claimant when automobile struck his motorcycle, it was error for court to permanently stay arbitration of claim for supplementary uninsured motorist (SUM) benefits under policy issued to claimant's mother, on ground that claimant lived with his mother and qualified as "insured" under SUM endorsement of her policy which excluded coverage for bodily injury to "an insured incurred while occupying a motor vehicle owned by that insured if such motor vehicle is not insured for SUM coverage by the policy under which a claim is made," as insurer waived its right to invoke designated exclusion by failing to timely disclaim coverage on that basis under CLS Ins § 3420(d). Allstate Ins. Co. v Arpaia, 276 A.D.2d 628, 714 N.Y.S.2d 326, 2000 N.Y. App. Div. LEXIS 10338 (N.Y. App. Div. 2d Dep't 2000).

Insurer's 34-day delay in disclaiming coverage was unreasonable; thus, it was improper to grant insurer's motion to stay arbitration of claim for supplemental uninsured motorist benefits. Brandon v Nationwide Mut. Ins. Co., 284 A.D.2d 886, 727 N.Y.S.2d 727, 2001 N.Y. App. Div. LEXIS 6855 (N.Y. App. Div. 3d Dep't 2001), aff'd, 97 N.Y.2d 491, 743 N.Y.S.2d 53, 769 N.E.2d 810, 2002 N.Y. LEXIS 977 (N.Y. 2002).

No-fault insurance carrier was not entitled to stay of underinsurance arbitration proceeding based on injured party's failure to comply with mandate of policy that he submit medical reports, authorizations and proof of claim, and appear for deposition and physical examination prior to arbitration; insurance carrier waived condition precedent by failing to issue timely denial of coverage and failing to comply with 11 NYCRR § 216.5 where it requested insurance information for 18 months following notice of claim until demand for arbitration, but never requested additional discovery, and failed to offer explanation for its delay. State Farm Mut. Auto. Ins. Co. v Urdahl, 170 Misc. 2d 841, 652 N.Y.S.2d 197, 1996 N.Y. Misc. LEXIS 474 (N.Y. Sup. Ct. 1996).

Insurer was not entitled to stay of uninsured motorist arbitration pending disclosure where it had notice of potential underinsured claim since May of 1997 and became aware that such claim ripened in February of 1999, some 5 months prior to moving for stay; under circumstances, insurer waived any contractual rights to disclosure. State Farm Mut. Auto. Ins. Co. v Aponte, 182 Misc. 2d 372, 702 N.Y.S.2d 747, 1999 N.Y. Misc. LEXIS 486 (N.Y. Sup. Ct. 1999).

Respondent was estopped from claiming untimeliness as defense to application for temporary stay of arbitration of underinsured motorist claim, although petition for stay was not filed until 49 days after insurer received arbitration demand, where insurer refrained from filing petition to stay arbitration in reliance on letter (received on same day as demand) in which respondent's counsel stated he would not file arbitration demand for 30 days so that parties could engage in settlement discussions, and it promptly sought stay when it received notice from American Arbitration Association, scheduling date for arbitration. Peerless Ins. Co. v McDonough, 183 Misc. 2d 341, 705 N.Y.S.2d 787, 1999 N.Y. Misc. LEXIS 644 (N.Y. Sup. Ct. 1999).

96. Judicial review of arbitrator's findings

Insurer's argument that arbitrator's award should be reduced by other insurance benefits which claimant received as compensation for injuries she suffered in accident, regardless of its merits, is not basis for vacating or modifying award. Commerce & Indus. Ins. Co. v Nester, 90 N.Y.2d 255, 660 N.Y.S.2d 366, 682 N.E.2d 967, 1997 N.Y. LEXIS 1374 (N.Y. 1997).

Court's holding, in proceeding to confirm arbitration award, that absence of agreement to arbitrate was not basis for vacating or modifying arbitration award, and that insurer lost its opportunity for appellate review of denial of its application to stay arbitration by participating in arbitration without seeking interim stay of effectuation of denial order, did not result in claimant improperly receiving windfall underinsurance benefits by estoppel; rather, insurer's responsibility to pay was based on judicial and arbitration decisions rendered after it had opportunity for full and fair hearing on its disclaimer of benefits. Commerce & Indus. Ins. Co. v Nester, 90 N.Y.2d 255, 660 N.Y.S.2d 366, 682 N.E.2d 967, 1997 N.Y. LEXIS 1374 (N.Y. 1997).

The MVAIC indorsement attached to policies of automobile liability insurance merely provides for recovery by insured of such damages as he might legally be entitled to recover from the uninsured or absent motorist, which damages are to be reached by arbitration in the event of inability to agree on their amount, and whatever amount the arbitrator awards is specifically made binding upon the parties, regardless of the fact that insured was killed as the result of the collision and the arbitrator's award amounts to only about one-sixth of expense of his funeral, there being no proof of partiality on the part of the arbitrator. Torano v Motor Vehicle Acci. Indemnification Corp., 19 A.D.2d 356, 243 N.Y.S.2d 434, 1963 N.Y. App. Div. LEXIS 3121 (N.Y. App. Div. 1st Dep't 1963), aff'd, 15 N.Y.2d 882, 258 N.Y.S.2d 418, 206 N.E.2d 353, 1965 N.Y. LEXIS 1553 (N.Y. 1965).

In an action invovling an uninsured motorist's provision in insurance policy, carrier failed to demonstrate that $10,000 award included those medical and hospital expenses for which it reimbursed the claimant under the provision for expenses for medical services of $2,000, and furthermore the arbitrator's restatement of the award suggested that he allocated very little of the award to all of the claimant's medical and hospital expenses in view of the overall extensive damages and that the medical and hospital damages covered by the $2,000 medical expenses provision constituted no part of the indefinite small amount allocated by him to all medical and hospital damages in the total award. Hutchison v Hartford Acci. & Indem. Co., 34 A.D.2d 1010, 312 N.Y.S.2d 789, 1970 N.Y. App. Div. LEXIS 4301 (N.Y. App. Div. 2d Dep't 1970).

In order to successfully reduce an arbitration award by the payments the insurance carrier made under the medical payment provision of the policy, the carrier must establish that specifically included in the total award were damages for those medical and hospital expenses for which it reimbursed the claimant; if the award does not include damages for medical and hospital expenses, or included damages for medical and hospital expenses other than those for which the carrier already paid the claimant under the medical payment provision, then the carrier may not set off such payments against the award. Hutchison v Hartford Acci. & Indem. Co., 34 A.D.2d 1010, 312 N.Y.S.2d 789, 1970 N.Y. App. Div. LEXIS 4301 (N.Y. App. Div. 2d Dep't 1970).

Ins Law § 3420(f)(1), which provides for binding arbitration over disputes as to coverage of uninsured motorist liability insurance, did not bar an insurer from relitigating all of the issues involved in an arbitration arising out of a fatal hit-and-run accident, where the decedent had opted for supplementary uninsured motorist coverage over and above that mandated by the statute, rendering her subject to the superseding insurance policy indorsement, which specifically provided that arbitration awards exceeding the state's per person compulsory liability insurance limit would be nonbinding. Reichel v Government Employees Ins. Co., 107 A.D.2d 463, 487 N.Y.S.2d 99, 1985 N.Y. App. Div. LEXIS 49766 (N.Y. App. Div. 2d Dep't), aff'd, 66 N.Y.2d 1000, 499 N.Y.S.2d 385, 489 N.E.2d 1287, 1985 N.Y. LEXIS 18353 (N.Y. 1985).

Insurer's assertion that passenger in insured vehicle was splitting her cause of action did not require summary judgment for insurer in passenger's action for damages under uninsured motorist endorsement, although passenger's claim had previously been arbitrated by parties and had resulted in arbitration award which had been confirmed by court, since policy required passenger to arbitrate as initial remedy, court had confirmed award only to extent of $10,000 (under policy provision that award up to that amount was binding on parties), policy gave either party right to trial on awards exceeding $10,000, and arbitrator had assessed passenger's damages at $40,000. Pfeiffer v Allstate Ins. Co., 136 A.D.2d 532, 523 N.Y.S.2d 152, 1988 N.Y. App. Div. LEXIS 318 (N.Y. App. Div. 2d Dep't 1988).

Insurance company waived its contractual right to trial de novo of underinsured motorist claim in event of arbitration award exceeding $10,000 when it acquiesced in appointment of one arbitrator, as called for by rules of arbitral forum designated in insured's demand for arbitration, instead of 3 arbitrators, as called for in policy, and by otherwise failing to advise forum that dispute was to be arbitrated in accordance with policy and not rules of forum prescribed for binding arbitration. General Accident Ins. Co. v Giacomazzo by Giacomazzo, 204 A.D.2d 236, 612 N.Y.S.2d 43, 1994 N.Y. App. Div. LEXIS 5623 (N.Y. App. Div. 1st Dep't 1994).

Underinsured motorist coverage endorsement of automobile insurance policy permitting either party to demand trial de novo if arbitration award exceeded New York's bodily injury liability limits was not unconscionable or against public policy, and was enforceable. Massachusetts Bay Ins. Co. v Lannon, 216 A.D.2d 954, 628 N.Y.S.2d 917, 1995 N.Y. App. Div. LEXIS 7347 (N.Y. App. Div. 4th Dep't 1995).

Insurer waived any claims as to alleged bias of arbitrator by proceeding with arbitration after learning of prior relationship between insured's counsel and one of arbitrators. Arner v Liberty Mut. Ins. Co., 233 A.D.2d 321, 649 N.Y.S.2d 185, 1996 N.Y. App. Div. LEXIS 11657 (N.Y. App. Div. 2d Dep't 1996).

Standard automobile liability insurance provision, which permits trial de novo when arbitration panel awards claim for underinsurance benefits in excess of $10,000 "minimum limit for bodily injury liability," is unenforceable since (1) provision is against public policy goal of providing arbitration as expeditious and inexpensive forum, and (2) provision is unconscionable in view of lack of mutuality and clear absence of choice on part of policyholder. Hanover Ins. Co. v Losquadro, 157 Misc. 2d 1014, 600 N.Y.S.2d 419, 1993 N.Y. Misc. LEXIS 244 (N.Y. Sup. Ct. 1993).

Where underinsured motorist provision of liability policy provided for arbitration and also provided that in certain circumstances either insured or insurer could demand trial following arbitration, court would reject insurer's request for trial by jury, since policy failed to so specify and court would not add to policy terms that did not exist. Povinelli v Royal Ins. Co., 171 Misc. 2d 826, 656 N.Y.S.2d 140, 1997 N.Y. Misc. LEXIS 60 (N.Y. Sup. Ct. 1997).

97. —Confirmation of award

Under the circumstances, it was not unreasonable for carrier to agree, in arbitration of claim for lost earnings under no-fault law, that if claimant prevailed he would be entitled to $1,000 per month, less 20 percent statutory deduction, and in light of such agreement, arbitrator did not exceed powers in omitting to deduct social security disability payments from award for lost earnings. Government Employees Ins. Co. v Lombino, 57 A.D.2d 957, 394 N.Y.S.2d 898, 1977 N.Y. App. Div. LEXIS 12236 (N.Y. App. Div. 2d Dep't 1977).

Arbitrator's finding that vehicle which struck and injured petitioner was within coverage of insurance policy was supported by the evidence and thus award could not be deemed irrational and was properly confirmed. James v Criterion Ins. Co., 59 A.D.2d 907, 399 N.Y.S.2d 142, 1977 N.Y. App. Div. LEXIS 14111 (N.Y. App. Div. 2d Dep't 1977).

Although arbitrator's determination to offset amount of damages awarded under supplementary uninsured motorist endorsement, by deducting amount insured had recovered from third party's insurer, may not have been legally correct, court did not err in refusing to vacate that portion of award in its entirety, as arbitrator's determination was in accordance with terms of policy and therefore had rational basis. Prudential Property & Casualty Ins. Co. v Carleton, 145 A.D.2d 492, 535 N.Y.S.2d 738, 1988 N.Y. App. Div. LEXIS 13258 (N.Y. App. Div. 2d Dep't 1988).

In proceeding to confirm arbitration award pertaining to underinsured motorist coverage, claim of insurance company that arbitrator applied law of wrong state could not be entertained unless award was violative of public policy, was totally irrational, or exceeded specifically enumerated limit on powers of arbitrator. Barbee v Nationwide Mut. Ins. Co., 194 A.D.2d 604, 599 N.Y.S.2d 70, 1993 N.Y. App. Div. LEXIS 5591 (N.Y. App. Div. 2d Dep't 1993).

Court erred in confirming uninsured motorist arbitration award where arbitrator named by insureds proceeded to make award after insurer failed to respond to request for appointment of its arbitrator within 30-day period specified therefor in insurance contract, since contract specifically provided for system of tripartite arbitration in which each party would select one arbitrator and 2 arbitrators would together agree on third, and adherence to such procedure was, in effect, condition precedent to arbitration process, on failure of which parties should have applied to court for appointment of second arbitrator so that third could thereafter be selected. Lassiter v CNA Ins. Co., 195 A.D.2d 362, 600 N.Y.S.2d 59, 1993 N.Y. App. Div. LEXIS 7200 (N.Y. App. Div. 1st Dep't 1993).

It was error to confirm arbitrator's award and to enjoin insurer from proceeding with trial de novo of uninsured motorist claim where arbitration award, which far exceeded maximum permitted under mandatory automobile accident indemnification endorsement attacked to insured's policy, was rendered pursuant to supplementary uninsured/underinsured motorist insurance endorsement relied on by insurer; such supplemental coverage, which insured may opt to purchase at additional premium, permits increased award but also permits either party to seek trial de novo in certain situations, and since insured sought benefit of supplementary endorsement in form of increased award, he could not avoid applicability of trial de novo provision by claiming ignorance thereof and nonreceipt of written endorsement. Nationwide Mut. Ins. Co. v Alvarez, 207 A.D.2d 401, 615 N.Y.S.2d 723, 1994 N.Y. App. Div. LEXIS 8187 (N.Y. App. Div. 2d Dep't 1994).

Court should have confirmed arbitrator's award of $190,000 under uninsured automobile endorsement of subject policy where policy provisions were ambiguous in that, on one hand, they appeared to limit recovery for bodily injury to $100,000 per person, but, on other hand, they also appeared to allow greater per person recovery where, as here, 2 or more people were injured in accident. Mostow v State Farm Ins. Cos., 216 A.D.2d 300, 628 N.Y.S.2d 146, 1995 N.Y. App. Div. LEXIS 5920 (N.Y. App. Div. 2d Dep't 1995), aff'd, 88 N.Y.2d 321, 645 N.Y.S.2d 421, 668 N.E.2d 392, 1996 N.Y. LEXIS 1169 (N.Y. 1996).

Court properly confirmed arbitration awards of $100,000 to each of 2 insureds, despite insurer's claim that such awards exceeded $10,000 per person policy limit, where insurer did not submit affidavit from person with personal knowledge to controvert insureds' claim that arbitrator was informed at hearing, without objection by insurer, that policy limits as to accident were $100,000 per person and $300,000 per accident. Sagona v State Farm Ins. Co., 218 A.D.2d 660, 630 N.Y.S.2d 352, 1995 N.Y. App. Div. LEXIS 8277 (N.Y. App. Div. 2d Dep't 1995).

Arbitrators had plenary jurisdiction to reform insurance policy to incorporate statutory standard for uninsured motorist coverage and then specifically enforce amended policy. Arner v Liberty Mut. Ins. Co., 233 A.D.2d 321, 649 N.Y.S.2d 185, 1996 N.Y. App. Div. LEXIS 11657 (N.Y. App. Div. 2d Dep't 1996).

Arbitrator did not exceed his authority or rule irrationally in determining that policy coverage for "all sums that the insured ... shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle because of bodily injury sustained by the insured" included future economic loss as well as pain and suffering. Huntemann v Allstate Ins. Co., 272 A.D.2d

126, 708 N.Y.S.2d 851, 2000 N.Y. App. Div. LEXIS 5435 (N.Y. App. Div. 1st Dep't 2000).

Court properly confirmed arbitration award which granted underinsured motorist benefits to petitioner, where respondent insurer contended that policy entitled it to offsets for Workers' Compensation benefits received by petitioner and settlement he received in underlying negligence action, but it failed to reconcile its position in earlier proceeding to stay arbitration that policy did not provide for offsets but only for "non-duplication" of certain benefits or recoveries, and arbitrator's award was consistent with non-duplication provision. Fazio v Allstate Ins. Co., 276 A.D.2d 696, 714 N.Y.S.2d 759, 2000 N.Y. App. Div. LEXIS 10882 (N.Y. App. Div. 2d Dep't 2000).

Court would confirm arbitration award of $10,000 where petitioner was injured while one of 4 passengers in car involved in hit-and-run car accident, even though 2 of other passengers had been awarded damages in prior arbitration proceedings, which left only $2,500 of $10,000 per person, $20,000 per incident coverage available under uninsured motorist endorsement of policy for disposition of petitioner's claim and that of fourth passenger who also filed claim, since insurer was aware of but failed to consolidate multiple claims. Belizaire v Aetna Cas. & Sur. Co., 171 Misc. 2d 473, 654 N.Y.S.2d 982, 1997 N.Y. Misc. LEXIS 21 (N.Y. Sup. Ct. 1997).

98. —Vacation of award

Court will vacate arbitration award in amount of $100,000 made to decedent's administrator on claim filed under uninsured motorists' provision of insurance policy covering decedent, where insured opted to purchase extra coverage, agreeing in "Supplemental Uninsured Motorists Coverage" indorsement superseding policy's standard provisions that arbitration award exceeding standard $50,000/$100,000 uninsured motorist limitation may be reviewed by either party in trial de novo; since arbitration award set insured's liability at $100,000, argument that award was made pursuant to standard uninsured motorists coverage indorsement of policy cannot be accepted. Reichel v Government Employees Ins. Co., 66 N.Y.2d 1000, 499 N.Y.S.2d 385, 489 N.E.2d 1287, 1985 N.Y. LEXIS 18353 (N.Y. 1985).

Where plaintiff who sustained injuries in automobile accident involving taxicab obtained arbitration award of $8,500 under uninsured motorist endorsement of her husband's automobile policy after commencing action against taxicab defendants and receiving no response from their insurer, and thereafter executed general release in favor of taxicab defendants on accepting late $3,000 settlement offer, court erred in vacating arbitration award based on mutual mistake as to insurance status of offending vehicle, since exclusive grounds for vacating arbitration award under CLS CPLR § 7511(b)(1) do not include newly discovered evidence. Desiderato v N & A Taxi, Inc., 190 A.D.2d 250, 597 N.Y.S.2d 958, 1993 N.Y. App. Div. LEXIS 5018 (N.Y. App. Div. 1st Dep't 1993).

It was improper for arbitrator to list, as ground for denying insured's claim for lost wage benefits under no-fault provision of automobile policy, alleged untimeliness of insured's claim where insurer specifically denied claim solely on issue of insufficiency of insured's claim of lost earnings and did not mention subject of timeliness at any point prior to hearing. Aetna Cas. & Sur. Co. v Berson, 225 A.D.2d 983, 639 N.Y.S.2d 530, 1996 N.Y. App. Div. LEXIS 2780 (N.Y. App. Div. 3d Dep't 1996).

Court properly denied insurer's application to vacate master arbitrator's award, which vacated arbitrator's decision denying insured's request for lost wage benefit under no-fault provision of automobile policy, where master arbitrator properly focused on record evidence in concluding that arbitrator acted irrationally by finding that insured failed to prove prima facie case. Aetna Cas. & Sur. Co. v Berson, 225 A.D.2d 983, 639 N.Y.S.2d 530, 1996 N.Y. App. Div. LEXIS 2780 (N.Y. App. Div. 3d Dep't 1996).

Court erred in denying insurer's petition to vacate arbitration award and for trial de novo where policy in question granted either party right to trial de novo of any arbitration award that exceeded limits of required coverage for underinsured motorist benefits under CLS Ins § 3420(f), and arbitration award in instant case exceeded stated limits. Allstate Ins. Co. v Hendricks, 226 A.D.2d 527, 641 N.Y.S.2d 79, 1996 N.Y. App. Div. LEXIS 4365 (N.Y. App. Div. 2d Dep't 1996).

Court did not err in vacating arbitration award and granting insurer trial de novo on claim for underinsured motorist benefits where, under terms of policy, each party had right to trial de novo if arbitration award, as here, exceeded certain stated limits. Izzo v Allstate Ins. Co., 228 A.D.2d 441, 643 N.Y.S.2d 642, 1996 N.Y. App. Div. LEXIS 6220 (N.Y. App. Div. 2d Dep't 1996).

Court erred in denying insurer's motion to vacate $60,000 arbitration award in favor of insured since uninsured motorist coverage in parties' insurance police gave both parties opportunity to seek trial de novo when arbitrator's award exceeded limits of uninsured motorist coverage required by CLS Ins § 3420(f)(1), and that policy provision was consistent with Insurance Law and relevant public policy. McPolin v Allstate Ins. Co., 228 A.D.2d 602, 644 N.Y.S.2d 759, 1996 N.Y. App. Div. LEXIS 7178 (N.Y. App. Div. 2d Dep't 1996).

Court properly vacated arbitration award and remitted matter to arbitrator for new determination on ground that it was "imperfectly executed" (CLS CPLR § 7511(b)(1)(iii)) where validity and applicability of offset provision of insurer's underinsurance endorsement was issue for judicial determination, and it was impossible to discern from face of arbitration award whether or not arbitrator intended to apply offset provision. Deckaj v State Farm Mut. Ins. Co., 230 A.D.2d 735, 646 N.Y.S.2d 173, 1996 N.Y. App. Div. LEXIS 8299 (N.Y. App. Div. 2d Dep't 1996).

Insurer's belated discovery of form signed by insured, "waiving" increase in his uninsured motorist benefits in connection with earlier policy, which was never submitted to arbitrators, was not sufficient ground on which to vacate arbitration award. Arner v Liberty Mut. Ins. Co., 233 A.D.2d 321, 649 N.Y.S.2d 185, 1996 N.Y. App. Div. LEXIS 11657 (N.Y. App. Div. 2d Dep't 1996).

Arbitrator did not exceed his authority by accepting medical documentation that postdated hearing, and thus court erred in granting insurer's motion to vacate award on that basis. Travelers Ins. Co. v Job, 239 A.D.2d 289, 658 N.Y.S.2d 585, 1997 N.Y. App. Div. LEXIS 5592 (N.Y. App. Div. 1st Dep't 1997).

Arbitrators exceeded their authority by awarding $75,000 on claim for uninsured motorist benefits where underlying policy contained uninsured liability limits of $10,000 per person and $20,000 per accident. Brijmohan v State Farm Ins. Co., 239 A.D.2d 496, 658 N.Y.S.2d 52, 1997 N.Y. App. Div. LEXIS 5384 (N.Y. App. Div. 2d Dep't 1997), aff'd, 92 N.Y.2d 821, 677 N.Y.S.2d 55, 699 N.E.2d 414, 1998 N.Y. LEXIS 1416 (N.Y. 1998).

In granting application to vacate underinsurance arbitration award, court created unauthorized "misapprehension" standard for judicial review of arbitration awards; vacatur of arbitrator's award is statutorily limited to occasions involving fraud, corruption, or bias, factors which were not present, or occasions when arbitrator exceeded his or her power, or so imperfectly executed it so that final and definite award was not made. Curley v State Farm Ins. Co., 269 A.D.2d 240, 702 N.Y.S.2d 305, 2000 N.Y. App. Div. LEXIS 1566 (N.Y. App. Div. 1st Dep't 2000).

Court properly vacated arbitration award on ground that arbitrator exceeded his powers where arbitrator determined that insurer could raise "liability defense" based on issue of contact between vehicles, even though that issue had been waived as "contractual coverage defense," and after holding hearing on issue of liability, arbitrator determined that respondent failed to show that decedent's vehicle was struck by hit-and-run vehicle, and dismissed claim. Nationwide Ins. Co. v McDonnell, 272 A.D.2d 547, 708 N.Y.S.2d 146, 2000 N.Y. App. Div. LEXIS 5816 (N.Y. App. Div. 2d Dep't 2000).

In proceeding to confirm award made by arbitrator who refused to recuse himself when asked to do so by respondent's counsel, it was proper for court to take judicial notice of rule 10 of Accident Claims Arbitration Rules of American Arbitration Association (AAA), which requires that decisions as to disqualifications of arbitrators for partiality are to be made by AAA and that its decisions are deemed to be conclusive; thus, it was proper to set aside award and direct parties to contact Santana v Country-Wide Ins. Co., 184 Misc. 2d 294, 714 N.Y.S.2d 854, 2000 N.Y. Misc. LEXIS 183 (N.Y. App. Term 2000).

99. Miscellaneous

Plaintiff was entitled to supplementary underinsured motorist benefits under policy issued to her father where she was injured in 2-car accident and reached settlement with 2 offending vehicles, exhausting bodily injury coverage of one of them; under CLS Ins § 3420(f)(2), aggregation of limits of liability of both tortfeasors was not prerequisite to recovery of underinsurance, and thus defendant insurer was improperly granted summary judgment on basis that second vehicle, whose bodily injury coverage was same as bodily coverage under policy issued to plaintiff's father, was not "underinsured". S'Dao v National Grange Mut. Ins. Co., 87 N.Y.2d 853, 638 N.Y.S.2d 597, 661 N.E.2d 1378, 1995 N.Y. LEXIS 4441 (N.Y. 1995).

Insured was not entitled to supplementary uninsured/underinsured motorist (SUM) coverage because although an exclusion for failure to establish a serious injury was not referenced in N.Y. Ins. Law § 3420(f)(2), Regulation 35-D, specifically N.Y. Comp. Codes R. & Regs. tit. 11, § 60-2.3(f), provided that such an exclusion should be included in policies with SUM coverage so that an insured had to establish a serious injury as defined in N.Y. Ins. Law § 5102(d); no indication in the legislative history was made that a serious injury exclusion only applied to mandatory uninsured motorist coverage in N.Y. Ins. Law § 3420(f)(1) and not to SUM benefits in § 3420(f)(2). Raffellini v State Farm Mut. Auto. Ins. Co., 9 N.Y.3d 196, 848 N.Y.S.2d 1, 878 N.E.2d 583, 2007 N.Y. LEXIS 3232 (N.Y. 2007).

As an insured violated a condition of her policy when she settled with an underinsured motorist for less than policy limits without her insurer's written consent, such that its subrogation rights were impaired, pursuant to N.Y. Ins Law § 3420(f)(2)(A), she forfeited her claim against her insurer for supplementary uninsured/underinsured benefits. Matter of Cent. Mut. Ins. Co. (Bemiss), 12 N.Y.3d 648, 884 N.Y.S.2d 222, 912 N.E.2d 54, 2009 N.Y. LEXIS 2548 (N.Y. 2009).

In a case involving multiple tortfeasors, when an insured settled with one of them in compliance with Condition 10 of N.Y. State Dept. Ins. Reg. 35-D (set forth in 11 NYCCR 60-2.3(f)), thereby also fulfilling the exhaustion requirement in Condition 9 of Reg. 35-D (§ 60-2.3(f)), she did not have to pursue a claim against the other tortfeasor in order to become eligible to collect up to the remaining limits of her supplementary uninsured/underinsured (SUM) policy. But having chosen to resolve her claim against the second tortfeasor, she was not free under the SUM endorsement to compromise the insurer's subrogation rights unilaterally. Matter of Cent. Mut. Ins. Co. (Bemiss), 12 N.Y.3d 648, 884 N.Y.S.2d 222, 912 N.E.2d 54, 2009 N.Y. LEXIS 2548 (N.Y. 2009).

Principles of res judicata and collateral estoppel did not entitle passenger in car (wife of insured) to summary judgment on issue of insurer's liability in action to recover under uninsured motorist endorsement, although court had confirmed arbitration award in her favor, where policy provided that arbitration award was binding only with regard to awards of up to $10,000 (and court had confirmed award only to that extent), policy called for court trial on all issues where award exceeded $10,000, arbitrator's award was for $40,000, and award failed to indicate whether passenger was comparatively negligent, or to what extent. Pfeiffer v Allstate Ins. Co., 136 A.D.2d 532, 523 N.Y.S.2d 152, 1988 N.Y. App. Div. LEXIS 318 (N.Y. App. Div. 2d Dep't 1988).

In action for judgment declaring that automobile insurance policy not having underinsured motorist endorsement included such coverage, court erred in finding that factual issue existed as to whether plaintiff and defendant insurer had entered into oral contract for underinsured motorist coverage, since plaintiff's cause of action was premised exclusively on impression that she had purchased such coverage based on reading of her application for insurance and policy itself. Terwilliger v American Motorists Ins. Co., 156 A.D.2d 805, 549 N.Y.S.2d 222, 1989 N.Y. App. Div. LEXIS 15538 (N.Y. App. Div. 3d Dep't 1989).

Court properly dismissed complaint seeking recovery for insurance broker's alleged failure to recommend that customer obtain coverage for underinsured motorists, where record established only that named insured, customer's mother, inquired of defendant whether she had good coverage for plaintiff to take car out of state, but did not specifically request coverage which would have provided protection in event of accident with underinsured motorist; while insurance broker acting as agent of customer has duty of reasonable care to customer to obtain requested coverage within reasonable time after request, or to inform customer of its inability to do so, broker owes no continuing duty to advise, guide or direct customer to obtain additional coverage. Erwig v Edward F. Cook Agency, Inc., 173 A.D.2d 439, 570 N.Y.S.2d 64, 1991 N.Y. App. Div. LEXIS 7066 (N.Y. App. Div. 2d Dep't 1991).

In action by insureds against insurance broker for negligently failing to obtain supplemental uninsured motorist coverage to protect them in event of accident with underinsured vehicle, court properly granted broker's motion for summary judgment after injured plaintiff settled claim against other driver for $14,500, which was $500 less than coverage limit of other driver's policy, since CLS Ins § 3420(f)(2) provides that, as condition precedent to obligation of insurer to pay under supplementary uninsured motorist coverage, limits of liability of all bodily injury liability bonds or insurance policies applicable at time of accident must be exhausted. Andriaccio v Borg & Borg, 198 A.D.2d 253, 603 N.Y.S.2d 528, 1993 N.Y. App. Div. LEXIS 10429 (N.Y. App. Div. 2d Dep't 1993).

Insurance brokers were entitled to summary judgment in action for negligence in procurement of insurance coverage where (1) plaintiffs failed to establish that they specifically requested amount of supplementary uninsured motorist coverage they wanted to procure, or that brokers made any specific representations as to coverage obtained, which was maximum amount required to be offered under CLS Ins § 3420, and (2) plaintiffs failed to establish that amount of supplementary coverage that they wanted brokers to procure for them was in fact available. Hjemdahl-Monsen v Faulkner, 204 A.D.2d 516, 611 N.Y.S.2d 309, 1994 N.Y. App. Div. LEXIS 5291 (N.Y. App. Div. 2d Dep't 1994).

Petitioner was not entitled to recover under uninsured motorist provision of vehicle that he was driving for injuries sustained in accident where liability limits of policy that insured offending vehicle had been exhausted by time that petitioner made claim under that policy. Harley v CNA Ins. Co., 212 A.D.2d 614, 622 N.Y.S.2d 539, 1995 N.Y. App. Div. LEXIS 1461 (N.Y. App. Div. 1st Dep't 1995).

In action against 2 insurance companies to recover benefits under supplementary uninsured motorist insurance policy, plaintiffs were entitled to summary judgment on issue of liability as against company that was named in policy as providing coverage and essentially conceded that it insured plaintiffs, and such evidence was sufficient to establish entitlement to dismissal of action as against company whose logo appeared on policy, where there was no prohibition against "stacking" of supplementary uninsured motorist coverage provided by 2 separate insurance companies at time action was commenced. Losi v Crum & Forster Personal Ins. Co., 222 A.D.2d 489, 635 N.Y.S.2d 72, 1995 N.Y. App. Div. LEXIS 12785 (N.Y. App. Div. 2d Dep't 1995).

When automobile insurance policy provides "uninsured motorist" coverage in amount greater than statutory maximum, and premium is paid for additional coverage, such coverage is deemed to constitute supplementary uninsured motorist (i.e., underinsurance) coverage. Olochnowitz v Hopmeier-Evans-Gage Agency, 225 A.D.2d 853, 639 N.Y.S.2d 496, 1996 N.Y. App. Div. LEXIS 2067 (N.Y. App. Div. 3d Dep't 1996).

Court correctly determined that decedent's administrator was entitled to uninsured motorist benefits by virtue of fact that vehicle in which decedent was riding had been stolen at time of accident causing his death. In re Prudential Prop. & Cas. Ins. Co., 236 A.D.2d 613, 654 N.Y.S.2d 159, 1997 N.Y. App. Div. LEXIS 1568 (N.Y. App. Div. 2d Dep't 1997).

Plaintiffs involved in motor vehicle accident were not entitled to underinsurance benefits, either under policy actually issued to them or under policy that allegedly should have been issued to them, where, based on facial comparison of bodily injury liability limits under subject policies, limits of tortfeasor's policy were not less than those of plaintiffs' policy. Wilson v Hartford Accident & Indem. Co., 246 A.D.2d 593, 668 N.Y.S.2d 49, 1998 N.Y. App. Div. LEXIS 384 (N.Y. App. Div. 2d Dep't 1998).

Court should have dismiss action alleging defendant broker's breach of his promise to procure greater uninsured/underinsured coverage for plaintiff then he, in fact, obtained where explicit and unambiguous information included in insurance application, which plaintiff and broker signed, indicated that plaintiff requested statutory minimum underinsurance coverage. Key Y. Sung v Kyung Ip Hong, 254 A.D.2d 271, 678 N.Y.S.2d 116, 1998 N.Y. App. Div. LEXIS 10070 (N.Y. App. Div. 2d Dep't 1998).

In action seeking uninsured motorist coverage arising from automobile accident that occurred in Bronx County, venue should have been retained in Bronx County even though neither party resided in Bronx County and defendant insurer sought transfer to Onondaga County, where eyewitness to accident and surgeon who treated injured plaintiff averred that they would be willing to testify in Bronx County but could not travel to Onondaga County, defendant did not identify any witnesses for whom Onondaga County would be more convenient, and facts of underlying accident were relevant because defendant did not concede liability. Oquendo v Nationwide Ins. Co., 270 A.D.2d 174, 705 N.Y.S.2d 347, 2000 N.Y. App. Div. LEXIS 3310 (N.Y. App. Div. 1st Dep't 2000).

Motion to dismiss insurer's proceeding to permanently stay arbitration of uninsured motorist claim, as abandoned under CLS Unif Tr Ct Rls § 202.48, was properly denied in light of insurer's efforts to settle matter during unexplained 2-year delay after court directed it to settle order on notice, inter alia, directing hearing as to coverage of other vehicles involved in accident. Allstate Ins. Co. v Slomowicz, 285 A.D.2d 501, 728 N.Y.S.2d 179, 2001 N.Y. App. Div. LEXIS 7060 (N.Y. App. Div. 2d Dep't 2001).

Pursuant to CLS Ins § 3420(f)(2), injured party who has underinsured motorist coverage may not pursue recovery of such benefits from own insurer until first recovering liability limits under tortfeasor's policy by settlement or judgment. Huth v Nationwide Ins. Co., 148 Misc. 2d 1003, 560 N.Y.S.2d 724, 1990 N.Y. Misc. LEXIS 493 (N.Y. Sup. Ct. 1990).

Livery conveyance exclusion under uninsured motorist endorsement could not be upheld since (1) CLS Veh & Tr § 370(1)(b) requires that every person transporting passengers for hire in any motor vehicle have bond or insurance policy containing uninsured motorist coverage, (2) enforcement of exclusion would be contrary to CLS Ins § 3420(f)(1), which provides that uninsured motorist coverage applies to insured motor vehicle when insurer disclaims liability or denies coverage, and (3) enforcement of exclusion would be inconsistent with strong public policy underlying statutes providing for uninsured motorist coverage. Liberty Mut. Ins. Co. v Hogan, 150 Misc. 2d 456, 576 N.Y.S.2d 784, 1991 N.Y. Misc. LEXIS 647 (N.Y. Sup. Ct. 1991), aff'd, 188 A.D.2d 378, 592 N.Y.S.2d 582, 1992 N.Y. App. Div. LEXIS 14312 (N.Y. App. Div. 1st Dep't 1992).

Stacking of 3 separate insurance policies providing for uninsured motorist coverage was permissible where (1) decedent was killed while passenger in motor vehicle which was neither registered nor insured, (2) one insurance company had issued policy to decedent which covered automobile owned by her and provided uninsured motorist coverage in amount of $50,000, (3) second insurance company had issued policy to decedent's parents which covered members of household (which included decedent, parents and brother) and provided uninsured motorist coverage in amount of $100,000, and (4) third insurance company had issued policy to decedent's brother which covered members of household and provided uninsured motorist coverage in amount of $50,000. Mackie v Metropolitan Ins. Co., 152 Misc. 2d 384, 577 N.Y.S.2d 193, 1991 N.Y. Misc. LEXIS 656 (N.Y. Sup. Ct. 1991).

Motor vehicle owner was entitled to increased uninsured motorist coverage on date of accident where (1) owner went to his agent and asked that uninsured motorist coverage for 2 vehicles be increased from $10,000/$20,000, (2) agent stated that matter would be taken care of, but limits were only increased on vehicle not involved in accident, (3) owner did not recall receiving bill for increased coverage, did not look at renewal policies to see if increased coverage was reflected, and stated that he would not have understood policies if he had read them, and (4) insurance company failed to produce agent or other employees with knowledge of matter at hearing. State Farm Mut. Auto. Ins. Co. v Guarascio, 153 Misc. 2d 485, 582 N.Y.S.2d 605, 1992 N.Y. Misc. LEXIS 86 (N.Y. Sup. Ct. 1992).

Where an alleged tortfeasor's auto insurance company became insolvent, insureds' petition to compel their own insurer to arbitrate their claim for uninsured motorist benefits was not time-barred by N.Y. C.P.L.R. 213(2), as their claims against their insurer did not accrue until the New York Public Motor Vehicle Liability Security Fund denied coverage of their claims within the meaning of N.Y. Ins. Law § 3420(f)(1). Matter of Progressive Northeastern Ins. Co. v Rogers, 90 A.D.3d 666, 934 N.Y.S.2d 451, 2011 N.Y. App. Div. LEXIS 8778 (N.Y. App. Div. 2d Dep't 2011).

Proposed fraud and misrepresentation endorsement, whose purpose was to inform insureds that company could withhold benefits to first party insureds covered under uninsured motorist insurance, supplementary uninsured/underinsured motorist insurance (UM/SUM), and no-fault insurance if they committed fraud or material misrepresentation, was inconsistent with cancellation provisions of CLS Ins § 3426 and would impermissibly alter prescribed no-fault and UM/SUM endorsements established under CLS Ins Art 51 and §§ 3420(f)(1) and (2). Insurance Department, Opinions of General Counsel, Opinion Number 01-10-11.

If injured individual were entitled to recover under his brother's Supplementary Uninsured Motorist (SUM) Coverage, brother's insurer, at time of renewal, could not increase premium based on fact that individual's claim was filed (and paid) on brother's policy. Insurance Department, Opinions of General Counsel, Opinion Number 04-10-10.

Insured who filed a breach of contact action against an insurer to recover damages under the supplementary underinsured provision of an automobile insurance policy was not required to prove that he sustained a serious injury within the meaning of N.Y. Ins. Law § 5102(d) because (1) N.Y. Ins. Law § 3420(f)(2) did not include a serious injury threshold with respect to supplemental coverage; (2) the exclusion mandated by N.Y. Comp. Codes R. & Regs. tit. 11, § 60-2.3(f), concerning compensation for pain and suffering when there was no serious injury, found no support in N.Y. Ins. Law § 3420(f)(2); and (3) under N.Y. Ins. Law § 3420(a), a serious injury threshold requirement, which was less favorable than § 3420(f)(2) to the insured, could not be imposed by contract. Raffellini v State Farm Mut. Auto. Ins. Co., 36 A.D.3d 92, 823 N.Y.S.2d 440, 2006 N.Y. App. Div. LEXIS 12795 (N.Y. App. Div. 2d Dep't 2006), rev'd, 9 N.Y.3d 196, 848 N.Y.S.2d 1, 878 N.E.2d 583, 2007 N.Y. LEXIS 3232 (N.Y. 2007).

IX. Liability for Accident or Injury to Spouse

100. In general

Subdivision 3 of former § 167 [now § 3420(g)], in creating a cause of action by one spouse for injury sustained due to negligence of the other, carefully excludes automobile liability insurance coverage of such accidents unless expressly written into the policy, and cannot be regarded as a change in public policy with respect to the rule of nonliability for negligence as between a parent and an unemancipated minor child. Badigian v Badigian, 9 N.Y.2d 472, 215 N.Y.S.2d 35, 174 N.E.2d 718, 1961 N.Y. LEXIS 1279 (N.Y. 1961), overruled, Gelbman v Gelbman, 23 N.Y.2d 434, 297 N.Y.S.2d 529, 245 N.E.2d 192, 1969 N.Y. LEXIS 1627 (N.Y. 1969).

The provisions of subd. 3 of former § 167 [now § 3420(g)], relating to necessity of an express clause in an automobile liability insurance policy, if it is to be deemed to cover liability of the insured for death or injury sustained by his or her spouse, is automatically a mandatory part of every motor vehicle liability policy issued in New York. Employers' Liability Assurance Corp. v Aresty, 11 A.D.2d 331, 205 N.Y.S.2d 711, 1960 N.Y. App. Div. LEXIS 7698 (N.Y. App. Div. 1st Dep't 1960), aff'd, 11 N.Y.2d 696, 225 N.Y.S.2d 764, 180 N.E.2d 916, 1962 N.Y. LEXIS 1428 (N.Y. 1962).

When defendant seeks indemnification from driver-spouse for injuries to passenger-spouse, exclusionary provision of Insurance Law relieves carrier of driver-spouse from its responsibility to defend or to pay such a claim. Sharlow v Nationwide Mut. Ins. Co., 47 A.D.2d 572, 362 N.Y.S.2d 618, 1975 N.Y. App. Div. LEXIS 8656 (N.Y. App. Div. 3d Dep't 1975).

By simultaneous amendment of the Domestic Relations Law, Insurance Law, and Vehicle and Traffic Law, the Legislature intended to wipe out the bar to tort suits between spouses, but it did not intend to make insurers liable where the tort was the result of an automobile accident. Lamb v Liberty Mut. Ins. Co., 5 Misc. 2d 236, 161 N.Y.S.2d 703, 1941 N.Y. Misc. LEXIS 1356 (N.Y. Sup. Ct. 1941), aff'd, 263 A.D. 859, 32 N.Y.S.2d 788, 1942 N.Y. App. Div. LEXIS 7062 (N.Y. App. Div. 1942).

Legislative intent in the 1937 amendment of subd. 3 former § 167 [now § 3420(g)] was to permit one spouse to maintain an action for negligence against the other, but to protect insurance carriers against collusive actions between husband and wife. Crilley v Allstate Ins. Co., 38 Misc. 2d 371, 238 N.Y.S.2d 125, 1963 N.Y. Misc. LEXIS 2408 (N.Y. Civ. Ct. 1963), rev'd, 50 Misc. 2d 1028, 271 N.Y.S.2d 484, 1966 N.Y. Misc. LEXIS 1760 (N.Y. App. Term 1966).

Insurance L former § 167, subdivision 3 [now § 3420(g)] is a limitation of the overall concept of Insurance L former § 312 [now § 4104] which is to provide the broadest possible compulsory insurance coverage for the operators of motor vehicles, and, as such should be narrowly construed. United States Fidelity & Guaranty Co. v Franklin, 74 Misc. 2d 506, 344 N.Y.S.2d 251, 1973 N.Y. Misc. LEXIS 1933 (N.Y. Sup. Ct. 1973), aff'd, 43 A.D.2d 844, 352 N.Y.S.2d 1009, 1974 N.Y. App. Div. LEXIS 5979 (N.Y. App. Div. 2d Dep't 1974).

The legislative purpose behind the enactment of Insurance L former § 167, subdivision 3 [now § 3420(g)] was to protect insurance carriers against collusive actions between husband and wife. United States Fidelity & Guaranty Co. v Franklin, 74 Misc. 2d 506, 344 N.Y.S.2d 251, 1973 N.Y. Misc. LEXIS 1933 (N.Y. Sup. Ct. 1973), aff'd, 43 A.D.2d 844, 352 N.Y.S.2d 1009, 1974 N.Y. App. Div. LEXIS 5979 (N.Y. App. Div. 2d Dep't 1974).

The simultaneous enactment of Insurance Law former § 167, subd 3 [now § 3420(g)], and Domestic Relations Law § 57, discloses a considered legislative intent to create a right of action theretofore denied and at the same time to protect insurance carriers for loss through collusive actions between husband and wife. Stone v Agricultural Ins. Co., 76 Misc. 2d 1021, 351 N.Y.S.2d 496, 1973 N.Y. Misc. LEXIS 1194 (N.Y. Sup. Ct. 1973).

Simultaneous enactment of statute permitting one spouse to maintain an action for personal injuries against the other for tortious conduct of the latter and enactment of statute that no policy of insurance be deemed to insure against liability of insured because of death or injuries to his or her spouse disclosed legislative intent to create right of action previously denied but at the same time to protect insurance carriers against collusive actions between husband and wife. Dunbar v Dunbar, 80 Misc. 2d 744, 364 N.Y.S.2d 699, 1975 N.Y. Misc. LEXIS 2251 (N.Y. Sup. Ct. 1975).

Trial court properly determined that an insurer was required to defend and indemnify the husband of a decedent, who was insured by the insurer, with respect to a cross claim by another driver in an underlying action, because N.Y. Ins. Law § 3420(g) did not preclude liability insurance coverage on a third-party claim for contribution against an insured joint tortfeasor spouse of an injured person. Allstate Ins. Co. v Roberts, 299 A.D.2d 820, 749 N.Y.S.2d 352, 2002 N.Y. App. Div. LEXIS 10888 (N.Y. App. Div. 4th Dep't 2002).

Trial court should have granted an insurer's summary judgment motion concerning the insurer's duty to defend and indemnify the husband of a decedent with respect to a wrongful death cause of action brought for the benefit of the decedent's children, as there was no distinction in the plain language of Ins. Law § 3420(g) between a survival cause of action and a wrongful death cause of action, and Ins. Law § 3420(g) specifically excluded coverage with respect to any liability of an insured because of death of or injuries to his or her spouse. Allstate Ins. Co. v Roberts, 299 A.D.2d 820, 749 N.Y.S.2d 352, 2002 N.Y. App. Div. LEXIS 10888 (N.Y. App. Div. 4th Dep't 2002).

Insurer does not have to offer supplemental spousal liability insurance on policies covering only hired and nonowned automobiles, where such policy is not used for purposes of satisfying requirements of CLS Veh & Tr Art 6. Insurance Department, Opinions of General Counsel, Opinion Number 03-07-28.

Insurer is not required to offer supplemental spousal liability (SSL) coverage on policy covering for-hire vehicle that is subject to CLS Veh & Tr Art 8. Insurance Department, Opinions of General Counsel, Opinion Number 05-04-06.

If insurer issues one commercial automobile policy that provides liability insurance for both vehicles subject to CLS Veh & Tr Art 6 and vehicles that are not subject to Article 6, insurer may issue such endorsement specifying that endorsement applies only to vehicles subject to Article 6 so long as endorsement is clear and not misleading. Insurance Department, Opinions of General Counsel, Opinion Number 05-04-06.

101. Constitutional considerations

The provisions of Ins Law § 167(3) [now § 3420], which operate to exclude coverage for liability of the insured to a spouse for personal injury or property damage unless the policy specifically provides for such coverage, do not violate either the due process or equal protection rights of insureds, because, although the statute does not require that insurance policies expressly give notice to the insured of the exclusion, ample notice of the exclusion is provided by the statutory provision itself, and since a rational basis exists for the legislature's determination to apply the exclusion only to spouses, and for any classification thereby created, in that the provision is designed to discourage collusive insurance claims between spouses involved in automobile accidents. Yankelevitz v Royal Globe Ins. Co., 59 N.Y.2d 928, 466 N.Y.S.2d 295, 453 N.E.2d 524, 1983 N.Y. LEXIS 3245 (N.Y. 1983).

Provision of Insurance Law that no policy shall be deemed to insure against liability of the insured because of death or injuries to his spouse unless express provision relating specifically thereto is included in the policy does not deny due process to injured spouses or deprive injured spouses of equal protection on theory that they are deprived of the right to claim damages against a financially secure defendant; statute merely requires that persons who desire coverage for liability with respect to injuries to their spouses must specifically contract for that coverage. Lauer v Claffey, 52 A.D.2d 275, 383 N.Y.S.2d 671, 1976 N.Y. App. Div. LEXIS 11994 (N.Y. App. Div. 3d Dep't 1976).

Amendment of Domestic Relations Law § 57 to permit actions for damages between spouses provided a reasonable basis for the enactment of Insurance Law former § 167, subd 3 [now § 3420(g)] protecting insurance carriers from any attendant increase in liability without a commiserate increase in premium, and thus Insurance Law former § 167, subd 3 [now § 3420(g)] was not so broad as to violate equal protection. Perno v Exchange Mut. Ins. Co., 73 Misc. 2d 346, 342 N.Y.S.2d 298, 1973 N.Y. Misc. LEXIS 2059 (N.Y. Sup. Ct. 1973).

New York statute providing that no policy of insurance shall be deemed to insure against liability of insured because of death of or injuries to his or her spouse or because of injury to or destruction of property of his or her spouse unless express provision therefor is included in policy does not constitute a denial of equal protection. Dunbar v Dunbar, 80 Misc. 2d 744, 364 N.Y.S.2d 699, 1975 N.Y. Misc. LEXIS 2251 (N.Y. Sup. Ct. 1975).

102. Applicability of amendments to preexisting policies or actions

Under an amendment to subdivision 3 of former section 167 [now § 3420(g)] of the Insurance Law, which provided that the exclusion from automobile liability insurance coverage of an insured because of injuries to his spouse would apply only where the injured spouse, to be entitled to recover, must prove the culpable conduct of the insured spouse (L 1976, ch 616) and which amendment was to apply to all causes of action arising on or after August 1, 1976 (L 1976, ch 617), an insurer is not obligated to defend or indemnify its insured in a third-party action commenced on November 17, 1976 against the insured who was operating his automobile on May 30, 1976 when it was involved in a collision in which his wife sustained injuries, the wife having commenced an action against the operator of the other vehicle, the third-party plaintiff, in October, 1976. The provision establishing the effective date refers to the main cause of action which arises immediately upon the occurrence of the accident and it necessarily follows that the establishment of that date, insofar as it affects an insurer's obligation to respond to a third-party claim,

is likewise limited to those situations where the main claim arises on or after August 1, 1976; for accidents occurring before that date third-party suits are excluded from coverage. Mandels v Liberty Mut. Ins. Co., 45 N.Y.2d 455, 410 N.Y.S.2d 62, 382 N.E.2d 762, 1978 N.Y. LEXIS 2270 (N.Y. 1978).

The provision that no policy of automobile liability insurance is deemed to insure against liability of an insured because of the death or injury to his or her spouse unless express provision is included in the policy applies to policies issued prior to the amendment. Standard Accident Ins. Co. v Newman, 2 Misc. 2d 348, 47 N.Y.S.2d 804, 1944 N.Y. Misc. LEXIS 1435 (N.Y. Sup. Ct.), aff'd, 268 A.D. 967, 51 N.Y.S.2d 767, 1944 N.Y. App. Div. LEXIS 4462 (N.Y. App. Div. 1944).

Third-party action against injured passenger's spouse did not arise prior to determination as to liability on part of third-party plaintiff, or any payment by third-party plaintiff so as to entitle it to recovery against third-party defendant, and therefore, statute, which became effective subsequent to automobile accident but before third-party plaintiff's action arose, and which provided that exclusion for liability of insured because of injuries to insured's spouse would apply only where injured spouse, to be entitled to recovery, was required to prove culpable conduct of insured spouse, required insurer to represent third-party action brought against injured passenger's spouse. Hanozas v Gramas, 91 Misc. 2d 520, 398 N.Y.S.2d 204, 1977 N.Y. Misc. LEXIS 2346 (N.Y. Sup. Ct. 1977).

103. Applicability to policy or accident tracable to foreign state

Former § 167 [now § 3420] is not limited to accidents occurring in New York. An insurance company which had issued an automobile liability policy in New York to a New York resident was entitled to judgment declaring that it had no obligation to defend the insured against an action brought by her husband to recover damages for injuries he suffered in a Connecticut accident. New Amsterdam Casualty Co. v Stecker, 1 A.D.2d 629, 152 N.Y.S.2d 879, 1956 N.Y. App. Div. LEXIS 5050 (N.Y. App. Div. 1st Dep't 1956), aff'd, 3 N.Y.2d 1, 163 N.Y.S.2d 626, 143 N.E.2d 357, 1957 N.Y. LEXIS 1002 (N.Y. 1957).

Where a policy of automobile liability insurance was issued to defendant husband in New York on June 19, 1957, but an indorsement changing his address to Connecticut was issued September 10, 1957, subd. 3 of former § 167 [now § 3420(g)] providing that no such policy shall insure against liability because of death or injuries of the insured's spouse unless it expressly so provides, was applicable to protect the insurer against liability for damages sustained by insured's wife in a Connecticut collision. Employers' Liability Assurance Corp. v Aresty, 11 A.D.2d 331, 205 N.Y.S.2d 711, 1960 N.Y. App. Div. LEXIS 7698 (N.Y. App. Div. 1st Dep't 1960), aff'd, 11 N.Y.2d 696, 225 N.Y.S.2d 764, 180 N.E.2d 916, 1962 N.Y. LEXIS 1428 (N.Y. 1962).

Insurer was obligated to defend and indemnify estate of its insured against claim of insured's spouse and indemnity claim of rental car company, to extent that such claims sought to recover damages for bodily injury as defined in excess liability policy, since that policy was Florida policy subject to that state's laws, which did not prohibit inter-spousal negligence suits, and policy contained express provision extending coverage for "bodily injury" to one spouse caused by negligence of other spouse. Federal Ins. Co. v McCampbell, 247 A.D.2d 359, 668 N.Y.S.2d 627, 1998 N.Y. App. Div. LEXIS 880 (N.Y. App. Div. 2d Dep't 1998).

Under Massachusetts law a husband is not liable to his wife for tort. Such liability exists in New York (Domestic Relations Law, § 57) and the New York statute provides, with reference to liability policies of insurance, that no policy shall be deemed to insure a husband or wife against liability for death or injuries to a spouse unless the policy expressly states such coverage (Insurance Law, former § 167, subd. 3 [now § 3420(g)]) although Massachusetts law contains no such restriction upon insurance contracts; the complaint will not be dismissed since it is a proper case for a declaratory judgment. Bradford v Utica Mut. Ins. Co., 39 N.Y.S.2d 810, 179 Misc. 919, 1943 N.Y. Misc. LEXIS 1576 (N.Y. Sup. Ct. 1943).

Insurer had no obligation under automobile liability policy to defend insured in action instituted by wife for personal injuries sustained as passengers in insured's car, though accident occurred in Connecticut. Globe Indem. Co. v Anastasio, 5 Misc. 2d 238, 158 N.Y.S.2d 641, 1956 N.Y. Misc. LEXIS 1382 (N.Y. Sup. Ct. 1956).

An insurer executed and delivered an automobile liability policy to the defendant in New York City. The policy did not contain express provision that an injury to a spouse was covered. Held: the insurer was not obligated to defend the insured in a Connecticut action by the insured's wife against the insured based on injuries sustained by the wife while riding as a passenger in an automobile driven by the insured and involved in an accident in Connecticut. Merchants Indem. Corp. v Seward, 12 Misc. 2d 638, 177 N.Y.S.2d 212, 1958 N.Y. Misc. LEXIS 3147 (N.Y. Sup. Ct. 1958).

Policy issued to husband in New York did not cover injuries to wife in an automobile accident, in Connecticut, where the parties were residents of New York, at the time of the accident, though they had resided in Connecticut for a portion of the year. United States Casualty Co. v Georgopulo, 15 Misc. 2d 169, 181 N.Y.S.2d 728, 1958 N.Y. Misc. LEXIS 2422 (N.Y. Sup. Ct. 1958).

One may sue his or her spouse in this state for injuries sustained in a motor vehicle accident herein even though a statute provides that no policy of insurance shall be deemed to insure against any liability of an insured because of injuries to his or her spouse unless express provision relating thereto is included in the policy, notwithstanding such provision was not included in the policy, where the policy was issued in a sister state. Maryland Casualty Co. v Jacek, 156 F. Supp. 43, 1957 U.S. Dist. LEXIS 2723 (D.N.J. 1957).

N.Y. Ins Law § 3420(g) did not require that New Jersey law be incorporated to provide insurance coverage for spouse, where insurance policy issued in New York did not require coverage for driver's spouse who was injured in an auto accident while the couple was driving in New Jersey, but since New Jersey law permits interspousal claims and New York law requires insurers to provide at least minimum coverage for New York drivers while in other states, spouse alleged that she was covered by the New York policy, because the purpose of the statute is to protect New York drivers from penalties and sanctions in other states. Allstate Ins. Co. v Siano, 726 F. Supp. 422, 1989 U.S. Dist. LEXIS 14853 (E.D.N.Y. 1989).

104. Status of legal relationship between parties

The controlling consideration under former § 109, subd. 3-a [predecessor to former § 167, now § 3420], is the status of the parties at the time when the injury was sustained which is when the liability arose. Stonborough v Preferred Acci. Ins. Co., 292 N.Y. 154, 54 N.E.2d 342, 292 N.Y. (N.Y.S.) 154, 1944 N.Y. LEXIS 1386 (N.Y. 1944).

The language of former § 109, subd. 3-a [predecessor to former § 167, now § 3420] as to insuring against liability for injuries to the spouse of an insured, is not broad enough to include a case where the parties marry during the pendency of the action. Stonborough v Preferred Acci. Ins. Co., 292 N.Y. 154, 54 N.E.2d 342, 292 N.Y. (N.Y.S.) 154, 1944 N.Y. LEXIS 1386 (N.Y. 1944).

An insurer was not liable under its automobile liability policy where insured husband collided with automobile driven by his wife the day after an interlocutory decree of divorce had been entered dissolving the marriage but before the decree became final. Indemnity Ins. Co. v Murphy, 128 N.Y.S.2d 424, 205 Misc. 332, 1954 N.Y. Misc. LEXIS 2288 (N.Y. Sup. Ct. 1954).

Subdivision 3 of former § 167 [now § 3420(g)], excluding from liability insurance coverage death or injuries sustained by the insured's spouse unless specifically included in the policy, does not bar a claim against the insurer, because the policy is silent as to spouse coverage, by one who is not the legal wife or spouse of the insured, but merely his consort or concubine in a common-law relationship entered into since the 1933 abolition of common-law marriages in New York. United States Fire Ins. Co. v Cruz, 35 Misc. 2d 272, 230 N.Y.S.2d 779, 1962 N.Y. Misc. LEXIS 3192 (N.Y. Sup. Ct. 1962), aff'd, 18 A.D.2d 1137, 239 N.Y.S.2d 531, 1963 N.Y. App. Div. LEXIS 5427 (N.Y. App. Div. 1st Dep't 1963).

A husband and wife could not be considered divorced, for purposes of determining applicability of Insurance Law section pertaining to coverage against liability of an insured because of injuries to his or her spouse, where judgment was not signed until after accident, and even though a hearing had been held before accident, and even though a hearing had been held before accident and judge had stated an inclination to grant the divorce. Longworth v Great American Ins. Co., 80 Misc. 2d 114, 362 N.Y.S.2d 762, 1974 N.Y. Misc. LEXIS 1853 (N.Y. Sup. Ct. 1974), modified, 55 A.D.2d 908, 390 N.Y.S.2d 602, 1977 N.Y. App. Div. LEXIS 10149 (N.Y. App. Div. 2d Dep't 1977).

105. Particular language as extension of coverage to spouse

A definition of "spouse" in a husband's automobile liability insurance policy as meaning a spouse of the insured "if a resident of the same household," is not a declaration of coverage but merely a specification of added benefits which the wife would be entitled to receive were she a member of the insured's household, and accordingly does not entitle the wife to recover against the husband's insurer for injury sustained while riding as a passenger in his automobile after the spouses had separated and were living separate and apart. Crilley v Allstate Ins. Co., 18 A.D.2d 1012, 239 N.Y.S.2d 27, 1963 N.Y. App. Div. LEXIS 4132 (N.Y. App. Div. 2d Dep't 1963), aff'd, 15 N.Y.2d 821, 257 N.Y.S.2d 939, 205 N.E.2d 863, 1965 N.Y. LEXIS 1593 (N.Y. 1965).

A husband's automobile liability insurance policy cannot be considered as containing an express provision, extending its coverage to his liability for injuries to his spouse under subd. 3 of former § 167 [now § 3420(g)] where she is living separate and apart from him by agreement at the time of injury and the definition of "spouse" in his insurance policy is limited to a "resident of the same household." Crilley v Allstate Ins. Co., 18 A.D.2d 1012, 239 N.Y.S.2d 27, 1963 N.Y. App. Div. LEXIS 4132 (N.Y. App. Div. 2d Dep't 1963), aff'd, 15 N.Y.2d 821, 257 N.Y.S.2d 939, 205 N.E.2d 863, 1965 N.Y. LEXIS 1593 (N.Y. 1965).

If a motor vehicle liability insurer intends to limit spouse coverage of its policy so as to exclude coverage of the spouse of the named insured, it should do so in plain language, and a general definition of "spouse" in the "definitions" portion of the policy as being spouse of the named insured "if resident of the same household" will not be construed as excluding the insured's spouse while she is living separate and apart from him. Crilley v Allstate Ins. Co., 38 Misc. 2d 371, 238 N.Y.S.2d 125, 1963 N.Y. Misc. LEXIS 2408 (N.Y. Civ. Ct. 1963), rev'd, 50 Misc. 2d 1028, 271 N.Y.S.2d 484, 1966 N.Y. Misc. LEXIS 1760 (N.Y. App. Term 1966).

106. Exclusion of liability for injury to spouse, generally

In a husband's action for declaratory judgment, asserting his entitlement to legal representation and insurance coverage in a third-party action brought against him by his employer, the employer's insurer would not be required to represent or cover the husband where his wife had brought a personal injury action against the husband's employer based on an accident that occurred while she was a passenger in a car operated by her husband, and where Ins Law former § 167(3) [now § 3420(g)] would validly relieve the insurer of its obligations in this interspousal context. Yankelevitz v Royal Globe Ins. Co., 88 A.D.2d 934, 451 N.Y.S.2d 166, 1982 N.Y. App. Div. LEXIS 17280 (N.Y. App. Div. 2d Dep't 1982), aff'd, 59 N.Y.2d 928, 466 N.Y.S.2d 295, 453 N.E.2d 524, 1983 N.Y. LEXIS 3245 (N.Y. 1983).

Ins Law former § 167(3) [now § 3420(g)],which pertains to barring interspousal causes of action under insurance contracts, relieves an insurer from the obligation to defend the husband in a third-party action arising out of the wife's action for personal injury suffered in an automobile accident which occurred when she was riding in the husband's car, where the applicable insurance contract carefully spelled out the exact coverage with its limitations, conditions, and exclusions, and purported to provide "Comprehensive Automobile Liability Insurance." Yankelevitz v Royal Globe Ins. Co., 88 A.D.2d 934, 451 N.Y.S.2d 166, 1982 N.Y. App. Div. LEXIS 17280 (N.Y. App. Div. 2d Dep't 1982), aff'd, 59 N.Y.2d 928, 466 N.Y.S.2d 295, 453 N.E.2d 524, 1983 N.Y. LEXIS 3245 (N.Y. 1983).

In an action arising out of a one-car accident in which a wife who was a passenger in a car owned by her and operated by her husband sustained injuries, the vehicle's insurer would be entitled to a judgment declaring that no insurance coverage existed under the policy for the injuries, since Ins Law § 167(3) [now 3420] excludes from coverage interspousal claims unless the policy expressly declares that such coverage exists. American Motorists Ins. Co. v Salvatore, 102 A.D.2d 342, 476 N.Y.S.2d 897, 1984 N.Y. App. Div. LEXIS 18790 (N.Y. App. Div. 1st Dep't 1984).

Former § 167 [now § 3420] provides that no motor vehicle liability policy shall be deemed to insure against any liability of an insured for negligence to his or her spouse unless an express provision for such insurance is declared in the policy. Stonborough v Preferred Accident Ins. Co., 40 N.Y.S.2d 480, 180 Misc. 339, 1943 N.Y. Misc. LEXIS 1689 (N.Y. Sup. Ct.), aff'd, 266 A.D. 838, 43 N.Y.S.2d 512, 1943 N.Y. App. Div. LEXIS 4758 (N.Y. App. Div. 1943).

No policy of automobile liability insurance is deemed to insure against liability of an insured because of the death of his or her spouse, unless express provision is included in the policy. Manhattan Cas. Co. v Cholakis, 133 N.Y.S.2d 90, 206 Misc. 287, 1954 N.Y. Misc. LEXIS 2752 (N.Y. Sup. Ct.), aff'd, 284 A.D. 1041, 137 N.Y.S.2d 612, 1954 N.Y. App. Div. LEXIS 4505 (N.Y. App. Div. 1954).

In the absence of an express provision in the policy, insurer was not liable to insured's wife for injury, but was liable where "insured" was not the spouse of the person injured. Jacobs v United States Fidelity & Guaranty Co., 2 Misc. 2d 428, 152 N.Y.S.2d 128, 1956 N.Y. Misc. LEXIS 1918 (N.Y. Sup. Ct. 1956).

The law is well settled that no coverage is afforded to the spouse of the person insured in an automobile liability policy in the absence of specific provision and affirmative undertaking in the policy granting such coverage. Empire Mut. Ins. Co. v Title, 42 Misc. 2d 425, 248 N.Y.S.2d 182, 1964 N.Y. Misc. LEXIS 2071 (N.Y. Sup. Ct. 1964), aff'd, 23 A.D.2d 968, 259 N.Y.S.2d 1006, 1965 N.Y. App. Div. LEXIS 5887 (N.Y. App. Div. 1st Dep't 1965).

Insurance Law former § 167, subd 3 [now § 3420(g)] absolves an insurer from defending an action where the liability of its insured is incurred because of the death or injuries to the spouse, unless there is an express provision to the contrary in the policy. Smith v Employer's Fire Ins. Co., 72 Misc. 2d 524, 340 N.Y.S.2d 12, 1972 N.Y. Misc. LEXIS 1334 (N.Y. Sup. Ct. 1972).

Trial court properly declared that an insurer was not obligated to defend and indemnify a policy holder for claims filed by the policy holder's wife arising from an automobile accident in Virginia, as the policy excluded interspousal claims, the insurer was not required to provide insurance coverage for injuries sustained by an insured's spouse, N.Y. Ins. Law § 3420(g), and N.Y. Ins. Law § 5103(e), which required a carrier to provide the coverage minimally required by the state where the loss occurred, applied solely to the amount and type of coverage required by another state. State Farm Mut. Auto. Ins. Co. v Harkins, 30 A.D.3d 502, 817 N.Y.S.2d 107, 2006 N.Y. App. Div. LEXIS 7908 (N.Y. App. Div. 2d Dep't 2006).

107. Particular applications of exclusion

The son of an insured, who was involved in an accident while driving the insured's car, was not an insured under the policy by virtue of the provisions of subdivision (3) of former § 167 [now § 3420(g)], insofar, as injuries to his wife, a passenger in the car, was concerned. Glens Falls Ins. Co. v Wood, 9 A.D.2d 201, 193 N.Y.S.2d 147, 1959 N.Y. App. Div. LEXIS 6124 (N.Y. App. Div. 3d Dep't 1959), aff'd, 8 N.Y.2d 409, 208 N.Y.S.2d 978, 171 N.E.2d 321, 1960 N.Y. LEXIS 858 (N.Y. 1960).

Husband, who was injured when vehicle operated by him was struck headon by another of his automobiles which was being negligently operated by his wife, was not a "qualified person" entitled to indemnity from motor vehicle accident indemnification corporation, where policy insuring automobiles was a standard automobile liability policy which contained no proviso insuring against any liability of insured because of injuries to his or her spouse or because of destruction of property of his or her spouse. Moffitt v Moffitt, 46 A.D.2d 944, 362 N.Y.S.2d 229, 1974 N.Y. App. Div. LEXIS 3290 (N.Y. App. Div. 3d Dep't 1974).

In an action evolving out of an auto accident, wherein plaintiff insurer sought a declaration that the automobile liability insurance policy in question did not provide coverage to insured husband in connection with his wife's lawsuit for personal injuries, the insurer would not be liable to the husband, notwithstanding the insurer's failure to render timely notice of disclaimer, since the policy did not afford coverage for interspousal liability claims. Empire Mut. Ins. Co. v Fleischman, 106 A.D.2d 295, 483 N.Y.S.2d 9, 1984 N.Y. App. Div. LEXIS 21358 (N.Y. App. Div. 1st Dep't 1984).

Exemption under CLS Ins § 3420(g) did not apply to insured, who was owner of car involved in accident, which was being driven with his consent by his son-in-law, and father of plaintiff in underlying action, who was passenger in car. Empire Ins. Co. v Silbowitz, 243 A.D.2d 251, 663 N.Y.S.2d 7, 1997 N.Y. App. Div. LEXIS 9284 (N.Y. App. Div. 1st Dep't 1997).

Insurer was entitled to summary judgment declaring that it was not required to defend or indemnify insured wife in underlying action for wrongful death of her husband, who was killed in traffic accident while he was passenger in car driven by wife, where underlying action was subject to operation of CLS Ins § 3420(g), which provides that "[n]o policy [of insurance]...shall be deemed to insure against any liability of an insured because of death of...his or her spouse...unless express provision relating specifically thereto is included in the policy," and policy contained no express language specifically extending coverage to interspousal liability. Government Emples. Ins. Co. v Pagano, 251 A.D.2d 452, 674 N.Y.S.2d 719, 1998 N.Y. App. Div. LEXIS 6850 (N.Y. App. Div. 2d Dep't 1998).

Insurer was entitled to disclaim liability to the owner's father, who killed the owner's mother while operating his son's vehicle with his permission, on the ground that the father was an "insured" under the policy and that since the action was brought for the death of the father's wife, the action was one for the death of the spouse of "insured". General Accident Fire & Life Assurance Corp. v Katz, 3 Misc. 2d 328, 150 N.Y.S.2d 667, 1956 N.Y. Misc. LEXIS 2085 (N.Y. Sup. Ct. 1956).

Spousal negligence provision of CLS Ins § 3420(g) did not limit suit against vicariously liable owner of automobile where automobile had been loaned by owner to his employee and was being driven by employee's wife at time of single car accident. Love v Luft, 150 Misc. 2d 732, 569 N.Y.S.2d 899, 1991 N.Y. Misc. LEXIS 217 (N.Y. Sup. Ct. 1991).

108. —Claim against spouse's employer or partner

A liability policy issued to an employee inured to the benefit of his employer in respect of a collision between the employee's car and another vehicle resulting in injury to the employee's wife and hence, the wife could sue the employer alleging that her husband, the employee, was negligent in the operation of his car in the course of his employment where the employee's policy included as "insured", "any person or organization legally responsible for the use thereof" and the provisions of this section did not apply. Catania v Hartford Acci. & Indem. Co., 4 A.D.2d 440, 166 N.Y.S.2d 389, 1957 N.Y. App. Div. LEXIS 4429 (N.Y. App. Div. 1st Dep't 1957).

Despite fact that driver of automobile owned by corporation of which he was president was an additional insured under the corporation's liability policy, Insurance Law former § 167, subdivision 3 [now § 3420(g)] would permit action by insurer of corporation as subrogee in wife's action against corporation for injuries incurred in accident involving automobile while her husband was driving from bringing indemnity action against husband where policy did not contain a provision for coverage of spouse of insured. United States Fire Ins. Co. v Gould, 43 A.D.2d 462, 352 N.Y.S.2d 541, 1974 N.Y. App. Div. LEXIS 5647 (N.Y. App. Div. 4th Dep't 1974).

It was irrelevant whether insurer acquired actual knowledge of property damage from primary insured or from another source, because plaintiffs, who were owners of covered property and additional insureds under policy, had independent duty to give timely written notice of claim against them; thus, further disclosure would serve no useful purpose, and award of summary judgment to insurer was not premature. American Mfrs. Mut. Ins. Co. v CMA Enters., 246 A.D.2d 373, 667 N.Y.S.2d 724, 1998 N.Y. App. Div. LEXIS 272 (N.Y. App. Div. 1st Dep't 1998).

Husband's claim to be indemnified against corporate employer's claim over against him for injuries sustained by his wife was excluded by former § 167 [now § 3420(g)] where the corporate employer and the husband were insured under a policy which contained no express coverage for the assured's spouse. Reis v Economy Hotels & Restaurants Purveyors, Inc., 4 Misc. 2d 146, 155 N.Y.S.2d 713, 1956 N.Y. Misc. LEXIS 1617 (N.Y. Sup. Ct. 1956).

Where partnership was named as defendant in spouse's negligence action, insurer was liable to members of the partnership other than the husband for any sums they might be legally obligated to pay as damages. Travelers Indem. Co. v Unger, 4 Misc. 2d 955, 158 N.Y.S.2d 892, 1956 N.Y. Misc. LEXIS 1316 (N.Y. Sup. Ct. 1956).

109. —Claim based on no-fault insurance provisions

The spousal exclusion clauses found in the Vehicle and Traffic Law (§ 388, subd 4) and the Insurance Law (former § 167, subd 3 [now § 3420(g)]), to the effect that no policy shall be deemed to insure against any liability of an insured because of injuries to his spouse, are inapplicable to payments made by an insurer under the no-fault insurance provisions (Insurance Law, former §§ 670-678 [now §§ 101 et seq.]) to the wife of the operator of a car which hit a utility pole since the no-fault law did not require payment because of any liabiity of the insured, but, rather, the obligation of the insured arose by reason of the law's provisions and their legislatively mandated incorporation into its policy with the insured; payment under no-fault is to be made irrespective of the insured's fault and liability whereas the statutory spousal exclusion is applicable only when an insured seeks indemnification for injuries to his spouse sustained as a result of his negligence. Liberty Mut. Ins. Co. v State, 94 Misc. 2d 676, 405 N.Y.S.2d 945, 1978 N.Y. Misc. LEXIS 2295 (N.Y. Ct. Cl. 1978).

110. —Claim for apportionment among tortfeasors

Court of Appeals decision permitting apportionment among joint or concurrent tort-feasors did not have the effect of limiting language of Insurance Law dealing with coverage for injury or death of spouse of the insured; absent express contractual provision relating thereto, insurer was not obligated to defend insured or indemnify him with respect to liability for injuries suffered by his spouse even though, spouse having brought action against insured and third parties, the third parties had asserted cross claim against the insured. Lauer v Claffey, 52 A.D.2d 275, 383 N.Y.S.2d 671, 1976 N.Y. App. Div. LEXIS 11994 (N.Y. App. Div. 3d Dep't 1976).

Insurance Law former § 167, subd 3 [now § 3420(g)], prohibition excluding from insurance coverage any liability of insured because of injury to spouse would be reexamined by court in light of judicial decision permitting apportionment of liability between parties. Aetna Casualty & Surety Co. v Delosh, 73 Misc. 2d 275, 341 N.Y.S.2d 465, 1973 N.Y. Misc. LEXIS 2169 (N.Y. Sup. Ct. 1973).

In married couple's personal injury action arising out of automobile collision, defendant's counterclaim seeking apportionment of damages from plaintiff husband under rule of Dole v Dow Chemical Co. was not a cause of action based on husband's liability due to death or injury of spouse within meaning of Insurance Law former § 167, subd 3 [now § 3420(g)]. Raia v Cook, 75 Misc. 2d 610, 349 N.Y.S.2d 956, 1973 N.Y. Misc. LEXIS 1405 (N.Y. Sup. Ct. 1973).

111. —Claim for indemnity or involving spouse as third party defendant

While a married woman has, by statute, been given a right of action against her husband for any tortious act causing injury, insurer of husband was not, in the instant case, obligated to defend or indemnify him with regard to third-party action in which it was alleged that he was liable in whole or in part for injuries sustained by his wife while she was a passenger in car operated by him, since another statute specifically provides that no insurance policy shall be deemed to insure against any liability of an insured because of injuries to spouse "unless express provision relating specifically thereto is included in the policy,"

and since the subject policy contained no such provision. State Farm Mut. Auto. Ins. Co. v Westlake, 35 N.Y.2d 587, 364 N.Y.S.2d 482, 324 N.E.2d 137, 1974 N.Y. LEXIS 1062 (N.Y. 1974).

While a married woman has a right of action against her husband for tortious acts causing injury, husband's insurer was not obligated to defend or indemnify him with regard to third-party action alleging that husband was liable in whole or in part for injuries sustained by wife while a passenger in car operated by husband, since Insurance Law former § 167 [now § 3420] specifically prohibits insurance against liability of an insured because of injuries to spouse "unless express provision relating specifically thereto is included in the policy," and since the subject policy contained no such provision. State Farm Mut. Auto. Ins. Co. v Westlake, 35 N.Y.2d 587, 364 N.Y.S.2d 482, 324 N.E.2d 137, 1974 N.Y. LEXIS 1062 (N.Y. 1974).

Despite provisions of Insurance Law former § 167, subd 3 [now § 3420(g)], insurer was obligated to defend third-party claim, asserted under rule of Dole v Dow Chemical Co., alleging that insured was liable in whole or in part for injuries sustained by wife in collision with defendant/third party plaintiff. State Farm Mut. Auto Ins. Co. v Westlake, 43 A.D.2d 314, 351 N.Y.S.2d 147, 1974 N.Y. App. Div. LEXIS 5962 (N.Y. App. Div. 2d Dep't), rev'd, 35 N.Y.2d 587, 364 N.Y.S.2d 482, 324 N.E.2d 137, 1974 N.Y. LEXIS 1062 (N.Y. 1974).

When defendant seeks indemnification from driver-spouse for injuries to passenger-spouse, exclusionary provision of Insurance Law relieves carrier of driver-spouse from its responsibility to defend or to pay such a claim. Sharlow v Nationwide Mut. Ins. Co., 47 A.D.2d 572, 362 N.Y.S.2d 618, 1975 N.Y. App. Div. LEXIS 8656 (N.Y. App. Div. 3d Dep't 1975).

An insurance carrier, which is exempt from providing coverage to a plaintiff's culpable insured spouse under subdivision 3 of former section 167 [now § 3420(g)] of the Insurance Law, may maintain a cross claim for indemnification against the insured spouse, in the right of a vicariously liable coinsured; if no claim for indemnification were permitted the wrongdoer spouse would be protected from any liability, and the very possibility of fraud and collusion against which the statute seeks to guard would be a factor. Schwartz v S. Lipkin & Son, Inc., 76 A.D.2d 141, 430 N.Y.S.2d 356, 1980 N.Y. App. Div. LEXIS 11741 (N.Y. App. Div. 2d Dep't 1980).

Plaintiff, insurer of owner of automobile that was being driven by insured of second insurer (defendant) when it became involved in accident resulting in injuries to driver's wife, was barred by CLS Ins § 3420(g) from recovering against defendant for amount plaintiff paid in settlement of wife's claim against owner of automobile since there was no provision in defendant's policy with driver expressly insuring him for injury claims by his wife. Firemen's Ins. Co. v Allstate Ins. Co., 171 A.D.2d 186, 575 N.Y.S.2d 378, 1991 N.Y. App. Div. LEXIS 13467 (N.Y. App. Div. 3d Dep't 1991), app. denied, 79 N.Y.2d 756, 583 N.Y.S.2d 191, 592 N.E.2d 799, 1992 N.Y. LEXIS 1004 (N.Y. 1992).

Insurance company was not required to defend husband in action brought by wife without an express provision therefor in his policy, even though husband was brought into action as a third party defendant. Feinman v Bernard Rice Sons, Inc., 2 Misc. 2d 86, 133 N.Y.S.2d 639, 1954 N.Y. Misc. LEXIS 1888 (N.Y. Sup. Ct. 1954), aff'd, 285 A.D. 926, 139 N.Y.S.2d 884, 1955 N.Y. App. Div. LEXIS 6125 (N.Y. App. Div. 1955).

Insurance Law former § 167, subd 3 [now § 3420(g)], applied to third party action by defendant in automobile accident case against plaintiff's husband who was driver of automobile in which she was riding at the time of the accident so that, although third party action could be maintained, husband's insurer had no obligation to defend. Perno v Exchange Mut. Ins. Co., 73 Misc. 2d 346, 342 N.Y.S.2d 298, 1973 N.Y. Misc. LEXIS 2059 (N.Y. Sup. Ct. 1973).

In personal injury action brought by wife arising out of automobile accident in which she was a passenger in a car driven by her husband, husband's insurer was obligated to defend husband in cross claim for indemnity brought by defendants. United States Fidelity & Guaranty Co. v Franklin, 74 Misc. 2d 506, 344 N.Y.S.2d 251, 1973 N.Y. Misc. LEXIS 1933 (N.Y. Sup. Ct. 1973), aff'd, 43 A.D.2d 844, 352 N.Y.S.2d 1009, 1974 N.Y. App. Div. LEXIS 5979 (N.Y. App. Div. 2d Dep't 1974).

Defendant motorist's cross-claim for indemnity against husband for injuries to wife was not within provisions of Insurance Law former § 167, subd 3 [now § 3420(g)]. Stone v Agricultural Ins. Co., 76 Misc. 2d 1021, 351 N.Y.S.2d 496, 1973 N.Y. Misc. LEXIS 1194 (N.Y. Sup. Ct. 1973).

112. —Recovery which does not depend on proof of spouse's culpability

Passenger was not precluded by CLS Ins § 3420(g) from recovering underinsurance motorist benefits for injuries sustained in one-car accident which occurred when her husband fell asleep while driving her father's car, where she alleged that her father was negligent in entrusting car to her husband because he knew that her husband was too tired to drive and that full limit of insurance coverage purchased by her father was insufficient to compensate her fully for her injuries, as negligent entrustment is independent tort and her father's liability was therefore not purely vicarious; thus, insurer's application to permanently stay arbitration was properly denied. General Accident Ins. Co. v Elbaum, 236 A.D.2d 472, 653 N.Y.S.2d 659, 1997 N.Y. App. Div. LEXIS 1215 (N.Y. App. Div. 2d Dep't 1997).

Subdivision 3 of former section 167 [now § 3420(g)] of the Insurance Law was amended so as to limit the presumptive exclusion of interspousal coverage to cases where the injured spouse must prove the culpable conduct of the insured spouse in order to recover; therefore, in an action for contribution against the defendant husband, following a judgment in favor of the defendant's wife, and dismissal of the husband's suit against plaintiffs, resulting from an automobile accident in which the wife sustained injury, the wife's insurance company was obligated to defend and indemnify the defendant husband, since the wife's recovery was not dependent upon proof of her husband's negligence. Ward v Accordino, 93 Misc. 2d 746, 403 N.Y.S.2d 438, 1978 N.Y. Misc. LEXIS 2129 (N.Y. Sup. Ct. 1978).

113. Other matters

Police officer was entitled to summary judgment against her own personal automobile insurance company in action against insurance company and city for judgment declaring right of officer to seek uninsured motorist benefits from one of defendants for injuries sustained when her police car was struck by uninsured vehicle, and insurance company's argument that its obligation was secondary to that of her employer, defendant city, would be rejected, since city was not obligated to, and did not, provide uninsured motorist coverage for police vehicles. Williams v New York, 144 A.D.2d 553, 534 N.Y.S.2d 222, 1988 N.Y. App. Div. LEXIS 11944 (N.Y. App. Div. 2d Dep't 1988).

Plaintiff, who sued both individually and in her capacity as executrix of her deceased husband in wrongful death action that arose from motor vehicle accident, was entitled to retain attorney at her insurance company's expense to represent her on counterclaim in action since interests of plaintiff and insurance company were in conflict as to counterclaim where (1) accident occurred when automobile driven by plaintiff skidded on ice, swerved into defendant's lane and collided with his vehicle, and (2) defendant counterclaimed for apportionment of damages based on plaintiff's fault; it was to insurance company's advantage to concede that plaintiff was at fault, since it would not be obligated to pay any money on claim if plaintiff were found 100 percent at fault, and therefore conflict of interest existed. Gorman v Pattengell, 145 A.D.2d 411, 535 N.Y.S.2d 402, 1988 N.Y. App. Div. LEXIS 12928 (N.Y. App. Div. 2d Dep't 1988).

Where a wife, while riding in a car driven by her husband was injured, as alleged, by reason of his negligent operation of the car with the consent of its owner who was named insured in a liability policy, sued the named insured taking the position that she was an "additional insured" under the terms of the policy, she and the named insured must be regarded as separately insured by separate policies and the insurer had no right of subrogation to her asserted cause of action. Barson v General Accident Fire & Life Assurance Corp., 42 Misc. 2d 381, 247 N.Y.S.2d 905, 1964 N.Y. Misc. LEXIS 2249 (N.Y. Sup. Ct.), reh'g denied, 41 Misc. 2d 1033,

246 N.Y.S.2d 868, 1964 N.Y. Misc. LEXIS 2083 (N.Y. Sup. Ct. 1964).

Former § 167 [now § 3420(g)] applies only in actions brought by a spouse against the insured spouse where such coverage is not expressly provided, and the law is well settled that denial of coverage to the insured where his spouse sues a third party must be expressly provided for in the policy, otherwise no right of subrogation arises. Barson v General Accident Fire & Life Assurance Corp., 42 Misc. 2d 381, 247 N.Y.S.2d 905, 1964 N.Y. Misc. LEXIS 2249 (N.Y. Sup. Ct.), reh'g denied, 41 Misc. 2d 1033, 246 N.Y.S.2d 868, 1964 N.Y. Misc. LEXIS 2083 (N.Y. Sup. Ct. 1964).

Former § 167 [now § 3420(g)] has no application to an action by a father, on behalf of his infant son, to recover damages for personal injuries suffered by the child and for medical expenses, loss of services, etc., incurred by the father and brought against the mother, the owner of the vehicle and its operator inasmuch as there is no prohibition in the law against one spouse suing the other. Such causes of action are authorized by General Obligations Law § 3-313, subd 2. Zelby v Omansky, 61 Misc. 2d 199, 304 N.Y.S.2d 899, 1969 N.Y. Misc. LEXIS 1096 (N.Y. Sup. Ct. 1969).

Insurance Law section providing that no policy shall be deemed to insure against any liability of an insured because of death or injuries to his or her spouse unless express provision relating specifically thereto is included in the policy was applicable to a homeowners liability policy and such provision was not applicable only to automobile liability insurance. Longworth v Great American Ins. Co., 80 Misc. 2d 114, 362 N.Y.S.2d 762, 1974 N.Y. Misc. LEXIS 1853 (N.Y. Sup. Ct. 1974), modified, 55 A.D.2d 908, 390 N.Y.S.2d 602, 1977 N.Y. App. Div. LEXIS 10149 (N.Y. App. Div. 2d Dep't 1977).

An insurer under a homeowners policy was not liable to pay for costs of a wife's defense against husband's negligence suit for injuries or to indemnify her for loss where homeowners policy did not contain a specific provision for interspousal coverage. Longworth v Great American Ins. Co., 80 Misc. 2d 114, 362 N.Y.S.2d 762, 1974 N.Y. Misc. LEXIS 1853 (N.Y. Sup. Ct. 1974), modified, 55 A.D.2d 908, 390 N.Y.S.2d 602, 1977 N.Y. App. Div. LEXIS 10149 (N.Y. App. Div. 2d Dep't 1977).

The administrator of a deceased wife could recover under an automobile liability policy, notwithstanding that the policy contained no express provision insuring against liability for injuries to spouse of insured, where the wife's death was negligently caused by the husband, since former § 109 [predecessor to former § 167, now § 3420] was enacted to prevent fraudulent actions between spouses at the expense of insurers, but its effect should not be enlarged by construing it to include the purpose of forestalling actions between other than spouses. General Acci. Fire & Life Assurance Corp. v Morgan, 33 F. Supp. 190, 1940 U.S. Dist. LEXIS 3047 (W.D.N.Y. 1940).

There is no definition in Insurance Law of "significant other" in relation to personal or commercial motor vehicle insurance. Insurance Department, Opinions of General Counsel, Opinion Number 06-07-05.

Insurance Service Organization ("ISO") policy form used by most motor vehicle insurers and other policy forms used by largest motor vehicle insurers in New York do not define or use term "significant other," nor is Department of Insurance aware of such use in any other motor vehicle policy forms filed with and approved by Superintendent of Insurance. Insurance Department, Opinions of General Counsel, Opinion Number 06-07-05.

X. Failure of Insured to Cooperate With Insurer

114. In general

The failure of the insured to co-operate with the insurer is a defense to an action under this Former § 167 [now § 3420]. Shafer v Utica Mut. Ins. Co., 248 A.D. 279, 289 N.Y.S. 577, 1936 N.Y. App. Div. LEXIS 6135 (N.Y. App. Div. 1936).

Motion to withdraw as counsel is inappropriate means of testing propriety of insurance carrier's disclaimer of liability on ground of lack of cooperation by insured. Rusolo v Skate Odyssey, 109 A.D.2d 875, 487 N.Y.S.2d 67, 1985 N.Y. App. Div. LEXIS 47395 (N.Y. App. Div. 2d Dep't 1985).

Defendant in underlying vehicle collision case lacked standing to implead insurer where defendant was not insured of that third-party defendant and thus had no legally cognizable interest in relationship between codefendant and his insurer. Abdalla v El Emeri Yehia, 246 A.D.2d 373, 667 N.Y.S.2d 736, 1998 N.Y. App. Div. LEXIS 265 (N.Y. App. Div. 1st Dep't 1998).

Stranger to insurance contract acquires no right to enforce insurer's duty until judgment against insured has been rendered and remains unsatisfied. Abdalla v El Emeri Yehia, 246 A.D.2d 373, 667 N.Y.S.2d 736, 1998 N.Y. App. Div. LEXIS 265 (N.Y. App. Div. 1st Dep't 1998).

While the precommencement settlement discussions between insured's insurer and the injured party's counsel may establish that the insurer had notice of the accident and the injured party's claim under N.Y. Ins. Law § 3420(a (3), neither those contacts nor the injured party's letter to insurer alleging that service had been obtained was sufficient to cure the insured's breach of the specific policy provision requiring the prompt forwarding of legal papers, and that breach justified the insurer's disclaimer of coverage. Fisher v Hanover Ins. Co., 288 A.D.2d 806, 733 N.Y.S.2d 761, 2001 N.Y. App. Div. LEXIS 11500 (N.Y. App. Div. 3d Dep't 2001).

An issue as to non-cooperation between an insured motorist and his insurer can be raised in actions under former § 167 [now § 3420]. Spadaro v Newark Ins. Co., 40 Misc. 2d 1042, 244 N.Y.S.2d 249, 1963 N.Y. Misc. LEXIS 1531 (N.Y. Sup. Ct. 1963), aff'd in part and rev'd in part, 21 A.D.2d 226, 249 N.Y.S.2d 753, 1964 N.Y. App. Div. LEXIS 3722 (N.Y. App. Div. 4th Dep't 1964).

While, under the provisions of the Safety Responsibility Act (Vehicle and Traffic Law, § 345) rights of an injured party are absolute, under subd. 5 of this section they are not absolute but subject to defenses which the insurer may have against insured, including a defense of insured's failure to cooperate with the insurer. Downing v Allstate Ins. Co., 43 Misc. 2d 215, 250 N.Y.S.2d 711, 1964 N.Y. Misc. LEXIS 1662 (N.Y. Sup. Ct. 1964).

Insurance companies could not disclaim coverage based on the noncooperation of the insured insulation company as to the individuals who had asbestos-related personal injuries and actions pending against the insulation company. Continental Cas. Co. v Employers Ins. Co. of Wausau, 839 N.Y.S.2d 403, 16 Misc. 3d 223, 237 N.Y.L.J. 92, 2007 N.Y. Misc. LEXIS 3336 (N.Y. Sup. Ct. 2007), rev'd, 60 A.D.3d 128, 871 N.Y.S.2d 48, 2008 N.Y. App. Div. LEXIS 9966 (N.Y. App. Div. 1st Dep't 2008).

The defense that the insured did not co-operate with the insurer in preparing the defense to an action by an injured person is a valid plea in an action under former § 109 [predecessor to former § 167, now § 3420]. Hoff v St. Paul-Mercury Indem. Co., 74 F.2d 689, 1935 U.S. App. LEXIS 3505 (2d Cir. N.Y. 1935).

115. Insurer's burden of proof, generally

The burden of proving lack of co-operation of the insured is placed upon the insurer, since the defense of lack of co-operation penalizes the plaintiff for the action of the insured over whom he has no control, and since the defense frustrates the policy of this state that innocent victims of motor vehicle accidents be recompensed for the injuries inflicted upon them. Thrasher v United States Liability Ins. Co., 19 N.Y.2d 159, 278 N.Y.S.2d 793, 225 N.E.2d 503, 1967 N.Y. LEXIS 1703 (N.Y. 1967).

In proving lack of co-operation of the insured, the insured must demonstrate that it acted diligently in seeking to bring about the insured's co-operation, that the efforts employed by the insurer were reasonably calculated to obtain the insured's co-operation and that the attitude of the insured, after his co-operation was sought, was one of wilful and avowed obstruction. Thrasher v United States Liability Ins. Co., 19 N.Y.2d 159, 278 N.Y.S.2d 793, 225 N.E.2d 503, 1967 N.Y. LEXIS 1703 (N.Y. 1967).

Automobile liability insurer's burden of proving lack of cooperation by its insured is a heavy one since a disclaimer penalizes the injured party for the alleged action of the insured and frustrates the New York policy that innocent victims of motor vehicle accidents be recompensed for injuries suffered by them. Alexander v Stone, 45 A.D.2d 216, 357 N.Y.S.2d 271, 1974 N.Y. App. Div. LEXIS 4460 (N.Y. App. Div. 4th Dep't 1974).

In order to disclaim coverage on ground of insured's lack of cooperation, carrier must demonstrate (1) that it acted diligently in seeking to bring about insured's cooperation, (2) that its efforts

were reasonably calculated to obtain insured's cooperation, and (3) that attitude of insured, after cooperation was sought, was one of willful and avowed obstruction. Pawtucket Mut. Ins. Co. v Soler, 184 A.D.2d 498, 584 N.Y.S.2d 192, 1992 N.Y. App. Div. LEXIS 7684 (N.Y. App. Div. 2d Dep't 1992).

Although insurer who alleges violation of cooperation clause of insurance policy is not required to show that insured openly avowed his or her intent to obstruct insurer, insurer has very heavy burden to show that circumstances support inference that insured's failure to cooperate was deliberate. Mount Vernon Fire Ins. Co. v 170 E. 106th St. Realty Corp., 212 A.D.2d 419, 622 N.Y.S.2d 758, 1995 N.Y. App. Div. LEXIS 1629 (N.Y. App. Div. 1st Dep't), app. denied, 86 N.Y.2d 707, 632 N.Y.S.2d 500, 656 N.E.2d 599, 1995 N.Y. LEXIS 3516 (N.Y. 1995).

In order to prevail on defense of noncooperation, insurer must show that its insured has engaged in unreasonable and willful pattern of refusing to answer material and relevant questions or to supply material and relevant documents. James & Charles Dimino Wholesale Seafood v Royal Ins. Co., 238 A.D.2d 379, 656 N.Y.S.2d 325, 1997 N.Y. App. Div. LEXIS 3844 (N.Y. App. Div. 2d Dep't 1997).

Insured's partial noncompliance with discovery was not so willful or extreme as to warrant extreme penalty of dismissal of action where, before commencement of suit, insured afforded insurer access to its corporate books and records, its president appeared for examination under oath at which he answered all questions posed by insurer, and produced a number of documents, including personal income tax returns and authorization permitting additional returns to be obtained from Internal Revenue Service; although some of insurer's demands for documents and information were still outstanding at time of commencement of suit, insured complied with outstanding requests and executed transcripts of examinations under oath about 4 months later. James & Charles Dimino Wholesale Seafood v Royal Ins. Co., 238 A.D.2d 379, 656 N.Y.S.2d 325, 1997 N.Y. App. Div. LEXIS 3844 (N.Y. App. Div. 2d Dep't 1997).

Where an automobile liability insurer seeks a declaration of non-liability by reason of insured's failure to cooperate, the plaintiff insurer has the burden of establishing breach of such condition. State Farm Mut. Auto. Ins. Co. v Brown, 40 Misc. 2d 694, 243 N.Y.S.2d 825, 1963 N.Y. Misc. LEXIS 1470 (N.Y. Sup. Ct. 1963), rev'd, 21 A.D.2d 742, 250 N.Y.S.2d 244, 1964 N.Y. App. Div. LEXIS 3751 (N.Y. App. Div. 4th Dep't 1964).

Insurer failed to satisfy its burden to prove that insured breached policy's cooperation clause, and its declaratory judgment action was dismissed as premature, where only factual assertion evincing failure to cooperate was insured's nonappearance at his examination before trial and, after letter of warning was sent to insured, insurer and plaintiff in underlying action had stipulated that insured's deposition could proceed as late as 30 days prior to trial. Allstate Ins. Co. v Loester, 177 Misc. 2d 372, 675 N.Y.S.2d 832, 1998 N.Y. Misc. LEXIS 280 (N.Y. Sup. Ct. 1998).

116. Sufficiency of proof in particular cases

This action is based on former § 109 [predecessor to former § 167, now § 3420], whereby a successful plaintiff is permitted to proceed against an obligor of a casualty policy in case execution against the assured is returned unsatisfied. Resistance to plaintiff's claim is predicated principally, if not wholly, on the ground of failure of co-operation on the part of the assured. . . . While agreement is accorded defendant's proposition that plaintiff can have no greater rights than the assured, and that the assured by lack of co-operation would have relieved the defendant from liability, yet, in accord with the opinion herein expressed, it is held that the defendant has failed to establish lack of co-operation and in consequence that policy for purposes of this action is in full force and effect. 1923 NY Law Jour. June 30. See also Roth v National Auto. Mut. Casualty Co., 202 A.D. 667, 195 N.Y.S. 865, 1922 N.Y. App. Div. LEXIS 4954 (N.Y. App. Div. 1922), app. dismissed, 235 N.Y. 605, 139 N.E. 752, 235 N.Y. (N.Y.S.) 605, 1923 N.Y. LEXIS 1329 (N.Y. 1923).

The failure of the insured to cooperate as a defense by the insurance company to the claim by the holder of an unsatisfied judgment against an insured cannot be sustained. Albert v Public Service Mut. Casualty Ins. Corp., 266 A.D. 284, 42 N.Y.S.2d 124, 1943 N.Y. App. Div. LEXIS 3544 (N.Y. App. Div. 1943), aff'd, 292 N.Y. 633, 55 N.E.2d 507, 292 N.Y. (N.Y.S.) 633, 1944 N.Y. LEXIS 1789 (N.Y. 1944).

In an action by a judgment creditor against the insurer of the judgment debtor, the evidence established that the insurer acted diligently in seeking to obtain the insured's co-operation and in fact did, in the first instance, obtain such co-operation, but that later the attitude of the insured was wilful and avowed obstruction. Campbell v Travelers Ins. Co., 35 A.D.2d 362, 317 N.Y.S.2d 444, 1970 N.Y. App. Div. LEXIS 3172 (N.Y. App. Div. 3d Dep't 1970), aff'd, 33 N.Y.2d 667, 348 N.Y.S.2d 982, 303 N.E.2d 707, 1973 N.Y. LEXIS 1024 (N.Y. 1973).

Evidence established that insured willfully obstructed insurer's defense of underlying litigation by his continued absence where signed, postal service return receipt showed that he had received insurer's written correspondence, and testimony of insurer's claims representative (who engaged in several post-incident conversations with insured), showed that insured was made fully aware of contractual obligation to cooperate in defense of action. State Farm Fire & Casualty Co. v Imeri, 182 A.D.2d 683, 582 N.Y.S.2d 463, 1992 N.Y. App. Div. LEXIS 5962 (N.Y. App. Div. 2d Dep't 1992).

Insurer was not entitled to judgment declaring that it was entitled to disclaim coverage on ground of insured's lack of cooperation where there was no post-claim communication by insurer to insured in which insured was apprised of continuing obligation to cooperate, since insureds could reasonably have believed they fulfilled their obligation to cooperate when they answered questions posed during investigator's fact-finding interview; absent compelling evidence which established that insureds knew they were to further participate in defense, their unexplained absence was insufficient to raise inference of willful noncooperation. Pawtucket Mut. Ins. Co. v Soler, 184 A.D.2d 498, 584 N.Y.S.2d 192, 1992 N.Y. App. Div. LEXIS 7684 (N.Y. App. Div. 2d Dep't 1992).

Insurer would be required to defend and indemnify insured with respect to underlying personal injury action, despite insurer's contention that insured failed to cooperate as required by policy, where (1) insured's initial attitude was one of basic, if rather haphazard, cooperation, (2) insured informed insurer that he lacked personal knowledge of accident, and (3) insured never received any specific warning that failure to cooperate could lead to disclaimer of coverage. Mount Vernon Fire Ins. Co. v 170 E. 106th St. Realty Corp., 212 A.D.2d 419, 622 N.Y.S.2d 758, 1995 N.Y. App. Div. LEXIS 1629 (N.Y. App. Div. 1st Dep't), app. denied, 86 N.Y.2d 707, 632 N.Y.S.2d 500, 656 N.E.2d 599, 1995 N.Y. LEXIS 3516 (N.Y. 1995).

Liability insurer was properly granted summary judgment based on lack of cooperation of its insured, who willfully obstructed insurer's defense of underlying litigation by refusing to turn over documents and failing to appear at examination before trial or court-ordered pretrial settlement conferences, resulting in orders of preclusion being granted against insured and insured being held in contempt of court; insurer was not required to show prejudice to be entitled to summary judgment. Utica Mut. Ins. Co. v Gruzlewski, 217 A.D.2d 903, 630 N.Y.S.2d 955, 1995 N.Y. App. Div. LEXIS 8316 (N.Y. App. Div. 4th Dep't 1995).

Paragraph 5 of former § 167 [now § 3420(c)], in providing with respect to actions over by third persons against automobile insurers that where the insurer defends on basis of failure of the insured to cooperate the burden of proof as to failure to cooperate is upon the insurer, is not met by a mere allegation of the insurer that the insured gave it no notice of the accident for some two years. Karp v Aetna Casualty & Surety Co., 21 Misc. 2d 487, 201 N.Y.S.2d 421, 1959 N.Y. Misc. LEXIS 2322 (N.Y. Mun. Ct. 1959).

Although the motorist insured under a liability policy duly notified his insurer of being involved in an accident, he was guilty of failure to cooperate with the insurer where he neither turned over to the insurer the summons which he was later served with nor notified it that he had been served with such a summons, nor notified it of judgment taken against him. Clark v Utica Mut. Ins. Co., 31 Misc. 2d 1005, 222 N.Y.S.2d 239, 1961 N.Y. Misc. LEXIS 1899 (N.Y. Mun. Ct. 1961).

Where an injured person seeks to enforce a judgment obtained against an insured motorist against his liability insurer, the insurer cannot successfully defend against the claim on the ground of the insured's failure to cooperate in defense of the action if the insured has reasonably attempted to cooperate and the insurer has failed to disclaim liability within a reasonable time on the ground of failure to cooperate. Wallace v Universal Ins., Inc., 227 N.Y.S.2d 999 (N.Y. Sup. Ct. 1962), modified, 18 A.D.2d 121, 238 N.Y.S.2d 379, 1963 N.Y. App. Div. LEXIS 4219 (N.Y. App. Div. 1st Dep't 1963).

Trial court erred in granting summary judgment to an insured as to an injured party's action under N.Y. Ins. Law § 3420, as the insurer failed to show that it used due diligence in attempting to gain an insured's cooperation in the action, or that the insured willfully obstructed the insurer's attempt to investigate the matter. Rucaj v Progressive Ins. Co., 19 A.D.3d 270, 797 N.Y.S.2d 79, 2005 N.Y. App. Div. LEXIS 6997 (N.Y. App. Div. 1st Dep't 2005).

Tenant injured in assault had reasonable chance of recovering more than NYC Housing Authority's $500,000 self-insured retention, and thus Authority breached policy's cooperation clause by preventing insurer from settling, where law was unsettled as to whether circumstantial evidence alone would suffice to support finding that unidentified assailants were not residents or guests of housing development. New York City Hous. Auth. v Housing Auth. Risk Retention Group, Inc., 203 F.3d 145, 2000 U.S. App. LEXIS 1173 (2d Cir. N.Y. 2000).

Insurer's actions were not reasonably calculated to elicit insured's cooperation in settling underlying personal injury case where insurer's disclaimer did not suggest that insured could change its mind, allow settlement, and thereby restore coverage; instead, insurer's tone of disclaimer was final: "[d]ue to your obstructive conduct of this date relative to the above matter, this is to advise that the [insurer] must hereby disclaim any and all coverage obligations to you in this matter." New York City Hous. Auth. v Housing Auth. Risk Retention Group, Inc., 203 F.3d 145, 2000 U.S. App. LEXIS 1173 (2d Cir. N.Y. 2000).

Insured's failure to cooperate in agreeing to settlement with plaintiff in underlying personal injury case fell short of willful and avowed obstruction where insurer never attempted to persuade insured to cooperate and, had insurer quickly persuaded insured to alter its position, settlement negotiations might still have taken place; thus, insurer was precluded from disclaiming coverage for noncooperation. New York City Hous. Auth. v Housing Auth. Risk Retention Group, Inc., 203 F.3d 145, 2000 U.S. App. LEXIS 1173 (2d Cir. N.Y. 2000).

In an action under former § 167 [now § 3420], it was a question of fact for the jury whether or not the insured had breached his contract of insurance, by failing to cooperate with the insurer in the defense of a personal injury action and not appearing at the trial after having been served with a subpoena. Cyr v American Guarantee & Liability Ins. Co., 242 F.2d 8, 1957 U.S. App. LEXIS 2752 (2d Cir. N.Y. 1957).

117. —Disappearance of insured

Proof of absence meets the insurer's burden of proving failure to co-operate where a third party fails to come forward with an explanation or excuse. Shalita v American Motorists Ins. Co., 266 A.D. 131, 41 N.Y.S.2d 507, 1943 N.Y. App. Div. LEXIS 3504 (N.Y. App. Div.), reh'g denied, 266 A.D. 885, 44 N.Y.S.2d 101, 1943 N.Y. App. Div. LEXIS 5036 (N.Y. App. Div. 1943).

Where an automobile insurer is attempting to avoid liability to a judgment creditor of the insureds on the ground of breach of condition by insureds to cooperate in preparation, settlement, and defense of the action against them, insurer has the burden of proving breach of the cooperation provision and fails to meet that burden if it appears from the evidence that insureds were willing to cooperate in defense of the action but were finally lost track of by the insurer through lack of diligence on its part. Kehoe v Motorists Mut. Ins. Co., 20 A.D.2d 308, 246 N.Y.S.2d 827, 1964 N.Y. App. Div. LEXIS 4351 (N.Y. App. Div. 3d Dep't 1964).

Although following an automobile accident the 72-year-old insured disappeared and could not be found despite a diligent search by the insurer, the insurance company could not disclaim liability based upon the insured's failure to co-operate, where following the commencement of the negligence action against the insured, he gave a statement to the company's representative and later willingly appeared and testified at plaintiff's examination before trial, but disappeared before signing the transcribed minutes. Pointing out that the insured had on prior occasions expressed a desire to commit suicide and that considering the circumstances of his disappearance the insured was probably dead, the court held that his unexplained disappearance was not enough to establish the defense of breach of the co-operation clause. Amatucci v Maryland Casualty Co., 25 A.D.2d 583, 267 N.Y.S.2d 41, 1966 N.Y. App. Div. LEXIS 4974 (N.Y. App. Div. 3d Dep't 1966).

Insurer was entitled to disclaim coverage under fire insurance policy where it had been unable to locate insured and bring about his cooperation despite diligent efforts, including (1) making numerous telephone calls and personal visits to insured's last known residence and business addresses, (2) undertaking record searches of both New York and Texas Departments of Motor Vehicles, (3) conducting post office and prison index inquiries, (4) canvassing several establishments in area of insured's former place of business, (5) personally questioning insured's former employer, and (6) contacting Michigan authorities in pursuit of lead that insured had been issued traffic ticket in that state. State Farm Fire & Casualty Co. v Imeri, 182 A.D.2d 683, 582 N.Y.S.2d 463, 1992 N.Y. App. Div. LEXIS 5962 (N.Y. App. Div. 2d Dep't 1992).

Insurer could not disclaim coverage on ground of insured's lack of cooperation where report prepared by private investigation firm hired by insurer to locate insured showed that insured did in fact timely respond to insurer's final notice, provided explanation for his prior unavailability, and pledged his full cooperation with investigation. Commercial Union Ins. Co. v Burr, 226 A.D.2d 416, 641 N.Y.S.2d 69, 1996 N.Y. App. Div. LEXIS 3539 (N.Y. App. Div. 2d Dep't 1996).

118. —Effect of insurer's lack of diligence in locating insured

The defense of failure of the insured to cooperate was not allowed where the insured had given notice of the accident, forwarded summons and complaint in the action to the insurer and verified the answer prepared by it, although the insured could not be located at the time of trial, since insurer had made no efforts to locate the insured for almost two years before the trial. Apfel v London Guarantee & Acci. Co., 275 N.Y. 471, 11 N.E.2d 303, 275 N.Y. (N.Y.S.) 471, 1937 N.Y. LEXIS 1459 (N.Y. 1937).

Where an injured person who has obtained judgment against an insured motorist seeks to enforce liability of the insurer, and the insurer seeks to avoid liability by reason of the insured's failure to cooperate in defense of the action, the burden of proving breach of the cooperation clause is upon the insurer, and this burden is not met by merely showing that the insurer's attorneys made some attempts to contact insured by telephone and letter but, after once contacting him and obtaining a written statement, failed to follow up obvious leads and keep contact with him. Wallace v Universal Ins. Co., 18 A.D.2d 121, 238 N.Y.S.2d 379, 1963 N.Y. App. Div. LEXIS 4219 (N.Y. App. Div. 1st Dep't), aff'd, 13 N.Y.2d 978, 244 N.Y.S.2d 779, 194 N.E.2d 688, 1963 N.Y. LEXIS 939 (N.Y. 1963).

In an action by a judgment creditor of an automobile owner and operator against their insurer to recover the amount of damages awarded to him from the insurer, the collision giving rise to the damage having occurred in 1953, insurer was not entitled to disclaim on the ground of lack of cooperation by insureds where it had not itself exercised diligence and good faith in attempting to get cooperation from them, it appearing that assureds were apparently cooperating as late as 1960 but the insurer later lost track of them so that they were not available when the case against it came up for trial. Kehoe v Motorists Mut. Ins. Co., 20 A.D.2d 308, 246 N.Y.S.2d 827, 1964 N.Y. App. Div. LEXIS 4351 (N.Y. App. Div. 3d Dep't 1964).

While field claims representative of automobile liability insurer for defendant motorist made first attempt to locate the defendant motorist three months after the accident at an address different from the one given by the motorist three days after the accident,

the representative did not thereafter attempt to contact the motorist until two years later, the law firm retained by the insurer for the case only made four attempts to locate the motorist by mail and no effort was made to personally contact him and, when finally contacted, the motorist showed willingness to cooperate, the insured failed to establish the motorist's lack of cooperation and was not warranted in disclaiming coverage. Alexander v Stone, 45 A.D.2d 216, 357 N.Y.S.2d 271, 1974 N.Y. App. Div. LEXIS 4460 (N.Y. App. Div. 4th Dep't 1974).

Insurer undertook diligent efforts to bring about insured's cooperation where it attempted to contact insured, personally and by mail, on numerous occasions over period of several months, and even retained services of private investigation firm for such purpose. Commercial Union Ins. Co. v Burr, 226 A.D.2d 416, 641 N.Y.S.2d 69, 1996 N.Y. App. Div. LEXIS 3539 (N.Y. App. Div. 2d Dep't 1996).

Insurer failed to act diligently in seeking to bring about insured's cooperation in settling underlying personal injury case, and thus was precluded from disclaiming coverage, where insurer made no attempt to persuade insured that plaintiff had reasonable chance of success in his case, and insurer did not give insured opportunity to reconsider its position in opposing settlement. New York City Hous. Auth. v Housing Auth. Risk Retention Group, Inc., 203 F.3d 145, 2000 U.S. App. LEXIS 1173 (2d Cir. N.Y. 2000).

119. —False or conflicting statements by insured

An automobile liability insurer was entitled to a declaratory judgment against the insured of non-liability on the policy issued to him on the ground of his breach of the cooperation clause in the policy, where insured lied to it as to identity of the driver of the car at the time it was involved in a certain accident, stating that he was not himself the driver of the car. State Farm Mut. Auto. Ins. Co. v Brown, 21 A.D.2d 742, 250 N.Y.S.2d 244, 1964 N.Y. App. Div. LEXIS 3751 (N.Y. App. Div. 4th Dep't 1964).

Where defendant in reporting automobile accident to his insurer stated that he had been cut off by an unknown vehicle and caused to swerve and strike a light pole when actually he had fallen asleep at the wheel, declaratory judgment was granted that the insurer was not obligated to defend a negligence action brought against him by passengers in the car because the insured's conduct in giving false evidence in reporting the accident was a breach of the condition of the policy requiring cooperation. National Grange Mut. Ins. Co. v Austin, 23 A.D.2d 776, 258 N.Y.S.2d 439, 1965 N.Y. App. Div. LEXIS 4464 (N.Y. App. Div. 2d Dep't 1965).

Where insured, in statement to plaintiff's attorneys, said that he was "going too fast to stop" and subsequently on examination before trial stated that he had seen plaintiff but "it was too late," insurer's defense of lack of co-operation was not established since there was no material variance between the statement given to plaintiff's attorneys and his examination before trial testimony, nor did it appear that the insured was ever told not to make any statement of facts to anyone other than his insurer and the statement which he did make was not an admission or assumption of liability. Greenhalgh v Commercial Ins. Co., 25 A.D.2d 916, 270 N.Y.S.2d 40, 1966 N.Y. App. Div. LEXIS 4154 (N.Y. App. Div. 3d Dep't 1966).

Insurance company would not be required to defend and indemnify its insured in connection with incident in which insured's husband struck and killed pedestrian where (1) husband told insured and insurance company that he had struck deer, and insurance company paid for damage to insured's vehicles, and (2) insured and her husband did not inform insurance company of truth until after husband was convicted of leaving scene of incident without reporting. Lewis v Nationwide Mut. Ins. Co., 202 A.D.2d 816, 609 N.Y.S.2d 106, 1994 N.Y. App. Div. LEXIS 2498 (N.Y. App. Div. 3d Dep't 1994).

It is not a defense in an action by an injured party against the insurer, pursuant to former § 109 [predecessor to former § 167, now § 3420], to recover on a judgment secured against a judgment-proof assured, that assured failed to comply with the terms of the policy in that, among other things, he failed to cooperate with the insurer in defense of the action by failing to advise the insurer of an admission made that he was "drowsing" at the wheel at the time of the accident, and that the defense was thereby prejudiced and the policy vitiated, where information as to drowsing was not withheld from any improper motive and insurer was put on notice of assured's "drowsing" before the action was commenced and answer interposed. Killeen v Preferred Acc. Ins. Co., 267 N.Y.S. 320, 149 Misc. 397, 1933 N.Y. Misc. LEXIS 1662 (N.Y. Sup. Ct. 1933), aff'd, 242 A.D. 725, 273 N.Y.S. 427, 1934 N.Y. App. Div. LEXIS 6964 (N.Y. App. Div. 1934).

An automobile liability insurer, in order to sustain a defense against an action brought pursuant to subd. 5 of former § 167 [now § 3420(c)] by an injured person who has recovered judgment against insured, on the basis of nonliability because of insured's failure to cooperate in defense of the action, has the burden of establishing breach of the policy provisions as to cooperation by the insured, including lack of good faith by the insured, which must be proved and cannot be inferred from conflicting statements of the insured carelessly made to an investigator following the accident, if insured appears at the trial and wholly and fairly testifies as a witness to what occurred. Rivera v Merchants Mut. Casualty Co., 27 Misc. 2d 139, 210 N.Y.S.2d 577, 1960 N.Y. Misc. LEXIS 3304 (N.Y. Mun. Ct. 1960).

Wilful falsification of identity of vehicle operator and failure to reveal truth thereof, coupled with other falsifications for a period of 6 months constituted noncooperation with insurer, relieving insurer from liability. Sweet v United States Fire Ins. Co., 72 Misc. 2d 1022, 340 N.Y.S.2d 957, 1973 N.Y. Misc. LEXIS 2322 (N.Y. Civ. Ct. 1973).

Insurer's motion to stay arbitration of an uninsured motorist claim was properly granted and N.Y. Ins. Law § 3420(d), requiring timely notice of denial of coverage after a notice of claim was filed, was properly found to be inapplicable because the insurer's denial of coverage was based on the insured's fraudulent misrepresentation that he was driving a covered vehicle during the accident. Since the denial was based on the fraudulent misrepresentation, the concerns of prejudice to the insured from the lack of timely notice were not present; the insurer's motion for a stay of arbitration was properly granted. Utica Mut. Ins. Co. v Reid, 22 A.D.3d 127, 799 N.Y.S.2d 509, 2005 N.Y. App. Div. LEXIS 8469 (N.Y. App. Div. 1st Dep't 2005).

120. Burden of going forward with evidence

Upon a showing by the insurer of an absence of the insured which remains unexplained despite reasonable efforts to locate the insured, the burden of going forward with the proof and supplying the data necessary to repel the adverse inference must rest on the assured. Campbell v Travelers Ins. Co., 35 A.D.2d 362, 317 N.Y.S.2d 444, 1970 N.Y. App. Div. LEXIS 3172 (N.Y. App. Div. 3d Dep't 1970), aff'd, 33 N.Y.2d 667, 348 N.Y.S.2d 982, 303 N.E.2d 707, 1973 N.Y. LEXIS 1024 (N.Y. 1973).

In action against insurance company for bad faith refusal to settle action against its insured, plaintiff has burden to prove that rejection by insurance company of offer of settlement within policy limits constituted deliberate, or at least reckless, decision to disregard interests of its insured. Roldan v Allstate Ins. Co., 149 A.D.2d 20, 544 N.Y.S.2d 359, 1989 N.Y. App. Div. LEXIS 9736 (N.Y. App. Div. 2d Dep't 1989).

Under subd. 5 of former § 167 [now § 3420(c)], there can be no question but that an insurance company can plead defenses by reason of breaches of policy conditions on the part of its insured as against a judgment claimant's attempt to enforce the insurer's liability; and the burden of proof in establishing such breaches rests with the insurer after which the burden of going forward with evidence to explain the breach shifts to plaintiffs. Wallace v Universal Ins., Inc., 227 N.Y.S.2d 999 (N.Y. Sup. Ct. 1962), modified, 18 A.D.2d 121, 238 N.Y.S.2d 379, 1963 N.Y. App. Div. LEXIS 4219 (N.Y. App. Div. 1st Dep't 1963).

121. Evidence

In action by teacher against emotionally handicapped student and his parents arising from incident in which student assaulted teacher in school, parents of student could have refused to sign authorization form which permitted their homeowner's insurance company to examine Family Court records pertaining to assault, and such refusal would not have been breach of obligation to cooperate, since CLS Family Ct Act § 380.1(3) permitted such

refusal to disclose information. Holyoke Mut. Ins. Co. v Jason B., 184 A.D.2d 550, 585 N.Y.S.2d 61, 1992 N.Y. App. Div. LEXIS 7820 (N.Y. App. Div. 2d Dep't 1992).

Insured engaged in willful conduct constituting material breach of policy, thus precluding his recovery under policy, where, without offering any explanation, he sought and obtained 6 adjournments of his examination under oath and then refused to submit to such examination unless insurer waived its right to assert affirmative defense of noncompliance with cooperation provision of policy. Sabel v Insurance Co. of N. Am., 251 A.D.2d 645, 676 N.Y.S.2d 478, 1998 N.Y. App. Div. LEXIS 7926 (N.Y. App. Div. 2d Dep't), app. denied, 92 N.Y.2d 813, 681 N.Y.S.2d 474, 704 N.E.2d 227, 1998 N.Y. LEXIS 3723 (N.Y. 1998).

Insurer was obligated to indemnify the insureds in the underlying personal injury action arising from a motor vehicle accident because the insurer had sufficient information to support its alleged disclaimer of coverage on the basis of noncooperation, at the latest, as of September 20, 2010, but the insurer's delay in disclaiming coverage on January 20, 2011, was not as soon as was reasonably possible Robinson v Global Liberty Ins. Co. of N.Y., 164 A.D.3d 1385, 84 N.Y.S.3d 255, 2018 N.Y. App. Div. LEXIS 6065 (N.Y. App. Div. 2d Dep't 2018).

In an action under former § 109 [predecessor to former § 167, now 3420] against an insurance carrier on the ground that the judgment against the insured is unsatisfied, where the defense is that insured failed to co-operate in defense of the prior action and is based on the fact that insured made a written statement after the accident which exonerated himself from liability, while, on trial of action, the insured testified to contrary facts which tended to establish that he was liable for the accident, the defendant has the right to introduce in evidence the written statement made by the insured for the purpose of showing lack of co-operation. Solomon v Preferred Acc. Ins. Co., 229 N.Y.S. 257, 132 Misc. 134, 1928 N.Y. Misc. LEXIS 876 (N.Y. App. Term 1928).

In an action against an insurer under former § 167 [now § 3420], evidence of the extent of investigation by the insurer for the trial of the action was relevant and material on the question of insurer's good faith, in interposing special defense of noncooperation on part of the insured. Cyr v American Guarantee & Liability Ins. Co., 242 F.2d 8, 1957 U.S. App. LEXIS 2752 (2d Cir. N.Y. 1957).

122. Waiver of disclaimer of liability by insurer

In actions under former § 167 [now § 3420] to recover because of unsatisfied judgments procured by plaintiffs against defendant's assured, a waiver by the defendant of conduct of the assured in refusing to co-operate in preparing for trial did not constitute a waiver of assured's subsequent refusal to appear at the trial of the action, nor prevent the defendant from disclaiming liability on that account. Briskman v Glens Falls Indem. Co., 251 A.D. 319, 296 N.Y.S. 519, 1937 N.Y. App. Div. LEXIS 6930 (N.Y. App. Div. 1937).

In an action by judgment creditors of an insured to recover the amounts of their judgments covered by an accident insurance policy under which defendant had disclaimed liability in an accident involving the operation of insured's automobile by insured's son, on the ground that insured had failed to co-operate with insurer, whether the act of the defendant in receiving a written statement from the insured amounted to a waiver of its right to claim this defense, is a question for the jury with the burden of proving lack of co-operation on the defendant and the burden of proving waiver on the plaintiff. Della-Posta v New York Casualty Co., 276 A.D. 770, 92 N.Y.S.2d 523, 1949 N.Y. App. Div. LEXIS 3266 (N.Y. App. Div. 1949).

Automobile liability insurer for defendant motorist waived its right to disclaim coverage on ground of lack of cooperation when insurer proceeded to defend the negligence action against the motorist and continued thereafter for three years to manage the defense thereof without seriously attempting to locate the motorist. Alexander v Stone, 45 A.D.2d 216, 357 N.Y.S.2d 271, 1974 N.Y. App. Div. LEXIS 4460 (N.Y. App. Div. 4th Dep't 1974).

Insurer's disclaimer of coverage based on insured's failure to give written notice of accident "as soon as is practical" was untimely as matter of law, where insurer did not advise insured that it was disclaiming coverage until almost 3 months after it received notice of injured party's suit against insured. Watson v Aetna Cas. & Sur. Co., 246 A.D.2d 57, 675 N.Y.S.2d 367, 1998 N.Y. App. Div. LEXIS 8282 (N.Y. App. Div. 2d Dep't 1998).

In insureds' action for declaratory judgment, insurer's assertion of untimely notice of claim as defense in its answer was timely notice of its disclaimer of coverage. American Mfrs. Mut. Ins. Co. v CMA Enters., 246 A.D.2d 373, 667 N.Y.S.2d 724, 1998 N.Y. App. Div. LEXIS 272 (N.Y. App. Div. 1st Dep't 1998).

Delay of two months caused by an insurer's need to investigate a claim was reasonable; thus, the insured made out a prima facie case that its denial of coverage was timely under N.Y. Ins. Law § 3420(d). Hermitage Ins. Co. v Arm-Ing, Inc., 46 A.D.3d 620, 847 N.Y.S.2d 628, 2007 N.Y. App. Div. LEXIS 12527 (N.Y. App. Div. 2d Dep't 2007).

Declaration that insurers were obligated to pay a share of the settlement and defense costs in an underlying personal injury action was proper because, although the commercial general liability and garage policies at issue excluded coverage for the claim, the insurers' disclaimer, issued more than four months after receiving notification of the third-party action brought by a state insurance fund, was untimely as a matter of law, and no showing of prejudice was required under N.Y. Ins. Law § 3420(d). State Ins. Fund v Am. Hardware Mut. Ins. Co., 64 A.D.3d 581, 882 N.Y.S.2d 300, 2009 N.Y. App. Div. LEXIS 5658 (N.Y. App. Div. 2d Dep't 2009).

Insurer that took no action for over eight months to disclaim uninsured motorist coverage when passengers failed to return completed proof of claim forms did not disclaim coverage as soon as possible as required by N.Y. Ins. Law § 3420(d); the passengers' failure to return the forms did not extend the insurer's time to disclaim or excuse its failure to do so. Matter of N.Y. Cent. Mut. Fire Ins. Co. v Aguirre, 7 N.Y.3d 772, 820 N.Y.S.2d 848, 854 N.E.2d 146, 2006 N.Y. LEXIS 1484 (N.Y. 2006).

123. Procedural matters

Issues of fact pertaining to opportunity of plaintiffs to conduct pretrial examination of insured out of state, whether insured might have been examined in New York State shortly before trial, whether conduct of insured in telephone conversation, and at other times, could be characterized as one of "willful and avowed obstruction" and whether illness of insured's mother restrained insured from attending examinations in New York State, precluded summary judgment in action against insurer based upon judgment entered against insured after defendant had disclaimed on its policy on ground of noncooperation. Van Opdorp v Merchants Mut. Ins. Co., 55 A.D.2d 810, 390 N.Y.S.2d 279, 1976 N.Y. App. Div. LEXIS 15614 (N.Y. App. Div. 4th Dep't 1976).

Court erred in permitting law firm retained by insurance company to withdraw as defense counsel for company's insured on ground that company was disclaiming coverage due to insured's lack of cooperation and had directed firm to withdraw since (1) record was devoid of proof regarding company's efforts to contact its insured, (2) nonaction, which was only factual basis for finding that insured failed to cooperate, did not demonstrate attitude of "willful and avowed obstruction" on part of insured, and (3) proper procedure for establishing insurance company's right to deny coverage was declaratory judgment action, not motion to withdraw as counsel. Flans v Martini, 136 A.D.2d 498, 523 N.Y.S.2d 819, 1988 N.Y. App. Div. LEXIS 434 (N.Y. App. Div. 1st Dep't 1988).

Cause of action based on insurance company's alleged breach of its contractual duty to indemnify its insured under automobile insurance policy against liability for bodily injury accrued when liability was imposed by judgment entered against insured. Roldan v Allstate Ins. Co., 149 A.D.2d 20, 544 N.Y.S.2d 359, 1989 N.Y. App. Div. LEXIS 9736 (N.Y. App. Div. 2d Dep't 1989).

Cause of action based on insurance company's alleged bad faith refusal to settle litigation against its insured under automobile insurance policy against liability for bodily injury accrued when liability was imposed by judgment entered against insured since it was not until that date that liability in excess of policy limits was imposed on insured; further, court would reject contention that cause of action did not accrue until later date of final

appellate court action on entry of judgment since cause of action did not allege violation of duty to defend but only of duty to indemnify or to settle in good faith. Roldan v Allstate Ins. Co., 149 A.D.2d 20, 544 N.Y.S.2d 359, 1989 N.Y. App. Div. LEXIS 9736 (N.Y. App. Div. 2d Dep't 1989).

Six-year statute of limitations of CLS CPLR § 213(2) applied to causes of action against insurance company for breach of its contractual duty to indemnify its insured and for bad faith refusal to settle litigation against its insured under automobile insurance policy against liability for bodily injury. Roldan v Allstate Ins. Co., 149 A.D.2d 20, 544 N.Y.S.2d 359, 1989 N.Y. App. Div. LEXIS 9736 (N.Y. App. Div. 2d Dep't 1989).

On causes of action against insurance company for breach of its contractual duty to indemnify its insured and for bad faith refusal to settle litigation against its insured under automobile insurance policy against liability for bodily injury, statute of limitations was suspended during period after court erroneously granted motion to vacate default judgment against insured and until such order was reversed. Roldan v Allstate Ins. Co., 149 A.D.2d 20, 544 N.Y.S.2d 359, 1989 N.Y. App. Div. LEXIS 9736 (N.Y. App. Div. 2d Dep't 1989).

Insurance company was not entitled, under CLS CPLR § 3211(a)(7), to dismissal of causes of action for bad faith refusal to indemnify its insured and bad faith refusal to settle action against its insured since motion was addressed solely to adequacy of pleadings and did not put plaintiff to her proof. Roldan v Allstate Ins. Co., 149 A.D.2d 20, 544 N.Y.S.2d 359, 1989 N.Y. App. Div. LEXIS 9736 (N.Y. App. Div. 2d Dep't 1989).

Insurance company was not entitled to dismissal of cause of action on ground that it constituted claim for punitive damages alone since complaint purported to state cause of action for fraud and alleged that insurance company issued automobile liability policy even though it never intended to honor covenants of policy, that representatives of insurance company made intentional misrepresentations to insured, and that insured justifiably relied on those representations. Roldan v Allstate Ins. Co., 149 A.D.2d 20, 544 N.Y.S.2d 359, 1989 N.Y. App. Div. LEXIS 9736 (N.Y. App. Div. 2d Dep't 1989).

Insurance company was entitled to dismissal of cause of action which attempted to impose strict liability on it for its failure to settle underlying action against its insured within policy limits on proof that its policy was in effect and that it failed to accept offer within policy limits since liability for failure to settle within policy limits requires showing of bad faith. Roldan v Allstate Ins. Co., 149 A.D.2d 20, 544 N.Y.S.2d 359, 1989 N.Y. App. Div. LEXIS 9736 (N.Y. App. Div. 2d Dep't 1989).

Court erred in dismissing, on res judicata grounds, counterclaim by defendant insurer against its insured (landlord) seeking to recover damages allegedly sustained as result of insured's failure to cooperate in settlement negotiations in tenant's action against it, since issue decided in previous declaratory judgment action between parties was whether insurance policy covered judgment rendered in favor of tenant, and issue raised in counterclaim was neither raised nor litigated in declaratory judgment action. Jefferson Towers, Inc. v Public Serv. Mut. Ins. Co., 195 A.D.2d 311, 600 N.Y.S.2d 41, 1993 N.Y. App. Div. LEXIS 7119 (N.Y. App. Div. 1st Dep't 1993).

Insurer's delay in completing its investigation of claim does not excuse insured from timely commencing action since insured is bound by terms of policy either to commence action prior to expiration of limitations period or to obtain waiver or extension of such provision. Brown v Royal Ins. Co. of Am., 210 A.D.2d 279, 620 N.Y.S.2d 399, 1994 N.Y. App. Div. LEXIS 12575 (N.Y. App. Div. 2d Dep't 1994).

Insurer was not entitled to summary judgment where there were fact issues as to whether insured's failure to cooperate with insurer in investigation of insurance claim, based on insured's failure to appear for continued examination under oath, was willful disregard of insured's policy obligations or was due to deteriorating physical and mental condition, and subsequent suspension from practice of law, of insured's former counsel; insurer failed to sustain its burden to prove that insured willfully refused to cooperate in investigation and to participate in examination under oath in violation of insurance contract where insured appeared at initial examination under oath but subsequently failed to submit to subsequent examinations, allegedly by reason of conduct of her incapacitated counsel. Baerga v Transtate Ins. Co., 213 A.D.2d 217, 623 N.Y.S.2d 587, 1995 N.Y. App. Div. LEXIS 2762 (N.Y. App. Div. 1st Dep't 1995).

Court erred in dismissing insurer's affirmative defense of failure to cooperate in action for breach of insurance contract where fact issue existed as to whether insured substantially performed his obligations under cooperation clause. Ashline v Genesee Patrons Coop. Ins. Co., 224 A.D.2d 847, 638 N.Y.S.2d 217, 1996 N.Y. App. Div. LEXIS 1268 (N.Y. App. Div. 3d Dep't 1996).

Insured who made October 1996 claim under uninsured motorist endorsement would be directed to submit to physical examination by insurer's doctors, to submit to examination under oath, and to provide authorization for hospital and medical records and for no-fault, employment, and workers' compensation records where insurer had not obtained any medical information about him since April 1992. Travelers Ins. Co. v Lianides, 246 A.D.2d 490, 668 N.Y.S.2d 200, 1998 N.Y. App. Div. LEXIS 693 (N.Y. App. Div. 1st Dep't 1998).

Trial court should not have denied the insurer's petition to stay arbitration on the grounds that the disclaimer was untimely as a matter of law because the insurer's contention that the policy language expressed a lack of coverage did not require prompt disclaimer. Matter of Hartford Acc. & Indem. Co. v Dellegrazie, 2021 N.Y. App. Div. LEXIS 321 (N.Y. App. Div. 2d Dep't 2021).

In action under CLS Ins § 3420(a)(2), which authorizes direct action against insurer by injured person when judgment obtained against insured remains unsatisfied, plaintiff (subrogee of injured party) was entitled to summary judgment despite fact that insured did not transmit summons and complaint to insurer in underlying action by injured party, since insurer concededly had sufficient notice of accident and had ample opportunity to investigate, and there was no showing of willful obstruction by insureds or of efforts by insurer to enlist cooperation of insured. Wausau Ins. Co. v Home Indem. Co., 151 Misc. 2d 302, 573 N.Y.S.2d 247, 1991 N.Y. Misc. LEXIS 392 (N.Y. Civ. Ct. 1991).

124. Other matters

It is a good defense to an action, brought under former § 109 [Predecessor to former § 167, now § 3420] by a person injured by an automobile of another, against an insurance company to recover the amount of the judgment which the injured person had recovered against the owner of the automobile, that the insured made an affidavit in effect that at the time of the injury the car was being used by the chauffeur for the chauffeur's own benefit, and that the insured after the injury failed to co-operate with the insurer in the defense of the action as required by the terms of the insurance policy. In such an action by an injured person, the insurer is entitled to assert any defense which it might have asserted in an action by the insured, and failure on the part of the insured to co-operate in the defense of the action would be a good defense to an action by the insured against the insurer. Under former § 109 [predecessor to former § 167, now § 3420] a right of action does not accrue to the injured person against the insurer on the ground that the insured is insolvent or has gone into bankruptcy, until an execution issued on a judgment recovered against the insured is returned unsatisfied by reason of the insolvency or bankruptcy of the insured. So where insurer cancels policy on ground that failure of insured to co-operate, which it has a right to do before a judgment is obtained by the injured person against the insured, the liability of the insurer ceases to exist, and no right of action survives to the injured person. Schoenfeld v New Jersey Fidelity & Plate Glass Ins. Co., 203 A.D. 796, 197 N.Y.S. 606, 1922 N.Y. App. Div. LEXIS 7306 (N.Y. App. Div. 1922).

The "no-action" condition in an insurance policy did not bar an insured's cause of action based on the insurer's failure to defend the insured in a liability action brought against her by a third party, since the insured's action was for breach of contract, and not on the policy, and in denying the efficacy of the policy the insurer was precluded from raising such provision as a defense. Patterson v Allstate Ins. Co., 34 A.D.2d 1081, 312 N.Y.S.2d 147, 1970 N.Y. App. Div. LEXIS 4264 (N.Y. App. Div. 3d Dep't 1970).

Insured, who submitted to examination under oath and agreed to provide insurer with certain documents but thereafter continuously refused to provide such documentation without explanation or excuse, materially breached policy that explicitly required him to provide information to insurer on request; mere fact that insurer participated in pretrial discovery pursuant to CLS CPLR Art 31 did not act as waiver of its right to assert breach. Cabe v Aetna Casualty & Surety Co., 153 A.D.2d 653, 544 N.Y.S.2d 862, 1989 N.Y. App. Div. LEXIS 11055 (N.Y. App. Div. 2d Dep't 1989).

Insured who was involved in automobile accident did not breach insurance contract by settling his claim against insurer of other vehicle where insured settled only after his insurer rejected his underinsured motorist claim as "not valid"; by repudiating liability, insurer released insured from requirement that he obtain insurer's consent to accept settlement offer from other insurer. Automobile Ins. Co. v Stillway, 165 A.D.2d 572, 568 N.Y.S.2d 727, 1991 N.Y. App. Div. LEXIS 4469 (N.Y. App. Div. 1st Dep't 1991).

Insured did not establish waiver of policy requirement of prior written consent to any proposed settlement based on insurer's failure to respond to letter written by insured's attorney to insurer stating that settlement offer "has been accepted, unless we receive objection from [insured] within ten days," where letter did not include copy of release that insured intended to issue upon acceptance of offer, which did not preserve insurer's subrogation rights. State Farm Auto. Ins. Co. v Blanco, 208 A.D.2d 933, 617 N.Y.S.2d 898, 1994 N.Y. App. Div. LEXIS 10609 (N.Y. App. Div. 2d Dep't 1994), app. denied, 85 N.Y.2d 802, 624 N.Y.S.2d 373, 648 N.E.2d 793, 1995 N.Y. LEXIS 276 (N.Y. 1995).

Insured's refusal to accept legal representation at expense of insurance company, and her insistence on representing herself, constituted willful obstruction and violation of her duty to cooperate with insurance company; thus, insured would be directed to accept insurance company's choice of counsel in defence of underlying action. Atlantic Mut. Ins. Co. v Struve, 210 A.D.2d 112, 621 N.Y.S.2d 5, 1994 N.Y. App. Div. LEXIS 12726 (N.Y. App. Div. 1st Dep't 1994), app. denied, 85 N.Y.2d 803, 624 N.Y.S.2d 373, 648 N.E.2d 793, 1995 N.Y. LEXIS 318 (N.Y. 1995).

Insurer was entitled to stay of arbitration of insured's claim for underinsurance coverage on basis that insured failed to comply with condition precedent to coverage by releasing her claim against tortfeasors and their insurer without her insurer's knowledge or consent in derogation of insurer's subrogation rights, despite insured's contention that consent to settlement condition applied on to uninsured motorist coverage and was not contained in underinsurance endorsement, where general conditions of policy expressly required notification and cooperation and required insured to do "whatever is necessary to enable" insurer to exercise its subrogation rights and "do nothing after loss to prejudice" those rights. Travelers Ins. Co. v Magyar, 217 A.D.2d 954, 629 N.Y.S.2d 900, 1995 N.Y. App. Div. LEXIS 8379 (N.Y. App. Div. 4th Dep't 1995).

Insured, as injured plaintiffs' employer and third-party defendant in plaintiffs' underlying action, was entitled to summary judgment declaring that its insurance carrier was obligated to provide for its defense and indemnification in underlying action where (1) insurer had permitted insured to select independent counsel in underlying action because insured's interests were at odds with its own, and (2) independent counsel's decision, to not oppose motion for summary judgment on common-law and contractual indemnification claims against insured in underlying action, was reasonable litigation strategy and thus did not constitute assumption of obligation without insurer's consent. Nelson Elec. Contr. Corp. v Transcontinental Ins. Co., 231 A.D.2d 207, 660 N.Y.S.2d 220, 1997 N.Y. App. Div. LEXIS 8172 (N.Y. App. Div. 3d Dep't), app. denied, 91 N.Y.2d 802, 667 N.Y.S.2d 682, 690 N.E.2d 491, 1997 N.Y. LEXIS 4102 (N.Y. 1997).

In action to enforce physical damage insurance policy following theft of insured's car, insurer was not entitled to summary judgment on ground that insured's failure to have timely obtained photo inspection of car after he purchased it resulted in suspension of insurance coverage under 11 NYCRR § 67.6, where insurer failed to satisfy its strict obligation to orally inform insured of urgent need for photo inspection pursuant to 11 NYCRR § 67.4(c)(1). Govan v Motor Ins. Corp./CIM Ins., 167 Misc. 2d 733, 643 N.Y.S.2d 883, 1996 N.Y. Misc. LEXIS 191 (N.Y. App. Term 1996).

Insurer was not required to pay fire damage claim asserted under insured's business property/liability policy prior to determining insured's claim for business interruption loss under separate property and business policy, where arson was suspected cause of fire. Grand Metro Transit Mix Corp. v Michigan Mut. Ins. Co., 170 Misc. 2d 872, 652 N.Y.S.2d 691, 1996 N.Y. Misc. LEXIS 489 (N.Y. Sup. Ct. 1996).

Insurer could not deny claim for lack of cooperation if insured did not produce its public adjuster for Examination Under Oath. Insurance Department, Opinions of General Counsel, Opinion Number 01-09-04.

XI. Persons Entitled to Maintain Actions

125. In general

Specific mention of persons to whom a right of action is accorded implies exclusion of all others. Jackson v Citizens Casualty Co., 252 A.D. 393, 299 N.Y.S. 644, 1937 N.Y. App. Div. LEXIS 5676 (N.Y. App. Div. 1937), aff'd, 277 N.Y. 385, 14 N.E.2d 446, 277 N.Y. (N.Y.S.) 385, 1938 N.Y. LEXIS 993 (N.Y. 1938).

Subdivision (7) of former § 167 [now § 3420(b)], added by ch. 409 of the Laws of 1945, authorizes the giving of notice of claim against a liability policy by three classes of judgment creditors in addition to the injured person, namely contribution creditors, indemnity creditors, and assignees. Greyhound Corp. v General Acci. Fire & Life Assurance Corp., 19 A.D.2d 419, 243 N.Y.S.2d 870, 1963 N.Y. App. Div. LEXIS 2987 (N.Y. App. Div. 1st Dep't 1963), aff'd in part and rev'd in part, 14 N.Y.2d 380, 251 N.Y.S.2d 958, 200 N.E.2d 625, 1964 N.Y. LEXIS 989 (N.Y. 1964).

An action by plaintiff, whose decedent perished aboard a tug that was lost off the coast of New Jersey, against an insurance company which had disclaimed coverage under its policy with decedent's employers on the basis of a provision in the policy warranting that the tug would not be operated outside the waters of Long Island Sound, and which had paid $95,000 into an escrow account after employers covenanted not to bring suit against the insurance company should have been dismissed since, under New York law, third parties are specifically prohibited from commencing direct actions against marine protection and indemnity insurers. Cowan v Continental Ins. Co., 86 A.D.2d 646, 446 N.Y.S.2d 412, 1982 N.Y. App. Div. LEXIS 15187 (N.Y. App. Div. 2d Dep't 1982).

New York does not permit direct suits against insurers prior to notice of entry of unsatisfied judgment against insured. Abbate v Medbrod, 109 A.D.2d 768, 486 N.Y.S.2d 282, 1985 N.Y. App. Div. LEXIS 47255 (N.Y. App. Div. 2d Dep't 1985).

Stranger to policy of marine protection and indemnity insurance is precluded from bringing action for judgment declaring extent of insurer's duty to defend. Dunn v American Home Assurance Co., 158 A.D.2d 505, 551 N.Y.S.2d 268, 1990 N.Y. App. Div. LEXIS 1755 (N.Y. App. Div. 2d Dep't 1990).

Party injured in altercation with defendant was barred under doctrine of claim preclusion from bringing direct action under CLS Ins § 3420(b)(1) against homeowner's insurer of defendant and his parents to recover on any judgment obtainable against defendant where judgment had been entered on consent of insureds declaring that insurer had no duty to defend and/or indemnify them in any action against one or all of them arising out of incident. New York Cent. Mut. Fire Ins. Co. v Kilmurray, 181 A.D.2d 40, 585 N.Y.S.2d 599, 1992 N.Y. App. Div. LEXIS 8576 (N.Y. App. Div. 3d Dep't 1992).

Insurance company was entitled to summary judgment dismissing action for loss of consortium by wife of pedestrian, who was struck by vehicle driven by insured and who settled with insurer for policy limit of $100,000 for "bodily injury," since derivative damages for loss of consortium and direct damages must be added together to determine limit of liability for bodily injury sustained by one person; there was no basis to conclude that wife's injuries constituted separate "bodily injury." Champagne v State Farm Mut. Auto. Ins. Co., 185 A.D.2d 835, 586 N.Y.S.2d 813, 1992 N.Y. App. Div. LEXIS 9924 (N.Y. App. Div. 2d Dep't 1992), app. denied, 81 N.Y.2d 704, 595 N.Y.S.2d 399, 611

N.E.2d 299, 1993 N.Y. LEXIS 240 (N.Y. 1993), overruled in part, Liberty Mut. Fire Ins. Co. v National Cas. Co., 90 A.D.3d 859, 935 N.Y.S.2d 319, 2011 N.Y. App. Div. LEXIS 9104 (N.Y. App. Div. 2d Dep't 2011).

In third-party action by commercial tenant against insurance carrier that provided primary coverage to landlord, tenant was properly granted summary judgment declaring that it was additional insured under policy and that insurer must provide coverage for its liability in underlying personal injury action; fact that tenant agreed to indemnify landlord, pursuant to their lease agreement, did not absolve insurer of responsibility to provide coverage to tenant as additional insured under insurance contract. Austin v Juster Assocs., 222 A.D.2d 632, 636 N.Y.S.2d 356, 1995 N.Y. App. Div. LEXIS 13895 (N.Y. App. Div. 2d Dep't 1995).

Motion to intervene as defendant in insurer's action against insured for declaratory judgment was properly denied where proposed intervenor was stranger to insurance contract and thus had no right to enforce insurer's obligation until judgment against insured was rendered and remained unsatisfied. Tower Ins. Co. v Skate Key, Inc., 273 A.D.2d 158, 712 N.Y.S.2d 352, 2000 N.Y. App. Div. LEXIS 7501 (N.Y. App. Div. 1st Dep't 2000).

Insurance is a contract of indemnity generally for the benefit of the insured and those in privity with him, and former § 109 [predecessor to former § 167, now § 3420] upon the grounds of sound public policy, extends indemnity against liability arising from the negligent operation of automobiles to and for the benefit of the persons injured. Bakker v Aetna Life Ins. Co., 265 N.Y.S. 231, 148 Misc. 162, 1933 N.Y. Misc. LEXIS 1606 (N.Y. Sup. Ct.), aff'd, 240 A.D. 880, 267 N.Y.S. 956, 1933 N.Y. App. Div. LEXIS 6917 (N.Y. App. Div. 1933).

Unless a liability policy is issued for the express benefit of a claimant he has no rights thereunder except such as are created by former § 109 [predecessor to former § 167, now § 3420]. Pisciotta v Preston, 10 N.Y.S.2d 44, 170 Misc. 376, 1938 N.Y. Misc. LEXIS 2342 (N.Y. Sup. Ct. 1938).

An action under former § 167 [now § 3420] is exclusively vested in an injured person and is available to no other. Fertig v General Acc. Fire & Life Assurance Corp., 13 N.Y.S.2d 872, 171 Misc. 921, 1939 N.Y. Misc. LEXIS 2112 (N.Y. Mun. Ct. 1939), aff'd, 54 N.Y.S.2d 466, 183 Misc. 1038, 1940 N.Y. Misc. LEXIS 1352 (N.Y. Sup. Ct. 1940).

The general rule that one not a party to an insurance contract cannot sue thereon applies to marine protection and indemnity policies since they are not excluded from such rule by the terms of former § 167 [now § 3420] which extend the right to sue on insurance policies to certain other parties. Meridian Trading Corp. v National Auto. & Casualty Ins. Co., 45 Misc. 2d 847, 258 N.Y.S.2d 16, 1964 N.Y. Misc. LEXIS 1376 (N.Y. Sup. Ct. 1964).

Trial court erred in denying an insurer's summary judgment motion pursuant to N.Y. C.P.L.R. 3212 in a declaratory judgment action concerning insurance coverage for damages to property; the insured's property damage claim did not fall within the ambit of N.Y. Ins. Law § 3420(d), and thus, absent proof that the insured was prejudiced by the alleged delay in disclaiming liability based on an exclusion in the insurance policy, the insurer was not estopped from making such a disclaimer, and the insurer made a prima facie showing of entitlement to judgment as a matter of law, and the insured failed to raise an issue of fact. Scappatura v Allstate Ins. Co., 6 A.D.3d 692, 775 N.Y.S.2d 162, 2004 N.Y. App. Div. LEXIS 4953 (N.Y. App. Div. 2d Dep't 2004).

Although the individual asbestos injury related claimants acted prematurely in interposing their counterclaims against the insurance companies prior to obtaining judgments against the insured insulation company that remained unsatisfied for 30 days after serving notice of entry of the judgments on the insurance companies and on the insulation company or its attorney, pursuant to N.Y. Ins. Law § 3420(a)(2), the insurance companies stood in a different position than the claimants who had to rely upon that statute for standing to sue. Thus, the insurance companies had the right to bring a declaratory judgment action. Continental Cas. Co. v Employers Ins. Co. of Wausau, 839 N.Y.S.2d 403, 16 Misc. 3d 223, 237 N.Y.L.J. 92, 2007 N.Y. Misc. LEXIS 3336 (N.Y. Sup. Ct. 2007), rev'd, 60 A.D.3d 128, 871 N.Y.S.2d 48, 2008 N.Y. App. Div. LEXIS 9966 (N.Y. App. Div. 1st Dep't 2008).

A claimant authorized by former § 167 [now § 3420] of the Insurance Law to bring suit against the insurer stands in the shoes of the insured and must abide by any applicable provisions of the policy. Florio v General Acci. Fire & Life Assurance Corp., 396 F.2d 510, 1968 U.S. App. LEXIS 6402 (2d Cir. N.Y. 1968).

Since an employee had not obtained a judgment against her employer, she lacked standing to seek declaratory relief against two insurance companies under N.Y. Ins. Law § 3420; therefore, the court granted the insurance companies' Fed. R. Civ. P. 12(b)(6) motion to dismiss. Vargas v Boston Chicken, Inc., 269 F. Supp. 2d 92, 2003 U.S. Dist. LEXIS 10900 (E.D.N.Y. 2003).

11 NYCRR § 216.9 (Regulation 64) applies when payment of $5,000 or more in settlement of third party liability claim is paid to claimant's attorney or other representative by insurer, whether directly by insurer or by its attorney, or by insured who is reimbursed by insurer. Insurance Department, Opinions of General Counsel, Opinion Number 02-04-01.

126. Person with judgment for damage or injury

In an action under former § 109 [predecessor to former § 167, now § 3420], to recover on a policy of liability insurance specifically exempting from its coverage any injuries caused by any of the assured's elevators while in charge of any person under the age fixed by law for elevator attendants, the burden is on the plaintiff to plead and prove that the elevator at the time of the accident was being operated by a person of legal age. Carles v Travelers' Ins. Co., 238 A.D. 43, 263 N.Y.S. 29, 1933 N.Y. App. Div. LEXIS 9413 (N.Y. App. Div.), reh'g denied, 239 A.D. 814, 263 N.Y.S. 976, 1933 N.Y. App. Div. LEXIS 8590 (N.Y. App. Div. 1933).

In actions against the insurer under a policy of automobile liability insurance, based on judgments recovered against an insured car owner for damages suffered by an infant when the owner approached his gasoline tank with a cigarette in his mouth and match in his hand to examine gauge, the father of infant has no claim against the defendant based on his judgment against the owner for expenses and loss of services where the policy covered only damages imposed on the owner by law for "bodily injury." Roche v United States Fidelity & Guaranty Co., 247 A.D. 335, 287 N.Y.S. 38, 1936 N.Y. App. Div. LEXIS 8254 (N.Y. App. Div.), aff'd, 273 N.Y. 473, 6 N.E.2d 410, 273 N.Y. (N.Y.S.) 473, 1936 N.Y. LEXIS 1485 (N.Y. 1936).

In personal injury actions arising out of a collision between a private vehicle and a fruit company vehicle owned by a leasing company that was insured by two insurance companies, a motion by the primary insurance company to dismiss the suit against it by plaintiffs, following judgment for them and against the other parties, as assignees of the fruit company's claim against the primary company, the trucking company, and the trucking company's excess insurer for neglecting to exercise good faith in the settlement negotiations and refusal to honor its obligation under the insurance contract to pay the amount due on the judgment, where plaintiffs stated a cause of action pursuant to Ins Law § 167 [now § 3420], in that their complaint sufficiently alleged notice to the primary insurance company of entry of the judgment in favor of plaintiffs, where plaintiffs thus were unsatisfied judgment creditors, and where even if the complaint did fail to allege the required notice, plaintiffs' affidavit in opposition to the primary insurance company's motion to dismiss remedied that defect. Fredericks v Home Indem. Co., 101 A.D.2d 614, 474 N.Y.S.2d 870, 1984 N.Y. App. Div. LEXIS 18154 (N.Y. App. Div. 3d Dep't 1984).

In action by accident victim to recover prior personal injury judgment directly from insurance company allegedly insuring car owned by judgment debtor who could no longer be located, insurer was not entitled to summary judgment where, although insurer denied having ever issued policy on car and plaintiff could offer no direct proof that any policy existed, jury question was presented based on indirect proof that insurance company had previously paid property damage claim in connection with same accident and had paid by check showing policy number, policy inception date, and name of issuing agent. Brown v Insurance Co. of North America, 123 A.D.2d 162, 511 N.Y.S.2d 149, 1987 N.Y. App. Div. LEXIS 39897 (N.Y. App. Div. 3d Dep't 1987).

In action by injured party against insurer pursuant to CLS Ins § 3420(b)(1), court properly granted plaintiff judgment against insurer in amount of $200,000, which was policy limit, even though insurer had already paid its insured $200,000 to cover loss to plaintiff, where insured had paid no part of that sum to plaintiff. Fisons Corp. v Lumbermens Mut. Cas. Co., 229 A.D.2d 925, 645 N.Y.S.2d 230, 1996 N.Y. App. Div. LEXIS 8951 (N.Y. App. Div. 4th Dep't 1996).

Automobile insurer was entitled to summary judgment dismissing insured's action to recover no-fault benefits where insured, having previously elected arbitration forum, waived her right to commence action based on claims arising from same accident. Mack v State Farm Mut. Auto. Ins. Co., 251 A.D.2d 1083, 675 N.Y.S.2d 575, 1998 N.Y. App. Div. LEXIS 7206 (N.Y. App. Div. 4th Dep't 1998).

Trial court erred in denying defendants' motion to dismiss, pursuant to N.Y. C.P.L.R. 3211, a declaratory judgment action pursuant to N.Y. C.P.L.R. 3001 concerning insurance coverage; the action had to be dismissed a premature, as the injured party had failed to obtain a judgment against a tortfeasor as required by N.Y. Ins. Law § 3420(a)(2). Lang v Hanover Ins. Co., 309 A.D.2d 1123, 766 N.Y.S.2d 915, 2003 N.Y. App. Div. LEXIS 11242 (N.Y. App. Div. 3d Dep't 2003), aff'd, 3 N.Y.3d 350, 787 N.Y.S.2d 211, 820 N.E.2d 855, 2004 N.Y. LEXIS 3525 (N.Y. 2004).

Because a child was pursuing a personal injury action solely to obtain a judgment or settlement in order to proceed directly against a debtor's liability insurer under N.Y. Ins. Law § 3420, the action was permitted even after the debtor's discharge in bankruptcy; thus, the trial court erred in dismissing the action on the ground of discharge in bankruptcy. Pomerantz v In-Stride, Inc., 39 A.D.3d 522, 835 N.Y.S.2d 589, 2007 N.Y. App. Div. LEXIS 4271 (N.Y. App. Div. 2d Dep't 2007).

Trial court properly denied an injured pedestrian's motion for summary judgment in his action to recover the amount of an unsatisfied judgment against an insured and granted the insurer's cross-motion for summary judgment because the insurer made a prima facie showing that the pedestrian failed to act diligently in attempting to ascertain the insurer's identity and in expeditiously notifying it of his claim, the pedestrian failed to raise a triable issue of fact in opposition, and the insurer was not required to cite the pedestrian's failure to provide notice in its disclaimer letter where the pedestrian did not notify the insurer of his claim until after the insured had done so. Glanz v New York Mar. & Gen. Ins. Co., 150 A.D.3d 704, 54 N.Y.S.3d 50, 2017 N.Y. App. Div. LEXIS 3434 (N.Y. App. Div. 2d Dep't 2017).

Owner of a vehicle damaged in an accident with a tractor trailer lacked standing to file suit against the insurer of the tractor trailer for payment of his property damages claim because the vehicle owner had not obtained a judgment against the tractor trailer owner, which was a condition precedent to a direct suit against the insurer. Carr v Haas, 163 A.D.3d 1212, 80 N.Y.S.3d 716, 2018 N.Y. App. Div. LEXIS 5175 (N.Y. App. Div. 3d Dep't 2018).

An insurance company, which had issued an indemnity policy against damages caused by a certain steamship was not liable on said policy to a person injured by the steamship prior to his obtaining judgment against the insured, since that person's only right against the insurance company was based on former § 167 [now § 3420] and he must take that right subject to such statutory provisions. Oakes v United States, 35 F. Supp. 868, 1940 U.S. Dist. LEXIS 2395 (E.D.N.Y. 1940).

Where a plaintiff was injured on insured's premises when he stepped into an open elevator shaft while being conducted by insured from the first to fifth floor, the plaintiff's rights under former § 167 [now § 3420] are to be measured by the protection and coverage afforded the insured under the terms and provisions of the policy. Lee v Aetna Casualty & Surety Co., 81 F. Supp. 1008, 1949 U.S. Dist. LEXIS 1779 (D.N.Y.), aff'd, 178 F.2d 750, 1949 U.S. App. LEXIS 2575 (2d Cir. N.Y. 1949).

Passengers maintaining personal injury claims in New York state courts against water taxi service, who had not yet obtained judgments, were barred by Ins § 3420 from intervening as defendants, either as of right or permissively, in water taxi service's marine insurer's declaratory judgment action against taxi service seeking to void or deny coverage under marine insurance policy, since granting intervention would circumvent judgment requirement of statute, prerequisite for actions by injured third parties against indemnity insurers, and create right not contemplated by state legislature. Hartford Fire Ins. Co. v Mitlof, 123 F. Supp. 2d 762, 2000 U.S. Dist. LEXIS 18200 (S.D.N.Y. 2000).

127. Person claiming right of subrogation

In an action by an excess insurer against a primary insurer seeking relief for the primary insurer's breach of its fiduciary duty in defending an underlying personal injury action, the lower court improperly treated the primary insurer's cross-motion for summary judgment as one to dismiss addressed to the face of the pleading, where there had been no disclosure, where there existed triable issues which could not be resolved solely upon the affidavits adduced, and where the pleadings raised serious issues involving ethical considerations in terms of the fiduciary obligations of the parties. Moreover, the court in denying the excess insurer's complaint in its own right, improperly held that the excess insurer could not proceed in its individual capacity and that any relief which could be sought was solely as subrogee of its insureds, where the primary insurer acted as fiduciary and owed a primary obligation to its insureds and to the excess insurer to exercise good faith in handling the defense of the underlying action, and where any right of action arising from the breach of fiduciary duty was the result of the independent and direct duty owed to the excess insurer and was not dependent upon equitable principles of subrogation. Hartford Acci. & Indem. Co. v Michigan Mut. Ins. Co., 93 A.D.2d 337, 462 N.Y.S.2d 175, 1983 N.Y. App. Div. LEXIS 17128 (N.Y. App. Div. 1st Dep't 1983), aff'd, 61 N.Y.2d 569, 475 N.Y.S.2d 267, 463 N.E.2d 608, 1984 N.Y. LEXIS 4181 (N.Y. 1984).

Release clause executed by injured pedestrian, which provided that receipt of payment from responsible driver's insurance company in "no way" reflected payment or release of obligation to pay "by any no-fault carrier no-fault payments" to pedestrian, was sufficient to protect subrogation rights of pedestrian's insurer; accordingly, driver was not entitled to summary judgment dismissing action brought by pedestrian's insurer to recover first-party payments made to pedestrian. State Farm Mut. Auto. Ins. Co. v La Forte, 125 A.D.2d 563, 509 N.Y.S.2d 632, 1986 N.Y. App. Div. LEXIS 62855 (N.Y. App. Div. 2d Dep't 1986).

Premises liability insurer, which had paid judgment rendered against one of its insureds, could not maintain subrogation action for indemnification from others who were insured under same policy, even though such other insureds fell under exclusion in policy's coverage, where insurer had undertaken defense of all insureds in underlying action, and had solicited their cooperation, without informing them that it reserved right to seek subrogation against them. Weinreb v Weinreb, 140 A.D.2d 226, 528 N.Y.S.2d 74, 1988 N.Y. App. Div. LEXIS 5383 (N.Y. App. Div. 1st Dep't 1988).

In action by leather tannery against manufacturer of spray booths used at tannery for damages caused by fire, in which tannery's insurance company was involved as subrogee of tannery, manufacturer was not entitled to summary judgment on ground that its insurance company and tannery's insurance company were part of same insurance company since (1) attorney's affirmation that insurance companies were under common management, which was only proof submitted by manufacturer on issue, was in inadmissible form since attorney was without personal knowledge, and (2) affidavit by officer of tannery's insurance company raised factual dispute sufficient to resist summary judgment where officer averred that, although companies were part of same group, they were distinct corporate entities. Fashion Tanning Co. v Fulton County Electrical Contractors, Inc., 142 A.D.2d 465, 536 N.Y.S.2d 866, 1989 N.Y. App. Div. LEXIS 95 (N.Y. App. Div. 3d Dep't 1989).

In personal injury action by employee of subcontractor against party who was both general contractor and owner of premises (defendant), insurance carrier for defendant was responsible for entire judgment rendered in favor of employee, regardless of fact that subcontractor as third party defendant was found partially responsible for injury, since insurer had no right of subrogation

against subcontractor where subcontractor had obtained and paid for insurance coverage on behalf of defendant. Fowler v Stillwater Assoc., Ltd., 169 A.D.2d 226, 572 N.Y.S.2d 558, 1991 N.Y. App. Div. LEXIS 10147 (N.Y. App. Div. 4th Dep't 1991).

Malpractice insurer of physician employed as professor at state medical school had standing under CLS Pub O § 17 to recover, as subrogee, costs of defending professor in medical malpractice action arising out of her state employment. Frontier Ins. Co. v State, 172 A.D.2d 13, 576 N.Y.S.2d 622, 1991 N.Y. App. Div. LEXIS 15072 (N.Y. App. Div. 3d Dep't 1991).

In arbitration proceeding, 3-year statute of limitations of CLS CPLR § 214(2), rather than 6-year statute of limitations, applied to claim by Motor Vehicle Accident Indemnification Corporation (MVAIC) against insurance company to recover for payments made to individual injured in motor vehicle accident involving automobile alleged to be insured by insurance company, since claims of MVAIC fell under principle of subrogation. Nationwide Mut. Ins. Co. v Motor Vehicle Accident Indemnification Corp., 190 A.D.2d 798, 593 N.Y.S.2d 561, 1993 N.Y. App. Div. LEXIS 1438 (N.Y. App. Div. 2d Dep't), app. denied, 82 N.Y.2d 651, 601 N.Y.S.2d 581, 619 N.E.2d 659, 1993 N.Y. LEXIS 2198 (N.Y. 1993).

In arbitration proceeding, claim asserted by Motor Vehicle Accident Indemnification Corporation (MVAIC) against insurance company, for payments made by MVAIC to individual injured in motor vehicle accident involving automobile alleged to be insured by insurance company, was time-barred under CLS CPLR § 214(2) where proceeding was not commenced until more than 3 years after accident, although proceeding was commenced within 3 years of payment by MVAIC, since claims of MVAIC sounded in subrogation and were derivative in nature. Nationwide Mut. Ins. Co. v Motor Vehicle Accident Indemnification Corp., 190 A.D.2d 798, 593 N.Y.S.2d 561, 1993 N.Y. App. Div. LEXIS 1438 (N.Y. App. Div. 2d Dep't), app. denied, 82 N.Y.2d 651, 601 N.Y.S.2d 581, 619 N.E.2d 659, 1993 N.Y. LEXIS 2198 (N.Y. 1993).

Defendant, whose negligence allegedly resulted in damages which were paid by plaintiff reinsurer, was entitled to summary judgment in action brought by reinsurer, as subrogee of original insured, since reinsurer had no contractual obligation to original insured and thus no subrogation rights. Reliance Ins. Co. v Aerodyne Eng'rs, 204 A.D.2d 944, 612 N.Y.S.2d 87, 1994 N.Y. App. Div. LEXIS 5638 (N.Y. App. Div. 3d Dep't 1994).

In personal injury action arising out of accident that occurred in insured building, where general liability insurer denied coverage on ground that policy had been cancelled for nonpayment of premiums and building owners sued insurance broker for professional negligence and breach of contract stemming from alleged lack of insurance coverage, broker had standing to assert claims against liability insurer based on alleged deficiencies in notice of cancellation, since broker who negligently fails to procure coverage stands in shoes of insurer as concerns liability to insured. Macon v Arnlie Realty Co., 207 A.D.2d 268, 615 N.Y.S.2d 28, 1994 N.Y. App. Div. LEXIS 8136 (N.Y. App. Div. 1st Dep't 1994).

Submission of defendant landlords in support of their motion for summary judgment in premises liability matter brought by insurer were insufficient where part of lease waiving subrogation specifically required clause in releasors' insurance policies stating that such waiver would not invalidate insurance. Public Serv. Mut. Ins. Co. v Windsor Place Corp., 238 A.D.2d 142, 655 N.Y.S.2d 947, 1997 N.Y. App. Div. LEXIS 3102 (N.Y. App. Div. 1st Dep't 1997).

Insurer of third-party plaintiff who does not insure third-party defendant may assert its right of subrogation against that third-party defendant even if coinsurer insures both third-party defendant and third-party plaintiff. Fitch v Turner Constr. Co., 241 A.D.2d 166, 671 N.Y.S.2d 446, 1998 N.Y. App. Div. LEXIS 3385 (N.Y. App. Div. 1st Dep't 1998).

Insurer's subrogation rights were not affected by fact that it asserted them through third-party action brought by parties named as additional insured, rather than primary insured, where there was no distinction in coverage provided to additional insured. Fitch v Turner Constr. Co., 241 A.D.2d 166, 671 N.Y.S.2d 446, 1998 N.Y. App. Div. LEXIS 3385 (N.Y. App. Div. 1st Dep't 1998).

Under terms of both No-Fault Law and insurance policy at issue, parents of child injured when his bicycle was hit by car could not recover first-party benefits for basic economic loss under their own no-fault policy where that element of loss already had been fully discharged by payment to parents of full amount available for personal injury under no-fault policy of motorist's insurer. Pittel v State Farm Mut. Auto. Ins. Co., 255 A.D.2d 303, 679 N.Y.S.2d 641, 1998 N.Y. App. Div. LEXIS 11561 (N.Y. App. Div. 2d Dep't 1998).

Declaratory judgment action filed by an insurer against its insured which ended in default judgment against the insured did not preclude an injured party's independent suit under N.Y. Ins. Law § 3420, as the matter of the insurer's coverage of its insured had not been specifically litigated because the insured defaulted and there was no identity of issues between the present action and the prior decision in the declaratory judgment action; thus, the insurer was erroneously granted summary judgment in the injured party's action under § 3420. Zimmerman v Tower Ins. Co., 13 A.D.3d 137, 788 N.Y.S.2d 309, 2004 N.Y. App. Div. LEXIS 15125 (N.Y. App. Div. 1st Dep't 2004).

Doctrines of collateral estoppel and res judicata barred a general contractor's insurer from litigating the same issues already decided against its insured as subrogor, who in turn was barred from litigating the same issues decided against the subcontractor as its subrogor because the parties were afforded a full and fair opportunity to litigate the insurance coverage issues in the prior action. Nationwide Mut. Ins. Co. v U.S. Underwriters Ins. Co., 151 A.D.3d 504, 59 N.Y.S.3d 1, 2017 N.Y. App. Div. LEXIS 4693 (N.Y. App. Div. 1st Dep't 2017).

Doctrines of collateral estoppel and res judicata barred a general contractor's insurer from litigating the same issues already decided against its insured as subrogor, who in turn was barred from litigating the same issues decided against the subcontractor as its subrogor because the parties were afforded a full and fair opportunity to litigate the insurance coverage issues in the prior action. Nationwide Mut. Ins. Co. v U.S. Underwriters Ins. Co., 151 A.D.3d 504, 59 N.Y.S.3d 1, 2017 N.Y. App. Div. LEXIS 4693 (N.Y. App. Div. 1st Dep't 2017).

128. —Anti-subrogation rule

Exclusion in liability insurance policy for injuries to employees of "insured" suffered in course of employment was not applicable to plaintiff's accident, and thus anti-subrogation rule precluded defendant in underlying action from maintaining third-party action against plaintiff's employer (county board of cooperative educational services, or BOCES) where policy defined "insured" as organization "designated in the declarations" as insured, BOCES was not listed as named insured on declarations page, and it was instead listed as "co-insured with regard to general liability" under "special items." Goldsmith v Levittown Union Free Sch. Dist., 232 A.D.2d 451, 648 N.Y.S.2d 929, 1996 N.Y. App. Div. LEXIS 10188 (N.Y. App. Div. 2d Dep't 1996).

Antisubrogation rule did not apply in premises liability matter between insurer and landlord where liability arose out of part of premises not leased to insured, and subject risk was not same one for which insured was covered. Public Serv. Mut. Ins. Co. v Windsor Place Corp., 238 A.D.2d 142, 655 N.Y.S.2d 947, 1997 N.Y. App. Div. LEXIS 3102 (N.Y. App. Div. 1st Dep't 1997).

In action by injured construction worker under CLS Labor § 240(1), antisubrogation rule barred insurer's third-party complaint on behalf of landowner against contractor, up to amount of insurance policy limits, where construction contract between landowner and contractor contained standard indemnification clause in favor of landowner and required that contractor to obtain liability insurance coverage naming landowner as additional insured, and contractor obtained such coverage through policy issued by insurer. Kvandal v Westminster Presbyterian Soc'y, 238 A.D.2d 889, 660 N.Y.S.2d 774, 1997 N.Y. App. Div. LEXIS 4679 (N.Y. App. Div. 4th Dep't 1997).

Antisubrogation rule precluding insured from interposing claim directly against coinsured did not apply to "pass through" situation in which defendant seeking contribution did not have same insurer as codefendants. Rook v 60 Key Centre, 242 A.D.2d 872, 662 N.Y.S.2d 670, 1997 N.Y. App. Div. LEXIS 10413 (N.Y. App. Div. 4th Dep't 1997).

Antisubrogation rule required summary judgment dismissing third-party action for indemnification where both third-party plaintiff and third-party defendant were named insureds under 2 insurance policies issued by single insurer covering same risk, and thus such double representation created potential conflict of interest to extent that any judgment entered in favor of plaintiffs in main action was covered by limits of subject policies. Glick v Millman Goldberg Pressler Assocs., 263 A.D.2d 497, 692 N.Y.S.2d 745, 1999 N.Y. App. Div. LEXIS 8126 (N.Y. App. Div. 2d Dep't 1999).

Third-party action by city against construction company did not violate antisubrogation rule where insurer had disclaimed coverage of city under general liability policy, city had participated in underlying litigation for 3 years and commenced third-party action against construction company before it sought coverage under policy, and thus danger of manipulation of litigation was not implicated. National Union Fire Ins. Co. v State Ins. Fund, 266 A.D.2d 518, 699 N.Y.S.2d 111, 1999 N.Y. App. Div. LEXIS 12246 (N.Y. App. Div. 2d Dep't 1999).

129. Persons claiming right of contribution or indemnity

State was not entitled to summary judgment in its action for judgment declaring that liability insurer of contractor on highway construction project was required to indemnify it for damages it had paid to motorists injured because of absence of guardrail where evidence failed to establish (1) that construction contract and insurance policy were broad enough to require coverage by insurer with regard to guardrail in question irrespective of whether any work on guardrail was actually done by contractor, or (2) that contractor actually performed any work on guardrail in question. State v Hartford Acci. & Indem. Co., 140 A.D.2d 324, 527 N.Y.S.2d 823, 1988 N.Y. App. Div. LEXIS 4623 (N.Y. App. Div. 2d Dep't 1988).

Antisubrogation rule barred insurer from seeking indemnification for its insured passenger in rental car involved in accident, for claims within policy limits for additional liability insurance purchased by insured, even though insurer was no longer obligated to defend insured against claims by other injured parties, where insurer had successfully moved to dismiss those claims against insured in attempt to structure its defense of insured so as to avoid application of antisubrogation rule and to protect its own interests, insurer was seeking to hold insured vicariously liable for driver's negligence, additional liability insurance provisions contained no exclusions for contractual indemnification, and insurer was seeking to pass incidence of loss from itself to insured and thus to avoid coverage purchased by insured. Ozturk v Taskiran, 245 A.D.2d 355, 665 N.Y.S.2d 420, 1997 N.Y. App. Div. LEXIS 12777 (N.Y. App. Div. 2d Dep't 1997).

A third-party action by a city against a construction contractor for common law indemnification on a claim asserted against the city by an employee of the contractor who was injured during the course of construction of a dam on city land would be dismissed, where the city had exchanged its common law right to indemnification for the broader right of indemnity and insurance protection provided by the contractor under the parties' contract. Moreover, an insurer who provided coverage for both the city and the contractor would be equitably precluded from bringing a third-party action on behalf of its insured based on common-law rather than contractual indemnity in order to shift the loss to the contractor's employer's liability carrier. Covert v Binghamton, 117 Misc. 2d 1075, 459 N.Y.S.2d 721, 1983 N.Y. Misc. LEXIS 3251 (N.Y. Sup. Ct. 1983).

130. Assignee

The 1945 amendment adding subd. 7 to former § 167 [now § 3420(b)] was designed to clear existing doubt as to standing of "any assignee" of a person who had obtained a judgment for personal injury or property damage to maintain an action for contribution against some other party involved in the accident in question, even though such other party was a joint tortfeasor. Greyhound Corp. v General Acci. Fire & Life Assurance Corp., 19 A.D.2d 419, 243 N.Y.S.2d 870, 1963 N.Y. App. Div. LEXIS 2987 (N.Y. App. Div. 1st Dep't 1963), aff'd in part and rev'd in part, 14 N.Y.2d 380, 251 N.Y.S.2d 958, 200 N.E.2d 625, 1964 N.Y. LEXIS 989 (N.Y. 1964).

Although an insurer established that a general contractor was not entitled to coverage as an additional insured since it was not named as such in the policy, the insurer failed to support its contention that an assignment of claims from its insured to the contractor was prohibited by N.Y. Ins. Law § 3420, N.Y. Gen. Oblig. Law § 13-101. Home Depot U.S.A., Inc. v National Fire & Mar. Ins. Co., 55 A.D.3d 671, 866 N.Y.S.2d 255, 2008 N.Y. App. Div. LEXIS 7648 (N.Y. App. Div. 2d Dep't 2008).

Physician who treated injured insureds, who were covered by no-fault automobile insurance policies issued by defendant insurer, did not lack standing to enforce "authorization" directing insurer to pay no-fault benefits directly to him, and insurer was not entitled to dismissal of complaint, as "authorization" executed by injured insureds constituted assignment enabling physician to recover insurance proceeds applicable to medical services provided, and there was no claim that either party revoked or intended to revoke insureds' written instructions directing insurer to pay their insurance benefits directly to plaintiff. Gingold v State Farm Ins. Co., 168 Misc. 2d 62, 642 N.Y.S.2d 812, 1996 N.Y. Misc. LEXIS 160 (N.Y. Civ. Ct. 1996).

Medical provider, as assignee of injured insured, had standing to sue insurance company to recover no-fault benefits for services performed on insured although assignment reserved provider's right to collect debt from insured if not collected from insurance company, where insurance company had written instructions from insured to pay her insurance benefits directly to medical provider, and there was no claim that she had revoked those instructions. Rehab. Med. Care of N.Y., PC v Travelers Ins. Co., 188 Misc. 2d 176, 727 N.Y.S.2d 247, 2001 N.Y. Misc. LEXIS 53 (N.Y. App. Term 2001).

Where the assignee of the unexpired portion of an insurance policy failed to obtain the consent of the insurer to the assignment of the policy, an action may not be maintained under predecessor to § 3420. Mobilia v Security Taxpayers Mut. Ins. Co., 90 N.Y.S.2d 895, 1949 N.Y. Misc. LEXIS 2521 (N.Y. Sup. Ct. 1949), aff'd, 277 A.D. 985, 99 N.Y.S.2d 856, 1950 N.Y. App. Div. LEXIS 4176 (N.Y. App. Div. 1950).

Shipowner/insurance claim assignee may sue to recover from vessel's property insurers, where assignee who purchased damaged, insured ship seeks repair cost of propeller and bottom plating damage suffered in grounding near Guyana, because CLS Ins Law § 3420 prevents only third party's recovery from marine liability insurer, not claim assignee's recovery from marine property insurer. Caribe Carriers, Ltd. v C. E. Heath & Co., 784 F. Supp. 1119, 1991 U.S. Dist. LEXIS 18436 (S.D.N.Y. 1991).

131. Priorities among competing claimants

Third-party plaintiffs were not third-party beneficiaries of vehicle insurance policy where policy did not express any intention to benefit third-party plaintiffs but instead, by its terms, afforded coverage only to named insured and 2 parties identified as additional insureds. Tilden Commer. Alliance v 2nd Edition Originals, 242 A.D.2d 702, 664 N.Y.S.2d 951, 1997 N.Y. App. Div. LEXIS 9259 (N.Y. App. Div. 2d Dep't 1997).

Plaintiff, who secured summary judgment, was entitled to priority over another plaintiff, whose action was pending, insofar as the right to recover against the liability insurer of defendant was concerned. Case law going back to 1935 in New York and even earlier elsewhere makes clear that the right granted by former subdivision 7 [now § 3420(b)] does not alter the "first in time, first in right" principle, whether the priority is by way of judgment or by way of settlement. David v Bauman, 24 Misc. 2d 67, 196 N.Y.S.2d 746, 1960 N.Y. Misc. LEXIS 3672 (N.Y. Sup. Ct. 1960).

132. Direct action against insurer by injured party

Injured worker could not maintain direct action against his employer's workers' compensation and liability insurance carrier on basis of employee's assertions that his injuries were caused by insurance company's negligence that occurred while company was conducting safety inspections of work site in effort to reduce risk of loss under terms of insurance policy which permitted such inspections. Jansen v Fidelity & Casualty Co., 79 N.Y.2d 867, 581 N.Y.S.2d 156, 589 N.E.2d 379, 1992 N.Y. LEXIS 33 (N.Y. 1992).

State could maintain action against insurance company under CLS Nav § 190 even though in earlier action Special Term had determined that insurer was not liable to defend or indemnify insured—since state was not party to first action neither collateral estoppel nor "law of the case" doctrine was applicable. State v Travelers Indem. Co., 120 A.D.2d 251, 508 N.Y.S.2d 698, 1986 N.Y. App. Div. LEXIS 60012 (N.Y. App. Div. 3d Dep't 1986), app. dismissed, 70 N.Y.2d 669, 518 N.Y.S.2d 962, 512 N.E.2d 545, 1987 N.Y. LEXIS 17318 (N.Y. 1987).

Insurer and its general manager (acting on behalf of insured, who ran over 15-year-old plaintiff with tractor) were entitled to partial summary judgment in plaintiffs' action seeking recovery for unlawful practice of law in allegedly advising plaintiffs to wait until injured plaintiff reached age 21, at which time insurer would evaluate his injuries and "make a fair settlement," since CLS Jud § 476-a provides that only Attorney General or bar association is authorized to enforce statute in civil actions. Lawrence v Houston, 172 A.D.2d 923, 567 N.Y.S.2d 962, 1991 N.Y. App. Div. LEXIS 4240 (N.Y. App. Div. 3d Dep't 1991).

Triable issues of fact precluding summary judgment were raised by plaintiffs who alleged that insurer and its general manager (acting on behalf of insured, who ran over 15-year-old plaintiff with tractor) fraudulently advised plaintiffs to wait until injured plaintiff reached age 21, at which time insurer would evaluate his injuries and "make a fair settlement," where plaintiffs alleged that delay in obtaining legal counsel resulted in failure to properly obtain and preserve evidence which could result in their inability to prevail at trial or in diminution of damages recovered, and that they were deprived of use of funds from settlement or from interest which could have been earned thereon. Lawrence v Houston, 172 A.D.2d 923, 567 N.Y.S.2d 962, 1991 N.Y. App. Div. LEXIS 4240 (N.Y. App. Div. 3d Dep't 1991).

Triable issues of fact precluding summary judgment were raised by plaintiffs who alleged that insurer and its general manager (acting on behalf of insured, who ran over 15-year-old plaintiff with tractor) negligently misrepresented to plaintiffs that they should wait until injured plaintiff reached age 21, at which time insurer would evaluate his injuries and "make a fair settlement," since there were controverted issues with regard to alleged establishment of "special relationship" which imposed on defendants duty to exercise reasonable care to impart correct information, whether such information was false, and whether plaintiff relied on it to his detriment. Lawrence v Houston, 172 A.D.2d 923, 567 N.Y.S.2d 962, 1991 N.Y. App. Div. LEXIS 4240 (N.Y. App. Div. 3d Dep't 1991).

Plaintiff injured in automobile collision was not entitled to summary judgment in declaratory judgment action against liability insurer of party allegedly at fault where (1) plaintiff was injured in September 1987, (2) plaintiff notified insurer of incident in February 1988, by which time the insured's policy with insurer had been cancelled, (3) despite further correspondence between plaintiff and insurer, insurer did not follow up on matter, (4) plaintiff brought action against insured in March 1989, (5) insured defaulted but did not send summons to insurer until default judgment was entered in January 1990, and (6) defendant disclaimed coverage; insurer raised factual questions regarding insured's default and failure to comply with policy obligations. Anderson v Colonial Penn Ins. Co., 179 A.D.2d 504, 578 N.Y.S.2d 199, 1992 N.Y. App. Div. LEXIS 451 (N.Y. App. Div. 1st Dep't 1992).

In action to recover from homeowner's insurer of neighboring property for emotional distress resulting from contamination of plaintiff's drinking water from oil spill thereon, court properly determined that defendant insurer, having disclaimed duty to defend neighboring landowner, was precluded from going behind underlying default judgment against landowner and raising defenses extending to merits of plaintiff's claim. Matychak v Security Mut. Ins. Co., 181 A.D.2d 957, 581 N.Y.S.2d 453, 1992 N.Y. App. Div. LEXIS 4149 (N.Y. App. Div. 3d Dep't), app. denied, 80 N.Y.2d 758, 589 N.Y.S.2d 309, 602 N.E.2d 1125, 1992 N.Y. LEXIS 3404 (N.Y. 1992).

In action to recover from homeowner's insurer of neighboring property for emotional distress resulting from contamination of plaintiff's drinking water from oil spill thereon, court did not err in determining that plaintiff, as subrogee, was not estopped from recovering on ground that defendant insurer's coverage disclaimer, leading to default judgment in underlying action against neighboring landowner, was product of its reliance on landowner's misrepresentation that plaintiff had purchased her property long after policy had expired, since there was no evidence of bad faith or collusion between plaintiff and landowner. Matychak v Security Mut. Ins. Co., 181 A.D.2d 957, 581 N.Y.S.2d 453, 1992 N.Y. App. Div. LEXIS 4149 (N.Y. App. Div. 3d Dep't), app. denied, 80 N.Y.2d 758, 589 N.Y.S.2d 309, 602 N.E.2d 1125, 1992 N.Y. LEXIS 3404 (N.Y. 1992).

In automobile accident case, court erred in directing alleged insurer of defendant to defend action on basis of plaintiffs' assertion that they were unable to locate defendant and that prior arbitration proceedings (in which plaintiffs had sought uninsured motorist benefits from their own carrier) had established that insurer was defendant's carrier, since insurer had not been party to prior proceedings, validity of its cancellation of defendant's policy had not been determined, and judgment in prior proceeding was not binding on insurer. Salgado v Sanon, 183 A.D.2d 708, 583 N.Y.S.2d 311, 1992 N.Y. App. Div. LEXIS 6684 (N.Y. App. Div. 2d Dep't 1992).

In action by insurer of contractor sued by homeowners for extensive fire damage to their home during renovation work, seeking declaration of its obligations with respect to defense and indemnification of contractor, cross-motion by homeowners seeking declaration that insurer was obligated to defend contractor and indemnify it for any judgment ultimately awarded against contractor was premature since homeowners failed to satisfy condition precedent to maintenance of direct action against contractor's insurer pursuant to CLS Ins § 3420(a)(2) in that no judgment had yet been obtained against contractor which had gone unsatisfied for 30 days, and homeowners were mere strangers to insurance contract until such time. Mount Vernon Fire Ins. Co. v NIBA Constr., 195 A.D.2d 425, 600 N.Y.S.2d 936, 1993 N.Y. App. Div. LEXIS 7625 (N.Y. App. Div. 1st Dep't 1993).

Insurance company was entitled to summary judgment dismissing injured party's action to recover on insurance policy under CLS Ins § 3420(b)(1) where defendants in underlying personal injury action admitted that vehicle insured by company was not involved in accident, and they failed to challenge company's disclaimer of liability. Yuska v State Farm Ins. Co., 203 A.D.2d 560, 611 N.Y.S.2d 203, 1994 N.Y. App. Div. LEXIS 4339 (N.Y. App. Div. 2d Dep't 1994).

Default judgment in underlying personal injury action, entered on complaint alleging that vehicle insured by insurance company was involved in accident, did not preclude company from disclaiming liability on policy in action to recover on policy brought under CLS Ins § 3420(b)(1) where issue of identity of vehicle was not actually litigated in personal injury action. Yuska v State Farm Ins. Co., 203 A.D.2d 560, 611 N.Y.S.2d 203, 1994 N.Y. App. Div. LEXIS 4339 (N.Y. App. Div. 2d Dep't 1994).

Action for judgment declaring that coverage for injury to plaintiff's son was provided by homeowner's policy issued to tortfeasor's mother was properly dismissed as premature, where no personal injury action had been commenced to recover damages against tortfeasor and his mother. Terry v Farmer's Ins. Co., 236 A.D.2d 829, 653 N.Y.S.2d 767, 1997 N.Y. App. Div. LEXIS 1760 (N.Y. App. Div. 4th Dep't 1997).

Plaintiff, who claimed to have been injured at insured premises and obtained default judgment against insured on issue of liability, had standing to seek judgment declaring that insurer was obligated to defend and indemnify insured in underlying tort action; CLS Ins § 3420 only prohibits direct cause of action to recover money damages, not declaratory judgment action by plaintiff in underlying tort action. Watson v Aetna Cas. & Sur. Co., 246 A.D.2d 57, 675 N.Y.S.2d 367, 1998 N.Y. App. Div. LEXIS 8282 (N.Y. App. Div. 2d Dep't 1998).

Insureds' causes of action against no-fault insurer for breach of contract and breach of covenant of good faith and fair dealing were duplicative and were properly dismissed for failure to allege any policy provision that insurer failed to perform, or insurer's awareness of falsity of independent medical examinations that were being supplied to it by nonparty. Odingo v Allstate Ins. Co.,

251 A.D.2d 81, 672 N.Y.S.2d 727, 1998 N.Y. App. Div. LEXIS 6535 (N.Y. App. Div. 1st Dep't), app. denied, 92 N.Y.2d 810, 680 N.Y.S.2d 55, 702 N.E.2d 840, 1998 N.Y. LEXIS 3084 (N.Y. 1998).

Insureds' causes of action against no-fault insurer for violation of CLS Gen Bus § 349 were properly dismissed for failure to allege materially deceptive conduct on which insureds relied to their detriment. Odingo v Allstate Ins. Co., 251 A.D.2d 81, 672 N.Y.S.2d 727, 1998 N.Y. App. Div. LEXIS 6535 (N.Y. App. Div. 1st Dep't), app. denied, 92 N.Y.2d 810, 680 N.Y.S.2d 55, 702 N.E.2d 840, 1998 N.Y. LEXIS 3084 (N.Y. 1998).

Construction company's insurer was entitled to summary judgment in homeowner's action against company and insurer where there was no proof that homeowner was named as additional insured on company's policy, and homeowner failed to satisfy condition precedent set forth in CLS Ins § 3420(b) since it had not obtained unsatisfied judgment against company. Castagna v Aiezza, 265 A.D.2d 364, 696 N.Y.S.2d 492, 1999 N.Y. App. Div. LEXIS 10246 (N.Y. App. Div. 2d Dep't 1999).

Court properly denied petition under CLS Ins § 5218 and determined that petitioner could proceed against owner of vehicle named in police report, where petitioner testified that he was struck by hit-and-run vehicle which he identified from his own observation as white Acura, officer who responded to scene noted that vehicle's plate number "was obtained by witnesses who refused to give names," and plate number in question was assigned to white Acura insured by respondent insurer. Irizarry v Motor Vehicle Indemnification Corp., 287 A.D.2d 716, 732 N.Y.S.2d 54, 2001 N.Y. App. Div. LEXIS 10031 (N.Y. App. Div. 2d Dep't 2001).

Motorist could initiate an action against a driver's purported insurer, under N.Y. Ins. Law § 3420(a)(2), because (1) it was determined, in a prior proceeding, that the insurer insured the subject vehicle involved in the accident, necessarily entailing a finding that the insurer insured the vehicle's owner, (2) a strong presumption that the driver used the vehicle with the owner's permission, making the owner liable, was uncontested, and (3) N.Y. Ins. Law § 3420(e) mandated coverage for permissive users. Creinis v Hanover Ins. Co., 59 A.D.3d 371, 872 N.Y.S.2d 544, 2009 N.Y. App. Div. LEXIS 740 (N.Y. App. Div. 2d Dep't), app. denied, 12 N.Y.3d 710, 881 N.Y.S.2d 660, 909 N.E.2d 583, 2009 N.Y. LEXIS 976 (N.Y. 2009).

Defendant was not entitled to dismissal of medical malpractice action on ground that his liability had been discharged in bankruptcy, although plaintiff had been permanently enjoined from proceeding against his personal assets, since contingent liability of his medical malpractice insurer was unaffected by discharge and thus plaintiff could continue action against defendant for purpose of determining his liability, as basis for seeking recovery from his insurer; furthermore, CLS Ins § 3420(a)(2) expressly condones direct recovery from liability insurer in event of insured's bankruptcy. Andriani v Czmus, 153 Misc. 2d 38, 580 N.Y.S.2d 123, 1992 N.Y. Misc. LEXIS 7 (N.Y. Sup. Ct. 1992).

In an action pursuant to N.Y. Ins. Law § 3420(a)(2), pursuant to the plain language of the insurance policy, the injured infant's injuries from exposure to lead paint while residing at the insureds' premises arose out of a single occurrence and constituted one loss; additionally, the plain language showed that the insurer intended to limit the number of policies that would be available to satisfy a judgment in a continuous exposure case. Thus, the limits of liability provision in the insurance policy applied and the insurer was liable only for the $300,000 it had deposited with the court pursuant to N.Y. C.P.L.R. 2601 and not for the entirety of the unsatisfied judgment, which was $555,000; therefore, the trial court properly granted the insurer's cross-motion for summary judgment dismissing the injured parties' claim against it for the entire judgment. Hiraldo v Allstate Ins. Co., 8 A.D.3d 230, 778 N.Y.S.2d 50, 2004 N.Y. App. Div. LEXIS 7531 (N.Y. App. Div. 2d Dep't 2004), aff'd, 5 N.Y.3d 508, 806 N.Y.S.2d 451, 840 N.E.2d 563, 2005 N.Y. LEXIS 2698 (N.Y. 2005).

Because an insurer was not a party to a settlement agreement between a mother and the insured, no provision of N.Y. C.P.L.R. § 5003-a or N.Y. Ins. Law § 3420(a)(2) provided for the entry of a judgment directly against the insurer in lieu of the insured. Paez v Varveris, 820 N.Y.S.2d 390, 12 Misc. 3d 101, 2006 N.Y. Misc. LEXIS 1592 (N.Y. App. Term 2006).

Injured party's declaratory action against an insurer, filed because the alleged tortfeasor had filed for bankruptcy, was properly dismissed because direct claims against an insurer under N.Y. Ins. Law § 3420 could only be brought after the injured party obtained a judgment against the alleged tortfeasor; the fact that the alleged tortfeasor had filed for and obtained a discharge in bankruptcy did not change that requirement because a judgment could be obtained against the alleged tortfeasor for the sole purpose of then bringing a § 3420 action. Lang v Hanover Ins. Co., 3 N.Y.3d 350, 787 N.Y.S.2d 211, 820 N.E.2d 855, 2004 N.Y. LEXIS 3525 (N.Y. 2004).

In action against the insurance company brought by the minor to recover the amount of the state court judgment against the insureds pursuant to N.Y. Ins. Law § 3420(a)(2), the district court's grant of summary judgment to the minor was reversed with respect to its holding that the insurance company had to indemnify the wife insured because since the wife insured never complied with the notice provisions of the policy, the insurance company never became obligated to disclaim coverage as to her, and was not obligated to indemnify her against liability arising from the minor's accident. Webster v Mount Vernon Fire Ins. Co., 368 F.3d 209, 2004 U.S. App. LEXIS 8720 (2d Cir. N.Y. 2004).

When an injured party was a defendant in an insurer's declaratory judgment action, he was not entitled to bring a third-party action against an additional prospective insurer until in accordance with N.Y. Ins. Law § 3420, he had obtained a judgment against the tortfeasor, served the judgment upon the additional prospective insurer, and awaited payment for 30 days. Clarendon Nat'l Ins. Co. v Gonzalez, 233 N.Y.L.J. 125, 2005 N.Y. Misc. LEXIS 3385 (N.Y. Sup. Ct. June 30, 2005).

There was no allegation that the first insured had obtained an unsatisfied judgment against the other individual involved in her auto accident; nor was there a basis for ignoring the directive that a plaintiff must proceed against an insured before moving against his insurer. Thus, at present, the first insured had no standing to pursue a breach of contract claim against the insurance company. Patchen v Gov't Emplrs. Ins. Co., 759 F. Supp. 2d 241, 2011 U.S. Dist. LEXIS 1551 (E.D.N.Y. 2011).

Pursuant to N.Y. Ins. Law § 3420(a)(2) and (b)(1), the estates of the decedents in the underlying action would be able to sue the insurer directly should they obtain a judgment in the underlying action that remained unsatisfied for thirty days. Sunbelt Rentals, Inc. v Charter Oak Fire Ins. Co., 839 F. Supp. 2d 680, 2012 U.S. Dist. LEXIS 37613 (S.D.N.Y. 2012).

"Third party liability claim" under 11 NYCRR § 216.9 (Regulation 64) refers to claim brought under liability insurance policy by party other than insured, where claimant is natural person. Insurance Department, Opinions of General Counsel, Opinion Number 02-04-01.

Under 11 NYCRR § 216.6(c) (Regulation 64), in any case where claim is rejected, insurer is required to notify claimant, or claimant's authorized representative, in writing, of any applicable policy provision limiting claimant's right to sue insurer; however, New York court has held that insurer's failure to comply with § 216.6(c) of Regulation 64 when insurer is denied claim, without more, was not sufficient to estop insurer from relying on limitations period and policy. Insurance Department, Opinions of General Counsel, Opinion Number 03-07-18.

Insurer may require third-party claimant to execute release before insurer will pay settled claim, as long as release comports with 11 NYCRR § 216.6(g) (Regulation 64) which prohibits insurer from requiring execution of release on first or third-party claim that is broader than scope of underlying settlement. NY Ins Dep't Gen Counsel, Opinion No. 11-04-01, 2011 NY Insurance GC Opinions LEXIS 12.

Creditor had standing to file cross-claims against a debtor's insurer seeking a declaration as to whether the debtor was liable to the creditor for negligence despite this provision since the creditor was a defendant in the suit. Kirschenbaum v Fed. Ins. Co., 505 B.R. 126, 2014 U.S. Dist. LEXIS 15478 (E.D.N.Y. 2014).

XII. Requirements for Disclaimer of Liability by Insurer

133. In general

Absent valid excuse, failure to satisfy insurance policy notice

requirement vitiates coverage, but insurer who fails to timely disclaim liability or deny coverage "as soon as is reasonably possible," when required by CLS Ins § 3420(d), waives its affirmative defense of late notice. Allcity Ins. Co. v Jimenez, 78 N.Y.2d 1054, 576 N.Y.S.2d 87, 581 N.E.2d 1342, 1991 N.Y. LEXIS 4210 (N.Y. 1991).

Section of Insurance Law providing that an insurer disclaiming liability for death or injury arising out of any type of accident shall give written notice of disclaimer to the insured and the injured person or any other claimant contains no exclusion or exception with respect to disclaimers by excess insurance carriers. Preisch v Continental Casualty Co., 55 A.D.2d 117, 389 N.Y.S.2d 700, 1976 N.Y. App. Div. LEXIS 14553 (N.Y. App. Div. 4th Dep't 1976), app. denied, 41 N.Y.2d 802, 1977 N.Y. LEXIS 2978 (N.Y. 1977).

Notice of disclaimer sent by insurance company to third-party claimant which only specifies grounds of disclaimer against insured and driver but which does not specifically address basis for disclaimer against third-party claimant is inadequate for disclaimer as to claimant. Aetna Casualty & Surety Co. v Rodriguez, 115 A.D.2d 418, 496 N.Y.S.2d 956, 1985 N.Y. App. Div. LEXIS 54805 (N.Y. App. Div. 1st Dep't 1985).

Insurance company was not required to notify insured in writing of its denial of her claim for underinsured motorist benefits where insured never purchased or paid for such coverage; insurer's failure to disclaim coverage does not create coverage which policy was not written to provide, since to do so would impose liability on insurer for risk for which no premium was ever received. Maryland Casualty Co. v Hopkins, 142 A.D.2d 946, 530 N.Y.S.2d 370, 1988 N.Y. App. Div. LEXIS 14966 (N.Y. App. Div. 4th Dep't), app. denied, 73 N.Y.2d 702, 537 N.Y.S.2d 490, 534 N.E.2d 328, 1988 N.Y. LEXIS 3450 (N.Y. 1988).

Excess liability motor vehicle insurance carrier had duty to disclaim coverage even before it was informed that primary coverage had been exhausted where insured established that primary carrier's offer of its policy limit had been rejected. Cassara v Nationwide Mut. Ins. Co., 144 A.D.2d 974, 534 N.Y.S.2d 277, 1988 N.Y. App. Div. LEXIS 14471 (N.Y. App. Div. 4th Dep't 1988).

If liability insurer intends to disclaim liability or deny coverage for any incident, it must give written notice of disclaimer as soon as it is reasonably possible to do so, and it will be estopped from denying coverage if notice of disclaimer is unreasonably delayed. Commercial Union Ins. Cos. v Jedamich Enterprises, Inc., 146 A.D.2d 599, 536 N.Y.S.2d 523, 1989 N.Y. App. Div. LEXIS 447 (N.Y. App. Div. 2d Dep't 1989).

Court correctly determined that "yacht hull and protection and indemnity policy" constituted marine protection and indemnity insurance within meaning of CLS Ins § 1113(a)(21) and was therefore, by reason of CLS Ins §§ 2117(b)(3)(B) and 3420(i), exempt from requirements of CLS Ins § 3420(d) regarding prompt written notice of disclaimer of coverage. Dunn v American Home Assurance Co., 158 A.D.2d 505, 551 N.Y.S.2d 268, 1990 N.Y. App. Div. LEXIS 1755 (N.Y. App. Div. 2d Dep't 1990).

Where CLS Ins § 3420(d) does not apply because automobile insurance policy was not issued or delivered in New York, estoppel of insurer's disclaimer of coverage may be sought only at common law, upon showing of prejudice. Zurich Ins. Co. v Travelers Indem. Co., 184 A.D.2d 454, 586 N.Y.S.2d 932, 1992 N.Y. App. Div. LEXIS 8630 (N.Y. App. Div. 1st Dep't 1992), rev'd, 81 N.Y.2d 938, 597 N.Y.S.2d 933, 613 N.E.2d 965, 1993 N.Y. LEXIS 5203 (N.Y. 1993).

CLS Ins § 3420(d) does not apply where underlying claim does not involve death or bodily injury. Incorporated Village of Pleasantville v Calvert Ins. Co., 204 A.D.2d 689, 612 N.Y.S.2d 441, 1994 N.Y. App. Div. LEXIS 5779 (N.Y. App. Div. 2d Dep't 1994).

No disclaimer of motor vehicle insurance coverage was required with regard to vehicle not insured under policy, even though driver of vehicle was "family member" of insured and thus was included under her policy as another insured, where she was not named insured and had no contractual relationship with insurer; thus, vehicle was not covered by policy in first instance. Smedes v Liberty Mut. Ins. Co., 206 A.D.2d 814, 615 N.Y.S.2d 138, 1994 N.Y. App. Div. LEXIS 7965 (N.Y. App. Div. 3d Dep't), app. denied, 84 N.Y.2d 812, 622 N.Y.S.2d 914, 647 N.E.2d 120, 1994 N.Y. LEXIS 4570 (N.Y. 1994).

Failure to disclaim coverage does not create coverage that automobile insurance policy was not written to provide. Lumbermens Mut. Casualty Co. v Aggesen, 209 A.D.2d 415, 618 N.Y.S.2d 441, 1994 N.Y. App. Div. LEXIS 10940 (N.Y. App. Div. 2d Dep't 1994).

CLS Ins § 3420(d) does not preclude tardy insurer from disclaiming liability based on invalidity of entire contract. Interested Underwriters at Lloyd's v H.D.I III Assocs., 213 A.D.2d 246, 623 N.Y.S.2d 871, 1995 N.Y. App. Div. LEXIS 2801 (N.Y. App. Div. 1st Dep't 1995).

Duty of insurer to disclaim coverage promptly extends to those situations where disclaimer is based on insured's failure to provide timely notice of claim. Nationwide Ins. Co. v Freehill, 224 A.D.2d 532, 637 N.Y.S.2d 800, 1996 N.Y. App. Div. LEXIS 1159 (N.Y. App. Div. 2d Dep't 1996).

Insurer's untimely denial of claim does not preclude defense that coverage limits of policy have been exhausted. Presbyterian Hosp. v General Accident Ins. Co. of Am., 229 A.D.2d 479, 645 N.Y.S.2d 516, 1996 N.Y. App. Div. LEXIS 7785 (N.Y. App. Div. 2d Dep't 1996).

Insurer's notification to insured of decision to deny coverage within 5 days after its receipt of summons and complaint was not untimely. Centenniel Ins. Co. v Hoffman, 265 A.D.2d 629, 695 N.Y.S.2d 774, 1999 N.Y. App. Div. LEXIS 10331 (N.Y. App. Div. 3d Dep't 1999).

Acts of sexual intercourse that formed basis of underlying psychiatric malpractice action did not constitute "accident" under CLS Ins § 3420(d), and thus statute did not entitle plaintiffs in underlying action to notice of malpractice insurer's disclaimer. Legion Ins. Co. v Singh, 272 A.D.2d 809, 708 N.Y.S.2d 183, 2000 N.Y. App. Div. LEXIS 5933 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 768, 721 N.Y.S.2d 605, 744 N.E.2d 141, 2000 N.Y. LEXIS 3573 (N.Y. 2000).

Insurer was required to comply with provisions of CLS Ins § 3420(d) requiring timely notice of disclaimer where its grounds for disclaimer were based on exclusionary clauses without which there would be coverage. Columbia Cas. Co. v Nat'l Emergency Servs., 282 A.D.2d 346, 723 N.Y.S.2d 473, 2001 N.Y. App. Div. LEXIS 4072 (N.Y. App. Div. 1st Dep't 2001).

Because the insured intentionally hit a guest at the insured's home, and because incident was not an occurrence as defined by the policy, a disclaimer pursuant to N.Y. Ins. Law § 3420(d) was unnecessary; therefore, the insurer was not obligated to defend the insured in the underlying action. State Farm Fire & Cas. Co. v Whiting, 53 A.D.3d 1033, 862 N.Y.S.2d 420, 2008 N.Y. App. Div. LEXIS 6011 (N.Y. App. Div. 4th Dep't 2008).

Former N.Y. Insur. Law § 3420(d) (current version at § 3420(d)(2)), regarding a liability insurer's notice of disclaimer of coverage, applies to excess insurers. George Campbell Painting v National Union Fire Ins. Co. of Pittsburgh, PA, 92 A.D.3d 104, 937 N.Y.S.2d 164, 2012 N.Y. App. Div. LEXIS 249 (N.Y. App. Div. 1st Dep't 2012).

The State was entitled to summary judgment in an action for indemnity where an insurance company, whose policy covered a general contractor hired to repair bridges by the State, failed to timely disclaim coverage for one of the contractor's employees who was injured on the job. State v Gen. Star Indem. Co., 299 A.D.2d 537, 751 N.Y.S.2d 47, 2002 N.Y. App. Div. LEXIS 11548 (N.Y. App. Div. 2d Dep't 2002), app. denied, 99 N.Y.2d 508, 757 N.Y.S.2d 818, 787 N.E.2d 1164, 2003 N.Y. LEXIS 201 (N.Y. 2003).

Where a demand for defense and indemnification had been brought by a party who was not an additional insured under the plain language of a limited general liability policy, the insurer had no duty to provide a timely disclaimer of coverage, since there was really no possible basis for coverage; therefore, a summary judgment imposing those obligations on the insurer was reversible error. Nat'l Union Fire Ins. Co. v Utica First Ins. Co., 6 A.D.3d 681, 775 N.Y.S.2d 175, 2004 N.Y. App. Div. LEXIS 4924 (N.Y. App. Div. 2d Dep't 2004).

In a proceeding pursuant to N.Y. C.P.L.R. art. 75, the trial court erred by declining to stay, permanently, arbitration proceedings

on a claim for uninsured motorist (UM) coverage; because the insured's injuries were the result of an intentional collision, not an accident, the insured was precluded from obtaining UM benefits, and because the insurer denied the claim based on a lack of coverage, not a policy exclusion, N.Y. Ins. Law § 3420(d) did not require the insurer to issue a disclaimer. Allstate Ins. Co. v Massre, 14 A.D.3d 610, 789 N.Y.S.2d 206, 2005 N.Y. App. Div. LEXIS 535 (N.Y. App. Div. 2d Dep't 2005).

Trial court properly granted summary judgment to an insurer as to plaintiff's action seeking to recover a judgment against an insured in an underlying personal injury action, because neither plaintiff nor the insured ever notified the insurer of the accident, and thus the insurer had no duty to disclaim liability, and thus the N.Y. Ins. Law § 3420(d) time limit for disclaiming coverage did not apply. Hernandez v Am. Tr. Ins. Co., 31 A.D.3d 343, 819 N.Y.S.2d 264, 2006 N.Y. App. Div. LEXIS 9693 (N.Y. App. Div. 1st Dep't 2006), app. denied, 2006 N.Y. App. Div. LEXIS 14224 (N.Y. App. Div. 1st Dep't Nov. 16, 2006).

Because a collision was intentional, the insurer was not required by Insurance Law § 3420(d) to issue a disclaimer because its denial of coverage was based on a lack of coverage and not a policy exclusion. Matter of Travelers Indem. Co. v Cruz, 40 A.D.3d 362, 835 N.Y.S.2d 567, 2007 N.Y. App. Div. LEXIS 6022 (N.Y. App. Div. 1st Dep't 2007).

Insurer's across-the-board denial of coverage may excuse insured party from providing notice of each individual claim. Texaco A/S (Den.) v Commercial Ins. Co., 160 F.3d 124, 1998 U.S. App. LEXIS 28240 (2d Cir. N.Y. 1998).

If insured could show to trier of fact that insurer issued "blanket denial" of coverage, insured would have been free, as matter of law (on receipt of such denial), to reasonably settle claims without notifying insurer or obtaining insurer's preauthorization. Texaco A/S (Den.) v Commercial Ins. Co., 160 F.3d 124, 1998 U.S. App. LEXIS 28240 (2d Cir. N.Y. 1998).

The purpose of N.Y. Ins. Law § 3420(d) is to assist a consumer or claimant in obtaining an expeditious resolution to liability claims by requiring insurance companies to give prompt notification when a claim is being denied. First Fin. Ins. Co. v Jetco Contr. Corp., 1 N.Y.3d 64, 769 N.Y.S.2d 459, 801 N.E.2d 835, 2003 N.Y. LEXIS 3948 (N.Y. 2003).

As the reasonable timeliness of notice under N.Y. Ins. Law § 3420(d) was an issue that was likely to recur and involved important public policy considerations, the appellate court certified two questions to the New York Court of Appeals: Under § 3420(d), could an insurer who discovered grounds for denying coverage wait to notify the insured of denial of coverage until after the insurer conducted an investigation into alternate, third-party sources of insurance benefitting the insured, although the existence or non-existence of alternate insurance sources was not a factor in its decision to deny coverage; and if an investigation into alternate sources was not a proper basis for delayed notification under § 3420(d), was an unexcused delay in notification of 48 days unreasonable as a matter of law. New York Univ. v First Fin. Ins. Co., 322 F.3d 750, 2003 U.S. App. LEXIS 4918 (2d Cir. N.Y. 2003).

Excess insurer's letter to insured was not disclaimer under New York law so as to potentially waive late notice defense not raised therein, although it denied current obligation to defend or indemnify, where it did not specifically disclaim coverage under policy if underlying coverage was exhausted. City of Utica v Genesee Mgmt., 934 F. Supp. 510, 1996 U.S. Dist. LEXIS 10723 (N.D.N.Y. 1996).

11 NYCRR § 216.6 (Reg. 64) and 11 NYCRR § 216.7 (Reg. 64) set forth time frames in which insurer must either pay claim for physical damage to vehicle, notify claimant that additional time is needed for investigation and state the reasons why, or reject claim. Insurance Department, Opinions of General Counsel, Opinion Number 03-10-21.

There are no requirements by regulation of Superintendent of Insurance specifying language to be included in standard reservation of rights letter; it is responsibility of insurer issuing such letter to ensure that letter meets any requirements that may be provided by case law. Insurance Department, Opinions of General Counsel, Opinion Number 05-02-18.

Reservation of rights letters should not be confused with disclaimer letters in which insurer notifies insured or other party of insurer's intent to deny coverage or disclaim liability; reservation of rights letters are usually not effective as disclaimer letters. Insurance Department, Opinions of General Counsel, Opinion Number 05-02-18.

L 2008, ch 388 amendments to CLS Ins § 3420, which apply to any "liability policy issued or delivered in this state," include policies issued in New York but delivered outside of state. Insurance Department, Opinions of General Counsel, Opinion Number 09-06-08.

CLS Ins § 3420 sets forth minimum requirements for liability policies, which includes prejudice rule (which prevents invalidation of claim due to untimely notice by insured, injured person or any other claimant unless failure to provide timely notice has prejudiced insurer); however, insurers may provide more liberal provisions in their policies to benefit their insureds, and thus may also include prejudice rule in other kinds of policies. Insurance Department, Opinions of General Counsel, Opinion Number 09-06-08.

CLS Ins § 3420 applies to claims-made policies; however, L 2008, ch 388 recognizes distinctive nature of claims-made policies and does not allow for duplicate claims under multiple policy periods, or late claim under prior policy period. Insurance Department, Opinions of General Counsel, Opinion Number 09-06-08.

Third party may not bring direct cause of action against New York insurer in foreign jurisdiction subsequent to denial for late notice if policy was delivered in foreign jurisdiction that requires judgment against, or settlement with, insured prior to initiation of such cause of action; CLS Ins § 3104(b) allows New York insurer to include in any policy of insurance issued for delivery in another jurisdiction any provision required by laws of such other jurisdiction applicable to such policy. Insurance Department, Opinions of General Counsel, Opinion Number 09-06-08.

134. Application to accidents outside state

The exclusion of guest coverage in an insurance policy provided by a corporation renting motor vehicles did not violate subdivision 2 of former section 167 [now § 3420(e)] of the Insurance Law where a van was rented in New York by a New York resident who was to deliver the van three days later to the lessor in Maine, inasmuch as the mandatory provisions of subdivision 2 of former section 167 [now § 3420(e)], one of which required coverage for injuries suffered by a passenger in the vehicle (Vehicle and Traffic Law, § 311; 11 NYCRR 60.1), are applicable only to policies issued on vehicles principally garaged or used in this State and the vehicle in question was registered in Massachusetts and was only temporarily in New York. Travelers Indem. Co. v Ryder Truck Rental, Inc., 47 N.Y.2d 139, 417 N.Y.S.2d 53, 390 N.E.2d 771, 1979 N.Y. LEXIS 1992 (N.Y. 1979).

In view of the substantial relationship of accident to state, statute requiring that any disclaimer of liability or denial of coverage for death or bodily injury arising out of motor vehicle accident occurring within the state shall be given by written notice from insurer as soon as reasonably possible should be applied. Newman v Ketani, 54 A.D.2d 926, 388 N.Y.S.2d 128, 1976 N.Y. App. Div. LEXIS 14778 (N.Y. App. Div. 2d Dep't 1976).

The granting of a motion by plaintiff for summary judgment to the extent of declaring defendant insurer's disclaimer invalid was improper and a trial would be required, where plaintiff, who was involved in an out-of-state accident when the vehicle he was operating struck a light pole, was denied no-fault benefits more than five months after notifying defendant of the accident, on the ground that he had been under the influence of drugs and alcohol at the time of the accident since Ins Law § 167, which obligates the insurer to give written notice of disclaimer as soon as is reasonably possible, appears to be inapplicable to out-of-state accidents; whether plaintiff would be entitled to no-fault coverage will largely depend on the terms of the policy and further evidence as to the nature of the accident. Grening v Empire Mut. Ins. Co., 101 A.D.2d 550, 475 N.Y.S.2d 423, 1984 N.Y. App. Div. LEXIS 18294 (N.Y. App. Div. 1st Dep't 1984).

CLS Ins § 3420(d) did not apply to disclaimer where accident at issue occurred in Florida. Brennan v Liberty Mut. Fire Ins. Co.,

204 A.D.2d 675, 612 N.Y.S.2d 237, 1994 N.Y. App. Div. LEXIS 5776 (N.Y. App. Div. 2d Dep't 1994).

In action by owner of leased car against its excess liability insurer, there was no merit in owner's claim that insurer could not properly be found to have disclaimed coverage under CLS Ins § 3420(d) because insurer did not notify injured person; by its terms, § 3420(d) applies only where insurance liability policy is delivered or issued for delivery in New York, and policy at issue was issued and delivered in Massachusetts. First City Acceptance Corp. v Gulf Ins. Co., 245 A.D.2d 649, 665 N.Y.S.2d 114, 1997 N.Y. App. Div. LEXIS 12534 (N.Y. App. Div. 3d Dep't 1997).

Disclaimer notice provision in CLS Ins § 3420(d) did not apply to accident that occurred in New Jersey; by its terms, § 3420(d) applies only to accidents "occurring within this state." U.S. Fid. & Guar. Co. v New York Susquehanna & Western Ry. Co., 275 A.D.2d 977, 713 N.Y.S.2d 624, 2000 N.Y. App. Div. LEXIS 9565 (N.Y. App. Div. 4th Dep't 2000).

Statutory requirement of notice of disclaimer or denial of coverage as soon as reasonably possible following death or bodily injury arising out of motor vehicle accident occurring within the state was not intended to exempt insurer from coverage for accidents occurring outside state. Kasson & Keller, Inc. v Centennial Ins. Co., 79 Misc. 2d 450, 359 N.Y.S.2d 760, 1974 N.Y. Misc. LEXIS 1683 (N.Y. Sup. Ct. 1974).

Second level excess insurers' failure to promptly disclaim coverage under CLS Ins § 3420(d) did not constitute waiver of their defense, in first level excess insurer's action for contribution involving out-of-state accident, that first insurer had failed to promptly notify second insurers of loss since statute does not apply to out-of-state accidents that bear no substantial relation to New York. American Home Assurance Co. v Republic Ins. Co., 984 F.2d 76, 1993 U.S. App. LEXIS 1040 (2d Cir. N.Y.), cert. denied, 508 U.S. 973, 113 S. Ct. 2964, 125 L. Ed. 2d 664, 1993 U.S. LEXIS 4086 (U.S. 1993).

N.Y. Ins. Law § 3420(d) was inapplicable where the accident that allegedly resulted in the death of an widow's husband occurred in Alabama since, but its plain terms, the statute applied only to accidents that occurred with the State of New York. Lemuel v Admiral Ins. Co., 414 F. Supp. 2d 1037, 2006 U.S. Dist. LEXIS 4903 (M.D. Ala. 2006), aff'd, 2007 U.S. App. LEXIS 380 (11th Cir. Ala. Jan. 9, 2007).

135. Declaratory actions regarding coverage or liability

Insured was not entitled to summary judgment declaring that insurance company was obligated to defend and indemnify in pending action against insured where fact issue existed as to whether insured's failure to give notice until commencement of underlying action, more than 2 years after incident, was reasonable under policy requiring notice "as soon as practicable." Cohoes Rod & Gun Club, Inc. v Firemen's Ins. Co., 134 A.D.2d 782, 521 N.Y.S.2d 836, 1987 N.Y. App. Div. LEXIS 50951 (N.Y. App. Div. 3d Dep't 1987).

Plaintiff insurance company was entitled to summary judgment declaring that defendant insurance company was obligated to share in defense of 2 individuals in underlying action, notwithstanding that those individuals never requested that defendant provide any defense and they denied that their actions were covered by defendant's policy, since allegations in underlying action fell squarely within scope of defendant's coverage and such allegations alone were sufficient to trigger defendant's duty to defend; whether or not 2 individuals were ultimately found not to have been acting within defendant's policy coverage was irrelevant in determining defendant's duty to defend. Zurich-American Ins. Cos. v Atlantic Mut. Ins. Cos., 139 A.D.2d 379, 531 N.Y.S.2d 911, 1988 N.Y. App. Div. LEXIS 8478 (N.Y. App. Div. 1st Dep't 1988), aff'd, 74 N.Y.2d 621, 541 N.Y.S.2d 970, 539 N.E.2d 1098, 1989 N.Y. LEXIS 465 (N.Y. 1989).

In action seeking declaration that second insurance company was responsible for sharing with first insurance company in defense of 2 individuals in underlying civil actions, neither named insureds, which allegedly employed 2 individuals, nor individuals themselves, as putative insureds, were necessary parties who should have been joined in declaratory judgment action, since declaration sought would not impair or reduce available defense coverage afforded by first insurance company, which was currently defending individuals and its named insured (one employer), nor would such declaration impair or reduce available defense coverage afforded by second insurance company to its named insured (other employer). Zurich-American Ins. Cos. v Atlantic Mut. Ins. Cos., 139 A.D.2d 379, 531 N.Y.S.2d 911, 1988 N.Y. App. Div. LEXIS 8478 (N.Y. App. Div. 1st Dep't 1988), aff'd, 74 N.Y.2d 621, 541 N.Y.S.2d 970, 539 N.E.2d 1098, 1989 N.Y. LEXIS 465 (N.Y. 1989).

Although first insurance company was entitled to summary judgment declaring that second insurance company was obligated to share in defense of 2 individuals in underlying civil actions, first company was not thereby entitled to reimbursement of ½ of its expenses in providing defense, since reasonable value of its attorneys' services presented fact issue and, in any event, extent of its recovery in that regard was controlled by coverage of parties' respective "other insurance" clauses, which was yet unresolved. Zurich-American Ins. Cos. v Atlantic Mut. Ins. Cos., 139 A.D.2d 379, 531 N.Y.S.2d 911, 1988 N.Y. App. Div. LEXIS 8478 (N.Y. App. Div. 1st Dep't 1988), aff'd, 74 N.Y.2d 621, 541 N.Y.S.2d 970, 539 N.E.2d 1098, 1989 N.Y. LEXIS 465 (N.Y. 1989).

Court properly stayed insurance company's action seeking declaratory judgment that it was not obligated to defend or indemnify its insured under homeowner's policy in personal injury action by third party against insured and others, since complaint in personal injury action alleged not only cause of action for intentional assault, but also cause of action sounding in negligence. Allstate Ins. Co. v Kemp, 144 A.D.2d 853, 534 N.Y.S.2d 806, 1988 N.Y. App. Div. LEXIS 11256 (N.Y. App. Div. 3d Dep't 1988).

Insurance company which issued policy to subcontractor in which general contractor was named as additional insured was estopped from denying coverage to general contractor where uncontested evidence showed that insurance company was informed that general contractor had required revised certificate of insurance with itself named as additional insured and that general contractor had relied on such certificate in permitting subcontractor to proceed with work. Bucon, Inc. v Pennsylvania Mfg. Asso. Ins. Co., 151 A.D.2d 207, 547 N.Y.S.2d 925, 1989 N.Y. App. Div. LEXIS 14183 (N.Y. App. Div. 3d Dep't 1989).

Insurance company was entitled to summary judgment declaring that it was liable for judgment in products liability action only to extent that judgment exceeded $1 million since its policy clearly and unambiguously stated that liability attached only after first $1 million was paid under insurance policy issued by other insurance company, which had since gone bankrupt and been liquidated. Steyr-Daimler-Puch AG. v Allstate Ins. Co., 151 A.D.2d 942, 543 N.Y.S.2d 538, 1989 N.Y. App. Div. LEXIS 8861 (N.Y. App. Div. 3d Dep't), app. denied, 74 N.Y.2d 617, 550 N.Y.S.2d 277, 549 N.E.2d 479, 1989 N.Y. LEXIS 3318 (N.Y. 1989).

Insurance company was not entitled to summary judgment declaring that it had no duty to defend or indemnify insureds in underlying personal injury action since question of fact existed as to whether notice of disclaimer was reasonable and timely where (1) delay in mailing notice covered 9-week period, and (2) although insurance company proffered confusion about which policy pertained as explanation for delay of 4 weeks, it failed to suggest any excuse for additional 5-week delay after it came to decision to disclaim. Massachusetts Bay Ins. Co. v Pendleton, 159 A.D.2d 770, 551 N.Y.S.2d 992, 1990 N.Y. App. Div. LEXIS 2202 (N.Y. App. Div. 3d Dep't 1990).

Where automobile insurance policy was never intended to provide coverage to vehicle involved in accident, delay in service of notice of disclaimer did not preclude summary judgment in favor of insurance company in declaratory judgment action to determine obligations of various insurance companies with regard to underlying personal injury action. Liberty Mut. Ins. Co. v Aetna Casualty & Surety Co., 168 A.D.2d 121, 571 N.Y.S.2d 735, 1991 N.Y. App. Div. LEXIS 8047 (N.Y. App. Div. 2d Dep't 1991).

Defendant insurance company was not entitled to summary judgment declaring that its policy did not cover underlying accident where (1) employee of plaintiff brought his 20-year-old son to work one day and, while operating truck owned by plaintiff, accident occurred and son sustained injury which required

stitches, (2) employee and son notified plaintiff of injury on day of accident, (3) almost 2 years later, son sued plaintiff for $3 million, and (4) plaintiff notified insurance company immediately after service of summons; question of fact existed regarding timely notice since it did not appear that, on day of accident, employee or son stated that suit would follow, and son was not employee excluded from coverage. AMRO Carting Corp. v Allcity Ins. Co., 170 A.D.2d 394, 566 N.Y.S.2d 282, 1991 N.Y. App. Div. LEXIS 2416 (N.Y. App. Div. 1st Dep't 1991).

Contractor and school district had standing to seek declaratory judgment regarding duty of insurance company to defend and indemnify them since both contractor and school district were insureds under policy issued by insurance company that provided coverage for claims asserted against them, and both established genuine dispute as to whether insurance company had duty to defend and indemnify that would not be resolved in underlying action; contrary result was not required by fact that both contractor and school district already had benefit of defense provided by other insurers. AAC Contracting v United Coastal Ins. Co., 193 A.D.2d 1085, 599 N.Y.S.2d 203, 1993 N.Y. App. Div. LEXIS 5715 (N.Y. App. Div. 4th Dep't 1993).

Coverage was properly disclaimed under umbrella policy covering only "damages because of 'bodily injury' [or] 'property damage'...[c]aused by an 'occurrence'" where claims asserted in underlying action against insured were for economic loss resulting from insured's purported breach of contract. Direct Travel v Aetna Casualty & Sur. Co., 214 A.D.2d 484, 625 N.Y.S.2d 221, 1995 N.Y. App. Div. LEXIS 4556 (N.Y. App. Div. 1st Dep't 1995).

Although complaint did not allege inadequate lighting at scene of accident, insurer was put on notice of such claim where plaintiff's bill of particulars alleged that he slipped on ice that accumulated on uneven planking and that location was unlit, and he stated at depositions that "There were no lights there" and "It was fixed later on and they put lights there." City of New York v Consolidated Edison Co., 238 A.D.2d 119, 655 N.Y.S.2d 496, 1997 N.Y. App. Div. LEXIS 2967 (N.Y. App. Div. 1st Dep't 1997).

Court properly awarded insured his costs in defending declaratory judgment action since insurers cast him in defensive posture by legal steps they took in trying to free themselves from their policy obligations. Empire Ins. Co. v Silbowitz, 243 A.D.2d 251, 663 N.Y.S.2d 7, 1997 N.Y. App. Div. LEXIS 9284 (N.Y. App. Div. 1st Dep't 1997).

In insurers' action for declaratory judgment involving their duty to defend and indemnify insured, insurers were not precluded from introducing audiotapes of their investigator's interviews with insured's principal, even though those tapes for some reason were never played, where judicial hearing officer properly advised insurers that he would have to listen to tapes before deciding whether transcripts, which contained many omissions, fairly and accurately reflected subject conversations. Paramount Ins. Co. v Eli Constr. Gen. Contr., 245 A.D.2d 38, 665 N.Y.S.2d 857, 1997 N.Y. App. Div. LEXIS 12526 (N.Y. App. Div. 1st Dep't 1997).

In action by owner of leased car against its excess liability insurer, involving issues of notice to insurer of accident and validity of insurer's disclaimer of coverage, New York law applied because New York had strongest interest in resolution of dispute, even though insurance contract was made in Massachusetts, where accident occurred in New York, parties to accident were New York residents, personal injury action was settled in New York, and owner chose to commence action against its insurer in New York. First City Acceptance Corp. v Gulf Ins. Co., 245 A.D.2d 649, 665 N.Y.S.2d 114, 1997 N.Y. App. Div. LEXIS 12534 (N.Y. App. Div. 3d Dep't 1997).

Insurer was relieved of its duty to defend and indemnify insureds where insureds' first notice to insurer of underlying claim was given in their summons and complaint in present declaratory judgment action, which was served 9 months after start of underlying action and 2 years after insureds first learned of property damage asserted in underlying action. American Mfrs. Mut. Ins. Co. v CMA Enters., 246 A.D.2d 373, 667 N.Y.S.2d 724, 1998 N.Y. App. Div. LEXIS 272 (N.Y. App. Div. 1st Dep't 1998).

In declaratory judgment action by city transit authority concerning whether insurers were obligated to defend and indemnify it, as work site owner, in underlying personal injury action, insurer under general liability policy was entitled to summary judgment where policy named only authority's contractor as insured, and certificate of insurance stating that insurer would "endeavor" to give certificate holder advance notice of any cancellation of policy imposed no affirmative duties whatsoever. New York City Transit Auth. v Firemen's Fund Ins. Co., 251 A.D.2d 166, 673 N.Y.S.2d 906, 1998 N.Y. App. Div. LEXIS 7322 (N.Y. App. Div. 1st Dep't), app. denied, 92 N.Y.2d 813, 680 N.Y.S.2d 906, 703 N.E.2d 764, 1998 N.Y. LEXIS 3694 (N.Y. 1998).

Plaintiffs, commercial tenant and its liability insurer, were entitled to summary judgment declaring that landlord and its liability insurer had to indemnify them for their payments in settlement of underlying action for water damage where plaintiffs submitted copy of indemnification agreement and judgment of indemnification in tenant's favor, landlord's insurer admitted that landlord's policy covered contractual indemnification, and defendants ignored merits of coverage claim and argued lack of privity of tenant's insurer and inapplicability of CLS Ins § 3420(b), neither of which had merit. American Motorists Ins. Co. v Greater New York Mut. Ins. Co., 255 A.D.2d 190, 680 N.Y.S.2d 10, 1998 N.Y. App. Div. LEXIS 12478 (N.Y. App. Div. 1st Dep't 1998).

Insured was not entitled to declaration that insurer was obligated to defend and indemnify him in underlying personal injury action by his wife for 3 instances of assault where his conduct was not mere negligence and came within exclusion from his homeowner's policy for "an act or omission intended or expected to cause bodily injury...even if the bodily injury...is of a different kind or degree...than that intended or expected." Doyle v Allstate Ins. Co., 255 A.D.2d 795, 680 N.Y.S.2d 741, 1998 N.Y. App. Div. LEXIS 12508 (N.Y. App. Div. 3d Dep't 1998).

In declaratory judgment action, insurer, which initially disclaimed coverage on grounds of late notices of "occurrence" and lawsuit, could amend its answer to add affirmative defense that underlying assault was never intended to be covered "occurrence" within scope of policy; CLS Ins § 3420(d), which requires insurance company to give prompt notice of grounds for disclaimer and precludes insurer from later disclaiming on grounds not initially asserted, was not applicable since statute applies only to policy exclusions and not to disclaimer based on lack of coverage. Agoado Realty Corp. v United Int'l Ins. Co., 260 A.D.2d 112, 699 N.Y.S.2d 335, 1999 N.Y. App. Div. LEXIS 12358 (N.Y. App. Div. 1st Dep't 1999), modified, 95 N.Y.2d 141, 711 N.Y.S.2d 141, 733 N.E.2d 213, 2000 N.Y. LEXIS 1373 (N.Y. 2000).

In declaratory judgment action, court would dismiss insurer's affirmative defense that underlying assault was never intended to be covered "occurrence" within scope of policy, even though assault was intentional from standpoint of perpetrator, since it was "accident" from standpoint of insured inasmuch as policy defined "occurrence" as "accident" but did not exclude assault, either in definition of "occurrence" or as exclusion. Agoado Realty Corp. v United Int'l Ins. Co., 260 A.D.2d 112, 699 N.Y.S.2d 335, 1999 N.Y. App. Div. LEXIS 12358 (N.Y. App. Div. 1st Dep't 1999), modified, 95 N.Y.2d 141, 711 N.Y.S.2d 141, 733 N.E.2d 213, 2000 N.Y. LEXIS 1373 (N.Y. 2000).

In declaratory judgment action, insurer, which initially disclaimed coverage on grounds of late notices of "occurrence" and lawsuit, was precluded by CLS Ins § 3420(d) from amending its answer to add affirmative defense based on policy exclusion of for bodily injury that was "expected or intended from the standpoint of the insured"; insurer waived its right to rely on exclusion by its failure to invoke such policy provision in its original notice of disclaimer. Agoado Realty Corp. v United Int'l Ins. Co., 260 A.D.2d 112, 699 N.Y.S.2d 335, 1999 N.Y. App. Div. LEXIS 12358 (N.Y. App. Div. 1st Dep't 1999), modified, 95 N.Y.2d 141, 711 N.Y.S.2d 141, 733 N.E.2d 213, 2000 N.Y. LEXIS 1373 (N.Y. 2000).

In declaratory judgment action seeking coverage under commercial general liability policy for wrongful death action which alleged that negligent security caused fatal assault on tenant in insureds' building on May 19, 1996, insureds were not entitled to summary judgment as to insurer's affirmative defense based on late notice of "occurrence" received on June 20, 1997 where fact

question existed as to insureds' alleged good-faith belief that no covered event had occurred until they were sued; although landlord was not given notice of murder until several days after it occurred, and landlord was not questioned by police, landlord's good-faith belief of nonliability was fact question. Agoado Realty Corp. v United Int'l Ins. Co., 260 A.D.2d 112, 699 N.Y.S.2d 335, 1999 N.Y. App. Div. LEXIS 12358 (N.Y. App. Div. 1st Dep't 1999), modified, 95 N.Y.2d 141, 711 N.Y.S.2d 141, 733 N.E.2d 213, 2000 N.Y. LEXIS 1373 (N.Y. 2000).

In declaratory judgment action seeking coverage under commercial general liability policy for action brought against insureds based on incident that occurred on May 19, 1996, insureds were entitled to summary judgment as to affirmative defenses based on lack of timely notice of actual underlying lawsuit where, because of death of attorney designated to accept service on their behalf, insureds did not receive actual notice that claim had been made against them until they received summons and complaint in mail on June 9, 1997; insureds' prompt filing of notice on receipt of summons negated affirmative defenses as matter of law. Agoado Realty Corp. v United Int'l Ins. Co., 260 A.D.2d 112, 699 N.Y.S.2d 335, 1999 N.Y. App. Div. LEXIS 12358 (N.Y. App. Div. 1st Dep't 1999), modified, 95 N.Y.2d 141, 711 N.Y.S.2d 141, 733 N.E.2d 213, 2000 N.Y. LEXIS 1373 (N.Y. 2000).

In action for judgment declaring that insurer had no duty to defend and indemnify insured in underlying action that did not involve death or bodily injury, insurer was not entitled to summary judgment where triable issue existed as to whether insured suffered prejudice as result of insurer's delay in disclaiming coverage. United States Fid. & Guar. Co. v Weiri, 265 A.D.2d 321, 696 N.Y.S.2d 200, 1999 N.Y. App. Div. LEXIS 9642 (N.Y. App. Div. 2d Dep't 1999).

Hospital's liability insurers were entitled to summary judgment declaring that they properly disclaimed coverage in underlying federal lawsuit claiming First Amendment violations, defamation and tortious interference with business relations, wherein plaintiff alleged that hospital engaged in intentional and malicious conduct intended to injure his professional reputation in reaction to his suggestion that nurse-midwives be allowed to practice at hospital, as (1) public policy precluded insurance coverage for such claims, and (2) liability policies in question expressly excluded coverage for claims arising from interference with contract, punitive damages, malicious civil acts or omissions, and defamation. Town of Massena v Healthcare Underwriters Mut. Ins. Co., 281 A.D.2d 107, 724 N.Y.S.2d 107, 2001 N.Y. App. Div. LEXIS 4180 (N.Y. App. Div. 3d Dep't 2001), aff'd in part, modified, 98 N.Y.2d 435, 749 N.Y.S.2d 456, 779 N.E.2d 167, 2002 N.Y. LEXIS 2729 (N.Y. 2002).

Summary judgment declaring that a primary insurer was required to defend and indemnify insureds in an underlying claim was proper because the provision at issue was ambiguous as to whether the insureds were covered by the policy, and the primary insurer did not issue a timely denial of coverage; the ambiguity in coverage was construed against the primary insurer, thus affording coverage under its policy to the insureds. Additionally, as the trial court properly determined, under the terms of the two policies at issue, the primary insurer's policy provided primary coverage and the policy of the excess insurer provided excess coverage. Liberty Mut. Fire Ins. Co. v National Cas. Co., 47 A.D.3d 770, 850 N.Y.S.2d 188, 2008 N.Y. App. Div. LEXIS 448 (N.Y. App. Div. 2d Dep't 2008).

While an insurer was required to give timely notice of disclaimer pursuant to N.Y. Ins. Law § 3420(d), because a triable issue of fact existed regarding the date it received a company's notice of claim, neither party was entitled to summary judgment. 233 E. 17th St., LLC v L.G.B. Dev., Inc., 78 A.D.3d 930, 913 N.Y.S.2d 110, 2010 N.Y. App. Div. LEXIS 8617 (N.Y. App. Div. 2d Dep't 2010).

In plaintiff worker's personal injury action after falling from a ladder, defendant/third-party plaintiff construction manager was incorrect that it was entitled to summary judgment on its claim seeking a declaration that defendant third-party insurer was obligated to indemnify the manager under an additional insured endorsement in a certain insurance policy based solely on the insurer's failure to issue a timely disclaimer, as it was not yet clear whether the claim fell outside the scope of the insurance policy's coverage portion, and if it did fall outside the scope of that portion of the policy, then disclaimer pursuant to N.Y. Ins. Law § 3420(d) was unnecessary. Crespo v City of New York, 303 A.D.2d 166, 756 N.Y.S.2d 183, 2003 N.Y. App. Div. LEXIS 1936 (N.Y. App. Div. 1st Dep't 2003).

Parties to a lawsuit involving an insurance company's insured had standing to challenge the timeliness of the insurance company's disclaimer, and the appellate court reversed the trial court's judgment granting the insurance company's motion for summary judgment on its claim that it did not have an obligation to defend or indemnify its insured because the issue of whether the disclaimer was timely was an issue of fact for trial. Colonial Coop. Ins. Co. v Desert Storm Constr. Corp., 305 A.D.2d 363, 757 N.Y.S.2d 894, 2003 N.Y. App. Div. LEXIS 5156 (N.Y. App. Div. 2d Dep't 2003).

Since the insured's employee, in attacking the injured person, was not acting within the scope of his employment or on the insured's behalf, the act was not intended and was thus a covered occurrence under a general commercial liability policy; since the insurer conceded that its disclaimer, which was based upon an exclusion, was untimely, and since the incident otherwise fell within the coverage, the insurer was precluded from denying coverage based on that exclusion. Siagha v Nat'l Fire Ins. Co., 306 A.D.2d 60, 762 N.Y.S.2d 46, 2003 N.Y. App. Div. LEXIS 6430 (N.Y. App. Div. 1st Dep't 2003), app. denied, 2 N.Y.3d 703, 778 N.Y.S.2d 462, 810 N.E.2d 915, 2004 N.Y. LEXIS 575 (N.Y. 2004).

When an insurer failed to timely disclaim coverage of its insured, under N.Y. Ins. Law § 3420(d), based on a policy exclusion, it could not assert that exclusion, and the insured was entitled to summary judgment in an action seeking a declaration that the insurer was required to defend and indemnify it, because the insurer's denial of coverage was based on an exclusion, rather than an absence of coverage, which would not require the insurer to timely disclaim coverage. A. Servidone, Inc. v Commer. Underwriter's Ins. Co., 7 A.D.3d 942, 777 N.Y.S.2d 526, 2004 N.Y. App. Div. LEXIS 7127 (N.Y. App. Div. 3d Dep't), app. dismissed, 3 N.Y.3d 701, 785 N.Y.S.2d 28, 818 N.E.2d 670, 2004 N.Y. LEXIS 2207 (N.Y. 2004).

In a declaratory judgment action concerning defense obligations, N.Y. Ins. Law § 3420(d) was not applicable to a notice of disclaimer between two coinsurers, so the notice given by defendant insurer to plaintiff insurer of its disclaimer of coverage to additional insureds was not untimely. Bovis Lend Lease LMB, Inc. v Royal Surplus Lines Ins. Co., 27 A.D.3d 84, 806 N.Y.S.2d 53, 2005 N.Y. App. Div. LEXIS 14220 (N.Y. App. Div. 1st Dep't 2005).

Insurer was obligated to defend and indemnify an insured for the obligations it assumed in a settlement agreement with an employee because the insurer did not timely disclaim coverage or deny liability under N.Y. Ins. Law § 3420(d)(2), and was precluded from relying on a policy exclusion regarding indemnification agreements. RLI Ins. Co. v Smiedala, 96 A.D.3d 1409, 947 N.Y.S.2d 850, 2012 N.Y. App. Div. LEXIS 4414 (N.Y. App. Div. 4th Dep't 2012).

Insurer had no obligation to indemnify the insureds because the insurer's initial denial was timely, the insurer reserved its right to deny coverage if the vacatur of the default judgment against the insureds was reversed, and, thus, the insurer was not estopped from denying coverage to the insureds and refusing to continue to defend them in the underlying action; the insurer was not entitled to recover its defense costs because there was no express provision to that effect in the policy. American W. Home Ins. Co. v Gjonaj Realty & Mgt. Co., 2020 N.Y. App. Div. LEXIS 8286 (N.Y. App. Div. 2d Dep't 2020).

It was irrelevant that under New York law an injured party may only assert a cause of action directly against a tortfeasor's liability insurer after the injured party has obtained a judgment against the tortfeasor-insured itself, pursuant to N.Y. Ins. Law § 3420(a)(2); § 3420 did not bear on the situation where plaintiff insurer pursued a declaration of noncoverage against its insured and the injured tort claimants. U.S. Underwriters Ins. Co. v Landau, 679 F. Supp. 2d 330, 2010 U.S. Dist. LEXIS 3430 (E.D.N.Y. 2010).

Appeals court agreed that a circus client's insurer was to cover the circus as named under a written agreement between the circus and the client as an additional insured in underlying action by the client's caterer who fell, after the circus performed, in circus's tent used by the client for holiday party. Big Apple Circus, Inc. v Chubb Ins. Group, 305 A.D.2d 197, 760 N.Y.S.2d 428, 2003 N.Y. App. Div. LEXIS 5449 (N.Y. App. Div. 1st Dep't 2003).

136. Reasonableness of delay in giving notice

The question of unreasonableness of an automobile insurer in making a disclaimer becomes a question of fact, or, if extreme, of law, depending upon the circumstances of the case which make it reasonable for the insurer to take more or less time to make, complete and act diligently on its investigation of its coverage or breach of conditions in the policy. Allstate Ins. Co. v Gross, 27 N.Y.2d 263, 317 N.Y.S.2d 309, 265 N.E.2d 736, 1970 N.Y. LEXIS 966 (N.Y. 1970).

The literal language of Insurance Law former § 167, subd 8 [now § 3420(d)] requires prompt notice of disclaimer after decision to do so, and by logical and practical exclusion, there is imported the obligation to reach the decision to disclaim liability or deny coverage promptly too, that is, within a reasonable time. Allstate Ins. Co. v Gross, 27 N.Y.2d 263, 317 N.Y.S.2d 309, 265 N.E.2d 736, 1970 N.Y. LEXIS 966 (N.Y. 1970).

Timeliness of insurer's disclaimer of liability is measured from time when insurer first learns of grounds for disclaimer or denial of coverage. Allcity Ins. Co. v Jimenez, 78 N.Y.2d 1054, 576 N.Y.S.2d 87, 581 N.E.2d 1342, 1991 N.Y. LEXIS 4210 (N.Y. 1991).

Carrier's 4 ½ -year delay in disclaiming coverage under business auto portion of comprehensive insurance policy was unreasonable as matter of law, and thus any purported exclusion of coverage would be construed against carrier. Jefferson Ins. Co. v Travelers Indem. Co., 92 N.Y.2d 363, 681 N.Y.S.2d 208, 703 N.E.2d 1221, 1998 N.Y. LEXIS 3664 (N.Y. 1998).

Insurers were not estopped by their delay from disclaiming any obligation to defend or indemnify an insured with respect to a claim arising out of the insured's purported sale of defective merchandise, where the insured was not prejudiced by the delay; Ins Law former § 167(8), [now § 3420(d)] which required notice of a disclaimer of liability "as soon as is reasonably possible," was inapplicable in that no death or bodily injury was claimed. Tel-Tru Mfg. Co. v North River Ins. Co., 90 A.D.2d 670, 456 N.Y.S.2d 287, 1982 N.Y. App. Div. LEXIS 18750 (N.Y. App. Div. 4th Dep't 1982).

In an action to declare that an injured employee was entitled to receive no-fault benefits from the insurer of a car owner who brought his car to the injured employee's employer for servicing, the employee was properly declared to be entitled to no-fault benefits where he was struck by the vehicle on the employer's lot while it was being moved by a fellow employee, and where the denial of coverage by the insurer, on the ground of a policy provision that excluded no-fault coverage for accidents arising out of servicing of the car unless the accident occurred off the business premises, was not timely as a matter of law. Nahmias v Merchants Mut. Ins. Co., 91 A.D.2d 680, 457 N.Y.S.2d 137, 1982 N.Y. App. Div. LEXIS 19556 (N.Y. App. Div. 2d Dep't 1982).

In an insurance company's declaratory judgment action arising out of a personal injury and wrongful death action in which defendant and her late husband had been struck by an automobile covered under an excess insurance policy, the insurer's failure to disclaim liability as soon as was reasonably possible, in violation of Ins Law § 167(8), precluded any consideration of the merits of the insurer's claim that it was not responsible, since conditions of the policy had been breached. Home Ins. Co. v Corcoran, 107 A.D.2d 561, 483 N.Y.S.2d 300, 1985 N.Y. App. Div. LEXIS 42570 (N.Y. App. Div. 1st Dep't), rev'd, 65 N.Y.2d 1035, 494 N.Y.S.2d 294, 484 N.E.2d 657, 1985 N.Y. LEXIS 16094 (N.Y. 1985).

Where insurance company provides no adequate explanation for not sending notice of disclaimer until approximately 2 ½ months after accident for which claim was filed, disclaimer would be declared invalid. Metropolitan Property & Liability Ins. Co. v State Farm Mut. Auto. Ins. Co., 119 A.D.2d 558, 500 N.Y.S.2d 369, 1986 N.Y. App. Div. LEXIS 55484 (N.Y. App. Div. 2d Dep't 1986).

Insurer's delay in disclaiming liability was not unreasonable as matter of law so as to render disclaimer ineffective under CLS Ins § 3420(d) where action involved property insurance policy; statute applies only to insurance policies involving tort liability to injured third party, and no comparable notice requirement exists for actions involving property insurance policies. Interested Underwriters at Lloyd's v H.D.I III Assocs., 213 A.D.2d 246, 623 N.Y.S.2d 871, 1995 N.Y. App. Div. LEXIS 2801 (N.Y. App. Div. 1st Dep't 1995).

It was error to grant insured's motion for summary judgment declaring that insurers were required to defend and indemnify insured in personal injury action where fact issues existed as to whether notice of claim that insured sent to insurers was reasonable in light of policy provision requiring insured to notify insurers "promptly of an 'occurrence' that may result in a claim".90 8th Ave. Hous. Co. v Andover Cos., 219 A.D.2d 699, 631 N.Y.S.2d 434, 1995 N.Y. App. Div. LEXIS 9569 (N.Y. App. Div. 2d Dep't 1995).

Disclaimers of coverage made more than 2 months after insurer possesses all facts necessary to invoke exclusion are untimely as matter of law; reasonableness of insurer's delay of less than 2 months is generally fact issue not to be resolved in summary judgment motion. Utica Fire Ins. Co. v Spagnolo, 221 A.D.2d 921, 634 N.Y.S.2d 296, 1995 N.Y. App. Div. LEXIS 13406 (N.Y. App. Div. 4th Dep't 1995).

Reasonableness of any delay in disclaiming coverage of underinsured motorist claim must be judged from time when carrier is aware of sufficient facts to issue disclaimer. Allstate Ins. Co. v Ferrone, 232 A.D.2d 479, 648 N.Y.S.2d 936, 1996 N.Y. App. Div. LEXIS 10165 (N.Y. App. Div. 2d Dep't 1996).

Defendants, insurance companies, should not have been granted summary judgment in action for breach of insurance contract where fact issue existed as to whether less than one month delay in disclaiming liability was reasonable. Murphy v Hanover Ins. Co., 239 A.D.2d 323, 657 N.Y.S.2d 740, 1997 N.Y. App. Div. LEXIS 4591 (N.Y. App. Div. 2d Dep't 1997).

Plaintiffs were not entitled to judgment declaring that insurer's disclaimer of coverage, based on construction exclusion clause contained in policies, was untimely under CLS Ins § 3420(d) because it was issued more than 3 months after insurer learned facts underlying disclaimer, given paucity of information furnished by plaintiffs concerning accident despite insurer's efforts to ascertain such information. West 56th St. Assocs. v Greater N.Y. Mut. Ins. Co., 250 A.D.2d 109, 681 N.Y.S.2d 523, 1998 N.Y. App. Div. LEXIS 13754 (N.Y. App. Div. 1st Dep't 1998), amended, 1999 N.Y. App. Div. LEXIS 1194 (N.Y. App. Div. 1st Dep't Jan. 19, 1999).

Reasonableness of insurer's delay in issuing disclaimer of liability is determined from time at which insurer is aware of sufficient facts on which to base disclaimer. Mohawk Minden Ins. Co. v Ferry, 251 A.D.2d 846, 674 N.Y.S.2d 512, 1998 N.Y. App. Div. LEXIS 7326 (N.Y. App. Div. 3d Dep't 1998).

Although reasonableness of insurer's delay in issuing disclaimer of liability generally is question of fact requiring consideration of totality of circumstances, long or unexplained delay will be found unreasonable as matter of law. Mohawk Minden Ins. Co. v Ferry, 251 A.D.2d 846, 674 N.Y.S.2d 512, 1998 N.Y. App. Div. LEXIS 7326 (N.Y. App. Div. 3d Dep't 1998).

Insurer who filed to disclaim coverage as soon as reasonably possible cannot justify its failure to do so by insured's late notice. Mohawk Minden Ins. Co. v Ferry, 251 A.D.2d 846, 674 N.Y.S.2d 512, 1998 N.Y. App. Div. LEXIS 7326 (N.Y. App. Div. 3d Dep't 1998).

Recent amendment to CLS Ins § 3420(f)(2)(A), requiring insurer to disclose within 45 days extent of coverage provided under its policy, does not apply retroactively. Travelers Prop. Cas. Corp. v Fusilli, 266 A.D.2d 48, 698 N.Y.S.2d 641, 1999 N.Y. App. Div. LEXIS 11596 (N.Y. App. Div. 1st Dep't 1999).

Prompt notice of disclaimer was not required, where owner's insurance policy did not provide coverage because vehicle was operated without owner's consent. Allstate Indem. Co. v Nelson, 285 A.D.2d 545, 728 N.Y.S.2d 82, 2001 N.Y. App. Div. LEXIS 7462 (N.Y. App. Div. 2d Dep't 2001).

Denial of insureds' summary judgment motion in declaratory judgment action was error because the insureds presented evidence that the insurer's delay in issuing a disclaimer of coverage was unreasonable, and that the insurer was precluded from disclaiming coverage based on a late notice of claim or a policy exclusion pursuant to N.Y. Ins. Law § 3420(d); in opposition, the insurer failed to raise a triable issue of fact as to whether the delay was reasonably related to the completion of a necessary, thorough, and diligent investigation, or whether there was any other satisfactory explanation for the delay. Quest Bldrs. Group, Inc. v Deco Interior Constr., Inc., 56 A.D.3d 744, 868 N.Y.S.2d 149, 2008 N.Y. App. Div. LEXIS 9005 (N.Y. App. Div. 2d Dep't 2008).

Trial court erred in denying an insurance company's motion pursuant to N.Y. C.P.L.R 7503 to permanently stay arbitration of an uninsured motorist claim; the offending vehicle was insured by another insurer at the time of an accident, because a livery exclusion in the other insurer's policy did not apply, and the other insurer failed to give a timely written notice of disclaimer as required by N.Y. Ins. Law § 3420(d), as the other insurer had sufficient facts upon which to disclaim upon receipt of the initial report on November 15, 1999, and under the circumstances, it was unreasonable for the other insurer to have waited until March 28, 2000, to issue a disclaimer. Fed. Ins. Co. v Provenzano, 300 A.D.2d 485, 751 N.Y.S.2d 567, 2002 N.Y. App. Div. LEXIS 12326 (N.Y. App. Div. 2d Dep't 2002).

Where the insurer had no duty to defend and indemnify the insured party because the act that was the basis of the underlying action did not occur on a date that was covered by the insurance policy, since no coverage was created in the first instance, the timely disclaimer provisions of N.Y. Ins. Law § 3420(d) were inapplicable. Levin v G.T.J. Co., 306 A.D.2d 385, 760 N.Y.S.2d 868, 2003 N.Y. App. Div. LEXIS 7135 (N.Y. App. Div. 2d Dep't 2003).

Due to an insurer's failure to timely disclaim coverage, it was obligated to defend an insured under a homeowner's policy with regard to bodily injuries she received as a result of a dog bite. Taking 45 days to send out a notice of disclaimer was unreasonable in as much as the insurer had all of the information about the claim, the injured child's residence at the insured home, and any additional information it required. Moore v Ewing, 9 A.D.3d 484, 781 N.Y.S.2d 51, 2004 N.Y. App. Div. LEXIS 10120 (N.Y. App. Div. 2d Dep't 2004).

Because the insurer acted reasonably in investigating the corporation's claims regarding the personal injury accident, the insurer issued a timely disclaimer in compliance with N.Y. Ins. Law § 3420(d). Laracuente v Mora, 784 N.Y.S.2d 921, 2 Misc. 3d 1012(A), 2004 N.Y. Misc. LEXIS 413 (N.Y. Sup. Ct. 2004).

Insurer's motion to stay arbitration of an uninsured motorist claim was properly granted and N.Y. Ins. Law § 3420(d), requiring timely notice of denial of coverage after a notice of claim was filed, was properly found to be inapplicable because the insurer's denial of coverage was based on the insured's fraudulent misrepresentation that he was driving a covered vehicle during the accident. Since the denial was based on the fraudulent misrepresentation, the concerns of prejudice to the insured from the lack of timely notice were not present; the insurer's motion for a stay of arbitration was properly granted. Utica Mut. Ins. Co. v Reid, 22 A.D.3d 127, 799 N.Y.S.2d 509, 2005 N.Y. App. Div. LEXIS 8469 (N.Y. App. Div. 1st Dep't 2005).

Trial court erred in granting partial summary judgment to a medial partnership in an action seeking indemnification from an insurer, as there was a triable issue of fact as to whether the insurer gave adequate and timely notice of its effort to deny coverage as required by N.Y. Ins. Law § 3420(d). Elacqua v Physicians' Reciprocal Insurers, 21 A.D.3d 702, 800 N.Y.S.2d 469, 2005 N.Y. App. Div. LEXIS 8789 (N.Y. App. Div. 3d Dep't 2005), app. dismissed, 6 N.Y.3d 844, 814 N.Y.S.2d 76, 847 N.E.2d 373, 2006 N.Y. LEXIS 622 (N.Y. 2006).

Where the construction company argued that it gave notice of claim to the insurer's agent and that the insurer's disclaimer was untimely under N.Y. Ins. Law § 3420, but the company did not prove that the agent was actually an agent of the insurer, the company could not assert untimely disclaimer under § 3420. Escobar v Colonial Indem. Ins. Co., 22 A.D.3d 633, 804 N.Y.S.2d 360, 2005 N.Y. App. Div. LEXIS 11094 (N.Y. App. Div. 2d Dep't 2005).

Trial court properly declared that an insurance company had no duty to defend or indemnify defendants in an underlying personal injury action, because the company demonstrated that a disclaimer was timely for purposes of N.Y. Ins. Law § 3420(d), as the grounds upon which teh insurance company denied coverage for untimely notice of the occurrence were not readily apparent until the company learned of defendants' misstatements concerning their role in managing a construction site, and established that defendants breached an insurance policy's cooperation clause by misstating their role. Sirius Am. Ins. Co. v TGC Constr. Corp., 37 A.D.3d 818, 830 N.Y.S.2d 773, 2007 N.Y. App. Div. LEXIS 2302 (N.Y. App. Div. 2d Dep't 2007).

Insurer was not made aware of the insolvency of the insurance company for the driver who was involved in an auto accident with its insured as the basis for the uninsured motorist benefits claim for its insured until its insured filed papers in opposition to the insurer's petition to stay arbitration. The insurer then submitted reply papers promptly thereafter, which unequivocally disclaimed coverage on the ground that the insured failed to provide timely notice under the insurance policy, thereby satisfying the insurer's statutory obligation to timely disclaim under N.Y. Ins. Law § 3420(d). Matter of State Farm Mut. Auto. Ins. Co. v Tubis, 38 A.D.3d 670, 831 N.Y.S.2d 520, 2007 N.Y. App. Div. LEXIS 3336 (N.Y. App. Div. 2d Dep't 2007).

Insurer timely disclaimed coverage under homeowner's liability policy where it was first informed of accident in letter from insured's attorney dated 3 months after accident, letter did not mention homeowner's policy but rather named only automobile and umbrella policies and made claim against insurer for "excess coverage," and insured first made claim under homeowner's policy when she served complaint on insurer, at which time insurer promptly disclaimed coverage. Brabender v Northern Assurance Co. of Am., 65 F.3d 269, 1995 U.S. App. LEXIS 25357 (2d Cir. N.Y. 1995).

Insurer's prompt investigation into injured party's claim was an adequate justification for the 50-day delay in giving notice of disclaimer, and such delay was reasonable as a matter of law. Mount Vernon Fire Ins. Co. v Harris, 193 F. Supp. 2d 674, 2002 U.S. Dist. LEXIS 5996 (E.D.N.Y. 2002).

As to a personal injury and wrongful death claim brought against insureds, which fell under N.Y. Ins. Law § 3420(d), whether the insurer should be estopped from disclaiming coverage depended in the first instance on how long the insurer had known of the accident and at what point it should have been aware of the information it asserted in support of its disclaimer. U.S. Underwriters Ins. Co. v Landau, 679 F. Supp. 2d 330, 2010 U.S. Dist. LEXIS 3430 (E.D.N.Y. 2010).

As to a personal injury and wrongful death claim brought against insureds, which fell under N.Y. Ins. Law § 3420(d), the timeliness of the insurer's "independent contractor" disclaimer was an open question; at the summary judgment stage, the court could not discern the earliest point at which the insurer reasonably should have learned of the integral role played by the independent contractor in the accident. U.S. Underwriters Ins. Co. v Landau, 679 F. Supp. 2d 330, 2010 U.S. Dist. LEXIS 3430 (E.D.N.Y. 2010).

Underlying incident fell within the assault and battery exclusion of the policy, but also fell within the policy's general coverage for claims of personal injury arising out of an accidental occurrence, so, under N.Y. Ins. Law § 3420(d), disclaimer was necessary when denial of coverage was based on a policy exclusion without which the claim was covered, and failure to comply with § 3420(d) precluded denial of coverage based on a policy exclusion. The appeals court held that to the extent that its Crouse W. Holding Corp. v Sphere Drake Ins. Co. decision was read to hold that compliance with § 3420(d) was not required in these circumstances, it was no longer to be followed. Penn-America Group, Inc. v Zoobar, Inc., 305 A.D.2d 1116, 759 N.Y.S.2d 825, 2003 N.Y. App. Div. LEXIS 4773 (N.Y. App. Div. 4th Dep't), app. denied, 100 N.Y.2d 511, 766 N.Y.S.2d 164, 798 N.E.2d 348, 2003 N.Y. LEXIS 2329 (N.Y. 2003).

Three deliberate collisions caused in furtherance of an insurance fraud scheme were not a covered accidents; the insurer was not required by N.Y. Ins. Law § 3420(d) to issue a disclaimer because its denial of coverage was based on a lack of coverage for the incident in the first instance, not an exclusion under the policy. State Farm Mut. Auto. Ins. Co. v Laguerre, 305 A.D.2d 490, 759 N.Y.S.2d 531, 2003 N.Y. App. Div. LEXIS 5387 (N.Y. App. Div. 2d Dep't 2003).

Trial court properly declared that an insurance company was obligated to defend and indemnify plaintiffs in an underlying personal injury action, because the evidence supported the finding that the company did not make a timely disclaimer of coverage as required by N.Y. Ins. Law § 3420(d). Schulman v Indian Harbor Ins. Co., 40 A.D.3d 957, 836 N.Y.S.2d 682, 2007 N.Y. App. Div. LEXIS 6437 (N.Y. App. Div. 2d Dep't 2007).

137. —Particular circumstances

Summary judgment was error in an insurer's action seeking a declaration that it was not obligated to defend a dental malpractice case against its insured based on the insured's non-cooperation because, inter alia, a fact question remained as to the time required for the insurer to evaluate the insured's conduct for purposes of disclaimer under N.Y. Ins. Law § 3420(d); because the insured had punctuated periods of non-compliance with sporadic cooperation or promises to cooperate, some reasonably longer period for analysis may have been warranted. In this case, the reasonableness of an approximately two-month delay to analyze the pattern of obstructive conduct that permeated the insurer's relationship with its insured for almost six years presented a fact question that precluded summary judgment. Continental Cas. Co. v Stradford, 11 N.Y.3d 443, 871 N.Y.S.2d 607, 900 N.E.2d 144, 2008 N.Y. LEXIS 3387 (N.Y. 2008).

Neither workers' compensation carrier nor general liability carrier were entitled to summary judgment in former's action for payment of latter's share of costs and expenses incurred in settlement of personal injury action against their insured where triable issues were raised as to (1) whether general liability carrier had received timely notice of underlying personal injury claim and third-party action against insured, inasmuch as general liability carrier was first notified of proceedings only 2 days before stipulation of settlement was entered on record, and (2) whether delay in giving such notice was reasonable. Lumbermens Mut. Ins. Co. of Kemper Group of Ins. Cos. v Lumber Mut. Ins. Co., 148 A.D.2d 328, 538 N.Y.S.2d 542, 1989 N.Y. App. Div. LEXIS 2383 (N.Y. App. Div. 1st Dep't 1989).

Plaintiff was not entitled to summary judgment declaring that defendant insurer had duty to defend and indemnify codefendants with respect to causes of action alleged in complaint, despite delay of almost 2 months in disclaiming coverage, where insured had given late notice of claim to insurer, and insurer submitted proof that, even though policy excluded claim based on Dram Shop violation, it was necessary to investigate validity of plaintiff's negligence claim and evaluate codefendant's reason for giving late notice before determination to disclaim could be made; reasonableness of delay in disclaiming coverage presented factual question. Wilczak v Ruda & Capozzi, Inc., 203 A.D.2d 944, 611 N.Y.S.2d 73, 1994 N.Y. App. Div. LEXIS 4955 (N.Y. App. Div. 4th Dep't 1994).

Liability insurer failed to disclaim liability or deny coverage as soon as reasonably possible, as required by CLS Ins § 3420(d), where it had sufficient facts to disclaim approximately 9 months before it gave required notice; such delay was unreasonable as matter of law. Allegany Co-op Ins. Co. v Williams, 216 A.D.2d 894, 628 N.Y.S.2d 900, 1995 N.Y. App. Div. LEXIS 7212 (N.Y. App. Div. 4th Dep't 1995), app. denied, 87 N.Y.2d 806, 641 N.Y.S.2d 597, 664 N.E.2d 508, 1996 N.Y. LEXIS 94 (N.Y. 1996).

It was error to grant insurer's motion for summary judgment declaring that it had no duty to defend or indemnify insureds in underlying action where fact issue existed as to whether insurer gave written notice of disclaimer to insureds within reasonable time after identity of injured party became known to insurer. Utica Fire Ins. Co. v Spagnolo, 221 A.D.2d 921, 634 N.Y.S.2d 296, 1995 N.Y. App. Div. LEXIS 13406 (N.Y. App. Div. 4th Dep't 1995).

In action by plaintiffs who were injured while operating equipment leased by defendant to their employer, wherein employer (equipment lessee) was impleaded by defendant and subsequently demanded defense and indemnification coverage as additional insured under defendant's comprehensive liability policy, timeliness of insurer's disclaimer of coverage was properly measured as of date when equipment lessee demanded coverage rather than date when insurer made its "business decision" to name lessee as additional insured, where insurer made its decision retroactive to date of equipment lease. Nuzzo v Griffin Tech., 222 A.D.2d 184, 643 N.Y.S.2d 802, 1996 N.Y. App. Div. LEXIS 6777 (N.Y. App. Div. 4th Dep't 1996), app. denied, 91 N.Y.2d 802, 666 N.Y.S.2d 564, 669 N.E.2d 534, 1997 N.Y. LEXIS 4164 (N.Y. 1997).

Insured landlord's reasonable belief that it was not required to notify insurer when it learned that tenant had been shot in its apartment building did not become unreasonable 2 weeks after shooting when victim told landlord's superintendent that he was going to sue, because even if that threat would have triggered notice provision if it had been made directly to landlord, superintendent's knowledge of threat could not be imputed to landlord in absence of evidence that superintendent's agency included handling of such information. Nalea Realty Corp. v Public Serv. Mut. Ins. Co., 238 A.D.2d 252, 656 N.Y.S.2d 613, 1997 N.Y. App. Div. LEXIS 4045 (N.Y. App. Div. 1st Dep't), app. dismissed, 90 N.Y.2d 927, 664 N.Y.S.2d 260, 686 N.E.2d 1355, 1997 N.Y. LEXIS 3101 (N.Y. 1997).

In action by owner of leased car against its excess liability insurer, owner's failure to give insurer requisite timely written notice of accident was not excused by its giving of oral "telephonic notice" to selling agent of insurance policy. First City Acceptance Corp. v Gulf Ins. Co., 245 A.D.2d 649, 665 N.Y.S.2d 114, 1997 N.Y. App. Div. LEXIS 12534 (N.Y. App. Div. 3d Dep't 1997).

In insurer's action for declaration that it was not obligated to defend and indemnify insureds in underlying third-party action for indemnification and contribution, insureds were entitled to summary judgment declaring that insurer was obligated to defend and indemnify them where insureds did not receive notice of insurer's disclaimer of liability until 90 days after insurer received notice of claim, and insurer failed to advance any concrete justification for its delay beyond alleging generally that it required time to investigate claim. Mohawk Minden Ins. Co. v Ferry, 251 A.D.2d 846, 674 N.Y.S.2d 512, 1998 N.Y. App. Div. LEXIS 7326 (N.Y. App. Div. 3d Dep't 1998).

Insurer's delay in issuing denial letter was not necessarily reasonable, and thus insurer was not entitled to partial summary judgment dismissing insured's claim for underinsured motorist benefits, where (1) insured's first demand for limits of underinsured coverage available under policy was contained in her letter to insurer dated February 6, 1998, (2) insurer denied that demand in letter dated March 5, 1998, (3) insured notified insurer of potential underinsured motorist claim in letter dated July 11, 1995, (4) insured's counsel and insurer corresponded between July 11, 1995, and March 5, 1998, and (5) affidavit of insurer's representative in support of its summary judgment motion did not discuss reasonableness of delay. Hess v Nationwide Mut. Ins. Co., 273 A.D.2d 689, 709 N.Y.S.2d 701, 2000 N.Y. App. Div. LEXIS 7222 (N.Y. App. Div. 3d Dep't 2000).

Insurer's disclaimer based on a contractual liability exclusion as well as an employer's liability exclusion was untimely under N.Y. Ins. Law § 3420(d) because the insurer began investigating the grounds for disclaiming coverage as early as five months before its disclaimer, and its insurance administrator received a letter requesting that it defend and indemnify another party in the underlying action three months before the disclaimer. Rael Automatic Sprinkler Co., Inc. v Schaefer Agency, 52 A.D.3d 670, 861 N.Y.S.2d 100, 2008 N.Y. App. Div. LEXIS 5586 (N.Y. App. Div. 2d Dep't 2008).

Insurer was obligated to defend and indemnify its insureds in the main action because, by failing to provide written notice of disclaimer of coverage to the insureds as additional insured, the insurer failed to comply with N.Y. Ins. Law § 3420(d)(2); the fact that the tendering carrier provided untimely notice did not excuse the insurer's unreasonable delay in disclaiming coverage. The primary insurance carrier was not the real party in interest, such that the notice of disclaimer to it would have been rendered

effective as against the insureds. Sierra v 4401 Sunset Park, LLC, 101 A.D.3d 983, 957 N.Y.S.2d 219, 2012 N.Y. App. Div. LEXIS 8646 (N.Y. App. Div. 2d Dep't 2012), aff'd, 24 N.Y.3d 514, 25 N.E.3d 921, 2 N.Y.S.3d 8, 2014 N.Y. LEXIS 3324 (N.Y. 2014).

Additional insured was entitled to summary judgment on a coverage dispute because the only basis for the insurer's denial of the additional insured's demand was the same employee exclusion the insurer invoked three months earlier when it denied the insurer's demand, and under the circumstances, the insurer's 48-day delay in responding to the additional insures's demand was unreasonable, and the insurer failed to provide notice of its disclaimer of coverage as soon as is reasonably possible. Bowers v Grier, 185 A.D.3d 998, 128 N.Y.S.3d 279, 2020 N.Y. App. Div. LEXIS 4395 (N.Y. App. Div. 2d Dep't 2020).

Question as to whether insurer had duty to defend or indemnify insured because of insured's failure to provide it with timely notice of accident, which resulted in injury to 16-year-old operator of insured's all-terrain vehicle, required trial where insured's allegation that he believed he had no responsibility for accident and that he was unaware there would be any claim against him until he was served with process presented clear question of fact as to whether failure of timely notice could be excused as result of good-faith, reasonable belief in nonliability. Progressive Casualty Ins. Co. v Jackson, 151 Misc. 2d 479, 573 N.Y.S.2d 556, 1991 N.Y. Misc. LEXIS 419 (N.Y. Sup. Ct. 1991), aff'd, 181 A.D.2d 1035, 585 N.Y.S.2d 716, 1992 N.Y. App. Div. LEXIS 4635 (N.Y. App. Div. 4th Dep't 1992).

In a declaratory judgment action filed by an insurer, the lower court's denial of summary judgment filed by the insurer was reversed because the insurer acted reasonably in not providing a disclaimer letter until a few months after receiving notice of the accident because the insurer did not know that the livery disclaimer was potentially applicable to the claim until receiving a report from its investigator and it was not unreasonable for the insurer to consult with counsel before sending the disclaimer letters. N.Y. Cent. Mut. Fire Ins. Co. v Majid, 5 A.D.3d 447, 773 N.Y.S.2d 429, 2004 N.Y. App. Div. LEXIS 2511 (N.Y. App. Div. 2d Dep't 2004).

An insurer who delays in giving written notice of disclaimer bears the burden of justifying the delay. While N.Y. Ins. Law § 3420(d) speaks only of giving notice "as soon as is reasonably possible," investigation into issues affecting an insurer's decision whether to disclaim coverage obviously may excuse delay in notifying the policyholder of a disclaimer; however, investigation into possible other sources of insurance is not an acceptable reason for delayed disclaimer. First Fin. Ins. Co. v Jetco Contr. Corp., 1 N.Y.3d 64, 769 N.Y.S.2d 459, 801 N.E.2d 835, 2003 N.Y. LEXIS 3948 (N.Y. 2003).

Insurer did not violate N.Y. Ins. Law § 3420 by taking 34 days to give written notice as soon as reasonably possible of its disclaimer of its insured's claim, pursuant to the parties' insurance agreement, because the insurer's investigation of the matter at issue was warranted and not unreasonable as a matter of law, including the insurer's assessment that the claim was sufficiently complex and that consultation with outside counsel was necessary, thus resulting in the 34-day delay. 105 St. Assocs., LLC v Greenwich Ins. Co., 507 F. Supp. 2d 377, 2007 U.S. Dist. LEXIS 67835 (S.D.N.Y. 2007).

138. — —Delay of less than 3 months

When claim is asserted against insurer under former § 167 [now § 3420], the insurer, if it does not intend to honor claim, is duty bound to disclaim as soon as reasonably possible, and hence delay was unreasonable where insurer did not disclaim for two months after its receipt of copy of summons and complaint against its insured. Appell v Liberty Mut. Ins. Co., 22 A.D.2d 906, 255 N.Y.S.2d 545, 1964 N.Y. App. Div. LEXIS 2459 (N.Y. App. Div. 2d Dep't 1964), app. dismissed, 15 N.Y.2d 955, 259 N.Y.S.2d 844, 207 N.E.2d 517, 1965 N.Y. LEXIS 1519 (N.Y. 1965), aff'd, 17 N.Y.2d 519, 267 N.Y.S.2d 516, 214 N.E.2d 792, 1966 N.Y. LEXIS 1616 (N.Y. 1966).

Notice of disclaimer of liability by insurer was made "as soon as . . . reasonably possible" under CLS Ins § 3420 where it was made approximately 2 months after insurer received notice of claim, but delay was explained by fact that insurer postponed interviewing one insured because she had just given birth, and it was not unreasonable as matter of law for insurer to complete its investigation before deciding to disclaim liability. Norfolk & Dedham Mut. Fire Ins. Co. v Petrizzi, 121 A.D.2d 276, 503 N.Y.S.2d 51, 1986 N.Y. App. Div. LEXIS 58253 (N.Y. App. Div. 1st Dep't), app. denied, 68 N.Y.2d 611, 510 N.Y.S.2d 1025, 502 N.E.2d 1007, 1986 N.Y. LEXIS 20868 (N.Y. 1986).

Liability insurer's disclaimer of coverage was not timely, and thus court properly rendered judgment declaring that insurer was obligated to defend and indemnify insured where letter from prospective plaintiff's attorney, explaining all facts needed as basis for disclaimer, was received by insurer on March 20 and letter of disclaimer was not sent by insurer until May 23; delay of more than 2 months was unreasonable as matter of law. Farmers Fire Ins. Co. v Brighton, 142 A.D.2d 547, 530 N.Y.S.2d 215, 1988 N.Y. App. Div. LEXIS 7311 (N.Y. App. Div. 2d Dep't 1988).

Insurer's delay in disclaiming coverage under motor vehicle policy was unreasonable as matter of law, and thus it was obligated to defend insured in injured passenger's action, where insurer was notified of accident in September 1991, it denied passenger's claim for no-fault benefits in November 1991 on basis of nonpermissive use, and it did not formally disclaim coverage until February 1993. Greater N.Y. Mut. Ins. Co. v Clark, 205 A.D.2d 857, 613 N.Y.S.2d 295, 1994 N.Y. App. Div. LEXIS 6073 (N.Y. App. Div. 3d Dep't), app. denied, 84 N.Y.2d 807, 621 N.Y.S.2d 516, 645 N.E.2d 1216, 1994 N.Y. LEXIS 3475 (N.Y. 1994).

Motor vehicle insurer's disclaimer of coverage was untimely as matter of law where insurer had all facts necessary to invoke exclusion for nonpermissive use on date that court held that operator was not permissive user as matter of law, and disclaimer was not made until more than 2 months later. Gill v Gouchie, 210 A.D.2d 954, 620 N.Y.S.2d 679, 1994 N.Y. App. Div. LEXIS 13434 (N.Y. App. Div. 4th Dep't 1994), app. denied, 1995 N.Y. App. Div. LEXIS 3998 (N.Y. App. Div. 4th Dep't Mar. 17, 1995), app. denied, 86 N.Y.2d 701, 631 N.Y.S.2d 605, 655 N.E.2d 702, 1995 N.Y. LEXIS 2709 (N.Y. 1995).

Disclaimer issued by insurer was not unreasonably delayed, even though slightly more than 2 months elapsed between insurer's receipt of insured's claim and issuance of disclaimer, where claim letter and accompanying document submitted to insurer by insured's attorney did not on their face immediately alert insurer to possible grounds for disclaimer, and during period in question, insurer engaged in reasonably prompt, thorough, and diligent investigation of claim, and repeatedly and unsuccessfully attempted to have insured made available to provide written statement as required by policy. In re Prudential Property & Casualty Ins. Co., 213 A.D.2d 408, 623 N.Y.S.2d 336, 1995 N.Y. App. Div. LEXIS 2414 (N.Y. App. Div. 2d Dep't 1995).

More than 2-month unexplained delay by insurer in giving insured notice of disclaimer of liability was unreasonable as matter of law. Allstate Ins. Co. v Souffrant, 221 A.D.2d 434, 633 N.Y.S.2d 575, 1995 N.Y. App. Div. LEXIS 11835 (N.Y. App. Div. 2d Dep't 1995).

Insurance company acted "as soon as...reasonably possible" in denying coverage where (1) one day after receiving notice of claim, it issued reservation of rights letter informing insured that it could not make decision about coverage until it completed its investigation, (2) in one week, its claims adjuster obtained statement from insured's principal, visited accident scene, and requested approval of disclaimer from division office, and (3) it disclaimed coverage one week later, only 3 weeks after receiving notice of accident. Can-Am Roofing v American States Ins. Co., 229 A.D.2d 973, 645 N.Y.S.2d 253, 1996 N.Y. App. Div. LEXIS 9020 (N.Y. App. Div. 4th Dep't 1996).

New York City was entitled to summary judgment declaring that insurer was obligated to defend and indemnify it in underlying action, as insurer knew all that it needed to know to disclaim when it received its investigator's first report, and its subsequent 83-day delay in disclaiming coverage could not be reasonably explained by need to further investigate underlying facts in that it knew that city notified insurance broker on day incident happened, it knew or should have known that broker was not city's agent, and it could have telephoned broker rather than waiting for second investigator's report to ascertain why

broker did not notify it sooner. Mount Vernon Fire Ins. Co. v City of New York, 236 A.D.2d 296, 653 N.Y.S.2d 582, 1997 N.Y. App. Div. LEXIS 1411 (N.Y. App. Div. 1st Dep't 1997).

Insurer was obligated to defend and, if necessary, indemnify insured, because insurer's delay in disclaiming coverage was unreasonable, where insurer had necessary information by mid-August 1994 to disclaim coverage based on insured's failure to provide timely notice of incident, yet it did not do so until it commenced present declaratory judgment action on November 1, 1994, insurer's October 6, 1994, reservation of rights letter was not written notice of disclaimer in compliance with CLS Ins § 3420(d), and insurer failed to offer adequate explanation for its delay in disclaiming coverage. Pennsylvania Millers Mut. Ins. Co. v Sorrentino, 238 A.D.2d 491, 657 N.Y.S.2d 62, 1997 N.Y. App. Div. LEXIS 4033 (N.Y. App. Div. 2d Dep't 1997).

Period of 31 days that it took insurer's attorneys to review 500-page file and conduct legal research before notifying insured of disclaimer was not unreasonable for purposes of CLS Ins § 3420(d). DeSantis Bros. v Allstate Ins. Co., 244 A.D.2d 183, 664 N.Y.S.2d 7, 1997 N.Y. App. Div. LEXIS 11375 (N.Y. App. Div. 1st Dep't 1997), app. denied, 91 N.Y.2d 808, 669 N.Y.S.2d 261, 692 N.E.2d 130, 1998 N.Y. LEXIS 283 (N.Y. 1998).

Neither insurer nor insureds were entitled to summary judgment in action seeking declaration that insurer had properly disclaimed liability and had no duty to indemnify insureds for supplementary underinsured motorist coverage where fact issue existed as to reasonableness of delay in disclaiming coverage as measured from 3 potential dates offered by parties, be it 42 days, 32 days, or 25 days. State Farm Mut. Auto. Ins. Co. v Clift, 249 A.D.2d 800, 671 N.Y.S.2d 843, 1998 N.Y. App. Div. LEXIS 4517 (N.Y. App. Div. 3d Dep't 1998).

In applying "as soon as is reasonably possible" language of CLS Ins § 3420(d), Appellate Division would not adopt bright-line rule, advocated by insurer, that any delay of 30 days or less is reasonable as matter of law; thus, reasonableness of insurer's delay of about 30 days in denying coverage of supplementary uninsured motorist benefits under policy was question of fact. Crowningshield v Nationwide Mut. Ins. Co., 255 A.D.2d 813, 680 N.Y.S.2d 302, 1998 N.Y. App. Div. LEXIS 12512 (N.Y. App. Div. 3d Dep't 1998).

Insurer was entitled to permanent stay of arbitration of claim for underinsured motorist benefits where insured commenced lawsuit against tortfeasor without "immediately" forwarding copy of summons and complaint to insurer as required by supplementary uninsured motorists endorsement contained in policy; insurer did not waive its right to disclaim coverage by waiting 3 years after insured's commencement of lawsuit, where insured did not forward copy of summons and complaint to insurer until 2 ½ years after commencing lawsuit, and insurer gave insured written notice of disclaimer within 20 days of confirming his failure to timely forward copy of summons and complaint. Nationwide Ins. Co. v Lukas, 264 A.D.2d 778, 695 N.Y.S.2d 132, 1999 N.Y. App. Div. LEXIS 9256 (N.Y. App. Div. 2d Dep't 1999).

Underlying plaintiff's insurer was entitled to permanent stay of arbitration of uninsured motorist claim where 41-day delay of underlying defendant's insurer in disclaiming coverage for its insured's vehicle was unreasonable, and thus insurance coverage for that vehicle still existed. Colonial Penn Ins. Co. v Pevzner, 266 A.D.2d 391, 698 N.Y.S.2d 310, 1999 N.Y. App. Div. LEXIS 11547 (N.Y. App. Div. 2d Dep't 1999).

Insurer's disclaimer of coverage, made about 45 days after receiving notice of claim, satisfied requirements of CLS Ins § 3420(d) and was timely has matter of law. Sphere Drake Ins. Co., PLC v Block 7206 Corp., 265 A.D.2d 78, 705 N.Y.S.2d 623, 2000 N.Y. App. Div. LEXIS 3259 (N.Y. App. Div. 2d Dep't 2000).

Delay of about 3 weeks in disclaiming coverage following completion of insurer's investigation was reasonable, and thus insurer was properly granted summary judgment declaring that it was not obligated to defend or indemnify driver of insurer's vehicle. State Farm Mut. Auto. Ins. Co. v Daniels, 269 A.D.2d 860, 703 N.Y.S.2d 796, 2000 N.Y. App. Div. LEXIS 1822 (N.Y. App. Div. 4th Dep't 2000).

Insurer's disclaimer issued 2 months after receipt of notice of claim was not untimely where notice of disclaimer was issued one week after receipt of insurance investigator's final report following prompt, diligent, and good faith investigation of claim. 2540 Assocs. v Assicurazioni Generali, S.P.A., 271 A.D.2d 282, 707 N.Y.S.2d 59, 2000 N.Y. App. Div. LEXIS 4090 (N.Y. App. Div. 1st Dep't 2000).

Reasonableness of insurer's delay of 52 days in disclaiming coverage was fact issue for trial; thus, court improperly granted insurer's summary judgment motion dismissing action to recover under insurance policy. Osterreicher v Home Mut. Ins. Co., 272 A.D.2d 926, 707 N.Y.S.2d 742, 2000 N.Y. App. Div. LEXIS 5362 (N.Y. App. Div. 4th Dep't 2000).

Liability insurer's disclaimer of coverage was timely where it was made within 2 weeks after insured admitted that he had misrepresented facts in his original report of incident. Nationwide Mut. Ins. Co. v Graham, 275 A.D.2d 1012, 713 N.Y.S.2d 602, 2000 N.Y. App. Div. LEXIS 9608 (N.Y. App. Div. 4th Dep't 2000).

Plaintiff was entitled to summary judgment declaring that defendant was obligated to indemnify plaintiff's insureds in underlying action where defendant's unexplained 42-day delay in disclaiming coverage was unreasonable as matter of law under CLS Ins § 3420(d), and although additional evidence submitted by defendant on later motion to reargue tended to explain part of delay, that evidence should have been submitted earlier and thus could not be relied on. Faas v N.Y. Cent. Mut. Fire Ins. Co., 281 A.D.2d 586, 722 N.Y.S.2d 173, 2001 N.Y. App. Div. LEXIS 3079 (N.Y. App. Div. 2d Dep't 2001).

Insurer's 34-day delay in disclaiming coverage was unreasonable; thus, it was improper to grant insurer's motion to stay arbitration of claim for supplemental uninsured motorist benefits. Brandon v Nationwide Mut. Ins. Co., 284 A.D.2d 886, 727 N.Y.S.2d 727, 2001 N.Y. App. Div. LEXIS 6855 (N.Y. App. Div. 3d Dep't 2001), aff'd, 97 N.Y.2d 491, 743 N.Y.S.2d 53, 769 N.E.2d 810, 2002 N.Y. LEXIS 977 (N.Y. 2002).

Insurer was obligated to defend and indemnify the insured in two underlying actions because the insurer failed to raise a triable issue of fact as to the timeliness of its disclaimer; the insurer had information to support a disclaimer two months earlier and its failure move earlier, without explanation, was not "as soon as possible" within the contemplation of N.Y. Ins. Law § 3420(d). Continental Cas. Co. v Stradford, 46 A.D.3d 598, 847 N.Y.S.2d 631, 2007 N.Y. App. Div. LEXIS 12577 (N.Y. App. Div. 2d Dep't 2007), aff'd in part, modified, 11 N.Y.3d 443, 871 N.Y.S.2d 607, 900 N.E.2d 144, 2008 N.Y. LEXIS 3387 (N.Y. 2008).

Under N.Y. Ins. Law § 3420(d), a general liability insurer was not entitled to summary judgment on the issue of coverage, as a fact issue existed as to whether it should have been readily apparent to the insurer, from a bare reading of the complaint against its insured, that grounds for disclaimer of coverage existed, and it did not show as a matter of law that taking 56 days to issue a disclaimer was reasonable. Those Certain Underwriters at Lloyds, London v Gray, 49 A.D.3d 1, 856 N.Y.S.2d 1, 2007 N.Y. App. Div. LEXIS 11743 (N.Y. App. Div. 1st Dep't 2007).

Because there was no explanation for an insurer's 34-day delay in disclaiming coverage, pursuant to N.Y. Ins. Law § 3420(d), the delay was unreasonable as a matter of law; therefore, the underlying plaintiff was entitled to summary judgment, and the insurer was obligated to defend and indemnify a contractor in the underlying action. Sirius Am. Ins. Co. v Vigo Constr. Corp., 48 A.D.3d 450, 852 N.Y.S.2d 176, 2008 N.Y. App. Div. LEXIS 1063 (N.Y. App. Div. 2d Dep't 2008).

Assignor's insurer's claim that a landlord failed to give notice of the claim as soon as reasonably practicable, as required by the policy, was rejected because the assignee's insurer demonstrated, prima facie, that assignor's insurer's 49-day delay in issuing a notice of disclaimer to the landlord was unreasonable as a matter of law, and that, consequently, it was precluded from disclaiming coverage based on the alleged lateness of the notice of claim; in opposition, the assignor's insurer failed to raise a triable issue of fact as to whether the delay was reasonably related to the completion of a necessary, thorough, and diligent investigation, or whether there was any other satisfactory explanation for the delay. 4815 Dev. Corp. v Harleysville Ins. Co. of N.Y., 103 A.D.3d 832, 962 N.Y.S.2d 258, 2013 N.Y. App. Div. LEXIS 1175 (N.Y. App.

Div. 2d Dep't), app. denied, 21 N.Y.3d 859, 971 N.Y.S.2d 80, 993 N.E.2d 758, 2013 N.Y. LEXIS 1692 (N.Y. 2013).

Insurance company's 57-day delay in disclaiming coverage was unreasonable as a matter of law, and the appellate court affirmed the trial court's judgment that the insurance company was liable to defend and indemnify its insured in an underlying personal injury action where the plaintiff obtained a judgment against the insured because the insured did not answer the summons and complaint. Uptown Whole Foods, Inc. v Liberty Mut. Fire Ins. Co., 302 A.D.2d 592, 756 N.Y.S.2d 251, 2003 N.Y. App. Div. LEXIS 1873 (N.Y. App. Div. 2d Dep't 2003).

Insurer was not entitled to summary judgment on an injured employee's action for a declaration that the insurer was obligated to defend and indemnify the employee's employer in a personal injury action as the insurer's disclaimer letter was sent 38 days after receipt of notice, creating an issue of fact whether that delay was reasonable. Potter v N. Country Ins. Co., 8 A.D.3d 1002, 778 N.Y.S.2d 805, 2004 N.Y. App. Div. LEXIS 8154 (N.Y. App. Div. 4th Dep't 2004).

Declaratory judgment to the effect that the insurer did not have a duty to defend or indemnify the insured in an underlying personal injury suit was proper because the insurer did not receive timely notice, and the insurer's two-week delay in giving notice of disclaimer was reasonable, within the meaning of N.Y. Ins. Law § 3420(d), and thus, the insurer's disclaimer was timely, vitiating coverage under the subject policy. Lancer Ins. Co. v T.F.D. Bus Co., Inc., 18 A.D.3d 445, 795 N.Y.S.2d 70, 2005 N.Y. App. Div. LEXIS 4777 (N.Y. App. Div. 2d Dep't), app. denied, 2005 N.Y. LEXIS 2480 (N.Y. Sept. 15, 2005), app. denied, 5 N.Y.3d 709, 803 N.Y.S.2d 30, 836 N.E.2d 1153, 2005 N.Y. LEXIS 2491 (N.Y. 2005), app. denied, 2005 N.Y. LEXIS 2531 (N.Y. Sept. 15, 2005).

Because only an investigation of the type ordered by an insurer would yield answers to questions that it needed in order to make a good faith decision regarding disclaimer under N.Y. Ins. Law § 3420(d), and because the 30-day delay was due to the insured's refusal to cooperate in the investigation, the insured and the insurance broker were not entitled to summary judgment. Ace Packing Co., Inc. v Campbell Solberg Assoc., Inc., 41 A.D.3d 12, 835 N.Y.S.2d 32, 2007 N.Y. App. Div. LEXIS 4370 (N.Y. App. Div. 1st Dep't 2007).

Because an insurer's 43-day delay in disclaiming coverage was unreasonable as a matter of law under N.Y. Ins. Law § 3420(d), the trial court properly denied the insurer's motion for summary judgment and declared that it was obligated to defendant and indemnify the insureds in an underlying action. Delphi Restoration Corp. v Sunshine Restoration Corp., 43 A.D.3d 851, 841 N.Y.S.2d 684, 2007 N.Y. App. Div. LEXIS 9593 (N.Y. App. Div. 2d Dep't), app. dismissed, 9 N.Y.3d 1002, 849 N.Y.S.2d 29, 879 N.E.2d 170, 2007 N.Y. LEXIS 3789 (N.Y. 2007).

Forty-two days an excess insurer took before disclaiming liability on an insured's claim was not unreasonable for purposes of N.Y. Ins. Law § 3420(d) where the letter the excess insurer believed was its first notice of the claim presented circumstances that warranted further investigation of whether the notice was late and that investigation was pursued diligently. Tully Constr. Co., Inc. v TIG Ins. Co., 43 A.D.3d 1150, 842 N.Y.S.2d 528, 2007 N.Y. App. Div. LEXIS 9986 (N.Y. App. Div. 2d Dep't 2007).

Insurer's delay of 48 days in notifying its policyholder that it would deny coverage was unreasonable as a matter of law under N.Y. Ins. Law § 3420(d) because the delay was unexcused where the purpose was to investigate other possible sources of insurance. First Fin. Ins. Co. v Jetco Contr. Corp., 1 N.Y.3d 64, 769 N.Y.S.2d 459, 801 N.E.2d 835, 2003 N.Y. LEXIS 3948 (N.Y. 2003).

Insurer's extensive delays in issuing disclaimers were unreasonable as a matter of law because the basis of the disclaimers was apparent from the face of the notice of claim and accompanying correspondence and the insurer issued separate disclaimers to the insured 79 days and 85 days after it received the notice of claim. Black Bull Contr., LLC v Indian Harbor Ins. Co., 135 A.D.3d 401, 23 N.Y.S.3d 59, 2016 N.Y. App. Div. LEXIS 2 (N.Y. App. Div. 1st Dep't 2016).

Insurer was not entitled to a declaratory judgment in its favor where (1) the fact that the insured's notice of the occurrence for which coverage was sought was untimely was readily apparent to the insurer on the day on which the insured's principal told the insurer's agent that the principal had been aware of the accident more than four months prior to notifying the insurer, and (2) the insurer's 47 day delay in notifying the insured of its disclaimer of coverage, without an explanation of why such a delay was necessary, was unreasonable under N.Y. Ins. Law § 3420(d). First Fin. Ins. Co. v City Wide Window Cleaning Co., 253 F. Supp. 2d 717, 2003 U.S. Dist. LEXIS 4665 (S.D.N.Y. 2003).

Although the insured party may have failed to provide timely notice of the occurrence, the insurer's delay of more than 60 days in disclaiming coverage was unreasonable as a matter of law under N.Y. Ins. Law § 3420(d); the grounds for a disclaimer were readily apparent before the onset of the delay from the documents submitted to the insurer. Milbank Hous. Dev. Fund v Royal Indem. Co., 17 A.D.3d 280, 794 N.Y.S.2d 23, 2005 N.Y. App. Div. LEXIS 4461 (N.Y. App. Div. 1st Dep't 2005).

Defendant, the subcontractor's insurer, did not waive applicability of the employer's liability exclusion, under the commercial general liability policy, because defendant's delay of thirty-one days to disclaim coverage was reasonable given the undisputed evidence that defendant conducted an immediate investigation and in light of the fact that New York courts had consistently held that an insurer must have been given reasonable time to adequately investigate a claim in order to determine whether it wished to disclaim coverage. Neth. Ins. Co. v United Specialty Ins. Co., 276 F. Supp. 3d 94, 2017 U.S. Dist. LEXIS 140403 (S.D.N.Y. 2017).

139. — —Delay of 3 months but less than 6 months

Notice of disclaimer which is not sent until more than 3 months after receipt of oral notice of accident upon which claim is based is unreasonably delayed and therefore ineffective where insurer not only acknowledges receipt of oral notice but also acknowledges that upon receipt thereof it acted to set up file on matter and investigated claim just as it would have done had notice been in written form. Aetna Casualty & Surety Co. v Rodriguez, 115 A.D.2d 418, 496 N.Y.S.2d 956, 1985 N.Y. App. Div. LEXIS 54805 (N.Y. App. Div. 1st Dep't 1985).

Summary judgment declaring that insurance company was obligated to defend insurance broker under broker's error and omissions policy would be affirmed since unexplained delay in providing notice of disclaimer of coverage, which was made over 4 months after claim was submitted, was unreasonable as matter of law under CLS Ins § 3420(d). Kleneic v White Lake Marine Corp., 144 A.D.2d 341, 533 N.Y.S.2d 909, 1988 N.Y. App. Div. LEXIS 11195 (N.Y. App. Div. 2d Dep't 1988).

Disclaimer of coverage by excess liability insurance carrier with respect to insured's operation of nonowned motor vehicle was insufficient as it was not given "as soon as is reasonably possible" within meaning of CLS Ins § 3420(d) since there was unexplained and inexcusable delay of almost 4 months which was unreasonable as matter of law, regardless of whether insured had suffered prejudice by delay. Cassara v Nationwide Mut. Ins. Co., 144 A.D.2d 974, 534 N.Y.S.2d 277, 1988 N.Y. App. Div. LEXIS 14471 (N.Y. App. Div. 4th Dep't 1988).

Insurer would be required to defend insured in negligence action pending resolution of factual issues as to reasonableness of insurer's delay in giving notice of disclaimer where notice of disclaimer was given 5 months after assumption of defense of negligence action by insurer, and insurer claimed that it did not have facts which led to notice of disclaimer until several days before notice was sent. Commercial Union Ins. Cos. v Jedamich Enterprises, Inc., 146 A.D.2d 599, 536 N.Y.S.2d 523, 1989 N.Y. App. Div. LEXIS 447 (N.Y. App. Div. 2d Dep't 1989).

Insurance company failed to comply with CLS Ins § 3420(d) and was, therefore, required to defend and indemnify insured, where it received all necessary information on June 7 and failed to issue disclaimer until October 23, notwithstanding that insured had already recognized that its policy excluded causes of action set forth by injured party. Associated Mut. Ins. Co. v Samicaban, Inc., 178 A.D.2d 883, 577 N.Y.S.2d 737, 1991 N.Y. App. Div. LEXIS 16828 (N.Y. App. Div. 3d Dep't 1991).

It was error to conclude, as matter of law, that insurer's delay in denying claim for no-fault benefits was reasonable where (1)

insured was involved in accident on January 27 and applied for benefits, (2) insurance company sent forms to health providers listed by insured on February 28, (3) insurance company received bills from hospital on April 10 and contacted hospital to request records, (4) insurance company received records on April 24, (5) insurance company requested toxicology report on May 9 and received report on June 2, (6) insurance company sent records to independent medical reviewing agency and received report back from it on July 6, and (7) on July 6, insurance company denied claim on basis that insured was intoxicated. Mirza v Allstate Ins. Co., 185 A.D.2d 303, 586 N.Y.S.2d 281, 1992 N.Y. App. Div. LEXIS 9067 (N.Y. App. Div. 2d Dep't 1992).

Insurance company failed to timely notify insured of its disclaimer as required by CLS Ins § 3420(d) where company issued reservation of rights letter to insured on February 20 but gave no notice of disclaimer until it filed action on July 30 for declaratory judgment on disclaimer; neither short delay in interviewing insured nor conflicting indications as to whether insured's employee would pursue claim under CLS Labor § 240 justified delay. Nova Casualty Co. v Charbonneau Roofing, Inc., 185 A.D.2d 490, 585 N.Y.S.2d 876, 1992 N.Y. App. Div. LEXIS 8977 (N.Y. App. Div. 3d Dep't 1992).

In action by pedestrian injured when struck by automobile driven by defendant's insured, even if pedestrian's insurer failed to give defendant insurer timely notice of accident pursuant to CLS Ins Art 51, defendant's 5-month delay in disclaiming coverage on ground of untimely notice was unreasonable as matter of law. Allstate Ins. Co. v Centennial Ins. Co., 187 A.D.2d 690, 590 N.Y.S.2d 272, 1992 N.Y. App. Div. LEXIS 13413 (N.Y. App. Div. 2d Dep't 1992).

Even if insurer's June 1989 motion to stay arbitration of its insured's underinsured motorist claim served as notice of disclaimer predicated on insured's alleged settlement with tortfeasor without its consent, insurer's delay in disclaiming coverage was unreasonable as matter of law where record showed that it was aware of grounds for disclaimer in February 1989 and failed to provide excuse for its delay. Bernstein v Allstate Ins. Co., 199 A.D.2d 358, 605 N.Y.S.2d 354, 1993 N.Y. App. Div. LEXIS 12137 (N.Y. App. Div. 2d Dep't 1993).

It was error to grant insurer's petition for stay of arbitration of uninsured motorist claim based on proof that insured had violated policy exclusion relating to injuries sustained while operating vehicle in violation of order of suspension or revocation, since insurer forfeited its right to disclaim coverage where it waited more than 4 months before issuing its disclaimer, and it failed to explain delay. Eagle Ins. Co. v Perez, 209 A.D.2d 695, 619 N.Y.S.2d 162, 1994 N.Y. App. Div. LEXIS 11671 (N.Y. App. Div. 2d Dep't 1994).

Insurer would be required to defend and indemnify its insured under commercial general liability policy in underlying wrongful death action, even though claim at issue was second suit brought by same complainant, and insurer disclaimed coverage with regard to first suit due to policy exclusion, where complainant commenced second suit premised on different theories of negligence, insurer did not immediately deny coverage and assigned attorney to prepare and serve answer, and insurer did not disclaim coverage with regard to second suit until 5 months after it was commenced. Dependible Janitorial Servs. v Transcontinental Ins. Co., 212 A.D.2d 946, 622 N.Y.S.2d 632, 1995 N.Y. App. Div. LEXIS 2127 (N.Y. App. Div. 3d Dep't), app. denied, 85 N.Y.2d 811, 631 N.Y.S.2d 287, 655 N.E.2d 400, 1995 N.Y. LEXIS 2100 (N.Y. 1995).

Insurer was entitled to summary judgment where insured gave no reasonable explanation for its failure to notify insurer until 5 months after slip-and-fall accident. Lukralle v Durso Supermarkets, 238 A.D.2d 318, 656 N.Y.S.2d 292, 1997 N.Y. App. Div. LEXIS 3425 (N.Y. App. Div. 2d Dep't 1997).

Liability insurer's delay of almost 6 months in disclaiming coverage was unreasonable as matter of law. United States Fid. & Guar. Co. v Weiri, 265 A.D.2d 321, 696 N.Y.S.2d 200, 1999 N.Y. App. Div. LEXIS 9642 (N.Y. App. Div. 2d Dep't 1999).

Insurer's 4-month delay in disclaiming coverage based on "pollution exclusion" contained in 2 commercial liability policies covering insured's municipal incinerator operations that had been delivered to insurer's parent corporation in Texas rendered disclaimer untimely as matter of law. American Ref-Fuel Co. v Employers Ins. Co., 265 A.D.2d 49, 705 N.Y.S.2d 67, 2000 N.Y. App. Div. LEXIS 3253 (N.Y. App. Div. 2d Dep't 2000).

Insurer's delay in disclaiming coverage was unreasonable, even though insured failed to provide insurer with timely notice of claim in first instance, where no explanation was offered by insurer to justify its 4-month delay, and primary reason for disclaiming coverage was readily apparent on receipt of notice of claim. Wasserheit v New York Cent. Mut. Fire Ins. Co., 271 A.D.2d 439, 705 N.Y.S.2d 638, 2000 N.Y. App. Div. LEXIS 3751 (N.Y. App. Div. 2d Dep't 2000).

In action by plaintiff who was injured on stairs at insureds' premises and thereafter sued defendant insurers to recover unsatisfied judgment against insureds, court properly granted summary judgment to plaintiff based on defendants' failure to disclaim coverage as soon as reasonably possible, where defendants initially notified plaintiff's attorney that they were denying coverage because their investigation revealed that stairs were free of defects, but after plaintiff obtained default judgment against insureds, they disclaimed coverage based on insureds' breach of policy condition requiring insureds to forward all papers and process, and they did not serve written notice of disclaimer of coverage until more than 4 months after copy of judgment with notice of entry was served on them. Oster v Aetna Cas. & Sur. Co., 283 A.D.2d 409, 724 N.Y.S.2d 198, 2001 N.Y. App. Div. LEXIS 4694 (N.Y. App. Div. 2d Dep't 2001).

Insurer's 3 ½ -month delay in disclaiming coverage was unreasonable as matter of law where ground for disclaimer, city's failure to provide timely notice of its claim, was plain from face of pleadings sent with city's demand letter; further, having covered same claim on behalf of city's co-insured, insurer was equitably estopped from denying coverage to city. City of New York v Investors Ins. Co. of Am., 287 A.D.2d 394, 731 N.Y.S.2d 623, 2001 N.Y. App. Div. LEXIS 9897 (N.Y. App. Div. 1st Dep't 2001).

Denial of an insurer's motion for summary judgment in a city's case seeking coverage was proper because the insurer's assertion of a late notice defense, made 92 days after receiving the city's summons and complaint, was not timely as a matter of law, and N.Y. Ins. Law § 3420(d) protected an insured from an insurer's unreasonable delays in disclaiming coverage even where the underlying claim had been satisfied. City of New York v Welsbach Elec. Corp., 49 A.D.3d 322, 852 N.Y.S.2d 134, 2008 N.Y. App. Div. LEXIS 1988 (N.Y. App. Div. 1st Dep't 2008).

Although N.Y. Ins. Law § 3420(d) was applicable to an agent's tender of notice behalf of an insured, triable issues of fact existed as to the timeliness of the primary insurer's disclaimer—113 days after the notice—and as to whether the primary insurer acted reasonably in seeking to investigate further. Admiral Ins. Co. v State Farm Fire & Cas. Co., 86 A.D.3d 486, 927 N.Y.S.2d 629, 2011 N.Y. App. Div. LEXIS 5952 (N.Y. App. Div. 1st Dep't 2011).

Excess insurer had no right to delay disclaiming coverage on grounds of late notice for four months while it investigated whether there were other grounds for disclaimer, because former N.Y. Insur. Law § 3420(d) (current version at § 3420(d)(2)) required it to provide the insureds written notice of the disclaimer as soon as reasonably possible. DiGuglielmo v. Travelers Prop. Cas., 6 A.D.3d 344 (2004), which held that under § 3420(d), an insurer was not required to disclaim on timeliness grounds before conducting an investigation into other possible grounds for disclaimer, was overruled. George Campbell Painting v National Union Fire Ins. Co. of Pittsburgh, PA, 92 A.D.3d 104, 937 N.Y.S.2d 164, 2012 N.Y. App. Div. LEXIS 249 (N.Y. App. Div. 1st Dep't 2012).

Disclaimer by insurance company of uninsured motorist benefits dated April 6, 1988 in response to claimant's notice for uninsured motorist benefits dated December 15, 1987 was untimely and void as matter of law in light of failure of insurance company to offer any explanation for approximate 4-month delay in issuance of disclaimer. Eagle Ins. Co. v Ruiz, 141 Misc. 2d 815, 535 N.Y.S.2d 294, 1988 N.Y. Misc. LEXIS 705 (N.Y. Sup. Ct. 1988).

Trial court erred in denying summary judgment pursuant to N.Y. C.P.L.R. 3212 to a judgment in holder in an action against an

insurer to collect on a judgment against an insured pursuant to N.Y. Ins. Law § 3420(a)(2), as the insurer's delay of more than three months in disclaiming coverage was unreasonable. Varella v Am. Transit Ins. Co., 306 A.D.2d 464, 762 N.Y.S.2d 253, 2003 N.Y. App. Div. LEXIS 7352 (N.Y. App. Div. 2d Dep't 2003).

When an excess insurer, who received notice of an accident for which coverage was sought over two years after the accident, did not provide formal notice of its disclaimer of liability for almost four months after it had information making the basis for its disclaimer of liability apparent, the delay in issuing the disclaimer was unreasonable as a matter of law, and the insurer was obligated to indemnify its insured. Mann v Gulf Ins. Co., 3 A.D.3d 554, 771 N.Y.S.2d 176, 2004 N.Y. App. Div. LEXIS 694 (N.Y. App. Div. 2d Dep't 2004).

Because a construction manager, as an additional insured under a subcontractor's insurance policy, was entitled to a defense when a subcontractor's employee was injured during the course of the subcontractor's work, pursuant to N.Y. Ins. Law § 3420(d)(2), the insurer's four-month delay in disclaiming coverage was unreasonable as a matter of law. Hunter Roberts Constr. Group, LLC v Arch Ins. Co., 75 A.D.3d 404, 904 N.Y.S.2d 52, 2010 N.Y. App. Div. LEXIS 5712 (N.Y. App. Div. 1st Dep't 2010).

District court properly granted summary judgment under Fed. R. Civ. P. 56 in favor of an insured in an insurance company's action under 28 U.S.C.S. § 2201 seeking a declaration that it had no duty to defend or indemnify the insured in an underlying personal injury action filed by a construction worker employee who was injured when scaffolding collapsed; the insurance company's disclaimer of coverage pursuant to an Employee Exclusion clause was untimely as a matter of law under N.Y. Ins. Law § 3420(d) because the disclaimer was made four months after the insurance company knew all of the necessary facts to disclaim coverage. U.S. Underwriters Ins. Co. v City Club Hotel, LLC, 369 F.3d 102, 2004 U.S. App. LEXIS 8078 (2d Cir. N.Y. 2004).

Indemnity company's denial of coverage to the insured's employee was due to his use of the van without permission, and based on a policy exclusion, and because the permissive use requirement operated as a policy exclusion, a disclaimer was necessary pursuant to N.Y. Ins. Law § 3420(d)(2). Despite receiving the automobile insurer's disclaimer letter, the indemnity company did not serve a disclaimer letter until 85 days after it became aware of the grounds for disclaimer, which was unreasonable as a matter of law; therefore, because the indemnity company failed to comply with N.Y. Ins. Law § 3420(d)(2), it was precluded from now disclaiming coverage based on non-permissive use. Britt v General Star Indem. Co., 775 F. Supp. 2d 454, 2011 U.S. Dist. LEXIS 36178 (N.D.N.Y. 2011), rev'd, 494 Fed. Appx. 151, 2012 U.S. App. LEXIS 18389 (2d Cir. N.Y. 2012).

140. — —Delay of 6 months but less than one year

Delay by automobile insurer in making its disclaimer nearly 7 months after a letter of reservation of its rights, was unreasonable. Allstate Ins. Co. v Gross, 27 N.Y.2d 263, 317 N.Y.S.2d 309, 265 N.E.2d 736, 1970 N.Y. LEXIS 966 (N.Y. 1970).

Automobile liability insurer was obligated to defend and indemnify insured, despite fact that car involved in accident was not covered by policy, where policy covered insured as "covered person" regardless of what vehicle was used, subject to further provision excluding from coverage any vehicle other than insured's first covered vehicle, insured gave prompt notice of accident to insurer, and insurer failed to serve effective disclaimer for 7 months after accident; neither insurer's letter reserving rights to deny coverage nor insurer's commencement of declaratory judgment action against insured constituted effective disclaimer of coverage under statute. Progressive Casualty Ins. Co. v Conklin, 123 A.D.2d 6, 510 N.Y.S.2d 246, 1986 N.Y. App. Div. LEXIS 60650 (N.Y. App. Div. 3d Dep't 1986).

Insurer was obligated to defend and indemnify insureds in underlying personal injury action, despite insureds' breach of policy requirement that notice of accident be given "as soon as practicable," since (1) insurer delayed in informing insureds of its intent to disclaim coverage for period of over 6 ½ months, (2) grounds for disclaimer—untimeliness of notice and its lack of specificity—were readily apparent to insurer on its receipt of notice, and (3) insurer provided no explanation for its delay in light of reasons proffered in support of disclaimer. New York Cent. Mut. Fire Ins. Co. v Markowitz, 147 A.D.2d 461, 537 N.Y.S.2d 571, 1989 N.Y. App. Div. LEXIS 1474 (N.Y. App. Div. 2d Dep't 1989).

Insurance company was estopped from disclaiming liability under motor vehicle insurance policy on basis of insured's settlement, without its consent, with driver of automobile in which insured was passenger where (1) insurance company sent letter to insured on November 27 in which it reserved right to make such disclaimer, and (2) insurance company issued disclaimer by letter dated May 18 of following year; delay was unreasonable as matter of law. Blee v State Farm Mut. Auto. Ins. Co., 168 A.D.2d 615, 563 N.Y.S.2d 455, 1990 N.Y. App. Div. LEXIS 15991 (N.Y. App. Div. 2d Dep't 1990).

Insurer's 8-month delay in disclaiming coverage was unreasonable as matter of law in light of evidence that it did not investigate claim between time it received notice in April 1986 and time of disclaimer in December 1986, and in light of its July 1986 letter to another insurer discussing its willingness to discuss sharing of defense costs. Incorporated Village of Pleasantville v Calvert Ins. Co., 204 A.D.2d 689, 612 N.Y.S.2d 441, 1994 N.Y. App. Div. LEXIS 5779 (N.Y. App. Div. 2d Dep't 1994).

Excess insurance carriers failed to provide timely disclaimer coverage as required by CLS Ins § 3420(d) by issuing disclaimer notice 8 months after receiving actual notice of claim without justifiable reason for delay. Grow-Kiewit-MK-Maclean Grove v Lexington Ins. Co., 232 A.D.2d 329, 649 N.Y.S.2d 18, 1996 N.Y. App. Div. LEXIS 11202 (N.Y. App. Div. 1st Dep't 1996).

Insurers were obligated to defend and indemnify insured in underlying personal injury action, even though they may have had valid grounds for disclaimer, either on basis that insured's son's operation of vehicle was in connection with business or on basis that vehicle which he was operating had been furnished to him for his regular use, since there was no explanation for insurers' failure to assert those grounds for disclaimer until some 6 months after their learning of facts of underlying accident, and bodily injury liability coverage afforded to insured extended to liability potentially incurred by his son. Nigro v General Accident Ins. Co., 239 A.D.2d 474, 658 N.Y.S.2d 963, 1997 N.Y. App. Div. LEXIS 5367 (N.Y. App. Div. 2d Dep't 1997).

Insurer's 10-month delay in providing notice of disclaimer to its insured was untimely as matter of law. Taradena v Nationwide Mut. Ins. Co., 239 A.D.2d 876, 659 N.Y.S.2d 646, 1997 N.Y. App. Div. LEXIS 6234 (N.Y. App. Div. 4th Dep't 1997).

Insurer was entitled to summary judgment declaring that it was not obligated to defend and indemnify insureds in underlying personal injury action where insureds' 15-month delay in notifying insurer of accident was not excused by their allegedly good-faith, albeit mistaken, beliefs that (1) loss was not covered by insurance policy, (2) notification of their insurance agent was notification of insurer, and (3) their attorney had communicated with attorney for injured party. Travelers Indem. Co. v Worthy, 281 A.D.2d 411, 721 N.Y.S.2d 400, 2001 N.Y. App. Div. LEXIS 2073 (N.Y. App. Div. 2d Dep't 2001).

Automobile insurer's 10-month delay in disclaiming underinsured motorist benefits, based on insured's alleged failure to timely notify insurer of circumstances of accident, was unreasonable as matter of law and waived insurer's right to assert such ground as justification for permanent stay of arbitration. Westchester Fire Ins. Co. v Imperiale, 157 Misc. 2d 721, 598 N.Y.S.2d 685, 1993 N.Y. Misc. LEXIS 188 (N.Y. Sup. Ct. 1993).

When an insured sought its insurer's coverage of the insured's defense costs in an underlying personal injury action, the insurer's nine-month delay in giving the insured notice of its disclaimer of coverage, based on the insured's late notice of its claim, was unreasonable as a matter of law, under N.Y. Ins. Law § 3420(d), because the reason for the disclaimer was apparent once the insurer received the claim, and the insurer offered no explanation for the delay in its notice, so the insured was entitled to summary judgment requiring the insurer to reimburse it for its defense costs. 79th Realty Co. v Wausau Ins. Cos., 7 A.D.3d 507, 776 N.Y.S.2d 96, 2004 N.Y. App. Div. LEXIS 6495 (N.Y. App. Div. 2d Dep't 2004).

General liability (GL) insurers' disclaimer that was made 11 months after the getting the city's claim was untimely since it was not made within 4 months as required by N.Y. Ins. Law § 3420(d). A timely disclaimer was required since the occurrence was covered but the GL insurers relied on an the automobile exclusion to disclaim coverage. City of New York v St. Paul Fire & Mar. Ins. Co., 21 A.D.3d 978, 801 N.Y.S.2d 362, 2005 N.Y. App. Div. LEXIS 9191 (N.Y. App. Div. 2d Dep't 2005).

At the very most, the general contractor's claim was that since it tendered its defense to the insurer on August 16, 1999, the approximate eight months it took the insurer to formally disclaim should be unreasonable as a matter of law. However, its claim of an unreasonable eight month delay was defeated by the insurer's defense that insurers must be given "adequate and reasonable" time to investigate the accident and grounds for disclaimer, and moreover, such efforts to investigate were barred by the contractor's failure to cooperate. Palanquet v Weeks Marine, Inc., 333 F. Supp. 2d 58, 2004 U.S. Dist. LEXIS 17764 (E.D.N.Y. 2004), vacated, in part, 352 F. Supp. 2d 361, 2005 U.S. Dist. LEXIS 996 (E.D.N.Y. 2005).

141. — —Delay of more than one year

Insurance carrier waived policy exclusion for family members driving automobiles not owned by policyholder and thus was not entitled to permanent stay of arbitration of underinsured motorist claim asserted by policyholder's son, who was injured in collision with underinsured vehicle while driving his own car, where it waited more than one year to deny coverage, meanwhile subjecting policyholder's son to discovery demands and consenting to settlement of his action against driver of other car. Worcester Ins. Co. v Bettenhauser, 95 N.Y.2d 185, 712 N.Y.S.2d 433, 734 N.E.2d 745, 2000 N.Y. LEXIS 1375 (N.Y. 2000).

Insurance company was barred from disclaiming underinsured motorist coverage on basis of insured's failure to make timely claim where (1) insured was injured in motor vehicle accident in October 1988, (2) insured was first informed of limit of policy which covered offending vehicle in February 1990, (3) insured first notified insurance company in July 1991 of her intent to pursue underinsured motorist benefits and made formal notice of claim for benefits in August 1991, (4) in September 1991, insured responded to request by insurance company for explanation of delay in making claim, and (5) in December 1991, insured demanded arbitration, and insurance company commenced instant proceeding to stay arbitration in January 1992; insurance company never disclaimed coverage except inferentially by commencement of proceeding for stay, and such delay was unreasonable as matter of law. State Farm Mut. Auto. Ins. Co. v Merrill, 192 A.D.2d 824, 596 N.Y.S.2d 554, 1993 N.Y. App. Div. LEXIS 3726 (N.Y. App. Div. 3d Dep't 1993).

Insured was entitled to summary judgment declaring that insurer failed to timely disclaim underinsurance coverage where (1) accident occurred in November 1985, but insured did not realize that she had underinsurance coverage until 1988, and thus she did not file underinsurance claim until almost 3 years after accident and some time after offending driver had settled claim for limits of his policy, and (2) insurer's records indicated that it became aware of settlement in March 1987, and that it decided, within few days of receiving insured's claim in 1988, to disclaim coverage (on ground that notice of claim was untimely) based on information which it had been in possession of since March 1987. Ward v Corbally, Gartland & Rappleyea, 207 A.D.2d 342, 615 N.Y.S.2d 430, 1994 N.Y. App. Div. LEXIS 8104 (N.Y. App. Div. 2d Dep't), app. denied, 84 N.Y.2d 812, 622 N.Y.S.2d 914, 647 N.E.2d 120, 1994 N.Y. LEXIS 4560 (N.Y. 1994).

Insurer's unexplained delay of more than 2 years in denying coverage was unreasonable as matter of law. Nationwide Ins. Co. v Freehill, 224 A.D.2d 532, 637 N.Y.S.2d 800, 1996 N.Y. App. Div. LEXIS 1159 (N.Y. App. Div. 2d Dep't 1996).

Insurer was estopped from disclaiming liability on contractual indemnification claim where its failure to openly adopt "no coverage" position until middle of settlement negotiations, 3 years after agreeing to defend, was unreasonable. Zurich Ins. Co. v Lumbermen's Cas. Co., 233 A.D.2d 186, 649 N.Y.S.2d 660, 1996 N.Y. App. Div. LEXIS 11691 (N.Y. App. Div. 1st Dep't 1996).

Insurer was required to defend and indemnify its insureds in underlying action since insurer never provided insureds with notice of disclaimer specifying ground on which disclaimer was predicated, and even if commencement of instant declaratory judgment action were sufficient notice of disclaimer, such delayed disclaimer was unreasonable as matter of law, as action was not brought for more than 2 years after commencement of underlying action and nearly 15 months after insurer's letter of reservation. Aetna Life & Cas. Co. v 57th St. Mgmt. Corp., 235 A.D.2d 379, 652 N.Y.S.2d 73, 1997 N.Y. App. Div. LEXIS 193 (N.Y. App. Div. 2d Dep't), app. denied, 90 N.Y.2d 803, 661 N.Y.S.2d 179, 683 N.E.2d 1053, 1997 N.Y. LEXIS 2228 (N.Y. 1997).

Insurer that assumed defense of personal injury action against insured for 4 years, without reserving right to disclaim coverage, was equitably estopped from denying coverage and thus not entitled to summary judgment in action seeking declaration that it did not have duty to defend or indemnify insured. American Transit Ins. Co. v Mendon Leasing Corp., 241 A.D.2d 436, 660 N.Y.S.2d 725, 1997 N.Y. App. Div. LEXIS 8148 (N.Y. App. Div. 1st Dep't 1997).

More than 2-year delay in disclaiming coverage was unreasonable matter of law. State Farm Mut. Auto. Ins. Co. v Grund, 243 A.D.2d 557, 662 N.Y.S.2d 845, 1997 N.Y. App. Div. LEXIS 9799 (N.Y. App. Div. 2d Dep't 1997).

Insurer's unexplained delay of approximately one year before mentioning new grounds for disclaimer was unreasonable as matter of law, irrespective of whether insureds were prejudiced. Agoado Realty Corp. v United Int'l Ins. Co., 260 A.D.2d 112, 699 N.Y.S.2d 335, 1999 N.Y. App. Div. LEXIS 12358 (N.Y. App. Div. 1st Dep't 1999), modified, 95 N.Y.2d 141, 711 N.Y.S.2d 141, 733 N.E.2d 213, 2000 N.Y. LEXIS 1373 (N.Y. 2000).

In action for judgment declaring that insurer was obligated to indemnify insured for liability and costs of defending underlying personal injury action, insurer's delay of over 3 years in disclaiming coverage on ground of late notice of claim was unreasonable, and thus insurer was barred from raising that defense. Consolidated Edison Co. v United States Fid. & Guar. Co., 263 A.D.2d 380, 693 N.Y.S.2d 31, 1999 N.Y. App. Div. LEXIS 7813 (N.Y. App. Div. 1st Dep't 1999).

Internal memorandum, clearly reflecting lack of cooperation by building owner, provided date from which timeliness of insurer's disclaimer could be assessed, and thus it was unreasonable, as matter of law, for insurer to wait 4 years after its first notice of deposition was ignored before issuing disclaimer; insurer's purported need for further time to investigate lack of cooperation was, under circumstances, implausible. Allcity Ins. Co. v 601 Crown St. Realty Corp., 264 A.D.2d 315, 693 N.Y.S.2d 141, 1999 N.Y. App. Div. LEXIS 8608 (N.Y. App. Div. 1st Dep't 1999).

Insurer's disclaimer issued over one year after it received notice of accident was untimely as matter of law, and thus court should have denied insurer's summary judgment motion in action seeking judgment declaring that insurer was not obligated to indemnify insured or to provide coverage for claims arising from automobile accident. Government Emples. Ins. Co. v Kolodny, 269 A.D.2d 564, 703 N.Y.S.2d 513, 2000 N.Y. App. Div. LEXIS 2103 (N.Y. App. Div. 2d Dep't 2000).

Liability insurer's 17-month delay in disclaiming coverage was unreasonable, and barred it from denying liability. Impulse Enterprises/F & V Mech. Plumbing & Heating v St. Paul Fire & Marine Ins. Co., 282 A.D.2d 266, 723 N.Y.S.2d 177, 2001 N.Y. App. Div. LEXIS 3602 (N.Y. App. Div. 1st Dep't 2001).

Insurer's 17-month delay in disclaiming coverage was unreasonable, and therefore disclaimer was ineffective regardless of whether insureds gave timely notice of claim. Columbia Cas. Co. v Nat'l Emergency Servs., 282 A.D.2d 346, 723 N.Y.S.2d 473, 2001 N.Y. App. Div. LEXIS 4072 (N.Y. App. Div. 1st Dep't 2001).

Insurance company's action in not providing formal disclaimer of an insured's claim for supplemental uninsured motorists compensation until 20 months after it knew that the insured was not driving a vehicle listed in his policy was unreasonable as a matter of law. Great Am. Ins. Co. v Tomaino, 293 A.D.2d 944, 741 N.Y.S.2d 315, 2002 N.Y. App. Div. LEXIS 4043 (N.Y. App. Div. 3d Dep't), app. denied, 98 N.Y.2d 611, 749 N.Y.S.2d 2, 778 N.E.2d 553, 2002 N.Y. LEXIS 2315 (N.Y. 2002).

In an action pursuant to N.Y. C.P.L.R. 75 to compel arbitration of an uninsured motorist claim, the trial court properly stayed the arbitration and determined that an insurance company's disclaimer of coverage was invalid and of no force and effect; N.Y. Ins. Law § 3420(d) provided that insurers had to give written notice as soon as was reasonably possible of a disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant, and the insurer had the burden to explain any delay in providing notice of a disclaimer or denial of coverage, and the reasonableness of such delay was a question of fact which was determined upon the facts and circumstances of each case, and in the instant action the insurance company failed to provide any explanation for its 17 month delay in issuing a disclaimer, and as such, the delay was unreasonable as a matter of law. Cosgriff v Progressive Ins. Co., 303 A.D.2d 680, 757 N.Y.S.2d 319, 2003 N.Y. App. Div. LEXIS 3145 (N.Y. App. Div. 2d Dep't 2003).

Because N.Y. Ins. Law § 3420(d) required an insurer to give written notice as soon as was reasonably possible of a disclaimer of coverage, and because the insurer's explanation for a 19-month delay was unreasonable as a matter of law, the insured was entitled to summary judgment. Wood v Nationwide Mut. Ins. Co., 45 A.D.3d 1285, 845 N.Y.S.2d 641, 2007 N.Y. App. Div. LEXIS 11555 (N.Y. App. Div. 4th Dep't 2007).

Trial court erred in denying an insurer's motion for summary judgment on the insured's second counterclaim because the approximately two-year delay between the time the insurer reserved its right to disclaim or deny coverage and its commencement of a declaratory judgment action did not evince bad faith under former N.Y. Ins. Law § 3420(d). State Farm Fire & Cas. Co. v Ricci, 96 A.D.3d 1571, 947 N.Y.S.2d 265, 2012 N.Y. App. Div. LEXIS 4818 (N.Y. App. Div. 4th Dep't 2012).

Insurer did not meet its obligations to investigate and timely respond to its insured's environmental cleanup claim, and, thus, waived its right to disclaim pursuant to N.Y. Ins. Law § 3420(d); during the more than seven years between the insured's notice and the insurer's disclaimer of coverage, the insurer failed to make a coverage determination, but, instead, it responded to the insured's requests for coverage by promising to investigate the claims and then enumerating numerous possible grounds upon which it might opt to disclaim coverage at a later time. The insurer's boilerplate reservation of rights letters to the insured were legally insufficient and did not relieve the insurer of the a duty to make a prompt investigation and disclaimer of coverage. Travelers Indem. Co. v Orange & Rockland Utils., Inc., 242 N.Y.L.J. 41, 2009 N.Y. Misc. LEXIS 2617 (N.Y. Sup. Ct. Aug. 18, 2009), rev'd, 73 A.D.3d 576, 905 N.Y.S.2d 11, 2010 N.Y. App. Div. LEXIS 4199 (N.Y. App. Div. 1st Dep't 2010).

Appeals court held bar's insurer was to defend and indemnify bar in patron's underlying action for bouncer injuries to her; insurer's three year delay to disclaim accident coverage under its assault and battery exclusion was unreasonable under N.Y. Ins. Law § 3420(d). Penn-America Group, Inc. v Zoobar, Inc., 305 A.D.2d 1116, 759 N.Y.S.2d 825, 2003 N.Y. App. Div. LEXIS 4773 (N.Y. App. Div. 4th Dep't), app. denied, 100 N.Y.2d 511, 766 N.Y.S.2d 164, 798 N.E.2d 348, 2003 N.Y. LEXIS 2329 (N.Y. 2003).

142. —Effect of delay in notifying insurer of accident

The plaintiff insurer was estopped from asserting its nonliability where it delayed five months from the time it learned about an accident involving its insured and further delayed two additional months after receiving the summons and complaint before it disclaimed liability. It was also held plaintiff had waived the defense of lack of timely notice of the accident by not communicating with its insured or investigating the accident within a reasonable time after receiving notice. Safeguard Ins. Co. v Trent, 29 A.D.2d 780, 287 N.Y.S.2d 894, 1968 N.Y. App. Div. LEXIS 4555 (N.Y. App. Div. 2d Dep't 1968).

Pursuant to subd 8 of former § 167 [now § 3420(d)] of the Insurance Law, an insurer seeking to disclaim under a liability policy delivered or issued for delivery in New York must give written notice of such disclaimer as soon as is reasonably possible and the carrier may not rely upon an insured's failure to give timely notice, where the carrier itself has unreasonably delayed in making a disclaimer. Wright v Wright, 35 A.D.2d 895, 315 N.Y.S.2d 710, 1970 N.Y. App. Div. LEXIS 3393 (N.Y. App. Div. 3d Dep't 1970), app. denied, 28 N.Y.2d 483, 1971 N.Y. LEXIS 1749 (N.Y. 1971).

Insurer which never disclaimed liability to insured or to injured person in accordance with statute could not avoid liability to injured person, who had obtained judgment in civil court in September, 1973, even where there was some delay on part of such person in giving notice to insurer, where insurer had ample opportunity after suit was commenced in May, 1973, to disclaim or deny coverage, but never did so. Richardson v Leatherbee Ins. Co., 47 A.D.2d 891, 367 N.Y.S.2d 263, 1975 N.Y. App. Div. LEXIS 9304 (N.Y. App. Div. 1st Dep't 1975).

In a declaratory judgment action to determine the rights and obligations of the parties under two insurance policies, an insurance company's claim of noncoverage based on provisions of the policies concerning activity related to an automobile business was barred by reason of the company's untimely notice of disclaimer. However, claims of noncoverage on the grounds that defendant was not a named insured and was not qualified as a resident of the household of the policyholder and that the automobile operated by the defendant at the time of the accident was not listed as a vehicle covered under the policy, did not require the giving of a written notice of disclaimer and should have been permitted to proceed to trial. United Services Auto. Asso. v Meier, 89 A.D.2d 998, 454 N.Y.S.2d 319 (2d Dept 1982).

Insurer's 11-month delay in disclaiming coverage because of insureds' alleged untimely notice was unreasonable and therefore was itself untimely as matter of law. Kamyr, Inc. v St. Paul Surplus Lines Ins. Co., 152 A.D.2d 62, 547 N.Y.S.2d 964, 1989 N.Y. App. Div. LEXIS 14347 (N.Y. App. Div. 3d Dep't 1989).

Disclaimer by insurance company was timely where (1) insured was in accident with pedestrian on April 29, 1984, and insured was aware of pedestrian's injuries on that date, (2) insured did not notify insurance company of accident until April 23, 1985, several weeks after he was served with summons and complaint, (3) insurance company promptly hired investigator, who interviewed pedestrian on June 3, 1985 and prepared report on June 11, 1985, and (4) insurance company issued disclaimer on July 11, 1985. Silk v City of New York, 203 A.D.2d 103, 610 N.Y.S.2d 36, 1994 N.Y. App. Div. LEXIS 3802 (N.Y. App. Div. 1st Dep't), app. denied, 84 N.Y.2d 810, 621 N.Y.S.2d 520, 645 N.E.2d 1220, 1994 N.Y. LEXIS 4378 (N.Y. 1994), app. denied, 84 N.Y.2d 810, 621 N.Y.S.2d 519, 645 N.E.2d 1219 (N.Y. 1994).

Insurer's 5-month delay in disclaiming coverage on ground of untimely notice was unreasonable as matter of law. Interboro Mut. Indem. Ins. Co. v Rivas, 205 A.D.2d 536, 613 N.Y.S.2d 191, 1994 N.Y. App. Div. LEXIS 5923 (N.Y. App. Div. 2d Dep't 1994).

In action by owner of leased car against its excess liability insurer, insurer's disclaimer of liability was valid where its disclaimer letter disclosed that it did not receive notice of accident until about 20 months after accident, it cited lack of written notice, and it asserted prejudice in that it was "deprived of its right to investigate, obtain a separate defense, pursue the contract rights afforded under the lease and participat[e] in the defense and conclusion of the captioned matter"; in any event, insurer was not required to show actual prejudice in order to disclaim coverage for late or defective notice. First City Acceptance Corp. v Gulf Ins. Co., 245 A.D.2d 649, 665 N.Y.S.2d 114, 1997 N.Y. App. Div. LEXIS 12534 (N.Y. App. Div. 3d Dep't 1997).

Insurer was not required to defend or indemnify insured regarding underlying action by insured's injured employee where insurer properly disclaimed coverage based on insured's failure to provide timely notice of claim, insured's delay of 2 years and 10 months in providing notice of claim was unreasonable as matter of law, insurer was not obligated to disclaim coverage until insured provided notice of accident or claim, and disclaimer in insurer's answer was timely notice of disclaimer. Roofing Consultants, Inc. v Scottsdale Ins. Co., 273 A.D.2d 933, 709 N.Y.S.2d 782, 2000 N.Y. App. Div. LEXIS 6715 (N.Y. App. Div. 4th Dep't), app. denied, 95 N.Y.2d 770, 722 N.Y.S.2d 473, 745 N.E.2d 393, 2000 N.Y. LEXIS 3859 (N.Y. 2000).

Although the insured provided prompt notice to the insurance agents of the administrators' wrongful death claim, the agents failed to notify the insurer; therefore, because the insurer failed

to provide a written disclaimer of coverage as soon as reasonably possible, as required by N.Y. Ins. Law § 3420(d), it was obligated to defend and/or indemnify the insured in the underlying action. Tex Dev. Co. v Greenwich Ins. Co., 51 A.D.3d 775, 858 N.Y.S.2d 682, 2008 N.Y. App. Div. LEXIS 4217 (N.Y. App. Div. 2d Dep't 2008).

An insurer who fails to comply with the requirements of subd. 8 of former § 167 [now § 3420(d)] by giving written notice of disclaimer of liability waives delay on the part of the assured and a plaintiff seeking damages against him in giving notice of the accident. Aetna Casualty & Surety Co. v Fireman's Fund Ins. Co., 40 Misc. 2d 813, 244 N.Y.S.2d 159, 1963 N.Y. Misc. LEXIS 1443 (N.Y. Sup. Ct. 1963).

An insurer who failed to give written notice of disclaimer to the insured or to the claimant waived any delay by either party in giving notice of the accident. Great American Ins. Co. v Schaefers, 47 Misc. 2d 522, 262 N.Y.S.2d 953, 1965 N.Y. Misc. LEXIS 1638 (N.Y. Sup. Ct. 1965).

Inasmuch as an insurer failed to specifically assert that the insured did not forward the complaint until the instant action was commenced, and failed to otherwise explain its 10-month delay in providing notice of disclaimer, it was precluded from disclaiming coverage on either theory. Paul M. Maint., Inc. v Transcon. Ins. Co., 300 A.D.2d 209, 755 N.Y.S.2d 3, 2002 N.Y. App. Div. LEXIS 13319 (N.Y. App. Div. 1st Dep't 2002).

Insurer is precluded from disclaiming coverage of agency for losses suffered due to sexual abuse of foster children it placed, even if court were to find that agency gave insurer late notice of alleged abuse, because insurer's delay in disclaiming for late notice was also unreasonable and in violation of CLS Ins Law § 3420(d). Safeguard Ins. Co. v Angel Guardian Home, 946 F. Supp. 221, 1996 U.S. Dist. LEXIS 20120 (E.D.N.Y. 1996).

143. Particular circumstances leading to estoppel to disclaim liability

Insurer was not estopped from disclaiming coverage, and had no obligation to provide insured with legal defense, even though disclaimer was issued more than 6 months after insurer was notified of claim, where policy had been issued providing coverage for liability arising out of negligent operations or supervision in course of highway resurfacing project, and underlying negligence claim involved motorcycle accident on portion of highway where work had not yet begun; since policy never covered claim in first place, CLS Ins § 3420(d) did not apply. Employers Ins. of Wausau v County of Nassau, 141 A.D.2d 496, 530 N.Y.S.2d 157, 1988 N.Y. App. Div. LEXIS 6312 (N.Y. App. Div. 2d Dep't 1988).

Insurer which disclaims liability solely on basis of insured's failure to cooperate may be estopped from later disclaiming liability on basis of insured's failure to provide timely notice of claim. Guberman v William Penn Life Ins. Co., 146 A.D.2d 8, 538 N.Y.S.2d 571, 1989 N.Y. App. Div. LEXIS 2441 (N.Y. App. Div. 2d Dep't 1989).

Insurer was not estopped from disclaiming coverage under service station policy because of its unreasonable delay in notifying insureds of its intention to do so since actionable conduct alleged in underlying personal injury action—negligence in instructing third party as to use of motorcycle—did not arise from operation of service station, and thus it was not "exclusion" under policy which insurer had to disclaim within reasonable time or be subject to estoppel. American Home Assurance Co. v Aprigliano, 161 A.D.2d 357, 555 N.Y.S.2d 106, 1990 N.Y. App. Div. LEXIS 5301 (N.Y. App. Div. 1st Dep't 1990).

Court erred in holding that liability insurer was not obligated to defend or indemnify its insured in personal injury action on ground that injured party had not timely notified it of action, since insurer's initial disclaimer was specifically based on its own insured's failure to notify it of action, and thus was not effective against injured party, and insurer was estopped from subsequently raising injured party's late notice as ground for disclaiming coverage; notice of disclaimer under CLS Ins § 3420(d) must promptly apprise claimant, with high degree of specificity, of ground or grounds on which disclaimer is predicated. United States Liab. Ins. Co. v Young, 186 A.D.2d 644, 588 N.Y.S.2d 640, 1992 N.Y. App. Div. LEXIS 11318 (N.Y. App. Div. 2d Dep't 1992), app. denied, 81 N.Y.2d 711, 601 N.Y.S.2d 580, 619 N.E.2d 658, 1993 N.Y. LEXIS 1860 (N.Y. 1993).

Fact that liability insurer had undertaken defense of underlying personal injury action did not estop it from disclaiming any further defense or indemnification of insured, even though insurer failed to explain 8- or 10-month delay in ascertaining that scene of injury was not part of covered premises, where insureds did not show that they had been prejudiced by delay, and in fact insureds had benefited by receiving valuable albeit gratuitous legal representation from insurer during delay. Sedgwick Ave. Assocs. v Insurance Co., 203 A.D.2d 93, 610 N.Y.S.2d 39, 1994 N.Y. App. Div. LEXIS 3771 (N.Y. App. Div. 1st Dep't 1994).

Employers' liability exclusion did not bar action in which injured plaintiffs' employer, who was impleaded by defendant for contribution and indemnity, sought defense and indemnification as additional insured under defendant's comprehensive liability policy, where insurer disclaimed coverage under that exclusion, without explanation, 4 months after employer sought coverage. Nuzzo v Griffin Tech., 222 A.D.2d 184, 643 N.Y.S.2d 802, 1996 N.Y. App. Div. LEXIS 6777 (N.Y. App. Div. 4th Dep't 1996), app. denied, 91 N.Y.2d 802, 666 N.Y.S.2d 564, 669 N.E.2d 534, 1997 N.Y. LEXIS 4164 (N.Y. 1997).

In action by driver of insured car alleging that insurer wrongfully refused to provide him with defense in underlying personal injury action, insurer was not entitled to summary judgment based on driver's alleged failure to notify it of accident, where owner of car had provided required notice and insurer did not disclaim coverage against owner on such ground. Sweet v State Farm Mut. Auto. Ins. Co., 223 A.D.2d 841, 636 N.Y.S.2d 196, 1996 N.Y. App. Div. LEXIS 85 (N.Y. App. Div. 3d Dep't 1996).

Neither insured nor insurer was entitled to summary judgment, where insured alleged that insurer failed to timely disclaim coverage, but it was uncontroverted that insurer would not have issued policy for roofing business, question of fact existed as to whether insured materially misrepresented to insurer's agent that its newly-formed business would be engaged in carpentry rather than roofing, and record did not establish whether work in question was being performed by insured's newly-formed business or by his pre-existing siding and roofing business. Morris v Merchants Mut. Ins. Co., 229 A.D.2d 992, 645 N.Y.S.2d 207, 1996 N.Y. App. Div. LEXIS 9045 (N.Y. App. Div. 4th Dep't 1996).

Insurer who defends action on behalf of its insured with knowledge of defense to coverage is thereafter estopped from asserting that policy does not cover claim; recognition of such estoppel has as its basis detrimental reliance suffered by insured in loss of right to control its own defense, and therefore estoppel will lie only if insured has shown that it has been prejudiced by insurance carrier's actions. National Indem. Co. v Ryder Truck Rental, 230 A.D.2d 720, 646 N.Y.S.2d 169, 1996 N.Y. App. Div. LEXIS 8258 (N.Y. App. Div. 2d Dep't 1996).

Insurer was estopped from denying coverage for third-party defendant, which was named insured along with third-party plaintiffs, where insurer failed to issue disclaimer under CLS Ins § 3420(d); thus, antisubrogration rule applied and court properly dismissed third-party complaint seeking indemnification and contribution. Hebert v Staltac Assocs., 231 A.D.2d 675, 647 N.Y.S.2d 858, 1996 N.Y. App. Div. LEXIS 9673 (N.Y. App. Div. 2d Dep't 1996), app. denied, 89 N.Y.2d 808, 655 N.Y.S.2d 888, 678 N.E.2d 501, 1997 N.Y. LEXIS 182 (N.Y. 1997).

If insurer, by reason of its not having denied coverage on basis of "dishonest theft" exclusion, was estopped from asserting it as defense to action on jeweler's block policy, such estoppel did not relieve insured of burden of proving prima facie case—that is, that loss occurred and was covered event. Dato Jewelry v Western Alliance Ins. Co., 238 A.D.2d 193, 656 N.Y.S.2d 30, 1997 N.Y. App. Div. LEXIS 3963 (N.Y. App. Div. 1st Dep't), app. denied, 90 N.Y.2d 805, 663 N.Y.S.2d 511, 686 N.E.2d 223, 1997 N.Y. LEXIS 2933 (N.Y. 1997).

Even if arbitrator misconstrued law in rejecting automobile accident victim's claim that absent timely disclaimer or denial of coverage by insurer under CLS Ins § 3420(d), on ground that he had not sustained "serious injury" under CLS Ins § 5102(d), he could recover for noneconomic loss even in absence of serious injury, victim's claim was academic where arbitrator's conclusion

was neither arbitrary nor capricious, so as to justify vacating his award. iGravenese v 245 A.D.2d 507, 666 N.Y.S.2d 710.

Despite nebulous references to "risk of impaired health," "threat to human, animal and plant life," "health, safety and well-being," and the like, 2 underlying claims against insured were not "for death or bodily injury arising out of [an accident]" under CLS Ins § 3420(d), and thus liability insurer did not waive defense of lack of coverage by failing to timely assert pollution exclusion, where complaint in state action pleaded causes of action under Comprehensive Environmental Response, Compensation and Liability Act and for public nuisance, seeking reimbursement for damages to state's natural resources and costs of remediation as well as injunction directing nuisance abatement, and complaint in private action sought only to abate nuisance and to recover damages for cost of water pollution controls and diminution of property value. Merchants Mut. Ins. Co. v Allcity Ins. Co., 245 A.D.2d 590, 664 N.Y.S.2d 690, 1997 N.Y. App. Div. LEXIS 12538 (N.Y. App. Div. 3d Dep't 1997).

Complaint alleging that, as result of pollution of plaintiffs' drinking water, they were at risk of disease because of exposure to identified toxins, pollutants, and contaminants, causing them to suffer emotional distress from fear of disease, might well be claim "for death or bodily injury arising out of [an accident]" under CLS Ins § 3420(d). Merchants Mut. Ins. Co. v Allcity Ins. Co., 245 A.D.2d 590, 664 N.Y.S.2d 690, 1997 N.Y. App. Div. LEXIS 12538 (N.Y. App. Div. 3d Dep't 1997).

Liability insurer was not estopped from denying coverage, and did not waive its pollution exclusion defense, where insured's alleged reliance on insurer's initial undertaking of defense of insured in underlying action was subject to explicit reservation of rights stating that insurer would defend "at this time, pending further investigations and decisions on coverage at a later date following all investigations," and within reasonable time insurer issued express written disclaimer of coverage based, inter alia, on policy's pollution exclusion. Merchants Mut. Ins. Co. v Allcity Ins. Co., 245 A.D.2d 590, 664 N.Y.S.2d 690, 1997 N.Y. App. Div. LEXIS 12538 (N.Y. App. Div. 3d Dep't 1997).

Insurer, as subrogee of construction company, was not collaterally estopped from asserting that defendant, based on contractual indemnification clause in subcontract between construction company and defendant, was liable for defense costs that insurer incurred in underlying personal injury action where trial court's determination in underlying action that construction company's application for indemnification from defendant was moot was not decision on merits that would collaterally estop either construction company or insurer as its subrogee, and insurer was not party to underlying action and did not have full and fair opportunity to litigate its claim therein. Michigan Mut. Ins. Co. v American & Foreign Ins. Co., 251 A.D.2d 141, 674 N.Y.S.2d 313, 1998 N.Y. App. Div. LEXIS 6899 (N.Y. App. Div. 1st Dep't 1998).

Insurer's disclaimer of coverage was ineffective against injured party in automobile accident case, and insurer was estopped from raising injured party's late notice of claim as ground for disclaiming coverage, where insurer's notice of disclaimer under CLS Ins § 3420(d) was based only on insured's failure to notify it of claim. Eagle Ins. Co. v Ortega, 251 A.D.2d 282, 674 N.Y.S.2d 56, 1998 N.Y. App. Div. LEXIS 6218 (N.Y. App. Div. 2d Dep't 1998).

Insurer was not estopped from denying coverage of insured wife in underlying action for wrongful death of her husband, who was killed in traffic accident while he was passenger in car driven by wife, where (1) policy never provided coverage for interspousal wrongful death claim, and thus prompt notice of disclaimer was not required, and (2) insurer did not engage in any conduct that would equitably estop it from denying coverage. Government Emples. Ins. Co. v Pagano, 251 A.D.2d 452, 674 N.Y.S.2d 719, 1998 N.Y. App. Div. LEXIS 6850 (N.Y. App. Div. 2d Dep't 1998).

Doctrine of estoppel may not be invoked to create insurance coverage where none exists under policy. Penske Truck Leasing Co., L.P., v Home Ins. Co., 251 A.D.2d 478, 674 N.Y.S.2d 400, 1998 N.Y. App. Div. LEXIS 6859 (N.Y. App. Div. 2d Dep't 1998).

Insurer was properly granted summary judgment declaring that it was entitled to be reimbursed for payments that it made to cover underlying tort plaintiff's economic loss where that result was required by terms of insurance policy pertaining to additional personal injury protection benefits and by subrogation principles. Foley v American Mfrs. Mut. Ins. Co., 255 A.D.2d 416, 680 N.Y.S.2d 562, 1998 N.Y. App. Div. LEXIS 11998 (N.Y. App. Div. 2d Dep't 1998), app. dismissed, 93 N.Y.2d 999, 695 N.Y.S.2d 744, 717 N.E.2d 1081, 1999 N.Y. LEXIS 1887 (N.Y. 1999).

In action arising from motor vehicle collision wherein defendants counterclaimed against plaintiff but never notified plaintiff's insurer of existence of their counterclaim, fact that plaintiff's insurer received notice of counterclaim from plaintiff did not estop it from disclaiming coverage on counterclaim for failure to directly notify defendants of its disclaimer. Agway Ins. v Alvarez, 258 A.D.2d 487, 684 N.Y.S.2d 635, 1999 N.Y. App. Div. LEXIS 983 (N.Y. App. Div. 2d Dep't 1999).

Hospital was entitled to summary judgment declaring that its liability insurer had duty to defend and indemnify it in underlying medical malpractice action, although policy did not insure hospital at time alleged acts of malpractice occurred, where insurer had notice of facts which would have revealed that it did not cover claim against hospital when bill of particulars in underlying malpractice action was served, but it completely assumed defense of action for more than 11 years, until eve of trial. Brooklyn Hosp. Ctr. v Centennial Ins. Co., 258 A.D.2d 491, 685 N.Y.S.2d 267, 1999 N.Y. App. Div. LEXIS 1048 (N.Y. App. Div. 2d Dep't 1999).

Liability insurer was not estopped from disclaiming coverage with respect to claim of injured party based on injured party's failure to give timely notice, where there was no evidence that injured party ever notified insurer of occurrence so as to trigger insurer's obligation to disclaim specifically based on failure to give timely notice. Dryden Mut. Ins. Co. v Brockman, 259 A.D.2d 947, 687 N.Y.S.2d 504, 1999 N.Y. App. Div. LEXIS 3048 (N.Y. App. Div. 4th Dep't 1999).

Insurance carrier was not estopped from denying underinsured coverage where (1) insured did not notify it that she had been injured by automobile and had commenced action against driver until 3 days after she settled that action for full amount of driver's policy and gave driver general release that did not preserve insurer's right of subrogation, (2) initial notice to insurer did not even mention settlement negotiations or release, (3) subsequent letter written by insured's attorney, warning that arbitration would be demanded if insurer did not "discuss" underinsured claim, mentioned settlement offer by driver's carrier but portrayed status of negotiations as unaccepted offer pending insurer's investigation, and (4) insurer diligently responded by undertaking investigation of insured's injuries (which, insured claimed, estopped it from denying coverage) until, after 2 months, it learned of settlement and disclaimed coverage. USAA Cas. Ins. Co. v Kaufman, 261 A.D.2d 275, 690 N.Y.S.2d 269, 1999 N.Y. App. Div. LEXIS 5501 (N.Y. App. Div. 1st Dep't 1999), app. denied, 94 N.Y.2d 758, 705 N.Y.S.2d 5, 726 N.E.2d 482, 2000 N.Y. LEXIS 1 (N.Y. 2000).

Insurer was estopped from raising injured party's alleged failure to provide timely notice of claim as ground for disclaiming coverage where its notice of disclaimer had denied coverage based only on insured's failure to provide timely notice. Utica Mut. Ins. Co. v Gath, 265 A.D.2d 805, 695 N.Y.S.2d 839, 1999 N.Y. App. Div. LEXIS 9833 (N.Y. App. Div. 4th Dep't 1999).

Although insurer will be estopped from disclaiming coverage based on exclusion in policy if it has delayed unreasonably in issuing its disclaimer, insurer has no duty to disclaim where coverage does not exist. Nationwide Ins. Co. v Sillman, 266 A.D.2d 551, 699 N.Y.S.2d 98, 1999 N.Y. App. Div. LEXIS 12293 (N.Y. App. Div. 2d Dep't 1999).

Insurer's mere statement that it would provide defense for corporation did estop insurer from denying coverage where (1) corporation's agent unilaterally made initial decision to look to insurer for coverage, without relying on insurer in any way, (2) corporation did not rely to its detriment on insurer by transferring control of its defense to insurer, and (3) thus, estoppel element of detrimental reliance was lacking. Martini v Lafayette Studio Corp., 273 A.D.2d 112, 710 N.Y.S.2d 39, 2000 N.Y. App. Div. LEXIS 7176 (N.Y. App. Div. 1st Dep't 2000).

Liability insurer was equitably estopped from denying coverage of claim against insured by insured's employee injured vehicular

accident where (1) insurer undertook defense of insured in employee's action under Federal Employers' Liability Act without reserving its rights under policy, (2) although insured was represented by attorneys of its choice, they shared information with insurer, provided insurer with status reports, conducted depositions with insurer's approval, and entered into settlement discussions with insurer's knowledge, and (3) insurer's first assertion of possible disclaimer on eve of settlement conference placed in jeopardy favorable settlement negotiated by insured's attorneys and forced insured to agree to litigate coverage issues in order to save settlement. U.S. Fid. & Guar. Co. v New York Susquehanna & Western Ry. Co., 275 A.D.2d 977, 713 N.Y.S.2d 624, 2000 N.Y. App. Div. LEXIS 9565 (N.Y. App. Div. 4th Dep't 2000).

Court properly entered summary judgment declaring that insurer was obligated to defend and indemnify insured where insurer's disclaimer of coverage was based only on insured's failure to notify it of claim, and was therefore not effective against injured party, who had given notice of claim. Legion Ins. Co. v Weiss, 282 A.D.2d 576, 723 N.Y.S.2d 235, 2001 N.Y. App. Div. LEXIS 3766 (N.Y. App. Div. 2d Dep't 2001).

Insurer was estopped from raising plaintiff injured parties' allegedly late notice of claim as ground for disclaiming coverage where (1) disclaimer was based solely on insured's failure to notify insurer of claim, (2) plaintiffs, not insured, gave notice of claim, and (3) thus, disclaimer was not effective against plaintiffs. Hazen v Otsego Mut. Fire Ins. Co., 286 A.D.2d 708, 730 N.Y.S.2d 156, 2001 N.Y. App. Div. LEXIS 8563 (N.Y. App. Div. 2d Dep't 2001).

Insurer was estopped from disclaiming insurance coverage to the general contractor, who was a named insured, on the basis of a policy exclusion because the insurer's letter to the named insured's insurance carrier disclaiming any duty did not suffice and the insurer was required to send written notice of its disclaimer directly to the named insured; the carrier's interests were not the same as the carrier. Harco Constr., LLC v First Mercury Ins. Co., 148 A.D.3d 870, 49 N.Y.S.3d 495, 2017 N.Y. App. Div. LEXIS 1766 (N.Y. App. Div. 2d Dep't 2017).

Trial court properly granted the additional insureds' motion for summary judgment declaring that the insurer was obligated to defend and indemnify them in the underlying personal injury action and to reimburse them for all defense costs incurred in connection with the underlying action because the insurer's failure to provide timely written notice of disclaimer to the additional insureds rendered its disclaimer of coverage ineffective against them, the insurer failed to raise a triable issue of fact in opposition, and the insurer did not need to receive the contract documents in order to provide a disclaimer directly to the additional insureds based on an employee exclusion. AVR-Powell C Dev. Corp. v Utica First Ins. Co., 174 A.D.3d 772, 106 N.Y.S.3d 320, 2019 N.Y. App. Div. LEXIS 5786 (N.Y. App. Div. 2d Dep't 2019).

Where the insurer failed to give the insured a timely notice of disclaimer of coverage for liability for personal injury and would therefore be precluded from claiming such noncoverage and would also be estopped from claiming noncoverage because it had paid a property damage claim, but where the insured had violated the law by selling the vehicle prior to the accident but permitted his registration to remain on it and did not give notice of the sale to the insurer, the insured was estopped from claiming the insurer was precluded or estopped from disclaiming coverage, since the insurer had been severely prejudiced by the insured's actions; and the insured's complaint for declaratory judgment that the insurer was liable under the policy would be dismissed for lack of merit. Blackmer v Travelers Indem. Co., 110 Misc. 2d 704, 442 N.Y.S.2d 923, 1981 N.Y. Misc. LEXIS 3145 (N.Y. Sup. Ct. 1981).

In an action resulting from an injury sustained in an accident involving respondent's automobile and an automobile driven by a thief, where the insurance contract covering the latter vehicle excluded coverage of the vehicle if operated without the permission of the owner, the defense of lack of permissive use was available to both the owner and insurer against the respondent but was contingent upon the issuance of written notice of the disclaimer of coverage, in that the vehicle was being operated in a situation in the nature of a policy exclusion, and failure by the insurer to give timely written notice of disclaimer precluded the insurer from asserting the defense of lack of permissive use regardless of whether the respondent was actually prejudiced by the failure. Insurance Co. of North America v Norris, 116 Misc. 2d 314, 455 N.Y.S.2d 190, 1982 N.Y. Misc. LEXIS 3876 (N.Y. Sup. Ct. 1982).

In action to determine insurance coverage of family automobile operated by owner's son while employed as pizza deliveryman, insurance company which insured automobile was required to provide coverage to pizza shop, regardless of proper interpretation of exclusion on which insurance company based disclaimer, since insurance company only sent disclaimer notices to persons injured in accident and did not send disclaimer notice to pizza shop. American Motorists Ins. Co. v Travelers Ins. Co., 158 Misc. 2d 257, 604 N.Y.S.2d 475, 1993 N.Y. Misc. LEXIS 562 (N.Y. Sup. Ct. 1993).

Plaintiff's contention that the insurer failed to give timely notice of its denial of coverage with respect to a negligence cause of action, and thus that the insurer was estopped from asserting that a policy did not cover that cause of action, was found by the appellate court to be without merit, as there was no duty to give notice of disclaimer or denial of coverage with respect to any of the causes of action, because the alleged defamation upon which the underlying action was based was not within the ambit of section N.Y. Ins. Law § 3420(d); defamation did not occur by accident, and, in the instant case, the insurer denied coverage, not because of a policy exclusion, but because defamation was not an occurrence, under the terms of the policy. Iafallo v Nationwide Mut. Fire Ins. Co., 299 A.D.2d 925, 750 N.Y.S.2d 386, 2002 N.Y. App. Div. LEXIS 11000 (N.Y. App. Div. 4th Dep't 2002).

Since defendant insurer was precluded from disclaiming coverage if it failed to send plaintiff injured party timely written notice of the disclaimer as required by N.Y. Ins. Law § 3420(d), but the insurer claimed that it mailed a copy of its disclaimer of coverage to the former attorney of the injured party, and the injured party asserted that neither the injured party nor the former attorney ever received such a notice, there was a question of fact as to whether the disclaimer was ever sent to the injured party or the injured party's attorney, and the trial court, therefore, erred in granting the insurer summary judgment dismissing the injured party's complaint to recover the amount of a judgment that was obtained against the insured of the insurer. Fisco v Provident Wash. Ins. Co., 303 A.D.2d 451, 755 N.Y.S.2d 893, 2003 N.Y. App. Div. LEXIS 2303 (N.Y. App. Div. 2d Dep't 2003).

Trial court properly searched the record and granted summary judgment to the insured in an action seeking a declaration that an insurance company was obligated to defend and indemnify the insured in an underlying personal injury action; the lateness of the notice of occurrence, which was the basis for the insurance company's denial of coverage, was evident on the fact of the underlying complaint and the insurance company provided no explanation for its own delay in promptly commencing such an investigation. Heegan v United Int'l Ins. Co., 2 A.D.3d 403, 767 N.Y.S.2d 861, 2003 N.Y. App. Div. LEXIS 12896 (N.Y. App. Div. 2d Dep't 2003), app. denied, 2 N.Y.3d 704, 778 N.Y.S.2d 774, 811 N.E.2d 36, 2004 N.Y. LEXIS 646 (N.Y. 2004).

Because the casualty company did not timely provide the insureds with notice of its disclaimer and denial of coverage on the basis of a policy exclusion, pursuant to N.Y. Ins. Law § 3420(d), the casualty company was estopped from disclaiming liability or denying coverage and was obligated to defend, indemnify, and reimburse the insureds for costs already incurred in the underlying personal injury action. Brighton Cent. Sch. Dist. v Am. Cas. Co., 19 A.D.3d 528, 800 N.Y.S.2d 415, 2005 N.Y. App. Div. LEXIS 6908 (N.Y. App. Div. 2d Dep't 2005).

Subcontractor's insurer was estopped, under N.Y. Ins. Law § 3420(d), from declining to defend and indemnify a general contractor who was an insured on the subcontractor's policy in an underlying suit filed by the subcontractor's employee because (1) the statute's prompt disclaimer requirement was triggered when the subcontractor's insurer was notified of the general contractor's claim by the general contractor's insurer on behalf of the general contractor, and (2) the subcontractor's insurer did not

justify the insurer's delay of 45 to 50 days in disclaiming coverage. JT Magen v Hartford Fire Ins. Co., 64 A.D.3d 266, 879 N.Y.S.2d 100, 2009 N.Y. App. Div. LEXIS 3687 (N.Y. App. Div. 1st Dep't 2009).

Second level excess insurers' subsequent refusal to contribute to settlement consummated between first level excess insurer and claimants did not constitute prejudicial delay which estopped second insurers from denying coverage in first insurer's action for contribution where first insurer had agreed to terms of its settlement with claimants before second insurers even received first insurer's notice of loss. American Home Assurance Co. v Republic Ins. Co., 984 F.2d 76, 1993 U.S. App. LEXIS 1040 (2d Cir. N.Y.), cert. denied, 508 U.S. 973, 113 S. Ct. 2964, 125 L. Ed. 2d 664, 1993 U.S. LEXIS 4086 (U.S. 1993).

Insurer is estopped from denying coverage of property damage caused to homeowners by negligence of insured builder, where homeowners achieved arbitration award in their favor against builder, and have independent right to proceed directly against insurer pursuant to Ins § 3420(a)(2), because insurer was informed of claim right from beginning, yet waited more than 6 months to disclaim coverage to its insured, and more than 21 months before informing homeowners of disclaimer. Frazier v Royal Ins. Co. of Am., 110 F. Supp. 2d 110, 2000 U.S. Dist. LEXIS 11724 (N.D.N.Y. 2000).

Defendant insurer failed to comply with N.Y. Ins. Law § 3420(d) and thus had to defend its insured under the policy. It was unreasonable as a matter of law for the claims handler to undertake a coverage review, because the basis for the insurer's disclaimer—the communicable disease exclusion—was or should have been readily apparent at the onset of the delay. Koegler v Liberty Mut. Ins. Co., 623 F. Supp. 2d 481, 2009 U.S. Dist. LEXIS 33734 (S.D.N.Y. 2009).

It was not shown that the insurer of a construction project owner and its general contractor was the real party in interest to preclude application of the requirement for notice of disclaimer of coverage by insurer of subcontractor since the insurer was not a party to the action, and communications from the insurer to the subcontractor's insurer about the underlying claims of an employee of the subcontractor were not factually or legally conclusive that the insurer was the real party in interest. Pearson Capital Partners LLC v James River Ins. Co., 151 F. Supp. 3d 392, 2015 U.S. Dist. LEXIS 117183 (S.D.N.Y. 2015).

Owner of a construction project and its general contractor sufficiently alleged that the insurer of a subcontractor was required to give timely notice of disclaimer of coverage for injuries to the subcontractor's employee, since the owner and contractor alleged that the employee was injured in the scope of employment, and the policy of the subcontractor's insurer which included the owner and contractor as additional insureds did not require a showing of negligence or wrongdoing on the part of the subcontractor. Pearson Capital Partners LLC v James River Ins. Co., 151 F. Supp. 3d 392, 2015 U.S. Dist. LEXIS 117183 (S.D.N.Y. 2015).

144. —Prejudicial delay in communicating disclaimer

Court properly dismissed insurer's petition to permanently stay arbitration on sole ground that insured failed to give timely written notice of uninsured motorist's claim, where insurer never sent any notice of disclaimer, and only communication of its intent to disclaim was contained in petition to stay arbitration served nearly 8 months after it first received notice of accident and 4 months after it received complete record. Firemen's Fund Ins. Co. v Hopkins, 88 N.Y.2d 836, 644 N.Y.S.2d 481, 666 N.E.2d 1354, 1996 N.Y. LEXIS 677 (N.Y.), reh'g denied, 88 N.Y.2d 963, 647 N.Y.S.2d 716, 670 N.E.2d 1348, 1996 N.Y. LEXIS 2083 (N.Y. 1996).

Insured was entitled to summary judgment declaring that its insurer was obligated to defend and indemnify it in action based on Dram Shop Law where insurer did not notify injured party of its disclaimer of coverage until 2 months after it commenced declaratory judgment action against insured, and only excuse offered was conclusory allegation that injured party had attempted to evade service; insurer's delay was unreasonable as matter of law. National Casualty Co. v Levittown Events, Inc., 191 A.D.2d 543, 595 N.Y.S.2d 93, 1993 N.Y. App. Div. LEXIS 2338 (N.Y. App. Div. 2d Dep't 1993).

Disclaimer of coverage was untimely, and thus was ineffective, where insurance company's internal memorandum, which summarized facts of accident and reason for disclaimer, preceded disclaimer by 4 ½ months. Consolidated Edison Co. v Hartford Ins. Co., 203 A.D.2d 83, 610 N.Y.S.2d 219, 1994 N.Y. App. Div. LEXIS 3815 (N.Y. App. Div. 1st Dep't 1994).

Insurer's disclaimer of coverage in connection with slip and fall at building owned by insured was not effective where (1) notice of accident was given in July 1988, (2) final investigative report was received by insurer in December 1988, and (3) no steps were taken to disclaim until commencement of action in February 1989; although complaint was not forwarded to insurer until January 1989 and it did not receive formal opinion from its coverage counsel until January 1989, its claim manager admitted that he alone made disclaimer decisions, and investigative report was sufficient to allow claims manager to conclude that insured breached notice provisions of policy. Mount Vernon Fire Ins. Co. v Gatesington Equities, 204 A.D.2d 419, 611 N.Y.S.2d 893, 1994 N.Y. App. Div. LEXIS 4815 (N.Y. App. Div. 2d Dep't 1994).

Insurer was estopped from disclaiming coverage where it failed to offer any explanation for its delay in issuing disclaimer based on policy exclusion until approximately one year after it was aware of sufficient facts to do so; nonwaiver agreement signed by insured, allowing insurer to deny coverage after investigation of accident and reserving insurer's right to disclaim based on insured's failure to timely notify insurer of occurrence, did not permit insurer to delay sending notice of disclaimer. Hanover Ins. Co. v Suffolk Overhead Door Co., 207 A.D.2d 428, 615 N.Y.S.2d 742, 1994 N.Y. App. Div. LEXIS 8343 (N.Y. App. Div. 2d Dep't 1994).

Insurer was estopped from disclaiming coverage where it unreasonably delayed issuance of disclaimer of coverage for about one year after it acquired sufficient facts to issue it. Aetna Life & Cas. v Boucher, 238 A.D.2d 414, 656 N.Y.S.2d 316, 1997 N.Y. App. Div. LEXIS 3840 (N.Y. App. Div. 2d Dep't 1997), overruled, Worcester Ins. Co. v Bettenhauser, 260 A.D.2d 488, 688 N.Y.S.2d 202, 1999 N.Y. App. Div. LEXIS 3804 (N.Y. App. Div. 2d Dep't 1999).

Disclaimer of coverage was invalid, where insurer did not disclaim until discovery was complete and action appeared on trial calendar, and insurer did not refute insured's assertions of prejudice arising from failure to assert certain counterclaims which insured could have asserted. State Farm Ins. Co. v O'Brien, 242 A.D.2d 381, 661 N.Y.S.2d 997, 1997 N.Y. App. Div. LEXIS 8469 (N.Y. App. Div. 2d Dep't 1997).

In third-party action by gasoline service station owner for declaration that its liability insurer had duty to defend and indemnify him in connection with underlying suit to recover cost of cleaning up underground gasoline leak, insurer did not waive its right to disclaim coverage where its disclaimer was not unreasonably delayed, owner failed to show how he was prejudiced by delay, and CLS Ins § 3420(d) did not apply, because underlying claim did not involve bodily injury or death. State v Ackley, 245 A.D.2d 668, 664 N.Y.S.2d 876, 1997 N.Y. App. Div. LEXIS 12582 (N.Y. App. Div. 3d Dep't 1997).

Where underlying action against insured did not involve death or bodily injury, insurer's untimely disclaimer of coverage would nevertheless be given effect unless insured could demonstrate prejudice as result of delay. United States Fid. & Guar. Co. v Weiri, 265 A.D.2d 321, 696 N.Y.S.2d 200, 1999 N.Y. App. Div. LEXIS 9642 (N.Y. App. Div. 2d Dep't 1999).

Subcontractor's insurer could not disclaim coverage to a property owner and a general contractor relating to a personal injury action because even if their notices of claims were late, no disclaimer was filed as to the owner, and the disclaimer as to the contractor was filed six to seven months later, which was unreasonable under N.Y. Ins. Law § 3420(d). One Beacon Ins. v Travelers Prop. Cas. Co. of Am., 51 A.D.3d 1198, 856 N.Y.S.2d 737, 2008 N.Y. App. Div. LEXIS 4022 (N.Y. App. Div. 3d Dep't 2008).

Trial court erred in granting an insured's motion for summary judgment because policy at issue contained clauses requiring the

insured to provide prompt notice of both an occurrence implicating coverage and any ensuing legal action, the insured's failure to notify the insurer of the underlying action was unreasonable as a matter of law where its nonreceipt of the complaint flowed from its failure to appoint a new registered agent for service to replace a defunct one that had been named decades earlier, and the insurer's failure to affirmatively establish prejudice was of no moment where the no-prejudice rule applied. Kraemer Bldg. Corp. v Scottsdale Ins. Co., 136 A.D.3d 1205, 25 N.Y.S.3d 718, 2016 N.Y. App. Div. LEXIS 1221 (N.Y. App. Div. 3d Dep't), app. denied, 27 N.Y.3d 908, 56 N.E.3d 902, 36 N.Y.S.3d 622, 2016 N.Y. LEXIS 1664 (N.Y. 2016).

Insurer was equitably estopped from bringing action, on eve of trial, seeking declaration that it be relieved of any duty to defend or indemnify insured in underlying personal injury action since insurer had appeared and defended insured for prior 3 years, even though it could have withdrawn its defense on ground of noncoverage 3 months after receiving notice of personal injury action. Travelers Prop. Cas. v Weiner, 174 Misc. 2d 831, 666 N.Y.S.2d 392, 1997 N.Y. Misc. LEXIS 558 (N.Y. Sup. Ct. 1997).

Commercial general liability insurer which, 15 months after it agreed to defend action, notified insured that it would not provide coverage because underlying claim was not made during policy period, was estopped from denying coverage; insured was prejudiced by insurer's conduct in advising insured that it was covered and not retracting that commitment for more than one year, lulling insured into not being concerned about need for other coverage. Martini v Lafayette Studios Corp., 177 Misc. 2d 383, 676 N.Y.S.2d 808, 1998 N.Y. Misc. LEXIS 302 (N.Y. Sup. Ct. 1998).

Insurance company would be required to defend and indemnify insured in action arising from incident in which insured's automobile struck group of pedestrians, notwithstanding contention that insured acted intentionally and that policy excluded injuries resulting from intentional acts, since insurance company failed to give timely written notice of disclaimer as required by CLS Ins § 3420(d) where (1) insurance company was notified of incident in October 1987, (2) negligence action was commenced against insured in April 1988 and copy of papers was forwarded to insurance company in May 1988, and (3) disclaimer was issued in July 1988; insurance company submitted affidavit of attorney which stated that investigation was made extremely difficult due to ongoing police investigation of incident, but there was no affidavit from anyone with personal knowledge of investigation. Interboro Mut. Indem. Ins. Co. v Gatterdum (1990, 3d Dept) 163 App D iv 2d 788,, 558 N.Y.S.2d 749.

Because the instant matter did not involve a claim for death or bodily injury (N.Y. Ins. Law § 3420(d)), the unexplained failure of defendants to promptly disclaim on the ground of untimely notification did not automatically estop them from relying upon such a disclaimer. Rather, reliance upon the untimely disclaimers would only have been estopped upon a showing of prejudice to plaintiff insured due to the delay. Only Natural, Inc. v Realm Natl. Ins. Co., 37 A.D.3d 436, 830 N.Y.S.2d 229, 2007 N.Y. App. Div. LEXIS 1562 (N.Y. App. Div. 2d Dep't 2007).

Where the insurer gave notice of its disclaimer 78 days after receiving notice of the facts upon which its disclaimer was based, the disclaimer was untimely as a matter of law under N.Y. Ins. Law § 3420(d); therefore, the trial court properly granted summary judgment in favor of the insured party in the insured party's action seeking defense and indemnification. Danna Constr. Corp. v Utica First Ins. Co., 17 A.D.3d 622, 794 N.Y.S.2d 72, 2005 N.Y. App. Div. LEXIS 4354 (N.Y. App. Div. 2d Dep't), app. denied, 5 N.Y.3d 714, 806 N.Y.S.2d 165, 840 N.E.2d 134, 2005 N.Y. LEXIS 2744 (N.Y. 2005).

Project owner and its general contractor sufficiently alleged that an employer's liability exclusion in a policy issued by the insurer of a subcontractor whose employee suffered personal injuries did not apply, since the owner and contractor alleged that letters advising the insurer of the employee's accidents constituted sufficient notice of claims, and the insurer's failure to timely disclaim coverage precluded application of the exclusion. People v Nigohosian, 138 Misc. 2d 843, 525 N.Y.S.2d 556, 1988 N.Y. Misc. LEXIS 204 (N.Y. Dist. Ct. 1988).

145. —Prior proceedings

Insurance company waived its right to disclaim coverage under policy where it participated in intercompany property damage arbitration on behalf of its insured and conceded coverage of offending vehicle. Government Employees Ins. Co. v Cusi, 163 A.D.2d 918, 558 N.Y.S.2d 430 (N.Y. App. Div. 4th Dep't 1990).

In action seeking declaration that insurance company was obligated to defend plaintiff in action arising from motor vehicle accident, insurance company was not collaterally estopped from denying coverage on basis of arbitration between it and company that insured other driver involved in accident since master arbitration agreement between insurance companies specifically provided that awards thereunder had no collateral estoppel effect. Kerins v Prudential Property & Casualty, 185 A.D.2d 403, 585 N.Y.S.2d 637, 1992 N.Y. App. Div. LEXIS 8828 (N.Y. App. Div. 3d Dep't 1992).

Prior proceeding, which resulted in finding that offending vehicle was insured by insurer at time of traffic accident, did not collaterally estop insurer from asserting otherwise in present action, where prior finding of coverage was made on default in proceeding that involved potential financial exposure that was inconsequential compared to damages sought in negligence action. American Transit Ins. Co. v Val-Roc Trucking, 242 A.D.2d 469, 662 N.Y.S.2d 309, 1997 N.Y. App. Div. LEXIS 8802 (N.Y. App. Div. 1st Dep't 1997).

146. Sufficiency of particular disclaimers

Insurer failed to properly and timely deny hospital's no-fault claim for medical payments for services provided to insured where it neither denied claim within 30 days after receiving it nor sought to extend that time frame by requesting verification on prescribed forms within 10 days of receiving hospital's completed application for no-fault payments, pursuant to 11 NYCRR § 65.15(g)(3) and CLS Ins § 5106(a). Presbyterian Hosp. v Maryland Cas. Co., 90 N.Y.2d 274, 660 N.Y.S.2d 536, 683 N.E.2d 1, 1997 N.Y. LEXIS 1358 (N.Y. 1997).

State Insurance Fund (SIF) was entitled to summary judgment declaring that it was not required to defend or indemnify fourth-party plaintiffs in third-party action where (1) SIF did not receive pleadings in third-party action until over 18 months after action was commenced, (2) within a few days of receiving pleadings, SIF sent written disclaimer notice to fourth-party plaintiffs based on their failure to comply with notice provision of policy requiring them to forward all legal papers to SIF, and (3) SIF's disclaimer letter was not defective merely because it was not sent to fourth-party plaintiffs' attorney. Almalabeh v Chelsea 19 Assocs., 273 A.D.2d 261, 708 N.Y.S.2d 700, 2000 N.Y. App. Div. LEXIS 6539 (N.Y. App. Div. 2d Dep't 2000).

In a declaratory judgment action to determine whether an insurer was obligated to defend a driver of a car in a wrongful death action brought against the driver by the estate of a deceased passenger, the insurer would not be obligated to defend where the driver had given false statements to the insurer concerning his use of the car, and where car had been registered in the name of a third party, despite the fact that the insurer had delayed approximately 19 months in disclaiming. Creech v Knitter, 88 A.D.2d 985, 451 N.Y.S.2d 825, 1982 N.Y. App. Div. LEXIS 17376 (N.Y. App. Div. 2d Dep't), aff'd, 57 N.Y.2d 712, 454 N.Y.S.2d 709, 440 N.E.2d 794, 1982 N.Y. LEXIS 3640 (N.Y. 1982).

An insurer's letter sent to its insured's attorneys disclaiming coverage of claims under an insurance policy was proper where the letter clearly apprised the insureds of the reason for the denial of coverage. The transmittal of a letter from the insured's attorneys to the injured party's attorneys stating that the insurer had denied coverage complied with the requirements of Ins Law § 167(a) requiring the insured to notify the injured party of its insurer's denial of coverage, given that the insured had first received notice of the injured party's claim by service of a summons and complaint. New York Mut. Underwriters v O'Connor, 105 A.D.2d 994, 482 N.Y.S.2d 144, 1984 N.Y. App. Div. LEXIS 21085 (N.Y. App. Div. 3d Dep't 1984).

Disclaimer of insurance coverage was invalid as against injured third parties where only ground stated in disclaimer was that insured had failed to notify insurer of accident. Fabian v Motor

Vehicle Accident Indemnification Corp., 111 A.D.2d 366, 489 N.Y.S.2d 581, 1985 N.Y. App. Div. LEXIS 51464 (N.Y. App. Div. 2d Dep't 1985).

Commencement of declaratory judgment action by insurer, seeking declaration that it had no duty to defend insureds under liability provision of homeowner's policy, constituted sufficient written notice of disclaimer of liability under CLS Ins § 3420. Norfolk & Dedham Mut. Fire Ins. Co. v Petrizzi, 121 A.D.2d 276, 503 N.Y.S.2d 51, 1986 N.Y. App. Div. LEXIS 58253 (N.Y. App. Div. 1st Dep't), app. denied, 68 N.Y.2d 611, 510 N.Y.S.2d 1025, 502 N.E.2d 1007, 1986 N.Y. LEXIS 20868 (N.Y. 1986).

Automobile liability insurer was obligated to defend and indemnify insured, despite fact that car involved in accident was not covered by policy, where policy covered insured as "covered person" regardless of what vehicle was used, subject to further provision excluding from coverage any vehicle other than insured's first covered vehicle, insured gave prompt notice of accident to insurer, and insurer failed to serve effective disclaimer for 7 months after accident; neither insurer's letter reserving rights to deny coverage nor insurer's commencement of declaratory judgment action against insured constituted effective disclaimer of coverage under statute. Progressive Casualty Ins. Co. v Conklin, 123 A.D.2d 6, 510 N.Y.S.2d 246, 1986 N.Y. App. Div. LEXIS 60650 (N.Y. App. Div. 3d Dep't 1986).

Supreme Court properly declared that insurer's notice of disclaimer was effective as to injured third party, notwithstanding that disclaimer referred only to insured's failure to give notice of accident and omitted any challenge to sufficiency of notice given by injured party, where notice was first given by insured rather than injured party and thus any subsequent information provided by injured party was superfluous for notice purposes. Massachusetts Bay Ins. Co. v Flood, 128 A.D.2d 683, 513 N.Y.S.2d 182, 1987 N.Y. App. Div. LEXIS 44371 (N.Y. App. Div. 2d Dep't), app. denied, 70 N.Y.2d 612, 523 N.Y.S.2d 496, 518 N.E.2d 7, 1987 N.Y. LEXIS 19015 (N.Y. 1987).

Court of Claims properly held that state's insurance carrier was estopped from denying coverage, and had breached its duty to defend countyunder snow removal agreement, where insurer failed to cover entire settlement in motor vehicle accident case, it had exercised complete control over defense, and it failed to provide notice of partial disclaimer to county until first day of trial; county's actual participation in settlement did not vitiate its right to recover for breach, and further proof of reasonableness as to amount paid was not required. County of Sullivan v State, 137 A.D.2d 165, 528 N.Y.S.2d 227, 1988 N.Y. App. Div. LEXIS 5002 (N.Y. App. Div. 3d Dep't 1988).

Disclaimer of coverage sent to insured who also happened to be claimant's guardian ad litem was valid under CLS Ins § 3420(d). Losi v Hanover Ins. Co., 139 A.D.2d 702, 527 N.Y.S.2d 458, 1988 N.Y. App. Div. LEXIS 4546 (N.Y. App. Div. 2d Dep't), app. dismissed, 72 N.Y.2d 950, 533 N.Y.S.2d 54, 529 N.E.2d 422, 1988 N.Y. LEXIS 2659 (N.Y. 1988).

Claimant's insurer was entitled to stay of arbitration in motor vehicle accident case where it satisfied its burden of going forward to show that offending vehicle was insured by producing "FS-25" form from Department of Motor Vehicles, and proof of lack of coverage provided by second insurer (whose name was listed on form) consisted only of (1) affirmation from attorney with no personal knowledge, (2) handwritten memorandum from second insurer's employee stating, in conclusory fashion, that its records did not reflect policyholder named as on form, and (3) additional record that form's policy number was not used by second insurer during policy period cited. Allstate Ins. Co. v Rivera, 148 A.D.2d 393, 539 N.Y.S.2d 337, 1989 N.Y. App. Div. LEXIS 3931 (N.Y. App. Div. 1st Dep't 1989).

Automobile insurer was not required by CLS Ins § 3420(d) to give timely written notice of disclaimer of coverage based on ground that individual involved in accident with underinsured motorist was not covered person under policy because he no longer resided in home of insured father since insurer had no contract of insurance with such individual. Fireman's Fund Ins. Co. v Freda, 156 A.D.2d 364, 548 N.Y.S.2d 319, 1989 N.Y. App. Div. LEXIS 15418 (N.Y. App. Div. 2d Dep't 1989).

Although insurer's notice of disclaimer misquoted language of exclusion in policy, it identified applicable policy exclusion and set forth factual basis for insurer's position that claim fell within policy exclusion with sufficient specificity to satisfy CLS Ins § 3420(d) mandate and purpose. Adams v Perry's Place, 168 A.D.2d 932, 564 N.Y.S.2d 1019, 1990 N.Y. App. Div. LEXIS 16470 (N.Y. App. Div. 4th Dep't 1990).

In action for declaration that insurer was obligated to defend individual insureds in underlying tort action against them, it was immaterial that insurer suggested in earlier correspondence with other parties that there might at some future point be disclaimer as to individual insureds, since written reservation of insurer is no substitute for notice of disclaimer required by CLS Ins § 3420(d); alleged failure of individual plaintiffs to give timely notice of claim was irrelevant since timely notice of disclaimer must be given even when reason for disclaimer is lack of timely notice by insured. All City Ins. Co. v Pioneer Ins. Co., 194 A.D.2d 424, 599 N.Y.S.2d 245, 1993 N.Y. App. Div. LEXIS 6284 (N.Y. App. Div. 1st Dep't 1993).

In action by plaintiff who was injured on premises owned by defendant power authority which sought contribution and indemnification from plaintiff's employer, insurance carriers that provided general and employer's liability insurance to plaintiff's employer properly and timely disclaimed liability in third-party action based on their failure to receive timely notice of action, where they asserted untimely notice defense in their respective answers to third-party complaint. Thomson v Power Auth., 217 A.D.2d 495, 629 N.Y.S.2d 760, 1995 N.Y. App. Div. LEXIS 8122 (N.Y. App. Div. 1st Dep't 1995).

Any failure of insurer, in its disclaimer letter based on employee exclusion, to mention absence of particular party from additional insured endorsement was not waiver where there was no coverage in first instance; failure to disclaim cannot create coverage that policy was not written to provide. Rivera v St. Regis Hotel Joint Venture, 240 A.D.2d 332, 659 N.Y.S.2d 270, 1997 N.Y. App. Div. LEXIS 6965 (N.Y. App. Div. 1st Dep't 1997).

In action by owner of leased car against its excess liability insurer, insurer's disclaimer of coverage was not defective merely because it cited wrong policy number where owner had 2 policies with insurer, both of which were relevant to present matter, owner never provided timely written notice of claim under either policy, owner was not specific in making its claim, and thus insurer should not be penalized for disclaiming under only one policy. First City Acceptance Corp. v Gulf Ins. Co., 245 A.D.2d 649, 665 N.Y.S.2d 114, 1997 N.Y. App. Div. LEXIS 12534 (N.Y. App. Div. 3d Dep't 1997).

Insurer was entitled to summary judgment declaring that it was not obligated to defend and indemnify insureds in underlying personal injury action where injured party did not provide insurer with written notice of claim, and insurer was not required to cite that failure to notify in its letter disclaiming coverage. Travelers Indem. Co. v Worthy, 281 A.D.2d 411, 721 N.Y.S.2d 400, 2001 N.Y. App. Div. LEXIS 2073 (N.Y. App. Div. 2d Dep't 2001).

Insurer's notice of disclaimer was not effective against plaintiff where it was based on its insureds' failure to timely notify it of accident and forward copies of pleadings, but it did not state that coverage was being denied due to plaintiff's failure to timely place it on notice of accident; plaintiff was entitled to summary judgment declaring that insurer was obligated to defend and indemnify its insureds in underlying action. Vanegas v Nationwide Mut. Fire Ins. Co., 282 A.D.2d 671, 723 N.Y.S.2d 516, 2001 N.Y. App. Div. LEXIS 3978 (N.Y. App. Div. 2d Dep't 2001).

Letter sent by insurer to its insured, disclaiming coverage based on insured's failure to timely forward "suit papers," was ineffective to disclaim coverage of injured party based on injured party's failure to timely forward suit papers. State Farm Mut. Auto. Ins. Co. v McGovern, 283 A.D.2d 582, 724 N.Y.S.2d 904, 2001 N.Y. App. Div. LEXIS 5218 (N.Y. App. Div. 2d Dep't 2001).

Employer was not entitled to be defended or indemnified by the New York State Insurance Fund, its workers' compensation carrier, in a third-party action by a city in a premises liability case brought against the city by the employer's employee as the Fund timely provided its disclaimer within five days after first learning of the third-party action, almost a year after it was filed, in

compliance with N.Y. Ins. Law §§ 3420(d) and 1108(c). Liberty Moving & Stor. Co., Inc. v Westport Ins. Corp., 55 A.D.3d 1014, 865 N.Y.S.2d 724, 2008 N.Y. App. Div. LEXIS 7767 (N.Y. App. Div. 3d Dep't 2008), app. denied, 12 N.Y.3d 709, 881 N.Y.S.2d 18, 908 N.E.2d 926, 2009 N.Y. LEXIS 860 (N.Y. 2009).

Trial court properly entered a judgment favor of the insurers and against the insured in its action to recover damages for breach of an insurance contract because, with respect to a retaining wall that collapsed due to heavy rains, the policy excluded loss caused by flood and/or surface water, the claim did not arise out of an accident involving bodily injury or death, the insured failed to make the requisite showing of prejudice, and there was no basis to estop the insurers from relying on policy exclusions not detailed in their letter disclaiming coverage. Provencal, LLC v Tower Ins. Co. of N.Y., 138 A.D.3d 732, 30 N.Y.S.3d 138, 2016 N.Y. App. Div. LEXIS 2529 (N.Y. App. Div. 2d Dep't 2016).

Notice from insurance company to its insured, which disclaimed or denied coverage in third party action, was insufficient to place injured party on notice of disclaimer. Kenyon v Security Ins. Co., 163 Misc. 2d 991, 626 N.Y.S.2d 347, 1993 N.Y. Misc. LEXIS 621 (N.Y. Sup. Ct. 1993), aff'd, 206 A.D.2d 980, 616 N.Y.S.2d 133, 1994 N.Y. App. Div. LEXIS 7871 (N.Y. App. Div. 4th Dep't 1994).

Liability insurer was not entitled to summary judgment dismissing claim for reimbursement based on insured's failure to give notice of claim "as soon as practicable," as required by policy, as letters wherein insurer merely expressed its reservations of rights, without expressly disclaiming liability or denying coverage, did not constitute notices of disclaimer of coverage. Guri v Atlanta Int'l Ins. Co., 169 Misc. 2d 952, 646 N.Y.S.2d 781, 1996 N.Y. Misc. LEXIS 292 (N.Y. Civ. Ct. 1996), aff'd, 173 Misc. 2d 683, 663 N.Y.S.2d 765, 1997 N.Y. Misc. LEXIS 460 (N.Y. App. Term 1997).

Insurer's disclaimer was invalid as to the injured party because the letter sent to the insured disclaimed coverage based upon the insured's failure to timely notify the insurer of the lawsuit, not the injured party's failure to give timely notice, thus, the trial court acted properly in permanently staying the arbitration. State Farm Mut. Auto. Ins. Co. v Cooper, 303 A.D.2d 414, 756 N.Y.S.2d 87, 2003 N.Y. App. Div. LEXIS 2167 (N.Y. App. Div. 2d Dep't 2003).

Since the insurer had no reasonable basis upon which to disclaim coverage under a general liability policy until the date that the insureds served the papers in the declaratory judgment action, coverage was timely denied when the insurer filed its answer. A.J. McNulty & Co. v Lloyds of London, 306 A.D.2d 211, 762 N.Y.S.2d 372, 2003 N.Y. App. Div. LEXIS 7455 (N.Y. App. Div. 1st Dep't 2003).

Insurance carrier complied with the mandate of N.Y. Ins. Law § 3420(d) when it rejected coverage for an accident on the basis of late notice by providing notice in a disclaimer letter to its policyholder and sending a copy to the injured party. The disclaimer was effective against the injured party, which, without explanation, did not notify the carrier of the accident until three years after the entry of judgment against the policyholder and seven years after the accident. Schlott v Transcon. Ins. Co., Inc., 41 A.D.3d 339, 838 N.Y.S.2d 559, 2007 N.Y. App. Div. LEXIS 7946 (N.Y. App. Div. 1st Dep't 2007), app. denied, 9 N.Y.3d 817, 851 N.Y.S.2d 126, 881 N.E.2d 222, 2008 N.Y. LEXIS 20 (N.Y. 2008).

Summary judgment declaring that an insurance company was obligated to defend its insureds in an underlying case was proper because the insurance company failed to demonstrate that an investigation was necessary and that it diligently pursued and completed any investigation that was undertaken for purposes of disclaimer; the deposition testimony of its assistant manager of litigation established only that the assistant manager noted the late notice issue as soon as she reviewed the notice of claim, that she directed an investigator to obtain a signed nonwaiver agreement from the insured, and after the nonwaiver agreement was obtained, she retained counsel who commenced the declaratory judgment action. Without an affidavit of the assistant manager, an affidavit from the investigator, a copy of any investigative report, or a copy of a statement obtained from its insured, the insurance company failed to support its claimed explanation with proof the investigation was necessary and diligently performed. Quincy Mut. Fire Ins. Co. v Uribe, 45 A.D.3d 661, 845 N.Y.S.2d 434, 2007 N.Y. App. Div. LEXIS 11862 (N.Y. App. Div. 2d Dep't 2007).

In action against the insurance company brought by the minor to recover the amount of the state court judgment he had obtained against the insureds pursuant to N.Y. Ins. Law § 3420(a)(2), the district court's grant of summary judgment to the minor was affirmed with respect to its holdings that the insurance company was not obligated to indemnify the husband insured and was not estopped from denying coverage as to the minor because the insurance company's investigation was reasonably prompt, necessary, and undertaken in good faith, and thus its disclaimer as to the husband insured was not untimely, and the insurance company was not obligated to disclaim coverage as to the minor because he never provided notice of the occurrence. Webster v Mount Vernon Fire Ins. Co., 368 F.3d 209, 2004 U.S. App. LEXIS 8720 (2d Cir. N.Y. 2004).

Because injured party did not assert and independent claim against insurer, insurer's disclaimer against insured also served as a disclaimer against injured party. Mount Vernon Fire Ins. Co. v Harris, 193 F. Supp. 2d 674, 2002 U.S. Dist. LEXIS 5996 (E.D.N.Y. 2002).

Trial court erred in denying plaintiff's summary judgment motion pursuant to N.Y. C.P.L.R. 3212 in a declaratory judgment action concerning insurance coverage; defendant failed to satisfy the requirements of N.Y. Ins. Law § 3420(d) in disclaiming coverage for an accident under a supplemental rental car insurance policy, as defendant's disclaimer letters quoted exclusions from the wrong insurance policy. Lancer Ins. Co. v Phila. Indem. Ins. Co., 12 A.D.3d 641, 786 N.Y.S.2d 191, 2004 N.Y. App. Div. LEXIS 14577 (N.Y. App. Div. 2d Dep't 2004).

Trial court properly denied an insurance company's summary judgment motion in plaintiff's action seeking to recover supplementary underinsured motorist coverage, because plaintiff presented a triable issue of fact on whether the company issued a timely disclaimer of coverage as required by Insurance Law § 3420(d) by presenting conflicting evidence as to when the insurance company first received notice of the accident and when it first became aware that plaintiff was operating her own vehicle at the time of the accident and therefore was subject to a policy exclusion. Ciasullo v Nationwide Ins. Co., 32 A.D.3d 889, 823 N.Y.S.2d 85, 2006 N.Y. App. Div. LEXIS 10942 (N.Y. App. Div. 2d Dep't 2006).

In an insurance coverage dispute, notice of disclaimer of coverage sent to particular insured was sufficiently specific because it apprised the insured that the insurer was disclaiming coverage on the grounds of a policy auto exclusion. City of New York v W. Heritage Ins. Co., 98 F. Supp. 3d 557, 2015 U.S. Dist. LEXIS 27780 (E.D.N.Y. 2015).

147. Other matters

In action to recover no-fault billing from insurer for medical services rendered to allegedly injured motorist, hospital was not entitled to summary judgment based on insurer's failure to deny claim within 30 days or seek verification within 10 days after receipt of claim as prescribed by CLS Ins § 5106(a) and 11 NYCRR § 65.15(g)(3), where insurer's defense was premised on its assertion that injured person's condition and hospitalization were unrelated to automobile accident, and that medical treatment was excessive; insurer, despite its untimely disclaimer, may assert lack of coverage defense premised on fact or founded belief that alleged injury does not arise out of insured incident. 90 N.Y.2d 195, 659 N.Y.S.2d 246, 681 N.E.2d 413.

In hospital's action to recover no-fault medical payments for services and treatment provided to insured, insurer was precluded from raising statutory intoxication defense where it did not timely deny hospital's no-fault claim pursuant to 11 NYCRR § 65.15(g)(3) and CLS Ins § 5106(a); application of interpretive canon of "inclusio unius, exclusio alterius" and consideration of 11 NYCRR § 65.15(g)(5), which expressly excludes preclusion as remedy for insurer's failure to comply with 10-day notice requirement for statutory exclusions, impliedly recognizes availability of preclusion remedy under § 65.15(g)(3). Presbyterian Hosp. v

Maryland Cas. Co., 90 N.Y.2d 274, 660 N.Y.S.2d 536, 683 N.E.2d 1, 1997 N.Y. LEXIS 1358 (N.Y. 1997).

Employer's insurer was not required by N.Y. Ins. Law § 3420(d) to make timely disclaimer of coverage in a contribution and indemnification claim because, inasmuch as the insured was a New Jersey business, the policy was neither actually "delivered" nor "issued for delivery" in New York. Preserver Ins. Co. v Ryba, 10 N.Y.3d 635, 862 N.Y.S.2d 820, 893 N.E.2d 97, 2008 N.Y. LEXIS 1483 (N.Y. 2008).

Nonresident risk retention group's disclaimer of coverage was not regulated by the Insurance Law because the statutory reference to an insurer's failure "to promptly disclose coverage" did not include the timely disclaimer requirement of N.Y. Ins. Law § 3420(d)(2), as the prohibition on an unfair claim settlement practice based on a failure to promptly disclose coverage encompassed the mandates of N.Y. Ins. Law § 3420(d)(1), not N.Y. Ins. Law § 3420(d)(2), since the statutory text plainly qualified a reference to N.Y. Ins. Law § 3420, limiting the reference to an insurer's failure "to promptly disclose coverage pursuant to" N.Y. Ins. Law § 3420(d) and (f)(2)(A), so the statute applied solely to those portions of N.Y. Ins. Law § 3420(d) and (f) requiring a prompt disclosure of coverage-specific information. Nadkos, Inc. v Preferred Contrs. Ins. Co. Risk Retention Group LLC, 34 N.Y.3d 1, 132 N.E.3d 568, 108 N.Y.S.3d 375, 2019 N.Y. LEXIS 1642 (N.Y. 2019).

The trial court erred in refusing to stay arbitration of an uninsured motorist insurance claim at the request of the claimant's insurer, which claimed that an issue existed as to whether the driver who was at fault in the subject accident was in fact insured, on the asserted ground that the insurer had failed to issue a timely disclaimer of liability under Ins Law § 167(8), since the words "deny coverage" as used in the statute refer to denial of liability predicated upon an exclusion in the policy, and the possible existence of insurance on the allegedly uninsured vehicle would in no sense constitute an exclusion from coverage; instead, the absence of insurance was an essential prerequisite for the existence of coverage under the uninsured motorist endorsement, and Ins Law § 167(8) therefore did not apply to require a prompt notice of disclaimer by the insurer. Aetna Casualty & Surety Co. v Hines, 102 A.D.2d 725, 476 N.Y.S.2d 561, 1984 N.Y. App. Div. LEXIS 18889 (N.Y. App. Div. 1st Dep't 1984).

The trial court erred in denying an insured's motion to stay an uninsured motorist arbitration proceeding pending a hearing on the issue of whether or not the insurer had issued a policy of insurance with respect to the vehicle in question, on the asserted ground that the insurer had failed to give the notice of its disclaimer of liability required by Ins Law § 167(8), since insurers are not required to deny coverage under the statute, or otherwise to respond to claims, when they have no contract with a claimant with respect to the vehicle involved, and the insurer had demonstrated that a thorough search of its records, both for the alleged named insured and for an insurance number indicated on a purported identification card issued to such insured, had failed to disclose any insurance coverage for such person, and that the policy number submitted was not a number that would identify any policy issued by the insurer. Aetna Casualty & Surety Co. v Rodriguez, 102 A.D.2d 744, 476 N.Y.S.2d 879, 1984 N.Y. App. Div. LEXIS 18913 (N.Y. App. Div. 1st Dep't 1984).

Plaintiffs were not entitled to summary judgment in action to recover damages under "no-fault" provisions of certain automobile liability insurance policies, even though defendant insurer conceded that it failed to timely disclaim liability based on alleged failure of plaintiffs' assignors to notify it of accidents underlying disputed claims for "no-fault" insurance benefits, where there were issues of fact as to whether policies were issued to persons referred to in causes of action; insurer had no duty to disclaim or deny coverage where there was simply no coverage. Nyack Hosp. v State Farm Ins. Co., 150 A.D.2d 659, 541 N.Y.S.2d 531, 1989 N.Y. App. Div. LEXIS 6933 (N.Y. App. Div. 2d Dep't 1989).

Insurance agent was not entitled to summary judgment in action for negligence where (1) client forwarded summons and complaint to agent on basis that it appeared to involve incident which occurred during period of insurance coverage, (2) insurance agent indicated that summons and complaint had been forwarded to insurance company and that claim had been taken care of, and (3) insurance agent subsequently returned all papers to client and stated that incident actually occurred prior to commencement of insurance coverage. General Sportwear Co. v Case, 158 A.D.2d 884, 551 N.Y.S.2d 678, 1990 N.Y. App. Div. LEXIS 1882 (N.Y. App. Div. 3d Dep't 1990).

Insurer which issued "Fiduciary Liability Policy," which mistakenly contained several pages of insurer's standard form for another type of policy, could not be held liable for punitive damages merely because it simultaneously (1) contended that policy should be reformed by replacement of pages erroneously included, and (2) argued that provisions contained in erroneous pages, if applicable, would exclude coverage. Multiplan, Inc. v Federal Ins. Co., 179 A.D.2d 541, 579 N.Y.S.2d 45, 1992 N.Y. App. Div. LEXIS 518 (N.Y. App. Div. 1st Dep't 1992).

Insurer was required to provide notice of disclaimer of coverage to injured passenger under motor vehicle policy issued to owner of vehicle in which she was riding, despite insurer's contention that driver of vehicle was nonpermissive user and policy did not provide coverage for nonpermissive users, where nonpermissive use was not specifically denominated as exclusion under policy but appeared as definition of coverage; strong statutory presumption of permissive use would be deemed in force at time of accident so that subsequent finding of nonpermissive use negating coverage would require notice of disclaimer. Greater N.Y. Mut. Ins. Co. v Clark, 205 A.D.2d 857, 613 N.Y.S.2d 295, 1994 N.Y. App. Div. LEXIS 6073 (N.Y. App. Div. 3d Dep't), app. denied, 84 N.Y.2d 807, 621 N.Y.S.2d 516, 645 N.E.2d 1216, 1994 N.Y. LEXIS 3475 (N.Y. 1994).

Liability insurer's blanket statement that it "has all the classic delay problems to deal with," without more, was insufficient to demonstrate actual prejudice for purpose of establishing its contention of laches as defense to claim based on alleged deficiencies in insurer's notice of cancellation. Macon v Arnlie Realty Co., 207 A.D.2d 268, 615 N.Y.S.2d 28, 1994 N.Y. App. Div. LEXIS 8136 (N.Y. App. Div. 1st Dep't 1994).

In action by plaintiff who performed surgery on insured person in 1993 automobile accident and thereafter sought to recover unpaid no-fault insurance benefits as her assignee, plaintiff was not entitled to summary judgment on ground that defendant insurer was precluded from defending action because its disclaimer of coverage was untimely, where defendant asserted that 1993 neck injury for which plaintiff sought benefits did not arise from 1987 automobile accident. Presbyterian Hosp. v Aetna Life & Cas. Co., 222 A.D.2d 492, 635 N.Y.S.2d 252, 1995 N.Y. App. Div. LEXIS 12788 (N.Y. App. Div. 2d Dep't 1995).

Absent controlling statutory provision, to extent that allegations of underlying complaints against insured placed those claims within pollution exclusion of insured's liability policy, insurer did not have to disclaim coverage in order to avoid coverage. Merchants Mut. Ins. Co. v Allcity Ins. Co., 245 A.D.2d 590, 664 N.Y.S.2d 690, 1997 N.Y. App. Div. LEXIS 12538 (N.Y. App. Div. 3d Dep't 1997).

In action by owner of leased car against its excess liability insurer, Appellate Division could not view insurer as reinsurer and require it to prove actual prejudice in order for its disclaimer of coverage to be valid; holding in American Home Assur. Co. v International Ins. Co., 219 AD2d 143, that excess carriers were not entitled to same protection as primary insurers was reversed by Court of Appeals in American Home Assur. Co. v International Ins. Co., 90 NY2d 433. First City Acceptance Corp. v Gulf Ins. Co., 245 A.D.2d 649, 665 N.Y.S.2d 114, 1997 N.Y. App. Div. LEXIS 12534 (N.Y. App. Div. 3d Dep't 1997).

In plaintiff's action against his insurer seeking additional personal injury protection (PIP) benefits, and against insurance agency for failure to timely advise him of existence of additional PIP coverage under his insurance policy, claim against insurance agency was rendered moot by court's ruling that insurer's disclaimer of coverage based on failure to give timely notice was untimely as matter of law; however, plaintiff was not ipso facto entitled to summary judgment against insurer, inasmuch as insurer disclaimed coverage on additional grounds that plaintiff's medical disability was not verified for entire period claimed, that full extent of his lost wages were included within basic economic

loss, and that he had settled his negligence action against tortfeasor without protecting insurer's subrogation rights. Cardinell v Allstate Ins. Co., 258 A.D.2d 853, 686 N.Y.S.2d 155, 1999 N.Y. App. Div. LEXIS 1947 (N.Y. App. Div. 3d Dep't 1999).

In action seeking declaration that plaintiff was not obligated to defend or indemnify its insured in underlying action, court erred in granting defendant's motion to amend its answer to include affirmative defense of improper notice of disclaimer under CLS Ins § 3420(d) where motion was brought on eve of trial, 4 years after service of answer, all facts on which defense was based were known to defendant from outset, and belated challenge to notice of disclaimer seriously prejudiced plaintiff by depriving it of opportunity to conduct discovery on issue. Excelsior Ins. Co. v Antretter Contr. Corp., 262 A.D.2d 124, 693 N.Y.S.2d 100, 1999 N.Y. App. Div. LEXIS 6795 (N.Y. App. Div. 1st Dep't 1999).

In plaintiff's action seeking satisfaction of judgment in its favor against defendant's insured pursuant to "errors and omissions" policy, defendant was entitled to summary judgment on ground that plaintiff's claim was not related to "death or bodily injury" within scope of CLS Ins § 3420(d) where judgment was for economic injury arising from misfeasance of insured's employee, consisting of notarizing forged power of attorney. Fairmont Funding, Ltd. v Utica Mut. Ins. Co., 264 A.D.2d 581, 694 N.Y.S.2d 389, 1999 N.Y. App. Div. LEXIS 8951 (N.Y. App. Div. 1st Dep't 1999).

Insurer was not required to disclaim uninsured motorist coverage where it had not been established that there was no insurance coverage on offending vehicle on date of accident. Allstate Ins. Co. v Frederick, 266 A.D.2d 283, 698 N.Y.S.2d 266, 1999 N.Y. App. Div. LEXIS 11316 (N.Y. App. Div. 2d Dep't 1999).

Company listed in automobile insurance policy as owner/lessor of vehicle and named in policy as additional insured was entitled to partial summary judgment on its cause of action against insurer to recover as additional insured where (1) company, as owner of vehicle, had insurable interest for which insurer had provided coverage, (2) it was irrelevant that principal insureds had misrepresented their own interest in insured vehicle, and (3) thus, insurer improperly disclaimed liability as to company. BMW Fin. Servs. NA, Inc. v Hassan, 273 A.D.2d 428, 710 N.Y.S.2d 607, 2000 N.Y. App. Div. LEXIS 7367 (N.Y. App. Div. 2d Dep't), app. denied, 95 N.Y.2d 767, 717 N.Y.S.2d 547, 740 N.E.2d 653, 2000 N.Y. LEXIS 3507 (N.Y. 2000), overruled in part, Admiral Ins. Co. v Joy Contrs., Inc., 19 N.Y.3d 448, 948 N.Y.S.2d 862, 972 N.E.2d 103, 2012 N.Y. LEXIS 1352 (N.Y. 2012).

Provision of CLS Ins § 3420(d) requiring timely notice of disclaimer was applicable, although policy was issued out of state and listed address of insured's corporate headquarters out of state, where policy expressly covered insureds and risks located in state. Columbia Cas. Co. v Nat'l Emergency Servs., 282 A.D.2d 346, 723 N.Y.S.2d 473, 2001 N.Y. App. Div. LEXIS 4072 (N.Y. App. Div. 1st Dep't 2001).

Written disclaimer was not required under N.Y. Ins. Law § 3420(d) in an underlying action involving a lessee's allegations of wrongful eviction/wrongful entry as the claims did not arise from death or bodily injury. 47 Mamaroneck Ave. Corp. v Hartford Fire Ins. Co., 50 A.D.3d 952, 857 N.Y.S.2d 610, 2008 N.Y. App. Div. LEXIS 3491 (N.Y. App. Div. 2d Dep't 2008).

Finding that an insurer's failure to send its disclaimer notice to the plaintiff in the underlying personal injury case and to the insureds rendered the disclaimer invalid under N.Y. Ins. Law § 3420(d) was error because the insureds lacked standing to assert the statutory violation as to the underlying plaintiff, and the insurer complied with the statute by sending the disclaimer notice to the insureds' insurance carrier. Cincinnati Ins. Cos. v Sirius Am. Ins. Co., 51 A.D.3d 1365, 856 N.Y.S.2d 800, 2008 N.Y. App. Div. LEXIS 3934 (N.Y. App. Div. 4th Dep't 2008).

Insurer's failure to issue a timely disclaimer of coverage under its general liability policy was not fatal to the insurer obtaining a declaratory judgment that it was not required to defend or indemnify plaintiffs in an underlying personal injury action; the insurer was not required to timely disclaim coverage because its denial of coverage was based on the lack of coverage rather than on a policy exclusion. Maxwell Plumb Mech. Corp. v Nationwide Prop. & Cas. Ins. Co., 116 A.D.3d 740, 983 N.Y.S.2d 600, 2014 N.Y. App. Div. LEXIS 2352 (N.Y. App. Div. 2d Dep't 2014).

Montana risk retention group (RRG) was entitled to summary judgment as to a claim of failure to provide timely notice of disclaimer because (1) N.Y. Ins. Law § 3420(d)(2) imposed a heightened standard requirement impairing an RRG's ability to operate on a nationwide basis without tailoring the RRG's policies to the specific requirements of every state in which the RRG did business, so N.Y. Ins. Law § 3420(d)(2) was preempted by the Liability Risk Retention Act, and (2) N.Y. Ins. Law § 2601 did not include a violation of N.Y. Ins. Law § 3420(d)(2) as an unfair claims settlement practice that was a permissible regulation of a nondomiciliary RRG, as N.Y. Ins. Law § 3420(d)(2) was not within the scope of N.Y. Ins. Law §§ 2601 and 5904. Nadkos, Inc. v Preferred Contrs. Ins. Co. Risk Retention Group LLC, 162 A.D.3d 7, 76 N.Y.S.3d 528, 2018 N.Y. App. Div. LEXIS 3154 (N.Y. App. Div. 1st Dep't 2018), aff'd, 170 A.D.3d 460, 93 N.Y.S.3d 834, 2019 N.Y. App. Div. LEXIS 1642 (N.Y. App. Div. 1st Dep't 2019).

Neither party was entitled to summary judgment regarding the insurer's timely notice of disclaimer because there were questions of fact regarding whether the insurer's claims manager actually asked the insured if she knew of any prior biting events by the family dog, and whether the insurer failed to conduct a reasonable and prompt investigation into the potential applicability of the canine exclusion. Battisti v Broome Coop. Ins. Co., 163 A.D.3d 1091, 79 N.Y.S.3d 765, 2018 N.Y. App. Div. LEXIS 4924 (N.Y. App. Div. 3d Dep't 2018).

In indemnification action against state, county was entitled to recover amount in excess of coverage provided by state's insurer under snow and ice agreement in which state agreed to conduct county's defense in underlying tort action, even though county failed to prove that it had been coerced into settling underlying action by counsel for insurer (who had informed county attorney on day trial was to begin that insurer was settling action and was disclaiming portion of liability, so that county would have to pay difference) since insurer's untimely disclaimer perpetrated actionable wrong on county which could be vicariously imputed to state due to nondelegable duty of its contractual liability to conduct defense, regardless of its employment of independent contractor (insurer's counsel) to do so. County of Sullivan v State, 135 Misc. 2d 810, 517 N.Y.S.2d 671, 1987 N.Y. Misc. LEXIS 2311 (N.Y. Ct. Cl. 1987), aff'd, 137 A.D.2d 165, 528 N.Y.S.2d 227, 1988 N.Y. App. Div. LEXIS 5002 (N.Y. App. Div. 3d Dep't 1988).

In action to recover unpaid no-fault insurance medical benefits and legal fees, plaintiff was entitled to summary judgment where defendant insurer failed to pay or deny claim, or timely request verification from plaintiff, within 10 business days of its receipt of claim. Sehagal v American Transit Ins. Co., 178 Misc. 2d 407, 678 N.Y.S.2d 468, 1998 N.Y. Misc. LEXIS 431 (N.Y. Civ. Ct. 1998).

Plaintiffs were not entitled to summary judgment dismissing an insured's affirmative defense on the ground it waived that defense under N.Y. Ins. Law § 3420(d). As the defense alleged that plaintiffs' claim was subject to multiple self-insured retentions (SIRs) under the general liability policies, and the SIRs, which were contained in endorsements, did not implicate policy exclusions, the time requirements for disclaiming coverage under § 3420(d) were inapplicable. Roman Catholic Diocese of Brooklyn v National Union Fire Ins. Co. of Pittsburgh, Pa., 87 A.D.3d 1057, 930 N.Y.S.2d 215, 2011 N.Y. App. Div. LEXIS 6432 (N.Y. App. Div. 2d Dep't 2011), aff'd, 21 N.Y.3d 139, 969 N.Y.S.2d 808, 991 N.E.2d 666, 2013 N.Y. LEXIS 1186 (N.Y. 2013).

Insured could not claim any benefit, in its action against insurer for remediation expenses, under theory that insurer had made "blanket denial" of coverage, where such expenditures were made prior to any receipt of such denial. Texaco A/S (Den.) v Commercial Ins. Co., 160 F.3d 124, 1998 U.S. App. LEXIS 28240 (2d Cir. N.Y. 1998).

Doctrine that liability insurer cannot raise, at trial, grounds for non-coverage that were not stated in its letter of disclaimer did not apply where insurer's defenses related to scope of insuring clause, not other conditions of coverage such as insured's timely reporting of claim. Continental Ins. Co. v Estate of Benton, 896 F. Supp. 272, 1995 U.S. Dist. LEXIS 12681 (N.D.N.Y. 1995).

Insured was not entitled to set deadline by which excess carrier had to raise its defenses to liability coverage or waive them. City

of Utica v Genesee Mgmt., 934 F. Supp. 510, 1996 U.S. Dist. LEXIS 10723 (N.D.N.Y. 1996).

Homeowners' claim of untimely disclaimer came too late because it was not raised in the original complaint, and even if the claim had been timely the contention that the insurance company was required to disclaim failed on the merits under N.Y. Ins. Law § 3420(d) since where the insurance company's policy limits were exhausted after application of the anti-stacking provision, no disclaimer was required; therefore, the insurance company's motion for summary judgment was granted. Greenidge v Allstate Ins. Co., 312 F. Supp. 2d 430, 2004 U.S. Dist. LEXIS 2391 (S.D.N.Y. 2004), aff'd, 446 F.3d 356, 2006 U.S. App. LEXIS 10362 (2d Cir. N.Y. 2006).

N.Y. Ins. Law § 3420(d) requires that the insurer give notice as soon as reasonably possible of its "intention" to disclaim or deny coverage. The insurer would have been required to disclaim coverage only if it was contractually obligated to provide additional insured coverage to the general contractor, and that contractual obligation was not present. Palanquet v Weeks Marine, Inc., 333 F. Supp. 2d 58, 2004 U.S. Dist. LEXIS 17764 (E.D.N.Y. 2004), vacated, in part, 352 F. Supp. 2d 361, 2005 U.S. Dist. LEXIS 996 (E.D.N.Y. 2005).

The Bus Regulatory Reform Act and the regulations promulgated thereunder did not preempt application of N.Y. Ins. Law § 3420 in plaintiff insurer's action for reimbursement against defendant insured, an owner and operator of a bus company. Ins. Corp. v Monroe Bus Corp., 491 F. Supp. 2d 430, 2007 U.S. Dist. LEXIS 44489 (S.D.N.Y. 2007).

XIII. Insurer's General Defenses

148. In general

The words "under the terms of the policy" refer to every term of the policy which is obligatory upon the policyholder and which it the assured violated would bar recovery by him, and hence by the injured person suing under the policy. It seems that the legislature did not intend to deprive the insurance company of any defenses which it could have properly urged against the assured under the provisions of the policy, had he brought an action thereon. Roth v National Auto. Mut. Casualty Co., 202 A.D. 667, 195 N.Y.S. 865, 1922 N.Y. App. Div. LEXIS 4954 (N.Y. App. Div. 1922), app. dismissed, 235 N.Y. 605, 139 N.E. 752, 235 N.Y. (N.Y.S.) 605, 1923 N.Y. LEXIS 1329 (N.Y. 1923).

Before an insurance company is entitled to offer any defenses to a cause of action against the insured under former § 109 [predecessor to former § 167, now § 3420], it must show by affidavit or other proof that it is entitled to defend the action. Killeen v General Acc. Fire & Life Assurance Corp., 227 N.Y.S. 220, 131 Misc. 691, 1928 N.Y. Misc. LEXIS 720 (N.Y. Sup. Ct.), aff'd, 224 A.D. 719, 229 N.Y.S. 875, 1928 N.Y. App. Div. LEXIS 10667 (N.Y. App. Div. 1928).

149. Availability of particular defenses

In primary liability insurer's action to recover excess insurers' proportional shares of settlement negotiated in underlying wrongful death action, excess liability insurers were entitled to assert defense based on late notice without showing that they were prejudiced by delay; court's holding in Unigard Sec. ins. Co. v North Riv. Ins. Co., 79 NY2d 576, that breach of prompt-notice provisions in reinsurance policy is not ground for disclaiming coverage unless reinsurer can show that it was actually prejudiced by delay, does not apply to providers of excess liability insurance because excess insurers have little in common with reinsurers. American Home Assur. Co. v International Ins. Co., 90 N.Y.2d 433, 661 N.Y.S.2d 584, 684 N.E.2d 14, 1997 N.Y. LEXIS 1378 (N.Y. 1997).

Where the underlying tort action was commenced by an employee of a self-service gasoline filling station and alleged that as a result of plaintiff's negligence and breach of warranties she sustained serious permanent injuries due to exposure to toxic substances in the leaded gasoline sold at the station, which first manifested themselves in October, 1974, Special Term properly denied defendant's motion for summary judgment in that defendant insurer could not disclaim coverage on the asserted ground that the injuries alleged in the complaint manifested themselves before the effective date of its general liability policy, January 1, 1975, since the allegations can reasonably be read as asserting that while the injuries first manifested themselves in October, 1974, the continued exposure to toxic substances thereafter, including the period from January, 1975 until the employment terminated in January, 1976, aggravated existing injuries or caused additional injuries. Autotronic Systems, Inc. v Aetna Life & Casualty, 89 A.D.2d 401, 456 N.Y.S.2d 504, 1982 N.Y. App. Div. LEXIS 18394 (N.Y. App. Div. 3d Dep't 1982).

In action by plaintiffs who were injured while operating leased equipment, wherein lessor of equipment asserted third-party complaint alleging that accident was caused by lessee's negligent placement of equipment, and equipment lessee then demanded defense and indemnification coverage as additional insured under lessor's comprehensive liability policy, insurer was not entitled to summary judgment on ground that it did not insure lessee against its own negligence, where language of additional insured endorsement did not focus on precise cause of accidents, but rather focused on general nature of operation in course of which injury was sustained. Nuzzo v Griffin Tech., 222 A.D.2d 184, 643 N.Y.S.2d 802, 1996 N.Y. App. Div. LEXIS 6777 (N.Y. App. Div. 4th Dep't 1996), app. denied, 91 N.Y.2d 802, 666 N.Y.S.2d 564, 669 N.E.2d 534, 1997 N.Y. LEXIS 4164 (N.Y. 1997).

Court erred in dismissing insurer's affirmative defense alleging arson in action for breach of insurance contract where evidence amply supported finding that insured had financial motive for arson, and there was ample testimony that blaze was deliberately set. Ashline v Genesee Patrons Coop. Ins. Co., 224 A.D.2d 847, 638 N.Y.S.2d 217, 1996 N.Y. App. Div. LEXIS 1268 (N.Y. App. Div. 3d Dep't 1996).

Seemingly contrary dictum in Obercon v Glebatis, 89 AD2d 762, did not alter rule that defense of failure to use available seat belt has nothing to do with issues of liability or serious injury threshold. Carson v De Lorenzo, 238 A.D.2d 790, 657 N.Y.S.2d 469, 1997 N.Y. App. Div. LEXIS 3944 (N.Y. App. Div. 3d Dep't), app. denied, 90 N.Y.2d 810, 666 N.Y.S.2d 99, 688 N.E.2d 1381, 1997 N.Y. LEXIS 3628 (N.Y. 1997).

Insurer's submission of evidence of underwriting practices that it followed 2 years after it accepted insured's application for insurance, couple with conclusory deposition testimony of insurer's underwriter, was insufficient to meet its burden of proving, on its motion for summary judgment dismissing complaint, that insured's misrepresentations were material as matter of law; thus, materiality of insured's failure to disclose prior loss was question of fact for jury. Alfie's Original Souliers v Phoenix Assur. Co., 245 A.D.2d 179, 665 N.Y.S.2d 890, 1997 N.Y. App. Div. LEXIS 13133 (N.Y. App. Div. 1st Dep't 1997).

In bringing legal malpractice action as assignee of insured, in which insurer asserted that counsel failed to advise insured of necessity of obtaining insurer's consent to settlement, insurer implicitly abandoned all other defenses that it might have raised to coverage under its excess professional liability policy, because it had to show that but for counsel's failure, insured would have received indemnification under that policy. Jones Lang Wootton USA v LeBoeuf, Lamb, Greene & MacRae, 243 A.D.2d 168, 674 N.Y.S.2d 280, 1998 N.Y. App. Div. LEXIS 4053 (N.Y. App. Div. 1st Dep't), app. dismissed, 92 N.Y.2d 962, 683 N.Y.S.2d 172, 705 N.E.2d 1213, 1998 N.Y. LEXIS 4090 (N.Y. 1998).

Excess professional liability insurer ratified settlement and would not be allowed to evade its contractual duties to insured under terms of policy where insurer did not contend that terms of settlement were unreasonable, did not specify basis for its objection to settlement, implicitly abandoned its defenses to coverage by bringing legal malpractice action as insured's assignee, and embraced all benefits of settlement, thereby limiting its exposure to liability to amount fixed in settlement agreement and avoiding further litigation expense. Jones Lang Wootton USA v LeBoeuf, Lamb, Greene & MacRae, 243 A.D.2d 168, 674 N.Y.S.2d 280, 1998 N.Y. App. Div. LEXIS 4053 (N.Y. App. Div. 1st Dep't), app. dismissed, 92 N.Y.2d 962, 683 N.Y.S.2d 172, 705 N.E.2d 1213, 1998 N.Y. LEXIS 4090 (N.Y. 1998).

Commercial property liability insurer was entitled to summary judgment declaring that it had no duty to indemnify corporate insured for property damage, where policy application contained false representations by corporation's officers and shareholders

concerning extent of prior insurance claims, and insurer's underwriting practices with respect to applicants with similar histories established as matter of law that such misrepresentations were material. Philadelphia Indem. Ins. Co. v Mendon Ponds Tennis Club, Inc., 259 A.D.2d 957, 687 N.Y.S.2d 511, 1999 N.Y. App. Div. LEXIS 3058 (N.Y. App. Div. 4th Dep't 1999).

Insurer may not insist on adherence to terms of its policy after it has repudiated liability on claim by sending letter disclaiming coverage, and it may not, after such repudiation, create grounds for its refusal to pay by demanding compliance with proof-of-loss provisions of policy; rather, it must stand or fall on defense on which it based its refusal to pay. State Farm Ins. Co. v Domotor, 266 A.D.2d 219, 697 N.Y.S.2d 348, 1999 N.Y. App. Div. LEXIS 11114 (N.Y. App. Div. 2d Dep't 1999).

It is a question of fact whether the insurer by its acts or conduct or that of its representatives waived a forfeiture which would otherwise result from the non-payment of premiums. Lothrop v Allstate Life Ins. Co., 62 Misc. 2d 962, 310 N.Y.S.2d 631, 1970 N.Y. Misc. LEXIS 1786 (N.Y. Sup. Ct. 1970).

As a matter of public policy, practicing psychiatrist, who admitted that fornication "therapy" he administered to lesbian patient did not constitute medical practice, would be denied resort to the judicial process for purpose of recovering from malpractice insurer the costs and expenses he incurred in defending patient's suit, in which he was adjudicated as having indulged his concupiscentia medicus; to rule otherwise would be to indemnity immorality and to pay the expenses of prurience. Hartogs v Employers Mut. Liability Ins. Co., 89 Misc. 2d 468, 391 N.Y.S.2d 962, 1977 N.Y. Misc. LEXIS 1888 (N.Y. Sup. Ct. 1977).

Claim in arbitration for uninsured motorist benefits exists solely by reason of separate coverage required to be provided by CLS Ins § 3420 and is contractual in nature; therefore, 6-year statute of limitations applies rather than 3-year statute pertaining to personal injury actions, and this conclusion holds true in cases involving self-insurers. New York City Health & Hospitals Corp. v Degorter, 133 Misc. 2d 93, 506 N.Y.S.2d 644, 1986 N.Y. Misc. LEXIS 2972 (N.Y. Sup. Ct. 1986).

It would have been inequitable to allow insurance companies to interpose a defense of laches against the individual asbestos injury related claimants in any future action under N.Y. Ins. Law § 3420(a)(2) where the insured insulation company sat on its right to bring a declaratory judgment action against the insurance companies to uphold the insulation company's right to operations coverage under insurance policies. This was especially so in light of the insulation company's having gone out of business and the claimants having had no right to bring their own actions when the insulation company failed to do so but rather had to wait until N.Y. Ins. Law § 3420(a)(2) gave the claimants such a right; thus, claims by the claimants against the insurance companies had not occurred yet, and the claimants had not committed laches. Continental Cas. Co. v Employers Ins. Co. of Wausau, 839 N.Y.S.2d 403, 16 Misc. 3d 223, 237 N.Y.L.J. 92, 2007 N.Y. Misc. LEXIS 3336 (N.Y. Sup. Ct. 2007), rev'd, 60 A.D.3d 128, 871 N.Y.S.2d 48, 2008 N.Y. App. Div. LEXIS 9966 (N.Y. App. Div. 1st Dep't 2008).

Statute of limitations had not yet begun to run as to the individual asbestos injury related claimants because their claims against the insurance companies did not accrue under N.Y. Ins. Law § 3420(a)(2) until after judgments were obtained against the insured insulation company. Continental Cas. Co. v Employers Ins. Co. of Wausau, 839 N.Y.S.2d 403, 16 Misc. 3d 223, 237 N.Y.L.J. 92, 2007 N.Y. Misc. LEXIS 3336 (N.Y. Sup. Ct. 2007), rev'd, 60 A.D.3d 128, 871 N.Y.S.2d 48, 2008 N.Y. App. Div. LEXIS 9966 (N.Y. App. Div. 1st Dep't 2008).

Under the direct action statute, N.Y. Ins. Law § 3420, a class of asbestos claimants stood in the shoes of a defaulted insured that had manufactured asbestos. Therefore, the insurer's equitable defenses against the insured, including the defense of laches, also applied to the claimants. Continental Cas. Co. v Employers Ins. Co. of Wausau, 60 A.D.3d 128, 871 N.Y.S.2d 48, 2008 N.Y. App. Div. LEXIS 9966 (N.Y. App. Div. 1st Dep't 2008), app. denied, 13 N.Y.3d 710, 890 N.Y.S.2d 447, 918 N.E.2d 962, 2009 N.Y. LEXIS 4020 (N.Y. 2009).

150. Other matters

Insurer of lessor of automobiles, by payment on at least one instance of claim arising out of a short term lease, waived any right to assert policy exclusion of coverage for drive-yourself private passenger vehicles except leased on annual basis. Rosado v Eveready Ins. Co., 34 N.Y.2d 43, 356 N.Y.S.2d 8, 312 N.E.2d 153, 1974 N.Y. LEXIS 1587 (N.Y. 1974).

Where employer had rule that unauthorized persons were not allowed to ride in company vehicles, and employee violated the restriction, there was no liability coverage for injury to unauthorized person. Primeau v Insurance Co. of North America, 46 A.D.2d 459, 363 N.Y.S.2d 124, 1975 N.Y. App. Div. LEXIS 8517 (N.Y. App. Div. 3d Dep't 1975).

Insured's default in declaratory judgment action brought by insurer to disclaim coverage did not estop nondefaulting injured third party from contesting that issue. American Motorists Ins. Co. v North Country Motors, Ltd., 57 A.D.2d 158, 393 N.Y.S.2d 799, 1977 N.Y. App. Div. LEXIS 10941 (N.Y. App. Div. 3d Dep't 1977).

Person concerned with issue of insurance coverage cannot be deprived of opportunity to be heard on that point by default of another and doctrine of collateral estoppel or res judicata cannot be used to effectuate such an end. American Motorists Ins. Co. v North Country Motors, Ltd., 57 A.D.2d 158, 393 N.Y.S.2d 799, 1977 N.Y. App. Div. LEXIS 10941 (N.Y. App. Div. 3d Dep't 1977).

Liability insurer of passenger injured in vehicle insured by another company was not collaterally estopped from litigating question of whether it was required to afford "no-fault" protection to passenger under policy which excluded such coverage if insured was occupying another vehicle for which there was other "no-fault" coverage, even though passenger's claim for "no-fault" coverage against driver's insurer had been denied in arbitration proceeding on basis that passenger was not covered by driver's policy, since passenger's insurer had not been party to such arbitration, and thus its interests were not represented. Eveready Ins. Co. v Asante, 153 A.D.2d 874, 545 N.Y.S.2d 585, 1989 N.Y. App. Div. LEXIS 11802 (N.Y. App. Div. 2d Dep't 1989).

It was error to grant insureds' motion for summary judgment declaring that insurers were obligated to defend and indemnify insureds in underlying actions where fact issues existed as to whether notice requirement of CLS Veh & Tr § 313(2)(a) was applicable. Fitzsimons v Automobile Ins. Co., 221 A.D.2d 500, 633 N.Y.S.2d 591, 1995 N.Y. App. Div. LEXIS 11985 (N.Y. App. Div. 2d Dep't 1995).

Insurance carrier, which had issued liability insurance policy to defendant police officer's employer, was entitled to summary judgment declaring that it owed no duty to indemnify defendant for damages assessed against him in civil action for sexual battery, as public policy precluded such coverage where jury in underlying action had determined that defendant engaged in sexual intercourse with victim without her consent; harm to victim was inherent in nature of act performed, and resulting injuries (including pregnancy) were, as matter of law, intentionally caused within meaning of policy. Travelers Ins. Cos. v Stanton, 223 A.D.2d 104, 645 N.Y.S.2d 948, 1996 N.Y. App. Div. LEXIS 8344 (N.Y. App. Div. 3d Dep't), app. denied, 89 N.Y.2d 804, 653 N.Y.S.2d 543, 676 N.E.2d 72, 1996 N.Y. LEXIS 4407 (N.Y. 1996).

Defendant insurer was not entitled to summary judgment in action by plaintiff insurer for judgment declaring that defendant was co-insurer in connection with certain automobile accident claims where plaintiff submitted Department of Motor Vehicles Registration Plate Record (form DP-37) and police accident report, both of which indicated that defendant insured automobile in question, and affidavit of defendant's underwriter, who searched defendant's records, was insufficient to establish as matter of law that defendant did not insure automobile, and thus question of fact existed. Country Wide Ins. Co. v Allstate Ins. Co., 223 A.D.2d 664, 637 N.Y.S.2d 218, 1996 N.Y. App. Div. LEXIS 670 (N.Y. App. Div. 2d Dep't 1996).

Petition under CLS CPLR Art 75 to permanently stay arbitration of uninsured motorist claim was properly dismissed without hearing where Department of Motor Vehicles document showed that insurance coverage applicable to offending vehicle had

terminated several weeks before accident, there was additional proof that insurer had mailed valid notice of cancellation to vehicle owner, there was no evidence of any defect in cancellation, and mere speculation by counsel that insurer might have failed to mail premium bill to owner before cancellation did not raise triable issue of fact. Eagle Ins. Co. v Awawadeh, 245 A.D.2d 372, 665 N.Y.S.2d 590, 1997 N.Y. App. Div. LEXIS 12878 (N.Y. App. Div. 2d Dep't 1997).

Defendant insurer was entitled to summary judgment declaring that it was relieved of any obligation to indemnify plaintiffs in underlying personal injury action by patron who was struck by motor vehicle after consuming alcoholic beverages at plaintiffs' bar, where settlement agreement and general releases executed by injured party and plaintiffs provided that injured party would have no future recourse against plaintiffs in underlying action, regardless of whether plaintiffs obtained any recovery from their insurance carrier, and defendant insurer did not participate in this settlement. McDonough v Dryden Mut. Ins. Co., 276 A.D.2d 817, 713 N.Y.S.2d 787, 2000 N.Y. App. Div. LEXIS 10100 (N.Y. App. Div. 3d Dep't 2000).

Student was not entitled to summary judgment in an action against an insurer to enforce a policy's additional insured provision to satisfy a default judgment because the insured did not lease the staircase the student was descending when he fell, the student was not an invitee of the insured at the time of the accident, and, as such, there was no causal relationship between the student's injury and the risk for which coverage was provided. Lissauer v GuideOne Specialty Mut. Ins., 161 A.D.3d 974, 76 N.Y.S.3d 216, 2018 N.Y. App. Div. LEXIS 3454 (N.Y. App. Div. 2d Dep't 2018).

Where the assignee of a retail installment contract executed by a car owner in connection with its purchase brought action against the insurer of the automobile which had been determined a total loss for the amount due on the retail installment contract, the court granted a summary judgment in favor of the insurance company. The insurance company had sent to the owner a check, which was in excess of the amount owed on the car, drawn to the order of both the owner and the credit company. The owner cashed the check over her signature, without the signature of the credit company, and did not pay the credit company the amount due on the note. The court, in granting the summary judgment, said that it was not the insurance company's settlement with the owner that caused the damage in light of the fact that the settlement was for an amount in excess of the amount due on the car, but rather that the damage was caused by the owner in cashing the check and not paying off the note or by the bank in cashing the check without the proper endorsement. Ford Motor Credit Co. v Aetna Casualty & Surety Co., 64 Misc. 2d 413, 314 N.Y.S.2d 831, 1970 N.Y. Misc. LEXIS 1838 (N.Y. Civ. Ct. 1970).

Homeowners' insurer was not entitled to access to sealed files of criminal proceedings against youthful offenders, including certificates of disposition and plea allocution minutes, for use in avoiding defense and indemnification in underlying civil action against insured youths brought by criminal action complainant, where there was other evidence available to insurer, including oral depositions of insured youths and testimony by nonparty witnesses. People v John F., 174 Misc. 2d 540, 665 N.Y.S.2d 822, 1997 N.Y. Misc. LEXIS 517 (N.Y. Dist. Ct. 1997).

Insurer, which was precluded from asserting any defenses in litigation to obtain no-fault benefits by reason of its failure to timely deny claim, was also precluded from challenging adequacy of showing of "medical necessity" of services for which payment was sought. Vinings Spinal Diagnostic, P.C. v Liberty Mut. Ins. Co., 186 Misc. 2d 287, 717 N.Y.S.2d 466, 2000 N.Y. Misc. LEXIS 463 (N.Y. Dist. Ct. 2000).

XIV. Effect of Particular Policy Provisions or Conditions

151. Construction of particular terms in policy

State is entitled to indemnification pursuant to liability policy issued by insurer naming as insureds "Jones Beach State Parkway Authority [and] The People of the State of New York as interests may appear", since it is not unreasonable to read ambiguous phrase naming "The People of the State of New York as interests may appear" as insureds under policy and extending coverage to Long Island State Park and Recreation Commission and Department of Transportation for their acts or omissions with respect to Jones Beach State Parkway Authority; any ambiguity must be resolved against insurer which drafted contract. State v Home Indem. Co., 66 N.Y.2d 669, 495 N.Y.S.2d 969, 486 N.E.2d 827, 1985 N.Y. LEXIS 17199 (N.Y. 1985).

Mechanical failure and resulting delay of ambulance did not amount to "accident" under either customary definition of term or insurance policy's expanded definition, and thus there was no coverage under policy, where (1) there were no extraordinary factors that distinguish accidents from other merely unexpected events, i.e., trauma, violence, casualty, suddenness, or application of external force in which automobile was involved, and (2) there was no continuous or repeated exposure. Michaels v City of Buffalo, 85 N.Y.2d 754, 628 N.Y.S.2d 253, 651 N.E.2d 1272, 1995 N.Y. LEXIS 1123 (N.Y. 1995).

Meaning of word "sudden," as used in exception to pollution exclusion clauses of insurers' policies for "sudden and accidental" discharge of pollutants, includes temporal element which cannot be established merely by showing that release of pollutant had its onset at some particular point in time, but is only met by abrupt discharge of significant quantity of pollutant sufficient to have potentially damaging environmental effect. Northville Indus. Corp. v National Union Fire Ins. Co., 89 N.Y.2d 621, 657 N.Y.S.2d 564, 679 N.E.2d 1044, 1997 N.Y. LEXIS 306 (N.Y. 1997).

Although garage operator's use of premises was governed by "management agreement" rather than "lease," ambiguous "additional insured" endorsement which covered owner of building for liability arising out of ownership, maintenance and use of "leased" premises was construed to encompass owner's actual contractual relationship with garage operator, as any other interpretation would render extra coverage purchased by garage operator nugatory. ZKZ Assocs. LP v CNA Ins. Co., 89 N.Y.2d 990, 657 N.Y.S.2d 390, 679 N.E.2d 629, 1997 N.Y. LEXIS 302 (N.Y. 1997).

In asbestos insulation contractor's action to enforce defense and indemnification provisions of comprehensive general liability policies issued by defendant insurers, defendants did not establish as matter of law that asbestos was insured's "product" within meaning of product-hazards exclusion clause of policies even if insured did not manufacture or sell insulation it installed, on ground that insured necessarily "handled" asbestos during its operations as term "handled" is broadly understood, where term "named insured's products" was defined in policies as "goods or products manufactured, sold, handled or distributed by the named insured"; association of "handled" with words "manufacturer" and "seller" in same clause indicates that it should be given its commercial connotation, and be construed to refer only to products in which insured trades or deals. Frontier Insulation Contrs. v Merchants Mut. Ins. Co., 91 N.Y.2d 169, 667 N.Y.S.2d 982, 690 N.E.2d 866, 1997 N.Y. LEXIS 3722 (N.Y. 1997).

Because each claimant fell within a supplementary uninsured/underinsured motorists (SUM) endorsement's definition of an "insured," they were not "other persons" entitled to SUM coverage under N.Y. Ins. Law § 3420, or Regulation 35-D, which was codified at N.Y. Comp. Codes R. & Regs. tit. 11, § 60-2. Allstate Ins. Co. v Rivera, 12 N.Y.3d 602, 883 N.Y.S.2d 755, 911 N.E.2d 817, 2009 N.Y. LEXIS 1750 (N.Y. 2009).

Policies' self-insured retention (SIR) was not subject to the notice requirements of N.Y. Ins. Law § 3420(d) because it did not bar coverage or implicate policy exclusions, but, rather focused on the extent of alleged liability under the various policies, and, thus, the insurer did not have to give notice of the SIR requirement because the SIR was not a basis for disclaimer or denial of coverage; the SIR, which was effectively a deductible to the policies, was not a basis for the denial of coverage, and, similarly, arguments pertaining to the appropriate methodology for allocating liability did not provide an exclusionary basis to evade coverage. Accordingly, § 3420(d) did not apply, and the insurer was not precluded from arguing that the underlying incidents of sexual abuse amounted to multiple occurrences, and that any liability should have been apportioned on a pro rata basis. Roman Catholic Diocese of Brooklyn v National Union Fire Ins. Co. of

Pittsburgh, PA., 21 N.Y.3d 139, 969 N.Y.S.2d 808, 991 N.E.2d 666, 2013 N.Y. LEXIS 1186 (N.Y. 2013).

In action seeking declaratory judgment that automobile insurance policy not having underinsured motorist endorsement included such coverage, court erred in concluding that phrase "out of state coverage" in supplementary coverage section of insurance application created ambiguity and could have been meant to apply to uninsured motorist coverage merely because language did not refer to any endorsement attached to policy, since policy was not ambiguous and clearly failed to provide underinsured motorist coverage in absence of endorsement. Terwilliger v American Motorists Ins. Co., 156 A.D.2d 805, 549 N.Y.S.2d 222, 1989 N.Y. App. Div. LEXIS 15538 (N.Y. App. Div. 3d Dep't 1989).

Insurer was entitled to summary judgment declaring that it was not required to defend and indemnify friend of insured's son (who had let mastpole slip while assisting son in securing boat on trailer) under homeowner's policy which defined insured as "any person or organization legally responsible for...[the] watercraft," even though removal of mast was necessary task and required participation of 2 people, since guest who assists custodian does not become "legally responsible" for watercraft; alternate construction to include any conduct related to operation of boat would materially alter clear meaning of policy language. Liberty Mut. Fire Ins. Co. v Home Ins. Co., 164 A.D.2d 857, 559 N.Y.S.2d 363, 1990 N.Y. App. Div. LEXIS 10185 (N.Y. App. Div. 2d Dep't 1990), app. denied, 77 N.Y.2d 802, 567 N.Y.S.2d 643, 569 N.E.2d 446, 1991 N.Y. LEXIS 106 (N.Y. 1991).

Plaintiff came within definition of "real estate manager," and thus was additional insured under policy, where record showed that he managed building on behalf of title owner, even though he was being allowed to purchase building on installment basis in lieu of collecting wages. Morales v Allstate Ins. Co., 170 A.D.2d 419, 566 N.Y.S.2d 295, 1991 N.Y. App. Div. LEXIS 2403 (N.Y. App. Div. 1st Dep't 1991).

Court properly concluded that terms and definitions of homeowner's insurance policy were sufficiently ambiguous to estop insurer from declining to defend and indemnify insured in underlying action arising out of injury sustained in building she had rented to another, since building was listed on declaration page of policy under heading "other insured locations," and word "not" was struck from caption "not rented to others" under which premises were listed as additional insured residence. Knudsen v Field, 185 A.D.2d 765, 586 N.Y.S.2d 950, 1992 N.Y. App. Div. LEXIS 9939 (N.Y. App. Div. 1st Dep't 1992).

"Additional Insured" endorsement, which stated that "Persons Insured" provision was amended to include plaintiff but only with respect to liability arising out of operations performed for plaintiff by or on behalf of insured, applied to accident in which subcontractor of insured was injured while removing debris accumulated from insured's work for plaintiff; fact that accident may have been plaintiff's fault was immaterial. Consolidated Edison Co. v Hartford Ins. Co., 203 A.D.2d 83, 610 N.Y.S.2d 219, 1994 N.Y. App. Div. LEXIS 3815 (N.Y. App. Div. 1st Dep't 1994).

"Service of suit" clause common to general liability policies issued by underwriters at Lloyds, London, which stated that insurer "at the request of the insured (or reinsured), will submit to the jurisdiction of any Court of competent jurisdiction within the United States," did not constitute "choice of forum" provision which would allow insured to commence action in forum of its choosing and preclude insurer from choosing forum by filing first, but rather indicated insurer's voluntary submission to jurisdiction of United States courts. Price v Brown Group, 206 A.D.2d 195, 619 N.Y.S.2d 414, 1994 N.Y. App. Div. LEXIS 11916 (N.Y. App. Div. 4th Dep't 1994), app. denied, 1995 N.Y. App. Div. LEXIS 3992 (N.Y. App. Div. 4th Dep't Mar. 17, 1995).

Allegations that insured was negligent in permitting asbestos to be removed without adequate precaution and warning to plaintiffs could reasonably be interpreted to be "accident...neither expected nor intended from the standpoint of the Insured," and thus "occurrence" within meaning of policy. Miano v Hehn, 206 A.D.2d 957, 614 N.Y.S.2d 829, 1994 N.Y. App. Div. LEXIS 7663 (N.Y. App. Div. 4th Dep't 1994).

Insured was entitled to summary judgment in action to declare that claim was covered by policy where policy expressly included coverage for recovery against insured on theory of implied contract, and underlying action against insured was limited to theories of unjust enrichment and quantum meruit, which are subsumed in claim for breach of implied contract. American Int'l Specialty Lines Ins. Co. v United States Olympic Comm., 219 A.D.2d 458, 631 N.Y.S.2d 40, 1995 N.Y. App. Div. LEXIS 9140 (N.Y. App. Div. 1st Dep't 1995).

Insured was improperly granted summary judgment declaring that coverage under homeowner's policy included "any personal property that was situate[d] in the barn, which would not normally be found in a barn," since policy specifically and unambiguously stated that coverage for insured's personal property "... [does] not include any barns or their contents." Kellar v Mid-Hudson Co-Operative Ins. Co., 233 A.D.2d 568, 649 N.Y.S.2d 96, 1996 N.Y. App. Div. LEXIS 11437 (N.Y. App. Div. 3d Dep't 1996), app. dismissed, 89 N.Y.2d 982, 656 N.Y.S.2d 740, 678 N.E.2d 1356, 1997 N.Y. LEXIS 220 (N.Y. 1997).

Clause in professional liability policy that defined insured, in part, as "any lawyer...who was a former partner...of the firm [insured under the policy] or predecessor's firm(s)" included former partner who was disbarred after occurrence of events giving rise to claim as (1) term "any lawyer" did not clearly exclude persons who were no longer attorneys when professional liability claim was made against them, and (2) insurer submitted no intrinsic evidence to support its claim that attorney had to be member of Bar not only when policy was issued but when underlying action was commenced in order to "insured"; if insurer intended to exclude coverage for former attorney who had been disbarred, it should have stated that exclusion unambiguously. Oot v Home Ins. Co., 244 A.D.2d 62, 676 N.Y.S.2d 715, 1998 N.Y. App. Div. LEXIS 8459 (N.Y. App. Div. 4th Dep't 1998).

Insured utility company's liability for resurfacing worker's injury in fall came within scope of additional insured endorsement of its liability policy where endorsement referred, inter alia, to "[w]ork or operations performed by you or on your behalf," and insured had contracted with worker's employer to perform resurfacing work after installation of utility lines; any negligence by resurfacing contractor in causing accident was not material to application of additional insured endorsement, which did not focus on precise cause of accident but on general nature of operation in course of which injury was sustained. Consolidated Edison Co. v United States Fid. & Guar. Co., 263 A.D.2d 380, 693 N.Y.S.2d 31, 1999 N.Y. App. Div. LEXIS 7813 (N.Y. App. Div. 1st Dep't 1999).

Insurer was obligated to indemnify insured property owner for its liability in underlying personal injury action by employee of insured's excavation contractor, which was additional insured under insured's policy, where employee was injured because of placement of barricade, and although insurer claimed that such placement had nothing to do with "your [excavation contractor's] work" under additional insured endorsement, that precise argument had been made regarding virtually identical endorsement and rejected in Tishman Constr. Corp. v CNA Ins. Co., 236 AD2d 211. Consolidated Edison Co. v United States Fid. & Guar. Co., 266 A.D.2d 9, 697 N.Y.S.2d 620, 1999 N.Y. App. Div. LEXIS 11171 (N.Y. App. Div. 1st Dep't 1999).

Dismissal of insured property owner's third-party claim against its excavation contractor, which was additional insured under insured's liability policy, and any resulting implication that owner was negligent in maintaining unsafe workplace for contractor's employees, had no bearing on issue of insurer's obligations to owner under additional insured endorsement limiting coverage to owner's liability arising from "your [excavation contractor's] work." Consolidated Edison Co. v United States Fid. & Guar. Co., 266 A.D.2d 9, 697 N.Y.S.2d 620, 1999 N.Y. App. Div. LEXIS 11171 (N.Y. App. Div. 1st Dep't 1999).

Insurer's duty to provide coverage for asbestos-related bodily injury claims under policy that provided that coverage was triggered by "occurrence," defined as event which included "continuous or repeated exposure" to conditions that resulted in personal injury, was triggered by exposure, whether first or subsequent, but not by exposure "in residence"; trigger event was occurrence that resulted in injury (inhalation), not injury itself (actual onset of asbestosis). Lac D'Amiante du Quebec, Ltee

(ASARCO) v Superintendent of Ins. (In re Liquidation of Midland Ins. Co.), 269 A.D.2d 50, 709 N.Y.S.2d 24, 2000 N.Y. App. Div. LEXIS 6085 (N.Y. App. Div. 1st Dep't 2000), app. denied, 2000 N.Y. App. Div. LEXIS 10264 (N.Y. App. Div. 1st Dep't Sept. 28, 2000), overruled in part, Matter of Liquidation of Midland Ins. Co., 16 N.Y.3d 536, 923 N.Y.S.2d 396, 947 N.E.2d 1174, 2011 N.Y. LEXIS 564 (N.Y. 2011).

Insurance policy covered convention center operating corporation for liability for personal injuries suffered at entranceway to convention center by persons who were on premises for purposes of attending licensee's conference, despite fact that entranceway was not included in "Space" licensee was licensed to use for conference, since entranceway was part of "right of passage" to such space, coverage under policy was not limited to injuries incurred in licensed "Space" itself, and person coming to attend corporation's conference had to go through entranceway to convention center in order to reach conference. New York Convention Ctr. Operating Corp. v Morris Cerullo World Evangelism, 269 A.D.2d 275, 704 N.Y.S.2d 211, 2000 N.Y. App. Div. LEXIS 2098 (N.Y. App. Div. 1st Dep't 2000).

In construing term "business" in multiperil insurance policy as applied to domestic situation, court should resolve all ambiguities against insurer. Fox v 18-05 215 Street Owners, Inc., 145 A.D.2d 410, 535 N.Y.S.2d 386, 1988 N.Y. App. Div. LEXIS 12954 (N.Y. App. Div. 2d Dep't 1988).

Employee was a pedestrian and not "occupying" the insured vehicle at the time of the accident and, as such, not entitled to supplementary uninsured/underinsured motorist coverage because the employee left the insured vehicle and walked across the street to go to his office, the accident occurred as the employee was walking back across the street, and the employee had yet to reach the insured vehicle; the employee had a mere intent to enter the insured vehicle and was not an occupant. J. Lawrence Constr. Corp. v Republic Franklin Ins. Co., 145 A.D.3d 761, 43 N.Y.S.3d 452, 2016 N.Y. App. Div. LEXIS 8215 (N.Y. App. Div. 2d Dep't 2016).

Under New York law, multiple injuries are grouped as single "occurrence" when they arise out of same event of unfortunate character and occur close in time with no intervening agent. Dicola v American S.S. Owners Mut. Protection & Indem. Assoc. (In re Prudential Lines), 158 F.3d 65, 1998 U.S. App. LEXIS 24614 (2d Cir. N.Y. 1998).

All asbestos-related bodily claims against shipping line resulting from exposure to asbestos on particular ship could not be attributed to single "occurrence" where each claimant was separately exposed to asbestos at different points in time; thus, injuries arose from multiple occurrences, and single deductible would apply to each claim. Dicola v American S.S. Owners Mut. Protection & Indem. Assoc. (In re Prudential Lines), 158 F.3d 65, 1998 U.S. App. LEXIS 24614 (2d Cir. N.Y. 1998).

Shipping line had right to demand that liability insurance policy pay full coverage for each insurance claim in which underlying claimant suffered asbestos exposure and therefore asbestos injury during policy period where (1) policy's broad language covered "any loss [or] damage" which line becomes liable to pay resulting—presumably even in part—from injuries occurring during policy period, (2) there was no contractual intent to require allocation of liability among policies in first instance, and (3) there was no compelling policy or equitable considerations favoring allocation. Dicola v American S.S. Owners Mut. Protection & Indem. Assoc. (In re Prudential Lines), 158 F.3d 65, 1998 U.S. App. LEXIS 24614 (2d Cir. N.Y. 1998).

Term "certificate holder" on commercial form ("Certificate of Insurance") that provides evidence of workers compensation insurance or liability insurance is not synonymous with "additional insured." NY Ins Dep't Gen Counsel, Opinion No. 10-09-12, 2010 NY Insurance GC Opinions LEXIS 47.

152. "Claims" or "claims made"

In action seeking declaratory judgment as to coverage under liability policy issued to claims adjusting company as insured, insurance carrier was not entitled to summary judgment on ground that claim asserted by insured's client for which insured sought coverage was first asserted prior to inception of subject policy, since client's letter to insured on which carrier relied did not constitute "claim" under parties' contract where it did not mention damages or compensation but merely stated dissatisfaction with insured's past performance and warned that failure to correct deficiencies might lead to cancellation of claims adjusting contract; parties contemplated that "claim" would relate to assertion of legally cognizable damage, and would be demand that could be defended. Evanston Ins. Co. v GAB Business Services, Inc., 132 A.D.2d 180, 521 N.Y.S.2d 692, 1987 N.Y. App. Div. LEXIS 49530 (N.Y. App. Div. 1st Dep't 1987).

Liability insurer was not obligated to defend and indemnify residential landlord under "claims made" policy in damage suit brought by commercial subtenant during policy period where (1) alleged "wrongful acts" from which lawsuit arose occurred prior to effective date of policy, (2) retroactive coverage described in standard policy form was expressly dependent on policy declarations, and (3) from policy declarations listing "retroactive period" beginning at policy effective date, it was apparent that insured had not purchased coverage for claims arising prior to effective date of policy. 30 W. 15th St. Owners Corp. v Travelers Ins. Co., 165 A.D.2d 731, 563 N.Y.S.2d 784, 1990 N.Y. App. Div. LEXIS 11189 (N.Y. App. Div. 1st Dep't 1990).

School was insured under comprehensive general liability policy purchased by swimming club which leased school's swimming pool, and thus insurer was obligated to defend and indemnify school in underlying action by minor who was injured when she dove into pool during club practice, notwithstanding fact that certificate of insurance naming school as insured was not issued until after accident, since policy was of "claims made" type, and both policy and certificate clearly and unambiguously stated effective dates encompassing date of accident. Dryden Cent. Sch. Dist. v Dryden Aquatic Racing Team, 195 A.D.2d 790, 600 N.Y.S.2d 388, 1993 N.Y. App. Div. LEXIS 7286 (N.Y. App. Div. 3d Dep't 1993).

"Overspray" property damage claims were "occurrences" within meaning of policies, even though insured intended to paint bridge in question, since insured did not intend to cause resultant property damage, and insurers each assessed potential risks involved in insuring painting contract before insured's inception of work. Zurich Ins. Co. v White, 221 A.D.2d 700, 633 N.Y.S.2d 415, 1995 N.Y. App. Div. LEXIS 10724 (N.Y. App. Div. 3d Dep't 1995), app. denied, 88 N.Y.2d 804, 645 N.Y.S.2d 446, 668 N.E.2d 417, 1996 N.Y. LEXIS 1507 (N.Y. 1996), app. denied, 88 N.Y.2d 804, 645 N.Y.S.2d 446, 668 N.E.2d 417, 1996 N.Y. LEXIS 1506 (N.Y. 1996).

Where there was no pending claim or lawsuit against plaintiffs in connection with oil spill, general liability provision of policy had not been triggered and plaintiffs had no cause of action against insurer to indemnify them for cleanup costs for which they might be liable under CLS Nav Art 12. Ziankoski v Boonville Oil Co., 241 A.D.2d 951, 661 N.Y.S.2d 322, 1997 N.Y. App. Div. LEXIS 7901 (N.Y. App. Div. 4th Dep't 1997).

Insured's action against its insurer to recover its oil spill cleanup costs was properly dismissed where policy agreement was "To indemnify the insured against loss the insured has or will become legally obligated to pay as a result of claims first made against the insured and reported to the Company, in writing, during the policy period...for pollution conditions," only $33,800 of such costs were so reported, and self-insured retention under policy was $50,000, which was greater than covered costs. Camalloy Wire, Inc. v National Union Fire Ins. Co. of Pittsburgh, Pa., 273 A.D.2d 123, 709 N.Y.S.2d 553, 2000 N.Y. App. Div. LEXIS 7118 (N.Y. App. Div. 1st Dep't), app. denied, 95 N.Y.2d 763, 716 N.Y.S.2d 38, 739 N.E.2d 294, 2000 N.Y. LEXIS 2840 (N.Y. 2000).

On termination of coverage on claims-made errors and omission (E & O) insurance policy, insurer is required within 30 days after termination of coverage to advise its insured of automatic 60-day extended reporting period and to offer insured coverage for additional three-year extended reporting period ("tail" coverage). Insurance Department, Opinions of General Counsel, Opinion Number 06-02-01.

Beyond initial 60-day period following termination of claim-made policy for which there is no premium due, sole exception to requirement to pay premium money to receive tail coverage

following termination of claims-made policy is when there is medical malpractice policy, under 11 NYCRR §§ 73.4 and 73.5; such exception is inapplicable to errors and omissions (E & O) policy. Insurance Department, Opinions of General Counsel, Opinion Number 06-02-01.

Insurer that is subject to 11 NYCRR Part 73 (Regulation 121) must offer one-year extended reporting period on cancellation of claims-made liability insurance policy that was written with large deductible or self-insured retention under 11 NYCRR § 73.3(g)(8); however, insurer is exempt from notice requirement of 11 NYCRR § 73.3(e)(1) under 11 NYCRR § 73.2(d)(2)(i). Insurance Department, Opinions of General Counsel, Opinion Number 06-11-15.

Insurer that is subject to 11 NYCRR Part 73 (Regulation 121) and that must offer one-year extended reporting period on cancellation of claims-made liability insurance policy that was written with large deductible or self-insured retention must submit written acceptance of extended reporting period within 60 days from date of termination under 11 NYCRR § 73.3(e)(3)(i). Insurance Department, Opinions of General Counsel, Opinion Number 06-11-15.

Where claims-made liability insurance policy issued by unauthorized insurer on New York risk has been properly placed through excess line broker under CLS Ins § 2118 and 11 NYCRR Part 27 (Regulation 41), policy is exempt from 11 NYCRR Part 73 (Regulation 121) extended reporting period requirements. Insurance Department, Opinions of General Counsel, Opinion Number 06-11-15.

Insurance company may choose to issue coverage for previously uninsured period on "claims-made" basis at premium commensurate with possible greater risk, but only with respect to unknown and unreported claims; such coverage must comply with 11 NYCRR Part 73 (Regulation 121). Insurance Department, Opinions of General Counsel, Opinion Number 07-04-14.

Coverage for events that occurred during contractually specified period of time that is prior to effective date of occurrence policy may not be issued to person who was previously self-insured and thus has uninsured exposure for prior acts oroccurrences. Insurance Department, Opinions of General Counsel, Opinion Number 07-04-14.

153. "Intentional acts"

In action by manufacturer of mercury thermometers for declaration that insurers were obligated to indemnify it in completed actions arising from mercury spill, insured was not entitled to summary judgment since it could not be ascertained as matter of law whether insured intended or expected to cause damage that resulted from mercury spill, or if it was substantially certain that such damage would result from manner of operation of plant. Munzer v St. Paul Fire & Marine Ins. Co., 145 A.D.2d 193, 538 N.Y.S.2d 633, 1989 N.Y. App. Div. LEXIS 1978 (N.Y. App. Div. 3d Dep't 1989).

Town's adoption of moratorium precluding excavation and removal of topsoil, earth, sand, clay or other soil substances constituted intentional and deliberate act, and thus was not "occurrence" as defined in insurance policy issued to town. Town of Grand Island v Hartford Fire Ins. Co., 206 A.D.2d 887, 614 N.Y.S.2d 831, 1994 N.Y. App. Div. LEXIS 7811 (N.Y. App. Div. 4th Dep't 1994), reh'g denied, 1994 N.Y. App. Div. LEXIS 10417 (N.Y. App. Div. 4th Dep't Sept. 30, 1994), app. denied, 84 N.Y.2d 810, 621 N.Y.S.2d 519, 645 N.E.2d 1219, 1994 N.Y. LEXIS 4390 (N.Y. 1994).

Insurance policy exclusion for acts or injuries expected or intended by insured precluded any liability on part of insurer as to causes of action for libel and slander asserted against insured. DiIorio v National Union Fire Ins. Co., 262 A.D.2d 347, 691 N.Y.S.2d 568, 1999 N.Y. App. Div. LEXIS 6385 (N.Y. App. Div. 2d Dep't 1999).

Petition under CLS CPLR § 5227 to compel community college's general liability insurer to pay default judgment debt of college employee was properly dismissed where employee's acts of sexual abuse, sexual harassment, and unlawful imprisonment were intentional and thus were not "occurrence" under policy, and thus insurer had no duty to defend or indemnify employee in underlying action. Sormani v Orange County Community College, 263 A.D.2d 511, 693 N.Y.S.2d 624, 1999 N.Y. App. Div. LEXIS 8101 (N.Y. App. Div. 2d Dep't 1999).

In an action under N.Y. Ins. Law § 3420, plaintiff, who was injured in an incident with the insured, was entitled to a declaration that the insurer had to indemnify the insured as an intentional acts exclusion did not apply as when the insured placed plaintiff in a defensive bear hug, it could not be foreseen that plaintiff would fall through a plate glass window. Clayburn v Nationwide Mut. Fire Ins. Co., 58 A.D.3d 990, 871 N.Y.S.2d 487, 2009 N.Y. App. Div. LEXIS 152 (N.Y. App. Div. 3d Dep't 2009).

"Accidental results" may flow from "intentional causes;" thus, in order to determine whether the result was intended, the "transaction as a whole" test should be applied by the fact finder when determining whether the term accident is applicable to a given situation, and regardless of the initial intent or lack thereof as it relates to causation, or the period of time involved, if the resulting damage could be viewed as unintended by the fact finder the total situation could be found to constitute an accident. Nat'l Grange Mut. Ins. Co. v Utica Mut. Ins. Co., 5 A.D.3d 1045, 773 N.Y.S.2d 692, 2004 N.Y. App. Div. LEXIS 3227 (N.Y. App. Div. 4th Dep't 2004).

Exclusion for intentional acts must be accorded a strict and narrow construction and a defendant bears the burden of proving that the loss alleged falls within the exclusion and that there is no reasonable interpretation of the exclusion that supports the claim of the plaintiff. Nat'l Grange Mut. Ins. Co. v Utica Mut. Ins. Co., 5 A.D.3d 1045, 773 N.Y.S.2d 692, 2004 N.Y. App. Div. LEXIS 3227 (N.Y. App. Div. 4th Dep't 2004).

More than a causal connection between the intentional act and the resultant harm is required to prove that the harm was intended. Nat'l Grange Mut. Ins. Co. v Utica Mut. Ins. Co., 5 A.D.3d 1045, 773 N.Y.S.2d 692, 2004 N.Y. App. Div. LEXIS 3227 (N.Y. App. Div. 4th Dep't 2004).

Neither party was entitled to summary judgment in plaintiff's action that was brought pursuant to N.Y. Ins. Law § 3420(a)(2) seeking to recover damages awarded to plaintiff's insureds by a default judgment entered against defendant's insureds where there was an issue of fact as to whether the son of defendant's insureds intended to damage the building owned by plaintiff's insureds when the son ignited the vehicle in order to commit suicide because, although the evidence presented by both plaintiff and defendant established that the building was engulfed in flames before the son drove into it, defendant also presented evidence that the son intended to strike the building with a burning vehicle and thus intended to cause that fire as well. Nat'l Grange Mut. Ins. Co. v Utica Mut. Ins. Co., 5 A.D.3d 1045, 773 N.Y.S.2d 692, 2004 N.Y. App. Div. LEXIS 3227 (N.Y. App. Div. 4th Dep't 2004).

In ruling that it had subject matter jurisdiction over a N.Y. Ins. Law § 3420 coverage dispute between a creditor and a debtor's insurer under 28 U.S.C.S. §§ 1334(b) and 157, a bankruptcy court noted that the policies were property of the estate, the creditor's rights against the insurer were derivative of the debtor's rights, and disposition of the coverage question could have a collateral estoppel effect on an 11 U.S.C.S. § 523(a)(6) dischargeability issue. The definition of "willful and malicious" under § 523(a)(6) and "intentional" injuries under state insurance law appeared to be identical. Hough v Margulies (In re Margulies), 476 B.R. 393, 2012 Bankr. LEXIS 3768 (Bankr. S.D.N.Y. 2012).

154. "Relative," "family member" and such

Victim of hit-and-run automobile accident, who resided with his parents, was covered as insured under policy issued to corporation of which his parents were officers and shareholders, which defined insured to include relatives of named insured residing with insured, since this description conflicted with description of insured as corporation, which could not have such relatives or suffer personal injuries, and could lead average person, such as plaintiff's parents, to believe policy referred to their relatives. Buckner v Motor Vehicle Accident Indemnification Corp., 107 A.D.2d 1031, 486 N.Y.S.2d 496, 1985 N.Y. App. Div. LEXIS 42846 (N.Y. App. Div. 4th Dep't), rev'd, 66 N.Y.2d 211, 495 N.Y.S.2d 952, 486 N.E.2d 810, 1985 N.Y. LEXIS 17192 (N.Y. 1985).

Plaintiff was entitled to recover under both policies of liability insurance issued to insured, each of which covered separate automobile and provided family coverage to insured's son who drove automobile which struck plaintiff, even though each policy contained clause providing that if 2 or more policies "issued by us to you apply to the same accident," total limits of liability under all such polices would not exceed that of policy with highest limit of liability, since policies did not include any clear "no liability" or "escape" clause, and thus would be interpreted in insured's favor as required by ratable contribution provision of regulations (11 NYCRR 60.1 [g]). Steinberg v State Farm Mut. Auto. Ins. Co., 181 A.D.2d 766, 581 N.Y.S.2d 87, 1992 N.Y. App. Div. LEXIS 3738 (N.Y. App. Div. 2d Dep't 1992).

Insureds' son-in-law was "relative" of named insureds for purposes of policy exclusion. Nationwide Mut. Ins. Co. v Hodge, 224 A.D.2d 770, 636 N.Y.S.2d 946, 1996 N.Y. App. Div. LEXIS 758 (N.Y. App. Div. 3d Dep't 1996).

Court erred in denying defendant insurer's summary judgment motion declaring that it was not obligated to pay plaintiff amount of judgment entered in underlying action brought against insureds since policy in question specifically excluded coverage for bodily injuries sustained by resident relative of named insureds, and medical payments to any person regularly residing at insureds' premises, and plaintiff was renting room in one-family home owned by insureds, plaintiff's niece and her husband, and plaintiff sustained injuries when she slipped and fell in house. Artis v Aetna Cas. & Sur. Co., 256 A.D.2d 429, 681 N.Y.S.2d 604, 1998 N.Y. App. Div. LEXIS 13506 (N.Y. App. Div. 2d Dep't 1998).

Court erred in determining that language "residents of your household" in homeowner's insurance policy was ambiguous, and in construing that language against defendant insurance company, thereby concluding that plaintiff's daughter was not resident of household of her father and stepmother when she was bitten by her stepmother's dog, where it was undisputed that for approximate 2-year period before incident, daughter regularly stayed with her father on alternate weekends from Friday to Sunday and one night each week, had bed, dresser, clothing, and toys at her father's home, and occasionally received mail there. Canfield v Peerless Ins. Co., 262 A.D.2d 934, 692 N.Y.S.2d 562, 1999 N.Y. App. Div. LEXIS 7084 (N.Y. App. Div. 4th Dep't), app. denied, 94 N.Y.2d 757, 704 N.Y.S.2d 532, 725 N.E.2d 1094, 1999 N.Y. LEXIS 4022 (N.Y. 1999).

Plaintiffs were entitled to summary judgment declaring that $300,000 general liability limit, rather than $25,000 limit for family members, applied to accident that resulted in injuries to father of named insured, as defendant insurers failed to sustain their burden of proving that term "any family member" was not subject to more than one reasonable interpretation where "insured" was defined as including "a member of the insured's immediate family, including spouses and children," but "family member" was not defined. Gaetan v Firemen's Ins. Co., 264 A.D.2d 806, 695 N.Y.S.2d 608, 1999 N.Y. App. Div. LEXIS 9400 (N.Y. App. Div. 2d Dep't), app. denied, 94 N.Y.2d 757, 704 N.Y.S.2d 532, 725 N.E.2d 1094, 1999 N.Y. LEXIS 4025 (N.Y. 1999).

Insured's grandson was not member of her "household" within meaning of homeowner's policy, and thus insured was entitled to summary judgment declaring that insurer was obligated to indemnify her for her liability in connection with grandson's fall on front stoop, where grandson and his mother lived in second floor apartment of insured's 2-family home, for which they paid rent, they received separate gas and electric bills, and their apartment had separate locked inner entrance door. General Assur. Co. v Schmitt, 265 A.D.2d 299, 696 N.Y.S.2d 72, 1999 N.Y. App. Div. LEXIS 9666 (N.Y. App. Div. 2d Dep't 1999).

Son was resident of his mother's household and thus insured person under supplementary uninsured motorists endorsement to automobile liability policy issued to mother, and thus insurer was not entitled to stay of arbitration under CLS CPLR § 7503(b), where son had his own key to mother's house and was free to come and go at will, he kept clothing and received mail there, and he spent 3 to 4 nights per week there and remainder of his time at home of mother's former boyfriend; person may have more than one residence for insurance coverage purposes. Prudential Prop. & Cas. Ins. Co. v Galioto, 266 A.D.2d 926, 697 N.Y.S.2d 415, 1999 N.Y. App. Div. LEXIS 11741 (N.Y. App. Div. 4th Dep't 1999).

Plaintiff who maintained separate apartment in same 2-family house as her mother was not resident of her mother's household within meaning of homeowner's insurance policy issued to her mother, and thus defendant insurer was entitled to judgment declaring that it was not obligated to defend and indemnify plaintiff in underlying personal injury action. Galanis v Travelers Prop. Cas., 277 A.D.2d 282, 715 N.Y.S.2d 80, 2000 N.Y. App. Div. LEXIS 11705 (N.Y. App. Div. 2d Dep't 2000).

Defendant insurer was entitled to summary judgment declaring that plaintiff did not qualify as "family member" and thus was not "covered person" under underinsured motorist provision of policy issued to his father because he did not reside in his father's household at time of accident, where evidence established that he resided in New York with his mother whereas his father resided in Maryland and had additional residence in Vermont, terms of prior sentence of probation required him to reside and attend school in New York, and complaint in underlying action alleged that at all relevant times he resided in New York. Harris v American Protection Ins. Co., 277 A.D.2d 772, 716 N.Y.S.2d 758, 2000 N.Y. App. Div. LEXIS 12218 (N.Y. App. Div. 3d Dep't 2000).

In action arising from allegedly accidental shooting that occurred at residence owned by shooter's grandmother, injured plaintiff was granted summary judgment declaring that shooter was covered "insured" under policy issued to his grandmother where he had his own room at her residence, he slept, showered and ate there, and he stored everything he owned there. Slayko v Security Mut. Ins. Co., 183 Misc. 2d 688, 705 N.Y.S.2d 528, 2000 N.Y. Misc. LEXIS 68 (N.Y. Sup. Ct. 2000), aff'd, 285 A.D.2d 875, 728 N.Y.S.2d 282, 2001 N.Y. App. Div. LEXIS 7532 (N.Y. App. Div. 3d Dep't 2001).

Due to an insurer's failure to timely disclaim coverage, it was obligated to defend an insured under a homeowner's policy with regard to bodily injuries she received as a result of a dog bite, but the insurer was not obligated to defend the insured with regard to the medical expense claim asserted by the mother of the bitten child, which was considered derivative and required an actual insurable loss. Because the insurer was obligated to defend the insured as to the child's claims only as a matter of law as a result of its late notice of disclaimer, the exclusion for bodily injury to an insured applied to the mother's claims and barred any obligation to defend on the part of the insurer. Moore v Ewing, 9 A.D.3d 484, 781 N.Y.S.2d 51, 2004 N.Y. App. Div. LEXIS 10120 (N.Y. App. Div. 2d Dep't 2004).

155. "Pollution" and environmental terms

Insurer failed to meet its burden of showing that umbrella policy's pollution exclusion clause, which defined pollutants as "smoke, vapors, soot, fumes, acids, sound, alkalies, chemicals, liquids, solids, gases, thermal pollutants, and all other irritants and Contaminants," also excluded coverage for lead paint injuries, where there was no language demonstrating drafter's intent to incorporate lead paint into pollution exclusion clause, and both umbrella policy and underlying commercial general liability policy contained general pollution exclusion but only underlying policy contained specific lead paint exclusion; furthermore, any ambiguity as to whether lead paint claims were excluded by umbrella policy's pollution exclusion had to be construed against insurer. Westview Assocs. v Guar. Nat'l Ins. Co., 95 N.Y.2d 334, 717 N.Y.S.2d 75, 740 N.E.2d 220, 2000 N.Y. LEXIS 2928 (N.Y. 2000).

In action to recover from homeowner's insurer of neighboring property for emotional distress resulting from contamination of plaintiff's drinking water from oil spill thereon, court did not err in determining that homeowner's policy had not expired when plaintiff suffered injury, notwithstanding contention that plaintiff's knowledge of elevated levels of hydrocarbons in her and her son's bodies and her consequent emotional distress all occurred after policy expired, since policy, in covering "occurrences" and defining such term to include continuous and repeated exposure to substantially similar conditions, did not require that "loss" occur during policy period. Matychak v Security Mut. Ins. Co., 181 A.D.2d 957, 581 N.Y.S.2d 453, 1992 N.Y. App. Div. LEXIS 4149 (N.Y. App. Div. 3d Dep't), app. denied, 80 N.Y.2d 758, 589

N.Y.S.2d 309, 602 N.E.2d 1125, 1992 N.Y. LEXIS 3404 (N.Y. 1992).

Although liquid manure is not "pollutant" or "contaminant" when properly applied (and confined) to cropland, it is properly classified as "waste material," "pollutant," or "contaminant" when substance has leached into groundwater and contaminated well on adjoining property. Space v Farm Family Mut. Ins. Co., 235 A.D.2d 797, 652 N.Y.S.2d 357, 1997 N.Y. App. Div. LEXIS 302 (N.Y. App. Div. 3d Dep't 1997).

Insured under commercial general liability policy was entitled to summary judgment declaring that insurer had to defend and indemnify it in underlying action for injuries resulting from exposure to toxic fumes released during insured's construction safety course when roofing membrane was applied with hot air gun during classroom demonstration, despite policy endorsement excluding "'[b]odily injury'...which would not have occurred in whole or in part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants at any time" and defining "pollutant" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste," where (1) average insured could reasonably interpret exclusion as applying only to environmental pollution, which was historical purpose of pollution exclusions, and not to bodily injury arising from use of product for its intended purpose, (2) fumes that caused underlying injury were part of normal roofing process, were confined to demonstration area, were inhaled in immediate vicinity, and thus were not result of "discharge, dispersal...release or escape of pollutants," and (3) term "pollutant" was ambiguous because there is virtually no substance or chemical in existence that is not "irritant or contaminant," and thus application of exclusion would lead to absurd results. Roofers' Joint Training, Apprentice & Educ. Comm. v Gen. Accident Ins. Co. of Am., 275 A.D.2d 90, 713 N.Y.S.2d 615, 2000 N.Y. App. Div. LEXIS 9785 (N.Y. App. Div. 4th Dep't 2000).

156. Terms relative to excess insurance

Insurer was liable for cumulative limits of 2 liability insurance policies in claim arising from automobile accident involving son of insureds where insureds were married couple residing in same household, they had purchased policies from same insurer to cover separately owned vehicles, policies were identical in covering son as household member, and each policy contained standard "other insurance" clause providing excess coverage; "two or more auto policies" clause did not cancel out requirement in "other insurance" clause that both policies should contribute ratably since former clause (1) stated that policies "apply to" same accident, and (2) lacked wording of "no liability" or "escape" clause. Carlino v Lumbermens Mut. Casualty Co., 74 N.Y.2d 350, 547 N.Y.S.2d 616, 546 N.E.2d 909, 1989 N.Y. LEXIS 3040 (N.Y. 1989).

Excess and primary carriers of insurance purchased by owner of leased van involved in underlying accident could recover against lessee's comprehensive liability insurer as primary coinsurer of owner-lessor under lessee's business auto policy with insurer, even though "other insurance" provision in business auto policy contained clause making its coverage "excess" for nonowned vehicles, where no limitation as to type of coverage (whether primary or excess) appeared in endorsement making owner-lessor additional insured; moreover, policy was designed to provide primary insurance for lessee and thus, after finding that owner-lessor was additional insured under that policy, it naturally followed that coverage of owner-lessor was also primary. Jefferson Ins. Co. v Travelers Indem. Co., 92 N.Y.2d 363, 681 N.Y.S.2d 208, 703 N.E.2d 1221, 1998 N.Y. LEXIS 3664 (N.Y. 1998).

Phrase "similar coverage for your work," in excess coverage provision of "other insurance" clause of commercial general liability policy, did not render that policy's coverage excess to third-party liability coverage provided by homeowner's policy, which was concededly excess with respect to commercial general liability policy, because third-party liability insurance under homeowner's policy was not similar to first-party property coverage enumerated in commercial general liability excess clause; thus, homeowner's insurer and commercial general liability insurer did not bear pro rata shares of cost of defending and indemnifying homeowner when third party was injured while performing construction work on home. Great N. Ins. Co. v Mount Vernon Fire Ins. Co., 92 N.Y.2d 682, 685 N.Y.S.2d 411, 708 N.E.2d 167, 1999 N.Y. LEXIS 23 (N.Y. 1999).

For purposes of excess liability coverage, use of word "also" in defining covered person as including family members evinced intent to incorporate descriptions contained in preceding paragraphs, which included permissive users of automobiles belonging to insured. Castricone v Riggi, 259 A.D.2d 815, 686 N.Y.S.2d 175, 1999 N.Y. App. Div. LEXIS 2104 (N.Y. App. Div. 3d Dep't 1999).

Contractor's liability insurer was not entitled to summary judgment declaring that policy issued by subcontractor's insurer provided concurrent coverage for construction site injury where subcontractor's policy stated that it provided only excess coverage unless subcontractor's contract specifically required coverage to be primary, and such contract required only that contractor be both named and additional insured, with no provision requiring primary coverage. Hartford Fire Ins. Co. v Lo Brutto, 275 A.D.2d 525, 711 N.Y.S.2d 639, 2000 N.Y. App. Div. LEXIS 8422 (N.Y. App. Div. 3d Dep't 2000).

Under "Liberalization Clause" that became effective prospectively on May 1, 1993, excess insurance policy did not incorporate terms of underlying "Multimedia Policy" regarding coverage for legal expenses in defending covered lawsuits where (1) excess policy was "occurrence" policy, (2) acts of false advertising that gave rise to liability commenced in April 1993, and (3) event that triggered attachment of coverage was occurrence that caused injury, not injury itself. Labatt Brewing Co. v Zurich Ins. Co., 281 A.D.2d 363, 723 N.Y.S.2d 17, 2001 N.Y. App. Div. LEXIS 3151 (N.Y. App. Div. 1st Dep't 2001).

Insurance carrier was entitled to summary judgment declaring that it was not obligated to indemnify insured in underlying action pursuant to umbrella policy which provided coverage for insured's loss in excess of "the applicable underlying limit," where State Insurance Fund was not listed in policy's schedule of underlying insurance and thus unambiguous terms of umbrella policy required that State Insurance Fund be exhausted before it was triggered and, since State Insurance Fund provides unlimited coverage, umbrella policy was never triggered. Comm'rs of the State Ins. Fund v Aetna Cas. & Sur. Co., 283 A.D.2d 335, 728 N.Y.S.2d 6, 2001 N.Y. App. Div. LEXIS 6271 (N.Y. App. Div. 1st Dep't 2001).

157. Exclusions or limitations, generally

Court did not err in finding that insurance company was required to defend and indemnify insured for damages to third party's house caused by insured's insulation; clause in policy excluding from coverage losses caused by withdrawal of product from market was inapplicable, since claim did not involve withdrawal of insured's product from market. Truax & Hovey, Ltd. v Aetna Casualty & Surety Co., 122 A.D.2d 563, 504 N.Y.S.2d 934, 1986 N.Y. App. Div. LEXIS 59840 (N.Y. App. Div. 4th Dep't 1986).

Insurer was entitled to summary judgment declaring that fixed monetary sum representing per person liability limit for bodily injury under automobile liability insurance policy did not apply separately to bodily injury claims of injured infant and to derivative claims for care and loss of services asserted by his parents since (1) derivative damages and direct damages are added together to determine limit of liability for bodily injury sustained by one person, (2) to construe policy to allow maximum limitation to each person damaged would require reordering of policy language, and (3) there was nothing ambiguous in policy language; fact that language of uninsured motorist rider attached to policy was more specific by stating that "all damages" included derivative claims did not create ambiguity in main policy. Redcross v Aetna Casualty & Surety Co., 146 A.D.2d 125, 539 N.Y.S.2d 146, 1989 N.Y. App. Div. LEXIS 2808 (N.Y. App. Div. 3d Dep't 1989).

Insurer had no obligation to defend landlord in premises liability action where landlord admittedly provided room and board on premises to at least 3 persons, which violated express clause excluding coverage for medical payments and personal liability where premises were rented for residential use by more

than 2 roomers or boarders, and there was no evidence to support landlord's claim that 3 boarders were not renters, but actually part of her extended family. Bates v Cole, 157 A.D.2d 813, 550 N.Y.S.2d 721, 1990 N.Y. App. Div. LEXIS 1045 (N.Y. App. Div. 2d Dep't 1990).

Automobile insurer was not required to provide coverage for vehicle in which plaintiff's decedent was killed as passenger where policy excluded "other automobiles" furnished "for the regular use" of either named insured or member of his family, even though use of vehicle by driver, who was son of named insured, was incidental to his possession of it for asserted purpose of selling it for another, since vehicle was, in fact, available to him for as long as he wished, without restrictions placed on its use, and he did put vehicle to regular use. Egle v United Services Auto. Ass'n, 158 A.D.2d 661, 551 N.Y.S.2d 954, 1990 N.Y. App. Div. LEXIS 2285 (N.Y. App. Div. 2d Dep't 1990).

IAS Court erred in determining that clause of comprehensive general liability policy, excluding coverage for defamation claims "in the course of or related to advertising," was rendered ambiguous by fact that insured was advertising agency where there was no ambiguous language in policy endorsement. Federal Ins. Co. v Tokio Marine & Fire Ins. Co., 175 A.D.2d 49, 572 N.Y.S.2d 306, 1991 N.Y. App. Div. LEXIS 9898 (N.Y. App. Div. 1st Dep't 1991).

Exclusions in liability policy did not apply to action against insured for injuries sustained by injured party when he was struck by water softener tank which fell off push cart operated by employee of insured who was delivering tank to injured party's employer, where exclusions provided (1) that policy did not apply to movement of property by mechanical device other than hand truck, but did not limit meaning of hand truck, and (2) that policy did not apply to loading and unloading of insured's vehicle, but did not define term unloading. General Accident Ins. Co. v United States Fidelity & Guar. Co., 193 A.D.2d 135, 602 N.Y.S.2d 948, 1993 N.Y. App. Div. LEXIS 9839 (N.Y. App. Div. 3d Dep't 1993).

Defendant insurer was entitled to summary judgment since insurance policies excluded damage to property of others while in care, custody or control of plaintiff insured, and thus insurer had right to disclaim and not defend when insured was sued for damage to rare coin consigned to it. Stack's Rare Coins v Federal Ins. Co., 199 A.D.2d 17, 604 N.Y.S.2d 108, 1993 N.Y. App. Div. LEXIS 11182 (N.Y. App. Div. 1st Dep't 1993).

Insurer, which issued general liability policy to camp, was not obligated to defend or indemnify camp for injuries sustained when camper was struck by automobile driven by camp employee where policy excluded coverage for all bodily injury arising from ownership, maintenance, operation, or use of automobiles; despite allegation in underlying action of negligent supervision of campers by camp, automobile remained immediate and efficient cause of injury. New Hampshire Ins. Co. v Jefferson Ins. Co., 213 A.D.2d 325, 624 N.Y.S.2d 392, 1995 N.Y. App. Div. LEXIS 3290 (N.Y. App. Div. 1st Dep't 1995).

Insurer seeking to invoke exclusion under its policy must establish that exclusion applies in particular case, is expressed in clear and unmistakable language, and is subject to no other reasonable interpretation; any ambiguity in exclusion must be resolved against insurer and in favor of coverage. American Int'l Specialty Lines Ins. Co. v United States Olympic Comm., 219 A.D.2d 458, 631 N.Y.S.2d 40, 1995 N.Y. App. Div. LEXIS 9140 (N.Y. App. Div. 1st Dep't 1995).

Insurer was estopped from enforcing policy deductible where, inter alia, certificates of insurance were on form devised by Department of Transportation (DOT) which incorporated by reference detailed insurance specifications of public works contract that precluded such deductibles, from further recited that issuing company certified, under penalty of perjury, that no deductible would apply, and both DOT and insured (public works contractor) relied on those representations to their detriment. Zurich Ins. Co. v White, 221 A.D.2d 700, 633 N.Y.S.2d 415, 1995 N.Y. App. Div. LEXIS 10724 (N.Y. App. Div. 3d Dep't 1995), app. denied, 88 N.Y.2d 804, 645 N.Y.S.2d 446, 668 N.E.2d 417, 1996 N.Y. LEXIS 1507 (N.Y. 1996), app. denied, 88 N.Y.2d 804, 645 N.Y.S.2d 446, 668 N.E.2d 417, 1996 N.Y. LEXIS 1506 (N.Y. 1996).

Exclusion in jeweler's block policy for "[l]oss or damage to property while in or upon any automobile...unless, at time the loss or damage occurs, there is actually in or upon such vehicle, the Assured, or a permanent employee of the Assured, or a person whose duty it is to attend the vehicle" barred recovery where jewelry was left in locked car that insured's employee had momentarily exited to pay gas station attendant, and was stolen, in sight of frightened employee, by thieves using metal object to smash car windows. Cordova, Inc. v Lloyd's Underwriters, 228 A.D.2d 179, 643 N.Y.S.2d 543, 1996 N.Y. App. Div. LEXIS 6270 (N.Y. App. Div. 1st Dep't), app. denied, 89 N.Y.2d 802, 653 N.Y.S.2d 279, 675 N.E.2d 1232, 1996 N.Y. LEXIS 4178 (N.Y. 1996).

Action for malicious prosecution fell within liability insurance policy exclusion of "an act or omission intended or expected to cause bodily injury or property damage," because malicious prosecution entails commencement of litigation for purpose of harassing another, harassment is calculated to produce, among other things, mental and/or emotional distress, and such harm is inherent part of intentional act. Tomain v Allstate Ins. Co., 238 A.D.2d 774, 656 N.Y.S.2d 470, 1997 N.Y. App. Div. LEXIS 3953 (N.Y. App. Div. 3d Dep't 1997).

Exclusion in professional liability policy for "any claim based upon or arising out of the work performed by the Insured, with or without compensation, with respect to any...partnership, limited partnership, business enterprise or other venture...in which any Insured has any pecuniary or beneficial interest...unless such entity is named in the Declarations" did not unambiguously exclude coverage for client's underlying legal malpractice action against attorney merely because attorney at one point held mortgage on property owned by client (even if "pecuniary or beneficial" interest included that of creditor such as mortgagee) where attorney was no longer mortgagee at time claim was made. Oot v Home Ins. Co., 244 A.D.2d 62, 676 N.Y.S.2d 715, 1998 N.Y. App. Div. LEXIS 8459 (N.Y. App. Div. 4th Dep't 1998).

Court erred in granting insurer's summary judgment motion declaring that it had no duty to defend or indemnify its insureds, motel bar and its owner, on basis of "alcoholic beverage" exclusion since underlying complaint alleged that insureds negligently failed "to properly supervise, manage and operate" establishment, and failed to afford underlying plaintiff "protection from the unlawful acts of another patron,"; such allegations were at least facially distinct from those relating to service of alcoholic beverages, and thus could not be said as matter of law to fall within exclusion. Dryden Mut. Ins. Co. v Harr, 247 A.D.2d 684, 668 N.Y.S.2d 730, 1998 N.Y. App. Div. LEXIS 941 (N.Y. App. Div. 3d Dep't 1998).

In action by primary insurer against excess insurer to recover amount paid in excess of policy limit in order to settle lawsuit against insured, primary insured was entitled to summary judgment where excess liability policy was to be triggered by loss in excess of "the retained limit," defined as "the total of the applicable limits of the underlying policies listed in Schedule A hereof, and the applicable limits of any other insurance collectible by the insured," and that language was correctly construed to include total of amounts specified for each of policies listed in Schedule A of category of coverage applicable to incident for which insured was sued, regardless of whether listed policies provided coverage and, if so, how much. State Ins. Fund v International Ins. Co., 251 A.D.2d 86, 673 N.Y.S.2d 680, 1998 N.Y. App. Div. LEXIS 6541 (N.Y. App. Div. 1st Dep't), app. denied, 92 N.Y.2d 816, 684 N.Y.S.2d 187, 706 N.E.2d 1211, 1998 N.Y. LEXIS 4924 (N.Y. 1998).

Mere control over general area, without any ability to access particular portion thereof in which another's personal property is stored, is insufficient to confer kind of possession or control necessary to invoke liability insurance policy exclusion of damage to property in "care, custody or control" of insured. Schroeder v Hubbell, 251 A.D.2d 947, 674 N.Y.S.2d 853, 1998 N.Y. App. Div. LEXIS 7735 (N.Y. App. Div. 3d Dep't 1998).

Exclusion in barn owner's general business liability insurance policy for damage to property in "care, custody or control" of insured did not apply to 800-square-foot area leased by plaintiff for storage of his personal belongings where leased area was surrounded by 8-foot-tall chicken-wire fence secured by padlock to which only plaintiff had key, owner was not authorized to move

or otherwise exercise physical dominion over property within fenced area, and owner had not represented that he would guard or protect plaintiff's property from hazards. Schroeder v Hubbell, 251 A.D.2d 947, 674 N.Y.S.2d 853, 1998 N.Y. App. Div. LEXIS 7735 (N.Y. App. Div. 3d Dep't 1998).

Insurer was entitled to judgment declaring that it was not obligated to defend and indemnify insured, which operated nursery school, in action alleging that 4-year-old girl student was "assaulted, battered and sexually molested" by 5-year-old boy student, where policy's "Molestation or Abuse Exclusion" clause excluded coverage for "any injury sustained by any person arising out of or resulting from molestation or abuse by" any employee or "any other person." New World Frontier, Inc. v Mount Vernon Fire Ins. Co., 253 A.D.2d 455, 676 N.Y.S.2d 648, 1998 N.Y. App. Div. LEXIS 8844 (N.Y. App. Div. 2d Dep't), app. denied, 92 N.Y.2d 816, 684 N.Y.S.2d 187, 706 N.E.2d 1211, 1998 N.Y. LEXIS 4917 (N.Y. 1998).

Insurer was required to defend and indemnify defendant in underlying negligence action where (1) insurer relied on policy exclusion of liability "arising out of the ownership or operation of a vehicle while it is being used to carry persons or property for a fee," (2) that exclusion was unenforceable insofar as it was broader than that authorized by 11 NYCRR § 60-1.2(a), which provides that liability policy may exclude coverage for losses arising from use of motor vehicle "as a public or livery conveyance," (3) that regulation was designed to limit exclusion to vehicle being used as taxicab or otherwise being offered indiscriminately to general public and not limited to use by particular persons or on particular occasions, and (4) underlying defendant, at time of accident, was driving his personal vehicle to make delivery to customer on behalf of his employer. United Servs. Auto. Ass'n v Reid, 255 A.D.2d 990, 680 N.Y.S.2d 340, 1998 N.Y. App. Div. LEXIS 12278 (N.Y. App. Div. 4th Dep't 1998).

Where lead-based paint liability exclusions in multi-peril insurance policies were valid and effectively excluded coverage for infant plaintiff's lead poisoning cause of action against owner and manager of multiple dwelling, insurer was entitled to summary judgment dismissing third-party complaint. Cartagena v Jin Lung Tang, 260 A.D.2d 337, 687 N.Y.S.2d 666, 1999 N.Y. App. Div. LEXIS 3596 (N.Y. App. Div. 2d Dep't 1999).

Public policy was not violated by provision of social worker's professional liability policy that created $25,000 limitation on claims for sexual misconduct, and thus insurer was entitled to summary judgment declaring that limitation applied to action by patient asserting improper sexual relationship. American Home Assur. Co. v McDonald, 274 A.D.2d 70, 712 N.Y.S.2d 507, 2000 N.Y. App. Div. LEXIS 8606 (N.Y. App. Div. 1st Dep't 2000).

Insurer's duty to indemnify insured under social worker's professional liability policy was not subject to $25,000 limitation on claims for sexual misconduct where plaintiff who asserted such misconduct in underlying action was individual patient of insured's partner, insured never met patient or participated in her treatment, partnership did not bill for services to patient, and allegations against insured pertained only to her supervision and operation of partnership matters. American Home Assur. Co. v McDonald, 274 A.D.2d 70, 712 N.Y.S.2d 507, 2000 N.Y. App. Div. LEXIS 8606 (N.Y. App. Div. 1st Dep't 2000).

Blanket "criminal activity" exclusion contained in homeowner's liability policy which, on its face, applied to criminal activity of any kind or degree even if only alleged and even if resulting harm was unintended, was so overbroad that it rendered coverage illusory and thus was against public policy. Slayko v Sec. Mut. Ins. Co., 285 A.D.2d 875, 728 N.Y.S.2d 282, 2001 N.Y. App. Div. LEXIS 7532 (N.Y. App. Div. 3d Dep't 2001), rev'd, 98 N.Y.2d 289, 746 N.Y.S.2d 444, 774 N.E.2d 208, 2002 N.Y. LEXIS 1902 (N.Y. 2002).

Social worker's professional liability policy which limited coverage to $25,000 in cases involving claims of sexual misconduct was not void contract of adhesion as (1) New York does not require social workers to purchase malpractice insurance, (2) policy was endorsed by National Association of Social Workers, and (3_ fact that challenged provision happened to benefit carrier in particular instance was not ground to set it aside as unconscionable. American Home Assur. Co. v Levy, 179 Misc. 2d 773, 686 N.Y.S.2d 639, 1999 N.Y. Misc. LEXIS 66 (N.Y. Sup. Ct. 1999).

Insurance policy's exclusionary clause concerning acts "arising directly or indirectly out of instances, occurrences or allegations of criminal activity by the insured or by employees of the insured" was overly broad and against public policy. Slayko v Security Mut. Ins. Co., 183 Misc. 2d 688, 705 N.Y.S.2d 528, 2000 N.Y. Misc. LEXIS 68 (N.Y. Sup. Ct. 2000), aff'd, 285 A.D.2d 875, 728 N.Y.S.2d 282, 2001 N.Y. App. Div. LEXIS 7532 (N.Y. App. Div. 3d Dep't 2001).

In plaintiffs' action against insurer pursuant to N.Y. Ins. Law § 3420(b)(1) to recover the amount of a judgment previously determined to be owed to plaintiffs by the insured, court erred in denying that part of the insurer's cross-motion for summary judgment seeking dismissal of plaintiffs' claims for damages in excess of the applicable limit of coverage under the policy at issue. Matijiw v N.Y. Cent. Mut. Fire Ins. Co., 15 A.D.3d 875, 792 N.Y.S.2d 742, 2005 N.Y. App. Div. LEXIS 1169 (N.Y. App. Div. 4th Dep't), app. denied, 19 A.D.3d 1185, 796 N.Y.S.2d 567, 2005 N.Y. App. Div. LEXIS 6404 (N.Y. App. Div. 4th Dep't 2005).

Supplemental uninsured/underinsured motorist policy provision containing a serious injury threshold requirement exclusion with reference to N.Y. Ins. Law § 5102(d) was valid and enforceable because the relevant regulations in N.Y. Comp. Codes R. & Regs. tit. 11, § 60-2.3(f) were not inconsistent with the serious injury threshold in N.Y. Ins. Law § 3420(f)(2); § 3420(f)(2) did not expressly dispense with that requirement, and the regulations did not impose a requirement that was less favorable to the insured as the requirement was the same as that imposed on an injured plaintiff would have against an adequately insured driver and an uninsured driver. Meegan v Progressive Ins. Co., 43 A.D.3d 182, 838 N.Y.S.2d 748, 2007 N.Y. App. Div. LEXIS 7225 (N.Y. App. Div. 4th Dep't 2007).

Claim for coverage for securities frauds claims, arising from insured's sale of mutual funds and related products to investors who allegedly suffered emotional distress from loss of value of their investments, fell within exclusion contained in umbrella policy's "banks and financial institutions" endorsement applicable to claims seeking damages arising from diminishment in value of investments. First Investors Corp. v Liberty Mut. Ins. Co., 955 F. Supp. 274, 1997 U.S. Dist. LEXIS 2391 (S.D.N.Y. 1997), aff'd, 152 F.3d 162, 1998 U.S. App. LEXIS 18227 (2d Cir. N.Y. 1998).

Household residential exclusion in an insurance policy covering an ocean-going vessel does not violate New York's public policy. Ins. Co. of N. Am. v Zaglool, 526 F. Supp. 2d 361, 2007 U.S. Dist. LEXIS 90339 (E.D.N.Y. 2007).

There is nothing in Insurance Law or regulations promulgated thereunder that specifically restricts or otherwise limits exclusions that may be contained in excess liability or umbrella insurance policy in regard to toxic mold, or that would otherwise require special risk insurer to provide coverage for damage or loss resulting from mold, whether or not underlying policy contained exclusion; however, there are certain statutorily mandated coverages, such as certain types of motor vehicle insurance (including statutory automobile liability, no-fault insurance and uninsured motorist coverage) and workers' compensation insurance, where mold exclusion is not permitted because such exclusion is not specifically authorized. Insurance Department, Opinions of General Counsel, Opinion Number 04-03-29.

Plaintiff's obligation to indemnify defendants in an underlying personal injury action was limited to the statutory minimum, as the savings clause in the policy provided for coverage up to the minimum amounts required by the financial responsibility law, N.Y. Ins. Law § 3420(f)(1), it was in compliance with N.Y. Veh. & Traf Law §§ 311(4)(a), 341, and 345(b)(3), and did not violate public policy. Connecticut Indem. Co. v Hines, 40 A.D.3d 903, 837 N.Y.S.2d 183, 2007 N.Y. App. Div. LEXIS 6375 (N.Y. App. Div. 2d Dep't 2007).

158. —Classification or exclusion of particular vehicles

Endorsement on policy issued to lessor of automobiles excluding coverage for drive-yourself private vehicles except vehicles leased on annual basis was contrary to law and to public policy of state to protect innocent victims of traffic accidents. Rosado v

Eveready Ins. Co., 34 N.Y.2d 43, 356 N.Y.S.2d 8, 312 N.E.2d 153, 1974 N.Y. LEXIS 1587 (N.Y. 1974).

Supreme Court properly declared that insurer was not entitled to disclaim coverage of rental automobile, and was obligated to defend and indemnify its insured (rental agency) and vehicle's lessee in personal injury action, even though policy defined covered vehicles as those rented on "short term basis (less than 12 months)" and vehicle involved in accident had been leased for 24-month term, since policy's limiting language amounted to exclusion and thus violated public policy underlying requirement of compulsory automobile insurance. Planet Ins. Co. v Bright Bay Classic Vehicles, Inc., 75 N.Y.2d 394, 554 N.Y.S.2d 84, 553 N.E.2d 562, 1990 N.Y. LEXIS 599 (N.Y. 1990).

Non-trucking-use exclusion from coverage in insurance policy obtained by owner of commercial vehicle, which did not expressly state that it was effective only if vehicle's lessee was required to obtain insurance coverage, violated New York law and public policy even if insurer established that its standard underwriting policy was to not issue policies containing such exclusion unless vehicle owner provided proof that vehicle's lessee had insurance coverage. Royal Indem. Co. v Providence Wash. Ins. Co., 92 N.Y.2d 653, 684 N.Y.S.2d 470, 707 N.E.2d 425, 1998 N.Y. LEXIS 4141 (N.Y. 1998).

Truck lessor's liability policy, executed in New York, excluding coverage of truck being used in business of any person or organization to whom truck is rented was invalid under New York law for failing to require the existence of other insurance sufficient to meet minimum standards of coverage established by financial responsibility laws. Randazzo v Cunningham, 56 A.D.2d 702, 392 N.Y.S.2d 740, 1977 N.Y. App. Div. LEXIS 10864 (N.Y. App. Div. 4th Dep't 1977), aff'd, 43 N.Y.2d 937, 403 N.Y.S.2d 894, 374 N.E.2d 1245, 1978 N.Y. LEXIS 1833 (N.Y. 1978).

Trial court erred in granting summary judgment in declaratory relief action where policy provided coverage for hired vehicle "which is used under contract in behalf of . . . named insured" but excluded in its definition of persons insured "owner or lessee (of whom named insured is sublessee) of hired automobile . . . or any agent or employee of such owner or lessee" and plaintiffs failed to establish whether there was hiring within meaning of policy. Robert Cole Trucking Co. v Old Republic Co., 107 A.D.2d 1055, 486 N.Y.S.2d 527, 1985 N.Y. App. Div. LEXIS 42876 (N.Y. App. Div. 4th Dep't 1985).

Insurer could not be deemed to have provided insurance for rental vehicle driven by insured's son under provision covering occasional or infrequent use of vehicle not owned by family member of insured, even though insured's own vehicle for which policy was written was in process of being repaired, where rental vehicle was available to son for as long a period as he wished with no restrictions placed on its use; such provision is not intended as substitute for insurance on vehicles furnished for insured's regular use. Liberty Mut. Ins. Co. v Sentry Ins., 130 A.D.2d 629, 515 N.Y.S.2d 557, 1987 N.Y. App. Div. LEXIS 46644 (N.Y. App. Div. 2d Dep't), modified, in part, reh'g denied, 135 A.D.2d 508, 522 N.Y.S.2d 462, 1987 N.Y. App. Div. LEXIS 52467 (N.Y. App. Div. 2d Dep't 1987).

Provision of insurance policy, extending coverage to any vehicle owned by nonmember of insured's household and used by insured or insured's relative, so long as losses occurred while insured or member of his household did not have vehicle available at all times for his regular use, did not constitute exclusion from coverage but was expression of insurer's intent not to provide coverage to non-family member's car while insured or insured's relative had regular use thereof; thus, insurer was entitled to declaration of noncoverage, despite its failure to give timely disclaimers of coverage to plaintiffs, who were injured while passengers in vehicle driven by insured's son and owned by nonmember of insured's household, since insured's son had vehicle available at all times for his regular use. Schmidt v Prudential Ins. Co., 143 A.D.2d 997, 533 N.Y.S.2d 614, 1988 N.Y. App. Div. LEXIS 10417 (N.Y. App. Div. 2d Dep't 1988), app. denied, 73 N.Y.2d 710, 541 N.Y.S.2d 764, 539 N.E.2d 592, 1989 N.Y. LEXIS 519 (N.Y. 1989).

Twelve-foot-by-31-foot barge was "watercraft" within meaning of exclusion contained in insurance policy, and thus insurance company had no duty to defend or indemnify under policy. Sloan Steel Erectors & Equipment Rental, Inc. v Illinois Union Ins. Co., 158 A.D.2d 984, 551 N.Y.S.2d 136, 1990 N.Y. App. Div. LEXIS 1532 (N.Y. App. Div. 4th Dep't 1990).

Insurer was obligated to defendant insured, whose van was involved in collision which injured third party while it was being driven by auto repair shop employee, notwithstanding auto business exclusion in policy, since van was not "being used in the auto business" when accident occurred. Erie Ins. Group v Nationwide Mut. Fire Ins. Co., 190 A.D.2d 1086, 593 N.Y.S.2d 704, 1993 N.Y. App. Div. LEXIS 1336 (N.Y. App. Div. 4th Dep't 1993).

Insurers, whose policies clearly excluded from coverage any "non-owned" "auto" or "vehicle" where such "auto" or "vehicle" was "furnished or available" for "a," or "any," family member's "regular use," were not obligated to defend or indemnify insured in underlying negligence actions brought following accident in which insured was driving vehicle which was leased by his father's company where father stated in his examination before trial that he was in charge of fleet of vehicles leased by his company, he regularly used vehicle in question for business and incidental personal purposes, he kept it either at his home or office, he had his own set of keys, he did not need anyone's permission to use it, and he drove it 60 to 70 percent of time. Liverzani v Amica Mut. Ins. Co., 214 A.D.2d 542, 624 N.Y.S.2d 637, 1995 N.Y. App. Div. LEXIS 3526 (N.Y. App. Div. 2d Dep't 1995).

Insurance carrier was entitled to summary judgment declaring that it was not obligated to provide coverage under policy issued to policyholders on their Ford Crown Victoria in connection with accident in which their son was driving Chevrolet Cavalier, where policy covering Ford Crown Victoria expressly and permissibly excluded family member's use of automobiles other than insured automobile. Marvul v Knecht, 216 A.D.2d 370, 628 N.Y.S.2d 171, 1995 N.Y. App. Div. LEXIS 6265 (N.Y. App. Div. 2d Dep't), app. denied, 86 N.Y.2d 710, 635 N.Y.S.2d 947, 659 N.E.2d 770, 1995 N.Y. LEXIS 4407 (N.Y. 1995).

Insurer for lessee of truck had no duty to indemnify lessor in motor vehicle action involving lessee and third party where lessee's policy showed that only specifically listed vehicles were provided coverage, and truck was not specifically listed vehicle. Ryder Truck Rental v Commercial Union Ins. Co., 232 A.D.2d 468, 648 N.Y.S.2d 939, 1996 N.Y. App. Div. LEXIS 10207 (N.Y. App. Div. 2d Dep't 1996).

Exclusion of coverage when tractor was used to carry property "in any business" was not ambiguous, and thus coverage was afforded only in those limited instances when tractor was being used in personal activities of owner-operator, subject to compulsory bodily injury limit. Hanover Ins. Co. v Connor, 232 A.D.2d 925, 648 N.Y.S.2d 839, 1996 N.Y. App. Div. LEXIS 11263 (N.Y. App. Div. 3d Dep't 1996).

Borrowed Nissan automobile did not qualify for coverage as temporary substitute auto under policy issued for insured's Chevrolet, where policy defined "temporary substitute auto" as one "used as a substitute for the owned auto...when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction," whereas insured's son had borrowed Nissan from friend rather than using his father's Chevrolet because Chevrolet was "old," experiencing "problems," and not reliable. Interboro Mut. Indem. Ins. Co. v GEICO, 250 A.D.2d 733, 674 N.Y.S.2d 52, 1998 N.Y. App. Div. LEXIS 5823 (N.Y. App. Div. 2d Dep't 1998).

In personal injury action arising from traffic accident, insurers were entitled to summary judgment where policies contained unambiguous language excluding from coverage vehicle involved in accident, and thus insurers had no duty to deny coverage under CLS Ins § 3420(d). Gewirtz v State Farm Mut. Auto. Ins. Co., 251 A.D.2d 286, 672 N.Y.S.2d 807, 1998 N.Y. App. Div. LEXIS 6317 (N.Y. App. Div. 2d Dep't 1998).

Exclusionary clause of liability policy which permitted noncoverage where "any trailer covered by this policy is used with any automobile owned or hired by the insured and not covered by like insurance in the company" was, as against vehicle owners, invalid and contrary to public policy requiring mandatory insurance; additionally, exclusionary clause was contrary to antimonopoly legislation. Mt. Vernon Fire Ins. Co. v Travelers Indem. Co., 90

Misc. 2d 717, 395 N.Y.S.2d 948, 1977 N.Y. Misc. LEXIS 2139 (N.Y. Sup. Ct. 1977), modified, 63 A.D.2d 254, 407 N.Y.S.2d 23, 1978 N.Y. App. Div. LEXIS 11342 (N.Y. App. Div. 1st Dep't 1978).

An insured's failure to pay the additional premium for one of four vehicles covered by a policy did not entitle the insurer to cancel the entire policy covering the other three vehicle, since the policy was severable or divisible in that it listed each vehicle separately, and assigned each a separate premium for separate coverages. Prudential Property & Casualty Ins. Co. v Pearce, 126 Misc. 2d 1044, 484 N.Y.S.2d 464, 1985 N.Y. Misc. LEXIS 2932 (N.Y. Sup. Ct. 1985), aff'd, 120 A.D.2d 597, 501 N.Y.S.2d 1015, 1986 N.Y. App. Div. LEXIS 56681 (N.Y. App. Div. 2d Dep't 1986).

Where crane mobile was not subject to motor vehicle registration on June 22, 1951 and (prior to revision of general liability manuals) it was not excluded or included in exceptions in general liability policy, court held it was not an automobile under the policy. Liberty Mut. Ins. Co. v Dooley Electric Co., 133 N.Y.S.2d 785, 1954 N.Y. Misc. LEXIS 2438 (N.Y. Sup. Ct. 1954).

In an insurer's suit for a judgment declaring it had no duty to indemnify or defend an insured for liability arising from an auto accident, summary judgment for the insurer based on the insured's failure to comply with N.Y. Ins. Law § 3420(d)(2) was improper; because coverage was denied based on lack of inclusion, not an exclusion, the notice of disclaimer requirements in N.Y. Ins. Law § 3420(d)(2) did not apply. NGM Ins. Co. v Blakely Pumping, Inc., 593 F.3d 150, 2010 U.S. App. LEXIS 2093 (2d Cir. N.Y. 2010).

159. —Employer liability

Comprehensive general liability insurance policy issued to company did not cover liability arising out of woman's accident while driving her father's car while engaged in company's business, although policy covered employees, since it excluded coverage for liability arising out of operation of automobiles in course of employment. Mead v Fidelity & Casualty Co., 155 A.D.2d 896, 547 N.Y.S.2d 491, 1989 N.Y. App. Div. LEXIS 14732 (N.Y. App. Div. 4th Dep't 1989).

Insurer of injured plaintiff's employer was not obligated to defend or indemnify owner of shipping terminal (portion of which employer had leased), even though endorsement naming owner as additional insured on employer's policy set forth entire terminal as designated premises, where accident did not occur on employer's leased portion and endorsement to include owner as additional insured was limited to liability arising out of employer's ownership, maintenance or use of part of terminal leased to employer. Gen. Accident Fire & Life Assur. Corp. v Travelers Ins. Co., 162 A.D.2d 130, 556 N.Y.S.2d 76, 1990 N.Y. App. Div. LEXIS 6800 (N.Y. App. Div. 1st Dep't 1990).

Damage caused by corporation's vice-president when he inadvertently hit sprinkler head on wall of hotel room, releasing substantial quantity of water in room and other areas of hotel, was not covered by his homeowner's insurance policy, which excluded from personal liability coverage property damage "arising out of business pursuits of an insured," where vice-president was at time attending management seminar on behalf of corporation, which paid his travel and lodging expenses, since even if he was on break from seminar at time of incident, viewing transaction as whole he was pursuing business at time incident occurred. United Food Serv., Inc. v Fidelity & Casualty Co., 189 A.D.2d 74, 594 N.Y.S.2d 887, 1993 N.Y. App. Div. LEXIS 2385 (N.Y. App. Div. 3d Dep't 1993).

Amendatory endorsement to insurance policy, which excluded liability for bodily injury to employee of insured arising out of performance of his work, did not apply to case since (1) exclusion did not apply to liability assumed under "incidental contract," (2) separate endorsement to policy expressly included contractor's contract with school district to perform asbestos removal on its high school building as incidental contract, (3) underlying action arose out of performance of that contract, and (4) school district was insured within meaning of policy, and person injured in underlying action was not district employee. AAC Contracting v United Coastal Ins. Co., 193 A.D.2d 1085, 599 N.Y.S.2d 203, 1993 N.Y. App. Div. LEXIS 5715 (N.Y. App. Div. 4th Dep't 1993).

Provision in directors' and officers' liability policy, which covered claims arising from "a negligent act, error or omission," defined as "any negligent act, error or omission or breach of duty of [the] directors or officers while acting in their capacity as such," did not justify insurer's disclaimer of coverage on ground that allegedly intentional acts of self-dealing and fraud on part of individual defendants were excluded from coverage as non-negligent acts, since policy definition was susceptible of more than one meaning and could be understood to cover any breach of duty by directors or officers, not exclusively negligent breaches of duty. Volney Residence, Inc. v Atlantic Mut. Ins. Co., 195 A.D.2d 434, 600 N.Y.S.2d 707, 1993 N.Y. App. Div. LEXIS 7601 (N.Y. App. Div. 1st Dep't 1993).

By its terms, employers' liability exclusion applied to action in which injured plaintiffs' employer, who was impleaded by defendant for contribution and indemnity, sought defense and indemnification as additional insured under defendant's comprehensive liability policy; policy exception for "liability assumed by the insured under a contract or agreement" was inapplicable as employer did not "assume" liability to its employees under its contract with defendant. Nuzzo v Griffin Tech., 222 A.D.2d 184, 643 N.Y.S.2d 802, 1996 N.Y. App. Div. LEXIS 6777 (N.Y. App. Div. 4th Dep't 1996), app. denied, 91 N.Y.2d 802, 666 N.Y.S.2d 564, 669 N.E.2d 534, 1997 N.Y. LEXIS 4164 (N.Y. 1997).

Employer was entitled to summary judgment declaring that its insurer had obligation to defend it in action by former employees under federal Age Discrimination in Employment Act (ADEA), and insurer was obligated to reimburse employer for any reasonable sum paid in settlement of claim, where general liability policy and umbrella endorsement issued by insurer afforded coverage for nonintentional "disparate impact" discrimination claim alleged in underlying action; although law was unsettled as to whether "disparate impact" theory was applicable under ADEA, there was at least reasonable possibility that such claim would have been recognized as valid. American Mgmt. Ass'n v Atlantic Mut. Ins. Co., 168 Misc. 2d 971, 641 N.Y.S.2d 802, 1996 N.Y. Misc. LEXIS 93 (N.Y. Sup. Ct. 1996).

Defendant insurer was entitled to summary judgment declaring that plaintiff insureds were not entitled to reimbursement for compensatory damages they had agreed to pay in settlement of underlying defamation action commenced by discharged employee arising from their statements assessing employee's job performance and explaining why she was discharged, as claimed defamation fell under policy's exclusion for damages stemming from oral disparagement of person's services if injury arose from any evaluation, defamation, humiliation or "other employment-related practices." Berman v General Accident Ins. Co. of Am., 176 Misc. 2d 13, 671 N.Y.S.2d 619, 1998 N.Y. Misc. LEXIS 63 (N.Y. Sup. Ct. 1998).

Under New York law, exclusions in insured's claims-made directors' and officers' liability insurance policies concerning loss related to facts underlying claims reported in preexisting policies did not, by virtue of prior claims alleging misstatements regarding licensing agreement and related inquiry by Securities and Exchange Commission, preclude coverage for securities claim alleging earnings misstatements, where latter claim not only arose from facts that occurred exclusively during current policy period, but also described wrongs that were factually and legally distinct from prior claims. Home Ins. Co. v Spectrum Info. Techs., 930 F. Supp. 825, 1996 U.S. Dist. LEXIS 12849 (E.D.N.Y. 1996).

160. — —Employee bodily injury exclusion

In light of a clause in an employer's liability policy excluding from coverage bodily injury arising out of the maintenance of any automobile owned or operated by the insured, it was error to deny plaintiff insurer summary judgment declaring that it was not obligated to share with the employer's compensation insurer in the defense and payment of a third-party claim over against the employer by the manufacturer of a tire in an action for personal injury sustained by an employee while he was changing the tire, where the undisputed facts established that the employee was engaged in the maintenance of one of the employer's buses when he was injured, thus bringing the claim over within the policy exclusion. Pennsylvania Millers Mut. Ins. Co. v Manco, 63 N.Y.2d 940, 483 N.Y.S.2d 686, 473 N.E.2d 38, 1984 N.Y. LEXIS 4724 (N.Y. 1984).

In regard to third party claim for contribution or indemnity in action arising from death of farm employee when he was struck by vehicle while using farm tractor to pull vehicle from highway ditch near farm, insurance company could not disclaim coverage of owner and operator of farm under provision of policy which excluded "liability...resulting from bodily injury to a farm employee," since such language is not specific enough to exclude insured's liability on third party claim for contribution or apportionment. Kimball v Chautauqua Patrons' Ins. Ass'n, 158 A.D.2d 983, 550 N.Y.S.2d 968, 1990 N.Y. App. Div. LEXIS 1531 (N.Y. App. Div. 4th Dep't 1990).

Insurance policy, which excluded coverage for "bodily injury to any employee of any named insured," applied to bar coverage to additional insured against claim by employee of primary insured. Tardy v Morgan Guar. Trust Co., 213 A.D.2d 296, 624 N.Y.S.2d 34, 1995 N.Y. App. Div. LEXIS 3028 (N.Y. App. Div. 1st Dep't 1995).

Policy exclusion for "bodily injury to any employee of any named insured" barred coverage to plaintiff as additional insured; further, that part of policy providing that exclusion was inapplicable where bodily injury "resulted solely from the negligence of the named insured" did not apply since plaintiff was "named" but "additional" insured. Consolidated Edison Co. v United Coastal Ins. Co., 216 A.D.2d 137, 628 N.Y.S.2d 637, 1995 N.Y. App. Div. LEXIS 6579 (N.Y. App. Div. 1st Dep't 1995), reh'g denied, app. denied, 1995 N.Y. App. Div. LEXIS 11272 (N.Y. App. Div. 1st Dep't Oct. 10, 1995).

Policy endorsement entitled "Employee Bodily Injury Exclusion" did not conflict with policy exclusion stating that policy did not cover claims for bodily injuries for which insured must pay because of liability assumed in contract or agreement other than "insured contract." Monteleone v Crow Constr. Co., 242 A.D.2d 135, 673 N.Y.S.2d 408, 1998 N.Y. App. Div. LEXIS 5853 (N.Y. App. Div. 1st Dep't 1998), app. denied, 1998 N.Y. App. Div. LEXIS 9725 (N.Y. App. Div. 1st Dep't Sept. 10, 1998), app. denied, 92 N.Y.2d 818, 684 N.Y.S.2d 489, 707 N.E.2d 444, 1998 N.Y. LEXIS 4344 (N.Y. 1998).

General liability insurer was entitled to summary judgment declaring that it had no duty to defend and indemnify its insured when insured was impleaded by defendant in underlying action by employee who was injured while operating allegedly defective machine, as plain meaning of policy exclusion for bodily injuries to "an employee of the insured arising out of and in course of employment of the insured" was to relieve insurer of liability when insured was sued or contribution was requested for damages arising out of bodily injury to its employees sustained in course of their employment. Milbin Printing, Inc. v Lumbermen's Mut. Cas. Ins. Co., 283 A.D.2d 467, 724 N.Y.S.2d 464, 2001 N.Y. App. Div. LEXIS 5005 (N.Y. App. Div. 2d Dep't 2001).

Injuries to claimant infant, in utero, from lead poisoning allegedly due to city university's failure to remove lead paint from its building, where claimant's mother both lived and was employed as custodian, fell within employment exclusion provision of general liability insurance policy issued to university excluding coverage for bodily injury to employee of insured or child of such employee as consequence of employment. Oates v State, 157 Misc. 2d 618, 597 N.Y.S.2d 550, 1993 N.Y. Misc. LEXIS 166 (Ct. Cl. 1993).

Provision of insurance policy excluding from coverage "bodily injury or property damage arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants: at or from premises owned, rented or occupied by the name insured" did not apply in action brought against insured by infant who sustained lead poisoning while residing at insured's premises since it was reasonable to interpret exclusion as applying only to claims for injuries based on industrial environmental pollution. General Accident Ins. Co. of Am. v Idbar Realty Corp., 163 Misc. 2d 809, 622 N.Y.S.2d 417, 1994 N.Y. Misc. LEXIS 623 (N.Y. Sup. Ct. 1994), modified, 229 A.D.2d 515, 646 N.Y.S.2d 138, 1996 N.Y. App. Div. LEXIS 7889 (N.Y. App. Div. 2d Dep't 1996).

161. —Homeowner liability

Summary judgment was properly granted to an insurance company where the homeowner's policy in question covered the son of the insureds only if he was a resident of his parents' household, and the evidence submitted by the parties established that he did not actually reside in his parents' household at the relevant time. D'Amico v Pennsylvania Millers Mut. Ins. Co., 52 N.Y.2d 1000, 438 N.Y.S.2d 290, 420 N.E.2d 88, 1981 N.Y. LEXIS 2235 (N.Y. 1981).

Insured was entitled to judgment declaring that insurer was obligated to defend and indemnify him with respect to counterclaim alleging that insured negligently entrusted dangerous instrumentality (3-wheel all-terrain vehicle) to his 14-year-old son, despite homeowner's policy exclusion of occurrences "arising out of the ownership, maintenance, or use of...a motor vehicle," since claim of negligent entrustment was not directly related to negligent operation of vehicle. Cone v Nationwide Mut. Fire Ins. Co., 75 N.Y.2d 747, 551 N.Y.S.2d 891, 551 N.E.2d 92, 1989 N.Y. LEXIS 4388 (N.Y. 1989), limited, Monarch Ins. Co. v Hetherly, 148 Misc. 2d 594, 560 N.Y.S.2d 745, 1990 N.Y. Misc. LEXIS 475 (N.Y. Sup. Ct. 1990), limited, New Hampshire Ins. Co. v Jefferson Ins. Co., 213 A.D.2d 325, 624 N.Y.S.2d 392, 1995 N.Y. App. Div. LEXIS 3290 (N.Y. App. Div. 1st Dep't 1995).

Insurance carrier was entitled to summary judgment declaring that insured's son was not "insured person" under homeowner's policy and that it was therefore not required to defend or indemnify son in personal injury action brought by victims of shooting incident where (1) policy defined insured person to include any relative of named insured, if resident of his household, (2) insured's son had lived in apartment with friends for 2 months prior to shooting incident and had paid upcoming month's rent at apartment, and (3) insured stated that his son did not reside in his home on date of shooting incident and that son would not be allowed to move back home if he asked to do so. Allstate Ins. Co. v Gominiak, 147 A.D.2d 979, 537 N.Y.S.2d 411, 1989 N.Y. App. Div. LEXIS 1438 (N.Y. App. Div. 4th Dep't 1989).

Homeowners were entitled to summary judgment declaring that homeowners' insurance carrier was both liable for property damage to homeowners' premises from fire and obligated to defend them in 2 actions brought against them on behalf of children who were injured or died in fire, notwithstanding facts that policy excluded claims "arising out of" business pursuit of insured, and co-insured wife was convicted of operating day-care service on premises without appropriate permits and approvals, since (1) insurer failed to submit any evidence establishing that property damage, which resulted from fire of unknown origin, arose out of alleged baby-sitting business conducted by wife, and (2) complaints in 2 underlying actions asserted that injuries sustained by children were caused by homeowners' negligent operation, maintenance, control and supervision of premises and did not arise out of wife's baby-sitting business. Allstate Ins. Co. v Noorhassan, 158 A.D.2d 638, 551 N.Y.S.2d 942, 1990 N.Y. App. Div. LEXIS 2231 (N.Y. App. Div. 2d Dep't 1990).

Parents were not entitled to coverage under homeowners general liability insurance policy in intrafamilial action brought by their child alleging sexual, physical and psychological abuse and failure to provide proper parental and intrafamilial care and support since acts alleged did not constitute "accidental loss," which was only loss for which coverage was provided; moreover, as matter of public policy, homeowners liability insurance policy should not provide coverage to parents who abuse their children. Doe v Allstate Ins. Co., 187 A.D.2d 181, 596 N.Y.S.2d 603, 1993 N.Y. App. Div. LEXIS 12885 (N.Y. App. Div. 4th Dep't 1993).

Insurance company had duty to defend its insured under homeowner's policy in action initiated by insured against third party for assault, in which third party counterclaimed for unlawful imprisonment, harassment, and menacing, even though policy excluded coverage for intentional or criminal acts if loss could be reasonably expected to result or was intended result of insured, where insurance company failed to establish that allegations of counterclaim fell within exclusion. Allstate Ins. Co. v DiBartolo, 209 A.D.2d 463, 618 N.Y.S.2d 828, 1994 N.Y. App. Div. LEXIS 11555 (N.Y. App. Div. 2d Dep't 1994).

Insurer, which disclaimed coverage for loss sustained when portion of concrete slab foundation of insureds' house collapsed as result of "decomposing organic matter" within ground underneath foundation, was entitled to summary judgment in breach of contract action where proximate cause of insureds' loss was "earth movement," despite decomposition of buried organic ma-

terials, and insurer's policy specifically denominated "earth movement" as "excluded event" and further clearly stated that it did not insure that type of loss "regardless of the cause of the excluded event." Sheehan v State Farm Fire & Cas. Co., 239 A.D.2d 486, 658 N.Y.S.2d 61, 1997 N.Y. App. Div. LEXIS 5346 (N.Y. App. Div. 2d Dep't 1997).

At time of their deaths from carbon monoxide poisoning, stepfather and his stepchild were no longer "relatives" within meaning of exclusionary clause in homeowner's policy issued to stepfather where his wife, who was child's adoptive mother, had died previously; to extent that stepchild had been relative of stepfather by affinity, that relationship had terminated on death of stepfather's wife. Randolph v Nationwide Mut. Fire Ins. Co., 242 A.D.2d 889, 662 N.Y.S.2d 650, 1997 N.Y. App. Div. LEXIS 10441 (N.Y. App. Div. 4th Dep't 1997).

Insurer was obligated to defend and indemnify insured as third-party defendant in action brought by insured's husband against third-party plaintiff, who then sought contribution and indemnification from insured, notwithstanding that underlying incident resulted in injury to insured's husband and that he qualified as insured under homeowner's policy, which excluded from coverage injuries to named insureds, since policy was narrowly drafted to exclude from coverage only direct claims of bodily injury by insureds. Doyle v Pawtucket Mut. Ins. Co., 243 A.D.2d 603, 667 N.Y.S.2d 755, 1997 N.Y. App. Div. LEXIS 10245 (N.Y. App. Div. 2d Dep't 1997).

Insurance carrier was entitled to summary judgment declaring that it was not obligated to defend and indemnify insured's son in tort action arising from his criminal act of firing 18 shots in direction of group of people, inflicting 5 wounds, because such conduct could not be considered "accident" under homeowners' and personal liability umbrella policies as matter of law. State Farm Fire & Cas. Co. v Torio, 250 A.D.2d 833, 673 N.Y.S.2d 696, 1998 N.Y. App. Div. LEXIS 6034 (N.Y. App. Div. 2d Dep't 1998), app. denied, 92 N.Y.2d 819, 685 N.Y.S.2d 420, 708 N.E.2d 177, 1999 N.Y. LEXIS 2039 (N.Y. 1999).

Insurer was entitled to summary judgment declaring that it was not obligated to defend and indemnify insureds under homeowner's policy in connection with personal injury action arising from dog bite incident on premises, where insureds owned but did not reside at insured premises, policy defined insured premises as "residence premises," and policy only provided coverage if insured premises was used as residence by insureds. Metropolitan Prop. & Cas. Ins. Co. v Pulido, 271 A.D.2d 57, 710 N.Y.S.2d 375, 2000 N.Y. App. Div. LEXIS 7426 (N.Y. App. Div. 2d Dep't 2000).

Adult stepchild who lived with his stepfather was not excluded from coverage under stepfather's homeowner's insurance policy as "relative" living in same household where stepchild's mother died prior to accident that gave rise to claim; once stepchild's mother died, bond of affinity terminated between stepchild and stepfather. Randolph v Nationwide Mut. Ins. Co., 170 Misc. 2d 364, 650 N.Y.S.2d 964, 1996 N.Y. Misc. LEXIS 437 (N.Y. Sup. Ct. 1996), aff'd, 242 A.D.2d 889, 662 N.Y.S.2d 650, 1997 N.Y. App. Div. LEXIS 10441 (N.Y. App. Div. 4th Dep't 1997).

Nothing in New York Insurance Law requires insurer to add endorsement to homeowner's insurance policy that extends liability insurance coverage to secondary residence located in state where insurer is not licensed; however, insurer is not prohibited from doing so, but may be subject to laws of other state. Insurance Department, Opinions of General Counsel, Opinion Number 02-10-25.

162. —Business activity exclusion

Insurer was obligated to defend insureds in underlying action by infant, who was allegedly injured while under insureds' supervision and care, even though insurer established that insureds were engaged in "business pursuit" within meaning of policy exclusion when child was injured, since there was no evidence as to circumstances under which child allegedly sustained injury; thus, insurer failed to establish that alleged injury resulted from activities which fell solely under business pursuits exclusion and not under narrow exception to that exclusionary clause requiring that coverage be afforded for activities "unusual to nonbusiness pursuits." Hanover Ins. Co. v Cowan, 172 A.D.2d 490, 568 N.Y.S.2d 115, 1991 N.Y. App. Div. LEXIS 4414 (N.Y. App. Div. 2d Dep't 1991).

Insurer was entitled to summary judgment declaring that it was not required to defend or indemnify insured in action for alleged assault and negligence arising from his participation in union picketing of his employer's plant, as alleged loss fell within "business pursuits" exclusion of homeowner's policy where insured was not only union member and worker at plant, but was also employed as union's local president; level of insured's compensation as union president (and fact that his compensation may have been suspended during strike) was irrelevant as long as he was entitled to payment for his work as union president. Salimbene v Merchants Mut. Ins. Co., 217 A.D.2d 991, 629 N.Y.S.2d 913, 1995 N.Y. App. Div. LEXIS 8428 (N.Y. App. Div. 4th Dep't 1995).

Business exception in homeowner's insurance policy applied to customer's slip and fall on homeowner's driveway while buying flowers, which homeowner was selling to passersby for $2 per bunch from folding table near front of her property, where policy defined "business" as "any full or part time activity of any kind engaged in for economic gain." Bragin v Allstate Ins. Co., 238 A.D.2d 773, 656 N.Y.S.2d 468, 1997 N.Y. App. Div. LEXIS 3937 (N.Y. App. Div. 3d Dep't 1997).

Plaintiff who owned snowmobile was entitled to summary judgment declaring that his homeowners policy covered injuries sustained by friend who was driving snowmobile when it hit some indentations or ruts on his lawn; policy exclusion for activities "arising out of business pursuits of an insured" did not apply where (1) plaintiff averred that he acquired snowmobile for personal use, and not for purpose of wholesale car business that he operated from his garage, and (2) even assuming arguendo that he was engaged in business pursuit, his friend's activity fell within policy exception for "activities...usual to nonbusiness pursuits." Showler v American Mfrs. Mut. Ins. Co., 261 A.D.2d 896, 690 N.Y.S.2d 369, 1999 N.Y. App. Div. LEXIS 4948 (N.Y. App. Div. 4th Dep't 1999).

Business pursuits exclusion of homeowners insurance policy applied where delivery service employee fell while making delivery to business that operated out of home, notwithstanding contention that fall was caused by construction work at home and not by business at home; relevant question was why delivery service employee was at home, and not why he fell. Velleman v Continental Ins. Co., 162 Misc. 2d 95, 616 N.Y.S.2d 146, 1994 N.Y. Misc. LEXIS 361 (N.Y. Sup. Ct. 1994).

Exception to business pursuits exclusion of homeowners insurance policy, which excepted activities that were ordinarily incident to non-business pursuits, did not apply to situation where delivery service employee fell while making delivery to business that operated out of home, since regular and frequent deliveries and pickups by delivery service are not usual activities occurring at residence. Velleman v Continental Ins. Co., 162 Misc. 2d 95, 616 N.Y.S.2d 146, 1994 N.Y. Misc. LEXIS 361 (N.Y. Sup. Ct. 1994).

General liability insurance policy issued to tavern owner may contain exclusion for liquor liability. Insurance Department, Opinions of General Counsel, Opinion Number 02-04-30.

163. —Contractor liability

In an action brought by a subcontractor against its liability insurer for reimbursement of a sum for which the subcontractor had been backcharged by the general contractor as a result of costs incurred to repair certain structural defects arising from the subcontractor's failure to perform properly the construction work, the property damage was excluded by a provision in the policy that denied coverage for damage to the insured's own work, but not for damage to the work product of others. Adler & Neilson Co. v Insurance Co. of North America, 56 N.Y.2d 540, 449 N.Y.S.2d 957, 434 N.E.2d 1335, 1982 N.Y. LEXIS 3224 (N.Y. 1982).

General liability insurer of subcontractor had no obligation to subcontractor's workers' compensation insurer to reimburse latter after it had paid settlement to subcontractor's injured employee, who had sued contractor, which in turn had brought third-party action against subcontractor, where general liability policy excluded coverage for injury to employee or "any obligation

of the insured to indemnify another because of damages arising out of such injury"; word "indemnification" was not ambiguous, and plain terms of provision expressly excluded liability under circumstances of case. North River Ins. Co. v United Nat'l Ins. Co., 81 N.Y.2d 812, 595 N.Y.S.2d 377, 611 N.E.2d 278, 1993 N.Y. LEXIS 87 (N.Y. 1993).

Builder's comprehensive liability insurer was properly granted summary judgment declaring that it was not obligated to defend and indemnify builder in underlying action by homeowners who alleged that builder failed to erect their homes in workmanlike manner by connecting them to contaminated ground water wells which posed risks to household fixtures and appliances as well as their families' health, where builder's insurance policy contained exclusion for property damage arising out of work performed by builder; such "work product" exclusion includes, not only mortar, bricks, wiring and pipes that comprise houses, but also numerous discretionary choices made in course of erecting houses, such as builder's choice of site. Basil Dev. Corp. v General Accident Ins. Co., 89 N.Y.2d 1057, 659 N.Y.S.2d 828, 681 N.E.2d 1274, 1997 N.Y. LEXIS 737 (N.Y. 1997).

Asbestos insulation contractor, which was held entitled to defense in underlying personal injury actions because its insurers failed to establish that claims in underlying actions fell wholly within product-hazards exclusion clause of policies, was not automatically entitled to declaration that insurers also had duty to indemnify it in all underlying actions, as insurer's duty to indemnify is broader than its duty to defend, and question of insurer's duty to indemnify must await ultimate determination of liability. Frontier Insulation Contrs. v Merchants Mut. Ins. Co., 91 N.Y.2d 169, 667 N.Y.S.2d 982, 690 N.E.2d 866, 1997 N.Y. LEXIS 3722 (N.Y. 1997).

Although heavy equipment lessee's commercial general liability policy evinced intention to pay third parties sums that insured became legally obligated to pay as damages, insurer was entitled to summary judgment in action by lessor of equipment that became damaged, allegedly due to insured's negligence, where policy excluded property rented by insured or in its care, custody, or control, and action was premature because policy did not allow third party to sue insurer until it had settled or obtained final judgment against insured, neither of which had yet occurred. Orange Handling v American Mfrs. Mut. Ins. Co., 245 A.D.2d 768, 665 N.Y.S.2d 469, 1997 N.Y. App. Div. LEXIS 12936 (N.Y. App. Div. 3d Dep't 1997).

Liability insurer was entitled to summary judgment declaring that it was not obligated to defend and indemnify insured in underlying action for injuries sustained by subcontractor's employee who slipped and fell while standing on side of bathtub to remove tape left on wall of recently completed apartment in building still under construction, where policy contained "basic construction exclusion" clause which excluded liability for bodily injury arising out of construction or demolition operations in course of any job involving "new construction...of any load bearing wall, floor, ceiling or roof." West 56th St. Assocs. v Greater N.Y. Mut. Ins. Co., 250 A.D.2d 109, 681 N.Y.S.2d 523, 1998 N.Y. App. Div. LEXIS 13754 (N.Y. App. Div. 1st Dep't 1998), amended, 1999 N.Y. App. Div. LEXIS 1194 (N.Y. App. Div. 1st Dep't Jan. 19, 1999).

164. —Vehicle lessor liability

The exclusion of guest coverage in an insurance policy provided by a corporation renting motor vehicles did not violate subdivision 2 of former section 167 [now § 3420(e)] of the Insurance Law where a van was rented in New York by a New York resident who was to deliver the van three days later to the lessor in Maine, inasmuch as the mandatory provisions of subdivision 2 of former section 167 [now § 3420(e)], one of which required coverage for injuries suffered by a passenger in the vehicle (Vehicle and Traffic Law, § 311; 11 NYCRR 60.1), are applicable only to policies issued on vehicles principally garaged or used in this State and the vehicle in question was registered in Massachusetts and was only temporarily in New York. Travelers Indem. Co. v Ryder Truck Rental, Inc., 47 N.Y.2d 139, 417 N.Y.S.2d 53, 390 N.E.2d 771, 1979 N.Y. LEXIS 1992 (N.Y. 1979).

"Step down" endorsement to primary insurance purchased by owner of leased van did not limit carrier's liability to $10,000 where term "leased auto" was specifically defined in endorsement to mean vehicle that owner-lessor leased "under a lease agreement which requires the lessee to provide primary insurance for you," and where rental agreement between owner-lessor and lessee required owner to maintain $500,000 of primary coverage. Jefferson Ins. Co. v Travelers Indem. Co., 92 N.Y.2d 363, 681 N.Y.S.2d 208, 703 N.E.2d 1221, 1998 N.Y. LEXIS 3664 (N.Y. 1998).

Exclusionary clause in truck lessor's nontrucking use policy, providing "bobtail" coverage for truck cab use only and excluding coverage when trailer is attached to truck and is being used to carry property in any business, was invalid as against state's public policy requiring existence of insurance to meet minimum standards of liability coverage, and policy would accordingly be construed to provide coverage whether vehicle was being used in lessor's or lessee's business at time of accident. Planet Ins. Co. v Gunther, 160 Misc. 2d 67, 608 N.Y.S.2d 763, 1993 N.Y. Misc. LEXIS 573 (N.Y. Sup. Ct. 1993).

165. —Liability for intentional act

Neighbors who had been shot by person insured under comprehensive personal liability homeowner's policy were collaterally estopped from relitigating insured's intent after insured was convicted of first degree manslaughter, attempted manslaughter and weapons offense, and thus insurer's liability to neighbors was precluded by policy provisions excluding injuries "expected" or "intended" or "caused intentionally" by insured; collateral estoppel effect of criminal findings was not nullified by fact that insured had established that he acted under extreme emotional disturbance. In re Nassau Ins. Co., 78 N.Y.2d 888, 573 N.Y.S.2d 447, 577 N.E.2d 1039, 1991 N.Y. LEXIS 817 (N.Y. 1991).

When third party perpetrates assault, basis of victim's claim for negligent failure to maintain safe premises against insured is assault; thus, insurance policy exclusion, providing that "no coverage shall apply...for any claim, demand or suit based on Assault and Battery, and Assault and Battery shall not be deemed an accident whether or not committed by or at the direction of the insured," applied, even though theory pleaded was insured's negligent failure to maintain safe premises, since operative act giving rise to any recovery was assault. Mount Vernon Fire Ins. Co. v Creative Hous., 88 N.Y.2d 347, 645 N.Y.S.2d 433, 668 N.E.2d 404, 1996 N.Y. LEXIS 1182 (N.Y. 1996).

Insured was entitled to summary judgment declaring that his insurance company had duty to indemnify him in negligence action arising from his altercation with bouncers at nightclub, where he was ejected from club, he returned with shotgun and fired round of buckshot at nightclub door, injuring patron inside, and he was arrested and pleaded guilty to attempted first degree assault, explaining at plea allocution that he only intended to damage door and did not think that anyone would be injured; patron's injuries were accidental result of insured's intentional act and thus were not within policy exclusion for "bodily injury... expected or intended" by insured. Barry v Romanosky, 147 A.D.2d 605, 538 N.Y.S.2d 14, 1989 N.Y. App. Div. LEXIS 1994 (N.Y. App. Div. 2d Dep't 1989).

Court should have granted insurer's motion to dismiss complaint in action by injured plaintiffs to compel payment of unsatisfied default judgment against insured where policy specifically excluded coverage for bodily injuries "expected or intended by insured" and insured was convicted of first degree assault of plaintiffs, conclusively establishing that plaintiffs' injuries were intentionally caused by insured, and collaterally estopping plaintiffs from relitigating issue of intent. D'Arata v New York Cent. Mut. Fire Ins. Co., 152 A.D.2d 1004, 543 N.Y.S.2d 810, 1989 N.Y. App. Div. LEXIS 9942 (N.Y. App. Div. 4th Dep't 1989), aff'd, 76 N.Y.2d 659, 563 N.Y.S.2d 24, 564 N.E.2d 634, 1990 N.Y. LEXIS 3484 (N.Y. 1990).

Incident for which insured was convicted of first degree manslaughter and attempted first degree manslaughter was not covered under comprehensive personal liability policy where police specifically provided that "This coverage does not apply to injury or destruction...caused intentionally by any insured over twelve years old." In re Nassau Ins. Co., 161 A.D.2d 146, 554 N.Y.S.2d 551, 1990 N.Y. App. Div. LEXIS 4837 (N.Y. App. Div. 1st

Dep't 1990), aff'd, 78 N.Y.2d 888, 573 N.Y.S.2d 447, 577 N.E.2d 1039, 1991 N.Y. LEXIS 817 (N.Y. 1991).

Insurance policy exclusion for intentionally caused harm applied to action alleging that president of insured company hired persons to assault and break both legs of another employee of company, that plan went awry, and that assailants killed employee, since physical injury to employee was inherent in hiring of persons to assault employee. Monter v CNA Ins. Cos., 202 A.D.2d 405, 608 N.Y.S.2d 692, 1994 N.Y. App. Div. LEXIS 1951 (N.Y. App. Div. 2d Dep't 1994).

In action for judgment declaring that liability insurer had duty to defend plaintiff in $1 million personal injury action which arose from verbal confrontation with shop attendant who alleged that, when she began to walk away, plaintiff grabbed her arm and told her to "lighten up," insurer was not entitled to summary judgment based on policy's express exclusion for intentional bodily injury where (1) police incident report indicated that shop attendant was not injured and was not touched in any sexual or intimate location, (2) complaint in underlying action could be construed as alleging intentional offensive contact resulting in unintended serious harm not inherent in nature of such physical contact, and (3) complaint also alleged that emotional harm to shop attendant was negligently inflicted. Jubin v St. Paul Fire & Marine Ins. Co., 236 A.D.2d 712, 653 N.Y.S.2d 454, 1997 N.Y. App. Div. LEXIS 1300 (N.Y. App. Div. 3d Dep't 1997).

Plaintiff was not entitled to summary judgment in action against insurance carrier which had improperly disclaimed coverage in underlying action against its insured based on policy exclusion for bodily injuries intentionally caused by insureds as (1) insurer's breach of duty to defend did not thereby create coverage, nor did its refusal to defend compel insured's default in underlying action, (2) contention that plaintiff's injury was intentionally caused was not defense to underlying action, and issue of whether plaintiff's injury was intentionally or negligently caused was not actually litigated in underlying action due to insured's default, and thus default judgment in underlying action had no collateral estoppel effect on issue of coverage, and (3) insurer was entitled to try to establish that it had no duty to indemnify (which is distinctly different from its duty to defend). Robbins v Michigan Millers Mut. Ins. Co., 236 A.D.2d 769, 653 N.Y.S.2d 975, 1997 N.Y. App. Div. LEXIS 2046 (N.Y. App. Div. 3d Dep't 1997).

Assault and battery exclusion in bar's liability insurance policy excluded all 6 of insured's causes of action where 3 of them alleged that perpetrator intentionally struck patron in face with glass bottle, 3 of them inconsistently alleged that perpetrator carelessly and negligently struck patron in face with glass bottle, no additional facts were pleaded, and motion papers did not suggest any evidentiary support for conclusory characterization of perpetrator's conduct as negligent, or provide any explanation of how intrinsically intentional act of assault could be negligently performed. Sphere Drake Ins. Co. v 72 Centre Ave. Corp., 238 A.D.2d 574, 657 N.Y.S.2d 65, 1997 N.Y. App. Div. LEXIS 4384 (N.Y. App. Div. 2d Dep't 1997).

Insurer, under liquor liability policy, was obligated to defend and indemnify insured in underlying action for injuries sustained in fight at insured's bar, even though insurer showed that assault and battery exclusion was customarily included in its commercial general liability and liquor liability policies, since insurer, by issuing binder that specifically noted exclusion as to commercial general liability coverage and not liquor liability coverage, created confusion as to exclusion's application to both coverages, and thus it would have been reasonable for insured to conclude based on binder that exclusion applied to commercial general liability coverage only. Crouse West Holding Corp. v Sphere Drake Ins. Co., PLC, 248 A.D.2d 932, 670 N.Y.S.2d 640, 1998 N.Y. App. Div. LEXIS 2965 (N.Y. App. Div. 4th Dep't), app. dismissed, 252 A.D.2d 995, 1998 N.Y. App. Div. LEXIS 8557 (N.Y. App. Div. 4th Dep't 1998), app. dismissed, 92 N.Y.2d 941, 681 N.Y.S.2d 469, 704 N.E.2d 222, 1998 N.Y. LEXIS 3730 (N.Y. 1998), aff'd, 92 N.Y.2d 1017, 684 N.Y.S.2d 480, 707 N.E.2d 435, 1998 N.Y. LEXIS 4905 (N.Y. 1998), overruled in part, Penn-America Group, Inc. v Zoobar, Inc., 305 A.D.2d 1116, 759 N.Y.S.2d 825, 2003 N.Y. App. Div. LEXIS 4773 (N.Y. App. Div. 4th Dep't 2003).

Insurer had no duty to defend or indemnify insured for personal liability in connection with his molestation of 7-year-old boy where (1) homeowner's policy at issue excluded injuries "expected or intended by the insured," (2) although underlying action alleged insured's negligence in committing sexual acts without foreseeing possibility of injuring boy, without considering boy's age, and without first assessing consequences of his acts, gravamen of action was insured intentional acts, for which he had been convicted of first degree sexual abuse and endangering welfare of child, and (3) insured should not be allowed to receive insurance protection for sexually molesting child. Gibbs v CNA Ins. Cos., 263 A.D.2d 836, 693 N.Y.S.2d 720, 1999 N.Y. App. Div. LEXIS 8278 (N.Y. App. Div. 3d Dep't 1999), app. denied, 1999 N.Y. LEXIS 3835 (N.Y. Nov. 23, 1999).

Insurer had no duty to defend or indemnify insured for personal liability in connection with his molestation of 7-year-old boy where (1) homeowner's policy at issue excluded injuries "expected or intended by the insured," (2) although underlying action alleged insured's negligence in committing sexual acts without foreseeing possibility of injuring boy, without considering boy's age, and without first assessing consequences of his acts, gravamen of action was insured intentional acts, for which he had been convicted of first degree sexual abuse and endangering welfare of child, (3) insured should not be allowed to receive insurance protection for sexually molesting child, and (4) amendment of complaint in underlying action to add causes of action based on negligent physical contact with boy was obvious manipulation of legal process for sole purpose of procuring coverage. Gibbs v General Accident Ins. Co., 263 A.D.2d 852, 693 N.Y.S.2d 719, 1999 N.Y. App. Div. LEXIS 8263 (N.Y. App. Div. 3d Dep't), app. denied, 94 N.Y.2d 755, 701 N.Y.S.2d 711, 723 N.E.2d 566, 1999 N.Y. LEXIS 3822 (N.Y. 1999).

In action by plaintiff who was injured when insured fired 20-gauge shotgun in his vicinity, exclusion in homeowner's policy for "intentional acts" did not apply where insured maintained that he was unaware that gun was loaded and insisted that shooting was accidental, he pleaded guilty to second degree assault admitting that he recklessly caused serious injury to plaintiff and, while he apparently intended to pull trigger, record was devoid of evidence that he intended harm or was aware that gun was loaded prior to its discharge. Slayko v Sec. Mut. Ins. Co., 285 A.D.2d 875, 728 N.Y.S.2d 282, 2001 N.Y. App. Div. LEXIS 7532 (N.Y. App. Div. 3d Dep't 2001), rev'd, 98 N.Y.2d 289, 746 N.Y.S.2d 444, 774 N.E.2d 208, 2002 N.Y. LEXIS 1902 (N.Y. 2002).

Insurer was entitled to summary judgment in a coverage dispute because the town fire investigator, a county police arson squad investigator, and a private fire investigator all determined that the fire at the insured's property was intentionally set, and, as such, the policy's vandalism exclusion applied; subsection (d) of this statute did not apply because the insured's claims were for property damage. Swanson v Allstate Ins. Co., 150 A.D.3d 1299, 55 N.Y.S.3d 408, 2017 N.Y. App. Div. LEXIS 4243 (N.Y. App. Div. 2d Dep't), app. denied, 30 N.Y.3d 903, 89 N.E.3d 519, 67 N.Y.S.3d 129, 2017 N.Y. LEXIS 3154 (N.Y. 2017).

Sexual misconduct provision of social workers' professional liability policy which limited coverage to $25,000 for all malpractice claims involving actual or alleged sexual misconduct violated public policy of New York and was unenforceable, although such provision was approved by Superintendent of Insurance and National Association of Social Workers. American Home Assur. Co. v McDonald, 182 Misc. 2d 716, 698 N.Y.S.2d 436, 1999 N.Y. Misc. LEXIS 471 (N.Y. Sup. Ct. 1999), aff'd in part, modified, 274 A.D.2d 70, 712 N.Y.S.2d 507, 2000 N.Y. App. Div. LEXIS 8606 (N.Y. App. Div. 1st Dep't 2000).

In action by plaintiff who was shot by defendant's insured after night of "partying" which included drinking alcoholic beverages and smoking marihuana, defendant was not entitled to disclaim coverage based on policy exclusion for intentional acts, where it submitted no proof to rebut plaintiff's allegation that insured was unaware gun was loaded when he pulled trigger, there was no proof that insured intended to actually shoot plaintiff, and it was irrelevant whether result of pulling trigger was foreseeable if shooting was not intended. Slayko v Security Mut. Ins. Co., 183 Misc. 2d 688, 705 N.Y.S.2d 528, 2000 N.Y. Misc. LEXIS 68 (N.Y.

Sup. Ct. 2000), aff'd, 285 A.D.2d 875, 728 N.Y.S.2d 282, 2001 N.Y. App. Div. LEXIS 7532 (N.Y. App. Div. 3d Dep't 2001).

Where a creditor sought to declare a state court judgment nondischargeable under 11 U.S.C.S. § 523(a)(6) and alternatively sought to recover the unsatisfied judgment from the debtor's insurer, which alleged that its policies excluded coverage because the debtor's actions in injuring the creditor were intentional, a bankruptcy court declined to abstain under 28 U.S.C.S. § 1334(c)(1), as the coverage issue raised in the N.Y. Ins. Law § 3420 action could have a dispositive effect on the scope of the debtor's discharge and thus, it would affect the administration of the estate and the debtor's future. Although the coverage issue was controlled by state law, the issue was not a difficult one and coincided with the issue of dischargeability under federal bankruptcy law. Hough v Margulies (In re Margulies), 476 B.R. 393, 2012 Bankr. LEXIS 3768 (Bankr. S.D.N.Y. 2012).

Professional liability insurer's failure to give notice under Ins § 3420(d) that insurer intended to disclaim coverage for injuries allegedly caused by psychiatrist's sexual contact with patient did not estop insurer from denying coverage, where policies did not provide coverage for that type of intentional misconduct. Dodge v Legion Ins. Co., 102 F. Supp. 2d 144, 2000 U.S. Dist. LEXIS 4980 (S.D.N.Y. 2000).

166. —Liability for pollution

Despite policy exclusion of coverage for injuries or damage arising out of discharge or escape of pollutants, including waste, liability insurer was obligated to defend insured village in actions for injury and damage allegedly caused by discharge or overflow of raw sewage from municipal sewer system, since any risk of liability faced by village allegedly arose from flood-like nature of discharge rather than its "polluting" character; however, trial was necessary before any determination on issue of indemnification could be made. Incorporated Village of Cedarhurst v Hanover Ins. Co., 89 N.Y.2d 293, 653 N.Y.S.2d 68, 675 N.E.2d 822, 1996 N.Y. LEXIS 3583 (N.Y. 1996).

Insurers were entitled to summary judgment declaring that they had no duty to defend or indemnify insured town and village in landowners' actions alleging that town and village negligently failed to prevent and abate illegal disposal of noxious waste on their land by excavation contractor retained by landowners to regrade their properties, since pollution exclusion clauses of policies unambiguously excluded coverage of claims generated by dumping of waste materials onto complainants' properties as asserted in underlying complaints, irrespective of who was responsible for such acts. Town of Harrison v National Union Fire Ins. Co., 89 N.Y.2d 308, 653 N.Y.S.2d 75, 675 N.E.2d 829, 1996 N.Y. LEXIS 3582 (N.Y. 1996), reh'g denied, 89 N.Y.2d 1031, 658 N.Y.S.2d 246, 680 N.E.2d 620, 1997 N.Y. LEXIS 395 (N.Y. 1997).

In determining whether coverage was barred under general liability insurance policy which excluded coverage for damages arising out of discharge of environmental pollutants but contained exception to exclusion for "sudden and accidental" discharge of pollutants, insurer had burden of showing that underlying complaints alleged damages attributable to discharge of pollutant into environment, whereupon burden shifted to insured to show reasonable interpretation of underlying complaints potentially bringing claims within sudden and accidental discharge exception, or to proffer extrinsic evidence that discharge was in fact sudden and accidental. Northville Indus. Corp. v National Union Fire Ins. Co., 89 N.Y.2d 621, 657 N.Y.S.2d 564, 679 N.E.2d 1044, 1997 N.Y. LEXIS 306 (N.Y. 1997).

In action under CLS Nav Art 12 to recover costs incurred in cleanup of area contaminated by leakage of underground gasoline storage tank, court erred in granting summary judgment for defendant insurer on ground that leakage, which occurred over many years, did not fall within exception to policy's pollution exclusion clause, which provided that exclusion did not apply if discharge was "sudden and accidental," since there was no evidence in record to indicate that tank or property owners were aware of leakage until investigations by State Department of Transportation revealed gasoline contamination in area. State v Aetna Casualty & Sur. Co., 155 A.D.2d 740, 547 N.Y.S.2d 452, 1989 N.Y. App. Div. LEXIS 13812 (N.Y. App. Div. 3d Dep't 1989).

In action by comprehensive general liability (CGL) insurer seeking declaration that it had no duty to defend and indemnify insured in underlying asbestos-related personal injury claims, court improperly held that pollution exclusion clause in CGL policy eliminated all coverage as matter of law since underlying complaints did not allege environmental pollution of land, water course, or atmosphere, but simply bodily injury sustained by ultimate product user; exclusion clause, as limited by "industry related activities," applied to environmental pollution from intentional discharge of pollutant in course of manufacturing or distribution activities by producer of product, not harm inflicted by product fully and finally launched into stream of commerce. Continental Casualty Co. v Rapid-American Corp., 177 A.D.2d 61, 581 N.Y.S.2d 669, 1992 N.Y. App. Div. LEXIS 2737 (N.Y. App. Div. 1st Dep't 1992), aff'd, 80 N.Y.2d 640, 593 N.Y.S.2d 966, 609 N.E.2d 506, 1993 N.Y. LEXIS 81 (N.Y. 1993).

In declaratory judgment action by insured gas station operator to require insurer to defend it in underlying action brought by nearby property owners to recover damages for contamination discovered in 1990, allegedly caused by leakage of petroleum products from subsurface tank or pipe, insurer failed to establish that absolute pollution exclusion which had been included in policy for years commencing August 1, 1986 and 1987 was operative for 2 later policy years, where no endorsement listing absolute pollution exclusion was listed on garage liability declarations page of policy for later years, and assertion by insurer's attorney that endorsement should have been appended to each policy was not based on first-hand knowledge. Petr-All Petroleum Corp. v Fireman's Ins. Co., 188 A.D.2d 139, 593 N.Y.S.2d 693, 1993 N.Y. App. Div. LEXIS 1324 (N.Y. App. Div. 4th Dep't 1993).

Pollution exclusion clause in comprehensive general liability policies issued to landowner, which excluded coverage for damage arising out of "discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants or pollutants into or upon land, the atmosphere or any other water course or body of water," exempted insurers from defending landowner in action by adjoining landowner seeking injunctive relief and damages for impairment of its land by "leachate contamination" from landfill. County of Columbia v Continental Ins. Co., 189 A.D.2d 391, 595 N.Y.S.2d 988, 1993 N.Y. App. Div. LEXIS 3502 (N.Y. App. Div. 3d Dep't), app. denied, 82 N.Y.2d 841, 606 N.Y.S.2d 591, 627 N.E.2d 512, 1993 N.Y. LEXIS 4306 (N.Y. 1993), aff'd, 83 N.Y.2d 618, 612 N.Y.S.2d 345, 634 N.E.2d 946, 1994 N.Y. LEXIS 1066 (N.Y. 1994).

Pollution exclusion clause of business liability policy barred insured landlord from obtaining defense or immunity from insurance company in action commenced by tenant against landlord for injuries caused by cigarette smoke, which allegedly seeped into tenant's premises from pool and billiard club in basement of building, where pollution exclusion clause stated that insurance company was not liable for physical or property damages caused by pollutants, and policy defined pollutant to include vapor, smoke and fumes. Demakos v Travelers Ins. Co., 205 A.D.2d 731, 613 N.Y.S.2d 709, 1994 N.Y. App. Div. LEXIS 6610 (N.Y. App. Div. 2d Dep't 1994), overruled in part, Belt Painting Corp. v TIG Ins. Co., 293 A.D.2d 206, 742 N.Y.S.2d 332, 2002 N.Y. App. Div. LEXIS 5146 (N.Y. App. Div. 2d Dep't 2002).

Insurance company was obligated to defend town, despite pollution-exclusion provisions of policy, where underlying actions by property owners did not allege that town was responsible for illegal dumping on property, but rather that town allowed properties to be used as illegal dump sites, negligently failed to enforce Public Health Law, county sanitary code, and other applicable laws, and failed to inspect and remedy contaminated landfill. Town of Harrison v National Union Fire Ins. Co., 219 A.D.2d 640, 631 N.Y.S.2d 420, 1995 N.Y. App. Div. LEXIS 9917 (N.Y. App. Div. 2d Dep't 1995), modified, 89 N.Y.2d 308, 653 N.Y.S.2d 75, 675 N.E.2d 829, 1996 N.Y. LEXIS 3582 (N.Y. 1996).

Provision of policy issued to village, which excluded coverage for claims arising from discharge or release of pollutants, was ambiguous as to whether raw sewage was encompassed within definition of waste where "raw sewage" was not explicitly listed in policy as pollutant, and policy term "waste" was subject to more than one reasonable interpretation; thus, insurer was obligated

to defend and indemnify village in underlying action to recover damages for bodily injury and property damage resulting from overflow of village's sewage system. Incorporated Village of Cedarhurst v Hanover Ins. Co., 223 A.D.2d 528, 636 N.Y.S.2d 390, 1996 N.Y. App. Div. LEXIS 159 (N.Y. App. Div. 2d Dep't), modified, aff'd, 89 N.Y.2d 293, 653 N.Y.S.2d 68, 675 N.E.2d 822, 1996 N.Y. LEXIS 3583 (N.Y. 1996).

Liability insurer was entitled to summary judgment declaring that it was not obligated to defend and indemnify its insured, sewer commission that designed, constructed, and maintained sewage treatment plant pursuant to agreement between village and town, since there was no merit to insured's contention that policy's pollution exclusion clause did not apply to municipal insureds; determinative factor was whether particular entity was in fact responsible for pollution, regardless of whether polluter was commercial agency or otherwise. Tri-Municipal Sewer Comm'n v Continental Ins. Co., 223 A.D.2d 639, 636 N.Y.S.2d 856, 1996 N.Y. App. Div. LEXIS 412 (N.Y. App. Div. 2d Dep't 1996).

Oil-like asphalt sealant applied on roads by plaintiff construction company constituted pollutant within meaning of general liability insurance policy where it dispersed and contaminated waters and wildlife of creek upon its discharge; thus, defendant insurer was entitled to summary judgment in plaintiff's action for indemnification of costs of environmental cleanup based on policy's absolute pollution exclusion clause. Cannon Constr. Co. v Liberty Mut. Ins. Co., 227 A.D.2d 364, 642 N.Y.S.2d 88, 1996 N.Y. App. Div. LEXIS 5273 (N.Y. App. Div. 2d Dep't 1996).

Underlying occurrences did not fall within exception to pollution exclusion in liability insurance policy where considerable litigation had established that exception was not operative unless occurrence was both "sudden" and "accidental," and insured failed to present any facts to support claim that subject pollution was sudden. Merchants Mut. Ins. Co. v Allcity Ins. Co., 245 A.D.2d 590, 664 N.Y.S.2d 690, 1997 N.Y. App. Div. LEXIS 12538 (N.Y. App. Div. 3d Dep't 1997).

Plaintiff's general liability insurer was entitled to summary judgment declaring that policy's pollution exclusion applied to claims asserted in underlying action wherein injured party alleged that, after plaintiff's subcontractor removed furnace, airborne asbestos was released into his home; indoor air contamination can constitute environmental pollution. A-One Oil, Inc. v Massachusetts Bay Ins. Co., 250 A.D.2d 633, 672 N.Y.S.2d 423, 1998 N.Y. App. Div. LEXIS 5556 (N.Y. App. Div. 2d Dep't), app. denied, 92 N.Y.2d 814, 683 N.Y.S.2d 174, 705 N.E.2d 1215, 1998 N.Y. LEXIS 4067 (N.Y. 1998), overruled in part, Belt Painting Corp. v TIG Ins. Co., 293 A.D.2d 206, 742 N.Y.S.2d 332, 2002 N.Y. App. Div. LEXIS 5146 (N.Y. App. Div. 2d Dep't 2002).

Defendant, which was in business of fractionating whole blood plasma into component parts by use of refrigerated centrifuge machines, was entitled to summary judgment declaring that its casualty insurer was obligated to indemnify it for damages resulting from contamination of blood plasma by seepage of ethylene glycol which occurred in processing, as policy's pollution exclusion clause did not apply as matter of law to contamination by leakage within processing machine. Vigilant Ins. Co. v V.I. Techs., 253 A.D.2d 401, 676 N.Y.S.2d 596, 1998 N.Y. App. Div. LEXIS 9189 (N.Y. App. Div. 1st Dep't 1998), app. dismissed, 93 N.Y.2d 999, 695 N.Y.S.2d 744, 717 N.E.2d 1081, 1999 N.Y. LEXIS 1841 (N.Y. 1999).

Insurance company was entitled to summary judgment declaring that it was not obligated to defend and indemnify insureds in underlying action to recover for property damage resulting from petroleum leakage into soil and groundwater, where policies at issue contained unambiguous total pollution exclusions with respect to property damage caused by pollutants. Tartan Oil Corp. v Clark, 258 A.D.2d 457, 684 N.Y.S.2d 600, 1999 N.Y. App. Div. LEXIS 806 (N.Y. App. Div. 2d Dep't), app. denied, 94 N.Y.2d 751, 699 N.Y.S.2d 6, 721 N.E.2d 22, 1999 N.Y. LEXIS 3476 (N.Y. 1999).

Liability insurer was entitled to summary judgment declaring that its insured was not entitled to defense and indemnity of pollution claim, where underlying complaint alleged that hazardous substances "from on and off-site were disposed of" during period when insured owned property in question, which satisfied basic requirement for application of policy's pollution coverage exclusion, and insured failed to offer any evidence to support its argument that alleged on-site disposal triggered "sudden and accidental" exception to policy exclusion. Bresky v Ace INA Holdings, Inc., 287 A.D.2d 912, 731 N.Y.S.2d 791, 2001 N.Y. App. Div. LEXIS 9944 (N.Y. App. Div. 3d Dep't 2001).

Pollution exclusion clause in professional liability insurance policy did not apply to action by owner of condominium for carbon monoxide poisoning caused by furnace installed in utility closet in condominium since release of carbon monoxide from furnace is not occurrence that falls within public understanding of "pollution" and is not implicated by insurance policy's use of terms of art common in environmental law. Kenyon v Security Ins. Co., 163 Misc. 2d 991, 626 N.Y.S.2d 347, 1993 N.Y. Misc. LEXIS 621 (N.Y. Sup. Ct. 1993), aff'd, 206 A.D.2d 980, 616 N.Y.S.2d 133, 1994 N.Y. App. Div. LEXIS 7871 (N.Y. App. Div. 4th Dep't 1994).

167. Particular accidents as involving use of vehicle

There was no coverage under an insurance policy which covered only direct loss resulting from actual physical contact of a vehicle with the property covered under the policy under evidence that the property owner entered into an agreement with a party for the removal of some boilers from the building on the property, that the contractor attached one end of a 100 foot cable to its truck and hooked the other end to a boiler tank and proceeded to pull the tank from the building through the doorway, that in the process of dragging the tank, a barrel which supported a beam or an upright to a beam was dislodged causing the roof of the building to sag resulting in extensive damages. Backer v Newark Ins. Co., 33 A.D.2d 873, 305 N.Y.S.2d 858, 1969 N.Y. App. Div. LEXIS 2550 (N.Y. App. Div. 3d Dep't 1969).

Where a car which the insured had undertaken to forward in the course of its forwarding business, was stolen while parked on a city street, which car had been locked and the key retained by the driver, the insurer was liable where the policy provided coverage against auto theft occurring while said automobile or other property was in the custody of the insured at a location stated in the indorsement or while temporarily removed therefrom in the ordinary course of the insured's business. Tadian v Continental Forwarding, Inc., 33 A.D.2d 334, 308 N.Y.S.2d 148, 1970 N.Y. App. Div. LEXIS 5396 (N.Y. App. Div. 1st Dep't), aff'd, 27 N.Y.2d 930, 318 N.Y.S.2d 145, 266 N.E.2d 824, 1970 N.Y. LEXIS 949 (N.Y. 1970).

Bridge authority's general liability insurer was entitled to summary judgment declaring that it was not obligated to share in cost of settlements paid by bridge authority's automobile insurer to driver and passenger of car that struck bridge authority truck, which had been left standing on roadway of bridge by maintenance man to curb flow of traffic to nonoperational tollgates, as general liability insurance policy contained automobile exclusion clause and, while underlying complaint asserted negligence in operation of bridge as opposed to use of vehicle, accident arose out of use of stationary vehicle. United States Fire Ins. Co. v New York Marine & Gen. Ins. Co., 268 A.D.2d 19, 706 N.Y.S.2d 377, 2000 N.Y. App. Div. LEXIS 2995 (N.Y. App. Div. 1st Dep't 2000).

Where plaintiff was injured by a carton falling from a truck during the process of unloading, since the accident occurred before the goods had finally come to rest in the premises of the consignee, the accident fell within the coverage of the policy dealing with the "use" of a truck. B & D Motor Lines, Inc. v Citizens Casualty Co., 43 N.Y.S.2d 486, 181 Misc. 985, 1943 N.Y. Misc. LEXIS 2255 (N.Y. City Ct. 1943), aff'd, 267 A.D. 955, 48 N.Y.S.2d 472, 1944 N.Y. App. Div. LEXIS 5717 (N.Y. App. Div. 1944).

Where a dog owner's liability policy insured against hazards on designated premises and specifically included the ways immediately joining or adjoining it on land, the insurer's contention that although the policy might cover a driveway or walk immediately adjoining the premises it could be said to cover accidents occurring beyond the center of the roadway was of no avail in the absence of such a definitive limitation in the policy itself, and a jury verdict for the infant plaintiff bitten by the insured's dog only three feet from the sidewalk opposite his premises would not be set aside. Mercado v Rios, 47 Misc. 2d 589, 263 N.Y.S.2d 67, 1965 N.Y. Misc. LEXIS 1636 (N.Y. Civ. Ct. 1965).

Under policy provisions providing coverage for vehicles acquired during the policy period provided the insured notified the company during the policy period or within 30 days of the date of such acquisition, there was coverage where insured notified insurer of accident, which occurred during policy period, involving automobile acquired subsequent to the issuance of the policy. Travelers Indem. Co. v Gaitings, 61 Misc. 2d 558, 306 N.Y.S.2d 224, 1969 N.Y. Misc. LEXIS 968 (N.Y. Sup. Ct. 1969).

Where cruiser was stolen from insured, was seized by police, who held the same as evidence, and the boat sank on two separate occasions while in police custody and was finally destroyed by the Army Corps of Engineers as a hazard to navigation, the insurer was liable despite a clause in the contract of insurance stating: "Warranted free from any claim for loss, damage or expense caused by or resulting from capture, seizure, arrest, restraint or detainment or the consequences thereof or of any attempt thereof, of any taking of the vessel by requisition or otherwise. Sciarrino v Glens Falls Ins. Co., 62 Misc. 2d 223, 308 N.Y.S.2d 165, 1970 N.Y. Misc. LEXIS 1922 (N.Y. Civ. Ct. 1970).

In an action to recover the amount of a loss suffered by plaintiff under a transportation policy insuring plaintiff against loss of goods "at and in transit," there was coverage under evidence that plaintiff, a dealer in antiquated documents decided to exhibit a number of rare documents, books and pamphlets at a show in California; that he shipped cartons in advance and intended to bring some more valuable items with him; that the items he intended to take along were packed in a case; which was placed in his car; that he then drove home, parked his car in front of the house, locked it and went to his apartment intending to leave the car overnight and continue to the airport the next morning when he was to board a plan to California taking the merchandise with him; and in the morning it was discovered that the car had been broken into and the case inside it had been stolen. Franklin v Washington General Ins. Corp., 62 Misc. 2d 965, 310 N.Y.S.2d 648, 1970 N.Y. Misc. LEXIS 1653 (N.Y. Sup. Ct. 1970), aff'd, 36 A.D.2d 688, 319 N.Y.S.2d 383 (N.Y. App. Div. 1st Dep't 1971).

Whether an interruption in actual transit is sufficient to remove the goods from coverage depends on the extent and purpose of the interruption and the context of the risk contemplated. The temporary interruption for purpose related to the carriage itself does not remove the property from transportation. The true test is whether the goods, even though temporarily at rest were still on their way with the stoppage being merely incidental to the main purpose of the delivery. Franklin v Washington General Ins. Corp., 62 Misc. 2d 965, 310 N.Y.S.2d 648, 1970 N.Y. Misc. LEXIS 1653 (N.Y. Sup. Ct. 1970), aff'd, 36 A.D.2d 688, 319 N.Y.S.2d 383 (N.Y. App. Div. 1st Dep't 1971).

Once the transportation of the goods has started the property remains under the protection of the policy during the ordinary delays in transportation incident to such movements and coverage is not confined to periods of actual movement, but includes periods of rest during the progress of the continuous undertaking. Franklin v Washington General Ins. Corp., 62 Misc. 2d 965, 310 N.Y.S.2d 648, 1970 N.Y. Misc. LEXIS 1653 (N.Y. Sup. Ct. 1970), aff'd, 36 A.D.2d 688, 319 N.Y.S.2d 383 (N.Y. App. Div. 1st Dep't 1971).

A woman who fell and was injured on a dangerous mound of snow that was created by a town's allegedly negligent snowplowing of a public highway with a rented truck was not entitled to compensation under the rental company's automobile liability insurance policy, which covered personal injuries caused by an accident resulting from the "use" of any of the trucks rented to the town, since the injury did not result from the town's "use" of the vehicle in that the sine qua non of plaintiff's action was the existence of a dangerous condition due to snow and ice, and the instrumentality by which such condition was created was irrelevant. Duroseau v Hempstead, 124 Misc. 2d 244, 474 N.Y.S.2d 935, 1984 N.Y. Misc. LEXIS 3186 (N.Y. Sup. Ct. 1984), aff'd, 117 A.D.2d 579, 498 N.Y.S.2d 51, 1986 N.Y. App. Div. LEXIS 52846 (N.Y. App. Div. 2d Dep't 1986).

168. Particular types of accidents as outside scope of policy

Commercial insurance policy clause, excluding coverage if "the [vehicle] is not being used exclusively in the business of the named insured...but this limitation shall not apply to a [vehicle] while en route, at the request of the named insured, to engage in such exclusive use and not transporting property for others," was applicable so as to deny coverage in accident that occurred after driver drove vehicle in opposite direction of any work-related function to visit friend following full completion of work day and duties; phrase "en route" was consistent with and buttressed strictly limiting phrase "used exclusively in the business," and did not operate here to undermine unqualified exclusion. Baughman v Merchants Mut. Ins. Co., 87 N.Y.2d 589, 640 N.Y.S.2d 857, 663 N.E.2d 898, 1996 N.Y. LEXIS 62 (N.Y. 1996).

For purpose of regulation which permits limitation of coverage of liability to others to a "lessee or borrower" of a vehicle where injuries are sustained in the process of "loading" or unloading, even if term "loading" were considered applicable to retarded child's boarding of school bus, such "loading" was completed at time of accident where child was ambulatory and was in bus starting to turn to sit in the seat when she fell backward out of bus and sustained personal injuries. Association for Help of Retarded Children, Inc. v Insurance Co. of North America, 59 A.D.2d 518, 397 N.Y.S.2d 109, 1977 N.Y. App. Div. LEXIS 13297 (N.Y. App. Div. 2d Dep't 1977).

In actions grounded in negligence by restaurant patrons who sustained serious personal injuries as the result of an assault committed at the restaurant, wherein it was alleged that the restaurant negligently failed to take proper precautions to protect them, the restaurant's insurer is required to defend its insured despite the fact that the policy excludes claims arising out of assault, since the complaint contained a cause of action grounded in negligence and the insurer's obligation to defend is broader than its duty to pay, although if a judgment grounded solely in assault is obtained against the restaurant, the insurer will not be obligated to indemnify; moreover, even though the insurer delayed more than three years in giving the insured notice of disclaimer, and subdivision 8 of former section 167 [now § 3420(d)] of the Insurance Law estops an insurer from denying coverage for bodily injury for any type of accident occurring within the State where it fails to make a prompt disclaimer, the statute is inapplicable because the injuries occurred prior to its effective date, and the common law will not estop the insurer from disclaiming liability since no prejudice was shown by the delay. Western World Ins. Co. v Jean & Benny's Restaurant, Inc., 69 A.D.2d 260, 419 N.Y.S.2d 163, 1979 N.Y. App. Div. LEXIS 11351 (N.Y. App. Div. 2d Dep't), app. dismissed, 48 N.Y.2d 653, 421 N.Y.S.2d 202, 396 N.E.2d 485, 1979 N.Y. LEXIS 2269 (N.Y. 1979).

Pursuant to Insurance Law § 3420[d], it is not necessary to show prejudice caused by insurer's delay in giving written notice of disclaimer; accordingly, where plaintiff insurance company or its adjuster has knowledge of facts governing exclusion in its policy as early as March 24, 1982, yet does not commence its declaratory judgment action until two years later, such delay is prejudicial to insured as matter of law and plaintiff insurer is estopped from disclaiming coverage. Dryden Mut. Ins. Co. v Michaud, 115 A.D.2d 150, 495 N.Y.S.2d 509, 1985 N.Y. App. Div. LEXIS 54412 (N.Y. App. Div. 3d Dep't 1985).

Liability insurer of passenger injured in vehicle insured by another company was entitled to summary judgment declaring that it was not required to afford her "no-fault" protection where passenger's policy did not provide "no-fault" coverage for injuries sustained by passenger while occupying another vehicle with respect to which "no-fault" coverage was in effect, and policy covering vehicle in which she was riding when injured provided "no-fault" coverage; even though "no-fault" coverage under vehicle's policy had been ruled excluded by arbitrator under provision governing liability coverage, "no-fault" endorsement was "internally complete and a distinct part of the insurance policy" and thus its coverage could not be qualified by liability portion of policy. Eveready Ins. Co. v Asante, 153 A.D.2d 874, 545 N.Y.S.2d 585, 1989 N.Y. App. Div. LEXIS 11802 (N.Y. App. Div. 2d Dep't 1989).

Court erred in granting summary judgment to liability insurer in its action seeking declaration that it was not obligated to cover injuries attributable to assaults to which insured pleaded guilty in criminal proceedings, given policy disclaimer of coverage for

bodily injury "expected or intended by the insured," since question of fact existed regarding insured's ability to form intent to commit acts complained of by virtue of his claim, supported by evidence from qualified psychiatrist, that he was suffering from schizoaffective disorder at time of assaults. Home Mut. Ins. Co. v Preston, 155 A.D.2d 932, 547 N.Y.S.2d 754, 1989 N.Y. App. Div. LEXIS 14788 (N.Y. App. Div. 4th Dep't 1989), app. dismissed, 75 N.Y.2d 947, 555 N.Y.S.2d 694, 554 N.E.2d 1282, 1990 N.Y. LEXIS 730 (N.Y. 1990).

Intentional assault by insured was not covered under insurance policy providing liability coverage only for bodily injury caused by occurrence, defined as "accident." Ward v Security Mut. Ins. Co., 192 A.D.2d 1000, 597 N.Y.S.2d 227, 1993 N.Y. App. Div. LEXIS 4424 (N.Y. App. Div. 3d Dep't), app. denied, 82 N.Y.2d 655, 602 N.Y.S.2d 803, 622 N.E.2d 304, 1993 N.Y. LEXIS 3090 (N.Y. 1993).

Insurers had no duty to defend and indemnify insured in third-party action brought against insured to recover for costs of clean-up of hazardous substances found at landfill operated by insured from 1957 to 1987, since (1) to be considered "sudden" within meaning of pollution exclusion clause of insured's policies, release or discharge must have occurred abruptly or quickly, and complaints did not so allege, but rather inferred that discharge occurred over long period of time, and (2) underlying complaint alleged that insured disposed of wastes at landfill site for number of years, making discharge on its face not "accidental" as required by pollution exclusion clause. County of Fulton v United States Fidelity & Guar. Co., 195 A.D.2d 864, 600 N.Y.S.2d 972, 1993 N.Y. App. Div. LEXIS 7534 (N.Y. App. Div. 3d Dep't 1993).

Insurers had no duty to defend and indemnify insured in third-party action brought against insured to recover for costs of clean-up of hazardous substances found at landfill operated by insured from 1957 to 1987, since (1) to be considered "sudden" within meaning of pollution exclusion clause of insured's policies, release or discharge must have occurred abruptly or quickly, and complaints did not so allege, but rather inferred that discharge occurred over long period of time, and (2) underlying complaint alleged that insured disposed of wastes at landfill site for number of years, making discharge on its face not "accidental" as required by pollution exclusion clause. County of Fulton v United States Fidelity & Guar. Co., 195 A.D.2d 864, 600 N.Y.S.2d 972, 1993 N.Y. App. Div. LEXIS 7534 (N.Y. App. Div. 3d Dep't 1993).

Under homeowners' policy, insurer was not required to defend or indemnify its insured in action alleging that insured wrongfully entered upon plaintiff's land and placed or erected earthen berms thereon, for which plaintiff sought damages, since (1) gravamen of complaint did not seek damages by reason of improper use of insured's property, (2) if it were determined that parcel was in fact insured's (insured answered and asserted, inter alia, that he had acquired parcel by adverse possession), there would be no need for indemnification, and likewise no duty to defend, and (3) if insured erred as to extent of his property, his acts in changing landscape of plaintiff's property were intentional, not accidental, and would not constitute "occurrence" within meaning of policy. People v Helinski, 203 A.D.2d 659, 610 N.Y.S.2d 376, 1994 N.Y. App. Div. LEXIS 3837 (N.Y. App. Div. 3d Dep't), app. denied, 84 N.Y.2d 804, 618 N.Y.S.2d 6, 642 N.E.2d 325, 1994 N.Y. LEXIS 3110 (N.Y. 1994).

Commercial general liability policy issued to contractor provided coverage for claim against contractor based on allegations that contractor was negligent in failing to build house entirely on owners' lot since placement of house partially on neighboring parcel was unintended result of contractor's intentional act to build house where it was, which was sufficient to establish that result was accidental for insurance coverage purpose; further, inasmuch as owners sought to recover for actual damage to their real property caused by contractor's negligent placement of house on property line, work product and loss of use exclusions relied on by insurer were inapplicable. Saks v Nicosia Contracting Corp., 215 A.D.2d 832, 625 N.Y.S.2d 758, 1995 N.Y. App. Div. LEXIS 4796 (N.Y. App. Div. 3d Dep't 1995).

Although vehicle that collided with individual was being operated by employee of garage that was named insured in "Garage Policy," bodily injury suffered did not result from "garage operations" within meaning of policy where, at time of accident, employee was using vehicle for purposes wholly unrelated to garage business. Empire Group Allcity Ins. Co. v Cicciaro, 240 A.D.2d 362, 658 N.Y.S.2d 112, 1997 N.Y. App. Div. LEXIS 5801 (N.Y. App. Div. 2d Dep't 1997).

Bar owner's general liability insurance policy's exclusion of coverage of personal injury "arising from [a]ssault and battery committed by an insured, any employee of any insured, or any other person, whether committed by or at the direction of the insured" applied to customer's injuries, even if they resulted from bouncer's negligence, where injuries "arose from" assault and battery in altercation involving customers and bouncers. Tower Ins. Co. v Old Northern Blvd. Restaurant Corp., 245 A.D.2d 241, 666 N.Y.S.2d 636, 1997 N.Y. App. Div. LEXIS 13418 (N.Y. App. Div. 1st Dep't 1997).

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In insured's action for breach of commercial general liability policies and for declaration of its right to indemnification under those policies for its investigation and remediation costs in connection with environmental damage at commercial waste disposal sites, insurers' motion to dismiss was not jurisdictionally deficient, either because motion papers did not identify particular subdivision of CLS CPLR § 3211(a) relied on or because supporting affidavit contained no factual averments but merely served as vehicle for submission of complaint and its attachments, where notice of motion clearly indicated that dismissal was being sought on basis of documentary evidence in form of "absolute pollution exclusion" in policies appended to insured's complaint, documents submitted were sufficient to allow decision on that ground, and insured's responding papers showed that it had ample opportunity to raise, and did raise, substantive arguments that it believed were germane to resolution of motion. Schenectady Int'l v Employers Ins., 245 A.D.2d 754, 665 N.Y.S.2d 455, 1997 N.Y. App. Div. LEXIS 12960 (N.Y. App. Div. 3d Dep't 1997).

In insured's action for breach of commercial general liability policies and for declaration of its right to indemnification under those policies for its investigation and remediation costs in connection with environmental damage at commercial waste disposal sites, complaint was properly dismissed on ground of documentary evidence under CLS CPLR § 3211(a) where policies contained "absolute pollution exclusion" of coverage for costs and expenses occasioned by release or dispersion of pollutants, regardless of nature or cause of discharge or culpability of insured, and nothing in exclusion or remainder of policy language was ambiguous as to whether coverage was provided for accidental discharges or when insured was not actual polluter. Schenectady Int'l v Employers Ins., 245 A.D.2d 754, 665 N.Y.S.2d 455, 1997 N.Y. App. Div. LEXIS 12960 (N.Y. App. Div. 3d Dep't 1997).

Public policy considerations did not require that "absolute pollution exclusion" in commercial general liability policies be interpreted as inapplicable to case involving environmental damage at commercial waste disposal sites where insured's reliance on public policy concerns underlying former Insurance Law provision prohibiting insurers from offering coverage for certain pollution-related costs was misplaced, because interests that prompted enactment of that statute—desire "to assure that corporate polluters bear the full burden of their own actions spoiling the environment" and to eliminate availability of insurance coverage that might remove financial disincentives to engaging in such actions—did not militate against use of broader exclusion in subject insurance policies. Schenectady Int'l v Employers Ins., 245 A.D.2d 754, 665 N.Y.S.2d 455, 1997 N.Y. App. Div. LEXIS 12960 (N.Y. App. Div. 3d Dep't 1997).

Servicing of ships was not included in general liability policy where insured represented on its application for insurance that

its work was "boat builder" involving "construction of a vessel," and insurance policy listed classification of insurance as "boat or ship building"; thus, policy did not cover accident that occurred when worker was engaged in "unstepping" and later "restepping" mainmast of boat to permit it to pass through barge canal. Continental Ins. Co. v Estate of Benton, 896 F. Supp. 272, 1995 U.S. Dist. LEXIS 12681 (N.D.N.Y. 1995).

Three deliberate collisions caused in furtherance of an insurance fraud scheme were not a covered accidents; the insurer was not required by N.Y. Ins. Law § 3420(d) to issue a disclaimer because its denial of coverage was based on a lack of coverage for the incident in the first instance, not an exclusion under the policy. State Farm Mut. Auto. Ins. Co. v Laguerre, 305 A.D.2d 490, 759 N.Y.S.2d 531, 2003 N.Y. App. Div. LEXIS 5387 (N.Y. App. Div. 2d Dep't 2003).

169. Ambiguities within policy

Any doubt as to the construction of an ambiguous insurance policy should be interpreted in favor of the insured. Birnbaum v Jamestown Mut. Ins. Co., 298 N.Y. 305, 83 N.E.2d 128, 298 N.Y. (N.Y.S.) 305, 1948 N.Y. LEXIS 788 (N.Y. 1948).

Interpretation of insurance policy is issue of law which can be decided by Court of Appeals on appellate review when there are no questions of credibility and no inferences to be drawn from extrinsic evidence. State v Home Indem. Co., 66 N.Y.2d 669, 495 N.Y.S.2d 969, 486 N.E.2d 827, 1985 N.Y. LEXIS 17199 (N.Y. 1985).

Terms of underinsured motorist coverage, providing that $100,000 per person policy limit "is the amount of coverage for all damages due to bodily injury to one person" and that $300,000 limits of liability for "'Each Accident' is the total amount of coverage for all damages due to bodily injury to 2 or more persons in the same accident," were ambiguous where policy did not contain any language deeming $300,000 per accident limit "subject to" per-person limit; thus, policy terms would be construed in favor of insureds. Mostow v State Farm Ins. Cos., 88 N.Y.2d 321, 645 N.Y.S.2d 421, 668 N.E.2d 392, 1996 N.Y. LEXIS 1169 (N.Y. 1996).

Phrases "based on" and "arising out of," when used in insurance policy exclusion clauses, are unambiguous and legally indistinguishable. Mount Vernon Fire Ins. Co. v Creative Hous., 88 N.Y.2d 347, 645 N.Y.S.2d 433, 668 N.E.2d 404, 1996 N.Y. LEXIS 1182 (N.Y. 1996).

Policy requirement that insured give written notice of underinsurance claim "within 90 days or as soon as practicable" would be interpreted to mean "90 days from date insured knew or should reasonably have known that tortfeasor was underinsured or as soon as practicable, whichever was longer," not "90 days from accident or as soon as practicable, whichever was shorter"; notice provision drafted by insurer was ambiguous, and thus was construed against insurer. Metropolitan Prop. & Cas. Ins. Co. v Mancuso, 93 N.Y.2d 487, 693 N.Y.S.2d 81, 715 N.E.2d 107, 1999 N.Y. LEXIS 1296 (N.Y. 1999).

"Issued or delivered," in the context of N.Y. Ins. Law § 3420(a), encompasses situations where both insureds and risks are located in New York. Carlson v American Intl. Group, Inc., 30 N.Y.3d 288, 89 N.E.3d 490, 67 N.Y.S.3d 100, 2017 N.Y. LEXIS 3280 (N.Y. 2017).

Court erred in declaring that plaintiff, company that merely transported equipment to work site, was "additional insured," defined under policy as "all general contractors and all tiers of sub-subcontractors,..." since terms "contractors" and "subcontractors" were ambiguous and court did not utilize evidence of insurance manual, incorporated by reference in construction contract, and change order to construction contract which provided that "others who merely transport, pick up, deliver or carry materials... to or from the Work Site shall not be considered Contractor(s), subcontractors or sub-subcontractors for purposes of insurance coverage." Higgins Erectors & Haulers, Inc. v Niagara Frontier Transp. Authority, 140 A.D.2d 982, 529 N.Y.S.2d 654, 1988 N.Y. App. Div. LEXIS 6253 (N.Y. App. Div. 4th Dep't), app. dismissed, 73 N.Y.2d 851, 537 N.Y.S.2d 495, 534 N.E.2d 333, 1988 N.Y. LEXIS 3552 (N.Y. 1988).

Issue of fact existed as to whether insurance company had agreed to provide coverage to general contractor under policy issued to its insured, which was subcontractor hired to erect structural steel and metal roofing, since (1) contractual liability endorsement of policy ran only to subcontractor and not to general contractor, and (2) certificate of insurance which named general contractor as additional insured was evidence of company's agreement to provide coverage to general contractor but was neither conclusive proof of existence of such contract nor, in and of itself, contract to insure general contractor. Bucon, Inc. v Pennsylvania Mfg. Asso. Ins. Co., 151 A.D.2d 207, 547 N.Y.S.2d 925, 1989 N.Y. App. Div. LEXIS 14183 (N.Y. App. Div. 3d Dep't 1989).

Where insurance policy is ambiguous and no extrinsic evidence is offered from which jury could conclude that policy should be interpreted in favor of insurer, verdict in favor of insured should be directed as matter of law. Tri Town Antlers Foundation, Inc. v Fireman's Fund Ins. Co., 158 A.D.2d 908, 550 N.Y.S.2d 953, 1990 N.Y. App. Div. LEXIS 1401 (N.Y. App. Div. 4th Dep't), aff'd, 76 N.Y.2d 841, 560 N.Y.S.2d 124, 559 N.E.2d 1283, 1990 N.Y. LEXIS 1983 (N.Y. 1990).

Absolute pollution exclusion endorsement providing that policy did not apply "to bodily injury or property damage arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants...which are at any time transported, handled, stored, treated, disposed of, or processed as waste" could be reasonably interpreted to apply only to instances of environmental pollution, and thus was ambiguous as to whether environment encompassed air within residential home through which asbestos fibers passed. Miano v Hehn, 206 A.D.2d 957, 614 N.Y.S.2d 829, 1994 N.Y. App. Div. LEXIS 7663 (N.Y. App. Div. 4th Dep't 1994).

"Underinsured motorist" endorsement of insurance policy was not ambiguous on basis that it did not contain notice requirements included in "uninsured motorist" endorsement where it specifically stated that it was amendment to uninsured motorist endorsement which included requisite notice provisions. Nationwide Ins. Co. v O'Halloran, 209 A.D.2d 701, 619 N.Y.S.2d 159, 1994 N.Y. App. Div. LEXIS 11680 (N.Y. App. Div. 2d Dep't 1994).

Subrogation provision of uninsured motorist provisions of policy could not be applied against insured where subrogation clause was ambiguous as to whether term "another" included named insured. American Mfrs. Mut. Ins. Co. v Sullivan, 219 A.D.2d 806, 632 N.Y.S.2d 49, 1995 N.Y. App. Div. LEXIS 10816 (N.Y. App. Div. 4th Dep't 1995).

Insurer was entitled to enforce "Paragraph B" of "Limit of Liability" portion of underinsurance endorsement, authorizing insurer to reduce damages payable under endorsement by amounts paid or payable to its insured for bodily injury under workers' compensation or disability benefit laws; because declarations page incorporated underinsurance endorsement by reference to its number, and endorsement unequivocally provided for offset for disability benefits received by insured, no ambiguity existed precluding enforcement of that provision. Exchange Ins. Co. v Skomski, 224 A.D.2d 948, 637 N.Y.S.2d 561, 1996 N.Y. App. Div. LEXIS 1586 (N.Y. App. Div. 4th Dep't 1996).

Provision of automobile liability policy, which excluded coverage for newly acquired car "if there is other vehicle liability coverage on a newly acquired car," was not ambiguous with respect to existence of coverage for new truck purchased by insured and his son and operated by son, which was covered under separate insurance policy issued to son; thus, insurer was entitled to judgment declaring that policy issued to father did not apply to claim asserted by plaintiff, who was involved in collision with truck driven by son. Bucklin v State Farm Ins. Co., 234 A.D.2d 984, 651 N.Y.S.2d 822, 1996 N.Y. App. Div. LEXIS 13753 (N.Y. App. Div. 4th Dep't 1996).

Homeowner's policy exclusion of coverage for bodily injury arising out of transmission of "communicable disease" by insured was neither ambiguous nor unduly broad, and thus insurer was entitled to summary judgment declaring that it had no duty to defend and indemnify plaintiff's action for personal injuries sustained as result of transmission of HIV infection to him by insured. Plaza v General Assur. Co., 244 A.D.2d 238, 664 N.Y.S.2d 444, 1997 N.Y. App. Div. LEXIS 11722 (N.Y. App. Div. 1st Dep't

1997), app. denied, 92 N.Y.2d 805, 677 N.Y.S.2d 781, 700 N.E.2d 320, 1998 N.Y. LEXIS 2292 (N.Y. 1998), cert. denied, 525 U.S. 1122, 119 S. Ct. 905, 142 L. Ed. 2d 903, 1999 U.S. LEXIS 773 (U.S. 1999).

Insurance policy effective "from 12/31/88 midnight to 12/31/89 midnight" was in effect at time of accident occurring at 9:00 A.M. on December 31, 1988; word "midnight" was ambiguous, and such ambiguity would be construed against insurer so as to provide coverage as of termination of policy at 12:01 A.M. Mumuni v Eagle Ins. Co., 247 A.D.2d 315, 668 N.Y.S.2d 464, 1998 N.Y. App. Div. LEXIS 1609 (N.Y. App. Div. 1st Dep't), app. dismissed, in part, app. denied, 92 N.Y.2d 940, 680 N.Y.S.2d 903, 703 N.E.2d 762, 1998 N.Y. LEXIS 3692 (N.Y. 1998).

Insurer was not entitled to permanent stay of arbitration of underinsured motorist claim where present case was indistinguishable from Matter of Federal Ins. Co. v Stechman, 192 AD2d 531, in which there was similar policy provision requiring insured to promptly forward to insurer copies of legal papers served in connection with any action brought by insured against owner or driver of offending vehicle, and Stechman court held that term "legal papers" was ambiguous, that compliance with that provision was not condition precedent to underinsured motorist coverage, and that insured's failure to comply did not result in forfeiture of right to underinsurance benefits. Nationwide Ins. Co. v Sobiesiuk, 263 A.D.2d 510, 691 N.Y.S.2d 925, 1999 N.Y. App. Div. LEXIS 8108 (N.Y. App. Div. 2d Dep't 1999).

Where terms of personal liability umbrella policy were, at best, ambiguous as to whether particular accident would be covered, ambiguity would be construed against insurer, and matter would be remitted for entry of summary judgment declaring that policy provided coverage for accident. Allstate Ins. Co. v Young, 265 A.D.2d 278, 696 N.Y.S.2d 189, 1999 N.Y. App. Div. LEXIS 9670 (N.Y. App. Div. 2d Dep't 1999).

Owner of apartment building was entitled to summary judgment declaring that defendant insurer was obligated to indemnify it for sums paid to settle underlying personal injury action, because fact that insurance was denominated as "owner's liability insurance" rather than "comprehensive liability insurance" did not raise any question as to parties' clear intent that owner be provided with insurance protecting it against liability claims for bodily injury arising from operations of elevator contractor and his subcontractors where elevator contractor, before commencing work on building, had contracted with owner to procure comprehensive liability insurance naming owner as additional insured. New York City Hous. Auth. v National Union Fire Ins. Co., 270 A.D.2d 123, 705 N.Y.S.2d 45, 2000 N.Y. App. Div. LEXIS 2989 (N.Y. App. Div. 1st Dep't 2000).

Specially negotiated endorsement requiring that periodic "loss run" reports be sent to insurer under commercial general liability policy did not supersede policy provision requiring, as condition of coverage, that insured give insurer notice of any occurrence within 15 days of learning about it or as soon as was reasonably practicable thereafter where (1) endorsement provided that notice conditions "shall be amended by the addition of new paragraph (e)" set forth in endorsement, which thus purported only to add requirements to existing ones, (2) when endorsements were intended to supersede policy provisions, they included language stating that relevant provision "is deleted and replaced by the following," and (3) endorsement could reconciled with notice provisions by construing it as requiring insured to give insurer specified information irrespective of whether such information related to claim that was entirely within insured's self-insured retentions or was otherwise outside scope of coverage under policy. Steadfast Ins. Co. v Sentinel Real Estate Corp., 283 A.D.2d 44, 727 N.Y.S.2d 393, 2001 N.Y. App. Div. LEXIS 5695 (N.Y. App. Div. 1st Dep't 2001).

Provision of social worker's professional liability policy which limited coverage to $25,000 whenever malpractice suit against insured involved actual or alleged "erotic physical contact" was unambiguous, although term "erotic physical contact" was not defined in policy; such term, given its normal or plain meaning, could be reasonably construed to mean "sexual contact." American Home Assur. Co. v Levy, 179 Misc. 2d 773, 686 N.Y.S.2d 639, 1999 N.Y. Misc. LEXIS 66 (N.Y. Sup. Ct. 1999).

In insureds' action seeking coverage for liability for workers' compensation benefits to their live-in housekeeper who was injured in course of her employment, wherein insureds maintained that they voluntarily elected to cover housekeeper and thus brought her within class of workers covered by Workers' Compensation Law for purposes of endorsement provided for in their homeowners' insurance policy, ambiguity in endorsement arose because it was unclear whether second condition of endorsement (whether insured's employee was one for whom workers' compensation benefits "must be provided") was satisfied by existence of endorsement itself. Haber v St. Paul Guardian Ins. Co., 137 F.3d 691, 1998 U.S. App. LEXIS 2416 (2d Cir. N.Y. 1998).

Contra proferentem rule in which courts will interpret policy against insurer does not apply in actions by one insurer against another, or where party is both insurer and insured (as in marine protection and indemnity (P&I) clubs). Dicola v American S.S. Owners Mut. Protection & Indem. Assoc. (In re Prudential Lines), 158 F.3d 65, 1998 U.S. App. LEXIS 24614 (2d Cir. N.Y. 1998).

Shipping line was within its contract rights to designate one policy to pay all of any asbestos-exposure claim covered by that policy (subject of course to exhaustion of policy limits) where policy did not show clear intent to allocate policyholder's claim among policies in first instance and no contract or equitable consideration militated in favor of such allocation under circumstances of case. Dicola v American S.S. Owners Mut. Protection & Indem. Assoc. (In re Prudential Lines), 158 F.3d 65, 1998 U.S. App. LEXIS 24614 (2d Cir. N.Y. 1998).

170. Conflict between policy and statutory requirements

The exclusion of guest coverage in an insurance policy provided by a corporation renting motor vehicles did not violate subdivision 2 of former section 167 [now § 3420(e)] of the Insurance Law where a van was rented in New York by a New York resident who was to deliver the van three days later to the lessor in Maine, inasmuch as the mandatory provisions of subdivision 2 of former section 167 [now § 3420(e)], one of which required coverage for injuries suffered by a passenger in the vehicle (Vehicle and Traffic Law, § 311; 11 NYCRR 60.1), are applicable only to policies issued on vehicles principally garaged or used in this State and the vehicle in question was registered in Massachusetts and was only temporarily in New York. Travelers Indem. Co. v Ryder Truck Rental, Inc., 47 N.Y.2d 139, 417 N.Y.S.2d 53, 390 N.E.2d 771, 1979 N.Y. LEXIS 1992 (N.Y. 1979).

Policy provision limiting uninsured motorist coverage to accidents occurring in state was void as against public policy of providing broad insurance coverage for members of public injured by motor vehicles. Insurance Co. of North America v Godwin, 46 A.D.2d 154, 361 N.Y.S.2d 461, 1974 N.Y. App. Div. LEXIS 3442 (N.Y. App. Div. 4th Dep't 1974).

The absence of an obligation to defend in an automobile operator's insurance policy, even if not designed to subvert public policy, may be contrary to law since New York has a clearly announced policy relating to the obligation to defend in this context. Chrapa v Johncox, 60 A.D.2d 55, 401 N.Y.S.2d 332, 1977 N.Y. App. Div. LEXIS 13963 (N.Y. App. Div. 4th Dep't 1977), app. dismissed, 44 N.Y.2d 836, 406 N.Y.S.2d 757, 378 N.E.2d 120, 1978 N.Y. LEXIS 2028 (N.Y. 1978), app. dismissed, 44 N.Y.2d 851, 1978 N.Y. LEXIS 4703 (N.Y. 1978).

Underage nonliability clause in motor vehicle insurance policy was invalid under CLS Veh & Tr § 345(b)(2) where it unconditionally excluded from coverage drivers under age 25 who operated insured vehicle with consent of named insured as owner. Mosca v Ford Motor Credit Co., 150 A.D.2d 656, 541 N.Y.S.2d 528, 1989 N.Y. App. Div. LEXIS 7106 (N.Y. App. Div. 2d Dep't 1989).

The terms of an automobile liability policy which violate or limit free force and effect of former § 109 [predecessor to former § 167, now § 3420] are illegal. The policy will, nevertheless, be held valid and deemed to include provisions required by former § 109 [Now § 3420]. Travelers' Ins. Co. v Russo, 280 N.Y.S. 99, 155 Misc. 589, 1935 N.Y. Misc. LEXIS 1199 (N.Y. App. Term 1935).

Although former § 109 [predecessor to former § 167, now § 3420] provides for action "under terms of policy," the policy may not contain any provision, such as providing for payment to

insured only on entry of final judgment, which would deprive injured person of rights expressly granted in statute. Youknot v United States Fidelity & Guaranty Co., 283 N.Y.S. 902, 158 Misc. 83, 1935 N.Y. Misc. LEXIS 1602 (N.Y. Sup. Ct.), aff'd, 245 A.D. 705, 281 N.Y.S. 968, 1935 N.Y. App. Div. LEXIS 10429 (N.Y. App. Div. 1935).

The Insurance Law requires that each policy issued meet standard minimum requirements without regard to the legality of operation or the age of the operator, and no automobile lease arrangement may nullify these requirements. Aetna Casualty & Surety Co. v World Wide Rent-A-Car, Inc., 52 Misc. 2d 552, 276 N.Y.S.2d 401, 1966 N.Y. Misc. LEXIS 1176 (N.Y. Sup. Ct. 1966), modified, 28 A.D.2d 286, 284 N.Y.S.2d 807, 1967 N.Y. App. Div. LEXIS 2928 (N.Y. App. Div. 1st Dep't 1967).

While an insurance policy ordinarily is merely a contract between the insurer and the insured, and the contract and the intent of the parties is controlling, when said policy is certified by the insurance company and filed with the Motor Vehicle Bureau to satisfy the requirements of a statute said contract ceases to be just a private contract because then the public interest is involved and the public interest supervenes and the policy then must conform to the requirements of the statute. Mills v Liberty Mut. Ins. Co., 60 Misc. 2d 1085, 304 N.Y.S.2d 801, 1969 N.Y. Misc. LEXIS 1337 (N.Y. Sup. Ct. 1969), rev'd, 36 A.D.2d 445, 321 N.Y.S.2d 230, 1971 N.Y. App. Div. LEXIS 3983 (N.Y. App. Div. 4th Dep't 1971).

An intrafamily exclusion for bodily injuries to resident relatives of the insured contained in a recreational vehicle insurance policy would be declared void as against public policy, except as it might apply to any liability of one spouse for injuries to the other spouse, which could be validly excluded under Ins Law § 167(3) [now § 3420], and the insurer would be ordered to defend and indemnify the insureds in a bodily injury action by the insureds' son arising from a motor boat accident, since approval of the contested exclusions by the State Superintendent of Insurance was improper and involved an erroneous construction of the provisions of Ins Law §§ 167(1), 167(2) [now both § 3420], which express a policy that persons injured as a result of the use and operation of a vessel be protected against financially irresponsible users of such vessels, and since such public policy must take precedence over the general right of parties to a contract to dictate its terms when such contract is a policy of casualty insurance required by law. Allstate Ins. Co. v Anzalone, 119 Misc. 2d 222, 462 N.Y.S.2d 738, 1983 N.Y. Misc. LEXIS 3491 (N.Y. Sup. Ct. 1983).

The actual terms of a policy should not be disregarded as between an insured and insurer notwithstanding provisions of former § 109 [predecessor to former § 167, now § 3420] that a policy shall "be deemed to include the provisions required" and that "when any provision in such policy . . . is in conflict with the provisions required . . . the rights, duties and obligations of the insurer, the policyholder and the injured person shall be governed by the provisions of this section." Larkin v Munson S.S. Line, 100 F.2d 393, 1938 U.S. App. LEXIS 2659 (2d Cir. N.Y. 1938).

Where there is a conflict between the provisions in the policy and former § 109 [predecessor to former § 167, now § 3420] the rights, duties and obligations of an insurer, and the injured person and the policyholder are governed by the provisions of former § 109 [Now § 3420]. Eber Bros. Wine & Liquor Corp. v Firemen's Ins. Co., 30 F. Supp. 412, 1939 U.S. Dist. LEXIS 2047 (D.N.Y. 1939).

171. Period of limitation on actions contained in policy

An arbitrator who is to hear a controversy by a claimant against the MVAIC is not permitted to import a three-year time limitation into the contract by virtue of former § 167 [now § 3420]. De Luca v Motor Vehicle Accident Indemnification Corp., 17 N.Y.2d 76, 268 N.Y.S.2d 289, 215 N.E.2d 482, 1966 N.Y. LEXIS 1545 (N.Y. 1966).

The 1-year period of limitation for suit against an insurer in a merchandise floater insurance policy does not begin to run until the insured is in a position to institute action against the insurer. Hence, where a shipper sued a trucker for loss of goods, the trucker's third party complaint against this insurer should not have been dismissed though more than three years had elapsed since the loss and the policy provided that suit could not be brought unless commenced within twelve months "after the happening of the loss". The insurer had prompt notice of the theft but took three years to investigate and then, when the trucker was sued, disclaimed liability. Sassi v Jersey Trucking Service, Inc., 283 A.D. 73, 126 N.Y.S.2d 389, 1953 N.Y. App. Div. LEXIS 2982 (N.Y. App. Div. 1953).

In an action for lost wages under no-fault insurance, an arbitrator's award that barred the claimant from receiving wage loss benefits after claimant had delayed 32 months in filing an application for wage loss, would be confirmed where the policy indorsement had required written notice as soon as reasonably practicable, and where there had been no reasonable basis for the delay. Prainito v Aetna Casualty & Surety Co., 91 A.D.2d 575, 457 N.Y.S.2d 64, 1982 N.Y. App. Div. LEXIS 19402 (N.Y. App. Div. 1st Dep't 1982).

A limitation in an automobile liability insurance policy of two years from the time the judgment against the insured has been entered in which to bring an action against the insurer for any loss under the policy is binding on an injured third person who sues the insurer under this section. The two-year period of limitation is not unreasonable nor restrictive of any rights conferred on an injured third person by predecessor to § 3420, as it existed in 1935. Matelsky v Globe Indem. Co., 294 N.Y.S. 588, 162 Misc. 326, 1937 N.Y. Misc. LEXIS 1594 (N.Y. App. Term 1937).

The statute of limitations on a liability policy, which required that an action should be commenced within twelve months after the loss, begins to run from the date of judgment on the policy and not from the date of the loss by virtue of former § 109 [precedessor to former § 167, now § 3420] Eber Bros. Wine & Liquor Corp. v Firemen's Ins. Co., 30 F. Supp. 412, 1939 U.S. Dist. LEXIS 2047 (D.N.Y. 1939).

172. Insurer's duty to defend

When insured has been sued, insurer does not satisfy its duty to defend merely by designating independent counsel to defend litigation. Feliberty v Damon, 72 N.Y.2d 112, 531 N.Y.S.2d 778, 527 N.E.2d 261, 1988 N.Y. LEXIS 1657 (N.Y. 1988).

In action for declaration as to obligation of insurance carrier to defend and indemnify insured for its liability for loss resulting from theft of property from its premises, court should have applied New Jersey law since New Jersey had most contacts with insurance policy under grouping of contacts concept where (1) policy was issued by New Jersey insurer to New Jersey corporation to insure against losses "happening anywhere," (2) loss occurred in New Jersey, and (3) plaintiff's liability for loss was litigated in New Jersey; fact that policy was placed through New York insurance broker which negotiated its terms was not sufficient contact with New York to preclude application of lex loci delicti commissi in favor of lex loci contractus. Regional Import & Export Trucking Co. v North River Ins. Co., 149 A.D.2d 361, 539 N.Y.S.2d 940, 1989 N.Y. App. Div. LEXIS 4834 (N.Y. App. Div. 1st Dep't 1989).

Homeowners were not entitled to select counsel of their own choice in personal injury action against them which alleged negligent entrustment of all terrain vehicle (ATV) to homeowners' son and negligent operation of ATV, notwithstanding that their insurance company commenced declaratory judgment action to determine scope of its duty to defend and provide coverage under policy, since insurance company's interest in disproving negligent entrustment by homeowners did not conflict with homeowners' interest in defeating both negligent entrustment and negligence claims. Prudential Property & Casualty Ins. Co. v Godfrey, 169 A.D.2d 1035, 565 N.Y.S.2d 315, 1991 N.Y. App. Div. LEXIS 891 (N.Y. App. Div. 3d Dep't 1991).

Insurer was not obligated to defend insured in administrative proceedings, which sought only voluntary participation and negotiation, and did not threaten litigation, since such proceedings were not functional equivalent of lawsuits within meaning of policy. Borg-Warner Corp. v Insurance Co. of North America, 174 A.D.2d 24, 577 N.Y.S.2d 953, 1992 N.Y. App. Div. LEXIS 109 (N.Y. App. Div. 3d Dep't), app. denied, 80 N.Y.2d 753, 587 N.Y.S.2d 905, 600 N.E.2d 632, 1992 N.Y. LEXIS 1631 (N.Y. 1992).

Court would apply New York law in action seeking declaration that insurers were obligated under various comprehensive liability insurance policies to defend and indemnify insured against underlying claims arising from its disposal of hazardous waste at 19 sites across county where (1) 7 of 19 contaminated sites were in New York, with balance scattered throughout country, (2) New York had unique policy-based interest in pollution exclusion clause, (3) insured chose New York as forum for action, and (4) insured had relied primarily on New York authority to support its arguments. Borg-Warner Corp. v Insurance Co. of North America, 174 A.D.2d 24, 577 N.Y.S.2d 953, 1992 N.Y. App. Div. LEXIS 109 (N.Y. App. Div. 3d Dep't), app. denied, 80 N.Y.2d 753, 587 N.Y.S.2d 905, 600 N.E.2d 632, 1992 N.Y. LEXIS 1631 (N.Y. 1992).

In action brought by insurer for declaration that it had no duty to defend and indemnify its insured in underlying personal injury actions, insured was entitled to reimbursement for its legal expenses inasmuch as insurer cast insured in defensive posture, and insured prevailed on merits. Continental Casualty Co. v Rapid-American Corp., 177 A.D.2d 61, 581 N.Y.S.2d 669, 1992 N.Y. App. Div. LEXIS 2737 (N.Y. App. Div. 1st Dep't 1992), aff'd, 80 N.Y.2d 640, 593 N.Y.S.2d 966, 609 N.E.2d 506, 1993 N.Y. LEXIS 81 (N.Y. 1993).

Insurer's duty to defend, once determined, extends to defense of entire action. Continental Casualty Co. v Rapid-American Corp., 177 A.D.2d 61, 581 N.Y.S.2d 669, 1992 N.Y. App. Div. LEXIS 2737 (N.Y. App. Div. 1st Dep't 1992), aff'd, 80 N.Y.2d 640, 593 N.Y.S.2d 966, 609 N.E.2d 506, 1993 N.Y. LEXIS 81 (N.Y. 1993).

In declaratory judgment action by insured gas station operator to require insurer to defend it in underlying action brought by nearby property owners to recover damages for contamination allegedly caused by leakage of petroleum products from subsurface tank or pipe, court erred in considering facts extrinsic to complaint in underlying action, indicating that leak may have been caused by incident which occurred subsequent to period during which insurer provided coverage; in deciding whether insurer has duty to defend, court may consider extrinsic facts submitted by insured to show that coverage under policy may exist, but insurer cannot use extrinsic facts to show that there is no coverage. Petr-All Petroleum Corp. v Fireman's Ins. Co., 188 A.D.2d 139, 593 N.Y.S.2d 693, 1993 N.Y. App. Div. LEXIS 1324 (N.Y. App. Div. 4th Dep't 1993).

In regard to insurance company's duty to defend, party's characterization of cause of action alleged in underlying complaint is not controlling; court will seek to determine nature of claims based on facts alleged. Curtis v Nutmeg Ins. Co., 204 A.D.2d 833, 612 N.Y.S.2d 256, 1994 N.Y. App. Div. LEXIS 5158 (N.Y. App. Div. 3d Dep't 1994), app. dismissed, 84 N.Y.2d 1027, 623 N.Y.S.2d 182, 647 N.E.2d 454, 1995 N.Y. LEXIS 75 (N.Y. 1995), aff'd, 256 A.D.2d 758, 681 N.Y.S.2d 620, 1998 N.Y. App. Div. LEXIS 13338 (N.Y. App. Div. 3d Dep't 1998).

In personal injury action arising from motor vehicle accident, plaintiff's motion to substitute defendants' insurer's in-house counsel as counsel for defendants would be denied, since Supreme Court lacked authority to direct insurer's attorney to appear as counsel on insurer's behalf where there was no evidence that insurer waived its right to control defense of underlying personal injury action; any application to compel insurer to fulfill its obligation to defend should have been brought against insurer and not against its attorney. Desriusseaux v Val-Roc Truck Corp., 230 A.D.2d 704, 646 N.Y.S.2d 161, 1996 N.Y. App. Div. LEXIS 8304 (N.Y. App. Div. 2d Dep't 1996).

Regarding issue of insurer's duty to provide defense, it was immaterial that underlying personal injury action absolved defendant of all liability and thus relieved insurer of its duty of indemnity. City of New York v Consolidated Edison Co., 238 A.D.2d 119, 655 N.Y.S.2d 496, 1997 N.Y. App. Div. LEXIS 2967 (N.Y. App. Div. 1st Dep't 1997).

Insurance companies that provided successive coverage to their insured were liable as coinsurers for costs of defending insured where payment of attorney fees that had been made by one insurer was not part of court-approved settlement of underlying action, and there was nothing in record to suggest agreement between insured and insurer discharging latter from its obligation to pay defense costs in that action; accordingly, insurers were required to share defense costs pro rata. Atlantic Mut. Ins. Co. v Greater N.Y. Mut. Ins. Co., 241 A.D.2d 427, 660 N.Y.S.2d 983, 1997 N.Y. App. Div. LEXIS 8155 (N.Y. App. Div. 1st Dep't 1997), app. dismissed, 91 N.Y.2d 956, 671 N.Y.S.2d 716, 694 N.E.2d 885, 1998 N.Y. LEXIS 872 (N.Y. 1998).

In action for bad faith refusal to defend, insurer's disclaimer of coverage could not be said to have been made in bad faith where it was premised on apparently reasonable belief that notice requirements of policy had not been satisfied. Daus v Lumberman's Mut. Cas. Co., 241 A.D.2d 665, 659 N.Y.S.2d 584, 1997 N.Y. App. Div. LEXIS 7337 (N.Y. App. Div. 3d Dep't), app. denied, 90 N.Y.2d 812, 666 N.Y.S.2d 100, 688 N.E.2d 1382, 1997 N.Y. LEXIS 3669 (N.Y. 1997).

In action for judgment declaring that insurer was obligated to defend and indemnify party in underlying action, proper remedy, on resolution of coverage question in favor of insurer, would have been declaratory judgment rather than dismissal of complaint. Halali v Evanston Ins. Co., 245 A.D.2d 422, 666 N.Y.S.2d 676, 1997 N.Y. App. Div. LEXIS 13102 (N.Y. App. Div. 2d Dep't 1997).

Court erred in granting insurers' motion for summary judgment declaring that they had no duty to defend insureds in underlying administrative matter before United States Environmental Protection Agency (EPA), on ground that such matter was not functional equivalent of suit within meaning of insurance policy, since letter from EPA to insureds demanded payment of large, specified sum of money and advised plaintiffs that interest would begin to accrue on that amount as of date of demand, filing of notice of lien was threatened, and insureds were given opportunity to be heard at conference with EPA's regional counsel and to attend with attorney. Carpentier v Hanover Ins. Co., 248 A.D.2d 579, 670 N.Y.S.2d 540, 1998 N.Y. App. Div. LEXIS 2868 (N.Y. App. Div. 2d Dep't 1998).

Court properly declined to issue declaration regarding duty of second liability insurer to defend and indemnify insured in underlying personal injury action where that insurer's policy was not submitted to court. Eagle Ins. Co. v Rite-Way Auto Sch., Inc., 263 A.D.2d 526, 693 N.Y.S.2d 213, 1999 N.Y. App. Div. LEXIS 8375 (N.Y. App. Div. 2d Dep't 1999).

Insurer's duty to defend is broader than its duty to indemnify and will be required unless insurer shows that allegations of complaint put that duty solely within policy exclusion. Gibbs v CNA Ins. Cos., 263 A.D.2d 836, 693 N.Y.S.2d 720, 1999 N.Y. App. Div. LEXIS 8278 (N.Y. App. Div. 3d Dep't 1999), app. denied, 1999 N.Y. LEXIS 3835 (N.Y. Nov. 23, 1999).

Insurance companies were not released from their obligations to defend and indemnify under all policies in question, even though preliminary language was broad and included release of "all actions, causes of action (etc.)," where release immediately narrowed in scope on reference to specific policies. Lexington Ins. Co. v Combustion Eng'g, Inc., 264 A.D.2d 319, 693 N.Y.S.2d 146, 1999 N.Y. App. Div. LEXIS 8661 (N.Y. App. Div. 1st Dep't 1999).

Extent to which insurer was obligated to bear costs of defending and indemnifying construction manager and owner of project in underlying tort action could not be determined on present record where record did not include copies of all insurance policies that might cover those parties for loss. Lehrer McGovern Bovis, Inc. v Component Assembly Sys., 266 A.D.2d 94, 698 N.Y.S.2d 648, 1999 N.Y. App. Div. LEXIS 11675 (N.Y. App. Div. 1st Dep't 1999).

Insurer, which provided its insured with defense to underlying action, was not collaterally estopped, in context of instant declaratory judgment action, from relitigating issue of whether insured's conduct was intentional or negligent since insurance company, which was not party to underlying action, could not be said to have been in privity with insured, and insurance company could not have fully and fairly litigated issue of insured's conduct in underlying action without breaching both insurance contract and fiduciary duty to its insured. Failla v Nationwide Ins. Co., 267 A.D.2d 860, 701 N.Y.S.2d 161, 1999 N.Y. App. Div. LEXIS 13575 (N.Y. App. Div. 3d Dep't 1999).

Court improperly granted plaintiffs' summary judgment motion declaring that defendant was obligated to indemnify plaintiffs for entire amount of judgment in underlying personal injury action where liability policy stated that "(t)he employment must

be necessary or incidental to (insured's) work in a state or territory listed in ... Information Page," and there was nothing indicating that subject work in New York City was "incidental or necessary" to work in New Jersey, which was listed as state in policy. Chase Manhattan Bank, N.A. v Travelers Group, Inc., 269 A.D.2d 107, 702 N.Y.S.2d 60, 2000 N.Y. App. Div. LEXIS 956 (N.Y. App. Div. 1st Dep't 2000).

Where policies issued to contractor and subcontractor both afforded primary coverage by respective insurers to their insureds, and both policies required contribution by equal shares, insurers were required to share equally in obligation to defend insureds in underlying action for injuries to worker. Impulse Enterprises/F & V Mech. Plumbing & Heating v St. Paul Fire & Marine Ins. Co., 282 A.D.2d 266, 723 N.Y.S.2d 177, 2001 N.Y. App. Div. LEXIS 3602 (N.Y. App. Div. 1st Dep't 2001).

Court properly granted insurer's motion to vacate default judgment against its insured after previous judgment, which had declared that insurer had no duty to defend of indemnify insured, had been reversed, and counsel for insured had been permitted to withdraw. Braddy v 601 Crown St. Corp., 282 A.D.2d 638, 724 N.Y.S.2d 71, 2001 N.Y. App. Div. LEXIS 3986 (N.Y. App. Div. 2d Dep't 2001).

Social worker's professional liability insurer was not entitled to summary judgment declaring that its duty to defend insured in underlying lawsuit was governed by provision of policy which limited coverage to $25,000 when sexual misconduct was claimed because, if plaintiff in underlying lawsuit could prepare for and prosecute her malpractice action without alleging "erotic physical contact," then $25,000 limit would not apply. American Home Assur. Co. v Levy, 179 Misc. 2d 773, 686 N.Y.S.2d 639, 1999 N.Y. Misc. LEXIS 66 (N.Y. Sup. Ct. 1999).

Directors' and officers' (D&O) liability policy may not include provision that places duty to defend on insured, rather than insurer. Insurance Department, Opinions of General Counsel, Opinion Number 08-10-07.

173. —Question of fact

In an action by plaintiff insurer for a declaratory judgment that it had no duty to defend or indemnify defendant insured under separate but similar insurance policies, each known as a "Libel, Slander, Copyright, Piracy, Plagiarism, and Privacy Liability Policy," in a prior federal suit brought against the insured based upon claims of unfair competition, deceptive trade practices, consumer fraud and deceptive business practices, and common-law libel, plaintiff insurer failed to establish on defendant insureds' motion for summary judgment that, as a matter of law, it had no duty to defend the federal suit; it could not be said that the provisions of the insurance policies clearly negated plaintiff's duty to defend against every allegation asserted in the complaint in the federal suit, and, moreover, some of the claims against the insureds fell within the general inclusory provisions of the policies and were not unambiguously excepted from coverage by the policies' exclusions. Seaboard Surety Co. v Gillette Co., 64 N.Y.2d 304, 486 N.Y.S.2d 873, 476 N.E.2d 272, 1984 N.Y. LEXIS 5212 (N.Y. 1984).

Insurance companies were not entitled to summary judgment declaring that they had no obligation to defend asbestos insulation contractor pursuant to policies issued by them because claims in underlying actions fell wholly within product-hazards exclusion provisions of policies, where numerous plaintiffs in underlying actions alleged that insured's "negligent installation" of asbestos insulation caused their injuries, and no complaints in underlying actions specified that plaintiffs' injuries occurred only after insured had completed installation and departed from covered premises; product-hazards exclusion, by definition, does not apply to occurrences that allegedly take place while installation work is in progress because offending product (asbestos insulation) is not relinquished from insured's control until installation is complete. Frontier Insulation Contrs. v Merchants Mut. Ins. Co., 91 N.Y.2d 169, 667 N.Y.S.2d 982, 690 N.E.2d 866, 1997 N.Y. LEXIS 3722 (N.Y. 1997).

Insurer would be required to defend insured in negligence action pending resolution of factual issues as to reasonableness of insurer's delay in giving notice of disclaimer where notice of disclaimer was given 5 months after assumption of defense of negligence action by insurer, and insurer claimed that it did not have facts which led to notice of disclaimer until several days before notice was sent. Commercial Union Ins. Cos. v Jedamich Enterprises, Inc., 146 A.D.2d 599, 536 N.Y.S.2d 523, 1989 N.Y. App. Div. LEXIS 447 (N.Y. App. Div. 2d Dep't 1989).

Insurer had duty to defend its insured in underlying personal injury action where it could not be said as matter of law that there was no possible factual or legal basis on which insurer might eventually be held obligated to indemnify insured. Emery v Capital Mut. Ins. Co., 151 A.D.2d 854, 542 N.Y.S.2d 829, 1989 N.Y. App. Div. LEXIS 7541 (N.Y. App. Div. 3d Dep't 1989).

In action seeking declaration that insurance company was required to defend and indemnify plaintiffs with respect to claim which arose after binder was issued by insurance agency, insurance company was not entitled to summary judgment, notwithstanding contention that insurance agency was discharged as insurance company's agent prior to issuance of binder, since there was evidence from which misleading conduct on part of insurance company could be inferred—conduct which might have created appearance that insurance agency had authority to issue binder. Lakeside Constr., Inc. v Depew & Schetter Agency, Inc., 154 A.D.2d 513, 546 N.Y.S.2d 136, 1989 N.Y. App. Div. LEXIS 12731 (N.Y. App. Div. 2d Dep't 1989).

Insurer was not entitled to summary judgment dismissing action seeking declaration that it had duty to defend and indemnify insured with respect to insured's disposal of hazardous waste since fact issue existed as to whether unexpected migration of toxins constituted "occurrence" under policy. Borg-Warner Corp. v Insurance Co. of North America, 174 A.D.2d 24, 577 N.Y.S.2d 953, 1992 N.Y. App. Div. LEXIS 109 (N.Y. App. Div. 3d Dep't), app. denied, 80 N.Y.2d 753, 587 N.Y.S.2d 905, 600 N.E.2d 632, 1992 N.Y. LEXIS 1631 (N.Y. 1992).

In action by teacher against emotionally handicapped student and his parents arising from incident in which student assaulted teacher in school, parents' homeowner's insurance company was not entitled to summary judgment declaring that it had no duty to defend and indemnify defendants, although policy excluded coverage for intentional acts and student had been declared person in need of supervision in Family Court proceeding, since Family Court proceeding was inadmissible against student or his interests. Holyoke Mut. Ins. Co. v Jason B., 184 A.D.2d 550, 585 N.Y.S.2d 61, 1992 N.Y. App. Div. LEXIS 7820 (N.Y. App. Div. 2d Dep't 1992).

Insured was not entitled to summary judgment declaring that his insurer was obligated to defend him in underlying negligence action where fact issue existed as to whether he breached condition precedent in insurance contract based on insurer's claim that he intentionally concealed and misrepresented material facts, and engaged in fraudulent conduct in connection with his demand for coverage. Orr v Continental Casualty Co., 205 A.D.2d 599, 613 N.Y.S.2d 234, 1994 N.Y. App. Div. LEXIS 6191 (N.Y. App. Div. 2d Dep't 1994).

It was error to grant insurer's motion for summary judgment declaring that it had no duty to defend physician where conduct alleged in underlying complaint could reasonably be construed as falling within coverage for any claim arising from rendering or failing to render professional services, and allegations of complaint did not cast pleading solely within policy exclusion of "Sexual Acts" and were not subject to no other interpretation. Chung v Physicians Reciprocal Insurers, 221 A.D.2d 907, 635 N.Y.S.2d 386, 1995 N.Y. App. Div. LEXIS 13384 (N.Y. App. Div. 4th Dep't 1995).

It was error to grant insurer's motion for summary judgment declaring that it had no duty to defend or indemnify insured under policy which provided that insurer would defend any suit against insured for damages caused by occurrence defined as accident, even though there was evidence that incident was intentional tort and thus would be excluded from coverage, since pleadings of underlying complaint could be read as alleging that injuries were negligently inflicted by insured. Merrimack Mut. Fire Ins. Co. v Carpenter, 224 A.D.2d 894, 638 N.Y.S.2d 234, 1996 N.Y. App. Div. LEXIS 1517 (N.Y. App. Div. 3d Dep't), app. dismissed, 88 N.Y.2d 1016, 649 N.Y.S.2d 382, 672 N.E.2d 608, 1996 N.Y. LEXIS 2749 (N.Y. 1996).

Insureds were not entitled to summary judgment to declare that insurer was obligated to defend and indemnify then in underlying negligence action, even though bank's drive-through window was permissible "operation" under lease, and accident "arising out of" the "use" of driving space outside bank when approaching window would be covered by policy naming landlord as additional insured, since there was no indication how far accident site was from drive-through window or where car was actually located when skidding began; as such, it could not be said as matter of law that accident arose out of use of bank's facilities. Moskowitz v Cigna Prop. & Cas. Co., 226 A.D.2d 179, 640 N.Y.S.2d 533, 1996 N.Y. App. Div. LEXIS 3747 (N.Y. App. Div. 1st Dep't 1996).

Insurer was not entitled to summary judgment disclosing that it was not obligated to defend individual, to whom insured gave permission to repair his automobile, in actions arising from accident while individual was driving insured's automobile since insurer failed to show, as matter of law, that individual was not operating vehicle with insured's permission at time of accident. Hurtig v Arestia, 235 A.D.2d 520, 653 N.Y.S.2d 855, 1997 N.Y. App. Div. LEXIS 635 (N.Y. App. Div. 2d Dep't 1997).

It was error to grant summary judgment declaring that insurer was obligated to indemnify insured in underlying action where fact issues existed as to if and when plaintiff therein was exposed to lead paint as alleged, and whether any injury occurred as result of that exposure during insurer's policy period. Cepeda by Rodriguez v Varveris, 239 A.D.2d 536, 658 N.Y.S.2d 981, 1997 N.Y. App. Div. LEXIS 5713 (N.Y. App. Div. 2d Dep't 1997).

Insured building owners were not entitled to declaratory judgment declaring that their insurer was required to defend and indemnify them in underlying personal injury action arising from stabbing, allegedly on owners' premises, where conflicting evidence on location of assault, and owner's statement that she believed that incident was criminal in nature and hence would not result in civil liability, raised questions of fact as to whether owners had reasonable, good-faith belief that claim for civil liability against them would not ensue; thus, case would be remanded because those issues could not be resolved on conflicting evidence in record. Rich Realty Co. v Public Serv. Mut. Ins. Co., 245 A.D.2d 60, 664 N.Y.S.2d 797, 1997 N.Y. App. Div. LEXIS 12874 (N.Y. App. Div. 1st Dep't 1997).

In declaratory judgment action by city transit authority concerning whether insurers were obligated to defend and indemnify it, as work site owner, in underlying personal injury action, authority was not entitled to summary judgment against insurer under owners' protective policy where fact questions existed as to (1) whether policy covered particular project on which accident occurred, (2) if not, whether authority relied on certificate of insurance indicating that policy did cover that project, and (3) if so, whether such reliance was reasonable in view of certificate's provision that it was issued "for information only" and "does not confer any rights upon the certificate holder; also, insurer made no affirmative assurance of coverage other than certificate New York City Transit Auth. v Firemen's Fund Ins. Co., 251 A.D.2d 166, 673 N.Y.S.2d 906, 1998 N.Y. App. Div. LEXIS 7322 (N.Y. App. Div. 1st Dep't), app. denied, 92 N.Y.2d 813, 680 N.Y.S.2d 906, 703 N.E.2d 764, 1998 N.Y. LEXIS 3694 (N.Y. 1998).

In order to determine whether insurer was obligated to defend and indemnify insured in underlying personal injury action, matter would be remitted for hearing on issues of whether insured's delay in notifying insurer of underlying incident was caused by insured's good faith belief that plaintiff in underlying action would not seek to hold him liable for his injuries and, if so, whether that belief was reasonable where Supreme Court did not hold such hearing, and issues could not be decided from record. Witriol v Travelers Ins. Group, 251 A.D.2d 497, 674 N.Y.S.2d 429, 1998 N.Y. App. Div. LEXIS 6861 (N.Y. App. Div. 2d Dep't 1998).

Insured's evidence that he was constructing residence through his business and had employed injured party to work at site raised issue of fact, precluding summary judgment for insurer seeking declaration that it had no obligation to defend or indemnify in underlying injury action because policy was limited to insurance for business conduct. American States Ins. Co. v Paris, 265 A.D.2d 805, 695 N.Y.S.2d 642, 1999 N.Y. App. Div. LEXIS 9832 (N.Y. App. Div. 4th Dep't 1999).

Court erred in granting insured's summary judgment motion declaring that insurer was obligated to insure and indemnify insured in underlying personal injury action where there was no evidence as to how or why underlying plaintiff, who was patron attempting to gain entry into insured's establishment, was allegedly assaulted by one of its employees, or as to degree of criminal assault to which employee allegedly pleaded guilty, and unprovoked intentional assault might not be covered under general liability policy in question; further, court's finding of alleged ambiguity in insurance policy as to term "accident," which resulted in policy being construed against insurer, was error. McKeown v Allcity Ins. Co., 272 A.D.2d 79, 707 N.Y.S.2d 321, 2000 N.Y. App. Div. LEXIS 4892 (N.Y. App. Div. 1st Dep't 2000).

Court improperly granted plaintiffs' summary judgment motion declaring that defendant insurer was obligated to defend and indemnify plaintiffs' landlord in action for injuries sustained from lead-paint ingestion where fact issues existed as to timeliness of notice of claim and defendant's ensuing disclaimer. Dumet v TIG Ins. Co., 272 A.D.2d 111, 710 N.Y.S.2d 18, 2000 N.Y. App. Div. LEXIS 5377 (N.Y. App. Div. 1st Dep't 2000).

Court properly denied insurer's summary judgment motion to declare that it was not obligated to defend estate of insured's brother, even though it was undisputed that brother was not "relative" as defined in policy because he did not reside in same household as insured, where insurer failed to show as matter of law that brother did not have implied permission to drive insured's vehicle, which was involved in accident. Progressive Ins. Cos. v Brouse, 272 A.D.2d 996, 708 N.Y.S.2d 673, 2000 N.Y. App. Div. LEXIS 5145 (N.Y. App. Div. 4th Dep't 2000).

It was error to grant insurer's summary judgment motion declaring that it had no duty to defend and indemnify insured in underlying action, even though insured did not inform insurer of accident that occurred on his premises until about 7 months after he received letter from attorney for plaintiff in underlying action advising him of occurrence, where insured contended that letter did not notify him that lawsuit would be commenced against him and that, as absentee landlord, he did not believe that he could be held liable for accident. Merrimack Mut. Fire Ins. Co. v Orsaeo, 274 A.D.2d 972, 711 N.Y.S.2d 819, 2000 N.Y. App. Div. LEXIS 7681 (N.Y. App. Div. 4th Dep't 2000).

174. —Duty found to exist

In action in which plaintiff, vice-president of corporation owning cooperative apartment building, sought declaration that defendant insurer, which insured corporation and its officers for damages resulting from defamatory statements made by them within course of their duties, was obligated to defend him in defamation action brought against him, partial summary judgment would be granted declaring that insurer was required to provide defense for plaintiff, and insurer could only be excused from defending plaintiff under policy exclusion if it could establish, as matter of law, that there was no possible factual or legal basis on which insurer might eventually be obligated to indemnify plaintiff under any provision in policy. Villa Charlotte Bronte, Inc. v Commercial Union Ins. Co., 64 N.Y.2d 846, 487 N.Y.S.2d 314, 476 N.E.2d 640, 1985 N.Y. LEXIS 14151 (N.Y. 1985).

Insurer had duty to defend insured corporation in asbestos case, even though insured, in claiming under policy with another insurer, asserted different theory as to when coverage was triggered for asbestos-related injury, since insured's actions vis-a-vis other insurer were irrelevant for purposes of determining rights and obligations with respect to insurer disclaiming coverage. Continental Casualty Co. v Rapid-American Corp., 80 N.Y.2d 640, 593 N.Y.S.2d 966, 609 N.E.2d 506, 1993 N.Y. LEXIS 81 (N.Y. 1993).

As "additional insured" under policy issued to garage operator, building owner was entitled to insurer-sponsored defense in action for injuries sustained by pedestrian who allegedly tripped and fell outside of building, as part of sidewalk where alleged accident occurred was necessarily used for access in and out of garage and was thus, by implication, "part of the premises" that garage operator was licensed to use. ZKZ Assocs. LP v CNA Ins.

Co., 89 N.Y.2d 990, 657 N.Y.S.2d 390, 679 N.E.2d 629, 1997 N.Y. LEXIS 302 (N.Y. 1997).

Plaintiffs were entitled to judgment declaring that defendant insurer was obligated to defend and indemnify them in tenants' action to recover for injuries caused by ingestion of lead paint, pursuant to umbrella policy which provided additional coverage for certain claims not already covered by commercial general liability policy also issued by insurer, where (1) underlying policy specifically excluded coverage for lead paint injuries, but there was no incorporation-by-reference clause in umbrella policy, (2) umbrella policy specifically excluded injuries involving alcohol, asbestos and "pollution," but not lead paint, and (3) at most, insurer's interpretation presented ambiguity in umbrella policy to be resolved against insurer. Westview Assocs. v Guar. Nat'l Ins. Co., 95 N.Y.2d 334, 717 N.Y.S.2d 75, 740 N.E.2d 220, 2000 N.Y. LEXIS 2928 (N.Y. 2000).

Insurers were contractually required to defend and indemnify insureds when they were sued by one of their tenants for losses sustained in theft of diamonds from safety deposit boxes where insureds did not have keys to boxes, but merely controlled access into and provided independent security guard services for vault room where boxes were located, and thus exclusion provisions were not applicable since diamonds were neither in "care, custody or control" nor "physical control" of insureds. Empire Assocs. v North River Ins. Co., 224 A.D.2d 270, 637 N.Y.S.2d 417, 1996 N.Y. App. Div. LEXIS 1059 (N.Y. App. Div. 1st Dep't), app. denied, 88 N.Y.2d 812, 649 N.Y.S.2d 379, 672 N.E.2d 605, 1996 N.Y. LEXIS 2962 (N.Y. 1996).

Insurer was obligated to defendant and indemnify insured as to third-party contribution claims where policy's exclusionary clause expressly referred only to insured's obligation to indemnify, with no reference to contribution. A.J. McNulty & Co. v National Union Fire Ins. Co., 226 A.D.2d 287, 642 N.Y.S.2d 860, 1996 N.Y. App. Div. LEXIS 4524 (N.Y. App. Div. 1st Dep't 1996).

Nightclub's insurance carrier was properly directed to provide defense in lawsuit alleging that plaintiff was injured when agents of nightclub "negligently and carelessly escorted" him from club, although insurance policy excluded coverage for claims arising out of "assault and battery or out of any act or omission in connection with the prevention or suppression of such acts," as plaintiff's injuries may have resulted from unintentional acts by agents of nightclub, and underlying complaint did not allege that he was assaulted while being escorted from club, or that he was being escorted from club to prevent or suppress assault. Essex Ins. Co. v T-Birds Nightclub & Restaurant, 229 A.D.2d 919, 645 N.Y.S.2d 218, 1996 N.Y. App. Div. LEXIS 8944 (N.Y. App. Div. 4th Dep't 1996).

Insurer was obligated, under terms of business owners' policy, to defend insureds in action brought against them by person who was injured while assisting in renovation of property, even if policy was not intended to cover injuries arising out of construction business, since renovation project was not so far removed from real estate business that insurer's interpretation of policy provisions on which it relied was only fair interpretation. Jadwiga Realty v General Accident Ins. Co. of Am., 232 A.D.2d 831, 648 N.Y.S.2d 758, 1996 N.Y. App. Div. LEXIS 10537 (N.Y. App. Div. 3d Dep't 1996).

Policy exclusion for bodily injury due to winter sports or winter activities "that you sponsor" did not apply to skiing accident, even though insureds, who owned hotel, paid for lift tickets and provided round-trip transportation, along with lunch, to their guests who skied at nearby ski resort, since insureds did not pay any money to have their business advertised or promised in connection with ski trip; thus, insurer was obligated to defend insureds in underlying action. New Pines v North River Ins. Co., 233 A.D.2d 563, 649 N.Y.S.2d 250, 1996 N.Y. App. Div. LEXIS 11456 (N.Y. App. Div. 3d Dep't 1996).

Insured, hospital, was entitled to summary judgment declaring that insurer was obligated to defend and indemnify it in underlying action by individual who visited its emergency room, received treatment with no further treatment contemplated, and slipped and fell on curb-side ramp on hospital's property since individual in question was no longer "patient" as defined by policy exclusion as being "natural person who seeks or receives any form of medical care from the insured." Westchester Square Med. Ctr. v ITT Hartford Ins. Group, 239 A.D.2d 297, 658 N.Y.S.2d 588, 1997 N.Y. App. Div. LEXIS 5582 (N.Y. App. Div. 1st Dep't), app. denied, 90 N.Y.2d 928, 664 N.Y.S.2d 261, 686 N.E.2d 1356, 1997 N.Y. LEXIS 3120 (N.Y. 1997).

RICO claims asserted in federal court against attorneys and their former clients for preparing and filing fraudulent workers' compensation claims did not give attorneys reasonable basis to believe that they had breached professional duty to their former clients or to foresee that their clients would be asserting cross claims for malpractice against them in that federal action, and thus attorneys' insurer was obligated to defend them against those malpractice claims, where claims-made policy defined "claim" as demand for specific relief that could be defended, settled, and paid by insurer—not mere awareness of possibility that some wrongdoing had occurred. Purcigliotti v Risk Enter. Mgmt., 240 A.D.2d 205, 658 N.Y.S.2d 296, 1997 N.Y. App. Div. LEXIS 6185 (N.Y. App. Div. 1st Dep't 1997).

Personal injuries that occurred at expanded portion of restaurant next door to original restaurant were covered under general liability portion of insurance policy, and thus insurer had to fulfill its duties to defend and indemnify insured, even though policy was amended to add expanded premises only after accident, where contrary result would have rendered meaningless provision defining "coverage territory" as "United States of America." Mazzuoccolo v Cinelli, 245 A.D.2d 245, 666 N.Y.S.2d 621, 1997 N.Y. App. Div. LEXIS 13416 (N.Y. App. Div. 1st Dep't 1997).

It was irrelevant whether particular premises at which personal injuries occurred had been added to insurance policy at time of injuries where nothing in terms of general liability portion of policy limited its application to claims arising from occurrences at premises listed in policy, and limitation in property damage portion of policy to losses "to covered property at the premises described in the Declarations" could not be engrafted onto liability portion of policy. Mazzuoccolo v Cinelli, 245 A.D.2d 245, 666 N.Y.S.2d 621, 1997 N.Y. App. Div. LEXIS 13416 (N.Y. App. Div. 1st Dep't 1997).

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In action for judgment declaring that insurer was obligated to defend and indemnify party in underlying action, insurer did not show that coverage provided by binder was not on "claims-made" basis as matter of law, and thus insurer was not entitled to dismissal of complaint, where documentary evidence submitted by insurer was inconclusive, binder did not indicate type of coverage afforded, insurer failed to produce copy of applicable policy form which it claimed was identified in binder, and insurer submitted policy bearing completely different policy number from that identified in binder. Halali v Evanston Ins. Co., 245 A.D.2d 422, 666 N.Y.S.2d 676, 1997 N.Y. App. Div. LEXIS 13102 (N.Y. App. Div. 2d Dep't 1997).

Insured company was entitled to summary judgment declaring that its liability insurer was required to defend it in underlying action for disparagement of another company's products, despite policy exclusion of advertising injury "arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity," where (1) complaint in underlying action alleged not only fraudulent intent but also violations of CLS Gen Bus §§ 349 and 350, which do not require proof of intentional or even reckless conduct, (2) there was sworn testimony that offending letter was published without knowledge of its falsity, and (3) because insurer might be obligated to indemnify insured for at least some causes of action asserted in underlying action, it had to defend insured on all causes of action asserted therein. Simply Lite Food Corp. v Aetna Cas. & Sur. Co. of Am., 245 A.D.2d 500, 666 N.Y.S.2d 714, 1997 N.Y. App. Div. LEXIS 13290 (N.Y. App. Div. 2d Dep't 1997).

Plaintiff insurer was required to defend defendant building, owners, managing agent, and their employee in underlying action by 2 former employees alleging unprovoked assault by defendant employee, even though liability policy specifically excluded coverage for bodily injury "expected or intended from the standpoint of the insured," where it also specifically excepted from that exclusion bodily injury "resulting from the use of reasonable force to protect persons or property," and both answer to underlying complaint and letter from defendants to plaintiff—asking it to reconsider its denial of their request for defense in light of dismissal of criminal charges against defendant employee and offering to provide it with additional witness statements—gave plaintiff actual knowledge of facts proving reasonable possibility that defendant employee acted in self-defense against plaintiffs in underlying action. Firemen's Ins. Co. v 860 West Tower, 246 A.D.2d 401, 667 N.Y.S.2d 718, 1998 N.Y. App. Div. LEXIS 276 (N.Y. App. Div. 1st Dep't 1998).

Insurer was obligated to defend its insured since underlying action, alleging negligent, reckless, and careless conduct, fell within policy's coverage of accidental injury; evidence that insured intentionally injured underlying plaintiffs was insufficient to relieve insurer of its duty to defend, in view of contrary evidence that insured was intoxicated and did not intend to strike plaintiffs. State Farm Mut. Auto. Ins. Co. v Van Dyke, 247 A.D.2d 848, 668 N.Y.S.2d 821, 1998 N.Y. App. Div. LEXIS 1147 (N.Y. App. Div. 4th Dep't 1998).

Theater owner was entitled to summary judgment declaring that defendant security company's liability insurer was obligated to defend it in action by patron who was injured in altercation during show, even though defendant had breached its contractual duty to maintain comprehensive general liability policy naming theater as additional insured, where defendant had contractual duty to defend and indemnify theater for liability arising from its negligent performance of security services and its liability insurer was obligated to defend any lawsuit against it claiming damages for personal injury. National Amusements, Inc. v Scottsdale Ins. Co., 253 A.D.2d 396, 676 N.Y.S.2d 590, 1998 N.Y. App. Div. LEXIS 9186 (N.Y. App. Div. 1st Dep't 1998).

Court erred in granting insurer's summary judgment motion declaring that it was not required to defend or indemnify its insured in underlying personal injury action on ground that because fire was intentionally set by insured, underlying plaintiff's injuries were not result of "accident" within meaning of insurance policy, since underlying plaintiff showed that insured did not intend to hurt him when insured intentionally set fire, and physical and/or emotional harm to another person was not inherent result of arson committed for insurance purposes; moreover, insured was not collaterally estopped by his criminal conviction of attempted second degree arson from denying intent to injure underlying plaintiff since intent to cause injury to person was not element of crimes with which insured was charged or crime to which he pleaded guilty. Allegany Co-Op Ins. Co. v Kohorst, 254 A.D.2d 744, 678 N.Y.S.2d 424, 1998 N.Y. App. Div. LEXIS 10431 (N.Y. App. Div. 4th Dep't 1998).

Automobile insurance policy exclusion of any vehicle owned by any family member other than insured did not apply to accident involving insured's car that her son was driving and considering purchasing, absent evidence that son owned car on day of accident. Brown v Keefe, 255 A.D.2d 971, 680 N.Y.S.2d 38, 1998 N.Y. App. Div. LEXIS 12237 (N.Y. App. Div. 4th Dep't 1998).

Automobile insurance policy exclusion of any vehicle furnished or available for "regular use" of any family member other than insured did not apply to accident involving insured's car that her son drove only once, on day of accident. Brown v Keefe, 255 A.D.2d 971, 680 N.Y.S.2d 38, 1998 N.Y. App. Div. LEXIS 12237 (N.Y. App. Div. 4th Dep't 1998).

Court erred in finding that applications for insurance were "integral" part of subject insurance policy, and thus erred in declaring that insurer had no duty to defend or indemnify insureds in underlying personal injury action, where it was undisputed that policy contained no reference to applications, there was no evidence that applications were attached thereto, and policy specifically stated that it contained "all the agreements between (insurer and insureds) concerning the insurance afforded"; court ran afoul of parol evidence rule when it resorted to extrinsic evidence to limit scope of coverage unambiguously set forth in insurance policy. Metro-North Commuter R.R. Co. v Yonkers Contr. Co., 256 A.D.2d 32, 680 N.Y.S.2d 537, 1998 N.Y. App. Div. LEXIS 13080 (N.Y. App. Div. 1st Dep't 1998), app. denied, 93 N.Y.2d 810, 694 N.Y.S.2d 632, 716 N.E.2d 697, 1999 N.Y. LEXIS 1404 (N.Y. 1999).

Defendants, corporate owner and individual owner/general contractor, were properly granted summary judgment declaring that plaintiff, which issued builder's risk insurance policy, was obligated to defend and indemnify defendants in underlying personal injury action, even though defendants were not name as insureds under terms of policy issued by plaintiff, since it was undisputed that policy was procured in order to insure against risks attendant to commercial construction project on specified parcel of property, it was character of property and project that was proposed to be undertaken thereon (both of which were properly identified) that defined risk, and identity of owner was comparatively unimportant; under circumstances, defendants were entitled to equitable reformation of policy to correct obvious inadvertent misidentification of named insured. New York Cas. Ins. Co. v Shaker Pine, 262 A.D.2d 735, 691 N.Y.S.2d 601, 1999 N.Y. App. Div. LEXIS 6514 (N.Y. App. Div. 3d Dep't 1999).

Driving school's automobile liability insurer was obligated to defend and indemnify both school and its driving instructor in underlying action by student involved in traffic accident, even though theory of underlying action was that instructor was negligent in refusing student's request to postpone driving lesson due to inclement weather, where liability policy applied to injuries "resulting from the ownership, maintenance or use" of covered car, and operative fact giving rise to any recovery was student's operation of school's car. Eagle Ins. Co. v Rite-Way Auto Sch., Inc., 263 A.D.2d 526, 693 N.Y.S.2d 213, 1999 N.Y. App. Div. LEXIS 8375 (N.Y. App. Div. 2d Dep't 1999).

Lessor was "indemnity" under insurance policy, and thus was entitled to be defended and indemnified by insurer to same extent and on same terms as would have obtained had lessor been named insured where, under general liability policy procured by lessee, insurer agreed to defend any claim or suit brought against "indemnity" under insured contract "to the same extent and on the same terms that we would defend if the 'indemnity' were the insured under the policy," and policy specifically included lease of premises as insured contract. Queens Office Tower Assocs. v General Mills Restaurant, Inc., 269 A.D.2d 223, 702 N.Y.S.2d 301, 2000 N.Y. App. Div. LEXIS 1508 (N.Y. App. Div. 1st Dep't 2000).

Court improperly granted insurer's summary judgment motion declaring that it had no duty to defend or indemnify its insureds in underlying action alleging that child was injured as result of negligent care and supervision exercised by defendants while they were providing child care, despite insurer's contention that defendants were engaged in business of child care as to child and that such activity fell squarely within subject policy's express exclusion for coverage of injuries "(a)rising out of the business pursuits of an insured," where there was nothing in nature of child's injuries themselves implying that they could have been sustained only as result of conduct intrinsic to provision of child care. Tenkate v Moore, 274 A.D.2d 934, 711 N.Y.S.2d 587, 2000 N.Y. App. Div. LEXIS 8264 (N.Y. App. Div. 3d Dep't 2000).

Insured under commercial general liability policy was entitled to summary judgment declaring that insurer had to defend and indemnify it in underlying action for injuries resulting from exposure to toxic fumes released during insured's construction safety course when roofing membrane was applied with hot air gun during classroom demonstration, despite policy endorsement excluding "'[b]odily injury'...which would not have occurred in whole or in part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants at any time" and defining "pollutant" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste," where (1) average insured could reasonably interpret exclusion as applying only to environmental pollution, which was historical purpose of pollution exclusions, and not to bodily injury arising from use of product for its intended purpose, (2) fumes that caused underly-

ing injury were part of normal roofing process, were confined to demonstration area, were inhaled in immediate vicinity, and thus were not result of "discharge, dispersal...release or escape of pollutants," and (3) term "pollutant" was ambiguous because there is virtually no substance or chemical in existence that is not "irritant or contaminant," and thus application of exclusion would lead to absurd results. Roofers' Joint Training, Apprentice & Educ. Comm. v Gen. Accident Ins. Co. of Am., 275 A.D.2d 90, 713 N.Y.S.2d 615, 2000 N.Y. App. Div. LEXIS 9785 (N.Y. App. Div. 4th Dep't 2000).

Insurer was required to defend and indemnify insured law partners in underlying legal malpractice action against them where (1) at time of their insurance renewal application, they lacked actual or constructive knowledge that their former associate had mishandled personal injury case, (2) former associate concealed his misconduct, and there was no basis for imputing it to partners, and (3) thus, partner who inquired of his partners and associates at time of renewal application truthfully told insurer that no circumstances had been reported that would result in malpractice claim. Holloway v Sacks & Sacks, 275 A.D.2d 625, 713 N.Y.S.2d 162, 2000 N.Y. App. Div. LEXIS 9278 (N.Y. App. Div. 1st Dep't), app. denied, 95 N.Y.2d 770, 722 N.Y.S.2d 473, 745 N.E.2d 394, 2000 N.Y. LEXIS 3912 (N.Y. 2000).

Plaintiffs were entitled to summary judgment declaring that defendant insurer was obligated to defend and indemnify them in personal injury action by relative who fell from ladder while staying at their home, where insurer disclaimed coverage on ground that injured relative was additional insured under plaintiffs' homeowner's policy, which excluded personal liability coverage for bodily injury to any insured, but uncontroverted evidence established that relatives' stay with plaintiffs, although prolonged, was only temporary and that they never intended to permanently reside in plaintiffs' home. Fiore v Excelsior Ins., 276 A.D.2d 895, 714 N.Y.S.2d 149, 2000 N.Y. App. Div. LEXIS 10456 (N.Y. App. Div. 3d Dep't 2000), app. denied, 96 N.Y.2d 755, 725 N.Y.S.2d 280, 748 N.E.2d 1076, 2001 N.Y. LEXIS 245 (N.Y. 2001).

Lessor of car involved in accident was entitled to summary judgment declaring that insurer was obligated to defend and indemnify it in underlying action where (1) driver, as lessee under lease for period greater than 30 days (2 years), was owner of car under CLS Veh & Tr § 128, (2) thus, insurance regulations in 11 NYCRR § 60-1.1 applied, and (3) any attempt by insurer to disclaim coverage through language of limiting provision of insurance policy was unenforceable as against public policy. GE Capital Auto Lease, Inc. v Allstate Ins. Co., 281 A.D.2d 456, 722 N.Y.S.2d 549, 2001 N.Y. App. Div. LEXIS 2400 (N.Y. App. Div. 2d Dep't), app. denied, 97 N.Y.2d 654, 737 N.Y.S.2d 54, 762 N.E.2d 932, 2001 N.Y. LEXIS 3472 (N.Y. 2001), app. denied, 98 N.Y.2d 671, 746 N.Y.S.2d 458, 774 N.E.2d 223, 2002 N.Y. LEXIS 1471 (N.Y. 2002).

Insurers were obligated to defend and indemnify insured in underlying action where insured showed good-faith, reasonable belief in its nonliability so as to excuse its 8-month delay in notifying insurers of accident; neither manner in which accident occurred, apparently trivial nature of injury, nor medical treatment rendered would have made prudent person believe that personal injury claim would be pursued. Abbey Richmond Ambulance Serv. v Northbrook Prop. & Cas. Ins. Co., 281 A.D.2d 501, 721 N.Y.S.2d 796, 2001 N.Y. App. Div. LEXIS 4195 (N.Y. App. Div. 2d Dep't), app. denied, 96 N.Y.2d 897, 730 N.Y.S.2d 793, 756 N.E.2d 81, 2001 N.Y. LEXIS 1966 (N.Y. 2001).

Insured was entitled to summary judgment declaring that insurers were obligated to defend and indemnify it in underlying personal injury action where (1) insurers sent letter notifying insured that they would not defend it with respect to any causes of action that might be asserted against it arising from injuries sustained by one of its employees, (2) because that letter served as repudiation of insurers' liability, insured was excused from further compliance with its obligations under policy, (3) thus, insurers could not rely on insured's later noncompliance as defense to third-party action in which insured sought that insurers were obligated to defend and indemnify it in personal injury action by employee in which insured was impleaded. Am. Ref-Fuel Co. v Res. Recycling, Inc., 281 A.D.2d 573, 722 N.Y.S.2d 570, 2001 N.Y. App. Div. LEXIS 3491 (N.Y. App. Div. 2d Dep't 2001).

Insurer of subcontractor had duty to defend and indemnify joint venturers (contractors) where subcontractor was contractually required to provide primary coverage, policy listed joint venturers as additional insureds and covered subcontractor's work, including equipment and materials connected with work, and plaintiff in underlying injury action alleged that he tripped over equipment belonging to subcontractor and located in its staging area. Impulse Enterprises/F & V Mech. Plumbing & Heating v St. Paul Fire & Marine Ins. Co., 282 A.D.2d 266, 723 N.Y.S.2d 177, 2001 N.Y. App. Div. LEXIS 3602 (N.Y. App. Div. 1st Dep't 2001).

Plaintiff who was injured when insured recklessly fired shotgun in his vicinity was entitled to summary judgment declaring that defendant insurer had duty to defend and indemnify insured in underlying personal injury action, although blanket "criminal activity" exclusion contained in homeowner's liability policy unambiguously on its face shielded defendant from liability, where language employed by defendant in exclusion was so overbroad that it rendered coverage illusory, and thus exclusion was unenforceable as against public policy. Slayko v Sec. Mut. Ins. Co., 285 A.D.2d 875, 728 N.Y.S.2d 282, 2001 N.Y. App. Div. LEXIS 7532 (N.Y. App. Div. 3d Dep't 2001), rev'd, 98 N.Y.2d 289, 746 N.Y.S.2d 444, 774 N.E.2d 208, 2002 N.Y. LEXIS 1902 (N.Y. 2002).

Court improperly granted summary judgment motion declaring that defendant, plaintiff's father's insurer, had no obligation to defend or indemnify plaintiff in underlying action where meaning of "covered motor vehicle" in policy was ambiguous, and thus such provision would be construed against defendant and in favor of coverage; while exclusions section of policy clearly limited coverage to only those vehicles listed in "Coverage Summary," defendant had not timely exclaimed and was thus estopped from doing so. Nationwide Mut. Ins. Co. v CNA Ins. Co., 286 A.D.2d 485, 729 N.Y.S.2d 760, 2001 N.Y. App. Div. LEXIS 8269 (N.Y. App. Div. 2d Dep't 2001).

In personal injury action, defendant owner of leased premises was entitled to summary judgment declaring that insurer was required to defend and indemnify it where (1) lease required insured to procure insurance for benefit of "owner" of premises and defined "owner" as, inter alia, "the owner of the fee" of demised premises, and (2) insurance contract required insurer to defend and indemnify "any...organization with whom [insured] agreed, because of a written contract or agreement or permit to provide insurance." Wilson v Commer. Envelope Mfg. Co., 286 A.D.2d 731, 730 N.Y.S.2d 352, 2001 N.Y. App. Div. LEXIS 8551 (N.Y. App. Div. 2d Dep't 2001), app. dismissed, 98 N.Y.2d 737, 751 N.Y.S.2d 840, 781 N.E.2d 904, 2002 N.Y. LEXIS 2834 (N.Y. 2002).

Security officer, who collided with concrete pillar while driving car out of indoor parking garage at owner's request, and his employer (which was legally responsible for his acts or omissions) were entitled to summary judgment declaring that defendant insurer was obligated to defend and indemnify them in personal injury action by car owner because (1) as permissive user of car, security guard was "an insured" under policy, and (2) "car business" exclusion did not apply to security guard, as he was not employed as parking attendant and had never previously been called on to drive car in course of his employment. *Nat'l Union Fire Ins. Co. v Progressive Ins. Co., 287 A.D.2d 697, 732 N.Y.S.2d 63, 2001 N.Y. App. Div. LEXIS 10027 (N.Y. App. Div. 2d Dep't 2001).

Insurer of chase car involved in high speed chase resulting in fatal accident was responsible for primary defense and coverage of claim against passenger of that vehicle, who allegedly controlled its use and was father of owner and actual driver of vehicle, where son's policy covered any "family member" who used vehicle, which included person related by blood who was resident of household, and father and son resided together. Excelsior Ins. Co. v Progressive Cas. Ins. Co., 170 Misc. 2d 78, 649 N.Y.S.2d 331, 1996 N.Y. Misc. LEXIS 392 (N.Y. Sup. Ct. 1996).

Insurance company, which issued insurance policies to insureds for both their primary and secondary residences, was obligated to defend and indemnify insureds in action brought by third party who was injured at insureds' secondary residence since policy on

that residence was ambiguous as to its coverage, or lack thereof, for personal injury to third persons, and it did not specifically state that insureds did not have such coverage. Levy v AETNA Cas. & Sur. Co., 172 Misc. 2d 816, 658 N.Y.S.2d 939, 1997 N.Y. Misc. LEXIS 215 (N.Y. Sup. Ct. 1997).

Insurer of driver of motor vehicle escorting tractor-trailer on highway would be obligated under standard automobile liability insurance policy to defend or pay out claims against its insured in lawsuit brought by New York State against insurer of tractor-trailer, whose driver caused damage to itself and to overpass structure on highway, and who sued owner of escort vehicle for indemnification, alleging that escort vehicle's driver failed to timely communicate with tractor-trailer's driver. Insurance Department, Opinions of General Counsel, Opinion Number 07-09-17.

175. — —Based on allegations in complaint

In a personal injury action arising out of an automobile accident, the vehicle's insurer was obligated to defend the driver as well as the owner, even though the insurer itself reasonably concluded that the driver did not have the owner's permission and the jury ultimately so found, where the complaint alleged that the driver was operating the vehicle with the owner's permission and the issue of permission was not judicially resolved prior to trial. Colon v Aetna Life & Casualty Ins. Co., 66 N.Y.2d 6, 494 N.Y.S.2d 688, 484 N.E.2d 1040, 1985 N.Y. LEXIS 16992 (N.Y. 1985).

Insurance company was obligated to defend its insured in underlying action in which plaintiffs alleged that insured's paint business was nuisance and had caused them bodily injury and property damage, notwithstanding contention that there was no duty to defend as policy only covered unexpected and unintentional injuries and that alleged injury was caused by intentional acts, since underlying action alleged both intentional and negligent conduct. Collum v State Farm Fire & Casualty Co., 155 A.D.2d 581, 547 N.Y.S.2d 423, 1989 N.Y. App. Div. LEXIS 14398 (N.Y. App. Div. 2d Dep't 1989).

Insured, manufacturer of central station alarm monitoring equipment, was entitled to summary judgment in action for judgment declaring insurer's obligation to defend and indemnify it in third-party action brought by alarm installer whose customer's jewelry store had been burglarized where (1) it was undisputed that, contrary to one exclusionary endorsement, neither main suit nor third-party action sought recovery for property damage resulting from an act or omission on part of any guard or security system employed by insured, and (2) insurer as a matter of law failed to carry burden of showing that allegations in both main and third-party suits fell within other endorsement excluding coverage for liability arising out of alarm system's failure to perform as intended. AFA Protective Sys. v Atlantic Mut. Ins. Co., 157 A.D.2d 683, 549 N.Y.S.2d 783, 1990 N.Y. App. Div. LEXIS 508 (N.Y. App. Div. 2d Dep't 1990).

In action against state for injuries sustained by infant when she dove from tree stump into lake, in which state counterclaimed alleging that infant's parents were guilty of negligent supervision, court erred in granting summary judgment favorable to parents' homeowner's insurer on issue of whether insurer had duty to defend and indemnify parents, even though policy specifically excluded coverage for bodily injuries sustained by insured person, including infant, since liability at issue on state's counterclaim was not parents' liability to infant but rather parents' potential liability to state on claim of equitable apportionment. Allstate Ins. Co. v Pestar, 168 A.D.2d 931, 564 N.Y.S.2d 892, 1990 N.Y. App. Div. LEXIS 16469 (N.Y. App. Div. 4th Dep't 1990).

Insurer had duty as matter of law to defend insured under warehouseman's liability policy where there was no question that claims pleaded in complaint in underlying action were, on their face, covered under policy; it was irrelevant that questions of fact might exist as to whether loss would ultimately be found to fall within clause of policy that excluded certain types of losses, such as "mysterious disappearances," from coverage. North River Ins. Co. v ECA Warehouse Corp., 172 A.D.2d 225, 568 N.Y.S.2d 71, 1991 N.Y. App. Div. LEXIS 4446 (N.Y. App. Div. 1st Dep't 1991).

Insurance brokers were entitled to summary judgment declaring that insurance company was under duty to defend them pursuant to policy of errors and omission insurance in action for failure to procure liability insurance for 1984 through 1986, notwithstanding that policy specifically excluded any claims attributable to acts which occurred before April 20, 1984, since it could not be determined from complaint in underlying action whether failure to obtain liability insurance occurred before or after April 20, 1984. K.M. Ins. Brokers v International Ins. Co., 180 A.D.2d 407, 579 N.Y.S.2d 81, 1992 N.Y. App. Div. LEXIS 1069 (N.Y. App. Div. 1st Dep't 1992).

Supreme Court erred in declaring that liability insurer had no obligation to defend or indemnify insured county in personal injury action arising out of accident on highway under construction, even though Appellate Court found no basis for liability against contractor on summary judgment motion, since plaintiffs' amended complaint in underlying action raised new theory of liability by alleging that county was negligent in failing to properly monitor highway while under construction, which sufficiently invoked policy provision obligating insurer to provide coverage for acts or omissions of insured "in connection with [its] general supervision of such operations." Liberty Mut. Ins. Co. v County of Onondaga, 181 A.D.2d 1024, 581 N.Y.S.2d 970, 1992 N.Y. App. Div. LEXIS 4623 (N.Y. App. Div. 4th Dep't), app. denied, 80 N.Y.2d 753, 587 N.Y.S.2d 905, 600 N.E.2d 632, 1992 N.Y. LEXIS 1649 (N.Y. 1992).

General contractor's comprehensive general liability insurance carrier had duty to defend and indemnify transit authority (general contractor's joint venturer and additional named insured under policy) in third-party action brought by subcontractor, after transit authority motorman commenced main action against general contractor and subcontractor alleging that injuries he sustained when dangling electrical conduit fell on train he was operating resulted from their negligence in performing contract with transit authority; allegations of third-part complaint, which incorporated complaint in main action, sufficiently set forth claim that could reasonably be said to fall within policy's coverage. New York City Transit Auth. v Aetna Casualty & Sur. Co., 207 A.D.2d 389, 615 N.Y.S.2d 709, 1994 N.Y. App. Div. LEXIS 8190 (N.Y. App. Div. 2d Dep't 1994).

Defendant insurance company had duty, as matter of law, to defend driver of car where complaint alleged that car was owned by defendant's insured and was driven with owner's permission at time of accident, and where policy issued by defendant defined "insured" (for purposes of liability coverage) as "any person using your covered auto." Sweet v State Farm Mut. Auto. Ins. Co., 223 A.D.2d 841, 636 N.Y.S.2d 196, 1996 N.Y. App. Div. LEXIS 85 (N.Y. App. Div. 3d Dep't 1996).

Garage owner was entitled to defense by insurer under insurer's obligations to owner as additional insured in policy held by garage operator where complaint in underlying action sought to charge both owner and operator with responsibility for accident due to defects on that part of sidewalk used by vehicles in order to enter garage, thereby triggering express coverage provided to owner. ZKZ Assocs. L.P. v CNA Ins. Co., 224 A.D.2d 174, 637 N.Y.S.2d 117, 1996 N.Y. App. Div. LEXIS 775 (N.Y. App. Div. 1st Dep't 1996).

Insurer was obligated to defend and indemnify county, as "additional insured," in underlying actions for injuries allegedly sustained in automobile accidents which occurred on resurfaced road where insured supplied materials and equipment for resurfacing project, its own employees operated equipment which controlled amount of emulsion and stone supplied to road surface, and some of allegations of negligence involved that work; at least part of county's potential liability arose from work by insured as defined by policy. County of Orange v Hartford Accident & Indem. Corp., 226 A.D.2d 578, 641 N.Y.S.2d 118, 1996 N.Y. App. Div. LEXIS 4358 (N.Y. App. Div. 2d Dep't 1996).

Court properly declared that liability insurer had duty to defend landlords in action by tenant who alleged that she suffered injuries from ingesting lead paint in her rented apartment over 9-year period, as allegations in complaint in underlying action fell within scope or risks covered by subject policies, and insurer failed to meet its burden of proving that coverage was vitiated as

matter of law by pollution exclusion clauses or by fact that portion of alleged injury may have occurred prior to effective dates of policies issued by insurer; however, because it could not be determined on record whether any injury occurred during effective dates of subject policies, declaration that insurer had duty to indemnify landlords was premature. General Accident Ins. Co. of Am. v IDBAR Realty Corp., 229 A.D.2d 515, 646 N.Y.S.2d 138, 1996 N.Y. App. Div. LEXIS 7889 (N.Y. App. Div. 2d Dep't 1996).

In action for judgment declaring that employer's liability insurer had duty to defend plaintiff in $1 million personal injury action brought against him and his employer by attendant of gift shop located in hotel where plaintiff was staying, insurer was not entitled to summary judgment on ground that plaintiff was not "protected person" within meaning of employer's liability insurance policy, where complaint in underlying action alleged that plaintiff was employee of insured at time of incident and that he was acting within scope of his employment and in furtherance of insured's business when incident occurred. Jubin v St. Paul Fire & Marine Ins. Co., 236 A.D.2d 712, 653 N.Y.S.2d 454, 1997 N.Y. App. Div. LEXIS 1300 (N.Y. App. Div. 3d Dep't 1997).

In action by plaintiff who obtained judgment in his favor in personal injury action wherein tortfeasor's insurance carrier disclaimed coverage based on exclusion for bodily injuries intentionally caused by its insured, allegations of complaint, together with tortfeasor's statements and his claim that he did not intend to hurt plaintiff, established as matter of law that insurance carrier was under duty to defend tortfeasor in underlying action despite evidence that intentional tort was committed. Robbins v Michigan Millers Mut. Ins. Co., 236 A.D.2d 769, 653 N.Y.S.2d 975, 1997 N.Y. App. Div. LEXIS 2046 (N.Y. App. Div. 3d Dep't 1997).

Liability insurers and hotel owner's landscaping contractor breached their duties to defend hotel owner in underlying action for slip and fall where (1) service agreement between owner and contractor required contractor to assume defense of any action against owner "arising out of or connected with" that agreement and to procure insurance naming owner as additional insured, (2) contractor obtained insurance from insurers providing coverage for owner for liability arising from contractor's work, and (3) allegations of complaint brought action within scope of insurance policy and service agreement. Davidson v Hilton Hotels Corp., 266 A.D.2d 336, 698 N.Y.S.2d 297, 1999 N.Y. App. Div. LEXIS 11563 (N.Y. App. Div. 2d Dep't 1999).

General contractor and owner, who were additional insureds under policy issued to defendant subcontractor, were entitled to summary judgment to extent of declaring that insurer was obligated to defend them in action to recover for injuries sustained by subcontractor's employee when he fell down stairs, because underlying complaint fell within scope of policy's coverage for bodily injury arising out of primary insured's work for additional insureds, and it set forth claims pursuant to, inter alia, CLS Labor § 240(1) such that additional insureds could be held liable despite lack of negligence on their part contributing to allegedly defective stairs. Pavarini Constr. Co. v Liberty Mut. Ins. Co., 270 A.D.2d 98, 704 N.Y.S.2d 72, 2000 N.Y. App. Div. LEXIS 2825 (N.Y. App. Div. 1st Dep't 2000).

Insured contractor was entitled to summary judgment declaring that insurer was required to defend it in underlying arbitration proceeding where allegations against contractor in arbitration stated claims falling within policy coverage, notwithstanding assertion in arbitration of additional claims for breach of contract and fraud not covered by policy. Sentry Contr., Inc. v Traveler's Prop. Cas. Corp., 279 A.D.2d 355, 720 N.Y.S.2d 15, 2001 N.Y. App. Div. LEXIS 462 (N.Y. App. Div. 1st Dep't 2001).

Court erred in granting summary judgment declaring that plaintiff, underwriter of commercial general liability insurance policy, was not obligated to defend and indemnify defendant in underlying action where policy included coverage for "advertising injury," and underlying complaint expressly alleged that defendant's advertising activities violated manufacturer's trademark. Am. Mfrs. Mut. Ins. Co. v Quality King Distribs., 287 A.D.2d 527, 731 N.Y.S.2d 234, 2001 N.Y. App. Div. LEXIS 9570 (N.Y. App. Div. 2d Dep't 2001).

Because the insureds' request for defense and indemnity did not constitute a request by a co-insurer for contribution, and because the proffered basis for the insurer's disclaimer was readily ascertainable from the face of the complaint in a coworker's underlying personal injury action, the insurer's disclaimer was untimely under N.Y. Ins. Law § 3420(d). Fish King Enters. v Countrywide Ins. Co., 88 A.D.3d 639, 930 N.Y.S.2d 256, 2011 N.Y. App. Div. LEXIS 6937 (N.Y. App. Div. 2d Dep't 2011).

176. — —Based on insurer's knowledge

Insurer has duty to defend where pleadings do not allege covered occurrence but insurer has actual knowledge of facts demonstrating that lawsuit does involve such occurrence; insurer cannot use third party's pleading as shield to avoid its contractual duty to defend its insured. Fitzpatrick v American Honda Motor Co., 78 N.Y.2d 61, 571 N.Y.S.2d 672, 575 N.E.2d 90, 1991 N.Y. LEXIS 644 (N.Y. 1991).

Insured was entitled to summary judgment declaring that insurers had duty to defend it in personal injury action alleging that it was negligent in "servicing and repairing" machine sold to customer where insurers disclaimed liability on ground that there was no coverage under policy's "completed operations hazard" exclusion, since insurers knew when they disclaimed liability that insured had been repairing machine immediately prior to accident; issue of whether or not insured had completed operations within definitional section of policy, while relevant to insurers' obligation to pay, was not decisive on their duty to defend. Suburban Bindery Equipment Corp. v Boston Old Colony Ins. Co., 150 A.D.2d 767, 541 N.Y.S.2d 613, 1989 N.Y. App. Div. LEXIS 7294 (N.Y. App. Div. 2d Dep't 1989).

Insured was entitled to summary judgment declaring that insurers had duty to defend it in personal injury action alleging that it was negligent in "servicing and repairing" machine sold to customer where insurers disclaimed liability on ground that there was no coverage under policy's "completed operations hazard" exclusion, since insurers knew when they disclaimed liability that insured had been repairing machine immediately prior to accident; issue of whether or not insured had completed operations within definitional section of policy, while relevant to insurers' obligation to pay, was not decisive on their duty to defend. Suburban Bindery Equipment Corp. v Boston Old Colony Ins. Co., 150 A.D.2d 767, 541 N.Y.S.2d 613, 1989 N.Y. App. Div. LEXIS 7294 (N.Y. App. Div. 2d Dep't 1989).

Court erred in granting insurer's summary judgment motion declaring that it was not obligated to defend its insured in underlying action where insurer first disclaimed coverage based on injured party's failure to provide timely notice in its June 14, 1994 disclaimer, but insurer, however, was fully aware of facts underlying its disclaimer on April 6, 1994, when it received notice of claim from injured party, and insurer's unexplained delay of over 2 months in disclaiming coverage as to injured party based on her untimely notice was unreasonable as matter of law. Prudential Prop. & Cas. Ins. v Persaud, 256 A.D.2d 502, 682 N.Y.S.2d 412, 1998 N.Y. App. Div. LEXIS 13674 (N.Y. App. Div. 2d Dep't 1998).

Insurer under homeowner's policy had to defend and indemnify insured in underlying negligence action where insurer's desire for additional discovery, claiming that it was waiting for 2 "main" witnesses to be deposed, was not reasonable excuse for its 7-month delay in disclaiming coverage after unequivocal evidence surfaced that accident fell squarely within policy exclusion. North Country Ins. Co. v Tucker, 273 A.D.2d 683, 709 N.Y.S.2d 255, 2000 N.Y. App. Div. LEXIS 7220 (N.Y. App. Div. 3d Dep't 2000).

Third-party defendant insurance carrier, which insured vehicles owned by renter of vehicle involved in collision, was obligated to defend driver of rental vehicle insofar as he was operating it with permission of renter-insured, although complaint contained no allegations bearing on question of whether rental vehicle qualified as "other motor vehicle" under terms of policy covering renter's own vehicles, as written report in which renter-insured stated that rental vehicle "was intended to be a substitute" for her own vehicle while it was being repaired, if ultimately established to be true, would bring occurrence within policy coverage. Pahl v Grenier, 277 A.D.2d 681, 715 N.Y.S.2d 124, 2000 N.Y. App. Div. LEXIS 11963 (N.Y. App. Div. 3d Dep't 2000).

177. —Duty found to not exist

Liability insurer was entitled to summary judgment declaring that it had no obligation to defend its insured, owner of garden apartment complex, in suit brought by person claiming to have fallen on premises prior to effective date of insurer's policy, where there was no documentary proof of any contract to insure at earlier date and no premiums had been paid for such coverage; insured's assertion that insurer's agent had promised to provide coverage with earlier effective date was insufficient to preclude summary judgment. Dedvukaj v Allstate Ins. Co., 80 N.Y.2d 843, 587 N.Y.S.2d 587, 600 N.E.2d 218, 1992 N.Y. LEXIS 1599 (N.Y. 1992).

State Insurance Fund (SIF) was entitled to summary judgment declaring that it was not required to defend or indemnify fourth-party plaintiffs in third-party action where (1) SIF did not receive pleadings in third-party action until over 18 months after action was commenced, (2) within a few days of receiving pleadings, SIF sent written disclaimer notice to fourth-party plaintiffs based on their failure to comply with notice provision of policy requiring them to forward all legal papers to SIF, and (3) SIF's disclaimer letter was not defective merely because it was not sent to fourth-party plaintiffs' attorney. Almalabeh v Chelsea 19 Assocs., 273 A.D.2d 261, 708 N.Y.S.2d 700, 2000 N.Y. App. Div. LEXIS 6539 (N.Y. App. Div. 2d Dep't 2000).

Court erred in determining that insurer had obligation to defend former owner of automobile involved in accident where that person was neither named insured nor operator of automobile when accident occurred. Beattie v Home Indem. Ins. Co., 170 A.D.2d 559, 566 N.Y.S.2d 335, 1991 N.Y. App. Div. LEXIS 2312 (N.Y. App. Div. 2d Dep't), app. denied, 78 N.Y.2d 851, 573 N.Y.S.2d 69, 577 N.E.2d 60, 1991 N.Y. LEXIS 841 (N.Y. 1991).

Insurer was not obligated to defend and indemnify insured against underlying claims arising from insured's disposal of hazardous wastes since coverage was limited to property damage alleged to have occurred during policy period, and did not extend to damages occurring long after policies had expired. Borg-Warner Corp. v Insurance Co. of North America, 174 A.D.2d 24, 577 N.Y.S.2d 953, 1992 N.Y. App. Div. LEXIS 109 (N.Y. App. Div. 3d Dep't), app. denied, 80 N.Y.2d 753, 587 N.Y.S.2d 905, 600 N.E.2d 632, 1992 N.Y. LEXIS 1631 (N.Y. 1992).

Insurer was entitled to summary judgment in action seeking declaration of its duty to defend and indemnify, even though insured alleged that he learned of accident one week after its occurrence and informed insurer's agent by telephone within 2 weeks, where policy required written notice of claim as soon as possible, agent denied telephonic notice, and written notice was not provided until 10 months after accident; whether or not telephonic notice was given, it did not constitute proper notice under policy. Elkowitz v Farm Family Mut. Ins. Co., 180 A.D.2d 711, 579 N.Y.S.2d 740, 1992 N.Y. App. Div. LEXIS 1638 (N.Y. App. Div. 2d Dep't 1992).

Insurance company was entitled to summary judgment in action for declaration that it was not required to defend or indemnify insured in action arising from insured's attack on coworker where (1) insured pleaded guilty to second degree assault in connection with attack, (2) insured stated in allocution under oath that he walked over to coworker and hit him in face with his fist, that they then rolled around floor fighting, and that he struck coworker with metal sign post, (3) 6 years after plea and 5 years after commencement of civil action by coworker, insured successfully moved for writ of coram nobis to vacate conviction and substitute plea to second degree assault by recklessly causing physical injury, based on allegation that insured's conduct was unintentional and caused by influence of alcohol, and (4) counsel conceded that underlying purpose of motion was to increase likelihood that coworker would be compensated under insurance policy; insured's change in his story 6 years after attack was incredible as matter of law. Home Mut. Ins. Co. v Lapi, 192 A.D.2d 927, 596 N.Y.S.2d 885, 1993 N.Y. App. Div. LEXIS 4033 (N.Y. App. Div. 3d Dep't 1993).

Court should have granted insurer's motion for summary judgment and declared that it did not have obligation to defend or indemnify insured in third-party action brought against insured by insured's affiliate where (1) insured's employee had been injured during course of his employment, (2) employee successfully applied for workers' compensation benefits under policy issued to insured by insurer, (3) employee thereafter commenced personal injury action against insured and its affiliate, with action dismissed as to insured based on Workers' Compensation Law, (4) affiliate commenced third-party action against insured, (5) insured failed to provide insurer with timely notice of pendency of personal injury action brought against insured by its employee, and (6) insured did not proffer reasonable excuse for its failure to so notify insurer; notice of employee's workers' compensation claim did not serve as notice of subsequent actions. 57th St. Management Corp. v Zurich Ins. Co., 208 A.D.2d 801, 617 N.Y.S.2d 852, 1994 N.Y. App. Div. LEXIS 10027 (N.Y. App. Div. 2d Dep't 1994).

Tenant's insurance company was not required to defend and indemnify landlord in underlying action that arose from incident in which tenant's employee walked through freight elevator door opening on first floor and fell down elevator shaft where tenant leased fourth floor of landlord's building, and lease required tenant to obtain liability insurance protecting landlord and tenant from any liability whatsoever occasioned by accident on or about leased premises or any appurtenances thereto; injury did not occur on leased premises or any appurtenance thereto. Axelrod v Maryland Casualty Co., 209 A.D.2d 336, 619 N.Y.S.2d 10, 1994 N.Y. App. Div. LEXIS 11609 (N.Y. App. Div. 1st Dep't 1994).

Defendant insurers were entitled to judgment declaring that they had no duty to defend and indemnify plaintiff under commercial general liability policy where they submitted insurance documents that conclusively established that plaintiff was not additional insured under policy on date of accident. ADF Constr. Corp. v Home Insulation & Supply, 237 A.D.2d 915, 656 N.Y.S.2d 1010, 1997 N.Y. App. Div. LEXIS 3509 (N.Y. App. Div. 4th Dep't 1997).

Insured's delay of at least 16 months in notifying its liability insurer of action against insured for slip and fall on its property was unreasonable as matter of law, and thus insurer was entitled to summary judgment declaring that it was not required to defend and indemnify insured in underlying action. Colonial Woods Condo. v Hanover Ins. Co., 245 A.D.2d 329, 665 N.Y.S.2d 102, 1997 N.Y. App. Div. LEXIS 12798 (N.Y. App. Div. 2d Dep't 1997).

Liability insurer's disclaimer of coverage was valid, and thus it had no duty to defend or indemnify insured, where insured failed to provide prompt notice of claim in violation of its obligations under policy, even if delay in notification caused no prejudice, and even if insurer had learned of underlying occurrence and subsequent claim from another source. Outlaw v City of New York, 245 A.D.2d 496, 666 N.Y.S.2d 700, 1997 N.Y. App. Div. LEXIS 13269 (N.Y. App. Div. 2d Dep't 1997).

In third-party action by gasoline service station owner for declaration that its liability insurer had duty to defend and indemnify him in connection with underlying suit to recover cost of cleaning up underground gasoline leak, insurer was entitled to summary judgment where owner did not file notice of loss or otherwise notify insurer that leak had occurred until 1993 despite having been notified that he would be liable for cleanup costs shortly after cleanup efforts began in 1986. State v Ackley, 245 A.D.2d 668, 664 N.Y.S.2d 876, 1997 N.Y. App. Div. LEXIS 12582 (N.Y. App. Div. 3d Dep't 1997).

Insurer was entitled to summary judgment dismissing action for judgment declaring that insurer was obligated to pay defense and indemnification costs to plaintiff in connection with settlement of underlying action where plaintiff had no right of subrogation against insured; thus, insurer was not obligated to tender its policy toward settlement. Ryder Truck Rental, Inc. v Countrywide Ins. Co., 251 A.D.2d 313, 672 N.Y.S.2d 802, 1998 N.Y. App. Div. LEXIS 6220 (N.Y. App. Div. 2d Dep't), app. dismissed, 92 N.Y.2d 920, 680 N.Y.S.2d 460, 703 N.E.2d 272, 1998 N.Y. LEXIS 3090 (N.Y. 1998).

Truck leasing company, which claimed to be additional insured under "Business Automobile Policy," was not entitled to summary judgment declaring that insurer had duty to defend and indemnify it in underlying action by truck driver whose arm was

crushed by truck's liftgate where (1) policy provided coverage to entities that leased vehicles "where required by contract," (2) although original lease agreement required lessee to procure and maintain automobile liability insurance and to list plaintiff lessor as additional insured on policy, lessee's trucking business was taken over another company (NCC) in 1992, (3) it was not until September 1993 that NCC executed assignment and assumption agreement transferring to NCC original lessee's rights under its lease with plaintiff, and (4) there were triable issues of fact as to whether NCC was required by contract to obtain insurance for plaintiff as of date of accident in August 1993 and whether there was oral contract between plaintiff and NCC before accident that obligated NCC to obtain such insurance. Penske Truck Leasing Co., L.P., v Home Ins. Co., 251 A.D.2d 478, 674 N.Y.S.2d 400, 1998 N.Y. App. Div. LEXIS 6859 (N.Y. App. Div. 2d Dep't 1998).

Insurer was under no duty to defend or indemnify defendant in underlying negligence action, despite alleged representations by insurer's employee to defendant where insurer did not issue liability insurance policy to defendant; thus, because policy of insurance between insurer and alleged tortfeasor never existed, it could not be created by equitable estoppel. Eagle Ins. Co. v Punctual Express, Inc., 251 A.D.2d 536, 673 N.Y.S.2d 926, 1998 N.Y. App. Div. LEXIS 7538 (N.Y. App. Div. 2d Dep't), app. denied, 92 N.Y.2d 814, 681 N.Y.S.2d 474, 704 N.E.2d 227, 1998 N.Y. LEXIS 4021 (N.Y. 1998).

Insured's failure to provide timely notice of loss, as required by insurance policy, precluded coverage under policy. YTSB Mgmt. Corp. v Westport Ins. Corp., 251 A.D.2d 571, 673 N.Y.S.2d 616, 1998 N.Y. App. Div. LEXIS 7498 (N.Y. App. Div. 2d Dep't 1998).

Insurer was not obligated to defend and indemnify former owner of car in personal injury action arising from accident which occurred when car was being driven by new owner, notwithstanding plaintiff's assertion that former owner was liable to third parties as "owner" until new owner complied with CLS Veh & Tr §§ 2113(b) and 2116(a) and (b), where former owner, through his agent, had delivered possession of car to bona fide transferee and complied with all provisions of CLS Veh & Tr §§ 2113 and 2116 that were applicable to owners. Potter v Keefe, 261 A.D.2d 864, 690 N.Y.S.2d 361, 1999 N.Y. App. Div. LEXIS 4898 (N.Y. App. Div. 4th Dep't 1999).

Court erred in declaring that plaintiff was obligated to defend and indemnify its insured against personal injury claims arising from automobile accident involving insured's brother, driver of insured's vehicle, where insured was not party to instant action, and plaintiff asserted that it had not raised any issue as to CLS Veh & Tr § 388. Progressive Ins. Cos. v Brouse, 272 A.D.2d 996, 708 N.Y.S.2d 673, 2000 N.Y. App. Div. LEXIS 5145 (N.Y. App. Div. 4th Dep't 2000).

Insurer was entitled to summary judgment declaring that sole claim in underlying litigation covered by subject policy was for property damage and that its duty to defend insured in that action would continue only until property damage claim was finally adjudicated or settled where insured effectively conceded that insurer was liable only for ruined garment damages, insured had its own independent counsel defending entire case, insured's claim of bad faith was based solely on insurer's settlement without insured's knowledge or consent, and policy gave insurer express prerogative to settle without insured's consent. Gerling Am. Ins. Co. v G.A. Braun, Inc., 273 A.D.2d 139, 710 N.Y.S.2d 896, 2000 N.Y. App. Div. LEXIS 7160 (N.Y. App. Div. 1st Dep't 2000).

Insurer was not required to defend or indemnify insured regarding underlying action by insured's injured employee where insurer properly disclaimed coverage based on insured's failure to provide timely notice of claim, insured's delay of 2 years and 10 months in providing notice of claim was unreasonable as matter of law, insurer was not obligated to disclaim coverage until insured provided notice of accident or claim, and disclaimer in insurer's answer was timely notice of disclaimer. Roofing Consultants, Inc. v Scottsdale Ins. Co., 273 A.D.2d 933, 709 N.Y.S.2d 782, 2000 N.Y. App. Div. LEXIS 6715 (N.Y. App. Div. 4th Dep't), app. denied, 95 N.Y.2d 770, 722 N.Y.S.2d 473, 745 N.E.2d 393, 2000 N.Y. LEXIS 3859 (N.Y. 2000).

Liability insurer had no duty to defend or indemnify insured for any claims against him by woman injured in slip and fall in bed of insured's pickup truck where (1) insured initially told insurer that woman fell while truck was parked and not moving and that he was not present at time of fall, (2) over one year later, after woman notified insurer that she intended to make liability claim against insured, insured told insurer that he was operating truck when woman fell, (3) insured's failure to make fair and truthful disclosures in reporting incident was breach of cooperation clause of insurance policy, and (4) insurer was not required to show prejudice as result of insured's lack of cooperation in order to prove its entitlement to summary judgment. Nationwide Mut. Ins. Co. v Graham, 275 A.D.2d 1012, 713 N.Y.S.2d 602, 2000 N.Y. App. Div. LEXIS 9608 (N.Y. App. Div. 4th Dep't 2000).

Insurer was entitled to summary judgment declaring that it was not obligated to defend and indemnify insureds in underlying personal injury action where insureds' 15-month delay in notifying insurer of accident was not excused by their allegedly good-faith, albeit mistaken, beliefs that (1) loss was not covered by insurance policy, (2) notification of their insurance agent was notification of insurer, and (3) their attorney had communicated with attorney for injured party. Travelers Indem. Co. v Worthy, 281 A.D.2d 411, 721 N.Y.S.2d 400, 2001 N.Y. App. Div. LEXIS 2073 (N.Y. App. Div. 2d Dep't 2001).

Insurer was entitled to summary judgment declaring that it was not obligated to defend and indemnify insureds in underlying personal injury action where injured party did not provide insurer with written notice of claim, and insurer was not required to cite that failure to notify in its letter disclaiming coverage. Travelers Indem. Co. v Worthy, 281 A.D.2d 411, 721 N.Y.S.2d 400, 2001 N.Y. App. Div. LEXIS 2073 (N.Y. App. Div. 2d Dep't 2001).

Insurer was properly granted summary judgment declaring that it was not obligated to defend or indemnify insured in underlying personal injury action where effective date of cancellation of insurance policy was November 19, 1994, and incident in question occurred on Nov. 28, 1994; even if reinstated coverage would have been in effect retroactively on Nov. 28, 1994, insurer showed, as matter of law, that insured's failure to advise it of potential claim was material misrepresentation which, if disclosed, would have resulted in determination not to reinstate policy. Hinderhofer v Daisy Mfg. Co., 286 A.D.2d 419, 729 N.Y.S.2d 512, 2001 N.Y. App. Div. LEXIS 8115 (N.Y. App. Div. 2d Dep't 2001).

178. — —Due to nature of claim

It was inappropriate to grant summary judgment requiring insurance company to defend insured without having established obligation to indemnify where insured had not sought defense from insurance company and had retained private counsel to serve his interests in underlying action, and both parties stated on appeal that insurance company's obligations of defense and indemnification could not be separated. Sterner v Colonial Coop. Ins. Co., 156 A.D.2d 950, 549 N.Y.S.2d 537, 1989 N.Y. App. Div. LEXIS 16098 (N.Y. App. Div. 4th Dep't 1989).

Insurance company was entitled to declaratory judgment that it had no duty to defend or indemnify insured in underlying action which contained negligence and assault causes of action since (1) policy covered accidents and it was undisputed that insured's assault on plaintiff in underlying action was intentional, and (2) insurance company had no duty to provide disclaimer under CLS Ins § 3420(d). Royal Indem. Co. v Miller, 187 A.D.2d 956, 591 N.Y.S.2d 652, 1992 N.Y. App. Div. LEXIS 13962 (N.Y. App. Div. 4th Dep't 1992), app. denied, 81 N.Y.2d 707, 597 N.Y.S.2d 937, 613 N.E.2d 969, 1993 N.Y. LEXIS 721 (N.Y. 1993).

Conclusory allegations in underlying complaint against insured, in which adjoining landowner sought injunctive relief and damages for impairment of its land by "leachate contamination" from insured's landfill, that landfill constituted continuing nuisance and continuing trespass warranting treble damages under CLS RPAPL § 853, did not obligate insurer to defend under personal injury liability coverage of comprehensive general liability policies for "wrongful entry or eviction or other invasion of the right of property," since (1) coverage under personal injury liability endorsement was limited to liability for purposeful acts aimed at dispossession of real property by someone asserting interest therein, and (2) extension of personal injury coverage to occurrences falling squarely within property damage coverage

would render pollution exclusion of property damage coverage meaningless. County of Columbia v Continental Ins. Co., 189 A.D.2d 391, 595 N.Y.S.2d 988, 1993 N.Y. App. Div. LEXIS 3502 (N.Y. App. Div. 3d Dep't), app. denied, 82 N.Y.2d 841, 606 N.Y.S.2d 591, 627 N.E.2d 512, 1993 N.Y. LEXIS 4306 (N.Y. 1993), aff'd, 83 N.Y.2d 618, 612 N.Y.S.2d 345, 634 N.E.2d 946, 1994 N.Y. LEXIS 1066 (N.Y. 1994).

In action alleging that president of insured company hired persons to assault and break both legs of another employee of company, that plan went awry, and that assailants killed employee, insurance company would not be required to provide defense, notwithstanding fact that action alleged gross negligence, since allegation of gross negligence was totally inconsistent with allegation of intentional malicious assault, and intentionally caused harm was excluded by policy. Monter v CNA Ins. Cos., 202 A.D.2d 405, 608 N.Y.S.2d 692, 1994 N.Y. App. Div. LEXIS 1951 (N.Y. App. Div. 2d Dep't 1994).

Court properly granted defendant insurer's summary judgment motion in action to recover damages due to defendant's refusal to defend or indemnify plaintiff in defamation action where complaint in underlying action alleged that defamatory words were uttered maliciously and with intent to injure, notwithstanding language within defendant's umbrella policy that included libel, slander, and defamation within definition of "injury," since both umbrella policy and plaintiff's general liability policy expressly excluded from coverage "injury or damage which is expected or intended by an insured." Hodgson v United Servs. Auto. Ass'n, 262 A.D.2d 359, 691 N.Y.S.2d 137, 1999 N.Y. App. Div. LEXIS 6272 (N.Y. App. Div. 2d Dep't 1999).

Plaintiff, which issued commercial liability policy to lessee naming lessors as "additional insureds," was barred by anti-subrogation rule from bringing action to declare that defendant, lessors' insurance carrier, was obligated to share in defense or indemnification of lessors in underlying personal injury action brought against lessors and lessee. Insurance Co. of Evanston v Mid-Hudson Coop. Ins. Co., 271 A.D.2d 651, 706 N.Y.S.2d 457, 2000 N.Y. App. Div. LEXIS 4521 (N.Y. App. Div. 2d Dep't 2000).

Insurer did not owe a duty to defend in the underlying personal injury action because the language of a specific endorsement and the declarations page stated the activities that were covered, the loss in question did not arise from activities within the classifications set forth on the declarations page, and, as such, coverage was lacking by reason of lack of inclusion; the classification limitation in the commercial general liability policy did not constitute an exclusion. Black Bull Contr., LLC v Indian Harbor Ins. Co., 135 A.D.3d 401, 23 N.Y.S.3d 59, 2016 N.Y. App. Div. LEXIS 2 (N.Y. App. Div. 1st Dep't 2016).

179. — — —Outside policy coverage

Insurer was not required to defend its insured in unfair competition proceeding brought by patent holder, even though general comprehensive liability policy covered "advertising injury" arising out of insured's "advertising activities," where patent holder's complaint alleged injury arising out of manufacture, importation, and sale of product which infringed holder's patents; moreover, price list circulated by insured and included in patent holder's complaint did not constitute "advertising activities," since it listed only prices and sizes of various products, and made no false, misleading, or deceptive claims that products were unique. A. Meyers & Sons Corp. v Zurich American Ins. Group, 74 N.Y.2d 298, 546 N.Y.S.2d 818, 545 N.E.2d 1206, 1989 N.Y. LEXIS 3008 (N.Y. 1989).

Coverage provided by "personal injury" endorsement in comprehensive general liability policies issued to county was not available for injuries arising from pollution-generated property damage, and thus insurers would not be required to provide representation and coverage for action against county alleging property damage resulting from leaching of toxic chemicals, where (1) action contained allegations of continuing nuisance, continuing trespass and invasion, (2) policy coverage was intended (as shown by torts enumerated in endorsement) to reach only purposeful acts undertaken by county, and (3) coverage for bodily injury and property damage contained exclusions for pollution-related injury or damage. County of Columbia v Continental Ins. Co., 83 N.Y.2d 618, 612 N.Y.S.2d 345, 634 N.E.2d 946, 1994 N.Y. LEXIS 1066 (N.Y. 1994).

Defendant insurers were entitled to summary judgment dismissing action for judgment declaring that they were obligated to defend and indemnify plaintiff in actions arising from accidental release of gasoline from 2 of plaintiff's petroleum storage facilities into groundwater, which then migrated underneath neighboring properties, as plaintiff failed to sustain its burden of showing that discharge of pollutants was "sudden" within meaning of exception to pollution exclusion clauses of defendants' policies where underlying complaints (and plaintiff's own version of occurrences) alleged that petroleum leaks occurred continuously over period of many years, suggesting opposite of suddenness. Northville Indus. Corp. v National Union Fire Ins. Co., 89 N.Y.2d 621, 657 N.Y.S.2d 564, 679 N.E.2d 1044, 1997 N.Y. LEXIS 306 (N.Y. 1997).

Insurer was not required to defend or indemnify a car owner and his sons under an automobile insurance policy where the policy only insured permissive users and sworn police statements rebutted the presumption that the driver was driving with the owner's consent and established a lack of permission for the driver to operate the vehicle. N.Y. Cent. Mut. Fire Ins. Co. v Nationwide Mut. Ins. Co., 307 A.D.2d 449, 761 N.Y.S.2d 730, 2003 N.Y. App. Div. LEXIS 7694 (N.Y. App. Div. 3d Dep't 2003).

Insurance companies owed no duty to defend town in federal action for dumping of chemical and industrial wastes at landfill from 1970 to 1984, and in proceeding by Department of Environmental Conservation, since there was no "occurrence" within meaning of insurance policies where (1) insurance policies defined "occurrence" to require injury or damage that was neither expected nor intended, (2) complaint in federal action alleged that town knew or should have known that disposal of chemical and industrial wastes would result into their release into environment, and (3) town was aware of problems at landfill as early as 1969. County of Broome v Aetna Casualty & Sur. Co., 146 A.D.2d 337, 540 N.Y.S.2d 620, 1989 N.Y. App. Div. LEXIS 5471 (N.Y. App. Div. 3d Dep't), app. denied, 74 N.Y.2d 614, 547 N.Y.S.2d 848, 547 N.E.2d 103, 1989 N.Y. LEXIS 3164 (N.Y. 1989).

Insurers had no duty to defend or indemnify insureds in nuisance action alleging that environmental damage was caused when chemicals improperly buried by corporate insured at its facility were carelessly removed since comprehensive general liability policies defined "occurrence" as unexpected, unintentional accident, and it was alleged that insureds "knew or should have known that the manner in which wastes were disposed of would result in their release into the environment"; such allegation allowed for no interpretation that would bring it within coverage afforded by policies. Moreau v Orkin Exterminating Co., 165 A.D.2d 415, 568 N.Y.S.2d 466, 1991 N.Y. App. Div. LEXIS 4275 (N.Y. App. Div. 3d Dep't 1991).

Liability arising out of long-term, intentional disposal of insured's industrial waste was not covered under "sudden and accidental" exception to pollution exclusion clause in insurance policies; further, in construing effect of second clause excepting discharges "which [are] neither intended nor expected," Supreme Court properly chose to read such clause out of exclusion rather than reading exclusion out of policy so that second clause was simply redundant surplusage and clarification that only unexpected and unintended discharges were excepted from exclusion. Borg-Warner Corp. v Insurance Co. of North America, 174 A.D.2d 24, 577 N.Y.S.2d 953, 1992 N.Y. App. Div. LEXIS 109 (N.Y. App. Div. 3d Dep't), app. denied, 80 N.Y.2d 753, 587 N.Y.S.2d 905, 600 N.E.2d 632, 1992 N.Y. LEXIS 1631 (N.Y. 1992).

Insurer had no duty to defend and indemnify oil company in action for injuries sustained when plaintiffs' kerosene heater exploded due to allegedly contaminated kerosene where policy issued to oil company was automobile liability policy covering truck used by company to transport kerosene, policy applied to accidents "resulting from the ownership, maintenance or use of a covered auto," and oil company failed to demonstrate that plaintiff's injuries were so caused. U.S. Oil Refining & Marketing Corp. v Aetna Casualty & Surety Co., 181 A.D.2d 768, 581 N.Y.S.2d 822, 1992 N.Y. App. Div. LEXIS 3737 (N.Y. App. Div. 2d Dep't 1992).

General liability insurance carrier for tenants was not required to defend or indemnify tenants in action by landlord which

alleged conversion of furnishings and personal property of landlord since insurance policy did not cover liability for theft or conversion by insured or others. Holman v Transamerica Ins. Co., 183 A.D.2d 589, 584 N.Y.S.2d 23, 1992 N.Y. App. Div. LEXIS 7430 (N.Y. App. Div. 1st Dep't 1992), aff'd, 81 N.Y.2d 1026, 599 N.Y.S.2d 913, 616 N.E.2d 499, 1993 N.Y. LEXIS 1709 (N.Y. 1993).

Insurance company was not required to indemnify supermarket in action alleging that supermarket solicited and abetted one of its employees to commit perjury, and that supermarket committed fraudulent misrepresentation and made false statements, where insurance policy required payment for damages attributable to bodily injury or property damage caused by "occurrence," which was defined as "an accident...which results in bodily injury or property damage." Dan's Supreme Supermarket v American Int'l Group, 210 A.D.2d 59, 619 N.Y.S.2d 47, 1994 N.Y. App. Div. LEXIS 12441 (N.Y. App. Div. 1st Dep't 1994).

Insurers was not obligated to defend and indemnify golf club in action for injuries sustained when golf cart in which plaintiff was riding flipped over where policy provided coverage for risks associated with maintenance and operation of golf carts, and sole allegation of negligence was that club negligently and carelessly maintained cart path and area adjacent thereto in dangerous, hazardous, and unsafe condition; such allegation related to premises liability and not to operation or maintenance of golf cart, which was risk covered under policy. Montammy Golf Club v Bruedan Corp., 210 A.D.2d 591, 620 N.Y.S.2d 153, 1994 N.Y. App. Div. LEXIS 11866 (N.Y. App. Div. 3d Dep't 1994).

Actions of insured's wife in turning vehicle around, accelerating, and striking decedent with enough force to crush his skull could not be deemed "an accident" within meaning of automobile insurance policy; thus, insurer was entitled to summary judgment declaring that it had no duty to defend and indemnify wife in wrongful death action. Allstate Ins. Allstate Ins. Co. v Bostic, 228 A.D.2d 628, 646 N.Y.S.2d 128, 1996 N.Y. App. Div. LEXIS 7430 (N.Y. App. Div. 2d Dep't 1996).

Insurer had no duty to defend and indemnify insured since sexual molestation allegations in underlying action did not constitute accidental "occurrence" under policies issued to insured; inclusion of action sounding in negligent training and supervision did not alter fact that operative acts giving rise to any recovery were intentional sexual assaults. Public Serv. Mut. Ins. Co. v Camp Raleigh, Inc., 233 A.D.2d 273, 650 N.Y.S.2d 136, 1996 N.Y. App. Div. LEXIS 12144 (N.Y. App. Div. 1st Dep't 1996), app. denied, 90 N.Y.2d 801, 660 N.Y.S.2d 554, 683 N.E.2d 19, 1997 N.Y. LEXIS 1575 (N.Y. 1997).

Acts alleged in underlying action sounding in sexual harassment, retaliatory discharge, and assault were intentional acts and thus did not constitute "occurrence" within meaning of general liability policies in question, which defined "occurrence" as "accident, including continuous or repeated exposure to substantially the same general harmful conditions"; thus, court properly granted insurer's summary judgment motion declaring that it had no duty to defend or indemnify insured. Green Chimneys Sch. for Little Folk v National Union Fire Ins. Co., 244 A.D.2d 387, 664 N.Y.S.2d 320, 1997 N.Y. App. Div. LEXIS 11269 (N.Y. App. Div. 2d Dep't 1997).

Plaintiffs, insured's son and granddaughter, were residents in insured's household where it was uncontested that they had been living at insured premises for 2 years, they had no separate or other residence, they used that address as their own in school, police, and medical records, and they had no concrete plans of moving to any other specific residence; thus, court properly declared that insurer had no duty to defend or indemnify insured in underlying personal injury in action brought against him by plaintiffs since coverage under policy did not apply to liability for bodily injuries sustained by residents of insured's household who were relatives. Commercial Mut. Ins. Co. v Wagschall, 256 A.D.2d 300, 681 N.Y.S.2d 317, 1998 N.Y. App. Div. LEXIS 13163 (N.Y. App. Div. 2d Dep't 1998).

Lease between school district (named insured) and childcare service (additional insured) did not constitute "insured contract" under policy which contained provision stating that its exclusions were not applicable if insured's liability arose under "insured contract"; thus, court erred in declaring that insurer had obligation to defend and indemnify school district in third-party action brought by childcare service against school district. State Ins. Fund v Hermitage Ins. Co., 256 A.D.2d 329, 681 N.Y.S.2d 354, 1998 N.Y. App. Div. LEXIS 13168 (N.Y. App. Div. 2d Dep't 1998).

Insurer was properly granted summary judgment declaring that it was not obligated to defend or indemnify its insured in underlying action for injuries allegedly sustained in motor vehicle accident while underlying plaintiff was riding as passenger in taxicab driven by insured's employee since policy at issue did not cover injuries which "arose out of" automobile accidents, but instead was limited to premises liability. Steinblatt v Reco, 256 A.D.2d 571, 685 N.Y.S.2d 69, 1998 N.Y. App. Div. LEXIS 14031 (N.Y. App. Div. 2d Dep't 1998).

Court properly granted insurer's summary judgment motion declaring that it was not obligated to defend or indemnify its insured in underlying personal injury action, even though insured pled guilty to first degree reckless endangerment in criminal action based on same incident, where there were no facts in complaint or otherwise to suggest that incident was not result of intentional conduct, insured's statement during his deposition intimating that he did not intend to injure underlying plaintiff was conclusory, unsupported, and not credible as matter of law, and cause of action in complaint alleging negligence was conclusory and unsupported by any facts. Pennsylvania Millers Mut. Ins. Co. v Rigo, 256 A.D.2d 769, 681 N.Y.S.2d 414, 1998 N.Y. App. Div. LEXIS 13334 (N.Y. App. Div. 3d Dep't 1998).

Insurer was entitled to summary judgment, and was properly declared not to be obligated to defend and indemnify its insured, where it submitted sufficient evidence to establish that injuries at issue were not caused by "occurrence" as defined in homeowners policy, and plaintiff failed to raise issue of fact with respect thereto. Diviney v Aetna Life & Cas. Co., 257 A.D.2d 643, 682 N.Y.S.2d 675, 1999 N.Y. App. Div. LEXIS 602 (N.Y. App. Div. 2d Dep't 1999).

Insurer was entitled to summary judgment declaring that it had no duty to defend or indemnify insured, under either workers' compensation or business owner's liability policy, in underlying action arising from sexual assaults allegedly committed by insured's employees; inclusion in underlying complaint of cause of action for negligent hiring, and other causes of action, did not alter fact that operative acts giving rise to recovery were alleged sexual assaults. General Accident Ins. Co. v 35 Jackson Ave. Corp., 258 A.D.2d 616, 685 N.Y.S.2d 774, 1999 N.Y. App. Div. LEXIS 1437 (N.Y. App. Div. 2d Dep't 1999).

Motor vehicle insurer was entitled to summary judgment declaring that it was not obligated to provide defense in underlying action against motor vehicle passenger who leaned out of moving vehicle and shoved plaintiff from his bicycle, causing him to fall and sustain injuries, because passenger was not "insured person" as he was not "using" vehicle at time of accident and, moreover, his conduct amounted to intentional act and thus was excluded from coverage under policy in question. Morris v Allstate Ins. Co., 261 A.D.2d 457, 690 N.Y.S.2d 102, 1999 N.Y. App. Div. LEXIS 4737 (N.Y. App. Div. 2d Dep't 1999).

Court should have granted plaintiff's summary judgment motion declaring that it was not obligated to defend or indemnify its insured in underlying action on basis of provision in insurance policy excluding coverage for injuries to insured's employees where, inter alia, defendant had obtained judgment in its favor in bankruptcy court by taking position that injured person was insured's employee, and Workers' Compensation Board had ruled that injured person was insured's employee. Excelsior Ins. Co. v Antretter Contr. Corp., 262 A.D.2d 124, 693 N.Y.S.2d 100, 1999 N.Y. App. Div. LEXIS 6795 (N.Y. App. Div. 1st Dep't 1999).

Insurer was properly granted summary judgment declaring that it had no duty defend or indemnify named insured's adoptive son in underlying action arising from automobile accident since automobile in question did not fall under either category of being "newly acquired" car or "non-owned" car within meaning of insurance policy. State Farm Mut. Auto. Ins. Co. v Bentley, 262 A.D.2d 739, 691 N.Y.S.2d 603, 1999 N.Y. App. Div. LEXIS 6527 (N.Y. App. Div. 3d Dep't 1999).

Insurers should have been granted summary judgment declaring that they had no duty to defend or indemnify their insured in

underlying wrongful death action since there was no coverage for decedent's injuries and death under provisions of insurance policies in light of fact that insured was convicted of causing death of decedent, who was unarmed, by shooting him once in abdomen and twice in back, with jury rejecting insured's justification defense. Hartford Cas. Ins. Co. v Pennington, 262 A.D.2d 1014, 692 N.Y.S.2d 534, 1999 N.Y. App. Div. LEXIS 7225 (N.Y. App. Div. 4th Dep't), app. denied, 94 N.Y.2d 757, 704 N.Y.S.2d 532, 725 N.E.2d 1094, 1999 N.Y. LEXIS 4031 (N.Y. 1999).

Insurers were not required to defend or indemnify school district in connection with underlying action alleging that teacher had assaulted and sexually abused 3 students where operative acts of assault and sexual abuse were intentional and thus were not "occurrence" covered by policies, even though complaint in underlying action alleged only negligent hiring, retention, and supervision by school district, and even though teacher's conduct was beyond scope of his employment. Sweet Home Cent. Sch. Dist. v Aetna Commer. Ins. Co., 263 A.D.2d 949, 695 N.Y.S.2d 445, 1999 N.Y. App. Div. LEXIS 7910 (N.Y. App. Div. 4th Dep't 1999).

Court erred in declaring that insurer was obligated to defend and indemnify its insured in underlying action for injuries allegedly caused by exposure to lead-based paint chips and flakes where "Coverage A" of policy provided that coverage was subject to all applicable exclusions in primary policy or policies, and primary policy, which was issued for same period as umbrella policy, stated that "this insurance does not apply to any liability or bodily injury or personal injury arising out of exposure to, ingestion of lead paint or any substance or matter containing lead paint or the residue of lead paint"; court's interpretation extending coverage for excluded loss under "Coverage B" of umbrella policy effectively negated clause incorporating exclusions in primary policy in "Coverage A" and left that provision without force and effect. Westview Assocs. v Guaranty Nat'l Ins. Co., 264 A.D.2d 307, 693 N.Y.S.2d 138, 1999 N.Y. App. Div. LEXIS 8602 (N.Y. App. Div. 1st Dep't 1999), rev'd, 95 N.Y.2d 334, 717 N.Y.S.2d 75, 740 N.E.2d 220, 2000 N.Y. LEXIS 2928 (N.Y. 2000).

Court properly declared that insurer had no duty to defend or indemnify property management company sued by homeowners' association to recover funds allegedly embezzled by company's employee, since policy covered only damages incurred because of bodily injury or property damage cause by "occurrence," defined as accident; allegation of company's negligent hiring and supervision of employee was insufficient to actuate coverage. Shared-Interest Mgmt. Inc. v Travelers Prop. Cas. Corp., 265 A.D.2d 622, 695 N.Y.S.2d 632, 1999 N.Y. App. Div. LEXIS 10318 (N.Y. App. Div. 3d Dep't 1999).

Insurer was entitled to summary judgment dismissing action for breach of advertising injury clause of commercial general liability policy where (1) policy covered claim for copyright infringement only insofar as such claim arose from insured's advertising of goods, products, or services, (2) complaint in underlying action, for which insured sought to recover its defense and settlement costs, alleged copyright infringement only by reason of insured's manufacture and sale of goods, and (3) no advertising injury having been alleged in underlying action, advertising injury clause did not apply. Quitman Mfg. Co. v Northbrook Nat'l Ins. Co., 266 A.D.2d 105, 698 N.Y.S.2d 469, 1999 N.Y. App. Div. LEXIS 11660 (N.Y. App. Div. 1st Dep't 1999).

Insurer was not obligated to defend or indemnify its insured in underlying negligence action in which patron in insured's nightclub sought damages for injuries sustained when he was shot in parking lot of club by fellow patron who was intoxicated since assault and battery exclusion was part of both general liability policy and liquor liability policy covering insured's premises, and exclusions encompassed claims "arising out of" assault and battery caused by either intentional conduct or negligence of insured. Sphere Drake Ins. Co., PLC v Block 7206 Corp., 265 A.D.2d 78, 705 N.Y.S.2d 623, 2000 N.Y. App. Div. LEXIS 3259 (N.Y. App. Div. 2d Dep't 2000).

Commercial liability insurer was properly granted summary judgment declaring that it was not obligated to defend or indemnify insureds in underlying personal injury action alleging that they negligently operated ride known as "the Whip," where insureds had purchased policy covering ride known as "the Moonwalk" and documentary evidence established that policy was not amended to include "Whip" ride prior to date of accident. Progressive Cas. Ins. Co. v Yodice, 276 A.D.2d 540, 714 N.Y.S.2d 715, 2000 N.Y. App. Div. LEXIS 10151 (N.Y. App. Div. 2d Dep't 2000).

Insurer was not required to defend or indemnify insured in underlying action where (1) general commercial liability policy covered only bodily injury and property damage, (2) underlying action was for economic loss resulting from need to remove asbestos-containing adhesive from school, (3) underlying complaint alleged causes of action for lost profits, extra costs due to delay and performance of extra work, breach of contract, breach of warranty, negligence, negligent representation, fraud, and false advertising, and (4) plaintiff in underlying action did not own school at which adhesive was used, and thus did not seek to recover for property damage. Structural Bldg. Prods. Corp. v Business Ins. Agency, Inc., 281 A.D.2d 617, 722 N.Y.S.2d 559, 2001 N.Y. App. Div. LEXIS 3055 (N.Y. App. Div. 2d Dep't 2001).

Insurer was not required to defend or indemnify insured in connection with underlying cause of action alleging that insured engaged in false advertising and misleading trade practices when it made written statements that its adhesive was asbestos-free where (1) "Advertising Liability Offense" section of general commercial liability policy provided coverage for damages from "advertising offense," (2) that term was defined as "injury incurred in the course of the [insured's] advertising activities" if injury arose from "libel, slander, defamation, violation of a right to privacy, piracy, unfair completion or infringement of copyright, title or slogan," and (3) underlying complaint did not allege any facts that would bring it within policy coverage so defined. Structural Bldg. Prods. Corp. v Business Ins. Agency, Inc., 281 A.D.2d 617, 722 N.Y.S.2d 559, 2001 N.Y. App. Div. LEXIS 3055 (N.Y. App. Div. 2d Dep't 2001).

Insurance carrier was entitled to summary judgment declaring that it was not obligated to defend and indemnify cooperative corporation in underlying action by holder of "unsold shares" in apartment, alleging that cooperative's board of directors refused to allow her to sublease apartment, since "Directors and Officers Error or Omissions Liability Endorsement" from insurer expressly limited recovery to instances when officer or director was entitled to indemnification from corporation, or was legally liable for actual or asserted wrongful act, but no such showing could be made in instant case because no directors or officers were named as defendants in underlying action. 34th Ave. Apt. Corp. v Nationwide Mut. Ins. Co., 283 A.D.2d 604, 725 N.Y.S.2d 98, 2001 N.Y. App. Div. LEXIS 5454 (N.Y. App. Div. 2d Dep't 2001).

Defendant insurer was entitled to summary judgment declaring that it was not obligated to defend and indemnify Toronto art dealer under policy issued to New York art dealer which covered New York dealer's employees for acts within scope of their employment, as it could not be said that New York dealer and Toronto dealer had employer-employee relationship with respect to underlying action, which arose from Toronto dealer's unsuccessful attempt to purchase certain painting at auction on New York dealer' behalf, where Toronto dealer worked exclusively from his own premises, had no fixed work hours, paid his own expenses, was not paid any salary and was not provided with insurance or training, and New York dealer did not exercise control over methods used by Toronto dealer but rather gave only general direction as to amount that Toronto dealer could spend on particular item. Curry v Atl. Mut. Ins. Co., 283 A.D.2d 937, 723 N.Y.S.2d 784, 2001 N.Y. App. Div. LEXIS 4574 (N.Y. App. Div. 4th Dep't), app. denied, 96 N.Y.2d 721, 733 N.Y.S.2d 373, 759 N.E.2d 372, 2001 N.Y. LEXIS 3169 (N.Y. 2001).

Insurer was properly granted summary judgment declaring that it was not obligated to defend or indemnify insured for loss or liability stemming from oil seepage at or from insured's property since fuel oil was pollutant within meaning and scope of subject insurance policy's pollution exclusion clause. Crane v Reliance Nat'l Indem. Ins. Co., 287 A.D.2d 332, 731 N.Y.S.2d 375, 2001 N.Y. App. Div. LEXIS 9639 (N.Y. App. Div. 1st Dep't 2001).

Because no judgment was entered in an underlying action against the insured, a non-party to the action and who was not operating the vehicle on the day of the accident in Maryland,

because the underlying action was conclusive as to the identity of the vehicle's owner and operator, and because N.Y. Ins. Law § 3420(d) did not apply to out-of-state accidents, the insurer was entitled to summary judgment due to a lack of coverage. Perkins v Allstate Ins. Co., 51 A.D.3d 647, 858 N.Y.S.2d 238, 2008 N.Y. App. Div. LEXIS 4085 (N.Y. App. Div. 2d Dep't 2008).

Order declaring defendant insurer obligated neither to co-insure a contractor nor to reimburse plaintiff insurer for defense and indemnification was affirmed; the duty to disclaim as soon as reasonably possible under N.Y. Ins. Law § 3420(d) was not triggered where the request was for contribution by a co-insurer. Plaintiff insurer received notice of the accident, conducted an investigation, undertook the defense of the lawsuit, and managed the defense on its own for four years, and had not been prejudiced by any late disclaimer by defendant insurer. AIU Ins. Co. v Investors Ins. Co., 17 A.D.3d 259, 793 N.Y.S.2d 412, 2005 N.Y. App. Div. LEXIS 4282 (N.Y. App. Div. 1st Dep't 2005).

District Court properly declined to broaden Lavanant v General Acci. Ins. Co., 79 N.Y.2d 623, 584 N.Y.S.2d 744, 595 N.E.2d 819, 1992 N.Y. LEXIS 1534 (N.Y. 1992).

180. — — —Within particular exclusion

Insured's criminal conviction of second degree manslaughter for recklessly cleaning shotgun that resulted in accidental death of victim did not collaterally block civil litigation of issue whether victim's death could, in language of homeowner's liability policy, "reasonably be expected to result" from insured's acts since, under one reasonable syllogism, person may engage in behavior that involves calculated risk without expecting that accident will occur; thus, insurer was not entitled to summary judgment in its action seeking declaratory judgment that it had no duty to defend or indemnify insured. Allstate Ins. Co. v Zuk, 78 N.Y.2d 41, 571 N.Y.S.2d 429, 574 N.E.2d 1035, 1991 N.Y. LEXIS 820 (N.Y. 1991).

Harm that resulted to children from sexual assaults allegedly committed on them by baby-sitter's husband in his home was harm "intentionally caused" as matter of law within meaning of husband's homeowner's insurance policy, and thus insurer was not required to defend and indemnify husband and baby-sitter from whatever damages might be recovered in victims' lawsuit, since such harm was inherent in nature of acts alleged. Allstate Ins. Co. v Mugavero, 79 N.Y.2d 153, 581 N.Y.S.2d 142, 589 N.E.2d 365, 1992 N.Y. LEXIS 204 (N.Y. 1992).

Insurance carrier was entitled to summary judgment declaring that it was not obligated to defend insured in tort action based on, inter alia, respondeat superior, where plaintiff alleged that security guard employed at insured's nightclub "negligently, carelessly and recklessly" shot him, since (1) insurance policy unambiguously excluded suits based on assault and battery, and (2) claims against insured were all based on assault and battery, notwithstanding security guard's lack of intent to cause actual harm that resulted. U.S. Underwriters Ins. Co. v Val-Blue Corp., 85 N.Y.2d 821, 623 N.Y.S.2d 834, 647 N.E.2d 1342, 1995 N.Y. LEXIS 126 (N.Y. 1995).

Insurer was not required to defend or indemnify a car owner and his sons under an homeowner's insurance policy where the policy contained exclusions for criminal acts and for injury arising out of the use of a motor vehicle and the parents of the deceased, who died as a result of a car accident, noted in their complaint that the cause of action against the sons was based on their illegal providing of alcoholic beverages. N.Y. Cent. Mut. Fire Ins. Co. v Nationwide Mut. Ins. Co., 307 A.D.2d 449, 761 N.Y.S.2d 730, 2003 N.Y. App. Div. LEXIS 7694 (N.Y. App. Div. 3d Dep't 2003).

Insurance carrier was entitled to summary judgment declaring that it had no duty to defend or indemnify city and city police department in underlying action alleging that police department was negligent in its handling of report of child abuse, where allegations in complaint fell within scope of exclusionary clause in insurance policy, stating that "This insurance does not apply to activities of any law enforcement personnel and/or agency." National Union Fire Ins. Co. v Pardo, 208 A.D.2d 702, 617 N.Y.S.2d 504, 1994 N.Y. App. Div. LEXIS 9959 (N.Y. App. Div. 2d Dep't 1994).

In action by truck driver against restaurant for injuries he sustained when he fell though open trap door into basement while preparing to move shipment of beer into basement, insurer of truck's lessor would not be obligated to defend restaurant where policy barred coverage to anyone other than lessees, borrowers and employees of named insured while moving property to or from covered vehicle. Coburn v Aetna Casualty & Sur. Co., 212 A.D.2d 752, 623 N.Y.S.2d 599, 1995 N.Y. App. Div. LEXIS 2194 (N.Y. App. Div. 1st Dep't 1995).

Release of 750,000 gallons of pollutant through improperly installed elbow in underground piping system, and release of 1.2 million gallons of pollutant through pin-hole leak in pipe, were not "sudden" discharges within meaning of exception to pollution exclusion clause in comprehensive general liability insurance policy, and insurers were entitled to summary judgment declaring that they were not obligated to defend insured in actions arising from such discharges, where only claim as to temporal aspect of discharges was that leak occurred "for many months or years without detection" and "discharge occurred continuously over a number of years". Northville Indus. Corp. v National Union Fire Ins. Co., 218 A.D.2d 19, 636 N.Y.S.2d 359, 1995 N.Y. App. Div. LEXIS 13973 (N.Y. App. Div. 2d Dep't 1995), aff'd, 89 N.Y.2d 621, 657 N.Y.S.2d 564, 679 N.E.2d 1044, 1997 N.Y. LEXIS 306 (N.Y. 1997), in part, 1997 N.Y. LEXIS 31 (N.Y. Jan. 9, 1997).

Insurer was entitled to summary judgment declaring that it had no duty to defend insured under homeowner's policy in civil action in which rape victim sought to recover damages for physical and emotional injuries, as harm that resulted to victim from sexual assault fell within policy's exclusion of liability coverage for injuries "expected and intended by insured"; mere allegation in fifth cause of action of victim's complaint, that victim's injuries were "unintended results" of insured's intentional acts, did not convert cause of action from one sounding in intentional tort to one sounding in negligence so as to trigger insurer's duty to defend, especially since that cause of action alleged that victim was physically unable to consent at time of intentional acts. Pistolesi v Nationwide Mut. Fire Ins. Co., 223 A.D.2d 94, 644 N.Y.S.2d 819, 1996 N.Y. App. Div. LEXIS 7251 (N.Y. App. Div. 3d Dep't), app. denied, 88 N.Y.2d 816, 651 N.Y.S.2d 17, 673 N.E.2d 1244, 1996 N.Y. LEXIS 3306 (N.Y. 1996).

Insurer was entitled to summary judgment declaring that it was not obligated to defend or indemnify its insured in underlying action brought against insured for injuries sustained by police officer in process of arresting insured where insured was originally charged with second degree assault and subsequently pleaded guilty to third degree assault under CLS Penal § 120.00(2), and policy provided that there was no coverage for bodily injuries which were "expected or intended by the insured." Utica Fire Ins. Co. v Shelton, 226 A.D.2d 705, 641 N.Y.S.2d 864, 1996 N.Y. App. Div. LEXIS 4590 (N.Y. App. Div. 2d Dep't 1996).

Insurer had no duty to defend, negotiate, settle, or indemnify village as to federal action brought against it, wherein it was found to have violated Federal Fair Housing Act when it amended zoning law to purposefully prohibit persons with AIDS from residing in boarding house, since policy exclusion denied coverage "[f]or damages arising out of or in any way connected with the actions of any administrative board...[that arises] out of...Land Use Planning; or Municipal Zoning." Village of Waterford v Reliance Ins. Co., 226 A.D.2d 887, 640 N.Y.S.2d 671, 1996 N.Y. App. Div. LEXIS 3723 (N.Y. App. Div. 3d Dep't 1996).

Insurance company was entitled to summary judgment declaring that it had no duty to defend and indemnify insured's son in underlying personal injury action where company timely disclaimed liability on basis of unambiguous exclusion for "any vehicle, other than your covered auto, which is...owned by any family member." Allen v Commercial Union Ins. Cos., 232 A.D.2d 949, 649 N.Y.S.2d 354, 1996 N.Y. App. Div. LEXIS 11238 (N.Y. App. Div. 3d Dep't 1996).

Insurer was entitled to summary judgment declaring that it had no duty to defend or indemnify insureds in underlying defamation action since such claim fell squarely within policy exclusion of knowingly false statements, underlying complaint being restricted to charges of malicious and purposeful intent; duty to defend could not be triggered by insureds' mere speculation that additional facts showing reckless or negligent defamation might be developed at later time. Transportation Ins. Co. v

Hugo Neu & Sons, Inc., 233 A.D.2d 234, 650 N.Y.S.2d 112, 1996 N.Y. App. Div. LEXIS 11989 (N.Y. App. Div. 1st Dep't 1996).

Insurer was entitled to summary judgment declaring that it had no duty to defend or indemnify insured in underlying action where policy contained exclusion for damages arising from use of "motor vehicles or all other motorized land conveyances," and underlying action would not have been brought "but for" insured's use of bulldozer. St. Paul Fire & Marine Ins. Co. v Home Ins. Co., 233 A.D.2d 388, 650 N.Y.S.2d 567, 1996 N.Y. App. Div. LEXIS 11563 (N.Y. App. Div. 2d Dep't 1996).

Insurer was not obligated to defend or indemnify insured in underlying defamation action alleging intentional, malicious conduct undertaken to cause injury to other party since policy in question specifically excluded from coverage injury that was expected or intended by insured. Gottlieb v New York Cent. Mut. Fire Ins. Co., 235 A.D.2d 394, 652 N.Y.S.2d 79, 1997 N.Y. App. Div. LEXIS 165 (N.Y. App. Div. 2d Dep't 1997).

Court erred in declaring that insurer was obligated to defendant insureds in underlying action alleging intentional infliction of emotional distress and prima facie tort since policy in question expressly provided that it did "not apply to bodily injury or property damage..which is expected or intended by the insured." Tranchina v Government Emples. Ins. Co., 235 A.D.2d 471, 652 N.Y.S.2d 1010, 1997 N.Y. App. Div. LEXIS 423 (N.Y. App. Div. 2d Dep't 1997).

Insurer was properly granted summary judgment declaring that it was not required to defend and indemnify insureds in underlying action to recover for alleged contamination of neighboring landowners' well by liquified cow manure that insureds had applied to their land as fertilizer since liquid manure constituted "waste material," "pollutant," or "contaminant" within meaning of pollution exclusion clause when, as was alleged in underlying action, substance had leached into groundwater and contaminated well on adjoining property. Space v Farm Family Mut. Ins. Co., 235 A.D.2d 797, 652 N.Y.S.2d 357, 1997 N.Y. App. Div. LEXIS 302 (N.Y. App. Div. 3d Dep't 1997).

Insurer was not obligated to defend or indemnify insured for intentional assault or intentional infliction of emotional distress where policy excluded coverage for bodily injury or property damage "which is expected or intended by any insured." Altamore v Aetna Cas. & Sur. Co., 238 A.D.2d 455, 657 N.Y.S.2d 903, 1997 N.Y. App. Div. LEXIS 4038 (N.Y. App. Div. 2d Dep't), app. denied, 91 N.Y.2d 801, 666 N.Y.S.2d 563, 689 N.E.2d 533, 1997 N.Y. LEXIS 4109 (N.Y. 1997).

Court should have granted insurer's motion for summary judgment declaring that it was not obligated to defend or indemnify insureds' son in underlying personal injury action where policy provided that it did not "cover any bodily injury...which may reasonably be expected to result from the intentional or criminal acts of an insured person or which are in fact intended by an insured person," and it was clear underlying plaintiff's injuries were to be reasonably expected by insured's son when he punched and kicked underlying plaintiff in face. Allstate Ins. Co. v Ruggiero, 239 A.D.2d 369, 658 N.Y.S.2d 321, 1997 N.Y. App. Div. LEXIS 5125 (N.Y. App. Div. 2d Dep't 1997).

Homeowner's policy exclusion of coverage for bodily injury arising out of transmission of "communicable disease" by insured was neither ambiguous nor unduly broad, and thus insurer was entitled to summary judgment declaring that it had no duty to defend and indemnify plaintiff's action for personal injuries sustained as result of transmission of HIV infection to him by insured. Plaza v General Assur. Co., 244 A.D.2d 238, 664 N.Y.S.2d 444, 1997 N.Y. App. Div. LEXIS 11722 (N.Y. App. Div. 1st Dep't 1997), app. denied, 92 N.Y.2d 805, 677 N.Y.S.2d 781, 700 N.E.2d 320, 1998 N.Y. LEXIS 2292 (N.Y. 1998), cert. denied, 525 U.S. 1122, 119 S. Ct. 905, 142 L. Ed. 2d 903, 1999 U.S. LEXIS 773 (U.S. 1999).

It being contrary to public policy to insure against liability arising directly against insured from his or her violation of criminal statute, clause in grandmother's homeowners insurance policy excluding injuries "expected or intended by the insured" had to be construed as excluding coverage of liability for grandson's striking of another person where grandson was convicted of second degree assault for that act. Litrenta v Republic Ins., 245 A.D.2d 344, 665 N.Y.S.2d 679, 1997 N.Y. App. Div. LEXIS 12808 (N.Y. App. Div. 2d Dep't 1997).

Court should have granted insurer's motion for summary judgment declaring that it did not have duty to defend or indemnify its insureds in underlying action, which alleged that "bouncers" employed by insureds' restaurant "did not control or stop" certain intoxicated patrons who "wrongfully, unlawfully, maliciously, and without valid reasons or probable cause (struck (plaintiff therein)) to and about his body," since any liability which might possibly have been imposed on restaurant fell squarely within terms of policy exclusion as to "claims arising out of Assault and Battery, whether caused...at the instigation of...or omission by the Insured (its) employees, patrons or any cause whatsoever." Dudley's Restaurant v United Nat'l Ins. Co., 247 A.D.2d 425, 670 N.Y.S.2d 36, 1998 N.Y. App. Div. LEXIS 1099 (N.Y. App. Div. 2d Dep't 1998).

Insurer was not obligated to defend or indemnify its insured, condominium board, in action alleging that board was negligent in failing to rebuild condominium in timely manner following fire since property damage exclusion in policy provided that insurer would not cover any claim that was "directly or indirectly, based on or attributable to, arising out of, resulting from or in any manner related to...Property Damage including loss of use thereof." Board of Managers of Yardarm Condo. II v Federal Ins. Co., 247 A.D.2d 499, 669 N.Y.S.2d 332, 1998 N.Y. App. Div. LEXIS 1485 (N.Y. App. Div. 2d Dep't 1998).

Insurer was entitled to summary judgment declaring that it had no duty to defend and indemnify insured in underlying action for assault, battery, negligent hiring, and negligent supervision where intentional assault fell within policy language excluding coverage for "bodily injury...expected or intended from the standpoint of the insured," and inclusion in underlying complaint of causes of action for negligent hiring and negligent supervision did not alter fact that operative act evoking any recovery was assault. Mattress Discounters, Inc. v United States Fire Ins. Co., 251 A.D.2d 384, 674 N.Y.S.2d 106, 1998 N.Y. App. Div. LEXIS 6618 (N.Y. App. Div. 2d Dep't), app. denied, 92 N.Y.2d 817, 684 N.Y.S.2d 488, 707 N.E.2d 443, 1998 N.Y. LEXIS 4273 (N.Y. 1998).

Court improperly granted insured's summary judgment motion declaring that insurer was obligated to defend and indemnify its insured in underlying breach of contract action, and court should have granted insurer's cross-motion for summary judgment on its counterclaims seeking judgment declaring that it had no such duty to defend or indemnify where exclusion in insurance policy excluded property damage at issue in underlying action, and fact that another exclusion may have been inconsistent therewith was irrelevant. Sampson v Johnston, 272 A.D.2d 956, 708 N.Y.S.2d 210, 2000 N.Y. App. Div. LEXIS 8118 (N.Y. App. Div. 4th Dep't 2000).

Insurer was under no duty to defend and indemnify insured in underlying federal action where (1) complaint in that action, alleging claims of trademark infringement against insured, fell wholly within insurance policy exclusion of advertising injury "arising out of oral or written publication of material; if done by or at the direction of the insured with knowledge of its falsity," and (2) there was express finding in federal action, before it was settled, that insured was "serial infringer" that had "deliberately sought to confuse the public" by selling goods nearly identical to those of competitor. A.J. Sheepskin & Leather Co. v Colonia Ins. Co., 273 A.D.2d 107, 709 N.Y.S.2d 82, 2000 N.Y. App. Div. LEXIS 6641 (N.Y. App. Div. 1st Dep't 2000).

Court erred in declaring that alcohol exclusion provision of insurance policy did not apply, and thus that insurer was obligated to defend or indemnify restaurant owner and its secretary in underlying action where secretary provided champagne to underage employees, including employee who was decorating restaurant after business hours for Christmas holidays and who subsequently operated motor vehicle in intoxicated state, resulting in fatal car accident; under circumstances, alcohol was furnished to minor in furtherance of business purpose. General Accident Ins. Group v C & H Pizza Corp., 284 A.D.2d 370, 726 N.Y.S.2d 133, 2001 N.Y. App. Div. LEXIS 6083 (N.Y. App. Div. 2d Dep't), app. denied, 97 N.Y.2d 601, 735 N.Y.S.2d 490, 760 N.E.2d 1286, 2001 N.Y. LEXIS 3214 (N.Y. 2001), app. denied, 97 N.Y.2d

601, 735 N.Y.S.2d 490, 760 N.E.2d 1286, 2001 N.Y. LEXIS 3215 (N.Y. 2001), app. denied, 97 N.Y.2d 601, 735 N.Y.S.2d 490, 760 N.E.2d 1286, 2001 N.Y. LEXIS 3257 (N.Y. 2001).

Seller of mutual funds was "financial institution" within scope of Banks and Financial Institutions endorsement of comprehensive general liability (CGL) insurance policy, and thus emotional distress claims asserted in underlying actions were not covered under terms of excess policies which excluded such institutions, relieving insurer of duty to defend seller. First Investors Corp. v Liberty Mut. Ins. Co., 152 F.3d 162, 1998 U.S. App. LEXIS 18227 (2d Cir. N.Y. 1998).

As matter of law, Dishonesty Exclusion abrogated any coverage arising from Personal Injury Endorsement, and thus insurer had no duty to defend insureds, where underlying complaint alleged that insureds had provided, at their marina, ostensibly private compartments for bathing and changing while surreptitiously videotaping their female employees and patrons, some of whom were minor children, for subsequent public viewing at insureds' nearby bar; under any common definition of term, these were acts of quintessentially "dishonest character." Commercial Union Assur. Co. v Oak Park Marina, Inc., 198 F.3d 55, 1999 U.S. App. LEXIS 33803 (2d Cir. N.Y. 1999).

Mere fact that insureds got caught by victims of their alleged voyeuristic activity (resulting from installation of video cameras in changing rooms at insureds' marina) did not constitute "unintended...[subsequent] event" sufficient to make resulting damage to victims "accidental," and thus insureds' Bodily Injury Endorsement (which provided coverage for "any and all claims for which [the Assured] may be held liable for damages Commercial Union Assur. Co. v Oak Park Marina, Inc., 198 F.3d 55, 1999 U.S. App. LEXIS 33803 (2d Cir. N.Y. 1999).

181. —Insurer's right to control defense

Medical malpractice insurer was entitled to summary judgment in insured's fraud and breach of contract action for damages arising from unconsented-to settlement of claim following adverse verdict in underlying malpractice trial, despite insured's claim that his professional reputation was hurt by insurer's refusal to appeal, where policy unambiguously gave insurer unconditional right to settle any claim or suit without insured's consent, and settlement was within policy limits. Feliberty v Damon, 72 N.Y.2d 112, 531 N.Y.S.2d 778, 527 N.E.2d 261, 1988 N.Y. LEXIS 1657 (N.Y. 1988).

In actions arising from single car accident in which driver and one passenger were killed and other passenger was injured, court did not abuse its discretion in ordering that private attorney represent estate of driver both in action by passengers against estate and city for damages, and in action by estate against city for damages, and that attorney for driver's motor vehicle insurance carrier would act as consultant only, notwithstanding contention by motor vehicle insurance carrier that close family relationship between driver and passengers raised reasonable fear that family members would collude against it, since potential risk of collusion had to be weighed against actual risk of confusion, and court remained free to increase role of insurance carrier's attorney if collusion became evident during trial. Kallivokas v Athanasatos, 151 A.D.2d 396, 543 N.Y.S.2d 84, 1989 N.Y. App. Div. LEXIS 8120 (N.Y. App. Div. 1st Dep't 1989).

In action for declaratory judgment in which general contractor obtained order to compel its insurance company to assume its defense in underlying action brought by owner of project, general contractor would be permitted to continue to choose its own counsel in underlying action where (1) underlying action sounded in both negligence, which was covered by insurance, and contract, which was not, (2) general contractor had attorney of its choice for 3 years because of insurance company's disclaimer, and (3) there were potential conflicts between general contractor and insurance company on how underlying case should be pursued. Major Builders Corp. v Commercial Union Ins. Co., 155 A.D.2d 267, 546 N.Y.S.2d 866, 1989 N.Y. App. Div. LEXIS 13862 (N.Y. App. Div. 1st Dep't 1989).

Absent showing that there is conflict of interest between liability insurer and insured, insurer has right to control defense of action brought against insured. Desriusseaux v Val-Roc Truck Corp., 230 A.D.2d 704, 646 N.Y.S.2d 161, 1996 N.Y. App. Div. LEXIS 8304 (N.Y. App. Div. 2d Dep't 1996).

There was no conflict of interest necessitating substitution of defendant's insurer-assigned counsel as defendant and his insurer shared single common interest in defeating plaintiff's claim, and defendant's disagreement with trial counsel regarding trial or settlement strategy did not warrant his retention of counsel of his choice at insurer's expense. Steinman v Silbowitz, 276 A.D.2d 299, 714 N.Y.S.2d 209, 2000 N.Y. App. Div. LEXIS 10553 (N.Y. App. Div. 1st Dep't 2000).

182. —Insurer estopped from refusing to defend

Plaintiff was entitled to summary judgment declaring that homeowner's insurance carrier was obligated to defend and, if necessary, indemnify bartender who allegedly served liquor to visibly intoxicated individual, who thereafter drove his car into utility pole, injuring plaintiff, where bartender was insured individual under homeowner's policy, and insurance carrier denied coverage based solely on policy's "business pursuits" exclusion, but timely written notice of its disclaimer was not given to injured plaintiff. Markevics v Liberty Mut. Ins. Co., 97 N.Y.2d 646, 735 N.Y.S.2d 865, 761 N.E.2d 557, 2001 N.Y. LEXIS 3411 (N.Y. 2001).

Court erred in granting insured's motion for summary judgment declaring that insurer was estopped to discontinue defense of underlying personal injury action against insured where insurer discovered 1 ½ years after undertaking defense that plaintiff had allowed policy to lapse before accident by failing to pay premiums, since estoppel cannot be invoked to create coverage when there is no coverage under insurance policy because policy was not in existence at time of accident, and such rule applies even where insurer assumes control over defense of action for appreciable period of time before it disclaims obligation to defend or indemnify. Tantillo v U.S. Fidelity & Guaranty Co., 155 A.D.2d 970, 547 N.Y.S.2d 781, 1989 N.Y. App. Div. LEXIS 14843 (N.Y. App. Div. 4th Dep't 1989).

Court properly determined that, although employees of defendant Brooklyn Navy Yard (BNY) were negligent in connection with injuries sustained by plaintiff on portion of BNY premises leased by defendant tenant under lease which did not require tenant to indemnify BNY for BNY's own negligence, tenant's insurer was equitably estopped from denying coverage where it assumed BNY's defense pursuant to provision of lease requiring tenant to provide such defense, since construction of lease to require tenant to defend BNY but not to provide indemnification would create untenable conflict of interest in that it would permit insurer to control BNY's case, allow finding of BNY's negligence, which would clearly be in tenant's and insurer's interest, and thereafter raise such negligence as defense to BNY's indemnification claim. Donato v New York, 156 A.D.2d 505, 548 N.Y.S.2d 779, 1989 N.Y. App. Div. LEXIS 15664 (N.Y. App. Div. 2d Dep't 1989), app. denied, 75 N.Y.2d 709, 556 N.Y.S.2d 247, 555 N.E.2d 619, 1990 N.Y. LEXIS 953 (N.Y. 1990).

As general rule, where insurer defends action on behalf of its insured with knowledge of defense to coverage, it is thereafter estopped from asserting that policy does not cover claim, since notice of disclaimer must be timely to reserve insurer's right, while defending action, to claim that policy does not cover situation at issue. Hartford Accident & Indem. Co. v Carson C. Peck Mem'l Hosp., 162 A.D.2d 659, 558 N.Y.S.2d 959, 1990 N.Y. App. Div. LEXIS 8184 (N.Y. App. Div. 2d Dep't 1990).

Insurer was equitably estopped from denying coverage where, despite its prompt receipt of underlying complaint, which clearly indicated that accident in question occurred outside of its coverage period, it nevertheless defended party in underlying action for more than 3 years before bringing instant judgment action, representing party in all pretrial matters and certifying matter as ready for trial. Indemnity Ins. Co. of N. Am. v Charter Oak Ins. Co., 235 A.D.2d 521, 653 N.Y.S.2d 135, 1997 N.Y. App. Div. LEXIS 726 (N.Y. App. Div. 2d Dep't 1997).

Insurer was equitably estopped from denying liability coverage to plaintiffs, who were defendants in underlying personal injury action, regardless of whether insurer knew of plaintiffs' request to be named as additional insureds under policy, where (1) insurer's agent provided plaintiffs with certificate naming them as addi-

tional insureds and allowed construction work to proceed in reliance on that certificate, (2) agency agreement specifically provided that agent was authorized to bind insurance, including any policy amendments, for plaintiffs, (3) agent had at least apparent authority to issue subject certificate, and (4) whether agent exceeded its authority or failed to follow proper procedures for adding insureds were matters between insurer and agent. Lenox Realty v Excelsior Ins. Co., 255 A.D.2d 644, 679 N.Y.S.2d 749, 1998 N.Y. App. Div. LEXIS 11686 (N.Y. App. Div. 3d Dep't 1998), app. denied, 93 N.Y.2d 807, 691 N.Y.S.2d 2, 712 N.E.2d 1245, 1999 N.Y. LEXIS 1263 (N.Y. 1999).

In action by plaintiff liability insurer seeking declaratory judgment that defendant general liability carrier was obligated to defend and indemnify property owner in underlying premises liability actions, and to recover its costs of defending such actions, defendant was entitled to summary judgment because plaintiff, by assuming defense of underlying actions in 1989 and 1992 without asserting any policy defenses or reserving its right to deny coverage, was equitably estopped as matter of law from denying coverage in 1993 when, upon reviewing liability policy issued to tenant, it discovered that owner was not named as additional insured. Utica Mut. Ins. Co. v 215 W. 91st St. Corp., 283 A.D.2d 421, 724 N.Y.S.2d 758, 2001 N.Y. App. Div. LEXIS 4705 (N.Y. App. Div. 2d Dep't 2001).

183. —Duty of excess insurer

Liability insurer for lessee of premises and liability insurer of property owners both had duty to defend action against owners for injuries sustained by person on premises where both policies contained clauses stating insurers were excess carriers; where multiple policies covering same risk purport to be excess, excess coverage clauses cancel each other out and each insurer must contribute in proportion to its insurance limit. Hausman v Royal Ins. Co., 153 A.D.2d 527, 544 N.Y.S.2d 605, 1989 N.Y. App. Div. LEXIS 10868 (N.Y. App. Div. 1st Dep't 1989).

Liability insurer's failure to inform insured or insured's excess carrier of insured's possible exposure to liability in excess of primary policy limits on particular claim did not constitute breach of insurer's duty to carry out defense of claim in good faith where there was no evidence that insurer acted deliberately or even recklessly, nothing suggested that insurer put its own interests ahead of insured's, insurer kept insured informed of all relevant facts, and it was insured who had contractual obligation to notify excess carrier "as soon as practicable." Monarch Cortland v Columbia Cas. Co., 224 A.D.2d 135, 646 N.Y.S.2d 904, 1996 N.Y. App. Div. LEXIS 8653 (N.Y. App. Div. 3d Dep't 1996), app. denied, 89 N.Y.2d 807, 655 N.Y.S.2d 887, 678 N.E.2d 500, 1997 N.Y. LEXIS 133 (N.Y. 1997).

Excess insurer was not obligated to defend underlying action where loss, including defense costs, could be covered by another policy; while primary insurer's "other insurance" clause provided it was primary unless another policy was also primary, excess insurer's policy provided that it was excess where loss was covered by another policy. Firemen's Ins. Co. v Federal Ins. Co., 233 A.D.2d 193, 649 N.Y.S.2d 700, 1996 N.Y. App. Div. LEXIS 11808 (N.Y. App. Div. 1st Dep't 1996), app. denied, 90 N.Y.2d 803, 661 N.Y.S.2d 179, 683 N.E.2d 1053, 1997 N.Y. LEXIS 2244 (N.Y. 1997).

Construction manager and its general liability insurer were entitled to partial summary judgment declaring that sheetmetal contractor's liability insurance carrier was primary insurer required to defend and indemnify construction manager in action by masonry subcontractor's employee, who was injured while performing work that his employer was obligated to perform for sheetmetal contractor, where contractors and subcontractors were contractually required to purchase liability insurance naming construction manager as additional insured, and defendant insurer failed to produce proof that its policy was intended only to provide excess coverage. Tishman Interiors Corp. v Fireman's Fund Ins. Co., 236 A.D.2d 385, 653 N.Y.S.2d 367, 1997 N.Y. App. Div. LEXIS 1003 (N.Y. App. Div. 2d Dep't 1997).

Insurance policy providing umbrella and excess coverage did not obligate insurer to defend insured in underlying action for false advertising or to reimburse insured for its attorney fees in defending that action where (1) there was primary insurance covering claims against insured, and thus umbrella coverage part of policy, which required insurer to provide defense, was not implicated, and (2) as to excess insurance coverage, policy in effect on date of insured's alleged acts of false advertising specifically excluded legal expenses from losses that insurer was required to pay. Labatt Brewing Co. v Zurich Ins. Co., 281 A.D.2d 363, 723 N.Y.S.2d 17, 2001 N.Y. App. Div. LEXIS 3151 (N.Y. App. Div. 1st Dep't 2001).

184. Oral contract of insurance

The liability of an insurance company may arise on an oral contract made by its duly authorized agent (Hicks v British American Assur. Co. (1900) 162 NY 284, 56 NE 743), and the fact that a written policy was delivered after the accident does not prevent recovery. Giles v Commercial Casualty Ins. Co., 251 A.D. 919, 297 N.Y.S. 546, 1937 N.Y. App. Div. LEXIS 8241 (N.Y. App. Div. 1937), aff'd, 278 N.Y. 480, 15 N.E.2d 71, 278 N.Y. (N.Y.S.) 480, 1938 N.Y. LEXIS 1335 (N.Y. 1938).

The judgment against an insurer of the owner of an automobile under this section, will be reversed where the evidence fails to establish that defendant's soliciting agent had authority to bind the defendant by an oral agreement to insure or that the underwriting agent accepted the application. Caccamise v Metropolitan Casualty Ins. Co., 252 A.D. 521, 300 N.Y.S. 487, 1937 N.Y. App. Div. LEXIS 5711 (N.Y. App. Div. 1937).

The statement of an agent to an owner that he was insured as of a day certain was equivalent to an oral contract of insurance, so that the said contract made between the owner and agent in behalf of defendant is presumed to contain provisions of former § 109 [predecessor to former § 167, now § 3420] and this plaintiff may avail himself of the benefits of such provisions and be reimbursed by the company for his damage. Searle v Southern Surety Co., 247 N.Y.S. 340, 138 Misc. 699, 1930 N.Y. Misc. LEXIS 1737 (N.Y. Sup. Ct. 1930).

A contract of insurance, even if not in writing, embraces all provisions required by statute to be contained in automobile liability policies certified as issued to provide financial responsibility coverage. Dembitzer v Gilliam, 44 Misc. 2d 487, 254 N.Y.S.2d 47, 1964 N.Y. Misc. LEXIS 1634 (N.Y. Sup. Ct. 1964).

Where one claiming to be the agent and representative for an automobile liability insurer apparently has authority from the company to accept premiums and issue policies, and to file "certificates of insurance" with the Motor Vehicle Bureau in its behalf, a motorist whose car injures a pedestrian is entitled to rely on his insurance coverage, although no written policy of insurance was ever issued or delivered by the company itself to the alleged insured. Dembitzer v Gilliam, 44 Misc. 2d 487, 254 N.Y.S.2d 47, 1964 N.Y. Misc. LEXIS 1634 (N.Y. Sup. Ct. 1964).

Where insurer was apprised of the insured's desire to be given coverage under a garage liability policy in a letter dated July 27, 1965 and from such date to April 5, 1967, the date of the trial, defendant had not disclaimed coverage, the insurer was required to defend the action brought against the insured. Moore v Fidelity & Casualty Co., 59 Misc. 2d 1012, 302 N.Y.S.2d 674, 1967 N.Y. Misc. LEXIS 1322 (N.Y. Sup. Ct. 1967), rev'd, 30 A.D.2d 560, 292 N.Y.S.2d 991, 1968 N.Y. App. Div. LEXIS 3944 (N.Y. App. Div. 2d Dep't 1968).

In an action under predecessor to § 3420 where it appeared that an automobile liability policy did not cover the driver at the time of the accident, the plaintiff could not succeed on a claim of an oral contract of insurance rather than on the written contract where the oral contract asserted was entirely different from that set forth in the complaint The plaintiff did not seek reformation of the written contract and hence, recovery upon an oral contract not referred to in the pleadings was not permissible. Ireland v Firemen's Fund Indem. Co., 115 N.Y.S.2d 762, 1951 N.Y. Misc. LEXIS 2150 (N.Y. Sup. Ct. 1951), aff'd, 281 A.D. 1007, 121 N.Y.S.2d 364, 1953 N.Y. App. Div. LEXIS 4075 (N.Y. App. Div. 1953).

185. Cancellation of policy

Automobile liability insurer would not be relieved of responsibility for collision which occurred during period between cancellation of insured's policy and retroactive reinstatement of coverage even though reinstatement was fraudulently induced by

insured; however, court's holding—that insurer had right to cancel policy prospectively only—would not prevent insurer from seeking redress against insured for losses resulting from insured's misrepresentation. Liberty Mut. Ins. Co. v McClellan, 127 A.D.2d 767, 512 N.Y.S.2d 161, 1987 N.Y. App. Div. LEXIS 43248 (N.Y. App. Div. 2d Dep't 1987).

Notice of cancellation sent by automobile insurer to its insured was ineffective under CLS Veh & Tr former § 313(1)(a) where it failed to advise insured that proof of financial security was required to be maintained. Lumbermens Mut. Casualty Co. v Progressive Casualty Ins. Co., 168 A.D.2d 708, 563 N.Y.S.2d 566, 1990 N.Y. App. Div. LEXIS 14811 (N.Y. App. Div. 3d Dep't 1990).

Insurer did not effectively terminate assigned risk liability policy, even though insured was mailed renewal quote 6 weeks prior to policy's expiration but made no attempt to renew policy, and notice of cancellation was sent and filed appropriately, since renewal notice which preceded termination notice failed to inform insured that he could have remitted his premium to either insurer or producer of record, and renewal notice did not clearly set forth amount insured was required to remit to renew policy. Eveready Ins. Co. v Hadzovic, 182 A.D.2d 818, 582 N.Y.S.2d 508, 1992 N.Y. App. Div. LEXIS 6397 (N.Y. App. Div. 2d Dep't 1992).

Insurance company was entitled to summary judgment declaring that it was not obligated to defend or indemnify its former insured in underlying personal injury action, despite claim that insurance company did not comply with CLS Veh & Tr § 313 in effecting termination of policy for nonpayment, since insurance company was not required to give notice of termination to Commissioner of Motor Vehicles where termination was for nonpayment for renewal policy offered after policy had been in effect for more than 6 months. Lloyd v Government Employees' Ins. Co., 204 A.D.2d 407, 612 N.Y.S.2d 47, 1994 N.Y. App. Div. LEXIS 4813 (N.Y. App. Div. 2d Dep't 1994).

Insurance policy was not cancelled pursuant to New York Automobile Insurance Plan § 18, and thus insurance carrier was not required to provide notice of right to appeal pursuant to New York Automobile Insurance Plan § 19, where policy was not cancelled because of any problem with eligibility, but because insurance plan was being restructured and insured was obligated to obtain new policy, either on open market or by submission of new application to insurance plan. Liberty Mut. Ins. Co. v Gonzalez, 204 A.D.2d 642, 612 N.Y.S.2d 222, 1994 N.Y. App. Div. LEXIS 5481 (N.Y. App. Div. 2d Dep't), app. denied, 84 N.Y.2d 811, 622 N.Y.S.2d 914, 647 N.E.2d 120, 1994 N.Y. LEXIS 4573 (N.Y. 1994).

Insurer was entitled to declaration that it cancelled defendant's policy prior to date of automobile accident and therefore was not required to defend defendant in action arising therefrom, although insurer's notice of cancellation was concededly improper because it was not in 12-point type as required by CLS Veh & Tr § 313, where record demonstrated that defendant had subsequently obtained automobile coverage from another insurance company, intending to replace cancelled automobile policy. Kaplan v Travelers Ins. Co., 205 A.D.2d 501, 612 N.Y.S.2d 658, 1994 N.Y. App. Div. LEXIS 5973 (N.Y. App. Div. 2d Dep't), app. denied, 84 N.Y.2d 807, 621 N.Y.S.2d 516, 645 N.E.2d 1216, 1994 N.Y. LEXIS 3461 (N.Y. 1994).

Defendant insurer was entitled to summary judgment in action for judgment declaring that it was obligated to defend and indemnify plaintiff as its insured in action by injured party who was hit by plaintiff's car on October 16, where plaintiff's car was insured by defendant through October 15, defendant cancelled policy effective 12:01 a.m. on October 16 due to plaintiff's failure to pay premium, plaintiff's wife conceded that they received cancellation notice prior to October 15, defendant submitted sample cancellation notice to prove that it was in proper form, and common-law proof presented by defendant with regard to its office practice was sufficient to establish that notice of cancellation was properly mailed. Fogarty v Boston Old Colony Ins. Co., 222 A.D.2d 484, 635 N.Y.S.2d 647, 1995 N.Y. App. Div. LEXIS 12808 (N.Y. App. Div. 2d Dep't 1995).

Insurer created rebuttable presumption that notice of policy cancellation was received where it presented documentary evidence of its cancellation, together with testimony of employee who was knowledgeable about its cancellation procedures, to effect that such procedures were in conformity with statutory requirements of New York Automobile Insurance Plan. Lora v New York Cent. Mut. Fire Ins. Co., 232 A.D.2d 242, 648 N.Y.S.2d 91, 1996 N.Y. App. Div. LEXIS 10100 (N.Y. App. Div. 1st Dep't 1996).

Insurer had no obligation to defend or indemnify owner or driver of vehicle where any insurance coverage was terminated at least 2 ½ months before accident. American Transit Ins. Co. v Val-Roc Trucking, 242 A.D.2d 469, 662 N.Y.S.2d 309, 1997 N.Y. App. Div. LEXIS 8802 (N.Y. App. Div. 1st Dep't 1997).

Proceedings under CLS CPLR § 7503 to permanently stay arbitration of uninsured motorist claims were properly dismissed, because insurance policy was effectively canceled, where insurer, before mailing notice of cancellation, mailed insured bill that was in compliance with Rules of New York Automobile Insurance Plan § 14(E)(2); cancellation was not rendered ineffective by mere fact that notice of cancellation recited as unpaid amount that included installment that had come due after mailing of bill. Eagle Ins. Co. v Lopez, 245 A.D.2d 563, 667 N.Y.S.2d 64, 1997 N.Y. App. Div. LEXIS 13394 (N.Y. App. Div. 2d Dep't 1997).

Insurer was not required to give insured 45 days notice of nonrenewal, because CLS Veh & Tr § 313(1)(a) did not apply, where insurer sent insured renewal quotation that insured failed to accept when he failed to pay his first renewal premium. Badagliacca v GEICO Gen. Ins. Co., 255 A.D.2d 536, 680 N.Y.S.2d 661, 1998 N.Y. App. Div. LEXIS 12858 (N.Y. App. Div. 2d Dep't 1998).

Insurer was not required to file notice of termination with Department of Motor Vehicles under CLS Veh & Tr § 313(2)(a) where insurance policy had been in force for more than 6 months. Badagliacca v GEICO Gen. Ins. Co., 255 A.D.2d 536, 680 N.Y.S.2d 661, 1998 N.Y. App. Div. LEXIS 12858 (N.Y. App. Div. 2d Dep't 1998).

Insurer's purported cancellation of policy on offending vehicle in accident was ineffective where offending vehicle was livery cab governed by financial security provisions of CLS Veh & Tr § 370, insurer elected to send insured additional notice of cancellation under CLS Veh & Tr § 313, and such additional notice could have caused insured confusion as to its duties under financial security provisions of Vehicle and Traffic Law. Travelers Prop. Cas. Corp. v Eagle Ins. Co., 273 A.D.2d 65, 708 N.Y.S.2d 406, 2000 N.Y. App. Div. LEXIS 6335 (N.Y. App. Div. 1st Dep't 2000).

Trial court properly granted the insurer's motion to dismiss pursuant to N.Y. C.P.L.R. 3211 and denied the judgment creditors' motion for summary judgment pursuant to N.Y. C.P.L.R. 3212 in the judgment creditors' action pursuant to N.Y. Ins. Law § 3420(b) to recover from the insurer an unsatisfied judgment against the insured party of the insurer; the insurer established that the insured party orally cancelled the liquor liability insurance policy just before the judgment creditors were injured on the insured party's premises, that the insurer waived strict compliance with the cancellation provisions of the policy, which provided for written notice of cancellation, and that the judgment creditors failed to adduce sufficient evidence to defeat the motion to dismiss and failed to establish their entitlement to summary judgment. Zachariades v Transcon. Ins. Co., 1 A.D.3d 509, 767 N.Y.S.2d 246, 2003 N.Y. App. Div. LEXIS 12112 (N.Y. App. Div. 2d Dep't 2003).

186. Reformation of policy

The alteration or elimination of terms and conditions of coverage of policy will not be granted in an action for reformation by one named assured. Kerr v New Amsterdam Casualty Co., 276 N.Y. 648, 12 N.E.2d 803, 276 N.Y. (N.Y.S.) 648, 1938 N.Y. LEXIS 1234 (N.Y.), reh'g denied, 278 N.Y. 566, 16 N.E.2d 105, 278 N.Y. (N.Y.S.) 566, 1938 N.Y. LEXIS 1405 (N.Y. 1938).

It is not essential that the right to reformation be found in the statute. The failure of insured to demand reformation cannot deprive the beneficiary of this right. Equity will step in in aid of former § 109 [predecessor to former § 167, now § 3420], and do for the beneficiary what was fairly intended by the legislature when the statute was enacted. The principle that a statute in derogation of common law will be construed strictly is inapplicable. Tuzinska v Ocean Acci. & Guarantee Corp., 241 A.D. 598,

272 N.Y.S. 593, 1934 N.Y. App. Div. LEXIS 8320 (N.Y. App. Div. 1934).

Supreme Court did not err in "converting" action from one for reformation of insurance policy to one for declaratory judgment where action was not truly conversion as contemplated by CLS CPLR § 103 but, rather, instance where court simply awarded relief to which insured was entitled, on basis of evidence adduced, under slightly different theory than that delineated in complaint; essentially, court amended complaint, sua sponte, to conform to proof presented and arguments advanced on motions. Olochnowitz v Hopmeier-Evans-Gage Agency, 225 A.D.2d 853, 639 N.Y.S.2d 496, 1996 N.Y. App. Div. LEXIS 2067 (N.Y. App. Div. 3d Dep't 1996).

Owner and general contractor on construction project were entitled to amend complaint to assert cause of action for reformation of liability policy issued to subcontractor by defendant insurer where insurer had previously been aware of possible errors in policy endorsements that made plaintiffs additional insureds, and uncontradicted evidence established that scrivener's error had occurred. Ebasco Constructors, Inc. v Aetna Ins. Co., 260 A.D.2d 287, 692 N.Y.S.2d 295, 1999 N.Y. App. Div. LEXIS 4347 (N.Y. App. Div. 1st Dep't 1999).

Owner and general contractor on construction project were entitled to summary judgment in action to reform liability policy issued to subcontractor by defendant insurer where obvious scrivener's error had occurred in endorsements listing plaintiffs as additional insureds, issuing agent's vice-president averred that she had discovered errors and reported them to insurer, and insurer offered only conclusory denials. Ebasco Constructors, Inc. v Aetna Ins. Co., 260 A.D.2d 287, 692 N.Y.S.2d 295, 1999 N.Y. App. Div. LEXIS 4347 (N.Y. App. Div. 1st Dep't 1999).

Owner and general contractor on construction project were not entitled to attorney fees in action against subcontractor's liability insurer to reform policy with respect to endorsements listing plaintiffs as additional insureds in absence of showing that insurer had acted in bad faith in refusing to defend action against plaintiffs. Ebasco Constructors, Inc. v Aetna Ins. Co., 260 A.D.2d 287, 692 N.Y.S.2d 295, 1999 N.Y. App. Div. LEXIS 4347 (N.Y. App. Div. 1st Dep't 1999).

Error may be mutual for purposes of reformation, even though insurer was not aware of error, where innocent mistake occurred as to named insured, and parties intended to cover risk. Cheperuk v Liberty Mut. Fire Ins. Co., 263 A.D.2d 748, 693 N.Y.S.2d 304, 1999 N.Y. App. Div. LEXIS 8051 (N.Y. App. Div. 3d Dep't 1999).

XV. Nature and Amount of Recovery

187. In general

A complaint does not state a cause of action which alleges that the defendant issued its policy indemnifying plaintiffs to the extent of $5,000, against liability by reason of an accident resulting in injury or death to any person and providing that defendant would defend or settle all actions brought against assured to enforce a claim on account of any such action but would not be responsible for any unauthorized settlement made by assured; that thereafter actions were brought against plaintiffs for amounts largely exceeding the amount of insurance and that before trial it was ascertained and defendant was advised that said actions could be settled for $6,500; that defendant agreed that the actions should be settled and offered to pay $3,500 if plaintiffs would pay the balance, which they refused to do, insisting that the insurance company pay the full amount of its liability under the policy; that the defendant declined and insisted upon a trial which resulted in verdicts greatly exceeding the amount of the policy, which defendants paid in full, leaving a large balance which plaintiffs were forced to pay and demanding judgment for the difference between that amount and what it would have paid had the settlement been made. The insurance company in refusing to settle actions, did what it had the legal right to do under the terms of the policy and in the absence of allegations of negligence or suppression of facts or fraud or misrepresentation on the part of insurer plaintiffs cannot recover. Auerbach v Maryland Casualty Co., 236 N.Y. 247, 140 N.E. 577, 236 N.Y. (N.Y.S.) 247, 1923 N.Y. LEXIS 879 (N.Y. 1923).

Punitive damages awarded against insured in underlying civil suit are not proper element of compensatory damages recoverable in suit against insurer for bad-faith refusal to settle underlying suit, regardless of how egregious insurer's conduct has been, since any award of punitive damages that might ensue is still directly attributable to insured's immoral and blameworthy behavior. Soto v State Farm Ins. Co., 83 N.Y.2d 718, 613 N.Y.S.2d 352, 635 N.E.2d 1222, 1994 N.Y. LEXIS 1034 (N.Y. 1994).

In action against insurer for costs incurred by insured in defense of civil action and amount of money (policy limit) paid in settlement thereof, court erred in allowing insured to amend its complaint to add cause of action seeking both compensatory damages (not confined to policy limit), and punitive damages for insurer's alleged bad-faith refusal to settle, since allegation of bad faith failure to settle, without more, does not give rise to claim for punitive damages; thus, order granting insured's motion to amend would be modified to delete that part of cause of action for punitive damages. AFIA v Continental Ins. Co., 140 A.D.2d 167, 527 N.Y.S.2d 420, 1988 N.Y. App. Div. LEXIS 4663 (N.Y. App. Div. 1st Dep't 1988).

Proper standard for determining whether insurer's refusal to settle within policy limits was made in bad faith is whether it was "highly probable" that insured would be subjected to personal liability if severityof victim's injuries resulted in verdict in excess of policy limits. DiBlasi v Aetna Life & Casualty Ins. Co., 147 A.D.2d 93, 542 N.Y.S.2d 187, 1989 N.Y. App. Div. LEXIS 7002 (N.Y. App. Div. 2d Dep't 1989).

Prima facie case was pleaded of insurer's bad faith in refusing to settle, and triable issues existed sufficient to survive insurer's motion for summary judgment, where reasonably prudent insurance adjuster or defense attorney should have realized that, due to fact that 22-year-old auto accident victim had sustained painful, permanent and progressive injury to her right elbow, it was "highly probable" that verdict would exceed policy limits of $25,000. DiBlasi v Aetna Life & Casualty Ins. Co., 147 A.D.2d 93, 542 N.Y.S.2d 187, 1989 N.Y. App. Div. LEXIS 7002 (N.Y. App. Div. 2d Dep't 1989).

University was not entitled to summary judgment in its bad-faith claim against insurer arising from medical malpractice claim where (1) no discovery had taken place, (2) evidence that insurer had incorrectly denied its obligation to provide coverage for both university and faculty member (defendant in underlying action) did not constitute "extraordinary showing of a disingenuous or dishonest failure to carry out a contract" required to establish bad faith liability of insurer, (3) affidavits of university's attorney were opposed by affidavits of insurer's attorney, and (4) insurer contended that university actively manufactured record of bad faith. Crawford v Hospital of Albert Einstein College of Medicine, 159 A.D.2d 304, 552 N.Y.S.2d 582, 1990 N.Y. App. Div. LEXIS 2697 (N.Y. App. Div. 1st Dep't 1990).

Court properly denied plaintiff's motion to increase ad damnum clause of complaint to amount beyond liability limits of her homeowner's insurance policy in action to recover for losses allegedly resulting from insurer's bad faith in refusing to settle her claim for loss of use of her home, including loss of her business, costs of refinancing her home, lost income, and miscellaneous costs for such things as postage and photocopying; plaintiff's claims were speculative, remote, and could not have been within contemplation of parties at time of insurance contract. 172 A.D.2d 585, 568 N.Y.S.2d 820.

Insurer and its general manager (acting on behalf of insured, who ran over 15-year-old plaintiff with tractor) were entitled to partial summary judgment in plaintiffs' action seeking recovery for bad faith in allegedly advising plaintiffs to wait until injured plaintiff reached age 21, at which time insurer would evaluate his injuries and "make a fair settlement," since bad faith does not provide independent basis for recovery. Lawrence v Houston, 172 A.D.2d 923, 567 N.Y.S.2d 962, 1991 N.Y. App. Div. LEXIS 4240 (N.Y. App. Div. 3d Dep't 1991).

Insurer was not entitled to summary judgment in its action to recover $28,000 paid to its insureds by tortfeasor and tortfeasor's insurer in exchange for subrogation receipt in satisfaction of claim made on their homeowner's policy after their property and its contents had been demolished by truck owned and operated by

tortfeasor, where $28,000 represented policy limits under policy, and insureds contended that they owed nothing to insurer because total of $90,000 received had not wholly covered their loss; insurer would be entitled to compensation from insureds only if they had received more than actual amount of damages suffered at hands of tortfeasor, which was factual issue that remained unresolved. Callicoon Coop. Ins. Co. v Osborne, 206 A.D.2d 796, 615 N.Y.S.2d 125, 1994 N.Y. App. Div. LEXIS 7978 (N.Y. App. Div. 3d Dep't 1994).

Liability insurer was not obligated to pay preverdict interest in absence of express provision in policy giving rise to such obligation. Monarch Cortland v Columbia Cas. Co., 224 A.D.2d 135, 646 N.Y.S.2d 904, 1996 N.Y. App. Div. LEXIS 8653 (N.Y. App. Div. 3d Dep't 1996), app. denied, 89 N.Y.2d 807, 655 N.Y.S.2d 887, 678 N.E.2d 500, 1997 N.Y. LEXIS 133 (N.Y. 1997).

Plaintiff, as injured party in one-car accident and assignee of car owner's claim against his insurer for bad faith failure to settle, stood in shoes of car owner and was estopped from contending that insurer acted in bad faith where its rejection of plaintiff's settlement offer was based on car owner's statements and other evidence that plaintiff and not owner had been driving at time of accident. Daus v Lumberman's Mut. Cas. Co., 241 A.D.2d 665, 659 N.Y.S.2d 584, 1997 N.Y. App. Div. LEXIS 7337 (N.Y. App. Div. 3d Dep't), app. denied, 90 N.Y.2d 812, 666 N.Y.S.2d 100, 688 N.E.2d 1382, 1997 N.Y. LEXIS 3669 (N.Y. 1997).

For purposes of action against liability insurer for bad faith failure to settle, it could not be said that settlement offers had come at time when all serious doubts about insured's liability had been removed in light of documentary evidence that raised question as to whether insured was driving car at time of accident. Daus v Lumberman's Mut. Cas. Co., 241 A.D.2d 665, 659 N.Y.S.2d 584, 1997 N.Y. App. Div. LEXIS 7337 (N.Y. App. Div. 3d Dep't), app. denied, 90 N.Y.2d 812, 666 N.Y.S.2d 100, 688 N.E.2d 1382, 1997 N.Y. LEXIS 3669 (N.Y. 1997).

Liability insurer was entitled to vacatur of $75,000 judgment against it for failure to defend its insured where insured had failed to disclose that her liability in underlying action had been resolved by postjudgment settlement for $12,000; insured's actions constituted misrepresentation and misconduct, and her nondisclosure was not excused by collateral source rule. Birsett v General Accident Ins. Co. of Am., 241 A.D.2d 683, 659 N.Y.S.2d 924, 1997 N.Y. App. Div. LEXIS 7329 (N.Y. App. Div. 3d Dep't 1997).

In action brought by insurer seeking declaration that it was not obligated to continue paying certain of insured's medical costs, court should have granted insurer's summary judgment motion dismissing insureds' claim that insurer fraudulently induced them to discontinue personal injury action by pledging to "continue" full payment of medical expenses, while intending to subsequently reduce reimbursement to providers to less than full payment, since there was no sound basis to derive fraud claim from agreement, concededly honored pending only outcome of instant judicial proceedings, specifically turning on whether medical expenses were reasonable and necessary under specific body of law; even to extent that insureds read stipulation as requiring continuation of then-current payments, as contrasted with continuation of payments that were determined to be reasonable and necessary, that presented, at most, issue of contract interpretation rather than fraud, regardless of insurer's intentions when entering agreement. Massachusetts Bay Ins. Co. v Stamm, 256 A.D.2d 181, 683 N.Y.S.2d 20, 1998 N.Y. App. Div. LEXIS 13723 (N.Y. App. Div. 1st Dep't 1998), app. denied, 1999 N.Y. App. Div. LEXIS 5187 (N.Y. App. Div. 1st Dep't Apr. 27, 1999).

Liability insurer was entitled to summary judgment on insureds' claim of bad faith failure to settle personal injury action where insurer's settlement offers were predicated on (1) its view that parents' derivative claim regarding child's injuries was not separate claim under policy, and such view was confirmed by Appellate Division on prior appeal, and (2) its assertion that one claimant had not sustained serious injuries, which was later vindicated by jury verdict so finding. Redcross v Aetna Cas. & Sur. Co., 260 A.D.2d 908, 688 N.Y.S.2d 817, 1999 N.Y. App. Div. LEXIS 4199 (N.Y. App. Div. 3d Dep't 1999).

Liability insurer was not entitled to summary judgment on insureds' claim of bad faith failure to settle personal injury action where issues of fact existed as to insurer's failure to keep insureds informed of settlement negotiations at time when insureds might have considered contributing difference between offer and demand in order to avoid potentially greater jury verdict. Redcross v Aetna Cas. & Sur. Co., 260 A.D.2d 908, 688 N.Y.S.2d 817, 1999 N.Y. App. Div. LEXIS 4199 (N.Y. App. Div. 3d Dep't 1999).

In an action arising out of injuries sustained by plaintiff passengers when the vehicle in which they were riding was involved in an accident with another vehicle, and in which both drivers were at fault, plaintiffs would be entitled to a judgment declaring that the uninsured motorist coverage provided for by a policy issued by defendant, the insurer of the owner of the host vehicle, be applied to plaintiffs' benefit to the extent that the amount that had already been obtained by plaintiff through exhaustion of each vehicle owner's liability policy was less than the full value of compensatory damage to which plaintiffs might actually be entitled, since defendant's policy was void to the extent that it attempted to impose a reduction of underinsured motorist limits by the amount paid by the person jointly or severally liable with the underinsured motorist, which reduction has not been provided for by the Legislature in Ins Law § 3420(f), and since exhaustion of the total proceeds of the underlying insurance policies of all vehicles involved in the accident is not statutorily required as a predicate to being eligible for underinsured benefits; rather, a claimant may obtain underinsured motorist benefits as long as any tort-feasor's liability policy limits are less than the uninsured/underinsured motorist coverage and are fully exhausted by the injured party. Passaro v Metropolitan Property & Liability Ins. Co., 128 Misc. 2d 21, 487 N.Y.S.2d 1009, 1985 N.Y. Misc. LEXIS 2869 (N.Y. Sup. Ct. 1985), aff'd, 124 A.D.2d 647, 507 N.Y.S.2d 836, 1986 N.Y. App. Div. LEXIS 61949 (N.Y. App. Div. 2d Dep't 1986).

In action by liability insurer to recover amounts of insureds' deductible pursuant to provision of insurance policy permitting insurer to settle claims without insured's consent, court would not dismiss insurer's summary judgment motion on basis of insureds' assertions that insurer had settled claims in bad faith, since (1) insureds' assertions that insurer did not properly investigate claims prior to entering into settlements, and did not respond to requests for information about progress of settlement negotiations, were unsupported by proof in evidentiary form, (2) insureds offered no factual support for their contention that insurer failed to give due consideration to their interests in settling claims, and (3) insureds merely speculated that insurer had no incentive to settle claims fairly, and disposed of them in "half-hearted" manner, because insureds had decided not to renew their insurance policy with insurer. Commerce & Indus. Ins. Co. v North Shore Towers Management, 162 Misc. 2d 778, 617 N.Y.S.2d 632, 1994 N.Y. Misc. LEXIS 447 (N.Y. Civ. Ct. 1994).

CLS CPLR § 5015(a)(3) did not support vacatur of judgment against insured entered upon settlement of underlying personal injury action, based on injured plaintiffs' refusal to provide insurer with their taxpayer identification numbers in accordance with insurer's policy of requesting such numbers to comply with its interpretation of 26 USCS § 6045(f) which purportedly requires insurers to provide Internal Revenue Service (IRS) with taxpayer identification numbers of attorneys to whom they issue payments, where insurer failed to present evidence of any ruling from IRS that § 6045(f) applies to payment of settlement accounts as well. Catania v Horsford, 181 Misc. 2d 740, 695 N.Y.S.2d 504, 1999 N.Y. Misc. LEXIS 363 (N.Y. Sup. Ct. 1999).

Insurance company could not recover, in subrogation action seeking common-law indemnification from construction contractor, amount it paid in excess of bodily injury policy limits to satisfy judgment obtained against its insured, as its overpayment, made in absence of any legal liability or compulsion to do so, was purely voluntary payment. Travelers Ins. Co. v Nory Constr. Co., 184 Misc. 2d 366, 708 N.Y.S.2d 252, 2000 N.Y. Misc. LEXIS 137 (N.Y. Sup. Ct. 2000), app. dismissed, 281 A.D.2d 955, 722 N.Y.S.2d 209, 2001 N.Y. App. Div. LEXIS 2693 (N.Y. App. Div. 4th Dep't 2001), aff'd, 281 A.D.2d 956, 722 N.Y.S.2d 209, 2001 N.Y. App. Div. LEXIS 2692 (N.Y. App. Div. 4th Dep't 2001).

Under CLS CPLR § 5003-a(a), when action to recover damages has been settled, unless CLS CPLR § 5003-a(b) or (c) apply, defendant must pay all sums to plaintiff within 21 days of tender. Insurance Department, Opinions of General Counsel, Opinion Number 02-07-23.

188. Particular items of recovery

Insurer's obligation to compensate for bodily injury does not extend to derivative claims for loss of services which occurred as result of physical injuries suffered by third person. Lavanant v General Acci. Ins. Co., 79 N.Y.2d 623, 584 N.Y.S.2d 744, 595 N.E.2d 819, 1992 N.Y. LEXIS 1534 (N.Y. 1992).

Term "bodily injury" in liability insurance policy was ambiguous, in that it was defined as "bodily injury, sickness or disease," and thus would be construed to include mental injury alone even though no physical injury or contact was involved. Lavanant v General Acci. Ins. Co., 79 N.Y.2d 623, 584 N.Y.S.2d 744, 595 N.E.2d 819, 1992 N.Y. LEXIS 1534 (N.Y. 1992).

Insurance carriers are liable for postjudgment interest only on portion of judgment which is covered by insurance policy, unless contract of insurance contains broader provision. Shnarch v Empire Mut. Ins. Co., 144 A.D.2d 795, 535 N.Y.S.2d 180, 1988 N.Y. App. Div. LEXIS 11129 (N.Y. App. Div. 3d Dep't 1988), app. dismissed, 74 N.Y.2d 715, 543 N.Y.S.2d 402, 541 N.E.2d 431, 1989 N.Y. LEXIS 825 (N.Y. 1989).

Where arbitration under uninsured motorist endorsement for death of passenger in insured vehicle resulted in award for maximum coverage under policy, prejudgment interest from date of death until date of award could not be awarded since prejudgment interest is substantive and part of damages, and insurer could not be held responsible for amounts in excess of policy limits. Russo v Kemper Group, 146 A.D.2d 701, 537 N.Y.S.2d 200, 1989 N.Y. App. Div. LEXIS 640 (N.Y. App. Div. 2d Dep't 1989).

Supreme Court correctly determined that damages for severe emotional distress, humiliation and mental anguish, sought in special proceeding against defendant by Attorney General, were not within bodily injury coverage of defendant's insurance policy. Mesmer & Sons Dairy, Inc. v Hartford Ins. Group, 155 A.D.2d 955, 549 N.Y.S.2d 618, 1989 N.Y. App. Div. LEXIS 14825 (N.Y. App. Div. 4th Dep't 1989).

Victorious plaintiff in wrongful death action against insured was entitled to summary judgment against insurer for postjudgment interest on policy limit amount of $50,000 where evidence failed to establish that insurer had made tender of $50,000 after judgment was entered, which, under 11 NYCRR § 60-1.1(b), would have prevented postjudgment interest from accruing, and court would not assume that insurer's tender was unconditional or that release proposed by insurer was routine. Fama v Metropolitan Prop. & Cas. Ins. Co., 242 A.D.2d 663, 662 N.Y.S.2d 784, 1997 N.Y. App. Div. LEXIS 9192 (N.Y. App. Div. 2d Dep't 1997).

Victorious plaintiff in wrongful death action against insured was not entitled to recover from insurer postjudgment interest based on entire amount of judgment, where insurer did not obligate itself under insurance policy to pay any postjudgment interest beyond that applicable to policy limit amount, and law did not require more. Fama v Metropolitan Prop. & Cas. Ins. Co., 242 A.D.2d 663, 662 N.Y.S.2d 784, 1997 N.Y. App. Div. LEXIS 9192 (N.Y. App. Div. 2d Dep't 1997).

In action by owner of leased car against its excess liability insurer, owner was not entitled to prejudgment interest where it never complied with written notice provisions of policies and thus was in breach of contract. First City Acceptance Corp. v Gulf Ins. Co., 245 A.D.2d 649, 665 N.Y.S.2d 114, 1997 N.Y. App. Div. LEXIS 12534 (N.Y. App. Div. 3d Dep't 1997).

Insured was not entitled to recover damages for emotional distress in action against her insurer for underinsured motorist benefits where (1) as general rule, there is no right to recover damages for emotional distress in breach of contract action in New York, and (2) attempt by insured's counsel to portray claim as relating solely to car accident was belied by language of complaint and insured's answer to insurer's interrogatories. Hess v Nationwide Mut. Ins. Co., 273 A.D.2d 689, 709 N.Y.S.2d 701, 2000 N.Y. App. Div. LEXIS 7222 (N.Y. App. Div. 3d Dep't 2000).

In action under CLS Ins § 3420(a)(1) to enforce judgment obtained in personal injury action in which infant plaintiff was injured by truck owned by defendant's insured, defendant's duty to pay postjudgment interest on judgment ceased when defendant tendered or paid amount of policy limit where policy clearly provided that defendant's duty to pay interest ended "when [the insurer has] paid...the part of the judgment that is within [the insurer's] Limit of Insurance." Woodson v Am. Transit Ins. Co., 281 A.D.2d 282, 722 N.Y.S.2d 138, 2001 N.Y. App. Div. LEXIS 2983 (N.Y. App. Div. 1st Dep't 2001).

Automobile liability insurer's offer to pay $50,000 policy limits, communicated to plaintiffs' counsel prior to trial of underlying wrongful death action constituted tender within meaning of 11 NYCRR § 60-1.1(b) sufficient to suspend accrual of interest on unsatisfied $1.8 million judgment for which insurer would have otherwise been liable. Fama v Metropolitan Prop. & Cas. Ins. Co., 169 Misc. 2d 872, 646 N.Y.S.2d 930, 1996 N.Y. Misc. LEXIS 289 (N.Y. Sup. Ct. 1996), modified, 242 A.D.2d 663, 662 N.Y.S.2d 784, 1997 N.Y. App. Div. LEXIS 9192 (N.Y. App. Div. 2d Dep't 1997).

Loss payment which insurer must make on private passenger automobile of current model year that has suffered total loss due to complete destruction or theft is reasonable purchase price on date of loss of new identical vehicle, less applicable deductible and allowance for depreciation, calculated in accordance with 11 NYCRR § 216.7(c)(3), unless this settlement method would result in lower loss payment than methods described in 11 NYCRR § 216.7(c)(1)(i), (ii) and (iii), in which case settlement method that results in higher loss payment among methods provided in 11 NYCRR § 216.7(c)(1)(i), (ii) and (iii) would be appropriate settlement method to calculate loss payment. NY Ins Dep't Gen Counsel, Opinion No. 11-02-01, 2011 NY Insurance GC Opinions LEXIS 1.

189. —Punitive damages

Plaintiff was not entitled to recover punitive damages from insurance company for allegedly defrauding its insured and for allegedly committing pattern of civil wrongs aimed at general public by having undeviating policy of improperly terminating insurance coverage, refusing to appear and to defend its insureds, refusing to honor judgments and refusing to pay full policy limits regardless of merits, since legislature has created different remedy for such public wrong by enacting CLS Ins § 2601. Roldan v Allstate Ins. Co., 149 A.D.2d 20, 544 N.Y.S.2d 359, 1989 N.Y. App. Div. LEXIS 9736 (N.Y. App. Div. 2d Dep't 1989).

Punitive damages may not be recovered against insurer by beneficiary of life insurance policy in absence of allegation supporting finding of wanton dishonesty implying criminal indifference to civil obligations. Botway v American International Assurance Co., 151 A.D.2d 288, 543 N.Y.S.2d 651, 1989 N.Y. App. Div. LEXIS 7503 (N.Y. App. Div. 1st Dep't 1989).

Liability insurer had no duty to provide coverage to stock brokerage for punitive damages rendered against it in 2 separate slander actions, one in federal court and other in Texas court, since New York public policy, which precludes insurance indemnification for punitive damages awards whether based on intentional or grossly negligent conduct, should not be applied any differently merely because punitive damages award happens to have been rendered in another jurisdiction. Zurich Ins. Co. v Shearson Lehman Hutton, Inc., 193 A.D.2d 1, 601 N.Y.S.2d 276, 1993 N.Y. App. Div. LEXIS 8054 (N.Y. App. Div. 1st Dep't 1993), modified, aff'd, 84 N.Y.2d 309, 618 N.Y.S.2d 609, 642 N.E.2d 1065, 1994 N.Y. LEXIS 3380 (N.Y. 1994).

In action by insurer seeking declaration that it had no duty to provide coverage to defendant stock brokerage for punitive damages rendered against it in 2 separate out-of-state slander actions, one in federal court, brokerage's counterclaims for unfair and deceptive trade practices and for costs incurred in defending federal court action did not have to be dismissed on basis of New York public policy barring insurance indemnification for punitive damages awards, since insurer may have collected premium from brokerage for coverage of punitive damages. Zurich Ins. Co. v Shearson Lehman Hutton, Inc., 193 A.D.2d 1, 601 N.Y.S.2d 276, 1993 N.Y. App. Div. LEXIS 8054 (N.Y. App. Div. 1st Dep't 1993), modified, aff'd, 84 N.Y.2d 309, 618 N.Y.S.2d 609, 642 N.E.2d 1065, 1994 N.Y. LEXIS 3380 (N.Y. 1994).

Although liability insurance carrier can be found liable for bad faith in not resolving claim within policy limits where it is highly probable that insured would be subject to personal liability, public policy of New York precludes insurer from writing coverage for punitive damages, and insurer accordingly cannot be found liable for bad faith in failing to pay punitive damages claim. Soto v State Farm Ins. Co., 155 Misc. 2d 447, 588 N.Y.S.2d 505, 1992 N.Y. Misc. LEXIS 434 (N.Y. Sup. Ct. 1992), aff'd, 83 N.Y.2d 718, 613 N.Y.S.2d 352, 635 N.E.2d 1222, 1994 N.Y. LEXIS 1034 (N.Y. 1994).

190. —Costs and counsel fees

Award of insured's counsel fees, which included counsel's charges for prosecution of declaratory judgment action against insurance company as well as for defense of underlying automobile negligence action brought against insured, would be reduced to amount expended in defense of underlying action, since holder of insurance policy is not entitled to recover legal fees and expenses for prosecution of declaratory judgment action against insurer, but only for fees and expenses necessitated should he be cast in defensive posture by legal steps taken by insurer in effort to free itself from its policy obligations. Grasso v Country-Wide Ins. Co., 132 A.D.2d 451, 517 N.Y.S.2d 150, 1987 N.Y. App. Div. LEXIS 49017 (N.Y. App. Div. 1st Dep't 1987).

Insured was properly awarded reasonable costs and attorney's fees incurred in action commenced by insurer for declaratory judgment to avoid its obligation to defend and indemnify insured where, after commencing action, insurer abandoned action, admitted coverage and settled underlying action on behalf of insured. U.S. Underwriters Ins. Co. v Mesiftah Eitz Chaim, 210 A.D.2d 218, 620 N.Y.S.2d 5, 1994 N.Y. App. Div. LEXIS 12355 (N.Y. App. Div. 2d Dep't 1994).

In action for breach of insurance contract arising from failure of insurer to timely defend insured in underlying tort action, insured could not recover counsel fees he incurred in seeking to compel insurer to comply with its duty to defend. Williams v Associated Mut. Ins. Co., 211 A.D.2d 865, 621 N.Y.S.2d 206, 1995 N.Y. App. Div. LEXIS 37 (N.Y. App. Div. 3d Dep't 1995).

In action for breach of insurance contract arising from failure of insurer to timely defend insured in underlying tort action, insured could recover counsel fees he incurred in his direct effort to vacate default judgment entered as result of insurer's failure to defend. Williams v Associated Mut. Ins. Co., 211 A.D.2d 865, 621 N.Y.S.2d 206, 1995 N.Y. App. Div. LEXIS 37 (N.Y. App. Div. 3d Dep't 1995).

Court properly awarded costs and attorney fees to insured because she was cast in defensive posture by liability insurer's commencement of action for judgment declaring policy void. Allegany Co-op Ins. Co. v Williams, 216 A.D.2d 894, 628 N.Y.S.2d 900, 1995 N.Y. App. Div. LEXIS 7212 (N.Y. App. Div. 4th Dep't 1995), app. denied, 87 N.Y.2d 806, 641 N.Y.S.2d 597, 664 N.E.2d 508, 1996 N.Y. LEXIS 94 (N.Y. 1996).

Plaintiffs were not entitled to recover costs and attorneys' fees for their prosecution of action in which defendant liability insurer was granted summary judgment declaring that it was not obligated to defend and indemnify them in underlying personal injury action by subcontractor's employee, because insurer's interposition of counterclaim was no more than prayer for declaration in its favor and, as such, was redundant and mere surplusage. West 56th St. Assocs. v Greater N.Y. Mut. Ins. Co., 250 A.D.2d 109, 681 N.Y.S.2d 523, 1998 N.Y. App. Div. LEXIS 13754 (N.Y. App. Div. 1st Dep't 1998), amended, 1999 N.Y. App. Div. LEXIS 1194 (N.Y. App. Div. 1st Dep't Jan. 19, 1999).

Insured's cause of action against insurer to recover attorney and expert fees arising from insurer's alleged breach of insurance contract was properly dismissed; insured may not recover expenses incurred in bringing affirmative action against insurer to settle its rights under insurance policy. Gold v Nationwide Mut. Ins. Co., 273 A.D.2d 354, 709 N.Y.S.2d 203, 2000 N.Y. App. Div. LEXIS 7107 (N.Y. App. Div. 2d Dep't 2000).

Fact that insurer initially paid for insured's defense in underlying personal injury action did not preclude insured from recovering attorney's fees and costs incurred in subsequent declaratory judgment action whereby insurer sought reimbursement for defense and indemnification provided in underlying action; by commencing declaratory judgment action, insurer cast its insured in defensive posture by legal steps it took in unsuccessful effort to free itself from its policy obligations. United States Fid. & Guar. Co. v New York, Susquehanna & W. Ry. Corp., 277 A.D.2d 1026, 716 N.Y.S.2d 181, 2000 N.Y. App. Div. LEXIS 11407 (N.Y. App. Div. 4th Dep't 2000).

In action by village against insurance carrier for reimbursement for defense and settlement of underlying action by property owner against village arising from negligent issuance of building permit in area designated as official floodway, village was only entitled to reimbursement of attorneys' fees and expenses which were attributable to underlying action and was not entitled to attorneys' fees and expenses which were attributable to instant action for reimbursement. Village of Camden v National Fire Ins. Co., 155 Misc. 2d 607, 589 N.Y.S.2d 293, 1992 N.Y. Misc. LEXIS 461 (N.Y. Sup. Ct. 1992), aff'd, 195 A.D.2d 1091, 603 N.Y.S.2d 781, 1993 N.Y. App. Div. LEXIS 7801 (N.Y. App. Div. 4th Dep't 1993).

Where action to recover no-fault first-party benefits, interest and counsel fees was resolved when plaintiff accepted tender of payment by defendant in amount less than requested, amount of counsel fees to plaintiff was 20 percent of amount accepted by plaintiff, pursuant to 11 NYCRR § 65.16(c)(8)(ix). Dondysh v Lumbermans Mut. Ins. Co., 168 Misc. 2d 121, 645 N.Y.S.2d 388, 1996 N.Y. Misc. LEXIS 240 (N.Y. App. Term 1996).

191. Division of recovered amount among numerous claimants

Where city was not in a position to maintain an action against automobile owner's insurer, under precedessor to § 3420, but it was reasonably expected that the city would take all necessary and proper steps, the city was a claimant within the meaning of the statute with respect of the fund which the insurer offered to pay into court for discharge from further liability. United States Fidelity & Guarantee Co. v Hotkins, 6 Misc. 2d 1027, 158 N.Y.S.2d 580, 1956 N.Y. Misc. LEXIS 1379 (N.Y. Sup. Ct. 1956).

Motion by insured to compel his judgment creditors to accept undertaking by his insurer on appeal in the amount of $6,000, was granted, where limits of liability of insurer was $20,000 for a single accident and the insurer had previously settled other claims for $14,000. O'Dwyer v Grove Service Corp., 15 Misc. 2d 154, 181 N.Y.S.2d 338, 1958 N.Y. Misc. LEXIS 2543 (N.Y. Sup. Ct. 1958), aff'd, 15 A.D.2d 457, 222 N.Y.S.2d 683, 1961 N.Y. App. Div. LEXIS 7375 (N.Y. App. Div. 1st Dep't 1961).

192. Insurer's option to repair or replace

Where aircraft hull insurance policy specifically gave insurers option to either repair or replace, in money or in kind, the aircraft, which had stated value of $300,000, and which, after crash, would require $158,000 to repair, insureds were not entitled to claim "constructive total loss" by virtue of fact that projected cost of repair exceeded 50 percent of agreed value. Trimble-Waterman Associates v Certain Underwriters at Lloyd's, 41 N.Y.2d 934, 394 N.Y.S.2d 628, 363 N.E.2d 352, 1977 N.Y. LEXIS 1997 (N.Y. 1977).

Where the insurer made an election to repair or replace damaged or stolen property, such election created a new agreement with the insured under the terms of which the insurer agreed to return a repaired car to the insured. Eisenberg v Motors Ins. Corp., 62 Misc. 2d 1, 307 N.Y.S.2d 922, 1970 N.Y. Misc. LEXIS 1928 (N.Y. Civ. Ct. 1970).

Where an insurer elects to repair instead of making a cash payment to the insured for the value of an automobile or the value of the repairs, it also undertakes to return the property so repaired. Eisenberg v Motors Ins. Corp., 62 Misc. 2d 1, 307 N.Y.S.2d 922, 1970 N.Y. Misc. LEXIS 1928 (N.Y. Civ. Ct. 1970).

Where an insurance company, under the contract, has elected to repair an automobile, the obligation of the company is measured by the new contract, and it cannot cancel the old contract until it has fully performed the contract created by its election. Eisenberg v Motors Ins. Corp., 62 Misc. 2d 1, 307 N.Y.S.2d 922, 1970 N.Y. Misc. LEXIS 1928 (N.Y. Civ. Ct. 1970).

An arrangement by the insurer with a repair shop constituted an election where the policy provided that the insurance company, after loss, had three options (1) to pay for the loss in money;

or (2) to repair or replace the damaged or stolen property; or (3) at any time before the loss was paid or the property was replaced, at its expense, to return any stolen property to the named insured with payment for any resultant damage thereto. Eisenberg v Motors Ins. Corp., 62 Misc. 2d 1, 307 N.Y.S.2d 922, 1970 N.Y. Misc. LEXIS 1928 (N.Y. Civ. Ct. 1970).

193. Contribution among tortfeasors and insurers

In an action between the separate liability insurers of a tractor and trailer, used in combination, which while negligently driven caused personal injuries to a number of bus passengers in a collision with a bus, where tractor-insurer settled with the bus passengers and trailer-insurer stipulated that settlements were reasonable and conceded its liability for contribution, the contribution of the trailer-insurer to total damages paid by tractor-insurer is in the ratio that the respective policy accident limits, rather than individual claim limits, bear to the total valid and collectible insurance. Travelers Ins. Co. v General Acci., Fire & Life Assurance Corp., 28 N.Y.2d 458, 322 N.Y.S.2d 704, 271 N.E.2d 542, 1971 N.Y. LEXIS 1254 (N.Y. 1971).

There was no error or unfairness in Appellate Division's declining to order sharing of defense costs in asbestos case between 2 insurers, with understanding that insurer could later obtain contribution from other applicable policies, where case had not yet been litigated; insured should not be denied initial recourse to carrier merely because another carrier might also be responsible. Continental Casualty Co. v Rapid-American Corp., 80 N.Y.2d 640, 593 N.Y.S.2d 966, 609 N.E.2d 506, 1993 N.Y. LEXIS 81 (N.Y. 1993).

In action primarily among insurers, to apportion liability for settlement in personal injury action involving truck leased to defendant and driven by defendant's employee, Appellate Division properly concluded that $1 million business auto policy issued to company which had contracted with defendant for trucking services provided excess coverage, not primary coverage, regardless of trial court's finding that truck driver was such company's "special employee," since truck was not owned, rented or used by company and thus did not trigger primary coverage under its business auto policy; under circumstances, policies issued to lessor and lessee of truck, each providing primary coverage, applied in full to settlement, with remaining liability apportioned among excess insurers. Federal Ins. Co. v Ryder Truck Rental, 82 N.Y.2d 909, 609 N.Y.S.2d 173, 631 N.E.2d 115, 1994 N.Y. LEXIS 2 (N.Y.), reh'g denied, 83 N.Y.2d 830, 612 N.Y.S.2d 103, 634 N.E.2d 599, 1994 N.Y. LEXIS 370 (N.Y. 1994).

Two primary coinsurers of owner of leased van involved in accident would share dollar-for-dollar in covering $900,000 loss where both policies had $500,000 limit of primary auto coverage and contained identical provision as to what constituted "our share"; policy issued by third insurer, which specifically described its coverage as excess insurance and defined its losses as those in excess of all other insurance that covered risk, was not reached. Jefferson Ins. Co. v Travelers Indem. Co., 92 N.Y.2d 363, 681 N.Y.S.2d 208, 703 N.E.2d 1221, 1998 N.Y. LEXIS 3664 (N.Y. 1998).

Excess coverage clauses cancelled each other out, and thus each of 2 insurers should contribute ratably to defense and, if necessary, to indemnification of insured (nurse) in underlying medical malpractice action, where one insurer had issued comprehensive general and professional liability policy to hospital which covered nurse as employee, and second insurer had issued to nurse comprehensive professional liability policy which also covered nurse for excess liability should he be found liable in underlying action; both policies covered same primary risk, even though they purported to be excess policies. Hospital Underwriters Mut. Ins. Co. v National Casualty Co., 150 A.D.2d 636, 541 N.Y.S.2d 512, 1989 N.Y. App. Div. LEXIS 6925 (N.Y. App. Div. 2d Dep't), app. dismissed, 74 N.Y.2d 832, 546 N.Y.S.2d 340, 545 N.E.2d 630, 1989 N.Y. LEXIS 2854 (N.Y. 1989), app. denied, 75 N.Y.2d 704, 552 N.Y.S.2d 927, 552 N.E.2d 175, 1990 N.Y. LEXIS 124 (N.Y. 1990).

Insurance company which issued workers' compensation and employer's liability policy to subcontractor, and insurance company which issued comprehensive general liability policy to subcontractor would share equally in payment of settlement of claim by construction worker who fell from scaffolding where stipulation among parties stated that subcontractor was 100 percent at fault for accident and that property owner was free of fault. Hawthorne v South Bronx Community Corp., 165 A.D.2d 652, 560 N.Y.S.2d 30, 1990 N.Y. App. Div. LEXIS 10933 (N.Y. App. Div. 1st Dep't 1990), aff'd, 78 N.Y.2d 433, 576 N.Y.S.2d 203, 582 N.E.2d 586, 1991 N.Y. LEXIS 4792 (N.Y. 1991).

Insurer which issued standard automobile policy to husband of operator of vehicle at fault had no duty to contribute toward satisfaction of judgment where (1) policy covered automobile owned by husband, (2) vehicle involved in accident was automobile leased by business owned by husband, (3) vehicle involved in accident was regularly available for use of operator, and (4) policy covered non-owned automobiles but excluded automobiles that were available for regular use. Liberty Mut. Ins. Co. v Aetna Casualty & Surety Co., 168 A.D.2d 121, 571 N.Y.S.2d 735, 1991 N.Y. App. Div. LEXIS 8047 (N.Y. App. Div. 2d Dep't 1991).

Automobile policy from defendant insurer which provided that "insurance under this policy...shall be excess insurance over any other valid and collectible insurance, whether primary, excess or contingent" sufficiently indicated higher layer of coverage compared to policy of plaintiff insurer, which provided merely that "[t]his insurance is excess over other collectible insurance," and thus court improperly granted summary judgment to plaintiff, directing defendant to make pro rata contribution toward plaintiff's settlement with injured party. Farm Family Mut. Ins. Co. v Allstate Ins. Co., 179 A.D.2d 965, 579 N.Y.S.2d 207, 1992 N.Y. App. Div. LEXIS 857 (N.Y. App. Div. 3d Dep't), app. denied, 80 N.Y.2d 756, 588 N.Y.S.2d 824, 602 N.E.2d 232, 1992 N.Y. LEXIS 3180 (N.Y. 1992).

Although where 2 insurance policies purport to provide coverage of same risk in excess of other available insurance, "excess" clauses cancel each other out, obligating each insurer to share ratably in settlement, exception exists where one policy is specifically shown to be excess of other excess policies and to offer only higher layer of coverage, but to so qualify policy must have plain language to that effect. Farm Family Mut. Ins. Co. v Allstate Ins. Co., 179 A.D.2d 965, 579 N.Y.S.2d 207, 1992 N.Y. App. Div. LEXIS 857 (N.Y. App. Div. 3d Dep't), app. denied, 80 N.Y.2d 756, 588 N.Y.S.2d 824, 602 N.E.2d 232, 1992 N.Y. LEXIS 3180 (N.Y. 1992).

Insurer must contribute to expenses incurred by co-insurer's in-house counsel in defense of mutual insured. Travelers Ins. Co. v Commissioners of the State Ins. Fund, 227 A.D.2d 208, 642 N.Y.S.2d 867, 1996 N.Y. App. Div. LEXIS 5171 (N.Y. App. Div. 1st Dep't), app. denied, 89 N.Y.2d 803, 653 N.Y.S.2d 280, 675 N.E.2d 1233, 1996 N.Y. LEXIS 4205 (N.Y. 1996).

Court erred in summarily declaring that insurers' contribution would be "ratable" rather than equal where there was no evidence as to provisions of subject policies on allocation of contribution of insurers. Aetna Cas. & Sur. Co. v National Union Fire Ins. Co., 228 A.D.2d 385, 645 N.Y.S.2d 5, 1996 N.Y. App. Div. LEXIS 7454 (N.Y. App. Div. 1st Dep't 1996).

In negligence action by subcontractor's employee against contractor named as additional insured under subcontractor's general liability policy, contractor's third-party indemnification and contribution claims against subcontractor should have been dismissed by court, pro tanto, to extent of payments actually made by insurer to contractor, thereby vindicating antisubrogation rule while preserving contractor's rights to recover losses for which it was not actually compensated by insurer. Small v Yonkers Contr., 242 A.D.2d 378, 662 N.Y.S.2d 67, 1997 N.Y. App. Div. LEXIS 8490 (N.Y. App. Div. 2d Dep't 1997).

Where defendant insurer first obtained arbitration award in amount of $19,969.34 against plaintiff, tortfeasor's insurer, for damage to its insured's vehicle resulting from multivehicle accident, and plaintiff then commenced interpleader action and deposited balance of proceeds under its insured's $300,000 policy into court because of insufficient insurance coverage to satisfy all claims, defendant's recovery was limited to its pro rata share of proceeds deposited into court in amount of $4,075, and it could not execute directly against plaintiff's assets to enforce prior arbitration award; plaintiff's liability was dependent on existence of coverage and, that coverage having been exhausted, plaintiff was not liable beyond its pro rata share. Boris v Flaherty, 242

A.D.2d 9, 672 N.Y.S.2d 177, 1998 N.Y. App. Div. LEXIS 5011 (N.Y. App. Div. 4th Dep't 1998).

In determining responsibility of 3 insurance carriers that issued consecutive policies on building in which child suffered injuries due to continuous exposure to lead based paint, court erred in applying pro rata contribution analysis based on period of time on risk that each policy was in effect, rather than $^1/_3$ allocation pursuant to "other insurance" provisions in general liability section of policies, which provided for contribution by equal shares. American Empire Ins. Co. v PSM Ins. Cos., 259 A.D.2d 341, 687 N.Y.S.2d 32, 1999 N.Y. App. Div. LEXIS 2767 (N.Y. App. Div. 1st Dep't 1999).

In action arising from automobile accident involving vehicle leased by defendant and his closely held corporation, excess coverage under defendant's excess liability policy had to be exhausted prior to contribution from his commercial catastrophe excess liability policy, in view of insurance binder of catastrophe policy, language of policy's "Other Insurance" provision, and its designation as "catastrophe" liability policy. Castricone v Riggi, 259 A.D.2d 815, 686 N.Y.S.2d 175, 1999 N.Y. App. Div. LEXIS 2104 (N.Y. App. Div. 3d Dep't 1999).

Insurance company for subcontractor at construction site was estopped from seeking contribution from insurer for general contractor and property owner, toward settlement of action arising from construction site accident, where plaintiff insurance company had unqualifiedly assumed control of defense of general contractor and property owner, and had arbitrarily apportioned liability among insureds over objection of other insurer. Home Ins. Co. v Travelers Ins. Co., 156 Misc. 2d 479, 593 N.Y.S.2d 932, 1993 N.Y. Misc. LEXIS 9 (N.Y. Sup. Ct. 1993).

Liability insurer that prevailed in contribution suit against second liability insurer, which had not participated in defense and indemnity of common insured in underlying personal injury action, was entitled to prejudgment interest under CLS CPLR § 5001(a) as matter of law. Royal Indem. Co. v Providence Wash. Ins. Co., 966 F. Supp. 149, 1997 U.S. Dist. LEXIS 9102 (N.D.N.Y. 1997).

194. Indemnity among tortfeasors and insurers

Public policy precludes insurance indemnification for punitive damage awards, whether punitive damages are based on intentional actions, or on actions which, while not intentional, amount to gross negligence, recklessness, wantonness, conscious disregard of rights of others, or for conduct so reckless as to amount to such disregard. Home Ins. Co. v American Home Products Corp., 75 N.Y.2d 196, 551 N.Y.S.2d 481, 550 N.E.2d 930, 1990 N.Y. LEXIS 90 (N.Y. 1990).

Conduct of brokerage house's executive, which resulted in punitive damage award in Georgia slander action, would support New York punitive damage award for purposes of determining insurer's duty to indemnify brokerage house under liability policy, despite plaintiff's purported failure to plead and prove special damages as required by New York law, where Georgia court found that statement at issue was made with "actual malice," which satisfies New York's legal standard for slander; New York court must ascertain whether conduct at issue exhibits degree of culpability necessary to sustain punitive award in New York, not whether form of evidence or method of proof acceptable to judgment state would be sufficient in New York. Zurich Ins. Co. v Shearson Lehman Hutton, Inc., 84 N.Y.2d 309, 618 N.Y.S.2d 609, 642 N.E.2d 1065, 1994 N.Y. LEXIS 3380 (N.Y. 1994).

Conduct of brokerage house's executive, which resulted in punitive damage award in Texas slander action, would support New York punitive damage award for purposes of determining insurer's duty to indemnify brokerage house under liability policy, despite plaintiff's purported failure to show that executive was not sufficiently highly placed to establish necessary level of corporate complicity under New York law, where Texas jury found that statements at issue were made with "actual malice," which satisfies New York's legal standard for slander. Zurich Ins. Co. v Shearson Lehman Hutton, Inc., 84 N.Y.2d 309, 618 N.Y.S.2d 609, 642 N.E.2d 1065, 1994 N.Y. LEXIS 3380 (N.Y. 1994).

Insurer would be required to indemnify insured for punitive damages awarded in Georgia slander action where Georgia law at time of action permitted jury to award "additional damages to deter the wrongdoer...or as compensation for the wounded feelings of the plaintiff," trial court charged jury that punitive damage award could include both punitive and compensatory elements, and there was evidence to support each element; only when damage award is of "punitive nature" is indemnification precluded by New York policy. Zurich Ins. Co. v Shearson Lehman Hutton, Inc., 84 N.Y.2d 309, 618 N.Y.S.2d 609, 642 N.E.2d 1065, 1994 N.Y. LEXIS 3380 (N.Y. 1994).

Where person driving car rented from self-insured rental company was involved in accident, causing injury to third person, rental company could not seek indemnification from renters to extent that damage fell below minimum insurance that company was required to provide for benefit of permissive users under CLS Veh & Tr § 370(1); however, indemnification clause of rental contract, if otherwise valid, was enforceable as to amounts exceeding statutory minimums. ELRAC, Inc. v Ward, 96 N.Y.2d 58, 724 N.Y.S.2d 692, 748 N.E.2d 1, 2001 N.Y. LEXIS 695 (N.Y. 2001).

In insured's action for judgment declaring that liability insurer had duty to indemnify it with respect to settlement reached by it in action for negligence and products liability, insured was not entitled to summary judgment based on court's holding that liability insurer had duty to defend it in underlying action as matter of law since (1) existence of duty to defend is not synonymous with duty to indemnify, (2) duty to indemnify is determined by actual basis for insured's liability to third person, and (3) issue of what portion of claim against insured, if any, was excluded from coverage under terms of policy had not been adjudicated. Apache Foam Products Div. of Millmaster Onyx Group of Kewanee Industries, Inc. v Continental Ins. Co., 139 A.D.2d 933, 528 N.Y.S.2d 448, 1988 N.Y. App. Div. LEXIS 4199 (N.Y. App. Div. 4th Dep't 1988).

When judgment debtor, whose tort liability is purely derivative, has right to full indemnification from another judgment debtor, whose tort liability is primary, and where both judgment debtors are insured under policies which cover same risk, insurance furnished to passive tortfeasor is excess to that furnished to active tortfeasor. Liberty Mut. Ins. Co. v Aetna Casualty & Surety Co., 168 A.D.2d 121, 571 N.Y.S.2d 735, 1991 N.Y. App. Div. LEXIS 8047 (N.Y. App. Div. 2d Dep't 1991).

In declaratory judgment action to determine obligations of various insurance companies with regard to underlying personal injury action, personal excess liability policy issued to husband of operator of vehicle at fault was layer of insurance to be used to satisfy judgment before most of policy issued to owner-lessor of vehicle, where policy issued to owner-lessor provided for $1 million in over-all coverage but only $100,000 coverage for lessee, since owner-lessor, which was passive tortfeasor, was entitled to full indemnification from operator, who was active tortfeasor. Liberty Mut. Ins. Co. v Aetna Casualty & Surety Co., 168 A.D.2d 121, 571 N.Y.S.2d 735, 1991 N.Y. App. Div. LEXIS 8047 (N.Y. App. Div. 2d Dep't 1991).

Trucking company's insurer was required to reimburse manufacturer's insurer for ½ of settlement paid to injured worker who brought negligence action against both trucking company and manufacturer for injuries he sustained while unloading manufacturer's merchandise from trucking company's truck where (1) under "business auto policy" issued by manufacturer's insurer, trailer owner was additional insured, (2) under "trucker's policy" issued by trucking company's insurer, manufacturer was additional insured, (3) policy limits of policies were identical, and (4) terms of each policy specified that it was excess insurance; since different insurers provided coverage for same interest and against same risk, concurrent coverage existed. Federal Ins. Co. v Empire Mut. Ins. Co., 181 A.D.2d 568, 581 N.Y.S.2d 56, 1992 N.Y. App. Div. LEXIS 3899 (N.Y. App. Div. 1st Dep't 1992).

New York State Insurance Fund was entitled to summary judgment dismissing action by contractor's insurance company for judgment declaring that state fund was obligated to reimburse insurer for costs it incurred in action against contractor by workers who sustained job-related injuries, where insurer claimed that state fund, as contractor's workers' compensation carrier, failed to fulfill its alleged contractual liability to defend

contractor in workers' actions; in absence of common-law indemnity claim against contractor (which contractor's insurer was barred from asserting), insurer had no independent basis on which to seek contribution from state fund. Avalanche Wrecking Corp. v New York State Ins. Fund, 211 A.D.2d 551, 621 N.Y.S.2d 74, 1995 N.Y. App. Div. LEXIS 531 (N.Y. App. Div. 1st Dep't 1995).

Plaintiff, as subcontractor's general liability insurer, was entitled to recoup from State Insurance Fund (subcontractor's employer's liability insurer) ½ of reasonable amounts it expended for defense and settlement of third-party action against subcontractor, as they were co-insurers of subcontractor in that they both insured subcontractor for damages arising out of bodily injury, and exclusion in employer's liability policy against contractually assumed indemnification claims did not bar coverage because included common-law liability and excluded contractual liability may co-exist; immediate trial was ordered pursuant to CLS CPLR § 3212(c) to determine reasonableness of plaintiff's decision to pay $125,000 of $185,000 settlement on behalf of subcontractor, as well as amount and reasonableness of defense costs paid by plaintiff. National Union Fire Ins. Co. v State Ins. Fund, 222 A.D.2d 369, 636 N.Y.S.2d 31, 1995 N.Y. App. Div. LEXIS 13761 (N.Y. App. Div. 1st Dep't 1995).

In personal injury action arising from accident that occurred when rented van was being operated by person who was not authorized by rental agreement to drive it, lessee of van was not entitled to summary judgment on lessor's counterclaim for contractual indemnification even though indemnity clause of parties' rental agreement did not comply with CLS Gen Bus § 396-z, as § 396-z did not apply where lessor had withdrawn portion of its counterclaim involving property damage to rented vehicle, and no other property claims were asserted. Layaw v Maguire Ford-Lincoln-Mercury, 219 A.D.2d 73, 639 N.Y.S.2d 544, 1996 N.Y. App. Div. LEXIS 2788 (N.Y. App. Div. 3d Dep't 1996).

In action against hotel under CLS Labor § 240, brought by contractor's employee who was injured while working at hotel, coverage was not barred by exclusion against contractually-assumed indemnification claims in contractor's commercial general liability insurance policy, which named hotel as additional insured pursuant to contractual obligation to indemnify hotel for negligence of contractor, since included common-law liability and excluded contractual liability may coexist. White v Hotel D'Artistes, 230 A.D.2d 657, 646 N.Y.S.2d 793, 1996 N.Y. App. Div. LEXIS 8624 (N.Y. App. Div. 1st Dep't 1996).

Insurer was entitled to summary judgment for indemnification from insurance agency that issued binder to insured providing coverage for nonowned vehicles where insurer thus became obligated to indemnify and defend insured for accident that occurred during effective period of binder, whereas policy later issued excluded coverage for nonowned vehicles. Bennacer v Travelers Ins. Co., 265 A.D.2d 823, 695 N.Y.S.2d 846, 1999 N.Y. App. Div. LEXIS 9860 (N.Y. App. Div. 4th Dep't 1999), app. denied, 94 N.Y.2d 763, 708 N.Y.S.2d 52, 729 N.E.2d 709, 2000 N.Y. LEXIS 550 (N.Y. 2000).

General liability insurer was not obligated under its policy to pay judgment on behalf of construction company, and thus insurer was entitled to summary judgment declaring that State Insurance Fund was obligated—under workers' compensation and employers' liability policy that it issued to company covering common-law indemnification claims—to reimburse general liability insurer for money spent in settling underlying action, where city did not have valid contractual indemnification claim against company. National Union Fire Ins. Co. v State Ins. Fund, 266 A.D.2d 518, 699 N.Y.S.2d 111, 1999 N.Y. App. Div. LEXIS 12246 (N.Y. App. Div. 2d Dep't 1999).

In personal injury action by worker at construction site in which defendant subcontractor asserted third-party action based on codefendant subcontractor's alleged breach of contractual obligation to have it named as additional insured on general liability insurance policy, summary judgment dismissing third-party complaint should have been granted to insurance broker which issued certificate of insurance naming defendant subcontractor as additional insured where (1) certificate contained disclaimer stating that it was issued for information only and did not confer any rights on certificate holder or extend or amend policy's coverage, (2) as such, certificate did not constitute contract to insure nor was it conclusive proof, standing alone, that such contract existed, and (3) while broker may have arguably breached its duty to its client, it could not be held liable to additional insured, to whom it owed no duty. St. George v W.J. Barney Corp., 270 A.D.2d 171, 706 N.Y.S.2d 24, 2000 N.Y. App. Div. LEXIS 3305 (N.Y. App. Div. 1st Dep't 2000).

Third-party plaintiff was entitled to indemnification by third-party defendant for all damages caused by third-party defendant's negligent referral of underlying claim to wrong insurer—that is, costs of defense and indemnity equivalent to what insurer would have provided if it had been timely notified, and reasonable costs of prosecuting third-party action as reasonable effort to mitigate damages. Martini v Lafayette Studio Corp., 273 A.D.2d 112, 710 N.Y.S.2d 39, 2000 N.Y. App. Div. LEXIS 7176 (N.Y. App. Div. 1st Dep't 2000).

Underlying plaintiff's injury was "caused intentionally by" insured under homeowner's liability policy, and thus insurer was entitled to judgment declaring that it had no duty of indemnification, where insured's intentional act was intended to cause injury, albeit less serious than that suffered, and it did not matter that amount of damages awarded was reduced by 20 percent for comparative negligence. Farina v Security Mut. Ins. Co., 273 A.D.2d 845, 709 N.Y.S.2d 304, 2000 N.Y. App. Div. LEXIS 6886 (N.Y. App. Div. 4th Dep't 2000).

Although neither public policy nor CLS Veh & Tr §§ 370 and 388 prohibited self-insured rental car agency from disclaiming any part of its liability to injured pedestrian that exceeded amount for which motor vehicle owners were required to be insured and from seeking indemnification for such sums under parties' agreement, public policy barred agency from obtaining indemnification from operator of rental car that hit pedestrian where agency's liability to pedestrian had been fixed settlement with pedestrian for sum that was less than required coverage. Snorac, Inc. v Skura, 273 A.D.2d 886, 709 N.Y.S.2d 311, 2000 N.Y. App. Div. LEXIS 6952 (N.Y. App. Div. 4th Dep't 2000).

Insurer was not required to defend or indemnify insured regarding underlying action by insured's injured employee where insurer properly disclaimed coverage based on insured's failure to provide timely notice of claim, insured's delay of 2 years and 10 months in providing notice of claim was unreasonable as matter of law, insurer was not obligated to disclaim coverage until insured provided notice of accident or claim, and disclaimer in insurer's answer was timely notice of disclaimer. Roofing Consultants, Inc. v Scottsdale Ins. Co., 273 A.D.2d 933, 709 N.Y.S.2d 782, 2000 N.Y. App. Div. LEXIS 6715 (N.Y. App. Div. 4th Dep't), app. denied, 95 N.Y.2d 770, 722 N.Y.S.2d 473, 745 N.E.2d 393, 2000 N.Y. LEXIS 3859 (N.Y. 2000).

Insured was entitled to summary judgment declaring that insurer had to indemnify it in underlying personal injury action where additional insured clause of policy limited such coverage "to liability arising out of 'your work'...by or for you," and that language was broad enough to cover injury to carpentry subcontractor who fell on electrical cable at insured's construction site. Structure Tone, Inc. v Component Assembly Sys., 275 A.D.2d 603, 713 N.Y.S.2d 161, 2000 N.Y. App. Div. LEXIS 9030 (N.Y. App. Div. 1st Dep't 2000).

Insurer was required to defend and indemnify insured law partners in underlying legal malpractice action against them where (1) at time of their insurance renewal application, they lacked actual or constructive knowledge that their former associate had mishandled personal injury case, (2) former associate concealed his misconduct, and there was no basis for imputing it to partners, and (3) thus, partner who inquired of his partners and associates at time of renewal application truthfully told insurer that no circumstances had been reported that would result in malpractice claim. Holloway v Sacks & Sacks, 275 A.D.2d 625, 713 N.Y.S.2d 162, 2000 N.Y. App. Div. LEXIS 9278 (N.Y. App. Div. 1st Dep't), app. denied, 95 N.Y.2d 770, 722 N.Y.S.2d 473, 745 N.E.2d 394, 2000 N.Y. LEXIS 3912 (N.Y. 2000).

Liability insurer had no duty to defend or indemnify insured for any claims against him by woman injured in slip and fall in bed of insured's pickup truck where (1) insured initially told insurer that woman fell while truck was parked and not moving and that

he was not present at time of fall, (2) over one year later, after woman notified insurer that she intended to make liability claim against insured, insured told insurer that he was operating truck when woman fell, (3) insured's failure to make fair and truthful disclosures in reporting incident was breach of cooperation clause of insurance policy, and (4) insurer was not required to show prejudice as result of insured's lack of cooperation in order to prove its entitlement to summary judgment. Nationwide Mut. Ins. Co. v Graham, 275 A.D.2d 1012, 713 N.Y.S.2d 602, 2000 N.Y. App. Div. LEXIS 9608 (N.Y. App. Div. 4th Dep't 2000).

In proceeding to vacate arbitration award which denied, as time-barred, petitioner's claim to recover for workers' compensation and medical expense benefits paid to employee of its insured who was injured in accident involving car insured by respondent, court correctly held that arbitrator's acceptance of respondent's statute of limitations defense was subject to judicial review under arbitrary and capricious standard, and that it was arbitrary and capricious of arbitrator not to follow clear precedent establishing that claims like petitioner's were subject to 3-year limitations period that commenced on date of petitioner's first payment to injured party, not on date of injury, and only precluded recovery of payments made more than 3 years prior to commencement of suit. State Ins. Fund v Country-Wide Ins. Co., 276 A.D.2d 432, 715 N.Y.S.2d 15, 2000 N.Y. App. Div. LEXIS 10752 (N.Y. App. Div. 1st Dep't 2000).

In action arising from collision involving vehicle rented by insured while one of her 2 cars was being repaired, question of fact existed as to whether rental vehicle qualified as "other motor vehicle," precluding summary judgment on issue of insurance carrier's obligation to indemnify rental agency, where undisputed evidence showed that insured had picked up rental vehicle because one of her cars was to be undergoing repair work 2 days later and she planned to let her daughter use her other car at same time, raising issue as to which of her cars rental vehicle was intended to replace. Pahl v Grenier, 277 A.D.2d 681, 715 N.Y.S.2d 124, 2000 N.Y. App. Div. LEXIS 11963 (N.Y. App. Div. 3d Dep't 2000).

Insurer was entitled to summary judgment declaring that it was not obligated to defend and indemnify insureds in underlying personal injury action where insureds' 15-month delay in notifying insurer of accident was not excused by their allegedly good-faith, albeit mistaken, beliefs that (1) loss was not covered by insurance policy, (2) notification of their insurance agent was notification of insurer, and (3) their attorney had communicated with attorney for injured party. Travelers Indem. Co. v Worthy, 281 A.D.2d 411, 721 N.Y.S.2d 400, 2001 N.Y. App. Div. LEXIS 2073 (N.Y. App. Div. 2d Dep't 2001).

Insurer was entitled to summary judgment declaring that it was not obligated to defend and indemnify insureds in underlying personal injury action where injured party did not provide insurer with written notice of claim, and insurer was not required to cite that failure to notify in its letter disclaiming coverage. Travelers Indem. Co. v Worthy, 281 A.D.2d 411, 721 N.Y.S.2d 400, 2001 N.Y. App. Div. LEXIS 2073 (N.Y. App. Div. 2d Dep't 2001).

Lessor of car involved in accident was entitled to summary judgment declaring that insurer was obligated to defend and indemnify it in underlying action where (1) driver, as lessee under lease for period greater than 30 days (2 years), was owner of car under CLS Veh & Tr § 128, (2) thus, insurance regulations in 11 NYCRR § 60-1.1 applied, and (3) any attempt by insurer to disclaim coverage through language of limiting provision of insurance policy was unenforceable as against public policy. GE Capital Auto Lease, Inc. v Allstate Ins. Co., 281 A.D.2d 456, 722 N.Y.S.2d 549, 2001 N.Y. App. Div. LEXIS 2400 (N.Y. App. Div. 2d Dep't), app. denied, 97 N.Y.2d 654, 737 N.Y.S.2d 54, 762 N.E.2d 932, 2001 N.Y. LEXIS 3472 (N.Y. 2001), app. denied, 98 N.Y.2d 671, 746 N.Y.S.2d 458, 774 N.E.2d 223, 2002 N.Y. LEXIS 1471 (N.Y. 2002).

Insurers were obligated to defend and indemnify insured in underlying action where insured showed good-faith, reasonable belief in its nonliability so as to excuse its 8-month delay in notifying insurers of accident; neither manner in which accident occurred, apparently trivial nature of injury, nor medical treatment rendered would have made prudent person believe that personal injury claim would be pursued. Abbey Richmond Ambulance Serv. v Northbrook Prop. & Cas. Ins. Co., 281 A.D.2d 501, 721 N.Y.S.2d 796, 2001 N.Y. App. Div. LEXIS 4195 (N.Y. App. Div. 2d Dep't), app. denied, 96 N.Y.2d 897, 730 N.Y.S.2d 793, 756 N.E.2d 81, 2001 N.Y. LEXIS 1966 (N.Y. 2001).

Insured was entitled to summary judgment declaring that insurers were obligated to defend and indemnify it in underlying personal injury action where (1) insurers sent letter notifying insured that they would not defend it with respect to any causes of action that might be asserted against it arising from injuries sustained by one of its employees, (2) because that letter served as repudiation of insurers' liability, insured was excused from further compliance with its obligations under policy, (3) thus, insurers could not rely on insured's later noncompliance as defense to third-party action in which insured sought that insurers were obligated to defend and indemnify it in personal injury action by employee in which insured was impleaded. Am. Ref-Fuel Co. v Res. Recycling, Inc., 281 A.D.2d 573, 722 N.Y.S.2d 570, 2001 N.Y. App. Div. LEXIS 3491 (N.Y. App. Div. 2d Dep't 2001).

Plaintiff was entitled to summary judgment declaring that defendant was obligated to indemnify plaintiff's insureds in underlying action where defendant's unexplained 42-day delay in disclaiming coverage was unreasonable as matter of law under CLS Ins § 3420(d), and although additional evidence submitted by defendant on later motion to reargue tended to explain part of delay, that evidence should have been submitted earlier and thus could not be relied on. Faas v N.Y. Cent. Mut. Fire Ins. Co., 281 A.D.2d 586, 722 N.Y.S.2d 173, 2001 N.Y. App. Div. LEXIS 3079 (N.Y. App. Div. 2d Dep't 2001).

Insurer was not required to defend or indemnify insured in underlying action where (1) general commercial liability policy covered only bodily injury and property damage, (2) underlying action was for economic loss resulting from need to remove asbestos-containing adhesive from school, (3) underlying complaint alleged causes of action for lost profits, extra costs due to delay and performance of extra work, breach of contract, breach of warranty, negligence, negligent representation, fraud, and false advertising, and (4) plaintiff in underlying action did not own school at which adhesive was used, and thus did not seek to recover for property damage. Structural Bldg. Prods. Corp. v Business Ins. Agency, Inc., 281 A.D.2d 617, 722 N.Y.S.2d 559, 2001 N.Y. App. Div. LEXIS 3055 (N.Y. App. Div. 2d Dep't 2001).

Insurer was not required to defend or indemnify insured in connection with underlying cause of action alleging that insured engaged in false advertising and misleading trade practices when it made written statements that its adhesive was asbestos-free where (1) "Advertising Liability Offense" section of general commercial liability policy provided coverage for damages from "advertising offense," (2) that term was defined as "injury incurred in the course of the [insured's] advertising activities" if injury arose from "libel, slander, defamation, violation of a right to privacy, piracy, unfair completion or infringement of copyright, title or slogan," and (3) underlying complaint did not allege any facts that would bring it within policy coverage so defined. Structural Bldg. Prods. Corp. v Business Ins. Agency, Inc., 281 A.D.2d 617, 722 N.Y.S.2d 559, 2001 N.Y. App. Div. LEXIS 3055 (N.Y. App. Div. 2d Dep't 2001).

In action for personal injuries sustained in fall on property owned by defendant and leased to plaintiff's employer, employer was not entitled to dismissal, under CLS CPLR § 3211(a)(7), of defendant's third-party complaint, which alleged causes of action for indemnification/contribution and breach of lease provision requiring employer to procure liability insurance naming owner as additional insured, where employer's arguments for dismissal —that plaintiff did not sustain "grave injury" as defined in CLS Work Comp § 11 and that employer did procure insurance naming owner as additional insured—raised defenses that were not germane to resolution of § 3211(a)(7) motion, focus of which is solely on sufficiency of allegations of complaint. Wilt v Brunswick Plaza L.L.C., 281 A.D.2d 840, 722 N.Y.S.2d 610, 2001 N.Y. App. Div. LEXIS 2995 (N.Y. App. Div. 3d Dep't 2001).

In action for personal injuries sustained in fall on property owned by defendant and leased to plaintiff's employer, who moved for dismissal, under CLS CPLR § 3211(a)(7), of defendant's

third-party complaint, which alleged causes of action for indemnification/contribution and breach of lease provision requiring employer to procure liability insurance naming owner as additional insured, even if motion were treated as one for summary judgment, it would have to be denied where there was no evidence that plaintiff's injuries arose "out of and in course of [her] employment" under CLS Work Comp § 10(1) or that defendant was being defended and indemnified by insurer that issued policy naming defendant as additional insured. Wilt v Brunswick Plaza L.L.C., 281 A.D.2d 840, 722 N.Y.S.2d 610, 2001 N.Y. App. Div. LEXIS 2995 (N.Y. App. Div. 3d Dep't 2001).

Defendant insurer could not seek contribution from plaintiff insurer via defendant's excess policy where (1) that policy was expressly excess only as against primary coverage, (2) excess policy issued by plaintiff was expressly excess as against all coverage, including excess coverage, and (3) those insurance policy provisions were controlling, rather than insurance procurement provisions of subcontract between plaintiff general contractor and injured party's employer; thus, plaintiffs were entitled to summary judgment declaring that (1) defendant had to indemnify its insured for payment of any amount above plaintiff insurer's primary policy limit and within limits of defendant's policy necessary to satisfy judgment in underlying action, and (2) policy limits of defendant's excess policy had to be exhausted before plaintiff insurer would be obligated under its excess policy. Travelers Indem. Co. v Am. & Foreign Ins. Co., 286 A.D.2d 626, 730 N.Y.S.2d 231, 2001 N.Y. App. Div. LEXIS 8595 (N.Y. App. Div. 1st Dep't 2001).

Plaintiff injured in motor vehicle accident involving taxi cab was entitled to summary judgment declaring that cab owner's insurer was required to provide liability insurance protection to owner under CLS Veh & Tr § 388 for any injuries sustained by plaintiff as result of cab passengers' negligence use of cab where (1) passengers' act of opening cab door in order to exit was "use and operation" of cab under § 388, (2) thus, owner would be liable for plaintiff's injuries if passengers' "use and operation" were negligent, and (3) under liability policy issued by insurer to owner, insurer was required to provide coverage to owner under such circumstances. Cohn v Nationwide Mut. Ins. Co., 286 A.D.2d 699, 730 N.Y.S.2d 152, 2001 N.Y. App. Div. LEXIS 8548 (N.Y. App. Div. 2d Dep't 2001).

In personal injury action, defendant owner of leased premises was entitled to summary judgment declaring that insured was contractually bound to indemnify it where lease required insured to procure insurance for benefit of "owner" of premises and defined "owner" as, inter alia, "the owner of the fee" of demised premises. Wilson v Commer. Envelope Mfg. Co., 286 A.D.2d 731, 730 N.Y.S.2d 352, 2001 N.Y. App. Div. LEXIS 8551 (N.Y. App. Div. 2d Dep't 2001), app. dismissed, 98 N.Y.2d 737, 751 N.Y.S.2d 840, 781 N.E.2d 904, 2002 N.Y. LEXIS 2834 (N.Y. 2002).

In personal injury action, defendant owner of leased premises was entitled to summary judgment declaring that insurer was required to defend and indemnify it where (1) lease required insured to procure insurance for benefit of "owner" of premises and defined "owner" as, inter alia, "the owner of the fee" of demised premises, and (2) insurance contract required insurer to defend and indemnify "any...organization with whom [insured] agreed, because of a written contract or agreement or permit to provide insurance." Wilson v Commer. Envelope Mfg. Co., 286 A.D.2d 731, 730 N.Y.S.2d 352, 2001 N.Y. App. Div. LEXIS 8551 (N.Y. App. Div. 2d Dep't 2001), app. dismissed, 98 N.Y.2d 737, 751 N.Y.S.2d 840, 781 N.E.2d 904, 2002 N.Y. LEXIS 2834 (N.Y. 2002).

Plaintiff, which obtained liability insurance for its business through defendant insurance broker at excessive cost and with unwanted exclusion, allegedly due to defendant's fraudulent misrepresentations and negligence, was entitled to directed verdict against defendant on liability issue in action seeking indemnification for cost to settle action by insurer against plaintiff for nonpayment of premiums since defendant's negligence in understating plaintiff's payroll to insurer was proximate cause of plaintiff's injury; jury verdict that defendant was negligent in having bound plaintiff to insurance obtained, but that defendant's negligence was not proximate cause of plaintiff's injury, was defective since, if defendant had negligently bound plaintiff to insurance in question, that negligence without doubt was proximate cause of injury (obligation to pay insurer). Trans World Maintenance Services, Inc. v Accident Prevention Brokerage Corp., 148 Misc. 2d 518, 560 N.Y.S.2d 914, 1989 N.Y. Misc. LEXIS 889 (N.Y. Sup. Ct. 1989), aff'd, 169 A.D.2d 519, 564 N.Y.S.2d 375, 1991 N.Y. App. Div. LEXIS 384 (N.Y. App. Div. 1st Dep't 1991).

Veterinary clinic was entitled to summary judgment declaring that its insurer was required to indemnify it for expenses of appealing jury verdict that found it liable for statements made about discharged veterinarian in form letter sent to more than 40 clients who requested that their pets' medical records be sent to discharged veterinarian at her new practice, where policy required insurer to defend any lawsuit seeking damages arising out of "advertising injury" caused in course of advertising "goods, products or services"; form letter in question involved advertising activity where it solicited continuation of business by calling attention to quality of care and services available at clinic. Berman v General Accident Ins. Co. of Am., 176 Misc. 2d 13, 671 N.Y.S.2d 619, 1998 N.Y. Misc. LEXIS 63 (N.Y. Sup. Ct. 1998).

Insurance company which afforded premises owner coverage for bodily injury claims was not entitled to summary judgment on common-law indemnification claim against construction contractor, seeking to recoup amount it paid to satisfy personal injury judgment obtained against premises owner in excess of applicable policy limits, where it failed to prove, as matter of law, that premises owner was only vicariously liable under Labor Law, and that contractor was wholly responsible for causing accident in question. Travelers Ins. Co. v Nory Constr. Co., 184 Misc. 2d 366, 708 N.Y.S.2d 252, 2000 N.Y. Misc. LEXIS 137 (N.Y. Sup. Ct. 2000), app. dismissed, 281 A.D.2d 955, 722 N.Y.S.2d 209, 2001 N.Y. App. Div. LEXIS 2693 (N.Y. App. Div. 4th Dep't 2001), aff'd, 281 A.D.2d 956, 722 N.Y.S.2d 209, 2001 N.Y. App. Div. LEXIS 2692 (N.Y. App. Div. 4th Dep't 2001).

Contractor was entitled to judgment in its third-party action, filed pursuant to N.Y. Ins. Law § 3420, seeking to compel an insurance fund to indemnify its insured, a subcontractor, in a suit in which the subcontractor was found liable for causing work-related injuries sustained by its employee; the fund's policy excluded only liability assumed under contract and did not exclude from coverage the subcontractor's contractual waiver of the defense in N.Y. Workers' Comp. Law § 11. Bowker v NVR, Inc., 39 A.D.3d 1162, 834 N.Y.S.2d 798, 2007 N.Y. App. Div. LEXIS 4937 (N.Y. App. Div. 4th Dep't), app. denied, 42 A.D.3d 976, 838 N.Y.S.2d 456, 2007 N.Y. App. Div. LEXIS 8278 (N.Y. App. Div. 4th Dep't 2007).

In determining what constitutes payment under indemnity policy, test in New York is whether assured has actually in good faith sustained loss for which reimbursement is sought, and insurer's obligation to indemnify may not be avoided because of assured's insolvency; thus, indemnifiable payment entails (1) satisfaction of claim and (2) absorption of some loss thereby by insured, (3) both in good faith. Dicola v American S.S. Owners Mut. Protection & Indem. Assoc. (In re Prudential Lines), 158 F.3d 65, 1998 U.S. App. LEXIS 24614 (2d Cir. N.Y. 1998).

Under New York law, insurer's obligation to pay under indemnity policy "does not arise until after the insured suffers an actual monetary loss." Dicola v American S.S. Owners Mut. Protection & Indem. Assoc. (In re Prudential Lines), 158 F.3d 65, 1998 U.S. App. LEXIS 24614 (2d Cir. N.Y. 1998).

If on remand insured were able to establish to satisfaction of trier of fact that (1) insurer issued blanket denial of coverage, and (2) insured's remediation costs were in response to governmental compulsion, insured would be entitled to indemnity from insurer on those costs, not limited to sums incurred in settlement of lawsuits. Texaco A/S (Den.) v Commercial Ins. Co., 160 F.3d 124, 1998 U.S. App. LEXIS 28240 (2d Cir. N.Y. 1998).

195. Subrogation among tortfeasors and insurers

Although insurance company that has indemnified its insured is entitled to subrogation against tortfeasor responsible for loss, insurer has no right of subrogation against its own insured. Judge Motor Corp. v Graham, 144 A.D.2d 998, 534 N.Y.S.2d 303, 1988 N.Y. App. Div. LEXIS 14538 (N.Y. App. Div. 4th Dep't 1988).

Rule that insurer has no right of subrogation against its own insured did not apply to declaratory judgment action by insur-

ance company to determine its rights and obligations under automobile insurance policy, even though insurance company postulated existence of right to be subrogated to rights of its insured against another who could be considered to be additional insured under policy, since case was declaratory judgment action, rather than subrogation action, and there was no possibility that action could result in monetary award against any insured party. Liberty Mut. Ins. Co. v Aetna Casualty & Surety Co., 168 A.D.2d 121, 571 N.Y.S.2d 735, 1991 N.Y. App. Div. LEXIS 8047 (N.Y. App. Div. 2d Dep't 1991).

In action under CLS Labor § 240 in which defendant city was found vicariously liable as owner for injuries sustained by worker in course of performing work for contractor on public works project, insurer which issued separate insurance policies to contractor—one of which protected city from claims arising out of activities of contractor and one which provided general liability coverage to contractor with respect to its own activities—was not subrogated to city's right to contractual indemnification against contractor, so as to enable it to shift some of loss to contractor's workers' compensation carrier by paying claim under contractual indemnification provision of contractor's general liability policy, since insurer may not be subrogated to claim against its own insured where claim arises out of incident for which insurer's policy covers that insured. Prince v City of New York, 189 A.D.2d 33, 594 N.Y.S.2d 235, 1993 N.Y. App. Div. LEXIS 2175 (N.Y. App. Div. 1st Dep't), aff'd sub. nom., North Star Reinsurance Corp. v Continental Ins. Co., 82 N.Y.2d 281, 604 N.Y.S.2d 510, 624 N.E.2d 647, 1993 N.Y. LEXIS 3898 (N.Y. 1993).

Plaintiff liability insurer, which on eve of trial of negligence action it was defending based on fall at insured's shopping center discovered that its policy contained exclusion for shopping center injuries, but which then settled action, acted as volunteer and was therefore precluded from seeking subrogation against defendant coinsurer, whose policy provided personal liability coverage for accident, since (1) even though plaintiff became legally obligated by having undertaken defense of action, its own mistakes and negligence gave rise to obligation to pay loss and such negligence could not create rights against third party, (2) plaintiff could not recover against defendant as equitable subrogee based solely on defendant's contractual liability because defendant was not negligent and did not cause insured's loss, and (3) there was no basis for finding of indemnity based on equitable estoppel because nothing that defendant did was relied on by plaintiff before it settled claim. National Union Fire Ins. Co. v Ranger Ins. Co., 190 A.D.2d 395, 599 N.Y.S.2d 347, 1993 N.Y. App. Div. LEXIS 5787 (N.Y. App. Div. 4th Dep't 1993).

Insurer was entitled to summary judgment in amount of $7,000 as against injured insureds where (1) it paid $8,750 to insureds in settlement of their uninsured motorist claim and obtained release and trust agreement providing that it would be subrogated to insureds' rights against remaining tortfeasors, and that it would be reimbursed for settlement it paid to insureds from any judgment or settlement they obtained against any tortfeasor involved in accident whether or not that tortfeasor was uninsured motorist, and (2) insureds settled with third-party tortfeasor for $7,000 without protecting insurer's right to subrogation. Nationwide Mut. Ins. Co. v Sinclair, 217 A.D.2d 686, 629 N.Y.S.2d 812, 1995 N.Y. App. Div. LEXIS 8205 (N.Y. App. Div. 2d Dep't 1995).

In personal injury action by lessee of van that overturned while being driven by person who was not authorized by rental agreement, lessee was not entitled to summary judgment on lessor's counterclaim alleging that it was entitled to indemnification because lessee breached rental agreement by allowing unauthorized person to drive van; even though lessee was insured by same liability insurer as lessor, there was no inherent risk that insurer would be able to pass incidence of loss from itself to its insured by recouping insurance proceeds from its insured, and thus anti-subrogation rule did not apply, where indemnification clause of rental agreement limited indemnification by lessee to damages in excess of limits of liability provided for in liability insurance purchased by lessor, and lessor's right to be indemnified by lessee did not accrue until coverage under policy was exhausted. Layaw v Maguire Ford-Lincoln-Mercury, 219 A.D.2d 73, 639 N.Y.S.2d 544, 1996 N.Y. App. Div. LEXIS 2788 (N.Y. App. Div. 3d Dep't 1996).

Court erred in dismissing subrogation action on ground that, in executing general release, plaintiff's insured failed to reserve plaintiff's subrogation rights against defendant since unambiguous reservation of insured's claim for underinsurance benefits from insurer encompassed reservation of insurer's right to subrogation. Hanover Ins. Co. v Finnerty, 225 A.D.2d 1054, 639 N.Y.S.2d 433, 1996 N.Y. App. Div. LEXIS 2887 (N.Y. App. Div. 4th Dep't 1996).

In subrogation action, court properly denied plaintiff's motion to amend complaint to assert cause of action for implied indemnification. Hanover Ins. Co. v Finnerty, 225 A.D.2d 1054, 639 N.Y.S.2d 433, 1996 N.Y. App. Div. LEXIS 2887 (N.Y. App. Div. 4th Dep't 1996).

Insurer could be subrogated to rights of property owner and general contractor—2 of its insureds—in its attempt to recoup from subcontractor claim that insurer had paid on behalf of property owner and general contractor, where insurer never undertook to insure subcontractor and did not do so. Fitch v Turner Constr. Co., 241 A.D.2d 166, 671 N.Y.S.2d 446, 1998 N.Y. App. Div. LEXIS 3385 (N.Y. App. Div. 1st Dep't 1998).

Subrogation action commenced by town's insurance carrier, seeking to recover moneys paid to town for loss allegedly resulting from defendant's misconduct when she was employed as court clerk, accrued when town discovered that funds were missing and was sufficiently convinced of defendant's responsibility that it demanded and received her resignation, not when state audit subsequently revealed discrepancies in town's financial records and fixed town's liability therefor, as formal determination of town's liability to state was not condition precedent to its right of action against defendant. Utica Mut. Ins. Co. v Avery, 261 A.D.2d 802, 690 N.Y.S.2d 760, 1999 N.Y. App. Div. LEXIS 5558 (N.Y. App. Div. 3d Dep't), app. denied, 93 N.Y.2d 818, 697 N.Y.S.2d 566, 719 N.E.2d 927, 1999 N.Y. LEXIS 2977 (N.Y. 1999).

Subrogation action to recover benefits paid under general liability insurance policy issued to negligent parties was properly dismissed, even though notice of cancellation issued by defendant insurer of negligent parties did not comply with CLS Ins § 3426(c) and thus was ineffective, where insureds never obtained endorsement providing coverage for subject construction project as required by terms of policy, and there was no basis for application of waiver or estoppel against defendant insurer. Home Ins. Co. v North Am. Specialty Ins. Co., 273 A.D.2d 443, 709 N.Y.S.2d 624, 2000 N.Y. App. Div. LEXIS 7423 (N.Y. App. Div. 2d Dep't), app. denied, 95 N.Y.2d 770, 722 N.Y.S.2d 473, 745 N.E.2d 393, 2000 N.Y. LEXIS 3874 (N.Y. 2000).

Landlord was entitled to summary judgment dismissing action by tenant's insurer for negligence and breach of contract where those claims were precluded by "waiver of subrogation" clause in insurance policy issued by insurer to tenant. Atl. Mut. Ins. Co. v Soiefer Bros. Realty Corp., 281 A.D.2d 441, 721 N.Y.S.2d 554, 2001 N.Y. App. Div. LEXIS 2322 (N.Y. App. Div. 2d Dep't 2001).

In action brought by contractor's employee against building owner for injuries sustained while working at owner's building, contractor's insurer could not seek subrogation against contractor where contractor carried general liability policy naming owner as additional insured, which provided that contractor would hold owner harmless against all claims asserted by employees; as such, contractor's broad duty to indemnify owner under construction contract was insured by insurer. Leyden v Square Arch Realty Corp., 164 Misc. 2d 769, 626 N.Y.S.2d 352, 1995 N.Y. Misc. LEXIS 176 (N.Y. Sup. Ct. 1995).

In subrogation action stemming from motor vehicle accident, defendant was not entitled to vacatur of default judgment entered against him on ground that he was improperly served with summons and complaint at his former address, as defendant was estopped from claiming improper service based on wrong address where he had failed to notify Department of Motor Vehicles in writing of his new address pursuant to CLS Veh & Tr § 505(5). USAA Cas. Ins. Co. v Singh, 171 Misc. 2d 960, 656 N.Y.S.2d 129, 1997 N.Y. Misc. LEXIS 103 (N.Y. Civ. Ct. 1997), rev'd, 184 Misc. 2d 296, 714 N.Y.S.2d 627, 2000 N.Y. Misc. LEXIS 181 (N.Y. App. Term 2000).

Insurer's subrogation action against defendants, seeking to recover additional personal injury protection benefits paid to its own insureds, was subject to 3-year statute of limitations applicable to underlying tort, and thus was time barred where it action was commenced nearly 6 years after date of accident. Nationwide Mut. Ins. Co. v Schwartz, 172 Misc. 2d 503, 660 N.Y.S.2d 623, 1997 N.Y. Misc. LEXIS 287 (N.Y. App. Term 1997).

CLS Ins §§ 5104(b) and 5105(a) did not bar insurer's equitable subrogation claim to recover remaining amount in excess of nonrecoverable $50,000 (meaning, first $50,000 of no-fault benefits paid to its insured); statutes only apply to "first party benefits" paid by insurer to insured under insurance policy. Allstate Ins. Co. v Mazzola, 175 F.3d 255, 1999 U.S. App. LEXIS 8187 (2d Cir. N.Y. 1999).

If defendant driver and vehicle owner effected settlement and release of liability from injured passenger without consent from passenger's insurer, and with actual or constructive knowledge that insurer had already paid benefits to passenger and thus obtained subrogation rights, release did not preclude insurer's right of subrogation against defendants. Allstate Ins. Co. v Mazzola, 175 F.3d 255, 1999 U.S. App. LEXIS 8187 (2d Cir. N.Y. 1999).

196. —Anti-subrogation rule

Antisubrogation rule promulgated in Pennsylvania Gen. Ins. Co. v Austin Powder Co., 68 NY2d 465, bars claim of indemnity by excess and primary carriers of insurance purchased by owner of leased van against lessee's carrier. Jefferson Ins. Co. v Travelers Indem. Co., 92 N.Y.2d 363, 681 N.Y.S.2d 208, 703 N.E.2d 1221, 1998 N.Y. LEXIS 3664 (N.Y. 1998).

Self-insured car rental companies are not immune from antisubrogation principles; thus, indemnification clause in rental agreement which sought to disclaim self-insured car rental company's duty to provide primary insurance to renters up to statutory minimum liability limits, and to assign risk to renters themselves, was unenforceable to that extent. ELRAC, Inc. v Ward, 96 N.Y.2d 58, 724 N.Y.S.2d 692, 748 N.E.2d 1, 2001 N.Y. LEXIS 695 (N.Y. 2001).

In action arising under state construction contract wherein insurer, as state's subrogee, sought indemnification from contractor in connection with work-related injury sustained by contractor's employee, it was error to grant summary judgment to contractor, which had purchased owner's and contractor's protective liability policy as well as general contractor's liability policy from insurer pursuant to its contract with state, where contractor failed to come forward with evidentiary proof either that both policies covered same risk, or that insurer was seeking indemnification for claim arising from risk for which it had insured contractor, and that antisubrogation rule therefore applied. State v U.W. Marx, Inc., 209 A.D.2d 784, 618 N.Y.S.2d 135, 1994 N.Y. App. Div. LEXIS 10863 (N.Y. App. Div. 3d Dep't 1994).

Plaintiff insurer was not entitled to declaratory judgment that defendant insurer was co-insurer of third party defendant in underlying personal injury action where (1) plaintiff was insurer of third party defendant at time of accident, and defendant was workers' compensation carrier for third party defendant at time of accident, and (2) insurer assumed defense of defendant and third party defendant in underlying action, and reached settlement which was approved by defendant; antisubrogation rule applied since double representation in underlying action created potential conflict of interest. National Union Fire Ins. Co. v State Ins. Fund, 213 A.D.2d 164, 623 N.Y.S.2d 558, 1995 N.Y. App. Div. LEXIS 2366 (N.Y. App. Div. 1st Dep't 1995).

"Antisubrogation rule" did not apply to preclude subcontractor's general liability carrier from recouping from State Insurance Fund, as subcontractor's employer's liability insurer, portion of monies expended to defend and settle general contractor's third-party action against subcontractor, as general contractor's insurance carrier, not general contractor, was real party in interest in prosecuting third-party action and, by causing third-party action to be commenced against subcontractor, general contractor's insurance carrier did not seek to recover from its own insured but rather from third-party stranger to its insurance policy. National Union Fire Ins. Co. v State Ins. Fund, 222 A.D.2d 369, 636 N.Y.S.2d 31, 1995 N.Y. App. Div. LEXIS 13761 (N.Y. App. Div. 1st Dep't 1995).

In action by plaintiffs who were injured while operating leased equipment, antisubrogation rule required dismissal of equipment lessor's third-party action alleging that accident was caused by lessee's negligent placement of equipment, where equipment lessee was covered as additional insured under lessor's comprehensive liability policy and, because of insurer's untimely disclaimer of coverage, both lessor and lessee were covered by same insurer for same risk despite their differing interests. Nuzzo v Griffin Tech., 222 A.D.2d 184, 643 N.Y.S.2d 802, 1996 N.Y. App. Div. LEXIS 6777 (N.Y. App. Div. 4th Dep't 1996), app. denied, 91 N.Y.2d 802, 666 N.Y.S.2d 564, 669 N.E.2d 534, 1997 N.Y. LEXIS 4164 (N.Y. 1997).

Workers' compensation/employers' liability insurance carrier was entitled to summary judgment declaring that general liability insurer had no right of reimbursement with respect to settlement which it paid to contractor's employee in his personal injury action against owner of premises where accident occurred, where owner was named as additional insured on contractor's general liability policy; fact that general liability insurer refused to defend or indemnify owner in underlying personal injury action and owner therefore retained its own counsel and commenced third-party action against contractor, who was found 100 percent liable for its employee's injuries, did not render anti-subrogation rule inapplicable. National Cas. Co. v State Ins. Fund, 227 A.D.2d 115, 641 N.Y.S.2d 665, 1996 N.Y. App. Div. LEXIS 4771 (N.Y. App. Div. 1st Dep't), app. denied, 88 N.Y.2d 813, 649 N.Y.S.2d 380, 672 N.E.2d 606, 1996 N.Y. LEXIS 3082 (N.Y. 1996).

In action under CLS Labor § 240(1) by contractor's employee who was injured in fall from elevated height while working at defendant's facility, defendant's third-party action against contractor was barred by antisubrogation rule where, in accordance with parties' contract, contractor had procured commercial general liability insurance policy wherein it was named insured and defendant was named as additional insured and, after commencement of action and defendant's third-party action, liability insurer agreed to provide legal representation to contractor and defendant. Cox v International Paper Co., 234 A.D.2d 757, 651 N.Y.S.2d 230, 1996 N.Y. App. Div. LEXIS 12466 (N.Y. App. Div. 3d Dep't 1996).

Antisubrogation rule was applicable and precluded insurer from seeking, through subrogation of vehicle owner's rights, indemnification from driver of vehicle for any payments over $100,000 where insurer, having paid over one million dollars plus interest on behalf of vehicle owner in order to satisfy portion of underlying judgment, simultaneously insured both owner (for $1,000,000) and driver's employer (for $100,000 under "step down" endorsement) for same risk. Liberty Mut. Ins. Co. v Aetna Cas. & Sur. Co., 235 A.D.2d 523, 652 N.Y.S.2d 764, 1997 N.Y. App. Div. LEXIS 674 (N.Y. App. Div. 2d Dep't), app. denied, 89 N.Y.2d 817, 659 N.Y.S.2d 857, 681 N.E.2d 1304, 1997 N.Y. LEXIS 1330 (N.Y. 1997).

Underlying defendant's third-party action against insured was not barred by antisubrogation rule where underlying action arose from personal injury to insured's employee, insured's general liability policy excluded coverage for claims arising from personal injury to employee of insured, that exclusion rendered policy inapplicable to loss, and thus antisubrogation rule did not apply. Franklin v Stillwater Hydro Partners, L.P., 255 A.D.2d 998, 679 N.Y.S.2d 494, 1998 N.Y. App. Div. LEXIS 12291 (N.Y. App. Div. 4th Dep't 1998).

Antisubrogation rule required summary judgment dismissing third-party action for indemnification where both third-party plaintiff and third-party defendant were named insureds under 2 insurance policies issued by single insurer covering same risk, and thus such double representation created potential conflict of interest to extent that any judgment entered in favor of plaintiffs in main action was covered by limits of subject policies. Glick v Millman Goldberg Pressler Assocs., 263 A.D.2d 497, 692 N.Y.S.2d 745, 1999 N.Y. App. Div. LEXIS 8126 (N.Y. App. Div. 2d Dep't 1999).

Antisubrogation rule did not bar action by subrogor-builder's risk insurer seeking to hold defendants liable for damages alleged

to have been negligently caused by burst water pipe where (1) policy did not name defendants as insureds, (2) "Additional Property Extension Endorsement" covered loss of "all materials, supplies, equipment and machinery intended for use in and to become a permanent part of construction work," (3) antisubrogation bar operated only to extent of defendants' insurable interest, which was limited to repairs necessitated by burst pipe, and (4) plain language of subrogation waiver endorsement precluded reading that it was self-executing, because it clearly contemplated that such waiver was executory and could only occur at instance of insured. St. Paul Fire & Marine Ins. Co. v L.E.S. Subsurface Plumbing Co., 266 A.D.2d 139, 699 N.Y.S.2d 31, 1999 N.Y. App. Div. LEXIS 12324 (N.Y. App. Div. 1st Dep't 1999).

Car rental company was entitled to summary judgment declaring that it was entitled to indemnification by defendant in underlying personal injury action arising from car accident where indemnification clause in rental agreement was valid, company was not primary insurer of car renter, and thus antisubrogation rule did not apply; however, company was not entitled to indemnification by insurer where there was no contractual relationship between them. ELRAC, Inc. v American Home Assur. Co., 273 A.D.2d 344, 710 N.Y.S.2d 91, 2000 N.Y. App. Div. LEXIS 7030 (N.Y. App. Div. 2d Dep't 2000), modified, 96 N.Y.2d 58, 724 N.Y.S.2d 692, 748 N.E.2d 1, 2001 N.Y. LEXIS 695 (N.Y. 2001).

Antisubrogation rule barred electrical contractor's third-party action against hotel owner for indemnification regarding its liability, if any, under CLS Labor § 200 or common law to electrician injured while working at hotel, to extent that any verdict for electrician did not exceed limits of liability insurance policy bought by contractor in which owner was named as additional insured, where same insurer covered owner and contractor for same risk—bodily injury caused by contractor's work—and thus there was potential conflict of interest. Yong Ju Kim v Herbert Constr. Co., 275 A.D.2d 709, 713 N.Y.S.2d 190, 2000 N.Y. App. Div. LEXIS 9154 (N.Y. App. Div. 2d Dep't 2000).

In subrogation action by insurer which afforded premises owner coverage for bodily injury claims as well as affording construction contractor commercial general liability coverage, construction contractor failed to establish its entitlement to summary judgment on ground that antisubrogation rule barred common-law indemnification cause of action seeking to recoup amount paid by insurer to satisfy judgment obtained against premises owner in excess of applicable policy limits, where contract between premises owner and contractor was not included with parties' motion papers and thus it could not be determined whether such contract contained standard clause requiring contractor to indemnify premises owner such that "insured contract" would apply. Travelers Ins. Co. v Nory Constr. Co., 184 Misc. 2d 366, 708 N.Y.S.2d 252, 2000 N.Y. Misc. LEXIS 137 (N.Y. Sup. Ct. 2000), app. dismissed, 281 A.D.2d 955, 722 N.Y.S.2d 209, 2001 N.Y. App. Div. LEXIS 2693 (N.Y. App. Div. 4th Dep't 2001), aff'd, 281 A.D.2d 956, 722 N.Y.S.2d 209, 2001 N.Y. App. Div. LEXIS 2692 (N.Y. App. Div. 4th Dep't 2001).

Order granting car lessors a conditional indemnification (as agreed by lessee in rental agreement: an amount over and above the lessors' policy limits) against lessee (who was driving in course of employer's employment) and his employer for plaintiffs' car accident personal injuries was affirmed; under the circumstances, the anti-subrogation rule precluded the lessors from obtaining indemnification from the employee and employer only to the extent of the $50,000 coverage mandated by statute and actually provided by the lessors to the employee pursuant to the rental agreement; however, anti-subrogation principles did not bar the lessor from seeking indemnification for amounts exceeding $50,000. Dunn v Hurtt, 4 A.D.3d 884, 771 N.Y.S.2d 467, 2004 N.Y. App. Div. LEXIS 1409 (N.Y. App. Div. 4th Dep't), app. denied, 3 N.Y.3d 601, 782 N.Y.S.2d 404, 816 N.E.2d 194, 2004 N.Y. LEXIS 1559 (N.Y. 2004).

197. Effect of receipt of Workers' Compensation award

Amount payable under arbitration award should have been reduced by amount of workmen's compensation award received by insured person, and fact that workmen's compensation would not be deducted from amount payable to "qualified person" claiming under former § 610 [now § 5210] of Insurance Law does not invalidate specific terms of the submission to arbitration under valid policy endorsement. Durant v Motor Vehicle Acci. Indemnification Corp., 15 N.Y.2d 408, 260 N.Y.S.2d 1, 207 N.E.2d 600, 1965 N.Y. LEXIS 1406 (N.Y.), reh'g denied, 16 N.Y.2d 716, 1965 N.Y. LEXIS 2307 (N.Y. 1965).

An insured under an automobile liability policy is entitled to receive payment of the amount of his medical expenses, under the medical expense provisions of the policy, despite the fact that such medical expenses were paid pursuant to his employer's coverage under the Workmen's Compensation Law, to the persons rendering the medical services. Rubin v Empire Mut. Ins. Co., 25 N.Y.2d 426, 306 N.Y.S.2d 914, 255 N.E.2d 154, 1969 N.Y. LEXIS 946 (N.Y. 1969).

Fact that workers' compensation insurance carrier was not entitled to offset under CLS Work Comp § 29(4), from future compensation payments to employee who was disabled in work-related auto accident, amount that employee recovered in uninsured motorist benefits under her own auto policy, did not give injured employee double recovery for same elements of loss because uninsured motorist coverage compensates for non-economic loss and economic loss in excess of basic economic loss, while workers' compensation benefits are limited to reimbursement for basic economic loss. Shutter v Philips Display Components Co., 90 N.Y.2d 703, 665 N.Y.S.2d 379, 688 N.E.2d 235, 1997 N.Y. LEXIS 3684 (N.Y. 1997).

Former § 109 [precedessor to former § 167, now § 3420] does not permit the subrogee of an injured person to maintain an action for moneys paid as compensation awards pursuant to provisions of Workmen's Compensation Law. Royal Indem. Co. v Travelers' Ins. Co., 244 A.D. 582, 280 N.Y.S. 485, 1935 N.Y. App. Div. LEXIS 5877 (N.Y. App. Div. 1935), aff'd, 270 N.Y. 574, 1 N.E.2d 337, 270 N.Y. (N.Y.S.) 574, 1936 N.Y. LEXIS 1635 (N.Y. 1936).

Workers' compensation insurance carrier was entitled to offset proceeds of claimant's uninsured motorist claim against future compensation; lien and offset provisions of CLS Work Comp § 29 are not by their terms specifically limited to actions against third-party tortfeasors. Shutter v Philips Display Components Co., 235 A.D.2d 904, 652 N.Y.S.2d 427, 1997 N.Y. App. Div. LEXIS 561 (N.Y. App. Div. 3d Dep't), rev'd, 90 N.Y.2d 703, 665 N.Y.S.2d 379, 688 N.E.2d 235, 1997 N.Y. LEXIS 3684 (N.Y. 1997).

The complaint, in an action by an employer of an injured person for indemnification for payment by the employer to state of contributions required by Workmen's Compensation Law, § 15, subds. 8 and 9, must be dismissed, for former § 109 [precedessor to former § 167, now § 3420] does not require that a policy of insurance must indemnify any other than the injured person or his representative against loss in event of insured's insolvency. Knickerbocker Ice Co. v New York Indem. Co., 251 N.Y.S. 526, 140 Misc. 654, 1931 N.Y. Misc. LEXIS 1447 (N.Y. App. Term 1931).

Notes to Unpublished Decisions

Analysis

I. Requirement that Notice be Timely

1. Timeliness of notice by insured, particular cases
2. —Particular periods of delay; less than one year

II. Requirements for Disclaimer of Liability by Insurer

3. Declaratory actions regarding coverage or liability
4. Particular circumstances leading to estoppel to disclaim liability
5. —Prejudicial delay in communicating disclaimer

I. Requirement that Notice be Timely

1. Timeliness of notice by insured, particular cases

2. —Particular periods of delay; less than one year

Unpublished decision: Insurer was not obligated to defend or indemnify insureds in a state court suit for damage to a building adjacent to the insureds' property because the insureds did not timely notify the insurer about the potential claim; under former N.Y. Ins. Law § 3240(a)(4) (2002), the insurer could require

notice to be provided as soon as reasonably possible, and no showing of prejudice was required. The insureds did not give notice until four months after damage to the building was shown to the insureds' construction manager, which was unreasonable under the circumstances. United Nat'l Ins. Co. v 515 Ocean Ave., LLC, 477 Fed. Appx. 840, 2012 U.S. App. LEXIS 8802 (2d Cir. N.Y. 2012).

II. Requirements for Disclaimer of Liability by Insurer

3. Declaratory actions regarding coverage or liability

Unpublished decision: Disclaimer of coverage made nearly two months after a state court jury's verdict was untimely under N.Y. Ins. Law § 3420(d)(2). The timeliness requirement applied to defendant insurer because plaintiff state insurance fund was its insured's subrogee, and thus, plaintiff had a real stake in the outcome and an interest in not being prejudiced by a belated denial of coverage. N.Y. State Ins. Fund v Mount Vernon Fire Ins. Co., 371 Fed. Appx. 207, 2010 U.S. App. LEXIS 8095 (2d Cir. N.Y. 2010).

4. Particular circumstances leading to estoppel to disclaim liability

5. —Prejudicial delay in communicating disclaimer

Unpublished decision: District court did not err in its conclusion that its disclaimer of coverage was untimely; defendant did not issue a disclaimer prior to providing a defense, during discovery, or even during the trial in the underlying case, but instead waited until over two years after it was notified about the case. N.Y. State Ins. Fund v Mount Vernon Fire Ins. Co., 2010 U.S. App. LEXIS 6733 (2d Cir. N.Y. Apr. 1, 2010).

Agency Opinions

Analysis

I. General Considerations

1. Regulatory power of superintendent

I. General Considerations

1. Regulatory power of superintendent

The Insurance Law, while it does not give the superintendent specific authority to approve or disapprove particular indorsements, does impose upon him the duty to prevent violations of the law, and further duties when companies refuse to comply with the statutes. 1918 NY Ops Atty Gen Jan 22.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 5202, 5206, 5303, 6610, 7603; CLS Work Comp §§ 54, 108.

Transfer of judgment for sum of money, CLS Gen Oblig § 13-103.

Negligence in use or operation of vessel attributable to owner, CLS Nav § 48.

Negligence in use or operation of vehicle attributable to owner, CLS Veh & Tr § 388.

The insurance contract, CLS Work Comp § 54.

Codes, Rules and Regulations:

Payments to insured. 11 NYCRR § 60-1.4.

Insurance department: minimum provisions for automobile liability insurance. 11 NYCRR § 60-1.6 (Regulation 35-A).

Minimum provisions for automobile liability insurance policies. 11 NYCRR §§ 60-1.1 et seq.

Liability insurance covering snowmobiles. 11 NYCRR §§ 64-1.0, 64-1.1.

Jurisprudences:

43 Am Jur 2d, Insurance § 703.

3 Am Jur Pl & Pr Forms (Rev ed), Automobile Insurance, Forms 19 et seq.

14B Am Jur Pl & Pr Forms (Rev ed), Insurance, Forms 1161–1234, 1672 et seq.

Law Reviews:

Ausubel, The impact of New York's judicially created loss apportionment amongst tortfeasors—Dole v Dow Chemical Co. 38 Alb. L. Rev. 155.

Wilner & Farrell, Dole v Dow Chemical Co.:The kaleidoscopic impact of a leading case. 42 Brook. L. Rev. 457.

A common law alternative to the doctrine of reasonable expectations in the construction of insurance contracts. 57 NYU L Rev 1175.

Appleman on Insurance:

6B Appleman, Insurance Law and Practice, Construction of Liability and Indemnity Policies §§ 4254, 4255.

7A Appleman, Insurance Law and Practice, Pubic and Private Coverages § 4491.

Matthew Bender's New York Practice Guides: LexisNexis AnswerGuide New York Negligence § 2.08[2][a] Identifying No-Fault Issues in Motor Vehicle Cases.

LexisNexis AnswerGuide New York Negligence § 2.10[1][d] Identifying Appropriate Plaintiffs in Motor Vehicle Cases.

LexisNexis AnswerGuide New York Negligence § 2.36[2] Presenting Evidence.

LexisNexis AnswerGuide New York Negligence § 7.32 Examining Plaintiff's Disclosure Demands.

LexisNexis AnswerGuide New York Negligence § 2.08 Identifying No-Fault Issues in Motor Vehicle Cases.

LexisNexis AnswerGuide New York Negligence § 7.32 Examining Plaintiff's Disclosure Demands.

LexisNexis AnswerGuide New York Negligence § 2.10 Identifying Appropriate Plaintiffs in Motor Vehicle Cases.

LexisNexis AnswerGuide New York Negligence § 2.37 Enforcing Final Judgments.

Texts: NY Pattern Jury Instructions 3d, PJI 4:65, 4:66.

NY Pattern Jury Instructions 3d, PJI 4:77, 4:79.

1 New York Appellate Practice (Matthew Bender) § 6.03.

New York Insurance Law (Matthew Bender's New York Practice Series) §§ 1.05[1][b], [2][a], 13.07[9], 17.02[2][e], 19.01[5], 30.01[4][g], 30.04[7], 36.05[4][c], [6][c], 38.02[3][b], 39.04[3], 39.05[3], 42.03[4], 46.03[5][b], 46.04[5], 47.09[2][a], 49.05, 49.10[1], 51.01[1], [2], [3][a]—[g], 51.02[1][c][ii], 51.03[2], [4]—[6], [8][a], [10], 51.04[1][a], [c], [d], 51.05[1], [3], 51.06[1], [2], 51.09[4], [5][b], 51.08[1][a], [b], [3][c], 51.09[2], 51.11[3].

Warren's Negligence in the New York Courts § 228.08 Liability for injuries to passengers.

Weinstein, Korn, Miller, CPLR Manual (Matthew Bender) § 10.02[b].

§ 3425. Certain property/casualty insurance policies; cancellation and renewal provisions; agents' contracts and brokers' accounts

* * * * *

(c) After a covered policy has been in effect for sixty days, or upon the effective date if the policy is a renewal, no notice of cancellation shall be issued to become effective unless required pursuant to a program approved by the superintendent as necessary because a continuation of the present premium volume would be hazardous to the interests of policyholders of the insurer, its creditors or the public, or unless it is based on one or more of the following:

(1) With respect to automobile insurance policies:

(A) nonpayment of premium, provided, however, that a notice of cancellation on this ground shall inform the insured of the amount due;

(B) suspension or revocation during the required policy period of the driver's license of the named insured or any other person who customarily operates an automobile insured under the policy, other than a suspension issued pursuant to subdivision one of section five hundred ten-b of the vehicle and traffic law or one or more administrative suspensions arising from the same incident which has or

have been terminated prior to the effective date of cancellation; or

(C) discovery of fraud or material mis-representation in obtaining the policy or in the presentation of a claim thereunder.

(2) With respect to personal lines insurance policies:

(A) nonpayment of premium, provided, however, that a notice of cancellation on this ground shall inform the insured of the amount due;

(B) conviction of a crime arising out of acts increasing the hazard insured against;

(C) discovery of fraud or material misrepresentation in obtaining the policy or in the presentation of a claim thereunder;

(D) discovery of willful or reckless acts or omissions increasing the hazard insured against;

(E) physical changes in the property insured occurring after issuance or last annual anniversary date of the policy which result in the property becoming uninsurable in accordance with the insurer's objective, uniformly applied underwriting standards in effect at the time the policy was issued or last voluntarily renewed; or

(F) a determination by the superintendent that the continuation of the policy would violate or would place the insurer in violation of this chapter.

(3) The provisions of this subsection shall apply to each and every coverage or limit afforded under the policy.

* * * * *

(h) (1) Proof of mailing of a notice of cancellation, reduction of limits, substitution of policy form, elimination of coverages, conditioned renewal or of intention not to renew, or proof of the mailing of the reasons therefor, to the named insured at the address shown in the policy, shall be sufficient proof of the giving of notice and the giving of reasons required by this section.

(2) No notice of cancellation, reduction of limits, substitution of policy form, elimination of coverages, conditioned renewal or of intention not to renew, or notice of the reasons therefor, that fails to include a provision required by this section shall be an effective notice for purposes of this section.

(3) A copy of every notice of cancellation, reduction of limits, substitution of policy form, elimination of coverages, conditioned renewal or of intention not to renew, including the reasons therefor, or a summary of such notice, shall be mailed, delivered or transmitted to the insured's authorized agent or broker within seven days of the time such notice is mailed to the named insured. Electronic transmission or any other means of delivery or transmission of information commonly used by the insurer to communicate with agents or brokers shall be deemed sufficient for compliance with this paragraph. Failure to mail, deliver or transmit a copy of such notice to the insured's authorized agent or broker pursuant to this paragraph shall not render any such notice ineffective, provided that all of the other requirements of this section are met and shall not be considered failure to include a provision required by this section for purposes of paragraph two of this subsection.

* * * * *

(*l*) * * * * *

(2) The superintendent shall collect, analyze and compile such reports with regard to the number of new insureds, non-renewed insureds and business written by each insurer in each rating territory of each such insurer and, in each case, the class of insureds (including age and sex) affected so that a statistical analysis of the results obtained pursuant to subsections (f) and (m) of this section, and the reasons in the aggregate for the non-renewal of policies shall be provided to the speaker of the assembly, the temporary president of the senate, the chair of the assembly insurance committee, and the chair of the senate insurance committee on or before June thirtieth, two thousand twenty and every two years thereafter.

(m)

(1) Paragraphs eight and nine of subsection (a), subsection (f) and subparagraphs (B) and (E) of paragraph one of subsection (j) of this section shall not apply to any new covered policy of automobile insurance voluntarily written on or after August first, nineteen hundred eighty-five and prior to January first, nineteen hundred eighty-six, and on or after August second, two thousand one and prior to the effective date of the property/casualty insurance availability act, and on or after June thirtieth, two thousand twenty-three, but the legal rights granted to insurers or policyholders under such provisions shall not be extinguished or impaired thereby.

(2) In lieu of such provisions, paragraph seven of subsection (a), subparagraph (A) of paragraph one of subsection (j) of this section and paragraph three of this subsection shall apply to such automobile insurance policies that are newly and voluntarily written to have an effective date on or after August first, nineteen hundred eighty-five and prior to January first, nineteen hundred eighty-six, and on or after August second, two thousand one and prior to the effective date of the property/casualty insurance availability act, and on or after June thirtieth, two thousand twenty-three.

(3) On and after August first, nineteen hundred eighty-five and prior to January first, nineteen hundred eighty-six, and on or after August second, two thousand one and prior to the effective date of the property/casualty insurance availability act, and on or after June thirtieth, two thousand twenty-three, no notice of nonrenewal or conditional renewal of such covered automobile insurance policies referred to in this subsection shall be issued to become effective during the required policy period unless it is based upon a ground for which the policy could have been cancelled or unless it is based upon one or more of the following grounds that occurred during

the thirty-six month period ending on the last day of the fourth month preceding the month of the effective date of such notice of nonrenewal or conditional renewal:

* * * * *

(B) Where a named insured or any other person who operates a motor vehicle insured under the policy is individually or are aggregately involved in three or more vehicle accidents while operating a motor vehicle insured under the policy, resulting in either personal injury, or in property damage in excess of two hundred dollars. For the purpose of this paragraph any of the following occurrences involving a motor vehicle operated by a named insured or such other person shall not be considered an accident:

(i) such motor vehicle was struck in rear; or

(ii) such motor vehicle was struck while legally parked; or

(iii) only the operator of another motor vehicle involved in the accident was convicted of a crime, offense or violation contributing to the accident; or

(iv) the named insured or other operator of the motor vehicle insured under the policy, or the insurer thereof, was reimbursed by or on behalf of a person responsible for the accident or has a judgment against such person.

Where more than one motor vehicle in a household is insured by the same insurer, the number of accidents which would permit conditional renewal or non-renewal shall, as for the aggregate, be increased by two for each additional motor vehicle insured. For the purposes of this paragraph accidents occurring as a result of the use or operation of a motor vehicle in response to an emergency, where the operator was responding to a call of duty as a paid or volunteer member of any police or fire department, first aid squad, or of any law enforcement agency; or was performing any other governmental function in a public emergency, shall not be accidents which afford an insurer the right to cancel or to refuse to renew.

* * * * *

(s) With respect to automobile insurance, no insurer shall refuse to issue or renew a covered individually-owned private passenger policy solely on the ground that the motor vehicle to be insured under such policy shall be used for volunteer firefighting.

HISTORY:

Add, L 1984, ch 367, § 1, eff Sept 1, 1984; amd, L 1984, ch 805, § 150, eff Sept 1, 1984; L 1985, ch 917, §§ 1, 2, eff Dec 20, 1985; L 1987, ch 314, §§ 1, 2; L 1989, ch 235, §§ 8, 9, eff July 1, 1989; L 1991, ch 207, §§ 7, 8; L 1992, ch 563, § 1, eff Jan 1, 1993; L 1992, ch 647, §§ 1, 4, 6, 7; L 1994, ch 683, § 1, eff Aug 2, 1994; L 1995, ch 563, § 1, eff Aug 8, 1995; L 1996, ch 42, § 2, eff June 1, 1996; L 1996, ch 42, § 3, eff April 2, 1996; L 1996, ch 309, §§ 464, 465; L 1997, ch 66, § 1, eff May 20, 1997, deemed eff April 30, 1997; L 1998, ch 65, § 6, eff April 1, 1999; L 1998, ch 136, §§ 4, 5, 7, eff June 30, 1998; L 2001, ch 105, § 4 (Part I), eff July 24, 2001; L 2003, ch 85, §§ 6, 7, eff June 26, 2003; L 2003, ch 675, § 1, eff Feb 12, 2004; L 2006, ch 115, §§ 2, 3, eff June 30, 2006; L 2006, ch 162, § 1, eff Nov 23, 2006; L 2007, ch 268, §§ 2, 3, eff July 18, 2007; L 2008, ch 136, §§ 5–8, eff June 30, 2008; L 2011, ch 102, §§ 3, 4, eff June 28, 2011; L 2011, ch 408, § 1, eff Sept 16, 2011; L 2014, ch 78, § 2 (Part B), effective June 30, 2014ch 78, § 3 (Part B), effective June 30, 2014; L 2017, ch 59, § 10 (Part AAA), effective June 30, 2017; L 2017, ch 69, § 4, effective June 29, 2017; L 2017, ch 395, § 1, effective October 23, 2017; L 2020, ch 58, § 4 (Part XXX, Subpart B, Item JJ), effective April 3, 2020.

Editor's Notes: This section formerly appeared, in part, as Ins §§ 167-a, 167-aa as added by L 1974, ch 1072; L 1979, ch 690; amd, L 1976, ch 348; L 1977, ch 214; L 1978, chs 24, 426, 429, 564; L 1979, ch 690; L 1980, chs 217, 247; L 1981, ch 691; L 1983, ch 378.

Laws 1989, ch 235, § 13, eff July 1, 1989, provides as follows:

§ 13. This act shall take effect July 1, 1989, and shall apply to acts occurring on or after the effective date, and shall not abrogate or otherwise affect any rights, claims or causes of action that may have accrued before such date and provided further, that the amendment to section 2320 of the insurance law, as amended by section four of this act, shall not affect the expiration of certain provisions contained in section 2342 of the insurance law, as amended.

Laws 1996, ch 42, § 13(b) and (d), eff April 2, 1996, provides as follows:

§ 13. This act shall take effect immediately; provided, however, that:

(b) any rules or regulations necessary for the timely implementation of sections one and two of this act on their effective date shall be promulgated on or before such date;

(d) [Deleted]

Laws 1998, ch 65, § 18 sub a, eff May 21, 1998, provides as follows:

§ 18. This act shall take effect immediately and shall be deemed to have been in full force and effect on and after April 1, 1998, except that:

a. sections two through sixteen of this act shall take effect April 1, 1999 and the superintendent of insurance shall promulgate such rules and regulations as are necessary to implement the provisions of such sections on or before such date; and (Amd, L 2003, ch 28, § 2, eff April 8, 2003, deemed eff April 1, 2003.)

Laws 2003, ch 28, § 2, eff April 8, 2003, deemed eff April 1, 2003, amended Laws 1998, ch 65, § 18 subs d and e, so as to delete an application dates and expiration provision of April 1, 2003, applicable to amendment of subdivision (a), paragraph (5).

Laws 2003, ch 85, §§ 1 and 11, eff June 26, 2003, provide as follows:

Section 1. Short title. This act shall be known and may be cited as the "property/casualty insurance availability act".

§ 11. This act shall take effect immediately, provided that sections five through ten of this act shall apply to insurance contracts issued or renewed on or after such effective date, and shall apply at the next required policy period, commencing on or after such date, to any insurance contract written prior to the effective date of this act.

Laws 2004, ch 121, § 4, eff June 28, 2004, deemed eff on and after April 30, 2004, provides as follows:

§ 4. This act shall take effect immediately and shall be deemed to have been in full force and effect on and after April 30, 2004 provided, however, that notwithstanding the provisions of article 5 of the general construction law, the provisions of sections 5411, 5412, 2351 and 3425 of the insurance law, as amended by this act, are hereby revived and shall continue in full force and effect as they existed on April 30, 2004.

Laws 2006, ch 162, § 3, eff Nov 23, 2006, provides as follows:

§ 3. This act shall take effect on the one hundred twentieth day after it shall have become a law; provided that the superintendent of insurance is authorized to promulgate any and all rules and regulations and take any other measures necessary to implement this act on its effective date on or before such date; provided, further that the amendments to

section 5403 of the insurance law made by section two of this act shall not affect the expiration of such section and shall be deemed to expire therewith.

Laws 2008, ch 136, § 3, eff June 30, 2008, deleted Laws 1996, ch 42, § 13, sub (d) (amd, L 2003, ch 85, § 4, eff June 6, 2003, L 2004, ch 121, § 3, eff June 28, 2004, deemed eff on and after April 30, 2004, L 2005, ch 156, § 3, eff June 30, 2005, L 2006, ch 115, § 9, eff June 30, 2006, L 2007, ch 86, § 3, eff June 29, 2007), so as to delete an expiration date applicable to amendment of subsections (n) and (o).

Laws 2017, ch 59, §§ 1, 26 (Part AAA), eff June 29, 2017, provide:

Section 1. Legislative intent. The purpose of this act is to ensure the safety, reliability, and cost-effectiveness of transportation network company (TNC) services within the state of New York and to preserve and enhance access to these important transportation options for residents and visitors to the state.

§ 26. This act shall take effect on the eightieth day after it shall have become a law; provided that the amendments to subdivision 1 of section 171-a of the tax law made by section fifteen of this act shall not affect the expiration of such subdivision and shall expire therewith, when upon such date the provisions of section sixteen of this act shall take effect; provided however that coverage provided pursuant to paragraph (b) of subdivision 1 of section 160-cc of the executive law as added by section eleven of this act shall be deemed repealed one year from the effective date of this act; provided, further, that any TNC driver permitted to operate prior to the repeal of such paragraph shall not see a reduction in coverage (Amd, L 2017, ch 34, § 1, eff June 5, 2017).

Amendment Notes: The 2014 amendment by ch 78, (Part B) §§ 2, 3 added "two thousand seventeen" at the end of (l)(2); substituted "June thirtieth, two thousand seventeen" for "June thirtieth, two thousand fourteen" in (m)(1); in (m)(2), substituted "insurance policies that" for "insurance policies which" and "June thirtieth, two thousand seventeen" for "June thirtieth, two thousand fourteen"; in the opening paragraph of (m)(3), substituted "June thirtieth, two thousand seventeen" for "June thirtieth, two thousand fourteen" and "following grounds that" for "following grounds which"; and made a related change.

2011. Chapter 102, § 3 amended:

Sub (l), par (2) by deleting at fig 1 "and" and adding the matter in italics.

2011. Chapter 102, § 4 amended:

Sub (m), par (1) by deleting at fig 1 "eleven" and adding the matter in italics.

Sub (m), par (2) by deleting at fig 1 "eleven" and adding the matter in italics.

Sub (m), par (3), opening par by deleting at fig 1 "eleven" and adding the matter in italics.

2011. Chapter 408, § 1 amended:

By adding sub (s).

2008. Chapter 136, § 6 amended:

Sub (f), par (1) by adding the matter in italics.

2008. Chapter 136, § 8 amended:

By adding sub (r).

2006. Chapter 162, § 1 amended:

Sub (e) by adding the matter in italics.

2003. Chapter 675, § 1 amended:

Sub (c), par (1), subpar (A) by adding the matter in italics.

Sub (c), par (2), subpar (A) by adding the matter in italics.

By redesignating entire sub (h) as sub (h), par (1).

By adding sub (h), par (2).

By adding sub (h), par (3).

1996. Chapter 42, § 2 amended:

By redesignating entire sub (o) as sub (o), par (1) and adding the matter in italics.

By adding sub (o), par (2).

1996. Chapter 42, § 3 amended:

Sub (n) [second setout], par (3) by adding the matter in italics.

Sub (n) [second setout], par (4) by adding the matter in italics.

By adding sub (n) [second setout], par (5).

The 2017 amendment by ch 59, § 10, (Part AAA), added "provided, however, that the use or operation of the motor vehicle by a transportation network driver as a TNC vehicle in accordance with article forty-four-B of the vehicle and traffic law shall not be included in determining whether the motor vehicle is being used predominantly for non-business purposes" at the end of (a)(1).

The 2017 amendment by ch 69, § 4, substituted "June thirtieth, two thousand twenty" for "June thirtieth, two thousand seventeen" in (m)(1), (m)(2), and in the opening language of (m)(3); and added "of this section" in (m)(2).

The 2017 amendment by ch 395, § 1, substituted "and the reasons in the aggregate for the non-renewal of policies shall be provided to the speaker of the assembly, the temporary president of the senate, the chair of the assembly insurance committee, and the chair of the senate insurance committee on or before June thirtieth, two thousand twenty and every two years thereafter" for "shall be provided to each house of the legislature by March fifteenth, in the years nineteen hundred ninety-two, nineteen hundred ninety-six, nineteen hundred ninety-eight, two thousand one, two thousand six, two thousand seven, two thousand eight, two thousand eleven, two thousand fourteen, and two thousand seventeen" in (l)(2).

The 2020 amendment by ch 58, § 4 (Part XXX, Subpart B, Item JJ), substituted "two thousand twenty-three" for "two thousand twenty" in (m)(1), (m)(2), and in the introductory paragraph of (m)(3).

Notes to Decisions

Analysis

1. In general; constitutional questions
2. Required time periods for notices
3. Sufficiency of particular nonrenewal or cancellation notices
4. —Notice to loss payee
5. —Notice to commissioner of motor vehicles
6. Notification requirements for policy with more than one named insured
7. Proof of mailing of notices
8. Effect of insurer's acceptance of late premiums
9. Miscellaneous

1. In general; constitutional questions

In construing phrase "the date as of which a covered policy is first issued," Court of Appeals held that "as of" refers to date mutually agreed upon by parties having some contractual significance, rather than merely referencing date of event, such as execution or delivery of policy; to simply apply common definition of term "issue," and hold that CLS Ins § 3425(a)(7) refers to policy's execution or delivery date, would effectively excise phrase "as of" from statute in derogation of canons of statutory construction, and would reduce certainty in policy coverage periods. Rosner v Metro. Prop. & Liab. Ins. Co., 96 N.Y.2d 475, 729 N.Y.S.2d 658, 754 N.E.2d 760, 2001 N.Y. LEXIS 1988 (N.Y. 2001).

In absence of nonrenewal, notice of cancellation for nonpayment of premium is required to terminate coverage for renewal term of policy protected by CLS Ins Law § 3425; public policy requires that burden of terminating coverage be placed affirmatively on insurer, rather than on insured, and it is not likely that legislature, while prescribing guaranteed continuity of coverage through mandatory renewals, and permitting cancellation only upon exclusive and enumerated grounds, would, at same time, permit insurers to avoid strictures of § 3425 by simple expedient of billing renewal premium and thereafter permitting coverage to terminate without notice of cancellation or grace period. Victor v Turner, 113 A.D.2d 490, 496 N.Y.S.2d 761, 1985 N.Y. App. Div. LEXIS 52946 (N.Y. App. Div. 2d Dep't 1985).

Whether farm owner insurance policy is "cover policy" within meaning of Insurance Law former § 167-a(1)(a) [now Insurance Law § 3425(a)(2), (3)] is factual question, and thus it was error to refuse admission of evidence concerning premium breakdown of

policy, since policy on farm may include both residential and nonresidential contingencies, and fact that plaintiffs had not yet commenced actual income-generating farm activities does not change result. Pezzino v Chenango Cooperative Ins. Co., 116 A.D.2d 81, 500 N.Y.S.2d 193, 1986 N.Y. App. Div. LEXIS 50236 (N.Y. App. Div. 3d Dep't 1986).

Cancellation of a homeowner's property insurance policy was effective because, contrary to the homeowner's claim, N.Y. Ins. Law § 3425(c)(1)(A) was applicable to auto policies, and in any event, the record showed that the notice stated that a payment of $87 was necessary to keep the policy in effect. Kaufmann v Leatherstocking Coop. Ins. Co., 52 A.D.3d 1010, 861 N.Y.S.2d 423, 2008 N.Y. App. Div. LEXIS 5296 (N.Y. App. Div. 3d Dep't 2008).

It is settled law that the statutory method of terminating coverage on notice is the sole and exclusive method by which automobile insurance coverage for which a certificate of insurance has been filed with the Commissioner of Motor Vehicles, can be canceled; cancellation notices must contain all information required by statute and failure to include the mandated information renders such notice fatally defective. Nationwide Mut. Ins. Co. v Liberty Mut. Ins. Co., 92 Misc. 2d 273, 401 N.Y.S.2d 675, 1976 N.Y. Misc. LEXIS 2882 (N.Y. Sup. Ct. 1976), aff'd, 43 N.Y.2d 810, 402 N.Y.S.2d 395, 373 N.E.2d 290, 1977 N.Y. LEXIS 2586 (N.Y. 1977).

The decision made by defendants insurers not to opt out of their automobile insurance policies prior to the effective date of the requirement in the no-fault law that all automobile policies in effect before August 1, 1973 be automatically renewable for three successive one-year periods (Insurance Law former, § 167-a [now § 3425]) without notice of three subsequent extensions of the automatic renewal provision through 1978, does not constitute a perpetual waiver of defendants' rights to cease doing business as insurance carriers in the State nor was such a procedure reasonably calculated to afford defendants due process in view of the subsequent extensions. People ex rel. Lewis v Safeco Ins. Co., 98 Misc. 2d 856, 414 N.Y.S.2d 823, 1978 N.Y. Misc. LEXIS 2896 (N.Y. Sup. Ct. 1978).

The power of the State to regulate insurance companies is subject to an insurer's entitlement to due process which prohibits a *de facto* taking of private property for public use, without just compensation, which may consist of regulations which arbitrarily, unreasonably and without sufficient public purpose, deprive the owner of the benefits of his property; the validity of the no-fault law and the automatic renewal provisions contained therein (Insurance Law, former § 167-a [now § 3425]) do not warrant compelling defendants to continue doing business as insurance carriers in the State since defendants are not seeking to reap the benefits of doing business here while "dumping" unprofitable automobile policies while retaining other more profitable areas of insurance coverage but rather are seeking to withdraw completely from conducting any insurance business in the State. People ex rel. Lewis v Safeco Ins. Co., 98 Misc. 2d 856, 414 N.Y.S.2d 823, 1978 N.Y. Misc. LEXIS 2896 (N.Y. Sup. Ct. 1978).

Insurer which cancels automobile insurance policy (CLS Insurance § 3425) on basis of suspension of driver's license (CLS Vehicle & Traffic § 510) arising out of reversed conviction for driving while impaired has engaged in unlawful discriminatory practice (CLS Executive § 296) since suspension must be deemed vitiated by reversal of conviction and is thus not valid basis for cancellation where insurer has not considered evidence of conduct leading to criminal charges independent of driving record disseminated by department of motor vehicles which improperly includes conviction and reversal. Brown v Fireman's Fund Ins. Co., 131 Misc. 2d 525, 500 N.Y.S.2d 500, 1986 N.Y. Misc. LEXIS 2556 (N.Y. Sup. Ct. 1986).

Insurance Law former § 167-a(4) and (6) [now § 3425(d)], requiring automatic renewal of most automobile insurance policies for specified periods, does not violate the Contract Clause of the United States Constitution, since regulation of the insurance industry, in order to provide adequate protection of the public, is a proper subject for the state's exercise of its police power. Country-Wide Ins. Co. v Harnett, 426 F. Supp. 1030, 1977 U.S. Dist. LEXIS 17467 (S.D.N.Y.), aff'd, 431 U.S. 934, 97 S. Ct. 2644, 53 L. Ed. 2d 252, 1977 U.S. LEXIS 1965 (U.S. 1977).

On renewal of insurance policy, insurance company may forward to insured declaration sheet; however, if there are any changes in policy, insurance company must send either new policy or new endorsements. Insurance Department, Opinions of General Counsel, Opinion Number 00-01-09.

Policy insuring loss of, or damage to, real property used predominantly for residential purposes, and consisting of nonowner occupied 1-4 family dwellings, is considered personal lines subject to CLS Ins § 3425, not commercial risk insurance subject to CLS Ins § 3426. Insurance Department, Opinions of General Counsel, Opinion Number 00-06-01.

Insurer may establish premium due date that is prior to CLS Ins § 3425 renewal policy's effective date and, after due date, may send notice of cancellation for non-payment of premium prior to effective date of policy; however, cancellation may not take effect prior to renewal policy's effective date. Insurance Department, Opinions of General Counsel, Opinion Number 00-12-02.

Insurer is not required, prior to renewal of CLS Ins § 3425 covered policy, to provide written notice to named insured as to change in its premium payment installment schedule. Insurance Department, Opinions of General Counsel, Opinion Number 00-12-02.

Superintendent of Insurance has not promulgated regulation under CLS Ins § 3425(m)(3)(D). Insurance Department, Opinions of General Counsel, Opinion Number 01-09-05.

Expiration of certain provisions of CLS Ins § 3425 did not change cancellation requirements of statute. Insurance Department, Opinions of General Counsel, Opinion Number 01-09-05.

Statement in Circular Letter No. 21 (2001) that provisions of CLS Ins § 3425(j)(1)(A) were still applicable was not meant to imply that such provisions previously applied to automobile insurance policies. Insurance Department, Opinions of General Counsel, Opinion Number 01-09-05.

Suspension by property/casualty insurer of sub-producers from writing new personal lines and new non-commercial automobile policies in certain geographic areas of New York does not count as "termination" because it constitutes geographic redlining and is illegal in New York under CLS Ins § 3429. Insurance Department, Opinions of General Counsel, Opinion Number 02-05-05.

Statutory policy period for new automobile insurance policy subject to CLS Ins § 3425 that is voluntarily written on or after August 2, 2001 is 3 years under CLS Ins § 3425(m); further, insurer must also offer to continue policy through terminated producer for next one-year policy period, and thereafter, at insurer's specific request, insurer must offer to continue policy through terminated producer for remaining years of 3-year required policy period, but producer's rights are subject to continuation of policy, and insurer may cancel or non-renew policy as allowed under applicable provisions of CLS Ins § 3425 and, in such circumstance, is not required to make offers above-described. Insurance Department, Opinions of General Counsel, Opinion Number 02-07-04.

Statutory policy period for covered policy of automobile insurance subject to CLS Ins § 3425 that was voluntarily written originally prior to August 2, 2001, and renewals thereof, is one year under CLS Ins § 3425(a)(8), and where producer agreement has been terminated, CLS Ins § 3425(j)(1)(B) requires insurer to offer to keep such policy in force through terminated producer for any remaining part of one-year required policy period, and thereafter, at insurer's specific request, insurer must continue to offer policy through terminated producer for 3 successive one-year policy periods, which commences within one year from date that termination notice was mailed or delivered; however, producer's rights are subject to continuation of policy, and insurer may cancel or non-renew policy as allowed under applicable provisions of CLS Ins § 3425 and, in such circumstance, is not required to make offers above-described. Insurance Department, Opinions of General Counsel, Opinion Number 02-07-04.

Phrase "statutory extensions" found in CLS Ins § 3425(j)(1)(A) is historical and has no other significance or meaning today. Insurance Department, Opinions of General Counsel, Opinion Number 02-10-23.

"Pay-As-You-Drive Insurance Policy" may not expire automatically if insured exceeds predetermined mileage, but does not pay additional premium; instead, insurer must issue notice of cancellation. Insurance Department, Opinions of General Counsel, Opinion Number 02-11-02.

Whether New York authorized insurer may issue motor vehicle insurance policy whose premium is calculated by multiplying per mile fee, which incorporates rating factors (i.e., sex, marital status, age, driving history, etc.) of policyholder, by number of miles such policyholder drives would require submission of detailed proposal of such policy and its rating rules for review by Insurance Department. Insurance Department, Opinions of General Counsel, Opinion Number 02-11-02.

Insurer may cancel automobile insurance policy for non-payment of installment fee, late payment fee, or reinstatement fee. Insurance Department, Opinions of General Counsel, Opinion Number 03-04-31.

Nonrenewal and cancellation requirements in CLS Ins § 3425 apply to personal lines marine insurance. Insurance Department, Opinions of General Counsel, Opinion Number 03-05-12.

CLS Ins §§ 3425 and 3426 do not contain general requirement that notices of cancellation or non-renewal of personal or commercial property/casualty insurance policies be sent by insurance companies to lenders of properties insured under policies; however, if particular policy were to name such lender as additional insured to whom notice of cancellation or notice must be given, then insurer would have to give notice in accordance with provisions of policy. Insurance Department, Opinions of General Counsel, Opinion Number 04-03-22.

If notice is sent electronically (necessarily implying that recipient of notice has consented to accept notices from insurance company in electronic format), proof of mailing and delivery could also be in electronic format; there is no requirement that proof of mailing or delivery of electronic notice be in any particular format, although, in order to comply with "E-Sign" (Electronic Signatures in Global and National Commerce Act, 15 USCS §§ 7001-7031), it should be accurate and capable of verification so as to be reliable proof that indeed such notice was sent to intended recipient, whether recipient be named insured under insurance policy, or mortgagee or other lender of property insured. Insurance Department, Opinions of General Counsel, Opinion Number 04-03-22.

Under CLS Ins § 3425(a)(7), insurer may not unilaterally impose any change in limits or diminution of coverage during required 3-year policy period, except in instance where insurer has right to cancel policy; at end of 3-year period, insurer may issue conditional renewal whereby continued coverage is offered only if insured accepts change in limits and/or diminution of coverage. Insurance Department, Opinions of General Counsel, Opinion Number 04-04-06.

As condition for securing "inflation guard" or "guaranteed replacement cost" endorsements to homeowners' policies, insured may agree to allow changes to value assigned to property insured (and corresponding premium increases) during 3-year policy period. Insurance Department, Opinions of General Counsel, Opinion Number 04-04-06.

Policies insuring one- to 4-family dwellings are subject to CLS Ins § 3425 whether or not they are owner-occupied. Insurance Department, Opinions of General Counsel, Opinion Number 04-10-04.

If number of policies involved in insurer's rental property program constituted material number of policies written by insurer that are subject to CLS Ins § 3425, then insurer would have to submit plan for orderly reduction in accordance with CLS Ins § 3425(o), should insurer wish to cease writing program because it was no longer profitable; if such policies were homeowners insurance policies, as defined in CLS Ins § 2351, then insurer would have to comply with provisions of subsection (o) that are applicable to homeowners policies. Insurance Department, Opinions of General Counsel, Opinion Number 04-10-04.

Authorized insurer may not base its refusal to issue or renew voluntary market personal lines automobile insurance policies solely on ground of advanced age of applicant or insured. Insurance Department, Opinions of General Counsel, Opinion Number 04-11-08.

Authorized New York insurer may base its refusal to issue or renew voluntary market personal lines automobile insurance policies on factors that are not unfairly discriminatory, or violative of Insurance Law or public policy (which include race, creed, color, national origin, disability, sex and marital status of applicant or insured); permissible factors include being newly licensed driver, driving record, health status, employment status, and driving habits of applicant or insured, and age of vehicle. Insurance Department, Opinions of General Counsel, Opinion Number 04-11-08.

CLS Ins §§ 3425(j)(1)(D) and 3426(k)(2) will be applicable on termination of agency agreement between agent and insurer, even though agreement provides that agency status is temporary and that agency is not Regular Agent of insurer. Insurance Department, Opinions of General Counsel, Opinion Number 06-01-21.

CLS Ins § 3425 does not recognize concept of "converting" policies or "selling" renewal rights. Insurance Department, Opinions of General Counsel, Opinion Number 07-07-13.

2. Required time periods for notices

Section 313 (subd 1) of the Vehicle and Traffic Law, which provides that where the cancellation of an automobile insurance policy is for nonpayment of premium 10 days' notice by the insurer shall be sufficient, is not impliedly repealed by an amendment to former section 167-a [now § 3425] of the Insurance Law, which states that payment to the insurer shall be timely if made within 15 days after the mailing to the insured of a notice of cancellation for nonpayment of premium, as, before there can be a repeal by implication, the conflict between the two statutes must be plain and unavoidable, and these statutes may be reconciled and therefore both remain in effect; the notice of cancellation may provide for a 10-day period (Vehicle and Traffic Law, § 313, subd 1), but the insured will have 15 days after the mailing to make the payment of the past due premium. Nassau Ins. Co. v Epps, 63 A.D.2d 473, 407 N.Y.S.2d 225, 1978 N.Y. App. Div. LEXIS 11367 (N.Y. App. Div. 2d Dep't 1978).

Notice of cancellation of fire insurance policy was not rendered invalid for violation of statute which provided that payment of premium would be timely if made within 15 days after mailing to insured of a notice of cancellation for nonpayment of premium where notice was dated February 6, 1979, and stated that policy would be terminated at noon on February 21, 1979. Gannon v New York Mut. Underwriters, 78 A.D.2d 399, 435 N.Y.S.2d 163, 1981 N.Y. App. Div. LEXIS 9649 (N.Y. App. Div. 3d Dep't), aff'd, 55 N.Y.2d 641, 446 N.Y.S.2d 265, 430 N.E.2d 1318, 1981 N.Y. LEXIS 3225 (N.Y. 1981).

Recovery under "employee dishonesty" endorsement of property insurance policy was not barred by insured's failure to comply with policy provision requiring "a detailed, sworn proof of loss within 120 days of the date of discovery" where insured filed proof of loss within 60 days of insurer's demand therefor and thus was protected by CLS Ins § 3407(a). Klyn v Travelers Indem. Co., 273 A.D.2d 931, 709 N.Y.S.2d 780, 2000 N.Y. App. Div. LEXIS 6801 (N.Y. App. Div. 4th Dep't 2000).

Notice of cancellation of automobile liability policy mailed on November 14 to be effective November 29 at 12:01 A.M. did not provide 15-day notice required by statute. Nassau Ins. Co. v Lion Ins. Co., 89 Misc. 2d 982, 393 N.Y.S.2d 280, 1977 N.Y. Misc. LEXIS 2722 (N.Y. Sup. Ct. 1977).

Statute relating to cancellation for nonpayment of premium does not require that notice of cancellation of automobile liability policy be given any number of days before becoming effective but grants insured a 15-day grace period after mailing in which to pay premium. Hartford Accident & Indem. Co. v Krumbein, 91 Misc. 2d 112, 397 N.Y.S.2d 675, 1977 N.Y. Misc. LEXIS 2245 (N.Y. Sup. Ct. 1977).

Cancellation of an insurance policy is not effective until notice is received by the company, regardless of the intentions of the insured; even if the broker received notice of the insured's intention to cancel at the time the insurer claims, cancellation did not occur until the insurer received notice of the cancellation

request since there is no presumption that an agent authorized to solicit insurance has authority to cancel policies on the insured's request and notice to an agent or broker is not notice to the company; therefore, as no proof has been offered that the broker was an agent authorized to receive notice of cancellation, the insurer's purported retroactive cancellation is ineffective. Truax v State Farm Ins. Cos., 101 Misc. 2d 1031, 422 N.Y.S.2d 592, 1979 N.Y. Misc. LEXIS 2805 (N.Y. Sup. Ct. 1979).

Insured's complaint for payment of medical bills under the Mandatory Personal Injury Protection Endorsement was dismissed as the claim was filed beyond the 45-day requirement of the Endorsement and the insured stipulated to the fact that the claim was filed late and that the policy was issued after April 5, 2002. Therefore, the insurer had no obligation to produce the policy to prove that the Endorsement was included at the time it was issued. Woolfson v Government Empls. Ins. Co., 862 N.Y.S.2d 794, 20 Misc. 3d 948, 240 N.Y.L.J. 40, 2008 N.Y. Misc. LEXIS 4615 (N.Y. Civ. Ct. 2008).

Period of time to calculate and apply for two-for-one business credit is same current calendar year in which non-renewals and uptiered policies are made; there must be new business written that year to support any non-renewals and uptiering made that year in two-for-one ratio. Insurance Department, Opinions of General Counsel, Opinion Number 00-06-07.

CLS Bank § 576, not CLS Veh & Tr § 313(1)(a), binds finance agencies regarding minimum notice required to be given prior to cancellation of noncommercial private passenger automobile policy. Insurance Department, Opinions of General Counsel, Opinion Number 02-03-17.

Non-commercial pet insurance is considered "personal lines" insurance and thus is subject to 3-year required policy period under CLS Ins § 3425(a)(7). Insurance Department, Opinions of General Counsel, Opinion Number 02-05-12.

Statutorily required policy period for automobile insurance policy subject to CLS Ins § 3425 that was originally issued on or before August 1, 2001 is one year under CLS Ins § 3425(a)(8), and where producer agreement has been terminated, CLS Ins § 3425(j)(1)(B) requires insurer to offer to keep such policy in force for any remaining part of one-year required policy period, and thereafter, at specific request of insured, insurer shall continue to offer policy through terminated producer for 3 successive one-year policy periods, which commence within year following date of mailing or delivery to terminated producer of written notice of termination of such contract or account; however, producer's rights are subject to continuation of policy, and insurer may cancel or non-renew policy as permitted under applicable provisions of CLS Ins § 3425, and, in such circumstance, is not required to make offers above-described. Insurance Department, Opinions of General Counsel, Opinion Number 02-10-23.

Required policy period for automobile insurance policy under CLS Ins § 3425 that was originally issued on or after August 2, 2001 is 3 years under CLS Ins § 3425(a)(7) and (m), and where producer agreement has been terminated, CLS Ins § 3425(j)(1)(A) states that insurer must offer to keep such policy in force for remainder of 3-year required policy period, and insurer must also offer to continue policy through terminated producer for at least its next one-year policy period that commences within one year following date of mailing or delivery to terminated agent or broker of written notice of termination of such contract or account; thereafter, at specific request of insured, insurer must offer to continue policy through terminated producer for remaining part of 3-year required policy period, and insurer may cancel or non-renew policy as permitted under applicable provisions of CLS Ins § 3425, and, in such circumstance, is not required to make offers above-described. Insurance Department, Opinions of General Counsel, Opinion Number 02-10-23.

After notice of cancellation for nonpayment of premium applicable to voluntary market commercial property/casualty insurance policy has been issued, premium is considered paid as of postmark date unless cancellation notice specifies otherwise. Insurance Department, Opinions of General Counsel, Opinion Number 03-01-40.

Effective date of cancellation may not be effective date of renewal, which is expiration date of expiring policy, because that would constitute retroactive cancellation in violation of CLS Ins § 3425. Insurance Department, Opinions of General Counsel, Opinion Number 05-09-15.

CLS Gen Const § 20 does not apply to CLS Ins § 3425(b) for notice of cancellation. Insurance Department, Opinions of General Counsel, Opinion Number 06-07-11.

Notice of cancellation may be mailed on 60th day of statutory period, but insurer must be acting in accordance with its uniformly applied underwriting rules for cancellations. Insurance Department, Opinions of General Counsel, Opinion Number 06-07-11.

CLS Gen Const § 20 applies to time periods established by CLS Ins § 3425(d) for conditional renewals, nonrenewals, and substitutions of policy forms. Insurance Department, Opinions of General Counsel, Opinion Number 06-07-11.

CLS Ins § 3425(d)(1) (45- to 60-day notice requirement) is applicable when insured's policy coverage is about to expire, and insurer either renews with change of limits or elimination of any coverage or non-renews policy, while CLS Ins § 3425(d)(2) (20-day notice) is applicable not when policy period is about to expire, but when insurer has right to cancel policy under CLS Ins § 3425(b) or (c). Insurance Department, Opinions of General Counsel, Opinion Number 07-01-05.

Homeowner's policy may be non-renewed only at end of its 3-year required policy period, unless non-renewal is based on ground for which insurer could have canceled policy. Insurance Department, Opinions of General Counsel, Opinion Number 07-06-02.

For purposes of sending out non-renewal notice, 3-year required policy period for new homeowners' policy is measured from effective date of policy. Insurance Department, Opinions of General Counsel, Opinion Number 07-07-06.

Insurer may non-renew homeowners insurance policy 3 years from date when insurer issued homeowners insurance policy, but only after providing timely notice to insured as required by Insurance Department, Opinions of General Counsel, Opinion Number 07-07-13.

Insurer that issues homeowners, renters or commercial lines insurance policy containing "inflation-guard" endorsement, whereby value of covered property is automatically adjusted depending on formula specified in policy, is not required to issue conditional renewal notice to insurance agent, broker or insured each year advising of specific dollar amount of resulting increase in coverage, if any, because any increase in coverage would be arising from terms of policy itself. NY Ins Dep't Gen Counsel, Opinion No. 10-09-11, 2010 NY Insurance GC Opinions LEXIS 46.

If insured's bank declines insured's debit card payment because of insufficient funds, insurer must notify insured that policy was canceled due to nonpayment of premium pursuant to CLS Ins § 3425(b), and notice of cancellation must provide at least 15 days' notice pursuant to CLS Veh & Tr § 313(1)(a). NY Ins Dep't Gen Counsel, Opinion No. 11-05-02, 2011 NY Insurance GC Opinions LEXIS 16.

If insured pays premium by debit card, and there are sufficient funds in insured's account, but insurer declines insured's debit card payment for some other reason, insurer must send insured notice of cancellation that specifies reason that policy was canceled pursuant to CLS Ins § 3425(b), and such notice must provide at least 20 days' notice pursuant to CLS Veh & Tr § 313(1)(a). NY Ins Dep't Gen Counsel, Opinion No. 11-05-02, 2011 NY Insurance GC Opinions LEXIS 16.

3. Sufficiency of particular nonrenewal or cancellation notices

An uninsured motorist claim seeking to direct the insurer to indemnify its insured under an allegedly cancelled policy against claims arising out of an automobile accident was properly dismissed where there was sufficient admissible proof of the office practice and procedure followed by the insurer together with proof that the particular cancellation notice was mailed to its insured prior to the date of the accident. Empire Mut. Ins. Co. v

Kohulka, 55 N.Y.2d 837, 447 N.Y.S.2d 703, 432 N.E.2d 596, 1982 N.Y. LEXIS 3046 (N.Y. 1982).

A judgment permanently staying arbitration demanded under the terms of an uninsured motorist endorsement after a finding that the policy issued had not been cancelled would be reversed, where the absence of a statement in the notice of cancellation informing the insured of the 15-day grace period provided by Ins Law § 167-a [now § 3425] did not render the notice invalid, inasmuch as no statutory provision, rule or regulation mandated the inclusion of such a statement, and inasmuch as a circular letter by the Superintendent of Insurance attempting to impose such a requirement did not constitute an official regulation because it was never filed in the office of the Department of State and was not contained in the Official Compilation of Codes, Rules and Regulations of the State of New York. In re Midwest Mut. Ins. Co., 96 A.D.2d 530, 464 N.Y.S.2d 838, 1983 N.Y. App. Div. LEXIS 19051 (N.Y. App. Div. 2d Dep't 1983), aff'd, 62 N.Y.2d 703, 476 N.Y.S.2d 538, 465 N.E.2d 45, 1984 N.Y. LEXIS 4307 (N.Y. 1984).

The arbitration of an uninsured motorist claim was improperly stayed on the asserted ground that the fault party's insurer's purported cancellation of such party's policy was invalid in that the notice of cancellation made no reference to the right to a "review" as provided for under applicable rules of the New York Automobile Insurance Plan because the notice apprised the insured of his right to "appeal" to the Committee of the plan; given the synonymous meaning of the words "review" and "appeal," the insurer substantially complied with the regulations. In re State Farm Mut. Auto. Ins. Co., 104 A.D.2d 495, 479 N.Y.S.2d 83, 1984 N.Y. App. Div. LEXIS 19938 (N.Y. App. Div. 2d Dep't 1984).

Insurer complied with CLS Ins § 3425 in stating its reasons for nonrenewal of automobile insurance policy when it listed 2 accidents and 2 convictions, gave their specific dates, and named source of information; insurer did not have initial burden of coming forward with proof of veracity of statements since absence of any evidence negating veracity was sufficient for compliance. State Farm Mut. Auto. Ins. Co. v Yung Shik Na, 123 A.D.2d 873, 507 N.Y.S.2d 474, 1986 N.Y. App. Div. LEXIS 60985 (N.Y. App. Div. 2d Dep't 1986).

Insurance company was not entitled to summary judgment dismissing judgment creditor's action to collect judgment entered against company's insured based on attempted cancellation of insured's policy for nonpayment of premium since cancellation notice failed to inform insured of her right to review by committee of Assigned Risk Plan; premium finance company which sent notice was not acting as insured's agent under finance agreement when it attempted to cancel her policy for nonpayment. Roth v Aetna Life & Casualty Ins. Co., 128 A.D.2d 514, 512 N.Y.S.2d 447, 1987 N.Y. App. Div. LEXIS 44207 (N.Y. App. Div. 2d Dep't 1987).

Insurer failed to establish that cancellation of automobile liability insurance policy was valid where bill mailed to insured prior to issuance of notice of cancellation was not offered into evidence, insurer had not retained copy thereof, and thus it could not be shown that bill complied with New York Automobile Insurance Plan Rules § 14(E)(2); right to cancel policy on notice for nonpayment of premium is contingent on mailing of proper bill, since premium does not otherwise become due and owing. Eveready Ins. Co. v Mitchell, 133 A.D.2d 210, 519 N.Y.S.2d 19, 1987 N.Y. App. Div. LEXIS 49716 (N.Y. App. Div. 2d Dep't 1987).

Notice of cancellation of insurance was ambiguous where it relied on generalized and incomplete language which could have referred to any of 3 different clauses of former CLS Ins § 167-a(3)(b), now CLS Ins § 3425(c)(2), and it left blank a box which would have indicated with code that insurer was cancelling policy on specific statutory grounds. Olshan v Greater New York Mut. Ins. Co., 181 A.D.2d 645, 582 N.Y.S.2d 18, 1992 N.Y. App. Div. LEXIS 5188 (N.Y. App. Div. 1st Dep't 1992).

Motorcycle insurance policy remained in force as of date of accident where insurance company failed to comply with strict statutory notice of termination requirements set forth in CLS Veh & Tr § 313(1)(a), even though insured permitted his registration to lapse prior to date of accident. Public Serv. Mut. Ins. Co. v Foley, 190 A.D.2d 800, 593 N.Y.S.2d 847, 1993 N.Y. App. Div. LEXIS 1527 (N.Y. App. Div. 2d Dep't), app. dismissed, 82 N.Y.2d 712, 602 N.Y.S.2d 808, 622 N.E.2d 309, 1993 N.Y. LEXIS 5264 (N.Y. 1993).

Notice of termination of automobile insurance policy was sufficiently specific to satisfy requirements of CLS Ins § 3425(b) where notice informed policyholder that it had rejected her insurance application due to her age and excessive odometer reading of vehicle she wished to insure. State Farm Mut. Auto. Ins. Co. v Cherian, 202 A.D.2d 434, 608 N.Y.S.2d 708, 1994 N.Y. App. Div. LEXIS 1887 (N.Y. App. Div. 2d Dep't 1994).

Notice of cancellation of automobile insurance was effective where it was filed with Department of Motor Vehicles prior to date of accident, even though it was not filed within 30 days of cancellation. Allcity Ins. Co. v Rodriguez, 212 A.D.2d 405, 622 N.Y.S.2d 43, 1995 N.Y. App. Div. LEXIS 1391 (N.Y. App. Div. 1st Dep't 1995).

Cancellation of homeowners' policy was not conditional, and therefore invalid, merely because notice of cancellation gave plaintiffs 15 days to pay amount due to avoid termination of coverage. Pardo v Central Coop. Ins. Co., 223 A.D.2d 832, 636 N.Y.S.2d 184, 1996 N.Y. App. Div. LEXIS 103 (N.Y. App. Div. 3d Dep't 1996).

Insurer's notice of cancellation for nonpayment of premium was ineffective under CLS Veh & Tr § 313 where it incorrectly stated that civil penalty for lapse of insurance was $4 per day, rather than $6 per day, and also failed to provide insured with notice of insurer's intent not to renew policy at least 20 days prior to renewal date; thus, automobile liability policy, which was not "covered policy" within meaning of cancellation and renewal requirements of CLS Ins § 3425 because it had not been issued to "natural person" for nonbusiness purposes, remained in effect after its natural expiration date. American Home Assur. Co. v Chin, 269 A.D.2d 24, 708 N.Y.S.2d 453, 2000 N.Y. App. Div. LEXIS 6082 (N.Y. App. Div. 2d Dep't 2000).

Defendants, insurance company and its agent, were properly granted summary judgment in action seeking to declare that automobile insurance policy was in full force and effect on date of accident where policy cancellation notice plainly recited that policy would be canceled if total premium due was not paid on or before certain date, and insured failed to make such payment prior to that date; insured's history with defendants, which included series of policy cancellations and reinstatements, did not, by itself, raise fact issue as to equitable estoppel since insured acknowledged both receipt of cancellation notice and that she understood import thereof. Ferber v Farm Family Cas. Ins. Co., 272 A.D.2d 747, 707 N.Y.S.2d 545, 2000 N.Y. App. Div. LEXIS 5699 (N.Y. App. Div. 3d Dep't 2000).

Insured's position that it never received notice of cancellation of property insurance policy was insufficient to rebut presumption of receipt raised by affidavit of insurer's small business underwriter, who stated that on January 10, 1989, based on insurer's failure to receive original premium finance agreement from finance company or any premiums, she personally sent, by certified mail, copy of notice of cancellation to insured and to premium finance company at their addresses as they appeared on declaration page of policy, which affidavit had attached notice dated January 10, 1989, canceling policy as of 12:01 a.m. on January 28, 1989, and certified mailing list date stamped January 10, 1989. 8112-24 18th Ave. Realty Corp. v Aetna Cas. & Sur. Co., 240 A.D.2d 287, 659 N.Y.S.2d 17, 1997 N.Y. App. Div. LEXIS 6659 (N.Y. App. Div. 1st Dep't 1997).

Broker's possession of sufficient funds, in form of returned unearned premiums from prior insurer, to pay premium would not be imputed to insurer under CLS Ins § 2121(a) where broker had returned those premiums well before issuance of subject policy, and nothing in documentary evidence submitted by insured showed that those premiums were payments in return for, or referable to, such policy; even if broker, insured, and insured's funding company had such private understanding, it could not bind insurer, who even after issuing policy was stranger to such prior transactions between insured and its fiduciaries as to funds which they held on insured's behalf. 8112-24 18th Ave. Realty Corp. v Aetna Cas. & Sur. Co., 240 A.D.2d 287, 659 N.Y.S.2d 17, 1997 N.Y. App. Div. LEXIS 6659 (N.Y. App. Div. 1st Dep't 1997).

Insurance company improperly cancelled homeowner's policy during term of policy based on loss history of insured since such reason is not listed in CLS Ins § 3425(c)(2) as permissible reason for cancellation during term of policy; thus, insurance company would be required to pay for loss which occurred after cancellation and before end of term of policy where insured obtained replacement policy, but loss was not covered by replacement policy. Fireman's Fund Ins. Co. v Hartford Casualty Ins. Co., 162 Misc. 2d 365, 616 N.Y.S.2d 874, 1994 N.Y. Misc. LEXIS 411 (N.Y. Sup. Ct. 1994).

Notice of cancellation sent to insured, which contained statement that proof of financial security must be maintained and notice of certain punitive aspects should insured fail to comply, was valid even though it erroneously advised insured that civil penalty for failure to maintain financial security was $4 per day rather than $6 per day; all essential and necessary elements of notice required by law were given to insured. Foster v Abrams, 167 Misc. 2d 909, 640 N.Y.S.2d 417, 1996 N.Y. Misc. LEXIS 83 (N.Y. Sup. Ct. 1996), modified, aff'd, 242 A.D.2d 952, 662 N.Y.S.2d 899, 1997 N.Y. App. Div. LEXIS 10561 (N.Y. App. Div. 4th Dep't 1997).

Policy cancellation letter was not effective to cancel an insured's motorcycle policy and the insurer did not show there was no genuine issue of material fact to warrant summary judgment for it; the insured made the motorcycle available for inspection as required by New York Automobile Insurance Plan § 18.2.6 by a certain date. The insurer's receipt of the inspection photos by that date was not the test; so the cancellation letter was not effective under N.Y. Ins. Law § 3425(b) and N.Y. Veh. and Traf. Law § 313(1)(a) since the policy was in its first 60 days and the insured did not state a valid reason for cancellation. Pascal v Carco Group, 782 N.Y.S.2d 187, 5 Misc. 3d 411, 2004 N.Y. Misc. LEXIS 1452 (N.Y. Civ. Ct. 2004).

Insured's alleged failure to provide the name of the insurance carrier to a vehicle inspector did not negate the fact that the insured had made the car "available" for inspection as required by New York Insurance Plan § 18.2.6. Pascal v Carco Group, 782 N.Y.S.2d 187, 5 Misc. 3d 411, 2004 N.Y. Misc. LEXIS 1452 (N.Y. Civ. Ct. 2004).

Insurer sending notice of cancellation for non-payment of premium of motor vehicle liability insurance coverage must add, to total amount that must be paid to avoid cancellation, one-dollar motor vehicle law enforcement fee charged policyholder in its statement of amount due; it is not practical to send separate written notice to policyholder to pay one-dollar fee, nor to send another declarations page of policy to accomplish same. Insurance Department, Opinions of General Counsel, Opinion Number 00-07-14.

Automobile insurance policy may be effectively canceled when effective date of notice of cancellation falls on same day as renewal policy's effective date or after. Insurance Department, Opinions of General Counsel, Opinion Number 01-01-07.

Insurer may nonrenew or conditionally renew automobile insurance policy, initially written on or after August 2, 2001, under one of specified reasons in CLS Ins § 3425(m)(3) on renewal date of policy, even though 3-year required policy period has not expired. Insurance Department, Opinions of General Counsel, Opinion Number 01-09-05.

Insurer may nonrenew automobile policy subject to CLS Ins § 3425 for any reason not otherwise prohibited by law, in accordance with insurer's uniformly applied underwriting rules, on expiration of policy's 3-year required policy period; specifically, insurer may specify as reason that insurer's agent no longer represents insurer. Insurance Department, Opinions of General Counsel, Opinion Number 01-09-05.

Under CLS Ins §§ 3425 and 3426, notice of cancellation for non-payment does not have to specify amount due in order for cancellation to be effected. Insurance Department, Opinions of General Counsel, Opinion Number 02-01-06.

Insurer may nonrenew personal lines policy based on insured's failure to complete self-inspection survey of insured's residence as required by insurer. Insurance Department, Opinions of General Counsel, Opinion Number 02-08-09.

"Mileage pattern" is not sufficiently specific to satisfy CLS Ins § 3425(d)(1). Insurance Department, Opinions of General Counsel, Opinion Number 02-09-25.

Insurer that sells non-commercial automobile insurance via telephone is required, under 11 NYCRR Part 218 (Regulation 90), to provide applicant that it has denied coverage with written notice of refusal to issue coverage. Insurance Department, Opinions of General Counsel, Opinion Number 03-07-08.

Where producer-insurer contract has been terminated, insurer must offer to keep personal lines insurance policy in force for remainder of 3-year required policy period, and insurer must offer to continue policy through terminated producer for at least its next one-year policy period that commences within one year following date that termination notice is delivered to producer; thereafter, at insured's specific request, insurer must offer to continue policy through terminated producer for any remaining part of 3-year required policy period. Insurance Department, Opinions of General Counsel, Opinion Number 03-08-21.

Insurer could not cancel homeowners' policy mid-term based on "physical changes in the property insured occurring after issuance or last annual anniversary date of the policy which result in the property becoming uninsurable in accordance with the insurer's objective, uniformly applied underwriting standards in effect at the time the policy was issued or last voluntarily renewed" where premises became unoccupied, policy was subsequently renewed, and insurer, pursuant to its uniformly applied underwriting standards, would not issue new homeowners' policy because premises were unoccupied; assuming that property becoming unoccupied was physical change, it had occurred prior to last annual anniversary date. Insurance Department, Opinions of General Counsel, Opinion Number 04-04-21.

Under CLS Ins § 3425, nonpayment cancellation notice is not valid if it fails to state amount due on face of notice, but refers insured to premium statement that accompanies notice, which states amount due; fact that CLS Veh & Tr § 313 might have different language is not determinative. Insurance Department, Opinions of General Counsel, Opinion Number 06-01-12.

Insurance agent is not prohibited from verbally communicating to insured, more than 60 days before homeowner's policy's expiration date, that insurer will not renew policy; such communication, however, does not effectuate non-renewal. Insurance Department, Opinions of General Counsel, Opinion Number 07-06-02.

Otherwise valid notice of cancellation for nonpayment of premium of non-commercial package policy, which includes homeowners, automobile, and umbrella liability insurance, is effective if, after notice is mailed, insurer receives check from insured in payment of premium and informs agent that policy will be reinstated, but check is thereafter dishonored. Insurance Department, Opinions of General Counsel, Opinion Number 09-12-02.

4. —Notice to loss payee

A policy of automobile collision insurance was effectively canceled as to all parties, including secured party under a loss payable clause, by a premium finance agency under power of attorney from the insured where the premium finance agency gave the requisite statutory notices, which notices did not include notice to loss payee. Dyer v Great Eastern Ins. Co., 41 A.D.2d 581, 340 N.Y.S.2d 3, 1973 N.Y. App. Div. LEXIS 5250 (N.Y. App. Div. 3d Dep't 1973).

Notice of cancellation of policies of insurance is not required by statute to be delivered to a loss payee. Dyer v Great Eastern Ins. Co., 41 A.D.2d 581, 340 N.Y.S.2d 3, 1973 N.Y. App. Div. LEXIS 5250 (N.Y. App. Div. 3d Dep't 1973).

Where the insured had granted a premium finance agency the authority to cancel an automobile liability policy for nonpayment of premiums, that agency could properly cancel the policy without giving notice to a named loss payee and pursuant to Banking Law § 576 effectively terminated the obligations and rights between the insurer and insured. Dyer v Great Eastern Ins. Co., 41 A.D.2d 581, 340 N.Y.S.2d 3, 1973 N.Y. App. Div. LEXIS 5250 (N.Y. App. Div. 3d Dep't 1973).

5. —Notice to commissioner of motor vehicles

In the absence of proof as to filing by insurer of notice of finance company's cancellation with commissioner of motor vehicles,

notice of cancellation of automobile policy was ineffective. Geoghegan v Empire Mut. Ins. Co., 52 A.D.2d 836, 382 N.Y.S.2d 826, 1976 N.Y. App. Div. LEXIS 12660 (N.Y. App. Div. 2d Dep't), app. denied, 39 N.Y.2d 711, 1976 N.Y. LEXIS 3456 (N.Y. 1976).

In an insured's declaratory judgment action, after an accident that occurred one month after cancellation of his automobile insurance policy, cancellation would be valid where the insured had failed to meet his obligations under a premium finance agreement with a premium service corporation, where the notice of cancellation only had to provide the date on which the policy would be cancelled, where the insured had not been entitled to two separate periods in which to cure his default, where the insurer had not been liable for the failure of the premium service corporation to return moneys in excess of the financed amount, and where it was no longer necessary to file a notice of cancellation with the commissioner of motor vehicles. Ward v Gresham, 92 A.D.2d 468, 459 N.Y.S.2d 48, 1983 N.Y. App. Div. LEXIS 16669 (N.Y. App. Div. 1st Dep't), aff'd, 59 N.Y.2d 878, 465 N.Y.S.2d 931, 452 N.E.2d 1259, 1983 N.Y. LEXIS 3210 (N.Y. 1983).

If the policy of insurance is canceled by the insurer pursuant to § 313 of the Vehicle and Traffic Law, then a late filing of the notice of cancellation with the Commissioner of Motor Vehicles will not operate to vitiate the effect of such cancellation provided the accident happened more than 10 days after the filing of the FS-4 with the Department of Motor Vehicles. Theodore v Hartford Accident & Indem. Co., 60 Misc. 2d 991, 304 N.Y.S.2d 688, 1969 N.Y. Misc. LEXIS 1142 (N.Y. Sup. Ct. 1969).

An automobile insurance carrier cannot in New York terminate an automobile policy on notice to the insured without also giving prior notice to the State Motor Vehicle Commissioner. Craine v New Hampshire Ins. Co., 64 Misc. 2d 86, 314 N.Y.S.2d 237, 1970 N.Y. Misc. LEXIS 1427 (N.Y. Sup. Ct. 1970).

Conditional notice requirements of N.Y. Ins. Law § 3425 did not apply to an insured's claim based on an insurer's annual increases in premiums and coverage because the policy provided that the insurer could condition annual renewal on the payment of increased premiums based on currents cases and values. Spagnola v Chubb Corp., 574 F.3d 64, 2009 U.S. App. LEXIS 16679 (2d Cir. N.Y. 2009).

6. Notification requirements for policy with more than one named insured

Where automobile liability policy provided that the insurance afforded applied separately to each insured against whom claim is made or suit is brought, the unilateral act of one "named insured" without notice to the other "named insured" could not cancel or terminate the obligation of the insurer to the second "named insured." Broquedis v Employers Mut. Liability Ins. Co., 45 A.D.2d 591, 360 N.Y.S.2d 735, 1974 N.Y. App. Div. LEXIS 3746 (N.Y. App. Div. 4th Dep't 1974).

Where automobile liability insurer mistakenly relied on former husband's request to delete the former wife as a "named insured" under liability policy and the insurer did not give the former wife 45 days' notice of nonrenewal prior to anniversary date of policy, the insured's termination of coverage of the former wife, a "named insured," was a nullity. Broquedis v Employers Mut. Liability Ins. Co., 45 A.D.2d 591, 360 N.Y.S.2d 735, 1974 N.Y. App. Div. LEXIS 3746 (N.Y. App. Div. 4th Dep't 1974).

Where automobile liability insurer had previously issued policy to owner on his automobile in owner's own name, and had issued a motor vehicle department insurance certificate certifying it had issued required statutory policy to owner which certificate enabled owner to register and operate his car on state streets, insurer would be estopped from denying coverage on basis that owner's father, who had become "named insured" under automobile policy which included coverage for his son's car, had cancelled such insurance, particularly in light of fact that son was never notified of the cancellation. Government Employees Ins. Co. v Employers Commercial Union Ins. Co., 88 Misc. 2d 132, 387 N.Y.S.2d 52, 1976 N.Y. Misc. LEXIS 2599 (N.Y. Sup. Ct. 1976), aff'd, 62 A.D.2d 123, 404 N.Y.S.2d 652, 1978 N.Y. App. Div. LEXIS 10427 (N.Y. App. Div. 2d Dep't 1978).

Where father, as named insured on policy covering both his own and his son's cars, purported to cancel as to son without son's consent, son, never having received notice of the cancellation, remained covered. Government Employees Ins. Co. v Employers Commercial Union Ins. Co., 88 Misc. 2d 132, 387 N.Y.S.2d 52, 1976 N.Y. Misc. LEXIS 2599 (N.Y. Sup. Ct. 1976), aff'd, 62 A.D.2d 123, 404 N.Y.S.2d 652, 1978 N.Y. App. Div. LEXIS 10427 (N.Y. App. Div. 2d Dep't 1978).

7. Proof of mailing of notices

Documentary evidence that, inter alia, the Department of Motor Vehicles received copy of notice of termination of automobile insurance addressed to car owner, and that termination notice had been sent to car owner at its last known address of record, and returned with indication that owner had moved, established insurer's full compliance with requirement of Insurance Law that notice of termination of insurance be mailed to named insured at address shown on policy at least 20 days prior to effective date of cancellation, and that liability insurance had been properly cancelled. Leatherby Ins. Co. v Scott, 51 A.D.2d 519, 378 N.Y.S.2d 399, 1976 N.Y. App. Div. LEXIS 10716 (N.Y. App. Div. 1st Dep't 1976).

In action against insurance company for breach of homeowners' policy, company was properly granted summary judgment on ground that policy had been canceled prior to date of fire that damaged plaintiffs' home, since company satisfied its burden of proving that cancellation notice was properly mailed to plaintiffs where it submitted (1) affidavits setting forth its standard operating procedure for insuring that cancellation notices were properly mailed, including verification by postal employee that names and addresses of policyholders on computer-generated list provided by company actually appeared in window of envelopes, and (2) certificate of mailing showing that cancellation notice addressed to plaintiffs was actually received by post office. Strohschein v Northern Assurance Co., 136 A.D.2d 625, 523 N.Y.S.2d 596, 1988 N.Y. App. Div. LEXIS 439 (N.Y. App. Div. 2d Dep't 1988).

In action against insurer and premium finance company to recover proceeds of commercial risk insurance policy, defendants were not entitled to summary judgment on basis that plaintiff's policy had been cancelled due to nonpayment of premiums, since issue of fact existed as to whether cancellation notice was sufficiently timely under CLS Bank § 576 to afford plaintiff appropriate opportunity to cure delinquency, where insurer submitted "file copy" of its notice of intent to cancel and 2 pages of ledger entries logging outgoing mail on date notice supposedly was sent, but plaintiff denied receipt of purported mailing. 1395 Second Ave. Restaurant v All City Ins. Co., 207 A.D.2d 271, 615 N.Y.S.2d 358, 1994 N.Y. App. Div. LEXIS 8124 (N.Y. App. Div. 1st Dep't 1994).

Insurer failed to show that it mailed cancellation notice to insureds where (1) both insureds and mortgage company denied ever having received notice allegedly mailed to them, (2) insurer's employee, who had personal knowledge of alleged mailings, testified as to usual procedure for mailing such notices, but testimony did not show that procedures were geared so as to ensure likelihood that notice was always properly addressed and mailed, and (3) insurer failed to present testimony of 2 personally-involved employees who were specifically named on mailing receipts. Colon v Nationwide Mut. Fire Ins. Co., 211 A.D.2d 579, 621 N.Y.S.2d 608, 1995 N.Y. App. Div. LEXIS 546 (N.Y. App. Div. 1st Dep't 1995).

Court erred in declaring that plaintiffs were covered by automobile insurance policy issued by defendant as to accident in question where defendant, through testimony of 2 knowledgeable employees, introduced copy of notice of cancellation it sent to plaintiffs prior to accident, along with properly endorsed postal service certificate of mailing, both generated and retained in ordinary course of business. Jones v Allstate Ins. Co., 221 A.D.2d 596, 634 N.Y.S.2d 176, 1995 N.Y. App. Div. LEXIS 12442 (N.Y. App. Div. 2d Dep't 1995).

In action to recover proceeds under homeowners' policy, where insurer claimed that policy had been canceled for nonpayment of premiums, and satisfied its burden of proving that notice of cancellation was properly mailed to plaintiffs based on direct proof of mailing of actual notice, proof of insurer's regular office mailing procedures was not required to obtain summary judg-

ment. Pardo v Central Coop. Ins. Co., 223 A.D.2d 832, 636 N.Y.S.2d 184, 1996 N.Y. App. Div. LEXIS 103 (N.Y. App. Div. 3d Dep't 1996).

In action to recover proceeds under homeowners' policy, where insurer claimed that policy had been canceled for nonpayment of premiums, affidavit of insurer's vice-president was sufficient to show that insurer mailed notice of cancellation on stated date, especially where insurer produced certificate of mailing that listed plaintiffs' address and was date-stamped on stated date. Pardo v Central Coop. Ins. Co., 223 A.D.2d 832, 636 N.Y.S.2d 184, 1996 N.Y. App. Div. LEXIS 103 (N.Y. App. Div. 3d Dep't 1996).

In action to recover proceeds under homeowners' policy, where insurer claimed that policy had been canceled for nonpayment of premiums and met its burden of proving that cancellation notice was properly mailed to plaintiffs, plaintiffs' contention that they never received notice was insufficient to rebut presumption that they received notice. Pardo v Central Coop. Ins. Co., 223 A.D.2d 832, 636 N.Y.S.2d 184, 1996 N.Y. App. Div. LEXIS 103 (N.Y. App. Div. 3d Dep't 1996).

In action to recover proceeds under homeowners' policy, where insurer claimed that policy had been canceled for nonpayment of premiums and met its burden of proving that cancellation notice was properly mailed to plaintiffs, fact that plaintiffs' post office box number was omitted from notice of cancellation, although contained on declaration page of policy, was insufficient to rebut presumption that plaintiffs received notice, absent any evidence to indicate that notice was not received by them due to missing box number. Pardo v Central Coop. Ins. Co., 223 A.D.2d 832, 636 N.Y.S.2d 184, 1996 N.Y. App. Div. LEXIS 103 (N.Y. App. Div. 3d Dep't 1996).

In action to recover proceeds under homeowners' policy, where insurer claimed that policy had been canceled for nonpayment of premiums, plaintiffs' denial of receipt of notice of cancellation was belied by evidence that, after cancellation and before occurrence of fire that destroyed plaintiffs' home, plaintiff visited insurance agent at his office and offered to make payment to reinstate policy. Pardo v Central Coop. Ins. Co., 223 A.D.2d 832, 636 N.Y.S.2d 184, 1996 N.Y. App. Div. LEXIS 103 (N.Y. App. Div. 3d Dep't 1996).

Insurer created rebuttable presumption that notice of policy cancellation was received where it presented documentary evidence of its cancellation, together with testimony of employee who was knowledgeable about its cancellation procedures, to effect that such procedures were in conformity with statutory requirements of New York Automobile Insurance Plan. Lora v New York Cent. Mut. Fire Ins. Co., 232 A.D.2d 242, 648 N.Y.S.2d 91, 1996 N.Y. App. Div. LEXIS 10100 (N.Y. App. Div. 1st Dep't 1996).

Insurer was not entitled to summary judgment dismissing action on homeowner's policy, based on insured's alleged failure to submit sworn proof of loss within 60 days after receiving demand to do so by insurer, even though insurer claimed to have received proof of loss by FAX on April 16, 12 days after expiration of 60-day period, where (1) insured's public adjuster averred that he mailed completed proof of loss forms to insurer on March 7, which was same date as that of insured's notarized signature on those forms, and (2) insurer did not conclusively prove that it supplied blank proof of loss forms with its February 3 demand letter as required by CLS Ins § 3407. Ingarra v General Accident/PG Ins. Co., 273 A.D.2d 766, 710 N.Y.S.2d 168, 2000 N.Y. App. Div. LEXIS 7460 (N.Y. App. Div. 3d Dep't 2000).

Commercial property insurance policy was properly canceled by insurer through its agent, and thus insurer did not breach insurance contract by disclaiming coverage for damage by fire, where (1) agent's mailing of notice of cancellation was proved by deposition testimony of agent's president, certificate of mailing, and mailing ledger signed and date-stamped by United States Postal Service employee, and (2) insured did not rebut presumption of delivery raised by proof of mailing. Residential Holding Corp. v Scottsdale Ins. Co., 286 A.D.2d 679, 729 N.Y.S.2d 776, 2001 N.Y. App. Div. LEXIS 8448 (N.Y. App. Div. 2d Dep't 2001).

8. Effect of insurer's acceptance of late premiums

Insurer would be estopped from asserting defense of cancellation against claim filed by insured under provisions of its homeowner's policy, even though insurer complied with relevant provisions of Insurance Law in attempting to cancel policy and in giving notice of cancellation, where insured's dilatory premium had been time stamped and posted by way of certified mail prior to alleged date of loss, where insurer had previously accepted premium following first notice of cancellation and thereby assured insured that future late payments would likewise be accepted, where language in cancellation notice indicated that carrier would entertain late payments, and where insurer's adjuster who interviewed insured two weeks after reported claim made no reference to policy cancellation or to receipt of late premiums. Weiner v Government Employees Ins. Co., 52 A.D.2d 844, 382 N.Y.S.2d 814, 1976 N.Y. App. Div. LEXIS 12678 (N.Y. App. Div. 2d Dep't 1976).

9. Miscellaneous

Insurer's attempt to cancel automobile insurance policy for "failure to remedy material defects," consisting of insured's failure to provide certain information on insurance application, was ineffective where notice of cancellation was given more than 60 days after effective date of policy, policy expressly prohibited insurer from exercising right of cancellation after policy had been in effect for 60 days with certain exceptions, and "failure to remedy material defects" was not listed among exceptions; ambiguities in contracts of insurance are to be strictly construed against insurer, and if insurer contractually limits its right of cancellation beyond what is otherwise required by law, contract takes precedence. De Urbaez v Lumbermens Mut. Casualty Co., 68 N.Y.2d 930, 510 N.Y.S.2d 78, 502 N.E.2d 993, 1986 N.Y. LEXIS 20882 (N.Y. 1986).

Where personal lines policy was executed or delivered after policy's stated effective date, policy period under CLS Ins § 3425(a)(7) was triggered on policy's effective date. Rosner v Metro. Prop. & Liab. Ins. Co., 96 N.Y.2d 475, 729 N.Y.S.2d 658, 754 N.E.2d 760, 2001 N.Y. LEXIS 1988 (N.Y. 2001).

In an action by an insured to recover for breaches of hospital and life insurance policies that allegedly occurred when the policies were canceled for a default in premiums, plaintiff's cause of action for compensatory damages would be dismissed, where plaintiff sustained no loss that would entitle him to benefits under the policies, but plaintiff's cause of action for a declaration that the policies remained in effect would be allowed to stand. Topiwala v New York Life Ins. Co., 95 A.D.2d 746, 464 N.Y.S.2d 184, 1983 N.Y. App. Div. LEXIS 18647 (N.Y. App. Div. 1st Dep't), app. dismissed, 60 N.Y.2d 859, 1983 N.Y. LEXIS 6525 (N.Y. 1983).

Insurer properly cancelled automobile liability policy which it had issued at low "fleet rate" to purported lessor of automobiles since purported lessor did not obtain insurable interest in vehicles by virtue of "short-form trust agreement" and lease-back arrangement with owners of vehicles by which it attempted to create equitable interest in itself as means of circumventing provisions of Insurance Law in order to obtain low group rates on automobile liability insurance for owners of vehicles; insurer was entitled to summary judgment in action by purported lessor to enforce policy and to recover damages for cancellation, even though insurer could not escape liability for claims which arose during precancellation period. National Superlease, Inc. v Reliance Ins. Co., 123 A.D.2d 608, 507 N.Y.S.2d 16, 1986 N.Y. App. Div. LEXIS 60759 (N.Y. App. Div. 2d Dep't 1986), app. denied, 69 N.Y.2d 611, 517 N.Y.S.2d 1026, 511 N.E.2d 85, 1987 N.Y. LEXIS 16859 (N.Y. 1987).

In action for judgment declaring that insurer was obligated under homeowners' insurance policy to pay any judgment rendered against homeowners in pending action arising out of fire at their premises, trial court properly determined that insurer was not insurer of subject premises on date in question and that it owed no duty to defend and indemnify homeowners, based on testimony by insurer's employee as to insurer's regular procedure for producing and sending out notices of cancellation, which raised presumption that notice of cancellation sent to homeowners in instant case was in fact received by them approximately 10 months before fire; homeowners failed to rebut presumption by presenting evidence that insurer's procedure was either not followed or carelessly followed. Ramos v De Mond, 127 A.D.2d

751, 512 N.Y.S.2d 143, 1987 N.Y. App. Div. LEXIS 43235 (N.Y. App. Div. 2d Dep't 1987).

Fact that suspension of insured's driver's license was merely "administrative," as defined in CLS Ins § 3425, did not preclude automobile insurers from invoking policy provision excluding uninsured motorist coverage to insured, who was injured while operating vehicle in violation of order of suspension, since § 3425 precludes insurer from canceling or failing to renew policy based on administrative suspension but does not extend to operation of exclusionary clauses in policies. Bouloukos v First Sec. Ins. Corp., 167 A.D.2d 366, 561 N.Y.S.2d 793, 1990 N.Y. App. Div. LEXIS 13626 (N.Y. App. Div. 2d Dep't 1990).

While New York's compulsory automobile insurance laws provide only for prospective cancellation of automobile insurance policies, thus abrogating insurer's common-law right to void policy from its inception on ground that it was obtained through fraud or misrepresentation, such rule is designed to protect innocent victims of motor vehicle accidents and does not bar action to void policy ab initio where it is alleged that claimant himself participated in fraudulent issuance of policy. Travelers Indem. Co. v Avelino, 191 A.D.2d 229, 594 N.Y.S.2d 249, 1993 N.Y. App. Div. LEXIS 2133 (N.Y. App. Div. 1st Dep't 1993).

In personal injury action arising out of accident that occurred in insured building, where general liability insurer denied coverage on ground that policy had been cancelled for nonpayment of premiums and building owners sued insurance broker for professional negligence and breach of contract stemming from alleged lack of insurance coverage, broker had standing to assert claims against liability insurer based on alleged deficiencies in notice of cancellation, since broker who negligently fails to procure coverage stands in shoes of insurer as concerns liability to insured. Macon v Arnlie Realty Co., 207 A.D.2d 268, 615 N.Y.S.2d 28, 1994 N.Y. App. Div. LEXIS 8136 (N.Y. App. Div. 1st Dep't 1994).

Liability insurer's blanket statement that it "has all the classic delay problems to deal with," without more, was insufficient to demonstrate actual prejudice for purpose of establishing its contention of laches as defense to claim based on alleged deficiencies in insurer's notice of cancellation. Macon v Arnlie Realty Co., 207 A.D.2d 268, 615 N.Y.S.2d 28, 1994 N.Y. App. Div. LEXIS 8136 (N.Y. App. Div. 1st Dep't 1994).

In action to recover proceeds under homeowners' policy which was canceled for nonpayment of premiums, summary judgment in favor of defendants was not precluded by plaintiffs' claim that policy was renewed when they tendered $150 to defendant insurance agent as payment for homeowners' insurance, where insurer had previously declined to reinstate policy and insurance agent had told plaintiffs that they would have to find another agent to obtain coverage, and insurance agent contended that $150 payment was for plaintiffs' auto insurance policy. Pardo v Central Coop. Ins. Co., 223 A.D.2d 832, 636 N.Y.S.2d 184, 1996 N.Y. App. Div. LEXIS 103 (N.Y. App. Div. 3d Dep't 1996).

Insurer was entitled to summary judgment dismissing action to recover benefits of fire insurance policy where its cancellation notice complied with CLS Ins § 3425(b), insured did not deny that he received cancellation notice or that he thereafter received and cashed refund of unearned premium, and property was destroyed by fire nearly 4 months after termination date of policy. Tannenbaum v Republic Ins. Co., 249 A.D.2d 460, 671 N.Y.S.2d 520, 1998 N.Y. App. Div. LEXIS 4312 (N.Y. App. Div. 2d Dep't), app. denied, 92 N.Y.2d 810, 680 N.Y.S.2d 55, 702 N.E.2d 840, 1998 N.Y. LEXIS 3094 (N.Y. 1998).

Insurer was not entitled to summary judgment dismissing action on homeowner's policy, based on insured's allegedly willful failure to cooperate, where insured submitted to examination under oath, supplied documents and records, offered what he believed were reasonable substitutes for discarded documents destroyed in water damage incident that was basis for his claim, and tried to explain his position regarding items that he could not, or would not, produce. Ingarra v General Accident/PG Ins. Co., 273 A.D.2d 766, 710 N.Y.S.2d 168, 2000 N.Y. App. Div. LEXIS 7460 (N.Y. App. Div. 3d Dep't 2000).

Insurer was not entitled to summary judgment dismissing action on homeowner's policy, based on insured's alleged fraud or concealment in his claims, even though insured's proof of loss and estimate included claims for damages to second floor of his townhouse, which floor was not damaged in present water damage incident, and insurer argued that some damages presently claimed resulted from prior water damage incident, where insured explained that he had no records from prior incident, that those records might have been among those destroyed or discarded as result of current damage, and that he did not go over proof of loss as carefully as he should have. Ingarra v General Accident/PG Ins. Co., 273 A.D.2d 766, 710 N.Y.S.2d 168, 2000 N.Y. App. Div. LEXIS 7460 (N.Y. App. Div. 3d Dep't 2000).

Insureds who settled their breach of contract action against their property insurer were entitled to dismissal of insurer's interpleader action against them where (1) at time of stipulation of settlement, insurer knew that other parties had potential claims on insurance proceeds, but insurer chose to settle and obtained releases only from subject insureds and their attorney, (2) insurer had not sought to vacate stipulation but merely obtained temporary restraining order in interpleader action that prevented parties to stipulation from entering judgment in breach of contract action, and (3) insurer would not be allowed to use interpleader action to circumvent stipulation. Charter Oak Fire Ins. Co. v Borrelli, 273 A.D.2d 797, 709 N.Y.S.2d 299, 2000 N.Y. App. Div. LEXIS 6702 (N.Y. App. Div. 4th Dep't 2000).

Property insurer that brought interpleader action was not entitled to order discharging it from liability to insureds and their attorney in exchange for its deposit of $323,000 with county treasurer where (1) by stipulation of settlement in insureds' breach of contract action against insurer, that sum was owed directly to insureds and their attorney, (2) any amounts disbursed to county treasurer or other possible claimants would diminish amount of proceeds that insureds and their attorney would receive, and (3) stipulation would not be altered without showing of sufficient cause to invalidate contract, such as fraud, collusion, mistake, or accident. Charter Oak Fire Ins. Co. v Borrelli, 273 A.D.2d 797, 709 N.Y.S.2d 299, 2000 N.Y. App. Div. LEXIS 6702 (N.Y. App. Div. 4th Dep't 2000).

Property insurer that brought interpleader action was not entitled to vacatur of judgment entered in insureds' breach of contract action against it where insurer did not move to vacate stipulation of settlement entered in breach of contract action, and there was no impediment to entry of judgment on stipulation; rather, insureds were entitled to dismissal of interpleader action. Charter Oak Fire Ins. Co. v Borrelli, 273 A.D.2d 797, 709 N.Y.S.2d 299, 2000 N.Y. App. Div. LEXIS 6702 (N.Y. App. Div. 4th Dep't 2000).

Recovery under "employee dishonesty" endorsement of property insurance policy was not barred by provision excluding coverage for "salaries, commissions, fees, bonuses, . . . or other benefits earned in the normal course of employment" where (1) insured's comptroller embezzled funds from payroll account over which he had sole control by secretly and fraudulently paying himself unauthorized and excessive salary, commissions, and bonuses, (2) policy protected against embezzlement or theft by employees, and (3) comptroller committed pure embezzlement. Klyn v Travelers Indem. Co., 273 A.D.2d 931, 709 N.Y.S.2d 780, 2000 N.Y. App. Div. LEXIS 6801 (N.Y. App. Div. 4th Dep't 2000).

Provision of lease releasing landlord from liability was ineffective by its own terms where it provided that "In the event that Lessee suffers loss or damage for which Lessor would be liable, and Lessee carries insurance which covers such loss or damage and such insurance policy or policies contain a waiver of subrogation against the Landlord, then in such event Lessee releases Lessor from any liability with respect to such loss or damage," and although relevant property insurance policy authorized insured to "waive your rights against another in writing...[p]rior to a loss," it did not contain any language that effected waiver of subrogation against landlord. Continental Ins. Co. v 115-123 West 29th St. Owners Corp., 275 A.D.2d 604, 713 N.Y.S.2d 38, 2000 N.Y. App. Div. LEXIS 9029 (N.Y. App. Div. 1st Dep't 2000).

Landlord was entitled to summary judgment dismissing action by tenant's insurer for negligence and breach of contract where those claims were precluded by "waiver of subrogation" clause in insurance policy issued by insurer to tenant. Atl. Mut. Ins. Co. v

Soiefer Bros. Realty Corp., 281 A.D.2d 441, 721 N.Y.S.2d 554, 2001 N.Y. App. Div. LEXIS 2322 (N.Y. App. Div. 2d Dep't 2001).

Neither party was entitled to summary judgment in action to recover under commercial property insurance policy issued to plaintiff's former tenant, even though plaintiff was named as loss payee under property coverage portion of policy, where record contained only some provisions of policy applicable to loss payee under property coverage portion of policy and contained none of common policy conditions and commercial property conditions applicable to property coverage. White v Commercial Union Ins. Co., 281 A.D.2d 877, 722 N.Y.S.2d 193, 2001 N.Y. App. Div. LEXIS 2744 (N.Y. App. Div. 4th Dep't 2001).

Insurance agency was entitled to summary judgment dismissing action for breach of contract and breach of duty to procure appropriate insurance coverage for plaintiff's business where (1) defendant's agent made unsolicited call at plaintiff's store and offered to procure business owner's insurance policy, (2) plaintiff never requested any specific coverage, allegedly relying on expertise of agent, (3) after plaintiff bought policy that excluded coverage for employee dishonesty, plaintiff's employee stole money from store, (4) parties had no special relationship that would entitle plaintiff to rely on agent's representations that new policy was "a better policy" than plaintiff's existing policy, and (5) once plaintiff received declarations pages and insurance policy showing coverage, plaintiff had conclusive presumptive knowledge of terms and limits of policy. Chase's Cigar Store v Stam Agency, 281 A.D.2d 911, 722 N.Y.S.2d 320, 2001 N.Y. App. Div. LEXIS 2724 (N.Y. App. Div. 4th Dep't 2001).

Insured was entitled to summary judgment in action to recover on fire insurance policy where, on renewal of policy, insurer failed to inform insured of changes in vacancy exclusion clause that reduced coverage, and thus insurer was bound by coverage provided under policy as originally issued. Janes v N.Y. State Cent. Mut. Ins. Co., 281 A.D.2d 982, 722 N.Y.S.2d 669, 2001 N.Y. App. Div. LEXIS 2817 (N.Y. App. Div. 4th Dep't 2001).

Property insurance policy, which was canceled on January 28, 1989, was not revived by insurer's mistaken June 15, 1989, payment of insured's claim for March 31, 1989, loss. 8112-24 18th Ave. Realty Corp. v Aetna Cas. & Sur. Co., 240 A.D.2d 287, 659 N.Y.S.2d 17, 1997 N.Y. App. Div. LEXIS 6659 (N.Y. App. Div. 1st Dep't 1997).

In action by plaintiffs who sued their current insurance carrier after their house burned down and insurance carrier refused to pay more than ½ of their loss on ground that their former insurance carrier was liable for remainder of loss because it did not effectively cancel earlier policy covering house, defendant insurer (as replacing insurer) had cause of action against plaintiffs' former insurer as though earlier policy remained in effect. Iaia v Graphic Arts Mut. Ins. Co., 175 Misc. 2d 838, 670 N.Y.S.2d 683, 1997 N.Y. Misc. LEXIS 679 (N.Y. Sup. Ct. 1997).

In action by plaintiffs whose current insurance carrier refused to pay more than ½ of their casualty loss on basis that their former insurance carrier did not effectively cancel earlier policy covering same property and therefore was liable for remainder of loss, former insurer was not entitled to summary judgment dismissing claims for penalties and attorney's fees because, having improperly attempted to terminate plaintiffs' policy in violation of CLS Ins § 3425 and then forcing plaintiffs to bear cost of litigating case, it clearly failed to eliminate any triable issues of fact regarding those claims. Iaia v Graphic Arts Mut. Ins. Co., 175 Misc. 2d 838, 670 N.Y.S.2d 683, 1997 N.Y. Misc. LEXIS 679 (N.Y. Sup. Ct. 1997).

Homeowner's insurer did comply with 11 NYCRR § 216.6(c) where it did not issue denial of claim within 15 business days, notify insured of need for additional time, or present reasons for position that additional time would be needed. Eveleno v Colonial Penn Ins. Co., 188 Misc. 2d 454, 728 N.Y.S.2d 907, 2001 N.Y. Misc. LEXIS 218 (N.Y. Civ. Ct. 2001).

"Non-waiver agreement" providing that insurer and insured under homeowner's policies agreed that "any action taken to investigate any circumstance connected with the claim, the issuance or status of the insurance, the ascertainment of value and loss of any other matter related thereto, shall not be construed to waive, modify, invalidate or forfeit any of their rights under the policy (ies)" did not satisfy requirements of 11 NYCRR § 216.6(c), relating to timely notification of acceptance or rejection of claims, did not allow insurer to unreasonably delay rights of insured to detriment of insured, and was not waiver of insured's right to insist on compliance with regulations. Eveleno v Colonial Penn Ins. Co., 188 Misc. 2d 454, 728 N.Y.S.2d 907, 2001 N.Y. Misc. LEXIS 218 (N.Y. Civ. Ct. 2001).

Failure of insurer to promptly disclaim coverage under specific exclusion, in homeowner's policy covering collapsed pool, of damage caused by low water level violated standards for prompt, fair, and equitable settlements set forth in CLS Ins § 2601 and 11 NYCRR § 216.6 and precluded insurer from denying coverage where insured did not breach policy condition, dynamic situation such as pool collapse requires rapid investigation and repair to avoid further damage, and insurer could have obtained additional time by merely sending notice to insured. Eveleno v Colonial Penn Ins. Co., 188 Misc. 2d 454, 728 N.Y.S.2d 907, 2001 N.Y. Misc. LEXIS 218 (N.Y. Civ. Ct. 2001).

Property insurer's disclaimer of coverage was valid and enforceable where it was based on clear and unambiguous policy language excluding coverage if insured's building were vacant for 60 consecutive days before loss, and record showed that building was vacant, within meaning of policy, for requisite period. Nicholas J. Masterpol, Inc. v Travelers Ins. Cos., 273 A.D.2d 817, 711 N.Y.S.2d 88, 2000 N.Y. App. Div. LEXIS 6714 (N.Y. App. Div. 4th Dep't 2000).

Property insurer was entitled to summary judgment dismissing insured's action on policy where insured had conclusive presumptive knowledge of terms of policy before loss and took no action to close gap in coverage resulting from vacancy exclusion, and insured's request for insurance neither triggered duty of insurer to recommend coverage in event of vacancy nor relieved insured of its duty to read policy, which contained express exclusion for vacancy. Nicholas J. Masterpol, Inc. v Travelers Ins. Cos., 273 A.D.2d 817, 711 N.Y.S.2d 88, 2000 N.Y. App. Div. LEXIS 6714 (N.Y. App. Div. 4th Dep't 2000).

Plaintiff's contract claim for misappropriation of policy "expirations" should not have been dismissed because the amended complaint set forth the terms allegedly breached and defendants did not contend that any provision of the agreement negated such claim, and plaintiff's claims for commissions allegedly owed, including claims for unpaid commissions during the 90-day period after plaintiff's receipt of defendants' notice of termination, override commissions owed pursuant to an addendum to the agreement, and commissions owed pursuant to N.Y. Ins. Law § 3425(j), were insufficiently pleaded under N.Y. C.P.L.R. 3013, and plaintiff did not cure the defect, so plaintiff was granted leave to amend its breach of contract cause of action solely as to the commissions' claims. Automobile Coverage, Inc. v American Intl. Group, Inc., 42 A.D.3d 405, 839 N.Y.S.2d 916, 2007 N.Y. App. Div. LEXIS 8787 (N.Y. App. Div. 1st Dep't 2007).

Private passenger automobile insurance coverage and homeowner's insurance coverage can be bound on Internet by authorized New York insurer following completion on Internet of electronic application that has been electronically signed by applicant; it is acceptable for insurer that binds such insurance coverage on Internet to give insured option to print insurance binder off Internet, and insurer need not separately file electronic version of binder that will be transmitted over Internet. Insurance Department, Opinions of General Counsel, Opinion Number 00-05-15.

As to those insurance policies which are subject to Insurance Department Regulation No. 90 (fire insurance, fire and extended coverage insurance, and private passenger automobile insurance subject to CLS Ins § 3425), if insurer chooses to send more than one notice of refusal to issue coverage, all notices of refusal to issue coverage mailed or delivered to applicant by insurer, including notice over Internet, must contain anti-redlining notice as prescribed in regulation; neither anti-redlining statute nor regulation applies to homeowner's insurance, and redlining statement is not required in connection with such policies. Insurance Department, Opinions of General Counsel, Opinion Number 00-05-15.

As to those insurance policies which are subject to Insurance Department Regulation No. 90 (fire insurance, fire and extended coverage insurance, and private passenger automobile insurance subject to CLS Ins § 3425), notices of refusal to issue coverage must be mailed or delivered to applicant, which can be done by electronic means if applicant consents to use of electronic technology, not more than 30 days after application is received by insurance agent or broker; regulatory requirements for mailing or delivery of notice of refusal to issue does not apply to homeowner's policies. Insurance Department, Opinions of General Counsel, Opinion Number.

It constitutes prohibited discrimination in benefits under CLS Insurance Law Art 23 where insurer offers more limited choice of premium installment payment plans to its new applicants (who deal with insurer through agents who have neither preferred agent nor exclusive agent contracts) than is made available to other new applicants (who deal with insurer through preferred or exclusive agents); status of agent is not valid underwriting criteria. Insurance Department, Opinions of General Counsel, Opinion Number 00-07-12.

Insurer that offers only paid-in-full payment option to certain policyholders on renewal, based on underwriting criteria, may or may not be violating law; if criteria used by insurer constitutes discrimination in benefits or is prohibited by law, its use would violate applicable law, but if insurer can show that criteria used relates to risk being insured, there would be no violation of law. Insurance Department, Opinions of General Counsel, Opinion Number 00-07-12.

Insurer that limits choice of premium installment payment plans, which were previously available to insured, on renewal or continuance of insured's policy, and after insured's agent or broker was terminated by insurer, violates policy continuation and renewal rights of affected insureds in contravention of CLS Ins § 3425(j). Insurance Department, Opinions of General Counsel, Opinion Number 00-07-12.

New York Insurance Law neither authorizes nor prohibits insurers from charging fees with relation to installment premium payment plan; although installment fees are not part of insurer's premium schedule, which must be filed with and approved by Insurance Department, schedule of such fees should be submitted to Department, along with policy forms, for informational purposes. Insurance Department, Opinions of General Counsel, Opinion Number 00-07-18.

Insurer may cancel policy for non-payment of installment fees, so long as insured had been made aware of contractual obligation to pay such fees. Insurance Department, Opinions of General Counsel, Opinion Number 00-07-18.

Insurer may cancel policy, under CLS Ins §§ 3425(a)(10) and 3426(a)(3), if insured fails to pay billing and late fees, so long as insured is aware of its contractual obligation to pay fees. Insurance Department, Opinions of General Counsel, Opinion Number 01-01-05.

On agency billed premiums, agent or broker may not request nonpayment cancellation from insurer if agency has remitted premium, but insured has not paid agency; further, agent or broker may not request nonpayment cancellation from insurer if agency collected premium payment check from insured, remitted producer's check to insurer, and insured's check to producer was subsequently dishonored by bank for insufficient funds or stop payment. Insurance Department, Opinions of General Counsel, Opinion Number 01-01-09.

Policy is obtained primarily for "personal, family or household" purposes under Regulation 169 if majority of premium is attributable to such purposes and insured is individual; in certain circumstances, insurance policies that are subject to CLS Ins § 3425 are not primarily for "personal, family, or household purposes," and thus privacy notices would not be mandated by regulation. Insurance Department, Opinions of General Counsel, Opinion Number 01-04-11.

Open cargo policy to be purchased by shipper's agent that provided coverage to all of its shipping customers whom elected to buy coverage would constitute impermissible group policy in violation of CLS Ins § 3425. Insurance Department, Opinions of General Counsel, Opinion Number 01-06025.

Insurer is not permitted under CLS Ins § 3425 from canceling policyholder's personal umbrella liability policy because underlying automobile liability coverage has been canceled by policyholder. Insurance Department, Opinions of General Counsel, Opinion Number 01-08-09.

Insurance Law does not require homeowners insurance policy to provide pollution coverage, whether such coverage arises from discharge of oil from homeowner's above-ground or underground oil tank or otherwise, for damage to insured's own property. Insurance Department, Opinions of General Counsel, Opinion Number 01-10-15.

Insurer's obligation under CLS Ins § 3425(j) to continue to offer automobile insurance policy through terminated insurance agent or broker is otherwise subject to insurer's right to nonrenew or cancel policy in accordance with other provisions of CLS Ins § 3425. Insurance Department, Opinions of General Counsel, Opinion Number 01-09-05.

Under CLS Ins §§ 3425 and 3426, insurance policy may be canceled for non-payment of late payment fee, reinstatement fee, or premium installment fee. Insurance Department, Opinions of General Counsel, Opinion Number 02-01-06.

Under CLS Ins §§ 3425 and 3426, effective date of cancellation for non-payment may be same as policy's inception or renewal date. Insurance Department, Opinions of General Counsel, Opinion Number 02-01-06.

Except as to assigned risk automobile insurance policy, insurance agent or broker that advances premium payment for its insured may not order insurer to cancel policy when insured fails to reimburse agent or broker for premium advanced. Insurance Department, Opinions of General Counsel, Opinion Number 02-01-06.

Policy is obtained primarily for "personal, family or household" purposes under Regulation 169 (11 NYCRR § 420.0-420.24) if majority of premium is attributable to such purposes and insured is individual; in certain circumstances, insurance policies that are subject to CLS Ins § 3425 are not primarily for "personal, family, or household purposes" and thus privacy notices would not be mandated by regulation. Insurance Department, Privacy Opinions of General Counsel, Opinion Number 01-04-11.

Pursuant to 11 NYCRR §§ 154.2 and 154.3 (Regulation 150), automobile insurance policy that has 3-year required policy period under CLS Ins § 3425 may be "uptiered" by insurer only at end of required policy period, not on interim anniversary dates. Insurance Department, Opinions of General Counsel, Opinion Number 02-02-28.

Executed letter agreement between insurer and producer cannot limit termination rights of sub-producers provided by CLS Ins § 3425(j)(1)(C) regarding new business by terminated sub-producers. Insurance Department, Opinions of General Counsel, Opinion Number 02-05-05.

If sub-producer becomes insolvent, abandons business, or commits gross or willful misconduct, or fails to pay over to insurer monies due to insurer after written demand, and if such acts are committed subsequent to termination but during period requiring acceptance of new business, insurer's obligation to continue to accept new business for 120-day period following date of notice of termination would not continue to apply on insurer providing notice to sub-producer. Insurance Department, Opinions of General Counsel, Opinion Number 02-05-05.

Material change in covered pet's health does not constitute physical change in property as ground for cancellation of policy; however, if pet develops condition during term of policy that insurer considers as being "uninsurable in accordance with the insurer's objective, uniformly applied underwriting standards," and policy specifically excludes that condition, it could be considered to be physical change under CLS Ins § 3425(c)(2)(E), and thus ground for cancellation of policy. Insurance Department, Opinions of General Counsel, Opinion Number 02-05-12.

Depending on type of insurance sold and agent's contract, insurer generally must pay full first year commission on insurance policy sold by licensed insurance agent who has terminated agency relationship with general agent before all premium pay-

ments have been made by insured. Insurance Department, Opinions of General Counsel, Opinion Number 02-06-25.

Under CLS Ins § 3425(j)(1)(A), if insurer were to terminate its agent in first year of 3-year required policy period of personal lines insurance policy, insurer must offer to insured option to renew policy through terminated agent for at least policy's second year. Insurance Department, Opinions of General Counsel, Opinion Number 02-06-26.

If insured were to request that insurer renew insurance policy's third year of 3-year required policy period through terminated agent, insurer must renew policy's third year through terminated agent. Insurance Department, Opinions of General Counsel, Opinion Number 02-06-26.

Insurer may non-renew or conditionally renew 2 percent of its business written on or before August 1, 2001 based on total number of insurer's covered policies in force at last year's-end of each year in each of insurer's rating territories in use in New York. Insurance Department, Opinions of General Counsel, Opinion Number 02-06-32.

Insurer may non-renew or conditionally renew one additional policy written in territory on or before August 1, 2001, in excess of 2 percent limit, for every 2 new automobile policies written on or after August 2, 2001, in that particular territory. Insurance Department, Opinions of General Counsel, Opinion Number 02-06-32.

Insurer is required to submit CLS Ins § 3425(m)(2) data in its 2001 year end report. Insurance Department, Opinions of General Counsel, Opinion Number 02-07-04.

Under CLS Ins § 3425, as to personal lines insurance policy, same requirements that apply to automobile insurance policies originally issued on or after August 2, 2001 apply to personal lines insurance policies, with only difference that those rules apply to all personal lines insurance policies no matter when such personal lines insurance policies were originally issued. Insurance Department, Opinions of General Counsel, Opinion Number 02-10-23.

Under CLS Ins § 3425(j)(1)(B), "the insurer shall...at the specific request of the insured, offer to continue the policy through the terminated agent or broker for three successive one year policy periods"; insured need only make such request once, at appropriate time. Insurance Department, Opinions of General Counsel, Opinion Number 02-10-23.

Under CLS Ins § 3425(j)(1)(B), "the insurer shall...at the specific request of the insured, offer to continue the policy through the terminated agent or broker for three successive one year policy periods"; there is no statutorily mandated format or method of service for making such request. Insurance Department, Opinions of General Counsel, Opinion Number 02-10-23.

ABC Casualty Insurance Company could amend its by-laws to require ABC Bureau membership for new business but not for renewals. Insurance Department, Opinions of General Counsel, Opinion Number 02-11-06.

ABC Casualty Insurance Company could amend its by-laws to cease requiring ABC Bureau membership in certain states. Insurance Department, Opinions of General Counsel, Opinion Number 02-11-06.

ABC Casualty Insurance Company could amend its by-laws to require ABC Bureau membership for certain kinds of insurance but not for automobile or homeowners policies. Insurance Department, Opinions of General Counsel, Opinion Number 02-11-06.

If ABC Casualty Insurance Company amended its by-laws so that it was no longer insurer that was organized for sole and exclusive purpose of providing insurance policies to members of organization, it would no longer be able to use CLS Ins § 3425(g) as basis for non-renewal of automobile liability policy. Insurance Department, Opinions of General Counsel, Opinion Number 02-11-06.

Environmental protection insurance policy written to homeowner who is natural person that constitutes covered policy of personal lines insurance under CLS Ins § 3425(a)(2) may not be written in Free Trade Zone, and thus is not excepted from New York filing requirements; such policy does not constitute Class 2 risk. Insurance Department, Opinions of General Counsel, Opinion Number 02-11-15.

Total number of policies in-force at year-end 2001 and for subsequent years for purposes of 2 percent rule under CLS Ins § 3425(f), includes both policies that were written prior to August 1, 2001 and policies that were written after August 1, 2001, even though those written after August 1, 2001 are not subject to 2 percent rule; similarly, total number of policies in-force at year-end 2001 and for subsequent years for purposes of two-for-one calculation, includes policies written after August 1, 2001, even though those written after August 1, 2001 can not be non-renewed under two-for-one rule. Insurance Department, Opinions of General Counsel, Opinion Number 03-03-03.

Insurance Regulation 150 (11 NYCRR § 154), in § 154.3(e) provides that 2-for-one new business credit in CLS Ins § 3425(f)(2) shall apply to 2 percent and 3 percent limitations in that for every 2 new policies written, insurer may either non-renew or conditionally renew one additional policy in excess of 2 percent limitations or may uptier one additional policy in excess of 3 percent limitation. Insurance Department, Opinions of General Counsel, Opinion Number 03-03-03.

Regarding requirement to continue to offer policy through terminated agent or broker under CLS Ins § 3425(j)(1)(B), insurer, if it does not receive specific request from insured to continue to renew policy through terminated agent or broker, may, on renewal, continue policy with another agent or broker or directly with insured and not pay any further commission to terminated agent/broker; there is no statutorily mandated format or method of service for making this request, and thus insurer may not required to request be in writing. Insurance Department, Opinions of General Counsel, Opinion Number 03-03-03.

Whether insurer made automobile insurance policy, which is subject to CLS Ins § 3425, to exclude collision coverage for particular driver depends, in part, on insurer obtaining insured's signature acknowledging that collision coverage is not provided when specific individual drives motor vehicle. Insurance Department, Opinions of General Counsel, Opinion Number 03-04-20.

Insurance Department Circular Letter No. 4 (1984) is still in effect and is based on statutory language contained in CLS Ins § 3425(j); see also CLS Ins § 3425(m) and (n) for new additional requirements. Insurance Department, Opinions of General Counsel, Opinion Number 03-04-21.

Under New York law, automobile liability policy that satisfies financial responsibility requirements of Vehicle and Traffic Law cannot be voided ab initio even if fraudulently obtained; thus, coverage would exist until policy was canceled in accordance with statutorily mandated procedure. Insurance Department, Opinions of General Counsel, Opinion Number 03-05-03.

There is no statutory prohibition against insurer renewing non-commercial motor vehicle policy with premium change within applicable statutorily required policy period of renewal. Insurance Department, Opinions of General Counsel, Opinion Number 03-08-18.

Policy issued outside New York on excess line basis insuring not-for-profit organization and affiliated agencies would not be permissible in regard to New York members since, as group policy, aggregate limit is not allowed. Insurance Department, Opinions of General Counsel, Opinion Number 03-08-15.

Insurer may non-renew personal automobile insurance policy originally issued February 23, 2001 for reason that insurer terminated its non-exclusive relationship with insured's agent in July of 2002. Insurance Department, Opinions of General Counsel, Opinion Number 04-03-03.

Insurer may request insured to complete medical statement as precondition to increasing coverage limit of her umbrella insurance policy only if information that insurer seeks from insured is relevant to underwriting risk for which insured seeks increased umbrella policy coverage. Insurance Department, Opinions of General Counsel, Opinion Number 04-06-20.

It cannot be said that in every case property becoming unoccupied is result of willful or reckless acts or omissions so as to permit cancellation of homeowners' policy under CLS Ins § 3425

or § 3426(c)(1)(D). Insurance Department, Opinions of General Counsel, Opinion Number 04-04-21.

Fact that insured became ill and went into hospital, and it was unclear whether she was going to be returning to premises, would not be considered willful or reckless so as to permit cancellation of homeowners' policy under CLS Ins § 3425 or § 3426(c)(1)(D). Insurance Department, Opinions of General Counsel, Opinion Number 04-04-21.

Under CLS Ins § 3425(h)(3), insurer must send copy of notice of cancellation, reduction of limits, substitution of policy form, elimination of coverage, conditioned renewal or intention not to renew to insured and insured's broker in transaction where insured's broker places business through agent; however, copies need not be sent to agent. Insurance Department, Opinions of General Counsel, Opinion Number 04-07-16.

When insurer cancels policy of homeowners insurance within first 60 days it is in effect, and property loss occurs after cancellation notice is issued but prior to effective date of cancellation, insurer may subsequently deny payment on insured's claim based on material misrepresentation in inception of policy, when insurer was aware of such facts at time it chose to prospectively cancel coverage. Insurance Department, Opinions of General Counsel, Opinion Number 04-08-13.

There is no provision of Insurance Law which governs whether insurer, having elected to cancel coverage prospectively under CLS Ins § 3425, may subsequently decide instead to rescind coverage under CLS Ins § 3105, thereby declining coverage on loss occurring during period coverage remained in effect under prospective cancellation. Insurance Department, Opinions of General Counsel, Opinion Number 04-08-13.

Cancellation under CLS Ins § 3425 or § 3426 would terminate contract on specific date prospectively, whereas rescission under CLS Ins § 3105 would nullify contract as if it had never existed; these are distinct and separate remedies that insurer may elect and no minimum notice for rescission is mandated. Insurance Department, Opinions of General Counsel, Opinion Number 04-08-13.

Neither CLS Ins § 3425 nor § 3426 expressly precludes use of rescission by insurer. Insurance Department, Opinions of General Counsel, Opinion Number 04-08-13.

CLS Ins § 3425(c)(1)(B) permits insurance company to cancel automobile policy if driver's license of named insured, or any other person who customarily operates automobile insured under policy, is suspended or revoked during policy period subject to certain exceptions; in addition, insurer may also non-renew policy pursuant to CLS Ins § 3425. Insurance Department, Opinions of General Counsel, Opinion Number 04-09-02.

Agent or broker, not licensed as premium finance agency, who has advanced premium payments for insured may neither cancel nor request insurer to cancel policy because insured defaults in making payments to agent or broker. Insurance Department, Opinions of General Counsel, Opinion Number 04-09-08.

Section 18(4) of Rules of New York Automobile Insurance Plan (2001) permits producer to order cancellation if insured's check is dishonored because producers are required under Plan to make immediate payment to insurer on receipt of payment by insured; Plan, in effect, requires (rather than permits) producer to advance premium payment when it has received payment in form of check that has not yet cleared in producer's premium account, and thus it expressly provides for cancellation in event that bank on which it was drawn subsequently dishonors insured's check. Insurance Department, Opinions of General Counsel, Opinion Number 04-09-08.

Assigned risk automobile insurance policies are not subject to CLS Ins § 3425 or § 3426. Insurance Department, Opinions of General Counsel, Opinion Number 04-09-08.

Eight-day maximum for acquiring mandatory photo inspection applies only to insurers who, under CLS Ins § 3425, must be required to provide automobile physical damage coverage on additional or replacement vehicle and elected to provide 3-day deferral by filing policy endorsement with Superintendent of Insurance; furthermore, it only applies to automobiles insured by insurer for at least 12 months prior to replacement date. Insurance Department, Opinions of General Counsel, Opinion Number 04-11-11.

If insured's act or omission results in insignificant or minor increase in risk, it should not trigger cancellation of homeowners policy under CLS Ins § 3425(c)(2)(D) or (E) on grounds that it was willful or reckless. Insurance Department, Opinions of General Counsel, Opinion Number 04-11-20.

Both swimming pools and trampolines are fairly common household additions and even if hazard could be increased by their addition, one cannot generally characterize such addition as being "reckless" within meaning of CLS Ins § 3425(c)(2)(D); however, failure of insured to take ordinary and proper safety precautions, such as having fence around pool or trampoline, may constitute reckless behavior if insured, after being notified of increased hazard or danger, fails or refuses to take measures to ensure safety of pool or trampoline. Insurance Department, Opinions of General Counsel, Opinion Number 04-11-20.

Insurer should not characterize mere addition of swimming pool or trampoline as being "willful" under CLS Ins § 3425(c)(2)(D) in absence of insurer having specifically advised insured that insurer would not insure such risk; moreover, if policy contains specific exclusion, as many do for trampolines, there would not appear to be any greater hazard insured against. Insurance Department, Opinions of General Counsel, Opinion Number 04-11-20.

Addition of above-ground swimming pool or trampoline would not be physical change in property under CLS Ins § 3425(c)(2)(E) since there has been no change to dwelling or other permanent structure; however, in-ground pool would be physical change. Insurance Department, Opinions of General Counsel, Opinion Number 04-11-20.

Addition of in-ground swimming pool would be grounds for cancellation under CLS Ins § 3425(c)(2)(E), provided however, that insurer considers such risk to be uninsurable in accordance with insurer's objective, uniformly applied underwriting standards in effect at time when policy was issued or last voluntarily renewed; however, since insurers commonly insure properties that have in-ground pools, there is usually no reason for insured to suspect that insurer would consider that addition of pool would make risk uninsurable, and thus it may be advisable that insurer initially advise insured that risk would become uninsurable if pool were added. Insurance Department, Opinions of General Counsel, Opinion Number 04-11-20.

Mere addition of home business would not in of itself be either reckless or willful act within meaning of CLS Ins § 3425(c)(2)(D); however, size and scope of business would clearly be relevant factor, and if insured conducted business in manner that was unsafe or unlawful or where insurer has advised insured that business would violate insurer's underwriting guidelines, or if insured has reason to suspect that operation of such business would violate underwriting guidelines, then such conduct may be reckless or willful. Insurance Department, Opinions of General Counsel, Opinion Number 04-11-20.

With respect to CLS Ins § 34252(c)(2)(E), mere addition of home business would not constitute physical changes in property except if there have been alterations to property, which changes would result in property becoming uninsurable in accordance with insurer's objective, uniformly applied underwriting standards in effect at time when policy was issued or last voluntarily renewed. Insurance Department, Opinions of General Counsel, Opinion Number 04-11-20.

Terminated agency contract between insurer and terminated agent may set forth specified commission rates; however, agent's rights to continue to collect commissions following termination of contract are controlled by CLS Ins § 3425(j)(1)(D) at "the insurer's prevailing commission rate," unless contract provides for higher amount. Insurance Department, Opinions of General Counsel, Opinion Number 04-12-22.

With regard to 15-day grace period, premium is generally considered paid as of date of postmark. Insurance Department, Opinions of General Counsel, Opinion Number 05-02-11.

Under "postal acceptance rule," premium is generally considered paid as of date of postmark, unless insurer requires payment

by particular method or otherwise limits payment methods. Insurance Department, Opinions of General Counsel, Opinion Number 05-02-19.

CLS Ins § 3425(j) provides terminated insurance agent with certain rights regarding business that it produced for insurer; however, under CLS Ins § 3425(m), different provisions of § 3425(j) apply based on when policy was first written. Insurance Department, Opinions of General Counsel, Opinion Number 05-02-30.

Agent's rights under CLS Ins § 3425(j) neither enhance nor diminish rights accorded to insureds or insurers under CLS Ins § 3425; thus, insured may cancel or non-renew policy that had been placed by terminated agent at any time at his or her discretion, and insurer may cancel or non-renew policy that had been placed by terminated agent based on any of grounds, and in manner, provided by other applicable provisions of § 3425, unimpeded by § 3425(j). Insurance Department, Opinions of General Counsel, Opinion Number 05-02-30.

CLS Ins § 3425(j) does not place affirmative obligation on part of insurer to send additional letter to insured whose producer has been terminated by insurer, notifying insured of right to specifically request renewal through terminated agent or broker beyond initial time period provided by § 3425(j), provided that insurer has satisfied notification requirements required by § 3425(j) when insured's producer was terminated. Insurance Department, Opinions of General Counsel, Opinion Number 05-03-08.

Insurer may not refuse to issue or renew personal lines automobile or homeowners insurance policy solely on ground of advanced age of applicant or insured; however, insurer may consider age in conjunction with other relevant factors (e.g., health of applicant or insured) when underwriting particular risk. Insurance Department, Opinions of General Counsel, Opinion Number 04-10-07.

Insurer may refuse to issue or renew travel insurance policy solely on ground of advanced age of applicant or insured; however, insurer may such underwriting decision must not be unfairly discriminatory, and must be based on sound actuarial principles or related to actual or reasonably anticipated experience. Insurance Department, Opinions of General Counsel, Opinion Number 04-10-07.

Whether 70-year-old applicant will pay more or less than, or same amount as, 45-year-old applicant for same insurance policy depends on rating classifications (which must be, inter alia, supported by and reflective of actuarially sound statistical data) of insurer that is underwriting risk. Insurance Department, Opinions of General Counsel, Opinion Number 04-10-07.

Policy originally written between /2001 and 6/25/2003 will have required policy period renewal date that falls outside 3-year required policy period; after 3-year required policy period, such policy, if renewed, becomes subject to one-year required policy period of CLS Ins § 3425, including CLS Ins § 3425(j)(1)(B) requirements where insurer must offer to continue policy through terminated agent for 3 successive one-year policy periods, which commence one year from date when termination notice was mailed or delivered. Insurance Department, Opinions of General Counsel, Opinion Number 05-02-30.

Insurer may cancel entire insurance policy for non-payment of premium when annual premium for original policy already in effect has been paid but additional premium billed, due to increase in amount of building fire coverage, has not been paid; however, insurer may not cancel entire automobile policy when additional premium is due is for addition of physical damage coverage to liability-only policy or addition of additional automobile. Insurance Department, Opinions of General Counsel, Opinion Number 05-05-22.

Provision in agency agreement purporting to waive rights contained in CLS Ins §§ 3425(j) and 3426(k) is invalid. Insurance Department, Opinions of General Counsel, Opinion Number 06-01-21.

Producer's rights under CLS Ins § 3425(j)(1)(D) or § 3426(k)(2) for particular policy are subject to continuation of policy; insurer may cancel or non-renew policy as permitted under CLS Ins § 3425 or § 3426, or insured may cancel policy. Insurance Department, Opinions of General Counsel, Opinion Number 06-01-21.

Insurer may non-renew non-commercial or commercial automobile insurance policy should insured repeatedly make late payments, in accordance with CLS Ins §§ 3425(f) and 3426(e), respectively. Insurance Department, Opinions of General Counsel, Opinion Number 06-02-07.

Under CLS Ins §§ 3425 and 3426, insurer generally may non-renew policy for any legitimate underwriting reason not prohibited by law, and non-renewal based on late payment is not prohibited by law. Insurance Department, Opinions of General Counsel, Opinion Number 06-02-07.

Motor vehicle insurance policy may be cancelled for nonpayment of Motor Vehicle Law Enforcement Fee, since failure to pay such fee would be failure by insured to discharge obligation in connection with payment of premium, within meaning of both CLS Ins §§ 3425 and 3426. Insurance Department, Opinions of General Counsel, Opinion Number 06-04-03.

Although New York Automobile Insurance Plan rules do not contain definition of nonpayment of premium similar to that contained in CLS Ins §§ 3425 and 3426, Plan rules would be construed so as to permit insurer to cancel policy for failure to pay Motor Vehicle Law Enforcement Fee with premium. Insurance Department, Opinions of General Counsel, Opinion Number 06-04-03.

When insurer obtains "take-out" credit for policy that had been written in New York Automobile Insurance Plan, current rules of Plan require insurer to pay insurance producer no less than Plan rate of commission on every renewal of policy, subject to certain limitations. Insurance Department, Opinions of General Counsel, Opinion Number 06-02-12.

CLS Ins § 3425(j) establishes minimum amount of commission that insurer may pay to terminated producer, not maximum; insurer may always agree by contract or otherwise to pay more than amount required by § 3425(j). Insurance Department, Opinions of General Counsel, Opinion Number 06-02-12.

Under CLS Ins § 2351(a), renter policies are not homeowners policies for purposes of reporting homeowners policies in force under Regulation 154 (11 NYCRR Part 19; implementing CLS Ins § 3425(o)); however, mobile home policies are homeowners policies for purposes of such reporting requirements. Insurance Department, Opinions of General Counsel, Opinion Number 06-04-16.

Renters policy issued to person insures renter's property but does not insure real property itself; thus, renters policy is not homeowners policy under CLS Ins § 3425(2)(A), (B) and (C), which covers "loss of or damage to real property used predominantly for residential purposes." Insurance Department, Opinions of General Counsel, Opinion Number 06-04-16.

If mobile home is affixed to land, whether or not owned by insured mobile home owner, it is real property; however, even where mobile home is not affixed to land, mobile home owner has insurable interest in residential unit in which insured resides—that is, mobile home itself—since, as defined in CLS Ins § 3401, insurable interest shall include any lawful and substantial economic interest in safety or preservation of property from loss, destruction pecuniary damage, and thus fulfills requirements of CLS Ins § 3425(a)(2)(B) and (C), and CLS Ins § 2351(a). Insurance Department, Opinions of General Counsel, Opinion Number 06-04-16.

For purposes of meeting reporting requirements of Regulation 154 and CLS Ins § 3425(o)(2)(C), calculations are based on number of "homeowners policies in force"; although single policy may cover multiple dwellings, plain language of statute refers to number of actual policies issued. Insurance Department, Opinions of General Counsel, Opinion Number 06-04-16.

Except with respect to assigned risk automobile insurance policy, insurer may not cancel policy for non-payment of premium when insured's check that had been deposited in insurance producer's sweep account was dishonored and insurer had already withdrawn funds representing premium from producer's account. Insurance Department, Opinions of General Counsel, Opinion Number 06-05-12.

After cancellation notice for non-payment has been issued, premium is generally considered paid as of date it is postmarked. Insurance Department, Opinions of General Counsel, Opinion Number 06-07-08.

After cancellation notice for non-payment has been issued, premium is generally considered paid as of date when insured transmits payment electronically to insurer or agent or broker authorized to receive such payment. Insurance Department, Opinions of General Counsel, Opinion Number 06-07-08.

CLS Ins § 3425(e) restricts nonrenewal or conditional renewals and not cancellation of personal lines insurance policies to 3-year required policy period. Insurance Department, Opinions of General Counsel, Opinion Number 06-07-11.

On completion of 3-year required policy period (unless policy provides for greater period), insurer may issue notice of nonrenewal or conditional renewal for any reason, including reasons not listed in CLS Ins § 3425(c)(2); however, reasons must not otherwise be prohibited by law (such as race, religion, etc.) or by policy terms, and must be in accordance with insurer's uniformly applied underwriting rules. Insurance Department, Opinions of General Counsel, Opinion Number 06-07-11.

Renewal of homeowner's policy that includes increase in windstorm deductible from 2 percent to 5 percent constitutes conditional renewal under CLS Ins § 3425(d)(1). Insurance Department, Opinions of General Counsel, Opinion Number 06-08-17.

Under CLS Ins § 3425(d)(1), insurer must specifically call change in windstorm deductible in homeowner's policy to attention of insured and provide reasons for such change. Insurance Department, Opinions of General Counsel, Opinion Number 06-08-17.

For conditional renewal to be issued to become effective during 3-year required policy period for homeowner's policies, it may be based only on ground for which policy could have been cancelled; at end of required policy period, conditional renewal may be issued for any reason not prohibited by law and which is in accordance with insurer's uniformly applied underwriting guidelines. Insurance Department, Opinions of General Counsel, Opinion Number 06-08-17.

Excess line insurer may not unilaterally amend homeowners' insurance policy to include deductible for windstorm hazard after policy has been in effect for more than 60 days. Insurance Department, Opinions of General Counsel, Opinion Number 06-10-07.

Notice of cancellation that includes premium amount not yet due is premature to be combined within amount that may cause policy to be cancelled; any amount not yet due does not provide legal grounds to cancel for nonpayment of premium and violates CLS Ins § 3425(c)(1)(A). Insurance Department, Opinions of General Counsel, Opinion Number 06-12-08.

If motor vehicle policy provides liability insurance coverage in satisfaction of financial responsibility requirements of Vehicle and Traffic Law, insurer may cancel or non-renew policy prospectively for insured's misrepresentation of facts, but may not void it retroactively; where there is policy with both liability and physical damage coverage, some New York courts have also prohibited insurer from voiding entire policy ab initio. Insurance Department, Opinions of General Counsel, Opinion Number 06-12-11.

Nothing under CLS Ins § 3425(j)(1)(D) prohibits terminated agent or broker from suing for commissions earned on policies continued after its contract with insurer was terminated. Insurance Department, Opinions of General Counsel, Opinion Number 06-12-12.

Licensed insurance broker may remove herself from representing and/or servicing client's account mid-term, absent contractual agreement to contrary. Insurance Department, Opinions of General Counsel, Opinion Number 06-12-19.

Where agent-insurer contract was terminated 3 years earlier, insurer may now notify insured, whose personal lines insurance policy is nearing end of its 3-year required policy period, that coverage will be renewed through different agent unless insured requests cancellation of policy. Insurance Department, Opinions of General Counsel, Opinion Number 06-12-20.

As an insurer could have rescinded a homeowners insurance policy based on material misrepresentations regarding prior loss claims by the insureds, which would have rendered the policy void ab initio under N.Y. Ins. Law § 3105(b), but it instead chose to cancel the policy under N.Y. Ins. Law § 3425, the insurer had to cover the insureds' property loss that occurred prior to the cancellation; further, as the insurer was aware of the material misrepresentations and it chose the cancellation route, it could not seek indemnification from the insurance agency that had secured the policy, as the insurer's own actions in cancelling rather than rescinding the policy were the proximate cause of its damages. Stein v Security Mut. Ins. Co., 38 A.D.3d 977, 832 N.Y.S.2d 679, 2007 N.Y. App. Div. LEXIS 2242 (N.Y. App. Div. 3d Dep't 2007).

Insurance policy may be cancelled for non-payment of fire insurance fee if insurer complies with CLS Ins § 3425 or § 3426, which set forth cancellation and renewal provisions for most non-commercial property/casualty insurance policies and commercial lines property/casualty insurance policies, respectively. Insurance Department, Opinions of General Counsel, Opinion Number 07-02-09.

Workers' compensation policy may be cancelled for non-payment of state assessment fee and Workers' Compensation Security Fund surcharge if insurer complies with CLS Work Comp § 54(5), which governs cancellation and termination of workers' compensation insurance contracts. Insurance Department, Opinions of General Counsel, Opinion Number 07-02-09.

Insurer transacting business in New York may not increase automobile insurance policy premium as result of violation of CLS Veh & Tr § 1192-a, since individual under age of 21 is not necessarily legally intoxicated or impaired if individual's blood alcohol content (BAC) is between 0.02 percent and 0.07 percent and thus CLS Ins § 2335 would not apply; however, insurer may cancel policy under CLS Ins § 3425(c)(1)(B), if underage driver's license is revoked or suspended as result of violation and driver is named insured under policy or person who customarily operates vehicle insured under policy. Insurance Department, Opinions of General Counsel, Opinion Number 07-05-08.

Neither Insurance Law nor regulations promulgated thereunder impose time limit on how long insurer may withhold broker's earned commission; contract between broker and insurer should determine answer to such question. Insurance Department, Opinions of General Counsel, Opinion Number 07-12-02.

If personal lines package policy contains both personal automobile and homeowners coverage, automobile insurance is subject to minimum one-year required policy period, and homeowners policy is subject to minimum 3-year required policy period. Insurance Department, Opinions of General Counsel, Opinion Number 07-12-08.

If personal lines package policy contains both personal automobile and homeowners coverage, automobile coverage may be non-renewed at one-year anniversary date, assuming that all other statutory requirements for non-renewal are met, and homeowners coverage continues for full 3-year required policy period. Insurance Department, Opinions of General Counsel, Opinion Number 07-12-08.

If personal lines package policy contains both personal automobile and homeowners coverage, applicable policy term does not depend on whether greater part of premium is attributable to auto coverage or to homeowners coverages. Insurance Department, Opinions of General Counsel, Opinion Number 07-12-08.

Property/casualty insurer may rely on (among other legitimate underwriting criteria related to risk insured) length of time that insured has renewed his or her coverage, and advanced age of policyholder, when deciding to renew insured homeowner's policy. Insurance Department, Opinions of General Counsel, Opinion Number 08-02-07.

As long as insurer defines "advanced age" within generally accepted meaning of term, Insurance Department would not object to insurer's using of advanced age as favorable criterion to renew. Insurance Department, Opinions of General Counsel, Opinion Number 08-02-07.

CLS Ins § 3425(d)(1) does not require conditional renewal notice when covered vehicle reaches 10 years of age, in case where

non-commercial automobile insurance policy states that OEM replacement parts, where available, must be used for claims for covered losses occurring to insured vehicle under 10 years of age, since there is no change in policy coverage or limits; rather, change occurs solely as result of operation of specific policy language. Insurance Department, Opinions of General Counsel, Opinion Number 08-02-09.

"Two percent rule" set forth in CLS Ins § 3425(f)(1), which limits to 2 percent per calendar year number of personal lines automobile insurance policies that insurer may non-renew or conditionally renew based on reduction or elimination of coverage, is not applicable to commercial automobile insurance policies governed by CLS Ins § 3426. Insurance Department, Opinions of General Counsel, Opinion Number 08-04-36.

Private passenger automobiles used predominantly for commercial purposes and written on commercial policies are governed by CLS Ins § 3426, and are not subject to "2 percent rule" prescribed in CLS Ins § 3425(f)(1); applicability of statutes depends on principal use of vehicle, not classification of motor vehicle. Insurance Department, Opinions of General Counsel, Opinion Number 08-04-36.

Certain personal lines automobile insurance policies that carry surcharge for business use factor are governed by CLS Ins § 3425, and thus are subject to "2 percent rule." Insurance Department, Opinions of General Counsel, Opinion Number 08-04-36.

Superintendent of Insurance does not have authority to permit insurer in latter stages of run-off to effect phased non-renewal of its remaining New York private passenger automobile policies in excess of otherwise applicable annual 2-percent limit unless, under CLS Ins § 3425(c), Superintendent determines that continuation of insurer's business will be hazardous to interests of public or insurer's policyholders or creditors, or insurer relinquishes its relevant licenses under CLS Ins § 1105. Insurance Department, Opinions of General Counsel, Opinion Number 08-06-06.

There is nothing in legislative history to suggest that CLS Ins § 3425(o) is intended to trump or supersede CLS Ins § 3425(f). Insurance Department, Opinions of General Counsel, Opinion Number 08-06-06.

Fees charged by insurance companies when policyholders elect to pay their premiums in installments do not constitute interest payments that could potentially render transaction usurious, assuming premium installment fee is flat fee unrelated to amount of premium. Insurance Department, Opinions of General Counsel, Opinion Number 08-07-25.

Insurer may not cancel homeowner's insurance policy based solely on notification by bank of impending or commenced foreclosure action, because foreclosure filing is not one of permissible grounds for cancellation set forth in CLS Ins § 3425(c)(2). Insurance Department, Opinions of General Counsel, Opinion Number 08-09-02.

With respect to CLS Ins § 3425(c)(2)(D), filing of foreclosure action does not constitute "willful or reckless act or omission" or "increas[e] the hazard insured against"; if there is any significant change in risk insured, it flows not from foreclosure action filing itself but from some other cause or causes related to particular circumstances. Insurance Department, Opinions of General Counsel, Opinion Number 08-09-02.

Insurer is not statutorily required to inform agent that policy will not be reinstated where, after notice of cancellation for nonpayment of premium is mailed, insurer receives check from insured in payment of premium and informs agent that policy will be reinstated, but check is thereafter dishonored. Insurance Department, Opinions of General Counsel, Opinion Number 09-12-02.

With respect to personal lines insurance policy, if insurer terminates its contract with agent during policy's first year, and insured specifically requests to continue policy through terminated agent until conclusion of 3-year required policy period, insurer must offer to continue policy through terminated agent for any remaining part of 3-year required policy period, and absent any agreement to contrary, pay agent prevailing commission rate. Insurance Department, Opinions of General Counsel, Opinion Number 10-01-05.

If insurer re-tiers property/casualty policy upon renewal, producer need not disclose compensation pursuant to Regulation 194 unless purchaser requests more information about producer's compensation within requisite time frames set forth in 11 NYCRR § 30.5(e). NY Ins Dep't Gen Counsel, Opinion No. 10-12-12, 2010 NY Insurance GC Opinions LEXIS 88.

Insurer could issue notice of cancellation of property/casualty insurance policy to insured for non-payment of premium (subject to any grace period or other minimum requirements for cancellation) and return premium funds to insurance producer, where insured provided check to producer for payment of premium, producer deposited check into producer's sweep account with no intention of advancing premium or making any type of loan to insured, check was subsequently dishonored after insurer withdrew premium funds from producer's sweep account, and producer asked insurer to return funds that insurer withdrew from producer's account. NY Ins Dep't Gen Counsel, Opinion No. 11-01-03, 2011 NY Insurance GC Opinions LEXIS 30.

If insured attempts to pay premium by debit card at office of insurance agent and agent provides payment confirmation number to insured, but insurer declines insured's debit card payment for insufficient funds or for any other reason, insurer must send notice of cancellation, or summary of such notice, to insurance agent pursuant to CLS Ins § 3425(h)(3). NY Ins Dep't Gen Counsel, Opinion No. 11-05-02, 2011 NY Insurance GC Opinions LEXIS 16.

Insurer that cancels insurance policy in accordance with CLS Ins § 3425 is not required to provide cancellation notices to all insurance agents and brokers that may be within chain of producers of policy; insurer need only provide cancellation notice to insured and to authorized insurance agent or broker that insured designates to receive information on insured's behalf. NY Ins Dep't Gen Counsel, Opinion No. 11-06-03, 2011 NY Insurance GC Opinions LEXIS 21.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 107, 2344, 3111, 3420, 3426, 3429, 3430, 3431, 3433, 5412.

Suspension and revocation for violations committed during probationary periods, CLS Veh & Tr § 510-b.

Operating a motor vehicle while under the influence of alcohol or drugs, CLS Veh & Tr § 1192.

Alcohol and drug rehabilitation program, CLS Veh & Tr Art 21.

Restricted use licenses, CLS Veh & Tr Art 21-A.

Codes, Rules and Regulations:

Mass merchandising of personal property—liability insurance. 11 NYCRR §§ 13.1 et seq.

Minimum provisions for automobile liability insurance policies. 11 NYCRR §§ 60-1.1 et seq.

Insurance department: homeowners insurance–application for withdrawal from marketplace. 11 NYCRR Part 19 (Regulation 154).

Jurisprudences:

43 Am Jur 2d, Insurance §§ 383, 388.

14A Am Jur Pl & Pr Forms (Rev ed), Insurance, Forms 271–274, 503 et seq.

10 Am Jur Proof of Facts 3d 483, Ineffective Cancellation of Automobile Insurance Policy–Deficient Communication of Cancellation Notice.

11 Am Jur Proof of Facts 3d 131, Ineffective Cancellation of Automobile Insurance Policy—Deficient Form or Content of Cancellation Notice.

11 Am Jur Proof of Facts 3d 227, Ineffective Cancellation of Automobile Insurance Policy—Deficient Repayment or Tender of Unearned Premium.

23 Am Jur Proof of Facts 221, Cancellation of Automobile Insurance Policies.

Appleman on Insurance:

8B Appleman, Insurance Law and Practice, Liability Policies Generally §§ 5011 et seq.

Texts: New York Insurance Law (Matthew Bender's New York Practice Series) §§ 1.05[2][a], 4.05[3], 13.07[11], 14.05[2][b][i], 14.07[1], [2], [3], 19.06[7], 26.03[1], 29.07[2][a], 39.04[2], 49.11[3][d], [7], 51.11[3].

§ 3429-a. Geographical location of risks in area serviced by a volunteer fire department; fire, fire and extended coverage policies

(a) No insurer shall refuse to issue or renew or shall cancel a homeowner's insurance policy including fire insurance or fire and extended coverage insurance based solely on the insured residing in an area that is serviced by a volunteer fire department. Such prohibition shall not preclude an insurer from refusing to issue or renew or from canceling such policies based on sound underwriting and actuarial principles reasonably related to actual or anticipated loss experience subject to the applicable provisions of section three thousand four hundred twenty-five of this article.

(b) The superintendent shall by regulation establish procedures with respect to notification to insureds of the insurer's specific reason or reasons for refusal to issue or renew or for cancellation of such policy.

HISTORY:

Add, L 2005, ch 259, § 1, eff Nov 16, 2005 (see 2005 note below).

Editor's Notes: Laws 2005, ch 249, § 3, eff Nov 16, 2005, provides as follows:

§ 3. This act shall take effect on the one hundred twentieth day after it shall have become a law and shall apply to all contracts and policies of insurance issued or renewed on and after such effective date.

§ 3430. Right of insured, agent or broker aggrieved on basis of geographical location of property or risks

(a) An insured aggrieved by an inability to obtain:

(1) homeowner's insurance, including fire insurance or fire and extended coverage insurance, other than from the New York property insurance underwriting association, or

(2) automobile insurance subject to section three thousand four hundred twenty-five of this article, other than through the New York automobile insurance plan, from any insurer or through any insurance agent or broker because of the geographical location of the risk or property within the state or a licensed agent or broker whose contract or account was terminated or not renewed because of the geographical location of the agent or broker or the geographical location of the risks within the state for which coverage is afforded through the agent or broker and the grievance was not the result of the application of sound underwriting and actuarial principles reasonably related to actual or anticipated loss experience may file a complaint to that effect with the superintendent on a form prescribed by him.

(b) The superintendent shall investigate the complaint pursuant to rules and regulations promulgated by him. In addition to any other power or procedure authorized by this chapter, the superintendent may require the physical inspection of the risk or property or hold a hearing, or both, for the purpose of assisting him in his determination of the issues raised by the complaint.

HISTORY:

Add, L 1984, ch 367, § 1, eff Sept 1, 1984; amd, L 2005, ch 259, § 2, eff Nov 16, 2005 (see 2005 note below).

Editor's Notes: This section formerly appeared, in part, as Ins §§ 168-f, 168-h as added by L 1979, chs 503, 690.

Laws 2005, ch 249, § 3, eff Nov 16, 2005, provides as follows:

§ 3. This act shall take effect on the one hundred twentieth day after it shall have become a law and shall apply to all contracts and policies of insurance issued or renewed on and after such effective date.

Notes to Decisions

Insurance agents failed to state cause of action to recover damages for wrongful termination by insurer on ground that termination was due to geographic location since employment contracts were terminable at will by either party, remedy for termination of agent's contract on such ground is administrative, and Insurance Law does not create private right of action or provide for compensatory remedy for agents whose contracts are so terminated. Huskission v Sentry Ins., 123 A.D.2d 832, 507 N.Y.S.2d 447, 1986 N.Y. App. Div. LEXIS 60956 (N.Y. App. Div. 2d Dep't 1986).

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

Prohibition of geographical redlining in writing automobile, fire and extended coverage insurance policies. 11 NYCRR §§ 218.1 et seq.

Jurisprudences:

68 NY Jur 2d Insurance §§ 18, 64, 65 .

Texts: New York Insurance Law (Matthew Bender's New York Practice Series) § 49.11[1].

ARTICLE 42 Life Insurance Companies and Accident and Health Insurance Companies and Legal Services Insurance Companies

Section
4216. Group life insurance; premium requirements; notice of conversion; filing of compensation
4237. Blanket accident and health insurance

HISTORY:

Add, L 1984, ch 367, § 1; amd, L 1998, ch 65, § 10, eff April 1, 1999 (see 1998 and 2003 notes below).

§ 4216. Group life insurance; premium requirements; notice of conversion; filing of compensation

(a) (1) In this chapter:

(A) "Group life insurance" means that form of life insurance covering any one of the groups specified in subsection (b) hereof, which is written under a policy issued to the policyholder as hereinafter defined, and which in all other respects conforms to the requirements of subsection (b) hereof.

(B) "Certificate holder," as used in relation to a group life insurance policy, means the person to whom a certificate evidencing such insurance is issued under any such policy, as hereinafter provided.

* * * * *

(b) Any life insurance company authorized to do business in this state may deliver in this state policies of group life insurance only as follows:

* * * * *

(7) A policy insuring the members of one or more troops or units of the state troopers or state police of any state, issued to the commanding officer of the state troopers or state police, who shall be deemed the policyholder, the premium on which is to be paid by the members insured; or a policy covering the members of one or more duly incorporated police officers' benevolent associations or of one or more associations or organizations of uniformed firefighters or volunteer firefighters or volunteer ambulance workers which association or organization shall have been in existence for at least two years prior to the issuance of such policy and which shall have twenty-five members at the time of the issuance of such policy, which shall be issued to such association or to a trustee or trustees of a fund established, or participated in, by one or more of such associations or organizations as the policyholder. If the opportunity to take such insurance is offered to all eligible members of a unit of such state troopers or state police, or to all eligible members of such incorporated police officers' benevolent association or of an association or organization of uniformed firefighters, volunteer firefighters, then not less than fifty percent of such members or, if less, fifty or more of such members may be so insured. If the insurance is limited to those eligible members who are employed as state troopers, police officers, firefighters or volunteer ambulance workers, then not less than sixty percent or five hundred of such members, whichever is less, may be so insured. Such policy shall provide for the payment of benefits, except policy dividends, to the person insured or to some beneficiary or beneficiaries, other than such commanding officer or such association or any of its officials, as such, and shall also provide for the issuance of a certificate to the policyholder for delivery to the person insured or to such beneficiary, as evidence of such insurance. For the purposes of this paragraph any association currently holding premium dividends as a result of policies issued under this section shall be permitted to maintain said dividends for the general purposes of the entire membership. For the purposes of this paragraph the term "eligible members of an association of volunteer firefighters or volunteer ambulance workers" means members who perform services in fire-fighting duties or members of a volunteer exempt fire benevolent association who are entitled to benefits from the expenditures of foreign fire insurance tax moneys, including, inactive exempt volunteer firefighters as defined by section two hundred of the general municipal law or in ambulance-related duties, respectively. The amounts of insurance may be based upon a plan which permits a limited number of selections by the members if the selections offered utilize a consistent pattern of grading the amounts of insurance for individual group members so that the resulting pattern of coverage is reasonable.

* * * * *

HISTORY:

Add, L 1984, ch 367, § 1, eff Sept 1, 1984; amd, L 1984, ch 769, §§ 9, 10, eff Jan 1, 1985; L 1985, ch 369, §§ 6–11 eff Jan 1, 1986; L 1985, ch 657, § 1; L 1986, ch 832, § 1, eff Aug 2, 1986; L 1986, ch 923, § 1; L 1988, ch 24, § 15, eff Jan 1, 1989; L 1988, ch 141, § 76, eff June 20, 1988; L 1993, ch 82, § 1, eff July 1, 1993; L 1996, ch 491, § 5, eff Aug 8, 1996; L 1997, ch 68, § 1, eff May 23, 1997; L 1998, ch 559, § 1, eff Aug 5, 1998; L 2002, ch 13, § 5, eff March 19, 2002; L 2002, ch 542, § 1, eff Sept 17, 2002; L 2008, ch 306, § 2, eff July 21, 2008; L 2010, ch 515, § 1, eff Sept 17, 2010; L 2018, ch 476, § 231, effective December 28, 2018.

Editor's Notes This section formerly appeared, in part, as Ins § 204 which was added by L 1939, ch 882; amd, L 1940, chs 208, 579, 626; L 1942, ch 909; L 1943, ch 597; L 1944, ch 504; L 1946, ch 645; L 1947, ch 324; L 1948, ch 708; L 1950, chs 360, 709; L 1951, ch 499; L 1952, ch 117; L 1952, ch 97; L 1953, L 97; L 1955, chs 385, 650; L 1957, ch 316; L 1958, chs 599, 683, 744; L 1959, chs 251, 279, 464; L 1960, ch 19; L 1961, ch 546; L 1962, chs 507, 735, 951; L 1963, chs 362, 418, 668; L 1965, chs 682, 867; L 1966, ch 910; L 1967, ch 341; L 1968, chs 140, 776; L 1969, chs 107, 207; L 1970, ch 601; L 1971, chs 505, 887, 890; L 1973, chs 550, 610, 1046, 1047; L 1974, chs 238, 968; L 1977, chs 300, 543; L 1978, ch 108; 1980, chs 207, 576, 787; L 1981, chs 321, 472; L 1982, ch 582; L 1984, ch 690.

Laws 1985, ch 369, §§ 18, 19, provides as follows:

§ 18. This act shall apply to a group policy issued outside the state to a trustee or trustees of a fund established or participated in by two or more employers not in the same industry, of the type described in paragraph four of subsection (b) of section four thousand two hundred sixteen or subparagraph (D) of paragraph one of subsection (c) of section four thousand two hundred thirty-five, with respect to an employer principally located within the state, when the coverage for such employer becomes effective under the policy on or after January first, nineteen hundred eighty-six. For employers principally located within the state covered under such a group policy on the effective date of this act, this act shall apply to all certificate holders of that employer on the anniversary date of the effective date of coverage of the employer under the policy occurring on or after January first, nineteen hundred eighty-seven.

§ 19. This act shall take effect January first, nineteen hundred eighty-six and shall be applicable to all policies and contracts issued or delivered on or after such date and to all certificates except as stated in section eighteen of this act, issued or delivered on or after such date, regardless of the effective date of the policies or contracts. Section ten of this act shall take effect as herein provided, but shall not operate to reduce the amount of dependent group life insurance in force on a certificate holder on the date this act shall become applicable.

Laws 1993, ch 82, § 2, eff July 1, 1993, provides as follows:

§ 2. This act shall take effect on the thirtieth day after it shall have become a law and shall apply to all applications submitted on or after such date.

Laws 1996, ch 491, § 1, eff Aug 8, 1996, provides as follows:

Section 1. Legislative intent. The legislature hereby finds and declares that assisting employers in developing innovative means of financing employee health and other benefits is in the best interest of the working people of this state. This legislation is intended to achieve that goal by authorizing businesses to purchase insurance on the lives of their employees in order to fund employee benefit plans which provide retirement, health and life insurance and deferred compensation benefits, a product known as corporate or trust-owned life insurance (COLI/TOLI). This legislation is not intended to authorize what is known as "leveraged" COLI, under

which an employer borrows against the policies to pay all or most of the cost of the insurance, and then benefits from both the federal income tax deductibility of the interest on that indebtedness and from the tax-free death benefits paid to it upon the death of the insureds.

Laws 1998, ch 559, § 3, eff Aug 5, 1998, provides as follows:

§ 3. This act shall take effect immediately and shall apply to all policies and certificates of insurance written, renewed or amended on or after such date.

Amendment Notes 2010. Chapter 515, § 1 amended:

Sub (b), par (1) by or funds contributed by him", at fig 2" not less than", at fig 3" of such eligible employees or, if less, fifty or more "and adding the matter in italics.

2008. Chapter 306, § 2 amended:

By redesignating entire sub (i), par (2) as sub (i), par (2), opening par and adding the matter in italics.

By adding sub (i), par (2), subpar (A).

By adding sub (i), par (2), subpar (B).

2002. Chapter 13, § 5 amended:

Sub (e) by deleting at fig 1 "or" and adding the matter in italics.

2002. Chapter 542, § 1 amended:

Sub (f) by deleting at fig 1 "except a policy issued in accordance with paragraph eleven of subsection (b) hereof", at fig 2 "such", at fig 3 "insured at the time application is made for spouse coverage", at fig 4 "four", at fig 5 "hereof" and adding the matter in italics.

The 2018 amendment by ch 476, § 231, in (b)(7), substituted "police officers' " for "policemen's" and "firefighters" for "firemen" in the first and second sentence, and substituted "police officers, firefighters" for "policemen, firemen" in the third sentence.

Notes to Decisions

Analysis

1. In general
2. Treatment of policies having extraterritorial contacts
3. Classification of employees or members based on age
4. Conversion from group to individual coverage
5. —Policyholder's duty to notify insured of conversion right
6. Rights of beneficiary
7. Credit insurance
8. Authorization for particular public bodies to procure insurance
9. —City
10. —Municipal corporation
11. —Town
12. Miscellaneous

1. In general

The new provisions introduced into former § 204 [now § 4216] by 1958 amendment, requiring approval by the Superintendent of Insurance of policy forms and rates for credit insurance to assure that rates were not unreasonable in relation to benefits provided were aimed at correcting abuses in this field of insurance whereby premium rates were often excessive and there was a great variance in rates without apparent reason. Old Republic Life Ins. Co. v Thacher, 12 N.Y.2d 48, 234 N.Y.S.2d 702, 186 N.E.2d 554, 1962 N.Y. LEXIS 891 (N.Y. 1962).

With reference to a group insurance policy under former § 204 [now § 4216], where the policy defines a "contributing employer" as an employer who contributed to the group insurance fund, and the "employee" as one actively engaged in "the business of the contributing employer," and an "employee" includes a proprietor, a pharmacy was the contributing employer, and the proprietor, who became disabled while he still owned the pharmacy, was covered by the policy and after a sale, when the pharmacy continued to contribute to the group insurance fund, under the policy, the former proprietor remained a disabled employee. Halpern v John Hancock Mut. Life Ins. Co., 33 A.D.2d 981, 307 N.Y.S.2d 273, 1970 N.Y. App. Div. LEXIS 5746 (N.Y. App. Div. 4th Dep't 1970).

Policies of group creditor life insurance issued by insurance companies to a seller of mutual fund purchase plans were group life insurance policies as defined in former § 204 [now § 4216]. Cutler v Hartford Life Ins. Co., 51 Misc. 2d 286, 272 N.Y.S.2d 939, 1966 N.Y. Misc. LEXIS 1712 (N.Y. Sup. Ct. 1966), aff'd, 28 A.D.2d 730, 282 N.Y.S.2d 97, 1967 N.Y. App. Div. LEXIS 3666 (N.Y. App. Div. 2d Dep't 1967).

A master policy of group insurance under former § 204 [now § 4216] constituted the contract of insurance between the individual insured members of the American Dental Association, and the insurer, whereas the certificate issued to the individual insured in New York was merely evidence of that insurance. Kahn v Great-West Life Assurance Co., 61 Misc. 2d 918, 307 N.Y.S.2d 238, 1970 N.Y. Misc. LEXIS 1940 (N.Y. Sup. Ct. 1970).

Cases construing Insurance L former § former 204, subd 3 [now §§ 3220, 4216] [now §§ 3220, 4216] apply equally to Insurance L former § 162, subd 5 [now § 3221]. Antinora v Nationwide Life Ins. Co., 76 Misc. 2d 599, 350 N.Y.S.2d 863, 1973 N.Y. Misc. LEXIS 1556 (N.Y. County Ct. 1973).

In the case of coverage under separate group policies, $15,000 limit contained in Insurance Law § former 204, subd 1(c) [now § 4216] would not seem to apply unless it could be shown that some public policy prohibited coverage on two or more policies. Fobare v Mohawk Nat'l Bank, 77 Misc. 2d 210, 352 N.Y.S.2d 138, 1974 N.Y. Misc. LEXIS 1108 (N.Y. Sup. Ct. 1974).

2. Treatment of policies having extraterritorial contacts

Under former § 204 [now § 4216], New York may regulate a certificate of insurance issued for delivery in New York, but not a group policy issued in Illinois. Kahn v Great-West Life Assurance Co., 61 Misc. 2d 918, 307 N.Y.S.2d 238, 1970 N.Y. Misc. LEXIS 1940 (N.Y. Sup. Ct. 1970).

Where national association of manufacturers and manufacturers' group insurance trust fund were organized under Illinois law, they were parties to master group policy and intended that the law of Illinois should control, the Illinois law, rather than former § 204 [now § 4216], governed in determining liability of the association and fund for alleged negligence in failing to notify an employee of a New York employer, who was a member of association, of his right to convert expired group life insurance. Reger v National Ass'n of Bedding Mfrs. Group Ins. Trust Fund, 83 Misc. 2d 527, 372 N.Y.S.2d 97, 1975 N.Y. Misc. LEXIS 2936 (N.Y. Sup. Ct. 1975).

Where employee was a resident of New York as was the plaintiff beneficiary of group life insurance, premiums were paid by the New York employer and certificate of insurance was delivered in New York, the contacts in Illinois were the creation of the trust fund acting on behalf of insurer, delivery of master policy, and the fund and association of manufacturers were Illinois corporations, and the situs of alleged tort in failing to notify the employee of his right to convert expired group insurance, weighing the contacts with New York's policy mandating notification to protect insureds and their beneficiaries vis-a-vis Illinois nonpolicy established that New York had the paramount interest in the litigation supporting application of New York law, and hence former § 204 [now § 4216]. Reger v National Ass'n of Bedding Mfrs. Group Ins. Trust Fund, 83 Misc. 2d 527, 372 N.Y.S.2d 97, 1975 N.Y. Misc. LEXIS 2936 (N.Y. Sup. Ct. 1975).

Where insured decedent and beneficiary were domiciliaries of New York and decedent paid premiums on group policy by mailing them from New York to Missouri upon a policy issued in Missouri by a Missouri corporation to its parent, a Delaware corporation doing business in Missouri, New York law (former § 204 [now § 4216]) would be applied to beneficiary's claim under policy pursuant to the grouping of contacts theory. Oakley v National Western Life Ins. Co., 294 F. Supp. 504, 1968 U.S. Dist. LEXIS 7959 (S.D.N.Y. 1968).

3. Classification of employees or members based on age

An insurer is obliged to insure either all of the employees of an employer, or else all employees of a class "determined by conditions pertaining to the employment" where the case is not one of those specified in former § 101-a, subd. 2 [predecessor to former § 204, now § 4216], and the age of an employee is not a "condition pertaining to employment," but rather a condition

pertaining to the employee himself. Dudrey v Equitable Life Assurance Soc., 10 N.Y.S.2d 639, 170 Misc. 418, 1939 N.Y. Misc. LEXIS 1619 (N.Y. App. Term 1939).

It is unlawful under former § 204 [now § 4216] for an insurer, in issuing a policy of group life insurance, to attempt to exclude from coverage of the policy employees over a certain age. Dudrey v Equitable Life Assurance Soc., 10 N.Y.S.2d 639, 170 Misc. 418, 1939 N.Y. Misc. LEXIS 1619 (N.Y. App. Term 1939).

If grandchild is dependent on grandparent, grandparent may add grandchild as insured individual. Insurance Department, Opinions of General Counsel, Opinion Number 03-01-44.

4. Conversion from group to individual coverage

Under subd. 3 of former § 204 [now § 4216(a)(8)], coverage of a certificate holder under a policy of group life insurance continued for 90 days after termination of employment, and his death during that period entitled the beneficiary to recover death benefits, no notice having been given to the certificate holder of his conversion privileges. Payne v Equitable Life Assurance Soc., 14 A.D.2d 266, 220 N.Y.S.2d 493, 1961 N.Y. App. Div. LEXIS 8258 (N.Y. App. Div. 1st Dep't 1961), aff'd, 11 N.Y.2d 1006, 229 N.Y.S.2d 752, 183 N.E.2d 763, 1962 N.Y. LEXIS 1151 (N.Y. 1962).

Where insured did not take advantage of opportunity afforded him to convert his life policy from group coverage provided in connection with his employment to direct insurance, insured suffered from no disability during his employment which would have extended his opportunity to convert policy, insured received timely notice of opportunity to convert under former § 204 [now § 4216], and insured further failed to convert policy even after his employer extended time to apply for conversion to direct insurance, insured was not covered by any direct insurance policy. Bergin v Guardian Life Ins. Co., 53 A.D.2d 582, 384 N.Y.S.2d 838, 1976 N.Y. App. Div. LEXIS 13224 (N.Y. App. Div. 1st Dep't 1976).

In an action to recover on a policy issued under the Federal Employees' Group Life Insurance Act (5 USCS §§ 8701 et seq.), plaintiff's deceased, a federal employee, was not covered when he died approximately 40 days after his employment had terminated because the employer policy's notice of conversion granting its terminated employee an additional 15 days in which to exercise his rights to obtain an individual policy without producing evidence of insurability did not also extend coverage pursuant to the provisions of the statute, the regulations attendant thereto, or the policy beyond the 31-day grace period set forth in those regulations and policies, and because the omission of a notice of conversion upon termination requirement constitutes a constant choice and inasmuch as it conflicts with New York law, it pre-empts such legislation. Reinisch v Metropolitan Life Ins. Co., 97 A.D.2d 135, 469 N.Y.S.2d 767, 1983 N.Y. App. Div. LEXIS 20343 (N.Y. App. Div. 2d Dep't 1983), app. dismissed, 62 N.Y.2d 617, 501 N.Y.S.2d 1029, 492 N.E.2d 1236, 1984 N.Y. LEXIS 5214 (N.Y. 1984).

In an action under former § 204 [now § 4216] on a group policy, which provided that, on termination of active employment, the policy should automatically terminate unless the employee within 31 days after such termination shall apply for an individual policy, evidence held to show that deceased employee, who had not applied for an individual policy after failing to report for work, quit work because of a strike and not because of illness, and his beneficiary was therefore not entitled to recover on the policy. Under a group policy providing that, on termination of active employment by an insured employee, his insurance shall automatically terminate and the insurer be released from further liability thereon, unless within 31 days of the termination of his employment he applies for and pays the premium on an individual policy, an insured employee is bound to know his rights as respects demanding an individual policy on leaving his employment, and no cancellation by the company is necessary. Chrosniak v Metropolitan Life Ins. Co., 201 N.Y.S. 211, 121 Misc. 453, 1923 N.Y. Misc. LEXIS 1235 (N.Y. Sup. Ct. 1923), aff'd, 209 A.D. 846, 204 N.Y.S. 898, 1924 N.Y. App. Div. LEXIS 9199 (N.Y. App. Div. 1924).

Subdivision 3 of former § 204 [now §§ 4216, 3220], extending coverage under group life insurance policies after it would otherwise terminate under stated conditions, being applicable only to such policies thereafter issued, had no application to a group policy issued in 1933. Ogrodowski v Aetna Life Ins. Co., 36 Misc. 2d 318, 232 N.Y.S.2d 653, 1962 N.Y. Misc. LEXIS 2569 (N.Y. Sup. Ct. 1962).

CLS Ins § 4216(d) is preempted by Employee Retirement Income Security Act of 1974, 29 USCS §§ 1001 et seq. (ERISA), when applied to employers who provide group insurance with conversion privilege as part of ERISA benefit plan, since state statute intrudes into area that Congress intended to be fully occupied by federal statute, and each statute sets forth different scheme for providing notice of plan benefits; moreover, state statute is not saved by ERISA's savings clause as law that "regulates insurance" since state statute is not specifically directed toward insurance industry and it does not dictate any terms of insurance contract itself. Howard v Gleason Corp., 901 F.2d 1154, 1990 U.S. App. LEXIS 6002 (2d Cir. N.Y. 1990).

5. —Policyholder's duty to notify insured of conversion right

Where decedent, in his lifetime, was issued a certificate of life insurance under a group insurance policy issued to the trustee of a labor union of which he was a member, and stopped working on December 30, 1958, to enter a hospital where he died on May 14, 1959, becoming ineligible for coverage under the insurance policy April 1, 1959, because his employer was thereafter making no contributions toward his insurance, but was not notified of his lack of coverage and conversion rights, under subd. 3 of former § 204 [now §§ 4216, 3220], extending the conversion privilege of such a certificate holder for 90 days after termination of coverage in the absence of notice given to him by the insurer concerning his conversion privileges, the policy was still in effect as to decedent at date of his death. De Ville v Continental Assurance Co., 8 N.Y.2d 1080, 207 N.Y.S.2d 453, 170 N.E.2d 457, 1960 N.Y. LEXIS 956 (N.Y. 1960).

Under former § 161, subd. 1, par. [e] [now § 3220] and former § 204, subd. 1, par. [d] [now § 4216 of this law as amended, group life insurance policies issued to trustees of union welfare funds must give certificate holders who become ineligible for coverage a conversion privilege period of 31 days with coverage during that time, and they must be notified of the conversion privilege or the period is extended to 90 days, and any provision in a group policy contravening these provisions is invalid. De Ville v Continental Assurance Co., 10 A.D.2d 386, 199 N.Y.S.2d 876, 1960 N.Y. App. Div. LEXIS 10395 (N.Y. App. Div. 4th Dep't), aff'd, 8 N.Y.2d 1080, 207 N.Y.S.2d 453, 170 N.E.2d 457, 1960 N.Y. LEXIS 956 (N.Y. 1960).

As to certain types of group insurance, such as policies issued to labor union trustees, the amendments of 1940, 1947, and 1948 of former §§ 161 and 204 [now §§ 3220 and 4216] of this act practically made obsolete policy provisions which simply grant a 31-day conversion privilege following termination of eligibility of a certificate holder, and an insurer issuing a group policy in this category which fails to notify a member of conversion rights within the stated period for conversion assumes the risk of the certificate holder's death within 90 days. De Ville v Continental Assurance Co., 10 A.D.2d 386, 199 N.Y.S.2d 876, 1960 N.Y. App. Div. LEXIS 10395 (N.Y. App. Div. 4th Dep't), aff'd, 8 N.Y.2d 1080, 207 N.Y.S.2d 453, 170 N.E.2d 457, 1960 N.Y. LEXIS 956 (N.Y. 1960).

Group insurer was not liable under former § 204 [now § 4216] to employee's estate for death benefits since the group policy had terminated upon employee's cessation of active work and had not been kept alive by employer's continuation of coverage during employee's disability; failure of employer to give notice to employee of such termination, of employer's election to discontinue coverage and of employee's conversion rights under the policy constituted a breach of duty to employee rendering employer liable for the death benefits. McGinnis v Bankers Life Co., 39 A.D.2d 393, 334 N.Y.S.2d 270, 1972 N.Y. App. Div. LEXIS 3969 (N.Y. App. Div. 2d Dep't 1972).

A motion for summary judgment requiring the insurer to pay over proceeds of a group insurance policy was granted as former § 204 [now § 4216] required the employer to give employees knowledge of their right to convert from group insurance to individual life insurance after termination of employment and if the insured failed to give notice, the conversion was extended to

90 days and the policy deemed amended at least to the extent of fixing the conversion privilege period of 90 days so that a notice set two days after the insured's death thereby made the group life policy still effective. Miller v Metropolitan Life Ins. Co., 64 Misc. 2d 658, 315 N.Y.S.2d 353, 1970 N.Y. Misc. LEXIS 1208 (N.Y. Sup. Ct. 1970).

Where employer does not have knowledge or is not in control of event triggering employee's conversion rights under group life policy, employer is not in position to notify employee of his or her rights under policy and thus employer is not liable under former § 204 [now § 4216] for its failure to act in absence of such information. Van Ostrand v National Life Assurance Co., 82 Misc. 2d 829, 371 N.Y.S.2d 51, 1975 N.Y. Misc. LEXIS 2819 (N.Y. Sup. Ct. 1975).

Where other employees' knowledge of employee's divorce and involvement in divorce proceedings was not acquired in scope of their employment nor was it their duty to report such information to employer, fact that other employees had such knowledge was not sufficient notice to justify imposition of liability on employer for its failure to inform employee, under former § 204 [now § 4216], of her conversion rights under group life policy upon her divorce with respect to policy taken out on life of employee's spouse. Van Ostrand v National Life Assurance Co., 82 Misc. 2d 829, 371 N.Y.S.2d 51, 1975 N.Y. Misc. LEXIS 2819 (N.Y. Sup. Ct. 1975).

Neither Illinois nor New York law, under former § 204 [now § 4216], would extend the employer's common-law duty of due care in insurance matters pertaining to notification of conversion privileges, and hence, national association of manufacturers, and group insurance trust fund, organized under Illinois law, were not liable for alleged negligence in failing to notify plaintiff's decedent, who had been employed by a New York employer which was a corporate member of the association, of privilege of conversion upon expiration of the group insurance when decedent's employer quit business. Reger v National Ass'n of Bedding Mfrs. Group Ins. Trust Fund, 83 Misc. 2d 527, 372 N.Y.S.2d 97, 1975 N.Y. Misc. LEXIS 2936 (N.Y. Sup. Ct. 1975).

While parties stipulated that group insurance coverage was part of a "compensation package" and not a negotiated fringe benefit, such benefits are commonly a substitute for direct cash wages and cannot be classified as mere gratuity, in determining whether national association of manufacturers and manufacturers' group trust fund who acted for group insurer, were negligent in failing to notify an employee of a member of association of his conversion rights upon expiration of the group insurance under former § 204 [now § 4216]. Reger v National Ass'n of Bedding Mfrs. Group Ins. Trust Fund, 83 Misc. 2d 527, 372 N.Y.S.2d 97, 1975 N.Y. Misc. LEXIS 2936 (N.Y. Sup. Ct. 1975).

Under former § 204 [now § 4216], an employer is liable for failure to notify an insured employee of his conversion rights under a group plan. Reger v National Ass'n of Bedding Mfrs. Group Ins. Trust Fund, 83 Misc. 2d 527, 372 N.Y.S.2d 97, 1975 N.Y. Misc. LEXIS 2936 (N.Y. Sup. Ct. 1975).

Under New York law former § 204 [now § 4216], the absence of affirmative notification subsequent to the termination of employment conferred upon deceased the right to convert for 90 days after the termination of coverage, and death before the expiration of 90-day period is deemed the exercise of the right of conversion. Oakley v National Western Life Ins. Co., 294 F. Supp. 504, 1968 U.S. Dist. LEXIS 7959 (S.D.N.Y. 1968).

Under standard laid down by U.S. Supreme Court, § 4216(d) does not "regulate insurance" and therefore does not come within saving clause of ERISA. Howard v Gleason Corp., 716 F. Supp. 740, 1989 U.S. Dist. LEXIS 8428 (W.D.N.Y. 1989), aff'd, 901 F.2d 1154, 1990 U.S. App. LEXIS 6002 (2d Cir. N.Y. 1990).

Employer's group insurance plan was "employee benefit plan" within scope of ERISA; employer's duty to inform insured employee (plaintiff's deceased) of his conversion option was not one-time obligation to which ERISA does not apply, rather conversion option is but one small aspect of overall insurance program offered to corporation and its employees and employees of subsidiaries, and group insurance plan as a whole requires ongoing oversight and administration, thus was employee benefit plan within ERISA. Howard v Gleason Corp., 716 F. Supp. 740, 1989 U.S. Dist. LEXIS 8428 (W.D.N.Y. 1989), aff'd, 901 F.2d 1154, 1990 U.S. App. LEXIS 6002 (2d Cir. N.Y. 1990).

6. Rights of beneficiary

Where the certificate issued to an employee under a group policy taken out by an employer named the employee's wife as beneficiary, a subsequent indorsement on the policy authorizing the insured to change the beneficiary, and providing that, if any employee should survive the beneficiary the insurance should be paid to his executors, administrators or assigns, was held not to affect the beneficiary's rights without her consent, notwithstanding the policy was renewed from year to year. Under Surrogate's Court Act, § 202 and Decedent's Estate Law, § 100, the proceeds of the husband's life policy naming his wife, who predeceased him as beneficiary were part of the personal estate of the wife and passed to her personal representatives. In re Johnson's Estate, 208 N.Y.S. 655, 124 Misc. 498, 1925 N.Y. Misc. LEXIS 700 (N.Y. Sur. Ct. 1925).

A beneficiary under an employee's term group life insurance policy under which the insured agreed not to change the beneficiary was not entitled to the proceeds of a new policy which replaced the old policy when a new master policy was issued under which the insured was permitted to redesignate a new beneficiary in the absence of a showing that such new designation was not in good faith and with the purpose of frustrating the rights of the first beneficiary. Frey v Feller, 127 N.Y.S.2d 302, 1953 N.Y. Misc. LEXIS 2558 (N.Y. Sup. Ct. 1953).

7. Credit insurance

The standards laid down in former §§ 154 [now § 3201] and 204 [now § 4216] of the Insurance Law, as amended, for guidance of the Superintendent of Insurance in approving or disapproving credit life insurance premiums, that the rates shall not be unreasonable in relation to the benefits provided, are as specific and clear as other statutory standards which have been upheld, and there is accordingly no basis for a contention of unconstitutional delegation of legislative power. Old Republic Life Ins. Co. v Wikler, 9 N.Y.2d 524, 215 N.Y.S.2d 481, 175 N.E.2d 147, 1961 N.Y. LEXIS 1285 (N.Y. 1961).

Under the authority conferred on the Superintendent of Insurance by former §§ 154 [now § 3201] and 204 [now § 4216] of the Insurance Law, as amended, to disapprove premium rates on credit life insurance which are unreasonable in relation to benefits and to prescribe regulations applicable to such insurance policies, it is well within his statutory powers to suggest reasonable rates as sort of a guide for insurers in applying for approval of rates, while affording them freedom to show that higher rates would not be unreasonable, as done in his Regulation 27A. Old Republic Life Ins. Co. v Wikler, 9 N.Y.2d 524, 215 N.Y.S.2d 481, 175 N.E.2d 147, 1961 N.Y. LEXIS 1285 (N.Y. 1961).

In proceedings challenging the validity of a regulation providing for the allocation of dividends earned on credit life insurance policies, the regulation was properly invalidated, where it had not been demonstrated that the regulation was consistent with, and could reasonably be implied from, the relevant statutes, Ins Law §§ 154, 204, where the allocation of dividends could not be reasonably inferred from the power given in those statutes to the superintendent to regulate and approve premium rates, and where, rather than promulgating regulations to clarify and implement the legislative policy, the superintendent had forged a new policy not reasonably implied from the statutes and in contradistinction to their history. Mazgulski v Lewis, 63 N.Y.2d 992, 483 N.Y.S.2d 1011, 473 N.E.2d 261, 1984 N.Y. LEXIS 4749 (N.Y. 1984).

Former sections 154 [now § 3201] and 204 [now § 4216] of the Insurance Law cannot be read together as authorizing the writing of mortgage indemnity insurance, since these sections deal with life insurance only. Schwartz v Lefkowitz, 21 A.D.2d 13, 247 N.Y.S.2d 716, 1964 N.Y. App. Div. LEXIS 4182 (N.Y. App. Div. 3d Dep't), app. denied, 14 N.Y.2d 489, 1964 N.Y. LEXIS 1911 (N.Y. 1964).

Automobile dealer that is not licensed as insurance agent or broker may make group credit life insurance available to its customers, but may not sell individual credit life insurance.

Insurance Department, Opinions of General Counsel, Opinion Number 05-02-12.

There is no specific insurance license limited to selling only credit life insurance. Insurance Department, Opinions of General Counsel, Opinion Number 06-03-15.

One must be licensed as life insurance agent in order to sell credit life insurance. Insurance Department, Opinions of General Counsel, Opinion Number 06-03-15.

8. Authorization for particular public bodies to procure insurance

A water district which has commissioners may not purchase group life insurance under former § 204 [now § 4216] for its employees. 1960 Ops St Compt File #454.

Foreign embassy or consulate qualifies as employer for purposes of qualifying for group health or group life insurance policy. Insurance Department, Opinions of General Counsel, Opinion Number 05-05-30.

9. —City

Peremptory mandamus will not lie to compel a city comptroller to pay a claim against the city unless it appears without contradiction that it is his clear legal duty to pay. Inadequacy of the record in failing to set forth facts needful to a determination precludes the Court of Appeals from examining the question as to the power of the city of Schenectady to take out group life insurance under predecessor to former § 204 [now § 4216] for the benefit of its employees who may thereafter die or become disabled while in the service of the city. People ex rel. Terbush & Powell, Inc. v Dibble, 231 N.Y. 593, 132 N.E. 901, 231 N.Y. (N.Y.S.) 593, 1921 N.Y. LEXIS 755 (N.Y. 1921).

Under former § 204 [now § 4216] a city may not pay any portion of group life insurance premiums for its employees, but may pay all or part of the medical, surgical, and hospital insurance premiums for retired officers and employees, provided they have retired subsequent to the city's adoption of such plan. 1964 Ops St Compt #786.

10. —Municipal corporation

Municipal corporations, including school districts, may, upon written authorization from an employee, make payroll deductions for premiums on group insurance. While a municipal corporation, under former § 204 [now § 4216], may contract for group life insurance for not less than 1,000 employees, it may not contribute any part of the premiums therefor. 1959 Ops St Compt File #73.

A life insurance company may not issue a group insurance policy to a contracting municipality under former § 204 [now § 4216] unless the premiums thereon are to be paid by the insured municipal employees. 1964 Ops St Compt #128.

General Municipal L § 93 does not authorize school district to pay full cost of participation by nonsalaried board member in group medical, dental and life insurance policies. Opinions of Commissioner of Education No. 8736.

11. —Town

Subject to the provisions of § former 221 [now § 4235] of the Insurance Law, a town may pay for group accident and health insurance for its employees. A town may not, however, expend town funds for premiums on group life insurance for its employees. 1952 Ops St Compt File #5778.

A town may provide hospitalization, medical and surgical insurance for town officers and employees, but may not provide disability insurance or group insurance except in accordance with certain minimum requirements. 1964 Ops St Compt #244.

A town may not pay the premiums on group life insurance for only its police force of eleven members, since the total number of employees covered would then be less than twenty-five. 1968 Ops St Compt File #58.

Under former § 204 [now § 4216], a town may provide group life insurance coverage and pay the premiums thereon for all town policemen and certain town highway employees when the total number covered exceeds twenty-five, provided the classifications are reasonable and all eligible members of each class are covered. 1968 Ops St Compt File #58.

A town may purchase group life insurance for all of its officers and employees. 1975 Ops St Compt File #57.

12. Miscellaneous

Where a policy of group life insurance conforms to the applicable requirements of former § 204 [now § 4216], the insurer is not acting improperly in terminating the policy for nonpayment of premiums by the representative of the group after the president of the corporation which took out the policy, as its president, has objected to the premiums as too high and announced that it would pay no more premiums and cancel the policy unless payments were reduced. Schwartz v Mutual Ben. Life Ins. Co., 28 Misc. 2d 367, 212 N.Y.S.2d 359, 1961 N.Y. Misc. LEXIS 3341 (N.Y. Sup. Ct.), aff'd, 14 A.D.2d 754, 218 N.Y.S.2d 526, 1961 N.Y. App. Div. LEXIS 8449 (N.Y. App. Div. 1st Dep't 1961).

Regulations promulgated by the state Superintendent of Insurance requiring policyholders to apply dividends for the benefit of the debtor-insureds who paid the premiums exceeded the superintendent's power to regulate and approve premium rates and were void, but regulations preventing long-term financing of credit insurance premiums were a function of the superintendent's power to regulate and supervise premium rates and therefore were valid. Mazgulski v Lewis, 118 Misc. 2d 600, 462 N.Y.S.2d 84, 1982 N.Y. Misc. LEXIS 4105 (N.Y. Sup. Ct. 1982), aff'd, 96 A.D.2d 1151, 467 N.Y.S.2d 108, 1983 N.Y. App. Div. LEXIS 22966 (N.Y. App. Div. 1st Dep't 1983), aff'd, 96 A.D.2d 1154, 467 N.Y.S.2d 108, 1983 N.Y. App. Div. LEXIS 23142 (N.Y. App. Div. 1st Dep't 1983).

Former § 204 [now § 4216] was referred to in connection with holding that an employee was covered by group insurance under policies issued to his employer and all premiums which were paid by the employer in the $15,000 coverage class of department heads, as against $5,000 for all other employees, where he had been appointed head of department and was performing as such prior to his death without notice of this change to the insurer or increase of premium payments by the employer. Korzinek v Postal Life Ins. Co., 224 F. Supp. 1001, 1964 U.S. Dist. LEXIS 6871 (S.D.N.Y. 1964).

No prohibited conflict of interest exists where a village police justice sells group hospitalization and life insurance to the village in which he is such officer for the benefit of its employees and officers. 1967 Ops St Compt File #397.

Insurers may pay incentive compensation for bonus over commission to agents, general agents, and brokers for sale of group life insurance and group annuities, but such incentive compensation for sale of group life insurance must be filed with Insurance Department under CLS Ins § 4216(e); there is no filing requirement under CLS Insurance Law for incentive compensation for sale of group annuities. Insurance Department, Opinions of General Counsel, Opinion Number 02-05-06.

It would constitute doing insurance business where New York corporation obtained group credit life insurance policy from authorized insurer to cover portion of its loan and then entered into agreement with debtor to forgive remainder of loan in event of debtor's death; under circumstances, corporation would have to be licensed under CLS Ins § 1102. Insurance Department, Opinions of General Counsel, Opinion Number 02-05-14.

Association may not purchase group life insurance policy to cover its members and have insured members designate it as beneficiary under policy; such designation would be contrary to CLS Ins § 4216(b)(12)(D). Insurance Department, Opinions of General Counsel, Opinion Number 02-11-23.

Association may purchase group life insurance policy and have its insured members designate their estate as beneficiary, in anticipation that member will designate association as recipient of policy proceeds; however, if association were to require such designation in member's will, it would be viewed as subterfuge to avoid CLS Ins § 4216(b)(12)(D). Insurance Department, Opinions of General Counsel, Opinion Number 02-11-23.

Grandparent may include his or her grandchild as insured under group life insurance policy if grandchild is dependent on grandparent. Insurance Department, Opinions of General Counsel, Opinion Number 03-01-44.

Where employer requires no contribution to employees to cover themselves or their dependents, employee may not waive em-

ployer sponsored group life insurance. Insurance Department, Opinions of General Counsel, Opinion Number 04-08-08.

Insurance Department does not object to insurer using Standard Industrial Code (SIC) or its successor North American Industry Classification System (NAICS) so long as such use by some insurers appropriately stratifies insureds and complies with requirements of CLS Ins §§ 4216, 4224, and 4235. Insurance Department, Opinions of General Counsel, Opinion Number 05-03-34.

CLS Ins § 3220(c)(1) does not serve to override prohibition in CLS Ins § 4216(b)(1). Insurance Department, Opinions of General Counsel, Opinion Number 05-10-17.

Prohibition in CLS Ins § 4216(b)(1) of employer receiving benefits under group policy would prevent assignments of policy benefits to employer/policyholder. Insurance Department, Opinions of General Counsel, Opinion Number 05-10-17.

Agency Opinions

Analysis

1. Plan for purchase of stock or securities
2. Credit insurance
3. Authorization for particular public bodies to procure insurance
4. —City
5. Miscellaneous

1. Plan for purchase of stock or securities

A periodic payment plan for the purchase of stock which makes the option of termination, supported by consideration, personal to the plan holder and stipulates for an obligation of his estate to complete the payment in the event of his death, is fairly within the statutory authorization under former § 204 [now § 4216] for group insurance. 1953 NY Ops Atty Gen Apr 17.

Where a periodic purchase plan for securities, considered in an earlier opinion of June 3, 1952, was revised so as to impose an obligation on the plan holder's estate for unpaid installments of kind for which group insurance under former § 204 [now § 4216] is authorized, such a periodic payment plan was not invalid. 1953 NY Ops Atty Gen Apr 17.

2. Credit insurance

A bank cannot obtain group insurance under predecessor to § 4216 where the individual does not actually procure the loan. 1930 N.Y. Op. Att'y Gen. No. 200.

3. Authorization for particular public bodies to procure insurance

4. —City

Under former § 204 [now § 4216] absent the establishment of an authorized group life insurance plan, the City of Oswego's fiscal or disbursing officer is not authorized to deduct life insurance premiums from the wages or salaries of its employees. 1978 NY Ops Atty Gen June 19.

Villages are authorized to provide group life insurance and group accident and health insurance under former § 204 [now § 4216] to its employees. 1958 NY Ops Atty Gen May 21 (informal).

The Chief of Staff to the Governor is not authorized to execute a trust agreement, as an employer, in order to establish a life and health insurance plan under former § 204 [now § 4216] for technician personnel of the New York Army and Air National Guard. 1978 NY Ops Atty Gen March 13 (Formal).

5. Miscellaneous

An insurer's contribution to the total premium for a group life, accident and sickness insurance policy issued by it for the benefit of its own employees is a taxable premium under Tax Law § 187. 1960 NY Ops Atty Gen Feb 17.

A group life insurance program established by a union free school district for its employees may include employees of the school district's public library so long as the library reimburses the school district for that portion of premiums attributable to library employees. 1980 Op St Compt File #199.

Exempt volunteer firemen who no longer are active in providing fire-fighting services may not be included in a group life insurance policy purchased for an association or organization of volunteer firemen. 1983 Op St Compt File #83-232.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 1101, 3220, 4208, 4224, 4235.

Public Employees' Fair Employment Act, CLS Civ S Art XIV.

Defining qualifications of exempt volunteer firemen, CLS Gen Mun § 200.

Codes, Rules and Regulations:

New York State Public Employees Group Life Insurance Plan. 2 NYCRR §§ 312.1 et seq.

Managerial and Confidential Group Term Life Insurance Plan. 4 NYCRR §§ 75.1 et seq.

Reporting of income and expenses. 11 NYCRR §§ 90.1 et seq.

Allocation of income and expenses. 11 NYCRR §§ 91.1 et seq.

Insurance department: policy provisions and rating standards for credit life and credit disability insurance. 11 NYCRR §§ 185.0 et seq.

Credit life insurance and credit accident and health insurance. 11 NYCRR §§ 185.1 et seq.

Compensation to agents and fees or other allowances under certain plans sponsored by union-management welfare funds. 11 NYCRR §§ 202.0 et seq.

Federal Aspects:

The Federal Farm Loan Act, cited in statutory text, formerly appeared as 12 USCS §§ 641 et seq. prior to its repeal by Act Dec. 10, 1971, P. L. 92-181, § 5.26(a), 85 Stat. 624; similar provisions now appear at 12 USCS §§ 2001 et seq.

Jurisprudences:

44 Am Jur 2d, Insurance §§ 1868 et seq.

14B Am Jur Pl & Pr Forms (Rev ed), Insurance, Forms 1481 et seq.

Texts: 1 Bergman on New York Mortgage Foreclosures (Matthew Bender) § 23.35.

New York Insurance Law (Matthew Bender's New York Practice Series) §§ 12.05[3][c], 20.03[1][a][ii], 22.05[6][b], 32.01[2][c], 32.03[1], [6][a], [d], [11], 32.04[2][8], 32.05[4], 32.06[1]—[16].

§ 4237. Blanket accident and health insurance

(a) (1) Any policy or contract of insurance against death or injury resulting from accident which insures a group of persons conforming to the requirements of one of the subparagraphs (A) through (F) of paragraph three hereof shall be deemed a blanket accident policy.

(2) Any policy or contract which insures a group of persons conforming to the requirements of subparagraph (C), (E) or (F) of paragraph three hereof against total or partial disability, excluding such disability from accident, shall be deemed a blanket health insurance policy.

(3) Any policy or contract of insurance which combines the coverage of blanket accident insurance and of blanket health insurance on such a group of persons shall be deemed a blanket accident and health insurance policy:

(A) Under a policy or contract issued to any railroad, steamship, motorbus or airplane carrier of passengers, which shall be deemed the policyholder, a group defined as all persons who may become such passengers may be insured against death or bodily injury either while, or as a result of, being such passengers.

(B) Under a policy or contract issued to an employer, who shall be deemed the policyholder, covering any group of employees defined by reference to exceptional hazards incident to such employment, insuring such employee against death or bodily injury resulting while, or from, being exposed to such exceptional hazards.

(C) Under a policy or contract issued to an institution of higher education, as defined in the higher education act of 1965, 20 U.S.C. § 1001, other school, or other institution of learning or to the head or principal thereof, who or which shall be deemed the policyholder, provided, with respect to a policy or contract issued to an institution of higher education, the policy or contract shall be a policy or contract:

(i) of hospital, medical, or surgical expense insurance that meets the requirements of section three thousand two hundred forty of this chapter;

(ii) that provides limited scope dental or vision benefits meeting the definition of "excepted benefits" set forth in section 2791 of the public health service act, 42 U.S.C. § 300gg-91(c); or

(iii) as described in item (ii), (iii) or (iv) of subparagraph (B) of paragraph one of subsection (a) of section three thousand two hundred forty of this chapter.

(D) Under a policy or contract issued in the name of

(i) any county, city, town, village or fire district,

(ii) any duly organized fire department, or fire company, of any such municipal corporation or fire district, whether or not any such corporation has been incorporated under any general or special law,

(iii) any fire corporation incorporated under or subject to the provisions of section one thousand four hundred two of the not-for-profit corporation law, or any general or special law, if such corporation is by law under the general control of, or recognized as a fire corporation by, the governing board of a city, town, village or fire district, which municipal corporation, fire district, fire department, fire company or fire corporation, as the case may be, shall be deemed the policyholder, covering all, but not less than twenty-five, volunteer members of such department, company or corporation. A district corporation which has the general powers of and operates as a fire district shall be considered a fire district for the purposes of this paragraph. A volunteer firefighter whose services are offered and accepted pursuant to the provisions of section two hundred nine-i of the general municipal law shall be deemed a volunteer member of any such fire department, fire company or fire corporation except for the purpose of determining the minimum number of twenty-five volunteer members for which any such policy or contract must provide coverage. Any such policy or contract issued to a municipal corporation or a fire district shall be subject to any limitations on the amount, coverage or benefits as are set forth in any applicable general, special or local law or city or village charter.

(E) Under a policy or contract issued to and in the name of an incorporated or unincorporated association of persons having a common interest or calling, which association shall be deemed the policyholder, having not less than fifty members, covering all the members of such association or if part or all of the premium is to be derived from funds contributed by the insured members and if the opportunity to take such insurance is offered to all eligible members, then such policy must cover not less than seventy-five percent of any class or classes of members determined by conditions pertaining to membership in the association.

(F) Under a policy or contract issued to insure; (i) any other substantially similar group approved by the superintendent as eligible for insurance under a blanket accident and health insurance policy or contract; or (ii) any other group approved by the superintendent upon a finding that: (I) there is a common enterprise or economic or social affinity or relationship; (II) the premiums charged are reasonable in relation to the benefits provided; and (III) the issuance of the policy would result in economies of acquisition or administration, would be actuarially sound, and would not be contrary to the best interest of the public. The superintendent shall promulgate regulations setting forth any such groups that have been accepted as qualifying pursuant to this subparagraph.

(b) All benefits under any blanket accident, blanket health or blanket accident and health insurance policy shall be payable to the person insured, or to his designated beneficiary or beneficiaries, or to his estate, except that if the person insured be a minor, such benefits may be made payable to his parent, guardian, or other person actually supporting him, or to a person or persons chiefly dependent upon him for support and maintenance.

(c) This section shall not affect the legal liability of policyholders for the death of or injury to, any such member of such group.

(d) (1) Any dividend hereafter apportioned on any participating blanket insurance policy, or any rate reduction hereafter made or continued on any non-participating blanket policy for the first or any subsequent year of insurance under any such policy heretofore or hereafter issued under item (ii) of subparagraph (F) of paragraph three of subsection (a) of this section may be applied to reduce the policyholder's part of the cost of such policy, except that the excess, if any, of the insured's aggregate contribution under the policy over the net cost (gross premium less dividends or rate reductions) of the insurance shall be applied at the discretion of the insurer either as a cash payment to the insured or to reduce the insured's premium, unless the insured assigns the dividend or rate reduction to the policyholder. If a dividend or rate reduction is payable upon termination of the policy the insurer shall either make payment to the insured or to the policyholder upon receipt of a certification from the

policyholder that the dividend or rate reduction will be distributed by the policyholder to the insureds or applied to reduce the insured's premium.

(2) The provisions of paragraph one of this subsection shall apply to New York residents insured under a policy issued in any other jurisdiction to a group which is not of the type described in subparagraphs (A) through (E) and item (i) of subparagraph (F) of paragraph three of subsection (a) of this section.

(e) (1) For the purposes of any policy or contract of insurance issued pursuant to this section, the term "employees" may include officers, managers, employees and retired employees of the employer, and of subsidiary or affiliated corporations of a corporate employer; and the individual proprietors, partners, employees and retired employees of affiliated individuals and firms controlled by the insured employer through stock ownership, contract or otherwise; and the individual proprietor or partners if the employer is an individual proprietorship or partnership.

(2) For purposes of subparagraph (B) of paragraph three of subsection (a) of this section, the term "employees" may also include the directors of the employer, and of subsidiary or affiliated corporations of a corporate employer.

HISTORY:

Add, L 1984, ch 367, § 1, eff Sept 1, 1984; amd, L 1985, ch 369, §§ 15, 16, eff Jan 1, 1986; L 2008, ch 504, § 1, eff Sept 4, 2008; L 2015, ch 461, § 3, effective November 20, 2015; L 2018, ch 476, § 232, effective December 28, 2018; L 2020, ch 55, § 2 (Part XX, Subpart K), effective December 27, 2019.

Editor's Notes: Laws 2015, ch 461, § 4, eff November 20, 2015, provides:

§ 4. This act shall take effect immediately and shall be deemed to have been in full force and effect on the same date and in the same manner as section 41 of part D of chapter 56 of the laws of 2013 took effect.

Laws 2020, ch 55, § 6 (Part XX, Subpart K), eff December 27, 2019, provides:

§ 6. This act shall take effect on the same date and in the same manner as a chapter of the laws of 2019, amending the insurance law relating to policies or contracts which are not included in the definition of student accident and health insurance, as proposed in legislative bills numbers S. 6197 and A. 492, takes effect.

Amendment Notes: The 2015 amendment by ch 461, § 3, rewrote (a)(3)(C), which formerly read: "Under a policy or contract issued to a college, school, or other institution of learning or to the head or principal thereof, who or which shall be deemed the policyholder."

The 2018 amendment by ch 476, § 232, substituted "firefighter whose services are offered" for "fireman whose services are offered" in the third sentence of (a)(3)(D)(iii).

The 2020 amendment by ch 55, § 2, (Part XX, Subpart K), added "(iii) or (iv)" in (a)(3)(C)(iii).

Notes to Decisions

Nonparticipating provider physician practicing in Pennsylvania was not intended third-party beneficiary entitled to enforce insurance contract between State of New York and insurer where insurance contract was intended to benefit state employees by providing them and their dependents with medical insurance, policy excluded nonparticipating providers from receiving direct benefits, and nonparticipating providers were to be paid directly by patients and had no relationship with insurer. Cole v Metropolitan Life Ins. Co., 273 A.D.2d 832, 708 N.Y.S.2d 789, 2000 N.Y. App. Div. LEXIS 6843 (N.Y. App. Div. 4th Dep't 2000).

Patients' assignments of their rights to New York State employees' group medical insurance payments to nonparticipating provider physician practicing in Pennsylvania were void and could not confer standing on physician to sue insurer for such payments where insurance policy contained clear language declaring invalidity of such assignments. Cole v Metropolitan Life Ins. Co., 273 A.D.2d 832, 708 N.Y.S.2d 789, 2000 N.Y. App. Div. LEXIS 6843 (N.Y. App. Div. 4th Dep't 2000).

This section is not applicable to group insurance. Bacchi v Continental Casualty Co., 53 Misc. 2d 796, 279 N.Y.S.2d 1008, 1967 N.Y. Misc. LEXIS 1865 (N.Y. Sup. Ct.), aff'd, 28 A.D.2d 970, 283 N.Y.S.2d 278, 1967 N.Y. App. Div. LEXIS 7585 (N.Y. App. Div. 1st Dep't 1967).

Health plan was not (1) required to cover one-person groups under N.Y. Ins. Law §§ 3216(g)(2)(B), 3221(p)(3)(A), since "group" meant more than one person under N.Y. Ins. Law § 4235, (2) N.Y. Ins. Law § 4237 blanket policy, (3) N.Y. Ins. Law § 3216(g)(2) individual plan, or (4) terminated, so statutory termination notice to solo member "group" was not required. Bentley v JLT Servs. Corp., 18 A.D.3d 205, 794 N.Y.S.2d 46, 2005 N.Y. App. Div. LEXIS 4763 (N.Y. App. Div. 1st Dep't 2005), app. denied, 2005 N.Y. App. Div. LEXIS 8742 (N.Y. App. Div. 1st Dep't Aug. 18, 2005).

A blanket accident insurance policy issued to a fire district pursuant to the provisions of former § 222(1)(d) [now § 4237(a)(3)(D)] of the Insurance Law cannot cover the ladies auxiliary of the fire company. 1967 Ops St Compt File #318.

Certain benefits provided by non-profit corporation, including accidental death and dismemberment insurance, group dental expense, and vision services coverage under blanket accident and health insurance policies that were presumably underwritten by one or more New York authorized insurers, would be in violation of New York Insurance Law if offered for sale in New York; thus, program could not be offered for sale in New York. Insurance Department, Opinions of General Counsel, Opinion Number 03-03-28.

Group or blanket medical expense insurance policy, which insures 300 or more persons, may not exclude or limit coverage for individuals that elect such coverage during first 30 days of their eligibility, unless such policy meets criteria of listed exception, and such restriction, and its exceptions, apply equally to both students and employer/employee medical expense insurance policies regardless of their designation as group or blanket policies; thus, policy limitations and exceptions of 11 NYCRR § 52.16(f) would be applicable to mandatory accident and health insurance policies issued to New York State colleges covering 300 or more students each. Insurance Department, Opinions of General Counsel, Opinion Number 03-07-22.

If health care organization desires to be recognized as "discretionary" group in accordance with CLS Ins § 4237(a)(3)(F), application for such recognition indicating how it meets requirements thereunder should be submitted to Department. Insurance Department, Opinions of General Counsel, Opinion Number 04-08-25.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 1101, 3221, 4235, 4304.

Fire corporations, CLS N-PCL § 1402.

Codes, Rules and Regulations:

State Health Insurance Plan. 4 NYCRR §§ 73.1 et seq.

State Dental Insurance Plan. 4 NYCRR §§ 74.1 et seq.

Managerial and Confidential Group Accident and Sickness Insurance Plan. 4 NYCRR §§ 76.1 et seq.

Minimum standards for an insurance plan qualifying under the long term care security demonstration program. 11 NYCRR §§ 39.1 et seq.

Minimum standards for the form, content and sale of health insurance; dental care exclusion. 11 NYCRR § 52.16 (Regulation 62).

Minimum standards for form, content and sale of health insurance. 11 NYCRR §§ 52.1 et seq.

Disclosure requirements for health insurance. 11 NYCRR §§ 52.54 et seq.

Federal Aspects:

Exclusion of contributions by employer to accident and health plans from taxpayer's gross income, 26 USCS § 106.

Jurisprudences:

18 NY Jur 2d Civil Servants and Other Public Officers and Employees § 147.

18A NY Jur 2d Civil Servants and Other Public Officers and Employees § 174.

68 NY Jur 2d Insurance §§ 18, 85 .

71 NY Jur 2d Insurance §§ 2217, 2220, 2221, 2229 .

111 NY Jur 2d Workers' Compensation § 833 .

44 Am Jur 2d, Insurance § 1502.

Appleman on Insurance:

2 Holmes' Appleman on Insurance 2d, Construction Against Insurance Company (Contra Proferentem) § 6.4.

4 Holmes' Appleman on Insurance 2d, Other Writings as Part of Contract § 20.5.

1 Appleman, Insurance Law and Practice, Group Insurance §§ 41 et seq.

6 Appleman, Insurance Law and Practice, Other Insurance§ 3912.

Annotations:

Effect of provision for coverage or double indemnity in case of injury or death in consequence of burning of building. 55 ALR2d 398.

Conflict of laws as to group insurance. 72 ALR2d 695.

Rights and liabilities under airplane passengers' trip insurance policy. 29 ALR3d 766.

Texts: New York Insurance Law (Matthew Bender's New York Practice Series) §§ 21.03[3][a], [d], 35.04[1][e][ii].

ARTICLE 45 Fraternal Benefit Societies

Section

4522. Exemptions of certain organizations

HISTORY:

Add, L 1984, ch 367, § 1, eff Sept 1, 1984.

§ 4522. Exemptions of certain organizations

(a) Except as provided in subsection (b) hereof the following societies, corporations, unincorporated associations, and other organizations shall be exempt from the provisions of this chapter requiring the obtaining of a license to do an insurance business and from all other requirements of this chapter except those provided in subsections (c) and (d) hereof and except section three thousand two hundred nine and the provisions of article seventy-four of this chapter:

(1) Organizations of workmen of the same trade or of several allied trades maintained for the purpose of securing by united action the most favorable conditions as regards wages, hours and conditions of labor, and the protection of their individual rights in the prosecution of their trade or trades.

(2) Organizations which limit their membership to the employees of a particular city or town, or of a designated business corporation or firm, or of one or more business corporations or firms having business interests in common, except as otherwise provided in subsection (f) of section one thousand one hundred eight of this chapter. Any such organization which limits its membership to the employees of a corporation having more than five thousand employees may provide for hospital, surgical and medical benefits for the employee, his or her spouse, and his or her child or children not over eighteen years of age.

(3) Organizations of a religious, charitable, benevolent or fraternal character, which are not organized or maintained primarily for the purpose of providing insurance benefits, and which have not more than fifteen hundred members who are or may be entitled to any insurance benefits unless the organization obligates itself to pay a death benefit of more than five hundred dollars on the death of any one member, or disability benefits of more than three hundred fifty dollars to any one person in any one year, or both.

(4) Organizations which limit their membership to persons engaged in one or more occupations in the same or similar lines of business and which, together with their legal predecessors or affiliated bodies continuously paid or provided for the payment of death or disability benefits to their members for a period of not less than fifteen years prior to January first, nineteen hundred forty.

(5) Any organization of a religious, charitable, benevolent or fraternal character, which is not organized or maintained primarily for the purpose of providing insurance benefits, which have furnished hospital benefits to its members under a plan where the maximum charge for such benefits is not in excess of two dollars per annum and which was in operation for ten years prior to March first, nineteen hundred forty-one, or which obligates itself to pay a death benefit of not more than one hundred dollars on the death of any one member, and has been in operation for more than twenty-five years prior to March first, nineteen hundred fifty.

(6) Organizations which limit their membership to members of a fraternal benefit society organized under the provisions of this chapter and which provide either cemetery benefits, or funeral benefits not in excess of seventy-five dollars for any one interment, or both, for such member, his or her spouse or his or her child or children not over twenty-one years of age.

(b) The foregoing exemptions shall not apply to:

(1) any organization which is incorporated or organized under the laws of, or has its principal office or headquarters in, any province or country outside of the United States,

(2) any organization, except one specified in paragraph two of subsection (a) hereof, which makes or issues annuity contracts,

(3) any organization of any of the kinds specified in paragraph two, three or five of subsection (a) hereof if it gives or allows, or promises to give or allow, to any person any compensation for procuring new members, or

(4) any subordinate lodge of any society providing insurance benefits to its members.

(c) The superintendent may require from any organization claiming exemption under subsection

(a) hereof, by examination in accordance with section three hundred ten of this chapter, or otherwise, such information as will enable him to determine whether such organization is exempt under this section.

(d) No organization of the kinds hereinbefore specified which obligates itself to pay life insurance or accident or health or disability insurance benefits to its members shall make, issue or deliver in this state any certificate or other written evidence of such obligation unless the same shall have conspicuously printed on the first page thereof in bold-faced type not smaller than ten point the following statement: "This organization does not operate under the supervision of the New York State Department of Financial Services."

HISTORY:

Add, L 1984, ch 367, § 1, eff Sept 1, 1984; amd, L 2011, ch 62, § 104 (Part A), eff Oct 3, 2011.

Editor's Notes: This section formerly appeared as Ins § 466 which was added by L 1939, ch 882; amd, L 1940, ch 580; L 1941, ch 613; L 1946, ch 138; L 1950, ch 288; L 1956, chs 746, 941.

Amendment Notes: 2011. Chapter 62, § 104 (Part A) amended:

Sub (d) at fig 1 by substituting "Department of Financial Services" for "Insurance Department".

Notes to Decisions

A union and employer welfare fund set up to cover thousands of employees employed in different states is not exempt, under this section, from auditing and examination by the New York Insurance Department, where a substantial number of the employees covered are New York residents, in view of the specific provisions of former Art. III-A [now Art. 44] of this law. People v Automobile Transporters Welfare Fund, 17 A.D.2d 448, 235 N.Y.S.2d 702, 1962 N.Y. App. Div. LEXIS 6290 (N.Y. App. Div. 1st Dep't 1962), aff'd, 13 N.Y.2d 814, 242 N.Y.S.2d 345, 192 N.E.2d 222, 1963 N.Y. LEXIS 1058 (N.Y. 1963).

There is a violation of former § 466 [now § 4522] where three organizations, whose bylaws provide for insurance benefits, have a combined membership of more than 1000 members and where the organizations are administered as one group by the same persons at joint meetings. In re St. Cecelia Service Club, Inc., 86 N.Y.S.2d 733, 194 Misc. 999, 1949 N.Y. Misc. LEXIS 1824 (N.Y. Sup. Ct. 1949).

Advice by the Insurance Department, that fraternal club could escape the provisions of this section by splitting up its membership, does not estop the department to enforce the prohibitions of this section after such split-up of membership. In re St. Cecelia Service Club, Inc., 86 N.Y.S.2d 733, 194 Misc. 999, 1949 N.Y. Misc. LEXIS 1824 (N.Y. Sup. Ct. 1949).

Where collective bargaining agreements provided that union welfare trust funds contributed by employers were to be administered solely by trustees, trustees had title to funds and State Superintendent of Insurance was authorized to examine the business records of such funds. Application of Townsend, 130 N.Y.S.2d 327, 206 Misc. 619, 1954 N.Y. Misc. LEXIS 2036 (N.Y. Sup. Ct. 1954).

Subdivision 1(b) of former § 466 [now § 4522(a)(2)] exempts a mutual aid association formed exclusively of members of the Air Line Pilots Association from being subject to service of process under § 59-a. Gentile v Air Line Pilots Mut. Aid Asso., 40 Misc. 2d 291, 243 N.Y.S.2d 50, 1963 N.Y. Misc. LEXIS 1683 (N.Y. Civ. Ct. 1963).

A proposed certificate of incorporation of veterans of United States Marine Corps was not approved where all the things proposed were being accomplished by an already existing veteran organization, and where the proposed certificate fails to comply with former § 466 [now § 4522] of the Insurance Law. In re Marine Corps Vets Foundation, Inc., 79 N.Y.S.2d 18, 1948 N.Y. Misc. LEXIS 2352 (N.Y. Sup. Ct. 1948).

A volunteer firemen's benevolent association may pay a death benefit to the family of a deceased volunteer fireman in an amount above $500. 1984 Op St Comp File #84-36.

Registered not-for-profit American religious organization incorporated with under 500 voluntary members (no one was compensated to procure members) was required to be licensed under CLS Ins § 1102(a) unless it fell within one of exemptions under CLS Ins § 4522(a). Insurance Department, Opinions of General Counsel, Opinion Number 00-04-04.

Self-funded health plan operated by religious organization that provided benefits to its employees and volunteers would not be exempt from New York's insurance regulation by virtue of CLS Ins § 4522(a)(3); however, if employees and volunteers were also members, and if organization provided benefits to its members, those employees and volunteers could also receive benefits. Insurance Department, Opinions of General Counsel, Opinion Number 02-09-20.

Association may not purchase group life insurance policy to cover its members and have insured members designate it as beneficiary under policy; such designation would be contrary to CLS Ins § 4216(b)(12)(D). Insurance Department, Opinions of General Counsel, Opinion Number 02-11-23.

Association may purchase group life insurance policy and have its insured members designate their estate as beneficiary, in anticipation that member will designate association as recipient of policy proceeds; however, if association were to require such designation in member's will, it would be viewed as subterfuge to avoid CLS Ins § 4216(b)(12)(D). Insurance Department, Opinions of General Counsel, Opinion Number 02-11-23.

Component of accident and health coverage conferred by charitable organization would be insurance contract, and thus would trigger requirement that charitable organization have license to do insurance business, where it conferred benefit of up to $2,000 accident and health coverage for its volunteers when they travel, covering health injuries and medical costs, with additional accident and health insurance for its volunteers provided by insurer, since there would be benefit of pecuniary value dependent on happening of fortuitous event. Insurance Department, Opinions of General Counsel, Opinion Number 04-03-07.

Tax exempt status of Multiple Employer Welfare Arrangement (MEWA), or of its constituent members, would not serve to exempt it from applicable requirements of Insurance Law. Insurance Department, Opinions of General Counsel, Opinion Number 05-01-07.

Organization composed of individuals who have direct financial responsibility in construction industry, or who are employed by entities that have capital invested in construction industry, does not qualify for exemption from applicable licensing requirements for medical insurers because it is not primarily charitable organization and does not otherwise qualify for any other exemption under Insurance Law, even though it is incorporated under Not-For-Profit Corporation Law and is exempt from federal taxes under Internal Revenue Code § 501(c)(6). Insurance Department, Opinions of General Counsel, Opinion Number 07-05-19.

Agency Opinions

The voluntary association of a benevolent description, having less than five hundred members, organized in this state thirteen years ago and doing business here at time L 1911 c 198 went into effect, and providing for a death benefit of not more than one hundred dollars and a disability benefit of not more than one hundred and fifty dollars to any one person in any one year is exempt from the provisions of former Art. 7. 1911 NY Ops Atty Gen Oct. 31.

The right of an unauthorized foreign fraternal benefit society to do business in this state does not depend upon the amount of benefits paid but does depend upon question of whether said society falls within first provisions of former § 245 [predecessor to former § 466, now § 4522], and that amount of benefits paid applies only to associations of local lodges of society now doing

business in the state and to domestic lodges of purely charitable and benevolent description. 1911 N.Y. Op. Att'y Gen. No. 603.

An unincorporated club which prior to Jan. 2, 1913, has had disability and death insurance feature connected with membership therein may not organize as a membership corporation and retain insurance features although claiming its activities to be purely for benevolent purposes. 1913 N.Y. Op. Att'y Gen. No. 680.

Membership corporations organized pursuant to Membership Law and engaged in business of rendering aid to members limited to amount specified in subd. (c) of former § 245 [predecessor to former § 466, now § 4522] are prohibited from advertising furnishing of insurance benefits generally. They are not presumed to deal with public generally, but such business is merely incident to business of corporations. Such corporations may issue certificates of membership to members in which there appears description of benefits promised for amounts paid. 1914 N.Y. Op. Att'y Gen. No. 178.

The Buffalo Police Mutual Aid and Benefit Association is the kind of organization contemplated by former § 245, subd. (c) [predecessor to former § 466, now § 4522]. 1939 N.Y. Op. Att'y Gen. No. 309.

The plain language of Section 514 of Public Law 93-406 indicates that, as of January 1, 1975, neither the employee benefit plans proposed by Warner-Lambert and First National City Bank, nor the trusts to be established pursuant thereto, nor the voluntary employees' beneficiary associations they will constitute, are subject to regulation under the New York State Insurance Law as "doing an insurance business." The clear intention of Public Law 93-406 is to pre-empt state insurance regulatory provisions as they relate to the plans in question and to substitute its own scheme of supervision. 1975 NY Ops Atty Gen Jan 31.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 4523.

Jurisprudences:

10 NY Jur 2d Benevolent Orders and Fraternal Benefit Societies § 7.

Appleman on Insurance:

18 Appleman, Insurance Law and Practice, Powers and Liabilities of Insurer and Representatives § 10180.

Texts: New York Insurance Law (Matthew Bender's New York Practice Series) § 22.05[8][a][iv].

ARTICLE 91 Taxes and Fees

Section

9104. Fire insurance premium tax on foreign and alieninsurers
9105. Fire insurance premium tax; foreign mutual fire insurance companies
9108. Fire insurance fee

HISTORY:

Add, L 1984, ch 367, § 1, eff Sept 1, 1984.

§ 9104. Fire insurance premium tax on foreign and alien insurers

(a) Except in the cities of New York and Buffalo, there shall be paid by every foreign and alien fire insurance corporation, association or individuals which insure property against loss or damage by fire, except foreign mutual fire insurance companies, on or before the first day of March the sum of one dollar and eighty cents upon the hundred dollars, and at that rate, upon the amount of all premiums which during the year, or part of a year, ending on the last preceding thirty-first day of December, shall have been received by any such insurer for any insurance against loss or damage by fire written by it upon property situated within each city, village, fire district, or fire alarm district, or fire protection district to:

(1) the treasurer or other fiscal officer of the fire department affording fire protection in such city, village, fire district, fire alarm district, or fire protection district, or

(2) if any such fire department does not have a treasurer or other fiscal officer then to the fiscal officer of the authorities having jurisdiction and control of such fire department, or

(3) to such other person or entity as shall be designated in any special law to receive the premium tax, and

(4) if such payment is made to the treasurer or other fiscal officer of a fire department or fiscal officer of authorities having jurisdiction and control of such fire department, such treasurer or fiscal officer shall on or before the fifteenth day of March in each year distribute the amount so received to the fire companies constituting the fire department if such fire department is constituted of more than one fire company.

(b) There shall also be paid to the treasurer of the Firemen's Association of the State of New York, on or before the first day of March in each year, by each such insurer, for the support and maintenance of the firemen's home at Hudson, New York, the sum of twenty cents upon the hundred dollars, and at that rate, upon the amount of all premiums upon which a fire insurance premium tax is payable as aforesaid.

(c) Each insurer required to pay a tax pursuant to this section shall, at the time of paying such tax, file with the person to whom the tax is required to be paid a report, subscribed and affirmed by the person making it as true under the penalties of perjury, setting forth the aggregate amount of premiums upon which the tax is payable.

(d) Corporations, associations or individuals required to pay a fire insurance premium tax by this section may elect to pay such tax to the superintendent, which shall be distributed by him as prescribed in this section, except that such distribution shall be made with the distribution required by section nine thousand one hundred five of this article after adding any earnings and deducting the expenses as specified in such section.

(e) Every agent for any such insurer writing a policy of fire insurance upon property in this state shall report to the insurer the name of the city, village, fire district or fire alarm district or fire protection district in which the property insured is situated, and, if the property insured is situated in territory not protected by any fire department or fire company, that fact shall be reported.

(f) Except as otherwise provided in any special law, and except as to the Firemen's Association of the State of New York, such tax shall be used for the benefit of, as determined by the members thereof:

(1) the fire company receiving the same, but this shall not preclude the payment by a fire company of all or a part of such tax so received to the fire department of which it is a part, or

(2) the fire department when such tax is not required under paragraph four of subsection (a) of this section to be distributed to fire companies.

(g) The provisions of this section shall not be changed, modified or amended by any charter, local law, ordinance, resolution or regulation.

(h) Those provisions of subsections (a) and (e) of this section which require the determination of the city, village, fire district, fire alarm district or fire protection district within which an insured property is located shall not apply to policies which insure motor vehicles, provided that:

(1) the insurer allocates the tax to be paid on fire premiums received from such policies by city, village, fire district, fire alarm district or fire protection district using a percentage of allocation which is based upon the amounts of tax to be paid on all other fire premiums; and

(2) the insurer has received the approval of the superintendent to use this percentage of allocation.

HISTORY:

Add, L 1984, ch 367, § 1; amd, L 1988, ch 293, § 1, eff Jan 1, 1989.

Editor's Notes: This section formerly appeared as Ins § 553 which was added by L 1939, ch 882; amd, L 1940, ch 554; L 1957, ch 613; L 1965, ch 845.

Notes to Decisions

Analysis

1. In general
2. Duty to collect and pay over funds
3. Particular groups or entities to whom funds must be paid over
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1. In general

Former § 133 [now § 9104], in regard to percentage tax collected from foreign fire insurance companies in cities, seems to provide that first claim upon such moneys is for relief of exempt or veteran volunteer firemen, administered through organized firemen's relief or benevolent societies having requisite authority. Exempt Fireman's Ass'n v Little Falls, 148 A.D. 440, 132 N.Y.S. 798, 1911 N.Y. App. Div. LEXIS 223 (N.Y. App. Div. 1911).

The tax provisions of the Insurance Law are clearly intended to apply to the state outside of cities of New York and Buffalo. Drennan v Hampton, 191 A.D. 576, 181 N.Y.S. 777, 1920 N.Y. App. Div. LEXIS 4760 (N.Y. App. Div. 1920), aff'd, 232 N.Y. 576, 134 N.E. 578, 232 N.Y. (N.Y.S.) 576, 1922 N.Y. LEXIS 1155 (N.Y. 1922).

The provisions of former § 134 [now § 9104] are not limited in their application to local resident agents but apply to all agents of insurance companies writing contracts of insurance within state. Fire Dep't of East Rochester v Barley, 133 N.Y.S. 539, 73 Misc. 628, 1911 N.Y. Misc. LEXIS 571 (N.Y. Sup. Ct. 1911).

Provisions of insurance law governing fire department tax on premiums paid on policies of foreign and alien fire insurance companies do not create a preference among the recipients of the tax moneys. Crohn v Firemen's Benevolent Fund Ass'n, 79 Misc. 2d 536, 359 N.Y.S.2d 599, 1973 N.Y. Misc. LEXIS 1279 (N.Y. Sup. Ct. 1973), aff'd, Crohn v Firemen's Benevolent Fund Asso., 45 A.D.2d 955, 359 N.Y.S.2d 247, 1974 N.Y. App. Div. LEXIS 4168 (N.Y. App. Div. 2d Dep't 1974).

Sections of Insurance Law providing for two percent fire insurance "tax" to be paid by all foreign and alien fire insurers other than mutual fire insurers were constitutionally valid, even though initial responsibility for collecting and allocating "tax" among proper fire departments, the intended benficiaries of the subject levies, was on taxed fire insurers. Greenville Fire Co. No. 1 v Aetna Casualty & Surety Co., 92 Misc. 2d 402, 399 N.Y.S.2d 985, 1977 N.Y. Misc. LEXIS 2558 (N.Y. Sup. Ct. 1977), aff'd, 63 A.D.2d 725, 405 N.Y.S.2d 310, 1978 N.Y. App. Div. LEXIS 11654 (N.Y. App. Div. 2d Dep't 1978).

Foreign fire insurance tax moneys may not be used for purpose of making interest-free loans to pay for volunteer firemen. 1987 Op St Compt No. 87-88.

With respect to fire department's pro rata distribution of foreign fire tax monies to its fire companies, "active member" of fire company is member who participates in firefighting and is subject to call for whatever duties may be assigned to him under rules and regulations of fire department or company of which he is member. Insurance Department, Opinions of General Counsel, Opinion Number 08-04-10.

2. Duty to collect and pay over funds

Disbursement of funds derived from tax on premiums of policies of fire insurance was in discretion of treasurer of village fire department for use and benefit of all components thereof, and order directing treasurer of village fire department to pay portion of such funds to either treasurer of paid fire department or to village treasurer therefore went beyond scope of applicable law. Wilcox v Schenck, 52 A.D.2d 349, 383 N.Y.S.2d 918, 1976 N.Y. App. Div. LEXIS 12028 (N.Y. App. Div. 3d Dep't 1976).

Moneys received by treasurer of a fire district from the fire insurance tax must be paid over to the volunteer fire company for its use. 1954 Ops St Compt File #6591.

Monies received pursuant to this section [now § 9104] must be paid to the fire companies furnishing fire protection to the territory for which such money is received. 1955 Ops St Compt File #7205.

Where a fire protection district is protected by a contract with a village, moneys received pursuant to this section [now § 9104] should be paid over to the fire company or department furnishing the protection 1954 Ops St Compt File #6891; 1957 Ops St Compt File #57-301.

A city must apportion and pay over to the fire companies moneys received pursuant to this section [now § 9104] but need not apportion and pay over moneys received pursuant to Insurance Law § 554 [now § 9105]. 1957 Ops St Compt File #602.

Where a fire protection district is protected by contract with three village fire departments or companies, insurance premium tax moneys received by a town supervisor should be distributed to all three. 1968 Ops St Compt File #281.

Foreign or alien insurer is required to pay both fire insurance premium tax and fire insurance fee. Insurance Department, Opinions of General Counsel, Opinion Number 09-10-01.

Under CLS Ins § 9104, foreign or alien insurer may elect to pay fire insurance premium tax to Superintendent of Insurance, but under CLS Ins § 9108, insurer must pay fire insurance fee to Superintendent. Insurance Department, Opinions of General Counsel, Opinion Number 09-10-01.

Because the supreme court properly determined that the actual number of calls a firefighter responded to was not determinative of the manner in which the city had to distribute tax monies, there was no error in its pro rata disbursement of the monies. Hennessy v G.S. Mink Steamer & T. Claxton Hose Co. No. 2, Auxiliary Inc., 182 A.D.3d 830, 122 N.Y.S.3d 784, 2020 N.Y. App. Div. LEXIS 2342 (N.Y. App. Div. 3d Dep't 2020).

3. Particular groups or entities to whom funds must be paid over

Chief financial officer of city that lacked fire department treasurer was proper recipient of future tax proceeds to which city firefighters were entitled, generated pursuant to CLS Ins §§ 9104 and 9105, where proceeds were to be divided between paid firemen and volunteer firemen on pro rata basis as determined by referee, pursuant to requirements of statute. Poughkeepsie v Poughkeepsie Associated Fire Dep't, 125 A.D.2d 522, 509 N.Y.S.2d 601, 1986 N.Y. App. Div. LEXIS 62827 (N.Y. App. Div. 2d Dep't 1986), app. dismissed, 69 N.Y.2d 1038, 517 N.Y.S.2d 1031, 511 N.E.2d 90, 1987 N.Y. LEXIS 17262 (N.Y. 1987), app. dismissed, 80 N.Y.2d 891, 587 N.Y.S.2d 901, 600 N.E.2d 628, 1992 N.Y. LEXIS 1817 (N.Y. 1992).

Amendment of city charter by local law, which precluded paid firefighters from sharing ratably with volunteers in proceeds of 2 percent tax imposed on certain insurance carriers under CLS Ins §§ 9104 and 9105, was authorized under Municipal Home Rule Law and thus constituted valid state-legislated preference since (1) CLS Mun H R § 10 permits legislation that is inconsistent with CLS Ins §§ 9104 and 9105 insofar as it alters beneficiaries of proceeds of 2 percent tax, (2) under Municipal Home Rule Law, local problems are to be dealt with locally, and (3) issue of beneficiaries under CLS Ins §§ 9104 and 9105 is primarily one of local concern. Van Orman v Slade, 126 A.D.2d 282, 513 N.Y.S.2d 867, 1987 N.Y. App. Div. LEXIS 41229 (N.Y. App. Div. 3d Dep't 1987).

Professional firefighters and their union were not entitled to a portion of taxes collected pursuant to N.Y. Ins. Law §§ 9104 and 9105 on certain fire insurance premiums, because the proceeds of the subject taxes were only to be used for the care and relief of disabled or indigent volunteer and exempt firemen and their families. Town of Mamaroneck Prof'l Firefighters Ass'n v Volunteer & Exempt Firemen's Benevolent Ass'n, 292 A.D.2d 375, 738 N.Y.S.2d 93, 2002 N.Y. App. Div. LEXIS 2221 (N.Y. App. Div. 2d Dep't 2002).

Under N.Y. Ins. Law §§ 9104(a)(1)-(3), 9105(d)(2)(B)-(D), the exempt association recipient of the two percent funds had discretion, not a requirement, how to disburse the funds for the benefit of its members (for the assistance of disabled or indigent members and their families, and the promotion of the welfare of the volunteer fire service in the fire district) and so was not required to pay a share to a local fireman's union. Watt v Richardson, 6 A.D.3d 1117, 776 N.Y.S.2d 418, 2004 N.Y. App. Div. LEXIS 6300 (N.Y. App. Div. 4th Dep't), app. denied, 9 A.D.3d 920, 779 N.Y.S.2d 799, 2004 N.Y. App. Div. LEXIS 9604 (N.Y. App. Div. 4th Dep't 2004), app. denied, 3 N.Y.3d 735, 786 N.Y.S.2d 808, 820 N.E.2d 287, 2004 N.Y. LEXIS 2526 (N.Y. 2004).

Because both paid and volunteer firefighters were entitled to share in the distribution of foreign fire insurance tax moneys on premiums received from the state pursuant to N.Y. Ins. Law §§ 9104(a), 9105(a)(1), (b)(1), the trial court should have declared the rights of the parties. Hahn v Garrett, 27 A.D.3d 1103, 810 N.Y.S.2d 705, 2006 N.Y. App. Div. LEXIS 3202 (N.Y. App. Div. 4th Dep't 2006).

While an emergency rescue and first aid squad within a village fire department is not entitled to receive foreign fire insurance tax moneys, such tax moneys may be expended for the use and benefit of a fire department or company receiving the same, as determined by the members. This would include the purpose of an emergency rescue squad, if the membership of the department or company reasonably determined that the expenditure is for the use and benefit of the department or company. Members of emergency and rescue first aid squads, as members of the fire department or company, may participate in the decision. 1990 Op St Compt 90-34.

Assuming there is no special act providing otherwise, fire district treasurer would be proper recipient of foreign fire insurance tax moneys if fire district fire department has no treasurer. 1999 Op St Compt No. 99-7.

A city may enact a local law superseding the provisions of a special act of the State Legislature with respect to designation of the recipients of foreign fire insurance tax proceeds. 1985 Op St Comp 85-2.

4. —Benevolent associations

A 1939 enactment which allocated to the Exempt Firemen's Association of the City of Kingston funds formerly payable to disbanded volunteer fire companies of Kingston, did not exempt the Board of Trustees of the Kingston Fire Department from application of Ins Law §§ 553, 554 [now §§ 9104, 9105], providing for payment of a designated percentage of premiums received for fire insurance by foreign insurance corporations to the treasurer of the fire department of every organized territory afforded protection by any fire department, and which entitle, in the absence of an express legislative enactment to the contrary, all firemen in a particular city, including paid firemen, to share ratably in the funds collected; thus, full-time paid firemen of the City of Kingston were entitled to share with volunteer firemen the two percent tax levied by Ins Law §§ 553, 554. Renn v Kimbark, 51 N.Y.2d 189, 433 N.Y.S.2d 71, 412 N.E.2d 1298, 1980 N.Y. LEXIS 2641 (N.Y. 1980).

In an action for declaratory and injunctive relief brought by a firemen's association seeking to prevent a firemen's union from limiting participation in tax funds under Ins Law §§ 553 and 554 [now §§ 9104, 9105] to indigent members of the union, the trial court's order limiting participation to union members would be reversed and the union would be required to use the monies in question for the care of indigent firemen irrespective of their membership in the union where the special enactment did not limit the beneficiary clause of indigent and disabled firemen to union members and where a union by-law limiting use of tax funds to union members was not valid and could not be used to bar distribution of funds to the association, which was comprised of former members of the union. Uniformed Fire Officers Ass'n v Mutual Aid Ass'n, 82 A.D.2d 916, 440 N.Y.S.2d 706, 1981 N.Y. App. Div. LEXIS 14635 (N.Y. App. Div. 2d Dep't 1981).

Where by special statute the Firemen's Benevolent Fund Association of the Village of Herkimer was designated as the recipient of funds collected from the taxes on businesses or policies of foreign fire insurance companies doing business within the corporate limits of the village, that organization was the proper recipient for moneys collected pursuant to §§ 553 and 554 of the Insurance Law [now §§ 9104 and 9105]. Abeline v Firemen's Benevolent Fund Ass'n, 55 Misc. 2d 406, 285 N.Y.S.2d 644, 1967 N.Y. Misc. LEXIS 1006 (N.Y. Sup. Ct. 1967).

Fireman's benevolent association, which was formed with the consent of the city after December 31, 1939, was the proper distributee of the tax revenues, since the funds were intended to be used for the fire department and its members rather than for general tax purposes. Watertown Firemen's Benevolent Ass'n v Watertown, 134 N.Y.S.2d 465, 1953 N.Y. Misc. LEXIS 2715 (N.Y. Sup. Ct. 1953).

A village treasurer may not transfer custody of foreign fire insurance tax moneys to a fireman's association unless authorized or required by special law, but the treasurer may pay such moneys to the association if the membership of a village fire department determines that the expenditure is for the use and benefit of the department. 1982 Ops St Compt 82-239 is superseded to the extent that it is inconsistent with this opinion. 1990 Op St Compt 90-20.

Any exempt firemen's association which may be established in village of Larchmont may not share in the proceeds of the foreign fire insurance premium taxes without statutory authority therefor. 1953 Ops St Comp File #6294.

5. —Paid corps

Moneys paid by agents of foreign fire insurance companies, pursuant to the requirements of former § 133 [now § 9104], should be apportioned among several companies which have been recognized by the common council of the city of Oneida as members of the fire department of said city. Volunteer companies have no preference under the statute over paid companies. Cary v Oneida, 158 A.D. 773, 144 N.Y.S. 57, 1913 N.Y. App. Div. LEXIS 8084 (N.Y. App. Div. 1913).

Because a union was neither a fire company nor a fire department, it was ineligible to receive the distributions; the city treasurer, who, as the fiscal officer of the city, was the person having jurisdiction and control of the paid firefighters, was the

appropriate recipient of the paid firefighters' share. Hennessy v G.S. Mink Steamer & T. Claxton Hose Co. No. 2, Auxiliary Inc., 182 A.D.3d 830, 122 N.Y.S.3d 784, 2020 N.Y. App. Div. LEXIS 2342 (N.Y. App. Div. 3d Dep't 2020).

L 1864 ch 140, which incorporated the fire department of the city of Rochester, in order to accumulate a fund for relief of certain indigent members of said fire department, was intended to comprehend, within scope of relief it was designed to afford, members of former volunteer companies as well as members of paid department that succeeded them; and legislature did not intend to modify or abridge rights of such corporation by former § 133 [now § 9104] or by amendments of charter of city of Rochester in 1879, but it is entitled to receive moneys derived from two per cent tax upon local premiums of foreign insurance companies demanded by former § 133. Egbert F. Ashley Co. v Fire Dep't of Rochester, 133 N.Y.S. 591, 73 Misc. 636, 1911 N.Y. Misc. LEXIS 573 (N.Y. Sup. Ct. 1911).

A corporation organized under the Membership Corporation Law and comprised of all paid firemen of the City of Amsterdam could not maintain an action to require the treasurer of that city to pay over to it all taxes levied upon foreign fire insurance companies under this section [now § 9104] and § 554 [now § 9105], as it was not a person designated by any "special law" to receive such funds. Amsterdam Permanent Firemen's Asso. v Amsterdam, 40 Misc. 2d 323, 242 N.Y.S.2d 950, 1963 N.Y. Misc. LEXIS 1627 (N.Y. Sup. Ct. 1963).

The tax imposed on foreign fire insurance pursuant to Insurance Law §§ 553, 554 [now §§ 9104 and 9105] applies not only to volunteer but also to municipally paid fire departments, and for the Firemen's Benevolent Association to be entitled to receive any portion of the tax moneys, the creation and designation of such association must be by special law or enactment. Eisinger v Stern, 57 Misc. 2d 16, 290 N.Y.S.2d 979, 1968 N.Y. Misc. LEXIS 1396 (N.Y. Sup. Ct. 1968).

Notwithstanding case law to the contrary with respect to other municipalities, paid firemen of the City of Kingston are not entitled to share the 2% tax levied by sections 553 and 554 of the Insurance Law [now §§ 9104 and 9105] on fire insurance premiums paid by insureds to foreign insurance companies for insurance coverage on properties within the city, since by special laws (L 1879, ch 325, § 1; L 1939, ch 734) the Legislature expressed an intent that all such tax moneys allocable to the City of Kingston must be exclusively applied to the use and benefit of volunteer firemen and the representative of disbanded volunteer companies and that no portion thereof be used to benefit paid firemen. Renn v Kimbark, 92 Misc. 2d 810, 401 N.Y.S.2d 941, 1977 N.Y. Misc. LEXIS 2615 (N.Y. Sup. Ct. 1977), aff'd, 70 A.D.2d 994, 418 N.Y.S.2d 160, 1979 N.Y. App. Div. LEXIS 12633 (N.Y. App. Div. 3d Dep't 1979).

Paid firemen in fire district in which foreign fire insurance tax moneys are distributed to an exempt volunteer fireman's benevolent association are entitled to share in use of such moneys on pro rata basis in accordance with membership unless special legislation establishing association and authorizing it to receive such moneys expressly excludes them. 1986 Op State Compt No. 86-16.

6. —Volunteer corps

In an action pursuant to Ins Law §§ 553 and 554 [now §§ 9104, 9105] to recover monies collected for the benefit of firefighters, defendants could not, by amendment, qualify the class of beneficiaries by limiting it to volunteers where no such restriction appeared in the legislative enactment creating the fund, where fund eligibility was broadly defined by the legislature and was not related to an organization's function or purpose as articulated in the special enactment creating it, and where the special enactment in the instant case created a benevolent association for the purpose of receiving the insurance tax monies and distributing them for the benefit of indigent firemen and their families, but not for the purpose of regulating the class of beneficiaries. Bruno v Walder, 82 A.D.2d 903, 440 N.Y.S.2d 703, 1981 N.Y. App. Div. LEXIS 14613 (N.Y. App. Div. 2d Dep't), dismissed, 55 N.Y.2d 748, 1981 N.Y. LEXIS 8549 (N.Y. 1981).

Where a village has supplanted a volunteer fire department with a paid fire department and the volunteer companies have been inactive for many years, such companies are not entitled to share in the distribution of the fire insurance premium tax. 1956 Ops St Compt File #7987.

A volunteer fire company may share the proceeds from the tax on premiums collected by foreign insurance companies. 1957 Ops St Compt File #57-301.

Where foreign fire insurance tax monies are distributed in accordance with CLS Ins Law §§ 9104 and 9105, monies must be allocated between or among volunteer fire companies of a multi-company fire department in proportion to active membership of each company. Ops St Compt 89-53.

Supreme court properly denied volunteer fire companies' motion for partial summary judgment by determining that the tax monies distributed to the paid firefighters were for their use and benefit as a whole, rather than the fire department as an entity, because the statute indicated that the distribution had be used solely for the benefit of the members of the fire companies, as determined by the members of the companies. Hennessy v G.S. Mink Steamer & T. Claxton Hose Co. No. 2, Auxiliary Inc., 182 A.D.3d 830, 122 N.Y.S.3d 784, 2020 N.Y. App. Div. LEXIS 2342 (N.Y. App. Div. 3d Dep't 2020).

7. Particular purposes for which funds may be used

A city council charged with the power and duty of expending two per cent foreign insurance tax receipts may not delegate such power and duty, but may seek the advice of fire department members. Two percent foreign insurance tax receipt must be expended for the use and benefit of the fire department. The determination of what expenditures are for the use and benefit of the fire department rests in the discretion of the city council, within prescribed bounds. 1969 Ops St Compt File #904.

A village treasurer may not transfer custody of foreign fire insurance tax moneys to a fireman's association unless authorized or required by special law, but the treasurer may pay such moneys to the association if the membership of a village fire department determines that the expenditure is for the use and benefit of the department. 1982 Ops St Compt 82-239 is superseded to the extent that it is inconsistent with this opinion. 1990 Op St Compt 90-20.

Except as provided by special act, foreign fire insurance tax moneys may be expended for any purpose, other than illegal purpose or purpose contrary to public policy, which members of fire department or company, as case may be, determine to be for benefit of fire department or company. 1999 Op St Compt No. 99-7.

A fire department, municipal or fire district treasurer should not permit the expenditure of foreign fire insurance tax moneys for a purpose which he, in good faith, believes to be illegal or improper. However, with respect to other proposed expenditures which have been approved by a majority of the members of the fire department, he is not authorized to veto the expenditure by refusing to release the moneys. 1981 Op St Comp File #81-389.

Pre-existing city charter provisions governing distribution and use of foreign fire insurance tax moneys remain operative following effective date of Laws of 1988, Chapter 223, which amends CLS Ins Law §§ 9104 and 9105, as provisions in §§ 9104(g) and 9105(e) providing that provisions of these sections shall not be changed, modified or amended by any charter, local law, ordinance, resolution or regulation, as these provisions refer only to future adoption of local laws, and not to existing city charter. Ops St Comp 90-8.

8. —Arbitration and other legal fees

If issues arise which directly relate to care and relief of indigent or disabled firefighters and their families and which necessarily require services of accountant or attorney, volunteer and exempt firemen's benevolent association may use foreign fire insurance tax moneys to pay for those services. 1995 Op St Compt No. 95-26.

9. —Care and relief of indigent

The Volunteer and Exempt Firemens' Benevolent Association of Hicksville may expend foreign fire insurance tax monies to provide death benefits to family members of deceased volunteer firefighters, and to fund retirement benefits to indigent or disabled volunteer firefighters, without regard to whether the deceased firefighters were, or the indigent or disabled firefighters are, members of the Association. 1991 Op St Compt No. 91-59.

The Fishkill Exempt Firemans' Benevolent Association may expend foreign fire insurance tax moneys to pay debts incurred in the operation of a volunteer firefighter's business if the Association determines, based on the entire financial circumstances of the firefighter and his or her family, that the firefighter is indigent and that the expenditure will provide personal financial relief to the firefighter and his or her family. 1992 Op St Compt No. 92-7.

Florida Fire Department Volunteer Exempt Firemen's Benevolent Association may expend foreign fire insurance tax moneys, or any interest earned thereon, to provide college scholarships to disabled or indigent volunteer firefighters and their families; scholarships must be available to all firefighters for whose benefit Association was established, without regard to actual membership in Association. 1993 Op St Compt No. 93-9.

Volunteer and exempt firemen's benevolent association may expend foreign fire insurance tax moneys to rent meeting room if purpose of meeting relates to care and relief of indigent or disabled volunteer firefighters and their families, and rental paid should be no more than fair market value, with room rented only if association's own facilities are inadequate. 1995 Op St Compt No. 95-26.

If volunteer and exempt firemen's benevolent association does not have adequate storage capacity for retention of necessary records relating to care and relief of indigent or disabled volunteer firefighters and their families, it may expend foreign fire insurance tax moneys for reasonable cost of obtaining storage space. 1995 Op St Compt No. 95-26.

Volunteer and Exempt Fireman's Benevolent Association of City of Glen Cove may not expend foreign fire insurance tax moneys to provide benefit to member of Association solely by reason of death of his or her spouse. 1997 Op St Compt No. 97-4.

Benevolent association that is authorized to use foreign fire insurance tax moneys for care and relief of disabled or indigent volunteer and exempt firefighters and their families may expend such moneys to make nominal contribution to charitable organizations designated by family of deceased volunteer firefighter, as memorial in honor of deceased firefighter, made for purpose of lessening grief of, or providing comfort to, firefighter's family. 1999 Op St Compt No. 99-3.

Montgomery Fire Department Volunteer Exempt Firemen's Benevolent Association may expend fire insurance tax moneys to rent room in which to meet, if meetings are for purpose of providing care and relief to disabled or indigent volunteer firemen and their families. Ops St Compt 89-11.

Moneys received by the Volunteer and Exempt Firemen's Benevolent Association of Baldwin from the taxes imposed by Insurance Law, §§ 553 and 554 [now §§ 9104, 9105] must be used for the care and relief of indigent and disabled volunteer and exempt firemen and their families, without regard to whether such firemen are members of the Association. Opn No. 78-912 superseded to the extent inconsistent. 1981 Op St Comp File #81-392.

10. —Death benefits

The Volunteer and Exempt Firemens' Benevolent Association of Hicksville may expend foreign fire insurance tax monies to provide death benefits to family members of deceased volunteer firefighters, and to fund retirement benefits to indigent or disabled volunteer firefighters, without regard to whether the deceased firefighters were, or the indigent or disabled firefighters are, members of the Association. 1991 Op St Compt No. 91-59.

A volunteer firemen's benevolent association may pay a death benefit to the family of a deceased volunteer fireman in an amount above $500. 1984 Op St Comp File #84-36.

11. —Equipment for fire department

Local law which purported to authorize spending of tax proceeds paid by foreign and alien fire insurance companies under CLS Ins §§ 9104 and 9105 on maintaining and purchasing equipment for municipal fire department was unconstitutional exercise of power since such proceeds are intended by legislature for personal use and benefit of municipal fire department members and cannot be used for general purposes that are normally considered municipal charges, and legislature preempted any local exercise of police power. MacIsaac v Poughkeepsie, 158 A.D.2d 140, 558 N.Y.S.2d 667, 1990 N.Y. App. Div. LEXIS 7900 (N.Y. App. Div. 3d Dep't), app. denied, 76 N.Y.2d 714, 564 N.Y.S.2d 717, 565 N.E.2d 1268, 1990 N.Y. LEXIS 4446 (N.Y. 1990), app. dismissed, 80 N.Y.2d 891, 587 N.Y.S.2d 901, 600 N.E.2d 628, 1992 N.Y. LEXIS 1817 (N.Y. 1992).

While this section [now § 9104] and § 554 [now § 9105] failed to enumerate the specific purposes for which proceeds of the tax levied upon foreign fire insurance companies may be expended, it specifically says that such money is to be used for the benefit of the fire department and all companies comprising it and obviously did not intend that these tax proceeds be used for purchase of equipment, but rather that they be used for the benefit of all members of the fire department. Amsterdam Permanent Firemen's Asso. v Amsterdam, 40 Misc. 2d 323, 242 N.Y.S.2d 950, 1963 N.Y. Misc. LEXIS 1627 (N.Y. Sup. Ct. 1963).

Moneys received by the treasurer of the city of Little Falls, pursuant to section 553 [now § 9104] of the Insurance Law, may not be used to purchase additional equipment for the fire department. 1947 Ops St Compt 204.

While an emergency rescue and first aid squad within a village fire department is not entitled to receive foreign fire insurance tax moneys, such tax moneys may be expended for the use and benefit of a fire department or company receiving the same, as determined by the members. This would include the purpose of an emergency rescue squad, if the membership of the department or company reasonably determined that the expenditure is for the use and benefit of the department or company. Members of emergency and rescue first aid squads, as members of the fire department or company, may participate in the decision. 1990 Op St Compt 90-34.

Unless otherwise provided by special act, members of volunteer fire department or, if department is comprised of several companies, members of each company, may determine to use foreign fire insurance tax moneys to purchase personal computer to be used for department purposes and to pay for ceremony to dedicate new fire house and new fire apparatus. 1995 Op St Compt No. 95-14.

Exempt firemen's benevolent association may not expend foreign fire insurance tax moneys to purchase exercise equipment for use generally by members of fire department. 1995 Op St Compt No. 95-22.

Unless otherwise provided by special act, members of volunteer fire department may determine to use foreign fire insurance tax monies to make reasonable expenditures to remodel and purchase appliances for firehouse kitchen. 1997 Op St Compt No. 97-20.

Unless otherwise provided by special act, volunteer fire department may use foreign fire insurance tax monies under CLS Ins §§ 9104 and 9105 to purchase personal computer, facsimile machine and refrigerator for fire department use. 2001 Opns St Comp No. 01-6.

12. —Investments

Under this section [now § 9104], the Amsterdam city treasurer must use the tax receipts from the tax on foreign insurers for the benefit of all fire department members and not simply turn them over to a pension fund participation in the benefits of which has become restricted to only a few members, but plaintiff membership corporation's demand that the monies be turned over to it could not be granted because it was not organized under a special law for that purpose. Amsterdam Permanent Firemen's Asso. v Amsterdam, 40 Misc. 2d 323, 242 N.Y.S.2d 950, 1963 N.Y. Misc. LEXIS 1627 (N.Y. Sup. Ct. 1963).

It is inadvisable for volunteer and exempt firemen's benevolent association to invest foreign fire insurance tax moneys by loaning moneys to fire department having essentially same membership as association. 1995 Op St Compt No. 95-26.

13. —Miscellaneous purposes

Proceeds from the tax on premiums collected by foreign fire insurance companies may be used by a city to purchase for members of the city fire department items of comfort and convenience. 1957 Ops St Compt File #57-269.

Foreign fire insurance tax monies may not be expended to purchase annuities for benefit of members of volunteer fire

company since such purchase would be tantamount to making direct cash payment. 2004 Op St Compt No. 04-5.

Volunteer fire department may not expend foreign fire insurance tax monies to reimburse active members of department for mileage expenses incurred in performing firemanic duties. 2005 Op St Compt No. 05-2.

Except as otherwise provided by special act, members of fire department or, in case of multi-company fire department, members of each company, must determine how foreign fire insurance tax moneys are to be used for benefit of department or company, however, treasurer having custody of these moneys should not permit expenditures for illegal or improper purposes; moneys may be expended by treasurer for purposes of paying for publication of fire department or company newsletter. Ops St Compt 89-16.

14. —Improvements to real property

Volunteer and exempt firemen's benevolent association may not expend foreign fire insurance tax moneys to pay for improvements to fire department's headquarters. 1995 Op St Compt No. 95-26.

Unless otherwise provided by special act, members of volunteer fire department may determine to use foreign fire insurance tax monies to make reasonable expenditures to remodel and purchase appliances for firehouse kitchen. 1997 Op St Compt No. 97-20.

15. —Insurance

Moneys received pursuant to Insurance Law §§ 553 and 554 [now §§ 9104, 9105] may be used for the purchase of accident insurance which pays benefits in addition to those available under the Workmen's Compensation Law and the Volunteer Firemen's Benefit Law. 1957 Ops St Compt File #602.

The Exempt Firemen's Benefit Association of the City of Long Beach may not purchase accident and life insurance with foreign fire insurance moneys for all exempt and volunteer firemen, because it may only use such money to aid disabled and indigent exempt and volunteer firemen, whether members of the Association or not. 1967 Ops St Compt File #752.

Moneys received by an exempt volunteer firemen's benevolent association from the taxes imposed by sections 553 and 554 of the Insurance Law [now §§ 9104, 9105] may be expended to purchase a group life insurance policy for all volunteer and exempt volunteer firemen without regard to membership in the association, provided that the participating firemen are required to designate family members as beneficiaries. 1983 Op St Comp File #83-120.

16. —Recreation

Unless otherwise provided by special acts, members of volunteer fire department or, if department is comprised of several companies, members of each company, may determine to use foreign fire insurance tax moneys to make reasonable expenditures to purchase furniture for recreation room and trophy case for meeting room for department use. 1997 Op St Compt No. 97-14.

Unless otherwise provided by special act, members of volunteer fire department may use foreign fire insurance tax monies to make reasonable expenditures to fund fire department softball, billiard and bowling teams, and to pay for expenses for department's annual fund-raising drive. 2002 Op St Compt No. 02-13.

17. Enforcement of reporting requirement

Superintendent of insurance has the exclusive power to enforce sections of Insurance Law providing for two percent fire insurance "tax" to be paid by all foreign and alien fire insurers except mutual fire insurers, and Superintendent has duty to enforce statutory directives, including requirement that every agent for any insurer shall report to the insurer the name of the correct city, village or fire district in which insured is situated. Greenville Fire Co. No. 1 v Aetna Casualty & Surety Co., 92 Misc. 2d 402, 399 N.Y.S.2d 985, 1977 N.Y. Misc. LEXIS 2558 (N.Y. Sup. Ct. 1977), aff'd, 63 A.D.2d 725, 405 N.Y.S.2d 310, 1978 N.Y. App. Div. LEXIS 11654 (N.Y. App. Div. 2d Dep't 1978).

Volunteer fire company did not, either individually or in a class action, have capacity to bring action charging fire insurers with failing to maintain adequate record-keeping procedures to insure accurate allocation among state's fire districts of two percent fire insurance "tax" imposed under sections [now §§ 9104, 9105] of Insurance Law, unless superintendent of insurance would both refuse to investigate complaints and take steps to remedy situation in the event that complaints were well founded and unless fire company would seek and would be denied mandamus relief sought against superintendent of insurance for failure to carry out his responsibility. Greenville Fire Co. No. 1 v Aetna Casualty & Surety Co., 92 Misc. 2d 402, 399 N.Y.S.2d 985, 1977 N.Y. Misc. LEXIS 2558 (N.Y. Sup. Ct. 1977), aff'd, 63 A.D.2d 725, 405 N.Y.S.2d 310, 1978 N.Y. App. Div. LEXIS 11654 (N.Y. App. Div. 2d Dep't 1978).

18. Tax on risks insured within New York City

A contract of indemnity by which a foreign corporation doing business in New York City assumes part of risks of a domestic company, but receives no premium from insured, is not "insurance against loss or injury by fire" within meaning of § 799 of greater New York charter, requiring every person acting in city as agent for such corporation, to pay certain percentages of premiums to fire commissioner. Adamson v Schreiner, 225 N.Y. 713, 122 N.E. 876, 225 N.Y. (N.Y.S.) 713, 1919 N.Y. LEXIS 1250 (N.Y. 1919).

Former § 133 to § 135 [now § 9104] have no application in an action brought by fire commissioner of New York City against agent of foreign insurance company to recover percentage of premiums received by defendant on policies on property in New York. Drennan v Hampton, 191 A.D. 576, 181 N.Y.S. 777, 1920 N.Y. App. Div. LEXIS 4760 (N.Y. App. Div. 1920), aff'd, 232 N.Y. 576, 134 N.E. 578, 232 N.Y. (N.Y.S.) 576, 1922 N.Y. LEXIS 1155 (N.Y. 1922).

Under the greater New York charter, § 799, an agent of a foreign fire insurance company must pay tax of two per cent on premiums on fire policies effected on property within city, without deduction of premiums on reinsurance effected by him as such agent. So long as provisions in greater New York charter §§ 798, 799, relative to taxation of premiums received by fire insurance companies apply equally to all in same situation, they are not unconstitutional because another statute applying to other localities may be different. Drennan v Hampton, 191 A.D. 576, 181 N.Y.S. 777, 1920 N.Y. App. Div. LEXIS 4760 (N.Y. App. Div. 1920), aff'd, 232 N.Y. 576, 134 N.E. 578, 232 N.Y. (N.Y.S.) 576, 1922 N.Y. LEXIS 1155 (N.Y. 1922).

19. Miscellaneous

The Firemen's Association had the right to receive money collected under Insurance Law § 553 [now § 9104], but plaintiff's complaint was sufficient to raise an issue of whether the defendant had the right to receive money collected under § 554 of the Insurance Law [now § 9105], and whether moneys received under § 553 were properly used. Niagara Falls Fire Dep't Mut. Aid Ass'n v Exempt Firemen's Ass'n, 25 A.D.2d 484, 266 N.Y.S.2d 627, 1966 N.Y. App. Div. LEXIS 5120 (N.Y. App. Div. 4th Dep't 1966).

In the absence of express repeal of defendant fire department's rights under its organizing laws, or other declaration to contrary, purpose of legislature to continue those rights and benefits to it as they had theretofore existed, is inevitable inference and it is evidently intended by legislature and also apparently confirmed by subsequent placing in statute law of provisions wherein legislature clearly recognized existing rights of volunteer companies by providing for maintenance of Firemen's Home at Hudson, N. Y., by them conducted. Egbert F. Ashley Co. v Fire Dep't of Rochester, 133 N.Y.S. 591, 73 Misc. 636, 1911 N.Y. Misc. LEXIS 573 (N.Y. Sup. Ct. 1911).

By changing its membership requirements from members of any fire company to volunteer members the Firemen's Benevolent Fund Association of the City of Mount Vernon did not unlawfully discriminate against professional firemen individually or as a class. Crohn v Firemen's Benevolent Fund Ass'n, 79 Misc. 2d 536, 359 N.Y.S.2d 599, 1973 N.Y. Misc. LEXIS 1279 (N.Y. Sup. Ct. 1973), aff'd, Crohn v Firemen's Benevolent Fund Asso., 45 A.D.2d 955, 359 N.Y.S.2d 247, 1974 N.Y. App. Div. LEXIS 4168 (N.Y. App. Div. 2d Dep't 1974).

Where a conflict exists between the provisions of §§ 553 and 554 [now §§ 9104, 9105] of the Insurance Law and § 151 of the Lockport City Charter, the charter provision must be followed and the city cannot, by local law, change the pertinent charter provisions. 1961 Ops St Compt #128.

Pro rata distribution of foreign fire tax constitutes distribution that is made on proportionate or percentage basis. Insurance Department, Opinions of General Counsel, Opinion Number 07-05-22.

Insurer is not required to list on fire insurance policy names and addresses of fire departments to which fire insurance fee or fire insurance premium tax is to be distributed. Insurance Department, Opinions of General Counsel, Opinion Number 09-10-01.

Fire insurance premium tax paid under CLS Ins § 9104 is levied only on that portion of premium that covers peril of fire. Insurance Department, Opinions of General Counsel, Opinion Number 09-10-01.

Agency Opinions

Analysis

1. In general
2. Duty to collect and pay over funds
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4. —Benevolent associations
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12. —Unspecified purposes
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16. Tax on risks insured within New York City
17. Miscellaneous

1. In general

In a fire department consisting of both paid and volunteer firemen, the paid firemen are entitled to receive an equitable share of foreign fire insurance tax moneys. 1979 Op St Compt File #813.

2. Duty to collect and pay over funds

An incorporated firefighters' benevolent association has no power to collect and receive fire insurance premium tax moneys imposed on foreign insurance companies unless specially authorized by a special law. 1958 NY Ops Atty Gen Dec 31.

A fire district treasurer must apportion and pay over all of the tax received under Insurance Law, § 553 [now § 9103] to the treasurer or treasurers of the fire company or companies constituting the fire district, to be used by that company or those companies for the use and benefit of the fire department and the company or companies comprising the department, whereas the tax received by the fire district treasurer under Insurance Law, § 554 [now § 9105] must be applied for the use and benefit of the fire department as such, which use is to be designated by the board of fire commissioners and if any portion or all of the tax under § 554 is not required by the fire district commissioners to be applied by them for the use and benefit of the fire department as such, then the fire district treasurer should apportion and pay over that tax, or the balance thereof, to the treasurer or treasurers of the fire company or fire companies constituting the fire department, to be used by them for the statutory purpose. The statutory direction to "apportion and pay over" does not require that the funds be distributed equally among the several fire companies constituting the fire district. The apportionment is based upon a determination by the treasurer of the fire district, which determination cannot be arbitrary, capricious or unreasonable. 1976 NY Ops Atty Gen August 23.

Where a village fire department consists of several volunteer fire companies, the treasurer of the fire department is not required to apportion foreign fire insurance tax moneys equally among the several companies; he may apportion such moneys in any equitable manner, such as on the basis of membership in each company. 1979 Op St Compt File #102.

3. Particular groups or entities to whom funds must be paid over

4. —Benevolent associations

A benevolent association incorporated under the Not-For-Profit Corporation Law may be dissolved pursuant to that statute without the consent of the State Legislature. Before a benevolent association can receive monies under sections 553 and 554 [now §§ 9104, 9105], it must be authorized by the State Legislature. 1979 Op St Compt File #676.

5. —Volunteer corps

Discussion of payment over to a newly incorporated exempt volunteer firemen's moneys held by a volunteer fire company the members of which are also eligible for membership in the benevolent association. 1978 Op St Compt File #304.

Where a village fire department does not have a treasurer and no person has been designated in a special law as the recipient of the tax moneys derived from the tax imposed by these sections [now §§ 9104, 9105], such moneys should be paid to the village treasurer. 1981 Op St Compt File #81-129.

A fire company or department which is not actively providing fire fighting services is not entitled to the foreign fire insurance tax moneys due to the fire district in which it is located. Such moneys should be paid to the fire department which is obligated by contract to provide fire protection to the district. 1982 Op St Compt File #82-56.

6. Particular purposes for which funds may be used

7. —Arbitration and other legal fees

Use of proceeds from the foreign fire insurance premium tax to pay for expenses related to arbitration in a village where only part of the fire department consists of paid professional firemen is improper. 1979 Op St Compt File #238.

The Medina Firemen's Benevolent Association may not use moneys paid to it from the tax on foreign fire insurance premiums to defray the cost of arbitration or the legal fees related to arbitration proceedings between the village and its paid firemen. 1979 Op St Compt File #238-A.

A fire department fire company which has received foreign fire insurance tax moneys from the fire department may expend such moneys to pay legal fees incurred in connection with a law suit brought against the company provided that it is determined by the members of the company that such expenditure is for the use and benefit of the company. 1980 Op St Compt File #536.

8. —Care and relief of indigent

The Deer Park Volunteer Exempt Firemen's Association may expend foreign fire insurance tax moneys only for the care and relief of disabled or indigent volunteer and exempt volunteer firemen and their families. 1979 Op St Compt File #285-A.

The Volunteer and Exempt Firemen's Benevolent Association of East Norwich may expend foreign fire insurance tax moneys to purchase gravestones for deceased volunteer and exempt firemen only where such firemen were indigent at the time of their death. 1979 Op St Compt File #379.

The Volunteer and Exempt Firemen's Benevolent Association of Inwood may expend foreign fire insurance tax proceeds only for the care and relief of disabled or indigent volunteer and exempt firemen and their families. 1979 Op St Compt File #628.

The Valley Stream Volunteer and Exempt Firemen's Benevolent Association may expend foreign fire insurance tax moneys only for the care and relief of disabled and indigent volunteer and exempt firemen and their families. 1981 Op St Compt File #81-29.

The Grand Island Volunteer Firemen's Benevolent Association may expend foreign fire insurance moneys only for the care and relief of disabled or indigent volunteer and exempt volunteer firemen and their families and, thus, may not use such moneys to purchase jackets for firemen. 1981 Op St Compt File #81-143.

Interest earned on foreign fire insurance tax moneys which have been invested by an exempt volunteer firemen's benevolent association may be expended only for the care and relief of

disabled or indigent volunteer firemen and their families or for such other purposes, if any, authorized by the legislation creating the association. 1982 Op St Compt File #82-334.

9. —Equipment for fire department

The members of a fire department may not be compelled to use foreign fire insurance tax moneys to purchase equipment for the fire department. However, if they decide on their own to use the moneys for such purpose, the moneys may be so expended by the department or municipal treasurer. 1979 Op St Compt File #680.

The Volunteer and Exempt Firemen's Benevolent Association of Briarcliff Manor may not expend foreign fire insurance tax moneys to purchase an air conditioner for the recreation room in the central firehouse—such moneys may be expended only for the relief of disabled and indigent volunteer firemen and their families. 1980 Op St Compt File #704.

A fire department may expend foreign fire insurance tax proceeds to help construct a fireman's training tower provided that the members of the fire department and the department treasurer determine that such expenditure is for the use and benefit of the department. 1981 Op St Compt File #81-49.

Foreign fire insurance tax moneys may be expended for the purchase of new beds for the fire house where the members of the fire department have determined that such expenditure is for the use and benefit of the department. 1982 Op St Compt File #82-25.

10. —Investments

The Volunteer and Exempt Firemen's Benevolent Association of West Hempstead may invest foreign fire insurance fund moneys in the manner authorized by section 11-2.2 of the EPTL. Whether such moneys may be invested in a mutual insurance company pursuant to the provisions of section 76 of the Insurance Law [now § 1307] depends upon whether such investment meets the criteria set forth in section 11-2.2. 1979 Op St Compt File #859.

A firemen's benevolent association may invest foreign fire insurance fund moneys in accordance with the prudent man standard set forth in EPTL, § 11-2.2. Whether such moneys may be invested in an interest bearing note or bond secured by a first mortgage on real property owned by the benevolent association depends upon whether such investment meets the prudent man standard of section 11-2.2. 1982 Op St Compt File #82-366.

A fire district may finance the acquisition of real property by issuing a statutory installment bond payable in ten years to a volunteer-exempt volunteer firemen's benevolent association. The association may use foreign fire insurance tax monies to purchase such bond provided such purchase complies with the prudent man rule set forth in section 11-2.2 of the Estates, Powers and Trusts Law. 1983 Op St Compt File § 83-159.

11. —Miscellaneous purposes

Fire district moneys may not be expended in connection with a program designed to insure that all homeowner's in the district correctly designate the fire district in which they reside on their homeowner's insurance policies. 1979 Op St Compt File #324.

The City of Corning may expend foreign fire insurance fund moneys to reimburse the Corning Fire Fighters Association for losses which the Association incurred in a fund raising event, provided that it is determined by the members of the fire department and the city treasurer that such expenditure is for the use and benefit of the fire department. All prior opinions inconsistent with this opinion are hereby superseded. 1979 Op St Compt File #627.

Foreign fire insurance tax moneys may be used by the fire department to purchase dress uniforms, including the purchase at cost of uniforms from firemen who have previously purchased uniforms with their own moneys. 1979 Op St Compt File #814.

The Morton Club Beneficiary Association, Inc., may not expend foreign fire insurance tax moneys to purchase a copying machine to be used for purposes of the association. 1980 Op St Compt File #87.

The Volunteer and Exempt Firemen's Benevolent Association of Roslyn may not expend foreign fire insurance tax moneys to provide a monthly gasoline allowance to the volunteer members of the fire department to defray their expenses in responding to fire calls. 1980 Op St Compt File #450.

Foreign fire insurance tax moneys may not be expended for direct cash payments to paid or volunteer firemen. 1982 Op St Compt File #82-10.

12. —Unspecified purposes

Discussion of use of foreign fire insurance moneys by the Deer Park Volunteer Firemen's Association to pay the cost of maintaining the association's headquarters. 1978 Op St Compt File #285.

Discussion of the expenditure of foreign fire insurance fund moneys in the City of Rochester. 1978 Op St Compt File #619.

Discussion of use of foreign fire insurance fund moneys in the City of Jamestown. 1978 Op St Compt File #711.

Discussion of the manner of expenditure of foreign fire insurance fund moneys by the Freeport Volunteer Exempt Firemen's Benevolent Association. 1978 Op St Compt File #821.

Discussion of expenditure of foreign fire insurance fund moneys by the Volunteer and Exempt Firemen's Benevolent Association of Baldwin for the benefit of firemen who are not members of the association. 1978 Op St Compt File #912.

Discussion of permissible expenditures of foreign fire insurance fund moneys by the Fishkill Exempt Firemen's Benevolent Association. 1978 Op St Compt File #931.

13. —Improvements to real property

Foreign fire insurance tax moneys may be used by a volunteer fire company to construct an addition to the fire house to be used for recreational purposes. 1979 Op St Compt File #303.

The Glenham Fire District may expend foreign fire insurance tax moneys to purchase a walk-in cooler for a fire company provided that it is determined by the members of the department and the department or district treasurer, as the case might be, that such expenditure is for the use and benefit of the fire department. 1980 Op St Compt File #506.

An incorporated volunteer fire company may expend funds received from donations and foreign fire insurance taxes to erect an addition to a firehouse and then donate this addition to the fire district. 1980 Op. St. Compt. No. 80–627.

The Plainview Volunteer and Exempt Firemen's Benevolent Association may expend foreign fire insurance tax moneys only for the care and relief of disabled or indigent volunteer and exempt firemen and their families and, thus, may not purchase a fire station. 1981 Op St Compt File #81-63.

14. —Insurance

Purchase by a volunteer fire department of insurance covering disability or death of a volunteer fireman resulting from non-firemanic activity is not proper use of funds received pursuant to Insurance Law §§ 553, 554 [now §§ 9104, 9105]. 1970 NY Ops Atty Gen May 13.

Foreign fire insurance fund moneys may be expended for the purchase of premiums on a group life insurance policy for the benefit of members of a fire department. 1978 Op St Compt File #401.

Discussion of the purchase of life insurance for volunteer firemen with fire district moneys, moneys of a volunteer fireman's benevolent association and foreign fire insurance fund moneys. 1978 Op St Compt File #909.

Foreign fire insurance tax proceeds may be paid by the treasurer of a fire department into a trust fund which is established, pursuant to the provisions of the trust agreement, for the purpose of providing a death benefit to the families of deceased members of the fire department provided that the members of the fire department and the department treasurer determine that this is for the use and benefit of the fire department. 1980 Op St Compt File #119.

The members of a paid fire company within a village fire department may spend their share of foreign fire insurance tax proceeds for the establishment of an optical and eye care program for members of the company and their families if the members of the company determine that such expenditure is for the use and benefit of the company. 1980 Op St Compt File #625.

Foreign fire insurance tax moneys may be expended for the purchase of group life insurance for the members of a fire department. 1982 Op St Compt File #82-356.

Exempt volunteer firemen who no longer are active in providing fire-fighting services may not be included in a group life

insurance policy purchased for an association or organization of volunteer firemen. 1983 Op St Compt File #83-232.

15. —Recreation

Discussion of expenditure of foreign fire insurance tax moneys for annual banquets by a volunteer firemen's benevolent association incorporated pursuant to a special act. 1978 Op St Compt File #196.

Discussion of expenditure of foreign fire insurance tax moneys to purchase ball hats, jackets, sweatshirts, T-shirt and other items of clothing and of the right of inactive volunteer firemen to the benefits of expenditures from such moneys. 1979 Op St Compt File #84.

Foreign fire insurance tax moneys may be used by a volunteer fire company to construct an addition to the fire house to be used for recreational purposes. 1979 Op St Compt File #303.

The Centerport Volunteer Exempt Firemen's Benevolent Association may not expend foreign fire insurance tax moneys to compensate two paid dispatchers for loss of salary incurred while the dispatchers are attending a social affair held by the benevolent association. 1979 Op St Compt File #697.

A fire department fire company which has received foreign fire insurance tax moneys from the fire department may expend such moneys to pay for a band for a parade provided that it is determined by the members of the company that such expenditure is for the use and benefit of the company. 1980 Op St Compt File #536.

A fire department may expend foreign fire insurance tax proceeds to help make payments on a tract of land purchased by the department for a fireman's park, to help develop such tract of land, provided that the members of the fire department and the department treasurer determine that such expenditure is for the use and benefit of the department. 1981 Op St Compt File #81-49.

The Plainview Volunteer and Exempt Firemen's Benevolent Association may expend foreign fire insurance tax moneys only for the care and relief of disabled or indigent volunteer and exempt firemen and their families and, thus, may not purchase real property to be used by firemen for recreational purposes. 1981 Op St Compt File #81-63.

The Pine Hill Hose Company may expend foreign fire insurance fund moneys for an installation dinner if it is determined by the members of the fire department and the fire district or fire department treasurer, as the case may be, that such expenditure is for the use and benefit of the fire department. In the absence of an internal fire company requirement, such expenditure need not be approved by inactive members of the company. The type of notice of the time and place of the vote on the expenditure is a matter of internal fire company policy. 1981 Op St Compt File #81-146.

Foreign fire insurance tax moneys may be used to finance a party to which non-members of the department will be invited provided the members of the department determine that such expenditure is for the use and benefit of the fire department. 1982 Op St Compt File #82-10.

Money received by a fire department from the proceeds of the fire department tax on premiums on policies of foreign and alien fire insurance companies should be expended for the benefit of the department. 1955 NY Ops Atty Gen June 9 (informal).

An exempt volunteer firemen's benevolent association created by special act of the State Legislature and authorized to receive foreign fire insurance tax moneys may expend such moneys only for the purposes authorized by the special act while a fire department, fire district or municipal treasurer receiving such moneys may expend them for any purpose which the members of the fire department and the department, district or municipal treasurer, as the case might be, determine to be for the use and benefit of the department. 1980 Op St Compt File #786.

A municipal treasurer may pay over foreign fire insurance tax moneys to the treasurer of a firemen's association which does not consist of all members of the fire department provided the moneys will be expended for a purpose which the members of the entire fire department determine will be for the use and benefit of the department. 1982 Op St Compt File #82-239.

16. Tax on risks insured within New York City

The superintendent in adjusting taxes unlawfully paid to state by foreign fire insurance companies has no power to make allowances upon claims arising before § 34-a as amended in 1920 [now § 9109], became effective. 1923 N.Y. Op. Att'y Gen. No. 233.

17. Miscellaneous

The Board of Trustees of a Volunteer and Exempt Firemen's Benevolent Association in Nassau County, under § 641.5 of the Nassau County Civil Divisions Act has control over disposition of funds, property and estate of the Association, subject to the restrictions imposed by §§ 553 and 554 [now §§ 9104, 9105] of the Insurance Law on disposition of foreign fire insurance tax monies. 1962 NY Ops Atty Gen Sept 24.

The board of fire commissioners of the Holtsville Fire District has no responsibility for the operation of the benevolent fund or for overseeing the money in the benevolent fund of the Holtsville Fire Department Volunteer Exempt Firemen's Benevolent Association. 1980 NY Ops Atty Gen April 23 (informal).

A by-law of a volunteer and exempt firemen's benevolent association cannot qualify eligibility for benefits from foreign fire insurance tax moneys on membership in the association where the special legislation creating the association contains no such qualification. 1983 Op St Compt File #83-33.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 9103.

Jurisprudences:

25 NY Jur 2d Counties, Towns, and Municipal Corporations § 91.

100 NY Jur 2d Taxation and Assessment §§ 1386, 1389, 1391, 1394–1398 .

Texts: New York Insurance Law (Matthew Bender's New York Practice Series) §§ 6.05[3], 6.06[7][a], [e].

§ 9105. Fire insurance premium tax; foreign mutual fire insurance companies

(a) (1) Every mutual fire insurance company or association authorized to do business in this state pursuant to section four thousand one hundred eight of this chapter shall pay to the superintendent on or before the fifteenth day of February of each year a tax of two per centum on all gross premiums collected or received by it or them for direct insurance against loss or injury upon property situated within this state during the preceding year ending the thirty-first day of December.

(2) The tax shall be determined after deducting from such gross premiums, premiums upon policies not taken; premiums returned on cancelled policies; and any dividends or refunds or returns paid to policyholders or applied in part payment of any renewal premium during such year.

(b) (1) Every such mutual fire insurance company or association whose business is confined chiefly to the insurance of sprinklered risks and which is conducted solely for the benefit and protection of its members and which pays no commissions or brokerages for the acquirement of its business, in lieu of all other taxes on premiums, shall pay to the superintendent on or before the fifteenth day of February of each year a tax at the rate of two per centum on all gross premiums upon policies on risks located in this state in force on the thirty-first day of December next preceding.

(2) The tax shall be determined after deducting from such gross premiums the dividends and returns and the unused or unabsorbed portion of such gross premiums computed at the average rate of such dividends and returns and the unused or

unabsorbed portion of such gross premiums actually paid to policyholders or applied in part payment of any renewal premiums on its annual policy expiring during such year.

(c) (1) On or before the fifteenth day of February of each year every mutual fire insurance company or association shall file with the superintendent a statement showing the aggregate amount of gross premiums collected for insurance against loss or injury and the several items of deduction referred to under paragraph two of subsection (a) hereof, and specifying the aggregate amounts of such gross premiums so collected and the deductions therefrom by city, village, fire district, fire alarm district, or fire protection district in which the property covered by such insurance is located.

(2) In the case of a mutual fire insurance company or association whose business is confined chiefly to the insurance of sprinklered risks and which is conducted solely for the benefit and protection of its members and which pays no commissions or brokerages for the acquirement of its business, such statement shall, in lieu of the information required pursuant to paragraph one hereof, specify by city, village, fire district, fire alarm district, or fire protection district:

(A) the aggregate amount of such gross premiums upon policies on risks located in this state in force at last year-end; and

(B) the dividends and returns and the unused or unabsorbed portion of such aggregate amount of gross premiums, computed at the average rate of such dividends and returns and the unused or unabsorbed portion of such gross premiums, actually paid or applied in part payment of any renewal premiums on its annual policies expiring during such year.

(3) Those provisions of this subsection which would require the determination of the city, village, fire district, fire alarm district or fire protection district in which an insured property is located shall not apply to policies which insure motor vehicles provided that:

(A) the mutual fire insurance company or association allocates the gross premiums and deductions, subject to the tax required by this section, received from such policies by city, village, fire district, fire alarm district or fire protection district using a percentage of allocation which is based upon the amounts of all other premiums required to be reported by this section; and

(B) the mutual fire insurance company or association has received the approval of the superintendent to use this percentage of allocation.

(d) (1) The amount of all monies which were received by the superintendent on or before the first day of April in each year under the provisions of this section or section nine thousand one hundred four of this article shall be distributed by him not later than the first day of July in such year, after adding any earnings resulting from the investment of such monies and deducting the expenses of collection and distribution. Ten percent of such remaining monies received under this section shall be paid to the treasurer of the Firemen's Association of the State of New York for the support and maintenance of the firemen's home at Hudson, New York, and the balance shall be paid as specified in paragraph two hereof, in amounts which will be that proportion of the balance so to be distributed which the total amount of fire insurance business written by foreign mutual fire insurance companies on property situated in such locality bears to the total amount of fire insurance business written by foreign mutual fire insurance companies on property situated in any and all of the protected localities in the state having treasurers or other fiscal officers as designated in paragraph two hereof afforded fire protection by a fire department or fire company and upon which the tax provided in this section has been paid.

(2) Such payment shall be made[:][*]

(A) in the city of New York to the fire commissioner as treasurer of the fire department of the city of New York, and

(B) to the treasurer or other fiscal officer of the fire department affording fire protection in each city, village, fire district, fire alarm district, or fire protection district, or

(C) if any such fire department does not have a treasurer or other fiscal officer then to the fiscal officer of the authorities having jurisdiction and control of such fire department, or

(D) to such other person or entity as shall be designated in any special law to receive such tax, and

(E) if such payment is received by the treasurer or other fiscal officer of a fire department or fiscal officer of authorities having jurisdiction and control of such fire department, such treasurer or fiscal officer shall on or before the fifteenth day of July in each year distribute the amount so received to the fire companies constituting the fire department if such fire department is constituted of more than one fire company.

(3) Except as otherwise provided in any special law, and except as to the Firemen's Association of the State of New York, such tax shall be used for the benefit of, as determined by the members thereof:

(A) the fire company receiving the tax, but this shall not preclude the payment by a fire company of all or a part of such tax to the fire department of which it is a part, or

(B) the fire department when such tax is not required under subparagraph (E) of paragraph two of this subsection to be distributed to fire companies.

(e) The provisions of this section shall not be changed, modified or amended by any charter, local law, ordinance, resolution or regulation.

[*]The bracketed punctuation has been inserted by Publisher.

HISTORY:

Add, L 1984, ch 367, § 1; amd, L 1988, ch 293, § 2, eff Jan 1, 1989.

Editor's Notes: This section formerly appeared as Ins § 554 which was added by L 1939, ch 882; amd, L 1953, ch 742; L 1968, ch 1027.

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1. In general

Provisions of insurance law governing fire department tax on premiums paid on policies of foreign and alien fire insurance companies do not create a preference among the recipients of the tax moneys. Crohn v Firemen's Benevolent Fund Ass'n, 79 Misc. 2d 536, 359 N.Y.S.2d 599, 1973 N.Y. Misc. LEXIS 1279 (N.Y. Sup. Ct. 1973), aff'd, Crohn v Firemen's Benevolent Fund Asso., 45 A.D.2d 955, 359 N.Y.S.2d 247, 1974 N.Y. App. Div. LEXIS 4168 (N.Y. App. Div. 2d Dep't 1974).

Sections of Insurance Law providing for two percent fire insurance "tax" to be paid by all foreign and alien fire insurers other than mutual fire insurers were constitutionally valid, even though initial responsibility for collecting and allocating "tax" among proper fire departments, the intended beneficiaries of the subject levies, was on taxed fire insurers. Greenville Fire Co. No. 1 v Aetna Casualty & Surety Co., 92 Misc. 2d 402, 399 N.Y.S.2d 985, 1977 N.Y. Misc. LEXIS 2558 (N.Y. Sup. Ct. 1977), aff'd, 63 A.D.2d 725, 405 N.Y.S.2d 310, 1978 N.Y. App. Div. LEXIS 11654 (N.Y. App. Div. 2d Dep't 1978).

The term "fire department" as used in Insurance Law §§ 553 and 554 [now §§ 9104, 9105] includes an incorporated volunteer fire company obligated by contract to serve a fire protection district. 1957 Ops St Compt File #57-301.

Foreign fire insurance tax moneys may not be used for purpose of making interest-free loans to pay for volunteer firemen. 1987 Op St Compt No. 87-88.

With respect to fire department's pro rata distribution of foreign fire tax monies to its fire companies, "active member" of fire company is member who participates in firefighting and is subject to call for whatever duties may be assigned to him under rules and regulations of fire department or company of which he is member. Insurance Department, Opinions of General Counsel, Opinion Number 08-04-10.

2. Duty to apportion and pay over funds

Because the supreme court properly determined that the actual number of calls a firefighter responded to was not determinative of the manner in which the city had to distribute tax monies, there was no error in its pro rata disbursement of the monies. Hennessy v G.S. Mink Steamer & T. Claxton Hose Co. No. 2, Auxiliary Inc., 182 A.D.3d 830, 122 N.Y.S.3d 784, 2020 N.Y. App. Div. LEXIS 2342 (N.Y. App. Div. 3d Dep't 2020).

Payments by cities of proportionate shares of tax on foreign fire insurance premiums to firemen's organizations entitled thereto are required by law and such payments are not unconstitutional gifts. 1946 Ops St Compt 33.

Moneys received on behalf of a fire protection district should be paid to fire departments of fire districts providing protection. 1954 Ops St Compt File #7013.

Pro rata distribution of foreign fire tax constitutes distribution that is made on proportionate or percentage basis. Insurance Department, Opinions of General Counsel, Opinion Number 07-05-22.

3. Entities and organizations entitled to receive funds

Chief financial officer of city that lacked fire department treasurer was proper recipient of future tax proceeds to which city firefighters were entitled, generated pursuant to CLS Ins §§ 9104 and 9105, where proceeds were to be divided between paid firemen and volunteer firemen on pro rata basis as determined by referee, pursuant to requirements of statute. Poughkeepsie v Poughkeepsie Associated Fire Dep't, 125 A.D.2d 522, 509 N.Y.S.2d 601, 1986 N.Y. App. Div. LEXIS 62827 (N.Y. App. Div. 2d Dep't 1986), app. dismissed, 69 N.Y.2d 1038, 517 N.Y.S.2d 1031, 511 N.E.2d 90, 1987 N.Y. LEXIS 17262 (N.Y. 1987), app. dismissed, 80 N.Y.2d 891, 587 N.Y.S.2d 901, 600 N.E.2d 628, 1992 N.Y. LEXIS 1817 (N.Y. 1992).

Professional firefighters and their union were not entitled to a portion of taxes collected pursuant to N.Y. Ins. Law §§ 9104 and 9105 on certain fire insurance premiums, because the proceeds of the subject taxes were only to be used for the care and relief of disabled or indigent volunteer and exempt firemen and their families. Town of Mamaroneck Prof'l Firefighters Ass'n v Volunteer & Exempt Firemen's Benevolent Ass'n, 292 A.D.2d 375, 738 N.Y.S.2d 93, 2002 N.Y. App. Div. LEXIS 2221 (N.Y. App. Div. 2d Dep't 2002).

Under N.Y. Ins. Law §§ 9104(a)(1)-(3), 9105(d)(2)(B)-(D), the exempt association recipient of the two percent funds had discretion, not a requirement, how to disburse the funds for the benefit of its members (for the assistance of disabled or indigent members and their families, and the promotion of the welfare of the volunteer fire service in the fire district) and so was not required to pay a share to a local fireman's union. Watt v Richardson, 6 A.D.3d 1117, 776 N.Y.S.2d 418, 2004 N.Y. App. Div. LEXIS 6300 (N.Y. App. Div. 4th Dep't), app. denied, 9 A.D.3d 920, 779 N.Y.S.2d 799, 2004 N.Y. App. Div. LEXIS 9604 (N.Y. App. Div. 4th Dep't 2004), app. denied, 3 N.Y.3d 735, 786 N.Y.S.2d 808, 820 N.E.2d 287, 2004 N.Y. LEXIS 2526 (N.Y. 2004).

Because both paid and volunteer firefighters were entitled to share in the distribution of foreign fire insurance tax moneys on premiums received from the state pursuant to N.Y. Ins. Law §§ 9104(a), 9105(a)(1), (b)(1), the trial court should have declared the rights of the parties. Hahn v Garrett, 27 A.D.3d 1103, 810 N.Y.S.2d 705, 2006 N.Y. App. Div. LEXIS 3202 (N.Y. App. Div. 4th Dep't 2006).

Where a fire protection district is protected pursuant to contract by two village fire departments, moneys received by the town supervisor pursuant to this section [now § 9105] should be distributed to the two fire departments. 1954 Ops St Compt File #6788.

Where a fire protection district is protected by contract with three village fire departments or companies, insurance premium tax moneys received by a town supervisor should be distributed to all three. 1968 Ops St Compt File #281.

While an emergency rescue and first aid squad within a village fire department is not entitled to receive foreign fire insurance tax moneys, such tax moneys may be expended for the use and benefit of a fire department or company receiving the same, as determined by the members. This would include the purpose of an emergency rescue squad, if the membership of the department or company reasonably determined that the expenditure is for the use and benefit of the department or company. Members of emergency and rescue first aid squads, as members of the fire department or company, may participate in the decision. 1990 Op St Compt 90-34.

Assuming there is no special act providing otherwise, fire district treasurer would be proper recipient of foreign fire insurance tax moneys if fire district fire department has no treasurer. 1999 Op St Compt No. 99-7.

A city may enact a local law superseding the provisions of a special act of the State Legislature with respect to designation of the recipients of foreign fire insurance tax proceeds. 1985 Op St Comp 85-2.

4. —Benevolent associations

A 1939 enactment which allocated to the Exempt Firemen's Association of the City of Kingston funds formerly payable to disbanded volunteer fire companies of Kingston, did not exempt the Board of Trustees of the Kingston Fire Department from application of Ins Law §§ 553, 554 [now §§ 9104, 9105], providing for payment of a designated percentage of premiums received for fire insurance by foreign insurance corporations to the treasurer of the fire department of every organized territory afforded protection by any fire department, and which entitled, in the absence of an express legislative enactment to the contrary, all firemen in a particular city, including paid firemen, to share ratably in the funds collected; thus, full-time paid firemen of the City of Kingston were entitled to share with volunteer firemen the two percent tax levied by Ins Law §§ 553, 554 [now §§ 9104, 9105]. Renn v Kimbark, 51 N.Y.2d 189, 433 N.Y.S.2d 71, 412 N.E.2d 1298, 1980 N.Y. LEXIS 2641 (N.Y. 1980).

It was correctly determined that firemen's association was not entitled to judgment, but court should have granted a declaration of the rights of the parties, i.e., declared that payments of money collected under Insurance Law § 554 [now § 9105] had been properly made to the defendant Exempt Volunteer Firemen's Association pursuant to statute. Batavia Paid Firemen's Benevolent Ass'n v Stewart, 34 A.D.2d 1087, 312 N.Y.S.2d 750, 1970 N.Y. App. Div. LEXIS 4373 (N.Y. App. Div. 4th Dep't), app. denied, 27 N.Y.2d 485, 1970 N.Y. LEXIS 2059 (N.Y. 1970).

Where by special statute the Firemen's Benevolent Fund Association of the Village of Herkimer was designated as the recipient of funds collected from the taxes on businesses or policies of foreign fire insurance companies doing business within the corporate limits of the village, that organization was the proper recipient for moneys collected pursuant to §§ 553 and 554 of the Insurance Law [now §§ 9104, 9105]. Abeline v Firemen's Benevolent Fund Ass'n, 55 Misc. 2d 406, 285 N.Y.S.2d 644, 1967 N.Y. Misc. LEXIS 1006 (N.Y. Sup. Ct. 1967).

In an action to determine the ownership of a fund arising from taxes collected upon premiums written by foreign fire insurance companies, the fireman's benevolent association, which was formed with the consent of the city after December 31, 1939, was the proper distributee of the tax revenues, since the funds were intended to be used for the fire department and its members rather than for general tax purposes. Watertown Firemen's Benevolent Ass'n v Watertown, 134 N.Y.S.2d 465, 1953 N.Y. Misc. LEXIS 2715 (N.Y. Sup. Ct. 1953).

Any exempt firemen's association which may be established in village of Larchmont may not share in the proceeds of the foreign fire insurance premium taxes without statutory authority therefor. 1953 Ops St Compt File #6294.

A village treasurer may not transfer custody of foreign fire insurance tax moneys to a fireman's association unless authorized or required by special law, but the treasurer may pay such moneys to the association if the membership of a village fire department determines that the expenditure is for the use and benefit of the department. 1982 Ops St Compt 82-239 is superseded to the extent that it is inconsistent with this opinion. 1990 Op St Compt 90-20.

5. —Paid corps

In an action for declaratory and injunctive relief brought by a firemen's association seeking to prevent a firemen's union from limiting participation in tax funds under Ins Law §§ 553 and 554 [now §§ 9104, 9105] to indigent members of the union, the trial court's order limiting participation to union members would be reversed and the union would be required to use the monies in question for the care of indigent firemen irrespective of their membership in the union where the special enactment did not limit the beneficairy clause of indigent and disabled firemen to union members and where a union by-law limiting use of tax funds to union members was not valid and could not be used to bar distribution of funds to the association, which was comprised of former members of the union. Uniformed Fire Officers Ass'n v Mutual Aid Ass'n, 82 A.D.2d 916, 440 N.Y.S.2d 706, 1981 N.Y. App. Div. LEXIS 14635 (N.Y. App. Div. 2d Dep't 1981).

Amendment of city charter by local law, which precluded paid firefighters from sharing ratably with volunteers in proceeds of 2 percent tax imposed on certain insurance carriers under CLS Ins §§ 9104 and 9105, was authorized under Municipal Home Rule Law and thus constituted valid state-legislated preference since (1) CLS Mun H R § 10 permits legislation that is inconsistent with CLS Ins §§ 9104 and 9105 insofar as it alters beneficiaries of proceeds of 2 percent tax, (2) under Municipal Home Rule Law, local problems are to be dealt with locally, and (3) issue of beneficiaries under CLS Ins §§ 9104 and 9105 is primarily one of local concern. Van Orman v Slade, 126 A.D.2d 282, 513 N.Y.S.2d 867, 1987 N.Y. App. Div. LEXIS 41229 (N.Y. App. Div. 3d Dep't 1987).

Because a union was neither a fire company nor a fire department, it was ineligible to receive the distributions; the city treasurer, who, as the fiscal officer of the city, was the person having jurisdiction and control of the paid firefighters, was the appropriate recipient of the paid firefighters' share. Hennessy v G.S. Mink Steamer & T. Claxton Hose Co. No. 2, Auxiliary Inc., 182 A.D.3d 830, 122 N.Y.S.3d 784, 2020 N.Y. App. Div. LEXIS 2342 (N.Y. App. Div. 3d Dep't 2020).

The tax imposed on foreign fire insurers pursuant to Insurance Law §§ 553, 554 [now §§ 9104, 9105] applies not only to volunteer but also to municipally paid fire departments, and for the Firemen's Benevolent Association to be entitled to receive any portion of the tax moneys, the creation and designation of such association must be by special law or enactment. Eisinger v Stern, 57 Misc. 2d 16, 290 N.Y.S.2d 979, 1968 N.Y. Misc. LEXIS 1396 (N.Y. Sup. Ct. 1968).

Notwithstanding case law to the contrary with respect to other municipalities, paid firemen of the City of Kingston are not entitled to share the 2% tax levied by sections 553 and 554 [now §§ 9104, 9105] of the Insurance Law on fire insurance premiums paid by insureds to foreign insurance companies for insurance coverage on properties within the city, since by special laws (L 1879, ch 325, § 1; L 1939, ch 734) the Legislature expressed an intent that all such tax moneys allocable to the City of Kingston must be exclusively applied to the use and benefit of volunteer firemen and the representative of disbanded volunteer companies and that no portion thereof be used to benefit paid firemen. Renn v Kimbark, 92 Misc. 2d 810, 401 N.Y.S.2d 941, 1977 N.Y. Misc. LEXIS 2615 (N.Y. Sup. Ct. 1977), aff'd, 70 A.D.2d 994, 418 N.Y.S.2d 160, 1979 N.Y. App. Div. LEXIS 12633 (N.Y. App. Div. 3d Dep't 1979).

Paid firemen in fire district in which foreign fire insurance tax moneys are distributed to an exempt volunteer fireman's benevolent association are entitled to share in use of such moneys on pro rata basis in accordance with membership unless special legislation establishing association and authorizing it to receive such moneys expressly excludes them. 1986 Op State Compt No. 86-16.

6. —Volunteer corps

In an action pursuant to Ins Law §§ 553 and 554 [now §§ 9104, 9105] to recover monies collected for the benefit of firefighters, defendants could not, by amendment, qualify the class of beneficiaries by limiting it to volunteers where no such restriction appeared in the legislative enactment creating the fund, where fund eligibility was broadly defined by the legislature and was not related to an organization's function or purpose as articulated in the special enactment creating it, and where the special enactment in the instant case created a benevolent association for the purpose of receiving the insurance tax monies and distributing them for the benefit of indigent firemen and their families, but not for the purpose of regulating the class of beneficiaries. Bruno v Walder, 82 A.D.2d 903, 440 N.Y.S.2d 703, 1981 N.Y. App. Div. LEXIS 14613 (N.Y. App. Div. 2d Dep't), dismissed, 55 N.Y.2d 748, 1981 N.Y. LEXIS 8549 (N.Y. 1981).

A volunteer fire company may share the proceeds from the tax on premiums collected by foreign insurance companies. 1957 Ops St Compt File #57-301.

Where foreign fire insurance tax monies are distributed in accordance with CLS Ins Law §§ 9104 and 9105, monies must be

allocated between or among volunteer fire companies of a multi-company fire department in proportion to active membership of each company. Ops St Compt 89-53.

Supreme court properly denied volunteer fire companies' motion for partial summary judgment by determining that the tax monies distributed to the paid firefighters were for their use and benefit as a whole, rather than the fire department as an entity, because the statute indicated that the distribution had be used solely for the benefit of the members of the fire companies, as determined by the members of the companies. Hennessy v G.S. Mink Steamer & T. Claxton Hose Co. No. 2, Auxiliary Inc., 182 A.D.3d 830, 122 N.Y.S.3d 784, 2020 N.Y. App. Div. LEXIS 2342 (N.Y. App. Div. 3d Dep't 2020).

7. Purposes for which funds may be used

Plaintiff association was incorporated in 1911 as a membership corporation comprising all of the paid firemen of the City of Binghamton and was authorized by 1911 Act to receive and disburse "the foreign fire insurance tax" provided by §§ 553, 554 [now §§ 9104, 9105] of the Insurance Law. A 1912 Act repealed the 1911 Act. This Act provided for the establishment of a pension fund and required the association to pay into the fund all of its properties, securities and moneys collected from the tax. In 1935 the city entered the State Employees' Retirement System and amended the 1912 Act by providing that no member of the fire department appointed after January 1, 1935 should receive any benefits from the 1912 pension fund. Although the association filed an action for a declaratory judgment that the words in §§ 553, 554 [now §§ 9104, 9105] of the Insurance Law respecting payment of the tax "for the use and benefit of the fire department" must be construed as intending the use of the proceeds for the benefit of all of the members of the fire department, the plain language of the fire tax statute and that of the 1912 Act establishing the pension fund cannot be so construed, since it is clear that the pension fund can only be properly used for the express purposes provided by the 1912 Act. Binghamton Fireman's Benevolent Asso. v McElhill, 9 A.D.2d 255, 192 N.Y.S.2d 583, 1959 N.Y. App. Div. LEXIS 6126 (N.Y. App. Div. 3d Dep't 1959).

A city council charged with the power and duty of expending two per cent foreign insurance tax receipts may not delegate such power and duty, but may seek the advice of fire department members. Two percent foreign insurance tax receipt must be expended for the use and benefit of the fire department. The determination of what expenditures are for the use and benefit of the fire department rests in the discretion of the city council, within prescribed bounds. 1969 Ops St Compt File #904.

A village treasurer may not transfer custody of foreign fire insurance tax moneys to a fireman's association unless authorized or required by special law, but the treasurer may pay such moneys to the association if the membership of a village fire department determines that the expenditure is for the use and benefit of the department. 1982 Ops St Compt 82-239 is superseded to the extent that it is inconsistent with this opinion. 1990 Op St Compt 90-20.

While an emergency rescue and first aid squad within a village fire department is not entitled to receive foreign fire insurance tax moneys, such tax moneys may be expended for the use and benefit of a fire department or company receiving the same, as determined by the members. This would include the purpose of an emergency rescue squad, if the membership of the department or company reasonably determined that the expenditure is for the use and benefit of the department or company. Members of emergency and rescue first aid squads, as members of the fire department or company, may participate in the decision. 1990 Op St Compt 90-34.

Except as provided by special act, foreign fire insurance tax moneys may be expended for any purpose, other than illegal purpose or purpose contrary to public policy, which members of fire department or company, as case may be, determine to be for benefit of fire department or company. 1999 Op St Compt No. 99-7.

A fire department, municipal or fire district treasurer should not permit the expenditure of foreign fire insurance tax moneys for a purpose which he, in good faith, believes to be illegal or improper. However, with respect to other proposed expenditures which have been approved by a majority of the members of the fire department, he is not authorized to veto the expenditure by refusing to release the moneys. 1981 Op St Comp File #81-389.

Pre-existing city charter provisions governing distribution and use of foreign fire insurance tax moneys remain operative following effective date of Laws of 1988, Chapter 223, which amends CLS Ins Law §§ 9104 and 9105, as provisions in §§ 9104(g) and 9105(e) providing that provisions of these sections shall not be changed, modified or amended by any charter, local law, ordinance, resolution or regulation, as these provisions refer only to future adoption of local laws, and not to existing city charter. Ops St Comp 90-8.

8. —Arbitration and other legal fees

If issues arise which directly relate to care and relief of indigent or disabled firefighters and their families and which necessarily require services of accountant or attorney, volunteer and exempt firemen's benevolent association may use foreign fire insurance tax moneys to pay for those services. 1995 Op St Compt No. 95-26.

9. —Care and relief of indigent

The Fishkill Exempt Firemans' Benevolent Association may expend foreign fire insurance tax moneys to pay debts incurred in the operation of a volunteer firefighter's business if the Association determines, based on the entire financial circumstances of the firefighter and his or her family, that the firefighter is indigent and that the expenditure will provide personal financial relief to the firefighter and his or her family. 1992 Op St Compt No. 92-7.

Florida Fire Department Volunteer Exempt Firemen's Benevolent Association may expend foreign fire insurance tax moneys, or any interest earned thereon, to provide college scholarships to disabled or indigent volunteer firefighters and their families; scholarships must be available to all firefighters for whose benefit Association was established, without regard to actual membership in Association. 1993 Op St Compt No. 93-9.

Volunteer and exempt firemen's benevolent association may expend foreign fire insurance tax moneys to rent meeting room if purpose of meeting relates to care and relief of indigent or disabled volunteer firefighters and their families, and rental paid should be no more than fair market value, with room rented only if association's own facilities are inadequate. 1995 Op St Compt No. 95-26.

If volunteer and exempt firemen's benevolent association does not have adequate storage capacity for retention of necessary records relating to care and relief of indigent or disabled volunteer firefighters and their families, it may expend foreign fire insurance tax moneys for reasonable cost of obtaining storage space. 1995 Op St Compt No. 95-26.

Montgomery Fire Department Volunteer Exempt Firemen's Benevolent Association may expend fire insurance tax moneys to rent room in which to meet, if meetings are for purpose of providing care and relief to disabled or indigent volunteer firemen and their families. Ops St Compt 89-11.

Moneys received by the Volunteer and Exempt Firemen's Benevolent Association of Baldwin from the taxes imposed by Insurance Law, §§ 553 and 554 [now §§ 9104, 9105] must be used for the care and relief of indigent and disabled volunteer and exempt firemen and their families, without regard to whether such firemen are members of the Association. Opn No. 78-912 superseded to the extent inconsistent. 1981 Op St Comp File #81-392.

10. —Death benefits

The Volunteer and Exempt Firemens' Benevolent Association of Hicksville may expend foreign fire insurance tax monies to provide death benefits to family members of deceased volunteer firefighters, and to fund retirement benefits to indigent or disabled volunteer firefighters, without regard to whether the deceased firefighters were, or the indigent or disabled firefighters are, members of the Association. 1991 Op St Compt No. 91-59.

The Volunteer and Exempt Firemens' Benevolent Association of Hicksville may expend foreign fire insurance tax monies to provide death benefits to family members of deceased volunteer firefighters, and to fund retirement benefits to indigent or disabled volunteer firefighters, without regard to whether the de-

ceased firefighters were, or the indigent or disabled firefighters are, members of the Association. 1991 Op St Compt No. 91-59.

Volunteer and Exempt Fireman's Benevolent Association of City of Glen Cove may not expend foreign fire insurance tax moneys to provide benefit to member of Association solely by reason of death of his or her spouse. 1997 Op St Compt No. 97-4.

Benevolent association that is authorized to use foreign fire insurance tax moneys for care and relief of disabled or indigent volunteer and exempt firefighters and their families may expend such moneys to make nominal contribution to charitable organizations designated by family of deceased volunteer firefighter, as memorial in honor of deceased firefighter, made for purpose of lessening grief of, or providing comfort to, firefighter's family. 1999 Op St Compt No. 99-3.

11. —Equipment for fire department

Local law which purported to authorize spending of tax proceeds paid by foreign and alien fire insurance companies under CLS Ins §§ 9104 and 9105 on maintaining and purchasing equipment for municipal fire department was unconstitutional exercise of power since such proceeds are intended by legislature for personal use and benefit of municipal fire department members and cannot be used for general purposes that are normally considered municipal charges, and legislature preempted any local exercise of police power. MacIsaac v Poughkeepsie, 158 A.D.2d 140, 558 N.Y.S.2d 667, 1990 N.Y. App. Div. LEXIS 7900 (N.Y. App. Div. 3d Dep't), app. denied, 76 N.Y.2d 714, 564 N.Y.S.2d 717, 565 N.E.2d 1268, 1990 N.Y. LEXIS 4446 (N.Y. 1990), app. dismissed, 80 N.Y.2d 891, 587 N.Y.S.2d 901, 600 N.E.2d 628, 1992 N.Y. LEXIS 1817 (N.Y. 1992).

Unless otherwise provided by special act, members of volunteer fire department or, if department is comprised of several companies, members of each company, may determine to use foreign fire insurance tax moneys to purchase personal computer to be used for department purposes and to pay for ceremony to dedicate new fire house and new fire apparatus. 1995 Op St Compt No. 95-14.

Exempt firemen's benevolent association may not expend foreign fire insurance tax moneys to purchase exercise equipment for use generally by members of fire department. 1995 Op St Compt No. 95-22.

Unless otherwise provided by special act, members of volunteer fire department may determine to use foreign fire insurance tax monies to make reasonable expenditures to remodel and purchase appliances for firehouse kitchen. 1997 Op St Compt No. 97-20.

Unless otherwise provided by special act, volunteer fire department may use foreign fire insurance tax monies under CLS Ins §§ 9104 and 9105 to purchase personal computer, facsimile machine and refrigerator for fire department use. 2001 Opns St Comp No. 01-6.

12. —Insurance

Moneys received pursuant to Insurance Law §§ 553 and 554 [now §§ 9104, 9105] may be used for the purchase of accident insurance which pays benefits in addition to those available under the Workmen's Compensation Law and the Volunteer Firemen's Benefit Law. 1957 Ops St Compt File #602.

The Exempt Firemen's Benefit Association of the City of Long Beach may not purchase accident and life insurance with foreign fire insurance moneys for all exempt and volunteer firemen, because it may only use such money to aid disabled and indigent exempt and volunteer firemen, whether members of the Association or not. 1967 Ops St Compt File #752.

Volunteer and exempt firemen's benevolent association may not expend foreign fire insurance tax moneys to pay for improvements to fire department's headquarters. 1995 Op St Compt No. 95-26.

Moneys received by an exempt volunteer firemen's benevolent association from the taxes imposed by sections 553 and 554 of the Insurance Law may [now §§ 9104, 9105] be expended to purchase a group life insurance policy for all volunteer and exempt volunteer firemen without regard to membership in the association, provided that the participating firemen are required to designate family members as beneficiaries. 1983 Op St Comp File #83-120.

13. —Investments

It is inadvisable for volunteer and exempt firemen's benevolent association to invest foreign fire insurance tax moneys by loaning moneys to fire department having essentially same membership as association. 1995 Op St Compt No. 95-26.

14. —Miscellaneous purposes

Proceeds from the tax on premiums collected by foreign fire insurance companies may be used by a city to purchase for members of the city fire department items of comfort and convenience. 1957 Ops St Compt File #57-269.

Foreign fire insurance tax monies may not be expended to purchase annuities for benefit of members of volunteer fire company since such purchase would be tantamount to making direct cash payment. 2004 Op St Compt No. 04-5.

Volunteer fire department may not expend foreign fire insurance tax monies to reimburse active members of department for mileage expenses incurred in performing firemanic duties. 2005 Op St Compt No. 05-2.

Except as otherwise provided by special act, members of fire department or, in case of multi-company fire department, members of each company, must determine how foreign fire insurance tax moneys are to be used for benefit of department or company, however, treasurer having custody of these moneys should not permit expenditures for illegal or improper purposes; moneys may be expended by treasurer for purposes of paying for publication of fire department or company newsletter. Ops St Compt 89-16.

A fire district may finance the acquisition of real property by means of issuance of a statutory installment bond payable in ten years to a volunteer exempt volunteer firemen's benevolent association. The association may use foreign fire insurance tax monies to purchase such bond provided such purchase complies with the prudent man rule set forth in section 11-2.2 of the Estates, Powers and Trusts Law. 1983 Op St Compt File § 83-159. A volunteer firemen's benevolent association may pay a death benefit to the family of a deceased volunteer fireman in an amount above $500. 1984 Op St Comp File #84-36.

15. —Recreation

Unless otherwise provided by special acts, members of volunteer fire department or, if department is comprised of several companies, members of each company, may determine to use foreign fire insurance tax moneys to make reasonable expenditures to purchase furniture for recreation room and trophy case for meeting room for department use. 1997 Op St Compt No. 97-14.

16. Enforcement of reporting requirement

Superintendent of insurance has the exclusive power to enforce sections of Insurance Law providing for two percent fire insurance "tax" to be paid by all foreign and alien fire insurers except mutual fire insurers, and Superintendent has duty to enforce statutory directives, including requirement that every agent for any insurer shall report to the insurer the name of the correct city, village or fire district in which insured is situated. Greenville Fire Co. No. 1 v Aetna Casualty & Surety Co., 92 Misc. 2d 402, 399 N.Y.S.2d 985, 1977 N.Y. Misc. LEXIS 2558 (N.Y. Sup. Ct. 1977), aff'd, 63 A.D.2d 725, 405 N.Y.S.2d 310, 1978 N.Y. App. Div. LEXIS 11654 (N.Y. App. Div. 2d Dep't 1978).

Volunteer fire company did not, either individually or in a class action, have capacity to bring action charging fire insurers with failing to maintain adequate record-keeping procedures to insure accurate allocation among state's fire districts of two percent fire insurance "tax" imposed under sections of Insurance Law, unless superintendent of insurance would both refuse to investigate complaints and take steps to remedy situation in the event that complaints were well founded and unless fire company would seek and would be denied mandamus relief sought against superintendent of insurance for failure to carry out his responsibility. Greenville Fire Co. No. 1 v Aetna Casualty & Surety Co., 92 Misc. 2d 402, 399 N.Y.S.2d 985, 1977 N.Y. Misc. LEXIS 2558 (N.Y. Sup. Ct. 1977), aff'd, 63 A.D.2d 725, 405 N.Y.S.2d 310, 1978 N.Y. App. Div. LEXIS 11654 (N.Y. App. Div. 2d Dep't 1978).

17. Tax on risks insured within New York City

A contract of indemnity by which a foreign corporation doing business in New York City assumes part of risks of a domestic

company, but receives no premium from insured, is not "insurance against loss or injury by fire" within meaning of § 799 of greater New York charter, requiring every person acting in city as agent for such corporation, to pay certain percentages of premiums to fire commissioner. Adamson v Schreiner, 225 N.Y. 713, 122 N.E. 876, 225 N.Y. (N.Y.S.) 713, 1919 N.Y. LEXIS 1250 (N.Y. 1919).

Under the greater New York charter, § 799, an agent of a foreign fire insurance company must pay tax of two per cent on premiums on fire policies effected on property within city, without deduction of premiums on re-insurance effected by him as such agent. So long as provisions in greater New York charter §§ 798, 799, relative to taxation of premiums received by fire insurance companies apply equally to all in same situation, they are not unconstitutional because another statute applying to other localities may be different. Drennan v Hampton, 191 A.D. 576, 181 N.Y.S. 777, 1920 N.Y. App. Div. LEXIS 4760 (N.Y. App. Div. 1920), aff'd, 232 N.Y. 576, 134 N.E. 578, 232 N.Y. (N.Y.S.) 576, 1922 N.Y. LEXIS 1155 (N.Y. 1922).

18. Other matters

The Firemen's Association had the right to receive money collected under Insurance Law § 553 [now § 9104] but plaintiff's complaint was sufficient to raise an issue of whether the defendant had the right to receive money collected under § 554 [now § 9105] of the Insurance Law, and whether moneys received under § 553 were properly used. Niagara Falls Fire Dep't Mut. Aid Ass'n v Exempt Firemen's Ass'n, 25 A.D.2d 484, 266 N.Y.S.2d 627, 1966 N.Y. App. Div. LEXIS 5120 (N.Y. App. Div. 4th Dep't 1966).

Volunteer firemen had no preference over paid firemen of village as to sharing in benefits of funds collected from tax on premiums of policies of fire insurance. Wilcox v Schenck, 52 A.D.2d 349, 383 N.Y.S.2d 918, 1976 N.Y. App. Div. LEXIS 12028 (N.Y. App. Div. 3d Dep't 1976).

By changing its membership requirements from members of any fire company to volunteer members the Firemen's Benevolent Fund Association of the City of Mount Vernon did not unlawfully discriminate against professional firemen individually or as a class. Crohn v Firemen's Benevolent Fund Ass'n, 79 Misc. 2d 536, 359 N.Y.S.2d 599, 1973 N.Y. Misc. LEXIS 1279 (N.Y. Sup. Ct. 1973), aff'd, Crohn v Firemen's Benevolent Fund Asso., 45 A.D.2d 955, 359 N.Y.S.2d 247, 1974 N.Y. App. Div. LEXIS 4168 (N.Y. App. Div. 2d Dep't 1974).

Agency Opinions

Analysis

1. In general
2. Duty to apportion and pay over funds
3. Entities and organizations entitled to receive funds
4. —Benevolent associations
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12. —Miscellaneous purposes
13. —Recreation
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1. In general

Legislative intention as expressed is to impose only one tax of two per cent on foreign mutual fire companies, and that one is collected by the state superintendent of insurance. 1946 NY Ops Atty Gen Aug 16.

In a fire department consisting of both paid and volunteer firemen, the paid firemen are entitled to receive an equitable share of foreign fire insurance tax moneys. 1979 Op St Compt File #813.

2. Duty to apportion and pay over funds

A fire district treasurer must apportion and pay over all of the tax received under Insurance Law, § 553 [now § 9104] to the treasurer or treasurers of the fire company or companies constituting the fire district, to be used by that company or those companies for the use and benefit of the fire department and the company or companies comprising the department, whereas the tax received by the fire district treasurer under Insurance Law, § 554 [now § 9105] must be applied for the use and benefit of the fire department as such, which use is to be designated by the board of fire commissioners and if any portion or all of the tax under Insurance Law, § 554 [now § 9105] is not required by the fire district commissioners to be applied by them for the use and benefit of the fire department as such, then the fire district treasurer should apportion and pay over that tax, or the balance thereof, to the treasurer or treasurers of the fire company or fire companies constituting the fire department, to be used by them for the statutory purpose. The statutory direction to "apportion and pay over" does not require that the funds be distributed equally among the several fire companies constituting the fire district. The apportionment is based upon a determination by the treasurer of the fire district, which determination can not be arbitrary, capricious or unreasonable. 1976 NY Ops Atty Gen August 23.

Discussion of payment over to a newly incorporated exempt volunteer firemen's benevolent association of unexpended foreign fire insurance fund moneys held by a volunteer fire company the members of which are also eligible for membership in the benevolent association. 1978 Op St Compt File #304.

Where a village fire department consists of several volunteer fire companies, the treasurer of the fire department is not required to apportion foreign fire insurance tax moneys equally among the several companies; he may apportion such moneys in any equitable manner, such as on the basis of membership in each company. 1979 Op St Compt File #102.

3. Entities and organizations entitled to receive funds

4. —Benevolent associations

Where a legally organized firemen's benevolent association does not exist, moneys received by a village under Insurance Law § 554 [now § 9105] must be used for the benefit of the fire department and not for the benefit of the village. 1958 NY Ops Atty Gen Dec 30 (informal).

An incorporated fire fighters benevolent association has no power to collect and receive fire insurance premium tax moneys imposed on foreign insurance companies unless specially authorized by a special law. 1958 NY Ops Atty Gen Dec 31.

A benevolent association incorporated under the Not-For-Profit Corporation Law may be dissolved pursuant to that statute without the consent of the State Legislature. Before a benevolent association can receive monies under sections 553 and 554 [now §§ 9104, 9105] it must be authorized by the State Legislature. 1979 Op St Compt File #676.

A by-law of a volunteer and exempt firemen's benevolent association cannot qualify eligibility for benefits from foreign fire insurance tax moneys on membership in the association where the special legislation creating the association contains no such qualification. 1983 Op St Compt File #83-33.

Where a village fire department does not have a treasurer and no person has been designated in a special law as the recipient of the tax moneys derived from the tax imposed by these sections [now §§ 9104, 9105], such moneys should be paid to the village treasurer. 1981 Op St Compt File #81-129.

A fire company or department which is not actively providing fire fighting services is not entitled to the foreign fire insurance tax moneys due to the fire district in which it is located. Such moneys should be paid to the fire department which is obligated by contract to provide fire protection to the district. 1982 Op St Compt File #82-56.

5. Purposes for which funds may be used

6. —Arbitration and other legal fees

Use of proceeds from the foreign fire insurance premium tax to pay for expenses related to arbitration in a village where only part of the fire department consists of paid professional firemen is improper. 1979 Op St Compt File #238.

The Medina Firemen's Benevolent Association may not use moneys paid to it from the tax on foreign fire insurance premiums

to defray the cost of arbitration or the legal fees related to arbitration proceedings between the village and its paid firemen. Opn No. 79-238 superseded. 1979 Op St Compt File #238-A.

A fire department fire company which has received foreign fire insurance tax moneys from the fire department may expend such moneys to pay legal fees incurred in connection with a law suit brought against the company provided that it is determined by the members of the company that such expenditure is for the use and benefit of the company. 1980 Op St Compt File #536.

7. —Care and relief of indigent

The Deer Park Volunteer Exempt Firemen's Association may expend foreign fire insurance tax moneys only for the care and relief of disabled or indigent volunteer and exempt volunteer firemen and their families. 1979 Op St Compt File #285-A.

The Volunteer and Exempt Firemen's Benevolent Association of Inwood may expend foreign fire insurance tax proceeds only for the care and relief of disabled or indigent volunteer and exempt firemen and their families. 1979 Op St Compt File #628.

The Valley Stream Volunteer and Exempt Firemen's Benevolent Association may expend foreign fire insurance tax moneys only for the care and relief of disabled and indigent volunteer and exempt firemen and their families. 1981 Op St Compt File #81-29.

The Plainview Volunteer and Exempt Firemen's Benevolent Association may expend foreign fire insurance tax moneys only for the care and relief of disabled or indigent volunteer and exempt firemen and their families. 1981 Op St Compt File #81-63.

The Grand Island Volunteer Firemen's Benevolent Association may expend foreign fire insurance moneys only for the care and relief of disabled or indigent volunteer and exempt volunteer firemen and their families. 1981 Op St Compt File #81-143.

Interest earned on foreign fire insurance tax moneys which have been invested by an exempt volunteer firemen's benevolent association may be expended only for the care and relief of disabled or indigent volunteer firemen and their families or for such other purposes, if any, authorized by the legislation creating the association. 1982 Op St Compt File #82-334.

8. —Death benefits

The Volunteer and Exempt Firemen's Benevolent Association of East Norwich may expend foreign fire insurance tax moneys to purchase gravestones for deceased volunteer and exempt firemen only where such firemen were indigent at the time of their death. 1979 Op St Compt File #379.

9. —Equipment for fire department

The members of a fire department may not be compelled to use foreign fire insurance tax moneys to purchase equipment for the fire department. However, if they decide on their own to use the moneys for such purpose, the moneys may be so expended by the department or municipal treasurer. 1979 Op St Compt File #680.

The Glenham Fire District may expend foreign fire insurance tax moneys to purchase a walk-in cooler for a fire company provided that it is determined by the members of the department and the department or district treasurer, as the case might be, that such expenditure is for the use and benefit of the fire department. 1980 Op St Compt File #506.

A fire department may expend foreign fire insurance tax proceeds to help construct a fireman's training tower provided that the members of the fire department and the department treasurer determine that such expenditure is for the use and benefit of the department. 1981 Op St Compt File #81-49.

The Grand Island Volunteer Firemen's Benevolent Association may expend foreign fire insurance moneys only for the care and relief of disabled or indigent volunteer and exempt volunteer firemen and their families and, thus, may not use such moneys to purchase jackets for firemen. 1981 Op St Compt File #81-143.

Foreign fire insurance tax moneys may be expended for the purchase of new beds for the fire house where the members of the fire department have determined that such expenditure is for the use and benefit of the department. 1982 Op St Compt File #82-25.

10. —Insurance

Purchase by a volunteer fire department of insurance covering disability or death of a volunteer fireman resulting from non-firemanic activity is not proper use of funds received pursuant to Insurance Law §§ 553, 554 [now §§ 9104, 9105]. 1970 NY Ops Atty Gen May 13.

Foreign fire insurance fund moneys may be expended for the purchase of premiums on a group life insurance policy for the benefit of members of a fire department. 1978 Op St Compt File #401.

Discussion of the purchase of life insurance for volunteer firemen with fire district moneys, moneys of a volunteer fireman's benevolent association and foreign fire insurance fund moneys. 1978 Op St Compt File #909.

The Mutual Aid Association of the Paid Fire Department of the City of Yonkers may not expend foreign fire insurance tax moneys to pay the firefighter's shares of health insurance provided by the city. 1980 Op St Compt File #58.

Foreign fire insurance tax proceeds may be paid by the treasurer of a fire department into a trust fund which is established, pursuant to the provisions of the trust agreement, for the purpose of providing a death benefit to the families of deceased members of the fire department provided that the members of the fire department and the department treasurer determine that this is for the use and benefit of the fire department. 1980 Op St Compt File #119.

The members of a paid fire company within a village fire department may spend their share of foreign fire insurance tax proceeds for the establishment of an optical and eye care program for members of the company and their families if the members of the company determine that such expenditure is for the use and benefit of the company. 1980 Op St Compt File #625.

Foreign fire insurance tax moneys may be expended for the purchase of group life insurance for the members of a fire department. 1982 Op St Compt File #82-356.

Exempt volunteer firemen who no longer are active in providing fire-fighting services may not be included in a group life insurance policy purchased for an association or organization of volunteer firemen. 1983 Op St Compt File #83-232.

11. —Investments

The Volunteer and Exempt Firemen's Benevolent Association of West Hempstead may invest foreign fire insurance fund moneys in the manner authorized by section 11-2.2 of the EPTL. Whether such moneys may be invested in a mutual insurance company pursuant to the provisions of section 76 of the Insurance Law depends upon whether such investment meets the criteria set forth in section 11-2.2. 1979 Op St Compt File #859.

Interest earned on foreign fire insurance tax moneys which have been invested by an exempt volunteer firemen's benevolent association may be expended only for the care and relief of disabled or indigent volunteer firemen and their families or for such other purposes, if any, authorized by the legislation creating the association. 1982 Op St Compt File #82-334.

A firemen's benevolent association may invest foreign fire insurance fund moneys in accordance with the prudent man standard set forth in EPTL, § 11-2.2. Whether such moneys may be invested in an interest bearing note or bond secured by a first mortgage on real property owned by the benevolent association depends upon whether such investment meets the prudent man standard of section 11-2.2. 1982 Op St Compt File #82-366.

12. —Miscellaneous purposes

Discussion of use of foreign fire insurance moneys by the Deer Park Volunteer Firemen's Association to pay the cost of maintaining the association's headquarters. 1978 Op St Compt File #285.

Fire district moneys may not be expended in connection with a program designed to insure that all homeowner's in the district correctly designate the fire district in which they reside on their homeowner's insurance policies. 1979 Op St Compt File #324.

The City of Corning may expend foreign fire insurance fund moneys to reimburse the Corning Fire Fighters Association for losses which the Association incurred in a fund raising event, provided that it is determined by the members of the fire department and the city treasurer that such expenditure is for the use and benefit of the fire department. All prior opinions inconsistent with this opinion are hereby superseded. 1979 Op St Compt File #627.

Foreign fire insurance tax moneys may be used by the fire department to purchase dress uniforms, including the purchase

at cost of uniforms from firemen who have previously purchased uniforms with their own moneys. 1979 Op St Compt File #814.

The Volunteer and Exempt Firemen's Benevolent Association of Roslyn may not expend foreign fire insurance tax moneys to provide a monthly gasoline allowance to the volunteer members of the fire department to defray their expenses in responding to fire calls. 1980 Op St Compt File #450.

An incorporated volunteer fire company may expend funds received from donations and foreign fire insurance taxes to erect an addition to a firehouse and then donate this addition to the fire district. 1980 Op. St. Compt. No. 80–627.

Foreign fire insurance tax moneys may not be expended for direct cash payments to paid or volunteer firemen. 1982 Op St Compt File #82-10.

13. —Recreation

Discussion of expenditure of foreign fire insurance tax moneys for annual banquets by a volunteer firemen's benevolent association incorporated pursuant to a special act. 1978 Op St Compt File #196.

Discussion of expenditure of foreign fire insurance tax moneys to purchase ball hats, jackets, sweatshirts, T-shirt and other items of clothing and of the right of inactive volunteer firemen to the benefits of expenditures from such moneys. 1979 Op St Compt File #84.

Foreign fire insurance tax moneys may be used by a volunteer fire company to construct an addition to the fire house to be used for recreational purposes. 1979 Op St Compt File #303.

The Centerport Volunteer Exempt Firemen's Benevolent Association may not expend foreign fire insurance tax moneys to compensate two paid dispatchers for loss of salary incurred while the dispatchers are attending a social affair held by the benevolent association. 1979 Op St Compt File #697.

A fire department fire company which has received foreign fire insurance tax moneys from the fire department may expend such moneys to pay for a band for a parade provided that it is determined by the members of the company that such expenditure is for the use and benefit of the company. 1980 Op St Compt File #536.

The Volunteer and Exempt Firemen's Benevolent Association of Briarcliff Manor may not expend foreign fire insurance tax moneys to purchase an air conditioner for the recreation room in the central firehouse—such moneys may be expended only for the relief of disabled and indigent volunteer firemen and their families. 1980 Op St Compt File #704.

A fire department may expend foreign fire insurance tax proceeds to help make payments on a tract of land purchased by the department for a fireman's park or to help develop such tract of land provided that the members of the fire department and the department treasurer determine that such expenditure is for the use and benefit of the department. 1981 Op St Compt File #81-49.

The Plainview Volunteer and Exempt Firemen's Benevolent Association may expend foreign fire insurance tax moneys only for the care and relief of disabled or indigent volunteer and exempt firemen and their families and, thus, may not purchase real property to be used by firemen for recreational purposes. 1981 Op St Compt File #81-63.

The Pine Hill Hose Company may expend foreign fire insurance fund moneys for an installation dinner if it is determined by the members of the fire department and the fire district or fire department treasurer, as the case may be, that such expenditure is for the use and benefit of the fire department. In the absence of an internal fire company requirement, such expenditure need not be approved by inactive members of the company. The type of notice of the time and place of the vote on the expenditure is a matter of internal fire company policy. 1981 Op St Compt File #81-146.

Foreign fire insurance tax moneys may be used to finance a party to which non-members of the department will be invited provided the members of the department determine that such expenditure is for the use and benefit of the fire department. 1982 Op St Compt File #82-10.

14. —Unspecified purposes

Discussion of the expenditure of foreign fire insurance fund moneys in the City of Rochester. 1978 Op St Compt File #619.

Discussion of use of foreign fire insurance fund moneys in the City of Jamestown. 1978 Op St Compt File #711.

Discussion of the manner of expenditure of foreign fire insurance fund moneys by the Freeport Volunteer Exempt Firemen's Benevolent Association. 1978 Op St Compt File #821.

Discussion of expenditure of foreign fire insurance fund moneys by the Volunteer and Exempt Firemen's Benevolent Association of Baldwin for the benefit of firemen who are not members of the association. 1978 Op St Compt File #912.

Discussion of permissible expenditures of foreign fire insurance fund moneys by the Fishkill Exempt Firemen's Benevolent Association. 1978 Op St Compt File #931.

An exempt volunteer firemen's benevolent association created by special act of the State Legislature and authorized to receive foreign fire insurance tax moneys may expend such moneys only for the purposes authorized by the special act while a fire department, fire district or municipal treasurer receiving such moneys may expend them for any purpose which the members of the fire department and the department, district or municipal treasurer, as the case might be, determine to be for the use and benefit of the department. 1980 Op St Compt File #786.

15. Other matters

The board of fire commissioners of the Holtsville Fire District has no responsibility for the operation of the benevolent fund or for overseeing the money in the benevolent fund of the Holtsville Fire Department Volunteer Exempt Firemen's Benevolent Association. 1980 NY Ops Atty Gen April 23 (informal).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 2118.

Federal Aspects:

Income tax treatment of foreign life insurance companies, 26 USCS § 819.

Income tax on certain insurance companies other than life insurance companies, 26 USCS § 831.

Jurisprudences:

25 NY Jur 2d Counties, Towns, and Municipal Corporations § 91.

100 NY Jur 2d Taxation and Assessment §§ 1386, 1390, 1392, 1394, 1396–1398 .

Texts: New York Insurance Law (Matthew Bender's New York Practice Series) §§ 6.05[3], 6.06[7][a], [f].

§ 9108. Fire insurance fee

(a) Every insurance company authorized to do business in this state shall collect, in addition to the applicable premium charge, a fire insurance fee, separately identified and charged to each policyholder, from each such holder of a policy issued in the state or for delivery in the state for coverage of peril of fire, excluding a policy for protection of household furnishings and/or policies issued to protect one or two-family residential structures, schools, churches and hospitals.

(b) (1) The fee is hereby imposed at the rate of one and one-quarter per centum on the gross direct premium written on property or risks located in this state, provided, however, no fee shall be imposed on a policy to insure against peril of inland marine, ocean marine, automobile, or aircraft physical damage. Such fees shall be paid quarterly by insurance companies to the superintendent, after deducting from such gross premiums, (i) premiums upon policies not taken and (ii) premiums returned on cancelled policies, as follows: April fifteenth, July fifteenth, October fifteenth, and January fifteenth to reflect the net collections for the quarters ending

March thirty-first, June thirtieth, September thirtieth, and December thirty-first, respectively.

(2) On or before the fifteenth day of February of each year, every insurance company required to collect the fee imposed by this section shall file with said superintendent an annual statement in a manner the superintendent shall prescribe, which statement shall show the aggregate amount of gross premiums and premium deposits and assessments collected during the immediately preceding year for insurance against loss or injury and the several items of deduction referred to under items (i) and (ii) of paragraph one of this subsection.

(c) In case any such company shall neglect or refuse to make and file such statement or pay over moneys collected from the fee imposed by this section, the provisions of section nine thousand one hundred nine of this article shall apply.

(d) All moneys received by the superintendent shall be paid into the code enforcement account by the tenth day of the month following receipt of such moneys.

(e) The fees imposed by this section shall be applicable to said policies issued or renewed on or after July first, nineteen hundred eighty-two.

HISTORY:

Add, L 1984, ch 367, § 1, eff Sept 1, 1984; amd, L 1994, ch 169, § 116, eff June 9, 1994, deemed eff April 1, 1994.

Editor's Notes: This section formerly appeared as Ins § 557-a which was added by L 1982, ch 55; amd, L 1982, ch 158.

Notes to Decisions

For those homeowners and commercial multiple peril policies for which actual fire portion cannot be determined, accepted fire portions of premium are 35 and 50 percent, respectively, that are then levied for fire insurance fee under CLS Ins § 9108. Insurance Department, Opinions of General Counsel, Opinion Number 06-09-01.

For those homeowners and commercial multiple peril policies for which actual fire portion cannot be determined, fire insurance fee is not levied on portion of premium applied to coverage for equipment breakdown since there is no coverage for peril of fire in coverage. Insurance Department, Opinions of General Counsel, Opinion Number 06-09-01.

Under CLS Ins § 9108, fire insurance fee does not apply to excess line insurance companies in New York; however, excess line premium tax paid by broker does include component representing fire premium tax. Insurance Department, Opinions of General Counsel, Opinion Number 06-11-10.

Word "churches" as used in CLS Ins § 9108(a) is not limited to Christian houses of worship and encompasses other houses of worship including, but not limited to, synagogues and mosques; to limit definition of "churches" solely to mean Christian houses of worship would violate CLS NY Const Art I § 3. Insurance Department, Opinions of General Counsel, Opinion Number 06-12-06.

Under Insurance Law and Workers' Compensation Law, fire insurance fee, state assessment fee, and Workers' Compensation Security Fund surcharge each must be separately stated on declarations page of insurance policy; there is no requirement that they be separately stated on premium notice. Insurance Department, Opinions of General Counsel, Opinion Number 07-02-09.

Fire insurance fee may not be used as basis for agent's commission, while state assessment fee and Workers' Compensation Security Fund surcharge do not count toward that of part of premium intended to fund commissions. Insurance Department, Opinions of General Counsel, Opinion Number 07-02-09.

Insurance policy may be cancelled for non-payment of fire insurance fee if insurer complies with CLS Ins § 3425 or § 3426, which set forth cancellation and renewal provisions for most non-commercial property/casualty insurance policies and commercial lines property/casualty insurance policies, respectively. Insurance Department, Opinions of General Counsel, Opinion Number 07-02-09.

On cancellation of policy by insured, fire insurance fee and state assessment fee must be refunded by insurer on same basis as any other return of premium. Insurance Department, Opinions of General Counsel, Opinion Number 07-02-09.

Fire insurance fee and Workers' Compensation Security Fund surcharge are not subject to premium tax, but state assessment fee is subject to premium tax. NY Ins Dep't Gen Counsel, Opinion No. 07-02-09.

Under CLS Ins § 9104, foreign or alien insurer may elect to pay fire insurance premium tax to Superintendent of Insurance, but under CLS Ins § 9108, insurer must pay fire insurance fee to Superintendent. Insurance Department, Opinions of General Counsel, Opinion Number 09-10-01.

Insurer is not required to list on fire insurance policy names and addresses of fire departments to which fire insurance fee or fire insurance premium tax is to be distributed. Insurance Department, Opinions of General Counsel, Opinion Number 09-10-01.

Homeowner's policy is not subject to fire insurance fee if policy covers only one- or 2-family residential structures, but homeowner's policy that covers 3-family or more residential structures is subject to fire insurance fee. Insurance Department, Opinions of General Counsel, Opinion Number 09-10-01.

Lender's property reporting (LPR) policy is subject to fire insurance fee under CLS Ins § 9108, even though policy is issued to lender. Insurance Department, Opinions of General Counsel, Opinion Number 09-10-03.

Agency Opinions

This section [now § 9108] contains no provision generally excluding cities from the fee imposed therein on fire insurance policyholders. 1983 Op St Compt File #83-1.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

Texts: New York Insurance Law (Matthew Bender's New York Practice Series) § 6.06[7][a], [g].

JUDICIARY LAW

Article
16. Selection of Jurors

ARTICLE 16 Selection of Jurors

Section
517. Excuses and postponements
519. Right of juror to be absent from employment

HISTORY:
Add, L 1977, ch 316, § 2, eff Jan 1, 1978.

§ 517. Excuses and postponements

(a) (1) Except as otherwise provided in paragraph two of this subdivision, the commissioner of jurors may, in his or her discretion, on the application of a prospective juror who has been summoned to attend, excuse such prospective juror from a part or the whole of the time of jury service or may postpone the time of jury service to a later day during the same or any subsequent term of the court, provided that if the prospective juror is a breastfeeding mother and submits with her application a note from a physician indicating that the prospective juror is breastfeeding, the commissioner shall excuse the prospective juror or postpone the time of jury service. The application shall be presented to the commissioner at such time and in such manner as he or she shall require, except that an application for postponement of the initial date for jury service may be made by telephone.

(2) An application for postponement of jury service shall be granted hereunder provided: (i) such service has not already been postponed or excused, (ii) the application is made at such time and in such manner as the commissioner of jurors requires, and (iii) the postponement is to a date certain when the court is in session not more than six months after the date on which such service otherwise is to commence and such date is selected by the prospective juror, provided that if the prospective juror is a breastfeeding mother, the postponement date may be a date certain up to two years after the date on which such service otherwise is to commence.

(b) A person whose application has been denied by the commissioner, or who has not applied to the commissioner for an excuse or postponement, may apply to the trial court, or to the court having supervision of the grand jury, as the case may be, which may, in its discretion, excuse such person from a part or the whole of the time of jury service, or may postpone the time of jury service to a later day during the same or any subsequent term of the court. If the applicant cannot personally attend, he or she shall send the summons and application by a person capable of making the necessary proof in relation to the application.

(c) In determining whether an application for excusal should be granted, the commissioner or the court shall consider whether the applicant has a mental or physical condition that causes him or her to be incapable of performing jury service or there is any other fact [which] indicates that attendance for jury service in accordance with the summons would cause undue hardship or extreme inconvenience to the applicant, a person under his or her care or supervision, or the public. Except as provided in paragraph two of subdivision (a) of this section, in determining whether an application for postponement should be granted, the commissioner or the court shall be guided by standards promulgated by the chief administrator of the courts.

HISTORY:
Add, L 1977, ch 316, § 2; amd, L 1984, ch 625, § 1; L 1995, ch 86, § 9, eff Jan 1, 1996; L 2019, ch 380, § 1, effective October 21, 2019.

Prior Law: Former § 517, add, L 1955, ch 864, § 2; repealed, L 1977, ch 316, § 1, eff Jan 1, 1978.

Prior § 517, add, L 1909, ch 35; repealed, L 1954, ch 305, § 26, eff July 1, 1955.

Amendment Notes The 2019 amendment by ch 380, § 1, added "provided that if the prospective juror is a breastfeeding mother and submits with her application a note from a physician indicating that the prospective juror is breastfeeding, the commissioner shall excuse the prospective juror or postpone the time of jury service" in the first sentence of (a)(1); and added "provided that if the prospective juror is a breastfeeding mother, the postponement date may be a date certain up to two years after the date on which such service otherwise is to commence" in (a)(2).

Notes to Decisions

Trial court did not err in questioning prospective jurors about hardship due to work commitments and family obligations because the only inquiry by the court was whether, given the length of the trial, any particular hardship would prevent them from serving, the questioning focused on matters that were extraneous to their fitness to serve, there had been no inquiry into whether they were fit to serve, and the trial judge and commissioner of jurors had authority to excuse prospective jurors from service based on undue hardship or extreme inconvenience. People v King, 27 N.Y.3d 147, 50 N.E.3d 869, 31 N.Y.S.3d 402, 2016 N.Y. LEXIS 427 (N.Y. 2016).

Defendant's motion to suspend the procedures for automatic postponement of jury service upon request in N.Y. Jud. Law § 517(a)(2) and N.Y. Codes R. & Regs. tit. 22, § 126- aa(1) was denied, because even assuming the court had the power to grant such a motion, defendant failed to demonstrate a sufficient need for such an order, as prospective jurors, who had already received summonses to attend on the date scheduled for trial, had no reason to believe that they would be called for this case, the Commissioner of Jurors gave out no advance information on when particular cases were scheduled to begin, and there was no basis to conclude that prospective jurors, in large numbers or of any particular group, would be trying to postpone service in order to avoid this case. People v Taylor, 192 Misc. 2d 786, 747 N.Y.S.2d 337, 2002 N.Y. Misc. LEXIS 1162 (N.Y. Sup. Ct. 2002).

Because the trial court complied with N.Y. Jud. Ct. Acts Law § 517(b), (c), and N.Y. Comp. Codes R. & Regs. tit. 22, § 128.6-a before excusing prospective jurors for undue hardship, and be-

[75]The bracketed word has been inserted by the Publisher.

cause defense counsel had no right to participate in the court's discretionary decisions, the jury pool was not unconstitutionally narrowed and defendant's right to counsel was not abrogated. People v Heckstall, 45 A.D.3d 907, 845 N.Y.S.2d 488, 2007 N.Y. App. Div. LEXIS 10969 (N.Y. App. Div. 3d Dep't 2007), app. denied, 10 N.Y.3d 765, 854 N.Y.S.2d 327, 883 N.E.2d 1262, 2008 N.Y. LEXIS 921 (N.Y. 2008).

Defendant's contention that the trial court's jury selection procedure violated his right to a jury selected in accordance with the law was unpreserved for appellate review because defendant did not object to the procedure, and the procedure did not fit within the "mode of proceedings" exception to the preservation requirement; pursuant to N.Y. Jud. Ct. Acts Law § 517(b) and N.Y. Comp. Codes R. & Regs. tit. 22, § 128.6-a, a trial court had discretion on the matter of excusing jurors. People v Casanova, 62 A.D.3d 88, 875 N.Y.S.2d 31, 2009 N.Y. App. Div. LEXIS 1698 (N.Y. App. Div. 1st Dep't), app. denied, 12 N.Y.3d 852, 881 N.Y.S.2d 663, 909 N.E.2d 586, 2009 N.Y. LEXIS 2782 (N.Y. 2009).

RESEARCH REFERENCES AND PRACTICE AIDS

Federal Aspects:

Selection and summoning of jury panels, 28 USCS § 1866.

Jurisprudences:

73A NY Jur 2d Jury §§ 74, 75, 81, 83 .

§ 519. Right of juror to be absent from employment

Any person who is summoned to serve as a juror under the provisions of this article and who notifies his or her employer to that effect prior to the commencement of a term of service shall not, on account of absence from employment by reason of such jury service, be subject to discharge or penalty. An employer may, however, withhold wages of any such employee serving as a juror during the period of such service; provided that an employer who employs more than ten employees shall not withhold the first forty dollars of such juror's daily wages during the first three days of jury service. Withholding of wages in accordance with this section shall not be deemed a penalty. Violation of this section shall constitute a criminal contempt of court punishable pursuant to section seven hundred fifty of this chapter.

HISTORY:

Add, L 1995, ch 85, § 3, eff Feb 15, 1998; amd, L 1909, ch 35; L 1954, ch 305, § 26, eff July 1, 1955.

Prior Law: Former § 519, add, L 1977, ch 316, § 2; amd, L 1991, ch 166, § 384, L 1995, ch 85, § 1; repealed, L 1995, ch 85, § 3, eff Feb 15, 1998.

Prior § 519, add, L 1955, ch 864, § 2; repealed, L 1977, ch 316, § 1, eff Jan 1, 1978.

Editor's Notes: Laws 2002, ch 302, § 4, eff April 1, 2003, provides as follows:

[Expires and repealed April 1, 2006] § 4. Notwithstanding any other provision of law, references to "forty dollars" in section 519 and subdivision (a) of section 521 of the judiciary law shall not apply where a juror subject to those provisions of law serves in a town or village court, and shall be replaced by: (i) "ten dollars", as of the effective date of this section; (ii) "fifteen dollars", as of one year after such effective date; and (iii) "twenty-five dollars", as of two years after such effective date. Where the provisions of this act would result in a juror in a town or village justice court receiving a smaller allowance from the state on account of jury service than he or she would have been entitled to receive for such service from the appropriate town or village on the day immediately preceding the effective date of this act, the amount specified in this section shall equal the amount of such larger allowance.

Notes to Decisions

Probationary employee's termination without hearing was proper even though it occurred one year and 6 days after he began his employment, since his one-year probationary period was extended for 23 days he spent on jury during his first year of work; extension of probationary period, under circumstances, was not penalty as contemplated by Judiciary Law § 519. Tomlinson v Ward, 66 N.Y.2d 771, 497 N.Y.S.2d 368, 488 N.E.2d 114, 1985 N.Y. LEXIS 17913 (N.Y. 1985).

Petitioner's proceeding to compel his reinstatement to employment with the New York State Office of Parks and Recreation was properly dismissed, where petitioner was terminated at the end of his probationary term, which had been extended pursuant to regulatory authority to reflect his absence while on jury duty; such extension was not a "penalty" within the intendment of Jud Law § 519. Schwartz v Cuomo, 111 A.D.2d 759, 489 N.Y.S.2d 786, 1985 N.Y. App. Div. LEXIS 50003 (N.Y. App. Div. 2d Dep't), app. dismissed, 66 N.Y.2d 758, 497 N.Y.S.2d 1027, 488 N.E.2d 119, 1985 N.Y. LEXIS 17660 (N.Y. 1985), app. denied, 67 N.Y.2d 605, 501 N.Y.S.2d 1023, 492 N.E.2d 400, 1986 N.Y. LEXIS 17514 (N.Y. 1986).

Claimant, who normally worked until 5:00 p.m., except for Wednesdays when she worked until 7:00 p.m., was not disqualified from receiving unemployment insurance benefits after she was terminated from her employment after she refused employer's order that she work on Wednesday evening after her jury duty had concluded for day. In re Claim of Wilson, 226 A.D.2d 870, 640 N.Y.S.2d 354, 1996 N.Y. App. Div. LEXIS 3692 (N.Y. App. Div. 3d Dep't 1996).

Employee dismissed for serving on jury does not have private civil cause of action against employer under CLS Jud § 519. Gomariz v Foote, Cone & Belding Communs., 228 A.D.2d 316, 644 N.Y.S.2d 224, 1996 N.Y. App. Div. LEXIS 7292 (N.Y. App. Div. 1st Dep't 1996).

Plaintiff, who made several unsuccessful attempts to notify employer that he would not be able to work on day in question due to jury duty, could not maintain causes of action for violation of CLS Jud § 519, and wrongful/retaliatory discharge in violation of public policy under CLS Jud § 500, after his employment was terminated for failing to comply with requirements of employee manual relating to advance written notice of absence from work. Di Blasi v Traffax Traffic Network, 256 A.D.2d 684, 681 N.Y.S.2d 147, 1998 N.Y. App. Div. LEXIS 13010 (N.Y. App. Div. 3d Dep't 1998).

RESEARCH REFERENCES AND PRACTICE AIDS

Federal Aspects:

Protection of jurors' employment, 28 USCS § 1875.

Jurisprudences:

73A NY Jur 2d Jury § 117 .

Matthew Bender's New York Practice Guides: 1 New York Practice Guide: Business and Commercial § 8.15; 4 New York Practice Guide: Business and Commercial §§ 25.05, 25.22, 26.21.

Texts: Liddle & Marino, Labor and Employment in New York (Michie) pp 21-17.

LABOR LAW

Article
1. Short Title: Definitions
2. The Department of Labor
7. General Provisions
8. Public Work
14. Mercantile and Other Establishments
17. Public Safety
18. Unemployment Insurance Law
20-C. Retaliatory Action by Employers

ARTICLE 1 Short Title: Definitions

Section
2. Definitions

HISTORY:
Add, L 1921, ch 50.

§ 2. Definitions

Whenever used in this chapter:

1. "Department" means the department of labor of the state of New York.

2. "Commissioner" means the commissioner of labor of the state of New York.

3. "Board," as determined by the context, shall mean either the workmen's compensation board or the industrial board of appeals of the state of New York.

4. "Rule" means any rule or regulation made by the industrial commissioner and any amendment or repeal thereof.

5. "Employee" means a mechanic, workingman or laborer working for another for hire.

6. "Employer" means the person employing any such mechanic, workingman or laborer, whether the owner, proprietor, agent, superintendent, foreman or other subordinate.

7. "Employed" includes permitted or suffered to work.

8. "Person" includes a corporation or a joint-stock association.

8-a. "Agent" of a corporation includes, but is not limited to, a manager, superintendent, foreman, supervisor or any other person employed acting in such capacity.

9. "Factory" includes a mill, workshop or other manufacturing establishment where one or more persons are employed at manufacturing, including making, altering, repairing, finishing, bottling, canning, cleaning or laundering any article or thing, in whole or in part, and includes all buildings, sheds, structures or other places used for or in connection therewith, except (a) dry dock plants engaged in making repairs to ships and (b) power houses, generating plants and other structures owned or operated by a public service corporation or a municipal corporation other than construction or repair shops, subject to the jurisdiction of the public service commission and (c) structures, operated as refrigerated warehouses for the handling, packing, refrigeration and storage of fruits and vegetables and which are subject to the jurisdiction of or licensed by the department of agriculture and markets, also structures used in cleaning or packing celery. The provisions of this chapter affecting structural changes and alterations shall not apply to factories or to any buildings, sheds or other places used for or in connection therewith where less than six persons are employed at manufacturing except as otherwise prescribed by the rules.

10. "Factory building" means a building, shed or structure which, or any part of which, is occupied by or used for a factory, and in which at least one-tenth or more than twenty-five of all the persons employed in the building are engaged in work for a factory, but shall not include a building in a city having a population of more than one million, used exclusively by one employer and in which not more than one-tenth of all the persons employed therein are engaged in work for a factory and which, except for such factory work, would be classified as a mercantile establishment. The provisions of this chapter shall apply to any part of a building occupied or used as a factory, except as otherwise provided by this subdivision.

11. "Mercantile establishment" means a place where one or more persons are employed in which goods, wares or merchandise are offered for sale and includes a building, shed or structure, or any part thereof, occupied in connection with such establishment. The provisions of this chapter affecting structural changes and alterations shall not apply to mercantile establishments where less than six persons are employed except as otherwise prescribed by the rules.

12. "Place of public assembly" shall include (1) a theatre, (2) moving picture house, (3) assembly halls maintained or leased for pecuniary gain where one hundred or more persons may assemble for amusement or recreation, except (a) halls owned by churches, religious organizations, granges, and public association and free libraries as defined by section two hundred fifty-three of the education law, and (b) hotels having fifty or more rooms.

13. "Public building" shall include a factory building, an office building, a mercantile building, a hotel building, a theatre building, a warehouse building, an apartment building, a state or municipal building, a school, a college or university building, a building containing a place of public assembly maintained or leased for pecuniary gain, or any other building more than one story high except a dwelling house less than three stories high or occupied by less than three families.

14. All references to male employees in this chapter shall be deemed to include female employees.

15. "Minor" means any person who has not attained the age of eighteen years.

16. "Domestic worker" shall mean a person employed in a home or residence for the purpose of caring for a child, serving as a companion for a sick, convalescing or elderly person, housekeeping, or for any other domestic service purpose. "Domestic worker" does not include any individual (a) working on a casual basis, (b) who is engaged in providing companionship services, as defined in paragraph fifteen of subdivision (a) of section 213 of the fair labor standards act of 1938, and who is employed by an employer or agency other than the family or household using his or her services, or (c) who is a relative through blood, marriage or adoption of: (1) the employer; or (2) the person for whom the worker is delivering services under a program funded or administered by federal, state or local government.

17. All references to labor law, chapter, article or section shall be deemed to include any rule, regulation or order promulgated thereunder or related thereto.

18. "Farm laborer" shall mean any individual who works on a farm and is an employee under article nineteen of this chapter. Members of an employer's immediate family who are related to the third degree of consanguinity or affinity shall not be considered to be employed on a farm if they work on a farm out of familial obligations and are not paid wages, or other compensation based on their hours or days of work.

HISTORY:

Add, L 1921, ch 50, eff March 9, 1921; amd, L 1930, ch 605, eff July 1, 1930; L 1937, ch 819; L 1939, ch 117; L 1941, ch 795; L 1942, ch 778; L 1945, ch 74, § 1; L 1946, ch 970; L 1947, ch 754; L 1947, ch 872, § 1; L 1948, ch 344, eff July 1, 1948; L 1949, ch 759; L 1950, ch 448; L 1957, ch 824; L 1961, ch 282, § 1; L 1968, ch 209, § 1, eff Oct 1, 1968; L 1973, ch 377, §§ 1, 2, eff Sept 1, 1973; L 1974, ch 939, § 1, eff Sept 1, 1974; L 1975, ch 756, §§ 3, 4, eff Aug 9, 1975; L 1980, ch 682, § 1, eff July 30, 1980; L 1982, ch 86, § 1, eff May 11, 1982; L 2010, ch 481, § 2, eff Nov 29, 2010; L 2010, ch 564, § 2, eff April 9, 2011; L 2020, ch 58, § 1 (Part II), effective April 3, 2020.

Prior Law: Former § 2, add, L 1909, ch 36; repealed, L 1921, ch 50, with substance transferred to §§ 3, 4, and 350.

Editor's Notes: Laws 2010, ch 481, § 1, eff Nov 29, 2010, provides as follows:

Section 1. Legislative findings and intent. Many thousands of domestic workers are employed in New York state as housekeepers, nannies, and companions to the elderly. The labor of domestic workers is central to the ongoing prosperity that the state enjoys, and yet, despite the value of their work, domestic workers do not receive the same protection of many state laws as do workers in other industries. Domestic workers often labor under harsh conditions, work long hours for low wages without benefits or job security, are isolated in their workplaces, and are endangered by sexual harassment and assault, as well as verbal, emotional and psychological abuse. Moreover, many domestic workers in the state of New York are women of color who, because of race and sex discrimination, are particularly vulnerable to unfair labor practices. Additionally, domestic workers are not afforded by law the right to organize labor unions for the purpose of collective bargaining.

The legislature finds that because domestic workers care for the most important elements of their employers' lives, their families and homes, it is in the interest of employees, employers, and the people of the state of New York to ensure that the rights of domestic workers are respected, protected, and enforced.

Laws 2010, ch 564, § 1, eff April 9, 2011, provides as follows:

Section 1. This act shall be known and may be cited as the "wage theft prevention act".

Laws 2020, ch 58, § 8 (Part II), eff April 3, 2020, provides:

§ 8. This act shall take effect immediately and shall be deemed to have been in full force and effect on and after January 1, 2020.

Amendment Notes: 2010. Chapter 481, § 2 amended:
By adding sub 16 [first setout].
2010. Chapter 564, § 2 amended:
By adding sub 16 [second setout].
The 2020 amendment by ch 58, § 1 (Part II), redesignated former 16 [second setout] as 17; and added 18.

Notes to Decisions

Analysis

1. In general
2. Employee
3. Employed
4. Factory
5. —Manufacturing
6. Mercantile establishment
7. Place of public assembly
8. Public building
9. Employer
46. —Summary judgment in favor of general contractor

1. In general

Statute imposing absolute liability upon contractors, owners and their agents for supplying defective equipment in connection with erection of structures applies to those "employed" in erecting structures and, though term is defined as applying to persons who are "permitted or suffered to work," a definition which may be broad enough to encompass one who comes upon premises to give advice in connection with construction, term also applies to "employees," defined as "a mechanic, working man or laborer working for another for hire," and an individual cannot, therefore, come within terms of statute unless he is both "employed" and an "employee." Yearke v Zarcone, 57 A.D.2d 457, 395 N.Y.S.2d 322, 1977 N.Y. App. Div. LEXIS 11823 (N.Y. App. Div. 4th Dep't), app. denied, 43 N.Y.2d 643, 1977 N.Y. LEXIS 4959 (N.Y. 1977).

Injured worker's action for common-law negligence and violations of CLS Labor §§ 200, 240(1), and 241(6) was not barred on ground that defendant city was not "owner" within meaning of Labor Law where injury occurred at city school when worker slipped and fell from I-beam onto top of boiler in attempt to replace boiler cap. Pasquale v City of Buffalo, 255 A.D.2d 874, 680 N.Y.S.2d 140, 1998 N.Y. App. Div. LEXIS 12061 (N.Y. App. Div. 4th Dep't 1998).

Two restaurant owners could be considered jointly liable for wage payments that were owed to a former employee for work the employee performed for a restaurant that had belonged to the owners, because, under a totality of circumstances, the owners had exercised control over the restaurant. Padilla v Manlapaz, 643 F. Supp. 2d 302, 2009 U.S. Dist. LEXIS 75186 (E.D.N.Y. 2009).

A water filtration plant operator is not prohibited from working in excess of eight hours a day, forty hours a week. 1967 Ops St Compt File #184.

Workingmen, laborers, or mechanics employed by a town may not be permitted or required to work in excess of eight hours a day, five days a week, as such, except in situations involving extraordinary emergencies. 1967 Ops St Compt File #742.

2. Employee

Section 701 contains its own definition of the term "employees" and is not controlled by the prior definition in § 2. Metropolitan Life Ins. Co. v New York State Labor Relations Bd., 280 N.Y. 194, 20 N.E.2d 390, 280 N.Y. (N.Y.S.) 194, 1939 N.Y. LEXIS 1309 (N.Y. 1939).

An employee within the meaning of § 2 does not include a factory superintendent and such superintendent is not entitled to be paid his wages in accordance with § 196. In re Wright Metal, Inc., 283 N.Y. 47, 27 N.E.2d 428, 283 N.Y. (N.Y.S.) 47, 1940 N.Y. LEXIS 946 (N.Y. 1940).

A child camper at a wholly charitable summer camp who dried dishes as a camp chore, for which he received no payment, was not an employee within the meaning of § 130. Bernal v Baptist Fresh Air Home Soc., 275 A.D. 88, 87 N.Y.S.2d 458, 1949 N.Y. App. Div. LEXIS 3712 (N.Y. App. Div.), aff'd, 300 N.Y. 486, 88 N.E.2d 720, 300 N.Y. (N.Y.S.) 486, 1949 N.Y. LEXIS 1380 (N.Y. 1949).

Injured worker's action for common-law negligence and violations of CLS Labor §§ 200, 240(1), and 241(6) was not barred on ground that worker was employee of defendant school board where worker was employee of school's boiler maintenance contractor, and board's reliance on 1988 decision by State Department of Labor in unrelated matter was misplaced. Pasquale v City of Buffalo, 255 A.D.2d 874, 680 N.Y.S.2d 140, 1998 N.Y. App. Div. LEXIS 12061 (N.Y. App. Div. 4th Dep't 1998).

Defendant was entitled to summary judgment dismissing Labor Law claims where plaintiff's decedent volunteered to assist defendant and defendant's decedent in construction of barn, there was no evidence of compensation or fulfillment of prior obligation, and silence of defendant's decedent during private investigator's interview of third party was not admission by silence, absent evidence that defendant's decedent was given opportunity to speak. Schwab v Campbell, 266 A.D.2d 840, 697 N.Y.S.2d 424, 1999 N.Y. App. Div. LEXIS 11778 (N.Y. App. Div. 4th Dep't 1999).

Plaintiff, who was sole shareholder, officer and director of defendant corporation and owner of building where accident occurred, was not "working for another for hire" within meaning of CLS Labor § 2(5) and, as such, was not in class of persons protected by CLS Labor §§ 200, 240(1) and 241(6). Scott v Scott's Landing, Inc., 277 A.D.2d 918, 715 N.Y.S.2d 135, 2000 N.Y. App. Div. LEXIS 11369 (N.Y. App. Div. 4th Dep't 2000), app. denied, 96 N.Y.2d 705, 723 N.Y.S.2d 132, 746 N.E.2d 187, 2001 N.Y. LEXIS 271 (N.Y. 2001).

Trial court's denial of a trustee's summary judgment motion dismissing a contractor's N.Y. Lab. Law § 240(1) claim was error because, although the contractor was injured while building a shed in return for his inclusion in a hunting trip organized by the trustee, the contractor was a volunteer and therefore not entitled to the protection afforded by § 240. Stringer v Musacchia, 46 A.D.3d 1274, 848 N.Y.S.2d 762, 2007 N.Y. App. Div. LEXIS 13212 (N.Y. App. Div. 3d Dep't 2007), aff'd, 11 N.Y.3d 212, 869 N.Y.S.2d 362, 898 N.E.2d 545, 2008 N.Y. LEXIS 3248 (N.Y. 2008).

Because a worker was a friend of first property owner and had offered to install a metal roof in exchange for the owners performing construction work on the worker's residence, he did not fall within the protections of the Labor Law pursuant to N.Y. Lab. Law § 2(5), (7) as a volunteer and, thus, could not pursue N.Y. Lab. Law §§ 240(1) and 241(6) claims. Fuller v Spiesz, 53 A.D.3d 1093, 861 N.Y.S.2d 896, 2008 N.Y. App. Div. LEXIS 5884 (N.Y. App. Div. 4th Dep't 2008).

Defendant, a rental property owner and plaintiff's mother, was not entitled to summary judgment on plaintiff's Labor Law claims because defendant directed plaintiff on what to do when he inspected the rental property's chimney, had previously paid plaintiff for repairs, and would have paid plaintiff if he had carried out the chimney repairs, and, as such, a triable issue of fact existed as to whether plaintiff was a volunteer or an employee at the time of his fall from a ladder. Doskotch v Pisocki, 168 A.D.3d 1174, 90 N.Y.S.3d 667, 2019 N.Y. App. Div. LEXIS 45 (N.Y. App. Div. 3d Dep't 2019).

The word "employees," as used in Penal Law, § 1272, must be given its ordinary and common meaning and not the definition thereof as contained in Labor Law, § 2, subd. 5. People ex rel. Furnice v Garlock, 11 N.Y.S.2d 82, 170 Misc. 686, 1939 N.Y. Misc. LEXIS 1692 (N.Y. Magis. Ct. 1939).

Persons employed as efficiency engineers to do work of a highly technical character are not employees within the spirit and intent of the Labor Law. People v Rowan, 38 N.Y.S.2d 648, 179 Misc. 225, 1942 N.Y. Misc. LEXIS 2223 (N.Y. Magis. Ct. 1942).

A professional carpenter who volunteers to help a neighbor in the erection of a garage on the neighbor's property, without pay, is not within the definition of employee in subd. 5 of this section. Cann v Dening, 216 N.Y.S.2d 164 (N.Y. Sup. Ct. 1961).

Evidence raised a triable issue of fact about whether an injured party who was hurt while using a scaffold to work on a homeowner's garage was a volunteer who was not protected by N.Y. Lab. Law § 240, or was protected by § 240 because he was an employee, and the trial court properly denied the injured party's motion for summary judgment on his claim that the homeowner was liable, as a matter of law, under § 240. Curatolo v Postiglione, 2 A.D.3d 480, 767 N.Y.S.2d 894, 2003 N.Y. App. Div. LEXIS 13069 (N.Y. App. Div. 2d Dep't 2003).

In an action seeking damages for personal injuries sustained by a volunteer fireman, said volunteer was not an employee or employed at the scene of a fire, was not a mechanic, workingman or laborer working for another for hire, nor was one permitted or suffered to work at the place of the occurrence, and as such, he could not be considered to have been within the class of persons employed therein or lawfully frequenting the premises entitled to the protection afforded by the flat and unvarying duty imposed by N.Y. Lab. Law §§ 200, 240(1), and 241(6). Green v Peterson, 13 A.D.3d 1157, 787 N.Y.S.2d 759, 2004 N.Y. App. Div. LEXIS 16344 (N.Y. App. Div. 4th Dep't 2004).

Plaintiff work experience program participant fell from a scaffolding, received workers' compensation, and sued defendant State under N.Y. Lab. Law § 240(1). Summary judgments were not granted because there was an issue whether the participant was a special employee of the State so as to be barred by workers' compensation exclusivity provisions. Bounds v State of New York, 24 A.D.3d 1212, 809 N.Y.S.2d 314, 2005 N.Y. App. Div. LEXIS 14428 (N.Y. App. Div. 4th Dep't 2005).

Owner was not entitled to summary judgment on an injured worker's causes of action for negligence and violations of the Labor Law because triable issues of fact existed as to whether the worker was an employee under the Labor Law, and as to whether he suffered a "grave injury" under the Workers' Compensation Law. Paredes v 1668 Realty Assoc., LLC, 110 A.D.3d 700, 972 N.Y.S.2d 304, 2013 N.Y. App. Div. LEXIS 6309 (N.Y. App. Div. 2d Dep't 2013).

Subcontractor's employee filing a negligence/labor law action under an assumed name did not prejudice the general contractor (GC) or property owner because, inter alia, neither the GC nor the owner knew the employee prior to his action, the assumed name was how the employee was known in the profession, and the assumed name did not sever the protections afforded the employee by the Labor Law; the employee was a Brazilian national without status in the United States. Bessa v Anflo Indus., Inc., 2014 N.Y. Misc. LEXIS 5885 (N.Y. Sup. Ct. 2014), app. dismissed, 148 A.D.3d 974, 51 N.Y.S.3d 102, 2017 N.Y. App. Div. LEXIS 1974 (N.Y. App. Div. 2d Dep't 2017).

Use of an assumed name by a subcontractor's worker when filing a Labor Law action against a general contractor (GC) and owner of the lot where the worker was injured did not prejudice the GC or the owner because the worker was known by the assumed name in the profession, and the use of an assumed name did not sever the protections afforded the worker by the Labor Law, which existed to protect all employees and the protection existed independently of an immigrant employee's work status. Bessa v Anflo Indus., Inc., 49 Misc. 3d 587, 10 N.Y.S.3d 835, 2015 N.Y. Misc. LEXIS 1418 (N.Y. Sup. Ct. 2015), aff'd in part, modified, 148 A.D.3d 974, 51 N.Y.S.3d 102, 2017 N.Y. App. Div. LEXIS 1974 (N.Y. App. Div. 2d Dep't 2017).

A man who is given board and lodging upon the understanding that he will do work about a building is "working for another for hire." Osborne v Salvation Army, 107 F.2d 929, 1939 U.S. App. LEXIS 2858 (2d Cir. N.Y. 1939).

3. Employed

The definition of employed in subsection 7 is applicable to § 133, which prohibits the employment of minors. Ludwig v Lowe, 29 A.D.2d 267, 287 N.Y.S.2d 202, 1968 N.Y. App. Div. LEXIS 4958 (N.Y. App. Div. 4th Dep't 1968), aff'd, 25 N.Y.2d 853,

303 N.Y.S.2d 871, 250 N.E.2d 866, 1969 N.Y. LEXIS 1175 (N.Y. 1969).

A 13-year-old infant-plaintiff who was injured while, voluntarily and without compensation, assisting his defendant-half brother in the construction of a house which the defendant was building for himself, is not within the meaning of the term "employed" in subsection 7. Ludwig v Lowe, 29 A.D.2d 267, 287 N.Y.S.2d 202, 1968 N.Y. App. Div. LEXIS 4958 (N.Y. App. Div. 4th Dep't 1968), aff'd, 25 N.Y.2d 853, 303 N.Y.S.2d 871, 250 N.E.2d 866, 1969 N.Y. LEXIS 1175 (N.Y. 1969).

Defendants were not entitled to summary judgment dismissing causes of action under CLS Labor §§ 240(1) and 241(6) where they failed to prove as matter of law that plaintiff was not "employed" at their construction project, given broad definition of that term in CLS Labor § 2(7) as including all persons "permitted or suffered to work" on the job. Peglow v L & A Builders, 251 A.D.2d 1015, 674 N.Y.S.2d 202, 1998 N.Y. App. Div. LEXIS 7040 (N.Y. App. Div. 4th Dep't 1998).

Defendant was entitled to summary judgment dismissing Labor Law claims where plaintiff's decedent volunteered to assist defendant and defendant's decedent in construction of barn, there was no evidence of compensation or fulfillment of prior obligation, and silence of defendant's decedent during private investigator's interview of third party was not admission by silence, absent evidence that defendant's decedent was given opportunity to speak. Schwab v Campbell, 266 A.D.2d 840, 697 N.Y.S.2d 424, 1999 N.Y. App. Div. LEXIS 11778 (N.Y. App. Div. 4th Dep't 1999).

The word "employed" means "engaged in" and applies to an employer or person working for himself if he is engaged in acts constituting manufacturing. Caroli v Saxl, 81 N.Y.S.2d 213, 192 Misc. 887, 1948 N.Y. Misc. LEXIS 2735 (N.Y. Sup. Ct. 1948).

State was not liable under N.Y. Lab. Law § 241(6) for injuries that occurred while the injured claimant was performing excavation and repairs on a state highway where the injured claimant was not within the class of persons afforded protection under the statute. The injured claimant and the company with which the injured claimant was employed trespassed on the highway in performing repairs on it because the company did not obtain a highway work permit in violation of state law, and thus, the injured claimant was not a person "employed" at a worksite within the meaning of N.Y. Lab. Law § 2(7). Morton v State, 13 A.D.3d 498, 788 N.Y.S.2d 124, 2004 N.Y. App. Div. LEXIS 15575 (N.Y. App. Div. 2d Dep't 2004), app. dismissed, 5 N.Y.3d 783, 801 N.Y.S.2d 802, 835 N.E.2d 662, 2005 N.Y. LEXIS 1496 (N.Y. 2005), aff'd, 15 N.Y.3d 50, 904 N.Y.S.2d 350, 930 N.E.2d 271, 2010 N.Y. LEXIS 1148 (N.Y. 2010).

4. Factory

A tugboat is neither a factory nor "mill, workshop or other manufacturing or business establishment." Shannahan v Empire Engineering Corp., 204 N.Y. 543, 98 N.E. 9, 204 N.Y. (N.Y.S.) 543, 1912 N.Y. LEXIS 796 (N.Y. 1912).

Plants for the cold storage of apples are factories within the meaning of subd. 9 of § 2. Red Hook Cold Storage Co. v Department of Labor, 295 N.Y. 1, 64 N.E.2d 265, 295 N.Y. (N.Y.S.) 1, 1945 N.Y. LEXIS 746 (N.Y. 1945).

A building which is occupied on the ground floor by stores and on the other floors by offices, mercantile establishments and factories, in which 96 out of 390 people are engaged in factory work, is a factory within the meaning of this law. Scheier v Mitchell, 188 A.D. 182, 176 N.Y.S. 597, 1919 N.Y. App. Div. LEXIS 7137 (N.Y. App. Div. 1919).

A building consisting of a cellar and five stories is a factory within the meaning of this section where the three top floors are occupied by a tenant engaged in manufacture of chemicals and perfumery sachets and employing about ten people at labor, and the second story is occupied by tenants engaged in towel supply and printing business and employing about five men. Davis Bros. Realty Corp. v Harte, 195 A.D. 403, 186 N.Y.S. 324, 1921 N.Y. App. Div. LEXIS 4760 (N.Y. App. Div. 1921).

A powerhouse was not a factory, and part of the powerhouse used for making minor repairs was not an independent construction or repair shop, within the meaning of this section. People v New York C. R. Co., 211 A.D. 195, 206 N.Y.S. 743, 1924 N.Y. App. Div. LEXIS 9908 (N.Y. App. Div. 1924).

The provisions in this statute relative to manufacturing do not apply where less than six persons are employed under the provisions of subd. 9. People ex rel. Strosahl v Cross & Brown Co., 232 A.D. 587, 251 N.Y.S. 138, 1931 N.Y. App. Div. LEXIS 13895 (N.Y. App. Div. 1931).

A portion of a building wherein articles of clothing are altered and finished is a factory within the meaning of this act. 1556 Broadway Corp. v Walsh, 241 A.D. 859, 271 N.Y.S. 761, 1934 N.Y. App. Div. LEXIS 10079 (N.Y. App. Div. 1934).

An employer was operating a factory, within the meaning of § 2 subd. 9, where it appears that its operations consisted of excavating sand and gravel from a deposit, the raw material being both altered and cleaned during its progress from the deposit to the final storage bins. Kast v Lacona Sand & Gravel Co., 250 A.D. 679, 295 N.Y.S. 242, 1937 N.Y. App. Div. LEXIS 8432 (N.Y. App. Div. 1937).

A building used by different tenants in their business of assorting and bailing waste materials which they collected from various factories was not a tenant factory building within the purview of the Labor Law. Dell'Olio v Mastronardi, 267 A.D. 829, 45 N.Y.S.2d 743, 1944 N.Y. App. Div. LEXIS 5001 (N.Y. App. Div. 1944).

A railroad company is not a "factory," within the meaning of § 2, subd. 9, and § 161, providing for one day of rest in seven, from the mere fact that an employee loaded coal on a tender and watered the only locomotive of the railroad, cleaned the firebox, removed the ashes and wiped dust from the driving rods. People v Middletown & U. R. Co., 8 N.Y.S.2d 193, 169 Misc. 773, 1938 N.Y. Misc. LEXIS 2174 (N.Y. City Ct. 1938).

A farm is not included within the statutory definition of a factory. Shrader v State, 46 N.Y.S.2d 199, 1944 N.Y. Misc. LEXIS 1606 (N.Y. Ct. Cl. 1944).

A commercial ice house is a factory within the meaning of the section requiring dangerous machines to be guarded. Rabe v Consolidated Ice Co., 113 F. 905, 1902 U.S. App. LEXIS 4013 (2d Cir. N.Y. 1902).

Under this section a machine for mixing asphalt, and stone for use in highway construction was a "factory." Continental Public Works Co. v Stein, 232 F. 559, 1916 U.S. App. LEXIS 1848 (2d Cir. N.Y. 1916).

"Factory" under this section included an open yard in which sandblasting was done. Pieczonka v Pullman Co., 89 F.2d 353, 1937 U.S. App. LEXIS 3477 (2d Cir. N.Y. 1937).

5. —Manufacturing

There must be some manufacturing in an establishment to bring it within the definition of "factory" as that word is used in this section. People v R. F. Stevens Co., 178 A.D. 306, 165 N.Y.S. 39, 1917 N.Y. App. Div. LEXIS 6440 (N.Y. App. Div.), app. dismissed, 221 N.Y. 622, 117 N.E. 1079, 221 N.Y. (N.Y.S.) 622, 1917 N.Y. LEXIS 1484 (N.Y. 1917).

An allegation in a complaint that the premises were used by the defendant for manufacturing is sufficiently established where it appears that they were used to manufacture theatrical costumes for the defendant under the direction of a person who was paid a salary for such work. Ursprung v Winter Garden Co., 183 A.D. 718, 169 N.Y.S. 738, 1918 N.Y. App. Div. LEXIS 7927 (N.Y. App. Div. 1918).

Watch repairing, jewelry designing, and servicing adding machines and typewriters on the premises, all are manufacturing within the meaning of this section, while conduct of a multigraphing business, engraving, and making occasional minor repairs to check-writing machines incidental to selling such machines are not. Caroli v Saxl, 81 N.Y.S.2d 213, 192 Misc. 887, 1948 N.Y. Misc. LEXIS 2735 (N.Y. Sup. Ct. 1948).

6. Mercantile establishment

A restaurant is not a mercantile establishment. People ex rel. Hertzberger v John R. Thompson Co., 230 A.D. 75, 243 N.Y.S. 618, 1930 N.Y. App. Div. LEXIS 8549 (N.Y. App. Div.), aff'd, 255 N.Y. 530, 175 N.E. 300, 255 N.Y. (N.Y.S.) 530, 1930 N.Y. LEXIS 727 (N.Y. 1930).

Court properly held that residential portion of building from which plaintiff's decedent, window washer, fell, did not constitute "mercantile establishment" within meaning of CLS Labor § 2(11), as that law existed in 1922 when subject premises underwent renovation; thus, rules than applicable to mercantile establishments, including rule requiring provision of safety devices for protection of window cleaners, did not affect premises in question much less give rise to continuing proprietary obligation on which plaintiff would premise his recovery (NYC Admin Code §§ 27-127, 27-128). Aviles v Crystal Mgmt., 253 A.D.2d 607, 677 N.Y.S.2d 330, 1998 N.Y. App. Div. LEXIS 9338 (N.Y. App. Div. 1st Dep't 1998), app. denied, 93 N.Y.2d 804, 689 N.Y.S.2d 16, 711 N.E.2d 201, 1999 N.Y. LEXIS 710 (N.Y. 1999).

7. Place of public assembly

A bar and grill was not a public place within the meaning of § 2(12) of the Labor Law, and the respondent building inspector could not limit the occupancy of petitioner's premises and justify this action by citing former § 110 of the Labor Law and appropriate sections of the State Standard Building Code for Places of Public Assembly. Rapaport v Messina, 47 Misc. 2d 394, 262 N.Y.S.2d 815, 1965 N.Y. Misc. LEXIS 1663 (N.Y. Sup. Ct. 1965).

A fire district may not lawfully permit the use of its assembly hall for a rally by a political party. 1967 Ops St Compt File #788.

8. Public building

A building consisting of fifty-three apartments is a public building within the meaning of this section. Pollard v Trivia Bldg. Corp., 291 N.Y. 19, 50 N.E.2d 287, 291 N.Y. (N.Y.S.) 19, 1943 N.Y. LEXIS 1057 (N.Y. 1943).

Where the facts were conceded, the question of whether a building was a public building became one of law. Vooth v Castroviejo, 133 N.Y.S.2d 287, 206 Misc. 85, 1954 N.Y. Misc. LEXIS 2174 (N.Y. Sup. Ct. 1954), aff'd, 285 A.D. 867, 137 N.Y.S.2d 829, 1955 N.Y. App. Div. LEXIS 5877 (N.Y. App. Div. 1955).

Law School's claim for restitution arising from installation of asbestos at its premises was not subject to dismissal on ground that school was private institution and thus failed to meet requirement that abatement of asbestos condition be immediately necessary to satisfy need of "public" decency, health, or safety since CLS Labor § 2(13) defines "public building" as including school, college or university building. Brooklyn Law School v Raybon, Inc., 143 Misc. 2d 237, 540 N.Y.S.2d 404, 1989 N.Y. Misc. LEXIS 207 (N.Y. Sup. Ct. 1989), rev'd, 175 A.D.2d 56, 572 N.Y.S.2d 312, 1991 N.Y. App. Div. LEXIS 9902 (N.Y. App. Div. 1st Dep't 1991).

9. Employer

Where plaintiffs moved to certify a class action, alleging that defendants violated requirements of Labor Law § 196-d and Department of Labor's wage orders relating to tips governed by § 196-d, factual issues relating to whether defendants could be deemed employers of wait staff precluded finding of summary judgment in favor of either party. Cornejo v Eden Palace Inc., 2020 N.Y. Misc. LEXIS 2317 (N.Y. Sup. Ct. 2020).

Since there were no allegations in the complaint from which it could reasonably be inferred that the construction company and its president had any control over the work performed by plaintiffs or the payment of their wages, the company and its president were not plaintiffs' employer within the meaning of the New York Labor Law. Barragan-Aquino v East Port Excavation & Utils. Contrs., Inc., 2014 U.S. Dist. LEXIS 36274 (E.D.N.Y. Mar. 18, 2014).

46. —Summary judgment in favor of general contractor

General contractor was entitled to summary judgment on a claim under this statute by a subcontractor's employee because the evidence established that the alleged dangerous condition arose from the methods of the subcontractor and the general contractor did not exercise supervisory control over the removal of the tree or any aspect of the activities of the subcontractor's employee. Krencik v Oakgrove Constr., Inc., 186 A.D.3d 1006, 129 N.Y.S.3d 567, 2020 N.Y. App. Div. LEXIS 4722 (N.Y. App. Div. 4th Dep't 2020).

Notes to Unpublished Decisions

1. Employee

Unpublished decision: Plaintiff was an "employee" for purposes of the provisions of N.Y. Lab. Law §§ 2, 190, 651, as he worked for defendants as a project manager's assistant, construction worker, and laborer. Ho v Target Constr. of NY, Corp., 2011 U.S. Dist. LEXIS 33365 (E.D.N.Y. Mar. 28, 2011).

Agency Opinions

Analysis

1. Factory
2. —Manufacturing
3. Mercantile establishment
4. Place of public assembly
5. Public building

1. Factory

2. —Manufacturing

"Employed at manufacturing" as used in subd. 9 means employed at labor in a workshop, and a building in which rags are sorted and baled is subject to the rules of the industrial board as to fireproof exits. 1928 N.Y. Op. Att'y Gen. No. 113.

A powerhouse for rapid transit lines formerly owned by Interboro Rapid Transit Co. but now owned by New York City and operated by the board of transportation comes within the definition of "factory" in the Labor Law since it no longer is excluded by the exemption relating to public service corporations under the jurisdiction of the public service commission. The Labor Law applies to municipal corporations. 1943 N.Y. Op. Att'y Gen. No. 318.

3. Mercantile establishment

Mercantile establishment means a place where one or more persons are employed in which goods, wares or merchandise are offered for sale. 1926 N.Y. Op. Att'y Gen. No. 108.

A building used to some extent as a storage warehouse which has nevertheless parts thereof which are used as mercantile establishments is, as to such parts, a mercantile establishment. 1928 N.Y. Op. Att'y Gen. No. 188.

4. Place of public assembly

Fire district property may constitute a place of public assembly within subd. 12 of § 2, and thus be subject to this article of the Labor Law. 1962 NY Ops Atty Gen July 13.

The Town Hall of the Town of Allegany, Cattaraugus County, is not a "place of public assembly", as defined in the meaning of Article 17 of the Labor Law. 1966 NY Ops Atty Gen Aug 10.

Use of part of town hall as a commercial theatre at nominal rental is prohibited under the Constitution. 1970 NY Ops Atty Gen Dec 16.

5. Public building

A building of a fraternal order, containing an auditorium, rented to the public for pecuniary gain and also a public garage, is subject to the public safety provisions of the Labor Law and the rules made pursuant thereto. 1927 N.Y. Op. Att'y Gen. No. 324.

A rural community building containing an assembly hall in which one hundred or more persons may assemble, which hall is rented to churches, fraternal organizations, etc., for events at which admission is charged, is maintained for pecuniary gain, although the net proceeds are used solely for public good in maintaining and developing property, and it is therefore subject to the safety provisions of the state standard building code. 1930 N.Y. Op. Att'y Gen. No. 330.

An unused factory is a "public building" if more than one story high. 1945 NY Ops Atty Gen Jul 19.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 202-d; CLS Art & Cult Affrs § 19.15; CLS Gen Bus § 69-b.

Washrooms, washing facilities and waterclosets for elevator employees, § 203.

Laundries, § 296.

Definitions, CLS Gen Bus § 69-b.

Definitions, CLS Pub B § 50.

Definitions, CLS Work Comp § 2.

Codes, Rules and Regulations:

Workers' compensation rules and regulations. 12 NYCRR §§ 300.1 et seq.

Federal Aspects:
Definitions under Labor Management Relations Act, 29 USCS § 142.
Definitions under National Labor Relations Act, 29 USCS § 152.
Definitions under Fair Labor Standards Act, 29 USCS § 203.
Definitions under Labor Management Reporting and Disclosure Act, 29 USCS § 402.
Definitions under Age Discrimination in Employment Act, 29 USCS § 630.
Definitions under Occupational Safety and Health Act, 29 USCS § 652.

Jurisprudences:
2A NY Jur 2d Agency and Independent Contractors § 416.
12 NY Jur 2d Buildings, Zoning, and Land Controls § 18.
13 NY Jur 2d Businesses and Occupations § 762.
18A NY Jur 2d Civil Rights §§ 214, 216.
27 NY Jur 2d Counties, Towns, and Municipal Corporations § 1138.
52 NY Jur 2d Employment Relations §§ 2, 3, 118, 131, 196, 220, 310.
53 NY Jur 2d Employment Relations §§ 360, 380.
85 NY Jur 2d Premises Liability §§ 37, 81, 88.
86 NY Jur 2d Premises Liability §§ 366, 447, 449.
107 NY Jur 2d Unemployment Insurance § 52.
48A Am Jur 2d, Labor and Labor Relations § 3873.

Annotations:
Who are "supervisors" within meaning of National Labor Relations Act (29 USCS §§ 151 et seq.) in industrial and manufacturing operations. 46 ALR Fed 407.
Who are "supervisors" within meaning of National Labor Relations Act (29 USCS §§ 151 et seq.) in sales operations labor. 47 ALR Fed 127.
Eligibility of aliens to vote in NLRB election. 47 ALR Fed 911.
Who are "supervisors" within meaning of National Labor Relations Act (29 USCS §§ 151 et seq.) in communications and publishing businesses. 48 ALR Fed 45.
Who are "supervisors" within meaning of National Labor Relations Act (29 USCS §§ 151 et seq.) in service operations. 49 ALR Fed 230.
When are newspaper and magazine editors and writers deemed "managerial employees" excluded from coverage under National Labor Relations Act (29 USCS §§ 151 et seq.). 49 ALR Fed 496.
Who are "supervisors" within meaning of National Labor Relations Act (29 USCS §§ 151 et seq.) in transportation operations. 50 ALR Fed 126.
Who are "supervisors" within meaning of National Labor Relations Act (29 USCS §§ 151 et seq.) in public utilities operations. 51 ALR Fed 14.
Who are "supervisors" within meaning of National Labor Relations Act (29 USCS §§ 151 et seq.) in construction and mining operations. 54 ALR Fed 74.
Trucker as independent contractor or employee under § 2(3) of National Labor Relations Act (29 USCS § 152(3)). 55 ALR Fed 20.
Meaning of term "employer" as defined in § 701(b) of Title VII of Civil Rights Act of 1964, as amended (42 USCS § 2000e(b)). 69 ALR Fed 191.

Texts: 4 Frumer & Biskind, Bender's New York Evidence —CPLR § 9.10.
Weinstein, Korn, Miller, CPLR Manual (Matthew Bender) § 25.04[f].

ARTICLE 2 The Department of Labor

Section
27-a. Safety and health standards for public employees
27-b. Duty of public employers to develop and implement programs to prevent workplace violence
27-c. Duty of public employers to develop operation plans in the event of certain declared public health emergencies.

HISTORY:
Add, L 1921, ch 50.

§ 27-a. Safety and health standards for public employees

1. Definitions. As used in this section:

a. [Eff until enactment of legislation by the state of New Jersey] "Employer" means the state, any political subdivision of the state, a public authority or any other governmental agency or instrumentality thereof.

a. [Eff upon enactment of legislation by the state of New Jersey] "Employer" means the state, any political subdivision of the state, a public authority, a bi-state authority utilizing its own police officers or firefighters or any other governmental agency or instrumentality thereof.

b. "Employees" means persons permitted to work by an employer.

c. "Authorized employee representative" means an employee authorized by the employees or the designated representative of an employee organization recognized or certified to represent the employees pursuant to article fourteen of the civil service law.

d. [Eff until enactment of legislation by the state of New Jersey] "Public employee" means any employee of the state, any political subdivision of the state, a public authority or any other governmental agency or instrumentality.

d. [Eff upon enactment of legislation by the state of New Jersey] "Public employee" means any employee of the state, any political subdivision of the state, a public authority, a bi-state authority utilizing its own police officers or firefighters or any other governmental agency or instrumentality.

e. "System components" means life safety harness, belts, ascending devices, carabiners, descent control devices, rope grab devices and snap-links.

2. Application. A safety or health standard promulgated under the provisions of this section shall apply to every public employee and the commissioner shall have exclusive authority to enforce such standard in accordance with the provisions of this chapter, notwithstanding any other safety or health standard or any other provision in this chapter or in any other general, local or special law or charter. However, this section shall not supersede any inconsistent provision of the education law, as applied to any school building certified by the commissioner of education as being in compliance with such law, and the regulations promulgated pursuant thereto, on the effective date of this section, or as applied to any application for certification which is pending before the effective date of this section.

3. Duties. a. Every employer shall: (1) furnish to each of its employees, employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees and which will provide reasonable and adequate protection to the lives, safety or health of its employees; and (2) comply with the safety and health standards promulgated under this section. In applying this paragraph, fundamental distinctions between private and public employment shall be recognized.

b. Every employee shall comply with the safety and health standards and all rules, regulations and orders issued pursuant to this section which are applicable to his own actions and conduct.

c. The state shall promulgate a plan for the development and enforcement of occupational safety and health standards with respect to public employers and employees, in accordance with section eighteen (b) of the United States Occupational Safety and Health Act of 1970 (Public Law 91-596) which provides: "(b) Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 6 shall submit a State plan for the development of such standards and their enforcement."

4. Safety and health standards. a. The commissioner shall by rule adopt all safety and health standards promulgated under the United States Occupational Safety and Health Act of 1970 (Public Law, 91-596) which are in effect on the effective date of this section, in order to provide reasonable and adequate protection to the lives, safety and health of public employees and shall promulgate and repeal such rules and regulations as may be necessary to conform to the standards established pursuant to such act or pursuant to paragraph b of this subdivision.

b. Notwithstanding the provisions of paragraph a of this subdivision, the commissioner, in consultation with the state occupational safety and health hazard abatement board, shall promulgate rules and regulations recommended to him by such board which establish standards whenever such board finds (i) that no federal standard exists for the particular condition being addressed and that such a standard is necessary for the protection of the public employees at risk, or (ii) a federal standard exists, but conditions in public workplaces in this state require a different standard, and such state standard will be at least as effective in providing safe and healthful places of employment as the federal standard.

c. Except for an employer located in a city with a population of over one million, any employer who employs a firefighter determined to be at risk of entrapment at elevations pursuant to regulations promulgated by the commissioner, shall provide emergency escape systems for use by such firefighter. The commissioner shall by rule identify the codes, standards and recommended practices of the National Fire Protection Associationand other appropriate standards approved by the commissioner as are appropriate to the nature of the risk to which the firefighter shall be exposed and shall, at a minimum, include in such rule language requiring employers to (1) identify whether firefighters employed by them would be exposed to the hazard of entrapment at elevated surfaces; (2) identify those firefighters who would be exposed to the hazard; and (3) determine the appropriate emergency escape systems to address the hazard. Such emergency escape systems shall be adequate to protect the health and safety of the firefighter. The employer shall ensure that the firefighter is instructed in the proper use of the emergency escape systems. As used in this subdivision, the term "entrapment at elevations" shall mean a situation where a fire or other emergency conditions require a firefighter inside a structure to immediately exit the structure but where such conditions make the normal route of exit unusable, thereby requiring the firefighter to exit the structure from an opening that is not designed as an exit and is above the ground floor or at an elevation above the surrounding terrain that would reasonably be expected to cause injury to a firefighter exiting by means of this opening without any emergency escape systems. As used in this subdivision, the term "emergency escape system" shall mean safety ropes and system components and any other system that (1) is compliant with the codes, standards and recommended practices of the National Fire Protection Association or other appropriate standard identified by the commissioner through regulation, as a means of emergency self-rescue from an above grade, immediately hazardous environment, (2) has been certified by a nationally recognized safety testing and certification organization, and (3) the commissioner has recognized through regulation.

In order to ensure the adequacy of the emergency escape systems, the employer must routinely inspect and ensure that:

(1) Existing emergency escape systems meet the codes, standards and recommended practices adopted by the commissioner.

(2) Existing emergency escape systems still perform their function and to identify any of their limitations such as but not limited to:

(i) Checking the labels or stamps on the equipment; and

(ii) Checking any documentation or equipment specifications; and

(iii) Contacting the supplier or the approval agency;

(3) Firefighters are informed of the limitations of emergency escape systems;

(4) Firefighters are not allowed or required to use any emergency escape systems beyond their limitations;

(5) Existing and new emergency escape systems have no visible defects that limit their safe use;

(6) Emergency escape systems are used, cleaned, maintained and stored according to manufacturer's instructions;

(7) The firefighter is instructed in identifying to the employer any defects that the firefighter may find in emergency escape systems; and

(8) Any identified defects are corrected or immediate action is taken by the employer to eliminate the use of this equipment.

d. Any person who may be adversely affected by a standard issued under this section may, within thirty days after the effective date of such standard, commence a proceeding for judicial review pursuant to article seventy-eight of the civil practice law and rules.

5. Inspections. a. Any employee or representative of employees who believes that a violation of a safety or health standard exists, or that an imminent danger exists, may request an inspection by giving notice to the commissioner of such violation or danger. Such notice and request shall be in writing, shall set forth with reasonable particularity the grounds for the notice, shall be signed by such employee or representative of employees, and a copy shall be provided by the commissioner to the employer or the person in charge no later than the time of inspection, except that on the request of the person giving such notice, his name and the names of individual employees or representatives of employees shall be withheld. Such inspections shall be made forthwith.

b. A representative of the employer and an authorized employee representative shall be given the opportunity to accompany the commissioner during an inspection for the purpose of aiding such inspection. Where there is no authorized employee representative, the commissioner shall consult with a reasonable number of employees concerning matters of safety and health in the workplace.

c. The authority of the commissioner to inspect a premises pursuant to such an employee complaint shall not be limited to the alleged violation contained in such complaint. The commissioner may inspect any other area of the premises in which he has reason to believe that a violation of this section exists.

d. No employee who accompanies the commissioner on an inspection shall suffer any reduction in wages.

e. The commissioner may, upon his own initiative, conduct an inspection of any premises occupied by a public employer if he has reason to believe that a violation of this section has occurred or if he has a general administrative plan for the enforcement of this section, including general schedule inspections, which provide a rational administrative basis for such inspecting. Within ninety days of enactment of this paragraph the commissioner shall publish the general administrative plan and shall adopt regulations on the conduct of inspections in locker rooms and other areas involving the personal property and privacy rights of public employees.

f. Any information obtained by the commissioner under this section shall be obtained with a minimum burden upon the employers.

5-a. Notwithstanding any other provisions of law, when a request for an inspection has been made in a situation where there is an allegation of an imminent danger such that an employee would be subjecting himself or herself to serious injury or death because of the hazardous condition in the workplace, the inspection shall be given the highest priority by the department and shall be carried out immediately.

6. Enforcement procedures. a. If the commissioner determines that an employer has violated a provision of this section, or a safety or health standard or regulation promulgated under this section, he or she shall with reasonable promptness issue to the employer an order to comply which shall describe particularly the nature of the violation including a reference to the provision of this section, standard, regulation or order alleged to have been violated, shall fix a reasonable time for compliance and may establish the penalty to be assessed for failure to correct the violation by the time fixed for compliance. An employer who fails to correct a non-serious violation by the time fixed for compliance may be assessed a civil penalty of up to fifty dollars per day until the violation is corrected. An employer who fails to correct a serious violation by the time fixed for compliance may be assessed a civil penalty of up to two hundred dollars per day until the violation is corrected. Pursuant to section 18(k) of the United States Occupational Safety and Health Act of 1970 (Public Law, 91-596), a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation. A non-serious violation shall be defined as any violation that does not fall under the definition of serious violation. The commissioner shall not assess a penalty against an employer for failure to correct a violation of a standard which is the subject of an application for a temporary order granting a variance or a violation which is the subject of a petition to modify an order to comply, provided however, that upon issuance by the commissioner of a determination denying such variance or petition to modify, or upon expiration of a temporary variance or modified compliance period, the time fixed for compliance shall recommence and the employer become liable for the penalties provided herein.

b. Where the commissioner issues to an employer an order to comply, the employer shall post such

order or a copy thereof in a conspicuous place at or near each place of violation cited in the order, where it is clearly visible to affected employees. The commissioner shall make such order available to employee representatives.

c. Any employer, or other party affected by a determination of the industrial commissioner issued pursuant to this section may petition the industrial board of appeals for review of such determination in accordance with section one hundred one of this chapter. Judicial review of the decision of the industrial board of appeals may be obtained by any party affected by such decision by commencing a proceeding pursuant to article seventy-eight of the civil practice law and rules within sixty days after such decision is issued.

d. If the time for compliance with an order of the commissioner issued pursuant to this section has elapsed, and the employer has not complied with the provisions of the order, the commissioner shall seek judicial enforcement of such order by commencing a proceeding pursuant to article seventy-eight of the civil practice law and rules. Where an employer has complied with an order in all respects other than the payment of a penalty imposed pursuant to this subdivision, the commissioner may file with the county clerk of the county where the employer has its place of business the order of the commissioner continuing the amount of civil penalty found to be due. The filing of such order shall have the full force and effect of a judgment duly docketed in the office of such clerk. The order or decision may be enforced by and in the same manner, and with like effect, as that prescribed by the civil practice law and rules for the enforcement of a money judgment.

6-a. Form of complaints. The department shall establish a dedicated webpage and hotline through which any public employee under the jurisdiction of this section or contractor as defined by the chapter which added this subdivision may report alleged or believed violations of any state law, regulation, rule or guidance related to occupational health and safety involving a communicable disease, including but not limited to the novel coronavirus COVID-19. Such webpage and hotline shall allow individuals to report alleged or believed violations anonymously.

7. Injunction proceedings. a. The supreme court of the state shall have jurisdiction, upon petition of the industrial commissioner, pursuant to the civil practice law and rules to restrain any conditions or practices in any place of public employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the abatement procedures otherwise provided for by this section. Such proceeding shall be brought in the county in which the violation is alleged to exist. Any order issued under this section may require such steps to be taken as may be necessary to avoid, correct or remove such imminent danger and prohibit the employment or presence of any individual in locations or under conditions where such imminent danger exists, except individuals whose presence is necessary to avoid, correct, or remove such imminent danger or to maintain the capacity of a continuous process operation to resume normal operations without a complete cessation of operations, or where a cessation of operations is necessary, to permit such to be accomplished in a safe and orderly manner. The employer may contest such order pursuant to the civil practice law and rules.

b. Whenever and as soon as an inspector concludes that conditions or practices described in paragraph a of this subdivision exist in any place of public employment, he shall inform the affected employees and employers of the danger and that he is recommending to the industrial commissioner that relief be sought.

c. If the industrial commissioner fails to seek relief under this section within forty-eight hours of being notified of such condition, any employee who may be injured by reason of such failure, or the authorized employee representative of such employees, may seek injunctive relief as provided in paragraph a of this subdivision.

8. Variances. a. Any employer may apply to the commissioner for a temporary order granting a variance from a standard or any provision thereof promulgated under this section. Such temporary order shall be granted only if the employer files an application which meets the requirements of paragraph b of this subdivision and establishes that (1) he is unable to comply with a standard by its effective date because of unavailability of professional or technical personnel or of materials and equipment needed to come into compliance with the standard or because necessary construction or alteration of facilities cannot be completed by the effective date, (2) he is taking all available steps to safeguard employees against the hazards covered by the standard, and (3) he has an effective program for coming into compliance with the standard as quickly as practicable. Any temporary order issued under this subdivision shall prescribe the practices, means, methods, operations and processes which the employer must adopt and use while the order is in effect and state in detail his program for coming into compliance with the standard. Such a temporary order may be granted only after notice to employees and an opportunity for a hearing, provided the commissioner may issue one interim order to be effective until a decision is made on the basis of the hearing. No temporary order may be in effect for longer than the period needed by the employer to achieve compliance with the standard or one year, whichever is shorter, except that such an order may be renewed not more than twice so long as the requirements of this subdivision are met and if an application for renewal is filed at least ninety days prior to the expiration date of the order. No interim renewal of an order may remain in effect longer than one hundred and eighty days.

b. An application for a temporary variance order shall contain: (1) a specification of the standard or portion thereof from which the employer or owner seeks a variance; (2) a representation by the employer, supported by representations from qualified persons who have firsthand knowledge of the facts represented, that he is unable to comply with the standard or portion thereof and a detailed statement of the reasons therefor; (3) a statement of the steps he has taken and will take, with specific dates, to protect employees against the hazard covered by the standard; (4) a statement of when he expects to be able to comply with the standard and what steps he has taken and what steps he will take, with dates specified, to come into compliance with the standard; and (5) a certification that he has informed his employees of the application by giving a copy thereof to their authorized representative, posting a statement giving a summary of the application and specifying where a copy may be examined at the place or places where notices to employees are normally posted, and by other appropriate means. A description of how employees have been informed shall be contained in the certification. The information to employees shall also inform them of their right to petition the commissioner for a hearing. The commissioner is also authorized to grant a variance from any standard or portion thereof whenever he determines that such variance is necessary to permit an employer to participate in an experiment approved by him designed to demonstrate or validate new and improved techniques to safeguard the health or safety of workers.

c. Any affected employer may apply to the commissioner for a rule or order for a variance from a standard promulgated under this section. Affected employees shall be given notice of each such application and an opportunity to participate in a hearing. The commissioner shall issue such rule or order if he determines on the record, after opportunity for an inspection where appropriate and a hearing, that the proponent of the variance has demonstrated by a preponderance of the evidence that the conditions, practices, means, methods, operations or processes used or proposed to be used by an employer will provide employment and places of employment which are as safe and healthful as those which would prevail if he complied with the standard. The rule or order so issued shall prescribe the conditions the employer must maintain, and the practices, means, methods, operations and processes which he must adopt and utilize to the extent they differ from the standard in question. Such a rule or order may be modified or revoked upon application by an employer, any employee or employee representative, or by the commissioner on his own motion, in the manner prescribed for its issuance under this subdivision at any time after six months from its issuance.

d. Any person, who may be adversely affected by a rule or order issued under this subdivision may challenge the validity or applicability of such rule or order by commencing, within sixty days, a proceeding pursuant to article seventy-eight of the civil practice law and rules.

9. Recordkeeping. a. In accordance with the commissioner's regulations, each employer shall make, keep and preserve, and make available to the commissioner such records regarding his activities relating to this section as the commissioner deems necessary or appropriate for developing information regarding the causes and prevention of occupational accidents and illness. Such regulations may include provisions requiring employers to conduct periodic inspections. The commissioner shall also issue regulations requiring that employers, through posting of notices, training or other appropriate means, keep their employees informed of their protections.

b. The commissioner shall prescribe regulations requiring employers to maintain accurate records and to make public periodic reports of work-related deaths, and injuries and illnesses other than minor injuries requiring only first aid treatment and which do not involve lost time from work, medical treatment, loss of consciousness, restriction of work or motion or transfer to another job.

c. The commissioner shall issue regulations requiring employers to maintain accurate records of employee exposures to potentially toxic materials or harmful physical agents which the regulation requires to be monitored or measured. Such regulations shall provide employees or their representatives with an opportunity to observe such monitoring or measuring and have access to the records thereof. Such regulations shall also make appropriate provisions for each employee or former employee to have access to such records as will indicate his own exposure to toxic materials or harmful physical agents. Each employer shall promptly notify any employee who has been or is being exposed to toxic materials or harmful physical agents in concentrations or at levels which exceed those prescribed by any safety and health standard promulgated under this section, and shall inform any employee who is being exposed of the corrective action being taken and the time limit for correction.

10. Discrimination against employees. a. No person shall discharge, or otherwise discipline, or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this section or has testified or is about to testify in any such proceeding, or because of the exercise by such employee on behalf of himself or others of any right afforded by this section.

b. Any employee who believes that he has been discharged, disciplined, or otherwise discriminated against by any person in violation of this subdivision may, within thirty days after such violation occurs, file a complaint with the commissioner alleging such discrimination. Upon receipt of such complaint, the commissioner shall cause such investigation to be

made as he deems appropriate, and shall, if requested withhold the name of the complainant from the employer. If upon such investigation, the commissioner determines that the provisions of this subdivision have been violated, he shall request the attorney general to bring an action in the supreme court against the person or persons alleged to have violated the provisions of this subdivision. In any such action the supreme court shall have jurisdiction, for cause shown, to restrain violations of this subdivision and order all appropriate relief, including rehiring or reinstatement of the employee to his former position with all back pay.

c. Within ninety days of this receipt of a complaint filed under this subdivision the commissioner shall notify the complainant and his representative by registered mail of his determination.

d. Nothing in this subdivision shall be deemed to diminish the rights of any employee under any law, rule or regulation or under any collective bargaining agreement.

11. Wherever notice is required to be given to an authorized employee representative under this section, notice shall be given to all organizations representing employees at the worksite in question. Notice should be given to the office of the employee representative as well as to the representative at the worksite. Representatives who wish this dual notice must inform the department of the person who is to be notified. Such notice shall be in writing unless the inspection is being conducted under subdivision five-a of this section.

12. The commissioner may initiate voluntary compliance programs, including, but not limited to, a public employee consultation program to provide on-site consultation to public employers desiring such services as an adjunct to the commissioner's inspections pursuant to this section. Whenever an on-site consultation is performed under this subdivision, a report shall be issued of any findings of noncompliance with the regulations promulgated under this section and the report shall be made public.

13. Regulations. The commissioner may promulgate such procedural regulations as he shall consider necessary and proper to effectuate the purposes and provisions of this section.

14. A commission to report on the operation and effect of this section is hereby established. a. Such commission shall examine the incidence of work related injuries, the incidence of injuries to the public, and the effect of this section upon insurance costs of public employers. Such commission shall be empowered to recommend additional or corrective legislation to advance the purposes of this section.

b. Such commission shall be composed of three members, one of whom shall be chosen by the speaker of the assembly, one of whom shall be chosen by the temporary president of the senate, and one of whom shall be chosen by the governor.

c. Members of the commission shall serve without compensation, except for expenses reasonably incurred in the discharge of their duties under this subdivision.

d. The commission shall issue an interim report to the legislature and the governor, which report shall be issued one year after the effective date of this section. A final report shall be issued two years after such effective date.

15. New York state occupational safety and health hazard abatement board; creation and procedure. a. The New York state occupational safety and health hazard abatement board is hereby created to have and exercise the powers, duties and prerogatives provided by the provisions of this subdivision.

b. The membership of the board shall consist of five persons appointed by the governor of whom one shall be upon the recommendation of the temporary president of the senate, one upon the recommendation of the speaker of the assembly, and one upon the recommendation of the state comptroller. Members shall serve at the pleasure of the governor, and the governor may replace any member in accordance with the provisions contained herein for the appointment of members.

The governor shall designate one of the members to serve as chairman. The board shall act by a majority vote of its members, and a quorum to conduct business shall consist of three members. Any determination of the board shall be evidenced by a certification thereof executed by all the members present and voting. Each member of the board shall be entitled to designate a representative to attend meetings of the board in his place, and to vote or otherwise act on his behalf in his absence. Such representative shall not be authorized to delegate any of his duties or functions to any other person. Notice of such designation shall be furnished in writing to the board by the designating member. A representative shall serve at the pleasure of the designating member during the member's term of office.

c. No elected public officer or public employee shall be eligible for appointment as a member of the board.

d. The members of the board and their representatives shall serve without salary or per diem allowance but shall be entitled to reimbursement for actual and necessary expenses incurred in the performance of their official duties pursuant to this section, provided however that such members and representatives are not, at the time such expenses are incurred, public employees or public officers otherwise entitled to such reimbursement.

e. The board shall meet at least four times a year with at least one meeting in each calendar quarter. The chairman shall designate the days of meeting, and shall provide each member with at least three weeks written notice of the date of such meeting.

f. Staff services for the board shall be performed insofar as practicable, by personnel of the department of labor. Additional professional and technical

services may be secured from other state departments or agencies, with the consent of the head of such department or agency.

16. New York state occupational safety and health hazard abatement board; powers and duties.

(A) a. The board created pursuant to subdivision fifteen of this section shall have the power, and it shall be its duty to receive, review and act upon applications for funding of capital projects designed to abate occupational safety and health hazards which have been found by the commissioner to violate the provisions of this section or which have been identified in a report of the public employee consultation program. The board shall fund seventy-five percent of the cost of any capital abatement project necessary to comply with an order issued by the commissioner pursuant to the provisions of this section or with a recommendation for hazard abatement issued by the public employee consultation program.

b. In determining the order in which applicants shall receive grants from the fund, and the amount of such funding, the board shall consider the following factors:

(1) the degree of possible physical harm which the hazard to be abated could inflict on the public employees and other citizens at risk;

(2) the imminent nature of the possible infliction of harm;

(3) the number of public employees and other citizens at risk;

(B) a. The board shall have the power, and it shall be its duty to receive, review, and act upon applications for funding for programs designed to provide occupational safety and health training and education for employees pursuant to the provisions of article twenty-nine of this chapter.

b. The board shall, by the promulgation of rules and regulations, establish procedures and criteria that are necessary and appropriate to carry out the provisions of article twenty-nine of this chapter, which shall include criteria for the evaluation and selection of applications for grants and the auditing of performance thereunder.

(C) a. The board may require as part of such applications made pursuant to the provisions of this subdivision such information as it deems necessary and shall act upon such applications within a reasonable time. The board shall furnish the state budget director, state industrial commissioner, state comptroller, temporary president of the senate and speaker of the assembly with a copy of each application within three days following receipt thereof by the board.

b. That a employer has applied for funds pursuant to the provisions of this subdivision shall not relieve that employer of the obligation to correct any violation of this section by variance or other means.

(D) a. The board, in the formulation of standards pursuant to paragraph b of subdivision four of this section, shall have the power to conduct public hearings, administer oaths and take sworn or unsworn testimony at such hearings. The board may, by subpoena issued by the chair, compel the attendance of witnesses and the production of all books, records and other evidence relative to any matter under inquiry in the formulation of such standards.

b. The board may contract with occupational health professionals and industrial safety engineers to provide expert assistance in the formulation of standards pursuant to paragraph b of subdivision four of this section.

c. The board is authorized, after public hearings, to recommend standards to the commissioner. The board, in addition to acting on its own initiative, shall review, consider and make recommendations regarding requests for new standards presented to such board by public employers, employees or authorized employee representatives.

HISTORY:

Add, L 1980, ch 729, § 4, eff Dec 27, 1980; amd, L 1984, ch 86, § 1, eff April 17, 1984; L 1985, ch 886, § 2; L 1990, ch 190, § 281, eff May 25, 1990; L 1990, ch 706, §§ 1–5, eff July 22, 1990; L 1992, ch 55, § 163, eff April 10, 1992; L 1993, ch 145, § 1, eff June 28, 1993; L 1997, ch 389, § 8 (Part E), eff Aug 7, 1997, deemed eff April 1, 1997; L 2007, ch 433, §§ 1, 2, eff Sept 30, 2007 (see 2007 note below); L 2012, ch 360, § 1, eff Aug 31, 2012; L 2012, ch 441, § 1, eff upon enactment of legislation by the state of New Jersey; L 2020, ch 168, § 2, effective September 7, 2020.

Prior Law: Former § 27-a, add, L 1937, ch 819, § 11; repealed, L 1975, ch 756, § 2, eff Aug 9, 1975 (see 1975 note below).

Editor's Notes: Laws 1975, ch 758, amended Laws 1975, ch 756, so as to change the effective date of the repeal of former § 27-a from July 1, 1975 to August 9, 1975.

Laws 2007, ch 433, § 3, eff Sept 30, 2007, provides:

§ 3. This act shall take effect on the sixtieth day after it shall have become a law, provided that the commissioner of labor shall promulgate regulations required under this act by May 1, 2008 and, further provided, that employers affected by this act shall fully comply with the requirements of this act and regulations promulgated thereunder, by November 1, 2008. (Amd, L 2008, ch 47, § 1, eff April 23, 2008.).

Laws 2012, ch 441, § 2, eff upon enactment of legislation by the state of New Jersey, provides as follows:

§ 2. This act shall take effect upon the enactment into law by the state of New Jersey of legislation having an identical effect with this act, but if the state of New Jersey shall have already enacted such legislation, this act shall take effect immediately; provided that the state of New Jersey shall notify the legislative bill drafting commission upon the occurrence of the enactment of the legislation provided for in section one of this act in order that the commission may maintain an accurate and timely effective data base of the official text of the laws of the state of New York in furtherance of effectuating the provisions of section 44 of the legislative law and section 70-b of the public officers law.

Laws 2020, ch 168, § 4, eff September 7, 2020, provides:

§ 4. This act shall take effect immediately; provided, however that the operation plans in the event of certain declared public health emergencies established pursuant to section 27-c of the labor law shall be finalized and published, the hotline and webpage established pursuant to section 27-a of the labor law shall be functional, and the protocols for responding to a declared public health emergency involving a communicable disease pursuant to paragraph m of subdivision 2 of section 2801-a of the education law shall be established and functional within 30 days of the effective date of this act.

Laws 2020, ch 168, § 4, eff September 7, 2020, provides:

§ 4. This act shall take effect immediately; provided, however that the operation plans in the event of certain declared public health emergencies established pursuant to section 27-c of the labor law shall be finalized and published, the hotline and webpage established pursuant to section 27-a of the labor law shall be functional, and the protocols for responding to a declared public health emergency involving a communicable disease pursuant to paragraph m of subdivision 2 of section 2801-a of the education law shall be established and functional within 30 days of the effective date of this act.

Amendment Notes: 2012. Chapter 360, § 1 amended:

Sub 4, par c, first undesignated par by deleting at figs 1, 5 and 6 "safety ropes and system components", at fig 2 "adopt", at fig 3 "promulgated by the most recent edition", at fig 4 "1983, Standard on Fire Service Life Safety Rope and System Components, and" and adding the matter in italics.

Sub 4, par c, second undesignated par, opening par by deleting at fig 1 "safety ropes and system components" and adding the matter in italics.

Sub 4, par c, second undesignated par, subpar (1) by deleting at fig 1 "safety ropes and system components" and adding the matter in italics.

Sub 4, par c, second undesignated par, subpar (2), opening par by deleting at fig 1 "safety ropes and system components" and adding the matter in italics.

Sub 4, par c, second undesignated par, subpar (3) by deleting at fig 1 "any safety ropes and system components" and adding the matter in italics.

Sub 4, par c, second undesignated par, subpar (4) by deleting at fig 1 "safety ropes and system components" and adding the matter in italics.

Sub 4, par c, second undesignated par, subpar (5) by deleting at fig 1 "safety ropes and system components" and adding the matter in italics.

Sub 4, par c, second undesignated par, subpar (6) by deleting at fig 1 "Safety ropes and system components" and adding the matter in italics.

Sub 4, par c, second undesignated par, subpar (7) by deleting at fig 1 "safety ropes and system components" and adding the matter in italics.

2012. Chapter 441, § 1 amended:

Sub 1, par a by adding the matter in italics.

Sub 1, par d by adding the matter in italics.

2007. Chapter 433, § 1 amended:

By adding sub 1, par e.

2007. Chapter 433, § 2 amended:

By redesignating former sub 4, par c, as sub 4, par d.

The 2020 amendment by ch 168, § 2, added 6-a.

Notes to Decisions

Analysis

1. In general
2. Who is "employee"
3. Rules and regulations
4. Representation of employees
5. Private action for violation
6. —Time limits
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8. Evidence

1. In general

Evidence supported finding by Industrial Board of Appeals that New York City Transit Authority violated regulation requiring it to maintain written hazard communication program, including list of hazardous chemicals known to be present, where Authority had developed computerized chemical inventory system, but did not have written list of hazardous chemicals available at particular facilities. New York City Transit Auth. v New York State DOL, 88 N.Y.2d 225, 644 N.Y.S.2d 463, 666 N.E.2d 1336, 1996 N.Y. LEXIS 310 (N.Y. 1996).

In an Article 78 proceeding seeking to prevent the scheduled closing of a correctional facility petitioner's motion for a preliminary injunction would be denied, since it is not within the scope of judicial power to question the wisdom of the administrative decision to close a correctional facility as part of an overall capital expansion plan and petitioner's efforts to enforce a generalized statutory right to safe working conditions is pursuant to Labor Law § 27-a would require the judiciary to involve itself in decision-making process of the executive branch; the commissioner was acting within his jurisdiction whether by virtue of the authority granted to him by the Correction Law or at the behest of the Governor and the remedy of prohibition would not lie. Additionally, the remedy of mandamus would not be available in the continued operation of the facility was not a purely ministerial act. New York State Inspection, etc., Dist. Council 82, etc. v Cuomo, 103 A.D.2d 312, 480 N.Y.S.2d 1, 1984 N.Y. App. Div. LEXIS 19280 (N.Y. App. Div. 2d Dep't), app. denied, 63 N.Y.2d 895, 483 N.Y.S.2d 210, 472 N.E.2d 1038, 1984 N.Y. LEXIS 4695 (N.Y. 1984), app. denied, 63 N.Y.2d 607, 1984 N.Y. LEXIS 5428 (N.Y. 1984), aff'd, 64 N.Y.2d 233, 485 N.Y.S.2d 719, 475 N.E.2d 90, 1984 N.Y. LEXIS 4858 (N.Y. 1984).

The State Industrial Board of Appeals properly revoked a decision of the Commissioner of Labor holding that the absence or nonfunctioning of automatic tear gas dispensing systems in certain correctional facilities did not constitute a violation of Labor Law § 27-a, pursuant to which public employees have the right to work in an environment as free from hazards and risks to their safety as is practicable. However, the Board also properly acknowledged that whether to include such a system as part of a correctional facility was a policy decision for the Department of Correctional Services, and properly refused to require the installation of such systems in those facilities in which a system had not previously been installed. Although there was evidence that members of petitioner union, representing corrections officers, had relied on the systems, and that the nonfunctioning of the systems might have contributed to injuries being suffered by petitioner's members in at least one disturbance, the evidence also showed that, when automatic systems were not in place, a manual tear gas dispensing system was sufficient to provide for the safety of petitioner's members. New York State Inspection, Security & Law Enforcement Emples., Dist. Council 82 v New York State Industrial Bd. of Appeals, 103 A.D.2d 489, 481 N.Y.S.2d 884, 1984 N.Y. App. Div. LEXIS 19965 (N.Y. App. Div. 3d Dep't 1984).

Court improperly granted preliminary injunction prohibiting New York City Transit Authority from deploying transit police officers at 2 of its facilities on ground that dangerous conditions existed in violation of right to safe workplace under CLS Labor § 27-a, since matter involved political question beyond scope of judicial review and plaintiffs did not demonstrate that specific conditions, ranging in severity from lack of emergency exits to insufficient locker space, were "extraordinary or emergency circumstances" warranting judicial intervention. McKechnie v New York City Transit Police Dep't of New York City Transit Authority, 130 A.D.2d 466, 515 N.Y.S.2d 48, 1987 N.Y. App. Div. LEXIS 46437 (N.Y. App. Div. 2d Dep't 1987).

Evidence supported Industrial Board of Appeals' decision to eliminate entire penalty imposed on village for failure to abate violations of Public Employee Safety and Health Act (CLS Labor § 27-a) where Commissioner of Labor did not directly notify principal elected official of village of violations and penalty assessments, and first official written notice of penalty assessment was not issued until 14 months after notice to comply was mailed, despite requirement that civil penalty bills be sent out quarterly. Hudacs v Village of Watkins Glen, 208 A.D.2d 181, 622 N.Y.S.2d 384, 1995 N.Y. App. Div. LEXIS 1389 (N.Y. App. Div. 3d Dep't 1995).

Restriction in CLS Labor § 27-a of right to attend workplace inspections to persons who are otherwise entitled to be present at workplace does not violate equal protection clauses of federal and state constitutions; such restriction is rationally related to legitimate governmental objective of limiting potential for disruption of workplace by intrusion of outsiders. Stone v Sweeney, 266 A.D.2d 103, 698 N.Y.S.2d 645, 1999 N.Y. App. Div. LEXIS 11656 (N.Y. App. Div. 1st Dep't 1999), app. denied, 94 N.Y.2d 761, 707 N.Y.S.2d 142, 728 N.E.2d 338, 2000 N.Y. LEXIS 233 (N.Y. 2000).

In action against employer for exposure of employees to dangerous substances, charge to jury on issue of whether employer violated 29 USCS §§ 651 et seq. and CLS Labor § 27-a was inadequate where plaintiffs alleged that they had been exposed to harmful substances in their work place from start of their employment in 1970s and early 1980s, and thus jury should have been instructed as to date on which allegedly violated regulations became binding on employer. Aguirre v Long Island R.R. Co., 286 A.D.2d 658, 730 N.Y.S.2d 122, 2001 N.Y. App. Div. LEXIS 8549 (N.Y. App. Div. 2d Dep't 2001).

New York City Economic Development Corporation (EDC) was not the firefighter's employer, and thus, the statute was inapplicable to that defendant; the firefighter failed to establish, prima facie, that EDC created the allegedly defective condition or had actual or constructive notice of the condition. Shea v New York City Economic Dev. Corp., 161 A.D.3d 803, 76 N.Y.S.3d 564, 2018 N.Y. App. Div. LEXIS 3098 (N.Y. App. Div. 2d Dep't 2018).

School districts had standing to bring an Article 78 proceeding seeking to review various acts performed by the Department of Labor in connection with the enactment of the State Occupational Safety and Health Act, specifically, challenging the promulgation of 12(c) NYCRR part 800, challenging the denial of a Freedom of Information Law request to examine a set of the Occupational Safety and Health Standards for public employees, and also challenging the promulgation of the record-keeping requirement pursuant to such rules and regulations without prior resort to a rule-making proceeding. The school districts' contention that 12(c) NYCRR part 800 is invalid was without merit, the Industrial Commissioner having been specifically directed by Labor Law § 27-a(4)(a) to adopt all federal safety and health standards rather than only those found, in his discretion, to be applicable to the public sector. However, the Industrial Commissioner, in adopting the federal OSHA standards improperly did so by incorporating them by reference rather than by setting them forth fully in the official compilation of the State rules and regulations. The school districts' third cause of action, relating to the promulgation of record-keeping requirements without initially undertaking a rule-making proceeding, was not ripe for determination since a proceeding had subsequently been commenced. New York State Coalition of Public Employers v New York State Dep't of Labor, 110 Misc. 2d 215, 441 N.Y.S.2d 878, 1981 N.Y. Misc. LEXIS 3067 (N.Y. Sup. Ct. 1981), modified, 89 A.D.2d 283, 456 N.Y.S.2d 465, 1982 N.Y. App. Div. LEXIS 18376 (N.Y. App. Div. 3d Dep't 1982).

Under mandatory access provisions of Public Employee Safety and Health (PESH) Act, petitioners were entitled to review entire logs and summaries of all recordable occupational injuries and illnesses in all 17 offices of Department of Labor and, absent showing that unwarranted invasion of personal privacy would result if identity of employees were disclosed, respondents' decision to redact certain identifying information from Occupational Injury Logs constituted erroneous interpretation of law, lacked reasonable basis, and would be annulled. Goldstein v State, 188 Misc. 2d 524, 728 N.Y.S.2d 891, 2001 N.Y. Misc. LEXIS 203 (N.Y. Sup. Ct. 2001).

There is no conflict between the New York General Duty Clause, N.Y. Lab. Law § 27-a(3), and the New York Workplace Violence Protection Act (WVPA), N.Y. Lab. Law § 27-b. The General Duty Clause includes provisions regarding workplace safety in general, whereas the WVPA addresses the specific issue of workplace violence. Matter of City of New York v Commissioner of Labor, 917 N.Y.S.2d 834, 31 Misc. 3d 398, 2011 N.Y. Misc. LEXIS 307 (N.Y. Sup. Ct. 2011), aff'd, 100 A.D.3d 519, 954 N.Y.S.2d 72, 2012 N.Y. App. Div. LEXIS 7822 (N.Y. App. Div. 1st Dep't 2012).

Labor Law § 27-a(3)(a)(1), requiring employers to furnish their employees with safe places to work, encompasses physical and environmental hazards in the workplace, not the use to which a room is put. Williams v City of New York, 304 A.D.2d 562, 758 N.Y.S.2d 349, 2003 N.Y. App. Div. LEXIS 3735 (N.Y. App. Div. 2d Dep't 2003), aff'd, 2 N.Y.3d 352, 779 N.Y.S.2d 449, 811 N.E.2d 1103, 2004 N.Y. LEXIS 1027 (N.Y. 2004).

2. Who is "employee"

Volunteer firefighters are included in definition of "employees" contained in Public Employee Safety and Health Act (CLS Labor § 27-a(1)(b)). Hartnett v Ballston Spa, 152 A.D.2d 83, 547 N.Y.S.2d 902, 1989 N.Y. App. Div. LEXIS 13870 (N.Y. App. Div. 3d Dep't 1989), app. dismissed, 75 N.Y.2d 863, 552 N.Y.S.2d 919, 552 N.E.2d 167, 1990 N.Y. LEXIS 282 (N.Y. 1990), app. denied, 75 N.Y.2d 711, 557 N.Y.S.2d 309, 556 N.E.2d 1116, 1990 N.Y. LEXIS 1041 (N.Y. 1990).

Industrial Board of Appeals had rational basis to conclude that service of notice and order on village fire chief did not comply with service requirements of Public Employee Safety and Health Act (CLS Labor § 27-a) because fire chief was mere "employee" and there was no assurance that he would notify village officials, whereas direct notice to principal elected official of village would assure notification to accountable village officer who could enforce compliance; Labor Commissioner failed to prove that grant of authority to fire chief under CLS Vill § 10-1018 was broad enough to authorize fire chief to act on behalf of village, and that actual notice to fire chief constituted constructive notice to village. Hudacs v Village of Watkins Glen, 208 A.D.2d 181, 622 N.Y.S.2d 384, 1995 N.Y. App. Div. LEXIS 1389 (N.Y. App. Div. 3d Dep't 1995).

Employer's alleged violations of OSHA and its regulations and this statute did not constitute negligence per se; neither the child nor his mother during her pregnancy belonged to the class intended to be protected by OSHA or its implementing regulations or this statute because neither the child nor his mother during the pregnancy were employees. Campanelli v Long Is. Light. Co., 164 A.D.3d 1416, 84 N.Y.S.3d 531, 2018 N.Y. App. Div. LEXIS 6244 (N.Y. App. Div. 2d Dep't 2018).

3. Rules and regulations

Penalty-assessment guidelines in Labor Department's Field Operations Manual, applying to violations of Public Employee Safety and Health Act, did not constitute rule or regulation required by CLS NY Const Art IV § 8 and CLS St Adm P Act § 102(2)(b)(i) to be filed with Secretary of State and published in State Register, since guidelines did not establish rigid, numerical policy, but encompassed both fixed and variable factors to be considered on case-by-case analysis, with ultimate amount of penalty dependent on inspectors' independent exercise of their professional judgment. New York City Transit Auth. v New York State DOL, 88 N.Y.2d 225, 644 N.Y.S.2d 463, 666 N.E.2d 1336, 1996 N.Y. LEXIS 310 (N.Y. 1996).

Penalty-assessment guidelines in Labor Department's Field Operations Manual, applying to violations of Public Employee Safety and Health Act, did not constitute rule or regulation required by CLS NY Const Art IV § 8 and CLS St Adm P Act § 102(2)(b)(i) to be filed with Secretary of State and published in State Register, since CLS Labor § 27-a(6) authorizes imposition of penalties for violations of Act or standards promulgated thereunder, but does not mandate promulgation of regulations regarding penalties to be imposed, permitting Labor Department to opt in favor of imposition of penalties on case-by-case basis. New York City Transit Auth. v New York State DOL, 88 N.Y.2d 225, 644 N.Y.S.2d 463, 666 N.E.2d 1336, 1996 N.Y. LEXIS 310 (N.Y. 1996).

The Industrial Commissioner of the Department of Labor, acting under the mandate of Labor Law § 27-a that the Commissioner "adopt all safety and health standards promulgated under the United States Occupational Safety and Health Act of 1970 (OSHA) in order to provide reasonable and adequate protection to the lives, safety and health of public employees," validly adopted all OSHA standards although many of the standards did not apply to public employees and could have been redacted; however, to the extent that the standards were incorporated by reference in the regulations, they were improperly adopted in violation of the New York Constitution Art IV, § 8, which requires that the text of such departmental regulations be filed and published. New York State Coalition of Public Employers v New York State Dep't of Labor, 89 A.D.2d 283, 456 N.Y.S.2d 465, 1982 N.Y. App. Div. LEXIS 18376 (N.Y. App. Div. 3d Dep't 1982), aff'd, 60 N.Y.2d 789, 469 N.Y.S.2d 679, 457 N.E.2d 785, 1983 N.Y. LEXIS 3478 (N.Y. 1983).

Plaintiffs may not use a violation of the New York City Police Patrol Guide as a predicate to establish a violation of N.Y. Lab. Law § 27-a(3) and then use that § 27-a(3) violation as a predicate for a N.Y. Gen. Mun. Law § 205-e claim. Forster v City of

New York, 309 A.D.2d 578, 765 N.Y.S.2d 598, 2003 N.Y. App. Div. LEXIS 10579 (N.Y. App. Div. 1st Dep't 2003), app. denied, 1 N.Y.3d 583, 776 N.Y.S.2d 213, 808 N.E.2d 348, 2004 N.Y. LEXIS 35 (N.Y. 2004).

Police department training lessons and videos, which are not part of a duly enacted body of law or regulations imposing clear legal duties, fail to provide a predicate for alleging a N.Y. Lab. Law § 27-a(3) violation as a ground for N.Y. Gen. Mun. Law § 205-e liability. Forster v City of New York, 309 A.D.2d 578, 765 N.Y.S.2d 598, 2003 N.Y. App. Div. LEXIS 10579 (N.Y. App. Div. 1st Dep't 2003), app. denied, 1 N.Y.3d 583, 776 N.Y.S.2d 213, 808 N.E.2d 348, 2004 N.Y. LEXIS 35 (N.Y. 2004).

State commissioner of labor was not required under N.Y. Lab. Law § 27-a(4)(B) to promulgate all regulations recommended by the state occupational safety and health board but was required to do so after "consultation with" the board and only after the board had made recommendations consistent with statutory directives, including a showing of necessity; the commissioner properly identified her specific concerns about the board's proposal regarding a safety standard recommended in 2004 and returned it for further consideration and the required statutory findings. Matter of Toussaint v Angello, 38 A.D.3d 298, 832 N.Y.S.2d 503, 2007 N.Y. App. Div. LEXIS 2778 (N.Y. App. Div. 1st Dep't 2007).

City department of juvenile justice argued that New York Industrial Board of Appeals improperly issued it a notice of violation (NOV) under N.Y. Lab. Law § 27-a(3) instead of the New York Workplace Violence Protection Act (WVPA), N.Y. Lab. Law § 27-b. This claim failed because at the time the NOV was issued, no regulations implementing the WVPA had been adopted. Matter of City of New York v Commissioner of Labor, 917 N.Y.S.2d 834, 31 Misc. 3d 398, 2011 N.Y. Misc. LEXIS 307 (N.Y. Sup. Ct. 2011), aff'd, 100 A.D.3d 519, 954 N.Y.S.2d 72, 2012 N.Y. App. Div. LEXIS 7822 (N.Y. App. Div. 1st Dep't 2012).

City was not entitled to administrative relief because the Commissioner of Labor had authority to adopt regulations and issue citations to enforce the Workplace Violence Prevention Act via the Public Employee Safety and Health Act to fill in the interstices in the legislative product and the requirements for employee participation did not constitute employee veto or control over workplace evaluations or prevention programs, left room for collective bargaining, and did not violate the Taylor Law. Matter of City of New York v Commissioner of Labor, 991 N.Y.S.2d 832, 44 Misc. 3d 612, 2014 N.Y. Misc. LEXIS 2605 (N.Y. Sup. Ct. 2014).

4. Representation of employees

Refusal of State Department of Labor (DOL) to allow National Employment Law Project, Inc., as chosen representative of public assistance workers in Work Experience Program (WEP) under CLS Soc Serv § 336-c, to be present for all phases of DOL's processing of workers' complaints of safety and health violations under CLS Labor § 27-a, made applicable to WEP workers by CLS Soc Serv § 330(5), was not arbitrary where it was consistent with express terms of CLS Labor § 27-a(5)(b), which provides that employees shall be represented on such inspections by "authorized employee representative," defined in CLS Labor § 27-a(1)(c) to mean only employees and union representatives. Stone v Sweeney, 266 A.D.2d 103, 698 N.Y.S.2d 645, 1999 N.Y. App. Div. LEXIS 11656 (N.Y. App. Div. 1st Dep't 1999), app. denied, 94 N.Y.2d 761, 707 N.Y.S.2d 142, 728 N.E.2d 338, 2000 N.Y. LEXIS 233 (N.Y. 2000).

Trial court erred in enjoining the lay off of two employees, even though all staffing reductions that affected the working conditions of employees represented by the union were not beyond judicial review since N.Y. Lab. Law § 27-a(7)(c) established automatic standing for unions to enjoin working conditions that were hazardous, or presented an imminent danger, if the New York Industrial Commissioner failed to seek relief; the union did not show that a danger existed that could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger could be eliminated through the abatement procedures with respect to the two employees. Matter of Civil Serv. Empls. Assn., Inc., Local 1000, AFSCME, AFL-CIO v County of Erie, 43 A.D.3d 1341, 843 N.Y.S.2d 203, 2007 N.Y. App. Div. LEXIS 10240 (N.Y. App. Div. 4th Dep't 2007).

5. Private action for violation

Court should have dismissed proposed class action brought by plaintiffs, public-assistance recipients assigned under New York City's Work Experience Program (WEP) to clean streets and remove debris in WEP assignments under supervision of City's Departments of Transportation and Sanitation, claiming that their assignments violated United States Occupational Safety and Health Administration standards, where plaintiffs did not dispute that they had not availed themselves of administrative procedures set forth in Labor Law to raise such claims. Capers v Giuliani, 253 A.D.2d 630, 677 N.Y.S.2d 353, 1998 N.Y. App. Div. LEXIS 9331 (N.Y. App. Div. 1st Dep't 1998).

State employee did not have a private right of action against the State of New York, pursuant to N.Y. Lab. Law §§ 27-a or 200, on her claim that her rights under state and federal health and safety statutes and regulations were violated, and trial court dismissed that claim and claims that the employee was subjected to unfair labor practices because the employee complained about a co-worker's hygiene. Shaw v Baldowski, 192 Misc. 2d 635, 747 N.Y.S.2d 136, 2002 N.Y. Misc. LEXIS 835 (N.Y. Sup. Ct. 2002).

6. —Time limits

Action under Public Employee Safety and Health Act (CLS Labor § 27-a) is manifestly one to recover on liability created by statute, to which 3-year statute of limitations under CLS CPLR § 214(2) applies. Hartnett v New York City Transit Auth., 86 N.Y.2d 438, 633 N.Y.S.2d 758, 657 N.E.2d 773, 1995 N.Y. LEXIS 3564 (N.Y. 1995).

Thirty-day time period of CLS Labor § 27-a(10)(b) for filing discrimination complaint with Commissioner of Labor is waivable by Commissioner; however, commissioner's discretion to decide which late filings he or she will decline to accept for investigation is not unrestrained, and commissioner's actions remain subject to judicial scrutiny for arbitrary and abusive exercise of discretion. Hartnett v New York City Transit Auth., 86 N.Y.2d 438, 633 N.Y.S.2d 758, 657 N.E.2d 773, 1995 N.Y. LEXIS 3564 (N.Y. 1995).

7. —Relationship to General Municipal Law § 205-e

City was entitled to summary judgment dismissing complaint by city employee who alleged that, after recuperating from unrelated injury, he was returned to duty in inappropriate work assignment where he was attacked by prisoner and injured because, assuming arguendo that violation of CLS Labor § 27-a(3) could constitute valid predicate for cause of action under CLS Gen Mun § 205-e, such claim was not within ambit of § 27-a(3). Sciangula v City of New York, 250 A.D.2d 833, 673 N.Y.S.2d 454, 1998 N.Y. App. Div. LEXIS 6000 (N.Y. App. Div. 2d Dep't 1998).

Alleged violation of CLS Labor § 27-a, which imposes legal duty on public employers to provide safe workplace for their employees, was sufficient predicate for CLS Gen Mun § 205-e claim asserted by police officer who was injured when motor vehicle collision caused his knee to come into contact with sharp protruding edge of unpadded computer console mounted off floor between driver and front passenger seats in his radio motor patrol car, which was responding to emergency call; court properly denied city's motion for summary judgment, as issue of fact existed whether unpadded computer console was "recognized hazard" within meaning of § 27-a, where city possessed all factual information regarding computer console and failed to disclose it. Balsamo v City of New York, 287 A.D.2d 22, 733 N.Y.S.2d 431, 2001 N.Y. App. Div. LEXIS 11029 (N.Y. App. Div. 2d Dep't 2001).

Denial of city's cross motion for summary judgment dismissing police officer's cause of action to recover damages for injuries resulting from traffic accident pursuant to N.Y. Gen. Mun. Law § 205-e based on a violation of N.Y. Lab. Law § 27-a was affirmed, where trial court properly determined that an issue of fact existed as to whether the unpadded computer console was a "recognized hazard" within the meaning of N.Y. Lab. Law § 27-a, as the city possessed all of the factual information regarding the computer console and failed to disclose it. Balsamo v City of New

York, 287 A.D.2d 22, 733 N.Y.S.2d 431, 2001 N.Y. App. Div. LEXIS 11029 (N.Y. App. Div. 2d Dep't 2001).

N.Y. Lab. Law § 27-a is applicable to the uniformed services and the safety or protective equipment provided to them; therefore, inasmuch as § 27-a imposes a clear legal duty on public employers to provide a safe workplace for their employees, and an expansive interpretation is consistent with the over-all goal of N.Y. Gen. Mun. Law § 205-e, a violation of N.Y. Lab. Law § 27-a may constitute a sufficient predicate for a claim pursuant to N.Y. Gen. Mun. Law § 205-e which is based on an allegation of a workplace safety violation. Balsamo v City of New York, 287 A.D.2d 22, 733 N.Y.S.2d 431, 2001 N.Y. App. Div. LEXIS 11029 (N.Y. App. Div. 2d Dep't 2001).

Jury verdict entered in favor of the police officer for injuries was affirmed because the police officer had provided sufficient evidence for a rational jury to conclude that the city had violated N.Y. Lab. Law § 27-a when it gave the officer a horse to ride that presented a recognized hazard. The officer's commanding officer knew of at least three prior incidents when the horse had acted in an unprovoked manner, causing injuries to the rider. Campbell v City of New York, 31 A.D.3d 594, 819 N.Y.S.2d 294, 2006 N.Y. App. Div. LEXIS 9389 (N.Y. App. Div. 2d Dep't 2006).

Although a police officer's action for common-law negligence was denied based on the firefighter's rule, there was a triable issue of fact as to the city's actual or constructive notice of the alleged sidewalk defect under N.Y. Lab. Law § 27-a(3)(a)(1); consequently, the city's motion for summary judgment in officer's cause of action under N.Y. Gen. Mun. Law § 205-e was denied. Marsillo v City of New York, 844 N.Y.S.2d 673, 17 Misc. 3d 612, 2007 N.Y. Misc. LEXIS 6540 (N.Y. Sup. Ct. 2007).

In a wrongful death action filed against a city under N.Y. Gen. Mun. Law § 205-e, a locker room where an inmate stole a gun with which he killed two police officers was not an unsafe place of employment within the meaning of N.Y. Labor Law § 27-a(3)(a)(1); the alleged hazard was not the locker room's physical condition but the practice of holding prisoners in close proximity to lockers where firearms were kept. Williams v City of New York, 304 A.D.2d 562, 758 N.Y.S.2d 349, 2003 N.Y. App. Div. LEXIS 3735 (N.Y. App. Div. 2d Dep't 2003), aff'd, 2 N.Y.3d 352, 779 N.Y.S.2d 449, 811 N.E.2d 1103, 2004 N.Y. LEXIS 1027 (N.Y. 2004).

City was not liable in a wrongful death action filed under N.Y. Gen. Mun. Law § 205-e by survivors of two police officers who were shot by an inmate who stole a gun from a locker while he was being detained in a detective squad locker room; the hazard presented by the necessity to transport and detain prisoners was sufficiently and properly diminished by the city so as to fulfill its duty to the officers under N.Y. Labor Law § 27-a(3). Williams v City of New York, 304 A.D.2d 562, 758 N.Y.S.2d 349, 2003 N.Y. App. Div. LEXIS 3735 (N.Y. App. Div. 2d Dep't 2003), aff'd, 2 N.Y.3d 352, 779 N.Y.S.2d 449, 811 N.E.2d 1103, 2004 N.Y. LEXIS 1027 (N.Y. 2004).

City and police department were not entitled to summary judgment dismissing a police officer's suit alleging she was injured while loading barriers onto an unsafe police flatbed truck that was improperly equipped, as this section set forth an objective, clear legal duty that could serve as a predicate for a claim under N.Y. Gen. Mun. Law § 205-e. Gammons v City of New York, 24 N.Y.3d 562, 25 N.E.3d 958, 2 N.Y.S.3d 45, 2014 N.Y. LEXIS 3440 (N.Y. 2014).

8. Evidence

Firefighter was not entitled to a new trial on his cause of action predicated upon a violation of this statute because a fair interpretation of the evidence supported a finding that the torn carpeting, upon which the firefighter tripped and sustained injuries while performing his assigned duties, was not a hazard likely to cause death or serious physical harm. Annunziata v City of New York, 175 A.D.3d 438, 107 N.Y.S.3d 355, 2019 N.Y. App. Div. LEXIS 6122 (N.Y. App. Div. 2d Dep't 2019).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 27, 213, 885, 886; CLS Exec § 383.

General provisions as to protection of health and safety of employees, §§ 200–219.

Public Employees' Fair Employment Act, CLS Civ S §§ 200 et seq.

Proceeding against body or officer, CLS CPLR §§ 7801 et seq.

Codes, Rules and Regulations:

Protection of persons employed at window cleaning—structural requirements, equipment and procedures. 12 NYCRR §§ 21.0 et seq.

Ionizing radiation protection. 12 NYCRR §§ 38.0 et seq.

Proof of citizenship and residence in connection with the employment of persons upon public works. 12 NYCRR §§ 225.1 et seq.

Public employees' occupational safety and health standards. 12 NYCRR §§ 800.1 et seq.

Penalties. 12 NYCRR §§ 830.1 et seq.

Recordkeeping and reporting of occupational injuries and illnesses by public employees. 12 NYCRR Part 801.

Federal Aspects:

Occupational Safety and Health Act, 29 USCS §§ 651 et seq.

Submission of state plan for development and enforcement of occupational safety and health standards, 29 USCS § 667.

Section eighteen of the United States Occupational Safety and Health Act of 1970, cited in statutory text, appears as 29 USCS § 667.

Texts:

Matthew Bender's New York Practice Guides: 4 New York Practice Guide: Business and Commercial §§ 25.08, 25.21, 26.21.

LexisNexis AnswerGuide New York Negligence § 6.09[3][c] Choosing Appropriate Basis of Liability.

LexisNexis AnswerGuide New York Negligence § 6.09 Choosing Appropriate Basis of Liability.

Warren's Negligence in the New York Courts §§ 33.04, 99.03[4], 146.01[8], 194.01[5] (vicarious liability; scope of employment).

Texts: 6 Frumer & Biskind, Bender's New York Evidence —CPLR § 28.02.

Liddle & Marino, Labor and Employment in New York (Michie) pp 5-9.

§ 27-b. Duty of public employers to develop and implement programs to prevent workplace violence

1. Purpose. The purpose of this section is to ensure that the risk of workplace assaults and homicides is evaluated by affected public employers and their employees and that such employers design and implement workplace violence protection programs to prevent and minimize the hazard of workplace violence to public employees.

2. Definitions. For the purposes of this section:

a. "Employer" means: (1) the state; (2) a political subdivision of the state, provided, however that this subdivision shall not mean any employer as defined in section twenty-eight hundred one-a of the education law; (3) a public authority, a public benefit corporation, or any other governmental agency or instrumentality thereof; and (4) an authorized agency as defined in paragraph (a) of subdivision ten of section three hundred seventy-one of the social services law that accepts children adjudicated delinquent under article three of the family court act.

b. "Employee" means a public employee working for an employer.

c. "Workplace" means any location away from an employee's domicile, permanent or temporary,

where an employee performs any work-related duty in the course of his or her employment by an employer.

d. "Supervisor" means any person within an employer's organization who has the authority to direct and control the work performance of an employee, or who has the authority to take corrective action regarding the violation of a law, rule or regulation to which an employee submits written notice.

e. "Retaliatory action" means the discharge, suspension, demotion, penalization, or discrimination against any employee, or other adverse employment action taken against an employee in the terms and conditions of employment.

3. Risk evaluation and determination. Every employer shall evaluate its workplace or workplaces to determine the presence of factors or situations in such workplace or workplaces that might place employees at risk of occupational assaults and homicides. Examples of such factors shall include, but not limited to:

a. working in public settings (e.g., social services or other governmental workers, police officers, firefighters, teachers, public transportation drivers, health care workers, and service workers);

b. working late night or early morning hours;

c. exchanging money with the public;

d. working alone or in small numbers;

e. uncontrolled access to the workplace; and

f. areas of previous security problems.

4. Written workplace violence prevention program. Every employer with at least twenty full time permanent employees shall develop and implement a written workplace violence prevention program for its workplace or workplaces that includes the following:

a. a list of the risk factors identified in subdivision three of this section that are present in such workplace or workplaces;

b. the methods the employer will use to prevent incidents of occupational assaults and homicides at such workplace or workplaces, including but not limited to the following:

(1) making high-risk areas more visible to more people;

(2) installing good external lighting;

(3) using drop safes or other methods to minimize cash on hand;

(4) posting signs stating that limited cash is on hand;

(5) providing training in conflict resolution and nonviolent self-defense responses; and

(6) establishing and implementing reporting systems for incidents of aggressive behavior.

5. Employee information and training. a. Every employer with at least twenty permanent full time employees shall make the written workplace violence prevention program available, upon request, to its employees, their designated representatives and the department.

b. Every employer shall provide its employees with the following information and training on the risks of occupational assaults and homicides in their workplace or workplaces at the time of their initial assignment and annually thereafter:

(1) employees shall be informed of the requirements of this section, the risk factors in their workplace or workplaces, and the location and availability of the written workplace violence prevention program required by this section; and

(2) employee training shall include at least: (a) the measures employees can take to protect themselves from such risks, including specific procedures the employer has implemented to protect employees, such as appropriate work practices, emergency procedures, use of security alarms and other devices, and (b) the details of the written workplace violence prevention program developed by the employer.

6. Application. a. Any employee or representative of employees who believes that a serious violation of a workplace violence protection program exists or that an imminent danger exists shall bring such matter to the attention of a supervisor in the form of a written notice and shall afford the employer a reasonable opportunity to correct such activity, policy or practice. This referral shall not apply where imminent danger or threat exists to the safety of a specific employee or to the general health of a specific patient and the employee reasonably believes in good faith that reporting to a supervisor would not result in corrective action.

b. If following a referral of such matter to the employee's supervisor's attention and after a reasonable opportunity to correct such activity, policy or practice the matter has not been resolved and the employee or representative of employees still believes that a violation of a workplace violence prevention program remains, or that an imminent danger exists, such employee or representative of employees may request an inspection by giving notice to the commissioner of such violation or danger. Such notice and request shall be in writing, shall set forth with reasonable particularity the grounds for the notice, shall be signed by such employee or representative of employees, and a copy shall be provided by the commissioner to the employer or the person in charge no later than the time of inspection, except that on the request of the person giving such notice, such person's name and the names of individual employees or representatives of employees shall be withheld. Such inspection shall be made forthwith.

c. A representative of the employer and an authorized employee representative shall be given the opportunity to accompany the commissioner during an inspection for the purpose of aiding such inspection. Where there is no authorized employee representative, the commissioner shall consult with a reasonable number of employees concerning matters of safety in the workplace.

d. The authority of the commissioner to inspect a premises pursuant to such an employee complaint shall not be limited to the alleged violation con-

tained in such complaint. The commissioner may inspect any other area of the premises in which he or she has reason to believe that a serious violation of this section exists.

e. No employer shall take retaliatory action against any employee because the employee does any of the following:

(1) makes an application pursuant to paragraph a of this subdivision;

(2) requests an inspection as authorized in paragraph b of this subdivision;

(3) accompanies the commissioner as authorized in paragraph c of this subdivision;

f. The commissioner may, upon his or her own initiative, conduct an inspection of any premises occupied by an employer if he or she has reason to believe that a violation of this section has occurred or if he or she has a general administrative plan for the enforcement of this section, including a general schedule of inspections, which provide a rational administrative basis for such inspecting. Within one hundred twenty days of the effective date of this paragraph the commissioner shall adopt rules and regulations implementing the provisions of this section.

g. Any information obtained by the commissioner pursuant to this subdivision shall be obtained with a minimum burden upon the employers.

h. When a request for an inspection has been made in a situation where there is an allegation of an imminent danger such that an employee would be subjecting himself or herself to serious injury or death because of the hazardous condition in the workplace, the inspection shall be given the highest priority by the department and shall be carried out immediately.

HISTORY:

Add, L 2006, ch 82, § 2, eff March 4, 2007 (see 2006 note below); amd, L 2011, ch 504, § 2, eff Jan 21, 2012 (see 2011 note below).

Prior Law: Former § 27-b, add, L 1965, ch 803, § 50; repealed, L 1975, ch 756, § 2, eff Aug 9, 1975 (see note below).

Editor's Notes: Laws 1975, ch 758, amended Laws 1975, ch 756, so as to change the effective date of the repeal of this section from July 1, 1975 to August 9, 1975.

Laws 2006, ch 82, §§ 1, 3–5, eff March 4, 2007, provides as follows:

Section 1. Legislative findings. The legislature finds and declares that workplace assaults and homicides are a serious public health problem that demands the attention of the state of New York. During the last decade, homicide was the third leading cause of death for all workers and the leading cause of occupational death for women workers. Workplace violence presents a serious occupational safety hazard for workers, but many employers and workers may be unaware of the risk. Moreover, the hazard of workplace violence is not currently addressed by any specific federal or state statute and regulation. It is critical to the maintenance of a productive workforce that employers and workers evaluate their workplaces to determine the risk of violence and to develop, and implement programs to minimize the hazard. Experience has shown that when employers evaluate the safety and health hazards in their workplaces and implement employee protection programs, the incidence of workplace injuries is reduced. The legislature, therefore, further finds and declares that the public health, safety and welfare would be advanced by enactment of a law to require that employers develop and implement workplace violence protection programs designed to minimize the danger to employees of workplace violence.

§ 3. The provisions of this act shall not diminish the rights of employees pursuant to any law, rule, regulation or collective bargaining agreement.

§ 4. Nothing in this act shall change or alter an agency's obligation to comply with workplace safety standards as set forth by the joint commission on accreditation of healthcare organizations. Any provision of this act which jeopardizes an agency's receipt of federal Medicaid and Medicare reimbursement shall be null and void with regard to such agency.

§ 5. This act shall take effect on the two hundred seventieth day after it shall have become a law; provided, however, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date is authorized and directed to be made and completed on or before such effective date (Amd, L 2006, ch 542, § 1, eff Aug 16, 2006.).

Laws 2006, ch 542, § 2, eff Aug 16, 2006, amended Laws 2006, ch 82, § 5, so as change the effective date of this section from Oct 5, 2006 to March 4, 2007.

Laws 2011, ch 504, §§ 1 and 3, provide:

Section 1. This act shall be known and may be cited as the "juvenile justice worker protection act."

§ 3. This act shall take effect on the one hundred twentieth day after it shall have become a law; provided, however, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date is authorized and directed to be made and completed on or before such effective date.

Amendment Notes: Laws 2011. Chapter 504, § 2 amended:

Sub 2, par a by deleting at fig 1 "and" and adding the matter in italics.

Repeal Notes: [1975] The substance of section 27-b of the Labor Law repealed by this act is incorporated in the new sections of the act, with certain modifications.

Notes to Decisions

City department of juvenile justice argued that New York Industrial Board of Appeals improperly issued it a notice of violation (NOV) under N.Y. Lab. Law § 27-a(3) instead of the New York Workplace Violence Protection Act (WVPA), N.Y. Lab. Law § 27-b. This claim failed because at the time the NOV was issued, no regulations implementing the WVPA had been adopted. Matter of City of New York v Commissioner of Labor, 917 N.Y.S.2d 834, 31 Misc. 3d 398, 2011 N.Y. Misc. LEXIS 307 (N.Y. Sup. Ct. 2011), aff'd, 100 A.D.3d 519, 954 N.Y.S.2d 72, 2012 N.Y. App. Div. LEXIS 7822 (N.Y. App. Div. 1st Dep't 2012).

There is no conflict between the New York General Duty Clause, N.Y. Lab. Law § 27-a(3), and the New York Workplace Violence Protection Act (WVPA), N.Y. Lab. Law § 27-b. The General Duty Clause includes provisions regarding workplace safety in general, whereas the WVPA addresses the specific issue of workplace violence. Matter of City of New York v Commissioner of Labor, 917 N.Y.S.2d 834, 31 Misc. 3d 398, 2011 N.Y. Misc. LEXIS 307 (N.Y. Sup. Ct. 2011), aff'd, 100 A.D.3d 519, 954 N.Y.S.2d 72, 2012 N.Y. App. Div. LEXIS 7822 (N.Y. App. Div. 1st Dep't 2012).

City was not entitled to administrative relief because the Commissioner of Labor had authority to adopt regulations and issue citations to enforce the Workplace Violence Prevention Act via the Public Employee Safety and Health Act to fill in the interstices in the legislative product and the requirements for employee participation did not constitute employee veto or control over workplace evaluations or prevention programs, left room for collective bargaining, and did not violate the Taylor Law. Matter of City of New York v Commissioner of Labor, 991 N.Y.S.2d 832, 44 Misc. 3d 612, 2014 N.Y. Misc. LEXIS 2605 (N.Y. Sup. Ct. 2014).

Dismissal of a state investigator's First Amendment claim brought pursuant to 42 U.S.C.S. § 1983 did not alter the inves-

tigator's opportunity under N.Y. Lab. Law § 27-b(6)(e) and N.Y. Exec. Law. § 55 to seek protection from the retaliatory acts he alleged. D'Olimpio v Crisafi, 718 F. Supp. 2d 340, 2010 U.S. Dist. LEXIS 59563 (S.D.N.Y. 2010), aff'd, 462 Fed. Appx. 79, 2012 U.S. App. LEXIS 3278 (2d Cir. N.Y. 2012).

State investigator's speech regarding a coworker's alleged misconduct contained in his Workplace Incident Reports and his complaint to the New York Inspector General were unprotected by the First Amendment because these statements were required by law, specifically N.Y. Lab. Law § 27-b(6)(a) and N.Y. Exec. Law § 55(1). D'Olimpio v Crisafi, 718 F. Supp. 2d 340, 2010 U.S. Dist. LEXIS 59563 (S.D.N.Y. 2010), aff'd, 462 Fed. Appx. 79, 2012 U.S. App. LEXIS 3278 (2d Cir. N.Y. 2012).

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

Department of labor: public employee workplace violence prevention programs. 12 NYCRR § 800.6.

§ 27-c. Duty of public employers to develop operation plans in the event of certain declared public health emergencies.

1. Definitions. For the purposes of this section:

a. "Personal protective equipment" shall mean all equipment worn to minimize exposure to hazards, including gloves, masks, face shields, foot and eye protection, protective hearing devices, respirators, hard hats, and disposable gowns and aprons.

b. "Public employer" or "employer" shall mean the state of New York, a county, city, town, village or any other political subdivision or civil division of the state, a public authority, commission or public benefit corporation, or any other public corporation, agency, instrumentality or unit of government which exercises governmental power under the laws of this state, provided, however, that this subdivision shall not include any employer as defined in section twenty-eight hundred one-a of the education law.

c. "Contractor" shall mean an individual performing services as party to a contract awarded by the state of New York or any other public employer defined in paragraph b of this subdivision.

d. "Essential" shall refer to a designation made that a public employee or contractor is required to be physically present at a work site to perform his or her job.

e. "Non-essential" shall refer to a designation made that a public employee or contractor is not required to be physically present at a work site to perform his or her job.

f. "Communicable disease" shall mean an illness caused by an infectious agent or its toxins that occurs through the direct or indirect transmission of the infectious agent or its products from an infected individual or via an animal, vector or the inanimate environment to a susceptible animal or human host.

g. "Retaliatory action" shall mean the discharge, suspension, demotion, penalization, or discrimination against any employee, or other adverse employment action taken against an employee in the terms and conditions of employment.

2. Each public employer in the state of New York shall prepare a plan for the continuation of operations in the event that the governor declares a public health emergency involving a communicable disease. Such plans shall follow the provisions for review and publication as prescribed in subdivision four of this section.

3. The operations plan required by this section shall include, but not be limited to:

a. A list and description of positions and titles considered essential in the event of a state-ordered reduction of in-person workforce, and a justification of such consideration for each position and title included.

b. A specific description of protocols the employer will follow in order to enable all non-essential employees and contractors to telecommute including, but not limited to, facilitating or requesting the procurement, distribution, downloading and installation of any needed devices or technology, including software, data, office laptops or cell phones, and the transferring of office phone lines to work or personal cell phones as practicable or applicable to the workplace.

c. A description of how the employer will, to the extent possible, stagger work shifts of essential employees and contractors in order to reduce overcrowding on public transportation systems and at worksites.

d. A description of the protocol the employer will implement in order to procure the appropriate personal protective equipment for essential employees and contractors, based upon the various tasks and needs of such employees and contractors in a quantity sufficient to provide at least two pieces of each type of personal protective equipment to each essential employee and contractor during any given work shift over at least six months. Such description shall also include a plan for storage of such equipment to prevent degradation and permit immediate access in the event of an emergency declaration.

e. A description of the protocol in the event an employee or contractor is exposed to a known case of the communicable disease that is the subject of the public health emergency, exhibits symptoms of such disease, or tests positive for such disease in order to prevent the spread or contraction of such disease in the workplace. Such protocol shall also detail actions to be taken to immediately and thoroughly disinfect the work area of any employee or contractor known or suspected to be infected with the communicable disease as well as any common area surface and shared equipment such employee or contractor may have touched, and the employer policy on available leave in the event of the need of an employee to receive testing, treatment, isolation, or quarantine. Such protocol shall not involve any action that would violate any existing federal, state, or local law, including regarding sick leave or health information privacy.

f. A protocol for documenting precise hours and work locations, including off-site visits, for essential employees and contractors. Such protocol shall be designed only to aid in tracking of the disease and to identify the population of exposed employees and

contractors in order to facilitate the provision of any benefits which may be available to certain employees and contractors on that basis.

g. A protocol for how the public employer will work with such employer's locality to identify sites for emergency housing for essential employees in order to further contain the spread of the communicable disease that is the subject of the declared emergency, to the extent applicable to the needs of the workplace.

4. Once drafted, each public employer shall present the plan described in this section to all applicable duly recognized or certified representatives of the employer's employees, who shall then be granted an opportunity to review the plan and make recommendations, if any, provided that nothing shall preclude such representatives from making such recommendations prior to the draft being completed. The employer must consider and respond to such recommendations in writing within a reasonable timeframe. A copy of the final version of such plan shall then be published in a clear and conspicuous location, and in the employee handbook, to the extent that the employer provides such handbook to its employees, and in a location accessible on either the employer's website or on the internet accessible by employees. No employer shall take retaliatory action or otherwise discriminate against any employee for making suggestions or recommendations regarding the content of the plan.

5. The department shall establish procedures to allow for public employees or contract workers to contact and inform the department of any alleged or believed violations of any of the provisions described in this section.

6. Nothing in this section shall be deemed to impede, infringe, diminish or impair the rights of a public employee or employer under any law, rule, regulation or collectively negotiated agreement, or the rights and benefits which accrue to employees through collective bargaining agreements, or otherwise diminish the integrity of the existing collective bargaining relationship.

HISTORY:
L 2020, ch 168, § 1, effective September 7, 2020.

ARTICLE 7 General Provisions

Section
201-g. Prevention of sexual harassment.
202-l. Leave of absence for volunteer emergency responders

HISTORY:
Add, L 1921, ch 50.

§ 201-g. Prevention of sexual harassment.

1. The department shall consult with the division of human rights to create and publish a model sexual harassment prevention guidance document and sexual harassment prevention policy that employers may utilize in their adoption of a sexual harassment prevention policy required by this section.

a. Such model sexual harassment prevention policy shall: (i) prohibit sexual harassment consistent with guidance issued by the department in consultation with the division of human rights and provide examples of prohibited conduct that would constitute unlawful sexual harassment; (ii) include but not be limited to information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims of sexual harassment and a statement that there may be applicable local laws; (iii) include a standard complaint form; (iv) include a procedure for the timely and confidential investigation of complaints and ensure due process for all parties; (v) inform employees of their rights of redress and all available forums for adjudicating sexual harassment complaints administratively and judicially; (vi) clearly state that sexual harassment is considered a form of employee misconduct and that sanctions will be enforced against individuals engaging in sexual harassment and against supervisory and managerial personnel who knowingly allow such behavior to continue; and (vii) clearly state that retaliation against individuals who complain of sexual harassment or who testify or assist in any proceeding under the law is unlawful.

b. Every employer shall adopt the model sexual harassment prevention policy promulgated pursuant to this subdivision or establish a sexual harassment prevention policy to prevent sexual harassment that equals or exceeds the minimum standards provided by such model sexual harassment prevention policy. Such sexual harassment prevention policy shall be provided to all employees in writing as required by subdivision two-a of this section. Such model sexual harassment prevention policy shall be publicly available and posted on the websites of both the department and the division of human rights.

2. The department shall consult with the division of human rights and produce a model sexual harassment prevention training program to prevent sexual harassment in the workplace.

a. Such model sexual harassment prevention training program shall be interactive and include: (i) an explanation of sexual harassment consistent with guidance issued by the department in consultation with the division of human rights; (ii) examples of conduct that would constitute unlawful sexual harassment; (iii) information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims of sexual harassment; and (iv) information concerning employees' rights of redress and all available forums for adjudicating complaints.

b. The department shall include information in such model sexual harassment prevention training program addressing conduct by supervisors and any additional responsibilities for such supervisors.

c. Every employer shall utilize the model sexual harassment prevention training program pursuant to this subdivision or establish a training program for employees to prevent sexual harassment that equals or exceeds the minimum standards provided by such model training. Such sexual harassment prevention training shall be provided to all employees on an annual basis.

2-a.

a. Every employer shall provide his or her employees, in writing in English and in the language identified by each employee as the primary language of such employee, at the time of hiring and at every annual sexual harassment prevention training provided pursuant to subdivision two of this section, a notice containing such employer's sexual harassment prevention policy and the information presented at such employer's sexual harassment prevention training program.

b. The commissioner shall prepare templates of the model sexual harassment prevention policy created and published pursuant to subdivision one of this section and the model sexual harassment prevention training program produced pursuant to subdivision two of this section. The commissioner shall determine, in his or her discretion, which languages to provide in addition to English, based on the size of the New York state population that speaks each language and any other factor that the commissioner shall deem relevant. All such templates shall be made available to employers in such manner as determined by the commissioner.

c. When an employee identifies as his or her primary language a language for which a template is not available from the commissioner, the employer shall comply with this subdivision by providing that employee an English-language notice.

d. An employer shall not be penalized for errors or omissions in the non-English portions of any notice provided by the commissioner.

3. The commissioner may promulgate regulations as he or she deems necessary for the purposes of carrying out the provisions of this section.

4. Beginning in the year two thousand twenty-two, and every succeeding four years thereafter, the department in consultation with the division of human rights shall evaluate, using the criteria within this section, the impact of the current model sexual harassment prevention guidance document and sexual harassment prevention policy. Upon the completion of each evaluation the department shall update the model sexual harassment prevention guidance document and sexual harassment prevention policy as needed.

HISTORY:

L 2018, ch 57, § 1 (Part KK, Subpart E), effective October 9, 2018; L 2019, ch 160, §§ 11, 14, effective August 12, 2019.

Editor's Notes Laws 2018, ch 57, § 2 (Part KK, Subpart E), eff October 9, 2018, provides:

§ 2. This act shall take effect on the one hundred eightieth day after it shall have become a law. Effective immediately, the department of labor, in consultation with the division of human rights, is authorized to create the model sexual harassment prevention policy and the model sexual harassment prevention training program required to be created and published pursuant to section 201-g of the labor law as added by section one of this act.

Laws 2019, ch 160, § 16, eff August 12, 2019, provides:

§ 16. This act shall take effect immediately, provided, however:

(a) Sections one of this act shall take effect on the one hundred eightieth day after it shall have become a law.

(b) Sections one-a, two, three, four, five, seven, eight and nine of this act shall take effect on the sixtieth day after it shall have become a law.

(c) Section thirteen of this act shall take effect one year after it shall have become a law.

(d) Sections one, one-a, two, three, four, five, six and thirteen shall only apply to claims filed under such sections on or after the effective date of such sections.

(e) Effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized and directed to be made and completed on or before such effective date.

Amendment Notes The 2019 amendment by ch 160, § 11, added "as required by subdivision two-a of this section" in the second sentence of 1(b); and added 2(a).

The 2019 amendment by ch 160, § 14, added 4.

§ 202-l. Leave of absence for volunteer emergency responders

1. During the time that an emergency exists following a declaration of such emergency pursuant to section twenty-four or twenty-eight of the executive law, an employee may request and shall be granted a leave of absence from his or her employer while engaged in the actual performance of his or her duties as, (a) a volunteer firefighter, or (b) an enrolled member of a volunteer ambulance service pursuant to article thirty of the public health law unless the employer determines that the employee's absence would impose an undue hardship on the conduct of the employer's business as defined by paragraph (d) of subdivision ten of section two hundred ninety-six of the executive law.

2. Subdivision one of this section shall apply only when:

(a) The employer has previously received written documentation from the head of the employee's volunteer fire department or volunteer ambulance service, as applicable, notifying the employer of the employee's status as a volunteer firefighter or member of a volunteer ambulance service; and

(b) The employee's duties as a volunteer firefighter or member of a volunteer ambulance service are related to the declared emergency.

3. The entire period of the authorized leave of absence granted pursuant to this section shall either be unpaid excused leave for employees who are subject to the overtime provisions of this chapter, the federal fair labor standards act and regulations promulgated thereunder, or may otherwise be charged against any other leave to which such employee is entitled, as determined by the employee.

4. Upon the employer's request, an employee who has been granted a leave of absence in accordance

with this section shall provide his or her employer with a notarized statement from the head of the volunteer fire department or volunteer ambulance service, as applicable, certifying the period of time, or times, that said employee responded to any emergency pursuant to this section.

5. Nothing set forth in this section shall be construed to impede, infringe or diminish the rights and benefits which accrue to employees through bona fide collective bargaining agreements, or otherwise diminish the integrity of the existing collective bargaining relationship.

6. As used in this section, employer does not include the state. Nothing set forth in this section shall be construed as superseding, limiting, or otherwise affecting the provisions of section eighty-two-a of the civil service law, providing for authorized absences for public officers and employees of the state.

HISTORY:
Add, L 2014, ch 393, § 1, eff Dec 22, 2014; amd, L 2014, ch 376, § 1, eff Dec 22, 2014.

Amendment Notes The 2014 amendment by ch 376, § 1, in 2(a), added "volunteer" following "employee's" and substituted "and" for "or" at the end.

ARTICLE 8 Public Work

Section
220. Hours, wages and supplements
220-h. Occupational Safety and Health Administration (OSHA) construction safety and health course

HISTORY:
Add, L 1921, ch 50.

§ 220. Hours, wages and supplements

* * * * *

3. (a) The wages to be paid for a legal day's work, as hereinbefore defined, to laborers, workmen or mechanics upon such public works, shall be not less than the prevailing rate of wages as hereinafter defined. Serving laborers, helpers, assistants and apprentices shall not be classified as common labor and shall be paid not less than the prevailing rate of wages as hereinafter defined. No employee shall be deemed to be an apprentice unless he is individually registered in an apprenticeship program which is duly registered with the commissioner of labor in conformity with the provisions of article twenty-three of this chapter. The wages to be paid for a legal day's work, as hereinbefore defined, to laborers, workmen or mechanics upon any material to be used upon or in connection therewith, shall be not less than the prevailing rate for a day's work in the same trade or occupation in the locality within the state where such public work on, about or in connection with which such labor is performed in its final or completed form is to be situated, erected or used. Such contracts shall contain a provision that each laborer, workman or mechanic, employed by such contractor, subcontractor or other person about or upon such public work, shall be paid the wages herein provided.

(b) The supplements, as hereinafter defined, to be provided to laborers, workmen or mechanics upon such public works, shall be in accordance with the prevailing practices in the locality, as hereinafter defined. Serving laborers, helpers, assistants and apprentices shall not be classified as common labor and shall be provided supplements in accordance with the prevailing practices as hereinafter defined. No employee shall be deemed to be an apprentice unless he is individually registered in an apprenticeship program which is duly registered with the industrial commissioner in conformity with the provisions of article twenty-three of this chapter. The supplements, as hereinafter defined, to be provided to laborers, workmen or mechanics upon any material to be used upon or in connection therewith, shall be in accordance with the prevailing practices in the same trade or occupation in the locality within the state where such public work on, about or in connection with which such labor is performed in its final or completed form is to be situated, erected or used. Such contracts shall contain a provision that each laborer, workman or mechanic, employed by such contractor, subcontractor or other person about or upon such public work, shall be provided the supplements as required in this article.

(c) It shall be the duty of the fiscal officer, as defined in this section, to ascertain and determine the schedules of supplements to be provided and wages to be paid workers, laborers and mechanics on such public work, prior to the time of the advertisement for bids, and such schedules shall be annexed to and form a part of the specifications for the work. Such fiscal officer shall file with the department having jurisdiction such schedules prior to the time of the commencement of the advertisement for bids on all public works proposed to be constructed. The term "contract" as used in this article also shall include reconstruction and repair of any such public work, and any public work performed under a lease, permit or other agreement pursuant to which the department of jurisdiction grants the responsibility of contracting for such public work to any third party proposing to perform such work to which the provisions of this article would apply had the department of jurisdiction contracted directly for its performance, or where there is no lease, permit or other agreement and ownership of a public work is intended to be assumed by such public entity at any time subsequent to completion of the public work.

(d) (i) Any person that participates in a public works project in the capacity of a contractor or subcontractor and who wilfully fails to pay or provide the prevailing rate of wage or supplements and:

(1) such failure results in underpayments, which in the aggregate amount to all workers employed by such person, results in an amount less than twenty-five thousand dollars, shall be guilty of a class A misdemeanor;

(2) such failure results in underpayments, which in the aggregate amount to all workers employed by such person, result in an amount greater than twenty-five thousand dollars, that person shall be guilty of a class E felony;

(3) such failure results in underpayments, which in the aggregate amount to all workers employed by such person, result in an amount greater than one hundred thousand dollars, that person shall be guilty of a class D felony; or

(4) such failure results in underpayments, which in the aggregate amount to all workers employed by such person, result in an amount greater than five hundred thousand dollars, that person shall be guilty of a class C felony.

(ii) Disposition for violations of this section shall be in accordance with the penal law. Fines upon conviction for any violation of this section shall be in accordance with the penal law.

(iii) In addition to the penalties set forth above, any such person convicted of a second offense under subparagraph (i) of this paragraph within five years shall disgorge profits and shall not be entitled to receive any monies due and owing on the contract or subcontract; nor shall any officer, agent or employee of the department of jurisdiction or its financial officer pay to such person any such monies. Notwithstanding the foregoing, the department of jurisdiction may release monies due and owing on the contract or subcontract which have not been withheld pursuant to section two hundred twenty-b of this article for the sole purpose of satisfying the contractor's or subcontractor's obligations under the contract or subcontract to third parties who were not themselves involved in the violations giving rise to the subsequent offense. For the purposes of this subdivision, third parties shall include, but not be limited to, contractors, subcontractors, materialmen, and funds, plans, and programs providing pension, health, and welfare benefits to workmen, laborers, and mechanics employed pursuant to such contract or subcontract. The department of jurisdiction may release such monies upon the application of the contractor provided that no monies shall be released without the written approval of the fiscal officer or by order of a court of competent jurisdiction.

(iv) In addition to the penalties set forth above, every contract for a public work project shall contain a term stating that the filing of payrolls in a manner consistent with subdivision three-a of this section is a condition precedent to payment of any sums due and owing to any person for work done upon the project.

(e) The commissioner shall ensure that all supplements due under this article shall be paid to or on behalf of an employee. The commissioner shall require proof that the pension plan for which any supplement has been paid is qualified as a bona fide plan by the United States internal revenue service. Acceptable proof shall be shown by submission of a determination letter issued by the United States internal revenue service.

* * * * *

HISTORY:

Add, L 1921, ch 50, eff March 9, 1921, with substance transferred from former §§ 3, 10; amd, L 1927, ch 563, § 1,1, 2; L 1935, ch 15, eff March 1, 1935; L 1935, ch 300, § 1, eff April 5, 1935; L 1938, ch 727; L 1939, ch 388, § 1; L 1939, ch 832, § 1; L 1941, ch 656; L 1942, ch 571; L 1943, ch 281; L 1943, ch 485; L 1946, ch 640; L 1947, ch 261; L 1947, ch 851, eff April 14, 1947; L 1947, ch 869; L 1948, ch 29; L 1956, ch 750, § 1, eff April 1, 1956; L 1959, ch 586; L 1962, ch 118, § 3, eff March 6, 1962; L 1962, ch 310, §§ 246, 247; L 1965, ch 845, § 76, eff Sept 1, 1965; L 1965, ch 1031, § 138, eff Sept 1, 1967, deriving from Penal § 1271(1); L 1966, ch 976, eff Sept 1, 1966; L 1967, ch 502, eff April 24, 1967; L 1967, ch 503, eff July 1, 1967; L 1968, ch 305, § 1; L 1969, ch 437, §§ 1, 2, eff Oct 1, 1969; L 1973, ch 503, § 1; L 1975, ch 752, §§ 1, 2; L 1976, ch 933, §§ 2, 3; L 1978, ch 336, §§ 1–3, eff Aug 18, 1978; L 1980, ch 363, § 1; L 1980, ch 695, § 1; L 1980, ch 696, § 1; L 1983, ch 447, §§ 2–6, eff July 15, 1983; L 1984, ch 230, § 1, eff June 19, 1984; L 1984, ch 767, § 1, eff Aug 3, 1984; L 1985, ch 137, §§ 2-4, eff Jan 1, 1986; L 1988, ch 314, § 1, eff July 25, 1988; L 1989, ch 642, § 1; L 1989, ch 752, § 1, eff July 25, 1989; L 1992, ch 55, § 165, eff April 10, 1992; L 1993, ch 162, § 2, eff Dec 25, 1993; L 1994, ch 170, § 207, eff July 1, 1994; L 1997, ch 565, § 1; L 1998, ch 547, § 1, eff Oct 4, 1998; L 1999, ch 458, § 1, eff Sept 7, 1999; L 1999, ch 491, § 1, eff Sept 7, 1999; L 2001, ch 203, § 1, eff Nov 18, 2001; L 2005, ch 720, § 1, eff Oct 11, 2005; L 2007, ch 629, § 1, eff Feb 24, 2008; L 2007, ch 678, §§ § 1, 2, eff Oct 27, 2007; L 2008, ch 7, §§ 1–7, eff April 27, 2008; L 2008, ch 8, §§ 1, 2-4, eff April 27, 2008; L 2008, ch 8, § 3–a, eff Feb 24, 2008; L 2008, ch 63, § 1, eff Feb 24, 2008; L 2008, ch 591, § 1, eff Sept 25, 2008; L 2011, ch 62, § 104 (Part A), eff Oct 3, 2011; L 2019, ch 744, §§ 1–3, effective June 23, 2020; L 2020, ch 86, §§ 2–5, effective June 23, 2020.

Prior Law: Former § 220, add, L 1909, ch 36; repealed, L 1921, ch 50.

Revision Notes: [1966, ch 976] This act was prepared under the direction of the New York State Department of Labor and was introduced at its request.

Editor's Notes See 1962 note under § 220-b.

See 1980 note below.

Laws 1947, ch 851, § 1, provides as follows:

§ 1. It is the policy of this state as provided in section seventeen of article one of the constitution to restrict the labor of laborers, workmen and mechanics employed upon public work performed by the state and its subdivisions to a maximum of eight hours per day and five days per week, except in cases of extraordinary emergency. It is hereby recognized that there are two types of extraordinary emergency: (1) a sudden or unexpected occurrence or condition calling for immediate action and (2) a continuing emergency, more general in character and arising out of economic or social conditions.

Provision for allowing additional hours of labor upon public work during the first type of emergency is specifically made in the labor law.

In the wake of world war II, an emergency of the second type now exists. In many areas of the state sufficient laborers, workmen and mechanics cannot be employed to carry on public work expeditiously, for the reason that on such public work labor is restricted to eight hours per day and five days per week, while on federal work and private work in the same vicinity employment is available, and upon such federal and private work laborers, workmen and mechanics are permitted to work more hours per day and more days per week and hence are able to earn a larger amount of money than on such public work. As a result, important public work is being delayed, particularly that involving highways, which have already been subjected to long years of neglect and the construction and reconstruction of which is not only seasonal but subject to delay caused by inclement weather.

It is hereby declared to be in the interest of the people of this state, as well as in the interest of the laborers, workmen and mechanics who earn their living on construction work, and in conformance with the public policy of this State to permit laborers, workmen and mechanics to work more than eight hours per day and more than five days per week on public work in cases of extraordinary emergency, whether such emergency be of the first or of the second type discussed herein. Therefore, the necessity for the enactment of this act is hereby declared as a matter of legislative determination.

Laws 1980, ch 695, § **4,** eff August 29, 1980, provides as follows:

§ 4. This act shall take effect on the sixtieth day after it shall have become a law provided, however, that the provisions of subdivision eight of section two hundred twenty, subdivision two of section two hundred twenty-b and subdivision five of section two hundred thirty-five of the labor law, as amended by sections one, two and three of this act shall only be construed to require the payment of interest in the manner provided for in such respective subdivisions upon underpayments in the payment of wages and/or supplements occurring on and after such effective date, provided, further that where payments upon an underpayment which occurred prior to the effective date of this act is not made until a time subsequent to such effective date interest in the manner provided for in such subdivisions shall accrue on such underpayment from the effective date of this act and shall continue until payment of the underpayment.

Laws 1980, ch 696, § **5,** eff August 29, 1980, provides as follows:

§ 5. This act shall take effect on the sixtieth day after it shall have become a law, provided, however, that the provisions of subdivision eight of section two hundred twenty, subdivision two of section two hundred twenty-b and subdivision five of section two hundred thirty-five of the labor law as amended by sections one, two and four of this act shall only be construed to authorize the imposition of civil penalties in the manner provided for in such respective subdivisions upon underpayments in the payment of wages and/or supplements occurring on and after such effective date.

Laws 1983, ch 447, §§ **1, 9** eff July 15, 1983, provide as follows:

Section 1. Legislative findings and intent. Because the constitution of the state of New York requires workers on public works projects to be compensated at a rate of wage not less than that prevailing in the locality in which the work is done, and because collective bargaining has been recognized as the most efficient and effective means of achieving competitive wage agreements, the legislature finds and declares it to be in the public interest that determinations of prevailing wages shall be made in accordance with the rates of wages paid pursuant to collective bargaining agreements in the locality in which the work is done.

§ 9. This act shall take effect immediately and shall apply to all public works contracts sent out to bid on or after such date.

Laws 1985, ch 137, §§ **1, 11** eff Jan 1, 1986, provide as follows:

Section 1. Legislative findings. The enactment of chapter four hundred forty-seven of the laws of nineteen hundred eighty-three served to significantly revamp and update the process and procedure for prevailing wage compliance for public works projects in New York state. In a further effort to safeguard the rights of the workers of the state provided by article eight of the labor law, the legislature finds it necessary to supplement and reorganize the state's enforcement capabilities with respect to such article.

§ 11, This act shall take effect January first, nineteen hundred eighty-six and shall apply to all public works contacts sent out to bid on or after such date.

Laws 1993, ch 162, § **3,** eff Dec 25, 1993, provides as follows:

§ 3. This act shall take effect on the one hundred eightieth day after it shall have become a law, provided however, that effective immediately, the addition, amendment and/or repeal of any rules or regulations necessary for the implementation of this act on its effective date is authorized and directed to be made and completed on or before such effective date.

Laws 2007, ch 629, § **2,** eff Feb 24, 2008, provides as follows:

§ 2. This act shall take effect on the one hundred eightieth day after it shall have become a law. Effective immediately, the addition, amendment and/or repeal of any rules or regulations necessary for the implementation of this act on its effective date is authorized to be made and completed on or before such effective date.

Laws 2007, ch 678, § **5,** eff Oct 27, 2007, provides as follows:

§ 5. This act shall take effect on the sixtieth day after it shall have become a law, and shall apply to all contracts or other agreements entered into on or after such date (Amd, L 2012, ch 389, § 1, eff Aug 17, 2012.).

Laws 2008, ch 7, § **11,** eff April 27, 2008, provides as follows:

§ 11. This act shall take effect on the ninetieth day after it shall have become a law and shall apply to all contracts entered into on or after such effective date, except as to subparagraph (iv) of paragraph (d) of subdivision 3 of section 220-a of the labor law, as added by section two of this act, which shall apply to all contracts advertised or solicited after such effective date. (Amd, L 2008, ch 8, § 8, eff April 27, 2008.).

Laws 2008, ch 8, § **9,** eff April 27, 2008, provides as follows:

§ 9. This act shall take effect on the same date and in the same manner as a chapter of the laws of 2007, amending the labor law and the general municipal law relating to guaranteeing payment of prevailing wages to the workers of New York state, as proposed in legislative bills numbers S. 5506-A and A. 8582-A, takes effect; provided, however that the amendments to subparagraphs (iii) and (iv) of paragraph a of subdivision 3-a of section 220 of the labor law made by section three-a of this act shall take effect on the same date and in the same manner as chapter 629 of the laws of 2007, takes effect, when upon such date the provisions of section three of this act shall expire and be deemed repealed.

Laws 2012, ch 389, § **1,** eff Aug 17, 2012, amended L 2007, ch 678, § 5 so as to delete the expiration date applicable to sub 2 and to sub 3, par c.

Laws 2019, ch 744, § **4,** eff June 23, 2020, provides:

§ 4. This act shall take effect on the one hundred eightieth day after it shall have become a law and shall only apply to public work contracts entered into on or after such effective date.

Laws 2020, ch 86, § **6,** eff June 23, 2020, provides:

§ 6. This act shall take effect on the same date and in the same manner as a chapter of the laws of 2019, amending the labor law relating to additional information provided to employees on public work contracts, as proposed in legislative bills numbers S. 5679-A and A. 2101-A, takes effect.

Amendment Notes 2011. Chapter 62, § 104 (Part A) amended:

Sub 8, first undesignated par by substituting at fig 1 "superintendent of financial services" for "superintendent of insurance".

2008. Chapter 7, § 1 amended:

Sub 2-a by deleting at fig 1 "therefor" and adding the matter in italics.

2008. Chapter 7, § 3 amended:

By designating sub 3, first–third undesignated pars as sub 3, pars (a)–(c), respectively.

By designating sub 3, fourth undesignated par as sub 3, par (d), subpar (i), opening par and sub 3, par (d), subpar (i), cl (1).

Sub 3, par (d), subpar (i), opening par by deleting at fig 1 "or corporation", at fig 2 "pays or provides after entering into such contract or a subcontract to perform on any portion of such contract, less than such stipulated", at fig 3 "scale", at

fig 4 "as established by the fiscal officer" and adding the matter in italics.

Sub 3, par (d), subpar (i), cl (1) by deleting at fig 1 "and upon conviction shall be punished for such first offense by a fine of five hundred dollars or by imprisonment for not more than thirty days, or both fine and imprisonment; for a second offense by a fine of one thousand dollars, and in addition thereto the contract on which the violation has occurred shall be forfeited; and no such person or corporation shall be entitled to receive any sum nor shall any officer, agent or employee of the state, municipal corporation or commission or board appointed pursuant to law pay the same or authorize its payment from the funds under his charge or control to any person or corporation for work done upon any contract, on which the contractor has been convicted for second offense in violation of the provisions of this section." and adding the matter in italics.

By adding sub 3, par (d), subpar (i), cls (2)–(4).

By adding sub 3, par (d), subpar (ii).

By designating sub 3, fifth undesignated par as sub 3, par (e).

2008. Chapter 7, § 3 amended:

By designating part of sub 3-a, par a as sub 3-a, par a, subpar (i).

2008. Chapter 7, § 4 amended:

By adding sub 3-a, par d.

2008. Chapter 7, § 6 amended:

Sub 7 by deleting at fig 1 "or corporation" and adding the matter in italics.

Sub 7-a by deleting at fig 1 "willfullness", at fig 2 "for the purposes of", at fig 3 "of the last undesignated" and adding the matter in italics.

Sub 8, closing par by deleting at fig 1 "or corporation" and adding the matter in italics.

2008. Chapter 7, § 7 amended:

Sub 9 by deleting at fig 1 ", or corporation", at fig 2 "for a first offense by a fine of five hundred dollars or by imprisonment for not more than thirty days, or by both such fine and imprisonment; for a second offense by a fine of one thousand dollars,", at figs 3 and 4 "or corporation" and adding the matter in italics.

2008. Chapter 8, § 2 amended:

Sub 3, par (d), subpar (iii) by deleting at fig 1 "without the written approval of the fiscal officer or by order of a court of competent jurisdiction" and adding the matter in italics.

Sub 3, par (d), subpar (iv) by deleting at fig 1 "no officer, agent or employee of the state, municipal corporation or commission or board appointed pursuant to law is authorized to pay or direct payment of any sums due and owing to any person for work done upon any project, on which the person has failed to file payrolls as specified in subdivision three-a of this section or where payment is prohibited pursuant to subparagraph (iii) of this paragraph" and adding the matter in italics.

2008. Chapter 8, § 3-a amended:

Sub 3-a, par a, subpar (iii) by deleting at fig 1 "five" and adding the matter in italics.

Sub 3-a, par a, subpar (iv) by deleting at figs 1 and 2 "certified" and adding the matter in italics.

2008. Chapter 8, § 4 amended:

By repealing former sub 5, par l.

By redesignating form sub 5, par m as sub 5, par l.

2008. Chapter 591, § 1 amended:

By adding sub 3-a, par e.

2008. Chapter 63, § 1 amended:

Sub 3-a, par a, subpar (ii) by deleting at figs 1–3 "department", at figs 4–6 "commissioner" and added the matter in italics.

2007. Chapter 678, § 1 amended:

Sub 2 by deleting at figs 1, 3, 6, 8, 11, 12 and 14 "workmen", at fig 2 "workman", at figs 4, 5, 7, 9, 10, 13 and 15 "industrial" and adding the matter in italics.

The 2019 amendments by ch 744, §§ 1–3, added the 3(e)(i) designation; added 3(e)(ii); rewrote 3-a(a)(ii); in 3-a(a)(iii), added the second, sixth, and seventh sentences, added "commissioner, or the fiscal officer" in the eight sentence; in 6, added "including information regarding the amounts to be paid per hour for each supplement provided for each particular job classification" in the first sentence and added the third sentence; and made stylistic changes.

The 2020 amendments by ch 86, §§ 2–5, deleted the (3)(e)(i) designation; deleted former (3)(e)(ii); in the first paragraph of (3-a)(a)(ii), substituted "rates of wages" for "rate of wage" in the fourth sentence, rewrote the fifth and ninth sentences and deleted the former sixth sentence; rewrote the second sentence of (3-a)(a)(iii); in 6, deleted "including information regarding the amounts to be paid per hour for each supplement provided for each particular job classification" at the end of the first sentence and deleted the former second sentence; and added the second and third sentences of (3-a)(c).

Repeal Notes; [1969] Subdivision 3-b of § 220 of the Labor Law establishing the Public Work Advisory Board, was repealed by this act. The Board is reconstituted by the new subdivision 3-b added by this act.

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1. In general

Provisions of CLS Labor § 220 which do not permit trainees registered in programs of federal Department of Labor to be paid wages less than journey-level workers are not preempted by federal regulations, despite stated policy of Federal-Aid Highway Act (23 USCS §§ 101 et seq.) to "fully utilize" all available training and skill improvement opportunities for designated workers, since "full utilization" policy declaration (23 CFR § 230.107(b)) neither mandates that states use federally trained workers nor constitutes limitation on range of programs which state may use so long as state achieves its affirmative action training goal. Tap Electrical Contracting Service, Inc. v Hartnett, 76 N.Y.2d 164, 556 N.Y.S.2d 988, 556 N.E.2d 427, 1990 N.Y. LEXIS 1308 (N.Y. 1990).

Requirement under CLS Labor § 220 that employer pay workers registered in federal training programs journey-level wages did not conflict with either prevailing wage requirements of Davis-Bacon Act (40 USCS § 276a) or training program's exemption for federal trainees from requirements of act(23 USCS § 113(c)) since CLS Labor § 220 does not purport to raise minimum wage paid to federal trainees and merely requires that state-registered trainees be hired instead of federal trainees. Tap Electrical Contracting Service, Inc. v Hartnett, 76 N.Y.2d 164, 556 N.Y.S.2d 988, 556 N.E.2d 427, 1990 N.Y. LEXIS 1308 (N.Y. 1990).

N.Y. Lab. Law § 220 prevailing wage law mandate did not apply to all charter school projects because only four public entities were identified under § 220(2): the state, a public benefit corporation, a municipal corporation, or a commission; the statute did not expressly apply to educational corporations, and that included charter schools. NY Charter School v Smith, 15 N.Y.3d 403, 914 N.Y.S.2d 696, 940 N.E.2d 522, 2010 N.Y. LEXIS 2950 (N.Y. 2010).

Section 220 of the Labor Law must be accorded a liberal construction. Long Island Lighting Co. v Industrial Comm'r, 40 A.D.2d 1003, 338 N.Y.S.2d 751, 1972 N.Y. App. Div. LEXIS 3063 (N.Y. App. Div. 2d Dep't 1972), app. dismissed, 32 N.Y.2d 646, 342 N.Y.S.2d 852, 295 N.E.2d 652, 1973 N.Y. LEXIS 1452 (N.Y. 1973), aff'd, 34 N.Y.2d 725, 357 N.Y.S.2d 493, 313 N.E.2d 787, 1974 N.Y. LEXIS 1607 (N.Y. 1974).

Provisions of Labor Law mandating inclusion in contracts to which public entity is party a clause that wages to be paid shall not be less than prevailing rate of wages and requiring that applicable wage schedule be annexed to work specifications before advertising for bids seek to insure that workmen on public projects will receive adequate wages and to afford protection to contractor by giving him some foreknowledge of potential labor cost when bidding on project. Brang Co. v State University Constr. Fund, 47 A.D.2d 178, 365 N.Y.S.2d 914, 1975 N.Y. App. Div. LEXIS 8739 (N.Y. App. Div. 3d Dep't 1975).

Request for writ of mandate or declaratory relief brought by several contractors and contractors' associations to challenge Commissioner of Labor's administration of CPL Labor § 220 was properly dismissed; plaintiffs lacked standing to bring suit since they did not demonstrate any injury or harmful effect on themselves stemming from alleged misadministration, and they pleaded no justiciable controversy since they presented no specific set of facts for court to consider. Associated General Contractors, New York State Chapter, Inc. v Roberts, 122 A.D.2d 406, 505 N.Y.S.2d 220, 1986 N.Y. App. Div. LEXIS 59719 (N.Y. App. Div. 3d Dep't 1986).

Commissioner properly determined that employer willfully failed to pay prevailing wages in violation of CLS Labor § 220, in that employer knew or should have known that 2 of its employees who operated equipment for substantial portion of work week were being paid as laborers rather than as equipment operators, since there was nothing irrational in commissioner's interpretation and application of statutory term "willfully," and employer's good faith in cooperating with investigation and in promptly remedying violation did not preclude finding of willfulness. In re Cam-Ful Industries, Inc., 128 A.D.2d 1006, 513 N.Y.S.2d 539, 1987 N.Y. App. Div. LEXIS 44654 (N.Y. App. Div. 3d Dep't 1987).

Evidence sustained determination by Commissioner of Labor that petitioner willfully failed to pay prevailing wages and supplements to 8 employees by classifying them as laborers and carpenters rather than as plumbers, since evidence showed that petitioner knew or should have known that employees were performing plumbing work while they were classified and paid lower wages as laborers and carpenters; "willful" does not imply criminal intent to defraud, but requires only that petitioner acted knowingly, intentionally, or deliberately. Frey & Campbell, Inc. v Hartnett, 139 A.D.2d 928, 527 N.Y.S.2d 1022, 1988 N.Y. App. Div. LEXIS 4188 (N.Y. App. Div. 4th Dep't 1988).

"Trade or occupation" classifications and prevailing wage determinations made by Department of Labor for public work project, pursuant to CLS Labor § 220, were not subject to rule promulgation requirements of State Administrative Procedure Act, since they were established on case-by-case analysis of work to be performed and thus did not constitute rule or regulation requiring filing under CLS St Adm P Act § 102; moreover, CLS Labor § 220 adequately outlines department's classification requirements, and thus rule promulgation of classification process is unnecessary. GE v N.Y. State Dep't of Labor, 154 A.D.2d 117, 551 N.Y.S.2d 966, 1990 N.Y. App. Div. LEXIS 1881 (N.Y. App. Div. 3d Dep't), aff'd, 76 N.Y.2d 946, 563 N.Y.S.2d 764, 565 N.E.2d 513, 1990 N.Y. LEXIS 3416 (N.Y. 1990).

In regard to application of CLS Labor § 220, there is no statutory requirement that state be direct party to challenged contract since wage and supplement provisions apply broadly to laborers, workers or mechanics on public works. Bridgestone/Firestone, Inc. v Hartnett, 175 A.D.2d 495, 572 N.Y.S.2d 770, 1991 N.Y. App. Div. LEXIS 10424 (N.Y. App. Div. 3d Dep't 1991).

Commissioner of Labor was preempted by Employee Retirement Income Security Act of 1974, 29 USCS §§ 1001 et seq. (ERISA) from collecting supplemental benefits pursuant to CLS Labor § 220 on public works contract incorporating schedule that listed supplemental benefits item by item, which is impermissible, despite fact that Labor Department's audit procedures were based on "total package" approach, by which department's investigators totaled amounts listed on schedule and compared that figure to total amount of supplements paid by subcontractor. Beltrone Constr. Co. v McGowan, 260 A.D.2d 870, 688 N.Y.S.2d 783, 1999 N.Y. App. Div. LEXIS 4217 (N.Y. App. Div. 3d Dep't 1999).

After the New York State Department of Labor found that a first contractor was a substantially-owned affiliated entity of a second contractor within the meaning of N.Y. Lab. Law §§ 220-b(3)(b), 220(5)(g), a preliminary injunction enjoining enforcement of the Department's debarment order against the first contractor was erroneously granted, as the first contractor failed to demonstrate the likelihood of success on its claim that the Department's determination was arbitrary and capricious given that (1) the first contractor's owner was the son of the second contractor's owner; (2) both contractors shared office equipment and a secretary and were in the same building; and (3) the first contractor, after the second contractor was debarred, hired one of the second contractor's former employees and began bidding on projects of the type formerly bid upon by the second contractor. Bistrian Materials, Inc. v Angello, 296 A.D.2d 495, 747 N.Y.S.2d 97, 2002 N.Y. App. Div. LEXIS 7513 (N.Y. App. Div. 2d Dep't 2002).

Contractor had standing to bring a claim under N.Y. Pub. Health Law § 2818 because the contractor had bid unsuccessfully for the electrical work on the construction project, a new hospital; therefore, the contractor sustained an injury-in-fact since it lost the opportunity to perform the electrical work for the new hospital, and to benefit financially. Furthermore, the contractor was within the zone of interests protected by § 2818 since it bid for the contract at the prevailing wage rates, consistent with N.Y. Lab. Law art. 8. Maraia v Orange Regional Med. Ctr., 63 A.D.3d 1113, 882 N.Y.S.2d 287, 2009 N.Y. App. Div. LEXIS 5346 (N.Y. App. Div. 2d Dep't 2009).

The Immigration Reform and Control Act of 1986 did not preempt New York Labor Law with regard to the payment of the prevailing wage to workers under New York Labor Law article 8. Pineda v Kel-Tech Constr., Inc., 832 N.Y.S.2d 386, 15 Misc. 3d 176, 237 N.Y.L.J. 20, 2007 N.Y. Misc. LEXIS 103 (N.Y. Sup. Ct. 2007).

Trial court should have dismissed defendant's counterclaims for underpayment of wages where no private right of action for the underpayment of wages exists under N.Y. Lab. Law § 220 until an administrative determination in the employee's favor has been made and has gone unreviewed or has been affirmed, and the record revealed that an audit by the state labor department was still ongoing nearly three years after the counterclaims were asserted. Marren v Ludlam, 14 A.D.3d 667, 790 N.Y.S.2d 146, 2005 N.Y. App. Div. LEXIS 795 (N.Y. App. Div. 2d Dep't), app. dismissed, 5 N.Y.3d 824, 804 N.Y.S.2d 38, 837 N.E.2d 737, 2005 N.Y. LEXIS 2538 (N.Y. 2005).

No private cause of action for underpayment of wages existed under N.Y. Lab. Law § 220 until an administrative determination in the employee's favor was made and went unreviewed or was affirmed, and, moreover, such private right of action belonged only to those employees who had gone underpaid; where a subcontractor brought suit against a general contractor for breach of contract, the general contractor had no standing to assert an affirmative defense based on its allegation that the subcontractor had failed to pay its employees in accordance with the prevailing wage provision of N.Y. Lab. Law § 220. P & T Iron Works v Talisman Contr. Co., 18 A.D.3d 527, 795 N.Y.S.2d 306, 2005 N.Y. App. Div. LEXIS 5094 (N.Y. App. Div. 2d Dep't 2005).

CLS Labor § 220 is not preempted by National Labor Relations Act (29 USCS §§ 151 et seq.) since federal statute is concerned with ensuring equitable bargaining process, not with substantive terms that may emerge from bargaining, and state statute (which establishes minimum labor standards) affects union and nonunion employees equally, and neither encourages nor discourages collective-bargaining processes. General Elec. Co. v New York State Dep't of Labor, 891 F.2d 25, 1989 U.S. App. LEXIS 18243 (2d Cir. N.Y. 1989), cert. denied, 496 U.S. 912, 110 S. Ct. 2603, 110 L. Ed. 2d 283, 1990 U.S. LEXIS 2851 (U.S. 1990).

As matter of law, labor union was not intended third-party beneficiary of provision of collective bargaining agreement that purportedly bound contractor to make fund payments to union's employee benefit plan, as such provision was nothing more than promise to uphold provisions of CLS Labor §§ 220 and 220-d. Plumbing Indus. Bd. Plumbing Local Union No. 1 v L & L Masons, 927 F. Supp. 645, 1996 U.S. Dist. LEXIS 5168 (S.D.N.Y. 1996), aff'd sub. nom., Plumbing Indus. Bd., Plumbing Local Union No. 1 v E.W. Howell Co., 126 F.3d 61, 1997 U.S. App. LEXIS 24047 (2d Cir. N.Y. 1997).

2. Purpose

By enactment of this section, the legislature intended to impose upon the state and its municipal corporations or civil subdivisions the same obligations to pay the prevailing rate of wages to laborers, workmen and mechanics upon its public works in ungraded or noncompetitive employment in classified public service, that it imposes upon persons or corporations constructing public works by contract with the state or a civil division thereof. Gaston v Taylor, 274 N.Y. 359, 9 N.E.2d 9, 274 N.Y. (N.Y.S.) 359, 1937 N.Y. LEXIS 854 (N.Y. 1937).

§ 220 discloses basic underlying policy that persons employed on public works shall receive prevailing rate of wages which is received by those doing the same work outside public employment; this is attempt to insure that persons engaged on public works are not penalized by receiving lower rate of wages. Kelly v Beame, 15 N.Y.2d 103, 256 N.Y.S.2d 329, 204 N.E.2d 491, 1965 N.Y. LEXIS 1649 (N.Y. 1965).

City of Rochester ordinance providing for preference to bidders on municipal contracts where bidders' employees participate in state approved apprenticeship program for certain trades, is invalid as violative of Gen Mun Law § 103 and similar legislative enactments requiring competitive bidding; although state's public policy embodied in Labor Law §§ 220, 810 and 817, is to encourage sound apprenticeship training standards and to equalize minimum labor costs between union contractors and nonunion employers, apprenticeship programs are undertaken voluntarily, and prevailing rate of wages statute is fulfilled when contractor pays in cash, totally or partially, cost of prevailing supplemental benefits to his employees; predominent purpose of legislature was protection of public fisc by requiring competitive bidding, and while apprentice training is desirable end, it was not intended to affect qualification of an otherwise responsible low bidder. Associated Builders & Contractors, Inc. v Rochester, 67 N.Y.2d 854, 501 N.Y.S.2d 653, 492 N.E.2d 781, 1986 N.Y. LEXIS 17597 (N.Y. 1986).

The purpose of the statute was to require the state and its subdivisions to fix a minimum rate of wage to be paid upon public works projects and thereby eliminate the necessity of compelling a laborer to make complaint to the industrial commissioner, under subd. 7 of this section, and thereafter to await determination thereon by the industrial commissioner before he might bring an action. Corti v Wexler, 287 N.Y.S. 243, 159 Misc. 116, 1936 N.Y. Misc. LEXIS 1084 (N.Y. Sup. Ct. 1936).

This section is designed to provide mechanics, laborers, and workmen a rate of pay commensurate with rates paid to a majority of employees in private industry engaged on public work in the same locality. Dinan v Patterson, 83 N.Y.S.2d 834, 193 Misc. 92, 1948 N.Y. Misc. LEXIS 3454 (N.Y. Sup. Ct. 1948), aff'd, 275 A.D. 801, 88 N.Y.S.2d 917, 1949 N.Y. App. Div. LEXIS 4538 (N.Y. App. Div. 1949).

While the prime purpose in enacting this section is to provide protection against possible injustice on the part of contractors in dealing with laborers and mechanics, under § 210 any citizen may maintain a mandamus proceeding to compel certification of a proposed schedule of wage rates and supplemental benefits, including the successful bidder on a public contract. Gottlieb Contracting, Inc. v Beame, 41 Misc. 2d 1097, 247 N.Y.S.2d 237, 1964 N.Y. Misc. LEXIS 2110 (N.Y. Sup. Ct. 1964).

3. Constitutionality

A contract for street improvement is not invalid because it requires bidders to observe the provisions of the Labor Law, a part of which was declared unconstitutional before the bids were made, where the contract only provided for compliance with the provisions of the laws which were enforced when the price for the work was not increased by reason of such provision and the contract would stand unimpaired if the unconstitutional part of the labor were eliminated therefrom. People ex rel. North v Featherstonhaugh, 172 N.Y. 112, 64 N.E. 802, 172 N.Y. (N.Y.S.) 112, 1902 N.Y. LEXIS 657 (N.Y. 1902).

This section is not violative of the N. Y. Const., in so far is it requires payment of the "prevailing rate" of wages on public works, on the ground that it is unintelligible; there is no constitutional immunity against ambiguous contractual obligations. Campbell v New York, 244 N.Y. 317, 155 N.E. 628, 244 N.Y. (N.Y.S.) 317, 1927 N.Y. LEXIS 1059 (N.Y. 1927).

Section 220 is a valid exercise of legislative power. Rooney v McGoldrick, 280 N.Y. 632, 20 N.E.2d 1009, 280 N.Y. (N.Y.S.) 632, 1939 N.Y. LEXIS 1453 (N.Y. 1939).

By requiring that each public works contract entered into with a governmental entity include a provision mandating that prevailing wages be paid to everyone employed on that project, the New York Legislature did not unduly interfere with a self-employed electrician and business owner's freedom of contract or deprive him of property without due process. The business owner had the choice of entering into public works contracts with two municipalities and pay prevailing wages or refusing to enter into those contracts; furthermore, the Legislature did not unconstitutionally delegate its power by allowing the New York State Department of Labor to rely on collective bargaining agreements in setting prevailing wage rates. Matter of Nash v New York State Dept. of Labor, 34 A.D.3d 905, 824 N.Y.S.2d 438, 2006 N.Y. App. Div. LEXIS 13011 (N.Y. App. Div. 3d Dep't 2006), app. denied, 8 N.Y.3d 803, 830 N.Y.S.2d 700, 862 N.E.2d 792, 2007 N.Y. LEXIS 247 (N.Y. 2007).

Section 83-4.0 of the Administrative Code of the City of New York, which provides that workmen on excavations made in city streets shall be paid at "the prevailing scale of union wages" differs from this section in that no method is prescribed for determining the specified scale and therefore the statute is subject to attack for vagueness. Larkin v Consolidated Tel. & Electrical Subway Co., 85 N.Y.S.2d 631, 193 Misc. 1001, 1949 N.Y. Misc. LEXIS 1683 (N.Y. Sup. Ct. 1949).

When public policy has been established by the Legislature, and it has spoken by statute as to what it shall be, the court

cannot invoke its opinion otherwise unless there is a flagrant violation of the Constitution or common law, and it is then, and only in rare instances, that the court may declare and determine public policy. Accordingly, section 220 of the Labor Law, which requires that public works contractors pay whatever prevailing labor rates and supplements the Industrial Commissioner of the State of New York might determine during the time the work is being performed, is not an impairment of contracts in violation of article I (§ 10, cl 1) of the United States Constitution when the contracts are entered into in legal contemplation that a change might be made in the prevailing rate of wages, nor is § 220 contrary to public policy in that it undermines principles of mutuality and comity in commercial transactions; it is virtually an unrealistic legal theory to enforce an equity complaint of overreaching by the State in public bid contracts, since the bidding process has to be a "take it or leave it" proposition. Meaott Constr. Corp. v Ross, 100 Misc. 2d 767, 420 N.Y.S.2d 118, 1979 N.Y. Misc. LEXIS 2543 (N.Y. Sup. Ct. 1979), aff'd, (N.Y. App. Div. 3d Dep't 1980).

4. Retroactive application

The 1966 and 1967 amendments to Labor Law § 220(3) may not be applied retroactively to a contract executed prior to the effective date of the Amendments. Deutsch v Catherwood, 31 N.Y.2d 487, 341 N.Y.S.2d 600, 294 N.E.2d 193, 1973 N.Y. LEXIS 1455 (N.Y. 1973).

1989 amendments to CLS Labor §§ 220(8) and 220-b(2)(f), which authorized Commissioner of Labor to file administrative order against employer with county clerk and stated that order would have same effect as judgment, could be applied retroactively to enforce 1987 administrative order against employer since amendments were remedial legislation which created no new substantive bases of liability, effected no change in prevailing standard of review before administrative agency, and did not curtail or limit employer's right to review. Unicorn Developers, Ltd. v Commissioner of Labor, 190 A.D.2d 807, 593 N.Y.S.2d 849, 1993 N.Y. App. Div. LEXIS 1445 (N.Y. App. Div. 2d Dep't 1993).

1989 amendments to CLS Labor §§ 220(8) and 220-b(2)(f), which authorized Commissioner of Labor to file administrative order against employer with county clerk and stated that order would have same effect as judgment, could be applied retroactively to enforce 1987 administrative order against employer without violating any due process considerations. Unicorn Developers, Ltd. v Commissioner of Labor, 190 A.D.2d 807, 593 N.Y.S.2d 849, 1993 N.Y. App. Div. LEXIS 1445 (N.Y. App. Div. 2d Dep't 1993).

Notice of new enforcement policies adopted by Department of Labor regarding payment of prevailing supplements on behalf of workers into ERISA-qualified benefit plans merely communicated to contractors that CLS Labor § 220 violations occurring after grace period would be prosecuted as willful, and thus Article 78 court properly dismissed petitioners' claim that investigating past practices which had always violated § 220, but were unregulated due to perceived procedural constraint, constituted improper retroactive application of law. HMI Mech. Sys. v McGowan, 277 A.D.2d 657, 716 N.Y.S.2d 426, 2000 N.Y. App. Div. LEXIS 11964 (N.Y. App. Div. 3d Dep't 2000), app. denied, 96 N.Y.2d 705, 723 N.Y.S.2d 131, 746 N.E.2d 186, 2001 N.Y. LEXIS 280 (N.Y. 2001).

This subdivision creates no new remedy, being rather procedural, and therefore may be applied retroactively. Evadan Realty Corp. v Patterson, 78 N.Y.S.2d 114, 192 Misc. 850, 1948 N.Y. Misc. LEXIS 2229 (N.Y. Sup. Ct. 1948), aff'd, 276 A.D. 751, 92 N.Y.S.2d 504, 1949 N.Y. App. Div. LEXIS 3165 (N.Y. App. Div. 1949), limited, Nolan v New York City Housing Authority, 99 N.Y.S.2d 307, 199 Misc. 599, 1950 N.Y. Misc. LEXIS 1931 (N.Y. Sup. Ct. 1950).

1989 amendments to CLS Labor §§ 220 and 220-b, allowing Commissioner of Labor to enter as money judgments administrative orders fixing amounts due laborers and others employed on public works for nonpayment or underpayment of prevailing wages without need to acquire wage claim assignments from affected employees or bring plenary actions to obtain judgments, would not be applied retroactively to permit entry as judgment of 1987 administrative order assessing civil penalty against petitioner and its subcontractor for willful failure to pay prevailing wages since such retroactive application would impair due process by depriving petitioner of right to assert defenses, such as statute of limitations under CLS Labor § 220(8). Unicorn Developers, Ltd. v Commissioner of Labor, 147 Misc. 2d 717, 556 N.Y.S.2d 811, 1990 N.Y. Misc. LEXIS 273 (N.Y. Sup. Ct. 1990).

5. Public works contracts

In an Article 78 proceeding to challenge the city's award of contracts for the supply of coal and coke to a competitor of a fuel service company, the company's petition would be dismissed where the city's alleged failure to include wage schedules in the bid and contract specifications would not render the contracts completely void, where it had been doubtful whether the contracts had come within the purview of "public work" and "building service work" contracts (Labor Law §§ 220 and 231), and where the competitor had contended that the wage rates for itself, and for the fuel service company, would have been the same in that both companies were parties to the same labor contract with the union. Public Fuel Service, Inc. v New York, 92 A.D.2d 451, 458 N.Y.S.2d 593, 1983 N.Y. App. Div. LEXIS 16639 (N.Y. App. Div. 1st Dep't 1983).

Manufacturer's replacement of warranted goods used in public works project constituted public works contract subject to prevailing wage rate requirement of CLS Labor § 220. Bridgestone/Firestone, Inc. v Hartnett, 175 A.D.2d 495, 572 N.Y.S.2d 770, 1991 N.Y. App. Div. LEXIS 10424 (N.Y. App. Div. 3d Dep't 1991).

Lack of competitive bidding in connection with manufacturer's replacement of roof on state-owned building did not bar its consideration as public works contract. Bridgestone/Firestone, Inc. v Hartnett, 175 A.D.2d 495, 572 N.Y.S.2d 770, 1991 N.Y. App. Div. LEXIS 10424 (N.Y. App. Div. 3d Dep't 1991).

Under public works contract that contractor entered into with city, subcontractor's invoices did not constitute an account stated because it failed to satisfy the condition precedent for payment, namely, the submission of payroll reports. High Tech Enters. & Elec. Servs. of NY, Inc. v Expert Elec., Inc., 113 A.D.3d 546, 980 N.Y.S.2d 387, 2014 N.Y. App. Div. LEXIS 442 (N.Y. App. Div. 1st Dep't 2014).

Section 220(3) has no application to work on materials entering into construction of public works project where work is not done at site of project and such work is not customarily done there. Garofano Const. Co. v New York, 43 N.Y.S.2d 26, 180 Misc. 539, 1943 N.Y. Misc. LEXIS 2102 (N.Y. App. Term), aff'd, 266 A.D. 960, 44 N.Y.S.2d 682, 1943 N.Y. App. Div. LEXIS 5475 (N.Y. App. Div. 1943).

Commissioner's decision to cancel a contract with a floor covering installer to perform government projects after discovering that the installer's bid was below the prevailing wage rate required for state contracts, and not permitting modification of the proposal was rational, and the trial court properly dismissed the installer's N.Y. C.P.L.R. art. 78 petition seeking an injunction to prevent the cancellation. Taub's Carpet & Tile Corp. v Ringler, 1 A.D.3d 730, 766 N.Y.S.2d 646, 2003 N.Y. App. Div. LEXIS 11734 (N.Y. App. Div. 3d Dep't 2003).

N.Y. Lab. Law § 220(3) did not include contracts for the sale of goods used in public works projects, and where a steel company acted solely as materials supplier, supplying shop-painted structural steel for a public works project, its workers were not subject to prevailing wage laws; a trial court's order dismissing a proceeding brought by a union representative pursuant to N.Y. C.P.L.R. art. 78 against a transportation department, seeking review of the transportation department's denial of the union representative's request under the Freedom of Information Law, N.Y. Pub. Off. Law art. 6, for the steel company's payroll records, was affirmed. Ramaglia v N.Y. State DOT, 5 A.D.3d 909, 773 N.Y.S.2d 167, 2004 N.Y. App. Div. LEXIS 2560 (N.Y. App. Div. 3d Dep't), app. denied, 3 N.Y.3d 601, 782 N.Y.S.2d 405, 816 N.E.2d 195, 2004 N.Y. LEXIS 1595 (N.Y. 2004).

A resolution by a county requiring all bidders on county public works contracts to participate in an approved apprentice training program is of questionable propriety. 1982 Op. St Compt File #82-128.

6. —What is "public work"

Installation of telecommunications system which required degree of construction-like labor and was installed in public building for use by public employees was "public work" within meaning of CLS Labor § 220; question as to what constitutes "public work" focuses on purpose or function of project. Twin State CCS Corp. v Roberts, 72 N.Y.2d 897, 532 N.Y.S.2d 746, 528 N.E.2d 1219, 1988 N.Y. LEXIS 1663 (N.Y. 1988).

Letterers and sign painters employed by the City of New York are engaged in "public work" and are entitled to the prevailing rate of wages. Miele v Joseph, 280 A.D. 408, 113 N.Y.S.2d 689, 1952 N.Y. App. Div. LEXIS 3489 (N.Y. App. Div. 1952), aff'd, 305 N.Y. 667, 112 N.E.2d 764, 305 N.Y. (N.Y.S.) 667, 1953 N.Y. LEXIS 1219 (N.Y. 1953).

Project to construct low and moderate income housing units pursuant to CLS Priv Hous Fin Art XIX was not public works project within parameters of CLS Labor § 220 so as to require payment of prevailing wages since there was no public use of project, no public ownership, no public access and no public enjoyment. Vulcan Affordable Housing Corp. v Hartnett, 151 A.D.2d 84, 545 N.Y.S.2d 952, 1989 N.Y. App. Div. LEXIS 12423 (N.Y. App. Div. 3d Dep't 1989).

Contract to lease privately-owned, but not yet built, facility to provide office space for county agency did not constitute public work project, and thus Commissioner of Labor erred in determining that building owner and general contractor failed to pay construction workers prevailing rate of wages, where owner's goal was to make profit, owner retained all risks and benefits of ownership, building was to be constructed on privately-owned property and, once completed, it would be privately owned. 60 Market Street Assoc. v Hartnett, 153 A.D.2d 205, 551 N.Y.S.2d 346, 1990 N.Y. App. Div. LEXIS 903 (N.Y. App. Div. 3d Dep't), aff'd, 76 N.Y.2d 993, 564 N.Y.S.2d 713, 565 N.E.2d 1264, 1990 N.Y. LEXIS 4424 (N.Y. 1990).

"Home for Parenting Adolescents" built by petitioner was not public works project subject to prevailing wage requirements of CLS Labor Art 8 where petitioner privately developed facility and privately owned it, notwithstanding that state provided financial assistance to petitioner; public purpose behind financing scheme should not be confused with private purpose or function of venture itself. Cattaraugus Community Action, Inc. v Hartnett, 166 A.D.2d 891, 560 N.Y.S.2d 550, 1990 N.Y. App. Div. LEXIS 12133 (N.Y. App. Div. 4th Dep't 1990).

Issue of what is public works contract, in regard to determination as to whether CLS Labor § 220 applies to project, is essentially question of statutory reading and analysis, and therefore determination of Commissioner of Labor of such issue is not entitled to special deference. National R. Passenger Corp. v Hartnett, 169 A.D.2d 127, 572 N.Y.S.2d 386, 1991 N.Y. App. Div. LEXIS 9549 (N.Y. App. Div. 3d Dep't 1991).

Construction of railroad line by Amtrak and state was not public works project subject to prevailing wage rate provisions of CLS Labor § 220 since (1) Amtrak's purpose in entering into contract with state to build railroad line was to enhance its nongovernmental function of providing efficient and eventually profitable passenger train service, and (2) Amtrak retained ownership of railroad lines that were subject of contract, bore risk of future financial losses or destruction, was entitled to all future profits, and retained authority to condition public's use of railroad lines on purchase of ticket. National R. Passenger Corp. v Hartnett, 169 A.D.2d 127, 572 N.Y.S.2d 386, 1991 N.Y. App. Div. LEXIS 9549 (N.Y. App. Div. 3d Dep't 1991).

Significant partial and even complete governmental funding of improvement is insufficient to convert private project into public works project; public purpose of funding scheme may be distinguished from essentially private purpose of venture itself. National R. Passenger Corp. v Hartnett, 169 A.D.2d 127, 572 N.Y.S.2d 386, 1991 N.Y. App. Div. LEXIS 9549 (N.Y. App. Div. 3d Dep't 1991).

Renovation of former classroom building located on state university campus was properly determined by Commissioner of Labor to benefit public as "public works" project subject to prevailing wage law where, inter alia, building was to be leased, not sold, as hotel and conference center, all renovations were subject to approval of state Office of General Services and university to ascertain that needs of public were met, and there was guaranteed public access to building on at least one day per month. Sarkisian Bros., Inc. v Hartnett, 172 A.D.2d 895, 568 N.Y.S.2d 190, 1991 N.Y. App. Div. LEXIS 4258 (N.Y. App. Div. 3d Dep't), app. denied, 78 N.Y.2d 859, 575 N.Y.S.2d 456, 580 N.E.2d 1059, 1991 N.Y. LEXIS 4177 (N.Y. 1991).

Replacement of roofing material on armory, which was state-owned public building, pursuant to warranty and for benefit of public employees, constituted public works project. Bridgestone/Firestone, Inc. v Hartnett, 175 A.D.2d 495, 572 N.Y.S.2d 770, 1991 N.Y. App. Div. LEXIS 10424 (N.Y. App. Div. 3d Dep't 1991).

Highway work permits issued by Department of Transportation (DOT) pursuant to 17 NYCRR § 125.2(a) for construction of privately financed frontage road on publicly owned land was not sufficient to label project "public work" within meaning of CLS Labor § 220-d, and project did not satisfy public works contract requirement of CLS Labor § 220, where it was undisputed that DOT was not party to any contract for construction of project; thus, court would annul Commissioner of Labor's determination that petitioner was required to pay prevailing wage and wage supplements. Pyramid Co. v New York State DOL, 223 A.D.2d 285, 645 N.Y.S.2d 633, 1996 N.Y. App. Div. LEXIS 7970 (N.Y. App. Div. 3d Dep't 1996).

Despite its ancillary use as training exercise for public school construction technology students, construction of school building qualified as "public work" project in that primary purpose of work performed by both building contractors and unpaid students was construction of office building that would benefit school district, its employees and general public. Onondaga-Cortland-Madison Bd. of Coop. Educ. Servs. v McGowan, 285 A.D.2d 36, 728 N.Y.S.2d 109, 2001 N.Y. App. Div. LEXIS 6242 (N.Y. App. Div. 3d Dep't 2001).

Willful failure to pay prevailing wages claim failed as Brukhman v. Giuliani, 727 N.E.2d 116 (N.Y. 2000), controlled, and the repair of City vessels that the workers were engaged in was not a public work under N.Y. Lab. Law § 220(3) since more than just public purpose or function was required to determine that project was public work; the prevailing wage law was limited to those workers employed in the construction, repair and maintenance work of fixed structures, and did not apply to workers who were servicing a commodity owned by the City. De La Cruz v Caddell Dry Dock & Repair Co., Inc., 95 A.D.3d 297, 942 N.Y.S.2d 61, 2012 N.Y. App. Div. LEXIS 2632 (N.Y. App. Div. 1st Dep't 2012), rev'd, 21 N.Y.3d 530, 975 N.Y.S.2d 371, 997 N.E.2d 1223, 2013 N.Y. LEXIS 1731 (N.Y. 2013).

Construction, repair, and maintenance of a charter school was subject to the prevailing wage law, N.Y. Lab. Law § 220 et seq., because a charter agreement was a contract by and between a public entity and a third party, and the Charter Schools Act, N.Y. Educ. Law § 2850 et seq., was intended to benefit the public; thus, work done on charter school facilities were public works projects. N.Y. Educ. Law § 2854(1)(b) did not exempt charter schools from provisions that required payment of the prevailing rate of wage to those engaged on projects for public work. Matter of Foundation for a Greater Opportunity v Smith, 860 N.Y.S.2d 734, 20 Misc. 3d 453, 2008 N.Y. Misc. LEXIS 3075 (N.Y. Sup. Ct. 2008), rev'd, 61 A.D.3d 1091, 875 N.Y.S.2d 643, 2009 N.Y. App. Div. LEXIS 2452 (N.Y. App. Div. 3d Dep't 2009).

N.Y. Lab. Law § 220 prevailing wage provisions did not apply to contracts for the construction, renovation, repair, and maintenance of charter schools because the agreements under which the charter schools operated were not contracts between a public entity and another party, or by a third party for the benefit of a public entity, which involved the employment of laborers, workers, or mechanics on a public works project, as was required under the first prong of the Erie County test; under the Charter Schools Act, N.Y. Educ. Law art. 56, charter schools had unique characteristics that distinguished them from the public entities enumerated in the prevailing wage law. Most of the provisions of the charter agreements addressed administrative matters involving the operation of the school, and the requirement that the charter agreement also contain information regarding the facilities to be used did not transform it into a contract for the

construction, renovation, or repair of a public works project. Matter of N.Y. Charter Sch. Ass'n v Smith, 61 A.D.3d 1091, 875 N.Y.S.2d 643, 2009 N.Y. App. Div. LEXIS 2452 (N.Y. App. Div. 3d Dep't 2009), aff'd, 15 N.Y.3d 403, 914 N.Y.S.2d 696, 940 N.E.2d 522, 2010 N.Y. LEXIS 2950 (N.Y. 2010).

Office of General Services (OGS) was unauthorized to include a provision requiring payment of a prevailing wage in a lease because the lease did not involve public work as required by N.Y. Lab. Law § 220; further, by including the prevailing wage clause in the lease, the OGS was violating the separation of powers doctrine. Ellicott Group, LLC v State of N.Y. Exec. Dept. Off. of Gen. Servs., 85 A.D.3d 48, 922 N.Y.S.2d 894, 2011 N.Y. App. Div. LEXIS 3401 (N.Y. App. Div. 4th Dep't 2011).

Contracts for purchase of commodities not "public work" within meaning of these Labor Law provisions. 1947 Ops St Compt 293.

A contract which is entered into between a town and a contractor for the construction of curbs and gutters in one section of a town, the real property owners of which section are assessed for the cost, is a contract for "public work" for the purposes of section 220 of the Labor Law and must contain a stipulation as to hours. 1956 Ops St Compt File #8255.

7. —Prevailing wage requirement

Volunteer fire department, general contractor, and subcontractors were entitled to N.Y. C.P.L.R. art. 78 relief because prevailing wage law, N.Y. Lab. Law § 220(2), did not apply where the volunteer fire department was not public agency, and the service agreements at issue did not include any provision contemplating the construction of a new firehouse. Matter of M.G.M. Insulation, Inc. v Gardner, 20 N.Y.3d 469, 962 N.Y.S.2d 600, 985 N.E.2d 911, 2013 N.Y. LEXIS 132 (N.Y. 2013).

Though a city comptroller properly determined that a contractor that had been hired to remove and dispose of sewer deposits had violated Labor L § 220 by failing to pay prevailing wages and to provide prevailing supplemental benefits to its employees in connection with the subject public works contracts, the comptroller's determination that the contractor's violations had been willful would be reversed, and the comptroller's imposition of a five-year sanction under Labor L § 220-b(3)(b) and award of a penalty and interest would be vacated, where the record showed that the contractor had been apprised by various agency officials in connection with both the current and prior contracts that Labor L § 220 did not apply to sewer cleaning contracts, and that, when the contractor had sought an opinion from the comptroller's office on such question, no response had been forthcoming, so that the contractor's actions did not constitute a knowing or intentional violation of the statute, and where the contractor had exhibited good faith in attempting to comply with the statute, the violation at issue had not been substantial, and the contractor had not engaged in any previous similar violations, so that the award of a civil penalty and interest was unwarranted under the terms of Labor L § 220(8). Sewer Environmental Contractors, Inc. v Goldin, 98 A.D.2d 606, 469 N.Y.S.2d 339, 1983 N.Y. App. Div. LEXIS 20886 (N.Y. App. Div. 1st Dep't 1983).

Court would reject contention that prevailing wage law, CLS Labor § 220, does not apply to small public projects; thus, court would affirm order directing petitioner to pay about $5,000 in additional wages, together with interest and penalties, to employees involved in several public works contracts, although only one contract exceeded $3,140. Door Specialties, Inc. v Commissioner of Labor, 158 A.D.2d 923, 551 N.Y.S.2d 88, 1990 N.Y. App. Div. LEXIS 1424 (N.Y. App. Div. 4th Dep't 1990).

Because no private right of action existed to enforce contracts requiring payment of prevailing wages pursuant to the Federal Davis-Bacon Act, 40 U.S.C.S. § 3142 et seq., the trial court properly dismissed the workers' N.Y. Lab. Law § 220 causes of action to recover wages and benefits for work performed on certain federally-funded projects. Gawez v Inter-Connection Elec., Inc., 44 A.D.3d 898, 845 N.Y.S.2d 367, 2007 N.Y. App. Div. LEXIS 11250 (N.Y. App. Div. 2d Dep't 2007).

Department's finding that an employer operating a water treatment plant failed to pay prevailing wages and supplements was proper because, in light of the beneficent purpose of N.Y. Lab. Law § 220 to ensure that contractors engaged in public works projects pay wages and supplements at a rate not less than the prevailing rate in area, that statute applied; nowhere in the special legislation of 2002 N.Y. Laws, 206 did it state that it superceded the constitutionally protected prevailing wage and supplement requirements embodied in N.Y. Lab. Law § 220. In fact, it clarified that every agreement entered into between the city and a private entity, for the construction of a water filtration or wastewater treatment facility, shall have required the payment of all applicable prevailing wages. Matter of Earth Tech, Inc. v Angello, 47 A.D.3d 1080, 851 N.Y.S.2d 658, 2008 N.Y. App. Div. LEXIS 267 (N.Y. App. Div. 3d Dep't 2008).

Because a contract between a fire department and a general contractor contemplated the employment of laborers, workers, or mechanics, because the fire department was under a village's control, and because the construction of a new fire station qualified as a public work project, it was subject to the prevailing wage requirements of N.Y. Lab. Law § 220; accordingly, they were not entitled to N.Y. C.P.L.R. art. 78 relief. Matter of M.G.M. Insulation, Inc. v Gardner, 86 A.D.3d 812, 927 N.Y.S.2d 242, 2011 N.Y. App. Div. LEXIS 5877 (N.Y. App. Div. 3d Dep't 2011), rev'd, 20 N.Y.3d 469, 962 N.Y.S.2d 600, 985 N.E.2d 911, 2013 N.Y. LEXIS 132 (N.Y. 2013).

Shareholder was not entitled to N.Y. C.P.L.R. art. 78 relief because N.Y. Lab. Law § 220, the prevailing wage law, was not preempted by federal law, and the evidence of significant discrepancies between the certified payroll records that the corporation submitted to the Department of Labor and the actual wages received by the employees supported a finding that the corporation failed to pay prevailing wages and supplements. Matter of Pascazi v Gardner, 106 A.D.3d 1143, 966 N.Y.S.2d 528, 2013 N.Y. App. Div. LEXIS 3062 (N.Y. App. Div. 3d Dep't), app. dismissed, 21 N.Y.3d 1057, 974 N.Y.S.2d 27, 996 N.E.2d 907, 2013 N.Y. LEXIS 2431 (N.Y. 2013), app. denied, 22 N.Y.3d 857, 981 N.Y.S.2d 367, 4 N.E.3d 379, 2013 N.Y. LEXIS 3305 (N.Y. 2013).

Because an alleged prevailing wage violation is an issue within the exclusive province of the Office of the Comptroller of the City of New York and there had been no final determination by the Comptroller, the trial court erred in dismissing a third-party cause of action alleging breach of contract on the ground that the third-party defendants had a legal right to withhold payment by reason of a prevailing wage violation. Gym Door Repairs, Inc. v Astoria Gen. Contr. Corp., 144 A.D.3d 1093, 43 N.Y.S.3d 381, 2016 N.Y. App. Div. LEXIS 7889 (N.Y. App. Div. 2d Dep't 2016).

Prevailing wage laws did not apply to construction work for a lessee of state-owned racetracks and facilities because there was not substantial evidence showing that the project was paid for by public funds, that the funds retained any public characteristic, or that they could be traced back to a public source. W.M. Schultz Constr., Inc. v Musolino, 147 A.D.3d 1259, 47 N.Y.S.3d 773, 2017 N.Y. App. Div. LEXIS 1407 (N.Y. App. Div. 3d Dep't), app. denied, 30 N.Y.3d 903, 89 N.E.3d 518, 67 N.Y.S.3d 128, 2017 N.Y. LEXIS 3099 (N.Y. 2017).

In an Article 78 proceeding brought by petitioner, an organization composed of representatives of labor and management in the electrical industry, seeking to require the mayor to incorporate within a city's standard form of contracts for the fabrication and installation of telecommunications facilities a provision requiring the payment of salaries at not less than the prevailing rate of wages for certain classes of employment in public works under Labor Law § 220(3) and the New York State Constitution Art I § 17, the petition would be granted where, although such provision is generally inapplicable to contracts for the purchase of goods, and the cost of labor is substantially less than the cost of the equipment, the test of the applicability of § 220 should be whether there are persons within the enumerated classes of employment engaged in public work and not determined by an arbitrary numerical ratio of labor to material. Joint Industry Bd. of Electrical Industry v Koch, 114 Misc. 2d 868, 452 N.Y.S.2d 488, 1982 N.Y. Misc. LEXIS 3579 (N.Y. Sup. Ct. 1982).

Davis-Bacon Act (40 USCS § 276a et seq.) preempts prevailing state wage act (CLS Labor § 220) on housing project that is entirely federally funded; thus, plaintiffs could not recover prevailing state wages for labor performed on 5 fully federally funded public work projects where 3 of contracts contained language that

mirrored 24 CFR § 965.101. Majstrovic v R. Maric Piping, Inc., 171 Misc. 2d 429, 655 N.Y.S.2d 285, 1997 N.Y. Misc. LEXIS 22 (N.Y. Sup. Ct. 1997).

Laborers could not assert private right of action against employer for value of their services and work performed on federally funded work projects where wage rate was determined by Davis-Bacon Act (40 USCS § 276a et seq.), which preempted state law, since Act did not expressly authorize private right of action in favor of wage earners aggrieved by violation of Act; even if Act did not preempt state law, CLS Labor § 220 did not provide private right of action. Majstrovic v R. Maric Piping, Inc., 171 Misc. 2d 429, 655 N.Y.S.2d 285, 1997 N.Y. Misc. LEXIS 22 (N.Y. Sup. Ct. 1997).

State Department of Labor Commissioner's decision that a contractor failed to pay the prevailing wages and supplements on five public works projects, that such failure was willful, and that the contractor was liable to pay principal sums in wages and in supplements with interest, as well as a civil penalty, was supported by substantial evidence; further, said failure to pay the prevailing wages constituted a single willful violation of N.Y. Lab. Law § 220. Chesterfield Assocs. v N.Y. State Dep't of Labor, 3 A.D.3d 491, 771 N.Y.S.2d 139, 2004 N.Y. App. Div. LEXIS 282 (N.Y. App. Div. 2d Dep't 2004), aff'd, 4 N.Y.3d 597, 797 N.Y.S.2d 389, 830 N.E.2d 287, 2005 N.Y. LEXIS 1056 (N.Y. 2005).

Because the parties' lease did not constitute "a public work project" within the meaning of N.Y. Lab. Law § 220, a county could not prevail on its action for a preliminary injunction under N.Y. C.P.L.R. art. 63 enjoining the landlord from continuing to violate the prevailing wage provision of their lease agreement. County of Suffolk v Coram Equities LLC, 233 N.Y.L.J. 54, 2005 N.Y. Misc. LEXIS 3289 (N.Y. Sup. Ct. Mar. 22, 2005), aff'd, 31 A.D.3d 687, 821 N.Y.S.2d 215, 2006 N.Y. App. Div. LEXIS 9566 (N.Y. App. Div. 2d Dep't 2006).

In the construction of a town garage, the prevailing rate of wage law applies. 1947 Ops St Compt 140.

8. Authorities, commissions, and districts

Statute concerning hours and wages under public contracts applied to construction project under contract with Power Authority of State of New York. G & G Erectors, Inc. v Levine, 48 A.D.2d 960, 369 N.Y.S.2d 40, 1975 N.Y. App. Div. LEXIS 10253 (N.Y. App. Div. 3d Dep't 1975).

9. Manufacturers

The phrase "self contractor or other person dealing or contracting to do a whole or part of the work in" does not include a manufacturer entering into an agreement with a municipal contractor for the manufacturer of doors, windows and other woodwork for a building. Such a contract constitutes a mere purchase of material. Bohnen v Metz, 126 A.D. 807, 111 N.Y.S. 196, 1908 N.Y. App. Div. LEXIS 3451 (N.Y. App. Div.), aff'd, 193 N.Y. 676, 87 N.E. 1122, 193 N.Y. (N.Y.S.) 676, 1908 N.Y. LEXIS 831 (N.Y. 1908).

In a suit to foreclose a mechanic's lien, it appears that the plaintiff contracted to manufacture, and install in a theatre gas and electric fixtures, and evidence shows that they were all specially designed with reference to general decorative scheme and architecture of building and to harmonize with one another, and were manufactured by plaintiff from such designs, labor of designing, manufacturing and installing such fixtures and furnishing of fixtures constitutes performance of labor and furnishing of materials "for improvement of real property" within the meaning of this section. Wahle-Phillips Co. v Fifty-Ninth St.-Madison Ave. Co., 153 A.D. 17, 138 N.Y.S. 13, 1912 N.Y. App. Div. LEXIS 9208 (N.Y. App. Div. 1912), aff'd, 214 N.Y. 684, 108 N.E. 1110, 214 N.Y. (N.Y.S.) 684, 1915 N.Y. LEXIS 1399 (N.Y. 1915).

10. Municipal corporations

The term public work includes work done by a municipal corporation itself as well as that done for a municipal corporation by a contractor. McAvoy v New York, 52 A.D. 485, 65 N.Y.S. 274, 1900 N.Y. App. Div. LEXIS 1630 (N.Y. App. Div. 1900), aff'd, 166 N.Y. 588, 59 N.E. 1125, 166 N.Y. (N.Y.S.) 588, 1901 N.Y. LEXIS 1307 (N.Y. 1901).

11. Utilities

Where town and public utility entered into contract for installation of light standards which were to remain the property of the utility, but the contract provided for purchase of the standards at any time by the town and reimbursement of the utility according to a formula in the event that the use of the standards was discontinued, the contract was a public works contract subject to the requirement that the utility pay laborers on the project the prevailing wage. Long Island Lighting Co. v Industrial Comm'r, 40 A.D.2d 1003, 338 N.Y.S.2d 751, 1972 N.Y. App. Div. LEXIS 3063 (N.Y. App. Div. 2d Dep't 1972), app. dismissed, 32 N.Y.2d 646, 342 N.Y.S.2d 852, 295 N.E.2d 652, 1973 N.Y. LEXIS 1452 (N.Y. 1973), aff'd, 34 N.Y.2d 725, 357 N.Y.S.2d 493, 313 N.E.2d 787, 1974 N.Y. LEXIS 1607 (N.Y. 1974).

In dispute as to whether contract between public utility and town for installation of lighting standards was a public works contract, it was within the competence of the industrial commissioner to determine whether the utility's employees were performing work in the field surveyed by him and to find the classification of the jobs involved. Long Island Lighting Co. v Industrial Comm'r, 40 A.D.2d 1003, 338 N.Y.S.2d 751, 1972 N.Y. App. Div. LEXIS 3063 (N.Y. App. Div. 2d Dep't 1972), app. dismissed, 32 N.Y.2d 646, 342 N.Y.S.2d 852, 295 N.E.2d 652, 1973 N.Y. LEXIS 1452 (N.Y. 1973), aff'd, 34 N.Y.2d 725, 357 N.Y.S.2d 493, 313 N.E.2d 787, 1974 N.Y. LEXIS 1607 (N.Y. 1974).

12. Employees protected

A city comptroller properly determined that a plumbing corporation, in its performance of five public work contracts with a city Board of Education, had wilfully violated Labor Law § 220 by failing to pay the prevailing wage and supplemental benefits to an employee where, though the plumbing company labelled the subject employee as a "gofer," a job title not appearing on the schedule of wages and benefits, as its basis for compensating the employee at a rate substantially lower than any of the scheduled rates, the company's description of the employee's duties, which entailed unskilled physical labor, as well as the claims examiner's observations, made it clear that the employee was a laborer, the prevailing wage for which position appeared on the schedule. Dadson Plumbing Corp. v Goldin, 104 A.D.2d 346, 479 N.Y.S.2d 348, 1984 N.Y. App. Div. LEXIS 19816 (N.Y. App. Div. 1st Dep't 1984), modified, 66 N.Y.2d 713, 496 N.Y.S.2d 731, 487 N.E.2d 558, 1985 N.Y. LEXIS 17255 (N.Y. 1985).

Substantial evidence supported determination that mason hired by public works contractor was employee, not independent contractor, and thus entitled to prevailing wage and wage supplements where (1) mason had no contract with contractor, did not hold himself out to public as independent contractor, had never worked as subcontractor on public works project, had no other employees, and worked for no other employer during his engagement with contractor, and (2) subcontractors on project worked for fixed price to be paid at conclusion of project, but mason was to be paid at periodic rate for number of days and half days actually worked. LBS of Frankfort, Inc. v Hudacs, 185 A.D.2d 476, 586 N.Y.S.2d 333, 1992 N.Y. App. Div. LEXIS 8971 (N.Y. App. Div. 3d Dep't 1992).

Evidence supported determination of Commissioner of Labor as to job classifications of workers who had not been paid prevailing wages where commissioner relied on testimony of department investigator as well as on testimony of workers as to work they actually performed, and local union representatives testified as to designations adopted by commissioner; employer's reliance on work performed by replacement subcontractor was appropriately rejected where such work was performed during different phase of construction than that of employer. Agency Constr. Corp. v Hudacs, 205 A.D.2d 980, 613 N.Y.S.2d 974, 1994 N.Y. App. Div. LEXIS 7039 (N.Y. App. Div. 3d Dep't 1994).

For purposes of determining payment of prevailing wages and supplements, question of appropriate classification of work performed is matter within expertise of Commissioner of Labor and will not be disturbed without clear showing that classification does not reflect nature of work actually performed. Marangos Constr. Corp. v New York State Dep't of Labor, 216 A.D.2d 758, 628 N.Y.S.2d 451, 1995 N.Y. App. Div. LEXIS 6543 (N.Y. App. Div. 3d Dep't 1995).

Determination of Commissioner of Labor that contractor should have paid prevailing sheet metal worker's wage for portion of construction project that involved installation of copper

roofing was supported by testimony of contractor's employees that project required them to cut, fabricate, lay, nail and solder 14-gauge copper sheeting to sloped portions of roof, and testimony of wage investigator that prevailing practice in area was to classify employees performing such work as sheet metal workers. Marangos Constr. Corp. v New York State Dep't of Labor, 216 A.D.2d 758, 628 N.Y.S.2d 451, 1995 N.Y. App. Div. LEXIS 6543 (N.Y. App. Div. 3d Dep't 1995).

All laborers employed by a village must be paid at least the prevailing rate of wage in the locality for the particular type of work they are performing. 1954 Ops St Compt File #7009.

Employees of a subcontractor could proceed on contractual claims against the general contractor as third-party beneficiaries of a New York public works contract that expressly incorporated this section's prevailing wage requirement because the contract mentioned subcontractors' employees and New York case law allows such claims. Fact issues precluded summary judgment as to work performed at a shop outside New York; its nature and extent was unclear, and the accuracy of time records was disputed. Solouk v European Copper Specialties, Inc., 2019 U.S. Dist. LEXIS 81267 (S.D.N.Y. May 2, 2019).

13. —Foremen; supervisors

A foreman of bridgemen and riveters is a workman within the meaning of this section providing that "laborers, workmen or mechanics" upon public works shall be paid the prevailing rate of wages therefor, and is entitled to the prevailing rate of pay for foremen in the locality. Austin v New York, 258 N.Y. 113, 179 N.E. 313, 258 N.Y. (N.Y.S.) 113, 1932 N.Y. LEXIS 1160 (N.Y. 1932).

Labor Commissioner properly required contractor on public work project to pay employee who was performing both supervisory and nonsupervisory duties prevailing wage rate under CLS Labor § 220 for portion of his time that he was doing nonsupervisory work, since employee's nonsupervisory duties were clearly covered by statute and he could not be excluded from coverage merely because he performed some supervisory functions in addition thereto. Tenalp Constr. Corp. v Roberts, 141 A.D.2d 81, 532 N.Y.S.2d 801, 1988 N.Y. App. Div. LEXIS 9316 (N.Y. App. Div. 2d Dep't 1988).

Failure of experienced public works contractor to pay prevailing rates of pay for carpenters to employee who was hired both as superintendent and carpenter constituted willful violation of CLS Labor § 220; employee did not cease to be carpenter merely because he supervised other carpenters, and contractor knew or should have known that it was obligated to pay him as carpenter. Tenalp Constr. Corp. v Roberts, 141 A.D.2d 81, 532 N.Y.S.2d 801, 1988 N.Y. App. Div. LEXIS 9316 (N.Y. App. Div. 2d Dep't 1988).

This section relates to laborers and is inapplicable to an office appliance operator and supervisor of tabulating machinery employed by the city of New York. Weiselberg v McNamara, 97 N.Y.S.2d 224, 198 Misc. 48, 1950 N.Y. Misc. LEXIS 1631 (N.Y. Sup. Ct. 1950), rev'd, 278 A.D. 694, 103 N.Y.S.2d 1014, 1951 N.Y. App. Div. LEXIS 4386 (N.Y. App. Div. 1951).

14. —Apprentices; trainees

Where record was deficient for lack of administrative determination relative to whether employees had been employed initially as apprentices or as electricians, proceeding would be remitted for such determination. Deutsch v Catherwood, 31 N.Y.2d 487, 341 N.Y.S.2d 600, 294 N.E.2d 193, 1973 N.Y. LEXIS 1455 (N.Y. 1973).

Under CLS Labor § 220, contractors involved in state-funded project were required to pay journey-level rather than apprentice-level wages to federal trainees not registered in state-approved apprentice programs, although federal trainee programs were virtually identical to state-approved programs and were consistent with state labor law policy of reducing discrimination in construction industry. Monarch Electrical Contracting Corp. v Roberts, 70 N.Y.2d 91, 517 N.Y.S.2d 711, 510 N.E.2d 795, 1987 N.Y. LEXIS 16799 (N.Y. 1987).

Rule that trainees registered in programs of federal Department of Labor may not be substituted by contractors and paid wages less than journey-level workers applies not only to state-funded projects but also to jointly-funded projects since CLS Labor § 220 unambiguously authorizes only 2 categories of employees—journeymen and apprentices—and makes no provision for third category. Tap Electrical Contracting Service, Inc. v Hartnett, 76 N.Y.2d 164, 556 N.Y.S.2d 988, 556 N.E.2d 427, 1990 N.Y. LEXIS 1308 (N.Y. 1990).

Where claimants were hired and compensated at the rate then prevailing for apprentices, but none of them had been registered in accordance with Labor Law § 220(3), an amendment to such statute to provide that no employee should be deemed to be an apprentice unless he was individually registered in the apprenticeship program did not result in their being underpaid since the amendment to the statute could not be applied retroactively. Deutsch v Catherwood, 37 A.D.2d 399, 325 N.Y.S.2d 953, 1971 N.Y. App. Div. LEXIS 2987 (N.Y. App. Div. 1st Dep't 1971), modified, 31 N.Y.2d 487, 341 N.Y.S.2d 600, 294 N.E.2d 193, 1973 N.Y. LEXIS 1455 (N.Y. 1973).

Where individuals hired and paid by employer on construction project under contract with Power Authority of State of New York as apprentices were not registered with State, statute relating to hours and wages under public contracts required that they be paid as journeymen. G & G Erectors, Inc. v Levine, 48 A.D.2d 960, 369 N.Y.S.2d 40, 1975 N.Y. App. Div. LEXIS 10253 (N.Y. App. Div. 3d Dep't 1975).

Employer on construction project under contract with Power Authority of State of New York was obligated to determine status of apprentices furnished by local union. G & G Erectors, Inc. v Levine, 48 A.D.2d 960, 369 N.Y.S.2d 40, 1975 N.Y. App. Div. LEXIS 10253 (N.Y. App. Div. 3d Dep't 1975).

Application to employer on construction project under contract with Power Authority of State of New York of statute providing that apprentices will be permitted to work as such only when they are registered, individually, under a bona fide program registered with New York State Department of Labor did not deprive employer of property without due process of law. G & G Erectors, Inc. v Levine, 48 A.D.2d 960, 369 N.Y.S.2d 40, 1975 N.Y. App. Div. LEXIS 10253 (N.Y. App. Div. 3d Dep't 1975).

The Industrial Commissioner could reasonably require participation in an approved apprenticeship training program as a supplement to the award of a public works construction contract let out to bid, and rejection of a low bid because it lacked proof that the bidder's employees were covered by an apprentice training program as required by the bid specifications was therefore proper. Skyway Roofing of Troy, Inc. v County of Rensselaer, 79 A.D.2d 1078, 436 N.Y.S.2d 103, 1981 N.Y. App. Div. LEXIS 10006 (N.Y. App. Div. 3d Dep't), app. denied, 53 N.Y.2d 606, 1981 N.Y. LEXIS 3483 (N.Y. 1981).

In a proceeding to vacate a determination of the Commissioner of Labor, in which it was found that petitioner electrical contracting company had willfully violated Labor Law § 220(3-e) by paying an employee as an apprentice rather than at the prescribed rate for an electrician during a period in which the employee was not individually registered as an apprentice, the petition would be granted where the record was clear that, as part of an affirmative action program, the employee in question was assigned to petitioner as an apprentice by the local labor council, whose director erroneously believed that because of the nature of the program involved it would be permissible to file a covering individual apprenticeship agreement after completion of the employee's probationary period, and where there was nothing to suggest that petitioner did not act in good faith on the basis of the assurance received from the director, a man with extensive experience regarding apprenticeship programs. In re Tap Electrical Contracting Service, Inc., 104 A.D.2d 548, 480 N.Y.S.2d 215, 1984 N.Y. App. Div. LEXIS 20006 (N.Y. App. Div. 1st Dep't 1984).

Determination that subcontractor willfully failed to pay its employee prevailing wages in violation of CLS Labor § 220 was supported by testimony that subcontractor's president and principal shareholder knew difference between journeyman and apprentice, but subcontractor paid employee as apprentice when in fact he did work of journeyman. J. E. Roze Assoc., Inc. v Department of Labor, 143 A.D.2d 510, 533 N.Y.S.2d 43, 1988 N.Y. App. Div. LEXIS 10749 (N.Y. App. Div. 4th Dep't 1988).

Determination that subcontractor willfully ignored requirement that apprentice be enrolled in registered training program was supported by evidence that such requirement was known to

subcontractor's former co-owner and its present superintendent, whose acts and knowledge could be imputed to subcontractor. J. E. Roze Assoc., Inc. v Department of Labor, 143 A.D.2d 510, 533 N.Y.S.2d 43, 1988 N.Y. App. Div. LEXIS 10749 (N.Y. App. Div. 4th Dep't 1988).

Even if petitioner's apprenticeship program was employee welfare benefit program within meaning of Employee Retirement Income Security Act of 1974 (29 USCS §§ 1001 et seq.), program would be not be exempt from application of prevailing wage and compensation requirements of CLS Labor §§ 220 and 220-b. J.F.B. Painting & Supply v Hudacs, 210 A.D.2d 805, 620 N.Y.S.2d 612, 1994 N.Y. App. Div. LEXIS 13279 (N.Y. App. Div. 3d Dep't 1994).

In Article 78 proceeding alleging that prevailing wage provisions of CLS Labor § 220 did not apply construction of public school building because project was training exercise for unpaid student trainees who were not employees, court held that project was "public work," but annulled determination that petitioner was required to pay its students prevailing wages, as respondent labor commissioner lacked rational basis to treat petitioner's students as employees. Onondaga-Cortland-Madison Bd. of Coop. Educ. Servs. v McGowan, 285 A.D.2d 36, 728 N.Y.S.2d 109, 2001 N.Y. App. Div. LEXIS 6242 (N.Y. App. Div. 3d Dep't 2001).

Union's request for a declaratory judgment that a statutory provision for prevailing wages applied to glazier apprentices enrolled in a bona fide apprenticeship program should not have been dismissed, as the determination by the New York State Department of Labor that the work performed by apprentices was that of ironworkers and not of glaziers was unreasonable, arbitrary, and capricious. International Union of Painters & Allied Trades v New York State Dept. of Labor, 147 A.D.3d 1542, 47 N.Y.S.3d 819, 2017 N.Y. App. Div. LEXIS 1134 (N.Y. App. Div. 4th Dep't), in part, 30 N.Y.3d 1028, 91 N.E.3d 1180, 69 N.Y.S.3d 201, 2017 N.Y. LEXIS 3937 (N.Y. 2017), rev'd, 32 N.Y.3d 198, 112 N.E.3d 1259, 88 N.Y.S.3d 136, 2018 N.Y. LEXIS 2968 (N.Y. 2018).

Deference to the New York State Department of Labor's interpretation of the prevailing wage statute to glazier apprentices was not warranted because its interpretation was contrary to the plain meaning of the statutory language, and an understanding of specialized knowledge and underlying practices was not at stake. International Union of Painters & Allied Trades v New York State Dept. of Labor, 147 A.D.3d 1542, 47 N.Y.S.3d 819, 2017 N.Y. App. Div. LEXIS 1134 (N.Y. App. Div. 4th Dep't), in part, 30 N.Y.3d 1028, 91 N.E.3d 1180, 69 N.Y.S.3d 201, 2017 N.Y. LEXIS 3937 (N.Y. 2017), rev'd, 32 N.Y.3d 198, 112 N.E.3d 1259, 88 N.Y.S.3d 136, 2018 N.Y. LEXIS 2968 (N.Y. 2018).

Court declared that glazing contractors could compensate apprentices registered and enrolled in a bona fide apprenticeship program pursuant to the applicable apprentice rates posted by the New York State Department of Labor on taxpayer financed projects, based on the plain statutory language. International Union of Painters & Allied Trades v New York State Dept. of Labor, 147 A.D.3d 1542, 47 N.Y.S.3d 819, 2017 N.Y. App. Div. LEXIS 1134 (N.Y. App. Div. 4th Dep't), in part, 30 N.Y.3d 1028, 91 N.E.3d 1180, 69 N.Y.S.3d 201, 2017 N.Y. LEXIS 3937 (N.Y. 2017), rev'd, 32 N.Y.3d 198, 112 N.E.3d 1259, 88 N.Y.S.3d 136, 2018 N.Y. LEXIS 2968 (N.Y. 2018).

State's proposed deregistration of apprenticeship training program (ATP) administered by employee benefit plan covered by Employee Retirement Income and Security Act (ERISA) was not means of enforcing prevailing wage provisions of CLS Labor § 220, and thus ERISA did not preempt state's proposed action under statute and regulations governing ATP standards, despite state's reliance on violations of CLS Labor § 220 in support of its proposed deregistration, since CLS Labor § 220 does not regulate ATPs, and such violations of § 220 were just part of array of federal and state violations listed as appropriate grounds for deregistration. Joint Apprenticeship & Training Council of Local 363 v New York State Dep't of Labor, 984 F.2d 589, 1993 U.S. App. LEXIS 1318 (2d Cir. N.Y. 1993).

15. —Civil service employees

A workman cannot be taken from his civil service grade by the provision of this section requiring payment of the prevailing rate of wages to laborers, workmen or mechanics upon public works. Wood v New York, 274 N.Y. 155, 8 N.E.2d 316, 274 N.Y. (N.Y.S.) 155, 1937 N.Y. LEXIS 829 (N.Y. 1937).

Manual workers engaged in maintenance work on a city owned subway system and employed in classified civil service, under the title of "structure maintainers," in ungraded positions entered into without competitive examinations are laborers, workmen and mechanics employed upon public works within the meaning of this section. Gaston v Taylor, 274 N.Y. 359, 9 N.E.2d 9, 274 N.Y. (N.Y.S.) 359, 1937 N.Y. LEXIS 854 (N.Y. 1937).

Men employed under civil service as maintenance men who did work of skilled plumbers, carpenters and other craftsmen were not entitled to the wages of such skilled crafts for if the courts were to determine his rights to the pay of the higher class it would create a conflict with the civil service provisions regarding examination and appointment in order to advance to a higher class. Flannery v Joseph, 300 N.Y. 149, 89 N.E.2d 869, 300 N.Y. (N.Y.S.) 149, 1949 N.Y. LEXIS 897 (N.Y. 1949).

Civil Service stationary firemen employed by the City of New York were entitled to the prevailing rate of wages mandated by this section to be paid to "laborers, workmen or mechanics" on public works where, among their other duties, they were regularly required to make repairs on boilers. Golden v Joseph, 307 N.Y. 62, 120 N.E.2d 162, 307 N.Y. (N.Y.S.) 62, 1954 N.Y. LEXIS 1001 (N.Y. 1954).

Carriage upholsterers employed by N.Y.C. were entitled to have their wages fixed at the prevailing rate where they had been classified by the Municipal Civil Service Commission in part 38 of the competitive class in a salary grade at the prevailing rate of wages. Don v Joseph, 1 N.Y.2d 708, 150 N.Y.S.2d 809, 134 N.E.2d 74, 1956 N.Y. LEXIS 977 (N.Y. 1956).

Civil Service Law principles of merit and fitness were not violated by application of prevailing wage rate mandate of CLS Labor § 220 to workers hired by county Board of Cooperative Educational Services (BOCES) for public work project in connection with agreement between BOCES and member school district, as workers were ungraded employees of BOCES and thus awarding them increases in remuneration to level of prevailing wage rates would not effectively grant them promotion to above-grade salary levels. Cayuga-Onondaga Counties Bd. of Coop. Educ. Servs. v Sweeney, 89 N.Y.2d 395, 654 N.Y.S.2d 92, 676 N.E.2d 854, 1996 N.Y. LEXIS 3601 (N.Y. 1996), reh'g denied, 89 N.Y.2d 1031, 658 N.Y.S.2d 246, 680 N.E.2d 620, 1997 N.Y. LEXIS 382 (N.Y. 1997).

There can be no thwarting of the legislative purpose to secure to civil service employees the prevailing per diem rate through the device of limiting the number of days men may work, and then, by the subterfuge of an annual salary, substituting others not similarly qualified, at a lower wage. Hence, a city could not by means of a budget limiting the number of days for employment of crane enginemen (electric) to 250 days per year relieve itself from liability through the employment of provisional employees for the rest of the year at a lower rate when there was actually sufficient work to occupy men for 313 days each year at a fixed annual salary. However, relief was denied to petitioners upon a finding that they had acquiesced in the wrong. Kunz v New York, 286 A.D. 252, 142 N.Y.S.2d 451, 1955 N.Y. App. Div. LEXIS 4022 (N.Y. App. Div. 1955), aff'd, 3 N.Y.2d 834, 166 N.Y.S.2d 76, 44 N.E.2d 721, 1957 N.Y. LEXIS 929 (N.Y. 1957).

Sanitary district employees who attended labor department hearings concerned with improvement of their jobs as collectors of garbage because in good faith they believed under the circumstances presented that they had to go to a judicial tribunal as witnesses did not violate the Civil Service Law statutory provision prohibiting strikes by public employees. Rosenberger v Sanitary Dist., 28 A.D.2d 892, 282 N.Y.S.2d 879, 1967 N.Y. App. Div. LEXIS 3516 (N.Y. App. Div. 2d Dep't 1967), aff'd, 22 N.Y.2d 815, 292 N.Y.S.2d 911, 239 N.E.2d 652, 1968 N.Y. LEXIS 1265 (N.Y. 1968).

Bridge painters' claim for increased wages while employed by New York State throughway authority, alleging that they were being paid less than the prevailing wage rate in the locality, would be dismissed where they were employed in graded positions of the civil service, in which case Labor Law § 220 does not apply. Casey v Catherwood, 34 A.D.2d 806, 311 N.Y.S.2d 562,

1970 N.Y. App. Div. LEXIS 4826 (N.Y. App. Div. 2d Dep't 1970), aff'd, 28 N.Y.2d 702, 320 N.Y.S.2d 750, 269 N.E.2d 408, 1971 N.Y. LEXIS 1483 (N.Y. 1971).

Under Education Law § 2503(5), school board properly reclassified certain employees from ungraded to graded competitive class, even though by virtue of reclassification said employees would receive a lower wage rate than that prevailing in community for the same work, since Labor Law § 220 does not apply to graded class employees. Buffalo Bldg. Trades Council v Bd. of Educ., 43 A.D.2d 796, 350 N.Y.S.2d 252, 1973 N.Y. App. Div. LEXIS 2902 (N.Y. App. Div. 4th Dep't 1973), app. dismissed, 34 N.Y.2d 667, 1974 N.Y. LEXIS 2675 (N.Y. 1974), aff'd, 36 N.Y.2d 782, 369 N.Y.S.2d 693, 330 N.E.2d 643, 1975 N.Y. LEXIS 1828 (N.Y. 1975).

An electrician who is appointed as such as a result of passing civil service examination for electrical inspector, is entitled to the prevailing rate of wages in the locality, in accordance with subd. 3 of this section. Lent v New York, 269 N.Y.S. 201, 150 Misc. 291, 1934 N.Y. Misc. LEXIS 1065 (N.Y. App. Term), aff'd, 242 A.D. 764, 275 N.Y.S. 342, 1934 N.Y. App. Div. LEXIS 7330 (N.Y. App. Div. 1934).

A cable splicer who was appointed from a civil service list, is not entitled to compensation at the prevailing rate of wage for electricians, notwithstanding he is performing the duties of electrician, where it appears that the position of electrician is in the competitive class under civil service rules, and that the employee has never qualified therefor. Manning v New York, 268 N.Y.S. 807, 150 Misc. 292, 1934 N.Y. Misc. LEXIS 1050 (N.Y. App. Term 1934).

Employees of the Port Authority are not subject to the Civil Service provision of the New York State Constitution or to the laws enacted pursuant thereto. Agesen v Catherwood, 55 Misc. 2d 744, 286 N.Y.S.2d 969, 1968 N.Y. Misc. LEXIS 1827 (N.Y. Sup. Ct. 1968), rev'd, 32 A.D.2d 416, 303 N.Y.S.2d 987, 1969 N.Y. App. Div. LEXIS 3261 (N.Y. App. Div. 2d Dep't 1969).

A municipal employee in a graded position in the non-competitive class of civil service may not obtain fixation of his wages by invoking the prevailing rate-of-wages formula and incidental remedial procedures provided by § 220 of the Labor Law. Favreau v Catherwood, 62 Misc. 2d 432, 308 N.Y.S.2d 715, 1970 N.Y. Misc. LEXIS 1957 (N.Y. Sup. Ct. 1970).

A board of education may not employ a painter on an annual salary at less than the prevailing wage scale except where such position is in the graded competitive civil service, subject to call at all hours, or in seasonable employment. 1954 Ops St Compt File #7026.

16. —Mechanics

Employees of the board of transportation of the City of New York engaged in manual and mechanical work, whose positions are classified in the graded service of the competitive class are not entitled to the statutory prevailing rate of wages. Otherwise the constitutional and statutory provisions affecting civil service would be nullified. But while in the ungraded service, they were entitled to the prevailing rate of wages. Corrigan v Joseph, 304 N.Y. 172, 106 N.E.2d 593, 304 N.Y. (N.Y.S.) 172, 1952 N.Y. LEXIS 767 (N.Y.), reh'g denied, 304 N.Y. 759, 108 N.E.2d 618, 304 N.Y. (N.Y.S.) 759, 1952 N.Y. LEXIS 960 (N.Y. 1952), cert. denied, 345 U.S. 924, 73 S. Ct. 783, 97 L. Ed. 1356, 1953 U.S. LEXIS 2258 (U.S. 1953).

Auto enginemen employed by the City of New York to operate its motor vehicles, to maintain such vehicles and to help load and unload them are not laborers, workmen or mechanics (sub 3) entitling them to the statutory prevailing rate of pay. Dinan v Joseph, 304 N.Y. 696, 107 N.E.2d 602, 304 N.Y. (N.Y.S.) 696, 1952 N.Y. LEXIS 907 (N.Y. 1952), reh'g denied, 307 N.Y. 935, 123 N.E.2d 577, 307 N.Y. (N.Y.S.) 935, 1954 N.Y. LEXIS 1611 (N.Y. 1954).

Machinists or mechanics engaged in public work were required to work eight hours daily and the city was under a statutory duty to pay them wages therefor at such rates as were fixed by the comptroller of the City of New York. McElroy v New York, 50 Misc. 2d 223, 270 N.Y.S.2d 113, 1966 N.Y. Misc. LEXIS 1932 (N.Y. Sup. Ct. 1966), aff'd, 29 A.D.2d 737, 287 N.Y.S.2d 352, 1968 N.Y. App. Div. LEXIS 5465 (N.Y. App. Div. 2d Dep't 1968).

17. —Police and firemen

The provisions providing that eight hours shall constitute a legal daily work does not apply to uniformed members of the fire department of the city of New York receiving annual salaries and not wages. It does not apply to persons holding offices or positions in the public service. People ex rel. Sweeney v Sturgis, 78 A.D. 460, 79 N.Y.S. 969, 1903 N.Y. App. Div. LEXIS 66 (N.Y. App. Div.), aff'd, 175 N.Y. 470, 67 N.E. 1088, 175 N.Y. (N.Y.S.) 470, 1903 N.Y. LEXIS 1017 (N.Y. 1903).

In a village of less than 5,000 inhabitants employing four or more policemen at annual salaries additional compensation may not be paid such policemen for working more than eight hours per day. 1945 Ops St Compt 47.

18. —School employees

School district employees hired by county Board of Cooperative Educational Services (BOCES) for public work project, in connection with agreement between BOCES and member school district, did not fall within common-law exemption from statutory prevailing wage rate mandate for classified and graded public employees, where such workers were classified by county civil service commission as temporary seasonal employees. Cayuga-Onondaga Counties Bd. of Coop. Educ. Servs. v Sweeney, 89 N.Y.2d 395, 654 N.Y.S.2d 92, 676 N.E.2d 854, 1996 N.Y. LEXIS 3601 (N.Y. 1996), reh'g denied, 89 N.Y.2d 1031, 658 N.Y.S.2d 246, 680 N.E.2d 620, 1997 N.Y. LEXIS 382 (N.Y. 1997).

The position of school janitor is not within the provisions of this section as to prevailing rate of wages. Farrell v Board of Education, 113 A.D. 405, 98 N.Y.S. 1046, 1906 N.Y. App. Div. LEXIS 1436 (N.Y. App. Div. 1906).

School bus drivers and matrons employed by private bus companies, which transport handicapped children to school pursuant to a contract with the Board of Education of the City of New York, are not "laborers, workmen or mechanics" in the employ of a contractor or subcontractor engaged in the construction, replacement, maintenance and repair of public works and, therefore, are not entitled to protection under provisions of the Labor Law and State Constitution requiring that contracts with the State or municipalities include provisions for wages to be paid to employees of contractors and subcontractors involved in public works projects at the prevailing wage rate (Labor Law § 220(3); NY Const, art I, § 17) and, accordingly, the Board is not bound by law to include any provision in the contracts with the bus companies setting a standard of wages or other labor clauses. Varsity Transit, Inc. v Saporita, 98 Misc. 2d 255, 413 N.Y.S.2d 868, 1979 N.Y. Misc. LEXIS 2071 (N.Y. Sup. Ct.), aff'd, 71 A.D.2d 643, 418 N.Y.S.2d 667, 1979 N.Y. App. Div. LEXIS 12868 (N.Y. App. Div. 2d Dep't 1979).

19. —State institution employees

The armory of a regiment of the National Guard of the state of New York is a state institution and this section is not applicable to a laborer employed in such armory since it expressly provides that it is not applicable to employees of the state institutions. Burns v Fox, 98 A.D. 507, 90 N.Y.S. 254, 1904 N.Y. App. Div. LEXIS 3587 (N.Y. App. Div. 1904).

20. —Public authority and commission employees

The Port of New York Authority is not required to pay its "direct" employees the prevailing rate of wages pursuant to Labor Law § 220(2), since the Authority was created by an interstate compact between New York and New Jersey and cannot be regulated by unilateral legislation of one of those two states. Agesen v Catherwood, 32 A.D.2d 416, 303 N.Y.S.2d 987, 1969 N.Y. App. Div. LEXIS 3261 (N.Y. App. Div. 2d Dep't 1969), aff'd, 26 N.Y.2d 521, 311 N.Y.S.2d 886, 260 N.E.2d 525, 1970 N.Y. LEXIS 1677 (N.Y. 1970).

Coverage under CLS Labor § 220(2) includes laborers involved in public works projects within state pursuant to contracts with public or governmental entities, and therefore included as "commission appointed pursuant to law," Niagara Falls Bridge Commission, even though it was created solely under federal law. Stephens & Rankin, Inc. v Hartnett, 160 A.D.2d 1201, 555

N.Y.S.2d 208, 1990 N.Y. App. Div. LEXIS 4728 (N.Y. App. Div. 3d Dep't 1990).

Where bridge and tunnel authority, a public benefit corporation, had approved its employee's application for transfer to sanitation department, authority was estopped to deny equal pay for equal performance by providing, after his transfer, that higher wage rate for period beginning before his transfer would apply only to persons still employed by authority. Petrocchi v Ronan, 81 Misc. 2d 741, 367 N.Y.S.2d 178, 1975 N.Y. Misc. LEXIS 2464 (N.Y. Civ. Ct. 1975).

21. Overtime

CLS Labor § 220(2) does not provide dispensation from paying overtime wages for work on sixth working day in one week to employees who do not work more than 40 hours during week; plain meaning of statute is that laborers shall not be required to work on more than 5 days in one week, and if they work on sixth day they are entitled to overtime pay. Green Island Constr. Co. v Roberts, 139 A.D.2d 907, 527 N.Y.S.2d 1021, 1988 N.Y. App. Div. LEXIS 4073 (N.Y. App. Div. 4th Dep't 1988).

Contractor would be held accountable for its failure to pay overtime, despite its asserted reliance on project supervisor who never advised it of overtime work, since contractor was fully accountable for noncompliance of its supervisor. Marangos Constr. Corp. v New York State Dep't of Labor, 216 A.D.2d 758, 628 N.Y.S.2d 451, 1995 N.Y. App. Div. LEXIS 6543 (N.Y. App. Div. 3d Dep't 1995).

The provisions of this section limiting hours of labor were not intended to apply to a case where a workman by accident or oversight labors beyond the prescribed limit nor were they intended to prevent a workman who had worked eight hours a day upon the work of the municipality from working overtime upon work of private customers. People ex rel. Hausauer-Jones Printing Co. v Zimmerman, 109 N.Y.S. 396, 58 Misc. 264, 1908 N.Y. Misc. LEXIS 326 (N.Y. Sup. Ct. 1908).

In action to recover compensation for overtime work allegedly performed by auto mechanics and machinists in employ of City of New York, though there was no question that defendant, in violation of Labor Law § 162, illegally denied them 15 minutes of lunch time which they otherwise were entitled to, plaintiffs could not recover the value thereof since under the statute they were given no right of action for any violation thereof and, moreover, loss of the 15 minutes was counterbalanced by their work time being correspondingly shortened in that they were permitted to leave their employment at 4:30 p.m. instead of 4:45 p.m. McElroy v New York, 50 Misc. 2d 223, 270 N.Y.S.2d 113, 1966 N.Y. Misc. LEXIS 1932 (N.Y. Sup. Ct. 1966), aff'd, 29 A.D.2d 737, 287 N.Y.S.2d 352, 1968 N.Y. App. Div. LEXIS 5465 (N.Y. App. Div. 2d Dep't 1968).

In § 220 of the Labor Law word "work" means physical or mental exertion controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer or his business and word "work time" therefore means such times during which the employee is necessarily required to be on duty at his place of work; but it does not include a lunch period where the employee during that period, though relieved of all duties and not restricted to the employer's premises, nevertheless has his lunch at his place of employment because the time allotted therefor does not permit him to have such meal elsewhere without running the risk of disciplinary action or penalties for belated resumption of work. McElroy v New York, 50 Misc. 2d 223, 270 N.Y.S.2d 113, 1966 N.Y. Misc. LEXIS 1932 (N.Y. Sup. Ct. 1966), aff'd, 29 A.D.2d 737, 287 N.Y.S.2d 352, 1968 N.Y. App. Div. LEXIS 5465 (N.Y. App. Div. 2d Dep't 1968).

Plaintiffs were chargeable with notice of the limitations upon overtime work as imposed by § 220 of the Labor Law, and therefore may not invoke the aid of the court to secure payment for work performed in violation of law. McElroy v New York, 50 Misc. 2d 223, 270 N.Y.S.2d 113, 1966 N.Y. Misc. LEXIS 1932 (N.Y. Sup. Ct. 1966), aff'd, 29 A.D.2d 737, 287 N.Y.S.2d 352, 1968 N.Y. App. Div. LEXIS 5465 (N.Y. App. Div. 2d Dep't 1968).

Determination of comptroller in settlement of dispute, that overtime should be paid in cash in accordance with stated schedule, vested sums earned and thus, estate of deceased city employee was entitled to recover for overtime earned by deceased. Lombardi v New York, 78 Misc. 2d 1057, 359 N.Y.S.2d 154, 1974 N.Y. Misc. LEXIS 1557 (N.Y. Sup. Ct.), modified, 46 A.D.2d 750, 361 N.Y.S.2d 1, 1974 N.Y. App. Div. LEXIS 3641 (N.Y. App. Div. 1st Dep't 1974).

A town may, under certain circumstances, provide for payment of premium compensation to highway employees for work performed prior to the general starting time and/or work performed after the general quitting time, although the work actually performed does not exceed eight hours per day. 1968 Ops St Compt File #488.

A water filtration plant operator is not prohibited from working in excess of eight hours a day, forty hours a week. 1967 Ops St Compt File #184.

A municipal corporation may not hire a laborer, workman or mechanic in two or more capacities if the effect, thereof, is to require work in excess of eight hours per day or five days per week. 1960 Ops St File #617.

22. —Willful violations

Commissioner of Labor properly ruled that employer's violation of overtime pay provision of Labor Law was willful where employer's overtime pay policy was identical to policy previously held unlawful by commissioner in another administrative proceeding to which employer was party; it was of no consequence that commissioner's later determination was made before earlier ruling was reviewed by Appellate Division. Hull-Hazard, Inc. v Roberts, 74 N.Y.2d 710, 543 N.Y.S.2d 383, 541 N.E.2d 412, 1989 N.Y. LEXIS 678 (N.Y. 1989).

Evidence supported determination by Commissioner of Labor that violation of CLS Labor § 220 was willful where (1) contractor decided not to pay overtime for sixth day of work to employees who did not work more than 40 hours during week based its conclusion that federal wage schedule superseded requirements of state law, (2) contractor's corporate officers discussed overtime issue but failed to seek advice of counsel or labor department representatives, and (3) contractor had sufficient experience with public work contracts to know that federal overtime provisions were inapplicable. Green Island Constr. Co. v Roberts, 139 A.D.2d 907, 527 N.Y.S.2d 1021, 1988 N.Y. App. Div. LEXIS 4073 (N.Y. App. Div. 4th Dep't 1988).

Evidence supported determination of Commissioner of Labor that contractor willfully failed to pay overtime where contractor failed to submit time cards for employees who worked on project, and commissioner relied on testimony of employees regarding hours worked, weekly work routine, and number of hours spent on particular portion of project; if contractor fails to maintain proper records and alternate method is employed by commissioner to determine number of hours worked, contractor has burden of demonstrating unreasonableness of commissioner's conclusion. Marangos Constr. Corp. v New York State Dep't of Labor, 216 A.D.2d 758, 628 N.Y.S.2d 451, 1995 N.Y. App. Div. LEXIS 6543 (N.Y. App. Div. 3d Dep't 1995).

Determination of Commissioner of Labor that contractor willfully failed to pay overtime was not arbitrary and capricious, since experienced contractor should have known that employees were not being paid overtime on days they worked more than 7 hours, and should also have been aware of requirements of CLS Labor Art 8, where it had been subject of several wage-related investigations in past, and had previously consented to finding of nonwillful violation relating to underpayment of wages. Marangos Constr. Corp. v New York State Dep't of Labor, 216 A.D.2d 758, 628 N.Y.S.2d 451, 1995 N.Y. App. Div. LEXIS 6543 (N.Y. App. Div. 3d Dep't 1995).

23. —Extraordinary emergency exception

This section contemplates that any order determining prevailing rate of wages may be modified. Carder Realty Corp. v Andrews, 239 A.D. 618, 269 N.Y.S. 596, 1934 N.Y. App. Div. LEXIS 10903 (N.Y. App. Div. 1934).

City of New York was prohibited from permitting or requiring machinists or mechanics to work more than eight hours a day except in case of extraordinary emergency or upon dispensation by the industrial commissioner, in which case overtime work would be compensable at premium wage rates. McElroy v New

York, 50 Misc. 2d 223, 270 N.Y.S.2d 113, 1966 N.Y. Misc. LEXIS 1932 (N.Y. Sup. Ct. 1966), aff'd, 29 A.D.2d 737, 287 N.Y.S.2d 352, 1968 N.Y. App. Div. LEXIS 5465 (N.Y. App. Div. 2d Dep't 1968).

A village may not require employees of the labor class to work more than eight hours a day or more than five days a week except in cases of extraordinary emergency. 1945 Ops St Compt 383.

Except in an emergency a town laborer may not be employed over eight hours per day for five days in a week; no agreement may be entered into for increased compensation for overtime work. 1946 Ops St Compt 184.

A village employee may be required to work more than 8 hours per day during an emergency; and may be paid overtime compensation where the village board has provided for the payment of such overtime compensation by local law, resolution or rule. 1959 Ops St Compt File #1031.

The authority to have highway employees work overtime in an emergency rests with the superintendent of highways. However, the supervisor may refuse to issue checks for the compensation of such employees where he has personal knowledge of an illegality in the payroll, e.g. employees working more than forty hours, where there was in fact no emergency or where the town board has not provided for payment of overtime compensation by resolution or rule pursuant to section 90 of the General Municipal Law. 1960 Ops St Compt File #660.

Employees of the Board of Education of a school district may not work more than eight hours per day or five days per week except in emergency, and may be eligible for overtime pay under § 90 of the General Municipal Law. 1961 Ops St Compt #588.

Workingmen, laborers, or mechanics employed by a town may not be permitted or required to work in excess of eight hours a day, five days a week, as such, except in situations involving extraordinary emergencies. 1967 Ops St Compt File #742.

24. —Particular emergencies

Installation of an extra pump by a city whose inhabitants are dependent for their water supply upon a single pump which was kept in almost continuous operation is within the exception providing for extraordinary emergency caused by fire, flood or danger to life or property. People ex rel. Usoy v Waring, 52 A.D. 36, 64 N.Y.S. 865, 1900 N.Y. App. Div. LEXIS 1535 (N.Y. App. Div. 1900).

Under this section, making eight hours a legal day's work for all employees engaged in public works, save in specially excepted cases and except as slightly modified with respect to New York City employees by § 884-4.0 of the New York City Administration Code, in the absence of application of one of the exceptions the city could not legally engage in the practice of requiring certain workers in its Department of Public Works to work in excess of eight hours per day by allowing them compensatory time off rather than overtime pay, regardless of emergency conditions due to shortage of budgeted funds. Del Gaudio v Zurmuhlen, 29 Misc. 2d 84, 213 N.Y.S.2d 157, 1961 N.Y. Misc. LEXIS 3228 (N.Y. Sup. Ct. 1961).

25. Prevailing wage

Failure to annex prevailing rate schedule to work specifications did not relieve contractor of its obligation to pay prevailing wages. Twin State CCS Corp. v Roberts, 72 N.Y.2d 897, 532 N.Y.S.2d 746, 528 N.E.2d 1219, 1988 N.Y. LEXIS 1663 (N.Y. 1988).

The "prevailing rate of wages" requirement of Labor Law § 220 was not applicable to private construction projects financed by industrial development agencies through the issuance of tax-exempt industrial revenue bonds, since such projects were not "public works" projects within the meaning of the statute, and the conveyance of legal title to such a public agency with a simultaneous leaseback to the private company was merely a mechanism to facilitate financing, and neither the fact that the agency held formal title to the project nor the fact that certain tax exemptions were accorded to the project could transform what was essentially a private venture into something that could be deemed public. Erie County Industrial Dev. Agency v Roberts, 94 A.D.2d 532, 465 N.Y.S.2d 301, 1983 N.Y. App. Div. LEXIS 18503 (N.Y. App. Div. 4th Dep't 1983), aff'd, 63 N.Y.2d 810, 482 N.Y.S.2d 267, 472 N.E.2d 43, 1984 N.Y. LEXIS 4635 (N.Y. 1984).

CLS Mental Hygiene § 41.34, providing that community residents shall be deemed family unit for purpose of local laws and ordinances, does not require that employees of contractor working on such building be compensated under CLS Labor § 220 for prevailing wages on residential construction rather than higher wages for general construction; Department of Labor could properly conclude that construction of community or group residence for up to 12 persons fits within general construction schedule rather than within residential rate schedule applicable to construction of 1-family, 2-family, row or garden-type housing. C.E.L. Lumber, Inc. v Roberts, 109 A.D.2d 1002, 486 N.Y.S.2d 481, 1985 N.Y. App. Div. LEXIS 47494 (N.Y. App. Div. 3d Dep't 1985).

Although public works contractor may satisfy its obligation under CLS Labor § 220(3) by supplying its employees with cash equivalent of cost of obtaining prevailing benefits, by providing equivalent benefits plan, or by combination of benefits and cash equal to cost of prevailing benefits, it may not do so by substituting different type of benefit for scheduled benefit or by substituting increase in one of scheduled benefits. A. L. Blades & Sons, Inc. v Roberts, 136 A.D.2d 926, 524 N.Y.S.2d 912, 1988 N.Y. App. Div. LEXIS 1364 (N.Y. App. Div. 4th Dep't), app. denied, 72 N.Y.2d 803, 532 N.Y.S.2d 368, 528 N.E.2d 520, 1988 N.Y. LEXIS 1810 (N.Y. 1988).

Department of Labor's determination of prevailing wage schedule for tele-data installation work on public work contracts, which merged existing separate categories for voice telecommunications work and data telecommunications work into since category of "telecommunications worker-voice, data, video," did not comply with CLS Labor § 220(3) because it was equivalent of unapproved apprentice program where it involved progression through step rates was dependent on mastery of skills acquired during on-the-job training and formal course work, not solely on longevity. Local 363, IBEW v New York State DOL, 230 A.D.2d 440, 659 N.Y.S.2d 518, 1997 N.Y. App. Div. LEXIS 6707 (N.Y. App. Div. 3d Dep't 1997).

The Commissioner of Labor of the State of New York erred in adopting that part of the recommendation of a hearing officer which found that the petitioner corporation failed to pay the prevailing wages and supplements to its employees pursuant to N.Y. Lab. Law § 220, because a heating contractor was the contractor on the project in question, and the corporation and the heating contractor were separate and distinct entities. Capstone Enters. of Port Chester, Inc. v McGowan, 289 A.D.2d 402, 735 N.Y.S.2d 145, 2001 N.Y. App. Div. LEXIS 12255 (N.Y. App. Div. 2d Dep't 2001).

Administrative Law Judge's conclusion (adopted by comptroller) that there should be differential between prevailing wage rates assigned 2 groups of elevator mechanics, was not arbitrary and capricious where one group was principally employed in ordinary maintenance and other in non-routine repairs. Local 237, Int'l Bhd. of Teamsters v Comptroller of the City of New York, 259 A.D.2d 314, 686 N.Y.S.2d 420, 1999 N.Y. App. Div. LEXIS 2420 (N.Y. App. Div. 1st Dep't 1999).

Judgment entered in favor of the property owner was affirmed because the property owner was not required, under the terms of the lease agreement that the owner had with the county, to pay a prevailing wage rate under N.Y. Lab. Law § 220 during the construction phase of the building. Pursuant to § 220, the construction of the building, being done at the owner's own expense, could not be considered a public works project. County of Suffolk v Coram Equities, LLC, 31 A.D.3d 687, 821 N.Y.S.2d 215, 2006 N.Y. App. Div. LEXIS 9566 (N.Y. App. Div. 2d Dep't 2006).

Dismissal of union employee's application for review of decision partially denying a Freedom of Information Law request was proper because the information sought, the names and addresses of non-union employees, implicated significant privacy interests, and the information provided, the titles and wage rates with employee names and addresses redacted, was sufficient to ensure compliance with prevailing wage requirements. Matter of Massaro v New York State Thruway Auth., 111 A.D.3d 1001, 974 N.Y.S.2d 636, 2013 N.Y. App. Div. LEXIS 7216 (N.Y. App. Div. 3d Dep't 2013).

This section does not preclude particular localities from going beyond wages and hours fixed by state legislation for the state as

a whole in fixing minimum wages to be paid by bidders on local public works projects. McMillen v Browne, 40 Misc. 2d 348, 243 N.Y.S.2d 293, 1963 N.Y. Misc. LEXIS 1785 (N.Y. Sup. Ct.), aff'd, 20 A.D.2d 531, 244 N.Y.S.2d 833, 1963 N.Y. App. Div. LEXIS 2692 (N.Y. App. Div. 1st Dep't 1963).

Motion to dismiss an action challenging the prevailing wages was denied because the record did not establish whether or how the Comptroller of the City of New York investigated the work in question, what evidence he weighed, what evidence he relied on, and whether he used engineering expertise and exercised his fiscal officer's discretion; the record was grossly imprecise as to what data the parties submitted directly to the Comptroller regarding the distinctions between trades. Matter of New York Ind. Contrs. Alliance v Liu, 981 N.Y.S.2d 246, 43 Misc. 3d 443, 2013 N.Y. Misc. LEXIS 6469 (N.Y. Sup. Ct. 2013).

Petitioners, a union and an employers association, had standing to challenge a city comptroller's reclassification of asphalt pavers and concrete pavers into a single trade for purposes of the prevailing wage schedules, as petitioners showed this reclassification caused union members to lose public work and association members to lose bids on public works projects. Matter of New York Ind. Contrs. Alliance v Liu, 49 Misc. 3d 478, 15 N.Y.S.3d 544, 2014 N.Y. Misc. LEXIS 5959 (N.Y. Sup. Ct. 2014).

Comptroller's reclassification of asphalt pavers and concrete pavers into a single trade for purposes of the prevailing wage schedules was reversed as arbitrary, as he failed to justify his revocation of precedent distinguishing between asphalt and concrete in the paving and roadbuilding trade classifications in favor of a subclassification based the use of a paving machine. Matter of New York Ind. Contrs. Alliance v Liu, 49 Misc. 3d 478, 15 N.Y.S.3d 544, 2014 N.Y. Misc. LEXIS 5959 (N.Y. Sup. Ct. 2014).

Under state's "benefit neutral" total package enforcement approach to enforcement of prevailing wage law (CLS Labor § 220) whereby employer may provide supplemental benefits in any form or combination so long as sum total is not less than locally prevailing benefits, preemption by Employee Retirement Income Security Act (ERISA) does not occur. Burgio & Campofelice, Inc. v New York State DOL, 107 F.3d 1000, 1997 U.S. App. LEXIS 4656 (2d Cir. N.Y. 1997).

Prevailing wage law (CLS Labor § 220) is not preempted by Employee Retirement Income Security Act (ERISA) on basis that it creates "alternative enforcement mechanism" for ERISA plan obligations, as employer's obligation does not arise under ERISA or collective bargaining agreement providing for ERISA benefits, but directly under Labor § 223. Burgio & Campofelice, Inc. v New York State DOL, 107 F.3d 1000, 1997 U.S. App. LEXIS 4656 (2d Cir. N.Y. 1997).

26. —Action for failure to pay

Substantial evidence showed that public works contractor underpaid employees by failing to keep proper records as to number of hours worked where engineer's summaries detailed discrepancies relating to payrolls in light of employer's failure to keep proper records. D.D.G. General Contracting Corp. v Hartnett, 149 A.D.2d 819, 540 N.Y.S.2d 344, 1989 N.Y. App. Div. LEXIS 4880 (N.Y. App. Div. 3d Dep't 1989).

Substantial evidence showed that public works contractor failed to pay prevailing hourly wages and supplements to 3 employees where calculations on PW-11 forms compared with prevailing wage schedule revealed that incorrect hourly wages were paid to them. D.D.G. General Contracting Corp. v Hartnett, 149 A.D.2d 819, 540 N.Y.S.2d 344, 1989 N.Y. App. Div. LEXIS 4880 (N.Y. App. Div. 3d Dep't 1989).

Substantial evidence did not support calculation of underpaid wages to 8 employees of public works contractor where Department of Labor, without explanation, utilized hours listed on engineer's summaries for some employees and hours listed on certified payroll for other employees. D.D.G. General Contracting Corp. v Hartnett, 149 A.D.2d 819, 540 N.Y.S.2d 344, 1989 N.Y. App. Div. LEXIS 4880 (N.Y. App. Div. 3d Dep't 1989).

In proceeding to annul labor commissioner's finding that subcontractor violated prevailing wage requirements of CLS Labor § 220(3) in connection with installation of telecommunications system on campus of state university, subcontractor failed to show that classification of workers as "electrician/telephone installers" was unsupported by evidence because of commissioner's inability to determine specific duties of each worker since (1) work was limited to installation of telecommunications system, (2) classification of trades or occupations is within expertise of commissioner, (3) it was permissible for commissioner to look at local collective bargaining agreement between electricians' union and contractors' association to establish job duties of classification, and (4) commissioner properly concluded that each worker was entitled to receive at least wage rate for lowest of 4 rates specified in collective bargaining agreement. Sierra Telcom Servs., Inc. v Hartnett, 174 A.D.2d 279, 579 N.Y.S.2d 753, 1992 N.Y. App. Div. LEXIS 909 (N.Y. App. Div. 3d Dep't), app. dismissed, 79 N.Y.2d 1039, 584 N.Y.S.2d 448, 594 N.E.2d 942, 1992 N.Y. LEXIS 1463 (N.Y. 1992), app. dismissed, 79 N.Y.2d 1039, 584 N.Y.S.2d 448, 594 N.E.2d 942, 1992 N.Y. LEXIS 1511 (N.Y. 1992), app. denied, 80 N.Y.2d 756, 588 N.Y.S.2d 824, 602 N.E.2d 232, 1992 N.Y. LEXIS 3179 (N.Y. 1992), app. denied, 80 N.Y.2d 757, 588 N.Y.S.2d 825, 602 N.E.2d 233, 1992 N.Y. LEXIS 3210 (N.Y. 1992), cert. denied, 507 U.S. 972, 113 S. Ct. 1413, 122 L. Ed. 2d 784, 1993 U.S. LEXIS 1979 (U.S. 1993).

In workers' action to recover prevailing wages and benefits on payment bond under CLS Labor §§ 220 and 220-g, even if motion court properly ignored workers' affidavits because they contradicted, without explanation, their month-old deposition testimony, and that workers thus failed to raise triable issue of fact in response to surety's prima facie showing that they participated in their employer's payroll kickback scheme, surety still was not entitled to summary judgment dismissing workers' claims where public policy, implemented by CLS Labor Art 8, of ensuring payment of prevailing wages on public construction contracts was paramount to surety's interest in avoiding liability for obligations imposed on it without its consent. Sullivan v International Fid. Ins. Co., 255 A.D.2d 128, 679 N.Y.S.2d 391, 1998 N.Y. App. Div. LEXIS 11710 (N.Y. App. Div. 1st Dep't 1998).

Construction company failed to pay prevailing wages and supplements as required by CLS Labor § 220(3), even though methodology used by investigator was imperfect, where that methodology was necessitated by absence of comprehensive payroll records from construction company. TPK Constr. Co. v Dillon, 266 A.D.2d 82, 700 N.Y.S.2d 672, 1999 N.Y. App. Div. LEXIS 11646 (N.Y. App. Div. 1st Dep't 1999).

In proceeding for construction company's failure to pay prevailing wages as required by CLS Labor § 220(3), company was entitled to credit against sums underpaid where employee from its payroll department testified that particular retroactive payment by company was for work on subject project, and there was no contrary evidence. TPK Constr. Co. v Dillon, 266 A.D.2d 82, 700 N.Y.S.2d 672, 1999 N.Y. App. Div. LEXIS 11646 (N.Y. App. Div. 1st Dep't 1999).

Contractor's counterclaim seeking damages for subcontractor's failure to pay the prevailing wage was properly dismissed, as there was no private right of action for underpayment of wages until there had been an administrative determination that was either unreviewed or affirmed in the employees' favor. Further, the private right belonged only to the employees who had been underpaid. High Tech Enters. & Elec. Servs. of NY, Inc. v Expert Elec., Inc., 113 A.D.3d 546, 980 N.Y.S.2d 387, 2014 N.Y. App. Div. LEXIS 442 (N.Y. App. Div. 1st Dep't 2014).

Trial court properly granted the corporation's motion to dismiss the former employees' second through fifth causes of action in a case where the former employees claimed that the corporation did not pay them the prevailing wages they were entitled to under N.Y. Lab. Law § 220 regarding their work on various public work projects, as they did not identify the contracts that the corporation allegedly breached; however, the trial court erred in denying the former employees' motion for leave to serve a second-amended complaint in light of the lack of prejudice to the corporation and the possibility that the former employees' claims had merit. Maldonado v Olympia Mech. Piping & Heating Corp., 8 A.D.3d 348, 777 N.Y.S.2d 730, 2004 N.Y. App. Div. LEXIS 7892 (N.Y. App. Div. 2d Dep't 2004).

Trial court's dismissal of a laborer's claims under N.Y. Lab. Law § 220, seeking recovery of prevailing wages that were allegedly

not paid by an employer, was proper where there was no showing of an administrative determination that was resolved in the employee's favor that was either affirmed or unreviewed; further, there were factual disputes regarding whether there was an underpayment of wages, and no common-law breach of contract claim had been stated. Dragone v Bob Bruno Excavating, Inc., 45 A.D.3d 1238, 847 N.Y.S.2d 251, 2007 N.Y. App. Div. LEXIS 12201 (N.Y. App. Div. 3d Dep't 2007).

The employees of the subcontractor are third-party beneficiaries of the prevailing wage promise in the prime contract and should be permitted to allege that the general contractor breached that obligation. Wrobel v Shaw Envtl. & Infrastructure Eng'g of N.Y., P.C., 56 Misc. 3d 798, 53 N.Y.S.3d 898, 2017 N.Y. Misc. LEXIS 1742 (N.Y. Sup. Ct. 2017).

A general contractor has a duty, under N.Y. Lab. Law § 220, to commit its subcontractors to paying a prevailing wage. Wrobel v Shaw Envtl. & Infrastructure Eng'g of N.Y., P.C., 56 Misc. 3d 798, 53 N.Y.S.3d 898, 2017 N.Y. Misc. LEXIS 1742 (N.Y. Sup. Ct. 2017).

As between the general contractor, who may choose with whom it subcontracts, and the laborers under the subcontract, New York Labor Law makes clear that the general contractor should bear the risk that it has hired a subcontractor who fails to pay a prevailing wage. Wrobel v Shaw Envtl. & Infrastructure Eng'g of N.Y., P.C., 56 Misc. 3d 798, 53 N.Y.S.3d 898, 2017 N.Y. Misc. LEXIS 1742 (N.Y. Sup. Ct. 2017).

Under a public works contract, plaintiff employees of a subcontractor were permitted to assert a breach of contract claim against defendant general contractor because plaintiffs were third-party beneficiaries of the contract's prevailing wage promise and were therefore permitted to allege that defendant breached that obligation. The trial court refused to enforce the negation clause in the prime contract, because it would eliminate plaintiffs' common-law right as third-party beneficiaries of the prime contract to enforce the prevailing wage requirement which would be against the public policy expressed in N.Y. Lab. Law § 220. Wrobel v Shaw Envtl. & Infrastructure Eng'g of N.Y., P.C., 56 Misc. 3d 798, 53 N.Y.S.3d 898, 2017 N.Y. Misc. LEXIS 1742 (N.Y. Sup. Ct. 2017).

27. — —Willfulness

Substantial evidence existed to support determination by Commissioner of Labor that employer willfully violated CLS Labor § 220 in underpaying prevailing wages and supplements to 3 employees who employer had classified as "trainees" where employer adhered to its own policy of hiring federal trainees at wages less than journey level after it was expressly notified that it was not conforming to department's policy. Tap Electrical Contracting Service, Inc. v Hartnett, 76 N.Y.2d 164, 556 N.Y.S.2d 988, 556 N.E.2d 427, 1990 N.Y. LEXIS 1308 (N.Y. 1990).

Evidence sustained administrative finding that contractor willfully violated CLS Labor § 220 by paying workers at laborer rate rather than at higher ironworker rate for job of tying steel rods since both sides offered credible proof on issue of whether tying steel rods is job for laborers or ironworkers and contractor knew or should have known that workers were entitled to ironworkers' wages since they were paid at ironworker rate for some but not all hours. Hull-Hazard, Inc. v Roberts, 129 A.D.2d 348, 517 N.Y.S.2d 824, 1987 N.Y. App. Div. LEXIS 44912 (N.Y. App. Div. 3d Dep't 1987), aff'd, 72 N.Y.2d 900, 532 N.Y.S.2d 748, 528 N.E.2d 1221, 1988 N.Y. LEXIS 1666 (N.Y. 1988).

Commissioner of Labor properly found that contractor had failed to pay prevailing wages and supplements under public works contract in willful violation of CLS Labor § 220(3), even though contractor had commenced litigation against commissioner on ground that she lacked authority to enforce new pay rates on ongoing projects, where contractor unilaterally refused to pay new rates, instead of seeking stay or other injunctive relief to prevent implementation; thus, contractor acted knowingly, intentionally and deliberately in choosing not to pay higher rates until judicially ordered to do so, which constituted willful failure. Hull-Hazard, Inc. v Roberts, 136 A.D.2d 872, 524 N.Y.S.2d 848, 1988 N.Y. App. Div. LEXIS 585 (N.Y. App. Div. 3d Dep't), app. denied, 72 N.Y.2d 805, 532 N.Y.S.2d 755, 528 N.E.2d 1228, 1988 N.Y. LEXIS 2775 (N.Y. 1988), modified, 74 N.Y.2d 710, 543 N.Y.S.2d 383, 541 N.E.2d 412, 1989 N.Y. LEXIS 678 (N.Y. 1989).

Determination that subcontractor committed willful violations of CLS Labor § 220(3) by failing to pay overtime specified in prevailing wage rate schedule in connection with project to remove asbestos and reinsulate mechanical systems at public school was supported by testimony from subcontractor's president admitting that although company had performed 110 previous public works projects, he never reviewed prevailing wage rates attached to general contractor's contract, never paid overtime rates contained therein, and never examined Labor Law. Tru-Temp Industrial Insulation Co. v Hartnett, 155 A.D.2d 820, 547 N.Y.S.2d 941, 1989 N.Y. App. Div. LEXIS 14371 (N.Y. App. Div. 3d Dep't 1989).

Evidence supported labor commissioner's finding that petitioner willfully failed to pay prevailing wages and supplements on public works project since petitioner, which had previously performed public works projects and whose officers were knowledgeable regarding prevailing wage law, should have known that employees on project in question were not being paid prevailing wages and that its payroll records were not authentic. Mid Hudson Pam Corp. v Hartnett, 156 A.D.2d 818, 549 N.Y.S.2d 835, 1989 N.Y. App. Div. LEXIS 15879 (N.Y. App. Div. 3d Dep't 1989).

Substantial evidence supported finding by Commissioner of Labor that employer had willfully failed to pay prevailing wages and supplements, despite employer's contention that underpayments were due to inexperience of job superintendent whose construction background was acquired in other states and who had not been involved in project governed by prevailing wage rate law, where employer was highly experienced public work contractor, it knew that superintendent was not knowledgeable about wage rate system, it made no effort to instruct or supervise superintendent, and superintendent submitted daily and weekly reports to employer containing coded entries identifying, inter alia, each worker's classification and specific task performed. D. A. Elia Constr. Corp. v State, 180 A.D.2d 881, 579 N.Y.S.2d 768, 1992 N.Y. App. Div. LEXIS 1497 (N.Y. App. Div. 3d Dep't), app. denied, 80 N.Y.2d 752, 587 N.Y.S.2d 287, 599 N.E.2d 691 (N.Y. 1992).

Substantial evidence supported determination that public works contractor acted willfully in failing to pay prevailing wages and wage supplements where contractor claimed confusion surrounding prevailing wage schedule issued by Department of Labor but failed to resolve confusion and merely assumed that compliance with national agreement between laborers' union and pipeline association would be sufficient. Otis Eastern Service, Inc. v Hudacs, 185 A.D.2d 483, 586 N.Y.S.2d 348, 1992 N.Y. App. Div. LEXIS 8949 (N.Y. App. Div. 3d Dep't 1992).

Underpayments of prevailing wages and supplements were not accidental and de minimis where (1) prevailing rate schedules were incorporated into contracts, and (2) although underpayment amounts were concededly small in relation to value of contracts, their duration extended over many months. Nelson's Lamp Lighters v Hudacs, 204 A.D.2d 814, 611 N.Y.S.2d 714, 1994 N.Y. App. Div. LEXIS 5176 (N.Y. App. Div. 3d Dep't 1994).

Finding that experienced public works contractors knew or should have known that they were violating prevailing wage law, and that violation was thus willful, was supported by evidence that contractors continued to adhere to their classifications after being given notice that they were improper, and thereby placed themselves in direct conflict with position of Commissioner of Labor. Waterway Constr. Corp. v Sweeney, 248 A.D.2d 256, 670 N.Y.S.2d 429, 1998 N.Y. App. Div. LEXIS 2662 (N.Y. App. Div. 1st Dep't 1998).

Substantial evidence supported the New York State Department of Labor's finding that a self-employed electrician and business owner violated the prevailing wage rate laws by not paying his employees journeyman electrician wages of $25 per hour plus supplemental benefits on two public works projects and that the underpayment was willful. The classification of the employees as journeymen electricians was supported by substantial evidence because they performed the same work designated for journeyman electricians under a collective bargaining agreement; substantial evidence also supported the finding of willful-

ness because the business owner had worked on public works projects before and knew that the wage rates were higher. Matter of Nash v New York State Dept. of Labor, 34 A.D.3d 905, 824 N.Y.S.2d 438, 2006 N.Y. App. Div. LEXIS 13011 (N.Y. App. Div. 3d Dep't 2006), app. denied, 8 N.Y.3d 803, 830 N.Y.S.2d 700, 862 N.E.2d 792, 2007 N.Y. LEXIS 247 (N.Y. 2007).

New York Bureau of Public Works' determination that workers who built a scaffold performed carpentry work and were intentionally underpaid by their employer was supported by substantial evidence. Consol. Masonry Contrs., Inc. v Angello, 2 A.D.3d 997, 770 N.Y.S.2d 134, 2003 N.Y. App. Div. LEXIS 13144 (N.Y. App. Div. 3d Dep't 2003).

Determination that the employer's failure to pay prevailing wages was willful was confirmed where the finding of willfulness arose from the employer's payment of all work at the lower glaziers' rate, including tasks such as affixing ceiling tiles and cleaning windows, and a review of the record demonstrated that substantial evidence supported the New York Department of Labor's determination that an experienced contractor such as the employer knew or should have known that this work was usually performed by carpenters and laborers. Lantry v State, 12 A.D.3d 864, 785 N.Y.S.2d 758, 2004 N.Y. App. Div. LEXIS 13795 (N.Y. App. Div. 3d Dep't 2004), aff'd, 6 N.Y.3d 49, 810 N.Y.S.2d 729, 844 N.E.2d 276, 2005 N.Y. LEXIS 3347 (N.Y. 2005).

Commissioner of Labor properly determined that a contractor willfully failed to pay its workers prevailing wages and supplements with respect to installation of a new roof on a high school building, as the contractor had decades of experience and knowingly used an expired wage rate schedule. Matter of Central City Roofing Co., Inc. v Musolino, 136 A.D.3d 1186, 25 N.Y.S.3d 433, 2016 N.Y. App. Div. LEXIS 1218 (N.Y. App. Div. 3d Dep't 2016).

28. —Determination of prevailing wages

The provision of subdivision 7 of this section requiring the Comptroller to make a rate determination within 6 months after the filing of a verified complaint are directory and not mandatory. Guercio v Gerosa, 8 A.D.2d 250, 186 N.Y.S.2d 458, 1959 N.Y. App. Div. LEXIS 8361 (N.Y. App. Div. 1st Dep't 1959), aff'd, 8 N.Y.2d 1104, 209 N.Y.S.2d 785, 171 N.E.2d 873, 1960 N.Y. LEXIS 895 (N.Y. 1960).

Whether particular undertaking constitutes electrician's work for purpose of wages provisions of CLS Labor § 220 is matter within expertise of Department of Labor. Nelson's Lamp Lighters v Roberts, 136 A.D.2d 810, 523 N.Y.S.2d 643, 1988 N.Y. App. Div. LEXIS 259 (N.Y. App. Div. 3d Dep't), app. denied, 73 N.Y.2d 702, 537 N.Y.S.2d 490, 534 N.E.2d 328, 1988 N.Y. LEXIS 3453 (N.Y. 1988).

Subcontractor found to have violated CLS Labor § 220(3) by failing to pay overtime specified in prevailing wage rate schedule in connection with project to remove asbestos and reinsulate mechanical systems at public school was properly denied credit for cost of health insurance benefits provided to one of project's employees, since benefit payments were not reflected in subcontractor's certified payroll. Tru-Temp Industrial Insulation Co. v Hartnett, 155 A.D.2d 820, 547 N.Y.S.2d 941, 1989 N.Y. App. Div. LEXIS 14371 (N.Y. App. Div. 3d Dep't 1989).

In proceeding against contractor for violating CLS Labor § 220(3) by failing to pay prevailing asbestos worker wage rates in connection with project to remove asbestos and reinsulate mechanical systems at public school, hearing officer did not err in determining that contractor's foreman should have been paid asbestos workers' wages, since foreman remained laborer where only $^1/_3$ of his time was spent in supervisory functions. Tru-Temp Industrial Insulation Co. v Hartnett, 155 A.D.2d 820, 547 N.Y.S.2d 941, 1989 N.Y. App. Div. LEXIS 14371 (N.Y. App. Div. 3d Dep't 1989).

In proceeding to collect back wages and civil fines due by reason of petitioner's failure to pay prevailing wages and supplements on public works project, Commissioner of Labor properly disallowed any use of payments entered in taxable adjustment column (TAC) of petitioner's payroll analysis, which allegedly represented payment to employees of difference between regular wages and required prevailing wages, where several employees testified that TAC payments were not for prevailing wages, and although petitioner's president testified to contrary, he lacked records to support claim and admitted on cross-examination that TAC payments were used for other purposes. Mid Hudson Pam Corp. v Hartnett, 156 A.D.2d 818, 549 N.Y.S.2d 835, 1989 N.Y. App. Div. LEXIS 15879 (N.Y. App. Div. 3d Dep't 1989).

In proceeding resulting in order requiring payment of back wages and civil fines due by reason of petitioner's failure to pay prevailing wages and supplements on public works project, recreation of petitioner's payroll records to add workers and compute underpayments was not arbitrary and speculative where, although petitioner was experienced public contractor and aware of prevailing wage statutes, its records were so incomplete that it was impossible to bring them to statutorily mandated standard of record keeping, thus entitling Commissioner of Labor to make just and reasonable inferences in awarding damages to employees even though results might be approximate. Mid Hudson Pam Corp. v Hartnett, 156 A.D.2d 818, 549 N.Y.S.2d 835, 1989 N.Y. App. Div. LEXIS 15879 (N.Y. App. Div. 3d Dep't 1989).

Court properly dismissed Article 78 proceeding to review determination of Department of Labor which established prevailing wage rate on public work project performed for New York Power Authority, pursuant to CLS Labor § 220, since there was rational basis for department to conclude that rewinding of off-line generators was performed by electricians, not "winders"; determination of "trade or occupation" under § 220 is matter within department's expertise. GE v N.Y. State Dep't of Labor, 154 A.D.2d 117, 551 N.Y.S.2d 966, 1990 N.Y. App. Div. LEXIS 1881 (N.Y. App. Div. 3d Dep't), aff'd, 76 N.Y.2d 946, 563 N.Y.S.2d 764, 565 N.E.2d 513, 1990 N.Y. LEXIS 3416 (N.Y. 1990).

CLS Labor § 220(5) does not unconstitutionally delegate legislative power to private parties by allowing Department of Labor to rely on collective bargaining agreements in determining wages since (1) use of collective bargaining agreement to set prevailing wage rates is reasonably necessary to accomplish legislature's mandate that workers receive prevailing wage, (2) parties who negotiate collective bargaining agreements may establish prevailing wage for public works in given locality only when employer employs at least 30 percent of workers engaged in that kind of work in that locality, and (3) 30 percent requirement provides safeguard to place any delegation within constitutional limits. GE v N.Y. State Dep't of Labor, 154 A.D.2d 117, 551 N.Y.S.2d 966, 1990 N.Y. App. Div. LEXIS 1881 (N.Y. App. Div. 3d Dep't), aff'd, 76 N.Y.2d 946, 563 N.Y.S.2d 764, 565 N.E.2d 513, 1990 N.Y. LEXIS 3416 (N.Y. 1990).

In Article 78 proceeding, court would not annul labor commissioner's finding that subcontractor violated prevailing wage requirements of CLS Labor § 220(3) in connection with its installation of telecommunications system on campus of state university on ground that university failed to classify workers to be employed on project or to provide description of work to be performed as required by § 220(3-a), since "request for proposal" sent by university to bidders on project described project's system and cable requirements, operational tests, and other work in sufficient detail to comply with statute. Sierra Telcom Servs., Inc. v Hartnett, 174 A.D.2d 279, 579 N.Y.S.2d 753, 1992 N.Y. App. Div. LEXIS 909 (N.Y. App. Div. 3d Dep't), app. dismissed, 79 N.Y.2d 1039, 584 N.Y.S.2d 448, 594 N.E.2d 942, 1992 N.Y. LEXIS 1463 (N.Y. 1992), app. dismissed, 79 N.Y.2d 1039, 584 N.Y.S.2d 448, 594 N.E.2d 942, 1992 N.Y. LEXIS 1511 (N.Y. 1992), app. denied, 80 N.Y.2d 756, 588 N.Y.S.2d 824, 602 N.E.2d 232, 1992 N.Y. LEXIS 3179 (N.Y. 1992), app. denied, 80 N.Y.2d 757, 588 N.Y.S.2d 825, 602 N.E.2d 233, 1992 N.Y. LEXIS 3210 (N.Y. 1992), cert. denied, 507 U.S. 972, 113 S. Ct. 1413, 122 L. Ed. 2d 784, 1993 U.S. LEXIS 1979 (U.S. 1993).

In Article 78 proceeding, court would not annul agency's finding that subcontractor violated prevailing wage requirements of CLS Labor § 220(3) on ground that agency's adoption of wage rates set forth in local collective bargaining agreement between union and contractors' association represented unconstitutional delegation of legislative power to private parties; § 220(5), which requires that employer under collective bargaining agreement employ at least 30 percent of workers engaged in same trade or occupation in locality before wage provisions of agreement may be used, provides sufficient standard to overcome constitutional objection.

Sierra Telcom Servs., Inc. v Hartnett, 174 A.D.2d 279, 579 N.Y.S.2d 753, 1992 N.Y. App. Div. LEXIS 909 (N.Y. App. Div. 3d Dep't), app. dismissed, 79 N.Y.2d 1039, 584 N.Y.S.2d 448, 594 N.E.2d 942, 1992 N.Y. LEXIS 1463 (N.Y. 1992), app. dismissed, 79 N.Y.2d 1039, 584 N.Y.S.2d 448, 594 N.E.2d 942, 1992 N.Y. LEXIS 1511 (N.Y. 1992), app. denied, 80 N.Y.2d 756, 588 N.Y.S.2d 824, 602 N.E.2d 232, 1992 N.Y. LEXIS 3179 (N.Y. 1992), app. denied, 80 N.Y.2d 757, 588 N.Y.S.2d 825, 602 N.E.2d 233, 1992 N.Y. LEXIS 3210 (N.Y. 1992), cert. denied, 507 U.S. 972, 113 S. Ct. 1413, 122 L. Ed. 2d 784, 1993 U.S. LEXIS 1979 (U.S. 1993).

Substantial evidence supported determination that public works contractor failed to pay prevailing wages and wage supplements to 28 workers by improperly classifying them as general laborers and welder helpers, rather than as intermediate laborers, where Department of Labor rejected national agreement between laborers' union and pipeline association, accepted local contract as applicable, and found that workers did enough work with pipe to qualify as "pipe men." Otis Eastern Service, Inc. v Hudacs, 185 A.D.2d 483, 586 N.Y.S.2d 348, 1992 N.Y. App. Div. LEXIS 8949 (N.Y. App. Div. 3d Dep't 1992).

Court properly dismissed Article 78 petition to annul city comptroller's decision establishing prevailing wage classification on work project for department of city planning, since (1) comptroller had rational basis for concluding that job requirements for installation of cables on project were consistent with requirements of comptroller's "telephone installer" job category, in that both jobs involved installation of low-voltage cables, and (2) comptroller properly applied wage rate set forth in Communications Workers of America (CWA) bargaining agreement based on surveys which indicated that more than 30 percent of telephone installers in locality belonged to CWA union. Joint Indus. Bd. of the Elec. Indus. v Schaffer, 205 A.D.2d 310, 613 N.Y.S.2d 11, 1994 N.Y. App. Div. LEXIS 5818 (N.Y. App. Div. 1st Dep't 1994).

The provision in subd. 7 of this section, requiring the fiscal officer to make an order or determination not later than six months after filing of the verified complaint, is directory and not mandatory. Port Chester v Industrial Comm'r, 32 Misc. 2d 64, 222 N.Y.S.2d 779, 1961 N.Y. Misc. LEXIS 2062 (N.Y. Sup. Ct. 1961).

Determination that the employer failed to pay prevailing wages and supplements was confirmed where substantial evidence supported the New York Department of Labor's decision to adopt the ironworkers' prevailing wage rate because (1) the employer's evidence did not purport to establish that the actual percentage of relevant workers subject to either the ironworkers' or the glaziers' collective bargaining agreement was less than 30 percent, (2) the Department relied upon a jurisdictional agreement between the carpenters' and ironworkers' unions granting the ironworkers jurisdiction over the installation of preglazed windows and curtain wall frames, the ironworkers' constitution, and the employer's own description of the work, and (3) there was testimony from an officer of a glazier company that the glaziers' union had a minimal local presence at the time the work was performed, the ironworkers' union provided a list of companies that used ironworkers to perform the work at issue, and survey evidence indicated that ironworkers installed preglazed windows. Lantry v State, 12 A.D.3d 864, 785 N.Y.S.2d 758, 2004 N.Y. App. Div. LEXIS 13795 (N.Y. App. Div. 3d Dep't 2004), aff'd, 6 N.Y.3d 49, 810 N.Y.S.2d 729, 844 N.E.2d 276, 2005 N.Y. LEXIS 3347 (N.Y. 2005).

Employers' association had standing to challenge the classification of work by the Comptroller of the City of New York and his prevailing wages because subsection (6) did not prohibit its claim, which either was integral to contesting the determination of the prevailing wages for a trade or occupation or was outside the scope of the statute; subsection (6) does not exclude other means or grounds for contesting the Comptroller's determinations. Matter of New York Ind. Contrs. Alliance v Liu, 981 N.Y.S.2d 246, 43 Misc. 3d 443, 2013 N.Y. Misc. LEXIS 6469 (N.Y. Sup. Ct. 2013).

Motion to dismiss an employers' association's action challenging the classification of work by the Comptroller of the City of New York and his prevailing wages for lack of standing was denied because the association showed that it represented and would promote the interests and objectives that the petitions sought to effect and maintained a stake in the petitions' adjudication; the activity and interest of the association's membership were representative of the petitions' claims. Matter of New York Ind. Contrs. Alliance v Liu, 981 N.Y.S.2d 246, 43 Misc. 3d 443, 2013 N.Y. Misc. LEXIS 6469 (N.Y. Sup. Ct. 2013).

Just as employers maintain standing under N.Y. Labor Law § 220(6) if a prevailing wage determination injures them, likewise, if a prevailing wage determination injures employees, they maintain standing under the constitution to pursue these proceedings. Matter of New York Ind. Contrs. Alliance v Liu, 981 N.Y.S.2d 246, 43 Misc. 3d 443, 2013 N.Y. Misc. LEXIS 6469 (N.Y. Sup. Ct. 2013).

Motion to dismiss an employers' association's action challenging the classification of work by the Comptroller of the City of New York and his prevailing wages for lack of standing was denied; the association members were injured not because they had to pay prevailing wages that were set too high but because the prevailing wages were set too low, causing them to lose work on public projects to other employers that would pay those lower wages. Matter of New York Ind. Contrs. Alliance v Liu, 981 N.Y.S.2d 246, 43 Misc. 3d 443, 2013 N.Y. Misc. LEXIS 6469 (N.Y. Sup. Ct. 2013).

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29. — —Burden of proof

Employer contesting prevailing wage rate determination who submits no evidence beyond conclusory allegations concerning number of workers employed subject to collective bargaining agreement, number of workers employed in locality covered by agreement, or wage rates for workers other than those adopted by commissioner of labor fails to meet burden of proving that less than 30 percent of workers in locality are subject to wage rate adopted by commissioner. Liquid Asphalt Distributors Asso. v Roberts, 116 A.D.2d 295, 501 N.Y.S.2d 483, 1986 N.Y. App. Div. LEXIS 50907 (N.Y. App. Div. 3d Dep't 1986).

Commissioner of Labor is not required to conduct surveys to determine whether at least 30 percent of workers in given locality are subject to collectively bargained wage rate prior to adopting such as prevailing wage rate for workers on public projects; burden is on employers who contest prevailing wage rates to show

that, in fact, less than 30 percent of workers in given locality are subject to wage rate adopted. Liquid Asphalt Distributors Asso. v Roberts, 116 A.D.2d 295, 501 N.Y.S.2d 483, 1986 N.Y. App. Div. LEXIS 50907 (N.Y. App. Div. 3d Dep't 1986).

Court would not annul determination of Department of Labor which established prevailing wage rate on public work project under CLS Labor § 220 based on employer's failure to file its own classification of workers and statement of work to be performed by each classification, since technical specifications filed by employer sufficiently complied with statute, and employer's failure to strictly comply with statute had no material effect on department's duty to make proper classification. GE v N.Y. State Dep't of Labor, 154 A.D.2d 117, 551 N.Y.S.2d 966, 1990 N.Y. App. Div. LEXIS 1881 (N.Y. App. Div. 3d Dep't), aff'd, 76 N.Y.2d 946, 563 N.Y.S.2d 764, 565 N.E.2d 513, 1990 N.Y. LEXIS 3416 (N.Y. 1990).

Dismissal of petitioner's application to review determinations of respondent establishing prevailing wage rates was affirmed because reading together N.Y. Lab. Law § 220(5) and (6) did not support shifting the initial burden to respondent and respondent failed to show that the collective bargaining agreements (CBAs) were not made with a bona fide labor organization, that incorrect data was used from the CBAs, or that the 30 percent threshold was not met. Matter of Suit-Kote Corp. v Rivera, 137 A.D.3d 1361, 26 N.Y.S.3d 642, 2016 N.Y. App. Div. LEXIS 1533 (N.Y. App. Div. 3d Dep't), app. denied, app. dismissed, 27 N.Y.3d 1054, 53 N.E.3d 754, 33 N.Y.S.3d 874, 2016 N.Y. LEXIS 1660 (N.Y. 2016).

30. — —Method of determination

Determination of prevailing rate of wages must be annulled, where decision was based upon reports of investigators and claimant-employee received no statement of facts disclosed and was given no opportunity to controvert conclusions based thereon. Heaney v McGoldrick, 286 N.Y. 38, 35 N.E.2d 641, 286 N.Y. (N.Y.S.) 38, 1941 N.Y. LEXIS 1472 (N.Y. 1941).

Economic security and larger annual income of men in steady employ throughout the year should not be reflected in difference of daily wages. Watson v McGoldrick, 286 N.Y. 47, 35 N.E.2d 645, 286 N.Y. (N.Y.S.) 47, 1941 N.Y. LEXIS 1473 (N.Y. 1941).

In determining the prevailing rate of wages to be paid maintenance men employed in city owned buildings it was error to exclude from consideration the wages paid maintenance men employed by private transportation companies on the ground that the business of their employers was in a different field; nature of the employees' duties and not the nature of the employer's business determines if they are in the same trade or occupation. Flannery v Joseph, 300 N.Y. 149, 89 N.E.2d 869, 300 N.Y. (N.Y.S.) 149, 1949 N.Y. LEXIS 897 (N.Y. 1949).

In determining the prevailing rate of wages to be paid maintenance men in city owned buildings it was error to exclude proof that maintenance men in private apartment houses generally receive large tips for if it could be shown that their actual pay bears no relation to the nature of their work because of the large additional income their income could not be included in the survey of prevailing wages. Flannery v Joseph, 300 N.Y. 149, 89 N.E.2d 869, 300 N.Y. (N.Y.S.) 149, 1949 N.Y. LEXIS 897 (N.Y. 1949).

To set the prevailing wage, classifying the installation of pre-glazed windows to concrete as ironwork rather than as glazier work under N.Y. Lab. Law § 220(5)(a) on a public school project was proper. Where both unions claimed jurisdiction, the Department of Labor properly used their collective bargaining agreements, the nature of the work, jurisdictional agreements, and other historic indices rather than surveying actual trade practices. Lantry v State, 6 N.Y.3d 49, 810 N.Y.S.2d 729, 844 N.E.2d 276, 2005 N.Y. LEXIS 3347 (N.Y. 2005).

Actual practice evidence is generally not relevant to the process of classifying work under N.Y. Lab. Law § 220(5)(a). Lantry v State, 6 N.Y.3d 49, 810 N.Y.S.2d 729, 844 N.E.2d 276, 2005 N.Y. LEXIS 3347 (N.Y. 2005).

Commissioner of the New York Department of Labor must classify work under N.Y. Lab. Law § 220(5)(a) in order to determine the pertinent locality because N.Y. Lab. Law § 220(5)(d) defines "locality" as "such areas of the State of New York described and defined for a trade or occupation in current collective bargaining agreements between bona fide labor organizations and employers of the private sector, performing public and private work. Because a trade classification determines the relevant collective bargaining agreement governing a wage rate, the locality cannot be ascertained until after the Commissioner classifies the work. Lantry v State, 6 N.Y.3d 49, 810 N.Y.S.2d 729, 844 N.E.2d 276, 2005 N.Y. LEXIS 3347 (N.Y. 2005).

Interpretation of N.Y. Lab. Law § 220 by the New York State Department of Labor as to prevailing wage requirements limiting the payment of apprentice wages on public work projects to apprentices who are performing tasks that are within the respective trade classifications of the approved apprenticeship programs in which they are enrolled was rational and upheld. International Union of Painters & Allied Trades, Dist. Council No. 4 v New York State Dept. of Labor, 32 N.Y.3d 198, 112 N.E.3d 1259, 88 N.Y.S.3d 136, 2018 N.Y. LEXIS 2968 (N.Y. 2018).

N.Y. Lab. Law § 220(3-e) supports the New York State Department of Labor's (DOL's) interpretation by requiring that the ostensible apprentice who is not in fact appropriately registered be paid journey worker's wages for the classification of work actually performed; the DOL's analysis is not an arbitrary and irrational interpretation of the statute, unsupported by the statutory language and is eminently reasonable. International Union of Painters & Allied Trades, Dist. Council No. 4 v New York State Dept. of Labor, 32 N.Y.3d 198, 112 N.E.3d 1259, 88 N.Y.S.3d 136, 2018 N.Y. LEXIS 2968 (N.Y. 2018).

In computing the prevailing rate of wages under this section additional compensation paid by private employers for night shifts and Sunday work must be considered when it is shown that city employees in comparable employment also work during these periods. Smith v Joseph, 275 A.D. 201, 88 N.Y.S.2d 818, 1949 N.Y. App. Div. LEXIS 3741 (N.Y. App. Div.), aff'd, 300 N.Y. 516, 89 N.E.2d 248, 300 N.Y. (N.Y.S.) 516, 1949 N.Y. LEXIS 1402 (N.Y. 1949).

In determining the prevailing rate of pay for laborers in a Broome County tunnel project, the Industrial Commissioner could not determine the prevailing rate of pay in several counties for common laborers and then take the wage differential in Queens and Bronx counties between common laborers and tunnel workers and apply that differential proportionately to the Broome County figure for common laborers. In re Application of Armco Drainage & Metal Products, Inc., 285 A.D. 236, 136 N.Y.S.2d 242, 1954 N.Y. App. Div. LEXIS 3314 (N.Y. App. Div. 1954).

In an Article 78 proceeding to review redeterminations of prevailing rates of wages and supplements to be paid under a public works contract for the construction of a village's water pollution control plant, the redeterminations would be annulled where they had been based on wages in the county as a whole, rather than wages paid either in the village itself or in the town in which the village had been located, and where there had been no proof that union members had constituted a majority of construction workers in either the village or the town. Nalews, Inc. v Ross, 88 A.D.2d 1035, 452 N.Y.S.2d 701, 1982 N.Y. App. Div. LEXIS 17455 (N.Y. App. Div. 3d Dep't 1982).

In an Article 78 proceeding to review the establishment of prevailing rates of wages and supplements to be paid by contractors who entered into public construction contracts with the state, the labor commissioner's determination of prevailing rates would be annulled where the commissioner had established a union wage rate as a prevailing wage, where the commissioner had attempted to supply the total number of workers in each job classification by applying national percentages to census figures, and where the commissioner could not show the percentage of unionized workers in each category in that the total numbers of workers in the applicable job categories could not be shown. Hull-Hazard, Inc. v Roberts, 91 A.D.2d 741, 457 N.Y.S.2d 990, 1982 N.Y. App. Div. LEXIS 19624 (N.Y. App. Div. 3d Dep't 1982).

Court would affirm determination by Labor Commission that work performed by contractor under public works contract in converting 2 structures, used as residences for security guards, into prison administration buildings did not fall within definition of "residential construction" contained in prevailing rate schedule published by New York State Department of Labor-Bureau of Public Works, defined as "construction of one-family, two-family,

row housing or garden type apartments," since it was reasonable for commissioner to determine that use for which structures were being renovated was controlling use, not their former character, and that nature of work contracted for thus required contractor to pay its workers at prevailing wage for "building" construction. Fra-Dee Constr., Inc. v Roberts, 132 A.D.2d 924, 518 N.Y.S.2d 259, 1987 N.Y. App. Div. LEXIS 49376 (N.Y. App. Div. 4th Dep't), app. denied, 70 N.Y.2d 611, 523 N.Y.S.2d 495, 518 N.E.2d 6, 1987 N.Y. LEXIS 19005 (N.Y. 1987).

While substantial evidence supported determination that subcontractor willfully failed to pay prevailing wages and supplements in violation of CLS Labor § 220, matter would be remitted for reassessment of amount of underpayment where assessment failed to credit subcontractor for making any payments to his workers even though some such payments were made, and where last day of work was computed as being one week after actual final working day; additionally, there was no rational basis for inferring that whenever inspector's report indicated that any workers were doing work on project, all workers were present, even when inspector's report specifically indicated that lesser number of workers were present. John Schepanski Roofing & Gutters v Roberts, 133 A.D.2d 757, 520 N.Y.S.2d 46, 1987 N.Y. App. Div. LEXIS 51799 (N.Y. App. Div. 2d Dep't 1987).

Commissioner of Labor's finding that electrical contractor had willfully underpaid its employees by classifying work performed as something other than electrical work would not be affected by fact that evidence supporting determination came from biased source (local representative of electricians' union) since, under CLS Labor § 220, prevailing wages are defined by reference to collective bargaining agreements struck by labor organizations. Nelson's Lamp Lighters v Roberts, 136 A.D.2d 810, 523 N.Y.S.2d 643, 1988 N.Y. App. Div. LEXIS 259 (N.Y. App. Div. 3d Dep't), app. denied, 73 N.Y.2d 702, 537 N.Y.S.2d 490, 534 N.E.2d 328, 1988 N.Y. LEXIS 3453 (N.Y. 1988).

In proceeding against contractor for violating CLS Labor § 220(3) by failing to pay prevailing asbestos worker wage rates in connection with project to remove asbestos and reinsulate mechanical systems at public school, consideration of local union wage scales was not rendered inappropriate by fact that only small percentage of asbestos workers in locality were unionized. Tru-Temp Industrial Insulation Co. v Hartnett, 155 A.D.2d 820, 547 N.Y.S.2d 941, 1989 N.Y. App. Div. LEXIS 14371 (N.Y. App. Div. 3d Dep't 1989).

In proceedings to review determinations of Commissioner of Labor that public contractors failed to pay prevailing wages and supplements to workers on Department of Transportation bridge projects, pursuant to contracts requiring that employees be paid prevailing wage in locality of each project as established by collective bargaining agreements between employers and unions in project area applying to at least 30 percent of workers in locality, there was no merit to contractors' contention that they could not be held liable for wage rates set in collective bargaining agreements to which they were not parties, since statutory reliance on collective bargaining agreements has been accepted as reasonably necessary to accomplish legislature's mandate to insure that workers receive prevailing wages. Naftilos Painting & Sandblasting, Inc. v Hartnett, 173 A.D.2d 964, 569 N.Y.S.2d 474, 1991 N.Y. App. Div. LEXIS 5614 (N.Y. App. Div. 3d Dep't 1991).

Under N.Y. Lab. Law § 220(3), (5)(a), an employer should have classified certain work as plumber's work, even though it may have generically fit within the literal description of "building laborer," as a distinction was made between work performed within five feet of a building, which was paid at the plumber's rate, and work performed beyond this five-foot perimeter, which could be paid at the building laborer's rate. Matter of CNP Mech., Inc. v Angello, 31 A.D.3d 925, 818 N.Y.S.2d 657, 2006 N.Y. App. Div. LEXIS 9225 (N.Y. App. Div. 3d Dep't 2006), app. denied, 8 N.Y.3d 802, 830 N.Y.S.2d 698, 862 N.E.2d 790, 2007 N.Y. LEXIS 99 (N.Y. 2007).

In a N.Y. Lab. Law § 220 proceeding, a city comptroller had properly established the prevailing wage rate for the title of a Supervisor Highway Repairer (SHR) because as part of the SHRs' supervisory duties, they were hands-on workers who performed "related" manual labor in instructing new employees and, thus, faced the same risks as their crew; substantial evidence supported the comptroller's finding as it was made after a thorough investigation that included a comparison of the civil service job specification and collective bargaining agreements, field surveys of private and public sectors in other cities, and a survey of private sector interviewees. Matter of Hanley v Thompson, 41 A.D.3d 207, 838 N.Y.S.2d 59, 2007 N.Y. App. Div. LEXIS 7373 (N.Y. App. Div. 1st Dep't 2007).

Comptroller's prevailing wage schedule for furniture movers was error, and was properly annulled in an N.Y. C.P.L.R. art. 78 proceeding, because, by ignoring data from his own survey and instead blindly adopting a union local's rates under a collective bargaining agreement (CBA), the comptroller failed to comply with the statutory mandate to determine the wage "to be prevailing" under N.Y. Lab. Law § 230(6), meaning the actual prevailing wage; in the face of survey results showing much lower wages than those in the CBA, it was improper for the comptroller to graft onto N.Y. Lab. Law art. 9 the 30 percent rule set forth in N.Y. Lab. Law § 220(5)(a). Matter of Metropolitan Movers Assn., Inc. v Liu, 95 A.D.3d 596, 944 N.Y.S.2d 529, 2012 N.Y. App. Div. LEXIS 3722 (N.Y. App. Div. 1st Dep't 2012).

Trial court did not abuse its discretion in denying N.Y. C.P.L.R. 408 disclosure in a proceeding challenging respondent's prevailing wage rates because petitioner sought, among other things, extensive disclosure from numerous nonparties, some of which were not even identified and in light of the exceedingly broad and undefined nature of the information sought, together with the almost certain unduly protracted delay that would result, the reviewing court upheld the denial. Matter of Suit-Kote Corp. v Rivera, 137 A.D.3d 1361, 26 N.Y.S.3d 642, 2016 N.Y. App. Div. LEXIS 1533 (N.Y. App. Div. 3d Dep't), app. denied, app. dismissed, 27 N.Y.3d 1054, 53 N.E.3d 754, 33 N.Y.S.3d 874, 2016 N.Y. LEXIS 1660 (N.Y. 2016).

The Industrial Commissioner's procedure for determining the prevailing rate of wages in a locality by maintaining a list of 57 geographical areas with current union wage rates for each area is improper, pursuant to § 220(3, 5, [a, d]) of the Labor Law, which is mandatory and explicit as to procedure; the commissioner is not free to select geographic areas at will or to determine the prevailing rate of wages in any manner other than that prescribed in the statute. F.G. Compagni Constr. Co. v Ross, 103 Misc. 2d 313, 425 N.Y.S.2d 767, 1980 N.Y. Misc. LEXIS 2115 (N.Y. Sup. Ct.), modified, (N.Y. App. Div. 3d Dep't 1980).

In an Article 78 proceeding brought by petitioner, an organization composed of representatives of labor and management in the electrical industry, seeking to require the mayor to incorporate within a city's standard form of contracts for the fabrication and installation of telecommunications facilities a provision requiring the payment of salaries at not less than the prevailing rate of wages for certain classes of employment in public works under Labor Law § 220(3) and the New York State Constitution Art I § 17, the petition would be granted where, although such provision is generally inapplicable to contracts for the purchase of goods, and the cost of labor is substantially less than the cost of the equipment, the test of the applicability of § 220 should be whether there are persons within the enumerated classes of employment engaged in public work and not determined by an arbitrary numerical ratio of labor to material. Joint Industry Bd. of Electrical Industry v Koch, 114 Misc. 2d 868, 452 N.Y.S.2d 488, 1982 N.Y. Misc. LEXIS 3579 (N.Y. Sup. Ct. 1982).

Although the annualization regulation may have an economic impact on contractors who perform public work, it does not compel them to pay the prevailing supplements in cash or make matching contributions to their employee benefit plan for private work; thus, the annualization regulation does not violate N.Y. Lab. Law § 220 and it is not preempted by the National Labor Relations Act, 29 U.S.C.S. §§ 151-169. Chesterfield Assocs. v N.Y. State Dep't of Labor, 3 A.D.3d 491, 771 N.Y.S.2d 139, 2004 N.Y. App. Div. LEXIS 282 (N.Y. App. Div. 2d Dep't 2004), aff'd, 4 N.Y.3d 597, 797 N.Y.S.2d 389, 830 N.E.2d 287, 2005 N.Y. LEXIS 1056 (N.Y. 2005).

New York City Comptroller's determination of the prevailing wages applicable to movers did not withstand challenge by the movers in a proceeding pursuant to N.Y. C.P.L.R. 7803, as the

Comptroller's reliance on a collective bargaining agreement and the 30 percent formula embodied in N.Y. Lab. Law § 220 was improper; rather, the determination should have been based on N.Y. Lab. Law § 230, which was specifically applicable to movers. Matter of Metropolitan Movers Assn., Inc. v Liu, 919 N.Y.S.2d 822, 32 Misc. 3d 175, 2011 N.Y. Misc. LEXIS 1415 (N.Y. Sup. Ct. 2011), aff'd, 95 A.D.3d 596, 944 N.Y.S.2d 529, 2012 N.Y. App. Div. LEXIS 3722 (N.Y. App. Div. 1st Dep't 2012).

31. — —Timeliness of objection

In proceeding against subcontractor for violating CLS Labor § 220(3) by failing to pay overtime specified in prevailing wage rate schedule in connection with project to remove asbestos and reinsulate mechanical systems at public school, subcontractor's challenge to use of prevailing wage rate schedule was untimely since it was made more than one year after it had received notice of violations. Tru-Temp Industrial Insulation Co. v Hartnett, 155 A.D.2d 820, 547 N.Y.S.2d 941, 1989 N.Y. App. Div. LEXIS 14371 (N.Y. App. Div. 3d Dep't 1989).

In proceeding against contractor for violating CLS Labor § 220(3) by failing to pay prevailing asbestos worker wage rates in connection with project to remove asbestos and reinsulate mechanical systems at public school, contractor's challenge to use of prevailing wage rate schedule was untimely since it was made more than one year after schedule had become binding. Tru-Temp Industrial Insulation Co. v Hartnett, 155 A.D.2d 820, 547 N.Y.S.2d 941, 1989 N.Y. App. Div. LEXIS 14371 (N.Y. App. Div. 3d Dep't 1989).

32. — —Modification

An order directing payment of prevailing rate of wages may provide for payment to employees "who may hereafter be employed" by the contractor. Such order binds the contractor to pay said rate until the order of determination is modified. Application for modification of such order must be made upon a verified complaint in writing. Carder Realty Corp. v Perkins, 237 A.D. 152, 261 N.Y.S. 819, 1932 N.Y. App. Div. LEXIS 5295 (N.Y. App. Div. 1932), aff'd, 261 N.Y. 634, 185 N.E. 770, 261 N.Y. (N.Y.S.) 634, 1933 N.Y. LEXIS 1443 (N.Y. 1933).

In an Article 78 proceeding brought by contractors engaged in public construction to annul certain prevailing wage and supplement redeterminations issued pursuant to Labor § 220 by the Industrial Commissioner and seeking vacatur of certain notices to withhold payment of monies issued on the basis of the contested redeterminations, the trial court correctly ruled that the Commissioner's failure to comply with statutory procedures in ascertaining prevailing wages and supplements vitiated the redeterminations, and that certain 1978 amendments to Labor § 220 were not to be applied retroactively in relation to a contract executed before their effective date so as to excuse the failure of the Commissioner to provide the contractor with notice and hearing and to justify his initiation of a redetermination without a request by the contracting municipality. However, the court's annulment of the notices to withhold payment of monies was premature since the contractors had failed to pursue the administrative remedy provided by Labor § 220-b(2). F. G. Compagni Constr. Co. v Ross, 79 A.D.2d 831, 435 N.Y.S.2d 144, 1980 N.Y. App. Div. LEXIS 14230 (N.Y. App. Div. 3d Dep't 1980)).

Commissioner of labor has authority to issue prevailing wage and supplement schedules on annual basis relative to ongoing public works projects pursuant to CLS Labor § 220, and amendments to statute which eliminated specific reference to redetermined rates and their enforcement in existing contracts were not intended to eliminate commissioner's authority to update rates and apply them to pre-existing contracts. General Bldg. Contractors, Inc. v Roberts, 118 A.D.2d 173, 504 N.Y.S.2d 292, 1986 N.Y. App. Div. LEXIS 54132 (N.Y. App. Div. 3d Dep't 1986).

33. Wage schedules

Where plaintiff constructed buildings for defendant under a contract in which he agreed to pay workmen on the jobs the prevailing rate of wages, and a schedule of wage rates was made a part of the contract, and during the progress of the work the prevailing wage rates increased, and although plaintiff would have been able to obtain labor at the rates specified in the schedule, the defendant required that wages be paid at the increased prevailing rates, such action on part of defendant in requiring the increased rates to be paid did not amount to a breach of contract on his part. D. M. W. Contracting Co. v Board of Education, 259 A.D. 1081, 21 N.Y.S.2d 299, 1940 N.Y. App. Div. LEXIS 8089 (N.Y. App. Div. 1940), aff'd, 285 N.Y. 591, 33 N.E.2d 254, 285 N.Y. (N.Y.S.) 591, 1941 N.Y. LEXIS 1611 (N.Y. 1941).

A subcontractor on a state job could not recover the difference between the wages paid by him to certain employees and the higher rates fixed by the Industrial Commissioner as the prevailing hour wage rates since the state was not liable for a breach of contract because of the effect on the contract of the rulings of the Industrial Commissioner on what were the prevailing wages for particular work under this section. Armco Drainage & Metal Products, Inc. v State, 4 A.D.2d 366, 165 N.Y.S.2d 276, 1957 N.Y. App. Div. LEXIS 4710 (N.Y. App. Div. 3d Dep't 1957).

Even though public entity neglected to perform its statutory obligation of annexing applicable wage schedule to work specifications before advertising for bids on university project, where contractor neglected to take advantage of information obtainable by law concerning requirement of party who contracts with public entity to pay prevailing rate of wages before submitting bid that did not take into account prevailing wage rate, agreed to perform work and failed to object before signing contract promising to pay prevailing rate, contractor could not seek to recover for difference between prevailing wage rate it was required to pay workmen and wage rate it had anticipated paying workmen at time of bid. Brang Co. v State University Constr. Fund, 47 A.D.2d 178, 365 N.Y.S.2d 914, 1975 N.Y. App. Div. LEXIS 8739 (N.Y. App. Div. 3d Dep't 1975).

Contractor may not obtain reimbursement from public entity for increased labor cost due to subsequent increases in prevailing wage rate schedule during project, despite fact that proper lower rates were originally included by schedule in contract with public entity. Brang Co. v State University Constr. Fund, 47 A.D.2d 178, 365 N.Y.S.2d 914, 1975 N.Y. App. Div. LEXIS 8739 (N.Y. App. Div. 3d Dep't 1975).

In proceedings to review determinations of Commissioner of Labor that public contractors failed to pay prevailing wages and supplements to workers on Department of Transportation bridge projects, there was no merit to contractors' contention that determinations were not supported by substantial evidence because they relied on wage rate schedules supplied by commissioner which had expired, since contractors were required by CLS Labor § 220(3) and (5) to pay "prevailing rate of wage," and any alleged failure of commissioner to supply wage rate schedules could not relieve them from paying prevailing wage rate. Naftilos Painting & Sandblasting, Inc. v Hartnett, 173 A.D.2d 964, 569 N.Y.S.2d 474, 1991 N.Y. App. Div. LEXIS 5614 (N.Y. App. Div. 3d Dep't 1991).

Evidence supported finding that contractor had notice of updated prevailing wage schedule, despite contractor's assertion that it did not learn of August 1987 schedule until August 1988, and was thus not obligated to pay higher wages until 30 days after it received schedule, where architect's progress notes for November 1987 meeting indicated that updated schedule was disseminated to all contractors, and contractor's project manager received and reviewed progress notes and took no exception to notes. Nelson's Lamp Lighters v Hudacs, 204 A.D.2d 814, 611 N.Y.S.2d 714, 1994 N.Y. App. Div. LEXIS 5176 (N.Y. App. Div. 3d Dep't 1994).

Contractor had no claim against the state where subcontractor paid higher wages for job classifications than he was required to pay, since such payments were voluntarily made and under the contract the State Department of Labor was to fix rates paid to classifications other than those designated in the bid proposal. Armco Drainage & Metal Products, Inc. v State, 3 Misc. 2d 803, 156 N.Y.S.2d 90, 1956 N.Y. Misc. LEXIS 1504 (N.Y. Ct. Cl. 1956), aff'd, 4 A.D.2d 366, 165 N.Y.S.2d 276, 1957 N.Y. App. Div. LEXIS 4710 (N.Y. App. Div. 3d Dep't 1957).

A resolution of the board of estimate which was merely the first step to the regrading of the position of climber-pruner under the career and salary plan had no effect on prior classification of that position in force up to the date that the resolution was approved by the State Civil Service Commission. Hence, petitioners were

entitled to the prevailing wages as determined under Labor Law. Auguti v Board of Estimate, 9 Misc. 2d 346, 169 N.Y.S.2d 670, 1957 N.Y. Misc. LEXIS 2078 (N.Y. Sup. Ct. 1957).

Where public housing authority advertises for bids for construction project, schedule of supplements to be provided and wages to be paid workmen, laborers and mechanics must be prepared by city treasurer rather than project manager of housing authority, as the city treasurer is the "fiscal officer" if the city is involved in operation of the project at all. Empire State Chapter of Associated Builders & Contractors, Inc. v Rome Housing Authority, 72 Misc. 2d 910, 339 N.Y.S.2d 847, 1972 N.Y. Misc. LEXIS 1375 (N.Y. Sup. Ct. 1972).

Two personnel orders—reclassifying certain positions, revising, and/or removing salary, time, and leave—had to be annulled as violative of N.Y. Civ. Serv. Law § 20, N.Y. Lab. Law § 220, and N.Y. Const. art. V, § 6 because they affected both new and incumbent employees without notice, hearing, or a determination confirming the adherence to state-wide standards of merit and fitness. Matter of DeMartino v City of New York, 948 N.Y.S.2d 552, 36 Misc. 3d 653, 2012 N.Y. Misc. LEXIS 3195 (N.Y. Sup. Ct. 2012).

The specifications for a public work advertised for competitive bidding should include schedules of prevailing wages and supplements for the laborers, mechanics and workmen to be employed, based upon the classifications of these trades and occupations furnished to the village fiscal officer by the advisory board to the industrial commissioner. 1968 Ops St Compt File #447.

34. Wage supplements

"Cost of living" bonuses paid to employees of the City of New York should be included in computing salary actually received even though such bonuses were not considered for retirement purposes. Driesbach v New York, 1 N.Y.2d 272, 152 N.Y.S.2d 271, 135 N.E.2d 32, 1956 N.Y. LEXIS 879 (N.Y.), reh'g denied, 2 N.Y.2d 756, 1956 N.Y. LEXIS 1313 (N.Y. 1956).

Laborers employed by the City of New York settled their prevailing rate of wages claims under an agreement which provided for a 5-day week and the same vacation allowance theretofore used. Previously, the laborers worked a 6-day week and received a vacation allowance of 4 work weeks and one day, amounting to 25 days. Under the new agreement, the laborers were not entitled to 25 days vacation allowance but only to 21 days. Trainor v New York, 2 N.Y.2d 761, 157 N.Y.S.2d 970, 139 N.E.2d 149, 1956 N.Y. LEXIS 653 (N.Y. 1956).

Labor Law § 220(3), which requires that supplemental fringe benefits be provided to employees engaged in public works projects "in accordance with the prevailing practices in the same trade or occupation in the locality within the state" in which the public work is located, is satisfied where employees are given cash, or a combination of benefits and cash, equivalent to the cost of obtaining the prevailing benefits, or are provided an equivalent benefits plan. Thus, the Comptroller of the City of New York erred in determining that an employer on a public works contract violated Labor Law § 220(3) by failing to provide its laborers and electricians with the prevailing supplemental benefits from the Comptroller's benefit schedule, or with an equivalent benefits plan, where the employer's compliance was evaluated under the erroneous standard that cash payments could not be a means of providing the prevailing supplements. Action Electrical Contractors Co. v Goldin, 64 N.Y.2d 213, 485 N.Y.S.2d 241, 474 N.E.2d 601, 1984 N.Y. LEXIS 4920 (N.Y. 1984).

There was nothing unreasonable in the Labor Commissioner's determination that the only way to be sure that a construction contractor was not getting too much prevailing wage credit for pension contributions on behalf of its employees was by applying the annualization regulation, N.Y. Comp. Codes tit. 12, § 220.2(d), dividing the contributions by the total annual hours worked on both public and private work and only then multiplying the quotient by the total annual hours worked on the public project in question. Chesterfield Assocs. v N.Y. State DOL, 4 N.Y.3d 597, 797 N.Y.S.2d 389, 830 N.E.2d 287, 2005 N.Y. LEXIS 1056 (N.Y. 2005).

Estate of deceased employee of city was not entitled to recover from city for accrued terminal leave allowance. Lombardi v New York, 46 A.D.2d 750, 361 N.Y.S.2d 1, 1974 N.Y. App. Div. LEXIS 3641 (N.Y. App. Div. 1st Dep't 1974), aff'd, 38 N.Y.2d 727, 381 N.Y.S.2d 38, 343 N.E.2d 756, 1975 N.Y. LEXIS 2317 (N.Y. 1975).

In a proceeding before the Industrial Commission, evidence supported the determination by the commissioner that payment by a development corporation which had been awarded a contract by the Department of Transportation for the construction of a portion of a highway of "supplementary employment benefits" in the form of continued premium payments for life and health insurance during eligible periods of unemployment did not constitute compliance with the article of the Labor Law providing for payment to workers of supplements by a party awarded a contract with the state; such supplements were required to be paid in cash, despite the fact that the extended health and life insurance protection may have represented greater benefits for the workers. Lancaster Development, Inc. v Ross, 82 A.D.2d 1013, 442 N.Y.S.2d 180, 1981 N.Y. App. Div. LEXIS 14748 (N.Y. App. Div. 3d Dep't 1981).

Under Labor Law § 220 a city was required to pay plaintiff the prevailing hourly wage rate (that rate paid to the majority of local private industry laborers performing similar work), and could not offset plaintiff's reimbursement by the amount of "supplemental" benefits already paid to him; however, the city would not be required to recompute past vacation and sick leave payments at the higher hourly rate, since these are "supplements" over and above what is commonly provided by the private sector. Mescia v New York, 107 A.D.2d 586, 483 N.Y.S.2d 316, 1985 N.Y. App. Div. LEXIS 42584 (N.Y. App. Div. 1st Dep't 1985).

In assessing liability of public works contractor for failure to provide supplements pursuant to operative schedule, Commissioner of Labor did not err in failing to calculate average hourly cost of contractor's employee health plan by dividing contractor's annual payment by number of hours worked on particular public project, since health benefits extended throughout entire year, whether employees worked or not, and hourly cost of such benefits should be similarly calculated. Janik Paving & Constr., Inc. v Roberts, 132 A.D.2d 978, 518 N.Y.S.2d 509, 1987 N.Y. App. Div. LEXIS 49449 (N.Y. App. Div. 4th Dep't 1987).

Substantial evidence existed to support determination by Commissioner of Labor that employer willfully underpaid prevailing vacation and holiday rate in violation of CLS Labor Art 8 where employer conceded that it utilized incorrect formula to compute rate of pay and it improperly credited itself for benefits paid over prevailing supplement for apprenticeship benefits. Tap Electrical Contracting Service, Inc. v Hartnett, 156 A.D.2d 612, 549 N.Y.S.2d 118, 1989 N.Y. App. Div. LEXIS 16440 (N.Y. App. Div. 2d Dep't 1989), app. dismissed, 75 N.Y.2d 835, 552 N.Y.S.2d 922, 552 N.E.2d 170, 1990 N.Y. LEXIS 132 (N.Y. 1990), app. dismissed, 75 N.Y.2d 836, 552 N.Y.S.2d 922, 552 N.E.2d 170, 1990 N.Y. LEXIS 130 (N.Y. 1990), modified, 76 N.Y.2d 164, 556 N.Y.S.2d 988, 556 N.E.2d 427, 1990 N.Y. LEXIS 1308 (N.Y. 1990).

This section cannot be interpreted as requiring a particular contractor to furnish the same wage "supplements" as are required of similar contractors whose employees are members of a different union, but merely that he furnish equal or equivalent benefits to those received by a majority of employees in the same industry and category. Gottlieb Contracting, Inc. v Beame, 41 Misc. 2d 1097, 247 N.Y.S.2d 237, 1964 N.Y. Misc. LEXIS 2110 (N.Y. Sup. Ct. 1964).

Even though right to annual leave, including accrued annual leave, was bargained-for benefit and enforceable as a contractual obligation of city, in absence of provision in bargaining agreement for cash payments or a statute authorizing payment, deceased sewage treatment employee's estate was not entitled to cash in lieu of employee's unused annual leave. Lombardi v New York, 78 Misc. 2d 1057, 359 N.Y.S.2d 154, 1974 N.Y. Misc. LEXIS 1557 (N.Y. Sup. Ct.), modified, 46 A.D.2d 750, 361 N.Y.S.2d 1, 1974 N.Y. App. Div. LEXIS 3641 (N.Y. App. Div. 1st Dep't 1974).

Under section 220 of the Labor Law, which provides that the wages to be paid to workers on public works projects shall not be less than the prevailing rate as defined therein, and that the supplements to be provided to such workers are to be in accordance with prevailing practice in the locality, and which defines "supplements" as "all remuneration for employment paid in any

medium other than cash, or reimbursement for expenses, or any payments which are not 'wages' . . . including . . . health, welfare, non-occupational disability . . . and life insurance", the City of New York, upon a finding that the predominant number of contractors in the locality provide health plans for their employees, could properly require bidders on a public works project to provide a health plan for their employees, and reject a bid by a contractor who paid supplemental funds to its employees instead of securing a health plan for them. Pilot Mechanical Corp. v Carroll, 94 Misc. 2d 437, 404 N.Y.S.2d 839, 1978 N.Y. Misc. LEXIS 2265 (N.Y. Sup. Ct. 1978).

A resolution of the Rensselaer County Legislature requiring contractors bidding upon construction work for the county to have an approved apprentice training program as well as an approved health and hospital plan and an approved pension plan for their employees, is not unconstitutional, and, accordingly, even though petitioner submitted the low bid for roof repairs to the county jail, the contract was properly awarded to the second lowest bidder because petitioner does not have an approved apprentice training program; the determination that a contractor provide an apprentice training program is reasonable, required by law (Labor Law, § 220) and further approved as public policy of the State. Skyway Roofing of Troy, Inc. v County of Rensselaer, 103 Misc. 2d 750, 426 N.Y.S.2d 959, 1980 N.Y. Misc. LEXIS 2190 (N.Y. Sup. Ct. 1980), aff'd, 79 A.D.2d 1078, 436 N.Y.S.2d 103, 1981 N.Y. App. Div. LEXIS 10006 (N.Y. App. Div. 3d Dep't 1981).

35. —Effect of ERISA

Federal Employee Retirement Income Security Act of 1974 (ERISA) (29 USCS §§ 1001 et seq.) did not preempt CLS Labor Art 8 regarding latter's regulation of rate of vacation and holiday payments where employer did not provide its employees with vacation and holiday supplements through a plan but, rather, paid them through its payroll. Tap Electrical Contracting Service, Inc. v Hartnett, 156 A.D.2d 612, 549 N.Y.S.2d 118, 1989 N.Y. App. Div. LEXIS 16440 (N.Y. App. Div. 2d Dep't 1989), app. dismissed, 75 N.Y.2d 835, 552 N.Y.S.2d 922, 552 N.E.2d 170, 1990 N.Y. LEXIS 132 (N.Y. 1990), app. dismissed, 75 N.Y.2d 836, 552 N.Y.S.2d 922, 552 N.E.2d 170, 1990 N.Y. LEXIS 130 (N.Y. 1990), modified, 76 N.Y.2d 164, 556 N.Y.S.2d 988, 556 N.E.2d 427, 1990 N.Y. LEXIS 1308 (N.Y. 1990).

Commissioner of Labor's order requiring public works contractor "either to bring [its Employee Retirement Income Security Act (ERISA) (29 USCS §§ 1001 et seq.) supplements] into conformity with those prevailing in the locality...or to make up the difference through cash payments to [its] employees" was preempted by ERISA. Tap Elec. Contracting Serv. v Hartnett, 207 A.D.2d 547, 616 N.Y.S.2d 86, 1994 N.Y. App. Div. LEXIS 8533 (N.Y. App. Div. 2d Dep't 1994), app. dismissed, 85 N.Y.2d 857, 624 N.Y.S.2d 374, 648 N.E.2d 794, 1995 N.Y. LEXIS 310 (N.Y. 1995), cert. denied, 516 U.S. 812, 116 S. Ct. 61, 133 L. Ed. 2d 24, 1995 U.S. LEXIS 5372 (U.S. 1995).

Portion of CLS Labor § 220 dealing with "supplements" was preempted by Employee Retirement Income Security Act, 29 USCS §§ 1001 et seq. (ERISA) where it was intent of out-of-state corporation and local union in their collective bargaining agreement to have those supplemental benefits which were incorporated into agreement apply as equally as possible to all employees, regardless of state or locality in which employees might be working; CLS Labor § 220 conflicted with ERISA regarding such agreement because state statute requires ex-locality employers either to bring pension and welfare plans into conformity with those prevailing in locality, or to make up difference through cash payments to employees. General Elec. Co. v New York State Dep't of Labor, 891 F.2d 25, 1989 U.S. App. LEXIS 18243 (2d Cir. N.Y. 1989), cert. denied, 496 U.S. 912, 110 S. Ct. 2603, 110 L. Ed. 2d 283, 1990 U.S. LEXIS 2851 (U.S. 1990).

Wage provisions of CLS Labor Law § 220 not relating to supplements are valid and severable from invalid provisions, where federal appeals court held that provisions relating to supplements were preempted by ERISA, because the remaining, valid provisions will continue to promote the goal of maintaining adequate wages on public works projects and equalizing competition for such projects. General Elec. Co. v New York State Dep't of Labor, 742 F. Supp. 80, 1990 U.S. Dist. LEXIS 6957 (S.D.N.Y. 1990), aff'd in part and rev'd in part, 936 F.2d 1448, 1991 U.S. App. LEXIS 14870 (2d Cir. N.Y. 1991).

Whether an employer on a public works project had avoided liability for contribution obligations under the Employee Retirement Income Security Act of 1974 as to designated core employees by meeting contractual requirements for private plans and paying cash supplements to the designated employees under this section could not be decided on summary judgment because factual disputes existed, including a dispute as to whether employees had been properly designated as core under the contract's terms. Cent. N.Y. Laborers' Health & Welfare Fund v Fahs Constr. Grp., 170 F. Supp. 3d 337, 2016 U.S. Dist. LEXIS 38270 (N.D.N.Y. 2016).

36. Waiver of rights

A municipal corporation may not knowingly violate this section and where payments in violation of such provisions have been made to contractors with knowledge that they worked their men more than eight hours while engaged in performance of such work, the corporation cannot be credited with such payments against the surety for the contractor who is in default, nor can the municipality waive violation of the statute to the extent of compensating the contractor for work done and materials furnished on the basis of quantum meruit. Medina v Dingledine, 211 N.Y. 24, 104 N.E. 1118, 211 N.Y. (N.Y.S.) 24, 1914 N.Y. LEXIS 1015 (N.Y. 1914).

Releases of claims for the prevailing rate of wages, executed by stationary engineers employed by the City of New York were not against public policy, were not barred by subdivision 8-a and did not fail for want of consideration. Manning v Joseph, 304 N.Y. 278, 107 N.E.2d 446, 304 N.Y. (N.Y.S.) 278, 1952 N.Y. LEXIS 741 (N.Y. 1952).

Signed releases from employees accepting sum as full settlement of earnings at established prevailing rate are unenforceable since releases are contrary to both legislative intent and public policy; court will not approve receipt and release forms obtained from workers who worked on public project for less than amount found to be due and payable under prevailing wage rate schedule. John F. Cadwallader, Inc. v New York State Dep't of Labor, 112 A.D.2d 577, 491 N.Y.S.2d 511, 1985 N.Y. App. Div. LEXIS 55927 (N.Y. App. Div. 3d Dep't 1985).

Hearing officer properly found, in proceeding brought under CLS Labor §§ 220 et seq., that release signed by employee in favor of contractor was unconscionable and should be set aside where it purported to release wage and benefit claim in excess of $7,000 in return for $600. Canarsie Plumbing & Heating Corp. v Goldin, 151 A.D.2d 331, 542 N.Y.S.2d 588, 1989 N.Y. App. Div. LEXIS 8014 (N.Y. App. Div. 1st Dep't 1989).

A contract between the city of New York and certain of its employees providing for retroactive wage increases is proper under this section where, even with the increase allowed, the compensation of such employees was below the prevailing rate for such services. Evadan Realty Corp. v Patterson, 78 N.Y.S.2d 114, 192 Misc. 850, 1948 N.Y. Misc. LEXIS 2229 (N.Y. Sup. Ct. 1948), aff'd, 276 A.D. 751, 92 N.Y.S.2d 504, 1949 N.Y. App. Div. LEXIS 3165 (N.Y. App. Div. 1949), limited, Nolan v New York City Housing Authority, 99 N.Y.S.2d 307, 199 Misc. 599, 1950 N.Y. Misc. LEXIS 1931 (N.Y. Sup. Ct. 1950).

A waiver of rights under this section may be effected. Evadan Realty Corp. v Patterson, 78 N.Y.S.2d 114, 192 Misc. 850, 1948 N.Y. Misc. LEXIS 2229 (N.Y. Sup. Ct. 1948), aff'd, 276 A.D. 751, 92 N.Y.S.2d 504, 1949 N.Y. App. Div. LEXIS 3165 (N.Y. App. Div. 1949), limited, Nolan v New York City Housing Authority, 99 N.Y.S.2d 307, 199 Misc. 599, 1950 N.Y. Misc. LEXIS 1931 (N.Y. Sup. Ct. 1950).

A city may validly require auto enginemen engaged in public work to waive any claim under this section, as a condition of participation in a general wage increase, where the city is contending that they do not fall within this section. Dinan v Patterson, 83 N.Y.S.2d 834, 193 Misc. 92, 1948 N.Y. Misc. LEXIS 3454 (N.Y. Sup. Ct. 1948), aff'd, 275 A.D. 801, 88 N.Y.S.2d 917, 1949 N.Y. App. Div. LEXIS 4538 (N.Y. App. Div. 1949).

A release by a civil service employee was invalid where it covered claims arising by reason of services heretofore rendered

and for difference in wages heretofore received where the employee's claim was based on the wrongful act of the city in not making employment available. This latter question was not contemplated by the parties nor involved in the controversy terminated by the releases. Kunz v New York, 126 N.Y.S.2d 588, 204 Misc. 1027, 1953 N.Y. Misc. LEXIS 2466 (N.Y. Sup. Ct. 1953), rev'd, 286 A.D. 252, 142 N.Y.S.2d 451, 1955 N.Y. App. Div. LEXIS 4022 (N.Y. App. Div. 1955).

Word "each," as contained in agreement between sanitation men and city providing that "The City agrees to employ each of the employees for the period between July 1, 1974 and June 30, 1976 for 261 * * * working days per annum * * *," did not require finding that job security was accorded to each employee; rather, the word "each" was required because initially each employee had to sign an indenture agreement in order to effectively waive his rights under section of the Labor Law relating to hours and wages. De Lury v New York, 83 Misc. 2d 202, 371 N.Y.S.2d 964, 1975 N.Y. Misc. LEXIS 2877 (N.Y. Sup. Ct. 1975), aff'd, 51 A.D.2d 288, 381 N.Y.S.2d 236, 1976 N.Y. App. Div. LEXIS 10694 (N.Y. App. Div. 1st Dep't 1976).

37. Procedural matters

After a proceeding pursuant to CPLR Article 78 to, inter alia, compel respondents to comply with Labor Law § 220 when contracting for work on a public works project which involved the construction of a municipal parking garage, the appeal would be dismissed where the parties informed the court that construction of the garage had been completed and therefore the issues presented to the court had been rendered moot. Place v White Plains, 81 A.D.2d 660, 438 N.Y.S.2d 367, 1981 N.Y. App. Div. LEXIS 11183 (N.Y. App. Div. 2d Dep't), app. dismissed, 54 N.Y.2d 605, 1981 N.Y. LEXIS 4451 (N.Y. 1981).

Commissioner of Labor was not precluded from finding that petitioner's failure to pay prevailing wages and supplements on public work project was "willful" on ground that Department of Labor did not promptly notify petitioner of violation in writing, in accordance with its procedure manual, since petitioner was orally advised more than once of prevailing wage violations and correct wages to be paid but continued to adhere to its payment practices; furthermore, petitioner's contention that, as out-of-state contractor it had no reason to know of prevailing wage requirements, was belied by terms of its subcontract which expressly related thereto. Sierra Telcom Servs., Inc. v Hartnett, 174 A.D.2d 279, 579 N.Y.S.2d 753, 1992 N.Y. App. Div. LEXIS 909 (N.Y. App. Div. 3d Dep't), app. dismissed, 79 N.Y.2d 1039, 584 N.Y.S.2d 448, 594 N.E.2d 942, 1992 N.Y. LEXIS 1463 (N.Y. 1992), app. dismissed, 79 N.Y.2d 1039, 584 N.Y.S.2d 448, 594 N.E.2d 942, 1992 N.Y. LEXIS 1511 (N.Y. 1992), app. denied, 80 N.Y.2d 756, 588 N.Y.S.2d 824, 602 N.E.2d 232, 1992 N.Y. LEXIS 3179 (N.Y. 1992), app. denied, 80 N.Y.2d 757, 588 N.Y.S.2d 825, 602 N.E.2d 233, 1992 N.Y. LEXIS 3210 (N.Y. 1992), cert. denied, 507 U.S. 972, 113 S. Ct. 1413, 122 L. Ed. 2d 784, 1993 U.S. LEXIS 1979 (U.S. 1993).

Commencement by filing system only applies to actions or special proceedings commenced in Supreme Court, County Court, and Surrogate's Court under CLS SCPA § 102; such commencement does not apply to proceedings that originate in Appellate Division. Spodek v New York State Comm'r of Taxation & Fin., 206 A.D.2d 758, 614 N.Y.S.2d 822, 1994 N.Y. App. Div. LEXIS 7971 (N.Y. App. Div. 3d Dep't 1994), aff'd, 85 N.Y.2d 760, 628 N.Y.S.2d 256, 651 N.E.2d 1275, 1995 N.Y. LEXIS 1111 (N.Y. 1995).

In employees' action to recover prevailing wage rate under CLS Labor § 220, all claims against subcontractor were automatically stayed by its filing for Chapter 11 bankruptcy protection, and all claims against subcontractor's surety were stayed by Bankruptcy Court's bar orders. Pesantez v Boyle Envtl. Servs., Inc., 251 A.D.2d 11, 673 N.Y.S.2d 659, 1998 N.Y. App. Div. LEXIS 6382 (N.Y. App. Div. 1st Dep't 1998).

Private right of action for underpayment of wages does not exist under CLS Labor § 220 until there has been administrative determination under CLS Labor § 220(8) that either has gone unreviewed or has been affirmed in employees' favor. Pesantez v Boyle Envtl. Servs., Inc., 251 A.D.2d 11, 673 N.Y.S.2d 659, 1998 N.Y. App. Div. LEXIS 6382 (N.Y. App. Div. 1st Dep't 1998).

In workers' action to recover prevailing wages and benefits on payment bond under CLS Labor §§ 220 and 220-g, workers were not required to proceed first in administrative forum where there was no claim that payment bonds had not been filed. Sullivan v International Fid. Ins. Co., 255 A.D.2d 128, 679 N.Y.S.2d 391, 1998 N.Y. App. Div. LEXIS 11710 (N.Y. App. Div. 1st Dep't 1998).

Respondent's withholding of payment of moneys due petitioner under public works contract, after petitioner refused to comply within 10 days with respondent's request for payroll records, was improperly characterized as lien which could be discharged by posting undertaking pursuant to Lien Law; to allow petitioner to vacate notice to withhold payment by posting undertaking would undermine respondent's ability to require compliance with CLS Labor § 220(3-a)(c). In re Diamond "D" Constr. Corp., 261 A.D.2d 903, 689 N.Y.S.2d 844, 1999 N.Y. App. Div. LEXIS 4959 (N.Y. App. Div. 4th Dep't 1999).

Notice issued by Department of Labor (DOL) relative to CLS Labor § 220 provisions regarding payment of prevailing supplements into ERISA-qualified benefit plans was not invalid or unenforceable because not formally adopted pursuant to State Administrative Procedure Act rule-making procedures, where it merely informed contractors on public works projects of DOL's new enforcement policies, it relied on existing regulations and laws for its stated conclusions, and it thus fell within exception of CLS St Adm P Act § 102(2)(b)(iv). HMI Mech. Sys. v McGowan, 277 A.D.2d 657, 716 N.Y.S.2d 426, 2000 N.Y. App. Div. LEXIS 11964 (N.Y. App. Div. 3d Dep't 2000), app. denied, 96 N.Y.2d 705, 723 N.Y.S.2d 131, 746 N.E.2d 186, 2001 N.Y. LEXIS 280 (N.Y. 2001).

Commissioner of Labor properly imputed its finding of a contractor's willfulness for failing to pay prevailing wages to its workers to a "substantially owned-affiliated entity" because the shareholders of both entities were members of the same family, and the contractor essentially used the entity's workers as its own field staff. Matter of Central City Roofing Co., Inc. v Musolino, 136 A.D.3d 1186, 25 N.Y.S.3d 433, 2016 N.Y. App. Div. LEXIS 1218 (N.Y. App. Div. 3d Dep't 2016).

State comptroller has the duty under § 220 to see that the law and the provisions of a construction contract with the state in respect of hours of labor and wages are observed, for which purpose he has the duty to require from the contractor reasonable proof of their observance; and requirement that such proof be in the form of an affidavit is not unreasonable. Carder Realty Corp. v State, 15 N.Y.S.2d 604, 172 Misc. 498, 1939 N.Y. Misc. LEXIS 2436 (N.Y. Ct. Cl. 1939), rev'd, 260 A.D. 459, 23 N.Y.S.2d 395, 1940 N.Y. App. Div. LEXIS 4628 (N.Y. App. Div. 1940).

In a class action suit brought by former and current employees seeking to recover unpaid prevailing wages for their work on various public works projects under State of New York law, the employer's motion for summary judgment on the ground that the Labor-Management Relations Act, 29 U.S.C.S. § 141 et seq., preempted the employees' claims was denied because while the collective bargaining agreements involved often contain wage rates that may be helpful in determining damages, reference to such information did not require a finding that the claims were preempted. Ramos v SimplexGrinnell LP, 796 F. Supp. 2d 346, 2011 U.S. Dist. LEXIS 65593 (E.D.N.Y. 2011), vacated, 773 F.3d 394, 2014 U.S. App. LEXIS 22791 (2d Cir. N.Y. 2014).

In a class action suit brought by former and current employees seeking to recover unpaid prevailing wages for their work on various public works projects under State of New York law, the employer's motion to strike the employees' economic expert was denied because none of the employer's challenges warranted exclusion of the expert's testimony or report at trial since the challenges went to the weight of the testimony, not its admissibility. Ramos v SimplexGrinnell LP, 796 F. Supp. 2d 346, 2011 U.S. Dist. LEXIS 65593 (E.D.N.Y. 2011), vacated, 773 F.3d 394, 2014 U.S. App. LEXIS 22791 (2d Cir. N.Y. 2014).

The statements required by these sections need not appear in the form of certification of a claim against a municipality. 1967 Ops St Compt File #858.

38. —Notice of claim

Three-month notice of claim requirement under CLS Educ § 3813(1) for statutory or nonjudicial proceedings involving

school districts, school boards, and boards of cooperative educational services does not apply to proceedings initiated by Commissioner of Labor to enforce prevailing wage payment requirements for public work projects under CLS Labor § 220. Cayuga-Onondaga Counties Bd. of Coop. Educ. Servs. v Sweeney, 89 N.Y.2d 395, 654 N.Y.S.2d 92, 676 N.E.2d 854, 1996 N.Y. LEXIS 3601 (N.Y. 1996), reh'g denied, 89 N.Y.2d 1031, 658 N.Y.S.2d 246, 680 N.E.2d 620, 1997 N.Y. LEXIS 382 (N.Y. 1997).

39. —Statute of limitations

In a proceeding brought by a public works contractor to annul a wage rate redetermination made by the Industrial Commissioner pursuant to Labor L § 220, an order of the lower court that reversed the judgment vacating the redetermination and the accompanying wage withholding orders would be affirmed, where the contractor received notice of the redetermination a few days after it was made and received prompt notice of wage withholding orders served on the relevant public officials but did not commence the proceeding until after the four-month statute of limitations contained in CPLR § 217 had expired, and since § 217 was appropriate limitations period to be applied to the proceeding. A.J. Cerasaro, Inc. v Ross, 60 N.Y.2d 946, 471 N.Y.S.2d 49, 459 N.E.2d 158, 1983 N.Y. LEXIS 3578 (N.Y. 1983).

Contractor's Article 78 proceeding to challenge Commissioner of Labor's classification of its telephone installers as "electricians" and commissioner's order to pay such employees according to prevailing rate schedule was timely where brought within 4 months of issuance of commissioner's determination; although contractor had previously received prevailing rate schedule which indicated that telephone installers were classified as electricians, classification did not become effective as to its employees, nor was it aggrieved by classification, until commissioner's determination was issued. Twin State CCS Corp. v Roberts, 72 N.Y.2d 897, 532 N.Y.S.2d 746, 528 N.E.2d 1219, 1988 N.Y. LEXIS 1663 (N.Y. 1988).

One-year statute of limitations under CLS Educ § 3813(2-b) for statutory or nonjudicial proceedings involving school districts, school boards, and boards of cooperative educational services does not apply to proceedings initiated by Commissioner of Labor to enforce prevailing wage payment requirements for public work projects under CLS Labor § 220. Cayuga-Onondaga Counties Bd. of Coop. Educ. Servs. v Sweeney, 89 N.Y.2d 395, 654 N.Y.S.2d 92, 676 N.E.2d 854, 1996 N.Y. LEXIS 3601 (N.Y. 1996), reh'g denied, 89 N.Y.2d 1031, 658 N.Y.S.2d 246, 680 N.E.2d 620, 1997 N.Y. LEXIS 382 (N.Y. 1997).

A proceeding to annul wage redeterminations of the Industrial Commissioner, made pursuant to § 220 of the Labor Law, which implements the constitutional mandate (NY Const, art I, § 17) that "[n]o laborer, workman or mechanic, in the employ of a contractor engaged in the performance of any public work * * * shall be paid less than the rate of wages prevailing in the same trade or occupation in the locality within the state where such public work is to be situated, executed or used", affecting contracts entered into prior to the effective date of chapter 336 of the Laws of 1978, which amended section 220 prospectively, must be commenced within four months of the notice of entry of the determination (CPLR 217), since in the absence of judicial proceedings the order of the Industrial Commissioner was final and enforceable insofar as the withholding of contract payment is concerned; the lack of underlying compliance to invoke the 30-day Statute of Limitations contained in former subdivision 8 of section 220 of the Labor Law does not establish that CPLR 217 is inapplicable, since the fact that the finality of the order of redetermination was subject to attack and the statutory infirmities were such as to bar the start of its own short Statute of Limitations does not establish that there was not otherwise a final determination subject to CPLR article 78 review. Schultz Constr., Inc. v Ross, 76 A.D.2d 151, 431 N.Y.S.2d 144, 1980 N.Y. App. Div. LEXIS 11743 (N.Y. App. Div. 3d Dep't 1980), app. dismissed, 52 N.Y.2d 897, 437 N.Y.S.2d 307, 418 N.E.2d 1325, 1981 N.Y. LEXIS 2147 (N.Y. 1981), aff'd, 53 N.Y.2d 790, 439 N.Y.S.2d 919, 422 N.E.2d 579, 1981 N.Y. LEXIS 2414 (N.Y. 1981), aff'd, 53 N.Y.2d 792, 439 N.Y.S.2d 919, 422 N.E.2d 579, 1981 N.Y. LEXIS 2415 (N.Y. 1981).

An article 78 proceeding to annul a prevailing-wage redetermination issued under Labor Law § 220 must be commenced, in accordance with CPLR § 217, within four months of the notice of entry of the determination. A.J. Cerasaro, Inc. v Ross, 94 A.D.2d 943, 464 N.Y.S.2d 70, 1983 N.Y. App. Div. LEXIS 18410 (N.Y. App. Div. 4th Dep't), aff'd, 60 N.Y.2d 946, 471 N.Y.S.2d 49, 459 N.E.2d 158, 1983 N.Y. LEXIS 3578 (N.Y. 1983).

Article 78 proceeding challenging determination of prevailing wage rate schedule and classification of subcontractor's employees as sheet metal workers was time barred by 4-month period of CLS CPLR § 217 where it was undisputed that proceeding was commenced more than one year after subcontractor received prevailing wage rate schedule, notwithstanding that subcontractor received such schedule after work was completed; further, notice of hearing issued by Department of Labor within 4-month period did not toll limitation period since hearing was held solely to determine whether subcontractor had complied with wage rate schedule. North Country Installers v Commissioner of Labor, 135 A.D.2d 1039, 522 N.Y.S.2d 974, 1987 N.Y. App. Div. LEXIS 52906 (N.Y. App. Div. 3d Dep't 1987).

The three months' period of limitations begins to run once there is final determination of the prevailing rate for any particular period of time, and does not run from the time that entire period of employment of a particular employee is covered by the final orders determining the prevailing rate. Filloramo v Carder Realty Corp., 284 N.Y.S. 240, 157 Misc. 662, 1935 N.Y. Misc. LEXIS 1628 (N.Y. App. Term 1935), aff'd, 248 A.D. 865, 291 N.Y.S. 394, 1936 N.Y. App. Div. LEXIS 7754 (N.Y. App. Div. 1936).

40. —Sufficiency of complaint

In an action by engineers who were formerly employed by the defendant to recover the difference between the amount paid them by the defendant and the alleged prevailing rate of wages, the complaint was properly dismissed for failure to allege compliance with statutory requirements for ascertainment of prevailing rate of wages by the comptroller. Olsen v Brooklyn Ash Removal Co., 268 N.Y. 693, 198 N.E. 561, 268 N.Y. (N.Y.S.) 693, 1935 N.Y. LEXIS 1155 (N.Y. 1935).

Where the plaintiff did not allege or prove that the city comptroller had made an investigation to determine the prevailing wage rate and filed an order fixing said rate and where the plaintiff had not been paid in accordance with such order his complaint was dismissed. Cirillo v New York, 287 N.Y. 641, 39 N.E.2d 273, 287 N.Y. (N.Y.S.) 641, 1941 N.Y. LEXIS 2510 (N.Y. 1941).

Where there was no proof of compliance with this section an action to foreclose a lien for the amount alleged to be the difference between the wages paid plaintiff and the prevailing rate was dismissed. Anderson v New York, 243 A.D. 731, 277 N.Y.S. 548, 1935 N.Y. App. Div. LEXIS 7993 (N.Y. App. Div. 1935).

An auto machinist, employed in labor class of civil service in department of sanitation of New York city, in order to maintain actions under § 220, must allege and prove that comptroller of New York city has, on his own initiative or on verified complaint of interested party, made an investigation to determine prevailing rate of wages, and that he as a machinist was not paid in accordance with rate fixed. Cirillo v New York, 10 N.Y.S.2d 472, 170 Misc. 230, 1939 N.Y. Misc. LEXIS 1593 (N.Y. Sup. Ct. 1939), aff'd, 259 A.D. 717, 19 N.Y.S.2d 151, 1940 N.Y. App. Div. LEXIS 6385 (N.Y. App. Div. 1940).

"Verified complaint" referred to in § 220, subd. 8, is original verified complaint in proceeding, rather than complaint of plaintiff. McKibbin v New York, 51 N.Y.S.2d 50, 182 Misc. 671, 1944 N.Y. Misc. LEXIS 2460 (N.Y. Sup. Ct. 1944), aff'd, 269 A.D. 696, 53 N.Y.S.2d 474, 1945 N.Y. App. Div. LEXIS 3352 (N.Y. App. Div. 1945).

Where laborer's three previous complaints concerning prevailing wage rates had been settled with city comptroller without filing of complaint with Industrial Commission, laborer's fourth complaint, filed with the comptroller, was valid complaint. Petrocchi v Ronan, 81 Misc. 2d 741, 367 N.Y.S.2d 178, 1975 N.Y. Misc. LEXIS 2464 (N.Y. Civ. Ct. 1975).

Private contractors were granted summary judgment on the workers' N.Y. Lab. Law § 220(2) claims for overtime wages where

there was no indication that they had exhausted their administrative remedies as required by N. Y. Lab. Law § 220(7)-(9). Almazo v M.A. Angeliades, Inc., 2015 U.S. Dist. LEXIS 152698 (S.D.N.Y. Nov. 10, 2015).

In a class action suit brought by former and current employees seeking to recover unpaid prevailing wages for their work on various public works projects under State of New York law, the employer's motion for summary judgment on the grounds that the employees have failed to submit the intended public works contracts underlying their claims was denied because there was no need to refer to the contracts to determine the wage rate to be paid as that amount was published, thus, the contracts were collateral, and therefore secondary evidence. Ramos v SimplexGrinnell LP, 796 F. Supp. 2d 346, 2011 U.S. Dist. LEXIS 65593 (E.D.N.Y. 2011), vacated, 773 F.3d 394, 2014 U.S. App. LEXIS 22791 (2d Cir. N.Y. 2014).

In a class action suit brought by former and current employees seeking to recover unpaid prevailing wages for their work on various public works projects under State of New York law, the employer's motion for summary judgment was granted on the employees' claim for failure to pay wages in violation of N.Y. Lab. Law §§ 190-198 because those statutory sections did not apply and the employees were merely trying to improperly seek liquidated damages and attorneys' fees by recasting their third-party beneficiary claims under N.Y. Lab. Law § 220 as statutory wage claims enforceable under those inapplicable enforcement provisions. Ramos v SimplexGrinnell LP, 796 F. Supp. 2d 346, 2011 U.S. Dist. LEXIS 65593 (E.D.N.Y. 2011), vacated, 773 F.3d 394, 2014 U.S. App. LEXIS 22791 (2d Cir. N.Y. 2014).

Former employee's claim against a security contractor for unpaid overtime was barred by the employee's failure to exhaust the condition precedent under N.Y. Lab. Law § 220(8). Goodman v Port Auth. of N.Y. & N.J., 850 F. Supp. 2d 363, 2012 U.S. Dist. LEXIS 26401 (S.D.N.Y. 2012).

41. —Class actions

In employees' action to recover prevailing wage rate under CLS Labor § 220, class would be limited to employees of primary employer and not expanded to include employees of its subcontractors where plaintiffs failed to prove existence of any employees of subcontractors, much less any who were paid less than prevailing rate of wages and benefits, and sole employees identified by complaint were those of primary employer. Pesantez v Boyle Envtl. Servs., Inc., 251 A.D.2d 11, 673 N.Y.S.2d 659, 1998 N.Y. App. Div. LEXIS 6382 (N.Y. App. Div. 1st Dep't 1998).

In employees' action to recover prevailing wage rate under CLS Labor § 220, requirements for certification of class under CLS CPLR §§ 901 and 902 were met where, inter alia, (1) employer's certified payroll records listed over 100 employees who worked on project in question, (2) named plaintiffs identified about 80 such workers, (3) joinder of all employees was impractical, (4) all proposed class members worked on same project, were due prevailing rates of wages and benefits, and were allegedly underpaid, (5) plaintiffs showed interest in action, (6) plaintiffs' counsel showed level of competence ensuring that they could fairly and adequately represent class members, and (7) any persons who wished to pursue punitive claims under CLS Labor § 198 could opt out of class. Pesantez v Boyle Envtl. Servs., Inc., 251 A.D.2d 11, 673 N.Y.S.2d 659, 1998 N.Y. App. Div. LEXIS 6382 (N.Y. App. Div. 1st Dep't 1998).

In employees' action to recover prevailing wage rate under CLS Labor § 220, class action would be best method of adjudicating controversy where amount of potential recovery of each individual was small, liability of primary employer's subcontractor and subcontractor's surety was only contingent on remaining defendants' failure to pay prevailing rate, many proposed class members had not sought relief in administrative proceeding under CLS Labor § 220(7) and (8), most individual differences could be resolved by documentary evidence of payroll checks and time sheets, and thus there would be no serious problems in managing claims of maximum of 300 individuals. Pesantez v Boyle Envtl. Servs., Inc., 251 A.D.2d 11, 673 N.Y.S.2d 659, 1998 N.Y. App. Div. LEXIS 6382 (N.Y. App. Div. 1st Dep't 1998).

Although plaintiff class of employees could proceed on its common-law breach of contract claims for underpayment of wages and benefits, issue of whether class could proceed on its claims under CLS Labor § 220 would be remanded to IAS Court for development of record and for decision where record did not allow review of extent and status of underlying administrative proceeding. Pesantez v Boyle Envtl. Servs., Inc., 251 A.D.2d 11, 673 N.Y.S.2d 659, 1998 N.Y. App. Div. LEXIS 6382 (N.Y. App. Div. 1st Dep't 1998).

Former and current employees' motion for class certification was granted with regard to seeking to recover unpaid prevailing wages for their work on various public works projects against an employer under State of New York law because under Fed. R. Civ. P. 23, they established: numerosity by alleging that the class consists of at least 400 members; the requirement of commonality was satisfied as their claim, that the proposed class members were denied prevailing wages by the employer, raised common questions of law and fact; as to typicality, they each performed similar work for the employer, were subject to the same payroll procedures of defendant, and were not paid prevailing wages to which they were entitled; a law firm was chosen to satisfy the adequate representation requirement; common questions of law and fact relevant to all class members predominated over individualized issues as, although the putative class members earned prevailing wages at different rates and some worked more hours than others, those differences do not predominate over the main issue: whether the employer systematically failed to pay its employees the prevailing wages due them; and a class action was superior to other means of adjudication. Ramos v SimplexGrinnell LP, 796 F. Supp. 2d 346, 2011 U.S. Dist. LEXIS 65593 (E.D.N.Y. 2011), vacated, 773 F.3d 394, 2014 U.S. App. LEXIS 22791 (2d Cir. N.Y. 2014).

42. —Investigation

Under subd. 8 of this section a city officer making investigation is no longer the agent of the city but the representative of the state, empowered to determine dispute impartially. Gaston v Taylor, 274 N.Y. 359, 9 N.E.2d 9, 274 N.Y. (N.Y.S.) 359, 1937 N.Y. LEXIS 854 (N.Y. 1937).

Employees who initiate investigation and employers who must pay rate determined thereby are the persons "affected" by investigation who are entitled to notice. Heaney v McGoldrick, 286 N.Y. 38, 35 N.E.2d 641, 286 N.Y. (N.Y.S.) 38, 1941 N.Y. LEXIS 1472 (N.Y. 1941).

The requirement for service of certain notices provided for in Labor Law § 220(5)(f), Village Law § 341-b, and General Municipal Law § 50-e are inapplicable to actions brought pursuant to Labor Law § 220(8). Bucci v Port Chester, 22 N.Y.2d 195, 292 N.Y.S.2d 393, 239 N.E.2d 335, 1968 N.Y. LEXIS 1341 (N.Y. 1968).

A trade union was not an interested person within the meaning of this section and could not compel the fiscal officer of a school district to make an investigation of alleged violations of the prevailing wage law where the school district undertook to repair its property by using its own maintenance employees who were paid their regular wages which were lower than the prevailing wages paid to tradesmen for similar work. Yerry v Goodsell, 4 A.D.2d 395, 166 N.Y.S.2d 224, 1957 N.Y. App. Div. LEXIS 4685 (N.Y. App. Div. 3d Dep't 1957), aff'd, 4 N.Y.2d 999, 177 N.Y.S.2d 514, 152 N.E.2d 535, 1958 N.Y. LEXIS 927 (N.Y. 1958).

In Article 78 proceeding for review of labor commissioner's finding that subcontractor violated prevailing wage requirements of CLS Labor § 220(3) in connection with its performance of public work project, court would not annul commissioner's finding on ground that labor department's investigation was unlawful because it was initiated as result of complaint by subcontractor's competitor since (1) CLS Labor § 220(7) permits commissioner to initiate compliance investigations, and (2) instant investigation, while prompted by letter from unsuccessful bidder, was initiated by Director of Bureau of Public Work, as commissioner's designee. Sierra Telcom Servs., Inc. v Hartnett, 174 A.D.2d 279, 579 N.Y.S.2d 753, 1992 N.Y. App. Div. LEXIS 909 (N.Y. App. Div. 3d Dep't), app. dismissed, 79 N.Y.2d 1039, 584 N.Y.S.2d 448, 594 N.E.2d 942, 1992 N.Y. LEXIS 1463 (N.Y. 1992), app. dismissed, 79 N.Y.2d 1039, 584 N.Y.S.2d 448, 594 N.E.2d 942, 1992 N.Y. LEXIS 1511 (N.Y. 1992), app. denied, 80 N.Y.2d 756, 588 N.Y.S.2d 824, 602 N.E.2d 232, 1992 N.Y. LEXIS 3179 (N.Y. 1992), app. denied, 80 N.Y.2d 757, 588 N.Y.S.2d 825, 602 N.E.2d 233, 1992 N.Y.

LEXIS 3210 (N.Y. 1992), cert. denied, 507 U.S. 972, 113 S. Ct. 1413, 122 L. Ed. 2d 784, 1993 U.S. LEXIS 1979 (U.S. 1993).

Evidence of contractor's cooperation when violations of prevailing wages and supplements were brought to its attention by investigators did not preclude finding of willfulness. Nelson's Lamp Lighters v Hudacs, 204 A.D.2d 814, 611 N.Y.S.2d 714, 1994 N.Y. App. Div. LEXIS 5176 (N.Y. App. Div. 3d Dep't 1994).

Finding that an employer underpaid employees was affirmed in an N.Y. C.P.L.R. art. 78 proceeding because, inter alia, any prejudice to the employer from the department's delay in the investigation was greatly ameliorated by the hearing officer's finding that the employer's account of its contacts with officials was credible, and that employer was left to understand that its proposed supplemental benefit credit was acceptable; the fact that the advice the employer received from department officials concerning the calculation of the prevailing wage may have been erroneous was not a basis for barring the department from performing its essential function. While the department was undoubtedly remiss in the manner in which it conducted the investigation, and was largely responsible for the extended amount of time it took to complete it, those failings did not relieve the employer of the contractual obligations to pay its employees the prevailing wage. Matter of Pegasus Cleaning Corp. v Smith, 73 A.D.3d 1328, 905 N.Y.S.2d 666, 2010 N.Y. App. Div. LEXIS 4018 (N.Y. App. Div. 3d Dep't), app. denied, 15 N.Y.3d 714, 913 N.Y.S.2d 643, 939 N.E.2d 809, 2010 N.Y. LEXIS 3469 (N.Y. 2010).

Six-month period for concluding compliance investigation under CLS Labor § 220(7) does not apply to investigation under CLS Labor § 220-b where withholdings have been directed pending final determination. Palmer Constr., Inc. v Hines, 154 Misc. 2d 248, 584 N.Y.S.2d 271, 1992 N.Y. Misc. LEXIS 222 (N.Y. Sup. Ct. 1992).

43. —Hearing

Provision of Labor Law that any corporation wilfully refusing to pay wage rates determined by administrative order is guilty of a misdemeanor must be read in conjunction with provision of Labor Law permitting a public authority to cause an investigation to be made to determine the prevailing wage rate and provision that before making an order or determination on an investigation made on his own initiative a fiscal officer shall order a hearing at which the affected party shall be given an opportunity to be heard. Expert Electric, Inc. v Goldin, 51 A.D.2d 763, 380 N.Y.S.2d 50, 1976 N.Y. App. Div. LEXIS 11324 (N.Y. App. Div. 2d Dep't 1976).

Although contract for electrical work for New York City Department of Water Resources bore legend that wage rates and supplemental benefits to be paid were those in effect at time work was being performed, provision of Labor Law requiring an opportunity for hearing before a wage order was made on a fiscal officer's own initiative was deemed part of the contract and, hence, absent notice or hearing, fiscal officer's unilateral promulgation of higher wage rate was not binding on contractor. Expert Electric, Inc. v Goldin, 51 A.D.2d 763, 380 N.Y.S.2d 50, 1976 N.Y. App. Div. LEXIS 11324 (N.Y. App. Div. 2d Dep't 1976).

Basic issue to be determined by hearing officer on complaints by contractor's employees was contradiction between records of contractor, which had been awarded contracts by city, and testimony of employees as to hours worked and wages paid, and it was function of comptroller and his hearing officer to determine where truth lay. Parallel Plumbing & Heating Co. v Goldin, 56 A.D.2d 779, 393 N.Y.S.2d 1, 1977 N.Y. App. Div. LEXIS 11051 (N.Y. App. Div. 1st Dep't), app. denied, 42 N.Y.2d 809, 1977 N.Y. LEXIS 3872 (N.Y. 1977).

The hearing provisions of section 220 of the Labor Law, relating to the prevailing wages to be paid under public works contracts, which require an investigation into prevailing wage rates when a complaint is filed or on the fiscal officer's own initiative (subd 7) and which require that a hearing be held before the fiscal officer proceeds under a complaint or before he makes any order or determination upon an investigation conducted on his own initiative (subd 8), do not apply only to initial wage rate determinations made prior to the letting of contracts but also apply to redeterminations of wage rates made during the pendency of contracts. Ballard Constr., Inc. v Ross, 63 A.D.2d 99, 406 N.Y.S.2d 904, 1978 N.Y. App. Div. LEXIS 11320 (N.Y. App. Div. 3d Dep't), app. denied, 45 N.Y.2d 713, 1978 N.Y. LEXIS 3256 (N.Y. 1978).

Section 220 of the Labor Law, as amended by chapter 752 of the Laws of 1975, which provides that contractors on public works contracts shall pay the prevailing rate of wages which, pursuant to the terms of said contracts, may be redetermined after a contract is let, is reasonable, is not in contravention of public policy, does not offend basic contract principles, and does not constitute an impairment of contract obligations in violation of the contract clause of the United States Constitution. Meaott Constr. Corp. v Ross, 76 A.D.2d 137, 431 N.Y.S.2d 207, 1980 N.Y. App. Div. LEXIS 11740 (N.Y. App. Div. 3d Dep't 1980).

Employer's good faith in cooperating with investigation and promptly remedying violation did not preclude finding of willful failure to pay prevailing wages and supplements in violation of CLS Labor § 220. Gross Plumbing & Heating Co. v Department of Labor, 133 A.D.2d 524, 519 N.Y.S.2d 896, 1987 N.Y. App. Div. LEXIS 50002 (N.Y. App. Div. 4th Dep't 1987).

Commissioner of Labor could rationally imply willfulness on part of nonunion electrical contractor in determining that contractor had underpaid its employees by classifying work performed as something other than electrical work where contractor's most persuasive evidence (affidavits from its employees, contract specifications, and fact that department of jurisdiction neglected to ascertain classification of workers on project) was not introduced at hearing; willfulness could be implied from evidence before commissioner, including contractor's past public works experience. Nelson's Lamp Lighters v Roberts, 136 A.D.2d 810, 523 N.Y.S.2d 643, 1988 N.Y. App. Div. LEXIS 259 (N.Y. App. Div. 3d Dep't), app. denied, 73 N.Y.2d 702, 537 N.Y.S.2d 490, 534 N.E.2d 328, 1988 N.Y. LEXIS 3453 (N.Y. 1988).

Basis for hearing officer's conclusion regarding length of employee's employment was unclear, and thus proceeding under CLS Labor §§ 200 et seq. would be remanded, where employee said she worked 6 months, contractor said she worked 6 weeks, and it was impossible to ascertain from record how officer decided her employment lasted 12 weeks. Canarsie Plumbing & Heating Corp. v Goldin, 151 A.D.2d 331, 542 N.Y.S.2d 588, 1989 N.Y. App. Div. LEXIS 8014 (N.Y. App. Div. 1st Dep't 1989).

In proceeding resulting in order requiring payment of back wages and civil fines due by reason of petitioner's failure to pay prevailing wages and supplements on public works project, testimony of Department of Labor (DOL) wage investigator was not incompetent or incredible because he lacked adequate contemporarily made log and records, where it was shown that despite incompleteness of petitioner's payroll records, wage investigator was able to compile list of names of persons believed to have worked on project, that 2 employees filed complaints with DOL and identified additional employees who worked on project but whose names did not appear on payroll records, that investigator interviewed others on telephone who also worked on project and was able to compile schedules of days and number of hours they worked, and that using such information, investigator formulated methodology to determine how much compensation was due. Mid Hudson Pam Corp. v Hartnett, 156 A.D.2d 818, 549 N.Y.S.2d 835, 1989 N.Y. App. Div. LEXIS 15879 (N.Y. App. Div. 3d Dep't 1989).

Where employer fails to keep accurate payroll records as required by CLS Labor § 220(3-a), Commissioner of Labor is permitted to calculate back wages due to employees by using best available evidence, and shift burden of negating reasonableness of Commissioner's calculations to employer. Mid Hudson Pam Corp. v Hartnett, 156 A.D.2d 818, 549 N.Y.S.2d 835, 1989 N.Y. App. Div. LEXIS 15879 (N.Y. App. Div. 3d Dep't 1989).

Court would affirm determination that contractor failed to pay 5 employees schedule "A" electrician wages, despite contractor's assertion that work performed did not fit appropriate description set forth in collective bargaining agreement, since Comptroller's electrical engineers demonstrated that employees performed "A" electrician work, and contractor did not refute such testimony with its own expert witnesses despite opportunity to do so. A. S. Reynolds Electric Co. v Golden, 161 A.D.2d 303, 555 N.Y.S.2d 79, 1990 N.Y. App. Div. LEXIS 5257 (N.Y. App. Div. 1st Dep't 1990).

Evidence did not support determination of Commissioner of Labor that contractor's 2 violations of Prevailing Wage Law were

willful where contractor had no prior violations and had not received prior warning about conduct complained of, and commissioner presented neither proof to rebut contractor's assertion that violations in question were unintentional nor evidence demonstrating that violations were so blatant that any experienced contractor would have recognized them as such. Fast Trak Structures, Inc. v Hartnett, 181 A.D.2d 1013, 581 N.Y.S.2d 505, 1992 N.Y. App. Div. LEXIS 4608 (N.Y. App. Div. 4th Dep't 1992).

At hearing conducted by Department of Labor to determine whether contractor on public work project has paid prevailing rate of wages and supplements, contractor may validly stipulate that project was public work project. Mailand Farms v Hartnett, 204 A.D.2d 326, 204 A.D.2d 327, 612 N.Y.S.2d 606, 612 N.Y.S.2d 954, 1994 N.Y. App. Div. LEXIS 4504 (N.Y. App. Div. 2d Dep't 1994).

Department of Labor has statutory power to determine issues raised at hearing conducted by it to determine whether contractor of public work project has paid prevailing rate of wages and supplements, and this power includes power to determine questions of fact on which Department of Labor's jurisdiction is based, such as whether project was public work project. Mailand Farms v Hartnett, 204 A.D.2d 326, 204 A.D.2d 327, 612 N.Y.S.2d 606, 612 N.Y.S.2d 954, 1994 N.Y. App. Div. LEXIS 4504 (N.Y. App. Div. 2d Dep't 1994).

Court would modify determination by annulling finding that employer failed to pay prevailing wage for work of 2 employees as technical engineers where there was no proof that either employee performed work of technical engineer. Passucci Gen. Constr. Co. v Hudacs, 221 A.D.2d 987, 633 N.Y.S.2d 903, 1995 N.Y. App. Div. LEXIS 13484 (N.Y. App. Div. 4th Dep't 1995), app. denied, 87 N.Y.2d 811, 644 N.Y.S.2d 144, 666 N.E.2d 1058, 1996 N.Y. LEXIS 636 (N.Y. 1996).

Determination finding that contractor was vicariously liable for willful violation by its subcontractor of CLS Labor § 220 in failing to pay prevailing wages and benefits to 57 of its employees was supported by evidence including testimony of Labor Department's investigator and subject employees. Asbestos Indus. of Am. v New York State DOL, 224 A.D.2d 414, 637 N.Y.S.2d 750, 1996 N.Y. App. Div. LEXIS 870 (N.Y. App. Div. 2d Dep't 1996).

44. — —Effect of 1978 amendment

The 1978 amendment to section 220 of the Labor Law (L 1978, ch 336), which implements the constitutional mandate (NY Const, art I, § 17) that "[n]o laborer, workman or mechanic, in the employ of a contractor engaged in the performance of any public work * * * shall be paid less than the rate of wages prevailing in the same trade or occupation in the locality within the state where such public work is to be situated, executed or used", and which, prior to its amendment, required a hearing prior to an upward redetermination of wages with due notice to any affected contractors, is not to be applied retroactively so as to eliminate the requirement of a hearing for contracts entered into prior to the amendment's effective date; the result of retroactivity would be the imposition upon the contractor of unilateral determinations by the Industrial Commissioner and the withholding of contract payments, and since the Legislature stipulated to an effective date 60 days after the enactment of the amendment and thus delayed the impact of the amendment upon contractors, no intent is perceived to affect those contracts in existence at the time of the amendment. Schultz Constr., Inc. v Ross, 76 A.D.2d 151, 431 N.Y.S.2d 144, 1980 N.Y. App. Div. LEXIS 11743 (N.Y. App. Div. 3d Dep't 1980), app. dismissed, 52 N.Y.2d 897, 437 N.Y.S.2d 307, 418 N.E.2d 1325, 1981 N.Y. LEXIS 2147 (N.Y. 1981), aff'd, 53 N.Y.2d 790, 439 N.Y.S.2d 919, 422 N.E.2d 579, 1981 N.Y. LEXIS 2414 (N.Y. 1981), aff'd, 53 N.Y.2d 792, 439 N.Y.S.2d 919, 422 N.E.2d 579, 1981 N.Y. LEXIS 2415 (N.Y. 1981).

An amendment to subdivision 8 of section 220 of the Labor Law, effective August 18, 1978, which provides that a hearing is only required before an order or determination is made in connection with a compliance investigation to determine if a public works contractor has been paying the prevailing wage and not where a redetermination of wage rate schedules and supplemental benefits is made, is not to be applied retroactively since the amendment took effect on the 60th day after it became a law, thereby negating a legislative intent that the amendment be applied retroactively and, furthermore, an amendment only has prospective applications unless its language clearly indicates that a contrary interpretation is to be applied; accordingly, the proceeding to review the practice of respondent Industrial Commissioner of delivering new prevailing wage rates to petitioners contractors after commencement of work on public works projects, states a cause of action. A. L. Blades & Sons, Inc. v Ross, 99 Misc. 2d 684, 416 N.Y.S.2d 690, 1979 N.Y. Misc. LEXIS 2314 (N.Y. Sup. Ct. 1979), aff'd, 76 A.D.2d 151, 431 N.Y.S.2d 144, 1980 N.Y. App. Div. LEXIS 11743 (N.Y. App. Div. 3d Dep't 1980).

Pursuant to a 1978 amendment to subdivisions 7 and 8 of section 220 of the Labor Law, a hearing is no longer required before a redetermination of the prevailing rate of wages to be paid to laborers, workmen or mechanics under public works contracts is issued by the Industrial Commissioner; however, a hearing is required when the matter in controversy is whether the contractor or subcontractor engaged in public work is paying the prevailing rate to his employees. Schultz Constr., Inc. v Ross, 99 Misc. 2d 1043, 419 N.Y.S.2d 32, 1979 N.Y. Misc. LEXIS 2386 (N.Y. Sup. Ct. 1979), modified, 76 A.D.2d 151, 431 N.Y.S.2d 144, 1980 N.Y. App. Div. LEXIS 11743 (N.Y. App. Div. 3d Dep't 1980).

Redeterminations of contractual wage rates and supplements issued by the Industrial Commissioner are improper since they were not requested by the town that is a party to the contract and were issued without notice or a hearing, all of which, the request, notice, and a hearing, were required by section 220 of the Labor Law, prior to its 1978 amendment; the contract was executed prior to the effective date of the amendment and amendments permitting redeterminations without a request and without notice and a hearing (Labor Law, § 220, subds 3, 7, 8) are not to be given retroactive application; any determination made absent notice and hearing is invalid pursuant to former section 220 of the Labor Law; therefore, the redetermination must be vacated. F.G. Compagni Constr. Co. v Ross, 103 Misc. 2d 313, 425 N.Y.S.2d 767, 1980 N.Y. Misc. LEXIS 2115 (N.Y. Sup. Ct.), modified, (N.Y. App. Div. 3d Dep't 1980).

1978 amendment of CLS Labor § 220, which eliminated requirement of hearing in wage redetermination case, did not take away implied authority of city comptroller to hold such hearing. Local 32B-32J, Service Employees Int'l Union v Holtzman, 149 Misc. 2d 666, 565 N.Y.S.2d 392, 1990 N.Y. Misc. LEXIS 688 (N.Y. Sup. Ct. 1990).

45. — —Fairness; due process

An administrative determination by the comptroller of the City of New York, which found that a construction company had wilfully violated Labor Law § 220, would be annulled where notes on the file jacket that contained the original claim examiner's notes on the investigation made prior to the hearing indicated that the hearing examiner engaged in ex parte contacts with the comptroller's trial counsel before the hearing began. Signet Constr. Corp. v Goldin, 99 A.D.2d 431, 470 N.Y.S.2d 396, 1984 N.Y. App. Div. LEXIS 16584 (N.Y. App. Div. 1st Dep't 1984).

Contractor received fair hearing in dispute regarding payment of required wages and benefits under public works contract, even though it did not have opportunity to cross-examine employees, where portions of employees' hearsay statements were corroborated by other testimony and by their rate of pay. Canarsie Plumbing & Heating Corp. v Goldin, 151 A.D.2d 331, 542 N.Y.S.2d 588, 1989 N.Y. App. Div. LEXIS 8014 (N.Y. App. Div. 1st Dep't 1989).

Hearing officer's denial of petitioner's request for subpoena duces tecum did not warrant annulment of agency's determination that petitioner violated prevailing wage requirements of CLS Labor § 220(3) since (1) agency gave petitioner its complete file containing all information relevant to compliance investigation, and (2) relevant matter not initially made available to petitioner was later produced on request. Sierra Telcom Servs., Inc. v Hartnett, 174 A.D.2d 279, 579 N.Y.S.2d 753, 1992 N.Y. App. Div. LEXIS 909 (N.Y. App. Div. 3d Dep't), app. dismissed, 79 N.Y.2d 1039, 584 N.Y.S.2d 448, 594 N.E.2d 942, 1992 N.Y. LEXIS 1463 (N.Y. 1992), app. dismissed, 79 N.Y.2d 1039, 584 N.Y.S.2d 448, 594 N.E.2d 942, 1992 N.Y. LEXIS 1511 (N.Y. 1992), app. denied, 80 N.Y.2d 756, 588 N.Y.S.2d 824, 602 N.E.2d 232, 1992 N.Y. LEXIS 3179 (N.Y. 1992), app. denied, 80 N.Y.2d 757, 588 N.Y.S.2d

825, 602 N.E.2d 233, 1992 N.Y. LEXIS 3210 (N.Y. 1992), cert. denied, 507 U.S. 972, 113 S. Ct. 1413, 122 L. Ed. 2d 784, 1993 U.S. LEXIS 1979 (U.S. 1993).

Delay of 3 years in conducting prevailing wage hearing did not satisfy requirement of CLS Labor § 220(8) that such hearing be conducted "expeditiously"; thus, employer would not be obligated to pay interest for Department of Labor's unreasonable delay. Passucci Gen. Constr. Co. v Hudacs, 221 A.D.2d 987, 633 N.Y.S.2d 903, 1995 N.Y. App. Div. LEXIS 13484 (N.Y. App. Div. 4th Dep't 1995), app. denied, 87 N.Y.2d 811, 644 N.Y.S.2d 144, 666 N.E.2d 1058, 1996 N.Y. LEXIS 636 (N.Y. 1996).

Delay of 3 years in conducting prevailing wage hearing did not deprive employee of due process. Passucci Gen. Constr. Co. v Hudacs, 221 A.D.2d 987, 633 N.Y.S.2d 903, 1995 N.Y. App. Div. LEXIS 13484 (N.Y. App. Div. 4th Dep't 1995), app. denied, 87 N.Y.2d 811, 644 N.Y.S.2d 144, 666 N.E.2d 1058, 1996 N.Y. LEXIS 636 (N.Y. 1996).

It did not violate due process during hearing on prevailing wages and supplements on public works project to include evidence of work performed on subcontracts not specifically mentioned in notice of hearing since that notice indicated that hearing would concern entire project and that hearing officer's report would include "any other issues raised by the testimony and evidence at the hearing." Waterway Constr. Corp. v Sweeney, 248 A.D.2d 256, 670 N.Y.S.2d 429, 1998 N.Y. App. Div. LEXIS 2662 (N.Y. App. Div. 1st Dep't 1998).

Petitioner received adequate notice prior to hearing on charges that it failed to pay prevailing wage rates to workers on construction project where (1) notice related pertinent facts disclosed through investigation, and stated charges to be resolved, and (2) while it did not specifically indicate petitioner's predecessor by name, it set forth CLS Labor § 220-b(3)(b) which, in substance, advised petitioner that final determination of violation by its predecessor could be considered. Alca Indus., Inc. v McGowan, 258 A.D.2d 704, 685 N.Y.S.2d 814, 1999 N.Y. App. Div. LEXIS 947 (N.Y. App. Div. 3d Dep't), app. denied, 93 N.Y.2d 807, 691 N.Y.S.2d 1, 712 N.E.2d 1244, 1999 N.Y. LEXIS 1251 (N.Y. 1999).

Hearing officer's denial of public works contractor's request for adjournment of hearing on its alleged failure to pay prevailing wages and supplements was not denial of due process where contractor's president had notice of charges and was given opportunity to participate in hearing, but merely wrote letter requesting adjournment and made no inquiry as to whether it had been granted or denied. General Design & Dev. Inc. v McGowan, 260 A.D.2d 740, 687 N.Y.S.2d 808, 1999 N.Y. App. Div. LEXIS 3688 (N.Y. App. Div. 3d Dep't 1999).

46. —Appeal

In an action by public employees pursuant to Labor Law § 220 for recovery of the difference between the sum actually paid and the amount which should have been paid as wages, the term "final determination" within three months of which plaintiff must bring his action, refers to an event that puts an end to any pending attack upon the determination of the fiscal officer of the prevailing rate, whether it be the original attack in an Article 78 proceeding or a subsequently launched attack by way of a motion for reargument or an appeal. Bucci v Port Chester, 22 N.Y.2d 195, 292 N.Y.S.2d 393, 239 N.E.2d 335, 1968 N.Y. LEXIS 1341 (N.Y. 1968).

In proceeding to review determination of Department of Labor which established prevailing wage rate on public work project pursuant to CLS Labor § 220, court would dismiss, as premature, petitioner's contention that department's determination improperly required petitioner, who was potential bidder on project, to provide supplements under part of § 220 preempted by Employee Retirement Income Security Act (29 USCS § 1001 et seq.), since prevailing rate determination was made before any contractual wage or supplement requirements attached to project. GE v N.Y. State Dep't of Labor, 154 A.D.2d 117, 551 N.Y.S.2d 966, 1990 N.Y. App. Div. LEXIS 1881 (N.Y. App. Div. 3d Dep't), aff'd, 76 N.Y.2d 946, 563 N.Y.S.2d 764, 565 N.E.2d 513, 1990 N.Y. LEXIS 3416 (N.Y. 1990).

Commissioner of Labor was entitled to dismissal of proceeding brought by corporation for declaration that construction project was not public work, and that it was therefore not required to pay prevailing wages, since corporation had failed to exhaust its administrative remedies where (1) prior to start of work, Department of Labor (DOL) informed corporation that it was required to pay prevailing wages, and (2) at time corporation commenced action, DOL had not conducted investigation to determine whether there had been underpayments, nor had hearing been scheduled concerning possible violations; court would reject contention that exhaustion would be futile, since no final determination had been made by DOL, and position taken by counsel to DOL and investigators in Bureau of Public Works could not be ascribed to commissioner. Pyramid Co. v Hudacs, 193 A.D.2d 924, 597 N.Y.S.2d 816, 1993 N.Y. App. Div. LEXIS 4860 (N.Y. App. Div. 3d Dep't 1993).

Article 78 petition to review determination of Commissioner of Labor, which found that petitioner had committed various violations of CLS Labor § 220, was properly dismissed as stipulation whereby petitioner acknowledged that it had willfully violated § 220 constituted substantial evidence to support commissioner's determination. G.A. Contractors v New York State DOL, 222 A.D.2d 673, 635 N.Y.S.2d 688, 1995 N.Y. App. Div. LEXIS 13938 (N.Y. App. Div. 2d Dep't 1995).

Although the sureties were entitled to summary judgment when the laborers did not exhaust their administrative remedies in an action to recover on a surety bond under Labor Law §§ 220, 220-g, they were not entitled summary judgment on the laborers' common-law claims for underpayment of wages and for class action certification under N.Y. C.P.L.R. 901(a). Brandy v Canea Mare Contr., Inc., 34 A.D.3d 512, 825 N.Y.S.2d 230, 2006 N.Y. App. Div. LEXIS 13497 (N.Y. App. Div. 2d Dep't 2006).

It was apparent that the intent of the legislature under this section was to give a defeated party a period of thirty days during which his appeal may be taken. Rainville v Keil, 266 N.Y.S. 867, 148 Misc. 795, 1933 N.Y. Misc. LEXIS 1352 (N.Y. County Ct. 1933).

Statute making it a misdemeanor for person or corporation to permit or require the working of more than eight hours of work for a day's labor in performance of contract with municipality does not lie within the jurisdiction of an administrative agency and does not require exhaustion of administrative remedies prescribed by another subdivision making it misdemeanor to violate final order of fiscal officer after hearing in connection with complaint. People v Firelands Sewer & Water Constr. Co., 86 Misc. 2d 570, 382 N.Y.S.2d 874, 1976 N.Y. Misc. LEXIS 2489 (N.Y. Town Ct. 1976).

47. — —Reviewability

Contractor's Article 78 challenge to determination of Commissioner of Labor that, due to contemporaneous and similar willful violations of CLS Labor § 220, contractor should be debarred from bidding on future public work contracts was ripe for judicial review, even though commissioner had not yet rendered new, formal or extended debarment order based on violations that occurred after first violation, since, under CLS Labor § 220-b, debarment occurs by operation of law on determination of second willful failure to comply with CLS Labor Art 8. Hull Corp. v Hartnett, 77 N.Y.2d 475, 568 N.Y.S.2d 884, 571 N.E.2d 54, 1991 N.Y. LEXIS 361 (N.Y. 1991).

A determination of the commissioner of labor that a municipal contractor is violating this section is not a final determination, and hence certiorari does not lie to review it. Keystone State Const. Co. v Williams, 152 A.D. 575, 137 N.Y.S. 405, 1912 N.Y. App. Div. LEXIS 10386, 1912 N.Y. App. Div. LEXIS 8586 (N.Y. App. Div. 1912), aff'd, 207 N.Y. 767, 101 N.E. 1107, 207 N.Y. (N.Y.S.) 767, 1913 N.Y. LEXIS 1464 (N.Y. 1913).

In employees' action to recover prevailing wage rate under CLS Labor § 220, employer's alleged successor in interest was not aggrieved party entitled to appeal, even though it filed notice of appeal, where it did not appear in opposition to employees' motion (to, inter alia, certify class) or make any cross motion. Pesantez v Boyle Envtl. Servs., Inc., 251 A.D.2d 11, 673 N.Y.S.2d 659, 1998 N.Y. App. Div. LEXIS 6382 (N.Y. App. Div. 1st Dep't 1998).

48. —Recovery of wages

The statutory remedy for the recovery of the difference between wages paid a workman and the prevailing wages which he should

have been paid under the contract between his employer and a public body is not exclusive. The contract was for his benefit and he may maintain an ordinary contract action. Fata v S. A. Healy Co., 289 N.Y. 401, 46 N.E.2d 339, 289 N.Y. (N.Y.S.) 401, 1943 N.Y. LEXIS 1159 (N.Y. 1943).

The words in § 220, subd. 8, which permit the complainant "or any other person affected" to recover the difference between the wages at the rate paid and at the prevailing rate from the time of filing the complaint with the municipal fiscal officer do not include an employee of the same designation who files no complaint. Accordingly a wireman who filed no complaint is not entitled to judgment for the differential from the time of filing of complaints by five other wiremen; the plaintiff's failure to file prevents recovery of benefits antecedent to order of fiscal officer determining the prevailing rate of wages. Campbell v New York, 291 N.Y. 461, 52 N.E.2d 949, 291 N.Y. (N.Y.S.) 461, 1943 N.Y. LEXIS 1017 (N.Y. 1943).

Where statutory requirement that applicable wage schedule be annexed to work specifications before advertising for bids was ignored by both contractor and public entity before contract for university project was executed, no liability on part of public entity for difference between prevailing wage rate contractor was required to pay its workmen and wages it had anticipated paying workmen at time of bid could arise on theory of contractual breach. Brang Co. v State University Constr. Fund, 47 A.D.2d 178, 365 N.Y.S.2d 914, 1975 N.Y. App. Div. LEXIS 8739 (N.Y. App. Div. 3d Dep't 1975).

Hearing officer's assessment of punitive interest rate at 10 percent on $181,342.52 in unpaid wages resulting from contractor's failure to pay its workers at prevailing wage for building construction was improper where officer found that contractor's violation was not willful, but was caused by inexperience, and was first violation; under circumstances, rate should be set at 6 percent. Fra-Dee Constr., Inc. v Roberts, 132 A.D.2d 924, 518 N.Y.S.2d 259, 1987 N.Y. App. Div. LEXIS 49376 (N.Y. App. Div. 4th Dep't), app. denied, 70 N.Y.2d 611, 523 N.Y.S.2d 495, 518 N.E.2d 6, 1987 N.Y. LEXIS 19005 (N.Y. 1987).

In contractor's action against town to recover for increased wages contractor was compelled to pay its workers on town's public works project, after being cited by Department of Labor for failing to pay prevailing wage rates as required by CLS Labor § 220, town could not be held liable on theory of breach of contract or negligent performance of contractual duty based on town's failure to apply for wage schedule or to annex schedule to bid specifications since those omissions occurred prior to formation of contract and contractor itself had assumed responsibility for preparing agreement based on representations as to its experience in such matters. E. Williamson Roofing & Sheet Metal Co. v Parish, 139 A.D.2d 97, 530 N.Y.S.2d 720, 1988 N.Y. App. Div. LEXIS 11231 (N.Y. App. Div. 4th Dep't 1988).

In contractor's action against town to recover for increased wages contractor was compelled to pay its workers on town's public works project, after being cited by Department of Labor for failing to pay prevailing wage rate as required by CLS Labor § 220, town could not be held liable on theory of unjust enrichment, even though town had received benefit of work performed at less than prevailing rate, since (1) there was no claim that town knew that contractor would perform contract by paying less than prevailing wages, (2) contractor was experienced in such matters and knew or should have known of wage requirement, and (3) to allow such recovery would circumvent CLS Labor § 220, designed to serve public good, and impose fiscal burden on town and its taxpayers, who are intended beneficiaries of statutory scheme. E. Williamson Roofing & Sheet Metal Co. v Parish, 139 A.D.2d 97, 530 N.Y.S.2d 720, 1988 N.Y. App. Div. LEXIS 11231 (N.Y. App. Div. 4th Dep't 1988).

Express language of CLS Labor § 220 imposes no liability on governmental entity for failing to determine classification of workers to be employed on public works project and for mistakenly accepting contractor's bid based on less than applicable prevailing wage, and statute does not create any remedy in nature of plenary action for benefit of contractor who was subsequently ordered to pay prevailing wage rate; to allow contractor to sue local government to recoup additional moneys it expended to comply with statute would reward contractor for its own violation of statute, would subvert statutory scheme of placing all bidders on equal footing, and would impose unwarranted burden on municipality and its taxpayers. E. Williamson Roofing & Sheet Metal Co. v Parish, 139 A.D.2d 97, 530 N.Y.S.2d 720, 1988 N.Y. App. Div. LEXIS 11231 (N.Y. App. Div. 4th Dep't 1988).

City defendant should have been granted summary judgment in subcontractor's action to recover mechanic's lien, which it filed under CLS Lien § 25(3) against amount of escrow funds held by city to pay general contractor on public improvement contract, since city's prevailing wages lien, filed against same funds relating to wages owed to general contractor's employees under CLS Labor § 220(7), had priority over subcontractor's mechanic's lien, and there had never been enough money in escrow account to satisfy even senior lien, let alone pay anything to subcontractor, so that any delay in ruling on prevailing wages claim could not have prejudiced subcontractor. Giant Supply Corp. v City of New York, 248 A.D.2d 231, 670 N.Y.S.2d 29, 1998 N.Y. App. Div. LEXIS 2601 (N.Y. App. Div. 1st Dep't 1998).

Because there was no proof that any administrative determination had been rendered, pursuant to N.Y. Lab. Law § 198, an employer was entitled to summary judgment in an employee's action alleging the employer's failure to pay prevailing wages under N.Y. Lab. Law § 220. Winsch v Esposito Bldg. Specialty, Inc., 48 A.D.3d 558, 852 N.Y.S.2d 199, 2008 N.Y. App. Div. LEXIS 1318 (N.Y. App. Div. 2d Dep't 2008).

In an action by a cable splicer employed by New York city to recover the difference between the wages received by him and the alleged prevailing rate of wages in outside employment in the same occupation for a certain period, the plaintiff failed to supply evidence, that the majority of cable splicers in New York city, or at least forty per centum of them, receive said wages, or that the average wage paid such cable splicers was said rate, which is a statutory requirement for the prevailing rate under subd. 5 of this section. In the absence of such proof the court cannot make a determination of the prevailing rate, nor has the plaintiff shown determination of wage rate by the comptroller under subds. 7 or 8. Ipsmiller v New York, 275 N.Y.S. 827, 153 Misc. 627, 1934 N.Y. Misc. LEXIS 1838 (N.Y. Mun. Ct. 1934).

Where the value of vacations and pension benefits were wrongfully deducted from the prevailing rate of wages to be paid to welders employed by the City of New York the employees could not recover such deductions unless they complied with the provisions of this section for the remedy provided by the statute is exclusive. Jung v New York, 6 Misc. 2d 200, 76 N.Y.S.2d 235, 1947 N.Y. Misc. LEXIS 1941 (N.Y. Sup. Ct. 1947).

Where a housing authority of a city in its budget fixed the pay of maintenance men at the prevailing rate instead of a stated amount, a maintenance man could recover retroactive pay, though he had not brought a proceeding to have his wages accord with the prevailing rate, but the recovery was limited to those months in which he signed the payroll under protest. Montebello v New York City Housing Authority, 13 Misc. 2d 180, 175 N.Y.S.2d 446, 1958 N.Y. Misc. LEXIS 3387 (N.Y. Sup. Ct. 1958).

Under subdivision 8 of this section, the right to sue for retroactive pay is limited to those who have initiated proceedings to have their wages accord with the prevailing rate. Montebello v New York City Housing Authority, 13 Misc. 2d 180, 175 N.Y.S.2d 446, 1958 N.Y. Misc. LEXIS 3387 (N.Y. Sup. Ct. 1958).

Surety's claim, under performance bond in trust fund representing amount owed to contractor on public works project, did not have priority over claim of New York Department of Labor under prevailing wage law (CLS Labor § 220). Titan Indem. Co. v Triborough Bridge & Tunnel Auth., 135 F.3d 831, 1998 U.S. App. LEXIS 1247 (2d Cir. N.Y. 1998).

49. —Penalties

Imposition of civil penalty is not proper where record discloses that petitioner was small contracting business, and that this was its first public works project, and where petitioner promptly complied upon notification of underpayment. C.E.L. Lumber, Inc. v Roberts, 109 A.D.2d 1002, 486 N.Y.S.2d 481, 1985 N.Y. App. Div. LEXIS 47494 (N.Y. App. Div. 3d Dep't 1985).

Contractor failed to show that 10 percent interest and 20 percent penalty imposed by Commissioner of Labor were shocking to one's sense of fairness for violation of CLS Labor § 220 in improperly computing overtime and failing to pay prevailing wages and supplements, even though overtime violation was not willful and contractor had challenged wage and supplement rates in separate proceeding, since (1) commissioner was entitled to consider number of factors in imposing penalty, (2) maximum interest and penalty were not imposed, and (3) amounts were based on contractor's decisions not to comply with Labor Department's directives or obtain judicial stay while seeking court review. Hull-Hazard, Inc. v Roberts, 136 A.D.2d 872, 524 N.Y.S.2d 848, 1988 N.Y. App. Div. LEXIS 585 (N.Y. App. Div. 3d Dep't), app. denied, 72 N.Y.2d 805, 532 N.Y.S.2d 755, 528 N.E.2d 1228, 1988 N.Y. LEXIS 2775 (N.Y. 1988), modified, 74 N.Y.2d 710, 543 N.Y.S.2d 383, 541 N.E.2d 412, 1989 N.Y. LEXIS 678 (N.Y. 1989).

Civil penalty and interest were properly imposed on public works contractor for failing to pay prevailing hourly wages and supplements to employees, and underpaying employees by failing to keep accurate records of number of hours worked, since contractor was experienced public works contractor and was notified on several occasions of discrepancies. D.D.G. General Contracting Corp. v Hartnett, 149 A.D.2d 819, 540 N.Y.S.2d 344, 1989 N.Y. App. Div. LEXIS 4880 (N.Y. App. Div. 3d Dep't 1989).

Employer's willful violation of CLS Labor § 220 in employing excessive number of apprentices in violation of applicable apprentice ratio as required by prevailing wage schedule in public works contract could not, in itself, constitute basis for employer's debarment. Tap Electrical Contracting Service, Inc. v Hartnett, 156 A.D.2d 612, 549 N.Y.S.2d 118, 1989 N.Y. App. Div. LEXIS 16440 (N.Y. App. Div. 2d Dep't 1989), app. dismissed, 75 N.Y.2d 835, 552 N.Y.S.2d 922, 552 N.E.2d 170, 1990 N.Y. LEXIS 132 (N.Y. 1990), app. dismissed, 75 N.Y.2d 836, 552 N.Y.S.2d 922, 552 N.E.2d 170, 1990 N.Y. LEXIS 130 (N.Y. 1990), modified, 76 N.Y.2d 164, 556 N.Y.S.2d 988, 556 N.E.2d 427, 1990 N.Y. LEXIS 1308 (N.Y. 1990).

Employer was properly barred from bidding on or being awarded any public work contract where Commissioner of Labor properly determined that employer had willfully violated CLS Labor Art 8 by underpaying wages and benefits, and determination was the second such final determination rendered against employer within 6 years. Tap Electrical Contracting Service, Inc. v Hartnett, 156 A.D.2d 612, 549 N.Y.S.2d 118, 1989 N.Y. App. Div. LEXIS 16440 (N.Y. App. Div. 2d Dep't 1989), app. dismissed, 75 N.Y.2d 835, 552 N.Y.S.2d 922, 552 N.E.2d 170, 1990 N.Y. LEXIS 132 (N.Y. 1990), app. dismissed, 75 N.Y.2d 836, 552 N.Y.S.2d 922, 552 N.E.2d 170, 1990 N.Y. LEXIS 130 (N.Y. 1990), modified, 76 N.Y.2d 164, 556 N.Y.S.2d 988, 556 N.E.2d 427, 1990 N.Y. LEXIS 1308 (N.Y. 1990).

It was proper to bar contractor from bidding on or being awarded any public work contract for 5 years based on second final determination of willful violation of CLS Labor § 220 within 6-year period. Tap Elec. Contracting Serv. v Hartnett, 207 A.D.2d 547, 616 N.Y.S.2d 86, 1994 N.Y. App. Div. LEXIS 8533 (N.Y. App. Div. 2d Dep't 1994), app. dismissed, 85 N.Y.2d 857, 624 N.Y.S.2d 374, 648 N.E.2d 794, 1995 N.Y. LEXIS 310 (N.Y. 1995), cert. denied, 516 U.S. 812, 116 S. Ct. 61, 133 L. Ed. 2d 24, 1995 U.S. LEXIS 5372 (U.S. 1995).

Determination that failure to pay prevailing wages was willful was supported by facts that employer's owner was present nearly every day that employees worked at site, he acknowledged that he was familiar with prevailing wage requirement, and that, as experienced public work contractor, he knew or should have known that he was required to pay prevailing wage to employees for work as rodman or laborer. Passucci Gen. Constr. Co. v Hudacs, 221 A.D.2d 987, 633 N.Y.S.2d 903, 1995 N.Y. App. Div. LEXIS 13484 (N.Y. App. Div. 4th Dep't 1995), app. denied, 87 N.Y.2d 811, 644 N.Y.S.2d 144, 666 N.E.2d 1058, 1996 N.Y. LEXIS 636 (N.Y. 1996).

In a prevailing wage dispute, as nearly two years elapsed between the initial complaint of a former employee and the issuance of the first set of audits, those audits was unsupported by a shred of evidence, and the entire initial investigatory time period was unreasonably delayed by a wage investigator, the employer should not have been charged any pre-hearing interest under N.Y. Lab. Law § 220-b. Matter of CNP Mech., Inc. v Angello, 31 A.D.3d 925, 818 N.Y.S.2d 657, 2006 N.Y. App. Div. LEXIS 9225 (N.Y. App. Div. 3d Dep't 2006), app. denied, 8 N.Y.3d 802, 830 N.Y.S.2d 698, 862 N.E.2d 790, 2007 N.Y. LEXIS 99 (N.Y. 2007).

Where, in light of the employer's failure to produce complete and accurate records, the Hearing Officer was permitted to make just and reasonable inferences using the best available evidence to calculate the amount of underpayments, even though the results may be approximate, there was substantial evidence to support the Commissioner's conclusion that the employer willfully violated N.Y. Lab. Law § 220; thus, the 25% civil penalty imposed was not so disproportionate to the underlying offenses as to be shocking to one's sense of fairness. Matter of Scuderi v Gardner, 103 A.D.3d 645, 960 N.Y.S.2d 132, 2013 N.Y. App. Div. LEXIS 730 (N.Y. App. Div. 2d Dep't 2013).

Commissioner of Labor properly imposed interest on the underpaid wages to a contractor's workers, as it was based on the statutory rate, a significant period of delays was attributable to the contractor, and delays attributable to the Commissioner of Labor were not unreasonable or unfair. Matter of Central City Roofing Co., Inc. v Musolino, 136 A.D.3d 1186, 25 N.Y.S.3d 433, 2016 N.Y. App. Div. LEXIS 1218 (N.Y. App. Div. 3d Dep't 2016).

Commissioner of Labor's imposition of the maximum percentage of an additional civil penalty on a contractor who failed to pay its workers the prevailing wage was not reasonable, as the individuals involved had no actual knowledge of the violations, the contractor's actions were not motivated by bad faith, and the penalty was disproportionate to the underlying offenses. Matter of Central City Roofing Co., Inc. v Musolino, 136 A.D.3d 1186, 25 N.Y.S.3d 433, 2016 N.Y. App. Div. LEXIS 1218 (N.Y. App. Div. 3d Dep't 2016).

50. Under former Penal Law § 1271

It is error to hold defendant street car company to be negligent if motorman and conductor worked over 10 hours on day of accident where route does not lie principally within corporate limits of first or second class city, there being no proof that they had worked 16 hours in violation of this section. Gleason v Hudson V. R. Co., 143 A.D. 884, 128 N.Y.S. 759, 1911 N.Y. App. Div. LEXIS 948 (N.Y. App. Div. 1911).

Notes to Unpublished Decisions

Analysis

1. Public works contracts
2. —Prevailing wage requirement
42. —Investigation

1. Public works contracts

2. —Prevailing wage requirement

Unpublished decision: The former president of the debtor lacked standing to seek relief against the New York Department of Labor (DOL) for its action to enforce the wage violation penalties under N.Y. Lab. Law § 220 against the corporate debtor, and the DOL had a good faith basis to believe its acts were protected by the police power exception. In re Fiber Optek Interconnect Corp., 2009 Bankr. LEXIS 3040 (Bankr. S.D.N.Y. Sept. 23, 2009).

42. —Investigation

Unpublished decision: Plaintiff's substantive due process claim failed since it was required to keep adequate payroll records and to provide them to the New York State Department of Labor (DOL) upon request under this section and DOL's request did not shock the conscience. DeMartino v New York State Dep't of Labor, 712 Fed. Appx. 24, 2017 U.S. App. LEXIS 19616 (2d Cir. N.Y. 2017).

Agency Opinions

Analysis

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2. Public works contracts

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21. Under former Penal Law § 1271

1. In general

Investigation and enforcement of compliance with New York prevailing wage law is not preempted by Employee Retirement Income Security Act. 1998 NY Ops Atty Gen F 98-7.

Projects or construction, renovation, or repair of building for charter school generally will be subject to CLS Labor § 220 et seq. N.Y. Op. Att'y Gen. No. 2000-F3, 2000 N.Y. AG LEXIS 40.

2. Public works contracts

3. —What is "public work"

Work performed by or for a real estate subdivision owner is not public work under this section. 1961 NY Ops Atty Gen July 24.

Section 220 is applicable to the construction of a fire house by a fire district. 1941 NY Ops Atty Gen Jan. 3.

4. Authorities, commissions, and districts

Public work contracts let by water commissioners, come within the purpose and purview of this article, subject to the limitation of time excepting such contracts from operation of exception to such article provided in this section. 1934 N.Y. Op. Att'y Gen. No. 334.

The Triborough bridge authority is a public benefit corporation performing a governmental function which is an agency or instrumentality of the state or of New York city or both, and as such, subd. 2 is applicable to work of construction undertaken by said authority. 1934 N.Y. Op. Att'y Gen. No. 348.

Operations of the Lake Champlain bridge commission in construction of Rouses Point bridge are subject to the provisions of this section. 1936 N.Y. Op. Att'y Gen. No. 218.

This article applies to Thousand Island bridge authority. 1937 N.Y. Op. Att'y Gen. No. 257.

Contract between water district and owner and developer of land for construction of water service is a contract for public work even though the actual work may be done by independent contractor hired by the developer. 1939 N.Y. Op. Att'y Gen. No. 271.

Agreement between Water Authority, a public benefit corporation, and developer of real property which involves installation of water mains on property of developer which are to be connected to the Authority's water mains so as to supply public water to said property is a contract for public work even though the actual work is performed by developer or an independent contractor engaged by him. 1966 NY Ops Atty Gen Jan 17.

Labor Law, § 220 applies to public works contracts awarded by Interstate Commission for work to be performed on Commission property located in the State of New York. 1973 NY Ops Atty Gen Oct 30.

5. Manufacturers

The provisions of Labor Law as to hours and wages do not apply to a manufacturer within the state who is engaged in fabricating materials for use in or upon work contracted to be done for state or any of its civil divisions, unless such manufacturer is himself the contractor or unless he is actually concerned in affixing the material to the completed structure. 1930 N.Y. Op. Att'y Gen. No. 339.

The spirit and purpose of this statute would seem to cover a situation, where a subcontractor to erect iron work on public building sublets fabrication thereof to a wholly owned and controlled subsidiary corporation which later does not obey the provisions of the Labor Law as to hours and wages on public work. 1931 N.Y. Op. Att'y Gen. No. 93.

6. Municipal corporations

These sections relating to eight hour day and preference to citizens of state in public work contracts are applicable to "school districts" as municipal corporations. 1932 N.Y. Op. Att'y Gen. No. 257.

7. Employees protected

8. —Mechanics

Mechanics who are regularly employed in state institutions are protected by the provisions of this section relative to hours of labor, etc. 1913 N.Y. Op. Att'y Gen. No. 453.

A motor equipment repairman at Matteawan State Hospital is a mechanic and is not entitled to payment or compensatory time off in lieu thereof for overtime service performed in that institution. 1946 NY Ops Atty Gen Feb 26.

Where a central school district desires to carry on repair with labor employed directly, no contract being let for labor, the employees working on such project are entitled to the benefits of the Labor Law relating to hours of labor and prevailing rate of wages. 1959 NY Ops Atty Gen Apr. 9 (informal).

Heavy duty equipment operators of a town highway department are workmen or mechanics for purposes of section 220(2). 1984 Op St Compt File #84-13.

9. —School employees

This section has no application in fixing the annual salaries of laborers, workmen or mechanics in employ of a board of education. 1921 N.Y. Op. Att'y Gen. No. 61.

10. —State institution employees

Employees of the state reservation at Niagara acting as police, and wearing uniforms and badges, are not subject to the provisions of this section. 1910 N.Y. Op. Att'y Gen. No. 805.

Men "regularly employed" in state institutions may be placed on "construction, additions and improvements" without coming under the general provisions of the eight hour law. 1910 N.Y. Op. Att'y Gen. No. 806.

A fireman at a state prison may be legally appointed to perform duty for more than eight hours a day, as the provisions of Labor Law do not restrict the hours of labor of an employee in a state institution. 1911 N.Y. Op. Att'y Gen. No. 612.

An eight-hour day and the prevailing rate of wage as provided for by this section apply to employees engaged pursuant to Pub. Bldgs. Law, § 18. 1933 N.Y. Op. Att'y Gen. No. 354.

Where the board of supervisors of a county desire to carry on construction with labor employed directly, letting contracts for materials only, employees working on such project are entitled to the benefits of this article relating to hours of labor and prevailing rate of wages. 1936 N.Y. Op. Att'y Gen. No. 289.

11. Overtime

12. —Extraordinary emergency exception

In case of "extraordinary emergency" under this section, a state engineer may direct employment of men over eight hours if emergency requires immediate action. 1909 N.Y. Op. Att'y Gen. No. 407.

The commissioner of labor is not empowered by the Labor Law to issue an order permitting a contractor engaged on work under contract with a municipality to work his men more than eight hours a day, even though, in the opinion of the commissioner, an extraordinary emergency exists. 1911 N.Y. Op. Att'y Gen. No. 552.

13. —Particular emergencies

Delay to canal traffic caused by early freezing of barge canal is not an "extraordinary emergency" warranting a permit to a contractor to exceed legal working day of eight hours. 1927 N.Y. Op. Att'y Gen. No. 89.

Loss to boatmen of time sufficient to complete one whole round trip of barge canal would not constitute an "extraordinary emer-

gency" within the meaning of this section. 1927 N.Y. Op. Att'y Gen. No. 98.

Contractors constructing bridges for the use of highways are permitted to make up time lost because of inclement weather by working employees more than eight hours a day and more than five days a week. 1938 N.Y. Op. Att'y Gen. No. 260.

Business convenience or pecuniary advantage is not an "extraordinary emergency." 1939 N.Y. Op. Att'y Gen. No. 239.

General weather and labor conditions prevailing in a locality where work is to be performed cannot give rise to a situation constituting an "extraordinary emergency." 1939 N.Y. Op. Att'y Gen. No. 239.

War is not an extraordinary emergency within the meaning of the Labor Law affecting suspension of eight-hour-day rule. 1917 N.Y. Op. Att'y Gen. No. 401.

Discussion of underpayment of overtime compensation to town highway department employees and payment of correct amount as recomputed. 1979 Op St Compt File #199.

14. Prevailing wage

15. —Determination of prevailing wages

16. — —Modification

Pursuant to this section when the industrial commissioner has determined the prevailing rate of wage which becomes effective as to work done and work to be done, this does not necessarily mean that the industrial commissioner may not at a subsequent time hold hearings to ascertain whether there has been a change in the prevailing rate of wage for that type of labor in that locality. 1933 N.Y. Op. Att'y Gen. No. 412.

17. Procedural matters

18. —Appeal

19. — —Reviewability

Final determination reduces disputed wages to prevailing rate of wages due and owing, thereby authorizing withholding of such wages by comptroller pursuant to this section. 1933 N.Y. Op. Att'y Gen. No. 165.

Duly filed mechanics' liens against public improvement contracts for the difference between the wages actually paid and the prevailing rate of wage as fixed by the order of the industrial commissioner, where the order of commissioner is awaiting final determination by the courts on appeal, must be recognized by the comptroller and progress payments withheld until such liens are discharged. 1934 N.Y. Op. Att'y Gen. No. 125.

Until "final determination" is made, the comptroller has no authority to withhold an installment or progress payments from a contractor. A subcontractor's default does not relieve the general contractor of the duty to pay the wages of all employees on job. 1934 N.Y. Op. Att'y Gen. No. 128.

20. —Recovery of wages

Where a contractor performing extra work by force account for the state in a locality where a wage agreement in effect provides for the employer's payment of such taxes as those imposed upon employees for social security purposes under the Internal Revenue Code, the contractor is entitled to reimbursement from the state for taxes so paid as part of the cost of performing extra work. 1961 NY Ops Atty Gen Apr 11.

21. Under former Penal Law § 1271

Railroad corporation contracting to do work connected with building of bridges upon spur track or switch upon state property to connect state institution with its main line cannot be relieved from compliance with eight-hour provision of Labor Law. 1916 N.Y. Op. Att'y Gen. No. 138.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 160, 225-a, 227; CLS Gen Mun § 120-w; CLS Unconsol Ch 131 § 72, Ch 214-A §§ 5, 9.

Hours of labor, §§ 160 et seq.

Rate of interest; banking board to adopt regulations, CLS Bank § 14-a.

Public Employees' Fair Employment Act, CLS Civ S §§ 200 et seq.

Subpoenas, oaths and affirmations, CLS CPLR §§ 2301 et seq.

Proceeding against body or officer, CLS CPLR Art 78 §§ 7801 et seq.

Codes, Rules and Regulations:

Supplements; effective dates of annual determinations; rest periods. 12 NYCRR §§ 220.1 et seq.

Civil penalty: criteria for waiver or reduction where payment is made by a prime contractor pursuant to Labor Law § 223. 12 NYCRR Part 221.

Federal Aspects:

Apprentice labor, formulation and promotion of standards, 29 USCS §§ 50 et seq.

Fair Labor Standards Act of 1938, minimum wages and maximum hours, 29 USCS §§ 206, 207.

Age discrimination in employment, 29 USCS §§ 621 et seq.

Jurisprudences:

4 NY Jur 2d Appellate Review § 342.

6 NY Jur 2d Article 78 and Related Proceedings §§ 161, 168, 215 .

6A NY Jur 2d Article 78 and Related Proceedings § 344 .

27 NY Jur 2d Counties, Towns, and Municipal Corporations § 1294 .

43 NY Jur 2d Declaratory Judgments and Agreed Case § 143 .

50 NY Jur 2d Elevators and Escalators § 4 .

52 NY Jur 2d Employment Relations §§ 9, 119, 157 .

53 NY Jur 2d Employment Relations § 381 .

53A NY Jur 2d Employment Relations §§ 729, 732 .

89 NY Jur 2d Public Works §§ 46, 47, 85, 87, 88, 90–95, 97–100.

64 Am Jur 2d, Public Works and Contracts §§ 227, 228, 220.

Annotations:

Validity of statute, ordinance, or charter provision requiring that workmen on public works be paid the prevailing or current rate of wages. 18 ALR3d 944.

Legal issues relating to wage rate determinations by Secretary of Labor under § 1 of Davis-Bacon Act (40 USCS § 276a). 53 ALR Fed 272.

Matthew Bender's New York Practice Guides: 2 New York Practice Guide: Business and Commercial §§ 13.13, 13.16; 4 New York Practice Guide: Business and Commercial § 25A.22.

§ 220-h. Occupational Safety and Health Administration (OSHA) construction safety and health course

The advertised specifications for every contract for the construction, reconstruction, maintenance and/or repair of public work to which the state or a municipality is a party, where the total cost of all work to be performed under the contract is at least two hundred fifty thousand dollars, shall contain a provision requiring that all laborers, workers, and mechanics employed in the performance of the contract on the public work site, either by the contractor, sub-contractor or other person doing or contracting to do the whole or a part of the work contemplated by the contract, shall be certified prior to performing any work on the project as having successfully completed a course in construction safety and health approved by the United States department of labor's occupational safety and health administration that is at least ten hours in duration.

HISTORY:

Add, L 2007, ch 282, § 1, eff July 18, 2008.

Editor's Notes: Laws 2007, ch 282, § 2, eff July 18, 2008, provides as follows:

§ 2. The department of labor may promulgate rules and regulations necessary for the enforcement of the provisions of section one of this act.

ARTICLE 14 Mercantile and Other Establishments

Title 2. General

Section
392. Exit signs in mercantile establishments or restaurants

HISTORY:
Add, L 1921, ch 50.

TITLE 2 General

HISTORY:
Add, L 1921, ch 50.

§ 392. Exit signs in mercantile establishments or restaurants

An employer having custody and control of a mercantile establishment or restaurant shall be required to post a legible sign marked "EXIT" over doors to be used for egress in the event of a fire emergency.

HISTORY:
Add, L 1981, ch 240, § 1, eff Sept 1, 1981.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:
Posting of means of egress in places of public assembly, § 473-a.

Jurisprudences:
52 NY Jur 2d Employment Relations § 223 .

ARTICLE 17 Public Safety

Section
473. Certificate of compliance with requirements of law
473-a. Posting of means of egress in places of public assembly

HISTORY:
Add, L 1922, ch 405.

§ 473. Certificate of compliance with requirements of law

1. The enforcing authority shall ascertain by inspection whether places of public assembly conform to the requirements of this article and the rules adopted thereunder. If such places are found to so conform, he or it shall issue a certificate of compliance to that effect. Such certificate shall be conspicuously posted on the premises. Before any certificate of compliance shall be issued to a place of public assembly erected after the first day of October, nineteen hundred and twenty-two, plans for such building shall be filed with the industrial commissioner or with the local enforcing authority for approval, and such plans shall not be approved unless they conform to the provisions of this article and the rules adopted thereunder. The industrial commissioner shall not require the filing of plans before the issuance of a certificate of compliance for a place of public assembly erected before July first, nineteen hundred sixty-three over which enforcement jurisdiction was delegated to the industrial commissioner on such date, nor for a place of public assembly which may be transferred to his jurisdiction pursuant to paragraph (b) of section four hundred seventy-two of this article.

2. A fee not to exceed one hundred dollars shall be charged to and collected from the owner, lessee or person conducting the place of assembly for each inspection, but not more than two hundred dollars in any one year shall be so charged or collected, in respect of the same premises, except that no fee shall be charged for inspection of buildings operated as a public place of assembly by any political subdivision or by an agricultural society or association receiving state aid; provided, however, that no fee shall be charged to or collected from a volunteer fire company or an organization of veterans for the inspection of any place of public assembly operated by such a volunteer fire company or organization of veterans.

HISTORY:
Add, L 1922, ch 405, § 3; amd, L 1921, ch 642; L 1961, ch 234, § 2; L 1962, ch 441; L 1962, ch 767, eff April 24, 1962; L 1962, ch 823; L 1963, ch 494, § 2, eff April 16, 1963; L 1968, ch 301, § 2; L 1980, ch 682, § 2; L 1989, ch 61, § 230, eff April 19, 1989 and deemed eff April 1, 1989 (see 1989 note below).

Prior Law: Former § 473, add, L 1921, ch 50; renumbered § 503, L 1922, ch 405.

Editor's Notes: Laws 1989, ch 61, § 365(h), eff April 19, 1989, provides:

(h) the fee charges provided for in sections two hundred twenty-two through two hundred thirty-one of this act shall take effect on July 1, 1989.

Notes to Decisions

Fees collected by a town building inspector pursuant to this section belong to the town and should be paid over to the supervisor pursuant to section 27(1) of the Town Law. 1955 St Compt File #7174.

Agency Opinions

A fee not to exceed $10 may be charged to and collected from village for the approval of plans and for each inspection of the newly constructed municipal building. 1958 NY Ops Atty Gen Dec 17 (informal).

A board of fire commissioners may charge a fee or rental for use of the fire hall by fire district residents and formal groups made up of residents, or may allow the free use of the fire hall by them; a fee or rental may be charged to non-residents of the district and formal groups not limited in membership to residents of the fire district; such use, if it makes the use of the premises fall within the Labor Law definition of a place of public assembly, subjects the property to Labor Law Article 17; if rental from the premises results in any profit the tax exempt status of the property may be lost; any use of the property is subject to reasonable regulation by the board of fire commissioners. 1977 NY Ops Atty Gen March 24.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:
This section referred to in § 216.

Jurisprudences:
12 NY Jur 2d Buildings, Zoning, and Land Controls § 18.
26 NY Jur 2d Counties, Towns, and Municipal Corporations § 1112 .

107 NY Jur 2d Veterans § 62 .

§ 473-a. Posting of means of egress in places of public assembly

There shall be posted in a conspicuous place and manner at all exits in every place of public assembly, a printed scale floor plan of that particular floor or story, which shall show all means of egress, clearly labeling those exits to be used in case of fire. Said printed scale floor plan shall be no smaller than eight inches by ten inches and shall be posted in such a manner that it cannot be readily removed.

HISTORY:
Add, L 1981, ch 787, § 1, eff Oct 25, 1981.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:
Exit signs in mercantile establishments or restaurants, § 392.

Jurisprudences:
12 NY Jur 2d Buildings, Zoning, and Land Controls § 22 .
26 NY Jur 2d Counties, Towns, and Municipal Corporations § 1112 .

ARTICLE 18 Unemployment Insurance Law

Title 2. Definitions

Section
527. Valid original claim

HISTORY:
Add, L 1944, ch 705, § 1.

TITLE 2 Definitions

HISTORY:
Add, L 1944, ch 705, with substance transferred from § 502.

§ 527. Valid original claim

1. Basic condition. "Valid original claim" is a claim filed by a claimant who meets the following qualifications: (a) is able to work, and available for work; (b) is not subject to any disqualification or suspension under this article; (c) his or her previously established benefit year, if any, has expired; (d) has been paid remuneration by employers liable for contributions or for payments in lieu of contributions under this article, other than employers from whom the claimant lost employment and for which the commissioner makes a determination disqualifying the claimant for misconduct pursuant to subdivisions three and six of section five hundred ninety-three of this article, for employment during at least two calendar quarters of the base period, with remuneration of one and one-half times the high calendar quarter remuneration within the base period and with at least two hundred twenty-one times the minimum wage established under subdivision one of section six hundred fifty-two of this chapter rounded down to the nearest one hundred dollars of such remuneration being paid during the high calendar quarter of such base period. For purposes of this section, the remuneration in the high calendar quarter of the base period used in determining a valid original claim shall not exceed an amount equal to twenty-two times the maximum benefit rate as set forth in subdivision five of section five hundred ninety of this article for all individuals.

2. Alternate condition. (a) An individual who is unable to file a valid original claim in accordance with subdivision one of this section, files a valid original claim by meeting the qualifications enumerated in paragraphs (a), (b) and (c) of subdivision one of this section and by having been paid remuneration by employers liable for contributions or for payments in lieu of contributions under this article, other than employers from whom the claimant lost employment and for which the commissioner makes a determination disqualifying the claimant for misconduct pursuant to subdivisions three and six of section five hundred ninety-three of this article, for employment during at least two calendar quarters of the base period, with remuneration of one and one-half times the high calendar quarter remuneration within the base period and with at least two hundred twenty-one times the minimum wage established under subdivision one of section six hundred fifty-two of this chapter rounded down to the nearest one hundred dollars of such remuneration being paid during the high calendar quarter of such base period. For purposes of this section, the remuneration in the high calendar quarter of the base period used in determining a valid original claim shall not exceed an amount equal to twenty-two times the maximum benefit rate as set forth in subdivision five of section five hundred ninety of this article for all individuals.

(b) An individual who is able to file a valid original claim in accordance with subdivision one of this section, may make an application to the commissioner to determine his or her entitlement to benefits and benefit rate pursuant to paragraph (a) of this subdivision under the following conditions:

(i) The claimant must file such application within ten days of the date the monetary determination was mailed by the department.

(ii) In those circumstances where a wage data report in relation to the alternate condition is not due or has not been received, the claimant must provide proof of remuneration paid for such quarter to the commissioner's satisfaction in order for the claimant's application to be considered.

(iii) Under those circumstances where such application results in the claimant being able to file a valid original claim under the basic condition and the alternate condition, the claimant may select the condition to be utilized.

3. Disability. In the case of a claimant who did not file a valid original claim solely because the claimant was not paid sufficient remuneration and who received workers' compensation payments or any benefits paid pursuant to the volunteer firefighters' benefit law during the base period specified in subdivision one of section five hundred twenty of this article, said period shall be extended. The term of

the extension shall be equivalent to the number of calendar quarters during which the claimant received such payments, but shall not exceed two calendar quarters.

4. General condition. A valid original claim may be filed only in a week in which the claimant has at least one effective day of unemployment.

5. Utilization of wage credits. Remuneration used to establish a valid original claim pursuant to subdivision one, two or three of this section, may not be considered for the purpose of establishing a subsequent valid original claim except as provided by section five hundred twenty-eight of this article.

6. Work requirement. An individual who has filed a previous valid original claim pursuant to this section must have worked in employment and been paid remuneration for such work since the beginning of such previous claim in an amount equal to at least ten times the claimant's weekly benefit rate in order to be able to file a subsequent valid original claim.

HISTORY:

Add, L 1951, ch 645, § 4; amd, L 1958, ch 387, § 2; L 1968, ch 832, § 2, eff Aug 26, 1968; L 1977, ch 675, § 22; L 1983, ch 415, § 1; L 1984, ch 381, § 1, eff Sept 17, 1984; L 1998, ch 589, §§ 5, 6, eff April 1, 1999; L 2000, ch 5, § 2, eff April 15, 2000 (see 2000 note below); L 2003, ch 413, § 1, eff Aug 26, 2003; L 2013, ch 57, § 2 (Part O), eff March 29, 2013 (see 2013 note below).

Prior Law: Former § 527, add, L 1935, ch 468, § 1; repealed, L 1942, ch 640.

Editor's Notes: See 1977 note under § 511.

Laws 1958, ch 387, § 19, provides as follows:

§ 19. Sections two, eight and eleven of this act shall take effect June thirtieth, nineteen hundred fifty-eight and shall apply to benefit years beginning under the unemployment insurance law on and after that date except that the provision relating to the transfer of excess of negative balances over two per cent pursuant to paragraph (e) of subdivision one of section five hundred eighty-one of the labor law shall take effect June thirtieth, nineteen hundred fifty-eight.

Laws 2000, ch 5, § 17(a), eff Feb 15, 2000, provides as follows:

§ 17. This act shall take effect immediately, provided that:

(a) sections one, two and fourteen of this act shall take effect on the sixtieth day after it shall have become law and shall apply to all new claims for unemployment insurance benefits filed on or after such date;.

Laws 2013, ch 57, § 29, subs (b) and (e) (Part O), eff March 29, 2013, provides as follows:

§ 29. This act shall take effect immediately, provided, however, that:

b. sections two, thirteen, fifteen, and nineteen of this act shall apply to all claims filed after January 1, 2014;

e. sections five, six, sixteen, seventeen, and eighteen of this act shall apply to all overpayments established after October 1, 2013;

Amendment Notes: 2013. Chapter 57, § 2 (Part O) amended:

Sub 1 by deleting at fig 1 "under conditions which would be", at fig 2 "subdivision", at fig 3 "earnings", at fig 4 "one thousand six", at fig 5 "earnings" and adding the matter in italics.

Sub 2, par (a) by deleting at fig 1 "under conditions which are", at fig 2 "subdivision", at fig 3 "earnings", at fig 4 "one thousand six", at fig 5 "earnings" and adding the matter in italics.

Sub 6 by deleting at fig 1 "five" and adding the matter in italics.

Notes to Decisions

Analysis

1. In general
2. Ability and availability for work
3. Twenty weeks requirement
4. Fifteen weeks alternative requirement
5. Average remuneration requirements
6. Part-time employment
7. Seasonal employment

1. In general

Where administrative statute is susceptible of more than one reasonable interpretation, construction adopted by enforcing agency must be adopted if it is not strained or unnatural. Eisenstark v Levine, 46 A.D.2d 606, 364 N.Y.S.2d 585, 1975 N.Y. App. Div. LEXIS 8554 (N.Y. App. Div. 3d Dep't 1975).

Amendment of CLS Labor § 527 permitting extension of base period in instances where claimants have received workers' compensation benefits during base periods is not retroactively effective to claims filed prior to effective date. In re Claim of Hagan, 109 A.D.2d 1039, 487 N.Y.S.2d 158, 1985 N.Y. App. Div. LEXIS 47517 (N.Y. App. Div. 3d Dep't 1985).

Unemployment Insurance Appeal Board properly determined that claimant had insufficient weeks of employment in her base period and was therefore not entitled to unemployment insurance benefits where claimant was absent from work due to pregnancy-related disability and worked only 7 weeks during base period; payments made to claimant by her employer pursuant to their contractual arrangement for paid maternity leave did not constitute remuneration for work under CLS Labor § 517, and regulation providing that week of employment includes any statutory week during which employee is on "paid leave" (12 NYCRR § 470.2) was inapplicable. In re Claim of Bachuretz, 140 A.D.2d 785, 527 N.Y.S.2d 887, 1988 N.Y. App. Div. LEXIS 4676 (N.Y. App. Div. 3d Dep't 1988).

Claimant was not entitled to unemployment insurance benefits since he was credited with only 5 weeks of employment for one-year base period, and thus did not meet statutory requirements of CLS Labor § 527(1) or (2), where he was laid off and received weekly severance payments for 34.75 weeks, and he applied for unemployment benefits after termination of severance payments; claimant performed no work for employer during period he received severance payments, and therefore such payments could not be converted into "weeks of employment" within meaning of CLS Labor § 524. In re Claim of Baxter, 159 A.D.2d 845, 552 N.Y.S.2d 711, 1990 N.Y. App. Div. LEXIS 2904 (N.Y. App. Div. 3d Dep't 1990).

Base period extension authorized by CLS Labor § 527(3) is intended to mitigate hardship of claimant who is unable to file valid employment claim due to injury on job, and does not allow claimant to extend his base period to use weeks of employment and wages previously used to establish valid claim. In re Gagnier, 174 A.D.2d 3, 577 N.Y.S.2d 961, 1992 N.Y. App. Div. LEXIS 66 (N.Y. App. Div. 3d Dep't), app. denied, 79 N.Y.2d 758, 584 N.Y.S.2d 446, 594 N.E.2d 940, 1992 N.Y. LEXIS 1264 (N.Y. 1992).

Claimant was ineligible to receive unemployment compensation benefits because he had insufficient weeks of covered employment where his base period included period during which he received workers' compensation benefits, and period after he was discharged and before he was reinstated pursuant to resolution of grievance; neither period constituted covered employment as he did not actually perform work for employer during such periods. In re Claim of Abul Barkat Mahmud, 196 A.D.2d 931, 601 N.Y.S.2d 976, 1993 N.Y. App. Div. LEXIS 8686 (N.Y. App. Div. 3d Dep't 1993).

Claimant, employed as video producer at United Nations during relevant period, was ineligible to receive unemployment insurance benefits because he lacked requisite number of weeks of employment by covered employer; United Nations was not covered employer under Labor Law. In re Claim of Tereshchuk, 235 A.D.2d 896, 653 N.Y.S.2d 170, 1997 N.Y. App. Div. LEXIS 537 (N.Y. App. Div. 3d Dep't 1997).

Unemployment Insurance Appeal Board's determination that CLS Gen Mun § 207-c payments made by claimant's employer did not constitute workers' compensation benefits which would extend claimant's base period under CLS Labor § 527(3) was not irrational or unreasonable, and thus supported finding that claimant lacked sufficient weeks of employment to file valid original claim. In re Claim of Rain, 250 A.D.2d 919, 672 N.Y.S.2d 514, 1998 N.Y. App. Div. LEXIS 5370 (N.Y. App. Div. 3d Dep't 1998).

Petitioner lacked sufficient weeks of covered employment to file valid original claim for unemployment insurance benefits where he indicated on his October 1999 original claim that his last employment ended in August 1998, and thus he had covered employment in only one calendar quarter of base period and none in alternate base period. In re Claim of Badrajan, 275 A.D.2d 830, 713 N.Y.S.2d 99, 2000 N.Y. App. Div. LEXIS 9203 (N.Y. App. Div. 3d Dep't 2000).

Plain meaning of the beginning phrase of the second sentence-"for purposes of this section"-is to make that sentence applicable to the entire section, thus capping "high calendar quarter earnings" to determine both whether a valid original claim exists and to calculate whether a claimant's earnings exceed that figure; thus, the Unemployment Insurance Appeal Board properly found that the claimant was ineligible to receive unemployment insurance benefits because the claimant was unable to file a valid original claim pursuant to N.Y. Lab. Law § 527 because the Board added the claimant's capped third quarter earnings of $8,910 to the fourth quarter earnings of $4,098, resulting in $13,008, less than the required $13,365 needed to file a valid original claim. In re Claim of Wojnar, 5 A.D.3d 899, 772 N.Y.S.2d 759, 2004 N.Y. App. Div. LEXIS 2561 (N.Y. App. Div. 3d Dep't 2004).

Appeal board properly found that a worker was ineligible to receive unemployment insurance benefits for a specific week; the worker failed to request benefits for that week, and failed to make a request for use of an alternate base period within 10 days of the date of the monetary determination as required by N.Y. Lab. Law § 527(2)(b)(i). In re Claim of Saluk, 8 A.D.3d 923, 779 N.Y.S.2d 268, 2004 N.Y. App. Div. LEXIS 8829 (N.Y. App. Div. 3d Dep't 2004).

Board's determination that a claimant was not eligible for unemployment insurance, because he was unable to file subsequent valid original claim pursuant to N.Y. Lab. Law § 527, was confirmed; his subsequent claim was based on fraudulent statement of income from his dissolved corporation after his corporation was dissolved and his corporation had not paid unemployment insurance premiums on any of his actual wages before the corporation was dissolved. In re Claim of Mazurkiewicz, 13 A.D.3d 770, 786 N.Y.S.2d 245, 2004 N.Y. App. Div. LEXIS 14983 (N.Y. App. Div. 3d Dep't 2004).

Since a worker voluntarily and without good cause quit the last employment he held before filing his unemployment claim, a part-time position, he lacked the total unemployment which was a prerequisite to eligibility for benefits; the worker's act of quitting his last, part-time position under disqualifying circumstances precluded a finding, necessary for benefits eligibility, that he was totally unemployed for purposes of a benefits claim. In re Claim of Rose, 19 A.D.3d 752, 796 N.Y.S.2d 718, 2005 N.Y. App. Div. LEXIS 6175 (N.Y. App. Div. 3d Dep't 2005).

Claimant's request for unemployment benefits was properly denied because claimant was terminated from the first position at issue for the claimant's own misconduct and claimant had only worked at the second position for a few months. Claimant thus did not meet the remuneration requirements of N.Y. Lab. Law § 527. Matter of Snyder (Commissioner of Labor), 32 A.D.3d 1145, 822 N.Y.S.2d 165, 2006 N.Y. App. Div. LEXIS 11575 (N.Y. App. Div. 3d Dep't 2006).

Unemployment Insurance Appeal Board was allowed to disregard the testimony of a claimant and her husband as to the legitimacy of her on call employment with the husband's paving business; thus, substantial evidence supported the inference that such employment was, in fact, contrived for the purpose of collecting unemployment insurance benefits. Matter of Wisinski (Commissioner of Labor), 23 A.D.3d 739, 803 N.Y.S.2d 277, 2005 N.Y. App. Div. LEXIS 11676 (N.Y. App. Div. 3d Dep't 2005).

2. Ability and availability for work

An order of the Appellate Division, which refers to decision of the board upholding claimant's entitlement to unemployment insurance benefits, would be reversed and the matter remanded for determination of claimant's eligibility pursuant to Labor Law § 527 where, although no medical eveidence was presented, there was substantial evidence to support the board's finding that claimant was an alcoholic and where the board acted within its discretion in determining claimant's discharge to be the result of illness rather than misconduct. In re Claim of Francis, 56 N.Y.2d 600, 450 N.Y.S.2d 471, 435 N.E.2d 1086, 1982 N.Y. LEXIS 3276 (N.Y. 1982).

Where a claimant for unemployment insurance benefits was uncertain whether his respiratory condition, greatly restricting his physical activities, disqualified him for unemployment benefits under this section and § 591, and likewise whether it was sufficiently serious to entitle him to disability benefits under Federal Social Security, and, without intent to defraud, applied to both agencies for benefits, but the Social Security Administration declined to make available the medical data made available to it by turning it over to the Industrial Commissioner, he should be given a further opportunity to present medical evidence to the Commissioner. In re Claim by Roehsler, 19 A.D.2d 927, 243 N.Y.S.2d 971, 1963 N.Y. App. Div. LEXIS 2981 (N.Y. App. Div. 3d Dep't 1963).

An unemployment insurance award may not be granted if the only reason for unemployment is the lack of transportation facilities. Leon v Porta Aluminum, Inc., 25 A.D.2d 925, 270 N.Y.S.2d 233, 1966 N.Y. App. Div. LEXIS 4102 (N.Y. App. Div. 3d Dep't 1966).

Claimant was not available for work when she sought unemployment benefits where she was modern dancer who was British national and was admitted to United States under H-1 visa, visa only allowed her to work for single employer, and thus she could not have legally accepted any other offer of employment after she was laid off without amendment to her visa. In re Claim of Diamond, 210 A.D.2d 835, 620 N.Y.S.2d 595, 1994 N.Y. App. Div. LEXIS 13274 (N.Y. App. Div. 3d Dep't 1994).

Claimant was ineligible to receive unemployment insurance benefits where she was suspended with pay throughout 52-week period preceding her application for benefits, during which time she performed no services for her employer. In re Claim of Odell, 233 A.D.2d 663, 649 N.Y.S.2d 735, 1996 N.Y. App. Div. LEXIS 11712 (N.Y. App. Div. 3d Dep't 1996).

Canadian national who had "Trade NAFTA visa" (TN visa) that allowed her to work for specific employer was ineligible to receive unemployment insurance benefits after her employment with that employer ended, because she was not legally authorized to work for any other employer without obtaining another TN visa and thus she was unavailable for work when she sought benefits. In re Claim of Graif, 250 A.D.2d 1012, 673 N.Y.S.2d 261, 1998 N.Y. App. Div. LEXIS 5920 (N.Y. App. Div. 3d Dep't 1998).

Claimant was properly considered not available for employment since she was not authorized to work in United States due to expiration of her work authorization card from Immigration and Naturalization Service. In re Claim of Gibei, 284 A.D.2d 784, 727 N.Y.S.2d 189, 2001 N.Y. App. Div. LEXIS 6608 (N.Y. App. Div. 3d Dep't 2001).

Where appellant claimant failed to offer documentation in support of the claimant's assertion that the claimant had valid authorization to work from the Immigration and Naturalization Service, substantial evidence supported the unemployment insurance appeal board's denial of benefits on the ground that the claimant was unavailable for employment within the meaning of N.Y. Lab. Law § 527(1)(a), and, thus, was ineligible for benefits. In re Claim of Okumakpeyi, 295 A.D.2d 828, 744 N.Y.S.2d 545, 2002 N.Y. App. Div. LEXIS 6801 (N.Y. App. Div. 3d Dep't 2002).

Claim for unemployment insurance benefits was properly denied because the claimant, who had been incarcerated for the year following his termination from employment, did not have sufficient earnings in his base period to qualify to file a valid

original claim for benefits, as set forth in N.Y. Lab. Law §§ 520 and 527. Further, even if the claimant's application was backdated one year, his incarceration made him unavailable for work and, thus, unable to satisfy the criteria for filing a valid original claim for benefits. Matter of Nieblas (Commissioner of Labor), 21 A.D.3d 1193, 801 N.Y.S.2d 102, 2005 N.Y. App. Div. LEXIS 9266 (N.Y. App. Div. 3d Dep't 2005).

Substantial evidence did not support the Unemployment Insurance Appeal Board's decision finding the claimant was ineligible for benefits due to unavailability because the claimant, a victim of domestic violence, was willing and able to work during the period in issue but was prevented from leaving her home to get to work due to her justifiable fear of further violence by her former boyfriend. Matter of Derfert (Commissioner of Labor), 150 A.D.3d 1515, 54 N.Y.S.3d 759, 2017 N.Y. App. Div. LEXIS 3952 (N.Y. App. Div. 3d Dep't 2017).

3. Twenty weeks requirement

Holding that claimant was ineligible for benefits on ground she did not have 20 weeks covered employment in base period, since at no time as singer did she work in New York, was properly overruled where she was hired by opera company as dresser and, after 2 weeks' work in New York, she went on tour with company and thereafter she was promoted to singer with written contract until company abandoned; claimant's employment was viewed in its entirety; there was no break in services and she received pay continuously either as dresser or singer during base period; fact that she signed written agreement was merely because it was required by union. Claim by Barnes, 5 A.D.2d 745, 168 N.Y.S.2d 799, 1957 N.Y. App. Div. LEXIS 3560 (N.Y. App. Div. 3d Dep't 1957).

Claimant did not qualify for unemployment benefits since she did not have at least 20 weeks of employment in the 52-week period preceding the filing of claim. where claimant filed for benefits on April 21, 1958 and she last worked on July 22, 1955. Claim for Benefits by Gettinger, 9 A.D.2d 586, 189 N.Y.S.2d 453, 1959 N.Y. App. Div. LEXIS 7449 (N.Y. App. Div. 3d Dep't 1959).

As to whether an applicant for benefits had the required number of weeks of employment in the 52 weeks preceding filing of his claim, the Appeal Board could decline to consider as constituting weeks of employment two weeks in which claimant, a salesman, actually picked up a couple of orders for his employer or former employer following termination of employment with two weeks' extra pay which, at the time, was designated as severance pay although later alleged to constitute vacation pay. Claim by Politzer, 11 A.D.2d 839, 203 N.Y.S.2d 133, 1960 N.Y. App. Div. LEXIS 8511 (N.Y. App. Div. 3d Dep't 1960).

Finding that unemployment compensation claimant did not have the requisite number of weeks of covered employment to qualify for benefits, was supported by evidence. In re Schneiderman, 12 A.D.2d 678, 207 N.Y.S.2d 831, 1960 N.Y. App. Div. LEXIS 6745 (N.Y. App. Div. 3d Dep't 1960).

A claimant was properly denied unemployment benefits where he failed to show he did not have at least 20 weeks of covered employment in his base period. Mitagstein v Catherwood, 32 A.D.2d 584, 299 N.Y.S.2d 63, 1969 N.Y. App. Div. LEXIS 4207 (N.Y. App. Div. 3d Dep't 1969).

A decision of the Unemployment Insurance Appeal Board determining that claimant-musician was ineligible to receive benefits because he did not have at least 20 weeks of covered employment in his base period was not justified as the amount of compensation (union scale) and the liability of employer were unconditionally established as of the dates of the respective rehearsals, two of which were within the first quarter and the rehearsal wages were earned when each rehearsal took place and were not dependent as to amount or liability on any future event. Jory v Catherwood, 34 A.D.2d 260, 312 N.Y.S.2d 383, 1970 N.Y. App. Div. LEXIS 4610 (N.Y. App. Div. 3d Dep't 1970).

Claimant who had 17 weeks of covered employment for her base period and who received 14 days of paid vacation when her employment was terminated was not entitled to have the additional 14 days included for purposes of determining whether she had worked at least 20 weeks as required for unemployment insurance benefits; a "week of employment" does not include a period beyond the employment when the claimant did not do some work in her employment in that period. Caltabiano v Levine, 50 A.D.2d 979, 376 N.Y.S.2d 228, 1975 N.Y. App. Div. LEXIS 11944 (N.Y. App. Div. 3d Dep't 1975).

Testimony by unemployment insurance claimant, who was president and major stockholder of his employer, that he originally drew money claimed to be wages because he feared that he would not otherwise recover money which he had loaned to or invested in the corporation sustained finding that claimant did not receive sufficient wages from his employment during at least 20 weeks of his base period to enable him to file a valid original claim and that he had made willful false statements to obtain benefits. Caporale v Levine, 53 A.D.2d 711, 384 N.Y.S.2d 63, 1976 N.Y. App. Div. LEXIS 13480 (N.Y. App. Div. 3d Dep't 1976).

Showing that, although unemployment insurance claimant did not have 20 weeks of employment in the year preceding his claim, he did have at least 15 weeks of employment in the year preceding the date of his claim and at least 40 weeks during the two years preceding the claim did not entitle claimant to benefits under the special unemployment assistance program. Liebowitz v Levine, 53 A.D.2d 769, 384 N.Y.S.2d 247, 1976 N.Y. App. Div. LEXIS 13546 (N.Y. App. Div. 3d Dep't 1976).

Claimant lacked sufficient weeks of employment in her base period where she had voluntarily resigned from her job on January 3, received dismissal pay until November 5, and applied for benefits on December 6, and thus had been employed during only 5 of 52 weeks preceding her application; fact that her former employer labeled her dismissal payments as "salary continuance" was not dispositive. In re Claim of Mercurio, 241 A.D.2d 662, 661 N.Y.S.2d 56, 1997 N.Y. App. Div. LEXIS 7360 (N.Y. App. Div. 3d Dep't 1997).

Evidence supported denial of benefits where claimant did not dispute that he worked only about 10 weeks during 52-week period prior to filing claim. In re Claim of Rodriguez, 257 A.D.2d 759, 683 N.Y.S.2d 341, 1999 N.Y. App. Div. LEXIS 10 (N.Y. App. Div. 3d Dep't 1999).

4. Fifteen weeks alternative requirement

Where claimant did not have the requisite 15 weeks for a "valid original claim" under subd. 2 of this section, the Appeal Board was justified in denying her application to predate her claim one week, notwithstanding her assertion of unfamiliarity with the mechanics of this law and she was 65 years old and wanted to rest a little longer before returning to work, where her physician had certified her ability to return to work about 10 days before she started looking for it. Claim for Benefits by Silver, 15 A.D.2d 839, 224 N.Y.S.2d 941, 1962 N.Y. App. Div. LEXIS 11408 (N.Y. App. Div. 3d Dep't 1962).

Claimant was not entitled to unemployment insurance benefits since she only had 11 weeks of actual employment during base period, rather than required 15 weeks, notwithstanding argument that 4 weeks of absences charged to claimant's annual leave accruals should have been credited as actual weeks of employment, since employer properly later restored leave credits to claimant and paid her for that period. In re Claim of Luxenberg, 149 A.D.2d 778, 539 N.Y.S.2d 571, 1989 N.Y. App. Div. LEXIS 4373 (N.Y. App. Div. 3d Dep't 1989).

Claimant was not entitled to unemployment insurance benefits because she failed to comply with registration requirements where (1) she was paid disability benefits from May, 1990 until September, 1990 because of difficulties during pregnancy, (2) she initially testified that her husband went to local unemployment insurance office without her in September, 1990 and was mistakenly told that she was ineligible for unemployment insurance benefits until she actually received her last disability check, (3) she offered no explanation for her failure to go to office in September, 1990 and stated that she first went to office in February, 1991 when she filed for benefits, (4) she testified that she was at office in September, 1990 only after she was confronted with previous statement she made to such effect, and (5) Unemployment Insurance Appeal Board ruled that claimant did not go to unemployment insurance office until February, 1991 and that, therefore, she had insufficient number of weeks of covered employment in base period. In re Claim of Gutowitz, 193 A.D.2d

1041, 598 N.Y.S.2d 575, 1993 N.Y. App. Div. LEXIS 5339 (N.Y. App. Div. 3d Dep't 1993).

Substantial evidence supported determination that claimant was not entitled to unemployment insurance benefits because he did not have sufficient weeks of covered employment to file valid original claim where claimant was officer of corporation that sold yarn on retail and wholesale basis, and he admitted that he drew no salary during corporation's last year of business and, in fact, had drawn no salary during 4 or 5 years preceding corporation's dissolution. In re Claim of Strauch, 193 A.D.2d 1044, 598 N.Y.S.2d 385, 1993 N.Y. App. Div. LEXIS 5336 (N.Y. App. Div. 3d Dep't 1993).

Claimant did not have sufficient weeks of covered employment to file valid original claim where she went on maternity/disability leave on August 11, 1994 but did not file claim for unemployment insurance benefits until May 16, 1995; claimant could not backdate her claim to May 1, 1995 on ground that she was available to return to work as of that date, but that her employer did not respond to her inquiries as to work until May 15, 1995, since she gave written statement to local unemployment office explaining that she delayed her application because she was seeking additional disability benefits from workers' compensation. In re Claim of Franklin, 232 A.D.2d 719, 647 N.Y.S.2d 1020, 1996 N.Y. App. Div. LEXIS 9985 (N.Y. App. Div. 3d Dep't 1996), app. denied, 89 N.Y.2d 806, 654 N.Y.S.2d 717, 677 N.E.2d 289, 1997 N.Y. LEXIS 51 (N.Y. 1997).

5. Average remuneration requirements

Subdivision of unemployment insurance statute providing for use, in computation of average weekly wage, of only those weeks in which $30 [now $40] was actually earned, providing there are as few as 15 of such weeks, does not make provision for an elective qualification, but is remedial, establishing criteria for qualification only by claimants unable to satisfy conditions of first subdivision, which establishes "Basic condition" to qualify. Eisenstark v Levine, 46 A.D.2d 606, 364 N.Y.S.2d 585, 1975 N.Y. App. Div. LEXIS 8554 (N.Y. App. Div. 3d Dep't 1975).

Where unemployment insurance claimant's earnings for 20 weeks of employment came to $790.46, so that her average earnings in each of those weeks was more than $39, her continuance in employment at reduced wages after June 9, 1975, which fell into the approximate middle of her base period, did not invalidate her claim to qualification under basic condition; having thus qualified under the basic condition, average for her entire base period was properly used to determine her average weekly wage since she had less than 20 weeks of actual earnings of $30 [now $40] or more. Eisenstark v Levine, 46 A.D.2d 606, 364 N.Y.S.2d 585, 1975 N.Y. App. Div. LEXIS 8554 (N.Y. App. Div. 3d Dep't 1975).

Denial of a former employee's claim for unemployment benefits was proper because the record revealed that the former employee did not have sufficient earnings in either his base period or alternate base period to file a valid original claim pursuant to N.Y. Lab. Law § 527; the former employee earned $11,664 during one quarter while working for the employer, but did not have any earnings thereafter. The former employee did not have earnings during at least two calendar quarters of the base period, with remuneration of one and one-half times the high calendar quarter earnings within the base period as required by N.Y. Lab. Law § 527(1)(d), and further did not have any earnings during any of the quarters in his alternate base period. Matter of Stennett v Commissioner of Labor, 54 A.D.3d 478, 862 N.Y.S.2d 649, 2008 N.Y. App. Div. LEXIS 6356 (N.Y. App. Div. 3d Dep't 2008).

Unemployment Insurance Appeal Board properly determined that a lump sum award made to an unemployment insurance claimant for back pay did not establish a valid original claim under N.Y. Lab. Law § 527 because such remuneration was credited to the claimant on the day that he received the check, under N.Y. Lab. Law § 516, and thus, the amount did not constitute earnings during the appropriate base periods established for the claimant's claim, which preceded the date that he received the lump sum payment. In re Claim of Paterson, 14 A.D.3d 751, 786 N.Y.S.2d 859, 2005 N.Y. App. Div. LEXIS 92 (N.Y. App. Div. 3d Dep't 2005).

Because an employee did not show good cause for failing to timely comply with an administrative law judge's decision, pursuant to N.Y. Comp. Codes R. & Regs. tit. 12, § 461.8, the employee's application to reopen was properly denied; because the employee did not have sufficient earnings in the base period, the employee did not qualify to file a valid original claim under Labor Law § 527. Matter of Bellamy (New York City Bd. of Educ.-Commissioner of Labor), 34 A.D.3d 891, 823 N.Y.S.2d 584, 2006 N.Y. App. Div. LEXIS 13050 (N.Y. App. Div. 3d Dep't 2006), app. dismissed, 8 N.Y.3d 842, 830 N.Y.S.2d 701, 862 N.E.2d 793, 2007 N.Y. LEXIS 839 (N.Y. 2007).

Substantial evidence supported the determination of the New York Unemployment Insurance Appeal Board that appellant did not have sufficient earnings in appellant's base period to file a valid original claim under N.Y. Lab. Law § 527; appellant failed to earn, in the base period under N.Y. Lab. Law § 520(1) and alternate base period under N.Y. Lab. Law § 520(2), one and one-half times the highest quarterly earnings in those periods, and the Board properly excluded, pursuant to N.Y. Lab. Law § 517(2)(b), from its calculations the compensation that appellant received as a foster parent since no taxes were withheld and appellant did not provide a breakdown of the amount purportedly paid to appellant for those services. Matter of Sotomayor v Commissioner of Labor, 34 A.D.3d 957, 823 N.Y.S.2d 622, 2006 N.Y. App. Div. LEXIS 13266 (N.Y. App. Div. 3d Dep't 2006).

Although an employee was entitled to take advantage of the extended base period provided by N.Y. Lab. Law § 527(3), because the employee received less than the required 1-½ times the amount received during the highest calendar quarter required by § 527(1)(d), the employee was unable to file a valid original claim for unemployment insurance benefits. Matter of Fiorino (Commissioner of Labor), 34 A.D.3d 892, 823 N.Y.S.2d 294, 2006 N.Y. App. Div. LEXIS 13051 (N.Y. App. Div. 3d Dep't 2006).

6. Part-time employment

Claimant, who held part-time employment two evenings per week subsequent to her discharge as a full-time teacher, was not entitled to claim benefits under Federal Special Unemployment Assistance Program where her part-time employment was covered under state law and entitled her to receive partial benefits equal to one-half of her benefit rate. Swyer v Levine, 52 A.D.2d 707, 382 N.Y.S.2d 590, 1976 N.Y. App. Div. LEXIS 12388 (N.Y. App. Div. 3d Dep't 1976).

Lump-sum payment of $2,000 made to retired attorney by his former municipal employer did not constitute continuance on the public payroll for purposes of determining the retired attorney's eligibility for unemployment insurance benefits. Liebowitz v Levine, 53 A.D.2d 769, 384 N.Y.S.2d 247, 1976 N.Y. App. Div. LEXIS 13546 (N.Y. App. Div. 3d Dep't 1976).

Limited employment may not always result in total disqualification to receive unemployment insurance benefits. People v Brandow, 53 A.D.2d 998, 386 N.Y.S.2d 123, 1976 N.Y. App. Div. LEXIS 15791 (N.Y. App. Div. 3d Dep't 1976).

Substantial evidence failed to establish that unemployment insurance claimant wilfully made false statements to obtain benefits, where evidence, inter alia, disclosed that claimant had consistently reported number of days he worked at corporation, there was no assertion that he understated the extent of those efforts and interviews between claimant and administrative employees demonstrated a forthright disclosure of claimant's involvement with corporation. People v Brandow, 53 A.D.2d 998, 386 N.Y.S.2d 123, 1976 N.Y. App. Div. LEXIS 15791 (N.Y. App. Div. 3d Dep't 1976).

Substantial evidence supported determination of Unemployment Insurance Appeal Board that claimant, when residing in New York State, and receiving benefits, generally worked at corporation's New York City office one day each week, was not totally unemployed, since claimant was compensated on an annual basis, receiving payments while in Florida, and was not merely working on a daily basis, notwithstanding that claimant made no claim for benefits while residing in Florida. People v Brandow, 53 A.D.2d 998, 386 N.Y.S.2d 123, 1976 N.Y. App. Div. LEXIS 15791 (N.Y. App. Div. 3d Dep't 1976).

Claimant who had been employed on part-time basis for approximately 5 years did not have valid original claim, and thus

was ineligible to receive unemployment insurance benefits, where her earnings from covered employment were less than $80 per week (except for 2 weeks) during base period of previous 52 weeks; $7 per week earned running errands for elderly neighbor did not constitute covered employment under CLS Labor § 560, and hence did not bear on claimant's eligibility to receive benefits, since neighbor did not pay claimant $300 or more in any calendar quarter during base period. In re Claim of Infortunio, 132 A.D.2d 803, 517 N.Y.S.2d 343, 1987 N.Y. App. Div. LEXIS 49304 (N.Y. App. Div. 3d Dep't 1987).

7. Seasonal employment

Record supported determination of Unemployment Insurance Appeal Board, disqualifying claimant from receiving benefits on ground that duration of his employment through June of each year was contrived in order to establish his eligibility for unemployment insurance benefits, where (1) claimant performed office services for tax preparation business owned and operated by his wife, (2) record showed repeated pattern each year in which tax preparation business virtually ceased operation after April 15 and claimant's wife thereafter had to utilize her personal funds to pay claimant's salary, and (3) claimant was paid for several weeks in advance on several occasions, and twice received vacation pay before ending his employment in July. In re Claim of Turco, 156 A.D.2d 797, 549 N.Y.S.2d 217, 1989 N.Y. App. Div. LEXIS 15493 (N.Y. App. Div. 3d Dep't 1989), app. denied, 76 N.Y.2d 703, 559 N.Y.S.2d 239, 558 N.E.2d 41, 1990 N.Y. LEXIS 1320 (N.Y. 1990).

Agency Opinions

1. Seasonal employment

A village may not contract out the hiring of school crossing guards to a private entity or agency. If the village hires school crossing guards for the school year, it is liable for unemployment insurance benefits to such crossing guards in the summer when school is not in session, provided that the crossing guards are otherwise eligible pursuant to Labor Law § 527(1). 1977 NY Ops Atty Gen Oct 26.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 590, 602.

Jurisprudences:

107 NY Jur 2d Unemployment Insurance §§ 126, 142.

Texts: Liddle & Marino, Labor and Employment in New York (Michie) pp 5-9.1, 8-3.1.

ARTICLE 20-C Retaliatory Action by Employers

Section
740. Retaliatory personnel action by employers; prohibition

HISTORY:

Add, L 1984, ch 660, § 2, eff Sept 1, 1984 and applies to any retaliatory personnel actions taken on or after Sept 1, 1984.

§ 740. Retaliatory personnel action by employers; prohibition

1. Definitions. For purposes of this section, unless the context specifically indicates otherwise:

(a) "Employee" means an individual who performs services for and under the control and direction of an employer for wages or other remuneration.

(b) "Employer" means any person, firm, partnership, institution, corporation, or association that employs one or more employees.

(c) "Law, rule or regulation" includes any duly enacted statute or ordinance or any rule or regulation promulgated pursuant to any federal, state or local statute or ordinance.

(d) "Public body" includes the following:

(i) the United States Congress, any state legislature, or any popularly-elected local governmental body, or any member or employee thereof;

(ii) any federal, state, or local judiciary, or any member or employee thereof, or any grand or petit jury;

(iii) any federal, state, or local regulatory, administrative, or public agency or authority, or instrumentality thereof; or

(iv) any federal, state, or local law enforcement agency, prosecutorial office, or police or peace officer.

(e) "Retaliatory personnel action" means the discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment.

(f) "Supervisor" means any individual with an employer's organization who has the authority to direct and control the work performance of the affected employee; or who has managerial authority to take corrective action regarding the violation of the law, rule or regulation of which the employee complains.

(g) "Health care fraud" means health care fraud as defined by article one hundred seventy-seven of the penal law.

2. Prohibitions. An employer shall not take any retaliatory personnel action against an employee because such employee does any of the following:

(a) discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety, or which constitutes health care fraud;

(b) provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any such violation of a law, rule or regulation by such employer; or

(c) objects to, or refuses to participate in any such activity, policy or practice in violation of a law, rule or regulation.

3. Application. The protection against retaliatory personnel action provided by paragraph (a) of subdivision two of this section pertaining to disclosure to a public body shall not apply to an employee who makes such disclosure to a public body unless the employee has brought the activity, policy or practice in violation of law, rule or regulation to the attention of a supervisor of the employer and has afforded such employer a reasonable opportunity to correct such activity, policy or practice.

4. Violation; remedy. (a) An employee who has been the subject of a retaliatory personnel action in violation of this section may institute a civil action in a court of competent jurisdiction for relief as set forth in subdivision five of this section within one year after the alleged retaliatory personnel action was taken.

(b) Any action authorized by this section may be brought in the county in which the alleged retalia-

tory personnel action occurred, in the county in which the complainant resides, or in the county in which the employer has its principal place of business.

(c) It shall be a defense to any action brought pursuant to this section that the personnel action was predicated upon grounds other than the employee's exercise of any rights protected by this section. It shall also be a defense that the individual was an independent contractor.

(d) Notwithstanding the provisions of paragraphs (a) and (c) of this subdivision, a health care employee who has been the subject of a retaliatory action by a health care employer in violation of section seven hundred forty-one of this article may institute a civil action in a court of competent jurisdiction for relief as set forth in subdivision five of this section within two years after the alleged retaliatory personnel action was taken. In addition to the relief set forth in that subdivision, the court, in its discretion, based upon a finding that the employer acted in bad faith in the retaliatory action, may assess the employer a civil penalty of an amount not to exceed ten thousand dollars, to be paid to the improving quality of patient care fund, established pursuant to section ninety-seven-aaaa of the state finance law.

5. Relief. In any action brought pursuant to subdivision four of this section, the court may order relief as follows:

(a) an injunction to restrain continued violation of this section;

(b) the reinstatement of the employee to the same position held before the retaliatory personnel action, or to an equivalent position;

(c) the reinstatement of full fringe benefits and seniority rights;

(d) the compensation for lost wages, benefits and other remuneration; and

(e) the payment by the employer of reasonable costs, disbursements, and attorney's fees.

6. Employer relief. A court, in its discretion, may also order that reasonable attorneys' fees and court costs and disbursements be awarded to an employer if the court determines that an action brought by an employee under this section was without basis in law or in fact.

7. Existing rights. Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any other law or regulation or under any collective bargaining agreement or employment contract.

HISTORY:

Add, L 1984, ch 660, § 2, eff Sept 1, 1984 and applies to any retaliatory personnel actions taken on or after Sept 1, 1984; amd, L 2002, ch 24, § 2, eff April 2, 2002; L 2006, ch 442, §§ 12, 13, eff Nov 1, 2006; L 2019, ch 684, § 1, effective December 20, 2019.

Editor's Notes Laws 2007, ch 109, § 1, amended Laws 2006, ch 442, § 7(d) by changing the effective date from July 26, 2006 to Nov 1, 2006, applicable to the amendment of sub 1, par (g) and sub 2, par (a).

Amendment Notes The 2019 amendment by ch 684 § 1, deleted "except that the institution of an action in accordance with this section shall be deemed a waiver of the rights and remedies available under any other contract, collective bargaining agreement, law, rule or regulation or under the common law" following "contract" in 7.

Notes to Decisions

Analysis

1. Generally; procedural questions
2. Parties
3. Election of remedies
4. Requirement that employer commit "violation of law"
5. Requirement of danger to public health or safety
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1. Generally; procedural questions

N.Y. Lab. Law § 741, which offers exceptional and specialized whistleblower protection over and above the generalized protection afforded by N.Y. Lab. Law § 740, is meant to safeguard only those employees who are qualified by virtue of training and/or experience to make knowledgeable judgments as to the quality of patient care and whose jobs require them to make these judgments. Reddington v Staten Is. Univ. Hosp., 11 N.Y.3d 80, 862 N.Y.S.2d 842, 893 N.E.2d 120, 2008 N.Y. LEXIS 1932 (N.Y. 2008).

Court should have granted employer's motion to strike employee's jury demand in action for wrongful discharge in violation of CLS Labor § 740(2)(a) and (c), in which employee sought compensatory damages under CLS Labor § 740(5), since latter section explicitly provides that relief may be awarded by court, rather than jury. Scaduto v Restaurant Assoc. Industries, Inc., 180 A.D.2d 458, 579 N.Y.S.2d 381, 1992 N.Y. App. Div. LEXIS 1298 (N.Y. App. Div. 1st Dep't 1992).

Time-barred retaliatory discharge cause of action in amended complaint did not relate back to dismissed causes of action for breach of contract and negligence asserted in original complaint, so as to be considered timely under CLS CPLR § 203(e), even though plaintiff sought redress for her termination from employment in both complaints, since retaliatory discharge cause of action was based on different theory and involved different factual allegations than those involved in original complaint. Perez v Wegman Cos., 181 A.D.2d 1010, 581 N.Y.S.2d 502, 1992 N.Y. App. Div. LEXIS 4605 (N.Y. App. Div. 4th Dep't), app. denied, 80 N.Y.2d 753, 587 N.Y.S.2d 904, 600 N.E.2d 631, 1992 N.Y. LEXIS 1757 (N.Y. 1992).

Service of process on Attorney General's office was sufficient to acquire personal jurisdiction over Division for Youth in action by former probationary teacher at youth detention facility who alleged retaliatory discharge since (1) instant matter was action rather than proceeding, (2) neither CLS Labor § 740 nor CLS Civ S § 75-b required dual service, and (3) there was no specific legislation pertaining to Division of Youth which required personal service in order to confer jurisdiction. Hanley v New York State Executive Dept., Div. for Youth, 182 A.D.2d 317, 589 N.Y.S.2d 366, 1992 N.Y. App. Div. LEXIS 12138 (N.Y. App. Div. 3d Dep't 1992).

In action brought against hospital personnel for defamation, conspiracy, loss of consortium and wrongful termination of employment, court properly allowed plaintiff to amend complaint to assert that cause of action for wrongful termination was based on CLS Labor § 740 since original complaint alleged that plaintiff was fired in retaliation for her report of medical misconduct constituting hazard to public health and safety; defendants were not prejudiced on ground that statute carries severe remedies, including reinstatement, and that defendants acted under assumption that plaintiff would not seek reinstatement in replacing her as director nursing, since defendants allowed 2 years to elapse without replacing director of nursing. Kraus v Brandstetter, 185 A.D.2d 302, 586 N.Y.S.2d 269, 1992 N.Y. App. Div. LEXIS 9035 (N.Y. App. Div. 2d Dep't 1992).

In action by truck driver against his former employer arising from his termination after he refused to keep log book in manner required by employer, truck driver was barred by one-year statute of limitations of CLS Labor § 740(4)(a) from amending his complaint to assert new cause of action alleging violation of § 740(2)(c) based on alleged discrimination and retaliation against him for refusal to comply with record keeping policy in violation of federal regulations, since proposed cause of action was based on different theory and facts than those which constituted earlier cause of action for age discrimination, and thus did not relate back to original complaint. Brown v Vail-Ballou Press, Inc., 188 A.D.2d 972, 592 N.Y.S.2d 78, 1992 N.Y. App. Div. LEXIS 14755 (N.Y. App. Div. 3d Dep't 1992).

Neither res judicata nor collateral estoppel barred action brought pursuant to CLS Labor § 740, alleging that plaintiff had been discharged after he attempted to enforce standards of Occupational Safety and Health Act at his place of employment, notwithstanding that plaintiff had already unsuccessfully brought proceeding before Occupational Safety and Health Administration alleging retaliatory discrimination, since (1) defendant failed to submit plaintiff's complaint in prior proceeding, and thus court could not determine if identity of issues existed, (2) instant action was based at least in part on conduct that took place after filing of complaint in prior proceeding and (3) prior complaint had been summarily dismissed without evidentiary hearing, depriving plaintiff of opportunity to employ procedures substantially similar to those utilized in court of law. Heinitz v Standard Constr., 202 A.D.2d 843, 609 N.Y.S.2d 102, 1994 N.Y. App. Div. LEXIS 2496 (N.Y. App. Div. 3d Dep't 1994).

Defendant was properly granted summary judgment in claim brought under CLS Labor § 740 where plaintiff's submissions failed to satisfy requirement of "actual" violation of law, and defendant showed that plaintiff had received warning, which he acknowledged, in connection with his use of racial slurs and racially provocative language as to or directed at fellow employees, that despite warning, he failed to refrain from such conduct, and that employment was terminated for that reason. Capobianco v AMEX, 233 A.D.2d 189, 649 N.Y.S.2d 688, 1996 N.Y. App. Div. LEXIS 11814 (N.Y. App. Div. 1st Dep't 1996), app. denied, 89 N.Y.2d 810, 657 N.Y.S.2d 403, 679 N.E.2d 642, 1997 N.Y. LEXIS 333 (N.Y. 1997).

In employee's action under CLS Labor § 740 against private employer, city, and director of city agency for retaliation against employee for "blowing the whistle" on unlawful practice, employee was not required to serve notice of claim on director for his allegedly retaliatory acts that were clearly beyond scope of his employment. Gorgone v Capozzi, 238 A.D.2d 308, 656 N.Y.S.2d 49, 1997 N.Y. App. Div. LEXIS 3388 (N.Y. App. Div. 2d Dep't 1997), app. denied, 95 N.Y.2d 767, 717 N.Y.S.2d 547, 740 N.E.2d 653, 2000 N.Y. LEXIS 3510 (N.Y. 2000).

In "Whistle Blower" action by plaintiff who allegedly was terminated from her position as nurse in retaliation for reporting her concerns that nursing home personnel violated CLS Pub Health § 2962 by failing to take appropriate resuscitation measures in case of elderly patient, court properly granted defendants' motion to compel disclosure of information or documents relating to any charge or complaint filed against plaintiff or respecting any investigation concerning her care, treatment and death of patient in question; even if plaintiff was protected by any statutory or regulatory privilege barring disclosure of requested materials, she waived her privilege by placing her actions regarding patient's treatment into issue. Marten v Eden Park Health Servs., 250 A.D.2d 44, 680 N.Y.S.2d 750, 1998 N.Y. App. Div. LEXIS 12486 (N.Y. App. Div. 3d Dep't 1998).

Plaintiff failed to state action under CLS Labor § 740(7) on basis of conclusory allegations that defendant violated its federal and state tritium distribution licenses by failing to perform certain tests and to impose governing regulatory standards on its foreign vendor. Pail v Precise Imports Corp., 256 A.D.2d 73, 681 N.Y.S.2d 498, 1998 N.Y. App. Div. LEXIS 13069 (N.Y. App. Div. 1st Dep't 1998).

In Article 78 proceeding alleging bad faith-termination of petitioner's public employment in violation of CLS Civ S § 75-b, defendants were not entitled to directed verdict, and new trial would be granted, even though petitioner was provisional at-will employee, where he presented evidence that termination was related to his report to Community Service Board that his superior had acted improperly toward him and 2 other employees. Sisson v Lech, 266 A.D.2d 858, 697 N.Y.S.2d 805, 1999 N.Y. App. Div. LEXIS 11823 (N.Y. App. Div. 4th Dep't 1999).

Defendant, university medical college, was improperly granted summary judgment in action brought under "Whistleblower Statute" (CLS Labor § 740) where plaintiff physician's contention that professional colleague was practicing medicine while impaired by mental defect, which represented danger to his patients, was supported by affidavits of senior nursing staff members that colleague was suspicious, hostile, and erratic, and that patient care was substandard as result, and defendant's suggestion that its investigation revealed that there was no substance to plaintiff's complaints was not supported by affidavits or documentation, merely asserting that any material relating to its investigation was privileged. Finkelstein v Cornell Univ. Med. College, 269 A.D.2d 114, 702 N.Y.S.2d 285, 2000 N.Y. App. Div. LEXIS 970 (N.Y. App. Div. 1st Dep't 2000).

Plaintiff, physician at university medical college, was not collaterally estopped from bringing action under CLS Labor § 740 against college, which allegedly terminated plaintiff's faculty appointment and transferred him to another hospital for asserting that colleague was practicing medicine while impaired by mental defect, Finkelstein v Cornell Univ. Med. College, 269 A.D.2d 114, 702 N.Y.S.2d 285, 2000 N.Y. App. Div. LEXIS 970 (N.Y. App. Div. 1st Dep't 2000).

In action, inter alia, to permanently enjoin defendant for taking any "retaliatory personnel action" against plaintiff in violation of CLS Labor § 740, court improperly granted plaintiff's motion to restrain defendant from discharging plaintiff from his employment pending trial of action where plaintiff's claims that if he lost his position as faculty member with defendant, he would have no one to support him, he would be unable to live in New York metropolitan area, and would be unable to prosecute instant action, were wholly speculative and conclusory. Khan v State Univ. of N.Y. Health Science Ctr., 271 A.D.2d 656, 706 N.Y.S.2d 192, 2000 N.Y. App. Div. LEXIS 4534 (N.Y. App. Div. 2d Dep't 2000).

Dismissal of CLS Labor § 740 claim was premature prior to disclosure of information by defendant hospital and doctor concerning 2 surgical patients, in action alleging that defendants had taken retaliatory personnel action for plaintiff's expressions of concern about quality of care patients had received. Bordan v North Shore Univ. Hosp., 275 A.D.2d 335, 712 N.Y.S.2d 155, 2000 N.Y. App. Div. LEXIS 8697 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff in action against hospital and doctor under "whistleblower's law" (CLS Labor § 740) was not entitled to disclosure concerning doctor's prior involvement in disciplinary proceeding where plaintiff did not allege that defendants' retaliatory personnel action resulted from disclosure or threatened disclosure of such proceeding or of charges underlying it. Bordan v North Shore Univ. Hosp., 275 A.D.2d 335, 712 N.Y.S.2d 155, 2000 N.Y. App. Div. LEXIS 8697 (N.Y. App. Div. 2d Dep't 2000).

Action commenced in May 1996, alleging that respondents retaliated against police sergeant for his "whistle-blowing" activity by actively preventing his promotion to lieutenant during life of preferred eligible list until its expiration by operation of law, was not time barred by applicable one year limitations period under CLS Labor § 740(4)(a) and CLS Civ S § 75-b(3)(c) because eligibility list did not expire until June or July of 1996, and thus alleged retaliatory conduct continued throughout year prior to commencement of action. Dobson v Loos, 277 A.D.2d 1013, 716 N.Y.S.2d 220, 2000 N.Y. App. Div. LEXIS 11441 (N.Y. App. Div. 4th Dep't 2000).

Although employment relationship is presumed to be hiring at will that is terminable at any time by either party, absent agreement establishing fixed duration, legislature, by enacting Whistleblower law, changed rule to extent of prohibiting retaliatory discharges in certain situations. Vella v United Cerebral Palsy, Inc., 141 Misc. 2d 976, 535 N.Y.S.2d 292, 1988 N.Y. Misc. LEXIS 725 (N.Y. Sup. Ct. 1988).

Plaintiff's attempt to withdraw meritless retaliatory discharge claim prior to judgment did not circumvent statutory waiver provision of CLS Labor § 740(7), nor would allowing him to serve amended complaint dropping retaliatory discharge claim nullify his initial waiver or preclude award of attorney's fees, costs and disbursements to defendant under CLS Labor § 740(6). Rotwein v Sunharbor Manor Residential Health Care Facility, 181 Misc. 2d 847, 695 N.Y.S.2d 477, 1999 N.Y. Misc. LEXIS 333 (N.Y. Sup. Ct. 1999).

Although an employee's complaint did not specifically state that his wrongful discharge claim was brought under the whistle blower statute, N.Y. Lab. Law § 740, the failure to allege that was not fatal to the pleading because it was clear that the claim was brought thereunder where the employee contended that he was wrongfully discharged after having reported violations of law by a fellow stockbroker to his employer. Feinman v Morgan Stanley Dean Witter, 193 Misc. 2d 496, 752 N.Y.S.2d 229, 2002 N.Y. Misc. LEXIS 1535 (N.Y. Sup. Ct. 2002).

Because a police officer did not serve a notice of a retaliation claim against a city until well beyond the 90-day period in N.Y. Gen. Mun. Law § 50-e(1)(a) and outside the one-year statute of limitations in N.Y. Lab. Law § 740(4)(a) and N.Y. Civ. Serv. Law § 75-b(3)(c), the city's motion to dismiss should have been granted in its entirety. Thomas v City of Oneonta, 90 A.D.3d 1135, 934 N.Y.S.2d 249, 2011 N.Y. App. Div. LEXIS 8536 (N.Y. App. Div. 3d Dep't 2011).

Former employee's claim for wrongful discharge in violation of CLS Labor Law § 740 is denied summarily, because (1) employee failed to file claim with Employment Relations Board, which has exclusive jurisdiction to adjudicate unfair labor practices claims, and (2) even if court had jurisdiction, claim was without merit since there is no evidence that alleged blacklist was circulated for purpose of preventing him from obtaining other employment, or that employee was blacklisted because he exercised protected right. Hogan v 50 Sutton Place S. Owners, Inc., 919 F. Supp. 738, 1996 U.S. Dist. LEXIS 4010 (S.D.N.Y. 1996).

In a whistle blower action, the court granted plaintiff's motion to compel defendant employer to produce performance evaluations of certain employees who had not been terminated, because such documents could test the merits of defendant's claim that it fired plaintiff for substandard work performance rather than for engaging in protected activities. McMahon v New York Organ Donor Network, Inc, 52 Misc. 3d 201, 28 N.Y.S.3d 282, 2016 N.Y. Misc. LEXIS 1034 (N.Y. Sup. Ct. 2016).

Former employee's claim under CLS Labor § 740, alleging that he was fired for reporting kickback scheme which violated federal racketeering laws, was not tolled while his administrative charges were pending in state and federal civil rights agencies, because his whistleblower claim was based on different theory and different facts from his discrimination claims. Gray v Shearson Lehman Bros., 947 F. Supp. 132, 1996 U.S. Dist. LEXIS 18104 (S.D.N.Y. 1996).

Labor § 740(4)(a) does not support loss of consortium claim by spouse of employee. Goldman v MCL Cos. of Chicago, 131 F. Supp. 2d 425, 2000 U.S. Dist. LEXIS 18509 (S.D.N.Y. 2000).

Plaintiff's omission of her N.Y. Labor Law § 740 claim from her amended complaint did not immunize her claims from the waiver provision in N.Y. Labor Law § 740(7). Reddington v Staten Island Univ. Hosp., 373 F. Supp. 2d 177, 2005 U.S. Dist. LEXIS 12029 (E.D.N.Y. 2005), aff'd, in part, 511 F.3d 126, 2007 U.S. App. LEXIS 28881 (2d Cir. N.Y. 2007).

Plaintiffs a cause of action under New York's Whistle blower Act, N.Y. Labor Law § 740 did not act as a waiver of her federal claim under the Age Discrimination in Employment Act, 29 U.S.C.S. § 623, because federalism issues were implicated, and likewise, plaintiff's state law whistle blower claims did not require waiver of her state law age discrimination claims under N.Y. Exec. Law § 290, because "differentiated facts" under laid the plaintiff's age discrimination claim versus her whistle blower claim. Reddington v Staten Island Univ. Hosp., 373 F. Supp. 2d 177, 2005 U.S. Dist. LEXIS 12029 (E.D.N.Y. 2005), aff'd, in part, 511 F.3d 126, 2007 U.S. App. LEXIS 28881 (2d Cir. N.Y. 2007).

In former volunteer firefighters' 42 U.S.C.S. § 1983 suit alleging that they were retaliated against, in violation of U.S. Const. amend. I, for reporting their fire company's safety violations to state and federal agencies, the firefighters' claim under N.Y. Exec. Law § 740, which concerned the State Board of Social Welfare, was dismissed on summary judgment because it was entirely irrelevant to the case; while it seemed likely that the firefighters intended to invoke N.Y. Lab. Law § 740, because they did not clarify the issue, despite the company's expressed confusion and arguments for dismissal of the claim, the claim was deemed withdrawn. Shanks v Vill. of Catskill Bd. of Trs., 653 F. Supp. 2d 158, 2009 U.S. Dist. LEXIS 79018 (N.D.N.Y. 2009).

Employee's pro se complaint under N.Y. Lab. Law § 740 was not completely barred by the one-year statute of limitations period, because, although some adverse employment action had been taken outside of the limitations period, the employee had received a letter from the employer that they did not intend to renew his appointment within one year of filing his complaint, and not all of the employee's claims were time-barred. Geldzahler v N.Y. Med. College, 663 F. Supp. 2d 379, 2009 U.S. Dist. LEXIS 96465 (S.D.N.Y. 2009).

Employee's claims for violations of N.Y. Lab. Law §§ 740 and 741 survived a motion to dismiss because the employee had adequately stated a belief that the employer, a college, had potentially violated laws and regulations, by the methods it used on patients and the way that dental residents were trained. Geldzahler v N.Y. Med. College, 663 F. Supp. 2d 379, 2009 U.S. Dist. LEXIS 96465 (S.D.N.Y. 2009).

To the extent that an employee was attempting to state a cause of action under state law for a retaliatory personnel action, the determination concerning whether or not the employee had a claim was best left to the decision of a state court. Schultz v Tribune Co., 2009 U.S. Dist. LEXIS 93590 (E.D.N.Y. Oct. 7, 2009), aff'd, 418 Fed. Appx. 26, 2011 U.S. App. LEXIS 7571 (2d Cir. N.Y. 2011).

Plaintiff surgeon's claim that his termination from his position as the director of a residency program at defendant medical college violated N.Y. Lab. Law § 740 was time-barred under N.Y. Lab. Law § 740(4)(a) because the action was filed more than one year after the termination. Geldzahler v New York Med. College, 746 F. Supp. 2d 618, 2010 U.S. Dist. LEXIS 105182 (S.D.N.Y. 2010).

United States District Court for the Eastern District of New York follows the reasoning of the Eleventh, Third, and Ninth Circuits and declines to follow the logic of the Eighth Circuit with regard to the issue of express preemption of state whistleblower claims under the Airline Deregulation Act of 1978, 49 U.S.C.S. § 42121. Ulysse v AAR Aircraft Component Servs., 841 F. Supp. 2d 659, 2011 U.S. Dist. LEXIS 152058 (E.D.N.Y. 2011).

United States District Court for the Eastern District of New York concludes that although the United States Congress intends to occupy the entire field of air safety, N.Y. Lab. Law § 740 does not interfere with federal laws and regulations sufficiently to fall within the scope of the preempted field. Ulysse v AAR Aircraft Component Servs., 841 F. Supp. 2d 659, 2011 U.S. Dist. LEXIS 152058 (E.D.N.Y. 2011).

Employee's motion for remand was granted with regard to his whistleblower complaint against his former employer, an airline, because complete preemption did not exist since the N.Y. Lab. Law § 740 claim was not related to a service of an air carrier within the express terms of the preemption provision of the Airline Deregulation Act of 1978, 49 U.S.C.S. § 41713(b)(1), and the United States District Court for the Eastern District of New York chooses to follow the reasoning of the Eleventh, Third, and Ninth Circuits and declines to follow the logic of the Eighth Circuit with regard to the issue of express preemption of state whistleblower claims under the Airline Deregulation Act of 1978, 49 U.S.C.S. § 42121; plus, diversity of citizenship did not exist between the parties. Ulysse v AAR Aircraft Component Servs., 841 F. Supp. 2d 659, 2011 U.S. Dist. LEXIS 152058 (E.D.N.Y. 2011).

United States District Court for the Southern District of New York finds persuasive the reasoning of Kramsky v. Chetrit Group, LLC, 2011 U.S. Dist. LEXIS 63138, and other authorities construing this statute as not requiring waiver of any federal claims; thus, plaintiff did not waive his right to bring an action under the

Family Medical Leave Act (FMLA) when he also filed a retaliation claim against defendants so there was no basis for dismissing the FMLA action. Hettler v Entergy Enters., 15 F. Supp. 3d 447, 2014 U.S. Dist. LEXIS 57234 (S.D.N.Y. 2014).

Claims by former employees for adult day care center were time-barred because suit was filed more than two years after alleged retaliatory actions. United States ex rel. Lee v N. Adult Daily Health Care Ctr., 205 F. Supp. 3d 276, 2016 U.S. Dist. LEXIS 121136 (E.D.N.Y. 2016).

2. Parties

Contractor that operated nuclear facility owned by federal government was not shielded from liability under CLS Labor § 740 by virtue of supremacy clause of United States Constitution since § 740 does not "directly" regulate federal facility nor interfere with federal goals, and Congress did not intend to exclusively occupy field of whistleblower protection. Bordell v General Elec. Co., 164 A.D.2d 497, 564 N.Y.S.2d 802, 1990 N.Y. App. Div. LEXIS 15811 (N.Y. App. Div. 3d Dep't 1990).

Retaliatory discharge action brought by former probationary teacher at youth detention facility was governed by standards set forth in CLS Civ S § 75-b and not by CLS Labor § 740 since plaintiff was "public employee" within meaning of § 75-b notwithstanding fact that she was probationary teacher. Hanley v New York State Executive Dept., Div. for Youth, 182 A.D.2d 317, 589 N.Y.S.2d 366, 1992 N.Y. App. Div. LEXIS 12138 (N.Y. App. Div. 3d Dep't 1992).

Court should have dismissed complaint alleging that defendant wrongfully terminated plaintiff's employment as nurse discharge planner because she reported abuse of elderly patient by personal care worker/home aide employed by third party, which occurred in patient's home while patient was in care of her family and personal care worker/home health aide, as abuse that plaintiff allegedly reported was not activity of defendant or any of its employees, but rather was act of personal care worker/home health aide employed by third party who was not party to plaintiff's action. Radice v Elderplan, Inc., 217 A.D.2d 690, 630 N.Y.S.2d 326, 1995 N.Y. App. Div. LEXIS 8209 (N.Y. App. Div. 2d Dep't 1995).

New York State Air National Guard Active Guard/Reserve officer's claim under N.Y. Lab. Law § 740, alleging that he was the subject of a retaliatory discharge when he was informed that upon the expiration of his tour, his position would not be renewed, should have been dismissed by a trial court where there was federal control over the military, including the National Guard pursuant to N.Y. Mil. Law § 42; the legislature did not intend the term "employee" as used in N.Y. Lab. Law § 740(1)(a) to include the officer. Matter of Figueroa v Maguire, 37 A.D.3d 829, 831 N.Y.S.2d 248, 2007 N.Y. App. Div. LEXIS 2372 (N.Y. App. Div. 2d Dep't 2007).

Chief executive officer and sole shareholder of corporate employer was proper party in his individual capacity in action under CLS Labor § 740 where defendants did not proffer any admissible evidence or sworn pleading to support their position that such individual was not employer, and he testified at his deposition that he informed plaintiff that he was lowering plaintiff's salary because he himself was taking bigger part of it. Granser v Box Tree S., 164 Misc. 2d 191, 623 N.Y.S.2d 977, 1994 N.Y. Misc. LEXIS 651 (N.Y. Sup. Ct. 1994).

If "supervisor" is individual who performs services under control and direction of employer for wages or other remuneration, supervisor is protected under CLS Labor § 740(2). Granser v Box Tree S., 164 Misc. 2d 191, 623 N.Y.S.2d 977, 1994 N.Y. Misc. LEXIS 651 (N.Y. Sup. Ct. 1994).

Plaintiff surgeon's claim that defendants, a medical college, a supervisor, and a new program director, violated N.Y. Lab. Law § 740 when they failed to renew his faculty position and removed him from all resident supervision and education was not cognizable because the surgeon, who continued to teach on a voluntary basis after he was terminated from his position as the director of a residency program, was not an employee under § 740(1)(a) and did not receive a salary from the medical college when his faculty appointment was not renewed. Geldzahler v New York Med. College, 746 F. Supp. 2d 618, 2010 U.S. Dist. LEXIS 105182 (S.D.N.Y. 2010).

Plaintiff's claims against the medical defendants for violations under the statutes failed because the medical defendants were neither plaintiff's employers nor public employers. Gorman v Rensselaer Cnty., 98 F. Supp. 3d 498, 2015 U.S. Dist. LEXIS 33908 (N.D.N.Y. 2015).

3. Election of remedies

While an employee's N.Y. Lab. Law § 740 claim was time-barred, the waiver provision of § 740(7) did not bar a N.Y. Lab. Law § 741 claim as § 741 expressly relied on and incorporated N.Y. Lab. Law § 740 for purposes of enforcement as N.Y. Lab. Law § 741 did not explicitly create a private right of action; no election of remedies was thus implicated when the two sections were pleaded together. Reddington v Staten Is. Univ. Hosp., 11 N.Y.3d 80, 862 N.Y.S.2d 842, 893 N.E.2d 120, 2008 N.Y. LEXIS 1932 (N.Y. 2008).

Plaintiff's assertion of cause of action based on CLS Labor § 740 did not require dismissal of actions for defamation, conspiracy, and loss of consortium, notwithstanding that statute provides for waiver of other rights and remedies, since waiver only applies to other causes of action relating to retaliatory discharge, and other causes of action were independent of retaliatory discharge. Kraus v Brandstetter, 185 A.D.2d 302, 586 N.Y.S.2d 269, 1992 N.Y. App. Div. LEXIS 9035 (N.Y. App. Div. 2d Dep't 1992).

Tort causes of action relating to retaliatory discharge were barred by plaintiff's election to assert action under CLS Labor § 740. Pipas v Syracuse Home Ass'n, 226 A.D.2d 1097, 641 N.Y.S.2d 768, 1996 N.Y. App. Div. LEXIS 5571 (N.Y. App. Div. 4th Dep't), app. denied, 88 N.Y.2d 810, 649 N.Y.S.2d 377, 672 N.E.2d 603, 1996 N.Y. LEXIS 2759 (N.Y. 1996).

Paramedic seeking to recover from hospital under state (CLS Labor § 740) and federal (42 USCS § 1395dd(i)) "whistleblower" acts would not be heard to assert any right he might have had to opt for litigation where he had served demand for arbitration under parties' contract, had participated fully in arbitration process, and never sought to withdraw his demand for arbitration, which resulted in award for hospital; hospital's motion to compel arbitration and stay action was properly granted. Strattner v Cabrini Med. Ctr., 257 A.D.2d 549, 682 N.Y.S.2d 594, 1999 N.Y. App. Div. LEXIS 674 (N.Y. App. Div. 1st Dep't 1999).

Action against hospital for breach of contract was properly dismissed under CLS Labor § 740(7) where it arose from plaintiff's § 740 action against hospital and doctor. Bordan v North Shore Univ. Hosp., 275 A.D.2d 335, 712 N.Y.S.2d 155, 2000 N.Y. App. Div. LEXIS 8697 (N.Y. App. Div. 2d Dep't 2000).

Action against doctor for tortious interference with contract should not have been dismissed pursuant to CLS Labor § 740(7) where it was separate and independent from plaintiff's § 740 claim. Bordan v North Shore Univ. Hosp., 275 A.D.2d 335, 712 N.Y.S.2d 155, 2000 N.Y. App. Div. LEXIS 8697 (N.Y. App. Div. 2d Dep't 2000).

Second through eighth causes of action set forth in the claimant's amended complaint should have been dismissed, and, thus, leave to file the amended complaint should not have been granted; all of those claims arose from the claimant's allegedly unlawful discharge and because the claimant commenced his unlawful discharge action under N.Y. Lab. Law § 740(4), the claimant elected his remedies under that statutory section, which meant that pursuant to N.Y. Lab. Law § 740(7), he waived his right to pursue remedies available under other legal provisions. Pipia v Nassau County, 34 A.D.3d 664, 826 N.Y.S.2d 318, 2006 N.Y. App. Div. LEXIS 13868 (N.Y. App. Div. 2d Dep't 2006).

Trial court should have dismissed a physician's claim that an employer and supervisors violated N.Y. Exec. Law § 296 and the New York City, N.Y., Admin. Code § 8-107 by terminating him in retaliation for his complaints about the favoritism shown towards other employees because, by commencing an action under N.Y. Lab. Law § 740(4), the physcian's elected remedies, waiving other causes of action relating to the alleged retaliatory discharge, irrespective of the disposition of such claims. Deshpande v TJH Med. Servs., P.C., 52 A.D.3d 648, 861 N.Y.S.2d 697, 2008

N.Y. App. Div. LEXIS 5563 (N.Y. App. Div. 2d Dep't 2008), app. denied, 12 N.Y.3d 704, 879 N.Y.S.2d 50, 906 N.E.2d 1084, 2009 N.Y. LEXIS 293 (N.Y. 2009), overruled in part, Webb-Weber v Community Action for Human Servs., Inc., 23 N.Y.3d 448, 992 N.Y.S.2d 163, 15 N.E.3d 1172, 2014 N.Y. LEXIS 1049 (N.Y. 2014).

Labor Law § 740(7), an election of remedies provision, which is incorporated into actions against public employers under Civil Service Law § 75-b(3)(c), does not extend to exclude a potential 42 U.S.C.S. § 1983 cause of action. Frank v State of New York, Off. of Mental Retardation & Dev. Disabilities, 86 A.D.3d 183, 924 N.Y.S.2d 634, 2011 N.Y. App. Div. LEXIS 4504 (N.Y. App. Div. 3d Dep't 2011).

Assertion of third cause of action for retaliatory firing under CLS Labor § 740, in complaint also alleging common law breach of contract and violation of Human Rights Law (CLS Exec § 296), technically required dismissal of first 2 causes of action since institution of action for retaliatory firing is "deemed a waiver of the rights and remedies available under any other contract, collective bargaining agreement, law, rule or regulation or under the common law" by CLS Labor § 740(7). Gonzalez v John T. Mather Memorial Hosp., 147 Misc. 2d 1082, 559 N.Y.S.2d 467, 1990 N.Y. Misc. LEXIS 388 (N.Y. Sup. Ct. 1990).

Statutory waiver provision of CLS Labor § 740(7) barred breach of contract claims alleging failure to give 30 days' notice of termination and failure to hold hearing prior to termination. Rotwein v Sunharbor Manor Residential Health Care Facility, 181 Misc. 2d 847, 695 N.Y.S.2d 477, 1999 N.Y. Misc. LEXIS 333 (N.Y. Sup. Ct. 1999).

Statutory waiver provision of CLS Labor § 740(7) did not apply to defamation claims based on alleged statements made by defendant health care facility after plaintiff's discharge relating to plaintiff's application for medical privileges at another health care facility. Rotwein v Sunharbor Manor Residential Health Care Facility, 181 Misc. 2d 847, 695 N.Y.S.2d 477, 1999 N.Y. Misc. LEXIS 333 (N.Y. Sup. Ct. 1999).

Employee's claims for wrongful discharge due to his having reported a fellow stockbroker's violations of law were dismissed pursuant to a motion by his employer, pursuant to N.Y. C.P.L.R. 3211(a), where one claim was brought under the whistle blower statute, N.Y. Lab. Law § 740, and it was barred by the one-year limitations period contained in § 740(4)(a), and further, it did not affect public health or safety as required by § 740(2)(a); the other claim, which was based on age discrimination, was deemed waived due to exclusivity of § 740(7), where it arose from the same set of facts. Feinman v Morgan Stanley Dean Witter, 193 Misc. 2d 496, 752 N.Y.S.2d 229, 2002 N.Y. Misc. LEXIS 1535 (N.Y. Sup. Ct. 2002).

Once a fired employee had made a claim of retaliatory discharge, even though it was insufficiently pled, the waiver of other causes of action became effective and remained effective, and an amendment of the employee's pleadings to remove the statutory whistleblowing claim would not operate to cancel the waiver. Owitz v Beth Israel Med. Ctr., 781 N.Y.S.2d 626, 1 Misc. 3d 912(A), 2004 N.Y. Misc. LEXIS 75 (N.Y. Sup. Ct. 2004).

Public employee waived his right to pursue a wrongful termination claim under the Civil Service Law statute concerning retaliatory action by public employers because the employee elected to initially commence the action pursuant to this statute but withdrew the claim. Castro v City of New York, 994 N.Y.S.2d 798, 45 Misc. 3d 805, 2014 N.Y. Misc. LEXIS 3923 (N.Y. Sup. Ct. 2014), rev'd, 141 A.D.3d 456, 36 N.Y.S.3d 113, 2016 N.Y. App. Div. LEXIS 5472 (N.Y. App. Div. 1st Dep't 2016).

Where employers argued that a former employee waived her N.Y. Lab. Law § 741 claim by including a time-barred N.Y. Lab. Law § 740 claim in her original complaint and that the employee, who had worked as the director of a hospital's international patient program, was not an employee within the meaning of N.Y. Lab. Law § 741, questions regarding the scope of N.Y. Lab. Law § 740(7)'s waiver provision and N.Y. Lab. Law § 741(1)(a)'s definition of an employee were certified to the New York Court of Appeals because the New York Court of Appeals had never discussed § 741, there was a split of authority between lower New York state courts and some federal district courts regarding the scope of N.Y. Lab. Law § 740(7)'s waiver provision, the laws applicable to health care service workers were of great importance to the public policy of New York, and a decision from the New York Court of Appeals would resolve the employee's N.Y. Lab. Law § 741 claim. Reddington v Staten Island Univ. Hosp., 511 F.3d 126, 2007 U.S. App. LEXIS 28881 (2d Cir. N.Y. 2007).

Claim of former employee of physicians alleging that she was discharged for reporting hazards to public health and safety is dismissed, where plaintiff brought federal qui tam claim arising out of same occurrence, because qui tam claims and New York's "whistleblower" Act (CLS Labor Law § 740) claims are incompatible, but plaintiff's state law claim is dismissed without prejudice to any state-court suit were plaintiff to elect to proceed under § 740 in state court in lieu of pursuing inconsistent qui tam claim in federal court. United States ex rel. Mikes v Straus, 853 F. Supp. 115, 1994 U.S. Dist. LEXIS 7116 (S.D.N.Y. 1994).

Pursuant to CLS Labor § 740(7), plaintiff abandoned claim for unpaid benefits allegedly due under contract with his former employer by electing to proceed under "whistle blower" statute. McGrane v Reader's Digest Ass'n, 863 F. Supp. 183, 1994 U.S. Dist. LEXIS 14253 (S.D.N.Y. 1994), aff'd, 60 F.3d 811, 1995 U.S. App. LEXIS 20330 (2d Cir. N.Y. 1995).

Former employee's claim of termination in violation of the employee handbook was dismissed because the commencement of an action pursuant to N.Y. Lab. Law § 740 constituted a waiver of any claim based on a collective bargaining agreement or employee contract. Rohlehr v Brookdale Univ. Hosp. & Med. Ctr., 390 F. Supp. 2d 207, 2005 U.S. Dist. LEXIS 29604 (E.D.N.Y. 2005).

When a plaintiff commences an action asserting a claim for relief pursuant to N.Y. Lab. Law § 740, he waives all claims that arise out of the same retaliatory action on which the § 740 claim is based. Dismissal of the § 740 claim does not negate the § 740(7) waiver. Rohlehr v Brookdale Univ. Hosp. & Med. Ctr., 390 F. Supp. 2d 207, 2005 U.S. Dist. LEXIS 29604 (E.D.N.Y. 2005).

Where plaintiff nurse's complaint alleged a whistleblower claim against defendant healthcare facility pursuant to N.Y. Lab. Law § 740, as well as New York State and federal discrimination claims on account of plaintiff's alleged disabilities under N.Y. Exec. Law § 290 and 42 U.S.C.S. § 12101, because the anti-discrimination statutes sought to protect against wrongs completely separate from those sought to be protected by § 740, there was no waiver of any such claims. Barker v Peconic Landing at Southold, Inc., 885 F. Supp. 2d 564, 2012 U.S. Dist. LEXIS 105988 (E.D.N.Y. 2012).

Former employee's FMLA and intentional infliction of emotional distress (IIED) claims were not barred by his filing of a claim under New York's Whistleblower Act because under the Act's waiver provision, the issue was whether the employee's additional claims protected against the same wrong that was prohibited by the Act, and the employee's FMLA and IIED claims were not related to his reporting of the employer's alleged violations of the law under the Act. Barber v Von Roll U.S.A., Inc., 2015 U.S. Dist. LEXIS 112198 (N.D.N.Y. Aug. 25, 2015).

Where an employee filed a claim under New York's Whistleblower Act, a determination of whether an employee's additional employment discrimination claims were barred by the Act's election of remedies provision was determined by looking at whether the employee's additional claims protected against the same wrong that was prohibited by the Act. Barber v Von Roll U.S.A., Inc., 2015 U.S. Dist. LEXIS 112198 (N.D.N.Y. Aug. 25, 2015).

4. Requirement that employer commit "violation of law"

Court properly dismissed action under "whistleblowers' statute" (CLS Labor § 740) alleging that plaintiff was discharged in retaliation for reporting to Department of Energy (DOE) that several of his coworkers might have been exposed to radiation levels sufficient to trigger DOE's mandatory reporting requirements, where employer did not actually violate any law, rule or regulation affecting public health and safety. Bordell v GE, 88 N.Y.2d 869, 644 N.Y.S.2d 912, 667 N.E.2d 922, 1996 N.Y. LEXIS 693 (N.Y. 1996).

Former employee, who was the chief operating officer (COO) of a non-profit corporation, sufficiently stated a claim under the whistleblower statute because the complaint asserted the COO was terminated after sanctions and violations were issued against the non-profit by public bodies as a result of her reports of the non-profit's policies and practices; for pleading purposes, the complaint did not have to identify the specific "law, rule, or regulation" the non-profit allegedly violated. Webb-Weber v Community Action for Human Servs., Inc., 23 N.Y.3d 448, 992 N.Y.S.2d 163, 15 N.E.3d 1172, 2014 N.Y. LEXIS 1049 (N.Y. 2014).

In action pursuant to Whistleblower Law brought by coordinator of employment services who claimed that she was discharged because of her objection to, and refusal to participate in, her employer's alleged fraudulent billing of city for placements it never made, complaint met requirement of alleging violation of law since it set forth facts which, if established, would constitute crime of larceny. Remba v Federation Employment & Guidance Service, 149 A.D.2d 131, 545 N.Y.S.2d 140, 1989 N.Y. App. Div. LEXIS 10871 (N.Y. App. Div. 1st Dep't 1989), aff'd, 76 N.Y.2d 801, 559 N.Y.S.2d 961, 559 N.E.2d 655, 1990 N.Y. LEXIS 1460 (N.Y. 1990).

Under CLS Labor § 740, employee's mere good-faith reasonable belief that activity, policy, or practice of employer is in violation of law, rule, or regulation is insufficient; statute requires proof of actual violation of law, rule, or regulation. Bordell v General Elec. Co., 208 A.D.2d 219, 622 N.Y.S.2d 1001, 1995 N.Y. App. Div. LEXIS 2376 (N.Y. App. Div. 1st Dep't), app. dismissed, 85 N.Y.2d 1032, 631 N.Y.S.2d 290, 655 N.E.2d 403, 1995 N.Y. LEXIS 2177 (N.Y. 1995), aff'd, 88 N.Y.2d 869, 644 N.Y.S.2d 912, 667 N.E.2d 922, 1996 N.Y. LEXIS 693 (N.Y. 1996).

Plaintiffs, who were discharged from their employment as armed guards for refusing to work with pistol permits which they believed to be invalid in Suffolk County, failed to state action under CLS Labor § 740 based on allegation that they were informed that their permits were invalid because their employer had moved its base of operations from Nassau to Suffolk County, since CLS Penal § 400.00(6) provides that license to carry or possess pistol or revolver shall be effective "throughout the state." Hughes v Gibson Courier Servs. Corp., 218 A.D.2d 684, 630 N.Y.S.2d 552, 1995 N.Y. App. Div. LEXIS 8709 (N.Y. App. Div. 2d Dep't 1995).

Without authorization from legislature, scope of "whistleblower law" (CLS Labor § 740) cannot be expanded to provide remedy to employees who merely allege perceived or implied threats to disclose activity, policy or practice of employer that is in violation of law, rule, or regulation. Roach v Computer Assocs. Int'l, 224 A.D.2d 676, 638 N.Y.S.2d 699, 1996 N.Y. App. Div. LEXIS 1884 (N.Y. App. Div. 2d Dep't 1996).

Former employee, who enrolled her children in employer's day care center, failed to state action for violation of "whistleblower law" (CLS Labor § 740) where employee alleged no actual disclosure of and no threat to disclose any violations occurring in day care center to supervisor or public body. Roach v Computer Assocs. Int'l, 224 A.D.2d 676, 638 N.Y.S.2d 699, 1996 N.Y. App. Div. LEXIS 1884 (N.Y. App. Div. 2d Dep't 1996).

Plaintiff must show actual violation of law to sustain action under CLS Labor § 740, not merely that employee had reasonable belief that law, rule, or regulation had been violated. Green v Saratoga A.R.C., 233 A.D.2d 821, 650 N.Y.S.2d 441, 1996 N.Y. App. Div. LEXIS 12178 (N.Y. App. Div. 3d Dep't 1996).

The trial court erred in denying a university's summary judgment motion in plaintiff's N.Y. Labor Law § 740 action, sometimes know as the whistleblower's law, because the university established that during the period relevant to the plaintiff's complaints of unsafe conditions, the university's laboratories were not found to be in violation of any safety or health standards promulgated under the United States Occupational Safety and Health Act of 1970, or any regulations promulgated by the Department of Labor, and the plaintiff failed to allege an actual violation of any specific law, rule, or regulation in his complaint. Khan v State Univ. of N.Y. Health Sci. Ctr., 288 A.D.2d 350, 734 N.Y.S.2d 92, 2001 N.Y. App. Div. LEXIS 11265 (N.Y. App. Div. 2d Dep't 2001).

Employers were entitled to summary judgment on the employee's N.Y. Lab. Law § 740 whistle blower cause of action; the employee failed to raise a triable issue of fact to refute the prima facie showing by the employers that they did not engage in any activity or practice that constituted an actual violation of a law, rule, or regulation. Mazzacone v Corlies Assoc., 21 A.D.3d 1066, 802 N.Y.S.2d 182, 2005 N.Y. App. Div. LEXIS 9551 (N.Y. App. Div. 2d Dep't 2005).

Nurse manager failed to submit sufficient evidence of an actual violation of law to entitle her to judgment as a matter of law on her N.Y. Lab. Law § 740 cause of action as an investigation of the state department of health regarding the nurse manager's claims that surgical instruments were not properly sterilized resulted in a finding that the former employer had not violated any applicable regulation. Berde v North Shore-Long Is. Jewish Health Sys., Inc., 50 A.D.3d 834, 855 N.Y.S.2d 656, 2008 N.Y. App. Div. LEXIS 3388 (N.Y. App. Div. 2d Dep't 2008).

Dismissal of a physician's cause of action alleging wrongful employment termination in violation of N.Y. Lab. Law § 740 was proper because the physician failed to allege an activity or practice of the employer which violated a law, rule, or regulation with the requisite particularity and specificity necessary to support that claim. Deshpande v TJH Med. Servs., P.C., 52 A.D.3d 648, 861 N.Y.S.2d 697, 2008 N.Y. App. Div. LEXIS 5563 (N.Y. App. Div. 2d Dep't 2008), app. denied, 12 N.Y.3d 704, 879 N.Y.S.2d 50, 906 N.E.2d 1084, 2009 N.Y. LEXIS 293 (N.Y. 2009), overruled in part, Webb-Weber v Community Action for Human Servs., Inc., 23 N.Y.3d 448, 992 N.Y.S.2d 163, 15 N.E.3d 1172, 2014 N.Y. LEXIS 1049 (N.Y. 2014).

Defendant established its entitlement to judgment as a matter of law on the causes of action asserted pursuant to the whistleblower statute by demonstrating that neither plaintiff's communications involved actual violations of law or regulation; expert testimony was necessary to establish the levels of formaldehyde the aroma encapsulate was capable of releasing, and plaintiff was not qualified to render such an opinion. Kamdem-Ouaffo v Pepsico, Inc., 133 A.D.3d 825, 21 N.Y.S.3d 150, 2015 N.Y. App. Div. LEXIS 8790 (N.Y. App. Div. 2d Dep't 2015), app. denied, 27 N.Y.3d 902, 51 N.E.3d 565, 32 N.Y.S.3d 54, 2016 N.Y. LEXIS 740 (N.Y. 2016).

Mere belief by employee that violation of law, rule or regulation has occurred is not sufficient to invoke protection of CLS Labor § 740(2)(a). Kern v De Paul Mental Health Services, Inc., 139 Misc. 2d 970, 529 N.Y.S.2d 265, 1988 N.Y. Misc. LEXIS 296 (N.Y. Sup. Ct. 1988), aff'd, 152 A.D.2d 957, 544 N.Y.S.2d 252, 1989 N.Y. App. Div. LEXIS 9848 (N.Y. App. Div. 4th Dep't 1989).

Violation of "law, rule or regulation," as used in CLS Labor § 740, is not limited to violation of criminal nature, but also includes violations of civil statutes and regulations since terms "rule" and "regulation" are not usually used to refer to criminal statutes but, in their ordinary meaning, relate to administrative rules or regulations. Vella v United Cerebral Palsy, Inc., 141 Misc. 2d 976, 535 N.Y.S.2d 292, 1988 N.Y. Misc. LEXIS 725 (N.Y. Sup. Ct. 1988).

Former employee's motion for leave to replead under N.Y. C.P.L.R. 3211(e) was properly denied, as the employee failed to set forth good ground to support a N.Y. Lab. Law § 740 cause of action; the employee failed to allege an actual violation of a regulation, as the employers never implemented the revised plan that allegedly would have violated the regulation. Nadkarni v N. Shore-Long Island Jewish Health Sys., 21 A.D.3d 354, 799 N.Y.S.2d 574, 2005 N.Y. App. Div. LEXIS 8237 (N.Y. App. Div. 2d Dep't 2005).

Employee's complaint alleging violations of N.Y. Labor Law § 740 by an employer and the employer's executives was dismissed because, other than a conclusory allegation that an executive was not allowed to engage in nepotism, under "Head Start Law," the complaint (1) cited no law, rule, or regulation allegedly actually violated, and (2) made no allegation that the employer's or executives' conduct was a substantial and specific danger to the public health or safety, as the complained of conduct related mainly to alleged financial improprieties. Klein v Metropolitan Child Servs., Inc., 100 A.D.3d 708, 954 N.Y.S.2d 559, 2012 N.Y. App. Div. LEXIS 7608 (N.Y. App. Div. 2d Dep't 2012).

Current and former employees of automobile component manufacturer stated cause of action under CLS Labor § 740 ("whistleblower statute") by alleging that employer violated provisions of National Traffic and Motor Vehicle Safety Act governing defects and noncompliance in automobile components and notification of defects and noncompliance (49 USCS §§ 30116 and 30118) with respect to systematic defects in vehicle components known as "Carter RFI Module" and "Ford ISO Relay". Clarke v TRW, Inc., 921 F. Supp. 927, 1996 U.S. Dist. LEXIS 4659 (N.D.N.Y. 1996).

Current and former employees of automobile component manufacturer did not state cause of action under CLS Labor § 740 ("whistleblower statute") for reporting that employer's practices violated regulations promulgated under federal National Traffic and Motor Vehicle Safety Act statutes where regulations relied on applied to finished vehicles only, not component parts. Clarke v TRW, Inc., 921 F. Supp. 927, 1996 U.S. Dist. LEXIS 4659 (N.D.N.Y. 1996).

Nurses employed by private entity, who claimed that they were fired for speaking out about operation of county mental health department, but not for any criticism of their own employer, failed to state claim under Labor § 740. Berweger v County of Orange, 121 F. Supp. 2d 334, 2000 U.S. Dist. LEXIS 16616 (S.D.N.Y. 2000).

5. Requirement of danger to public health or safety

CLS Labor § 740(2)(c), like CLS Labor § 740(2)(a), is triggered only by violation of law, rule, or regulation that creates and presents substantial and specific danger to public health and safety; fraudulent billing practices was not type of violation contemplated by statute. Remba v Federation Employment & Guidance Serv., 76 N.Y.2d 801, 559 N.Y.S.2d 961, 559 N.E.2d 655, 1990 N.Y. LEXIS 1460 (N.Y. 1990).

Whistleblower Law requires that there be not only actual, as opposed to possible, violation of law, but also that there be actual and substantial present danger to public health; reasonable belief as basis for protection under statute will not suffice. Remba v Federation Employment & Guidance Service, 149 A.D.2d 131, 545 N.Y.S.2d 140, 1989 N.Y. App. Div. LEXIS 10871 (N.Y. App. Div. 1st Dep't 1989), aff'd, 76 N.Y.2d 801, 559 N.Y.S.2d 961, 559 N.E.2d 655, 1990 N.Y. LEXIS 1460 (N.Y. 1990).

Both subdivisions (2)(a) and (c) of CLS § 740 require that violation of law create and present substantial and specific danger to public health or safety, even though only subdivision (2)(a) has specific language that so states, since legislature's manifest intent and ordinary principles of statutory construction mandate similar conclusion with regard to subdivision (2)(c). Remba v Federation Employment & Guidance Service, 149 A.D.2d 131, 545 N.Y.S.2d 140, 1989 N.Y. App. Div. LEXIS 10871 (N.Y. App. Div. 1st Dep't 1989), aff'd, 76 N.Y.2d 801, 559 N.Y.S.2d 961, 559 N.E.2d 655, 1990 N.Y. LEXIS 1460 (N.Y. 1990).

Plaintiff's claim under "whistleblower statute," CLS Labor § 740, was properly dismissed where defendant's alleged illegalities consisted of neglect of certain patient, failure to report incident of patient neglect, improper deletion of entry concerning such incident, and improper attempt to persuade plaintiff to change her entry to delete reference to incident; while such illegalities may have presented danger to individual patient, they did not create substantial and specific danger to public health and safety. Kern v De Paul Mental Health Servs., 152 A.D.2d 957, 544 N.Y.S.2d 252, 1989 N.Y. App. Div. LEXIS 9848 (N.Y. App. Div. 4th Dep't), app. denied, 74 N.Y.2d 615, 549 N.Y.S.2d 960, 549 N.E.2d 151, 1989 N.Y. LEXIS 3200 (N.Y. 1989).

Employee failed to state cause of action under whistleblower's statute, CLS Labor § 740, based on allegations that he was wrongfully discharged due to his discovery of and refusal to participate in fiscal "improprieties" of employer, since allegations of fiscal improprieties did not portend substantial and specific danger to public health or safety. Lamagna v New York State Ass'n for Help of Retarded Children, Inc., 158 A.D.2d 588, 551 N.Y.S.2d 556, 1990 N.Y. App. Div. LEXIS 1973 (N.Y. App. Div. 2d Dep't 1990).

Evidence established violation of CLS Labor § 740 where plaintiff was discharged as vice-president of nursing after she reported that attending physician failed to properly perform and document bronchoscopic procedures on several patients, or failed to obtain appropriate informed consents from patients, thereby violating 10 NYCRR §§ 405.7(b)(9) and 405.10, which created substantial and specific danger to public health and safety. Kraus v New Rochelle Hosp. Medical Ctr., 216 A.D.2d 360, 628 N.Y.S.2d 360, 1995 N.Y. App. Div. LEXIS 6175 (N.Y. App. Div. 2d Dep't), app. dismissed, 86 N.Y.2d 885, 635 N.Y.S.2d 950, 659 N.E.2d 773, 1995 N.Y. LEXIS 4393 (N.Y. 1995).

Defendant, intermediate care facility for developmentally disabled clients, was properly granted summary judgment in action brought under CLS Labor § 740(2), even if defendant violated its own personnel policy or 14 NYCRR § 633.7 requiring implementation of that policy, where plaintiff failed to show that alleged violation threatened health or safety of public-at-large, notwithstanding that alleged misconduct may have posed danger to certain individual residents of facility. Green v Saratoga A.R.C., 233 A.D.2d 821, 650 N.Y.S.2d 441, 1996 N.Y. App. Div. LEXIS 12178 (N.Y. App. Div. 3d Dep't 1996).

Defendants were entitled to partial summary judgment dismissing cause of action for violation of CLS Labor § 740 where plaintiff failed to show that defendants' allegedly unlawful billing practices "create[d] and present[ed] a substantial and specific danger to the public health or safety" under CLS Labor § 740(2)(a). Smith v Angel Guardian Home, 263 A.D.2d 476, 692 N.Y.S.2d 724, 1999 N.Y. App. Div. LEXIS 7881 (N.Y. App. Div. 2d Dep't 1999).

Trial court erred in denying the health care corporation's and medical center's motion to dismiss the claimant's N.Y. Lab. Law § 740(4) action against them, as the claimant did not alleged that their conduct created a substantial and specific danger to public health, as was required. Pipia v Nassau County, 34 A.D.3d 664, 826 N.Y.S.2d 318, 2006 N.Y. App. Div. LEXIS 13868 (N.Y. App. Div. 2d Dep't 2006).

In action brought against mental health facility under CLS Labor § 740 for retaliatory discharge following employee's disclosure of what she thought was nonconsensual sexual activity between male and female residents, facility was entitled to summary judgment to dismiss where (1) employee admitted during examination before trial that she did not know whether activity she observed was nonconsensual but had merely assumed such was true from female resident's disability, (2) all credible evidence indicated that sexual contacts in question were in fact consensual despite female resident's limitations, and (3) even if consensual sexual intercourse violated in-house rules and regulations, such violation could not be said to create substantial and specific danger to public health or safety. Kern v De Paul Mental Health Services, Inc., 139 Misc. 2d 970, 529 N.Y.S.2d 265, 1988 N.Y. Misc. LEXIS 296 (N.Y. Sup. Ct. 1988), aff'd, 152 A.D.2d 957, 544 N.Y.S.2d 252, 1989 N.Y. App. Div. LEXIS 9848 (N.Y. App. Div. 4th Dep't 1989).

Employee established prima facie case of retaliatory action under CLS Labor § 740 based on her termination from employment for "excessive absenteeism" during 3-month probationary period after she filed complaint with county health officials concerning employer's failure to maintain smoke-free work area for nonsmoking employees, since exposure of office employees to secondhand smoke constitutes substantial and specific danger to public health or safety within meaning of statute, especially given CLS Pub Health § 1399-o, and county laws, regulating smoking in workplace. Bompane v Enzolabs, Inc., 160 Misc. 2d 315, 608 N.Y.S.2d 989, 1994 N.Y. Misc. LEXIS 58 (N.Y. Sup. Ct. 1994).

Application of CLS Labor § 740 is not limited to situations where unsafe practice or condition complained of poses large-scale threat to public at large; anything causing risk to workers who are part of public can constitute legal infraction making statute applicable. Bompane v Enzolabs, Inc., 160 Misc. 2d 315, 608 N.Y.S.2d 989, 1994 N.Y. Misc. LEXIS 58 (N.Y. Sup. Ct. 1994).

Employee's sworn statements as to his observations of dangerous unlawful conditions, including absence of fire exit signs, was sufficient showing of violations which presented actual and substantial present danger to public health to support action under CLS Labor § 740; purpose of § 740 is not served by requiring employees with personal knowledge of obviously dangerous unlawful conditions to submit additional proof of existence of

conditions to state cause of action under § 740. Granser v Box Tree S., 164 Misc. 2d 191, 623 N.Y.S.2d 977, 1994 N.Y. Misc. LEXIS 651 (N.Y. Sup. Ct. 1994).

Employee whose employer allegedly fired him for accepting elective position as mayor could not maintain action under CLS Labor § 740 (whistleblower law), since § 740 is limited to matters involving health or safety hazards. Ribando v Silhouette Optical, 871 F. Supp. 675, 1994 U.S. Dist. LEXIS 18713 (S.D.N.Y. 1994).

When a pharmacist with an ownership interest in a healthcare company could return to work after surgery, and the company's president refused to permit him to return full-time, causing him to resign, his discrimination and retaliation claims could proceed against the president because employees could sue individuals for alleged discrimination if they had an ownership interest or the power to do more than carry out personnel decisions made by others where the discrimination occurred. When a pharmacist with an ownership interest in a healthcare company could return to work after surgery, and the company's president refused to permit him to return full-time, causing him to resign, his discrimination and retaliation claims could proceed against the president because employees could sue individuals for alleged discrimination if they had an ownership interest or the power to do more than carry out personnel decisions made by others where the discrimination occurred. Magnotti v Crossroads Healthcare Mgmt., LLC, 126 F. Supp. 3d 301, 2015 U.S. Dist. LEXIS 118194 (E.D.N.Y. 2015)

When a pharmacist with an ownership interest in a healthcare company could return to work after surgery, and the company's president refused to permit him to return full-time, causing him to resign, the failure to employ a full-time supervising pharmacist did not present a substantial and specific danger to the public health or safety, and since the pharmacist alleged no inherent danger or actual adverse consequences from the company's actions, he did not state a whistleblower claim. Magnotti v Crossroads Healthcare Mgmt., LLC, 126 F. Supp. 3d 301, 2015 U.S. Dist. LEXIS 118194 (E.D.N.Y. 2015).

Employer's alleged overbilling of customers and irregular business practices did not constitute danger to public health and safety, and, thus, employee who was allegedly discharged for objecting to employer's improper activities was not protected by Labor § 740(2)(a). Schultz v North Am. Ins. Group, 34 F. Supp. 2d 866, 1999 U.S. Dist. LEXIS 1410 (W.D.N.Y. 1999).

6. —Sufficiency of complaint

In action pursuant to Whistleblower Law brought by coordinator of employment services who claimed that she was discharged because of her objection to, and refusal to participate in, her employer's alleged fraudulent billing of city for placements it never made, complaint failed to meet requirement that it allege violation of law which would create and present substantial and specific danger to public health or safety. Remba v Federation Employment & Guidance Service, 149 A.D.2d 131, 545 N.Y.S.2d 140, 1989 N.Y. App. Div. LEXIS 10871 (N.Y. App. Div. 1st Dep't 1989), aff'd, 76 N.Y.2d 801, 559 N.Y.S.2d 961, 559 N.E.2d 655, 1990 N.Y. LEXIS 1460 (N.Y. 1990).

Employee failed to state cause of action under CLS Labor § 740 (so-called "Whistleblowers' Statute") despite her allegation that she was terminated from employment in retaliation for disclosing allegedly illegal acts of her supervisors, since there was no allegation that reported unlawful activity represented "substantial and specific danger to public health or safety." Leibowitz v Bank Leumi Trust Co., 152 A.D.2d 169, 548 N.Y.S.2d 513, 1989 N.Y. App. Div. LEXIS 15216 (N.Y. App. Div. 2d Dep't 1989).

Employee's allegations of retaliation did not support claim under CLS Labor § 740(2)(a) where employee merely reported theft by coemployee and did not "blow the whistle" on any improper policy or practice of employer that posed any threat to health or safety of public. Gorgone v Capozzi, 238 A.D.2d 308, 656 N.Y.S.2d 49, 1997 N.Y. App. Div. LEXIS 3388 (N.Y. App. Div. 2d Dep't 1997), app. denied, 95 N.Y.2d 767, 717 N.Y.S.2d 547, 740 N.E.2d 653, 2000 N.Y. LEXIS 3510 (N.Y. 2000).

Former employee's counterclaim against former employer for retaliation in violation of CLS Labor § 740 failed to state cause of action where (1) employee claimed that he was fired because he filed complaint with National Labor Relations Board accusing his union of failing to negotiate over workers' compensation pilot program and that such failure violated unspecified law, and (2) even if union's failure to negotiate matter that should have been subject of collective bargaining were statutory or regulatory violation by employer, alleged wrongdoing did not pose "a substantial and specific danger to the public health or safety" under CLS Labor § 740(2)(a). Vail-Ballou Press, Inc. v Tomasky, 266 A.D.2d 662, 698 N.Y.S.2d 98, 1999 N.Y. App. Div. LEXIS 11400 (N.Y. App. Div. 3d Dep't 1999).

Trial court erred in denying the motion to dismiss filed by the health care corporation and the medical center in a case where the claimant alleged that their termination of his employment violated N.Y. Lab. Law § 740(2); he was required to allege that the conduct of which he complained created a substantial and specific danger to the public health, and, instead, he asserted that they violated the law through their allegedly improper and corrupt purchasing practices. Pipia v Nassau County, 34 A.D.3d 664, 826 N.Y.S.2d 318, 2006 N.Y. App. Div. LEXIS 13868 (N.Y. App. Div. 2d Dep't 2006).

Because the practices about which an employee complained related to the privacy of confidential information, they did not threaten public health and safety; accordingly, they did not sustain a cause of action under N.Y. Lab. Law § 740. Tomo v Episcopal Health Servs., Inc., 85 A.D.3d 766, 925 N.Y.S.2d 563, 2011 N.Y. App. Div. LEXIS 4946 (N.Y. App. Div. 2d Dep't 2011).

In an action to recover damages for retaliatory personnel action, defendants' motion to dismiss the complaint was improperly granted as the complaint sufficiently stated a cause of action because it alleged that plaintiff was offered a promotion at a care facility; that she pointed out that she would be under the supervision of an individual who was not authorized to supervise her; that, after she declined to accept the promotion, she was discharged from her position as head of nursing, and another nurse was given the position that plaintiff had turned down; and that supervision of a nurse in clinical activities by an unauthorized person would, under the circumstances alleged, cause a substantial and specific danger to public health. Fough v August Aichhorn Ctr. for Adolescent Residential Care, Inc., 139 A.D.3d 665, 30 N.Y.S.3d 677, 2016 N.Y. App. Div. LEXIS 3408 (N.Y. App. Div. 2d Dep't 2016).

Trial court properly granted an employer's motion to dismiss an employee's action to recover damages for violations of the Labor Law because the violations complained of did not create and present a substantial and specific danger to the public health or safety where the employee alleged that the employer retaliated against him when he alerted his supervisors about violations of laws and regulations relating to obtaining a custom broker's license under federal law and regulations, and the employer's alleged violation of one Labor Law section could not form the basis for a violation of the other section. Starikov v CEVA Frgt., LLC, 153 A.D.3d 1377, 61 N.Y.S.3d 311, 2017 N.Y. App. Div. LEXIS 6553 (N.Y. App. Div. 2d Dep't 2017).

Supreme court properly granted an employer's motion to dismiss an employee's action alleging a violation of the whistleblower statute because the complaint failed to allege any substantial and specific danger to the public health or safety resulting from a violation. Coyle v College of Westchester, Inc., 166 A.D.3d 722, 87 N.Y.S.3d 242, 2018 N.Y. App. Div. LEXIS 7676 (N.Y. App. Div. 2d Dep't 2018).

Supreme court providently exercised its discretion in denying an employee's motion for leave to renew her opposition to an employer's motion to dismiss the cause of action alleging a violation of the statute because the new evidence the employee tendered would not change the prior determination to grant the employer's motion to dismiss. Coyle v College of Westchester, Inc., 166 A.D.3d 722, 87 N.Y.S.3d 242, 2018 N.Y. App. Div. LEXIS 7676 (N.Y. App. Div. 2d Dep't 2018).

In action for damages for retaliatory discharge brought under Whistleblower law, defendant employer was entitled to dismissal of complaint for failure to state cause of action where complaint alleged wrongful payments and overpayments to vendor of plumbing fixtures but failed to allege that such payments created

substantial and specific damage to public health. Vella v United Cerebral Palsy, Inc., 141 Misc. 2d 976, 535 N.Y.S.2d 292, 1988 N.Y. Misc. LEXIS 725 (N.Y. Sup. Ct. 1988).

Former law firm associate, allegedly terminated for insisting that activities of fellow associate be reported to disciplinary committee, failed to state cause of action for wrongful discharge under CLS Labor § 740 since he had not asserted violation thereof in his pleading, and in any event alleged refusal to report associate did not constitute statutorily required activity, policy or practice of employer presenting substantial and specific danger to public health or safety. Wieder v Skala, 144 Misc. 2d 346, 544 N.Y.S.2d 971, 1989 N.Y. Misc. LEXIS 495 (N.Y. Sup. Ct. 1989), aff'd, 167 A.D.2d 265, 562 N.Y.S.2d 930, 1990 N.Y. App. Div. LEXIS 14247 (N.Y. App. Div. 1st Dep't 1990).

Employer was entitled to dismissal of action for alleged violation of CLS Labor § 740 (Whistleblower Law) wherein plaintiff asserted that she was fired because she refused to accept blame for falsifying medical records of certain patient, as case arose out of plaintiff's effort to protect her own nursing license and reputation, not to protect public. Paul v Aurora Med. Group, P.C., 176 Misc. 2d 11, 670 N.Y.S.2d 747, 1998 N.Y. Misc. LEXIS 76 (N.Y. Sup. Ct. 1998).

Defendant health care facility was entitled to summary judgment on CLS Labor § 740 retaliatory discharge claim asserted by plaintiff whose medical privileges were terminated after he failed to follow allegedly unlawful directions not to bill families of residents for services covered by Medicare, where there was no evidence that defendant controlled and directed care and treatment provided to residents by plaintiff, plaintiff never received any remuneration or other benefit from defendant, and there was no evidence of written employment contract between plaintiff and defendant; furthermore, defendant's alleged bill collection direction did not constitute actual "violation of law, rule or regulation" and, even if it did, it did not present "substantial and specific danger" to public health and safety. Rotwein v Sunharbor Manor Residential Health Care Facility, 181 Misc. 2d 847, 695 N.Y.S.2d 477, 1999 N.Y. Misc. LEXIS 333 (N.Y. Sup. Ct. 1999).

Because a client pleaded sufficient facts establishing an attorney-client relationship and breach of the attendant duties, including, a lost right of recovery under N.Y. Lab. Law § 740, there was no basis to dismiss the client's legal malpractice action against an attorney under N.Y. C.P.L.R. 3211(a)(7), (1). Hayes v Bello, 881 N.Y.S.2d 609, 23 Misc. 3d 534, 2009 N.Y. Misc. LEXIS 286 (N.Y. Sup. Ct. 2009).

Trial court properly granted summary judgment pursuant to N.Y. C.P.L.R. 3212 to a health care company in an employee's wrongful termination action; the alleged misconduct reported by the employee, co-worker's failure to perform medical tests, was not sufficiently harmful to warrant protection under a whistleblower act, N.Y. Lab. Law § 740(2)(a), as the patient suffered no serious adverse consequences, and therefore the alleged misconduct did not establish the requisite threat to public health and safety. Peace v KRNH, Inc., 12 A.D.3d 914, 785 N.Y.S.2d 547, 2004 N.Y. App. Div. LEXIS 13798 (N.Y. App. Div. 3d Dep't 2004), app. denied, 4 N.Y.3d 705, 792 N.Y.S.2d 898, 825 N.E.2d 1093, 2005 N.Y. LEXIS 155 (N.Y. 2005).

Proposed complaint alleging cause of action under CLS Labor Law § 740 based upon violation of federal motor vehicle safety statutes as predicate acts will not be dismissed, because allegations of systematic defects in manufacture of both fuel outlet nozzle modules and electro-mechanical relay switches are sufficiently related to motor vehicle safety to plead violations of statutes, and allegations that violations could lead to gasoline fires and loss of vehicle brake control provide element of specific and substantial risk to public health and safety. Clarke v TRW, Inc., 921 F. Supp. 927, 1996 U.S. Dist. LEXIS 4659 (N.D.N.Y. 1996).

Former employer correctly contended that the employee's complaint failed to state a claim upon which relief could be granted because N.Y. Lab. Law § 740 was triggered only by a violation of a law, rule, or regulation that created and presented a substantial and specific danger to the public health and safety; the complaint alleged that the employee was retaliated against for asserting his right to engage in union activities, but he did not allege that the employer violated any law, rule, or regulation designed to protect public health or safety, or that the employer's retaliation against him posed such a threat. Therefore, the employer was entitled to summary judgment on the § 740 claim. Rohlehr v Brookdale Univ. Hosp. & Med. Ctr., 390 F. Supp. 2d 207, 2005 U.S. Dist. LEXIS 29604 (E.D.N.Y. 2005).

Medical center's motion for summary judgment on the doctor's whistleblower claim under New York's Whistleblower law, N.Y. Lab. Law § 740 where the doctor made a number of complaints to his supervisors, if it was true that the loading dock was set up that all incoming and outgoing materials entered and exited through the same loading dock, which was never cleaned, it was clear that the conditions of the loading dock violated N.Y. Comp. Codes R. & Regs. tit. 14, § 1.1 et seq., and hospital food passing through a loading dock allegedly covered with rodents, toxins, and human waste raised a substantial and specific danger to public health and safety. Calabro v Nassau Univ. Med. Ctr., 424 F. Supp. 2d 465, 2006 U.S. Dist. LEXIS 24069 (E.D.N.Y. 2006).

Plaintiff nurse's allegations regarding drug use and theft by defendant healthcare facility's staff were sufficient to state a claim that plaintiff reported conduct under N.Y. Lab. Law § 740(2)(a) that was in actual violation of law, and which presented a substantial threat to public health or safety. Barker v Peconic Landing at Southold, Inc., 885 F. Supp. 2d 564, 2012 U.S. Dist. LEXIS 105988 (E.D.N.Y. 2012).

Former employee did not state a violation of New York's Whistleblower Act because his allegations indicated only that a coworker made verbal threats to other coworkers and displayed inappropriate images and ammunition on his desk, but the coworker's conduct, while inappropriate and harassing to his coworkers, simply did not rise to the level of danger to public health and safety required by the statute Barber v Von Roll U.S.A., Inc., 2015 U.S. Dist. LEXIS 112198 (N.D.N.Y. Aug. 25, 2015).

Former employee, who contacted department of labor with complaints about his wages, including complaints that paychecks bounced and that certain deductions, such as union dues and court ordered spousal support, could not maintain suit because wage-and-hour practices he reported did not present substantial and specific danger to the public health or safety. Humphrey v RAV Investigative & Sec. Servs., 169 F. Supp. 3d 489, 2016 U.S. Dist. LEXIS 31780 (S.D.N.Y. 2016).

7. Requirement that employee report danger

Trial court properly dismissed a director's Labor Law causes of action against a corporation because the allegations were insufficient to establish that the director was an employee of the corporation as defined in N.Y. Lab. Law § 740(1)(a), and, moreover, the complaint, which claimed that the corporation retaliated against the director after he insisted that certain documents filed with the Securities and Exchange Commission be corrected, did not allege a violation which would threaten the health or safety of the public at large; since the director asserted causes of action pursuant to § 740, he waived other causes of action relating to the alleged retaliatory action. The trial court properly denied that branch of the corporation's motion which was for an attorney's fee. Garner v China Natural Gas, Inc., 71 A.D.3d 825, 898 N.Y.S.2d 49, 2010 N.Y. App. Div. LEXIS 2028 (N.Y. App. Div. 2d Dep't), app. denied, 15 N.Y.3d 703, 906 N.Y.S.2d 816, 933 N.E.2d 215, 2010 N.Y. LEXIS 1372 (N.Y. 2010).

Former employee's complaint sufficiently stated a claim for wrongful termination under N.Y. Lab. Law § 740 under circumstances in which the former employee alleged that the former employer terminated her employment in retaliation for her report of suspected child abuse which, she argued, fulfilled her reporting obligations under N.Y. Soc. Serv. Law § 413; the parties in this case had a legal duty under § 413 to report the suspected child abuse or maltreatment committed by a third party and there was no requirement that there be a large-scale threat, or multiple potential or actual victims for purposes of a protected activity in a wrongful termination claim under § 740. The former employee's allegation that the former employer actively discouraged the reporting of suspected child abuse or maltreatment was sufficient to state a claim under § 740(2), as the alleged inaction might have resulted in further abuse or maltreatment. Villarin v Rabbi

Haskel Lookstein School, 96 A.D.3d 1, 942 N.Y.S.2d 67, 2012 N.Y. App. Div. LEXIS 2633 (N.Y. App. Div. 1st Dep't 2012).

Former employee has 45 days to supplement his pleadings to attempt to state claim, where defendant magazine hired him as fraud investigator, but allegedly prevented him from pursuing various reports of financial wrongdoing in ways he thought were appropriate and fired him for continuing to raise issue, and employee hints that information he possesses that was somehow suppressed suggests risks involving food products arising form improper behavior on part of magazine, because employee's reliance on state "whistle blower" statute, NYCLS Labor Law § 740, must fail unless he can show that he reported or wished to report substantial and specific danger to public health or safety. McGrane v Reader's Digest Ass'n, 822 F. Supp. 1044, 1993 U.S. Dist. LEXIS 7133 (S.D.N.Y. 1993).

Claim of former fraud investigator against former employer, alleging violation of whistle blower statute, is dismissed, where plaintiff alleged he was forced to resign for attempting to pursue various reports of financial wrongdoing and assertedly hazardous behavior, because plaintiff failed to provide evidence of specific reports made by him personally and communicated to others, for which he may have been penalized, concerning any substantial and specific danger to public health or safety. McGrane v Reader's Digest Ass'n, 863 F. Supp. 183, 1994 U.S. Dist. LEXIS 14253 (S.D.N.Y. 1994), aff'd, 60 F.3d 811, 1995 U.S. App. LEXIS 20330 (2d Cir. N.Y. 1995).

Auditor/fraud investigator, who allegedly was forced to resign for attempting to pursue various reports of financial wrongdoing, could not maintain action under "whistle blower" statute (CLS Labor § 740) where he failed to provide evidence of specific reports made by him personally, for which he may have been penalized, concerning substantial and specific danger to public health or safety; while such reports in written form are not required by statute, it was implausible that plaintiff should have retained no copies of letters or memoranda sent by him to anyone, claiming that substantial specific health or safety hazards existed requiring urgent action. McGrane v Reader's Digest Ass'n, 863 F. Supp. 183, 1994 U.S. Dist. LEXIS 14253 (S.D.N.Y. 1994), aff'd, 60 F.3d 811, 1995 U.S. App. LEXIS 20330 (2d Cir. N.Y. 1995).

8. What constitutes "retaliatory" action

County board's meeting to consider plaintiff's termination from his position as county manager did not constitute adverse personnel action under CLS Labor § 740 or CLS Civ S § 75-b where no official action was taken as to plaintiff's position at such meeting, even if statements made by elected supervisor at meeting created impression that plaintiff would not be reappointed. Higgs v County of Essex, 232 A.D.2d 815, 648 N.Y.S.2d 787, 1996 N.Y. App. Div. LEXIS 10542 (N.Y. App. Div. 3d Dep't 1996).

Neither CLS Labor § 740 nor CLS Civ S § 75-b provide remedy to employees to merely allege perceived or implied threats. Higgs v County of Essex, 232 A.D.2d 815, 648 N.Y.S.2d 787, 1996 N.Y. App. Div. LEXIS 10542 (N.Y. App. Div. 3d Dep't 1996).

Employer's decision to transfer assistant store manager to different store, with no apparent loss of wages or benefits, was not "retaliatory personnel action" under CLS Labor § 740(1)(e), absent any identifiable right of assistant manager to work in store of his choice. Gorgone v Capozzi, 238 A.D.2d 308, 656 N.Y.S.2d 49, 1997 N.Y. App. Div. LEXIS 3388 (N.Y. App. Div. 2d Dep't 1997), app. denied, 95 N.Y.2d 767, 717 N.Y.S.2d 547, 740 N.E.2d 653, 2000 N.Y. LEXIS 3510 (N.Y. 2000).

Allegation that county personnel officials took extraordinary measures to preclude police sergeant's appointment as lieutenant during life of preferred eligible list, until its expiration by operation of law, sufficiently alleged retaliatory action in violation of CLS Labor § 740(1)(e) and CLS Civ S § 75-b(1)(d) and (2)(a). Dobson v Loos, 277 A.D.2d 1013, 716 N.Y.S.2d 220, 2000 N.Y. App. Div. LEXIS 11441 (N.Y. App. Div. 4th Dep't 2000).

Fact that no enforcement action was taken against employer as result of employee's report to authorities has no bearing on whether employee's dismissal for making report is remediable under CLS Labor § 740. Bompane v Enzolabs, Inc., 160 Misc. 2d 315, 608 N.Y.S.2d 989, 1994 N.Y. Misc. LEXIS 58 (N.Y. Sup. Ct. 1994).

Owner of hotel-restaurant business was not entitled to summary judgment in action alleging violation of CLS Labor § 740 where fact issue existed as to whether plaintiff, or reasonable person in his position, would find demotion from manager to chef so intolerable as to constitute constructive discharge. Granser v Box Tree S., 164 Misc. 2d 191, 623 N.Y.S.2d 977, 1994 N.Y. Misc. LEXIS 651 (N.Y. Sup. Ct. 1994).

Plaintiff stated cause of action for constructive discharge under CLS Labor § 740 based on his alleged retaliatory demotion from general manager to chef, causing him to leave his position, after he threatened to disclose various health and safety violations to municipal authorities. Granser v Box Tree S., 164 Misc. 2d 191, 623 N.Y.S.2d 977, 1994 N.Y. Misc. LEXIS 651 (N.Y. Sup. Ct. 1994).

Trial court erred in denying an employer's summary judgment as to plaintiff's action under N.Y. Lab. Law § 740, because the employer established that plaintiff left his employment voluntarily, and that there was thus no retaliatory discharge of plaintiff based on alleged whistleblowing activity, and established that plaintiff failed to disclose, or threaten to disclose, the alleged illegal activity to a supervisor or public body prior to the end of the employment relationship, because the employer established that although plaintiff told a night dispatcher of the alleged illegal activity, the night dispatcher was not a supervisor. McNally v Swift Transp. Co., Inc., 35 A.D.3d 1238, 827 N.Y.S.2d 395, 2006 N.Y. App. Div. LEXIS 15503 (N.Y. App. Div. 4th Dep't 2006).

Terminated coordinator's claims are not barred by Labor § 740(7), even though she previously settled case alleging employer fired her in retaliation for reporting illegal pharmaceutical contributions to accrediting agency, where current claims assert (1) retaliation for reporting discriminatory hiring practices, (2) disparate impact discrimination against non-Jewish job applicants, and (3) breach of employment contract regarding back pay and vacation, because § 740(7) waiver provision applies only to rights and remedies concerning whistleblowing as defined in § 740. Collette v St. Luke's Roosevelt Hosp., 132 F. Supp. 2d 256, 2001 U.S. Dist. LEXIS 1905 (S.D.N.Y. 2001).

9. Damages

Plaintiff who was discharged as vice-president of nursing in violation of CLS Labor § 740 should have been reinstated to her position; moreover, trial court's award of lost future earnings and fringe benefits was unauthorized by statute. *Kraus v New Rochelle Hosp. Medical Ctr., 216 A.D.2d 360, 628 N.Y.S.2d 360, 1995 N.Y. App. Div. LEXIS 6175 (N.Y. App. Div. 2d Dep't), app. dismissed, 86 N.Y.2d 885, 635 N.Y.S.2d 950, 659 N.E.2d 773, 1995 N.Y. LEXIS 4393 (N.Y. 1995).

Because a city and its supervisors offered no justification for the denial of predetermination interest in an employee's N.Y. Civ. Serv. Law § 75-b action, and because the record supported the employee's request for reinstatement, pursuant to N.Y. Lab. Law § 740(5) and N.Y. Civ. Serv. Law § 77, the trial court erred in failing to award them. Tipaldo v Lynn, 76 A.D.3d 477, 907 N.Y.S.2d 177, 2010 N.Y. App. Div. LEXIS 6567 (N.Y. App. Div. 1st Dep't 2010), aff'd, 26 N.Y.3d 204, 42 N.E.3d 670, 21 N.Y.S.3d 173, 2015 N.Y. LEXIS 3505 (N.Y. 2015).

Punitive damages may not be recovered in action under CLS Labor § 740. Bompane v Enzolabs, Inc., 160 Misc. 2d 315, 608 N.Y.S.2d 989, 1994 N.Y. Misc. LEXIS 58 (N.Y. Sup. Ct. 1994).

Punitive damages are not available under CLS Labor § 740. Granser v Box Tree S., 164 Misc. 2d 191, 623 N.Y.S.2d 977, 1994 N.Y. Misc. LEXIS 651 (N.Y. Sup. Ct. 1994).

Defendants' request for attorneys' fees under N.Y. Labor Law § 740(6) was denied because there had been no discovery as to the nature of the plaintiff's claim. Reddington v Staten Island Univ. Hosp., 373 F. Supp. 2d 177, 2005 U.S. Dist. LEXIS 12029 (E.D.N.Y. 2005), aff'd, in part, 511 F.3d 126, 2007 U.S. App. LEXIS 28881 (2d Cir. N.Y. 2007).

10. Defenses and counterclaims

Plaintiff in action under Whistleblower Statute cannot recover if he is found to be accomplice in illegal acts of employer; thus, former employer was entitled to additional discovery with respect to whether plaintiff bore some responsibility for acts attributed to

employer's former president which created substantial and specific risk of injury to general public and led to death of one individual. DaSilva v Clarkson Arms, Inc., 189 A.D.2d 619, 592 N.Y.S.2d 319, 1993 N.Y. App. Div. LEXIS 180 (N.Y. App. Div. 1st Dep't 1993).

Plaintiffs, who were discharged from their employment as armed guards for refusing to work with pistol permits which they believed were invalid, could not invoke doctrine of collateral estoppel to bar defendants from arguing that permits were valid because administrative law judge had previously determined, in context of unemployment benefits proceeding, they were not represented by counsel, and there was no indication that they were aware that unemployment benefits award might later be used in attempt to show liability in retaliatory discharge action. Hughes v Gibson Courier Servs. Corp., 218 A.D.2d 684, 630 N.Y.S.2d 552, 1995 N.Y. App. Div. LEXIS 8709 (N.Y. App. Div. 2d Dep't 1995).

In action for wrongful termination under CLS Labor § 740, inter alia, order denying defendant's motion to add counterclaims for breach of fiduciary duty and fraud except those based on plaintiff's alleged falsifications of his time records would be modified to allow allegations of false time records to proceed under counterclaim for fraud only. Rodgers v Lenox Hill Hosp., 239 A.D.2d 140, 657 N.Y.S.2d 616, 1997 N.Y. App. Div. LEXIS 4643 (N.Y. App. Div. 1st Dep't 1997).

As New York did not recognize a tort for wrongful discharge from an employment at will and no discriminatory motive was alleged, an employee's only possibly viable claim alleging that the employee was wrongfully discharged because the employee would not commit unlawful and unethical acts was one for retaliatory discharge under N.Y. Lab. Law § 740; however, such a claim was time-barred under the one-year limitations period of § 740(4)(a). Russek v Dag Media, Inc., 47 A.D.3d 457, 851 N.Y.S.2d 399, 2008 N.Y. App. Div. LEXIS 327 (N.Y. App. Div. 1st Dep't 2008).

In action alleging termination in violation of whistleblowers' statute, CLS Labor § 740, counterclaim alleging that plaintiff breached fiduciary duty would be dismissed since defendant had previously moved to dismiss on ground (found to have merit) that federal agencies had exclusive jurisdiction over matter because it involved operation of nuclear research laboratory subject to federal regulations; defendant would not be permitted to reverse its position by asserting that state court was appropriate forum to initiate inquiry into issues presented by its counterclaim. Bordell v General Electric Co., 147 Misc. 2d 475, 556 N.Y.S.2d 234, 1990 N.Y. Misc. LEXIS 281 (N.Y. Sup. Ct. 1990).

Employer's evidence of employee's alleged "pre-hire deceit" in stating in response to question on employment application relating to current employment "temp position" was no defense to action under CLS Labor § 740 since alleged misinformation supplied by employee was not material, was not made to induce employment, and was not relied on by employer in hiring her. Bompane v Enzolabs, Inc., 160 Misc. 2d 315, 608 N.Y.S.2d 989, 1994 N.Y. Misc. LEXIS 58 (N.Y. Sup. Ct. 1994).

Absentee employer many not avoid liability under CLS Labor § 740 by delegating to its employee responsibility for enforcement of safety laws, nor would such delegation render employee "accomplice" in employer's failure to comply with law. Granser v Box Tree S., 164 Misc. 2d 191, 623 N.Y.S.2d 977, 1994 N.Y. Misc. LEXIS 651 (N.Y. Sup. Ct. 1994).

There is no exception under CLS Labor § 740 for employees who may initially participate in alleged unlawful activity and then subsequently refuse to engage in such activities and seek protection of statute. Granser v Box Tree S., 164 Misc. 2d 191, 623 N.Y.S.2d 977, 1994 N.Y. Misc. LEXIS 651 (N.Y. Sup. Ct. 1994).

11. Attorneys' fees

As an employee's complaint for retaliatory discharge and amended complaint for prima facie tort were time-barred and without basis in law and fact, it was proper to award an employer reasonable attorneys fees and costs under N.Y. Lab. Law § 740(6). Russek v Dag Media, Inc., 47 A.D.3d 457, 851 N.Y.S.2d 399, 2008 N.Y. App. Div. LEXIS 327 (N.Y. App. Div. 1st Dep't 2008).

Trial court erred in awarding an employer attorneys' fees and costs in an employee's action to recover damages for unlawful termination because her action could not reasonably be characterized as being without basis in law or in fact where, while the employer's evidence indicated that the employee had numerous conflicts with other hospital staff and failed to improve despite opportunities to do so, the employee's annual performance evaluations did not indicate a risk of dismissal until after she complained to upper management about ongoing sterility problems in the operating room. Berde v North Shore-Long Is. Jewish Health Sys., Inc., 162 A.D.3d 624, 78 N.Y.S.3d 402, 2018 N.Y. App. Div. LEXIS 3962 (N.Y. App. Div. 2d Dep't 2018).

Notes to Unpublished Decisions

Analysis

1. Generally; procedural questions
2. Defenses and counterclaims

1. Generally; procedural questions

Unpublished decision: Complaint alleging retaliatory termination in violation of the whistleblower statute was barred by the one-year statute of limitations at N.Y. Lab. Law § 740(4)(a) because the employee's cause of action accrued on the day when he was notified of his suspension pending discharge; his notice of suspension and his ultimate discharge were properly viewed as one personnel action. Dykstra v Wyeth Pharms., Inc., 454 Fed. Appx. 20, 2012 U.S. App. LEXIS 141 (2d Cir. N.Y. 2012).

2. Defenses and counterclaims

Unpublished decision: Even though plaintiff employee may have been in contact with the EEOC prior to April 2003, he did not file any formal charge until that time, thus, all pre-June 2002 conduct by defendant employer was time-barred as to claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., and N.Y. Lab. Law § 740. Antonmarchi v Consol. Edison Co. of N.Y., 514 Fed. Appx. 33, 2013 U.S. App. LEXIS 5164 (2d Cir. N.Y.), cert. denied, 571 U.S. 1098, 134 S. Ct. 790, 187 L. Ed. 2d 601, 2013 U.S. LEXIS 8982 (U.S. 2013).

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

18 NY Jur 2d Civil Rights § 40.

19 NY Jur 2d Civil Servants and Other Public Officers and Employees § 527.

64 NY Jur 2d Health and Sanitation § 105.

84 NY Jur 2d Pleading § 167.

73A NYJur 2d, Judgments § 446.

Law Reviews:

Chagares, Utilization of the disclaimer as an effective means to define the employment relationship. 17 Hofstra L. Rev. 365.

Annotations:

Liability for retaliation against at-will employee for public complaints or efforts relating to health or safety. 75 ALR4th 13.

What constitutes activity of private–sector employee protected under state whistleblower protection statute covering employee's "report," "disclosure," "notification," or the like of wrongdoing–nature of activity reported. 36 ALR6th 203.

Matthew Bender's New York Practice Guides: 4 New York Practice Guide: Business and Commercial §§ 25.07, 25.05, 25.21, 26.05.

Texts: Liddle & Marino, Labor and Employment in New York (Michie) pp 3-3, 3-6, 3-7, 3-46a.

New York Employee Discrimination Handbook (1998 ed, Matthew Bender).

LOCAL FINANCE LAW

Article
1. Short Title; Definitions
2. Local Indebtedness

ARTICLE 1 Short Title; Definitions

Section
2.00. Definitions

HISTORY:
Add, L 1942, ch 424.

§ 2.00. Definitions

As used in this chapter:

1. The term "municipality" shall mean a county, city, town or village.

2. The term "school district" shall mean any school district, except the school districts of the cities of New York, Buffalo, Rochester, Syracuse and Yonkers.

2-a. The term "city school district" shall mean the city school district of a city having less than one hundred twenty-five thousand inhabitants, according to the latest federal census.

2-b. The term "school district in a city" shall mean any school district which is coterminous with, or partly within, or wholly within, a city having less than one hundred twenty-five thousand inhabitants, according to the latest federal census.

2-c. The term "board of cooperative educational services" shall mean any board of cooperative educational services, as defined in section nineteen hundred fifty of the education law, and such board shall, solely for the purpose of contracting indebtedness pursuant to section 25.00 of this chapter, be deemed to be a school district.

3. The term "district corporation" shall mean

(a) A fire district

(b) A river improvement, river regulating or drainage district established by or under the supervision of the department of conservation, or

(c) Any other territorial division of the state, other than a municipality or a school district, which as of December thirty-first, nineteen hundred thirty-eight, possessed the power to

(1) Contract indebtedness in its own name, and

(2) Levy taxes or benefit assessments upon real estate or require the levy of such taxes or assessments.

4. The term "finance board" shall mean

(a) In the case of counties, the board of supervisors.

(b) In the case of cities:

(1) The board of estimate, board of estimate and apportionment or board of estimate and contract in any city in which, as of the effective date of this chapter, such body had the power to authorize the issuance of bonds or notes without the approval, in any case, of the council, common council or board of aldermen.

(2) The council, common council or board of aldermen in any city in which, as of the effective date of this chapter, such body had the power to authorize the issuance of bonds or notes without the approval, in any case, of the board of estimate or board of estimate and apportionment or board of estimate and contract.

(3) The council, common council or board of aldermen and the board of estimate, board of estimate and apportionment or board of estimate and contract, in any city in which, as of the effective date of this chapter, the council, common council or board of aldermen had the power to authorize the issuance of all bonds or notes or bonds or notes for certain objects or purposes only with the approval of the board of estimate, board of estimate and apportionment or board of estimate and contract. In such a city, action by the finance board shall be initiated by the council, common council or board of aldermen.

(c) In the case of towns, the town board.

(d) In the case of villages, the village board.

(e) In the case of school districts, the board of education or board of trustees; in the case of common school districts having one trustee, such trustee.

(f) In the case of district corporations, the governing board or body, except that in the case of river regulating districts the action of the governing board or body thereof shall be subject to the approval of the water power and control commission in relation to the authorization, term, form and contents of bonds and capital notes. Nothing contained in this subdivision shall be construed to affect the power of (a) the executive of a county to veto the acts of the board of supervisors or (b) the executive of a city to veto the acts of the council, common council or board of aldermen, or of the board of estimate, board of estimate and apportionment or board of estimate and contract, when such bodies are acting alone or jointly or (c) the executive of a village to veto the acts of the board of trustees.

5. The term "chief fiscal officer" shall mean:

(a)(1) In the case of counties operating under (1) an alternative form of county government or charter enacted as a state statute or adopted under the alternative county government law or by local law, or (2) the optional county government law, the official designated in such statute, consolidated law or local law as the chief fiscal officer, or, if no such designation is made therein, the official possessing powers and duties similar to those of a county treasurer under the county law as shall be designated by local law.

(2) In the case of counties not included in subparagraph (1) of this paragraph, the treasurer, except that, in the case of such counties having a comptroller, it shall mean the comptroller.

(b) In the case of cities, the comptroller; if a city does not have a comptroller, the treasurer; if a city has neither a comptroller nor a treasurer, such official possessing powers and duties similar to those of a city treasurer as the finance board shall, by resolution, designate. A certified copy of such designation shall be filed with the state comptroller and shall be a public record.

(c) In the case of towns, the town supervisor; if a town has more than one supervisor, the presiding supervisor.

(d) In the case of villages, the village treasurer.

(e) In the case of school districts, the chairman or president of the school board; in the case of common school districts having a sole trustee, such trustee.

(f) In the case of fire districts, the district treasurer; in the case of other district corporations, such official as the finance board shall, by resolution, designate. A certified copy of such designation shall be filed with the state comptroller and shall be a public record.

5-a. The term "chief executive officer" shall mean:

(a) In the case of counties, the chairman of the board of supervisors, except that in those counties having a county administrator, director, executive, manager or president, it shall mean such latter officer.

(b) In the case of cities, the mayor, except that in those cities having a city manager, it shall mean such city manager.

(c) In the case of towns, the supervisor or presiding supervisor.

(d) In the case of villages, the mayor, except that in those villages having a president or manager, it shall mean such latter officer.

(e) In the case of school districts, the chairman or president of the school board; in the case of common school districts having a sole trustee, such trustee.

(f) In the case of fire districts, the chairman of the board of commissioners; in the case of other district corporations, the chairman of the board of commissioners or other comparable officer of the finance board of such district corporation.

6. The term "obligations" shall mean bonds or notes.

7. The term "average assessed valuation" shall mean the average assessed valuation of the real property within a municipality, school district or fire district subject to taxation for any purpose by such municipality, school district or fire district as determined by averaging the assessed valuation of such real property in the last completed assessment roll and the four preceding assessment rolls of such municipality, school district or fire district. If less than five assessment rolls have been prepared for a municipality, school district or fire district, the average assessed valuation shall be determined by averaging the assessed valuation in the last completed assessment roll and all the preceding assessment rolls of such municipality, school district or fire district. For the purpose of contracting indebtedness or for the purpose of preparing debt statements, the assessment rolls referred to in this subdivision shall mean such assessment rolls as completed, verified and filed by the assessors.

7-a. The term "average full valuation" shall mean the valuation of taxable real estate of a municipality or of a school district in a city which is derived by dividing the assessed valuations of taxable real estate on the last completed and the four preceding assessment rolls by the equalization rates established by the authorized state officer or agency for such rolls or, in the case of school districts, by the city and town rates so established for the rolls on which the school district rolls were based. In a county the average full valuation of taxable real estate thereof shall be derived by dividing the assessed valuations of taxable real estate on the last completed and four preceding assessment rolls of the cities and towns therein by the equalization rates established for such rolls; provided, however, in a county having a county department of assessment the state equalization rates established for the cities and towns therein on the basis of the county roll shall be applied to the appropriate portions of the county roll. The sum of the quotients thus obtained shall be divided by five. In such computations the last completed assessment roll shall be the latest roll for which a state equalization rate shall have been established, or in the case of school districts the last completed assessment roll thereof shall be the latest school district roll for all parts of which the equalization rates to be applied thereto shall have been established. In addition to the foregoing, where real estate on the assessment roll is partially exempt under the provisions of title two-a of article four of the real property tax law, an assessment roll shall not be deemed to be completed until a railroad ceiling, or, if a railroad ceiling has not been certificated, an estimated railroad ceiling established in accordance with the provisions of such title shall have been applied thereto.

Where, after the creation of a new municipality or school district in a city, or after a consolidated school district shall have been created by the consolidation of a school district in a city and one or more other school districts.

1. There is no completed assessment roll or rolls of the municipality or school district as so created, the average full valuation of taxable real estate thereof shall be determined from the last completed assessment roll or rolls upon which the real estate included in the municipality or school district was assessed for city, town or school district purposes, as the case may be, or

2. There are assessment rolls of the municipality or school district as so created which have been completed for at least one year but less than five years, the average full valuation of the taxable real estate of the municipality or school district shall be determined from the last completed assessment roll or rolls and the preceding assessment roll or rolls, if

any, of the municipality or district, which were completed after such creation.

Where after the boundaries of a municipality or school district in a city shall have been altered so that real estate subject to taxation for municipal or school district purposes, as the case may be, shall have been thereby added to or subtracted from the area of the municipality or school district,

1. There is no completed assessment roll of the municipality or school district as so altered, the average full valuation of the taxable real estate of the municipality or school district shall be determined from the last completed assessment roll or rolls and the four preceding assessment rolls upon which the real estate included in the municipality or school district after such alteration was assessed prior to such alteration for city, town or school district purposes, as the case may be, or

2. There are assessment rolls of the municipality or school district as so altered which have been completed for at least one year but less than five years, the average full valuation of taxable real estate of the municipality or school district shall be determined from the last completed assessment roll or rolls and the four proceeding assessment rolls upon which the real estate included in the municipality or school district after such alteration was assessed prior to such alteration for city, town or school district purposes, as the case may be.

For the purpose of contracting indebtedness or for the purpose of preparing debt statements, the assessment rolls referred to in this subdivision shall mean such assessment rolls as completed, verified and filed by the assessors.

8. The terms "real property" or "real estate" shall mean such terms as defined in section two* of the tax law, as amended from time to time.

9. The term "capital improvement" shall mean:

(a) Any physical public betterment or improvement or any preliminary studies and surveys relative thereto, or

(b) Land or rights in land, or

(c) Any furnishings, machinery, apparatus or equipment for any physical betterment or improvement when such betterment or improvement is first constructed or acquired, or

(d) Any combination of items (a), (b) and (c).

10. The term "annual budget" shall mean the annual budget or estimate, as finally adopted, of a municipality, school district or district corporation which is required by law to adopt an annual budget or estimate of the expenditures to be made during a current or ensuing fiscal year for the general support or for the expenses of the government of such municipality, school district or district corporation during such fiscal year.

11. The term "budgetary appropriation" shall mean an appropriation for a specific object or purpose in the annual budget as finally adopted or in the annual ordinance, resolution or local law of a municipality, school district or district corporation making appropriations for the general support or expenses of the government thereof, which appropriation is to be paid from taxes or assessments or from other current revenues or from the proceeds of notes issued in anticipation of the collection of such taxes, assessments or other current revenues.

12. The term "voting strength" shall mean the aggregate number of votes which all the members of the finance board are entitled to cast. If the finance board consists of more than one body, the term shall mean, in relation to each body, the aggregate number of votes which all the members of such body are entitled to cast.

13. The term "housing authority" shall mean an "authority" as that term is defined in section three of the public housing law, as amended from time to time.

14. The term "local share of safety net assistance" shall mean that term as defined in section ninety-three of the social services law, as amended from time to time.

15. The terms "solvent fund or system" or "solvent," in referring to a pension or retirement system or fund, shall mean a pension or retirement system or fund which is on an actuarial reserve basis with current payments to the reserve adequate to provide for all current accruing liabilities.

16. The term "assessment" shall mean any charge based in whole or in part on benefits (other than real estate taxes, water or sewer charges, rents or rates) against a parcel of real property for any capital improvement, for any work or service, for operation and maintenance, or for debt service.

17. The term "resolution" shall mean resolution, act or ordinance.

18. The term "renewal" as applied to a note, shall mean a note the date of payment of which has been extended or a note issued for the purpose of securing money for the redemption of an outstanding note. The proceeds of such renewal note shall be applied only to the redemption of the note for the renewal of which it was issued.

19. The term "fiscal year" shall mean the fiscal year provided by law for a municipality, school district or district corporation, or if no fiscal year is so provided, such fiscal year as shall be determined by resolution of the finance board of such municipality, school district or district corporation. A statement of such determination shall be filed with the state comptroller and shall be a public record.

20. The term "class," as applied to the terms "objects or purposes", "capital improvements" or "equipment", shall mean an unspecified number of items, the description of which is contained in a single subdivision, other than subdivision thirty-five of paragraph a of section 11.00 of this chapter, notwithstanding the fact that such subdivision may be drafted in the singular number.

*Now in Real P Tax Law § 102, sub 12, which has substance transferred from Tax Law § 2, sub 6.

21. The term "full valuation", when used in relation to real property subject to taxation by a school district, shall mean the valuation which is derived by dividing the appropriate portions of the assessed valuation of the real property concerned, as shown by the last completed assessment roll of the school district, by the city and town equalization rates established by the authorized state officer or agency for the rolls on which such school district roll was based. Where, in the case of a newly created school district, there is no completed assessment roll of such school district in existence, full valuation shall be determined from the last completed assessment roll or rolls upon which the real property included within the district was assessed for school purposes prior to such creation. In such computations the last completed assessment roll shall be the latest roll for all parts of which the equalization rates to be applied thereto shall have been established. In addition to the foregoing, where real estate on the assessment roll is partially exempt under the provisions of title two-a of article four of the real property tax law, an assessment roll shall not be deemed to be completed until a railroad ceiling, or, if a railroad ceiling has not been certificated, an estimated railroad ceiling established in accordance with the provisions of such title shall have been applied thereto.

21-a. The term "full valuation", when used in relation to real property subject to taxation by a fire district, shall mean the valuation which is derived by dividing the assessed valuation of the real property concerned, as shown by the last completed assessment roll for the fire district, by the town equalization rate established by the authorized state officer or agency for such roll. Where, in the case of a newly-created fire district, there is no completed assessment roll for such fire district, full valuation shall be determined from the last completed assessment roll upon which the real property included within the district was assessed for town purposes prior to such creation. Where, after the boundaries of a fire district shall have been changed so that real property subject to taxation for fire district purposes shall have been thereby added to or subtracted from the area of the fire district, there is no completed assessment roll for the fire district as so changed, full valuation shall be determined from the last completed assessment roll upon which the real property included in the fire district after such change was assessed prior to such change for town or fire district purposes, as the case may be. For the purpose of contracting indebtedness or for the purpose of preparing debt statements, the assessment rolls referred to in this subdivision shall mean such assessment rolls as completed, verified and filed by the assessors. Where two or more fire districts consolidate to form one fire district the consolidated fire district, for the purpose of this subdivision, shall not be deemed a newly-created fire district, but shall be deemed an existing fire district and its full valuation shall be determined accordingly.

22. The term "specific" as applied to the terms "object or purpose", "capital improvement" or "equipment" shall mean a single item, or a specified number of items, the description of which is contained in a single subdivision of paragraph a of section 11.00 of this chapter.

23. Urban renewal. The term "urban renewal" shall mean that term as defined in the general municipal law.

24. The term "financially responsible party" shall mean a person or persons other than the issuer, as determined by the finance board, or in the case of the city of New York, the mayor and the comptroller, to have sufficient net worth and liquidity to (a) purchase and pay for on a timely basis, under the terms of an agreement with the issuer, all of the bonds and notes which may be tendered for repurchase or redemption pursuant to the terms of the bonds or notes by the holders thereof, or (b) advance funds on a timely basis on behalf of a municipality, school district or district corporation to pay bonds, notes or other evidences of indebtedness of such public body on their date or dates of maturity or redemption.

25. The term "governing body" of a municipality or school district shall mean the finance board or its duly authorized designee pursuant to section 56.00 of this chapter.

26. The term "interest" shall mean any payments, however designated, for the use of borrowed money. Interest shall include, but not be limited to, accretions to the value of bonds, notes or other obligations in amounts projected as of their dates of issuance, capital appreciation to bonds, notes or other obligations in amounts projected as of their dates of issuance and any similar payments whether scheduled to be made periodically or at the maturity or prior redemption of bonds, notes or other obligations.

27. The term "face value at maturity" shall mean all interest, principal and other payments due to the holders of bonds, notes or other obligations at their maturity or prior redemption, provided however, that current interest on bonds, notes or other obligations on which interest is payable at least annually shall be excluded.

HISTORY:

Add, L 1942, ch 424; amd, L 1943, ch 711, eff April 23, 1943; L 1944, ch 607; L 1944, ch 608, eff April 6, 1944; L 1944, ch 609; L 1944, ch 611, eff April 6, 1944; L 1945, ch 837; L 1946, ch 806, eff April 14, 1946; L 1950, ch 608, § 1; L 1950, ch 719, eff Jan 1, 1951; L 1950, ch 762, §§ 51, 52; L 1950, ch 817, § 1; L 1951, ch 582, eff July 1, 1951; L 1951, ch 790; L 1951, ch 831, eff Jan 1, 1952; L 1954, ch 141, §§ 11, 12; L 1957, ch 778, § 1, eff July 1, 1957; L 1959, ch 142; L 1959, ch 601; L 1959, ch 671; L 1960, ch 392, eff April 7, 1960; L 1960, ch 761, eff June 1, 1960; L 1960, ch 1053, § 16; L 1961, ch 405, eff April 11, 1961; L 1963, ch 86, eff March 11, 1963; L 1963, ch 989, eff May 3, 1963; L 1964, ch 146, eff March 16, 1964; L 1972, ch 65, § 1, eff March 21, 1972, to be retroactive to, and deemed to have been in full force and effect from and after Jan 1, 1972; L 1977, ch 914, eff Aug 11, 1977; L 1984, ch 621, § 1, eff July 27, 1984; L 1991, ch 413, § 1, eff July 19, 1991; L 1994, ch 201, § 1, eff June 20, 1994, deemed eff Jan 1, 1994; L 1997, ch 436, § 112 (Part B), eff Aug 20, 1997; L 2009, ch 74, § 15, eff March 21, 2010 (see 2009 note below).

Commission Note: Originally the definition of the term "average assessed valuation" in subdivision 7 followed the method of computation set forth in § 4 of article 8 of the State Constitution. This subdivision clarified the situation where a parcel of property was subject to taxation for certain purposes and not others, such as real property owned by a person who performed military or naval services for the United States and who purchased such real property with the proceeds of a bonus or pension granted him by the United States or the State of New York for such services. Such real property was to be included in determining the average assessed valuation of the municipality, school district or district corporation which subjected it to taxation for any purpose. It was also the intent of this subdivision that in any case in which a parcel of real property was removed from the tax roll of a municipality, school district or district corporation during the period in which a tax lien on such property was held by any municipality, school district or district corporation, such real property should be included in computing the average assessed valuation of the municipality, school district or district corporation from whose tax roll such property had been removed.

While the term "capital improvement" is used in several places in the Local Finance Law, subdivision 9 was primarily designed to implement § 11 of article 8 of the State Constitution by defining the term "capital improvement". Such term has been used in that constitutional provision without being defined.

The term "budgetary appropriation" was defined in subdivision 11 so as to clearly indicate the type of appropriation for debt service and other current expenses, generally contained in the annual "budget" of a municipality, as the term "budget" is commonly understood.

Throughout this act there are numerous references to the fiscal year of municipalities, school districts or district corporations. The definition of the term "fiscal year" was intended to aid municipalities and district corporations which do not have a fixed fiscal year or which operate under different fiscal years for various purposes. Such municipalities and district corporations are empowered to select a fiscal year for the purposes of this chapter.

Revision Notes: [1944 Revision] Subd 3. The definition of a district corporation was taken from New York Constitution, Article VIII, section 3. The Commission was of the opinion that the Constitution had reference to those units which possessed power to contract indebtedness in their own names. Hence the insertion of the words "in its own name" in subdivision three.

Subd 11. The 1944 amendment to this section was intended to make the definition of "budgetary appropriation" apply to appropriations by all units whether they adopted an annual budget (as defined by the Local Finance Law) or not.

Subd 16. The Commission believed that the definition of "assessments" should be clarified to refer to those charges based in whole or in part on benefits, and that the definition should be expanded to cover clearly "operation and maintenance" and "debt service."

[1945 Revision] Subd 5, sub-pars b and f. These provisions were amended to provide that, in the case of a city which had neither a comptroller nor a treasurer and in the case of a district corporation other than a fire district, the designation of an official to be the chief fiscal officer should be accomplished by resolution and that the filing of such designation with the State Comptroller should be done by filing a certified copy thereof.

Editor's Notes: See 1961 note to § 11.00.

See 1972 note to Educ L § 2502.

Sections 14–16 of chapter 86 of the Laws of 1963, dealing with the effect of such chapter 86, are published under Art 4, Title 2-A, of the Real Property Tax Law.

In connection with L 1950, ch 762, see extensive historical note to Education Law, Article 51.

Laws 1951, ch 582, § 4, provides: Any bond resolution or capital note resolution adopted by the finance board of a municipality, school district or district corporation pursuant to the provisions of the local finance law prior to July first, nineteen hundred fifty-one, shall be effective on and after such date (subject to any mandatory or permissive referendum in relation thereto), notwithstanding the amendments to the local finance law made by this act.

Laws 1951, ch 582, § 5, provides: A special tax or a tax to be collected in installments which is voted prior to July first, nineteen hundred fifty-one, shall be effective for the purpose of adopting a bond resolution or capital note resolution pursuant to the provisions of the local finance law on and after such date if the notice of the meeting or election at which such tax is voted complies with the provisions of section 41.10 of the local finance law as added by this act.

Laws 1957, ch 778, § 4, eff May 1, 1957, provided: Where fire district bonds are sold at public sale on or after July first, nineteen hundred fifty-seven, any debt statement prepared and filed in relation to such sale prior to July first, nineteen hundred fifty-seven, shall be prepared in the manner provided by the local finance law as in force and effect on July first, nineteen hundred fifty-seven. The state comptroller shall prescribe the form of such debt statement and prepare printed forms thereof on or before June first, nineteen hundred fifty-seven, and make such forms available for distribution to fire districts.

Laws, 1959, ch 601, § 14, provides:

§ 14. Separability clause. If any clause, sentence, paragraph, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section or part thereof directly involved in the controversy in which such judgment shall have been rendered.

Laws 1964, ch 146, § 2, provides:

§ 2. This act shall take effect January first, nineteen hundred sixty-five, but that portion of paragraph a of subdivision five of section 2.00 of the local finance law authorizing certain counties to adopt a local law designating the chief fiscal officer shall take effect immediately.

Laws 1997, ch 436, § 1 (Part B), eff Aug 20, 1997, provides as follows:

Section 1. Short title. This act shall be known and may be cited as "The Welfare Reform Act of 1997". (Amd, L 1998, ch 214, § 1, eff July 7, 1998, deemed eff Aug 20, 1997.).

Laws 1997, ch 436, § 143 (Part B), eff Aug 20, 1997, provides as follows:

§ 143. Notwithstanding any provision of law to the contrary, the attorney general and the commissioners of social services, taxation and finance, health, and labor, and the chair of the workers' compensation board, and any appropriate entity of the state, shall be authorized to promulgate regulations on an emergency basis to ensure the implementation of this act and may take any steps necessary to implement this act prior to its effective date.

Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

§ 18. Savings clause. Notwithstanding the repeal or amendment of any law by this act, nothing in this act shall be construed to impair the consolidation or dissolution of any local government entity pursuant to any such repealed or amended law if there was commenced in or for such local government entity prior to the effective date of this act a consolidation or dissolution proceeding pursuant to such law, in which event the provisions of such former law shall govern such proceeding as though such former law had not been repealed hereby.

Amendment Notes: 2009. Chapter 74, § 15 amended:

Sub 21-a by deleting at fig 1 "assesment", at fig 2 "pursuant to section one hundred seventy-two of the town law," and adding the matter in italics.

1997. Chapter 436, § 112 (Part B) amended:

Sub 14 by deleting at fig 1 "home relief", at fig 2 "welfare" and adding the matter in italics.

1994. Chapter 201, § 1 amended:

By adding sub 25–27.

1991. Chapter 413, § 1 amended:

By adding sub 24.

Repeal Notes: [1960 (ch 392)] The portion of paragraph (a) of subdivision 5 of § 2.00 of the local finance law repealed by this act defined the Suffolk county auditor as its chief fiscal officer. It is now obsolete because of the adoption of the Suffolk county charter.

Notes to Decisions

Analysis

1. In general; municipality
2. School district
3. District corporation
4. —Fire district
5. Chief fiscal officer
6. Assessed value
7. Capital improvements
8. Resolution for indebtedness

1. In general; municipality

While a water district, for special objects of certain statutes, has been included, as a matter of convenient reference, within the terms "municipal corporation" or "municipality," it is essentially and only "a special administrative area." Kenwell v Lee, 261 N.Y. 113, 184 N.E. 692, 261 N.Y. (N.Y.S.) 113, 1933 N.Y. LEXIS 1263 (N.Y.), reh'g denied, 262 N.Y. 563, 188 N.E. 65, 262 N.Y. (N.Y.S.) 563, 1933 N.Y. LEXIS 1084 (N.Y. 1933).

Plaintiff fire and water district is a political, territorial and civil division of the State, designated a "district", public corporation (Local Finance Law, § 2.00, subd 3, par [c]; General Construction Law, § 66, subd 3), created for a public purpose, supported by public funds, governed by parties deriving their authority from government, possessing the power to contract indebtedness and levy taxes but having no independent sovereignty of its own, and as such, it falls under the jurisdiction of the County Civil Service Commission operating within its territorial area and must therefore make all appointments and promotions of employees from a civil service list. Hyde Park Fire & Water Dist. v County of Dutchess, 97 Misc. 2d 104, 410 N.Y.S.2d 783, 1978 N.Y. Misc. LEXIS 2755 (N.Y. Sup. Ct. 1978).

New York regional off-track betting corporation was not a "municipality" for purposes of N.Y. Local Fin. Law § 85.80 that was allowed to declare bankruptcy without obtaining prior approval, and its petition under Chapter 9 of the Bankruptcy Code was dismissed pursuant to 11 U.S.C.S. § 921(c) because it did not obtain proper approval before it declared bankruptcy. Although the Suffolk County (New York) Legislature issued a resolution which authorized the corporation to declare Chapter 9 bankruptcy, it exceeded its authority when it did so. In re Suffolk Reg'l Off-Track Betting Corp., 462 B.R. 397, 2011 Bankr. LEXIS 4614 (Bankr. E.D.N.Y. 2011).

2. School district

The provisions of § 60.10(a) of the Local Finance Law apply to central school districts. 1953 Ops St Compt 360.

Where the president of a central school district board of education is a director of a bank, a prohibited interest in contract does not occur when the district (1) designates the bank as a depository and (2) sells obligations to the bank in accordance with Local Finance Law, § 60.10. 1972 Ops St Compt File #747.

A central high school district may issue tax anticipation notes. 1976 Ops St Compt File #507.

3. District corporation

The water acquisition and storage district of the town of Tonawanda is not a district corporation within the meaning of this section. 1945 Ops St Compt 593.

Board of water commissioners has no power to contract indebtedness. 1955 Ops St Compt 311.

Board of governors of public hospital has no power to contract indebtedness to obtain funds for hospital purposes. It does have authority to employ professional fund raisers. 1965 Ops St Compt File #452.

4. —Fire district

Terms "fire district" and "district corporation," as used in CLS Loc Fin § 102.00 are not mutually exclusive since CLS Loc Fin § 2.00(3) provides that term "district-corporation" includes fire district. Eckelman v Anderson, 180 A.D.2d 618, 579 N.Y.S.2d 446, 1992 N.Y. App. Div. LEXIS 1255 (N.Y. App. Div. 2d Dep't), app. denied, 79 N.Y.2d 759, 584 N.Y.S.2d 447, 594 N.E.2d 941, 1992 N.Y. LEXIS 1461 (N.Y. 1992).

A fire district may invest the proceeds of a bond sale pending their use to carry out the purpose for which they were issued. 1954 Ops St Compt 12.

Fire district has no power to issue bonds to finance construction of addition to firehouse not owned by it. 1965 Ops St Compt File #244.

5. Chief fiscal officer

The treasurer is chief fiscal officer of city of New Rochelle for purposes of this section. 1955 Ops St Compt File #7431.

The Director of Finance is, in fact, the chief fiscal officer of the City of New Rochelle, and is the person charged with the duty of making the annual report required by section 30 of the General Municipal Law. 1955 Ops St Compt File #7557.

Proceeds of bonds issued by school district to finance library building are to be disbursed by chief fiscal officer of district in payment of claims audited and ordered paid by board of education. 1966 Op St Compt No. 66–728.

The "chief fiscal officer" of the city of Lackawanna is the city comptroller. 1968 Ops St Compt File #71.

Powers of town supervisor as treasurer under CLS Town Law may be transferred to town comptroller by local law subject to mandatory referendum; whether it is proper to designate town comptroller as chief fiscal officer must be made on case by case basis depending on particular function to be performed. Ops St Compt 89-35.

6. Assessed value

Real property which is bid in by the city treasurer at a tax sale or against which the city holds and owns tax liens, although exempt from annual city taxes by the city charter, is nevertheless subject to taxation and may be included in computing the average assessed valuation for purposes of determining the city's debt limit. L. L. F. Realty Co. v Fuchs, 273 A.D. 111, 75 N.Y.S.2d 356, 1947 N.Y. App. Div. LEXIS 2941 (N.Y. App. Div. 1947).

Although New York Comptroller was required to use equalization rates established by New York Office of Real Property Services (ORPS) to determine if village had exceeded taxing authority, neither N.Y. Gen. Constr. Law § 61 nor N.Y. Local Fin. Law § 2.00(7-a) required the comptroller to use equalization rates in effect on or before date village adopted its budget, and comptroller's decision to use uncorrected ORPS rates was arbitrary and irrational where ORPS had corrected rates after village adopted its budget and village called those corrections to comptroller's attention before he made his decision. Inc. Vill. of W. Hampton Dunes v McCall, 289 A.D.2d 837, 734 N.Y.S.2d 689, 2001 N.Y. App. Div. LEXIS 12311 (N.Y. App. Div. 3d Dep't 2001), app. dismissed, 99 N.Y.2d 652, 760 N.Y.S.2d 105, 790 N.E.2d 279, 2003 N.Y. LEXIS 420 (N.Y. 2003), app. denied, 1 N.Y.3d 503, 775 N.Y.S.2d 779, 807 N.E.2d 892, 2003 N.Y. LEXIS 4073 (N.Y. 2003).

The debt limit of a fire district is computed by adding the last five completed assessment rolls, dividing by five, and multiplying that average by .05. 1956 Ops St Compt 167.

The last completed assessment roll to be used for calculating tax and debt limits is the assessment roll as it comes from the assessor after all action open to him, including administrative review, has been completed. 1984 Op St Compt 84-55.

7. Capital improvements

The word "apparatus" does not include within its meaning road-building materials, such as stone, gravel, and bituminous surfacing. 1946 Ops St Compt 591.

The resurfacing of a highway or street is a capital improvement. 1946 Ops St Compt 623.

A village may issue serial bonds or capital notes for the purpose of financing the employment of experts to appraise the value of the real property within the village. 1952 Ops St Compt 258.

8. Resolution for indebtedness

Separate capital note resolutions must be adopted for each specific object or purpose. However, one issue of capital notes may be sold in the total amount of the separate authorizations. 1957 Ops St Compt File #57-846.

Agency Opinions

Analysis

1. School district
2. District corporation
3. Chief fiscal officer
4. Assessed value
5. Resolution for indebtedness

1. School district

A board of cooperative educational services may enter into an installment contract to purchase computer equipment. 1979 Op St Compt File #557.

2. District corporation

A soil conservation district is not a "district corporation" within the meaning of this section and has no power to borrow money. 1948 NY Ops Atty Gen Jan 13.

A soil conservation district is a "district corporation" as defined in this section, and is not subject to the requirements of § 103 of the General Municipal Law as to letting contracts on competitive bidding. 1961 NY Ops Atty Gen Oct 5.

The Port Washington Police District may enter into a municipal cooperation agreement to perform police services for a village located outside the district unless the village, in accordance with the Nassau County Charter, has transferred the police function to the Nassau County Police Department. 1983 NY Op Atty Gen No. 83-8, 1983 N.Y. AG LEXIS 92 February 8, 1983.

3. Chief fiscal officer

The chief fiscal officer of a county may not charge a fee for the issuance of a certificate of residence under Education Law, § 6305(3), nor may a county by local law authorize the imposition of such a fee. 1983 N.Y. AG LEXIS 84.

4. Assessed value

N. Y. Const. Art. VIII, § 4, provides that completed assessment rolls mean such rolls as they stand upon completion of all action open to assessing officials. 1944 NY Ops Atty Gen Jan 26.

The assessed valuation of municipalities for debt limit purposes before March 4, 1946, included "pension exempt" property in all municipalities wherein it was taxable for streets and highways, but after that date it included such property only in cities or villages wherein it was taxable for local school purposes by the municipality rather than by a school district. 1946 NY Ops Atty Gen May 23.

5. Resolution for indebtedness

Grouping of bond resolution for construction of new school building with bond resolution for reconstruction of existing school building under single proposition is not authorized under § 104.00(c). Estoppel procedure of §§ 80.00-84.00 eliminates objection based on such grounding; after this procedure has been followed, approval may be granted under § 104.00(c). 1955 N.Y. Op. Att'y Gen. No. 158.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 11.00; CLS Educ §§ 1950, 6305; CLS Gen City § 24-i; CLS Gen Const § 61; CLS Gen Mun § 709; CLS Pub A § 2432; CLS Real P Tax §§ 489-pp, 489-s; CLS Sec Cl Cities § 60; CLS Town §§ 55-a, 194, 209-f, 209-g.

This section referred to in CLS Gen Mun § 99-p; CLS Ins §§ 107, 6102.

Definition of fiscal year under various laws, CLS Alt Co Gov § 600; CLS County § 352; CLS Educ 2515; CLS Sec Cl Cities § 73; CLS St Fin § 3; CLS Town §§ 101, 181; CLS Vill § 5-500, sub 4.

Establishment of boards of cooperative educational services pending the creation of intermediate districts, CLS Educ § 1950.

Date for determining last completed assessment rolls, CLS Gen Constr § 61.

Jurisprudences:

26 NY Jur 2d Counties, Towns, and Municipal Corporations § 661.

27 NY Jur 2d Counties, Towns, and Municipal Corporations § 1544.

3 Am Jur Proof of Facts 2d 1, Overassessment of Income-Producing Property—Neighborhood Shopping Center.

19 Am Jur Proof of Facts 313, Correlation of Paving Benefit and Special Assessments.

Law Reviews:

Hochberg, Public authority bond issues: the need for legislative reform. 21 NY L F 183.

ARTICLE 2 Local Indebtedness

Title 1. Power to Contract Indebtedness and Periods of Probable Usefulness

Section
11.00. Periods of probable usefulness

Title 2. Local Obligations; Types Thereof

20.00. Types of obligations which may be issued
21.00. Serial bonds
23.00. Bond anticipation notes
24.00. Tax anticipation notes
28.00. Capital notes
29.00. Budget notes

Title 3. Local Obligations: Authorization Thereof

30.00. Agency authorizing issuance of obligations
31.00. Bond resolution and capital note resolution
38.00. Referenda on bond resolutions or capital note resolutions; fire districts and other district corporations
41.00. Repeal of unexpended authorizations

Title 4. Local Obligations: Terms, Form and Contents Thereof; Sale and Issuance Thereof

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Title 6. Local Obligations: Estoppel from Contesting Validity Thereof

80.00. Bond resolution, or note resolution or certificate, may contain estoppel clause
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82.00. Twenty day period of limitation
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Title 8. Limitations on the Power to Contract Indebtedness

100.00. Requirement of pledge of faith and credit
101.00. Giving or loaning of municipal credit and contracting indebtedness other than for municipal purposes prohibited
104.00. Limitation on amount of local indebtedness which may be contracted
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Title 12. Miscellaneous Provisions

160.00. Action by finance board
162.00. Exemption from taxation

165.00. Deposit and use of proceeds from sale of bonds, bond anticipation notes, capital notes, urban renewal notes or budget notes

HISTORY:
Add, L 1942, ch 424.

TITLE 1 Power to Contract Indebtedness and Periods of Probable Usefulness

HISTORY:
Add, L 1942, ch 424.

§ 11.00. Periods of probable usefulness

a. A municipality, school district or district corporation may not contract indebtedness for any object or purpose for a period longer than the period of probable usefulness set forth below for such object or purpose, provided, however, that for purposes of selling bonds or notes evidencing indebtedness contracted for any two or more objects or purposes, or any combination thereof, for which the periods of probable usefulness as determined pursuant to this section are not all the same, such indebtedness may be contracted for a period no longer than the weighted average period of probable usefulness of the objects or purposes. Unless the context requires otherwise, whenever the phrase "period of probable usefulness" is used in this chapter, it shall include weighted average period of probable usefulness. For purposes of this chapter, indebtedness contracted for an object or purpose (or class of objects or purposes) shall be deemed to be contracted for no longer than the period of probable usefulness of such object or purpose (or class of objects or purposes) irrespective of whether such indebtedness is combined with indebtedness contracted for other objects or purposes (or classes of objects or purposes) for purpose of sale and the combined indebtedness is contracted for the weighted average period of probable usefulness of all of the objects or purposes (or classes of objects or purposes) for which it is contracted. Weighted average period of probable usefulness shall be determined by the governing body by computing the sum of the products derived from multiplying the dollar value of the portion of the proceeds of the indebtedness expected to be received for each object or purpose (or class of objects or purposes) by the period of probable usefulness, or, if less, the maximum authorized maturity of indebtedness to be contracted for such object or purpose (or class of objects or purposes), as determined by the bond resolution authorizing such indebtedness, and dividing the resulting sum by the dollar value of the proceeds expected to be received by the municipality, school district or district corporation from the combined indebtedness. Preliminary costs of surveys, maps, plans, estimates, and hearings in connection with a capital improvement, and costs incidental to such improvement, including but not limited to legal fees, printing or engraving, publication of notices, taking of title, apportionment of costs, and interest during construction, shall be deemed part of the cost of the object or purpose in connection with which they are incurred. Where a municipality is authorized by law to pay to the state or a county all or part of the cost of a capital improvement, the period of probable usefulness determined in this paragraph for a like capital improvement shall be the period of probable usefulness for the municipality's share of the cost of such capital improvement. The period of probable usefulness of each such object or purpose is hereby determined to be as follows:

* * * * *

11. Buildings. The acquisition or construction of buildings not included in any other subdivision hereof, whether or not including grading or improvement of the site, original furnishings, equipment, machinery or apparatus required for the purposes for which such buildings are to be used, as follows:

(a) Class "A" (fireproof and certain fire resistant) buildings.

(1) Buildings, the walls of which are constructed of brick, stone, concrete, metal or other incombustible material, and in which there are no wooden beams or lintels, except wood glue laminated structural members, and in which the floors, roofs, stairhalls, and other means of vertical communication between floors and their enclosures are built entirely of brick, stone, metal or other incombustible materials, and in which no woodwork or other inflammable material is used in any of the rough partitions, floor or ceiling structures, or

(2) Buildings, not more than one story above the ground, the outer walls of which are constructed of brick, stone, concrete, metal, stucco or other fire-resisting material and which are to be used as school houses by school districts wholly outside of a city, thirty years.

(b) Class "B" (fire-resistant) buildings. Buildings, the outer walls of which are constructed of brick, stone, concrete, metal, stucco or other fire-resisting material, twenty-five years.

(c) Class "C" buildings. Buildings which are neither class "A" nor class "B", as defined in items (a) and (b) above, including any such building which is rebuilt or altered so that it, together with any addition or vertical or other extension, is not fireproof or fire-resisting, as thus defined, fifteen years.

12. Additions to or conversion of buildings.

(a)(1) The construction of an addition or additions to or the reconstruction of a class "A" building, whether or not such construction or reconstruction includes grading or improvement of the site, twenty-five years, except as hereinafter provided; the conversion of a class "B" or class "C" building into a class "A" building, whether or not such conversion includes grading or improvement of the site, twenty-five years. If indebtedness has been contracted or is to be contracted with a maximum maturity of over twenty-five years, but not to exceed thirty years, to finance the cost of acquisition or construction of a class "A" building and if more than twenty-five

annual installments of principal on the indebtedness evidenced or to be evidenced by bonds or notes have not matured, then the foregoing twenty-five year period of probable usefulness for the construction of an addition to such class "A" building shall be increased by the number of years over twenty-five as there are unmatured annual installments of principal on such indebtedness which has been or is to be contracted for the class "A" building; provided that such addition is to be constructed to meet the construction standards of the class "A" building to which it is an addition. The maximum maturity of such indebtedness for the class "A" building shall be measured from the date of the bonds or from the date of the first bond anticipation note issued in anticipation of such bonds, whichever is the earlier.

(2) The construction of an addition or additions to or the reconstruction of a class "B" building or the conversion of a class "C" building into a class "B" building, whether or not such construction, reconstruction or conversion includes grading or improvement of the site, fifteen years.

(3) The construction of an addition or additions to or the reconstruction of a class "C" building, whether or not such construction or reconstruction includes grading or improvement of the site, ten years.

(b) The periods of probable usefulness set forth in item (a) above shall include original furnishings, equipment, machinery or apparatus required for the purposes for which such additions to such buildings or for which such reconstructed or converted buildings are to be used.

(c) A building which is to be attached to an existing building or buildings shall be deemed to be a new building and not an addition if the probable useful life thereof is not dependent upon the useful life of such existing building or buildings.

(d) The terms "class 'A' building," "class 'B' building" and "class 'C' building," as used in this subdivision, shall mean such buildings as they are described in subdivision eleven of this paragraph.

12-a. Demolition and repair of buildings. The demolishing or repair of any (a) privately owned building or structure that poses a significant threat to public health or safety, five years, or (b) municipally owned structure or building, or any building or structure owned by a school district or district corporation, whenever the same is no longer of any use or value or has become dangerous or detrimental to human life, health or safety, ten years.

* * * * *

21. Land acquisition.

(a) The acquisition of land or permanent rights in land not provided for in any other subdivision hereof, thirty years;

(b) The financing of the acquisition of land, permanent rights in land or temporary easements in land incidental to a capital improvement, inclusive of any administrative or other expenditures arising therefrom or related thereto, if such acquisition and expenditures are financed from a fund into which are paid the proceeds of the sale of bonds or bond anticipation notes issued in anticipation of such bonds and out of which the cost of such acquisition and such expenditures are paid, thirty years.

22. Dredging and construction of dikes and bulkheads. The dredging and making navigable of creeks, streams, bays, harbors and inlets, whether or not including the construction, reconstruction of or addition to a dike, bulkhead, dam, sea wall, jetty or similar device for navigation purposes or to prevent the encroachment of or damage from flood or storm waters:

(a) Construction work of steel, stone or concrete, thirty years.

(b) Construction work of wood or partly of wood, twenty years.

(c) Dredging alone, five years.

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25. Police and fire alarm systems and signal systems. The purchase or installation of a fire or police alarm, telegraph or telephone system or any other system of communication or transmission, or additions thereto, ten years.

26. Fire, police and ferry boats. The acquisition of a fire or police boat, propelled by mechanical power, ten years. The acquisition of a ferry boat, propelled by mechanical power, thirty-five years.

27. Fire-fighting vehicles and apparatus. The purchase of a motor vehicle used for fighting fires, other than a passenger vehicle having a seating capacity of less than ten persons, whether or not including apparatus used in connection with such motor vehicle, or the purchase of such apparatus alone, if the estimated cost thereof, as set forth in the resolution authorizing the issuance of obligations therefor, is five thousand dollars or less, five years; if the estimated cost thereof is in excess of five thousand dollars, ten years; if the estimated cost thereof is in excess of fifty thousand dollars, twenty years.

27-a. Ambulances. The purchase of a motor vehicle which is specially designed for use for the treatment, care or transport of sick or injured persons, whether or not including equipment or furnishings used in connection with such a vehicle, ten years, or the purchase of original equipment or furnishings for such a vehicle or the replacement of equipment or furnishings for such a vehicle, five years.

28. Machinery and apparatus for construction and maintenance. The purchase of machinery or apparatus to be used for constructing, reconstructing, repairing, maintaining or removing the snow and ice from, any physical public betterment or improvement, other than machinery or apparatus which is to be permanently attached to or to form a part of any such betterment or improvement, five years if the cost is fifteen thousand dollars or less; ten years if the cost is over fifteen thousand dollars, but less than thirty thousand dollars; fifteen years if the cost is thirty thousand dollars or over.

29. Motor vehicles. The purchase of a motor vehicle, five years. The term "motor vehicle," as used in this subdivision, shall mean a vehicle propelled by any power other than muscular power, except

(a) a passenger vehicle, other than a school bus, having a seating capacity of less than ten persons,

(b) a vehicle used for fighting fires,

* * * * *

(d) machinery or apparatus for which a period of probable usefulness has been determined by subdivision twenty-eight of this paragraph, and

(e) a vehicle which is specially designed for use for the treatment, care or transport of sick or injured persons.

29-a. Transit motor vehicles. The purchase of municipally owned omnibus or similar surface transit motor vehicles, ten years.

30. Water meters. The purchase or installation of a water meter, twenty years; the replacement of such water meter, twenty years. Provided, however, that if such purchase or installation is incidental to and in connection with the acquisition, construction or reconstruction of or addition to a water supply or distribution system, such purchase or installation of such water meter shall have the same period of probably[*] usefulness as may be determined for such acquisition, construction or reconstruction of or addition to such system.

* * * * *

32. Equipment, machinery, apparatus or furnishings. The acquisition of original equipment, machinery, apparatus or furnishings for any physical public betterment or improvement or required for the purposes for which the physical public betterment or improvement is to be used, not included in any other subdivision hereof, five years; the replacement of such equipment, machinery, apparatus or furnishings, whether or not the original acquisition thereof is included in any other subdivision hereof, five years, unless a longer period for the replacement thereof is prescribed in another subdivision hereof, in which case such other subdivision shall be applicable.

* * * * *

35. Unspecified betterments and improvements. The acquisition, construction or reconstruction of or addition to any physical public betterment or improvement not included in any other subdivision hereof, five years; if the useful life of a physical public betterment or improvement classified as a capital asset under generally accepted accounting principles for municipalities has been determined to be at least ten years by an appropriate engineering, architectural or other professional, ten years; if the useful life of a physical public betterment or improvement classified as a capital asset under generally accepted accounting principles for municipalities has been determined to be at least fifteen years by an appropriate engineering, architectural or other professional, fifteen years.

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40. Miscellaneous expenditures. Any object or purpose set forth in section 29.00 or 29.20 of this article, if such object or purpose is to be financed by the issuance of budget notes or deficiency notes, three years.

41. Housing. The effectuating of any of the purposes of the public housing law, other than making loans to limited profit housing companies pursuant to article two of the private housing finance law, and other than making loans to owners of existing multiple dwellings, fifty years; bonds issued by a housing authority pursuant to section forty-one of the public housing law and guaranteed by a municipality pursuant to section ninety-five of the public housing law, five years, in addition to the foregoing period of fifty years, for the temporary financing of a project prior to the permanent financing thereof; evidences of indebtedness issued to the state pursuant to paragraph c of section 20.00 of this chapter, three years, in addition to the foregoing period of fifty years for the temporary financing of a project prior to the permanent financing thereof; loans to limited profit housing companies pursuant to article two of the private housing finance law, fifty-five years; loans to owners of existing private or multiple dwellings pursuant to the provisions of article eight, article eight-A, article eight-B, article eleven or article fifteen of the private housing finance law, or loans for the construction of multiple dwellings pursuant to article eleven of the private housing finance law, or loans for the pre-development costs or construction of private or multiple dwellings pursuant to article twenty-two of the private housing finance law, thirty years.

* * * * *

56. Fire safety and prevention programs. The financing of a program for fire safety and fire prevention in relation to one or more buildings by any municipality or school district, including one or more of the following: the installation, construction or reconstruction of a sprinkler system, fire alarm system, fire escape, fire tower, fire door, illuminated exit sign, or of any other improvement or system in a building to eliminate fire hazards or to provide for the safety of persons and property in the event of fire therein, or the acquisition of fire extinguishers or other equipment for such purposes, if the estimated aggregate cost thereof, as set forth in the resolution authorizing the issuance of obligations therefor, is less than ten thousand dollars, five years; if the estimated aggregate cost thereof is ten thousand dollars or more, ten years; provided, however, that if a different period for the installation, construction, reconstruction or acquisition of any item or class of items of the improvement or equipment included in such program is prescribed in another subdivision hereof, such other subdivision shall be applicable to such item or class of items when the expenditure

[*]So in original.

therefor is not to be financed as a fire safety and fire prevention program pursuant to the provisions of this subdivision.

57. [There are three par a, subs 57] Tree rehabilitation and replacement programs. The financing of a program for the rehabilitation and replacement of ornamental shade trees within the limits of a municipality, including as a part of any such program the acquisition, growing, planting, preservation, removal, disposal and replacement of trees, five years.

57. [There are three par a, subs 57] Hydraulic and mechanical dredges. Dredges, both hydraulic and mechanical, used in dredging creeks, streams, bays, harbors and inlets and the construction of dikes, bulkheads, dams, sea walls and jettys, fifteen years.

57. [There are three par a, subs 57] Workmen's compensation self-insurance plans. (a) Payments required of a municipality, school district or district corporation upon entry to or withdrawal from a county self-insurance plan, five years, except that if the amount of such payment exceeds one per centum of the average assessed valuation of such municipality, school district or district corporation, ten years.

(b) The amount of an apportionment payable by a participating municipality or fire district upon changing to a county self-insurance plan in accordance with the transition provisions of section seventy-five of the workmen's compensation law, five years, except that if the amount of such payment exceeds one per centum of the average assessed valuation of such municipality or district corporation, ten years.

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62. [There are two par a, subs 62] Skiing developments. The construction of a skiing development, including: ski lifts and other original facilities, equipment and furnishings; buildings appurtenant or incidental thereto; access roads and parking areas; land or rights of land, and the improvement of such land for use as a skiing development; twenty years.

62. [There are two par a, subs 62] a. Planning for future capital improvements. The preparation pursuant to section ninety-nine-d of the general municipal law of surveys, preliminary plans and detailed plans, specifications and estimates necessary for planning for a capital improvement which it is contemplated might be undertaken in the future, five years. If the cost of such surveys, preliminary plans and detailed plans, specifications and estimates, however, is to be financed as part of the cost of the capital improvement in connection with which they are prepared, then and in such event they shall have the same period of probable usefulness as may be determined for such capital improvement.

b. In the event that any such capital improvement is financed in whole or in part pursuant to this chapter after the commencement of the financing of the cost of any such surveys, preliminary plans and detailed plans, specifications and estimates, and if the period of five years shall not have elapsed since the date of issuance of the first obligation or obligations for such surveys, preliminary plans and detailed plans, specifications and estimates, then the period of probable usefulness for such surveys, preliminary plans and detailed plans, specifications and estimates, may be increased so that the period of probable usefulness thereof shall be equal to the period of probable usefulness of the capital improvement for which the financing of such surveys, preliminary plans and detailed plans, specifications and estimates was originally commenced less the period of time which shall have elapsed from the date of issuance of the first obligation or obligations therefor to the date of issuance of the first obligation or obligations for such capital improvement.

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77. [There are two par a, subs 77] Passenger vehicle other than a school bus. The purchase of a passenger vehicle, other than a school bus, having a seating capacity of less than ten persons, when purchased to replace a similar vehicle previously in service for three years or more, or in the case of a police or fire vehicle, in service for one year or more, three years.

77. [There are two par a, subs 77] In the city of New York a comprehensive program of renovation or improvement of transit facilities or the water supply system or a public or school building or playground or of a public park and of the lighting, plumbing, ventilating and communication systems in such building, playground or park, five years. Nothing herein contained, however, shall prevent the application of the period of probable usefulness prescribed in any other subdivision of this section for any object or purpose constituting a separable part of such program.

* * * * *

85-b. Two thousand four—two thousand five retirement contributions. Payments made by participating employers to the New York state and local employees' retirement system and the New York state and local police and fire retirement system for the two thousand four-two thousand five fiscal year of the retirement systems, but only up to a maximum of the "amount eligible for amortization" pursuant to section seventeen-b or three hundred seventeen-b of the retirement and social security law, ten years; provided, however, that in no event shall the amount of such debt, when added to any amounts amortized pursuant to section seventeen-b or three hundred seventeen-b of the retirement and social security law, exceed the "amount eligible for amortization" as defined in section seventeen-b or three hundred seventeen-b of the retirement and social security law.

85-c. Two thousand five—two thousand six retirement contributions. Payments made by participating employers to the New York state and local employees' retirement system and the New York state and local police and fire retirement system for

the two thousand five—two thousand six fiscal year of the retirement systems, but only up to a maximum of the "amount eligible for amortization" pursuant to section seventeen-c or three hundred seventeen-c of the retirement and social security law, ten years; provided, however, that in no event shall the amount of such debt, when added to any amounts amortized pursuant to section seventeen-c or three hundred seventeen-c of the retirement and social security law, exceed the "amount eligible for amortization" as defined in section seventeen-c or three hundred seventeen-c of the retirement and social security law.

85-d. Two thousand six—two thousand seven retirement contributions. Payments made by participating employers to the New York state and local employees' retirement system and the New York state and local police and fire retirement system for the two thousand six—two thousand seven fiscal year of the retirement systems, but only up to a maximum of the "amount eligible for amortization" pursuant to section seventeen-d or three hundred seventeen-d of the retirement and social security law, ten years; provided, however, that in no event shall the amount of such debt, when added to any amounts amortized pursuant to section seventeen-d or three hundred seventeen-d of the retirement and social security law, exceed the "amount eligible for amortization" as defined in section seventeen-d or three hundred seventeen-d of the retirement and social security law.

* * * * *

99. [There are two par a, subs 99] Payment for a retirement incentive program adopted in accordance with the provisions of part A of chapter sixty-nine of the laws of two thousand two and payment for any outstanding obligations for any retirement incentive program adopted in accordance with any legislation prior to such date, five years.

99. [There are two par a, subs 99] Payment by the city of Albany, in the county of Albany, of contributions to the New York state and local police and fire retirement system to reopen the optional twenty year retirement plan to certain firefighters in the city of Albany and to provide additional pension benefits, pursuant to section three hundred eighty-four-e of the retirement and social security law, to firefighters employed by such city, twenty years.

100. [There are two par a, subs 100] Certain retirement prior service contributions. Contributions to the New York state and local police and fire retirement system for benefits provided pursuant to section three hundred eighty-four-e of the retirement and social security law that are attributable to service rendered prior to the adoption of such section, and which are being amortized over ten years or less, the lesser of ten years or the period of time remaining to pay such contributions to such retirement system.

100. [There are two par a, subs 100] Payment by the Ridge Road fire district, in the county of Monroe, of contributions to the New York state and local police and fire retirement system to provide additional pension benefits, pursuant to section three hundred eighty-four-e of the retirement and social security law, to all eligible firefighters employed by such fire district, five years.

101. [There are two par a, subs 101] Payment of certain negotiated benefits by the village of Haverstraw. Payment of negotiated benefits pursuant to collective bargaining agreements to retiring or transferring village police officers in connection with the disbanding of the village of Haverstraw police department, five years, except that if the amount of such payments in any fiscal year exceeds one per centum of the average assessed valuation of such village, ten years.

101. [There are two par a, subs 101] One or more objects or purposes for which a period of probable usefulness has been determined under any other subdivision of this paragraph to be at least thirty-five years, thirty-five years.

102. One or more objects or purposes for which a period of probable usefulness has been determined under any other subdivision of this paragraph to be at least forty years, forty years.

103. One or more objects or purposes for which a period of probable usefulness has been determined under any other subdivision of this paragraph to be at least fifty years, fifty years.

104. [There are two par a, subs 104] Payments of a targeted retirement program by the county of Rockland incentive payments by the county of Rockland with respect to a targeted retirement program for current employees, ten years.

104. [There are two par a, subs 104] Payments by the county of Nassau to employees upon separation from employment, as may be approved by the county and including, but not limited to, cash payment for separation incentives and/or payment of the monetary value of accrued and accumulated but unused and unpaid sick leave, personal leave, holiday leave, vacation time, time allowances granted in lieu of overtime compensation and any other forms of payment required to be paid to such employees upon separation from employment, ten years.

105. [There are two par a, subs 105] Payments by the town of East Hampton, county of Suffolk to employees upon separation from employment, as may be approved by the town and including, but not limited to, cash payment for separation incentives and/or payment of the monetary value of accrued and accumulated but unused and unpaid sick leave, personal leave, holiday leave, vacation time, time allowances granted in lieu of overtime compensation and any other forms of payment required to be paid to such employees upon separation from employment, ten years.

105. [There are two par a, subs 105] Payments by the town of Stony Point to or for the benefit of employees upon separation from employment, as may be approved by the town and including, but not

limited to, cash payment for separation incentives and/or payment of the monetary value of accrued and accumulated but unused and unpaid sick leave, personal leave, holiday leave, vacation time, time allowances granted in lieu of overtime compensation, premiums or contributions with respect to health, dental and vision care insurance plans for the fiscal year in which such separation occurs, and any other forms of payment required to be paid to or for the benefit of such employees in connection with the separation from employment, ten years.

106. [There are four par a, subs 106] Payments by the town of Southampton to or for the benefit of employees upon separation from employment, as may be approved by the town and including, but not limited to, cash payment for separation incentives and/or payment of the monetary value of accrued and accumulated but unused and unpaid sick leave, personal leave, holiday leave, vacation time, time allowances granted in lieu of overtime compensation, premiums or contributions with respect to health, dental and vision care insurance plans for the fiscal year in which such separation occurs, and any other forms of payment required to be paid to or for the benefit of such employees in connection with the separation from employment, ten years.

106. [There are four par a, subs 106] Payments by the village of Lynbrook, in the county of Nassau, made on or after April first, two thousand eleven, to employees upon separation from employment, as may be approved by such village and including, but not limited to, cash payment for separation incentives and/or payment of the monetary value of accrued and accumulated but unused and unpaid sick leave, personal leave, holiday leave, vacation time, time allowances granted in lieu of overtime compensation and any other forms of payment required to be paid to such employees upon separation from employment, ten years.

106. [There are four par a, subs 106] Payments by the town of Oyster Bay to employees upon separation from employment, as may be approved by the town and including, but not limited to, such payments, cash payment for separation incentives and/or payment of the monetary value of accrued and accumulated but unused and unpaid sick leave, vacation time, and any other forms of payment required to be paid to such employees upon separation from employment, ten years.

106. [There are four par a, subs 106] Any payments by the city of Glen Cove made after January first, two thousand twelve to employees upon separation from employment, as may be approved by the city and including, but not limited to, cash payment for separation incentives and/or payment of the monetary value of accrued and accumulated but unused and unpaid sick leave, personal leave, holiday leave, vacation time, time allowances granted in lieu of overtime compensation and any other forms of payment required to be paid to such employees upon separation from employment, ten years.

107. Payment by the city of Elmira, county of Chemung, of the past service cost due to the New York state and local police and fire retirement system to provide additional pension benefits pursuant to sections three hundred seventy-five-i and three hundred seventy-five-j of the retirement and social security law to eligible firefighters employed by the city of Elmira, ten years.

108. [There are two par a, subs 108] Payments by the town of Hempstead, county of Nassau, to employees upon separation from employment, as may be approved by the town and including, but not limited to, such payments, cash payment for separation incentives and/or payment of the monetary value of accrued and accumulated but unused and unpaid sick leave, vacation time, and any other forms of payment required to be paid to such employees upon separation from employment, ten years.

108. [There are two par a, subs 108] Intangible assets. The acquisition or development of an intangible asset that is classified as a capital asset under generally accepted accounting principles for municipalities and that has been determined to have a useful life of at least five years by an appropriate engineering or other professional, five years.

b. The finance board or other body or official designated by law shall have the power to determine, prior to the contracting of an indebtedness for any object or purpose specified in paragraph a of this section, or a class thereof, the period of probable usefulness thereof, but the period so determined shall in no event exceed the period determined by this section. In those municipalities in which the finance board has such power, the finance board may, by resolution, delegate such power to such other body or official as it may designate, in which event such body or official shall exercise such power until the finance board, by resolution, shall elect to reassume the same. If a body other than the finance board makes such determination it shall do so by resolution and it shall file a certified copy thereof with the finance board. If an official makes such determination he shall do so by a certificate properly dated and signed by him, and he shall file such certificate with the finance board.

c. The agency exercising the power to determine the period of probable usefulness, pursuant to paragraph b above, shall also determine which subdivision of paragraph a of this section applies to such object or purpose, or class thereof. If the indebtedness which is to be contracted for such object or purpose, or class thereof, is to be evidenced by obligations, such determination shall become conclusive upon the sale of such obligations. If a body other than the finance board makes such determination it shall do so by resolution and it shall file a certified copy thereof with the finance board. If an official makes such determination he shall do so by a certificate properly dated and signed by him, and he shall file such certificate with the finance board.

HISTORY:

Add, L 1942, ch 424; ; amd, L 1943, ch 696; L 1943, ch 711; L 1943, ch 712, with substance transferred from County L §§ 12, sub 6, 14 and 400, sub 11; Educ Law §§ 189–f and 480(9); Gen Mun L § 8–b; Pub Housing L §§ 92, 94, 211; Social Welfare L § 93(7); and Village L § 199–a; L 1944, ch 608; L 1944, ch 611; L 1945, ch 339; L 1945, ch 837, eff April 18, 1945; L 1946, ch 977, eff April 23, 1946; L 1949, ch 614, eff Jan 1, 1950; L 1949, ch 749, eff April 22, 1949; L 1950, ch 99, §§ 1, 2, eff March 13, 1950; L 1950, ch 740, eff April 17, 1950; L 1951, ch 142, eff March 20, 1951; L 1951, ch 235; L 1951, ch 290; L 1951, ch 482; L 1951, ch 631; L 1951, ch 636; L 1952, ch 225, §§ 1, 2, eff March 25, 1952; L 1952, ch 358; L 1952, ch 359, eff March 29, 1952; L 1952, ch 601; L 1953, ch 207, § 1; L 1953, ch 445; L 1953, ch 447, eff April 2, 1953; L 1953, ch 792, eff April 17, 1953; L 1954, ch 563, eff April 8, 1954; L 1954, ch 565, eff April 8, 1954; L 1955, ch 213, § 1, eff April 2, 1955; L 1955, ch 390; L 1955, ch 398, §§ 1, 2; L 1955, ch 746; L 1955, ch 768, §§ 1, 2; L 1955, ch 849, § 6, eff April 29, 1955; L 1956, ch 17, § 2, eff Feb 20, 1956; L 1956, ch 291; L 1956, ch 492, § 1; L 1957, ch 1051, § 1, eff June 22, 1957; L 1958, ch 12, eff Feb 10, 1958; L 1958, ch 304, eff March 21, 1958; L 1958, ch 678, eff April 12, 1958; L 1958, ch 911; L 1959, ch 269; L 1959, ch 387, eff April 13, 1959; L 1959, ch 437; L 1959, ch 441; L 1959, ch 601; L 1959, ch 773; L 1959, ch 795; L 1959, ch 801; L 1959, ch 822; L 1960, ch 264; L 1960, ch 707; L 1960, ch 735; L 1960, ch 955, eff April 28, 1960; L 1961, ch 174; L 1961, ch 186, eff March 21, 1961; L 1961, ch 402, eff April 11, 1961; L 1961, ch 404, eff April 11, 1961; L 1961, ch 405, eff April 11, 1961; L 1961, ch 804, § 9; L 1962, ch 492, eff June 1, 1962; L 1963, ch 354, § 11, eff April 16, 1963; L 1963, ch 500; L 1963, ch 512; L 1963, ch 625, eff April 23, 1963; L 1964, ch 152, § 11, eff March 23, 1964; L 1964, ch 284, eff April 3, 1964; L 1964, ch 401; L 1964, ch 850; L 1965, ch 101; L 1966, ch 220; L 1966, ch 255; L 1966, ch 359, eff May 16, 1966; L 1967, ch 138, eff March 28, 1967; L 1967, ch 418, eff April 18, 1967; L 1967, ch 634, eff April 27, 1967; L 1967, ch 722; L 1968, ch 420, § 131, eff May 31, 1968; L 1968, ch 849, eff June 22, 1968; L 1968, ch 887, eff June 22, 1968; L 1968, ch 1000, eff June 22, 1968; L 1968, ch 1089, § 7, eff June 22, 1968; L 1969, ch 3, eff Feb 25, 1969; L 1969, ch 96, eff March 25, 1969; L 1969, ch 764, eff May 22, 1969; L 1969, ch 1105; L 1970, ch 129; L 1970, ch 144, eff April 22, 1970; L 1970, ch 699, eff May 12, 1970; L 1970, ch 861; L 1970, ch 923; L 1970, ch 924; L 1970, ch 957, eff Aug 1, 1970; L 1971, ch 227; L 1971, ch 300, eff May 25, 1971; L 1971, ch 355, eff June 1, 1971; L 1971, ch 968; L 1971, ch 1099, eff July 2, 1971; L 1971, ch 1130, eff Aug 1, 1971; L 1972, ch 230, eff May 2, 1972; L 1972, ch 637; L 1972, ch 714, eff May 30, 1972; L 1972, ch 885; L 1973, ch 889; L 1973, ch 890, eff June 22, 1973; L 1973, ch 894, eff June 22, 1973; L 1973, ch 898; L 1973, ch 924, § 2, eff June 22, 1973; L 1973, ch 937; L 1974, ch 257; L 1974, ch 496, § 2, eff May 23, 1974; L 1974, ch 688, § 1, eff May 30, 1974; L 1974, ch 745, eff June 7, 1974; L 1975, ch 353; L 1976, ch 797; L 1977, ch 887, eff Aug 11, 1977; L 1978, ch 348, eff June 19, 1978; L 1979, ch 571, § 1, eff July 10, 1979; L 1980, ch 552, § 24, eff June 26, 1980; L 1980, ch 719, § 1, eff June 30, 1980; L 1981, ch 16, § 1, eff March 17, 1981; L 1981, ch 850, § 7, eff July 31, 1981; L 1981, ch 883, § 1, eff July 31, 1981; L 1982, ch 6, § 2, eff March 1, 1982; L 1982, ch 732, § 1, eff July 27, 1982; L 1982, ch 842, § 1, eff July 27, 1982; L 1983, ch 177, § 1, eff May 31, 1983; L 1984, ch 619, § 1, eff July 27, 1984; L 1984, ch 646, § 1, eff July 27, 1984; L 1986, ch 220, § 30, eff June 28, 1986; L 1986, ch 448, §§ 2, 3; L 1987, ch 348, § 1, eff Sept 21, 1987; L 1987, ch 786, § 2; L 1987, ch 790, § 2; L 1988, ch 261, § 18, eff July 19, 1988; L 1988, ch 417, § 1, eff July 29, 1988; L 1988, ch 418, § 2, eff July 29, 1988; L 1988, ch 650, § 2, eff Sept 1, 1988; L 1988, ch 738, § 15, eff Dec 19, 1988; L 1989, ch 62, § 85, eff April 19, 1989; L 1989, ch 95, §§ 6, 7, eff May 22, 1989, deemed eff July 1, 1988; L 1989, ch 296, § 1, eff July 10, 1989; L 1989, ch 639, § 2, eff July 21, 1989; L 1989, ch 758, § 1, eff July 25, 1989; L 1989, ch 759, § 1, eff July 25, 1989; L 1990, ch 155, § 1, eff May 17, 1990, deemed eff July 25, 1989; L 1990, ch 175, § 3, eff May 21, 1990; L 1990, ch 507, § 1, eff July 18, 1990; L 1990, ch 540, § 1, eff July 18, 1990; L 1990, ch 599, § 1, eff July 18, 1990, deemed eff July 25, 1989; L 1990, ch 796, § 1, eff July 25, 1990; L 1991, ch 413, § 2, eff July 19, 1991; L 1991, ch 559, § 1, eff July 23, 1991; L 1992, ch 702, § 16, eff Jan 27, 1993; L 1993, ch 261, § 7, eff July 13, 1993; L 1993, ch 475, § 2, eff July 26, 1993; L 1993, ch 595, § 1, eff July 26, 1993; L 1994, ch 201, § 2, eff June 20, 1994, deemed eff Jan 1, 1994; L 1994, ch 400, § 3, eff July 20, 1994; L 1995, ch 570, § 1, eff Aug 8, 1995; L 1996, ch 482, § 3, eff Aug 8, 1996; L 1996, ch 504, § 1, eff Aug 8, 1996; L 1996, ch 567, § 7, eff Aug 8, 1996; L 1996, ch 680, § 3, eff Sept 27, 1996; L 1998, ch 201, § 1, eff July 7, 1998; L 1998, ch 219, § 1, eff July 7, 1998; L 1998, ch 349, § 1, eff July 14, 1998; L 1998, ch 514, § 2, eff July 29, 1998; L 1998, ch 558, § 4, eff Aug 5, 1998; L 1998, ch 619, § 1, eff Oct 13, 1998; L 2001, ch 108, § 1, eff July 25, 2001; L 2001, ch 383, § 6 (Part F), eff Oct 29, 2001, deemed eff April 1, 2001; L 2002, ch 81, § 4 (Part H), eff May 29, 2002; L 2002, ch 93, §§ 2–6 (Part A), eff June 25, 2002; L 2002, ch 368, § 1, eff Aug 13, 2002; L 2003, ch 49, §§ 1, 6 (Part B), eff May 14, 2003; L 2003, ch 291, § 1 eff Aug 5, 2003; L 2004, ch 260, §§ 2, 3, eff July 30, 2004; L 2004, ch 352, § 1, eff Aug 10, 2004; L 2005, ch 78, § 1, eff June 7, 2005; L 2005, ch 456, § 1, eff Aug 9, 2005; L 2005, ch 622, § 2, eff Aug 30, 2005; L 2006, ch 190, §§ 1, 2, eff July 26, 2006; L 2009, ch 114, § 1, eff July 11, 2009; L 2009, ch 146, § 1, eff July 11, 2009; L 2010, ch 386, § 11, eff Aug 13, 2010; L 2011, ch 477, § 1, eff Aug 17, 2011; L 2011, ch 482, eff Aug 17, 2011; L 2012, ch 127, § 1, eff July 18, 2012; L 2012, ch 170, § 1, eff July 18, 2012; L 2012, ch 178, § 1, eff July 18, 2012; L 2012, ch 250, § 1, eff July 18, 2012; L 2012, ch 258, § 1, eff July 18, 2012; L 2013, ch 424, § 9, eff Oct 22, 2013, deemed eff on and after Oct 28, 2012; L 2014, ch 55, § 8 (Part T), eff March 31, 2014; L 2014, ch 422, § 1, effective October 21, 2014; L 2015, ch 58, § 1 (Part BB), effective April 13, 2015; L 2015, ch 377, § 1, effective October 26, 2015; L 2016, ch 265, § 1, effective August 19, 2016; L 2016, ch 309, § 1, effective September 9, 2016; L 2016, ch 446, § 1, effective November 28, 2016; L 2017, ch 22, § 1, effective November 28, 2016; L 2017, ch 85, § 8 (Part B), effective July 10, 2017; L 2020, ch 56, § 1 (Part III), effective April 3, 2020.

Revision Notes: [1944 Revision] Par a, subds 11, 12. These subdivisions referred to class "A," "B" and "C" buildings but failed to define what was meant by such letter designations. The 1944 amendments clarified the intent of the use of the descriptive letters.

Subd 29(c). This amendment was suggested so as to leave no question that the proceeds of bond anticipation notes can be used for the payment of the judgments, claims, awards or sums referred to in item (c).

Pars b and c. The use of the words "capital improvement or equipment" in these paragraphs was broadened by the use of the words "object or purpose."

[1945 Revision] Par a. The insertion of several new periods of usefulness in this paragraph, and the elimination of hyphenated subdivision numbers, has necessitated renumbering the subdivisions. In the opening paragraph of paragraph a there has been inserted a provision that preliminary costs in connection with a capital improvement shall be deemed part of the cost of the object or purpose in connection with which they are incurred. A new subdivision 3 has been added, providing a period of usefulness for waterway improvement and drainage, at the request of the Department of Conservation. Amendments to former subdivisions 13 and 14 (now numbered 14 and 17) and new subdivisions 15, 16 and 18 provide periods of usefulness for airport improvements in accordance with the wishes of the New York City administration, these changes involving the repeal of similar provisions in the General Municipal Law, as amended and added by L, 1944, ch 532. A new subdivision 22 provides a period of usefulness for dredging and construction of dikes and bulkheads, deemed necessary to cover navigation improvements not within the jurisdiction of the Department of Conservation. An amendment to subdivision 26 (renumbered subdivision 30) provides that the purchase and installation of a water meter, in connection with the original construction of a water system, shall have the same period of usefulness as the system itself. In a new subdivision 38 a period of usefulness is provided for the financing of a county which is obliged to change its fiscal year upon the adoption of a uniform budget system.

[1949 Revision] This act [L 1949, ch 614], which relates only to New York City, was required by the 1949 amendment

to § 2 of art 8 of the Constitution. This act conformed the local finance law to the 1949 amendment, which reduced the maximum period for which the city might issue bonds for dock and rapid transit purposes, from fifty years to forty years after nineteen hundred forty-nine.

[1956] (Paragraph a, sub 41) This act permits municipalities to take advantage of the exclusion provisions of the Local Finance Law in relating to local indebtedness when the same is incurred in connection with limited profit housing and is self-liquidating in nature.

[1957] Introduced at request of the Joint Legislative Committee to Study the New York State Employees' Retirement System.

[1959] (Par a, sub 41)] This act made possible lower rents in projects financed by municipal guarantees by excluding the period of lower cost temporary financing from the life of permanent financing bonds. Housing authority bonds guaranteed by a municipality were thus placed on the same basis as those issued for federally-aided and state-aided projects.

[1959, ch 269 (Par a, sub 61)] This act was recommended be the Joint Legislative Committee on Winter Tourists, to enable municipalities to finance expensive skiing developments. Most such municipalities could not be expected to retire large bond issues in the ten years prescribed by former law for parks and recreational areas.

[1961] This act comprised part of Governor Rockefeller's urban renewal program legislation and was developed by means of close co-ordination between the New York State Division of Housing, the Joint Legislative Committee on Housing and the Department of Audit and Control. It was designed to conform and harmonize the provisions of the Local Finance Law with the omnibus revision of the General Municipal Law relating to urban renewal. In particular, it would accelerate the progress of urban renewal programs in municipalities by facilitating the temporary financing of the cost of such programs and by clarifying the ability of municipalities to finance separately identifiable capital improvements for urban renewal areas within the periods of probable usefulness for such objects or purposes.

Editor's Notes: See 1959 note to § 2.00.

See 1960 note to Mult R Law § 305.

See 1961 notes to §§ 20.00, 23.00.

See 1962 note under Mult D Law § 309.

See 1964 note under County Law § 850.

Laws 1945, ch 318, eff March 28, 1945, amending L 1943, ch 696, § 5 (also amended by L 1944, ch 594), provides: "§ 5. Sections one and two of this act [creating new Gen. Mun. Law, § 5-c and § 8-b, subd. 27] shall take effect immediately [Apr 22, 1943]. Sections three and four of this act [creating new Local Finance Law, § 11.00, par. a, subd. 39 and repealing Gen. Mun. Law, § 5-c as added by L 1943, ch 6961] shall take effect September first, nineteen hundred forty-five."

Laws 1953, ch 445, § 2 provides: The repeal by this act of the period of probable usefulness of the repairing of a highway, road, street, parkway or parking area shall not affect any resolution authorizing the issuance of bonds, bond anticipation notes or capital notes adopted prior to July first, nineteen hundred fifty-three, for any such purpose; and bonds and capital notes may be executed, issued and sold for any such purpose pursuant to any such resolution after June thirtieth, nineteen hundred fifty-three. Such repeal shall not affect the power of any political subdivision to exclude from the tax limitation imposed by section ten of article eight of the state constitution the amount of any direct budgetary appropriation for any such repairs or the amount of any appropriation for the redemption of capital notes issued for such purpose, provided such appropriations were made before July first, nineteen hundred fifty-three, and, for the purpose of any such exclusion, such repairing shall continue to have the present period of probable usefulness during the fiscal year for which any such appropriation was made. Such repeal shall not extinguish any indebtedness created pursuant to section 122.00 of this chapter.

Laws 1957, ch 1051, § 4, provides: "This act shall take effect immediately and shall control notwithstanding any inconsistent general, special or local law."

Laws 1968, ch 1089, § 12, provides:

§ 12. Severability. If any clause, sentence, paragraph, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid or unconstitutional, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section or part thereof directly involved in the controversy in which such judgment shall have been rendered.

Laws 1969, ch 183, § 10, eff July 1, 1969, provides:

§ 10. Notwithstanding any other provision of law and pursuant to the provisions of section 11.00 of the local finance law, the employer's share of the cost of current coverage and contribution to the New York State Employees' Retirement System, the New York State Teachers Retirement System and to the social security fund of the New York State Social Security Agency by any school district which is coterminous with or partly within or wholly within, a city having less than one hundred twenty-five thousand inhabitants according to the latest federal census, shall have a period of probable usefulness of three years and the taxes required to meet the cost of such coverage and contributions, shall be excluded from the tax limitations prescribed by section ten of article eight of the constitution. The provisions of this section shall apply for the period beginning July first, nineteen hundred sixty-nine and ending June thirtieth, nineteen hundred seventy-five (amended L 1972, ch 553).

Laws 1970, ch 923, § 1, provides:

Section 1. Through an error in the determination of items properly excludable in computing the constitutionally permissible tax levy in its nineteen hundred seventy calendar fiscal budget, the city of Yonkers, without the authorization hereinafter provided, will suffer a substantial loss of state aid with grave consequenences to the welfare of the residents of said city.

Laws 1973, ch 587, § 11, § 1, provides:

§ 11. Notwithstanding any other provision of law and pursuant to the provisions of section 11.00 of the local finance law, the employer's share of the cost of current health and dental insurance coverage and payments made to a board of cooperative educational services for payment to the dormitory authority for the cost of acquiring and constructing a school facility by any school district which is coterminous with or partly within or wholly within, a city having less than one hundred twenty-five thousand inhabitants according to the latest federal census, shall have a period of probable usefulness of three years and the taxes required to meet the cost of such coverage and contributions, shall be excluded from the tax limitations prescribed by section ten of article eight of the constitution. The provisions of this section shall apply for the period beginning July first, nineteen hundred seventy-three and ending June thirtieth, nineteen hundred seventy-nine (amended L 1976, ch 484, § 1).

Laws 1973, ch 890, § 2, provides:

§ 2. The city of New York may enter into contracts with any bank or trust company organized under the laws of the state of New York or national banking association doing business in the state of New York or any person, firm or corporation under which amounts required to be paid by such city in each of three or more consecutive fiscal years of such city to the New York state housing finance agency pursuant to any lease, sublease or other agreement with respect to a health facility constructed, acquired, reconstructed, rehabilitated or improved by the health and mental hygiene facilities improvement corporation are paid in advance to and held by such bank or trust company, person, firm or corporation for payment to such agency.

Laws 1973, ch 898, § 2, provides:

§ 2. The city of New York may enter into contracts with any bank or trust company organized under the laws of the state of New York or national banking association doing business in the state of New York or any person, firm or

corporation under which amounts required to be paid in each of three or more consecutive fiscal years of such city to the lessor or sublessor of any real property leased or subleased for any public or municipal purpose are paid in advance to and held by such bank or trust company, person, firm or corporation for payment to such lessor or sublessor (amended L 1974, ch 688, § 2).

Laws 1980, ch 552, § 28, provides:

§ 28. Separability. If any provision of this act or the application thereof to any person or circumstance is held invalid, the remainder of this act or the application of such provision to other persons or circumstances shall not be affected thereby.

Laws 1980, ch 719, § 2, provides as follows:

§ 2. This act shall take effect immediately and the provisions of section one of this act shall remain in force and effect to and including June 15, 2023 (Amd, L 1985, ch 192, § 1, eff June 11, 1985; L 1992, ch 176, § 1, eff June 16, 1992; L 1997, ch 193, § 1, eff July 8, 1997; L 2003, ch 83, § 1, eff June 24, 2003; L 2008, ch 122, § 1, eff June 30, 2008; L 2013, ch 77, § 1, eff June 30, 2013; L 2018, ch 87, § 1, eff July 1, 2018).

Laws 1981, ch 850, § 7, added a sub 82 to par a of § 11.00 (first setout of sub 82 appearing in the parent volume), providing for the construction, reconstruction, rehabilitation and improvement of a correctional facility, contingent upon passage of a bond issue at the general election in 1981. That bond issue was not approved and par a, sub 82 (first setout), as so enacted never became law.

Laws 1986, ch 220, §§ 1, 33, eff June 28, 1986, applicable to contracts in force and effect on and amended, executed, modified, renewed or altered on June 28, 1986, provide:

Section 1. Legislative intent. The legislature hereby finds, and declares that the state is in the midst of an insurance crisis which affects all aspects of the public and private sectors. Day care centers, not-for-profit organizations, volunteer groups, businesses, governmental entities, housing and transit authorities, professionals and others have experienced sudden and inexplicable cancellations and nonrenewals of their liability insurance policies with little, if any, notice. In other cases, policyholders and the public have been confronted by skyrocketing premiums or reductions in coverage. These events have disastrous effects on a multitude of public entities, groups and individuals, and threaten to undermine economic development and the delivery of essential and necessary services to residents, consumers and businesses throughout New York state. Because critical coverages have become unavailable or unaffordable, a comprehensive, balanced approach is imperative to provide stability and safeguard the public interest.

The legislature further finds and declares that, by the enactment of the provisions of this act, it is the intent of the legislature to fulfill its constitutional obligation to provide for the health, safety and welfare of the people of this state. It is imperative that this state provide stability, security and certainty for commercial risk, public entity and professional liability insurance policyholders and the public at-large by the enactment of this act.

This act is intended to alleviate the problems of unaffordability and unavailability of such insurance, to provide for increased security of rates and rating procedures, and to provide for increased disclosure and knowledge of insurance company financial practices, by, among other measures:

(a) establishing a flexible rating system, with prior approval of rate changes beyond flexibility bands, for certain liability insurance;.

(b) preventing unwarranted mid-term cancellations and affording policyholders minimum notice of nonrenewal of policies, reductions in coverage and premium increases;.

(c) allowing New York counties, towns, cities, villages, district corporations, school districts and boards of cooperative educational services to organize and subscribe to statewide municipal reciprocal insurers;.

(d) authorizing the issuance of property/casualty insurance policies on a group basis for public entities and not-for-profit organizations;.

(e) establishing stand-by joint underwriting authority by expanding the powers of the New York property insurance underwriting association;.

(f) instituting qualified immunity for uncompensated officers and directors of not-for-profit organizations;.

(g) increasing capacity by expediting access to alternative voluntary markets where appropriate;.

(h) providing for annual reports to the governor and legislature of insurance company rating and financial practices;.

(i) authorizing costs upon frivolous claims and counterclaims; and.

(j) authorizing the admissibility of recovery from collateral sources.

§ 33. A commercial risk policy insuring any municipality, school district or board of cooperative educational services (as defined in section 2.00 of the local finance law) which expires during the period commencing with the effective date of this act, and ending on the ninetieth day after such effective date, shall remain in full force and effect unless, at least sixty days prior to expiration of the policy, a written notice is mailed or delivered to the first-named insured at the mailing address shown on the policy and to the insured's authorized agent or broker indicating the insurer's intent not to renew the policy. If timely notice is not provided, coverage shall remain in effect at the prior policy's terms and conditions until sixty days after such notice is provided. The rates for any period that extends beyond the expiration date shall be determined pro rata based upon the current rates for a renewal policy.

Laws 1987, ch 348, § 2, eff Sept 21, 1987, provides:

§ 2. This act shall take effect on the sixtieth day next succeeding the day on which it shall have become a law and shall apply to judgments, claims, awards and determinations occurring on or after such effective date.

Laws 1989, ch 62, § 101(f), eff April 19, 1989, provides as follows:

(f) Sections eighty-eight through ninety-five of this act shall apply to pension contributions by participating employers to the New York state and local employees' retirement system, the New York state and local police and fire retirement system and the New York state public employees' group life insurance plan, as appropriate, for periods of service beginning after March 31, 1987. The provisions of sections ninety and ninety-three of this act shall be deemed to fulfill the requirements of sections 17 and 317 of the retirement and social security law as they applied, after March 31, 1987, and prior to the effective date of this act, to contributions by participating employers to the retirement systems and the New York state public employees' group life insurance plan, as appropriate, for obligations incurred in fiscal years ending March 31, 1988 and March 31, 1989.

Laws 1989, ch 95, § 8, eff May 22, 1989, provides as follows:

§ 8. This act shall take effect immediately, and shall be deemed to have been in effect on and after July 1, 1988, provided that the provisions of section seven of this act shall take effect January 1, 1994 and shall apply to indebtedness contracted for on or after such date. (Amd, L 1989, ch 547, § 1, eff July 16, 1989).

Laws 1990, ch 175, §§ 2 and 5, eff May 21, 1990, provide as follows:

§ 2. Nothing contained in this act shall in any way impair or limit the constitutional, statutory or contractual authority of the retirement board to determine the amount of contributions required to fund the liabilities of the retirement system including any and all actuarial or other assumptions pertaining thereto, and to collect such contributions. The obligation to pay such contributions as determined by the retirement board shall constitute a contract and the rights of the New York state teachers' retirement system thereunder shall not be impaired in any way whatsoever.

§ 5. This act shall take effect immediately, provided that the provisions of paragraphs h, i, k, l and m of subdivision 2 of section 521 of the education law as added by section one of this act and sections two and three thereof shall not be

applicable until the retirement board adopts an eight per centum valuation rate of interest in the manner authorized in paragraph j of subdivision 2 of such section 521.

Laws 1993, ch 475, § 1, eff July 26, 1993, provides as follows:

Section 1. The remediation of hazardous waste sites in the city of Utica, Oneida county, pursuant to a consent agreement entered into with a federal or state governmental agency or authority is hereby determined to constitute a public purpose of the city.

Laws 1995, ch 570, § 2, eff Aug 8, 1995, provides as follows:

§ 2. This act shall take effect immediately and shall apply to indebtedness contracted for on or after the first day of January, nineteen hundred ninety-four.

Laws 1996, ch 482, § 1, eff Aug 8, 1996, provides as follows:

Section 1. Legislative findings. The legislature finds and declares that it is in the public interest to permit school districts which have determined to amortize their retirement contributions due and payable to the New York state teachers' retirement system in accordance with chapter 175 of the laws of 1990 to exercise their option to pre-pay the contributions and refinance the debt through the issuance of bonds without a referendum where such refinancing would result in cost savings to the school district and its taxpayers. The legislature further finds and declares that because the school district in such circumstance has already incurred the debt and determined to amortize and pay the contributions in annual installments without having to conduct a referendum, it would be unnecessary and wasteful for a school district and its taxpayers to bear the expense of a referendum upon refinancing of the debt.

Laws 1996, ch 680, § 1, eff Sept 27, 1996, provides as follows:

Section 1. Legislative findings and declaration of purpose. The urban development action area act (the "act") has been instrumental in enabling municipalities to undertake and assist the rehabilitation and construction of private and multiple dwellings and to eliminate the substandard, insanitary, deteriorated or deteriorating housing conditions that contributed to the existence of slum or blighted areas. However, certain residential areas that have received substantial public and private assistance in furtherance of the policy and purposes of the act and pursuant to the rights and powers granted by the act lack the commercial and community facilities necessary for their stability, safety and vitality.

In order to further the policy and purposes of the urban development action area act and to facilitate a comprehensive revitalization of areas in which a substantial public and private investment in residential redevelopment has already occurred, it is necessary to authorize a department of housing preservation and development in a city having a population of one million or more, to make or contract to make mortgage loans or to participate with another lender in the making of mortgage loans for the development of neighborhood improvement projects, including commercial and community facilities, in urban development action areas, in proximity to urban development action areas or in proximity to urban development action area projects.

Laws 2001, ch 383, § 20 (Part F), eff Oct 29, 2001, deemed eff April 1, 2001, provides as follows:

§ 20. This act shall take effect immediately and shall be deemed to have been in full force and effect on and after April 1, 2001 and shall apply to school years commencing on or after July 1, 2001, provided, however, that section fourteen-a of this act shall take effect on the same date and in the same manner as section 1 of part B of chapter 149 of the laws of 2001 takes effect.

Laws 2002, ch 93, § 1, (Part A), eff June 25, 2002, provides as follows:

Section 1. Short title. This act shall be known and may be cited as the "New York city debt modernization act of 2002".

Laws 2003, ch 96, § 1, eff July 1, 2003, amended Laws 1996, ch 680, § 4 (amd, L 1998, ch 126, § 1), so as to delete the provisions for authorization to make or contract to make loans or to participate in the making of loans only within targeted commercial corridors designated by the department of housing preservation and development of the city of New York prior to September 30, 2001.

Laws 2005, ch 622, § 1, eff Aug 30, 2005, provides as follows:

Section 1. Legislative findings and declaration. The legislature hereby finds and declares that, under existing law, the objects and purposes for which local governments are authorized to issue their bonds include those with 35, 40 and 50-year periods of probably usefulness. The legislature further finds and declares that permitting the consolidation of currently authorized periods of probable usefulness will help local governments manage the proceeds of their bonds more effectively, thereby enhancing the efficiency of local borrowing programs, and further will not affect the final maturity of those bonds.

Laws 2013, ch 424, § 1, eff Oct 22, 2013, deemed eff on and after Oct 28, 2012, provides as follows:

Section 1. Short title. This act shall be known and may be cited as the "Superstorm Sandy assessment relief act".

Laws 2014, ch 55, § 1 (Part T), eff March 31, 2013, provides as follows:

Section 1. Short title. This act shall be known and may be cited as the "Mohawk Valley and Niagara county assessment relief act".

Laws 2017, ch 22, § 2, eff Nov 28, 2016, provides:

§ 2. This act shall take effect on the same date and in the same manner as a chapter of the laws of 2016 amending the local finance law relating to the issuance of bonds to finance airport improvements at the East Hampton Airport, as proposed in legislative bill numbers S. 3690 and A. 5245, takes effect.

Laws 2017, ch 85, § 10 (Part B), eff July 10, 2017, provides:

Section 10. This act shall take effect immediately and shall be deemed to have been in full force and effect on and after May 3, 2017.

Commission Notes: [1942] It was the intent of the Commission that only one period of probable usefulness should apply to an object or purpose.

This section is derived from General Municipal Law § 8-b, Education Law § 480 (9), Public Housing Law §§ 92, 94 and 211, Social Welfare Law § 93(7), Village Law § 199-a, and § 9 of chapter 791 of the Laws of 1928 as added by § 13 of chapter 544 of the Laws of 1940. This section of the Local Finance Law differs in some important respects from the provisions of the above-mentioned laws.

Amendment Notes The 2014 amendment by ch 422, § 1 added a107.

The 2015 amendment by ch 58, § 1 (Part BB), added a29-a.

The 2015 amendment by ch 377, § 1, in a13, deleted "heating" following "reconstruction of a" in the first sentence and added the second sentence.

The 2016 amendment by ch 265, § 1, added a108 [first set out].

The 2016 amendment by ch 309, § 1, added a108 [second set out].

The 2016 amendment by ch 446, § 1, added a14-a.

The 2017 amendment by ch 22, § 1, rewrote a14-a, which formerly read: "The construction, reconstruction, or extension of the East Hampton Airport, whether or not including buildings, hangars, runways, taxi-strips, paved areas, grading, filling, drainage, other site work, original furnishings, equipment, machinery or apparatus, thirty years; the acquisition or replacement of such equipment, machinery or apparatus, thirty years."

The 2017 amendment by ch 85, § 8 (Part B), added a33-d.

The 2020 amendment by ch 56, § 1 (Part III), added (a)14-b.

Repeal Notes: [1955] Item (d) of subdivision 33, of paragraph a of a section 11.00 of the Local Finance Law, which was repealed by section 1 of the act, made the provisions of items (a) and (b) of such subdivision inapplicable to any city having a population of one million or more.

[1961] Subdivision sixty-five of paragraph a of section 11.00 of the Local Finance Law, repealed by this act, duplicated the provisions of subdivision forty-one-a of such paragraph as herein amended.

[1974] Subdivision forty-two-a of paragraph a of section 11.00 of the local finance law, repealed by section two of this act, related to the period of probable usefulness of pension and social security costs for certain cities.

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1. In general; period of probable usefulness

Section 11.00 subd 33 of ¶ (a) of the Local Finance Law provides means for borrowing to pay a judgment or claim. Sweet Associates, Inc. v Central School Dist., 24 A.D.2d 1065, 265 N.Y.S.2d 791, 1965 N.Y. App. Div. LEXIS 2638 (N.Y. App. Div. 3d Dep't 1965).

The court construed a town board bond resolution, and found that the resolution stated with sufficient clarity (1) that the object or purpose was to acquire real property, (2) the maximum cost of the item to be purchased, (3) the plan for financing the purchase and the source of all the funds to be used. Mitchell v Shelter Island, 3 Misc. 2d 127, 148 N.Y.S.2d 212, 1955 N.Y. Misc. LEXIS 2175 (N.Y. Sup. Ct. 1955), aff'd, 2 A.D.2d 712, 153 N.Y.S.2d 298, 1956 N.Y. App. Div. LEXIS 4874 (N.Y. App. Div. 2d Dep't 1956).

One of the requirements for contracting indebtedness is that the obigation must be amortized during a period of probable usefulness not longer than that specified in Local Finance Law § 11.00 for such object or purpose, and to the extent that the assets of a bus company which the city proposed to purchase are not included under § 11.00, it will be necessary that the city undertake alternative methods of financing to cover those items. Andrello v Dulan, 49 Misc. 2d 17, 266 N.Y.S.2d 738, 1966 N.Y. Misc. LEXIS 2252 (N.Y. Sup. Ct. 1966).

When determining period of probable usefulness for $6.5 million project which involved purchase of computers in addition to reconstruction of infrastructure, board of education was not obligated to calculate weighted average period for each component of project as (1) CLS Loc Fin § 11.00(a)(12)(b) specifically permits inclusion of equipment as part of building reconstruction within 20-year period of probable usefulness, and (2) neither Local Finance Law nor state constitution precludes inclusion of computers as "equipment" within renovation project. 1999 Op Comm Ed No. 14,271.

A village board of trustees may amend a bond resolution to increase from five to fifteen years the authorized maximum maturity of a proposed bond issue, provided that no bonds have been issued pursuant to the original bond resolution and the object or purpose for which the bonds are to be issued has a period of probable usefulness of at least fifteen years. The amended bond resolution would be subject to a permissive referendum. 1957 Ops St Compt File #402.

"Expected useful life" of energy facilities or equipment subject to energy performance contract, for purposes of CLS Energy § 9-103, is estimated period over which facilities or equipment are reasonably expected to be useful and is not necessarily equated to period of probable usefulness prescribed in CLS Loc Fin § 11.00(a) for obligations issued for such facilities or equipment; estimate should be determined pursuant to generally accepted industry standards and should be based on evidence that will provide reasonable accuracy. 1999 Op St Compt No. 99-10.

CLS Loc Fin § 11.00(a) sets forth "periods of probable usefulness" for various objects or purposes for which municipality, school district or district corporation may generally contract indebtedness; period of probable usefulness represents determination by state legislature that expenditure for object or purpose will generally provide current and future benefits, and sets maximum period over which object or purpose may be financed by issuance of indebtedness. 2004 Op St Compt No. 04-3.

Bond resolution adopted by village to authorize issuance of bonds to finance village's share of cost of closing landfill, as ordered by DEC and approved by Appellate Division, is not subject to referendum requirements under CLS Loc Fin § 36.00(a)(4), but bonds issued for this purpose may not exceed 10 years. 1986 Op St Comp No. 86-87.

2. Constitutionality

Local Finance L § 11.00, subd a (42-a) excepting pension and retirement payments levy from 2 percent constitutional real property tax limitation is without a rational basis and is arbitrary. Hurd v Buffalo (1973, 4th Dept) 41 AD2d 402, 343 NYS2d 950, affd 34 NY2d 628, 355 NYS2d 369, 311 NE2d 504 (prior to repeal of subdivision in 1974).

City taxpayer, who paid real property tax under protest on basis of decision of Appellate Division declaring section of Local Finance Law unconstitutional, was not entitled to refund even though Appellate Division's decision was subsequently affirmed by the Court of Appeals, since to require city, which was entitled to prepare and adopt its budget in reliance on revenues to be derived from previously devised tax formula, to restore taxes would be inequitable and contrary to sound policy considerations. Pellnat v Buffalo, 59 A.D.2d 1038, 399 N.Y.S.2d 788, 1977 N.Y. App. Div. LEXIS 14326 (N.Y. App. Div. 4th Dep't 1977) (disagreed with by Gandolfi v Yonkers, 101 A.D.2d 188, 475 N.Y.S.2d 429, 1984 N.Y. App. Div. LEXIS 17801 (N.Y. App. Div. 2d Dep't), app. dismissed, 62 N.Y.2d 604, 478 N.Y.S.2d 1023, 467 N.E.2d 532, 1984 N.Y. LEXIS 7710 (N.Y. 1984), app. dismissed, 62 N.Y.2d 882, 478 N.Y.S.2d 865, 467 N.E.2d 529, 1984 N.Y. LEXIS 4421 (N.Y. 1984), aff'd, 62 N.Y.2d 995, 479 N.Y.S.2d 517, 468 N.E.2d 699, 1984 N.Y. LEXIS 4484 (N.Y. 1984).

Taxpayer who paid real property tax under protest on basis of decision of Appellate Division declaring section of Local Finance Law imposing tax unconstitutional was not entitled to refund even though Court of Appeals affirmed Appellate Division's nonretroactive decision since governmental process of budget prepa-

ration and adoption and tax billing and collection could not possibly be halted when decision of Appellate Division was published. Pellnat v Buffalo (1976) 87 Misc 2d 742, 386 NYS2d 965, affd (4th Dept) 59 AD2d 1038, 399 NYS2d 788 (disagreed with by Gandolfi v Yonkers, 101 A.D.2d 188, 475 N.Y.S.2d 429, 1984 N.Y. App. Div. LEXIS 17801 (N.Y. App. Div. 2d Dep't), app. dismissed, 62 N.Y.2d 604, 478 N.Y.S.2d 1023, 467 N.E.2d 532, 1984 N.Y. LEXIS 7710 (N.Y. 1984), app. dismissed, 62 N.Y.2d 882, 478 N.Y.S.2d 865, 467 N.E.2d 529, 1984 N.Y. LEXIS 4421 (N.Y. 1984), aff'd, 62 N.Y.2d 995, 479 N.Y.S.2d 517, 468 N.E.2d 699, 1984 N.Y. LEXIS 4484 (N.Y. 1984).

3. Law governing

Former § 129 of the Village Law, relating to the issue and sale of bonds and other obligations, was a special law governing the affairs of villages and controlled over the provisions of the General Municipal Law. Balducci v Strough, 239 N.Y.S. 611, 135 Misc. 346, 1929 N.Y. Misc. LEXIS 1082 (N.Y. Sup. Ct. 1929).

Town board of suburban town, which established general reserve fund pursuant to § 55 of Town Law, may, subject to subdivision 3 of that section, authorize an expenditure therefrom for specific object or purpose having a period of probable usefulness of at least 5 years pursuant to § 11.00 of Local Finance Law. 1967 Ops St Compt File #846.

4. Authorization of indebtedness

Trial court properly granted summary judgment to a city, its mayor, and a ferry service in a challenger's declaratory judgment suit seeking to invalidate various agreements the city entered into via the creation of a limited liability company (LLC) to operate a ferry service and then to assume the debt of the LLC after it went under as there was no prohibition against the city creating a LLC, and the city's assumption of the LLC's debt did not violate to statutory or constitutional provisions addressing the length a municipality could incur an indebtedness for longer than the useful purpose of the object at issue, namely the ferry. Summers v City of Rochester, 60 A.D.3d 1271, 875 N.Y.S.2d 658, 2009 N.Y. App. Div. LEXIS 2010 (N.Y. App. Div. 4th Dep't 2009).

Separate capital note resolutions must be adopted for each specific object or purpose. However, one issue of capital notes may be sold in the total amount of the separate authorizations. 1957 Ops St Compt File #57-846.

Where plans, specifications, and estimates for a future school district capital improvement are financed pursuant to the authorization of section 99-d(1), the district cannot authorize the actual undertaking of the improvement until at least one year after the issuance of the obligations. 1968 Ops St Compt File #497.

A town board may make temporary advances of general fund moneys to special funds for capital purposes, after bonds or capital notes have been authorized by the said town board. 1969 Ops St Compt File #254.

5. Referendum

No notice or public hearing on town board's resolution to sell previously authorized water system bonds was required, and resolution was not subject to referendum. Larkin v Town Board of Fleming, 52 A.D.2d 1068, 384 N.Y.S.2d 603, 1976 N.Y. App. Div. LEXIS 12994 (N.Y. App. Div. 4th Dep't 1976), app. denied, 41 N.Y.2d 802, 393 N.Y.S.2d 1026, 1977 N.Y. LEXIS 2991 (N.Y. 1977), cert. denied, 434 U.S. 836, 98 S. Ct. 125, 54 L. Ed. 2d 97, 1977 U.S. LEXIS 2969 (U.S. 1977).

The cost of a referendum held on a bond resolution may be paid from the proceeds of the sale of the bonds. 1955 Ops St Compt 107.

Fixing a maturity date of five years or less on bonds to be issued pursuant to the supplemental bond resolution would not exempt such resolution from permissive referendum. 1967 Ops St Compt File #369.

The expenditure of moneys by a town from a capital reserve fund established for a type of improvement is subject to permissive referendum in the town under specified circumstances. 1968 Ops St Compt File #22.

Moneys in a capital reserve fund established for specific purpose of acquiring and developing park land could not be used for reconstruction of town hall unless town board [1] establishes capital reserve fund for that specific purpose, and [2] authorizes, subject to permissive referendum, transfer of all or part of money in park land reserve fund to reserve fund for reconstruction of town hall. 1986 Op St Compt No. 86-21.

Where an initial bond resolution is subject to permissive referendum in order for a town to finance the cost of land to be acquired by condemnation, and where the actual cost of such acquisition is to exceed the amount fixed in the initial bond resolution, a supplemental bond resolution for the excess sum is also subject to permissive referendum, notwithstanding the anticipated entry of judgment against the town for the award in condemnation. 1967 Ops St Compt File #369.

6. Fees associated with project

A village may issue serial bonds or capital notes for the purpose of financing the employment of experts to appraise the value of the real property within the village. 1952 Ops St Compt 258.

Where a town tax collector dies during his term of office, his legal representative may not be paid any portion of his annual salary for the period subsequent to his death. 1957 Ops St Compt File #311.

Engineering fees incurred in connection with a capital improvement may be paid from the proceeds of bonds, bond anticipation notes, capital notes or deferred payment notes. 1957 Ops St Compt File #57-737.

7. Architectural and legal fees

With the exception of plans for post-war projects, capital notes may not be issued to finance the cost of architects' fees in relation to school buildings. 1946 Ops St Compt 67.

Employment of architect to prepare plans for school district public library building discussed. 1953 Ops St Compt 95.

Architects' and legal fees in connection with school construction should ordinarily be included as an item of cost payable from bond proceeds issued to finance the construction. 1963 Ops St Compt #637.

The expense of architectural and legal fees incurred in connection with a capital improvement may be paid from the proceeds of bonds issued for the purpose of financing such capital improvement although the bond resolution does not mention such fees among the purposes to which the bond proceeds are to be applied. 1969 Ops St Compt File #127.

8. —Referendum upon subject of fees

Town expenditures for experts to appraise real property whether financed from budgetary funds or by the issuance of obligations, is not subject to a referendum. 1952 Ops St Compt 303.

In the absence of express authorization by the Legislature, a city may not hold advisory referendum on the question of whether the city should undertake a general revision of real property assessments. A city, by local law, may require that bond resolution, authorizing bonds to finance employment of experts to assist in any such revision of assessments, shall be subject to a mandatory or permissive referendum. 1952 Ops St Compt 349.

A referendum is not required to authorize the expenditure of funds for the services of a firm to make appraisals for assessment purposes. 1954 Ops St Compt 102.

Where the fees of a financial consultant and bond counsel have been incurred by a town as a preliminary expense for a general town project for which obligations are to issue, such expense should normally be paid from the proceeds of the sale of the obligations, unless the bond resolution is defeated and there are no such proceeds or earmarked moneys, in which case such expense is payable from the town general fund. 1967 Ops St Compt File #499.

The engagement of professional appraisers to make an appraisal of the real property in the town is not subject to either a mandatory or permissive referendum. 1968 Ops St Compt File #146.

9. Definitions

The word "apparatus" does not include within its meaning road-building materials, such as stone, gravel, and bituminous surfacing. 1946 Ops St Compt 591.

10. Permissibility of particular objects or purposes of indebtedness

A Board of Education of a union free school district may engage the services of a firm specializing in municipal surveys to make a

survey of the school district to provide the Board and voters with proper statistical information in relation to the need for a school building for the district and other pertinent data, the reasonable cost therefor to be paid from bonds issued to finance the school building. 1947 Ops St Compt 300.

Where obligations are to be issued by a town to finance its share of a code enforcement program, each separate project within the program must be treated as a specific object or purpose. The determination whether such an item is a town-wide or part-town charge can be made only by reference to the nature of such specific object or purpose. 1959 Ops St Compt file #133.

General discussion of whether a village may issue bonds to finance payment of a refund allegedly owing to a public utility upon termination of an electric power purchase contract. 1961 Ops St Compt #384.

A town may finance the purchase of machinery and equipment for the operation of a landfill installation, as a general town charge, through a budgetary appropriation or through the issuance of serial bonds, bond anticipation notes or capital notes. 1969 Ops St Compt File #540.

Issuance of bonds by non-city school district is subject to mandatory referendum when bonds would be issued to finance prepayment of those contributions to State Retirement Systems that would otherwise be amortized and paid to Systems in annual installments; participating employer may issue bonds to finance prepayment of such contributions after employer has recorded amount as "current liability." 1993 Op St Compt No. 93-17.

City which has previously prepaid to State Policemen's and Fireman's Retirement System amount to be amortized under L 1989, ch 62 may not now issue bonds to finance that amount. 1995 Op St Compt No. 95-19.

In the event that the parts of the current surplus of the City of Rome to be used for the construction of an annex to the city hall, an annex to the Public Works barn, the paving and repairing of streets, and the construction of storm-water sewers are insufficient or unavailable to defray all of the cost of any of these objects or purposes, the city may borrow to defray all or part of such cost by the issuance of serial bonds or capital notes, subject to the limitations of par. d of § 104.00 and § 107.00. 1946 Ops St Compt 155.

11. —Water systems

Bonds issued by town for construction of water system were required to bear final redemption date no more than 40 years beyond date of completion of water system. Larkin v Town Board of Fleming, 52 A.D.2d 1068, 384 N.Y.S.2d 603, 1976 N.Y. App. Div. LEXIS 12994 (N.Y. App. Div. 4th Dep't 1976), app. denied, 41 N.Y.2d 802, 393 N.Y.S.2d 1026, 1977 N.Y. LEXIS 2991 (N.Y. 1977), cert. denied, 434 U.S. 836, 98 S. Ct. 125, 54 L. Ed. 2d 97, 1977 U.S. LEXIS 2969 (U.S. 1977).

Serial bonds or capital notes may be issued to finance the local share of the cost of preparing preliminary plans for a water district to be constructed as a post-war Public Works project. 1946 Ops St Compt 348.

The maximum term of bonds issued for a supply of water is forty years. 1954 Ops St Compt 414.

The cost of increasing and improving the source of water supply in a town water district may be financed by the issuance of serial bonds. 1955 Ops St Compt 107.

Water district land may be sold without referendum, but a public hearing is required if the value exceeds $1,000. The seller has no authority to accept, as the purchase price, anything but money. The purchasing town has no authority to pay the purchase price by giving an installment contract. 1966 Ops St Compt File #1129.

The cost of construction of additions to and improvement of the water system of a water district may be financed by the issuance of capital notes or serial bonds. It is necessary to hold a public hearing on a proposition to increase or improve the facilities and appurtenances of the water system. No referendum, either mandatory or permissive is required. 1968 Ops St Compt File #812.

A county may issue obligations on behalf of a soil and water conservation district for the purchase of various types of machinery. 1974 Ops St Compt File #385.

Capital notes may not be issued to finance the cost of preliminary engineering studies in connection with the proposed rehabilitation of a water district water system unless the improvements are actually constructed. 1981 Op St Comp File #81-385.

12. —Flood control and drainage systems

A drainage district may be established for the purpose of constructing improvements designed to prevent silting of a creek outlet and consequent flooding of riparian real property. 1953 Ops St Compt 372.

Town may finance the cost of drainage facilities by the issuance of bonds having a maximum maturity of not more than thirty years. 1955 Ops St Compt 375.

Village may dredge privately owned pond within village where such pond is integral part of village's drainage system and where filled in condition is result of its drainage function; entire cost of dredging may be assessed against properties benefited; if village authorizes such dredging, cost may be financed through issuance of bonds if village has interest in property during time obligations are outstanding, such as easements from owners of pond to restrict owners from taking any actions which prevent pond from fulfilling its village draining function; such easements would ensure that pond is "drainage improvement" within meaning of CLS Local Fin Law § 11.00(a)(3). Ops St Comp 90-4.

13. —Sewer systems

A sewer system extension may be financed over a thirty-year period. 1947 Ops St Compt 319.

The cleaning of sewers constitutes repair or maintenance and may not be financed with bonds or capital notes. 1952 Ops St Compt 164.

Serial bonds and capital notes may be issued to finance town's share of cost of preliminary plans for sewer system prepared pursuant to Public Works Law, § 31(1). 1952 Ops St Compt 275.

14. —Incinerators and disposal facilities

Where a village wishes to finance a $15,000 addition to its incinerator over a period of five years it may do so by issuing serial bonds or bond anticipation notes or a statutory installment bond, but not by issuing a capital note. 1967 Ops St Compt File #379.

15. —Bridges, tunnels, viaducts and underpasses

When a bridge, over water, connects a city of the third class and a town, the cost of improvements may be shared among the city, town and county. To finance its share a town may issue bonds. Under such circumstances, the bond resolution is not subject to referendum and the bonds would have a maximum duration of twenty years where the cost of the improvement is under five million dollars. The town may finance such improvements by taxation. A levy, for this purpose, greater than ten thousand dollars in any one year is subject to referendum where taxation is the sole means of financing such improvements. 1968 Ops St Compt File #816.

16. —Buildings, additions, original furnishings and apparatus

A village may establish a capital reserve fund for the construction of a village hall. 1968 Ops St Compt File #968.

17. —School buildings and apparatus

CLS Loc § 11.00(a), which assigns 10-year period of probable usefulness to various types of computer systems, applies to entire computer systems not necessarily installed as part of building renovation, and thus did not preclude school district's inclusion of computers as "equipment" within renovated school building pursuant to CLS Loc Fin § 11.00(a)(12). Friedman v Board of Educ., 259 A.D.2d 464, 686 N.Y.S.2d 84, 1999 N.Y. App. Div. LEXIS 2019 (N.Y. App. Div. 2d Dep't 1999).

Where the bond resolutions of a school district were under attack as directed to financing the removal of 50 portable classroom units distributed among seven elementary schools where they were already upon permanent foundations and attached to the school buildings and attaching them for use in connection with certain high schools at different locations, it was held that the portable classrooms, when so removed and attached to the different schools, would amount to new, separate and distinct buildings and that the referendum was accordingly not invalid as

not relating to financing new buildings. Szendy v Board of Education, 25 Misc. 2d 5, 205 N.Y.S.2d 668, 1960 N.Y. Misc. LEXIS 2340 (N.Y. Sup. Ct. 1960), aff'd, 13 A.D.2d 679, 215 N.Y.S.2d 474, 1961 N.Y. App. Div. LEXIS 11509 (N.Y. App. Div. 2d Dep't 1961).

Resolution whereby board of education of central school district called for special district meeting to vote on single proposition authorizing levy of $22,062,000 tax (to be collected in installments and used to reconstruct buildings, parking lots and sidewalks, improve existing playground and recreational areas, purchase and install oil tanks, and purchase school buses) did not improperly include multiple objects and purposes in single proposition, under CLS St Fin § 11.00; board's actions complied with CLS Educ § 416 and CLS Loc Fin § 41.10, and were consistent with interpretations of those statutes by courts and Commissioner of Education. 1997 Op Comm Ed No. 13769.

The unexpended portion of the proceeds from the sale of bonds issued by a school district to finance construction of a school building may not be used to purchase original furnishings, equipment, machinery or apparatus required for the purposes for which the building is to be used when the proposition adopted by the voters and the bond resolution adopted by the board of education make no reference to the acquisition of such furnishings, equipment and apparatus in describing the object or purposes for which the bonds were issued. 1953 Ops St Compt 7.

School district may issue bonds or capital notes to finance construction of a building to house the public library established by the law district. 1953 Ops St Compt 95.

A public library building constructed by a school district is not a "school house" within the meaning of par (a) sub 11 of this section. 1954 Ops St Compt 17.

Subdivisions 12 and 35 cover expenditures for reroofing various buildings and replacing wooden floor in gymnasium with new wooden floor. 1955 St Compt File #7220.

A city school district may properly adopt separate bond resolutions for (1) the construction of a new school and construction of additions to 3 existing schools; (2) the construction of 3 schools and the construction to an existing school; and (3) the acquisition of cities for 2 of the additions mentioned in the first resolution. However, the object of resolutions (1) and (3) should be combined in a single resolution. 1959 Ops St Compt #13.

Textbooks and library books are original equipment and furnishings for a new school building. 1960 Ops St Compt File #375.

The proceeds of bonds, which are appropriated by a school district for the construction of a building for public library use, are under the control of the school district officials and accordingly the debt service on the bonds should be reflected in the budget of the school district. 1956 Ops St Compt 265.

While there is no specific period of probable usefulness for removal of asbestos from a building, the expense of such work may be financed through the issuance of bonds if it necessarily includes or requires other improvements, such as building alterations, which have periods of probable usefulness. 1984 Op St Comp File #84-28.

18. —Police and fire buildings and apparatus

A fire district may finance the construction of an addition to a fire house on land held under a conveyance for that purpose. 1960 Ops St Compt File #1129.

Fire district has no power to issue bonds to finance construction of addition to firehouse not owned by it. 1965 Ops St Compt File #244.

Town may issue obligations to finance construction of building for use by state police on land owned by state so long as town retains ownership interest in building during term of bonds. 1988 Op St Compt No 88-26.

19. —Highways, roads, streets, parkways and parking areas

A county legislature's bond resolution would not be invalidated on the asserted ground that it lacked the specificity required under Loc Fin Law § 32.00(1) in that it merely designated "reconstructing various roads in said county" as the purpose for the issuance of bonds and notes rather than setting forth specific roads, since the county legislature was not prohibited from designating the reconstruction of roads within the county as a class of objects and purposes for the issuance of its obligations, and since the resolution sufficiently satisfied the objectives underlying the statutory requirement that the objects or purposes for the issuance of municipal obligations be described in that it reasonably insured that the funds derived from such issuance would be expended only for the stated class of objects or purposes, and sufficiently determined the period of probable usefulness of the class or specific object or purpose. Morris v Cahill, 96 A.D.2d 88, 469 N.Y.S.2d 231, 1983 N.Y. App. Div. LEXIS 19878 (N.Y. App. Div. 3d Dep't 1983).

County resolution to issue highway improvement bonds was sufficiently specific to permit determination as to whether periods of indebtedness contracted for would exceed probable usefulness of each particular project, as required by CLS NY Const Art VIII § 2 and CLS Loc Fin § 11.00, despite resolution's generally stated purpose of reconstructing "various county roads" and its failure to state maturity date of bonds issued, where resolution (1) referred to class of objects and purposes, not specific projects, (2) set forth maximum debt to be incurred and probable useful life for each class, and (3) expressly required that bonds mature "on or before the date of the expiration of the useful life of the object or purpose involved." Ayers v County of Greene, 132 A.D.2d 66, 521 N.Y.S.2d 843, 1987 N.Y. App. Div. LEXIS 49544 (N.Y. App. Div. 3d Dep't 1987).

Budget notes, capital notes, or serial bonds may be issued for the resurfacing of a town highway. 1945 Ops St Compt 473.

The resurfacing of the pavement portion of a bridge over railroad tracks may be financed by the issuance of bonds, bond anticipation notes or capital notes. 1956 Ops St Compt 89.

The city may not acquire real property for municipal parking lot purposes and finance the purchase of the same by issuing a purchase money mortgage therefor. 1956 Ops St Compt 291.

A "Dix Seal" surface treatment of highways would have a period of probable usefulness of ten years. 1962 Ops St Compt #91.

A village may issue bond anticipation notes to finance, over a period of four years, a $7,000 street repaving project. 1968 Ops St Compt File #40.

Subdivision 20 covers re-surfacing of a parking area. 1955 St Compt File #7220.

20. —Highway construction and maintenance machinery and apparatus

A village may finance the purchase of snow-fighting equipment by the issuance of capital notes or bonds. Such bonds may not have a maturity exceeding five years. 1947 Ops St Compt 531.

A town may finance the purchase of highway machinery and equipment without the necessity of making a down payment. 1954 Ops St Compt 124.

A town which purchases highway machinery may issue bonds having a maturity of five years. Such period commences upon the date of such bonds. 1956 Ops St Compt 71.

Moneys raised by borrowing are not a charge against the limitation upon the amount which may be levied and collected in any one year for the purchase of highway machinery. Debt service on such borrowings will be a charge against such limitations. 1957 Ops St Compt File #287.

Bonds issued to finance the purchase of highway machinery have a maximum maturity of five years. 1957 Ops St Compt File #287.

No down payment is necessary on the purchase of highway machinery. 1957 Ops St Compt File #287.

Bonds may not be issued to finance cost of repairing highway machinery, since no period of probable usefulness is prescribed by Local Finance Law, § 11(a). 1960 Ops St Compt File #269.

A town may not finance the purchase of highway equipment by means of an installment loan through a bank. 1967 Ops St Compt File #963.

21. —Land acquisition

City may finance acquisition of real property pursuant to Military Law § 171-a by issuance of bonds. 1954 Ops St Compt 54.

The maximum maturity of bonds issued to acquire land for a town is 30 years. 1964 Ops St Compt #640.

Town may provide in its proposed budget appropriation of amount to be funded by real property tax and to be paid into capital reserve fund for purpose of accumulating monies for future purchase of development rights for open space preservation; if reserve fund is established for purchase of development rights of specific parcel, establishment of fund is subject to permissive referendum requirements. 2002 Op St Compt No. 2002-5.

Town may provide in its proposed budget appropriation of amount to be funded by real property tax and to be paid into capital reserve fund for purpose of accumulating monies for future purchase of development rights for open space preservation; if fund is established generally for acquisitions of rights in land for open space preservation, no referendum is required on establishment of reserve fund, but expenditures from fund to acquire development rights would be subject to permissive referendum requirements. 2002 Op St Compt No. 2002-5.

Town may provide in its proposed budget appropriation of amount to be funded by real property tax and to be paid into capital reserve fund for purpose of accumulating monies for future purchase of development rights for open space preservation; monies in fund may be invested in accordance with CLS Gen Mun § 11. 2002 Op St Compt No. 2002-5.

Town may issue bonds to finance acquisition of permanent development rights in land for open space preservation; bond resolution to authorize issuance of such obligations would be subject to permissive referendum if proposed maturity of bonds is more than 5 years. 2002 Op St Compt No. 2002-5.

In addition to other procedural requirements, expenditure of public funds for preservation of open spaces and areas may be made only after due notice and public hearing. 2002 Op St Compt No. 2002-5.

22. —Police and fire communication systems

Since subd. a-25 of this section gives the probable life of usefulness of police and fire communication systems as ten years, there is nothing to prevent the City of Cohoes from amending its charter to sanction contracts for rental of such equipment for periods in excess of one year, subject to the restrictions contained in § 17 of the City Home Rule Law. 1960 Ops St Compt #60-324.

23. —Fire fighting vehicles and equipment

Bonds issued by a village to finance the cost of four fire trucks, each of which costs less than $10,000, cannot be spread over a period in excess of five years. 1945 Ops St Compt 500.

Appropriations for the purchase of fire-fighting vehicles and apparatus may be raised outside the constitutional two per cent tax limit if serial bonds or capital notes are issued or if the purchase is made pursuant to the pay-as-you-go plan in accordance with the Constitution, Art. VIII, § 11. 1947 Ops St Compt 354.

Rules and regulations relative to purchase of fire apparatus are discussed herein. 1953 Ops St Compt File #6421.

A village board of trustees may establish a capital reserve fund to finance all or a portion of the cost of purchasing an ambulance. 1965 Ops St Compt File #738.

A fire district may establish a capital reserve fund to purchase a fire alarm system or establish a repair reserve fund to repair a fire alarm system under certain circumstances. A reserve fund may not be established to fund current expenses concerning, or maintenance of, a fire alarm system. 1973 Ops St Compt File #1015.

24. —Ambulances

A fire district may not expend money from a repair reserve fund to purchase a fire alarm siren. A transfer of funds may be made to a fire district capital reserve fund and then the siren may be purchased from such capital reserve fund, subject to applicable referendum provisions. 1968 Ops St Compt File #632.

25. —Other motor vehicles

Bonds may not be issued to finance the cost of a station wagon with a seating capacity of less than ten persons. 1955 Ops St Compt 388.

The purchase and installation of a truck motor costing in excess of $2,500 is subject to competitive bidding. The cost of a new truck motor may be financed by serial bonds or capital notes. 1956 Ops St Compt 176.

If police cars are to be purchased to replace similar police cars which were in service for one year or more, 3-year period of probable usefulness exists and purchase of such cars may be financed by issuance of capital note or bond; however, notwithstanding 3-year period of probable usefulness prescribed by CLS Loc Fin § 11.00(a)(77), any capital notes issued to finance purchase of police cars must mature not later than last day of second fiscal year succeeding fiscal year in which notes are issued pursuant to CLS Loc Fin § 28.00[a]. Ops St Compt 88-37.

26. —Voting machines

Towns may finance voting machines by either bonds or capital notes. 1947 Ops St Compt 127.

Resolution of town board establishing capital reserve fund for acquisition of voting machines is subject to permissive referendum. 1964 Ops St Compt File #902.

27. —Equipment, machinery, apparatus and furnishings

Subdivision 32 covers expenditures for replacement of pupils' desks, teachers' desks and other furniture; replacement of shelving in storage rooms, bulletin boards in classrooms, filing equipment, laundry equipment, business machines in business office; and new library books. 1955 St Compt File #7220.

Proceeds of serial bonds issued pursuant to subpar. (32) (a) may be used to finance purchase of educational film strips. 1962 Ops St Compt #964.

28. —Judgments

In a dispute over a school construction contract an award of arbitrators in excess of the amount authorized to be expended by the voters of the school district was payable from funds obtained by taxation for the proceeds of a bond issue, and the judgment did not require satisfaction from funds in the hands of the appellant treasurer. Sweet Associates, Inc. v Central School Dist., 24 A.D.2d 1065, 265 N.Y.S.2d 791, 1965 N.Y. App. Div. LEXIS 2638 (N.Y. App. Div. 3d Dep't 1965).

Where section 206 of the Second Class Cities Law requires that the amount of judgments against a city be appropriated in its next budget and where such amount was not appropriated therein, there is no authority for issuance of a budget not to finance such purpose. 1956 Ops St Compt 41.

Town board may authorize issuance of bonds to finance tax certiorari judgments; resolution authorizing issuance of bonds must be authorized by ⅔ vote of town board and is neither subject to mandatory referendum nor is town board authorized to provide for referendum on its own motion. 1993 Op St Compt No. 93-4.

A judgment against the city may not be satisfied by an abatement of the 1953-54 city tax levy on the property of the judgment creditor. Payment of the judgment may not be financed by bonds or capital notes. If the judgment against the city cannot be paid out of available moneys in the general fund in the current year, the amount must be included in the tax levy for the following year. In such case, the city may finance the payment by the issuance of budget notes pursuant to section 29.00(d) of the Local Finance Law. 1953 Ops St Compt 296.

29. —Tax and revenue anticipation obligations

Bond anticipation notes may be issued in anticipation of the future sale of bonds under § 23.00 after the adoption of a bond resolution. The length of the bond issue would depend upon the period of probable usefulness under this section. 1945 Ops St Compt 583.

Bonds may not be issued in anticipation of the collection of taxes or revenues to finance salary increases for teachers. 1946 Ops St Compt 614.

In a school district budget, interest on bond anticipation notes should be considered as part of the administrative expense of the bond issue and charged as such against the Construction Fund. 1955 Ops St Compt File #7756.

Where a municipality has insufficient funds to meet certain year-end costs, it may, subject to certain statutory limitations, borrow through the issuance of serial bonds, bond anticipation

notes, or capital notes, if for capital expenditures, and through issuing budget notes, if for current operating expenses. 1967 Ops St Compt File #643.

A school district may establish a reserve fund to pay tax certiorari claims, and may establish the fund prior to a court order determining the amount of a judgment or claim. Prior opinions inconsistent herewith are superseded 1984 Op St Comp File #84-32.

30. —Change of fiscal year

A village which will shift from a March 1 fiscal year to a June 1 fiscal year in 1956 may finance the three month interim period from March 1, 1956 to May 31, 1956 by the issuance of serial bonds or capital notes. 1955 Ops St Compt 155.

31. —Urban renewal

A bond resolution, effectuating an urban renewal program in a village, is subject to a permissive referendum if the proposed maturity of the bonds is more than five years. 1969 Ops St Compt File #1015.

32. —Equipment associated with tax assessment

Subdivision 52 covers expenditures for certain business machines. 1955 St Compt File #7220.

33. —Swimming pools

A swimming pool to be constructed with steel walls set in a concrete floor does not fall within the provisions of this section, but such a project has a period of probable usefulness of ten years under subd. (a)(19). 1962 Ops St Compt #804.

34. —Boardwalks

Bonds may be issued for the reconstruction of a boardwalk in a park district. 1945 Ops St Compt 448.

35. —Skiing developments

The Town of North Elba, on behalf of the North Elba Parks and Play Grounds District, may properly finance certain expenditures relating to the John F. Kennedy 1968 Winter Games, to be held in said district, by the sale of bonds or capital notes. 1968 Ops St Compt File #84.

Agency Opinions

Analysis

1. In general; period of probable usefulness
2. Permissibility of particular objects or purposes of indebtedness
3. —Flood control and drainage systems
4. —Sewer systems
5. —Buildings, additions, original furnishings and apparatus
6. —School buildings and apparatus
7. —Highways, roads, streets, parkways and parking areas
8. —Fire fighting vehicles and equipment
9. —Equipment associated with tax assessment

1. In general; period of probable usefulness

A town may appropriate the necessary funds (if funds are available) to pay a claim based upon a contract entered into in a prior year where no appropriation had been made in the year of the contract, provided that funds were available from which an appropriation could have been made in the year the contract was entered into and provided the statute of limitations has not run out. If such a claim is for preliminary work in connection with a capital project for which bonds are issued, the proceeds from such bond issue may be used to pay the claim. 1978 Op St Compt File #608.

2. Permissibility of particular objects or purposes of indebtedness

3. —Flood control and drainage systems

A village flood control project, whether undertaken by the village alone, or in participation with a federal program of flood control, is not subject to permissive referendum. However, the method of financing same may be subject to such referendum. 1970 NY Ops Atty Gen July 21.

4. —Sewer systems

The Village of Southampton may not issue its bonds and assess the cost of the principal and interest thereof on "benefitted property" where the water mains to be constructed with the proceeds of the bonds will be owned by Suffolk County Water Authority. 1979 Op St Compt File #596.

5. —Buildings, additions, original furnishings and apparatus

The Village of Babylon does not have statutory authority to repair the facade of privately-owned condominiums. However, the Board of Trustees of the Village could request a special act giving it authority to use its credit to repair the facade and to recoup the cost by special assessments against the condominium owners. 1980 NY Ops Atty Gen Dec. 10 (Informal), 1980 N.Y. AG LEXIS 27.

6. —School buildings and apparatus

Local Finance Law § 11.00(a)(12-a) is not applicable to the demolishing of a building owned by a school district. 1979 Op St Compt File #829.

7. —Highways, roads, streets, parkways and parking areas

Villages are authorized to acquire real property for parking purposes and to establish fees or charges for the use thereof. A bond resolution proposing maturity of more than five years to finance the cost of acquiring such a parking area is subject to a permissive referendum or may be submitted to a referendum by the village board. 1957 NY Ops Atty Gen March 26 (informal).

8. —Fire fighting vehicles and equipment

The Town Board of the Town of Sullivan, acting as Fire Commissioners of said town, may purchase a fire truck without submission of a proposition to the electors for their approval, provided that the expenditure is to be made from cash on hand if the expenditure is within the district's spending limitation. If such purchase is not to be made from cash on hand or from cash on hand exceeding such imitation, approval by the electors of a proposition on referendum is necessary. 1968 NY Ops Atty Gen Oct 16 (informal).

The Town Board of the Town of Sullivan, acting as Fire Commissioners of said town under Town Law § 176(18), may purchase a fire truck without submission of a proposition to the electors for their approval, provided that the expenditure is to be made from cash on hand if the expenditure is within the district's spending limitation, but if such purchase is to be made under Town Law § 179 or Local Finance Law § 38.00, approval by the electors of a proposition on referendum is necessary. 1968 NY Ops Atty Gen Oct 16.

9. —Equipment associated with tax assessment

Town may issue municipal bonds to finance town data collection project. 9 Op Counsel SBEA No. 67.

The Village of Saranac Lake may not issue bonds for the purpose of creating mortgage money for the private housing sector, nor may it enact a local law granting special real property tax treatment to building owners who improve the facades of their buildings. 1979 NY Ops Atty Gen May 8. (Informal).

Costs of a lawsuit, such as attorneys' fees, disbursements, expenses and the cost of appeals, may be financed by issuing budget notes, but not serial bonds. However, items which are included in a judgment against a municipality may be financed by issuing serial bonds. 1978 Op St Compt File #1012.

Whether the Village of Rockville Center may establish a cable television system which would provide special services (electric, water meter readings, fire and burglar alarms, etc.) and as an additional auxiliary service, recreational TV is a question which should be determined by the Commission on Cable Television; if such a system may be established, its capital costs should not be paid solely by the customers of the Village Electric Department; if such a system may be established, indebtedness may be contracted by the Village and obligations issued to finance its capital costs pursuant to Local Finance Law, § 11.00(a)(35). 1980 Op St Compt File #556.

Where a county initiates a revaluation of real property for tax purposes which does not include all towns in the county, the expense of financing the revaluation is levied on a county-wide basis. 1978 Op St Compt File #786.

The proceeds of bonds issued for the reconstruction of docks and bulkheads may not be used for the maintenance of channel markers and/or mooring piles which are re-set each spring because of winter ice. 1979 Op St Compt File #317.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 2.00, 10.00, 15.00, 21.00, 26.00, 26.10, 28.10, 29.00, 31.00, 32.00, 33.10, 54.10, 54.30, 54.40, 54.50, 54.60, 92.00, 93.00, 107.00, 121.20, 122.00, 151.00; CLS County §§ 227, 277; CLS Gen Mun §§ 99-d, 503-a, 708, 960-a; CLS Pub A §§ 1285, 2505; CLS Pub Hous § 76-a; CLS Town §§ 55, 176.

Periods of probable usefulness of county hurricane protection, flood and shoreline erosion control projects, CLS County § 280-v.

State office buildings and other public improvements in certain counties, CLS County § 850.

Collection of contributions, CLS Educ § 521.

Definitions, CLS Educ § 2590-a.

Short title, CLS Gen Mun Art 16, §§ 690 et seq.

Definition of advisory committee; doing business without license; licensing, CLS Ins Art 61, §§ 6101 et seq.

Repairs, vacation and demolition of buildings, CLS Mult D § 309.

Nuisances, CLS Mult R § 305.

Limited-profit housing companies, CLS Priv Hous Fin §§ 10 et seq.

Additional powers of municipalities, CLS Priv Hous Fin § 36-a.

Loans to owners of existing multiple dwellings, CLS Priv Hous Fin §§ 400 et seq.

Small loans to owners of multiple dwellings to remove substandards or insanitary conditions, CLS Priv Hous Fin §§ 450 et seq.

New York city rehabilitation mortgage insurance corporation, CLS Priv Hous Fin §§ 700 et seq.

Mortgage insurance fund; remic premium reserve fund, CLS Priv Hous Fin § 709.

Assistance to the corporation, CLS Priv Hous Fin § 710.

Policy and purposes of article, CLS Priv Hous Fin Art 15, §§ 800 et seq.

Judicial review, CLS Real P Tax §§ 700 et seq.

Transition provisions, CLS Work Comp § 75.

Period of probable usefulness for payments of certain employers' shares of pension, CLS Unconsol, Ch 59-B § 2.

Federal Aspects:

Title I of the Housing Act of 1949, cited in statutory text, formerly appeared generally as 42 USCS §§ 1450 et seq., prior to its omission on the authority of Act Aug. 22, 1974, P. L. 93-383, Title I, § 116(a), (b), (f), (g), 88 Stat. 652, which appears as 42 USCS § 5316.

Jurisprudences:

64 Am Jur 2d, Public Securities and Obligations §§ 104 et seq., 195.

15 Am Jur Proof of Facts 411, Swimming Pool Accidents.

TITLE 2 Local Obligations; Types Thereof

HISTORY:

Add, L 1942, ch 424.

§ 20.00. Types of obligations which may be issued

a. Bonds, notes or other evidences of indebtedness authorized to be issued by municipalities, school districts or district corporations for any object or purpose shall hereafter be of the following nature and kind only and shall be denominated respectively as follows:

1. Serial bonds.
2. Sinking fund bonds or corporate stock.
3. Bond anticipation notes.
4. Tax anticipation notes.
5. Revenue anticipation notes.
6. Capital notes.
7. Budget notes.
8. Urban renewal notes.
9. Deferred payment notes.
10. [Expires and repealed July 31, 2021 (see 1996 note below)] Land installment purchase obligations.
11. Lease, sublease or other agreements entered into pursuant to subparagraph two of paragraph b of subdivision thirty-eight of section sixteen hundred eighty of the public authorities law.
12. Deficiency notes.

b. Nothing contained in this section shall be construed to prevent the prepayment of taxes to a municipality, school district or district corporation and the furnishing of a non-negotiable receipt of such prepayment whether or not interest is to be paid on the moneys so prepaid.

c. Nothing contained in this chapter shall prevent a municipality from issuing evidences of indebtedness to the state of New York or to the United States of America with respect to a project or projects undertaken by such municipality pursuant to any general law to effectuate any of the purposes of article eighteen of the state constitution.

d. Nothing contained in this section shall be construed to prevent a municipality from issuing evidence of indebtedness or entering into installment contracts to purchase equipment, machinery and apparatus pursuant to section one hundred nine-b of the general municipal law.

HISTORY:

Add, L 1942, ch 424; amd, L 1943, ch 711, eff April 23, 1943; L 1944, ch 611; L 1950, ch 270, § 2; L 1957, ch 950, § 1; L 1961, ch 404, eff April 11, 1961; L 1961, ch 611, eff April 17, 1961; L 1983, ch 704, § 3, eff Oct 24, 1983; L 1996, ch 626, § 1, eff Sept 4, 1996, expires and repealed July 31, 2021 (see 1996 note below); L 2001, ch 383, § 7 (Part F), eff Oct 29, 2001, deemed eff April 1, 2001 (see 2001 note below); L 2012, ch 255, § 2, eff July 18, 2012.

Commission Note: [1942] The Commission limited the types of obligations which might be issued to seven basic types to obviate the confusion inherent in giving different descriptive names to obligations which are fundamentally the same and vice versa. Cf., for example, former Village Law § 126-g which has substance transferred to Local Finance Law § 24.00 (authorizing the issuance of "tax notes," which are obligations issued in anticipation of the levy of taxes) with New York City Charter former § 249 (which authorize "tax notes" for budget deficiencies, certain emergencies and the financing of capital improvements). The first type of obligation in the example referred to is termed a "tax anticipation note" in this chapter and the second type is classified herein as a "budget note" or a "capital note."

Editor's Notes: See 1961 note to § 25.10.

Laws 1996, ch 626, § 3, eff Sept 4, 1996, expires and repealed July 31, 2021, provides as follows:

§ 3. This act shall take effect immediately and shall expire on July 31, 2021 when upon such date the provisions of this act shall be deemed repealed (Amd, L 2000, ch 456, § 1, eff Sept 20, 2000, L 2011, ch 200, § 1, eff July 20, 2011.).

Laws 2001, ch 383, § 20 (Part F), eff Oct 29, 2001, deemed eff April 1, 2001, provides as follows:

§ 20. This act shall take effect immediately and shall be deemed to have been in full force and effect on and after April 1, 2001 and shall apply to school years commencing on or

after July 1, 2001, provided, however, that section fourteen-a of this act shall take effect on the same date and in the same manner as section 1 of part B of chapter 149 of the laws of 2001 takes effect.

Amendment Notes: 2012. Chapter 255, § 2 amended:
By adding par a, sub 12.
2001. Chapter 383, § 7 (Part F) amended:
By adding par a, sub 11.
1996. Chapter 626, § 1 amended:
By adding par a, sub 10.

Notes to Decisions

Analysis

1. In general
2. Purposes for which indebtedness may be incurred
3. Annual basis
4. Purchase money mortgage
5. Rental of equipment
6. Installment purchase contract

1. In general

No notice or public hearing on town board's resolution to sell previously authorized water system bonds was required, and resolution was not subject to referendum. Larkin v Town Board of Fleming, 52 A.D.2d 1068, 384 N.Y.S.2d 603, 1976 N.Y. App. Div. LEXIS 12994 (N.Y. App. Div. 4th Dep't 1976), app. denied, 41 N.Y.2d 802, 393 N.Y.S.2d 1026, 1977 N.Y. LEXIS 2991 (N.Y. 1977), cert. denied, 434 U.S. 836, 98 S. Ct. 125, 54 L. Ed. 2d 97, 1977 U.S. LEXIS 2969 (U.S. 1977).

School district's acceptance of advance payment, conditioned on pro rata repayment in event contract was prematurely terminated, did not constitute loan to district in violation of CLS Loc Fin §§ 20.00 et seq., or revenue anticipation note as defined in CLS Loc Fin § 25.00, where there was no absolute requirement of repayment at time contract was signed, obligation to repay advance arose only in subsequent year if contract was terminated, and amount of contingent repayment was unknown when contract was executed; advance payment was more similar to contingent gift subject to certain contractual obligations of repayment if conditions of gift were not met. 2000 Op Comm Ed No. 14,489.

Water district land may be sold without referendum, but a public hearing is required if the value exceeds $1,000. The seller has no authority to accept, as the purchase price, anything but money. The purchasing town has no authority to pay the purchase price by giving an instalment contract. 1966 Ops St Compt File #1129.

"Line of credit" transaction whereby bank offers to lend county money by making funds available to county up to predetermined amount and county would be permitted to draw against entire amount of line all at once or in increments, with interest payable monthly and entire principal balance payable on any payment date, is not type of municipal debt authorized by law; "line of credit" is not equivalent of capital note authorized by CLS Loc Fin § 28.00; use of term "line of credit" for transaction whereby bank lends county money, is improper under CLS Loc Fin § 20.00. Op St Compt 88-45.

2. Purposes for which indebtedness may be incurred

Fire district has no power to issue bonds to finance construction of addition to firehouse not owned by it. 1965 Ops St Compt File #244.

A county may not contract indebtedness for the purpose of constructing a county infirmary adjacent to a private hospital and operating the infirmary in conjunction with the hospital to the extent of furnishing heat, physical and occupational therapy, laundry and other facilities and services to the said private hospital, on a contract basis, nor may a county expend its funds for this purpose. 1965 Ops St Compt File #389.

A village may issue bond anticipation notes to finance, over a period of four years, a $7,000 street repaving project. 1968 Ops St Compt File #40.

3. Annual basis

Village board may not make a deposit of public moneys with a water corporation, or contract to make periodic payments in the future for materials or services to be furnished at this time; or pay now for materials and services to be furnished later. 1965 Ops St Compt File #175.

Strictly speaking, the mere existence of assets in a city's electric utility depreciation reserve fund, and the existence of surplus moneys in its electric light and water rent funds, would not require the use of such assets and surplus for related capital improvements in the place of issuing obligations therefor, except that a city is without authority to accumulate capital reserve fund assets solely for investment purposes or to carry over uncommitted surpluses into an ensuing fiscal year. 1967 Ops St Compt File #390.

Where a village board of trustees determines that benefit assessments are to be paid in annual installments, it must finance the cost of the improvement, or the part thereof to be defrayed by benefit assessments on an annual basis, pursuant to the requirements of the Local Finance Law. 1967 Ops St Compt File #522.

4. Purchase money mortgage

The city may not acquire real property for municipal parking lot purposes and finance the purchase of the same by issuing a purchase money mortgage therefor. 1956 Ops St Compt 291.

5. Rental of equipment

A municipality has no authority to rent equipment with the rental to be applied against purchase price, as such agreements not only contravene the purpose of laws requiring competitive bidding but are unauthorized as installment purchases. 1961 Ops St Compt File #301.

6. Installment purchase contract

None of the provisions of this law establish a method of financing an obligation by purchase agreement with installment payments and any contract entered into by a village, such as one for acquisition of property for a public parking lot, is void. Marine Midland Trust Co. v Waverly, 42 Misc. 2d 704, 248 N.Y.S.2d 729, 1963 N.Y. Misc. LEXIS 1722 (N.Y. Sup. Ct. 1963), aff'd, 21 A.D.2d 753, 251 N.Y.S.2d 937, 1964 N.Y. App. Div. LEXIS 5365 (N.Y. App. Div. 3d Dep't 1964).

De facto lease-purchase, characterized as "lease agreement" by city school district and high school development corporation, was invalid where (1) it explicitly stated that neither full faith and credit nor district's taxing power were pledged to payment of any amount due or to become due, and that district's obligations did not and would not constitute indebtedness under CLS NY Const Art VII or Art VIII or CLS Loc Fin § 20.00, and (2) new high school was to be constructed on land owned by development corporation, not on district property. 2003 Op Comm Ed No. 14,857.

A fire district may not enter into an installment land contract for purchase of realty, since such a contract is not included in the enumeration of obligations authorized by this section. 1962 Ops St Compt #818.

Water district land may be sold without referendum, but a public hearing is required if the value exceeds $1,000. The seller has no authority to accept, as the purchase price, anything but money. The purchasing town has no authority to pay the purchase price by giving an installment contract. 1966 Ops St Compt File #1129.

An arrangement whereby a municipality agrees to "lease" developed real property for a specified time, with title to vest in the municipality at the conclusion thereof, would be void as an unauthorized instalment purchase. The municipality could purchase or lease land and develop it, or agree to a true lease of such developed property. 1969 Ops St Compt File #217.

A transaction whereby a not-for-profit corporation, without competitive bidding, constructs a public facility for use by a municipal corporation in the performance of its governmental functions and the municipal corporation acquires use of the facility under a lease agreement and has an option to purchase: (a) does not constitute indebtedness for purposes of the State Constitution and Local Finance Law if the lease agreement has an executory clause making the municipal corporation's obligation contingent on annual appropriations, although it is doubtful that a clause providing that, if the municipal corporation fails to

appropriate money for the lease payments, the municipal corporation agrees not to purchase, lease or rent property to perform the same functions as the facility, would be enforceable; (b) constitutes a prohibited installment purchase contract if the total character of the transaction is that of a purchase rather than a lease; and (c) violates the competitive bidding requirements of General Municipal Law §§ 101, 103, if the total character of the transaction constitutes a contract for public work of the municipal corporation. 1991 Op St Compt No. 91-13.

Agency Opinions

Analysis

1. In general
2. Rental of equipment
3. Installment purchase contract

1. In general

Discussion concerning a village's purchase of a building and grounds from an American Legion post and of the use of the property thereafter for the post's meetings and social affairs. 1978 Op St Compt File #998.

A village may not use a multi-purpose credit card issued by one of the credit card firms, such as Master Charge. 1979 Op St Compt File #152.

If a multi-purpose credit card company which issues a card such as the VISA card, is able to comply with the certification of claim requirements of Town Law, § 118, it may issue its cards in the name of a town for the use of town employees and officers for, among other things, reimbursable travel expenses incurred in the performance of their duties. 1979 Op St Compt File #202.

An arrangement whereby a village leases a pistol range to several private organizations in exchange for repair and renovation work to be performed by the organizations could be viewed as a circumvention of statutory competitive bidding and/or local financing requirements. 1982 Op St Compt File #82-144.

Municipal hospitals may not establish a line of credit with a bank as a means of financing expenditures; municipal hospitals may not guarantee repayment of loans taken out by incoming patients as a means of paying their bills. 1982 Op St Compt File #82-152.

A village may sell unneeded real property to a fire company. The fire company may construct a building and lease part of the structure back to the village to house village fire equipment if the arrangement constitutes a true lease. 1982 Op St Compt File #82-341.

2. Rental of equipment

A town may not enter into a "lease" agreement to obtain a tractor where such agreement provides that rental payments be applied to an option purchase price and provides for rental payments to include a principal amount plus a finance charge. 1982 Op St Compt File #82-51.

3. Installment purchase contract

A multi-purpose credit card may be issued to a city school district for use by personnel in charging reimbursable travel expenses incurred while performing their duties. However, the credit card company must comply with Education Law, § 2524(1) when claiming payment. 1979 Op St Compt File #494.

A board of cooperative educational services may enter into an installment contract to purchase computer equipment. 1979 Op St Compt File #557.

A lease agreement pursuant to which the Town of Altamont pays an annual rental for real property used by the town as a ski area and which further provides that the lessor agrees to make a gift of the property to the town at the expiration of the lease term would appear to constitute an unauthorized installment purchase contract. 1980 Op St Compt File #243.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 11.00, 15.40; CLS Gen Mun § 109-b; CLS Pub Hous § 55.

This section referred to in CLS Pub A § 1680-a.

Installment contracts, CLS Gen Mun § 109-b.

Federal Aspects:

Municipal security defined, 15 USCS § 78c.

United States notes, 31 USCS § 3103.

Jurisprudences:

64 Am Jur 2d, Public Securities and Obligations §§ 5, 9, 11–14, 24.

Law Reviews:

Sovern, Ginzberg, Goldin, Bribetz, Thomas, New York City—what lies ahead? A panel. 12 Colum J L & Soc Prob 587.

Future of nonguaranteed bond financing in New York. 45 Fordham L. Rev. 860.

Macchiarola, Constitutional, statutory and judicial restraints on local finance in New York state. 15 NY L F 852.

Annotations:

Power of governmental unit to issue bonds as implying power to refund them. 1 ALR2d 134.

§ 21.00. Serial bonds

a. Any municipality, school district or district corporation may issue serial bonds for any object or purpose having a period of probable usefulness set forth in paragraph a of section 11.00 of this chapter and for which object or purpose it may contract indebtedness pursuant to section 10.00 of this chapter; provided, however, that serial bonds shall not be issued by such municipality, school district or district corporation (1) in those cases in which provision is made in sections 24.00 and 25.00 of this chapter for the issuance of tax anticipation notes and revenue anticipation notes to be issued in anticipation of the collection or receipt of taxes, revenues or assessments, as the case may be, or (2) in those cases in which provision is made in section 29.00 of this chapter for the issuance of budget notes other than paragraph n of such section, or (3) in those cases in which budget notes have been issued under such paragraph n; and further provided, however, that nothing contained herein shall prohibit the issuance of serial bonds by such municipality, school district or district corporation for the object or purpose specified in subdivision sixty of paragraph a of section 11.00 of this chapter.

b. Serial bonds shall mature in annual installments. The first installment shall mature not later than eighteen months after the date of such bonds or two years after the date of the first bond anticipation note or notes issued in anticipation of such bonds, whichever is the earlier, provided, however, that until July fifteenth, two thousand twenty-one, the first installment shall mature not later than two years after the date of such bonds or two years after the date of the first bond anticipation note or notes issued in anticipation of such bonds, whichever is the earlier. However, if bond anticipation notes are issued in anticipation of bonds and if a portion of such notes or the renewals thereof are redeemed from a source other than the proceeds of such bonds within two years from the date of the first such note or notes and a further portion thereof shall be so redeemed prior to the termination of each twelve months' period succeeding the date such original portion was so redeemed, the first installment of such bonds may, in the alternative, be made to

mature not later than five years from the date of the first such note or notes.

b-1. Notwithstanding the provisions of paragraph b of this section, if bond anticipation notes are issued in anticipation of bonds for assessable improvements and if a portion of such notes or the renewals thereof are redeemed from a source other than the proceeds of such bonds within two years from the date of the first such note or notes and a further portion thereof shall be so redeemed prior to the termination of each twelve months' period succeeding the date such original portion was so redeemed, the first installment of such bonds shall mature not later than twelve months from the last preceding date such portion is so redeemed.

c. The last installment of serial bonds shall mature not later than the expiration of the period of probable usefulness of the object or purpose for which such bonds are issued, as computed from the date of such bonds or, if bond anticipation notes shall have been issued in anticipation thereof, as computed from the date of the earliest note or notes so issued.

d. No annual installment of serial bonds shall be more than fifty per centum in excess of the smallest prior installment. For the purpose of the preceding sentence, bond anticipation notes, which are redeemed from a source other than the proceeds of bonds, shall be deemed to be serial bonds. Notwithstanding the foregoing, the finance board of any municipality, school district or district corporation may determine to issue bonds and provide for substantially level or declining annual debt service. The determination of whether annual debt service is substantially level or declining shall not take into account the first twelve months after issuance to the extent that no provision is to be made for the payment of principal during such period. If a municipality, school district or district corporation determines to issue bonds with a substantially level or declining annual debt service schedule, then the aggregate amount of debt service payable in each year shall not exceed the lowest aggregate amount of debt service payable in any prior year by more than the greater of five percent or ten thousand dollars. For purposes of this paragraph, debt service shall include all of the following scheduled to become due: principal, redemption price, sinking fund installments or contributions, and interest. For purposes of determining whether debt service is substantially level or declining on bonds issued with a variable rate of interest pursuant to section 54.90 of this article, the finance board shall estimate the average rate of interest at which fixed interest rate bonds of the same maturities would be sold and amortize principal based upon such interest rate assumption. The estimate by the finance board of such interest rate shall be deemed final and conclusive. If the finance board of the municipality, school district or district corporation determines that interest on such bonds shall be compounded and payable at maturity or prior redemption, such bonds may be issued only where such finance board has determined to issue the bonds pursuant to a substantially level or declining annual debt service schedule unless accrued interest is contributed at least annually to a sinking fund in accordance with section two of article VIII of the constitution and the procedures of section 22.10 of this title. A municipality, school district or district corporation providing for substantially level or declining debt service may provide for contracting such indebtedness as serial bonds, as sinking fund bonds, as term bonds, or as any combination thereof. Term bonds may be issued under the authority of this paragraph with a stated maturity and a schedule of mandatory redemptions prior thereto, providing (with other bonds of the same issue, if any) for substantially level or declining debt service.

e. Serial bonds shall be redeemed by an annual appropriation.

f. Notwithstanding the provisions of paragraphs b and d of this section:

1. The first installment of serial bonds issued for the purpose of providing moneys out of which to make loans to or in aid of limited-profit housing companies pursuant to article two of the private housing finance law, or loans to owners of existing multiple dwellings pursuant to article eight of the private housing finance law, or issued for the purpose of providing moneys for the effectuating of any urban renewal program or part thereof pursuant to the general municipal law, may mature not later than five years after the date of issuance of such bonds or six years after the date of issuance of the first bond anticipation note or notes issued in anticipation of such bonds, whichever is earlier; provided, however, that if the bond anticipation notes or renewals thereof issued in anticipation of such serial bonds extend more than five years beyond the original date of such issue, pursuant to the provisions of paragraph b of section 23.00 of this chapter, the first installment of such serial bonds may mature not later than such number of years after the date of issuance of such bonds or such number of years plus one after the original date of issuance of such notes, whichever is earlier; and

2. The annual installments of serial bonds issued for such purpose and for the purpose of providing moneys out of which to make loans to owners of existing multiple dwellings pursuant to article eight of the private housing finance law may be computed in such manner that the total of principal and interest required to be paid in each year beginning with the year in which the first installment is due, will be approximately equal to the total of principal and interest required to be paid in each succeeding year of the period for which such bonds were issued.

HISTORY:

Add, L 1942, ch 424, eff Sept 1, 1945, with substance transferred from County L §§ 400, sub 11, and 12, sub 6; Law § 189–f; amd, L 1944, ch 611; L 1956, ch 870, § 1; L 1957, ch 483, §§ 1, 2, eff April 13, 1957; L 1957, ch 1051, § 2; L 1958, ch 304, eff March

21, 1958; L 1958, ch 986; L 1958, ch 987, eff April 25, 1958; L 1960, ch 415, eff April 7, 1960; L 1960, ch 859; L 1961, ch 405; L 1961, ch 804, § 10, eff March 1, 1962; L 1962, ch 408, § 1; L 1966, ch 205; L 1967, ch 768; L 1968, ch 135; L 1968, ch 976; L 1969, ch 12; L 1969, ch 168; L 1970, ch 4; L 1970, ch 266; L 1971, ch 4, eff Jan 15, 1971 (par f subdivision 1 was also amended by L 1961, ch 804, without reference to the amendment by L 1961, ch 405 but the par as so amended was repealed, L 1962, ch 408, § 2, eff March 1, 1962.); L 1976, ch 64; L 1976, ch 856; L 1980, ch 215, § 1; L 1981, ch 590, § 1; L 1982, ch 354, § 1; L 1983, ch 230, § 1; L 1984, ch 276, § 1, eff June 25, 1984; L 1991, ch 413, § 3, eff July 19, 1991; L 1994, ch 201, § 3, eff June 20, 1994, deemed eff Jan 1, 1994; L 1994, ch 258, § 1, eff July 6, 1994; L 1997, ch 192, § 1, eff July 8, 1997; L 2000, ch 139, § 1, eff July 11, 2000; L 2003, ch 137, § 1, eff July 22, 2003; L 2006, ch 97, § 1, eff June 7, 2006; L 2009, ch 186, § 1, eff July 11, 2009; L 2012, ch 91, § 1, eff June 29, 2012; L 2015, ch 77, § 1, effective July 13, 2015; L 2018, ch 113, § 1, effective July 10, 2018.

Revision Notes: [1956] (Paragraph f) This act reduces the development cost and rentals by facilitating the use of municipal funds for building loans on limited profit housing projects for middle income families.

[1958] Because of the time which elapses from the inception of an urban renewal project to completion of land acquisition and demolition of buildings it is impractical to require the issuance of long term bonds within three years after the start of work on such projects. It was therefore deemed desirable to extend the permissible time for temporary financing so that bonds for permanent financing need not be issued prior to completion of the project. It is believed this procedure will also effect some savings on interest charges.

Editor's Notes: See 1961 notes to §§ 11.00, 23.00.

Par f, sub 1, amd, L 1971, ch 4, eff Jan 15, 1971. (This subdivision was also amended by L 1961, ch 804, without reference to the amendment by L 1961, ch 405 but the par as so amended was repealed, L 1962, ch 408, § 2, eff March 1, 1962.).

Laws 1957, ch 483, § 6, provides as follows:

Notwithstanding the provisions of the local finance law as amended by this act, any bond anticipation notes heretofore issued in anticipation of bonds for an assessable improvement may be renewed from time to time for a period not exceeding one year for each such renewal, and without limitation as to the number of such renewals, provided that such notes, as renewed, shall not extend beyond the expiration of the period of probable usefulness of the object or purpose for which issued, as computed from the date of the first note or notes so issued, and provided further that such notes, as renewed, shall not extend more than two years from the date of the first note or notes so issued unless a portion thereof shall be redeemed from a source other than the proceeds of such bonds within two years from the date of the first note or notes so issued and unless a further portion thereof shall be so redeemed prior to the termination of each twelve months' period succeeding the date such original portion was so redeemed, if any of such notes, as renewed, are still outstanding at the termination of each such period. Every bond anticipation note resolution and certificate authorizing any such renewal note, in addition to the statements and provisions required by section 38.10 of the local finance law, shall contain a statement indicating that such note is issued in anticipation of bonds for an assessable improvement. All of the provisions of the local finance law not inconsistent with the provisions of this section shall apply to such notes and renewals thereof.

Laws 1958, ch 304, § 3, provides:

This act shall take effect immediately and shall control notwithstanding any inconsistent general, special or local law.

Amendment Notes: 2012. Chapter 91, § 1 amended:

Par b by deleting at fig 1 "twelve" and adding the matter in italics.

1994. Chapter 201, § 3 amended:

Par d by deleting at fig 1 "this paragraph" and adding the matter in italics.

The 2015 amendment by ch 77, § 1, substituted "two thousand eighteen" for "two thousand fifteen" in the second sentence of b.

The 2018 amendment by ch 113, § 1, substituted "two thousand twenty-one" for "two thousand eighteen" in the second sentence of b.

Commission Note: [1942] Under the provisions of paragraph c, serial bonds need not necessarily be redeemed by a budgetary appropriation. Thus, assessment bonds may be redeemed from assessable improvement funds, etc.

Notes to Decisions

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23. Issuance of bond anticipation notes

1. In general

By Laws 1909, c 365, the common council of Yonkers was vested with discretion to select the mode of city financing by which the cost of sites for educational purposes should be met, and that right was preserved to it by former § 879, subd. 2, of the Education Law. Yonkers Lodge No. 707 of B. P. O. E. v Condon, 287 N.Y. 44, 38 N.E.2d 123, 287 N.Y. (N.Y.S.) 44, 1941 N.Y. LEXIS 1389 (N.Y. 1941), reh'g denied, 287 N.Y. 755, 40 N.E.2d 41, 287 N.Y. (N.Y.S.) 755, 1942 N.Y. LEXIS 1770 (N.Y. 1942).

Bonds may be typewritten. 1945 Ops St Compt 458.

Water district land may be sold without referendum, but a public hearing is required if the value exceeds $1,000. The seller has no authority to accept, as the purchase price, anything but money. The purchasing town has no authority to pay the purchase price by giving an installment contract. 1966 Ops St Compt File #1129.

2. Partial financing of improvement through issuance of bonds

In the event that the parts of the current surplus of the city of Rome to be used for the construction of an annex to the city hall, an annex to the Public Works barn, the paving and repairing of streets, and the construction of storm-water sewers are insufficient or unavailable to defray all of the cost of any of these objects or purposes, the city may borrow to defray all or part of such cost by the issuance of serial bonds or capital notes, subject to the limitations of par. d of § 104.00 and § 107.00. 1946 Ops St Compt 155.

3. Budgeting of bond debts

Where a board of education of a school district in Westchester County has certified to the town supervisor the amount to be raised by tax for school purposes, it would seem that prior to the execution and delivery of the warrant, an amended certificate could be submitted providing for an increase in the tax levy because of the board's failure to include an appropriation in the

budget for the payment of debt service as required by the Constitution. 1953 Ops St Compt 314.

The proceeds of bonds, which are appropriated by a school district for the construction of a building for public library use, are under the control of the school district officials and accordingly the debt service on the bonds should be reflected in the budget of the school district. 1956 Ops St Compt 265.

There is no requirement for establishment of sinking fund as to "zero coupon bonds" issued between July 19, 1991 and December 31, 1993 as part of issuance having overall discount of 25 percent or less; face amount at maturity of "zero coupon bonds" issued between those dates is chargeable against local government's debt limit. 1994 Op St Compt No. 94-19.

4. Consent of State Comptroller

The consent of the State Comptroller is not necessary to the issuance of bonds or bond anticipation notes by village except in certain refundings. After bonds have been authorized, bond anticipation notes may be issued from time to time as needed within the limitation of this section which requires bonds to be dates not later than two years after the date of the first such note. 1945 Ops St Compt 566.

A central school district may issue bonds in the amount of $2,700 without the permission of the State Comptroller. 1947 Ops St Compt 433.

A town may construct an additional lateral water main to serve a new street within a water district. The cost of such construction may be financed by the issuance of bonds or capital notes, or surplus moneys of the water district may be used, if the district is on an "ad valorem basis". The construction may be undertaken by the town board without the consent of the State Comptroller. Where district is on an "ad valorem basis", the cost of construction shall be a general charge against the district and it shall be assessed, levied and collected from the several lots or parcels of real property within the district in the same manner as taxes. 1969 Ops St Compt File #398.

5. Term for which bonds may be issued

A town which purchases highway machinery may issue bonds having a maturity of five years. Such period commences upon the date of such bonds. 1956 Ops St Compt 71.

A town may not issue bonds which have a maximum maturity greater than the period of probable usefulness of the project. 1957 Ops St Compt File #757.

The maximum maturity of bonds issued to finance the construction of different objects or purposes depends on the periods of probable usefulness of each different object or purpose. 1969 Ops St Compt File #707.

6. Redemption

Surplus funds of a fire district may be used to redeem bonds or capital notes and interest thereon. 1946 Ops St Compt 600.

A village may not issue bonds that are payable on a semi-annual basis. 1967 Ops St Compt File #1033.

7. Renewal

For a discussion of power to renew bond anticipation notes beyond usual two-year maximum where issued in anticipation of sale of bonds for assessable improvements, see 1955 Ops St Compt 13.

8. Referendum

Water district land may be sold without referendum, but a public hearing is required if the value exceeds $1,000. The seller has no authority to accept, as the purchase price, anything but money. The purchasing town has no authority to pay the purchase price by giving an installment contract. 1966 Ops St Compt File #1129.

The cost of construction of additions to and improvement of the water system of a water district may be financed by the issuance of capital notes or serial bonds. It is necessary to hold a public hearing on a proposition to increase or improve the facilities and appurtenances of the water system. No referendum, either mandatory or permissive is required. 1968 Ops St Compt File #812.

A bond resolution, effectuating an urban renewal program in a village, is subject to a permissive referendum if the proposed maturity of the bonds is more than five years. 1969 Ops St Compt File #1015.

9. Issuance of serial bonds for specific purposes

Bonds may not be issued in anticipation of the collection of taxes or revenues to finance salary increases for teachers. 1946 Ops St Compt 614.

Where a municipality has insufficient funds to meet certain year-end costs, it may, subject to certain statutory limitations, borrow through the issuance of serial bonds, bond anticipation notes, or capital notes, if for capital expenditures, and through issuing budget notes, if for current operating expenses. 1967 Ops St Compt File #643.

Town board may authorize issuance of bonds to finance tax certiorari judgments; resolution authorizing issuance of bonds must be authorized by ⅔ vote of town board and is neither subject to mandatory referendum nor is town board authorized to provide for referendum on its own motion. 1993 Op St Compt No. 93-4.

10. —Water systems

Serial bonds for capital notes may be issued to finance the local share of the cost of preparing preliminary plans for a water district to be constructed as a post-war Public Works project. 1946 Ops St Compt 348.

A new roof on a water district pump house may involve partial reconstruction which may be financed by the issuance of bonds or capital notes. If repair alone is involved, borrowing would be under § 29.00(i). The same problem is involved in respect to machinery. A water district may not issue bonds to finance legal services. 1946 Ops St Compt 642.

The cost of the construction of additions to and the improvement of the water system of a water district may be financed by the issuance of capital notes or serial bonds. 1947 Ops St Compt 313.

The construction of new pipelines in a water district may be financed by the issuance of serial bonds or capital notes. 1947 Ops St Compt 401.

A village may issue bonds to finance the cost of an auxiliary or additional water supply. 1954 Ops St Compt 414.

The cost of increasing and improving the source of water supply in a town water district may be financed by the issuance of serial bonds. 1955 Ops St Compt 107.

Where proposed water system for a water district was not constructed, legal and engineering fees and miscellaneous expenses of establishment of the district may nevertheless be financed by the issuance of capital notes or serial bonds. 1957 Ops St Compt File #765.

A pipe line constructed by a village outside its own boundaries may be financed by bond issue or capital note. 1963 Ops St Compt #643.

The cost of construction of additions to and improvement of the water system of a water district may be financed by the issuance of capital notes or serial bonds. It is necessary to hold a public hearing on a proposition to increase or improve the facilities and appurtenances of the water system. No referendum, either mandatory or permissive is required. 1968 Ops St Compt File #812.

A town may construct an additional lateral water main to serve a new street within a water district. The cost of such construction may be financed by the issuance of bonds or capital notes, or surplus moneys of the water district may be used, if the district is on an "ad valorem basis". The construction may be undertaken by the town board without the consent of the State Comptroller. Where district is on an "ad valorem basis", the cost of construction shall be a general charge against the district and it shall be assessed, levied and collected from the several lots or parcels of real property within the district in the same manner as taxes. 1969 Ops St Compt File #398.

11. —Sewer systems

Serial bonds or capital notes would be used to finance capital improvements in a sewer district. 1946 Ops St Compt 107.

Serial bonds and capital notes may be issued to finance town's share of cost of preliminary plans for sewer system prepared pursuant to Public Works Law, § 31(1). 1952 Ops St Compt 275.

12. —Incinerators

Where a village wishes to finance a $15,000 addition to its incinerator over a period of five years, it may do so by issuing serial bonds or bond anticipation notes or a statutory installment bond, but not by issuing a capital note. 1967 Ops St Compt File #379.

13. —Landfills

The cost of installing a town sanitary landfill operation is a town-wide charge against all taxable real property in the town, including incorporated villages within the town. 1968 Ops St Compt File #510.

A town may finance the purchase of machinery and equipment for the operation of a landfill installation, as a general town charge, through a budgetary appropriation or through the issuance of serial bonds, bond anticipation notes or capital notes. 1969 Ops St Compt File #540.

14. —Buildings

On and after Sept. 1, 1945, the cost of the construction of a town garage may be financed by the issuance of either serial bonds or capital notes, pursuant to the provisions of the Local Finance Law. 1945 Ops St Compt 342.

A village may issue bonds to finance the purchase of land and the construction of a municipal building thereon. 1946 Ops St Compt 396.

The cost of construction of a fire house may be financed by the issuance of capital notes or serial bonds. 1952 Ops St Compt 137.

School district may issue bonds or capital notes to finance construction of a building to house the public library established by the law district. 1953 Ops St Compt 95.

City may finance acquisition of real property pursuant to Military Law § 171-a by issuance of bonds. 1954 Ops St Compt 54.

15. —Parks and recreation facilities

A village recreation field may not be financed over a five-year period except by the issuance of serial bonds. For shorter periods capital notes may be used. 1945 Ops St Compt 477.

16. —Highways, roads, streets, parkways and parking areas

A county may finance the purchase of highway machinery and equipment by the issuance of bonds or capital notes. 1945 Ops St Compt 378.

Budget notes, capital notes, or serial bonds may be issued for the resurfacing of a town highway. 1945 Ops St Compt 473.

While there is no authority for a village to purchase property on a land contract basis, a project for a village parking lot may be financed by the issuance of serial bonds and capital notes pursuant to the Local Finance Law. 1952 Ops St Compt 262.

17. —Vehicles

School buses may be financed by the issuance of serial bonds or capital notes. 1945 Ops St Compt 257.

Appropriations for the purchase of fire-fighting vehicles and apparatus may be raised outside the constitutional 2% tax limit if serial bonds or capital notes are issued or if the purchase is made pursuant to the pay-as-you-go plan in accordance with the Constitution, Article VIII, section 11. 1947 Ops St Compt 354.

If police cars are to be purchased to replace similar police cars which were in service for one year or more, 3-year period of probable usefulness exists and purchase of such cars may be financed by issuance of capital note or bond; however, notwithstanding 3-year period of probable usefulness prescribed by CLS Loc Fin § 11.00(a)(77), any capital notes issued to finance purchase of police cars must mature not later than last day of second fiscal year succeeding fiscal year in which notes are issued pursuant to CLS Loc Fin § 28.00[a]. Ops St Compt 88-37.

18. —Voting machines

Towns may finance voting machines by either bonds or capital notes. 1947 Ops St Compt 127.

19. —Appraisals

A village may issue serial bonds or capital notes for the purpose of financing the employment of experts to appraise the value of the real property within the village. 1952 Ops St Compt 258.

20. —Tax assessment equipment

Neither bonds nor capital notes may be issued to finance the cost of leasing I.B.M. equipment or the expense of assessment rolls prepared on such equipment. 1946 Ops St Compt 675.

21. Issuance of budget notes as alternative

Budget notes should not be issued under section 29.l00 (h) if serial bonds or capital notes may be issued. 1947 Ops St Compt 26.

22. Issuance of capital notes as alternative

A village recreation field may not be financed over a five-year period except by the issuance of serial bonds. For shorter periods capital notes may be used. 1945 Ops St Compt 477.

Where a village wishes to finance a $15,000 addition to its incinerator over a period of five years, it may do so by issuing serial bonds or bond anticipation notes or a statutory installment bond, but not by issuing a capital note. 1967 Ops St Compt File #379.

23. Issuance of bond anticipation notes

The consent of the State Comptroller is not necessary to the issuance of bonds or bond anticipation notes by village except in certain refundings. After bonds have been authorized, bond anticipation notes may be issued from time to time as needed within the limitation of this section which requires bonds to be dates not later than two years after the date of the first such note. 1945 Ops St Compt 566.

A village may issue bond anticipation notes to finance, over a period of four years, a $7,000 street repaving project. 1968 Ops St Compt File #40.

Agency Opinions

Analysis

1. Term for which bonds may be issued
2. Issuance of serial bonds for specific purposes
3. Issuance of budget notes as alternative
4. Issuance of bond anticipation notes

1. Term for which bonds may be issued

School district bonds were limited in respect to maximum terms by former § 8-a of the General Municipal Law and could not be issued for a maximum period of thirty years in accordance with the provisions of former § 480 of the Education Law. 1936 N.Y. Op. Att'y Gen. No. 292.

2. Issuance of serial bonds for specific purposes

Where a county enters a contract for services to be performed for a county sewer district and the contract is terminated without cause by the district, any judgment for damages would be rendered against the county but the county must assess any judgment against the district. The county may sell bonds to pay such a judgment since the district is a unit of county government but the cost of debt service on the bonds must be charged back to the district. 1980 Op St Compt File #201.

3. Issuance of budget notes as alternative

Where a village has insufficient funds to pay operating expenses during a fiscal year as a result of having previously financed unanticipated capital expenditures from current funds, it may raise additional funds to meet operating expenses by the issuance of budget notes. It may not issue bonds to finance the capital purchases after current funds have already been expended to make such purchases. 1981 Op St Compt File #81-122.

4. Issuance of bond anticipation notes

An "assessable improvement" within the context of Local Finance Law, §§ 21.00(b-1) and 23.00(b-1) is a capital improvement the cost of which is assessed in whole or part against an area deemed benefited by the improvement. Bond anticipation notes issued by the Chautauqua Utility District are issued "in anticipation of bonds for assessable improvements" within the meaning of such provisions. 1983 Op St Compt File #83-157.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 15.00, 23.00, 26.00, 26.10, 90.00; CLS County § 277.

Serial bonds to finance cost of sewer district in Suffolk County, CLS County § 277, sub 10.

Bonds or capital notes, notice of school district meeting authorizing, CLS Educ § 416, sub 2.

Limited-profit housing companies, CLS Priv Hous Fin §§ 10 et seq.

Loans to owners of existing multiple dwellings, CLS Priv Hous Fin §§ 400 et seq.

Jurisprudences:

64 Am Jur 2d, Public Securities and Obligations §§ 12, 188, 201.

Annotations:

Power of governmental unit to issue bonds as implying power to refund them. 1 ALR2d 134.

§ 23.00. Bond anticipation notes

a. Bond anticipation notes may be issued by any municipality, school district or district corporation in anticipation of the sale of bonds. Such notes may be issued whenever bonds have been authorized and the proceeds of such notes shall be expended only for the same object or purpose, or class thereof for which the proceeds of such bonds may be expended.

b. Such notes shall mature at such time as the issuer may determine and may be renewed from time to time, provided, that in no event shall such notes or the renewals thereof extend more than two years beyond such original date of issue unless a portion of such notes or the renewals thereof shall be redeemed from a source other than the proceeds of bonds within two years from such original date of issue and unless a further portion thereof shall be so redeemed prior to the termination of each twelve months' period succeeding the date such original portion was so redeemed, if any of such notes, as renewed, are still outstanding at the termination of each such period, but such notes or the renewals thereof shall not extend more than five years beyond such original date of issue. Such redemption shall be consistent with the amortization requirements of article eight of the state constitution and section 21.00 of this title. If the finance board has determined to provide for substantially level or declining debt service on the bonds in anticipation of which such notes are authorized to be issued, such notes shall be redeemed in an amount at least equal in each year to the annual installment which would be paid in such year if such notes were serial bonds issued at a five percent rate of interest for the remaining period of probable usefulness of the object or purpose for which issued, or, if less, the remaining portion of the maximum authorized maturity of such bonds, and all annual debt service payments were equal over the life of such bonds. In any event, bond anticipation notes shall not be renewed after the receipt of the proceeds from the sale of the bonds in anticipation of which such notes were issued. Notwithstanding the provisions of this paragraph: 1. bond anticipation notes issued in anticipation of the receipt of the proceeds of the sale of bonds for the purpose of providing moneys out of which to make loans to limited profit housing companies pursuant to article two of the private housing finance law, or loans to owners of existing multiple dwellings pursuant to article eight of the private housing finance law, or for the purpose of providing moneys for the effectuating of any urban renewal program or part thereof pursuant to the general municipal law, or the renewals of such notes, may extend not more than five years beyond the original date of issue of such notes; and 2. renewals of bond anticipation notes issued originally during calendar years two thousand fifteen through two thousand twenty-one, inclusive may not extend more than seven years beyond the original date of issue of such bond anticipation notes.

b-1. Notwithstanding the provisions of paragraph b of section 21.00 of this title and the provisions of paragraph b of this section any bond anticipation notes issued in anticipation of bonds for an assessable improvement may be renewed from time to time for a period not exceeding one year for each such renewal, and without limitation as to the number of such renewals, provided that such notes, as renewed, shall not extend beyond the expiration of the period of probable usefulness of the object or purpose for which issued, as computed from the date of the first note or notes so issued, and provided further that such notes, as renewed, shall not extend more than two years from the date of the first note or notes so issued unless a portion thereof shall be redeemed from a source other than the proceeds of such bonds within two years from the date of the first note or notes so issued and unless a further portion thereof shall be so redeemed prior to the termination of each twelve months' period succeeding the date such original portion was so redeemed, if any of such notes, as renewed, are still outstanding at the termination of each such period. Annual principal installments on notes issued pursuant to this paragraph shall be computed in accordance with the provisions of paragraph b of this section. Every bond anticipation note resolution and certificate authorizing any such renewal note, in addition to the statements and provisions required by section 38.10 of this chapter, shall contain a statement indicating that such note is issued in anticipation of bonds for an assessment improvement.

c. Bond anticipation notes shall not be issued in an amount which shall exceed the par value of the bonds in anticipation of which they are to be issued.

d. 1. Bond anticipation notes shall be redeemed from the proceeds of the sale of the bonds in anticipation of which they were issued. However, if such bonds are not sold, then such bond anticipation notes shall be redeemed:

(a) From any unencumbered balance in any fund which may be applied to the payment thereof, or

(b) By a budgetary appropriation.

2. Notwithstanding the provisions of subdivision one of this paragraph, bond anticipation notes may be redeemed, in whole or in part, prior to the sale of the bonds in anticipation of which such notes were issued, from any moneys which lawfully may be applied to the payment of such notes.

HISTORY:

Add, L 1942, ch 424, eff Sept 1, 1945, with substance transferred from Conser L § 466, County L §§ 12, sub 6 and 14; Law § 189–f; amd, L 1943, ch 711; L 1944, ch 608, eff April 6, 1944; L 1948, ch 813; L 1950, ch 721; L 1956, ch 492, § 2; L 1956, ch 870, § 2; L 1957, ch 483, §§ 3, 4; L 1958, ch 986; L 1958, ch 987; L 1958, ch 988, eff April 25, 1958; L 1960, ch 859; L 1960, ch 892; L 1961, ch 405; L 1961, ch 804, §§ 11, 13, 14, eff March 1, 1962; L 1962, ch 408, § 3; L 1962, ch 716; L 1963, ch 890; L 1966, ch 205; L 1966, ch 288; L 1968, ch 135; L 1968, ch 976; L 1969, ch 12; L 1969, ch 62; L 1969, ch 168; L 1969, ch 690, eff May 22, 1969; L 1970, ch 4; L 1970, ch 266; L 1971, ch 4; L 1972, ch 202; L 1973, ch 645; L 1974, ch 885; L 1975, ch 367; L 1976, ch 64; L 1976, ch 712; L 1976, ch 856; L 1978, ch 167; L 1980, ch 215, § 2; L 1981, ch 590, § 2; L 1982, ch 354, § 2; L 1983, ch 230, § 2; L 1984, ch 276, § 2, eff June 25, 1984; L 1991, ch 413, § 4, eff July 19, 1991; L 1994, ch 201, §§ 4, 5, eff June 20, 1994, deemed eff Jan 1, 1994; L 2010, ch 386, § 1, eff Aug 13, 2010; L 2012, ch 264, § 1, eff July 23, 2012; L 2020, ch 157, § 1, effective August 24, 2020.

Revision Notes: [1944 Revision] Par a. The words "or class thereof" were inserted to aid in the interpretation of the section.

[1956] See 1956 note to § 11.00.

[1961] This legislation conformed the references to the Limited Profit Housing Law, the Limited Dividend Housing Law, and the Redevelopment Companies Law to reflect the enactment of chapter 803 of the Laws of 1961, which brought together as Chapter 44-B of the Consolidated Laws the various provisions formerly found in the Public Housing Law, the Unconsolidated Laws, the Local Finance Law and elsewhere relating to aids to private enterprise housing. It also repealed paragraph b of § 23.00 of the Local Finance Law to correct an error caused by the passage of two amendments to this paragraph without reference to each other at the 1958 Session. It further repealed subdivision 2 of paragraph c of § 23.00 of such law to correct an error caused by the passage of two amendments to this subdivision without reference to each other at the 1960 Session.

See 1961 note to § 11.00.

Editor's Notes: Based upon a review of L 1969, ch 62, and L 1969, ch 690, the Legislative Bill Drafting Commission has determined that the language and objective of the Legislature in 1969 was clearly to eliminate the additional limitation as contained in former sub 2 of par c of this section. Accordingly, par c, as above shown, represents the Commission's determination of the correct version of said par c.

See 1960 note to Pub Hous Law § 58.

Amendment Notes; 2012. Chapter 264, § 1 amended:

Par b, sub 2 by deleting at fig 1 "four", at fig 2 "five" and adding the matter in italics.

1994. Chapter 201, § 5 amended:

Par b-1 by deleting at fig 1 "twenty-one", at fig 2 "chapter" and adding the matter in italics.

Commission Note: As an aid for the reduction of long term borrowing for financing assessable improvements, the Commission has provided that bond anticipation notes issued in anticipation of bonds for assessable improvements may be redeemed directly from the assessments levied upon and collected from the real property benefited thereby as well as from the other sources provided for in this section (i.e., bonds, budget appropriations and unencumbered funds). However, as a practical matter more than two years may lapse between the date of the issuance of such notes and the collection of such assessments. Thus, in order to facilitate such desirable method of redemption, the Commission has excepted such notes from the restriction that bond anticipation notes, including the renewals thereof, shall not extend more than two years from the date of their original issue, with the proviso, if the maturity of such notes extend beyond two years, that a portion of such notes be redeemed in accordance with the requirements of § 2 of Article 8 of the State Constitution, relating to serial retirement of indebtedness.

Amendment Notes The 2020 amendment by ch 157, § 1, substituted "years two thousand fifteen through two thousand twenty-one, inclusive" for "year two thousand seven or two thousand eight" in (b)(2).

Repeal Notes: [1963] Section 2 of this act repealed subdivision 2 of paragraph c of section 23.00 of the Local Finance Law, which was amended by Chapter 716 of the laws of 1962. This repeal corrects an error caused by the passage of two amendments to this subdivision without reference to each other at the 1962 Session.

Notes to Decisions

Analysis

1. In general; authorization of bond anticipation notes
2. —Appropriation of surplus funds
3. Purposes for which notes may be issued
4. Renewal of notes
5. Redemption of notes

1. In general; authorization of bond anticipation notes

The consent of the State Comptroller is not necessary to the issuance of bonds or bond anticipation notes by a village except in certain refundings. After bonds have been authorized, bond anticipation notes may be issued from time to time as needed within the limitation of § 21.00 which requires bonds to be dated not later than two years after the date of the first such note. 1945 Ops St Compt 566.

Bond anticipation notes may be issued in anticipation of the future sale of bonds under this section after the adoption of a bond resolution. 1945 Ops St Compt 583.

A fire district bond resolution must be adopted by at least a two-thirds vote of the voting strength of the finance board. In fire districts having a five member board of commissioners, at least four must vote for such resolution. 1957 Ops St Compt File #97.

Bond anticipation notes may be issued for any purpose for which a bond resolution has been adopted. The bond resolution would be subject to permissive referendum unless the proposed maturity date is not more than five years from the date of issue of the first bond anticipation note. No further referendum is needed for the issuance of the bonds. 1968 Ops St Compt File #683.

2. —Appropriation of surplus funds

Strictly speaking, the mere existence of assets in a city's electric utility depreciation reserve fund, and the existence of surplus moneys in its electric light and water rent funds, would not require the use of such assets and surplus for related capital improvements in the place of issuing obligations therefor, except that a city is without authority to accumulate capital reserve fund assets solely for investment purposes or to carry over uncommitted surpluses into an ensuing fiscal year. 1967 Ops St Compt File #390.

3. Purposes for which notes may be issued

Engineering fees incurred in connection with a capital improvement may be paid from the proceeds of bonds, bond anticipation notes, capital notes or deferred payment notes. 1957 Ops St Compt File #57-737.

Where a village wishes to finance a $15,000 addition to its incinerator over a period of five years, it may do so by issuing serial bonds or bond anticipation notes or a statutory installment bond, but not by issuing a capital note. 1967 Ops St Compt #379.

It would seem that, where a school district has procured voter approval and has adopted a bond resolution for the construction of one or more schools, including furnishings and equipment, and, where it needs such furnishings and equipment for use in temporary school quarters, pending completion of the new project, it may issue bond anticipation notes for the acquisition and temporary use of such furnishings and equipment. 1967 Ops St Compt File #573.

Where a municipality has insufficient funds to meet certain year-end costs, it may, subject to certain statutory limitations, borrow through the issuance of serial bonds, bond anticipation notes, or capital notes, if for capital expenditures, and through issuing budget notes, if for current operating expenses. 1967 Ops St Compt File #643.

A village may issue bond anticipation notes to finance, over a period of four years, a $7,000 street repaving project. 1968 Ops St Compt File #40.

A town may finance the purchase of machinery and equipment for the operation of a landfill installation, as a general town charge, through a budgetary appropriation or through the issuance of serial bonds, bond anticipation notes or capital notes. 1969 Ops St Compt File #540.

4. Renewal of notes

For a discussion of power to renew bond anticipation notes beyond usual two-year maximum where issued in anticipation of sale of bonds for assessable improvements, see 1954 Ops St Compt 13.

With certain exceptions, bond anticipation notes may not be renewed so as to extend more than five years beyond the date of original issue, the prime exception, subject to statutory provisos, being where such notes have been issued in anticipation of bonds for an assessable improvement. 1967 Ops St Compt File #569.

5. Redemption of notes

Deferred payment notes may not be issued to redeem bond anticipation notes. 1959 Ops St Compt File #776.

The unneeded balance of a capital reserve fund may not be used to retire bond anticipation notes. 1967 Ops St Compt File #14.

Where a capital project has been temporarily financed by the issuance of bond anticipation notes, the finance board may issue bonds at any time thereafter and before the due date of the notes, and may invest the bond proceeds until such time as the notes mature. 1967 Ops St Compt File #636.

Agency Opinions

Analysis

1. In general; authorization of bond anticipation notes
2. Purposes for which notes may be issued

1. In general; authorization of bond anticipation notes

A town may not issue bond anticipation notes for the purchase of a snowplow where such notes would be extended or renewed beyond five years from the date the notes were first issued. 1980 Op St Compt File #198.

A bank, of which a village attorney is a director, may purchase a bond anticipation note issued by the village and agree to extend the date of maturity, so long as the village attorney does not have the power or duty to perform any of the functions listed in General Municipal Law, § 801(1). 1982 Op St Compt File #82-251.

2. Purposes for which notes may be issued

An "assessable improvement" within the context of Local Finance Law, §§ 21.00(b-1) and 23.00(b-1) is a capital improvement the cost of which is assessed in whole or part against an area deemed benefited by the improvement. Bond anticipation notes issued by the Chautauqua Utility District are issued "in anticipation of bonds for assessable improvements" within the meaning of such provisions. 1983 Op St Compt File #83-157.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 15.00, 21.00, 91.00, 104.10.

State office buildings and other public improvements in certain counties, CLS County § 850.

Limited-profit housing companies, CLS Priv Hous Fin §§ 10 et seq.

Limited dividend housing companies, CLS Priv Hous Fin §§ 70 et seq.

Jurisprudences:

64 Am Jur 2d, Public Securities and Obligations § 14.

§ 24.00. Tax anticipation notes

a.

1. Tax anticipation notes may be issued by any municipality, school district or district corporation, other than a fire district,

(a) During a fiscal year in anticipation of the collection of taxes or assessments levied for such fiscal year,

(b) Within ten days prior to the commencement of a fiscal year or, where the fiscal year of the issuer is a calendar year, within thirty days prior to the commencement of a fiscal year, in anticipation of the collection of taxes or assessments levied for such fiscal year,

(c) During a fiscal year in anticipation of the collection of taxes or assessments to be levied in such fiscal year,

(d) Within ten days prior to the commencement of a fiscal year or, where the fiscal year of the issuer is a calendar year, within thirtydays prior to the commencement of a fiscal year, in anticipation of the collection of taxes or assessments to be levied in such fiscal year, or

(e) During any fiscal year in anticipation of the collection of taxes or assessments levied for any of the four preceding fiscal years.

The term "assessments" as used in this paragraph means assessments levied or to be levied for operation, maintenance or debt service.

2. Prior to the adoption of its annual budget any municipality, school district or district corporation which adopts an annual budget after the commencement of its fiscal year shall not issue such notes pursuant to items (c) or (d) of subdivision one of this paragraph in excess of the combined amounts of:

(a) The amount necessary for the payment of the principal of and interest on any indebtedness to become due during the first four months of its current fiscal year, and

(b) Thirty-five per centum of the difference between the amount of its annual budget for the preceding fiscal year and the amount provided therein for the payment of the principal of and interest on indebtedness.

3. In no event shall any municipality, school district or district corporation reduce the amount to be raised by taxes or assessments in its annual budget or other determination of taxes or assessments to be raised to an amount less than the amount of the outstanding notes which have been issued pursuant to items (c) and (d) of subdivision one of this paragraph.

4. In the case of such notes issued pursuant to items (a), (b) and (e) of subdivision one of this paragraph, such notes shall not be issued in an amount in excess of the amount of the taxes or assessments levied for a fiscal year which is uncollected at the time of such borrowing less:

(a) The amount of the outstanding tax anticipation notes issued in anticipation of the collection of such taxes or assessments, and

(b) The amount, if any, included in the annual budget for such fiscal year or in the levy of taxes or assessments for such fiscal year to offset, in whole or in part, an anticipated deficiency in the collection before the end of such fiscal year of the taxes or assessments levied for such fiscal year.

5. The proceeds of notes issued pursuant to items (c) and (d) of subdivision one of this paragraph shall be used only for the purposes for which the taxes or assessments are to be levied or for the redemption of notes in renewal of which they were issued. The proceeds of notes issued pursuant to items (a), (b) and (e) of subdivision one of this paragraph shall be used only for the purposes for which the taxes or assessments were levied or for the redemption of notes in renewal of which they were issued, provided, however, that the proceeds of such notes may be used for other lawful purposes if the purposes for which the taxes or assessments were levied have been satisfied and there are no unpaid claims arising therefrom or appropriate provision has already been made for the payment of such unpaid claims.

6. Tax anticipation notes issued pursuant to this paragraph shall mature within one year from the date of their issuance and may be renewed from time to time, but each renewal shall be for a period not to exceed one year. Such notes or the renewals thereof shall be retired within five years after their date of original issue and in any event not later than five years after the close of the fiscal year for which were levied the taxes or assessments in anticipation of the collection of which such notes were issued; provided, however, that such notes issued pursuant to items (b) and (d) of subdivision one of this paragraph, or the renewals thereof, shall not extend beyond the close of the fourth fiscal year succeeding that in which the original notes were issued.

b. A municipality may issue tax anticipation notes in anticipation of the collection of the unpaid taxes or assessments of another municipality, a school district or a district corporation provided (1) such unpaid taxes or assessments are returned or certified to it, pursuant to law, and (2) such unpaid taxes or assessments are to be collected by or on behalf of the municipality to which such return or certification is made, and (3) such return or certification be accepted by such municipality. If a municipality is required by law to pay over to another municipality, a school district or district corporation all or part of the taxes or assessments of such other municipality, school district or district corporation, such municipality may issue tax anticipation notes in anticipation of the collection of such unpaid taxes or assessments in order to make such payment. Notes issued pursuant to this paragraph shall mature within a period not to exceed one year from the date of their issuance and may be renewed from time to time, but each renewal shall be for a period not to exceed one year and in no event shall such notes or the renewals thereof extend beyond the close of the fourth fiscal year succeeding the fiscal year for which such taxes or assessments were levied. The proceeds of such notes shall be used as required by law, or for the redemption of notes in renewal of which they were issued.

c. If any tax district which is required by law to pay over to the county treasurer on or before October fifteenth of any calendar year the full amount of county or county district taxes or assessments due for such calendar year fails or neglects to pay to the treasurer of such county on or before such date the full amount of such taxes or assessments due for such calendar year, the county may issue tax anticipation notes in its own name to the amount of such deficiency. Such notes shall mature on or before June first of the next calendar year after such default and may be renewed from time to time but no renewal shall extend beyond eighteen months from the date of issue of the original note. Provision shall be made for the payment of the principal of and interest on said tax anticipation notes in the manner provided by section ninety-six of the tax law. the proceeds of such notes shall be used only for the purposes for which such taxes or assessments were levied or for the redemption of notes in renewal of which they were issued.

c-1. Any fire district in a town in the county of Westchester in which real estate taxes and assessments become payable on April first in each year may issue tax anticipation notes during any fiscal year prior to June first in such year in anticipation of the collection of taxes or assessments levied for such fire district for such year. Notes issued pursuant to the provisions of this paragraph shall mature on or before June first next following the date of their issuance and shall be redeemed from the taxes or assessments in anticipation of the collection of which such notes were issued. Such notes shall not be issued in an amount in excess of the difference between the amount of the fire district taxes or assessments remaining uncollected at the time of such borrowing and the amount of tax anticipation notes issued in anticipation of the collection of such taxes or assessments. Whenever the amount of tax anticipation notes issued pursuant to this paragraph shall equal the amount of such taxes or assessments remaining uncollected, all of such taxes or assessments, as thereafter collected, shall be set aside in a special bank account to be used only for the payment of such notes as they become due. The proceeds of such notes shall be used only for the purposes for which such taxes or assessment were levied.

c-2. Any fire district in any town other than a town in the county of Westchester may issue tax anticipation notes at any time during the first three months of its fiscal year in anticipation of the collection of real estate taxes levied for such fire district for such fiscal year. Notes issued pursuant to the provisions of this paragraph shall mature on or before the fifteenth day of April next following the date of their issuance and shall be redeemed from the taxes in anticipation of the collection of which such notes were issued. Such notes shall not be issued in an amount in excess of the difference between the amount of the fire district taxes remaining uncollected at the time of such borrowing and the amount of tax anticipation notes issued in an-

ticipation of the collection of such taxes. Whenever the amount of tax anticipation notes issued pursuant to this paragraph shall equal the amount of such taxes remaining uncollected, all of such taxes, as thereafter collected, shall be set aside in a special bank account to be used only for the payment of such notes as they become due. The proceeds of such notes shall be used only for the purposes for which such taxes were levied. For the purpose of this paragraph such real estate taxes shall be deemed to be uncollected until the fire district receives cash therefor from the public officer required to pay such taxes to the fire district.

d.

1. In the case of a newly created municipality, school district or district corporation, or in the case of any such unit of government which has elected a finance board for the first time, tax anticipation notes may be issued, prior to the first levy of taxes or assessments, for the necessary expenses incidental to its incorporation or creation and the other necessary expenses incurred or to be incurred prior to such levy. In the case of a municipality or school district, such notes shall not be issued in an amount in excess of two per centum of the assessed valuation of the taxable property therein as shown upon the last preceding assessment roll of any unit of government in which such property was evaluated. If, however, any part of such property was evaluated in the assessment roll of more than one unit of government its value, for the purposes of this section, shall be the lowest value assigned to it by any such assessment roll. In the case of a fire district, such notes shall not be issued in an amount exceeding one-twelfth of the amount of taxes which the fire district may raise annually without adopting a proposition pursuant to the provisions of the town law for each calendar month intervening between the date of the creation of the district and the first day of the fiscal year of the district for which an annual budget can be adopted, plus an amount not exceeding the actual and necessary expenses incidental to its creation. The phrase "the amount of taxes which the fire district may raise annually without adopting a proposition pursuant to the provisions of the town law," as used herein, shall mean two thousand dollars, except that in fire districts having a full valuation in excess of one million dollars it shall mean two thousand dollars plus one mill for each dollar of full valuation of the taxable real property of the fire district in excess of the first million dollars of full valuation of such taxable real property. In the case of any district corporation, other than a fire district, such notes shall not be issued in an amount in excess of one mill of the assessed valuation of the taxable property therein as shown upon the last preceding assessment roll of any unit of government in which such property was evaluated in addition to the necessary expenses incidental to incorporation. If, however, any part of such property was evaluated in the assessment roll of more than one unit of government, its value for the purpose of this section shall be the lowest value assigned to it by any such assessment roll.

2. In the case of the establishment of any improvement district of a county or of a town, which is to be financed by taxes or assessments levied upon an ad valorem or benefit basis, or in the case of the consolidation of special improvement districts, prior to the first levy in which such taxes or assessments are to be levied for such district or consolidated district the county or town, as the case may be, may issue tax anticipation notes for the necessary expenses incidental to the creation of such district or consolidation of such districts, and the other necessary expenses incurred or to be incurred for such district or consolidated district prior to such levy.

3. An appropriation for the redemption of notes issued pursuant to this paragraph shall be included in the first levy of taxes or assessments of or for such municipality, school district, district corporation or improvement district. Such notes shall mature within one year from their date of issue and may be renewed from time to time, but each renewal shall be for a period not to exceed one year and in no event shall such notes or the renewals thereof extend beyond the close of the second fiscal year succeeding the fiscal year in which such notes were issued. The proceeds of such notes shall be used only to pay such necessary expenses incidental to such incorporation or creation and such other necessary expenses incurred or to be incurred prior to any such levy or for the redemption of notes in renewal of which they were issued.

e. Whenever the amount of tax anticipation notes issued pursuant to paragraphs a, b and d of this section in anticipation of the collection of the taxes or assessments levied or to be levied for a fiscal year shall equal the amount of such taxes or assessments remaining uncollected less the amount, if any, included in the annual budget for such fiscal year or in the levy of taxes or assessments for such fiscal year to offset, in whole or in part, an anticipated deficiency in the collection before the end of such fiscal year of the taxes or assessments levied for such fiscal year, all of such uncollected taxes or assessments, as thereafter collected, shall be set aside in a special bank account to be used only for the payment of such notes as they become due, unless other provision is made pursuant to law for the redemption of such notes. Any municipality, school district or district corporation may make budgetary appropriations for the redemption of such notes whether or not required or otherwise authorized by law to do so. In the event such an appropriation is made, such municipality, school district or district corporation shall not be required to pay into the special account the proceeds of the taxes or assessments against which such notes were issued but such proceeds may be used in the manner provided by law or if there is no provision of law pertaining to the use of such

proceeds, such proceeds shall be treated as surplus moneys for the fiscal year in which they are collected. This paragraph shall not apply to notes issued pursuant to paragraph c of this section.

f.

1. Where a tax anticipation note issued pursuant to paragraphs a, b or d of this section is to be renewed by the issuance of a renewal note, and the taxes or assessments in anticipation of which it was issued have been levied for a fiscal year, but remain uncollected, such renewal note shall not be issued for an amount in excess of the amount of such taxes or assessments remaining uncollected at the time of such renewal, less:

(a) The amount of any other outstanding tax anticipation notes issued in anticipation of the collection of such taxes or assessments, and

(b) The amount, if any, included in the annual budget for such fiscal year or in the levy of taxes or assessments for such fiscal year to offset, in whole or in part, an anticipated deficiency in the collection before the end of such fiscal year of the taxes or assessments levied for such fiscal year.

In no event shall such a renewal note be issued for an amount in excess of the original amount of the note in renewal of which it is to be issued.

2. Where a tax anticipation note issued pursuant to paragraphs a or d of this section is to be renewed, and the taxes or assessments in anticipation of which it was issued have not been levied, such renewal note shall not be issued for an amount in excess of the original amount of the note in renewal of which it is to be issued.

3. Where a tax anticipation note issued pursuant to paragraph c of this section is to be renewed, such renewal note shall not be issued in an amount in excess of the difference between the original amount of such note to be renewed, less the amount of moneys received and applied or to be applied to the payment of such note.

g. Tax anticipation notes may be issued by any municipality during any fiscal year thereof:

1. In anticipation of the collection of assessments levied for such fiscal year, or to be levied in such fiscal year, to pay the cost of capital improvements, if such assessments are to be collected in one installment; provided, however, that if such assessments have been levied, such notes shall not be issued in an amount in excess of the difference between the amount of such assessments remaining uncollected at the time of such borrowing and the amount of outstanding tax anticipation notes issued in anticipation of the collection of such assessments.

2. In anticipation of the collection of an installment of assessments levied for a capital improvement, if such assessments are to be collected in several annual installments and such installment becomes due and payable during such fiscal year; provided, however, that such notes shall not be issued in an amount in excess of the difference between the amount of such installment remaining uncollected at the time of such borrowing and the amount of outstanding tax anticipation notes issued in anticipation of the collection of such installment.

3. The proceeds of tax anticipation notes issued pursuant to this paragraph shall be used only for the purposes for which such assessments were levied or are to be levied or for the redemption of notes in renewal of which they were issued.

4. Tax anticipation notes issued pursuant to this paragraph shall mature within one year from the date of their issuance and may be renewed from time to time but each renewal shall be for a period not to exceed one year and in no event shall such notes or the renewals thereof extend beyond the close of the second fiscal year succeeding the fiscal year in which such notes were issued.

5. Whenever the amount of tax anticipation notes issued pursuant to this paragraph in anticipation of the collection of assessments or an installment thereof levied for a capital improvement equals the amount of such assessments or such installment remaining uncollected, all of such assessments or such installment, as thereafter collected, shall be set aside in a special bank account to be used only for the payment of such notes as they become due, unless other provision is made, pursuant to law, for the redemption of such notes. Any municipality may make budgetary appropriations for the redemption of such notes whether or not required or otherwise authorized by law to do so. In the event such an appropriation is made, such municipality shall not be required to pay into the special account the proceeds of the assessments, or the installment thereof, against which such notes were issued but such proceeds may be used in the manner provided by law or if there is no provision of law pertaining to the use of such proceeds, such proceeds shall be treated as surplus moneys for the fiscal year in which they are collected.

6.

(a) Where a tax anticipation note issued pursuant to this paragraph is to be renewed by the issuance of a renewal note, and the assessments or installment thereof in anticipation of which it was issued have been levied, but remain uncollected, such renewal note shall not be issued for an amount in excess of the amount of such assessments or installment thereof remaining uncollected at the time of such renewal, less the amount of any other outstanding tax anticipation notes issued in anticipation of the collection of such assessments or installment thereof; but in no event shall such a renewal note be issued for an amount in excess of the original amount of the note in renewal of which it is to be issued.

(b) Where a tax anticipation note issued pursuant to this paragraph is to be renewed, and the assessments or installment thereof in anticipation of which it was issued have not been levied, such renewal note shall not be issued for an amount in excess of the original amount of the note in renewal of which it is to be issued.

h. Tax anticipation notes may be issued by any municipality during any fiscal year thereof in anticipation of the levy or distribution of assessments for work or services if the expenditures for such work or services are financed from a fund into which are paid the proceeds of such notes and if such assessments are required to be collected in one installment and included in the tax roll for the fiscal year succeeding the fiscal year in which such notes were issued or in the tax roll for the second succeeding fiscal year. Any such municipality shall pay the proceeds of such assessments into any such fund. Notes issued pursuant to the provisions of this paragraph shall mature within one year from the date of their issuance and may be renewed from time to time but each renewal shall be for a period not to exceed one year and in no event shall such notes or the renewals thereof extend beyond the close of the second fiscal year succeeding the fiscal year in which such notes were issued. No such renewal note shall be issued for an amount in excess of the original amount of the note in renewal of which it was issued.

i. For the purpose of this section, taxes or assessments shall be deemed to be uncollected and not received by a municipality, school district or district corporation until cash is paid to such municipality, school district or district corporation for such taxes or assessments and such taxes or assessments are cancelled or the title to such taxes or assessments is transferred by such municipality, school district or district corporation, or until real property has been sold for such taxes or assessments and has been acquired by such municipality, school district or district corporation and such municipality, school district or district corporation has realized cash by the sale of such real property. For the purpose of this section the term "taxes" or the term "assessments" shall not include interest or penalties upon uncollected taxes or assessments.

j. Notwithstanding any provision of any other law, general or special, a central high school district may issue tax anticipation notes in accordance with and subject to the provisions of this section applicable to a school district; provided, however, that the aggregate amount of taxes in anticipation of which a central high school district may issue tax anticipation notes shall not exceed the sum of the taxes levied or to be levied for central high school district purposes in each school district included within the central high school district and, provided further, that no such school district included within the central high school district shall be authorized to issue tax anticipation notes in anticipation of taxes levied or to be levied therein for central high school district purposes.

HISTORY:

Add, L 1942, ch 424; amd, L 1943, ch 711, with substance transferred from County L § 41; L 1944, ch 615, eff April 6, 1944; L 1946, ch 806, § 2; L 1947, ch 696; L 1949, ch 618, eff Jan 1, 1950; L 1950, ch 208; L 1952, ch 233, eff March 26, 1952; L 1952, ch 260, eff March 26, 1952; L 1954, ch 735, § 2, eff April 15, 1954; L 1955, ch 334; L 1958, ch 575; L 1961, ch 929, eff April 17, 1961; L 1966, ch 672, eff June 21, 1966; L 1977, ch 468, eff August 1, 1977; L 2002, ch 363, § 1, eff Aug 13, 2002; L 2009, ch 74, § 16, eff March 21, 2010.

Commission Note: [1942] The Commission limited the maximum maturity of tax anticipation notes, including the renewals thereof, to a period not exceeding the termination of the fourth fiscal year succeeding the fiscal year for which the taxes (in anticipation of which such notes are issued) were levied. Such taxes outstanding and uncollected after the termination of such period are assets of doubtful value and consequently the notes issued in anticipation of their collection should be redeemed no later than the termination of such period.

The Commission also deemed it advisable to spell out clearly the power of a municipality to which the uncollected taxes of a school district, district corporation or another municipality are returned or certified, to issue tax anticipation notes in anticipation of the collection of such taxes.

Revision Notes: [1944] The Commission determined that as assets against which obligations might be issued taxes and assessments were in the same class. Accordingly, all obligations issued in anticipation of the collection of taxes or assessments are now termed tax anticipation notes and issued pursuant to section 24.00.

The Commission limited the maximum maturity of tax anticipation notes issued in anticipation of the collection of taxes or assessments upon real estate, including the renewals thereof, to a period not exceeding the termination of the fourth fiscal year succeeding the fiscal year for which the taxes or assessments (in anticipation of which such notes are issued) were levied. A shorter period of maximum maturity has been provided for notes issued in anticipation of the collection of assessments levied for a capital improvement.

Counties which heretofore in one fiscal year financed the payment of audited bills by the issuance of short term obligations payable from a tax to be levied for the succeeding fiscal year, will now issue budget notes to finance the payment of such bills.

[1955] (Paragraph d, sub 1) This amendment was made to harmonize the appropriate provisions of the local finance law with the provisions of subd 18 of § 176 of the town law, as amended by chap 706 of the laws of 1954, which latter increased the spending limitation of fire districts from $1500 to $2000.

[1958] This act embodied separate recommendations of the Association of Fire Districts of the State of New York and of the Joint Legislative Committee on Fire Laws. If separate bills had been introduced, there would have been considerable confusion to local officials and the fire service.

Editor's Notes: See 1954 note to Town Law, § 206, sub 11.

Laws 1949, ch 618, § 4, provides: The amendments effectuated by this act shall not apply to any tax anticipation note or renewal of a tax anticipation note which was issued or authorized to be issued prior to January first, nineteen hundred fifty.

Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

§ 18. Savings clause. Notwithstanding the repeal or amendment of any law by this act, nothing in this act shall be construed to impair the consolidation or dissolution of any local government entity pursuant to any such repealed or amended law if there was commenced in or for such local government entity prior to the effective date of this act a consolidation or dissolution proceeding pursuant to such law, in which event the provisions of such former law shall govern such proceeding as though such former law had not been repealed hereby.

Amendment Notes: 2009. Chapter 74, § 16 amended:

Par d, sub 2 by deleting at fig 1 "pursuant to section two hundred six of the town law".

2002. Chapter 363, § 1 amended:

Par a, sub 1, subpar (b) by adding the matter in italics.

Par a, sub 1, subpar (d) by adding the matter in italics.

Notes to Decisions

Analysis

1. In general
2. Authorization prerequisites
3. Power of governmental bodies to issue notes
4. —Town lighting districts
5. —Fire districts
6. Purposes for which notes may be issued
7. —Garbage collection
8. —Parks and recreation
9. Use of proceeds from issuance of notes
10. Redemption of notes

1. In general

Certificates of indebtedness which were not payable out of uncollected taxes of the current year but expressly stated that they were issued in addition to the appropriations for such year were not temporary loans permitted under former § 5 of the General Municipal Law and, therefore, were not valid obligations of the city. Rondout Sav. Bank v Kingston, 259 N.Y.S. 30, 144 Misc. 880, 1932 N.Y. Misc. LEXIS 1185 (N.Y. Sup. Ct. 1932).

A county may borrow in anticipation of taxes to be levied or of uncollected taxes, 1945 Ops St Compt 378.

The consent of the State Comptroller to the establishment of a special district is not necessary when the only indebtedness to be incurred is the issuance of tax anticipation notes. 1947 Ops St Compt 125.

2. Authorization prerequisites

Where, because of an inadvertent omission, no tax was levied for the share of the expenses of a consolidated health district which the town was intended to bear, money may not be borrowed in anticipation of the collection of taxes to pay such share. 1945 Ops St Compt 415.

A special tax is required to be voted in school districts as a prerequisite to the issuance of tax anticipation notes to finance budgetary deficiencies. 1946 Ops St Compt 605.

3. Power of governmental bodies to issue notes

Board of education properly authorized issuance of tax anticipation notes to borrow cash necessary to meet its expenses prior to collection of taxes. 1994 Op Comm Ed No. 13136.

Consolidated health districts created prior to January 1, 1939, are district corporations and may issue tax anticipation and budget notes pursuant to the Local Finance Law. 1947 Ops St Compt 90.

A central high school district may issue tax anticipation notes. 1976 Ops St Compt File #507.

4. —Town lighting districts

Where a town lighting district is formed, such district may be financed prior to the first levy of district taxes pursuant to subd. 2 of para. d of this section. 1946 Ops St Compt 267.

Town may issue tax anticipation notes for expenses of creating lighting district established prior to the first levy in which taxes or assessments therefor are to be levied. Renewals of such notes may not extend beyond the close of second fiscal year succeeding the fiscal year in which such notes were issued. 1964 Ops St Compt File #1035.

5. —Fire districts

For an explanation of the borrowing limitation on newly created fire districts under para. d of this section, see 1946 Ops St Compt 673.

A fire district may not borrow in anticipation of taxes except in the special cases covered by this section. 1955 Ops St Compt 126.

Fire protection district has no authority to issue obligations. Town has no authority to issue obligations for fire protection district purposes. 1964 Ops St Compt File #933.

A fire district may issue tax anticipation notes pursuant to statutorily prescribed terms. 1968 Ops St Compt File #1030.

6. Purposes for which notes may be issued

The Board of Supervisors of a county can raise additional money to defray unforeseen expenses in the building of a county hospital, but the money cannot be raised by a temporary loan not to be included in the tax budget, for so to permit would violate this section. People ex rel. Moody Engineering Co. v Hamilton, 178 N.Y.S. 702, 108 Misc. 585, 1919 N.Y. Misc. LEXIS 1079 (N.Y. Sup. Ct. 1919).

The Town Board may borrow sums of money sufficient to maintain a special improvement (such as a garbage district) until such time as money becomes available from taxes or assessments levied for such purpose. 1945 Ops St Compt 285.

Tax anticipation notes may be issued to finance the cost of operation and maintenance of water supply systems after the Town Board has taken them over and until taxes can be levied to pay for such cost of operation and maintenance. 1947 Ops St Compt 112.

Tax anticipation notes may not be issued to finance the purchase of fire apparatus. 1947 Ops St Compt 416.

A union free school district is not authorized to issue and sell tax anticipation notes for the purpose of securing funds to invest in time deposit accounts nor does it have power to invest proceeds of sale from such an issue in time deposit accounts. 1962 Ops St Compt #963.

Discussion of borrowing by school district for public library purposes. 1963 Ops St Compt #195.

School district may not issue revenue anticipation notes or tax anticipation notes in anticipation of receipt of payments in lieu of taxes from public authority; however, school district may issue revenue anticipation notes in anticipation of receipt of state aid payable under CLS RPTL § 545. 1999 Op St Compt No. 99-6.

7. —Garbage collection

The expenses of providing garbage collection prior to the first tax levy may be financed by the issuance of tax anticipation notes. 1947 Ops St Compt 125.

Where a garbage collection district has been in existence since 1949, tax anticipation notes may not be issued in 1953 to finance the cost of collection service for the remainder of the year, even though no budgetary appropriation has been made for district purposes and no assessments have been levied and collected for such purposes. 1953 Ops St Compt 254.

8. —Parks and recreation

It is possible that a village may borrow against uncollected taxes to provide all or a portion of the cost of a recreation field pursuant to this section. 1945 Ops St Compt 477.

An item may be included in the annual estimate to defray the cost of the maintenance and operation of a city's memorial park. Pending its inclusion, the necessary moneys may be obtained by authorized budgetary transfers or by appropriate borrowing. 1947 Ops St Compt 381.

9. Use of proceeds from issuance of notes

Board of education's practice of investing portions of proceeds from tax anticipation notes (TANS) was proper where investments were to defray operating expenses, not for sole purpose of investment, board only invested proceeds not immediately required in certificates of deposit, those deposits were timed to become due and payable at times when school district would require cash, and principal amount of TANS would not exceed school district's greatest cash flow deficit during term of TANS. 1994 Op Comm Ed No. 13136.

Proceeds of tax anticipation notes, as a general rule, may be used only for the purposes for which the taxes are levied or are to be levied. 1946 Ops St Compt 566.

If school district has issued tax anticipation notes in anticipation of taxes levied for library purposes, proceeds should be paid to library fund or to library treasurer, as case may be, as soon as practicable after receipt, and interest on such notes is charge for which school district, not library, is liable; however, it is permissible for library, in its discretion, to reimburse school district for

interest costs with respect to such notes. 1992 Op St Compt No. 92-28, 1992 N.Y. Comp. LEXIS 15.

10. Redemption of notes

A village was not required to impound taxes to pay a note which, by its terms, it was held must have been issued pursuant to former § 126-g of the Village Law, which provided for the issuance of tax anticipation notes but contained no provision for the segregation of funds, rather than pursuant to former § 128 thereof, which contained such a provision. First Nat'l Bank & Trust Co. v Saltaire, 256 A.D. 156, 9 N.Y.S.2d 103, 1939 N.Y. App. Div. LEXIS 4662 (N.Y. App. Div. 1939).

Agency Opinions

Analysis

1. Power of governmental bodies to issue notes,
2. —Fire districts
3. Use of proceeds from issuance of notes

1. Power of governmental bodies to issue notes,

2. —Fire districts

Expense of enlarging a fire district may be charged back to fire district, including Town Attorney paid on fee basis. 1967 NY Ops Atty Gen June 23.

3. Use of proceeds from issuance of notes

A fire district may use the proceeds of a tax anticipation note (TAN) to purchase apparatus provided that fire district tax revenues have been appropriated for such purpose. 1982 Op St Compt File #82-205.

A municipality or school district may issue RANS or TANS in an amount in excess of its immediate cash requirements and invest those proceeds not immediately needed for expenditure at a profitable rate of interest. In order to retain the tax exempt status of the obligations, the yield on such investments must be within the limits established by the Federal arbitrage rules. 1982 Op St Compt File #82-211.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 10.00, 15.00, 21.00, 24.10, 24.11, 29.00, 39.00 , 165.00; CLS Educ §§ 1604-a, 1723-a; CLS Gen Mun § 11; CLS Town § 176.

Tax and revenue anticipation funds and notes, CLS County §§ 372, 838.

Budget notes for public general hospital, CLS Gen Mun § 126, sub 4.

Jurisprudences:

64 Am Jur 2d, Public Securities and Obligations §§ 24, 27.

15 Am Jur Legal Forms 2d, Public Securities and Obligations §§ 214:34, 214:43, 214:73, 214:74, 214:83, 214:119.

19 Am Jur Proof of Facts 313, Correlation of Paving Benefit and Special Assessment.

§ 28.00. Capital notes

a. Any municipality, school district or district corporation may issue capital notes to finance all or part of the cost of any object or purpose for which serial or sinking fund bonds may be issued. Such capital notes may be renewed from time to time but such notes, including the renewals thereof, shall mature not later than the last day of the second fiscal year succeeding the fiscal year in which such notes are issued. However, an installment of not less than fifty per centum of the amount of such notes shall mature in the first fiscal year succeeding the fiscal year in which such notes are issued, unless such notes are authorized and issued during a fiscal year at a time subsequent to the date of the adoption of the annual budget for the next succeeding fiscal year.

b. Capital notes shall be redeemed out of the taxes or assessments levied or to be levied for the fiscal year in which they mature or out of other revenues of that fiscal year legally available for that purpose.

HISTORY:

Add, L 1942, ch 424, eff Sept 1, 1945; amd, L § 12, sub 6; L § 189–f; L 1943, ch 711, eff Apr 23, 1943; L 1970, ch 578, eff May 8, 1970.

Commission Note: [1942] This type of obligation provides a method whereby objects and purposes generally financed by the issuance of bonds may be financed by the issuance of notes having a maximum maturity of three years. Further, the proceeds of capital notes may be used as a source of the down payment which is required to be made available prior to the issuance of bonds or bond anticipation notes for certain capital improvements and types of equipment (see § 107.00 of this chapter).

Notes to Decisions

Analysis

1. In general; authorization of capital notes
2. Issuance of capital notes
3. Permissibility of issuance for particular purposes
4. —Water systems
5. —Sewer systems
6. Incinerators
7. —Landfills
8. —Buildings
9. —Buildings: fire houses
10. —Buildings: municipal garages
11. —Parks and recreation
12. —Highways, roads, streets, parkways and parking areas
13. —Highways, roads, streets, parkways and parking areas: parking lots
14. —Highways, roads, streets, parkways and parking areas: machinery and equipment
15. —Motor vehicles
16. —Motor vehicles: fire vehicles and apparatus
17. Permissibility of issuance to finance repairs
18. Redemption

1. In general; authorization of capital notes

Capital notes may be authorized in one fiscal year and issued in the next fiscal year. 1946 Ops St Compt 78.

"Line of credit" transaction whereby bank offers to lend county money by making funds available to county up to predetermined amount and county would be permitted to draw against entire amount of line all at once or in increments, with interest payable monthly and entire principal balance payable on any payment date, is not type of municipal debt authorized by law; "line of credit" is not equivalent of capital note authorized by CLS Loc Fin § 28.00; use of term "line of credit" for transaction whereby bank lends county money, is improper under CLS Loc Fin § 20.00. Op St Compt 88-45.

2. Issuance of capital notes

A town may issue a capital note in 1945 after the adoption of a budget payable in February, 1946, from item 3 moneys. 1945 Ops St Compt 526.

Budget notes should not be issued under § 29.00 (h) if serial bonds or capital notes may be issued. Budget notes may be issued under such paragraph to finance budgetary deficiencies in counties. 1947 Ops St Compt 26.

Where a village proposed to purchase real property for use in the village water system at a cost of $1,200, it is suggested in view of the small amount involved that a capital note be issued. 1947 Ops St Compt 515.

3. Permissibility of issuance for particular purposes

Neither bonds nor capital notes may be issued to finance the cost of leasing I.B.M. equipment or the expense of assessment rolls prepared on such equipment. 1946 Ops St Compt 675.

Towns may finance voting machines by either bonds or capital notes. No referendum is required in towns upon a bond resolution or capital note resolution in regard to financing voting machines. 1947 Ops St Compt 127.

A village may issue serial bonds or capital notes for the purpose of financing the employment of experts to appraise the value of the real property within the village. 1952 Ops St Compt 258.

A village which will shift from a March 1 fiscal year to a June 1 fiscal year in 1956 may finance the three month interim period from March 1, 1956 to May 31, 1956 by the issuance of serial bonds or capital notes. 1955 Ops St Compt 155.

Engineering fees incurred in connection with a capital improvement may be paid from the proceeds of bonds, bond anticipation notes, capital notes or deferred payment notes. 1957 Ops St Compt File #57-737.

4. —Water systems

Capital notes may be issued to finance the cost of the repair, reconstruction, or improvement of facilities for a water district, and the consent of the State Comptroller is not required therefor. 1945 Ops St Compt 493.

In the event that the parts of the current surplus of the city of Rome to be used for the construction of an annex to the city hall, an annex to the Public Works barn, the paving and repairing of streets, and the construction of storm-water sewers are insufficient or unavailable to defray all of the cost of any of these objects or purposes, the city may borrow to defray all or part of such cost by the issuance of serial bonds or capital notes, subject to the limitations of par. d of § 104.00 and § 107.00 1946 Ops St Compt 155.

Serial bonds or capital notes may be issued to finance the local share of the cost of preparing preliminary plans for a water district to be constructed as a post-war Public Works project. 1946 Ops St Compt 348.

A new roof on a water district pump house may involve partial reconstruction which may be financed by the issuance of bonds or capital notes. If repair alone is involved, borrowing would be under § 29.00 (i). The same problem is involved in respect to machinery. 1946 Ops St Compt 642.

The cost of the construction of additions to and the improvement of the water system of a water district may be financed by the issuance of capital notes or serial bonds. 1947 Ops St Compt 313.

The construction of new pipelines in a water district may be financed by the issuance of serial bonds or capital notes. 1947 Ops St Compt 401.

Discussion in regard to financing construction of water system and administration of water district. 1957 Ops St Compt File #57-992.

The cost of construction of additions to and improvement of the water system of a water district may be financed by the issuance of capital notes or serial bonds. It is necessary to hold a public hearing on a proposition to increase or improve the facilties and appurtenances of the water system. No referendum, either mandatory or permissive is required. 1968 Ops St Compt File #812.

A town may construct an additional lateral water main to serve a new street within a water district. The cost of such construction may be financed by the issuance of bonds or capital notes, or surplus moneys of the water district may be used, if the district is on an "ad valorem basis". The construction may be undertaken by the town board without the consent of the State Comptroller. Where district is on an "ad valorem basis", the cost of construction shall be a general charge against the district and it shall be assessed, levied and collected from the several lots or parcels of real property within the district in the same manner as taxes. 1969 Ops St Compt File #398.

5. —Sewer systems

Serial bonds or capital notes would be used to finance capital improvements in a sewer district. Budget notes could be used to finance repairs in certain cases. 1946 Ops St Compt 107.

In the event that the parts of the current surplus of the city of Rome to be used for the construction of an annex to the city hall, an annex to the Public Works barn, the paving and repairing of streets, and the construction of storm-water sewers are insufficient or unavailable to defray all of the cost of any of these objects or purposes, the city may borrow to defray all or part of such cost by the issuance of serial bonds or capital notes, subject to the limitations of par. d of § 104.00 and § 107.00 1946 Ops St Compt 155.

Serial bonds and capital notes may be issued to finance town's share of cost of preliminary plans for sewer system prepared pursuant to Public Works Law, § 31(1). 1952 Ops St Compt 275.

6. Incinerators

Where a village wishes to finance a $15,000 addition to its incinerator over a period of five years, it may do so by issuing serial bonds or bond anticipation notes or a statutory installment bond, but not by issuing a capital note. 1967 Ops St Compt File #379.

7. —Landfills

The cost of installing a town sanitary landfill operation is a town-wide charge against all taxable real property in the town, including incorporated villages within the town. 1968 Ops St Compt File #510.

A town may finance the purchase of machinery and equipment for the operation of a landfill installation, as a general town charge, through a budgetary appropriation or through the issuance of serial bonds, bond anticipation notes or capital notes. 1969 Ops St Compt File #540.

8. —Buildings

With the exception of plans for post-war projects, capital notes may not be issued to finance the cost of architects' fees in relation to school buildings. 1946 Ops St Compt 67.

In the event that the parts of the current surplus of the city of Rome to be used for the construction of an annex to the city hall, an annex to the Public Works barn, the paving and repairing of streets, and the construction of storm-water sewers are insufficient or unavailable to defray all of the cost of any of these objects or purposes, the city may borrow to defray all or part of such cost by the issuance of serial bonds or capital notes, subject to the limitations of par. d of § 104.00 and § 107.00 1946 Ops St Compt 155.

School district may issue bonds or capital notes to finance construction of a building to house the public library established by the law district. 1953 Ops St Compt 95.

9. —Buildings: fire houses

The cost of construction of a fire house may be financed by the issuance of capital notes or serial bonds. 1952 Ops St Compt 137.

Cost of capital improvement to fire house may be financed by capital notes. Capital note resolution is subject to referendum. 1954 Ops St Compt 383.

10. —Buildings: municipal garages

On and after Sept. 1, 1945, the cost of the construction of a town garage may be financed by the issuance of either serial bonds or capital notes, pursuant to the provisions of the Local Finance Law. 1945 Ops St Compt 342.

Village board may purchase land and building for a garage and finance transaction without referendum. 1953 Ops St Compt 260.

11. —Parks and recreation

A village recreation field may not be financed over a five-year period except by the issuance of serial bonds. For shorter periods capital notes may be used. 1945 Ops St Compt 477.

The Town of North Elba, on behalf of the North Elba Parks and Play Grounds District, may properly finance certain expenditures relating to the John F. Kennedy 1968 Winter Games, to be held in said district, by the sale of bonds or capital notes. 1968 Ops St Compt File #84.

12. —Highways, roads, streets, parkways and parking areas

Budget notes, capital notes, or serial bonds may be issued for the resurfacing of a town highway. 1945 Ops St Compt 473.

13. —Highways, roads, streets, parkways and parking areas: parking lots

While there is no authority for a village to purchase property on a land contract basis, a project for a village parking lot may be

financed by the issuance of serial bonds and capital notes pursuant to the Local Finance Law. 1952 Ops St Compt 262.

A single capital note may be issued to finance the cost of a parking lot, and it may be redeemed by collections from parking meters. 1955 Ops St Compt 598.

14. —Highways, roads, streets, parkways and parking areas: machinery and equipment

A county may finance the purchase of highway machinery and equipment by the issuance of bonds or capital notes. 1945 Ops St Compt 378.

A village may issue a capital note to finance the cost of machinery for the construction and maintenance of highways. 1947 Ops St Compt 102.

15. —Motor vehicles

School buses may be financed by the issuance of serial bonds or capital notes. 1945 Ops St Compt 257.

The city of Port Jervis may issue capital notes for a snow loader notwithstanding a local law enacted pursuant to § 34.00. 1946 Ops St Compt 664.

The purchase and installation of a truck motor costing in excess of $2,500 is subject to competitive bidding. The cost of a new truck motor may be financed by serial bonds or capital notes. 1956 Ops St Compt 176.

If police cars are to be purchased to replace similar police cars which were in service for one year or more, 3-year period of probable usefulness exists and purchase of such cars may be financed by issuance of capital note or bond; however, notwithstanding 3-year period of probable usefulness prescribed by CLS Loc Fin § 11.00(a)(77), any capital notes issued to finance purchase of police cars must mature not later than last day of second fiscal year succeeding fiscal year in which notes are issued pursuant to CLS Loc Fin § 28.00[a]. Ops St Compt 88-37.

16. —Motor vehicles: fire vehicles and apparatus

A capital note may be issued to finance the cost of fire apparatus for a village. 1947 Ops St Compt 315.

Appropriations for the purchase of fire-fighting vehicles and apparatus may be raised outside the constitutional 2% tax limit if serial bonds or capital notes are issued or if the purchase is made pursuant to the pay-as-you-go plan in accordance with the Constitution, Article VIII, section 11. 1947 Ops St Compt 354.

A village fire pumper may not be financed over a five-year period by the issuance of notes. 1947 Ops St Compt 360.

Discussion of rules and regulations relative to purchase of fire apparatus. 1953 Ops St Compt File #6421.

17. Permissibility of issuance to finance repairs

Serial bonds or capital notes would be used to finance capital improvements in a sewer district. Budget notes could be used to finance repairs in certain cases. 1946 Ops St Compt 107.

A new roof on a water district pump house may involve partial reconstruction which may be financed by the issuance of bonds or capital notes. If repair alone is involved, borrowing would be under § 29.00 (i). The same problem is involved in respect to machinery. 1946 Ops St Compt 642.

The issuance of a capital note to be used to repair a pump house and machinery and to pay attorneys' fees is not authorized. 1946 Ops St Compt 676.

18. Redemption

A capital note issued for town highway machinery must be paid from moneys raised in Item 3 of the town highway budget, except as provided in § 266 of the Highway Law. 1946 Ops St Compt 17.

Surplus funds of a fire district may be used to redeem bonds or capital notes and interest thereon. 1946 Ops St Compt 600.

Capital notes which cannot legally be renewed must be paid from the first revenues received by the city. There is no authority to issue new obligations to obtain funds for such purpose. 1966 Ops St Compt File #684.

Agency Opinions

Analysis

1. Incinerators

2. —Buildings

1. Incinerators

2. —Buildings

Discussion of the procedures applicable to the acquisition of real property and construction of a building thereon by a town. 1982 Op St Compt File #82-260.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 15.00, 104.10.

Jurisprudences:

64 Am Jur 2d, Public Securities and Obligations § 14.

15 Am Jur Legal Forms 2d, Public Securities and Obligations § 214:119.

§ 29.00. Budget notes

a.

1. Any municipality or district corporation, other than a fire district, may issue budget notes during any fiscal year for any unforeseeable public emergency during such year such as epidemic, conflagration, riot, storm, flood, earthquake or other unusual peril to the lives and property of the citizens of such unit of government in such amount as the finance board shall determine to be necessary, but no municipality may issue such notes for emergencies in behalf of any local improvement district. Any school district may issue budget notes during any fiscal year to provide temporary school buildings or facilities in such year when such buildings or facilities are necessitated because of an unforeseeable public emergency during such year such as epidemic, conflagration, riot, storm, flood, earthquake or other unusual circumstance preventing the use in whole or in part, of the buildings or other facilities used by such school district.

2. Any municipality or district corporation which adopts an annual budget may issue budget notes during any fiscal year for expenditures for which an insufficient or no provision is made in the annual budget for such fiscal year in an amount not to exceed five per centum of the amount of such annual budget.

Notwithstanding the foregoing limitation, any fire district may issue budget notes pursuant to this subdivision in the amount of at least one thousand dollars. In addition, any county which adopts an annual budget may issue budget notes pursuant to this subdivision without limitation as to amount for necessary expenditures for the apprehension and prosecution of persons charged with the commission of crime and for which an insufficient or no provision has been made in the annual budget for such fiscal year. If, however, any such municipality or district corporation may issue budget notes for any such expenditures pursuant to the provisions of any other paragraph of this section, such municipality or district corporation shall not issue budget notes for any such expenditures pursuant to this subdivision. Any town, and any county, in computing "the amount of the annual budget" for the purposes of this subdivision shall not include any amounts which are to be paid in the first instance from improvement district assessments.

3. A school district may issue budget notes during the last nine months of any fiscal year for expenditures for which an insufficient or no provision is made in the annual budget for such fiscal year in an amount not to exceed five per centum of such annual budget. The foregoing limitation shall not be applicable in any case in which a budget note resolution has been adopted by the finance board of a school district and has been approved by a majority of the qualified voters of the school district present and voting at any annual or special meeting of the school district held pursuant to the provisions of the education law during the last nine months of such fiscal year. The notice for any such meeting, in addition to complying with applicable provisions of the education law, must state that such budget note resolution will be submitted for approval by the voters at such meeting; the purpose for which moneys are proposed to be borrowed under such resolution; the total amount proposed to be borrowed, and the fiscal year in which taxes are required to be levied for the payment of the budget note proposed to be issued. The vote at any such meeting on such proposition shall be by ballot, or ascertained by taking and recording the ayes and noes of such qualified voters attending and voting at such meeting.

3-a. Notwithstanding any other provisions of this section, where a school district can demonstrate to the satisfaction of the commissioner of education extenuating circumstances that a waiver is warranted for the adoption of a budget note resolution by its finance board, upon certification by the chief executive officer to the commissioner of education, in such form as the commissioner of education shall determine pursuant to guidelines developed, for the purpose of making additional accruals requirements in the two thousand four—two thousand five or two thousand five—two thousand six school years associated with changes in accounting methodologies for liabilities for employer and employee contributions due and payable to a public retirement system that will result in a tax increase to the residents of the district in the following school year, a school district may issue budget notes during the last nine months of the school year in which such resolution is adopted, or during the first three months of the following school year, in an amount not to exceed the amount of such additional accruals for public pension liabilities. The limitation on the amount of budget notes contained in subdivision three of this paragraph shall not be applicable to notes issued pursuant to this section and the amount of budget notes issued pursuant to this section shall not be included in the computation of such limitation.

4. Any fire district may issue budget notes for expenditures for necessary repairs to any fire-fighting apparatus, fire-fighting vehicles or other motorized equipment of such fire district which has been damaged as the result of an accident; but only to the extent that budgetary appropriations for such purpose and the proceeds of insurance received on account of such damage and on hand at the time the repairs are completed are insufficient to pay for such damage. Unless a budgetary appropriation for the payment of such notes is in existence at the time the proceeds of any such insurance are received, such proceeds shall be used only for the payment of such notes.

5. Any municipality or fire district may issue budget notes during any fiscal year to provide for the payment in such fiscal year of the cost of insurance secured to indemnify against liability for benefits payable under the volunteer firefighters' benefit law and for which cost an insufficient or no provision was made in the annual budget of the municipality or fire district for such fiscal year. The aggregate amount of any such notes which may be issued for such purpose in a fiscal year commencing after December thirty-first, nineteen hundred sixty-five, shall not exceed the sum by which the actual cost of such insurance to be paid in the fiscal year in which such notes are issued exceeds the actual cost of such insurance in the fiscal year prior to the fiscal year in which such notes are issued; provided, however, that this limitation shall not apply in a case where the municipality or fire district has not incurred any such cost in the fiscal year prior to that in which such notes are issued.

6. Any fire district may issue budget notes for expenditures for water supply and in relation to fire hydrant maintenance and rental costs; but only to the extent that budgetary appropriations for such purpose under subdivision twelve of section one hundred seventy-six of the town law are insufficient to pay increased charges which the public service commission has authorized and the fire district is required to pay in the fiscal year in which the budget note is issued for such maintenance or rental.

7. Any fire district which elects to become liable for payments in lieu of contributions pursuant to section five hundred sixty-five of the labor law and is required by the commissioner of labor to pay into the unemployment insurance fund an amount equal to the amount of benefits paid to claimants and charged to such fire district's account may issue budget notes for such expenditures for the amount required to be so paid in the fiscal year in which the budget note is issued, but only to the extent that budgetary appropriations for such purpose are insufficient to pay such claim.

8. [There are two sub a, paras 8] Any county, city, village, town, town on behalf of an ambulance district, or town on behalf of a fire protection district which contracts with an ambulance service which is not organized pursuant to section two hundred nine-b of the general municipal law, may issue budget notes during the first fiscal year in which it is required to pay contributions to the volunteer ambulance workers' service award program, but only to the extent that budgetary appropriations for such purpose are insufficient to pay such contributions.

8. [There are two sub a, paras 8] Any county, city, village, town, town on behalf of an ambulance dis-

trict, or town on behalf of a fire protection district which contracts with an ambulance service which is not organized pursuant to section two hundred nine-b of the general municipal law, may issue budget notes during the first fiscal year in which it is required to pay contributions to the volunteer ambulance workers' service award program, but only to the extent that budgetary appropriations for such purpose are insufficient to pay such contributions.

b. Any municipality which adopts an annual budget may issue budget notes during any fiscal year for either or both the following purposes:

1. The payment of the expenses for the removal of snow and ice, exclusive of salaries and wages of regular employees except for overtime work and work on Sundays and holidays, or

2. The payment of the expenses for the demolition of unsafe buildings,

to the extent that an insufficient provision shall have been made therefor in the annual budget for such fiscal year, if such municipality is required by statute, local law or ordinance to include in its annual budget for such fiscal year and each fiscal year thereafter either (a) an amount equal to at least the average of all expenditures for such purpose during each of the five preceding fiscal years for each purpose for which such budget notes are to be issued, or (b) such amount as is prescribed in the schedule set forth below, for each purpose for which such budget notes are to be issued:

1. For such fiscal year, an amount equal to at least one-fifth of the average of all expenditures for such purpose during each of the five preceding fiscal years.

2. For the first fiscal year succeeding such fiscal year, an amount equal to at least two-fifths of the average of all expenditures for such purpose during each of the five preceding fiscal years.

3. For the second fiscal year succeeding such fiscal year, an amount equal to at least three-fifths of the average of all expenditures for such purpose during each of the five preceding fiscal years.

4. For the third fiscal year succeeding such fiscal year, an amount equal to at least four-fifths of the average of all expenditures for such purpose during each of the five preceding years.

5. For the fourth fiscal year succeeding such fiscal year and for each succeeding fiscal year thereafter, an amount equal to at least the average of all expenditures for such purpose during each of the five preceding fiscal years.

Any city, any county and any village having a population of five thousand or more, as determined pursuant to the latest available federal census, may adopt a local law or ordinance, and any other municipality may adopt an ordinance requiring the inclusions of such amounts set forth in the above schedule for either of or both such purposes in its annual budget.

c. Any city which is required pursuant to law to include annually in its annual budget an amount for:

1. Judgments which may be obtained against the city and which may become due and payable during the fiscal year for which the budget is adopted,

2. Claims which may be settled or compromised and become payable during such fiscal year, and

3. The repaving of streets

may issue budget notes for any of such purposes during a fiscal year if the amount included in the annual budget for such fiscal year is insufficient therefor.

d. Any municipality, school district or district corporation which is required by law to include in its annual budget the amount of judgments or compromised or settled claims which are outstanding at the time such budget is prepared, may issue budget notes for the payment of any such judgment or claim. Such notes may be issued at any time prior to the earliest time at which tax anticipation notes may be issued by such municipality, school district or district corporation pursuant to section 24.00 of this chapter in anticipation of the levy or collection of taxes for such budget. If such notes are issued in a fiscal year prior to the preparation of an annual budget during such fiscal year, an appropriation for their redemption shall be included in such next budget when it is prepared. If such notes are issued after an appropriation has been included in an annual budget for the payment of the judgments or claims for which the notes are issued, such notes shall be redeemed from such appropriation. Such budget notes may be renewed from time to time, but such notes including renewals thereof shall mature not later than the close of the fiscal year for which such annual budget is adopted.

e. Any city, county or town, during any fiscal year or, in the case of the city of New York, within ninety days after the close of such fiscal year, for which it shall make a supplemental, deficiency or additional appropriation for one or more purposes authorized by or under the provisions of the social services law, including the administration thereof, may issue budget notes for the amount of the local share of the cost thereof.

e-1. If any town has made an appropriation in its annual budget for any fiscal year for its share of the cost of an approved project under article eight-A of the highway law, and the appropriation is insufficient, the town may issue budget notes in such fiscal year to finance such share in an amount not to exceed fifty per centum of the town's share of the cost of such project. Budget notes may not be issued under any other paragraph of this section to finance any portion of the town's share of the cost of an approved project under such article eight-A of the highway law.

f. If any municipality which is authorized or required by law to include in its annual budget an estimate of the amount of state, county district and other county taxes to be levied on the real property within such municipality for or during the fiscal year for which such budget is adopted, underesti-

mates the amount that is actually levied, such municipality may issue budget notes for the payment of all or part of such deficiency.

g. If any portion of the taxes or assessments levied by a municipality, school district or district corporation in any fiscal year are cancelled prior to the collection thereof pursuant to a determination by a court in an action or proceeding brought by the taxpayer, or, in the case of a school district with the written approval and consent of the commissioner of education under section thirty-five hundred twelve* of the education law, such municipality, school district or district corporation may issue budget notes in the fiscal year in which any such cancellation occurs in an amount not in excess of the amount of taxes or assessments so cancelled. The proceeds of such notes shall be used only for the purposes for which such taxes or assessments so cancelled were levied, or for the redemption of tax anticipation notes which had been issued in anticipation of the collection of the taxes or assessments so cancelled and for the redemption of which notes no other provision has been made, or for the redemption of budget notes in renewal of which they were issued.

h. Any county which does not adopt an annual budget may issue budget notes during any fiscal year to pay accounts, claims, demands or charges which may be directed to be paid pursuant to the provisions of any law in an amount not in excess of the total amount of such accounts, claims, demands or charges directed to be paid in such fiscal year and for which an insufficient or no provision was made in the estimate upon which the tax levy for such fiscal year was based. No county shall issue budget notes pursuant to this paragraph on or after January first, nineteen hundred fifty-one; provided that budget notes issued prior to such date pursuant to this paragraph may be renewed as provided in paragraph j of this section.

i. Any town on behalf of a town improvement district situated therein, or any county on behalf of a county improvement district situated therein, may issue budget notes during any fiscal year for expenditures for which an insufficient or no provision is made in the annual estimate for such improvement district as finally adopted for such fiscal year in an amount not to exceed five per centum of the amount of such annual estimate.

j. Except as otherwise provided in paragraph d of this section, budget notes may be renewed from time to time, but such notes, including the renewals thereof, shall mature not later than the close of the fiscal year succeeding the fiscal year in which such notes are issued. However, such notes, including the renewals thereof, may mature not later than the close of the second fiscal year succeeding the fiscal year in which such notes are issued, when authorized and issued during a fiscal year at a time subsequent to the date of the adoption of the annual budget for the next succeeding fiscal year, by a municipality, school district or district corporation in which the total amount of taxes or assessments levied for a fiscal year is determined pursuant to an annual budget adopted during the fiscal year preceding such fiscal year.

k. Budget notes shall be redeemed out of the taxes or assessments levied or to be levied for the fiscal year in which they mature or out of other revenues of that fiscal year legally available for that purpose.

l. Notwithstanding the provisions of any general, special or local law, any municipality, school district or district corporation, which has the power to issue budget notes under this section, shall to the same extent have the power to appropriate and expend money received from the proceeds of the sale of budget notes for the purposes for which such notes are issued.

m. Notwithstanding the provisions of this section or any other law, no city shall issue budget notes for the purpose of providing funds for the payment pursuant to section thirty-six-a of the rapid transit law, or otherwise, of the amounts which the board of transportation or any other agency of such city determines or estimates, claims (including claims reduced to judgment) or certifies to the board of estimate or other analogous local authority of such city, as the sum by which the revenues derived from operation of any railroad, as defined in section two of the rapid transit law, fail or will fail to provide for any costs and expenses of operation and maintenance of such railroad for any period or periods commencing on or after July first, nineteen hundred fifty-three. For the purpose of this paragraph, such costs and expenses shall also include the payments or contributions paid or payable by the board of transportation or the city during such period to any employees' pension or retirement system on account of membership therein of officers and employees of such board of transportation.

n. Notwithstanding any other provision of this section, except where any obligations other than budget notes are or have been issued for the object or purpose described in subdivision fifty-nine of paragraph a of section 11.00 of this chapter, budget notes may be issued by a municipality, school district or district corporation, or by a county on behalf of a county improvement district situated therein or by a town on behalf of a town improvement district situated therein, pursuant to an irrevocable election to finance all or part of the employer's share of the cost of retroactive coverage provided to its employees under the federal old-age and survivors insurance system pursuant to section one hundred thirty-eight-a of the retirement and social security law where an insufficient or no provision is or has been made in the annual budget for such cost.

o. Notwithstanding any other provision of this section, if any city in this state having a population

*Education Law § 3512 repealed, L 1958, ch 959, and substance transferred to Real P Tax Law § 1316 (1, 2).

of one million or more includes in its annual budget for the fiscal year nineteen hundred seventy-one-nineteen hundred seventy-two an estimate in an amount not to exceed one hundred million dollars of additional revenues available to it as a result of a federal program of general or special revenue sharing or any similar program or any combination of such programs which relieves a financial burden which would otherwise require expenditure from city tax receipts in such amount for the fiscal year, and if that estimate should exceed the amount of such revenue that actually becomes available to it, such city may issue during the last quarter of such fiscal year budget notes which shall have a maximum maturity of not more than one year for the payment of all or part of the amount of such overestimate, upon a determination by the state budget director of the amount of such overestimate.

HISTORY:

Add, L 1942, ch 424; amd, L 1943, ch 711, with substance transferred from County L § 400, sub 11; L 1944, ch 607, eff Apr 6, 1944; L 1945, ch 837; L 1946, ch 305; L 1946, ch 806; L 1947, ch 393; L 1947, ch 697, eff Apr 7, 1947; L 1948, ch 827, eff Apr 6, 1948; L 1949, ch 507; L 1950, ch 373, § 1, eff Apr 1, 1950,2, eff Apr 1, 1950,f; L 1950, ch 719, eff Jan 1, 1951; L 1951, ch 77; L 1952, ch 328, § 2; L 1952, ch 523; L 1952, ch 686, § 2, eff Apr 14, 1952; L 1953, ch 206, § 1, eff Mar 25, 1953,2; L 1953, ch 207, § 2; L 1954, ch 411, § 1; L 1955, ch 211, eff Apr 2, 1955; L 1955, ch 213, § 2, eff Apr 2, 1955; L 1955, ch 397; L 1956, ch 90; L 1957, ch 470, § 1; L 1957, ch 1051, § 3, eff June 30, 1957; L 1958, ch 26; L 1959, ch 132; L 1959, ch 725; L 1960, ch 26; L 1960, ch 743, eff Apr 21, 1960; L 1961, ch 115; L 1962, ch 20; L 1963, ch 77; L 1963, ch 426; L 1964, ch 93; L 1965, ch 624, eff June 28, 1965; L 1966, ch 256, § 49; L 1970, ch 128; L 1970, ch 575; L 1970 ch 578, eff May 8, 1970; L 1971, ch 18; L 1971, ch 334, eff May 28, 1971; L 1971, ch 415, eff June 17, 1971; L 1972, ch 479, eff May 24, 1972; L 1972, ch 669; deleted, L 1980, ch 668, § 1, eff June 30, 1980,2, eff June 30, 1980,2; L 1982, ch 730, § 1, eff July 27, 1982; L 1998, ch 514, § 3, eff July 29, 1998; L 1998, ch 558, § 5, eff Aug 5, 1998; L 2005, ch 57, § 9 (Part M), eff April 12, 2005; L 2018, ch 476, § 83, effective December 28, 2018.

Commission Note: This type of obligation is designed to enable municipalities and district corporations which estimate in advance the amounts to be expended for certain or all current expenditures for a fiscal year to issue notes payable out of the levy for the first or second succeeding fiscal year, to the extent that the amounts forecasted were insufficient.

Revision Note: [1945] Par a, subd. 2. This subdivision has been amended to remove the 1 per cent limitation upon the issuance of budget notes for expenditures for which an insufficient or no provision has been made in the annual budget for the fiscal year, in a county which adopts an annual budget, in the case of necessary expenditures for the apprehension and prosecution of persons charged with the commission of crime.

Par h. This paragraph has been amended to permit a county which does not adopt an annual budget to issue budget notes to pay accounts, claims, demands or charges which may be directed to be paid pursuant to any provision of the County Law, instead of being limited to accounts, etc., directed to be paid pursuant to sections 10-a or 10-b of such law. The amendment also provides that in a county which is hereafter required to adopt an annual budget the budget notes issued during the fiscal year immediately preceding the effective date of the first annual budget so adopted may have a maturity of three years, instead of the one-year limit normally provided for budget notes. Paragraph j of section 29.00 has been amended in conformity with this provision.

Par l. This is a new provision, to follow paragraph k, specifically setting forth that the power to appropriate and expend money for any of the purposes for which a budget note may be issued shall be coextensive with the power to issue such a note.

[1955] (Paragraph a, sub 5) This act is comparable in purpose to chapter 411 of the Laws of 1954, enacted on recommendation of the Temporary State Commission on Fire Laws. It authorized municipalities and fire districts to issue short-term budget notes, if necessary, to pay the cost of insurance purchased to indemnify against liabilities for mandatory financial benefits when volunteer firemen were killed or injured in line of duty. A flat 8.4 increase in the rate level for such insurance became effective July 1, 1954, to provide for increased benefits which became effective on such date. The premium increase took effect on the anniversary dates of various insurance contracts and may not have been adequately provided for in budgets adopted after June 30. Also an application for a substantial increase in the premiums for such insurance was pending before the Superintendent of Insurance when this act was passed. If granted, it would further increase the cost of such insurance. An extension of such temporary borrowing power seemed advisable.

[1963] This act was prepared under the direction of the New York State Department of Audit and Control and was introduced at its request. Budget notes for public general hospital, deposit and payment of proceeds, Gen. Mun. Law, § 126(4); tax and revenue anticipation funds and notes, County Law, §§ 367, 372, 838.

Editor's Notes: Laws 1953, ch 206, § 3, provides that section two [par n] of this act shall apply to any fiscal year of any municipality or district corporation commencing on or after July first, nineteen hundred fifty-two.

Laws 1957, ch 1051, § 4, provides: "This act shall take effect immediately and shall control notwithstanding any inconsistent general, special or local law."

Laws 1971, ch 415, § 2, provides:

§ 2. In the event the federal government does not make available to a city, through a federal program of general or special revenue sharing or any similar program or any combination of such programs which relieves a financial burden which would otherwise require expenditure from city tax receipts, sufficient additional revenues by February fifteenth, nineteen hundred seventy-three to provide for the payment of principal and interest on budget notes, issued pursuant to paragraph o of section 29.00 of the local finance law, the city budget director shall certify to the state budget director on or before the first day of March, nineteen hundred seventy-three, the amount by which such revenues are insufficient to provide for such payments. The state budget director shall review such certification and shall certify to the legislature the amount he determines such overestimate to be and the legislature shall appropriate such amount which shall be advanced in the first instance to such city by the state comptroller by June thirtieth, nineteen hundred seventy-three.

Upon such appropriation by the legislature, such city shall be authorized until August first, nineteen hundred seventy-three to impose, by local law, any or all of the taxes prescribed in sections three, four and five of this act, which tax or taxes shall take effect no later than September first, nineteen hundred seventy-three, provided, however, that such city may not impose either of the taxes authorized in sections four or five of this act unless both such taxes are so imposed; and provided further that such city may not impose either of the taxes authorized in sections four or five of this act after the end of the fiscal year of such city in which final payment is made to the state of the amount advanced by the state comptroller to such city in accordance with this section.

The city shall repay to the state on or before December thirty-first, nineteen hundred seventy-three, thirty per centum or thirty million dollars of said advance whichever is less, and on or before December thirty-first, nineteen hundred seventy-four twenty-five per centum or twenty-five

million dollars of said advance whichever is less, and on or before December thirty-first, nineteen hundred seventy-five, twenty-five per centum or twenty-five million dollars of said advance whichever is less, and on December thirty-first, nineteen hundred seventy-six, the balance of said advance.

In the event that such city fails to make the payments required to be made by December thirty-first, nineteen hundred seventy-three or by December thirty-first, nineteen hundred seventy-four, or by December thirty-first, nineteen hundred seventy-five, or by December thirty-first, nineteen hundred seventy-six, the state comptroller shall deduct an amount necessary to meet such payments from any moneys available from any succeeding payments of state aid apportioned to such city; except, however, that prior to any deductions from moneys available for payments of state aid apportioned to such city as per capita aid for the support of local government pursuant to section fifty-four of the state finance law, the moneys, if any, payable to the city university construction fund pursuant to the provisions of the city university construction fund act or to the New York city housing development corporation pursuant to the New York city housing development corporation act shall be paid in full to such fund or corporation.

Laws 1972, ch 669, § 2, provides:

§ 2. Prior to the issuance of any budget notes pursuant to section one of this act, and on or before March first, nineteen hundred seventy-three, the mayor of the city of New York shall submit to the council and the board of estimate of such city, and to the governor and the senate finance committee and the assembly ways and means committee copies of a detailed statement of the expense budget of such city setting forth the appropriations made for the current fiscal year, the expenditures made to date, the expenditures proposed to be made before the close of the current fiscal year, the anticipated expenditures for each of the three succeeding fiscal years and the moneys and revenues estimated to be available during the current and three succeeding fiscal years. Such statement shall make appropriate recognition of, and provision for, the redemption of any budget notes issued pursuant to subparagraph (e) of subdivision two of paragraph a of section 29.00 of the local finance law, chapter four hundred fifteen of the laws of nineteen hundred seventy-one entitled "An act to amend the local finance law, in relation to budget notes which may be issued by cities of one million or more and providing for state advances in relation to such notes, to amend the tax law, in relation to the imposition of taxes by cities of one million or more upon certain utilities, and to amend chapter seven hundred seventy-two of the laws of nineteen hundred sixty-six, entitled "An act to enable any city having a population of one million or more to raise tax revenue by authorizing the imposition of taxes on general, financial, insurance and transportation corporations and on unincorporated businesses to provide for the administration and review of such new taxes, to provide for the suspension of any tax on gross income of conduit companies imposed by such city and for the suspension and repeal of any general business and financial tax imposed by any such city, to amend the tax law in relation to authorizing an increase in the rates of tax which such city may impose on utilities and vendors of utility services, and to repeal article two-B of the general city law, authorizing the imposition of a general business and financial tax by such city", in relation to increasing the rates of tax on financial corporations", chapter seven of the laws of nineteen hundred seventy-two entitled "An act in relation to payment of loans made by New York city transit authority and the making of advances for the purposes of paying the operating expenses of the New York city transit authority", or subparagraph (f) of subdivision two of paragraph a of section 29.00 of the local finance law, as added by section one of this act.

Amendment Notes The 2018 amendment by ch 476, § 83, substituted "firefighters'" for "firemen's" in a5.

Repeal Notes: [1955] (Paragraph n) Paragraph n of section 29.00 of the Local Finance Law, which was repealed by this act, imposed certain limitations on the aggregate amount of budget notes which may be issued by a municipality or district corporation in any fiscal year.

Notes to Decisions

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21. Redemption of budget notes

1. In general

In performing its statutory duties, the Board of Health may incur expenses although no provision to pay the same is contained in the budget. 1946 Ops St Compt 8.

Budget notes are available to aid a village as to its anticipated budgetary deficits. 1946 Ops St Compt 76.

A county board of supervisors may authorize the issuance of a budget note to finance an additional appropriation for a particular purpose even though there are unappropriated surplus moneys available for transfer. 1957 Ops St Compt File #511.

2. Issuance of budget notes

Budget notes should not be issued under para. h of this section if serial bonds or capital notes may be issued, but budget notes may be issued under said paragraph to finance budgetary deficiencies in counties. 1947 Ops St Compt 26.

Capital notes which cannot legally be renewed must be paid from the first revenues received by the city. There is no authority to issue new obligations to obtain funds for such purpose. 1966 Ops St Compt File #684.

The maximum amounts which may be borrowed by the issuance of budget notes are prescribed by section 29.00 of the Local Finance Law. 1967 Ops St Compt File #736.

3. Governmental bodies which may issue

Consolidated health districts created prior to January 1, 1939, are district corporations and may issue tax anticipation and budget notes pursuant to the Local Finance Law. 1947 Ops St Compt 90.

4. —Fire districts

A fire district may borrow pursuant to para. a (2) of this section, notwithstanding the provisions of para. 1 of this section. 1946 Ops St Compt 583.

A fire district may issue budget notes to supply a deficiency in budget appropriations. Where the annual budget is under fifty thousand dollars, the amount of budget notes is limited to five per centum of the amount of the annual budget. 1947 Ops St Compt 188.

A fire district may borrow by a budget note limited to not more than 5% of its annual budget. 1947 Ops St Compt 430.

Board of Fire Commissioners should not submit the entire fire district budget, item by item, for approval at a fire district election, but should, if necessary, submit a single proposition under § 179(1-d) calling for the expenditure of a given amount

over and above the spending limitation for the district as computed under § 176(18). 1954 Ops St Compt 371.

Except as otherwise provided in this section budget notes may not be issued in 1955 to pay expenses of fire district incurred in 1954. 1955 Ops St Compt 126.

There is no authority for a town to borrow moneys on behalf of a fire protection district. 1956 Ops St Compt 56.

Fire protection district has no authority to issue obligations. Town has no authority to issue obligations for fire protection district purposes. 1964 Ops St Compt File #933.

5. Purposes for which budget notes may be issued; unbudgeted expenses, generally

Rental for rooms of the Marine Corps League may be provided from contingent or surplus funds or by a budget note when there is no item in the budget therefor. 1946 Ops St Compt 200.

An item may be included in the annual estimate to defray the cost of the maintenance and operation of a city's memorial park. Pending its inclusion, the necessary moneys may be obtained by authorized budgetary transfers or by appropriate borrowing. 1947 Ops St Compt 381.

A town which has made no provision in its budget for funds for the payment of a general ambulance service contract may obtain such funds from a surplus or unexpended balance (if one exists) or by issuing budget notes. 1967 Ops St Compt File #349.

Where no appropriation has been made for the operation of the public library, the town may obtain such funds from any true surplus, unexpended balance, the contingent fund, or the proceeds of budget notes. 1968 Ops St Compt File #508.

A village may expend village moneys for the publication of a local history and may raise the necessary funds by issuing budget notes. 1972 Ops St Compt File #16.

6. —Unbudgeted expenses: salaries

The issuance and sale, pursuant to a resolution of the Board of Estimate, of $18,500,000 in budget notes to cover a deficit in the operating expenses of the municipally-owned subway system, caused by wage increases of subway employees granted after the annual city budget for the period had been adopted, was authorized by subd. 2 of para. c of this section, providing for the payment of claims which may be settled or compromised. Wilmerding v O'Dwyer (1947) 272 AD 35, 69 NYS2d 90, revd on the ground that subd. c of § 136 of the Rapid Transit Law (now § 38), added subsequently to this decision, rendered the question moot, 297 N.Y. 664, 76 N.E.2d 325.

The resolution of the Board of Estimate authorizing the issuance and sale of budget notes for the purpose of meeting a deficiency resulting from retroactive salary increases granted to the employees of the New York City Transportation Board was valid. Timmerman v New York, 69 N.Y.S.2d 102, 1946 N.Y. Misc. LEXIS 3392 (N.Y. Sup. Ct. 1946), aff'd, 272 A.D. 758, 70 N.Y.S.2d 140, 1947 N.Y. App. Div. LEXIS 3433 (N.Y. App. Div. 1947).

The salary of a newly created position may be paid from the proceeds of budget notes issued pursuant to this section. 1946 Ops St Compt 30.

Power of common council to fix salaries of officers and employees discussed. Retroactive salary increases forbidden. Budget notes may be issued to finance salary increases which may be granted. 1955 Ops St Compt #7190.

The salaries of school crossing guards may be paid from a budgetary appropriation therefor. Where no such appropriation exists such salaries may be paid from the contingent fund, surplus, unexpended balances or from the proceeds of a budget note issued for such purposes. 1960 Ops St Compt File #167.

Where the budget appropriation for the town constabulary has been exhausted, an appropriation therefor may be made from the contingent fund, or from surplus moneys or unexpended balances, or from the proceeds of a budget note issued for that purpose. 1960 Ops St Compt File #670.

When there is no specific budgetary appropriation for the salary of a particular officer or employee, such salary may be paid from the contingent fund, surplus, unexpended balances, or from the proceeds of a budget note, pursuant to §§ 107, 112, and 115 of the Town Law and § 20.00 of the Local Finance Law. 1960 Ops St Compt File #899.

A town may create the position of park superintendent subsequent to the adoption of the final budget for the fiscal year and pay the salary assigned thereto from legally available funds. 1968 Ops St Compt File #56.

7. —Unbudgeted expenses: other forms of compensation

Discussion of borrowing to pay Workmen's Compensation claims. 1946 Ops St Compt 580.

The town board may authorize payment of a claim for mileage only if moneys have been appropriated for such purpose and are available therefor. Such appropriation need not have been made in the original budget. 1953 Ops St Compt 414.

Highway fund moneys may not be transferred to the general fund to pay town's share of social security of highway employees. 1954 Ops St Compt 88.

Extra compensation may be paid by a village to the village attorney for extraordinary services performed by him, where an agreement to that effect exists. Where insufficient village moneys are available to pay such additional compensation, budget notes may be issued therefor, subject to statutory limitations. 1967 Ops St Compt File #674.

8. —Unbudgeted expenses: repairs

Additional moneys may be borrowed for the repair of town highway equipment pursuant to this section and § 273 of the Highway Law. 1945 Ops St Compt 258.

Where unforeseen damage has been caused to a bridge abutment maintained by a town and there are insufficient funds to repair the same, such repairs may, nevertheless, be made and the necessary funds borrowed therefor pursuant to this section and §§ 269, 271, and 273 of the Highway Law. 1945 Ops St Compt 271.

In the event that the appropriation therefor is insufficient, machinery repairs may be paid for by the issuance of budget notes pursuant to para. 2 of subd. a of this section. 1945 Ops St Compt 379.

Serial bonds or capital notes would be used to finance capital improvements in a sewer district. Budget notes could be used to finance repairs in certain cases. 1946 Ops St Compt 107.

A new roof on a water district pump house may involve partial reconstruction which may be financed by the issuance of bonds or capital notes. If repair only is involved, borrowing would be under para. i of this section. The same problem is involved in respect to machinery. 1946 Ops St Compt 642.

9. —Unbudgeted expenses: school districts

Removal of city school district officials was not warranted on ground that they passed resolution authorizing issuance of up to $4 million in budget notes in event that expenditures during year exceeded revenues, as no budget notes were actually issued, amount authorized was less than 5 percent of city school district's budget, and thus no violation of CLS Loc Fin § 29.00 occurred; moreover, even if violation occurred, respondents acted on advice of counsel and thus lacked requisite willfulness. 1996 Op Comm Ed No. 13535.

A school district, as defined in this chapter, may issue budget notes in the manner provided in para. 2, subd. 3, of this section to finance a grant by it to a recreation project made in accordance with L 1947, ch 449. 1947 Ops St Compt 406.

Subject to the limitations on amount prescribed in this section, a central school district may issue budget notes during last nine months of fiscal year, without a vote at a district meeting, to finance expenditures for the transportation of pupils when insufficient provision was made in budget. Notes issued in excess of limitations must be approved by voters. 1954 Ops St Compt 8.

10. —Unbudgeted expenses: fire districts

Fire districts may issue budget notes to finance repairs to a fire truck. 1947 Ops St Compt 157.

11. —Unbudgeted expenses: water districts

A Town Board may issue a budget note to raise moneys for the cost of the preparation of an estimate for additions and improvements to the water system of a water district. 1947 Ops St Compt 180.

Where proposed water system for a water district was not constructed, legal and engineering fees and miscellaneous expenses of establishment of the district may nevertheless be financed by the issuance of capital notes or serial bonds. 1957 Ops St Compt File #765.

12. —Unbudgeted expenses: municipal operating expenses

Where a municipality has insufficient funds to meet certain year-end costs, it may, subject to certain statutory limitations, borrow through the issuance of serial bonds, bond anticipation notes, or capital notes, if for capital expenditures, and through issuing budget notes, if for current operating expenses. 1967 Ops St Compt File #643.

Town may issue budget note to pay for unanticipated increase in amount of liability insurance premium over amount budgeted. 1986 Opn St Comp No. 86-84.

13. —Snow removal

A town which has a budgetary deficiency for snow removal purposes may issue budget notes within the limitations of this section. 1945 Ops St Compt 513.

Discussion of snow removal financing. 1946 Ops St Compt 154.

Village may not impose special assessment to pay cost of snow removal in excess of amounts appropriated, but it may issue budget notes to finance such excess costs; in addition, village has temporary authority to issue serial bonds to pay for "extraordinary expenses" for snow and ice removal incurred in its 1993-4 fiscal year. 1994 Op St Compt No. 94-20.

14. —Judgments

A judgment against the city may not be satisfied by an abatement of the 1953-54 city tax levy on the property of the judgment creditor. Payment of the judgment may not be financed by bonds or capital notes. If the judgment against the city cannot be paid out of available moneys in the general fund in the current year, the amount must be included in the tax levy for the following year. In such case, the city may finance the payment by the issuance of budget notes pursuant to this section. 1953 Ops St Compt 296.

15. —Claims

Where change orders and extras raise total cost of waterworks construction above amount which was appropriated and which was approved by referendum, village has no authority to pay claim for the additional amount in the absence of litigation or a special act of the Legislature. 1965 Ops St Compt File #340.

16. —Street repaving

Budget notes, capital notes, or serial bonds may be issued for the resurfacing of a town highway. 1945 Ops St Compt 473.

When Item 3 moneys are exhausted, no claim may be paid except from moneys received pursuant to § 266 of the Highway Law or § 29.00 (a, 2) of the Local Finance Law. 1945 Ops St Compt 504.

17. —Social welfare

A town which has made no budgetary appropriation for home relief for 1946 may spend moneys therefor. 1946 Ops St Compt 111.

18. —Social welfare: Child care and aid to dependent children

If an appropriate item for child care is not contained in a town budget, a town may provide such care with funds from budget notes. 1946 Ops St Compt 264.

"Aid to dependent children" does not include "child care." 1947 Ops St Compt 216.

19. —Revenue underestimates or cancellations

Where the clerk of a board of supervisors, prior to the levy and extension of town taxes on the rolls, has arbitrarily and without authority reduced the amount of the town's budget, causing the town to receive less tax revenue than anticipated, there is no legal principle upon which the town may recover the shortage from the county, and the town must simply cut its appropriations or possibly borrow permitted sums through the issuance of budget notes. 1967 Ops St Compt File #352.

Revenue anticipation notes, rather than budget notes, should be issued when the village needs funds due to a delay in the receipt of state aid. 1968 Ops St Compt File #778.

20. —Improvement district operating expenses

Cost of establishment of a refuse and garbage district may be financed by the issuance of tax anticipation notes. 1956 Ops St Compt 56.

Operating expenses incurred as a result of the extension of improvement districts may be financed only by the issuance of budget notes in amounts limited by the size of the district budget. 1957 Ops St Compt File #57-1001.

A town which needs funds to pay for maps, plans and reports for the creation of an improvement area established under Town Law, section 54, may obtain funds by: (a) transferring available funds from part-town sources, to be repaid by the improvement area; (b) issuance of budget notes pursuant to Local Finance Law, section 29.00; or (c) issuance of bonds pursuant to General Municipal Law, section 99-d and the Local Finance Law. 1968 Ops St Compt File #624.

21. Redemption of budget notes

A budget note issued by a county may not be purchased with unappropriated cash surplus in either the general fund or the county road machinery fund. 1957 Ops St Compt File #511.

Agency Opinions

Analysis

1. In general
2. Purposes for which budget notes may be issued; unbudgeted expenses, generally
3. —Unbudgeted expenses: municipal operating expenses

1. In general

Although a county is not legally required to adopt a budget note resolution as a condition precedent to making a supplemental appropriation which it intends to finance from unappropriated fund balance, as a matter of sound fiscal policy it is advisable to do so whenever the amount of fund balance cannot be determined with exact certainty. 1984 Op St Compt File #84-9.

2. Purposes for which budget notes may be issued; unbudgeted expenses, generally

3. —Unbudgeted expenses: municipal operating expenses

Costs of a lawsuit, such as attorneys' fees, disbursements, expenses and the cost of appeals, may be financed by issuing budget notes, but not serial bonds. However, items which are included in a judgment against a municipality may be financed by issuing serial bonds. 1978 Op St Compt File #1012.

Where a village has insufficient funds to pay operating expenses during a fiscal year as a result of having previously financed unanticipated capital expenditures from current funds, it may raise additional funds to meet operating expenses by the issuance of budget notes. It may not issue bonds to finance the capital purchases after current funds have already been expended to make such purchases. 1981 Op St Compt File #81-122.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 10.00, 11.00, 15.00, 21.00, 26.00, 26.10, 40.00, 104.10; CLS Educ § 1709; CLS Gen Mun § 99-d; CLS Pub A §§ 1277, 1299-q; CLS Sec Cl Cities §§ 79, 153; CLS Town § 176; CLS Unconsol Ch 22 § 9-b; Ch 59-B § 2; Ch 131 § 29.

Governmental entities, CLS Labor § 565.

Town highway improvement program, CLS High §§ 219 et seq.

Power to issue budget notes unimpaired by provisions of emergency city and school district relief act, CLS Unconsol, Ch 59-B § 2.

Jurisprudences:
107 NY Jur 2d Unemployment Insurance § 132.

TITLE 3 Local Obligations: Authorization Thereof

HISTORY:
Add, L 1942, ch 424.

§ 30.00. Agency authorizing issuance of obligations

a. The finance board shall have the power to authorize the issuance of bonds and notes. However, the finance board may, by resolution, delegate such power in relation to bond anticipation notes, tax anticipation notes, revenue anticipation notes or urban renewal notes or the renewals thereof, to the chief fiscal officer, in which event the chief fiscal officer shall exercise such power until the finance board, by resolution, shall elect to reassume the same.

b. Whenever the power to authorize the issuance of any of such notes, or the renewals thereof, has been delegated to the chief fiscal officer, no such note, or such renewal note, authorized by such officer pursuant to such power shall be issued unless such officer shall have first filed with the finance board a certificate authorizing the issuance of such note, or such renewal note. Such certificate shall contain in substance at least the same statements and provisions as a finance board would be required to incorporate in a resolution adopted by it in compliance with section 38.10 or section 39.00 of this chapter and, in addition, a statement that the power delegated to such officer to issue such note, or such renewal note, is in full force and effect and has not been modified, amended or revoked. Such certificate shall be properly dated and signed by the chief fiscal officer and the same shall be a public record. The failure to have first filed such certificate with the finance board as hereinbefore provided shall not invalidate the issuance of any such note.

c. In such instances in which the chief fiscal officer exercises such power, the same shall be exercised subject to such terms and conditions, not inconsistent with the provisions of this chapter, as the finance board may prescribe.

HISTORY:
Add, L 1942, ch 424, with substance transferred from County L §§ 7–e, 12, sub 6; amd, L § 189–f; L 1944, ch 611, eff Apr 6, 1944; L 1961, ch 404, eff Apr 11, 1961; L 1983, ch 338, § 1, eff June 21, 1983.

Editor's Notes: See 1961 note to § 25.10.

Notes to Decisions

Former § 129 of the Village Law, relating to the issue and sale of bonds and other obligations, was a special law governing the affairs of villages and controlled over provisions of the General Municipal Law. Balducci v Strough, 239 N.Y.S. 611, 135 Misc. 346, 1929 N.Y. Misc. LEXIS 1082 (N.Y. Sup. Ct. 1929).

A resolution of the finance board of a school district authorizing the issuance of revenue anticipation notes need not contain the form of the notes, if the power to prescribe the terms, form, and contents of the notes has been duly delegated to the chief fiscal officer of the school district. 1947 Ops St Compt 484.

Board of water commissioners has no power to contract indebtedness. 1955 Ops St Compt 311.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:
This section referred to in §§ 15.00, 25.00, 38.10, 39.00.

Jurisprudences:
64 Am Jur 2d, Public Securities and Obligations §§ 129, 130.

§ 31.00. Bond resolution and capital note resolution

a. The issuance of bonds shall be authorized by a "bond resolution." The issuance of capital notes or renewals thereof shall be authorized by "a capital note resolution." However, if capital notes are to be issued for the same object or purpose for which bonds are to be issued, the issuance of such capital notes may be authorized by the bond resolution authorizing the issuance of such bonds.

b. Any municipality, school district or district corporation may adopt one or more bond resolutions or capital note resolutions authorizing the issuance of bonds or capital notes for a specific object or purpose, for which object or purpose serial bonds may be issued. In addition thereto any municipality or school district may adopt one or more bond resolutions or capital note resolutions authorizing the issuance of bonds or capital notes for any class of objects or purposes, for which objects or purposes serial bonds may be issued.

c. The issuance of obligations for a capital improvement and for the acquisition of land or permanent rights in land for such improvement may be authorized by the same bond resolution or capital note resolution, notwithstanding the fact that the subdivision of paragraph a of section 11.00 of this chapter which sets forth the period of probable usefulness for such capital improvement does not include therein the acquisition of land or permanent rights in land for such improvement.

d. The issuance of bonds or capital notes for two or more specific objects or purposes or two or more classes of objects or purposes may be authorized by the same bond resolution or capital note resolution, notwithstanding the fact that such specific objects or purposes or classes of objects or purposes are described in separate subdivisions of paragraph a of section 11.00 of this chapter, provided:

1. The maximum period of probable usefulness is five years or less, as determined by paragraph a of such section 11.00 or pursuant to paragraph b of such section, or

2. The bond resolution or the capital note resolution, as the case may be, is not subject to either mandatory or permissive referendum.

HISTORY:
Add, L 1942, ch 424, eff Sept 1, 1945, with substance transferred from County L § 14; amd, L 1944, ch 608, eff Apr 6, 1944; L 1946, ch 806; L 1951, ch 276; L 1961, ch 338; L 1970, ch 305, eff May 1, 1970; L 1971, ch 182, eff Apr 21, 1971; L 1986, ch 866, § 3, eff Sept 15, 1986.

Commission Note: This section requires that the authorization of bonds or capital notes be by a uniform type of

enactment to be called a "bond resolution" or a "capital note resolution", as the case may be. The form of such resolution is prescribed in the following section. A bond resolution or capital note resolution may not contain an authorization for the issuance of obligations for more than one specific object or purpose or class of objects or purposes; however, such requirement does not prevent the sale of a single issue of bonds or capital notes for several specific objects or purposes or classes of objects or purposes or both.

Editor's Notes: For savings clause, see 1986 note to § 22.10.

Notes to Decisions

A county bond resolution would not be declared invalid on the asserted ground that it proposed reconstructing certain streets that did not qualify as connecting county or State highways in violation of High Law § 131-k, since the provisions of the Local Finance Law that authorize the issuance of municipal bonds and notes and those of the Highway Law that govern the expenditure of county funds to improve highways situated in the county are separate and distinct, and full compliance with the pertinent provisions of the Highway Law is not a condition precedent to the enactment of a county bond resolution. Morris v Cahill, 96 A.D.2d 88, 469 N.Y.S.2d 231, 1983 N.Y. App. Div. LEXIS 19878 (N.Y. App. Div. 3d Dep't 1983).

Former § 129 of the Village Law, relating to the issue and sale of bonds and other obligations, was a special law governing the affairs of villages and controlled over provisions of the General Municipal Law. Balducci v Strough, 239 N.Y.S. 611, 135 Misc. 346, 1929 N.Y. Misc. LEXIS 1082 (N.Y. Sup. Ct. 1929).

A fire district may finance construction of a fire house by the issuance of serial bonds. Bond resolution must be adopted by at least a two-thirds vote of the board of commissioners and approved at a fire district election. 1953 Ops St Compt File #6144.

Separate capital note resolutions must be adopted for each specific object or purpose. However, one issue of capital notes may be sold in the total amount of the separate authorizations. 1957 Ops St Compt File #57846.

A city school district may properly adopt separate bond resolutions for (1) the construction of a new school and construction of additions to 3 existing schools; (2) the construction of 3 schools and the construction to an existing school; and (3) the acquisition of cities for 2 of the additions mentioned in the first resolution. However, the object of resolutions (1) and (3) should be combined in a single resolution. 1959 Ops St Compt #13.

Agency Opinions

Grouping of bond resolution for construction of new school building with bond resolution for reconstruction of existing school building under single proposition is not authorized under § 104.00(c). Estoppel procedure of §§ 80.00–84.00 eliminates objection based on such grounding; after this procedure has been followed, approval may be granted under § 104.00(c). 1955 N.Y. Op. Att'y Gen. No. 158.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 10.00, 15.00, 32.00.

Bonds or capital notes, notice of school district meeting authorizing, CLS Educ § 416, sub 2.

Jurisprudences:

64 Am Jur 2d, Public Securities and Obligations § 129.

§ 38.00. Referenda on bond resolutions or capital note resolutions; fire districts and other district corporations

a. A bond resolution or a capital note resolution adopted by the finance board of a fire district shall not become effective unless it shall have been approved at a regular or special election of such district in the manner provided in section one hundred and seventy-nine of the town law, as amended from time to time.

b.

1. If, prior to the effective date of this chapter, in a district corporation other than a fire district, the voting of a special tax or a tax to be collected in installments for an object or purpose, at a regular or special election or meeting, is a condition precedent to the authorization of the issuance of obligations for such object or purpose, a bond resolution or a capital note resolution authorizing the issuance of bonds or capital notes for such object or purpose shall not be adopted by the finance board unless a special tax or a tax to be collected in installments for such object or purpose shall have been voted at such an election or meeting in the manner provided by law.

2. If, prior to the effective date of this chapter, in a district corporation other than a fire district, the approval of a proposition for the expenditure of money for an object or purpose, at a regular or special election or meeting, is a condition precedent to the authorization of the issuance of obligations for such object or purpose, a bond resolution or a capital note resolution authorizing the issuance of bonds or capital notes for such object or purpose shall not be adopted by the finance board unless a proposition for the expenditure of money for such object or purpose shall have been approved at such an election or meeting in the manner provided by law.

3. If, prior to the effective date of this chapter, in a district corporation other than a fire district, the authorization of the issuance of obligations for an object or purpose must be approved at a regular or special election or meeting, a bond resolution or a capital note resolution adopted by the finance board authorizing the issuance of bonds or capital notes for such object or purpose shall not become effective unless it shall have been so approved at such an election or meeting in the manner provided by law.

HISTORY:

Add, L 1942, ch 424, eff Sept 1, 1945; amd, L 1943, ch 711, § 17; L 1944, ch 609; L 1945, ch 837, eff Apr 18, 1945.

Notes to Decisions

Analysis

1. In general
2. Referendum procedure
3. Revision of project after referendum is held
4. Specific acts requiring referendum
5. —Fire house purchase and construction
6. —Purchase of apparatus

1. In general

A fire district need not obtain the consent of the State Comptroller to the issuance of bonds. 1947 Ops St Compt 105.

Discussion of the issuance of fire district bonds. 1947 Ops St Compt 435.

Both a capital note resolution and a serial bond resolution are subject to mandatory referendum. 1952 Ops St Compt 137.

A fire district may finance construction of a fire house by the issuance of serial bonds. Bond resolution must be adopted by at least a two-thirds vote of the board of commissioners and approved at a fire district election. 1953 Ops St Compt File #6144.

Fire commissioners may reject all bids and re-advertise for new bids. If condemnation proceeding is discontinued, fire district may be ordered to pay damages to owners of realty. Board may

not expend in excess of estimate set forth in bond resolution. Board may issue bonds to an amount smaller than approved. Expenses incurred in connection with building construction project disapproved in referendum are legal liabilities and may be paid. 1966 Ops St Compt File #751.

2. Referendum procedure

A referendum on a bond resolution of the fire district Commissioners is not effective if held before the bond resolution is passed. 1947 Ops St Compt 490.

A special fire district election is held in the same manner as the annual fire district election. 1955 Ops St Compt 333.

Issuance of bond anticipation notes by fire district in connection with purchase of fire truck must be preceeded by bond resolution which is subject to mandatory referendum. 1987 Op St Compt No 87-74.

3. Revision of project after referendum is held

There is some doubt whether a board of fire commissioners can resubmit a bond resolution which has already been approved at a district election, at a second election. The board may, however, repeal a bond resolution which has been approved by the voters of the district, where no indebtedness has been contracted thereunder, and then adopt a new resolution and submit it at a second election. 1954 Ops St Compt 94.

4. Specific acts requiring referendum

The creation of a capital reserve fund by a fire district is subject to a permissive referendum. 1946 Ops St Compt 546.

5. —Fire house purchase and construction

Where the cost of a fire house is to be financed by the issuance of bonds, a referendum pursuant to this section is required. 1952 Ops St Compt 122.

Cost of capital improvement to fire house may be financed by capital notes. Capital note resolution is subject to referendum. 1954 Ops St Compt 383.

6. —Purchase of apparatus

The Board of Fire Commissioners of a fire district may accept a gift of an automobile for the use of the Chief Engineer of the Fire Department without the adoption of a proposition by the qualified electors of the fire district, even though the acceptance of the gift entails expenditures for its operation, maintenance, repair, and insurance. 1947 Ops St Compt 349.

Fire apparatus may not be purchased by a fire district unless a proposition has been adopted by the electors of the fire district pursuant to either § 179 of the Town Law or this section. 1947 Ops St Compt 416.

Discussion of rules and regulations relative to purchase of fire apparatus. 1953 Ops St Compt File #6421.

If the purchase of fire apparatus is to be financed by the issuance of serial bonds or capital notes, a referendum is necessary pursuant to this section and a referendum may not be held pursuant to Town Law § 179. 1957 Ops St Compt File #309.

Where a fire district intends to finance purchase of apparatus by issuance of serial bonds, it may advertise for bids on the proposed purchase before a proposition authorizing the financing has been approved, if a clause in the advertisement makes awarding of the contract subject to referendum approving the same. 1961 Ops St Compt #279.

A contract may not be entered into for the purchase of a fire engine unless the contract cost is available or provided for on the date the contract is signed. 1970 Ops St Compt File #82.

Fire district may purchase fire truck from its fire department utilizing current funds if spending limitation contained in CLS Town § 176 will not be exceeded or if proposition has been adopted pursuant to CLS Town § 179; alternatively, Reserve Funds may be used, subject to limitations of CLS Gen Mun § 6-g, CLS Local Fin § 38.00, or obligations may be issued subject to mandatory referendum under CLS Local Fin § 38.00. 1986 Op St Compt No. 86-67.

Fire district board of commissioners may determine to include in annual fire district budget amount to be paid into capital reserve fund established for purchase of equipment, and board may fix such amount each year at approximately same amount previously paid annually for principal on obligations issued to finance fire truck; establishment of capital reserve fund for acquisition of specific item of equipment, or expenditures from capital reserve fund established for type of equipment, would be subject to permissive referendum requirements. 1996 Op St Compt No. 96-24.

Agency Opinions

Analysis

1. Revision of project after referendum is held
2. Specific acts requiring referendum
3. —Purchase of apparatus

1. Revision of project after referendum is held

Where the issuance of serial bonds to finance the cost of constructing a fire house by a board of fire commissioners has been approved at a referendum, the board is empowered to determine whether to go forward to construct the fire house and issue the bonds. 1956 NY Ops Atty Gen 22 (informal).

2. Specific acts requiring referendum

3. —Purchase of apparatus

A fire district may advertise for and open bids for purchase of fire apparatus but may not award a contract therefor until approval by referendum is secured of the bond issue or capital note resolution authorizing the purchase and financing. 1964 NY Ops Atty Gen Mar 5.

The Town Board of the Town of Sullivan, acting as Fire Commissioners of said town under Town Law § 176(18), may purchase a fire truck without submission of a proposition to the electors for their approval, provided that the expenditure is to be made from cash on hand if the expenditure is within the district's spending limitation, but if such purchase is to be made under Town Law § 179 or Local Finance Law § 38.00, approval by the electors of a proposition on referendum is necessary. 1968 NY Ops Atty Gen Oct 16.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 91.00; CLS Pub A § 1285.

Jurisprudences:

26 NY Jur 2d Counties, Towns, and Municipal Corporations § 1106.

64 Am Jur 2d, Public Securities and Obligations §§ 132 et seq.

Annotations:

Validity of submission of proposition to voters at bond election as affected by inclusion of several structures or units. 4 ALR2d 617.

Capacity of taxpayers to maintain suit to enjoin submission of initiative, referendum, or recall measure to voters. 6 ALR2d 557.

Validity of municipal bond issue as against owners of property annexation of which to municipality became effective after date of election at which issue was approved by voters. 10 ALR2d 559.

Construction and effect of absentee voters' laws. 97 ALR2d 257.

Construction and application of constitutional or statutory provisions expressly excepting certain laws from referendum. 100 ALR2d 314.

§ 41.00. Repeal of unexpended authorizations

a. The finance board of:

1. Any municipality may at any time, by resolution, repeal or revoke in whole or in part (a) any resolution heretofore or hereafter adopted authorizing the issuance of obligations, and (b) any certificate of a chief fiscal officer authorizing the issuance of obligations, dated on or after the effective date of this chapter, or

2. Any school district may, by resolution, repeal or revoke in whole or in part (a) any resolution hereto-

fore or hereafter adopted authorizing the issuance of obligations, at any time after four years have elapsed from the date of the adoption of any such resolution, and (b) any certificate of a chief fiscal officer authorizing the issuance of obligations, dated on or after the effective date of this chapter, at any time after four years have elapsed from the date of any such certificate, or

3. Any district corporation may at any time, by resolution, repeal or revoke in whole or in part (a) any resolution heretofore or hereafter adopted authorizing the issuance of obligations, and (b) any certificate of a chief fiscal officer authorizing the issuance of obligations, dated on or after the effective date of this chapter, except to the extent that any indebtedness shall already have been contracted or encumbrances made thereunder for the object or purpose for which such resolution or certificate authorizes the issuance of obligations, whether or not the voting of a special tax or a tax to be collected in installments or the approval of a proposition for the expenditure of money, at a regular or special election or meeting, was a condition precedent to the adoption of such resolution or such resolution subsequent to the adoption thereof was submitted and approved at a regular or special election or meeting.

b. Any resolution heretofore or hereafter adopted authorizing the issuance of obligations, or any certificate of a chief fiscal officer authorizing the issuance of obligations, dated on or after the effective date of this chapter, unless repealed or revoked at a prior date in the manner provided in paragraph a of this section, shall be deemed to be repealed ten years after the date it becomes effective, except to the extent that any indebtedness shall already have been contracted or encumbrances made thereunder for the object or purpose for which such resolution or certificate authorizes the issuance of obligations.

HISTORY:

Add, L 1942, ch 424; amd, L 1944, ch 608; L 1945, ch 837, eff Apr 18, 1945.

Commission Note: This section permits the repeal of such authorizations to the extent to which indebtedness has not been contracted or encumbrances made thereunder. It also provides for an automatic repeal ten years after the effective date of such authorizations. Otherwise, such unexpended authorizations will unnecessarily swell the "gross indebtedness" in the debt statement required to be filed by this chapter.

Notes to Decisions

Section 41.00 of the Local Finance Law is limited to the repeal or revocation of bond resolutions whether or not they were subject to a bond referendum pursuant to section 35.00 of the Local Finance Law, and, in essence, authorizes the repeal of unnecessary debt and has nothing to do with the repeal or revocation of the establishment of a public utility system created under section 360 of the General Municipal Law. Accordingly, a town could not amend its original bond resolution pursuant to section 360 of the General Municipal Law authorizing the establishment of a public utility system by using the procedures for amending the financing of the system set forth in section 41.00 of the Local Finance Law. Niagara Mohawk Power Corp. v Massena, 92 Misc. 2d 587, 400 N.Y.S.2d 430, 1977 N.Y. Misc. LEXIS 2591 (N.Y. Sup. Ct. 1977).

There is some doubt whether a board of fire commissioners can resubmit a bond resolution which has already been approved at a district election, at a second election. The board may, however, repeal a bond resolution which has been approved by the voters of the district, where no indebtedness has been contracted thereunder, and then adopt a new resolution and submit it at a second election. 1954 Ops St Compt 94.

A village board of trustees may amend a bond resolution to increase from five to fifteen years the authorized maximum maturity of a proposed bond issue, provided that no bonds have been issued pursuant to the original bond resolution and the object or purpose for which the bonds are to be issued has a period of probable usefulness of at least fifteen years. The amended bond resolution would be subject to a permissive referendum. 1957 Ops St Compt File #402.

A central school district may finance purchase of buses through current funds, despite the fact that district voters have previously authorized a tax to be collected in installments and financing of the purchase by issuance of serial bonds. 1963 Ops St Compt #71.

Where a bond resolution is subject to permissive referendum, and no petition is filed within the thirty day period, the finance board may not thereafter, on its own motion, provide for a referendum on the bond resolution. It may repeal such bond resolution and adopt a new bond resolution, however. 1967 Ops St Compt File #634.

Where a bond resolution is subject to permissive referendum, and no petition is filed within the thirty day period, the finance board may not thereafter, on its own motion, provide for a referendum on the bond resolution. It may repeal such bond resolution and adopt a new bond resolution, however. 1967 Ops St Compt File #634.

Agency Opinions

A village board, upon repealing or revoking a resolution approved by the voters, is not required to proceed with the financing and construction of an improvement within the confines of the village. 1958 NY Ops Atty Gen Feb 3 (informal).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 15.00.

Jurisprudences:

64 Am Jur 2d, Public Securities and Obligations § 179.

Annotations:

Rescission of vote authorizing school district or other municipal bond issue, expenditure, or tax. 68 ALR2d 1041.

TITLE 4 Local Obligations: Terms, Form and Contents Thereof; Sale and Issuance Thereof

HISTORY:

Add, L 1942, ch 424.

§ 52.00. Recital of validity in obligations

Any obligation issued by a municipality, school district or district corporation may contain on its face a recital in substantially the following form:

"It is hereby certified and recited that all conditions, acts and things required by the Constitution and statutes of the State of New York to exist, to have happened and to have been performed precedent to and in the issuance of this *(Here insert type of obligation),* exist, have happened and have been performed, and that the issue of *(Here insert type of obligations)* of which this is one, together with all other indebtedness of such *(Here insert name of municipality, school district or district corporation)* is within every debt and other limit prescribed by the Constitution and laws of such State."

HISTORY:

Add, L 1942, ch 424, eff Sept 1, 1945, with substance transferred from Gen City L § 115.

Commission Note: This provision is derived from part of General City Law § 115 and has been broadened to include all municipalities, school districts and district corporations. The recital provided for herein may be inserted upon the face of an obligation whether or not such obligation is issued pursuant to a resolution adopted and published in accordance with the estoppel provisions of title 6 of this article.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 15.00, 84.00.

Jurisprudences:

64 Am Jur 2d, Public Securities and Obligations §§ 324 et seq., 349, 352 et seq.

TITLE 6 Local Obligations: Estoppel from Contesting Validity Thereof

HISTORY:

Add, L 1942, ch 424, with substance transferred from Gen City L Art 7.

§ 80.00. Bond resolution, or note resolution or certificate, may contain estoppel clause

The resolution of a finance board authorizing the issuance of bonds or notes, or the certificate of a chief fiscal officer authorizing the issuance of notes, may, in the discretion of the finance board or such chief fiscal officer, as the case may be, contain a statement that the validity of such bonds or notes or any bond anticipation notes issued in anticipation of the sale of such bonds may be contested only if:

1. Such obligations are authorized for an object or purpose for which the municipality, school district or district corporation is not authorized to expend money, or

2. The provisions of law which should be complied with at the date of the publication of such resolution or summary thereof, or certificate, as the case may be, are not substantially complied with, and an action, suit or proceeding contesting such validity, is commenced within twenty days after the date of such publication, or

3. Such obligations are authorized in violation of the provisions of the constitution.

HISTORY:

Add, L 1942, ch 424; amd, L 1944, ch 608; L 1982, ch 471, § 7, eff July 7, 1982.

Commission Note: This section and §§ 81.00 through 83.00 provide a permissive procedure for the validation by resolution of obligations issued by any municipality, school district or district corporation. Upon the publication of the resolution together with the necessary notice, a twenty day period of limitation is commenced within which any action contesting the validity of the obligations authorized by such a resolution, other than on the grounds of unconstitutionality, must be instituted. This validation procedure is derived in part from the procedure contained in article 7 of the General City Law with minor revisions as to the data which such a resolution must contain and as to the requirement of compliance with the necessary provisions of law. The procedure in the General City Law requires full compliance whereas the instant procedure requires only substantial compliance. It should be noted that this procedure is reserved only to a municipality, school district or district corporation and cannot be availed of by a bondholder or taxpayer.

Notes to Decisions

Former Art. 2-A of the General Municipal Law, from which this Article was derived, was not an attempted delegation of legislative functions to the judiciary in violation of N. Y. Const., Art. III, § 1, and Art. VI, § 10. In re Common Council of Lackawanna, 158 A.D. 263, 143 N.Y.S. 198, 1913 N.Y. App. Div. LEXIS 7328 (N.Y. App. Div. 1913).

Where the record did not indicate that a bond resolution authorizing the issuance of bonds to finance the cost of a water district was in fact published, the time limitations of the Local Finance Law were inapplicable. However, since the validity of the determination establishing a water district could not be questioned because it was barred by the statute of limitations, and since no challenge as to the bond resolution was made which would not depend upon a review of the determination establishing the water district, there was no basis in the record upon which a review of the bond resolution could be had. Niegocki v Brookhaven, 5 A.D.2d 999, 173 N.Y.S.2d 323, 1958 N.Y. App. Div. LEXIS 6306 (N.Y. App. Div. 2d Dep't 1958).

No notice or public hearing on town board's resolution to sell previously authorized water system bonds was required, and resolution was not subject to referendum. Larkin v Town Board of Fleming, 52 A.D.2d 1068, 384 N.Y.S.2d 603, 1976 N.Y. App. Div. LEXIS 12994 (N.Y. App. Div. 4th Dep't 1976), app. denied, 41 N.Y.2d 802, 393 N.Y.S.2d 1026, 1977 N.Y. LEXIS 2991 (N.Y. 1977), cert. denied, 434 U.S. 836, 98 S. Ct. 125, 54 L. Ed. 2d 97, 1977 U.S. LEXIS 2969 (U.S. 1977).

Since a fire district is authorized to issue bonds, the provisions of former Art. 2-A of the General Municipal Law, from which this article was derived, are applicable and available to it. Petition of Board of Fire Comm'rs, 29 N.Y.S.2d 605, 1941 N.Y. Misc. LEXIS 2124 (N.Y. Sup. Ct. 1941).

The estoppel provisions of this law will not preclude attack upon validity of bonds where the bond resolution was deliberately adopted by the Municipal Finance Board by less than the majority required by § 33.00. 1962 Ops St Compt #790.

Agency Opinions

Grouping of bond resolution for construction of new school building with bond resolution for reconstruction of existing school building under single proposition not authorized under § 104.00(c). Estoppel procedure of §§ 80.00–84.00 eliminates objection based on such grounding; after this procedure has been followed, approval may be granted under § 104.00(c). 1955 N.Y. Op. Att'y Gen. No. 158.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 15.00, 81.00.

Restrictions on local indebtedness, CLS Const. Art. VIII, § 1 et seq.

Jurisprudences:

64 Am Jur 2d, Public Securities and Obligations §§ 324–347, 349, 375.

20 Am Jur Pl and Pr Forms (Rev ed), Public Securities and Obligations, Forms 41–46.

§ 81.00. Bond resolution, or note resolution or certificate, containing estoppel clause; publication and notice

a. If a resolution of a finance board authorizing the issuance of bonds or notes or the certificate of a chief fiscal officer authorizing the issuance of notes contains the statement referred to in section 80.00 of this chapter, such resolution after adoption, or a summary of such resolution, or such certificate after its execution and filing, shall be published in full by the clerk of the municipality, school district or district corporation or such other official or person as the finance board or such fiscal officer may designate, together with a notice in substantially the following form:

"The resolution (or the resolution a summary of which is) (or certificate) published herewith has

been adopted (or authorized) on the day of , 19, and the validity of the obligations authorized by such resolution (or certificate) may be hereafter contested only if such obligations were authorized for an object or purpose for which the (Here insert name of municipality, school district or district corporation) is not authorized to expend money or if the provisions of law which should have been complied with as of the date of publication of this notice were not substantially complied with, and an action, suit or proceeding contesting such validity is commenced within twenty days after the date of publication of this notice, or such obligations were authorized in violation of the provisions of the constitution.

If a summary of such resolution is published as provided in this section, such summary shall list the class or classes of objects or purposes for which the obligations to be authorized by such resolution are to be issued together with the period or periods of probable usefulness and the amount of obligations to be issued for each such class of objects or purposes, and in addition, such summary shall state an office of the municipality, school district or district corporation where the resolution summarized thereby shall be available for public inspection. Such resolution shall be kept available for public inspection at such office during normal business hours for twenty days following the publication of such summary as provided in this title.

b. However, if such resolution is subject to a mandatory or permissive referendum, or is submitted to a referendum by the finance board on its own motion, such resolution or summary thereof shall not be published together with such notice until it shall have been approved at such a referendum or, in the case of a resolution subject to a permissive referendum, until the period of time shall have elapsed for the submission and filing of a petition for a permissive referendum and a valid petition shall not have been submitted and filed, and such notice shall state that such resolution has been approved at such a referendum or, in the case of a resolution subject to a permissive referendum, that the period of time has elapsed for the submission and filing of a petition for a permissive referendum and a valid petition has not been submitted and filed, as the case may be.

c. If any bond resolution or capital note resolution does not contain a determination of the period of probable usefulness of the specific object or purpose or class of objects or purposes for which such resolution authorizes the issuance of obligations, there shall be published, together with such resolution or summary thereof and notice, the certificate of the appropriate body or official containing such determination.

d. Such publication as shall be required by this section shall be in the official newspaper or newspapers of the municipality, school district or district corporation or if there be no such newspaper or newspapers, then in such newspaper or newspapers having a general circulation in the municipality, school district or district corporation as the finance board shall designate.

HISTORY:

Add, L 1942, ch 424, eff Sept 1, 1945; amd, L 1944, ch 608; L 1981, ch 1050, § 4, eff Nov 11, 1981 and deemed to have been in full force and effect from and after October 31, 1981.

Revision Notes: [1944] Par c. The language was changed slightly to indicate that the resolution referred to is either a bond resolution or a capital note resolution.

Editor's Notes: Laws 1981, ch 1050, § 1, eff Nov 11, 1981, and deemed to have been in full force and effect from and after October 31, 1981, provides as follows:

Section 1. In nineteen hundred seventy-five and nineteen hundred seventy-eight, the legislature found that a financial emergency existed in the city of New York and enacted certain laws in response thereto. Certain changes important to the marketing of city obligations and consistent with current market practices are necessary to assist the city in its effort to achieve a full fiscal recovery. Fiscal difficulties experienced by the city would substantially and adversely affect the state and other municipalities within this state. The legislature hereby finds that the legislation embodied in this act will make certain changes essential to ensure the continued financial recovery of the city.

Notes to Decisions

No notice or public hearing on town board's resolution to sell previously authorized water system bonds was required, and resolution was not subject to referendum. Larkin v Town Board of Fleming, 52 A.D.2d 1068, 384 N.Y.S.2d 603, 1976 N.Y. App. Div. LEXIS 12994 (N.Y. App. Div. 4th Dep't 1976), app. denied, 41 N.Y.2d 802, 393 N.Y.S.2d 1026, 1977 N.Y. LEXIS 2991 (N.Y. 1977), cert. denied, 434 U.S. 836, 98 S. Ct. 125, 54 L. Ed. 2d 97, 1977 U.S. LEXIS 2969 (U.S. 1977).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 15.00; CLS Educ §§ 2008, 2612; CLS Unconsol Ch 131 § 29.

Application of Education Law to publication of bond resolution notwithstanding this section, CLS Educ § 2612.

Jurisprudences:

64 Am Jur 2d, Public Securities and Obligations §§ 345 et seq., 375.

20 Am Jur Pl and Pr Forms (Rev ed), Public Securities and Obligations, Forms 42-44, 55.

§ 82.00. Twenty day period of limitation

After the publication of a resolution, summary of such resolution or certificate together with such a notice, the validity of the obligations authorized thereby may be contested only if:

1. Such obligations were authorized for an object or purpose for which the municipality, school district or district corporation is not authorized to expend money, or

2. The provisions of law which should have been complied with at the date of the publication of such resolution, summary of such resolution or certificate were not substantially complied with, and an action, suit or proceeding contesting such validity is commenced within twenty days after such publication, or

3. Such obligations were authorized in violation of the provisions of the constitution.

HISTORY:

Add, L 1942, ch 424; amd, L 1944, ch 608, eff Apr 6, 1944; L

1981, ch 1050, § 5, eff Nov 11, 1981 and deemed to have been in full force and effect from and after October 31, 1981; L 1982, ch 471, § 8, eff July 7, 1982.

Editor's Notes: Laws 1981, ch 1050, § 1, eff Nov 11, 1981, and deemed to have been in full force and effect from and after October 31, 1981, provides as follows:

Section 1. In nineteen hundred seventy-five and nineteen hundred seventy-eight, the legislature found that a financial emergency existed in the city of New York and enacted certain laws in response thereto. Certain changes important to the marketing of city obligations and consistent with current market practices are necessary to assist the city in its effort to achieve a full fiscal recovery. Fiscal difficulties experienced by the city would substantially and adversely affect the state and other municipalities within this state. The legislature hereby finds that the legislation embodied in this act will make certain changes essential to ensure the continued financial recovery of the city.

Notes to Decisions

No notice or public hearing on town board's resolution to sell previously authorized water system bonds was required, and resolution was not subject to referendum. Larkin v Town Board of Fleming, 52 A.D.2d 1068, 384 N.Y.S.2d 603, 1976 N.Y. App. Div. LEXIS 12994 (N.Y. App. Div. 4th Dep't 1976), app. denied, 41 N.Y.2d 802, 393 N.Y.S.2d 1026, 1977 N.Y. LEXIS 2991 (N.Y. 1977), cert. denied, 434 U.S. 836, 98 S. Ct. 125, 54 L. Ed. 2d 97, 1977 U.S. LEXIS 2969 (U.S. 1977).

Bonds issued by town for construction of water system were required to bear final redemption date no more than 40 years beyond date of completion of water system. Larkin v Town Board of Fleming, 52 A.D.2d 1068, 384 N.Y.S.2d 603, 1976 N.Y. App. Div. LEXIS 12994 (N.Y. App. Div. 4th Dep't 1976), app. denied, 41 N.Y.2d 802, 393 N.Y.S.2d 1026, 1977 N.Y. LEXIS 2991 (N.Y. 1977), cert. denied, 434 U.S. 836, 98 S. Ct. 125, 54 L. Ed. 2d 97, 1977 U.S. LEXIS 2969 (U.S. 1977).

Under CLS Loc Fin § 82.00, any challenge to validity of resolution must be made within 20 days of publication, unless premised on constitutional grounds. Ayers v County of Greene, 132 A.D.2d 66, 521 N.Y.S.2d 843, 1987 N.Y. App. Div. LEXIS 49544 (N.Y. App. Div. 3d Dep't 1987).

Taxpayer's action challenging validity of county resolution to issue highway improvement bonds was based on statutory rather than constitutional grounds, and thus was foreclosed by time limitations of CLS Loc Fin § 82.00, where taxpayer asserted, inter alia, that highway program incorporated by reference in resolution was not on file in county clerk's office, and that county treasurer did not properly file certificate of determination with finance board prior to issuance of notes. Ayers v County of Greene, 132 A.D.2d 66, 521 N.Y.S.2d 843, 1987 N.Y. App. Div. LEXIS 49544 (N.Y. App. Div. 3d Dep't 1987).

Twenty-day limitation period set forth in CLS Loc Fin § 82.00 was not tolled by county's failure to properly publish resolution to issue highway improvement bonds where, despite claimed irregularities, resolution was published in full and provided adequate notice of county's road reconstruction plans. Ayers v County of Greene, 132 A.D.2d 66, 521 N.Y.S.2d 843, 1987 N.Y. App. Div. LEXIS 49544 (N.Y. App. Div. 3d Dep't 1987).

County bond resolution which failed to state a specific purpose, the proceeds of which were used to acquire land for reservoirs as part of a comprehensive water supply system was subject to attack for failure to comply with statutory requirement that maps and plans for such systems be filed with the New York State Water Resources Commission before condemning of any lands, but failure to raise such objections within the 20-day limitation contained in Local Finance Law § 82.00 rendered question moot. Blomquist v County of Orange, 69 Misc. 2d 1077, 332 N.Y.S.2d 546, 1972 N.Y. Misc. LEXIS 1973 (N.Y. Sup. Ct. 1972).

Right to a public vote upon propositions involving the expenditure of funds by local government was intended to be fully afforded and safeguarded by the legislature in its enactment of the Local Finance Law. Richardson v Bohemia Fire Dist., 75 Misc. 2d 837, 349 N.Y.S.2d 582, 1973 N.Y. Misc. LEXIS 1383 (N.Y. Sup. Ct. 1973).

Legislative intent in freeing a cause of action "alleging violations of the provisions of the Constitution" from the 20-day period of limitation was to permit unrestricted litigation of objections having constitutional dimension, including, but not limited to provisions of Article 8 of New York Constitution; thus, cause of action founded on constitutional objections within the framework of Local Finance Law § 82.00(3) was not barred by 20-day limitation period following publication of adoption of resolution approving bond issue. Richardson v Bohemia Fire Dist., 75 Misc. 2d 837, 349 N.Y.S.2d 582, 1973 N.Y. Misc. LEXIS 1383 (N.Y. Sup. Ct. 1973).

Local Finance Law's 20-day statute of limitations did not apply to appeal challenging bond referendum and 2 implementing bond resolutions adopted by central school district's board of education where board, having amended its initial bond resolution to make certain corrections, approved supplemental bond resolutions that were never published in accordance with CLS Loc Fin § 81.00. 1999 Op Comm Ed No. 14,271.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 15.00; CLS Unconsol Ch 131 § 29.

Jurisprudences:

64 Am Jur 2d, Public Securities and Obligations §§ 309, 324 et seq.

15 Am Jur Legal Forms 2d, Public Securities and Obligations, Forms 214:131–214:141.

Annotations:

When limitations begin to run against actions on public securities or obligations to be paid out of a special or particular fund. 50 ALR2d 271.

§ 84.00. Effect of recital of validity in obligations

If the obligations issued pursuant to a resolution or certificate published in the manner provided in this title contain a recital in substantially the form prescribed in section 52.00 of this chapter, such recital shall bind the municipality, school district or district corporation issuing such obligations, and twenty days after such resolution or certificate shall have been published and after such obligations have been purchased in good faith and for fair value by any person, the validity of such obligations shall not be questioned by such municipality, school district or district corporation or any taxpayer thereof in any court.

HISTORY:

Add, L 1942, ch 424, with substance in part transferred from Gen City L § 115; amd, L 1944, ch 608, eff Apr 6, 1944.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 15.00.

Jurisprudences:

64 Am Jur 2d, Public Securities and Obligations §§ 352 et seq.

TITLE 8 Limitations on the Power to Contract Indebtedness

HISTORY:

Add, L 1942, ch 424.

§ 100.00. Requirement of pledge of faith and credit

Every municipality, school district and district corporation shall pledge its faith and credit for the payment of all indebtedness contracted by it.

HISTORY:

Add, L 1942, ch 424, eff Sept 1, 1945, with substance transferred from County L §§ 12, sub 6, and 14.

Commission Note: Section 2 of article 8 of the State Constitution requires such a pledge of faith and credit by municipalities and school districts only. This section has extended such requirement to district corporations as well.

Notes to Decisions

"Turnkey" contract for construction of new court and police facility, whereby city agreed to purchase completed project from developer, did not violate CLS NY Const Art VIII § 2 and CLS Loc Fin § 100.00 as city was not financing developer's purchase of site of proposed facility, and was not obligated to pay anything to developer until construction was completed and title conveyed to city by developer. Imburgia v City of New Rochelle, 223 A.D.2d 44, 645 N.Y.S.2d 111, 1996 N.Y. App. Div. LEXIS 7260 (N.Y. App. Div. 3d Dep't), app. denied, 88 N.Y.2d 815, 651 N.Y.S.2d 17, 673 N.E.2d 1244, 1996 N.Y. LEXIS 3299 (N.Y. 1996).

Bonds to be issued by a municipality for the payment of the cost of purchasing a water company are not a debt of the municipality or even a lien on the property purchased but only a prior and paramount lien on the income derived from the undertaking. Hanrahan v Corrou, 12 N.Y.S.2d 536, 170 Misc. 922, 1938 N.Y. Misc. LEXIS 2370 (N.Y. Sup. Ct. 1938).

The State Comptroller may approve the establishment of a special improvement district where the proposed cost thereof exceeds fifteen per cent of the assessed valuation of the proposed district. The faith and credit of the town must be pledged for the payment of special district bonds. 1947 Ops St Compt 528.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 15.00.

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations § 1546.

§ 101.00. Giving or loaning of municipal credit and contracting indebtedness other than for municipal purposes prohibited

a. No municipality, school district or district corporation shall:

1. Give or loan its credit to or in aid of any individual, or public or private corporation or association, or private undertaking, or

2. Contract indebtedness except for the purposes of such municipality, school district or district corporation.

Notwithstanding the foregoing provisions of this paragraph:

1. If any municipality or any county or town on behalf of an improvement district is authorized by a general law or by a special law (a) to provide a supply of water, in excess of its own needs, for sale to any other public corporation or improvement district, (b) to provide facilities, in excess of its own needs, for the conveyance, treatment and disposal of sewage, from any other public corporation or improvement district, or (c) to provide facilities, in excess of its own needs, for drainage purposes from any other public corporation or improvement district, the indebtedness contracted by the municipality for such an object or purpose shall be deemed to be for a county, city, town or village purpose, as the case may be.

2. If any two or more municipalities and county and town improvement districts are authorized by a general law or by a special law (a) to provide for a common supply of water, (b) to provide for the common conveyance, treatment and disposal of sewage or (c) to provide for a common drainage system, the joint indebtedness, or the several indebtedness for a specific proportion of the cost, contracted by the municipality for such an object or purpose shall be deemed to be for a county, city, town or village purpose, as the case may be.

3. If any two or more municipalities and school districts and county and town improvement districts are authorized by a general law or by a special law to join together to provide any municipal facility, service, activity or undertaking which each of such units has the power to provide separately, the joint indebtedness, or the several indebtedness for a specific proportion of the cost, contracted by the municipality or school district for such an object or purpose shall be deemed to be for county, city, town, village or school district purpose, as the case may be.

b. This section shall not be deemed to prevent:

1. A county from contracting indebtedness for the following purposes:

(a) Advancing to a city, town or school district, pursuant to law, the amount of unpaid taxes.

(b) Financing tax refunds required to be made by section seven hundred twenty-six of the real property tax law.

(c) Paying to the state the state tax levied against such county.

2. A town from contracting indebtedness for the following purposes:

(a) Advancing to a county or school district, pursuant to law, the amount of unpaid taxes.

(b) Paying to a county such town's share of the state tax levied against such county if such town is required by law to levy and collect such tax.

3. A city from contracting indebtedness for the following purposes:

(a) Advancing to a county or school district, pursuant to law, the amount of unpaid taxes.

(b) Paying to a county such city's share of the state tax levied against such county if such city is required by law to levy and collect such tax.

4. A municipality from making such provision for the aid, care and support of the needy, including the aid, care and support of neglected and dependent children and of the needy sick, as may be authorized by law.

5. A county, city or town from providing, pursuant to law, for the care, support, maintenance and secular education of inmates of orphan asylums, homes for dependent children or correctional institutions and of children placed in family homes by authorized agencies, whether under public or private control.

6. A municipality or school district, when authorized by law, from using its credit for

(a) The examination or inspection of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, or

(b) The transportation of children to and from any school or institution of learning.

7. A city, town or village from giving or loaning its credit when authorized to do so by the legislature pursuant to the provisions of article eighteen of the state constitution.

8. A county, city or town from increasing, pursuant to law, pension benefits payable to retired members of a police department or fire department or to widows, dependent children or dependent parents of members or retired members of a police department or fire department.

9. A municipality, school district or district corporation from increasing, pursuant to law, the amount of pension of any member of a retirement system of the state, or of a subdivision of the state.

10. A municipality, school district or district corporation from providing, pursuant to law, for the protection by insurance or otherwise against the hazards of unemployment, sickness and old age.

11. A municipality or school district from providing, pursuant to law, for the education and support of the blind, the deaf, the mute, the physically handicapped and juvenile delinquents or for health and welfare services for all children.

12. A city, town or village from expending or loaning its money, property or credit as consideration for the effectuation of all or part of the public purpose provided for in sections eleven-a and thirty-six-a of the private housing finance law.

13. A municipality from making loans of money or credit to or in aid of any eligible corporation or association for the purpose of providing hospital or other facilities for the prevention, diagnosis or treatment of human disease, pain, injury, disability, deformity or physical condition, and for facilities incidental or appurtenant thereto, as may be authorized by law pursuant to section seven of article seventeen of the state constitution.

HISTORY:

Add, L 1942, ch 424; amd, L 1944, ch 610, eff Apr 6, 1944; L 1960, ch 200, eff Mar 15, 1960; L 1968, ch 1089, § 8, eff Jan 22, 1968; L 1971, ch 355, eff June 1, 1971; L 1978, ch 550, § 31, eff July 24, 1978.

Commission Note: Sections 1 and 2 of article 8 of the State Constitution from which paragraph a of this section is derived, apply to municipalities and school districts. This section extends the scope of the prohibition, as set forth in those sections of the State Constitution, to district corporations as well.

Section 1 of article 8 of the State Constitution also contains a prohibition against the giving or loaning of money or property to or in aid of any individual or private corporation or association by a municipality or school district. That provision of the State Constitution has been omitted from this section because it does not relate to the contracting of indebtedness, with which topic this article is concerned. However, it is the intention of this Commission to add additional articles to the Local Finance Law from time to time. When an article on Financial Management is added to the Local Finance Law, there will be contained therein the constitutional prohibition against the giving or loaning of money or property.

Paragraph b of this section does not contain any grants or limitations of power. It contains only construction clauses which are inserted merely as a matter of caution lest the failure to include them might result in the inference that their omission was intentional and that consequently there would be repealed the power of various types of municipalities to lend their credit for the purposes set forth in this paragraph.

Editor's Notes: See 1968 note to § 11.00.

Notes to Decisions

"Turnkey" contract for construction of new court and police facility, whereby city agreed to purchase completed project from developer, did not violate CLS NY Const Art VIII § 1 and CLS Loc Fin § 101.00(a)(1) and (2); money was expended in furtherance of public purpose, and thus there was no illegal gift or loan. Imburgia v City of New Rochelle, 223 A.D.2d 44, 645 N.Y.S.2d 111, 1996 N.Y. App. Div. LEXIS 7260 (N.Y. App. Div. 3d Dep't), app. denied, 88 N.Y.2d 815, 651 N.Y.S.2d 17, 673 N.E.2d 1244, 1996 N.Y. LEXIS 3299 (N.Y. 1996).

Fire district has no power to issue bonds to finance construction of addition to fire house not owned by it. 1965 Ops St Comp File #244.

Agency Opinions

Discussion of fire districts paying a membership or policy fee to the Fire Districts of New York Mutual Insurance Company, Inc., and also of fire districts guaranteeing repayment of a loan made to such company by a bank or lending institution. 1978 Op St Compt File #567.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Additional policy and purposes of article, CLS Priv Hous Fin § 11-a.

Additional powers of municipalities, CLS Priv Hous Fin § 36-a.

Codes, Rules and Regulations:

Exclusion of sewer indebtedness in ascertaining power of a municipality to contract indebtedness. 2 NYCRR §§ 62.1 et seq.

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations § 1546.

56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 588, 589.

64 Am Jur 2d, Public Securities and Obligations §§ 65, 95 et seq.

§ 104.00. Limitation on amount of local indebtedness which may be contracted

a. The term "indebtedness", as used in this section, shall mean in relation to a county, city, town, village, school district or fire district, any indebtedness other than an indebtedness which would be excluded, pursuant to law, in ascertaining the power of such county, city, town, village, school district or fire district to contract indebtedness. For purposes of any debt limitation contained in this title and title nine of this article, when obligations are sold by a county, city, town, village, school district or fire district at a discount, the term indebtedness shall only include the original amount of money actually received by such county, city, town, village, school district or fire district, irrespective of the face amount of the obligations at maturity.

b. No county, city, town, village or school district in a city shall contract indebtedness for any purpose or in any manner which, including existing indebtedness, shall exceed an amount equal to the following percentages of the average full valuation of such county, city, town, village or school district:

1. The county of Nassau, for county purposes, ten per centum;

2. Any county, other than the county of Nassau, for county purposes, seven per centum;

3. The city of New York, for city purposes, ten per centum;

4. Any city, other than the city of New York, having one hundred twenty-five thousand or more inhabitants according to the latest federal census, for city purposes; nine per centum;

5. Any city having less than one hundred twenty-five thousand inhabitants according to the latest federal census, for city purposes, excluding education purposes, seven per centum;

6. Any town, for town purposes, seven per centum;

7. Any village, for village purposes, seven per centum; and

8. Any school district in a city, for education purposes, five per centum.

c. Notwithstanding the provisions of paragraph b of this section any school district in a city may issue bonds, bond anticipation notes or capital notes for a specific object or purpose, and, where authorized by this chapter, for a class of objects or purposes, in an amount which, including existing indebtedness, shall exceed an amount equal to five per centum of the average full valuation of such school district, provided:

1. The tax voted to be collected in installments in relation thereto, or the proposition for the approval of a bond resolution or capital note resolution in relation thereto, shall have been voted or approved, as the case may be, by at least a sixty per centum vote of the qualified voters voting thereon in person at the meeting or election called for such purpose;

2. The proposition to authorize the tax to be collected in installments in relation thereto, or the proposition for the approval of a bond resolution or capital note resolution in relation thereto, contained a statement to the effect that the obligations to be issued may be issued in excess of the constitutional debt limitation of the school district; and

3. The board of regents and the state comptroller severally shall consent thereto.

d. A school district, other than a school district in a city, having an aggregate assessed valuation of taxable real property of one hundred thousand dollars or over, except for the payment of judgments, or compromised or settled claims against the school district, or awards or sums payable by the school district pursuant to a determination by a court, or an officer, body or agency acting in an administrative or quasi-judicial capacity, shall not issue bonds or bond anticipation notes, if the indebtedness of the school district determined pursuant to section 137.00 of this chapter will exceed ten per centum of the full valuation of the real property subject to taxation by the school district, unless:

1. The tax voted to be collected in installments in relation thereto, or the proposition for the approval of a bond resolution in relation thereto, shall have been voted or approved, as the case may be, before July first, nineteen hundred sixty-three, by at least a two thirds vote, or on and after July first, nineteen hundred sixty-three, by at least a sixty per centum vote, of the qualified voters voting thereon in person at the meeting or election called for such purpose;

2. The board of regents shall consent thereto; and

3. In a school district located wholly or partly in the Adirondack park which has within its boundaries state lands subject to taxation, the full valuation of which is more than thirty per centum of the full valuation of the real property subject to taxation by the school district, the state comptroller, on behalf of the state, also shall consent thereto.

e. No fire district shall contract idebtedness [indebtedness][*] for any purpose or in any manner to an amount which, including existing indebtedness, shall exceed three per centum of the full valuation of the taxable real property of such fire district, except that a fire district may contract indebtedness to an amount which, including existing indebtedness, shall not exceed five per centum of the full valuation of the taxable real property of the fire district if the proposition, when required, for the approval of the resolution authorizing the contracting of such indebtedness shall have been approved by a two-thirds vote of the qualified voters of the fire district voting thereon in person at the election called for that purpose and the state comptroller consents thereto. Before any such consent is granted, the state comptroller shall find and determine that it is in the public interest that the limitation of three per centum should be exceeded.

HISTORY:

Add, L 1942, ch 424, with substance transferred from County L § 12, sub 6; amd, L § 180; amd, L 1943, ch 711, eff April 23, 1943,480(1); L 1947, ch 902; L 1948, ch 826; L 1950, ch 608, § 2; L 1951, ch 831; L 1957, ch 778, § 2; L 1958, ch 285, eff July 1, 1958; L 1963, ch 99; L 1964, ch 641, eff April 16, 1964; L 1994, ch 201, § 14, eff June 20, 1994, deemed eff Jan 1, 1994; L 2001, ch 424, § 8, eff Oct 31, 2001; L 2003, ch 444, § 1.

Commission Note: This section is derived from § 4 of article 8 of the State Constitution, Education Law § 480(1) and Town Law § 180.

This section will repeal any provision of a statute or local law containing any general limitations on the amount of indebtedness that may be contracted or any specific limitations on the amount of certain types of indebtedness that may be contracted by any municipality, school district or district corporation.

Revision Notes: [1951] This section implements in part, provisions of section 4 of article VIII of the Constitution relating to debt limitations for counties, cities, towns, villages and certain school districts, as amended in 1951.

Among other things, this section provides that the debt limitations prescribed are to be computed on the basis of average full valuation of taxable real estate rather than on the basis of average assessed valuation of taxable real estate.

This section also makes provision for separate debt limitations for all cities having less than 125,000 inhabitants and

[*]The bracketed word is inserted by the Publisher as the word probably intended.

school districts coterminous with, partly within, or wholly within, any such city. This is accomplished by excluding indebtedness for "education purposes" from the debt limitation imposed upon these cities, and by providing a separate debt limitation for such school districts.

The term "education purposes", therefore, is employed in its narrower sense, being synonymous generally with "school district purpose". It is not intended, for example, to permit a city having less than 125,000 inhabitants to exclude indebtedness contracted by it for a city community college or city public library in ascertaining its power to contract indebtedness, although in the broad sense it may be argued that such indebtedness is for an educational purpose. Indebtedness contracted by the city for these purposes (i.e., a city community college or city public library), accordingly, would be considered as indebtedness for "city purposes".

It may be noted that in section 1 of this act, reference also is made to indebtedness for "education purposes". Again, such phrase was used in its more restrictive sense, and city indebtedness contracted for a city public library, for example, should not be treated as "city indebtedness for education purposes" which should be allocated to the city school district.

[1958] Chapter 778 of the Laws of 1957, which was enacted upon recommendation of the Joint Legislative Committee on Fire Laws, changed the statutory fire district debt limit from 5% of the five-year average of assessed valuations of taxable real property to 5% of the current full valuation of the taxable real property in the district. The new and more flexible base for the debt limit is comparable to that of most school districts, which, like fire districts, change their boundaries to fit local needs.

In 1957, the Committee pointed out that the new base for the fire district debt limit would have the result of increasing the borrowing power of many fire districts far beyond their needs. The Committee stated that further studies might show that the new debt limit base would permit a safe reduction in the percentage limitation from 5% to a lower percentage (Second Interim Report of the Joint Legislative Committee on Fire Laws, Leg Doc (1957) No. 42, pages 41–42, 75–80). Studies made by the State Comptroller indicate that the percentage might be lowered with safety to 2%. The Joint Legislative Committee on Fire Laws, however, believes that the percentage should not be reduced below 3% at this time and that there should be an "escape" clause to permit the contracting of debt in excess of the 3% limit, but not to exceed 5% of current full valuation. This act, therefore, provides that the 3% limit may be exceeded with a two-thirds vote of the voters and the consent of the State Comptroller. This "escape" clause is comparable to that for most school districts (Local Finance Law, § 104.00 (d)). The studies indicate that few fire districts will need to use the "escape" clause. It is intended primarily for the districts in which the total full valuation of taxable real property is very low.

Editor's Notes: See 1957 note to § 2.00.

Laws 1948, ch 826, § 2, provides:

The provisions of section one of this act shall not apply to bonds and bond anticipation notes duly authorized to be issued by a school district prior to July first, nineteen hundred forty-eight.

Laws 1950, ch 608, § 8, eff July 1, 1950, provides:

If the issuance of obligations by a school district has been approved by the board of regents and/or consented to by the state comptroller pursuant to the provisions of paragraph e of section 104.00 of the local finance law prior to July first, nineteen hundred fifty, this act shall not be deemed to require the obtaining of another approval and/or consent in conformity with the provisions of law amended by this act, but such approval and/or consent shall continue to be effective on and after July first, nineteen hundred fifty.

Laws 1951, ch 831, § 45, provides:

The provisions of paragraph b of section 104.00 of the local finance law, as added by this act, shall not prevent a municipality or a school district issuing obligations in an amount which, including existing indebtedness, would exceed the applicable limitation of such paragraph for the purpose of providing for the payment of any indebtedness of the municipality or school district contracted prior to January first, nineteen hundred fifty-two, where the municipality or school district is otherwise authorized by such law or any other law to issue obligations for such purpose.

Laws 1951, ch 831, § 47, provides:

The provisions of the local finance law shall not prevent a district corporation issuing obligations on and after January first, nineteen hundred fifty-two, pursuant to a consent granted prior to such date under the provisions of such law as in force and effect prior to such date for the purpose of providing for the payment of any indebtedness of the district corporation contracted prior to such date, where the district corporation is otherwise authorized by such law or any other law to issue obligations for such purpose.

Laws 1951, ch 831, § 48, provides:

Where bonds are sold at public sale after January first, nineteen hundred fifty-two, any debt statement prepared and filed in relation to such sale prior to January first, nineteen hundred fifty-two, by a municipality or by a school district subject to the provisions of paragraph b of section 104.00 of the local finance law, as added by this act, shall be prepared in the manner provided by law as in force and effect on and after such date. The state comptroller shall prescribe the form of such debt statement and prepare printed forms thereof on or before December first, nineteen hundred fifty-one, and make such forms available for distribution to municipalities and such school districts.

Laws 1951, ch 831, § 49, provides:

Notwithstanding the provisions of the local finance law as amended by this act, any school district may prepare and file debt statements during the months of May and June of the year nineteen hundred fifty-one in accordance with the provisions of the local finance law as in force and effect prior to May first, nineteen hundred fifty-one and may issue bonds and bond anticipation notes subject to and in accordance with the provisions of paragraph e of section 104.00 of such law as in force and effect prior to such date.

Laws 1958, ch 235, §§ 2 and 3, provide:

§ 2. Notwithstanding the provisions of paragraph e of section 104.00 of the local finance law, as amended by this act, a fire district may issue obligations on or after July first, nineteen hundred fifty-eight without such consent of the state comptroller, in an amount which, including existing indebtedness, shall not exceed five per centum of the full valuation of the taxable real property of the fire district for the purpose of providing for the cost of any object or purpose for which bonds, deferred payment notes or capital notes have been duly authorized prior to July first, nineteen hundred fifty-eight and are to be sold prior to July first, nineteen hundred sixty, or for the purpose of providing for the payment of any indebtedness of the fire district contracted prior to July first, nineteen hundred fifty-eight, which is to be financed in whole or in part from the proceeds of obligations sold on or after such date. [Eff July 1, 1958].

§ 3. Where fire district bonds are sold at public sale on or after July 1st, nineteen hundred fifty-eight, any debt statement prepared and filed in relation to such sale prior to July first, nineteen hundred fifty-eight, shall be prepared in the manner provided by the local finance law as in force and effect on July first, nineteen hundred fifty-eight. The state comptroller shall prescribe the form of such debt statement and prepare printed forms thereof on or before June first, nineteen hundred fifty-eight, and make such forms available for distribution to fire districts. [Eff May 1, 1958].

Laws 1964, ch 641, § 2, provide:

§ 2. Notwithstanding the provisions of this chapter, any bonds issued by a school district, other than a school district in a city, having an aggregate assessed valuation of taxable real property of one hundred thousand dollars or over, on or after July first, nineteen hundred sixty-three and prior to the effective date of this act, shall be held to be valid provided that all other provisions of law have been complied with.

Laws 2003, ch 444, § 2, provides as follows:

§ 2. This act shall take effect on the same date as a constitutional amendment proposed in a concurrent resolution entitled, "CONCURRENT RESOLUTION OF THE SENATE AND ASSEMBLY proposing an amendment to section 4 of article 8 of the constitution, in relation to limitations on local indebtedness" and passed by the legislature for the second time in the year 2003, as proposed in legislative bills numbers S.2295 and A.3871 [The amendment was not approved by the electorate at the general election held in November 2003].

Amendment Notes: 2001. Chapter 424, § 8 amended:

Par d, sub 3 by deleting at fig 1 "ten" and adding the matter in italics.

1994. Chapter 201, § 14 amended:

Par a by adding the matter in italics.

Notes to Decisions

Analysis

1. In general
2. Method of computing debt contracting power
3. Date of determining debt contracting power
4. Limitation upon indebtedness; cities and villages
5. —School districts
6. —Fire districts

1. In general

This section, in determining the question of whether the ten per cent clause will be violated, controls Town Law, § 512-a, and in so far as it is inconsistent therewith will be considered as equivalent to a repeal of said law. Meyer & Meyer Corp. v Amherst, 217 A.D. 213, 216 N.Y.S. 529, 1926 N.Y. App. Div. LEXIS 7778 (N.Y. App. Div. 1926).

Amendment of this section by ch 99 of the Laws of 1963 was not retroactive, and hence a 62% vote on a bond resolution at an election prior to July 1, 1963 will not authorize a school district to issue bonds in excess of its debt limit after that date. 1963 Ops St Compt #370.

Term "outstanding indebtedness" as used in CLS Gen Mun § 109-b(6)(c) includes only outstanding indebtedness which is not excludable pursuant to law. 1993 Op St Compt No. 93-11.

This provision does not prohibit expenditure of money nor other action in connection with proposed object or purpose but merely prohibits issuance of bonds or bond anticipation notes. Re Haber (1953) 74 NY St Dept 81.

2. Method of computing debt contracting power

Discussion of the method of computing the average assessed valuation in a fire district which has been extended or diminished in area. 1946 Ops St Compt 484.

Indebtedness of component districts need not be included in computing the debt contracting power of central high school district located outside a city. 1954 Ops St Compt 178.

3. Date of determining debt contracting power

At the time of the approval of a bond resolution authorizing the construction of a new high school, the bonded indebtedness of the school district was in excess of 10% of the total value of all the taxable property in the district. Thereafter, the resolution to finance the project by the issuance of serial bonds was adopted by the Board of Education and at that time, as a result of new equalization rates, the bonded indebtedness did not exceed the 10% limit. A proceeding to declare the bond resolution void and enjoining the schol from issuing the bonds was dismissed since the debt limitation requirement of this section does not come into play until issue of bonds is imminent. Hill v Board of Education, 286 A.D. 332, 143 N.Y.S.2d 415, 1955 N.Y. App. Div. LEXIS 4043 (N.Y. App. Div.), aff'd, 309 N.Y. 945, 132 N.E.2d 315, 309 N.Y. (N.Y.S.) 945, 1955 N.Y. LEXIS 1672 (N.Y. 1955).

The date controlling the validity of a bond issue under this section is the date when the bonds are issued and not the date of the school district meeting. Rigaud v Board of Education, 142 N.Y.S.2d 168, 207 Misc. 742, 1955 N.Y. Misc. LEXIS 2776 (N.Y. Sup. Ct. 1955).

Controlling date for determining whether more than simple majority vote is required for purposes of Local Finance Law is date bonds are issued, rather than date bonds are authorized by voters. 2011 Op Comm Ed No. 16,316.

Determination under paragraph d of this section cannot be made until such time as issuance of bonds or bond anticipation notes become immediately imminent and it is impossible for determination to be made at time of school district meeting. Re Haber (1953) 74 NY St Dept 81.

4. Limitation upon indebtedness; cities and villages

In the event that the parts of the current surplus of the city of Rome to be used for the construction of an annex to the city hall, an annex to the Public Works barn, the paving and repairing of streets, and the construction of storm-water sewers are insufficient or unavailable to defray all of the cost of any of these objects or purposes, the city may borrow to defray all or part of such cost by the issuance of serial bonds or capital notes, subject to the limitations of § 107.00 and par. d of this section. 1946 Ops St Compt 155.

A city's share of the cost of acquisition of rights of way for arterials under subd. 2.6 of § 349-c of the Highway Law must be included in computing its debt-contracting power notwithstanding it is to be paid to the state in installments. 1962 Ops St Compt #799.

There is no requirement for establishment of sinking fund as to "zero coupon bonds" issued between July 19, 1991 and December 31, 1993 as part of issuance having overall discount of 25 percent or less; face amount at maturity of "zero coupon bonds" issued between those dates is chargeable against local government's debt limit. 1994 Op St Compt No. 94-19.

5. —School districts

Bonds authorized by the mere act of passing a bond resolution did not have to be included in a school district's debt limit computations and did not violate the state constitution or the Local Finance Law because indebtedness was not incurred for purposes of the district's debt limit until the authorized bonds were actually sold, i.e., issued. Matter of O'Brien v New York State Commr. of Educ., 112 A.D.3d 188, 975 N.Y.S.2d 205, 2013 N.Y. App. Div. LEXIS 7207 (N.Y. App. Div. 3d Dep't 2013), app. dismissed, 22 N.Y.3d 1125, 983 N.Y.S.2d 485, 6 N.E.3d 603, 2014 N.Y. LEXIS 228 (N.Y. 2014), cert. denied, 574 U.S. 959, 135 S. Ct. 404, 190 L. Ed. 2d 290, 2014 U.S. LEXIS 7129 (U.S. 2014).

Voters' approval of school district bond resolution for issuance of obligations in excess of constitutional debt limit did not have immediate effect of putting school debt over constitutional limit, since obligations could not be issued without approvals from State Comptroller and Board of Regents, and it was possible that such approvals might not be obtained; term "existing indebtedness" in CLS Loc Fin § 104.00) does not include obligations authorized but not issued (CLS Loc Fin §§ 132.00, 135.00, 136.00). 2011 Op Comm Ed No. 16,316.

Contract characterized as "lease agreement" by high school development corporation and board of education was de facto lease-purchase agreement, where development corporation was created for express purpose of constructing high school to board's specifications, it retained few incidents of ownership in high school during lease period and none at end of period, board assumed many responsibilities that ordinarily attend ownership, board's obligation to make payments under lease was "absolute and unconditional," 30-year lease term corresponded to probable usefulness of building (CLS Loc Fin § 11.00), and circumstances strongly suggested that "lease" was designed to provide means for development corporation to finance construction of new high school to be owned by board. 2003 Op Comm Ed No. 14,857.

The approval of a school district bond resolution authorizing issuance of bonds in excess of the Constitutional debt limit has no immediate effect on the debt-contracting power of the district. 1955 Ops St Compt 634.

Judgment bonds issued pursuant to § 37.00 by school districts form part of the bonded indebtedness of such school districts. 1956 Ops St Compt 733.

Chairman of a school district meeting has no duty, right or authority to make a determination under this section. Re Haber (1953) 74 NY St Dept 81.

6. —Fire districts

Discussion of rules and regulations relative to purchase of fire apparatus. 1953 Ops St Compt File #6421.

A fire district with an average assessed valuation of approximately $160,000 did not have borrowing power sufficient to issue bonds in the amount of $25,000. 1955 Ops St Compt File #7499.

The debt limit of a fire district is computed by adding the last five completed assessment rolls, dividing by five, and multiplying that average by .05. 1956 Ops St Compt 167.

In fire districts there is a three per cent debt limitation which may be exceeded, subject to certain conditions, to a maximum of five per cent of full valuation. 1967 Ops St Compt File #699.

Agency Opinions

Analysis

1. In general
2. Limitation upon indebtedness; cities and villages
3. —School districts

1. In general

Discussion of power of Village of Lyons Falls to contract indebtedness for the construction of a sewer system. 1979 Op St Compt File #301.

The fact that a municipality has issued obligations to fund a deficit does not prohibit the issuance of obligations for other lawful capital purposes, provided that the debt limit is not thereby exceeded. 1979 Op St Compt File #599.

2. Limitation upon indebtedness; cities and villages

3. —School districts

Discussion of application of cited provisions in the financing of condemnation awards where amount required exceeds the sum originally authorized by certain school districts for acquisition of land and rights in land. 1955 NY Ops Atty Gen 216 (informal).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 15.00, 15.20, 121.30, 140.00, 150.00; CLS Educ § 1950; CLS Gen Mun § 368; CLS Pub A 1599-iii, § 1600-ii; CLS Unconsol Ch 131 § 29.

This section referred to in CLS Pub A §§ 1596-i, 1621-i.

Date for determining last completed assessment rolls, CLS Gen Const § 61.

Constitutional provisions affecting or limiting municipal power to contract indebtedness, CLS Const Art VIII §§ 2–12.

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1327, 1337, 1544, 1546.

56 Am Jur 2d, Municipal Corporations, Counties and Other Political Subdivisions §§ 594–647.

15 Am Jur Legal Forms 2d, Public Securities and Obligations § 214:17.

20 Am Jur Pl and Pr Forms (Rev ed), Public Securities and Obligations, Form 28.

Annotations:

Presumptions and burden of proof as to violation of or compliance with public debt limitation. 16 ALR2d 515.

Inclusion of tax-exempt property in determining value of taxable property for debt limit purposes. 30 ALR2d 903.

§ 109.00. Filing of debt statement required

a. Not more than fifteen nor less than three days before any municipality, fire district, or any school district having an aggregate assessed valuation of taxable real property of one hundred thousand dollars or more, sells any bonds which are required to be sold at public sale, it shall file with the state comptroller a verified statement of its debt-contracting power prepared as of a date not more than thirty days previous to the date of the sale of such bonds, except that in a city containing more than one county the statement of its debt-contracting power shall be prepared as of a date not more than sixty days previous to the date of the sale of such bonds. The statement shall show the amount of obligations proposed to be sold at such sale. A duplicate copy of every such debt statement shall be filed in the same respective periods of time with the clerk or corresponding officer of such municipality, fire district or school district. In the case of a city containing more than one county, such statements in addition to being filed with the city clerk shall also be filed in the same respective periods of time in the office of the chief fiscal officer thereof. Debt statements and duplicates thereof, filed pursuant to this section, shall be public records.

b. Such statements shall be prepared in the manner prescribed in title ten of article two of this chapter. Any error, defect, omission or inaccuracy in any such statement, or in the manner of its execution or filing, shall not affect the validity of any obligations of any municipality, school district or fire district.

HISTORY:

Add, L 1942, ch 424; amd, L 1944, ch 608; L 1945, ch 343; L 1947, ch 902, eff June 30, 1947; L 1950, ch 608, § 3; L 1951, ch 831, §§ 14, 15; L 1955, ch 313; L 1978, ch 245, eff Sept 1, 1978.

Commission Note: Formerly counties, other than those within the City of New York, second and third class cities, villages and towns only were required to make annual reports of their financial condition to the state comptroller. This section requires the cities of New York, Rochester and Buffalo, fire districts and certain school districts to file debt statements with the state comptroller and thus increase the number of units of government supplying that official with statistics relating to their finances.

Revision Notes: [1944] Par a. This section was amended to bring out clearly the intent of the section that duplicate statements must be filed in the same respective time periods as original statements are required to be filed.

Notes to Decisions

Bonds previously authorized which are required to be sold at public sale must be sold by the municipality in accordance with the provisions of this section as to the filing of a verified supplemental statement of the debt contracting power of the municipality. 1945 Ops St Compt 292.

The time period for filing the annual debt statement is directory. 1946 Ops St Compt 500.

Supplemental debt statements are required to be filed only when bonds are sold at public sale. 1946 Ops St Compt 699.

School districts need not file annual debt statements for the fiscal year ending June 30, 1947. 1947 Ops St Compt 362.

A supplemental debt statement should not be filed when bonds are sold at a private sale. 1955 Ops St Compt 597.

The last completed assessment roll to be used for calculating tax and debt limits is the assessment roll as it comes from the assessor after all action open to him, including administrative review, has been completed. 1984 Op St Compt 84-55.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 15.30, 130.00, 137.00, 172.00; CLS Unconsol Ch 131 § 29.

Codes, Rules and Regulations:

Debt statement form to be used in connection with public sales of bonds by cities having more than 125,000 inhabitants; form of statement. 2 NYCRR § 28.1.

Debt statement form to be used in connection with public sales of bonds by cities having more than 125,000 inhabitants; temporary provision. 2 NYCRR § 28.2.

Debt statement form to be used in connection with public sales of bonds by counties, towns, villages and cities having less than 125,000 inhabitants; form of statement. 2 NYCRR § 31.1.

Debt statement form to be used in connection with public sales of bonds by counties, towns, villages and cities having less than 125,000 inhabitants; temporary provision. 2 NYCRR § 31.2.

Debt statement form to be used in connection with public sales of bonds by school districts; form of statement. 2 NYCRR § 33.1.

Debt statement form to be used in connection with public sales of bonds by school districts; temporary provision. 2 NYCRR § 33.2.

Debt statement forms to be used in connection with public sales of bonds by school districts in cities under 125,000 inhabitants; form of statement. 2 NYCRR § 34.1.

Debt statement forms to be used in connection with public sales of bonds by school districts in cities under 125,000 inhabitants; temporary provision. 2 NYCRR § 34.2.

Debt statement form to be used in connection with public sales of bonds by fire districts; form of statement. 2 NYCRR § 35.1.

Debt statement form to be used in connection with public sales of bonds by fire districts; temporary provision. 2 NYCRR § 35.2.

Debt statement form to be used in connection with public sales of bonds by school districts outside of cities; form of statement. 2 NYCRR § 36.1.

TITLE 12 Miscellaneous Provisions

HISTORY:
Add, L 1942, ch 424.

§ 160.00. Action by finance board

Whenever in this chapter the finance board is empowered or required to act, and no proportion of voting strength for such action is prescribed, such action shall be taken by at least a majority vote of the voting strength of such finance board.

HISTORY:
Add, L 1942, ch 424, eff Sept 1, 1945.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:
This section referred to in § 15.00.

§ 162.00. Exemption from taxation

All bonds and notes of a municipality, school district or district corporation, until payable, and the interest thereon, shall be exempt from taxation for municipal and state purposes.

HISTORY:
Add, L 1942, ch 424, with substance transferred from Conser L § 466, and Gen Mun L § 9–b; amd, L 1944, ch 608; L 1950, ch 762.

Commission Note: This section is derived from General Municipal Law § 9-b. It differs therefrom in the following respects:

1. It includes notes as well as bonds.

2. It applies to all municipalities, school districts and district corporations.

Revision Notes: [1950]. Amendment made necessary by L 1950, ch 762, § 53, repealing § 26.00 of the Local Finance Law.

Editor's Notes: In connection with Laws 1950, ch 762, see extensive historical note to Educ Law Article 51.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:
This section referred to in §§ 15.00, 25.00.

Jurisprudences:
64 Am Jur 2d, Public Securities and Obligations § 28.
71 Am Jur 2d, State and Local Taxation § 342.

Annotations:
What are educational institutions or schools within state property tax exemption provisions. 34 ALR4th 698.

§ 165.00. Deposit and use of proceeds from sale of bonds, bond anticipation notes, capital notes, urban renewal notes or budget notes

a. The proceeds, inclusive of premiums, from the sale of bonds, bond anticipation notes, capital notes, urban renewal notes or budget notes shall be deposited and secured in a special account in the manner provided by section ten of the general municipal law, shall not be commingled with other funds of the issuer, and shall be expended only for the object or purpose for which such obligations were issued. In the event that any portion of the proceeds, inclusive of premiums, from the sale of bonds, bond anticipation notes, capital notes, urban renewal notes or budget notes is not expended for the object or purpose for which such obligations were issued, such portion shall be applied only to the payment of the principal of and interest on such obligations, respectively. Notwithstanding the foregoing provisions of this paragraph, the finance board of any municipality, school district or district corporation may adopt any or all of the following resolutions to provide that:

1. The proceeds, inclusive of premiums, of capital notes issued in amounts of one hundred thousand dollars or less, and of budget notes, need not be deposited in a special account but may be deposited and commingled with other funds of the issuer in any account of the issuer in a bank or trust company located and authorized to do business in this state, but such power shall not be construed as authorizing the use of such proceeds for an object or purpose other than that for which the obligations were issued.

2. The proceeds, inclusive of premiums, from the sale of any two or more issues of bonds, bond anticipation notes, capital notes, urban renewal notes or budget notes need not be deposited in separate special accounts but may be deposited in a single special account of the issuer in a bank or trust company located and authorized to do business in this state, but shall not be commingled with other funds of the issuer. The chief fiscal officer shall then maintain a separate accounting record of each issue to insure that the proceeds shall be used only for the object or purpose for which the obligation was issued.

3. Moneys appropriated for a purpose for which bonds, bond anticipation notes, capital notes or urban renewal notes have been authorized may be deposited in the same bank account with the proceeds from the sale of such obligations. Such power shall not be construed as authorizing the use of the proceeds of such obligations for an object or purpose other than that for which they were issued. Pro-

vided, however, that any moneys remaining in such bank account after the object or purpose has been completed or abandoned shall be applied to the payment of the principal of and interest on such obligations; any excess remaining thereafter may be used for any lawful purpose.

b. Notwithstanding the provisions of paragraph a of this section, the proceeds, inclusive of premiums, from the sale of bonds, bond anticipation notes, capital notes and urban renewal notes may be invested in the manner provided by section eleven of the general municipal law.

Such investment shall be made by the finance board or the chief fiscal officer, if the finance board shall delegate such duty to that person. The separate identity of the proceeds from the sale of bonds, bond anticipation notes, capital notes, urban renewal notes and budget notes shall be maintained at all times, whether such proceeds consist of cash or investments or both. Any interest earned or capital gain realized on any investment shall be applied to either the payment of the principal of and interest on the bonds, bond anticipation notes, capital notes, urban renewal notes or budget notes, as the case may be, the proceeds from the sale of which were used in making such investment or for any other purpose or purposes for which such issue of bonds, capital notes or urban renewal notes has been authorized. Notwithstanding the preceding sentence, any interest earned or capital gain realized on any investment shall, to the extent necessary to maintain the exemption from federal income taxation of interest on the obligations the proceeds from the sale of which were used in making such investment, be paid to the United States treasury department, or any agency of the United States. Where the proceeds from the sale of bond anticipation notes have been invested and such notes have been retired from the proceeds from the sale of the bonds in anticipation of which they were issued, any interest earned or capital gain realized on any investment shall be applied only to the payment of the principal of and interest on the bonds.

c. Notwithstanding the provision of paragraph a of this section or the provision of subdivision three of section ninety-nine-o of the general municipal law, the proceeds of obligations issued for the partial refinancing of mass commuting vehicles by the county of Suffolk may be used to reimburse in whole or in part any accounts or funds from which moneys were disbursed to meet the cost of the original acquisition of such mass commuting vehicles. As used in this paragraph "mass commuting vehicles" means any bus, subway car, rail car, locomotive, or similar equipment used or to be used to provide mass commuting services, whether or not operated by a private operator under agreement with the county of Suffolk.

d. Notwithstanding the provisions of paragraph a of this section, if obligations issued by a school district or a city on behalf of a school district have been refunded with bonds issued by the dormitory authority of the state of New York pursuant to subdivision thirty-nine of section sixteen hundred eighty of the public authorities law, that portion of the proceeds that are allocable to obligations refunded with bonds issued by the dormitory authority of the state of New York and that have not been expended by the school for the object or purpose for which such obligations were issued shall be applied only to the payment of the principal of and interest on the bonds issued by the dormitory authority.

HISTORY:

Add, L 1942, ch 424; amd, L 1944, ch 610; L 1947, ch 412; L 1950, ch 382; L 1953, ch 151; L 1953, ch 537; L 1954, ch 379; L 1955, ch 818; L 1961, ch 404, eff April 11, 1961; L 1962, ch 890; L 1963, ch 715, eff April 23, 1963; L 1968, ch 877, eff June 22, 1968; L 1969, ch 770, eff May 22, 1969; L 1972, ch 54; L 1976, ch 680, § 1, eff July 24, 1976, expires June 30, 1998 (see 1976 note below); L 1983, ch 106, § 4, eff May 17, 1983; L 1991, ch 413, § 29, eff July 19, 1991; L 1992, ch 708, § 26, eff Nov 28, 1992 (see 1992 note below); L 2001, ch 383, § 10 (Part F), eff Oct 29, 2001, deemed eff April 1, 2001 (see 2001 note below).

Editor's Notes: See 1961 note to § 25.10.

Laws 1976, ch 680, § 5, provides as follows:

§ 5. This act shall take effect immediately provided that sections one and two of this act shall expire on June 30, 1998 and provided, however, that it is hereby declared to be the express intention of the legislature that the provisions of sections one and two of this act, except with respect to investments made pursuant to the provisions hereof, shall remain in full force and effect only until the date of such expiration at which time the provisions of law amended by this act, shall be continued in full force and effect as they existed prior to the enactment of this act. (Amd, L 1977, ch 630, § 1, L 1978, ch 90, 1983, ch 908, § 1, L 1988, ch 189, § 1, eff June 30, 1988, L 1993, ch 196, § 1, eff July 1, 1993.).

Laws 1992, ch 708, § 45, eff Nov 28, 1992, provides as follows:

§ 45. This act shall take effect on the one hundred twentieth day after it shall have become a law, provided that section forty-three of this act shall take effect June 4, 1997; and provided, however, that the amendments to the opening paragraph of subdivision 2 of section 11 of the general municipal law, made by section thirteen of this act and the opening paragraph of paragraph b of section 165.00 of the local finance law, made by section twenty-six of this act shall not affect the expiration and reversion of such provisions as provided in chapter 680 of the laws of 1976, as amended. (Amd, L 1995, ch 109, § 1, eff June 30, 1995, deemed eff July 1, 1995, L 1996, ch 6, § 1, eff Jan 31, 1996, deemed eff Feb 1, 1996, L 1996, ch 70, § 1, eff April 30, 1996, deemed eff April 30, 1996, L 1996, ch 152, § 1, eff June 14, 1996, deemed eff June 15, 1996, L 1997, ch 13, § 1, eff Feb 14, 1997, deemed eff Feb 15, 1997, L 1997, ch 27, § 1, eff April 1, 1997, deemed eff March 27, 1997, L 1997, ch 67, § 1, eff May 21, 1997, deemed eff May 27, 1997.).

Laws 2001, ch 383, § 20 (Part F), eff Oct 29, 2001, deemed eff April 1, 2001, provides as follows:

§ 20. This act shall take effect immediately and shall be deemed to have been in full force and effect on and after April 1, 2001 and shall apply to school years commencing on or after July 1, 2001, provided, however, that section fourteen-a of this act shall take effect on the same date and in the same manner as section 1 of part B of chapter 149 of the laws of 2001 takes effect.

Amendment Notes: 2001. Chapter 383, § 10 (Part F) amended:

By adding par d.

1992. Chapter 708, § 26 amended:

Par a, opening par by deleting at fig 1 "a bank or trust company located and authorized to do business in this state," and adding the matter in italics.

By redesignating par b, first undesignating par, opening par as par b, first undesignated par.

Par b, first undesignated par by deleting at fig 1 "obligations of the United States of America, or in obligations guaranteed by agencies of the United States of America where the payment of principal and interest are guaranteed by the United States of America, or in obligations of the state of New York, or with the approval of the state comptroller in obligations issued pursuant to section 24.00 or 25.00 of this chapter by any municipality, school district or district corporation other than the municipality, school district or district corporation investing such proceeds pursuant to this paragraph, subject to the following conditions:" and adding the matter in italics.

By deleting par b, first undesignated par, subpars 1–3.

By redesignating former par b, third undesignated par as par b as second undesignated par.

By deleting former par b, second undesignated par.

Par c by deleting at fig 1 a comma and adding the matter in italics.

Notes to Decisions

Analysis

1. In general
2. Deposit in special account
3. —Bank or trust company
4. Investment of proceeds
5. —Federal and State of New York obligations
6. —Time deposit accounts
7. Application of proceeds to specific object or purpose
8. —Application to another purpose
9. Application of income from invested proceeds
10. Application of bond premiums
11. Use of general fund monies in lieu of bond proceeds
12. Payment of specific expenses out of proceeds
13. —Salaries
14. —Fees
15. —Preliminary expenses
16. Application of surplus proceeds

1. In general

The restrictions of the Local Finance Law (§ 32.00, subd 1; § 165.00, subd a), requiring that bond resolutions be for a specific object or purpose and that funds may only be expended for that purpose, are not applicable to a resolution to condemn property enacted pursuant to section 360 of the General Municipal Law, which does not direct that bonds or any form of borrowing will be used, but only that the resolution and referendum must specify the costs. Massena v Niagara Mohawk Power Corp., 60 A.D.2d 139, 400 N.Y.S.2d 862, 1977 N.Y. App. Div. LEXIS 14366 (N.Y. App. Div. 3d Dep't 1977), app. dismissed, 44 N.Y.2d 732, 1978 N.Y. LEXIS 4470 (N.Y. 1978), aff'd, 45 N.Y.2d 482, 410 N.Y.S.2d 276, 382 N.E.2d 1139, 1978 N.Y. LEXIS 2279 (N.Y. 1978).

Discussion of investments for town and village reserve and sinking funds and proceeds from sale of obligations. 1954 Ops St Compt 238.

An obligation of the particular municipality, school district or district corporation which makes a deposit of the proceeds of such obligation, may be used to secure such deposit. 1967 Ops St Compt File #274.

The guaranteed portion of SBA loans may be used as collateral for municipal and school district investments and deposits. 1976 Ops St Compt File #1155.

A city may deposit with the state comptroller the proceeds of bonds and notes issued by the city to finance the non-federal share of a federally-aided city bridge project. 1992 Op St Compt No. 92-8.

New York State higher education loans which have been reinsured by the Federal government pursuant to the Higher Education Act of 1965 may be accepted as collateral to the extent of the amount which has been reinsured. 1983 Op St Comp File #83-107.

2. Deposit in special account

Petition alleging, inter alia, that district superintendent improperly directed transfer of $400,000 from construction bond fund to new code or line item without reporting this action to board for informational purposes or approval, and seeking restoration $400,000 to district's general fund, was untimely where petition was served more than 10 to 12 months after allegedly improper transfer occurred. 2008 Op Comm Ed No. 15,740.

The down payment should be used for the purpose appropriated prior to the use of the bond proceeds; it may be deposited in a special bond account. 1946 Ops St Compt 670; 1947 Ops St Compt 129.

The proceeds of bond anticipation notes must be deposited in a special bank account. 1947 Ops St Compt 302.

When bonds of various issues are sold as a single bond issue at one rate of interest for all the bonds, the proceeds of each issue, together with the premium allocated to the issue, must be deposited in a special bank account as required by this section. 1947 Ops St Compt 386.

Moneys raised by tax for the purchase of town highway machinery shall be deposited to the credit of the town highway fund in a separate bank account. The proceeds of the sale of municipal obligations for machinery purchases should also be deposited in a separate bank account unless the town board resolves to commingle such funds. 1956 Ops St Compt 207.

This section governs the deposit of borrowing by the Syracuse City School District, requiring that they be deposited in a separate bank account except as the City Finance Department may authorize their commingling with other funds. 1961 Ops St Compt File #71.

Where two separate bond resolutions were passed, and the proceeds from the bonds are placed in a single, separate bank account, a single voucher for monthly progress payments to each contractor may be used only if the amount chargeable to each project is clearly allocated therein. Separate accounting records must be made of each issue so that the proceeds shall be used only for the object or purpose for which the obligation was issued. 1967 Ops St Compt File #515.

3. —Bank or trust company

Funds of a school district may not be deposited in a bank of which the trustee is an officer or director. 1947 Ops St Compt 116.

Proceeds of fire district obligations may be deposited in either federal or state banks but may not be deposited in savings and loan associations or savings banks. Such proceeds may be deposited in more than one qualified bank or trust company. 1947 Ops St Compt 439.

The term "bank" as used in these sections does not include a savings bank or savings and loan association regardless of whether such institutions are state chartered or federally chartered. 1983 Op St Comp File #83-69.

4. Investment of proceeds

Bond proceeds may not be invested. 1946 Ops St Compt 444.

A fire district may invest the proceeds of a bond sale pending their use to carry out the purpose for which they were issued. 1954 Ops St Compt 12.

Sale of school district bond anticipation notes in advance of need, for the deliberate purpose of investing sale proceeds at a profit, would be contrary to the spirit and intent of this section. 1961 Ops St Compt #366; 1961 Ops St Compt #372.

Where a capital project has been temporarily financed by the issuance of bond anticipation notes, the finance board may issue bonds at any time thereafter and before the due date of the notes, and may invest the bond proceeds until such time as the notes mature. 1967 Ops St Compt File #636.

5. —Federal and State of New York obligations

The Local Finance Law permits limited investment of bond proceeds in obligations of the United States of America and the State of New York. 1953 Ops St Compt 187.

A union free school district may invest the proceeds of a bond issue and should name a depositary for such proceeds pursuant to the Education Law. Federal and Land Bank bonds, Federal National Mortgage Association notes and debentures, Federal

Intermediate Credit Bank debentures, and Federal Home Loan Bank bonds are not obligations of the United States of America. New York State Power Authority bonds, New York State Thruway Authority bonds and bonds of a subdivision of the State are not obligations of the State. 1960 Ops St Compt File #732.

Village may temporarily invest in short term United States Treasury Bills issued in book-entry form, which are registered in the name of the village, under the "Treasury Direct" program, where no physical security is issued, the security being evidenced only by an account master record and a description of the security in a securities portfolio associated therewith in the Federal Reserve's computer system. Ops St Compt 89-42.

6. —Time deposit accounts

A time deposit is an unconstitutional loan of municipal moneys. 1953 Ops St Compt 82.

Bond proceeds may be invested only pursuant to this section. Investment in time deposits would be unconstitutional loan of municipal money. 1954 Ops St Compt 423.

Capital reserve fund moneys may not be invested in special time deposit accounts at the present time. 1957 Ops St Compt File #485.

Bond proceeds may be deposited in special time deposit accounts. 1957 Ops St Compt File #485.

Cash deposits made by electric consumers may be deposited in special time deposit accounts. 1957 Ops St Compt File #485.

F.N.M.A. participation certificates are acceptable as collateral for deposits of bond or note proceeds in special time deposit accounts or certificates of deposit, but such proceeds cannot be invested in such participation certificates, directly. 1968 Ops St Compt File #347.

7. Application of proceeds to specific object or purpose

A county legislature's bond resolution would not be invalidated on the asserted ground that it lacked the specificity required under Loc Fin Law § 32.00(1) in that it merely designated "reconstructing various roads in said county" as the purpose for the issuance of bonds and notes rather than setting forth specific roads, since the county legislature was not prohibited from designating the reconstruction of roads within the county as a class of objects and purposes for the issuance of its obligations, and since the resolution sufficiently satisfied the objectives underlying the statutory requirement that the objects or purposes for the issuance of municipal obligations be described in that it reasonably insured that the funds derived from such issuance would be expended only for the stated class of objects or purposes, and sufficiently determined the period of probable usefulness of the class or specific object or purpose. Morris v Cahill, 96 A.D.2d 88, 469 N.Y.S.2d 231, 1983 N.Y. App. Div. LEXIS 19878 (N.Y. App. Div. 3d Dep't 1983).

The proceeds from the sale of bonds issued by a union free school district to finance construction of a public library building must be held in the custody of the school district treasurer and may be expended only under direction of the library trustees for the object or purpose for which the bonds were issued. The board of education has no control over the expenditure of such proceeds. 1953 Op St Compt No. 53–6061.

Funds held as retained percentages due ultimately to contractors may be invested in certificates of deposit. If funds are proceeds of sale of obligations, interest earned or capital gain realized thereon shall be applied only to the payment of principal and interest related to such obligations in accordance with section 165.00 of the Local Finance Law. If moneys are reserve funds or proceeds of current appropriations, interest earned or capital gain realized thereon would belong to the city and could be used by it subject to the same requirements as in the case of unexpended balances. 1967 Ops St Compt File #825.

When county contracts with Facilities Development Corporation (FDC) to oversee its construction of jail project, and contract requires proceeds of county bonds issued to fund project to be paid to FDC to finance construction costs, FDC, pursuant to contract, may invest bond proceeds and use interest earned thereon to pay cost overruns on project. 1987 Op St Compt No. 87-90.

Where surplus bond proceeds are available to pay debt service for purposes of town improvement district and current assessments also have been raised and appropriated for purpose, debt service need not be paid from assessments. 1988 Op St Compt No. 88-7.

School district which has excess proceeds of outstanding bonds issued for completed capital project must retain those proceeds for payment of principal and interest on bonds, irrespective of whether bonds have "call" provision; such excess proceeds may not be used for any other school district purpose. 1995 Op St Compt No. 95-13.

8. —Application to another purpose

In the case of fully paid bonds issued for a purpose never accomplished, the village is either obligated to spend the proceeds in accordance with the original resolution or else it should secure the enactment of legislation authorizing the rescission of the original resolution and permitting the proceeds to be used for other capital purposes by the village. 1946 Ops St Compt 26.

A fire district may not divert bond proceeds to pay current operating expenses. 1946 Ops St Compt 583.

School district voters have no authority to authorize or direct the expenditure of bond proceeds for an object or purpose different than the object or purpose for which such bonds were issued. 1954 Ops St Compt 423.

Where a bond issue for school building construction has been authorized but the full amount of bonds have not been issued because costs were less than anticipated, the additional bonds may not be issued to finance some other project not included in the authorization. 1962 Ops St Compt #124.

9. Application of income from invested proceeds

Interest received from the temporary investment of bond proceeds by a central high school district may not be applied to the payment of interest due on bond anticipation notes. Such earned interest may be applied in the current year to the payment of debt service on the bonds the proceeds from the sale of which were invested, notwithstanding that the current budget contains provisions for the payment of such debt service. Such earned interest should be accounted for by the district on a cash basis. 1953 Ops St Compt 411.

Where the proceeds of bonds issued to finance the construction of school buildings have been invested, the income realized from such investment may be used only for paying the principal of or interest on such bonds. 1957 Ops St Compt File #234.

10. Application of bond premiums

Premiums on sales of village or other municipal bonds may be applied either to the payment of debt service on the bonds or, if the estimated maximum cost recited in the bond resolution is not exceeded, to the cost of the capital improvement for which the bonds were issued. 1967 Ops St Compt File #612.

11. Use of general fund monies in lieu of bond proceeds

When village moneys were improperly used to pay construction costs pending the sale of bonds, such moneys may be reimbursed from the bond proceeds under certain conditions. The same rule would not apply if the moneys were properly used. 1946 Ops St Compt 519.

Pending the issuance of bonds or capital notes, a village may not use general fund moneys temporarily to pay for water meters delivered to the village. 1947 Ops St Compt 276.

12. Payment of specific expenses out of proceeds

Proceeds of bonds issued by school district to finance library building are to be disbursed by chief fiscal officer of district in payment of claims audited and ordered paid by board of education. 1966 Op St Compt No. 66–728.

13. —Salaries

The salary of a newly created position may be paid from the proceeds of budget notes issued pursuant to § 29.00. 1946 Ops St Compt 30.

The proceeds of a budget note may be transferred to the budget item for assessors' salaries. 1946 Ops St Compt 495.

Salaries of regular village employees may be paid from the proceeds of sale of bonds issued for construction of a village garage, but only for work actually performed in constructing the garage. 1963 Ops St Compt #222.

14. —Fees

Legal services for a fire apparatus bond issue by a fire district may be paid from bond proceeds. 1946 Ops St Compt 215.

Engineering fees incurred in connection with a capital improvement may be paid from the proceeds of bonds, bond anticipation notes, capital notes or deferred payment notes. 1957 Ops St Compt File #57-737.

Where the fees of a financial consultant and bond counsel have been incurred by a town as a preliminary expense for a general town project for which obligations are to issue, such expense should normally be paid from the proceeds of the sale of the obligations, unless the bond resolution is defeated and there are no such proceeds or earmarked moneys, in which case such expense is payable from the town general fund. 1967 Ops St Compt File #499.

15. —Preliminary expenses

A Board of Education of a union free school district may engage the services of a firm specializing in municipal surveys to make a survey of the school district to provide the Board and voters with proper statistical information in relation to the need for a school building for the district and other pertinent data, the reasonable cost therefor to be paid from bonds issued to finance the school building. 1947 Ops St Compt 300.

The cost of a referendum held on a bond resolution may be paid from the proceeds of the sale of the bonds. 1955 Ops St Compt 375.

16. Application of surplus proceeds

Resolution adopted by central school district, transferring balances from 2 unrelated bond referendum funds to district's debt service fund, did not contravene CLS Loc Fin § 165.00 where purpose of transfer was to offset future debt service payments on outstanding bond obligations, not to reduce anticipated debt service on project under consideration at special district meeting (so that district could claim that passage of propositions would not require tax increase) as petitioner alleged. 2000 Op Comm Ed No. 14,572.

Petition alleging that superintendent improperly purchased computers from construction bond fund approved by district voters, and seeking restoration of any misspent funds to district's general fund, was untimely where it was served more than 9 months after board meeting at which superintendent publicly announced his intent to issue purchase orders for computers using excess funds from construction bond; even if matter was deemed ongoing until superintendent forwarded letter from district's architect to board regarding expenditure for computers in March of 2007, petitioner still did not serve petition until July of 2007, more than 30 days later. 2008 Op Comm Ed No. 15,740.

The city council may not make unexpended bond moneys available for sewer construction but must apply such moneys to the retirement of the outstanding bonds of the issue. 1945 Ops St Compt 366.

Surplus bond proceeds must be used for debt service on the bonds and may not be diverted for other purposes. 1946 Ops St Compt 600.

Unexpended proceeds of a bond issue must be applied only to the payment of the principal and interest on such bonds. 1947 Ops St Compt 401.

The unexpended portion of the proceeds from the sale of bonds issued by a school district to finance construction of a school building may not be used to purchase original furnishings, equipment, machinery or apparatus required for the purposes for which the building is to be used when the proposition adopted by the voters and the bond resolution adopted by the board of education make no reference to the acquisition of such furnishings, equipment and apparatus in describing the object or purposes for which the bonds were issued. 1953 Ops St Compt 7.

Unexpended proceeds of a bond issue may be used only for payment of debt service on such bonds and until so used, such funds must remain segregated if not invested. 1955 Ops St Compt 96.

Surplus proceeds from the sale of bonds to finance construction of a firehouse may not be paid into a reserve fund established pursuant to General Municipal Law, § 6-h for the payment of bonded indebtedness. 1960 Ops St Compt File #721.

If any portion of the proceeds of a sale of obligations is not expended for the purpose for which such obligations were issued, such portion must be applied to the payment of principal and interest on such obligations. 1967 Ops St Compt File #661.

Proceeds of bonds not expended for the object for which the bonds were sold cannot be transferred, but must be applied to the payment of principal of and interest on such bonds. 1968 Ops St Compt File #104.

The entirety of excess bond anticipation note proceeds must be used to pay the interest on and principal of such notes as expeditiously as possible. 1969 Ops St Compt File #866.

Agency Opinions

Analysis

1. In general
2. Deposit in special account
3. —Bank or trust company
4. Investment of proceeds
5. —Time deposit accounts
6. Application of proceeds to specific object or purpose
7. —Application to another purpose
8. Application of surplus proceeds

1. In general

Government National Mortgage Association obligations may be used to secure Dutchess County investments but may not be used as security for its demand deposits. 1978 Op St Compt File #907.

Where a county commissioner of finance is authorized to invest municipal and school district moneys pursuant to a joint investment agreement, the securities pledged as collateral may be designated to the credit of the county if the joint investment agreement contains a provision stating that in the event of a default the county will reimburse the participating municipalities and school districts according to the contribution each has made to the investment. 1982 Op St Compt File #82-337.

2. Deposit in special account

3. —Bank or trust company

A Federal savings and loan association is not a bank or trust company within the meaning of the provisions of former § 89 of the Village Law designating permissible depositories of village funds. 1939 N.Y. Op. Att'y Gen. No. 169, 1939 N.Y. AG LEXIS 141.

A town may not adopt a local law authorizing investments in savings banks, savings and loan associations and/or money market programs. 1981 Op St Compt No. 81-191, 1981 N.Y. Comp. LEXIS 693.

4. Investment of proceeds

5. —Time deposit accounts

Capital funds of a school district may be invested in a time deposit account in a bank or trust company, subject to statutory requirements. 1978 Op St Compt File #857.

Student loans guaranteed by the United States government acting through HEW may be accepted as collateral for municipal and school district investments while student loans guaranteed by New York State acting through the Higher Education Services Corporation may not be. 1982 Op St Compt File #82-112.

6. Application of proceeds to specific object or purpose

7. —Application to another purpose

The proceeds of bonds issued for the reconstruction of docks and bulkheads may not be used for the maintenance of channel markers and/or mooring piles which are re-set each spring because of winter ice. 1979 Op St Compt File #317.

The proceeds of a bond issue authorized by a referendum cannot lawfully be used except strictly in accordance with the terms of the referendum. 1928 N.Y. Op. Att'y Gen. No. 170.

Where bonds are issued in series, the accrued interest from the sale of a later series of bonds may be used for the payment of debt service on an earlier series of bonds, provided the object or purpose for which all the bonds are issued is the same. 1978 Op St Compt File #650.

8. Application of surplus proceeds

Unexpended balance of local bond issue may be used to purchase outstanding bonds of such issue at a discount. 1956 NY Ops Atty Gen Dec 7 (informal).

Discussion of disposition of surplus proceeds from sale of bonds and also of transferring surplus moneys in a water fund to the general fund and then to a capital reserve fund. 1978 Op St Compt File #672.

Surplus proceeds from bonds issued a fire district for construction of an addition to the existing fire headquarters may not be used to construct a garage-maintenance-storage building at the same site. 1979 Op St Compt File #404.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 15.00, 165.10; CLS ECL § 15-2129; CLS Pub A § 1096; CLS Town §§ 176, 215; CLS Vill § 17-1718.

Deposit of proceeds of bonds issued in connection with financing of drainage improvements, CLS ECL § 15-1951.

Transfer and lease of mass commuting vehicles by the county of Suffolk, CLS Gen Mun § 99-o.

Disposition of proceeds of school district bonds or obligations, CLS Educ §§ 1719, 2122, 2129, 2130.

Federal Aspects:

Federal Deposit Insurance Corporation, 12 USCS §§ 1811 et seq.

Jurisprudences:

26 NY Jur 2d Counties, Towns, and Municipal Corporations § 1125.

63A Am Jur 2d, Public Funds §§ 7 et seq.

Annotations:

Liability of public officer for interest or other earnings received on public money in his possession. 5 ALR2d 257.

MENTAL HYGIENE LAW

Title
B. Mental Health Act
C. Developmental Disabilities Act

HISTORY:
Add, L 1972, ch 251; amd, L 1977, ch 978.

TITLE B Mental Health Act

Article 7. Office of Mental Health

Section
7.21. Directors of facilities
7.27. Facility services

HISTORY:
Add, L 1977, ch 978, § 4, eff April 1, 1978.

ARTICLE 7 Office of Mental Health

HISTORY:
Add, L 1977, ch 978, § 4, eff April 1, 1978.

§ 7.21. Directors of facilities

(a) The director of a facility under the jurisdiction of the office of mental health shall be its chief executive officer. Each such director shall be in the noncompetitive class and designated as confidential as defined by subdivision two-a of section forty-two of the civil service law and shall be appointed by and serve at the pleasure of the commissioner. He or she shall manage the facility subject to applicable law and the regulations of the commissioner of mental health. Before the commissioner shall issue any such regulation or any amendment or revision thereof, he or she shall consult with the facility directors regarding its suitability. The director shall maintain effective supervision of all parts of the facility and over all persons employed therein or coming thereon and shall generally direct the care and treatment of patients. Directors presently serving at office of mental health facilities shall continue to serve under the terms of their original appointment.

(b) [Until June 30, 2013] Such director shall have the responsibility of seeing that there is humane treatment of the patients at his facility and shall investigate every case of alleged patient abuse or mistreatment. The director shall notify immediately, and in any event within three working days, the board of visitors of the facility and the mental hygiene legal service located in the same judicial department as the hospital, school, or institution of every complaint of patient abuse or mistreatment and shall inform the board and the mental hygiene legal service of the results of his investigation. If it appears that a crime may have been committed, the director shall give notice thereof to the district attorney or other appropriate law enforcement official as soon as possible, and in any event within three working days unless it appears that the crime includes an employee, intern, volunteer, consultant, contractor, or visitor and the alleged conduct caused physical injury or the patient was subject to unauthorized sexual contact, or if it appears the crime is endangering the welfare of an incompetent or physically disabled person pursuant to section 260.25 of the penal law, or if the crime was any felony under state or federal law, then the district attorney or other appropriate law enforcement official must be contacted immediately, and in any event no later than twenty-four hours.

(b) [Eff June 30, 2013] Such director shall have the responsibility of seeing that there is humane treatment of the patients at his or her facility and shall investigate, or cause to be investigated, every reportable incident in accordance with article eleven of the social services law. Also in accordance with article eleven of the social services law, the director shall require allegations of reportable incidents to be reported to the vulnerable persons' central register, which shall screen and immediately forward reports that appear to allege crimes to the appropriate law enforcement agency. The vulnerable persons' central register shall notify immediately, and in any event within three working days, the board of visitors of the facility and the mental hygiene legal service located in the same judicial department as the hospital, school, or institution of every complaint of patient abuse or neglect and shall inform the board and the mental hygiene legal service of the results of his investigation.

(c) In any investigation into the treatment and care of patients or the conduct, performance, or neglect of duty of officers or employees, the director of a department hospital shall be authorized to subpoena witnesses, compel their attendance, administer oaths to witnesses, examine witnesses under oath, and require the production of any books or papers deemed relevant to the inquiry or investigation. A subpoena issued under this section shall be regulated by the civil practice law and rules.

(d) Each facility director of the office shall, upon notice from the commissioner or upon knowledge that programs of such facility may be contracted or terminated, implement procedures to ensure timely notification to affected employees. Such procedures shall include, but not be limited to:

(1) dissemination and posting of all decisions, policies and procedures with respect to all aspects of such actions and their impact on facility staff; and

(2) compliance with all requirements and protection of employee rights pursuant to collective bargaining agreements with the designated legal representative of the employees and the civil service law.

(e) Every facility director or designee thereof is authorized and empowered to grant leaves of absence to employees of such facility not involved in

direct patient care who are volunteer firefighters as defined in subdivision one of section three of the volunteer firefighters' benefit law, responding to an emergency within the community for such periods as the volunteer firefighters are engaged in the actual performance of their duties as volunteer firefighters.

HISTORY:

Add, L 1977, ch 978, § 4, eff April, 1978; amd, L 1978, ch 492, § 4, eff July 20, 1978, 1979, ch 307, § 48; L 1980, ch 434, § 1, eff June 23, 1980; L 1982, ch 144, § 1; L 1985, ch 789, § 1, eff April, 1986; L 1992, ch 326, § 1, eff July 17, 1992; L 2011, ch 558, § 1, eff Nov 22, 2011; L 2012, ch 501, § 3 (Part C), eff June 30, 2013 (see 2013 note below); L 2013, ch 56, § 2 (Part J), eff April 1, 2013.

Editor's Notes: Laws 1978, ch 492, § 1, provides:

Section 1. Declaration of legislative findings and intent. The legislature finds and declares that, consistent with the policy of the state that all of its residents who are disabled will receive services according to their individualized needs and, whenever possible, in their home communities to enable them to realize their fullest potential for self-fulfillment and independent living in society, the continued utilization of qualified and dedicated state employees, whose employment in a program of a facility of an office may be terminated because of planned contraction of such program, will help ensure the development of effective and efficient service delivery systems at the community level consistent with the needs of the mentally disabled. It is the intent of the legislature to foster the development of appropriate mechanisms to ensure the continuity of employment of state employees, in the state, local government and voluntary nonprofit service sectors in order to foster the development of improved community mental health services, encourage cooperative and responsible participation and staffing arrangements that take into consideration the retraining needs and the negotiated employment rights of state employees, and to maximize the utilization of the wide range of staff disciplines and experience in servicing the needs of the chronically, severely and profoundly disabled.

Laws 1985, ch 789, § 57, eff April 1, 1986, provides as follows:

§ 57. This act shall take effect April first, nineteen hundred eighty-six; provided, however, the presiding justice of the appellate division is hereby authorized to take such actions as are necessary and proper in order to effectuate the purposes of this act prior to such effective date. Such actions shall include, but not be limited to, the promulgation of rules or regulations, the designation of a person to serve as director of the mental hygiene legal service for such appellate division of the judicial department, the preparation and submission of budget requests and a staffing plan for the mental hygiene legal service. Officers or employees of the mental health information service shall be transferred to the mental hygiene legal service without further examination or qualification and shall retain their respective civil service classifications and statuses.

Laws 2012, ch 501, § 1, eff Dec 17, 2012, provides as follows:

Section 1. This act shall be known and may be cited as the "protection of people with special needs act".

Laws 2013, ch 56, § 3 (Part J), eff April 1, 2013, provides as follows:

§ 3. The amendments to sections 7.19 and 7.21 of the mental hygiene law pursuant to Part J of a chapter of the laws of two thousand thirteen shall not authorize the commissioner of mental health to make any decisions with respect to employees in contradiction of the civil service law and regulations, and applicable collective bargaining agreements, nor otherwise alter any geographically discrete layoff unit structures.

Notes to Decisions

Analysis

I. GENERALLY

1. In general

II. UNDER FORMER § 7.17

2. In general

III. UNDER EARLIER LAWS

3. Under former § 33
4. Under former § 34; generally
5. —Applicable law
6. —Appointment and removal of employees
7. —Fire prevention powers
8. —Police of institution
9. —Reporting of crimes
10. —Family care and convalescent status of patients
11. —Fingerprinting and photographing of patients
12. —Funds and property of patients
13. —Out-patient treatments
14. —Records of patients
15. —Records of patients: disclosure permitted
16. —Records of patients: disclosure not permitted

I. GENERALLY

1. In general

Court would order State Office of Mental Retardation and Developmental Disabilities to conduct name-clearing hearing for benefit of former employee of not-for-profit social service agency, whose employment had been terminated for his alleged infliction of physical and psychological abuse on patient with developmental disabilities, since public disclosure or dissemination of reason for termination would occur by virtue of regulations requiring agency to report all incidents of abuse, and by fact that employee would be asked to reveal grounds for termination in future employment applications. Wright v Guarinello, 165 Misc. 2d 720 (N.Y. Sup. Ct. 1995).

II. UNDER FORMER § 7.17

2. In general

Though a hearing officer's report is entitled to weight in determining existence of substantial evidence, particularly to extent that material facts in given case may depend on resolving credibility of witnesses as shown by their demeanor or conduct at hearing, findings of hearing officer are not conclusive and may be overruled by the official upon whom has been imposed power to remove or mete out discipline, provided, of course, that the latter's action is supported by substantial evidence. Simpson v Wolansky, 38 N.Y.2d 391, 380 N.Y.S.2d 630, 343 N.E.2d 274, 1975 N.Y. LEXIS 2359 (N.Y. 1975).

Where director of school for mentally retarded, in rendering account of his decision to discharge permanent employee who had been accused of sexual relations with a school resident, acknowledged that he had relied on matters not appearing in record of hearing at which hearing officer had concluded that employee was innocent of charge, director's action violated general proposition that it is not proper for an administrative agency to base an adjudicatory decision on evidence or information outside the record, where right to a hearing exists. Simpson v Wolansky, 38 N.Y.2d 391, 380 N.Y.S.2d 630, 343 N.E.2d 274, 1975 N.Y. LEXIS 2359 (N.Y. 1975).

Although it was not necessary that director of school for mentally retarded personally conduct hearing on charge that permanent employee at school had been guilty of misconduct, it was essential that any determination as to misconduct and penalty be made by the director, as that function may not be delegated. Simpson v Wolansky, 38 N.Y.2d 391, 380 N.Y.S.2d 630, 343 N.E.2d 274, 1975 N.Y. LEXIS 2359 (N.Y. 1975).

Employee of state facility for mentally retarded problem children was properly dismissed after striking several children. Merchant v New York State Dep't of Mental Hygiene, 41 A.D.2d 588, 340 N.Y.S.2d 214, 1973 N.Y. App. Div. LEXIS 5298 (N.Y. App. Div. 4th Dep't 1973).

III. UNDER EARLIER LAWS

3. Under former § 33

Application to compel father to support insane son in state hospital, as required by Men. Hyg. Law, § 128, and Code of Crim. Proc., §§ 914 and 915, must be brought in name of treasurer of institution where person confined rather than in name of superintendent and this procedure is not changed by Men. Hyg. L. § 33 or 38. In re Brinkler, 33 N.Y.S.2d 778, 1942 N.Y. Misc. LEXIS 1429 (N.Y. Sup. Ct. 1942).

4. Under former § 34; generally

The report of injury required by sub 9 of this section as required of the director of a state institution by sub 9 of this section was not admissible into evidence in the trial of a case of a claimant injured while an inmate of a state hospital. Cox v State, 282 A.D. 815, 122 N.Y.S.2d 589, 1953 N.Y. App. Div. LEXIS 5006 (N.Y. App. Div.), modified, 282 A.D. 912, 124 N.Y.S.2d 917, 1953 N.Y. App. Div. LEXIS 5388 (N.Y. App. Div. 1953).

Under doctrine of state immunity for alleged injuries arising out of governmental functions or administrative decisions, claimant who was confined for 28 ½ years in state facility for criminally insane with little or no attention or medical consultation stated no cause of action for false imprisonment or involuntary servitude where there was no express or implied allegation that court orders directing claimant's confinement were invalid on their face or that court lacked in personam jurisdiction, and where claimant failed to allege that tasks assigned him during confinement were not reasonably related to his rehabilitation, or that said labors were involuntary. Ferrucci v State, 42 A.D.2d 359, 348 N.Y.S.2d 236, 1973 N.Y. App. Div. LEXIS 3309 (N.Y. App. Div. 3d Dep't 1973), aff'd, 34 N.Y.2d 881, 359 N.Y.S.2d 279, 316 N.E.2d 715, 1974 N.Y. LEXIS 1476 (N.Y. 1974).

The six-year Statute of Limitations (Civ. Prac. Act, § 48, subd. 2) in respect to action based upon liability created by statute was applicable in common-law action for damages against superintendent of mental institution for violation of this section, but did not bar such action where action was timely commenced, taking date of its accrual as time when superintendent released letter containing plaintiff's case record. Munzer v Blaisdell, 49 N.Y.S.2d 915, 183 Misc. 773, 1944 N.Y. Misc. LEXIS 2235 (N.Y. Sup. Ct. 1944), aff'd, 269 A.D. 970, 58 N.Y.S.2d 359, 1945 N.Y. App. Div. LEXIS 4798 (N.Y. App. Div. 1st Dep't 1945).

A state hospital may not be required upon application for production of records pursuant to this section to make or certify copies of the records since such records may be rendered available only under close supervision of the court. Greff v Havens, 66 N.Y.S.2d 124, 186 Misc. 914, 1946 N.Y. Misc. LEXIS 2999 (N.Y. Sup. Ct. 1946).

An order of examination and discovery before trial is such an order of a court of record as is contemplated by this section. Scolavino v State, 62 N.Y.S.2d 17, 187 Misc. 253, 1946 N.Y. Misc. LEXIS 2172 (N.Y. Ct. Cl.), modified, 271 A.D. 618, 67 N.Y.S.2d 202, 1946 N.Y. App. Div. LEXIS 2807 (N.Y. App. Div. 1946).

Zoning ordinance which authorized the granting by the Zoning Board of Appeals of revocable permit for the use of existing building in particular district as boarding house for the boarding of mental patients and parolees, is not invalid on ground it tends to abrogate or nullify provisions of the Statute. Kanasy v Nugent, 135 N.Y.S.2d 128, 206 Misc. 826, 1954 N.Y. Misc. LEXIS 2894 (N.Y. Sup. Ct. 1954), aff'd, 286 A.D. 1038, 145 N.Y.S.2d 638, 1955 N.Y. App. Div. LEXIS 5092 (N.Y. App. Div. 1955), app. denied, 1 A.D.2d 681, 148 N.Y.S.2d 455, 1955 N.Y. App. Div. LEXIS 3817 (N.Y. App. Div. 2d Dep't 1955).

The admission of incompetent evidence does not require the granting of a new trial unless the opponent of the evidence was prejudiced. Tinney v Neilson's Flowers, Inc., 61 Misc. 2d 717, 305 N.Y.S.2d 713, 1969 N.Y. Misc. LEXIS 1377 (N.Y. Sup. Ct. 1969), aff'd, 35 A.D.2d 532, 314 N.Y.S.2d 161, 1970 N.Y. App. Div. LEXIS 4190 (N.Y. App. Div. 2d Dep't 1970).

In an action for personal injuries, where the plaintiff was in a mental institution, a motion to have him produced for examination by the court to determine whether he was competent to testify in an examination before trial was denied in the court's discretion, where it was not shown that plaintiff claimed his confinement was due to the accident, and the examination might tend to retard his recovery. Sobel v Feldhamer, 137 N.Y.S.2d 187, 1954 N.Y. Misc. LEXIS 3608 (N.Y. Sup. Ct. 1954).

Mental hygiene commissioner may make available records of cases in hearings to determine claim of an employee of the department for occupational disease. 1941 N.Y. Op. Att'y Gen. No. 325, 1941 N.Y. AG LEXIS 166.

Order contemplated is judge's order which although obtained without notice, must not, with certain exceptions, be disregarded. 1944 N.Y. Op. Att'y Gen. No. 288, 1944 N.Y. AG LEXIS 134.

The directors of state institutions should furnish persons copies of commitments other than civil court commitments when they are required for the purpose of securing a writ. As to civil court commitments, the person requiring the same should be informed of the court granting the order of commitment and the date thereof and of the fact that such records are sealed pursuant to the Mental Hygiene Law. 1953 N.Y. Op. Att'y Gen. No. 164, 1953 N.Y. AG LEXIS 46.

5. —Applicable law

This subdivision does not apply to hospitals, which are not state institutions. Petition of Maryland Casualty Co., 274 A.D. 211, 80 N.Y.S.2d 181, 1948 N.Y. App. Div. LEXIS 3041 (N.Y. App. Div. 1948).

Former § 84, prior to amendment of 1944, was not applicable where applicant was inmate in school for mental defectives, because it expressly applied only to institution for the insane. Lee v State, 49 N.Y.S.2d 836, 183 Misc. 615, 1944 N.Y. Misc. LEXIS 2218 (N.Y. Ct. Cl. 1944).

The provisions of the section do not apply to privately owned institutions. In re Fitzgerald, 133 N.Y.S.2d 779, 1954 N.Y. Misc. LEXIS 2436 (N.Y. Sup. Ct. 1954).

Provisions of § 34, subd. 14, do not apply to Dannemora state hospital, because that hospital is not one of the "state institutions in the department" of mental hygiene, as defined by § 12. 1940 N.Y. Op. Att'y Gen. No. 368, 1940 N.Y. AG LEXIS 183.

6. —Appointment and removal of employees

Dismissal of assistant engineer at state hospital for neglect of duty, without formal hearing or trial, is proper, and, where employee had hearing and was given right to be represented by counsel, there appearing no evidence of bad faith in conduct of hearing, dismissal will be affirmed. Scott v Tobin, 219 A.D. 699, 220 N.Y.S. 924, 1927 N.Y. App. Div. LEXIS 11004 (N.Y. App. Div. 1927).

Under subd. 2 of this section superintendent of Pilgrim state hospital is empowered "for cause stated in writing, after opportunity to be heard" to "discharge any of such employees in his discretion." In re Application of Thiel, 243 A.D. 787, 278 N.Y.S. 127, 1935 N.Y. App. Div. LEXIS 8310 (N.Y. App. Div. 1935).

The acting senior director of a state institution is vested with all powers of "director" of such institution, including power to appoint and remove employees, in the absence of anyone appointed as director. Manzi v Kaplan, 35 Misc. 2d 793, 231 N.Y.S.2d 161, 1962 N.Y. Misc. LEXIS 3068 (N.Y. Sup. Ct. 1962), aff'd, 20 A.D.2d 791, 248 N.Y.S.2d 390, 1964 N.Y. App. Div. LEXIS 4271 (N.Y. App. Div. 2d Dep't 1964).

7. —Fire prevention powers

Director of State institution in Department of Mental Hygiene, may enter into reciprocal arrangement with town or village in which institution is located, for mutual assistance in fighting fires, and employees of institution, directed to fight fires off premises pursuant to such arrangement, would be covered by workmen's compensation; such direction should, however, be given to employees to whose title this duty would be appropriate. 1945 N.Y. Op. Att'y Gen. No. 246, 1945 N.Y. AG LEXIS 126.

8. —Police of institution

"Safety officer" employed by the New York State Department of Mental Hygiene violated Penal Law § 265.05(3) by possessing an

unlicensed firearm where there was no evidence that he was performing any duties in or arising out of the course of his employment at the time he was arrested in possession of the unlicensed firearm. People v Kortright, 62 Misc. 2d 141, 307 N.Y.S.2d 359, 1970 N.Y. Misc. LEXIS 1950 (N.Y. City Crim. Ct. 1970).

Duly appointed state hospital special policemen have all the powers of peace officers upon the grounds and premises of the institution and also upon the entire region within a mile radius of the grounds. 1954 N.Y. Op. Att'y Gen. No. 197, 1954 N.Y. AG LEXIS 60.

9. —Reporting of crimes

The requirement that the director of a department of Mental Hygiene hospital, school or institute notify the district attorney or other appropriate law enforcement official when it appears that a crime may have been committed is not limited to a crime involving patient abuse or mistreatment. 1975 NY Ops Atty Gen May 29 (Informal), 1975 N.Y. AG LEXIS 127.

10. —Family care and convalescent status of patients

It seems implied in subdivision 12 that a patient on convalescent status is not a patient at the institution, and the statutory relation between the state and the custodian of a patient on convalescent status does not impose a liability on the state for an act of negligence of the custodian not foreseeable by the state in the exercise of reasonable care. Hawley v State, 16 N.Y.2d 809, 263 N.Y.S.2d 6, 210 N.E.2d 358, 1965 N.Y. LEXIS 1240 (N.Y. 1965).

The Workmen's Compensation Law does not authorize limiting an award of death benefits to a dependent child, confined as an incompetent, to $500 so that payment might be made without appointment of a committee where other payments in that amount or less are contemplated. La Burt v Ankara Perfumes, 273 A.D. 836, 75 N.Y.S.2d 878, 1948 N.Y. App. Div. LEXIS 4848 (N.Y. App. Div. 1948).

Award of death benefits to a dependent incompetent adult daughter of a deceased employee is authorized to be paid to the director of the hospital for the benefit of the incompetent. La Burt v Ankara Perfumes, 274 A.D. 866, 81 N.Y.S.2d 795, 1948 N.Y. App. Div. LEXIS 3728 (N.Y. App. Div.), app. denied, 274 A.D. 949, 84 N.Y.S.2d 927 (N.Y. App. Div. 1948).

Family care provided for in subd 12 of above statute is intermediate step between confinement in institution and release on community status under § 132. Hawley v State, 22 A.D.2d 357, 256 N.Y.S.2d 269, 1965 N.Y. App. Div. LEXIS 5040 (N.Y. App. Div. 4th Dep't), rev'd, 16 N.Y.2d 809, 263 N.Y.S.2d 6, 210 N.E.2d 358, 1965 N.Y. LEXIS 1240 (N.Y. 1965).

Under subd. 12 of this section the state was liable for injuries sustained by an institutional inmate, 62 years of age, who was simple minded and placed with a farm family under the family care program where the farmer permitted him to work around the motor driven buzz saw used for cutting up firewood, and finally, at patient's request, to operate the saw from which he sustained the injuries in question. Hendler v State, 33 Misc. 2d 171, 225 N.Y.S.2d 878, 1962 N.Y. Misc. LEXIS 3654 (N.Y. Ct. Cl. 1962).

11. —Fingerprinting and photographing of patients

The statute relating to the fingerprinting and photographing of mental patients is constitutional. Winters v Miller, 306 F. Supp. 1158, 1969 U.S. Dist. LEXIS 8859 (E.D.N.Y. 1969), rev'd, 446 F.2d 65, 1971 U.S. App. LEXIS 9993 (2d Cir. N.Y. 1971).

12. —Funds and property of patients

Subd. 14 of this section does not expressly alter Civil Pr. Act, §§ 1356 and 1358, providing method for exercise of court's powers over person and property of incompetent. In re Rinn, 242 A.D. 523, 275 N.Y.S. 705, 1934 N.Y. App. Div. LEXIS 6114 (N.Y. App. Div. 1934).

Where a direction to pay moneys due an incompetent to the superintendent of a state hospital was not given by the Commissioner of Mental Hygiene pursuant to subd. 14 of this section the superintendent of the hospital may not receive the funds until a committee has been appointed. In re McGuinness, 264 A.D. 944, 36 N.Y.S.2d 273 (N.Y. App. Div. 1942), aff'd, 290 N.Y. 117, 48 N.E.2d 286, 290 N.Y. (N.Y.S.) 117, 1943 N.Y. LEXIS 1146 (N.Y. 1943).

Where the proceeds of an insurance policy on the life of a mother payable to her incompetent son were paid to the superintendent of a state hospital pursuant to subd. 14 of this section the amount thereof was not allowed as a credit against the claim of the state against the estate of the mother for care and maintenance of the son. In re Wright's Estate, 14 N.Y.S.2d 953, 172 Misc. 215, 1939 N.Y. Misc. LEXIS 2341 (N.Y. Sur. Ct. 1939).

Subdivision 14 of this section was intended to obviate the necessity for appointment of a committee for an incompetent where funds or other personal property, excepting jewelry, were due or belonging to a patient in a state institution, or where the balance remaining in the hands of a committee upon his discharge did not exceed the amount limited, but not to obviate necessity for appointment of a committee or continuance of a committee where future installments of income are payable to the incompetent in monthly installments. In re Arnold, 26 Misc. 2d 298, 203 N.Y.S.2d 335, 1960 N.Y. Misc. LEXIS 3083 (N.Y. Sup. Ct. 1960).

Mental Hygiene Law imposes an obligation on state agencies to conserve the rights and assets of those in its custody, and the reimbursement agent of a state institution is obligated to seek out sources of assets of its patients. Szostak v State, 51 Misc. 2d 739, 273 N.Y.S.2d 786, 1966 N.Y. Misc. LEXIS 1433 (N.Y. Ct. Cl. 1966), aff'd, 28 A.D.2d 1042, 284 N.Y.S.2d 31, 1967 N.Y. App. Div. LEXIS 3170 (N.Y. App. Div. 3d Dep't 1967).

Superintendent has discretionary power on authorization from commissioner to receive or obtain personal effects of inmate for whom no committee has been appointed, and to sell same for his benefit. 1943 N.Y. Op. Att'y Gen. No. 326, 1943 N.Y. AG LEXIS 163.

13. —Out-patient treatments

It is not permissible for commissioner of department of mental hygiene to direct superintendents of hospitals to establish out-patient clinics for the performance of spinal fluid examinations. 1940 N.Y. Op. Att'y Gen. No. 342, 1940 N.Y. AG LEXIS 162.

Treatments may be given on an out-patient basis to persons not committed, and payment may be received, but must be paid to state treasurer. 1943 N.Y. Op. Att'y Gen. No. 334.

14. —Records of patients

Where superintendent of mental institution has violated duty not to make case record of patient available except in accordance with statute, patient is entitled to maintain action for damages under common law since statute itself does not provide remedy. Munzer v Blaisdell, 49 N.Y.S.2d 915, 183 Misc. 773, 1944 N.Y. Misc. LEXIS 2235 (N.Y. Sup. Ct. 1944), aff'd, 269 A.D. 970, 58 N.Y.S.2d 359, 1945 N.Y. App. Div. LEXIS 4798 (N.Y. App. Div. 1st Dep't 1945).

Compliance with statutory provisions for waiver of privilege requires that the records of a deceased patient be produced on trial and any claim of privilege as to confidential communications or facts tending to disgrace the memory of the patient must be passed upon at the trial. Greff v Havens, 66 N.Y.S.2d 124, 186 Misc. 914, 1946 N.Y. Misc. LEXIS 2999 (N.Y. Sup. Ct. 1946).

In a death action wherein it was claimed that decedent was intoxicated at the time of the accident, a new trial was granted because of the admission of hospital records showing treatment of decedent for alcoholism, even though there was other evidence that decedent had a drinking problem. Tinney v Neilson's Flowers, Inc., 61 Misc. 2d 717, 305 N.Y.S.2d 713, 1969 N.Y. Misc. LEXIS 1377 (N.Y. Sup. Ct. 1969), aff'd, 35 A.D.2d 532, 314 N.Y.S.2d 161, 1970 N.Y. App. Div. LEXIS 4190 (N.Y. App. Div. 2d Dep't 1970).

As to information which would tend to disgrace the memory of the decedent there can be neither an express waiver nor a waiver by failure to object. Tinney v Neilson's Flowers, Inc., 61 Misc. 2d 717, 305 N.Y.S.2d 713, 1969 N.Y. Misc. LEXIS 1377 (N.Y. Sup. Ct. 1969), aff'd, 35 A.D.2d 532, 314 N.Y.S.2d 161, 1970 N.Y. App. Div. LEXIS 4190 (N.Y. App. Div. 2d Dep't 1970).

15. —Records of patients: disclosure permitted

An order for inspection of a decedent's hospital record may be permitted under this section although such record may contain privileged and confidential communications to a doctor, the disclosure of which is barred by §§ 352 and 354 of the Civil Practice

Act, and which must be considered in applying this section. In re Warrington, 303 N.Y. 129, 100 N.E.2d 170, 303 N.Y. (N.Y.S.) 129, 1951 N.Y. LEXIS 696 (N.Y. 1951).

Where an incompetent claims against the state for injury while confined in a state mental institution, the privilege attached to communications between patient and physician does not apply to inspection of hospital records under §§ 20 and 34(9). In re Warrington, 303 N.Y. 129, 100 N.E.2d 170, 303 N.Y. (N.Y.S.) 129, 1951 N.Y. LEXIS 696 (N.Y. 1951).

An application to inspect and copy the state hospital records of an incompetent patient, who allegedly was injured as a result of a fall in the hospital, made by her committee, should be granted since the filing of such a verified application indicates that the privilege embodied in §§ 352 and 354 of the Civil Practice Act was waived by the patient, since this privilege was intended for the protection of the patient and no one else. Application of Warrington, 277 A.D. 1076, 100 N.Y.S.2d 655, 1950 N.Y. App. Div. LEXIS 4530 (N.Y. App. Div. 1950), aff'd, 303 N.Y. 129, 100 N.E.2d 170, 303 N.Y. (N.Y.S.) 129, 1951 N.Y. LEXIS 696 (N.Y. 1951).

An order of the Court of Claims allowing the committee of an incompetent person to inspect a state hospital's records to ascertain the facts of an alleged accident, on the hospital premises, whereby the incompetent sustained personal injuries so that the committee could determine whether a cause of action existed against the state should not have prohibited the committee from making notes or copies of the records. Civil Practice Act § 342 provides for such rights and the omission of similar provisions to implement the right of examination under this section was not significant. Application of Bradshaw, 5 A.D.2d 511, 173 N.Y.S.2d 406, 1958 N.Y. App. Div. LEXIS 6144 (N.Y. App. Div. 3d Dep't 1958).

In a negligence action where the plaintiff put in issue his mental and psychological condition following the accident, and his attribution of those conditions to the accident, he was entitled to inspect and examine records of a state hospital pursuant to Mental Hygiene Law §§ 20 and 34, inasmuch as he had waived the privilege against disclosure. Mancinelli v Texas Eastern Transmission Corp., 34 A.D.2d 535, 308 N.Y.S.2d 882, 1970 N.Y. App. Div. LEXIS 5258 (N.Y. App. Div. 1st Dep't 1970).

Judge of a court of claims may order that the records of a state hospital be made accessible for inspection by legal representative of former inmate of hospital. Buchalter v State, 15 N.Y.S.2d 244, 172 Misc. 420, 1939 N.Y. Misc. LEXIS 2376 (N.Y. Ct. Cl. 1939); Manzi v State, 23 N.Y.S.2d 21, 1940 N.Y. Misc. LEXIS 2271 (N.Y. Ct. Cl. 1940); Lee v State, 49 N.Y.S.2d 836, 183 Misc. 615, 1944 N.Y. Misc. LEXIS 2218 (N.Y. Ct. Cl. 1944).

Hospital records of inmate of state institution for care of mentally ill enjoy no such absolute privilege against disclosure that only patient can waive it. Scolavino v State, 62 N.Y.S.2d 17, 187 Misc. 253, 1946 N.Y. Misc. LEXIS 2172 (N.Y. Ct. Cl.), modified, 271 A.D. 618, 67 N.Y.S.2d 202, 1946 N.Y. App. Div. LEXIS 2807 (N.Y. App. Div. 1946).

Sections 20 and 34 sub 9 of the Mental Hygiene Law create an exception to the privilege of physician and patient, and allow a disclosure, on the consent of the commissioner or upon order of a court of record, of a state hospital's records relating to an incompetent decedent, for the benefit of the special guardian of the decedent's surviving kin. In re Grabau's Will, 85 N.Y.S.2d 748, 193 Misc. 859, 1948 N.Y. Misc. LEXIS 3856 (N.Y. Sur. Ct. 1948).

Case records are privileged but may be ordered made accessible to a claimant acting as the committee for an injured inmate in an examination before trial but the examination of records of other persons or of witnesses in connection therewith will be denied. McGrath v State, 104 N.Y.S.2d 882, 200 Misc. 165, 1950 N.Y. Misc. LEXIS 2511 (N.Y. Ct. Cl. 1950).

In a proceeding by 14-year-old mental inmate to recover damages from the state wherein the Court of Claims appointed father of infant as guardian ad litem, the court exercised its legal discretion as a court of record in the interest of justice and granted motion by guardian for examination of hospital records, though the state contended that the guardian was not a proper party to the application. Kossar v State, 13 Misc. 2d 941, 179 N.Y.S.2d 71, 1958 N.Y. Misc. LEXIS 2760 (N.Y. Ct. Cl. 1958).

Where claimants seeks order for production of hospital records as to another person, the records shall be produced for use in accordance with CPA § 296. Torres v State, 14 Misc. 2d 246, 179 N.Y.S.2d 201, 1958 N.Y. Misc. LEXIS 2748 (N.Y. Ct. Cl. 1958).

In connection with a will contest involving mental competency of the testator, state hospital records with respect to him were ordered produced, regardless of their ultimate admissibility, notwithstanding he was admitted to the hospital in 1939 and the will was not executed until 1961. In re Will of Reardon, 36 Misc. 2d 307, 232 N.Y.S.2d 581, 1962 N.Y. Misc. LEXIS 2512 (N.Y. Sur. Ct. 1962).

Evidence of chronic alcoholism in a form not protected by CPLR 4504(c) is admissible notwithstanding that it disgraces memory. Tinney v Neilson's Flowers, Inc., 61 Misc. 2d 717, 305 N.Y.S.2d 713, 1969 N.Y. Misc. LEXIS 1377 (N.Y. Sup. Ct. 1969), aff'd, 35 A.D.2d 532, 314 N.Y.S.2d 161, 1970 N.Y. App. Div. LEXIS 4190 (N.Y. App. Div. 2d Dep't 1970).

The attorney for a patient is not entitled to appointment of an impartial psychiatrist to examine the patient for the purpose of testifying before the commission appointed under § 85 but he is entitled to an order under § 34 permitting examination of records. In re Sullivan, 85 N.Y.S.2d 251, 1948 N.Y. Misc. LEXIS 3755 (N.Y. Sup. Ct. 1948).

16. —Records of patients: disclosure not permitted

The records of a state hospital where decedent died, produced on the Surrogate's order made under this section, were properly excluded from evidence in a will contest involving mental capacity. Parts of the hospital records were the result of "confidential communications" and, therefore, the doctors could not have testified as to such matters had they been called to the stand. In re Coddington's Will, 307 N.Y. 181, 120 N.E.2d 777, 307 N.Y. (N.Y.S.) 181, 1954 N.Y. LEXIS 991 (N.Y. 1954).

This section does not render the privilege given communications between physicians and patients by § 352 of the Civil Practice Act inapplicable in the case of state institutions. Westphal v State, 79 N.Y.S.2d 634, 191 Misc. 688, 1948 N.Y. Misc. LEXIS 2447 (N.Y. Ct. Cl. 1948).

This section was not intended to vitiate §§ 352 and 354 of the Civil Practice Act relating to confidential communications. Kinbacher v Schneider, 89 N.Y.S.2d 350, 194 Misc. 969, 1949 N.Y. Misc. LEXIS 2272 (N.Y. Sup. Ct. 1949).

This section will not be deemed to create an exception to the privilege granted hospital records under § 352 of the Civil Practice Act. Jaffe v New York, 94 N.Y.S.2d 60, 196 Misc. 710, 1949 N.Y. Misc. LEXIS 3041 (N.Y. Sup. Ct. 1949).

Where a wife was appointed guardian ad litem of an inmate of a state mental hospital to prosecute a claim for injuries received from another patient, she could not waive the privilege from disclosure attaching to hospital records, and her application for inspection was denied; the inmate himself should make the application, or if unable, his committee should do so. Application of Patarino, 142 N.Y.S.2d 891, 208 Misc. 16, 1955 N.Y. Misc. LEXIS 3575 (N.Y. Ct. Cl. 1955).

The application of the employer's insurance carrier for an order authorizing the physical examination of a claimant for workmen's compensation, who was a patient in a state hospital for the insane, and the production of hospital records, was denied where it was not shown that a committee had been appointed. In re Application of Lanham, 1 Misc. 2d 264, 144 N.Y.S.2d 401, 1955 N.Y. Misc. LEXIS 2339 (N.Y. Sup. Ct. 1955).

In a proceeding by infant claimant to recover damages for assault by fellow inmate at state hospital, the claimant was entitled to examination of records pertaining to fellow inmate as to observations made of the activities of fellow inmate, his movements and what protection and custodial care he was given both with respect to himself and to his relations with other inmates, but was not entitled to examination of entries, which referred to his propensities and diagnosis of his conditions by hospital doctors, since their opinion as to his propensities was of a confidential nature. Boykin v State, 13 Misc. 2d 1037, 179 N.Y.S.2d 197, 1958 N.Y. Misc. LEXIS 3765 (N.Y. Ct. Cl.), aff'd, 7 A.D.2d 819, 180 N.Y.S.2d 884, 1958 N.Y. App. Div. LEXIS 3753 (N.Y. App. Div. 3d Dep't 1958).

In connection with a claim against the State for damages sustained by claimant as the result of an assault by a person allegedly improperly or negligently released from a state mental institution, claimant is not entitled to an order for inspection of the institution's records concerning the released patient by motion pursuant to §§ 20 and 34 subd. 9 of the Mental Hygiene Law, but could request their production under § 296 of the Civil Practice Act. Peters v State, 32 Misc. 2d 407, 224 N.Y.S.2d 194, 1962 N.Y. Misc. LEXIS 3937 (N.Y. Ct. Cl. 1962).

A death certificate, though admissible to prove the fact of death, is as to cause of death subject to the same nonwaivable privilege against disgracing the memory of decedent as are hospital records. Tinney v Neilson's Flowers, Inc., 61 Misc. 2d 717, 305 N.Y.S.2d 713, 1969 N.Y. Misc. LEXIS 1377 (N.Y. Sup. Ct. 1969), aff'd, 35 A.D.2d 532, 314 N.Y.S.2d 161, 1970 N.Y. App. Div. LEXIS 4190 (N.Y. App. Div. 2d Dep't 1970).

Because the privilege accorded by CPLR 4504 to information disgracing decedent's memory cannot be waived, neither the bringing of a personal injury action nor the relevance of alcoholism to the issue of damages makes privileged hospital records admissible in proof of alcoholism. Tinney v Neilson's Flowers, Inc., 61 Misc. 2d 717, 305 N.Y.S.2d 713, 1969 N.Y. Misc. LEXIS 1377 (N.Y. Sup. Ct. 1969), aff'd, 35 A.D.2d 532, 314 N.Y.S.2d 161, 1970 N.Y. App. Div. LEXIS 4190 (N.Y. App. Div. 2d Dep't 1970).

Section 352 of the Civil Practice Act and §§ 20, 32 and 84 of this law indicate the intention of the Legislature to keep and protect the case records of a patient in a state hospital as a privileged communication and available only when the provisions of the statute as to release are met. No exception is made in favor of a member of the Board of Visitors and the mere coincidence that the visitor happens to be a physician makes no difference. Munzer v State, 41 N.Y.S.2d 98, 1943 N.Y. Misc. LEXIS 1792 (N.Y. Ct. Cl. 1943).

If medical records of an inmate of a state hospital, ordered produced before a referee in workmen's compensation, are to be introduced in evidence, there must be compliance with the Civil Practice Act. A statement in the moving papers that the attorney for the committee of the incompetent has agreed to waive any privilege is not sufficient. The waiver must be made by the appropriate person in open court upon the trial of the proceeding. Petition of Maryland Casualty Co., 78 N.Y.S.2d 651, 1947 N.Y. Misc. LEXIS 3760 (N.Y. Sup. Ct. 1947).

A motion by the mother of an alleged incompetent to inspect hospital records will be denied since relief may be afforded only to a legal representative of the patient entitled to waive the statutory ban of patient and physician privilege. Application of Bryant, 105 N.Y.S.2d 446, 1950 N.Y. Misc. LEXIS 2519 (N.Y. Ct. Cl. 1950).

In an action for injuries sustained in an automobile accident, where plaintiff had since the accident been a patient at various mental institutions, a motion seeking to examine the records of his present hospital was denied, such records being confidential communications. Sobel v Feldhamer, 137 N.Y.S.2d 187, 1954 N.Y. Misc. LEXIS 3608 (N.Y. Sup. Ct. 1954).

A petition on behalf of the state insurance fund for an order requiring the Institution for Male Defective Delinquents at Napanoch to produce the records of a former inmate of the institution who was a claimant before the Workmen's Compensation Board was denied because this section was not applicable. Since the institution was not in the Department of Health, but was under the jurisdiction of the Department of Correction, nothing in the Correction Law authorized or required such an order. In re Klein, 138 N.Y.S.2d 611, 1955 N.Y. Misc. LEXIS 2649 (N.Y. Sup. Ct. 1955).

Referee in workmen's compensation lacks authority to subpoena records of patients. 1946 N.Y. Op. Att'y Gen. No. 270, 1946 N.Y. AG LEXIS 125.

Agency Opinions

Analysis

I. UNDER EARLIER LAWS

1. Under former § 34; generally
2. —Police of institution

I. UNDER EARLIER LAWS

1. Under former § 34; generally

2. —Police of institution

While special policemen at state institutions are not listed as peace officers in § 154 of code of criminal procedure, under subd 4 they possess all powers of peace officers upon grounds of such institutions, and since they are employed by state, justice's fees in arrests made by them for speeding on institution grounds should be paid by comptroller. 1930 N.Y. Op. Att'y Gen. No. 467.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Commissioner's power to transfer and discharge patients, § 29.11.

Discharge and conditional release of patients to the community, § 29.15.

Non-competitive class, CLS Civ S § 42.

Licensure and employment of persons previously convicted of one or more criminal offenses, CLS Correc §§ 750 et seq.

Responsibility of the department for recipients in family care, CLS Soc Serv § 138-a.

Indebtedness not to be contracted without appropriation, CLS St Fin § 41.

Specific appropriations limited as to use; certain appropriations to be specific, CLS St Fin § 43.

Deposit of moneys by state officers, state institutions and charitable and benevolent institutions, CLS St Fin § 106.

Itemized accounts of public officers, CLS St Fin § 113.

Rendition of accounts, CLS St Fin § 116.

Statements of accounts not rendered, CLS St Fin § 117.

Statements of accounts rendered, CLS St Fin § 118.

Statement of joint accounts, CLS St Fin § 119.

Definitions, CLS SCPA § 103.

Service of process, CLS SCPA § 307.

Designee for person under disability, CLS SCPA § 311.

Subpoenas, oaths and affirmations, CLS CPLR 2301 et seq.

Oaths and affirmations, CLS CPLR 2309.

Jurisprudences:

65A NY Jur 2d Hospitals and Related Health Care Facilities §§ 101, 225.

66 NY Jur 2d Infants and Other Persons Under Legal Disability §§ 60, 63, 70.

§ 7.27. Facility services

(a) Chapels. The commissioner may permit any religious or missionary corporation or society or combination of such corporations and societies to erect a building on the grounds of any in-patient facility in the office of mental health for the holding of religious service, to be used exclusively for the benefit of the patients and employees of such facility, subject to such conditions as may be imposed by the commissioner.

(b) Fire mutual aid. In cooperation with the development and operation of plans for mutual aid in cases of fire and other public emergencies, the director of an in-patient facility in the office of mental health, with the approval of the commissioner of mental health, may authorize the fire department of the facility to furnish aid to such territory surrounding the facility as may be practical in cases of fire and such emergencies, having due regard to the safety of the patients and property of the facility and to engage in practice and training programs in connection with the development and operation of such mutual aid plans.

(c) Community stores. The commissioner may authorize the director of any facility in the office of mental health to operate a community store or to

lease space in any of its buildings not inconsistent with the requirements of the facility for the operation of a community store for the use and benefit of the patients, visitors, and personnel of such facility. The moneys received by the director of such facility under or pursuant to any such operation shall be deposited in a special fund to be known as the community store fund and shall be used for the general purposes of the facility, subject to the provisions of section fifty-three of the state finance law.

(d) Laboratory services. Subject to the regulations of the commissioner, the director of a facility in the office of mental health may agree to make the laboratory service of such facility available to adjacent local governments and may receive, apply, and spend money for the extension of laboratory service according to the terms of the agreement as approved by such commissioner.

(e) Special employment programs. The director of any facility operated by the office of mental health may purchase goods and services produced by special employment programs, sheltered workshop programs or supported work programs, which are operated by any facility within such office, subject to the provisions of section one hundred seventy-five-c of the state finance law.

HISTORY:

Add, L 1977, ch 978, § 4, eff April 1, 1978; amd, L 1987, ch 800, § 1, eff Oct 6, 1987.

Notes to Decisions

1. Under former § 12

Manager of state hospital community store, who had resigned civil service position with the hospital to take the managership, was not covered by civil service and thus was not entitled to a hearing prior to termination by hospital director who rather than leasing out the store operated it himself. O'Shea v Zwerling, 72 Misc. 2d 163, 338 N.Y.S.2d 846, 1969 N.Y. Misc. LEXIS 983 (N.Y. Sup. Ct. 1969), aff'd, 40 A.D.2d 628, 335 N.Y.S.2d 926, 1972 N.Y. App. Div. LEXIS 5784 (N.Y. App. Div. 1st Dep't 1972).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Special emergency appropriations, CLS St Fin § 53.

Jurisprudences:

65A NY Jur 2d Hospitals and Related Health Care Facilities §§ 227, 228.

66 NY Jur 2d Infants and Other Persons Under Legal Disability § 63.

TITLE C Developmental Disabilities Act

Article 13. Office For People With Developmental Disabilities

Section
13.27. Facility services

Article 16. Regulation and Quality of Services

16.37. Autism spectrum disorder booklet; first responders

HISTORY:

Add, L 1977, ch 978, § 11, eff April 1, 1978; amd, L 2011, ch 37, § 6–a, eff June 1, 2011.

ARTICLE 13 Office For People With Developmental Disabilities

§ 13.27. Facility services

(a) Chapels. The commissioner may permit any religious or missionary corporation or society or combination of such corporations and societies to erect a building on the grounds of any facility in the office for the holding of religious service, to be used exclusively for the benefit of the patients and employees of such facility, subject to such conditions as may be imposed by the commissioner.

(b) Fire mutual aid. In cooperation with the development and operation of plans for mutual aid in cases of fire and other public emergencies, the director of a facility in the office for people with developmental disabilities, with the approval of the commissioner, may authorize the fire department of the facility to furnish aid to such territory surrounding the facility as may be practical in cases of fire and such emergencies, having due regard to the safety of the patients and property of the facility and to engage in practice and training programs in connection with the development and operation of such mutual aid plans.

(c) Community stores. The commissioner may authorize the director of any facility under his jurisdiction to operate a community store or to lease space in any of its buildings not inconsistent with the requirements of the facility for the operation of a community store for the use and benefit of the patients, visitors, and personnel of such facility. The moneys received by the director of such facility under or pursuant to any such operation shall be deposited in a special fund to be known as the community store fund and shall be used for the general purposes of the facility, subject to the provisions of section fifty-three of the state finance law.

(d) Laboratory services. Subject to the commissioner's regulations, the director may agree to make the laboratory service of a facility in the office for people with developmental disabilities available to adjacent local governments and may receive, apply, and spend money for the extension of laboratory service according to the terms of the agreement as approved by the commissioner.

HISTORY:

Add, L 1977, ch 978, § 11, eff April 1, 1978; amd, L 2010, ch 168, § 19, eff July 13, 2010.

Prior Law: Former § 13.27, add, L 1972, ch 251, deriving from § 229; repealed, L 1973, ch 68, § 1, eff April 1, 1973.

Notes to Decisions

2. Under former § 12

Manager of state hospital community store, who had resigned civil service position with the hospital to take the managership, was not covered by civil service and thus was not entitled to a hearing prior to termination by hospital director who rather than leasing out the store operated it himself. O'Shea v Zwerling, 72 Misc. 2d 163, 338 N.Y.S.2d 846, 1969 N.Y. Misc. LEXIS 983 (N.Y. Sup. Ct. 1969), aff'd, 40 A.D.2d 628, 335 N.Y.S.2d 926, 1972 N.Y. App. Div. LEXIS 5784 (N.Y. App. Div. 1st Dep't 1972).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Special emergency appropriations, CLS St Fin § 53.

Jurisprudences:

65A NY Jur 2d Hospitals and Related Health Care Facilities §§ 227, 228.

66 NY Jur 2d Infants and Other Persons Under Legal Disability § 70.

ARTICLE 16 Regulation and Quality of Services

HISTORY:

Add, L 1983, ch 786, § 1, eff Oct 28, 1983.

§ 16.37. Autism spectrum disorder booklet; first responders

The commissioner, in consultation with other appropriate agency representatives, shall prepare for publication and cause to be distributed to first responders, including emergency medical services personnel, firefighters and police officers, a booklet containing information on recognizing the behavioral symptoms and characteristics of children and adults with autism spectrum disorders. Such booklet also shall contain information on additional resources and any other information deemed necessary and appropriate by the commissioner.

HISTORY:

Add, L 2007, ch 475, § 2, eff Aug 1, 2007.

Editor's Notes: Laws 2007, ch 475, § 1, eff Aug 1, 2007, provides as follows:

Section 1. Legislative intent. The legislature finds that, according to the federal Centers for Disease Control and Prevention, one out of every 150 children in the United States has an autism spectrum disorder. The legislature therefore finds that emergency medical services personnel, firefighters and police officers may unexpectedly encounter or be asked to locate a person diagnosed with an autism spectrum disorder. Given the high numbers of individuals affected by autism spectrum disorders, the legislature declares that it is altogether fitting and proper to ensure that first responders, at a minimum, are provided information on recognizing the behavioral symptoms and characteristics of a person with an autism spectrum disorder and on basic response techniques.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

65A NY Jur 2d Hospitals and Related Health Care Facilities §§ 7, 217–219, 222, 238, 239, 241, 242.

66 NY Jur 2d Infants and Other Persons Under Legal Disability § 66.

MILITARY LAW

Article
11. Privileges, Prohibitions and Penalties

ARTICLE 11 Privileges, Prohibitions and Penalties

Section
236. Right of way

HISTORY:
Add, L 1953, ch 420, eff Apr 2, 1953.

§ 236. Right of way

The commanding officer of any unit of the organized militia parading or performing any military duty in any street or highway, may require any or all persons in such street or highway to yield the right of way to such militia, provided the carriage of the United States mail, the legitimate functions of the police and the progress and operations of the hospital ambulances, fire engines, fire departments and apparatus of the insurance patrol shall not be interfered with thereby. All others who shall hinder, delay, or obstruct any unit of the organized militia wherever parading or performing any military duty, or who shall attempt so to do, shall be guilty of a misdemeanor.

HISTORY:
Add, L 1953, ch 420, eff Apr 2, 1953.

Derivation Notes: Derived from former § 236, add, L 1909, ch 41, repealed, L 1953, ch 420.

Revision Notes: [1953] This section derives from and is the same as former section 236 of the Military Law.

MUNICIPAL HOME RULE LAW

Article
4. Powers of Counties and Cities to Adopt Charters

HISTORY:
Add, L 1963, ch 843, eff Jan 1, 1964.

ARTICLE 4 Powers of Counties and Cities to Adopt Charters

Part 1. The County Charter Law

Section
33-a. Transfer of functions or duties of local governments and districts

HISTORY:
Add, L 1963, ch 843, eff Jan 1, 1964.

PART 1 The County Charter Law

HISTORY:
Add, L 1963, ch 843, eff Jan 1, 1964.

§ 33-a. Transfer of functions or duties of local governments and districts

1. Subject to restrictions in the constitution, in this article or in any other applicable law, the board of supervisors of any county may, by local law, transfer functions or duties of the county or of the cities, towns, villages, districts or other units of government wholly contained in such county to each other, or for the abolition of one or more units of government, including but not limited to offices, departments or agencies thereof, when the level and quality of ongoing services of all their functions or duties are transferred.

2. Any such local law, or an amendment or repeal of one or more provisions thereof which would have the effect of transferring or abolishing a function or duty of the county or of the cities, towns, villages, districts or other units of government wholly contained in the county, shall not become operative unless and until it is approved at a general election or at a special election, held in the county by receiving a majority of the total votes cast thereon: (a) in the area of the county outside of cities and (b) in the area of cities of the county, if any, considered as one unit, and if it provides for the transfer of any function or duty to or from any village or for the abolition of any office, department, agency or unit of government of a village wholly contained in the county, it shall not take effect unless it shall also receive a majority of all the votes cast thereon in all the villages so affected considered as one unit. Such a local law, amendment or repeal thereof, shall provide for its submission to the electors of the county at the next general election or at a special election, occurring not less than sixty days after the adoption thereof by the board of supervisors.

HISTORY:
Add, L 1970, ch 708, § 1, eff May 12, 1970; amd, L 2009, ch 74, § 3, eff March 21, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

§ 18. Savings clause. Notwithstanding the repeal or amendment of any law by this act, nothing in this act shall be construed to impair the consolidation or dissolution of any local government entity pursuant to any such repealed or amended law if there was commenced in or for such local government entity prior to the effective date of this act a consolidation or dissolution proceeding pursuant to such law, in which event the provisions of such former law shall govern such proceeding as though such former law had not been repealed hereby.

Amendment Notes:

2009. Chapter 74, § 3 amended:

Sub 1, by deleting "offices, departments or agencies of such units of government when all their functions or duties are so transferred".

Notes to Decisions

§§ 33 and 33-a of the Municipal Home Rule Law make charter amendments and local laws transferring functions subject to the restrictions in the Constitution, in Article 4 of such law, or in any other applicable law. Smithtown v Howell, 31 N.Y.2d 365, 339 N.Y.S.2d 949, 292 N.E.2d 10, 1972 N.Y. LEXIS 944 (N.Y. 1972).

CLS Tax § 1210-A and Suffolk County Resolution No. 823 of 1984, which permit funding of sewer district through countywide tax, were not improperly enacted merely because they became operative without referendum pursuant to NY Const Art IX § 1 and CLS Mun H R § 33-a. Lang v Cohalan, 127 A.D.2d 17, 513 N.Y.S.2d 726, 1987 N.Y. App. Div. LEXIS 41329 (N.Y. App. Div. 2d Dep't), app. dismissed, 70 N.Y.2d 744, 519 N.Y.S.2d 966, 514 N.E.2d 386, 1987 N.Y. LEXIS 18594 (N.Y. 1987).

A county may by local law adopt a fire prevention code to be applicable to all cities, towns and villages within the county, except that such code may not supersede similar codes adopted by local governing boards. A charter county may by local law transfer the power to enact such a code from municipalities therein to the county governing body. 1975 Ops St Compt File #485.

Cities, towns, and villages are prohibited from transferring the assessing function to a county unless such function is transferred by adoption or amendment of a county charter subject to referendum, including the "split referendum" requirement where transfer from cities or villages, as well as towns, is involved. 3 Op Counsel, SBEA #79.

Four-month limitation period applied to claims challenging a local agency's formation based on allegations of inadequate environmental review and failure to conduct a referendum. Village of Islandia v County of Suffolk, 162 A.D.3d 715, 79 N.Y.S.3d 188, 2018 N.Y. App. Div. LEXIS 3981 (N.Y. App. Div. 2d Dep't 2018).

Agency Opinions

Counties having alternate forms of county government may, by local law subject to mandatory referendum, transfer functions or duties of the county or of the cities, towns, villages, districts or other units of government wholly contained in such county, to each other. 1971 NY Ops Atty Gen Oct 14.

The transfer of the public health functions of a county to any of its cities, towns, villages, districts or other units of government wholly contained in such county must be by local law subject to mandatory referendum as provided in Municipal Home Rule Law, § 33-a and subject also to the notice of hearing provisions of Public Health Law, § 355. 1971 NY Ops Atty Gen Dec 16.

A charter county by charter amendment alone can transfer the function of administration and operation of its jail from the sheriff to a county commissioner of corrections. 1979 NY Ops Atty Gen August 16 (informal).

If a non-charter county passes a local law pursuant to the authority of County Law § 575 and Municipal Home Rule Law § 10 to change from an elective county treasurer to an appointive county comptroller, the mandatory referendum provision required by County Law § 575 is to be conducted in all respects under the provisions of Municipal Home Rule Law § 23; a simple majority of the votes cast on the proposition in the area of the whole county is sufficient for passing. 1979 NY Ops Atty Gen June 26. (Informal).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 32.

Referendum, CLS County §§ 100–104.

NAVIGATION LAW

Article
12. Oil Spill Prevention, Control, and Compensation

HISTORY:
Add, L 1941, ch 941, eff July 1, 1941.

ARTICLE 12 Oil Spill Prevention, Control, and Compensation

Part THREE. New York Environmental Protection and Spill Compensation Fund; Liability; Third Party Compensation

Section
181. Liability

HISTORY:
Add, L 1977, ch 845, eff April 1, 1978.

PART THREE New York Environmental Protection and Spill Compensation Fund; Liability; Third Party Compensation

HISTORY:
Add, L 1977, ch 845, § 2, eff April 1, 1978.

§ 181. Liability

1. Any person who has discharged petroleum shall be strictly liable, without regard to fault, for all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained, as defined in this section. In addition to cleanup and removal costs and damages, any such person who is notified of such release and who did not undertake relocation of persons residing in the area of the discharge in accordance with paragraph (c) of subdivision seven of section one hundred seventy-six of this article, shall be liable to the fund for an amount equal to two times the actual and necessary expense incurred by the fund for such relocation pursuant to section one hundred seventy-seven-a of this article.

2. The fund shall be strictly liable, without regard to fault, for all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained, including, but not limited to:

(a) The cost of restoring, repairing, or replacing any real or personal property damaged or destroyed by a discharge, any income lost from the time such property is damaged to the time such property is restored, repaired or replaced, any reduction in value of such property caused by such discharge by comparison with its value prior thereto;

(b) The cost of restoration and replacement, where possible, of any natural resource damaged or destroyed by a discharge;

(c) Loss of income or impairment of earning capacity due to damage to real or personal property, including natural resources destroyed or damaged by a discharge; provided that such loss or impairment exceeds ten percent of the amount which claimant derives, based upon income or business records, exclusive of other sources of income, from activities related to the particular real or personal property or natural resources damaged or destroyed by such discharge during the week, month or year for which the claim is filed;

(d) Loss of tax revenue by the state or local governments for a period of one year due to damage to real or personal property proximately resulting from a discharge;

(e) Interest on loans obtained or other obligations incurred by a claimant for the purpose of ameliorating the adverse effects of a discharge pending the payment of a claim in full as provided by this article.

3. (a) The owner or operator of a major facility or vessel which has discharged petroleum shall be strictly liable, without regard to fault, subject to the defenses enumerated in subdivision four of this section, for all cleanup and removal costs and all direct and indirect damages paid by the fund. However, the cleanup and removal costs and direct and indirect damages which may be recovered by the fund with respect to each incident shall not exceed:

(i) for a tank vessel, the greater of:

(1) one thousand two hundred dollars per gross ton; or

(2)(A) in the case of a vessel greater than three thousand gross tons, ten million dollars; or

(B) in the case of a vessel or [of][*] three thousand gross tons or less, two million dollars;

(ii) for any other vessel subject to the liability limits set forth in the Federal Oil Pollution Act of 1990 (33 U.S.C. 2701 et seq.), six hundred dollars per gross ton or five hundred thousand dollars, whichever is greater;

(iii) for any other vessel not subject to the liability limits set forth in the Federal Oil Pollution Act of 1990 (33 U.S.C. 2701 et seq.), three hundred dollars per gross ton for each vessel;

(iv) for a major facility that is defined as an "onshore facility" and covered by the liability limits established under the Federal Oil Pollution Act of 1990 (33 U.S.C. 2701 et seq.), three hundred fifty million dollars. This liability limit shall not be considered to increase the liability above the federal limit of three hundred fifty million dollars per incident.[;][**]

(v) for a major facility not covered in subparagraph (iv) of this paragraph, fifty million dollars.

(b) The liability limits established in subparagraphs (i) and (ii) of paragraph (a) of this subdivision

[*]The bracketed word has been inserted by the Publisher.
[**]The bracketed punctuation has been inserted by the Publisher.

shall not be considered to increase liability above the federal limits for tank vessels or vessels as defined in the Federal Oil Pollution Act of 1990 (33 U.S.C. 2701 et seq.).

(c) (i) The department shall establish, by regulation, a limit of liability under this subdivision of less than three hundred fifty million dollars but not less than eight million dollars, for major facilities defined as "onshore facilities" under the Federal Oil Pollution Act of 1990 (33 U.S.C. 2701 et seq.), taking into account facility size, storage capacity, throughput, proximity to environmentally sensitive areas, type of petroleum handled, and other factors relevant to risks posed by the class or category of facility.

(ii) The department shall establish, by regulation, a limit of liability under this subdivision of fifty million dollars or less for major facilities other than vessels that are not defined as "onshore facilities" under the Federal Oil Pollution Act of 1990 (33 U.S.C. 2701 et seq.), taking into account facility size, storage capacity, throughput, proximity to environmentally sensitive areas, type of petroleum handled, and other factors relevant to risks posed by the class or category of facility.

(d) The provisions of paragraph (a) of this subdivision shall not apply and the owner or operator shall be liable for the full amount of cleanup and removal costs and damages if it can be shown that the discharge was the result of (i) gross negligence or willful misconduct, within the knowledge and privity of the owner, operator or person in charge, or (ii) a gross or willful violation of applicable safety, construction or operating standards or regulations. In addition, the provisions of paragraph (a) of this subdivision shall not apply if the owner or operator fails or refuses:

(1) to report the discharge as required by section one hundred seventy-five of this article and the owner or operator knows or had reason to know of the discharge; or

(2) to provide all reasonable cooperation and assistance requested by the federal on-scene coordinator or the commissioner or his designee in connection with cleanup and removal activities.

(e) (i) The owner or operator of a vessel shall establish and maintain with the department evidence of financial responsibility sufficient to meet the amount of liability established pursuant to paragraph (a) of this subdivision. The owner or operator of any vessel which demonstrates financial responsibility pursuant to the requirements of the Federal Oil Pollution Act of 1990 (33 U.S.C. 2701 et seq.), shall be deemed to have demonstrated financial responsibility in accordance with this paragraph.

(ii) The commissioner in consultation with the superintendent of financial services may promulgate regulations requiring the owner or operator of a major facility other than a vessel to establish and maintain evidence of financial responsibility in an amount not to exceed twenty-five dollars, per incident, for each barrel of total petroleum storage capacity at the facility, subject to a maximum of one million dollars per incident per facility in an aggregate not to exceed two million dollars per facility per year; provided, however, that if the owner or operator establishes to the satisfaction of the commissioner that a lesser amount will be sufficient to protect the environment and public health, safety and welfare, the commissioner shall accept evidence of financial responsibility in such lesser amount. In determining the sufficiency of the amount of financial responsibility required under this section, the commissioner and the superintendent of financial services shall take into consideration facility size, storage capacity, throughput, proximity to environmentally sensitive areas, type of petroleum handled, and other factors relevant to the risks posed by the class or category of facility, as well as the availability and affordability of pollution liability insurance. Any regulations promulgated pursuant to this subparagraph shall not take effect until forty-eight months after the effective date of this section.

(iii) Financial responsibility under this paragraph may be established by any one or a combination of the following methods acceptable to the commissioner in consultation with the superintendent of financial services: evidence of insurance, surety bonds, guarantee, letter of credit, qualification as a self-insurer, or other evidence of financial responsibility, including certifications which qualify under the Federal Oil Pollution Act of 1990 (33 U.S.C. 2701 et seq.).

(iv) The liability of a third-party insurer providing proof of financial responsibility on behalf of a person required to establish and maintain evidence of financial responsibility under this section is limited to the type of risk assumed and the amount of coverage specified in the proof of financial responsibility furnished to and approved by the department. For the purposes of this section, the term "third-party insurer" means a third-party insurer, surety, guarantor, person furnishing a letter of credit, or other group or person providing proof of financial responsibility on behalf of another person; it does not include the person required to establish and maintain evidence of such financial responsibility.

4. (a) The only defenses that may be raised by a person responsible for a discharge of petroleum are: an act or omission caused solely by (i) war, sabotage, or governmental negligence or (ii) an act or omission of a third party other than an employee or agent of the person responsible, or a third party whose act or omission occurs in connection with a contractual relationship with the person responsible, if the person responsible establishes by a preponderance of the evidence that the person responsible (a) exercised due care with respect to the petroleum concerned, taking into consideration the characteristics of petroleum and in light of all relevant facts and circumstances; and (b) took precautions against the acts or omissions of any such third party and the

consequences of those acts or omissions. These defenses shall not apply to a person responsible who refuses or fails to (a) report the discharge, or (b) provide all reasonable cooperation and assistance in cleanup and removal activities undertaken on behalf of the fund by the department. In any case where a person responsible for a discharge establishes by a preponderance of the evidence that a discharge and the resulting cleanup and removal costs were caused solely by an act or omission of one or more third parties as described above, the third party or parties shall be treated as the person or persons responsible for the purposes of determining liability under this article.

(b) Nothing set forth in this subdivision shall be construed to hold a lender liable to the state as a person responsible for the discharge of petroleum at a site in the event: (i) such lender, without participating in the management of such site, holds indicia of ownership primarily to protect the lender's security interest in the site, or (ii) such lender did not participate in the management of such site prior to a foreclosure, and such lender:

(1) forecloses on such site; and

(2) after foreclosure, sells, re-leases (in the case of a lease finance transaction), or liquidates such site, maintains business activities, winds up operations, or takes any other measure to preserve, protect or prepare such site for sale or disposition; provided however, that such lender shall take actions to sell, re-lease (in the case of a lease finance transaction), or otherwise divest itself of such site at the earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements.

(c) This exemption shall not apply to any lender that has (i) caused or contributed to the discharge of petroleum from or at the site, (ii) purchased, sold, refined, transported, or discharged petroleum from or at such site, or (iii) caused the purchase, sale, refinement, transportation, or discharge of petroleum from or at such site.

The terms "participating in management," "foreclosure," "lender" and "security interest" shall have the same meaning as those terms are defined in paragraph (c) of subdivision one of section 27-1323 of the environmental conservation law.

5. Any claim by any injured person for the costs of cleanup and removal and direct and indirect damages based on the strict liability imposed by this section may be brought directly against the person who has discharged the petroleum, provided, however, that damages recoverable by any injured person in such a direct claim based on the strict liability imposed by this section shall be limited to the damages authorized by this section.

6. Notwithstanding any other provision of this section, a volunteer firefighter, volunteer fire company, volunteer fire district, volunteer fire protection district, or volunteer fire department shall not be strictly liable for discharged petroleum when such discharge results from such volunteer firefighter, volunteer fire company, volunteer fire district, volunteer fire protection district, or volunteer fire department performing his, her, or their firefighting duties and there is not a showing of willful or gross negligence. This subdivision shall not be construed to provide an exemption from liability for a discharge of petroleum on or from real or personal property owned, leased, or operated by any such volunteer fire company, volunteer fire district, volunteer fire protection district, or volunteer fire department.

HISTORY:

Add, L 1977, ch 845, § 2; amd, L 1978, ch 458, § 3, eff June 30, 1978 and deemed eff on and after April 1, 1978; L 1989, ch 712, § 5, eff Nov 21, 1989; L 1991, ch 672, §§ 1, 2; L 1992, ch 584, § 5, eff July 24, 1992; L 1996, ch 358, § 1; L 1999, ch 157, § 1, eff July 6, 1999, deemed eff Aug 29, 1996; L 2003, ch 1, § 1 (Part G), eff Oct 7, 2003; L 2004, ch 577, § 1, eff Oct 5, 2004,1 (Part G), eff Oct 5, 2004; L 2011, ch 62, § 104 (Part A), eff Oct 3, 2011.

Amendment Notes: 2011. Chapter 62, § 104 (Part A) amended:

Sub 3, par (e), subpar (ii) by substituting at figs 1 and 2 "superintendent of financial services" for "superintendent of insurance".

Sub 3, par (e), subpar (iii) by substituting at fig 1 "superintendent of financial services" for "superintendent of insurance".

2004. Chapter 577, § 1 (Part G) amended:

By designating entire sub 4 as sub 4, par (a).

Sub 4, par (a) by deleting at fig 1 "and", at fig 2 "a contractual relationship resulting from a loan, mortgage or conduit financing from the person responsible" and adding the matter in italics.

By adding sub 4, pars (b) and (c).

2003. Chapter 1, § 1 (Part G) amended:

By repealing former sub 4.

PRACTICE INSIGHTS:

CONSIDER ASSESSMENTS AND INSURANCE AS LIABILITY UNDER OIL SPILL ACT CAN BE SEVERE.

By Brook Boyd, Esq., New York, NY.

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INSIGHT

New York's Oil Spill Act is a broad statute that covers petroleum spills in New York State and affects practically everyone in New York. Nav. Law §§ 170—195. Landowners are particularly vulnerable to liability under the Oil Spill Act for acts of third parties, including tenants. To reduce this risk, a prospective purchaser of property should perform at least a Phase I assessment of the property, and consider procuring environmental insurance. Any party relying on an indemnity should make sure the indemnity specifically covers liability arising under the Navigation Law.

ANALYSIS

Any Type of Petroleum Discharge Is Covered Under Oil Spill Act.

The Oil Spill Act not only affects large oil companies, but also owners, lessees, drivers of cars, homeowners with oil tanks, and owners of office buildings or shopping centers with parking lots (from which oil-tainted run-off may be expected). Any discharge of petroleum is covered. Discharge is broadly defined in the Oil Spill Act to include any intentional or unintentional action or omission resulting in the releasing of petroleum into the waters of the state or onto lands from which it might flow or drain into those waters. Nav. Law

§ 172(8). No discharge is too small to escape the reach of the Oil Spill Act.

Petroleum Dischargers Are Strictly Liable for Direct and Indirect Damages.

Any person who has discharged petroleum shall be strictly liable, without regard to fault, for all cleanup and removal costs and all direct and indirect damages. Nav. Law § 181(1). A person can be liable for a discharge of petroleum merely because of such person's ownership of property where an oil spill occurred, even if the spill occurred before such person acquired the property. *White v. Long*, 85 N.Y.2d 564, 650 N.E.2d 836, 626 N.Y.S.2d 989 (1995).

Innocent Owners May Be Strictly Liable for Oil Spills by Tenants and Other Third Parties.

If a landowner has the ability to control a tenant's activities on its property and has reason to believe that a tenant would create an oil spill, the landowner will be liable for cleanup costs as a discharger under the Navigation Law. However, a landowner will not be liable for a midnight dumper since the landowner cannot control the events resulting from the discharge. *State v. Green*, 96 N.Y.2d 403, 754 N.E.2d 179, 729 N.Y.S.2d 420 (2001). Nav. Law § 181(4) was amended in 2003 to clarify the extent to which a discharger may raise the acts or omissions of a third party as a defense.

Oil Spill Act Fills Gaps in Other Environmental Laws.

New York's Oil Spill Act helps to fill gaps in other laws. For example, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 USCS § 9601 *et seq*., empowers the United States Environmental Protection Agency to order any owner or operator of a property to clean-up hazardous waste on the property. However, CERCLA generally does not apply to petroleum spills. 42 USCS § 9601(14).

The federal Resource Conservation and Recovery Act (RCRA), 42 USCS § 6901 *et seq*., regulates storage and disposal of wastes, including underground storage tanks (other than storage tanks in cellars, and residential and farm tanks of less than 1,100 gallons) containing hazardous substances or petroleum. Petroleum is included within the broad scope of solid waste under RCRA. 42 USCS § 6903(27). However, while an existing owner of a property may have a cause of action under RCRA for contamination of such property by its prior owner, such existing owner may not sue for reimbursement of costs incurred in past cleanup efforts. *Bologna v. Kerr-McGee Corp.*, 95 F. Supp. 2d 197 (S.D.N.Y. 2000). On the other hand, New York's Oil Spill Act does allow the existing owner to sue the prior owner for such reimbursement, and applies to small discharges of petroleum of any kind.

Obtain Phase I and Phase II Environmental Reviews to Evaluate Purchaser's Risk of Liability Under Oil Spill Act.

To determine the risk of liability under the Oil Spill Act and other laws, a prospective purchaser should obtain a Phase I site assessment before closing of title. A Phase I assessment is a limited review of the environmental aspects of a property based on an examination of publicly available records and a visit to the property without any soil sampling. It is now possible to do a free Internet search (*www.epa.gov/echo*) that will quickly reveal environmental compliance inspections, violations, and enforcement actions relating to a property that are likely to be disclosed in a Phase I report.

If the Phase I report identifies any potential problems, then a more detailed Phase II site assessment will be made to determine whether there is in fact contamination of the property. If there is contamination, then a Phase III report will determine the extent of the contamination to plan for its removal or remediation. E1527, Standard Practice for Environmental Site Assessments: Phase I (2000 revision) at *www.astm.org*.

It should be noted that the Court of Appeals has held that a purchaser of contaminated property was liable when the purchaser, with knowledge of its vendor's discharge of oil and the need for cleanup, did nothing. State v. Speonk Fuel Inc., 3 N.Y.3d 720, 786 N.Y.S.2d 375, 819 N.E.2d 991 (2004).

Consider Whether Client Should Obtain Environmental Insurance to Protect Against Unknown Property Hazards.

A prospective purchaser or mortgage lender should consider obtaining environmental insurance. This insurance will generally not cover known hazards, but only the risk of currently unknown hazards that manifest themselves in the future. Generally the insurer will insist on at least a Phase I report before issuing the insurance.

Ensure Any Contract Indemnities Specifically Cover Liabilities Arising Under Environmental Statutes.

If the contract of sale provides that the purchaser takes title to the property as is, this does not prevent the purchaser from suing the seller after the closing for contribution on account of Navigation Law claims. Even if a contract of sale provides that the seller is indemnified by the purchaser for any environmental liabilities with respect to the property, this may be construed as a mere contractual indemnification that will not protect the seller against any statutory liability under the Navigation Law. *Umbra U.S.A., Inc. v. Niagara Frontier Transportation Authority*, 262 A.D.2d 980, 693 N.Y.S.2d 371 (1999). On the other hand, sellers are usually unwilling to provide an indemnity, for environmental liabilities existing as of the closing, particularly in the case of sellers whose stock is publicly traded, since this liability may need to be disclosed on their financial statements post-closing. In any event, if any party gives an indemnity, the parties should specifically allocate, in the indemnity, any liabilities arising under the Navigation Law and other similar environmental statutes.

FOLLOW SPECIFIC PROCESS IN RESPONDING TO OIL SPILL.

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INSIGHT

If an oil spill occurs, then the New York State Department of Environmental Conservation (DEC) must be immediately notified; and each party liable for the discharge (called discharger) has an obligation to contain the discharge. Notice and proof of loss should be promptly given under any applicable insurance policies. The parties involved in a cleanup should consider executing a settlement agreement among themselves, and consider the impact of such agreement on the liability of those parties who fail to consent to such agreement. Once cleanup is complete, each discharger should also seek to obtain a certificate of completion from the DEC, which will give the discharger the benefit of a limited covenant not to sue, and may help confirm eligibility for tax benefits.

ANALYSIS

Discharger Must Notify Dec of Discharge and Give Notice to Affected Parties to Reduce Tort Claims.

Any person liable for a discharge must notify the DEC within two hours of the discharge. Nav. Law § 175. Each landowner should also give notice to any other persons who may be adversely affected by the discharge to avoid, or at least reduce, the risk of premises liability and other tort claims.

Discharger Must Contain Discharge and Others Have Right to Respond to Discharge.

Any person responsible for a discharge shall immediately undertake to contain it. Nav. Law § 176(1). The DEC may undertake to cleanup and remove the discharge, or may direct the discharger to do so. Nav. Law § 176(2). Any person threatened by the discharge may also undertake such cleanup and removal as soon as reasonably possible with approval of the DEC. Nav. Law §§ 176(7), 178-a.

Discharger Must Give Notice and Proof of Loss Under Insurance Policies.

Each discharger should give notice and proof of loss to its insurers. However, most liability insurance policies contain exclusions for pollution of a gradual nature (for example, leaking underground tank) and the exclusion is generally

enforceable. If coverage is available under a policy, an owner should consider performing at least an inspection, and potentially a full environmental assessment, to document the nature of the discharge and that the discharge was an occurrence during the term of the policy.

Two or More Dischargers Can Enter into Agreement to Settle Their Respective Liability for Discharge.

In the event there is more than one discharger, then ideally all the dischargers will enter into an agreement among themselves regarding their respective liability for the discharge, the resulting damages, cleanup cost, and joint hiring of the contractors to perform cleanup. Some parties may seek to extricate themselves from the process by making an advance payment and obtaining releases from all other parties. If a claimant gives a release to one of several dischargers, then one issue is the effect of the release on the liability of the remaining dischargers if all of the dischargers fail to give their consent to the release. When a release or a covenant not to sue is given to one of two or more persons liable or claimed to be liable in tort for the same injury, it does not discharge any of the other tortfeasors. GOL § 15-108.

Discharger Should Seek Covenant Not to Sue from Dec Once Cleanup Complete.

An owner of land where a discharge occurred is generally deemed a discharger even if such owner did not actually cause the discharge, so long as the owner reasonably could have prevented the discharge. *State v. Green*, 96 N.Y.2d 403, 754 N.E.2d 179, 729 N.Y.S.2d 420 (2001). The owner, and all other dischargers, should seek a covenant not to sue from the DEC once cleanup is complete. When a contaminated site (sometimes called brownfield) is cleaned-up in accordance with the Brownfield Cleanup Program under ECL § 27-1401 *et seq*., the DEC Commissioner shall issue a written certificate of completion once the brownfield is cleaned-up to DEC standards. ECL § 27-1419(3).

A covenant not to sue applies to successors and assigns in certain cases. ECL § 27-1421(3). Any prospective purchaser of a brownfield site, and any prospective mortgage lender, will need to review the certificate of completion to make sure it will protect the purchaser. However, the covenant not to sue does not protect against lawsuits by the federal government or private parties. Nothing in ECL § 27-1421 will affect the liability of any person with respect to any civil action brought by a party other than the state. ECL § 27-1421(8).

Taxpayer, Not Responsible for Discharge, Should Make Request to Dec Commissioner for Certificate of Completion to Obtain Tax Credit.

Tax credits are available if the DEC Commissioner has issued a certificate of completion with respect to the Brownfield Cleanup Program. Tax Law § 21(b)(1). Certain tax credits are available only if the DEC Commissioner, at the taxpayer's request, has made a certification both that the taxpayer is deemed to be a discharger solely by virtue of the operation of the property after the discharge occurs, and that the taxpayer is actually not responsible for the discharge. Tax Law § 21(a)(3). In addition, an additional tax credit is available if the certificate of completion indicates that the qualified site has been remediated to track 1 (most pure condition recognized by DEC). Tax Law § 21(a)(5).

MAKING CLAIMS AFTER OIL SPILL OCCURS.

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INSIGHT

If an oil spill (discharge) occurs, then all parties who actually caused the discharge, or who are deemed to be dischargers (including landowners who did not cause spill, but leased property to tenant who did), may be sued. A discharger may sue another discharger for contribution if the plaintiff discharger is not primarily responsible for the discharge. A person damaged by a discharge is entitled to reimbursement by the New York State Environmental Protection and Spill Compensation Fund (Fund) in certain cases, which in turn may file an environmental lien against the property where the discharge occurred. Since the Fund's lien will be subordinate to a then existing mortgage, the lender's strategy may be to do nothing, and then foreclose once the property is cleaned-up, since this will cut-off the Fund's lien and enable the lender to realize a windfall from the efforts of others.

ANALYSIS

Injured Persons and Blameless Dischargers May Seek Contribution Against Responsible Dischargers.

Any claim by any injured person for cleanup costs and removal, and direct and indirect damages based on the strict liability imposed by Nav. Law § 181(5) may be brought directly against the person who has discharged the petroleum. A faultless landowner may seek contribution from the party responsible for the discharge, even though the landowner is technically liable as a discharger under Nav. Law § 181(1). *State v. Green*, 96 N.Y.2d 403, 754 N.E.2d 179, 729 N.Y.S.2d 420 (2001).

Responsible Discharger Cannot Make Claim Against Other Dischargers for Contribution.

The party primarily responsible for the discharge generally cannot sue other parties for contribution under the Navigation Law. *White v. Long*, 85 N.Y.2d 564, 650 N.E.2d 836, 626 N.Y.S.2d 989 (1995). This does not necessarily bar a claim for contribution under other causes of action, for example, tort.

Blameless Non-Dischargers May Sue Fund for Reimbursement of Repairing Damage to Property.

The Fund finances state cleanup efforts when the discharger either is unknown or delinquent in paying these costs. Nav. Law § 179. Any innocent party not responsible for an oil spill, not deemed a discharger, and who has been damaged by or has cleaned-up an oil spill, may sue the Fund. Nav. Law §§ 181(2), 182. In addition to cleanup costs, these parties may be reimbursed for restoring or replacing damage to property, lost income, and impairment of property value. However, any party responsible for a spill, and any party deemed to be a discharger, may not sue the Fund. A purchaser who did not cause contamination that was discovered only after the purchaser acquired a property, and who then cleans it up, cannot recover the cleanup cost from the Fund since the purchaser is deemed a discharger. *White v. Long*, 85 N.Y.2d 564, 650 N.E.2d 836, 626 N.Y.S.2d 989 (1995). The Fund may also reject the claim when the claimant can collect from the discharger. Under Nav. Law § 182, claims must be filed with the Fund administrator no later than three years after the date of discovery of damage, and no later than 10 years after the date of the incident that caused the damage.

New York State May File Claims on Behalf of Fund Against Discharger for Claims Paid by Fund.

If the Fund pays any claim, then it is subrogated to the rights of the claimant against the discharger. Nav. Law § 188. New York State may then file claims on behalf of the Fund against the discharger under Nav. Law §§ 187, 188, and is entitled to a lien against culpable owners of property where a discharge occurred. Nav. Law § 181-a. The Fund is also given the right to direct access against any insurers with respect to the claim. Nav. Law § 190. Any such person who is notified of a discharge, and does not relocate persons accordingly, may be liable for two times the relocation costs incurred by the Fund. Nav. Law § 181(1).

Discharger May Raise Defense of Non-Liability for Acts or Omissions of Third Party.

A discharger is generally not liable for an act or omission of a third party if the discharger exercised due care with respect to the petroleum concerned, taking into consideration the characteristics of petroleum in light of all relevant facts and circumstances, and took precautions against the acts or omissions of any such third party and the consequences of those acts or omissions. Nav. Law § 181(4). While this defense is based on a 2003 amendment, it is not a defense consistent with the vague standard set forth in *State v. Green,* 96 N.Y.2d 403, 754 N.E.2d 179, 729 N.Y.S.2d 420 (2001).

Fund Has Environmental Lien on Property for Cleanup Costs and Payment of Claims.

The Fund has a lien for the costs incurred by the Fund for the cleanup and removal of a discharge and for payment of claims for direct and indirect damages as a result of a discharge upon real property located within the state. Nav. Law § 181-a(1). An environmental lien shall attach when a notice of environmental lien is filed. Nav. Law §§ 181-a(2), 181-c(1). An environmental lien is subject to the rights of any other person, including an owner, purchaser, holder of a mortgage or security interest, or judgment lien creditor, whose interest is perfected before a lien notice has been filed. Nav. Law § 181-a(4). The contents of the environmental lien, and the procedure for filing the notice of that lien, are as set forth under Nav. Law §§ 181-b, 181-c.

Lender Should Avoid Taking Title to Property if Possible Until Clean-Up Complete.

The environmental lien arising under the Navigation Law is not a super-lien, and will ordinarily be subject to any mortgage that has been recorded before the lien is filed. If a lender holds such a mortgage, then its strategy will often be to allow private parties or the Fund to clean-up the property, and then foreclose on the cleaned-up property, cutting-off any lien filed by the Fund and consequently realizing a windfall. Some commentators believe the government could sue a lender in this case for unjust enrichment, although there is disagreement as to whether there is actually unjust enrichment if the lender does not sell the property for more than the unpaid balance of the mortgage. Moreover, lenders should note that some cases have authorized the federal government to clean-up a property and then recover its costs from the proceeds of sale before the first mortgage is paid. *In re Mowbray Engineering Co. Inc.*, 67 Bankr. 34 (Bankr. M.D. Ala. 1986).

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1. In general

Faultless landowner on whose property petroleum has spilled is "discharger" liable for cleanup costs where it can control activities occurring on its property and has reason to believe that petroleum products will be stored there. State v Green, 96 N.Y.2d 403, 729 N.Y.S.2d 420, 754 N.E.2d 179, 2001 N.Y. LEXIS 1981 (N.Y. 2001).

Fire department, which allegedly damaged above-ground kerosene or petroleum storage tank, causing contents to leak onto ground and flow onto plaintiffs' adjacent property, could be held strictly liable to plaintiffs under CLS Nav § 181(1); even though CLS Nav § 176(2) grants officials of Department of Environmental Conservation some immunity under CLS Nav Art 12, which contains § 181(1), it makes no similar provision for fire companies, and there is nothing in legislative history of Article 12 indicating intention to exempt fire companies from liability. Nicol v D.W. Jenkins Fire Co., 192 A.D.2d 164, 600 N.Y.S.2d 519, 1993 N.Y. App. Div. LEXIS 7257 (N.Y. App. Div. 3d Dep't 1993).

In action for property damage and personal injuries arising from leak of gasoline from underground storage tanks at service station, oil company which owned service station was liable under CLS Nav § 181(5) as owner of underground tanks. Leone v Leewood Serv. Station, 212 A.D.2d 669, 624 N.Y.S.2d 610, 1995 N.Y. App. Div. LEXIS 1734 (N.Y. App. Div. 2d Dep't), app. denied, 86 N.Y.2d 709, 634 N.Y.S.2d 443, 658 N.E.2d 221 (N.Y. 1995).

There is no cause of action for personal injuries under CLS Nav § 181. Strand v Neglia, 232 A.D.2d 907, 649 N.Y.S.2d 729, 1996 N.Y. App. Div. LEXIS 11247 (N.Y. App. Div. 3d Dep't 1996), app. dismissed, 89 N.Y.2d 1086, 659 N.Y.S.2d 859, 681 N.E.2d 1306, 1997 N.Y. LEXIS 1251 (N.Y. 1997).

Regardless of whether defendant was owner of property from which petroleum allegedly was discharged onto plaintiffs' property, defendant still might be liable under CLS Nav § 181 if he were found to have discharged petroleum in violation of § 181. Berens v Cook, 263 A.D.2d 521, 694 N.Y.S.2d 684, 1999 N.Y. App. Div. LEXIS 8389 (N.Y. App. Div. 2d Dep't 1999).

In action under CLS Nav § 181 to recover petroleum discharge cleanup costs, defendant was not entitled to amend its answer to assert affirmative defense of sabotage where merit of that defense was dubious, and there was unexplained delay of about one year in making motion to amend. Amco Int'l, Inc. v Long Island R.R. Co., 273 A.D.2d 421, 713 N.Y.S.2d 119, 2000 N.Y. App. Div. LEXIS 7406 (N.Y. App. Div. 2d Dep't 2000).

In order to hold corporate stockholder, officer, or employee personally liable under Navigation Law for discharge occurring at site owned or operated by corporation, that individual must, at minimum, have been directly, actively, and knowingly involved in culpable activities or inaction that led to spill or allowed spill to continue unabated. State v Markowitz, 273 A.D.2d 637, 710 N.Y.S.2d 407, 2000 N.Y. App. Div. LEXIS 7297 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 770, 722 N.Y.S.2d 473, 745 N.E.2d 393, 2000 N.Y. LEXIS 3872 (N.Y. 2000).

Where property owner is not owner of system from which discharge occurs, liability without regard to fault is properly imposed on system owner and not on faultless property owner under CLS Nav § 181.310 South Broadway Corp. v McCall, 275 A.D.2d 549, 712 N.Y.S.2d 206, 2000 N.Y. App. Div. LEXIS 8402 (N.Y. App. Div. 3d Dep't 2000), app. denied, 96 N.Y.2d 701, 722 N.Y.S.2d 793, 745 N.E.2d 1015, 2001 N.Y. LEXIS 7 (N.Y. 2001).

Supplier of residential heating oil was not strictly liable under CLS Nav § 181 to plaintiff who was injured as result of exposure to oil; statute, which was motivated by desire to ensure clean environment and prompt cleanup of unregulated discharges, contemplates only property damage. Lowenthal v Perkins, 164 Misc. 2d 922, 626 N.Y.S.2d 358, 1995 N.Y. Misc. LEXIS 201 (N.Y. Sup. Ct. 1995).

In action against defendant corporation for disposing of or arranging for disposal of steel and aluminum scrap containing hazardous substances at various sites owned by plaintiffs, affidavit of defendant's own expert stating that steel used by defendant would have been thinly coated with oil was enough to defeat motion to dismiss cause of action under CLS Nav § 181(1). Cooper Indus., Inc. v Agway, Inc., 987 F. Supp. 92, 1997 U.S. Dist. LEXIS 19192 (N.D.N.Y. 1997).

Where defendants brought claims against plaintiff power company alleging they are entitled to contribution from the power company for the removal costs of the petroleum it discharged on their property, taking the allegations as true, these defendants could have been entitled to relief; thus, the counterclaims brought pursuant to the New York Navigation Law were not dismissed. Niagara Mohawk Power Corp. v CONRAIL, 291 F. Supp. 2d 105, 2003 U.S. Dist. LEXIS 19958 (N.D.N.Y. 2003), reaff'd, 565 F. Supp. 2d 399, 2008 U.S. Dist. LEXIS 85253 (N.D.N.Y. 2008), aff'd in part and rev'd in part, 596 F.3d 112, 2010 U.S. App. LEXIS 3859 (2d Cir. N.Y. 2010).

2. Statute of limitations

An action by the State against defendant, who allegedly caused a petroleum discharge, to recover monies expended from the New York Environmental Protection and Spill Compensation Fund for the cleanup and removal of the discharged petroleum pursuant to Nav Law § 181, which requires the discharger to bear ultimate responsib1lity for the costs incurred, is properly characterized as a common law indemnity action based on a contract to reimburse implied by law, and is not a liability imposed by statute within the meaning of CPLR § 214(2); hence, the appropriate period of limitations is six years as specified by CPLR § 213(2). Accord-

ingly, an action by the State against an alleged discharger, commenced within six years after the State expended funds for the cleanup, was timely as to all of the State's expenditures. State v Stewart's Ice Cream Co., 64 N.Y.2d 83, 484 N.Y.S.2d 810, 473 N.E.2d 1184, 1984 N.Y. LEXIS 4786 (N.Y. 1984).

Suit against discharger of gasoline initiated by damaged party is one for damages caused by injury to property and is subject to 3-year statute of limitations of CLS CPLR § 214(4). Guilderland v Texaco Refining & Marketing, Inc., 159 A.D.2d 829, 552 N.Y.S.2d 704, 1990 N.Y. App. Div. LEXIS 2925 (N.Y. App. Div. 3d Dep't 1990).

In action by lessors to recover from lessees past and future costs of cleaning up petroleum spill allegedly caused by lessees, demand for reimbursement for funds previously expended to pay for cleanup of spill constituted request for relief in nature of indemnification, and hence was governed by 6-year statute of limitations. 145 Kisco Ave. Corp. v Dufner Enters., 198 A.D.2d 482, 604 N.Y.S.2d 963, 1993 N.Y. App. Div. LEXIS 11050 (N.Y. App. Div. 2d Dep't 1993).

Cause of action for alleged violation of CLS Nav § 181, which imposes strict liability for improper discharge of petroleum, was governed by 6-year statute of limitations under CLS CPLR § 213(2); liberally construed, complaint stated cause of action for indemnification to extent that it sought recoupment of cleanup costs expended by plaintiff. 750 Old Country Rd. Realty Corp. v Exxon Corp., 229 A.D.2d 1034, 645 N.Y.S.2d 186, 1996 N.Y. App. Div. LEXIS 9170 (N.Y. App. Div. 4th Dep't 1996).

Action brought under Navigation Law Article 12 against petroleum deliverer (defendant), brought in April 1997 alleging that defendant delivered petroleum to leaky underground tanks between 1986 and 1991, was time-barred under both 12-month contractual period of limitations and 3-year statute of limitations under CLS CPLR § 214-c(2). Kozemko v Griffith Oil Co., 256 A.D.2d 1199, 682 N.Y.S.2d 503, 1998 N.Y. App. Div. LEXIS 14361 (N.Y. App. Div. 4th Dep't 1998).

Retail dealer agreement between plaintiffs and petroleum deliverer (defendant), providing that any claim arising under agreement or otherwise "shall be waived and barred unless asserted by the commencement of an action within twelve months after the event, action or inaction to which such claim relates," was reasonable contractual shortening of 3-year limitations period in action brought under Navigation Law Article 12 for defendant's conduct in delivering petroleum to allegedly leaky tanks at gas station. Kozemko v Griffith Oil Co., 256 A.D.2d 1199, 682 N.Y.S.2d 503, 1998 N.Y. App. Div. LEXIS 14361 (N.Y. App. Div. 4th Dep't 1998).

Plaintiffs' action under Navigation Law Article 12, commenced in April 1997, was time-barred since injury should have been discovered either in September 1991, when Department of Environmental Conservation spill report indicated that tanks at gas station did not pass initial tank tightness test, or February 1992, when plaintiffs detected water in tanks; either event should have placed plaintiffs on notice of possible leaks. Kozemko v Griffith Oil Co., 256 A.D.2d 1199, 682 N.Y.S.2d 503, 1998 N.Y. App. Div. LEXIS 14361 (N.Y. App. Div. 4th Dep't 1998).

Action by state under CLS Nav Art 12 to recover gasoline cleanup costs was timely where it was action for indemnification subject to 6-year limitations period, which did not begin to run until state last expended funds for cleanup of petroleum contamination. State v Speonk Fuel, Inc., 273 A.D.2d 681, 710 N.Y.S.2d 652, 2000 N.Y. App. Div. LEXIS 7219 (N.Y. App. Div. 3d Dep't 2000), app. dismissed, 98 N.Y.2d 721, 748 N.Y.S.2d 901, 778 N.E.2d 551, 2002 N.Y. LEXIS 2335 (N.Y. 2002), app. denied, 98 N.Y.2d 766, 752 N.Y.S.2d 5, 781 N.E.2d 917, 2002 N.Y. LEXIS 3397 (N.Y. 2002), aff'd, 3 N.Y.3d 720, 786 N.Y.S.2d 375, 819 N.E.2d 991, 2004 N.Y. LEXIS 2438 (N.Y. 2004).

In action to recover hazardous waste and remediation costs, 6-year statute of limitations governed claim under Oil Spill Act (CLS Nav § 181(5)). AL Tech Specialty Steel Corp. v Allegheny Int'l Credit Corp., 104 F.3d 601, 1997 U.S. App. LEXIS 706 (3d Cir. Pa. 1997).

3. Damages

In action under CLS Nav § 181(1) to recover for damage to property caused by broken underground pipeline on adjoining property owned by state, claimant failed to proffer sufficient proof to show that injury to his property was permanent in nature or affected by stigma, where his appraiser assessed marketability without requesting documents relating to spill or testing of property and did not take into account that claimant might be able to successfully use or rent commercial portion of property. Putnam v State, 223 A.D.2d 872, 636 N.Y.S.2d 473, 1996 N.Y. App. Div. LEXIS 82 (N.Y. App. Div. 3d Dep't 1996).

In action against state under CLS Nav § 181(1), where property sustained temporary injury, claimant was entitled to be compensated for his loss of use as measured by decrease in rental value during pendency of injury; court properly utilized methodology proffered by expert who treated oil spill as temporary easement and calculated rental value of property both with and without encroachment, given claimant's complete failure to offer any alternative approach to assessment. Putnam v State, 223 A.D.2d 872, 636 N.Y.S.2d 473, 1996 N.Y. App. Div. LEXIS 82 (N.Y. App. Div. 3d Dep't 1996).

In action to recover for temporary injury to claimant's property due to contamination from broken underground pipeline located on adjoining property owned by state, claimant was not entitled to recover prospective costs of detailed environmental review and placement of additional monitoring wells, where court's conclusion that additional precautions urged by claimant were unnecessary was supported by experts' testimony that remediation was complete and there was no evidence of contamination to bedrock groundwater, which confirmed that samples taken from 3 existing monitoring wells were clean when last tested. Putnam v State, 223 A.D.2d 872, 636 N.Y.S.2d 473, 1996 N.Y. App. Div. LEXIS 82 (N.Y. App. Div. 3d Dep't 1996).

In actions and third party claims involving leaks from underground fuel storage tanks and associated piping, installer of system was entitled to partial summary judgment, limiting damages recoverable under Navigation Law strict liability causes of action to economic loss. Wever Petroleum v Gord's Ltd., 225 A.D.2d 27, 649 N.Y.S.2d 726, 1996 N.Y. App. Div. LEXIS 11262 (N.Y. App. Div. 3d Dep't 1996).

In landlords' action against their former tenants for breach of lease and for discharge of petroleum in violation of CLS Nav § 181, case would be remitted for calculation of damages for lost rental income, including additional rent, for period from July 1, 1992, through October 31, 1993, where (1) landlords showed loss of rental income from their new tenant as result of contamination, (2) former tenants' lease terminated on June 30, 1992, (3) court awarded lost rent through March 5, 1994, when new tenant became obligated to pay rent, (4) State Department of Environmental Conservation accepted remediation plan in October 1993, (5) contaminated soil was removed from premises in about 2 days, (6) remediation thus could have been completed by November 1, 1993, at which time landlords' entitlement to damages ceased, and (7) remainder of period for which landlords did not receive rent was attributable to new tenant's work in reconstructing gas station to prepare for its tenancy. Gettner v Getty Oil Co., 266 A.D.2d 342, 701 N.Y.S.2d 64, 1999 N.Y. App. Div. LEXIS 11572 (N.Y. App. Div. 2d Dep't 1999), app. dismissed, 95 N.Y.2d 791, 711 N.Y.S.2d 158, 733 N.E.2d 230, 2000 N.Y. LEXIS 1014 (N.Y. 2000), app. denied, 95 N.Y.2d 860, 714 N.Y.S.2d 704, 737 N.E.2d 946, 2000 N.Y. LEXIS 2279 (N.Y. 2000), app. denied, 97 N.Y.2d 603, 735 N.Y.S.2d 492, 760 N.E.2d 1288, 2001 N.Y. LEXIS 3317 (N.Y. 2001).

In landlords' action against their former tenants for breach of lease and for discharge of petroleum in violation of CLS Nav § 181, landlords were not entitled to award of attorney fees, disbursements, and litigation support expenses where lease provisions at issue related exclusively to expenses incurred in litigation with third parties. Gettner v Getty Oil Co., 266 A.D.2d 342, 701 N.Y.S.2d 64, 1999 N.Y. App. Div. LEXIS 11572 (N.Y. App. Div. 2d Dep't 1999), app. dismissed, 95 N.Y.2d 791, 711 N.Y.S.2d 158, 733 N.E.2d 230, 2000 N.Y. LEXIS 1014 (N.Y. 2000), app. denied, 95 N.Y.2d 860, 714 N.Y.S.2d 704, 737 N.E.2d 946, 2000 N.Y. LEXIS 2279 (N.Y. 2000), app. denied, 97 N.Y.2d 603, 735 N.Y.S.2d 492, 760 N.E.2d 1288, 2001 N.Y. LEXIS 3317 (N.Y. 2001).

In action by state to hold individual and corporate defendants liable as dischargers of gasoline under CLS Nav §§ 172(8) and 181(1), court properly failed to instruct jury that statutory penalties could be imposed only if discharger acted "knowingly" in derogation of Navigation Law where "knowingly" limitation in CLS Nav § 192 applies only to giving of false information and not to phrase "or who otherwise violates any of the provisions of [Navigation Law art 12]," and thus any person or entity liable for cleanup costs as violator is liable for statutory penalties without any requirement that he, she, or it acted knowingly. State v Markowitz, 273 A.D.2d 637, 710 N.Y.S.2d 407, 2000 N.Y. App. Div. LEXIS 7297 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 770, 722 N.Y.S.2d 473, 745 N.E.2d 393, 2000 N.Y. LEXIS 3872 (N.Y. 2000).

Landowners onto whose land oil from a damaged locomotive leaked were entitled to recover remediation and cleanup costs, as well as lost profits due to the railroad's long delay in taking action, and litigation costs, but they should not have been awarded prejudgment interest on amounts they had not yet spent. AMCO Int'l, Inc. v Long Island R.R. Co., 302 A.D.2d 338, 754 N.Y.S.2d 655, 2003 N.Y. App. Div. LEXIS 796 (N.Y. App. Div. 2d Dep't 2003).

Trial court erred in denying a property owner's motion for an award of attorney's fees incurred in the owner's action brought to recover damages resulting from the discharge of petroleum where the law did not require that, in order to recover such a fee, a plaintiff has to have either paid cleanup and removal costs or been held liable to the State for such costs. N.Y. Nave. Law § 181(5) provides a private right of action against a discharger to recover direct and indirect damages, including an attorney's fee incurred in such an action, in addition to damages related to the cleanup and removal of oil. Starnella v Heat, 14 A.D.3d 694, 789 N.Y.S.2d 227, 2005 N.Y. App. Div. LEXIS 803 (N.Y. App. Div. 2d Dep't 2005).

Summary judgment was improperly granted In homeowners' action under N.Y. Nav. Law § 181 to recover damages from a city transit authority for a plume of diesel fuel that migrated under the homeowners' properties; though the authority met its initial burden of demonstrating that the homeowners sustained no damages, the homeowners raised triable issues of fact with evidence that the contamination could not be fully remediated and that the stigma of its continued presence had negatively affected the value of their homes. Turnbull v MTA N.Y. City Tr., 28 A.D.3d 647, 814 N.Y.S.2d 191, 2006 N.Y. App. Div. LEXIS 4582 (N.Y. App. Div. 2d Dep't 2006).

State's motion for summary judgment was properly granted in its action to recover its remediation costs and penalties because the possibility that other dischargers contributed to the off-site contamination was simply irrelevant to an owner's liability as an established discharger under N.Y. Nav. Law art. 12. State of New York v Slezak Petroleum Prods., Inc., 96 A.D.3d 1200, 947 N.Y.S.2d 189, 2012 N.Y. App. Div. LEXIS 4766 (N.Y. App. Div. 3d Dep't), app. denied, 19 N.Y.3d 814, 955 N.Y.S.2d 553, 979 N.E.2d 814, 2012 N.Y. LEXIS 3268 (N.Y. 2012).

Owners were entitled to summary judgment on the issue of liability against the petroleum companies because the companies, as a matter of law, were strictly liable for the discharge of petroleum onto the owners' property during delivery because, while the Oil Spill Act did not set forth any minimum quantity of petroleum product that must be released before its provisions applied and they responded promptly, prevented further spillage, followed proper cleaning and reporting protocols, and succeeded in thoroughly cleaning the spill, the Act did not foreclose strict liability for de minimis spills, and required some nexus between the petroleum emission and the waters of the state, however minimal. Guidice v Oil, 51 Misc. 3d 313, 24 N.Y.S.3d 858, 2016 N.Y. Misc. LEXIS 65 (N.Y. Sup. Ct. 2016).

Defendants, prior owners of a service station, were strictly liable under N.Y. Nav. Law § 181 to owners of petroleum-contaminated property for any costs that could be established by the owners associated with the remediation of their property. However, the owners failed to offer admissible expert testimony regarding any diminution in value of their property. Hanna v Motiva Enters., LLC, 839 F. Supp. 2d 654, 2012 U.S. Dist. LEXIS 36807 (S.D.N.Y. 2012).

4. Discharge

Even if company which serviced underground fuel tanks could be deemed to be "discharger" of petroleum within meaning of CLS Nav § 181(5), owner of tanks could not recover from service company since owner was itself liable as discharger, and thus had no private right of action against service company. Busy Bee Food Stores v WCC Tank Lining Technology, 202 A.D.2d 898, 609 N.Y.S.2d 118, 1994 N.Y. App. Div. LEXIS 2802 (N.Y. App. Div. 3d Dep't), app. dismissed, 83 N.Y.2d 953, 615 N.Y.S.2d 877, 639 N.E.2d 418, 1994 N.Y. LEXIS 1406 (N.Y. 1994).

Plaintiffs, merely by virtue of their status as landowners, were not "dischargers" of gasoline precluded from pursuing any statutory claims against tenant for leakage of gasoline from underground storage tank located on plaintiffs' property but owned and operated by tenant; liability as "discharger" is based on conduct, not status. Drouin v Ridge Lumber, 209 A.D.2d 957, 619 N.Y.S.2d 433, 1994 N.Y. App. Div. LEXIS 11959 (N.Y. App. Div. 4th Dep't 1994).

Owner of service station was improperly granted leave to amend common-law negligence complaint to add claim for strict liability under CLS Nav § 181(5) against gas pump repair company since it was undisputed that plaintiff was "discharger" within meaning of CLS Nav § 181(1), and thus could not assert private right of action against another alleged discharge. Race Oil Corp. v Eastman, 213 A.D.2d 915, 623 N.Y.S.2d 964, 1995 N.Y. App. Div. LEXIS 3078 (N.Y. App. Div. 3d Dep't 1995).

Defendant, operator of service station, was not entitled to summary judgment in action for strict liability under CLS Nav § 181(5), except to extent that plaintiffs sought to recover for personal injuries sustained in connection with gasoline discharge, where fact issue existed as to whether individual plaintiff contributed to spill and qualified as "discharger" for purposes of CLS Nav § 181(1). Strand v Neglia, 232 A.D.2d 907, 649 N.Y.S.2d 729, 1996 N.Y. App. Div. LEXIS 11247 (N.Y. App. Div. 3d Dep't 1996), app. dismissed, 89 N.Y.2d 1086, 659 N.Y.S.2d 859, 681 N.E.2d 1306, 1997 N.Y. LEXIS 1251 (N.Y. 1997).

Defendant, which owned 4.4 percent interest as non-operator in oil and gas lease on land and did not control operations conducted under lease, could not be considered "discharger" subject to liability under CLS Nav § 181(1) and (5). Whitesell v Walchli, 237 A.D.2d 953, 654 N.Y.S.2d 541, 1997 N.Y. App. Div. LEXIS 3548 (N.Y. App. Div. 4th Dep't 1997).

In action for damages arising from significant discharge of oil from underground oil tanks, one which was cracked and one which collapsed, general contractor was not entitled to dismissal of complaint and cross claims under CLS Nav § 181(1) because its responsibility for overall supervision of installation of oil tanks in question might subject it to statutory liability as "discharger." Huntington Hosp. v Anron Heating & Air Conditioning, Inc., 250 A.D.2d 814, 673 N.Y.S.2d 456, 1998 N.Y. App. Div. LEXIS 6147 (N.Y. App. Div. 2d Dep't 1998).

Individual defendant's roles as sole stockholder and sole officer of corporation that owned gas station at which gasoline leaked from overfilled storage tanks did not support imposition of personal liability on him or his estate as discharger under CLS Nav §§ 172(8) and 181(1) where neither he nor his fiduciaries wrongfully did or failed to do anything that led to or could have prevented spills, neither he nor his estate directly owned system from which discharge occurred, they were not involved in day-to-day operations of station, and they did not know of spills or of Department of Environmental Conservation's directives regarding those spills. State v Markowitz, 273 A.D.2d 637, 710 N.Y.S.2d 407, 2000 N.Y. App. Div. LEXIS 7297 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 770, 722 N.Y.S.2d 473, 745 N.E.2d 393, 2000 N.Y. LEXIS 3872 (N.Y. 2000).

Trial court erred in failing to strike testimony relating to vapor contamination in an owner's N.Y. Nav. Law § 173 et seq. claim because that theory was not alleged in the owner's bill of particulars, and the owner knew of the vapor contamination theory for more than two years before the start of trial, but did not seek to amend its bill of particulars until trial; however, there was

credible and admissible evidence of groundwater contamination of the corporation's property, from a discharge or discharges on that property, at a time which could not have been determined. The evidence further established that the groundwater contamination flowed from the corporation's property to the owner's property and that the corporation was liable as a discharger for purposes of the N.Y. Nav. Law § 181(1) claim. Sunrise Harbor Realty, LLC v 35th Sunrise Corp., 86 A.D.3d 562, 927 N.Y.S.2d 145, 2011 N.Y. App. Div. LEXIS 5834 (N.Y. App. Div. 2d Dep't 2011).

Two oil corporations that had been held to be contributing dischargers and strictly liable for cleanup and removal costs associated with the discharge of petroleum products at a property and the property owner failed to show that a scrap metal firm (SMF) was strictly liable as a discharger since they did not show that SMF owned or controlled the property; SMF's acceptance of scrap metal at a discounted rate from a scrap yard owner who dismantled vehicles on the property did not make SMF a landowner or give it the authority to control the property or the activities conducted thereon. One Flint St., LLC v Exxon Mobil Corp., 175 A.D.3d 1012, 107 N.Y.S.3d 577, 2019 N.Y. App. Div. LEXIS 6322 (N.Y. App. Div. 4th Dep't 2019).

In action under CLS Nav § 181 to recover for damage to plaintiff's cows arising from their ingestion of oil that allegedly spilled from oil tank on land leased, in part, by defendant for purpose of developing gas and oil from land, defendant was not entitled to dismissal of complaint on ground that he was not "discharger" within meaning of § 181; defendant was not being sued because he owned interest in property, but because his company allegedly discharged oil. Whitesell v Walchli, 168 Misc. 2d 879, 644 N.Y.S.2d 610, 1996 N.Y. Misc. LEXIS 220 (N.Y. Sup. Ct. 1996), rev'd, 237 A.D.2d 953, 654 N.Y.S.2d 541, 1997 N.Y. App. Div. LEXIS 3548 (N.Y. App. Div. 4th Dep't 1997).

Viable cause of action for strict liability under CLS Nav § 181 was stated against deliverer of fuel oil into fuel storage tank from which it spilled out onto ground via hose installed by former property owner for redistribution of oil to another storage tank, and former owner's act was not intervening or superseding cause of spill, given broad definition of "discharge" in CLS Nav § 172 and liberal construction and public policy considerations surrounding CLS Nav Art 12, where deliverer set in motion events that resulted in discharge. Premier Nat'l Bank v Effron Fuel Oil Co., 182 Misc. 2d 169, 698 N.Y.S.2d 434, 1999 N.Y. Misc. LEXIS 460 (N.Y. Sup. Ct. 1999).

When a fuel company spilled oil onto customers' premises when the company overfilled one of the customers' oil tanks, the customers were not entitled to bring a claim, under N.Y. Nav. Law § 181(5), against a burner company that serviced an oil burner and boilers in a separate room 70 feet away from the oil tanks, as the burner company did not cause or contribute to the discharge. Fuchs & Bergh, Inc. v Lance Enters., Inc., 22 A.D.3d 715, 802 N.Y.S.2d 749, 2005 N.Y. App. Div. LEXIS 11435 (N.Y. App. Div. 2d Dep't 2005).

Trial court properly granted partial summary judgment to the State in its action, seeking recovery of environmental cleanup costs due to a gasoline spill from a gasoline company's underground tanks, as the company did not rebut evidence that a discharge occurred while it owned the property, pursuant to N.Y. Nav. Law § 181(1). State of New York v Passalacqua, 19 A.D.3d 786, 797 N.Y.S.2d 576, 2005 N.Y. App. Div. LEXIS 6163 (N.Y. App. Div. 3d Dep't 2005).

Evidence was sufficient to support a verdict in favor of defendants, a town and a fire company, on a claim under N.Y. Nav. Law § 181(1) by owners of an industrial facility. Witnesses testified that they did not find indications that defendants discharged petroleum in the course of fighting a fire at the facility. AMW Materials Testing, Inc. v Town of Babylon, 584 F.3d 436, 2009 U.S. App. LEXIS 22893 (2d Cir. N.Y. 2009).

Corporation's president was potentially liable under N.Y. Nav. Law § 181(5) for having caused or contributed to the discharge, by failing to report past suspected dumping, or by failing to take some kind of remedial action to prevent the spread of contamination. Moreover, there were triable issues of fact precluding summary judgment on the claim. Emerson Enters., LLC v Kenneth Crosby N.Y., LLC, 781 F. Supp. 2d 166, 2011 U.S. Dist. LEXIS 26388 (W.D.N.Y. 2011).

5. Homeowners

By virtue of ownership and control of heating system from which fuel oil leaked, homeowner was strictly liable to Environmental Protection and Spill Compensation Fund for clean-up costs of spill; proof of wrongful act or omission by homeowner or fuel oil supplier was not required. State v New York Cent. Mut. Fire Ins. Co., 147 A.D.2d 77, 542 N.Y.S.2d 402, 1989 N.Y. App. Div. LEXIS 7136 (N.Y. App. Div. 3d Dep't 1989).

Provisions of Navigation Law Article 12 apply to residential properties as well as oil industry enterprises. State v Arthur L. Moon, Inc., 228 A.D.2d 826, 643 N.Y.S.2d 760, 1996 N.Y. App. Div. LEXIS 6700 (N.Y. App. Div. 3d Dep't), app. dismissed, 89 N.Y.2d 861, 653 N.Y.S.2d 282, 675 N.E.2d 1235, 1996 N.Y. LEXIS 4257 (N.Y. 1996).

Defendant was not entitled to summary judgment in action brought under CLS Nav Article 12, even though she made prima facie showing that oil spill on her property did not actually reach groundwater or threaten to do so, where state submitted affidavit of Department of Environmental Conservation technician stating that he visited defendant's home, that he found soil beneath her fuel tank to be saturated with fuel oil, and that he detected strong odor of fuel oil coming from her well, and comparison testing of samples of soil beneath fuel tank and water from well showed same No. 2 fuel oil to be present in both. State v Arthur L. Moon, Inc., 228 A.D.2d 826, 643 N.Y.S.2d 760, 1996 N.Y. App. Div. LEXIS 6700 (N.Y. App. Div. 3d Dep't), app. dismissed, 89 N.Y.2d 861, 653 N.Y.S.2d 282, 675 N.E.2d 1235, 1996 N.Y. LEXIS 4257 (N.Y. 1996).

Oil spill caused when fuel tank located in homeowner's basement was tipped over in flood constituted "discharge" under CLS Nav § 172(8) where, despite actual knowledge that flooding in her cellar was so severe that water was flowing from basement windows, homeowner took no action to prevent tank from being toppled by flooding waters; since homeowner could have had oil tank drained, or could have employed pumps to drain flood waters, her omission, unintentional or otherwise, was cause of spilling petroleum. State v Pawtucket Mut. Ins., 140 Misc. 2d 1041, 532 N.Y.S.2d 335, 1988 N.Y. Misc. LEXIS 569 (N.Y. Sup. Ct. 1988).

Because an owner was the person who last winterized the oil pipes in the owner's house, and because there was conflicting evidence as to who authorized the delivery of kerosene to the premises, summary judgment was correctly denied on the owner's Navigation Law § 181(5) claim. Carter v Suburban Heating Oil Partners, L.P., 44 A.D.3d 1221, 845 N.Y.S.2d 482, 2007 N.Y. App. Div. LEXIS 10853 (N.Y. App. Div. 3d Dep't 2007).

6. Landlord-tenant

State was entitled to summary judgment in its action against owner of gasoline station, seeking reimbursement for cleanup costs and statutory penalties under CLS Nav Art 12 in connection with gasoline leakage from underground storage tanks located on defendant's property, since (1) CLS Nav § 181 provides for strict liability without regard to fault, (2) defendant's ownership of premises was established, as matter of law, by lease agreement which provided, inter alia, that all items attached to premises, islands, or underground, were to remain property of defendant, and that underground storage tanks were property of defendant, and (3) defendant submitted no proof in evidentiary form to support its claim that it had sold its tanks to lessor. State v Wisser Co., 170 A.D.2d 918, 566 N.Y.S.2d 747, 1991 N.Y. App. Div. LEXIS 2461 (N.Y. App. Div. 3d Dep't 1991).

Tenant was entitled to summary judgment dismissing landlord's action for reimbursement for costs incurred to remedy property damage caused by leakage of gasoline from deteriorated underground storage tanks and connecting piping at leased garage building where, under unambiguous terms of commercial lease involved, landlord was obligated to comply with all statutes and governmental orders at its sole expense, since landlord therefore bore financial responsibility for removing tanks and performing cleanup ordered by State Department of Environmental Conservation. 101 Fleet Place Assocs. v New York Tel. Co., 197

A.D.2d 27, 609 N.Y.S.2d 896, 1994 N.Y. App. Div. LEXIS 3626 (N.Y. App. Div. 1st Dep't), app. dismissed, 83 N.Y.2d 962, 616 N.Y.S.2d 13, 639 N.E.2d 752, 1994 N.Y. LEXIS 1525 (N.Y. 1994).

Property owners were properly granted summary judgment declaring and holding tenant statutorily liable for all cleanup and removal costs and other damages incurred by leaking of gasoline from underground storage tank where it was established that tank, once abandoned by third party, became trade fixture owned by tenant, and that tenant was in exclusive possession control, use, and operation of tank throughout its tenancy. Drouin v Ridge Lumber, 209 A.D.2d 957, 619 N.Y.S.2d 433, 1994 N.Y. App. Div. LEXIS 11959 (N.Y. App. Div. 4th Dep't 1994).

Sublessees, who operated gasoline service station under various sublease and franchise agreements with sublessors, were not entitled to summary judgment dismissing sublessors' third-party complaint based on stipulation executed in prior nonpayment proceeding releasing sublessees from all claims arising during their occupancy of premises, since it was undisputed that parties were unaware of property damage caused by petroleum leakage at time they settled summary nonpayment proceeding, and release was intended only to settle matters related to that proceeding and was not intended to release sublessees from potential liability for contamination of property due to discharge of petroleum products in violation of CLS Nav Art 12, which was subject of main action. Gettner v Getty Oil Co., 226 A.D.2d 502, 641 N.Y.S.2d 73, 1996 N.Y. App. Div. LEXIS 4408 (N.Y. App. Div. 2d Dep't 1996).

In landlords' action against their former tenants for breach of lease and for discharge of petroleum in violation of CLS Nav § 181, tenants unreasonably delayed investigation and remediation of environmental problems where (1) tenants were reluctant to undertake investigation of subsurface drains on premises because of their concern about costs and doubt that investigation was necessary, (2) drains were investigated without tenants' approval, at insistence of landlords' consultants and counsel, revealing subsurface contamination, and (3) tenants never conceded that landlords were entitled to certain basic remediation costs until they perfected present appeal. Gettner v Getty Oil Co., 266 A.D.2d 342, 701 N.Y.S.2d 64, 1999 N.Y. App. Div. LEXIS 11572 (N.Y. App. Div. 2d Dep't 1999), app. dismissed, 95 N.Y.2d 791, 711 N.Y.S.2d 158, 733 N.E.2d 230, 2000 N.Y. LEXIS 1014 (N.Y. 2000), app. denied, 95 N.Y.2d 860, 714 N.Y.S.2d 704, 737 N.E.2d 946, 2000 N.Y. LEXIS 2279 (N.Y. 2000), app. denied, 97 N.Y.2d 603, 735 N.Y.S.2d 492, 760 N.E.2d 1288, 2001 N.Y. LEXIS 3317 (N.Y. 2001).

Appeals court affirmed dismissal of gas station's third-party anticipatory breach of lease counterclaim against lessor; lessor's settlement with neighbor lessee to build access barrier was subject to station's supplier's approval so was not final repudiation; station had argued that the barrier or tire stop settlement stipulation restricted access to their leased land (in particular the use of the gas pumps) and was a unilateral modification of their lease; the neighbor lessee's original suit was for injunctive relief under the New York Navigation Law. Coney Island Exhaust, Inc. v Mobil Oil Corp., 304 A.D.2d 706, 758 N.Y.S.2d 389, 2003 N.Y. App. Div. LEXIS 4286 (N.Y. App. Div. 2d Dep't 2003).

Lessor's stipulation (to build a barrier) with lessee that was neighbor to gas station lessee was not an anticipatory breach, because, by it terms, it required that the oil supplier had to consent to the stipulation before it became operative; therefore, the stipulation was not an unequivocal, definite and final repudiation of the lease agreement. Coney Island Exhaust, Inc. v Mobil Oil Corp., 304 A.D.2d 706, 758 N.Y.S.2d 389, 2003 N.Y. App. Div. LEXIS 4286 (N.Y. App. Div. 2d Dep't 2003).

Landlord's claims for contribution and indemnification relating to a petroleum leak from an underground storage tank (UST) system on property it leased to a tenant for use as a gasoline service station were improperly dismissed as precluded by N.Y. Nav. Law § 181(5) because the parties' lease did not conclusively establish that the landlord was responsible for maintaining and repairing the UST system. Additionally, § 181(5) allowed a faultless landowner to seek contribution from the actual discharger even if the landowner itself was liable as a discharger under § 181(1). Union Turnpike Assoc., LLC v Getty Realty Corp., 27 A.D.3d 725, 812 N.Y.S.2d 628, 2006 N.Y. App. Div. LEXIS 3851 (N.Y. App. Div. 2d Dep't 2006).

Lessor was strictly liable under N.Y. Nav. Law §§ 181(1), 172(8) for the remediation costs of a petroleum discharge on propety it owned even though it had leased the property to a lessee for use as a gasoline station; the lessor admittedly knew petroleum products would be stored on the property, and it had the requisite level of control over the property through the terms of the lease, which acknowledged that the property would be used as a gasoline station. State of New York v B & P Auto Serv. Ctr., Inc., 29 A.D.3d 1045, 814 N.Y.S.2d 367, 2006 N.Y. App. Div. LEXIS 5875 (N.Y. App. Div. 3d Dep't), app. dismissed, 7 N.Y.3d 864, 824 N.Y.S.2d 608, 857 N.E.2d 1139, 2006 N.Y. LEXIS 3230 (N.Y. 2006).

Control over the terms of a lease is sufficient to establish the requisite level of control over a property to hold an otherwise faultless landowner liable for the remediation costs of petroleum discharges on the property under N.Y. Nav. Law §§ 172(8), 181(1); the landowner's contractual relationship through the lease with the party directly responsible for the spill conveys the requisite level of control over activities at the spill site to warrant the imposition of liability. State of New York v B & P Auto Serv. Ctr., Inc., 29 A.D.3d 1045, 814 N.Y.S.2d 367, 2006 N.Y. App. Div. LEXIS 5875 (N.Y. App. Div. 3d Dep't), app. dismissed, 7 N.Y.3d 864, 824 N.Y.S.2d 608, 857 N.E.2d 1139, 2006 N.Y. LEXIS 3230 (N.Y. 2006).

7. Liens

Article 78 petition to annul and vacate environmental lien filed under CLS Nav § 181-a was properly dismissed on ground that another adequate remedy at law was available, in that (1) CLS Lien § 59 gave petitioner statutory remedy to effect vacatur of lien, and (2) in state's plenary civil action to recover clean-up costs, petitioner had opportunity to dispute its classification as entity liable for discharge, which was necessary predicate to validity of lien. Art-Tex Petroleum v New York State Dep't of Audit & Control, 93 N.Y.2d 830, 687 N.Y.S.2d 619, 710 N.E.2d 265, 1999 N.Y. LEXIS 34 (N.Y. 1999).

Article 78 petition seeking to nullify and vacate notice of environmental lien filed by Department of Audit and Control against petitioner's property was properly dismissed since petitioner, as owner of contaminated property, was discharger based on CLS Nav § 181(1) liability, and petitioner failed to comply with provisions of CLS Lien § 59, which provides for means for vacating lien. Art-Tex Petroleum v New York State Dep't of Audit & Control, 248 A.D.2d 901, 670 N.Y.S.2d 605, 1998 N.Y. App. Div. LEXIS 2811 (N.Y. App. Div. 3d Dep't 1998), aff'd, 93 N.Y.2d 830, 687 N.Y.S.2d 619, 710 N.E.2d 265, 1999 N.Y. LEXIS 34 (N.Y. 1999).

8. Private right-of-action

Oil Spill Prevention, Control and Compensation Law (CLS Nav Art 12) does not create private right of action, but rather provides injured parties with administrative remedy in lieu of their existing common-law and statutory remedies, so that claimant injured by discharge of petroleum must proceed against Oil Spill Fund administered by Department of Environmental Conservation, which alone has recourse against discharger through subrogation, or claimant may pursue his existing common-law remedies directly against discharger; thus, action based on CLS Nav Art 12 asserted by property owner against oil company for damages allegedly resulting from company's discharge of oil on nearby property which seeped into claimant's property would be dismissed. Snyder v Jessie, 164 A.D.2d 405, 565 N.Y.S.2d 924, 1990 N.Y. App. Div. LEXIS 16406 (N.Y. App. Div. 4th Dep't 1990), app. dismissed, 77 N.Y.2d 940, 569 N.Y.S.2d 613, 572 N.E.2d 54, 1991 N.Y. LEXIS 581 (N.Y. 1991).

In action arising from seepage of petroleum into basement from adjoining property, court erred in refusing to permit plaintiff to amend her complaint to add cause of action against occupant of adjoining property premised on strict liability under CLS Nav Art 12 since (1) at time of motion, appellate court had already decided that private cause of action existed under CLS Nav § 181, (2) during pendency of motion, statute was amended to explicitly provide private cause of action, and (3) defendant presented no

evidence of prejudice. Wheeler v National Sch. Bus Serv., 193 A.D.2d 998, 598 N.Y.S.2d 109, 1993 N.Y. App. Div. LEXIS 5083 (N.Y. App. Div. 3d Dep't 1993).

Court properly allowed jury to consider private causes of action for strict liability for petroleum discharge based on CLS Nav § 181(5), even though leak and contamination originally occurred before effective date of statute, since statute was remedial in nature and simply extended common-law right to recover damages which previously existed in favor of any party injured as result of oil discharge. Leone v Leewood Serv. Station, 212 A.D.2d 669, 624 N.Y.S.2d 610, 1995 N.Y. App. Div. LEXIS 1734 (N.Y. App. Div. 2d Dep't), app. denied, 86 N.Y.2d 709, 634 N.Y.S.2d 443, 658 N.E.2d 221 (N.Y. 1995).

In action to recover for clean-up costs incurred by plaintiff in remediating petroleum-contaminated soil detected on property which he had purchased from defendant several years earlier, plaintiff's status as person responsible for discharge under CLS Nav § 181 did not preclude him from recovering in negligence as against defendant or any other third party, as negligence exists as substantive cause of action independent of Navigation Law. Calabro v Sun Oil Co., 276 A.D.2d 858, 714 N.Y.S.2d 781, 2000 N.Y. App. Div. LEXIS 10478 (N.Y. App. Div. 3d Dep't 2000).

Because the insureds were faultless property owners who paid cleanup and related costs resulting from an oil discharge on their property, the insurer's complaint against the oil tank companies alleged viable causes of action under N.Y. Nav. Law § 181(5) and for common-law indemnification based on the companies' alleged manufacture, design, assembly, and distribution of the tank that leaked; consequently, the companies' N.Y. C.P.L.R. 3211(a)(7) motion to dismiss the complaint was properly denied. General Cas. Ins. Co. v Kerr Heating Prods., 48 A.D.3d 512, 852 N.Y.S.2d 257, 2008 N.Y. App. Div. LEXIS 1274 (N.Y. App. Div. 2d Dep't 2008).

It was error to dismiss landowners' suit against an insurer under N.Y. Nav. Law § 181(5) on grounds the landowners had no viable cause of action because (1) N.Y. Nav. Law § 190 let the landowners sue the insurer directly, and (2) the insurer could not disclaim coverage due to the landowners not giving the insurer notice of an accident, as this was not stated in the insurer's notice of disclaimer. Henner v Everdry Mktg. & Mgt., Inc., 74 A.D.3d 1776, 902 N.Y.S.2d 765, 2010 N.Y. App. Div. LEXIS 5081 (N.Y. App. Div. 4th Dep't 2010).

Utility was not entitled to contribution for remediation of hazardous substance contamination from the owner to which it sold contaminated land on a peninsula, under N.Y. Lab. Law § 181; the court found, on testimony of former employees of the owner that it did not have any spills or leaks, that the utility did not show a release from the owner's property. Niagara Mohawk Power Corp. v Jones Chem., Inc., 315 F.3d 171, 2003 U.S. App. LEXIS 135 (2d Cir. N.Y. 2003).

9. Res judicata and collateral estoppel

Collateral estoppel did not apply to motion for summary judgment in action against insurance company commenced by state to recover amount paid to contractor for cleanup of spill of liquid asphalt from tanker truck owned by insured, notwithstanding prior action by contractor against insurance company in which it was determined that insurance company had right to question bills submitted by contractor, since, even though state could be considered to be in privity with contractor, state did not seek same relief as had been sought by contractor; while contractor had sought amount of its own unaudited invoices, state sought reimbursement of payments it was required to make pursuant to CLS Nav § 181(2). State v Gorman Bros., Inc., 166 A.D.2d 859, 563 N.Y.S.2d 187, 1990 N.Y. App. Div. LEXIS 12837 (N.Y. App. Div. 3d Dep't 1990).

State was not precluded by res judicata from maintaining action alleging that gas station owners, whose underground storage tanks leaked and resulted in cleanup expenditure from State Environmental Protection Spill Compensation Fund, were strictly liable for cleanup and removal costs plus penalties pursuant to CLS Nav Art 12, even though prior arbitration award between Fund and owners of contaminated wells determined that discharges occurred prior to effective date of CLS Nav Art 12, where cost of cleanup and removal were incurred subsequent to effective date, and CLS Nav Art § 190-a, added in 1980, provides that Art 12 applies to spills occurring either before or after effective date. State v Cities Service Co., 180 A.D.2d 940, 580 N.Y.S.2d 512, 1992 N.Y. App. Div. LEXIS 2679 (N.Y. App. Div. 3d Dep't 1992).

10. Strict liability

CLS Nav Art 12 imposes strict liability on any entity, large or small, commercial or residential, responsible for discharge of petroleum which threatens state's waters. State v New York Cent. Mut. Fire Ins. Co., 147 A.D.2d 77, 542 N.Y.S.2d 402, 1989 N.Y. App. Div. LEXIS 7136 (N.Y. App. Div. 3d Dep't 1989).

In action alleging defendants' strict liability for cleanup costs under CLS Nav Art 12 and liability for penalties in connection with discovery of gasoline in groundwater near their service station, court erred in dismissing third-party strict liability cause of action against defendants' immediate predecessors in title, as plaintiff's recovery did not depend on finding that discharge took place while defendants owned property, and defendants could pursue claim under CLS Nav § 181(5) against party who actually caused discharge. State v Tartan Oil Corp., 219 A.D.2d 111, 638 N.Y.S.2d 989, 1996 N.Y. App. Div. LEXIS 2286 (N.Y. App. Div. 3d Dep't 1996).

In action alleging defendants' strict liability for cleanup costs under CLS Nav Art 12 and liability for penalties in connection with discovery of gasoline in groundwater near their service station, where defendants asserted third-party strict liability cause of action against their immediate predecessors in title, defendants could recover expense incurred in defending main action to extent that such expense constituted element of "indirect damage" under CLS Nav § 181(1) and (5). State v Tartan Oil Corp., 219 A.D.2d 111, 638 N.Y.S.2d 989, 1996 N.Y. App. Div. LEXIS 2286 (N.Y. App. Div. 3d Dep't 1996).

In action alleging defendants' strict liability for cleanup costs under CLS Nav Art 12 and liability for penalties in connection with discovery of gasoline in groundwater near their service station, where defendants asserted third-party strict liability cause of action against their immediate predecessors in title, court properly dismissed defendants' claim concerning their liability for statutory penalties, which was based solely on defendants' failure to promptly contain discharges. State v Tartan Oil Corp., 219 A.D.2d 111, 638 N.Y.S.2d 989, 1996 N.Y. App. Div. LEXIS 2286 (N.Y. App. Div. 3d Dep't 1996).

Defendant should have been granted summary judgment in action alleging strict liability under CLS Nav § 181 where plaintiff's primarily relied on one sentence in 7-page expert affidavit, which vaguely suggested that petroleum discharge may have occurred "at least during the late 1970's and continued through the 1980's." Hilltop Nyack Corp. v TRMI Holdings Inc., 272 A.D.2d 521, 708 N.Y.S.2d 138, 2000 N.Y. App. Div. LEXIS 5801 (N.Y. App. Div. 2d Dep't 2000).

CLS Nav § 181(1) imposes strict liability on corporations and individuals who directly own system from which discharge occurred, and such liability attaches despite lack of proof that owner caused or contributed to discharge; however, § 181(1) does not impose strict liability on stockholders or officers of corporation that owns or operates system from which discharge occurred, based solely on those statuses. State v Markowitz, 273 A.D.2d 637, 710 N.Y.S.2d 407, 2000 N.Y. App. Div. LEXIS 7297 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 770, 722 N.Y.S.2d 473, 745 N.E.2d 393, 2000 N.Y. LEXIS 3872 (N.Y. 2000).

In absence of claim that property owners caused or contributed to discharges from underground tanks on their property, they were strictly liable as dischargers under CLS Nav Art 12 only if they owned tanks from which discharges occurred. 310 South Broadway Corp. v McCall, 275 A.D.2d 549, 712 N.Y.S.2d 206, 2000 N.Y. App. Div. LEXIS 8402 (N.Y. App. Div. 3d Dep't 2000), app. denied, 96 N.Y.2d 701, 722 N.Y.S.2d 793, 745 N.E.2d 1015, 2001 N.Y. LEXIS 7 (N.Y. 2001).

Summary judgment as to liability for owners' subrogee and against oil companies on the subrogee's N.Y. Nav. Law art. 12 claims was proper under circumstances in which the subrogee established that one of the oil companies pumped oil into an abandoned fill pipe that led to the owners' basement, thereby

discharging oil into the house, and that the owners' property was damaged as a result of the discharge; the oil companies failed to raise a triable fact issue in opposition. Cleary v Wallace Oil Co., Inc., 55 A.D.3d 773, 865 N.Y.S.2d 663, 2008 N.Y. App. Div. LEXIS 7964 (N.Y. App. Div. 2d Dep't 2008).

Because there were issues of fact as to whether the current owners contributed to the property's contamination, the trial court properly denied the parties' summary judgment motions with respect strict liability under N.Y. Nav. Law § 181(1), (5), and for common-law indemnification. Sweet v Texaco, Inc., 67 A.D.3d 1322, 890 N.Y.S.2d 233, 2009 N.Y. App. Div. LEXIS 8108 (N.Y. App. Div. 4th Dep't 2009).

Because the owners did nothing after learning that a petroleum storage system on their property had discharged petroleum contaminating the property and that a cleanup was needed, they were strictly liable as dischargers under N.Y. Nav. Law § 181(1) as a matter of law. State of New York v C.J. Burth Servs., Inc., 79 A.D.3d 1298, 915 N.Y.S.2d 174, 2010 N.Y. App. Div. LEXIS 9155 (N.Y. App. Div. 3d Dep't 2010).

Property owner was strictly liable as a discharger for cleanup and removal costs associated with the discharge of petroleum products at a property since: (1) he owned the property for a year; (2) petroleum discharge from the dismantling of vehicles by a scrap yard owner occurred during that year; and (3) the property owner was able to control the scrap yard owner's activities on the property. One Flint St., LLC v Exxon Mobil Corp., 175 A.D.3d 1012, 107 N.Y.S.3d 577, 2019 N.Y. App. Div. LEXIS 6322 (N.Y. App. Div. 4th Dep't 2019).

Strict liability provisions of Oil Spill Act apply to homeowners. State v Pawtucket Mut. Ins., 140 Misc. 2d 1041, 532 N.Y.S.2d 335, 1988 N.Y. Misc. LEXIS 569 (N.Y. Sup. Ct. 1988).

Under N.Y. Nav. Law § 181(1), a fuel company, as discharger, was strictly liable to the State for the clean-up and removal costs made by a state fund and all direct and indirect damages; the fuel company was not entitled to a hearing on the reasonableness of the clean-up costs under N.Y. Nav. Law § 185(1) because the statute did not apply here where the fund sought reimbursement from the company for clean-up costs, and to the extent that the court's previous decisions suggested that a hearing might have been required where the State sought indemnification on behalf of the fund, they were either based on materially different older provisions of N.Y. Nav. Law § 185 or they inadvertently relied on such decisions rather than the present wording of the statute. State v Speonk Fuel, Inc., 307 A.D.2d 59, 762 N.Y.S.2d 674, 2003 N.Y. App. Div. LEXIS 7701 (N.Y. App. Div. 3d Dep't 2003), aff'd, 3 N.Y.3d 720, 786 N.Y.S.2d 375, 819 N.E.2d 991, 2004 N.Y. LEXIS 2438 (N.Y. 2004).

Where the New York State Thruway Authority established that a carrier discharged petroleum upon its involvement in an auto accident, that a gasoline discharge occurred, and that the Thruway's property was damaged as a result of said discharge, the carrier was liable for all direct and indirect damages sustained, pursuant to N.Y. Nav. Law §§ 181(1), (5). Matera v Mystic Transp., Inc., 308 A.D.2d 514, 764 N.Y.S.2d 458, 2003 N.Y. App. Div. LEXIS 9711 (N.Y. App. Div. 2d Dep't 2003).

In a case brought by homeowners against a corporation and its president, alleging that gasoline had been discharged from a service station onto the homeowners' property, questions of fact existed as to whether the president owned the petroleum tanks from which the gasoline discharged occurred, and whether the president had engaged in "active wrongful conduct or culpable inaction" so as to have rendered him personally liable as a discharger; partial summary judgment in favor of the homeowners and against the president was reversed. Golovach v Bellmont L.M., Inc., 4 A.D.3d 730, 773 N.Y.S.2d 139, 2004 N.Y. App. Div. LEXIS 2021 (N.Y. App. Div. 3d Dep't), app. dismissed, 2 N.Y.3d 793, 781 N.Y.S.2d 291, 814 N.E.2d 463, 2004 N.Y. LEXIS 967 (N.Y. 2004).

Evidence that a fuel company overfilled some customers' oil tank, discharging oil onto the customers' premises, showed the customers were prima facie entitled to judgment against the fuel company, as a matter of law, because, under N.Y. Nav. Law § 181(1), the company was strictly liable for the discharge, but it was error to find that the fuel company raised a triable issue of fact as to whether a leak in the customer's second tank contributed to the discharge because the leak was not discovered until five months after the spill and was not shown to be related to the spill, nor was a later-discovered spill in the overfilled tank shown to be related to the spill. Fuchs & Bergh, Inc. v Lance Enters., Inc., 22 A.D.3d 715, 802 N.Y.S.2d 749, 2005 N.Y. App. Div. LEXIS 11435 (N.Y. App. Div. 2d Dep't 2005).

In a suit wherein the State was asserting strict liability against a gasoline station for contamination resulting from petroleum discharges, the trial court erred in granting summary judgment to a chemical corporation with regard to the gasoline station owner's fourth-party complaint asserting indemnification and contribution from the chemical corporation, because genuine issues of material fact existed with regard to whether a 1976 petroleum discharge at a nearby gas station, then owned by the chemical corporation, contributed to the contamination at the gasoline station owner's property, which was the subject property in the suit. State of New York v Metro Resources, Inc., 14 A.D.3d 982, 788 N.Y.S.2d 697, 2005 N.Y. App. Div. LEXIS 618 (N.Y. App. Div. 3d Dep't 2005).

Neither a petroleum product supplier nor its insurer could be held strictly liable under N.Y. Nav. Law § 181(1) for the costs of cleaning up a gasoline spill from a gas station's leaking underground tanks because the supplier could not have seen or known of the spill and no question of fact was raised as to whether the supplier caused the spill; liability under § 181(1) is predicated on a potentially responsible party's capacity to prevent an oil spill or to clean up resulting contamination, and read in conjunction with N.Y. Nav. Law § 172(8), an act or omission that results in a discharge is required. State of New York v Joseph, 29 A.D.3d 1233, 816 N.Y.S.2d 214, 2006 N.Y. App. Div. LEXIS 6794 (N.Y. App. Div. 3d Dep't), app. denied, 7 N.Y.3d 711, 823 N.Y.S.2d 770, 857 N.E.2d 65, 2006 N.Y. LEXIS 2664 (N.Y. 2006).

Owner was entitled to summary judgment under N.Y. Nav. Law § 181 arising from a fuel oil spill from a new storage tank at the owner's home because the owner submitted evidence that a corporation and a subcontractor were petroleum dischargers and the corporation and the subcontractor submitted no evidence to show how the owner's actions or inactions actually caused or contributed to the oil discharge; the assertions the corporation and the subcontractor to that effect were based on pure speculation. Thus, the corporation and the subcontractor failed to raise a triable fact issue sufficient to preclude summary judgment for the owner under § 181. Tifft v Bigelow's Oil Serv., Inc., 70 A.D.3d 1248, 894 N.Y.S.2d 594, 2010 N.Y. App. Div. LEXIS 1393 (N.Y. App. Div. 3d Dep't 2010).

Owner was strictly liable as a discharger and not entitled to reimbursement from the Fund because owner's liability under N.Y. Nav. Law § 181(1) was not predicated on his status as a landowner but, rather, as the owner of the system from which the discharge occurred at the time of discovery of the discharge, regardless of fault or knowledge; while the underground storage tank (UST) at issue was installed by an entity other than the owner and the owner took steps in an attempt to remove all USTs from the property before buying it, it was undisputed that the UST remained in the ground when the property was bought by the owner. The UST was a fixture, the owner bought the property in "as is" condition and failed to submit any proof that the transfer of the land did not include fixtures, and the record was otherwise devoid of any evidence that the owner was not the owner of the UST. Matter of Veltri v New York State Off. of The State Comptroller, 81 A.D.3d 1050, 916 N.Y.S.2d 315, 2011 N.Y. App. Div. LEXIS 762 (N.Y. App. Div. 3d Dep't 2011).

11. Successor liability

Property owner who is deemed pollutant-discharger under Navigation Law has cause of action against previous owner-discharger for cost of cleaning up contaminated site. White v Long, 85 N.Y.2d 564, 626 N.Y.S.2d 989, 650 N.E.2d 836, 1995 N.Y. LEXIS 1029 (N.Y. 1995).

Seller was not entitled to summary judgment dismissing action for strict liability under CLS Nav § 181 arising from sale of property on which buyer found cracked underground gasoline storage tank, where buyer was not estopped from asserting a private right of action against seller simply because of his status

as discharger. White v Long, 204 A.D.2d 892, 612 N.Y.S.2d 482, 1994 N.Y. App. Div. LEXIS 5406 (N.Y. App. Div. 3d Dep't), app. dismissed, in part, 84 N.Y.2d 905, 621 N.Y.S.2d 508, 645 N.E.2d 1206, 1994 N.Y. LEXIS 3484 (N.Y. 1994), aff'd, modified, 85 N.Y.2d 564, 626 N.Y.S.2d 989, 650 N.E.2d 836, 1995 N.Y. LEXIS 1029 (N.Y. 1995).

Purchasers of real property on which sellers had been operating motor vehicle repair shop were not entitled to summary judgment in sellers' mortgage foreclosure action on ground that sellers failed to satisfy their contractual obligation to deliver marketable title due to presence on property of possible sources of underground discharge of petroleum products, as to which cost of cleanup could be imposed on any owner pursuant to CLS Nav § 181; marketability of title to real property refers to purchaser's right to hold land free from probable claim by another, not to value of property. Vandervort v Higginbotham, 222 A.D.2d 831, 634 N.Y.S.2d 800, 1995 N.Y. App. Div. LEXIS 12669 (N.Y. App. Div. 3d Dep't 1995).

Sellers, who had operated motor vehicle repair shop on property sold to defendants, were entitled to summary judgment defendants' claim for rescission predicated on mutual mistake and fraud arising from presence on property of possible sources of underground discharge of petroleum products as to which cost of cleanup could be imposed on any owner under CLS Nav § 181, where defendants admittedly were aware of prior use of property and existence of floor drains signaling presence of underground disposal or storage of oil before they purchased property, and there was no showing that they were prevented from conducting inspections or tests to allay concerns about property, or that sellers concealed anything that could not readily be discovered through reasonable inspection. Vandervort v Higginbotham, 222 A.D.2d 831, 634 N.Y.S.2d 800, 1995 N.Y. App. Div. LEXIS 12669 (N.Y. App. Div. 3d Dep't 1995).

Plaintiffs failed to state action under Navigation Law Article 12 against defendants (petroleum deliverer and plaintiffs' predecessors in title) where defendants submitted documentary evidence (tank tightness tests) that showed that underground storage tanks were not leaking at time of transfer of title to plaintiffs, and plaintiff merely submitted affidavit asserting his "believe" that defendants knew about leaks in tanks when plaintiffs purchased gas station. Kozemko v Griffith Oil Co., 256 A.D.2d 1199, 682 N.Y.S.2d 503, 1998 N.Y. App. Div. LEXIS 14361 (N.Y. App. Div. 4th Dep't 1998).

Defendant's summary judgment motion was properly denied in actions seeking indemnification or contribution for costs to clean up contaminated soil under strict liability provisions of Navigation Law Art 12, despite "as is" clause in parties' contract allocating to plaintiff risks associated with environmental problems on property, since clause in question precluded actions based on breach of warranty, not those based on statut- Umbra U.S.A., Inc. v Niagara Frontier Transp. Auth., 262 A.D.2d 980, 693 N.Y.S.2d 371, 1999 N.Y. App. Div. LEXIS 7149 (N.Y. App. Div. 4th Dep't 1999).

New owner of property on which prior owner had operated gas station was properly added as defendant in action under CLS Nav § 181 for discharge of gasoline from leaking tank where purchase included tanks, pipes, and other fixtures constituting system from which discharge occurred, and fact that leaking tank was removed shortly before closing of title was irrelevant. State v Speonk Fuel, Inc., 273 A.D.2d 681, 710 N.Y.S.2d 652, 2000 N.Y. App. Div. LEXIS 7219 (N.Y. App. Div. 3d Dep't 2000), app. dismissed, 98 N.Y.2d 721, 748 N.Y.S.2d 901, 778 N.E.2d 551, 2002 N.Y. LEXIS 2335 (N.Y. 2002), app. denied, 98 N.Y.2d 766, 752 N.Y.S.2d 5, 781 N.E.2d 917, 2002 N.Y. LEXIS 3397 (N.Y. 2002), aff'd, 3 N.Y.3d 720, 786 N.Y.S.2d 375, 819 N.E.2d 991, 2004 N.Y. LEXIS 2438 (N.Y. 2004).

In a diversity action in which a current owner sought recovery from a property's former owner of settlement money that the current owner paid to the State for cleanup of a petroleum discharge that occurred on the property, the current owner's claim under N.Y. Nav. Law § 181(5) was dismissed on summary judgment because it was undisputed that the current owner owned the property at the time of the discharge and subsequently entered into a settlement agreement with the State concerning its voluntary payment for the remediation of the discharge, and, as such, the owner had not set forth any facts which would allow a reasonable juror to conclude that it lacked all culpability for the discharge. Furthermore, because at no time did the current owner ever conduct a survey to determine whether the property complied with all environmental laws and regulations, as it alleged that the former owner was required to do, it had failed to present evidence which would allow a reasonable jury to conclude that it was faultless with respect to the discharge. Dora Homes, Inc. v Epperson, 344 F. Supp. 2d 875, 2004 U.S. Dist. LEXIS 26354 (E.D.N.Y. 2004).

12. Miscellaneous

In action to recover clean-up costs incurred as result of accidental discharge of petroleum from above-ground tank owned by tenant in defendant's trailer park and utilized by tenant for storage of residential heating fuel, summary judgment should not have been granted in favor of defendant, where it had the ability to control potential sources of contamination on its property. State v Green, 96 N.Y.2d 403, 729 N.Y.S.2d 420, 754 N.E.2d 179, 2001 N.Y. LEXIS 1981 (N.Y. 2001).

An insurance company was properly required to indemnify its liability policyholder for expenses incurred in cleaning up a fuel oil spill at a residence at which the policyholder had serviced a fuel oil tank and delivered fuel oil which subsequently leaked into the basement, since the policyholder was strictly liable pursuant to Nav Law § 181(1) for the cleanup costs; under the Navigation Law, no proof was required of specific wrongdoing which directly caused the spill in order to impose liability, and judicial notice of the common knowledge that oil can seep into subsurface waters obviated the necessity of specific proof that the oil was in danger of seeking into protected water. Domermuth Petroleum Equipment & Maintenance Corp. v Herzog & Hopkins, Inc., 111 A.D.2d 957, 490 N.Y.S.2d 54, 1985 N.Y. App. Div. LEXIS 50231 (N.Y. App. Div. 3d Dep't 1985).

Court did not err in summarily awarding state full reimbursement for cleanup and removal costs under CLS Nav Art 12, although defendant owner was not given notice of receipt of cleanup cost claims by State Environmental Protection and Spill Compensation Fund, since absence of notice did not result in prejudice such that defendant was denied opportunity to contest validity or amount of costs through arbitration (CLS Nav § 185) where (1) letters from Department of Transportation (DOT) placed defendant on notice of leak, its responsibility for cleanup and removal, and its responsibility for reimbursement should DOT be required to undertake cleanup, and (2) defendant failed to respond to DOT's initial and subsequent notices. State v Wisser Co., 170 A.D.2d 918, 566 N.Y.S.2d 747, 1991 N.Y. App. Div. LEXIS 2461 (N.Y. App. Div. 3d Dep't 1991).

Complaint alleging that defendant lessee owned petroleum which leaked from premises it leased from plaintiff, contaminating local waterways, was sufficient to state cause of action under CLS Nav § 181(1), which provides that any person who has discharged petroleum shall be strictly liable for all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained. 145 Kisco Ave. Corp. v Dufner Enters., 198 A.D.2d 482, 604 N.Y.S.2d 963, 1993 N.Y. App. Div. LEXIS 11050 (N.Y. App. Div. 2d Dep't 1993).

It was error to dismiss cause of action based on violation of CLS Nav § 181(5) where complaint alleged that defendants' property was contaminated with chemical compounds, that defendants "used, generated and disposed of" hazardous substances, and that defendants caused hazardous substances to come onto plaintiffs' property, since language in affidavit of plaintiffs' expert, which defined nature of hazardous substances as "hydrocarbons which are commonly associated with petroleum waste," fell within definition of "petroleum" in CLS Nav § 172(15). Henning v Rando Mach. Corp., 207 A.D.2d 106, 620 N.Y.S.2d 867, 1994 N.Y. App. Div. LEXIS 13421 (N.Y. App. Div. 4th Dep't 1994).

In action alleging defendants' strict liability for cleanup costs under CLS Nav Art 12 and liability for penalties in connection with discovery of gasoline in groundwater near their service station, where defendants asserted third-party strict liability cause of action against their immediate predecessors in title, third-party defendants' motion for partial summary judgment on

cross-claim based on theory of contractual indemnity was properly denied, as agreement executed in connection with transfer of service station to defendants did not indicate that they agreed to indemnify their predecessors for leaking underground storage tanks regardless of their negligence or responsibility for spill. State v Tartan Oil Corp., 219 A.D.2d 111, 638 N.Y.S.2d 989, 1996 N.Y. App. Div. LEXIS 2286 (N.Y. App. Div. 3d Dep't 1996).

In negligence action for oil spill affecting plaintiff's property, plaintiff was entitled, despite extensive delay, to amend complaint to add cause of action under CLS Nav § 181 where (1) defendant's bald statement that witnesses pertinent to new claim were not deposed and were no longer available was insufficient to support its claim of prejudice, absent identification of witnesses or documents that were no longer available or how they were necessary to defense of cause of action under § 181, and (2) amended complaint did not include any new facts but only different theory of liability. Danise v Agway Energy Prods., 255 A.D.2d 731, 680 N.Y.S.2d 723, 1998 N.Y. App. Div. LEXIS 11918 (N.Y. App. Div. 3d Dep't 1998).

Defendants, company which removed underground storage tanks at gasoline service station and company hired to investigate extent of contamination and continued to monitor site for 6 years, were improperly granted summary judgment where they failed to raise issue of immunity under CLS Nav § 178-a, and they could be found strictly liable for discharge of petroleum under CLS Nav § 172(8). Hilltop Nyack Corp. v TRMI Holdings, Inc., 264 A.D.2d 503, 694 N.Y.S.2d 717, 1999 N.Y. App. Div. LEXIS 8914 (N.Y. App. Div. 2d Dep't 1999), aff'd in part, modified, 272 A.D.2d 521, 708 N.Y.S.2d 138, 2000 N.Y. App. Div. LEXIS 5801 (N.Y. App. Div. 2d Dep't 2000).

Defendant, city which sold property to plaintiffs at public auction, was properly granted summary judgment in action under CLS Nav § 181(5) where plaintiff's conceded that defendant did not cause or contribute to discharge from underground petroleum storage tanks. Popolizio v City of Schenectady, 269 A.D.2d 670, 701 N.Y.S.2d 755, 2000 N.Y. App. Div. LEXIS 1280 (N.Y. App. Div. 3d Dep't 2000).

Trial court erred, in customers' claim pursuant to N.Y. Nav. Law § 181 arising from a fuel spill, in precluding evidence of other oil conditions on the premises other than the overfill of the first oil tank, including a leak in a second oil tank, because the majority of the damages claim was that the customers' business inventory, which remained on the premises after the discharge at issue, became unmarketable as a result of petroleum vapors, the customers presented evidence that the premises still smelled of oil six months after the discharge, and the customers argued in summation that this showed that the spill was much larger than the fuel company admitted; under these circumstances, a new trial was warranted. Although an attorney's fee and litigation costs were recoverable in an action pursuant to N.Y. Nav. Law § 181, because the amount awarded for the attorney's fee was based upon the judgment, that award was subject to reversal as well. Fuchs & Bergh, Inc. v Lance Enters., Inc., 48 A.D.3d 626, 853 N.Y.S.2d 106, 2008 N.Y. App. Div. LEXIS 1565 (N.Y. App. Div. 2d Dep't 2008).

In plaintiff's action to recover petroleum cleanup costs from defendant owners of an oil storage facility, the supreme court held that plaintiffs were entitled to recover the $221,192 expended by the Leaking Underground Storage Tank Fund because the federal appropriation was not "compensation" for cleanup costs under Navigation Law § 193; recovery of the disputed funds would make plaintiff whole for the cleanup costs and replenish the Leaking Underground Storage Tank Fund so that the recovered funds could be used to pay for other remediation work. Plaintiff's recoupment of the $221,192 would not amount to a double recovery. State of New York v Ronney, 163 A.D.3d 1315, 81 N.Y.S.3d 647, 2018 N.Y. App. Div. LEXIS 5313 (N.Y. App. Div. 3d Dep't 2018).

Defendant was properly denied summary judgment, as plaintiffs' evidence could support the conclusion that defendant used certain pipes as part of an active fuel distribution system and that a large quantity of fuel oil spilled out of those pipes, plaintiffs' experts identified numerous flaws in the methodology used to date the contamination to some earlier spill, and plaintiffs' experts identified a particular "T-joint" that defendant could have capped. Plainview Props. SPE, LLC v County of Nassau, 181 A.D.3d 731, 121 N.Y.S.3d 338, 2020 N.Y. App. Div. LEXIS 1681 (N.Y. App. Div. 2d Dep't 2020).

Plaintiff, a company in the business of cleaning up petroleum spills hired by the State Department of Transportation to contain and clean up liquid asphalt emulsion from a tanker owned by defendant, could sue defendant directly to recover the cost of cleanup without first making a claim against the New York Environmental Protection and Spill Compensation Fund; however, a plaintiff could not sue defendant's insurer directly to recover the cost of cleanup. Domermuth Petroleum Equipment & Maintenance Corp. v Gorman Bros., Inc., 127 Misc. 2d 323, 485 N.Y.S.2d 705, 1985 N.Y. Misc. LEXIS 2597 (N.Y. Sup. Ct. 1985).

Mere delivery of gasoline to underground storage tank, absent other factors, was insufficient to render gasoline supplier liable as discharger under CLS Nav § 181(1); it would be unduly burdensome to extend liability for petroleum discharges to petroleum suppliers without some proof that supplier either caused or contributed to discharge, or that it possessed ability to anticipate and/or prevent discharge. State v Cronin, 186 Misc. 2d 809, 717 N.Y.S.2d 828, 2000 N.Y. Misc. LEXIS 476 (N.Y. Sup. Ct. 2000).

Where a property owner failed to establish as a matter of law that a gasoline spill from underground storage tanks did not occur during any of the time that he owned the property, the trial court erred in granting summary judgment to him on his claim of statutory indemnification against a gas company that previously owned the property, pursuant to N.Y. Nav. Law § 181(5). State of New York v Passalacqua, 19 A.D.3d 786, 797 N.Y.S.2d 576, 2005 N.Y. App. Div. LEXIS 6163 (N.Y. App. Div. 3d Dep't 2005).

In an action filed by a property buyer to recover damages for fraud, negligence, and other claims arising out of contamination on his property from spills that took place before he bought it, the buyer's theory that the complaint stated a cause of action against a corporation for violating N.Y. Nav. Law § 181(5) was without merit; the theory was raised for the first time on appeal, and the complaint did not support it. Ozelkan v Tyree Bros. Envtl. Servs., Inc., 29 A.D.3d 877, 815 N.Y.S.2d 265, 2006 N.Y. App. Div. LEXIS 6887 (N.Y. App. Div. 2d Dep't 2006).

Former operator of a manufactured gas plant could not pursue a claim under N.Y. Nav. Law § 181(1) against property owners and former owners to recover the operator's cleanup costs related to petroleum discharges, as the operator was at fault for at least some of the petroleum discharge at the site. However, the operator could seek contribution under N.Y. Nav. Law § 176(8), which did not bar a responsible party from bringing a claim. Niagara Mohawk Power Corp. v Chevron U.S.A., Inc., 596 F.3d 112, 2010 U.S. App. LEXIS 3859 (2d Cir. N.Y. 2010).

Fire company was exempt from any liability under N.Y. Nav. Law § 181 because it did not act negligently when it extinguished the fire at plaintiffs' industrial facility and was not negligent when it used a pay loader to move debris around after the fire because in all likelihood, the kerosene that had been contained in the containers probably burned in the fire and did not contribute to the contamination of the storm drains or the recharge basin. AMW Materials Testing, Inc. v Town of Babylon, 348 F. Supp. 2d 4, 2004 U.S. Dist. LEXIS 25511 (E.D.N.Y. 2004), aff'd in part, vacated in part, 187 Fed. Appx. 24, 2006 U.S. App. LEXIS 8545 (2d Cir. 2006).

Building owner's N.Y. Nav. Law § 181 claim against a bank failed because the record showed there was no evidence of a discharge of hazardous materials during the 10-day period the bank held the property to monitor its security, and the bank, as a mere secured creditor, was exempted from liability under navigation law. Schenectady Indus. Corp. v Upstate Textiles, Inc., 2008 U.S. Dist. LEXIS 95910 (N.D.N.Y. Nov. 24, 2008).

Fact issues as to whether and to what extent the tenants contributed to or caused the discharge of petroleum in and around a landlord's buildings during their use and occupancy precluded summary judgment on the landlord's N.Y. Nav. Law §§ 176(8) and 181(5) claims. Schenectady Indus. Corp. v Upstate Textiles, Inc., 689 F. Supp. 2d 282, 2010 U.S. Dist. LEXIS 6138 (N.D.N.Y. 2010).

Defendants' nonrenewal of a gas station operator's franchise was proper under the Petroleum Marketing Practices Act because there were no material issue of fact as to defendants having decided in good faith and in the normal course of business to sell the premises, defendants made a bona fide offer to sell the premises to the operator, and a tank-removal provision was not a creature of bad faith or some "conspiracy" to put the operator out of business. Scarsdale Cent. Serv. v Cumberland Farms, Inc., 2015 U.S. Dist. LEXIS 18850 (S.D.N.Y. Feb. 13, 2015).

13. Defenses

Current property owner's action under this statue was barred by releases executed by the former owner and the gas station operator because although the releases were ambiguous on their faces as to whether they encompassed unknown claims for environmental contamination, the current owner failed to adduce evidence to support a finding that the releases did not, whereas the operator adduced evidence showing that the releases were intended to be general releases. Burnside 711, LLC v Amerada Hess Corp., 175 A.D.3d 557, 106 N.Y.S.3d 368, 2019 N.Y. App. Div. LEXIS 6228 (N.Y. App. Div. 2d Dep't 2019).

A former tenant established a defense to an assignee's action to recover purported remediation costs in connection with a 1992 petroleum spill, asserted under the common law, the contract between the former tenant and one of the intermediaries, and the Navigation Law because the former tenant performed its remediation obligations under the contract and received a "no further action" letter from the Department of Environmental Conservation. 2015 N.Y. App. Div. LEXIS 9267.

Trial court properly denied a borrower's motion for partial summary judgment in a surviving lender's action to foreclose on a purchase money mortgage because there were triable issues of fact as to whether the borrower's counterclaims under the innocent lender exemption to liability were precluded by the parties' completion agreement, and the borrower failed to establish as a matter of law that, by executing the completion agreement, he did not release the deceased lender and the lender's assignee. Mason v Caruana, 177 A.D.3d 1295, 110 N.Y.S.3d 763, 2019 N.Y. App. Div. LEXIS 8052 (N.Y. App. Div. 4th Dep't 2019).

Notes to Unpublished Decisions

1. Discharge

Unpublished decision: Statutory cross-claims were dismissed on the basis of defendant-appellee's previously established status as a "discharger." Under neither N.Y. Nav. Law § 181(5) nor § 176(8) was defendant-appellee's status as a "discharger" alone sufficient to bar its recovery, and defendant-appellant's cross-claims against defendant-appellee for damages under § 181(5) were improperly dismissed. Lambrinos v Exxon Mobil Corp., 349 Fed. Appx. 613, 2009 U.S. App. LEXIS 22879 (2d Cir. N.Y. 2009).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 186.– 188.

Jurisprudences:

23 NY Jur 2d Contribution, Indemnity, and Subrogation § 113.

29 NY Jur 2d Courts and Judges § 243.

55 NY Jur 2d Environmental Rights and Remedies §§ 187, 188, 190, 195, 198, 199, 309.

62A NY Jur 2d Government Tort Liability § 86.

Treatises

Matthew Bender's New York Practice Guides: New York Practice Guide: Real Estate § 1.09 [9]. (Underground Storage Tanks and Petroleum Spills).

Matthew Bender's New York Practice Guides: LexisNexis AnswerGuide New York Real Property § 2.07. (Advising Purchaser as to Condition of Property and Environmental Matters).

Warren's Weed New York Real Property: Warren's Weed: New York Real Property § 18.40. (Petroleum Cleanups).

Warren's Weed New York Real Property: Warren's Weed: New York Real Property § 82.26. (Potential Liability of Lessor for Environmental Contamination).

Warren's Weed New York Real Property: Warren's Weed: New York Real Property § 82.38. (Tenant's Liability for Damage to Property at Termination of Lease).

Warren's Weed New York Real Property: Warren's Weed: New York Real Property § 123.15. (Navigation Law).

Annotations:

Liability, under § 311(f, g) of Federal Water Pollution Control Act (33 USCS § 1321(f, g)), to United States of owner or operator of onshore or offshore facility, or vessel, for discharge of oil or hazardous substance. 56 ALR Fed 343.

FORMS: Bender's Forms for the Consolidated l Laws of New York Navigation Law § 181.(Form No. 1: Complaint in Action by Landowner Against Neighbor and Heating Oil Distributor Who Caused Leak).

Bender's Forms of Pleading Form No. 217:5. (Complaint in Action Based on Navigation Law by Property Owner Against Previous Owner for Damages Caused by Petroleum Discharge).

Bender's Forms of Pleading Form No. 288:4. (Complaint in Action by Property Owner and Tenant Against Seller of Leaking Oil Tank and Installers Under Navigation Law § 181).

Steinman's Bergerman and Roth, New York Real Property Forms Annotated Form No. 809.1. (Complaint in Action Where Defendants Caused Leakage of Gasoline Onto Plaintiff's Property).

Steinman's Bergerman and Roth, New York Real Property Forms Annotated Form No. 810.1. (Complaint in Action for Damages from Leakage of Gasoline).

Texts: Powell on Real Property Ch. P8A. (Practice Guide 8A Environmental Due Diligence in Real Estate Transactions).

A Practical Guide to Disputes Between Adjoining Landowners, Ch. 19A, Adjoining Landowner Litigation Based on Environmental Law.

NOT-FOR-PROFIT CORPORATION LAW

Article

1.	Short Title; Definitions; Application; Certificates; Miscellaneous
2.	Corporate Purposes and Powers
3.	Corporate Name and Service of Process
4.	Formation of Corporations
5.	Corporate Finance
6.	Members
7.	Directors and Officers
8.	Amendments and Changes
10.	Non-Judicial Dissolution
14.	Special Not-For-Profit Corporations

HISTORY:
Add, L 1969, ch 1066, eff Sept 1, 1970.

ARTICLE 1 Short Title; Definitions; Application; Certificates; Miscellaneous

Section

102.	Definitions
103.	Application
104.	Certificates; requirements, signing, filing, effectiveness
105.	Certificates; corrections
112.	Actions or special proceedings by attorney-general
114.	Visitation of supreme court
115.	Power to solicit contributions for charitable purposes

HISTORY:
Add, L 1969, ch 1066, § 1; amd, L 1970, ch 847, § 1, eff Sept 1, 1970.

§ 102. Definitions

(a) As used in this chapter, unless the context otherwise requires, the term:

(1) "Bonds" includes secured and unsecured bonds, debentures, and notes.

(2) "By-laws" means the code or codes of rules adopted for the regulation or management of the affairs of the corporation irrespective of the name or names by which such rules are designated.

(3) "Certificate of incorporation" includes (A) the original certificate of incorporation or any other instrument filed or issued under any statute to form a domestic or foreign corporation, as amended, supplemented or restated by certificates of amendment, merger or consolidation or other certificates or instruments filed or issued under any statute; or (B) a special act or charter creating a domestic or foreign corporation, as amended, supplemented or restated.

(3-a) "Charitable corporation" means any corporation formed, or for the purposes of this chapter, deemed to be formed, for charitable purposes.

(3-b) "Charitable purposes" of a corporation means one or more of the following purposes: charitable, educational, religious, scientific, literary, cultural or for the prevention of cruelty to children or animals.

(4) "Conducting of activities" of a corporation means the operations for the conduct of which such corporation is formed and may constitute "doing of business" or "transaction of business" as those terms are used in the statutes of this state.

(5) "Corporation" or "domestic corporation" means a corporation (1) formed under this chapter, or existing on its effective date and theretofore formed under any other general statute or by any special act of this state, exclusively for a purpose or purposes, not for pecuniary profit or financial gain, for which a corporation may be formed under this chapter, and (2) no part of the assets, income or profit of which is distributable to, or enures to the benefit of, its members, directors or officers except to the extent permitted under this statute.

(6) "Director" means any member of the governing board of a corporation, whether designated as director, trustee, manager, governor, or by any other title. The term "board" means "board of directors" or any other body constituting a "governing board" as defined in this section.

(6-a) "Entire board" means the total number of directors entitled to vote which the corporation would have if there were no vacancies. If the by-laws of the corporation provide that the board shall consist of a fixed number of directors, then the "entire board" shall consist of that number of directors. If the by-laws of any corporation provide that the board may consist of a range between a minimum and maximum number of directors, and the number within that range has not been fixed in accordance with paragraph (a) of section seven hundred two of this chapter, then the "entire board" shall consist of the number of directors within such range that were elected or appointed as of the most recently held election of directors, as well as any directors whose terms have not yet expired.

(7) "Foreign corporation" means a corporation formed under laws other than the statutes of this state, which, if formed under the statutes of this state, would be within the term "corporation or domestic corporation" as herein defined. "Authorized", when used with respect to a foreign corporation, means having authority under Article 13 (Foreign Corporations) to conduct activities of the corporation in this state.

(7-a) "Infant" or "minor" means any person who has not attained the age of eighteen years.

(8) "Insolvent" means being unable to pay debts as they become due in the usual course of the debtor's business.

(9) "Member" means one having membership rights in a corporation in accordance with the provisions of its certificate of incorporation or by-laws.

(9-a) "Non-charitable corporation" means any corporation formed under this chapter, other than a

charitable corporation, including but not limited to one formed for any one or more of the following non-pecuniary purposes: civic, patriotic, political, social, fraternal, athletic, agricultural, horticultural, or animal husbandry, or for the purpose of operating a professional, commercial, industrial, trade or service association.

(10) "Not-for-profit corporation" means a corporation as defined in subparagraph (5).

(11) "Office of a corporation" means the office the location of which is stated in the certificate of incorporation of a domestic corporation, or in the application for authority of a foreign corporation or an amendment thereof. Such office need not be a place where activities are conducted by such corporation.

(12) "Process" means judicial process and all orders, demands, notices or other papers required or permitted by law to be personally served on a domestic or foreign corporation, for the purpose of acquiring jurisdiction of such corporation in any action or proceeding, civil or criminal, whether judicial, administrative, arbitrative or otherwise, in this state or in the federal courts sitting in or for this state.

(13) [Repealed]

(14) [Repealed]

(15) "Governing board" means the body responsible for the management of a corporation or of an institutional fund.

(16) "Historic dollar value" means the aggregate fair value in dollars of (i) an endowment fund at the time it became an endowment fund, (ii) each subsequent donation to the fund at the time it is made, and (iii) each accumulation made pursuant to a direction in the applicable gift instrument at the time the accumulation is added to the fund. The determination of historic dollar value made in good faith by the corporation is conclusive.

(17) [Repealed]

(18) "Authorized person" means a person, whether or not a member, officer, or director, who is authorized to act on behalf of a corporation or foreign corporation.

(19) An "affiliate" of a corporation means any entity controlled by, or in control of, such corporation.

(20) "Independent auditor" means any certified public accountant performing the audit of the financial statements of a corporation required by subdivision one of section one hundred seventy-two-b of the executive law.

(21) "Independent director" means a director who: (i) is not, and has not been within the last three years, an employee or a key person of the corporation or an affiliate of the corporation, and does not have a relative who is, or has been within the last three years, a key person of the corporation or an affiliate of the corporation; (ii) has not received, and does not have a relative who has received, in any of the last three fiscal years, more than ten thousand dollars in direct compensation from the corporation or an affiliate of the corporation; (iii) is not a current employee of or does not have a substantial financial interest in, and does not have a relative who is a current officer of or has a substantial financial interest in, any entity that has provided payments, property or services to, or received payments, property or services from, the corporation or an affiliate of the corporation if the amount paid by the corporation to the entity or received by the corporation from the entity for such property or services, in any of the last three fiscal years, exceeded the lesser of ten thousand dollars or two percent of such entity's consolidated gross revenues if the entity's consolidated gross revenue was less than five hundred thousand dollars; twenty-five thousand dollars if the entity's consolidated gross revenue was five hundred thousand dollars or more but less than ten million dollars; one hundred thousand dollars if the entity's consolidated gross revenue was ten million dollars or more; or (iv) is not and does not have a relative who is a current owner, whether wholly or partially, director, officer or employee of the corporation's outside auditor or who has worked on the corporation's audit at any time during the past three years. For purposes of this subparagraph, the terms: "compensation" does not include reimbursement for expenses reasonably incurred as a director or reasonable compensation for service as a director as permitted by paragraph (a) of section 202 (General and special powers) of this chapter; and "payment" does not include charitable contributions, dues or fees paid to the corporation for services which the corporation performs as part of its nonprofit purposes, or payments made by the corporation at fixed or non-negotiable rates or amounts for services received, provided that such services by and to the corporation are available to individual members of the public on the same terms, and such services received by the corporation are not available from another source.

(22) "Relative" of an individual means (i) his or her spouse or domestic partner as defined in section twenty-nine hundred ninety-four-a of the public health law; (ii) his or her ancestors, brothers and sisters (whether whole or half blood), children (whether natural or adopted), grandchildren, great-grandchildren; or (iii) the spouse or domestic partner of his or her brothers, sisters, children, grandchildren, and great-grandchildren.

(23) "Related party" means (i) any director, officer or key person of the corporation or any affiliate of the corporation; (ii) any relative of any individual described in clause (i) of this subparagraph; or (iii) any entity in which any individual described in clauses (i) and (ii) of this subparagraph has a thirty-five percent or greater ownership or beneficial interest or, in the case of a partnership or professional corporation, a direct or indirect ownership interest in excess of five percent.

(24) "Related party transaction" means any transaction, agreement or any other arrangement in

which a related party has a financial interest and in which the corporation or any affiliate of the corporation is a participant, except that a transaction shall not be a related party transaction if: (i) the transaction or the related party's financial interest in the transaction is de minimis, (ii) the transaction would not customarily be reviewed by the board or boards of similar organizations in the ordinary course of business and is available to others on the same or similar terms, or (iii) the transaction constitutes a benefit provided to a related party solely as a member of a class of the beneficiaries that the corporation intends to benefit as part of the accomplishment of its mission which benefit is available to all similarly situated members of the same class on the same terms.

(25) "Key person" means any person, other than a director or officer, whether or not an employee of the corporation, who (i) has responsibilities, or exercises powers or influence over the corporation as a whole similar to the responsibilities, powers, or influence of directors and officers; (ii) manages the corporation, or a segment of the corporation that represents a substantial portion of the activities, assets, income or expenses of the corporation; or (iii) alone or with others controls or determines a substantial portion of the corporation's capital expenditures or operating budget.

HISTORY:

Add, L 1969, ch 1066, § 1; amd, L 1970, ch 847, § 2, eff Sept 1, 1970; L 1974, ch 901, § 1, eff Sept 1, 1974; L 1978, ch 690, § 1, eff July 25, 1978; L 1998, ch 375, § 30, eff Aug 13, 1998; L 2005, ch 726, § 1, eff April 9, 2006; L 2006, ch 434, § 1, eff July 26, 2006; L 2010, ch 490, § 2, eff Sept 17, 2010; L 2013, ch 549, § 29, eff July 1, 2014; L 2014, ch 23, § 2, eff July 1, 2014; L 2015, ch 555, § 1, effective December 11, 2015; L 2016, ch 466, § 1, effective May 27, 2017.

Derivation Notes: Derived from Gen Corp Law § 3, subd 11, 12, 13, 15, 16, 17, and Mem Corp Law § 2.

Revision Notes: § 102(a).

Source: None.

Changes: Completely new.

Comment: This provision was included to make clear that the context in which a defined term is used controls the applicability of the definition set forth in this section.

§ 102(a)(1).

Source: None.

Changes: Completely new.

Comment: The Gen Corp L does not contain a definition of "bonds". For purposes of this chapter, the term "bonds" should include both secured and unsecured bonds, debentures and notes. This definition is taken from the Bus Corp L.

§ 102(a)(2).

Source: None.

Changes: Completely new.

Comment: The definition of "by-laws" is substantially taken from § 2(e) of the Model Non-Profit Corporation Act of the American Bar Association. It includes the basic code of rules whether they be called "constitution", "constitution and by-laws", "by-laws" or "charter". It is intended to cover the basic code immediately subordinate to the certificate of incorporation.

§ 102(a)(3).

Source: Gen Corp L § 3(14).

Changes: Revised and extended.

Comment: This is taken from the Bus Corp L § 102(a)(3). The definition in the Gen Corp L has been extended to encompass the original certificate of incorporation or any other instrument filed or issued to form a domestic or foreign corporation, or a special act creating a domestic or foreign corporation, as amended, supplemented or restated.

§ 102(a)(4).

Source: Gen Corp L § 3(17).

Changes: Revised.

Comment: This is substantially similar to the definition of "business of a corporation" in the Gen Corp L. It is intended to be substantially the same as "doing of business" and "transaction of business".

§ 102(a)(5).

Source: Mem Corp L § 2.

Changes: Revised.

Comment: The definition of "corporation" and "domestic corporation", equating the two terms, has been included for convenience of drafting (see § 201). It includes any corporation which meets two tests, (1) formed for a purpose, not for pecuniary profit or financial gain, permitted under § 201 and (2) no flow-through of assets, income or profit to or for the benefit of its members, directors or officers except as permitted under this chapter. The use of these terms must be read with § 103 (Application) in determining the meaning of the terms as they are used in this chapter.

§ 102(a)(6).

Source: Gen Corp L § 3(13).

Changes: Revised and extended.

Comment: This is taken from Bus Corp L § 102(a)(5). The word "director" means a member of the governing board of the corporation regardless of his official title. The term "board" means "board of directors" (see § 708).

§ 102(a)(7).

Source: Gen Corp L § 3(12).

Changes: Reworded.

Comment: This is similar to the definition of "foreign corporation" in Bus Corp L § 102(a)(7). A requirement is added that, if it were to be formed under the statutes of this state, it would come within the definition of the term "corporation" or "domestic corporation" as defined in this chapter. Under this definition a corporation formed by or under the laws of the United States is a foreign corporation unless it otherwise comes within the definition.

§ 102(a)(8).

Source: None.

Changes: Completely new.

Comment: This is the definition from the Bus Corp L § 102(a)(8). To avoid confusion between the "equity" and "bankruptcy" meanings of the word "insolvent", the term has been defined in the equity sense, which is the one that has greater applicability in this chapter. The wording of the definition is substantially that of Model Non-Profit Corporation Act § 2(n).

§ 102(a)(9).

Source: Gen Corp L § 3(15).

Changes: Revised.

Comment: This is an adaptation of the definition "member of a corporation" in Gen Corp L § 3(15). It is verbatim from the Model Non-Profit Corporation Act.

§ 102(a)(10).

Source: None.

Changes: Completely new.

Comment: See comment under definition of "corporation" or "domestic corporation" in subparagraph (5) above.

§ 102(a)(11).

Source: Gen Corp L § 3(16).

Changes: Revised and reworded.

Comment: This is an adaptation of the definition in Bus Corp L § 102(a)(10). Defining "office of a corporation" (i.e., domestic corporation—see § 102(a)(5)) as the office the location of which is stated in the certificate of incorporation represents a change from Gen Corp L § 3(16) which defines the term as the "principal office within the state, or principal place of business within the state if it has no principal office therein". The same principle is applied to foreign corporations.

§ 102(a)(12).

Source: None.

Changes: Completely new.

Comment: This is the definition from the Bus Corp L § 102(a)(11). The definition of the term "process" has been included for convenience of drafting.

Editor's Notes Laws 1978, ch 690, § 11, provides as follows:

§ 11. This act may be cited as the "New York management of institutional funds act".

Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

Amendment Notes The 2016 amendment by ch 466, § 1, rewrote (a)(21), and (a)(23) through (a)(25).

The 2015 amendment by ch 555, § 1, in the last sentence of (a)(6-a), added "and the number within that range has not been fixed in accordance with paragraph (a) of section seven hundred two of this chapter," "or appointed," and "as well as any directors whose terms have not yet expired"; deleted "or under common control with" following "in control of" in (a)(19); in (a)(21), added "or (iv) is not and does not have a relative who is a current owner, whether wholly or partially, director, officer or employee of the corporation's outside auditor or who has worked on the corporation's audit at any time during the past three years" in the first sentence and rewrote the second sentence, which formerly read: "For purposes of this subparagraph, 'payment' does not include charitable contributions"; rewrote (a)(22) and (a)(23); added "to the extent such provisions are applicable" in (a)(25); and made a related change.

Notes to Decisions

Analysis

1. Generally
2. Under former Membership Corporations Law § 2
3. —Engaging in business for profit
4. — —Right to own productive property
5. —Membership corporations; generally
6. — —Effect of issuance of stock
7. — —Effect of excessive solicitor's commissions
8. — —Right to maintain action for slander
9. — —Tax liability
10. —Bankruptcy proceedings
11. —Right of action of member
12. —Miscellaneous

1. Generally

Plaintiff was entitled to summary judgment declaring null and void certain deeds conveying certain properties from plaintiff to defendant where (1) plaintiff was not-for-profit corporation whose board of directors never authorized challenged conveyances, (2) defendant's claim that plaintiff's then-president conveyed properties in order to satisfy his personal debt to defendant did nothing to advance, and even undermined, legitimacy of transactions, because no part of not-for-profit corporation's assets may inure to benefit of its members, and (3) no triable issue of fact was raised as to president's apparent authority, because sole evidence thereof was president's own representations at time of transactions. Stand Up Harlem Inc. v Miller, 286 A.D.2d 644, 730 N.Y.S.2d 437, 2001 N.Y. App. Div. LEXIS 8820 (N.Y. App. Div. 1st Dep't 2001).

Holders' claims under the N.Y. Not-for-Profit Corp. Law challenging a board of trade merger were not viable because N.Y. Not-for-Profit Corp. Law § 102(a)(9) expressly delegated to the board of trade the right to designate members in its certificate of incorporation or by-laws, and the board of trade's by-laws clearly provided that the holders did not have any of the rights or privileges of members under the N.Y. Not-for-Profit Corp. Law. Altman v New York Bd. of Trade, Inc., 52 A.D.3d 396, 860 N.Y.S.2d 94, 2008 N.Y. App. Div. LEXIS 5659 (N.Y. App. Div. 1st Dep't 2008), app. dismissed, 11 N.Y.3d 912, 873 N.Y.S.2d 527, 901 N.E.2d 1280, 2009 N.Y. LEXIS 218 (N.Y. 2009).

Parishioners lacked standing to challenge the sale of a church's property as they were not members of the religious corporation; the church was managed by a five-member board of trustees consisting of the diocesan bishop, the vicar general of the diocese, the rector of the church and two laypersons selected by the other trustees, and the custody and control of the religious corporation's real property was vested in the board of trustees. Citizens for St. Patrick's v Saint Patrick's Church of W. Troy, 117 A.D.3d 1213, 985 N.Y.S.2d 743, 2014 N.Y. App. Div. LEXIS 3259 (N.Y. App. Div. 3d Dep't 2014).

Trial court properly granted a petition for judicial dissolution of a fire department (the FD) because its members presented affidavits or other competent evidence in support of their request to add two additional members of the FD as petitioners, a town and the Attorney General were necessary parties, the court's determination that the FD was no longer able to carry out the purpose or purposes for which it was formed was based on a fair interpretation of the evidence, the court properly considered the "paramount" issue of the benefit of dissolution to the members of the FD, and its determination that dissolution would benefit the members was supported by the evidence. Matter of Inzer v West Brighton Fire Dept., Inc., 173 A.D.3d 1826, 105 N.Y.S.3d 655, 2019 N.Y. App. Div. LEXIS 5256 (N.Y. App. Div. 4th Dep't), app. denied, reh'g denied, 175 A.D.3d 1852, 107 N.Y.S.3d 740, 2019 N.Y. App. Div. LEXIS 6929 (N.Y. App. Div. 4th Dep't 2019), app. denied, 35 N.Y.3d 903, 148 N.E.3d 524, 125 N.Y.S.3d 60, 2020 N.Y. LEXIS 826 (N.Y. 2020).

A charitable bequest made to petitioner nonprofit hospital under a 1924 will, presently valued at $850,000, "to be used by said hospital to endow charity beds . . . and for charitable purposes only," as a memorial to decedent and his sister would be an endowment under Not for Profit Corporation Law § 102(a)(13) in view of decedent's clear intent to bestow upon petitioner a permanent fund as memorial and, as such, would be governed by Not for Profit Corporation Law § 102(a)(16) requiring the governing board of the corporation to at all times retain the "historic dollar value" of the gift, representing principal payments received by petitioner between 1926 and 1962, and petitioner would be entitled to expend any amount in excess of the "historic dollar value" of the endowment for such hospital purposes as would be deemed prudent by its board of trustees under former Not for Profit Corporation Law § 513(c) where the will specifically stated that the fund was to be used for charity beds "and for charitable purposes," there no longer being a need for charity beds; since the very nature of petitioner's operation is charitable, any expenditure that is necessary to further its operation is within the framework of the "charitable purposes" intended by the testator. In re Estate of McKenna, 114 Misc. 2d 304, 451 N.Y.S.2d 617, 1982 N.Y. Misc. LEXIS 3473 (N.Y. Sur. Ct. 1982).

Business improvement district that was organized as a nonprofit entity but operated a taxi service was not immune from suit by a customer who claimed that the district's employees acted negligently when they established a taxi dispatch area near a defect in a roadway, and the trial court denied the district's motion for summary judgment on the customer's claim that she was injured when she stepped off a curb to enter a taxi because the customer raised issues of fact about whether the district knew or should have known about the condition which caused her injury. Hendryx v City of New York, 776 N.Y.S.2d 763, 3 Misc. 3d 512, 2004 N.Y. Misc. LEXIS 234 (N.Y. Sup. Ct. 2004).

2. Under former Membership Corporations Law § 2

Since above statute limits membership corporations to those not organized for pecuniary profit and Insurance Law § 250 provides for organization of membership corporations for purpose of issuing medical expense indemnity policies, such corporations organized under that statute cannot operate for profit. Shapira v United Medical Service, Inc., 15 N.Y.2d 200, 257 N.Y.S.2d 150, 205 N.E.2d 293, 1965 N.Y. LEXIS 1581 (N.Y. 1965).

A corporation created by special statute and not organized under this law is not governed by its provisions. Petition of Sousa, 12 A.D.2d 956, 211 N.Y.S.2d 204, 1961 N.Y. App. Div. LEXIS

12759 (N.Y. App. Div. 2d Dep't), rev'd, 10 N.Y.2d 68, 217 N.Y.S.2d 58, 176 N.E.2d 77, 1961 N.Y. LEXIS 1167 (N.Y. 1961).

Mandamus will not issue to compel the respondent to accept an executed certificate of consolidation of a corporation created under provisions of the Stock Corporation Law with one created under provisions of the Membership Corporation Law, since that writ will only issue to compel performance of a prescribed act to which the petitioner had a clear legal right. Debs Memorial Radio Fund, Inc. v Lomenzo, 50 Misc. 2d 51, 269 N.Y.S.2d 632, 1966 N.Y. Misc. LEXIS 2253 (N.Y. Sup. Ct. 1966).

Fact that certain town fire corporations were legalized and other fire corporations created under general law made subject to the statute's provisions did not make the Firemen's Benevolent Fund Association of the City of Mount Vernon a membership corporation, for purpose of determining effectiveness of 1930 amendment to certificate of incorporation changing membership requirements, since the Association was created by special law. Crohn v Firemen's Benevolent Fund Ass'n, 79 Misc. 2d 536, 359 N.Y.S.2d 599, 1973 N.Y. Misc. LEXIS 1279 (N.Y. Sup. Ct. 1973), aff'd, Crohn v Firemen's Benevolent Fund Asso., 45 A.D.2d 955, 359 N.Y.S.2d 247, 1974 N.Y. App. Div. LEXIS 4168 (N.Y. App. Div. 2d Dep't 1974).

3. —Engaging in business for profit

The test of whether a corporation is engaged in business for a pecuniary profit cannot rest upon the financial results of its operations, retrospectively or currently or even prospectively; the court rather must regard the nature rather than the results of its activities. Kubik v American Composers Alliance, Inc., 54 N.Y.S.2d 764, 1945 N.Y. Misc. LEXIS 1763 (N.Y. Sup. Ct. 1945).

A membership corporation made up of the composers of serious music, which takes assignments of performing rights to the compositions of its members and licenses such rights for a consideration, thereby producing some income for distribution to the members, is engaged in an activity for pecuniary profit which is not permitted to a membership corporation. Kubik v American Composers Alliance, Inc., 54 N.Y.S.2d 764, 1945 N.Y. Misc. LEXIS 1763 (N.Y. Sup. Ct. 1945).

4. — —Right to own productive property

A membership corporation is not prohibited from owning productive property if the income is devoted to legitimate purposes of the corporation. Burton Potter Post v Epstein, 219 N.Y.S.2d 224, 1961 N.Y. Misc. LEXIS 3635 (N.Y. Sup. Ct. 1961).

5. —Membership corporations; generally

A corporation which has no authorization either in its certificate of incorporation or by statute to connect it with a business for profit or to distribute profits among its stockholders, and whose certificates are not transferable and can only be assigned to another member of the corporation, and in case of the death of the member are purchasable by the corporation at their issued value, so that a member can in no case realize a profit, is a membership corporation within the meaning of this section rather than a stock corporation within the meaning of General Corporation Law § 3. Stationers' & Publishers' Board of Trade v Flynn, 226 A.D. 496, 235 N.Y.S. 58, 1929 N.Y. App. Div. LEXIS 8759 (N.Y. App. Div. 1929).

The American Society for Prevention of Cruelty to Animals is not a membership corporation. Bailey v American Soc. for Prevention of Cruelty to Animals, 282 A.D. 502, 125 N.Y.S.2d 18, 1953 N.Y. App. Div. LEXIS 4503 (N.Y. App. Div. 1953), aff'd, 307 N.Y. 679, 120 N.E.2d 853, 307 N.Y. (N.Y.S.) 679, 1954 N.Y. LEXIS 1423 (N.Y. 1954).

A corporation formed for "benevolent, charitable, literary and scientific purposes and mutual improvement of religious knowledge" is a membership corporation and its character as such is not affected by an insertion in the certificate of incorporation that "the amount of the capital stock of the said association is $20,000 and is divided into 2,000 shares at $10 each." Bartlett v Lily Dale Assembly, 249 N.Y.S. 482, 139 Misc. 338, 1931 N.Y. Misc. LEXIS 1248 (N.Y. Sup. Ct. 1931), dismissed, Ackerman v Fletcher, 6 A.D.2d 758, 174 N.Y.S.2d 903, 1958 N.Y. App. Div. LEXIS 5892 (N.Y. App. Div. 4th Dep't 1958), dismissed, 6 A.D.2d 758, 174 N.Y.S.2d 913, 1958 N.Y. App. Div. LEXIS 7384 (N.Y. App. Div. 4th Dep't 1958)

6. — —Effect of issuance of stock

A corporation formed for educational purposes, and in which shares of stock have been issued, is not a membership corporation within the meaning of this section. Rye Country Day School v Lynch, 239 A.D. 614, 269 N.Y.S. 761, 1934 N.Y. App. Div. LEXIS 10902 (N.Y. App. Div. 1934), aff'd, 266 N.Y. 549, 195 N.E. 194, 266 N.Y. (N.Y.S.) 549, 1935 N.Y. LEXIS 1438 (N.Y. 1935).

7. — —Effect of excessive solicitor's commissions

The certificate of incorporation of a membership corporation will be revoked where it appears from an investigation of the Attorney General that 40 per cent of the sums collected ostensibly in the form of contributions by the organization to advance its charitable purposes, actually was used for the payment of solicitor's commissions, thereby violating the provision of this section that membership corporations must be operated for purposes other than pecuniary gain. Bennett v American-Canadian Ambulance Corps, 37 N.Y.S.2d 470, 179 Misc. 21, 1942 N.Y. Misc. LEXIS 2047 (N.Y. Sup. Ct. 1942).

8. — —Right to maintain action for slander

A membership corporation, which is not permitted to engage in any business for pecuniary profit cannot maintain an action for slander in the absence of an allegation of special damages, since its credit could not be affected, and no pecuniary injury could be occasioned to it. Electrical Board of Trade v Sheehan, 214 A.D. 712, 210 N.Y.S. 127, 1925 N.Y. App. Div. LEXIS 6950 (N.Y. App. Div. 1925).

9. — —Tax liability

The liability of a social club for tax, under the Revenue Act, on the sale of tickets to an amusement place depends on whether the club is the agent of its members in procuring theatre tickets for which a service charge is made, and this is a matter of intention between the parties, as manifested by their acts and by all surrounding circumstances. Columbia University Club v Higgins, 23 F. Supp. 572, 1938 U.S. Dist. LEXIS 2228 (S.D.N.Y. 1938).

A social club is not liable for tax where the relationship of agent and principal existed between club and member where the member controlled the purchase of tickets, with respect to time, location and price, and had the final say as to whether it would accept those which the club was able to obtain although the ticket broker billed the club monthly for the tickets purchased. Columbia University Club v Higgins, 23 F. Supp. 572, 1938 U.S. Dist. LEXIS 2228 (S.D.N.Y. 1938).

10. —Bankruptcy proceedings

A country club which operates a golf course for the pleasure of its members, and which was organized under this section, cannot be the object of involuntary proceedings in bankruptcy. In re Elmsford Country Club, 50 F.2d 238, 1931 U.S. Dist. LEXIS 1383 (D.N.Y. 1931).

11. —Right of action of member

Minority members of a membership corporation could not complain that corporation had, by illegally adopting by-laws in 1900 and 1907, usurped excessive powers and made board of directors self perpetuating by permitting the then board to elect their successors and permitting further changes in by-laws without their consent. The 1900 and 1907 irregularities had been affirmed and ratified by the members, and in any event, by-laws of such a corporation organized for non-profit purposes permitting self-perpetuation of board of directors did not infringe on any property right or enforceable right of ordinary members. Bailey v American Soc. for Prevention of Cruelty to Animals, 307 N.Y. 679, 120 N.E.2d 853, 307 N.Y. (N.Y.S.) 679, 1954 N.Y. LEXIS 1423 (N.Y. 1954).

A member of a membership corporation, who has actively participated in activities of the corporation designed to promote pecuniary gain, is not thereby estopped from asserting the illegality of the activities of the corporation. Kubik v American Composers Alliance, Inc., 54 N.Y.S.2d 764, 1945 N.Y. Misc. LEXIS 1763 (N.Y. Sup. Ct. 1945).

12. —Miscellaneous

An order granted on affidavits alone, without trial permanently enjoining a local non-profit trading association from using a name was not justified where respondent's affidavit alleged circum-

stances indicating good faith and a right to use the name. Association of Contracting Plumbers, Inc. v Contracting Plumbers Ass'n, 302 N.Y. 495, 99 N.E.2d 542, 302 N.Y. (N.Y.S.) 495, 1951 N.Y. LEXIS 709 (N.Y. 1951).

A membership corporation conducting a collection agency for charitable hospitals is not a charitable corporation so as to exempt it from the prohibition against the practice of law by corporations. Hospital Credit Exchange, Inc. v Shapiro, 59 N.Y.S.2d 812, 186 Misc. 658, 1946 N.Y. Misc. LEXIS 1790 (N.Y. Mun. Ct. 1946).

Agency Opinions

Analysis

1. Generally
2. Under former Membership Corporations Law § 2
3. —Engaging in business for profit
4. —Membership corporations; generally

1. Generally

A municipality may not convey real property owned by it to a not-for-profit corporation for less than adequate consideration. 1971 NY Ops Atty Gen April 21 (Informal), 1971 N.Y. AG LEXIS 66.

A legal aid society, incorporated as a membership or not-for-profit corporation and designated under County Law § 722 to represent persons charged with crime who are financially unable to obtain counsel and whose expenses for providing such counsel and services other than counsel are paid by the county may not charge such defendants fees for such representation. 1972 NY Ops Atty Gen Jan 28 (Informal), 1972 N.Y. AG LEXIS 45.

A subsidiary of the Urban Development Corporation may incorporate under the Business Corporation Law without forfeiting its public status. The subsidiary may not pay profits to private investors, and upon dissolution of the corporation, the assets belong to the State. 1980 N.Y. Op. Att'y Gen. No. 93, 1980 N.Y. AG LEXIS 54.

Since the certificate of incorporation states one purpose which is not within section 420 of the Real Property Tax Law, real property owned by the corporation would not be exempt from taxation. 1967 Op. St. Compt. No. 67–872.

Homeowners association organized as not for profit, type corporation as defined in CLS N-PCL § 102(a) is not required to conform to requirements of Freedom of Information Law. Comm on Open Gov't FOIL-AO-7924.

Meetings of both homeowners association organized as not for profit, type corporation as defined in CLS N-PCL § 102(a) and of its board are not governed by Open Meetings Law. Comm on Open Gov't FOIL-AO-7924.

Exemption from mortgage recording tax applied to 43.3 percent of leasehold mortgage representing expenditures for diagnostic and treatment center, and portion of common space reasonably apportioned to diagnostic and treatment center; remainder of mortgage proceeds that were not utilized for hospital-related purposes were subject to tax. NY Adv Op Comm T & F TSB-A-02-(3)R, 2002 N.Y. Tax LEXIS 128.

2. Under former Membership Corporations Law § 2

3. —Engaging in business for profit

While a membership corporation may acquire real property for its corporate purposes, it may not use such property, as by way of lease, for a purpose essentially of a business nature for profit. 1953 NY Ops Atty Gen May 14 (Informal), 1953 N.Y. AG LEXIS 422.

4. —Membership corporations; generally

A corporation having for its purpose the ownership and operation of motor vehicles upon public highways for transportation of persons may not be organized under the Membership Corporations Law even though the corporation is not organized for profit and persons transported are limited to members of the corporation. 1942 N.Y. Op. Att'y Gen. No. 219, 1942 N.Y. AG LEXIS 86.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-1 White, New York Business Entities ¶ N102.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business & Commercial § 8.01. Applicability of Not-for-Profit Corporation Law.

New York Practice Guide: Business & Commercial § 8.15. Preparing Certificate of Incorporation.

Matthew Bender's New York Checklists: Checklist for Assessing Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 2.47.

Checklist for Forming Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.02.

Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Checklist for Addressing Federal, State, and Local Tax Considerations LexisNexis AnswerGuide New York Business Entities § 9.14.

§ 103. Application

(a) Except as otherwise provided in this section, this chapter applies to every domestic corporation as herein defined, and to every foreign corporation as herein defined which is authorized to conduct or which conducts any activities in this state. This chapter also applies to any other domestic corporation or foreign corporation of any kind to the extent, if any, provided under this chapter or any law governing such corporation and, if no such provision for application is made, to the extent, if any, that the membership corporations law applied to such corporation as of the effective date of this chapter. A corporation formed by a special act of this state which has as its principal purpose an education purpose and which is a member of the university of the state of New York, is an "education corporation" under section two hundred sixteen-a of the education law.

To the extent that the membership corporations law or the general corporation law applied to it as of the effective date of this chapter, the corresponding provisions of this chapter apply to a corporation heretofore formed by or pursuant to a special act of this state other than a religious corporation or an "education corporation" under clause (b) of subdivision one of section two hundred sixteen-a of the education law, if (1) its principal purpose is a religious, charitable or education purpose, and (2) it is operated, supervised or controlled by or in connection with a religious organization. Any such corporation may at any time after the effective date of this chapter file a restated certificate of incorporation under section 805 (restated certificate of incorporation) including a statement that it elects to have this chapter apply in all respects to it. The restated certificate of incorporation shall conform with the requirements of section 402 (certificate of incorporation; contents) for new corporations. Upon the filing of such certificate by the department of state, this chapter shall apply in all respects to such corporation.

This chapter also applies to any other corporation of any kind, formed not-for-profit under any other chapter of the laws of this state except a chapter of

the consolidated laws, to the extent that provisions of this chapter do not conflict with the provisions of such unconsolidated law. If an applicable provision of such unconsolidated law relates to a matter embraced in this chapter but is not in conflict therewith, both provisions shall apply. Any corporation to which this chapter is made applicable by this paragraph shall be treated as a "corporation" or "domestic corporation" as such terms are used in this chapter, except that the purposes of any such corporation formed or formable under such unconsolidated law shall not thereby be extended. For the purpose of this paragraph, the effective date of this chapter as to corporations to which this chapter is made applicable by this paragraph shall be September one, nineteen hundred seventy-three.

(b) The general corporation law does not apply to a corporation of any kind to which this chapter applies. A reference in any statute of this state which makes a provision of the general corporation law applicable to a corporation of any kind to which this chapter is applicable or a reference in any statute of this state, other than the membership corporations law, which makes a provision of the membership corporations law applicable to a corporation of any kind shall be deemed and construed to refer to and make applicable the corresponding provision, if any, of this chapter.

(c) If any provision in articles one to thirteen inclusive of this chapter conflicts with a provision of any subsequent articles or of any special act under which a corporation to which this chapter applies is formed, the provision in such subsequent article or special act prevails. A provision of any such subsequent article or special act relating to a matter referred to in articles one to thirteen inclusive and not in conflict therewith is supplemental and both shall apply. Whenever the board of a corporation, formed under a special act, reasonably makes an interpretation as to whether a provision of the special act or this chapter prevails, or both apply, such interpretation shall govern unless and until a court determines otherwise, if such board has acted in good faith for a purpose which it reasonably believes to be in the best interests of the corporation, provided however, that such interpretation shall not bind any governmental body or officer.

(d) A corporation whose formation under this chapter is authorized by another corporate law is, unless otherwise provided by such corporate law, subject to all the provisions of this chapter that are applicable to a charitable corporation formed under this chapter.

(e) This chapter applies to commerce with foreign nations and among the several states, and to corporations formed by or under any act of congress, only to the extent permitted under the constitution and laws of the United States.

(f) The enactment of this chapter shall not affect the duration of a corporation which is existing on the effective date of this chapter. Any such existing corporation, its members, directors and officers shall have the same rights and be subject to the same limitations, restrictions, liabilities and penalties as a corporation formed under this chapter, its members, directors and officers.

(g) This chapter shall not affect any cause of action, liability, penalty or action or special proceeding, which on the effective date of this chapter, is accrued, existing, incurred or pending but the same may be asserted, enforced, prosecuted or defended as if this chapter had not been enacted.

HISTORY:

Add, L 1969, ch 1066, § 1 eff Sept 1, 1970; amd, L 1969, ch 1067; L 1970, ch 847, § 3; L 1971, ch 955, § 1; L 1971, ch 956, § 1; L 1972, ch 901, § 6; L 1972, ch 961, § 1, eff Sept 1, 1972; L 1973, ch 807, § 1, eff Sept 1, 1973; L 2013, ch 549, § 30, eff July 1, 2014; L 2014, ch 23, §§ 3, 4, eff July 1, 2014.

Derivation Notes: Derived in part from Mem Corp Law § 3.

Revision Notes: *Source:* None.

Changes: New.

Comment: Upon its effective date, this chapter applies to all existing corporations as defined in § 102(a)(5) as well as to corporations thereafter formed under this chapter. It applies to any corporations to the extent that the Mem Corp L applied as of the effective date. This chapter does not apply to any corporation to which the Education Law, Religious Corporations Law or Benevolent Orders Law is applicable or to certain corporations formed under special acts.

The application of this chapter is exclusive in that if it applies to a corporation the Gen Corp L does not apply. Any reference in any statute which makes a provision of the Gen Corp L applicable to a corporation under that statute or makes a provision of the Mem Corp L applicable to any corporation is deemed to refer to and make applicable the corresponding provision, if any, of this chapter.

Articles 1–13 are superseded if there is a contrary provision in Article 14 covering special not-for-profit corporations. If there are common but non-conflicting provisions, both apply.

This chapter applies to interstate and foreign activities and to federally formed corporations only to the extent permitted by the United States Constitution and federal law.

Editor's Notes: Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

Notes to Decisions

1. Generally

Where a religious society did not follow its own by-law procedures and the trustees were considered "directors" under the Not-For-Profit Law and where neither N.Y. Relig. Corp. Law § 2-b(1)(a) nor NY. Not-For-Profit Corp. Law § 103(c) contained inconsistent provisions, they clearly did not preclude the removal of the trustees, the trial court erred in denying the members' petition to remove the trustees, invalidate the new by-laws, and appoint a referee. Venigalla v Alagappan, 307 A.D.2d 1041, 763 N.Y.S.2d 765, 2003 N.Y. App. Div. LEXIS 9041 (N.Y. App. Div. 2d Dep't 2003).

Agency Opinions

1. Generally

There is no requirement that multiple employer welfare association (MEWA) be non-profit organization. NY Ins Dep't Gen Counsel, Opinion No. 03-11-07, 2003 NY Insurance GC Opinions LEXIS 308.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-1 White, New York Business Entities ¶ N103.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business & Commercial § 8.01. Applicability of Not-for-Profit Corporation Law.

New York Practice Guide: Business & Commercial § 8.13. Preliminary Determination.

Matthew Bender's New York Checklists: Checklist for Assessing Not-For-Profit Corporations LexisNexis AnswerGuide New York Business Entities § 2.47.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

§ 104. Certificates; requirements, signing, filing, effectiveness

(a) Every certificate or other instrument relating to a domestic or foreign corporation which is delivered to the department of state for filing under this chapter, other than a certificate of existence under section 1304 (Application for authority; contents), shall be in the English language, except that the corporate name may be in another language if written in English letters or characters.

(b) [Repealed]

(c) Whenever such instrument is required to set forth the date of incorporation or the date when a certificate of incorporation was filed, the original certificate of incorporation is meant. This requirement shall be satisfied, in the case of a corporation created by special act, by setting forth the chapter number and year of passage of such act.

(d) Every such certificate required under this chapter to be signed and delivered to the department of state shall, except as otherwise specified in the section providing for such certificate, be signed either by an officer, director, attorney-in-fact or duly authorized person and include the name and the capacity in which such person signs such certificate.

(e) If an instrument which is delivered to the department of state for filing complies as to form with the requirements of law and there has been attached to it the consent or approval of the supreme court justice, governmental body or officer, or, other person or body, if any, whose consent to or approval of such instrument or the filing thereof is required by any statute of this state and the filing fee and tax, if any, required by any statute of this state in connection therewith have been paid, the instrument shall be filed and indexed by the department of state. No certificate of authentication or conformity or other proof shall be required with respect to any verification, oath or acknowledgment of any instrument delivered to the department of state under this chapter, if such verification, oath or acknowledgment purports to have been made before a notary public, or person performing the equivalent function, of one of the states, or any subdivision thereof, of the United States or the District of Columbia. Without limiting the effect of section four hundred three of this chapter, filing and indexing by the department of state shall not be deemed a finding that a certificate conforms to law, nor shall it be deemed to constitute an approval by the department of state of the name of the corporation or the contents of the certificate, nor shall it be deemed to prevent any person with appropriate standing from contesting the legality thereof in an appropriate forum.

(f) Except as otherwise provided in this chapter, such instrument shall become effective upon the filing thereof by the department of state.

(g) The department shall make, certify and transmit electronically a copy of each such instrument to the clerk of the county in which the office of the domestic or foreign corporation is or is to be located. The county clerk shall file and index such copy.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970; amd, L 1982, ch 833, § 1, eff Oct 25, 1982; L 1998, ch 375, §§ 31, 32, eff Aug 13, 1998; L 2014, ch 57, § 2 (Part O), eff March 31, 2014.

Derivation Notes: Derived from Gen Corp Law § 8.

Reviser's Notes: *Source:* Gen Corp L § 8.

Changes: Revised and reworded.

Comment: This section sets forth general provisions relating to the contents, signing, filing and effect of certificates or other instruments which are required by this chapter to be delivered to the department of state for filing. The presence of this general section eliminates unnecessary repetition of its provisions throughout the rest of the chapter.

Notes to Decisions

Analysis

1. Generally
2. Under former General Corporation Law § 8

1. Generally

The Not-For-Profit Corporation Law mandates the Secretary of State to accept for filing a certificate of incorporation which meets the formal requirements of the statute and sets forth corporate purposes that are lawful. Gay Activists Alliance v Lomenzo, 31 N.Y.2d 965, 341 N.Y.S.2d 108, 293 N.E.2d 255, 1973 N.Y. LEXIS 1527 (N.Y. 1973).

Filing of an amendatory certificate of incorporation commences the effective date of the amendment; approval of a Supreme Court justice is a mere condition precedent to the right to file the amendment and is not conclusive on either the public or Secretary of State; however, such approval indicates that the purpose of the amendment is lawful and an acceptance by the Secretary enforces such view. Crohn v Firemen's Benevolent Fund Ass'n, 79 Misc. 2d 536, 359 N.Y.S.2d 599, 1973 N.Y. Misc. LEXIS 1279 (N.Y. Sup. Ct. 1973), aff'd, Crohn v Firemen's Benevolent Fund Asso., 45 A.D.2d 955, 359 N.Y.S.2d 247, 1974 N.Y. App. Div. LEXIS 4168 (N.Y. App. Div. 2d Dep't 1974).

2. Under former General Corporation Law § 8

Mere execution of a certificate of incorporation does not create a de facto corporation if the incorporators have not complied with this section and, therefore, where the incorporators, prior to any attempt made in good faith to comply with this section, transfer all the stock of the proposed corporation in exchange for certain rights under alleged contracts owned by a third party, the transfer is without consideration and it is error to dismiss a complaint of a judgment creditor seeking to sequester the assets of the corporation and to recover on the personal liability of the stockholders. Stevens v Episcopal Church History Co., 140 A.D. 570, 125 N.Y.S. 573, 1910 N.Y. App. Div. LEXIS 2994 (N.Y. App. Div. 1910).

A corporation which had failed to comply with the requirements of this section was not a corporation authorized to do business nor a de facto corporation and the Secretary of State was not justified in refusing to file the certificate of another corporation on the grounds of similarity of name. Brooks Clothing of California, Ltd. v Flynn, 232 A.D. 346, 250 N.Y.S. 69, 1931 N.Y. App. Div. LEXIS 13806 (N.Y. App. Div. 1931).

Where a company went out of existence as a result of merger and no new corporation was formed under § 85 of the Stk. Corp. Law, this section does not apply. O'Donnell v Milling & Lighting Co., 298 N.Y.S. 9, 163 Misc. 860, 1937 N.Y. Misc. LEXIS 1432 (N.Y. Sup. Ct. 1937).

Article 78 of the Civil Practice Act is not available to review an alleged erroneous filing of a certificate of incorporation, for the statutory authority "to review a determination" relates only to the determination of a body or an officer exercising quasi-judicial functions and in receiving a certificate for filing the Department of State is acting in a ministerial capacity, except where there is some conflict of names. Where the certificate is in conformity with law there is a duty to receive and file it. New York State Soc. of Professional Engineers, Inc. v Department of State, 20 N.Y.S.2d 62, 174 Misc. 173, 1940 N.Y. Misc. LEXIS 1764 (N.Y. Sup. Ct. 1940).

Filing of an amendatory certificate of incorporation commences the effective date of the amendment; approval of a Supreme Court justice is a mere condition precedent to the right to file the amendment and is not conclusive on either the public or Secretary of State; however, such approval indicates that the purpose of the amendment is lawful and an acceptance by the Secretary enforces such view. Crohn v Firemen's Benevolent Fund Ass'n, 79 Misc. 2d 536, 359 N.Y.S.2d 599, 1973 N.Y. Misc. LEXIS 1279 (N.Y. Sup. Ct. 1973), aff'd, Crohn v Firemen's Benevolent Fund Asso., 45 A.D.2d 955, 359 N.Y.S.2d 247, 1974 N.Y. App. Div. LEXIS 4168 (N.Y. App. Div. 2d Dep't 1974).

The existence of a corporation is not affected by the fact that no stock was ever actually issued, if its certificate of incorporation was duly filed and payment of the tax and filing fee was made. Gale-Hasslacher Corp. v Carmen Contracting Corp., 219 N.Y.S.2d 212 (N.Y. Sup. Ct. 1961).

Agency Opinions

1. Under former General Corporation Law § 8

A certificate with no statement of duration of corporation shall not be filed. 1926 N.Y. Op. Att'y Gen. No. 128.

An incorporated fire company may purchase with its own funds and retain ownership of fire apparatus and equipment although it is located in a fire district. 1955 Op. St. Compt. No. 55–7480.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-1 White, New York Business Entities ¶ N104.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business & Commercial § 8.02. Corporate Formation.

New York Practice Guide: Business & Commercial § 8.15. Preparing Certificate of Incorporation.

Matthew Bender's New York Checklists: Checklist for Assessing Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 2.47.

Checklist for Forming Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.02.

Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N104:1. Acknowledgment by Individual.

White, New York Business Entities Form N104:2. Acknowledgment by Corporation.

White, New York Business Entities Form N104:3. Verification.

White, New York Business Entities Form N104:4. Affirmation in Lieu of Verification or Acknowledgment.

§ 105. Certificates; corrections

(a) Corrections prior to filing by department of state. Any certificate or other instrument relating to a domestic or foreign corporation submitted to the department of state under this chapter may be corrected with respect to any typographical, or similar non-material error apparent on the face of the certificate or instrument, prior to the filing of such certificate or instrument by the department of state. Such correction shall be effected by the department of state upon authorization in writing by the incorporator in a form acceptable to the department. Such authorization may be delivered by mail or sent by electronic mail to the department.

(b) Corrections following incorporation. Any certificate or other instrument relating to a domestic or foreign corporation filed by the department of state under this chapter may be corrected with respect to any typographical or similar non-material error apparent on the face or defect in the execution thereof including the deletion of any matter not permitted to be stated therein. A certificate, entitled "Certificate of correction of ..... (correct title of certificate and name of corporation)" shall be signed and delivered to the department of state by mail or electronic mail. It shall set forth the name of the corporation, the date the certificate to be corrected was filed by the department of state, the provision in the certificate as corrected or eliminated and if the execution was defective, the proper execution. The filing of the certificate by the department of state shall not alter the effective time of the instrument being corrected, which shall remain as its original effective time, and shall not affect any right or liability accrued or incurred before such filing.

(c) A corporate name may not be changed or corrected under this section other than to correct any typographical or similar non-material error.

HISTORY:

Add, L 1969, ch 1066, § 1; amd, L 1999, ch 172, § 24, eff July 6, 1999; L 2013, ch 549, § 32, eff July 1, 2014; L 2014, ch 23, § 5, eff July 1, 2014.

Derivation Notes: Derived from Gen Corp Law § 10.

Revision Notes: *Source:* Gen Corp L § 10.

Changes: Revised and reworded.

Comment: This general section applies to the correction of all certificates or other instruments which are filed by the department of state under the provisions of this chapter.

Editor's Notes: Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

Notes to Decisions

1. Under former Membership Corporations Law § 10

Membership corporations may amend their charter under this section so as to truly set forth the object and purpose of the corporation. In re Creditors' Audit & Adjustment Ass'n, 131 N.Y.S. 263, 72 Misc. 461, 1911 N.Y. Misc. LEXIS 423 (N.Y. Sup. Ct. 1911).

Agency Opinions

1. Generally

A certificate of a membership corporation may not be amended, without the approval of the state board of social welfare, to delete a condition set forth in the certificate. 1941 N.Y. Op. Att'y Gen. No. 336, 1941 N.Y. AG LEXIS 172.

The failure of a membership corporation to obtain the necessary approval of the Board of Social Welfare to a certificate of

extension of corporate existence is a defect which cannot be corrected by an amendatory certificate or by the Board's nunc pro tunc approval. However, a remedy lies in the filing of a certificate of revival of corporate existence pursuant to General Corporation Law § 49. 1952 N.Y. Op. Att'y Gen. No. 159, 1952 N.Y. AG LEXIS 49.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-1 White, New York Business Entities ¶ N105.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business & Commercial § 8.07. Amending or Changing the Certificate of Incorporation.

New York Practice Guide: Business & Commercial § 8.07A. Restating Certificate of Incorporation.

New York Practice Guide: Business & Commercial § 8.07B. Certificate of Change.

Matthew Bender's New York Checklists: Checklist for Assessing Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 2.47.

Checklist for Forming Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.02.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N105:1. Certificate of Correction to Eliminate Matter Not Permitted to Be Stated.

White, New York Business Entities Form N105:2. Certificate of Correction to Remedy Defective Execution.

White, New York Business Entities Form N105:3. Certificate of Correction of Certificate of Amendment.

§ 112. Actions or special proceedings by attorney-general

(a) The attorney-general may maintain an action or special proceeding:

(1) To annul the corporate existence or dissolve a corporation that has acted beyond its capacity or power or to restrain it from carrying on unauthorized activities;

(2) To annul the corporate existence or dissolve any corporation that has not been duly formed;

(3) To restrain any person or persons from acting as a domestic or foreign corporation within this state without being duly incorporated or from exercising in this state any corporate rights, privileges or franchises not granted to them by the law of the state;

(4) To procure a judgment removing a director of a corporation for cause under section 706 (Removal of directors);

(5) To dissolve a corporation under article 11 (Judicial dissolution);

(6) To restrain a foreign corporation or to annul its authority to carry on activities in this state under section 1303 (Violations).

(7) To enforce any right given under this chapter to members, a director or an officer of a charitable corporation. The attorney-general shall have the same status as such members, director or officer.

(8) To compel the directors and officers, or any of them, of a charitable corporation which has been dissolved under section 1011 (Dissolution for failure to file certificate of type of Not-for-Profit Corporation Law under section 113) to account for the assets of the dissolved corporation.

(9) Upon application, ex parte, for an order to the supreme court at a special term held within the judicial district where the office of the corporation is located, and if the court so orders, to enforce any right given under this chapter to members, a director or an officer of a non-charitable corporation. For such purpose, the attorney-general shall have the same status as such members, director or officer.

(10) To enjoin, void or rescind any related party transaction, seek damages and other appropriate remedies, in law or equity, in addition to any actions pursuant to section 715 (Related party transactions) of this chapter.

(b) In an action or special proceeding brought by the attorney-general under any of the provisions of this chapter:

(1) If an action, it is triable by jury as a matter of right.

(2) The court may confer immunity in accordance with the provisions of section six hundred nineteen-c of the code of criminal procedure.

(3) A temporary restraining order to restrain the commission or continuance of the unlawful acts which form the basis of the action or special proceeding may be granted upon proof, by affidavit, that the defendant or defendants have committed or are about to commit such acts. Application for such restraining order may be made ex parte or upon such notice as the court may direct.

(4) If the action or special proceeding is against a foreign corporation, the attorney-general may apply to the court at any stage thereof for the appointment of a temporary receiver of the assets in this state of such foreign corporation, whenever it has assets or property of any kind whatsoever, tangible or intangible, within this state.

(5) When final judgment in such action or special proceeding is rendered against the defendant or defendants, the court may direct the costs to be collected by execution against any or all of the defendants or by order of attachment or other process against the person of any director or officer of a corporate defendant.

(6) In connection with any such proposed action or special proceeding, the attorney-general may take proof and issue subpoenas in accordance with the civil practice law and rules.

(c) In any such action or special proceeding against a foreign corporation which has not designated the secretary of state as its agent for service of process under section 304 (Statutory designation of secretary of state as agent for service of process), any of the following acts in this state by such foreign corporation shall constitute the appointment by it of the secretary of state as its agent upon whom process against such foreign corporation may be served.

(1) As used in this paragraph the term "resident" shall include individuals, domestic corporations of any kind and foreign corporations of any kind authorized to do business or carry on activities in the state.

(2) Any act done, or representation made as part of a course of the solicitation of orders, or the issuance, or the delivery of contracts for, or the sale of, property, or the performance of services to residents which involves or promotes a plan or scheme to defraud residents in violation of the laws or the public policy of the state.

(3) Any act done as part of a course of conduct of business or activities in the solicitation of orders from residents for property, goods or services, to be delivered or rendered within this state to, or on their behalf, where the orders or contracts are executed by such residents within this state and where such orders or contracts are accompanied or followed by an earnest money deposit or other down payment or any installment payment thereon or any other form of payment, which payment is either delivered in or transmitted from the state.

(4) Any act done as part of the conduct of a course of business or activities with residents which defrauds such residents or otherwise involves or promotes an attempt by such foreign corporation to circumvent the laws of this state.

(d) Paragraphs (b), (c), (d) and (e) of section 307 (Service of process of unauthorized foreign corporation) shall apply to process served under paragraph (c).

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970; amd, L 1970, ch 992, § 1; L 1971, ch 1058, § 1, eff Sept 1, 1971; L 2013, ch 549, §§ 33, 34, eff July 1, 2014; L 2015, ch 358, § 1, effective September 25, 2015.

Derivation Notes: Derived from Gen Corp Law §§ 61, 83, 84, 85, 91, 93, 94, 95, 219.

Revision Notes: *Source:* Gen Corp L § 92(2).

Changes: Revised and extended.

Comment: This is an adaptation of Bus Corp L § 112 with certain additions to accommodate the attorney-general's concern with not-for-profit corporations. A new subparagraph (a)(7) has been included to in effect subrogate the attorney-general to any right given under this chapter to a member, director or officer of any Type B or Type C corporation. Thus the provisions of self-help given to such participants in a not-for-profit corporation are made available to the attorney-general in protecting the public interest in the operations of Type B and Type C corporations because of the high level of legitimate public concern.

The power which the Attorney-General has to take proof and issue subpoenas under Gen Corp L § 92(2) in an action to annul a corporation, has been expanded to apply to all actions and proceedings brought by him.

Editor's Notes: Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

Amendment Notes: The 2015 amendment by ch 358, § 1, substituted "damages and other appropriate remedies, in law or equity, in addition to any actions" for "or seek additional damages or remedies" in (a)(10).

Notes to Decisions

Analysis

1. Generally
2. Subpoenas
3. Standing
4. Venue
5. Injunctive relief
6. Administrative procedure

1. Generally

Owner cited no authority for the proposition that any entity other than the attorney general had the right to take action against a not-for-profit foundation based upon a claimed violation of its legal obligations; neither the foundation's tax status nor case law allowing charities unique enforcement rights for charitable subscriptions gave the owner any rights. Thome v Alexander & Louisa Calder Found., 70 A.D.3d 88, 890 N.Y.S.2d 16, 2009 N.Y. App. Div. LEXIS 8707 (N.Y. App. Div. 1st Dep't 2009), app. denied, 15 N.Y.3d 703, 906 N.Y.S.2d 817, 933 N.E.2d 216, 2010 N.Y. LEXIS 1383 (N.Y. 2010).

Trial court declined to issue an order on the Attorney General's request that the trial court do so to allow the Attorney General to bring his four claims against the stock exchange chairman involving his alleged receipt of unreasonable compensation; the trial court had already denied the stock exchange chairman's motion to dismiss the four claims and, thus, an ex parte order was unnecessary. People v Grasso, 816 N.Y.S.2d 863, 12 Misc. 3d 384, 235 N.Y.L.J. 54, 2006 N.Y. Misc. LEXIS 484 (N.Y. Sup. Ct. 2006), rev'd, 42 A.D.3d 126, 836 N.Y.S.2d 40, 2007 N.Y. App. Div. LEXIS 5719 (N.Y. App. Div. 1st Dep't 2007).

CLS N-PCL § 513(c) does not override CLS N-PCL § 1507 restrictions on invading principal and thus, in action under CLS N-PCL § 112(a)(1), defendants were preliminarily enjoined from invading principal of cemetery's permanent maintenance trust fund or perpetual care trust fund, and from borrowing money from its perpetual care income fund (without prejudice to them if they applied for judicial approval under § 1507(a)), because (1) borrowing money that probably cannot be repaid is extra-statutory means of removing monies from funds without seeking court approval, (2) there would be continued invasion and arguably irreparable harm if injunction was not issued, and (3) balancing of equities favored issuance of preliminary injunction. People by Vacco v Woodlawn Cemetery, 173 Misc. 2d 846, 662 N.Y.S.2d 369, 1997 N.Y. Misc. LEXIS 397 (N.Y. Sup. Ct. 1997).

2. Subpoenas

Religious organization and its founder would be compelled to comply with subpoena issued by Attorney General in connection with investigation of fraudulent charitable solicitations since (1) religious corporations are subject to provisions of Not-for-Profit Corporation Law, (2) while not required to register with and report annually to Attorney General under CLS EPTL § 8-1.4(b)(3), religious corporations are within Attorney General's subpoena power, and (3) investigation in question was not being conducted in bad faith or in manner disruptive to respondents' religious activity. Abrams v Temple of Lost Sheep, Inc., 148 Misc. 2d 825, 562 N.Y.S.2d 322, 1990 N.Y. Misc. LEXIS 557 (N.Y. Sup. Ct. 1990), dismissed, 1990 U.S. Dist. LEXIS 13699 (E.D.N.Y. Sept. 25, 1990).

Subpoena issued by Attorney General in connection with investigation of fraudulent charitable solicitations, requiring religious organization and its founder to produce corporate books and records, would not be quashed on Fourth Amendment grounds since documents sought were not overly broad, burdensome or irrelevant to proper inquiry. Abrams v Temple of Lost Sheep, Inc., 148 Misc. 2d 825, 562 N.Y.S.2d 322, 1990 N.Y. Misc. LEXIS 557 (N.Y. Sup. Ct. 1990), dismissed, 1990 U.S. Dist. LEXIS 13699 (E.D.N.Y. Sept. 25, 1990).

Religious organization and its founder could not refuse to comply with subpoena, issued by Attorney General in connection with investigation of fraudulent charitable solicitations, on ground that compliance with subpoena would deprive them of Fifth Amendment right against self-incrimination since neither religious organization nor its officers have Fifth Amendment rights against production of corporate records pursuant to lawful judicial order. Abrams v Temple of Lost Sheep, Inc., 148 Misc. 2d 825, 562 N.Y.S.2d 322, 1990 N.Y. Misc. LEXIS 557 (N.Y. Sup. Ct. 1990), dismissed, 1990 U.S. Dist. LEXIS 13699 (E.D.N.Y. Sept. 25, 1990).

3. Standing

The Attorney-General, purporting to represent the ultimate beneficiaries of a charitable organization, which is the donee of an unconditional gift of corporate stock, does not have standing pursuant to EPTL 8-1.1 (subd [f]), which provides that the Attorney-General shall represent the beneficiaries of dispositions of property for religious, charitable, educational or benevolent purposes and it shall be his duty to enforce the rights of such beneficiaries, to sue the corporation to compel both the declaration and payment of dividends and the payment of market value of those shares repurchased from the donee corporation at less than market value, since although the Attorney-General's powers of representation and enforcement are not limited to express trusts, but encompass those charitable dispositions where property has been donated for a specific purpose, this does not mean that the Attorney-General has standing to represent those who might eventually reap the benefit of gifts made without a specified purpose to charitable organizations; in such cases, the charity implicitly receives the gift for its own uses, consistent with its charitable purposes and there are no beneficiaries, legally cognizable, apart from the donee, and the charity may use the gift as it sees fit, in accordance with the laws of its creation. Where there has been a completed, unconditional, irrevocable gift of stock to a charity, there is neither any intention of the donor for the Attorney-General to protect, nor any beneficiaries to represent. Furthermore, the Not-For-Profit Corporation Law (§ 112, subd [a], par [7]; §§ 719, 720), which authorizes the Attorney-General to bring an action against the directors and officers of a charitable corporation for certain specified types of misconduct and to enforce any right afforded under the statute to members, a director or an officer of a charitable corporation, does not provide the Attorney-General with standing. Lefkowitz v Lebensfeld, 68 A.D.2d 488, 417 N.Y.S.2d 715, 1979 N.Y. App. Div. LEXIS 10968 (N.Y. App. Div. 1st Dep't 1979), aff'd, 51 N.Y.2d 442, 434 N.Y.S.2d 929, 415 N.E.2d 919, 1980 N.Y. LEXIS 2739 (N.Y. 1980).

4. Venue

In action by Attorney-General under CLS N-PCL § 112(a)(1) and CLS EPTL Art 8 to obtain injunctive relief against Long Island Society for the Prevention of Cruelty to Children (LISPCC), venue was properly in New York County where Charities Bureau of Attorney-General was located, and where LISPCC was required to annually file its financial reports or exemptions from filing. Koppell ex rel. People v Long Island Soc'y for the Prevention of Cruelty to Children, 163 Misc. 2d 654, 621 N.Y.S.2d 762, 1994 N.Y. Misc. LEXIS 600 (N.Y. Sup. Ct. 1994).

5. Injunctive relief

Attorney-General has legal capacity to commence action to preserve cemetery's assets by seeking injunctive relief to restrain defendants from invading principal of cemetery's "permanent maintenance trust fund" and "perpetual care trust fund," and from borrowing money from its "perpetual care income fund" or otherwise carrying on unauthorized activities. People by Vacco v Woodlawn Cemetery, 173 Misc. 2d 846, 662 N.Y.S.2d 369, 1997 N.Y. Misc. LEXIS 397 (N.Y. Sup. Ct. 1997).

6. Administrative procedure

In action under CLS N-PCL § 112(a)(1) to restrain cemetery from invading principal of its permanent maintenance trust fund and perpetual care trust fund, and from borrowing money from its perpetual care income fund, Attorney General's failure to have followed every possible administrative procedure before commencing action did not warrant dismissal of complaint; when Attorney General or Cemetary Board are not challenging agency determinations, they are not bound to exhaust all of their own procedures before commencing actions to quell wrongdoing by entities they oversee. People by Vacco v Woodlawn Cemetery, 173 Misc. 2d 846, 662 N.Y.S.2d 369, 1997 N.Y. Misc. LEXIS 397 (N.Y. Sup. Ct. 1997).

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-1 White, New York Business Entities ¶ N112.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business & Commercial § 8.23. Dissolution Procedures.

§ 114. Visitation of supreme court

Charitable corporations, whether formed under general or special laws, with their books and vouchers, shall be subject to the visitation and inspection of a justice of the supreme court, or of any person appointed by the court for that purpose. If it appears by the verified petition of a member, director, officer or creditor of any such corporation, that it, or its directors, officers, members, key persons or agents, have misappropriated any of the funds or property of the corporation, or diverted them from the purpose of its incorporation, or that the corporation has acquired property in excess of the amount which it is authorized by law to hold, or has engaged in any business other than that stated in its certificate of incorporation, the court may order that notice of at least eight days, with a copy of the petition, be served on the corporation, the attorney general and the persons charged with misconduct, requiring them to show cause at a time and place specified, why they should not be required to make and file an inventory and account of the property, effects and liabilities of such corporation with a detailed statement of its transactions during the twelve months next preceding the granting of such order. On the hearing of such application, the court may make an order requiring such inventory, account and statement to be filed, and proceed to take and state an account of the property and liabilities of the corporation, or may appoint a referee for that purpose. When such account is taken and stated, after hearing all the parties to the application, the court may enter a final order determining the amount of property so held by the corporation, its annual income, whether any of the property or funds of the corporation have been misappropriated or diverted to any other purpose than that for which such corporation was incorporated, and whether such corporation has been engaged in any activity not covered by its certificate of incorporation. An appeal may be taken from the order by any party aggrieved to the appellate division of the supreme court, and to the court of appeals, as in a civil action. No corporation shall be required to make and file more than one inventory and account in any one year, nor to make a second account and inventory, while proceedings are pending for the statement of an account under this section.

HISTORY:

Add, L 1970, ch 847, § 6, eff Sept 1, 1970; amd, L 2013, ch 549, § 36, eff July 1, 2014; L 2016, ch 466, § 2, effective May 27, 2017.

Editor's Notes: Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

Amendment Notes: The 2016 amendment by ch 466, § 2, substituted "key persons" for "key employees" in the second sentence.

Notes to Decisions

Analysis

1. Generally
2. Right to inspect records

1. Generally

The Court has authority to intervene in corporate proceedings in matters of compliance with the corporation's charter and by-laws where the need for such intervention is clearly demonstrated. Santos v Chappell, 65 Misc. 2d 559, 318 N.Y.S.2d 570, 1971 N.Y. Misc. LEXIS 1875 (N.Y. Sup. Ct. 1971).

2. Right to inspect records

Petitioner, who was a resident and taxpayer of town and who made annual charitable contributions to nursing home organized pursuant to Not-For-Profit Corporation Law, but who was not a manager thereof under any of four tests specified by Law and who was not an officer or director and had no beneficial interest in corporation, had no right to inspect records of corporation. Getman v Mohawk Valley Nursing Home, Inc., 44 A.D.2d 392, 355 N.Y.S.2d 508, 1974 N.Y. App. Div. LEXIS 4990 (N.Y. App. Div. 4th Dep't 1974).

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-1 White, New York Business Entities ¶ N114.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business & Commercial § 8.04. The Role of Members in the Corporation.

New York Practice Guide: Business & Commercial § 8.23. Dissolution Procedures.

§ 115. Power to solicit contributions for charitable purposes

(a) No corporation required to obtain approval or provide notice of formation pursuant to section 404 (Approvals, notices and consents) of this chapter may solicit contributions for any purpose requiring such approval or notice unless and until such corporation (1) obtains and submits any approval or notice required thereunder, and (2) is in compliance with the registration and reporting requirements of article seven-A of the executive law and section 8-1.4 of the estates, powers and trusts law.

(b) The attorney general may maintain an action or proceeding pursuant to the provisions of subparagraph one of paragraph (a) of section one hundred twelve of this article against any corporation that solicits contributions in violation of paragraph (a) of this section. Such an action may also be maintained in relation to a corporation hereinafter incorporated if the name, purposes, objects or the activities of such corporation may, in any manner, lead to the belief that the corporation possesses or may exercise any of such purposes.

HISTORY:

Add, L 1977, ch 669, § 7, eff Oct 1, 1977; amd, L 2013, ch 549, § 37, eff July 1, 2014.

Editor's Notes: Laws 1977, ch 669, §§ 1, 6, 17–19 and 24, provide as follows:

Section 1. It is the purpose of this act to transfer certain direct administrative functions, powers and duties currently performed by the state board of social welfare, relating to operational and programmatic supervision of facilities, agencies and programs providing care or services to children and adults, and relating to the solicitation and collection of funds for charitable purposes, so that the board can more effectively perform its constitutional role of visitation and inspection of such facilities, agencies and programs and such new functions, powers and duties as may be conferred upon the board by this act, to help assure that state and local agencies having direct supervisory responsibilities for child and adult care or services appropriately utilize their resources to improve the quality of such programs. It is also the purpose of this act to more clearly delineate the respective responsibilities of the state departments of social services and mental hygiene, the division for youth, and other state and local government agencies having direct or indirect responsibilities for all or part of the resident population of such facilities, and to help assure by the provision of this act and by cooperative agreements entered into pursuant thereto that duplication of effort, overlapping of responsibilities, and the fragmentation of program planning and operational supervision are minimized.

§ 6. All of the functions and powers possessed by and all the obligations and duties of the board of social welfare relating to solicitation and collection of funds for charitable purposes and approval of certificates of incorporation which include the study and prevention of poverty; the relieving or reducing of unemployment among youth; the promoting or providing of employment of youth or the solicitation of contributions for any such purpose or purposes, are hereby transferred and assigned to, assumed and devolved upon the secretary of state. To effectuate such transfer there shall also be transferred such officers and employees as are necessary, all appropriations or reappropriations, to the extent of remaining unexpended or unencumbered balances thereof, whether allotted or unallotted or whether obligated or unobligated and all necessary books, papers, records and property. All rules, regulations, acts, determinations and decisions in force at the time of such transfer and proceedings or other business matters undertaken or commenced by or before the board of social welfare pertaining to the functions herein transferred and assigned, in force at the time of such transfer, assignment, assumption or devolution shall continue in force and effect until duly modified, obligated or completed by the secretary of state. References to the board of social welfare or office, bureau or other unit thereof contained in laws, rules, contracts and other documents relating to the functions herein transferred shall be deemed to be references to the secretary of state or the corresponding office, bureau or unit of the department of state as the case may be.

§ 17. Any provision of any special or general law heretofore or hereafter enacted relating to those functions, powers and duties of the state board of social welfare with respect to supervision of residential programs for children and adults which are by this act transferred to the state department of social services, shall be deemed to refer to such department rather than to such board.

§ 18. All the functions and powers possessed by, and all the obligations and duties of, the state board of social welfare in relation to direct supervision of residential programs for children and adults which are transferred to the state department of social services by this act are hereby transferred and assigned to, assumed and devolved upon the state department of social services.

§ 19. All functions and powers possessed by, and all the obligations and duties of the state board of social welfare related to functions which are transferred to the department of social services, health or mental hygiene are hereby transferred and assigned to, assumed by and devolved upon each such department.

§ 24. All rules, regulations, determinations and decisions of the state board of social welfare pertaining to the functions herein transferred and assigned in force at the time of such transfer and assignment shall continue in force and effect as rules, regulations, determinations and decisions of the state department of social services. Whenever the terms "board" or "state board of social welfare" are referred to or indicated in any contract or document pertaining to the functions, powers and duties hereby transferred and assigned, such reference or designation shall be deemed to refer to the state department of social services.

Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-1 White, New York Business Entities ¶ N115.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business & Commercial § 8.01. Applicability of Not-for-Profit Corporation Law.

Matthew Bender's New York Checklists: Checklist for Identifying Financing Options When Selecting Form of Business Entity LexisNexis AnswerGuide New York Business Entities § 2.18.

Checklist for Identifying Business Considerations in Entity Selection LexisNexis AnswerGuide New York Business Entities § 2.23.

Checklist for Assessing Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 2.47.

Checklist for Forming Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.02.

Checklist for Financing Operations of Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.12.

ARTICLE 2 Corporate Purposes and Powers

Section

201. Purposes
202. General and special powers
204. Limitation on activities

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970.

§ 201. Purposes

(a) A corporation, as defined in paragraph (a) of § 102 (Definitions), may be formed under this chapter as a charitable corporation or a non-charitable corporation unless it may be formed under any other corporate law of this state, in which event it may not be formed under this chapter unless such other corporate law expressly so provides.

(b) A corporation formed under this chapter on or after July first, two thousand fourteen shall either be a charitable corporation or a non-charitable corporation. Any corporation formed for both charitable purposes and non-charitable purposes shall be deemed a charitable corporation for purposes of this chapter. A type A not-for-profit corporation formed prior to July first, two thousand fourteen shall be deemed a non-charitable corporation under this chapter. Any submission or filing by such corporation to any person or entity shall be deemed to have been submitted or filed by a non-charitable corporation, and any reference in any such filing or submission referring to the status of such corporation as a type A corporation shall be deemed to refer to a non-charitable corporation.

(c) A type B or C not-for-profit corporation formed prior to July first, two thousand fourteen shall be deemed a charitable corporation for all purposes under this chapter. Any submission or filing by such corporation to any person or entity shall be deemed to have been submitted or filed by a charitable corporation, and any reference in any such filing or submission referring to the status of such corporation as a type B or type C corporation shall be deemed to refer to a charitable corporation.

(d) A type D not-for-profit corporation formed prior to July first, two thousand fourteen for charitable purposes shall be deemed a charitable corporation. Any submission or filing by such corporation to any person or entity shall be deemed to have been submitted or filed by a charitable corporation, and any reference in any such filing or submission referring to the status of such corporation as a type D corporation shall be deemed to refer to a charitable corporation. Any other type D not-for-profit corporations formed prior to July first, two thousand fourteen shall be deemed a non-charitable corporation. Any submission or filing by such corporation to any person or entity shall be deemed to have been submitted or filed by a non-charitable corporation, and any reference in any such filing or submission referring to the status of such corporation as a type D corporation shall be deemed to refer to a non-charitable corporation.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970; amd, L 1970, ch 847, § 7, eff Sept 1, 1970; L 1971, ch 1058, § 3, eff Sept 1, 1971; L 2013, ch 549, § 38, eff July 1, 2014; L 2014, ch 23, § 6, eff July 1, 2014.

Derivation Notes: Derived from Mem Corp Law § 10.

Revision Notes: *Source:* Mem Corp L §§ 2 and 10.

Changes: Revised.

Comment: This section relates to the purposes for which a corporation may be formed. "Corporation" is defined in § 102(a)(5) as a corporation which meets two tests: (1) formed for a purpose, not for pecuniary profit or financial gain, permitted under § 201, and (2) no flow-through of assets, income or profit to or for the benefit of its members, directors or officers except as permitted under this chapter. This section permits formation under this chapter as provided therein unless it may be formed under another corporate law. The section provides for a classification of not-for-profit corporations into four types, Type A, Type B, or Type C, or Type D. Type A is intended to cover the usual membership type organization where the support of the organization is derived from a limited class called "members" and where the non-pecuniary benefits flow primarily to such limited class. A nonexclusive list of purposes is included. Type B is a class limited to one or more of the following nonbusiness purposes: charitable, educational, scientific, literary, cultural or for the prevention of cruelty to children or animals. This is intended to encompass substantially the same class as qualify for exemption under IRC section 501c(3). The benefit group is the public or some broad segment of it. The supporting group often is the general public. Type C is intended to fill the present gap in the New York law by permitting a not-for-profit corporation to be formed to conduct a lawful business purpose. The corporation must still meet the requirements of the definition of "not-for-profit corporation" in section 102a(5) and (10) which requires that the purposes be non-pecuniary and that there be no flow-through to individuals except as permitted by this chapter. This means that although the corporation may be organized for a purpose normally carried on by business corporations for profit, the purpose must be non-pecuniary i.e. it must be formed with an objective other than the making of money.

This section provides for a Type D corporation. This is a so-called "adapter" provision. A Type D corporation is a not-for-profit corporation which may be formed under this chapter if and when authorized by any other corporate law of the state for any purposes specified by such other law and subject to the provisions of the other law. This is intended to permit the use of this chapter as a basic law for other corporate statutes. It will permit limiting the special corpo-

rate statute to the special provisions peculiar to a certain type of not-for-profit corporation. It eliminates the necessity of including in the special law all general provisions.

Paragraph (c) of this section provides that if a corporation is formed for both Type A and Type B purposes, it shall be considered a Type B corporation. If it has among its purposes any purposes within Type C, it shall be considered a Type C corporation. This results in the corporation being subjected to the classification representing the highest degree of legitimate public concern with appropriate regulatory supervision by the state under the various provisions of the chapter.

Editor's Notes: Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

PRACTICE INSIGHTS:

QUALIFIED IMMUNITY IS NOT BULLET-PROOF SHIELD

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INSIGHT

Not-For-Profit Corporation Law § 720-a confers qualified immunity from suit upon certain directors or officers of not-for-profits. Although it does offer protection for certain individuals, counsel must fully understand the limitations of that protection to represent the not-for-profit corporation and individual directors and officers adequately.

ANALYSIS

Qualified immunity is limited to directors and officers of entities eligible for tax exemption under Internal Revenue Code § 501(c)(3).

A director or officer sued for personal liability must raise the qualified immunity granted under Not-For-Profit Corp. Law § 720-a as an affirmative defense in the answer. *Woodford v. Benedict Community Health Center*, 176 A.D.2d 1115, 575 N.Y.S.2d 415 (3d Dep't 1991). Best practices dictate that an attorney representing a director or officer sued under these circumstances review the complaint to ensure that it has been verified and that it affirmatively states that the director's actions constituted either gross negligence or intentional infliction of harm. *See* CPLR 3016(h).

Alternatively, the defendant may move to dismiss a complaint against which qualified immunity is a defense. This CPLR 3211(a)(11) motion must be made before the answer is filed. *Woodford v. Benedict Community Health Center*, 176 A.D.2d 1115, 575 N.Y.S.2d 415 (3d Dep't 1991). A claim will be dismissed if the defendant can show that the factors have been met, that is: (1) defendant can prove that there is no probability of meeting the statutory standard of gross negligence or intent to cause harm to the plaintiff; (2) the defendant can show that his or her service to the not-for-profit was uncompensated; and (3) the not-for-profit is eligible for tax exemption under IRC § 501(c)(3).

If defendant is paid, immunity is not available.

Although the law permits not-for-profits to compensate its directors (Not-For-Profit Corp. Law § 202(a)(12)), most directors are volunteers who serve without compensation. If an IRC § 501(c)(3) organization chooses to compensate its directors for more than "actual expenses incurred in attending meetings or otherwise in the execution of such office" (Not-For-Profit Corp. Law § 720-a), any such director will lose the right to qualified immunity under this provision. This choice also affects the director's right to seek indemnification. This issue arises most frequently in the case of paid officers who also hold a seat on the board of directors and directors involved with a private foundation.

Know what actions qualified immunity will not protect.

Directors who otherwise meet the criteria for qualified immunity are not protected from every cause of action that may be filed by a third party. It is important for the practitioner to know what types of actions expose the director or officer to personal liability. For example, Not-for-Profit Corp. Law § 720-a does not immunize directors from federal claims or employment litigation (such as wrongful termination) to the extent the claims are based upon federal law. This section does not apply to actions taken by the Attorney General or actions commenced under Not-For-Profit Corp. Law § 719 (director liability in certain defined transactions) or Not-For-Profit Corp. Law § 720 (actions brought on behalf of the organization).

In addition, directors may be held personally liable if the not-for-profit corporation does not follow the dissolution procedures set forth in Not-For-Profit Corp. Law § 1002-a or if the not-for-profit does not adequately provide for known liabilities upon dissolution. In such an event, the directors will be held personally liable only if the creditors file claims within the time period provided for in Not-For-Profit Corp. Law Article 10 (Non-Judicial Dissolution and Article 11 (Judicial Dissolution) Not-For-Profit Corp. Law § 719.

Notes to Decisions

Analysis

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1. Generally

Where formal requirements for filing a certificate of incorporation were complied with and the purposes for which corporation was to be formed offended against no law, secretary of state lacked authority to label those purposes (namely, furthering of homosexual's rights), violative of "public policy," and secretary's refusal to accept certificate was arbitrary. Gay Activists Alliance v Lomenzo, 31 N.Y.2d 965, 341 N.Y.S.2d 108, 293 N.E.2d 255, 1973 N.Y. LEXIS 1527 (N.Y. 1973).

Judicial approval of certificate of incorporation for proposed type B not-for-profit corporation would be withheld as unnecessary since proposed corporation was type A not-for-profit corporation, for which no judicial approval was necessary, where proposed corporation did not have charitable purpose but was intended for specific benefit of 3 named persons, and no provision was made for using any portion of funds raised for benefit of public or any class of public. In re Beach, 141 Misc. 2d 735, 534 N.Y.S.2d 341, 1988 N.Y. Misc. LEXIS 670 (N.Y. Sup. Ct. 1988).

In action against organization which operated residence for young single working women, there was nothing inconsistent in organization's claim to exemption from rent stabilization code, as charity, and to exemption from Human Rights Law, as religious institution, since entity may have different status under different statutes, and organization was religious order engaged in charitable work. Priolo v Saint Mary's Home for Working Girls, 157 Misc. 2d 494, 597 N.Y.S.2d 890, 1993 N.Y. Misc. LEXIS 144 (N.Y. Sup. Ct. 1993), modified, aff'd, 207 A.D.2d 664, 616 N.Y.S.2d 36, 1994 N.Y. App. Div. LEXIS 8646 (N.Y. App. Div. 1st Dep't 1994).

Life insurer's claim against a purported beneficiary on grounds of an improper assignment should not have been dismissed because the insurer had raised litigable issues as to whether the assignee beneficiary was in fact the type of religious organization, Type B religious charitable corporation under N.Y. Not-for-Profit Corp. Law § 201, that could have been an assignee under N.Y.

Ins. Law § 3205(b)(3) as it was constituted at that time. Am. Mayflower Life Ins. Co. v Moskowitz, 17 A.D.3d 289, 794 N.Y.S.2d 32, 2005 N.Y. App. Div. LEXIS 4499 (N.Y. App. Div. 1st Dep't 2005).

Trial court denied the stock exchange chairman's motion to dismiss, as the Attorney General had the statutory responsibility to protect investors, had the authority to pursue the stock exchange chairman under the doctrine of parens patriae because they could not protect themselves from the allegedly unreasonable compensation that the New York Stock Exchange, a type A not-for-profit corporation, allowed him to receive, and the Attorney General stated four viable claims against him: for imposition of a constructive trust and for restitution for ultra vires payments allegedly received, for payment had and received, for violation of N.Y. Not-for-Profit Corp. Law § 715 for benefits he received that were improperly approved, and for violation of N.Y. Not-for-Profit Corp. Law for his allegedly receiving improper loans. People v Grasso, 816 N.Y.S.2d 863, 12 Misc. 3d 384, 235 N.Y.L.J. 54, 2006 N.Y. Misc. LEXIS 484 (N.Y. Sup. Ct. 2006), rev'd, 42 A.D.3d 126, 836 N.Y.S.2d 40, 2007 N.Y. App. Div. LEXIS 5719 (N.Y. App. Div. 1st Dep't 2007).

Plaintiff lacked standing to bring a declaratory judgment suit alleging discrimination in unmet housing needs, municipal services, and lack of representation on the planning and zoning boards on behalf of its shareholders as plaintiff, which was formed to assert the objectives of the shareholders, could not do so as a for-profit corporation under N.Y. Bus. Corp. Law § 201(a); plaintiff's claims were maintainable under N.Y. Not-for-Profit Corp. Law § 201(b). United Fairness, Inc. v Town of Woodbury, 932 N.Y.S.2d 895, 34 Misc. 3d 725, 2011 N.Y. Misc. LEXIS 5478 (N.Y. Sup. Ct. 2011), rev'd, in part, 113 A.D.3d 754, 979 N.Y.S.2d 365, 2014 N.Y. App. Div. LEXIS 333 (N.Y. App. Div. 2d Dep't 2014).

2. Construction with other statutes

An application for approval of a certificate of incorporation pursuant to the Not-For-Profit Corporation Law, setting forth the purposes of the corporation as being "to print, mail, disseminate, Roman Catholic information . . . to conduct prayer vigils, and with divine guidance keep the knowledge of God and His plan for peace and security in the hearts of all mankind", brings the proposed corporation within the definition of an incorporated church making it subject to the provisions of the Religious Corporations Law as well as the Not-For-Profit Corporation Law, and, as such, the application must be denied for failure to conform to the specific provisions of the Religious Corporations Law which govern the incorporation of groups associated with the Roman Catholic Church, including the requirement of an execution and acknowledgment by certain specific officials of that church. In re Lueken (Our Lady of Roses), 97 Misc. 2d 201, 410 N.Y.S.2d 793, 1978 N.Y. Misc. LEXIS 2770 (N.Y. Sup. Ct. 1978).

3. Business purpose

Each certificate of incorporation for a not-for-profit corporation must be evaluated on the nature of proposed activities and not merely on the results, no matter how laudatory, to determine whether the proposed corporation would be a business purpose or nonbusiness purpose not-for-profit corporation. Bodell v Ghezzi, 50 A.D.2d 674, 375 N.Y.S.2d 426, 1975 N.Y. App. Div. LEXIS 12511 (N.Y. App. Div. 3d Dep't 1975).

Despite the fact that buildings and improvements which proposed not-for-profit corporation proposed to construct for purposes of leasing, selling or giving would be so leased, sold, or given exclusively to voluntary agencies which were exempt from taxation under the Internal Revenue Code, the sale and lease of real property, without restriction, could only be considered a business purpose so that Secretary of State properly refused to accept proposed certificate of incorporation which stated that the proposed corporation would be a nonbusiness purpose not-for-profit corporation rather than a business purpose not-for-profit corporation. Bodell v Ghezzi, 50 A.D.2d 674, 375 N.Y.S.2d 426, 1975 N.Y. App. Div. LEXIS 12511 (N.Y. App. Div. 3d Dep't 1975).

4. Under former Membership Corporations Law § 10

Where a certificate of incorporation under this section provides for the holding of the annual meeting on Sunday, it will not be approved for the reason that transaction of secular business on Sunday is contrary to public policy. In re Hakehiloth, 42 N.Y.S. 985, 18 Misc. 717, 1896 N.Y. Misc. LEXIS 741 (N.Y. Sup. Ct. 1896).

A corporation may not be incorporated under this law if it may be incorporated under any other general law. Hence, an organization basically religious in nature had to be incorporated under the Religious Corporations Law. Application of Basilio Scientific Spiritist Cult Asso., 9 Misc. 2d 389, 170 N.Y.S.2d 679, 1958 N.Y. Misc. LEXIS 3961 (N.Y. Sup. Ct. 1958).

A proposed corporation which has for its object the conduct of religious services may not be granted a certificate of incorporation under this section, inasmuch as a corporation organized for religious purposes must be organized under the Religious Corporations Law. Application for Temple of Joy, 86 N.Y.S.2d 678, 1949 N.Y. Misc. LEXIS 1811 (N.Y. Sup. Ct. 1949).

5. —Vague and indefinite purpose clause

Court approval of an application to incorporate under the Membership Corporations Law for the objectives of promoting and fostering public understanding of insurance, insurance claims, policies, etc., was denied on the ground that the purposes stated were too general and vague, might invade the professional field of practice of law, failure to state necessity for incorporation under this act, and lack of any indication that applicants had the facilities or ability to attain their stated objectives. In re Policyholders Information Office, 23 Misc. 2d 1093, 206 N.Y.S.2d 897, 1960 N.Y. Misc. LEXIS 3035 (N.Y. Sup. Ct. 1960).

Approval was refused of a proposed certificate of incorporation of a membership corporation, to be known as "Aid Foundation," the vague purpose of which was to obtain funds to be distrubuted to worthwhile charitable and philanthropic endeavors, upon the ground that such an organization would merely duplicate the efforts of charities already in existence. In re Aid Foundation, Inc., 27 Misc. 2d 314, 210 N.Y.S.2d 165, 1960 N.Y. Misc. LEXIS 2186 (N.Y. Sup. Ct. 1960).

An application for judicial approval of a certificate of incorporation was insufficient to enable the court to exercise its function of "judicial scrutiny" where it merely stated the proposed name of the organization and that its purpose was "to develop a program to meet the cultural, physical, mental and community needs of the individual." In re Fraternidad Hispana Americana, 39 Misc. 2d 106, 240 N.Y.S.2d 110, 1963 N.Y. Misc. LEXIS 2060 (N.Y. Sup. Ct. 1963).

Application for certificate of incorporation of membership corporation was denied where the purposes of the said corporation were too generalized and vague to warrant approval thereof. In re Council for Small Business, Inc., 155 N.Y.S.2d 530 (N.Y. Sup. Ct. 1956).

6. —Existence of organization for similar purpose

A certificate of incorporation will not be granted to an organization which has for its purpose the perpetuation of the name of the late President Roosevelt, the proposed organization to be called the F.D.R. Social and Civic Club, in view of the fact that existing membership corporations are adequate for the laudable purposes sought to be attained, and in view of the danger that the unrestricted use of the name of the late president would lead to confusion and create the impression that the corporation has official sanction, and could readily result in unauthorized and uncontrolled solicitation of funds. Application of F. D. R. Social & Civic Club, 58 N.Y.S.2d 549, 185 Misc. 1015, 1945 N.Y. Misc. LEXIS 2475 (N.Y. Sup. Ct. 1945).

An application for incorporation of a proposed membership corporation, designed to substantially duplicate the functions of an already well established organization, will not be looked upon with favor by the courts since the public interest will not be served by the economic waste and loss of efficiency which would result from approval. In re Boy Explorers of America, Inc., 21 Misc. 2d 114, 67 N.Y.S.2d 108, 1946 N.Y. Misc. LEXIS 1747 (N.Y. Sup. Ct. 1946).

A proposed certificate of incorporation may not be approved where the objects of the new corporation are listed as helping soldiers in need of money, food and clothing, and sending them packages of food, cigarettes and books, since the present agencies

are adequate to accomplish these purposes, and incorporation would mean the solicitation and collection of funds in competition with already existing organizations. In re East Flatbush Victory Club, Inc., 42 N.Y.S.2d 351, 1943 N.Y. Misc. LEXIS 2001 (N.Y. Sup. Ct. 1943).

An organization will not be incorporated for the purpose of fostering friendship and good will among returning service men and women and their families and to engage in social events and patriotic rallies, parades, etc., since there are already many organizations doing this kind of work which need more money than they have been able to secure and the objects specified are obviously the basis of an appeal for funds. In re Victory Committee of Greenpoint of Patriotic, Social & Fraternal Club, Inc., 59 N.Y.S.2d 546, 1945 N.Y. Misc. LEXIS 2604 (N.Y. Sup. Ct. 1945).

Application for approval of proposed certificate of incorporation was denied where proposed rabbinic corporation would merely lead to confusion and misunderstanding and tend to impair the work presently carried on by long established and well known rabbinic organizations. Application of Knesseth Harabonim D'America, Inc., 131 N.Y.S.2d 543, 1954 N.Y. Misc. LEXIS 3339 (N.Y. Sup. Ct. 1954).

Court denied application for approval of proposed amended certificate of incorporation for membership corporation where the papers failed to show that any purpose could be achieved by the sponsors, or that they would not merely duplicate work done by other organizations. Application of Howard Memorial Fund, 155 N.Y.S.2d 126 (N.Y. Sup. Ct. 1956).

Application for approval of proposed certificate of incorporation was denied where the existing agency with the same purpose was sufficient. In re Certificate of Incorporation of Humanity Club, 155 N.Y.S.2d 210 (N.Y. Sup. Ct. 1955).

7. —Particular purposes

There is nothing unlawful in stated purposes of a corporation to promote rights of individual freedom of choice and association and the individual right to associate with only those persons with whom he desires to associate, to investigate the problems involved, assist in elimination of barriers to individual freedom of choice, etc., and an individual judge of the Supreme Court, on application for his approval of such a certificate, lacks power to deny the application. Association for Preservation of Freedom of Choice, Inc. v Shapiro, 9 N.Y.2d 376, 214 N.Y.S.2d 388, 174 N.E.2d 487, 1961 N.Y. LEXIS 1364 (N.Y. 1961), reh'g denied, 11 N.Y.2d 662, 225 N.Y.S.2d 740, 180 N.E.2d 898, 1962 N.Y. LEXIS 1478 (N.Y. 1962).

The Secretary of State may properly refuse to file a certificate of incorporation of an alleged membership corporation which is executed under this section, where the certificate states that the purpose or object of the corporation is to make loans out of the common funds of the corporation and to collect the same together with dues, assessments and other contributions. The certificate, as drawn, violates Stk. Corp. Law, § 5. A corporation for that purpose should be formed under the Bank. Law. Bernstein v Moses, 231 N.Y.S. 669, 133 Misc. 513, 1928 N.Y. Misc. LEXIS 1164 (N.Y. Sup. Ct. 1928).

Where the affidavit submitted in connection with an application to the Supreme Court for approval of a proposed certificate of incorporation contained repeated references to underbidding as one of the purposes of the proposed corporation, contrary to public policy as declared in General Business Law § 340, the court, in exercise of its discretion, declined to approve the proposed certificate. In re Application of Excavating Machine Owners Ass'n, 208 N.Y.S.2d 364 (N.Y. Sup. Ct. 1960).

The Secretary of State cannot be compelled to file a certificate of incorporation as a social club, when its objects are, in fact, of a business nature. People ex rel. Davenport v Rice, 22 N.Y.S. 631, 68 Hun 24 (1893).

8. — —Religious

Certificates of incorporation must be denied to a proposed corporation organized for the purpose of changing the religious beliefs of a specified religious group, in this case the object being to convert persons of the Jewish faith to Christianity. In re American Jewish Evangelization Soc., 50 N.Y.S.2d 236, 183 Misc. 634, 1944 N.Y. Misc. LEXIS 2294 (N.Y. Sup. Ct. 1944).

9. — —Rehabilitation of prisoners

A certificate of incorporation will be granted under this section to a corporation organized to solicit, receive and apply funds "for the moral betterment, religious advancement, temporal improvement and rehabilitation of inmates of prisons or penal institutions", where the fund in question was the result of publicity attendant upon the construction by prisoners of Clinton Prison at Dannemora of a church within the walls of the prison. In re Good Thief Foundation, Inc., 47 N.Y.S.2d 511, 1944 N.Y. Misc. LEXIS 1806 (N.Y. Sup. Ct. 1944).

10. — —Aid to displaced children

A certificate of incorporation for a charitable organization to be known as "German Jewish Children's Aid, Incorporated," submitted to the court for approval, pursuant to this section, will be approved where the certificate recites that the purposes of the corporation are, to facilitate the entry into the U.S. from Nazi Germany of German children of Jewish extraction, to give to the secretary of labor and others such bonds and undertakings as may be necessary without charge and without indemnity, to aid and care for such children, and to perform matters incidental to the foregoing purposes, all without profit to the corporation, its members or officers. The objects of the corporation are charitable. In re German Jewish Children's Aid, Inc., 272 N.Y.S. 540, 151 Misc. 834, 1934 N.Y. Misc. LEXIS 1392 (N.Y. Sup. Ct. 1934).

11. — —Foreign birth or ancestry

A certificate of incorporation will be denied for an organization, the incorporators of which are naturalized citizens, which has for its object to "instill in its members a double patriotic love for both their country of origin, Italy, and for their adopted country, the great and free United States of America" since there can be no dual citizenship or double patriotic love for both a country of origin and the United States. In re Societa Fra-E Nate-Di Torre-Faro, Inc., 22 N.Y.S.2d 688, 175 Misc. 373, 1940 N.Y. Misc. LEXIS 2196 (N.Y. Sup. Ct. 1940).

Approval by the court of an application to form a membership corporation of "all New York City Transit System employees of Italian extraction" will be withheld, because there is no necessity for this membership corporation and because its existence under certain circumstances might prove embarrassing to its membership or to New York city. In re Columbia Ass'n of New York City Transit System, Inc., 24 N.Y.S.2d 901, 175 Misc. 876, 1940 N.Y. Misc. LEXIS 2548 (N.Y. Sup. Ct. 1940).

A corporate body composed of city employees of one nationality formed "to promote unity," one of the objects of the proposed corporation, would not aid the orderly administration of a city's affairs. In re Columbia Ass'n of New York City Transit System, Inc., 24 N.Y.S.2d 901, 175 Misc. 876, 1940 N.Y. Misc. LEXIS 2548 (N.Y. Sup. Ct. 1940).

Incorporation will be granted to an organization of German and Austria-Hungarian war veterans whether or not the members thereof were to be veterans of the armed forces of the United States or of the armies of Germany and Austria-Hungary in the late war, where the purposes specified in the certificate are laudable and patriotic, provided, however, the court is satisfied that the organization is not being used as a front for a bund, semi-military in character, secretly supporting Hitlerian views. In re German & Austrian-Hungarian War Veterans Post, 13 N.Y.S.2d 207, 1939 N.Y. Misc. LEXIS 2011 (N.Y. Sup. Ct. 1939).

A certificate of incorporation for an organization to be known as the "Voters Alliance for Americans of German Ancestry, Inc." will not be approved where the purposes of the proposed corporation are the political education of Germans seeking or granted naturalization as American citizens since the court is not convinced of any need of politically educating Americans of German ancestry, and the other purposes set forth are adequately accomplished by the Steuben Society, and further the name is provocative of a notion that the organization is intended to unite persons resentful of the victory of the United States over Germany at a time when United States forces are in occupation of Germany and German leaders are on trial as war criminals. In re Voters Alliance for Americans of German Ancestry, Inc., 64 N.Y.S.2d 298, 1946 N.Y. Misc. LEXIS 2612 (N.Y. Sup. Ct. 1946).

12. — —Mutual assistance

Notwithstanding grave concern expressed by the court as to the legality of purposes expressed by 21 milk distributors seeking to organize for mutual assistance in the milk industry field, the proposed certificate of incorporation was approved, following admonitions of the Court of Appeals as to the extent of the functions of a Supreme Court justice in passing upon approval applications, provided a clause relating to elimination of unfair competition was deleted. In re Wholesale Milk Distributors Asso., 39 Misc. 2d 738, 241 N.Y.S.2d 944, 1963 N.Y. Misc. LEXIS 1844 (N.Y. Sup. Ct. 1963).

Organizations for aid by voluntary assistance dependent upon dues or assessments of members have not been looked upon with favor unless they are subject to some supervision by a public authority such as the Insurance Department of the State of New York. In re Gold Star Parents Ass'n, 67 N.Y.S.2d 73, 1946 N.Y. Misc. LEXIS 3182 (N.Y. Sup. Ct. 1946).

13. — —Legal action; aid to lawyers

Incorporation will be refused to an organization which has for its purpose to sponsor amendments to the United States Constitution and the constitutions of the various states which would bar from citizenship, from offices of trust and from old age benefits and unemployment insurance or other benefits persons advocating overthrow of the government by force or who knowingly circulates literature advocating such overthrow, and the deportation of naturalized citizens advocating such overthrow, since such amendments as outlined would be so drastic and sweeping as to be contrary to democratic principles. In re Patriotic Citizenship Ass'n, 26 Misc. 2d 995, 53 N.Y.S.2d 595, 1945 N.Y. Misc. LEXIS 1465 (N.Y. Sup. Ct. 1945).

The application for a certificate of incorporation of the "Committee for the Preservation of the Constitutional Rights to Trial by Jury," was granted. In re Application of "Committee for Preservation, etc.", 1 Misc. 2d 548, 151 N.Y.S.2d 1005, 1956 N.Y. Misc. LEXIS 2238 (N.Y. Sup. Ct. 1956).

A certificate of incorporation will be granted to an organization having among its objectives the advancement of knowledge and understanding of the law and research in jurisprudence, the promotion of a sound administration of justice and a grant of aid to members of the bar who may find themselves in need because of ill health, physical disability, or misfortune. In re Certificate of Incorporation of New York County Lawyers' Ass'n Fund, Inc., 81 N.Y.S.2d 724, 1948 N.Y. Misc. LEXIS 2932 (N.Y. Sup. Ct. 1948).

14. — —Military

A membership corporation may not be formed for "the purpose of organizing, equipping and maintaining a voluntary local guard of citizen soldiers . . . subject at all times to the laws and general rules and regulations of the United States and of the state of New York." In re Proposed Incorporation of L. B. Defense Guards, Inc., 166 N.Y.S. 459, 100 Misc. 584, 1917 N.Y. Misc. LEXIS 884 (N.Y. Sup. Ct. 1917).

A proposed certificate of incorporation for a membership corporation is not entitled to judicial approval where one of its recited purposes is the training of young persons "in military tactics, procedure and discipline," notwithstanding consents of various state executive officers are annexed to the proposed certificate, as authority for formation of military forces rests with the legislative bodies of the State and National Government. In re Bronx County Cadet Corps, Inc., 40 Misc. 2d 3, 242 N.Y.S.2d 669, 1963 N.Y. Misc. LEXIS 1726 (N.Y. Sup. Ct. 1963).

15. —Powers

In view of provision of the General Corporation Law § 14 subd 3, that every corporation has power to acquire property for corporate purposes by devise, a membership corporation whose certificate of incorporation specified that it may "own and acquire land" falls within the exception to Decedent's Estate Law § 12 permitting corporation expressly authorized by its charter or by statute to take by devise. In re Battles' Estate, 45 Misc. 2d 348, 257 N.Y.S.2d 91, 1965 N.Y. Misc. LEXIS 2197 (N.Y. Sur. Ct. 1965).

Where membership corporation is formed for research purposes it obviously has implied power to solicit and collect funds from public since nature of research is such as to make it financially unproductive and corporation cannot carry out its authorized purposes without getting money from some source. Waldemar Medical Research Foundation, Inc. v Margolies, 45 Misc. 2d 887, 257 N.Y.S.2d 991, 1965 N.Y. Misc. LEXIS 2155 (N.Y. Sup. Ct. 1965), aff'd, 25 A.D.2d 444, 267 N.Y.S.2d 483, 1966 N.Y. App. Div. LEXIS 5165 (N.Y. App. Div. 2d Dep't 1966).

16. —Miscellaneous

New York Soccer Association could not enjoin National Soccer Association from registering players of a league which was not a member or affiliated with the New York Association. New York State Soccer Football Ass'n v United States Soccer Football Asso., 8 Misc. 2d 729, 166 N.Y.S.2d 319, 1957 N.Y. Misc. LEXIS 2766 (N.Y. Sup. Ct. 1957).

Agency Opinions

Analysis

1. Generally
2. Under former Membership Corporations Law § 10
3. —Vague and indefinite purpose clause
4. —Particular purposes
5. — —Transportation
6. Under former Membership Corporation Law § 20

1. Generally

A village may not form a not-for-profit corporation and convey to it title to unused reservoir property for the purposes of avoiding real estate taxes. 1979 NY Ops Atty Gen August 16 (Informal), 1979 N.Y. AG LEXIS 65.

A subsidiary of the Urban Development Corporation may incorporate under the Business Corporation Law without forfeiting its public status. The subsidiary may not pay profits to private investors, and upon dissolution of the corporation, the assets belong to the State. 1980 N.Y. Op. Att'y Gen. No. 93, 1980 N.Y. AG LEXIS 54.

The possession and rehabilitation of wildlife, as well as the restoration of wildlife to their natural habitat, are governed exclusively by the Environmental Conservation Law. Agents or officers of an incorporated society for the prevention of cruelty to animals or other humane societies may not engage in such activities, except in accordance with the procedures set forth in that statute. N.Y. Op. Att'y Gen. No. 82-78, 1982 N.Y. AG LEXIS 22.

An incorporated volunteer fire company performing services in a fire protection district may set aside part of the payment received each year under the contract to accumulate money for a new fire truck. 1979 Op St Compt No. 79–648.

Purchase of condominium unit by petitioner, tax-exempt not-for-profit corporation, would be subject to real estate transfer tax; further, since petitioner was required to pay grantor's obligation for transfer tax as condition of contract, such payment of tax would be deemed to be additional consideration for real property. NY Adv Op Comm T & F TSB-A-90-(3)R, 1990 N.Y. Tax LEXIS 94.

If petitioner, tax-exempt not-for-profit corporation about to execute mortgage with lending institution, was organization that had established exemption under Internal Revenue Code § 501(a), petitioner would be exempt from portion of mortgage recording tax representing special additional tax, but would be subject to basic tax, additional tax, and tax on mortgages recorded in cities having population of one million or more. NY Adv Op Comm T & F TSB-A-90-(3)R, 1990 N.Y. Tax LEXIS 94.

A central school district may not convey a building no longer needed for district purposes to a not-for-profit corporation for a nominal consideration. 1975 Op. St. Compt. No. 75–1230.

If college is type B corporation under CLS N-PCL § 201(b), it may procure life insurance under CLS Ins § 3205(b)(3). NY Ins. Dep't Gen. Counsel Op. No. 03-05-01.

Certificate of incorporation for museum formed under CLS N-PCL § 201(b) should be reviewed to determine purpose or purposes for which it was organized, and if one of purposes is charitable or educational, exception provided under CLS Ins § 3205(b)(3) would apply. NY Ins. Dep't Gen. Counsel Op. No. 03-08-13, 2003 240.

2. Under former Membership Corporations Law § 10

The conduct of fund-raising activities by volunteer firemen is within the purposes stated in the usual charter provisions of a volunteer fire corporation. 1955 Op St Compt No. 55–7124.

3. —Vague and indefinite purpose clause

The secretary of state must refuse to file a certificate of incorporation which contains a vague and indefinite purpose clause. 1940 N.Y. Op. Att'y Gen. No. 281.

A proposed certificate of incorporation which is so vague and general as to purposes that it cannot be determined therefrom what the corporation proposes to do should not be filed by the Secretary of State, notwithstanding it bears indorsement of court approval and the Attorney General's acknowledgment of notice. 1963 N.Y. Op. Att'y Gen. No. 44, 1963 N.Y. AG LEXIS 35.

4. —Particular purposes

5. — —Transportation

A corporation having for its purpose the ownership and operation of motor vehicles upon public highways for transportation of persons may not be organized under the Membership Corporations Law even though the corporation be not organized for profit and the persons transported be limited to members of the corporation. 1942 N.Y. Op. Att'y Gen. No. 219, 1942 N.Y. AG LEXIS 86.

Formation of a corporation to engage in the practice of medicine is possible only under the provisions of § 11. 1934 N.Y. Op. Att'y Gen. No. 240.

A membership corporation cannot be formed for purposes essentially of a business nature, such as ownership, maintenance, improvement and operation of common utility systems of heat, water, electricity, etc. for the mutual benefit of individual owners of housing units. 1951 N.Y. Op. Att'y Gen. No. 183, 1951 N.Y. AG LEXIS 63.

6. Under former Membership Corporation Law § 20

The Secretary of State should not accept for filing a certificate of incorporation which includes as a stated purpose matters of a business nature within the purview of the Federal Export Trade Act. 1955 N.Y. Op. Att'y Gen. No. 221, 1955 N.Y. AG LEXIS 78.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-2 White, New York Business Entities ¶ N201.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business & Commercial § 8.01. Applicability of Not-for-Profit Corporation Law.

New York Practice Guide: Business & Commercial § 8.13. Preliminary Determination.

New York Practice Guide: Business & Commercial § 8.15. Preparing Certificate of Incorporation.

Matthew Bender's New York Checklists: Checklist for Assessing Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 2.47.

Checklist for Forming Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.02.

Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N201:1. Purpose Clauses.

§ 202. General and special powers

(a) Each corporation, subject to any limitations provided in this chapter or any other statute of this state or its certificate of incorporation, shall have power in furtherance of its corporate purposes:

(1) To have perpetual duration.

(2) To sue and be sued in all courts and to participate in actions and proceedings, whether judicial, administrative, arbitrative or otherwise, in like cases as natural persons.

(3) To have a corporate seal, and to alter such seal at pleasure, and to use it by causing it or a facsimile to be affixed or impressed or reproduced in any other manner.

(4) To purchase, receive, take by grant, gift, devise, bequest or otherwise, lease, or otherwise acquire, own, hold, improve, employ, use and otherwise deal in and with, real or personal property, or any interest therein, wherever situated.

(5) To sell, convey, lease, exchange, transfer or otherwise dispose of, or mortgage or pledge, or create a security interest in, all or any of its property, or any interest therein, wherever situated.

(6) To purchase, take, receive, subscribe for, or otherwise acquire, own, hold, vote, employ, sell, lend, lease, exchange, transfer, or otherwise dispose of, mortgage, pledge, use and otherwise deal in and with, bonds and other obligations, shares, or other securities or interests issued by others, whether engaged in similar or different business, governmental, or other activities.

(7) To make capital contributions or subventions to other not-for-profit corporations.

(8) To accept subventions from other persons or any unit of government.

(9) To make contracts, give guarantees and incur liabilities, borrow money at such rates of interest as the corporation may determine, issue its notes, bonds and other obligations, and secure any of its obligations by mortgage or pledge of all or any of its property or any interest therein, wherever situated.

(10) To lend money, invest and reinvest its funds, and take and hold real and personal property as security for the payment of funds so loaned or invested.

(11) To conduct the activities of the corporation and have offices and exercise the powers granted by this chapter in any jurisdiction within or without the United States.

(12) To elect or appoint officers, employees and other agents of the corporation, define their duties, fix their reasonable compensation and the reasonable compensation of directors, and to indemnify corporate personnel. Such compensation shall be commensurate with services performed.

(13) To adopt, amend or repeal by-laws, including emergency by-laws made pursuant to subdivision seventeen of section twelve of the state defense emergency act, relating to the activities of the corporation, the conduct of its affairs, its rights or powers or the rights or powers of its members, directors or officers.

(14) To make donations, irrespective of corporate benefit, for the public welfare or for community fund, hospital, charitable, educational, scientific, civic or similar purposes, and in time of war or other national emergency in aid thereof.

(15) To be a member, associate or manager of other non-profit activities or to the extent permitted in any other jurisdiction to be an incorporator of other corporations, and to be a partner in a redevelopment company formed under the private housing finance law.

(16) To have and exercise all powers necessary to effect any or all of the purposes for which the corporation is formed.

(b) If any general or special law heretofore passed, or any certificate of incorporation, shall limit the amount of property a corporation may take or hold, or the yearly income from the corporate assets or any part thereof, such corporation may take and hold property of the value of fifty million dollars or less, or the yearly income derived from which shall be six million dollars or less, or may receive yearly income from such corporate assets of six million dollars or less, notwithstanding any such limitations. In computing the value of such property, no increase in value arising otherwise than from improvements made thereon shall be taken into account.

(c) When any corporation shall have sold or conveyed any part of its real property, the supreme court, notwithstanding a restriction in any general or special law, may authorize it to purchase and hold from time to time other real property, upon satisfactory proof that the value of the property so purchased does not exceed the value of the property so sold and conveyed within the three years next preceding the application.

(d) A corporation formed under general or special law to provide parks, playgrounds or cemeteries, or buildings and grounds for camp or grove meetings. Sunday school assemblies, cemetery purposes, temperance, missionary, educational, scientific, musical and other meetings, subject to the ordinances and police regulations of the county, city, town, or village in which such parks, playgrounds, cemeteries, buildings and grounds are situated, may appoint from time to time one or more special police officers, with power to remove the same at pleasure. Such special police officers shall preserve order in and about such parks, playgrounds, cemeteries, buildings and grounds, and the approaches thereto, and to protect the same from injury, and shall enforce the established rules and regulations of the corporation. Every police officer so appointed shall within fifteen days after his or her appointment and before entering upon the duties of his or her office, take and subscribe the oath of office prescribed in the thirteenth article of the constitution of the state of New York, which oath shall be filed in the office of the county clerk of the county where such grounds are situated. A police officer appointed under this section when on duty shall wear conspicuously a metallic shield with the name of the corporation which appointed him or her inscribed thereon. The compensation of police officers appointed under this section shall be paid by the corporation by which they are appointed.

(e) Any wilful trespass in or upon any of the parks, playgrounds, buildings or grounds provided for the purposes mentioned in the preceding paragraph, or upon the approaches thereto, and any wilful injury to any of the said parks, playgrounds, building or grounds, or to any trees, shrubbery, fences, fixtures or other property thereon or pertaining thereto, and any wilful disturbance of the peace thereon by intentional breach of the rules and regulations of the corporation, is a misdemeanor.

(f) No corporation shall conduct activities in New York state under any name, other than that appearing in its certificate of incorporation, without compliance with the filing provisions of section one hundred thirty of the general business law governing the conduct of business under an assumed name.

(g) Every corporation receiving any kind of state funding shall ensure the provision on any form required to be completed at application or recertification for the purpose of obtaining financial assistance pursuant to this chapter, that the application form shall contain a check-off question asking whether the applicant or recipient or a member of his or her family served in the United States military, and an option to answer in the affirmative. Where the applicant or recipient answers in the affirmative to such question, the not-for-profit corporation shall ensure that contact information for the state division of veterans' services is provided to such applicant or recipient in addition to any other materials provided.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970; amd, L 1970, ch 847, § 8; L 1971, ch 246, § 4, eff May 11, 1971; L 1971, ch 1097, § 70; L 1972, ch 961, § 2; L 1978, ch 693, eff Jan 1, 1979; L 1980, ch 843, § 191, eff Sept 1, 1980; L 1984, ch 757, § 1, eff Aug 3, 1984; L 2016, ch 407, § 2, effective January 3, 2017; L 2018, ch 476, § 233, effective December 28, 2018; L 2019, ch 56, § 33 (Part AA), effective April 12, 2019.

Derivation Notes: Derived from Gen Corp Law §§ 13, 14, 15, 16, 17, 34, 35 and Mem Corp Law § 23.

Revision Notes: § 202(a).

Source: Gen Corp L §§ 13(2) and 14.

Changes: Reworded.

Comment: This paragraph introduces an enumeration of general corporate powers which have been consolidated in part from scattered provisions of the Gen Corp L and Mem Corp L. The reference in this paragraph to limitations prescribed by the certificate of incorporation is only to valid limitations therein, that is, limitations "not inconsistent with this chapter or any other statute" (see § 402(c)). The general requirement that powers be in furtherance of corporate purposes is consistent with most of the present scattered powers provisions. The structure of this section substantially parallels the corresponding section of the Bus Corp L.

§ 202(a)(1).

Source: Gen Corp L § 14(1).

Changes: Reworded.

Comment: This paragraph is taken from Bus Corp L § 202(a)(1) and briefly relates to Gen Corp L § 14(1). It is qualified by the reference in the introductory paragraph to limitations described by the certificate of incorporation. Section 402(a)(6) provides that the certificate of incorporation set forth the duration of the corporation if it is to be other than perpetual.

§ 202(a)(2).

Source: NY Const Art X, § 4.

Changes: Elaborated.

Comment: This subparagraph parallels the present provision in the New York Constitution (Art X, § 4), with the insertion of the phrase, "and to participate in actions, suits and proceedings, whether judicial, administrative, arbitra-

tive or otherwise", in conformity with existing New York statutes and case law. Although the subject is covered in the Constitution, its repetition in this chapter is convenient.

§ 202(a)(3).

Source: Gen Corp L § 14(2).

Changes: Reworded; omission.

Comment: This subparagraph is taken from Bus Corp L § 202(a)(3) and a composite of Gen Corp L § 14(2) except for the substitution of the phrase "corporate seal" to conform to current usage and § 45 of the General Construction Law. The present provision in Gen Corp L § 14(2) on the corporate seal as evidence has been inserted, in modified language, in § 107.

§ 202(a)(4).

Source: Gen Corp L §§ 14(3) and 17.

Changes: Reworded and slightly extended.

Comment: This subparagraph taken from Bus Corp L § 202(a)(4) restates and slightly broadens Gen Corp L § 14(3) and part of Gen Corp L § 17. With respect to property without the state, this paragraph is slightly broader than Gen Corp L § 17, which is limited to jurisdictions in which the corporation is doing business and to property "requisite" for the transaction of its business. This subparagraph is qualified by the phrase "in furtherance of its corporate purposes" in the introductory paragraph and by the reference therein to limitations prescribed by this chapter or any other statute. As to corporations to which this chapter applies, acting in furtherance of their corporate purposes, this subparagraph supplies the statutory authority required by § 3-1.3 of the Estates, Powers and Trusts Law, which invalidates a devise to a corporation unless the corporation is authorized by its charter or by statute to take by devise. Certain federal statutes limit the ownership by aliens, directly or indirectly of certain types of property (e.g., 30 USC § 181; 48 USC §§ 302a, 1501 et seq.). Section 1307 deals with the acquisition and tenure of real property in this state by foreign corporations. Section 202(a)(5) deals with the power to dispose of property.

§ 202(a)(5).

Source: Gen Corp L § 14(3).

Changes: Reworded.

Comment: This subparagraph is taken from Bus Corp L § 202(a)(5) and is a composite of part of Gen Corp L § 14(3) (the balance being covered by § 202(a)(4)). This subparagraph is qualified by the reference in the introductory paragraph to limitations prescribed by §§ 509 and 510 and by other applicable statutes.

§ 202(a)(6).

Source: None.

Changes: New.

Comment: This subparagraph is taken from Bus Corp L § 202(a)(6). It has no specific counterpart in the existing law. Such broader power is, of course, subject to any limitations in the certificate of incorporation, pursuant to the introductory paragraph. This subparagraph also expressly empowers a corporation to acquire governmental obligations. The references in this subparagraph to sale are qualified by the limitation in the introductory paragraph (see §§ 509 and 510).

§ 202(a)(7).

Source: None.

Changes: New.

Comment: The power to make capital contributions or subventions to other not-for-profit corporations is included as a general power. This is the equivalent in respect of not-for-profit corporations to the power to purchase bonds, shares or other securities as set forth in subparagraph (6). See Article 5 (Corporate Finance) for treatment of capital contributions and subventions.

§ 202(a)(8).

Source: None.

Changes: New.

Comment: This subparagraph covers the power to accept subventions from other persons or unit of government. This is the corollary of the power to make such subventions in subparagraph (7). See Article 5 (Corporate Finance) for treatment of subventions.

§ 202(a)(9).

Source: Bus Corp L § 202(a)(7).

Changes: Reworded and slightly extended.

Comment: This subparagraph is taken from Bus Corp L § 202(a)(7). This subparagraph is qualified by the phrase "in furtherance of its corporate purposes" in the introductory paragraph, which also subjects this paragraph to limitations prescribed by this chapter or any other statute. Possible limitations imposed by this chapter are those in §§ 506, 509 and 510. Section 374 of the General Business Law prohibits a corporation from interposing the defense of usury.

§ 202(a)(10).

Source: Gen Corp L § 18.

Changes: Reworded.

Comment: This subparagraph is taken from Bus Corp L § 202(a)(8) and restates the proviso in Gen Corp L § 18 in more positive language. Present limitations on the exercise of banking powers by business corporations, imposed by § 131 of the Banking Law, apply by reason of the limitation in the introductory paragraph. This subparagraph is limited by the phrase "in furtherance of its corporate purposes" in the introductory paragraph, which by its reference to limitations prescribed by this chapter, subjects this subparagraph to the restrictions on loans to directors prescribed by § 716.

§ 202(a)(11).

Source: Gen Corp L § 17.

Changes: Reworded.

Comment: This is an adaptation of Bus Corp L § 202(a)(9). This subparagraph restates Gen Corp L § 17, making express the power to have offices without the state. Except for minor changes of terminology, this subparagraph follows § 5(j) of the Model Non-Profit Corp Act.

§ 202(a)(12).

Source: Gen Corp L § 14(4).

Changes: Reworded; new provision.

Comment: This is an adaptation of Bus Corp L § 202(a)(10). The word "reasonable" has been added to qualify compensation of officers and of directors. A sentence has been added requiring that such compensation shall be commensurate with services performed. This subparagraph restates Gen Corp L § 14(4) with an added reference to employees and an express provision for fixing the compensation of directors and indemnifying corporate personnel. Such indemnification must conform to the requirements of Article 7 (Directors and Officers) of this chapter. This subparagraph is similar to § 5(k) of the Model Non-Profit Corp Act. § 715(c) provides that directors have authority to fix the compensation of directors unless otherwise provided in the certificate of incorporation or the by-laws.

§ 202(a)(13).

Source: Gen Corp L § 14(5).

Changes: Revised.

Comment: This subparagraph empowers a corporation to adopt, amend and repeal by-laws, and is similar to § 5(1) of the Model Act with addition of authority to adopt emergency by-laws under State Emergency Defense Act § 12. Section 602 defines the respective functions of the incorporators, board of directors and members with respect to the exercise of this corporate power, and provides that the by-laws may contain any provision relating to the business of the corporation, the conduct of its affairs, its rights or powers or the rights or powers of its members, directors or officers, not inconsistent with this chapter or any other statute or the certificate of incorporation.

§ 202(a)(14).

Source: Gen Corp L §§ 34 and 35.

Changes: Combined, reworded and slightly extended.

Comment: This subparagraph is a composite of Gen Corp L §§ 34 and 35 and § 5(m) of the Model Non-Profit Corporation Act, expressly broadened to comprehend national emergencies and to abrogate more fully the corporate benefit rule. Reference to national emergencies takes into account modern conditions and avoids the necessity of temporary legislation

like that enacted in the state during and after World War II. Gen Corp L § 34 expressly limits contributions to defined activities within the states in which the corporation is operating or to similar activities within or without such states which the board of directors determines "may be beneficial to the business activities of the corporation or the well-being of its employees". Such vestige of the corporate benefit rule is eliminated by this subparagraph which recognizes no such distinctions and expressly permits donations "irrespective of corporate benefit". Contributions, of course, remain governed by the business judgment rule. This subparagraph is subject to limitations prescribed by the certificate of incorporation, as stated in the introductory paragraph. Present prohibitions on corporate political contributions (§ 460 of the Election Law) are not affected by this subparagraph.

§ 202(a)(15).

Source: None.

Changes: New.

Comment: This is an adaptation of Bus Corp L § 202(a)(15). It permits a non-profit corporation to be a member, associate or manager of other non-profit corporations. It also expressly empowers a corporation to be an incorporator to the extent permitted in any other jurisdiction. § 401 of this chapter permits a corporation to be an incorporator. This subparagraph omits the general power to be a promoter found in Bus Corp L § 202(a)(15).

§ 202(a)(16).

Source: Gen Corp L § 13(1).

Changes: Reworded.

Comment: This subparagraph is taken from Bus Corp L § 202(a)(16) and rephrases in positive language the negative provision of Gen Corp L § 13(1). It is subject to the limitations referred to in the introductory paragraph.

[1971, ch 1097] This act was intended to complement the Criminal Procedure Law (Chapter 996, Laws 1970) which replaced the Code of Criminal Procedure on September 1, 1971. Throughout the consolidated and unconsolidated laws there were references to various provisions of the Code of Criminal Procedure. In this act, these references have been amended to reflect the appropriate provision of the Criminal Procedure Law or, if such be the case, the appropriate section outside the Criminal Procedure Law to which a companion act has transferred such Code provision. In addition, this act has deleted various statutes which either conflicted with or were otherwise treated in the Criminal Procedure Law.

Amendment Notes The 2016 amendment by ch 407, § 2, added (g).

The 2018 amendment by ch 476, § 233, in (d), substituted "police officer" for "policeman" or variants wherever it appears; and added "or her" three times.

The 2019 amendment by ch 56, § 33 (Part AA), substituted "services" for "affairs" in the second sentence of (g).

PRACTICE INSIGHTS:

QUALIFIED IMMUNITY IS NOT BULLET-PROOF SHIELD

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INSIGHT

Not-For-Profit Corporation Law § 720-a confers qualified immunity from suit upon certain directors or officers of not-for-profits. Although it does offer protection for certain individuals, counsel must fully understand the limitations of that protection to represent the not-for-profit corporation and individual directors and officers adequately.

ANALYSIS

Qualified immunity is limited to directors and officers of entities eligible for tax exemption under Internal Revenue Code § 501(c)(3).

A director or officer sued for personal liability must raise the qualified immunity granted under Not-For-Profit Corp. Law § 720-a as an affirmative defense in the answer. *Woodford v. Benedict Community Health Center*, 176 A.D.2d 1115, 575 N.Y.S.2d 415 (3d Dep't 1991). Best practices dictate that an attorney representing a director or officer sued under these circumstances review the complaint to ensure that it has been verified and that it affirmatively states that the director's actions constituted either gross negligence or intentional infliction of harm. *See* CPLR 3016(h).

Alternatively, the defendant may move to dismiss a complaint against which qualified immunity is a defense. This CPLR 3211(a)(11) motion must be made before the answer is filed. *Woodford v. Benedict Community Health Center*, 176 A.D.2d 1115, 575 N.Y.S.2d 415 (3d Dep't 1991). A claim will be dismissed if the defendant can show that the factors have been met, that is: (1) defendant can prove that there is no probability of meeting the statutory standard of gross negligence or intent to cause harm to the plaintiff; (2) the defendant can show that his or her service to the not-for-profit was uncompensated; and (3) the not-for-profit is eligible for tax exemption under IRC § 501(c)(3).

If defendant is paid, immunity is not available.

Although the law permits not-for-profits to compensate its directors (Not-For-Profit Corp. Law § 202(a)(12)), most directors are volunteers who serve without compensation. If an IRC § 501(c)(3) organization chooses to compensate its directors for more than "actual expenses incurred in attending meetings or otherwise in the execution of such office" (Not-For-Profit Corp. Law § 720-a), any such director will lose the right to qualified immunity under this provision. This choice also affects the director's right to seek indemnification. This issue arises most frequently in the case of paid officers who also hold a seat on the board of directors and directors involved with a private foundation.

Know what actions qualified immunity will not protect.

Directors who otherwise meet the criteria for qualified immunity are not protected from every cause of action that may be filed by a third party. It is important for the practitioner to know what types of actions expose the director or officer to personal liability. For example, Not-for-Profit Corp. Law § 720-a does not immunize directors from federal claims or employment litigation (such as wrongful termination) to the extent the claims are based upon federal law. This section does not apply to actions taken by the Attorney General or actions commenced under Not-For-Profit Corp. Law § 719 (director liability in certain defined transactions) or Not-For-Profit Corp. Law § 720 (actions brought on behalf of the organization).

In addition, directors may be held personally liable if the not-for-profit corporation does not follow the dissolution procedures set forth in Not-For-Profit Corp. Law § 1002-a or if the not-for-profit does not adequately provide for known liabilities upon dissolution. In such an event, the directors will be held personally liable only if the creditors file claims within the time period provided for in Not-For-Profit Corp. Law Article 10 (Non-Judicial Dissolution and Article 11 (Judicial Dissolution) Not-For-Profit Corp. Law § 719.

Notes to Decisions

Analysis

1. Generally
2. Powers
3. Under former General Corporation Law § 13
4. Under former General Corporation Law § 14
5. —Right to acquire property
6. —Meaning of take and hold
7. —Right to use or dispose of property
8. —Miscellaneous
9. Under former General Corporation Law § 15

1. Generally

Tribal social service agency incorporated under District of Columbia Nonprofit Corporation Act and qualified to do business in New York under Nonprofit Corporation Act did not waive its

common-law tribal sovereign immunity by virtue of reference in its corporate charter to statutory authority to sue and be sued where tribe itself had not explicitly consented in agency's charter, or by any ordinance or resolution, to waive its sovereign immunity, to submit corporate disputes to jurisdiction of New York courts, or to be bound by such judgment. Ransom v St. Regis Mohawk Educ. & Community Fund, 86 N.Y.2d 553, 635 N.Y.S.2d 116, 658 N.E.2d 989, 1995 N.Y. LEXIS 3551 (N.Y. 1995).

Article 78 proceeding was appropriate vehicle to challenge not-for-profit corporation's determination to terminate employee where it was claimed that corporation violated its own rules set forth in employee manual. De Petris v Union Settlement Ass'n, 209 A.D.2d 180, 618 N.Y.S.2d 276, 1994 N.Y. App. Div. LEXIS 10865 (N.Y. App. Div. 1st Dep't 1994), aff'd, 86 N.Y.2d 406, 633 N.Y.S.2d 274, 657 N.E.2d 269, 1995 N.Y. LEXIS 3555 (N.Y. 1995).

Under N-PCL § 202, subd 11, act of not for profit contract bridge corporation in sanctioning and organizing membership districts wholly within Canada was not ultra vires where certificate of incorporation did not specifically limit the corporation's activities to the territorial boundaries of the United States. Central New York Bridge Ass'n v American Contract Bridge League, Inc., 72 Misc. 2d 271, 339 N.Y.S.2d 438, 1972 N.Y. Misc. LEXIS 1209 (N.Y. Sup. Ct. 1972).

Grant of special use permit to college to renovate buildings and lease them to not for profit corporation for purposes of offering community instruction in art courses was proper under zoning ordinance authorizing use for bona fide educational purposes despite fact that school would not be approved by board of regents. Imbergamo v Barclay, 77 Misc. 2d 188, 352 N.Y.S.2d 337, 1973 N.Y. Misc. LEXIS 1215 (N.Y. Sup. Ct. 1973).

Vehicle owned by county Society for Prevention of Cruelty to Children, and operated by society employee, was not "police vehicle" under CLS Veh & Tr § 132-a for purposes of claiming exemption from enforcement of traffic laws under CLS Veh & Tr § 1104 since society is not equivalent to state or public authority by virtue of its limited powers under CLS N-PCL § 1403, and is not authorized to maintain law enforcement unit under CLS N-PCL § 202. People v Ellman, 135 Misc. 2d 1010, 517 N.Y.S.2d 664, 1987 N.Y. Misc. LEXIS 2351 (N.Y. City Ct. 1987).

Trial court denied the stock exchange chairman's motion to dismiss, as the Attorney General had the statutory responsibility to protect investors, had the authority to pursue the stock exchange chairman under the doctrine of parens patriae because they could not protect themselves from the allegedly unreasonable compensation that the New York Stock exchange allowed him to receive, and the Attorney General stated four viable claims against him: for imposition of a constructive trust and for restitution for ultra vires payments allegedly received, for payment had and received, for violation of N.Y. Not-for-Profit Corp. Law § 715 for benefits he received that were improperly approved, and for violation of N.Y. Not-for-Profit Corp. Law for his allegedly receiving improper loans. People v Grasso, 816 N.Y.S.2d 863, 12 Misc. 3d 384, 235 N.Y.L.J. 54, 2006 N.Y. Misc. LEXIS 484 (N.Y. Sup. Ct. 2006), rev'd, 42 A.D.3d 126, 836 N.Y.S.2d 40, 2007 N.Y. App. Div. LEXIS 5719 (N.Y. App. Div. 1st Dep't 2007).

Absent a direct connection with the obligation of the Department of Health to oversee the expenditures of taxpayer funds for health care and services, and absent other specific statutory authority, the "soft cap" regulation, which imposes a limit on executive compensation, appears to be in tension with the legislative choices reflected in N-PCL § 202(a), Business Corporation Law § 202(a), Limited Liability Company Law § 202, giving corporations the power to set executive compensation. Matter of Leadingage N.Y. Inc. v Shah, 56 Misc. 3d 594, 53 N.Y.S.3d 804, 2015 N.Y. Misc. LEXIS 5181 (N.Y. Sup. Ct. 2015).

N-PCL § 202(a), Business Corporation Law § 202(a), Limited Liability Company Law § 202, do not preclude the Department of Health from promulgating regulations governing the administrative costs and executive compensation that are reimbursed by taxpayer funds; the statutes subject the corporations' general powers to more specific limitations imposed not only by other statutes, but also by regulations duly promulgated under other statutes. Matter of Leadingage N.Y. Inc. v Shah, 56 Misc. 3d 594, 53 N.Y.S.3d 804, 2015 N.Y. Misc. LEXIS 5181 (N.Y. Sup. Ct. 2015).

Because the Legislature authorized the Department of Health to establish limits on health care expenses paid for by State funds or State-authorized funds, the regulations pertaining to administrative costs and the "hard cap" on executive compensation are not in conflict with N-PCL § 202(a), Business Corporation Law § 202(a), Limited Liability Company Law § 202, generally governing corporate powers. Matter of Leadingage N.Y. Inc. v Shah, 56 Misc. 3d 594, 53 N.Y.S.3d 804, 2015 N.Y. Misc. LEXIS 5181 (N.Y. Sup. Ct. 2015).

State attorney general's complaint against stock exchange chairman was not properly removed where contrary to the chairman's argument, the complaint did not seek to hold him liable for the manner in which he enforced federal securities laws, but rather the state attorney general sought to hold the chairman liable for what the complaint alleged was the receipt of excessive and improperly determined compensation under N.Y. Not-for-Profit Corp. Law § 202(a)(12) and the validity of this claim did not depend on whether the chairman's enforcement of federal securities laws or of the exchange rules was proper or not. New York v Grasso, 350 F. Supp. 2d 498, 2004 U.S. Dist. LEXIS 25044 (S.D.N.Y. 2004).

2. Powers

Blue Cross has authority to enter into contracts, and contract with pharmacists is in furtherance of function to provide subscribers with prepaid prescription benefits; upon finding that corporation did not exceed its powers by offering agreement, its rationality is not proper subject for judicial inquiry. Pharmacists' Ass'n of Western N.Y., Inc. v Blue Cross of Western N.Y., Inc., 112 A.D.2d 728, 492 N.Y.S.2d 221, 1985 N.Y. App. Div. LEXIS 56238 (N.Y. App. Div. 4th Dep't 1985).

Through application of N.Y. Not-for-Profit Corp. Law § 202(a)(2) and N.Y. Educ. Law §§ 2853(1) and 216-a(4), charter schools had the capacity to sue, as natural persons, the State and its comptroller to challenge the constitutionality of statutes requiring the comptroller to audit the charter schools. Matter of New York Charter Schools Assn., Inc. v DiNapoli, 857 N.Y.S.2d 450, 20 Misc. 3d 235, 2008 N.Y. Misc. LEXIS 2406 (N.Y. Sup. Ct. 2008), rev'd, 60 A.D.3d 119, 871 N.Y.S.2d 497, 2009 N.Y. App. Div. LEXIS 154 (N.Y. App. Div. 3d Dep't 2009).

3. Under former General Corporation Law § 13

A cemetery corporation organized under the membership corporation law has a general power to convey its property under this section even gratuitously, except when limitations are imposed by statute. Application of Kensico Cemetery, 83 N.Y.S.2d 73, 193 Misc. 479, 1948 N.Y. Misc. LEXIS 3287 (N.Y. Sup. Ct. 1948), rev'd, 275 A.D. 681, 86 N.Y.S.2d 737, 1949 N.Y. App. Div. LEXIS 4009 (N.Y. App. Div. 2d Dep't 1949).

Mere issuance of registration certificates by a department will not confer a power on a corporation not set forth in its certificate of incorporation. John B. Waldbillig, Inc. v Gottfried, 43 Misc. 2d 664, 251 N.Y.S.2d 991, 1964 N.Y. Misc. LEXIS 1536 (N.Y. Sup. Ct.), rev'd, 22 A.D.2d 997, 254 N.Y.S.2d 924, 1964 N.Y. App. Div. LEXIS 2450 (N.Y. App. Div. 3d Dep't 1964).

4. Under former General Corporation Law § 14

This section is apparently inapplicable to impose power to acquire and dispose of real property on an educational corporation whose powers in such matters are controlled by the Education Law. Board of Education v Board of Cooperative Educational Services, 41 Misc. 2d 699, 246 N.Y.S.2d 48, 1964 N.Y. Misc. LEXIS 2192 (N.Y. Sup. Ct. 1964).

A cemetery association did not dedicate lands to the cemetery use where the land has not been surveyed or plotted for burial purposes, nor has it either been set apart for the burial of the dead, or marked and distinguished from the adjoining ground as a place of burial, and, as a result, it could sell the land. Diamond v Foote, 109 N.Y.S.2d 831, 1952 N.Y. Misc. LEXIS 2365 (N.Y. City Ct. 1952).

5. —Right to acquire property

A membership corporation duly incorporated has power under this section to take property by bequest. In re McQuirk's Estate, 224 N.Y.S. 431, 130 Misc. 336, 1927 N.Y. Misc. LEXIS 1138 (N.Y.

Sur. Ct. 1927), aff'd, 224 A.D. 724, 229 N.Y.S. 880, 1928 N.Y. App. Div. LEXIS 10714 (N.Y. App. Div. 1928).

Subordinate post of Veterans of Foreign Wars which has filed certificate required by Benevolent Orders Law § 2, subd 38-b and final unnumbered paragraph, has power under terms of §§ 3 and 3-a of such law and those of General Corporation Law § 14, subd 3, to receive property by devise or bequest. And authority conferred by above statutes is sufficient to bring such post within exception to Decedent's Estate Law § 12 for corporations expressly authorized by statute to take by devise. In re Battles' Estate, 45 Misc. 2d 348, 257 N.Y.S.2d 91, 1965 N.Y. Misc. LEXIS 2197 (N.Y. Sur. Ct. 1965).

Power to acquire property by gift conferred on corporations generally by subd 3 of above statute includes power to solicit gifts. Waldemar Medical Research Foundation, Inc. v Margolies, 45 Misc. 2d 887, 257 N.Y.S.2d 991, 1965 N.Y. Misc. LEXIS 2155 (N.Y. Sup. Ct. 1965), aff'd, 25 A.D.2d 444, 267 N.Y.S.2d 483, 1966 N.Y. App. Div. LEXIS 5165 (N.Y. App. Div. 2d Dep't 1966).

6. —Meaning of take and hold

The words take and hold, as used in § 15, do not mean taking by devise when taking by such method is not authorized, but such words refer to all methods by which a corporation can acquire property set forth in § 14 so that a hospital corporation was entitled to take and hold real and personal property devised and bequeathed to it, the amount of which was within the limitations of § 15. In re Clark's Estate, 7 N.Y.S.2d 299, 1938 N.Y. Misc. LEXIS 2044 (N.Y. Sur. Ct. 1938), aff'd, 257 A.D. 982, 14 N.Y.S.2d 157, 1939 N.Y. App. Div. LEXIS 8798 (N.Y. App. Div. 1939).

7. —Right to use or dispose of property

A soldiers' monument corporation was permitted to sell its real property where before closing, a majority of the whole number of directors authorized the sale under the terms contained in the contract. The evidence established the adequacy of the consideration and that the interests of the corporation would be promoted by the sale. Application of Staten Island War Memorial Asso., 286 A.D. 887, 143 N.Y.S.2d 100, 1955 N.Y. App. Div. LEXIS 4441 (N.Y. App. Div.), app. denied, 286 A.D. 1017, 145 N.Y.S.2d 318, 1955 N.Y. App. Div. LEXIS 5023 (N.Y. App. Div. 1955).

A cemetery corporation organized under the membership corporation law has a general power to convey its property under this section even gratuitously, except when limitations are imposed by statute. Application of Kensico Cemetery, 83 N.Y.S.2d 73, 193 Misc. 479, 1948 N.Y. Misc. LEXIS 3287 (N.Y. Sup. Ct. 1948), rev'd, 275 A.D. 681, 86 N.Y.S.2d 737, 1949 N.Y. App. Div. LEXIS 4009 (N.Y. App. Div. 2d Dep't 1949).

8. —Miscellaneous

A religious corporation could not remove the pastor of a Baptist church on the theory that the power to appoint given in subd 4 of this section includes the power to remove, where the rules and regulations of that denomination show that the pastor is an officer of the religious society of the church and not of the religious corporation. Walker Memorial Baptist Church v Saunders, 285 N.Y. 462, 35 N.E.2d 42, 285 N.Y. (N.Y.S.) 462, 1941 N.Y. LEXIS 1487 (N.Y.), reh'g denied, 286 N.Y. 607, 35 N.E.2d 944, 286 N.Y. (N.Y.S.) 607, 1941 N.Y. LEXIS 2155 (N.Y. 1941).

A chamber of commerce, although not specifically granted the power by its charter to own real property, had such power under either the Membership Corporations Law or the General Corporation Law, it being incorporated as a membership corporation. Corning Chamber of Commerce v Bohoy, 139 N.Y.S.2d 503, 207 Misc. 789, 1955 N.Y. Misc. LEXIS 3459 (N.Y. County Ct. 1955).

9. Under former General Corporation Law § 15

A missionary society, incorporated by a special act under which it might take, receive, hold and enjoy by gift, devise or bequest any real estate or personal property within state "provided the annual value of such real estate . . . shall not exceed sum of ten thousand dollars," by reason of this section is entitled to hold and enjoy real and personal property, value of which would produce an income of not more than $2,000,000 yearly. In re Dooper's Will, 212 N.Y.S. 616, 125 Misc. 909, 1925 N.Y. Misc. LEXIS 1142 (N.Y. Sur. Ct. 1925).

The words take and hold, as used in § 15, do not mean taking by devise where taking by such method is not authorized, but such words refer to all methods by which a corporation can acquire property set forth in § 14 so that a hospital corporation was entitled to take and hold real and personal property devised and bequeathed to it, the amount of which was within the limitations of § 15. In re Clark's Estate, 7 N.Y.S.2d 299, 1938 N.Y. Misc. LEXIS 2044 (N.Y. Sur. Ct. 1938), aff'd, 257 A.D. 982, 14 N.Y.S.2d 157, 1939 N.Y. App. Div. LEXIS 8798 (N.Y. App. Div. 1939).

A cemetery association did not dedicate lands to cemetery use where the land has not been surveyed or plotted for burial purposes, nor has it either been set apart for the burial of the dead, or marked and distinguished from the adjoining ground as a place of burial, and, as a result, it could sell the land. Diamond v Foote, 109 N.Y.S.2d 831, 1952 N.Y. Misc. LEXIS 2365 (N.Y. City Ct. 1952).

Agency Opinions

Analysis

1. Generally
2. Tax exemptions
2. Under former General Corporation Law § 13
3. Under former General Corporation Law § 14
4. —Right to use or dispose of property
5. —Miscellaneous
6. Under former Membership Corporations Law § 23
7. Under former General Corporation Law § 34

1. Generally

The Town of Hempstead Local Development Corporation is authorized to compensate its directors by reason of rendering services in effecting its corporate purposes. 1977 NY Ops Atty Gen March 29 (Informal), 1977 N.Y. AG LEXIS 135.

A fire company may adopt a bylaw providing that only firemen who attend at least 15% of all fire calls during the year may vote in an election of line officers of the fire company. 1982 NY Op. Att'y Gen. No. 82–17 (Informal), 1982 N.Y. AG LEXIS 92.

Discussion concerning a proposed donation of moneys by a free association library to a central school district in aid of an inter-scholastic sports program. 1978 Op. St. Compt. No. 78–775.

An incorporated volunteer fire company may expend funds received from donations and foreign fire insurance taxes to erect an addition to a firehouse and then donate this addition to the fire district. 1980 Op. St. Compt. No. 80–627.

A free association library, which receives no public funds and holds its assets outright because the testamentary trust which established it has terminated, may donate money to a water district. 1981 Op. St. Compt. No. 81-140, 1981 N.Y. Comp. LEXIS 743.

A not-for-profit corporation which supplies services under contract to a community college is not generally subject to the restrictions of General Municipal Law, § 11 in investing its funds. 1981 Op. St. Compt. No. 81–257, 257,, 1981 N.Y. Comp. LEXIS 628.

A free association library may permit a portion of its building to be used by the New York State Police as a barracks provided the library trustees deem such use to be in the best interests of the library, and further provided that the library is not otherwise precluded from entering into such an arrangement by its charter or by the terms of a gift, trust or bequest. 1982 Op. St. Compt. No. 82-119, 1982 N.Y. Comp. LEXIS 614.

2. Tax exemptions

Purchase of condominium unit by petitioner, tax-exempt not-for-profit corporation, would be subject to real estate transfer tax; further, since petitioner was required to pay grantor's obligation for transfer tax as condition of contract, such payment of tax would be deemed to be additional consideration for real property. NY Adv Op Comm T & F TSB-A-90-(3)R, 1990 N.Y. Tax LEXIS 94.

If petitioner, tax-exempt not-for-profit corporation about to execute mortgage with lending institution, was organization that had established exemption under Internal Revenue Code § 501(a), petitioner would be exempt from portion of mortgage recording tax representing special additional tax, but would be subject to basic tax, additional tax, and tax on mortgages re-

corded in cities having population of one million or more. NY Adv Op Comm T & F TSB-A-90-(3)R, 1990 N.Y. Tax LEXIS 94.

Neither real estate transfer tax nor real estate transfer gains tax would apply to transfer of real property from petitioner, not-for-profit membership corporation, to second not-for-profit membership corporation formed for purposes of acquiring, holding, managing, and developing real property to serve petitioner's needs, since transfer in question, whereby second not-for-profit corporation would leaseback real property to petitioner for 99 years for nominal consideration, would effectuate mere change of identity or form of ownership or organization. NY Adv Op Comm T & F TSB-A-94-(5)R, 1994 N.Y. Tax LEXIS 758.

Exemption from mortgage recording tax applied to 43.3 percent of leasehold mortgage representing expenditures for diagnostic and treatment center, and portion of common space reasonably apportioned to diagnostic and treatment center; remainder of mortgage proceeds that were not utilized for hospital-related purposes were subject to tax. NY Adv Op Comm T & F TSB-A-02-(3)R, 2002 N.Y. Tax LEXIS 128.

2. Under former General Corporation Law § 13

By-laws of membership corporation may provide for an executive committee of the board of directors. Requirement that at least five members of executive committee be chosen from directors of another corporation was not proper. 1955 N.Y. Op. Att'y Gen. No. 227, 1955 N.Y. AG LEXIS 82.

Board of governors of public hospital has no power to contract indebtedness to obtain funds for hospital purposes. It does have authority to employ professional fund raisers. 1965 Op. St. Compt. No. 65–452.

3. Under former General Corporation Law § 14

Fire district may acquire real estate for fire house purposes upon condition that the property be used for such purposes and will revert to donor on breach of such condition. The condition of such deed may provide that fire district shall remove the building in the event of breach of condition. The fire house upon such property so acquired may be financed by issuance of serial bonds. 1947 Op. St. Compt. No. 47–225.

4. —Right to use or dispose of property

While a membership corporation may acquire real property for its corporate purposes, it may not use such property, as by way of lease, for a purpose essentially of a business nature for profit. 1953 NY Ops Atty Gen May 14 (Informal), 1953 N.Y. AG LEXIS 422.

Where a volunteer fire company has purchased apparatus for corporate purposes from company funds, such apparatus remains the property of the company. Board of Fire Commissioners has no control over expenditures of fire company moneys. 1955 NY Ops Atty Gen Apr 28 (Informal), 1955 N.Y. AG LEXIS 213.

5. —Miscellaneous

A membership corporation has implied power to act as trustee of a trust established for payment of pensions or similar benefits to its officers and employees. 1963 N.Y. Op. Att'y Gen. No. 54, 1963 N.Y. AG LEXIS 44.

An incorporated village may alter its common seal at pleasure. However, if the alteration constitutes a change of name of the village, a proposition must be adopted and permission of the Postmaster General of the United States must be obtained. 1967 NY Ops Atty Gen Dec 28 (Informal), 1967 N.Y. AG LEXIS 155.

A gift or legacy to a municipality for public library purposes, with directions to invest the principal and the income only to be used for public library, should be invested in United States government, New York State or municipal bonds, and the income deposited in the municipal library fund. 1954 N.Y. Op. Att'y Gen. No. 150, 1954 N.Y. Op. Att'y Gen. No. 150, 1954 N.Y. AG LEXIS 32.

A similar gift to the public library trustees or the public library trustees incorporated is the absolute property of the public library trustees incorporated to be used for corporate purposes and invested in securities eligible for municipal investments. 1954 N.Y. Op. Att'y Gen. No. 150, 1954 N.Y. Op. Att'y Gen. No. 150, 1954 N.Y. AG LEXIS 32.

A similar gift to the library trustees incorporated in trust for the benefit of the municipal library fund may also be good as a trust, and if so, may be invested pursuant to the Personal Property Law, § 21. 1954 N.Y. Op. Att'y Gen. No. 150, 1954 N.Y. Op. Att'y Gen. No. 150, 1954 N.Y. AG LEXIS 32.

A gift to the individuals serving as library trustees for the same purposes as above is preferable and may be invested as directed by the donor. 1954 N.Y. Op. Att'y Gen. No. 150, 1954 N.Y. Op. Att'y Gen. No. 150, 1954 N.Y. AG LEXIS 32.

A village fire department may convey for a consideration less than actual value, a parcel of real estate purchased by it with its own funds. Such conveyance must be in accordance with applicable law and the by-laws of the department. 1955 Op. St. Compt. No. 55–7747.

6. Under former Membership Corporations Law § 23

Special policemen appointed under this section are not exempt from pistol license requirements. 1958 NY Ops Atty Gen Jan 15 (Informal), 1958 N.Y. AG LEXIS 77.

7. Under former General Corporation Law § 34

A fire corporation organized under the Membership Corporations Law may make a gift of money to a fire district to be used to purchase fire apparatus. 1947 Op. St. Compt. No. 47–61.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-2 White, New York Business Entities ¶ N202.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business & Commercial § 8.01. Applicability of Not-for-Profit Corporation Law.

Matthew Bender's New York Checklists: Checklist for Assessing Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 2.47.

Checklist for Forming Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.02.

Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N202:1. Statutory Power Clauses.

White, New York Business Entities Form N202:2. Power to Purchase Shares, Bonds, and Obligations of.

White, New York Business Entities Form N202:3. Power to Acquire and Dispose of Securities: Another Form.

White, New York Business Entities Form N202:4. Power to Vote Shares in Other Corporations.

White, New York Business Entities Form N202:5. Power to Guarantee.

White, New York Business Entities Form N202:6. Provision Authorizing Contracts within or without the State.

White, New York Business Entities Form N202:7. Power to Borrow Money.

White, New York Business Entities Form N202:7A. Power to Lend Money.

White, New York Business Entities Form N202:7B. Power to Accept Subventions and Make Donations.

White, New York Business Entities Form N202:8. Power to Conduct Activities in Other States.

White, New York Business Entities Form N202:9. Provision Giving Incidental Powers.

White, New York Business Entities Form N202:10. Power to Acquire and Dispose of Real Estate.

White, New York Business Entities Form N202:11. Certificate of Corporate Use of Assumed Name.

§ 204. Limitation on activities

Notwithstanding any other provision of this chapter or any other general law, a corporation of any kind to which this chapter applies shall conduct no activities for pecuniary profit or financial gain, whether or not in furtherance of its corporate pur-

poses, except to the extent that such activity supports its other lawful activities then being conducted.

HISTORY:
Add, L 1969, ch 1066, § 1, eff Sept 1, 1970; amd, L 2013, ch 549, § 39, eff July 1, 2014.

Revision Notes: *Source:* None.
Changes: New.
Comment: This section is intended to limit the conduct of any activities which result in profit to the corporation, to an extent that such activities support the other lawful operations of the corporation then being carried on. This means that a non-profit corporation cannot engage in any profit making activity, whether or not in furtherance of its corporate purposes, unless such profit making activity actually supports the other lawful operations of the corporation currently being conducted. This does not mean that all profit must be currently expended, but it does mean that such activity resulting in profit cannot go beyond what is reasonably related to the requirements of the corporation's operations as they are then conducted. A moribund corporation which carries on profit making activities such as investments but nothing else will violate this section.

Editor's Notes: Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:
Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

Notes to Decisions

1. Generally
A multiple listing service of a real estate brokers' trade association was held not a permissible activity under the Not-for-Profit Corporation Law where the substantial receipts of the Multiple Listing Service of the organization were devoted to continued promotion and generation of real estate sales through the Multiple Listing Service and in expanding the scope and effectiveness of that service. Santos v Chappell, 65 Misc. 2d 559, 318 N.Y.S.2d 570, 1971 N.Y. Misc. LEXIS 1875 (N.Y. Sup. Ct. 1971).

Agency Opinions

1. Generally
It was not necessary for out-of-state non-profit 501(c)(3) corporation, licensed as debt management company without physical presence in New York, to become licensed under Banking Law in order to receive payments directly from debtor who had relocated to New York. Banking Department, Legal Opinion (1/27/00).

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-2 White, New York Business Entities ¶ N204.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business & Commercial § 8.10A. Receivership.

Matthew Bender's New York Checklists: Checklist for Assessing Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 2.47.
Checklist for Forming Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.02.

ARTICLE 3 Corporate Name and Service of Process

Section
303. Reservation of name
304. Statutory designation of secretary of state as agent of domestic corporations formed under article four of this chapter and authorized foreign corporations for service of process
305. Registered agent for service of process
306. Service of process
309. Personal jurisdiction and service of process on non-domiciliary resident director, officer, key person or agent

HISTORY:
Add, L 1969, ch 1066, eff Sept 1, 1970.

§ 303. Reservation of name

(a) A corporate name may be reserved by:

(1) Any person intending to form a domestic corporation.

(2) Any domestic corporation intending to change its name.

(3) Any foreign corporation intending to apply for authority to conduct activities in this state.

(4) Any authorized foreign corporation intending to change its name.

(5) Any person intending to incorporate a foreign corporation and to have it apply for authority to conduct activities in this state.

(6) Any domestic corporation intending to file the consent of the attorney general to reinstate such corporation pursuant to section 1014 of this chapter.

(b) A fictitious name for use pursuant to section 1301 of this chapter may be reserved by:

(1) Any foreign corporation intending to apply for authority to do business in this state, pursuant to paragraph (d) of section 1301 of this chapter.

(2) Any authorized foreign corporation intending to change its fictitious name under which it conducts activities in this state.

(3) Any authorized foreign corporation which has changed its corporate name in its jurisdiction, which new corporate name is not available in this state.

(c) Application to reserve a corporate name shall be delivered to the department of state. It shall set forth the name and address of the applicant, the name to be reserved and a statement of the basis under paragraph (a) or (b) for the application. The secretary of state may require the applicant to set forth in his application the nature of the activities to be conducted by the corporation. If the name is available for corporate use, the department of state shall reserve the name for the use of the applicant for a period of sixty days and issue a certificate of reservation. The prohibitions, restrictions and qualifications set forth in section 301 (Corporate name; general), section 302 (Corporate name; exceptions) and section 404 (Approvals, notices and consents) are not waived by the issuance of a certificate of reservation. The certificate of reservation shall include the name of the applicant, the name reserved and the date of the reservation. The certificate of reservation (or in lieu thereof an affidavit by the applicant or by his agent or attorney that the certificate of reservation has been lost or destroyed) shall accompany the certificate of incorporation or the application for authority when either is delivered to the department of state.

(d) The secretary of state may extend the reservation for additional periods of not more than sixty days each, upon the written request of the applicant,

his attorney or agent delivered to the department of state, to be filed before the expiration of the reservation period then in effect. Such request shall have attached to it the certificate of reservation of name. Not more than two such extensions shall be granted.

(e) Upon the request of the applicant, delivered to the department of state before the expiration of the reserved period, together with the certificate of reservation, the department shall cancel the reservation.

(f) Any application or request under this section shall be signed by the applicant, his attorney or agent.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970; amd, L 1982, ch 590, §§ 13, 14, eff Oct 20, 1982; L 1984, ch 241, § 2, eff June 19, 1984; L 2006, ch 434, § 3, eff July 26, 2006; L 2013, ch 549, § 42, eff July 1, 2014.

Derivation Notes: Derived from Gen Corp Law §§ 40, 215.

Revision Notes: *Source:* Gen Corp L § 40.

Changes: Revised; new provisions.

Comment: Gen Corp L § 40 permitted reservation of corporate names only for a change of name. Paragraph (a) is based on Model Act § 7A. The statement as to the intention of the applicant is new and intended to discourage applicants who do not in good faith intend to use the reserved name. The secretary of state may request additional information as to the nature of the activities to be conducted by the applicant. The requirement for presentation of the certificate of reservation upon filing of the certificate of incorporation or application for authority would prevent filing on behalf of any one other than the applicant, during the reserved period. The section permits a cancellation of a reservation. An extension of the reservation is in the discretion of the secretary of state. Two extensions are permitted.

Editor's Notes: Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

PRACTICE INSIGHTS:

SET UP FOR SUCCESS RIGHT FROM THE START — STRATEGIES FOR PREPARING NOT-FOR PROFIT CERTIFICATE OF INCORPORATION

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INSIGHT

Not-For-Profit Corp. Law § 402 sets forth the requirements for the contents of the Certificate of Incorporation (the "Certificate") which is filed with the Department of State (the "Department") to formally create a not-for-profit corporation. The practitioner should carefully consider the contents of the Certificate before filing it with the Department to get the entity started off on the right foot. Specifically, counsel should ensure that any contemplated powers are included in the Certificate, carefully draft the statement of purpose, avoid certain buzz words, and consider limiting internal governance provisions.

ANALYSIS

Include certain powers in Certificate if they are contemplated.

Certain powers must be included in the Certificate if they are going to be granted to the corporation. For example, if the management of the not-for-profit corporation is vested in individuals other than the Board of Directors (see Not-For-Profit Corp. Law § 701), this power must be included in the Certificate. Similar requirements exist for the following powers: if members are required to make capital contributions other than the payment of dues (Not-For-Profit Corp. Law § 502); if the corporation can accept subventions (Not-For-Profit Corp. Law § 505); or if written consent of less than all members is permitted for certain types of corporate action (Not-For-Profit Corp. Law § 614).

Consider adding certain permissive powers to Certificate.

The Not-For-Profit Corporation Law permits, but does not require, the inclusion of certain provisions in the Certificate. For example, Not-For-Profit Corp. Law § 709(a) permits a corporation to specify that the proportion of directors or the proportion of votes of directors that shall constitute a quorum or be necessary for the transaction of business or of any specified item of business shall be greater than the proportion prescribed by statute. The Certificate may also restrict the taking of action by the Board of Directors without a meeting and by written consent (Not-For-Profit Corp. Law § 708(b)) or permit directors to participate in meetings via telephone conference (Not-For-Profit Corp. Law § 708(c)). If these actions are contemplated, the authority may be granted in the Certificate.

Pay particularly close attention to "purposes" section of Certificate.

The Certificate must include a statement of the purpose for which the corporation has been formed. Not-For-Profit Corp. Law § 402(a)(2). The practitioner should exercise caution when drafting the purposes clause. The purposes clause must be broad enough to cover not only the acts the proposed directors envision at the corporation's infancy, but also those acts the corporation may need to take as the organization matures and builds up steam. Failure to stay within the stated purposes of the entity can later create a liability for the entity and its directors, officers and members. This can easily occur if the purposes clause is narrowly constructed. It is possible to broaden the purposes clause at a later time by amending the Certificate. See Not-For-Profit Corp. Law § 802. The larger the organization, however, the more difficult it becomes to make sweeping changes to the fundamental structure of the organization, such as changing its charter. Also, pursuant to Not-For-Profit Corp. Law § 804, amendments to Certificates which add, change or eliminate a purpose, power or provision the inclusion of which in an initial Certificate require approval or consent from a governmental entity will require such approval or consent to be obtained. Also, certificates of amendments of charitable corporations which change, eliminate or add a power or purpose require approval of either the attorney general or a justice of the supreme court. Not-For-Profit Corp. Law § 804.

Avoid certain buzz words when drafting Certificate.

Any reference to certain buzz words will typically trigger a requirement for pre-approval or consent from a state agency prior to filing the Certificate. For example, Education Department consent may be required if the Certificate is drafted using the terms "education," "research," or "school." Private foundations seeking not-for-profit status should be sure to include a disclaimer of Not-For-Profit Corp. Law § 404 activities that necessitate agency approval as well as the disclaimers required in Not-For-Profit Corp. Law § 406. Pre-approval requirements can delay the process significantly, particularly if the agency requires revisions to the proposed Certificate (that will in turn require internal approvals as well). If state agency consent is necessary, counsel should consider reserving the chosen name for the entity. Not-For-Profit Corp. Law § 303. A relatively small fee buys 60 days and may be well worth the investment if the approval process is stalled at any point and the name of the entity is important to the client.

It may be advisable to limit internal governance provisions in Certificate.

The certificate of incorporation may set forth any provision for the regulation of the internal affairs of the corporation that is consistent with the Not-For-Profit Corp. Law or any other New York law. Although it is permissible to add provisions relating to internal governance to the Certificate

under Not-For-Profit Corp. Law § 402(c), it may be more advisable to add those types of provisions to the bylaws. The dynamics of an organization change over time, and changes to operating procedures are inevitable. Changes to the Certificate require governmental filing and approval — at minimum, the Department's. Changes to the bylaws, however, require only proposal by the Board of Directors and vote of the membership — a completely transparent and internal process that is relatively painless unless the organization has grown exponentially. See Not-For-Profit Corp. Law § 802.

When adding internal governance provisions to the Certificate or the bylaws, ensure that those provisions are consistent with the Not-For-Profit Corp. Law. Inconsistencies can lead a court to stop the corporation in its tracks. *See Sealey v. Amer. Socy. of Hypertension, Inc.*, 26 A.D.3d 254, 810 N.Y.S.2d 48 (1st Dep't 2006).

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-3 White, New York Business Entities ¶ N303.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business & Commercial § 8.02. Corporate Formation.

New York Practice Guide: Business & Commercial § 8.14. Choosing a Corporate Name.

Matthew Bender's New York Checklists: Checklist for Forming Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.02.

Forms: White, New York Business Entities Form N303:1. Application for Reservation of Name [or Fictitious Name] for Not-for-Profit Corporation.

White, New York Business Entities Form N303:2. Request for Extension of Reservation of Name.

White, New York Business Entities Form N303:3. Request for Cancellation of Reservation of Name.

White, New York Business Entities Form N303:4. Application for Reservation of Name.

§ 304. Statutory designation of secretary of state as agent of domestic corporations formed under article four of this chapter and authorized foreign corporations for service of process

(a) The secretary of state shall be the agent of every domestic corporation formed under article four of this chapter and every authorized foreign corporation upon whom process against the corporation may be served.

(b) Any designation by a domestic corporation formed under article four of this chapter or foreign corporation of the secretary of state as such agent, which designation is in effect on the effective date of this chapter, shall continue. Every domestic corporation formed under article four of this chapter or foreign corporation, existing or authorized on the effective date of this chapter, which has not designated the secretary of state as such agent, shall be deemed to have done so.

(c) Any designation by a domestic corporation formed under article four of this chapter or foreign corporation of an agent other than the secretary of state which is in effect on the effective date of this chapter shall continue in effect until changed or revoked as provided in this chapter.

(d) Any designated post-office address to which the secretary of state shall mail a copy of process served upon him or her as agent of a domestic corporation formed under article four of this chapter or foreign corporation, shall continue until the filing of a certificate under this chapter directing the mailing to a different post-office address.

HISTORY:

Add, L 1969, ch 1066, § 1; amd, L 1981, ch 564, § 1; L 1982, ch 168, § 1, eff June 8, 1982; L 2013, ch 549, § 43, eff July 1, 2014; L 2015, ch 358, § 2, effective September 25, 2015.

Derivation Notes: Derived from Gen Corp Law §§ 213, 214a and Mem Corp Law §§ 51, 52.

Revision Notes: *Source:* Gen Corp L §§ 213, 214-a.

Changes: Revised; new provisions.

Comment: The secretary of state is the designated agent for service of process for authorized foreign corporations. All designations by foreign corporations of agents other than the secretary of state continue until changed or terminated.

The address designated for mailing of process continues. A change in such address of a domestic corporation or of an authorized foreign corporation is by certificate of amendment or change under this chapter.

Editor's Notes: Laws 1981, ch 564, § 6, eff Sept 13, 1981, provides as follows:

§ 6. This act shall take effect on the sixtieth day after it shall have become a law and shall apply to domestic corporations formed under section two hundred one of the not-for-profit corporation law and to amended certificates of incorporation filed under section eight hundred one of such law after such date.

Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

Laws 2013, ch 549, § 7, eff July 1, 2014, repealed L 2013, ch 549, § 43 which amended this section.

Amendment Notes The 2015 amendment by ch 358, § 2, made a stylistic change.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-3 White, New York Business Entities ¶ N304.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business & Commercial § 8.10A. Receivership.

Matthew Bender's New York Checklists: Checklist for Forming Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.02.

Forms: White, New York Business Entities Form N304:1. Provision Designating Secretary of State as Agent of Corporation for Service of Process.

§ 305. Registered agent for service of process

(a) Every domestic corporation or authorized foreign corporation may designate a registered agent in this state upon whom process against such corporation may be served. The agent shall be a natural person who is a resident of or has a business address in this state or a domestic corporation or foreign corporation of any kind formed, or authorized to do business in this state, under this chapter or under any other statute of this state.

(b) Any such designation of a registered agent may be made, revoked or changed as provided in this chapter.

(c) A registered agent may resign as such agent. A certificate, entitled "Certificate of resignation of registered agent of ..... (name of designating corporation) under section 305 of the Not-for-Profit

Corporation Law", shall be signed by him and delivered to the department of state. It shall set forth:

(1) That he resigns as registered agent for the designating corporation.

(2) The date the certificate of incorporation or the application for authority of the designating corporation was filed by the department of state.

(3) That he has sent a copy of the certificate of resignation by registered mail to the designating corporation at the post-office address on file in the department of state specified for the mailing of process or if such address is the address of the registered agent, then to the office of the designating corporation in the jurisdiction of its formation or incorporation.

(d) The designation of a registered agent shall terminate thirty days after the filing by the department of state of a certificate of resignation or a certificate containing a revocation or change of the designation, whichever is filed earlier. A certificate designating a new registered agent may be delivered to the department of state by the corporation within the thirty days or thereafter.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970; amd, L 1985, ch 131, § 2, eff May 28, 1985; L 1998, ch 375, § 35, eff Aug 13, 1998; L 2013, ch 549, § 44, eff July 1, 2014.

Derivation Notes: Derived from Gen Corp Law § 213.

Revision Notes: *Source:* None.

Changes: Completely new.

Comment: The section permits domestic and authorized foreign corporations to designate an agent upon whom process against it may be served. He is designated the registered agent. The corporation may designate an individual or corporate registered agent. The CPLR lists the officers, directors and agents upon whom process against a corporation may be served. Existing or authorized corporations may designate a registered agent, or revoke or change the designation or address of the agent by certificate of amendment or change under this chapter. Designations may be in a certificate of incorporation or application for authority. The agent is permitted to resign but he must notify his principal before the resignation is effective.

Editor's Notes: Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-3 White, New York Business Entities ¶ N305.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business & Commercial § 8.10A. Receivership.

New York Practice Guide: Business & Commercial § 8.20. Drafting a Certificate of Change.

Matthew Bender's New York Checklists: Checklist for Forming Not-For-Profit Corporation LexisNexis Answer-Guide New York Business Entities § 9.02.

Forms: White, New York Business Entities Form N305:1. Provision Designating Individual as Registered Agent.

White, New York Business Entities Form N305:2. Provision Designating Corporation as Registered Agent.

White, New York Business Entities Form N305:3. Certificate of Change as to Registered Agent.

White, New York Business Entities Form N305:4. Certificate of Resignation of Registered Agent.

§ 306. Service of process

(a) Service of process on a registered agent may be made in the manner provided by law for the service of a summons, as if the registered agent was a defendant.

(b) Service of process on the secretary of state as agent of a domestic corporation formed under article four of this chapter or an authorized foreign corporation shall be made by personally delivering to and leaving with the secretary of state or his or her deputy, or with any person authorized by the secretary of state to receive such service, at the office of the department of state in the city of Albany, duplicate copies of such process together with the statutory fee, which fee shall be a taxable disbursement. Service of process on such corporation shall be complete when the secretary of state is so served. The secretary of state shall promptly send one of such copies by certified mail, return receipt requested, to such corporation, at the post office address, on file in the department of state, specified for the purpose. If a domestic corporation formed under article four of this chapter or an authorized foreign corporation has no such address on file in the department of state, the secretary of state shall so mail such copy to such corporation at the address of its office within this state on file in the department.

(c) If an action or special proceeding is instituted in a court of limited jurisdiction, service of process may be made in the manner provided in this section if the office of the domestic corporation formed under article four of this chapter or foreign corporation is within the territorial jurisdiction of the court.

(d) Nothing in this section shall affect the right to serve process in any other manner permitted by law.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970; amd, L 1981, ch 564, § 2; L 1982, ch 168, § 2, eff June 8, 1982; L 1984, ch 93, § 2, eff April 24, 1984; L 2013, ch 549, § 45, eff July 1, 2014; L 2014, ch 23, § 8, eff July 1, 2014.

Derivation Notes: Derived from Gen Corp Law §§ 84(2), 217.

Revision Notes: *Source:* Gen Corp L § 217.

Changes: Revised; new provisions.

Comment: The procedure for serving process on the registered agent and the secretary of state is set forth in this section. Service on the registered agent is similar to service on any defendant. The procedure for serving the secretary of state is similar to that set forth in Bus Corp L § 306 and Gen Corp L § 217.

Editor's Notes: Laws 1981, ch 564, § 6, eff Sept 13, 1981, provides as follows:

§ 6. This act shall take effect on the sixtieth day after it shall have become a law and shall apply to domestic corporations formed under section two hundred one of the not-for-profit corporation law and to amended certificates of incorporation filed under section eight hundred one of such law after such date.

Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

Notes to Decisions

Analysis

1. Under former General Corporation Law § 217

2. —Service of process on secretary of state
3. — —Notice to corporation of service
4. —Jurisdiction obtained by service
5. —Miscellaneous

1. Under former General Corporation Law § 217

An action brought in the justice court on a policy of insurance issued within the state, service having been effected on the superintendent of insurance pursuant to § 59 of the Insurance Law, is within the jurisdiction of such a court even though the defendant insurance company has no office within the jurisdiction and service was not made upon the Secretary of State under this section. Jackson v National Grange Mut. Liability Co., 274 A.D. 330, 83 N.Y.S.2d 602, 1948 N.Y. App. Div. LEXIS 3075 (N.Y. App. Div. 1948), app. dismissed, 299 N.Y. 333, 87 N.E.2d 283, 299 N.Y. (N.Y.S.) 333, 1949 N.Y. LEXIS 939 (N.Y. 1949).

In a personal injury action arising out of an accident in another state, service of summons on a foreign corporation authorized to do business in the state must be made under the provisions of § 217; service made in accordance with Veh. & Traf. Law § 52 is ineffectual. Schlago v Seaboard Freight Lines, Inc., 65 N.Y.S.2d 369, 187 Misc. 732, 1946 N.Y. Misc. LEXIS 2827 (N.Y. Sup. Ct. 1946).

Where foreign corporation maintained regular and established place of business in New York within jurisdiction of N. Y. Fed. Dist. Ct. and had obtained license to do business in New York, and designated Secretary of State of New York as its agent to receive process in New York, such service is valid. American Blower Corp. v B. F. Sturtevant Co., 61 F. Supp. 756, 1945 U.S. Dist. LEXIS 2055 (D.N.Y. 1945).

2. —Service of process on secretary of state

Section 217, as amended by L 1941 c 538, permits service on the secretary of state of process of court of limited territorial jurisdiction if the cause of action arose and stated office of the defendant is within such territorial jurisdiction. Pohlers v Exeter Mfg. Co., 293 N.Y. 274, 56 N.E.2d 582, 293 N.Y. (N.Y.S.) 274, 1944 N.Y. LEXIS 1314 (N.Y. 1944).

Where the agent appointed to receive service of process died and no new agent had been appointed the federal district court in New York obtained jurisdiction where service was made on the secretary of state even though it was a foreign cause of action. Cohen v American Window Glass Co., 126 F.2d 111, 1942 U.S. App. LEXIS 4074 (2d Cir. N.Y. 1942).

3. — —Notice to corporation of service

Where a foreign corporation licensed to do business in this state has filed an instrument with the Secretary of State designating him as agent for service of process and specifying the address of its office within New York State, and this section is complied with in serving the Secretary of State, a default judgment obtained against the corporation is not subject to being set aside on the ground that the corporation inadvertently failed to provide the Secretary of State with its full address and accordingly did not receive the notice of service forwarded to it by the Secretary of State. General Crane Service, Inc. v Whiting-Turner Contracting Co., 27 Misc. 2d 403, 208 N.Y.S.2d 244, 1960 N.Y. Misc. LEXIS 2110 (N.Y. Sup. Ct. 1960).

4. —Jurisdiction obtained by service

Jurisdiction in rem is obtained by the city court of New York by attachment levy in an action against a foreign corporation served with summons and complaint within thirty days after the granting of the warrant by service on the secretary of state at Albany. Swedosh v Belding Hosiery Mills, Inc., 6 N.Y.S.2d 532, 168 Misc. 673, 1938 N.Y. Misc. LEXIS 1886 (N.Y. City Ct. 1938).

Municipal court of New York city has no jurisdiction to enter a judgment against a foreign corporation which has been authorized to do business in this state and has designated the secretary of state to receive process, where the corporation was served by serving the secretary of state at Albany under § 217, because § 217 cannot extend the territorial jurisdiction of the municipal court beyond the territorial limits of New York city. McCulloch v American Carrier Corp., 15 N.Y.S.2d 566, 172 Misc. 450, 1939 N.Y. Misc. LEXIS 2432 (N.Y. Mun. Ct. 1939), app. denied, 260 A.D. 933, 24 N.Y.S.2d 129, 1940 N.Y. App. Div. LEXIS 5517 (N.Y. App. Div. 1940).

5. —Miscellaneous

Under former § 16 where a foreign corporation doing business in this state had designated a person as agent upon whom process against the corporation might be served, the agency of such person was not limited to actions which arose out of business transacted in this state. Bagdon v Philadelphia & Reading Coal & Iron Co., 217 N.Y. 432, 111 N.E. 1075, 217 N.Y. (N.Y.S.) 432, 1916 N.Y. LEXIS 1327 (N.Y. 1916).

Under former § 15 where a foreign corporation was authorized to do business in the state and had officers residing here and had a local bank account, its certificate never having been revoked, it was presumed to be subject to service of summons in this state in the absence of clear and convincing proof on its part that it was not transacting business here. Burke v Galveston, H. & H. R. Co., 173 A.D. 221, 159 N.Y.S. 379, 1916 N.Y. App. Div. LEXIS 6580 (N.Y. App. Div. 1916).

Under former § 16 where a foreign corporation had designated a person on whom process might be served process might be served on such person although the cause of action arose outside the state. Smolik v Philadelphia & Reading Coal & Iron Co., 222 F. 148, 1915 U.S. Dist. LEXIS 1506 (D.N.Y. 1915).

Agency Opinions

Analysis

1. Under former General Corporation Law § 217
2. —Service of process on secretary of state
3. — —Notice to corporation of service
4. —Statutory fees

1. Under former General Corporation Law § 217

2. —Service of process on secretary of state

3. — —Notice to corporation of service

Administrative reclassification of title of assistant, senior and associate corporation examiners to titles of attorney, senior attorney and associate attorney will not affect their authority to receive process against corporations served upon the Secretary of State pursuant to these sections. 1954 N.Y. Op. Att'y Gen. No. 210, 1954 N.Y. AG LEXIS 70.

Process issued under this section may only be made upon the secretary of state or a deputy secretary of state. 1933 N.Y. Op. Att'y Gen. No. 288, 1933 N.Y. AG LEXIS 718.

4. —Statutory fees

Superintendent of insurance, when acting as liquidator, is not exempt from payment of filing fees provided for in § 217. 1939 N.Y. Op. Att'y Gen. No. 225.

State insurance fund is not exempt from the payment of the fees prescribed by § 217 or Stk. Corp. Law, § 25. 1942 N.Y. Op. Att'y Gen. No. 295, 1942 N.Y. AG LEXIS 161.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: White, New York Business Entities ¶ N306.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business & Commercial § 8.10A. Receivership.

New York Practice Guide: Business & Commercial § 8.20. Drafting a Certificate of Change.

Forms: White, New York Business Entities Form N306:1. Affidavit of Service of Process upon Secretary of State.

§ 309. Personal jurisdiction and service of process on non-domiciliary resident director, officer, key person or agent

A person, by becoming a director, officer, key person or agent of a corporation is subject to the personal jurisdiction of the supreme court of the state of New York, and in an action or proceeding by the attorney general under this chapter process may be served upon such person as provided in section

three hundred thirteen of the civil practice law and rules.

HISTORY:
Add, L 2013, ch 549, § 46, eff July 1, 2014; L 2016, ch 466, § 3, effective May 27, 2017.

Editor's Notes: Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

Amendment Notes The 2016 amendment by ch 466, § 3, substituted "key person" for "key employee" in the section heading; and substituted "key person" for "key employee."

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-3 White, New York Business Entities ¶ N309.01 et seq.

ARTICLE 4 Formation of Corporations

Section
401. Incorporators
402. Certificate of incorporation; contents
404. Approvals, notices and consents
405. Organization meeting

HISTORY:
Add, L 1969, ch 1066, § 1, eff Sept 1, 1970.

§ 401. Incorporators

One or more natural persons at least eighteen years of age may act as incorporators of a corporation to be formed under this chapter.

HISTORY:
Add, L 1969, ch 1066, § 1; amd, L 1970, ch 847, § 12; L 1974, ch 901, § 2, eff Sept 1, 1974.

Derivation Notes: Derived from Gen Corp Law § 7 and Mem Corp Law § 10.

Revision Notes: *Source:* Mem Corp L § 10.
Changes: Revised.
Comment: This section substantially changes existing law by reducing the minimum number of incorporators from five to one and by eliminating citizenship and residence requirements. In these respects the section follows the provisions of § 401 of the Bus Corp L and the ABA Model Non-profit Corp Act. By eliminating the requirements that incorporators be natural persons and of full age this section departs from the Bus Corp L and adopts the position of the ABA Model Non-profit Corporation.

The use of corporate incorporators in the non-profit area has received previous legislative sanction in the New York Cooperative Corporations Law. It is believed that the simplification of this section reflects the realities of modern corporate practice through the elimination of meaningless formalities and the substitution, in section 718, of a meaningful procedure for discovering and reaching the real parties in interest in not-for-profit corporations. That section makes available to state officials e.g. Attorney General and Secretary of State, and to creditors and members a list of the names and resident addresses of all directors and officers.

Notes to Decisions

Analysis

1. Under former General Corporation Law § 7
2. Under former Membership Corporations Law § 10

1. Under former General Corporation Law § 7

Recitation of facts is not a statement of them, and requirement of this section that certificate of incorporation shall state certain facts is not satisfied by recitation of them in certificate. In re Wendover Athletic Ass'n, 128 N.Y.S. 561, 70 Misc. 273, 1911 N.Y. Misc. LEXIS 77 (N.Y. Sup. Ct. 1911).

It is not essential that all incorporators shall make an affidavit as to age, citizenship and residence of incorporators for the purpose of showing that this section has been followed. In re Daughters of Israel Orphan Aid Soc., 210 N.Y.S. 541, 125 Misc. 217, 1925 N.Y. Misc. LEXIS 877 (N.Y. Sup. Ct. 1925).

2. Under former Membership Corporations Law § 10

One may not be designated as a director of an organization seeking to be incorporated who is not listed as a member in the certificate of incorporation. In re Victory Committee of Greenpoint of Patriotic, Social & Fraternal Club, Inc., 59 N.Y.S.2d 546, 1945 N.Y. Misc. LEXIS 2604 (N.Y. Sup. Ct. 1945).

Agency Opinions

1. Generally

A village may not form a not-for-profit corporation and convey to it title to unused reservoir property for the purposes of avoiding real estate taxes. 1979 NY Ops Atty Gen August 16 (Informal), 1979 N.Y. AG LEXIS 65.

A town may not form a not-for-profit corporation to operate and manage town marinas and dockage facilities. However, a town, by local law, may authorize a contract with any entity for the management and operation of such facilities. 1981 Op. St. Compt. No. 81-151, 1981 N.Y. Comp. LEXIS 729.

Discussion of procedure for incorporation of volunteer fire company and the beneficial effect of a corporate status to simplify matters concerning the management of affairs and ownership of assets. 1967 Op. St. Compt. No. 67–786.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-4 White, New York Business Entities ¶ N401.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business & Commercial § 8.03. Commencing Corporate Functions.

New York Practice Guide: Business & Commercial § 8.15. Preparing Certificate of Incorporation.

Matthew Bender's New York Checklists: Checklist for Forming Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.02.

§ 402. Certificate of incorporation; contents

(a) A certificate, entitled "Certificate of Incorporation of ..... (name of corporation), under section 402 of the Not-for-Profit Corporation Law," shall be signed by each incorporator with his name and address included in such certificate and delivered to the department of state. It shall set forth:

(1) The name of the corporation.

(2) That the corporation is a corporation as defined in subparagraph (5) of paragraph (a) of section 102 (Definitions).

(2-a) The purpose or purposes for which it is formed, it being sufficient to state that the purpose of the corporation is any purpose for which corporations may be organized under this chapter as a charitable or non-charitable corporation, and whether it is a charitable corporation or a non-charitable corporation under section 201 (Purposes). Any corporation may also set forth any activities that it intends to carry out in furtherance of such purpose or purposes; provided that this subparagraph shall not be interpreted to require that the certificate of incorporation set forth such activities or otherwise state how the corporation's purposes will be achieved.

(2-b) If it is not formed to engage in any activity or for any purpose requiring consent or approval of any state official, department, board, agency or other body, a statement that no such consent or approval is required. Such statement shall be deemed conclusive for purposes of filing by the department of state. If subsequent to submitting the certificate of incorporation for filing, the corporation plans to engage in any activity requiring consent or approval pursuant to section 404 (approvals, notices and consents) of this chapter, the corporation shall obtain such consent or approval and accordingly amend its certificate of incorporation pursuant to article eight of this chapter.

(3) The county within the state in which the office of the corporation is to be located. It may also set forth the post office address of an office without the state, at which, pursuant to section 621 (Books and records; right of inspection; prima facie evidence), the books and records of account of the corporation shall be kept.

(4) The names and addresses of the initial directors.

(5) The duration of the corporation if other than perpetual.

(6) A designation of the secretary of state as agent of the corporation upon whom process against it may be served and the post office address within or without this state to which the secretary of state shall mail a copy of any process against it served upon him.

(7) If the corporation is to have a registered agent, his name and address within this state and a statement that the registered agent is to be the agent of the corporation upon whom process against it may be served.

(8) The statements, if any, with respect to special not-for-profit corporations required under article 14 (Special not-for-profit corporations).

(b) If the certificate is for the incorporation of an existing unincorporated association or group it shall have annexed thereto an affidavit of the subscribers of such certificate stating that they constitute a majority of the members of a committee duly authorized to incorporate such association or group.

(c) The certificate of incorporation may set forth any provision, not inconsistent with this chapter or any other statute of the state, which provision is (1) for the regulation of the internal affairs of the corporation, including types or classes of membership and the distribution of assets on dissolution or final liquidation, or (2) required by any governmental body or officer or other person or body as a condition for giving the consent or approval required for the filing of such certificate of incorporation.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970; amd, L 1970, ch 847, § 13, eff Sept 1, 1970; L 1972, ch 961, eff Sept 1, 1972; L 1981, ch 564, § 3; L 1983, ch 145, § 1; L 1985, ch 132, § 1, eff May 28, 1985; L 1985, ch 499, § 3, eff Oct 22, 1985; L 1985, ch 679, § 1, eff Nov 29, 1985; L 1998, ch 375, § 36, eff Aug 13, 1998; L 2013, ch 549, § 47, eff July 1, 2014; L 2014, ch 23, § 9, eff July 1, 2014.

Derivation Notes: Derived from Gen Corp Law§ 13(2) and Mem Corp Law §§ 10, 11.

Revision Notes: *Source:* Gen Corp L §§ 8(2) and 13(2); Mem Corp L §§ 10 and 11(9).

Changes: Revised.

Comment: This section restates existing law modified to reflect the basic classification of not-for-profit corporations under section 201 and the collection of all consent and approval requirements in section 404.

Editor's Notes: Laws 1981, ch 564, § 6, eff Sept 13, 1981, provides as follows:

§ 6. This act shall take effect on the sixtieth day after it shall have become a law and shall apply to domestic corporations formed under section two hundred one of the not-for-profit corporation law and to amended certificates of incorporation filed under section eight hundred one of such law after such date.

Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

PRACTICE INSIGHTS:

DRAFTING FOR TAX AND FINANCIAL NEEDS OF NOT-FOR PROFIT CORPORATION

By Kelly Mooney Lester, Esq.

General Editor, Glenn J. Bobeck, Esq., Phillips Lytle LLP www.phillipslytle.com

INSIGHT

Most not-for-profit corporations will apply for tax exempt status, usually under Internal Revenue Code § 501(c). Many will also seek state and federal funding. Although Not-for-Profit Corp. Law § 402 does not require that the Certificate of Incorporation (the "Certificate") address these considerations, Not-for-Profit Corp. Law § 406 requires that those not-for-profit corporations that will be private foundations need to specify that in the Certificate. Accordingly, the practitioner must anticipate these needs and address them in the drafting process.

ANALYSIS

Include required provisions in Certificate to qualify for certain federal tax exemptions.

Most not-for-profit corporations will apply for tax exempt status, usually under Internal Revenue Code § 501(c)(3). To do that, the Certificate must contain a statement that the assets of the corporation will not be distributed or inure to the benefit of any private individual. If, on the other hand, the organization is to be a private foundation under IRC § 509, the Certificate must satisfy the requirements to qualify for that status. Thus, if the entity plans to qualify for tax exempt status under the federal tax system, the practitioner is well-advised to examine the IRC and related regulations carefully when drafting the Certificate. Because the application seeking tax exempt status (the Form 1023 or Form 1024) does not need to be filed until 18 months into the corporation's existence, the entity may have by then grown to the point where making fundamental changes to the Certificate may be difficult to orchestrate.

Consider potential grant funding source requirements when drafting Certificate.

State and federal agencies often require incorporation of an entity before issuing grants to an organization. In some cases, grant agencies will require that an organization's Certificate contain certain language or safeguards before a grant will be issued. If counsel is contemplating applying for grant funding, he or she should investigate the potential grant agencies requirements before filing the Certificate. Given notice and quorum requirements to obtain membership and director authority, as well as the logistics typically involved with making structural changes, it may be difficult to make the change later in the short period of time that may be needed to satisfy a grant application deadline. If the

attorney knows that a certain funding source is available, he or she should include the required language from the outset.

SPEED TRAPS IN AMENDING BYLAWS

By Kelly Mooney Lester, Esq.

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INSIGHT

The internal affairs of a not-for-profit corporation may be regulated by the provisions of either the certificate of incorporation (COI) or the bylaws. Not-for-Profit Corp. Law §§ 402(c), 602. The dynamics of an organization change over time and internal governance provisions may need to be amended accordingly. Although changes to the COI require governmental filing and approval, changes to the bylaws can usually be accomplished through a completely transparent and internal process. Not-for-Profit Corp. Law §§ 803, 602. Unless the organization has grown exponentially, amending the bylaws is a relatively painless process. Larger corporations, however, may run into some speed traps.

ANALYSIS

Consider expanding internal governance provisions in bylaws to account for future growth.

Under Not-for-Profit Corp. Law § 602(f), which has historically been interpreted broadly, bylaws may contain any provision "relating to" the business of the corporation, the conduct of the corporation's affairs, and the rights or powers of the corporation, its members, directors and officers. Given the broad authority granted to a corporation to control its own internal affairs, the bylaws can be expanded at the outset to allow for future growth without formal changes to the organizational structure. For example, the bylaws may provide for the delegation of tasks to committees or for participation in meetings via telephone conference calls. These types of provisions allow for flexibility when the organization is working through a growth spurt and do not interfere with management when the corporation is in its infancy.

Conflict between members and board may cause stalemate.

It is not unusual for a conflict to arise between the members of the corporation and the board of directors. This creates an especially difficult situation when the issue of amending the bylaws is on the table. Unless otherwise provided for in the bylaws or the COI, the bylaws may be adopted, amended or repealed by either the members entitled to vote in the election of directors or by the board. Not-for-Profit Corp. Law § 602(b). Any bylaw adopted by the board may be amended or repealed by the members and vice versa. Not-for-Profit Corp. Law § 602(c). This creates a potentially endless loop of amendments that can result in a stalemate until the conflict is resolved. Type B corporations with no members avoid this difficulty.

Consider scheduling and other logistics when amending bylaws.

Although the process for amending the bylaws is not complicated, some formalities must be followed. It is easy to forget timing, scheduling and other logistics when proposing bylaw amendments. If time is of the essence, the logistics can be another speed trap for the unwary. For example, if the members are considering the amendment, a notice of meeting must be prepared and sent to the members. Counsel should factor into the equation such things as quorum requirements, minimum voting requirements, and the level of involvement of the members. In some instances, the members will be happy to delegate the drafting to a committee and pass the proposal without much discussion. In other organizations, membership is intimately involved in operations and a number of meetings may be needed to discuss, dissect and agree on the exact wording of the amendments.

Special care must be taken when the proposed amendment relates to the election of directors. The board may change the rules related to an impending election, but if it does so, the notice sent to the corporation's members related to the next meeting when directors would be elected must be modified. The notice of meeting must not only restate the affected bylaw provision but must also include a concise statement of the changes. Not-for-Profit Corp. Law § 602(e). If the members' notice is not properly issued, the bylaw amendments will not be enforceable with respect to that election of directors. Counsel should consider initiating any such amendments at the membership level to avoid the extra step in the process.

Notify IRS of changes to bylaws if exemption has been granted.

Federal tax exempt status is available to a not-for-profit Corporation under a variety of federal bases pursuant to (IRC) 26 USCS § 501(a). If the corporation amending its bylaws has been granted such a tax exemption, notify the IRS of changes to the bylaws. IRS regulations require that a tax-exempt organization immediately notify the local IRS district director whenever a change is made to the character, operations or purpose for which it was originally created. Reg. 1.6033-2(i). This rule applies even if the organization is not required to file an annual information return (the Form 990).

SET UP FOR SUCCESS RIGHT FROM THE START — STRATEGIES FOR PREPARING NOT-FOR PROFIT CERTIFICATE OF INCORPORATION

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INSIGHT

Not-For-Profit Corp. Law § 402 sets forth the requirements for the contents of the Certificate of Incorporation (the "Certificate") which is filed with the Department of State (the "Department") to formally create a not-for-profit corporation. The practitioner should carefully consider the contents of the Certificate before filing it with the Department to get the entity started off on the right foot. Specifically, counsel should ensure that any contemplated powers are included in the Certificate, carefully draft the statement of purpose, avoid certain buzz words, and consider limiting internal governance provisions.

ANALYSIS

Include certain powers in Certificate if they are contemplated.

Certain powers must be included in the Certificate if they are going to be granted to the corporation. For example, if the management of the not-for-profit corporation is vested in individuals other than the Board of Directors (see Not-For-Profit Corp. Law § 701), this power must be included in the Certificate. Similar requirements exist for the following powers: if members are required to make capital contributions other than the payment of dues (Not-For-Profit Corp. Law § 502); if the corporation can accept subventions (Not-For-Profit Corp. Law § 505); or if written consent of less than all members is permitted for certain types of corporate action (Not-For-Profit Corp. Law § 614).

Consider adding certain permissive powers to Certificate.

The Not-For-Profit Corporation Law permits, but does not require, the inclusion of certain provisions in the Certificate. For example, Not-For-Profit Corp. Law § 709(a) permits a corporation to specify that the proportion of directors or the proportion of votes of directors that shall constitute a quorum or be necessary for the transaction of business or of any specified item of business shall be greater than the proportion prescribed by statute. The Certificate may also restrict the taking of action by the Board of Directors without a meeting and by written consent (Not-For-Profit Corp. Law § 708(b)) or permit directors to participate in meetings via telephone conference (Not-For-Profit Corp. Law § 708(c)). If these actions are contemplated, the authority may be granted in the Certificate.

Pay particularly close attention to "purposes" section of Certificate.

The Certificate must include a statement of the purpose for which the corporation has been formed. Not-For-Profit Corp. Law § 402(a)(2). The practitioner should exercise caution when drafting the purposes clause. The purposes clause must

be broad enough to cover not only the acts the proposed directors envision at the corporation's infancy, but also those acts the corporation may need to take as the organization matures and builds up steam. Failure to stay within the stated purposes of the entity can later create a liability for the entity and its directors, officers and members. This can easily occur if the purposes clause is narrowly constructed. It is possible to broaden the purposes clause at a later time by amending the Certificate. See Not-For-Profit Corp. Law § 802. The larger the organization, however, the more difficult it becomes to make sweeping changes to the fundamental structure of the organization, such as changing its charter. Also, pursuant to Not-For-Profit Corp. Law § 804, amendments to Certificates which add, change or eliminate a purpose, power or provision the inclusion of which in an initial Certificate require approval or consent from a governmental entity will require such approval or consent to be obtained. Also, certificates of amendments of charitable corporations which change, eliminate or add a power or purpose require approval of either the attorney general or a justice of the supreme court. Not-For-Profit Corp. Law § 804.

Avoid certain buzz words when drafting Certificate.

Any reference to certain buzz words will typically trigger a requirement for pre-approval or consent from a state agency prior to filing the Certificate. For example, Education Department consent may be required if the Certificate is drafted using the terms "education," "research," or "school." Private foundations seeking not-for-profit status should be sure to include a disclaimer of Not-For-Profit Corp. Law § 404 activities that necessitate agency approval as well as the disclaimers required in Not-For-Profit Corp. Law § 406. Pre-approval requirements can delay the process significantly, particularly if the agency requires revisions to the proposed Certificate (that will in turn require internal approvals as well). If state agency consent is necessary, counsel should consider reserving the chosen name for the entity. Not-For-Profit Corp. Law § 303. A relatively small fee buys 60 days and may be well worth the investment if the approval process is stalled at any point and the name of the entity is important to the client.

It may be advisable to limit internal governance provisions in Certificate.

The certificate of incorporation may set forth any provision for the regulation of the internal affairs of the corporation that is consistent with the Not-For-Profit Corp. Law or any other New York law. Although it is permissible to add provisions relating to internal governance to the Certificate under Not-For-Profit Corp. Law § 402(c), it may be more advisable to add those types of provisions to the bylaws. The dynamics of an organization change over time, and changes to operating procedures are inevitable. Changes to the Certificate require governmental filing and approval — at minimum, the Department's. Changes to the bylaws, however, require only proposal by the Board of Directors and vote of the membership — a completely transparent and internal process that is relatively painless unless the organization has grown exponentially. See Not-For-Profit Corp. Law § 802.

When adding internal governance provisions to the Certificate or the bylaws, ensure that those provisions are consistent with the Not-For-Profit Corp. Law. Inconsistencies can lead a court to stop the corporation in its tracks. *See Sealey v. Amer. Socy. of Hypertension, Inc.*, 26 A.D.3d 254, 810 N.Y.S.2d 48 (1st Dep't 2006).

Notes to Decisions

Analysis

1. Generally
2. Under former Membership Corporations Law § 10

1. Generally

If nonprofit hospital seeking some special advantage separately incorporates for such advantage, separate corporation cannot thereafter be classified as "voluntary nonprofit hospital corporation" for purpose of seeking relief from imposition of mortgage tax. St. Joseph's Health Center Properties, Inc. v State Tax Com., 55 A.D.2d 484, 391 N.Y.S.2d 16, 1977 N.Y. App. Div. LEXIS 10006 (N.Y. App. Div. 3d Dep't), app. denied, 41 N.Y.2d 804, 1977 N.Y. LEXIS 3039 (N.Y. 1977).

Although a temple's certificate of incorporation failed to fully comport with N.Y. Relig. Corp. Law § 180, summary judgment for defendants for lack of standing was improper because the certificate was, in effect, a hybrid of the relevant criteria of both the Religious Corporations Law and the Not-For-Profit Corporation Law regarding corporation formation and the temple was a "de facto" religious corporation; the temple was intended to be a religious corporation and, in fact, carried on under the assumption that it was a religious corporation, was a place of worship and did not receive any money in the form of stock or otherwise, and regularly solicited and received donations in the donation boxes. Further, there were unresolved fact issues as to whether the individual plaintiffs constituted the temple's validly appointed board of trustees. Temple-Ashram v Satyanandji, 84 A.D.3d 1158, 923 N.Y.S.2d 664, 2011 N.Y. App. Div. LEXIS 4327 (N.Y. App. Div. 2d Dep't 2011).

Trial court properly granted a petition for judicial dissolution of a fire department (the FD) because its members presented affidavits or other competent evidence in support of their request to add two additional members of the FD as petitioners, a town and the Attorney General were necessary parties, the court's determination that the FD was no longer able to carry out the purpose or purposes for which it was formed was based on a fair interpretation of the evidence, the court properly considered the "paramount" issue of the benefit of dissolution to the members of the FD, and its determination that dissolution would benefit the members was supported by the evidence. Matter of Inzer v West Brighton Fire Dept., Inc., 173 A.D.3d 1826, 105 N.Y.S.3d 655, 2019 N.Y. App. Div. LEXIS 5256 (N.Y. App. Div. 4th Dep't), app. denied, reh'g denied, 175 A.D.3d 1852, 107 N.Y.S.3d 740, 2019 N.Y. App. Div. LEXIS 6929 (N.Y. App. Div. 4th Dep't 2019), app. denied, 35 N.Y.3d 903, 148 N.E.3d 524, 125 N.Y.S.3d 60, 2020 N.Y. LEXIS 826 (N.Y. 2020).

Application for certificate of incorporation pursuant to Not For Profit Corporation L § 402 was refused organization which had as its purpose the advising of students, parents, and the general public as to means of improving the school system and where the proposed name of the organization implied professional legal advice which would not in fact be available. In re Application of Queens Lay Advocate Service, Inc., 71 Misc. 2d 33, 335 N.Y.S.2d 583, 1972 N.Y. Misc. LEXIS 1591 (N.Y. Sup. Ct. 1972).

Under Sections 10-1000 et seq. of the Village Law, a village fire department is a corporation consisting of members of all the fire, hose, protective and hook and ladder companies of a village; it is administered by a board of fire commissioners or, where no board of fire commissioners has been appointed, by the village board of trustees and the council of the fire department. Fire companies in a village are associations or corporations, which must operate in accordance with their certificates of incorporation, bylaws, and statutes; and, although fire companies are separate and distinct from the village, the statutes do permit village authorities to exercise a certain degree of control over their organization, incorporation, governance, and membership, including residency for membership. A fire company must consent to a contract for the provision of fire protection outside the village and the fire chief of the village fire department cannot consent on behalf of members of the company. 1990 Op St Compt 90-19.

2. Under former Membership Corporations Law § 10

A certificate of incorporation, as provided by this section, contains no reference to the number of memberships or the capital of the corporation and creditors are not put upon notice as to either. Keeler v New York Hide Exchange, Inc., 231 A.D. 450, 247 N.Y.S. 482, 1931 N.Y. App. Div. LEXIS 16073 (N.Y. App. Div. 1931).

The fact that none of the corporation papers on file contained a statement that the hospital was incorporated as a "charitable corporation" did not negate the actuality that the hospital was a charitable institution within the purport of § 189 of the Lien Law. The court pointed out there was no general charitable corporation statute in New York, and that the law contemplated,

with respect to hospitals, that charitable pursuits may be pursued by an entity functioning under the Membership Corporation Law. Gonzalez v New York City Transit Authority, 27 A.D.2d 744, 277 N.Y.S.2d 527, 1967 N.Y. App. Div. LEXIS 4816 (N.Y. App. Div. 2d Dep't 1967).

A proposed certificate of incorporation was fatally defective in that it omitted to state the county in which the proposed corporation's office was to be located. In re Daughters of Bilitis, Inc., 52 Misc. 2d 1075, 277 N.Y.S.2d 709, 1967 N.Y. Misc. LEXIS 1747 (N.Y. Sup. Ct. 1967).

Agency Opinions

Analysis

1. Generally
2. Under former Membership Corporations Law § 10

1. Generally

The Camillus Volunteer Fire Department may, without public bidding, purchase an ambulance with its own funds and then donate the ambulance to the village. But, any purchase made with village funds must meet the requirements of public bidding. 1979 Op St Compt No. 79–666.

Certificate of incorporation for museum formed under CLS N-PCL § 201(b) should be reviewed to determine purpose or purposes for which it was organized, and if one of purposes is charitable or educational, exception provided under CLS Ins § 3205(b)(3) would apply. NY Ins. Dep't Gen. Counsel Op. No. 03-08-13, 2003 240.

2. Under former Membership Corporations Law § 10

A membership corporation may not include in its charter purposes power to act as a trustee. 1936 N.Y. Op. Att'y Gen. No. 206.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: White, New York Business Entities ¶ N402.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business & Commercial § 8.02. Corporate Formation.

New York Practice Guide: Business & Commercial § 8.07. Amending or Changing the Certificate of Incorporation.

New York Practice Guide: Business & Commercial § 8.07A. Restating Certificate of Incorporation.

New York Practice Guide: Business & Commercial § 8.07B. Certificate of Change.

Matthew Bender's New York Checklists: Checklist for Forming Not-For-Profit Corporation LexisNexis Answer-Guide New York Business Entities § 9.02.

Forms: White, New York Business Entities Form N402:1. Certificate of Incorporation.

White, New York Business Entities Form N402:2. Affidavit of Authorization of Incorporation of Unincorporated Association.

White, New York Business Entities Form N402:3. Provision for Limited Duration.

White, New York Business Entities Form N402:4. Provision Permitting Action by Board of Directors without Meeting.

White, New York Business Entities Form N402:5. Provision Permitting Action By Committee without Meeting.

White, New York Business Entities Form N402:6. Clauses Recommended if Corporation Seeks Tax Exempt Status.

§ 404. Approvals, notices and consents

(a) Every certificate of incorporation which includes among its purposes the formation of a trade or business association shall have endorsed thereon or annexed thereto the consent of the attorney-general.

(b) (1) Every certificate of incorporation which includes among its purposes the care of destitute, delinquent, abandoned, neglected or dependent children; the establishment or operation of any adult care facility, or the establishment or operation of a residential program for victims of domestic violence as defined in subdivision four of section four hundred fifty-nine-a of the social services law, or the placing-out or boarding-out of children or a home or shelter for unmarried mothers, excepting the establishment or maintenance of a hospital or facility providing health-related services as those terms are defined in article twenty-eight of the public health law and a facility for which an operating certificate is required by articles sixteen, nineteen, twenty-two and thirty-one of the mental hygiene law; or the solicitation of contributions for any such purpose or purposes, shall have endorsed thereon or annexed thereto the approval of the commissioner of the office of children and family services or with respect to any adult care facility, the commissioner of health.

(2) A corporation whose statement of purposes specifically includes the establishment or operation of a child day care center, as that term is defined in section three hundred ninety of the social services law, shall mail a certified copy of the certificate of incorporation, each amendment thereto, and any certificate of merger, consolidation or dissolution involving such corporation to the office of children and family services within thirty days after receipt of confirmation of the filing of such certificate, amendment, merger, consolidation or dissolution with the department of state. This requirement shall also apply to any foreign corporation filing an application for authority under section thirteen hundred four of this chapter, any amendments thereto, and any surrender of authority or termination of authority in this state of such corporation.

(c) Every certificate of incorporation which includes among the purposes of the corporation, the establishment, maintenance and operation of a hospital service or a health service or a medical expense indemnity plan or a dental expense indemnity plan as permitted in article forty-three of the insurance law, shall have endorsed thereon or annexed thereto the approval of the superintendent of financial services and the commissioner of health.

(d) Every corporation whose certificate of incorporation includes among its purposes the operation of a school; a college, university or other entity providing post secondary education; a library; or a museum or historical society shall have endorsed thereon or annexed thereto the approval of the commissioner of education, or in the case of a college or a university, the written authorization of the Regents of the university of the state of New York. Any other corporation the certificate of incorporation of which includes a purpose for which a corporation might be chartered by the regents of the university of the State of New York shall mail a certified copy of the certificate of incorporation to the commissioner of education within thirty days after receipt of confirmation of filing.

(e) Every certificate of incorporation of a cemetery corporation, except those within the exclusionary provisions of section 1503 (Cemetery corporations) shall have endorsed thereon or annexed thereto the approval of the cemetery board.

(f) Every certificate of incorporation of a fire corporation shall have endorsed thereon or annexed thereto the approval, signed and acknowledged, of the authorities of each city, village, town or fire district in which the corporation proposes to act. Such authorities shall be: in a city, the mayor; in a village, a majority of the trustees; in a town, a majority of the members of the town board; in a fire district, a majority of the fire commissioners. The members of the town board of a town, or the trustees of a village, shall not consent to the formation of a fire corporation as hereinbefore provided, until such board shall have held a public hearing on the question of whether the fire company should be incorporated. The notice shall be published at least once in each week for two successive weeks in the official newspaper published in the county in which such fire corporation intends to locate, prior to the regular meeting of such board designated by the chairman of the board to consider the matter. Such notice shall contain the name of the proposed company, the names of the persons signing the certificate of incorporation, a brief description of the territory to be protected by the fire company and that all persons interested shall be heard. If no newspaper is published in the county the publication of the notice shall be in a newspaper in an adjoining county selected by the chairman of such board. All expenses in connection with such publication shall be borne by the parties making the application and paid before the hearing.

(g) Every certificate of incorporation of a corporation for prevention of cruelty to animals shall have endorsed thereon or annexed thereto the approval of the American Society for the Prevention of Cruelty to Animals, or, if such approval be withheld thirty days after application therefor, a certified copy of an order of a justice of the supreme court of the judicial district in which the office of the corporation is to be located, dispensing with such approval, granted upon eight days' notice to such society.

(h) Every certificate of incorporation of a Young Men's Christian Association shall have endorsed thereon or annexed thereto the approval of the chairman of the national board of Young Men's Christian Associations.

(i) Every certificate of incorporation which indicates that the proposed corporation is to solicit funds for or otherwise benefit the armed forces of the United States or of any foreign country, or their auxiliaries, or of this or any other state or any territory, shall have endorsed thereon or annexed thereto the approval of the adjutant general. The department of state, in conjunction with the division of military and naval affairs, shall establish and maintain on the department's website a public listing of all approved not-for-profit corporations soliciting funds for or otherwise benefiting the armed forces of the United States or of any foreign country, or their auxiliaries, or of this or any other state or territory.

(j) Every certificate of incorporation which includes among its purposes the organization of wage-earners for their mutual betterment, protection and advancement; the regulation of hours of labor, working conditions, or wages; or the performance, rendition or sale of services as labor consultant, labor-management advisor, negotiator, arbitrator, or specialist; and every certificate of incorporation in which the name of the proposed corporation includes "union", "labor", "council" or "industrial organization", or any abbreviation or derivative thereof in a context that indicates or implies that the corporation is formed for any of the above purposes, shall have endorsed thereon or annexed thereto the approval of the industrial board of appeals. The board shall make such inquiry into the purposes of the proposed corporation as it shall deem advisable and shall order a hearing if necessary to determine whether or not such purposes are in all respects consistent with public policy and the labor law. Notice of the time and place of hearing shall be given to the applicants and such other persons as the board may determine.

(k) Every certificate of incorporation for a corporation which has as its exclusive purpose the promotion of the interests of savings bank life insurance or the promotion of the interests of member banks may, if the approval of the superintendent of financial services is endorsed thereon or annexed thereto, use as a part of the corporate name any of the words or phrases, or any abbreviation or derivative thereof, set forth in subparagraph (5) of paragraph (a) of section 301 (Corporate name; general).

(*l*) Every certificate of incorporation for a corporation which has as its exclusive purpose the creation of an association of licensed insurance agents, licensed insurance brokers, or licensed insurance underwriters and every application for authority of a foreign corporation which is an independent laboratory engaged in testing for public safety, or which has as its purpose the advancement of corporate, governmental, and institutional risk and insurance management, or which has as its exclusive purpose the creation of an association of insurers, each of which is duly licensed in this state or, if it does no business or is not licensed in this state, is duly licensed in another state or foreign jurisdiction may, if the approval of the superintendent of financial services is endorsed thereon or annexed thereto, use as a part of the corporate name any of the words or phrases, or any abbreviation or derivative thereof, set forth in subparagraph (5) of paragraph (a) of section 301 (Corporate name; general).

(m) Every certificate of incorporation in which the name of the proposed corporation includes the name of a political party shall have endorsed thereon or

annexed thereto the consent of the chairman of the county committee of such political party of the county in which the office of the corporation is to be located, except in cases where the supreme court finds that the withholding of such consent of the county chairman is unreasonable.

(n) Every certificate of incorporation in which the name of the proposed corporation includes the words "American Legion," shall have endorsed thereon or annexed thereto the approval of the Department of New York, the American Legion, duly acknowledged by its commander or adjutant.

(o) Every certificate of incorporation which includes among its corporate purposes or powers the establishment or maintenance of any hospital, as defined in article twenty-eight of the public health law, or the solicitation of contributions for any such purpose, or purposes, shall have endorsed thereon or annexed thereto the approval of the public health and health planning council.

(p) Every certificate of incorporation of a medical corporation as defined in article forty-four of the public health law and organized pursuant thereto and pursuant to this chapter, shall have endorsed thereon or annexed thereto the consent of the commissioner of health and the approval of the public health and health planning council.

(q) Every certificate of incorporation which includes among its corporate purposes or powers the establishment, or operation of a facility for which an operating certificate from the commissioner of mental health is required by article thirty-one of the mental hygiene law, or the solicitation of contributions for any such purpose, shall have endorsed thereon or annexed thereto the approval of the commissioner of mental health.

(r) Every certificate of incorporation of a health maintenance organization as defined in article forty-four of the public health law and organized pursuant thereto and pursuant to this chapter, shall have endorsed thereon or annexed thereto the consent of the commissioner of health.

(s) [Repealed]

(t) Every certificate of incorporation which includes among its purposes and powers the establishment or maintenance of a hospital or facility providing health related services, as those terms are defined in article twenty-eight of the public health law, or the solicitation of contributions for any such purpose or two or more of such purposes, shall have endorsed thereon the approval of the public health and health planning council.

(u) Every certificate of incorporation which includes among the purposes of the corporation, the establishment or operation of a substance abuse, substance dependence, alcohol abuse, alcoholism, or chemical abuse or dependence program, or the solicitation of contributions for any such purpose, shall have endorsed thereon or annexed thereto the consent of the commissioner of the office of alcoholism and substance abuse services to its filing by the department of state.

(v) Every certificate of incorporation which includes among the purposes of the corporation, the establishment, maintenance and operation of a nonprofit property/casualty insurance company, pursuant to article sixty-seven of the insurance law, shall have endorsed thereon or annexed thereto the approval of the superintendent of financial services.

HISTORY:

Add, L 1969, ch 1066, § 1; amd, L 1970, ch 617, §§ 13, 14; amd, L 1970, ch 847, § 14; L 1971, ch 1058, § 9; L 1971, ch 1139, § 12; L 1972, ch 961, § 4; L 1973, ch 1036, § 1; L 1974, ch 168, § 1; L 1974, ch 527, § 1; L 1975, ch 498, § 1; L 1976, ch 72, § 10; L 1976, ch 436, §§ 5, 6; L 1976, ch 938, § 1; L 1977, ch 450, § 5; L 1977, ch 669, §§ 9, 11, 12; L 1978, ch 162, § 1; L 1978, ch 555, §§ 62, 63, eff July 24, 1978; L 1981, ch 173, § 1; L 1981, ch 601, § 13; L 1984, ch 805, § 45; L 1985, ch 99, § 2; L 1985, ch 804, § 4; L 1985, ch 856, § 5; L 1987, ch 838, § 9; L 1988, ch 141, § 7; L 1990, ch 526, § 1; L 1992, ch 17, § 1; L 1993, ch 139, § 1; L 1993, ch 201, § 3; L 1993, ch 431, § 1, eff Aug 20, 1993; L 1997, ch 468, § 1, eff Sept 25, 1997; L 1999, ch 558, § 23, eff Oct 5, 1999; L 2000, ch 598, § 6, eff Dec 20, 2000; L 2005, ch 316, § 6, eff Jan 1, 2006; L 2006, ch 58, § 4 (Part D), eff April 12, 2006; L 2010, ch 58, § 79 (Part A), eff Dec 31, 2010; L 2010, ch 198, § 2, eff July 15, 2010; L 2011, ch 62, § 104 (Part A), eff Oct 3, 2011; L 2013, ch 549, §§ 48, 49, eff July 1, 2014; L 2014, ch 23, § 10, eff July 1, 2014; L 2015, ch 358, § 3, effective September 25, 2015; L 2016, ch 134, § 1, effective July 21, 2016; L 2017, ch 405, § 2, effective January 1, 2019.

Derivation Notes: Derived from Mem Corp Law §§ 10, 11.

Revision Notes: *Source:* Gen Corp L §§ 9 and 9-a; Mem Corp L §§ 10 and 11; Soc Wel L § 35.

Changes: Revised.

Comment: This section brings together all required consents and approvals required as a condition to filing a certificate of incorporation for a not-for-profit corporation. It preserves existing law except in that the requirement of the approval of a justice of the supreme court is eliminated in the case of corporations classified as Type A under section 201.

Editor's Notes: Laws 1970, ch 617, § 11, provides as follows:

§ 11. Transfer of functions. All of the functions and powers possessed by and all the obligations and duties of the department of social services and the board of social welfare relating to approval of certificates of incorporation, which include among their corporate purposes the establishment or maintenance of any hospital, and relating to the establishment of any hospital, as defined in article twenty-eight of the public health law, are hereby transferred and assigned to, assumed by and devolved upon the department of health and the public health council respectively. To effectuate such transfer there shall also be transferred such officers and employees as are necessary, all appropriations or reappropriations, to the extent of remaining unexpended or unencumbered balances thereof, whether allocated or unallocated and whether obligated or unobligated, and all necessary books, papers, records and property. All rules, regulations, acts, determinations and decisions in force at the time of such transfer and proceedings or other business or matters undertaken or commenced by or before the department of social services or the board of social welfare relating to approval of certificates of incorporation, which include among their corporate purposes the establishment or maintenance of any hospital, and relating to the establishment of any hospital, as defined in article twenty-eight of the public health law, and pending at the time of such transfer, shall continue in force and effect until duly modified, abrogated or completed by the department of health or the public health council. References to the department of social services, an office or bureau thereof, or the board of social welfare contained in laws, contracts and other documents relating to the approval of

certificates of incorporation, which include among their corporate purposes the establishment or maintenance of any hospital, and relating to the establishment of any hospital, as defined in article twenty-eight of the public health law, shall be deemed to be references to the public health council or to the department of health or to the corresponding office, bureau or unit of such department, as the case may be.

Laws, 1971, ch 1139, § 1, provides as follows:

Section 1. The legislature hereby finds and declares that:

Improving the present method of delivering health care services is a matter of vital state concern. Without improving the present system, increased health insurance and other benefits will continue to drive up the cost of medical care and overload the delivery system.

Prepaid comprehensive health care plans, wherein the consumer receives comprehensive health services for a periodic charge and the providers are paid on a fixed per capita basis, represent a promising system for delivering a full-range of health care services at a reasonable cost.

Accordingly, it shall be the policy of this state to:

(a) expand the health care options available to the consumer and ensure that each New Yorker will have true freedom of choice in choosing that plan which is most compatible with his needs;.

(b) encourage the formation by physicians of non-profit medical corporations and the operation of such groups in connection with prepaid comprehensive health care plans by.

—granting preferred tax status to medical corporations participating in such plans;.

—making medical and hospital corporations eligible for seed money loans to cover expenses incurred in organizing such a plan;.

—making the capital facilities and equipment of medical corporations eligible for financing by the state housing finance agency under the hospital and nursing home loan program;.

—empowering health service corporations, governed by article nine-C of the insurance law, to organize and manage prepaid comprehensive health care plans;.

—directing the superintendent of insurance to modify insurance requirements applicable to health service corporations to enable them to use their assets to organize and manage prepaid comprehensive health care plans.

Laws 1985, ch 804, § 6, provides as follows:

§ 6. This act shall take effect on the first day of August, nineteen hundred eighty-five and shall remain in full force and effect until the thirtieth day of June, nineteen hundred eighty-nine. Registrations accepted and certificates and permits issued by programs funded pursuant to section three hundred ninety-a of the social services law prior to the thirtieth day of June, nineteen hundred eighty-nine shall continue in full force and effect for the period applicable to such registrations or specified in such certificates and permits and shall not automatically terminate as of the date of conclusion of the project established by this act. (Amd, L 1989, ch 20, § 1, eff March 31, 1989.).

Laws 1997, ch 468, § 2, eff Sept 25, 1997, provides as follows:

§ 2. Nothwithstanding any other provision of law, this act shall not require the amendment of any certificate of incorporation for which consent had been obtained pursuant to paragraph (s) of section 404 of the not-for-profit corporation law, and any such corporate purposes, powers, or provisions shall continue until duly amended or changed pursuant to law. Consent of the secretary of state shall not be required to effect such amendment or change.

Laws 1999, ch 558, §§ 55–57, eff Oct 5, 1999, provide as follows:

§ 55. Existing rules, policies, and regulations for the reimbursement of alcohol, substance abuse, or chemical dependence costs under the medical assistance program shall remain unchanged until an affirmative action is taken by the department of health, in consultation with the office of alcoholism and substance abuse services, and approved by the division of budget.

Laws 2010, ch 58, § 86 (f) (Part A), eff July 2, 2010, deemed eff on and after April 1, 2010, provides as follows:

§ 86. This act shall take effect immediately and shall be deemed to have been in full force and effect on and after April 1, 2010, provided however that:

(f) sections forty-three through eighty-five of this act shall take effect December 1, 2010, provided however, that the public health and health planning council shall be authorized to complete action on any application, regulation, complaint or other matter under consideration by the public health council or state hospital review and planning council on such effective date; and provided further that any final approval granted or regulation adopted by the public health council or state hospital review and planning council shall remain in effect according to its terms after the effective date of this act, unless otherwise lawfully annulled, revoked, modified, amended, limited or suspended.

Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

Laws 2017, ch 405, § 3, eff Jan 1, 2019, provides:

§ 3. This act shall take effect January 1, 2019 (Amd, L 2018, ch 24, § 1, eff April 18, 2018).

Amendment Notes The 2015 amendment by ch 358, § 3, in the first sentence of (b)(2) and in the second sentence of (d), substituted "mail" for "provide" and added "receipt of confirmation of" and in (d), added "of the university of the state of New York" and substituted "business days after the corporation receives confirmation from the department of state that the certificate has been accepted for" for "days after."

The 2016 amendment by ch 134, § 1, substituted "adjutant general" for "chief of staff" in (i).

The 2017 amendment by ch 405, § 2, added the second sentence of (i).

PRACTICE INSIGHTS:

SET UP FOR SUCCESS RIGHT FROM THE START — STRATEGIES FOR PREPARING NOT-FOR PROFIT CERTIFICATE OF INCORPORATION

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INSIGHT

Not-For-Profit Corp. Law § 402 sets forth the requirements for the contents of the Certificate of Incorporation (the "Certificate") which is filed with the Department of State (the "Department") to formally create a not-for-profit corporation. The practitioner should carefully consider the contents of the Certificate before filing it with the Department to get the entity started off on the right foot. Specifically, counsel should ensure that any contemplated powers are included in the Certificate, carefully draft the statement of purpose, avoid certain buzz words, and consider limiting internal governance provisions.

ANALYSIS

Include certain powers in Certificate if they are contemplated.

Certain powers must be included in the Certificate if they are going to be granted to the corporation. For example, if the management of the not-for-profit corporation is vested in individuals other than the Board of Directors (see Not-For-Profit Corp. Law § 701), this power must be included in the Certificate. Similar requirements exist for the following powers: if members are required to make capital contributions other than the payment of dues (Not-For-Profit Corp. Law § 502); if the corporation can accept subventions (Not-For-Profit Corp. Law § 505); or if written consent of less than all members is permitted for certain types of corporate action (Not-For-Profit Corp. Law § 614).

Consider adding certain permissive powers to Certificate.

The Not-For-Profit Corporation Law permits, but does not require, the inclusion of certain provisions in the Certificate.

For example, Not-For-Profit Corp. Law § 709(a) permits a corporation to specify that the proportion of directors or the proportion of votes of directors that shall constitute a quorum or be necessary for the transaction of business or of any specified item of business shall be greater than the proportion prescribed by statute. The Certificate may also restrict the taking of action by the Board of Directors without a meeting and by written consent (Not-For-Profit Corp. Law § 708(b)) or permit directors to participate in meetings via telephone conference (Not-For-Profit Corp. Law § 708(c)). If these actions are contemplated, the authority may be granted in the Certificate.

Pay particularly close attention to "purposes" section of Certificate.

The Certificate must include a statement of the purpose for which the corporation has been formed. Not-For-Profit Corp. Law § 402(a)(2). The practitioner should exercise caution when drafting the purposes clause. The purposes clause must be broad enough to cover not only the acts the proposed directors envision at the corporation's infancy, but also those acts the corporation may need to take as the organization matures and builds up steam. Failure to stay within the stated purposes of the entity can later create a liability for the entity and its directors, officers and members. This can easily occur if the purposes clause is narrowly constructed. It is possible to broaden the purposes clause at a later time by amending the Certificate. See Not-For-Profit Corp. Law § 802. The larger the organization, however, the more difficult it becomes to make sweeping changes to the fundamental structure of the organization, such as changing its charter. Also, pursuant to Not-For-Profit Corp. Law § 804, amendments to Certificates which add, change or eliminate a purpose, power or provision the inclusion of which in an initial Certificate require approval or consent from a governmental entity will require such approval or consent to be obtained. Also, certificates of amendments of charitable corporations which change, eliminate or add a power or purpose require approval of either the attorney general or a justice of the supreme court. Not-For-Profit Corp. Law § 804.

Avoid certain buzz words when drafting Certificate.

Any reference to certain buzz words will typically trigger a requirement for pre-approval or consent from a state agency prior to filing the Certificate. For example, Education Department consent may be required if the Certificate is drafted using the terms "education," "research," or "school." Private foundations seeking not-for-profit status should be sure to include a disclaimer of Not-For-Profit Corp. Law § 404 activities that necessitate agency approval as well as the disclaimers required in Not-For-Profit Corp. Law § 406. Pre-approval requirements can delay the process significantly, particularly if the agency requires revisions to the proposed Certificate (that will in turn require internal approvals as well). If state agency consent is necessary, counsel should consider reserving the chosen name for the entity. Not-For-Profit Corp. Law § 303. A relatively small fee buys 60 days and may be well worth the investment if the approval process is stalled at any point and the name of the entity is important to the client.

It may be advisable to limit internal governance provisions in Certificate.

The certificate of incorporation may set forth any provision for the regulation of the internal affairs of the corporation that is consistent with the Not-For-Profit Corp. Law or any other New York law. Although it is permissible to add provisions relating to internal governance to the Certificate under Not-For-Profit Corp. Law § 402(c), it may be more advisable to add those types of provisions to the bylaws. The dynamics of an organization change over time, and changes to operating procedures are inevitable. Changes to the Certificate require governmental filing and approval — at minimum, the Department's. Changes to the bylaws, however, require only proposal by the Board of Directors and vote of the membership — a completely transparent and internal process that is relatively painless unless the organization has grown exponentially. See Not-For-Profit Corp. Law § 802.

When adding internal governance provisions to the Certificate or the bylaws, ensure that those provisions are consistent with the Not-For-Profit Corp. Law. Inconsistencies can lead a court to stop the corporation in its tracks. *See Sealey v. Amer. Socy. of Hypertension, Inc.*, 26 A.D.3d 254, 810 N.Y.S.2d 48 (1st Dep't 2006).

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1. Generally

The name "Gay Activists Alliance" was not inappropriate. Owles v Lomenzo, 38 A.D.2d 981, 329 N.Y.S.2d 181 (N.Y. App. Div. 3d Dep't 1972), aff'd, 31 N.Y.2d 965, 341 N.Y.S.2d 108, 293 N.E.2d 255, 1973 N.Y. LEXIS 1527 (N.Y. 1973).

In a proceeding to review determinations of a town board of appeals granting a special use permit for a private boarding school to a not-for-profit corporation and its agent, the board erred in granting a permit to the agent where he was merely the nominal head of the school and where it was undisputed that the corporation did not have authorization as required by law to operate the school. McLain St. Area Ass'n v Bd. of Appeals, 82 A.D.2d 834, 439 N.Y.S.2d 668, 1981 N.Y. App. Div. LEXIS 14506 (N.Y. App. Div. 2d Dep't 1981).

Commissioner of Education properly determined that foreign non-profit corporation had no authority to operate a private school in New York under N-PCL §§ 404, subd d, 1301, and 1304, subd c where said school, although in existence prior to passage of N-PCL, had never been authorized to do business here within the meaning of N-PCL § 1302. Green Valley School, Inc. v Nyquist, 72 Misc. 2d 889, 340 N.Y.S.2d 234, 1972 N.Y. Misc. LEXIS 1394 (N.Y. Sup. Ct. 1972).

An application for approval of a certificate of incorporation pursuant to the Not-For-Profit Corporation Law, setting forth the purposes of the corporation as being "to print, mail, disseminate, Roman Catholic information . . . to conduct prayer vigils, and with divine guidance keep the knowledge of God and His plan for peace and security in the hearts of all mankind", brings the proposed corporation within the definition of an incorporated church making it subject to the provisions of the Religious Corporations Law as well as the Not-For-Profit Corporation Law, and, as such, the application must be denied for failure to conform to the specific provisions of the Religious Corporations Law which govern the incorporation of groups associated with the Roman Catholic Church, including the requirement of an execution and acknowledgment by certain specific officials of that church. In re Lueken (Our Lady of Roses), 97 Misc. 2d 201, 410 N.Y.S.2d 793, 1978 N.Y. Misc. LEXIS 2770 (N.Y. Sup. Ct. 1978).

Although the Attorney-General failed to appear on two occasions when the court was to consider an amendment to the certificate of incorporation of petitioner not-for-profit corporation, petitioner may not compel the Attorney-General to respond to petitioner's application by a CPLR article 78 proceeding in the nature of mandamus since mandamus does not lie in the absence of a showing that the Attorney-General failed to perform a duty enjoined upon him by law and there is no statute or other requirement obligating the Attorney-General to furnish a waiver or consent in connection with the approval of an amendment to the certificate of incorporation of a not-for-profit corporation; the applicable statutes (Not-For-Profit Corporation Law, § 804, subd [a]; § 404, subd [a]) require only that the Attorney-General be given notice that a not-for-profit corporation is applying to an appropriate Justice to amend its certificate of incorporation, and the failure of the Attorney-General to appear after proper service of the notice should result in the court's approval of the application in the absence of an apparent defect in the certificate. Electrical Industry Ass'n v State, 102 Misc. 2d 494, 423 N.Y.S.2d 576, 1979 N.Y. Misc. LEXIS 2898 (N.Y. Sup. Ct. 1979).

Judicial approval of certificate of incorporation for proposed type B not-for-profit corporation would be withheld as unnecessary since proposed corporation was type A not-for-profit corporation, for which no judicial approval was necessary, where proposed corporation did not have charitable purpose but was intended for specific benefit of 3 named persons, and no provision was made for using any portion of funds raised for benefit of public or any class of public. In re Beach, 141 Misc. 2d 735, 534 N.Y.S.2d 341, 1988 N.Y. Misc. LEXIS 670 (N.Y. Sup. Ct. 1988).

2. Under former Membership Corporations Law § 10

Under former § 41 from which this section is derived the approval of a justice of the supreme court of a certificate of incorporation was an indispensable requisite to the creation of a membership corporation. People v Smith, 200 N.Y.S. 863, 121 Misc. 338, 1923 N.Y. Misc. LEXIS 1166 (N.Y. Sup. Ct. 1923).

3. —Court approval of certificate of incorporation

Public policy of the state is not violated where the purposes of a proposed corporation are lawful, and the grant of a charter should not be granted or denied on the basis of the personal notion of the justice of what is contrary to public policy or injurious to the community. Association for Preservation of Freedom of Choice, Inc. v Shapiro, 9 N.Y.2d 376, 214 N.Y.S.2d 388, 174 N.E.2d 487, 1961 N.Y. LEXIS 1364 (N.Y. 1961), reh'g denied, 11 N.Y.2d 662, 225 N.Y.S.2d 740, 180 N.E.2d 898, 1962 N.Y. LEXIS 1478 (N.Y. 1962).

This section, stripped of technical requirements and certain exceptions, authorizes five or more persons to become a membership corporation "for any lawful purpose," but requires that the certificate of incorporation be approved by a justice of the Supreme Court, thus setting up practically no standards to guide exercise of judicial power; and it would seem logical to assume that the function of judicial scrutiny as intended by the Legislature was merely to ascertain whether the proposed incorporation was for a lawful purpose. Association for Preservation of Freedom of Choice, Inc. v Shapiro, 9 N.Y.2d 376, 214 N.Y.S.2d 388, 174 N.E.2d 487, 1961 N.Y. LEXIS 1364 (N.Y. 1961), reh'g denied, 11 N.Y.2d 662, 225 N.Y.S.2d 740, 180 N.E.2d 898, 1962 N.Y. LEXIS 1478 (N.Y. 1962).

There is no basis for the view that this section authorizes a Supreme Court justice, for whose approval a membership corporation certificate is submitted, to grant or deny the application on his personal notion of what is contrary to public policy or injurious to the community, the basic test of whether the application is entitled to judicial approval being whether the stated purposes of the corporation are lawful. Association for Preservation of Freedom of Choice, Inc. v Shapiro, 9 N.Y.2d 376, 214 N.Y.S.2d 388, 174 N.E.2d 487, 1961 N.Y. LEXIS 1364 (N.Y. 1961), reh'g denied, 11 N.Y.2d 662, 225 N.Y.S.2d 740, 180 N.E.2d 898, 1962 N.Y. LEXIS 1478 (N.Y. 1962).

The fact that the aims of a proposed membership corporation are lawful is not alone sufficient for judicial sanction as a matter of course. In re Boy Explorers of America, Inc., 21 Misc. 2d 114, 67 N.Y.S.2d 108, 1946 N.Y. Misc. LEXIS 1747 (N.Y. Sup. Ct. 1946).

Mere legality of aims is not sufficient for judicial sanction of a certificate of incorporation as a matter of course. Application of United Cadet Ass'n, 13 Misc. 2d 957, 178 N.Y.S.2d 479, 1958 N.Y. Misc. LEXIS 2730 (N.Y. Sup. Ct. 1958).

4. — —As exercise of judicial function

The approval of a Supreme Court Justice as required by this section does not involve simply the performance of a ministerial act but the exercise of a judicial function to decide whether the special privilege of a corporate charter should be granted under all the circumstances surrounding the application. Hence, an application for approval of a proposed certificate of incorporation was denied an organization seeking the establishment of a hospital in Israel where the proposed corporation would merely lead to confusion and misunderstanding and tend greatly to impair the work now being carried on by long established and well-known agencies. Application of United Winograder Medical Center, 21 Misc. 2d 27, 125 N.Y.S.2d 279, 21 Misc. 27, 1953 N.Y. Misc. LEXIS 1407 (N.Y. Sup. Ct. 1953).

The approval of a justice of the supreme court as required by this section does not simply involve the performance of a ministerial act, but the exercise of a judicial function to decide whether the special privilege of a corporate charter should be granted or conferred under all the circumstances surrounding the application. In re Boy Explorers of America, Inc., 21 Misc. 2d 114, 67 N.Y.S.2d 108, 1946 N.Y. Misc. LEXIS 1747 (N.Y. Sup. Ct. 1946).

The approval by a justice of the Supreme Court required by this section does not involve simply the performance of a ministerial act, but the exercise of a judicial function, to decide whether the special franchise of a corporate charter should be granted or conferred under all the circumstances surrounding the application. Application of Council of Orthodox Rabbis, Inc., 10 Misc. 2d 62, 171 N.Y.S.2d 664, 1958 N.Y. Misc. LEXIS 3852 (N.Y. Sup. Ct. 1958).

5. — —Discretion of court

A justice before approving an application for incorporation as a membership corporation as required by this section must draw freely on his own knowledge and experience as well as whatever sources of information may be available to him in determining whether the proper exercise of judicial discretion dictates approval or disapproval in any particular case. In re Boy Explorers of America, Inc., 21 Misc. 2d 114, 67 N.Y.S.2d 108, 1946 N.Y. Misc. LEXIS 1747 (N.Y. Sup. Ct. 1946).

By reason of the ex parte nature of the application for approval of a certificate of incorporation, it is incumbent upon a justice considering it to draw freely upon his own knowledge and experience as well as other sources of information available to assist him in proper exercise of his discretion. Application of United Cadet Ass'n, 13 Misc. 2d 957, 178 N.Y.S.2d 479, 1958 N.Y. Misc. LEXIS 2730 (N.Y. Sup. Ct. 1958).

The duty imposed upon the Justice of the Supreme Court to whom a certificate for leave to file articles of incorporation is presented is not clerical or ministerial, but requires exercise of judgment and discretion, the questions to be determined being whether objects of the corporation violate public policy, whether approval will permit irresponsible or unequipped citizens to operate under a corporate charter, and whether the proposed corporation will duplicate or conflict with existing corporations. In re Application of Excavating Machine Owners Ass'n, Inc., 25 Misc. 2d 419, 205 N.Y.S.2d 265, 1960 N.Y. Misc. LEXIS 2527 (N.Y. Sup. Ct. 1960).

A justice who rules on the certificate of a trade association is exercising a semi-administrative discretion as a separate and distinct step in the procedure for incorporation, and in no sense merely reviewing the decision of the Attorney General; therefore, the court is not limited to matter presented by the applicant but may consider extraneous facts, including such facts as may be presented for its consideration by the Attorney General after his own investigation has been made. In re Application of Excavating Machine Owners Ass'n, Inc., 25 Misc. 2d 419, 205 N.Y.S.2d 265, 1960 N.Y. Misc. LEXIS 2527 (N.Y. Sup. Ct. 1960).

6. — —Conclusiveness of approval

Approval of a judge is not conclusive upon the Secretary of State as to the regularity of a certificate. People ex rel. Blossom v

Nelson, 46 N.Y. 477, 46 N.Y. (N.Y.S.) 477, 1871 N.Y. LEXIS 282 (N.Y. 1871).

The consent and approbation of a Justice of the Supreme Court, required as one of the conditions precedent to right to file a certificate of incorporation as a membership corporation of the types dealt with in §§ 10 and 11 of the Membership Corporation Law, is cumulative to the other requisites of the act, but decides nothing, and is not conclusive either upon the public or the Secretary of State. In re Application of Excavating Machine Owners Ass'n, Inc., 25 Misc. 2d 419, 205 N.Y.S.2d 265, 1960 N.Y. Misc. LEXIS 2527 (N.Y. Sup. Ct. 1960).

7. — —Constitutionality of requirement

Neither § 10 of the Membership Corporation Law, nor subd. 2 of § 212 of the General Corporation Law, is unconstitutional in making an application for a certificate to do business in this state as a membership corporation subject to approval of a justice of the Supreme Court, and mandamus will not issue to compel the Secretary of State to accept and file such a certificate without the required judicial approval. Association for Preservation of Freedom of Choice, Inc. v Simon, 22 Misc. 2d 1016, 201 N.Y.S.2d 135, 1960 N.Y. Misc. LEXIS 3289 (N.Y. Sup. Ct.), app. dismissed, 8 N.Y.2d 909, 204 N.Y.S.2d 150, 168 N.E.2d 826, 1960 N.Y. LEXIS 1178 (N.Y. 1960), aff'd, 11 A.D.2d 927, 206 N.Y.S.2d 532, 1960 N.Y. App. Div. LEXIS 8210 (N.Y. App. Div. 1st Dep't 1960).

8. —Other requirements; notice to attorney general

The purpose of the 1958 amendment of this section, requiring the giving of five days' written notice of the application to the Attorney General where it relates to certain types of corporations, was to permit him to present to the court relevant facts at his disposal rather than to authorize him to make any independent ruling or determination on the application. In re Application of Excavating Machine Owners Ass'n, Inc., 25 Misc. 2d 419, 205 N.Y.S.2d 265, 1960 N.Y. Misc. LEXIS 2527 (N.Y. Sup. Ct. 1960).

9. — —Incorporation of political club

This section confers a qualified veto power on county chairman in permitting the use of the word descriptive of a political party. The policy of this section has in some cases been extended to cover certain unincorporated associations on the theory that they are de facto corporations. However, the statute does not extend to every unincorporated association which may use the descriptive word or the name of a political party. So, a temporary injunction granted against 5 unincorporated associations of Republicans which prohibited them from using the word "Republican" in their organizational name was modified by permitting the use of the word "Republican" and also to use the party emblems and the initials "G. O. P." so long as it was clear that the 5 associations were opposed to the regular organization. Mele v Ryder, 8 A.D.2d 390, 188 N.Y.S.2d 446, 1959 N.Y. App. Div. LEXIS 7775 (N.Y. App. Div. 1st Dep't 1959), app. dismissed, 7 N.Y.2d 1027, 200 N.Y.S.2d 69, 166 N.E.2d 859, 1960 N.Y. LEXIS 1423 (N.Y. 1960).

An unincorporated association formed for political purposes with offices, stationery, and the name of the club on office windows, is a de facto corporation and therefore subject to the prohibition of this section against the use of the name of a political party without the consent of the county chairman of that party. Gerlach v Good Government Republican Club, 16 Misc. 2d 1050, 123 N.Y.S.2d 902, 1953 N.Y. Misc. LEXIS 1411 (N.Y. Sup. Ct.), modified, 282 A.D. 830, 123 N.Y.S.2d 641, 1953 N.Y. App. Div. LEXIS 5050 (N.Y. App. Div. 2d Dep't 1953).

Republican county chairman could withhold consent to use of name "Metropolitan Republican Club, Inc." where the incorporators intended to appeal to all individuals. In re Application of Roosevelt, 9 Misc. 2d 205, 160 N.Y.S.2d 747, 1957 N.Y. Misc. LEXIS 3384 (N.Y. Sup. Ct.), aff'd, 3 A.D.2d 988, 163 N.Y.S.2d 403, 1957 N.Y. App. Div. LEXIS 5236 (N.Y. App. Div. 1st Dep't 1957).

Where the persons seeking to incorporate an organization to be known as the "7th Ward Democratic Club" of a particular city are, in the majority, not residents of that ward, are of undetermined residence and not even enrolled members of the party in the county, such danger of confusion exists as to warrant the county party chairman in withholding consent to incorporation of the organization. Application of Coles, 27 Misc. 2d 789, 211 N.Y.S.2d 751, 1961 N.Y. Misc. LEXIS 3310 (N.Y. Sup. Ct. 1961).

Subdivision 8 of this section recognizes the necessity of propriety of control, albeit a limited control, by the party chairman where the name of the proposed corporation includes the name of a political party, and only when the exercise of such power by the county chairman is patently unreasonable should the Supreme Court veto his withholding of consent. Application of Coles, 27 Misc. 2d 789, 211 N.Y.S.2d 751, 1961 N.Y. Misc. LEXIS 3310 (N.Y. Sup. Ct. 1961).

Secretary of state properly received certificate of incorporation of membership corporation with name containing name of political party where endorsement of county chairman was made when encumbent had resigned but still held office and certificate was approved by court before resignation of chairman took effect. Archinal v Reuss, 46 Misc. 2d 428, 260 N.Y.S.2d 78, 1965 N.Y. Misc. LEXIS 1967 (N.Y. Sup. Ct. 1965).

An affidavit attached to an application for approval of a certificate of incorporation of a political club, stating that the county chairman has refused to give his consent because the leader of the assembly district in which the proposed club is to operate objects, does not take the place of the indorsement of consent required by this section, and approval must be withheld until the county chairman is given an opportunity to be heard before the court so that there may be a determination as to whether the withholding of consent is unreasonable. In re Independent Republican Club, 58 N.Y.S.2d 162, 1945 N.Y. Misc. LEXIS 2406 (N.Y. Sup. Ct. 1945).

10. — —Incorporation of fire company

Incorporation of a fire company requires approval of a justice of the Supreme Court and consent of the Town Board after public hearing. 1964 Op St Compt No. 64–176.

11. Under former Membership Corporation Law § 11

Public hearing may not be held under this section until after expiration of 14 days from first publication of notice of such hearing. 1955 St Compt No. 55–7248.

12. —Required prior consent of various state agencies

Above statute providing for special prior consents from variety of State agencies for numerous activities affected with public interest, contains no such requirement as to solicitation of funds. Waldemar Medical Research Foundation, Inc. v Margolies, 45 Misc. 2d 887, 257 N.Y.S.2d 991, 1965 N.Y. Misc. LEXIS 2155 (N.Y. Sup. Ct. 1965), aff'd, 25 A.D.2d 444, 267 N.Y.S.2d 483, 1966 N.Y. App. Div. LEXIS 5165 (N.Y. App. Div. 2d Dep't 1966).

13. — —Commissioner of education; board of regents

The Commissioner of Education has no power to approve the incorporation of an educational organization known as the "Human Engineering Laboratory, Inc.", in view of the provisions of § 1461 of the Education Law which provides that the word "engineers" or "engineering" shall not be used in the title of any such corporation except a nonprofit group composed exclusively of professional engineers. New York State Soc. of Professional Engineers, Inc. v Education Dep't of New York, 262 A.D. 602, 31 N.Y.S.2d 305, 1941 N.Y. App. Div. LEXIS 5436 (N.Y. App. Div. 1941).

Where the Commissioner of Education has improperly approved a certificate of incorporation and the Board of Regents has refused to correct the mistake, the courts will order such correction where the refusal to act is unfair, arbitrary or capricious. New York State Soc. of Professional Engineers, Inc. v Education Dep't of New York, 262 A.D. 602, 31 N.Y.S.2d 305, 1941 N.Y. App. Div. LEXIS 5436 (N.Y. App. Div. 1941).

Under subd. 2 of this section, a certificate of incorporation for a membership corporation to establish professional standards for training and research in the field of psychoanalysis and to arrange lectures and discussions pertaining to relationship between that field and other fields of science and education clearly required the consent of the Commissioner of Education. Nat'l Psychological Ass'n for Psychoanalysis, Inc. v Allen, 14 A.D.2d 190, 217 N.Y.S.2d 893, 1961 N.Y. App. Div. LEXIS 9367 (N.Y. App. Div. 3d Dep't 1961).

The purposes referred to in subd. 2 of this section, requiring consent of the Commissioner of Education, are those found in § 216 of the Education Law. Nat'l Psychological Ass'n for Psycho-

analysis, Inc. v Allen, 14 A.D.2d 190, 217 N.Y.S.2d 893, 1961 N.Y. App. Div. LEXIS 9367 (N.Y. App. Div. 3d Dep't 1961).

The Secretary of State was entitled to refuse to file a certificate of incorporation without express consent of the Commissioner of Education where one of the stated purposes of the corporation was "to promote and develop facilities for training and study for its members." Association for Psychoanalysis, Inc. v Simon, 21 A.D.2d 209, 250 N.Y.S.2d 253, 1964 N.Y. App. Div. LEXIS 3655 (N.Y. App. Div. 3d Dep't 1964).

Prior acceptance for filing by the Secretary of State of the certificate of organization of a membership corporation, without requiring consent of the Commissioner of Education pursuant to subd 2 of this section, did not mandate similar action in a later incident under pain of being charged with arbitrary conduct. Association for Psychoanalysis, Inc. v Simon, 21 A.D.2d 209, 250 N.Y.S.2d 253, 1964 N.Y. App. Div. LEXIS 3655 (N.Y. App. Div. 3d Dep't 1964).

Where the purposes enumerated in a certificate of incorporation of a membership corporation constituted no basis for incorporation by the Board of Regents, the Secretary of State improperly refused to file a certificate without the endorsement of consent of the Commissioner of Education. Lunderman v De Sapio, 9 Misc. 2d 322, 173 N.Y.S.2d 158, 1957 N.Y. Misc. LEXIS 2217 (N.Y. Sup. Ct. 1957).

The Secretary of State was not required to file the certificate of incorporation of a group organized "to advise, encourage and assist local area (areas) in obtaining a betterment of methods, means, facilities, and operations in education matters" without the consent of the Commissioner of Education, since such an association could be incorporated by the Regents of the University. Lunderman v De Sapio, 19 Misc. 2d 679, 196 N.Y.S.2d 250, 1958 N.Y. Misc. LEXIS 3862 (N.Y. Sup. Ct. 1958), aff'd, 9 A.D.2d 803, 193 N.Y.S.2d 1022, 1959 N.Y. App. Div. LEXIS 6143 (N.Y. App. Div. 3d Dep't 1959).

14. — —Board of standards and appeals

The Board of Standards and Appeals may not refuse approval of a proposed certificate of incorporation of a labor organization because it disapproves of provisions in a tentative contract which may be offered to the employers by the proposed corporation. McNair v Picard, 262 A.D. 927, 29 N.Y.S.2d 18, 1941 N.Y. App. Div. LEXIS 6509 (N.Y. App. Div. 1941).

The purpose specified in a proposed certificate of incorporation for the "Hotel Roosevelt Employees Welfare Association", that the corporation was designed to promote the well-being of the employees, brings the proposed corporation within subd. 1-a of this section and Gen. Corp. Law, § 9-a. Breen v Picard, 4 N.Y.S.2d 301, 167 Misc. 561, 1938 N.Y. Misc. LEXIS 1569 (N.Y. Sup. Ct. 1938).

The Board of Standards and Appeals may not refuse to approve the incorporation as a membership corporation of a formerly unincorporated association consisting of public employees, where the purpose of the organization set forth in its certificate is to benefit and advance the welfare and interest of the employees of the Park Department of the City of New York. Hagan v Picard, 12 N.Y.S.2d 873, 171 Misc. 475, 1939 N.Y. Misc. LEXIS 1964 (N.Y. Sup. Ct.), aff'd, 258 A.D. 771, 14 N.Y.S.2d 706, 1939 N.Y. App. Div. LEXIS 6818 (N.Y. App. Div. 1939).

The power vested by the statute and the Board of Standards and Appeals to approve or disapprove certificates of incorporation of organizations of workingmen is ministerial, and does not authorize action on the basis of some policy which the Board thinks should be followed by the state, and it is not competent for the Board to withhold approval because it is not in sympathy with the purposes of the corporation. Hagan v Picard, 12 N.Y.S.2d 873, 171 Misc. 475, 1939 N.Y. Misc. LEXIS 1964 (N.Y. Sup. Ct.), aff'd, 258 A.D. 771, 14 N.Y.S.2d 706, 1939 N.Y. App. Div. LEXIS 6818 (N.Y. App. Div. 1939).

An application for a certificate of incorporation which enumerates the following purposes: "To further the social and economic conditions of its members and to take over, carry on, and continue the affairs, property, obligations, business and objectives of the unincorporated association" needs no approval by the Board of Standards and Appeals, since the certificate contains no statement that the members of the corporation, whose social and economic ambitions are to be furthered, are workingmen or women or wage earners, as required by subdivision 1-a of this section. Wilson v Picard, 20 N.Y.S.2d 119, 173 Misc. 788, 1940 N.Y. Misc. LEXIS 1771 (N.Y. Sup. Ct. 1940).

15. — —Board of social welfare

Where the Board of Social Welfare has refused to permit a membership corporation to amend its certificate of incorporation to permit it to operate a hospital, the court should not substitute its judgment for that of the Board where it clearly appears that there was no arbitrary or malicious exercise of power. Italian Hospitalization Soc. v State Department of Social Welfare, 34 N.Y.S.2d 385, 178 Misc. 183, 1942 N.Y. Misc. LEXIS 1522 (N.Y. Sup. Ct. 1942).

16. —Court approval

The consent and approbation of a Justice of the Supreme Court, required as one of the conditions precedent to right to file a certificate of incorporation as a membership corporation of the types dealt with in §§ 10 and 11 of the Membership Corporation Law, is cumulative to the other requisites of the act, but decides nothing, and is not conclusive either upon the public or the Secretary of State. In re Application of Excavating Machine Owners Ass'n, Inc., 25 Misc. 2d 419, 205 N.Y.S.2d 265, 1960 N.Y. Misc. LEXIS 2527 (N.Y. Sup. Ct. 1960).

The duty imposed upon the Justice of the Supreme Court to whom a certificate for leave to file articles of incorporation is presented is not clerical or ministerial, but requires exercise of judgment and discretion, the questions to be determined being whether objects of the corporation violate public policy, whether approval will permit irresponsible or unequipped citizens to operate under a corporate charter, and whether the proposed corporation will duplicate or conflict with existing corporations. In re Application of Excavating Machine Owners Ass'n, Inc., 25 Misc. 2d 419, 205 N.Y.S.2d 265, 1960 N.Y. Misc. LEXIS 2527 (N.Y. Sup. Ct. 1960).

17. —Incorporation and powers of particular corporations

Where the great council of New York was not given the power, by its charter, to erect and maintain a home for aged members, this section does not give it such power in the absence of a change in its charter to that effect. Kiowa Council, etc. v Great Council of New York, etc., 228 N.Y.S. 256, 132 Misc. 106, 1928 N.Y. Misc. LEXIS 799 (N.Y. Sup. Ct. 1928).

Approval of certificate of incorporation under name "National Foundation for Diarrheal Diseases, Inc." was denied where the organization sought generally to foster, promote, and disseminate information. In re National Foundation for Diarrheal Diseases, 8 Misc. 2d 12, 164 N.Y.S.2d 177, 1957 N.Y. Misc. LEXIS 3497 (N.Y. Sup. Ct. 1957).

18. — —Bar association; aid to lawyers

Activity of bar association in conducting poll of membership to determine fitness of candidates for judicial office and expending funds to support judicial candidates found to be fit was not ultra vires under this section. Pecora v Queens County Bar Asso., 46 Misc. 2d 530, 260 N.Y.S.2d 116, 1965 N.Y. Misc. LEXIS 1807 (N.Y. Sup. Ct. 1965).

A certificate of incorporation will be granted to an organization having among its objectives the advancement of knowledge and understanding of the law and research in jurisprudence, the promotion of a sound administration of justice and a grant of aid to members of the bar who may find themselves in need because of ill health, physical disability, or misfortune. In re Certificate of Incorporation of New York County Lawyers' Ass'n Fund, Inc., 81 N.Y.S.2d 724, 1948 N.Y. Misc. LEXIS 2932 (N.Y. Sup. Ct. 1948).

19. — —Labor union

The Secretary of State may properly refuse to approve a certificate of incorporation of a labor union where it appears that the union seeking incorporation is or will be dominated by the employer and therefor approval would be in conflict with the public policy of the state as set forth in the Labor Law. Campbell v Picard, 300 N.Y.S. 515, 165 Misc. 148, 1937 N.Y. Misc. LEXIS 1950 (N.Y. Sup. Ct. 1937).

20. — —Prevention of cruelty to animals

The approval of the National Association for the Prevention of Cruelty to Animals as a condition precedent to incorporation of a county society may be dispensed with upon evidence that the public interest required approval of the proposed certificate of incorporation. In re Warren County Soc. for Prevention of Cruelty to Animals, Inc., 123 N.Y.S.2d 419, 1953 N.Y. Misc. LEXIS 1981 (N.Y. Sup. Ct. 1953).

21. —Tax liability

A membership corporation was entitled to exemption from real property taxes where its membership was open to the public as a little theater corporation and no officer, member or employee other than production directors received money. Little Theatre of Watertown, Inc. v Hoyt, 7 Misc. 2d 907, 165 N.Y.S.2d 292, 1956 N.Y. Misc. LEXIS 1607 (N.Y. Sup. Ct. 1956), aff'd, 4 A.D.2d 853, 167 N.Y.S.2d 240, 1957 N.Y. App. Div. LEXIS 4564 (N.Y. App. Div. 4th Dep't 1957).

22. —Miscellaneous

The fact that none of the corporation papers on file contained a statement that the hospital was incorporated as a "charitable corporation" did not negate the actuality that the hospital was a charitable institution within the purport of § 189 of the Lien Law. The court pointed out there was no general charitable corporation statute in New York, and that the law contemplated, with respect to hospitals, that charitable pursuits may be pursued by an entity functioning under the Membership Corporation Law. Gonzalez v New York City Transit Authority, 27 A.D.2d 744, 277 N.Y.S.2d 527, 1967 N.Y. App. Div. LEXIS 4816 (N.Y. App. Div. 2d Dep't 1967).

A will directing that a memorial to testator's wife be maintained, and setting aside from the remainder a certain sum for perpetual care, for the maintenance and exhibition of valuable art objects, and for which purpose a nonprofit corporation had been formed, will be given effect and the testator's intention will be determined as having established a charitable and educational bequest with a devise of the real property and improvements thereon to the corporation. In re Klauber's Will, 106 N.Y.S.2d 264, 201 Misc. 839, 1951 N.Y. Misc. LEXIS 2043 (N.Y. Sur. Ct. 1951).

Agency Opinions

Analysis

1. Generally
2. Under former Membership Corporations Law § 10
3. —Other requirements; notice to attorney general
4. — —Incorporation of political club
5. Under former Membership Corporation Law § 11
6. —Required prior consent of various state agencies
7. — —Commissioner of education; board of regents
8. — —Board of standards and appeals
9. — —Board of social welfare
10. — —Board of charities
11. —Incorporation and powers of particular corporations
12. — —Practice of medicine; practice of optometry

1. Generally

The State Board of Social Welfare has legal authority to approve the physical facility and the certificate of incorporation of a not-for-profit corporation to be formed for the purpose of operating, with federal funds, a multi-service halfway house residential facility for adult female ex-offenders and their children. 1977 N.Y. AG LEXIS 147.

A subsidiary of the Urban Development Corporation may incorporate under the Business Corporation Law without forfeiting its public status. The subsidiary may not pay profits to private investors, and upon dissolution of the corporation, the assets belong to the State. 1980 N.Y. Op. Att'y Gen. No. 93, 1980 N.Y. AG LEXIS 54.

In constructing a firehouse to be utilized for fire fighting or fire prevention, a fire corporation in a fire district need not comply with town zoning and building regulations. 1983 N.Y. Op. Att'y Gen. No. 83-33.

2. Under former Membership Corporations Law § 10

The certificate of incorporation of a volunteer fire company may be amended so as to include a fire district within the territory in which the fire company proposes to act. 1955 Op St Compt No. 55–7319.

A town board may, in its discretion, consent to the incorporation of a fire company which will have its headquarters in and protect against fires in a fire protection district which is presently being served pursuant to contract with another fire company situated in the fire protection district. 1955 Op St Compt No. 55–7736.

The members of a volunteer fire company organized and incorporated in an area of a town not within a village or fire district will be covered under a county self-insurance plan. The cost of this coverage is included as part of the town's apportionate share. 1958 Op St Compt No. 58–366.

Discussion of procedure for incorporation of volunteer fire company and the beneficial effect of a corporate status to simplify matters concerning the management of affairs and ownership of assets. 1967 Op St Compt No. 67–786.

The board of fire commissioners of a fire district may organize, operate, maintain and equip additional fire companies in the fire district. The board of fire commissioners may consent to the formation of a fire corporation which intends to operate within the territory of such fire district. In either case, either the fire company or the district could purchase and own real property and equipment. 1968 Op St Compt No. 68–926.

3. —Other requirements; notice to attorney general

4. — —Incorporation of political club

Where county chairman is deceased and rules of county committee authorize first vice-chairman to perform the duties of and exercise the powers of chairman in his absence, approval of first vice-chairman and acting chairman to incorporation of membership corporation containing name of political party is sufficient compliance with requirements of this section. 1954 N.Y. Op. Att'y Gen. No. 212, 1954 N.Y. AG LEXIS 72.

Where a certificate of incorporation specifies as a purpose of the proposed corporation maintenance and support of a centennial celebration for the benefit of village citizens, the purpose is charitable and five days' written notice of application for approval should be given to the Attorney General. 1962 NY Ops Atty Gen July 31 (Informal), 1962 N.Y. AG LEXIS 200.

Judicial approval of the certificate of incorporation of a membership corporation requires five days' notice to the Attorney General and is not ex parte. 1963 NY Ops Atty Gen Nov 27 (Informal), 1963 N.Y. AG LEXIS 208.

5. Under former Membership Corporation Law § 11

6. —Required prior consent of various state agencies

7. — —Commissioner of education; board of regents

A certificate of incorporation which includes some primary educational features can be granted pursuant to the Mem. Corp. Law with the consent of the board of regents, and the approval of a justice of supreme court and the state board of charities. 1915 N.Y. Op. Att'y Gen. No. 300.

Where the purposes of a proposed corporation are to investigate the present educational system, to disseminate information thereon, to stimulate public interest in securing improvement, such purposes constitute the "promotion" of "education" under Education Law § 216 so as to require the consent of the commissioner of education before the certificate may be filed. 1957 N.Y. Op. Att'y Gen. No. 269, 1957 N.Y. AG LEXIS 79.

8. — —Board of standards and appeals

A certificate of incorporation stating a purpose to assume the affairs, business and objects of the unincorporated Yard Workers Association and not disclosing what those affairs, business and objects were, and disclosing other purposes authorizing incorporation under § 10, may be accepted for filing without approval of the board of standards and appeals under subd 1-a of this section, if the clause disclosing the purpose to assume the affairs, business and objects of the unincorporated association is deleted. 1940 N.Y. Op. Att'y Gen. No. 281.

9. — —Board of social welfare

Where a proposed certificate of incorporation states in its purpose clause that it is formed to give financial and other help, aid and assistance to existing institutions or organizations estab-

lished for the care and treatment of the sick, needy and infirm, such proposed certificate does not require the approval of the state board of social welfare. 1940 N.Y. Op. Att'y Gen. No. 361, 1940 N.Y. AG LEXIS 177.

It is permissible in stating the powers of a membership corporation subject to the jurisdiction of the state department of social welfare to attach a condition to the effect that any institution which if incorporated separately under a general law would require the approval of the state board of social welfare, shall not be established or maintained in this state unless the written approval of such state board shall first have been obtained; and such a certificate may not be amended, without the approval of the state board of social welfare, to delete the condition set forth in the certificate. 1941 N.Y. Op. Att'y Gen. No. 336, 1941 N.Y. AG LEXIS 172.

Before a foreign corporation organized to maintain a home for the aged may take title to realty in this State it must obtain approval of the State Board of Social Welfare and file statement and designation with Secretary of State. 1955 NY Ops Atty Gen April 20 (Informal), 1955 N.Y. AG LEXIS 209.

10. — —Board of charities

A hospital should be organized under the provisions of the Membership Corporations Law rather than under the Business Corporations Law, and the State Board of Charities is not authorized to approve certificates for incorporation under the latter statute. 1911 N.Y. Op. Att'y Gen. No. 191.

The functions of public health authorities in considering the location of a new hospital as a public health matter are entirely different from those of the state board of charities in the same premises. The latter cannot base its refusal to approve the certificate of incorporation upon the grounds involved in a determination already made by the former. 1927 N.Y. Op. Att'y Gen. No. 331.

11. —Incorporation and powers of particular corporations

12. — —Practice of medicine; practice of optometry

Formation of a corporation to engage in the practice of medicine is possible only under the provisions of this section. 1934 N.Y. Op. Att'y Gen. No. 240.

A corporation other than one to organize a hospital or similar institution may not lawfully be formed, under the Mem. Corp. Law, for the purpose of engaging in the practice of optometry. 1935 N.Y. Op. Att'y Gen. No. 373.

A hospital service corporation formed pursuant to Membership Corporations Law as provided under the cited article of the Insurance Law is a moneyed corporation and may use the word "Insurance" as part of its corporate name. 1965 N.Y. Op. Att'y Gen. No. 46, 1965 N.Y. AG LEXIS 35.

The purposes stated in Soc. Wel. Law, § 35, subd. 1, are purposes for which a corporation must be formed under the provisions of the Membership Corporations Law. 1941 N.Y. Op. Att'y Gen. No. 338, 1941 N.Y. AG LEXIS 173.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-4 White, New York Business Entities ¶ N404.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business & Commercial § 8.15. Preparing Certificate of Incorporation.

Matthew Bender's New York Checklists: Checklist for Forming Not-For-Profit Corporation LexisNexis Answer-Guide New York Business Entities § 9.02.

Forms: White, New York Business Entities Form N404:1. Registration Statement for use by Charitable Organizations.

White, New York Business Entities Form N404:2. Re-Registration Statement (for use by charitable organizations whose registration has been canceled).

White, New York Business Entities Form N404:3. Amendment to Registration Statement.

White, New York Business Entities Form N404:4. Request for Registration Exemption for Charitable Organizations.

§ 405. Organization meeting

(a) After the corporate existence has begun, an organization meeting of the initial directors, or, if directors are not designated in the certificate of incorporation, of the incorporator or incorporators, shall be held within or without this state, for the purpose of adopting by-laws, electing directors to hold office as provided in the certificate of incorporation or the by-laws, and the transaction of such other business as may come before the meeting. The meeting may be held at the call of any director or, if directors are not designated in the certificate of incorporation, any incorporator who shall give at least five days' notice thereof by mail to each other director or incorporator, which notice shall set forth the time and place of the meeting. Notice need not be given to any director or incorporator who submits a signed waiver of notice before or after the meeting, or who attends the meeting without protesting, prior thereto or at its commencement, the lack of notice to him. If there are more than two directors or incorporators, a majority shall constitute a quorum and the act of the majority of those present at a meeting at which a quorum is present shall be the act of the directors or incorporators. For the purposes of this section an incorporator or director may act in person or by proxy signed by him or his attorney in fact.

(b) Any action permitted to be taken at an organization meeting may be taken without a meeting if each director or, if directors are not designated in the certificate of incorporation, each incorporator or his attorney-in-fact signs an instrument setting forth the action so taken.

(c) If a designated director or an incorporator dies or is for any reason unable to act, the other or others may act. If there is no designated director or incorporator able to act, any person for whom an incorporator is acting as agent may act in his stead, or if such other person also dies or is for any reason unable to act, his legal representative may act.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970.

Revision Notes: *Source:* None.

Changes: Completely new.

Comment: This section has no counterpart in existing law. It is derived from the ABA Model Non-profit Corp Act § 32 and Bus Corp L § 404. The section codifies the usual New York practice of having the incorporators or the initial directors adopt by-laws and complete the corporate organization. Paragraph (c) covers the situation where a designated director or an incorporator dies or is for any reason unable to act.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-4 White, New York Business Entities ¶ N405.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business & Commercial § 8.03. Commencing Corporate Functions.

New York Practice Guide: Business & Commercial § 8.17. Checklist for Commencing Operation.

Matthew Bender's New York Checklists: Checklist for Forming Not-For-Profit Corporation LexisNexis Answer-Guide New York Business Entities § 9.02.

Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N405:1. Minutes of Incorporators' Organization Meeting.

White, New York Business Entities Form N405:2. Notice for Organization Meeting of Incorporators.

White, New York Business Entities Form N405:3. Waiver of Notice of Incorporators' Meeting.

White, New York Business Entities Form N405:4. Proxy for Incorporators' Meeting after Filing of Certificate of Incorporation.

White, New York Business Entities Form N405:5. Statement as to Action of Incorporators in Lieu of Organization Meeting.

ARTICLE 5 Corporate Finance

Section

501. Stock and shares prohibited; membership certificates authorized
507. Fees, dues and assessments; fines and penalties
509. Purchase, sale, mortgage and lease of real property
510. Disposition of all or substantially all assets
511. Petition for court approval
511-a. Petition for attorney general approval
513. Administration of assets received for specific purposes
514. Delegation of investment management
515. Dividends prohibited; certain distributions of cash or property authorized
516. Distributions to members upon termination of membership
517. Liabilities of members
519. Annual report of directors
519-a. Annual reports for certain transactions required
520. Reports of corporation

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970; amd, L 1970, ch 847, § 15, eff Sept 1, 1970.

§ 501. Stock and shares prohibited; membership certificates authorized

A corporation shall not have stock or shares or certificates for stock or for shares, but may issue non-transferable membership certificates or cards to evidence membership, whether or not connected with any financial contribution to the corporation, as provided in section 601 (Members). The fact that the corporation is a not-for-profit corporation, and that the membership certificate or card is non-transferable shall be noted conspicuously on the face or back of each such certificate or card.

HISTORY:

Add, L 1969, ch 1066, § 1; amd, L 1970, ch 847, § 16, eff Sept 1, 1970.

Revision Notes: *Source:* Mem Corp L § 40.

Changes: Reworded and revised; new provisions.

Comment: The section makes express the implied prohibition of Mem Corp L § 40 against the issuance of shares or certificates for shares. It follows Mem Corp L § 40 in authorizing the issuance of membership certificates or cards, and governs their terms. Membership may be evidenced otherwise than by certificates or cards as provided in section 601 (Members). A new provision specifies that membership certificates or cards shall be non-transferable.

Notes to Decisions

1. Generally

Non-profit corporation was statutorily prohibited from issuing shares, so a "shareholder's" assertion that she had acquired the shares of another member, giving her 50 percent of the shares in the corporation and creating a voting deadlock between herself and the corporation's directors, was incorrect. Spencer v Petrone, 297 A.D.2d 730, 747 N.Y.S.2d 569, 2002 N.Y. App. Div. LEXIS 8671 (N.Y. App. Div. 2d Dep't 2002).

2003 amended by-laws of a non-profit corporation that owned an apartment building violated N.Y. Not-for-Profit Corp. Law § 602(f) and 611(e) because no shares could be issued pursuant to N.Y. Not-for-Profit Corp. Law § 501 and each member could have only one vote; it was improper to give petitioner families entitlement to an additional vote because they possessed an additional unit. Matter of Thakur v 210 Forsyth St. Hous. Dev. Fund Corp., 844 N.Y.S.2d 686, 17 Misc. 3d 1012, 238 N.Y.L.J. 98, 2007 N.Y. Misc. LEXIS 7261 (N.Y. Sup. Ct. 2007).

Notes to Unpublished Decisions

1. Generally

Unpublished decision: Because plaintiff's "equity interest" in defendant corporation was a forbidden "stock or share" in a not-for-profit corporation, the agreement was therefore invalid; plaintiff therefore did not allege the existence of a valid contract to support a claim for breach of contract, and its complaint was properly dismissed. IDT Corp. v Touro College, 376 Fed. Appx. 245, 2010 U.S. App. LEXIS 7627 (3d Cir. N.J. 2010).

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-5 White, New York Business Entities ¶ N501.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business & Commercial § 8.05. Directors.

Matthew Bender's New York Checklists: Checklist for Identifying Ownership and Ownership Transition Considerations in Entity Selection LexisNexis AnswerGuide New York Business Entities § 2.08.

Checklist for Assessing Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 2.47.

Checklist for Forming Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.02.

Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N501:1. Certificate of Membership in Not-for-Profit Corporation.

§ 507. Fees, dues and assessments; fines and penalties

(a) If authorized by its certificate of incorporation or by-laws and subject to any limitations stated therein a corporation may levy initiation fees, dues and assessments on its members, whether or not they are voting members, and may impose reasonable fines or other penalties upon its members for violations of its rules and regulations.

(b) Initiation fees, dues or assessments may be levied on all classes of members alike or in different amounts or proportions for different classes of members, as the certificate of incorporation or the by-laws may provide, but in all cases the fees, dues and

assessments payable by members of one class shall be determined upon the same basis.

(c) The certificate of incorporation or the by-laws may contain such provisions as are deemed necessary to enforce the collection of fees, dues, assessments, fines or other penalties, including provisions for the termination of membership, upon reasonable notice, for non-payment of such fees, dues, assessments, fines or other penalties, and provisions for reinstatement of membership.

(d) Subject to the provisions of this chapter, the certificate of incorporation may provide that members paying initiation fees, dues or assessments shall, upon dissolution of the corporation, have distributive rights in its assets. The distributive rights may be different for different classes of members, but in all cases the rights of members of one class shall be the same.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970; amd, L 1970, ch 847, § 20, eff Sept 1, 1970.

Derivation Notes: Derived from Mem Corp Law § 20.

Revision Notes: *Source:* Mem Corp L § 20.

Changes: Revised; new provisions.

Comment: This section expands the provisions of Mem Corp L § 20. Paragraph (a) permits a corporation to levy initiation fees, dues and assessments on its members if its certificate of incorporation or by-laws so provide and subject to any limitations contained in either. Paragraph (b), the language of which is in part adapted from 15 Pa Stat Ann § 7602, provides that the amounts levied may vary from class to class, as the certificate of incorporation or the by-laws may provide, but requires that the obligations of members of one class shall be the same. Paragraph (c) authorizes provisions to enforce the collection of fees, dues or assessments in the certificate of incorporation or the by-laws. These provisions may include termination of membership, upon reasonable notice, for nonpayment and provisions for re-instatement. Paragraph (d) authorizes provisions in the certificate of incorporation for distributive rights, upon dissolution of the corporation, to members paying initiation fees, dues or assessments. Such rights are subject to the provisions of this chapter. In all cases, however, the distributive rights of members of one class must be the same.

Notes to Decisions

Analysis

1. Generally
2. Penalties
3. Under former Membership Corporations Law § 21

1. Generally

Townhouse developer was not collaterally estopped from challenging validity of foreclosure judgment for maintenance and special assessments entered against it following its voluntary filing for bankruptcy where central issue before Bankruptcy Court was motion of townhouse owners' association to lift stay of foreclosure sale, and parties did not litigate validity of association's underlying lien for assessments, which Bankruptcy Court simply presumed valid for purposes of resolving stay issue. Roxrun Estates, Inc. v Roxbury Run Village Asso., 136 A.D.2d 162, 526 N.Y.S.2d 633, 1988 N.Y. App. Div. LEXIS 3389 (N.Y. App. Div. 3d Dep't), app. denied, 72 N.Y.2d 808, 533 N.Y.S.2d 57, 529 N.E.2d 425, 1988 N.Y. LEXIS 2628 (N.Y. 1988).

Supreme Court properly imposed reduced assessment on townhouse developer for maintenance of its unimproved lots (as compared to full rate which individual townhouse owners were required to pay for their improved lots) under rules of owners' association in which developer and individual owners were members as same class, even though CLS N-PCL § 507(b) requires that assessments payable by members must be determined on same basis, since rates were based on actual cost of maintaining properties. Roxrun Estates, Inc. v Roxbury Run Village Asso., 136 A.D.2d 162, 526 N.Y.S.2d 633, 1988 N.Y. App. Div. LEXIS 3389 (N.Y. App. Div. 3d Dep't), app. denied, 72 N.Y.2d 808, 533 N.Y.S.2d 57, 529 N.E.2d 425, 1988 N.Y. LEXIS 2628 (N.Y. 1988).

Automatic suspension provided by a not-for-profit corporation's by-laws was unenforceable because it violated N.Y. Not-for-Profit Corp. Law § 507(c); it was undisputed that no notice was given to the members that had not paid dues, and, thus, pursuant to § 507(c), the votes of members who had not paid dues could not have been disqualified from voting an amendments to the by-laws based solely on that basis. Abraham v Diamond Dealers Club, Inc., 896 N.Y.S.2d 848, 27 Misc. 3d 663, 2010 N.Y. Misc. LEXIS 399 (N.Y. Sup. Ct. 2010), aff'd, 80 A.D.3d 461, 914 N.Y.S.2d 152, 2011 N.Y. App. Div. LEXIS 98 (N.Y. App. Div. 1st Dep't 2011).

Financial Industry Regulatory Authority, Inc. had sufficient authority under state corporation law to impose penalties on its members. Fiero v Fin. Indus. Regulatory, Auth., Inc., 606 F. Supp. 2d 500, 2009 U.S. Dist. LEXIS 30414 (S.D.N.Y. 2009), rev'd, 660 F.3d 569, 2011 U.S. App. LEXIS 20173 (2d Cir. N.Y. 2011).

2. Penalties

Low balance surcharge and insufficient fund penalty imposed by not-for-profit corporation organized to provide for collective management of many of business and administrative responsibilities of individual chapters of college fraternities and sororities, which were imposed upon members who failed to contribute to or maintain designated minimum balance in fund set up to pay for goods and services, were properly imposed upon members as penalties authorized by Not-For-Profit Corporation Law § 507(a), where money collected from imposition of such penalties was not retained by corporation but was distributed among members in accordance with their participation in fund. Sigma Phi Soc. v Rensselaer Fraternity Managers Ass'n, 114 A.D.2d 711, 494 N.Y.S.2d 532, 1985 N.Y. App. Div. LEXIS 53372 (N.Y. App. Div. 3d Dep't 1985).

3. Under former Membership Corporations Law § 21

A bylaw imposing a fine upon members of a milk association for not furnishing a certain quantity of milk is void. Monroe Dairy Ass'n v Webb, 40 A.D. 49, 57 N.Y.S. 572, 1899 N.Y. App. Div. LEXIS 1052 (N.Y. App. Div. 1899).

An attempt to enforce an involuntary payment of moneys by depriving members of certain privileges, under a levied "assessment," is not the collection of dues or fees authorized by this section. Kiowa Council, etc. v Great Council of New York, etc., 228 N.Y.S. 256, 132 Misc. 106, 1928 N.Y. Misc. LEXIS 799 (N.Y. Sup. Ct. 1928).

An amendment to the bylaws of a membership corporation assessing each of the members thereof a certain sum for the purchase, equipment and maintenance of a home for aged members, is of no effect, where the power to purchase and maintain such a home was not granted under the original certificate of incorporation, and there has been no amendment of such certificate or legislative authorization of the proposed additional activity. Kiowa Council, etc. v Great Council of New York, etc., 228 N.Y.S. 256, 132 Misc. 106, 1928 N.Y. Misc. LEXIS 799 (N.Y. Sup. Ct. 1928).

An assessment does not fall within the terms "dues" or "fees" as used in this section. In re Monroe Chapter, O. E. S., 228 N.Y.S. 248, 132 Misc. 109, 1927 N.Y. Misc. LEXIS 1303 (N.Y. Sup. Ct. 1927).

While the defendant contends that a by-law authorizing an assessment and providing that "there shall be an annual assessment due and payable on April first, which assessment shall be determined upon a vote of the club on the report made at the annual meeting by the Treasurer," assumed to provide for an assessment without authority in law, it is clear that this so-called assessment was to cover the expenses for the ensuing year and not to cover expenses already incurred, and consequently constitutes "fees" or "dues," which the plaintiff is authorized to levy.

Rainbow Falls Fish & Game Club, Inc. v Clute, 29 N.Y.S.2d 948, 177 Misc. 71, 1941 N.Y. Misc. LEXIS 2188 (N.Y. Sup. Ct. 1941).

The word "dues" with reference to membership corporations means the obligation to pay a sum to be fixed, usually by bylaws, at recurring intervals for maintenance of the organization, and dues so fixed become a debt by the member to the club. Associated General Contractors of America v Lapardo Bros. Excavating Contractors, Inc., 43 Misc. 2d 825, 252 N.Y.S.2d 486, 1964 N.Y. Misc. LEXIS 1491 (N.Y. Sup. Ct. 1964).

A membership corporation may raise its dues in the discretion of the body authorized to make its bylaws and has a right to adopt a bylaw that no member may withdraw from membership unless by resignation in writing accompanied by all outstanding dues. Associated General Contractors of America v Lapardo Bros. Excavating Contractors, Inc., 43 Misc. 2d 825, 252 N.Y.S.2d 486, 1964 N.Y. Misc. LEXIS 1491 (N.Y. Sup. Ct. 1964).

Where an organization under this law did not provide for enforcible regular assessments but made an extraordinary assessment in one year to pay for repairs and replacements without the usual reference to suspension of members for nonpayment of indebtedness, such an assessment was taxable under the meaning of 26 USC § 1712(a). City Athletic Club v United States, 242 F.2d 43, 1957 U.S. App. LEXIS 5148 (2d Cir. N.Y. 1957), .

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-5 White, New York Business Entities ¶ N507.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business & Commercial § 8.04. The Role of Members in the Corporation.

Matthew Bender's New York Checklists: Checklist for Identifying Financing Options When Selecting Form of Business Entity LexisNexis AnswerGuide New York Business Entities § 2.18.

Checklist for Assessing Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 2.47.

Checklist for Financing Operations of Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.12.

Forms: White, New York Business Entities Form N507:1. Provision in Certificate of Incorporation Providing for Initiation Fees.

White, New York Business Entities Form N507:2. Provision in Certificate of Incorporation Providing for Dues.

White, New York Business Entities Form N507:3. Provisions in Certificate of Incorporation Providing for Fines and Penalties.

White, New York Business Entities Form N507:4. Bylaw Provision Describing Notice of Fine or Penalty.

§ 509. Purchase, sale, mortgage and lease of real property

(a) No corporation shall purchase real property unless such purchase is authorized by the vote of a majority of directors of the board or of a majority of a committee authorized by the board, provided that if such property would, upon purchase thereof, constitute all, or substantially all, of the assets of the corporation, then the vote of two-thirds of the entire board shall be required, or, if there are twenty-one or more directors, the vote of a majority of the entire board shall be sufficient.

(b) No corporation shall sell, mortgage, lease, exchange or otherwise dispose of its real property unless authorized by the vote of a majority of directors of the board or of a majority of a committee authorized by the board; provided that if such property constitutes all, or substantially all, of the assets of the corporation, then the vote of two-thirds of the entire board shall be required, or, if there are twenty-one or more directors, the vote of a majority of the entire board shall be sufficient.

(c) If a corporation authorizes a committee to act pursuant to paragraphs (a) and (b) of this section, the committee shall promptly report any actions taken to the board, and in no event after the next regularly scheduled meeting of the board.

HISTORY:

Add, L 1969, ch 1066, § 1; amd, L 1991, ch 145, § 2, eff Jan 1, 1992; L 2013, ch 549, § 53, eff July 1, 2014.

Derivation Notes: Derived from Mem Corp Law §§ 21, 22.

Revision Notes: *Source:* Mem Corp L § 21.

Changes: Reworded and revised.

Comment: This section rewords the first paragraph of Mem Corp L § 21, by replacing the term "the whole number of directors" with "the entire board". It continues to require a vote of two-thirds of the entire board to authorize the purchase, sale, mortgage or lease of real property by the corporation. Other parts of Mem Corp L § 21 are revised by eliminating the requirement of court approval for all sales, mortgages, and leases of real property, except where such property constitutes all or substantially all the corporate assets, so that § 510 is applicable.

Editor's Notes: Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

PRACTICE INSIGHTS:

BOARD AUTHORIZATION OF LEASES UNDER NPCL § 509.

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INSIGHT

NPCL § 509 provides that a not-for-profit corporation may not purchase, sell, mortgage or lease real property unless authorized by two-thirds of its entire board of directors (or by a majority if there are twenty-one or more directors). A not-for-profit corporation entering into a lease should seek board approval of the arrangement regardless of whether the not-for-profit corporation will be the lessor or lessee. The board of directors should follow the statute closely when authorizing the arrangement and refrain from delegating its authority to authorize such arrangement.

ANALYSIS

NPCL § 509 states simply that a not-for-profit corporation may not "lease" real property unless authorized by two-thirds of its entire board of directors (or by a majority if there are twenty-one or more directors). The statutory language is less than clear as to whether board authorization is required only when a not-for-profit corporation is the lessor of real property or also when the not-for-profit corporation is the lessee. The legislative history of *NPCL § 509* suggests authorization is required in both cases.

Prior to a 1991 amendment, *NPCL § 509* read ". . . [n]o corporation shall sell, mortgage or lease *its* real property, unless authorized . . . ." (emphasis added). The pre-amendment language required board authorization only when a not-for-profit corporation was the lessor. The 1991 amendment deleted the possessive pronoun "its" suggesting that board authorization is now required regardless of whether a

not-for-profit corporation enters into a lease as the lessor or lessee. *See* 1991 N.Y. Laws 145. Legislative materials support this interpretation. One memorandum in support of the amendment summarized the amendment as requiring board authorization for "any real property lease entered into by the corporation" and emphasized that a not-for-profit corporation's lease of real property "can have a significant impact on its fiscal integrity similar to the purchasing of real property . . . ." Mem. of Comm'n on Quality of Care for the Mentally Disabled.

Boards of not-for-profit corporations might be inclined to delegate their authority to authorize *NPCL § 509* transactions to their executive committees or other committees. However, an informal opinion of the Attorney General of the State of New York recognized that such authority cannot be delegated: "Clearly the literal interpretation of section *509* precludes the delegation of the approval of real estate transactions to the executive committee or other standing committee." 1988 N.Y. Op's Att'y Gen. No. 88-35, 1988 N.Y. AG LEXIS 37, *2. The opinion describes how "Section 509 reflects a legislative intent to have a substantial number of the members of the board approve real estate transactions." Id. at *4. Moreover, since the language of *NPCL § 509* requires authorization by two-thirds of the *entire* board, authorization by two-thirds of those present at a board meeting where not all directors are in attendance is insufficient.

A practitioner representing a not-for-profit corporation seeking to enter into a leasing arrangement (either as lessor or lessee) or other *NPCL § 509* transaction should first determine whether the provisions of *NPCL § 509* apply, as certain not-for-profit corporations are not subject to the provision. If *NPCL § 509* is applicable, the practitioner should advise that the two-thirds of *all* directors (or a majority, if there are twenty-one or more directors) authorize the transaction.

Notes to Decisions

Analysis

1. Generally
2. Under former Membership Corporations Law § 21
3. —Authority to purchase, lease, or sell; directors, trustees
4. — —President
5. — —Members
6. —Actions involving lease or sale
7. Under former Membership Corporations Law § 22

1. Generally

In mortgage foreclosure action arising from loans made by plaintiff bank to member of defendant not-for-profit corporation who falsely represented that he was acting on behalf of and with authorization from defendant when he repeatedly borrowed money in defendant's name, court properly dismissed complaint and vacated mortgages following nonjury trial where (1) corporate resolutions on which plaintiff relied in granting loans were patently fraudulent and invalid, (2) member's fraudulent transactions were made without defendant's knowledge, (3) plaintiff made no factual showing that defendant was responsible for appearance of authority to conduct such transactions, and (4) plaintiff failed to take even minimal steps to discover actual scope of member's authority. Fleet Bank v Consola, Ricciteli, Squadere Post No. 17, Inc., 268 A.D.2d 627, 701 N.Y.S.2d 182, 2000 N.Y. App. Div. LEXIS 112 (N.Y. App. Div. 3d Dep't 2000).

Federal court determined that New York's highest court would likely hold that the provisions of N.Y. Not-for-Profit Corp. Law §§ 509, 510 requiring a vote of directors or court approval to sell the assets of a not-for-profit corporation do not apply to transfers which are involuntary, such as foreclosure against the assets by a creditor or an involuntary transfer in bankruptcy. In re Machne Menachem, Inc., 371 B.R. 63, 2006 Bankr. LEXIS 4295 (Bankr. M.D. Pa. 2006).

In real estate broker's action for sale commission, not-for-profit corporation could not invoke provisions of N-PCL § 509 to avoid contract where statute did not prohibit corporate officers from contracting with brokers to procure a purchaser, where corporate committee responsible for selling property had authority under N-PCL § 712 to act on board's behalf, and where, under general agency principles, committee had apparent authority to bind corporation. Shear v NRA, 606 F.2d 1251, 196 U.S. App. D.C. 344, 1979 U.S. App. LEXIS 12492 (D.C. Cir. 1979).

2. Under former Membership Corporations Law § 21

Compliance with the statute is absolutely necessary to the validity of any mortgage of real estate which corporations of the class described therein shall execute and deliver. Dudley v Congregation of Third Order of St. Francis, 138 N.Y. 451, 34 N.E. 281, 138 N.Y. (N.Y.S.) 451, 1893 N.Y. LEXIS 858 (N.Y. 1893).

This section merely imposes a limitation on the power of a cemetery corporation organized under the Membership Corporations Law to convey away its property, and is in no sense to be considered a grant of power not previously enjoyed by such a corporation. Application of Kensico Cemetery, 83 N.Y.S.2d 73, 193 Misc. 479, 1948 N.Y. Misc. LEXIS 3287 (N.Y. Sup. Ct. 1948), rev'd, 275 A.D. 681, 86 N.Y.S.2d 737, 1949 N.Y. App. Div. LEXIS 4009 (N.Y. App. Div. 2d Dep't 1949).

A chamber of commerce, although not specifically granted the power by its charter to own real property, had such power under either the Membership Corporations Law or the General Corporation Law, it being incorporated as a membership corporation. Corning Chamber of Commerce v Bohoy, 139 N.Y.S.2d 503, 207 Misc. 789, 1955 N.Y. Misc. LEXIS 3459 (N.Y. County Ct. 1955).

3. —Authority to purchase, lease, or sell; directors, trustees

A soldiers' monument corporation was permitted to sell its real property where, before title closing, a majority of the directors authorized the sale under the terms contained in the contract. The evidence established the adequacy of the consideration and that the interests of the corporation would be promoted by the sale. Application of Staten Island War Memorial Asso., 286 A.D. 887, 143 N.Y.S.2d 100, 1955 N.Y. App. Div. LEXIS 4441 (N.Y. App. Div.), app. denied, 286 A.D. 1017, 145 N.Y.S.2d 318, 1955 N.Y. App. Div. LEXIS 5023 (N.Y. App. Div. 1955).

The majority of directors of a membership corporation may authorize a sale of real estate, and provisions of Gen. Corp. Law, § 71, in regard to a two-thirds vote are inapplicable. In re Application of Diocesan Auxiliary, 197 N.Y.S. 750, 119 Misc. 610, 1922 N.Y. Misc. LEXIS 1773 (N.Y. Sup. Ct. 1922).

A buyer is entitled to inquire into the question of whether the required number of trustees approved the sale to the buyer, since this is a matter peculiarly within the knowledge of the seller. Bounding Home Corp. v Chapin Home for Aged & Infirm., 19 Misc. 2d 653, 191 N.Y.S.2d 722, 1959 N.Y. Misc. LEXIS 3087 (N.Y. Sup. Ct. 1959).

4. — —President

Resolutions adopted by the directors of a membership corporation to the effect that the president "be empowered to take charge of the fiscal affairs of the corporation" and that he "has authority to sign and execute all documents," standing alone and without other evidence, are not sufficient to authorize him to enter into an agreement for the purchase of real property by the corporation. Catholic Foreign Mission Soc. v Oussani, 215 N.Y. 1, 109 N.E. 80, 215 N.Y. (N.Y.S.) 1, 1915 N.Y. LEXIS 976 (N.Y. 1915).

5. — —Members

A corporation could impose further requirements in its bylaws regarding the leasing of real property than those imposed by this section. So where a membership corporation's bylaws limited the powers of its directors to a great degree and required a majority vote of the members themselves on almost every conceivable problem, a lease of real property without membership approval never had a valid inception. In re Trapasso Oldsmobile, Inc., 4 N.Y.2d 133, 173 N.Y.S.2d 10, 149 N.E.2d 515, 1958 N.Y. LEXIS 1120 (N.Y. 1958).

6. —Actions involving lease or sale

A member of a membership corporation composed of the property holders of a certain community, which corporation performs many of the functions ordinarily performed by a municipal government, has the right to maintain an action in equity to restrain a contemplated sale of all the real property of the

corporation to a business corporation in exchange for shares in the business corporation which are to be divided among the members of the membership corporation. Richter v Sea Gate Asso., 207 A.D. 573, 202 N.Y.S. 68, 1923 N.Y. App. Div. LEXIS 5983 (N.Y. App. Div. 1923).

In an action for breach of an implied warranty of authority by the president and treasurer of a membership corporation to execute a lease for five years with a two year renewal and also a purchase option, the complaint must allege facts showing that the contract is one which the law would enforce against the principal, and the facts required by this section and Gen. Corp. Law, § 50. Yorkville Square Club, Inc. v Lichtenberger, 250 N.Y.S. 571, 140 Misc. 348, 1931 N.Y. Misc. LEXIS 1372 (N.Y. Sup. Ct. 1931).

7. Under former Membership Corporations Law § 22

A membership corporation could convey portions of its real property to members of the corporation, but it could not give more than is authorized by law, and a power reserved to change restrictions could not be exercised to make certain substantial alterations. Resnick v Croton Park Colony, Inc., 3 Misc. 2d 109, 151 N.Y.S.2d 328, 1955 N.Y. Misc. LEXIS 2357 (N.Y. Sup. Ct. 1955).

Agency Opinions

Analysis

1. Generally
2. Under former Membership Corporations Law § 21

1. Generally

A religious corporation must obtain leave of court to sell any of its real estate or any interest therein to a municipality for a public purpose. 1982 NY Ops Atty Gen No. 82–13, 1982 N.Y. AG LEXIS 96.

New York City Public Development Corporation does not have authority to delegate approval of real property transactions to executive committee or another standing committee of board of directors. 1988 N.Y. Op. Att'y Gen. No. 88-35 (Informal), 1988 N.Y. AG LEXIS 37.

2. Under former Membership Corporations Law § 21

An agricultural society may lease real estate for a term not greater than five years, without leave of court, under former § 13 from which this section is derived and leasing is not violation of this section. 1911 N.Y. Op. Att'y Gen. No. 432.

While a membership corporation may acquire real property for its corporate purposes, it may not use such property, as by way of lease, for a purpose essentially of a business nature for profit. 1953 NY Ops Atty Gen May 14 (Informal), 1953 N.Y. AG LEXIS 422.

The commissioners of a fire district may lease a firehouse owned by a volunteer fire company. 1945 Op St Compt No. 45–584.

A town may sell a portion of its property to an incorporated fire company for the construction of a firehouse and subsequently lease space therein for town purposes. 1953 Op St Compt No. 53–6153.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-5 White, New York Business Entities ¶ N509.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business & Commercial § 8.05. Directors.

Matthew Bender's New York Checklists: Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N509:1. Notice of Meeting of Directors to Vote on Sale, Lease, or Mortgage of Real Property of Not-for-Profit Corporation.

White, New York Business Entities Form N509:2. Resolution of Board of Directors Consenting to Mortgage.

§ 510. Disposition of all or substantially all assets

(a) A sale, lease, exchange or other disposition of all, or substantially all, the assets of a corporation may be made upon such terms and conditions and for such consideration, which may consist in whole or in part of cash or other property, real or personal, including shares, bonds or other securities of any other domestic or foreign corporation or corporations of any kind, as may be authorized in accordance with the following procedure:

(1) If there are members entitled to vote thereon, the board shall adopt a resolution recommending such sale, lease, exchange or other disposition. The resolution shall specify the terms and conditions of the proposed transaction, including the consideration to be received by the corporation and the eventual disposition to be made of such consideration, together with a statement that the dissolution of the corporation is or is not contemplated thereafter. The resolution shall be submitted to a vote at a meeting of members entitled to vote thereon, which may be either an annual or a special meeting. Notice of the meeting shall be given to each member and each holder of subvention certificates or bonds of the corporation, whether or not entitled to vote. At such meeting by two-thirds vote as provided in paragraph (c) of section 613 (Vote of members) the members may approve the proposed transaction according to the terms of the resolution of the board, or may approve such sale, lease, exchange or other disposition and may authorize the board to modify the terms and conditions thereof.

(2) If there are no members entitled to vote thereon, such sale, lease, exchange or other disposition shall be authorized by the vote of at least two-thirds of the entire board, provided that if there are twenty-one or more directors, the vote of a majority of the entire board shall be sufficient.

(3) If the corporation is, or would be if formed under this chapter, classified as a charitable corporation under section 201 (Purposes) such sale, lease, exchange or other disposition shall in addition require approval of the attorney general or the supreme court in the judicial district or of the county court of the county in which the corporation has its office or principal place of carrying out the purposes for which it was formed in accordance with section 511 (Petition for court approval) or section 511-a (Petition for attorney general approval) of this article.

(b) After such authorization the board in its discretion may abandon such sale, lease, exchange or other disposition of assets, subject to the rights of third parties under any contract relating thereto, without further action or approval.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970; amd, L 1970, ch 847, § 22, eff Sept 1, 1970; L 1972, ch 961, § 5, eff Sept 1, 1972; L 2013, ch 549, § 54, eff July 1, 2014.

Derivation Notes: Derived from Mem Corp Law § 21.

Revision Notes: *Source:* Mem Corp L § 21.

Changes: Reworded and revised; new provisions.

Comment: This section marks a departure from the Membership Corporation Law by distinguishing a sale, lease, exchange or other distribution of all, or substantially all, the assets of a corporation, from transactions involving less than all or substantially all the assets, governed by the preceding section. Paragraph (a) is derived from Bus Corp L § 909(a). Authorization of the disposition of all or substantially all of the assets, and the terms, conditions and consideration therefor, shall be in accordance with subparagraph (1) if there are members entitled to vote; otherwise, in accordance with subparagraph (2).

The requirement in Mem Corp L § 21, second paragraph, of obtaining judicial approval for the sale, mortgage or lease of any of the corporation's real property has been modified and retained to the extent provided in subparagraph (3): judicial approval is required for the sale, lease, exchange or other disposition of all or substantially all the assets of a Type B or Type C corporation. Paragraph (b) is derived from Bus Corp L § 909(c).

Editor's Notes: Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

Notes to Decisions

Analysis

1. Generally
2. Under former Membership Corporations Law § 21

1. Generally

Charitable foundation's sale of 34 acres of land to defendants fell within ambit of CLS N-PCL §§ 510 and 511 where property in question was foundation's largest, most significant and single most valuable possession, and its sale for inadequate consideration severely hampered foundation's ability to carry out its mission of constructing and operating senior citizens' center thereon; accordingly, contract of sale and deed were null and void where transaction was never subjected to requisite judicial scrutiny, and there was no proof that it was approved by foundation's membership or board of trustees. Rose Ocko Found., Inc. v Lebovits, 93 N.Y.2d 997, 696 N.Y.S.2d 107, 718 N.E.2d 412, 1999 N.Y. LEXIS 1964 (N.Y. 1999).

Prior arbitration proceeding before rabbinical panel and subsequent proceeding to confirm arbitration award were not res judicata to proceeding under CLS Relig Corp § 12 and CLS N-PCL § 511 since prior proceedings did not address issue of whether proposed sale of religious organization's real property met requirements of Religious Corporations Law and Not-for-Profit Corporation Law, and CLS Relig Corp § 12 and CLS N-PCL §§ 510 and 511 expressly make authorization by Supreme Court or County Court condition precedent to sale of property, so that rabbinical panel had no authority to give such authorization. Agudist Council of Greater New York v Imperial Sales Co., 158 A.D.2d 683, 551 N.Y.S.2d 955, 1990 N.Y. App. Div. LEXIS 2290 (N.Y. App. Div. 2d Dep't), app. denied, 76 N.Y.2d 707, 560 N.Y.S.2d 989, 561 N.E.2d 889, 1990 N.Y. LEXIS 3095 (N.Y. 1990).

When a court was asked to approve the sale of the assets of a not-for-profit corporation, under N.Y. Not-for-Profit Corp. Law § 510(3), it also had to review, in the same proceeding, termination payment clauses or similar damages or reimbursement provisions in the sales contract under the standard in N.Y. Not-for-Profit Corp. Law § 511(d) of fairness, reasonableness and furtherance of corporate purpose, as provisions of this type could be valuable to not-for-profits but judicial scrutiny would protect not-for-profits against board actions that might be adverse to the entity's well-being. 64th Assocs., L.L.C. v Manhattan Eye, Ear & Throat Hosp., 2 N.Y.3d 585, 780 N.Y.S.2d 746, 813 N.E.2d 887, 2004 N.Y. LEXIS 1379 (N.Y. 2004), dismissed, 816 N.Y.S.2d 701, 11 Misc. 3d 1067(A), 235 N.Y.L.J. 75, 2006 N.Y. Misc. LEXIS 536 (N.Y. Sup. Ct. 2006)

Where a not-for-profit seller had not met the requirements of N.Y. Not-For-Profit Corp. Law §§ 510(a), 511(d) by, inter alia, obtaining leave of court to sell certain property, a buyer could not obtain specific performance of a real property sale contract; therefore, the buyer's N.Y. C.P.L.R. 3215 motion for a default judgment was denied. Century 2000 Custom Home Builders & Developers, LLC. v United Muslim Org. of N.Y., Inc., 772 N.Y.S.2d 186, 1 Misc. 3d 890, 2003 N.Y. Misc. LEXIS 1395 (N.Y. Sup. Ct. 2003)

Federal court determined that New York's highest court would likely hold that the provisions of N.Y. Not-for-Profit Corp. Law §§ 509, 510 requiring a vote of directors or court approval to sell the assets of a not-for-profit corporation do not apply to transfers which are involuntary, such as foreclosure against the assets by a creditor or an involuntary transfer in bankruptcy. In re Machne Menachem, Inc., 371 B.R. 63, 2006 Bankr. LEXIS 4295 (Bankr. M.D. Pa. 2006).

2. Under former Membership Corporations Law § 21

Where a membership corporation leased a hall to be used as a theater and later relying upon the lease, the building was completely remodeled, the court would not void the lease on the ground that it was entered by the trustees improvidently by reason of their inexperience in business affairs and that the rent reserved in the lease was inadequate where no claim of fraud is made even though the provisions of this section was not followed in that no approval of the lease was obtained from the supreme court. Application of Norbury Theatre Corp., 279 A.D. 827, 109 N.Y.S.2d 291, 1952 N.Y. App. Div. LEXIS 4967 (N.Y. App. Div. 1952).

A lease executed by a membership corporation for a term of more than five years is not void even though it is not confirmed by a court and it may be confirmed in a proceeding under this section. Application of Trapasso Oldsmobile, Inc., 2 A.D.2d 166, 153 N.Y.S.2d 753, 1956 N.Y. App. Div. LEXIS 4625 (N.Y. App. Div. 4th Dep't 1956).

A lease from a membership corporation for a term of five years, but not effective until a future date, is a lease "for more than five years" and is subject to court approval. Application of Trapasso Oldsmobile, Inc., 2 A.D.2d 166, 153 N.Y.S.2d 753, 1956 N.Y. App. Div. LEXIS 4625 (N.Y. App. Div. 4th Dep't 1956).

A lease of cemetery lands for mining purposes is not only ultra vires but is in contravention of former § 13 from which this section is derived and inconsistent with the objects and purposes for which the lessor was organized, and the court is without power to sanction such a lease without explicit legislative authority. Briggs v Bloomingdale Cemetery Ass'n, 185 N.Y.S. 348, 113 Misc. 685, 1920 N.Y. Misc. LEXIS 1908 (N.Y. Sup. Ct. 1920), aff'd, 208 A.D. 761, 202 N.Y.S. 918, 1924 N.Y. App. Div. LEXIS 5479 (N.Y. App. Div. 1924).

In a proceeding under this section to confirm two mortgages executed by a membership corporation, since dissolved initially organized to provide a school building for special guidance of mentally and emotionally handicapped children on a nonprofit basis, the mortgages in question were confirmed on the basis of authorization by the Board of Trustees and court approval and findings that the corporation was not insolvent when the mortgages were executed. Application of Eleven Bros. Realty Corp., 28 Misc. 2d 201, 213 N.Y.S.2d 1004, 1961 N.Y. Misc. LEXIS 3208 (N.Y. Sup. Ct. 1961).

This section does not require that a copy of the proposed mortgage be presented to the court and approved by it. Harper v Larchmont Yacht Club, 38 N.Y.S.2d 505, 1942 N.Y. Misc. LEXIS 2212 (N.Y. Sup. Ct. 1942).

A proposed twelve-year lease of lands owned by a membership corporation and used as a park and playground area to private individuals for the construction of a swimming pool could not be made without leave of the Supreme Court which could be obtained only after satisfactory proof that the transaction is legal and to the advantage of the corporation. Such approval would have the effect of a visitation of the Supreme Court with respect to that transaction. Petition of Moss, 114 N.Y.S.2d 314, 1952 N.Y. Misc. LEXIS 2893 (N.Y. Sup. Ct. 1952).

A membership corporation with leave of the Supreme Court may convey its real property to a town without consideration. 1947 Op St Compt 156.

Conveyance of property of cemetery associations to a town should be made only after prior judicial approval. 1954 Op St Compt No. 54–6779.

Permission of the Court must be obtained by a religious corporation or a membership corporation before it may grant an easement in its real property. 1955 Op St Compt No. 55–7735.

A fire company may, under certain conditions, lease a portion of its real property to a fire district in which the property is located for parking of vehicles of members and residents of the fire district while in attendance at social functions at the district fire house. Where the rent under any such lease does not exceed the amount of carrying, maintenance and depreciation charges, the leased portion may remain or become tax exempt. 1968 Op St Compt No. 68–252.

Agency Opinions

1. Under former Membership Corporations Law § 21

A religious corporation must obtain leave of court to sell any of its real estate or any interest therein to a municipality for a public purpose. 1982 NY Ops Atty Gen No. 82–13, 1982 N.Y. AG LEXIS 96.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-5 White, New York Business Entities ¶ N510.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business & Commercial § 8.05. Directors.

Matthew Bender's New York Checklists: Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N510:1. Resolution by Board Recommending Proposed Sale of Assets of Corporation.

White, New York Business Entities Form N510:2. Notice of Special Meeting of Members to Take Action on Proposition to Sell, Lease, or Exchange the Assets of Corporation.

White, New York Business Entities Form N510:3. Resolution of Members Authorizing Sale of Property.

White, New York Business Entities Form N510:4. Resolution of Board of Directors Authorizing Sale of Corporate Assets of Corporation Having No Members.

White, New York Business Entities Form N510:5. Contract for Sale of Assets.

§ 511. Petition for court approval

(a) To obtain court approval to sell, lease, exchange or otherwise dispose of all or substantially all its assets, a corporation shall present a verified petition to the supreme court of the judicial district, or the county court of the county, wherein the corporation has its office or principal place of carrying out the purposes for which it was formed. The petition shall set forth:

1. The name of the corporation, the law under or by which it was incorporated.

2. The names of its directors and principal officers, and their places of residence.

3. The activities of the corporation.

4. A description, with reasonable certainty, of the assets to be sold, leased, exchanged, or otherwise disposed of, or a statement that it is proposed to sell, lease, exchange or otherwise dispose of all or substantially all the corporate assets more fully described in a schedule attached to the petition; and a statement of the fair value of such assets, and the amount of the corporation's debts and liabilities and how secured.

5. The consideration to be received by the corporation and the disposition proposed to be made thereof, together with a statement that the dissolution of the corporation is or is not contemplated thereafter.

6. That the consideration and the terms of the sale, lease, exchange or other disposition of the assets of the corporation are fair and reasonable to the corporation, and that the purposes of the corporation, or the interests of its members will be promoted thereby, and a concise statement of the reasons therefor.

7. That such sale, lease, exchange or disposition of corporate assets, has been recommended or authorized by vote of the directors in accordance with law, at a meeting duly called and held, as shown in a schedule annexed to the petition setting forth a copy of the resolution granting such authority with a statement of the vote thereon.

8. Where the consent of members of the corporation is required by law, that such consent has been given, as shown in a schedule annexed to the petition setting forth a copy of such consent, if in writing, or of a resolution giving such consent, adopted at a meeting of members duly called and held, with a statement of the vote thereon.

9. A request for court approval to sell, lease, exchange or otherwise dispose of all or substantially all the assets of the corporation as set forth in the petition.

(b) Upon presentation of the petition, the court shall direct that a minimum of fifteen days notice be given by mail or in person to the attorney general, and in its discretion may direct that notice of the application be given, personally or by mail, to any person interested therein, as member, officer or creditor of the corporation. The court shall have authority to shorten the time for service on the attorney general upon a showing of good cause. The notice shall specify the time and place, fixed by the court, for a hearing upon the application. Any person interested, whether or not formally notified, may appear at the hearing and show cause why the application should not be granted.

(c) If the corporation be insolvent, or if its assets be insufficient to liquidate its debts and liabilities in full, the application shall not be granted unless all the creditors of the corporation shall have been served, personally or by mail, with a notice of the time and place of the hearing.

(d) If it shall appear, to the satisfaction of the court, that the consideration and the terms of the transaction are fair and reasonable to the corporation and that the purposes of the corporation or the interests of the members will be promoted, it may authorize the sale, lease, exchange or other disposi-

tion of all or substantially all the assets of the corporation, as described in the petition, for such consideration and upon such terms as the court may prescribe. The order of the court shall direct the disposition of the consideration to be received thereunder by the corporation.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970; amd, L 1970, ch 847, § 23; L 1972, ch 961, eff Sept 1, 1972; L 1985, ch 102, § 1, eff May 21, 1985; L 2013, ch 549, § 55, eff July 1, 2014.

Derivation Notes: Derived from Gen Corp Law §§ 50, 51, 52, 53.

Revision Notes: *Source:* Gen Corp L §§ 50, 51, 52 and 53. *Changes:* Revised, rewarded and combined; new provisions.

Comment: Paragraph (a) is adapted from Gen Corp L § 50. The information required to be stated in the verified petition includes several new provisions, as well as revisions of the requirements of Gen Corp L § 50, in line with the changes made from the provisions of the Mem Corp L. Paragraph (b) is derived from Gen Corp L § 51, with the addition of a provision requiring notice to the Attorney General of the filing of an application under paragraph (a). Paragraph (c) incorporates, without change, the provisions of Gen Corp L § 53. Paragraph (d) is based on Gen Corp L § 52. If the court determines that either the purposes of the corporation or the interests of the members will be promoted, it may authorize the disposition of all or substantially all of the assets, as provided.

Editor's Notes: Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

Notes to Decisions

Analysis

1. Generally
2. Petition for approval of sale
3. Standing
4. Failure to obtain approval
5. Action to set aside sale
6. Specific performance of contract of sale
7. Under former General Corporation Law § 50
8. —Authority to act for corporation
9. —Petition for approval of sale
10. — —Decision of court
11. —Proceeding to confirm unauthorized sale
12. —Stockholder action to set aside sale
13. —Specific performance of contract of sale
14. Under former General Corporation Law § 52

1. Generally

Prior arbitration proceeding before rabbinical panel and subsequent proceeding to confirm arbitration award were not res judicata to proceeding under CLS Relig Corp § 12 and CLS N-PCL § 511 since prior proceedings did not address issue of whether proposed sale of religious organization's real property met requirements of Religious Corporations Law and Not-for-Profit Corporation Law, and CLS Relig Corp § 12 and CLS N-PCL §§ 510 and 511 expressly make authorization by Supreme Court or County Court condition precedent to sale of property, so that rabbinical panel had no authority to give such authorization. Agudist Council of Greater New York v Imperial Sales Co., 158 A.D.2d 683, 551 N.Y.S.2d 955, 1990 N.Y. App. Div. LEXIS 2290 (N.Y. App. Div. 2d Dep't), app. denied, 76 N.Y.2d 707, 560 N.Y.S.2d 989, 561 N.E.2d 889, 1990 N.Y. LEXIS 3095 (N.Y. 1990).

Religious corporation cannot invalidate ultra vires, but otherwise lawful, transfer of property if transfer was duly approved or authorized by judge; religious corporation's remedy is to sue its misbehaving corporate officers. Congregation Yetev Lev D'Satmar v 26 Adar N.B. Corp., 219 A.D.2d 186, 641 N.Y.S.2d 680, 1996 N.Y. App. Div. LEXIS 4447 (N.Y. App. Div. 2d Dep't), app. denied, 88 N.Y.2d 808, 647 N.Y.S.2d 713, 670 N.E.2d 1345, 1996 N.Y. LEXIS 1538 (N.Y. 1996).

Not-for-profit hospitals and not-for-profit corporations that sought to affiliate under newly created common parent corporation, which would assume certain statutory powers under Not-For-Profit Corporation Law including power to appoint and/or remove directors and approve amendments to respective certificates of incorporation and bylaws, were properly granted summary judgment declaring that proposed affiliation did not require notification to Attorney General and court approval under CLS N-PCL §§ 510, 511, 804 and 805. Nathan Littauer Hosp. Ass'n v Spitzer, 287 A.D.2d 202, 734 N.Y.S.2d 671, 2001 N.Y. App. Div. LEXIS 12347 (N.Y. App. Div. 3d Dep't 2001), app. denied, 98 N.Y.2d 602, 744 N.Y.S.2d 762, 771 N.E.2d 835, 2002 N.Y. LEXIS 940 (N.Y. 2002).

Former parishioners' notice of pendency and complaint seeking a declaratory judgment was an impermissible collateral attack on an order authorizing a sale of a church's real property under N.Y. Relig. Corp. Law § 12 and this section; the proper procedure for challenging an order authorizing a sale under this section and § 12 was to move to vacate the order, rather than commencing a second plenary action collaterally attacking an order in a prior action. Citizens for St. Patrick's v Saint Patrick's Church of W. Troy, 117 A.D.3d 1213, 985 N.Y.S.2d 743, 2014 N.Y. App. Div. LEXIS 3259 (N.Y. App. Div. 3d Dep't 2014).

Lender was not entitled to nunc pro tunc confirmation of mortgage entered into with religious organization without court approval because lender had not submitted enough evidence to prove, before discovery had even begun, that nunc pro tunc approval of mortgage would promote purposes of corporation or interest of members as required by statute. Mosdos Chofetz Chaim, Inc. v RBS Citizens, N.A., 14 F. Supp. 3d 191, 2014 U.S. Dist. LEXIS 44039 (S.D.N.Y. 2014).

2. Petition for approval of sale

When a court was asked to approve the sale of the assets of a not-for-profit corporation, under N.Y. Not-for-Profit Corp. Law § 510(3), it also had to review, in the same proceeding, termination payment clauses or similar damages or reimbursement provisions in the sales contract under the standard in N.Y. Not-for-Profit Corp. Law § 511(d) of fairness, reasonableness and furtherance of corporate purpose, as provisions of this type could be valuable to not-for-profits but judicial scrutiny would protect not-for-profits against board actions that might be adverse to the entity's well-being. 64th Assocs., L.L.C. v Manhattan Eye, Ear & Throat Hosp., 2 N.Y.3d 585, 780 N.Y.S.2d 746, 813 N.E.2d 887, 2004 N.Y. LEXIS 1379 (N.Y. 2004), dismissed, 816 N.Y.S.2d 701, 11 Misc. 3d 1067(A), 235 N.Y.L.J. 75, 2006 N.Y. Misc. LEXIS 536 (N.Y. Sup. Ct. 2006)

In determining whether to approve religious corporation's sale of real property under CLS Relig Corp § 12 and CLS N-PCL § 511, court must consider whether bargain was fair and reasonable at time it was entered into and whether sale of property would presently benefit religious corporation (church) and promote best interests of its members, who were real parties in interest. Rende & Esposito Consultants, Inc. v St. Augustine's Roman Catholic Church, 131 A.D.2d 740, 516 N.Y.S.2d 959, 1987 N.Y. App. Div. LEXIS 48195 (N.Y. App. Div. 2d Dep't 1987).

Proceeding to authorize the sale of real property pursuant to N.Y. Not-For-Profit Corp. Law § 511 was remitted for a hearing to determine whether the premises' authorized sale would meet the principles of protecting the beneficiaries of a charitable organization from loss through unwise bargains and from perversion of the use of its property. Matter of Prospect Hgts. Hous. De v Fund Corp., 38 A.D.3d 781, 833 N.Y.S.2d 132, 2007 N.Y. App. Div. LEXIS 3787 (N.Y. App. Div. 2d Dep't 2007).

In determining pursuant to N-PCL § 511 whether a church had leave of court to sell a building, the court determined that the consideration in terms of the transactions were fair and reasonable to the church at the time the contract was made where the fair market value of the building at that time was $2,000,000 and the amended contract price was $2,200,000. In re Church of St. Francis de Sales, 110 Misc. 2d 511, 442 N.Y.S.2d 741, 1981 N.Y. Misc. LEXIS 3115 (N.Y. Sup. Ct. 1981).

Court denied CLS N-PCL § 511 application to approve sale of acute care specialty teaching hospital to for-profit hospital which would open breast cancer facility and to real estate developer which planned to use remaining real estate for apartment building, as (1) transaction could not be deemed "fair and reasonable," even if real estate was fairly valued, where petitioner's board of directors failed to account for significant value of hospital as going concern, (2) proposed sale did not promote "purposes of the corporation," in absence of reasoned and studied determination that there was lack of need for hospital or that financial difficulties made it impossible to ensure hospital's survival, and (3) board failed to properly consider various alternatives which would have preserved hospital's mission. Manhattan Eye, Ear & Throat Hosp. v Spitzer, 186 Misc. 2d 126, 715 N.Y.S.2d 575, 1999 N.Y. Misc. LEXIS 663 (N.Y. Sup. Ct. 1999).

N.Y. Not-For-Profit Corp. Law § 511(a)(6) required that the terms of a proposed sale be fair and reasonable to the corporation, and that the purposes of the corporation, or the interests of its members, will be promoted thereby; in its decision, the New York State Supreme Court held that this requirement was not met by the proposed sale. The Appellate Division affirmed, adding that as a threshold issue, petitioners failed to show that the proposed sales of their properties were even possible; the Bankruptcy Court could not review these earlier state court determinations. In re 51-53 W. 129th St. HDFC, Inc., 475 B.R. 391, 2012 Bankr. LEXIS 3297 (Bankr. S.D.N.Y. 2012).

3. Standing

Prospective purchaser of church property is not properly interested person under CLS N-PCL § 511 and purchaser's due process rights are not violated by failure to give purchaser notice of hearing at which court disapproves contract on basis of inadequate consideration or to allow purchaser to otherwise participate in hearing. Wolkoff v Church of St. Rita, 132 Misc. 2d 464, 505 N.Y.S.2d 327, 1986 N.Y. Misc. LEXIS 2719 (N.Y. Sup. Ct. 1986), aff'd, 133 A.D.2d 267, 518 N.Y.S.2d 1020, 1987 N.Y. App. Div. LEXIS 49756 (N.Y. App. Div. 2d Dep't 1987).

Where a not-for-profit seller had not met the requirements of N.Y. Not-For-Profit Corp. Law §§ 510(a), 511(d) by, inter alia, obtaining leave of court to sell certain property, a buyer could not obtain specific performance of a real property sale contract; therefore, the buyer's N.Y. C.P.L.R. 3215 motion for a default judgment was denied. Century 2000 Custom Home Builders & Developers, LLC. v United Muslim Org. of N.Y., Inc., 772 N.Y.S.2d 186, 1 Misc. 3d 890, 2003 N.Y. Misc. LEXIS 1395 (N.Y. Sup. Ct. 2003)

4. Failure to obtain approval

Charitable foundation's sale of 34 acres of land to defendants fell within ambit of CLS N-PCL §§ 510 and 511 where property in question was foundation's largest, most significant and single most valuable possession, and its sale for inadequate consideration severely hampered foundation's ability to carry out its mission of constructing and operating senior citizens' center thereon; accordingly, contract of sale and deed were null and void where transaction was never subjected to requisite judicial scrutiny, and there was no proof that it was approved by foundation's membership or board of trustees. Rose Ocko Found., Inc. v Lebovits, 93 N.Y.2d 997, 696 N.Y.S.2d 107, 718 N.E.2d 412, 1999 N.Y. LEXIS 1964 (N.Y. 1999).

Deeds used by respondent-appellant to purportedly take title to certain property were null and void because respondent-appellant did not provide evidence showing that the putative grantors had an interest in the property that could be conveyed to respondent-appellant, and no evidence showed the putative grantors of the deed ever had legal title to the property. Furthermore, the conveyance of the property from the former owner/mortgagor religious not-for-profit corporation was ineffective because neither judicial consent nor consent from the state attorney general was obtained for the sale as required under N.Y. Relig. Corp. Law § 12 and N.Y. Not-for-Profit Corp. Law § 511. Wiggs v Williams, 36 A.D.3d 570, 828 N.Y.S.2d 397, 2007 N.Y. App. Div. LEXIS 878 (N.Y. App. Div. 1st Dep't 2007).

A contract for the sale of real property owned by defendant, a nonprofit organization of fraternal lodges, which was properly executed by the corporation president but never delivered to plaintiff purchaser, would not be a valid contract, since the mere signing of the instrument by the parties, not in each other's presence, without more, did not evince the necessary intent, since the failure to satisfy an express condition precedent conditioning the sale upon a final determination of a pending action brought by a faction of defendant's organization opposed to the sale rendered the contract void, since the court had not approved of the sale, which represented substantially all the assets of the corporation, as required by N-PCL § 511, and since the proposed sale would not benefit the corporation or promote the best interests of its members at the present time. Manhattan Theatre Club, Inc. v Bohemian Benevolent & Literary Ass'n, 120 Misc. 2d 1094, 467 N.Y.S.2d 143, 1983 N.Y. Misc. LEXIS 3858 (N.Y. Sup. Ct. 1983), aff'd, 102 A.D.2d 788, 478 N.Y.S.2d 274, 1984 N.Y. App. Div. LEXIS 18952 (N.Y. App. Div. 1st Dep't 1984).

5. Action to set aside sale

In action brought by plaintiff, religious organization, seeking, inter alia, to rescind sale of its property on ground that agreement with buyer, which made substantial changes to terms of court-approved sale, was not court-approved, and to void mortgages on property, court erred in dismissing counterclaims alleging that plaintiff negligently failed to inform mortgagee of agreement and that had he been informed of agreement he would not have made loans to buyer since fact issue existed as to whether mortgagee's reliance on plaintiff's negligent misrepresentation was justified. Salesian Soc'y, Inc. v Nutmeg Partners Ltd., 271 A.D.2d 671, 706 N.Y.S.2d 459, 2000 N.Y. App. Div. LEXIS 4486 (N.Y. App. Div. 2d Dep't 2000).

6. Specific performance of contract of sale

Plaintiff is not entitled to specific performance of a contract to sell real property owned by defendant and upon which its church edifice was erected where, despite the fact that the contract was fair and reasonable when made, the conveyance would be detrimental to the purpose of defendant corporation and the interests of its members. Church of God v Fourth Church of Christ, Scientist, 76 A.D.2d 712, 431 N.Y.S.2d 834, 1980 N.Y. App. Div. LEXIS 12185 (N.Y. App. Div. 2d Dep't 1980), aff'd, 54 N.Y.2d 742, 442 N.Y.S.2d 986, 426 N.E.2d 480, 1981 N.Y. LEXIS 2658 (N.Y. 1981).

In action by prospective purchasers for specific performance of religious corporation's contract to sell property, defended by religious corporation on ground that its trustees had not approved sale as required by CLS Relig Corp § 12 and CLS N-PCL § 511, prospective purchasers could not be bound by findings of rabbinical court (acting as arbitrator of internal dispute among trustees over issue of whether approval had been given) where prospective purchasers were not parties to arbitration and thus had no opportunity to litigate issue; accordingly, religious corporation was not entitled to dismissal of complaint, since "legitimate question" still existed as to whether trustees had validly voted to authorize sale. Levovitz v Yeshiva Beth Henoch, Inc., 120 A.D.2d 289, 508 N.Y.S.2d 196, 1986 N.Y. App. Div. LEXIS 60614 (N.Y. App. Div. 2d Dep't 1986).

At trial of action by prospective purchasers for specific performance of religious corporation's contract to sell property, it would not be necessary to litigate questions of fairness of contract's terms and its promotion of interests of religious corporation (as required by CLS N-PCL § 511), since such questions had been determined by prior Supreme Court order approving sale of property, and that order had never been challenged by parties. Levovitz v Yeshiva Beth Henoch, Inc., 120 A.D.2d 289, 508 N.Y.S.2d 196, 1986 N.Y. App. Div. LEXIS 60614 (N.Y. App. Div. 2d Dep't 1986).

Where a not-for-profit seller had not met the requirements of N.Y. Not-For-Profit Corp. Law §§ 510(a), 511(d) by, inter alia, obtaining leave of court to sell certain property, a buyer could not obtain specific performance of a real property sale contract; therefore, the buyer's N.Y. C.P.L.R. 3215 motion for a default judgment was denied. Century 2000 Custom Home Builders & Developers, LLC. v United Muslim Org. of N.Y., Inc., 772 N.Y.S.2d 186, 1 Misc. 3d 890, 2003 N.Y. Misc. LEXIS 1395 (N.Y. Sup. Ct. 2003)

Court was not allowed to direct specific performance of a contract for the sale of real property by a religious corporation without first determining that the proposed sale complied with N.Y. Relig. Corp. Law § 12 and N.Y. Not-for-Profit Corp. Law § 511. Scher v Yeshivath Makowa Corp., 20 A.D.3d 470, 799 N.Y.S.2d 106, 2005 N.Y. App. Div. LEXIS 7764 (N.Y. App. Div. 2d Dep't 2005).

7. Under former General Corporation Law § 50

A mere exchange of a member's right to share in the property of a membership corporation for a stock interest in a realty corporation to be formed, which interest would be less than the share in the property of the membership corporation, is not a "sale" within the contemplation of this section. Richter v Sea Gate Ass'n, 199 N.Y.S. 303, 120 Misc. 307, 1923 N.Y. Misc. LEXIS 955 (N.Y. Sup. Ct.), aff'd, 207 A.D. 573, 202 N.Y.S. 68, 1923 N.Y. App. Div. LEXIS 5983 (N.Y. App. Div. 1923).

This section merely imposes a limitation on the power of a cemetery corporation organized under the membership corporation law to convey away its property, and is in no sense to be considered a grant of power previously not enjoyed by such a corporation. Application of Kensico Cemetery, 83 N.Y.S.2d 73, 193 Misc. 479, 1948 N.Y. Misc. LEXIS 3287 (N.Y. Sup. Ct. 1948), rev'd, 275 A.D. 681, 86 N.Y.S.2d 737, 1949 N.Y. App. Div. LEXIS 4009 (N.Y. App. Div. 2d Dep't 1949).

8. —Authority to act for corporation

For an extension of a lease to be the act of a corporation, the person signing for the corporation must be authorized to do the act of the corporation, and whether or not he has been so authorized must be determined according to the general corporate law and is not affected by the General Obligations Law. Once it is determined that the signer was authorized to sign for the corporation, the corporation has signed and the statute is satisfied. Commission on Ecumenical Mission & Relations of United Presbyterian Church v Roger Gray, Ltd., 34 A.D.2d 94, 309 N.Y.S.2d 225, 1970 N.Y. App. Div. LEXIS 5145 (N.Y. App. Div. 1st Dep't 1970), rev'd, 27 N.Y.2d 457, 318 N.Y.S.2d 726, 267 N.E.2d 467, 1971 N.Y. LEXIS 1599 (N.Y. 1971).

A buyer is entitled to enquire into the question of whether the required number of seller's trustees approved of the sale to the buyer, since this is a matter peculiarly within the knowledge of the seller. Bounding Home Corp. v Chapin Home for Aged & Infirm., 19 Misc. 2d 653, 191 N.Y.S.2d 722, 1959 N.Y. Misc. LEXIS 3087 (N.Y. Sup. Ct. 1959).

9. —Petition for approval of sale

Petition for approval of church conveyance did not comply with this section, where the secretary's certificate did not show that the sale was authorized by a vote of at least two thirds of the board of directors, and also failed to state, that the interests of the church corporation was promoted by the sale. Application of Margolin, 16 Misc. 2d 961, 183 N.Y.S.2d 36, 1958 N.Y. Misc. LEXIS 2068 (N.Y. Sup. Ct. 1958).

The facts required to be set forth in a petition under this section are those facts which exist at the time of the presentment of the petition. Wilson v Ebenezer Baptist Church, Inc., 17 Misc. 2d 607, 187 N.Y.S.2d 861, 1959 N.Y. Misc. LEXIS 3443 (N.Y. Sup. Ct. 1959).

10. — —Decision of court

The court in determining whether a sale of real property by a religious corporation is in the best interest of the corporation will take into consideration the circumstances surrounding the transaction. Sun Assets Corp. v English Evangelical Lutheran Church of Ascension, 19 Misc. 2d 187, 185 N.Y.S.2d 695, 1959 N.Y. Misc. LEXIS 4167 (N.Y. Sup. Ct. 1959).

11. —Proceeding to confirm unauthorized sale

Where at the time of the sale of real property by a religious corporation, the corporation failed to obtain the permission of the court to sell the property, proceedings for confirmation of the conveyance were referred to a referee to inquire into whether it was for the best interest of the corporation to sell, the reasons for the sale, whether the corporation was solvent, whether consideration was adequate and how the proceeds were to be used, and the oral consent of the religious corporation's attorney was not sufficient. In re Application of Barusek, 1 Misc. 2d 950, 149 N.Y.S.2d 420, 1956 N.Y. Misc. LEXIS 2081 (N.Y. Sup. Ct. 1956).

12. —Stockholder action to set aside sale

A stockholder's derivative action to set aside a conveyance of real property by the corporation on the ground that it was not made with unanimous approval of the directors and stockholders because plaintiff, one of them, had not consented to the sale, was properly dismissed on the merits where it appeared that plaintiff attended the closing and participated in the sale, her conduct being tantamount to formal approval of the sale. Bradley v East Williston Shopping Center, Inc., 15 A.D.2d 560, 222 N.Y.S.2d 943, 1961 N.Y. App. Div. LEXIS 6872 (N.Y. App. Div. 2d Dep't 1961).

13. —Specific performance of contract of sale

Complaint for specific performance of a contract for the sale of church property, where no prior approval thereof has been obtained from the court, must plead the essential facts required by this section. Wilson v Ebenezer Baptist Church, Inc., 17 Misc. 2d 669, 185 N.Y.S.2d 1018, 1959 N.Y. Misc. LEXIS 3758 (N.Y. Sup. Ct. 1959).

The court cannot bypass the submission of a petition under this section and grant specific performance of a contract of sale of church property contrary to the determination by the trustees that it would be against the best interests of the church to convey title. Sun Assets Corp. v English Evangelical Lutheran Church of Ascension, 19 Misc. 2d 187, 185 N.Y.S.2d 695, 1959 N.Y. Misc. LEXIS 4167 (N.Y. Sup. Ct. 1959).

14. Under former General Corporation Law § 52

A contemplated sale is illegal where it appears that a membership corporation is to dispose of all its real property without any consideration which can be applied to its corporate purposes of municipal government, as interests of the corporation will not be promoted by the sale as required by § 50 and this section. Richter v Sea Gate Asso., 207 A.D. 573, 202 N.Y.S. 68, 1923 N.Y. App. Div. LEXIS 5983 (N.Y. App. Div. 1923).

A soldiers' monument corporation was permitted to sell its real property where, before title closing, a majority of the directors authorized the sale under the terms contained in the contract. The evidence established the adequacy of the consideration and that the interests of the corporation would be promoted by the sale. Application of Staten Island War Memorial Asso., 286 A.D. 887, 143 N.Y.S.2d 100, 1955 N.Y. App. Div. LEXIS 4441 (N.Y. App. Div.), app. denied, 286 A.D. 1017, 145 N.Y.S.2d 318, 1955 N.Y. App. Div. LEXIS 5023 (N.Y. App. Div. 1955).

Where at the time of the sale of real property by a religious corporation, the corporation failed to obtain the permission of the court to sell the property, proceedings for confirmation of the conveyance were referred to a referee to inquire into whether it was for the best interest of the corporation to sell, the reasons for the sale, whether the corporation was solvent, whether consideration was adequate and how the proceeds were to be used, and the oral consent of the religious corporation's attorney was not sufficient. In re Application of Barusek, 1 Misc. 2d 950, 149 N.Y.S.2d 420, 1956 N.Y. Misc. LEXIS 2081 (N.Y. Sup. Ct. 1956).

A petition for sale of hospital property must be approved by the court where it clearly appears that the terms of sale are fair and that the sale will be in the best interests of the corporation. Application of St. Luke's Hospital, 33 Misc. 2d 888, 228 N.Y.S.2d 25, 1962 N.Y. Misc. LEXIS 3664 (N.Y. Sup. Ct. 1962).

Agency Opinions

Analysis

1. Generally
2. Under former General Corporation Law § 50
3. —Miscellaneous

1. Generally

A religious corporation must obtain leave of court to sell any of its real estate or any interest therein to a municipality for a public purpose. 1982 NY Ops Atty Gen No. 82–13, 1982 N.Y. AG LEXIS 96.

2. Under former General Corporation Law § 50

3. —Miscellaneous

Library trustees may not loan trust funds of the library to a

religious corporation. 1958 NY Ops Atty Gen Jan 24 (Informal), 1958 N.Y. AG LEXIS 80.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-5 White, New York Business Entities ¶ N511.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business & Commercial § 8.23. Dissolution Procedures.

Matthew Bender's New York Checklists: Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N511:1. Petition to Sell All or Substantially All of Corporation's Property.

§ 511-a. Petition for attorney general approval

(a) In lieu of obtaining court approval under section 511 (Petition for court approval) of this article to sell, lease, exchange or otherwise dispose of all or substantially all of its assets, the corporation may alternatively seek approval of the attorney general by verified petition, except in the following circumstances: (1) the corporation is insolvent, or would become insolvent as a result of the transaction, and must proceed on notice to creditors pursuant to paragraph (c) of section 511 of this article; or (2) the attorney general, in his or her discretion, concludes that a court should review the petition and make a determination thereon.

(b) The verified petition to the attorney general shall set forth (1) all of the information required to be included in a verified petition to obtain court approval pursuant to subparagraphs one through nine of paragraph (a) of section 511 of this article; (2) a statement that the corporation is not insolvent and will not become insolvent as a result of the transaction; and (3) a statement as to whether any persons have raised, or have a reasonable basis to raise, objections to the sale, lease, exchange or other disposition that is the subject of the petition, including a statement setting forth the names and addresses of such persons, the nature of their interest, and a description of their objections. The attorney general, in his or her discretion, may direct the corporation to provide notice of such petition to any interested person, and the corporation shall provide the attorney general with a certification that such notice has been provided.

(c) If it shall appear, to the satisfaction of the attorney general that the consideration and the terms of the transaction are fair and reasonable to the corporation and that the purposes of the corporation or the interests of the members will be promoted, the attorney general may authorize the sale, lease, exchange or other disposition of all or substantially all the assets of the corporation, as described in the petition, for such consideration and upon such terms as the attorney general may prescribe. The authorization of the attorney general shall direct the disposition of the consideration to be received thereunder by the corporation.

(d) At any time, including if the attorney general does not approve the petition, or if the attorney general concludes that court review is appropriate, the petitioner may seek court approval on notice to the attorney general pursuant to section 511 (Petition for court approval) of this article.

HISTORY:

Add, L 2013, ch 549, § 56, eff July 1, 2014.

Editor's Notes: Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

§ 513. Administration of assets received for specific purposes

(a) A corporation which is, or would be if formed under this chapter, a charitable corporation shall hold full ownership rights in any assets consisting of funds or other real or personal property of any kind, that may be given, granted, bequeathed or devised to or otherwise vested in such corporation in trust for, or with a direction to apply the same to, any purpose specified in its certificate of incorporation, and shall not be deemed a trustee of an express trust of such assets. Any other corporation subject to this chapter may similarly hold assets so received, unless otherwise provided by law or in the certificate of incorporation.

(b) Except as may be otherwise permitted under article eight of the estates, powers and trusts law or section 555 (Release or modification of restrictions on management, investment, or purpose), the governing board shall apply all assets thus received to the purposes specified in the gift instrument as defined in section 551 (Definitions) and to the payment of the reasonable and proper expenses of administration of such assets. The governing board shall cause accurate accounts to be kept of such assets separate and apart from the accounts of other assets of the corporation. Unless the terms of the particular gift instrument provide otherwise, the treasurer shall make an annual report to the members (if there be members) or to the governing board (if there be no members) concerning the assets held under this section and the use made of such assets and of the income thereof.

(c), (d) [Repealed]

HISTORY:

Add, L 1969, ch 1066, § 1; amd, L 1970, ch 847, § 24, eff Sept 1, 1970; L 1972, ch 961, § 7; L 1978, ch 690, §§ 3, 4, eff July 25, 1978; L 2010, ch 490, §§ 2, 5, eff Sept 17, 2010; L 2013, ch 549, § 57, eff July 1, 2014.

Revision Notes: *Source:* None.

Changes: Completely new.

Comment: This section provides increased flexibility in the administration of funds received by a not-for-profit corporation for specific purposes that fall within any of its corporate purposes. The section codifies St. Joseph's Hospital v Bennett, 281 NY 115, 22 NE2d 305 (1939), but goes beyond that decision in providing the framework for administration of such assets within the principles of the corporation law

rather than the trust law. Even if trust language is used in the conveying instrument, the receiving corporation acquires full ownership of the fund or property, subject to the duty of the directors to follow the directions of the donor. As compared with trust law, the section gives the directors greater freedom of investment, including the pooling of two or more funds. In addition, the section removes some practical obstacles to the investment of endowment or similar funds in growth, rather than fixed income, securities. This is done by authorizing directors to include in the income of such funds that portion of the realized appreciation of principal as they deem prudent. The directors may therefore, after taking into account the effect of such factors as inflation, properly protect the availability of current income by realization of increased value of securities and similar properties in the fund. The section is made applicable both to existing funds and to funds created in the future.

Editor's Notes: Laws 1978, ch 690, § 11, provides as follows:

§ 11. This act may be cited as the "New York management of institutional funds act".

Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

PRACTICE INSIGHTS:

NOT ALL GIFTS ARE CREATED EQUAL - SPECIAL CONSIDERATIONS FOR ENDOWMENT FUNDS, NEW YORK'S PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT.

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INSIGHT

A donor may designate a gift as an "endowment fund," a label that is more important than it may appear at first glance. Essentially, an endowment is a gift that establishes a permanent source of income to a not-for-profit corporation for a designated purpose. It should be determined immediately upon receipt if a gift is (or could be) an endowment fund. If so, the funds should be administered and accounted for appropriately.

Prior to September 17, 2010, a not-for-profit corporation could not spend the principal, "historic dollar value", of endowment funds. The entity could only spend the "net appreciation" on principal. After adoption of the New York Prudent Management of Institutional Funds Act ("NYPMIFA"), not-for-profit corporations now have greater flexibility in using these funds and in obtaining relief from restrictions imposed on use of these funds. The new law ought to be carefully reviewed in determining how to expend endowment funds created both before and after adoption of the NYPMIFA.

ANALYSIS

Determine Whether Fund in Question Is in Fact Endowment Fund.

The analysis begins with a look at the gift instrument itself. This instrument can be any written document in which the gift is made and defined (for example, will, trust, court order). *See* Not-For-Profit Corp. Law § 551. If the gift instrument expressly establishes an "endowment" or "permanent" fund that is "not wholly expendable by institution on a current basis" it is an endowment fund. Not-For-Profit Corp. Law § 551(b).

Expenditures from Endowment Funds Under New Nypmifa.

Prior to adoption of the NYPMIFA, a not-for-profit corporation was only permitted to spend the net income of a fund and net appreciation on a fund. The funds' "historic dollar value" or principal needed to be preserved. The NYPMIFA removes the prohibition on appropriations below the historical dollar value. However, donors who are "available" with respect to funds established before September 17, 2010 may elect to retain the old historical value limit by responding to a notice from the institution. See Not-For-Profit Corp. Law § 553(e).

New § 553(a) of the Not-For-Profit Law provides that "In making a determination to appropriate or accumulate, the institution shall act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, and shall consider, if relevant, the following factors:(1) the duration and preservation of the endowment fund;(2) the purpose of the institution and the endowment fund;(3) general economic conditions;(4) the possible effect of inflation or deflation;(5) the expected total return from income and the appreciation of investments;(6) other resources of the institution;(7) where appropriate and circumstances would otherwise warrant, alternatives to expenditure of the endowment fund, giving due consideration to the effect that such alternatives may have on the institution; and(8) the investment policy of the institution."

A donor may specifically limit the application of these new spending rules in the gift instrument. See Not-For-Profit Corp. Law § 555. However, generally these new rules will provide not-for-profit boards with greater access to endowment fund monies to support their purposes.

Notification to Donors of Endowment Funds in Existence Prior to September 17, 2010.

Under the new NYPMIFA, all "available" donors of endowment gifts made pursuant to instruments executed before September 17, 2010 must be provided with notice prior to the first time an institution applies the new rules set forth in Not-For-Profit Corp. Law § 553(a). A donor is "available" if the donor can be found with reasonable efforts and is living or is conducting activities (if an entity). Specific language must be included in such notice and during a 90 day period thereafter the donor may make an election to prohibit the application of new Not-For-Profit Corp. Law § 553(a) to the gift.

Lifting Restrictions Under the New Nypmifa.

Under the new NYPMIFA, the NFP corporation also has more options to have restrictions lifted regarding use of funds. New Not-For-Profit Corp. Law § 555 provides that the restrictions on management, investment or purpose can be released or modified (i) by donor consent, (ii) by a court, upon application of an institution, if the restriction has become impracticable or wasteful, if it impairs the management or investment of the fund or if, because of circumstances not anticipated by the donor, a modification of the restriction will further the purposes of the fund, and (iii) if a particular purpose or restriction becomes unlawful, impracticable, impossible, or wasteful. In addition, under the new NYPMIFA an institution may modify or release restrictions on small ($100,000 or less) and old (over 20 years) funds upon appropriate prior notice to the Attorney General, provided the use is in a manner consistent with the purposes expressed in the gift instruction. Under the old law release of restrictions could only be obtained with donor consent, by court order after the donor's death (or if the donor could not be located).

Notes to Decisions

1. Generally

A charitable bequest made to petitioner nonprofit hospital under a 1924 will, presently valued at $850,000, "to be used by said hospital to endow charity beds . . . and for charitable purposes only," as a memorial to decedent and his sister would be an endowment under Not for Profit Corporation Law § 102(a)(13) in view of decedent's clear intent to bestow upon petitioner a permanent fund as memorial and, as such, would be governed by Not for Profit Corporation Law § 102(a)(16) requiring the governing board of the corporation to at all times retain the "historic

dollar value" of the gift, representing principal payments received by petitioner between 1926 and 1962, and petitioner would be entitled to expend any amount in excess of the "historic dollar value" of the endowment for such hospital purposes as would be deemed prudent by its board of trustees under former Not for Profit Corporation Law § 513(c) where the will specifically stated that the fund was to be used for charity beds "and for charitable purposes," there no longer being a need for charity beds; since the very nature of petitioner's operation is charitable, any expenditure that is necessary to further its operation is within the framework of the "charitable purposes" intended by the testator. In re Estate of McKenna, 114 Misc. 2d 304, 451 N.Y.S.2d 617, 1982 N.Y. Misc. LEXIS 3473 (N.Y. Sur. Ct. 1982).

CLS N-PCL § 513(c) does not override CLS N-PCL § 1507 restrictions on invading principal and thus, in action under CLS N-PCL § 112(a)(1), defendants were preliminarily enjoined from invading principal of cemetery's permanent maintenance trust fund or perpetual care trust fund, and from borrowing money from its perpetual care income fund (without prejudice to them if they applied for judicial approval under § 1507(a)), because (1) borrowing money that probably cannot be repaid is extra-statutory means of removing monies from funds without seeking court approval, (2) there would be continued invasion and arguably irreparable harm if injunction was not issued, and (3) balancing of equities favored issuance of preliminary injunction. People by Vacco v Woodlawn Cemetery, 173 Misc. 2d 846, 662 N.Y.S.2d 369, 1997 N.Y. Misc. LEXIS 397 (N.Y. Sup. Ct. 1997).

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-5 White, New York Business Entities ¶ N513.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business & Commercial § 8.05. Directors.

Matthew Bender's New York Checklists: Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

§ 514. Delegation of investment management

(a) Except as otherwise provided by the applicable gift instrument as defined in section 551 (Definitions), the governing board may delegate to its committees, officers or employees of the corporation or the fund the authority to act in place of the governing board in investment and reinvestment of institutional funds as defined in section 551 (Definitions). Each contract, if any, pursuant to which authority is so delegated shall provide that it may be terminated by the governing board at any time, without penalty, upon not more than sixty days' notice. Section 554 (Delegation of management and investment functions) shall govern external delegation.

(b) The governing board shall exercise the standard of care required by section 717 (Duty of directors and officers) in the selection of persons to whom authority is delegated or with whom contracts are made under paragraph (a) of this section and in the continuation or termination of such delegation or contracts. The governing board shall be relieved of all liability for the investment and reinvestment of institutional funds by, and for the other acts or omissions of, persons to whom authority is so delegated or with whom contracts are so made.

HISTORY:

Add, L 1978, ch 690, § 5, eff July 25, 1978; amd, L 2010, ch 490, § 6, eff Sept 17, 2010.

Prior Law: Former § 514, add, L 1969, ch 1066, § 1, derived from Mem Corp Law § 45; amd, L 1970, ch 847, § 25; repealed, L 1978, ch 690, § 5, eff July 25, 1978.

Editor's Notes: Laws 1978, ch 690, § 11, provides as follows:

§ 11. This act may be cited as the "New York management of institutional funds act".

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-5 White, New York Business Entities ¶ N514.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business & Commercial § 8.05. Directors.

Matthew Bender's New York Checklists: Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N514:1. Provisions in Certificate of Incorporation for Appointment of Individual Trustees of Corporation.

White, New York Business Entities Form N514:2. Resolution by Board of Directors Delegating Investment Management to Investment Counsel.

§ 515. Dividends prohibited; certain distributions of cash or property authorized

(a) A corporation shall not pay dividends or distribute any part of its income or profit to its members, directors, or officers.

(b) A corporation may pay compensation in a reasonable amount to members, directors, or officers, for services rendered, and may make distributions of cash or property to members upon dissolution or final liquidation as permitted by this chapter. No person who may benefit from such compensation may be present at or otherwise participate in any board or committee deliberation or vote concerning such person's compensation; provided that nothing in this section shall prohibit the board or authorized committee from requesting that a person who may benefit from such compensation present information as background or answer questions at a committee or board meeting prior to the commencement of deliberations or voting relating thereto. Nothing in this section or in paragraph (h) of section seven hundred fifteen of this chapter shall be construed to prohibit a director from deliberating or voting concerning compensation for service on the board that is to be made available or provided to all directors of the corporation on the same or substantially similar terms.

(c) A corporation may confer benefits upon members or nonmembers in conformity with its purposes, may redeem its capital certificates or subvention certificates, and may make other distributions of cash or property to its members or former members, directors, or officers prior to dissolution or final liquidation, as authorized by this article, except when the corporation is currently insolvent or would

thereby be made insolvent or rendered unable to carry on its corporate purposes, or when the fair value of the corporation's assets remaining after such conferring of benefits, or redemption, or other distribution would be insufficient to meet its liabilities.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970; amd, L 1970, ch 847, § 26, eff Sept 1, 1970; L 2013, ch 549, § 58, eff July 1, 2014; L 2015, ch 555, § 2, effective December 11, 2015.

Revision Notes: *Source:* None.

Changes: Completely new.

Comment: This section is derived in part from Model Not-for-Profit Corp Act § 26. Paragraph (a) prohibits the payment of dividends and the distribution of any part of the corporation's income or profit to its members, directors or officers. Paragraph (b) authorizes the payment of reasonable compensation and distributions of cash or property upon dissolution or final liquidation as permitted by this chapter. Paragraph (c) sets forth the conditions under which a corporation may not confer benefits upon members or non-members, may not redeem its capital certificates or bonds, nor make other distributions prior to dissolution or final liquidation. It should be noted that the express limitations of this paragraph are in addition to the requirements for the redemption of capital certificates in § 502 (Members' capital contributions) and subvention certificates in § 504 (Subventions).

Editor's Notes: Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

Amendment Notes: The 2015 amendment by ch 555, § 2, added the last sentence of (b).

Notes to Unpublished Decisions

1. Generally

Unpublished decision: Receiver's state court action alleging that New York not-for-profit corporation had retained surplus distributions in violation of state law was not subject to removal because New York not-for-profit corporation failed to demonstrate that it was acting under direction of federal officer when it received such distributions or that lawsuit challenged validity of any federal law. Veneruso v Mount Vernon Neighborhood Health Ctr., 586 Fed. Appx. 604, 2014 U.S. App. LEXIS 8449 (2d Cir. N.Y. 2014).

Agency Opinions

1. Generally

The Town of Hempstead Local Development Corporation is authorized to compensate its directors by reason of rendering services in effecting its corporate purposes. 1977 NY Ops Atty Gen March 29 (Informal), 1977 N.Y. AG LEXIS 135.

A subsidiary of the Urban Development Corporation may incorporate under the Business Corporation Law without forfeiting its public status. The subsidiary may not pay profits to private investors, and upon dissolution of the corporation, the assets belong to the State. 1980 N.Y. Op. Att'y Gen. No. 93, 1980 N.Y. AG LEXIS 54.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-5 White, New York Business Entities ¶ N515.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business & Commercial § 8.05. Directors.

Matthew Bender's New York Checklists: Checklist for Identifying Financing Options When Selecting Form of Business Entity LexisNexis AnswerGuide New York Business Entities § 2.18.

Checklist for Assessing Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 2.47.

Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Checklist for Financing Operations of Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.12.

Forms: White, New York Business Entities Form N515:1. Provision for Redemption of Capital Certificates at Prices Reduced Annually.

White, New York Business Entities Form N515:2. Provision for Redemption of Subvention Certificates.

§ 516. Distributions to members upon termination of membership

(a) Except as provided in this chapter or the certificate of incorporation or the by-laws, the interest of a member in the property of a corporation shall terminate upon the termination of his membership, whether by expiration of the term of membership, or by the death, voluntary withdrawal, or expulsion of the member, or otherwise. Such termination shall be without prejudice to his rights, if any, as holder of a capital or subvention certificate.

(b) In the event of a termination of membership, whether voluntary or involuntary, and subject to any restrictions contained in this chapter or the certificate of incorporation or the by-laws, a corporation may at its option thereafter call for redemption any capital certificate or certificates held by such former member, and redeem the same upon payment of a sum of money equal to the redemption price thereof if such certificates are by their terms redeemable, or upon payment of a sum of money equal to the amount of the capital contribution evidenced by such certificates if they are not by their express terms redeemable.

(c) If a member who would upon dissolution of the corporation have distributive rights in its assets under paragraph (d) of section 507 (Fees, dues and assessments; fines and penalties) is expelled other than for cause pursuant to a provision of the certificate of incorporation or by-laws authorizing such expulsion, and the corporation is dissolved within a period of five years after the date of such expulsion, the expelled member shall be entitled to share in the distribution of assets in the same manner as other members of the same class entitled to share at that time, except that his share shall be charged with any arrearages and all dues and assessments which he would have paid if he had remained a member, plus interest on all such items.

(d) Nothing in this section shall authorize a corporation to make a distribution of cash or property to a former member in contravention of the provisions of section 515 (Dividends prohibited; certain distributions of cash or property authorized).

HISTORY:

Add, L 1969, ch 1066, eff Sept 1, 1970; amd, L 1969, ch 1066, § 1, eff Sept 1, 1970; L 1970, ch 847, § 27, eff Sept 1, 1970.

Derivation Notes: Derived from Mem Corp Law § 40.

Revision Notes: *Source:* None.

Changes: Completely new.

Comment: Paragraph (a) states that the general rule, in the absence of a provision in this chapter, the certificate of incorporation or the by-laws providing otherwise, is that the interest of a member in the property of the corporation shall terminate upon the termination of his membership, however this may occur. Termination of membership shall not, however, prejudice a member's rights as holder of a capital or subvention certificate. Paragraph (b) provides that upon termination of membership and subject to any certificate or by-law restrictions, a corporation may call for redemption any capital certificate held by the former member and redeem the same by paying an amount equal to the redemption value, if any, or to the face value of the certificate, if the certificate is not by its terms redeemable. Paragraph (c), which is in part adapted from NC Gen Stat § 55A-29, sets forth provisions to protect the property rights of expelled members. Paragraph (d) makes clear that these provisions are subject to the prohibitions of sections 515 (Dividends prohibited; certain distributions of cash or property authorized).

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-5 White, New York Business Entities ¶ N516.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business & Commercial § 8.04. The Role of Members in the Corporation.

New York Practice Guide: Business & Commercial § 8.16. By-laws.

Matthew Bender's New York Checklists: Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N516:1. Provision in By-Laws Continuing Member's Interest in Property of Corporation after Termination of Membership.

§ 517. Liabilities of members

(a) The members of a corporation shall not be personally liable for the debts, liabilities or obligations of the corporation.

(b) A member shall be liable to the corporation only to the extent of any unpaid portion of the initiation fees, membership dues or assessments which the corporation may have lawfully imposed upon him, or for any other indebtedness owed by him to the corporation. No action shall be brought by any creditor of the corporation to reach and apply any such liability to any debt of the corporation until after final judgment shall have been rendered against the corporation in favor of the creditor and execution thereon returned unsatisfied, or the corporation shall have been adjudged bankrupt, or a receiver shall have been appointed with power to collect debts, and which receiver, on demand of a creditor to bring suit thereon, has refused to sue for such unpaid amount, or the corporation shall have been dissolved or ceased its activities leaving debts unpaid. No such action shall be brought more than three years after the happening of any one of such events.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970.

Revision Notes: *Source:* None.

Changes: Completely new.

Comment: Paragraph (a) provides that members are not personally liable for corporate debts, liabilities or obligations. The language is derived from 15 Pa Stat Ann § 7610. Paragraph (b) provides that a member shall be liable to the corporation to the extent of any unpaid portion of lawfully imposed initiation fees, membership dues, assessments or any other indebtedness. The paragraph further provides that a corporate creditor may bring an action to reach the member's obligation and apply it to the satisfaction of the corporate debt only upon the happening of specified events, and then, within three years. Paragraph (b) is adapted from provisions in Ind Ann Stat § 25-513.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-5 White, New York Business Entities ¶ N517.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business & Commercial § 8.04. The Role of Members in the Corporation.

New York Practice Guide: Business & Commercial § 8.16. By-laws.

Matthew Bender's New York Checklists: Checklist for Identifying Liability Issues When Selecting Entity Form LexisNexis AnswerGuide New York Business Entities § 2.02.

Checklist for Assessing Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 2.47.

§ 519. Annual report of directors

(a) The board shall present at the annual meeting of members a report, verified by the president and treasurer or by a majority of the directors, or certified by an independent public or certified public accountant or a firm of such accountants selected by the board, showing in appropriate detail the following:

(1) The assets and liabilities, including the trust funds, of the corporation as of the end of a twelve month fiscal period terminating not more than six months prior to said meeting.

(2) The principal changes in assets and liabilities, including trust funds, during said fiscal period.

(3) The revenue or receipts of the corporation, both unrestricted and restricted to particular purposes during said fiscal period.

(4) The expenses or disbursements of the corporation, for both general and restricted purposes, during said fiscal period.

(5) The number of members of the corporation as of the date of the report, together with a statement of increase or decrease in such number during said fiscal period, and a statement of the place where the names and places of residence of the current members may be found.

(b) The annual report of directors shall be filed with the records of the corporation and either a copy or an abstract thereof entered in the minutes of the proceedings of the annual meeting of members.

(c) The board of a corporation having no members shall direct the president and treasurer to present at the annual meeting of the board a report in accordance with paragraph (a), but omitting the requirement of subparagraph (5). This report shall be filed with the minutes of the annual meeting of the board.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970; amd, L 1970, ch 847, § 28; L 1971, ch 1058 § 12, eff Sept 1, 1971; L 1974, ch 213, eff July 1, 1974.

Derivation Notes: Derived from Mem Corp Law §§ 26, 46.

Revision Notes: *Source:* Mem Corp L § 46.

Changes: Revised and reworded; new provisions added.

Comment: This section is adapted from Mem Corp L § 46 with some revisions in procedure and content. Instead of statements about the amount of real and personal property owned by the corporation, the report is to include specific information about the assets and liabilities of the corporation, thus in effect requiring accounts to be kept in the current forms generally accepted and used today. Paragraph (b) continues the requirement in the Membership Corporation Law that the report be filed with the records of the corporation, with an abstract of the report entered in the minutes of the meeting at which it is presented. Paragraph (c), which is new, applies in the case of corporations without members. The report, omitting only the list of new members but otherwise complying with the requirements of subparagraph (a), is to be made by the president and treasurer and presented to the board.

Notes to Decisions

Analysis

1. Generally
2. Under former Membership Corporations Law § 46

1. Generally

Where purported accounting by nonprofit church corporation failed to comply with statutory requirement, church corporation was ordered to render an accounting of its assets and financial transactions for the period from October 1, 1974, to the date of the judgment. Anthony v Cardin, 91 Misc. 2d 506, 398 N.Y.S.2d 215, 1977 N.Y. Misc. LEXIS 2341 (N.Y. Sup. Ct. 1977).

2. Under former Membership Corporations Law § 46

A bylaw of a membership corporation which precludes any and all access to the corporate records of lists of guild membership on the say-so of the guild council is so far inconsistent with the letter and spirit of § 46 as to be wholly void and without effect. Davids v Sillcox, 297 N.Y. 355, 79 N.E.2d 440, 297 N.Y. (N.Y.S.) 355, 1948 N.Y. LEXIS 845 (N.Y.), reh'g denied, 298 N.Y. 618, 81 N.E.2d 353, 298 N.Y. (N.Y.S.) 618, 1948 N.Y. LEXIS 1185 (N.Y. 1948).

This section specifically excludes a corporation promoting or maintaining the principles of a political party from the mandate of the law requiring a corporation to provide a member with a copy of the membership list upon demand. Avallon v Riverside Democrats, Inc., 25 A.D.2d 378, 269 N.Y.S.2d 573, 1966 N.Y. App. Div. LEXIS 4281 (N.Y. App. Div. 1st Dep't), app. dismissed, 18 N.Y.2d 714, 274 N.Y.S.2d 151, 220 N.E.2d 798, 1966 N.Y. LEXIS 1134 (N.Y. 1966).

This section does not require directors to file an account; the report required is limited to the information described in the statute, whereas an accounting is without limitation. Hamilton v Patrolmen's Benov. Ass'n, 88 N.Y.S.2d 683, 202 Misc. 848, 1949 N.Y. Misc. LEXIS 2163 (N.Y. Sup. Ct. 1949).

A director of a membership corporation has the unqualified right to inspect the books and records of the corporation. Javits v Investors League, Inc., 92 N.Y.S.2d 267, 1949 N.Y. Misc. LEXIS 2809 (N.Y. Sup. Ct. 1949).

This section does not make it necessary to furnish a copy of the membership list of the corporation to a director, since the names and addresses of those admitted to membership during the preceding year may be verified by the president and treasurer or by a majority of the directors. Javits v Investors League, Inc., 92 N.Y.S.2d 267, 1949 N.Y. Misc. LEXIS 2809 (N.Y. Sup. Ct. 1949).

Where a director of a membership corporation seeks to inspect the membership list of the corporation for the purpose of enabling him to communicate his views to the members, and it appears that there are grounds for suspicion that the director is seeking to establish a new corporation in opposition to that of which he is a director, he will be allowed to inspect such records, but will be allowed to make no copies thereof and he will be required to submit correspondence to the corporation for transmission to the members. Javits v Investors League, Inc., 92 N.Y.S.2d 267, 1949 N.Y. Misc. LEXIS 2809 (N.Y. Sup. Ct. 1949).

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-5 White, New York Business Entities ¶ N519.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business & Commercial § 8.05. Directors.

New York Practice Guide: Business & Commercial § 8.12. Reporting Requirements.

Matthew Bender's New York Checklists: Checklist for Assessing Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 2.47.

Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N519:1. Annual Report of Directors.

§ 519-a. Annual reports for certain transactions required

(a) A condominium created pursuant to the real property law or a cooperative housing corporation created pursuant to the business corporation law, shall, at least once each year:

(b) The annual report required by subdivision (a) of this section shall include, but not be limited to, the following:

(1) a list of all contracts voted on by the board of directors, including information on the contract recipient, contract amount, and the purpose of entering into the contract;

(2) the record of each meeting including director attendance, voting records for contracts, and how each director voted on such contracts; and

(3) the date of each vote on each contract, and the date the contract would be and remain valid.

(c) If the annual report required by paragraph two of subdivision (a) of this section would, notwithstanding the requirements of this section, contain no information because of the absence of any actions taken by the board that would otherwise qualify for inclusion in such annual report, then the board shall instead submit to the members or to the governing board, if there are no members, a document, signed by each director, indicating: "No actions taken by the board were subject to the annual report required pursuant to section 519-a of the Not-for-Profit Corporation Law".

HISTORY:

L 2017, ch 305, § 1, effective January 1, 2018; L 2018, ch 9, § 1, effective January 1, 2018.

Editor's Notes Laws 2017, ch 305, § 3, eff Jan 1, 2018, provides:

§ 3. This act shall take effect on the first of January next succeeding the date on which it shall have become a law.

Laws 2018, ch 9, § 3, eff January 1, 2018, provides:

§ 3. This act shall take effect on the same date and in the same manner as a chapter of the laws of 2017, amending the not-for-profit corporation law and the business corporation law, relating to conflicts of interests for condominium and cooperative housing, as proposed in legislative bills numbers S.6652-A and A.8261-A, takes effect.

Amendment Notes The 2018 amendment by ch 9, § 1, substituted "A condominium created pursuant to the real property law or a cooperative housing corporation created pursuant to the business corporation law" for "Every condominium or cooperative housing corporation, incorporated pursuant to this chapter" in the introductory language of (a).

§ 520. Reports of corporation

Each domestic corporation, and each foreign corporation authorized to conduct activities in this state, shall from time to time file such reports on its activities as may be required by the laws of this state. All registration and reporting requirements pursuant to article seven-A of the executive law, and section 8-1.4 of the estates, powers and trusts law, or related successor provisions, are, without limitation on the foregoing, expressly included as reports required by the laws of this state to be filed within the meaning of this section. Willful failure of a corporation to file a report as required by law shall constitute a breach of the directors' duty to the corporation and shall subject the corporation, at the suit of the attorney-general, to an action or special proceeding for dissolution under article 11 (Judicial dissolution) in the case of a domestic corporation, or under section 1303 (Violations) in the case of a foreign corporation.

HISTORY:

Add, L 1969, ch 1066, § 1; amd, L 1970, ch 847, § 29; L 1981, ch 58, § 1, eff July 5, 1981; L 2013, ch 549, § 59, eff July 1, 2014.

Revision Notes: *Source:* None.

Changes: Completely new.

Comment: This section makes provision for the enforcement of any requirement that the laws of the state may set forth that domestic and foreign corporations shall file reports on the conduct of their activities in this state.

Editor's Notes: Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-5 White, New York Business Entities ¶ N520.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business & Commercial § 8.05. Directors.

New York Practice Guide: Business & Commercial § 8.12. Reporting Requirements.

Matthew Bender's New York Checklists: Checklist for Assessing Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 2.47.

Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

ARTICLE 6 Members

Section

601. Members
602. By-laws
603. Meetings of members
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605. Notice of meeting of members.
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611. Qualification of voters; fixing record date to determine eligibility to vote; voting entitlement
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614. Action by members without a meeting
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616. Voting by class of members
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618. Power of supreme court respecting elections
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624. Notification to tenants.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970.

§ 601. Members

(a) A corporation shall have one or more classes of members, or, in the case of a charitable corporation, may have no members, in which case any such provision for classes of members or for no members shall be set forth in the certificate of incorporation or the by-laws. Corporations, joint-stock associations, unincorporated associations and partnerships, as well as any other person without limitation, may be members, provided however, that effective July first, two thousand nineteen, no corporation except a corporation that has no members, shall have a membership comprised of fewer than three persons. A corporation may have a corporation, joint-stock association, unincorporated association or partnership as a sole member, if such corporation, joint-stock association, unincorporated association or partnership is owned or controlled by no fewer than three persons.

(b) If the corporation has two or more classes of members, the designation and characteristics of each class and the qualifications and rights of, and limitations upon, the members of each class may be set forth in the certificate of incorporation, the by-laws or, if the by-laws so provide, a resolution of the board.

(c) If the corporation has members, membership may be effected and evidenced by:

(1) Signature on the certificate of incorporation.

(2) Designation in the certificate of incorporation or the by-laws.

(3) Membership certificate or card or capital certificate.

(4) Such method, including but not limited to the foregoing, as is prescribed by the certificate of incorporation or the by-laws.

(d) Membership certificates or cards shall not be transferable. If the certificate of incorporation or by-laws permits transfer of membership, upon each such transfer the certificate or card issued to a former member shall be surrendered, and a new certificate or card shall be issued to the new member.

(e) Except as otherwise provided in this chapter or the certificate of incorporation or the by-laws, membership shall be terminated by death, resignation, expulsion, expiration of a term of membership or dissolution and liquidation under articles 10 and 11.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970; amd, L 1970, ch 847, § 31, eff Sept 1, 1970; L 1971, ch 1058, § 13, eff Sept 1, 1971; L 2013, ch 549, § 61, eff July 1, 2014; L 2018, ch 411, § 1, effective December 21, 2018.

Derivation Notes: Derived from Mem Corp Law §§ 20, 40.

Revision Notes: *Source:* Mem Corp L § 40.

Changes: Virtually new.

Comment: This section, essentially a new codification for this state, provides a comprehensive treatment of the subject of membership in not-for-profit corporations, setting forth, generally, who may be members (paragraph (a)); how membership may be effected and evidenced (paragraph (c)); and how membership may be terminated (paragraph (e)).

The following features of the section should be especially noted:

(1) Type B corporations (described in section 201 as basically charitable in character) may exist without membership-statutory recognition of the current existence of certain charitable foundations without membership, which are managed by self-perpetuating boards of directors.

(2) Where there are two or more classes of members, the number of classes (paragraph (a)) and the designation and special characteristics of each such class (paragraph (b)) may be set forth in the by-laws as well as the certificate of incorporation.

(3) Membership, as such, may not be transferred (paragraph (d)), although capital contributions, represented by capital certificates, may be, to the extent authorized by paragraph (d) of section 502.

Editor's Notes: Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

Amendment Notes The 2018 amendment by ch 411, § 1, added "provided however, that effective July first, two thousand nineteen, no corporation except a corporation that has no members, shall have a membership comprised of fewer than three persons. A corporation may have a corporation, joint-stock association, unincorporated association or partnership as a sole member, if such corporation, joint-stock association, unincorporated association or partnership is owned or controlled by no fewer than three persons" in (a).

Notes to Decisions

Analysis

1. Generally
2,. Voluntary withdrawal
3. Under former Membership Corporations Law § 20
4. —Reduction of membership
5. —Voluntary withdrawal of member
6. —Power to discipline, suspend, or expel
7. — —Grounds
8. —Procedure for expulsion
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12. —Applicant for membership
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16. —Procedure for expulsion
17. — —Notice of meeting to consider expulsion
18. — —Notice of charges
19. — —Waiver of notice
20. —Remedy for improper expulsion
21. —Readmission of expelled member
22. —Membership as property
23. —Miscellaneous

1. Generally

Petitioner, who was a resident and taxpayer of town and who made annual charitable contributions to nursing home organized pursuant to Not-For-Profit Corporation Law, but who was not a manager thereof under any of four tests specified by Law and who was not an officer or director and had no beneficial interest in corporation, had no right to inspect records of corporation. Getman v Mohawk Valley Nursing Home, Inc., 44 A.D.2d 392, 355 N.Y.S.2d 508, 1974 N.Y. App. Div. LEXIS 4990 (N.Y. App. Div. 4th Dep't 1974).

Conflict between definition of "member" as used in restrictive covenants in deeds of subdivision to include an "entity" and the definition of membership in the by-laws of association incorporated under the Not-For-Profit Corporation Law must be governed by by-laws and would be construed to preclude corporation from membership in the Association. Procopio v Fisher, 83 A.D.2d 757, 443 N.Y.S.2d 492, 1981 N.Y. App. Div. LEXIS 15075 (N.Y. App. Div. 4th Dep't 1981).

Complaint was properly dismissed due to plaintiff's lack of standing to bring derivative action on behalf of not-for-profit cemetery corporation where plaintiff was not member of corporation as set forth in its certificate or incorporation, and he did not otherwise come within categories of members defined by its by-laws; fact that plaintiff was land share certificate holder, and thus had voting rights under corporation's by-laws, was irrelevant where enumeration in by-laws of "members" did not include land share certificate holders. Harris v Lyke, 217 A.D.2d 982, 629 N.Y.S.2d 911, 1995 N.Y. App. Div. LEXIS 8420 (N.Y. App. Div. 4th Dep't), app. denied, 87 N.Y.2d 801, 637 N.Y.S.2d 688, 661 N.E.2d 160, 1995 N.Y. LEXIS 4931 (N.Y. 1995).

Petitioner's expulsion from country club violated CLS N-PCL § 601 where board of governors failed to strictly comply with provision of club by-laws which required notifying petitioner, in writing, of charges against him and action that might be taken on those charges. Capossela v Wykagyl Country Club, 258 A.D.2d 522, 685 N.Y.S.2d 275, 1999 N.Y. App. Div. LEXIS 1004 (N.Y. App. Div. 2d Dep't 1999).

In Article 78 proceeding in which "inactive" members of respondent not-for-profit corporation involved in presentation of "Tony" Awards challenged respondent's decision to amend its bylaws to prevent inactive members from participating in Tony awards, respondent was directed to provide its official membership list of Tony award voters for season in question and to create such list if it did not already exist, as petitioners' disclosure demand was not frivolous or intended to harass, in light of issues presented. Wells v League of Am. Theatres & Producers, Inc., 183 Misc. 2d 915, 706 N.Y.S.2d 599, 2000 N.Y. Misc. LEXIS 101 (N.Y. Sup. Ct. 2000).

Since the sponsor was not a member under N.Y. Not-for-Profit Corp. Law 601 of defendant company, there was no basis in N.Y. Not-for-Profit Corp. Law 706 for its attempted removal of the latter's directors. Alpha Phi Alpha Senior Citizens Ctr., Inc. v Zeta Zeta Lambda Co., Inc., 53 Misc. 3d 1066, 38 N.Y.S.3d 400, 2016 N.Y. Misc. LEXIS 3336 (N.Y. Sup. Ct. 2016), aff'd, 180 A.D.3d 630, 119 N.Y.S.3d 181, 2020 N.Y. App. Div. LEXIS 892 (N.Y. App. Div. 2d Dep't 2020).

By-laws of not-for-profit corporation which required each member to agree not to withdraw from the association without the consent of a majority of all members were valid despite fact that members were in effect locked into the association unless they could persuade a majority of the members to vote against their own economic interests to release them. Leon v Chrysler Motors Corp., 358 F. Supp. 877, 1973 U.S. Dist. LEXIS 14734 (D.N.J.), aff'd, 474 F.2d 1340 (3d Cir. N.J. 1973).

2, Voluntary withdrawal

Under corporate trade association's bylaw providing that "Upon receipt at the principal place of business of the cooperative of a notice of intention to resign, the Secretary of the corporation shall mark such receipt in the records of the corporation, and sixty days after such receipt such resignation shall become effective, relieving the member of all liability and responsibility for assessments thereafter," secretary's marking the receipt of notice of intention to resign from membership in association on records of association was not a condition precedent to a valid resignation. New York New Jersey Producer Dealers Cooperative, Inc. v Mocker, 59 A.D.2d 970, 399 N.Y.S.2d 280, 1977 N.Y. App. Div. LEXIS 14232 (N.Y. App. Div. 3d Dep't 1977).

There is prima facie validity to any provision of a not-for-profit corporation by-law restricting right of member to withdraw voluntarily. Leon v Chrysler Motors Corp., 358 F. Supp. 877, 1973 U.S. Dist. LEXIS 14734 (D.N.J.), aff'd, 474 F.2d 1340 (3d Cir. N.J. 1973).

3. Under former Membership Corporations Law § 20

The Medical Society of County of New York has jurisdiction to try a member on charges which, if proved, would show that he had committed acts unfavorably affecting the dignity, character and interests of the medical profession, of the society and its members, although the acts do not directly involve the relations of the member as such to the society. Ewald v Medical Soc. of New York County, 144 A.D. 82, 128 N.Y.S. 886, 1911 N.Y. App. Div. LEXIS 1629 (N.Y. App. Div. 1911).

Where the bylaws and the constitution of a membership corporation provide for the determination of claims involving members, and a member voluntarily submits his case to the arbitration committee thereof and has appealed from the arbitration award, he cannot then dispute the authority of the arbitration committee to consider and pass upon the claim on the ground that the adversary party is not a member of the association. National League of Com. Merchants v Hornung, 148 A.D. 355, 132 N.Y.S. 871, 1911 N.Y. App. Div. LEXIS 209 (N.Y. App. Div. 1911).

This section provides that bylaws of a membership corporation may make provisions not inconsistent with law or its certificate of incorporation regulating admission and voluntary withdrawal of members, their dues, and termination of membership on nonpayment of dues or otherwise, and a member of such a corporation makes its valid bylaws part of his contract of membership and becomes bound by them. Associated General Contractors of America v Lapardo Bros. Excavating Contractors, Inc., 43 Misc. 2d 825, 252 N.Y.S.2d 486, 1964 N.Y. Misc. LEXIS 1491 (N.Y. Sup. Ct. 1964).

In the absence of provisions in the bylaws to the contrary, members of one faction in a club may solicit and induct into membership, new members for the purpose of gaining their support in a forthcoming election. Petition of Serenbetz, 46 N.Y.S.2d 475, 1943 N.Y. Misc. LEXIS 2788 (N.Y. Sup. Ct. 1943), aff'd, 267 A.D. 836, 46 N.Y.S.2d 127, 1944 N.Y. App. Div. LEXIS 5031 (N.Y. App. Div. 1944).

Where an association incorporated pursuant to former § 8 from which this section is derived sets up a private tribunal to determine whether a member has forfeited his rights of membership, the courts will interfere to keep such tribunals within its jurisdiction, and inquire into whether action was taken in bad faith, or in violation of law, but will not investigate the merits of the tribunal's decision. Stevenson v Holstein-Friesian Ass'n, 30 F.2d 625, 1929 U.S. App. LEXIS 2475 (2d Cir. N.Y. 1929).

4. —Reduction of membership

The number of members of a membership corporation may be reduced by an amendment in respect thereto to the bylaws, in the absence of a provision in the certificate of incorporation fixing the membership. Keeler v New York Hide Exchange, Inc., 231 A.D. 450, 247 N.Y.S. 482, 1931 N.Y. App. Div. LEXIS 16073 (N.Y. App. Div. 1931).

5. —Voluntary withdrawal of member

A by-law of a membership corporation which states that any withdrawal must be approved by the board, and, if not so approved, the member may still have the benefit of his contract for a period of two years by continuing to receive service and pay for it, at the end of which period, automatically, his withdrawal shall become final is not invalid as arbitrary. Associated Press v Emmett, 45 F. Supp. 907, 1942 U.S. Dist. LEXIS 2669 (D. Cal. 1942).

6. —Power to discipline, suspend, or expel

Where the bylaws of a society provide for the expulsion of a member for two specific offenses, and further recite that as to other infractions, the directing board has discretion to impose "disciplinary measures and punishments", the term disciplinary measures and punishments does not include the power of expulsion. Pepe v Missanellese Soc. of Mut. Aid, 252 N.Y.S. 70, 141 Misc. 7, 1930 N.Y. Misc. LEXIS 1807 (N.Y. Sup. Ct. 1930).

A membership corporation has no right to impose a fine on one of its members under a provision of its bylaws giving the corporation the right to expel, suspend or discipline a member for any violation of the bylaws of the corporation or any agreement made thereby. Merchants' Ladies Garment Ass'n v Coat House of William M. Schwartz, Inc., 273 N.Y.S. 317, 152 Misc. 130, 1934 N.Y. Misc. LEXIS 1487 (N.Y. Mun. Ct. 1934).

The power of expulsion, unless it appears by the most express and unambiguous language that such power has been transferred to the governing body of the organization, either in the bylaws or by the constitution, is in the membership of the organization as a whole. Weinberg v Carton, 90 N.Y.S.2d 398, 196 Misc. 74, 1949 N.Y. Misc. LEXIS 2425 (N.Y. Sup. Ct. 1949).

Where the bylaws of a membership corporation whose membership consisted of commercial discount companies provided that each member should inform the secretary of the organization of unusual or suspicious transactions involving clients, and the bylaws further provided for the punishment of a member failing to comply with such bylaws, the sole recourse of a member who feels that he has been injured by another member's nonobservance of the bylaw is by seeking the punishment of the offending member in the manner and to the extent authorized by the bylaws, and such member has no action either in breach of contract or in tort, even though such bylaws constitute a contract not only with the association and its members, but also between the members inter sese. Weissman v Birn, 56 N.Y.S.2d 269, 1945 N.Y. Misc. LEXIS 2000 (N.Y. Sup. Ct.), aff'd, 270 A.D. 757, 59 N.Y.S.2d 917, 1945 N.Y. App. Div. LEXIS 2863 (N.Y. App. Div. 1945).

7. — —Grounds

A membership corporation has the natural right of self-preservation and the inherent power to expell its members for disloyalty in joining or forming rival organizations. So, a complaint by members of a national society of decorators in their action for a judgment declaring illegal a resolution terminating their membership in the society if they did not resign from a competitive society, was dismissed. Bockman v American Institute of Decorators, 7 A.D.2d 495, 184 N.Y.S.2d 381, 1959 N.Y. App. Div. LEXIS 9197 (N.Y. App. Div. 1st Dep't), aff'd, 7 N.Y.2d 850, 196 N.Y.S.2d 988, 164 N.E.2d 862, 1959 N.Y. LEXIS 936 (N.Y. 1959).

Nothing in this section precludes the inclusion of a provision in the by-laws of a membership corporation, which is a trade organization composed of persons and entities engaged in the retail furniture business in New York State, automatically suspending any member who files a bankruptcy petition or makes an assignment for benefit of creditors and further provides for expulsion from membership in such case, nor is such a by-law in violation of general law or of federal law relating to bankruptcy. Schlossmans, Inc. v Associated Furniture Dealers, Inc., 31 Misc. 2d 938, 221 N.Y.S.2d 872, 1961 N.Y. Misc. LEXIS 2224 (N.Y. Sup. Ct. 1961), aff'd, 17 A.D.2d 725, 1962 N.Y. App. Div. LEXIS 8162 (N.Y. App. Div. 1st Dep't 1962).

A local membership corporation is bound by the rules and decisions of the parent organization and the power to suspend or expel members is "for cause" when such conduct is destructive of the purpose of the organization. Paglia v Staten Island Little League, Inc., 66 Misc. 2d 626, 322 N.Y.S.2d 37, 1971 N.Y. Misc. LEXIS 1574 (N.Y. Sup. Ct.), rev'd, 38 A.D.2d 575, 328 N.Y.S.2d 224, 1971 N.Y. App. Div. LEXIS 2723 (N.Y. App. Div. 2d Dep't 1971).

8. —Procedure for expulsion

Where a bylaw provides that in order to expel a member, there must be a hearing at a regular meeting and the person charged must be found guilty by a two-thirds vote of the members present, the directors, or the governing body of the association, have no power to conduct a hearing, and expel a member at a directors' meeting. Weinberg v Carton, 90 N.Y.S.2d 398, 196 Misc. 74, 1949 N.Y. Misc. LEXIS 2425 (N.Y. Sup. Ct. 1949).

In the absence of any provision in the bylaws or constitution of an organization as to procedure regulating the filing of charges and subsequent preliminary procedure before trial of one charged with an offense which if proved would result in expulsion, such charges must be filed with the members of the association as a body at a meeting of the association, and they, as such body, must prescribe the preliminary procedure. Weinberg v Carton, 90 N.Y.S.2d 398, 196 Misc. 74, 1949 N.Y. Misc. LEXIS 2425 (N.Y. Sup. Ct. 1949).

9. — —Notice of charges

A bylaw permitting expulsion of a member without notice of charges and an opportunity to be heard is invalid. Briggs v Technocracy, Inc., 85 N.Y.S.2d 735, 1948 N.Y. Misc. LEXIS 3852 (N.Y. Sup. Ct. 1948).

Expulsion of a member of a membership corporation without notice or a statement of charges or an opportunity to be heard is illegal, notwithstanding the fact that the bylaws of the corporation make no express provision for a hearing. Briggs v Technocracy, Inc., 85 N.Y.S.2d 735, 1948 N.Y. Misc. LEXIS 3852 (N.Y. Sup. Ct. 1948).

10. —Readmission of expelled member

Where the bylaws of a union provided for readmission of members "on such terms as a local union or Executive Board . . . may determine upon a two-thirds vote of the members present at a meeting of the local or its executive or membership committee" an applicant for readmission cannot be considered to have been readmitted where no official action was taken by the union upon the application. Felman v Fur Dressers' Union, 29 N.Y.S.2d 174, 1941 N.Y. Misc. LEXIS 2005 (N.Y. App. Term 1941).

11. Under former Membership Corporations Law § 40

A bylaw restricting membership is valid. Matthews v Associated Press, 136 N.Y. 333, 136 N.Y. 662, 32 N.E. 981, 136 N.Y. (N.Y.S.) 333, 1893 N.Y. LEXIS 607 (N.Y. 1893).

The language of this section compels the conclusion that where the sole method of termination has not been employed, membership would appear still to exist. In re Mt. Sinai Hospital, 219 N.Y.S. 505, 128 Misc. 476, 1926 N.Y. Misc. LEXIS 846 (N.Y. Sup. Ct. 1926), aff'd, 223 A.D. 836, 228 N.Y.S. 855, 1928 N.Y. App. Div. LEXIS 7539 (N.Y. App. Div. 1928).

A member upon joining a membership corporation accepts and agrees to abide by the bylaws of the corporation and the duly adopted amendments thereto; the by-laws are a contract between the corporation and the member. Buffalo Ass'n of Fire Underwriters v Noxsel-Dimick Co., 253 N.Y.S. 40, 141 Misc. 333, 1931 N.Y. Misc. LEXIS 1761 (N.Y. Sup. Ct. 1931), rev'd, 235 A.D. 92, 256 N.Y.S. 263, 1932 N.Y. App. Div. LEXIS 7890 (N.Y. App. Div. 1932).

Each person admitted to membership in a membership corporation pursuant to law or its bylaws shall be a member until his membership shall terminate by death, resignation or otherwise. Associated General Contractors of America v Lapardo Bros. Excavating Contractors, Inc., 43 Misc. 2d 825, 252 N.Y.S.2d 486, 1964 N.Y. Misc. LEXIS 1491 (N.Y. Sup. Ct. 1964).

The by-laws of an incorporated volunteer fire department may provide for provisional appointment of new members for a probationary period. 1955 Ops St Compt File #7411.

12. —Applicant for membership

There is no rule of law which gives power to a court to compel a membership corporation or a voluntary association to accept an applicant as a member. Simons v Berry, 210 A.D. 90, 205 N.Y.S. 442, 1924 N.Y. App. Div. LEXIS 6661 (N.Y. App. Div. 1924).

Where one who is a member of a suspended and subsequently dissolved local union and who is a party to such dissolution, seeks to join the international union of which the former local was affiliated, his status is that of an applicant for membership, not that of one seeking reinstatement, and upon rejection of his application, he cannot claim to have been improperly expelled. Simons v Berry, 210 A.D. 90, 205 N.Y.S. 442, 1924 N.Y. App. Div. LEXIS 6661 (N.Y. App. Div. 1924).

13. —Reduction of membership

The number of members of a membership corporation may be reduced by an amendment in respect thereto to the bylaws, in the absence of a provision in the certificate of incorporation fixing the membership. Keeler v New York Hide Exchange, Inc., 231 A.D. 450, 247 N.Y.S. 482, 1931 N.Y. App. Div. LEXIS 16073 (N.Y. App. Div. 1931).

A membership corporation may use its capital funds for the purchase of an outstanding certificate of membership, even though such a purchase reduces the outstanding membership of the corporation and such reduction increases the burden of assessment for operating expenses upon each of the remaining members. Keeler v New York Hide Exchange, Inc., 231 A.D. 450, 247 N.Y.S. 482, 1931 N.Y. App. Div. LEXIS 16073 (N.Y. App. Div. 1931).

A creditor cannot complain of a reduction of membership resulting from the purchase by a membership corporation of an outstanding certificate of membership, at least in the absence of a provision in the certificate of incorporation fixing the number of members. Keeler v New York Hide Exchange, Inc., 231 A.D. 450, 247 N.Y.S. 482, 1931 N.Y. App. Div. LEXIS 16073 (N.Y. App. Div. 1931).

14. —Voluntary withdrawal of member

By-law of membership corporation which states that any withdrawal must be approved by the board, and, if not so approved, the member may still have the benefit of his contract for a period of two years by continuing to receive service and pay for it, at the end of which period, automatically, his withdrawal shall become final is not invalid as arbitrary. Associated Press v Emmett, 45 F. Supp. 907, 1942 U.S. Dist. LEXIS 2669 (D. Cal. 1942).

15. —Power to discipline or expel

Where the bylaws of a society provide for the expulsion of a member for two specific offenses, and further recite that as to other instances, the directing board has discretion to impose "disciplinary measures and punishments", the term disciplinary measures and punishments does not include the power of expulsion. Pepe v Missanellese Soc. of Mut. Aid, 252 N.Y.S. 70, 141 Misc. 7, 1930 N.Y. Misc. LEXIS 1807 (N.Y. Sup. Ct. 1930).

In the absence of an express provision in the constitution or bylaws of the society, the power of expulsion belongs to the association, that is, to the membership at large. Weinberg v Carton, 90 N.Y.S.2d 398, 196 Misc. 74, 1949 N.Y. Misc. LEXIS 2425 (N.Y. Sup. Ct. 1949).

A member cannot be expelled for failure to comply with a bylaw which conflicts with the statute or the constitution. People ex rel. Doyle v New York Benevolent Soc. of Operative Masons, 3 Hun 361 (N.Y.).

16. —Procedure for expulsion

Where the bylaws of a membership corporation provide that the nonpayment of dues shall render the delinquent member liable to expulsion, the latter retains his membership until corporate action is taken. Davis v Congregation Beth Tephilas Israel, 40 A.D. 424, 57 N.Y.S. 1015, 1899 N.Y. App. Div. LEXIS 1136 (N.Y. App. Div. 1899).

Where a bylaw provides that in order to expel a member, there must be a hearing at a regular meeting and the person charged must be found guilty by a two-thirds vote of the members present, the directors or the governing body of the association, have no power to conduct a hearing and expel a member at a directors'

meeting. Weinberg v Carton, 90 N.Y.S.2d 398, 196 Misc. 74, 1949 N.Y. Misc. LEXIS 2425 (N.Y. Sup. Ct. 1949).

In the absence of any provision in the bylaws or constitution of an organization as to procedure regulating the filing of charges and subsequent preliminary procedure before trial of one charged with an offense which if proved would result in expulsion, such charges must be filed with the members of the association as a body at a meeting of an association, and they, as such body, must prescribe the preliminary procedure. Weinberg v Carton, 90 N.Y.S.2d 398, 196 Misc. 74, 1949 N.Y. Misc. LEXIS 2425 (N.Y. Sup. Ct. 1949).

17. — —Notice of meeting to consider expulsion

Where the bylaws of an organization provide for the participation of the entire membership of the society in a vote for the expulsion of a member, or such bylaws omit to provide for the notice to the members of a meeting at which such a vote is to be taken, proper notice of the meeting and of the right of the members to participate in the trial and the vote for expulsion must nevertheless be given to the members; such notice should properly be given by mail, preferably by registered mail. Weinberg v Carton, 90 N.Y.S.2d 398, 196 Misc. 74, 1949 N.Y. Misc. LEXIS 2425 (N.Y. Sup. Ct. 1949).

An article in the newspaper of a society which merely reports that expulsion proceedings against certain delegates or directors who are unnamed, are scheduled at a delegate's meeting and inviting rank and file members to attend, does not constitute notice to the members of such a meeting, where the bylaws provided that the expulsion of any member must be by a vote at a meeting of the entire membership. Weinberg v Carton, 90 N.Y.S.2d 398, 196 Misc. 74, 1949 N.Y. Misc. LEXIS 2425 (N.Y. Sup. Ct. 1949).

18. — —Notice of charges

A member cannot be expelled without fair, adequate and sufficient notice, and an opportunity of meeting the accusation. People ex rel. Bartlett v Medical Soc. of County of Erie, 32 N.Y. 187, 32 N.Y. (N.Y.S.) 187, 1865 N.Y. LEXIS 141 (N.Y. 1865).

A bylaw permitting the expulsion of a member without notice of charges and an opportunity to be heard is invalid. Briggs v Technocracy, Inc., 85 N.Y.S.2d 735, 1948 N.Y. Misc. LEXIS 3852 (N.Y. Sup. Ct. 1948).

Expulsion of a member of a membership corporation without notice or a statement of charges or an opportunity to be heard is illegal, notwithstanding the fact that the bylaws of the corporation make no express provisions for a hearing. Briggs v Technocracy, Inc., 85 N.Y.S.2d 735, 1948 N.Y. Misc. LEXIS 3852 (N.Y. Sup. Ct. 1948).

19. — —Waiver of notice

Where a notice of an extraordinary meeting called to consider the expulsion of a member fails to recite the object thereof, but the member whose expulsion was to be considered attended the meeting and raised no question in that regard nor was any objection made by other persons, the member must be deemed to have waived the defect in the notice. Pepe v Missanellese Soc. of Mut. Aid, 252 N.Y.S. 70, 141 Misc. 7, 1930 N.Y. Misc. LEXIS 1807 (N.Y. Sup. Ct. 1930).

20. —Remedy for improper expulsion

While the remedy of mandamus is available to a member who is improperly expelled, the remedies provided by the constitution and bylaws of the corporation should be first exhausted. Lafond v Deems, 81 N.Y. 507, 81 N.Y. (N.Y.S.) 507, 1880 N.Y. LEXIS 267 (N.Y. 1880).

If a member is improperly expelled his remedy is by mandamus. People ex rel. Doyle v New York Benevolent Soc. of Operative Masons, 3 Hun 361 (N.Y.).

21. —Readmission of expelled member

Where the bylaws of a union provide for readmission of members "on such terms as a local union or Executive Board . . . may determine upon a two-thirds vote of the members present at a meeting of the local or its executive or membership committee" an applicant for readmission cannot be considered to have been readmitted where no official action was taken by the union upon the application. Felman v Fur Dressers' Union, 29 N.Y.S.2d 174, 1941 N.Y. Misc. LEXIS 2005 (N.Y. App. Term 1941).

22. —Membership as property

It has been generally held that, to the extent that an exchange seat or membership includes rights which are transferable and is subject to purchase and sale, it constitutes property, and the proceeds should be applied in payment of the debt of an insolvent debtor. Ulmann v Thomas, 255 N.Y. 506, 175 N.E. 192, 255 N.Y. (N.Y.S.) 506, 1931 N.Y. LEXIS 707 (N.Y. 1931).

The membership of a judgment debtor in a produce exchange, though having a market value, is not property of which a receiver may be appointed to take possession, where the judgment debtor is in a foreign state and beyond the jurisdiction of the court, and the membership is represented by a certificate also beyond the reach of the court which, by the bylaws of the exchange, represents the sole means of transferring or assigning the membership. Ulmann v Thomas, 255 N.Y. 506, 175 N.E. 192, 255 N.Y. (N.Y.S.) 506, 1931 N.Y. LEXIS 707 (N.Y. 1931).

23. —Miscellaneous

Where in an action to recover dues and assessments alleged to be due from incorporation as a member of a membership corporation it is made to appear that the defendant under former § 41 from which the present § 10 is derived could not legally become a member of the plaintiff, the complaint will be dismissed. Doll & Stuffed Toy Mfg. Ass'n v Ideal Novelty & Toy Co., 195 N.Y.S. 71, 119 Misc. 63, 1922 N.Y. Misc. LEXIS 1351 (N.Y. App. Term 1922).

In an action to recover the face amount of certificates of indebtedness together with accrued interest thereon, where the certificates provided that no interest should be payable except as declared by the governors and in no event in excess of 6 percent per year, the holders were entitled to no more than the face amount of their certificates less any indebtedness which they might owe the club. Whatever remained after sale of the club would belong to the members. Kendall v Oakland Golf Club, 123 N.Y.S.2d 907, 1953 N.Y. Misc. LEXIS 2067 (N.Y. Sup. Ct.), aff'd, 282 A.D. 1057, 126 N.Y.S.2d 379, 1953 N.Y. App. Div. LEXIS 5809 (N.Y. App. Div. 1953).

Agency Opinions

Analysis

1. Generally
2. Under former Membership Corporations Law § 20
3. —Miscellaneous

1. Generally

A volunteer member of a fire company may be removed in accordance with the constitution and by-laws of the company. 1985 N.Y. Op. Att'y Gen. No. 85-17.

2. Under former Membership Corporations Law § 20

3. —Miscellaneous

So long as it is so authorized by the by-laws of a fire company incorporated under the village law or the membership corporations law, an active village fireman may receive compensation for his services as Secretary-Treasurer of the fire department. 1960 NY Ops Atty Gen July 25 (Informal), 1960 N.Y. AG LEXIS 145.

This section regulates admission, voluntary withdrawal, censure, suspension and expulsion of members. 1963 NY Ops Atty Gen Feb 21 (Informal), 1963 N.Y. AG LEXIS 91.

The by-laws of an incorporated volunteer fire department may provide for provisional appointment of new members for a probationary period. 1955 Op. St. Compt. No. 55–7411.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-6 White, New York Business Entities ¶ N601.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.04. The Role of Members in the Corporation.

New York Practice Guide: Business and Commercial § 8.16. By-Laws.

New York Practice Guide: Business and Commercial § 8.17. Checklist for Commencing Operation.

Matthew Bender's New York Checklists: Checklist for Identifying Ownership and Ownership Transition Considerations in Entity Selection LexisNexis AnswerGuide New York Business Entities § 2.08.

Checklist for Assessing Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 2.47.

Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N601:1. Certificate of Membership in Corporation.

§ 602. By-laws

(a) The initial by-laws of a corporation may be adopted by its incorporators at the organization meeting and, if not so adopted by the incorporators, by its board. Any reference in this chapter to a "by-law adopted by the members" includes a by-law adopted by the incorporators.

(b) Subject to section 612 (Limitations on right to vote), the by-laws may be adopted, amended or repealed by the members at the time entitled to vote in the election of directors and, unless otherwise provided in the certificate of incorporation or the by-laws adopted by the members, by the board.

(c) Any by-law adopted by the board may be amended or repealed by the members and, unless otherwise provided in the certificate of incorporation or the by-laws adopted by the members, any by-law adopted by the members may be amended or repealed by the board.

(d) In the case of a corporation which is subject, under any other law of this state, to regulation or control by a governmental body or officer, such body or officer may, to the extent provided in such other law, in furtherance of its or his authority to regulate or control:

(1) Adopt, amend or repeal by-laws.

(2) Amend or repeal any by-law adopted by the members or the board.

(e) If any by-law regulating an impending election of directors is adopted, amended or repealed by the board, there shall be set forth in the notice of the next meeting of the members for the election of directors the by-law so adopted, amended or repealed, together with a concise statement of the changes made.

(f) The by-laws may contain any provision relating to the business of the corporation, the conduct of its affairs, its rights or powers or the rights or powers of its members, directors or officers, not inconsistent with this chapter or any other statute of this state or the certificate of incorporation.

(g) In the case of residential not-for-profit corporations, changes including the adoption, amendment or repeal of the by-laws by the board of directors shall be provided to the members, stockholders, and delegates of such corporation in writing, by physical or electronic means, within ten days of such adoption.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970; amd, L 1970, ch 847, § 32, eff Sept 1, 1970; L 2019, ch 558, § 2, effective January 24, 2020.

Derivation Notes: Derived from Gen Corp Law §§ 14, 27 and Mem Corp Law § 20.

Revision Notes: *Source:* Gen Corp L §§ 14(5), 27; Mem Corp L § 20.

Changes: Revised.

Comment: This section, patterned after section 601 of the Bus Corp L, departs substantially from existing statutory law regulating by-laws in not-for-profit corporations. Two significant changes have been effected:

(1) Unless otherwise provided in the certificate of incorporation or the by-laws adopted by the members, the board of directors is authorized to adopt, amend or repeal by-laws (paragraph (b)) and to amend or repeal by-laws adopted by the members (paragraph (c)).

(2) If so provided in some other law of the state, any governmental body or officer authorized by such law to supervise a not-for-profit corporation created under such law, may adopt, amend or repeal by-laws and may amend or repeal by-laws adopted by the members or the board of directors (paragraph (d)).

Editor's Notes Laws 2019, ch 558, § 4, eff January 1, 2020, provides:

§ 4. This act shall take effect on the sixtieth day after it shall have become a law.

Amendment Notes The 2019 amendment by ch 558, § 2, added (g).

PRACTICE INSIGHTS:

SPEED TRAPS IN AMENDING BYLAWS

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INSIGHT

The internal affairs of a not-for-profit corporation may be regulated by the provisions of either the certificate of incorporation (COI) or the bylaws. Not-for-Profit Corp. Law §§ 402(c), 602. The dynamics of an organization change over time and internal governance provisions may need to be amended accordingly. Although changes to the COI require governmental filing and approval, changes to the bylaws can usually be accomplished through a completely transparent and internal process. Not-for-Profit Corp. Law §§ 803, 602. Unless the organization has grown exponentially, amending the bylaws is a relatively painless process. Larger corporations, however, may run into some speed traps.

ANALYSIS

Consider expanding internal governance provisions in bylaws to account for future growth.

Under Not-for-Profit Corp. Law § 602(f), which has historically been interpreted broadly, bylaws may contain any provision "relating to" the business of the corporation, the conduct of the corporation's affairs, and the rights or powers of the corporation, its members, directors and officers. Given the broad authority granted to a corporation to control its own internal affairs, the bylaws can be expanded at the outset to allow for future growth without formal changes to the organizational structure. For example, the bylaws may provide for the delegation of tasks to committees or for participation in meetings via telephone conference calls. These types of provisions allow for flexibility when the organization is working through a growth spurt and do not interfere with management when the corporation is in its infancy.

Conflict between members and board may cause stalemate.

It is not unusual for a conflict to arise between the members of the corporation and the board of directors. This creates an especially difficult situation when the issue of amending the bylaws is on the table. Unless otherwise provided for in the bylaws or the COI, the bylaws may be adopted, amended or repealed by either the members entitled to vote in the election of directors or by the board. Not-for-Profit Corp. Law § 602(b). Any bylaw adopted by the board may be amended or repealed by the members and vice versa. Not-for-Profit Corp. Law § 602(c). This creates a potentially endless loop of amendments that can result in a stalemate until the conflict is resolved. Type B corporations with no members avoid this difficulty.

Consider scheduling and other logistics when amending bylaws.

Although the process for amending the bylaws is not complicated, some formalities must be followed. It is easy to forget timing, scheduling and other logistics when proposing bylaw amendments. If time is of the essence, the logistics can be another speed trap for the unwary. For example, if the members are considering the amendment, a notice of meeting must be prepared and sent to the members. Counsel should factor into the equation such things as quorum requirements, minimum voting requirements, and the level of involvement of the members. In some instances, the members will be happy to delegate the drafting to a committee and pass the proposal without much discussion. In other organizations, membership is intimately involved in operations and a number of meetings may be needed to discuss, dissect and agree on the exact wording of the amendments.

Special care must be taken when the proposed amendment relates to the election of directors. The board may change the rules related to an impending election, but if it does so, the notice sent to the corporation's members related to the next meeting when directors would be elected must be modified. The notice of meeting must not only restate the affected bylaw provision but must also include a concise statement of the changes. Not-for-Profit Corp. Law § 602(e). If the members' notice is not properly issued, the bylaw amendments will not be enforceable with respect to that election of directors. Counsel should consider initiating any such amendments at the membership level to avoid the extra step in the process.

Notify IRS of changes to bylaws if exemption has been granted.

Federal tax exempt status is available to a not-for-profit Corporation under a variety of federal bases pursuant to (IRC) 26 USCS § 501(a). If the corporation amending its bylaws has been granted such a tax exemption, notify the IRS of changes to the bylaws. IRS regulations require that a tax-exempt organization immediately notify the local IRS district director whenever a change is made to the character, operations or purpose for which it was originally created. Reg. 1.6033-2(i). This rule applies even if the organization is not required to file an annual information return (the Form 990).

Notes to Decisions

Analysis

1. Generally
2. Elections
3. Under former Membership Corporations Law § 20

1. Generally

In a proceeding by a member of a not-for-profit corporation providing free ambulance services in which the member sought to annul a determination expelling her for removing and copying a trip sheet from the corporate headquarters, the member would be reinstated where her conduct violated no rule of the corporation and constituted no breach of any obligation to the corporation. Ames v Central Oneida County Volunteer Ambulance Corps., 81 A.D.2d 1035, 440 N.Y.S.2d 122, 1981 N.Y. App. Div. LEXIS 11797 (N.Y. App. Div. 4th Dep't 1981).

Trial court properly denied a tenant's motion for summary judgment on it claims for breach of the alleged agreements between an owner and a company that it founded because, while the owner also founded the tenant, the requirement that at least three-fourths of the directors of the company shall be members in good standing of the owner was not set forth in the landlord's certificate of incorporation, the amendment to the bylaws to remove the requirement was permissible under the not-for-profit corporation law, the owner was not a member of the landlord or a party to the bylaws that could enforce the bylaws as a contract, and the record revealed triable issues of fact as to the existence and terms of an alleged third-party agreement. Alpha Phi Alpha Senior Citizens Ctr., Inc. v Zeta Zeta Lambda Co., Inc., 180 A.D.3d 630, 119 N.Y.S.3d 181, 2020 N.Y. App. Div. LEXIS 892 (N.Y. App. Div. 2d Dep't 2020).

In a personal injury action defendant ski club's motion for summary judgment would be denied, where, although an exculpatory clause contained in the by-laws of the ski club purporting to exempt the club from liability for "claims of any kind . . . including claims resulting from the negligence of an . . . employee of . . . the Club . . . arising out of the use of any of the Club's facilities" by a member or the member's family was sufficiently clear and unambiguous as to include within its scope the injuries sustained by plaintiff, the wife of a club member while using the club's chair lift, such exculpatory clause was nonetheless unenforceable against either plaintiff or her husband on his derivative claim, where plaintiff who was a nonmember of the club did not agree to indemnification nor was she apprised of the existence of the exculpatory clause and her husband never received the by-laws and had no notice of the exculpatory clause until after institution of the suit, where defendant club offered no proof that the exculpatory clause was properly enacted by the membership after sufficient notice had been sent to the members as required by N-PCL § 602, and where, in any event, the exculpatory clause was invalid under Gen Oblig Law § 5-326 which deems void as against public policy any agreement exempting a place of amusement or recreation or similar establishment from liability for damages caused by or resulting from its own negligence and defendant, at the time of the accident, was a "place of . . . recreation" within the plain meaning of the statute. Blanc v Windham Mountain Club, Inc., 115 Misc. 2d 404, 454 N.Y.S.2d 383, 1982 N.Y. Misc. LEXIS 3701 (N.Y. Sup. Ct. 1982), aff'd, 92 A.D.2d 529, 459 N.Y.S.2d 447, 1983 N.Y. App. Div. LEXIS 16741 (N.Y. App. Div. 1st Dep't 1983).

Automatic suspension provided by a not-for-profit corporation's by-laws was unenforceable because it violated N.Y. Not-for-Profit Corp. Law § 507(c); it was undisputed that no notice was given to the members that had not paid dues, and, thus, pursuant to § 507(c), the votes of members who had not paid dues could not have been disqualified from voting an amendments to the by-laws based solely on that basis. Abraham v Diamond Dealers Club, Inc., 896 N.Y.S.2d 848, 27 Misc. 3d 663, 2010 N.Y. Misc. LEXIS 399 (N.Y. Sup. Ct. 2010), aff'd, 80 A.D.3d 461, 914 N.Y.S.2d 152, 2011 N.Y. App. Div. LEXIS 98 (N.Y. App. Div. 1st Dep't 2011).

2003 amended by-laws of a non-profit corporation that owned an apartment building violated N.Y. Not-for-Profit Corp. Law § 602(f) and 611(e) because no shares could be issued pursuant to N.Y. Not-for-Profit Corp. Law § 501 and each member could have only one vote; it was improper to give petitioner families entitlement to an additional vote because they possessed an additional unit. Matter of Thakur v 210 Forsyth St. Hous. Dev. Fund Corp., 844 N.Y.S.2d 686, 17 Misc. 3d 1012, 238 N.Y.L.J. 98, 2007 N.Y. Misc. LEXIS 7261 (N.Y. Sup. Ct. 2007).

Certificate of incorporation merely designated certain individuals as the initial directors of the company and was otherwise silent about the composition of the board; the amendment of the company's bylaws for the purpose of removing the requirement that three-fourths of the directors be members of the sponsor did not violate the certificate of incorporation under N.Y. Not-for-Profit Corp. Law 602. Alpha Phi Alpha Senior Citizens Ctr., Inc. v Zeta Zeta Lambda Co., Inc., 53 Misc. 3d 1066, 38 N.Y.S.3d 400, 2016 N.Y. Misc. LEXIS 3336 (N.Y. Sup. Ct. 2016), aff'd, 180 A.D.3d 630, 119 N.Y.S.3d 181, 2020 N.Y. App. Div. LEXIS 892 (N.Y. App. Div. 2d Dep't 2020).

There is prima facie validity to any provision of a not-for-profit corporation by-law restricting right of member to withdraw voluntarily. Leon v Chrysler Motors Corp., 358 F. Supp. 877, 1973 U.S. Dist. LEXIS 14734 (D.N.J.), aff'd, 474 F.2d 1340 (3d Cir. N.J. 1973).

By-laws of not-for-profit corporation which required each member to agree not to withdraw from the association without the consent of a majority of all members were valid despite fact that members were in effect locked into the association unless they could persuade a majority of the members to vote against their own economic interests to release them. Leon v Chrysler Motors Corp., 358 F. Supp. 877, 1973 U.S. Dist. LEXIS 14734 (D.N.J.), aff'd, 474 F.2d 1340 (3d Cir. N.J. 1973).

2. Elections

Where original constitution of not-for-profit corporation provided that all officers should be elected for term of one year and that no officer should succeed himself for more than two successive years for same office, and term of office was increased to two years but it was neglected to amend time provided for succession, period of one year would be construed to mean "one term" in order to give meaning to constitutional provision on succession. In re Election of Officers & Directors of F.I.G.H.T., Inc., 79 Misc. 2d 655, 360 N.Y.S.2d 564, 1974 N.Y. Misc. LEXIS 1730 (N.Y. Sup. Ct. 1974).

Where, though irregularities appeared to have taken place, there was no showing of fraud or wrongdoing and it appeared that, even if some delegates to convention of not-for-profit corporation members were barred, their vote or presence would not have changed results of election of officers, new election was denied. In re Election of Officers & Directors of F.I.G.H.T., Inc., 79 Misc. 2d 655, 360 N.Y.S.2d 564, 1974 N.Y. Misc. LEXIS 1730 (N.Y. Sup. Ct. 1974).

3. Under former Membership Corporations Law § 20

Bylaws must be reasonable. Matthews v Associated Press, 136 N.Y. 333, 136 N.Y. 662, 32 N.E. 981, 136 N.Y. (N.Y.S.) 333, 1893 N.Y. LEXIS 607 (N.Y. 1893).

An amendment to the bylaws of a membership corporation organized for charitable purposes which permits amendments to the bylaws without notice to the members of the corporation may be unwise and contrary to the corporation's best interests, but it is not so unreasonable or unfair that it is beyond the power of the members to adopt, especially where no member has objected. In re Flushing Hospital & Dispensary, 288 N.Y. 125, 41 N.E.2d 917, 288 N.Y. (N.Y.S.) 125, 1942 N.Y. LEXIS 1064 (N.Y. 1942).

Where amended bylaws were adopted without proper notice, but for seven years had gone unchallenged by the membership of the corporation and the affairs of the corporation have been conducted in accordance therewith, there has been a waiver of the irregularity and the bylaws are valid. In re Flushing Hospital & Dispensary, 288 N.Y. 125, 41 N.E.2d 917, 288 N.Y. (N.Y.S.) 125, 1942 N.Y. LEXIS 1064 (N.Y. 1942).

Under § 20 the bylaws of a New York membership corporation may not make provisions inconsistent with law. Davids v Sillcox, 297 N.Y. 355, 79 N.E.2d 440, 297 N.Y. (N.Y.S.) 355, 1948 N.Y. LEXIS 845 (N.Y.), reh'g denied, 298 N.Y. 618, 81 N.E.2d 353, 298 N.Y. (N.Y.S.) 618, 1948 N.Y. LEXIS 1185 (N.Y. 1948).

Where the bylaws do not state whether they may be amended by a vote of the directors, or by a vote of electors and delegates, or by a vote of the members, the directors have no power to change the bylaws of a society which governs eligibility to membership. Croughan v New York Mut. Benevolent Soc., 179 A.D. 211, 166 N.Y.S. 161, 1917 N.Y. App. Div. LEXIS 7330 (N.Y. App. Div. 1917).

A member of a membership corporation makes the by-laws thereof a part of his contract of membership and becomes bound by them. Cabana v Holstein-Friesian Ass'n, 196 A.D. 842, 188 N.Y.S. 277, 1921 N.Y. App. Div. LEXIS 5620 (N.Y. App. Div. 1921), aff'd, 233 N.Y. 644, 135 N.E. 953, 233 N.Y. (N.Y.S.) 644, 1922 N.Y. LEXIS 1067 (N.Y. 1922).

A purported election will be set aside where such election was not in accord with the corporation's bylaws. Brunone v Societa' Mutuo Soccorso, etc., 254 A.D. 753, 4 N.Y.S.2d 305, 1938 N.Y. App. Div. LEXIS 7481 (N.Y. App. Div. 1938).

The bylaws of a corporation when legally adopted, which are reasonable and fair in character, have the force of law within the corporate body. In re Flushing Hospital & Dispensary, 27 N.Y.S.2d 207, 1941 N.Y. Misc. LEXIS 1711 (N.Y. Sup. Ct.), aff'd, 262 A.D. 749, 28 N.Y.S.2d 155, 1941 N.Y. App. Div. LEXIS 5726 (N.Y. App. Div. 1941).

The membership application, the constitution and by-laws of membership corporations are the contract by which each member is bound. Associated Press v Emmett, 45 F. Supp. 907, 1942 U.S. Dist. LEXIS 2669 (D. Cal. 1942).

Agency Opinions

1. Generally

A fire company may adopt a bylaw providing that only firemen who attend at least 15 percent of all fire calls during the year may vote in an election of line officers of the fire company. 1982 NY Op. Att'y Gen. No. 82–17, 1982 N.Y. AG LEXIS 92.

An incorporated volunteer fire company may amend its by-laws and constitution to require that members of the company attend at least three meetings annually as a qualification to vote for company officers. 1983 Op. St. Compt. No. 83-65, 1983 N.Y. Comp. LEXIS 420.

Under Sections 10-1000 et seq. of the Village Law, a village fire department is a corporation consisting of members of all the fire, hose, protective and hook and ladder companies of a village; it is administered by a board of fire commissioners or, where no board of fire commissioners has been appointed, by the village board of trustees and the council of the fire department. Fire companies in a village are associations or corporations, which must operate in accordance with their certificates of incorporation, bylaws, and statutes; and, although fire companies are separate and distinct from the village, the statutes do permit village authorities to exercise a certain degree of control over their organization, incorporation, governance, and membership, including residency for membership. A fire company must consent to a contract for the provision of fire protection outside the village and the fire chief of the village fire department cannot consent on behalf of members of the company. 1990 Op St Compt 90-19.

RESEARCH REFERENCES AND PRACTICE AIDS

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Matthew Bender's New York Business Entities: 6-6 White, New York Business Entities ¶ N602.01 et seq.

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New York Practice Guide: Business and Commercial § 8.04. The Role of Members in the Corporation.

New York Practice Guide: Business and Commercial § 8.05. The Role of Members in the Corporation.

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Matthew Bender's New York Checklists: Checklist for Identifying Management and Structure of Business Issues When Selecting Form of Business Entity LexisNexis AnswerGuide New York Business Entities § 2.11.

Checklist for Assessing Not-For-Profit Corporations LexisNexis AnswerGuide New York Business Entities § 2.47.

Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N602:1. Bylaws of Not-for-Profit Trade Associations.

White, New York Business Entities Form N602:2. Bylaws of Not-for Profit Lake Resort Associations.

White, New York Business Entities Form N602:3. Bylaws of Not-for-Profit Charitable Corporations.

White, New York Business Entities Form N602:4. Bylaws of Not-for-Profit Alumnae Associations.

White, New York Business Entities Form N602:5. Bylaws of Not-for-Profit Regional Yachting Associations Bylaws of the.

White, New York Business Entities Form N602:6. Provision Permitting Action by Board of Directors without Meeting.

White, New York Business Entities Form N602:7. Provision Permitting Action by Committee without Meeting.

White, New York Business Entities Form N602:8. Provision Permitting Meeting of Board of Directors by Conference Telephone or Similar Communications Equipment.

White, New York Business Entities Form 602:9. Provision Permitting Meetings of Committee by Conference Telephone or Similar Communications Equipment.

§ 603. Meetings of members

(a) [Eff until December 31, 2021] Meetings of members may be held at such place, within or without this state, as may be fixed by or under the by-laws or, if not so fixed, as determined by the board of directors. For the duration of the state disaster emergency declared by executive order two hundred two that began on March seventh, two thousand twenty, the board of directors may, in its sole discretion, determine that meetings of members be held partially or solely by means of electronic communication, the electronic service and/or platform by which the meeting is held shall be the place of the meeting for purposes of this article if a meeting is held solely by means of electronic communication. Meetings conducted partially or solely by means of electronic communications in reliance upon this paragraph and any member's electronic participation in such meetings shall be subject to those guidelines and procedures as the board adopts, provided the board shall implement reasonable measures to: (1) verify that each person participating electronically is a member or a proxy of a member; (2) provide each member participating electronically with a reasonable opportunity to participate in the meeting, including an opportunity to propose, object to, and vote upon a specific action to be taken by the members, and to see, read or hear the proceedings of the meeting substantially concurrently with those proceedings; and (3) record and maintain a record of any votes or other actions taken by electronic communication at the meeting.

(a) [Eff December 31, 2021] Meetings of members may be held at such place, within or without this state, as may be fixed by or under the by-laws or, if not so fixed, at the office of the corporation in this state.

(b) A meeting of the members shall be held annually for the election of directors and the transaction of other business on a date fixed by or under the by-laws. Failure to hold the annual meeting on the date so fixed or to elect a sufficient number of directors to conduct the business of the corporation shall not work a forfeiture or give cause for dissolution of the corporation, except as provided in paragraph (a) of section 1102 (Judicial dissolution; petition by directors or members; petition in case of deadlock among directors or members).

(c) Special meetings of the members may be called by the board and by such person or persons as may be authorized by the certificate of incorporation or the by-laws. In any case, such meetings may be convened by the members entitled to cast ten per cent of the total number of votes entitled to be cast at such meeting, who may, in writing, demand the call of a special meeting specifying the date and month thereof, which shall not be less than two nor more than three months from the date of such written demand. The secretary of the corporation upon receiving the written demand shall promptly give notice of such meeting, or if he fails to do so within five business days thereafter, any member signing such demand may give such notice. The meeting shall be held at the place fixed in the by-laws or, if not so fixed, at the office of the corporation.

(d) A corporation may provide in its certificate of incorporation or by-laws adopted by the members for the election of representatives or delegates, who, when assembled within or without the state as directed by the certificate of incorporation or the by-laws, shall have and may exercise all of the powers, rights and privileges of members at an annual meeting. When so exercising the powers, rights and privileges of members, such representatives or delegates shall be subject in all respects to the provisions of this chapter governing members.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970; amd, L 1971, ch 1058 § 14; L 1972, ch 961, § 8, eff Sept 1, 1972; L 2020, ch 122, § 3, effective June 17, 2020.

Derivation Notes: Derived from Gen Corp Law §§ 21, 26 and Mem Corp Law §§ 42, 44.

Revision Notes: *Source:* Gen Corp L §§ 21, 26; Mem Corp L §§ 42, 44.

Changes: Slightly revised.

Comment: This section, patterned after section 602 of the Bus Corp L, does not depart substantially from existing statutory law governing meetings of members in not-for-profit corporations. The provision for special meetings, in paragraph (c), is more explicit than its counterpart in the Mem Corp L in authorizing such meetings to be called by the board of directors and by such persons as may be authorized by the certificate of incorporation or the by-laws. An innovation appears in the provision that if the certificate or the by-laws do not provide for the convening of special meetings by the membership, such meetings may be called by members entitled to cast 10 % of the total number of votes entitled to be cast thereat.

The provision in paragraph (b) that failure to hold the annual meeting or to elect a sufficient number of directors does not work a forfeiture, or cause the dissolution, if the corporation re-enacts section 21 of the Gen Corp L.

The provision in paragraph (d), authorizing representative or delegate voting re-enacts section 44 of the Mem Corp L.

Editor's Notes Laws 2020, ch 122, § 6, eff June 17, 2020, provides:

§ 6. This act shall take effect immediately and shall expire and be deemed repealed December 31, 2021.

Amendment Notes The 2020 amendment by ch 122, § 3, in (a), substituted "as determined by the board of directors" for "at the office of the corporation in this state" in the first sentence, and added the second and third sentence.

PRACTICE INSIGHTS:

OPTIONS FOR MEMBERS IN THE MINORITY TO PUT AN END TO WRONGDOING

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INSIGHT

Members in the minority of a not-for-profit corporation ("corporation") who want to stop those in control of the corporation from committing improper activities have various options available to them. A corporation must pursue the purposes for which it was formed as set forth in its certificate of incorporation, must follow those procedures established in its bylaws, and cannot distribute its funds for the private benefit of any director, officer or member. When those in control of a not-for-profit corporation cause it to deviate from any of these principles, those members in the minority may attempt to handle the situation internally, through the court system, or by putting the Attorney General on notice.

ANALYSIS

Call a special meeting of members to openly discuss the objectionable items.

A special meeting may be called by the members in the minority to bring the corporate malfeasance to the attention of all the members and to attempt to spur change. Members should review the corporation's organizational documents for the procedures pursuant to which such a meeting may be brought. If no such provision exists in the organizational documents or if the number of members needed to call such a meeting is an insurmountable impediment, such a meeting may be convened by ten percent (10%) of the members entitled to vote at such a meeting pursuant to N- PCL § 603(c). Such an action will force those in the majority to openly discuss the objectionable items. If the minority's concerns are not properly addressed after such a meeting, the members may resign from the corporation, bring a derivative action on behalf of the corporation, or even seek the dissolution of the corporation. The special meeting is important as it will memorialize the members' objections in the corporate record and may prove to be critical from a public relations standpoint and in any future litigation.

A derivative action may be commenced to recover funds on behalf of the corporation.

If minority members constitute five percent (5%) or more of the total membership, they can bring a derivative action in the name of the corporation pursuant to N-PCL §§ 623 and 720(b)(3). Such an action can take many forms, such as an action: (i) against an individual director or officer for fraud or breach of fiduciary duties; (ii) to set aside any action that was beyond the corporate "purposes"; or, (iii) to enjoin a proposed improper conveyance of corporate assets. In such an action the importance of the special meeting becomes apparent; pursuant to N-PCL § 623(c) the complaint must set forth, with particularity, the attempt to address the objectionable behavior presented in the complaint.

The practitioner should be aware that while a derivative action, if successful, can result in the recovery of funds for the corporation and the likely resignation or dismissal of the offending actors, it could also subject the corporation's affairs to public scrutiny, result in litigation expenses that may be unrecoverable, and could divert the corporation's funds and attention from its mission.

Minority members may seek dissolution and distribution of funds to an appropriate successor.

The members in the minority, specifically those making up ten percent (10%) of the total membership, can bring an action to dissolve the corporation pursuant to N-PCL § 1102(a)(2) and to distribute the corporation's funds to a similar entity. An action pursuant to N-PCL §1102(a)(2)(D) appears to be the best option available to a smaller number of members, as it deals with controlling members acting in a fraudulent manner and perpetuating the corporation solely for their personal benefit. In the face of the limited case law it appears to be a hard case to make, however, as it has been held that dissolution is a drastic measure and that even if excessive spending can be proven, in the absence of bad faith, dissolution is not appropriate. *Application of John Luther & Sons Co.*, 52 A.D.2d 737, 381 N.Y.S.2d 934 (4th Dept, 1976). A larger obstacle for a petition based on N-PCL § 1102 is that it must be established that such dissolution would be beneficial to the membership as a whole, pursuant to N-PCL § 1109(b)(2). In a situation where the majority of the members agree with the inappropriate actions taken by those in the control of the corporation, meeting that threshold could present problems for the minority members. It is important to note that even if the action is successful and the corporation is dissolved and its funds released to another not-for-profit corporation with a similar purpose, the cost of litigation may be great and may deplete a large percentage of the corporation's funds.

Putting the Attorney General on notice of the improper activity.

An informal option available to the minority members would be to notify the Attorney General of the corporation's activities. Pursuant to N-PCL § 1101(a)(2), an action can be brought by the Attorney General to dissolve a corporation that has persistently acted fraudulently and contrary to public policy. In such an action, it must be demonstrated that the corporation exceeded its powers and that this abuse of power has threatened the public welfare. *People v. North River Sugar Refining Co.*, 121 N.Y. 582 (1890). In addition, pursuant to N-PCL § 1109(b)(1), in such an action the public interest, rather than the benefit to the corporation's membership, is of supreme importance. There is a great deal of uncertainty involved with this course action, such as (i) the lack of control of the distribution of the corporation's funds following dissolution; and (ii) what the investigation will uncover, as all corporate actions, not just the objectionable ones complained of, are open to investigation. It is important for the practitioner to note that if the corporate actions come under scrutiny by the Attorney General, it is likely that an audit by the Department of Taxation and Finance will follow. Such an investigation could result in the corporation being stripped of its tax-exempt status and could jeopardize the deductibility of any donations made by the members in the minority if it is determined that the members knew that the improper activity was taking place.

Notes to Decisions

Analysis

1. Generally
2. Under former General Corporation Law § 21
3. Under former Membership Corporations Law § 44
4. Under former Membership Corporations Law § 45

1. Generally

Defendants' counterclaim to compel plaintiff church to call a special membership meeting for the purpose of voting on a proposed amendment to the church's by-laws that was submitted by an individual defendant church member at a parish meeting would be dismissed where the proposed resolution was not submitted in accordance with N-PCL Law § 603(c), which requires a written demand by 10 percent of the members eligible to vote to compel church officials to call such a meeting when the church charter or by-laws do not provide therefor. Rector, Church Wardens & Vestrymen etc. v Committee to Preserve St. Bartholomew's Church, Inc., 84 A.D.2d 516, 443 N.Y.S.2d 233, 1981 N.Y. App. Div. LEXIS 15530 (N.Y. App. Div. 1st Dep't 1981).

N-PCL § 603 is not in conflict with Relig Corps Law § 5, inasmuch as the Relig Corp L makes no provision for convening a special meeting of parishioners to vote on a proposed amendment to the Church's by-laws. Rector, Church Wardens & Vestrymen etc. v Committee to Preserve St. Bartholomew's Church, Inc., 84 A.D.2d 516, 443 N.Y.S.2d 233, 1981 N.Y. App. Div. LEXIS 15530 (N.Y. App. Div. 1st Dep't 1981).

2. Under former General Corporation Law § 21

Where plaintiff was elected as a member of the board of directors of the Jamaica Community Corporation for a term of one

year commencing in June of 1967 and continued to serve as director until receiving a letter on October 4, 1968 which purported to terminate his membership; plaintiff was entitled to a preliminary injunction to enjoin the defendant chairman of the board from conducting meetings unless and until plaintiff was permitted to participate, where no successor had been elected to his position on the board. The court held that General Corporation Law § 21 must be deemed controlling to preserve plaintiff's position until his successor was elected. Ming v Simpkins, 59 Misc. 2d 853, 300 N.Y.S.2d 805, 1968 N.Y. Misc. LEXIS 1028 (N.Y. Sup. Ct. 1968).

3. Under former Membership Corporations Law § 44

A provision in the bylaws of a lodge that any number of delegates may be held to constitute a quorum at a "second call meeting" is void since it violates the provisions of § 20 and this applies equally to meetings of delegates, even though this section contains no statement as to what constitutes a quorum. Di Silvestro v Sons of Italy Grand Lodge, 223 N.Y.S. 791, 130 Misc. 494, 1927 N.Y. Misc. LEXIS 1038 (N.Y. Sup. Ct. 1927).

4. Under former Membership Corporations Law § 45

A purported election will be set aside where such election was not in accord with the corporation's bylaws. Brunone v Societa' Mutuo Soccorso, etc., 254 A.D. 753, 4 N.Y.S.2d 305, 1938 N.Y. App. Div. LEXIS 7481 (N.Y. App. Div. 1938).

This section is inapplicable to a membership corporation created by special law. Petition of Sousa, 12 A.D.2d 956, 211 N.Y.S.2d 204, 1961 N.Y. App. Div. LEXIS 12759 (N.Y. App. Div. 2d Dep't), rev'd, 10 N.Y.2d 68, 217 N.Y.S.2d 58, 176 N.E.2d 77, 1961 N.Y. LEXIS 1167 (N.Y. 1961).

In the absence of provision in the bylaws to the contrary, members of one faction of a club may solicit and induct into membership new members for the purpose of gaining their support in a forthcoming election. Petition of Serenbetz, 46 N.Y.S.2d 475, 1943 N.Y. Misc. LEXIS 2788 (N.Y. Sup. Ct. 1943), aff'd, 267 A.D. 836, 46 N.Y.S.2d 127, 1944 N.Y. App. Div. LEXIS 5031 (N.Y. App. Div. 1944).

If a bylaw for the election of directors has not been adopted, a valid election may be held under the General Corporation Law on the call of any member of the corporation. In re David Jones Co., 22 N.Y.S. 318, 67 Hun 360 (1893).

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Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.04. The Role of Members in the Corporation.

New York Practice Guide: Business and Commercial § 8.16. By-Laws.

New York Practice Guide: Business and Commercial § 8.17. Checklist for Commencing Operation.

Matthew Bender's New York Checklists: Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N603:1. Provision in By-Laws for Meetings of Members.

White, New York Business Entities Form N603:2. Provision for Calling Special Meeting of Members.

White, New York Business Entities Form N603:3. Minutes of the Annual Meeting.

White, New York Business Entities Form N603:4. Minutes of Special Meeting.

White, New York Business Entities Form N603:5. Provision in Certificate Permitting Election of Delegate.

§ 604. Special meeting for election of directors

(a) If, for a period of one month after the date fixed by or under the by-laws for the annual meeting of members or, if no date has been so fixed, for a period of thirteen months after the formation of the corporation or the last annual meeting, there is a failure to elect a sufficient number of directors to conduct the business of the corporation, the board shall call a special meeting for the election of directors. If such special meeting is not called by the board within two weeks after the expiration of such period or if it is so called but there is a failure to elect such directors for a period of two months after the expiration of such period, members entitled to cast one hundred votes or ten per cent of the total number of votes entitled to be cast in an election of directors, whichever is lesser, may, in writing, demand the call of a special meeting for the election of directors specifying the date and month thereof, which shall not be less than two nor more than three months from the date of such written demand. The secretary of the corporation upon receiving the written demand shall promptly give notice of such meeting or, if he fails to do so within five business days thereafter, any member signing such demand may give such notice. The meeting shall be held at the place fixed in the by-laws or, if not so fixed, at the office of the corporation.

(b) At any such special meeting called on the demand of members, notwithstanding section 608 (Quorum of members), the members attending, in person or by proxy, and entitled to vote in an election of directors shall constitute a quorum for the purpose of electing directors, but not for the transaction of any other business.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970.

Derivation Notes: Derived from Gen Corp Law §§ 22, 23.

Revision Notes: *Source:* Gen Corp L §§ 22, 23, 24.

Changes: Slightly revised.

Comment: This section, patterned after section 603 of the Bus Corp L, departs only slightly from the provisions of sections 22 through 24 of the Gen Corp L presently regulating special meetings for the election of directors of not-for-profit corporations when the regular machinery for the election of directors has failed. Aside from the more precise timing procedures prescribed by this section, the sole substantive change is embodied in the provision which authorizes such special meetings to be initiated by members entitled to cast "one hundred votes or ten per cent of the total number of votes entitled to be cast in an election of directors, whichever is lesser". The "one hundred vote" provision is specially designed for the very large membership-type corporation, for which the "ten percent vote" provision would be unduly restrictive.

Notes to Decisions

Analysis

1. Generally
2. Under former General Corporation Law § 22

1. Generally

Defendants were entitled to summary judgment declaring that they were proper officers, directors and trustees of plaintiff nonprofit corporation where they established that "special annual membership meeting" at which those in attendance voted to remove them as members of board of trustees, and to elect new board, had been called without requisite notice and in violation of other sections of applicable by-laws. Residents for Equitable &

Affordable Permanent Shelter v Lawrence, 236 A.D.2d 382, 654 N.Y.S.2d 575, 1997 N.Y. App. Div. LEXIS 1014 (N.Y. App. Div. 2d Dep't 1997).

2. Under former General Corporation Law § 22

The provisions of General Corporation Law § 22 are applicable where there is a claim failure to elect directors of a membership corporation. In re Election of Directors of FDR-Woodrow Wilson Democrats, Inc., 57 Misc. 2d 743, 293 N.Y.S.2d 463, 1968 N.Y. Misc. LEXIS 1470 (N.Y. Sup. Ct. 1968).

Where due notice was given of annual membership meeting of membership corporation but directors of corporation were not elected on such date, subsequent election of directors at membership meeting, notice of which was insufficient in accordance with statute and by-laws was void. In re Election of Directors of FDR-Woodrow Wilson Democrats, Inc., 57 Misc. 2d 743, 293 N.Y.S.2d 463, 1968 N.Y. Misc. LEXIS 1470 (N.Y. Sup. Ct. 1968).

This section is applicable to a membership corporation since its provisions are not in conflict with any provision of the Membership Corporation Law. Application of Atwater, 85 N.Y.S.2d 738, 1948 N.Y. Misc. LEXIS 3853 (N.Y. Sup. Ct. 1948), aff'd, 277 A.D. 766, 97 N.Y.S.2d 541, 1950 N.Y. App. Div. LEXIS 3209 (N.Y. App. Div. 1950).

Where, under the conditions in the case, any member of a membership corporation could call a meeting pursuant to this section, petitioning members of such a corporation were not entitled to an order to compel the directors to call a meeting for the purpose of electing officers and directors. Application of Atwater, 85 N.Y.S.2d 738, 1948 N.Y. Misc. LEXIS 3853 (N.Y. Sup. Ct. 1948), aff'd, 277 A.D. 766, 97 N.Y.S.2d 541, 1950 N.Y. App. Div. LEXIS 3209 (N.Y. App. Div. 1950).

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Forms: White, New York Business Entities Form N604:1. Resolution of Directors Calling Special Meeting to Elect Directors.

White, New York Business Entities Form N604:2. Demand to Call Special Meeting of Members.

White, New York Business Entities Form N604:3. Notice of Special Meeting Called by Members of Corporation for Election of Directors.

§ 605. Notice of meeting of members.

(a) [Eff until December 31, 2021] Whenever under the provisions of this chapter members are required or permitted to take any action at a meeting, written notice shall state the place, date and hour of the meeting, for the duration of the state disaster emergency declared by executive order two hundred two that began on March seventh, two thousand twenty, the means of electronic communication, if any, by which members may participate in the proceedings of the meeting pursuant to paragraph (a) of section six hundred three of this article and, unless it is an annual meeting, indicate that it is being issued by or at the direction of the person or persons calling the meeting. Notice of a special meeting shall also state the purpose or purposes for which the meeting is called. A copy of the notice of any meeting shall be given, personally, by mail, or by facsimile telecommunications or by electronic mail, to each member entitled to vote at such meeting. If the notice is given personally, by first class mail or by facsimile telecommunications or by electronic mail, it shall be given not less than ten nor more than fifty days before the date of the meeting; if mailed by any other class of mail, it shall be given not less than thirty nor more than sixty days before such date. If mailed, such notice is given when deposited in the United States mail, with postage thereon prepaid, directed to the member at his address as it appears on the record of members, or, if he shall have filed with the secretary of the corporation a written request that notices to him be mailed to some other address, then directed to him at such other address. If sent by facsimile telecommunication or mailed electronically, such notice is given when directed to the member's fax number or electronic mail address as it appears on the record of members, or, to such fax number or other electronic mail address as filed with the secretary of the corporation. Notwithstanding the foregoing, such notice shall not be deemed to have been given electronically (1) if the corporation is unable to deliver two consecutive notices to the member by facsimile telecommunication or electronic mail; or (2) the corporation otherwise becomes aware that notice cannot be delivered to the member by facsimile telecommunication or electronic mail. An affidavit of the secretary or other person giving the notice or of a transfer agent of the corporation that the notice required by this section has been given shall, in the absence of fraud, be prima facie evidence of the facts therein stated. Whenever a corporation has more than five hundred members, the notice may be served by publication in a newspaper published in the county in the state in which the principal office of the corporation is located, once a week for three successive weeks next preceding the date of the meeting, provided that the corporation shall also prominently post notice of such meeting on the homepage of any website maintained by the corporation continuously from the date of publication through the date of the meeting. A corporation shall send notice of meetings by first class mail to any member who requests in writing that such notices be delivered by such method.

(a) [Eff December 31, 2021] Whenever under the provisions of this chapter members are required or permitted to take any action at a meeting, written notice shall state the place, date and hour of the meeting and, unless it is an annual meeting, indicate that it is being issued by or at the direction of the person or persons calling the meeting. Notice of a special meeting shall also state the purpose or purposes for which the meeting is called. A copy of the notice of any meeting shall be given, personally, by mail, or by facsimile telecommunications or by electronic mail, to each member entitled to vote at such meeting. If the notice is given personally, by

first class mail or by facsimile telecommunications or by electronic mail, it shall be given not less than ten nor more than fifty days before the date of the meeting; if mailed by any other class of mail, it shall be given not less than thirty nor more than sixty days before such date. If mailed, such notice is given when deposited in the United States mail, with postage thereon prepaid, directed to the member at his address as it appears on the record of members, or, if he shall have filed with the secretary of the corporation a written request that notices to him be mailed to some other address, then directed to him at such other address. If sent by facsimile telecommunication or mailed electronically, such notice is given when directed to the member's fax number or electronic mail address as it appears on the record of members, or, to such fax number or other electronic mail address as filed with the secretary of the corporation. Notwithstanding the foregoing, such notice shall not be deemed to have been given electronically (1) if the corporation is unable to deliver two consecutive notices to the member by facsimile telecommunication or electronic mail; or (2) the corporation otherwise becomes aware that notice cannot be delivered to the member by facsimile telecommunication or electronic mail. An affidavit of the secretary or other person giving the notice or of a transfer agent of the corporation that the notice required by this section has been given shall, in the absence of fraud, be prima facie evidence of the facts therein stated. Whenever a corporation has more than five hundred members, the notice may be served by publication in a newspaper published in the county in the state in which the principal office of the corporation is located, once a week for three successive weeks next preceding the date of the meeting, provided that the corporation shall also prominently post notice of such meeting on the homepage of any website maintained by the corporation continuously from the date of publication through the date of the meeting. A corporation shall send notice of meetings by first class mail to any member who requests in writing that such notices be delivered by such method.

(b) [Eff until December 31, 2021] When a meeting is adjourned to another time or place, it shall not be necessary, unless the by-laws require otherwise, to give any notice of the adjourned meeting if the time and place to which the meeting is adjourned and, for the duration of the state disaster emergency declared by executive order two hundred two that began on March seventh, two thousand twenty, the means of electronic communications, if any, by which members may participate in the proceedings of the meeting pursuant to paragraph (a) of section six hundred three of this article are announced at the meeting at which the adjournment is taken, and at the adjourned meeting any business may be transacted that might have been transacted on the original date of the meeting. However, if after the adjournment the board fixes a new record date for the adjourned meeting, a notice of the adjourned meeting shall be given to each member of record on the new record date entitled to notice under paragraph (a) of this section.

(b) [Eff December 31, 2021] When a meeting is adjourned to another time or place, it shall not be necessary, unless the by-laws require otherwise, to give any notice of the adjourned meeting if the time and place to which the meeting is adjourned are announced at the meeting at which the adjournment is taken, and at the adjourned meeting any business may be transacted that might have been transacted on the original date of the meeting. However, if after the adjournment the board fixes a new record date for the adjourned meeting, a notice of the adjourned meeting shall be given to each member of record on the new record date entitled to notice under paragraph (a).

(c) [Eff until December 31, 2021] Nothing required in paragraphs (a) or (b) of this section shall limit, restrict or supersede other forms of voting and participation.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970; amd, L 1971, ch 1058 § 15, eff Sept 1, 1971; L 2013, ch 549, § 62, eff July 1, 2014; L 2020, ch 122, § 4, effective June 17, 2020.

Derivation Notes: Derived from Mem Corp Law §§ 42, 43.

Revision Notes: *Source:* Mem Corp L § 43.

Changes: Revised.

Comment: This section, patterned after section 605 of the Bus Corp L, revises the existing statute regulating notice of meetings of members in not-for-profit corporations in two important respects: (a) it prescribes the procedure for giving notice to members of any meeting of members, not alone special meetings as in section 43 of the Mem Corp L; and (b) it makes explicit provision for adjourned meetings, in which case no additional notice is required unless the by-laws prescribe it or unless the board fixes a new record date after the adjournment, in which event notice must be given to each member of record on the new record date who is entitled to such notice.

Editor's Notes: Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

Laws 2020, ch 122, § 6, eff June 17, 2020, provides:

§ 6. This act shall take effect immediately and shall expire and be deemed repealed December 31, 2021.

Amendment Notes The 2020 amendment by ch 122, § 4,added "for the duration of the state disaster emergency declared by executive order two hundred two that began on March seventh, two thousand twenty, the means of electronic communication, if any, by which members may participate in the proceedings of the meeting pursuant to paragraph (a) of section six hundred three of this article" in the first sentence of (a); in (b), added "and, for the duration of the state disaster emergency declared by executive order two hundred two that began on March seventh, two thousand twenty, the means of electronic communications, if any, by which members may participate in the proceedings of the meeting pursuant to paragraph (a) of section six hundred three of this article" in the first sentence and "of this section" in the second sentence; and added (c).

Notes to Decisions

Analysis

1. Generally
2. Board of directors

3. Under former Membership Corporations Law § 20
4. Under former Membership Corporations Law § 42
5. Under former Membership Corporations Law § 43

1. Generally

Where, though irregularities appeared to have taken place, there was no showing of fraud or wrongdoing and it appeared that, even if some delegates to convention of not-for-profit corporation members were barred, their vote or presence would not have changed results of election of officers, new election was denied. In re Election of Officers & Directors of F.I.G.H.T., Inc., 79 Misc. 2d 655, 360 N.Y.S.2d 564, 1974 N.Y. Misc. LEXIS 1730 (N.Y. Sup. Ct. 1974).

Meeting of delegates of public employee labor union organized as not-for-profit corporation was nullity, and all actions taken at meeting were void, where union's constitution provided that each local chapter elect delegates who were, in effect, representatives of union rank and file, but only notice of meeting sent to all such delegates failed to set forth time and place of meeting and thus failed to comply with CLS N-PCL § 605. Simoni v Civil Service Employees Ass'n, Local 1000, etc., 133 Misc. 2d 1, 507 N.Y.S.2d 371, 1986 N.Y. Misc. LEXIS 2958 (N.Y. Sup. Ct. 1986).

2. Board of directors

Congregation had the authority to discharge members of a not-for-profit corporation's board of directors because (1) N.Y. Not-for-Profit Corp. Law § 703(b) and the corporation's bylaws only let the board increase the board's number, (2) the congregation, as the corporation's sole member, could not be denied the right to vote except by the congregation's removal or resignation, under N.Y. Not-for-Profit Corp. Law §§ 612 and 605(a), so bylaw amendments denying that right had no effect, (3) the bylaws in effect let the congregation veto the board's bylaw amendments, and (4) the congregation vetoed amendments denying the congregation the rights to vote, remove directors, and adopt, amend, or repeal bylaws. Gluck v Chevre Liady Nusach Hoary, 97 A.D.3d 787, 949 N.Y.S.2d 149, 2012 N.Y. App. Div. LEXIS 5657 (N.Y. App. Div. 2d Dep't 2012), app. denied, 21 N.Y.3d 855, 967 N.Y.S.2d 688, 989 N.E.2d 970, 2013 N.Y. LEXIS 1195 (N.Y. 2013).

Congregation had the authority to discharge members of a not-for-profit corporation's board of directors without notice because (1) the congregation was the corporation's sole member, (2) N.Y. Not-for-Profit Corp. Law § 605(a) only entitled members to notice, and (3) the corporation's certificate of incorporation and bylaws did not require notice. Gluck v Chevre Liady Nusach Hoary, 97 A.D.3d 787, 949 N.Y.S.2d 149, 2012 N.Y. App. Div. LEXIS 5657 (N.Y. App. Div. 2d Dep't 2012), app. denied, 21 N.Y.3d 855, 967 N.Y.S.2d 688, 989 N.E.2d 970, 2013 N.Y. LEXIS 1195 (N.Y. 2013).

3. Under former Membership Corporations Law § 20

Where the bylaws of a corporation provide for the expulsion of members by the rank and file members, after a hearing held at a regular meeting of members, the chance presence of certain members at a directors' meeting, and participation by them in a vote along with the directors present, resulting in a purported expulsion, does not lend validity to the proceedings. Weinberg v Carton, 90 N.Y.S.2d 398, 196 Misc. 74, 1949 N.Y. Misc. LEXIS 2425 (N.Y. Sup. Ct. 1949).

Where the bylaws of an organization provide for the participation of the entire membership of the society in a vote for the expulsion of a member, but such bylaws omit to provide for notice to the members of a meeting at which such a vote is to be taken, proper notice of the meeting and of the right of the members to participate in the trial and the vote for expulsion must nevertheless be given to the members; such notice should properly be given by mail, preferably by registered mail. Weinberg v Carton, 90 N.Y.S.2d 398, 196 Misc. 74, 1949 N.Y. Misc. LEXIS 2425 (N.Y. Sup. Ct. 1949).

An article in the newspaper of a society which merely reports that expulsion proceedings against certain delegates or directors who are unnamed are scheduled at a delegates' meeting, and inviting rank and file members to attend, does not constitute notice to the members of such a meeting, where the bylaws provided that the expulsion of any member must be by a vote at a meeting of the entire membership. Weinberg v Carton, 90 N.Y.S.2d 398, 196 Misc. 74, 1949 N.Y. Misc. LEXIS 2425 (N.Y. Sup. Ct. 1949).

4. Under former Membership Corporations Law § 42

Where there is no provision in the constitution or the bylaws of an unincorporated association specifying the time or manner of giving notice of a meeting, such notice must be given a reasonable time before the date of the meeting at which authorization is given to incorporate the association. Heights Democratic Club, Inc. v Brewer, 272 A.D. 1009, 74 N.Y.S.2d 243, 1947 N.Y. App. Div. LEXIS 4683 (N.Y. App. Div. 1947).

A notice of a meeting of an unincorporated association at which authorization was given to incorporate, is inadequate in the absence of any provision in the association's bylaws or constitution in regard thereto, where notice was mailed but two days before the meeting was held, and it does not appear that the notice was sent to all the members of the association insofar as they were known or could have been identified. Heights Democratic Club, Inc. v Brewer, 272 A.D. 1009, 74 N.Y.S.2d 243, 1947 N.Y. App. Div. LEXIS 4683 (N.Y. App. Div. 1947).

5. Under former Membership Corporations Law § 43

Although the votes cast at a meeting of a membership corporation in favor of the consolidation with another membership corporation were not by at least ⅔ of its members entitled to vote thereon and the notice of meeting might have been defective in that it was not given at least 10 days before the meeting and was not signed by an executive officer, former treasurer of one of the consolidated clubs could not claim that consolidation should be upset on those grounds in the light of the fact that he took no steps to litigate his claim until after a lapse of almost a year after said meeting and seven months after the court approved the certificate of consolidation. Liberal Civic Club, Inc. v Poli, 284 A.D. 1057, 135 N.Y.S.2d 814, 1954 N.Y. App. Div. LEXIS 4562 (N.Y. App. Div. 1954).

Where there was a substantial controversy between parties, and moving papers were voluminous, motion for injunction pendente lite was denied. Sorokin v Young Israel of Kings Bay, 133 N.Y.S.2d 242, 1954 N.Y. Misc. LEXIS 2158 (N.Y. Sup. Ct. 1954).

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-6 White, New York Business Entities ¶ N605.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.04. The Role of Members in the Corporation.

New York Practice Guide: Business and Commercial § 8.16. By-Laws.

Matthew Bender's New York Checklists: Checklist for Organizing and Operating Not-For-Profit Corporation Lexis-Nexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N605:1. Notice of Annual Meeting of Members.

White, New York Business Entities Form N605:2. Notice of Special Meeting of Members.

White, New York Business Entities Form N605:3. Notice of Adjournment.

White, New York Business Entities Form N605:4. Affidavit of Mailing.

§ 606. Waivers of notice

Notice of meeting need not be given to any member who submits a waiver of notice, in person or by proxy, whether before or after the meeting. Waiver of notice may be written or electronic. If written, the waiver must be executed by the member or the member's authorized officer, director, employee, or agent by signing such waiver or causing his or her signature to be affixed to such waiver by any rea-

sonable means, including, but not limited to facsimile signature. If electronic, the transmission of the waiver must be sent by electronic mail and set forth, or be submitted with, information from which it can reasonably be determined that the transmission was authorized by the member. The attendance of any member at a meeting, in person or by proxy, without protesting prior to the conclusion of the meeting the lack of notice of such meeting, shall constitute a waiver of notice by him or her.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970; amd, L 2013, ch 549, § 63, eff July 1, 2014; L 2015, ch 358, § 4, effective September 25, 2015.

Derivation Notes: Derived from Gen Corp Law § 31.

Revision Notes: *Source:* None.

Changes: New.

Comment: This section, dealing with the subject of waiver of notice of meetings, is an adaptation of section 606 of the Bus Corp L and is new for not-for-profit corporations in this state. It authorizes membership action at a meeting without notice of such meeting to a member who waives such notice (1) by written waiver signed, in person or by proxy, either before or after the meeting, or (2) by attendance at such meeting, in person or by proxy, without protesting the lack of notice to him at some time prior to the close of the meeting.

It should be noted that section 31 of the Gen Corp L, which authorizes corporate action by the board of directors or a committee thereof on a written waiver of notice, has its counterpart in section 108 of this chapter.

Editor's Notes: Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

Amendment Notes: The 2015 amendment by ch 358, § 4, made a stylistic changes.

Notes to Decisions

1. Generally

Where, though irregularities appeared to have taken place, there was no showing of fraud or wrongdoing and it appeared that, even if some delegates to convention of not-for-profit corporation members were barred, their vote or presence would not have changed results of election of officers, new election was denied. In re Election of Officers & Directors of F.I.G.H.T., Inc., 79 Misc. 2d 655, 360 N.Y.S.2d 564, 1974 N.Y. Misc. LEXIS 1730 (N.Y. Sup. Ct. 1974).

Under evidence, members of not-for-profit corporation acquiesced in action of previous convention in adopting constitutional amendment, and failure to question validity of amendment prior to application to court following election at 1974 convention constituted waiver of claim that improper notice had been given as to amendment. In re Election of Officers & Directors of F.I.G.H.T., Inc., 79 Misc. 2d 655, 360 N.Y.S.2d 564, 1974 N.Y. Misc. LEXIS 1730 (N.Y. Sup. Ct. 1974).

There could be no waiver, under CLS N-PCL § 606, of notice of special meeting of delegates of public employee labor union organized as not-for-profit corporation where delegate submitted affidavit stating that he did not attend meeting because of lack of notice, and no evidence was produced that such delegate received proper notice of meeting, leaving no factual dispute on issue. Simoni v Civil Service Employees Ass'n, Local 1000, etc., 133 Misc. 2d 1, 507 N.Y.S.2d 371, 1986 N.Y. Misc. LEXIS 2958 (N.Y. Sup. Ct. 1986).

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-6 White, New York Business Entities ¶ N606.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.04. The Role of Members in the Corporation.

Matthew Bender's New York Checklists: Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N606:1. Waiver of Notice of Meeting of Members.

§ 607. List or record of members at meetings

A list or record of members entitled to vote, certified by the corporate officer responsible for its preparation or by a transfer agent, shall be produced at any meeting of members upon the request therefor of any member who has given written notice to the corporation that such request will be made at least ten days prior to such meeting. If the right to vote at any meeting is challenged, the inspectors of election, or the person presiding thereat, shall require such list or record of members to be produced as evidence of the right of the persons challenged to vote at such meeting, and all persons who appear from such list or record to be members entitled to vote thereat may vote at such meeting.

HISTORY:

Add, L 1969, ch 1066, § 1; amd, L 1970, ch 847, § 33, eff Sept 1, 1970.

Derivation Notes: Derived from Mem Corp Law § 41.

Revision Notes: *Source:* Mem Corp L § 41.

Changes: Slightly revised.

Comment: This section, patterned after section 607 of the Bus Corp L, revises the existing statutory law governing the production of records of membership at meetings of members only to the extent of requiring any member who wishes such records to be produced at a meeting to make a request therefor in writing at least ten days prior to such meeting.

Notes to Decisions

1. Generally

Where, though irregularities appeared to have taken place, there was no showing of fraud or wrongdoing and it appeared that, even if some delegates to convention of not-for-profit corporation members were barred, their vote or presence would not have changed results of election of officers, new election was denied. In re Election of Officers & Directors of F.I.G.H.T., Inc., 79 Misc. 2d 655, 360 N.Y.S.2d 564, 1974 N.Y. Misc. LEXIS 1730 (N.Y. Sup. Ct. 1974).

RESEARCH REFERENCES AND PRACTICE AIDS

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Matthew Bender's New York Business Entities: 6-6 White, New York Business Entities ¶ N607.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.04. The Role of Members in the Corporation.

Matthew Bender's New York Checklists: Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N607:1. Request for List of Members.

White, New York Business Entities Form N607:2. List of Members.

§ 608. Quorum at meeting of members

(a) Members entitled to cast a majority of the total number of votes entitled to be cast thereat shall

constitute a quorum at a meeting of members for the transaction of any business, provided that when a specified item of business is required to be voted on by a class of members, voting as a class, members entitled to cast a majority of the total number of votes entitled to be cast by such class shall constitute a quorum for the transaction of such specified items of business.

(b) The certificate of incorporation or the by-laws may provide for any lesser quorum not less than the members entitled to cast one hundred votes or one-tenth of the total number of votes entitled to be cast, whichever is lesser, and may, under section 615 (Greater requirement as to quorum and vote of members), provide for a greater quorum.

(c) Action to amend the certificate of incorporation or by-laws to conform to paragraph (b) may be taken at a special meeting of members at which the quorum requirements applicable to the corporation immediately prior to the effective date of this chapter are fulfilled, but action may be taken only once under this paragraph.

(d) The members present may adjourn the meeting despite the absence of a quorum.

(e) If for any reason it has proved to be impractical or impossible for a corporation to obtain a quorum in order to conduct a meeting of its members in the manner prescribed by its certificate or by-laws or by statute, then upon the petition of a director, officer or member to the supreme court in the judicial district where the office of the corporation is or was located on notice to the attorney general or by the attorney general, the supreme court may in its discretion dispense with the requirement as to quorums that would otherwise be imposed by the corporation's certificate of incorporation or by-laws or by statute. The petition shall set forth the reasonable efforts the corporation has made to obtain a quorum, including the manner in which the corporation provided notice to its members of prior meetings. The supreme court shall, in an order issued pursuant to this section, provide for a method of notice reasonably designed to give actual notice to all persons who would be entitled to notice of a meeting held pursuant to the certificate of incorporation or by-laws or the statute, whether or not the method results in actual notice to all such persons or conforms to the notice requirements that would otherwise apply. In a proceeding under this section the court may determine who are the members of the corporation.

(f) For purposes of this section "person" means any association, corporation, joint stock company, estate, general partnership (including any registered limited liability partnership or foreign limited liability partnership), limited association, limited liability company (including a professional service limited liability company), foreign limited liability company (including a foreign professional service limited liability company), joint venture, limited partnership, natural person, real estate investment trust, business trust or other trust, custodian, nominee or any other individual or entity in its own or any representative capacity.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970; amd, L 1971, ch 1058 § 16; L 1972, ch 961, § 9, eff Sept 1, 1972; L 2005, ch 726, § 2, eff April 9, 2006; L 2006, ch 434, § 2, eff July 26, 2006.

Derivation Notes: Derived from Gen Corp Law § 14 and Mem Corp Law § 20.

Revision Notes: *Source:* Mem Corp L § 20.

Changes: Revised.

Comment: This section, patterned after section 608 of the Bus Corp L, effects the following changes in the existing statutory law regulating the quorum at membership meetings in not-for-profit corporations:

(a) It fixes the quorum at meetings of members at a majority of the total number of votes entitled to be cast thereat, unless the certificate of incorporation or the by-laws prescribe a greater proportion or number of such votes, under section 615, or a lesser proportion or number, under paragraph (b) of this section.

(b) It reduces the minimum requirement for a quorum at membership meetings from the one-third provision under section 20 of the Mem Corp L to "the members entitled to cast one hundred votes or one-tenth of the total number of votes entitled to be cast, whichever is lesser". The provision for one hundred votes as a minimum requirement is specially designed for the very large membership-type corporation.

(c) Explicit provisions are made for the quorum when voting is by class (paragraph (a)), and adjournment of meetings in the absence of a quorum (paragraph (c)).

PRACTICE INSIGHTS:

PRACTICAL CONSIDERATIONS WHEN DEVELOPING AND FILLING NOT-FOR-PROFIT BOARD OF DIRECTORS

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INSIGHT

Not-For-Profit Corp. Law § 702 law requires that a not-for-profit corporation have no less than three directors. The law sets no maximum number of directors and permits the entity, through its bylaws or member action, to set the upper limit requirements. The qualifications of the board members are addressed in Not-For-Profit Corp. Law § 701. Although the legal requirements related to the size and makeup of the board of directors may be easy to fulfill, the practical considerations are much more complicated and should be addressed periodically as the entity grows and changes.

ANALYSIS

Formally authorize board of directors with more than three members.

A not-for-profit corporation will be considered to have a three-person board of directors, unless the number is fixed in some authorized way. Custom, usage or acquiescence cannot establish the size of the board. *In re Rye Psychiatric Hosp. Med. Ctr. Inc.*, 66 N.Y.2d 333, 497 N.Y.S.2d 317 (1985). Consequently, review of the Certificate of Incorporation and the bylaws of the organization is important if the corporation is considering increasing the size of the board. The appropriate amendments should be made before moving forward with the appointment or election of additional board members.

Fine balancing act must take place when determining size of board of directors.

Not-for-profits typically have larger boards of directors than their for-profit counterparts. There are certainly advantages to having a large number of directors. Since directors are typically large contributors and fundraisers for an organization, those organizations with larger boards usually raise more money. Larger boards can include directors with diver-

gent skills (such as legal, financial, accounting) to which smaller boards may not have access.

That said, the larger the board, the more difficult it becomes to take action. For example, coaxing enough directors to a meeting as necessary to meet quorum requirements becomes more difficult, as does reaching a consensus at the required level (for example, majority or two-thirds) on important issues. Directors on a board that is too large may attach less importance to their individual role and, often, this leads to overburdened staff, an unfair distribution of work to those directors who make a commitment to participate actively, or both. Committees are essential when a large board is involved.

Recently, a provision was added to Not-For-Profit Corp. Law § 608 to assist not-for-profit organizations that find it impossible or impractical to reach a quorum for meetings of members. There is no similar relief provided for meeting board quorum requirements. The best course for dealing with this difficulty remains in limiting the size of the board to a manageable number.

Certain Not-For-Profit Corp. Law provisions make it logistically difficult to manage large board of directors.

When representing an organization considering a move to a larger board of directors, counsel would be well-advised to review certain provisions of the Not-For-Profit Corporation Law that make a large board particularly difficult to work with. For example, under Not-For-Profit Corp. Law § 703(d), directors are not permitted to vote by proxy (although there is a very limited exception to allow voting through an alternate). Pursuant to Not-For-Profit Corp. Law § 708(b), action may be taken by the board without a meeting only if all directors consent to the action in writing. Recent changes to Not-For-Profit Corp. Law § 708(b)made as part of the Non-Profit Revitalization Act of 2013 have made this process a bit easier by providing that such "consent may be written or electronic". However, obtaining unanimous written consent can still be an administrative nightmare.

Telephone conferencing has been permitted for board meetings for some time where all directors participating in the meeting are able to hear each other at the same time. Not-For-Profit Corp. Law § 708(c). In addition, under the Non-Profit Revitalization Act of 2013, Not-For-Profit Corp. Law § 708(c) has been revised to clarify that "electronic video screen communication", *i.e.* video conferencing, can be used for board meetings provided again that all directors participating in the meeting are able to hear each other at the same time and participate in all matters before the board. This alternative ought make working with a larger board more practical. These options are not available if otherwise restricted by the certificate of incorporation or by-laws.

Consider honorary or advisory boards as alternative to large board of directors.

When logistical considerations weigh in favor of a more manageable number of directors, not-for-profits may want to address increased fundraising through the creation of an honorary or advisory board. Although honorary directors participate in fundraising efforts and projects that are very limited in scope, they do not get involved in the day-to-day decision-making of the organization and attendance requirements are not overwhelming. The management of the organization vests in a smaller, active board of directors that meets regularly. As a result, the not-for-profit enjoys most of the financial benefits of having a large board of directors, the practical benefits of having a committed active board of directors, and few of the disadvantages of working with a large number of directors.

REDUCING QUORUM REQUIREMENTS FOR MEMBER MEETINGS

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INSIGHT

Not-For-Profit Corp. Law § 608 establishes the requirements for a quorum at member meetings. It is critical that the practitioner drafting bylaws for a New York not-for-profit corporation (NFP) pay particular attention to the reduced quorum requirements permitted by this section. These requirements provide options to reduce the number of members needed to obtain a quorum at member meetings to less than a majority, thus assisting corporations with large memberships from the potential difficulty of obtaining a quorum.

ANALYSIS

By reducing number of members needed to constitute quorum at meetings to less than majority, not-for-profit corporations are spared an oppressive burden applicable to obtaining a quorum.

Not-For-Profit Corp. Law § 608(a) provides that a majority of all members entitled to vote constitutes a quorum at a meeting of members for the purpose of conducting business. Section 608(b), however, allows the NFP to adopt a quorum requirement of less than a majority. This section provides that a quorum can be the *lesser* of:

1. One hundred members who are entitled to vote; or
2. One-tenth of the total members entitled to vote.

The ability to set a quorum of less than a majority can be critical to a NFP with a large voting membership. It is not uncommon to find that the local YMCA or performing arts center has a voting membership that numbers in the several thousand. Achieving attendance (in person or by proxy) of at least fifty percent of these members is a Herculean task.

Although the "standard" quorum requirement of a majority may work in some cases, the better practice is for the practitioner to consider the demographics and logistics of the membership group. Before a NFP's bylaws are finalized, the practitioner should discuss with the client the obstacles to achieving fifty percent of all members at a meeting. The practitioner may find that one of the alternatives set forth in Not-For-Profit Corp. Law § 608 makes sense.

Consider adopting bylaw language that sets quorum at less than majority.

If the client decides that less than a majority of members entitled to vote shall constitute a quorum, counsel should consider the following suggested bylaw language:

1. Ten percent (10%) of all members eligible to vote shall constitute a quorum at a meeting of members of the Corporation.

2. One Hundred (100) members eligible to vote shall constitute a quorum at a meeting of members of the Corporation.

Notes to Decisions

Analysis

1. Generally
2. Under former Membership Corporations Law § 20

1. Generally

Provision in a not-for-profit organization's revised bylaws setting a quorum at 90 members was void and unenforceable because it conflicted with N.Y. Not-for-Profit Corp. Law § 608(b). Since the provision was invalid, the quorum requirement for meeting, under § 608(a), was a majority of the members, and as a majority of the members were not present at the meeting, there was no valid quorum, thereby rendering the vote taken at that meeting null and void. Sealey v American Socy. of Hypertension, Inc., 809 N.Y.S.2d 421, 10 Misc. 3d 572, 234 N.Y.L.J. 96, 2005 N.Y. Misc. LEXIS 2472 (N.Y. Sup. Ct. 2005), aff'd, 26 A.D.3d 254, 810 N.Y.S.2d 48, 2006 N.Y. App. Div. LEXIS 2056 (N.Y. App. Div. 1st Dep't 2006).

N.Y. Not-for-Profit Corp. Law § 608(c) did not justify a not-for-profit organization's actions taking a vote to adopt revised bylaws setting a quorum at 90 members because the organization was not in existence prior to the effective date of the statute. Sealey v American Socy. of Hypertension, Inc., 809 N.Y.S.2d 421, 10 Misc. 3d 572, 234 N.Y.L.J. 96, 2005 N.Y. Misc. LEXIS 2472 (N.Y. Sup. Ct. 2005), aff'd, 26 A.D.3d 254, 810 N.Y.S.2d 48, 2006 N.Y. App. Div. LEXIS 2056 (N.Y. App. Div. 1st Dep't 2006).

Plain words of N.Y. Not-for-Profit Corp. Law § 608(c) make clear that its provisions are only applicable to those corporations that existed at the time of its enactment. Sealey v American Socy. of Hypertension, Inc., 809 N.Y.S.2d 421, 10 Misc. 3d 572, 234 N.Y.L.J. 96, 2005 N.Y. Misc. LEXIS 2472 (N.Y. Sup. Ct. 2005), aff'd, 26 A.D.3d 254, 810 N.Y.S.2d 48, 2006 N.Y. App. Div. LEXIS 2056 (N.Y. App. Div. 1st Dep't 2006).

Because the quorum provision in a society's revised bylaws was inconsistent with N.Y. Not-for-Profit Corp. Law § 608(a), the trial court properly determined that the bylaws were null and void and enjoined the society from exercising any powers or taking any action pursuant to the bylaws relating to the removal of the officers and directors. Sealey v American Socy. of Hypertension, Inc., 26 A.D.3d 254, 810 N.Y.S.2d 48, 2006 N.Y. App. Div. LEXIS 2056 (N.Y. App. Div. 1st Dep't 2006).

2. Under former Membership Corporations Law § 20

A provision in the by-laws of a lodge that any number of delegates may be held to constitute a quorum at a "second call meeting" is void since it violates the provisions of the Mem. Corp. Law of 1909, § 8 (now this section). Mem. Corp. Law of 1909, § 8 controls although there is no statement in the Mem. Corp. Law of 1909, § 44 (now the Mem. Corp. Law of 1926, § 44) as to number of delegates necessary to constitute a quorum, where the meeting is held by delegates instead of by members. Di Silvestro v Sons of Italy Grand Lodge, 223 N.Y.S. 791, 130 Misc. 494, 1927 N.Y. Misc. LEXIS 1038 (N.Y. Sup. Ct. 1927).

Where the membership of a membership corporation had dwindled to less than thirty persons, an event in which the bylaws of the corporation through an oversight failed to indicate what constituted a quorum, and where at least nine members were present and voted at a duly called meeting, election of officers at such a meeting is a valid act. Application of Havender, 44 N.Y.S.2d 213, 181 Misc. 989, 1943 N.Y. Misc. LEXIS 2935 (N.Y. Sup. Ct. 1943).

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-6 White, New York Business Entities ¶ N608.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.04. The Role of Members in the Corporation.

New York Practice Guide: Business and Commercial § 8.16. By-Laws.

Matthew Bender's New York Checklists: Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N608:1. Provision Fixing Quorum at Meetings.

White, New York Business Entities Form N608:2. Provision Fixing Lesser Quorum.

§ 609. Proxies

(a) Except as otherwise provided in the certificate of incorporation or the by-laws:

(1) Every member entitled to vote at a meeting of members or to express consent or dissent without a meeting may authorize another person or persons to act for him by proxy.

(2) No proxy shall be valid after the expiration of eleven months from the date thereof unless otherwise provided in the proxy. Every proxy shall be revocable at the pleasure of the member executing it, except as otherwise provided in this section.

(3) The authority of the holder of a proxy to act shall not be revoked by the incompetence or death of the member who executed the proxy unless, before the authority is exercised, written notice of an adjudication of such incompetence or of such death is received by the corporate officer responsible for maintaining the list or record of members.

(4) Except when other provision shall have been made by written agreement between the parties, the record holder of capital certificates which he holds as pledgee or otherwise as security or which belong to another, shall issue to the pledgor or to such owner of such capital certificates, upon demand therefor and payment of necessary expenses thereof, a proxy to vote or take other action thereon.

(5) A member shall not sell his vote or issue a proxy to vote to any person for any sum of money or anything of value, except as authorized in this section and section 619 (Agreements as to voting).

(6) A proxy which is entitled "irrevocable proxy" and which states that it is irrevocable is irrevocable when it is held by any of the following or a nominee of any of the following:

(A) A pledgee.

(B) A person who has purchased or agreed to purchase the capital certificates.

(C) A creditor or creditors of the corporation who extend or continue credit to the corporation in consideration of the proxy if the proxy states that it was given in consideration of such extension or continuation of credit, the amount thereof, and the name of the person extending or continuing credit.

(D) A person who has contracted to perform services as an officer of the corporation, if a proxy is required by the contract of employment, if the proxy states that it was given in consideration of such contract of employment, the name of the employee and the period of employment contracted for.

(E) A person designated by or under an agreement under section 619.

(7) Notwithstanding a provision in a proxy, stating that it is irrevocable, the proxy becomes revocable after the pledge is redeemed, or the debt of the corporation is paid, or the period of employment provided for in the contract of employment has terminated, or the agreement under section 619 has terminated; and, in a case provided for in subparagraphs (6)(C) or (D), becomes revocable three years after the date of the proxy or the end of the period, if any, specified therein, whichever period is less, unless the period of irrevocability is renewed from time to time by the execution of a new irrevocable proxy as provided in this section. This paragraph does not affect the duration of a proxy under subparagraph (2).

(8) A proxy may be revoked, notwithstanding a provision making it irrevocable, by a purchaser of capital certificates without knowledge of the existence of the provision unless the existence of the proxy and its irrevocability is noted conspicuously on the face or back of the capital certificate.

(b) Without limiting the manner in which a member may authorize another person or persons to act for him as proxy pursuant to paragraph (a) of this

section, the following shall constitute a valid means by which a member may grant such authority:

(1) A member may execute a writing authorizing another person or persons to act for him as proxy. Execution may be accomplished by the member or the member's authorized officer, director, employee or agent signing such writing or causing his or her signature to be affixed to such writing by any reasonable means including, but not limited to, by facsimile signature.

(2) A member may authorize another person or persons to act for the member as proxy by providing such authorization by electronic mail to the person who will be the holder of the proxy or to a proxy solicitation firm, proxy support service organization or like agent duly authorized by the person, provided that any such authorization by electronic mail shall either set forth information from which it can be reasonably determined that the authorization by electronic mail was authorized by the member. If it is determined that such authorization by electronic mail is valid, the inspectors or, if there are no inspectors, such other persons making that determination shall specify the nature of the information upon which they relied.

(c) Any copy, facsimile telecommunication or other reliable reproduction of the writing or electronic mail created pursuant to paragraph (b) of this section may be substituted or used in lieu of the original writing or transmission for any and all purposes for which the original writing or transmission could be used, provided that such copy, facsimile telecommunication or other reproduction shall be a complete reproduction of the entire original writing or transmission.

HISTORY:

Add, L 1969, ch 1066, § 1; amd, L 1970, ch 847, § 34, eff Sept 1, 1970; L 1999, ch 186, §§ 1, 2, eff July 6, 1999; L 2013, ch 549, § 64, eff July 1, 2014.

Derivation Notes: Derived from Gen Corp Law § 19 and Mem Corp Law § 41.

Revision Notes: *Source:* Gen Corp L § 19.

Changes: Revised.

Comment: This section, patterned after section 609 of the Bus Corp L, effects the following changes in the existing statute regulating proxies in not-for-profit corporations:

(1) The holder of a proxy is not precluded from exercising it by reason of the incompetence of the donor, unless written notice of an adjudication of incompetence is received by the corporate officer responsible for maintaining the list of members before the proxy is exercised (paragraph (c)).

(2) The record holder of capital certificates held by him as pledgee or otherwise as security, or which belong to another, must, upon demand therefor, issue a proxy to the pledgor or the beneficial owner of the certificates (paragraph (d)).

(3) A member is precluded from selling his vote or issuing a proxy for any sum of money or anything of value except as authorized in the section and in section 619 (paragraph (e)).

(4) Detailed provisions for irrevocable proxies are set forth in paragraphs (f), (g) and (h). These had formerly been made applicable to not-for-profit corporations by an oblique reference to former section 47-a of the Stock Corporation Law in paragraph 3 of section 19 of the Gen Corp L.

Editor's Notes: Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

Notes to Decisions

Analysis

1. Generally
2. Under former Membership Corporations Law § 20
3. Under former Membership Corporations Law § 41

1. Generally

Unless provided in certificate of incorporation or bylaws, proxy voting by members of religious corporation is not authorized except for limited purposes set forth in CLS Relig Corp § 207. Holler v Goldberg, 163 Misc. 2d 1075, 623 N.Y.S.2d 512, 1995 N.Y. Misc. LEXIS 46 (N.Y. Sup. Ct. 1995).

2. Under former Membership Corporations Law § 20

Bylaws of a membership corporation which deprive members of the privilege of registering proxy votes are invalid as in conflict with the express provisions of § 41 of the Membership Corporation Law. Flynn v Kendall, 88 N.Y.S.2d 299, 195 Misc. 221, 1949 N.Y. Misc. LEXIS 2091 (N.Y. Sup. Ct. 1949).

3. Under former Membership Corporations Law § 41

The right to vote by proxy, specifically conferred by this section, is not abridged by the failure of the bylaws of a membership corporation to provide for voting by proxy. Flynn v Kendall, 88 N.Y.S.2d 299, 195 Misc. 221, 1949 N.Y. Misc. LEXIS 2091 (N.Y. Sup. Ct. 1949).

A provision of the bylaws of a membership corporation, that the board shall be elected by the vote of members present at the meeting, does not restrict the right to vote by proxy expressly conferred by this section. Flynn v Kendall, 88 N.Y.S.2d 299, 195 Misc. 221, 1949 N.Y. Misc. LEXIS 2091 (N.Y. Sup. Ct. 1949).

Directors cannot vote by proxy. Craig Medicine Co. v Merchants' Bank of Rochester, 14 N.Y.S. 16, 59 Hun 561, 1891 N.Y. Misc. LEXIS 1834 (N.Y. Sup. Ct. 1891).

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-6 White, New York Business Entities ¶ N609.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.04. The Role of Members in the Corporation.

Matthew Bender's New York Checklists: Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N609:1. Proxy for Members' Meeting.

White, New York Business Entities Form N609:2. Proxy for Members' Vote or Consent.

White, New York Business Entities Form N609:3. Proxy—Specific Items.

White, New York Business Entities Form N609:4. Revocation of Proxy.

White, New York Business Entities Form N609:5. Clause in Pledge Agreement Granting Pledgor Right to Vote.

White, New York Business Entities Form N609:6. Irrevocable Proxy.

§ 610. Selection of inspectors at meeting of members; duties

(a) If the by-laws require inspectors at any meeting of members, such requirement is waived unless compliance therewith is requested by a member present in person or by proxy and entitled to vote at such meeting. Unless otherwise provided in the by-laws, the board, in advance of any meeting of members, may appoint one or more inspectors to act

at the meeting or any adjournment thereof. If inspectors are not so appointed, the person presiding at a meeting of members may, and on the request of any member entitled to vote thereat shall, appoint one or more inspectors. In case any person appointed fails to appear or act, the vacancy may be filled by appointment made by the board in advance of the meeting or at the meeting by the person presiding thereat. Each inspector, before entering upon the discharge of his duties, shall take and sign an oath faithfully to execute the duties of inspector at such meeting with strict impartiality and according to the best of his ability.

(b) The inspectors shall determine the number of membership certificates or cards and capital certificates outstanding and the voting power of each, the certificates and cards represented at the meeting, the existence of a quorum, the validity and effect of proxies, and shall receive votes, ballots or consents, hear and determine all challenges, and questions arising in connection with the right to vote, count and tabulate all votes, ballots or consents, determine the result, and do such acts as are proper to conduct the election or vote with fairness to all members. On request of the person presiding at the meeting or any members entitled to vote thereat, the inspectors shall make a report in writing of any challenge, question or matter determined by them and execute a certificate of any fact found by them. Any report or certificate made by them shall be prima facie evidence of the facts stated and of the vote as certified by them.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970.

Derivation Notes: Derived from Gen Corp Law §§ 23, 24.

Revision Notes: *Source:* Gen Corp L §§ 23, 24; Mem Corp L § 41.

Changes: Substantially revised.

Comment: This section, patterned after sections 610 and 611 of the Bus Corp L, considerably enlarges on the existing statutes regulating inspectors at meetings of members in not-for-profit corporations. While the existing statutes make merely passing references to inspectors, and rather sketchy provisions regarding their function at meetings, this section elaborates a very detailed procedure for their selection and provides a comprehensive statement of their function at meetings.

Notes to Decisions

1. Generally

N.Y. Not-for-Profit Corp. Law § 610 does not provide members with the right to appoint representatives from their slate of candidates as election inspectors. Cuva v United States Tennis Assn. E., Inc., 831 N.Y.S.2d 347, 13 Misc. 3d 1221(A), 236 N.Y.L.J. 62, 2006 N.Y. Misc. LEXIS 3712 (N.Y. Sup. Ct. 2006).

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-6 White, New York Business Entities ¶ N610.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.04. The Role of Members in the Corporation.

Matthew Bender's New York Checklists: Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N610:1. Form of Bylaws Relative to Appointment of Inspectors of Election.

White, New York Business Entities Form N610:2. Oath of Inspectors.

White, New York Business Entities Form N610:3. Report of Inspectors at Members' Meeting.

White, New York Business Entities Form N610:4. Inspectors' Certificate of Result of Election.

§ 611. Qualification of voters; fixing record date to determine eligibility to vote; voting entitlement

(a) The by-laws may provide or, in the absence of such provision, the board may fix, in advance, a date as the record date for the purpose of determining the members entitled to notice of any meeting of members or any adjournment thereof. Such record date shall not be more than fifty nor less than ten days before the date of the meeting.

(b) Any member in good standing, otherwise eligible to vote, is entitled to vote at any meeting of members, except that, if the certificate of incorporation or the by-laws so provide, the by-laws may provide or, in the absence of such provision, the board may fix a date as the record date for the purpose of determining the members entitled to vote at any meeting of members or any adjournment thereof, or to express consent to or dissent from any proposal without a meeting, or for the purpose of determining members entitled to receive any distribution or the allotment of any rights, or for the purpose of any other action by the members. Such record date shall not be more than fifty nor less than ten days before the date of the meeting.

(c) If the certificate of incorporation or the by-laws provide for a record date, as authorized by paragraph (b), and no record date is fixed:

(1) The record date for the determination of members entitled to vote at a meeting of members shall be at the close of business on the day next preceding the day on which notice is given, or, if no notice is given, the day on which the meeting is held.

(2) The record date for determining members for any purpose other than that specified in subparagraph (1) shall be at the close of business on the day on which the resolution of the board relating thereto is adopted.

(d) When a determination of members of record entitled to notice of or to vote at any meeting of members has been made as provided in this section, such determination shall apply to any adjournment thereof, unless the board fixes a new record date under this section for the adjourned meeting.

(e) In any case in which a member is entitled to vote, he shall have no more than, nor less than, one vote; except that if a corporation has an organization as a member, the certificate of incorporation or by-laws may provide that such organization shall be entitled to votes substantially proportionate to its membership.

HISTORY:

Add, L 1969, ch 1066, § 1; amd, L 1970, ch 847, § 35, eff Sept 1, 1970; L 1971, ch 1057 § 4, eff Sept 1, 1971; L 1971, ch 1058 § 17.

Derivation Notes: Derived from Mem Corp Law §§ 20, 41.

Revision Notes: *Source:* Mem Corp L § 41.

Changes: Partially new.

Comment: This section is an adaptation of section 604 and paragraph (a) of section 612 of the Bus Corp L. The provisions dealing with fixing the record date to determine the right to notice of, and voting eligibility at, any meeting of members, the right to receive any distribution or the allotment of any other rights, are entirely new for not-for-profit corporations in this state. The provision in paragraph (d) entitling every member of record to one vote on each matter submitted to a vote of members is presently found in section 41 of the Mem Corp L. The one member-one vote rule is, of course, subject to any contrary provision of the certificate of incorporation or the by-laws. The remaining provisions of section 612 of the Bus Corp L were omitted as having minimal applicability to not-for-profit corporations.

Notes to Decisions

Analysis

1. Generally
2. Under former Membership Corporations Law § 20
3. Under former Membership Corporations Law § 41

1. Generally

By-law of not-for-profit corporation which provided for issuance of membership certificate for each lot owned in subdivision and permitted member to have one vote for each membership certificate issued violated statutory proscription providing that "members shall have no more than, nor less than, one vote" and was therefore invalid. Procopio v Fisher, 83 A.D.2d 757, 443 N.Y.S.2d 492, 1981 N.Y. App. Div. LEXIS 15075 (N.Y. App. Div. 4th Dep't 1981).

Townhouse developer possessed "class A" membership in owners' association (which provided same single-vote rights as those exercised by individual owners), not "class B" membership (which gave predecessor sponsor-developer 3 votes per lot), where class B membership expired in 1979 by virtue of amended certificate of incorporation by which sponsor turned over management of association to owners, and, despite reference to current developer's "class B sites" in 1985 amendment to association's declaration of covenants, conditions and restrictions, neither 1979 nor 1985 amendment recreated class B membership. Roxrun Estates, Inc. v Roxbury Run Village Asso., 136 A.D.2d 162, 526 N.Y.S.2d 633, 1988 N.Y. App. Div. LEXIS 3389 (N.Y. App. Div. 3d Dep't), app. denied, 72 N.Y.2d 808, 533 N.Y.S.2d 57, 529 N.E.2d 425, 1988 N.Y. LEXIS 2628 (N.Y. 1988).

Townhouse developer was entitled to only one vote as member of owners' association, regardless of number of units developer owned, where developer was member of same voting class as other individual owners; power in not-for-profit corporation is more appropriately shared between members on equivalent basis rather than on degree of investment. Roxrun Estates, Inc. v Roxbury Run Village Asso., 136 A.D.2d 162, 526 N.Y.S.2d 633, 1988 N.Y. App. Div. LEXIS 3389 (N.Y. App. Div. 3d Dep't), app. denied, 72 N.Y.2d 808, 533 N.Y.S.2d 57, 529 N.E.2d 425, 1988 N.Y. LEXIS 2628 (N.Y. 1988).

2003 amended by-laws of a non-profit corporation that owned an apartment building violated N.Y. Not-for-Profit Corp. Law § 602(f) and 611(e) because no shares could be issued pursuant to N.Y. Not-for-Profit Corp. Law § 501 and each member could have only one vote; it was improper to give petitioner families entitlement to an additional vote because they possessed an additional unit. Matter of Thakur v 210 Forsyth St. Hous. Dev. Fund Corp., 844 N.Y.S.2d 686, 17 Misc. 3d 1012, 238 N.Y.L.J. 98, 2007 N.Y. Misc. LEXIS 7261 (N.Y. Sup. Ct. 2007).

2. Under former Membership Corporations Law § 20

Where a membership corporation is formed for charitable and benevolent purposes and for the fostering of spiritualism a bylaw declaring the unit of voting strength as a membership corporation to be measured by each share of stock held by the members thereof is void. Bartlett v Lily Dale Assembly, 249 N.Y.S. 482, 139 Misc. 338, 1931 N.Y. Misc. LEXIS 1248 (N.Y. Sup. Ct. 1931), dismissed, Ackerman v Fletcher, 6 A.D.2d 758, 174 N.Y.S.2d 903, 1958 N.Y. App. Div. LEXIS 5892 (N.Y. App. Div. 4th Dep't 1958), dismissed, 6 A.D.2d 758, 174 N.Y.S.2d 913, 1958 N.Y. App. Div. LEXIS 7384 (N.Y. App. Div. 4th Dep't 1958).

3. Under former Membership Corporations Law § 41

Where Membership Corporation Law § 41 and bylaws of Girl Scout Council provided by implication that only active members had a right to vote, failure to give notice of a meeting in which active members voted to consolidate Girl Scout Councils to associate members did not invalidate the action. Armstrong v White Plains Council of Girl Scouts, Inc., 30 A.D.2d 818, 292 N.Y.S.2d 813, 1968 N.Y. App. Div. LEXIS 3459 (N.Y. App. Div. 2d Dep't 1968), aff'd, 24 N.Y.2d 748, 299 N.Y.S.2d 846, 247 N.E.2d 662, 1969 N.Y. LEXIS 1475 (N.Y. 1969).

Where a membership corporation is formed for charitable and benevolent purposes and for the fostering of spiritualism a bylaw declaring the unit of voting strength as a membership corporation to be measured by each share of stock held by the members thereof is void. Bartlett v Lily Dale Assembly, 249 N.Y.S. 482, 139 Misc. 338, 1931 N.Y. Misc. LEXIS 1248 (N.Y. Sup. Ct. 1931), dismissed, Ackerman v Fletcher, 6 A.D.2d 758, 174 N.Y.S.2d 903, 1958 N.Y. App. Div. LEXIS 5892 (N.Y. App. Div. 4th Dep't 1958), dismissed, 6 A.D.2d 758, 174 N.Y.S.2d 913, 1958 N.Y. App. Div. LEXIS 7384 (N.Y. App. Div. 4th Dep't 1958).

Insofar as voting rights and election of officers of a charitable corporation are governed by special statute chartering the corporation, and amendments thereof, the provisions of the Membership Corporations Law are inapplicable. Petiton of Sousa, 26 Misc. 2d 474, 203 N.Y.S.2d 3, 1960 N.Y. Misc. LEXIS 2665 (N.Y. Sup. Ct. 1960), aff'd, 12 A.D.2d 956, 211 N.Y.S.2d 204, 1961 N.Y. App. Div. LEXIS 12759 (N.Y. App. Div. 2d Dep't 1961).

The fact that a member may be restricted from voting in a membership corporation in no way diminishes his standing as a member, and plaintiffs, who were members, had standing to bring a derivative action on behalf of the membership corporation, notwithstanding the lack of voting rights or the fact plaintiffs were not members when the transactions complained of occurred. Atwell v Bide-A-Wee Home Ass'n, 59 Misc. 2d 321, 299 N.Y.S.2d 40, 1969 N.Y. Misc. LEXIS 1670 (N.Y. Sup. Ct. 1969).

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-6 White, New York Business Entities ¶ N611.01 et seq.

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Matthew Bender's New York Checklists: Checklist for Organizing and Operating Not-For-Profit Corporation Lexis-Nexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N611:1. Resolution of Board of Directors Fixing Record Date.

White, New York Business Entities Form N611:2. By-Law Provision for Fixing Record Date.

§ 612. Limitations on right to vote

The certificate of incorporation or the by-laws may provide, either absolutely or contingently, that the members of any class shall not be entitled to vote, or it may limit or define the matters on, and the circumstances in, which a member or a class of members shall be entitled to vote, and, except as otherwise provided in this chapter, such provisions of the certificate of incorporation or the by-laws shall prevail, according to their tenor, in all elections and

in all proceedings, over the provisions of this chapter which authorize any action by the members, but no such denial, limitation or definition of voting rights shall be effective unless at the time one or more classes of members, singly or in the aggregate, are entitled to full voting rights.

HISTORY:

Add, L 1969, ch 1066, § 1; amd, L 1971, ch 1057, § 5, eff Sept 1, 1971; L 1971, ch 1058, § 18.

Derivation Notes: Derived from Mem Corp Law §§ 20, 41.

Revision Notes: *Source:* None.

Changes: New.

Comment: This section, dealing with the subject of limitations on the right to vote, is an adaptation of section 613 of the Bus Corp L. It is new for not-for-profit corporations in this state.

Notes to Decisions

1. Generally

Congregation had the authority to discharge members of a not-for-profit corporation's board of directors because (1) N.Y. Not-for-Profit Corp. Law § 703(b) and the corporation's bylaws only let the board increase the board's number, (2) the congregation, as the corporation's sole member, could not be denied the right to vote except by the congregation's removal or resignation, under N.Y. Not-for-Profit Corp. Law §§ 612 and 605(a), so bylaw amendments denying that right had no effect, (3) the bylaws in effect let the congregation veto the board's bylaw amendments, and (4) the congregation vetoed amendments denying the congregation the rights to vote, remove directors, and adopt, amend, or repeal bylaws. Gluck v Chevre Liady Nusach Hoary, 97 A.D.3d 787, 949 N.Y.S.2d 149, 2012 N.Y. App. Div. LEXIS 5657 (N.Y. App. Div. 2d Dep't 2012), app. denied, 21 N.Y.3d 855, 967 N.Y.S.2d 688, 989 N.E.2d 970, 2013 N.Y. LEXIS 1195 (N.Y. 2013).

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-6 White, New York Business Entities ¶ N612.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.04. The Role of Members in the Corporation.

Matthew Bender's New York Checklists: Checklist for Assessing Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 2.47.

Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N612:1. Provision for Voting by One Class.

White, New York Business Entities Form N612:2. Provisions for Equal Voting Rights.

§ 613. Vote of members

(a) Except as otherwise required by this chapter or by the certificate of incorporation or the by-laws as permitted by this chapter, directors shall be elected by a plurality of the votes cast at a meeting of members by the members entitled to vote in the election.

(b) Whenever any corporate action, other than the election of directors, is to be taken under this chapter by vote of the members, it shall, except as otherwise required by this chapter or by the certificate of incorporation or by by-laws as permitted by this chapter, be authorized by a majority of the votes cast at a meeting of members by the members entitled to vote thereon.

(c) Except as provided in paragraph (b), any reference in this chapter to corporate action at a meeting of members by "majority vote" or "two-thirds vote" shall require the action to be taken by such proportion of the votes cast at such meeting, provided that the affirmative votes cast in favor of any such action shall be at least equal to the quorum. Blank votes or abstentions shall not be counted in the number of votes cast.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970.

Revision Notes: *Source:* None.

Changes: New.

Comment: This section, dealing with the proportion of votes required for corporate action by members, is, in paragraphs (a) and (b), an adaptation of section 614 of the Bus Corp L and is new for not-for-profit corporations in this state. Paragraph (c) introduces an important change in the membership vote required to approve amendments to the certificate of incorporation (see, section 802(a)(1)), mergers and consolidations (see, section 903(a)(2)) and the disposition of all or substantially all of the assets of the corporation (see, section 510(a)(1)). Under the existing statutes, the vote required is, generally, two-thirds of all outstanding votes entitled to be cast at the meeting; under the new formula, the vote required is the requisite "majority" or "two-thirds" of the votes cast at the meeting (blank votes and abstentions not being counted in the number of votes cast), "provided that the affirmative votes cast in favor of any (such) action shall be at least equal to the quorum".

Agency Opinions

1. Generally

A fire company may adopt a bylaw providing that only firemen who attend at least 15 percent of all fire calls during the year may vote in an election of line officers of the fire company. 1982 NY Op. Att'y Gen. No. 82–17, 1982 N.Y. AG LEXIS 92.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-6 White, New York Business Entities ¶ N613.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.04. The Role of Members in the Corporation.

Matthew Bender's New York Checklists: Checklist for Assessing Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 2.47.

Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N613:1. Provision in Certificate Providing for Vote of Directors.

§ 614. Action by members without a meeting

(a) Whenever, under this chapter, members are required or permitted to take any action by vote, such action may be taken without a meeting upon the consent of all of the members entitled to vote thereon, which consent shall set forth the action so taken. Such consent may be written or electronic. If written, the consent must be executed by the member or the member's authorized officer, director,

employee or agent by signing such consent or causing his or her signature to be affixed to such consent by any reasonable means including but not limited to facsimile signature. If electronic, the transmission of the consent must be sent by electronic mail and set forth, or be submitted with, information from which it can reasonably be determined that the transmission was authorized by the member. This paragraph shall not be construed to alter or modify any provision in a certificate of incorporation not inconsistent with this chapter under which the written consent of less than all of the members is sufficient for corporate action.

(b) Written or electronic consent thus given by all members entitled to vote shall have the same effect as a unanimous vote of members and any certificate with respect to the authorization or taking of any such action which is delivered to the department of state shall recite that the authorization was by unanimous written consent.

(c) When there are no members of record, such action may be taken on the written consent signed by a majority in interest of the subscribers for capital certificates whose subscriptions have been accepted or their successors in interest or, if no subscription has been accepted, on the written consent signed by the incorporator or a majority of the incorporators. When there are two or more incorporators, if any dies or is for any reason unable to act, the other or others may act. If there is no incorporator able to act, any person for whom an incorporator was acting as agent may act in his or her stead, or if such other person also dies or is for any reason unable to act, his or her legal representative may act.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970; amd, L 2013, ch 549, § 65, eff July 1, 2014; L 2015, ch 358, § 5, effective September 25, 2015.

Revision Notes: *Source:* None.

Changes: New.

Comment: This section, dealing with the subject of membership action without a meeting and which authorizes such action on the written consent of all of the members entitled to vote thereon, is an adaptation of section 615 of the Bus Corp L. It is new for not-for-profit corporations in this state.

Editor's Notes: Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

Amendment Notes: The 2015 amendment by ch 358, § 5, substituted "consent" for "waiver" in the third sentence of (a) and made stylistic changes.

PRACTICE INSIGHTS:

SET UP FOR SUCCESS RIGHT FROM THE START — STRATEGIES FOR PREPARING NOT-FOR PROFIT CERTIFICATE OF INCORPORATION

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INSIGHT

Not-For-Profit Corp. Law § 402 sets forth the requirements for the contents of the Certificate of Incorporation (the "Certificate") which is filed with the Department of State (the "Department") to formally create a not-for-profit corporation. The practitioner should carefully consider the contents of the Certificate before filing it with the Department to get the entity started off on the right foot. Specifically, counsel should ensure that any contemplated powers are included in the Certificate, carefully draft the statement of purpose, avoid certain buzz words, and consider limiting internal governance provisions.

ANALYSIS

Include certain powers in Certificate if they are contemplated.

Certain powers must be included in the Certificate if they are going to be granted to the corporation. For example, if the management of the not-for-profit corporation is vested in individuals other than the Board of Directors (see Not-For-Profit Corp. Law § 701), this power must be included in the Certificate. Similar requirements exist for the following powers: if members are required to make capital contributions other than the payment of dues (Not-For-Profit Corp. Law § 502); if the corporation can accept subventions (Not-For-Profit Corp. Law § 505); or if written consent of less than all members is permitted for certain types of corporate action (Not-For-Profit Corp. Law § 614).

Consider adding certain permissive powers to Certificate.

The Not-For-Profit Corporation Law permits, but does not require, the inclusion of certain provisions in the Certificate. For example, Not-For-Profit Corp. Law § 709(a) permits a corporation to specify that the proportion of directors or the proportion of votes of directors that shall constitute a quorum or be necessary for the transaction of business or of any specified item of business shall be greater than the proportion prescribed by statute. The Certificate may also restrict the taking of action by the Board of Directors without a meeting and by written consent (Not-For-Profit Corp. Law § 708(b)) or permit directors to participate in meetings via telephone conference (Not-For-Profit Corp. Law § 708(c)). If these actions are contemplated, the authority may be granted in the Certificate.

Pay particularly close attention to "purposes" section of Certificate.

The Certificate must include a statement of the purpose for which the corporation has been formed. Not-For-Profit Corp. Law § 402(a)(2). The practitioner should exercise caution when drafting the purposes clause. The purposes clause must be broad enough to cover not only the acts the proposed directors envision at the corporation's infancy, but also those acts the corporation may need to take as the organization matures and builds up steam. Failure to stay within the stated purposes of the entity can later create a liability for the entity and its directors, officers and members. This can easily occur if the purposes clause is narrowly constructed. It is possible to broaden the purposes clause at a later time by amending the Certificate. See Not-For-Profit Corp. Law § 802. The larger the organization, however, the more difficult it becomes to make sweeping changes to the fundamental structure of the organization, such as changing its charter. Also, pursuant to Not-For-Profit Corp. Law § 804, amendments to Certificates which add, change or eliminate a purpose, power or provision the inclusion of which in an initial Certificate require approval or consent from a governmental entity will require such approval or consent to be obtained. Also, certificates of amendments of charitable corporations which change, eliminate or add a power or purpose require approval of either the attorney general or a justice of the supreme court. Not-For-Profit Corp. Law § 804.

Avoid certain buzz words when drafting Certificate.

Any reference to certain buzz words will typically trigger a requirement for pre-approval or consent from a state agency prior to filing the Certificate. For example, Education Department consent may be required if the Certificate is drafted using the terms "education," "research," or "school." Private foundations seeking not-for-profit status should be sure to include a disclaimer of Not-For-Profit Corp. Law § 404

activities that necessitate agency approval as well as the disclaimers required in Not-For-Profit Corp. Law § 406. Pre-approval requirements can delay the process significantly, particularly if the agency requires revisions to the proposed Certificate (that will in turn require internal approvals as well). If state agency consent is necessary, counsel should consider reserving the chosen name for the entity. Not-For-Profit Corp. Law § 303. A relatively small fee buys 60 days and may be well worth the investment if the approval process is stalled at any point and the name of the entity is important to the client.

It may be advisable to limit internal governance provisions in Certificate.

The certificate of incorporation may set forth any provision for the regulation of the internal affairs of the corporation that is consistent with the Not-For-Profit Corp. Law or any other New York law. Although it is permissible to add provisions relating to internal governance to the Certificate under Not-For-Profit Corp. Law § 402(c), it may be more advisable to add those types of provisions to the bylaws. The dynamics of an organization change over time, and changes to operating procedures are inevitable. Changes to the Certificate require governmental filing and approval — at minimum, the Department's. Changes to the bylaws, however, require only proposal by the Board of Directors and vote of the membership — a completely transparent and internal process that is relatively painless unless the organization has grown exponentially. See Not-For-Profit Corp. Law § 802.

When adding internal governance provisions to the Certificate or the bylaws, ensure that those provisions are consistent with the Not-For-Profit Corp. Law. Inconsistencies can lead a court to stop the corporation in its tracks. *See Sealey v. Amer. Socy. of Hypertension, Inc.*, 26 A.D.3d 254, 810 N.Y.S.2d 48 (1st Dep't 2006).

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-6 White, New York Business Entities ¶ N614.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.04. The Role of Members in the Corporation.

New York Practice Guide: Business and Commercial § 8.16. By-Laws.

Matthew Bender's New York Checklists: Checklist for Assessing Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 2.47.

Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N614:1. Written Consent by Subscribers to Capital Certificates or Incorporators.

White, New York Business Entities Form N614:2. Unanimous Written Consent of Members.

White, New York Business Entities Form N614:3. Written Consent to Action Requiring Vote of Members.

§ 615. Greater requirement as to quorum and vote of members

(a) The certificate of incorporation or a by-law adopted by the members may contain provisions specifying either or both of the following:

(1) That the proportion of members, or of a class thereof, who shall be present in person or by proxy at any meeting of members, including a special meeting for election of directors under section 604 (Special meeting for election of directors), in order to constitute a quorum for the transaction of any business or of any specified item of business, including amendments to the certificate of incorporation, shall be greater than the proportion prescribed by this chapter in the absence of such provision.

(2) That the proportion of votes of the members, or of a class thereof, that shall be necessary at any meeting of members for the transaction of any business or of any specified item of business, including amendments to the certificate of incorporation, shall be greater than the proportion prescribed by this chapter in the absence of such provision.

(b) An amendment of the certificate of incorporation or a by-law adopted by the members which adds a provision permitted by this section or which changes or strikes out such a provision, shall be authorized at a meeting of members by vote of the members entitled to cast two-thirds of the total number of votes entitled to be cast thereon, or of such greater proportion of such total number of votes or the total number of votes of a class, as may be provided specifically in the certificate of incorporation or a by-law adopted by the members for adding, changing or striking out a provision permitted by this section.

(c) If the certificate of incorporation or a by-law adopted by the members contains a provision authorized by this section, the existence of such provision shall be noted conspicuously on the face or back of every membership certificate or card or capital certificate issued by such corporation.

HISTORY:

Add, L 1969, ch 1066, § 1; amd, L 1970, ch 847, § 36, eff Sept 1, 1970.

Derivation Notes: Derived from Mem Corp Law § 20.

Revision Notes: *Source:* None.

Changes: New.

Comment: This section, dealing with the subject of greater requirements as to quorum and votes of members, is an adaptation of section 616 of the Bus Corp L except for the change which authorizes super-majority quorum and voting provisions to be made by by-law as well as the certificate of incorporation. The provisions of this section are new for not-for-profit corporations in this state.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-6 White, New York Business Entities ¶ N615.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.04. The Role of Members in the Corporation.

New York Practice Guide: Business and Commercial § 8.16. By-Laws.

Matthew Bender's New York Checklists: Checklist for Assessing Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 2.47.

Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N615:1. Provision in Certificate of Incorporation for Greater Quorum and Voting Requirements at Members' Meetings.

White, New York Business Entities Form N615:2. Clauses in Certificate of Incorporation for Greater-Than-Statutory Quorum and Vote of Classes of Members.

White, New York Business Entities Form N615:3. Provision in Certificate of Incorporation That Number of Directors Cannot Be Changed without Unanimous Consent.

White, New York Business Entities Form N615:4. Clauses in Certificate of Incorporation or Amendatory Certificate for Greater-than-Majority or Plurality Vote.

White, New York Business Entities Form N615:5. Notice of Meeting of Members to Authorize Amendment of Certificate of Incorporation by Striking Out Greater-Than-Statutory Quorum and Voting Requirements as to Members.

White, New York Business Entities Form N615:6. Resolution of Members' Meeting Authorizing Amendment of Certificate of Incorporation by Striking Out Greater-Than-Statutory Quorum and Voting Requirements as to Members.

White, New York Business Entities Form N615:7. Statement on Capital Certificates of Provision in Certificate of Incorporation for Greater-Than-Statutory Quorum and Voting Requirements of Members.

§ 616. Voting by class of members

(a) The certificate of incorporation or the by-laws may contain provisions specifying that any class or classes of members shall vote as a class in connection with the transaction of any business or of any specified item of business at a meeting of members, including amendments to the certificate of incorporation.

(b) Where voting as a class is provided in the certificate of incorporation or the by-laws, it shall be by the proportionate vote so provided or, if no proportionate vote is provided, in the election of directors, by a plurality of the votes cast at such meeting by the members of such class entitled to vote in the election, or for any other corporate action, by a majority of the votes cast at such meeting by the members of such class entitled to vote thereon.

(c) Such voting by class shall be in addition to any other vote, including vote by class, required by this chapter or by the certificate of incorporation or the by-laws as permitted by this chapter.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970.

Revision Notes: *Source:* None.

Changes: New.

Comment: This section, dealing with the subject of class voting by members and which authorizes such voting if provision therefor is made by by-law or certificate of incorporation, is an adaptation of section 617 of the Bus Corp L except for the change which authorizes provision for class voting to be made by by-law. The provisions of this section are new for not-for-profit corporations in this state.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-6 White, New York Business Entities ¶ N616.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.04. The Role of Members in the Corporation.

New York Practice Guide: Business and Commercial § 8.16. By-Laws.

Matthew Bender's New York Checklists: Checklist for Identifying Ownership and Ownership Transition Considerations in Entity Selection LexisNexis AnswerGuide New York Business Entities § 2.08.

Checklist for Assessing Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 2.47.

Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N616:1. Provision in Certificate of Incorporation as to Class Voting.

White, New York Business Entities Form N616:2. Provision in Certificate of Incorporation for Class Vote for Directors.

§ 617. Cumulative voting

The certificate of incorporation or the by-laws of any corporation may provide that in all elections of directors of such corporation each member shall be entitled to as many votes as shall equal the number of votes which, except for such provisions as to cumulative voting, he would be entitled to cast for the election of directors multiplied by the number of directors to be elected, and that he may cast all of such votes for a single director or may distribute them among the number to be voted for, or for any two or more of them, as he may see fit, which right, when exercised, shall be termed cumulative voting.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970.

Revision Notes: *Source:* None.

Changes: New.

Comment: This section, dealing with the subject of cumulative voting and which authorizes such voting in the election of directors if provision therefor is made in the certificate of incorporation or the by-laws, is an adaptation of section 618 of the Bus Corp L except for the change which authorizes provision for such voting to be made by by-law. The provisions of this section are new for not-for-profit corporations in this state.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-6 White, New York Business Entities ¶ N617.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.04. The Role of Members in the Corporation.

New York Practice Guide: Business and Commercial § 8.16. By-Laws.

Matthew Bender's New York Checklists: Checklist for Assessing Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 2.47.

Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N617:1. Provision for Cumulative Voting for Election of Directors.

§ 618. Power of supreme court respecting elections

Upon the petition of any member aggrieved by an election and upon notice to the persons declared elected thereat, the corporation and such other persons as the court may direct, the supreme court at a special term held within the judicial district where the office of the corporation is located shall forthwith hear the proofs and allegations of the parties, and

confirm the election, order a new election, or take such other action as justice may require.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970.

Derivation Notes: Derived from Gen Corp Law § 25.

Revision Notes: *Source:* Gen Corp L § 25.

Changes: Revised.

Comment: This section, dealing with the power of the supreme court respecting elections, is an adaptation of section 619 of the Bus Corp L. It revises section 25 of the Gen Corp L, which presently regulates not-for-profit corporations in this area, by extending the power of the court with respect to elections "to take such other action (aside from merely confirming the election or ordering a new election) as justice may require". This additional power affords the court sufficient flexibility to pass upon questions of stock ownership and sundry other questions that may arise in connection with a corporate election.

Notes to Decisions

Analysis

1. Generally
2. Determining validity of election
3. Jurisdiction
4. "Aggrieved" party
5. Power of court
6. Under former General Corporation Law § 25
7. —Purpose of section
8. — —Exclusiveness of remedy
9. — —As authorizing mandamus
10. — —Stay of subsequent election
11. —Proceeding to determine validity of election; parties
12. — —Who is party "aggrieved" by election
13. — —Petition
14. — —Limitations and laches
15. — —Nature and conduct of proceeding
16. —Power of court; confirm or order new election
17. — —Determination of other issues
18. —Decision on election; confirming
19. — —Setting aside
20. —Miscellaneous

1. Generally

A challenge by a candidate for the office of president of a union was not untimely for failure to exhaust his remedy within the union by filing a protest by a certain date where there was no evidence that such a deadline was properly adopted by the board of directors of the union and, assuming it was so adopted, a candidate should not be charged with knowledge of a deadline which does not appear in the election rules and regulations or the election timetable. Accordingly, said candidate, having exhausted his internal union remedies, was improperly barred from raising objections to the election. Wenzl v Civil Service Employees Asso., 62 A.D.2d 82, 404 N.Y.S.2d 426, 1978 N.Y. App. Div. LEXIS 10421 (N.Y. App. Div. 3d Dep't 1978).

Proceeding to annul action of stockholders in removing director was not the forum for approving an express agreement that director was to be retained as long as he or his designee was a stockholder. Teperman v Atcos Baths, Inc., 6 Misc. 2d 162, 163 N.Y.S.2d 221, 1957 N.Y. Misc. LEXIS 3078 (N.Y. Sup. Ct. 1957), aff'd, 7 A.D.2d 854, 182 N.Y.S.2d 765, 1959 N.Y. App. Div. LEXIS 10347 (N.Y. App. Div. 2d Dep't 1959).

Member of New York Mercantile Exchange who leased all her seats to obtain income therefrom is not granted injunction allowing her to reclaim right to vote, where member had been without vote for 2 years but waited until 3 weeks prior to election to seek relief, because (1) member did not show irreparable injury, and (2) member had adequate remedy at law in form of CLS N-PCL § 618 which provides judicial authority to overturn or modify results of improper election. Blanksteen v New York Mercantile Exch., 879 F. Supp. 363, 1995 U.S. Dist. LEXIS 3267 (S.D.N.Y. 1995).

2. Determining validity of election

Because membership issues at the core of an election controversy between two rival factions of a religious congregation were an ecclesiastical matter, resolution of the controversy could not be achieved through N.Y. Not-for-Profit Corp. Law § 618 or N.Y. Relig. Corp. Law § 207 without judicial intrusion into matters of religious doctrine; therefore, the lower courts properly declined to review the controversy. Matter of Congregation Yetev Lev D'Satmar, Inc. v Kahana, 9 N.Y.3d 282, 849 N.Y.S.2d 463, 879 N.E.2d 1282, 2007 N.Y. LEXIS 3284 (N.Y. 2007).

In a proceeding pursuant to Not-for-Profit Corp Law § 618 to compel a church to hold a membership meeting to elect officers and trustees, which dispute arose out of the alleged failure to hold a membership meeting pursuant to the church's bylaws, under the church's certificate of incorporation relating to membership, dues, active parishioners, and the governance of the church, the trial court properly found the church to have subjected itself to the hierarchical ecclesiastical authority, together with the right of the church to determine the qualifications of membership, so that the bishop had the power to determine who in fact was a member in good standing, and therefore the proceeding was properly dismissed as the matter of when there was to be a new meeting had to await the action of the bishop in determining membership issues. Kissel v Russian Orthodox Greek Catholic Holy Trinity Church, 103 A.D.2d 830, 478 N.Y.S.2d 68, 1984 N.Y. App. Div. LEXIS 19468 (N.Y. App. Div. 2d Dep't 1984).

Court would dismiss petition to declare church elections of trustees and officers to be null and void and to require new elections pursuant to CLS Relig Corp § 182 since petition was not filed within 4-month period mandated by CLS CPLR § 217. In re Uranian Phalanstery 1st New York Gnostic Lyceum Temple, 155 A.D.2d 302, 547 N.Y.S.2d 63, 1989 N.Y. App. Div. LEXIS 14078 (N.Y. App. Div. 1st Dep't 1989).

New election for president of dental society was required, under by-law requiring new election if result "could have been affected by the extra ballots," where 4 extra votes were cast, and margin of victory was only 3 votes; it did not matter that, when extra ballots were examined, they would not have changed result of election, because test was not whether outcome was changed but whether it "could have" been affected by number of excess votes. Jackson v First Dist. Dental Soc'y, 240 A.D.2d 265, 659 N.Y.S.2d 14, 1997 N.Y. App. Div. LEXIS 6576 (N.Y. App. Div. 1st Dep't 1997).

In special proceeding under CLS N-PCL § 618 to set aside results of election to parish council of church, injunctive relief would be granted against individuals purportedly elected to council where church's constitution and bylaws gave bishop authority to rule on challenges to election within 60 days, which he did by setting aside election results for irregularities and directing new election. Ionescu v Barbu, 255 A.D.2d 584, 680 N.Y.S.2d 653, 1998 N.Y. App. Div. LEXIS 12892 (N.Y. App. Div. 2d Dep't 1998), app. denied, 93 N.Y.2d 809, 694 N.Y.S.2d 631, 716 N.E.2d 696, 1999 N.Y. LEXIS 1336 (N.Y. 1999).

Petition under CLS N-PCL § 618 to set aside petitioner's removal from not-for-profit corporation's board of trustees lacked merit to extent that it was based on claim that proceedings were tainted by "fraud" where (1) petitioner was present at and participated in challenged election and was fully able to communicate her views to other board members, (2) her mother's statement that petitioner no longer represented her family was prompted by petitioner's estrangement from her family, and (3) even if certain memoranda previously adopted by board and relied on by petitioner were enforceable, her removal complied with them. Nesbeda v Edna McConnell Clark Found., 266 A.D.2d 72, 698 N.Y.S.2d 627, 1999 N.Y. App. Div. LEXIS 11611 (N.Y. App. Div. 1st Dep't 1999).

Where, though irregularities appeared to have taken place, there was no showing of fraud or wrongdoing and it appeared that, even if some delegates to convention of not-for-profit corporation members were barred, their vote or presence would not have changed results of election of officers, new election was denied. In re Election of Officers & Directors of F.I.G.H.T., Inc., 79 Misc. 2d 655, 360 N.Y.S.2d 564, 1974 N.Y. Misc. LEXIS 1730 (N.Y. Sup. Ct. 1974).

When petitioners challenged the conduct of an election for a not-for-profit corporation, the action was properly brought under N.Y. Not-for-Profit Corp. Law § 618, not N.Y. C.P.L.R. art. 78. The action, however, could be deemed to have been brought under the proper statute pursuant to N.Y. C.P.L.R. 103(c). Cuva v United States Tennis Assn. E., Inc., 831 N.Y.S.2d 347, 13 Misc. 3d 1221(A), 236 N.Y.L.J. 62, 2006 N.Y. Misc. LEXIS 3712 (N.Y. Sup. Ct. 2006).

3. Jurisdiction

New York City Civil Court lacked jurisdiction over action to enjoin not-for-profit organization and its executive committee from transferring power pursuant to recent elections and expending assets of organization, as such matters are reserved for Supreme Court. Koshy v Thomas, 185 Misc. 2d 102, 712 N.Y.S.2d 727, 2000 N.Y. Misc. LEXIS 321 (N.Y. Civ. Ct. 2000).

4. "Aggrieved" party

When respondents had not rebutted petitioners' assertion that individual petitioners had the right to vote in an election as the delegates of organizations that were members of a not-for-profit corporation, and the individual petitioners were defeated candidates, the individual petitioners had standing to institute a N.Y. Not-for-Profit Corp. Law § 618 proceeding. Organizations that were not listed in a membership report, though, were not members aggrieved and thus lacked standing. Cuva v United States Tennis Assn. E., Inc., 831 N.Y.S.2d 347, 13 Misc. 3d 1221(A), 236 N.Y.L.J. 62, 2006 N.Y. Misc. LEXIS 3712 (N.Y. Sup. Ct. 2006).

5. Power of court

The Supreme Court properly declared a winner in an election for the position of editor-in-chief of a student publication, rather than ordering a new election, after disallowing proxy votes in the election pursuant to the publication's bylaws, which stated that the editor-in-chief would be elected at each annual meeting by "the members present" and that "[no] proxy votes may be counted," since N-PCL § 618 provides that the Supreme Court may "confirm the election, order a new election, or take such other action as justice may require," and since the votes that had been cast in person had already been fairly alloted and there was no claim of fraud or irregularity. In re Application of Kachic, 98 A.D.2d 965, 470 N.Y.S.2d 60, 1983 N.Y. App. Div. LEXIS 21291 (N.Y. App. Div. 4th Dep't 1983).

Court did not improperly interfere with internal affairs of petitioner not-for-profit corporation when it declared that petitioner had no authority to limit number of nominees for elective office, where petitioner had initially commenced proceeding to restrain respondents from engaging in disruptive and violent behavior at nomination meetings, and obtained such relief, and then invoked CLS N-PCL § 618 (which provides for judicial intervention in election matters) by specifically seeking judicial oversight of nomination meeting and extension of executive committee's authority until nominations and elections were completed. Sun Wei Ass'n v Wong, 222 A.D.2d 203, 634 N.Y.S.2d 475, 1995 N.Y. App. Div. LEXIS 12624 (N.Y. App. Div. 1st Dep't 1995).

In an action challenging, inter alia, the election of a religious corporation's board of directors and board of trustees, the court converted the action under N.Y. C.P.L.R. § 103(c) to a special proceeding under N.Y. Not-for-Profit Corp. Law § 618 as the allegations that synagogue members who failed to pay their dues were allowed to vote in contravention of the corporation's bylaws did not involve ecclesiastical matters and the special proceeding was the exclusive remedy for challenging the validity of the election of a director or trustee. Esformes v Brinn, 52 A.D.3d 459, 860 N.Y.S.2d 547, 2008 N.Y. App. Div. LEXIS 5022 (N.Y. App. Div. 2d Dep't 2008).

In passing upon election of officers of not-for-profit corporation, court sits as court of equity, and should not interfere in internal affairs of such corporation unless clear showing is made to warrant such action. In re Election of Officers & Directors of F.I.G.H.T., Inc., 79 Misc. 2d 655, 360 N.Y.S.2d 564, 1974 N.Y. Misc. LEXIS 1730 (N.Y. Sup. Ct. 1974).

Court in passing upon election of officers of not-for-profit corporation has broad equitable powers and may direct new election where election under review is so clouded with doubt and tainted with questionable circumstances that standards of fair dealing require new, clear and adequate expression. In re Election of Officers & Directors of F.I.G.H.T., Inc., 79 Misc. 2d 655, 360 N.Y.S.2d 564, 1974 N.Y. Misc. LEXIS 1730 (N.Y. Sup. Ct. 1974).

Where original constitution of not-for-profit corporation provided that all officers should be elected for term of one year and that no officer should succeed himself for more than two successive years for same office, and term of office was increased to two years but it was neglected to amend time provided for succession, period of one year would be construed to mean "one term" in order to give meaning to constitutional provision on succession. In re Election of Officers & Directors of F.I.G.H.T., Inc., 79 Misc. 2d 655, 360 N.Y.S.2d 564, 1974 N.Y. Misc. LEXIS 1730 (N.Y. Sup. Ct. 1974).

Petitioner's election to board of directors of her cooperative was not invalid on ground that she was delinquent on her carrying charges for August and September 1988 and thus ineligible under cooperative's by-laws to have her name placed in nomination on September 13, 1988 since (1) by allowing petitioner to make late payments of 3 to 4 weeks each month over past year without notifying her that future rent had to be paid on first of month, cooperative waived its right to enforce provision of by-laws that tenant nominated to run for directorship not be delinquent in payment of carrying charges at time of nomination, and (2) uncontroverted evidence established that petitioner's August carrying charge check was, through no fault of petitioner, incorrectly refused payment by her bank. Smith v Ellerbe, 141 Misc. 2d 699, 534 N.Y.S.2d 100, 1988 N.Y. Misc. LEXIS 685 (N.Y. Sup. Ct. 1988).

When competing members of a religious community sought the validation of their election of the community's board of directors and the invalidation of rival members' election, such a decision could not be made by reference to neutral principles of law, and the tangential issues that would have to be decided required the impermissible application of ecclesiastical doctrine or law, so the competing petitions were dismissed. Congregation Yetev Lev D'Satmar v Kahan, 799 N.Y.S.2d 159, 5 Misc. 3d 1023(A), 2004 N.Y. Misc. LEXIS 2466 (N.Y. Sup. Ct. 2004), aff'd, in part, 31 A.D.3d 541, 820 N.Y.S.2d 62, 2006 N.Y. App. Div. LEXIS 9177 (N.Y. App. Div. 2d Dep't 2006).

Petitioners, who challenged an election, were not entitled to relief under N.Y. Not-for-Profit Corp. Law § 618. They had not supported their allegation that corporate funds had been improperly used in connection with the election, and there were no allegations that the expenditure influenced the result; they were not entitled to appoint representatives from their slate of candidates as election inspectors; they had failed to rebut respondents' showing that certain membership applications were never received; and respondents had shown that their treatment of other applications was in accordance with standard operating procedures and the corporation's bylaws, whereas petitioners had provided merely conclusory assertions. Cuva v United States Tennis Assn. E., Inc., 831 N.Y.S.2d 347, 13 Misc. 3d 1221(A), 236 N.Y.L.J. 62, 2006 N.Y. Misc. LEXIS 3712 (N.Y. Sup. Ct. 2006).

6. Under former General Corporation Law § 25

The provisions of this section are not limited to stock corporations. In re Empire State Supreme Lodge D. of H., 118 A.D. 616, 103 N.Y.S. 1124, 1907 N.Y. App. Div. LEXIS 728 (N.Y. App. Div. 1907).

A federal savings and loan association is subject to this section although an agency of the federal government. In re Election of Directors of Baldwinsville Fed. S&L Ass'n, 268 A.D. 414, 51 N.Y.S.2d 816, 1944 N.Y. App. Div. LEXIS 3188 (N.Y. App. Div. 4th Dep't), modified, In re Election of Directors of Baldwinsville Federal Sa v & Loan Ass'n, 268 A.D. 1024 (N.Y. App. Div. 4th Dep't 1944).

7. —Purpose of section

The purpose of this section is to provide a summary review of a contested election, free from the procedural complications of a plenary proceeding. In re William Faehndrich, Inc., 2 N.Y.2d 468, 161 N.Y.S.2d 99, 141 N.E.2d 597, 1957 N.Y. LEXIS 1163 (N.Y. 1957).

This section was enacted to give the court power to test in a summary manner the title of corporate officers without resorting

to the cumbersome action of quo warranto. In re Lake Placid Co., 274 A.D. 205, 81 N.Y.S.2d 36, 1948 N.Y. App. Div. LEXIS 3040 (N.Y. App. Div. 1948).

8. — —Exclusiveness of remedy

If an election of directors by board of directors is illegal, petitioner's only remedy is to proceed under this section to have the election set aside and a new election ordered, and not by motion to reinstate him as director on the ground that he was illegally removed, since by force of the annual election, if that election is legal, he is not entitled to be reinstated as director. In re Moscowitz, 206 A.D. 289, 200 N.Y.S. 630, 1923 N.Y. App. Div. LEXIS 7197 (N.Y. App. Div. 1923).

In an action by a corporation to restrain defendants who claimed to be directors from interfering with directors previously elected, remedy must be sought under Civil Practice Act, § 1208 or under this section. Merchants' Loan & Inv. Corp. v Abramson, 214 A.D. 252, 212 N.Y.S. 193, 1925 N.Y. App. Div. LEXIS 10492 (N.Y. App. Div. 1925), aff'd, 242 N.Y. 587, 152 N.E. 438, 242 N.Y. (N.Y.S.) 587, 1926 N.Y. LEXIS 1126 (N.Y. 1926).

The remedy afforded by this section is not exclusive and does not preclude an application for injunction against use of proxies allegedly obtained by defendants through fraud in connection with an election of directors. Segal v Bresnick, 30 Misc. 2d 569, 222 N.Y.S.2d 768, 1952 N.Y. Misc. LEXIS 1548 (N.Y. Sup. Ct. 1952).

This section has been referred to as a somewhat quicker method of determining right to corporate office than an action at law in the nature of quo warranto, but either remedy is available for such a purpose. Application of Porea, 29 Misc. 2d 48, 215 N.Y.S.2d 881, 1961 N.Y. Misc. LEXIS 2798 (N.Y. Sup. Ct. 1961).

The remedy provided by this section is not exclusive for determining validity of election as director. Tabulating Card Co. v Leidesdorf, 32 Misc. 2d 720, 223 N.Y.S.2d 652, 1961 N.Y. Misc. LEXIS 3325 (N.Y. Sup. Ct. 1961).

9. — —As authorizing mandamus

This section does not authorize mandamus. People ex rel. Putzel v Simonson, 16 N.Y.S. 118, 61 Hun 338, 1891 N.Y. Misc. LEXIS 348 (N.Y. Sup. Ct.), modified, 18 N.Y.S. 934, 63 Hun 630 (N.Y. Sup. Ct. 1891).

10. — —Stay of subsequent election

Tenant-owners of a cooperative apartment building brought a proceeding to set aside a 1956 election of its directors upon the ground of fraud allegedly perpetrated by the management, which was under the control of a former owner under a 10-year contract. During the course of the litigation, the time for the 1957 election approached, and the tenant-owners obtained a stay thereof. It was conceded that a new election would render the issues at bar moot and academic. However, similar issues might easily arise concerning the new election. In view of the nature of this corporation and the relationship of the parties, the court was justified in granting such a stay until a determination of partially tried issues could be had, although it should not have enjoined the solicitation of proxies for the prospective election. Ohrbach v Kirkeby, 3 A.D.2d 269, 161 N.Y.S.2d 371, 1957 N.Y. App. Div. LEXIS 6253 (N.Y. App. Div. 1st Dep't 1957).

11. —Proceeding to determine validity of election; parties

In a proceeding under this section brought to set aside an election of directors, the corporation itself is a necessary party defendant. In re P. F. Keogh, Inc., 192 A.D. 624, 183 N.Y.S. 408, 1920 N.Y. App. Div. LEXIS 7525 (N.Y. App. Div. 1920).

Under this section the corporation itself may complain of an illegal election of directors at directors' meeting. In re Election of Directors of Hammond Light & Power Co., 228 N.Y.S. 70, 131 Misc. 747, 1928 N.Y. Misc. LEXIS 781 (N.Y. Sup. Ct.), aff'd, 224 A.D. 684, 229 N.Y.S. 865, 1928 N.Y. App. Div. LEXIS 10370 (N.Y. App. Div. 1928).

Petitioner, in order to set aside election which has been held in accordance with proper authority and upon due notice, must show only that he has been aggrieved by it, but where alleged election was illegal in that it was unauthorized or insufficient notice of it was given, no further showing is required. In re Green Bus Lines, Inc., 2 N.Y.S.2d 556, 166 Misc. 800, 1937 N.Y. Misc. LEXIS 1192 (N.Y. Sup. Ct. 1937).

Only an aggrieved party may institute a proceeding under this section to determine validity of a concluded corporate election; such a proceeding may not be brought by the corporation. Veverka v Suffolk County Patrolemen's Benevolent Asso., 236 N.Y.S.2d 917 (N.Y. Sup. Ct. 1963).

12. — —Who is party "aggrieved" by election

One who was a candidate for election and thus was directly affected by the outcome of an election was an aggrieved member within the meaning of this section. In re Workmen's Ben. Fund, 265 A.D. 176, 38 N.Y.S.2d 429, 1942 N.Y. App. Div. LEXIS 5711 (N.Y. App. Div. 1942), app. denied, 265 A.D. 991, 39 N.Y.S.2d 990, 1943 N.Y. App. Div. LEXIS 6464 (N.Y. App. Div. 1943).

Voting in a previous election and in the election complained of, knowing that no provision had been made for classification of directors as required by the charter, did not constitute such ratification of an illegal act that the petitioner was not an aggrieved person, particularly where he objected at the election and was assured that the directors would be classified after the election. In re Election of Directors of Baldwinsville Fed. S&L Ass'n, 268 A.D. 414, 51 N.Y.S.2d 816, 1944 N.Y. App. Div. LEXIS 3188 (N.Y. App. Div. 4th Dep't), modified, In re Election of Directors of Baldwinsville Federal Sa v & Loan Ass'n, 268 A.D. 1024 (N.Y. App. Div. 4th Dep't 1944).

Unless a petitioner has been injured by the proceedings he is not a party "aggrieved" by the election; and in order to have it set aside he must show that fact. Such a showing must amount to either an inequitable result or proof that the irregularity complained of would, if corrected, produce a different result. In re Workmen's Ben. Fund, 36 N.Y.S.2d 662 (N.Y. Sup. Ct.), app. dismissed, 265 A.D. 176, 38 N.Y.S.2d 429, 1942 N.Y. App. Div. LEXIS 5711 (N.Y. App. Div. 1942).

13. — —Petition

There are no grounds for ordering a new corporate election under this section where there was no allegation of fraud as to the original election, which was conducted by an impartial committee composed of supporters of both candidates and whose decision regarding a certain disputed proxy upon which the election turned could not be said to be arbitrary. Burke v Wiswall, 85 N.Y.S.2d 187, 193 Misc. 14, 1948 N.Y. Misc. LEXIS 3736 (N.Y. Sup. Ct. 1948).

Petition for order annuling action of corporation whereby petitioner was removed as director was sufficient as a matter of pleading and the motion to dismiss was denied. Teperman v Atcos Baths, Inc., 4 Misc. 2d 738, 158 N.Y.S.2d 391, 1956 N.Y. Misc. LEXIS 1333 (N.Y. Sup. Ct. 1956).

14. — —Limitations and laches

The four-month limitation period is inapplicable to a proceeding under this section and no statute or principle of equity precludes maintenance of proceeding where respondents were not injured by delay in commencement. Wyatt v Armstrong, 59 N.Y.S.2d 502, 186 Misc. 216, 1945 N.Y. Misc. LEXIS 2597 (N.Y. Sup. Ct. 1945).

15. — —Nature and conduct of proceeding

A proceeding under this section is summary in nature and does not lend itself to the delays entailed by taking of depositions. In re Scharf, 28 Misc. 2d 869, 216 N.Y.S.2d 775, 1961 N.Y. Misc. LEXIS 2813 (N.Y. Sup. Ct.), modified, 15 A.D.2d 563, 223 N.Y.S.2d 307, 1961 N.Y. App. Div. LEXIS 6881 (N.Y. App. Div. 2d Dep't 1961).

This statute does not prescribe that the court hearing the application shall take oral proof; it is clearly within the power of the parties to agree on proof in written form; no statutory provision is made for trying the issue of fact by a jury. Petition of Serenbetz, 46 N.Y.S.2d 475, 1943 N.Y. Misc. LEXIS 2788 (N.Y. Sup. Ct. 1943), aff'd, 267 A.D. 836, 46 N.Y.S.2d 127, 1944 N.Y. App. Div. LEXIS 5031 (N.Y. App. Div. 1944).

16. —Power of court; confirm or order new election

The court has no power to supervise an election which it has ordered. In re Flushing Hospital & Dispensary, 289 N.Y. 654, 44 N.E.2d 626, 289 N.Y. (N.Y.S.) 654, 1942 N.Y. LEXIS 1225 (N.Y. 1942).

In a proceeding under this section, the court is not authorized to vacate a corporate election without ordering a new one. In re

William Faehndrich, Inc., 2 N.Y.2d 468, 161 N.Y.S.2d 99, 141 N.E.2d 597, 1957 N.Y. LEXIS 1163 (N.Y. 1957).

In a proceeding under this section, the court sits as a court of equity which may order a new election "as justice may require." Gearing v Kelly, 11 N.Y.2d 201, 227 N.Y.S.2d 897, 182 N.E.2d 391, 1962 N.Y. LEXIS 1258 (N.Y.), reh'g denied, 11 N.Y.2d 1016, 1962 N.Y. LEXIS 2275 (N.Y. 1962).

The supreme court has no authority, to act in advance of an annual election of a religious corporation to determine qualifications of voters or to supervise proceedings at an election to be thereafter held, but the limit of the court's authority is to pass upon the validity of an election that has been held and to confirm it or to order a new election. In re Trustees of Washington Ave. Baptist Church, 215 A.D. 529, 214 N.Y.S. 259, 1926 N.Y. App. Div. LEXIS 11002 (N.Y. App. Div. 1926).

This section gives the court discretionary power to confirm an election or to order a new one, as justice may require. Application of Kaminsky, 251 A.D. 132, 295 N.Y.S. 989, 1937 N.Y. App. Div. LEXIS 6878 (N.Y. App. Div.), reh'g denied, 251 A.D. 795, 298 N.Y.S. 171, 1937 N.Y. App. Div. LEXIS 7571 (N.Y. App. Div. 1937), aff'd, 277 N.Y. 524, 13 N.E.2d 456, 277 N.Y. (N.Y.S.) 524, 1938 N.Y. LEXIS 1019 (N.Y. 1938).

The power of a court under this section is to confirm an election or order a new election, as justice may require, and it has no authority to go beyond this by setting aside an election already held and ordering a new election where there is a deadlock in control and no possibility of a change in result. Jacobs v Ostow & Jacobs, Inc., 12 A.D.2d 613, 209 N.Y.S.2d 37, 1960 N.Y. App. Div. LEXIS 6379 (N.Y. App. Div. 1st Dep't 1960).

The court's powers under this section are limited to confirming an election or ordering a new election as justice may require. Burke v Wiswall, 85 N.Y.S.2d 187, 193 Misc. 14, 1948 N.Y. Misc. LEXIS 3736 (N.Y. Sup. Ct. 1948).

The court refused to undertake to substitute itself for the tellers of an election of directors where the claims of the adversary parties were in sharp conflict. Juster v Morrison, 15 Misc. 2d 998, 182 N.Y.S.2d 940, 1956 N.Y. Misc. LEXIS 1660 (N.Y. Sup. Ct. 1956).

17. — —Determination of other issues

A summary proceeding to determine which of two slates of directors were validly elected was inappropriate to the determination of questions properly triable by plenary action such as the actual or equitable ownership of stock. In re Bruder's Estate, 302 N.Y. 52, 96 N.E.2d 84, 302 N.Y. (N.Y.S.) 52, 1950 N.Y. LEXIS 775 (N.Y. 1950).

While this section confers ample authority upon court to determine any question relating to election of trustees, including such as are merely incidental thereto, if necessarily involved in controversy, proceeding is summary in its nature, and does not permit decision of equitable claims, or extraneous matters not necessarily involved in determination of primary question itself. Application of Kaminsky, 251 A.D. 132, 295 N.Y.S. 989, 1937 N.Y. App. Div. LEXIS 6878 (N.Y. App. Div.), reh'g denied, 251 A.D. 795, 298 N.Y.S. 171, 1937 N.Y. App. Div. LEXIS 7571 (N.Y. App. Div. 1937), aff'd, 277 N.Y. 524, 13 N.E.2d 456, 277 N.Y. (N.Y.S.) 524, 1938 N.Y. LEXIS 1019 (N.Y. 1938).

Under this section, the court was limited to confirming an election of directors or ordering a new one and had no authority to pass on other issues, such as questions of stock ownership. Unbekant v Bohl Tours Travel Agency, Inc., 21 A.D.2d 317, 250 N.Y.S.2d 397, 1964 N.Y. App. Div. LEXIS 3585 (N.Y. App. Div. 3d Dep't), app. dismissed, 14 N.Y.2d 959, 253 N.Y.S.2d 996, 202 N.E.2d 377, 1964 N.Y. LEXIS 955 (N.Y. 1964).

Proceeding to annul action of stockholders in removing director was not the forum for approving an express agreement that director was to be retained as long as he or his designee was a stockholder. Teperman v Atcos Baths, Inc., 6 Misc. 2d 162, 163 N.Y.S.2d 221, 1957 N.Y. Misc. LEXIS 3078 (N.Y. Sup. Ct. 1957), aff'd, 7 A.D.2d 854, 182 N.Y.S.2d 765, 1959 N.Y. App. Div. LEXIS 10347 (N.Y. App. Div. 2d Dep't 1959).

18. —Decision on election; confirming

Where the constitution of a fraternal benefit association consisting of subordinate councils, grand councils, and supreme council, provides that each grand council is entitled to send two representatives to meetings of the supreme council, and that subordinate councils shall have no representation in the supreme council, members of subordinate council are precluded from questioning the validity of election of officers at a meeting of the supreme council, in proceeding under this section where they acquiesced in the provisions of the constitution excluding them by failing to send representatives to the meeting and by not making a demand for representation. In re Triennial Election of Catholic R. & B. Ass'n, 142 A.D. 307, 127 N.Y.S. 143, 1911 N.Y. App. Div. LEXIS 303 (N.Y. App. Div. 1911).

In proceeding under § 25 to confirm claimed election of petitioner and others as duly elected officers and directors of membership corporation and to set aside claimed wrongful election of respondents as such officers and directors, where election meeting conducted by respondents was regularly called and members duly warned thereof, change of place of meeting from hotel suite announced in notice of meeting to another suite in same hotel, by notice posted at original suite, did not prejudice any of petitioner's group, all of whom attended meeting, or mislead any other member or deprive her of a vote. Application of Havender, 44 N.Y.S.2d 213, 181 Misc. 989, 1943 N.Y. Misc. LEXIS 2935 (N.Y. Sup. Ct. 1943).

Election of a particular person as a director of a membership corporation would not be set aside, because of informality in the manner in which the election was held, upon petition of one who, up to that meeting, had personally dominated the affairs of the corporation, making the corporation a vehicle for his own personal use or abuse. Hungarian Freedom Fighters Federation, Inc. v Samson, 30 Misc. 2d 354, 219 N.Y.S.2d 348, 1961 N.Y. Misc. LEXIS 2571 (N.Y. Sup. Ct. 1961).

Since this section commands that the court confirm the election or order a new election, "as justice may require," an election will not be set aside merely because of informality in convening the meeting where all of those in active interest were present and took part. Hungarian Freedom Fighters Federation, Inc. v Samson, 30 Misc. 2d 354, 219 N.Y.S.2d 348, 1961 N.Y. Misc. LEXIS 2571 (N.Y. Sup. Ct. 1961).

Elections are not vitiated for mere irregularity; there must be fraud involved or such a degree of irregularity as to effect the result in a material respect. In re Workmen's Ben. Fund, 36 N.Y.S.2d 662 (N.Y. Sup. Ct.), app. dismissed, 265 A.D. 176, 38 N.Y.S.2d 429, 1942 N.Y. App. Div. LEXIS 5711 (N.Y. App. Div. 1942).

19. — —Setting aside

Where amendments adopted at the annual meeting were void, an election which followed thereunder must be set aside. In re Flushing Hospital & Dispensary, 288 N.Y. 125, 41 N.E.2d 917, 288 N.Y. (N.Y.S.) 125, 1942 N.Y. LEXIS 1064 (N.Y. 1942).

An election of directors of a membership corporation will be set aside and a new election ordered, where it appears that a small portion of the membership in attendance at an annual meeting separated from the main body and held an election of directors in strict accordance with their legal rights, but said election was contrary to long-continued, though illegal, practice of electing directors. In re Bogart, 215 A.D. 45, 213 N.Y.S. 137, 1925 N.Y. App. Div. LEXIS 5363 (N.Y. App. Div. 1925).

Where a certificate of incorporation provided for unanimous vote or consent of all stockholders for transaction of corporate business, election of a board of directors by a plurality vote, pursuant to a by-law of the corporation was invalid, since the provision in the certificate took priority over the by-law. In re Election of Directors of Radiant Knitting Mills, Inc., 20 Misc. 2d 915, 194 N.Y.S.2d 232, 1959 N.Y. Misc. LEXIS 2415 (N.Y. Sup. Ct. 1959).

20. —Miscellaneous

Even though directors and officers were illegally elected, they were nonetheless de facto directors and officers who could call a meeting required by the by-laws. Petition of Weinstein, 119 N.Y.S.2d 457, 203 Misc. 975, 1953 N.Y. Misc. LEXIS 1549 (N.Y. Sup. Ct. 1953).

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-6 White, New York Business Entities ¶ N618.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.04. The Role of Members in the Corporation.

Matthew Bender's New York Checklists: Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N618:1. Notice of Petition to Set Aside Election of Directors.

White, New York Business Entities Form N618:2. Order to Show Cause to Set Aside Election of Directors.

White, New York Business Entities Form N618:3. Petition to Set Aside an Election.

White, New York Business Entities Form N618:4. Judgment Setting Aside Election of Directors.

§ 619. Agreements by members as to voting

An agreement between two or more members, if in writing and signed by the parties thereto, may provide that in exercising their voting rights as members they shall vote as therein provided, or as they may agree, or as determined in accordance with a procedure agreed upon by them.

HISTORY:

Add, L 1969, ch 1066, § 1; amd, L 1970, ch 847, § 37, eff Sept 1, 1970.

Revision Notes: *Source:* None.

Changes: New.

Comment: This section, dealing with agreements by members as to voting, is an adaptation of paragraph (a) of section 620 of the Bus Corp L and is new for not-for-profit corporations in this state. The section authorizes a very liberal vote-pooling arrangement among members which, when coupled with the irrevocable proxy device (see, section 619(f)(5)), effectively eliminates the need for the voting trust in not-for-profit corporations, and, accordingly, the latter vote-pooling device is not authorized in the new law.

Paragraph (b) of section 620 of the Bus Corp L has not been included in the new law because it was designed specially for the close-type of business corporation and also because unlimited sterilization of the management powers of the board of directors in not-for-profit corporations is authorized by section 701 of the new law, which provides that a corporation shall be managed by its board of directors "except as otherwise provided in the certificate of incorporation."

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-6 White, New York Business Entities ¶ N619.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.04. The Role of Members in the Corporation.

Matthew Bender's New York Checklists: Checklist for Assessing Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 2.47.

Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N619:1. Members' Agreement with Provision for Voting Rights.

§ 620. Preemptive rights

There shall be no preemptive rights in relation to membership certificates or cards, capital certificates, subvention certificates, or bonds. In the case of bonds having lawful voting rights, this section shall not invalidate otherwise valid contract provisions designed to protect such voting rights.

HISTORY:

Add, L 1969, ch 1066, § 1; amd, L 1971, ch 1058 § 19, eff Sept 1, 1971.

Derivation Notes: Derived from Mem Corp Law § 26.

Revision Notes: *Source:* None.

Changes: New.

Comment: This section denies members of not-for-profit corporations any preemptive rights in unissued capital certificates or in bonds convertible into such certificates, except to the extent that such rights are granted by the certificate of incorporation. Existing statutory law in this state similarly makes no provision for preemptive rights in not-for-profit corporations. The comprehensive and detailed provisions for preemptive rights in section 622 of the Bus Corp L were rejected as generally inappropriate for the not-for-profit corporation, in which "control" factors are not likely to play the crucial role they do in the business corporation for profit. Whenever maintenance of a "ratio of control" may become important in a particular not-for-profit corporation, suitable preemptive rights can be provided in the certificate of incorporation.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-6 White, New York Business Entities ¶ N620.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.04. The Role of Members in the Corporation.

Matthew Bender's New York Checklists: Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N620:1. Provision in Certificate of Incorporation Limiting Preemptive or Preferential Rights.

§ 621. Books and records; right of inspection; prima facie evidence

(a) Except as otherwise provided herein, every corporation shall keep, at the office of the corporation, correct and complete books and records of account and minutes of the proceedings of its members, board and executive committee, if any, and shall keep at such office or at the office of its transfer agent or registrar in this state, a list or record containing the names and addresses of all members, the class or classes of membership or capital certificates and the number of capital certificates held by each and the dates when they respectively became the holders of record thereof. A corporation may keep its books and records of account in an office of the corporation without the state, as specified in its certificate of incorporation. Any of the foregoing books, minutes and records may be in written form or in any other form capable of being converted into written form within a reasonable time.

(b) Any person who shall have been a member of record of a corporation for at least six months immediately preceding his demand, or any person holding, or thereunto authorized in writing by the holders of, at least five percent of any class of the

outstanding capital certificates, upon at least five days written demand shall have the right to examine in person or by agent or attorney, during usual business hours, its minutes of the proceedings of its members and list or record of members and to make extracts therefrom.

(c) An inspection authorized by paragraph (b) may be denied to such member or other person upon his refusal to furnish to the corporation, its transfer agent or registrar an affidavit that such inspection is not desired and will not be used for a purpose which is in the interest of a business or object other than the business of the corporation and that he has not within five years given, sold or offered for sale any list or record of members of any domestic or foreign corporation or aided or abetted, or attempted or offered to aid or abet, any person in procuring any such list or record of members for any such purpose.

(d) Upon refusal by the corporation or by an officer or agent of the corporation to permit an inspection of the minutes of the proceedings of its members or of the list or record of members, as herein provided, the person making the demand for inspection may apply to the supreme court in the judicial district where the office of the corporation is located, upon such notice as the court may direct, for an order directing the corporation, its officer or agent to show cause why an order should not be granted permitting such inspection by the applicant. Upon the return day of the order to show cause, the court shall hear the parties summarily, by affidavit or otherwise, and if it appears that the applicant is qualified and entitled to such inspection, the court shall grant an order compelling such inspection and awarding such further relief as to the court may seem just and proper.

(e) Upon the written request of any person who shall have been a member of record for at least six months immediately preceding his request, or of any person holding, or thereunto authorized in writing by the holders of, at least five percent of any class of the outstanding capital certificates, the corporation shall provide to such member an annual balance sheet and profit and loss statement or a financial statement performing a similar function for the preceding fiscal year, and, if any interim balance sheet or profit and loss or similar financial statement has been distributed to its members or otherwise made available to the public, the most recent such interim balance sheet or profit and loss or similar financial statement. The corporation shall be allowed a reasonable time to prepare such annual balance sheet and profit and loss or similar financial statement.

(e-1) In addition to those documents described in paragraph (e) of this section, members of a homeowners association incorporated pursuant to the provisions of this chapter shall also be entitled to review, upon request to the homeowners association's governing board, invoices, ledgers, bank accounts, reconciliations, contracts, and any documents related to the expenditure of homeowners association dues.

(f) Nothing herein contained shall impair the power of courts to compel the production for examination of the books and records of a corporation.

(g) The books and records specified in paragraph (a) shall be prima facie evidence of the facts therein stated in favor of the plaintiff in any action or special proceeding against such corporation or any of its officers, directors or members.

(h) Nothing in this chapter shall require an employee organization certified or recognized for any collective negotiating unit of an employer pursuant to article fourteen of the civil service law to disclose the home address of any member or former member of such organization.

HISTORY:

Add, L 1969, ch 1066, § 1; amd, L 1970, ch 847, § 38, eff Sept 1, 1970; L 1984, ch 27, § 1, eff March 20, 1984; L 2013, ch 549, § 66, eff July 1, 2014; L 2017, ch 343, § 1, effective October 23, 2017.

Revision Notes: *Source:* None.

Changes: New.

Comment: This section, dealing with the inspection rights of members, is an adaptation of section 624 of the Bus Corp L. Its extensive provisions for the inspection of the books and records of not-for-profit corporations, and particularly the right to examine the minutes of proceedings of members and the record of members, are new for not-for-profit corporations in this state.

Editor's Notes: Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

Amendment Notes The 2017 amendment by ch 343, § 1 added (e-1).

Notes to Decisions

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1. Generally

When asserting a common-law right of access to corporate books and records the shareholder must plead and prove that inspection is desired for a proper purpose. Crane Co. v Anaconda Co., 39 N.Y.2d 14, 382 N.Y.S.2d 707, 346 N.E.2d 507, 1976 N.Y. LEXIS 2371 (N.Y. 1976).

The manner of communication selected by stockholder desiring to discuss aspects of tender offer with fellow stockholders should be within the judgment of the shareholder. Crane Co. v Anaconda Co., 39 N.Y.2d 14, 382 N.Y.S.2d 707, 346 N.E.2d 507, 1976 N.Y. LEXIS 2371 (N.Y. 1976).

Qualified stockholder may inspect corporation's stock register to ascertain the identity of fellow stockholders for the avowed purpose of informing them directly of its exchange offer and

soliciting tenders of stock. Crane Co. v Anaconda Co., 39 N.Y.2d 14, 382 N.Y.S.2d 707, 346 N.E.2d 507, 1976 N.Y. LEXIS 2371 (N.Y. 1976).

Petitioner was not entitled under common-law principles to compel not-for-profit corporation to make available to petitioner certain financial records and documents he sought where petition alleged nothing more than disagreement with corporation's officers as to expenditure of some of corporation's funds. Mathews v Onondaga County Deputy Sheriff's Benevolent Ass'n, 225 A.D.2d 1048, 639 N.Y.S.2d 613, 1996 N.Y. App. Div. LEXIS 2876 (N.Y. App. Div. 4th Dep't 1996).

Right of "inactive" members of not-for-profit corporation to inspect its books and records, in connection with their challenge to its decision to amend its bylaws, was not as broad as disclosure permitted under CLS CPLR § 3101; better statute to compare to CLS N-PCL § 621 was CLS Bus Corp § 624 (describing for-profit corporation's obligation to shareholders who demand inspection of corporate books, records and minutes). Wells v League of Am. Theatres & Producers, Inc., 183 Misc. 2d 915, 706 N.Y.S.2d 599, 2000 N.Y. Misc. LEXIS 101 (N.Y. Sup. Ct. 2000).

2. Construction

Phrase "by one or more of the members," in statute providing that actions against corporate directors and officers for mismanagement, waste of corporate assets and unlawful conduct may be brought by one or more of its members, does not relate back to provisions of general statutory provision requiring that derivative action be instituted by at least five percent of members of corporation, but instead, authorizes bringing of such actions against corporate directors and officers by one or more of members; such construction gives effect to entire statute and gives recognition to apparent legislative intent to differentiate actions against officers and directors for misconduct or misfeasance in office from other derivative actions. Hoffert v Dank, 86 Misc. 2d 384, 382 N.Y.S.2d 421, 1976 N.Y. Misc. LEXIS 2452 (N.Y. Sup. Ct.), modified, 55 A.D.2d 518, 389 N.Y.S.2d 101, 1976 N.Y. App. Div. LEXIS 15153 (N.Y. App. Div. 1st Dep't 1976).

3. Beneficial interest

Provision of Not-For-Profit Corporation Law reserving to court right to authorize inspection of corporate documents authorizes court to grant right to one entitled thereto on common-law principles, to a pledgee of stock, to a holder of a voting trust certificate, to an executor of a deceased stockholder, and to directors of corporation, but does not authorize court to grant such right to persons who have no beneficial interest in corporation and who are not officers or directors thereof. Getman v Mohawk Valley Nursing Home, Inc., 44 A.D.2d 392, 355 N.Y.S.2d 508, 1974 N.Y. App. Div. LEXIS 4990 (N.Y. App. Div. 4th Dep't 1974).

Petitioner, who was a resident and taxpayer of town and who made annual charitable contributions to nursing home organized pursuant to Not-For-Profit Corporation Law, but who was not a manager thereof under any of four tests specified by Law and who was not an officer or director and had no beneficial interest in corporation, had no right to inspect records of corporation. Getman v Mohawk Valley Nursing Home, Inc., 44 A.D.2d 392, 355 N.Y.S.2d 508, 1974 N.Y. App. Div. LEXIS 4990 (N.Y. App. Div. 4th Dep't 1974).

Petitioners were not precluded from inspecting books and records of respondent not-for-profit corporation involved in presentation of Antoinette Perry ("Tony") Awards, on ground that their application was not made in good faith and for proper purpose; fact that petitioners were "inactive" members of respondent corporation, and had some personal interest in challenging its decision to amend its bylaws so as to prevent inactive members from participating in Tony awards process, did not preclude there being legitimate corporate interest involved in their claims. Wells v League of Am. Theatres & Producers, Inc., 183 Misc. 2d 915, 706 N.Y.S.2d 599, 2000 N.Y. Misc. LEXIS 101 (N.Y. Sup. Ct. 2000).

4. Good faith

In an Article 78 proceeding to inspect and copy certain minutes, reports and membership lists of a not-for-profit cemetery corporation from which petitioner had purchased a burial plot, a hearing to determine the good faith of petitioner in seeking the inspection was required, where the president of the corporation, in an affidavit in opposition to petitioner's application, averred that petitioner was an attorney employed by a law firm representing a former employee of the corporation in various actions against the corporation, that these actions had been based on charges of waste and conversion of corporate assets by the corporation's directors and that these charges had been investigated by the attorney general's office, the cemetery board and the county grand jury and in each instance no impropriety or wrongdoing was found and that the request to inspect was made in bad faith and for the improper purpose of aiding the former employee's continuing harassment of the corporation. De Paula v Memory Gardens, Inc., 90 A.D.2d 886, 456 N.Y.S.2d 522, 1982 N.Y. App. Div. LEXIS 19155 (N.Y. App. Div. 3d Dep't 1982).

In proceeding under CLS N-PCL § 621(d) against not-for-profit corporation to inspect and copy various of its records, corporation properly raised issue as to bad faith of petitioners, who were residential members of corporation involved in long and bitter dispute with corporation regarding rent control status of residence units, and hearing was necessary to determine good faith of petitioners in their request; although ill will and desire to change corporation's management and policies did not render request improper, request would be improper if driving motive was personal gain. Mayer v National Arts Club, 192 A.D.2d 863, 596 N.Y.S.2d 537, 1993 N.Y. App. Div. LEXIS 3747 (N.Y. App. Div. 3d Dep't 1993).

Although petitioner in action seeking inspection of corporation's membership lists filed the affidavit required by Not-For-Profit Corp L § 621, the court could, where the question was raised, go beyond the face of the affidavit to determine whether in fact the inspection was sought in good faith. Application of Santuccio, 70 Misc. 2d 587, 334 N.Y.S.2d 67, 1972 N.Y. Misc. LEXIS 1803 (N.Y. Sup. Ct. 1972).

Because of the special relationship between the N.R.A. and The American Rifleman the fiduciary obligations of the association's directors and officers, as imposed by N.P.C.L. § 717, applied with equal vigor to the operation of The American Rifleman to the effect that the Board could not refuse to publish advertisements of candidates for N.R.A. directorships in order that they might retain control of the association for themselves; refusal of the Board to furnish a membership list to candidates and to publish a request for monetary support for a candidate raised the issue of directors' bad faith. Fitzgerald v National Rifle Asso., 383 F. Supp. 162, 1974 U.S. Dist. LEXIS 6646 (D.N.J. 1974).

5. Elections

A candidate for vice-president of a union was entitled, under Not-For-Profit Corp Law § 621, to inspect and copy the membership list of the union, notwithstanding the federal preemption argument, since the Labor Management Reporting Disclosure Act requires yielding to more favorable remedies under State law. Frankland v Independent Ass'n of Publishers' Employees, Inc., 110 Misc. 2d 732, 442 N.Y.S.2d 951, 1981 N.Y. Misc. LEXIS 3150 (N.Y. Sup. Ct. 1981).

Request to compel the inspection of election ballots for the purpose of conducting a recount fell within the right of inspection of corporate records afforded under N.Y. Not-for-Profit Corp. Law § 621. Cuva v United States Tennis Assn. E., Inc., 831 N.Y.S.2d 347, 13 Misc. 3d 1221(A), 236 N.Y.L.J. 62, 2006 N.Y. Misc. LEXIS 3712 (N.Y. Sup. Ct. 2006).

6. Pleadings

It was overly broad for petitioner to request "the corporate books, records, papers and contracts, including minute books, any and all cancelled checks, bills, bank statements, vouchers, correspondence, and any other documents or data which deal in any way with any entry on the books and records of said corporation." Mathews v Onondaga County Deputy Sheriff's Benevolent Ass'n, 225 A.D.2d 1048, 639 N.Y.S.2d 613, 1996 N.Y. App. Div. LEXIS 2876 (N.Y. App. Div. 4th Dep't 1996).

Dismissal of a member's cause of action seeking to compel production of a church's books and records was error because the issue of whether the member, who sought to enforce a statutory right, was entitled to the production, could have been determined

by resort to neutral principles of law; although the action was not brought as a special proceeding pursuant to N.Y. Not-for-Profit Corp. Law § 621, it was appropriate to convert the action. Tae Hwa Yoon v New York Hahn Wolee Church, Inc., 56 A.D.3d 752, 870 N.Y.S.2d 42, 2008 N.Y. App. Div. LEXIS 9041 (N.Y. App. Div. 2d Dep't 2008).

Although plaintiff did not cross move for summary judgment, in action seeking to enjoin defendants from paying any salary or other sums to executive director of corporation and to direct complete disclosure of names and addresses of all members and books of account of corporation, the trial court would grant plaintiff's request for complete disclosure where appropriate demand for production was made, there was sufficient showing that inspection was not desired and would not be used for purpose which was in interest of business or object other than business of corporation, and there was no proof that plaintiff had otherwise failed to comply with provisions of Not-for-Profit Corporation Law. Hoffert v Dank, 86 Misc. 2d 384, 382 N.Y.S.2d 421, 1976 N.Y. Misc. LEXIS 2452 (N.Y. Sup. Ct.), modified, 55 A.D.2d 518, 389 N.Y.S.2d 101, 1976 N.Y. App. Div. LEXIS 15153 (N.Y. App. Div. 1st Dep't 1976).

7. Under former Membership Corporation Law § 26

The power of visitation vested in the supreme court by former § 16 from which this section is derived and other statutes where the word "visitation" is used confers no power to do anything other than as specifically stated in former § 16. In re Norton, 161 N.Y.S. 710, 97 Misc. 289, 1916 N.Y. Misc. LEXIS 974 (N.Y. Sup. Ct. 1916).

This section may not be invoked for the investigation of the affairs of a religious corporation. Taylor v Day Star Baptist Church, Inc., 92 N.Y.S.2d 206, 196 Misc. 449, 1949 N.Y. Misc. LEXIS 2795 (N.Y. Sup. Ct. 1949).

Where there has been a demand for relief in the form of an inventory and account with a detailed statement of transactions by a membership corporation, under this section, and the pleadings allege that one of the directors caused moneys to be paid to himself without the concurring vote of two-thirds of the Board of Directors as required by § 47 of the Membership Corporations Law, the court before granting such relief will direct a trial of the issues raised. Application of Atwater, 85 N.Y.S.2d 738, 1948 N.Y. Misc. LEXIS 3853 (N.Y. Sup. Ct. 1948), aff'd, 277 A.D. 766, 97 N.Y.S.2d 541, 1950 N.Y. App. Div. LEXIS 3209 (N.Y. App. Div. 1950).

8. —Order appointing referee to investigate for court

An order appointing a referee to conduct the investigation in a proceeding instituted under former § 16 from which the section is derived to make visitation and inquiry into the affairs of a membership corporation should contain only the statutory provisions defining the scope and method of the referee's investigation and nothing in the way of adjudication upon the merits. People v Horowitz, 216 N.Y. 637, 110 N.E. 1046, 216 N.Y. (N.Y.S.) 637, 1915 N.Y. LEXIS 836 (N.Y. 1915).

9. — —Right to appeal order

An order appointing a referee to conduct the investigation in a proceeding instituted under former § 16 from which this section is derived to make visitation and inquiry into the affairs of a membership corporation, is not appealable to the appellate division. People v Horowitz, 216 N.Y. 637, 110 N.E. 1046, 216 N.Y. (N.Y.S.) 637, 1915 N.Y. LEXIS 836 (N.Y. 1915).

10. —Order requiring inventory and accounting

Under former § 16 from which this section is derived the supreme court had power to make an order requiring an inventory and account of the property, effects and liabilities of a cemetery corporation, with a detailed statement of its transactions during the twelve months next preceding the granting of said order. In re Norton, 161 N.Y.S. 710, 97 Misc. 289, 1916 N.Y. Misc. LEXIS 974 (N.Y. Sup. Ct. 1916).

Directors of a membership corporation organized chiefly for charitable purposes were directed to file inventory, accounting and statement of transactions during 12 months next preceding the granting of the order, where it appeared that the members of the corporation, under the guise of voting compensation to themselves for past services, sought to divide the assets among themselves. Distribution of the assets of a membership corporation whose purposes were charitable among the membership, even on dissolution, would be improper. It was also immaterial that the petitioner, a member of the corporation, might be estopped to object to the resolution for payment of compensation since the supreme court may act on its own motion. In re Green, 10 Misc. 2d 557, 177 N.Y.S.2d 933, 1957 N.Y. Misc. LEXIS 2680 (N.Y. Sup. Ct. 1957).

11. — —Provision restraining sale of property

In an order granted under former § 16 from which this section is derived, providing for visitation by the supreme court of a cemetery corporation and directing the filing of an inventory and account, a provision in the nature of an injunction restraining the sale of the property of such corporation is unauthorized. In re Greene, 153 A.D. 8, 138 N.Y.S. 95, 1912 N.Y. App. Div. LEXIS 11097, 1912 N.Y. App. Div. LEXIS 9206 (N.Y. App. Div. 1912).

12. —Investigation or attack by others; city

Where city is entitled to net revenues of membership corporation it has power to investigate the finances thereof under General City Law § 20, subds 19 and 21, although books and vouchers of such corporation are subject to visitation and inspection of justice of the Supreme Court or of any person appointed by such court under above statute. New York World's Fair 1964-1965 Corp. v Beame, 45 Misc. 2d 683, 257 N.Y.S.2d 543, 1965 N.Y. Misc. LEXIS 2241 (N.Y. Sup. Ct.), aff'd, 22 A.D.2d 611, 257 N.Y.S.2d 747, 1965 N.Y. App. Div. LEXIS 4535 (N.Y. App. Div. 1st Dep't 1965).

13. — —Nonmembers

No procedure is afforded in law for an attack upon a budget regularly adopted by the directors of a membership corporation by one who is not a member of the corporation and has not taken advantage of opportunities to become a member. Sea Gate Assoc., v Fleischer, 211 N.Y.S.2d 767, 1960 N.Y. Misc. LEXIS 3988 (N.Y. Sup. Ct. 1960).

Persons who bought property in a private community with knowledge that its facilities, such as police protection, street repair, sewage disposal, and the like, were, and for many years had been, handled through a membership corporation open to all property owners on an annual assessment basis, having refused to pay such assessments and not having become members of the corporation, had no standing, in an action to collect service assessments, to attack the assessments as excessive or because they were denied use of certain facilities by reason of nonpayment. Sea Gate Assoc., v Fleischer, 211 N.Y.S.2d 767, 1960 N.Y. Misc. LEXIS 3988 (N.Y. Sup. Ct. 1960).

14. —Bylaw precluding access to membership list

A bylaw of a membership corporation which precludes all access to the corporate record of lists of its members on the say-so of its governing body is so far inconsistent with the letter and spirit of section 46 of the Membership Corporations Law as to be wholly void and without effect. Davids v Sillcox, 297 N.Y. 355, 79 N.E.2d 440, 297 N.Y. (N.Y.S.) 355, 1948 N.Y. LEXIS 845 (N.Y.), reh'g denied, 298 N.Y. 618, 81 N.E.2d 353, 298 N.Y. (N.Y.S.) 618, 1948 N.Y. LEXIS 1185 (N.Y. 1948).

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-6 White, New York Business Entities ¶ N621.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.04. The Role of Members in the Corporation.

Matthew Bender's New York Checklists: Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N621:1. Record of Members.

White, New York Business Entities Form N621:2. Provision in Certificate of Incorporation Regulating Inspection of Books and Records.

White, New York Business Entities Form N621:3. Demand for Inspection of Minutes of Members' Proceedings and Record of Members on Balance Sheet and Profit and Loss Statement.

White, New York Business Entities Form N621:4. Authorization to Inspect Record of Members on Behalf of Holders of 5 Percent of Outstanding Capital Certificates.

White, New York Business Entities Form N621:5. Affidavit as to Inspection of Minutes and Record of Members for Proper Purpose.

White, New York Business Entities Form N621:6. Order to Show Cause for Inspection of Books and Records.

White, New York Business Entities Form N621:7. Petition for Inspection of Membership Records.

White, New York Business Entities Form N621:8. Order for Inspection of Corporate Books.

White, New York Business Entities Form N621:9. Request for Annual Balance Sheet and Profit and Loss Statement.

§ 622. Infant members

(a) If the certificate of incorporation or the by-laws provide that a member shall be of full age:

(1) A corporation may treat an infant who holds a membership certificate or card or capital certificate or a bond of such corporation as having capacity to receive and to empower others to receive payments or distributions, to vote or express consent or dissent, in person or by proxy, and to make elections and exercise rights relating to such certificates or bonds, unless, in the case of membership certificates or cards or capital certificates, the corporate officer responsible for maintaining the list or record of members or the transfer agent of the corporation or, in the case of bonds, the treasurer or paying officer or agent has received written notice that such holder is an infant.

(2) An infant holder of a membership certificate or card or capital certificate or a bond of a corporation who has received or empowered others to receive payments or distributions, voted or expressed consent or dissent, or made an election or exercised a right relating thereto, shall have no right thereafter to disaffirm or avoid, as against the corporation, any such act on his part, unless prior to such receipt, vote, consent, dissent, election or exercise, as to membership certificates or cards or capital certificates, the corporate officer responsible for maintaining the list or record of members or its transfer agent or, in the case of bonds, the treasurer or paying officer or agent had received written notice that such holder was an infant.

HISTORY:

Add, L 1969, ch 1066, § 1; amd, L 1970, ch 847, § 39, eff Sept 1, 1970.

Derivation Notes: Derived from Gen Corp Law § 12-a.

Revision Notes: *Source:* Gen Corp L § 12-a.

Changes: None.

Comment: This section, dealing with the subject of infant members and which authorizes the corporation to treat such members as having power to receive and to empower others to receive corporate payments and distributions, to vote and exercise other rights and which disables the infant member from disaffirming and avoiding as against the corporation any such act on his part, unless the corporation is on written notice that the member is an infant, makes no essential change in section 12-a of the Gen Corp L which presently regulates not-for-profit corporations in this area. The elimination of any reference to "dividends" in the section coordinates this section with section 508 which precludes the division or distribution of incidental profits made by the corporation "in any manner whatsoever among the members, directors, or officers of the corporation".

Agency Opinions

1. Generally

If permitted in the by-laws or the certificate of incorporation of a not-for-profit corporation, minors may be members and hold office in the corporation. 1984 N.Y. Op. Att'y Gen. No. 84-64.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-6 White, New York Business Entities ¶ N622.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.04. The Role of Members in the Corporation.

Matthew Bender's New York Checklists: Checklist for Identifying Ownership and Ownership Transition Considerations in Entity Selection LexisNexis AnswerGuide New York Business Entities § 2.08.

Checklist for Assessing Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 2.47.

Forms: White, New York Business Entities Form N622:1. Notice as to Infancy of Member.

§ 623. Members' derivative action brought in the right of the corporation to procure a judgment in its favor

(a) An action may be brought in the right of a domestic or foreign corporation to procure a judgment in its favor by five percent or more of any class of members or by such percentage of the holders of capital certificates or of the owners of a beneficial interest in the capital certificates of such corporation.

(b) In any such action, it shall be made to appear that each plaintiff is such a member, holder or owner at the time of bringing the action.

(c) In any such action, the complaint shall set forth with particularity the efforts of the plaintiff or plaintiffs to secure the initiation of such action by the board of the reason for not making such effort.

(d) Such action shall not be discontinued, compromised or settled without the approval of the court having jurisdiction of the action. If the court shall determine that the interests of the members or of any class or classes thereof will be substantially affected by such discontinuance, compromise or settlement, the court, in its discretion, may direct that notice, by publication or otherwise, shall be given to the members or class or classes thereof whose interests it determines will be so affected; if notice is so directed to be given, the court may determine which one or more of the parties to the action shall bear the expense of giving the same, in such amount as the court shall determine and find to be reasonable in the circumstances, and the amount of such expense shall be awarded as special costs of the action and recoverable in the same manner as statutory taxable costs.

(e) If the action on behalf of the corporation was successful, in whole or in part, or if anything was

received by the plaintiff or plaintiffs or a claimant or claimants as the result of a judgment, compromise or settlement of an action or claim, the court may award the plaintiff or plaintiffs, claimant or claimants, reasonable expenses, including reasonable attorney's fees, and shall direct him or them to account to the corporation for the remainder of the proceeds so received by him or them. This paragraph shall not apply to any judgment rendered for the benefit of injured members or non-record owners only and limited to a recovery of the loss or damage sustained by them.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970; amd, L 1971, ch 1058, § 20, eff Sept 1, 1971.

Derivation Notes: Derived from Gen Corp Law §§ 60, 61.

Revision Notes: *Source:* None.

Changes: New.

Comment: This section, dealing with the subject of derivative actions, is modeled after section 626 of the Bus Corp L and is new for not-for-profit corporations in this state. The following differences between this section and section 626 of the Bus Corp L should be carefully noted:

(a) No derivative action can be brought under this section unless the plaintiffs in such action consist of at least 5% of any class of members. This change was necessitated by the elimination from the new law of the "security for expenses" provision embodied in section 627 of the Bus Corp L.

(b) The "contemporaneous ownership" provision in paragraph (b) of section 626 of the Bus Corp L has been eliminated in the new law as inappropriate for not-for-profit corporations, since the likelihood is remote that an interest in such corporations would be purchased solely for the purpose of initiating a derivative suit.

PRACTICE INSIGHTS:

OPTIONS FOR MEMBERS IN THE MINORITY TO PUT AN END TO WRONGDOING

By Brendan J. Rich, Esq.

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INSIGHT

Members in the minority of a not-for-profit corporation ("corporation") who want to stop those in control of the corporation from committing improper activities have various options available to them. A corporation must pursue the purposes for which it was formed as set forth in its certificate of incorporation, must follow those procedures established in its bylaws, and cannot distribute its funds for the private benefit of any director, officer or member. When those in control of a not-for-profit corporation cause it to deviate from any of these principles, those members in the minority may attempt to handle the situation internally, through the court system, or by putting the Attorney General on notice.

ANALYSIS

Call a special meeting of members to openly discuss the objectionable items.

A special meeting may be called by the members in the minority to bring the corporate malfeasance to the attention of all the members and to attempt to spur change. Members should review the corporation's organizational documents for the procedures pursuant to which such a meeting may be brought. If no such provision exists in the organizational documents or if the number of members needed to call such a meeting is an insurmountable impediment, such a meeting may be convened by ten percent (10%) of the members entitled to vote at such a meeting pursuant to N- PCL § 603(c). Such an action will force those in the majority to openly discuss the objectionable items. If the minority's concerns are not properly addressed after such a meeting, the members may resign from the corporation, bring a derivative action on behalf of the corporation, or even seek the dissolution of the corporation. The special meeting is important as it will memorialize the members' objections in the corporate record and may prove to be critical from a public relations standpoint and in any future litigation.

A derivative action may be commenced to recover funds on behalf of the corporation.

If minority members constitute five percent (5%) or more of the total membership, they can bring a derivative action in the name of the corporation pursuant to N-PCL §§ 623 and 720(b)(3). Such an action can take many forms, such as an action: (i) against an individual director or officer for fraud or breach of fiduciary duties; (ii) to set aside any action that was beyond the corporate "purposes"; or, (iii) to enjoin a proposed improper conveyance of corporate assets. In such an action the importance of the special meeting becomes apparent; pursuant to N-PCL § 623(c) the complaint must set forth, with particularity, the attempt to address the objectionable behavior presented in the complaint.

The practitioner should be aware that while a derivative action, if successful, can result in the recovery of funds for the corporation and the likely resignation or dismissal of the offending actors, it could also subject the corporation's affairs to public scrutiny, result in litigation expenses that may be unrecoverable, and could divert the corporation's funds and attention from its mission.

Minority members may seek dissolution and distribution of funds to an appropriate successor.

The members in the minority, specifically those making up ten percent (10%) of the total membership, can bring an action to dissolve the corporation pursuant to N-PCL § 1102(a)(2) and to distribute the corporation's funds to a similar entity. An action pursuant to N-PCL §1102(a)(2)(D) appears to be the best option available to a smaller number of members, as it deals with controlling members acting in a fraudulent manner and perpetuating the corporation solely for their personal benefit. In the face of the limited case law it appears to be a hard case to make, however, as it has been held that dissolution is a drastic measure and that even if excessive spending can be proven, in the absence of bad faith, dissolution is not appropriate. *Application of John Luther & Sons Co.*, 52 A.D.2d 737, 381 N.Y.S.2d 934 (4th Dept, 1976). A larger obstacle for a petition based on N-PCL § 1102 is that it must be established that such dissolution would be beneficial to the membership as a whole, pursuant to N-PCL § 1109(b)(2). In a situation where the majority of the members agree with the inappropriate actions taken by those in the control of the corporation, meeting that threshold could present problems for the minority members. It is important to note that even if the action is successful and the corporation is dissolved and its funds released to another not-for-profit corporation with a similar purpose, the cost of litigation may be great and may deplete a large percentage of the corporation's funds.

Putting the Attorney General on notice of the improper activity.

An informal option available to the minority members would be to notify the Attorney General of the corporation's activities. Pursuant to N-PCL § 1101(a)(2), an action can be brought by the Attorney General to dissolve a corporation that has persistently acted fraudulently and contrary to public policy. In such an action, it must be demonstrated that the corporation exceeded its powers and that this abuse of power has threatened the public welfare. *People v. North River Sugar Refining Co.*, 121 N.Y. 582 (1890). In addition, pursuant to N-PCL § 1109(b)(1), in such an action the public interest, rather than the benefit to the corporation's membership, is of supreme importance. There is a great deal of uncertainty involved with this course action, such as (i) the lack of control of the distribution of the corporation's funds following dissolution; and (ii) what the investigation will uncover, as all corporate actions, not just the objectionable ones complained of, are open to investigation. It is important for the practitioner to note that if the corporate actions come

under scrutiny by the Attorney General, it is likely that an audit by the Department of Taxation and Finance will follow. Such an investigation could result in the corporation being stripped of its tax-exempt status and could jeopardize the deductibility of any donations made by the members in the minority if it is determined that the members knew that the improper activity was taking place.

Notes to Decisions

Analysis

1. Generally
2. Standing
3. Demand on board
4. Defenses
5. Procedure

1. Generally

Not-for-profit cemetery corporation did not owe fiduciary duty to plaintiff on basis that land share agreement between corporation and development corporation from which plaintiff obtained his land share certificates provided that proceeds from sale of cemetery lots would be placed into land purchase fund for distribution to land share certificate holders, and thus derivative action against defendants was properly dismissed where plaintiff's claim of standing was based on his fiduciary relationship with corporation; land purchase fund merely was account in which proceeds from sale of cemetery lots were placed until time when contractually-determined payments for sales were disbursed to land share certificate holders, and cemetery corporation merely acted as collector and disburser of land purchase funds. Harris v Lyke, 217 A.D.2d 982, 629 N.Y.S.2d 911, 1995 N.Y. App. Div. LEXIS 8420 (N.Y. App. Div. 4th Dep't), app. denied, 87 N.Y.2d 801, 637 N.Y.S.2d 688, 661 N.E.2d 160, 1995 N.Y. LEXIS 4931 (N.Y. 1995).

2. Standing

An individual bringing a derivative action against directors or officers of a corporation for misconduct must meet requirement for standing by representing five percent or more of the membership of the corporation. Hoffert v Dank, 55 A.D.2d 518, 389 N.Y.S.2d 101, 1976 N.Y. App. Div. LEXIS 15153 (N.Y. App. Div. 1st Dep't 1976).

Phrase "one or more of the members thereof," within statute governing a member's derivative action brought in right of corporation to procure a judgment in its favor by one or more of the members thereof, does not eliminate requirement for standing in preceding statute that plaintiff represent five percent or more of the members. Hoffert v Dank, 55 A.D.2d 518, 389 N.Y.S.2d 101, 1976 N.Y. App. Div. LEXIS 15153 (N.Y. App. Div. 1st Dep't 1976).

An individual bringing a derivative action on behalf of a corporation with a membership of 20 or less would meet the statutory requirement for standing that he represent five percent or more of the members. Hoffert v Dank, 55 A.D.2d 518, 389 N.Y.S.2d 101, 1976 N.Y. App. Div. LEXIS 15153 (N.Y. App. Div. 1st Dep't 1976).

Cause of action advancing derivative claim seeking to recover for alleged misconduct of board of governors of country club was properly dismissed since plaintiff did not represent 5 percent or more of any class of members of country club and therefore lacked standing. Bernbach v Bonnie Briar Country Club, 144 A.D.2d 610, 534 N.Y.S.2d 695, 1988 N.Y. App. Div. LEXIS 12353 (N.Y. App. Div. 2d Dep't 1988), app. dismissed, 74 N.Y.2d 715, 543 N.Y.S.2d 401, 541 N.E.2d 430, 1989 N.Y. LEXIS 798 (N.Y. 1989).

Complaint was properly dismissed due to plaintiff's lack of standing to bring derivative action on behalf of not-for-profit cemetery corporation where plaintiff was not member of corporation as set forth in its certificate or incorporation, and he did not otherwise come within categories of members defined by its by-laws; fact that plaintiff was land share certificate holder, and thus had voting rights under corporation's by-laws, was irrelevant where enumeration in by-laws of "members" did not include land share certificate holders. Harris v Lyke, 217 A.D.2d 982, 629 N.Y.S.2d 911, 1995 N.Y. App. Div. LEXIS 8420 (N.Y. App. Div. 4th Dep't), app. denied, 87 N.Y.2d 801, 637 N.Y.S.2d 688, 661 N.E.2d 160, 1995 N.Y. LEXIS 4931 (N.Y. 1995).

Complaint against defendants was properly dismissed due to plaintiff's lack of standing to bring derivative action on behalf of not-for-profit cemetery corporation; plaintiff was not capital certificate holder under CLS N-PCL § 623(a) based on his status as land share certificate holder under CLS N-PCL § 1511(b) in that definition of capital certificates (CLS N-PCL § 503) does not include land share certificates, and land share certificates are not equivalent of capital certificates as they represent debt rather than equity. Harris v Lyke, 217 A.D.2d 982, 629 N.Y.S.2d 911, 1995 N.Y. App. Div. LEXIS 8420 (N.Y. App. Div. 4th Dep't), app. denied, 87 N.Y.2d 801, 637 N.Y.S.2d 688, 661 N.E.2d 160, 1995 N.Y. LEXIS 4931 (N.Y. 1995).

Land share certificate holder did not have standing, on public policy grounds, to bring derivative action on behalf of not-for-profit cemetery corporation based on his claim that he had strong interest in policing corporate management, and thus complaint against defendants was properly dismissed; land share certificate holders such as plaintiff have other available remedies for management delinquency, plaintiff had already complained of corporate wrongdoing to district attorney's office and state's Division of Cemeteries which investigated matter and decided not to pursue it, and court had permitted plaintiff to commence new action under "contract theory." Harris v Lyke, 217 A.D.2d 982, 629 N.Y.S.2d 911, 1995 N.Y. App. Div. LEXIS 8420 (N.Y. App. Div. 4th Dep't), app. denied, 87 N.Y.2d 801, 637 N.Y.S.2d 688, 661 N.E.2d 160, 1995 N.Y. LEXIS 4931 (N.Y. 1995).

Plaintiff did not have standing, in equity, to bring derivative action on behalf of not-for-profit cemetery corporation based on corporation's alleged fiduciary obligation to him due to his status as land share certificate holder, and thus complaint against defendants was properly dismissed; action was derivative, not equitable, and record did not establish any relationship that would make corporation trustee or agent for plaintiff. Harris v Lyke, 217 A.D.2d 982, 629 N.Y.S.2d 911, 1995 N.Y. App. Div. LEXIS 8420 (N.Y. App. Div. 4th Dep't), app. denied, 87 N.Y.2d 801, 637 N.Y.S.2d 688, 661 N.E.2d 160, 1995 N.Y. LEXIS 4931 (N.Y. 1995).

Dismissal of a member's causes of action, pursuant to N.Y. Not-for-Profit Corp. Law § 720, to compel the a church's pastor and trustees to account for certain alleged misconduct, and for a judgment declaring that the pastor and the trustees had engaged in certain unlawful conduct, was proper because, inasmuch as the member sought to vindicate the church's rights by asserting those claims, they had to have been, but were not, asserted in the context of a derivative action brought by at least 5 percent of the church's members pursuant to N.Y. Not-for-Profit Corp. Law § 623(a); further, the complaint failed to set forth the member's efforts to secure the initiation of a derivative action or the reason for not making such effort. Therefore, the member lacked standing to bring the claims. Tae Hwa Yoon v New York Hahn Wolee Church, Inc., 56 A.D.3d 752, 870 N.Y.S.2d 42, 2008 N.Y. App. Div. LEXIS 9041 (N.Y. App. Div. 2d Dep't 2008).

Trial court properly found that an owner had standing to sue the homeowners association for violation of the declaration of covenants because the declaration specifically provided that any owner had the right to enforce the provisions of the declaration, and N.Y. Not-for-Profit Corp. Law § 623(a) did not operate to take away individual standing derived from other sources. In the Matter of St. Denis v Queensbury Baybridge Homeowners Assn., Inc., 100 A.D.3d 1326, 955 N.Y.S.2d 263, 2012 N.Y. App. Div. LEXIS 8168 (N.Y. App. Div. 3d Dep't 2012).

Lot owners lacked standing to assert any derivative claims on behalf of the homeowners' association (HOA) because the owners sought to vindicate the HOA's rights and recover damages on behalf of the HOA, and, as such, the owners' breach of contract cause of action had to be, but was not, asserted in the context of a derivative action brought by at least 5 percent of the HOA members. Schaefer v Chautauqua Escapes Assn., Inc., 158 A.D.3d 1186, 71 N.Y.S.3d 244, 2018 N.Y. App. Div. LEXIS 702 (N.Y. App. Div. 4th Dep't), reh'g denied, app. denied, 160 A.D.3d 1507, 72 N.Y.S.3d 854, 2018 N.Y. App. Div. LEXIS 3023 (N.Y. App. Div. 4th

Dep't 2018), app. denied, 32 N.Y.3d 902, 109 N.E.3d 1156, 84 N.Y.S.3d 856, 2018 N.Y. LEXIS 2523 (N.Y. 2018).

Plaintiff failed to meet 5 percent standing requirement of CLS N-PCL § 623, warranting dismissal of derivative action against not-for-profit corporation, where he failed to name in complaint individuals who constituted requisite "5 percent or more of any class of members"; standing under § 623 must be shown to exist at time of bringing action. Segal v Powers, 180 Misc. 2d 57, 687 N.Y.S.2d 589, 1999 N.Y. Misc. LEXIS 96 (N.Y. Sup. Ct. 1999).

3. Demand on board

Derivative action, seeking to nullify sale of nonprofit organization's headquarters, was properly dismissed where plaintiffs alleged that unsuccessful demands were made on board of directors to initiate legal action but complaint provided no indication as to who made demands, when they were made, which board members they were made to, content of demands or why board refused to take action; nor did court err in denying plaintiffs' motion to amend complaint to allege contradictory claim that no demand was made on board because it would have been futile, as plaintiffs' conclusory allegation that board was not functionally constituted was plainly without merit in light of documentary evidence. Tomczak v Trepel, 283 A.D.2d 229, 724 N.Y.S.2d 737, 2001 N.Y. App. Div. LEXIS 4804 (N.Y. App. Div. 1st Dep't), app. denied, 96 N.Y.2d 930, 733 N.Y.S.2d 365, 759 N.E.2d 364, 2001 N.Y. LEXIS 3085 (N.Y. 2001).

Derivative action against not-for-profit corporation was dismissed under CLS CPLR § 3211(a)(3) due to lack of adequate demand on board of governors, where complaint merely alleged that plaintiff asked current president (who was one of 22 board members) to obtain board's authorization to initiate action, and that "this request has been denied"; complaint alleged that president failed to present issue to board, not that board considered demand and rejected it, and there was no showing that demand to board would have been futile. Segal v Powers, 180 Misc. 2d 57, 687 N.Y.S.2d 589, 1999 N.Y. Misc. LEXIS 96 (N.Y. Sup. Ct. 1999).

4. Defenses

Dissident fraternity members failed to establish prima facie case of bad faith or fraud in a derivative action under N.Y. Not-for-Profit Corp. Law § 623 to protest the sale of a fraternity house to a university by the fraternity board because the evidence showed that the board obtained an independent appraisal and exacted significant concessions from the university and the board was thus protected by the business judgment rule. Sanford v Colgate Univ., 36 A.D.3d 1060, 828 N.Y.S.2d 633, 2007 N.Y. App. Div. LEXIS 254 (N.Y. App. Div. 3d Dep't 2007).

Directors and officers were entitled to summary judgment on a corporation's cause of action pursuant to N.Y. Not-for-Profit Corp. Law §§ 623, 720, asserting the improper transfer of real property because the claim was asserted in a prior action which was resolved by a stipulation, and, contrary to the corporation's claim, the identity requirement of res judicata was satisfied; however, although the issue of improper assessment of membership dues was raised in the prior action, any losses occasioned by assessments made after the discontinuance of that action constituted separate injuries for which recovery could not have been obtained in the prior action, and the stipulation did not prevent the corporation from asserting claims that accrued after the stipulation came into effect. Pawling Lake Prop. Owners Assn., Inc. v Greiner, 72 A.D.3d 665, 897 N.Y.S.2d 729, 2010 N.Y. App. Div. LEXIS 2868 (N.Y. App. Div. 2d Dep't 2010).

5. Procedure

Because a factual dispute existed as to whether the first director possessed standing to sue under N.Y. Not-for-Profit Corp. Law § 623(a), 720, a cross-motion by the second director and a non-profit corporation to dismiss the complaint for lack of standing to sue was properly denied. Brach v Harmony Servs., Inc., 93 A.D.3d 748, 940 N.Y.S.2d 652, 2012 N.Y. App. Div. LEXIS 2054 (N.Y. App. Div. 2d Dep't 2012).

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-6 White, New York Business Entities ¶ N623.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.04. The Role of Members in the Corporation.

Matthew Bender's New York Checklists: Checklist for Assessing Not-For-Profit Corporation LexisNexis Answer-Guide New York Business Entities § 2.47.

Forms: White, New York Business Entities Form N623:1. Title and Allegation in Members' Derivative Action.

§ 624. Notification to tenants.

Upon the adoption, amendment or repeal of the by-laws by the board of directors pursuant to paragraph (g) of section 602 (By-laws), where such change would have a direct effect on the resident's occupancy or the rules of the building, the board of directors shall post the adopted, amended, or repealed by-laws conspicuously to ensure tenants will be aware of such adoption.

HISTORY:

L 2019, ch 558, § 3, effective January 24, 2020.

Editor's Notes Laws 2019, ch 558, § 4, eff January 1, 2020, provides:

§ 4. This act shall take effect on the sixtieth day after it shall have become a law.

ARTICLE 7 Directors and Officers

Section

701. Board of directors
702. Number of directors
703. Election and term of office of directors; alternates
704. Classification of directors
705. Newly created directorships and vacancies
706. Removal of directors
707. Quorum of directors
708. Action by the board
709. Greater requirement as to quorum and vote of directors
710. Place and time of meetings of the board
711. Notice of meetings of the board
712. Executive committee and other committees
712-a. Audit oversight
713. Officers
714. Removal of officers
715. Related party transactions
715-a. Conflict of interest policy
715-b. Whistleblower policy
716. Loans to directors, officers and key persons
717. Duty of directors, officers and key persons
718. List of directors, officers and key persons
719. Liability of directors in certain cases
720. Actions against directors, officers and key persons
720-a. Liability of directors, officers, trustees and key persons
721. Nonexclusivity of statutory provisions for indemnification of directors and officers
722. Authorization for indemnification of directors and officers
723. Payment of indemnification other than by court award
724. Indemnification of directors and officers by a court
725. Other provisions affecting indemnification of directors and officers
726. Insurance for indemnification of directors and officers

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept. 1, 1970; amd, L 1970, ch 847, § 40, eff Sept 1, 1970.

§ 701. Board of directors

(a) Except as otherwise provided in the certificate of incorporation, a corporation shall be managed by its board of directors. Each director shall be at least eighteen years of age; provided, however, that a member of the board of directors of any girl scout council chartered by Girl Scouts of the United States of America, Inc., or any Camp Fire Girls club member serving as a member of the board of directors on the National Board and National Council of Camp Fire Girls, Inc. or on the local board of the Camp Fire Girls, Inc. or any member of Aspira of America Inc. or Aspira of New York Inc. serving on the board of directors, shall be at least sixteen years of age. Notwithstanding the above, a corporation organized for educational purposes primarily for the benefit of individuals below eighteen years of age may include one director below eighteen years of age who is at least sixteen years of age. Further, a corporation organized for recreational or youth development and delinquency prevention purposes primarily for the benefit of individuals below eighteen years of age may include one or more directors, the number of which shall not exceed one-half of the total number of directors for a quorum for the transaction of business, who are at least sixteen years of age but not over eighteen years of age. The certificate of incorporation or the by-laws may prescribe other qualifications for directors, provided, however, any corporation organized for recreation or youth development and delinquency prevention purposes, when increasing the number of directors between the ages of sixteen and eighteen years old to more than one, shall prescribe in its certificate of incorporation the number of such directors not to exceed the limitations of this paragraph.

(b) If the certificate of incorporation vests the management of the corporation, in whole or in part, in one or more persons other than the board, individually or collectively, such other person or persons shall be subject to the same obligations and the same liabilities for managerial acts or omissions as are imposed upon directors by this chapter.

HISTORY:

Add, L 1969, ch 1066, § 1; amd, L 1970, ch 847, § 41; L 1972, ch 437, eff Sept 1, 1972; L 1972, ch 961, § 10; L 1973, ch 875, § 1; L 1975, ch 266, § 1; L 1980, ch 154, § 1; L 1980, ch 502, § 1; L 1983, ch 730, § 1, eff July 27, 1983.

Derivation Notes: Derived from Gen Corp Law §§ 27, 28.

Revision Notes: *Source:* Gen Corp L § 27, Mem Corp L § 45(1).

Changes: Revised, new provisions.

Comment: The language of this section follows generally that of the Bus Corp L § 701, with modifications. The certificate of incorporation may provide for corporate management by others than the directors; but no specific reference is made to any particular form, as in the Bus Corp L § 701, since there is no equivalent in the Not-For-Profit Corporation Law to the "close" business corporation. The requirement of Gen Corp L § 27 that at least one director shall be a citizen and a resident of the United States has been omitted, but the certificate of incorporation or the bylaws may prescribe these or other qualifications for directors.

The express provisions of Mem Corp L § 45(1), that directors and officers need not be members has been omitted as unnecessary; membership may be prescribed in the certificate of incorporation or the bylaws as a qualification for directors and officers.

PRACTICE INSIGHTS:

PRACTICAL CONSIDERATIONS WHEN DEVELOPING AND FILLING NOT-FOR-PROFIT BOARD OF DIRECTORS

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INSIGHT

Not-For-Profit Corp. Law § 702 law requires that a not-for-profit corporation have no less than three directors. The law sets no maximum number of directors and permits the entity, through its bylaws or member action, to set the upper limit requirements. The qualifications of the board members are addressed in Not-For-Profit Corp. Law § 701. Although the legal requirements related to the size and makeup of the board of directors may be easy to fulfill, the practical considerations are much more complicated and should be addressed periodically as the entity grows and changes.

ANALYSIS

Formally authorize board of directors with more than three members.

A not-for-profit corporation will be considered to have a three-person board of directors, unless the number is fixed in some authorized way. Custom, usage or acquiescence cannot establish the size of the board. *In re Rye Psychiatric Hosp. Med. Ctr. Inc.*, 66 N.Y.2d 333, 497 N.Y.S.2d 317 (1985). Consequently, review of the Certificate of Incorporation and the bylaws of the organization is important if the corporation is considering increasing the size of the board. The appropriate amendments should be made before moving forward with the appointment or election of additional board members.

Fine balancing act must take place when determining size of board of directors.

Not-for-profits typically have larger boards of directors than their for-profit counterparts. There are certainly advantages to having a large number of directors. Since directors are typically large contributors and fundraisers for an organization, those organizations with larger boards usually raise more money. Larger boards can include directors with divergent skills (such as legal, financial, accounting) to which smaller boards may not have access.

That said, the larger the board, the more difficult it becomes to take action. For example, coaxing enough directors to a meeting as necessary to meet quorum requirements becomes more difficult, as does reaching a consensus at the required level (for example, majority or two-thirds) on important issues. Directors on a board that is too large may attach less importance to their individual role and, often, this leads to overburdened staff, an unfair distribution of work to those directors who make a commitment to participate actively, or both. Committees are essential when a large board is involved.

Recently, a provision was added to Not-For-Profit Corp. Law § 608 to assist not-for-profit organizations that find it impossible or impractical to reach a quorum for meetings of members. There is no similar relief provided for meeting board quorum requirements. The best course for dealing with this difficulty remains in limiting the size of the board to a manageable number.

Certain Not-For-Profit Corp. Law provisions make it logistically difficult to manage large board of directors.

When representing an organization considering a move to a larger board of directors, counsel would be well-advised to review certain provisions of the Not-For-Profit Corporation Law that make a large board particularly difficult to work with. For example, under Not-For-Profit Corp. Law § 703(d), directors are not permitted to vote by proxy (although there

is a very limited exception to allow voting through an alternate). Pursuant to Not-For-Profit Corp. Law § 708(b), action may be taken by the board without a meeting only if all directors consent to the action in writing. Recent changes to Not-For-Profit Corp. Law § 708(b)made as part of the Non-Profit Revitalization Act of 2013 have made this process a bit easier by providing that such "consent may be written or electronic". However, obtaining unanimous written consent can still be an administrative nightmare.

Telephone conferencing has been permitted for board meetings for some time where all directors participating in the meeting are able to hear each other at the same time. Not-For-Profit Corp. Law § 708(c). In addition, under the Non-Profit Revitalization Act of 2013, Not-For-Profit Corp. Law § 708(c) has been revised to clarify that "electronic video screen communication", *i.e.* video conferencing, can be used for board meetings provided again that all directors participating in the meeting are able to hear each other at the same time and participate in all matters before the board. This alternative ought make working with a larger board more practical. These options are not available if otherwise restricted by the certificate of incorporation or by-laws.

Consider honorary or advisory boards as alternative to large board of directors.

When logistical considerations weigh in favor of a more manageable number of directors, not-for-profits may want to address increased fundraising through the creation of an honorary or advisory board. Although honorary directors participate in fundraising efforts and projects that are very limited in scope, they do not get involved in the day-to-day decision-making of the organization and attendance requirements are not overwhelming. The management of the organization vests in a smaller, active board of directors that meets regularly. As a result, the not-for-profit enjoys most of the financial benefits of having a large board of directors, the practical benefits of having a committed active board of directors, and few of the disadvantages of working with a large number of directors.

SET UP FOR SUCCESS RIGHT FROM THE START — STRATEGIES FOR PREPARING NOT-FOR PROFIT CERTIFICATE OF INCORPORATION

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INSIGHT

Not-For-Profit Corp. Law § 402 sets forth the requirements for the contents of the Certificate of Incorporation (the "Certificate") which is filed with the Department of State (the "Department") to formally create a not-for-profit corporation. The practitioner should carefully consider the contents of the Certificate before filing it with the Department to get the entity started off on the right foot. Specifically, counsel should ensure that any contemplated powers are included in the Certificate, carefully draft the statement of purpose, avoid certain buzz words, and consider limiting internal governance provisions.

ANALYSIS

Include certain powers in Certificate if they are contemplated.

Certain powers must be included in the Certificate if they are going to be granted to the corporation. For example, if the management of the not-for-profit corporation is vested in individuals other than the Board of Directors (see Not-For-Profit Corp. Law § 701), this power must be included in the Certificate. Similar requirements exist for the following powers: if members are required to make capital contributions other than the payment of dues (Not-For-Profit Corp. Law § 502); if the corporation can accept subventions (Not-For-Profit Corp. Law § 505); or if written consent of less than all members is permitted for certain types of corporate action (Not-For-Profit Corp. Law § 614).

Consider adding certain permissive powers to Certificate.

The Not-For-Profit Corporation Law permits, but does not require, the inclusion of certain provisions in the Certificate. For example, Not-For-Profit Corp. Law § 709(a) permits a corporation to specify that the proportion of directors or the proportion of votes of directors that shall constitute a quorum or be necessary for the transaction of business or of any specified item of business shall be greater than the proportion prescribed by statute. The Certificate may also restrict the taking of action by the Board of Directors without a meeting and by written consent (Not-For-Profit Corp. Law § 708(b)) or permit directors to participate in meetings via telephone conference (Not-For-Profit Corp. Law § 708(c)). If these actions are contemplated, the authority may be granted in the Certificate.

Pay particularly close attention to "purposes" section of Certificate.

The Certificate must include a statement of the purpose for which the corporation has been formed. Not-For-Profit Corp. Law § 402(a)(2). The practitioner should exercise caution when drafting the purposes clause. The purposes clause must be broad enough to cover not only the acts the proposed directors envision at the corporation's infancy, but also those acts the corporation may need to take as the organization matures and builds up steam. Failure to stay within the stated purposes of the entity can later create a liability for the entity and its directors, officers and members. This can easily occur if the purposes clause is narrowly constructed. It is possible to broaden the purposes clause at a later time by amending the Certificate. See Not-For-Profit Corp. Law § 802. The larger the organization, however, the more difficult it becomes to make sweeping changes to the fundamental structure of the organization, such as changing its charter. Also, pursuant to Not-For-Profit Corp. Law § 804, amendments to Certificates which add, change or eliminate a purpose, power or provision the inclusion of which in an initial Certificate require approval or consent from a governmental entity will require such approval or consent to be obtained. Also, certificates of amendments of charitable corporations which change, eliminate or add a power or purpose require approval of either the attorney general or a justice of the supreme court. Not-For-Profit Corp. Law § 804.

Avoid certain buzz words when drafting Certificate.

Any reference to certain buzz words will typically trigger a requirement for pre-approval or consent from a state agency prior to filing the Certificate. For example, Education Department consent may be required if the Certificate is drafted using the terms "education," "research," or "school." Private foundations seeking not-for-profit status should be sure to include a disclaimer of Not-For-Profit Corp. Law § 404 activities that necessitate agency approval as well as the disclaimers required in Not-For-Profit Corp. Law § 406. Pre-approval requirements can delay the process significantly, particularly if the agency requires revisions to the proposed Certificate (that will in turn require internal approvals as well). If state agency consent is necessary, counsel should consider reserving the chosen name for the entity. Not-For-Profit Corp. Law § 303. A relatively small fee buys 60 days and may be well worth the investment if the approval process is stalled at any point and the name of the entity is important to the client.

It may be advisable to limit internal governance provisions in Certificate.

The certificate of incorporation may set forth any provision for the regulation of the internal affairs of the corporation that is consistent with the Not-For-Profit Corp. Law or any other New York law. Although it is permissible to add provisions relating to internal governance to the Certificate under Not-For-Profit Corp. Law § 402(c), it may be more advisable to add those types of provisions to the bylaws. The dynamics of an organization change over time, and changes to operating procedures are inevitable. Changes to the Certificate require governmental filing and approval — at minimum, the Department's. Changes to the bylaws, however, require only proposal by the Board of Directors and vote of the membership — a completely transparent and internal process that is relatively painless unless the organization has grown exponentially. See Not-For-Profit Corp. Law § 802.

When adding internal governance provisions to the Certificate or the bylaws, ensure that those provisions are consistent with the Not-For-Profit Corp. Law. Inconsistencies can lead a court to stop the corporation in its tracks. *See Sealey v. Amer. Socy. of Hypertension, Inc.*, 26 A.D.3d 254, 810 N.Y.S.2d 48 (1st Dep't 2006).

Notes to Decisions

Analysis

1. Generally
2. Business judgment rule
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4. —Bylaws; relating to vote of stockholders
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7. — —Veto of litigation instituted by president
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10. — —Action by majority of quorum
11. Under former Membership Corporations Law § 46

1. Generally

The business of corporations shall be managed by the board of directors, the only exception being a provision contrary to the rule in its charter. Weiss v Opportunities for Cortland County, Inc., 40 A.D.2d 45, 337 N.Y.S.2d 409, 1972 N.Y. App. Div. LEXIS 3428 (N.Y. App. Div. 3d Dep't 1972).

Under CLS N-PCL § 701, public employee labor union organized as not-for-profit corporation was to be managed by its board of directors despite provision in union's constitution that board's authority to transact business of union was "subject to the power and authority of the delegates at meetings of the Association," and any attempt by delegates to place general management responsibility in another person without so specifying in certificate of incorporation would be violation of § 701; however, if delegates desired to limit management authority of board of directors by amending certificate of incorporation, they could, after proper notice, vote to do so at general or special meeting, and if delegates believed board of directors, either individually or as group, failed to abide by union's constitution and bylaws, they could, after proper notice, vote to remove board of directors in whole or in part. Simoni v Civil Service Employees Ass'n, Local 1000, etc., 133 Misc. 2d 1, 507 N.Y.S.2d 371, 1986 N.Y. Misc. LEXIS 2958 (N.Y. Sup. Ct. 1986).

Resolutions passed by board of directors of public employee labor union organized as not-for-profit corporation, by which board reorganized union's staff in manner inconsistent with union president's organizational plan, were in conflict with provision of union's bylaws stating that "President shall be responsible for the organization and direction of the staff of the Association," constituted attempt to usurp authority given by members to president, and were therefore void. Simoni v Civil Service Employees Ass'n, Local 1000, etc., 133 Misc. 2d 1, 507 N.Y.S.2d 371, 1986 N.Y. Misc. LEXIS 2958 (N.Y. Sup. Ct. 1986).

Because not-for-profit corporations were given statutory authority to exercise all powers necessary to affect their purposes, and this power could be curtailed only if restricted by another statute or its own certificate of incorporation or bylaws, unless there was a specific prohibition in the documents or another statute, the corporation could act in any appropriate way in pursuit of its purposes. Suburban Scholastic Council v Section 2 of N. Y. State Pub. High School Athletic Assn., Inc., 23 A.D.3d 728, 803 N.Y.S.2d 270, 2005 N.Y. App. Div. LEXIS 11693 (N.Y. App. Div. 3d Dep't 2005).

2. Business judgment rule

Business judgment rule prohibits judicial inquiry into actions of corporate directors taken in good faith and in exercise of honest judgment in lawful and legitimate furtherance of corporate purposes; so long as directors have not breached their fiduciary obligation to corporation, exercise of their powers for common and general interests of corporation may not be questioned, even if results show that what they did was unwise or inexpedient. Levandusky v One Fifth Ave. Apartment Corp., 75 N.Y.2d 530, 554 N.Y.S.2d 807, 553 N.E.2d 1317, 1990 N.Y. LEXIS 753 (N.Y. 1990).

Action by board of directors of corporation that comes within business judgment rule cannot be characterized as arbitrary and capricious, or abuse of discretion, for purpose of Article 78 proceeding. Levandusky v One Fifth Ave. Apartment Corp., 75 N.Y.2d 530, 554 N.Y.S.2d 807, 553 N.E.2d 1317, 1990 N.Y. LEXIS 753 (N.Y. 1990).

Members of board of cooperative residential association were not entitled to summary judgment in shareholder's derivative action brought by board member, despite business judgment doctrine which bars judicial inquiry into actions of corporate directors, where triable issues of fact were raised regarding good faith of board's actions including, inter alia, whether voting proxies were improperly used, whether one member was coerced into voting certain way, and whether remodeling application at issue was evaluated in good faith. Van Camp v Sherman, 132 A.D.2d 453, 517 N.Y.S.2d 152, 1987 N.Y. App. Div. LEXIS 49019 (N.Y. App. Div. 1st Dep't 1987), aff'd, Nostima Foods, Inc. v State Liquor Authority, 71 N.Y.2d 648, 529 N.Y.S.2d 270, 524 N.E.2d 871, 1988 N.Y. LEXIS 690 (N.Y. 1988).

3. Under former General Corporation Law § 27

Vacancies on a Board of Directors are to be filled as the by-laws of the corporation may provide, subject to statutory limitations. Gearing v Kelly, 15 A.D.2d 219, 222 N.Y.S.2d 474, 1961 N.Y. App. Div. LEXIS 7003 (N.Y. App. Div. 1st Dep't 1961), aff'd, 11 N.Y.2d 201, 227 N.Y.S.2d 897, 182 N.E.2d 391, 1962 N.Y. LEXIS 1258 (N.Y. 1962).

The court would not entertain a petition for an order setting aside a special meeting of the board of directors of a corporation, and vacating the removal of a corporate officer. Heller v Clark Merchandisers, Inc., 9 Misc. 2d 106, 154 N.Y.S.2d 150, 1955 N.Y. Misc. LEXIS 2316 (N.Y. Sup. Ct. 1955).

4. —Bylaws; relating to vote of stockholders

A by-law requiring unanimous vote of stockholders for any action by them is invalid as contrary to decree of § 27. Benintendi v Kenton Hotel, Inc., 294 N.Y. 112, 60 N.E.2d 829, 294 N.Y. (N.Y.S.) 112, 1945 N.Y. LEXIS 820 (N.Y. 1945).

5. — —Relating to quorum of directors

By § 27 every corporation is given privilege of enacting a by-law fixing its own quorum requirement at any fraction not less than one-third, nor more than a majority, of its directors. Benintendi v Kenton Hotel, Inc., 294 N.Y. 112, 60 N.E.2d 829, 294 N.Y. (N.Y.S.) 112, 1945 N.Y. LEXIS 820 (N.Y. 1945).

Reading together § 27 and § 28 and examining their legislative history, court concluded that there never was legislative intent so to change common-law rule as to quorums as to authorize a by-law requiring unanimous vote of directors. Benintendi v Kenton Hotel, Inc., 294 N.Y. 112, 60 N.E.2d 829, 294 N.Y. (N.Y.S.) 112, 1945 N.Y. LEXIS 820 (N.Y. 1945).

This section and § 28 do not forbid a bylaw requiring a two-thirds' vote of a quorum of directors. In re Lake Placid Co., 274 A.D. 205, 81 N.Y.S.2d 36, 1948 N.Y. App. Div. LEXIS 3040 (N.Y. App. Div. 1948).

A by-law provision that a "majority of the directors shall constitute a quorum" is ambiguous as to whether the reference is to a majority of the remaining directors in case of a vacancy or to a majority of the authorized number of members, but where other by-law provisions indicate a distinction between action which can only be taken by a majority of the "whole" board, or by a certain fraction of the whole board, it can be implied that in instances where the whole board is not called for the "board" consists of the directors actually in office. Gearing v Kelly, 15 A.D.2d 219, 222 N.Y.S.2d 474, 1961 N.Y. App. Div. LEXIS 7003 (N.Y. App. Div. 1st Dep't 1961), aff'd, 11 N.Y.2d 201, 227 N.Y.S.2d 897, 182 N.E.2d 391, 1962 N.Y. LEXIS 1258 (N.Y. 1962).

6. —Management of corporation by board of directors

Directors have power to manage the corporation only when acting as a board. Acting singly the directors cannot bind the corporation. Knapp v Rochester Dog Protective Ass'n, 235 A.D. 436, 257 N.Y.S. 356, 1932 N.Y. App. Div. LEXIS 7981 (N.Y. App. Div. 1932).

The directors of a corporation may not be bound by an agreement requiring that any question involving removal be submitted to a board of arbitrators, nor may their authority be delegated to others. In re Allied Fruit & Extract Co., 243 A.D. 52, 276 N.Y.S. 153, 1934 N.Y. App. Div. LEXIS 5481 (N.Y. App. Div. 1934).

7. — —Veto of litigation instituted by president

Any actual or implied authority which the president of a corporation may have to institute litigation is terminated when the board of directors refuses to sanction it, the management of a corporation being in its board of directors. Sterling Industries, Inc. v Ball Bearing Pen Corp., 298 N.Y. 483, 84 N.E.2d 790, 298 N.Y. (N.Y.S.) 483, 1949 N.Y. LEXIS 1007 (N.Y. 1949).

8. — —Authorization of bankruptcy

A petition in bankruptcy, in order to justify adjudication in voluntary bankruptcy and consequent transfer of all property of the corporation, real and personal, to a trustee, should at least allege and show corporate action by the board of directors authorizing the petition and its execution by an officer signing the name of the corporation thereto. In re Jefferson Casket Co., 182 F. 689, 1910 U.S. Dist. LEXIS 160 (D.N.Y. 1910).

9. —Directors meeting; required notice

The provision of this section that a majority of the Board of Directors at a meeting "duly assembled" shall constitute a quorum infer that each director shall receive proper notice of the meeting unless he waives it. Cirrincione v Polizzi, 14 A.D.2d 281, 220 N.Y.S.2d 741, 1961 N.Y. App. Div. LEXIS 8260 (N.Y. App. Div. 4th Dep't 1961).

10. — —Action by majority of quorum

It appears to be the legislative intent that a board of directors can act by a majority of a quorum, irrespective of the number of other directors who may merely be present at the meeting. Crowley v Commodity Exchange, Inc., 141 F.2d 182, 1944 U.S. App. LEXIS 3625 (2d Cir. N.Y. 1944).

11. Under former Membership Corporations Law § 46

The authority of directors of a membership corporation are similar to those of directors of other corporations, except that the authority of the directors of membership corporations to deal with property is restricted by § 21. Van Campen v Olean General Hospital, 210 A.D. 204, 205 N.Y.S. 554, 1924 N.Y. App. Div. LEXIS 6689 (N.Y. App. Div. 1924), aff'd, 239 N.Y. 615, 147 N.E. 219, 239 N.Y. (N.Y.S.) 615, 1925 N.Y. LEXIS 1007 (N.Y. 1925).

The directors of a hospital incorporated under this law may deprive a physician of the privilege of treating his patients in the hospital, the latter not being within the definition of a public corporation even though it is sustained in part by charitable gifts. Van Campen v Olean General Hospital, 210 A.D. 204, 205 N.Y.S. 554, 1924 N.Y. App. Div. LEXIS 6689 (N.Y. App. Div. 1924), aff'd, 239 N.Y. 615, 147 N.E. 219, 239 N.Y. (N.Y.S.) 615, 1925 N.Y. LEXIS 1007 (N.Y. 1925).

In a membership corporation the power of control is vested in the board of directors and stockholders cannot bind the corporation by contract. Clifford v Firemen's Mut. Benevolent Ass'n, 232 A.D. 260, 249 N.Y.S. 713, 1931 N.Y. App. Div. LEXIS 13783 (N.Y. App. Div. 1931), aff'd, 259 N.Y. 547, 182 N.E. 175, 259 N.Y. (N.Y.S.) 547, 1932 N.Y. LEXIS 1025 (N.Y. 1932).

The Board of Directors cannot impose an obligation on a corporation long after their term of office, and accordingly a contract to pay a former president a salary for life cannot be enforced. Clifford v Firemen's Mut. Benevolent Ass'n, 232 A.D. 260, 249 N.Y.S. 713, 1931 N.Y. App. Div. LEXIS 13783 (N.Y. App. Div. 1931), aff'd, 259 N.Y. 547, 182 N.E. 175, 259 N.Y. (N.Y.S.) 547, 1932 N.Y. LEXIS 1025 (N.Y. 1932).

The indebtedness of a membership corporation for rent is not contracted, within the meaning of former § 11 from which this section is derived, when the lease is made, but when the instalments of rent come due. Dunn v Neustadtl, 129 N.Y.S. 161, 72 Misc. 1, 1911 N.Y. Misc. LEXIS 303 (N.Y. App. Term 1911).

Agency Opinions

1. Generally

If permitted in the by-laws or the certificate of incorporation of a not-for-profit corporation, minors may be members and hold office in the corporation. 1984 N.Y. Op. Att'y Gen. No. 84-64.

Under Sections 10-1000 et seq. of the Village Law, a village fire department is a corporation consisting of members of all the fire, hose, protective and hook and ladder companies of a village; it is administered by a board of fire commissioners or, where no board of fire commissioners has been appointed, by the village board of trustees and the council of the fire department. Fire companies in a village are associations or corporations, which must operate in accordance with their certificates of incorporation, bylaws, and statutes; and, although fire companies are separate and distinct from the village, the statutes do permit village authorities to exercise a certain degree of control over their organization, incorporation, governance, and membership, including residency for membership. A fire company must consent to a contract for the provision of fire protection outside the village and the fire chief of the village fire department cannot consent on behalf of members of the company. 1990 Op St Compt 90-19.

Meetings of governing body of ambulance company formed as not-for-profit corporation may be subject to Open Meetings Law if corporation is similar to volunteer fire company, and it performs its duties solely for ambulance district and town. Comm on Open Gov't OML-AO-3885.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-7 White, New York Business Entities ¶ N701.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.05. Directors.

New York Practice Guide: Business and Commercial § 8.16. By-Laws.

New York Practice Guide: Business and Commercial § 8.17. Checklist for Commencing Operation.

Matthew Bender's New York Checklists: Checklist for Identifying Management and Structure of Business Issues When Selecting Form of Business Entity LexisNexis AnswerGuide New York Business Entities § 2.11.

Checklist for Assessing Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 2.47.

Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N701:1. Provision in Certificate of Incorporation Limiting Management Powers of Board of Directors.

White, New York Business Entities Form N701:2. Provision in Certificate of Incorporation for Corporate Management and Election of Officers by Members.

White, New York Business Entities Form N701:3. Provision in Certificate of Incorporation or the Bylaws Prescribing Additional Director Qualifications.

§ 702. Number of directors

(a) The number of directors constituting the entire board shall be not less than three. Subject to such limitation, such number may be fixed by the by-laws or by action of the members or of the board under the specific provisions of a by-law allowing such action, or by any number within a range set forth in the by-laws. If not otherwise fixed under this paragraph, the number shall be three.

(b) The number of directors may be increased or decreased by amendment of the by-laws or by action of the members, or of the board under the specific provisions of a by-law, subject to the following limitations:

(1) If the board is authorized by the by-laws to change the number of directors, whether by amend-

ing the by-laws or by taking action under the specific provisions of a by-law, such amendment or action shall require the vote of a majority of the entire board.

(2) No decrease shall shorten the term of any incumbent director.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970; amd, L 2013, ch 549, § 67, eff July 1, 2014; L 2015, ch 555, § 3, effective December 11, 2015.

Derivation Notes: Derived from Mem Corp Law § 20.

Revision Notes: *Source:* Mem Corp L § 10(5).

Changes: Reworded and revised; new provisions.

Comment: This section expands the provisions found in the Mem Corp L but retains the requirement of a minimum of three directors on the board. Based on Bus Corp L § 702, the new provisions provide for increase or decrease in the number of directors, subject to limitations designed to prevent the unqualified power of directors to control the structure of the board. The provision in the Bus Corp L authorizing a lesser number than three directors where all the shares are owned beneficially and of record by less than three shareholders has been omitted as inappropriate to the non-profit corporation. The expression "specific provision of a by-law adopted by the members" used in this section and elsewhere in this article, has the same meaning as in the Bus Corp L: that is, a by-law that the members themselves adopt for the particular occasion, and not a by-law adopted by the board pursuant to any general authority conferred on the board by the members to adopt, amend, or repeal by-laws.

Editor's Notes: Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

Amendment Notes: The 2015 amendment by ch 555, § 3, deleted "in the case of a corporation having members" following "by-laws or" in the introductory language of (b); and deleted "adopted by the members" following "a by-law" in the introductory language of (b) and in (b)(1).

PRACTICE INSIGHTS:

PRACTICAL CONSIDERATIONS WHEN DEVELOPING AND FILLING NOT-FOR-PROFIT BOARD OF DIRECTORS

By Kelly Mooney Lester, Esq.

General Editor, Glenn J. Bobeck, Esq., Phillips Lytle LLP www.phillipslytle.com

INSIGHT

Not-For-Profit Corp. Law § 702 law requires that a not-for-profit corporation have no less than three directors. The law sets no maximum number of directors and permits the entity, through its bylaws or member action, to set the upper limit requirements. The qualifications of the board members are addressed in Not-For-Profit Corp. Law § 701. Although the legal requirements related to the size and makeup of the board of directors may be easy to fulfill, the practical considerations are much more complicated and should be addressed periodically as the entity grows and changes.

ANALYSIS

Formally authorize board of directors with more than three members.

A not-for-profit corporation will be considered to have a three-person board of directors, unless the number is fixed in some authorized way. Custom, usage or acquiescence cannot establish the size of the board. *In re Rye Psychiatric Hosp. Med. Ctr. Inc.*, 66 N.Y.2d 333, 497 N.Y.S.2d 317 (1985). Consequently, review of the Certificate of Incorporation and the bylaws of the organization is important if the corporation is considering increasing the size of the board. The appropriate amendments should be made before moving forward with the appointment or election of additional board members.

Fine balancing act must take place when determining size of board of directors.

Not-for-profits typically have larger boards of directors than their for-profit counterparts. There are certainly advantages to having a large number of directors. Since directors are typically large contributors and fundraisers for an organization, those organizations with larger boards usually raise more money. Larger boards can include directors with divergent skills (such as legal, financial, accounting) to which smaller boards may not have access.

That said, the larger the board, the more difficult it becomes to take action. For example, coaxing enough directors to a meeting as necessary to meet quorum requirements becomes more difficult, as does reaching a consensus at the required level (for example, majority or two-thirds) on important issues. Directors on a board that is too large may attach less importance to their individual role and, often, this leads to overburdened staff, an unfair distribution of work to those directors who make a commitment to participate actively, or both. Committees are essential when a large board is involved.

Recently, a provision was added to Not-For-Profit Corp. Law § 608 to assist not-for-profit organizations that find it impossible or impractical to reach a quorum for meetings of members. There is no similar relief provided for meeting board quorum requirements. The best course for dealing with this difficulty remains in limiting the size of the board to a manageable number.

Certain Not-For-Profit Corp. Law provisions make it logistically difficult to manage large board of directors.

When representing an organization considering a move to a larger board of directors, counsel would be well-advised to review certain provisions of the Not-For-Profit Corporation Law that make a large board particularly difficult to work with. For example, under Not-For-Profit Corp. Law § 703(d), directors are not permitted to vote by proxy (although there is a very limited exception to allow voting through an alternate). Pursuant to Not-For-Profit Corp. Law § 708(b), action may be taken by the board without a meeting only if all directors consent to the action in writing. Recent changes to Not-For-Profit Corp. Law § 708(b)made as part of the Non-Profit Revitalization Act of 2013 have made this process a bit easier by providing that such "consent may be written or electronic". However, obtaining unanimous written consent can still be an administrative nightmare.

Telephone conferencing has been permitted for board meetings for some time where all directors participating in the meeting are able to hear each other at the same time. Not-For-Profit Corp. Law § 708(c). In addition, under the Non-Profit Revitalization Act of 2013, Not-For-Profit Corp. Law § 708(c) has been revised to clarify that "electronic video screen communication", *i.e.* video conferencing, can be used for board meetings provided again that all directors participating in the meeting are able to hear each other at the same time and participate in all matters before the board. This alternative ought make working with a larger board more practical. These options are not available if otherwise restricted by the certificate of incorporation or by-laws.

Consider honorary or advisory boards as alternative to large board of directors.

When logistical considerations weigh in favor of a more manageable number of directors, not-for-profits may want to address increased fundraising through the creation of an honorary or advisory board. Although honorary directors participate in fundraising efforts and projects that are very limited in scope, they do not get involved in the day-to-day decision-making of the organization and attendance requirements are not overwhelming. The management of the organization vests in a smaller, active board of directors that meets regularly. As a result, the not-for-profit enjoys most of the financial benefits of having a large board of directors, the practical benefits of having a committed active board of

directors, and few of the disadvantages of working with a large number of directors.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-7 White, New York Business Entities ¶ N702.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.05. Directors.

New York Practice Guide: Business and Commercial § 8.16. By-Laws.

Matthew Bender's New York Checklists: Checklist for Identifying Management and Structure of Business Issues When Selecting Form of Business Entity LexisNexis AnswerGuide New York Business Entities § 2.11.

Checklist for Assessing Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 2.47.

Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N702:1. Provisions as to Number of Directors.

White, New York Business Entities Form N702:2. Resolution of Board of Directors Changing Number of Directors.

§ 703. Election and term of office of directors; alternates

(a) A corporation may provide in its certificate of incorporation or by-laws for directors to be elected or appointed at large, or by special districts or membership sections, or by virtue of their office or former office in the corporation or other entity, public or private, or by bondholders pursuant to paragraph (c) of section 506 (Bonds and security interests) voting as a class, or any combination thereof.

(b) Directors shall be elected or appointed in the manner and for the term of office provided in the certificate of incorporation or the by-laws. The term of office of directors, other than those elected or appointed by virtue of their office or former office in the corporation or other entity, public or private, shall not exceed five years; and, if the board is classified under section 704 (Classification of directors), such term shall not exceed a number of years equal to the number of classes into which the board is classified. In the absence of a provision fixing the term, it shall be one year.

(c) Each director shall hold office until the expiration of the term for which he is elected or appointed, and until his successor has been elected or appointed and qualified.

(d) If the certificate of incorporation or by-laws so provide, a special district or membership section entitled to elect or appoint one or more directors may elect or appoint an alternate for each such director. In the absence of a director from a meeting of the board, his alternate may, upon written notice to the secretary of the corporation, attend such meeting and exercise therein the rights, powers, and privileges of the absent director. When so exercising the rights, powers, and privileges of the absent director, such alternate shall be subject in all respects to the provisions of this chapter governing directors.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970; amd, L 1970, ch 847, § 42, eff Sept 1, 1970.

Derivation Notes: Derived from Gen Corp Law § 21 and Mem Corp Law §§ 20, 45.

Revision Notes: *Source:* Mem Corp L §§ 20 and 45(1), Gen Corp L § 21.

Changes: Revised and reworded; new provisions.

Comment: This section continues the provisions of the Mem Corp L for directors elected at large or by membership sections (§ 45(1)) or by bondholders (§ 20) and adds directors elected or appointed by virtue of their office or former office. Except in the latter group, the maximum term of office is four years, as in the Bus Corp L (§ 704), instead of five years permitted under Mem Corp L § 20. Paragraph (c) is derived from Bus Corp L § 703(b); it retains the substance of Gen Corp L § 21 on tenure of directors. Paragraph (d) is new; its provision for alternate directors for special membership sections is of particular advantage to national corporations.

PRACTICE INSIGHTS:

PRACTICAL CONSIDERATIONS WHEN DEVELOPING AND FILLING NOT-FOR-PROFIT BOARD OF DIRECTORS

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INSIGHT

Not-For-Profit Corp. Law § 702 law requires that a not-for-profit corporation have no less than three directors. The law sets no maximum number of directors and permits the entity, through its bylaws or member action, to set the upper limit requirements. The qualifications of the board members are addressed in Not-For-Profit Corp. Law § 701. Although the legal requirements related to the size and makeup of the board of directors may be easy to fulfill, the practical considerations are much more complicated and should be addressed periodically as the entity grows and changes.

ANALYSIS

Formally authorize board of directors with more than three members.

A not-for-profit corporation will be considered to have a three-person board of directors, unless the number is fixed in some authorized way. Custom, usage or acquiescence cannot establish the size of the board. *In re Rye Psychiatric Hosp. Med. Ctr. Inc.*, 66 N.Y.2d 333, 497 N.Y.S.2d 317 (1985). Consequently, review of the Certificate of Incorporation and the bylaws of the organization is important if the corporation is considering increasing the size of the board. The appropriate amendments should be made before moving forward with the appointment or election of additional board members.

Fine balancing act must take place when determining size of board of directors.

Not-for-profits typically have larger boards of directors than their for-profit counterparts. There are certainly advantages to having a large number of directors. Since directors are typically large contributors and fundraisers for an organization, those organizations with larger boards usually raise more money. Larger boards can include directors with divergent skills (such as legal, financial, accounting) to which smaller boards may not have access.

That said, the larger the board, the more difficult it becomes to take action. For example, coaxing enough directors to a meeting as necessary to meet quorum requirements becomes more difficult, as does reaching a consensus at the required level (for example, majority or two-thirds) on important issues. Directors on a board that is too large may attach less importance to their individual role and, often, this leads to overburdened staff, an unfair distribution of work to those directors who make a commitment to participate actively, or

both. Committees are essential when a large board is involved.

Recently, a provision was added to Not-For-Profit Corp. Law § 608 to assist not-for-profit organizations that find it impossible or impractical to reach a quorum for meetings of members. There is no similar relief provided for meeting board quorum requirements. The best course for dealing with this difficulty remains in limiting the size of the board to a manageable number.

Certain Not-For-Profit Corp. Law provisions make it logistically difficult to manage large board of directors.

When representing an organization considering a move to a larger board of directors, counsel would be well-advised to review certain provisions of the Not-For-Profit Corporation Law that make a large board particularly difficult to work with. For example, under Not-For-Profit Corp. Law § 703(d), directors are not permitted to vote by proxy (although there is a very limited exception to allow voting through an alternate). Pursuant to Not-For-Profit Corp. Law § 708(b), action may be taken by the board without a meeting only if all directors consent to the action in writing. Recent changes to Not-For-Profit Corp. Law § 708(b)made as part of the Non-Profit Revitalization Act of 2013 have made this process a bit easier by providing that such "consent may be written or electronic". However, obtaining unanimous written consent can still be an administrative nightmare.

Telephone conferencing has been permitted for board meetings for some time where all directors participating in the meeting are able to hear each other at the same time. Not-For-Profit Corp. Law § 708(c). In addition, under the Non-Profit Revitalization Act of 2013, Not-For-Profit Corp. Law § 708(c) has been revised to clarify that "electronic video screen communication", *i.e.* video conferencing, can be used for board meetings provided again that all directors participating in the meeting are able to hear each other at the same time and participate in all matters before the board. This alternative ought make working with a larger board more practical. These options are not available if otherwise restricted by the certificate of incorporation or by-laws.

Consider honorary or advisory boards as alternative to large board of directors.

When logistical considerations weigh in favor of a more manageable number of directors, not-for-profits may want to address increased fundraising through the creation of an honorary or advisory board. Although honorary directors participate in fundraising efforts and projects that are very limited in scope, they do not get involved in the day-to-day decision-making of the organization and attendance requirements are not overwhelming. The management of the organization vests in a smaller, active board of directors that meets regularly. As a result, the not-for-profit enjoys most of the financial benefits of having a large board of directors, the practical benefits of having a committed active board of directors, and few of the disadvantages of working with a large number of directors.

Notes to Decisions

Analysis

1. Generally
2. Under former Membership Corporations Law § 45

1. Generally

Congregation had the authority to discharge members of a not-for-profit corporation's board of directors because (1) N.Y. Not-for-Profit Corp. Law § 703(b) and the corporation's bylaws only let the board increase the board's number, (2) the congregation, as the corporation's sole member, could not be denied the right to vote except by the congregation's removal or resignation, under N.Y. Not-for-Profit Corp. Law §§ 612 and 605(a), so bylaw amendments denying that right had no effect, (3) the bylaws in effect let the congregation veto the board's bylaw amendments, and (4) the congregation vetoed amendments denying the congregation the rights to vote, remove directors, and adopt, amend, or repeal bylaws. Gluck v Chevre Liady Nusach Hoary, 97 A.D.3d 787, 949 N.Y.S.2d 149, 2012 N.Y. App. Div. LEXIS 5657 (N.Y. App. Div. 2d Dep't 2012), app. denied, 21 N.Y.3d 855, 967 N.Y.S.2d 688, 989 N.E.2d 970, 2013 N.Y. LEXIS 1195 (N.Y. 2013).

Directors of not-for-profit corporation did not abandoned their duties by their involvement with a separate not-for-profit group where, the directors did not surrender their positions in writing, were not replaced by the not-for-profit corporation and did not regard themselves as having abandoned their roles. Machne Menachem, Inc. v Hershkop, 237 F. Supp. 2d 227, 2002 U.S. Dist. LEXIS 23309 (E.D.N.Y. 2002).

2. Under former Membership Corporations Law § 45

The office of director confers certain responsibilities of management and control upon such officers, but they are merely representatives of their associates, and their action is subject to fair criticism by any such associate. People ex rel. Ward v Uptown Ass'n, 26 A.D. 297, 49 N.Y.S. 881, 1898 N.Y. App. Div. LEXIS 391 (N.Y. App. Div. 1898).

The provisions of this section providing that directors of such corporations need not be members is permissive rather than mandatory and the by-laws may require that directors be members. Thus, a non-member of a hospital corporation which required payment of dues as a condition of membership could not be elected to the office of director where the by-laws limited such offices to members. In re Tri-County Memorial Hospital, 4 A.D.2d 304, 165 N.Y.S.2d 590, 1957 N.Y. App. Div. LEXIS 4769 (N.Y. App. Div. 4th Dep't 1957).

Members of a charitable membership corporation have no vested right to choose its directors, nor is "self-perpetuation" of the board of such a corporation per se invalid in the absence of clear showing that it violates fundamental principles of justice. Petition of Sousa, 12 A.D.2d 956, 211 N.Y.S.2d 204, 1961 N.Y. App. Div. LEXIS 12759 (N.Y. App. Div. 2d Dep't), rev'd, 10 N.Y.2d 68, 217 N.Y.S.2d 58, 176 N.E.2d 77, 1961 N.Y. LEXIS 1167 (N.Y. 1961).

Where a cemetery corporation has elected an entire slate of six directors but has failed to specify the terms of such directors, and the bylaws of the corporation as well as a statute in effect at the time of the election, provided that one-third of the directors were to be elected each year, upon agreement of the elected directors that the terms of two of them were to expire at the end of the first year, at the first subsequent annual election only two new directors are to be elected, rather than an entire new slate as urged upon the theory that the original election was invalid. In re Washington Cemetery, 238 N.Y.S. 664, 135 Misc. 763, 1930 N.Y. Misc. LEXIS 935 (N.Y. Sup. Ct. 1930).

Directors cannot vote by proxy. Craig Medicine Co. v Merchants' Bank of Rochester, 14 N.Y.S. 16, 59 Hun 561, 1891 N.Y. Misc. LEXIS 1834 (N.Y. Sup. Ct. 1891).

Agency Opinions

Analysis

1. Generally
2. Under former Membership Corporations Law § 45

1. Generally

The terms "special district" and "improvement district" are synonymous and are used interchangeably in the statutes. The provisions of Public Officers Law § 36 for removal of town, village, improvement district or fire district officers are applicable to officers of what the Nassau County Civil Divisions Act refers to as "special districts" including removal of a commissioner of the Port Washington Police District. 1980 NY Ops Atty Gen April 14 (Informal), 1980 N.Y. AG LEXIS 134.

2. Under former Membership Corporations Law § 45

By-laws of membership corporation may provide for an executive committee of the board of directors. Requirement that at least five members of executive committee be chosen from directors of another corporation not proper. 1955 N.Y. Op. Att'y Gen. No. 227, 1955 N.Y. AG LEXIS 82.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-7 White, New York Business Entities ¶ N703.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.05. Directors.

New York Practice Guide: Business and Commercial § 8.16. By-Laws.

Matthew Bender's New York Checklists: Checklist for Identifying Management and Structure of Business Issues When Selecting Form of Business Entity LexisNexis AnswerGuide New York Business Entities § 2.11.

Checklist for Assessing Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 2.47.

Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N703:1. Provision for Election of Directors by Bondholders.

§ 704. Classification of directors

(a) The certificate of incorporation or a by-law adopted by the members may provide that directors elected or appointed at large shall be divided into either two, three, four or five classes for the purpose of staggering their terms of office and that all or some of the directors elected or appointed otherwise than at large shall be divided into the same or a different number of classes, not exceeding five, for the same purpose. All classes of each type shall be as nearly equal in number as possible and, if provision has been made for cumulative voting under section 617 (Cumulative voting), no class shall include less than three directors.

(b) The terms of office of the directors initially classified shall be as follows: that of the first class shall expire at the next annual meeting of members if there be members, or of the board if there be no members, the second class at the second succeeding annual meeting, the third class, if any, at the third succeeding annual meeting, the fourth class, if any, at the fourth succeeding annual meeting and the fifth class, if any, at the fifth succeeding annual meeting. After such initial classification, directors to replace those whose terms expire at each annual meeting shall be elected or appointed at such meeting to hold office for a full term in accordance with such classification.

(c) If directors are classified and the number of directors is thereafter changed by action of the board:

(1) Any newly created directorships or any decrease in directorships shall be so apportioned among the classes as to make all classes as nearly equal in number as possible.

(2) If newly created directorships are filled by the board in a corporation having members, there shall be no classification of the additional directors until the next annual meeting of members.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970; amd, L 1970, ch 847, § 43, eff Sept 1, 1970.

Derivation Notes: Derived from Mem Corp Law § 20.

Revision Notes: *Source:* Mem Corp L § 20.

Changes: Revised and reworded; new provisions.

Comment: This section reduces the number of possible classes of directors elected at large from the five permitted under the Mem Corp L § 20 to the four authorized by Bus Corp L § 704. However, this limitation does not apply to directors elected by bondholder or by membership sections, or by virtue of their office or former office. The provisions for avoiding impairment of cumulative voting rights, where authorized, are derived from the Bus Corp L § 704.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-7 White, New York Business Entities ¶ N704.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.05. Directors.

New York Practice Guide: Business and Commercial § 8.16. By-Laws.

Matthew Bender's New York Checklists: Checklist for Identifying Management and Structure of Business Issues When Selecting Form of Business Entity LexisNexis AnswerGuide New York Business Entities § 2.11.

Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N704:1. Provision in Certificate of Incorporation or Bylaws Dividing Directors into Classes.

§ 705. Newly created directorships and vacancies

(a) Newly created directorships resulting from an increase in the number of directors elected or appointed at large, and vacancies among such directors for any reason, may be filled by vote of a majority of the directors then in office, regardless of their number, unless the certificate of incorporation or the by-laws provide that such newly created directorships or vacancies shall be filled by vote of the members.

(b) Vacancies among directors elected or appointed by special districts or membership sections, or by bondholders voting as a class, shall be filled by action of the persons entitled to vote thereon; except that, if a vacancy remains unfilled for six months after it occurs, and by reason of the absence, illness, or other inability of one or more of the remaining directors a quorum of the board cannot be obtained, the remaining directors, or a majority of them, may appoint a director to fill such vacancy.

(c) A director elected or appointed to fill a vacancy shall hold office until the next annual meeting at which the election of directors is in the regular order of business, and until his successor is elected or appointed and qualified.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970.

Derivation Notes: Derived from Mem Corp Law § 45.

Revision Notes: *Source:* Mem Corp L §§ 20 and 45(2).

Changes: Revised and reworded; new provisions.

Comment: Paragraph (a) of this section follows the language of Bus Corp L § 705(a) in giving equal treatment to newly created directorships and vacancies among directors at large. The Mem Corp L provision in § 20 authorizing the

by-laws to define a vacancy has been superseded by the provision that this section applies to a "vacancy for any reason." In paragraph (b), vacancies in directorships elected other than at large are to be filled by the appropriate electoral body, except that if a vacancy remains unfilled for six months and a quorum cannot be obtained in consequence, the provisions of Mem Corp L § 45(2) are applied to permit the remaining directors to fill the vacancy. Paragraph (c) follows Bus Corp L § 705(c) except in the important respect that a director elected to fill a vacancy does not serve for the unexpired term, which may run up to four years, but only until the next annual meeting at which a director may be elected.

Agency Opinions

1. Generally

The terms "special district" and "improvement district" are synonymous and are used interchangeably in the statutes. The provisions of Public Officers Law § 36 for removal of town, village, improvement district or fire district officers are applicable to officers of what the Nassau County Civil Divisions Act refers to as "special districts" including removal of a commissioner of the Port Washington Police District. 1980 NY Ops Atty Gen April 14 (Informal), 1980 N.Y. AG LEXIS 134.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-7 White, New York Business Entities ¶ N705.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.05. Directors.

New York Practice Guide: Business and Commercial § 8.16. By-Laws.

Matthew Bender's New York Checklists: Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N705:1. Provision in Certificate of Incorporation Stating that Newly Created Directorships Are to Be Filled by Members.

§ 706. Removal of directors

(a) Except as limited in paragraph (c), any or all of the directors may be removed for cause by vote of the members, or by vote of the directors provided there is a quorum of not less than a majority present at the meeting of directors at which such action is taken.

(b) Except as limited in paragraph (c), if the certificate of incorporation or the by-laws so provide, any or all of the directors may be removed without cause by vote of the members.

(c) The removal of directors, with or without cause, as provided in paragraphs (a) and (b) is subject to the following:

(1) In the case of a corporation having cumulative voting, no director may be removed when the votes cast against his removal would be sufficient to elect him if voted cumulatively at an election at which the same total number of votes were cast and the entire board, or the entire class of directors of which he is a member, were then being elected; and

(2) When by the provisions of the certificate of incorporation or the by-laws the members of any class or group, or the holders of bonds, voting as a class, are entitled to elect one or more directors, any director so elected may be removed only by the applicable vote of the members of that class or group, or the holders of such bonds, voting as a class.

(d) An action to procure a judgment removing a director for cause may be brought by the attorney-general or by ten percent of the members whether or not entitled to vote. The court may bar from re-election any director so removed for a period fixed by the court.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970.

Derivation Notes: Derived from Gen Corp Law §§ 60, 136.

Revision Notes: *Source:* Gen Corp L § 60(4) and § 136. *Changes:* Revised; new provisions.

Comment: These provisions, reworded in part, are derived from Bus Corp L § 706, which combined statutory provisions of the Gen Corp L on the power of the attorney-general to procure a judgment ousting a derelict director with provisions essentially codifying the decisional law and also added some new substantive provisions. Paragraphs (a) and (b) have been reworded in part to simplify the language, but no change in substance is effected thereby. A director elected by cumulative voting may be removed, with or without cause, only by vote of the members of the corporation and in accordance with the requirements of paragraph (c)(1). Similarly, a director elected by the members of any class or group may be removed only by vote of the members of that class or group. The provision in Bus Corp L § 706(d), extending the right to initiate judicial proceedings to remove a director for cause to the holders of ten per cent of the outstanding shares, has been given to ten per cent of the members whether or not these members are entitled to vote.

Notes to Decisions

1. Generally

Board of governors of not-for-profit corporation had inherent power to remove directors for cause where they had commenced personal injury action against corporation and searched its records for confidential information as to nature and extent of its insurance coverage; directors acted in breach of their fiduciary obligation to corporation and contrary to its interest. Davidson v James, 172 A.D.2d 323 (1st Dept 1991).

Congregation had the authority to discharge members of a not-for-profit corporation's board of directors without cause because N.Y. Not-for-Profit Corp. Law § 706(b) and the corporation's bylaws allowed a discharge without cause. Gluck v Chevre Liady Nusach Hoary, 97 A.D.3d 787, 949 N.Y.S.2d 149, 2012 N.Y. App. Div. LEXIS 5657 (N.Y. App. Div. 2d Dep't 2012), app. denied, 21 N.Y.3d 855, 967 N.Y.S.2d 688, 989 N.E.2d 970, 2013 N.Y. LEXIS 1195 (N.Y. 2013).

Where a religious society did not follow its own by-law procedures and the trustees were considered "directors" under the Not-For-Profit Law and where neither N.Y. Relig. Corp. Law § 2-b(1)(a) nor NY. Not-For-Profit Corp. Law § 103(c) contained inconsistent provisions, they clearly did not preclude the removal of the trustees, the trial court erred in denying the members' petition to remove the trustees, invalidate the new by-laws, and appoint a referee. Venigalla v Alagappan, 307 A.D.2d 1041, 763 N.Y.S.2d 765, 2003 N.Y. App. Div. LEXIS 9041 (N.Y. App. Div. 2d Dep't 2003).

In a proceeding to remove a religious society's board of trustees, newly-elected trustees were properly directed to assume their duties upon the signing of the judgment because findings that the society failed to comply with by-laws providing for election of trustees constituted the law of the case and could not be challenged; an appeal from the denial of a motion for an order rejecting the interim report of the court-appointed referee was dismissed. Matter of Venigalla v Nori, 41 A.D.3d 725, 840 N.Y.S.2d 365, 2007 N.Y. App. Div. LEXIS 7735 (N.Y. App. Div. 2d

Dep't 2007), rev'd, 11 N.Y.3d 55, 862 N.Y.S.2d 457, 892 N.E.2d 850, 2008 N.Y. LEXIS 1931 (N.Y. 2008).

Since the sponsor was not a member under N.Y. Not-for-Profit Corp. Law 601 of defendant company, there was no basis in N.Y. Not-for-Profit Corp. Law 706 for its attempted removal of the latter's directors. Alpha Phi Alpha Senior Citizens Ctr., Inc. v Zeta Zeta Lambda Co., Inc., 53 Misc. 3d 1066, 38 N.Y.S.3d 400, 2016 N.Y. Misc. LEXIS 3336 (N.Y. Sup. Ct. 2016), aff'd, 180 A.D.3d 630, 119 N.Y.S.3d 181, 2020 N.Y. App. Div. LEXIS 892 (N.Y. App. Div. 2d Dep't 2020).

Agency Opinions

1. Generally

A volunteer member of a fire company may be removed in accordance with the constitution and by-laws of the company. 1985 N.Y. Op. Att'y Gen. No. 85-17.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-7 White, New York Business Entities ¶ N706.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.05. Directors.

New York Practice Guide: Business and Commercial § 8.16. By-Laws.

Matthew Bender's New York Checklists: Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N706:1. Provision for Removal of Directors upon Notice and after Hearing.

White, New York Business Entities Form N706:2. Provision for Removal of Director Elected by Bondholders.

White, New York Business Entities Form N706:3. Provision for Removal of Director Without Cause by Members.

§ 707. Quorum of directors

Unless a greater proportion is required by this chapter or by the certificate of incorporation or by a by-law adopted by the members, a majority of the entire board shall constitute a quorum for the transaction of business or of any specified item of business, except that the certificate of incorporation or the by-laws may fix the quorum at less than a majority of the entire board, provided that in the case of a board of fifteen members or less the quorum shall be at least one-third of the entire number of members and in the case of a board of more than fifteen members the quorum shall be at least five members plus one additional member for every ten members (or fraction thereof) in excess of fifteen.

HISTORY:

Add, L 1969, ch 1066, § 1; amd, L 1970, ch 847, § 44; L 1971, ch 1058 § 21, eff Sept 1, 1971.

Derivation Notes: Derived from Gen Corp Law § 27 and Mem Corp Law § 20.

Revision Notes: *Source:* Gen Corp L §§ 27 and 28.

Changes: Parts of prior sections combined and reworded; also revised.

Comment: This section is based on Bus Corp L § 707, revised in part to indicate that a quorum greater than a majority may be required not only by the certificate of incorporation but also by this chapter.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-7 White, New York Business Entities ¶ N707.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.05. Directors.

Matthew Bender's New York Checklists: Checklist for Assessing Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 2.47.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N707:1. Provision Fixing Quorum of Board of Directors.

§ 708. Action by the board

(a) Except as otherwise provided in this chapter, any reference in this chapter to corporate action to be taken by the board shall mean such action at a meeting of the board.

(b) Unless otherwise restricted by the certificate of incorporation or the by-laws, any action required or permitted to be taken by the board or any committee thereof may be taken without a meeting if all members of the board or the committee consent to the adoption of a resolution authorizing the action. Such consent may be written or electronic. If written, the consent must be executed by the director by signing such consent or causing his or her signature to be affixed to such consent by any reasonable means including, but not limited to, facsimile signature. If electronic, the transmission of the consent must be sent by electronic mail and set forth, or be submitted with, information from which it can reasonably be determined that the transmission was authorized by the director. The resolution and the written consents thereto by the members of the board or committee shall be filed with the minutes of the proceedings of the board or committee.

(c) Unless otherwise restricted by the certificate of incorporation or the by-laws, any one or more members of the board or of any committee thereof who is not physically present at a meeting of the board or a committee may participate by means of a conference telephone or similar communications equipment or by electronic video screen communication. Participation by such means shall constitute presence in person at a meeting as long as all persons participating in the meeting can hear each other at the same time and each director can participate in all matters before the board, including, without limitation, the ability to propose, object to, and vote upon a specific action to be taken by the board or committee.

(d) Except as otherwise provided in this chapter, the vote of a majority of the directors present at the time of the vote, if a quorum is present at such time, shall be the act of the board. Directors who are present at a meeting but not present at the time of a vote due to a conflict of interest or related party transaction shall be determined to be present at the time of the vote for purposes of this paragraph.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970; amd, L 1975, ch 173, § 1, eff Sept 1, 1975; L 1977, ch 314, § 1, eff June 21, 1977; L 1983, ch 92, § 1, eff May 17, 1983; L 2007, ch 211, § 1, eff July 3,

2007; L 2013, ch 549, § 68, eff July 1, 2014; L 2015, ch 555, § 4, effective December 11, 2015.

Derivation Notes: Derived from Gen Corp Law § 28.

Revision Notes: *Source:* Gen Corp L §§ 27 and 28.

Changes: Parts of prior sections combined and revised.

Comment: This section is the same, both in substance and language, as Bus Corp L § 708, which resolved conflict between Gen Corp L § 27 and Gen Corp L § 28 by following the rule of § 27 that the directors may act by a majority of those present at a meeting at which a quorum is present.

Editor's Notes: Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

Amendment Notes: The 2015 amendment by ch 555, § 4, added the second sentence of (d).

PRACTICE INSIGHTS:

PRACTICAL CONSIDERATIONS WHEN DEVELOPING AND FILLING NOT-FOR-PROFIT BOARD OF DIRECTORS

By Kelly Mooney Lester, Esq.

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INSIGHT

Not-For-Profit Corp. Law § 702 law requires that a not-for-profit corporation have no less than three directors. The law sets no maximum number of directors and permits the entity, through its bylaws or member action, to set the upper limit requirements. The qualifications of the board members are addressed in Not-For-Profit Corp. Law § 701. Although the legal requirements related to the size and makeup of the board of directors may be easy to fulfill, the practical considerations are much more complicated and should be addressed periodically as the entity grows and changes.

ANALYSIS

Formally authorize board of directors with more than three members.

A not-for-profit corporation will be considered to have a three-person board of directors, unless the number is fixed in some authorized way. Custom, usage or acquiescence cannot establish the size of the board. *In re Rye Psychiatric Hosp. Med. Ctr. Inc.*, 66 N.Y.2d 333, 497 N.Y.S.2d 317 (1985). Consequently, review of the Certificate of Incorporation and the bylaws of the organization is important if the corporation is considering increasing the size of the board. The appropriate amendments should be made before moving forward with the appointment or election of additional board members.

Fine balancing act must take place when determining size of board of directors.

Not-for-profits typically have larger boards of directors than their for-profit counterparts. There are certainly advantages to having a large number of directors. Since directors are typically large contributors and fundraisers for an organization, those organizations with larger boards usually raise more money. Larger boards can include directors with divergent skills (such as legal, financial, accounting) to which smaller boards may not have access.

That said, the larger the board, the more difficult it becomes to take action. For example, coaxing enough directors to a meeting as necessary to meet quorum requirements becomes more difficult, as does reaching a consensus at the required level (for example, majority or two-thirds) on important issues. Directors on a board that is too large may attach less importance to their individual role and, often, this leads to overburdened staff, an unfair distribution of work to those directors who make a commitment to participate actively, or both. Committees are essential when a large board is involved.

Recently, a provision was added to Not-For-Profit Corp. Law § 608 to assist not-for-profit organizations that find it impossible or impractical to reach a quorum for meetings of members. There is no similar relief provided for meeting board quorum requirements. The best course for dealing with this difficulty remains in limiting the size of the board to a manageable number.

Certain Not-For-Profit Corp. Law provisions make it logistically difficult to manage large board of directors.

When representing an organization considering a move to a larger board of directors, counsel would be well-advised to review certain provisions of the Not-For-Profit Corporation Law that make a large board particularly difficult to work with. For example, under Not-For-Profit Corp. Law § 703(d), directors are not permitted to vote by proxy (although there is a very limited exception to allow voting through an alternate). Pursuant to Not-For-Profit Corp. Law § 708(b), action may be taken by the board without a meeting only if all directors consent to the action in writing. Recent changes to Not-For-Profit Corp. Law § 708(b)made as part of the Non-Profit Revitalization Act of 2013 have made this process a bit easier by providing that such "consent may be written or electronic". However, obtaining unanimous written consent can still be an administrative nightmare.

Telephone conferencing has been permitted for board meetings for some time where all directors participating in the meeting are able to hear each other at the same time. Not-For-Profit Corp. Law § 708(c). In addition, under the Non-Profit Revitalization Act of 2013, Not-For-Profit Corp. Law § 708(c) has been revised to clarify that "electronic video screen communication", *i.e.* video conferencing, can be used for board meetings provided again that all directors participating in the meeting are able to hear each other at the same time and participate in all matters before the board. This alternative ought make working with a larger board more practical. These options are not available if otherwise restricted by the certificate of incorporation or by-laws.

Consider honorary or advisory boards as alternative to large board of directors.

When logistical considerations weigh in favor of a more manageable number of directors, not-for-profits may want to address increased fundraising through the creation of an honorary or advisory board. Although honorary directors participate in fundraising efforts and projects that are very limited in scope, they do not get involved in the day-to-day decision-making of the organization and attendance requirements are not overwhelming. The management of the organization vests in a smaller, active board of directors that meets regularly. As a result, the not-for-profit enjoys most of the financial benefits of having a large board of directors, the practical benefits of having a committed active board of directors, and few of the disadvantages of working with a large number of directors.

SET UP FOR SUCCESS RIGHT FROM THE START — STRATEGIES FOR PREPARING NOT-FOR PROFIT CERTIFICATE OF INCORPORATION

By Kelly Mooney Lester, Esq.

General Editor, Glenn J. Bobeck, Esq., Phillips Lytle LLP www.phillipslytle.com

INSIGHT

Not-For-Profit Corp. Law § 402 sets forth the requirements for the contents of the Certificate of Incorporation (the "Certificate") which is filed with the Department of State (the "Department") to formally create a not-for-profit corporation. The practitioner should carefully consider the contents of the Certificate before filing it with the Department to get the entity started off on the right foot. Specifically, counsel should ensure that any contemplated powers are included in the Certificate, carefully draft the statement of purpose, avoid certain buzz words, and consider limiting internal governance provisions.

ANALYSIS

Include certain powers in Certificate if they are contemplated.

Certain powers must be included in the Certificate if they are going to be granted to the corporation. For example, if the management of the not-for-profit corporation is vested in individuals other than the Board of Directors (see Not-For-

Profit Corp. Law § 701), this power must be included in the Certificate. Similar requirements exist for the following powers: if members are required to make capital contributions other than the payment of dues (Not-For-Profit Corp. Law § 502); if the corporation can accept subventions (Not-For-Profit Corp. Law § 505); or if written consent of less than all members is permitted for certain types of corporate action (Not-For-Profit Corp. Law § 614).

Consider adding certain permissive powers to Certificate.

The Not-For-Profit Corporation Law permits, but does not require, the inclusion of certain provisions in the Certificate. For example, Not-For-Profit Corp. Law § 709(a) permits a corporation to specify that the proportion of directors or the proportion of votes of directors that shall constitute a quorum or be necessary for the transaction of business or of any specified item of business shall be greater than the proportion prescribed by statute. The Certificate may also restrict the taking of action by the Board of Directors without a meeting and by written consent (Not-For-Profit Corp. Law § 708(b)) or permit directors to participate in meetings via telephone conference (Not-For-Profit Corp. Law § 708(c)). If these actions are contemplated, the authority may be granted in the Certificate.

Pay particularly close attention to "purposes" section of Certificate.

The Certificate must include a statement of the purpose for which the corporation has been formed. Not-For-Profit Corp. Law § 402(a)(2). The practitioner should exercise caution when drafting the purposes clause. The purposes clause must be broad enough to cover not only the acts the proposed directors envision at the corporation's infancy, but also those acts the corporation may need to take as the organization matures and builds up steam. Failure to stay within the stated purposes of the entity can later create a liability for the entity and its directors, officers and members. This can easily occur if the purposes clause is narrowly constructed. It is possible to broaden the purposes clause at a later time by amending the Certificate. See Not-For-Profit Corp. Law § 802. The larger the organization, however, the more difficult it becomes to make sweeping changes to the fundamental structure of the organization, such as changing its charter. Also, pursuant to Not-For-Profit Corp. Law § 804, amendments to Certificates which add, change or eliminate a purpose, power or provision the inclusion of which in an initial Certificate require approval or consent from a governmental entity will require such approval or consent to be obtained. Also, certificates of amendments of charitable corporations which change, eliminate or add a power or purpose require approval of either the attorney general or a justice of the supreme court. Not-For-Profit Corp. Law § 804.

Avoid certain buzz words when drafting Certificate.

Any reference to certain buzz words will typically trigger a requirement for pre-approval or consent from a state agency prior to filing the Certificate. For example, Education Department consent may be required if the Certificate is drafted using the terms "education," "research," or "school." Private foundations seeking not-for-profit status should be sure to include a disclaimer of Not-For-Profit Corp. Law § 404 activities that necessitate agency approval as well as the disclaimers required in Not-For-Profit Corp. Law § 406. Pre-approval requirements can delay the process significantly, particularly if the agency requires revisions to the proposed Certificate (that will in turn require internal approvals as well). If state agency consent is necessary, counsel should consider reserving the chosen name for the entity. Not-For-Profit Corp. Law § 303. A relatively small fee buys 60 days and may be well worth the investment if the approval process is stalled at any point and the name of the entity is important to the client.

It may be advisable to limit internal governance provisions in Certificate.

The certificate of incorporation may set forth any provision for the regulation of the internal affairs of the corporation that is consistent with the Not-For-Profit Corp. Law or any other New York law. Although it is permissible to add provisions relating to internal governance to the Certificate under Not-For-Profit Corp. Law § 402(c), it may be more advisable to add those types of provisions to the bylaws. The dynamics of an organization change over time, and changes to operating procedures are inevitable. Changes to the Certificate require governmental filing and approval — at minimum, the Department's. Changes to the bylaws, however, require only proposal by the Board of Directors and vote of the membership — a completely transparent and internal process that is relatively painless unless the organization has grown exponentially. See Not-For-Profit Corp. Law § 802.

When adding internal governance provisions to the Certificate or the bylaws, ensure that those provisions are consistent with the Not-For-Profit Corp. Law. Inconsistencies can lead a court to stop the corporation in its tracks. *See Sealey v. Amer. Socy. of Hypertension, Inc.*, 26 A.D.3d 254, 810 N.Y.S.2d 48 (1st Dep't 2006).

Notes to Decisions

1. Under former General Corporation Law § 28

Reading together § 27 and § 28 and examining their legislative history, court concluded that there never was legislative intent so to change common-law rule as to quorums as to authorize a by-law requiring unanimous vote of directors. Benintendi v Kenton Hotel, Inc., 294 N.Y. 112, 60 N.E.2d 829, 294 N.Y. (N.Y.S.) 112, 1945 N.Y. LEXIS 820 (N.Y. 1945).

This section and § 27 do not forbid a bylaw requiring a two-thirds' vote of a quorum of directors. In re Lake Placid Co., 274 A.D. 205, 81 N.Y.S.2d 36, 1948 N.Y. App. Div. LEXIS 3040 (N.Y. App. Div. 1948).

The court would not entertain a petition for an order setting aside a special meeting of the board of directors, and vacating the removal of a corporate officer by a majority vote of the board. Heller v Clark Merchandisers, Inc., 9 Misc. 2d 106, 154 N.Y.S.2d 150, 1955 N.Y. Misc. LEXIS 2316 (N.Y. Sup. Ct. 1955).

Court vacated determination of respondent not-for-profit corporation which found petitioner guilty of inappropriate behavior at its recreational club and suspended his membership privileges for 6 weeks where (1) petitioner was not provided any written notice of date, time and place of hearing, he was not afforded opportunity to testify, submit evidence, call witness or examine any complaining witness, and (2) informal meetings between club president and petitioner did not satisfy fundamental due process requirement of Not-For-Profit Corporation Law or "substantially" comply with club's by-laws and rules. Anderson v Board of Dirs. of the Powelton Club, 183 Misc. 2d 200, 702 N.Y.S.2d 762, 1999 N.Y. Misc. LEXIS 600 (N.Y. Sup. Ct. 1999).

Failure to notify library trustees of a meeting in accordance with the Education Law was such a defect as could be cured or waived by the actual presence of the trustees at the meeting. Kahn v Blinn, 60 N.Y.S.2d 413, 1946 N.Y. Misc. LEXIS 1877 (N.Y. Sup. Ct. 1946).

Corporation which had been dissolved could not maintain action for specific performance of alleged undertaking to effectuate a lien on realty. Dieselcraft Corp. v Joca Realty Corp., 161 N.Y.S.2d 761 (N.Y. Sup. Ct. 1957).

It appears to be the legislative intent that a board of directors can act by a majority of a quorum, irrespective of the number of other directors who may merely be present at the meeting. Crowley v Commodity Exchange, Inc., 141 F.2d 182, 1944 U.S. App. LEXIS 3625 (2d Cir. N.Y. 1944).

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-7 White, New York Business Entities ¶ N708.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.05. Directors.

Matthew Bender's New York Checklists: Checklist for Identifying Management and Structure of Business Issues When Selecting Form of Business Entity LexisNexis AnswerGuide New York Business Entities § 2.11.

Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N708:1. Provision as to Action by Board of Directors.

White, New York Business Entities Form N708:2. Minutes of Annual Meeting of Board of Directors.

White, New York Business Entities Form N708:3. Minutes of Directors' Meeting.

White, New York Business Entities Form N708:4. Action by Resolution Without Meeting.

White, New York Business Entities Form N708:5. Minutes of Directors' Meeting by Conference Telephone.

§ 709. Greater requirement as to quorum and vote of directors

(a) The certificate of incorporation or a by-law adopted by the members may contain provisions specifying either or both of the following:

(1) That the proportion of directors that shall constitute a quorum for the transaction of business or of any specified item of business shall be greater than the proportion prescribed by this chapter in the absence of such provision.

(2) That the proportion of votes of directors that shall be necessary for the transaction of business or of any specified item of business shall be greater than the proportion prescribed by this chapter in the absence of such provision.

(b) An amendment by the members of the certificate of incorporation or of the by-laws which adds a provision permitted by this section or which changes or strikes out such a provision, shall be authorized by vote of two-thirds of the members entitled to vote or of such greater proportion as may be provided specifically in the certificate of incorporation or the by-law for adding, changing or striking out a provision permitted by this section.

(c) If there are no members, an amendment by the board of directors of the certificate of incorporation or the by-law which adds a provision permitted by this section or which changes or strikes out such a provision, shall be authorized at a meeting by vote of two-thirds of the entire board, or of such greater proportion as may be provided specifically in the certificate of incorporation or the by-law for adding, changing or striking out a provision permitted by this section.

HISTORY:

Add, L 1969, ch 1066, § 1; amd, L 1970, ch 847, § 45, eff Sept 1, 1970.

Derivation Notes: Derived from Gen Corp Law § 28.

PRACTICE INSIGHTS:

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foundations seeking not-for-profit status should be sure to include a disclaimer of Not-For-Profit Corp. Law § 404 activities that necessitate agency approval as well as the disclaimers required in Not-For-Profit Corp. Law § 406. Pre-approval requirements can delay the process significantly, particularly if the agency requires revisions to the proposed Certificate (that will in turn require internal approvals as well). If state agency consent is necessary, counsel should consider reserving the chosen name for the entity. Not-For-Profit Corp. Law § 303. A relatively small fee buys 60 days and may be well worth the investment if the approval process is stalled at any point and the name of the entity is important to the client.

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Matthew Bender's New York Checklists: Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N709:1. Provisions in Certificate of Incorporation for Greater-than-Statutory Quorum and Voting Requirements of Directors.

§ 710. Place and time of meetings of the board

(a) Meetings of the board, annual, regular or special, may be held at any place within or without this state, unless otherwise provided by the certificate of incorporation or the by-laws.

(b) The time and place for holding annual or regular meetings of the board shall be fixed by or under the by-laws, or, if not so fixed, by the board.

(c) A special meeting may be called at any time by the president or other corporate officer as provided in the by-laws or as determined by the board; and, in the case of a corporation without members, by any director upon written demand of not less than one-fifth of the entire board.

HISTORY:

Add, L 1969, ch 1066, § 1; amd, L 1971, ch 1058, § 22, eff Sept 1, 1971.

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Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N710:1. Provision Limiting Place of Meeting of Board of Directors.

White, New York Business Entities Form N710:2. Provision as to Time and Place of Meeting of Board.

White, New York Business Entities Form N710:3. Provision in Bylaws for Regular and Special Meetings.

§ 711. Notice of meetings of the board

(a) Unless otherwise provided by the by-laws, regular meetings of the board may be held without notice if the time and place of such meetings are fixed by the by-laws or the board. Special meetings of the board shall be held upon notice to the directors.

(b) The by-laws may prescribe what shall constitute notice of meeting of the board. A notice, or waiver of notice, need not specify the purpose of any regular or special meeting of the board, unless required by the by-laws.

(c) Notice of a meeting need not be given to any alternate director, nor to any director who submits a waiver of notice whether before or after the meeting, or who attends the meeting without protesting, prior thereto or at its commencement, the lack of notice to him. Such waiver of notice may be written or electronic. If written, the waiver must be executed by the director signing such waiver or causing his or her signature to be affixed to such waiver by any reasonable means including but not limited to facsimile signature. If electronic, the transmission of the waiver must be sent by electronic mail and set forth, or be submitted with, information from which it can reasonably be determined that the transmission was authorized by the director.

(d) A majority of the directors present, whether or not a quorum is present, may adjourn any meeting to another time and place. If the by-laws so provide, notice of any adjournment of a meeting of the board to another time or place shall be given to the directors who were not present at the time of the adjournment and, unless such time and place are announced at the meeting, to the other directors.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970; amd, L 1970, ch 847, § 46, eff Sept 1, 1970; L 2013, ch 549, § 69, eff July 1, 2014; L 2015, ch 358, § 6, effective September 25, 2015.

Derivation Notes: Derived from Gen Corp Law §§ 28, 31.

Revision Notes: *Source:* Gen Corp L §§ 28 and 31.

Changes: Revised; new provisions.

Comment: This section is the same, both in substance and in language, as Bus Corp L § 711, which was in part derived from Model Business Corporation Act § 39.

Editor's Notes: Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

Amendment Notes: The 2015 amendment by ch 358, § 6, substituted "consent" for "waiver" in the last sentence of (c).

Notes to Decisions

1. Generally

By failing to object to propriety of notice of meeting or any other defect regarding regularity of meeting at which hospital board of trustees authorized its takeover by another hospital, plaintiff waived any objection to board's action. Union Hosp. Ass'n ex rel. Shumofsky v Carty, 185 A.D.2d 787, 586 N.Y.S.2d 798, 1992 N.Y. App. Div. LEXIS 10033 (N.Y. App. Div. 1st Dep't 1992).

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Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N711:1. Notice of Meeting of Board of Directors.

White, New York Business Entities Form N711:2. Waiver of Notice of Meeting of Board.

§ 712. Executive committee and other committees

(a) The certificate of incorporation, the by-laws, or the board may create committees of the board, each consisting of three or more directors. The board shall appoint the members of such committee of the board, except that in the case of any executive committee or similar committee however denominated, the appointment shall be made by a majority of the entire board, provided that in the case of a board of thirty members or more, the appointment shall be made by at least three-quarters of the directors present at the time of the vote, if a quorum is present at that time. In addition, the by-laws may provide that directors who are the holders of certain positions in the corporation shall be ex-officio members of specific committees. Each such committee shall have the authority of the board to the extent provided in a board resolution or in the certificate of incorporation or by-laws, except that no committee of any kind shall have authority as to the following matters:

(1) The submission to members of any action requiring members' approval under this chapter.

(2) The filling of vacancies in the board of directors or in any committee.

(3) The fixing of compensation of the directors for serving on the board or on any committee.

(4) The amendment or repeal of the by-laws or the adoption of new by-laws.

(5) The amendment or repeal of any resolution of the board which by its terms shall not be so amendable or repealable.

(6) The election or removal of officers and directors.

(7) The approval of a merger or plan of dissolution.

(8) The adoption of a resolution recommending to the members action on the sale, lease, exchange or other disposition of all or substantially all the assets of a corporation or, if there are no members entitled to vote, the authorization of such transaction.

(9) The approval of amendments to the certificate of incorporation.

(b) The board may designate one or more directors as alternate members of any committee, who may replace any absent member or members at any meeting of such committee.

(c) [Repealed]

(d) Each committee of the board shall serve at the pleasure of the board. The designation of any such committee and the delegation thereto of authority shall not alone relieve any director of his duty to the corporation under section 717 (Duty of directors and officers).

(e) Committees, other than committees of the board, whether created by the board or by the members, shall be committees of the corporation. No such committee shall have the authority to bind the board. Members of such committees of the corporation, who may be non-directors, shall be elected or appointed in the manner set forth in the by-laws, or if not set forth in the by-laws, in the same manner as officers of the corporation.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970; amd, L 1971, ch 1057 § 6; L 1971, ch 1058 § 23; L 1972, ch 961, § 12, eff Sept 1, 1972; L 2013, ch 549, §§ 70, 71, eff July 1, 2014; L 2015, ch 555, § 5, effective December 11, 2015; L 2016, ch 466, § 4, effective May 27, 2017.

Derivation Notes: Derived from Mem Corp Law § 20.

Revision Notes: *Source:* Mem Corp L § 20.

Changes: Revised; new provisions.

Comment: This section expands Mem Corp L § 20 which simply authorized the bylaws to provide for the creation of an executive committee of the board. The section is the same, both in substance and in language, as Bus Corp L § 712. Bus Corp L § 712, in part adapted from the Model Business Corporation Act § 38, changed the decisional law by authorizing delegation of policy-making power as well as ministerial duties to a committee of the board, with express restrictions on delegation of certain powers. New language has been added to make clear that other committees of the Board may be created with more limited powers, and that the appointment of committees does not relieve directors of the duties to the corporation.

Editor's Notes: Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

Amendment Notes: The 2015 amendment by ch 555, § 5, in (e), deleted "Such committees of the corporation may be elected or appointed in the same manner as officers of the corporation, but" at the beginning of the second sentence and in the last sentence, added "Members of" and "who may be non-directors"; and made stylistic changes.

The 2016 amendment by ch 466, § 4, rewrote the introductory paragraph of (a); added (a)(6) through (a)(9); and deleted the former third sentence of (e), which read:

"Provisions of this chapter applicable to officers generally shall apply to members of such committees."

PRACTICE INSIGHTS:

APPLYING PUBLIC-COMPANY CONCEPTS TO NOT-FOR-PROFIT BOARD COMMITTEES.

By Gregory J. Champion, Esq., Bond, Schoeneck & King, PLLC www.bsk.com.

General Editor, Glenn J. Bobeck, Esq., Phillips Lytle LLP www.phillipslytle.com

INSIGHT

Unless otherwise provided in the certificate of incorporation (*See*, Not-For-Profit Corporation Law § 402), the business of the corporation shall be managed by its board of directors. Not-for-Profit Corp. Law § 701. The board of directors of a not-for-profit corporation may designate executive and other committees if the corporation's certificate of incorporation and bylaws so provide. Not-for-Profit Corp. Law § 712. Not-for-Profit Corp. Law § 712 also sets forth certain duties that cannot be delegated to these committees. Practitioners can use lessons learned from Sarbanes-Oxley to better advise their clients regarding the formation of not-for-profit board committees.

ANALYSIS

Sarbanes-Oxley Act of 2002 Can Help Practitioners Advise Clients About Not-For-Profit Committee Formation.

Most provisions of the Sarbanes-Oxley Act of 2002 (SOX) apply only to publicly-traded corporations. Nevertheless, attorneys advising not-for-profit corporations should be familiar with the provisions of SOX for several reasons. First, SOX provides a roadmap for accepted standards of corporate governance. Second, some efforts have been made to apply at least some Sarbanes-Oxley provisions to New York not-for-profit corporations. Then New York Attorney General, Eliot Spitzer, initially proposed to apply SOX-like requirements to not-for-profit corporations. Although that initiative has been abandoned, the Attorney General's office continues to scrutinize activities and governance of not-for-profits. On April 5, 2005, the Senate Finance Committee held hearings on "Charities and Charitable Giving: Proposals for Reform."

SOX § 301 requires that each publicly traded corporation have an audit committee. Each member of the audit committee must be a director and must be independent (that is, not an officer or manager and not receiving compensation from the corporation for activities other than for service on the board of directors). SOX § 407 states that each audit committee should have a financial expert. If no financial expert serves on the audit committee, the reason for such failure must be disclosed.

Although not yet required by law to do so, not-for-profits should seriously consider creating audit committees and using the SOX standards as guidelines. These committees can serve an important function in overseeing the financial activities of not-for-profits and in protecting the corporation, its officers and directors, and the constituents they serve.

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ANALYSIS

Include Certain Powers in Certificate if They Are Contemplated.

Certain powers must be included in the Certificate if they are going to be granted to the corporation. For example, if the management of the not-for-profit corporation is vested in individuals other than the Board of Directors (*see Not-For-Profit Corp. Law § 701*), this power must be included in the Certificate. Similar requirements exist for the following powers: if members are required to make capital contributions other than the payment of dues (*Not-For-Profit Corp. Law § 502*); if the corporation can accept subventions (*Not-For-Profit Corp. Law § 505*); or if written consent of less than all members is permitted for certain types of corporate action (*Not-For-Profit Corp. Law § 614*).

Consider Adding Certain Permissive Powers to Certificate.

The Not-For-Profit Corporation Law permits, but does not require, the inclusion of certain provisions in the Certificate. For example, *Not-For-Profit Corp. Law § 709(a)* permits a corporation to specify that the proportion of directors or the proportion of votes of directors that shall constitute a quorum or be necessary for the transaction of business or of any specified item of business shall be greater than the proportion prescribed by statute. The Certificate may also restrict the taking of action by the Board of Directors without a meeting and by written consent (*Not-For-Profit Corp. Law § 708[b]*) or permit directors to participate in meetings via telephone conference (*Not-For-Profit Corp. Law § 708[c]*). If these actions are contemplated, the authority may be granted in the Certificate.

Pay Particularly Close Attention to "Purposes" Section of Certificate.

The Certificate must include a statement of the purpose for which the corporation has been formed. *Not-For-Profit Corp. Law § 402(a)(2)*. The practitioner should exercise caution when drafting the purposes clause because the Department typically scrutinizes this section closely. The purposes clause must be broad enough to cover not only the acts the proposed directors envision at the corporation's infancy, but also those acts the corporation may need to take as the organization matures and builds up steam. Failure to stay within the stated purposes of the entity can later create a liability for the entity and its directors, officers and members. This can easily occur if the purposes clause is narrowly constructed. It is possible to broaden the purposes clause at a later time by amending the Certificate. *See Not-For-Profit Corp. Law § 802*. The larger the organization, however, the more difficult it becomes to make sweeping changes to the fundamental structure of the organization, such as changing its charter. Also, if the Certificate required initial approval or consent from a governmental entity, the Certificate may not be amended without first obtaining court approval upon notice to the attorney general. *Not-For-Profit Corp. Law § 804*.

That said, unlike its for-profit counterpart, where broad purposes clauses are routinely accepted, the department will not accept a Not-For-Profit Certificate if its proposed purposes are too broad.

Avoid Certain Buzz Words when Drafting Certificate.

Any reference to certain buzz words will typically trigger a requirement for pre-approval or consent from a state agency prior to filing the Certificate. For example, Education Department consent may be required if the Certificate is drafted using the terms "education," "research," or "school." Private foundations seeking not-for-profit status should be sure to

include a disclaimer of Not-For-Profit Corp. Law § 404 activities that necessitate agency approval as well as the disclaimers required in Not-For-Profit Corp. Law § 406. Pre-approval requirements can delay the process significantly, particularly if the agency requires revisions to the proposed Certificate (that will in turn require internal approvals as well). If state agency consent is necessary, counsel should consider reserving the chosen name for the entity. *Not-For-Profit Corp. Law § 303*. A relatively small fee buys 60 days and may be well worth the investment if the approval process is stalled at any point and the name of the entity is important to the client.

It May Be Advisable to Limit Internal Governance Provisions in Certificate.

The certificate of incorporation may set forth any provision for the regulation of the internal affairs of the corporation that is consistent with the Not-For-Profit Corp. Law or any other New York law. Although it is permissible to add provisions relating to internal governance to the Certificate under *Not-For-Profit Corp. Law § 402(c)*, it may be more advisable to add those types of provisions to the bylaws. The dynamics of an organization change over time, and changes to operating procedures are inevitable. Changes to the Certificate require governmental filing and approval - at minimum, the Department's. Changes to the bylaws, however, require only proposal by the Board of Directors and vote of the membership - a completely transparent and internal process that is relatively painless unless the organization has grown exponentially. *See Not-For-Profit Corp. Law § 802*.

When adding internal governance provisions to the Certificate or the bylaws, ensure that those provisions are consistent with the Not-For-Profit Corp. Law. Inconsistencies can lead a court to stop the corporation in its tracks. *See Sealey v. Amer. Socy. of Hypertension, Inc.*, 26 A.D.3d 254, 810 N.Y.S.2d 48 (1st Dep't 2006).

Notes to Decisions

1. Generally

In real estate broker's action for sale commission, not-for-profit corporation could not invoke provisions of N-PCL § 509 to avoid contract where statute did not prohibit corporate officers from contracting with brokers to procure a purchaser, where corporate committee responsible for selling property had authority under N-PCL § 712 to act on board's behalf, and where, under general agency principles, committee had apparent authority to bind corporation. Shear v NRA, 606 F.2d 1251, 196 U.S. App. D.C. 344, 1979 U.S. App. LEXIS 12492 (D.C. Cir. 1979).

Agency Opinions

Analysis

1. Generally
2. Under former Membership Corporations Law § 20

1. Generally

New York City Public Development Corporation does not have authority to delegate approval of real property transactions to executive committee or another standing committee of board of directors. 1988 N.Y. Op. Att'y Gen. No. 88-35 (Informal), 1988 N.Y. AG LEXIS 37.

2. Under former Membership Corporations Law § 20

By-laws of membership corporation may provide for an executive committee of the board of directors. Requirement that at least five members of executive committee be chosen from directors of another corporation not proper. 1955 N.Y. Op. Att'y Gen. No. 227, 1955 N.Y. AG LEXIS 82.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-7 White, New York Business Entities ¶ N712.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.05. Directors.

Matthew Bender's New York Checklists: Checklist for Assessing Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 2.47.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N712:1. Provision in Certificate of Incorporation Relative to Designation of Committees.

White, New York Business Entities Form N712:2. Provision in Certificate of Incorporation Relative to Executive Committee.

White, New York Business Entities Form N712:3. Provision Permitting Designation of Committees.

White, New York Business Entities Form N712:4. Resolution of Board Creating Executive Committee.

§ 712-a. Audit oversight

(a) The board, or a designated audit committee of the board comprised solely of independent directors, of any corporation required to file an independent certified public accountant's audit report with the attorney general pursuant to subdivision one of section one hundred seventy-two-b of the executive law shall oversee the accounting and financial reporting processes of the corporation and the audit of the corporation's financial statements. The board or designated audit committee shall annually retain or renew the retention of an independent auditor to conduct the audit and, upon completion thereof, review the results of the audit and any related management letter with the independent auditor.

(b) The board, or a designated audit committee of the board comprised solely of independent directors, of any corporation required to file an independent certified public accountant's audit report with the attorney general pursuant to subdivision one of section one hundred seventy-two-b of the executive law and that in the prior fiscal year had or in the current fiscal year reasonably expects to have annual revenue in excess of one million dollars shall, in addition to those duties set forth in paragraph (a) of this section:

(1) review with the independent auditor the scope and planning of the audit prior to the audit's commencement;

(2) upon completion of the audit, review and discuss with the independent auditor: (A) any material risks and weaknesses in internal controls identified by the auditor; (B) any restrictions on the scope of the auditor's activities or access to requested information; (C) any significant disagreements between the auditor and management; and (D) the adequacy of the corporation's accounting and financial reporting processes;

(3) annually consider the performance and independence of the independent auditor; and

(4) if the duties required by this section are performed by an audit committee, report on the committee's activities to the board.

(c) [Repealed]

(d) If a corporation controls a group of corporations, the board or designated audit committee of the board of the controlling corporation may perform the

duties required by this section for one or more of the controlled corporations and, if independent directors, directors from one or more of such controlled corporations may serve on any designated audit committee of the board of such controlling corporation, and perform the duties required by this section for each corporation and any controlled corporations.

(e) Only independent directors may participate in any board or committee deliberations or voting relating to matters set forth in this section, provided that nothing in this paragraph shall prohibit the board or designated audit committee from requesting that a person with an interest in the matter present information as background or answer questions at a committee or board meeting prior to the commencement of deliberations or voting relating thereto.

(f) Any corporation that is a state authority or a local authority as defined in section two of the public authorities law and that has complied substantially with sections twenty-eight hundred two and twenty-eight hundred twenty-four of such law shall be deemed in compliance with this section.

HISTORY:

Add, L 2013, ch 549, § 72, eff July 1, 2014; L 2015, ch 555, § 6, effective December 11, 2015; L 2016, ch 466, § 5, effective May 27, 2017; L 2018, ch 468, § 1, effective December 28, 2018.

Editor's Notes: Laws 2013, ch 549, §§ 1, 132, eff July 1, 2014, provide as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

§ 132. This act shall take effect July 1, 2014, provided, however, that the amendments to section 172-b of the executive law made by section three of this act shall expire and be deemed repealed June 30, 2017; provided further that the amendments to section 172-b of the executive law made by section three-a of this act shall take effect July 1, 2017 and shall expire and be deemed repealed June 30, 2021; provided further that the amendments to section 172-b of the executive law made by section three-b of this act shall take effect July 1, 2021; provided further that the amendments to paragraph (a) of section 713 of the not-for-profit corporation law made by section seventy-three of this act shall take effect January 1, 2015; provided further that paragraph (f) of section 713 of the not-for-profit corporation law added by section seventy-three of this act shall take effect January 1, 2016; provided further that section seventy-two of this act and paragraph (b) of section 8-1.9 of the estates, powers and trusts law as added by section one hundred thirty of this act shall not be applicable until January 1, 2015 for any corporation or trust that had annual revenues of less than 10,000,000 dollars in the last fiscal year ending prior to January 1, 2014. (Amd, L 2014, ch 81, § 1, eff June 30, 2014.)

Amendment Notes: The 2015 amendment by ch 555, § 6, added "provided that nothing in this paragraph shall prohibit the board or designated audit committee from requesting that a person with an interest in the matter present information as background or answer questions at a committee or board meeting prior to the commencement of deliberations or voting relating thereto" in (e).

The 2016 amendment by ch 466, § 5, deleted former (c), which read: "The board or designated audit committee of the board shall oversee the adoption, implementation of, and compliance with any conflict of interest policy or whistleblower policy adopted by the corporation if this function is not otherwise performed by another committee of the board comprised solely of independent directors."

The 2018 amendment by ch 468, § 1, added "and, if independent directors, directors from one or more of such controlled corporations may serve on any designated audit committee of the board of such controlling corporation, and perform the duties required by this section for each corporation and any controlled corporations" in (d).

PRACTICE INSIGHTS:

NEW AUDIT OVERSIGHT REQUIREMENTS

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INSIGHT

Prior to the adoption of the New York Non-Profit Revitalization Act of 2013 ("Revitalization Act"), many practitioners used lessons learned from Sarbanes-Oxley ("SOX") to advise their clients regarding the formation of not-for-profit corporation board committees — in particular audit committees because the New York Not-for-Profit Corporation Law provided no guidance on audit oversight or audit committees. As of July 1, 2014, the effective date of the Revitalization Act's amendments, the New York Not-for-Profit Corporation Law now expressly addresses audit and financial process oversight and audit committees for certain not-for-profits. Practitioners ought carefully review these new requirements and ought advise those not-for profit corporation's covered by the statute of these new requirements. In addition, practitioners may wish to use these new requirements to guide other not-for-profits as to best practices.

ANALYSIS

The Revitalization Act amendments require New York not-for-profit corporations that file independent certified public accountant audit reports with the Attorney General's office to perform certain audit oversight functions through an audit committee or the board. Like SOX, Section 712-a of the New York Not-for-Profit Corporation Law requires an audit committee to be comprised solely of independent directors, which is a new defined term added by the Revitalization Act (*see* N-PCL § 102(a)(21)). The audit and financial process oversight required under the Revitalization Act is comparable to the requirements independent public accountants would require of the corporation, the board and an audit committee.

In particular, the board, or the board's audit committee, in either case comprised solely of independent directors, of a New York not-for-profit corporation registered in New York to make charitable solicitations and filing independent certified public accountant's audit reports with the Attorney General's office if the corporation has gross revenues of more than $750,000 (from July 1, 2017 through June 30, 2021 and $1 million thereafter) have the responsibility to:

- "oversee the accounting and financial reporting process of the corporation and audit of the corporation's financial statements."
- "annually retain or renew the retention of the independent auditor to conduct the audit, review the results of the audit and any management letter with the independent auditor."

In addition, the board or designated audit committee of a not-for-profit corporation subject to the charitable solicitation registration and Attorney General reporting requirements that "in the prior fiscal year had or in the current fiscal year reasonably expects to have annual revenues in excess of one million dollars," have heighted oversight responsibilities. These responsibilities include:

- before the audit begins, review the scope and planning of the audit with the independent auditor.
- conduct a review and discussion with the independent auditor of "material risks and weaknesses in internal controls identified by the auditor," "any restrictions on the scope of the auditor's activities or access to requested information," "any significant disagreements between the auditor and

management," and "the adequacy of the corporation's accounting and financial reporting processes.

• "annually consider the performance and independence of the auditor."

• the audit committee must make a report of its activities to the board.

The Revitalization Act permits the board or audit committee of a parent organization that controls multiple not-for-profit corporations subject to the new audit oversight requirements to perform the audit oversight duties on behalf of its subsidiary organizations.

For those organizations not subject to the Revitalization Act's audit oversight rules, *i.e.* because they are not required to file independent certified public accountant audit reports with the Attorney General's office, practitioners may want to counsel clients to follow the audit oversight rules because they represent best practices.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-7 White, New York Business Entities ¶ N712–a.01 et seq.

§ 713. Officers

(a) The board may elect or appoint a chair or president, or both, one or more vice-presidents, a secretary and a treasurer, and such other officers as it may determine, or as may be provided in the by-laws. These officers may be designated by such alternate titles as may be provided in the certificate of incorporation or the by-laws. Any two or more offices may be held by the same person, except the offices of president and secretary, or the offices corresponding thereto.

(b) The certificate of incorporation or a by-law adopted by the members may provide that all officers or that specified officers shall be elected by the members instead of by the board, or it may authorize the president to appoint the other officers, or some of them, subject to approval by the board.

(c) Each officer shall hold office for the term for which he is elected or appointed, and until his successor has been elected or appointed and qualified. Unless otherwise provided in the certificate of incorporation or the by-laws, all officers shall be elected or appointed annually.

(d) The certificate of incorporation or the by-laws may provide that any one or more officers shall be ex-officio members of the board, with voting rights unless specified otherwise.

(e) All officers as between themselves and the corporation shall have such authority and perform such duties in the management of the corporation as may be provided in the by-laws or, to the extent not so provided, by the board. The board may require any officer to give security for the faithful performance of his duties.

(f) No employee of the corporation shall serve as chair of the board or hold any other title with similar responsibilities, unless the board approves such employee serving as chair of the board by a two-thirds vote of the entire board and contemporaneously documents in writing the basis for the board approval; provided, however, that no such employee shall be considered an independent director for the purposes of this chapter.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970; amd, L 1970, ch 847, § 47; L 1971, ch 1058, § 24, eff Sept 1, 1971; L 2013, ch 549, § 73, eff July 1, 2014; L 2016, ch 466, § 6, effective January 1, 2017.

Derivation Notes: Derived from Mem Corp Law §§ 20, 45.

Revision Notes: *Source:* Mem Corp L §§ 20 and 45(1).

Changes: Completely revised.

Comment: The Mem Corp L §§ 20 and 45(1) state only that officers are to be chosen as provided by the bylaws. This section specifies that the board may elect or appoint the officers. It is based on Bus Corp L § 715, with the addition of two provisions, one in paragraph (a) authorizing the designation of officers by other titles than "president," "vice-president," "secretary" or "treasurer,"; the other, in paragraph (d) providing that there may be ex-officio members of the board who shall have voting rights, unless specified otherwise.

Editor's Notes: Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

Laws 2013, ch 549, § 132, eff July 1, 2014, provides as follows:

§ 132. This act shall take effect July 1, 2014, provided, however, that the amendments to subdivisions 1 and 2 of section 172-b of the executive law made by section three of this act shall expire and be deemed repealed June 30, 2017; provided further that the amendments to section 172-b of the executive law made by section three-a of this act shall take effect July 1, 2017 and shall expire and be deemed repealed June 30, 2021; provided further that the amendments to section 172-b of the executive law made by section three-b of this act shall take effect July 1, 2021; provided further that the amendments to paragraph (a) of section 713 of the not-for-profit corporation law made by section seventy-three of this act shall take effect January 1, 2015; provided further that paragraph (f) of section 713 of the not-for-profit corporation law added by section seventy-three of this act shall take effect January 1, 2017; provided further that section seventy-two of this act and paragraph (b) of section 8-1.9 of the estates, powers and trusts law as added by section one hundred thirty of this act shall not be applicable until January 1, 2015 for any corporation or trust that had annual revenues of less than 10,000,000 dollars in the last fiscal year ending prior to January 1, 2014 (Amd, L 2014, ch 81, § 1, eff June 30, 2014; L 2015, ch 388, § 1, eff Oct 26, 2015; L 2017, ch 78, § 1, eff June 29, 2017).

Laws 2016, ch 466, § 21, eff May 27, 2017, provides:

§ 21. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided, however, that the amendments to paragraph (f) of section 713 of the not-for-profit corporation law made by section six of this act shall take effect on the same date and in the same manner as section 132 of chapter 549 of the laws of 2013, as amended, takes effect.

Amendment Notes: The 2016 amendment by ch 466, § 6, added "unless the board approves such employee serving as chair of the board by a two-thirds vote of the entire board and contemporaneously documents in writing the basis for the board approval; provided, however, that no such employee shall be considered an independent director for the purposes of this chapter" at the end of (f).

Notes to Decisions

Analysis

1. Generally
2. Under former Membership Corporations Law § 20
3. Under former Membership Corporations Law § 45

1. Generally

Resolutions passed by board of directors of public employee labor union organized as not-for-profit corporation, by which

board reorganized union's staff in manner inconsistent with union president's organizational plan, were in conflict with provision of union's bylaws stating that "President shall be responsible for the organization and direction of the staff of the Association," constituted attempt to usurp authority given by members to president, and were therefore void. Simoni v Civil Service Employees Ass'n, Local 1000, etc., 133 Misc. 2d 1, 507 N.Y.S.2d 371, 1986 N.Y. Misc. LEXIS 2958 (N.Y. Sup. Ct. 1986).

Because a union's bylaws complied with N.Y. Not-for-Profit Corp. Law § 713(b), (e), its officers could suspend a police officer for refusing to relinquish an assignment that violated the collective bargaining agreement; thus, the officer's N.Y. C.P.L.R. art. 78 reinstatement petition was properly dismissed for failing to state a cause of action. Matter of Berich v Ithaca Police Benevolent Assn., Inc., 23 A.D.3d 904, 804 N.Y.S.2d 833, 2005 N.Y. App. Div. LEXIS 13137 (N.Y. App. Div. 3d Dep't 2005).

2. Under former Membership Corporations Law § 20

An election of officers will be set aside and a new election ordered where by amending the bylaws of a membership corporation organized for charitable purposes certain of the members thereof overthrew the long established custom of the corporation to elect only candidates for office who had been nominated in advance, thereby unfairly depriving the members of the corporation in effect of their right to vote in the election, inasmuch as under the pre-existing bylaws few of the members attended such meetings. In re Flushing Hospital & Dispensary, 288 N.Y. 125, 41 N.E.2d 917, 288 N.Y. (N.Y.S.) 125, 1942 N.Y. LEXIS 1064 (N.Y. 1942).

An election of officers will be set aside and a new election ordered where by amending the bylaws of a membership corporation organized for charitable purposes certain of the members thereof overthrew the long established custom of the corporation to elect only candidates for office who had been nominated in advance, thereby unfairly depriving the members of the corporation in effect of their right to vote in the election, inasmuch as under the pre-existing bylaws few of the members attended such meetings. In re Flushing Hospital & Dispensary, 288 N.Y. 125, 41 N.E.2d 917, 288 N.Y. (N.Y.S.) 125, 1942 N.Y. LEXIS 1064 (N.Y. 1942).

A bylaw of a corporation fixing the salary of its president may be validly modified by an agreement whereby the president accepts a lower salary in consideration of being continued in office. Bowler v American Box Strap Co., 49 N.Y.S. 153, 22 Misc. 335, 1898 N.Y. Misc. LEXIS 32 (N.Y. App. Term 1898).

A provision of a union constitution which would suppress the protests of members against the actions of their officers which such members regard as improper or opposed to their best interests, would be illegal and unenforceable. Schrank v Brown, 80 N.Y.S.2d 452, 192 Misc. 80, 1948 N.Y. Misc. LEXIS 2586 (N.Y. Sup. Ct. 1948).

Where bylaws make no provision for filling the office of president, in the event of the resignation of the president and certain other officers designated to be in succession for the office, one who becomes head of the organization by the action of its members is the de facto president with the powers and duties of that office. Petition of Serenbetz, 46 N.Y.S.2d 475, 1943 N.Y. Misc. LEXIS 2788 (N.Y. Sup. Ct. 1943), aff'd, 267 A.D. 836, 46 N.Y.S.2d 127, 1944 N.Y. App. Div. LEXIS 5031 (N.Y. App. Div. 1944).

In the absence of any bylaw provision relating thereto, in the event of the resignation of an officer of a club, where the members refuse to accept such resignation, the officer, whether he knows it or not, continues to hold office. Petition of Serenbetz, 46 N.Y.S.2d 475, 1943 N.Y. Misc. LEXIS 2788 (N.Y. Sup. Ct. 1943), aff'd, 267 A.D. 836, 46 N.Y.S.2d 127, 1944 N.Y. App. Div. LEXIS 5031 (N.Y. App. Div. 1944).

Any attempt in the by-laws of a membership corporation to invest its Board of Trustees or anyone else with power to void an election of officers would contravene the provisions of this section. Veverka v Suffolk County Patrolemen's Benevolent Asso., 236 N.Y.S.2d 917 (N.Y. Sup. Ct. 1963).

If a bylaw for the election of directors has not been adopted, a valid election may be held under the General Corporation Law on the call of any member of the corporation. In re David Jones Co., 22 N.Y.S. 318, 67 Hun 360 (1893).

3. Under former Membership Corporations Law § 45

A national union may not prevent the directors of an incorporated local union affiliated with the national organization from removing the president of the local in accordance with the bylaws thereof. Kunze v Weber, 197 A.D. 319, 188 N.Y.S. 644, 1921 N.Y. App. Div. LEXIS 7459 (N.Y. App. Div. 1921).

Where the bylaws of a membership corporation failed to define a quorum where the membership of the corporation consisted of less than thirty members, in view of the provisions of § 20 of the Membership Corporation Law a meeting at which nine members participated had a quorum, and an election of officers at such meeting was valid. Application of Havender, 44 N.Y.S.2d 213, 181 Misc. 989, 1943 N.Y. Misc. LEXIS 2935 (N.Y. Sup. Ct. 1943).

An officer of a membership corporation may not be held criminally liable for the violation of a penal statute by the corporation. People v Smith, 74 N.Y.S.2d 845, 190 Misc. 871, 1947 N.Y. Misc. LEXIS 3319 (N.Y. Magis. Ct. 1947).

Where the bylaws make no provision for filling the office of president, in the event of the resignation or incapacity of the president and certain other officers designated to be in succession for the office, one who becomes head of the organization by the action of its members is the de facto president with powers and duties of that office. Petition of Serenbetz, 46 N.Y.S.2d 475, 1943 N.Y. Misc. LEXIS 2788 (N.Y. Sup. Ct. 1943), aff'd, 267 A.D. 836, 46 N.Y.S.2d 127, 1944 N.Y. App. Div. LEXIS 5031 (N.Y. App. Div. 1944).

In the absence of any bylaw provision relating thereto, in the event of the resignation of an officer of a club, where the members refuse to accept such resignation, the officer whether he knows it or not continues to hold office. Petition of Serenbetz, 46 N.Y.S.2d 475, 1943 N.Y. Misc. LEXIS 2788 (N.Y. Sup. Ct. 1943), aff'd, 267 A.D. 836, 46 N.Y.S.2d 127, 1944 N.Y. App. Div. LEXIS 5031 (N.Y. App. Div. 1944).

Activity of certain officers of a membership corporation information, and as members, of an allegedly competing and hostile organization, could not bar them from examining its books and records as long as no action had been taken to remove them from office. Pino v United Democratic Regular Organization, 195 N.Y.S.2d 860 (N.Y. Sup. Ct. 1959).

Agency Opinions

Analysis

1. Generally
2. Under former Membership Corporations Law § 45

1. Generally

If permitted in the by-laws or the certificate of incorporation of a not-for-profit corporation, minors may be members and hold office in the corporation. 1984 N.Y. Op. Att'y Gen. No. 84-64.

Under Sections 10-1000 et seq. of the Village Law, a village fire department is a corporation consisting of members of all the fire, hose, protective and hook and ladder companies of a village; it is administered by a board of fire commissioners or, where no board of fire commissioners has been appointed, by the village board of trustees and the council of the fire department. Fire companies in a village are associations or corporations, which must operate in accordance with their certificates of incorporation, bylaws, and statutes; and, although fire companies are separate and distinct from the village, the statutes do permit village authorities to exercise a certain degree of control over their organization, incorporation, governance, and membership, including residency for membership. A fire company must consent to a contract for the provision of fire protection outside the village and the fire chief of the village fire department cannot consent on behalf of members of the company. 1990 Op St Compt 90-19.

2. Under former Membership Corporations Law § 45

A secretary and treasurer of a village fire department must be appointed by the council of a village fire department. 1965 NY Ops Atty Gen July 21 (Informal), 1965 N.Y. AG LEXIS 111.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-7 White, New York Business Entities ¶ N713.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.06. Officers.

Matthew Bender's New York Checklists: Checklist for Identifying Management and Structure of Business Issues When Selecting Form of Business Entity LexisNexis AnswerGuide New York Business Entities § 2.11.

Checklist for Assessing Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 2.47.

Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N713:1. Provision in Certificate of Incorporation for Election of Officers by Members.

White, New York Business Entities Form N713:2. Resolution of Board of Directors Requiring Officer to Give Security for Faithful Performance of Duties.

White, New York Business Entities Form N713:3. Treasurer's Bond (Individual Sureties).

White, New York Business Entities Form N713:4. Resolution of Board of Directors Appointing President and Other Officers.

White, New York Business Entities Form N713:5. Resolution of Board of Directors Fixing President's Salary.

§ 714. Removal of officers

(a) Any officer elected or appointed by the board may be removed by the board with or without cause. An officer elected by the members or a class of members may be removed, with or without cause, only by the vote of the members or such class of members, but his authority to act as an officer may be suspended by the board for cause.

(b) The removal of an officer without cause shall be without prejudice to his contract rights, if any. The election or appointment of an officer shall not of itself create contract rights.

(c) An action to procure a judgment removing an officer for cause may be brought by the attorney-general, by any director, by ten percent of the members, whether or not entitled to vote, or by the holders of ten percent of the face value of the outstanding capital certificates, subvention certificates or bonds having voting rights. The court may bar from re-election or reappointment any officer so removed for a period fixed by the court.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970.

Derivation Notes: Derived from Gen Corp Law §§ 60, 136.

Revision Notes: *Source:* Gen Corp L §§ 60(3), 60(4), and 136.

Changes: Reworded and revised; new provisions.

Comment: This section, derived from Bus Corp L § 716, retains, with additions, the substance of existing statutory and case law. Paragraph (c) includes new provisions extending the right to institute an action to remove a director for cause to any director, the holders of ten per cent of the face value of outstanding securities with voting rights, and to ten per cent of the members whether or not entitled to vote in order to insure that these interested persons will have standing to protect the corporation.

Notes to Decisions

1. Generally

Employee's N.Y. Not-for-Profit Corp. Law § 714 claim that alleged that an employee's supervisor improperly removed the employee from his position as an officer of an employer was moot as the board of directors later removed the employee from his position as an officer of the employer. Waddell v Boyce Thompson Inst. for Plant Research, Inc., 92 A.D.3d 1172, 940 N.Y.S.2d 331, 2012 N.Y. App. Div. LEXIS 1369 (N.Y. App. Div. 3d Dep't), app. denied, 19 N.Y.3d 805, 948 N.Y.S.2d 579, 971 N.E.2d 861, 2012 N.Y. LEXIS 1306 (N.Y. 2012).

Agency Opinions

1. Generally

A volunteer member of a fire company may be removed in accordance with the constitution and by-laws of the company. 1985 N.Y. Op. Att'y Gen. No. 85-17.

The attorney general or one or more members of the Medina Firemen's Benevolent Association having standing to bring an action to challenge improper disbursements by this not-for-profit corporation. 1979 Op St Compt No. 79–238-A.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-7 White, New York Business Entities ¶ N714.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.06. Officers.

Matthew Bender's New York Checklists: Checklist for Identifying Management and Structure of Business Issues When Selecting Form of Business Entity LexisNexis AnswerGuide New York Business Entities § 2.11.

Checklist for Assessing Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 2.47.

Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N714:1. Resolution of Board of Directors Removing Officer.

White, New York Business Entities Form N714:2. Resolution of Board Suspending Officer for Cause.

White, New York Business Entities Form N714:3. Complaint in Action by Member to Remove Officer.

White, New York Business Entities Form N714:4. Judgment Removing Officer for Cause and Barring from Further Office.

§ 715. Related party transactions

(a) No corporation shall enter into any related party transaction unless the transaction is determined by the board, or an authorized committee thereof, to be fair, reasonable and in the corporation's best interest at the time of such determination. Any director, officer or key person who has an interest in a related party transaction shall disclose in good faith to the board, or an authorized committee thereof, the material facts concerning such interest.

(b) With respect to any related party transaction involving a charitable corporation and in which a related party has a substantial financial interest, the board of such corporation, or an authorized committee thereof, shall:

(1) Prior to entering into the transaction, consider alternative transactions to the extent available;

(2) Approve the transaction by not less than a majority vote of the directors or committee members present at the meeting; and

(3) Contemporaneously document in writing the basis for the board or authorized committee's approval, including its consideration of any alternative transactions.

(c) The certificate of incorporation, by-laws or any policy adopted by the board may contain additional restrictions on related party transactions and additional procedures necessary for the review and approval of such transactions, or provide that any transaction in violation of such restrictions shall be void or voidable.

(d) Unless otherwise provided in the certificate of incorporation or the by-laws, the board shall have authority to fix the compensation of directors for services in any capacity.

(e) The fixing of compensation of officers, if not done in or pursuant to the by-laws, shall require the affirmative vote of a majority of the entire board unless a higher proportion is set by the certificate of incorporation or by-laws.

(f) The attorney general may bring an action to enjoin, void or rescind any related party transaction or proposed related party transaction that violates any provision of this chapter or was otherwise not reasonable or in the best interests of the corporation at the time the transaction was approved, or to seek restitution, and the removal of directors or officers, or seek to require any person or entity to:

(1) Account for any profits made from such transaction, and pay them to the corporation;

(2) Pay the corporation the value of the use of any of its property or other assets used in such transaction;

(3) Return or replace any property or other assets lost to the corporation as a result of such transaction, together with any income or appreciation lost to the corporation by reason of such transaction, or account for any proceeds of sale of such property, and pay the proceeds to the corporation together with interest at the legal rate; and

(4) Pay, in the case of willful and intentional conduct, an amount up to double the amount of any benefit improperly obtained.

(g) The powers of the attorney general provided in this section are in addition to all other powers the attorney general may have under this chapter or any other law.

(h) No related party may participate in deliberations or voting relating to a related party transaction in which he or she has an interest; provided that nothing in this section shall prohibit the board or authorized committee from requesting that a related party present information as background or answer questions concerning a related party transaction at a board or committee meeting prior to the commencement of deliberations or voting relating thereto.

(i) In an action by any person or entity other than the attorney general, it shall be a defense to a claim of violation of any provisions of this section that a transaction was fair, reasonable and in the corporation's best interest at the time the corporation approved the transaction.

(j) In an action by the attorney general with respect to a related party transaction not approved in accordance with paragraphs (a) or (b) of this section at the time it was entered into, whichever is applicable, it shall be a defense to a claim of violation of any provisions of this section that (1) the transaction was fair, reasonable and in the corporation's best interest at the time the corporation approved the transaction and (2) prior to receipt of any request for information by the attorney general regarding the transaction, the board has: (A) ratified the transaction by finding in good faith that it was fair, reasonable and in the corporation's best interest at the time the corporation approved the transaction; and, with respect to any related party transaction involving a charitable corporation and in which a related party has a substantial financial interest, considered alternative transactions to the extent available, approving the transaction by not less than a majority vote of the directors or committee members present at the meeting; (B) documented in writing the nature of the violation and the basis for the board's or committee's ratification of the transaction; and (C) put into place procedures to ensure that the corporation complies with paragraphs (a) and (b) of this section as to related party transactions in the future.

HISTORY:

Add, L 1969, ch 1066, § 1; amd, L 1970, ch 847, § 48, eff Sept 1, 1970; L 1971, ch 1057, § 7, eff July 2, 1971; L 2013, ch 549, § 74, eff July 1, 2014; L 2015, ch 555, § 7, effective December 11, 2015; L 2016, ch 466, § 7, effective May 27, 2017.

Derivation Notes: Derived from Mem Corp Law § 47.

Revision Notes: *Source:* Mem Corp L § 47.

Changes: Revised; new provisions.

Comment: This section eliminates the provisions of Mem Corp L § 47 permitting contracts with interested directors and officers if authorized in the bylaws or by the concurring vote of two-thirds of the directors. It follows generally Bus Corp L § 713, extended to apply to officers as well as to directors. As with the Bus Corp L, the function of this section is not to provide a basis for validating for all purposes a contract or other transaction between an interested director or officer and his corporation, but simply to establish that such contract or transaction is not automatically void or voidable by reason alone of the director's or officer's interest. However, the Bus Corp L provided three independent criteria to be applied in this respect: disclosure to shareholders (members), disclosure to directors, or fairness of the transaction to the corporation. This section requires fairness in all cases, and then provides for disclosure in the alternative to members or to directors. Paragraph (c) follows the Bus Corp L with respect to compensation to directors. Paragraph (d) is new; it is designed to impede syphoning of corporate funds to officers.

Editor's Notes: Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

Amendment Notes: The 2015 amendment by ch 555, § 7, substituted "compensation" for "salaries" in (e); redesignated the former second version of (f) as (g); redesignated former (g) as (h); and in (h), substituted "a related party transaction in which he or she has an interest" for "matters set forth in this section" and added "as background or answer questions."

The 2016 amendment by ch 466, § 7, in (a), added "or an authorized committee thereof" in the first sentence and substituted "key person" for "key employee" in the second sentence; and added (i) and (j).

Notes to Decisions

Analysis

1. Generally
2. Under former Membership Corporations Law § 47

1. Generally

Attorney general could not challenge the compensation of the former chairman of the New York Stock Exchange as not being approved in accordance with N.Y. Not-for-Profit Corp. Law § 715(f) as § 715 provided that only the non-profit corporation had the power to avoid contracts or transactions between the corporation and its officers or directors. People v Grasso, 11 N.Y.3d 64, 862 N.Y.S.2d 828, 893 N.E.2d 105, 2008 N.Y. LEXIS 1821 (N.Y. 2008).

Dismissal of petitioner's action seeking rescission of management fees for a non-profit was reversed because that cause of action was dependent upon resolution of issues of fact related to whether respondents engaged in improper related party transactions or otherwise transferred the senior living facility's surplus to benefit the non-profit and its other affiliates. Matter of The People of The State of New York v The Lutheran Care Network, Inc., 167 A.D.3d 1281, 92 N.Y.S.3d 154, 2018 N.Y. App. Div. LEXIS 8666 (N.Y. App. Div. 3d Dep't 2018).

Trial court denied the stock exchange chairman's motion to dismiss, as the Attorney General had the statutory responsibility to protect investors, had the authority to pursue the stock exchange chairman under the doctrine of parens patriae because they could not protect themselves from the allegedly unreasonable compensation that the New York Stock Exchange, a type A not-for-profit corporation, allowed him to receive, and the Attorney General stated four viable claims against him: for imposition of a constructive trust and for restitution for ultra vires payments allegedly received, for payment had and received, for violation of N.Y. Not-for-Profit Corp. Law § 715 for benefits he received that were improperly approved, and for violation of N.Y. Not-for-Profit Corp. Law for his allegedly receiving improper loans. People v Grasso, 816 N.Y.S.2d 863, 12 Misc. 3d 384, 235 N.Y.L.J. 54, 2006 N.Y. Misc. LEXIS 484 (N.Y. Sup. Ct. 2006), rev'd, 42 A.D.3d 126, 836 N.Y.S.2d 40, 2007 N.Y. App. Div. LEXIS 5719 (N.Y. App. Div. 1st Dep't 2007).

2. Under former Membership Corporations Law § 47

Where the plaintiff was a director and an officer of the defendant membership corporation, she should be denied a recovery on a lease under this section, for the by-laws of the defendant do not authorize the making of a contract with any officer or director, and it is not claimed that any such authority was given by resolution of the board which was concurred in by two-thirds of the directors. Knapp v Rochester Dog Protective Ass'n, 235 A.D. 436, 257 N.Y.S. 356, 1932 N.Y. App. Div. LEXIS 7981 (N.Y. App. Div. 1932).

Directors of a membership corporation organized chiefly for charitable purposes were directed to file inventory, account and statement of transactions during 12 months next preceding the granting of the order, where it appeared that the members of the corporation, under the guise of voting compensation to themselves for past services, sought to divide the assets among themselves. Distribution of the assets of a membership corporation whose purposes were charitable among the membership, even on dissolution, would be improper. It was also immaterial that the petitioner, a member of the corporation, might be estopped to object to the resolution for payment of compensation since the supreme court, may act on its own motion. In re Green, 10 Misc. 2d 557, 177 N.Y.S.2d 933, 1957 N.Y. Misc. LEXIS 2680 (N.Y. Sup. Ct. 1957).

Notes to Unpublished Decisions

1. Generally

Unpublished decision: Other than a notation of "loan" on some deposit slips and checks issued by appellant director to a nonprofit corporate debtor, lack of documentation as to the terms of a loan, and lack of evidence the debtor intended to accept a loan, supported bankruptcy court's finding that the advances were donations, not loans; it was unreasonable to interpret an injunction preventing other directors from interfering with administration of the corporation's children's camp as authorizing the director to both make the loan to the corporation and accept the loan on its behalf because N.Y. Not-for-Profit Corp. Law § 715(a), (b), prohibited such self-dealing, unless, at a minimum, the board was informed of the material facts of the transaction and there was no evidence the old board or a properly constituted new board was so informed as to the purported loans or that any board authorized the loans at any time. Machne Menachem, Inc. v Spritzer, 456 Fed. Appx. 163, 2012 U.S. App. LEXIS 33 (3d Cir. Pa. 2012).

Agency Opinions

1. Generally

The Town of Hempstead Local Development Corporation is authorized to compensate its directors by reason of rendering services in effecting its corporate purposes. 1977 NY Ops Atty Gen March 29 (Informal), 1977 N.Y. AG LEXIS 135.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-7 White, New York Business Entities ¶ N715.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.05. Directors.

New York Practice Guide: Business and Commercial § 8.06. Officers.

Matthew Bender's New York Checklists: Checklist for Identifying Management and Structure of Business Issues When Selecting Form of Business Entity LexisNexis AnswerGuide New York Business Entities § 2.11.

Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N715:1. Provision Relating to Contracts with Interested Directors or Officers.

White, New York Business Entities Form N715:2. Provision Permitting Fixing Directors' Compensation.

White, New York Business Entities Form N715:3. Provision Restricting Directors' Compensation.

§ 715-a. Conflict of interest policy

(a) Except as provided in paragraph (d) of this section, the board shall adopt, and oversee the implementation of, and compliance with, a conflict of interest policy to ensure that its directors, officers and key persons act in the corporation's best interest and comply with applicable legal requirements, including but not limited to the requirements set forth in section seven hundred fifteen of this article.

(b) The conflict of interest policy shall include, at a minimum, the following provisions:

(1) a definition of the circumstances that constitute a conflict of interest;

(2) procedures for disclosing a conflict of interest or possible conflict of interest to the board or to a committee of the board, and procedures for the board or committee to determine whether a conflict exists;

(3) a requirement that the person with the conflict of interest not be present at or participate in board or committee deliberation or vote on the matter giving rise to such conflict, provided that nothing in this section shall prohibit the board or a committee from requesting that the person with the conflict of interest present information as background or answer questions at a committee or board meeting prior to the commencement of deliberations or voting relating thereto;

(4) a prohibition against any attempt by the person with the conflict to influence improperly the deliberation or voting on the matter giving rise to such conflict;

(5) a requirement that the existence and resolution of the conflict be documented in the corporation's records, including in the minutes of any meeting at which the conflict was discussed or voted upon; and

(6) procedures for disclosing, addressing, and documenting related party transactions in accordance with section seven hundred fifteen of this article.

(c) The conflict of interest policy shall require that prior to the initial election of any director, and annually thereafter, such director shall complete, sign and submit to the secretary of the corporation or a designated compliance officer a written statement identifying, to the best of the director's knowledge, any entity of which such director is an officer, director, trustee, member, owner (either as a sole proprietor or a partner), or employee and with which the corporation has a relationship, and any transaction in which the corporation is a participant and in which the director might have a conflicting interest. The policy shall require that each director annually resubmit such written statement. The secretary of the corporation or the designated compliance officer shall provide a copy of all completed statements to the chair of the audit committee or, if there is no audit committee, to the chair of the board.

(d) A corporation that has adopted and possesses a conflict of interest policy pursuant to federal, state or local laws that is substantially consistent with the provisions of paragraph (b) of this section shall be deemed in compliance with provisions of this section. In addition, any corporation that is a state authority or a local authority as defined in section two of the public authorities law, and that has complied substantially with section twenty-eight hundred twenty-four and subdivision three of section twenty-eight hundred twenty-five of such law, shall be deemed in compliance with this section.

(e) Nothing in this section shall be interpreted to require a corporation to adopt any specific conflict of interest policy not otherwise required by this section or any other law or rule, or to supersede or limit any requirement or duty governing conflicts of interest required by any other law or rule.

HISTORY:

Add, L 2013, ch 549, § 75, eff July 1, 2014; L 2015, ch 555, §§ 8, 9, effective December 11, 2015; L 2016, ch 466, §§ 8, 9, effective May 27, 2017.

Editor's Notes: Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

Amendment Notes: The 2015 amendment by ch 555, §§ 8, 9, added "provided that nothing in this section shall prohibit the board or a committee from requesting that the person with the conflict of interest present information as background or answer questions at a committee or board meeting prior to the commencement of deliberations or voting relating thereto" in (b)(3) and in (c), added "or a designated compliance officer" in the first sentence and added "or the designated compliance officer" in the last sentence.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-7 White, New York Business Entities ¶ N715–a.01 et seq.

§ 715-b. Whistleblower policy

(a) Except as provided in paragraph (c) of this section, the board of every corporation that has twenty or more employees and in the prior fiscal year had annual revenue in excess of one million dollars shall adopt, and oversee the implementation of, and compliance with, a whistleblower policy to protect from retaliation persons who report suspected improper conduct. Such policy shall provide that no director, officer, key person, employee or volunteer of a corporation who in good faith reports any action or suspected action taken by or within the corporation that is illegal, fraudulent or in violation of any adopted policy of the corporation shall suffer intimidation, harassment, discrimination or other retaliation or, in the case of employees, adverse employment consequence.

(b) The whistleblower policy shall include the following provisions:

(1) Procedures for the reporting of violations or suspected violations of laws or corporate policies, including procedures for preserving the confidentiality of reported information;

(2) A requirement that an employee, officer or director of the corporation be designated to administer the whistleblower policy and to report to the board or an authorized committee thereof, except that directors who are employees may not participate in any board or committee deliberations or voting relating to administration of the whistleblower policy;

(3) A requirement that the person who is the subject of a whistleblower complaint not be present at or participate in board or committee deliberations or vote on the matter relating to such complaint, provided that nothing in this subparagraph shall prohibit the board or committee from requesting that the person who is subject to the complaint

present information as background or answer questions at a committee or board meeting prior to the commencement of deliberations or voting relating thereto; and

(4) A requirement that a copy of the policy be distributed to all directors, officers, key persons, employees and to volunteers who provide substantial services to the corporation. For purposes of this subdivision, posting the policy on the corporation's website or at the corporation's offices in a conspicuous location accessible to employees and volunteers are among the methods a corporation may use to satisfy the distribution requirement.

(c) A corporation that has adopted and possesses a whistleblower policy pursuant to federal, state or local laws that is substantially consistent with the provisions of paragraph (b) of this section shall be deemed in compliance with provisions of this section. In addition, any corporation that is a state authority or local authority as defined in section two of the public authorities law, and that has complied substantially with section twenty-eight hundred twenty-four of such law and is subject to the provisions of section twenty-eight hundred fifty-seven of such law, shall be deemed in compliance with the provisions of this section.

(d) Nothing in this section shall be interpreted to relieve any corporation from any additional requirements in relation to internal compliance, retaliation, or document retention required by any other law or rule.

HISTORY:

Add, L 2013, ch 549, § 75, eff July 1, 2014; L 2015, ch 555, § 10, effective December 11, 2015; L 2016, ch 466, §§ 10, 11, effective May 27, 2017; L 2019, ch 445, § 1, effective November 8, 2019.

Editor's Notes: Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

Amendment Notes: The 2015 amendment by ch 555, § 10, added the second sentence of (b)(3).

The 2016 amendment by ch 466, §§ 10, 11, in the first sentence of (a), substituted "the board of every corporation" for "every corporation" and added "and oversee the implementation of, and compliance with"; substituted "the board or an authorized committee thereof, except that directors who are employees may not participate in any board or committee deliberations or voting relating to administration of the whistleblower policy" for "the audit committee or other committee of independent directors or, if there are no such committees, to the board" in (b)(2); added(b)(3); redesignated former (b)(3) as (b)(4); and made a related change.

The 2019 amendment by ch 445, § 1, added "key person" in the second sentence of (a); and added "key persons" in the first sentence of (b)(4).

NOTES TO DECISIONS

Trial court erred by dismissing an employee's claim because this section creates an implied private right of action for employees who are retaliated against or subject to adverse employment consequences as a result of whistleblowing activities. Dismissal on the grounds that the employer had fewer than 20 employees was improper because the submissions did not conclusively establish the number of employees or that the single employer doctrine or the joint employer doctrine did not apply. Ferris v Lustgarten Found., 2020 N.Y. App. Div. LEXIS 7540 (N.Y. App. Div. 2d Dep't 2020).

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-7 White, New York Business Entities ¶ N715–b.01 et seq.

§ 716. Loans to directors, officers and key persons

No loans, other than through the purchase of bonds, debentures, or similar obligations of the type customarily sold in public offerings, or through ordinary deposit of funds in a bank, shall be made by a corporation to its directors, officers or key persons, or to any other corporation, firm, association or other entity in which one or more of its directors, officers or key persons are directors, officers or key persons or hold a substantial financial interest, except a loan by one charitable corporation to another charitable corporation. A loan made in violation of this section shall be a violation of the duty to the corporation of the directors or officers authorizing it or participating in it, but the obligation of the borrower with respect to the loan shall not be affected thereby.

HISTORY:

Add, L 1969, ch 1066, § 1; amd, L 1970, ch 847, § 49; L 1971, ch 644, eff Sept 1, 1971; L 2013, ch 549, § 76, eff July 1, 2014; L 2019, ch 445, § 2, effective November 8, 2019.

Revision Notes: *Source:* Mem Corp L § 47.

Changes: Completely revised.

Comment: This section is derived in part from Model Nonprofit Corporation Act § 27 and in part from Bus Corp L § 714. The prohibition applies both to directors and officers. The Mem Corp L did not expressly refer to loans, and it is not clear whether a loan would be properly included in the expression "salary, compensation or emolument" or in the expression "contract relating to the operations conducted by the corporation" or "contract for furnishing supplies." To the extent that the Mem Corp L did not prohibit loans to officers and directors, the existing law is changed.

Editor's Notes Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

Amendment Notes The 2019 amendment by ch 445, § 2, added "and key persons" in the section heading; added "or key persons" three times in the first sentence; and made related changes.

Notes to Decisions

1. Generally

While the attorney general had the authority to pursue a claim that alleged that certain advance payments from a supplemental retirement plan for the former chairman of the New York Stock Exchange constituted an improper loan under N.Y. Not-for-Profit Corp. Law § 716, the claim pleaded disregarded the knowledge element that other statutory claims under N.Y. Not-for-Profit Corp. Law §§ 719(3) and 720(a)(2) had to allege and, thus, had to be dismissed. People v Grasso, 11 N.Y.3d 64, 862 N.Y.S.2d 828, 893 N.E.2d 105, 2008 N.Y. LEXIS 1821 (N.Y. 2008).

Trial court denied the stock exchange chairman's motion to dismiss, as the Attorney General had the statutory responsibility to protect investors, had the authority to pursue the stock exchange chairman under the doctrine of parens patriae because they could not protect themselves from the allegedly unreasonable compensation that the New York Stock Exchange, a type A not-for-profit corporation, allowed him to receive, and the Attorney General stated four viable claims against him: for imposition of a constructive trust and for restitution for ultra vires payments allegedly received, for payment had and received, for violation of N.Y. Not-for-Profit Corp. Law § 715 for benefits he received that

were improperly approved, and for violation of N.Y. Not-for-Profit Corp. Law for his allegedly receiving improper loans. People v Grasso, 816 N.Y.S.2d 863, 12 Misc. 3d 384, 235 N.Y.L.J. 54, 2006 N.Y. Misc. LEXIS 484 (N.Y. Sup. Ct. 2006), rev'd, 42 A.D.3d 126, 836 N.Y.S.2d 40, 2007 N.Y. App. Div. LEXIS 5719 (N.Y. App. Div. 1st Dep't 2007).

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-7 White, New York Business Entities ¶ N716.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.05. Directors.

New York Practice Guide: Business and Commercial § 8.06. Officers.

Matthew Bender's New York Checklists: Checklist for Assessing Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 2.47.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

§ 717. Duty of directors, officers and key persons

(a) Directors, officers and key persons shall discharge the duties of their respective positions in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances. The factors set forth in subparagraph one of paragraph (e) of section 552 (Standard of conduct in managing and investing an institutional fund), if relevant, must be considered by a governing board delegating investment management of institutional funds pursuant to section 514 (Delegation of investment management) For purposes of this paragraph, the term institutional fund is defined in section 551 (Definitions).

(b) In discharging their duties, directors, officers and key persons, when acting in good faith, may rely on information, opinions, reports or statements including financial statements and other financial data, in each case prepared or presented by: (1) one or more officers or employees of the corporation, whom the director believes to be reliable and competent in the matters presented, (2) counsel, public accountants or other persons as to matters which the directors, officers or key persons believe to be within such person's professional or expert competence or (3) a committee of the board upon which they do not serve, duly designated in accordance with a provision of the certificate of incorporation or the bylaws, as to matters within its designated authority, which committee the directors, officers or key persons believe to merit confidence, so long as in so relying they shall be acting in good faith and with that degree of care specified in paragraph (a) of this section. Persons shall not be considered to be acting in good faith if they have knowledge concerning the matter in question that would cause such reliance to be unwarranted. Persons who so perform their duties shall have no liability by reason of being or having been directors, officers or key persons of the corporation.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970; amd, L 1978, ch 690, § 8, eff July 25, 1978; L 1988, ch 734, § 1, eff Dec 16, 1988; L 2010, ch 490, § 7, eff Sept 17, 2010; L 2019, ch 445, § 3, effective November 8, 2019.

Revision Notes: *Source:* None.

Changes: Completely new.

Comment: This section is the same as Bus Corp L § 717, revised only in that the single paragraph of Bus Corp L § 717 has been divided into paragraph (a), stating the standard of care, and paragraph (b), creating a presumption that a director or officer performs his duties as defined if his decisions are made in good faith reliance on reports of properly designated corporate officers and accountants. As the comments to Bus Corp L § 717 make clear, the standard of care may vary according to the kind of corporation involved, and the particular circumstances in which the director is called upon to act. Accordingly, the standard as set forth in paragraph (a) is considered flexible enough to meet the many differing circumstances of the various types of nonprofit corporations.

Editor's Notes: Laws 1978, ch 690, § 11, provides as follows:

§ 11. This act may be cited as the "New York management of institutional.funds act".

Amendment Notes The 2019 amendment by ch 445, § 3, added "and key persons" in the section heading; added "and key persons" in the first sentence of (a) and in the introductory language of (b); added "or key persons" three times in (b); and made related changes.

PRACTICE INSIGHTS:

NOT ALL GIFTS ARE CREATED EQUAL — SPECIAL CONSIDERATIONS FOR ENDOWMENT FUNDS, NEW YORK'S PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT

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INSIGHT

A donor may designate a gift as an "endowment fund," a label that is more important than it may appear at first glance. Essentially, an endowment is a gift that establishes a permanent source of income to a not-for-profit corporation for a designated purpose. It should be determined immediately upon receipt if a gift is (or could be) an endowment fund. If so, the funds should be administered and accounted for appropriately.

Prior to September 17, 2010, a not-for-profit corporation could not spend the principal, "historic dollar value", of endowment funds. The entity could only spend the "net appreciation" on principal. After adoption of the New York Prudent Management of Institutional Funds Act ("NYPMIFA"), not-for-profit corporations now have greater flexibility in using these funds and in obtaining relief from restrictions imposed on use of these funds. The new law ought be carefully reviewed in determining how to expend endowment funds created both before and after adoption of the NYPMIFA.

ANALYSIS

Determine whether fund in question is in fact endowment fund.

The analysis begins with a look at the gift instrument itself. This instrument can be any written document in which the gift is made and defined (for example, will, trust, court order). *See* Not-For-Profit Corp. Law § 551. If the gift instrument expressly establishes an "endowment" or "permanent" fund that is "not wholly expendable by institution on a current basis" it is an endowment fund. Not-For-Profit Corp. Law § 551(b).

Expenditures from endowment funds under new NFPMIFA.

Prior to adoption of the NFPMIFA, a not-for–profit corporation was only permitted to spend the net income of a fund

and net appreciation on a fund. The funds' "historic dollar value" or principal needed to be preserved. The NFPMIFA removes the prohibition on appropriations below the historical dollar value. However, donors who are "available" with respect to funds established before September 17, 2010 may elect to retain the old historical value limit by responding to a notice from the institution. *See* Not-For-Profit Corp. Law §553(e).

New § 553(a) of the Not-For-Profit Law provides that "In making a determination to appropriate or accumulate, the institution shall act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, and shall consider, if relevant, the following factors:

(1) the duration and preservation of the endowment fund;

(2) the purpose of the institution and the endowment fund;

(3) general economic conditions;

(4) the possible effect of inflation or deflation;

(5) the expected total return from income and the appreciation of investments;

(6) other resources of the institution;

(7) where appropriate and circumstances would otherwise warrant, alternatives to expenditure of the endowment fund, giving due consideration to the effect that such alternatives may have on the institution; and

(8) the investment policy of the institution."

A donor may specifically limit the application of these new spending rules in the gift instrument. *See* Not-For-Profit Corp. Law § 555. However, generally these new rules will provide not-for-profit boards with greater access to endowment fund monies to support their purposes.

Notification to Donors of Endowment Funds in Existence Prior to September 17, 2010.

Under the new NFPMIFA, all "available" donors of endowment gifts made pursuant to instruments executed before September 17, 2010 must be provided with notice prior to the first time an institution applies the new rules set forth in Not-For-Profit Corp. Law § 553(a). A donor is "available" if the donor can be found with reasonable efforts and is living or is conducting activities (if an entity). Specific language must be included in such notice and during a 90 day period thereafter the donor may make an election to prohibit the application of new Not-For-Profit Corp. Law § 553(a) to the gift.

Lifting restrictions under the new NFPMIFA.

Under the new NYPMIFA, the NFP corporation also has more options to have restrictions lifted regarding use of funds. New Not-For-Profit Corp. Law § 555 provides that the restrictions on management, investment or purpose can be released or modified (i) by donor consent, (ii) by a court, upon application of an institution, if the restriction has become impracticable or wasteful, if it impairs the management or investment of the fund or if, because of circumstances not anticipated by the donor, a modification of the restriction will further the purposes of the fund, and (iii) if a particular purpose or restriction becomes unlawful, impracticable, impossible, or wasteful. In addition, under the new NYPMIFA an institution may modify or release restrictions on small ($100,000 or less) and old (over 20 years) funds upon appropriate prior notice to the Attorney General, provided the use is in a manner consistent with the purposes expressed in the gift instruction. Under the old law release of restrictions could only be obtained with donor consent, by court order after the donor's death (or if the donor could not be located).

Notes to Decisions

Analysis

1. Generally
2. Fiduciary duty
3. Business judgment rule
4. Summary judgment

1. Generally

Board of not-for-profit residential cooperative corporation owes its duty of loyalty to cooperative—that is, it must act for benefit of residents collectively and, so long as board acts for purposes of cooperative, within scope of its authority and in good faith, courts will not substitute their judgment for board's; unless resident who is challenging board's action is able to demonstrate breach of duty, judicial review is unavailable. Levandusky v One Fifth Ave. Apartment Corp., 75 N.Y.2d 530, 554 N.Y.S.2d 807, 553 N.E.2d 1317, 1990 N.Y. LEXIS 753 (N.Y. 1990).

Proprietary lessee failed to show that board of not-for-profit residential cooperative corporation acted improperly in issuing "stop-work" order in response to renovation work in which lessee relocated certain heating pipes, and thus his Article 78 petition to have order set aside was properly dismissed, even though lessee claimed that he had relied on board's initial approval of his plans and that, in any case, no harm was done to building, where lessee failed to comply with provisions either of alteration agreement or of renovation guidelines which required explicit written notice to board of any proposed changes in building's heating system, board promptly consulted its engineer when it learned of lessee's intent, and board notified lessee that it would not depart from its policy of refusing to permit movement of pipes. Levandusky v One Fifth Ave. Apartment Corp., 75 N.Y.2d 530, 554 N.Y.S.2d 807, 553 N.E.2d 1317, 1990 N.Y. LEXIS 753 (N.Y. 1990).

CLS N-PCL § 717 did not prohibit church from expending sums necessary to renovate existing landmark building, and thus did not require granting of "hardship exception" under Landmarks Law (NYC Admin Code §§ 207-4.0 and 207-8.0, redesignated NYC Admin Code § 25-309) that would permit replacement of existing building with commercial office tower, since § 717 does no more than impose on church fiduciary duty of care to manage congregation's money in prudent and responsible fashion, and would be implicated only if expenditures in question unacceptably impaired church's financial condition. Rector, Wardens, & Members of Vestry of St. Bartholomew's Church v New York, 914 F.2d 348, 1990 U.S. App. LEXIS 16005 (2d Cir. N.Y. 1990), cert. denied, 499 U.S. 905, 111 S. Ct. 1103, 113 L. Ed. 2d 214, 1991 U.S. LEXIS 1447 (U.S. 1991).

2. Fiduciary duty

Yacht club member failed to sufficiently plead a breach of fiduciary duty claim against the club's board of directors because the complaint did not allege that the board failed to act in good faith on behalf of the club or its members' collective interests, but merely alleged that the board failed to act in the individual member's personal best interest. Nachbar v Cornwall Yacht Club, 160 A.D.3d 972, 75 N.Y.S.3d 494, 2018 N.Y. App. Div. LEXIS 2744 (N.Y. App. Div. 2d Dep't 2018).

Court awarded attorney general damages on the breach of fiduciary duty/waste claim against the foundation's officer/director in the amount of $2,000,000 because although the $2,823,000 raised at a fundraiser was used for the officer's political campaign and disbursed by his campaign staff, rather than by the foundation, in violation of N.Y. Not-for-Profit Corp. Law §§ 717 and 720 and N.Y. Est. Powers & Trusts Law §§ 8-1.4 and 8-1.8, the funds ultimately reached their intended destinations. People v Trump, 66 Misc. 3d 200, 112 N.Y.S.3d 467, 2019 N.Y. Misc. LEXIS 5936 (N.Y. Sup. Ct. 2019).

District court had ample evidence indicating that the sole beneficiary of a choreographer breached his fiduciary duty to a dance school and a dance center. There was evidence that the beneficiary ignored questions that surfaced from several sources about his ownership of the choreographer's dances, sets, and costumes, and made assertions regarding ownership of these items to the center's board of directors and to third parties; moreover, the court had ample evidence that the beneficiary sought to register as unpublished works in his own name works that he knew to be published and to belong to the center. Martha Graham Sch. & Dance Found., Inc. v Martha Graham Ctr. of Contemporary Dance, Inc., 380 F.3d 624, 2004 U.S. App. LEXIS 17452 (2d Cir. N.Y. 2004), amended, reprinted, 2004 U.S. App. LEXIS 20904 (2d Cir. N.Y. Aug. 18, 2004), cert. denied, 544 U.S. 1060, 125 S. Ct. 2518, 161 L. Ed. 2d 1110, 2005 U.S. LEXIS 4372 (U.S. 2005).

Because of the special relationship between the N.R.A. and The American Rifleman the fiduciary obligations of the association's directors and officers, as imposed by N.P.C.L. § 717, applied with

equal vigor to the operation of The American Rifleman to the effect that the Board could not refuse to publish advertisements of candidates for an N.R.A. directorships in order that they might retain control of the association for themselves; refusal of the Board to furnish a membership list to candidates and to publish a request for monetary support for a candidate raised the issue of directors' bad faith. Fitzgerald v National Rifle Asso., 383 F. Supp. 162, 1974 U.S. Dist. LEXIS 6646 (D.N.J. 1974).

3. Business judgment rule

Business judgment rule prohibits judicial inquiry into actions of corporate directors taken in good faith and in exercise of honest judgment in lawful and legitimate furtherance of corporate purposes; so long as directors have not breached their fiduciary obligation to corporation, exercise of their powers for common and general interests of corporation may not be questioned, even if results show that what they did was unwise or inexpedient. Levandusky v One Fifth Ave. Apartment Corp., 75 N.Y.2d 530, 554 N.Y.S.2d 807, 553 N.E.2d 1317, 1990 N.Y. LEXIS 753 (N.Y. 1990).

Action by board of directors of corporation that comes within business judgment rule cannot be characterized as arbitrary and capricious, or abuse of discretion, for purpose of Article 78 proceeding. Levandusky v One Fifth Ave. Apartment Corp., 75 N.Y.2d 530, 554 N.Y.S.2d 807, 553 N.E.2d 1317, 1990 N.Y. LEXIS 753 (N.Y. 1990).

Nonstatutory claims for, inter alia, constructive trust against the former chairman of the New York Stock Exchange (NYSE) regarding his compensation could not be pursued by the attorney general as those claims required a lower burden of proof as knowledge or good faith did not have to be shown as in the statutory claims pursuant to N.Y. Not-for-Profit Corp. Law § 720(a)(b); directors and officers of a non-profit corporation, such as the NYSE, were provided with the protection of the business judgment rule under N.Y. Not-for-Profit Corp. Law § 717. People v Grasso, 11 N.Y.3d 64, 862 N.Y.S.2d 828, 893 N.E.2d 105, 2008 N.Y. LEXIS 1821 (N.Y. 2008).

Director and the officers were entitled to summary judgment in an N.Y. Not-for-Profit Corp. Law § 720(a)(1) proceeding because they established, inter alia, that payments made by the director and the officers to a law firm to dissolve the corporation were either authorized or made in good faith and the attorney general failed to raise a triable fact issue in opposition; because officers of a not-for-profit corporation are protected by the business judgment rule, N.Y. Not-for-Profit Corp. Law § 717, liability pursuant to N.Y. Not-for-Profit Corp. Law § 720(a)(1) required a showing that the officer or director lacked good faith in executing his or her duties. The absence of a majority vote of all members to dissolve the corporation, did not demonstrate a lack of good faith because, pursuant to N-PCL 1102(a)(2), ten percent of the total number of members may commence a proceeding for judicial dissolution of a corporation under certain circumstances, and thus a minority interest had the power to dissolve a corporation. People v Lawrence, 74 A.D.3d 1705, 903 N.Y.S.2d 618, 2010 N.Y. App. Div. LEXIS 4940 (N.Y. App. Div. 4th Dep't 2010).

Corporations which determined eligibility for nomination for annual "Tony" awards concerning excellence in theatre could not be held liable in damages for their refusal to categorize comedian's one-man theatrical comedy show as "play" eligible for award where they complied with their internal, published threshold requirements as to eligibility, within scope of their broad discretionary authority; in absence of any evidence of bad faith or discriminatory enforcement of rules, business judgment rule precluded court from inquiring into wisdom of such corporate action. Mason v American Theatre Wing, 165 Misc. 2d 432, 627 N.Y.S.2d 539, 1995 N.Y. Misc. LEXIS 241 (N.Y. Sup. Ct. 1995).

It is improper to dismiss a suit at the motion to dismiss stage on the basis of the business judgment rule if the plaintiff's pleadings allege that directors or officers did not act in good faith. Levy v Young Adult Inst., Inc., 103 F. Supp. 3d 426, 2015 U.S. Dist. LEXIS 57216 (S.D.N.Y. 2015).

4. Summary judgment

In action for injunction prohibiting townhouse homeowners' association from enforcing rule restricting parking on private streets of development, association was entitled to summary judgment since (1) bylaws of association gave broad discretion to board of directors to enact reasonable regulations governing use of development property, (2) business judgment rule applied to review of regulations, and (3) there was no evidence that parking restriction was unreasonable or enacted in bad faith. Gillman v Pebble Cove Home Owners Ass'n, 154 A.D.2d 508, 546 N.Y.S.2d 134, 1989 N.Y. App. Div. LEXIS 12778 (N.Y. App. Div. 2d Dep't 1989).

In action by homeowners' association and individual homeowners against construction company and individuals for breach of contract and warranties regarding quality of workmanship and materials, individual defendants were not entitled to summary judgment where it had been established that they were officers of construction company as well as directors of homeowners' association, and that they failed to disclose and failed to take steps to correct purported misconduct by construction company. Pebble Cove Homeowners' Ass'n v Shoratlantic Dev. Co., 191 A.D.2d 544, 595 N.Y.S.2d 92, 1993 N.Y. App. Div. LEXIS 2339 (N.Y. App. Div. 2d Dep't), app. dismissed, 82 N.Y.2d 802, 604 N.Y.S.2d 559, 624 N.E.2d 697, 1993 N.Y. LEXIS 3878 (N.Y. 1993).

Because the chairman of a compensation committee might not have effectively communicated a former chief executive officer's compensation to the board of directors, and his recommendations might not have been in the best interest of the New York Stock Exchange, the chairman was not entitled to summary judgment as the chairman did not establish that the chairman fulfilled the chairman's obligations under N.Y. Not-for-Profit Corp. Law § 717. People v Grasso, 50 A.D.3d 535, 858 N.Y.S.2d 23, 2008 N.Y. App. Div. LEXIS 3592 (N.Y. App. Div. 1st Dep't), app. dismissed, 53 A.D.3d 403, 859 N.Y.S.2d 563, 2008 N.Y. App. Div. LEXIS 5846 (N.Y. App. Div. 1st Dep't 2008), app. dismissed, 53 A.D.3d 404, 859 N.Y.S.2d 564, 2008 N.Y. App. Div. LEXIS 5850 (N.Y. App. Div. 1st Dep't 2008).

With respect to a cause of action alleging breach of fiduciary duty by the former CEO of the New York Stock Exchange under N.Y. Not-for-Profit Corp. Law § 717(b), the trial court improperly decided a disputed issue of fact as to the compensation committee's and board's knowledge of the extent of the CEO's supplemental executive retirement plan (SERP) benefit. People v Grasso, 54 A.D.3d 180, 861 N.Y.S.2d 627, 2008 N.Y. App. Div. LEXIS 5853 (N.Y. App. Div. 1st Dep't 2008).

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-7 White, New York Business Entities ¶ N717.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.05. Directors.

New York Practice Guide: Business and Commercial § 8.06. Officers.

Matthew Bender's New York Checklists: Checklist for Identifying Management and Structure of Business Issues When Selecting Form of Business Entity LexisNexis AnswerGuide New York Business Entities § 2.11.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N717:1. Defense by Director that Director Acted in Good Faith and in Reliance upon Information from Person Believed to be Reliable and Competent Regarding Matters Presented.

§ 718. List of directors, officers and key persons

(a) If a member or creditor of a corporation, in person or by his attorney or agent, or a representative of the district attorney or of the secretary of state, the attorney general, or other state official, makes a written demand on a corporation to inspect a current list of its directors, officers and key persons, the corporation shall, within two business days

after receipt of the demand and for a period of one week thereafter, make the list available for such inspection at its office during usual business hours.

(b) Upon refusal by the corporation to make a current list of its directors, officers and key persons available, as provided in paragraph (a) of this section, the person making a demand for such list may apply, ex parte, to the supreme court at a special term held within the judicial district where the office of the corporation is located for an order directing the corporation to make such list available. The court may grant such order or take such other action as it may deem just and proper.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970; amd, L 1970, ch 992, eff Sept 1, 1970; L 2013, ch 549, § 77, eff July 1, 2014; L 2019, ch 445, § 4, effective November 8, 2019.

Revision Notes: *Source:* None.

Changes: Completely new.

Comment: This section is the same, both in substance and in language, as Bus Corp L § 718. The provision is intended to fill the public need for a current list of directors and officers.

Editor's Notes: Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

Amendment Notes The 2019 amendment by ch 445, § 4, added "and key persons" in the section heading; added "and key persons" in (a) and (b); and made related changes.

Notes to Decisions

1. Generally

Although plaintiff did not cross move for summary judgment, in action seeking to enjoin defendants from paying any salary or other sums to executive director of corporation and to direct complete disclosure of names and addresses of all members and books of account of corporation, the trial court would grant plaintiff's request for complete disclosure where appropriate demand for production was made, there was sufficient showing that inspection was not desired and would not be used for purpose which was in interest of business or object other than business of corporation, and there was no proof that plaintiff had otherwise failed to comply with provisions of Not-for-Profit Corporation Law. Hoffert v Dank, 86 Misc. 2d 384, 382 N.Y.S.2d 421, 1976 N.Y. Misc. LEXIS 2452 (N.Y. Sup. Ct.), modified, 55 A.D.2d 518, 389 N.Y.S.2d 101, 1976 N.Y. App. Div. LEXIS 15153 (N.Y. App. Div. 1st Dep't 1976).

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-7 White, New York Business Entities ¶ N718.01 et seq.L

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.05. Directors.

New York Practice Guide: Business and Commercial § 8.06. Officers.

Matthew Bender's New York Checklists: Checklist for Assessing Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 2.47.

Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N718:1. Demand for List of Directors and Officers.

§ 719. Liability of directors in certain cases

(a) Directors of a corporation who vote for or concur in any of the following corporate actions shall be jointly and severally liable to the corporation for the benefit of its creditors or members or the ultimate beneficiaries of its activities, to the extent of any injury suffered by such persons, respectively, as a result of such action, or, if there be no creditors or members or ultimate beneficiaries so injured, to the corporation, to the extent of any injury suffered by the corporation as a result of such action:

(1) The distribution of the corporation's cash or property to members, directors or officers, other than a distribution permitted under section 515 (Dividends prohibited; certain distributions of cash or property authorized).

(2) The redemption of capital certificates, subvention certificates or bonds, to the extent such redemption is contrary to the provisions of section 502 (Member's capital contributions), section 504 (Subventions), or section 506 (Bonds and security interests).

(3) The payment of a fixed or contingent periodic sum to the holders of subvention certificates or of interest to the holders or beneficiaries of bonds to the extent such payment is contrary to the provisions of section 504 or section 506.

(4) The distribution of assets in violation of section 1002-a (Carrying out the plan of dissolution and distribution of assets) or without paying or adequately providing for all known liabilities of the corporation, excluding any claims not filed by creditors within the time limit set in a notice given to creditors under articles 10 (Non-judicial dissolution) or 11 (Judicial dissolution).

(5) The making of any loan contrary to section 716 (Loans to directors and officers).

(b) A director who is present at a meeting of the board, or any committee thereof, at which action specified in paragraph (a) is taken shall be presumed to have concurred in the action unless his dissent thereto shall be entered in the minutes of the meeting, or unless he shall submit his written dissent to the person acting as the secretary of the meeting before the adjournment thereof, or shall deliver or send by registered mail such dissent to the secretary of the corporation promptly after the adjournment of the meeting. Such right to dissent shall not apply to a director who voted in favor of such action. A director who is absent from a meeting of the board, or any committee thereof, at which such action is taken shall be presumed to have concurred in the action unless he shall deliver or send by registered mail his dissent thereto to the secretary of the corporation or shall cause such dissent to be filed with the minutes of the proceedings of the board or committee within a reasonable time after learning of such action.

(c) Any director against whom a claim is successfully asserted under this section shall be entitled to contribution from the other directors who voted for

or concurred in the action upon which the claim is asserted.

(d) Directors against whom a claim is successfully asserted under this section shall be entitled, to the extent of the amounts paid by them to the corporation as a result of such claims:

(1) Upon reimbursement to the corporation of any amount of an improper distribution of the corporation's cash or property, to be subrogated to the rights of the corporation against members, directors or officers who received such distribution with knowledge of facts indicating that it was not authorized by this chapter, in proportion to the amounts received by them respectively.

(2) Upon reimbursement to the corporation of an amount representing an improper redemption of a capital certificate, subvention or bond, to have the corporation rescind such improper redemption and recover the amount paid, for their benefit but at their expense, from any member or holder who received such payment with knowledge of facts indicating that such redemption by the corporation was not authorized by this chapter.

(3) Upon reimbursement to the corporation of an amount representing all or part of an improper payment of a fixed or contingent periodic sum to the holder of a subvention certificate, or of interest to the holder or beneficiary of a bond, to have the corporation recover the amount so paid, for their benefit but at their expense, from any holder or beneficiary who received such payment with knowledge of facts indicating that such payment by the corporation was not authorized by this chapter.

(4) Upon payment to the corporation of the claim of the attorney general or of any creditor by reason of a violation of subparagraph (a)(4), to be subrogated to the rights of the corporation against any person who received an improper distribution of assets.

(5) Upon reimbursement to the corporation of the amount of any loan made contrary to section 716 (Loans to directors and officers), to be subrogated to the rights of the corporation against a director or officer who received the improper loan.

(e) A director or officer shall not be liable under this section if, in the circumstances, he discharged his duty to the corporation under section 717 (Duty of directors and officers).

(f) This section shall not affect any liability otherwise imposed by law upon any director or officer.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970; amd, L 1970, ch 847, § 50, eff Sept 1, 1970; L 2005, ch 726, § 3, eff April 9, 2006.

Derivation Notes: Derived from Mem Corp Law § 46.

Revision Notes: *Source:* Mem Corp L § 46.

Changes: Revised; new provisions.

Comment: The language of this section is derived from Bus Corp L § 719, modified to accord with the substantive provisions in this chapter and to take account of the differences between a business corporation and a not-for-profit corporation. The section is designed to group in one section every instance in which liability is imposed upon directors for violation of substantive requirements prescribed by other sections. The remedy for the enforcement of directors' liability is given exclusively to the corporation for the benefit of creditors or members to the extent of their respective injuries. If there are neither creditors nor members injured by the unlawful director action, the remedy is given to the corporation to the extent of any injury suffered by the corporation, and an action may be brought as provided in § 723. Paragraphs (b), (c), and (d) have the same purpose as in Bus Corp L § 719.

PRACTICE INSIGHTS:

QUALIFIED IMMUNITY IS NOT BULLET-PROOF SHIELD

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INSIGHT

Not-For-Profit Corporation Law § 720-a confers qualified immunity from suit upon certain directors or officers of not-for-profits. Although it does offer protection for certain individuals, counsel must fully understand the limitations of that protection to represent the not-for-profit corporation and individual directors and officers adequately.

ANALYSIS

Qualified immunity is limited to directors and officers of entities eligible for tax exemption under Internal Revenue Code § 501(c)(3).

A director or officer sued for personal liability must raise the qualified immunity granted under Not-For-Profit Corp. Law § 720-a as an affirmative defense in the answer. *Woodford v. Benedict Community Health Center*, 176 A.D.2d 1115, 575 N.Y.S.2d 415 (3d Dep't 1991). Best practices dictate that an attorney representing a director or officer sued under these circumstances review the complaint to ensure that it has been verified and that it affirmatively states that the director's actions constituted either gross negligence or intentional infliction of harm. *See* CPLR 3016(h).

Alternatively, the defendant may move to dismiss a complaint against which qualified immunity is a defense. This CPLR 3211(a)(11) motion must be made before the answer is filed. *Woodford v. Benedict Community Health Center*, 176 A.D.2d 1115, 575 N.Y.S.2d 415 (3d Dep't 1991). A claim will be dismissed if the defendant can show that the factors have been met, that is: (1) defendant can prove that there is no probability of meeting the statutory standard of gross negligence or intent to cause harm to the plaintiff; (2) the defendant can show that his or her service to the not-for-profit was uncompensated; and (3) the not-for-profit is eligible for tax exemption under IRC § 501(c)(3).

If defendant is paid, immunity is not available.

Although the law permits not-for-profits to compensate its directors (Not-For-Profit Corp. Law § 202(a)(12)), most directors are volunteers who serve without compensation. If an IRC § 501(c)(3) organization chooses to compensate its directors for more than "actual expenses incurred in attending meetings or otherwise in the execution of such office" (Not-For-Profit Corp. Law § 720-a), any such director will lose the right to qualified immunity under this provision. This choice also affects the director's right to seek indemnification. This issue arises most frequently in the case of paid officers who also hold a seat on the board of directors and directors involved with a private foundation.

Know what actions qualified immunity will not protect.

Directors who otherwise meet the criteria for qualified immunity are not protected from every cause of action that may be filed by a third party. It is important for the practitioner to know what types of actions expose the director or officer to personal liability. For example, Not-for-Profit Corp. Law § 720-a does not immunize directors from federal claims or employment litigation (such as wrongful termination) to the extent the claims are based upon federal law. This section does not apply to actions taken by the Attorney

General or actions commenced under Not-For-Profit Corp. Law § 719 (director liability in certain defined transactions) or Not-For-Profit Corp. Law § 720 (actions brought on behalf of the organization).

In addition, directors may be held personally liable if the not-for-profit corporation does not follow the dissolution procedures set forth in Not-For-Profit Corp. Law § 1002-a or if the not-for-profit does not adequately provide for known liabilities upon dissolution. In such an event, the directors will be held personally liable only if the creditors file claims within the time period provided for in Not-For-Profit Corp. Law Article 10 (Non-Judicial Dissolution and Article 11 (Judicial Dissolution) Not-For-Profit Corp. Law § 719.

Notes to Decisions

Analysis

1. Generally
2. Under former Membership Corporations Law § 46

1. Generally

While the attorney general had the authority to pursue a claim that alleged that certain advance payments from a supplemental retirement plan for the former chairman of the New York Stock Exchange constituted an improper loan under N.Y. Not-for-Profit Corp. Law § 716, the claim pleaded disregarded the knowledge element that other statutory claims under N.Y. Not-for-Profit Corp. Law §§ 719(3) and 720(a)(2) had to allege and, thus, had to be dismissed. People v Grasso, 11 N.Y.3d 64, 862 N.Y.S.2d 828, 893 N.E.2d 105, 2008 N.Y. LEXIS 1821 (N.Y. 2008).

New York Not-for-Profit-Corporation Law (N-PCL) forbade the New York Attorney General from suing a chief executive officer (CEO) of a non-profit corporation on four non-statutory causes of action, as the N-PCL delineated the specific circumstances under which he could sue officers or directors, and he could not use his parens patriae-based authority to avoid the N-PCL's requirement that he prove fault on the CEO's part. People v Grasso, 42 A.D.3d 126, 836 N.Y.S.2d 40, 2007 N.Y. App. Div. LEXIS 5719 (N.Y. App. Div. 1st Dep't 2007), aff'd, 11 N.Y.3d 64, 862 N.Y.S.2d 828, 893 N.E.2d 105, 2008 N.Y. LEXIS 1821 (N.Y. 2008).

2. Under former Membership Corporations Law § 46

The office of director confers certain responsibilities of management and control upon such officers, but they are merely representatives of the associates, and their action is subject to fair criticism by any of such associates. People ex rel. Ward v Uptown Ass'n, 26 A.D. 297, 49 N.Y.S. 881, 1898 N.Y. App. Div. LEXIS 391 (N.Y. App. Div. 1898).

Where, in an action to enforce the liability of a director of a membership corporation, under former § 11 from which this section is derived, the plaintiff for a first cause of action alleges all necessary jurisdictional facts, and states that the defendant was a director at the time the debt was contracted, and for a second cause of action repeats the same facts, but instead of stating that the defendant was a director, alleges that the defendant and his codefendants were held out by the corporation with the permission and consent of the defendants as being the directors of said corporation, and the credit for the indebtedness mentioned and described in a certain paragraph was extended by said plaintiff on the belief and reliance of the fact and the holding out thereof to the public, the second cause of action is insufficient under the statue and does not contain the necessary allegations for an action based upon fraud or misrepresentation, since the allegations of "holding out" are mere conclusions and there are no averments that the representations were false. Edward Davis, Inc. v Albee, 172 A.D. 414, 158 N.Y.S. 623, 1916 N.Y. App. Div. LEXIS 5983 (N.Y. App. Div. 1916).

Where a membership corporation is organized under this law, the treasurer of a subordinate branch, called a "court," which is not incorporated, but which consists of more than seven persons, is not entitled to sue to recover moneys alleged to be due to the local court, for the title to the money and the right of action is in the corporation itself, there being nothing to show that the subordinate court has any derivative rights. Conboy v Mathews, 174 A.D. 523, 160 N.Y.S. 538, 1916 N.Y. App. Div. LEXIS 7665 (N.Y. App. Div. 1916).

Directors of a membership corporation who were active in the promulgation of a prospectus designed to interest investors in purchasing the notes of the corporation, which prospectus contained statements which the directors knew or should have known to be false, are liable for the loss occasioned to investors resulting therefrom. First Nat'l Bank v Level Club, Inc., 241 A.D. 433, 272 N.Y.S. 273, 1934 N.Y. App. Div. LEXIS 8272 (N.Y. App. Div. 1934).

The scope of this section is imprecise, but its basic purpose is clearly to charge directors in circumstances of "fraud or bad faith" with a liability which they would otherwise escape because it was exclusively a corporate liability, but where the same cause of action lies against both the corporation and against its directors personally, the statute would seem needless and should therefore be interpreted as inapplicable. Faulk v Milton, 25 A.D.2d 314, 268 N.Y.S.2d 844, 1966 N.Y. App. Div. LEXIS 4463 (N.Y. App. Div. 1st Dep't 1966), aff'd, 20 N.Y.2d 894, 285 N.Y.S.2d 864, 232 N.E.2d 860, 1967 N.Y. LEXIS 1100 (N.Y. 1967).

A complaint in an action to enforce the liability of a trustee of a club upon a note given by such club is sufficient, although it does not state when the debt for which the note was given was contracted; it must be assumed that the debt was contracted simultaneously with the giving of the note. Straus v Sage, 30 N.Y.S. 905, 10 Misc. 118, 1894 N.Y. Misc. LEXIS 902 (N.Y.C.P. 1894).

Directors are jointly and severally liable, and the plaintiff may sue one, any or all. Kugelman v Hirschman, 49 N.Y.S. 1012, 22 Misc. 533, 1898 N.Y. Misc. LEXIS 84 (N.Y. City Ct.), aff'd, 53 N.Y.S. 1107, 23 Misc. 773, 1898 N.Y. Misc. LEXIS 400 (N.Y. App. Term 1898).

The appointment of a permanent receiver of a dissolved membership corporation neither vests in him the personal right of its creditors to enforce the liability of directors under former § 11 from which this section is derived nor does it enable him to assert or enforce the rights of the corporation under Gen. Fordham v Poor, 179 N.Y.S. 367, 109 Misc. 187, 1919 N.Y. Misc. LEXIS 615 (N.Y. Sup. Ct. 1919).

An officer of a membership corporation may not be held criminally liable for the violation of a penal statute by the corporation. People v Smith, 74 N.Y.S.2d 845, 190 Misc. 871, 1947 N.Y. Misc. LEXIS 3319 (N.Y. Magis. Ct. 1947).

Directors cannot vote by proxy. Craig Medicine Co. v Merchants' Bank of Rochester, 14 N.Y.S. 16, 59 Hun 561, 1891 N.Y. Misc. LEXIS 1834 (N.Y. Sup. Ct. 1891).

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: White, New York Business Entities ¶ N719.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.05. Directors.

Matthew Bender's New York Checklists: Checklist for Identifying Liability Issues When Selecting Entity Form LexisNexis AnswerGuide New York Business Entities § 2.02.

Checklist for Assessing Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 2.47.

Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N719:1. Dissent to Declaration of Illegal Loan.

White, New York Business Entities Form N719:2. Communication of Director's Dissent to Declaration of Illegal Loan.

§ 720. Actions against directors, officers and key persons

(a) An action may be brought against one or more directors, officers, or key persons of a corporation to procure a judgment for the following relief:

(1) To compel the defendant to account for his official conduct in the following cases:

(A) The neglect of, or failure to perform, or other violation of his duties in the management and disposition of corporate assets committed to his charge.

(B) The acquisition by himself, transfer to others, loss or waste of corporate assets due to any neglect of, or failure to perform, or other violation of his duties.

(2) To set aside an unlawful conveyance, assignment or transfer of corporate assets, where the transferee knew of its unlawfulness.

(3) To enjoin a proposed unlawful conveyance, assignment or transfer of corporate assets, where there are reasonable grounds for belief that it will be made.

(b) An action may be brought for the relief provided in this section and in paragraph (a) of section 719 (Liabilities of directors in certain cases) by the attorney general, by the corporation, or, in the right of the corporation, by any of the following:

(1) A director or officer of the corporation.

(2) A receiver, trustee in bankruptcy, or judgment creditor thereof.

(3) Under section 623 (Members' derivative action brought in the right of the corporation to procure a judgment in its favor), by one or more of the members thereof.

(4) If the certificate of incorporation or the by-laws so provide, by any holder of a subvention certificate or any other contributor to the corporation of cash or property of the value of $1,000 or more.

(c) In a corporation having no members, an action may be brought by a director against third parties to obtain a judgment in favor of the corporation. The complaint shall set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board or the reason for not making such efforts. The court in its discretion shall determine whether it is in the interest of the corporation that the action be maintained, and if the action is successful in whole or in part, what reimbursement if any should be made out of the corporate treasury to the plaintiff for his reasonable expenses including attorney's fees, incurred in the prosecution of the action.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970; amd, L 1971, ch 1058, § 25, eff Sept 1, 1971; L 2013, ch 549, § 78, eff July 1, 2014; L 2016, ch 466, § 12, effective May 27, 2017.

Derivation Notes: Derived from Gen Corp Law §§ 60, 61.

Revision Notes: *Source:* Gen Corp L §§ 60 and 61.

Changes: Combined and reworded; new provisions.

Comment: This section is a substantial re-enactment of Gen Corp L §§ 60 and 61 with certain modifications and additions. Paragraph (a) corresponds to Bus Corp L § 720(a) which re-enacted Gen Corp L § 60 with slight changes in language. Paragraph (b) of Bus Corp L § 720 does not carry over the Gen Corp L § 61 provisions authorizing the attorney-general to bring an action as provided in the section. However, the authority of the attorney-general to bring such actions in connection with a not-for-profit corporation has been expressly retained. In addition to a director or officer of the corporation, and a receiver, trustee in bankrputcy or a judgment creditor of the corporation, one or more members under § 623 (Members' derivative action brought in the name of the corporation to procure a judgment in its favor) and, if the certificate of incorporation or the by-laws so provide, any contributor to the corporation of cash or property of the value of $1,000 or more are given standing to institute an action for the relief provided in § 723 and in § 722(a) (Liability of directors in certain cases). It is believed that these additional persons should be recognized as having legitimate interests in protecting the corporation and its property. The provisions in paragraphs (3) and (4) of Gen Corp L § 60 dealing, respectively, with the suspension from office and the removal from office of a defendant have been omitted from this section as they have been provided for in § 706 (Removal of directors) and § 715 (Removal of officers).

Editor's Notes Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

Amendment Notes The 2016 amendment by ch 466, § 12, substituted "key persons" for "key employees" in the section heading; and substituted "key persons" for "key employees" in the introductory language of (a).

PRACTICE INSIGHTS:

QUALIFIED IMMUNITY IS NOT BULLET-PROOF SHIELD

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INSIGHT

Not-For-Profit Corporation Law § 720-a confers qualified immunity from suit upon certain directors or officers of not-for-profits. Although it does offer protection for certain individuals, counsel must fully understand the limitations of that protection to represent the not-for-profit corporation and individual directors and officers adequately.

ANALYSIS

Qualified immunity is limited to directors and officers of entities eligible for tax exemption under Internal Revenue Code § 501(c)(3).

A director or officer sued for personal liability must raise the qualified immunity granted under Not-For-Profit Corp. Law § 720-a as an affirmative defense in the answer. *Woodford v. Benedict Community Health Center*, 176 A.D.2d 1115, 575 N.Y.S.2d 415 (3d Dep't 1991). Best practices dictate that an attorney representing a director or officer sued under these circumstances review the complaint to ensure that it has been verified and that it affirmatively states that the director's actions constituted either gross negligence or intentional infliction of harm. *See* CPLR 3016(h).

Alternatively, the defendant may move to dismiss a complaint against which qualified immunity is a defense. This CPLR 3211(a)(11) motion must be made before the answer is filed. *Woodford v. Benedict Community Health Center*, 176 A.D.2d 1115, 575 N.Y.S.2d 415 (3d Dep't 1991). A claim will be dismissed if the defendant can show that the factors have been met, that is: (1) defendant can prove that there is no probability of meeting the statutory standard of gross negligence or intent to cause harm to the plaintiff; (2) the defendant can show that his or her service to the not-for-profit was uncompensated; and (3) the not-for-profit is eligible for tax exemption under IRC § 501(c)(3).

If defendant is paid, immunity is not available.

Although the law permits not-for-profits to compensate its directors (Not-For-Profit Corp. Law § 202(a)(12)), most directors are volunteers who serve without compensation. If an IRC § 501(c)(3) organization chooses to compensate its directors for more than "actual expenses incurred in attending meetings or otherwise in the execution of such office" (Not-For-Profit Corp. Law § 720-a), any such director will lose the

right to qualified immunity under this provision. This choice also affects the director's right to seek indemnification. This issue arises most frequently in the case of paid officers who also hold a seat on the board of directors and directors involved with a private foundation.

Know what actions qualified immunity will not protect.

Directors who otherwise meet the criteria for qualified immunity are not protected from every cause of action that may be filed by a third party. It is important for the practitioner to know what types of actions expose the director or officer to personal liability. For example, Not-for-Profit Corp. Law § 720-a does not immunize directors from federal claims or employment litigation (such as wrongful termination) to the extent the claims are based upon federal law. This section does not apply to actions taken by the Attorney General or actions commenced under Not-For-Profit Corp. Law § 719 (director liability in certain defined transactions) or Not-For-Profit Corp. Law § 720 (actions brought on behalf of the organization).

In addition, directors may be held personally liable if the not-for-profit corporation does not follow the dissolution procedures set forth in Not-For-Profit Corp. Law § 1002-a or if the not-for-profit does not adequately provide for known liabilities upon dissolution. In such an event, the directors will be held personally liable only if the creditors file claims within the time period provided for in Not-For-Profit Corp. Law Article 10 (Non-Judicial Dissolution and Article 11 (Judicial Dissolution) Not-For-Profit Corp. Law § 719.

OPTIONS FOR MEMBERS IN THE MINORITY TO PUT AN END TO WRONGDOING

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INSIGHT

Members in the minority of a not-for-profit corporation ("corporation") who want to stop those in control of the corporation from committing improper activities have various options available to them. A corporation must pursue the purposes for which it was formed as set forth in its certificate of incorporation, must follow those procedures established in its bylaws, and cannot distribute its funds for the private benefit of any director, officer or member. When those in control of a not-for-profit corporation cause it to deviate from any of these principles, those members in the minority may attempt to handle the situation internally, through the court system, or by putting the Attorney General on notice.

ANALYSIS

Call a special meeting of members to openly discuss the objectionable items.

A special meeting may be called by the members in the minority to bring the corporate malfeasance to the attention of all the members and to attempt to spur change. Members should review the corporation's organizational documents for the procedures pursuant to which such a meeting may be brought. If no such provision exists in the organizational documents or if the number of members needed to call such a meeting is an insurmountable impediment, such a meeting may be convened by ten percent (10%) of the members entitled to vote at such a meeting pursuant to N- PCL § 603(c). Such an action will force those in the majority to openly discuss the objectionable items. If the minority's concerns are not properly addressed after such a meeting, the members may resign from the corporation, bring a derivative action on behalf of the corporation, or even seek the dissolution of the corporation. The special meeting is important as it will memorialize the members' objections in the corporate record and may prove to be critical from a public relations standpoint and in any future litigation.

A derivative action may be commenced to recover funds on behalf of the corporation.

If minority members constitute five percent (5%) or more of the total membership, they can bring a derivative action in the name of the corporation pursuant to N-PCL §§ 623 and 720(b)(3). Such an action can take many forms, such as an action: (i) against an individual director or officer for fraud or breach of fiduciary duties; (ii) to set aside any action that was beyond the corporate "purposes"; or, (iii) to enjoin a proposed improper conveyance of corporate assets. In such an action the importance of the special meeting becomes apparent; pursuant to N-PCL § 623(c) the complaint must set forth, with particularity, the attempt to address the objectionable behavior presented in the complaint.

The practitioner should be aware that while a derivative action, if successful, can result in the recovery of funds for the corporation and the likely resignation or dismissal of the offending actors, it could also subject the corporation's affairs to public scrutiny, result in litigation expenses that may be unrecoverable, and could divert the corporation's funds and attention from its mission.

Minority members may seek dissolution and distribution of funds to an appropriate successor.

The members in the minority, specifically those making up ten percent (10%) of the total membership, can bring an action to dissolve the corporation pursuant to N-PCL § 1102(a)(2) and to distribute the corporation's funds to a similar entity. An action pursuant to N-PCL §1102(a)(2)(D) appears to be the best option available to a smaller number of members, as it deals with controlling members acting in a fraudulent manner and perpetuating the corporation solely for their personal benefit. In the face of the limited case law it appears to be a hard case to make, however, as it has been held that dissolution is a drastic measure and that even if excessive spending can be proven, in the absence of bad faith, dissolution is not appropriate. *Application of John Luther & Sons Co.*, 52 A.D.2d 737, 381 N.Y.S.2d 934 (4th Dept, 1976). A larger obstacle for a petition based on N-PCL § 1102 is that it must be established that such dissolution would be beneficial to the membership as a whole, pursuant to N-PCL § 1109(b)(2). In a situation where the majority of the members agree with the inappropriate actions taken by those in the control of the corporation, meeting that threshold could present problems for the minority members. It is important to note that even if the action is successful and the corporation is dissolved and its funds released to another not-for-profit corporation with a similar purpose, the cost of litigation may be great and may deplete a large percentage of the corporation's funds.

Putting the Attorney General on notice of the improper activity.

An informal option available to the minority members would be to notify the Attorney General of the corporation's activities. Pursuant to N-PCL § 1101(a)(2), an action can be brought by the Attorney General to dissolve a corporation that has persistently acted fraudulently and contrary to public policy. In such an action, it must be demonstrated that the corporation exceeded its powers and that this abuse of power has threatened the public welfare. *People v. North River Sugar Refining Co.*, 121 N.Y. 582 (1890). In addition, pursuant to N-PCL § 1109(b)(1), in such an action the public interest, rather than the benefit to the corporation's membership, is of supreme importance. There is a great deal of uncertainty involved with this course action, such as (i) the lack of control of the distribution of the corporation's funds following dissolution; and (ii) what the investigation will uncover, as all corporate actions, not just the objectionable ones complained of, are open to investigation. It is important for the practitioner to note that if the corporate actions come under scrutiny by the Attorney General, it is likely that an audit by the Department of Taxation and Finance will follow. Such an investigation could result in the corporation being stripped of its tax-exempt status and could jeopardize the deductibility of any donations made by the members in the minority if it is determined that the members knew that the improper activity was taking place.

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1. Generally

Assuming plaintiff to be trustee or officer of not-for-profit corporation, her removal without validly called meeting was nullity, and her right of action against other officers and directors of corporation could not be challenged for lack of standing; thus, court properly denied motion to dismiss her complaint for breach of fiduciary duty and for declaration of her status as officer and director. Chang v Fa-Yun, 265 A.D.2d 265, 697 N.Y.S.2d 31, 1999 N.Y. App. Div. LEXIS 10886 (N.Y. App. Div. 1st Dep't 1999).

Directors and officers were entitled to summary judgment on a corporation's cause of action pursuant to N.Y. Not-for-Profit Corp. Law §§ 623, 720, asserting the improper transfer of real property because the claim was asserted in a prior action which was resolved by a stipulation, and, contrary to the corporation's claim, the identity requirement of res judicata was satisfied; however, although the issue of improper assessment of membership dues was raised in the prior action, any losses occasioned by assessments made after the discontinuance of that action constituted separate injuries for which recovery could not have been obtained in the prior action, and the stipulation did not prevent the corporation from asserting claims that accrued after the stipulation came into effect. Pawling Lake Prop. Owners Assn., Inc. v Greiner, 72 A.D.3d 665, 897 N.Y.S.2d 729, 2010 N.Y. App. Div. LEXIS 2868 (N.Y. App. Div. 2d Dep't 2010).

Phrase "by one or more of the members," in statute providing that actions against corporate directors and officers for mismanagement, waste of corporate assets and unlawful conduct may be brought by one or more of its members, does not relate back to provisions of general statutory provision requiring that derivative action be instituted by at least five percent of members of corporation, but instead, authorizes bringing of such actions against corporate directors and officers by one or more of members; such construction gives effect to entire statute and gives recognition to apparent legislative intent to differentiate actions against officers and directors for misconduct or misfeasance in office from other derivative actions. Hoffert v Dank, 86 Misc. 2d 384, 382 N.Y.S.2d 421, 1976 N.Y. Misc. LEXIS 2452 (N.Y. Sup. Ct.), modified, 55 A.D.2d 518, 389 N.Y.S.2d 101, 1976 N.Y. App. Div. LEXIS 15153 (N.Y. App. Div. 1st Dep't 1976).

While pending statutory claims against, inter alia, the former CEO of the New York Stock Exchange (NYSE) were not completely extinguished by virtue of N.Y. Bus. Corp. Law § 906(b)(3) following the NYSE's merger into a for-profit entity from a non-profit corporation as the NYSE could bring the claims itself, the public policy concerns supporting the state attorney general's authority under N.Y. Not-for-Profit Corp. § 720(b) to bring the claims no longer existed as the public interest was not involved in the NYSE as a private corporation. People v Grasso, 54 A.D.3d 180, 861 N.Y.S.2d 627, 2008 N.Y. App. Div. LEXIS 5853 (N.Y. App. Div. 1st Dep't 2008).

2. Actions by attorney general

Nonstatutory claims for, inter alia, constructive trust against the former chairman of the New York Stock Exchange (NYSE) regarding his compensation could not be pursued by the attorney general as those claims required a lower burden of proof as knowledge or good faith did not have to be shown as in the statutory claims pursuant to N.Y. Not-for-Profit Corp. Law § 720(a)(b); directors and officers of a non-profit corporation, such as the NYSE, were provided with the protection of the business judgment rule under N.Y. Not-for-Profit Corp. Law § 717. People v Grasso, 11 N.Y.3d 64, 862 N.Y.S.2d 828, 893 N.E.2d 105, 2008 N.Y. LEXIS 1821 (N.Y. 2008).

The Attorney-General, purporting to represent the ultimate beneficiaries of a charitable organization, which is the donee of an unconditional gift of corporate stock, does not have standing pursuant to EPTL 8-1.1 (subd [f]), which provides that the Attorney-General shall represent the beneficiaries of dispositions of property for religious, charitable, educational or benevolent purposes and it shall be his duty to enforce the rights of such beneficiaries, to sue the corporation to compel both the declaration and payment of dividends and the payment of market value of those shares repurchased from the donee corporation at less than market value, since although the Attorney-General's powers of representation and enforcement are not limited to express trusts, but encompass those charitable dispositions where property has been donated for a specific purpose, this does not mean that the Attorney-General has standing to represent those who might eventually reap the benefit of gifts made without a specified purpose to charitable organizations; in such cases, the charity implicitly receives the gift for its own uses, consistent with its charitable purposes and there are no beneficiaries, legally cognizable, apart from the donee, and the charity may use the gift as it sees fit, in accordance with the laws of its creation. Where there has been a completed, unconditional, irrevocable gift of stock to a charity, there is neither any intention of the donor for the Attorney-General to protect, nor any beneficiaries to represent. Furthermore, the Not-For-Profit Corporation Law (§ 112, subd [a], par [7]; §§ 719, 720), which authorizes the Attorney-General to bring an action against the directors and officers of a charitable corporation for certain specified types of misconduct and to enforce any right afforded under the statute to members, a director or an officer of a charitable corporation, does not provide the Attorney-General with standing. Lefkowitz v Lebensfeld, 68 A.D.2d 488, 417 N.Y.S.2d 715, 1979 N.Y. App. Div. LEXIS 10968 (N.Y. App. Div. 1st Dep't 1979), aff'd, 51 N.Y.2d 442, 434 N.Y.S.2d 929, 415 N.E.2d 919, 1980 N.Y. LEXIS 2739 (N.Y. 1980).

New York Not-for-Profit-Corporation Law (N-PCL) forbade the New York Attorney General from suing a chief executive officer (CEO) of a non-profit corporation on four non-statutory causes of action, as the N-PCL delineated the specific circumstances under which he could sue officers or directors, and he could not use his parens patriae-based authority to avoid the N-PCL's requirement that he prove fault on the CEO's part. People v Grasso, 42 A.D.3d 126, 836 N.Y.S.2d 40, 2007 N.Y. App. Div. LEXIS 5719 (N.Y. App. Div. 1st Dep't 2007), aff'd, 11 N.Y.3d 64, 862 N.Y.S.2d 828, 893 N.E.2d 105, 2008 N.Y. LEXIS 1821 (N.Y. 2008).

Serious constitutional questions under N.Y. Const. art. VII, § 8(1), regarding state subsidization of a nongovernmental entity, would be raised if N.Y. Not-for-Profit Corp. Law § 720(b) were construed to permit the continued prosecution of statutory claims by the state attorney general against, inter alia, the former CEO of the New York Stock Exchange after the Exchange was involved in a merger converting it from a non-profit corpora-

tion into a for-profit entity. People v Grasso, 54 A.D.3d 180, 861 N.Y.S.2d 627, 2008 N.Y. App. Div. LEXIS 5853 (N.Y. App. Div. 1st Dep't 2008).

Term "constituent corporation" under N.Y. Bus. Corp. Law § 901(b)(3) plainly excluded an entity such as a non-profit subsidiary of the New York Stock Exchange (NYSE) that was created at the time of or after the merger of the NYSE from a non-profit corporation into a for-profit entity; thus, the state attorney general did not have the authority to pursue claims against the former CEO of the NYSE under N.Y. Not-for-Profit Corp. Law § 720(b). People v Grasso, 54 A.D.3d 180, 861 N.Y.S.2d 627, 2008 N.Y. App. Div. LEXIS 5853 (N.Y. App. Div. 1st Dep't 2008).

When the Attorney General sued a non-profit corporation's executive and board members, under N.Y. Not-For-Profit Corp. Law § 720(a) and (b), for, inter alia, various breaches of fiduciary duty, a six year limitations period applied, under N.Y. C.P.L.R. § 213(7), as the action was on behalf of the corporation to recover damages for waste or injury to property. Spitzer v Schussel, 792 N.Y.S.2d 798, 7 Misc. 3d 171, 233 N.Y.L.J. 18, 2005 N.Y. Misc. LEXIS 83 (N.Y. Sup. Ct. 2005).

Court awarded attorney general damages on the breach of fiduciary duty/waste claim against the foundation's officer/director in the amount of $2,000,000 because although the $2,823,000 raised at a fundraiser was used for the officer's political campaign and disbursed by his campaign staff, rather than by the foundation, in violation of N.Y. Not-for-Profit Corp. Law §§ 717 and 720 and N.Y. Est. Powers & Trusts Law §§ 8-1.4 and 8-1.8, the funds ultimately reached their intended destinations. People v Trump, 66 Misc. 3d 200, 112 N.Y.S.3d 467, 2019 N.Y. Misc. LEXIS 5936 (N.Y. Sup. Ct. 2019).

3. Standing

An individual bringing a derivative action against directors or officers of a corporation for misconduct must meet requirement for standing by representing five percent or more of the membership of the corporation. Hoffert v Dank, 55 A.D.2d 518, 389 N.Y.S.2d 101, 1976 N.Y. App. Div. LEXIS 15153 (N.Y. App. Div. 1st Dep't 1976).

An individual bringing a derivative action on behalf of a corporation with a membership of 20 or less would meet the statutory requirement for standing that he represent five percent or more of the members. Hoffert v Dank, 55 A.D.2d 518, 389 N.Y.S.2d 101, 1976 N.Y. App. Div. LEXIS 15153 (N.Y. App. Div. 1st Dep't 1976).

Dismissal of a member's causes of action, pursuant to N.Y. Not-for-Profit Corp. Law § 720, to compel the a church's pastor and trustees to account for certain alleged misconduct, and for a judgment declaring that the pastor and the trustees had engaged in certain unlawful conduct, was proper because, inasmuch as the member sought to vindicate the church's rights by asserting those claims, they had to have been, but were not, asserted in the context of a derivative action brought by at least 5 percent of the church's members pursuant to N.Y. Not-for-Profit Corp. Law § 623(a); further, the complaint failed to set forth the member's efforts to secure the initiation of a derivative action or the reason for not making such effort. Therefore, the member lacked standing to bring the claims. Tae Hwa Yoon v New York Hahn Wolee Church, Inc., 56 A.D.3d 752, 870 N.Y.S.2d 42, 2008 N.Y. App. Div. LEXIS 9041 (N.Y. App. Div. 2d Dep't 2008).

Because a factual dispute existed as to whether the first director possessed standing to sue under N.Y. Not-for-Profit Corp. Law § 623(a), 720, a cross-motion by the second director and a non-profit corporation to dismiss the complaint for lack of standing to sue was properly denied. Brach v Harmony Servs., Inc., 93 A.D.3d 748, 940 N.Y.S.2d 652, 2012 N.Y. App. Div. LEXIS 2054 (N.Y. App. Div. 2d Dep't 2012).

4. Pleadings

While the attorney general had the authority to pursue a claim that alleged that certain advance payments from a supplemental retirement plan for the former chairman of the New York Stock Exchange constituted an improper loan under N.Y. Not-for-Profit Corp. Law § 716, the claim pleaded disregarded the knowledge element that other statutory claims under N.Y. Not-for-Profit Corp. Law §§ 719(3) and 720(a)(2) had to allege and, thus, had to be dismissed. People v Grasso, 11 N.Y.3d 64, 862 N.Y.S.2d 828, 893 N.E.2d 105, 2008 N.Y. LEXIS 1821 (N.Y. 2008).

5. Under former General Corporation Law § 60

Under an agreement whereby the corporate defendant agreed to employ plaintiff as an officer, plaintiff had a right of action for specific performance and damages. He also might have a right of action for fraud, but the court was without power to intervene in the management of the corporation and set aside the action of the board of directors in dismissing plaintiff. Heller v Clark Merchandisers, Inc., 9 Misc. 2d 106, 154 N.Y.S.2d 150, 1955 N.Y. Misc. LEXIS 2316 (N.Y. Sup. Ct. 1955).

Officers of a membership corporation could not be barred from examining its books and records because of their participation in formation of an allegedly competing and hostile organization, and membership therein, as long as they had not been removed from office or resigned their existing positions. Pino v United Democratic Regular Organization, 195 N.Y.S.2d 860 (N.Y. Sup. Ct. 1959).

This section applies to a foreign corporation and an action under it may be tried in a federal court. Schwarz v Artcraft Silk Hosiery Mills, Inc., 110 F.2d 465, 1940 U.S. App. LEXIS 4569 (2d Cir. N.Y. 1940).

6. —Cause of action

This section does not create any new cause of action except as to removal or suspension of directors. Rights and remedies conferred are cumulative but not exlcusive rights. Bailey v Colleen Products Corp., 198 N.Y.S. 418, 120 Misc. 297, 1923 N.Y. Misc. LEXIS 790 (N.Y. Sup. Ct. 1923).

A cause of action pursuant to this action and § 61 may be maintained only by a judgment creditor. Kendall v Oakland Golf Club, 123 N.Y.S.2d 907, 1953 N.Y. Misc. LEXIS 2067 (N.Y. Sup. Ct.), aff'd, 282 A.D. 1057, 126 N.Y.S.2d 379, 1953 N.Y. App. Div. LEXIS 5809 (N.Y. App. Div. 1953).

7. — —Transfer of assets

The transfer of assets of a debtor corporation, made by an officer subsequent to the date when the plaintiff secured a judgment against the corporation, such transfers whether made to another corporation, without consideration, or to select creditors in preference to others at a time when he knew the corporation to be insolvent, all fall within the prohibition of this section. Beol, Inc. v Dorf, 22 Misc. 2d 798, 193 N.Y.S.2d 394, 1959 N.Y. Misc. LEXIS 2530 (N.Y. Sup. Ct. 1959), aff'd, 12 A.D.2d 459, 209 N.Y.S.2d 267, 1960 N.Y. App. Div. LEXIS 7135 (N.Y. App. Div. 1st Dep't 1960).

Where a judgment creditor sued the debtor corporation, its secretary, her mother, and others and proved a conspiracy to fraudulently convey, conceal, and dispose of the assets of the corporation by means of a fraudulent chattel mortgage and foreclosure, bills of sale, disregard of the corporate entity and other acts, the intent to defraud creditors was actual and affirmative, and the plaintiff established causes of action under the fraudulent conveyance statute and Art 6 of this chapter. Lazar v Towne House Restaurant Corp., 142 N.Y.S.2d 315, 1955 N.Y. Misc. LEXIS 2796 (N.Y. Sup. Ct. 1955), aff'd, 5 A.D.2d 794, 171 N.Y.S.2d 334, 1958 N.Y. App. Div. LEXIS 7167 (N.Y. App. Div. 2d Dep't 1958).

8. — —Waste of assets

Under §§ 60 and 61, a creditor may maintain an action if any misconduct has resulted in waste of any money or property of the corporation even though the money or property comes out of surplus, but general creditors have no right to rely on the assumption that all of the surplus assets of the corporation have in the past been fully conserved. New York Credit Men's Ass'n v Harris, 11 N.Y.S.2d 435, 170 Misc. 988, 1939 N.Y. Misc. LEXIS 1744 (N.Y. Sup. Ct. 1939), aff'd, 262 A.D. 826, 29 N.Y.S.2d 505, 1941 N.Y. App. Div. LEXIS 6052 (N.Y. App. Div. 1941).

9. — —Accounting

The plaintiff is not entitled to an accounting personally but only to an accounting by the defendants to the corporation. Wangrow v Wangrow, 211 A.D. 552, 207 N.Y.S. 132, 1924 N.Y. App. Div. LEXIS 9918 (N.Y. App. Div. 1924).

In New York, an action brought under this section is in equity and in the nature of an action for an accounting, rather than a legal action for damages. Chambers v Blickle Ford Sales, Inc., 313 F.2d 252, 1963 U.S. App. LEXIS 6345 (2d Cir. Conn. 1963).

10. — —Removal of officers

The attorney-general cannot proceed under this section and § 136 to remove vestrymen and church wardens from their office on the ground of violation of their official duties, in view of § 130. Fiske v Beaty, 206 A.D. 349, 201 N.Y.S. 441, 1923 N.Y. App. Div. LEXIS 7209 (N.Y. App. Div. 1923), aff'd, 238 N.Y. 598, 144 N.E. 907, 238 N.Y. (N.Y.S.) 598, 1924 N.Y. LEXIS 778 (N.Y. 1924).

Subd 4 of § 60 deals with the removal by the corporation of its officers. But by the precise words of § 130, § 60 does not apply to religious corporations. Walker Memorial Baptist Church, Inc. v Saunders, 17 N.Y.S.2d 842, 173 Misc. 455, 1940 N.Y. Misc. LEXIS 1463 (N.Y. Sup. Ct.), aff'd, 259 A.D. 1010, 21 N.Y.S.2d 512, 1940 N.Y. App. Div. LEXIS 7748 (N.Y. App. Div. 1940).

11. — —Cause of action as bar to voluntary dissolution

Where a corporation and its creditors have an apparent cause of action against the officers and directors of the corporation for maladministration of its affairs, a petition for voluntary dissolution should be denied. In re Great Northern Trading Co., 168 A.D. 536, 153 N.Y.S. 213, 1915 N.Y. App. Div. LEXIS 8232 (N.Y. App. Div. 1915).

12. —Parties; plaintiff

The property of a corporation is a trust fund in the hands of its directors for payment of its debts and an action at law cannot be brought against an officer or director under this section. An action brought pursuant to said section is maintainable only in equity and must be brought in a representative capacity for the benefit of the plaintiff and all other creditors similarly situated. Schwartzreich v Bauman, 183 N.Y.S. 440, 112 Misc. 464, 1920 N.Y. Misc. LEXIS 1588 (N.Y. App. Term 1920).

A single stockholder may not, under this section, maintain an individual proceeding against officers and directors for misconduct. In re Tama, 137 N.Y.S.2d 248, 1954 N.Y. Misc. LEXIS 2530 (N.Y. Sup. Ct. 1954).

In an action by a judgment creditor for himself and on behalf of all other creditors of a corporation, since under Debtor and Creditor Law § 278 the action may be maintained only by a creditor in his own right and since under General Corporation Law § 133 the court need not make an order requiring all creditors to prove their claims, the court granted judgment to plaintiff only as an individual and not as a representative of other creditors. Lazar v Towne House Restaurant Corp., 142 N.Y.S.2d 315, 1955 N.Y. Misc. LEXIS 2796 (N.Y. Sup. Ct. 1955), aff'd, 5 A.D.2d 794, 171 N.Y.S.2d 334, 1958 N.Y. App. Div. LEXIS 7167 (N.Y. App. Div. 2d Dep't 1958).

13. — —Defendant

Liability of directors in an action brought under this section is several, and plaintiff may proceed against one or more of them without joining all. Buckley v United Cloak & Suit Co., 155 A.D. 735, 140 N.Y.S. 953, 1913 N.Y. App. Div. LEXIS 5184 (N.Y. App. Div. 1913), aff'd, 214 N.Y. 679, 108 N.E. 1090, 214 N.Y. (N.Y.S.) 679, 1915 N.Y. LEXIS 1391 (N.Y. 1915).

Where an action is brought against defendant officers, and the complaint states no cause of action against the corporation itself, it states but a single cause of action, although the corporation is properly made party defendant to whom the individual defendants will be directed to account and pay over. Higgins v Applebaum, 183 A.D. 527, 170 N.Y.S. 228, 1918 N.Y. App. Div. LEXIS 5006 (N.Y. App. Div. 1918).

14. —Pleadings; complaint

While subd 1 of this section permits an action to be brought to compel a director or officer to account to plaintiff for official conduct, including negligence or misconduct in management and disposition of funds, a complaint which merely alleges a discrepancy in the corporate books over a two-month period for which, it is asserted, only the president of the corporation can be responsible, fails to state a cause of action. Cirrincione v Polizzi, 14 A.D.2d 281, 220 N.Y.S.2d 741, 1961 N.Y. App. Div. LEXIS 8260 (N.Y. App. Div. 4th Dep't 1961).

Dismissal of petitioner's action seeking rescission of management fees for a non-profit was reversed because that cause of action was dependent upon resolution of issues of fact related to whether respondents engaged in improper related party transactions or otherwise transferred the senior living facility's surplus to benefit the non-profit and its other affiliates. Matter of The People of The State of New York v The Lutheran Care Network, Inc., 167 A.D.3d 1281, 92 N.Y.S.3d 154, 2018 N.Y. App. Div. LEXIS 8666 (N.Y. App. Div. 3d Dep't 2018).

A complaint in an action by a trustee in bankruptcy, which is brought to compel former officers and directors of the bankrupt to account for funds misappropriated, is insufficient in failing to allege that there were any creditors in existence at the time of the alleged misconduct or that misappropriation was for the purpose of defrauding creditors then existing and for whom the plaintiff is now acting, or in furtherance of a scheme to defraud subsequent creditors. Garrison v Pope, 223 N.Y.S. 737, 130 Misc. 290, 1927 N.Y. Misc. LEXIS 1026 (N.Y. Sup. Ct. 1927).

Complaint, in action brought under § 60, which alleges merely that the assets of the corporation were misappropriated, but does not allege that these assets constituted the capital stock of the corporation and also does not allege any fraudulent transfer as against subsequent creditors, is insufficient and must be dismissed in absence of an allegation that there were creditors in existence at time of alleged unlawful transaction, who are still creditors. New York Credit Men's Ass'n v Harris, 11 N.Y.S.2d 435, 170 Misc. 988, 1939 N.Y. Misc. LEXIS 1744 (N.Y. Sup. Ct. 1939), aff'd, 262 A.D. 826, 29 N.Y.S.2d 505, 1941 N.Y. App. Div. LEXIS 6052 (N.Y. App. Div. 1941).

15. — —Counterclaim

In an action by a director of a corporation in which it is alleged that the defendant, president, treasurer and manager of the corporation, mismanaged its business and appropriated and wasted its assets, it seems that the defendant is not entitled to counterclaim for moneys loaned and advanced to the corporation. Burgess v Stevens, 266 N.Y.S. 79, 148 Misc. 450, 1933 N.Y. Misc. LEXIS 1229 (N.Y. Sup. Ct. 1933).

In an action by a corporation against a former officer and director for an accounting, a money judgment for funds allegedly converted, and other relief, defendant's counterclaim against the corporation and another officer and director would substantially change the litigation to a stockholder's derivative suit, and the counterclaim was therefore dismissed without prejudice to new action because a derivative action is a class suit and in many respects is in a technical class by itself. Orto Theatres Corp. v Newins, 138 N.Y.S.2d 550, 207 Misc. 414, 1955 N.Y. Misc. LEXIS 2641 (N.Y. Sup. Ct. 1955).

16. — —Defenses

In an action under this section brought on the theory that the directors of the corporation were guilty of negligence and waste in conveying all the assets without other security than exaction from the grantee of a covenant to assume debts and pay them, held, there was no breach of duty since the plaintiff had assented and concurred in the breach of trust or had subsequently acquiesced in it. Darcy v Brooklyn & N. Y. Ferry Co., 196 N.Y. 99, 89 N.E. 461, 196 N.Y. (N.Y.S.) 99, 1909 N.Y. LEXIS 803 (N.Y. 1909).

In an action by directors of a corporation to compel defendant directors to restore to said defendant corporation moneys and assets which were allegedly wasted or fraudulently transferred at grossly inadequate prices, it was not a defense that the plaintiffs were estopped because they might have participated in or ratified said wrongs. Williams v Robinson, 9 Misc. 2d 774, 169 N.Y.S.2d 811, 1957 N.Y. Misc. LEXIS 2107 (N.Y. Sup. Ct. 1957), aff'd, 5 A.D.2d 823, 170 N.Y.S.2d 991, 1958 N.Y. App. Div. LEXIS 6927 (N.Y. App. Div. 1st Dep't 1958).

Ratification is not a defense to acts of directors which are unequivocally prohibited by law. Cowin v Jonas, 43 N.Y.S.2d 468, 1943 N.Y. Misc. LEXIS 2249 (N.Y. Sup. Ct. 1943), aff'd, 267 A.D. 947, 48 N.Y.S.2d 460, 1944 N.Y. App. Div. LEXIS 5647 (N.Y. App. Div. 1944).

17 —Service of process

The only valid method of affecting service on a foreign corporation which was the subject of a stockholder's derivative action

and had surrendered its authority to do business in the State by a certificate in which it consented that process in any action on a liability incurred before filing of the certificate might be served on the Secretary of State, was by such service on the Secretary of State. The wrongs complained of occurred before the corporation surrendered its authority, and jurisdiction was properly secured. Herold v Wills, 110 N.Y.S.2d 321, 201 Misc. 114, 1952 N.Y. Misc. LEXIS 2412 (N.Y. Sup. Ct. 1952).

18. —Statute of limitations

In an action for waste where the profits obtained by officers and directors do not exceed the losses to the corporation the legal remedy is adequate and the action is governed by the three year statute of limitations. Corash v Texas Co., 264 A.D. 292, 35 N.Y.S.2d 334, 1942 N.Y. App. Div. LEXIS 4134 (N.Y. App. Div. 1942).

The gravamen of the cause of action, not the prayer for relief, determines the statute of limitations applicable. The fact that the action is in equity and equitable relief is demanded does not make the ten year statute of limitations applicable. Corash v Texas Co., 264 A.D. 292, 35 N.Y.S.2d 334, 1942 N.Y. App. Div. LEXIS 4134 (N.Y. App. Div. 1942).

Action by judgment creditors under §§ 60, 61, and 70, because of alleged waste committed by individual defendants, as directors of a corporation against which plaintiffs held an unsatisfied judgment were actions at law and having come into being in favor of judgment creditors perforce the statute, under Civ. Pr. Act, § 48, subd 2, six-year statute of limitations (since reduced to three years) is applicable to them. Luke v Polstein, 268 A.D. 921, 51 N.Y.S.2d 427, 1944 N.Y. App. Div. LEXIS 4258 (N.Y. App. Div. 2d Dep't 1944), aff'd, 294 N.Y. 896, 63 N.E.2d 27, 294 N.Y. (N.Y.S.) 896, 1945 N.Y. LEXIS 1074 (N.Y. 1945).

The three year statute of limitations applies to actions for corporate waste where the individual directors have not profited personally through the transaction. Purdy v Humphrey, 82 N.Y.S.2d 92, 192 Misc. 309, 1947 N.Y. Misc. LEXIS 3805 (N.Y. Sup. Ct. 1947), aff'd, 274 A.D. 841, 82 N.Y.S.2d 388, 1948 N.Y. App. Div. LEXIS 3578 (N.Y. App. Div. 1948).

The six year period of limitations applies to actions for waste of corporate funds where the director has profited by the transaction. Purdy v Humphrey, 82 N.Y.S.2d 92, 192 Misc. 309, 1947 N.Y. Misc. LEXIS 3805 (N.Y. Sup. Ct. 1947), aff'd, 274 A.D. 841, 82 N.Y.S.2d 388, 1948 N.Y. App. Div. LEXIS 3578 (N.Y. App. Div. 1948).

The six year statute of limitations applies to actions against directors and officers of a corporation for an accounting for misfeasance in office. Baker v Cohn, 42 N.Y.S.2d 159, 1942 N.Y. Misc. LEXIS 2396 (N.Y. Sup. Ct. 1942), modified, 266 A.D. 715, 40 N.Y.S.2d 623, 1943 N.Y. App. Div. LEXIS 4025 (N.Y. App. Div. 1943).

Since, under New York law, an action in behalf of the corporation against its directors is an equitable one, in the nature of one to require an accounting, the tort statute of limitations is inapplicable and the longer period of limitations on time to seek an accounting is applicable. Chambers v Blickle Ford Sales, Inc., 313 F.2d 252, 1963 U.S. App. LEXIS 6345 (2d Cir. Conn. 1963).

19. — —Accrual of cause of action

Where an action is brought under this section no cause of action accrues to a creditor with certain exceptions until judgment has been obtained and execution returned unsatisfied. The statute of limitations does not commence to run until the cause of action is accrued to the creditor. Buttles v Smith, 281 N.Y. 226, 22 N.E.2d 350, 281 N.Y. (N.Y.S.) 226, 1939 N.Y. LEXIS 1003 (N.Y. 1939).

An action by a creditor to secure an accounting for losses caused by the wrongful acts of the defendant can be maintained, pursuant to this section, only after entry of judgment in return of execution unsatisfied and therefore the statute of limitations does not commence to run until entry of judgment and return of execution unsatisfied. Hastings v H. M. Byllesby & Co., 38 N.Y.S.2d 201, 1942 N.Y. Misc. LEXIS 2167 (N.Y. Sup. Ct. 1942).

20. —Burden of proof

In an action by a trustee in bankruptcy against officers, directors and stockholders of a corporation who disposed of the corporate assets at an auction sale, held without notice to creditors and without compliance with any statutory procedure designed to protect the rights of creditors, the burden of showing that full value was realized, and that the creditors therefor did not sustain a loss by virtue of the defendant's unilateral action, is upon the defendants, and they must account and respond in damages for the amount, if any, by which less than full value was realized upon the sale. New York Credit Men's Adjustment Bureau, Inc. v Weiss, 278 A.D. 501, 105 N.Y.S.2d 604, 1951 N.Y. App. Div. LEXIS 3848 (N.Y. App. Div. 1951), aff'd, 305 N.Y. 1, 110 N.E.2d 397, 305 N.Y. (N.Y.S.) 1, 1953 N.Y. LEXIS 844 (N.Y. 1953).

21. —Right to and questions for jury

Order setting issues to be tried by jury in an action brought under this section against officers for neglect and misconduct, which is alleged to have consisted in wrongfully excluding plaintiff from participating in management of corporation, jury should not be allowed to determine damage to corporation caused by such acts as it is wholly a matter of speculation. Momand v Landers, 174 A.D. 227, 160 N.Y.S. 1053, 1916 N.Y. App. Div. LEXIS 7707 (N.Y. App. Div. 1916).

Defendants were entitled to a jury trial of causes of action at law contained in a complaint for an accounting under §§ 60, 61. Duane Jones Co. v Burke, 280 A.D. 889, 115 N.Y.S.2d 529, 1952 N.Y. App. Div. LEXIS 4041 (N.Y. App. Div. 1952).

In an action by a director of a corporation against other directors of same corporation for damages for negligent transactions, the question whether the plaintiff-director acquiesced in and ratified the transactions complained of is a question for the jury. Kehaya v Axton, 30 F. Supp. 838, 1940 U.S. Dist. LEXIS 3658 (D.N.Y. 1940).

22. —Liability of officers and directors

In an action under this section, where it has been adjudged that one of the defendants has misappropriated a stated sum, his refusal to pay the receiver of the corporation does not entitle the plaintiff, as a matter of law, to an order committing such defendant for contempt, where no specific fund has been directed to be paid over and it does not appear that the money cannot be collected by execution. Nelson v Hirsch, 264 N.Y. 316, 190 N.E. 653, 264 N.Y. (N.Y.S.) 316, 1934 N.Y. LEXIS 1433 (N.Y. 1934).

Officers and directors of a solvent corporation who, confronted with unfavorable business conditions, sold all the corporate property at public auction without notice to creditors, are prima facie liable to creditors for waste of the corporate assets if the proceeds of the property at the auction were less than its full value. New York Credit Men's Adjustment Bureau, Inc. v Weiss, 305 N.Y. 1, 110 N.E.2d 397, 305 N.Y. (N.Y.S.) 1, 1953 N.Y. LEXIS 844 (N.Y. 1953).

Corporate assets constitute a trust fund for payment of corporate debts, and when two directors of a stock corporation transfer all corporate property to a third director for nominal consideration they commit a breach of duty toward creditors, and become personally liable for existing claims. Cullen v Friedland, 152 A.D. 124, 136 N.Y.S. 659, 1912 N.Y. App. Div. LEXIS 8493 (N.Y. App. Div. 1912).

Directors of a defunct corporation, who distribute all of its assets among themselves without formal dissolution proceeding and notice to creditors of the corporation, are not liable to such creditors on the ground that they have wrongfully and unlawfully distributed assets of the corporation, where it does not appear that the creditors would have been entitled to payment of their claims if the corporation had been regularly dissolved, and there is no proof of fraud or bad faith. Curran v Oppenheimer, 164 A.D. 746, 150 N.Y.S. 369, 1914 N.Y. App. Div. LEXIS 8513 (N.Y. App. Div. 1914), aff'd, 222 N.Y. 615, 118 N.E. 1055, 222 N.Y. (N.Y.S.) 615, 1918 N.Y. LEXIS 1496 (N.Y. 1918).

Action by judgment creditors of corporate debtor to set aside transfers made by corporation to another corporation, money judgment against individual defendants who were officers and directors of both corporations sustained as a breach of their duties as directors of corporate debtor. Thorne Neale & Co. v New York Southern Coal Terminal Corp., 270 A.D. 816, 59 N.Y.S.2d 833, 1946 N.Y. App. Div. LEXIS 4085 (N.Y. App. Div.), aff'd, 295 N.Y. 977, 68 N.E.2d 56, 295 N.Y. (N.Y.S.) 977, 1946 N.Y. LEXIS 1114 (N.Y. 1946).

Diversion of corporate funds by a director-officer of a corporation to his personal use is in flagrant dereliction of his duty and violation of his trust, rendering him liable to a trustee in bankruptcy of the corporation. Newfield v Ettlinger, 22 Misc. 2d 769, 194 N.Y.S.2d 670, 1959 N.Y. Misc. LEXIS 2554 (N.Y. Sup. Ct. 1959), app. dismissed, 10 A.D.2d 947, 205 N.Y.S.2d 908, 1960 N.Y. App. Div. LEXIS 9529 (N.Y. App. Div. 1st Dep't 1960).

Where the individual defendant, an officer in the debtor corporation, controlled and dominated the corporation, the individual defendant was liable to a judgment-creditor for the money and value of the corporate debtor's assets disbursed by him with knowledge of its actual or impending insolvency. This liability includes, but is not limited to, the preferential repayments of loans made by the individual defendant to the debtor corporation or to the corporation's customers in behalf of the debtor corporations. Beol, Inc. v Dorf, 22 Misc. 2d 798, 193 N.Y.S.2d 394, 1959 N.Y. Misc. LEXIS 2530 (N.Y. Sup. Ct. 1959), aff'd, 12 A.D.2d 459, 209 N.Y.S.2d 267, 1960 N.Y. App. Div. LEXIS 7135 (N.Y. App. Div. 1st Dep't 1960).

In an action by a judgment creditor attacking the transfer of assets of a debtor corporation, where the evidence established that the secretary of the corporation and others fraudulently transferred the corporation's assets and also that the secretary fraudulently transferred her interest in certain real estate, such transfer of title was vitiated and the secretary's interest in the property was made subject to the lien of the judgment. Lazar v Towne House Restaurant Corp., 142 N.Y.S.2d 315, 1955 N.Y. Misc. LEXIS 2796 (N.Y. Sup. Ct. 1955), aff'd, 5 A.D.2d 794, 171 N.Y.S.2d 334, 1958 N.Y. App. Div. LEXIS 7167 (N.Y. App. Div. 2d Dep't 1958).

Although New York law holds directors liable for misappropriations of assets and provides a remedy to require them to account, it does not go so far as to make them actual trustees of the corporate assets, even in liquidation. Chambers v Blickle Ford Sales, Inc., 313 F.2d 252, 1963 U.S. App. LEXIS 6345 (2d Cir. Conn. 1963).

23. —Appointment of receiver pendente lite

A receiver pendente lite cannot be appointed in the absence of any allegation in the complaint that the corporation is insolvent or that insolvency threatens. Lichtenstadter v Lichtenstadter Bros., Inc., 224 N.Y.S. 459, 130 Misc. 772, 1927 N.Y. Misc. LEXIS 1144 (N.Y. Sup. Ct. 1927).

24. Under former General Corporation Law § 61

An action by corporate directors and stockholders against other directors and the corporation for an accounting was a representative suit. Handler v Belmare Lighting Co., 8 Misc. 2d 687, 168 N.Y.S.2d 288, 1957 N.Y. Misc. LEXIS 2331 (N.Y. Sup. Ct. 1957).

An action against officers of a corporation for waste and breach of fiduciary duty can only be maintained by the corporation or in its behalf. Hyde v Everett Van Kleeck & Co., 17 Misc. 2d 375, 190 N.Y.S.2d 914, 1959 N.Y. Misc. LEXIS 4092 (N.Y. Sup. Ct. 1959).

Waste, mismanagement and inference with the corporation's business are wrongs to the corporation, and such wrongs must be redressed by means of a suit by, or in behalf of the corporation. It gives no rise to a cause of action in favor of the individual stockholders. Weinstein v Behn, 65 N.Y.S.2d 536, 1946 N.Y. Misc. LEXIS 2874 (N.Y. Sup. Ct. 1946), aff'd, 272 A.D. 1045, 75 N.Y.S.2d 284, 1947 N.Y. App. Div. LEXIS 4875 (N.Y. App. Div. 1947).

25. —Action by corporation

Plaintiff membership corporations may assert a cause of action for an accounting (§§ 60, 61). Kang Jai Ass'n, Inc. v Poon Gee Datt, 279 A.D. 872, 110 N.Y.S.2d 424, 1952 N.Y. App. Div. LEXIS 5154 (N.Y. App. Div. 1952).

Where causes of action against directors and officers for breach of contract or fiduciary duties are sought to be enforced by the corporation directly, they are not controlled by limitations prescribed by this section with respect to maintenance of derivative actions. Platt Corp. v Platt, 21 A.D.2d 116, 249 N.Y.S.2d 75, 1964 N.Y. App. Div. LEXIS 3973 (N.Y. App. Div. 1st Dep't 1964), aff'd, 15 N.Y.2d 705, 256 N.Y.S.2d 335, 204 N.E.2d 495, 1965 N.Y. LEXIS 1699 (N.Y. 1965).

26. —Stockholder's derivative action

In a stockholder's derivative action, the corporation is an indispensable party. The corporation cannot be made a party simply by act of the defendant in inserting the name of the corporation in his answer as an additional defendant. Thus, a motion to dismiss a counter-claim seeking an accounting by the plaintiff was granted with leave to file an amended answer after compelling the plaintiff to join the corporation as a party defendant. Meier v Holmes, 282 A.D. 1030, 126 N.Y.S.2d 655, 1953 N.Y. App. Div. LEXIS 5726 (N.Y. App. Div. 1953).

Action by stockholder of co-operative corporation to obtain order requiring officers to call a meeting for election of directors or that a meeting to consider his charges be held, was a representative action. Lazar v Knolls Cooperative Section No. 2, Inc., 130 N.Y.S.2d 407, 205 Misc. 748, 1954 N.Y. Misc. LEXIS 2044 (N.Y. Sup. Ct. 1954).

27. — —Complaint

A complaint in a stockholder's derivative suit that "plaintiff brings this action derivately in the right and for the benefit of" the designated corporation is sufficient to fully apprise all parties of plaintiff's position. Abramson v Blakeley, 25 Misc. 2d 967, 202 N.Y.S.2d 586, 1960 N.Y. Misc. LEXIS 2997 (N.Y. Sup. Ct. 1960).

A complaint in a stockholders' derivative suit is insufficient to state a cause of action against individual directors and officers of the corporation for alleged mismanagement and wasting of the corporate funds where its allegations are wholly conclusory, vague and general, and fail to allege when the acts complained of occurred. Arvonio v Arvonio, 31 Misc. 2d 5, 219 N.Y.S.2d 635, 1961 N.Y. Misc. LEXIS 2754 (N.Y. Sup. Ct. 1961).

28. —Action by officer or director

Under § 61 third persons to whom property was transferred are properly joined in such action and a director of a corporation may bring an action wthout prior demand that the corporation bring the action. Katz v Braz, 66 N.Y.S.2d 722, 188 Misc. 581, 1946 N.Y. Misc. LEXIS 3126 (N.Y. Sup. Ct. 1946), aff'd, 271 A.D. 970, 69 N.Y.S.2d 324, 1947 N.Y. App. Div. LEXIS 5447 (N.Y. App. Div. 1947).

This section expressly authorizes an action by a director of a corporation against its officers for an accounting. Wyckoff v Sagall, 16 Misc. 2d 630, 56 N.Y.S.2d 392, 1945 N.Y. Misc. LEXIS 1461 (N.Y. Sup. Ct. 1945).

An officer or director of a corporation may maintain an action to compel other officers or directors to account for their conduct in management of the corporation. Scott v Funaroff, 84 N.Y.S.2d 144, 1948 N.Y. Misc. LEXIS 3527 (N.Y. Sup. Ct. 1948).

Under § 61 a director of a foreign corporation may bring an action against such corporation for misconduct of other directors. Kehaya v Axton, 32 F. Supp. 266, 1940 U.S. Dist. LEXIS 3343 (D.N.Y. 1940).

29. — —Complaint

It is not necessary for a director of a corporation, bringing an action under this section, to state in the title of the action that he sues in a representative capacity if complaint itself alleges that he is a director. Higgins v Applebaum, 183 A.D. 527, 170 N.Y.S. 228, 1918 N.Y. App. Div. LEXIS 5006 (N.Y. App. Div. 1918).

An action under this section only lies when the plaintiff is a director at the time of commencement of the action, which fact he should allege specifically, or by an allegation of other facts which by necessary inference will show him to be such. Rothbart v Star Wet Wash Laundry Co., 185 A.D. 807, 174 N.Y.S. 76, 1919 N.Y. App. Div. LEXIS 5797 (N.Y. App. Div. 1919).

Under the provisions of this section permitting an action by an officer or director, an allegation that the plaintiff is and has been treasurer of the corporation is sufficient to enable him to maintain an action for conversion and misappropriation of corporate property in his own name. Peets v Manhasset Civil Engineers, Inc., 68 N.Y.S.2d 335, 1946 N.Y. Misc. LEXIS 3364 (N.Y. Sup. Ct. 1946).

30. — —Defense

In an action by directors of a corporation to compel defendant directors to restore to said defendant corporation moneys and assets which were allegedly wasted or fraudulently transferred at grossly inadequate prices, it was not a defense that the plaintiffs were estopped because they might have participated in or ratified said wrongs to the corporation. Williams v Robinson, 9 Misc. 2d

774, 169 N.Y.S.2d 811, 1957 N.Y. Misc. LEXIS 2107 (N.Y. Sup. Ct. 1957), aff'd, 5 A.D.2d 823, 170 N.Y.S.2d 991, 1958 N.Y. App. Div. LEXIS 6927 (N.Y. App. Div. 1st Dep't 1958).

31. — —Abatement

An action by a director of a corporation against other directors does not abate when the plaintiff ceases to be a director of the corporation and the action which is one for the benefit of the corporation may be continued in the director's name after he ceases to be such. Manix v Fantl, 209 A.D. 756, 205 N.Y.S. 174, 1924 N.Y. App. Div. LEXIS 8730 (N.Y. App. Div. 1924).

The fact that the plaintiff was illegally ousted as a director of the corporation after commencement of an action under this section does not abate the action. Wangrow v Wangrow, 211 A.D. 552, 207 N.Y.S. 132, 1924 N.Y. App. Div. LEXIS 9918 (N.Y. App. Div. 1924).

Action commenced by director of corporate defendant to compel individual defendants, directors and officers of corporate defendant, to account for and to set aside certain corporate transactions did not abate the cause, after commencement of action, plaintiff ceased to be a director. Tenney v Rosenthal, 6 A.D.2d 510, 179 N.Y.S.2d 728, 1958 N.Y. App. Div. LEXIS 4130 (N.Y. App. Div. 1st Dep't 1958), aff'd, 6 N.Y.2d 204, 189 N.Y.S.2d 158, 160 N.E.2d 463, 1959 N.Y. LEXIS 1134 (N.Y. 1959).

An illegal attempted removal of an officer or director would not prevent his maintaining an action as such. Wyckoff v Sagall, 16 Misc. 2d 630, 56 N.Y.S.2d 392, 1945 N.Y. Misc. LEXIS 1461 (N.Y. Sup. Ct. 1945).

Director who commenced an action against other directors of corporation for negligence and waste under § 60, could not continue to maintain action after he was ousted as a director. Kehaya v Axton, 32 F. Supp. 266, 1940 U.S. Dist. LEXIS 3343 (D.N.Y. 1940).

32. —Action by judgment creditor

Suit by creditor to recover moneys misappropriated by directors or other officers of corporation, should be brought by plaintiff in a representative capacity. Davis v Wilson, 150 A.D. 704, 135 N.Y.S. 825, 1912 N.Y. App. Div. LEXIS 7197 (N.Y. App. Div. 1912).

Judgment creditor of a corporation may maintain an individual action against directors who have caused the assets of the corporation to be transferred to another corporation without providing for payment of plaintiff's claim, if the rights of no other creditors are involved. Buckley v United Cloak & Suit Co., 155 A.D. 735, 140 N.Y.S. 953, 1913 N.Y. App. Div. LEXIS 5184 (N.Y. App. Div. 1913), aff'd, 214 N.Y. 679, 108 N.E. 1090, 214 N.Y. (N.Y.S.) 679, 1915 N.Y. LEXIS 1391 (N.Y. 1915).

A creditor of a corporation seeking to hold liable its trustees in dissolution for alleged wrongful distribution of assets of the corporation must not only proceed under §§ 60, 61, but must be a judgment creditor. Bristol Mfg. Corp. v Elk Textile Co., 200 N.Y.S. 860, 121 Misc. 138, 1923 N.Y. Misc. LEXIS 1553 (N.Y. Sup. Ct. 1923), aff'd, 209 A.D. 95, 204 N.Y.S. 427, 1924 N.Y. App. Div. LEXIS 8559 (N.Y. App. Div. 1924).

A creditor who is not a judgment creditor may not maintain an action against corporate directors to compel them to account for their official conduct. Levy v Paramount Publix Corp., 266 N.Y.S. 271, 149 Misc. 129, 1933 N.Y. Misc. LEXIS 1260 (N.Y. Sup. Ct. 1933), aff'd, 241 A.D. 711, 269 N.Y.S. 997, 1934 N.Y. App. Div. LEXIS 9067 (N.Y. App. Div. 1934).

To maintain an action either under § 276 of the Debtor and Creditor Law or § 61 of the General Corporation Law, the plaintiff must have status as a creditor, and he cannot maintain such an action after his claim has been fully paid. Lazar v Libby, 28 Misc. 2d 131, 219 N.Y.S.2d 362, 1960 N.Y. Misc. LEXIS 2142 (N.Y. Sup. Ct. 1960).

A cause of action pursuant to this section and § 60 may be maintained by a judgment creditor. Kendall v Oakland Golf Club, 123 N.Y.S.2d 907, 1953 N.Y. Misc. LEXIS 2067 (N.Y. Sup. Ct.), aff'd, 282 A.D. 1057, 126 N.Y.S.2d 379, 1953 N.Y. App. Div. LEXIS 5809 (N.Y. App. Div. 1953).

In an action by a judgment creditor for himself and on behalf of all other creditors of a corporation, since under Debtor and Creditor Law § 278 the action may be maintained only by a creditor in his own right and since under General Corporation Law § 133 the court need not make an order requiring all creditors to prove their claims, the court granted judgment to plaintiff only as an individual and not as a representative of other creditors. Lazar v Towne House Restaurant Corp., 142 N.Y.S.2d 315, 1955 N.Y. Misc. LEXIS 2796 (N.Y. Sup. Ct. 1955), aff'd, 5 A.D.2d 794, 171 N.Y.S.2d 334, 1958 N.Y. App. Div. LEXIS 7167 (N.Y. App. Div. 2d Dep't 1958).

33. —Action by receiver for corporation

The receiver of corporation, appointed on application of one creditor may recover in an action to recover the value of property alleged to have been illegally transferred to certain directors thereby denuding the corporation and defeating and impairing the rights of creditors. Hitz v Garfinkel, 246 A.D. 728, 283 N.Y.S. 872, 1935 N.Y. App. Div. LEXIS 9952 (N.Y. App. Div. 1935).

A receiver appointed in supplementary proceedings has the same power as a general receiver and may maintain an action against officers and directors of a corporation to recover property wrongfully conveyed and dividends improperly declared. Klages v Cohen, 146 F.2d 641, 1945 U.S. App. LEXIS 3101 (2d Cir. N.Y. 1945).

34. —Action by attorney general

An action for the removal of the officers and directors of a corporation may be brought only by the attorney general. Purdy v Humphrey, 82 N.Y.S.2d 92, 192 Misc. 309, 1947 N.Y. Misc. LEXIS 3805 (N.Y. Sup. Ct. 1947), aff'd, 274 A.D. 841, 82 N.Y.S.2d 388, 1948 N.Y. App. Div. LEXIS 3578 (N.Y. App. Div. 1948).

35. — —Complaint

A complaint by the attorney general, which alleges matters concerning the internal management of a corporation as between itself and its stockholders or individuals with whom private contractual rights are involved, might be sustainable as a derivative action under §§ 60 and 61 but could not be sustained as affecting the public interest under § 134. People v Singer, 85 N.Y.S.2d 727, 193 Misc. 976, 1949 N.Y. Misc. LEXIS 1693 (N.Y. Sup. Ct. 1949).

36. —Right to jury trial

Defendants were entitled to a jury trial of causes of action at law contained in a complaint which also alleged a cause of action for an accounting under §§ 60, 61. Duane Jones Co. v Burke, 280 A.D. 889, 115 N.Y.S.2d 529, 1952 N.Y. App. Div. LEXIS 4041 (N.Y. App. Div. 1952).

Agency Opinions

1. Generally

The attorney general or one or more members of the Medina Firemen's Benevolent Association having standing to bring an action to challenge improper disbursements by this not-for-profit corporation. 1979 Op St Compt No. 79–238-A.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-7 White, New York Business Entities ¶ N720.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.05. Directors.

Matthew Bender's New York Checklists: Checklist for Assessing Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 2.47.

Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N720:1. Complaint by Director or Officer Against Director or Officer Manipulating Corporation for Own Benefit.

§ 720-a. Liability of directors, officers, trustees and key persons

Except as provided in sections seven hundred nineteen and seven hundred twenty of this chapter,

and except any action or proceeding brought by the attorney general or, in the case of a charitable trust, an action or proceeding against a trustee brought by a beneficiary of such trust, no person serving without compensation as a director, officer, key person or trustee of a corporation, association, organization or trust described in section 501 (c) (3) of the United States internal revenue code shall be liable to any person other than such corporation, association, organization or trust based solely on his or her conduct in the execution of such office unless the conduct of such director, officer, key person or trustee with respect to the person asserting liability constituted gross negligence or was intended to cause the resulting harm to the person asserting such liability. For purposes of this section, such a director, officer, key person or trustee shall not be considered compensated solely by reason of payment of his or her actual expenses incurred in attending meetings or otherwise in the execution of such office.

HISTORY:

Add, L 1986, ch 220, § 11, eff June 28, 1986, applicable to causes of action arising on or after June 28, 1986; L 2019, ch 445, § 5, effective November 8, 2019.

Editor's Notes: Laws 1986, ch 220, § 1, eff June 28, 1986, applicable to contracts in force and effect on and amended, executed, modified, renewed or altered on June 28, 1986, provides as follows:

Section 1. Legislative intent. The legislature hereby finds and declares that the state is in the midst of an insurance crisis which affects all aspects of the public and private sectors. Day care centers, not-for-profit organizations, volunteer groups, businesses, governmental entities, housing and transit authorities, professionals and others have experienced sudden and inexplicable cancellations and nonrenewals of their liability insurance policies with little, if any, notice. In other cases, policyholders and the public have been confronted by skyrocketing premiums or reductions in coverage. These events have disastrous effects on a multitude of public entities, groups and individuals, and threaten to undermine economic development and the delivery of essential and necessary services to residents, consumers and businesses throughout New York state. Because critical coverages have become unavailable or unaffordable, a comprehensive, balanced approach is imperative to provide stability and safeguard the public interest.

The legislature further finds and declares that, by the enactment of the provisions of this act, it is the intent of the legislature to fulfill its constitutional obligation to provide for the health, safety and welfare of the people of this state. It is imperative that this state provide stability, security and certainty for commercial risk, public entity and professional liability insurance policyholders and the public at-large by the enactment of this act.

This act is intended to alleviate the problems of unaffordability and unavailability of such insurance, to provide for increased security of rates and rating procedures, and to provide for increased disclosure and knowledge of insurance company financial practices, by, among other measures:

(a) establishing a flexible rating system, with prior approval of rate changes beyond flexibility bands, for certain liability insurance;

(b) preventing unwarranted mid-term cancellations and affording policyholders minimum notice of nonrenewal of policies, reductions in coverage and premium increases;

(c) allowing New York counties, towns, cities, villages, district corporations, school districts and boards of cooperative educational services to organize and subscribe to statewide municipal reciprocal insurers;

(d) authorizing the issuance of property/casualty insurance policies on a group basis for public entities and not-for-profit organizations;

(e) establishing stand-by joint underwriting authority by expanding the powers of the New York property insurance underwriting association;

(f) instituting qualified immunity for uncompensated officers and directors of not-for-profit organizations;

(g) increasing capacity by expediting access to alternative voluntary markets where appropriate;

(h) providing for annual reports to the governor and legislature of insurance company rating and financial practices;

(i) authorizing costs upon frivolous claims and counterclaims; and

(j) authorizing the admissibility of recovery from collateral sources.

Amendment Notes The 2019 amendment by ch 445, § 5, added "and key persons" in the section heading; and added "key person" three times.

PRACTICE INSIGHTS:

QUALIFIED IMMUNITY IS NOT BULLET-PROOF SHIELD

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INSIGHT

Not-For-Profit Corporation Law § 720-a confers qualified immunity from suit upon certain directors or officers of not-for-profits. Although it does offer protection for certain individuals, counsel must fully understand the limitations of that protection to represent the not-for-profit corporation and individual directors and officers adequately.

ANALYSIS

Qualified immunity is limited to directors and officers of entities eligible for tax exemption under Internal Revenue Code § 501(c)(3).

A director or officer sued for personal liability must raise the qualified immunity granted under Not-For-Profit Corp. Law § 720-a as an affirmative defense in the answer. *Woodford v. Benedict Community Health Center*, 176 A.D.2d 1115, 575 N.Y.S.2d 415 (3d Dep't 1991). Best practices dictate that an attorney representing a director or officer sued under these circumstances review the complaint to ensure that it has been verified and that it affirmatively states that the director's actions constituted either gross negligence or intentional infliction of harm. *See* CPLR 3016(h).

Alternatively, the defendant may move to dismiss a complaint against which qualified immunity is a defense. This CPLR 3211(a)(11) motion must be made before the answer is filed. *Woodford v. Benedict Community Health Center*, 176 A.D.2d 1115, 575 N.Y.S.2d 415 (3d Dep't 1991). A claim will be dismissed if the defendant can show that the factors have been met, that is: (1) defendant can prove that there is no probability of meeting the statutory standard of gross negligence or intent to cause harm to the plaintiff; (2) the defendant can show that his or her service to the not-for-profit was uncompensated; and (3) the not-for-profit is eligible for tax exemption under IRC § 501(c)(3).

If defendant is paid, immunity is not available.

Although the law permits not-for-profits to compensate its directors (Not-For-Profit Corp. Law § 202(a)(12)), most directors are volunteers who serve without compensation. If an IRC § 501(c)(3) organization chooses to compensate its directors for more than "actual expenses incurred in attending meetings or otherwise in the execution of such office" (Not-For-Profit Corp. Law § 720-a), any such director will lose the right to qualified immunity under this provision. This choice also affects the director's right to seek indemnification. This issue arises most frequently in the case of paid officers who also hold a seat on the board of directors and directors involved with a private foundation.

Know what actions qualified immunity will not protect.

Directors who otherwise meet the criteria for qualified immunity are not protected from every cause of action that may be filed by a third party. It is important for the practitioner to know what types of actions expose the director or officer to personal liability. For example, Not-for-Profit Corp. Law § 720-a does not immunize directors from federal claims or employment litigation (such as wrongful termination) to the extent the claims are based upon federal law. This section does not apply to actions taken by the Attorney General or actions commenced under Not-For-Profit Corp. Law § 719 (director liability in certain defined transactions) or Not-For-Profit Corp. Law § 720 (actions brought on behalf of the organization).

In addition, directors may be held personally liable if the not-for-profit corporation does not follow the dissolution procedures set forth in Not-For-Profit Corp. Law § 1002-a or if the not-for-profit does not adequately provide for known liabilities upon dissolution. In such an event, the directors will be held personally liable only if the creditors file claims within the time period provided for in Not-For-Profit Corp. Law Article 10 (Non-Judicial Dissolution and Article 11 (Judicial Dissolution) Not-For-Profit Corp. Law § 719.

Notes to Decisions

Analysis

1. Generally
2. Construction
3. Qualified immunity
4. Motion to dismiss

1. Generally

Trustees and officers of religious corporation were not entitled to dismissal of action under CLS CPLR § 3211(a)(11) where (1) they did not present affidavit of chief financial officer as to their uncompensated status, and (2) it was alleged that certain individual defendant, who had nearly absolute authority over church, its trustees and officers, its membership, and related churches, raped, sodomized, and sexually abused infant plaintiffs while they were under his religious guidance. Karen S. v Streitferdt, 172 A.D.2d 440, 568 N.Y.S.2d 946, 1991 N.Y. App. Div. LEXIS 5187 (N.Y. App. Div. 1st Dep't 1991).

Defendants were not entitled to dismissal of action on ground that they had immunity under CLS N-PCL § 720-a as uncompensated directors of not-for-profit corporation where plaintiff, not-for-profit religious corporation, alleged in detail that defendants formed second not-for-profit corporation so as to assist in deceptive scheme to appropriate property for themselves; such allegation came within statutory exception for intentional misconduct. American Baptist Churches v Galloway, 271 A.D.2d 92, 710 N.Y.S.2d 12, 2000 N.Y. App. Div. LEXIS 5373 (N.Y. App. Div. 1st Dep't 2000).

Appellate court found that tax returns and other financial documents which plaintiff requested from defendant in her lawsuit alleging sexual discrimination, negligent supervision, and breach of contract were relevant to defendant's claim that he was entitled to qualified immunity, pursuant to N.Y. Not-for-Profit Corp. Law § 720-a, and held that defendant's claim of qualified immunity under § 720-a should be stricken if he did not provide those documents. Samide v Roman Catholic Diocese of Brooklyn, 5 A.D.3d 463, 773 N.Y.S.2d 116, 2004 N.Y. App. Div. LEXIS 2472 (N.Y. App. Div. 2d Dep't 2004).

Complaint could not proceed against the individual defendants, who were entitled to qualified immunity pursuant to N.Y. Not-for-Profit Corp. Law § 720-a, in view of the affidavit by the foundation's chairman and director establishing that they served without compensation, and because, as provided by N.Y. C.P.L.R. 3211(a)(11), there was no "reasonable probability" that their conduct constituted gross negligence or was intended to cause harm; although the chairman was not the chief financial officer (CFO) of the foundation, the Civil Practice Law and Rules did not require that it be the CFO who submitted a letter, but, rather, stated only that the evidence "may consist" of a letter from the CFO. Thome v Alexander & Louisa Calder Found., 70 A.D.3d 88, 890 N.Y.S.2d 16, 2009 N.Y. App. Div. LEXIS 8707 (N.Y. App. Div. 1st Dep't 2009), app. denied, 15 N.Y.3d 703, 906 N.Y.S.2d 817, 933 N.E.2d 216, 2010 N.Y. LEXIS 1383 (N.Y. 2010).

2. Construction

Board of governors of country club is not entitled to qualified immunity conferred upon uncompensated officials of not-for-profit corporations pursuant to CLS CPLR § 3211 (a)(11) and CLS N-PCL § 720-a since those provisions only grant qualified immunity to tax exempt organizations which are largely charitable or otherwise socially beneficial in nature. Bernbach v Bonnie Briar Country Club, 144 A.D.2d 610, 534 N.Y.S.2d 695, 1988 N.Y. App. Div. LEXIS 12353 (N.Y. App. Div. 2d Dep't 1988), app. dismissed, 74 N.Y.2d 715, 543 N.Y.S.2d 401, 541 N.E.2d 430, 1989 N.Y. LEXIS 798 (N.Y. 1989).

3. Qualified immunity

Cause of action for allegedly defamatory remarks made by members of board of governors of country club was improperly dismissed on ground that plaintiff failed to overcome qualified immunity of board of governors since country club was not organization entitled to qualified immunity pursuant to CLS CPLR § 3211 (a)(11) and CLS N-PCL § 720-a. Bernbach v Bonnie Briar Country Club, 144 A.D.2d 610, 534 N.Y.S.2d 695, 1988 N.Y. App. Div. LEXIS 12353 (N.Y. App. Div. 2d Dep't 1988), app. dismissed, 74 N.Y.2d 715, 543 N.Y.S.2d 401, 541 N.E.2d 430, 1989 N.Y. LEXIS 798 (N.Y. 1989).

Uncompensated trustee defendants were entitled to summary judgment dismissing employee's cause of action for fraud where those defendants were immune from liability under CLS N-PCL § 720-a. Goldsmith v Fight for Sight, Inc., 251 A.D.2d 120, 674 N.Y.S.2d 649, 1998 N.Y. App. Div. LEXIS 6948 (N.Y. App. Div. 1st Dep't 1998).

Unpaid directors of California not-for-profit organization were immune from suit under CLS N-PCL § 720-a and CLS CPLR § 3211(a)(11), absent allegations of their gross negligence or intention to cause harm. Pontarelli v Shapero, 231 A.D.2d 407, 647 N.Y.S.2d 185, 1996 N.Y. App. Div. LEXIS 9204 (N.Y. App. Div. 1st Dep't 1996).

Members of a board of trustees of a Jewish congregation were not entitled to qualified immunity under this statute in a defamation action by a former rabbi and the congregation because there was a reasonable probability the rabbi and the congregation could establish the trustees' actions in refusing to allow the congregation to vote on the issue of extending or renewing the rabbi's contract constituted gross negligence or were intended to cause the resulting harm. Kamchi v Weissman, 125 A.D.3d 142, 1 N.Y.S.3d 169, 2014 N.Y. App. Div. LEXIS 9021 (N.Y. App. Div. 2d Dep't 2014).

Individual defendants are not liable for federal copyright infringements under CLS N-PCL § 720-a, where photographer does not prove that their actions in posting 2 of his photographs on corporation's Internet site were grossly negligent or intended to cause him harm, because § 720-a provides that individual director of not-for-profit corporation can only be held liable for act undertaken as director if that person's act "constituted gross negligence or was intended to cause resulting harm to person asserting such liability." Scanlon v Kessler, 11 F. Supp. 2d 444, 1998 U.S. Dist. LEXIS 10201 (S.D.N.Y. 1998).

4. Motion to dismiss

CLS CPLR § 3211(a)(11) motion to dismiss complaint must be made before service of answer, and inclusion of statutory defense in answer neither preserves nor extends time within which to make dismissal motion. Woodford v Benedict Community Health Center, 176 A.D.2d 1115, 575 N.Y.S.2d 415, 1991 N.Y. App. Div. LEXIS 13359 (N.Y. App. Div. 3d Dep't 1991).

In defamation action against directors of not-for-profit corporation by plaintiffs who were removed from their positions as executive director and treasurer of corporation due to alleged fiscal improprieties, where defendants sought dismissal under CLS CPLR § 3211(a)(11) on ground that they were immune from liability under CLS N-PCL § 720-a, plaintiffs were required to come forward with evidentiary proof showing fair likelihood that

they would be able to prove that defendants were grossly negligent or intended to cause resulting harm. Rabushka v Marks, 229 A.D.2d 899, 646 N.Y.S.2d 392, 1996 N.Y. App. Div. LEXIS 7936 (N.Y. App. Div. 3d Dep't 1996).

Agency Opinions

1. Generally

A village can be held vicariously liable for Dram Shop Act violations committed by volunteer firefighters during fundraising events, but not for misconduct during social activities. 1990 N.Y. Op. Att'y Gen. No. 90-64, 1990 N.Y. AG LEXIS 68.

Directors of Independent Livery Driver Benefit Fund are not eligible for defense, indemnification, and immunity that may be accorded to public officers. 2011 NY Ops Atty Gen 2011-09 (Informal), N.Y. Op. Att'y Gen. No. 2011-9, 2011 N.Y. AG LEXIS 10.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-7 White, New York Business Entities ¶ N720-a.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.05. Directors.

Matthew Bender's New York Checklists: Checklist for Identifying Liability Issues When Selecting Entity Form LexisNexis AnswerGuide New York Business Entities § 2.02.

Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N720-a:1. Required Allegation in Complaint.

White, New York Business Entities Form N720-a:2. Notice of Motion to Dismiss on Ground of Immunity of Director or Officer.

White, New York Business Entities Form N720-a:3. Affidavit in Support of Motion to Dismiss on Ground of Immunity of Director of Officer.

§ 721. Nonexclusivity of statutory provisions for indemnification of directors and officers

The indemnification and advancement of expenses granted pursuant to, or provided by, this article shall not be deemed exclusive of any other rights to which a director or officer seeking indemnification or advancement of expenses may be entitled, whether contained in the certificate of incorporation or the by-laws or, when authorized by such certificate of incorporation or by-laws, (a) a resolution of members, (b) a resolution of directors, or (c) an agreement providing for such indemnification, provided that no indemnification may be made to or on behalf of any director or officer if a judgment or other final adjudication adverse to the director or officer establishes that his acts were committed in bad faith or were the result of active and deliberate dishonesty and were material to the cause of action so adjudicated, or that he personally gained in fact a financial profit or other advantage to which he was not legally entitled. Nothing contained in this article shall affect any rights to indemnification to which corporate personnel other than directors and officers may be entitled by contract or otherwise under law.

HISTORY:

Add, L 1969, ch 1066, § 1; amd, L 1987, ch 368, § 1, eff July 23, 1987.

Revision Notes: *Source:* None.

Changes: Completely new.

Comment: This section is the same, both in substance and in language, as Bus Corp L § 721. The purpose of this section is to make clear that the provisions which follow relating to indemnification of directors and officers are exclusive and establish a policy from which no material deviation is permissible. The indemnifcation of corporate personnel, other than directors and officers, is left to common law formulation.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-7 White, New York Business Entities ¶ N721.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.05. Directors.

§ 722. Authorization for indemnification of directors and officers

(a) A corporation may indemnify any person, made, or threatened to be made, a party to an action or proceeding other than one by or in the right of the corporation to procure a judgment in its favor, whether civil or criminal, including an action by or in the right of any other corporation of any kind, domestic or foreign, or any partnership, joint venture, trust, employee benefit plan or other enterprise, which any director or officer of the corporation served in any capacity at the request of the corporation, by reason of the fact that he, his testator or intestate, was a director or officer of the corporation, or served such other corporation, partnership, joint venture, trust, employee benefit plan or other enterprise in any capacity, against judgments, fines, amounts paid in settlement and reasonable expenses, including attorneys' fees actually and necessarily incurred as a result of such action or proceeding, or any appeal therein, if such director or officer acted, in good faith, for a purpose which he reasonably believed to be in, or, in the case of service for any other corporation or any partnership, joint venture, trust, employee benefit plan or other enterprise, not opposed to, the best interests of the corporation and, in criminal actions or proceedings, in addition, had no reasonable cause to believe that his conduct was unlawful.

(b) The termination of any such civil or criminal action or proceeding by judgment, settlement, conviction or upon a plea of nolo contendere, or its equivalent, shall not in itself create a presumption that any such director or officer did not act, in good faith, for a purpose which he reasonably believed to be in, or, in the case of service for any other corporation or any partnership, joint venture, trust, employee benefit plan or other enterprise, not opposed to, the best interests of the corporation or that he had reasonable cause to believe that his conduct was unlawful.

(c) A corporation may indemnify any person made, or threatened to be made, a party to an action by or in the right of the corporation to procure a judgment in its favor by reason of the fact that he, his testator or intestate, is or was a director or officer of the corporation, or is or was serving at the request

of the corporation as a director or officer of any other corporation of any kind, domestic or foreign, of any partnership, joint venture, trust, employee benefit plan or other enterprise, against amounts paid in settlement and reasonable expenses, including attorneys' fees, actually and necessarily incurred by him in connection with the defense or settlement of such action, or in connection with an appeal therein, if such director or officer acted, in good faith, for a purpose which he reasonably believed to be in, or, in the case of service for any other corporation or any partnership, joint venture, trust, employee benefit plan or other enterprise, not opposed to, the best interests of the corporation, except that no indemnification under this paragraph shall be made in respect of (1) a threatened action, or a pending action which is settled or otherwise disposed of, or (2) any claim, issue or matter as to which such person shall have been adjudged to be liable to the corporation, unless and only to the extent that the court in which the action was brought, or, if no action was brought, any court of competent jurisdiction, determines upon application that, in view of all the circumstances of the case, the person is fairly and reasonably entitled to indemnity for such portion of the settlement amount and expenses as the court deems proper.

(d) For the purpose of this section, a corporation shall be deemed to have requested a person to serve an employee benefit plan where the performance by such person of his duties to the corporation also imposes duties on, or otherwise involves services by, such person to the plan or participants or beneficiaries of the plan; excise taxes assessed on a person with respect to an employee benefit plan pursuant to applicable law shall be considered fines; and action taken or omitted by a person with respect to an employee benefit plan in the performance of such person's duties for a purpose reasonably believed by such person to be in the interest of the participants and beneficiaries of the plan shall be deemed to be for a purpose which is not opposed to the best interests of the corporation.

HISTORY:

Formerly § 723, add, L 1969, ch 1066, § 1; renumbered § 722 and amd, L 1987, ch 368, §§ 2, 3, eff July 23, 1987; L 1970, ch 847, § 51; L 1977, ch 299, § 2; L 2013, ch 549, § 79, eff July 1, 2014.

Prior Law: Former § 722, add, L 1969, ch 1066, § 1, with substance derived from Gen Corp Law § 63; amd, L 1977, ch 299, § 2; repealed, L 1987, ch 368, § 2, eff July 23, 1987.

Derivation Notes: Derived from Gen Corp Law § 63.

Revision Notes: *Source:* None.

Changes: Completely new.

Comment: This section is the same, both in substance and in language, as Bus Corp L § 723. It codifies the common law principle of reimbursement for directors and officers. In contrast to indemnification in derivative actions, indemnification is permissible under this section for expenses incurred and amounts paid in settling threatened as well as pending non-derivative actions or proceedings.

Editor's Notes: Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

PRACTICE INSIGHTS:

REVIEW ALLEGATIONS AND FACTS BEFORE CONCLUDING THAT NOT-FOR-PROFIT CORPORATION SHOULD PROVIDE INDEMNIFICATION TO OFFICERS AND DIRECTORS

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INSIGHT

Not-for-Profit Corp. Law § 722 allows corporations to indemnify officers and directors in certain circumstances, but only if the director or officer acted in good faith, for a purpose which he or she reasonably believed to be in the best interests of the corporation, and, in criminal actions or proceedings, in which he or she had no reasonable cause to believe the conduct was unlawful. Practitioners should be cautious when counseling their not-for-profit clients regarding indemnification of an officer or director convicted of a crime.

ANALYSIS

Exercise caution when counseling not-for-profit clients about indemnification of officer or director convicted of crime.

Not-for-Profit Corp. Law § 722(b) cautions that termination of either a civil or criminal action by a judgment, settlement, conviction, or *nolo contendere* plea, shall not necessarily create a presumption that the officer or director failed to act in good faith or that he or she had reasonable cause to believe the conduct was unlawful. Statements made under oath in the course of a guilty plea, however, may make it difficult to argue that an officer or director did not have reason to know his or her actions were unlawful.

Unless ordered by a court, a person who has not successfully defended a criminal action may be indemnified by a corporation only if indemnification is authorized by the board, acting in a quorum of uninterested directors, upon a finding that the director or officer to be indemnified (1) acted in good faith, (2) acted in the best interests of the corporation, and (3) did not have reason to believe that his conduct was unlawful.

If a quorum of disinterested directors cannot be obtained, or if a quorum of disinterested directors deems it advisable, the board may authorize indemnification following receipt of a written opinion by independent legal counsel opining that indemnification is proper because the independent legal counsel has determined that the director or officer to be indemnified acted in good faith, in the best interests of the corporation, and did not have reasonable cause to believe that his conduct was unlawful.

Alternatively, the members may authorize indemnification upon a finding by the members that the director or officer to be indemnified acted in good faith, in the best interests of the corporation, and did not have reasonable cause to believe that director's or officer's conduct was unlawful. Not-for-Profit Corp. Law §§ 721, 722, 723.

All indemnification payments must be repaid if recipient is found "not to be entitled."

Furthermore, all indemnification payments advanced by a corporation must be repaid in the event that the person receiving the advancement is found "not to be entitled to indemnification or, where indemnification is granted, to the extent the expenses so advanced by the corporation … exceed the indemnification to which he is entitled." Not-for-Profit Corp. Law § 725(a).

If corporation indemnifies officer or director for expenses, corporation must mail statement providing notice of indemnification payments and circumstances from which they arise.

If the corporation does indemnify an officer or director for expenses (other than pursuant to court order or direct authorization by the corporation's members), the corporation

must mail to all members a statement providing notice of the indemnification payments and the circumstances from which those payments arise. This statement must be sent by the next annual meeting of members, unless the meeting is to be held within three months from the date of payment, in which event the notice must be sent no later than 15 months from the date of payment. Not-for-Profit Corp. Law § 725(c).

Practitioners must exercise caution when counseling their corporate clients regarding indemnification of an officer or director convicted of a crime.

When advising a client regarding indemnification, caution is warranted. Attorneys must carefully review all statements made by the officers and directors in question, including statements made in depositions and in the course of court proceedings. Furthermore, seeking reimbursement of funds already expended, if it is determined that the officer or director was not entitled to indemnification, can be extremely difficult. Consequently, counsel must make a proper determination as to the propriety of indemnification in the first instance, especially because improper indemnification could result in allegations of impropriety on the part of the corporation.

Notes to Decisions

Analysis

1. Generally
2. Under former General Corporation Law § 63

1. Generally

Director was not entitled to the advancement of fees under this statute because the documentation presented by the director lacked probative value, the director did not provide any affirmed statement that he acted in good faith, and the director did not make any showing whatsoever as to irreparable harm. Kaloyeros v Fort Schuyler Mgt. Corp., 157 A.D.3d 1152, 69 N.Y.S.3d 739, 2018 N.Y. App. Div. LEXIS 359 (N.Y. App. Div. 3d Dep't 2018).

CLS N-PCL § 722, regarding corporate indemnification of director or officer, must be construed with corporation's bylaws to determine if bylaws permit indemnification and whether such indemnification would be authorized if director or officer acted in good faith. Vacco v Diamandopoulos, 185 Misc. 2d 724, 715 N.Y.S.2d 269, 1998 N.Y. Misc. LEXIS 716 (N.Y. Sup. Ct. 1998).

Union officers vindicated against charges by union nevertheless cannot recover attorney's fees and expenses, where union is unincorporated association, because, inter alia, N-PCL §§ 722-725 and Bus Corp §§ 724-726 do not apply to union. Doyle v Turner, 90 F. Supp. 2d 311, 2000 U.S. Dist. LEXIS 2616 (S.D.N.Y.), aff'd sub. nom., Hughley v Local 1199, Drug, Hosp. and Health Care Emples. Union, 231 F.3d 889, 2000 U.S. App. LEXIS 27944 (2d Cir. N.Y. 2000).

2. Under former General Corporation Law § 63

This section, changing the common-law rule that each party pays his own lawyer, is to be construed strictly. Diamond v Diamond, 307 N.Y. 263, 120 N.E.2d 819, 307 N.Y. (N.Y.S.) 263, 1954 N.Y. LEXIS 988 (N.Y. 1954).

As to assessment of attorney's fees against a corporation for legal services in successfully defending an officer of the corporation against charges of misconduct, although some of the language in § 68 might indicate that the attorney is entitled to apply directly for the assessment, the implication from § 63 and other sections of this article is that the assessment and allowance can only be made by way of indemnity or reimbursement to the officer charged with the allegedly objectionable conduct, and that the application must be in his name notwithstanding both he and the attorney are residents of New York. Buchman & Buchman v Lanston Industries, Inc., 25 Misc. 2d 818, 200 N.Y.S.2d 445, 1960 N.Y. Misc. LEXIS 3367 (N.Y. Sup. Ct. 1960).

The statute which provides for the reimbursement of litigation expenses of corporation officials in a suit, action or proceeding to which the official is made a party by reason of the fact that he is such a corporation official does not apply to criminal actions. Petition of Schwarz, 94 F. Supp. 129, 1950 U.S. Dist. LEXIS 2074 (D.N.Y. 1950).

Agency Opinions

Analysis

1. Under former § 722
2. Under former General Corporation Law § 63

1. Under former § 722

Neither section 17 nor section 18 of the Public Officers Law covers officers and directors of Safe Affordable Housing, Inc., a not-for-profit community development corporation organized by the Division of Housing and Community Renewal, even though the officers and directors are also officers and employees of the division. The corporation is authorized to indemnify its officers and directors. 1982 N.Y. Op. Att'y Gen. No. 32, 1982 N.Y. AG LEXIS 49.

The directors of the Independent Livery Driver Benefit Fund are not eligible for the defense, indemnification, and immunity that may be accorded to public officers. N.Y. Op. Att'y Gen. No. 2011-9, 2011 N.Y. AG LEXIS 10.

2. Under former General Corporation Law § 63

A certificate of incorporation which excepts only cases wherein a director, etc., is adjudged "guilty of wilful misfeasance or malfeasance in the performance of his duties" violates this section which excepts all cases wherein it is adjudged that the director, etc., is "liable for negligence or misconduct in the performance of his duties". 1953 N.Y. Op. Att'y Gen. No. 182, 1953 N.Y. AG LEXIS 58.

A certificate of incorporation may provide for the indemnification of a director officer or employee for expenses if an action brought against him as such as been settled with the approval of a court. But a certificate which provides for indemnification upon settlement without court approval does not comply with the statute and should be refused filing. 1953 N.Y. Op. Att'y Gen. No. 182, 1953 N.Y. AG LEXIS 58.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-7 White, New York Business Entities ¶ N722.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.05. Directors.

Matthew Bender's New York Checklists: Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N722:1. Resolution of Board for Payment of Settlement and Expenses of Officers and Directors.

White, New York Business Entities Form N722:2. Resolution of Board for Payment of Fine of Officer.

§ 723. Payment of indemnification other than by court award

(a) A person who has been successful, on the merits or otherwise, in the defense of a civil or criminal action or proceeding of the character described in section 722 shall be entitled to indemnification as authorized in such section.

(b) Except as provided in paragraph (a), any indemnification under section 722 or otherwise permitted by section 721, unless ordered by a court under section 724 (Indemnification of directors and officers by a court), shall be made by the corporation, only if authorized in the specific case:

(1) By the board acting by a quorum consisting of directors who are not parties to such action or proceeding upon a finding that the director or officer

has met the standard of conduct set forth in section 722 or established pursuant to section 721, as the case may be, or,

(2) If a quorum under subparagraph (1) is not obtainable or, even if obtainable, a quorum of disinterested directors so directs:

(A) By the board upon the opinion in writing of independent legal counsel that indemnification is proper in the circumstances because the applicable standard of conduct set forth in such sections has been met by such director or officer, or

(B) By the members upon a finding that the director or officer has met the applicable standard of conduct set forth in such sections.

(c) Expenses incurred in defending a civil or criminal action or proceeding may be paid by the corporation in advance of the final disposition of such action or proceeding upon receipt of an undertaking by or on behalf of such director or officer to repay such amount as, and to the extent, required by paragraph (a) of section 725.

HISTORY:

Formerly § 724, add, L 1969, ch 1066, § 1; renumbered § 723 and amd, L 1987, ch 368, §§ 2, 4, eff July 23, 1987; L 1987, ch 368, § 4, eff July 23, 1987.

Prior Law: Former § 723, add, L 1969, ch 1066, § 1, derived from Gen Corp Law § 63; renumbered § 722, L 1987, ch 368, § 2, eff July 23, 1987.

Revision Notes:: *Source:* None.

Changes: Completely new.

Comment: This section is the same, both in language and in substance, as Bus Corp L § 724. Its purpose is the same for directors and officers of a non-profit corporation as for their counterparts in a business corporation.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-7 White, New York Business Entities ¶ N723.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.05. Directors.

Matthew Bender's New York Checklists: Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N723:1. Resolution of Board of Directors Authorizing Indemnification.

White, New York Business Entities Form N723:2. Resolution of Board Authorizing Indemnification of Expenses in Advance of Final Disposition.

§ 724. Indemnification of directors and officers by a court

(a) Notwithstanding the failure of a corporation to provide indemnification, and despite any contrary resolution of the board or of the members in the specific case under section 723 (Payment of indemnification other than by court award), indemnification shall be awarded by a court to the extent authorized under section 722 (Authorization for indemnification of directors and officers), and paragraph (a) of section 723 (Payment of indemnification other than by court award). Application therefor shall be made on notice to the attorney general and may be made, in every case, either:

(1) In the civil action or proceeding in which the expenses were incurred or other amounts were paid, or

(2) To the supreme court in a separate proceeding, in which case the application shall set forth the disposition of any previous application made to any court for the same or similar relief and also reasonable cause for the failure to make application for such relief in the action or proceeding in which the expenses were incurred or other amounts were paid.

(b) The application shall be made in such manner and form as may be required by the applicable rules of court or, in the absence thereof, by direction of a court to which it is made. Such application shall be upon notice to the corporation. The court may also direct that notice be given at the expense of the corporation to the members and such other persons as it may designate in such manner as it may require.

(c) Where indemnification is sought by judicial action, the court may allow a person such reasonable expenses, including attorneys' fees, during the pendency of the litigation as are necessary in connection with his defense therein, if the court shall find that the defendant has by his pleadings or during the course of the litigation raised genuine issues of fact or law.

HISTORY:

Formerly § 725, add, L 1969, ch 1066; renumbered § 724 and amd, L 1987, ch 368, §§ 2, 5, eff July 23, 1987; L 1970, ch 847, § 52; L 2013, ch 549, § 80, eff July 1, 2014.

Prior Law: Former § 724, add, L 1969, ch 1066; renumbered § 723, L 1987, ch 368, § 2, eff July 23, 1987.

Derivation Notes: Derived from Gen Corp Law §§ 64, 65, 66.

Revision Notes: *Source:* Gen Corp L §§ 64, 65 and 66.

Changes: Revised, new provisions.

Comment: This section is the same, both in substance and in language, as Bus Corp L § 725. Bus Corp L § 725 substantially re-enacted Gen Corp L §§ 64, 65 and 66, with modification, deletions and additions. This section is intended to serve the same purpose for directors and officers of a non-profit corporation as the corresponding Bus Corp L section serves for a business corporation's directors and officers.

Editor's Notes: Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

Notes to Decisions

Analysis

1. Generally
2. Under former General Corporation Law § 64
3. —Construction and constitutionality
4. —Common law right to reimbursement
5. —Right of individual defendant to reimbursement
6. — —Absence of adjudication of negligence or misconduct
7. — —Conviction on plea of nolo contendere
8. —Action or proceeding
9. — —Martin Act proceeding
10. — —Joinder of causes of action

11. — —Effect of severance
12. —Jurisdiction of United States District Court
13. Under former General Corporation Law § 65
14. Under former General Corporation Law § 66
15. Under former General Corporation Law § 67
16. Under former General Corporation Law § 68

1. Generally

Director was not entitled to the advancement of fees under this statute because the documentation presented by the director lacked probative value, the director did not provide any affirmed statement that he acted in good faith, and the director did not make any showing whatsoever as to irreparable harm. Kaloyeros v Fort Schuyler Mgt. Corp., 157 A.D.3d 1152, 69 N.Y.S.3d 739, 2018 N.Y. App. Div. LEXIS 359 (N.Y. App. Div. 3d Dep't 2018).

Former university trustees were not entitled to advance indemnification by university for cost of their legal defense in action brought by Attorney General where Board of Regents, in its investigation, found that trustees had engaged in grossly negligent conduct and extreme breaches of fiduciary duties in, inter alia, awarding compensation package to trustee as university president, and permitting conflicts of interest in purchasing goods and services for university. Vacco v Diamandopoulos, 185 Misc. 2d 724, 715 N.Y.S.2d 269, 1998 N.Y. Misc. LEXIS 716 (N.Y. Sup. Ct. 1998).

2. Under former General Corporation Law § 64

This section was not applicable to a consolidated action brought in the right of an insurance society by nine out of its more than 1,750,000 policy holders. Imberman v Alexander, 116 N.Y.S.2d 609, 203 Misc. 576, 1952 N.Y. Misc. LEXIS 1917 (N.Y. Sup. Ct.), aff'd, 281 A.D. 656, 117 N.Y.S.2d 682, 1952 N.Y. App. Div. LEXIS 3131 (N.Y. App. Div. 1952).

This section was not controlling with respect to a petition of attorneys for allowance of fees and expenses against a corporation whose trustees in bankruptcy sued their clients, directors of the corporation, to recover damages for alleged breach of duties owed to the corporation. The question whether allowances could or should be made depended on the Bankruptcy Act. Le Boeuf v Austrian, 240 F.2d 546, 1957 U.S. App. LEXIS 4372 (4th Cir.), cert. denied, 353 U.S. 965, 77 S. Ct. 1049, 1 L. Ed. 2d 914, 1957 U.S. LEXIS 908 (U.S. 1957).

3. —Construction and constitutionality

This section, being in derogation of both the common law and the contract rights of the parties, must be strictly construed. Schwarz v General Aniline & Film Corp., 305 N.Y. 395, 113 N.E.2d 533, 305 N.Y. (N.Y.S.) 395, 1953 N.Y. LEXIS 808 (N.Y. 1953).

Former section 61-a provided for the assessment of the plaintiff's expenses against the corporation and the amount of such expenses could not be added to the amount of the recovery and the entire amount charged to the individual defendants. Masholie v Salvator, 46 N.Y.S.2d 596, 182 Misc. 523, 1944 N.Y. Misc. LEXIS 1663 (N.Y. Sup. Ct. 1944), modified, 269 A.D. 846, 55 N.Y.S.2d 395, 1945 N.Y. App. Div. LEXIS 4208 (N.Y. App. Div. 1945).

The purpose of § 64 was to broaden the scope of former § 61-a in order to make it consistent with former § 27-a, which was amended and renumbered as § 63. Tichner v Andrews, 85 N.Y.S.2d 760, 193 Misc. 1050, 1949 N.Y. Misc. LEXIS 1695 (N.Y. Sup. Ct.), app. dismissed, 275 A.D. 749, 90 N.Y.S.2d 920, 1949 N.Y. App. Div. LEXIS 4321 (N.Y. App. Div. 1949).

Nothing in the legislative history of Section 61-b indicates the intention of the Legislature to make co-extensive Section 61-b and this section. Imberman v Alexander, 116 N.Y.S.2d 609, 203 Misc. 576, 1952 N.Y. Misc. LEXIS 1917 (N.Y. Sup. Ct.), aff'd, 281 A.D. 656, 117 N.Y.S.2d 682, 1952 N.Y. App. Div. LEXIS 3131 (N.Y. App. Div. 1952).

Enactments awarding attorney's fees and including them in the classification of costs are valid exercises of the police power and are immune from attack upon the ground that they are unconstitutional legislation. Hayman v Morris, 37 N.Y.S.2d 884, 1942 N.Y. Misc. LEXIS 2111 (N.Y. Sup. Ct. 1942).

Former section 61-a was not invalid as being extraterritorial legislation as applied to a foreign corporation. Hayman v Morris, 37 N.Y.S.2d 884, 1942 N.Y. Misc. LEXIS 2111 (N.Y. Sup. Ct. 1942).

Former section 61-a was constitutional. Shielcrawt v Moffett, 49 N.Y.S.2d 64, 1944 N.Y. Misc. LEXIS 2059 (N.Y. Sup. Ct.), aff'd, 268 A.D. 352, 51 N.Y.S.2d 188, 1944 N.Y. App. Div. LEXIS 3171 (N.Y. App. Div. 1944).

4. —Common law right to reimbursement

Directors have no common law right to reimbursement for expenses. Bailey v Bush Terminal Co., 46 N.Y.S.2d 877, 1943 N.Y. Misc. LEXIS 2813 (N.Y. Sup. Ct. 1943), aff'd, 267 A.D. 899, 48 N.Y.S.2d 324, 1944 N.Y. App. Div. LEXIS 6188 (N.Y. App. Div. 1944).

5. —Right of individual defendant to reimbursement

The court-mandated reimbursement under this article can never be had as to expenses of one defending himself against criminal charges. Schwarz v General Aniline & Film Corp., 305 N.Y. 395, 113 N.E.2d 533, 305 N.Y. (N.Y.S.) 395, 1953 N.Y. LEXIS 808 (N.Y. 1953).

An officer, director, employee and substantial stockholder of a corporation could not be reimbursed for his litigation expenses from his corporation in a damage action against the corporation and the officer as an individual where the proof showed that the officer could be liable only if he participated as an individual. Spring v Moncrieff, 10 Misc. 2d 731, 173 N.Y.S.2d 86, 1958 N.Y. Misc. LEXIS 3756 (N.Y. Sup. Ct. 1958).

Directors named as defendants purely for procedural reasons are not entitled to attorney fees under this section. Warnecke v Forty Wall Street Bldg., Inc., 16 Misc. 2d 467, 183 N.Y.S.2d 925, 1959 N.Y. Misc. LEXIS 4406 (N.Y. Sup. Ct. 1959), aff'd, 13 A.D.2d 630, 215 N.Y.S.2d 720, 1961 N.Y. App. Div. LEXIS 11440 (N.Y. App. Div. 1st Dep't 1961).

If a defendant seeks to impose upon a corporation the responsibility of meeting the expenses of contesting an action against him, it is an indispensable condition that the corporation have been a party defendant to the action by reason of his being or having been a director or officer or employee of the corporation. People v Uran Mining Corp., 26 Misc. 2d 957, 206 N.Y.S.2d 455, 1960 N.Y. Misc. LEXIS 2844 (N.Y. Sup. Ct. 1960), aff'd, 13 A.D.2d 419, 216 N.Y.S.2d 985, 1961 N.Y. App. Div. LEXIS 9856 (N.Y. App. Div. 4th Dep't 1961).

Under this section providing for and authorizing reimbursement and compensation, there is no reason why the successful defendants in a derivative stockholders' action should not have the benefit of this enactment even though an award was also made to plaintiffs or their counsel. Cohn v Columbia Pictures Corp., 117 N.Y.S.2d 809, 1952 N.Y. Misc. LEXIS 2079 (N.Y. Sup. Ct. 1952).

6. — —Absence of adjudication of negligence or misconduct

The words "negligence or misconduct" as used in this section refer back to sections 60 and 61, setting up civil actions by or on behalf of corporations against their officers or directors who have injured the corporation by wrongdoing or inattention to duty. Schwarz v General Aniline & Film Corp., 305 N.Y. 395, 113 N.E.2d 533, 305 N.Y. (N.Y.S.) 395, 1953 N.Y. LEXIS 808 (N.Y. 1953).

This section, read in conjunction with § 61-b, authorizes assessment of "reasonable expenses, including attorney's fees, actually and necessarily incurred in connection with the defense of" a stockholder's derivative suit by an individual defendant where there has been no adjudication rendering him liable for negligence or misconduct, and such a defendant is accordingly entitled to apply for such an assessment where the action has been dismissed by reason of plaintiff's failure to give security for expenses pursuant to an order under § 61-b. Tyler v Gas Consumers Asso., 35 Misc. 2d 801, 231 N.Y.S.2d 15, 1962 N.Y. Misc. LEXIS 3110 (N.Y. Sup. Ct. 1962).

7. — —Conviction on plea of nolo contendere

A conviction upon a plea of nolo contendere was an adjudication that the director was liable for misconduct in the performance of his duties within the statute. Schwarz v General Aniline & Film Corp., 102 N.Y.S.2d 325, 198 Misc. 1046, 1951 N.Y. Misc. LEXIS 1504 (N.Y. Sup. Ct. 1951), aff'd, 279 A.D. 996, 112 N.Y.S.2d 146, 1952 N.Y. App. Div. LEXIS 5588 (N.Y. App. Div. 1952).

8. —Action or proceeding

Section 65, the complement of this section, being thus limited to a basic civil action or proceeding, the legislative intention, therefore, clearly was to limit similarly this section to a civil action or proceeding. Schwarz v General Aniline & Film Corp., 305 N.Y. 395, 113 N.E.2d 533, 305 N.Y. (N.Y.S.) 395, 1953 N.Y. LEXIS 808 (N.Y. 1953).

9. — —Martin Act proceeding

The fact alone that a petitioner, seeking to recover reasonable expenses, including attorney's fees, incurred in defending Martin Act proceedings involving his acts as a director and officer of a corporation, was successful in defending the underlying suit, it not sufficient to require granting of his petition, as against the receiver who was not a party. People v Uran Mining Corp., 13 A.D.2d 419, 216 N.Y.S.2d 985, 1961 N.Y. App. Div. LEXIS 9856 (N.Y. App. Div. 4th Dep't 1961).

In connection with an application by an officer and director of a corporation for reimbursement of expenses, under this section, incurred in defending Martin Act proceedings against the corporation, a Referee's finding that petitioner was only a truck driver who was hired to operate and maintain motor vehicles would not aid his position where he was likewise an officer and director at the scene of field operations which were the subject of the Martin Act proceeding, knew or should have known what was going on, and lent his name and activities to fraudulent operations of the corporation. People v Uran Mining Corp., 14 A.D.2d 481, 216 N.Y.S.2d 992, 1961 N.Y. App. Div. LEXIS 9857 (N.Y. App. Div. 4th Dep't 1961).

10. — —Joinder of causes of action

Sections 61-b, 64, apply where the complaint alleges several causes of action for the benefit of the corporation notwithstanding the fact that some causes of action alleged in the complaint appear to be personal to the plaintiff. Sherman v P & Q Shops, Inc., 275 A.D. 788, 87 N.Y.S.2d 759, 1949 N.Y. App. Div. LEXIS 4482 (N.Y. App. Div. 1949).

11. — —Effect of severance

Upon severance of an action each cause of action becomes a separate action and terminates in a distinct judgment and this must be considered in the award of reasonable expenses under this section. Diamond v Davis, 62 N.Y.S.2d 175, 1945 N.Y. Misc. LEXIS 2750 (N.Y. Sup. Ct. 1945).

12. —Jurisdiction of United States District Court

The United States District Court had no jurisdiction of an application under this article for expenses and attorney's fees incurred by them in the defense of an action brought by the trustees of a corporation in reorganization although the petitioners successfully defended themselves in that court for their conduct as stockholders, officers and directors. The award of allowances was exclusively for the reorganization court. Austrian v Williams, 216 F.2d 278, 1954 U.S. App. LEXIS 3925 (2d Cir. N.Y. 1954), cert. denied, 348 U.S. 953, 75 S. Ct. 441, 99 L. Ed. 745 (U.S. 1955).

13. Under former General Corporation Law § 65

The court-mandated reimbursement under this article can never be had as to expenses of one defending himself against criminal charges. Schwarz v General Aniline & Film Corp., 305 N.Y. 395, 113 N.E.2d 533, 305 N.Y. (N.Y.S.) 395, 1953 N.Y. LEXIS 808 (N.Y. 1953).

This section, the complement of section 64, being thus limited to a basic civil action or proceeding, the legislative intention therefore clearly was to limit similarly section 64 to a civil action or proceeding. Schwarz v General Aniline & Film Corp., 305 N.Y. 395, 113 N.E.2d 533, 305 N.Y. (N.Y.S.) 395, 1953 N.Y. LEXIS 808 (N.Y. 1953).

Assessment and award to stockholders of reasonable expenses incurred in prosecution of actions on behalf of the corporation is incidental to the action and is properly applied for therein. The rule that a proceeding to fix attorney's fees is a special proceeding does not apply to such actions. Smith v Bradlee, 37 N.Y.S.2d 512, 1942 N.Y. Misc. LEXIS 2057 (N.Y. Sup. Ct.), modified, 265 A.D. 931, 38 N.Y.S.2d 379, 1942 N.Y. App. Div. LEXIS 6617 (N.Y. App. Div. 1942).

The statute which provides for the reimbursement of litigation expenses of corporation officials in a suit, action or proceeding to which the official is made a party by reason of the fact that he is such a corporation official does not apply to criminal actions. Petition of Schwarz, 94 F. Supp. 129, 1950 U.S. Dist. LEXIS 2074 (D.N.Y. 1950).

14. Under former General Corporation Law § 66

This section does not offend the due process clause of the national and state constitution in failing to provide for the giving of notice to the corporation, or for opportunity to be properly represented and heard. Hayman v Morris, 37 N.Y.S.2d 884, 1942 N.Y. Misc. LEXIS 2111 (N.Y. Sup. Ct. 1942).

15. Under former General Corporation Law § 67

Where there is doubt as to whether the judgments against the individual defendants will be substantially or wholly collected the fixation of the allowance for the plaintiff's attorney should be deferred until it can be determined if the corporation has benefited. Masholie v Salvator, 269 A.D. 846, 55 N.Y.S.2d 395, 1945 N.Y. App. Div. LEXIS 4208 (N.Y. App. Div. 1945).

Plaintiffs who create fund for benefit of corporation are entitled to their expenses and reasonable attorneys' and accountants' fees out of fund; former § 61-a was declaratory in this respect. Neuberger v Barrett, 39 N.Y.S.2d 575, 180 Misc. 222, 1942 N.Y. Misc. LEXIS 2353 (N.Y. Sup. Ct. 1942).

To warrant assessment of expenses against corporations pursuant to former § 61-a, corporations must have been benefited. Masholie v Salvator, 46 N.Y.S.2d 596, 182 Misc. 523, 1944 N.Y. Misc. LEXIS 1663 (N.Y. Sup. Ct. 1944), modified, 269 A.D. 846, 55 N.Y.S.2d 395, 1945 N.Y. App. Div. LEXIS 4208 (N.Y. App. Div. 1945).

Former § 61-a was intended to reward, out of corporate treasury, those who either brought money to the treasury or prevented others from taking money out of it. Drivas v Lekas, 48 N.Y.S.2d 785, 182 Misc. 567, 1944 N.Y. Misc. LEXIS 1999 (N.Y. Sup. Ct. 1944).

A successful party was entitled to allowance of expenses under former § 61-a regardless of specific demand therefor in complaint on principle that those sharing benefits should share expenses of producing benefit. Gildener v Lynch, 54 N.Y.S.2d 827, 184 Misc. 427, 1945 N.Y. Misc. LEXIS 1773 (N.Y. Sup. Ct. 1945).

A vindication on the merits is not a condition precedent to granting an application for assessment of expenses allowed by § 64. A dismissal of an action for failure to furnish security for cost is a sufficient determination that the defendant has been successful in whole or in part as required by § 67. Tichner v Andrews, 85 N.Y.S.2d 760, 193 Misc. 1050, 1949 N.Y. Misc. LEXIS 1695 (N.Y. Sup. Ct.), app. dismissed, 275 A.D. 749, 90 N.Y.S.2d 920, 1949 N.Y. App. Div. LEXIS 4321 (N.Y. App. Div. 1949).

Since this section permits a party to be reimbursed for expenses where successful either "in whole or in part," the fact that he has only been partially successful at the stage of trial when plaintiff is required to give security pursuant to § 61-b, and has been ordered to account with respect to certain matters, will not entitle plaintiff to an order cancelling a prior order requiring the posting of security pursuant to § 61-b. Sorin v Shahmoon Industries, Inc., 34 Misc. 2d 1008, 231 N.Y.S.2d 6, 1962 N.Y. Misc. LEXIS 3814 (N.Y. Sup. Ct. 1962).

Under this section the only test for the granting of allowances is that of success in the prosecution or defense of the action. The creation or production of a fund is not a prerequisite for an award of compensation for services. Bysheim v Miranda, 45 N.Y.S.2d 473, 1943 N.Y. Misc. LEXIS 2641 (N.Y. Sup. Ct. 1943).

16. Under former General Corporation Law § 68

As to assessment of attorney's fees against a corporation for legal services in successfully defending an officer of the corporation against charges of misconduct, although some of the language in § 68 might indicate that the attorney is entitled to apply directly for the assessment, the implication from § 63 and other sections of this article is that the assessment and allowance can only be made by way of indemnity or reimbursement to the officer charged with the allegedly objectionable conduct, and that the application must be in his name notwithstanding both he and the attorney are residents of New York. Buchman & Buchman v

Lanston Industries, Inc., 25 Misc. 2d 818, 200 N.Y.S.2d 445, 1960 N.Y. Misc. LEXIS 3367 (N.Y. Sup. Ct. 1960).

Agency Opinions

Analysis

1. Under former General Corporation Law § 65
2. Under former General Corporation Law § 67

1. Under former General Corporation Law § 65

No assessment of expenses could be effected under former § 61-a without approval of the court. 1942 N.Y. Op. Att'y Gen. No. 215, 1942 N.Y. AG LEXIS 84.

2. Under former General Corporation Law § 67

A certificate of incorporation may provide for the indemnification of a director, officer or employee for expenses if an action brought against him as such has been settled with the approval of a court. But a certificate which provides for indemnification upon settlement without court approval does not comply with the statute and should be refused filing. 1953 N.Y. Op. Att'y Gen. No. 182, 1953 N.Y. AG LEXIS 58.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-7 White, New York Business Entities ¶ N724.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.05. Directors.

Matthew Bender's New York Checklists: Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N724:1. Order to Show Cause on Application for Indemnification.

White, New York Business Entities Form N724:2. Petition of Director in Proceeding for Indemnification.

White, New York Business Entities Form N724:3. Judgment Awarding Indemnification.

§ 725. Other provisions affecting indemnification of directors and officers

(a) All expenses incurred in defending a civil or criminal action or proceeding which are advanced by the corporation under paragraph (c) of section 723 (Payment of indemnification other than by court award) or allowed by a court under paragraph (c) of section 724 (Indemnification of directors and officers by a court) shall be repaid in case the person receiving such advancement or allowance is ultimately found, under the procedure set forth in this article, not to be entitled to indemnification or, where indemnification is granted, to the extent the expenses so advanced by the corporation or allowed by the court exceed the indemnification to which he is entitled.

(b) No indemnification, advancement or allowance shall be made under this article in any circumstance where it appears:

(1) That the indemnification would be inconsistent with the law of the jurisdiction of incorporation of a foreign corporation which prohibits or otherwise limits such indemnification; or

(2) That the indemnification would be inconsistent with a provision of the certificate of incorporation, a by-law, a resolution of the board or of the members, an agreement or other proper corporate action, in effect at the time of the accrual of the alleged cause of action asserted in the threatened or pending action or proceeding in which the expenses were incurred or other amounts were paid, which prohibits or otherwise limits indemnification; or

(3) If there has been a settlement approved by the court, that the indemnification would be inconsistent with any condition with respect to indemnification expressly imposed by the court in approving the settlement.

(c) If any expenses or other amounts are paid by way of indemnification, otherwise than by court order or action by the members, the corporation shall prepare a statement specifying the persons paid, the amounts paid, and the nature and status at the time of such payment of the litigation or threatened litigation, and

(1) Not later than the next annual meeting of members, unless such meeting is held within three months from the date of such payment, and, in any event, within fifteen months of the date of such payment, shall mail the statement to its members of record entitled at the time to vote for the election of directors; or

(2) If the corporation has no members, shall include the statement in the records of the corporation open to public inspection, or

(3) If the corporation is a cemetery corporation, as defined in paragraph (a) of section 1502 (Definitions), which term, for the purposes of this section, shall include a religious corporation having members, (i) by including the statement required by this paragraph or paragraph (d) of section 726 (Insurance for indemnification of directors and officers), as the case may be in the records of the corporation open to public inspection; (ii) by including the information required by the statement in any notice published pursuant to the provisions of section 605 (Notice of meeting of members), except as otherwise provided by law; (iii) by enclosing the statement with the notice of annual meeting if such notice is in fact mailed to the members; and (iv) by raising the issue for approval at the next annual meeting of the members.

(d) If any action with respect to indemnification of directors and officers is taken by way of amendment of the by-laws, resolution of directors, or by agreement, then the corporation shall, not later than the next annual meeting of members, unless such meeting is held within three months from the date of such action, and, in any event, within fifteen months from the date of such action, mail to its members of record at the time entitled to vote for the election of directors a statement specifying the action taken. If the corporation has no members, the statement shall be included in the records of the corporation open to public inspection.

(e) The provisions of this article relating to indemnification of directors and officers and insurance therefor shall apply to domestic corporations and

foreign corporations conducting activities in this state, except as provided in section 1321 (Exemption from certain provisions).

HISTORY:

Formerly § 726, add, L 1969, ch 1066; renumbered § 725 and amd, L 1987, ch 368, §§ 2, 6, eff July 23, 1987; L 1970, ch 847, § 53; L 1987, ch 368, § 6, eff July 23, 1987; L 1988, ch 389, §§ 1, 2, eff July 29, 1988.

Prior Law: Former § 725, add, L 1969, ch 1066, with substance derived from Gen Corp Law §§ 64, 65, 66; renumbered § 724, L 1987, ch 368, § 2, eff July 23, 1987.

Derivation Notes: Derived from Gen Corp Law §§ 63, 67, 68.

Revision Notes: *Source:* Gen Corp L §§ 63, 67 and 68.
Changes: Completely revised; new provisions.
Comment: This section is derived from Bus Corp L § 726, with modifications and deletions to accommodate the different circumstances of a non-profit corporation. The provisions of this section are generic and, except as otherwise specifically indicated, are intended to apply whether indemnification is made voluntarily by the corporation or by court proceedings. Paragraph (a) which imposes an obligation of repayment on the director or officer who is advanced litigation expenses as authorized, but to which he is ultimately found not to be entitled, is the same as in the Bus Corp L. Paragraph (b), continuing parallel provisions of Gen Corp L § 67, is modified only by the insertion of "or" at the conclusion of paragraph (b)(1). Paragraph (c) is modified to make provision for a statement of expenses or other amounts paid by way of indemnification in the case of a corporation having no members.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-7 White, New York Business Entities ¶ N725.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.05. Directors.

Matthew Bender's New York Checklists: Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N725:1. Notice by Corporation to Members of Payments of Expenses or Other Amounts by Way of Indemnification.

§ 726. Insurance for indemnification of directors and officers

(a) Subject to paragraph (b), a corporation shall have power to purchase and maintain insurance:

(1) To indemnify the corporation for any obligation which it incurs as a result of the indemnification of directors and officers under the provisions of this article, and

(2) To indemnify directors and officers in instances in which they may be indemnified by the corporation under the provisions of this article, and

(3) To indemnify directors and officers in instances in which they may not otherwise be indemnified by the corporation under the provisions of this article provided the contract of insurance covering such directors and officers provides, in a manner acceptable to the superintendent of financial services, for a retention amount and for co-insurance.

(b) No insurance under paragraph (a) may provide for any payment, other than cost of defense, to or on behalf of any director or officer:

(1) if a judgment or other final adjudication adverse to the insured director or officer establishes that his acts of active and deliberate dishonesty were material to the cause of action so adjudicated, or that he personally gained in fact a financial profit or other advantage to which he was not legally entitled, or

(2) in relation to any risk the insurance of which is prohibited under the insurance law of this state.

(c) Insurance under any or all subparagraphs of paragraph (a) may be included in a single contract or supplement thereto. Retrospective rated contracts are prohibited.

(d) The corporation shall, within the time and to the persons provided in paragraph (c) of section 725 (Other provisions affecting indemnification of directors and officers), mail a statement in respect to any insurance it has purchased or renewed under this section, specifying the insurance carrier, date of the contract, cost of the insurance, corporate positions insured, and a statement explaining all sums, not previously reported in a statement to members, paid under any indemnification insurance contract. Notwithstanding any other provision of law, a cemetery corporation or a religious corporation having members which purchases or renews any insurance under this section after the effective date of the act which added this sentence to this paragraph, which corporation had two hundred fifty or more interments in the calendar year preceding such purchase or renewal, shall mail the statement required by this section to every person to whom a care notice or solicitation for services has been sent during such calendar year and to every person to whom a notice of annual meeting was mailed during such calendar year, but in no event to less than ten per centum of the lot owners of record during such calendar year. Such corporation shall not be required to mail such statement during any subsequent year, unless such corporation elects to mail notices of annual meeting to its members in which event the statement shall be enclosed as provided in clause (iii) of paragraph (c)(3) of section 725 (Other provisions affecting indemnification of directors and officers). A corporation having less than two hundred fifty interments in the calendar year preceding such purchase or renewal shall not be required to mail such statement unless such corporation elects to mail notices of annual meeting to its members in which event the statement shall be enclosed as provided in clause (iii) of paragraph (c)(3) of section 725 (Other provisions affecting indemnification of directors and officers).

(e) This section is the public policy of this state to spread the risk of corporate management, notwithstanding any other general or special law of this state or of any other jurisdiction, including the federal government.

HISTORY:
Formerly § 727, add, L 1970, ch 847, § 54; renumbered § 726 and amd, L 1987, ch 368, § 2, eff July 23, 1987; L 1987, ch 368, § 7; L 1988, ch 389, § 3, eff July 29, 1988; L 2011, ch 62, § 104 (Part A), eff Oct 3, 2011.

Prior Law: Former § 726, add, L 1969, ch 1066, derived from Gen Corp Law §§ 63, 67, 68; amd, L 1970, ch 847, § 53; renumbered § 725, L 1987, ch 368, § 2, eff July 23, 1987.

Agency Opinions

1. Generally
Neither section 17 nor section 18 of the Public Officers Law covers officers and directors of Safe Affordable Housing, Inc., a not-for-profit community development corporation organized by the Division of Housing and Community Renewal, even though the officers and directors are also officers and employees of the division. The corporation is authorized to indemnify its officers and directors. 1982 N.Y. Op. Att'y Gen. No. 32, 1982 N.Y. AG LEXIS 49.

The directors of the Independent Livery Driver Benefit Fund are not eligible for the defense, indemnification, and immunity that may be accorded to public officers. N.Y. Op. Att'y Gen. No. 2011-9, 2011 N.Y. AG LEXIS 10.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-7 White, New York Business Entities ¶ N726.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.05. Directors.

Matthew Bender's New York Checklists: Checklist for Identifying Business Considerations in Entity Selection LexisNexis AnswerGuide New York Business Entities § 2.23.

Checklist for Assessing Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 2.47.

Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N726:1. Provision Authorizing Indemnification Insurance.

ARTICLE 8 Amendments and Changes

Section

801. Right to amend certificate of incorporation
802. Authorization of amendment or change, class vote
803. Certificate of amendment; contents
803-A. Certificate of change; contents
804. Approvals, notices and effect
805. Restated certificate of incorporation

HISTORY:
Add, L 1969, ch 1066, § 1, eff Sept 1, 1970.

§ 801. Right to amend certificate of incorporation

(a) A corporation may amend its certificate of incorporation, from time to time, in any and as many respects as may be desired, if such amendment contains only such provisions as might be lawfully contained in an original certificate of incorporation filed at the time of making such amendment.

(b) In particular, and without limitation upon such general power of amendment, a corporation may amend its certificate of incorporation, from time to time, so as:

(1) To change its corporate name.

(2) To enlarge, limit or otherwise change its corporate purposes.

(3) To strike out, change or add any provision not inconsistent with this chapter or any other statute relating to the affairs of the corporation, its rights or powers or the rights or powers of its members, directors or officers, including any provision required or permitted to be set forth in the by-laws.

(4) To extend its duration, or revive its existence if it has ceased to exist because of the expiration of its period of duration. A corporation may not however reduce its corporate duration.

(5) To specify, change or revoke the voting rights of its directors or members or of any class of members.

(6) To specify or change the location of the office of the corporation.

(7) To specify or change the post office address to which the secretary of state shall mail a copy of any process against the corporation served upon him.

(8) To make, revoke or change the designation of a registered agent, or to specify or change the address of its registered agent.

(9) To authorize the issuance of capital certificates and to fix the face value and terms of such certificates and the rights and privileges of their holders and the manner in which the terms, rights and privileges may be amended and to confer upon the holders of such certificates the right to vote in the election of directors and upon any other matters as may be set forth.

(c) A corporation created by special act may accomplish any or all amendments permitted in this article, in the manner and subject to the conditions provided in this article.

HISTORY:
Add, L 1969, ch 1066, § 1, eff Sept 1, 1970; amd, L 1984, ch 438, § 2, eff Aug 18, 1984.

Derivation Notes: Derived from Gen Corp Law §§ 40, 45, 49 and Mem Corp Law § 30.

Revision Notes: *Source:* Gen Corp L §§ 40, 45, 49, Mem Corp L § 30.

Changes: Revised; consolidated; new provisions.

Comment: The section combines the sections of the Gen Corp L and of the Mem Corp L relating to amendments and permits one or more amendments or changes to be included in a single certificate. The listing of the amendments is illustrative only, but not exclusive of any other amendments or changes that may be effected by amendment.

The section permits a change in the address for mailing of process and the designation of a registered agent for service of process.

The section also permits an amendment authorizing the corporation to issue capital certificates and to fix their face amount and their terms and the privileges of the certificate holders.

A corporation formed by or under a special act of the legislature may make any of the changes or amendments permitted in this section.

Notes to Decisions

Analysis

1. Under former Membership Corporations Law § 30
2. Under former General Corporation Law § 40

1. Under former Membership Corporations Law § 30

The vested rights of members are not violated by an amendment to the certificate of incorporation. In re Walker, 276 N.Y. 567, 12 N.E.2d 579, 276 N.Y. (N.Y.S.) 567, 1937 N.Y. LEXIS 1135 (N.Y. 1937).

Firemen's Benevolent Fund Association of the City of Mount Vernon, which is a domestic corporation created in 1894 by special act, constitutes a membership corporation by virtue of the General Corporation Law as it existed before and after the Association's creation and, thus, Association was authorized to amend its certificate of incorporation in 1930 to restrict membership to volunteer firemen. Crohn v Firemen's Benevolent Fund Ass'n, 79 Misc. 2d 536, 359 N.Y.S.2d 599, 1973 N.Y. Misc. LEXIS 1279 (N.Y. Sup. Ct. 1973), aff'd, Crohn v Firemen's Benevolent Fund Asso., 45 A.D.2d 955, 359 N.Y.S.2d 247, 1974 N.Y. App. Div. LEXIS 4168 (N.Y. App. Div. 2d Dep't 1974).

By changing its membership requirements from members of any fire company to volunteer members the Firemen's Benevolent Fund Association of the City of Mount Vernon did not unlawfully discriminate against professional firemen individually or as a class. Crohn v Firemen's Benevolent Fund Ass'n, 79 Misc. 2d 536, 359 N.Y.S.2d 599, 1973 N.Y. Misc. LEXIS 1279 (N.Y. Sup. Ct. 1973), aff'd, Crohn v Firemen's Benevolent Fund Asso., 45 A.D.2d 955, 359 N.Y.S.2d 247, 1974 N.Y. App. Div. LEXIS 4168 (N.Y. App. Div. 2d Dep't 1974).

The conduct of fund-raising activities by volunteer firemen is within the purposes stated in the usual charter provisions of a volunteer fire corporation. 1955 Op St Compt No. 55–7124.

The certificate of incorporation of a volunteer fire company may be amended so as to include a fire district within the territory in which the fire company proposes to act. 1955 Op St Compt No. 55–7319.

2. Under former General Corporation Law § 40

Use of a similar name to that of another corporation cannot be denied where a corporation desires to reincorporate under the same name which it has theretofore borne. People ex rel. United States Grand Lodge of O. B. A. v Payn, 59 N.Y.S. 851, 28 Misc. 275, 1899 N.Y. Misc. LEXIS 487 (N.Y. Sup. Ct.), aff'd, 43 A.D. 621, 60 N.Y.S. 1146, 1899 N.Y. App. Div. LEXIS 2092 (N.Y. App. Div. 1899).

The absence of any element of fraud in the use of the proposed new name bearing similarity to the name of another corporation is not controlling; if there are reasonable grounds to conclude that the granting of the change will result in injury to the complaining corporation it should be denied. In re United States Mortg. Co., 32 N.Y.S. 11, 83 Hun 572 (1895).

A corporation does not die or "cease to exist" merely because of a change of name pursuant to this section. Williams Grain Co. v Leval & Co., 277 F.2d 213, 1960 U.S. App. LEXIS 4693 (8th Cir. 1960).

Agency Opinions

Analysis

1. Under former Membership Corporations Law § 30
2. Under former General Corporation Law § 49

1. Under former Membership Corporations Law § 30

A corporation incorporated under the Mem Corp Law, having for its principal objects the establishment and maintenance of a hospital and home for treatment, care, support, maintenance and education of crippled and atypical children, is not entitled, under this section, to eliminate some objects of the present charter. 1911 N.Y. Op. Att'y Gen. No. 460.

A corporation, existing under the provisions of the Mem Corp Law, other than a hospital or similar corporation, may not, by amendment of its charter pursuant to this section acquire authority to engage in the practice of medicine as a corporation other than a hospital or similar corporation. 1935 NY Op. Att'y Gen. 229, 1935 N.Y. AG LEXIS 645. See also 1935 N.Y. Op. Att'y Gen. No. 373.

A membership corporation may not include in its charter purposes the power to act as a trustee. 1936 N.Y. Op. Att'y Gen. No. 206.

An agricultural and horticultural corporation must comply with the provisions of the Stock Corporation Law in order to amend its certificate of incorporation so as to eliminate the authorization for issuance of capital stock entitling shareholders to dividends, as distinguished from non-dividend bearing stock. 1950 N.Y. Op. Att'y Gen. No. 187, 1950 N.Y. AG LEXIS 67.

2. Under former General Corporation Law § 49

The failure of a membership corporation to obtain the necessary approval of the Board of Social Welfare to a certificate of extension of corporate existence is a defect which cannot be corrected by an amendatory certificate or by the Board's nunc pro tunc approval. However, a remedy lies in the filing of a certificate of revival of corporate existence pursuant to General Corporation Law § 49. 1952 N.Y. Op. Att'y Gen. No. 159, 1952 N.Y. AG LEXIS 49.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-8 White, New York Business Entities ¶ N801.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.07. Amending of Changing the Certificate of Incorporation.

Matthew Bender's New York Checklists: Checklist for Organizing and Operating Not-For-Profit Corporation Lexis-Nexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

§ 802. Authorization of amendment or change, class vote

(a) Amendment or change of the certificate of incorporation shall be authorized:

(1) If there are members entitled to vote thereon, by majority vote of such members at a meeting as provided in paragraph (c) of section 613 (Vote of members).

(2) If there are no members entitled to vote thereon, by vote of a majority of the entire board.

(b) Notwithstanding any provision in the certificate of incorporation or by-laws, members of a class shall be entitled to vote and to vote as a class upon the authorization of an amendment and, in addition to the authorization of the amendment required by paragraph (a)(1), the amendment shall be authorized by majority vote of the members of the class, when the proposed amendment would exclude or limit their right to vote on any matter except as such right may be limited by voting rights given to members of an existing class or of a new class.

(c) Any one or more of the following changes may be authorized by or pursuant to authorization of the board:

(1) To specify or change the location of the office of the corporation.

(2) To specify or change the post office address to which the secretary of state shall mail a copy of any process against the corporation served upon him.

(3) To make, revoke or change the designation of a registered agent, or to specify or change the address of its registered agent.

(d) This section shall not alter the vote required under any other section for the authorization of an amendment referred to therein, nor alter the authority of the board to authorize amendments under any other section.

HISTORY:

Add, L 1969, ch 1066, § 1; amd, L 1970, ch 847, § 55, eff Sept 1, 1970; L 1971, ch 1058, § 26, eff Sept 1, 1971; L 1972, ch 961, § 13, eff Sept 1, 1972; L 1983, ch 186, § 5, eff June 30, 1983.

Derivation Notes: Derived from Gen Corp Law §§ 40, 45, 49 and Mem Corp Law § 30.

Revision Notes: *Source:* Gen Corp L §§ 40, 45, 49, Mem Corp L § 30.

Changes: Revised; new provisions.

Comment: The section provides for authorization of amendments by a majority of the members present, if the corporation has members entitled to vote, otherwise by vote of the board. Paragraph (b) provides for class voting. Paragraph (c) refers to any instances in which under other sections a different vote is required for adoption of an amendment and to those other instances in which the board is authorized to adopt an amendment.

PRACTICE INSIGHTS:

SET UP FOR SUCCESS RIGHT FROM THE START — STRATEGIES FOR PREPARING NOT-FOR PROFIT CERTIFICATE OF INCORPORATION

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INSIGHT

Not-For-Profit Corp. Law § 402 sets forth the requirements for the contents of the Certificate of Incorporation (the "Certificate") which is filed with the Department of State (the "Department") to formally create a not-for-profit corporation. The practitioner should carefully consider the contents of the Certificate before filing it with the Department to get the entity started off on the right foot. Specifically, counsel should ensure that any contemplated powers are included in the Certificate, carefully draft the statement of purpose, avoid certain buzz words, and consider limiting internal governance provisions.

ANALYSIS

Include certain powers in Certificate if they are contemplated.

Certain powers must be included in the Certificate if they are going to be granted to the corporation. For example, if the management of the not-for-profit corporation is vested in individuals other than the Board of Directors (see Not-For-Profit Corp. Law § 701), this power must be included in the Certificate. Similar requirements exist for the following powers: if members are required to make capital contributions other than the payment of dues (Not-For-Profit Corp. Law § 502); if the corporation can accept subventions (Not-For-Profit Corp. Law § 505); or if written consent of less than all members is permitted for certain types of corporate action (Not-For-Profit Corp. Law § 614).

Consider adding certain permissive powers to Certificate.

The Not-For-Profit Corporation Law permits, but does not require, the inclusion of certain provisions in the Certificate. For example, Not-For-Profit Corp. Law § 709(a) permits a corporation to specify that the proportion of directors or the proportion of votes of directors that shall constitute a quorum or be necessary for the transaction of business or of any specified item of business shall be greater than the proportion prescribed by statute. The Certificate may also restrict the taking of action by the Board of Directors without a meeting and by written consent (Not-For-Profit Corp. Law § 708(b)) or permit directors to participate in meetings via telephone conference (Not-For-Profit Corp. Law § 708(c)). If these actions are contemplated, the authority may be granted in the Certificate.

Pay particularly close attention to "purposes" section of Certificate.

The Certificate must include a statement of the purpose for which the corporation has been formed. Not-For-Profit Corp. Law § 402(a)(2). The practitioner should exercise caution when drafting the purposes clause. The purposes clause must be broad enough to cover not only the acts the proposed directors envision at the corporation's infancy, but also those acts the corporation may need to take as the organization matures and builds up steam. Failure to stay within the stated purposes of the entity can later create a liability for the entity and its directors, officers and members. This can easily occur if the purposes clause is narrowly constructed. It is possible to broaden the purposes clause at a later time by amending the Certificate. See Not-For-Profit Corp. Law § 802. The larger the organization, however, the more difficult it becomes to make sweeping changes to the fundamental structure of the organization, such as changing its charter. Also, pursuant to Not-For-Profit Corp. Law § 804, amendments to Certificates which add, change or eliminate a purpose, power or provision the inclusion of which in an initial Certificate require approval or consent from a governmental entity will require such approval or consent to be obtained. Also, certificates of amendments of charitable corporations which change, eliminate or add a power or purpose require approval of either the attorney general or a justice of the supreme court. Not-For-Profit Corp. Law § 804.

Avoid certain buzz words when drafting Certificate.

Any reference to certain buzz words will typically trigger a requirement for pre-approval or consent from a state agency prior to filing the Certificate. For example, Education Department consent may be required if the Certificate is drafted using the terms "education," "research," or "school." Private foundations seeking not-for-profit status should be sure to include a disclaimer of Not-For-Profit Corp. Law § 404 activities that necessitate agency approval as well as the disclaimers required in Not-For-Profit Corp. Law § 406. Pre-approval requirements can delay the process significantly, particularly if the agency requires revisions to the proposed Certificate (that will in turn require internal approvals as well). If state agency consent is necessary, counsel should consider reserving the chosen name for the entity. Not-For-Profit Corp. Law § 303. A relatively small fee buys 60 days and may be well worth the investment if the approval process is stalled at any point and the name of the entity is important to the client.

It may be advisable to limit internal governance provisions in Certificate.

The certificate of incorporation may set forth any provision for the regulation of the internal affairs of the corporation that is consistent with the Not-For-Profit Corp. Law or any other New York law. Although it is permissible to add provisions relating to internal governance to the Certificate under Not-For-Profit Corp. Law § 402(c), it may be more advisable to add those types of provisions to the bylaws. The dynamics of an organization change over time, and changes to operating procedures are inevitable. Changes to the Certificate require governmental filing and approval — at minimum, the Department's. Changes to the bylaws, however, require only proposal by the Board of Directors and vote of the membership — a completely transparent and internal process that is relatively painless unless the organization has grown exponentially. See Not-For-Profit Corp. Law § 802.

When adding internal governance provisions to the Certificate or the bylaws, ensure that those provisions are consistent with the Not-For-Profit Corp. Law. Inconsistencies can lead a court to stop the corporation in its tracks. *See Sealey v. Amer. Socy. of Hypertension, Inc.*, 26 A.D.3d 254, 810 N.Y.S.2d 48 (1st Dep't 2006).

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-8 White, New York Business Entities ¶ N802.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.07. Amending of Changing the Certificate of Incorporation.

New York Practice Guide: Business and Commercial § 8.18. Drafting a Certificate of Amendment.

Matthew Bender's New York Checklists: Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N802:1. Notice of Special Meeting to Vote upon Amendment of Certificate of Incorporation.

White, New York Business Entities Form N802:2. Resolution Authorizing Amendment of Certificate of Incorporation of Not-for-Profit Corporation.

§ 803. Certificate of amendment; contents

(a) To accomplish any amendment, a certificate of amendment entitled "Certificate of amendment of the certificate of incorporation of ..... (name of corporation) under section 803 of the Not-for-Profit Corporation Law" shall be signed and delivered to the department of state. It shall set forth:

(1) The name of the corporation and, if it has been changed, the name under which it was formed.

(2) The date its certificate of incorporation was filed by the department of state and the law under which it was formed.

(3) That the corporation is a corporation as defined in subparagraph (a) (5) of section 102 (Definitions).

(4) Each amendment effected thereby, setting forth the subject matter of each provision of the certificate of incorporation which is to be amended or eliminated and the full text of the provision or provisions, if any, which are to be substituted or added.

(5) The manner in which the amendment of the certificate of incorporation was authorized.

(6) A designation of the secretary of state as agent of the corporation upon whom process against it may be served and the post office address within or without this state to which the secretary of state shall mail a copy of any process against it served upon the secretary.

(b) Any number of amendments or changes may be included in one certificate under this section. Such certificate may also include any amendments or changes permitted by other sections and in that case the certificate shall set forth any additional statement required by any other section specifying the contents of a certificate to effect such amendment or change.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970; amd, L 1970, ch 847, § 56; L 1971, ch 1058 § 27; L 1972, ch 961, § 14; L 1973, ch 176; L 1981, ch 564, § 4; L 1982, ch 168, § 3, eff June 8, 1982; L 1983, ch 145, § 2, eff May 23, 1983; L 1985, ch 101, § 2, eff May 21, 1985; L 1998, ch 375, § 37, eff Aug 13, 1998; L 2013, ch 549, § 81, eff July 1, 2014; L 2014, ch 23, § 11, eff July 1, 2014.

Derivation Notes: Derived from Gen Corp Law §§ 40, 45, 49 and Mem Corp Law § 30.

Revision Notes: *Source:* Gen Corp L §§ 40, 45, 49, Mem Corp L § 30.

Changes: Combined, revised.

Comment: The section sets forth the statements which must be included in the certificate of amendment as well as the manner of authorization previously set forth in the affidavit attached to a certificate of amendment. Section 104(d) provides a uniform method of executing and filing of certificates and subparagraph (f) thereof sets forth the effect of filing the certificate. Any number of changes and amendments may be included in a single certificate.

Editor's Notes: Laws 1981, ch 564, § 6, eff Sept 13, 1981, provides as follows:

§ 6. This act shall take effect on the sixtieth day after it shall have become a law and shall apply to domestic corporations formed under section two hundred one of the not-for-profit corporation law and to amended certificates of incorporation filed under section eight hundred one of such law after such date.

Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

PRACTICE INSIGHTS:

SPEED TRAPS IN AMENDING BYLAWS

By Kelly Mooney Lester, Esq.

General Editor, Glenn J. Bobeck, Esq., Phillips Lytle LLP www.phillipslytle.com

INSIGHT

The internal affairs of a not-for-profit corporation may be regulated by the provisions of either the certificate of incorporation (COI) or the bylaws. Not-for-Profit Corp. Law §§ 402(c), 602. The dynamics of an organization change over time and internal governance provisions may need to be amended accordingly. Although changes to the COI require governmental filing and approval, changes to the bylaws can usually be accomplished through a completely transparent and internal process. Not-for-Profit Corp. Law §§ 803, 602. Unless the organization has grown exponentially, amending the bylaws is a relatively painless process. Larger corporations, however, may run into some speed traps.

ANALYSIS

Consider expanding internal governance provisions in bylaws to account for future growth.

Under Not-for-Profit Corp. Law § 602(f), which has historically been interpreted broadly, bylaws may contain any provision "relating to" the business of the corporation, the conduct of the corporation's affairs, and the rights or powers of the corporation, its members, directors and officers. Given the broad authority granted to a corporation to control its own internal affairs, the bylaws can be expanded at the outset to allow for future growth without formal changes to the organizational structure. For example, the bylaws may provide for the delegation of tasks to committees or for participation in meetings via telephone conference calls. These types of provisions allow for flexibility when the organization is working through a growth spurt and do not interfere with management when the corporation is in its infancy.

Conflict between members and board may cause stalemate.

It is not unusual for a conflict to arise between the members of the corporation and the board of directors. This creates an especially difficult situation when the issue of amending the bylaws is on the table. Unless otherwise provided for in the bylaws or the COI, the bylaws may be adopted, amended or repealed by either the members entitled to vote in the election of directors or by the board. Not-for-Profit Corp. Law § 602(b). Any bylaw adopted by the board may be amended or repealed by the members and vice versa. Not-for-Profit Corp. Law § 602(c). This creates a potentially endless loop of amendments that can result in a stalemate until the conflict is resolved. Type B corporations with no members avoid this difficulty.

Consider scheduling and other logistics when amending bylaws.

Although the process for amending the bylaws is not complicated, some formalities must be followed. It is easy to forget timing, scheduling and other logistics when proposing bylaw amendments. If time is of the essence, the logistics can be another speed trap for the unwary. For example, if the members are considering the amendment, a notice of meeting must be prepared and sent to the members. Counsel should factor into the equation such things as quorum requirements, minimum voting requirements, and the level of involvement of the members. In some instances, the members will be happy to delegate the drafting to a committee and pass the proposal without much discussion. In other organizations, membership is intimately involved in operations and a number of meetings may be needed to discuss, dissect and agree on the exact wording of the amendments.

Special care must be taken when the proposed amendment relates to the election of directors. The board may change the rules related to an impending election, but if it does so, the notice sent to the corporation's members related to the next meeting when directors would be elected must be modified. The notice of meeting must not only restate the affected bylaw provision but must also include a concise statement of the changes. Not-for-Profit Corp. Law § 602(e). If the members' notice is not properly issued, the bylaw amendments will not be enforceable with respect to that election of directors. Counsel should consider initiating any such amendments at the membership level to avoid the extra step in the process.

Notify IRS of changes to bylaws if exemption has been granted.

Federal tax exempt status is available to a not-for-profit Corporation under a variety of federal bases pursuant to (IRC) 26 USCS § 501(a). If the corporation amending its bylaws has been granted such a tax exemption, notify the IRS of changes to the bylaws. IRS regulations require that a tax-exempt organization immediately notify the local IRS district director whenever a change is made to the character, operations or purpose for which it was originally created. Reg. 1.6033-2(i). This rule applies even if the organization is not required to file an annual information return (the Form 990).

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-8 White, New York Business Entities ¶ N803.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.18. Drafting a Certificate of Amendment.

Matthew Bender's New York Checklists: Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N803:1. Certificate of Amendment of the Certificate of Incorporation of _____, Inc. under Section 803 of the Not-for-Profit Corporation Law.

White, New York Business Entities Form N803:2. Statement to Be Inserted in Certificate of Amendment as to Authorization of Change.

§ 803-A. Certificate of change; contents

(a) Any one or more of the changes authorized by paragraph (c) of section 802 (Authorization of amendment or change, class vote) may be accomplished by filing a certificate of change which shall be entitled "Certificate of Change of ..... (name of corporation) under section 803-A of the Not-for-Profit Corporation Law" and shall be signed and delivered to the department of state. It shall set forth:

(1) The name of the corporation and if it has been changed, the name under which it was formed.

(2) The date its certificate of incorporation was filed by the department of state.

(3) Each change effected thereby.

(4) The manner in which the change was authorized.

(b) A certificate of change which changes only the post office address to which the secretary of state shall mail a copy of any process against the corporation served upon him or the address of the registered agent, provided such address being changed is the address of a person, partnership or other corporation whose address, as agent, is the address to be changed or who has been designated as registered agent for such corporation, may be signed and delivered to the department of state by such agent. The certificate of change shall set forth the statements required under subparagraphs (1), (2) and (3) of paragraph (a) of this section; that a notice of the proposed change was mailed to the corporation by the party signing the certificate not less than thirty days prior to the date of delivery to the department and that such corporation has not objected thereto; and that the party signing the certificate is the agent of such corporation to whose address the secretary of state is requried to mail copies of any process against the corporation served upon him or the registered agent, if such be the case. A certificate signed and delivered under this paragraph shall not be deemed to effect a change of location of the office of the corporation in whose behalf such certificate is filed.

HISTORY:

Add, L 1971, ch 1058 § 28, eff Sept 1, 1971; amd, L 1983, ch 186, § 6; L 1984, ch 438, § 3; L 1998, ch 375, § 38, eff Aug 13, 1998; L 1999, ch 172, § 27, eff July 6, 1999.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-8 White, New York Business Entities ¶ N803-A.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.20. Drafting a Certificate of Change.

Matthew Bender's New York Checklists: Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N803-A:1. Certificate of Change of Certificate of Incorporation.

White, New York Business Entities Form N803-A:2. Certificate of Change of Address of Registered Agent Executed by Registered Agent.

White, New York Business Entities Form N803-A:3. Certificate of Change (Another Form).

§ 804. Approvals, notices and effect

(a) (i) A certificate of amendment shall not be filed if the amendment adds, changes or eliminates a purpose, power or provision the inclusion of which in a certificate of incorporation requires consent or approval of a governmental body or officer or any

other person or body, or if the amendment changes the name of a corporation whose certificate of incorporation had such consent or approval endorsed thereon or annexed thereto, unless such consent or approval is no longer required or is endorsed on or annexed to the certificate of amendment. A certificate of amendment adding, changing or eliminating a purpose, power or provision the inclusion of which in a certificate of incorporation requires the incorporator to send such certificate to a governmental body or officer or any other person or body, or if the amendment changes the name of a corporation whose certificate of incorporation was required to be delivered by the incorporator to a governmental body or officer or any other person or body, shall be delivered by the person or entity filing the certificate of amendment within thirty business days after the corporation receives confirmation from the department of state that the certificate has been accepted for filing.

(ii) Every certificate of amendment of a charitable corporation which seeks to change or eliminate a purpose or power enumerated in the corporation's certificate of incorporation, or to add a power or purpose not enumerated therein, shall have endorsed thereon or annexed thereto the approval of either (A) the attorney general, or (B) a justice of the supreme court of the judicial district in which the office of the corporation is located. At any time, including if the attorney general does not approve a certificate of amendment submitted pursuant to clause (A) of this subparagraph, or if the attorney general concludes that court review is appropriate, the corporation may apply for approval of the amendment to a justice of the supreme court of the judicial district in which the office of the corporation is located. Any application for approval of a certificate of amendment by the supreme court pursuant to this paragraph shall be on ten days' written notice to the attorney general.

(b) The department of state shall not file a certificate of amendment reviving the existence of a corporation unless the consent or approval of a governmental body or officer or any other person or body required to be endorsed on or annexed to the certificate of incorporation of a corporation formed for similar purposes, is attached thereto, or, if notice to the attorney-general was required prior to the filing of its certificate of incorporation, the certificate of amendment should indicate that such notice has been given as required by law.

(c) The department of state shall not file a certificate of amendment reviving the existence of a corporation if the name of the corporation being revived is not available under section 301 (Corporate name; general) for use by a corporation then being formed under this chapter, unless the certificate of amendment shall change the name to one which is available for such use.

(d) No amendment or change shall affect any existing cause of action in favor of or against the corporation, or any pending suit to which it shall be a party, or the existing rights of persons other than members; and in the event the corporate name shall be changed, no suit brought by or against the corporation under its former name shall abate for that reason.

(e) Notwithstanding any law to the contrary, a certificate of amendment of a corporation whose statement of purposes specifically includes the establishment or operation of a child day care center, as that term is defined in section three hundred ninety of the social services law, shall provide a certified copy of such certificate to the office of children and family services within thirty days after the filing of such certificate with the department of state.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970; amd, L 1971, ch 1058 § 29, eff Sept 1, 1971; L 1972, ch 961, § 15; L 1993, ch 139, § 2, eff Aug 20, 1993; L 2006, ch 58, § 5 (Part D), eff April 12, 2006; L 2010, ch 198, § 3, eff July 15, 2010; L 2013, ch 549, § 82, eff July 1, 2014.

Derivation Notes: Derived from Gen Corp Law § 40 and Mem Corp Law § 30.

Revision Notes: *Source:* Mem Corp L § 30, Gen Corp L §§ 40, 42, 45, 49.

Changes: Revised; combined.

Comment: The section substantially re-enacts the provisions as to notice, consent and approval previously contained in the statutes. Subparagraph (d) is based on Model Nonprofit Corporation Act § 36.

Editor's Notes: Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

PRACTICE INSIGHTS:

SET UP FOR SUCCESS RIGHT FROM THE START — STRATEGIES FOR PREPARING NOT-FOR PROFIT CERTIFICATE OF INCORPORATION

By Kelly Mooney Lester, Esq.

General Editor, Glenn J. Bobeck, Esq., Phillips Lytle LLP www.phillipslytle.com

INSIGHT

Not-For-Profit Corp. Law § 402 sets forth the requirements for the contents of the Certificate of Incorporation (the "Certificate") which is filed with the Department of State (the "Department") to formally create a not-for-profit corporation. The practitioner should carefully consider the contents of the Certificate before filing it with the Department to get the entity started off on the right foot. Specifically, counsel should ensure that any contemplated powers are included in the Certificate, carefully draft the statement of purpose, avoid certain buzz words, and consider limiting internal governance provisions.

ANALYSIS

Include certain powers in Certificate if they are contemplated.

Certain powers must be included in the Certificate if they are going to be granted to the corporation. For example, if the management of the not-for-profit corporation is vested in individuals other than the Board of Directors (see Not-For-Profit Corp. Law § 701), this power must be included in the Certificate. Similar requirements exist for the following powers: if members are required to make capital contributions other than the payment of dues (Not-For-Profit Corp. Law § 502); if the corporation can accept subventions (Not-For-Profit Corp. Law § 505); or if written consent of less than

all members is permitted for certain types of corporate action (Not-For-Profit Corp. Law § 614).

Consider adding certain permissive powers to Certificate.

The Not-For-Profit Corporation Law permits, but does not require, the inclusion of certain provisions in the Certificate. For example, Not-For-Profit Corp. Law § 709(a) permits a corporation to specify that the proportion of directors or the proportion of votes of directors that shall constitute a quorum or be necessary for the transaction of business or of any specified item of business shall be greater than the proportion prescribed by statute. The Certificate may also restrict the taking of action by the Board of Directors without a meeting and by written consent (Not-For-Profit Corp. Law § 708(b)) or permit directors to participate in meetings via telephone conference (Not-For-Profit Corp. Law § 708(c)). If these actions are contemplated, the authority may be granted in the Certificate.

Pay particularly close attention to "purposes" section of Certificate.

The Certificate must include a statement of the purpose for which the corporation has been formed. Not-For-Profit Corp. Law § 402(a)(2). The practitioner should exercise caution when drafting the purposes clause. The purposes clause must be broad enough to cover not only the acts the proposed directors envision at the corporation's infancy, but also those acts the corporation may need to take as the organization matures and builds up steam. Failure to stay within the stated purposes of the entity can later create a liability for the entity and its directors, officers and members. This can easily occur if the purposes clause is narrowly constructed. It is possible to broaden the purposes clause at a later time by amending the Certificate. See Not-For-Profit Corp. Law § 802. The larger the organization, however, the more difficult it becomes to make sweeping changes to the fundamental structure of the organization, such as changing its charter. Also, pursuant to Not-For-Profit Corp. Law § 804, amendments to Certificates which add, change or eliminate a purpose, power or provision the inclusion of which in an initial Certificate require approval or consent from a governmental entity will require such approval or consent to be obtained. Also, certificates of amendments of charitable corporations which change, eliminate or add a power or purpose require approval of either the attorney general or a justice of the supreme court. Not-For-Profit Corp. Law § 804.

Avoid certain buzz words when drafting Certificate.

Any reference to certain buzz words will typically trigger a requirement for pre-approval or consent from a state agency prior to filing the Certificate. For example, Education Department consent may be required if the Certificate is drafted using the terms "education," "research," or "school." Private foundations seeking not-for-profit status should be sure to include a disclaimer of Not-For-Profit Corp. Law § 404 activities that necessitate agency approval as well as the disclaimers required in Not-For-Profit Corp. Law § 406. Pre-approval requirements can delay the process significantly, particularly if the agency requires revisions to the proposed Certificate (that will in turn require internal approvals as well). If state agency consent is necessary, counsel should consider reserving the chosen name for the entity. Not-For-Profit Corp. Law § 303. A relatively small fee buys 60 days and may be well worth the investment if the approval process is stalled at any point and the name of the entity is important to the client.

It may be advisable to limit internal governance provisions in Certificate.

The certificate of incorporation may set forth any provision for the regulation of the internal affairs of the corporation that is consistent with the Not-For-Profit Corp. Law or any other New York law. Although it is permissible to add provisions relating to internal governance to the Certificate under Not-For-Profit Corp. Law § 402(c), it may be more advisable to add those types of provisions to the bylaws. The dynamics of an organization change over time, and changes to operating procedures are inevitable. Changes to the Certificate require governmental filing and approval — at minimum, the Department's. Changes to the bylaws, however, require only proposal by the Board of Directors and vote of the membership — a completely transparent and internal process that is relatively painless unless the organization has grown exponentially. See Not-For-Profit Corp. Law § 802.

When adding internal governance provisions to the Certificate or the bylaws, ensure that those provisions are consistent with the Not-For-Profit Corp. Law. Inconsistencies can lead a court to stop the corporation in its tracks. *See Sealey v. Amer. Socy. of Hypertension, Inc.*, 26 A.D.3d 254, 810 N.Y.S.2d 48 (1st Dep't 2006).

Notes to Decisions

Analysis

1. Generally
2. Under former Membership Corporations Law § 30

1. Generally

Because The Not-For Profit Corporation Law Provisions governing Type B corporations, expressly incorporates a quasi-cy pres principle with respect to both the administration and use of assets (N-PCL §§ 513(6), 522) and the transfer of assets on dissolution (N-PCL §§ 1005(a)(3)(A), 1008(a)(15)), N-PCL § 804, which permits amendment of the certificate of incorporations of such corporation, cannot be construed to authorize an amendment inconsistent with the purposes for which funds were given to the corporation without compliance with such quasi-cy pres principles. Thus, the amendment of the certificate of incorporation of defendant The Knapp Foundation, a Type B not-for-profit corporation, authorizing its trustees "in their absolute discretion" to transfer its assets to another foundation for the purpose of furthering the good works of that organization without the Supreme Court passing upon said quasi-cy pres considerations, was improper. Alco Gravure, Inc. v Knapp Foundation, 64 N.Y.2d 458, 490 N.Y.S.2d 116, 479 N.E.2d 752, 1985 N.Y. LEXIS 15719 (N.Y. 1985).

Not-for-profit hospitals and not-for-profit corporations that sought to affiliate under newly created common parent corporation, which would assume certain statutory powers under Not-For-Profit Corporation Law including power to appoint and/or remove directors and approve amendments to respective certificates of incorporation and bylaws, were properly granted summary judgment declaring that proposed affiliation did not require notification to Attorney General and court approval under CLS N-PCL §§ 510, 511, 804 and 805. Nathan Littauer Hosp. Ass'n v Spitzer, 287 A.D.2d 202, 734 N.Y.S.2d 671, 2001 N.Y. App. Div. LEXIS 12347 (N.Y. App. Div. 3d Dep't 2001), app. denied, 98 N.Y.2d 602, 744 N.Y.S.2d 762, 771 N.E.2d 835, 2002 N.Y. LEXIS 940 (N.Y. 2002).

Delineation of nonprofit corporate powers was not an addition of powers triggering review and approval procedures; reservation of enumerated powers to sole corporate member did not change, eliminate or add to corporate powers warranting judicial intervention. Nathan Littauer Hosp. Ass'n v Spitzer, 287 A.D.2d 202, 734 N.Y.S.2d 671, 2001 N.Y. App. Div. LEXIS 12347 (N.Y. App. Div. 3d Dep't 2001), app. denied, 98 N.Y.2d 602, 744 N.Y.S.2d 762, 771 N.E.2d 835, 2002 N.Y. LEXIS 940 (N.Y. 2002).

Although the Attorney-General failed to appear on two occasions when the court was to consider an amendment to the certificate of incorporation of petitioner not-for-profit corporation, petitioner may not compel the Attorney-General to respond to petitioner's application by a CPLR article 78 proceeding in the nature of mandamus since mandamus does not lie in the absence of a showing that the Attorney-General failed to perform a duty enjoined upon him by law and there is no statute or other requirement obligating the Attorney-General to furnish a waiver or consent in connection with the approval of an amendment to the certificate of incorporation of a not-for-profit corporation; the applicable statutes (Not-For-Profit Corporation Law, § 804, subd [a]; § 404, subd [a]) require only that the Attorney-General be given notice that a not-for-profit corporation is applying to an appropriate Justice to amend its certificate of incorporation, and

the failure of the Attorney-General to appear after proper service of the notice should result in the court's approval of the application in the absence of an apparent defect in the certificate. Electrical Industry Ass'n v State, 102 Misc. 2d 494, 423 N.Y.S.2d 576, 1979 N.Y. Misc. LEXIS 2898 (N.Y. Sup. Ct. 1979).

New York Attorney General must be given notice of any application for approval to dilute the influence of a college and its president on the governance of a not-for-profit foundation, in effect transforming the foundation into an independent entity unaccountable to the college. Herbert H. Lehman College Found., Inc. v Fernandez, 292 A.D.2d 227, 739 N.Y.S.2d 375, 2002 N.Y. App. Div. LEXIS 2465 (N.Y. App. Div. 1st Dep't 2002).

2. Under former Membership Corporations Law § 30

Where the original certificate of incorporation as a membership corporation was such as to require the consent of the Commissioner of Education under subd 2 of § 1, as specifying a purpose of establishing training and research in the field of psychoanalysis, an amendment of the certificate, under this section, which made it a purpose of the corporation to maintain an institution of learning for instruction of students in psychoanalysis and related subjects, would still require approval of the Board of Regents under § 224. Nat'l Psychological Ass'n for Psychoanalysis, Inc. v Allen, 14 A.D.2d 190, 217 N.Y.S.2d 893, 1961 N.Y. App. Div. LEXIS 9367 (N.Y. App. Div. 3d Dep't 1961).

An increase of the board of a membership corporation did not become legally effective until the filing of the certificate in the proper offices required by former § 14 from which this section is in part derived. Cabana v Holstein-Friesian Ass'n, 182 N.Y.S. 658, 112 Misc. 262, 1920 N.Y. Misc. LEXIS 1465 (N.Y. Sup. Ct. 1920), modified, 196 A.D. 842, 188 N.Y.S. 277, 1921 N.Y. App. Div. LEXIS 5620 (N.Y. App. Div. 1921).

The statute of limitations runs from the time an application for a proposed amended certificate of incorporation is denied rather than from the date of a subsequent hearing granted as a matter of courtesy by the Board of Social Welfare at which the original decision was adhered to, and accordingly an application for an order under Civil Practice Act §§ 1283 et seq. annulling the determination which was made more than four months after the original disapproval is barred. Italian Hospitalization Soc. v State Department of Social Welfare, 34 N.Y.S.2d 385, 178 Misc. 183, 1942 N.Y. Misc. LEXIS 1522 (N.Y. Sup. Ct. 1942).

Where the Board of Social Welfare has refused to permit a membership corporation to amend its certificate of incorporation to permit it to operate a hospital, the court should not substitute its judgment for that of the Board where it clearly appears that there was no arbitrary or malicious exercise of power. Italian Hospitalization Soc. v State Department of Social Welfare, 34 N.Y.S.2d 385, 178 Misc. 183, 1942 N.Y. Misc. LEXIS 1522 (N.Y. Sup. Ct. 1942).

When the statute refers to "each public office", what is meant is the office of the Secretary of State and the office of the clerk of the county in which the corporation is located as specified in its certificate of incorporation. In re Daughters of Bilitis, Inc., 52 Misc. 2d 1075, 277 N.Y.S.2d 709, 1967 N.Y. Misc. LEXIS 1747 (N.Y. Sup. Ct. 1967).

Agency Opinions

1. Generally

A subsidiary of the Urban Development Corporation may incorporate under the Business Corporation Law without forfeiting its public status. The subsidiary may not pay profits to private investors, and upon dissolution of the corporation, the assets belong to the State. 1980 N.Y. Op. Att'y Gen. No. 93, 1980 N.Y. AG LEXIS 54.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-8 White, New York Business Entities ¶ N804.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.15. Preparing Certificate of Information.

New York Practice Guide: Business and Commercial § 8.18. Drafting a Certificate of Amendment.

Matthew Bender's New York Checklists: Checklist for Organizing and Operating Not-For-Profit Corporation LexisNexis AnswerGuide New York Business Entities § 9.04.

Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Forms: White, New York Business Entities Form N804:1. Approval of Justice of the Supreme Court.

§ 805. Restated certificate of incorporation

(a) A corporation, when authorized by the board, may restate in a single certificate the text of its certificate of incorporation without making any amendment or change thereby, except that it may include any one or more of the amendments or changes which may be authorized by the board without a vote of members under this chapter. Alternatively, a corporation may restate in a single certificate the text of its certificate of incorporation as amended thereby to effect any one or more of the amendments or changes authorized by this chapter, when authorized as required by section 802 (Authorization of amendment or change, class vote).

(b) A restated certificate of incorporation, entitled "Restated certificate of incorporation of ..... (name of corporation) under section 805 of the Not-for-Profit Corporation Law", shall be signed and delivered to the department of state. It shall set forth:

(1) The name of the corporation and, if it has been changed, the name under which it was formed.

(2) The date its certificate of incorporation was filed by the department of state.

(3) If the restated certificate restates the text of the certificate of incorporation without making any amendment or change, then a statement that the text of the certificate of incorporation is thereby restated without amendment or change to read as therein set forth in full.

(4) If the restated certificate restates the text of the certificate of incorporation as amended or changed thereby, then a statement that the certificate of incorporation is amended or changed to effect one or more of the amendments or changes authorized by this chapter, specifying each such amendment or change and that the text of the certificate of incorporation is thereby restated as amended or changed to read as therein set forth in full.

(5) The manner in which the restatement of the certificate of incorporation was authorized.

(c) A restated certificate need not include statements as to the incorporator or incorporators, or the first directors.

(d) Any amendment or change under this section shall be subject to any other section, not inconsistent with this section, which would be applicable if a separate certificate were filed to effect such amendment or change.

(e) Notwithstanding that the corporation would be required by any statute to secure from any supreme court justice, governmental body or officer, or other person or body, any consent or approval to the filing of its certificate of incorporation or a

certificate of amendment, such consent or approval shall not be required with respect to the restated certificate if such certificate makes no amendment and if any previously required consent or approval had been secured.

(f) Upon filing by the department, the original certificate of incorporation shall be superseded and the restated certificate of incorporation, including any amendments and changes made thereby, shall be the certificate of incorporation of the corporation.

HISTORY:

Add, L 1969, ch 1066, eff Sept 1, 1970; amd, L 1971, ch 1058 § 30, eff Sept 1, 1971; L 1981, ch 210, §§ 4–6, eff June 9, 1981; L 1998, ch 375, § 39, eff Aug 13, 1998.

Revision Notes: *Source:* None.

Changes: Completely new.

Comment: The section provides for the filing of a restated certificate of incorporation restating the provisions as previously amended. It may also include additional amendments permitted by statute. Authorization is by the board unless an amendment requiring shareholder authorization is included.

Paragraph (c) removes the necessity of including outdated statements as to the original incorporators and directors.

In paragraph (e), the approval of a public officer is made unnecessary if it had been previously obtained and the certificate is restated without further change.

Under paragraph (f), the restated certificate, after filing by the department of state, becomes the certificate of incorporation, rather than presumptive evidence of incorporation. This is consistent with the provision in § 106(a) that the restated certificate is prima facie evidence of the facts stated therein.

Notes to Decisions

1. In general

Not-for-profit hospitals and not-for-profit corporations that sought to affiliate under newly created common parent corporation, which would assume certain statutory powers under Not-For-Profit Corporation Law including power to appoint and/or remove directors and approve amendments to respective certificates of incorporation and bylaws, were properly granted summary judgment declaring that proposed affiliation did not require notification to Attorney General and court approval under CLS N-PCL §§ 510, 511, 804 and 805. Nathan Littauer Hosp. Ass'n v Spitzer, 287 A.D.2d 202, 734 N.Y.S.2d 671, 2001 N.Y. App. Div. LEXIS 12347 (N.Y. App. Div. 3d Dep't 2001), app. denied, 98 N.Y.2d 602, 744 N.Y.S.2d 762, 771 N.E.2d 835, 2002 N.Y. LEXIS 940 (N.Y. 2002).

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 6-8 White, New York Business Entities ¶ N805.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.19. Drafting a Restated Certificate of Incorporation.

Matthew Bender's New York Checklists: Checklist for Conducting Business Under Business Not-For-Profit Corporation Law LexisNexis AnswerGuide New York Business Entities § 9.08.

Checklist for Addressing Considerations in Mergers and Consolidations of Not-For-Profit Corporations LexisNexis AnswerGuide New York Business Entities § 9.17.

Forms: White, New York Business Entities Form N805:1. Resolution of Directors Authorizing Filing of Restated Certificates of Incorporation Without New Amendments.

White, New York Business Entities Form N805:2. Resolution of Directors Authorizing Filing of Restated Certificate of Incorporation with Changes.

White, New York Business Entities Form N805:3. Restated Certificate of Incorporation, Without New Amendments.

White, New York Business Entities Form N805:4. Restatement of Certificate of Incorporation Containing Changes.

ARTICLE 10 Non-Judicial Dissolution

Section

1001. Plan of dissolution and distribution of assets
1002. Authorization of plan
1002-a. Carrying out the plan of dissolution and distribution of assets
1003. Certificate of dissolution; contents; approval
1004. Certificate of dissolution; filing; effect
1006. Corporate action and survival of remedies after dissolution
1007. Notice to creditors by corporations intending to dissolve; filing or barring claims
1008. Jurisdiction of supreme court to supervise dissolution and liquidation
1009. Applicability to dissolution under other provisions
1012. Certificate of annulment of dissolution and reinstatement of corporate existence
1013. Dissolution of certain firemen's benevolent associations

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970.

§ 1001. Plan of dissolution and distribution of assets

(a) The board shall adopt a plan for the dissolution of the corporation and the distribution of its assets. Such plan shall implement any provision in the certificate of incorporation prescribing the distributive rights of members.

(b) If the corporation is a charitable corporation and has no assets to distribute and no liabilities at the time of dissolution, the plan of dissolution shall include a statement to that effect.

(c) If the corporation has no assets to distribute, other than a reserve not to exceed twenty-five thousand dollars for the purpose of paying ordinary and necessary expenses of winding up its affairs including attorney and accountant fees, and liabilities not in excess of ten thousand dollars at the time of adoption of the plan of dissolution, the plan of dissolution shall include a statement to that effect.

(d) If the corporation has assets to distribute or liabilities, the plan of dissolution shall contain:

(1) a description with reasonable certainty of the assets of the corporation and their fair value, and the total amount of debts and other liabilities incurred or estimated by the corporation, including the total amount of any accounting and legal fees incurred or estimated, in connection with the dissolution procedure.

(2) a statement as to whether any gifts or other assets are legally required to be used for a particular purpose.

(3) if there are assets received and held by the corporation either for a charitable purpose or which are legally required to be used for a particular purpose, a statement that the assets owned by the corporation, subject to any unpaid liabilities of the corporation, shall be distributed as required by any gift instrument or to a charitable corporation or

organization or organizations exempt from taxation pursuant to federal and state laws and engaged in activities substantially similar to those of the dissolved corporation. Each such recipient organization shall be identified and the governing instrument and amendments thereto of each of the proposed recipient organizations shall be annexed to such statement, along with the most recent financial report of each recipient organization and a sworn affidavit from a director and officer of each recipient organization stating the purposes of the organization, and that it is currently exempt from federal income taxation.

(4) if any of the assets of the corporation are to be distributed to a recipient for a particular legally required purpose, an agreement by the recipient to apply the assets received only for such purpose shall be included.

HISTORY:

Add, L 1969, ch 1066, § 1; amd, L 1970, ch 847, § 59, eff Sept 1, 1970; L 1971, ch 1057 § 8, eff Sept 1, 1971; L 2005, ch 726, § 4, eff April 9, 2006; L 2006, ch 434, § 4, eff July 26, 2006; L 2013, ch 549, § 88, eff July 1, 2014.

Revision Notes: *Source:* None.

Changes: New.

Comment: This section, patterned in part after the Model Non-Profit Corporation Act, departs from existing statutory law regulating the dissolution of not-for-profit corporations by requiring the board of directors to initiate informal dissolution proceedings by preparing a plan for the dissolution of the corporation and the distribution of its assets in liquidation. No such board action was required or authorized by section 55 of the Mem Corp L which presently regulates the dissolution of not-for-profit corporations.

Editor's Notes: Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

PRACTICE INSIGHTS:

THE BENEFITS OF USING THE SIMPLIFIED METHOD OF DISSOLUTION.

By Kelly Mooney Lester, Esq. and Anat Alon-Beck, Esq.

General Editor, Glenn J. Bobeck, Esq., Phillips Lytle LLP www.phillipslytle.com

INSIGHT

N-PCL Article 10 now provides a simplified method of dissolution for a not-for-profit corporation (the "Corporation") that has minimal assets and liabilities at the time the decision to dissolve is made. The simplified process requires administrative consent from the Attorney General, but keeps the dissolution process out of court.

ANALYSIS

Traditionally, all not-for-profit Corporations that commenced dissolution proceedings were required to seek judicial approval. This method requires a formal petition, administrative consent, filing fees and court proceedings (all at considerable time and expense to the Corporation). By taking advantage of the new simplified method offered by N-PCL § 1002, certain not-for-profit Corporations may avoid the expensive and time-consuming step of judicial approval.

In both cases, the Corporation must complete paperwork and seek approval from the Attorney General prior to filing a certificate of dissolution with the Department of State. N-PCL §§ 1002(d) and 1003. Even so, the paperwork for the simplified method is less cumbersome and the process can proceed more quickly and with much less formality.

A couple of steps can be taken prior to adoption of a plan of dissolution to position a Corporation for dissolution using the simplified method. First, reduce the Corporation's liabilities to less than $10,000. Second, at the time the petition is filed, the Corporation's assets must consist solely of a reserve fund (less than $25,000) for legal fees and other anticipated dissolution expenses. N-PCL §§ 1001 and 1002.

If the assets of the Corporation are greater than that allowed at the time dissolution is first discussed, the Corporation may consider spending-down its excess resources on projects that fit within the established purposes of the Corporation. The practitioner is well-advised to take some time to review the organizational documents to determine if charitable gifts or sponsorships are an appropriate use of Corporation funds before disposing of assets in that manner. If the Corporation plans to use the simplified dissolution method, the plan for dissolution should not be formally adopted until the Corporation's funds have been appropriately reduced.

It may be that the formal, judicial dissolution process is the best option for the Corporation. However, best practices dictate that this new, simplified process of dissolution be explored to determine if it offers a more advantageous solution for a dissolving Corporation.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 7-10 White, New York Business Entities ¶ N1001.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.10. Corporate Dissolution.

New York Practice Guide: Business and Commercial § 8.23. Dissolution Procedures.

Matthew Bender's New York Checklists: Checklist for Terminating Not-For-Profit Corporations LexisNexis AnswerGuide New York Business Entities § 9.19.

Forms: White, New York Business Entities Form N1001:1. Resolution of Board of Directors Adopting Plan of Dissolution and Distribution of Assets.

§ 1002. Authorization of plan

(a) Upon adopting a plan of dissolution and distribution of assets, the board shall submit it to a vote of the members, if any, and such plan shall be approved at a meeting of members by two-thirds vote as provided in paragraph (c) of section 613 (Vote of members) of this chapter; provided, however, that if the corporation is a charitable corporation, other than a corporation incorporated pursuant to article 15 (Public cemetery corporations) of this chapter, the vote required by the corporation's board of directors for adoption of the plan of dissolution of such a corporation or by the corporation's members for the authorization thereof shall be:

(1) In the case of a vote by the board of directors: (i) the number of directors required under the certificate of incorporation, by-laws, this chapter and any other applicable law; or

(ii) if the number of directors actually holding office as such at the time of the vote to adopt the plan is less than the number required to constitute a quorum of directors under the certificate of incorporation, the by-laws, this chapter or any other applicable law, the remaining directors unanimously;

(2) In the case of a vote by the members, (i) the number of members required under the certificate of incorporation, by-laws, this chapter and any other applicable law; or (ii) by the vote of members authorized by an order of the supreme court pursuant to section 608 (Quorum at meeting of members) of this chapter permitting the corporation to dispense with the applicable quorum requirement.

Notice of a special or regular meeting of the board of directors or of the members entitled to vote on adoption and authorization or approval of the plan of dissolution shall be sent to all the directors and members of record entitled to vote. Unless otherwise directed by order of the supreme court pursuant to section 608 (Quorum at meeting of members) of this chapter, the notice shall be sent by certified mail, return receipt requested, to the last known address of record of each director and member not fewer than thirty, and not more than sixty days before the date of each meeting provided, however, that if the last known address of record of any director or member is not within the United States, the notice to such director shall be sent by any other reasonable means.

(b) If there are no members entitled to vote on the dissolution of the corporation, the plan of dissolution and distribution of assets shall be deemed authorized upon its adoption by the board.

(c) Whenever a statute creating, or authorizing the formation of, a corporation requires approval by a governmental body or officer for the formation of such corporation, dissolution shall not be authorized without the approval of such body or officer.

(d) (1) The plan of dissolution and distribution of assets shall have annexed thereto the approval of the attorney general in the case of a charitable corporation, and in the case of any non-charitable corporation which at the time of dissolution holds assets legally required to be used for a particular purpose.

(2) Application to the attorney general for such approval shall be by verified petition, with the plan of dissolution and distribution of assets and certified copies of the consents prescribed by this section annexed thereto.

(3) The attorney general may approve the petition if the corporation has adopted a plan in accordance with the requirements of section 1001 (Plan of dissolution and distribution of assets) of this article, and any other requirements imposed by law or rule. At any time, including if the attorney general does not approve the petition, or the attorney general concludes, in his or her discretion, that court review of the petition is appropriate, the corporation may apply for approval to the supreme court in the judicial district in which the principal office of the corporation is located, or in which the office of one of the domestic constituent corporations is located, for an order dissolving the corporation. Application to the supreme court for an order for such approval shall be by verified petition upon ten days written notice to the attorney general, and shall include all information required to be included in the application to the attorney general pursuant to this section.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970; amd, L 1971, ch 1057 § 9, eff Sept 1, 1971; L 1971, ch 1058 § 34; L 2005, ch 726, § 5, eff April 9, 2006; L 2006, ch 434, § 5, eff July 26, 2006; L 2013, ch 549, § 89, eff July 1, 2014.

Derivation Notes: Derived from Gen Corp Law § 101 and Mem Corp Law § 55.

Revision Notes: *Source:* Mem Corp L § 55.

Changes: Revised.

Comment: This section, setting forth the procedure for authorizing the plan of dissolution and distribution of assets adopted by the board, departs from existing statutory law by requiring approval for such plan by two-thirds of the votes cast at a duly convened meeting of the members (blank votes and abstentions not being counted as votes cast), provided that the votes cast in favor of the plan be at least equal to the requisite quorum for convening the meeting. Under § 55 of the Mem Corp L, which presently regulates the dissolution of not-for-profit corporations, a vote of two-thirds of all members entitled to vote thereon is required to authorize the dissolution.

In the case of a Type B corporation in which there are no members, the plan is deemed authorized upon its adoption by the board.

Paragraph (c) perpetuates the present requirement that the dissolution be approved by any governmental body or officer whose approval was required for the formation of the corporation.

Paragraph (d) departs from existing law to the extent that approval of the dissolution by a justice of the supreme court is not generally required for the Type A corporation. Such approval is required for Type B corporations, or for any corporation, whatever its type, which holds assets for distribution under the plan that are legally required to be used for a particular purpose ("cy pres" assets—see, § 1005(a)(3)(A)), and for Type C corporations which are those organized and conducted for business purposes. Since only the foregoing special types of not-for-profit corporations require supreme court approval, a provision has been added that application to the court for such approval be on notice to the attorney-general.

Editor's Notes: Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

PRACTICE INSIGHTS:

THE BENEFITS OF USING THE SIMPLIFIED METHOD OF DISSOLUTION.

By Kelly Mooney Lester, Esq. and Anat Alon-Beck, Esq.

General Editor, Glenn J. Bobeck, Esq., Phillips Lytle LLP www.phillipslytle.com

INSIGHT

N-PCL Article 10 now provides a simplified method of dissolution for a not-for-profit corporation (the "Corporation") that has minimal assets and liabilities at the time the decision to dissolve is made. The simplified process requires administrative consent from the Attorney General, but keeps the dissolution process out of court.

ANALYSIS

Traditionally, all not-for-profit Corporations that commenced dissolution proceedings were required to seek judicial approval. This method requires a formal petition, administrative consent, filing fees and court proceedings (all at

considerable time and expense to the Corporation). By taking advantage of the new simplified method offered by N-PCL § 1002, certain not-for-profit Corporations may avoid the expensive and time-consuming step of judicial approval.

In both cases, the Corporation must complete paperwork and seek approval from the Attorney General prior to filing a certificate of dissolution with the Department of State. N-PCL §§ 1002(d) and 1003. Even so, the paperwork for the simplified method is less cumbersome and the process can proceed more quickly and with much less formality.

A couple of steps can be taken prior to adoption of a plan of dissolution to position a Corporation for dissolution using the simplified method. First, reduce the Corporation's liabilities to less than $10,000. Second, at the time the petition is filed, the Corporation's assets must consist solely of a reserve fund (less than $25,000) for legal fees and other anticipated dissolution expenses. N-PCL §§ 1001 and 1002.

If the assets of the Corporation are greater than that allowed at the time dissolution is first discussed, the Corporation may consider spending-down its excess resources on projects that fit within the established purposes of the Corporation. The practitioner is well-advised to take some time to review the organizational documents to determine if charitable gifts or sponsorships are an appropriate use of Corporation funds before disposing of assets in that manner. If the Corporation plans to use the simplified dissolution method, the plan for dissolution should not be formally adopted until the Corporation's funds have been appropriately reduced.

It may be that the formal, judicial dissolution process is the best option for the Corporation. However, best practices dictate that this new, simplified process of dissolution be explored to determine if it offers a more advantageous solution for a dissolving Corporation.

OPTIONS FOR MEMBERS IN THE MINORITY TO PUT AN END TO WRONGDOING

By Brendan J. Rich, Esq.

General Editor, Glenn J. Bobeck, Esq., Phillips Lytle LLP www.phillipslytle.com

INSIGHT

Members in the minority of a not-for-profit corporation ("corporation") who want to stop those in control of the corporation from committing improper activities have various options available to them. A corporation must pursue the purposes for which it was formed as set forth in its certificate of incorporation, must follow those procedures established in its bylaws, and cannot distribute its funds for the private benefit of any director, officer or member. When those in control of a not-for-profit corporation cause it to deviate from any of these principles, those members in the minority may attempt to handle the situation internally, through the court system, or by putting the Attorney General on notice.

ANALYSIS

Call a special meeting of members to openly discuss the objectionable items.

A special meeting may be called by the members in the minority to bring the corporate malfeasance to the attention of all the members and to attempt to spur change. Members should review the corporation's organizational documents for the procedures pursuant to which such a meeting may be brought. If no such provision exists in the organizational documents or if the number of members needed to call such a meeting is an insurmountable impediment, such a meeting may be convened by ten percent (10%) of the members entitled to vote at such a meeting pursuant to N- PCL § 603(c). Such an action will force those in the majority to openly discuss the objectionable items. If the minority's concerns are not properly addressed after such a meeting, the members may resign from the corporation, bring a derivative action on behalf of the corporation, or even seek the dissolution of the corporation. The special meeting is important as it will memorialize the members' objections in the corporate record and may prove to be critical from a public relations standpoint and in any future litigation.

A derivative action may be commenced to recover funds on behalf of the corporation.

If minority members constitute five percent (5%) or more of the total membership, they can bring a derivative action in the name of the corporation pursuant to N-PCL §§ 623 and 720(b)(3). Such an action can take many forms, such as an action: (i) against an individual director or officer for fraud or breach of fiduciary duties; (ii) to set aside any action that was beyond the corporate "purposes"; or, (iii) to enjoin a proposed improper conveyance of corporate assets. In such an action the importance of the special meeting becomes apparent; pursuant to N-PCL § 623(c) the complaint must set forth, with particularity, the attempt to address the objectionable behavior presented in the complaint.

The practitioner should be aware that while a derivative action, if successful, can result in the recovery of funds for the corporation and the likely resignation or dismissal of the offending actors, it could also subject the corporation's affairs to public scrutiny, result in litigation expenses that may be unrecoverable, and could divert the corporation's funds and attention from its mission.

Minority members may seek dissolution and distribution of funds to an appropriate successor.

The members in the minority, specifically those making up ten percent (10%) of the total membership, can bring an action to dissolve the corporation pursuant to N-PCL § 1102(a)(2) and to distribute the corporation's funds to a similar entity. An action pursuant to N-PCL §1102(a)(2)(D) appears to be the best option available to a smaller number of members, as it deals with controlling members acting in a fraudulent manner and perpetuating the corporation solely for their personal benefit. In the face of the limited case law it appears to be a hard case to make, however, as it has been held that dissolution is a drastic measure and that even if excessive spending can be proven, in the absence of bad faith, dissolution is not appropriate. *Application of John Luther & Sons Co.*, 52 A.D.2d 737, 381 N.Y.S.2d 934 (4th Dept, 1976). A larger obstacle for a petition based on N-PCL § 1102 is that it must be established that such dissolution would be beneficial to the membership as a whole, pursuant to N-PCL § 1109(b)(2). In a situation where the majority of the members agree with the inappropriate actions taken by those in the control of the corporation, meeting that threshold could present problems for the minority members. It is important to note that even if the action is successful and the corporation is dissolved and its funds released to another not-for-profit corporation with a similar purpose, the cost of litigation may be great and may deplete a large percentage of the corporation's funds.

Putting the Attorney General on notice of the improper activity.

An informal option available to the minority members would be to notify the Attorney General of the corporation's activities. Pursuant to N-PCL § 1101(a)(2), an action can be brought by the Attorney General to dissolve a corporation that has persistently acted fraudulently and contrary to public policy. In such an action, it must be demonstrated that the corporation exceeded its powers and that this abuse of power has threatened the public welfare. *People v. North River Sugar Refining Co.*, 121 N.Y. 582 (1890). In addition, pursuant to N-PCL § 1109(b)(1), in such an action the public interest, rather than the benefit to the corporation's membership, is of supreme importance. There is a great deal of uncertainty involved with this course action, such as (i) the lack of control of the distribution of the corporation's funds following dissolution; and (ii) what the investigation will uncover, as all corporate actions, not just the objectionable ones complained of, are open to investigation. It is important for the practitioner to note that if the corporate actions come under scrutiny by the Attorney General, it is likely that an audit by the Department of Taxation and Finance will follow. Such an investigation could result in the corporation being stripped of its tax-exempt status and could jeopardize the deductibility of any donations made by the members in the

minority if it is determined that the members knew that the improper activity was taking place.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 7-10 White, New York Business Entities ¶ N1002.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.10. Corporate Dissolution.

New York Practice Guide: Business and Commercial § 8.23. Dissolution Procedures.

Matthew Bender's New York Checklists: Checklist for Terminating Not-For-Profit Corporations LexisNexis AnswerGuide New York Business Entities § 9.19.

Forms: White, New York Business Entities Form N1002:1. Notice of Meeting to Vote upon Dissolution of Not-for-Profit Corporation.

White, New York Business Entities Form N1002:2. Affidavit that Subscribers of Certificate of Dissolution Constitute All Members Entitled to Vote.

White, New York Business Entities Form N1002:3. Notice to Attorney-General.

White, New York Business Entities Form N1002:4. Petition for Approval of Plan of Dissolution.

§ 1002-a. Carrying out the plan of dissolution and distribution of assets

Prior to filing the certificate of dissolution with the department of state, a corporation, as applicable, shall:

(a) Carry out the plan of dissolution and distribution of assets, pay its liabilities and distribute its assets in accordance therewith within two hundred seventy days from the date the plan of dissolution and distribution of assets shall have been (1) authorized as provided in section 1002 (Authorization of plan) of this article, (2) approved by any governmental body or officer whose approval is required pursuant to paragraph (c) of section 1002 (Authorization of plan) of this article, and (3) approved by either the attorney general or a justice of the supreme court pursuant to paragraph (d) of section 1002 (Authorization of plan) of this article. Evidence of the disposition of its assets and payment of its liabilities pursuant to the plan of dissolution and distribution of assets shall be submitted by the corporation to the attorney general and any other governmental body or officer, as required under applicable laws. If the plan of dissolution and distribution of assets cannot be carried out within the prescribed time, the attorney general may upon good cause shown extend such time, or any extended period of time, by not fewer than thirty days nor more than one year;

(b) Pursuant to the plan of dissolution and distribution of assets, fulfill or discharge its contracts, collect and sell its assets for cash at public or private sale, discharge or pay its liabilities, and do all other acts appropriate to liquidate its business;

(c) Distribute the assets of the corporation that remain after paying or adequately providing for the payment of its liabilities, in the following manner:

(1) assets received and held by the corporation either for a charitable purpose or which are legally required to be used for a particular purpose, shall be distributed to one or more domestic or foreign corporations or other organizations engaged in activities substantially similar to those of the dissolved corporation pursuant to the plan of dissolution and distribution or, if applicable, as approved by the attorney general or ordered by the supreme court pursuant to section 1002 (Authorization of plan) of this article. Any disposition of assets contained in a will or other instrument, in trust or otherwise, made before or after the dissolution, to or for the benefit of any corporation so dissolved shall inure to or for the benefit of the corporation or organization acquiring such assets of the dissolved corporation as provided in this section, and so far as is necessary for that purpose the corporation or organization acquiring such disposition shall be deemed a successor to the dissolved corporation with respect to such assets; provided, however, that such disposition shall be devoted by the acquiring corporation or organization to the purposes intended by the testator, donor or grantor.

(2) assets other than those described by subparagraph one of this paragraph, if any, shall be distributed in accordance with the specifications of the plan of dissolution and distribution of assets or, to the extent that the certificate of incorporation prescribes the distributive rights of members, or of any class or classes of members, as provided in such certificate;

(d) Within six months from the date fixed for the payment of the final liquidating distribution pursuant to paragraph (a) of this section, pay any assets distributable to a creditor or member who is unknown or cannot be found, to the state comptroller pursuant to the abandoned property law;

(e) Distribute assets that are not subject to subparagraph one of paragraph (c) of this section under a plan of distribution, in accordance with the following order of priorities:

(1) holders of certificates of subvention.

(2) holders of capital certificates.

(3) members, if permitted by law.

HISTORY:

Add, L 2005, ch 726, § 6, eff April 9, 2006; amd, L 2006, ch 434, § 6, eff July 26, 2006; L 2013, ch 549, § 90, eff July 1, 2014.

Editor's Notes: Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 7-10 White, New York Business Entities ¶ N1002-a.01 et seq.

§ 1003. Certificate of dissolution; contents; approval

(a) After the plan of dissolution and distribution of assets has been adopted, authorized, approved and carried out pursuant to the terms of the plan within the time period set forth pursuant to section 1002-a (Carrying out the plan of dissolution and distribution of assets), a certificate of dissolution, entitled "Certificate of dissolution of . . . . . (name

of corporation) under section 1003 of the Not-for-Profit Corporation Law" shall be signed and, if required pursuant to subparagraph two of paragraph (b) of this section, after the attorney general has affixed thereon his or her consent to the dissolution, such certificate of dissolution shall be delivered to the department of state. It shall set forth:

(1) The name of the corporation and, if its name has been changed, the name under which it was formed.

(2) The date its certificate of incorporation was filed by the department of state.

(3) The name and address of each of its officers and directors.

(4) A statement as to whether the corporation is a charitable corporation or a non-charitable corporation.

(5) A statement as to whether or not the corporation holds assets at the time of authorization of its plan of dissolution and distribution of assets as provided in section 1002 of this article (Authorization of plan) which are legally required to be used for a particular purpose.

(6) That the corporation elects to dissolve.

(7) The manner in which the dissolution was authorized. If the dissolution of the corporation is authorized by a vote of the directors and/or members of the corporation that is less than that ordinarily required by the certificate of incorporation, the bylaws, this chapter or any other applicable law, as permitted by paragraph (a) of section 1002 (Authorization of plan) of this article, then the certificate of dissolution shall so state.

(8) A statement that prior to delivery of such certificate of dissolution to the department of state for filing, the plan of dissolution and distribution of assets has been approved by the attorney general or by a justice of the supreme court, if such approval is required pursuant to section 1002 (Authorization of plan) of this article. A copy of the approval of the attorney general or of the court order shall be attached to the certificate of dissolution. In the case of a corporation, other than a corporation incorporated pursuant to article 15 (Public cemetery corporations), having no assets to distribute, or having no assets to distribute other than a reserve not to exceed twenty-five thousand dollars for the purpose of paying ordinary and necessary expenses of winding up its affairs including attorney and accountant fees, and liabilities not in excess of ten thousand dollars at the time of dissolution, a statement that a copy of the plan of dissolution which contains the statement prescribed by paragraph (b) of section 1001 (Plan of dissolution and distribution of assets) has been duly filed with the attorney general, if required.

(b) Such certificate of dissolution shall have endorsed thereon or annexed thereto the approval of the dissolution:

(1) By a governmental body or officer, if such approval is required. A corporation whose statement of purposes specifically includes the establishment or operation of a child day care center, as that term is defined in section three hundred ninety of the social services law, shall provide a certified copy of any certificate of dissolution involving such corporation to the office of children and family services within thirty days after the filing of such dissolution with the department of state.

(2) By the attorney general in the case of a charitable corporation, or any other corporation that holds assets at the time of dissolution legally required to be used for a particular purpose.

(c) The application to the attorney general for approval of the certificate of dissolution pursuant to paragraph (b) of this section shall be by verified petition and shall include a final financial report showing disposition of all of the corporation's assets and liabilities, the requisite governmental approvals and the appropriate fees, if any, accompanied by the certificate of dissolution.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970; amd, L 1971, ch 1057 § 10, eff Sept 1, 1971; L 1971, ch 1058 § 35; L 1998, ch 375, § 43, eff Aug 13, 1998; L 2005, ch 726, § 7, eff April 9, 2006; L 2006, ch 58, § 7 (Part D), eff April 9, 2006; L 2006, ch 434, § 7, eff July 26, 2006; L 2013, ch 549, § 91, eff July 1, 2014; L 2015, ch 358, § 8, effective September 25, 2015.

Derivation Notes: Derived from Mem Corp Law § 55.

Revision Notes: *Source:* Mem Corp L § 55.

Changes: Slightly revised.

Comment: This section, which prescribes the contents of the certificate of dissolution and the requisite approvals for filing, expands § 55 of the Mem Corp L, presently regulating not-for-profit corporations, by requiring inclusion in the certificate of three additional items: (a) a statement as to the type of corporation; (b) a statement indicating whether or not the corporation holds assets for distribution which are legally required to be used for a particular purpose ("cy-pres" assets —see, § 1005(a)(3)(A)); and (c) where necessary, statement whether supreme court approval for the plan of dissolution and distribution of assets has been obtained. The inclusion of the foregoing items is designed to alert the department of state to the fact that the approval of a supreme court justice must be endorsed on or attached to the certificate of dissolution before it can be filed.

Editor's Notes: Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

Amendment Notes: The 2015 amendment by ch 358, § 8, added "approval of the attorney general or of the court" in the second sentence of (a)(8).

PRACTICE INSIGHTS:

THE BENEFITS OF USING THE SIMPLIFIED METHOD OF DISSOLUTION.

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INSIGHT

N-PCL Article 10 now provides a simplified method of dissolution for a not-for-profit corporation (the "Corporation")

that has minimal assets and liabilities at the time the decision to dissolve is made. The simplified process requires administrative consent from the Attorney General, but keeps the dissolution process out of court.

ANALYSIS

Traditionally, all not-for-profit Corporations that commenced dissolution proceedings were required to seek judicial approval. This method requires a formal petition, administrative consent, filing fees and court proceedings (all at considerable time and expense to the Corporation). By taking advantage of the new simplified method offered by N-PCL § 1002, certain not-for-profit Corporations may avoid the expensive and time-consuming step of judicial approval.

In both cases, the Corporation must complete paperwork and seek approval from the Attorney General prior to filing a certificate of dissolution with the Department of State. N-PCL §§ 1002(d) and 1003. Even so, the paperwork for the simplified method is less cumbersome and the process can proceed more quickly and with much less formality.

A couple of steps can be taken prior to adoption of a plan of dissolution to position a Corporation for dissolution using the simplified method. First, reduce the Corporation's liabilities to less than $10,000. Second, at the time the petition is filed, the Corporation's assets must consist solely of a reserve fund (less than $25,000) for legal fees and other anticipated dissolution expenses. N-PCL §§ 1001 and 1002.

If the assets of the Corporation are greater than that allowed at the time dissolution is first discussed, the Corporation may consider spending-down its excess resources on projects that fit within the established purposes of the Corporation. The practitioner is well-advised to take some time to review the organizational documents to determine if charitable gifts or sponsorships are an appropriate use of Corporation funds before disposing of assets in that manner. If the Corporation plans to use the simplified dissolution method, the plan for dissolution should not be formally adopted until the Corporation's funds have been appropriately reduced.

It may be that the formal, judicial dissolution process is the best option for the Corporation. However, best practices dictate that this new, simplified process of dissolution be explored to determine if it offers a more advantageous solution for a dissolving Corporation.

Notes to Decisions

Analysis

1. Generally
2. Under former N-PCL § 1005
3. Under former General Corporation Law § 29
4. —Directors as trustees for liquidation
5. — —Delegation of powers
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7. —Continuing corporate powers
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9. Under former Membership Corporations Law § 55
10. Under former Membership Corporations Law § 56

1. Generally

In view of the special circumstances relating to the block of stock in the trust, requiring protracted arrangements for its sale or disposition, there was no reason to disapprove a plan of dissolution and distribution of charitable trust assets merely because liquidation required a step by step process. In re Martin Foundation, Inc., 73 Misc. 2d 985, 343 N.Y.S.2d 518, 1972 N.Y. Misc. LEXIS 1265 (N.Y. Sup. Ct. 1972), aff'd, 41 A.D.2d 905, 342 N.Y.S.2d 643 (N.Y. App. Div. 1st Dep't 1973).

2. Under former N-PCL § 1005

Under quasi cy pres standard of CLS N-PCL § 1005, Supreme Court Justice, in determining whether to approve plan of distribution proposed by corporation's board of directors, and if not to what other charitable organization distribution should be made, should consider (1) source of funds to be distributed, whether received through public subscription or under trust provision of will or other instrument, (2) purposes and powers of corporation as enumerated in its certificate of incorporation, (3) activities in fact carried out and service actually provided by corporation, (4) relationship of activities and purposes of proposed distributees to those of dissolving corporation, and (5) bases for distribution recommended by board of directors. In re Multiple Sclerosis Service Organization, Inc., 68 N.Y.2d 32, 505 N.Y.S.2d 841, 496 N.E.2d 861, 1986 N.Y. LEXIS 19365 (N.Y. 1986).

Standard governing distribution of assets of charitable corporation being dissolved under CLS N-PCL § 1005 ("engaged in activities substantially similar to") is less restrictive and accords greater authority to corporation's board of directors and to courts than standard governing distribution of assets held by trustee under will or other instrument making distribution for charitable purposes under CLS EPTL § 8-1.1 ("will most effectively accomplish its general purposes") or standard governing distribution of assets held by officers and trustees of voluntary association which has received by public subscription fund for charitable purposes from more than 1,000 contributors under CLS EPTL § 8-1.1 ("will most effectively accomplish the general purpose for which such fund was collected") or cy pres standard at common law ("as nearly as possible"). In re Multiple Sclerosis Service Organization, Inc., 68 N.Y.2d 32, 505 N.Y.S.2d 841, 496 N.E.2d 861, 1986 N.Y. LEXIS 19365 (N.Y. 1986).

Legislation, primarily involving the amendment of N.Y. Ins. Law § 4301 and the enactment of N.Y. Ins. Law § 7317, which permitted New York State's historic hospital-linked not-for-profit health insurer to reorganize as a for-profit and, pursuant to N.Y. Not-for-Profit Corp. Law § 1005, to place some of its assets in a charitable trust to promote accessible health care, did not unconstitutionally deprive subscribers of any property right, did not impair contracts, did not confer an exclusive privilege, and did not involve allowing the corporation's board members to breach any fiduciary duties; it was legislation aimed at allowing the corporation to survive, while assuring that some of its assets promoted its historic values. Consumers Union of U.S., Inc. v State, 5 N.Y.3d 327, 806 N.Y.S.2d 99, 840 N.E.2d 68, 2005 N.Y. LEXIS 1433 (N.Y. 2005).

Cy pres doctrine, codified at CLS N-PCL §§ 1005 et seq., requires that corporation be dissolved either voluntarily or through proceeding brought by Attorney General; thus, doctrine had no relevance in mortgage foreclosure proceeding wherein defendant mortgagor alleged that mortgagee corporation's invalid assignment of mortgage operated to automatically dissolve corporation. Aquarian Ctr. for Initiation Corp. v Church of God, 193 A.D.2d 708, 598 N.Y.S.2d 69, 1993 N.Y. App. Div. LEXIS 4925 (N.Y. App. Div. 2d Dep't 1993).

In ordering distribution under the dissolution statutes, the Supreme Court is not concerned with the directions or intentions of the creator or testator but only that the funds be transferred to a charitable recipient having similar purposes to the dissolved charitable corporation. In re Will of Goehringer, 69 Misc. 2d 145, 329 N.Y.S.2d 516, 1972 N.Y. Misc. LEXIS 2132 (N.Y. Sur. Ct. 1972).

Testamentary bequests to not-for-profit charitable corporations who had been dissolved either through bankruptcy or otherwise had to be distributed to those who acquired the corporation's assets, as long as these successors were engaged in activities substantially similar to those of the dissolved corporation. In re Estate of Thurston, 192 Misc. 2d 344, 746 N.Y.S.2d 343, 2002 N.Y. Misc. LEXIS 1014 (N.Y. Sur. Ct. 2002).

When the operator of a children's hospital's simply amended its corporate name and purpose after the hospital's assets and facilities were purchased by medical centers, N.Y. Not-for-Profit Corp. Law §§ 1005 and 905 did not apply to a bequest under a charitable trust because the hospital had not been formally dissolved and because there had not been a merger. Matter of Hummel, 30 A.D.3d 802, 817 N.Y.S.2d 424, 2006 N.Y. App. Div. LEXIS 7960 (N.Y. App. Div. 3d Dep't), app. denied, 7 N.Y.3d 713, 824 N.Y.S.2d 605, 857 N.E.2d 1136, 2006 N.Y. LEXIS 3303 (N.Y. 2006).

3. Under former General Corporation Law § 29

The statutory procedures for dissolution of corporations were set up to avoid the injustices of the common-law rule that, upon

dissolution of a corporation, its assets escheated to the sovereign. Northern Properties, Inc. v Kuf Realty Corp., 30 Misc. 2d 1, 217 N.Y.S.2d 355, 1961 N.Y. Misc. LEXIS 2923 (N.Y. Sup. Ct. 1961).

Mere dissolution of a corporation does not totally destroy its existence, but it continues its corporate character for liquidation of its assets and payment of its debts and may be sued in its corporate name. Bloedorn v Washington Times Co., 89 F.2d 835, 1937 U.S. App. LEXIS 3601 (D.C. 1937).

4. —Directors as trustees for liquidation

After dissolution directors, by this section, become trustees for the creditors and are personally liable for corporate debts to the extent of corporate property coming into their hands. But an action by a creditor of a dissolved corporation must be brought against the corporation, not against the directors alone. Cunningham v Glauber, 133 A.D. 10, 117 N.Y.S. 866, 1909 N.Y. App. Div. LEXIS 2089 (N.Y. App. Div. 1909).

The directors of a corporation become, upon dissolution of the corporation, trustees for the purpose of liquidating the affairs of the corporation, and the statute of limitations does not begin to run in their favor so as to bar a proceeding to require the surviving directors of a dissolved corporation to present and file an account unless and until the trust is terminated or unless and until the trust is repudiated or denied. In re Baldwin Trading Corp., 8 A.D.2d 968, 190 N.Y.S.2d 949, 1959 N.Y. App. Div. LEXIS 7503 (N.Y. App. Div. 2d Dep't 1959), aff'd, 8 N.Y.2d 144, 202 N.Y.S.2d 312, 168 N.E.2d 383, 1960 N.Y. LEXIS 1142 (N.Y. 1960).

On application for appointment of a receiver pendente lite of assets of a corporation in dissolution, defendant directors, in possession of any administering assets of corporation, under this section, are not trustees of an express trust, as such a trust is defined by Real Prop. Law, § 96, and Pers. Prop. Law, § 11. Hassett v Kimball, 258 N.Y.S. 17, 144 Misc. 50, 1932 N.Y. Misc. LEXIS 1157 (N.Y. Sup. Ct. 1932).

5. — —Delegation of powers

Under this section the president of a de facto corporation, who is also one of the trustees in liquidation, may be delegated to effectuate a sale of the corporation. Gaillard Realty Co. v Manhattan Brass Co., 238 A.D. 84, 263 N.Y.S. 397, 1933 N.Y. App. Div. LEXIS 9427 (N.Y. App. Div. 1933).

Under the provisions of this section authorizing the directors of a corporation in dissolution to settle its affairs and distribute its assets and to elect or appoint officers who may execute transfers and conveyances in the corporate name, upon authority of the directors, an assignment of mortgage executed by the president of a corporation in dissolution and reciting that its execution is by order of the directors is sufficient, prima facie, to establish transfer to the assignee. Northern Properties, Inc. v Kuf Realty Corp., 30 Misc. 2d 1, 217 N.Y.S.2d 355, 1961 N.Y. Misc. LEXIS 2923 (N.Y. Sup. Ct. 1961).

This section, in providing that upon a corporate dissolution that directors may appoint officers, fill vacancies on the board, etc., does not contemplate, after dissolution, any "de facto" officers or that persons in interest may merely "assume" official positions. A. & R. Theatre Corp. v Azteca Films, Inc., 218 F. Supp. 893, 1962 U.S. Dist. LEXIS 3069 (S.D.N.Y. 1962).

6. — —Appointment of liquidator on failure to agree

A sanatorium, although its corporate existence had expired, was entitled by reason of § 29 to receive the residuary estate of a decedent. In re Mohr's Estate, 24 N.Y.S.2d 977, 175 Misc. 706, 1941 N.Y. Misc. LEXIS 1403 (N.Y. Sur. Ct. 1941).

Under § 29 the directors are authorized to settle the corporate affairs of a corporation undergoing dissolution, but where the directors are evenly divided, making agreement on conduct impossible, the court has implied power to appoint a liquidator. Gutwirth & Errante Homes, Inc. v Jacobowitz, 81 N.Y.S.2d 607, 1948 N.Y. Misc. LEXIS 2895 (N.Y. Sup. Ct. 1948).

7. —Continuing corporate powers

Under this section a corporation which has filed a certificate of voluntary dissolution may lawfully enter into an agreement of retainer fixing attorney's fees to be paid for legal services required to be rendered in prosecuting claims for damages. Application of Peters, 271 A.D. 518, 67 N.Y.S.2d 305, 1946 N.Y. App. Div. LEXIS 2789 (N.Y. App. Div. 1946), modified, 296 N.Y. 974, 73 N.E.2d 560, 296 N.Y. (N.Y.S.) 974, 1947 N.Y. LEXIS 1720 (N.Y. 1947).

8. — —Right to maintain action

Dissolution of a corporation had no effect upon a cause of action for damages sustained before dissolution of said corporation. I. Kalfus Co. v Ad Press, Ltd., 53 N.Y.S.2d 496, 184 Misc. 285, 1945 N.Y. Misc. LEXIS 1536 (N.Y. Mun. Ct.), rev'd, 56 N.Y.S.2d 373, 185 Misc. 214, 1945 N.Y. Misc. LEXIS 2026 (N.Y. App. Term 1945).

An educational corporation which had a provisional charter which had expired could maintain an action for an accounting for a large sum of money allegedly belonging to it which defendant had received as its fiduciary if the action was brought for the purpose of settling the corporate affairs. School of Music of Brooklyn Free Musical Society, Inc. v Moritt, 145 N.Y.S.2d 645, 1955 N.Y. Misc. LEXIS 3820 (N.Y. Sup. Ct. 1955).

Corporation which had been dissolved could not maintain action for specific performance of alleged undertaking to effectuate a lien on realty. Dieselcraft Corp. v Joca Realty Corp., 161 N.Y.S.2d 761 (N.Y. Sup. Ct. 1957).

9. Under former Membership Corporations Law § 55

This section is not mandatory and is not retroactive. St. John of Vizzini v Cavallo, 234 N.Y.S. 683, 134 Misc. 152, 1929 N.Y. Misc. LEXIS 810 (N.Y. Sup. Ct. 1929).

Where a charitable society, which was remainderman under a testamentary trust, was dissolved prior to the death of the life beneficiary, the remainder gift vested irrevocably in the society upon the death of the testatrix. The trustee was directed to make inquiry and join in the proceeding for judicial settlement of his accounts the successors in interest or surviving directors of such society. In re Tapper's Will, 139 N.Y.S.2d 110, 1954 N.Y. Misc. LEXIS 3637 (N.Y. Sur. Ct. 1954).

10. Under former Membership Corporations Law § 56

The mere fact that, in proceedings by directors of a dissolved charity organized under this act, a particular corporation or association is suggested by petitioners as a proper successor to funds and property of the dissolved corporation, gives that organization no legal right to any of the funds, and such corporation is not a person aggrieved entitled to appeal from disposition of the funds to other charities. Application of Richmond County Soc. for Prevention of Cruelty to Children, 11 A.D.2d 236, 204 N.Y.S.2d 707, 1960 N.Y. App. Div. LEXIS 8437 (N.Y. App. Div. 2d Dep't 1960), aff'd, 9 N.Y.2d 913, 217 N.Y.S.2d 86, 176 N.E.2d 97, 1961 N.Y. LEXIS 1229 (N.Y. 1961).

In a proceeding instituted under this section by the directors of a dissolved charitable corporation, known as the Richmond County Society for the Prevention of Cruelty to Children, for an order authorizing transfer of all funds, etc., to appellant, likewise a charitable corporation organized under this act, or to such other corporation as to the court might seem just and proper, it was the duty of the court to transfer the funds to such other corporation or association as, in its best judgment, would best accomplish the general purposes for which the original society was organized, requiring application of the cy pres doctrine and involving exercise of a large measure of discretion. Application of Richmond County Soc. for Prevention of Cruelty to Children, 11 A.D.2d 236, 204 N.Y.S.2d 707, 1960 N.Y. App. Div. LEXIS 8437 (N.Y. App. Div. 2d Dep't 1960), aff'd, 9 N.Y.2d 913, 217 N.Y.S.2d 86, 176 N.E.2d 97, 1961 N.Y. LEXIS 1229 (N.Y. 1961).

Where will bequeathed property to three charities, one of which was nonexistent, and will disclosed a general charitable intent, court divided the bequest between the two remaining charitable legatees. In re Sanders' Estate, 7 Misc. 2d 800, 161 N.Y.S.2d 982, 1957 N.Y. Misc. LEXIS 3351 (N.Y. Sur. Ct. 1957).

An application pursuant to this section is premature where it is made before a membership corporation has been dissolved pursuant to Article VIII of the Membership Corporation Law or where it is made before the corporation is dissolved by the expiration of its corporate existence. Madden v Atkins, 14 Misc. 2d 813, 179 N.Y.S.2d 748, 1958 N.Y. Misc. LEXIS 2628 (N.Y. Sup. Ct. 1958).

A proceeding under this section for the retention of moneys to satisfy claims against a corporation should have been initiated by

an order to show cause and not by a notice of motion in the action giving rise to the claims. Madden v Atkins, 14 Misc. 2d 813, 179 N.Y.S.2d 748, 1958 N.Y. Misc. LEXIS 2628 (N.Y. Sup. Ct. 1958).

Where a membership corporation sought leave upon its dissolution to transfer its assets to another institution with purposes most clearly comporting with original beneficent purposes and where there was a conflict in the papers in respect of the appropriate successorship to the purposes the matter would be referred to a referee to hear and report as to the appropriate corporation or association to which should be transferred the property and assets of the dissolved membership corporation. Application of Italian Benevolent Institute, 127 N.Y.S.2d 396, 1953 N.Y. Misc. LEXIS 2566 (N.Y. Sup. Ct. 1953).

Under the Cy Pres doctrine, a bequest to a hospital was paid to the society operating the hospital, with directions to apply the income as nearly as possible in accordance with intent of testator. In re Estate of Stern, 159 N.Y.S.2d 308 (N.Y. Sur. Ct. 1953).

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 7-10 White, New York Business Entities ¶ N1003.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.10. Corporate Dissolution.

New York Practice Guide: Business and Commercial § 8.23. Dissolution Procedures.

Matthew Bender's New York Checklists: Checklist for Terminating Not-For-Profit Corporations LexisNexis AnswerGuide New York Business Entities § 9.19.

Forms: White, New York Business Entities Form N1003:1. Certificate of Dissolution of Not-for-Profit Corporation Subscribed by All Members.

White, New York Business Entities Form N1003:2. Application to Supreme Court for Approval of Certificate of Dissolution.

§ 1004. Certificate of dissolution; filing; effect

(a) The department of state shall not file a certificate of dissolution unless the consent of the state department of taxation and finance to the dissolution is attached thereto. Upon filing the certificate, the corporation is dissolved.

(b) Notwithstanding paragraph (a) of this section, with respect to any corporation that has done business in the city of New York and incurred liability for any tax or charge under chapter six, seven, eight, ten, eleven, twelve, thirteen, fourteen, fifteen, twenty-one, twenty-four, twenty-five or twenty-seven of title eleven of the administrative code of the city of New York, the department of state shall not file a certificate of dissolution unless the consent of the commissioner of finance of the city of New York to the dissolution is also attached thereto.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970; amd, L 2009, ch 201, § 75, eff Oct 1, 2009.

Derivation Notes: Derived from Mem Corp Law § 55.

Revision Notes: *Source:* Mem Corp L § 55.

Changes: Revised.

Comment: This section, an adaptation of § 1004 of the Bus Corp L, revises the existing statutory law regulating not-for-profit corporations by precluding the filing of a certificate of dissolution without the consent thereto of the state tax commission. This additional requirement is particularly significant in the case of Type C corporations which were organized and conducted for business purposes.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 7-10 White, New York Business Entities ¶ N1004.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.10. Corporate Dissolution.

New York Practice Guide: Business and Commercial § 8.23. Dissolution Procedures.

Matthew Bender's New York Checklists: Checklist for Terminating Not-For-Profit Corporations LexisNexis AnswerGuide New York Business Entities § 9.19.

Forms: White, New York Business Entities Form N1004:1. Resolution Authorizing Officers to Execute and File Certificate of Dissolution of Not-for-Profit Corporation.

White, New York Business Entities Form N1004:2. Affidavit of Authority to Execute and File Certificate of Dissolution.

§ 1006. Corporate action and survival of remedies after dissolution

(a) After dissolution, a corporation shall not commence any new activities. A dissolved corporation, its directors, officers and members may continue to function for the purpose of winding up the affairs of the corporation in the same manner as if the dissolution had not taken place, except as otherwise provided in this chapter or by court order. In particular and without limiting the generality of the foregoing:

(1) The directors of a dissolved corporation shall not be deemed to be trustees of its assets; title to such assets shall not vest in them, but shall remain in the corporation until transferred by it in its corporate name.

(2) Dissolution shall not change quorum or voting requirements for the board or members, or provisions regarding election, appointment, resignation or removal of, or filling vacancies among, directors or officers, or provisions regarding amendment or repeal of by-laws or adoption of new by-laws.

(3) Capital certificates may be transferred and determination of members for any purpose may be made without closing the record of members until such time, if any, as such record may be closed, and either the board or the members may close it.

(4) The corporation may sue or be sued in all courts and participate in actions and proceedings, whether judicial, administrative, arbitrative or otherwise, in its corporate name, and process may be served by or upon it.

(b) The dissolution of a corporation shall not affect any remedy available to or against such corporation, its directors, officers or members, for any right or claim existing or any liability incurred before such dissolution, except as provided in sections 1007 (Notice to creditors; filing or barring claims) or 1008 (Jurisdiction of supreme court to supervise dissolution and liquidation.)

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970; amd, L 1970, ch 847, § 61, eff Sept 1, 1970; L 2005, ch 726, § 9, eff April 9, 2006.

Derivation Notes: Derived from Gen Corp Law § 29 and Mem Corp Law §§ 55, 56.

Revision Notes: *Source:* Mem Corp L § 55; Gen Corp L § 29.

Changes: Revised.

Comment: This section, which sets forth the ground rules for the conduct of corporate affairs and the survival of remedies after dissolution, is an adaptation of § 1006 of the Bus Corp L. Aside from spelling out the rules for conducting corporate affairs during liquidation in greater detail than under existing statutory law, and preserving, for or against the corporation, any remedies available on a claim existing or liability incurred before dissolution, the section adopts from the Bus Corp L the rule that the directors of a dissolved corporation are not trustees of its assets, title to such assets remaining in the dissolved corporation until transferred in the corporate name.

Notes to Decisions

Analysis

1. Generally
2. Under former Membership Corporations Law § 56

1. Generally

Inactive corporation was entitled to recover surplus funds from a foreclosure when the funds had been turned over to the State Comptroller as abandoned. Because the corporation had acquired the subject property before it became inactive, its inactive status did not preclude it from prosecuting the proceeding; under N.Y. Bus. Corp. Law § 1006(a)(4) and N.Y. Not-for-Profit Corp. Law § 1006(a)(4), a dissolved corporation could sue or be sued and participate in actions and proceedings. NYCTL 1996-1 Trust v Nuthree Inc., 852 N.Y.S.2d 710, 18 Misc. 3d 603, 2007 N.Y. Misc. LEXIS 8303 (N.Y. Sup. Ct. 2007).

2. Under former Membership Corporations Law § 56

This section relates to but does not conflict with § 29 of the General Corporation Law which provides in part that "upon the dissolution of a corporation for any cause and whether voluntary or involuntary its corporate existence shall continue for the purpose of collecting its assets and it may sue and be sued in its corporate name." In re Mohr's Estate, 24 N.Y.S.2d 977, 175 Misc. 706, 1941 N.Y. Misc. LEXIS 1403 (N.Y. Sur. Ct. 1941).

Two societies adjudged to be successors of a dissolved membership corporation were entitled to share equally in funds which might fall to the dissolved corporation under will probated after dissolution. Application of Richmond County Soc. for Prevention of Cruelty to Children, 8 Misc. 2d 123, 165 N.Y.S.2d 861, 1957 N.Y. Misc. LEXIS 2831 (N.Y. Sup. Ct. 1957), app. dismissed, 11 A.D.2d 236, 204 N.Y.S.2d 707, 1960 N.Y. App. Div. LEXIS 8437 (N.Y. App. Div. 2d Dep't 1960).

Where a membership Corporation prayed for the exoneration and discharge of its officers, directors, trustees and members, as authorized by subdivision 3 of this section, the corporation would be directed to file an accounting within 30 days of the entry of the order therefor and for the purpose of passing on such accounting, the matter would be referred to a referee to take and state such account. Application of Italian Benevolent Institute, 127 N.Y.S.2d 396, 1953 N.Y. Misc. LEXIS 2566 (N.Y. Sup. Ct. 1953).

An Italian benevolent institute, formed for one of the purposes described in § 11(1) of the Membership Corporation Law and thereafter dissolved, as indicated by the certificate of the secretary of state, was entitled to petition for the relief prescribed by subdivision 5 of this section. Application of Italian Benevolent Institute, 127 N.Y.S.2d 396, 1953 N.Y. Misc. LEXIS 2566 (N.Y. Sup. Ct. 1953).

Where a charitable society, which was remainderman under a testamentary trust, was dissolved prior to the death of the life beneficiary, the remainder gift vested irrevocably in the society upon the death of the testatrix. The trustee was directed to make inquiry and join in the proceeding for judicial settlement of his accounts the successors in interest or surviving directors of such society. In re Tapper's Will, 139 N.Y.S.2d 110, 1954 N.Y. Misc. LEXIS 3637 (N.Y. Sur. Ct. 1954).

RESEARCH REFERENCES AND PRACTICE AIDS

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Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.10. Corporate Dissolution.

New York Practice Guide: Business and Commercial § 8.23. Dissolution Procedures.

Matthew Bender's New York Checklists: Checklist for Terminating Not-For-Profit Corporations LexisNexis AnswerGuide New York Business Entities § 9.19.

§ 1007. Notice to creditors by corporations intending to dissolve; filing or barring claims

(a) At any time after the plan of dissolution and distribution of assets shall have been (1) authorized as provided in section 1002 of this article (Authorization of plan), (2) approved by any governmental body or officer whose approval is required pursuant to paragraph (c) of section 1002 of this article, and (3) approved by either by the attorney general or a justice of the supreme court pursuant to paragraph (d) of section 1002 of this article, and prior to filing the certificate of dissolution, the corporation may give a notice requiring all creditors and claimants, including any with unliquidated or contingent claims and any with whom the corporation has unfulfilled contracts, to present their claims in writing and in detail at a specified place and by a specified day, which shall not be less than six months after the first publication of such notice. Such notice shall be published at least once a week for two successive weeks in a newspaper of general circulation in the county in which the office of the corporation was located at the date of authorization of its plan of dissolution and distribution of assets as provided in section 1002 of this article (Authorization of plan). On or before the date of the first publication of such notice, the corporation shall mail a copy thereof, postage prepaid, to each person believed to be a creditor of or claimant against the corporation whose current name and address are known to or can with due diligence be ascertained by the corporation. The giving of such notice shall not constitute a recognition that any person is a proper creditor or claimant, and shall not revive or make valid, or operate as a recognition of the validity of, or a waiver of any defense or counterclaim in respect of any claim against the corporation, its assets, directors, officers or members, which has been barred by any statute of limitations or become invalid by any cause, or in respect of which the corporation, its directors, officers or members, has any defense or counterclaim.

(b) Any claims which shall have been filed as provided in such notice and which shall be disputed by the corporation may be submitted for determination to the supreme court under section 1008 (Jurisdiction of supreme court to supervise dissolution and liquidation) or pursuant to article 11 (Judicial dissolution). A claim filed by the trustee or paying agent for the holders of bonds or coupons shall have the

same effect as if filed by the holder of any such bonds or coupons. Any person whose claim is, at the date of the first publication of such notice, barred by any statute of limitations is not a creditor or claimant entitled to any notice under this section or such section 1008. The claim of any such person and all other claims which are not timely filed as provided in such notice except claims which are the subject of litigation on the date of the first publication of such notice and all claims which are so filed but are disallowed by the court under such section 1008, shall be forever barred as against the corporation, its assets, directors, officers and members, except to such extent, if any, as the court may allow them against any remaining assets of the corporation in the case of a creditor who shows satisfactory reason for failure to file a claim as so provided. If the court requires a further notice under such section 1008, any reference to a notice in this section shall, to the extent that the court so orders, mean such further notice, except that a claim which has been filed in accordance with a notice under this section need not be refiled under such further notice.

(c) Notwithstanding this section and section 1008 (Jurisdiction of supreme court to supervise dissolution and liquidation), tax claims and other claims of this state, of the United States and of the department of finance of the city of New York shall not be required to be filed under those sections, and such claims shall not be barred because not so filed, and distribution of the assets of the corporation, or any part thereof, may be deferred until determination of any such claims.

(d) Laborer's wages shall be preferred claims and entitled to payment before any other creditors out of the assets of the corporation in excess of valid prior liens or encumbrances.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970; amd, L 1970, ch 847, § 62, eff Sept 1, 1970; L 1971, ch 1058 § 36, eff Sept 1, 1971; L 2005, ch 726, § 10, eff April 9, 2006; L 2006, ch 434, § 8, eff July 26, 2006; L 2009, ch 201, § 76, eff Oct 1, 2009; L 2013, ch 549, § 92, eff July 1, 2014.

Derivation Notes: Derived from Gen Corp Law § 133 and Mem Corp Law § 56.

Revision Notes: *Source:* Gen Corp L § 133.

Changes: Revised.

Comment: This section, an adaptation of § 1007 of the Bus Corp L, sets forth a procedure for notice to creditors and the filing and barring of claims against the dissolved corporation which is more explicit than that found in § 133 of the Gen Corp L, presently regulating not-for-profit corporations.

Editor's Notes: Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 7-10 White, New York Business Entities ¶ N1007.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.10. Corporate Dissolution.

New York Practice Guide: Business and Commercial § 8.23. Dissolution Procedures.

Matthew Bender's New York Checklists: Checklist for Terminating Not-For-Profit Corporations LexisNexis AnswerGuide New York Business Entities § 9.19.

Forms: White, New York Business Entities Form N1007:1. Notice to Creditors to Present Claims Following Dissolution of Corporation.

§ 1008. Jurisdiction of supreme court to supervise dissolution and liquidation

(a) At any time after the filing of a certificate of dissolution under this article, the supreme court in the judicial district where the office of the corporation was located at the date of its dissolution, in a special proceeding instituted under this section, upon the petition of the corporation or, in a situation approved by the court, upon the petition of a creditor, claimant, director, officer, member, subscriber for capital certificates, incorporator or the attorney general, may suspend or annul the dissolution or continue the liquidation of the corporation under the supervision of the court and may make all such orders as it may deem proper in all matters in connection with the dissolution or the winding up of the affairs of the corporation, and in particular, and without limiting the generality of the foregoing, in respect of the following:

(1) The determination of the validity of the authorization of the dissolution of the corporation and of the execution and delivery of the certificate of dissolution under this article.

(2) The adequacy of the notice given to creditors and claimants and, if it is determined to have been inadequate, the requirement of such further notice as the court may deem proper.

(3) The determination of the validity and amount of invalidity of any claims which have been presented to the corporation.

(4) The barring of all creditors and claimants who have not timely filed claims as provided in any such notice, or whose claims have been disallowed by the court, as against the corporation, its assets, directors, officers and members.

(5) The determination and enforcement of the liability of any director, officer, member or subscriber for capital certificates, to the corporation or for the liabilities of the corporation.

(6) The presentation and filing of intermediate and final accounts of the directors, the hearing thereon, the allowance or disallowance thereof, and the discharge of the directors, or any of them, from their liabilities.

(7) The administration of any trust, or the disposition of any property held in trust by or for the corporation.

(8) The adequacy of a plan of distribution.

(9) The payment, satisfaction or compromise of claims against the corporation, the retention of assets for such purpose, and the determination of the adequacy of provisions made for payment of the liabilities of the corporation.

(10) The disposition or destruction of records, documents and papers of the corporation.

(11) The appointment and removal of a receiver under article 12 (Receivership) who may be a director, officer or member of the corporation.

(12) The issuance of injunctions for one or more of the purposes and as provided in section 1113 (Injunction).

(13) The return of subscription payments to subscribers for capital certificates, and the making of distributions, in cash or in kind or partly in each, to the members.

(14) The payment to the state comptroller, as abandoned property, of assets under paragraph (d) of section 1002-a (Carrying out the plan of dissolution and distribution of assets).

(15) Where assets were received and held by the corporation either for a charitable purpose or legally required to be used for a particular purpose, the distribution of such assets to one or more domestic or foreign corporations or other organizations engaged in activities substantially similar to those of the dissolved corporation, on notice to the attorney general and to such other persons, and in such manner, as the court may deem proper.

(b) No order annulling a dissolution shall be made under this section if the name of the corporation whose dissolution is to be annulled is no longer available for use by such corporation, unless such corporation submits with its petition for the annulment of the dissolution a certificate of reservation of another available name.

(c) Orders under this section may be entered ex parte, except that if such special proceeding was not instituted upon petition of the corporation, notice shall be given to the corporation in such manner as the court may direct. Notice shall be given to other persons interested, and in such manner, as the court may deem proper, of any hearings and of the entry of any orders on such matters as the court shall deem proper. All orders made by the court under this section shall be binding upon the attorney-general, the corporation, its directors, officers, members, subscribers for capital certificates, incorporators, creditors and claimants.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970; amd, L 2005, ch 726, § 11, eff April 9, 2006; L 2013, ch 549, § 93, eff July 1, 2014.

Derivation Notes: Derived from Mem Corp Law § 56.

Revision Notes: *Source:* Mem Corp L § 56.

Changes: Revised.

Comment: This section, patterned after § 1008 of the Bus Corp L, spells out the jurisdiction of the supreme court over the affairs of the dissolved corporation during the liquidation period in greater detail than § 56 of the Mem Corp L, which presently regulates not-for-profit corporations.

Editor's Notes: Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

Notes to Decisions

Analysis

1. Generally
2. Under former Membership Corporations Law § 56

1. Generally

Where certificate of dissolution which is required as a condition for court supervision of liquidation had not been filed, court lacked jurisdiction to appoint referee to aid it in supervision of liquidation of foundation. Martin Foundation, Inc. v Ginsburg, 41 A.D.2d 824, 342 N.Y.S.2d 726, 1973 N.Y. App. Div. LEXIS 4675 (N.Y. App. Div. 1st Dep't 1973).

In ordering distribution under the dissolution statutes, the Supreme Court is not concerned with the directions or intentions of the creator or testator but only that the funds be transferred to a charitable recipient having similar purposes to the dissolved charitable corporation. In re Will of Goehringer, 69 Misc. 2d 145, 329 N.Y.S.2d 516, 1972 N.Y. Misc. LEXIS 2132 (N.Y. Sur. Ct. 1972).

2. Under former Membership Corporations Law § 56

The Special Term has inherent power to permit the filing of a claim after the expiration of the time fixed therefor in an order obtained pursuant to the statute. New York World's Fair 1964-1965 Corp. v De Rijdt, 30 A.D.2d 928, 294 N.Y.S.2d 80, 1968 N.Y. App. Div. LEXIS 3263 (N.Y. App. Div. 2d Dep't 1968).

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 7-10 White, New York Business Entities ¶ N1008.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.10. Corporate Dissolution.

New York Practice Guide: Business and Commercial § 8.23. Dissolution Procedures.

Matthew Bender's New York Checklists: Checklist for Terminating Not-For-Profit Corporations LexisNexis AnswerGuide New York Business Entities § 9.19.

Forms: White, New York Business Entities Form N1008:1. Petition by Members for Accounting by Director of Dissolved Corporation.

§ 1009. Applicability to dissolution under other provisions

The provisions of paragraphs (c), (d) and (e) of section 1002-a of this article (Carrying out the plan of dissolution and distribution of assets), sections 1006 (Corporate action and survival of remedies after dissolution), 1007 (Notice to creditors; filing or barring claims) and 1008 (Jurisdiction of supreme court to supervise dissolution and liquidation) shall apply to a corporation dissolved by proclamation pursuant to section 1014 (Dissolution of domestic corporations by proclamation), by expiration of its period of duration or under section 203-a of the tax law, or to an incorporated firemen's benevolent association created by act of the legislature if such act is subsequently repealed.

HISTORY:

Add, L 1969, ch 1066, § 1; amd, L 1970, ch 847, § 63, eff Sept 1, 1970; L 1984, ch 275, § 1, eff June 25, 1984; L 2005, ch 726, § 12, eff April 9, 2006; L 2006, ch 434, § 10, eff July 26, 2006.

Revision Notes: *Source:* None.

Changes: New.

Comment: This section is an adaptation of § 1009 of the Bus Corp L and is new. It provides for the application of

§§ 1005–1008 to corporations dissolved by expiration of their periods of duration or under section 203-a of the Tax Law (for failure to pay franchise taxes or a period of three consecutive years).

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 7-10 White, New York Business Entities ¶ N1009.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.10. Corporate Dissolution.

Matthew Bender's New York Checklists: Checklist for Terminating Not-For-Profit Corporations LexisNexis AnswerGuide New York Business Entities § 9.19.

§ 1012. Certificate of annulment of dissolution and reinstatement of corporate existence

(a) Any corporation dissolved under former section 57 of the membership corporations law may, at any time after the effective date of this chapter, deliver to the department of state a signed certificate which shall be entitled, "certificate of annulment of dissolution and reinstatement of corporate existence of ..... (name of corporation) pursuant to section 1012 of the Not-for-Profit Corporation Law", and shall set forth:

(1) The name of the corporation and, if it has been changed, the name under which it was formed.

(2) The date of the filing of its certificate of incorporation by the department of state.

(3) The law under which it was formed.

(4) That it failed to deliver to the department of state a certificate, as required by subdivision 1 of section 57 of the membership corporations law.

(5) That it elects to be reinstated and to continue its corporate existence.

(6) That it is a charitable corporation or a non-charitable corporation, as applicable.

(b) Notwithstanding subparagraph one of paragraph (a) of section 1006 (Corporate action and survival of remedies after dissolution), the directors of a corporation whose dissolution is annulled under this section shall be deemed trustees of its assets, unless such assets have been distributed pursuant to section 1002-a (Carrying out the plan of dissolution and distribution of assets).

(c) The filing of such certificate by the department of state shall have the effect of annulling all of the proceedings theretofore taken for the dissolution of such corporation, and it shall thereafter have such corporate powers, rights, privileges, immunities, duties and liabilities as it had on the date of publication of the proclamation of dissolution, as if such proclamation had not been made and published.

(d) The department of state shall not file a certificate of annulment of dissolution and reinstatement of corporate existence if the name of the corporation being reinstated is not available under section 301 (Corporate name; general) for use by a corporation then being formed under this chapter, unless such certificate shall change the name to one which is available for such use.

(e) If, after the publication of the proclamation of dissolution, it shall appear that the name of any corporation was erroneously included therein, the secretary of state shall make an appropriate entry on the records of the department of state, which entry shall have the effect of annulling all of the proceedings theretofore taken for the dissolution of the corporation under this section, and it shall have such corporate powers, rights, privileges, immunities, duties and liabilities as it had on the date of such publication of the proclamation, as if such proclamation had not been made and published.

(f) Whenever a corporation has complied with paragraph (a) or the action specified in paragraph (e) has been taken, the secretary of state shall publish a notice thereof in the state advertising bulletin and shall send a copy of such bulletin to the clerk of the county in which the office of the corporation is located. The county clerk shall file such copy and make appropriate entry on his record without charge.

(g) Nothing in this section shall be deemed to extend the duration of any corporation as stated in its certificate of incorporation.

(h) The fee of the secretary of state for filing a certificate under this section shall be ten dollars.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970; amd, L 1970, ch 847, § 65, eff Sept 1, 1970; L 1974, ch 415, § 5, eff May 23, 1974; L 1998, ch 375, § 44, eff Aug 13, 1998; L 2005, ch 726, § 13, eff April 9, 2006; L 2013, ch 549, § 94, eff July 1, 2014.

Derivation Notes: Derived from Mem Corp Law § 57.

Revision Notes: *Source:* Mem Corp L § 57.

Changes: Revised.

Comment: This section, dealing with the reinstatement of the existence of corporations dissolved under former § 57 of the Mem Corp L or under § 1011, is adapted in part from § 57 of the Mem Corp L. Corporations so dissolved are authorized to apply for reinstatement in accordance with the procedure set forth in the section. The only substantive change from the procedure provided in § 57 of the Mem Corp L is the provision, in paragraph (b), that directors of a corporation.

Editor's Notes: Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 7-10 White, New York Business Entities ¶ N1012.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.10. Corporate Dissolution.

New York Practice Guide: Business and Commercial § 8.23. Dissolution Procedures.

Matthew Bender's New York Checklists: Checklist for Terminating Not-For-Profit Corporations LexisNexis AnswerGuide New York Business Entities § 9.19.

Forms: White, New York Business Entities Form N1012:1. Certificate of Annulment of Dissolution of Corporation.

§ 1013. Dissolution of certain firemen's benevolent associations

(a) An incorporated firemen's benevolent association created by act of the legislature may dissolve in accordance with the provisions of this article.

(b) Any such corporation authorized to have paid to it foreign fire insurance premium taxes imposed under sections 9104 and 9105 of the insurance law shall, in addition to any other requirements of this article, file with the superintendent of financial services a copy of the certificate of dissolution. Moneys then due and owing to the corporation under said sections, and moneys thereafter otherwise payable to the corporation pursuant to such authorization, shall be distributed as provided in said sections.

HISTORY:

Add, L 1984, ch 275, § 2, eff June 25, 1984; amd, L 1988, ch 293, § 3, eff Jan 1, 1989; L 2011, ch 62, § 104 (Part A), eff Oct 3, 2011.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 7-10 White, New York Business Entities ¶ N1013.01 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.10. Corporate Dissolution.

ARTICLE 14 Special Not-For-Profit Corporations

Section
1402. Fire corporations

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970.

§ 1402. Fire corporations

(a) Certificate of incorporation; additional contents.

In addition to the requirements of section 402 (Certificate of incorporation; contents), the certificate of incorporation of a fire corporation shall state the precise boundaries of the territory in which the corporation intends to operate.

(b) Type of corporation.

A fire corporation is a charitable corporation under this chapter.

(c) Appointment of firefighters.

(1) A person shall not be eligible to be named in the certificate of incorporation of a fire corporation unless he shall be at least eighteen years of age and a resident of a city, village, fire district, or town outside of villages and fire districts, where the fire corporation intends to operate.

(2) If the fire corporation becomes part of the fire department of a city, village or fire district, a person shall not be eligible to be elected as a member or to continue as a member except as provided by law for volunteer members of the fire companies in such city, village or fire district.

(3) In towns outside of villages and fire districts, the consent of a majority of the members of the town board to the formation of a fire corporation shall constitute an appointment of the persons named in the certificate of incorporation as town firefighters. Thereafter, other eligible persons may be elected as members pursuant to the by-laws of the fire corporation, but the election of a member must be approved by the town board of each town which consented to the formation of the fire corporation. Such a person shall be a resident of the territory specified in the certificate of incorporation or of territory outside such boundaries which is afforded fire protection by the fire corporation pursuant to a contract for fire protection under which a cash consideration is received by the corporation or for which negotiations for renewal of such a contract are pending. The membership of any volunteer member shall terminate when he or she ceases to be a resident of such inside or outside territory, except that the corporation may authorize his or her continued membership where he or she notifies the secretary of the fire corporation (a) that he or she plans to change his or her residence to a territory which is not in such inside or outside territory, and (b) that by reason of his or her residence in the vicinity or his or her usual occupation he or she will be available to render active service as a volunteer firefighter in either such inside or such outside territory. Voting for such authorization shall be pursuant to the by-laws. Such authorization shall not become effective unless approved by resolution of the town board of each town which consented to the formation of the corporation. Any membership so continued shall terminate when the member can no longer meet the requirements of this subparagraph. A person who cannot meet the residence requirements of this subparagraph may be elected to membership as a volunteer member if by reason of his or her residence in the vicinity or his or her usual occupation he or she will be available to render active service as a volunteer firefighter in such inside or outside territory. Voting for such election shall be pursuant to the by-laws. Such election shall not become effective unless approved by resolution of the town board of each town which consented to the formation of the corporation. Such membership shall terminate when the member can no longer meet the requirements of this subparagraph. The election or continuance of any person as a member shall be deemed to have been approved by the town board pursuant to this subparagraph in the event that no action is taken by the town board, either approving or disapproving, within forty days in the case of residents of the territory specified in the certificate of incorporation or of outside contract territory, and within seventy days in the case of all others, after service of written notice of such election or continuance of membership shall have been made by the secretary of the corporation upon the town clerk, either personally or by mail. The membership of any volunteer firefighter shall not be continued pursuant to this subparagraph, and persons who do not reside in the territory specified in the certificate of incorporation or in territory protected pursuant to a contract for fire protection shall not be elected to membership, if, by so doing, the percentage of such nonresident members in the fire corporation would exceed forty-five per centum of the actual member-

ship thereof, provided, however, that the forty-five percent limit on non-resident members shall not apply to the membership of the Huguenot Fire Company, Inc., within the town of Deerpark, Orange county, to the membership of the Prospect Terrace Fire Company, Inc., within the town of Dickinson, Broome county, to membership of the Hopewell Volunteer Fire Department, Inc., to membership of the Wales Center Volunteer Fire Company, Inc., within the town of Wales, Erie county, to the membership of the Nedrow Fire Department, within the town of Onondaga, Onondaga county, to the membership of the Howlett Hill Fire Department, within the town of Onondaga, Onondaga county, to the membership of the East Syracuse Fire Department, within the town of Dewitt, Onondaga county, to the membership of the Pleasant Square Fire Company, Inc. within the town of Johnstown, Fulton county, or to membership of the fire departments within the town of Fleming, Cayuga county. Nonresidents of the territory specified in the certificate of incorporation whose volunteer membership has been authorized or continued pursuant to this subparagraph may be elected or appointed to any office in the fire corporation and shall have all the powers, duties, immunities, and privileges of resident volunteer members except a non-resident of this state whose membership has been continued pursuant to this subparagraph, or who was elected to membership pursuant to this subparagraph, shall not be considered to be performing any firefighting duty, or to be engaged in any firefighting activity, as a member of the fire company while he or she is outside of this state unless and until he or she has first reported to the officer or firefighter in command of his or her fire department, or any company, squad or other unit thereof, engaged or to be engaged in rendering service outside this state, or has received orders or authorization from an officer of the fire department or fire company to participate in or attend authorized activities outside of this state in the same manner as resident members of the fire company. A person shall not be eligible to volunteer membership in any other fire corporation or fire company at one time. The provisions of this subparagraph shall not be deemed to authorize the election or the continuance of any person as a member of the corporation if such election or continuance of membership shall be contrary to the by-laws, rules or regulations of the fire corporation.

(4) A person who has been convicted of arson in any degree shall not be eligible to be named in the certificate of incorporation of a fire corporation, or to be elected or appointed as a volunteer member of a fire corporation. The membership of any volunteer member of a fire corporation shall immediately terminate if he is convicted of arson in any degree while a member of a fire corporation.

(5) Upon application by any person for membership in a fire corporation operating pursuant to this section, the fire chief shall cause the applicant's background to be checked pursuant to section eight hundred thirty-seven-o of the executive law for a criminal history involving a conviction for arson and conviction of a crime which requires the person to register as a sex offender under article six-C of the correction law. Where such criminal history information includes conviction of a crime which requires the person to register as a sex offender under article six-C of the correction law, a fire company shall determine whether or not such person shall be eligible to be elected or appointed as a volunteer member of such fire company. Such determination shall be made in accordance with the criteria established in sections seven hundred fifty-two and seven hundred fifty-three of the correction law.

(d) Incorporation of fire corporations in towns legalized.

Any fire, hose, protective or hook and ladder corporation heretofore organized under any general law with the consent of the town board in the territory served by such corporation is hereby legalized and confirmed, notwithstanding the omission of any town board to appoint or confirm the members of such corporations as town firefighters. Any such corporation shall hereafter be subject to the provisions of this section.

(e) Powers. (1) A fire, hose, protective or hook and ladder corporation heretofore incorporated under any general law or a fire corporation hereafter incorporated under this section shall be under the control of the city, village, fire district or town authorities having, by law, control over the prevention or extinguishment of fires therein. Such authorities may adopt rules and regulations for the government and control of such corporations. Notwithstanding the provisions of any such local law, a person who has been convicted of arson in any degree shall not be eligible for nomination, election or appointment to any office of the corporation, nor may such person serve as director of the corporation. Any fire corporation officer or director who is convicted of arson in any degree during his term of office shall be disqualified from completing such term of office.

(2) Where a fire corporation formed outside of a city, village or fire district furnishes fire protection to territory outside of the boundaries specified in its certificate of incorporation, the fire corporation and the members thereof shall be under the exclusive control of the town board of the town in which the fire corporation maintains its apparatus.

(3) The emergency relief squad of a fire corporation incorporated under this section or subject to the provisions thereof shall have power to furnish general ambulance service when duly authorized under the provisions of section two hundred nine-b of the general municipal law.

(4) Any fire company incorporated under this section or subject to the provisions thereof shall have power to engage in fund raising activities pursuant to section two hundred four-a of the general municipal law.

(5) Any fire company incorporated under this section or subject to the provisions thereof shall have power, subject to the approval or authorization of the town board, to attend a funeral.

(6) Fire, hose, protective or hook and ladder corporations heretofore incorporated under any general law or fire corporations hereafter incorporated under this section or volunteer fire companies or fire departments as defined in section three of the volunteer firefighters' benefits [benefit]* law are hereby authorized to enter into contracts among themselves and among municipal corporations for the joint purchase of goods, supplies and services. Provided that the provisions of article five-A of the general municipal law shall be controlling for any proposed joint purchase between such fire corporation, company, or department and a municipal corporation. For the purposes of this subparagraph the term "municipal corporation" shall mean a county, city, town, village, fire district, or ambulance district.

(f) Directors to file report.

It shall be the duty of the directors of all fire, hose, protective or hook and ladder corporations incorporated under a general law or of a fire corporation formed under this section in territory outside of cities or villages, or a majority of them, on or before the fifteenth day of January in each year, to make and file in the county clerk's office, where the certificate of incorporation is filed a verified certificate, stating the names of the directors and officers of the corporation, containing an inventory of its property, a statement of its liabilities and that the corporation has not engaged, directly or indirectly, in any business other than that set forth in its certificate of incorporation.

(g) Firefighters' exemption.

Every active firefighter who shall be a member of a corporation subject to the provisions of this section shall be entitled to all the rights granted by law to volunteer firefighters and every such active firefighter who shall meet the requirements of section two hundred of the general municipal law shall be entitled to the additional rights granted by law to exempt volunteer firefighters.

(h) Legalization of membership of fire corporations in towns outside villages and fire districts.

(1) Any person:

(A) who was recognized prior to the first day of July, nineteen hundred fifty-four, as a volunteer member of a fire corporation subject to the provisions of this section located in a town outside villages and fire districts by the town board or by the officers and members of the fire corporation, and

(B) who rendered active service with such fire corporation prior to such date, and

(C) who was, at the time of his or her election to membership, a resident of the territory specified in the certificate of incorporation or of territory outside such boundaries which was afforded fire protection by the fire corporation pursuant to a contract for fire protection, shall for all purposes in law be considered to have been duly elected and confirmed as a member in such fire corporation as of the date of such confirmation, if any, and, if none, then as of the date of such election; notwithstanding that there may have been some legal defect in such election, or the proceedings precedent thereto, or a failure of the town board to confirm such member, as provided by the law in force at the time of such election, and the status of such person as a volunteer firefighter as of the date of such confirmation or election is hereby legalized, validated and confirmed. This subparagraph shall not apply to a person, if any, whose volunteer membership in a fire corporation was declared invalid by a court of competent jurisdiction prior to the first day of January, nineteen hundred fifty-five.

(2) Any person:

(A) who was recognized on or after the first day of July, nineteen hundred fifty-four and prior to the first day of January, two thousand eleven as a volunteer member of a fire corporation subject to the provisions of this section located in a town outside villages and fire districts by the town board or by the officers and members of the fire corporation, and

(B) who rendered active service with such fire corporation between such dates, and

(C) who was, at the time of his or her election to membership, a resident of the territory specified in the certificate of incorporation or of territory outside such boundaries which was afforded fire protection by the fire corporation pursuant to a contract for fire protection, or who was a nonresident elected to membership or who was continued as a member, pursuant to the provisions of subparagraph (A) shall for all purposes in law be considered to have been duly elected and confirmed, or continued, as a member in such fire corporation as of the date of such confirmation, if any, and, if none, then as of the date of such election or, in the case of a continuance, as of the date of approval, if any, by the town board and, if none, as of the date of authorization of continuance by the fire corporation; notwithstanding that there may have been some legal defect in such election, or the proceedings thereto, or a failure of the town board to confirm the election, or approve the continuance of membership, of such member, as provided by the law in force at the time of such election or continuance, and the status of such person as a volunteer firefighter as of such date is hereby legalized, validated and confirmed. This subparagraph shall not apply to a person, if any, whose volunteer membership in a fire corporation was declared invalid by a court of competent jurisdiction prior to the first day of January, two thousand eleven.

(i) Discrimination because of race, color, creed or national origin prohibited.

*The bracketed word has been inserted by the Publisher.

(1) It shall be an unlawful discriminatory practice for any volunteer fire department, fire company or fire corporation, through any member or members thereof, directors, officers, members of a town board, board of fire commissioners or other body or office having power of appointment of volunteer firefighters in any fire department, fire company or fire corporation pursuant to this section, because of the race, creed, color, national origin, sex or marital status of any individual, to exclude or to expel from its volunteer membership such individual, or to discriminate against any of its members because of the race, creed, color, national origin, sex or marital status of such volunteer members.

(2) Any person claiming to be aggrieved by an unlawful discriminatory practice pursuant to this paragraph may by himself or his attorney at law make, sign and file with the state division of human rights, a verified complaint which shall set forth the particulars of the alleged unlawful discriminatory practice and contain such other information as the division of human rights may require. The division shall thereupon cause to be made an investigation and disposition of the charges pursuant to the provisions of article fifteen of the executive law.

HISTORY:

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970; amd, L 1970, ch 847, §§ 87, 88; L 1971, ch 914, § 1; L 1971, ch 1058, § 40; L 1974, ch 901, § 4, eff Sept 1, 1974; L 1976, ch 273, § 3; L 1978, ch 215, § 3, eff Sept 1, 1978; L 1980, ch 133, § 3, eff May 16, 1980; L 1980, ch 307, § 4, eff June 19, 1980; L 1984, ch 185, § 2; L 1985, ch 719, §§ 1, 2, eff Aug 1, 1985; L 1999, ch 423, § 5, eff April 1, 2000; L 2000, ch 351, § 3, eff Aug 23, 2000; L 2003, ch 393, §§ 8, 9, eff Aug 19, 2003; L 2010 ch 276, § 1, eff July 30, 2010; L 2011, ch 373, §§ 8, 9, eff Aug 3, 2011; L 2011, ch 472, § 1, eff Aug 17, 2011; L 2012, ch 407, § 1, eff Aug 17, 2012; L 2013, ch 505, § 1, eff Nov 13, 2013; L 2013, ch 549, § 112, eff July 1, 2014; L 2014, ch 149, § 1, effective August 21, 2014; L 2014, ch 198, § 4, effective December 2, 2014; L 2016, ch 276, § 1, effective August 19, 2016; L 2018, ch 476, § 235, effective December 28, 2018; L 2018, ch 500, § 1, effective December 28, 2018; L 2018, ch 513, § 1, effective December 28, 2018; L 2019, ch 275, § 1, effective September 13, 2019; L 2019, ch 276, § 1, effective September 13, 2019.

Derivation Notes: Derived from Mem Corp Law §§ 11, 110, 111, 112, 113, 114, 115, 116.

Revision Notes: *Source:* Mem Corp L, Article 10.

Changes: Slightly revised.

Comment: This section, which sets forth provisions for regulating fire corporations, is verbatim from Article 10 of the Mem Corp L with two additions: (a) provision for additional contents in the certificate of incorporation (see, paragraph (a)); and (b) a statement that a fire corporation is a Type B corporation under § 201.

Editor's Notes Laws 1999, ch 423, § 1, eff April 1, 2000, provides as follows:

Section 1. Legislative intent. The efforts of volunteer firefighters in New York state embody many of the values and traditions long respected and admired by our citizens. Volunteer firefighters devote many hours acquiring necessary training and then expend their energies to protect lives and property while placing their own lives and physical well being in jeopardy. They are heroes to our children, are trusted in our hour of need and provide role models for dedication and discipline.

Laws 2003, ch 393, § 1, eff Aug 19, 2003, provides as follows:

Section 1. Legislative intent. This legislation is designed to update certain provisions of the village law, the town law, the general city law and the not-for-profit corporation law relating to recognition of volunteer firefighters as duly elected or approved members of their respective fire companies. Periodically, these provisions of law should be updated to ensure that firefighters recently recognized as volunteers are considered to be duly elected and approved members in their respective fire companies, notwithstanding any legal defect in the election or approval process. This bill updates the relevant statutory provisions and ensures that more recently elected or approved volunteer members of fire companies are recognized as duly elected or approved for all purposes in law, including but not limited to coverage under the volunteer firefighters' benefit law.

Laws 2011, ch 373, § 1, eff Aug 3, 2011, provides as follows:

Section 1. Legislative intent. This legislation is designed to update certain provisions of the village law, the town law, the general city law and the not-for-profit corporation law relating to recognition of volunteer firefighters as duly elected or approved members of their respective fire companies. Periodically, these provisions of law should be updated to ensure that firefighters recently recognized as volunteers are considered to be duly elected and approved members in their respective fire companies, notwithstanding any legal defect in the election or approval process. This act updates the relevant statutory provisions and ensures that more recently elected or approved volunteer members of fire companies are recognized as duly elected or approved for all purposes in law, including but not limited to coverage under the volunteer firefighters' benefit law.

Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

Amendment Notes The 2014 amendment by ch 149, § 1 added "to membership of the Wales Center Volunteer Fire Company, Inc., within the town of Wales, Erie county" in the fourth to the last sentence of (c)(3).

The 2014 amendment by ch 198, § 4, in (c)(5), added "and conviction of a crime which requires the person to register as a sex offender under article six-C of the correction law" at the end of the first sentence and added the last two sentences.

The 2016 amendment by ch 276, § 1, added "to the membership of the Prospect Terrace Fire Company, Inc., within the town of Dickinson, Broome county" in the thirteenth sentence of (c)(3).

The 2018 amendment by ch 476, § 235, substituted "firefighters" for "firemen" in the subsection heading of (c); substituted "Firefighters' exemption" for "Firemen's exemption" in the subsection heading of (g); substituted "firefighter" for "fireman" or variants wherever it appears in (d), (g), (h)(1)(c), (h)(2)(C) and in (i)(1); and substituted "his or her" for "or her" in the first sentence of (h)(1)(C) and (h)(2)(C).

The 2018 amendment by ch 500, § 1, added "to the membership of the Nedrow Fire Department, within the town of Onondaga, Onondaga county" in the fourth to the last sentence of (c)(3).

The 2018 amendment by ch 513, § 1, added "to the membership of the Pleasant Square Fire Company, Inc. within the town of Johnstown, Fulton county" in the fourth to the last sentence of (c)(3).

The 2019 amendment by ch 275, § 1, added "to the membership of the Howlett Hill Fire Department, within the town of Onondaga, Onondaga county" in the twelfth sentence of (c)(3).

The 2019 amendment by ch 276, § 1, added "to the membership of the East Syracuse Fire Department, within the town of Dewitt, Onondaga county" in the twelfth sentence of (c)(3).

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1. Generally

In action by plaintiff who was injured in accident involving vehicle driven by volunteer firefighter responding to fire alarm, fire company incorporated under CLS N-PCL § 1402 was properly granted summary judgment on ground that it was not proper party to action, where town had chosen to establish "fire protection district" (which, unlike "fire district," is not political subdivision independent of town), fire company provided fire protection services within fire protection district pursuant to contract with town, and town retained complete control over fire company and ultimate responsibility for fire protection pursuant to § 1402. Miller v Savage, 237 A.D.2d 695, 654 N.Y.S.2d 215, 1997 N.Y. App. Div. LEXIS 2265 (N.Y. App. Div. 3d Dep't 1997).

Trial court properly granted a petition for judicial dissolution of a fire department (the FD) because its members presented affidavits or other competent evidence in support of their request to add two additional members of the FD as petitioners, a town and the Attorney General were necessary parties, the court's determination that the FD was no longer able to carry out the purpose or purposes for which it was formed was based on a fair interpretation of the evidence, the court properly considered the "paramount" issue of the benefit of dissolution to the members of the FD, and its determination that dissolution would benefit the members was supported by the evidence. Matter of Inzer v West Brighton Fire Dept., Inc., 173 A.D.3d 1826, 105 N.Y.S.3d 655, 2019 N.Y. App. Div. LEXIS 5256 (N.Y. App. Div. 4th Dep't), app. denied, reh'g denied, 175 A.D.3d 1852, 107 N.Y.S.3d 740, 2019 N.Y. App. Div. LEXIS 6929 (N.Y. App. Div. 4th Dep't 2019), app. denied, 35 N.Y.3d 903, 148 N.E.3d 524, 125 N.Y.S.3d 60, 2020 N.Y. LEXIS 826 (N.Y. 2020).

2. Control of city, town, village or fire district

In actions arising out of an automobile collision in which it was alleged that the accident was caused by the negligence of a volunteer fireman who, while operating his own automobile, was answering a mutual aid call, causes of action are stated against the town which established a fire protection district and which entered into a contract with the volunteer fire department of which the volunteer fireman was a member. By the terms of section 1402 (subd [e], par 1) of the Not-for-Profit Corporation Law the volunteer fire department is under the control of the town which has control over fire prevention and extinguishment and, consequently, the town can be held liable for the acts of the volunteer firemen. Cuddy v Amsterdam, 62 A.D.2d 119, 403 N.Y.S.2d 590, 1978 N.Y. App. Div. LEXIS 10426 (N.Y. App. Div. 3d Dep't 1978).

Volunteer fire company, which is private not-for-profit corporation, is not liable to plaintiff for damages sustained to his business property allegedly caused by negligence of fire company, since company was discharging public function over which municipality exercised control. Helman v County of Warren, 114 A.D.2d 573, 494 N.Y.S.2d 188, 1985 N.Y. App. Div. LEXIS 53275 (N.Y. App. Div. 3d Dep't 1985).

Fire company could not be held vicariously liable for alleged negligence of firefighter in operating her vehicle in response to emergency since, under statute, (1) fire district, not fire company, employs, supervises and controls individual firefighters, (2) district is responsible for prevention and extinguishment of fires, (3) district possesses virtually total supervision and control over all aspects of creation and staffing of fire companies as well as over rules and regulations governing firefighting practices and procedures, and (4) district is answerable for negligence of its firefighters committed in course of their duties. Knapp v Union Vale Fire Co., 141 A.D.2d 509, 529 N.Y.S.2d 132, 1988 N.Y. App. Div. LEXIS 6348 (N.Y. App. Div. 2d Dep't 1988).

In negligence action by homeowners whose residence was destroyed by rekindling of fire after fire chief had assured them that earlier fire had been extinguished, defendant town was not entitled to summary judgment on basis that fire company was independent contractor over which it exercised no control, since CLS N-PCL § 1402(e) specifies that fire company incorporated under statute is under control of town authorities having, by law, control over prevention or extinguishment of fires, and town's concession that it had established fire protection district pursuant to CLS Town § 184(1) made it responsible for providing fire protection. Miller v Morania Oil, O.C.P., 194 A.D.2d 770, 599 N.Y.S.2d 303, 1993 N.Y. App. Div. LEXIS 6724 (N.Y. App. Div. 2d Dep't 1993).

Volunteer fire company was not liable for the alleged negligence of its members because the Fire District was responsible for preventing and extinguishing fires within its jurisdiction and trained and supervised the company's members, who acted under the direction of the Chief of the Fire District, the company and the fire district were separate entities, and the company did not exert control over its members. Roberts v Coeymans Hollow Volunteer Fire Co., 168 A.D.3d 1144, 91 N.Y.S.3d 590, 2019 N.Y. App. Div. LEXIS 47 (N.Y. App. Div. 3d Dep't), app. denied, 33 N.Y.3d 903, 124 N.E.3d 256, 100 N.Y.S.3d 706, 2019 N.Y. LEXIS 1299 (N.Y. 2019).

A volunteer fire company located entirely within city limits would be held covered under the city's excess liability policy in an action to recover for personal injuries sustained in an automobile accident while plaintiff was a passenger in a car owned and operated by a volunteer fireman responding to a fire in the city, since, although the city's three volunteer fire companies were otherwise independent corporations free to carry on their internal affairs without interference by the city, once a fire alarm sounded, the fire chief, a paid civil service employee of the city, by virtue of the city charter assumed command of the city's volunteer companies to coordinate and direct the firefighting efforts (see also, N-PCL § 1402[e][1]; Gen Mun Law § 209-l), thus making the volunteer company a "named insured" as an organization under the "control and management" of the city during a fire; such holding is consistent with the rule that fire districts may be held liable for the negligence of volunteer fireman while operating privately-owned vehicles in responding to an alarm; even if the volunteer company were not a "named insured," it would nevertheless be entitled to coverage as an insured under the city's primary policy. Cook v Geneva, 127 Misc. 2d 261, 485 N.Y.S.2d 497, 1985 N.Y. Misc. LEXIS 2583 (N.Y. Sup. Ct. 1985).

3. Discrimination

By changing its membership requirements from members of any fire company to volunteer members the Firemen's Benevolent Fund Association of the City of Mount Vernon did not unlawfully discriminate against professional firemen individually or as a

class. Crohn v Firemen's Benevolent Fund Ass'n, 79 Misc. 2d 536, 359 N.Y.S.2d 599, 1973 N.Y. Misc. LEXIS 1279 (N.Y. Sup. Ct. 1973), aff'd, Crohn v Firemen's Benevolent Fund Asso., 45 A.D.2d 955, 359 N.Y.S.2d 247, 1974 N.Y. App. Div. LEXIS 4168 (N.Y. App. Div. 2d Dep't 1974).

4. Fundraising activities

City was entitled to summary judgment dismissing consolidated actions for personal injuries and wrongful death arising out of alcohol-related automobile accident which occurred after intoxicated driver consumed beer at fund-raising event to benefit volunteer fire companies, although city was vested with authority to control activities of its volunteer fire company under CLS N-PCL § 1402(e)(1) and CLS Gen Mun § 204-a(6)(b), since participation by volunteer firefighters in fund-raising activities was not deemed to constitute "duty as volunteer firemen" within meaning § 204-a(7); moreover, city submitted evidentiary proof that it had not received prior written notice of fire company's fund-raising activities as required by § 204-a(8)(a). Haskell v Chautauqua County Fireman's Fraternity, Inc., 184 A.D.2d 12, 590 N.Y.S.2d 637, 1992 N.Y. App. Div. LEXIS 14048 (N.Y. App. Div. 4th Dep't 1992), app. dismissed, 81 N.Y.2d 954, 597 N.Y.S.2d 939, 613 N.E.2d 971, 1993 N.Y. LEXIS 5289 (N.Y. 1993).

5. Membership

Where denial of membership would work an irreparable injury an action will lie to compel a membership corporation or a voluntary association to accept an applicant. Crohn v Firemen's Benevolent Fund Ass'n, 79 Misc. 2d 536, 359 N.Y.S.2d 599, 1973 N.Y. Misc. LEXIS 1279 (N.Y. Sup. Ct. 1973), aff'd, Crohn v Firemen's Benevolent Fund Asso., 45 A.D.2d 955, 359 N.Y.S.2d 247, 1974 N.Y. App. Div. LEXIS 4168 (N.Y. App. Div. 2d Dep't 1974).

6. Under former Membership Corporation Law § 110

Fact that certain town fire corporations were legalized and other fire corporations created under general law made subject to the statute's provisions did not make the Firemen's Benevolent Fund Association of the City of Mount Vernon a membership corporation, for purpose of determining effectiveness of 1930 amendment to certificate of incorporation changing membership requirements, since the Association was created by special law. Crohn v Firemen's Benevolent Fund Ass'n, 79 Misc. 2d 536, 359 N.Y.S.2d 599, 1973 N.Y. Misc. LEXIS 1279 (N.Y. Sup. Ct. 1973), aff'd, Crohn v Firemen's Benevolent Fund Asso., 45 A.D.2d 955, 359 N.Y.S.2d 247, 1974 N.Y. App. Div. LEXIS 4168 (N.Y. App. Div. 2d Dep't 1974).

7. —Municipal consent; incorporation of voluntary fire company

An unincorporated fire company with its headquarters in a village may, with the consent of the village board, incorporate as a village fire company. The persons named in the certificate of incorporation should be residents of the village. 1968 Op St Compt No. 68–635.

8. — —To operation outside limits

The fire department of the village of Bergen may operate outside of the village limits only if the village has authorized such operation. The town of Bergen may contract with the village of Bergen for the furnishing of fire protection outside of the village limits only if a fire protection or fire alarm district has been established. 1947 Ops St Compt 441.

9. —Ownership of fire apparatus and equipment

An incorporated fire company may purchase with its own funds and retain ownership of fire apparatus and equipment although it is located in a fire district. 1955 Op St Compt No. 55–7480.

10. —Insurance; purchase by town board

Where there is no fire district in a town and no tax for fire protection purposes is levied, the town board may not expend town funds for the purchase of public liability insurance upon a truck owned by and licensed in the name of an unincorporated volunteer fire company furnishing fire protection services in the town. The town board may, however, expend town fund for the purchase of insurance indemnifying the town against any loss by reason of the liability imposed by § 205 of the General Municipal Law. 1945 Ops St Compt 176.

11. — —County self-insurance plan

The members of a volunteer fire company organized and incorporated in an area of a town not within a village or fire district will be covered under a county self-insurance plan. The cost of this coverage is included as part of the town's apportionate share. 1958 Op St Compt No. 58–366.

12. —Membership in fire company

A volunteer fireman may not be a member of two volunteer fire companies on or after July 1, 1954. 1954 Op St Compt No. 54–6669.

13. — —Women

Women may be elected to membership in an incorporated fire company, if the by-laws do not prohibit such membership and if their election is approved by the board of fire commissioners or town board. 1955 Op St Compt No. 55–7128.

14. — —Nonresidents

For a general explanation of Chapter 699 of Laws of 1954 in relation to non-resident members of volunteer fire departments see 1954 Op St Compt No. 54–7063.

Admission of non-resident volunteer members in fire district fire department discussed. 1955 Op St Compt No. 55–7275.

A fire company may not restrict the powers, duties, immunities and privileges of a nonresident member to a greater extent than is provided by statute. 1956 Op St Compt No. 56–7850.

15. —Liability for torts of firemen

A town which contracts on behalf of a fire protection district for fire protection is liable for injuries to a third person caused by the negligent act of a member of an incorporated fire company located within the fire protection district, in answering an alarm pursuant to contract. However, if the tort was committed by a member of a village fire company under contract, located outside the fire protection district, the village would be liable. 1956 Op St Compt No. 56–7984.

A municipality or district being aided by an outside fire company is not liable to third parties for torts of firemen rendering assistance where such firemen are not under the control of the officials of the municipality or district being aided. 1956 Op St Compt No.. 56–7984.

16. Under former Membership Corporation Law § 111

The term "fire district" as used in § 205-b of the General Municipal Law, referring to liability for negligence of fire district and volunteer firemen, has a specific meaning in law and does not include fire companies. Heifetz v Rockaway Point Volunteer Fire Dep't, 124 N.Y.S.2d 257, 1953 N.Y. Misc. LEXIS 2150 (N.Y. Sup. Ct.), aff'd, 282 A.D. 1062, 126 N.Y.S.2d 604, 1953 N.Y. App. Div. LEXIS 5825 (N.Y. App. Div. 1953).

17. Under former Membership Corporation Law § 112

A fire corporation organized under the Membership Corporations Law may make a gift of money to a fire district to be used to purchase fire apparatus. 1947 Ops St Compt 61.

The funds of a fire corporation are under the exclusive control of the directors of such corporation. 1959 Op St Compt No. 59–665.

18. —Village control of voluntary fire company

Incorporation of a volunteer fire company of a village will not affect the control which the village exercises over the fire company, nor will it affect the duties and liabilities of the village in regard to its volunteer firemen. 1947 Ops St Compt 414.

The village board of fire commissioners is not required to include in its annual report moneys raised by an incorporated volunteer fire company constituting the fire department of the village. 1953 Op St Compt No. 53–6225.

19. — —Fire company located in village

Incorporated fire companies situated within a village are under the control of village authorities having control over prevention and extinguishment of fires therein. 1945 Ops St Compt 215.

An incorporated fire company located in a village is subject to the control of the village authorities irrespective of the fact it existed before incorporation of the village. Such fire company may not contract to furnish fire protection outside the village independently of the village board. 1953 Op St Compt No. 53–6358.

An incorporated fire company located in a village is subject to control of the village board of fire commissioners. 1961 Op St Compt No. 61–266.

20. —Contract; between incorporated fire company and village

The making of a contract between an incorporated fire company and village will not operate to make the fire company a paid fire company. 1947 Ops St Compt 414.

21. — —To provide fire protection outside village

An incorporated fire company of a village cannot contract to furnish fire protection outside of the village independently of the village board of trustees. 1947 Ops St Compt 414; 1953 Op St Compt No. 53–6358.

A village must be a party to all contracts to provide fire protection outside the limits of said village between a fire company, located in said village, and those desiring fire protection outside said village. 1956 Op St Compt No. 56–7934.

22. — —Money received under contract

Both village and fire department or fire company should be parties to contract to furnish fire protection outside of village. Village may retain moneys received pursuant to such contract or pay over a portion to the fire department or fire company. 1954 Op St Compt No. 54–6769.

23. —Powers of board of fire commissioners

A fire district created pursuant to former § 38 of the County Law must function through a board of fire commissioners, which shall have the management and control of all of the property and affairs of such district, including control of the activities of all fire companies situated within such district. 1945 Ops St Compt 196.

For a discussion re control of board of fire commissioners over "jeep" purchased with fire company funds, see 1953 Op St Compt No. 53–6388.

24. — —Organize fire company

The board of fire commissioners may not disband an incorporated fire company constituting the fire department of the district, but may organize other companies. 1953 Op St Compt 53–6282.

25. — —Require physical examination of firemen

A Board of Fire Commissioners may require volunteer firemen of the district to undergo physical examinations at expense of the district. 1963 Op St Compt No. 63–849.

26. —Power of municipality to acquire and house equipment

A city is empowered to acquire fire apparatus by gift or otherwise, to pay the cost of maintenance and operation thereof, to pay rent for housing such apparatus and to have volunteer firemen fight fires. A contract may be made for such fire-fighting force to serve an area in another city. 1947 Ops St Compt 445.

A town may sell a portion of its property to an incorporated fire company for the construction of a firehouse and subsequently lease space therein for town purposes. 1953 Op St Compt No. 53–6153.

A village may construct an addition to the village owned firehouse for the purpose of housing fire equipment, owned by the incorporated fire company and to be used outside of the village. Providing the arrangement is provident for the village, rental need not be charged the fire company for such use. 1965 Op St Compt No. 65–320.

27. —Eligibility for membership in fire company

If a member of a volunteer fire company located within fire district moves outside such district, he is no longer a member of such company unless there is compliance with provisions of subdivision 24 of Section 176 of Town Law. 1947 Op St Compt No. 47–317.

A person is eligible for membership in a fire corporation organized outside a city, village or fire district if he resides either (1) in the territory specified in the certificate of incorporation of the corporation or (2) in an area furnished fire protection by the corporation pursuant to contract. 1953 Op St Compt No. 53–6442.

28. Under former Membership Corporation Law § 113

Fire apparatus and equipment purchased by an incorporated fire company is its own property and not the property of the village. 1955 Op St Compt No. 55–7135.

The funds of a fire corporation are under the exclusive control of the directors of such corporation. 1959 Op St Compt No. 59–665.

The fact that a fire corporation undertakes to render fire protection to an area located in another county does not require it, or the Secretary of State, to file a copy of its certificate of incorporation in such other county. 1962 Op St Compt No. 62–575.

29. Under former Membership Corporation Law § 114

Where there is no proof that a city employee, upon his dismissal May 15, 1935, had qualified as an exempt volunteer fireman under Gen Mun Law, § 200, he cannot invoke this section, because this section (as amended by L 1935, ch 771, eff May 6), adopts requirements of Gen Mun Law, § 200. Brown v Stephan, 245 A.D. 552, 284 N.Y.S. 403, 1935 N.Y. App. Div. LEXIS 10355 (N.Y. App. Div. 1935).

A village employee who had qualified as an exempt volunteer fireman under this section, although he had not so qualified under Gen Mun Law, § 200, was entitled to a hearing under Civil Ser Law, § 22 upon his summary dismissal April 2, 1935. Brown v Stephan, 245 A.D. 588, 283 N.Y.S. 31, 1935 N.Y. App. Div. LEXIS 10363 (N.Y. App. Div. 1935).

A member of a volunteer fire company which has not been incorporated, is not entitled to a hearing upon his removal from a civil service position, where he had not served for a five year period, even though had the company been incorporated he would have been entitled under this section to such a hearing in spite of his failure to serve for five years. Mahan v Bacon, 277 N.Y.S. 390, 154 Misc. 291, 1934 N.Y. Misc. LEXIS 2008 (N.Y. Sup. Ct. 1934), aff'd, 277 N.Y.S. 393, 154 Misc. 535, 1935 N.Y. Misc. LEXIS 958 (N.Y. App. Term 1935).

A volunteer fireman in a fire company subject to this section is not entitled to a hearing prior to his removal, where he has not served the five year "term required by law" under Civil Ser Law, § 22, subd. 1, and Gen Mun Law, § 200. Huber v Stephan, 282 N.Y.S. 154, 156 Misc. 131, 1935 N.Y. Misc. LEXIS 1405 (N.Y. Sup. Ct. 1935).

30. Under former Membership Corporation Law § 115

Petitioner was reinstated to the position of Principal Park Superintendent and should not have been dismissed from employment except for incompetency or misconduct found after a hearing where evidence showed that he secured a certificate after his dismissal that he was an exempt volunteer fireman and the affidavits of the fire company's officer past and present left no room for triable issue of fact as to whether he was honorably discharged or whether he was not in good standing at the time he applied for his certificate. Badman v Falk, 4 A.D.2d 149, 163 N.Y.S.2d 570, 1957 N.Y. App. Div. LEXIS 5112 (N.Y. App. Div. 3d Dep't 1957), aff'd, 4 N.Y.2d 839, 173 N.Y.S.2d 813, 150 N.E.2d 240, 1958 N.Y. LEXIS 1080 (N.Y. 1958).

A person who claims membership in a fire company, the home territory of which is a fire protection district located in two towns, is protected by the Volunteer Firemen's Benefit Law although one town has not confirmed his membership by proper resolution, if his membership has been legalized under this section. 1963 Op St Compt No. 63–391.

Agency Opinions

Analysis

1. Generally
2. Control of city, town, village or fire district
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10. Under former Membership Corporation Law § 112

1. Generally

In constructing a firehouse to be utilized for fire fighting or fire prevention, a fire corporation in a fire district need not comply

with town zoning and building regulations. 1983 N.Y. Op. Att'y Gen. No. 83-33.

A fire district in which a fire company is located is a necessary party to a fire protection contract under which such company provides protection to a fire protection district, notwithstanding the fact that the fire company owns all the buildings and equipment necessary in connection with such fire protection contract. 1978 Op St Compt No. 78-300.

A village may not transfer title to its real property without consideration to an incorporated fire company. 1978 Op St Compt No. 78-451.

A town may not make an outright gift or transfer of moneys to the emergency rescue and first aid squad of a volunteer fire department or fire company. 1980 Op St Compt No. 80–271.

The Hewlett Fire Department of the Hewlett Bay Fire District as presently constituted, in terms of its corporate status, is a fire department rather than a fire company and it is the Fire Department of the Hewlett Bay Fire District. However, for purposes of Article 11 of the Town Law, the Hewlett Fire Department should be considered a fire company. 1981 Op St Compt No. 81-53.

Under Section 10-1000 et seq. of the Village Law, a village fire department is a corporation consisting of members of all the fire, hose, protective and hook and ladder companies of a village; it is administered by a board of fire commissioners or, where no board of fire commissioners has been appointed, by the village board of trustees and the council of the fire department. Fire companies in a village are associations or corporations, which must operate in accordance with their certificates of incorporation, bylaws, and statutes; and, although fire companies are separate and distinct from the village, the statutes do permit village authorities to exercise a certain degree of control over their organization, incorporation, governance, and membership, including residency for membership. A fire company must consent to a contract for the provision of fire protection outside the village and the fire chief of the village fire department cannot consent on behalf of members of the company. 1990 Op St Compt 90-19.

By operation of law, mere existence of fire companies in village results in corporation known as village fire department. 1994 Op St Compt No. 94-18.

Board of volunteer fire company is "public body" subject to Open Meetings Law; volunteer fire companies, which generally are not-for-profit corporations that perform their duties by means of contractual relationships with municipalities, perform governmental function and their records are subject to rights of access granted by Freedom of Information Law. Comm on Open Gov't OML-AO-3311.

Board of volunteer fire company is "public body" subject to Open Meetings Law despite its status as not-for-profit corporation. Comm on Open Gov't OML-AO-3904.

Volunteer fire companies are subject to Freedom of Information Law. Comm on Open Gov't OML-AO-3904.

2. Control of city, town, village or fire district

When the entire unincorporated area of a town comprises a fire protection district and is served by several volunteer fire companies within the district by contract with the town, the town board may require volunteer firemen to have physical examinations before the town board approves them as members of the fire companies. 1980 Op St Compt No. 80-325.

Village must be party to any contract for fire protection provided by volunteer fire company situated within the village. 1987 Op St Compt No 87-73.

While there is no statute requiring fire company which constitutes village fire department to submit its books and records pertaining to receipt and expenditure of proceeds from fire protection contracts and fund raising to village board for audit, village board may make such requirement condition to entering into fire protection contracts for outside service or to allowing company to undertake fund raising activities; financial information concerning fire department may also be obtained under provisions of CLS Not-For-Profit Corporation Law and Freedom of Information Law; board of fire commissioners or, if there is no board of fire commissioners, board of trustees of village may require submission of report by chief of fire department. 1988 Op St Compt No. 88-55.

In general, a board of fire commissioners, or if there is no board of fire commissioners, the village board of trustees and the council of the fire department, has control of the external affairs of a fire company within the village, and the constitution and by-laws of the fire company regulate the internal affairs of the company. In addition, the by-laws of a fire company within the village should not be inconsistent with the rules and regulations enacted by the board of fire commissioners, or the village board of trustees and the council of the fire department. There is, however, no statutory requirement that the latter approve the by-laws of the fire company. 1990 Op St Compt 90-19.

3. Discrimination

By-law provisions for the admission of members of volunteer fire companies which provide that three negative votes or black balls will defeat election to membership appear to be valid but if they are used in a manner contrary to the Constitutions of the United States or of the State of New York or the anti-discrimination statutes of the state, such a by-law would be invalid. 1977 NY Ops Atty Gen May 9 (Informal), 1977 N.Y. AG LEXIS 114.

A woman may be admitted to membership in a volunteer fire company to participate in all firemanic activities. 1974 Op St Compt No. 74–1171.

Whether a woman may be excluded from membership in a volunteer fire company, in the face of a claim of unconstitutional discrimination, is a matter for judicial determination. 1974 Op St Compt No. 74–1171.

4. Membership

A volunteer fireman may not be a member of a fire company within New York State and a volunteer fire company located out of New York State at the same time. 1975 NY Ops Atty Gen Feb 24 (Informal), 1975 N.Y. AG LEXIS 74.

When a volunteer fireman is removed from membership in a volunteer fire company by vote of the members themselves based on the company's constitution and bylaws, rather than by village fire authorities, then the village may not provide a legal defense to the fire department when sued by the discharged fireman for wrongful removal. 1980 Op St Compt File No. 80-366.

A volunteer firefighter may not simultaneously be a member of 2 fire companies, regardless of whether the companies are part of the same fire department or different fire departments. 1991 Op St Compt No. 91-23.

There is no statutory prohibition on individual becoming member of fire company and member of volunteer ambulance corps at same time. 1997 Op St Compt No. 97-23, 1997 N.Y. Comp. LEXIS 23.

5. Fundraising activities

A village can be held vicariously liable for Dram Shop Act violations committed by volunteer firefighters during fundraising events, but not for misconduct during social activities. 1990 N.Y. Op. Att'y Gen. No. 90-64, 1990 N.Y. AG LEXIS 68.

6. Offices

An alien may not be a fire district officer; an alien may not vote in a fire district election; an alien may be a volunteer fireman; an alien may be appointed fire chief or assistant fire chief and may be elected to fire company corporate office. 1980 NY Ops Atty Gen Feb 6 (Informal), 1980 N.Y. AG LEXIS 152.

Establishment of qualifications to hold line offices in fire department of fire district are established solely by board of fire commissioners of fire district. 1997 NY Ops Atty Gen No. 97-49, 1997 N.Y. AG LEXIS 76.

An individual may be appointed or elected to any office in a volunteer fire company located in a fire protection district if he is a member of the volunteer fire company and a resident of the State. In the area of towns outside of villages and fire districts, election of a member to the volunteer fire company must be approved by the town board of each town which consented to formation of the fire corporation. 1983 Op St Compt No. 83-60.

An incorporated volunteer fire company may amended its by-laws and constitution to require that members of the company attend at least three meetings annually as a qualification to vote for company officers. 1983 Op St Compt No. 83-65.

7. Powers

A fire district has no authority to pay the cost of construction of a memorial monument in memory of deceased volunteer firemen. 1980 NY Ops Atty Gen Jun 11 (Informal), 1980 N.Y. AG LEXIS 104.

Debts incurred by an incorporated fire company are the responsibility of such corporation and a municipality would not be liable therefor in the event of default by the corporation. 1978 Op St Compt No. 78-451.

An incorporated volunteer fire company performing services in a fire protection district may set aside part of the payment received each year under the contract to accumulate money for a new fire truck. 1979 Op St Compt No. 79–648.

Competitive bidding would not be required if volunteer fire company expended moneys received from donations and membership dues to improve village fire hall and then made gift of improvement to village. 1987 Op St Compt No. 87-87.

8. Territory

A volunteer fire department may not secede or separate itself from the village in which it is located. 1983 NY Ops Atty Gen No. 83–21, 1983 N.Y. AG LEXIS 78.

The exclusive firefighting jurisdiction of a village fire department does not automatically expand upon annexation by the village of territory in a neighboring fire district; an agreement by which a village fire department would provide services to the annexed portion of a fire district is possible under Town Law § 176(22). 1990 N.Y. Op. Att'y Gen. No. I90-59.

(1) A village fire department or a volunteer fire company serving territory outside a village may respond to a call for assistance to a fire outside its designated area even if the call is not made pursuant to a mutual aid agreement. However, there is no authority to respond to a fire outside the area usually served when no call for assistance is made. (2) A village fire department or volunteer fire company has no authority to contract to provide fire protection to a business establishment or school located outside its designated area. 1979 Op St Compt No. 79-568.

9. Under former Membership Corporation Law § 110

There appears to be no statutory prohibition against a town board consenting to the formation of a volunteer fire company which proposes to operate in a territory already served by a volunteer fire department where the territory is outside the limits of a village or fire district. 1954 NY Ops Atty Gen Oct 16 (Informal), 1954 N.Y. AG LEXIS 365.

A village fire company, under the direction of the chief, may respond to emergency calls from outside the area regularly protected, until such outside service is restricted by action of the governing board of the village. 1957 NY Ops Atty Gen Oct 4 (Informal), 1957 N.Y. AG LEXIS 354.

Where a volunteer fire company has purchased apparatus for corporate purposes from company funds, such apparatus remains the property of the company. Board of Fire Commissioners has no control over expenditure of fire company moneys. 1955 NY Ops Atty Gen April 28 (Informal), 1955 N.Y. AG LEXIS 213.

10. Under former Membership Corporation Law § 112

The offices of village trustee and chief engineer of the village fire department may not be held by the same person at the same time. 1964 NY Ops Atty Gen Sept 25 (Informal), 1964 N.Y. AG LEXIS 139.

RESEARCH REFERENCES AND PRACTICE AIDS

Treatises

Matthew Bender's New York Business Entities: 7-14 White, New York Business Entities ¶ N1402.00 et seq.

Matthew Bender's New York Practice Guides: New York Practice Guide: Business and Commercial § 8.10B. Special Corporations.

New York Practice Guide: Business and Commercial § 8.15. Preparing Certificate of Incorporation.

Forms: White, New York Business Entities Form N1402:1. Certificate of Incorporation of a Fire Corporation.

White, New York Business Entities Form N1402:2. Consent by Mayor, Village Trustees or Town Board to Incorporation of Fire Corporation.

White, New York Business Entities Form N1402:3. Consent by Fire Commissioners to Incorporation of Fire Corporation Within Fire District.

White, New York Business Entities Form N1402:4. Notice of First Meeting of Incorporators of Fire Company.

White, New York Business Entities Form N1402:5. Minutes of First Meeting of Incorporators of Fire Company.

White, New York Business Entities Form N1402:6. By Laws of a Fire Company.

White, New York Business Entities Form N1402:7. Certificate Filed Annually by Fire Corporation.

PARKS, RECREATION AND HISTORIC PRESERVATION LAW

Title
D. Snowmobiles

HISTORY:
Add, L 1981, ch 679, § 1, eff July 21, 1981.

TITLE D Snowmobiles

Article 21. General Provisions

Section
21.05. Definitions

Article 25. Control Provisions

25.03. Operation of snowmobiles; general
25.17. Equipment

HISTORY:
Add, L 1972, ch 660, § 1, eff Sept 1, 1972, with substance derived from Conserv Law Art 8.

ARTICLE 21 General Provisions

HISTORY:
Add, L 1972, ch 660, § 1, eff Sept 1, 1972, with substance derived from Conserv Law Art 8 Title 1.

§ 21.05. Definitions

As used in this article, unless the context requires otherwise:

1. "Governmental agency" shall mean any agency of the state of New York and all municipalities within the state.

2. "Executive officer" shall mean:

(a) In the case of a county, the county executive unless there is none, in which case it shall mean the county manager if there is one, or the chairman of the county legislative body if there is neither a county executive nor county manager.

(b) In the case of cities, the mayor, except in those cities having a city manager it shall mean such city manager.

(c) In the case of towns, the supervisor or presiding supervisor.

(d) In the case of villages, the mayor, except in those villages having a president or manager it shall mean such president or manager.

3. "Snowmobile" shall mean a self-propelled vehicle equipped with a motor, originally manufactured and designed for travel on snow or ice, steered by skis or runners and supported in whole or in part by one or more skis, belts or tracked cleats.

4. "Owner" shall mean any person having title to a snowmobile. If a snowmobile is sold under a contract of conditional sale whereby the title remains in the vendor, such vendor or his assignee shall not, after delivery of such snowmobile, be deemed an owner within the provisions of this section, but the vendee or his assignee, upon receipt of possession thereof, shall be deemed such owner notwithstanding the terms of such contract, until the vendor or his assignee shall retake possession. A person holding only a security interest in a snowmobile shall not be deemed an owner unless such person also has possession of such snowmobile.

5. "Operate" shall mean to ride in or on, other than as a passenger, or use or control the operation of a snowmobile in any manner, whether or not said snowmobile is under way.

6. "Operator" shall mean every person who operates or is in actual physical control of a snowmobile.

7. "Register" shall mean the act of assigning a registration number to a snowmobile.

8. "Roadway" shall mean that portion of a highway improved, designed, or ordinarily used for vehicular travel, exclusive of the shoulder.

9. "Highway" shall mean the entire width between the boundary lines of any way or place when any part thereof is open to the use of the public, as a matter of right, for the purpose of vehicular traffic.

10. "Shoulder" shall mean that portion of a highway which lies outside the paved or unpaved roadway immediately adjacent to the portion of the roadway which may be used by motor vehicles.

11. "Bank" shall mean a mound, pile or ridge of snow on the edge of a highway accumulated from natural snowfall or by snowplowing operations.

12. "Inside bank" shall mean the portion of a snowbank immediately adjacent to the shoulder of the roadway.

13. "Outside bank" shall mean the portion of a snowbank outside the crest thereof and farthest removed from the roadway.

14. "Cowling" shall mean the forward portion of the snowmobile usually surrounding the motor and clutch assembly.

15. "Dealer" shall mean a person engaged in the business of selling snowmobiles at wholesale or retail.

16. "Special event" shall mean an organized rally, race, exhibition or demonstration of limited duration which is conducted according to a prearranged schedule and in which general public interest is manifested.

17. "Snowmobile operator's certificate" shall mean a certificate issued by the commissioner evidencing that the holder thereof has successfully completed an approved course of instruction in snowmobile operation and safety as hereinafter provided.

18. "Authorized ambulance snowmobile" shall mean a snowmobile designated as such in writing and filed with the commissioner by the chief executive officer of any duly organized volunteer ambulance company, fire department, or paid fire department, operated by a member thereof and equipped

with emergency lights as provided in subdivision four of section 25.17 of this chapter.

19. "Authorized police snowmobile" shall mean a snowmobile operated by a police or other peace officer while engaged in the performance of his official duties within the area of his territorial jurisdiction and equipped with emergency lights as provided in subdivision four of section 25.17 of this chapter.

20. "Authorized civil defense snowmobile" shall mean a snowmobile designated as such in writing and filed with the commissioner by the chief executive officer of a municipality and operated by a member of a civil defense organization of the municipality and equipped with emergency lights as provided in subdivision four of section 25.17 of this chapter.

21. "Operation as emergency vehicle." The operation or parking of an authorized ambulance, police or civil defense snowmobile, including attendant equipment, displaying one or more lighted, red or combination red or white lights which is revolving, rotating, flashing, oscillating or constantly moving light and which snowmobile is engaged in transporting a sick or injured person, pursuing an actual or suspected violator of the law or responding to, or working or assisting at the scene of an accident, disaster, police call, alarm or other emergency but shall not include returning from such service.

HISTORY:

Add, L 1972, ch 660, § 1, eff Sept 1, 1972, with substance derived from Conserv Law § 8–0105(2), (5)–(10), (14), (15), (17)–(24); L 1975, ch 835, § 1, eff Sept 1, 1975; amd, L 1976, ch 643, §§ 1, 2 eff Sept 1, 1976; L 2017, ch 341, § 1, effective January 1, 2018.

Editor's Notes Laws 2017, ch 341, § 6, eff Jan 1, 2018, provides:

§ 6. This act shall take effect January 1, 2018.

Amendment Notes The 2017 amendment by ch 341, § 1, in 3, added "equipped with a motor, originally manufactured and" and substituted "tracked cleats" for "cleats."

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 25.11; CLS Pers P § 301. Definitions, CLS Pers Prop § 301.

Codes, Rules and Regulations:

Definitions 9 NYCRR § 453.1.

Jurisprudences:

8A NY Jur 2d Automobiles and Other Vehicles §§ 806, 860, 861 .

21 NY Jur 2d Consumer and Borrower Protection §§ 164, 205 .

ARTICLE 25 Control Provisions

HISTORY:

Add, L 1972, ch 660, § 1, eff Sept 1, 1972, with substance derived from Conserv Law Art 8 Title 3.

§ 25.03. Operation of snowmobiles; general

It shall be unlawful for any person to drive or operate any snowmobile in the following unsafe or harassing ways:

1. Imprudent speed. At a rate of speed greater than reasonable or proper under the surrounding circumstances provided, however, that in no case shall a snowmobile be operated at a speed in excess of fifty-five miles per hour upon public trails or lands, unless (a) participating in a special event authorized by the commissioner pursuant to section 25.11 of this article or (b) engaged in operation as an emergency vehicle as defined in subdivision twenty-one of section 21.05 of this title.

2. Reckless operation. In a careless, reckless or negligent manner so as to unreasonably endanger the person or property of another or to cause injury or damage thereto.

3. Intoxication and drugs. While in an intoxicated condition or under the influence of narcotics or drugs as defined by section one hundred fourteen-a of the vehicle and traffic law.

4. Lights. (a) Between sunset and sunrise or when lights are required for safety without displaying at least one lighted head light and tail light.

(b) Operating other than as an emergency vehicle and displaying one or more lighted red or combination red or white lights which is revolving, rotating, flashing, oscillating or constantly moving light.

5. Railroad tracks. On the tracks of an operating railroad.

6. Plantings. In any tree nursery or planting in a manner which damages or destroys growing stock, or creates a substantial risk thereto.

7. On lands of another. On private property, except for operation as emergency vehicle, without the consent of the owner or lessee thereof. Any person operating a snowmobile upon lands of another in violation of this section shall stop and identify himself or herself upon the request of the landowner, the landowner's duly authorized representative or lessee, and, if requested to do so by said landowner, representative or lessee shall promptly remove said snowmobile from the premises.

8. Snowmobiles towing a sleigh, sled or toboggan. The towing of a sleigh, sled or toboggan, unless attached by a rigid support, connection or towbar.

9. Failure to stop and yield. In any place at any time failing to stop and yield to an authorized ambulance, civil defense, or police snowmobile or police vehicle being operated as an emergency vehicle and approaching from any direction.

9-a. Failing to yield to trail grooming equipment. Failure by the operator of a snowmobile upon any snowmobile trail to yield the right of way to the operator of trail grooming equipment upon such trail, whether such snowmobile operator is approaching or overtaking.

10. Failure and refusal to comply. In any place at any time failure or refusal to comply with any lawful order or direction of any police officer or other person duly empowered to enforce all laws of the state relating to snowmobiles.

HISTORY:

Add, L 1972, ch 660, § 1, eff Sept 1, 1972, with substance derived from Conserv Law § 8–0303(1); amd, L 1973, ch 400, § 84; L 1975, ch 835, §§ 2, 3, eff Sept 1, 1975; L 1976, ch 643, § 4,

eff Sept 1, 1976; L 1976, ch 643, eff Sept 1, 1976; L 1992, ch 773, § 5; L 2000, ch 120, §§ 1, 2, eff July 11, 2000; L 2001, ch 215, § 2, eff Aug 29, 2001; L 2005, ch 609, § 9, eff Feb 26, 2006.

Editor's Notes: Laws 2005, ch 609, § 1, eff Feb 26, 2006, provides as follows:

Section 1. Short title. This act shall be known and may be cited as the "snowmobile rights and responsibilities act".

Notes to Decisions

Because questions of fact existed under N.Y. Parks Rec. & Hist. Preserv. Law § 25.03(1), (2) as to whether a passenger assumed the risk of riding on a snowmobile, the driver and the owner of the snowmobile were not entitled to summary judgment. Pantalone v Talcott, 52 A.D.3d 1148, 861 N.Y.S.2d 166, 2008 N.Y. App. Div. LEXIS 5821 (N.Y. App. Div. 3d Dep't 2008).

Trial court properly granted summary judgment to a rider on an injured party's claims that the rider's negligent use of a snowmobile caused injuries; even if the rider violated N.Y. Parks Rec. & Hist. Preserv. Law 25.03 by operating a snowmobile while intoxicated, the possibility that the injured party would grab the rider's jacket and that his foot would be caught in the snowmobile treads was not foreseeable, and the injured party's actions constituted an intervening cause. Kemper v Arnow, 18 A.D.3d 939, 795 N.Y.S.2d 138, 2005 N.Y. App. Div. LEXIS 4858 (N.Y. App. Div. 3d Dep't), app. denied, 5 N.Y.3d 708, 803 N.Y.S.2d 28, 836 N.E.2d 1151, 2005 N.Y. LEXIS 2557 (N.Y. 2005).

Agency Opinions

County may not implement snowmobile permit system which involves charging fees for use of snowmobiles on public highways and lands. 2000 NY Ops Atty Gen I 00-16.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Taking wildlife from snowmobile prohibited, CLS ECL § 11-0901(1).

Jurisprudences:

8A NY Jur 2d Automobiles and Other Vehicles § 860 .

Annotations:

Snowmobile operation as DWI or DUI. 56 ALR4th 1092.

§ 25.17. Equipment

1. All snowmobiles operating within the state of New York shall be equipped with:

(a) Head lights. At least one white or amber head-lamp having a minimum candlepower of sufficient intensity to reveal persons and vehicles at a distance of at least one hundred feet ahead during hours of darkness under normal atmospheric conditions.

(b) Tail light. At least one red tail-lamp having a minimum candlepower of sufficient intensity to exhibit a red light plainly visible from a distance of five hundred feet to the rear during hours of darkness under normal atmospheric conditions.

(c) Brakes. A brake system in good mechanical condition.

(d) Reflector material. Reflector material of a minimum area of sixteen square inches mounted on each side of the cowling. Registration numbers must be reflectorized, and such numbers or decorative material may be included in computing the required sixteen square inch area.

(e) Mufflers. An adequate muffler system in good working condition. On and after June first, nineteen seventy-two, no snowmobile manufactured after June first, nineteen seventy-two shall be sold or offered for sale unless it is equipped in such a way as to limit noise produced by the snowmobile to not more than eighty-two decibels as measured on the "A" scale at fifty feet. On and after June first, nineteen seventy-five, no such snowmobile manufactured after June first, nineteen seventy-five shall be sold or offered for sale unless it is equipped in such a way as to limit noise produced by the snowmobile to not more than seventy-eight decibels on such scale. On and after June first, nineteen eighty, no such snowmobile manufactured after June first, nineteen eighty, shall be sold or offered for sale unless it is equipped in such a way as to limit noise produced by the snowmobile to not more than seventy-three decibels on such scale. On or after November first, two thousand thirteen, a person shall not operate a snowmobile unless the snowmobile is equipped with a muffler in good working order and in constant operation from which noise emission does not exceed either seventy-eight decibels at fifty feet at full throttle, as measured using a generally accepted test for a snowmobile manufactured after July first, nineteen hundred seventy-seven and sold or offered for sale in this state, or eighty-eight decibels, as measured at four meters from an inline position from the exhaust and four thousand rpm using a generally accepted test for using a stationary snowmobile manufactured after July first, nineteen hundred eighty and sold or offered for sale in this state. Should the federal government adopt snowmobile noise level standards different from those contained in this paragraph and require that the state conform thereto, the commissioner shall be authorized to adopt rules and regulations superseding the noise level requirements of this paragraph to achieve compliance with federal standards. No snowmobile shall be modified by any person in any manner that shall amplify or otherwise increase total noise emission to a level greater than that emitted by the snowmobile as originally constructed, regardless of date of manufacture.

2. Inspection and testing. The commissioner may adopt rules and regulations with respect to the inspection and testing of snowmobiles.

3. No person shall have for sale, sell or offer for sale in this state any snowmobile which fails to comply with the provisions of subdivision one, or which does not comply with the specifications for such equipment required by the rules and regulations of the commissioner after the effective date of such rules and regulations.

4. No person shall operate an authorized ambulance, police or civil defense snowmobile as an emergency vehicle unless it is equipped with one or more lighted, red or combination red or white lights which is revolving, rotating, flashing, oscillating or constantly moving light having a minimum candle power of sufficient intensity to be plainly visible from a distance of five hundred feet in all directions under normal atmospheric conditions.

5. No person shall operate a snowmobile or ride as a passenger on a snowmobile unless he or she is wearing a protective helmet of a type approved by

the commissioner, except when operating a snowmobile or riding as a passenger on private lands owned by the operator or passenger, or to which the operator or passenger has a contractual right other than as a member of a club or association, and for which no compensation is paid to the owner with respect to such operation.

HISTORY:

Add, L 1972, ch 660, § 1, eff Sept 1, 1972, with substance derived from Conserv Law § 8–0305; amd, L 1973, ch 184, § 1, eff Sept 1, 1973; L 1973, ch 838, § 1; L 1975, ch 835, § 4; L 1976, ch 643, § 5, eff Sept 1, 1976; L 1977, ch 650, § 1, eff August 1, 1977; L 1997, ch 228, § 1, eff April 1, 1998; L 2013, ch 473, § 1, eff Nov 1, 2013.

Amendment Notes: 2013. Chapter 473, § 1 amended: Sub 1, par (e) by adding the matter in italics.

Agency Opinions

6. Under former Conservation Law § 8-0305

A village board may adopt a local law, ordinance or resolution permitting the operation of snowmobiles on the roadway, shoulder or inside bank of a village highway or street only if the outside bank or slope is impassable and if the highway or street is uncongested and safe for snowmobile travel. 1970 NY Ops Atty Gen Nov 13.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 21.05, 25.01.

Registration, CLS Veh & Tr § 2222.

Codes, Rules and Regulations:

Standards for equipment on snowmobiles sold or offered for sale in New York state. 9 NYCRR §§ 459.1 et seq.

Jurisprudences:

8 NY Jur 2d Automobiles and Other Vehicles §§ 142, 172, 179, 191, 201, 223, 260 .

15 Am Jur Legal Forms 2d, Pollution Control, §§ 205:3 et seq.

PENAL LAW

Part
TWO. Sentences
THREE. Specific Offenses
FOUR. Administrative Provisions

PART TWO Sentences

Title
E. Sentences

HISTORY:
Add, L 1965, ch 1030, eff Sept 1, 1967.

TITLE E Sentences

Article 60. Authorized Dispositions of Offenders

Section
60.27. Restitution and reparation

Article 70. Sentences of Imprisonment

70.02. Sentence of imprisonment for a violent felony offense.

HISTORY:
Add, L 1965, ch 1030, eff Sept 1, 1967.

ARTICLE 60

AUTHORIZED DISPOSITIONS OF OFFENDERS

HISTORY:
Add, L 1967, ch 791, § 6, eff Sept 1, 1967.

§ 60.27. Restitution and reparation

1. In addition to any of the dispositions authorized by this article, the court shall consider restitution or reparation to the victim of the crime and may require restitution or reparation as part of the sentence imposed upon a person convicted of an offense, and after providing the district attorney with an opportunity to be heard in accordance with the provisions of this subdivision, require the defendant to make restitution of the fruits of his or her offense or reparation for the actual out-of-pocket loss caused thereby and, in the case of a violation of section 190.78, 190.79, 190.80, 190.82 or 190.83 of this chapter, any costs or losses incurred due to any adverse action taken against the victim. The district attorney shall where appropriate, advise the court at or before the time of sentencing that the victim seeks restitution or reparation, the extent of injury or economic loss or damage of the victim, and the amount of restitution or reparation sought by the victim in accordance with his or her responsibilities under subdivision two of section 390.50 of the criminal procedure law and article twenty-three of the executive law. The court shall hear and consider the information presented by the district attorney in this regard. In that event, or when the victim impact statement reports that the victim seeks restitution or reparation, the court shall require, unless the interests of justice dictate otherwise, in addition to any of the dispositions authorized by this article that the defendant make restitution of the fruits of the offense and reparation for the actual out-of-pocket loss and, in the case of a violation of section 190.78, 190.79, 190.80, 190.82 or 190.83 of this chapter, any costs or losses incurred due to any adverse action, caused thereby to the victim. In the event that restitution or reparation are not ordered, the court shall clearly state its reasons on the record. Adverse action as used in this subdivision shall mean and include actual loss incurred by the victim, including an amount equal to the value of the time reasonably spent by the victim attempting to remediate the harm incurred by the victim from the offense, and the consequential financial losses from such action.

2. Whenever the court requires restitution or reparation to be made, the court must make a finding as to the dollar amount of the fruits of the offense and the actual out-of-pocket loss to the victim caused by the offense. In making this finding, the court must consider any victim impact statement provided to the court. If the record does not contain sufficient evidence to support such finding or upon request by the defendant, the court must conduct a hearing upon the issue in accordance with the procedure set forth in section 400.30 of the criminal procedure law.

3. The provisions of sections 420.10, 420.20 and 420.30 of the criminal procedure law shall apply in the collection and remission of restitution and reparation.

4. For purposes of the imposition, determination and collection of restitution or reparation, the following definitions shall apply:

(a) the term "offense" shall include the offense for which a defendant was convicted, as well as any other offense that is part of the same criminal transaction or that is contained in any other accusatory instrument disposed of by any plea of guilty by the defendant to an offense.

(b) the term "victim" shall include the victim of the offense, the representative of a crime victim as defined in subdivision six of section six hundred twenty-one of the executive law, an individual whose identity was assumed or whose personal identifying information was used in violation of section 190.78, 190.79 or 190.80 of this chapter, or any person who has suffered a financial loss as a direct result of the acts of a defendant in violation of section 190.78, 190.79, 190.80, 190.82 or 190.83 of this chapter, a good samaritan as defined in section six hundred twenty-one of the executive law and the office of victim services or other governmental agency that has received an application for or has provided financial assistance or compensation to the victim. A

victim shall also mean any owner or lawful producer of a master recording, or a trade association that represents such owner or lawful producer, that has suffered injury as a result of an offense as defined in article two hundred seventy-five of this chapter.

5. (a) Except upon consent of the defendant or as provided in paragraph (b) of this subdivision, or as a condition of probation or conditional discharge as provided in paragraph (g) of subdivision two of section 65.10 of this chapter, the amount of restitution or reparation required by the court shall not exceed fifteen thousand dollars in the case of a conviction for a felony, or ten thousand dollars in the case of a conviction for any offense other than a felony. Notwithstanding the provisions of this subdivision, if an officer of a school district is convicted of violating any section of article one hundred fifty-five of this chapter where the victim of such crime is such officer's school district, the court may require an amount of restitution up to the full amount of the fruits of the offense or reparation up to the full amount of the actual out-of-pocket loss suffered by the victim, provided further that in such case the provisions of paragraph (b) of this subdivision shall not apply.

(b) The court in its discretion may impose restitution or reparation in excess of the amounts specified in paragraph (a) of this subdivision, provided however that the amount in excess must be limited to the return of the victim's property, including money, or the equivalent value thereof; and reimbursement for medical expenses actually incurred by the victim prior to sentencing as a result of the offense committed by the defendant.

6. Any payment made as restitution or reparation pursuant to this section shall not limit, preclude or impair any liability for damages in any civil action or proceeding for an amount in excess of such payment.

7. In the event that the court requires restitution or reparation to be made to a person and that person dies prior to the completion of said restitution or reparation, the remaining payments shall be made to the estate of the deceased.

8. The court shall in all cases where restitution or reparation is imposed direct as part of the disposition that the defendant pay a designated surcharge of five percent of the entire amount of a restitution or reparation payment to the official or organization designated pursuant to subdivision eight of section 420.10 of the criminal procedure law. The designated surcharge shall not exceed five percent of the amount actually collected. Upon the filing of an affidavit of the official or organization designated pursuant to subdivision eight of section 420.10 of the criminal procedure law demonstrating that the actual cost of the collection and administration of restitution or reparation in a particular case exceeds five percent of the entire amount of the payment or the amount actually collected, as the case may be, the court shall direct that the defendant pay an additional surcharge of not more than five percent of the entire amount of a restitution or reparation payment to such official or organization, or the actual cost of collection or administration, whichever is less unless, upon application of the defendant, the court determines that imposition of such additional surcharge would cause undue hardship to the defendant, or any other person who is financially supported by the defendant, or would otherwise not be in the interest of justice. Such additional surcharge, when added to the initial five percent surcharge, shall not exceed ten percent of the amount actually collected.

9. If the offense of which a person is convicted is a class A, class B, class C, or class D felony involving the sale of a controlled substance, as defined in article two hundred twenty of this chapter, and no other victim who is a person is seeking restitution in the case, the term "victim" as used in this section, in addition to its ordinary meaning, shall mean any law enforcement agency of the state of New York or of any subdivision thereof which has expended funds in the purchase of any controlled substance from such person or his agent as part of the investigation leading to such conviction. Any restitution which may be required to be made to a law enforcement agency pursuant to this section shall be limited to the amount of funds expended in the actual purchase of such controlled substance by such law enforcement agency, less the amount of any funds which have been or will be recovered from any other source, and shall not include a designated surcharge pursuant to subdivision eight of this section. Any law enforcement agency seeking restitution pursuant to this section shall file with the court and the district attorney an affidavit stating that funds expended in the actual purchase of a controlled substance for which restitution is being sought have not been and will not be recovered from any other source or in any other civil or criminal proceeding. Any law enforcement agency receiving restitution pursuant to this section shall promptly transmit to the commissioner of the division of criminal justice services a report stating the dollar amount of the restitution received.

10. If the offense of which a person is convicted is defined in section 150.10, 150.15 or 150.20 of this chapter, and no other victim who is a person is seeking restitution in the case, the term "victim" as used in this section, in addition to its ordinary meaning, shall mean any municipality or volunteer fire company which has expended funds or will expend funds for the purpose of restoration, rehabilitation or clean-up of the site of the arson. Any restitution which may be required to be made to a municipality or volunteer fire company pursuant to this section shall be limited to the amount of funds reasonably expended or to be expended for the purpose of restoration, rehabilitation or cleanup of the site of the arson, less the amount of any funds which have been or will be recovered from any other

source, and shall not include a designated surcharge pursuant to subdivision eight of this section. Any municipality or volunteer fire company seeking restitution pursuant to this section shall file with the court, district attorney and defense counsel an affidavit stating that the funds reasonably expended or to be expended for which restitution is being sought have not been and will not be recovered from any other source or in any other civil or criminal proceeding. For the purposes of this subdivision, "volunteer fire company" means a fire company as defined in paragraph a of subdivision two of section one hundred of the general municipal law.

11. Notwithstanding any other provision of this section to the contrary, when a person is convicted of harming an animal trained to aid a person with a disability in the second degree as defined in section 195.11 of this chapter, or harming an animal trained to aid a person with a disability in the first degree as defined in section 195.12 of this chapter, the court, in addition to any other sentence, shall order the payment of restitution to the person with a disability who was aided by such animal.

12. If the offense of which a person is convicted is defined in section 155.25, 155.30, 155.35, 155.40 or 155.42 of this chapter, and the property taken is timber, the court may upon conviction, in addition to any other sentence, direct the defendant to pay the rightful owner of such timber an amount equal to treble the stumpage value of the timber stolen as defined in section 71-0703 of the environmental conservation law and for any permanent and substantial damage caused to the land or the improvements thereon as a result of such violation. Such reparations shall be of such kind, nature and extent as will reasonably restore the lands affected by the violation to their condition immediately before the violation and may be made by physical restoration of such lands and/or by the assessment of monetary payment to make such restoration.

13. If the offense of which a person is convicted is defined in section 240.50, subdivision one or two of section 240.55, section 240.60, section 240.61, section 240.62 or section 240.63 of this chapter, and no other victim who is a person is seeking restitution in the case, the term "victim" as used in this subdivision, in addition to the ordinary meaning, shall mean any school, municipality, fire district, fire company, fire corporation, ambulance association, ambulance corporation, or other legal or public entity engaged in providing emergency services which has expended funds for the purpose of responding to a false report of an incident or false bomb as defined in section 240.50, subdivision one or two of section 240.55, section 240.60, section 240.61, section 240.62, or section 240.63 of this chapter. Any restitution which may be required to be made to a victim pursuant to this subdivision shall be limited to the amount of funds reasonably expended for the purpose of responding to such false report of incident or false bomb, less the amount of any funds which have been or will be recovered from any other source and shall not include a designated surcharge pursuant to subdivision eight of this section. Any victim seeking restitution pursuant to this subdivision shall file with the court, district attorney and defense counsel an affidavit stating that the funds reasonably expended for which restitution is being sought have not been and will not be recovered from any other source or in any other civil or criminal proceeding, except as provided for by section 3-112 of the general obligations law.

14. Where a transfer of probation has occurred pursuant to section 410.80 of the criminal procedure law and the probationer is subject to a restitution condition, the department of probation in the county in which the order of restitution was imposed shall notify the appropriate district attorney. Upon notification by the department of probation, such district attorney shall file a certified copy of the judgment with the clerk of the county in the receiving jurisdiction for purposes of establishing a first lien and to permit institution of civil proceedings pursuant to the provisions of subdivision six of section 420.10 of the criminal procedure law.

HISTORY:

Add, L 1980, ch 290, § 1, eff Sept 1, 1980; amd, L 1983, ch 397, § 2; L 1983, ch 468, § 1; L 1984, ch 335, § 1, eff July 3, 1984; L 1984, ch 965, § 4 (see 1984 note below); L 1985, ch 14, § 6; L 1985, ch 187, § 1; L 1985, ch 233, § 7; L 1985, ch 506, § 2, eff Nov 1, 1985; L 1986, ch 615, § 1; L 1991, ch 363, § 1, eff Nov 1, 1991; L 1991, ch 545, § 1, eff Nov 1, 1991; L 1992, ch 618, §§ 12, 13, 16, eff Nov 1, 1992; L 1996, ch 310, § 1, eff Nov 1, 1996; L 1999, ch 160, § 1, eff Nov 1, 1999; L 1999, ch 207, § 2, eff July 6, 1999 (see 1999 note below); L 2002, ch 619, §§ 1, 2, eff Nov 1, 2002; L 2003, ch 602, § 14, eff March 1, 2004 (see 2003 note below); L 2005, ch 499, § 2, eff Aug 16, 2005; L 2007, ch 519, § 1, eff Aug 15, 2007; L 2008, ch 279, § 7, eff Jan 3, 2009; L 2010, ch 56, § 41 (Part A–1), eff June 22, 2010; L 2010, ch 56, § 7 (Part D), eff Sept 20, 2010; L 2011, ch 313, § 2, eff Nov 1, 2011; L 2013, ch 356, § 1, eff Sept 27, 2013.

Editor's Notes: Laws 1983, ch 397, § 1, eff Sept 26, 1983, provides as follows:

Section 1. Legislative findings. The legislature hereby finds and declares that it is the policy of this state to encourage restitution by a person convicted of a criminal offense to the victims of his or her criminal activities in appropriate cases and to the extent that the defendant is reasonably able to do so. This act shall be interpreted and administered to effectuate this policy.

Laws 1984, ch 965, § 1, provides as follows:

Section 1. Legislative findings. The legislature hereby finds and declares that it is the policy of this state to encourage restitution by a person convicted of a criminal offense to the victims of his or her criminal activities in appropriate cases and to the extent that the defendant is reasonably able to do so. This act shall be interpreted and administered to effectuate this policy.

Laws 1999, ch 207, § 1, eff July 6, 1999, provides as follows:

Section 1. Short title. This act shall be known and may be cited as the "false reporting act of 1999".

Laws 2003, ch 602, § 1, eff March 1, 2004, provides as follows:

Section 1. Legislative findings and purposes. The forest resources of this state have increased in size and quality in every decade since the turn of the century. Today, nearly two-thirds of the state's land cover, 18.5 million acres, is forestland, and the quality and quantity of forests found

today continues to improve. At the same time this remarkable resource has provided clean water, a diversity of habitat for wildlife, abundant outdoor recreational activities, and a wide-range of wood and paper products.

The forest-based economy in New York provides employment for over 122,000 people, forty percent of which jobs are tied to wood product manufacturing. The practice of forestry, including the manufacture of wood and paper products and nurturing, harvesting and management of these forests, is an important way of life that has been sustained for generations in many areas of the state. It also provides for the range of goods and forest conditions that are desired by all residents of the state.

It is then the general purpose of this act: (1) to respect the existing common law right to engage in forestry practices in order to maintain such practices for the benefit of the state; (2) to protect the existence and operation of existing forest activities; (3) to encourage the initiation and expansion of additional forestry businesses; (4) to discourage inadvertent impediments to the practice of forestry that may result from well meaning but poorly constructed local ordinances concerning forestry activities; (5) to improve understanding of the economic and environmental contributions that well managed forests bring to the state; and (6) to deter the unlawful taking of trees by increasing criminal and civil penalties.

Amendment Notes: 2013. Chapter 356, § 1amended:
Sub 10 by adding the matter in italics.
2011. Chapter 313, § 1 amended:
Sub 4, par (b) by adding the matter in italics.
2010. Chapter 56, § 7 (Part D) amended:
By adding sub 14.
2008. Chapter 279, § 7 amended:
Sub 1 by adding the matter in italics.
2007. Chapter 519, § 1.
Sub 13 by deleting at figs 1 and 2 "or" and adding the matter in italics.
2005. Chapter 499, § 2 amended:
Sub 5, par (a) by adding the matter in italics.
2003. Chapter 602, § 14 amended:
By adding sub 12.
1999. Chapter 160, § 1 amended:
By adding sub 11.

PRACTICE INSIGHTS:

Issues Involved With Seeking Restitution and Reparations.

By Spiros A. Tsimbinos, Esq., Member of New York Bar.

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INSIGHT

Restitution and reparations can be an important part of any authorized disposition, often providing a defendant with an opportunity to mitigate culpability by giving up the fruits of his or her crime and providing compensation to an injured victim. As such, restitution and reparations can also be an invaluable tool in seeking to obtain either a reduced incarceratory sentence or a non-incarceratory sentence. Over time, the Legislature and courts have expanded the scope of restitution and reparations as being a fair way of making the offender pay for his or her crimes while providing adequate compensation to the victim. Therefore, defense counsel should become thoroughly familiar with the provisions of Penal Law § 60.27. and also refer to its companion sections in CPL Article 420.. Always advise the defendant that payment of restitution does not bar subsequent civil action and that the failure to pay could result in imprisonment.

ANALYSIS

Penal Law § 60.27 Addresses Basis for Restitution and Victims Entitled to Receive It.

Penal Law § 60.27 provides that, in addition to any other sentence imposed, the court may order restitution or reparations to the victim. Restitution is limited to the fruits of the offense, and reparations are limited to out-of-pocket loss (not loss or damage that would include pain or suffering). The term victim has an expanded meaning that includes designated representatives of a victim and governmental agencies. Article 420 of the Criminal Procedure Law. dictates the methods of payment and collection of monies owed.

Certain Procedures Must Be Followed to Obtain Restitution.

When either restitution or reparations are sought, the defendant must have advance notice and the court, if ordering such relief, must find as to the dollar amount in question. The court is required, under a 1992 amendment, to order restitution or reparations if the victim is seeking this relief unless the court finds that the interests of justice dictate otherwise. The sentencing court alone has authority to determine the amount and propriety of restitution or reparation and may not delegate its power to set the conditions of restitution or reparations to the Department of Probation, as was held by the Court of Appeals in *People v. Fuller*, 57 N.Y.2d 152, 455 N.Y.S.2d 253, 441 N.E.2d 563 (1982).

Designated Amounts of Restitution Are Established Unless Special Circumstances Exist.

Unless special circumstances are involved, restitutions or reparations shall not exceed $15,000 for a felony and $10,000 for a misdemeanor or violation. However, the court, in its discretion, may impose restitution or reparation in excess of these amounts to cover the reasonable return of the victim's property, including money and reimbursement for medical expenses actually incurred by the victim prior to sentencing as a result of the offense committed by the defendant. An additional five percent surcharge of the amount of restitution or reparations is imposed as an administrative fee payable to the established restitution agency.

Courts and Legislature Have Recently Been More Inclined to Order Restitution as Means of Compensating Victims and Making Defendants Accept Responsibility for

Recent decisions from the appellate courts and further actions by the State Legislature have all served to enlarge the parameters of restitution and reparations as a justified means of making offenders take responsibility for their actions and compensating losses sustained by victims. A recent decision the Court of Appeals gave a broad interpretation to Penal Law § 60.27 relating to the ability of a sentencing court to order restitution. The Court also ruled that each defendant is jointly and severally liable for the actions of co-defendants. *People v. Kim*, 91 N.Y.2d 407, 671 N.Y.S.2d 420, 694 N.E.2d 421 (1998). The Court viewed the goal of the restitution statute as "to insure, to the maximum extent possible, that victims will be made whole and offenders will be rehabilitated and deterred, by requiring all defendants to confront concretely, and take responsibility for, the entire harm resulting from their acts."

In 1999, the legislature also added a special provision to provide restitution for loss of a seeing-eye dog or other animal trained to assist a person with a disability with respect to a defendant who harms such an animal. The legislature also enlarged the category of victims to clearly include schools, municipalities, and other government units who expend monies as a result of false reports made by an offender.

Willingness and Ability of Defendant to Make Restitution and Reparations Often Leads to Imposition of More Lenient and Favorable Sentence.

Prosecutors and judges are often anxious to obtain restitution and reparations to compensate a victim or recoup monies for governmental treasuries. When defense counsel has a client who is able to make restitution, this factor can be used to either obtain a sentence with no incarceration or obtain a short definite or intermittent sentence. Emphasize that if the defendant is to make restitution or reparations, he or she must be able to continue work or to run a business and that a lengthy period of imprisonment will be counterproductive to the goal of making restitution. Even if a long payout schedule has to be arranged, the defendant's ability and

willingness to make restitution can go a long way toward obtaining a favorable plea disposition. The ability and willingness to make restitution is also an affirmative and positive act by which a defendant acknowledges the wrongdoing and that he or she is willing to pay for the actions.

Warn Defendant that Civil Action May Follow and Failure to Pay May Result in Jail.

Payment of restitution or reparations to the victim does not impair the right of any victim to proceed with a civil action. Accordingly, before counsel negotiates a sentence involving either of these terms, counsel should be sure to warn the client about a possible future civil action, at least where all of the relevant parties have not been fully compensated. Counsel may also attempt to obtain a release from the appropriate parties for any uncompensated amounts.

Counsel must also realistically assess the defendant's ability to pay, and if payments are to be made over time, the defendant's reliability. Counsel should warn the defendant that the failure to pay may result in prison time. If a court imposes restitution as a condition of probation, probation may be revoked and any incarceratory sentence authorized for the original offense may be imposed upon resentence. If a court simply imposes a sentence of imprisonment as an alternative to payment, the sentence upon non-payment will be more limited because it must be in accord with Penal Law § 420.10, which specifies that not more than one year may be imposed for a felony and also places limits on alternative sentences for misdemeanor and petty offenses. While restitution and reparations can be powerful tools to obtain favorable sentences through negotiation, counsel should be aware that some clients are not well suited to these types of sentences and could end up worse off if they do not pay in a timely manner.

Notes to Decisions

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1. In General

CLS CPL § 420.10(4)(a) does not prohibit court from initially imposing prison term and restitution on defendant who has been convicted of felony; rather, such sanctions are expressly authorized by CLS Penal § 60.27(1). People v Travis, 88 N.Y.2d 970, 647 N.Y.S.2d 724, 670 N.E.2d 1356, 1996 N.Y. LEXIS 2916 (N.Y. 1996).

Whether defendant will be required to make restitution to crime victim is matter within discretion of court. People v Consalvo, 89 N.Y.2d 140, 651 N.Y.S.2d 963, 674 N.E.2d 672, 1996 N.Y. LEXIS 3577 (N.Y. 1996).

In a prosecution for grand larceny in the second degree, the trial court erred in sentencing defendant to an indeterminate term of imprisonment of from two and one-third to seven years to run concurrently with a federal term of zero to seven years, and ordering defendant to make restitution and pay a fine, where the record reflected a strong likelihood that the defendant possessed considerable assets which would be available for restitution purposes, and where the term of state imprisonment might never in fact be served, in that it was concurrent with the federal prison sentence. People v Kolman, 88 A.D.2d 549, 450 N.Y.S.2d 329, 1982 N.Y. App. Div. LEXIS 16690 (N.Y. App. Div. 1st Dep't), app. denied, 57 N.Y.2d 686, 1982 N.Y. LEXIS 4216 (N.Y. 1982).

Court is required to consider whether defendant should be required to make restitution to victim under CLS Penal § 60.27 irrespective of whether district attorney requests it. People v Turco, 130 A.D.2d 785, 515 N.Y.S.2d 853, 1987 N.Y. App. Div. LEXIS 46818 (N.Y. App. Div. 2d Dep't 1987).

Where pistol permit clerk pleaded guilty to felony of first degree offering of false instrument for filing in satisfaction of investigation arising from apparently embezzled pistol permit fees, clerk was improperly ordered to pay restitution in amount of missing fees where (1) accusatory instrument did not allege monetary gain to clerk or damage to state, and (2) clerk steadfastly denied taking any money. People v Buza, 166 A.D.2d 774, 563 N.Y.S.2d 134, 1990 N.Y. App. Div. LEXIS 12046 (N.Y. App. Div. 3d Dep't 1990).

County Court's failure to fix amount and terms of restitution at time it pronounced sentence of which restitution was to be part, and improper deferral of restitution issues, did not deprive court of jurisdiction to thereafter impose restitution. People v Jackson, 180 A.D.2d 755, 580 N.Y.S.2d 390, 1992 N.Y. App. Div. LEXIS 2637 (N.Y. App. Div. 2d Dep't 1992).

Filing of affidavit by law enforcement agency seeking restitution is not matter that affects court's authority to order restitution, but relates to amount of restitution. People v Perez, 203 A.D.2d 665, 610 N.Y.S.2d 643, 1994 N.Y. App. Div. LEXIS 3869 (N.Y. App. Div. 3d Dep't), app. denied, 83 N.Y.2d 970, 616 N.Y.S.2d 23, 639 N.E.2d 763, 1994 N.Y. LEXIS 2517 (N.Y. 1994).

While restitution may be ordered for offenses contained in any accusatory instrument disposed of by guilty plea by defendant to an offense, defendant cannot be ordered to pay restitution for uncharged criminal acts of which he or she denies guilt. People v Jody M., 208 A.D.2d 1019, 618 N.Y.S.2d 587, 1994 N.Y. App. Div. LEXIS 9678 (N.Y. App. Div. 3d Dep't 1994).

Order directing defendant to pay restitution was not barred by automatic stay which resulted from his filing of petition in bankruptcy since court ordered restitution in connection with criminal proceeding which was pending against him at time of filing of bankruptcy petition and in accordance with plea agreement voluntarily entered into by him after filing of that petition; defendant could invoke automatic stay to enjoin authorities from collecting payments under restitution order only via adversary proceeding in Bankruptcy Court. People v Clouser, 221 A.D.2d 727, 633 N.Y.S.2d 658, 1995 N.Y. App. Div. LEXIS 11137 (N.Y. App. Div. 3d Dep't 1995), app. denied, 87 N.Y.2d 920, 641 N.Y.S.2d 602, 664 N.E.2d 513, 1996 N.Y. LEXIS 447 (N.Y. 1996).

Order of restitution under CLS Penal § 60.27(9) was not illegal simply because it was district attorney's office that originally provided funds that were expended by law enforcement personnel invoked in undercover drug operation that led to defendant's convictions for third degree sale and possession of controlled substance. People v Tracey, 221 A.D.2d 738, 633 N.Y.S.2d 645, 1995 N.Y. App. Div. LEXIS 11163 (N.Y. App. Div. 3d Dep't 1995), app. denied, 88 N.Y.2d 943, 647 N.Y.S.2d 177, 670 N.E.2d 461, 1996 N.Y. LEXIS 2662 (N.Y. 1996).

On conviction of second degree murder, imposition of both mandatory surcharge of $150 and restitution of $2,000 was improper. People v Richter, 223 A.D.2d 734, 637 N.Y.S.2d 206, 1996 N.Y. App. Div. LEXIS 645 (N.Y. App. Div. 2d Dep't), app. denied, 88 N.Y.2d 852, 644 N.Y.S.2d 698, 667 N.E.2d 348, 1996 N.Y. LEXIS 1983 (N.Y. 1996).

Defendant may not be ordered to pay restitution under CLS Penal § 60.27(1) for conduct that is not offense within meaning of CLS Penal § 60.27(4)(a). People v Taylor, 242 A.D.2d 925, 662 N.Y.S.2d 894, 1997 N.Y. App. Div. LEXIS 10505 (N.Y. App. Div. 4th Dep't 1997).

Physician convicted of failure to file corporate tax returns for his dissolved medical services corporation was properly ordered,

as restitution, to personally pay corporate taxes for years in question; as "alter ego" of medical services corporation, physician profited from failure to timely file corporate tax returns and pay taxes thereon. People v Brigham, 261 A.D.2d 43, 702 N.Y.S.2d 119, 1999 N.Y. App. Div. LEXIS 13538 (N.Y. App. Div. 3d Dep't 1999), app. dismissed, 94 N.Y.2d 900, 707 N.Y.S.2d 145, 728 N.E.2d 341, 2000 N.Y. LEXIS 1779 (N.Y. 2000).

Court lacked authority to order criminal defendant to pay as restitution cost of extraditing him from California where no charge of bail jumping was ever brought against him; cost of extradition did not constitute "actual out-of-pocket loss caused by" defendant's offense, county was not "victim" thereof, and cost of extradition was part of county's normal law enforcement operating costs. People v La Fave, 265 A.D.2d 740, 698 N.Y.S.2d 733, 1999 N.Y. App. Div. LEXIS 10948 (N.Y. App. Div. 3d Dep't 1999), app. denied, 94 N.Y.2d 881, 705 N.Y.S.2d 13, 726 N.E.2d 490, 2000 N.Y. LEXIS 367 (N.Y. 2000).

Court erred in modifying conditions of defendant's probation by requiring him to pay reparation where People had failed to provide notice under CLS Penal § 60.27(1) that they were seeking reparation. People v Kevin C., 265 A.D.2d 828, 697 N.Y.S.2d 217, 1999 N.Y. App. Div. LEXIS 9873 (N.Y. App. Div. 4th Dep't 1999).

CLS Penal § 65.10(2)(g), authorizing court to impose restitution or reparation as condition of probation, did not allow court to impose reparation where People did not provide notice under CLS Penal § 60.27(1) that they were seeking reparation. People v Kevin C., 265 A.D.2d 828, 697 N.Y.S.2d 217, 1999 N.Y. App. Div. LEXIS 9873 (N.Y. App. Div. 4th Dep't 1999).

CLS CPL § 410.20(1), authorizing court to modify or enlarge conditions of probation, did not allow court to impose reparation where People did not provide notice under CLS Penal § 60.27(1) that they were seeking reparation. People v Kevin C., 265 A.D.2d 828, 697 N.Y.S.2d 217, 1999 N.Y. App. Div. LEXIS 9873 (N.Y. App. Div. 4th Dep't 1999).

Court could not modify conditions of defendant's probation by requiring him to pay reparation without giving him opportunity to withdraw his plea, and thus such modification was improper where defendant had changed his position in reliance on plea by beginning his "work Saturdays," making vacatur of plea unavailable. People v Kevin C., 265 A.D.2d 828, 697 N.Y.S.2d 217, 1999 N.Y. App. Div. LEXIS 9873 (N.Y. App. Div. 4th Dep't 1999).

In prosecution for third and fifth degree possession of stolen property, defendant was properly ordered to pay restitution for stolen chainsaws, despite his contention that he did not steal them and there was no evidence produced or any hearing conducted as to their value, since defendant's "offense" included theft of chainsaws, victim impact statement and trial evidence on issue of valuation provided court with valid basis for fixing monetary value of chainsaws, and defendant made no request for hearing on restitution prior to sentencing. People v Sheehy, 274 A.D.2d 844, 711 N.Y.S.2d 856, 2000 N.Y. App. Div. LEXIS 8295 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 938, 721 N.Y.S.2d 615, 744 N.E.2d 151, 2000 N.Y. LEXIS 4107 (N.Y. 2000).

Court's failure to order restitution at time of sentencing does not necessarily deprive court of jurisdiction to impose restitution thereafter, so long as People properly state at sentencing that they intend to seek restitution. People v Swiatowy, 280 A.D.2d 71, 721 N.Y.S.2d 185, 2001 N.Y. App. Div. LEXIS 1083 (N.Y. App. Div. 4th Dep't), app. denied, 96 N.Y.2d 868, 730 N.Y.S.2d 43, 754 N.E.2d 1126, 2001 N.Y. LEXIS 2664 (N.Y. 2001).

Judicial modification or correction of sentence, such as addition of restitution, must occur within reasonable time following sentencing proceeding; unreasonable delay will result in loss of jurisdiction over defendant. People v Swiatowy, 280 A.D.2d 71, 721 N.Y.S.2d 185, 2001 N.Y. App. Div. LEXIS 1083 (N.Y. App. Div. 4th Dep't), app. denied, 96 N.Y.2d 868, 730 N.Y.S.2d 43, 754 N.E.2d 1126, 2001 N.Y. LEXIS 2664 (N.Y. 2001).

Court properly severed issue of restitution at sentencing, and imposed restitution 13 months later, where information as to assault victim's medical expenses was not available at time of sentencing and both prosecutor and defense counsel consented to severance; delay did not divest court of jurisdiction. People v Swiatowy, 280 A.D.2d 71, 721 N.Y.S.2d 185, 2001 N.Y. App. Div. LEXIS 1083 (N.Y. App. Div. 4th Dep't), app. denied, 96 N.Y.2d 868, 730 N.Y.S.2d 43, 754 N.E.2d 1126, 2001 N.Y. LEXIS 2664 (N.Y. 2001).

Trial court's order at sentencing for each defendant to pay $81,045 in restitution did not render inconsistent the jury's verdict of guilt for grand larceny in the second degree, 6 counts of criminal possession of a forged instrument in the second degree, and 48 counts of offering a false instrument for filing in the first degree; the restitution hearing was not part of the jury trial, but was a different proceeding pursuant to N.Y. Penal Law § 60.27(2) and N.Y. Crim. Proc. Law § 400.30(4), before a different fact-finder, and addressing different issues. People v DiCarlo, 293 A.D.2d 279, 741 N.Y.S.2d 508, 2002 N.Y. App. Div. LEXIS 3450 (N.Y. App. Div. 1st Dep't), app. denied, 98 N.Y.2d 767, 752 N.Y.S.2d 7, 781 N.E.2d 919, 2002 N.Y. LEXIS 3884 (N.Y. 2002), app. denied, 98 N.Y.2d 767, 752 N.Y.S.2d 7, 781 N.E.2d 919, 2002 N.Y. LEXIS 3883 (N.Y. 2002).

Restitution order was improper because, although a victim gave a statement at sentencing that he was "out" $1,018, no detailed evidence was presented as to the losses covered by this amount, the manner in which it was computed, or defendant's ability to pay, and thus there was insufficient evidence to order restitution. People v Durant, 41 A.D.3d 976, 838 N.Y.S.2d 699, 2007 N.Y. App. Div. LEXIS 7312 (N.Y. App. Div. 3d Dep't 2007), overruled, People v Henry, 64 A.D.3d 804, 881 N.Y.S.2d 701, 2009 N.Y. App. Div. LEXIS 5375 (N.Y. App. Div. 3d Dep't 2009).

Trial court erred in enhancing defendant's sentence of incarceration based on his failure to pay restitution arising from previous convictions. People v Maliszewski, 49 A.D.3d 1165, 853 N.Y.S.2d 792, 2008 N.Y. App. Div. LEXIS 2334 (N.Y. App. Div. 4th Dep't 2008).

It was error to direct defendant to pay restitution for the $2,400 used for a controlled drug buy, which was recovered from defendant. People v Danford, 88 A.D.3d 1064, 931 N.Y.S.2d 137, 2011 N.Y. App. Div. LEXIS 7210 (N.Y. App. Div. 3d Dep't 2011), app. denied, 18 N.Y.3d 882, 939 N.Y.S.2d 752, 963 N.E.2d 129, 2012 N.Y. LEXIS 369 (N.Y. 2012).

All undisbursed restitution payments, as defined by statute, regardless of one collected by the designated restitution agency, must be used for the purposes set forth in CPL § 420.10(7). A county, whose probation department is a designated restitution agency, may not deposit into its general fund unclaimed restitution payments collected by the county probation department prior to November 1, 1984, the effective date of CPL § 420.10(7). 1990 Op St Compt 90-29.

2. Retroactive application

In a prosecution for criminal possession of stolen property, defendant would be remanded to the trial court for resentencing where he had received a sentence of one year imprisonment, together with the requirement that he make restitution, where the activities for which he had been convicted had occurred prior to the effective date of Penal Law § 60.27, and where the statute could not be applied retroactively. People v Winston, 92 A.D.2d 740, 461 N.Y.S.2d 89, 1983 N.Y. App. Div. LEXIS 17063 (N.Y. App. Div. 4th Dep't 1983).

CLS Penal § 60.27 cannot be applied retroactively because it authorizes court to require restitution in addition to other forms of punishment, and thus provides for harsher sentence than permitted under former law. Agoney v Feinberg, 132 A.D.2d 829, 517 N.Y.S.2d 834, 1987 N.Y. App. Div. LEXIS 49320 (N.Y. App. Div. 3d Dep't 1987).

Probationer was entitled to Appellate Division order prohibiting enforcement of County Court's order of restitution since such order, as part of sentence which had included term of imprisonment, was illegal on date of sentencing (May 27, 1980); prior to effective date of CLS Penal § 60.27, and corresponding amendment to CLS CPL § 420.10, restitution could not be ordered where sentence of incarceration was imposed. Agoney v Feinberg, 132 A.D.2d 829, 517 N.Y.S.2d 834, 1987 N.Y. App. Div. LEXIS 49320 (N.Y. App. Div. 3d Dep't 1987).

Five percent surcharge imposed under CLS CPL § 60.27(8) on amount of restitution to be paid by defendant following second degree grand larceny conviction would be vacated in interest of

justice where crimes occurred prior to effective date of statute (November 1, 1984). People v Pani, 138 A.D.2d 532, 525 N.Y.S.2d 912, 1988 N.Y. App. Div. LEXIS 2894 (N.Y. App. Div. 2d Dep't), app. denied, 71 N.Y.2d 900, 527 N.Y.S.2d 1010, 523 N.E.2d 317, 1988 N.Y. LEXIS 1525 (N.Y. 1988).

Provision in CLS Penal § 60.27 for 5 percent surcharge could not be applied retroactively to punish conduct that occurred before its effective date. People v Zinke, 147 A.D.2d 106, 541 N.Y.S.2d 986, 1989 N.Y. App. Div. LEXIS 7125 (N.Y. App. Div. 1st Dep't), app. denied, 74 N.Y.2d 749, 545 N.Y.S.2d 124, 543 N.E.2d 767, 1989 N.Y. LEXIS 2706 (N.Y. 1989), rev'd, 76 N.Y.2d 8, 556 N.Y.S.2d 11, 555 N.E.2d 263, 1990 N.Y. LEXIS 1031 (N.Y. 1990).

3. Relationship to civil actions

State was entitled to summary judgment awarding it $150,000 on its cause of action for treble damages under CLS Soc Serv § 245-b because defendant's criminal conviction and sentence, ordering him to pay $50,000 in restitution, collaterally estopped him from contesting accuracy of restitution amount as reflecting amount of fruits of offense. State v Stokols, 234 A.D.2d 222, 652 N.Y.S.2d 7, 1996 N.Y. App. Div. LEXIS 12956 (N.Y. App. Div. 1st Dep't 1996).

Where criminal defendant's plea of guilty incorporated restitution of $500,000 for Medicaid fraud, and restitution funds were held in escrow pending further proceedings in his case, his former attorney was not entitled to recover her legal fees from restitution funds, and court properly dismissed her petition for judgment under CLS CPLR §§ 6221 and 5239 because criminal defendant had no interest in restitution funds at time his former attorney obtained confession of judgment and perfected her interest therein. Lang v State, 258 A.D.2d 165, 696 N.Y.S.2d 3, 1999 N.Y. App. Div. LEXIS 8929 (N.Y. App. Div. 1st Dep't 1999).

City's acceptance of restitution in a criminal action against company owners for violations of N.Y. Envt'l. Conserv. Law § 71-2703(2)(c)(i) did not constitute an accord and satisfaction disallowing a crime victim cause of action under N.Y. C.P.L.R. § 213-b because N.Y. Penal Law § 60.27(6) did not preclude liability for damages in any civil action for an amount in excess of the restitution payment. City of New York v College Point Sports Assn., Inc., 61 A.D.3d 33, 876 N.Y.S.2d 409, 2009 N.Y. App. Div. LEXIS 405 (N.Y. App. Div. 2d Dep't 2009).

Payment of restitution as part of sentence for criminal trespass does not collaterally estop victim of criminal trespass from seeking damages in civil action based upon same underlying conduct involved in criminal action since discretionary order of restitution in criminal case under CLS Penal § 60.27 in no way decides amount of damages so as to preclude relitigation of that issue in civil action. Farber v Stockton, 128 Misc. 2d 560, 490 N.Y.S.2d 685, 1985 N.Y. Misc. LEXIS 2958 (N.Y. Civ. Ct. 1985), app. dismissed, 131 Misc. 2d 470, 502 N.Y.S.2d 901, 1986 N.Y. Misc. LEXIS 2519 (N.Y. App. Term 1986).

Payment of reparation award by court in criminal proceeding does not bar subsequent action against defendant to recover damages in excess of reparation award, but subsequent action is not controlled by doctrine of collateral estoppel since victim of crime does not have full and fair opportunity to litigate amount of reparation in criminal proceeding. Farber v Stockton, 131 Misc. 2d 470, 502 N.Y.S.2d 901, 1986 N.Y. Misc. LEXIS 2519 (N.Y. App. Term 1986).

Defendant's successful defense of civil action for damages based on expiration of statute of limitations did not affect his liability for restitution under CLS Penal § 60.27 as part of sentencing for criminal activity that was basis of civil suit. People v Lightfoot, 147 Misc. 2d 918, 559 N.Y.S.2d 936, 1990 N.Y. Misc. LEXIS 435 (N.Y. Dist. Ct. 1990).

Defendant, who was convicted of altering freshwater wetland without permit, and was ordered to pay fine, was not required to pay restitution to town which incurred expense for cleaning debris and unplugging culverts since restitution is not available remedy in freshwater wetland cases; also, CLS Penal § 60.27, which authorizes court to order restitution to victim, is inapplicable to freshwater wetland cases. People v De Witt, 171 Misc. 2d 622, 655 N.Y.S.2d 243, 1996 N.Y. Misc. LEXIS 556 (N.Y. County Ct. 1996).

Plea bargain under which victims of defendant stockbroker's larceny and other crimes were precluded from suing him later for those amounts not covered by restitution was modified to remove that illegal provision but was otherwise allowed to stand. People v Wein, 294 A.D.2d 78, 743 N.Y.S.2d 439, 2002 N.Y. App. Div. LEXIS 5843 (N.Y. App. Div. 1st Dep't 2002).

4. Relationship to mandatory surcharge and forfeiture

Until defendant has in fact made restitution, sentencing court has power to order both restitution to crime victim and mandatory surchargecrime victim assistance fee. People v Quinones, 95 N.Y.2d 349, 717 N.Y.S.2d 86, 740 N.E.2d 231, 2000 N.Y. LEXIS 3499 (N.Y. 2000).

Court erred in ordering defendant both to make restitution and to pay mandatory surcharge, since imposition of surcharge is inconsistent with requirement that defendant make restitution. People v Turco, 130 A.D.2d 785, 515 N.Y.S.2d 853, 1987 N.Y. App. Div. LEXIS 46818 (N.Y. App. Div. 2d Dep't 1987).

It was error to direct defendant to make both restitution and pay surcharge; those directives are inconsistent with each other. People v Mela, 172 A.D.2d 630, 568 N.Y.S.2d 432, 1991 N.Y. App. Div. LEXIS 4639 (N.Y. App. Div. 2d Dep't 1991).

Court erred in ordering payment of restitution, as term and condition of defendant's probation, beyond period of his probation, and in ordering defendant both to make restitution and to pay mandatory surcharge. People v Meade, 195 A.D.2d 756, 600 N.Y.S.2d 353, 1993 N.Y. App. Div. LEXIS 7264 (N.Y. App. Div. 3d Dep't 1993), overruled in part, People v Quinones, 95 N.Y.2d 349, 717 N.Y.S.2d 86, 740 N.E.2d 231, 2000 N.Y. LEXIS 3499 (N.Y. 2000).

It was error for sentencing court to direct defendant to both make restitution and to pay mandatory surcharge, since imposition of surcharge was inconsistent with requirement that defendant make restitution. People v Bailey, 209 A.D.2d 709, 619 N.Y.S.2d 682, 1994 N.Y. App. Div. LEXIS 11692 (N.Y. App. Div. 2d Dep't 1994).

Imposition of mandatory surcharge and crime victim assistance fee under CLS Penal § 60.35 on second degree robbery conviction was inconsistent with requirement that defendant pay restitution under CLS Penal § 60.27. People v Espola, 238 A.D.2d 281, 656 N.Y.S.2d 268, 1997 N.Y. App. Div. LEXIS 4301 (N.Y. App. Div. 1st Dep't), app. denied, 90 N.Y.2d 904, 663 N.Y.S.2d 516, 686 N.E.2d 228, 1997 N.Y. LEXIS 3355 (N.Y. 1997), overruled in part, People v Quinones, 95 N.Y.2d 349, 717 N.Y.S.2d 86, 740 N.E.2d 231, 2000 N.Y. LEXIS 3499 (N.Y. 2000).

Court did not err in directing petit larceny defendant to pay both restitution and mandatory surcharge. People v McElrath, 241 A.D.2d 932, 661 N.Y.S.2d 361, 1997 N.Y. App. Div. LEXIS 7868 (N.Y. App. Div. 4th Dep't 1997).

Where defendant has not made restitution prior to imposition of sentence, it is not error for sentencing court to direct payment of mandatory surcharge and crime victim assistance fee in addition to restitution; to extent that People v Neff, 110 AD2d 721, and its progeny may suggest otherwise, they are no longer to be followed. People v Cabrera, 243 A.D.2d 720, 664 N.Y.S.2d 308, 1997 N.Y. App. Div. LEXIS 10814 (N.Y. App. Div. 2d Dep't 1997).

Trial court erred by imposing a surcharge of 10% of the total amount of restitution ordered rather than the surcharge of 5% that was directed by N.Y. Penal Law § 60.27(8) because the record did not contain the affidavit required by N.Y. Crim. Proc. Law § 420.10(8), and there was no showing or assertion that one was filed. People v Stachnik, 101 A.D.3d 1590, 956 N.Y.S.2d 777, 2012 N.Y. App. Div. LEXIS 8797 (N.Y. App. Div. 4th Dep't 2012), app. denied, 20 N.Y.3d 1104, 965 N.Y.S.2d 800, 988 N.E.2d 538, 2013 N.Y. LEXIS 934 (N.Y. 2013).

Civil forfeiture of crime proceeds under CLS CPLR Art 13-A does not preclude subsequent order requiring defendant to make restitution under CLS Penal § 60.27 since requirements of restitution of fruits of offense, or reparation for damage caused thereby, and civil forfeiture serve different purposes and are not mutually exclusive remedies. People v Ten Eyck, 146 Misc. 2d 132, 549 N.Y.S.2d 362, 1989 N.Y. Misc. LEXIS 822 (N.Y. County Ct. 1989).

5. Role of probation department

In a prosecution for grand larceny in the second degree stemming from the unlawful receipt of public assistance moneys by defendant's concealing the fact that she was gainfully employed, the sentencing court could not delegate to the probation department the power to fix the conditions of restitution or reparation since Pen L §§ 60.27, 65.10 specify that the court alone must fix the amount of restitution and the manner of performance. People v Fuller, 57 N.Y.2d 152, 455 N.Y.S.2d 253, 441 N.E.2d 563, 1982 N.Y. LEXIS 3692 (N.Y. 1982).

The trial court in a burglary prosecution erred in delegating to the Probation Department the authority to determine the amount, time, and manner of defendant's payment of restitution to one of his victims, since it is the sentencing court rather than the Probation Department that must fix the amount and method of restitution payments under Penal L § 60.27. People v Mark R.S., 98 A.D.2d 755, 469 N.Y.S.2d 466, 1983 N.Y. App. Div. LEXIS 21078 (N.Y. App. Div. 2d Dep't 1983).

When ordering restitution pursuant to CLS CPL § 60.27, court has duty to fix not only amount thereof but also manner of performance, and thus it was improper delegation of court's duty to require restitution from defendant in amount of $5,358 to be made "if, how and when [the Department of Probation] can decide you can pay it." People v Minutoli, 128 A.D.2d 813, 513 N.Y.S.2d 517, 1987 N.Y. App. Div. LEXIS 44500 (N.Y. App. Div. 2d Dep't 1987).

Court erred in sentencing defendant by simply directing restitution "as mandated" by probation department, for while court may use probation department as preliminary fact-finder to determine actual amount of loss due to crime or defendant's ability to pay, it is for court alone to impose sentence and fix amount of restitution and manner of performance. People v Bowden, 131 A.D.2d 581, 516 N.Y.S.2d 497, 1987 N.Y. App. Div. LEXIS 48037 (N.Y. App. Div. 2d Dep't 1987).

Where defendant was convicted of 19 criminal counts, court erred in failing to fix amount of restitution at time of defendant's sentencing, and in delegating task to probation authorities; matter would be remitted for hearing as to proper amount of restitution since record was insufficient to support finding of proper amount of restitution where (1) court failed to conduct hearing, either at time of sentencing or at defendant's request to be resentenced, to determine victims' losses or to consider defendant's claim that he could not afford to make restitution, and (2) defendant was convicted on his plea of guilty and thus no proof was developed as to loss sustained by victims. People v Bentivegna, 145 A.D.2d 899, 536 N.Y.S.2d 280, 1988 N.Y. App. Div. LEXIS 13890 (N.Y. App. Div. 4th Dep't 1988).

In prosecution for welfare fraud in which defendant pleaded guilty to lesser charge of fourth degree grand larceny and agreed to serve definite sentence and make restitution in amount of $22,168, court improperly exceeded statutory limit on its discretion when it ordered restitution in such amount with payment schedule to be set by probation department, thereby delegating power to fix terms and conditions of sentence to probation department. People v Baker, 156 A.D.2d 766, 549 N.Y.S.2d 187, 1989 N.Y. App. Div. LEXIS 15499 (N.Y. App. Div. 3d Dep't 1989).

Defendant was deprived of his right to be sentenced in accordance with law when sentencing court made no independent finding with respect to amount and manner of restitution, but merely accepted recommendation of probation department without hearing; while probation department can serve as preliminary fact-finder with respect to issue of restitution, sentencing court has duty to set amount and manner of restitution, and matter would be remitted for hearing notwithstanding defendant's waiver of hearing. People v Kronenberg, 167 A.D.2d 483, 562 N.Y.S.2d 154, 1990 N.Y. App. Div. LEXIS 14019 (N.Y. App. Div. 2d Dep't 1990).

Appellate Division would reverse portion of sentence that required defendant to make restitution in unspecified amount since County Court erred in delegating to probation department its responsibility to fix amount of restitution. People v Willis, 168 A.D.2d 470, 562 N.Y.S.2d 711, 1990 N.Y. App. Div. LEXIS 15016 (N.Y. App. Div. 2d Dep't 1990).

Court erred in allowing probation report to be dispositive of amount of restitution to be paid by defendant; even though court may use probation department as preliminary factfinder in directing restitution, it must also require production of competent evidence sufficient to support independent judicial findings as to amount of loss and defendant's ability to pay amount in issue. People v Byrd, 175 A.D.2d 170, 572 N.Y.S.2d 59, 1991 N.Y. App. Div. LEXIS 9482 (N.Y. App. Div. 2d Dep't 1991).

Court did not exceed its authority in fixing restitution in amount exceeding recommendation of probation department; while probation department can serve as preliminary fact finder on issue of restitution, sentencing court has duty to set amount of restitution and manner in which restitution condition is to be satisfied. People v Chaulk, 192 A.D.2d 669, 598 N.Y.S.2d 719, 1993 N.Y. App. Div. LEXIS 3889 (N.Y. App. Div. 2d Dep't), app. denied, 81 N.Y.2d 1071, 601 N.Y.S.2d 590, 619 N.E.2d 668, 1993 N.Y. LEXIS 2710 (N.Y. 1993).

Matter would be remanded for hearing to determine amount of restitution to be paid by defendant where court did not determine exact amount to be paid, but only set ceiling of $22,000 with exact amount to be fixed at later date; court was required to set amount to be paid and could not delegate matter to probation department. People v Beaudoin, 195 A.D.2d 996, 600 N.Y.S.2d 558, 1993 N.Y. App. Div. LEXIS 7791 (N.Y. App. Div. 4th Dep't), app. denied, 82 N.Y.2d 891, 610 N.Y.S.2d 158, 632 N.E.2d 468, 1993 N.Y. LEXIS 4830 (N.Y. 1993).

County Court erred in failing to conduct hearing to determine amount of restitution, and improperly delegating task of determining that amount to Departments of Probation and Social Services. People v Bernier, 197 A.D.2d 882, 604 N.Y.S.2d 876, 1993 N.Y. App. Div. LEXIS 9288 (N.Y. App. Div. 4th Dep't 1993).

6. Effect of plea bargain

It was not improper to impose full restitution as part of defendant's sentence, despite his assertion that restitution was not part of plea bargain, since sentencing court must consider according restitution to victim whether or not encompassed in plea bargain, prosecutor specifically reserved right to seek restitution, and court gave defendant opportunity to withdraw plea due to confusion as to whether restitution was included in plea agreement. People v Jackson, 143 A.D.2d 473, 532 N.Y.S.2d 590, 1988 N.Y. App. Div. LEXIS 9218 (N.Y. App. Div. 3d Dep't 1988), app. denied, 73 N.Y.2d 892, 538 N.Y.S.2d 805, 535 N.E.2d 1345, 1989 N.Y. LEXIS 1146 (N.Y. 1989).

It was not improper to direct defendant pay restitution in addition to sentencing him to period of confinement promised in plea bargain where probation report, which included copy of victim impact statement, provided sufficient basis for departure from original sentencing promise; in any event, having failed to accept court's offer to withdraw plea, defendant had no claim to specific performance of original sentencing representation. People v Richards, 158 A.D.2d 627, 551 N.Y.S.2d 597, 1990 N.Y. App. Div. LEXIS 2019 (N.Y. App. Div. 2d Dep't), app. denied, 76 N.Y.2d 741, 558 N.Y.S.2d 903, 557 N.E.2d 1199, 1990 N.Y. LEXIS 2293 (N.Y. 1990).

Court would vacate provision of defendant's sentence directing him to make restitution where People specifically indicated that no restitution would be sought with regard to any charges encompassed by defendant's plea agreement. People v Allen, 170 A.D.2d 686, 567 N.Y.S.2d 99, 1991 N.Y. App. Div. LEXIS 3247 (N.Y. App. Div. 2d Dep't 1991).

Court's consideration of amount of restitution paid by defendant in tailoring final sentence pursuant to plea bargain did not violate defendant's right to equal protection. People v Connell, 188 A.D.2d 825, 591 N.Y.S.2d 563, 188 A.2d 825, 1992 N.Y. App. Div. LEXIS 13895 (N.Y. App. Div. 3d Dep't 1992), app. denied, 81 N.Y.2d 883, 597 N.Y.S.2d 944, 613 N.E.2d 976, 1993 N.Y. LEXIS 1350 (N.Y. 1993).

In sentencing defendant on his plea of guilty to fifth degree possession of controlled substance, court's imposition of "restitution in the form of the forfeiture agreement of $145" was lawful where (1) to extent that court required defendant to make restitution of $20 used by undercover police officer to purchase controlled substance from defendant, restitution was permissible

under CLS Penal § 60.27(9), and (2) remainder of payment was civil forfeiture that defendant had agreed to pay as condition of his plea agreement. People v Ford, 246 A.D.2d 665, 666 N.Y.S.2d 947, 1998 N.Y. App. Div. LEXIS 678 (N.Y. App. Div. 2d Dep't), app. denied, 92 N.Y.2d 897, 680 N.Y.S.2d 61, 702 N.E.2d 846, 1998 N.Y. LEXIS 3374 (N.Y. 1998).

In prosecution for second degree forgery, second degree possession of forged instrument, and petty larceny, order that defendant pay restitution would be vacated, despite defendant's consent to restitution during plea allocution, where restitution was intended to compensate for uncharged crimes, and record was insufficient to determine whether restitution satisfied requirements of CLS Penal § 60.27(4). People v Miller, 251 A.D.2d 747, 674 N.Y.S.2d 471, 1998 N.Y. App. Div. LEXIS 6771 (N.Y. App. Div. 3d Dep't 1998).

Restitution was properly imposed, without hearing, as part of sentence for second degree grand larceny where defendant agreed to amount of restitution at his plea allocution. People v Vazquez-tell, 273 A.D.2d 328, 710 N.Y.S.2d 539, 2000 N.Y. App. Div. LEXIS 6467 (N.Y. App. Div. 2d Dep't), app. denied, 95 N.Y.2d 908, 716 N.Y.S.2d 649, 739 N.E.2d 1154, 2000 N.Y. LEXIS 3729 (N.Y. 2000).

Defendant's sentence would be vacated, and case would be remitted for either imposition of promised sentence or opportunity for defendant to withdraw his plea, where he pleaded guilty to second degree assault with understanding that he would be sentenced as second felony offender to incarceration for 3 years, and court imposed that sentence but further ordered him to pay restitution of $1,664.52. People v Austin, 275 A.D.2d 913, 715 N.Y.S.2d 173, 2000 N.Y. App. Div. LEXIS 9697 (N.Y. App. Div. 4th Dep't 2000).

Since defendant's plea agreement did not mention restitution, a county court erred by ordering restitution as part of the sentence on defendant's guilty plea to arson without offering defendant an opportunity to either withdraw the guilty plea or accept the greater sentence that included restitution. On remand, a hearing under N.Y. Crim. Proc. Law § 400.30 on the proper amount to impose as restitution was required since the original amount set by the county court was not sufficiently supported by the record to satisfy N.Y. Penal Law § 60.27(2). People v Snyder, 23 A.D.3d 761, 803 N.Y.S.2d 779, 2005 N.Y. App. Div. LEXIS 12445 (N.Y. App. Div. 3d Dep't 2005).

Where a plea agreement does not include any mention of restitution, and restitution is imposed as part of a sentence, a defendant must be given the opportunity to either withdraw his plea or accept the greater sentence of restitution. People v Snyder, 23 A.D.3d 761, 803 N.Y.S.2d 779, 2005 N.Y. App. Div. LEXIS 12445 (N.Y. App. Div. 3d Dep't 2005).

Record failed to reflect that defendant was adequately apprised that restitution would be imposed pursuant to the plea agreement and defendant did not knowingly agree to it, requiring that his sentence be vacated and he be given an opportunity to withdraw his plea or to accept restitution as a component of his sentence; at the outset of the plea, the trial court merely stated that restitution would be reduced to a civil judgment, and while defendant subsequently indicated generally that he understood the plea terms and had no questions, restitution was not otherwise specifically mentioned, and neither defendant nor defense counsel agreed that it would be imposed at sentencing as part of the negotiated agreement. Further, the record was silent as to whether defendant was ever advised prior to sentence being imposed of the amount (or scope) of restitution, or if defendant or defense counsel ever received a copy of the itemized list of restitution that appeared in the record. People v Sawyer, 55 A.D.3d 949, 865 N.Y.S.2d 378, 2008 N.Y. App. Div. LEXIS 7774 (N.Y. App. Div. 3d Dep't 2008).

Although a restitution award at the time of sentencing was supported by depositions in the record and letters from the victims, and the sentencing court properly corrected its failure to consider the victims' timely requests, because the post-sentence restitution orders raised the total amount that defendant would be required to pay beyond the anticipated range presented in defendant's plea agreement, defendant could either withdraw the plea or consent to the higher restitution amount in accordance with N.Y. Penal Law § 60.27(1); since the conditions required for imposition of restitution were not met with respect to two claims, they had to be vacated. People v Naumowicz, 76 A.D.3d 747, 907 N.Y.S.2d 353, 2010 N.Y. App. Div. LEXIS 6466 (N.Y. App. Div. 3d Dep't 2010).

Because defendant pleaded guilty to the indictment, after rejecting a proposed plea offer, sentencing remained within the county court's discretion, with the qualifier that the county court represented that it would not impose a sentence in excess of 48 years or a fine, and the county court did not err in requiring that defendant pay $500 in restitution, which was separate and distinct from a fine. People v Brandon, 133 A.D.3d 901, 20 N.Y.S.3d 432, 2015 N.Y. App. Div. LEXIS 8101 (N.Y. App. Div. 3d Dep't 2015), app. denied, 27 N.Y.3d 992, 59 N.E.3d 1215, 38 N.Y.S.3d 103, 2016 N.Y. LEXIS 1235 (N.Y. 2016), app. denied sub. nom., People v Kareem, 27 N.Y.3d 1000, 59 N.E.3d 1222, 38 N.Y.S.3d 110, 2016 N.Y. LEXIS 1289 (N.Y. 2016).

7. Application to codefendants

Imposing joint and several liability on all perpetrators for entire loss of crime victim caused by their concerted action is more consistent with, and better promotes, dual purposes of restitution statute to ensure, to maximum extent possible, that victims will be made whole and offenders will be rehabilitated and deterred; thus, court correctly refused to divide restitution amount equally between defendant and his accomplice. People v Kim, 91 N.Y.2d 407, 671 N.Y.S.2d 420, 694 N.E.2d 421, 1998 N.Y. LEXIS 596 (N.Y. 1998).

Under procedure for collection of restitution, official designated by court to receive payment should be obligated to apply to court for modification or elimination of restitution in case involving one or more defendants where restitution has been partially or wholly paid by another defendant, and should also report to court amount of restitution paid by any defendant in case that could result in duplicative or inequitable apportionment of payments; in order to facilitate this procedure, it is imperative that defendant who made restitution be given notice, similar to that provided to victim under CLS CPL § 420.10(5), of (1) any other payments made by codefendants, or (2) any application to modify or eliminate restitution portion of sentence. People v Turco, 130 A.D.2d 785, 515 N.Y.S.2d 853, 1987 N.Y. App. Div. LEXIS 46818 (N.Y. App. Div. 2d Dep't 1987).

On conviction of attempted robbery, defendant was properly made to pay entire amount of victim's loss, even though 4 defendants were convicted for their parts in crime and both she and another perpetrator were required to make restitution, since legislative intent of restitution statutes is to make victim whole and to serve rehabilitative purpose of requiring defendant to appreciate economic consequences of his crime, and intent would be fostered by requiring each defendant to be jointly and severally responsible for entire amount of damage caused; however, defendant should receive notice of any further proceeding affecting restitution to be paid to victims, which notice should be similar to that provided to victim under CLS CPL § 420.10(5). People v Turco, 130 A.D.2d 785, 515 N.Y.S.2d 853, 1987 N.Y. App. Div. LEXIS 46818 (N.Y. App. Div. 2d Dep't 1987).

Following conviction for attempted unauthorized use of vehicle, defendant would be required to pay restitution for ½ of amount of damages caused by accident in which he was passenger in subject vehicle, even though codefendant driver had testified that defendant had told him to stop vehicle just prior to accident, since defendant nonetheless had aided codefendant in unauthorized use and thus was liable for codefendant's conduct while driving. People v Rivera, 135 Misc. 2d 350, 515 N.Y.S.2d 397, 1987 N.Y. Misc. LEXIS 2225 (N.Y. Dist. Ct. 1987).

Under N.Y. Penal Law § 60.27(4)(a), liability need not be apportioned among accomplices according to their percentage of fault or the precise harm that their individual actions caused, and while § 60.27(4)(a), is silent on the issue, imposing joint and several liability on all perpetrators for the entire loss of the victim caused by their concerted action is more consistent with the purposes of N.Y. Penal Law § 60.27(1). People v Stone, 307 A.D.2d 387, 761 N.Y.S.2d 722, 2003 N.Y. App. Div. LEXIS 7692 (N.Y. App. Div. 3d Dep't), app. denied, 100 N.Y.2d 645, 769 N.Y.S.2d 211, 801 N.E.2d 432, 2003 N.Y. LEXIS 4352 (N.Y. 2003).

8. Who is entitled to restitution

Security firm guard who pleaded guilty to fourth-degree attempted arson and third-degree criminal mischief after setting fire to photocopy room of building she was assigned to guard could be ordered to make restitution to her employer as term of probation where employer had already reimbursed company whose property was destroyed, and since neither CLS Penal § 60.27 nor § 65.10 precluded restitution to someone other than direct victim of crime and security firm's liability was dependent on its employment relationship with defendant. People v Hall-Wilson, 69 N.Y.2d 154, 513 N.Y.S.2d 73, 505 N.E.2d 584, 1987 N.Y. LEXIS 15326 (N.Y. 1987).

Despite a welfare recipient's acquittal of theft offenses, jury's determination that she was guilty of three counts of filing false instruments in which she omitted to mention earned income supported the trial court's award of restitution, in the amount of benefits overpayments, to the county social services department. People v Horne, 97 N.Y.2d 404, 740 N.Y.S.2d 675, 767 N.E.2d 132, 2002 N.Y. LEXIS 488 (N.Y. 2002).

Defendant was properly ordered to pay restitution to victim's parents, who were billed for hospital services rendered to victim and for his funeral expenses, since amount of loss was readily ascertainable from bills for those services, which were appended to presentence report. People v Canada, 156 A.D.2d 1001, 549 N.Y.S.2d 286, 1989 N.Y. App. Div. LEXIS 16197 (N.Y. App. Div. 4th Dep't 1989), app. denied, 75 N.Y.2d 964, 556 N.Y.S.2d 249, 555 N.E.2d 621, 1990 N.Y. LEXIS 1772 (N.Y. 1990).

Defendant may be compelled to pay restitution to murder victim's family for hospital or funeral expenses. People v Evans, 242 A.D.2d 948, 662 N.Y.S.2d 651, 1997 N.Y. App. Div. LEXIS 10554 (N.Y. App. Div. 4th Dep't), app. denied, 91 N.Y.2d 834, 667 N.Y.S.2d 687, 690 N.E.2d 496, 1997 N.Y. LEXIS 4323 (N.Y. 1997).

Business tenant of building vandalized by defendant was "victim" for purpose of receiving restitution where defendant damaged windows in building and computer used by tenant in his business. People v Christman, 265 A.D.2d 856, 696 N.Y.S.2d 594, 1999 N.Y. App. Div. LEXIS 9936 (N.Y. App. Div. 4th Dep't 1999), app. denied, 94 N.Y.2d 878, 705 N.Y.S.2d 10, 726 N.E.2d 487, 2000 N.Y. LEXIS 276 (N.Y. 2000).

Defendant's objection to an order of restitution in his criminal matter which directed that he make payment to individuals who were not named in the indictment and/or who did not testify lacked merit pursuant to N.Y. Penal Law § 60.27. People v DeDeo, 59 A.D.3d 846, 874 N.Y.S.2d 291, 2009 N.Y. App. Div. LEXIS 1363 (N.Y. App. Div. 3d Dep't), app. denied, 12 N.Y.3d 782, 879 N.Y.S.2d 59, 906 N.E.2d 1093, 2009 N.Y. LEXIS 1580 (N.Y. 2009).

Drug addicts are victims for purposes of restitution under CLS Penal § 60.27. People v Lopez, 139 Misc. 2d 448, 528 N.Y.S.2d 748, 1988 N.Y. Misc. LEXIS 221 (N.Y. Sup. Ct. 1988), amended, aff'd, 162 A.D.2d 621, 557 N.Y.S.2d 93, 1990 N.Y. App. Div. LEXIS 7691 (N.Y. App. Div. 2d Dep't 1990).

With regard to the order requiring defendant to pay $3,600 in arson reparations to the resident of the adjacent home, defendant did not request a hearing and the neighbor's uncontroverted testimony sufficiently established the cost of repairs necessitated by the offenses, obviating the need for a hearing. People v Wojes, 306 A.D.2d 754, 763 N.Y.S.2d 103, 2003 N.Y. App. Div. LEXIS 7431 (N.Y. App. Div. 3d Dep't), app. denied, 100 N.Y.2d 600, 766 N.Y.S.2d 176, 798 N.E.2d 360, 2003 N.Y. LEXIS 3676 (N.Y. 2003).

Since arson restitution was sought on behalf of the neighbor, the trial court lacked the authority to also order restitution to the city. People v Wojes, 306 A.D.2d 754, 763 N.Y.S.2d 103, 2003 N.Y. App. Div. LEXIS 7431 (N.Y. App. Div. 3d Dep't), app. denied, 100 N.Y.2d 600, 766 N.Y.S.2d 176, 798 N.E.2d 360, 2003 N.Y. LEXIS 3676 (N.Y. 2003).

9. —Judgment creditors

Judgment creditors were not entitled to collect judgment from restitution fund held by county Probation Department pursuant to plea-bargained sentence by which judgment debtor was required to establish restitution fund under CLS Penal § 60.27 where judgment establishing restitution fund was prior in time to money judgment obtained by judgment creditors, and judgment debtor, having surrendered money to Probation Department, had no interest in restitution account that could be executed against; proper remedy for judgment creditors was to appeal from decision which had denied their application to share in restitution fund on pro rata basis with other claimants. Hanrahan v Albany County Probation Dep't, 119 A.D.2d 334, 508 N.Y.S.2d 283, 1986 N.Y. App. Div. LEXIS 60629 (N.Y. App. Div. 3d Dep't 1986).

Under CLS Penal § 60.27, County Court improperly dismissed claim of criminal defendant's judgment creditors against restitution fund established after defendant was convicted of fraud in connection with operation of one of his several businesses, where dismissal was based on fact that incident which led to creditors' judgment involved fraudulent scheme in another of defendant's businesses, and neither that business nor incident were subject of any criminal indictment; second definitional category of "offense" in § 60.27(4) is not limited to conduct which has resulted in conviction or even filing of formal charges, and matter would therefore be remanded to County Court for determination as to whether factual basis of creditors' claim was part of same criminal transaction underlying defendant's criminal conviction. People v Prewett, 126 A.D.2d 86, 513 N.Y.S.2d 282, 1987 N.Y. App. Div. LEXIS 41128 (N.Y. App. Div. 3d Dep't), app. dismissed, 70 N.Y.2d 693, 518 N.Y.S.2d 1028, 512 N.E.2d 554, 1987 N.Y. LEXIS 17961 (N.Y. 1987).

Judgment creditors of criminal who pleaded guilty to charges of criminal fraud and who established restitution fund with county probation department pursuant to terms of plea bargain are not entitled to attach restitution fund since moneys paid by criminal to fund do not constitute property in which criminal, as judgment debtor, has interest since he can neither assign nor transfer any of fund; by limiting claimants to fund to those who were defrauded by specific corporate identity of criminal rather then several other corporate identities maintained, sentencing judge improperly created separate class of preferred creditors, and action may be instituted to compel inclusion of petitioners in any restitution award. Hanrahan v Albany County Probation Dep't, 128 Misc. 2d 604, 490 N.Y.S.2d 709, 1985 N.Y. Misc. LEXIS 2964 (N.Y. Sup. Ct. 1985), aff'd, 119 A.D.2d 334, 508 N.Y.S.2d 283, 1986 N.Y. App. Div. LEXIS 60629 (N.Y. App. Div. 3d Dep't 1986).

10. —Insurers

In light of strong legislative policy favoring restitution for all actual monetary losses caused by criminal conduct, insurer's payment of injured crime victim's medical expenses is sufficient to bring insurer within category of representatives of victim eligible for restitution, and it was not error for court to require defendant to make restitution for portion of victim's medical expenses paid by health insurer; moreover, insurer was legally obligated under its insurance contract to pay for victim's medical expenses and, as such, was properly classified as victim in its own right. People v Kim, 91 N.Y.2d 407, 671 N.Y.S.2d 420, 694 N.E.2d 421, 1998 N.Y. LEXIS 596 (N.Y. 1998).

It was not abuse of discretion to require defendant convicted of third degree criminal mischief to pay portion of restitution to victim's insurance carrier since carrier had reimbursed victim for damage to her car and was therefore "victim" under CLS Penal §§ 60.27 and 65.10. People v Chery, 126 A.D.2d 659, 511 N.Y.S.2d 88, 1987 N.Y. App. Div. LEXIS 41789 (N.Y. App. Div. 2d Dep't 1987).

Court properly made portion of restitution payable to insurer of victim where victim had been reimbursed by insurer for portion of total monetary loss suffered due to defendant's criminal conduct. People v Turco, 130 A.D.2d 785, 515 N.Y.S.2d 853, 1987 N.Y. App. Div. LEXIS 46818 (N.Y. App. Div. 2d Dep't 1987).

Court properly directed defendant to make restitution for cost of medical care paid by victim's insurer and for sick leave borne by victim's employer; but it was improper to direct that those sums be paid to assault victim, rather than to insurer and employer respectively. People v McDaniel, 219 A.D.2d 861, 631 N.Y.S.2d 957, 1995 N.Y. App. Div. LEXIS 10994 (N.Y. App. Div. 4th Dep't 1995), app. denied, 88 N.Y.2d 850, 644 N.Y.S.2d 697, 667 N.E.2d 347, 1996 N.Y. LEXIS 1944 (N.Y. 1996).

In ordering restitution under CLS Penal § 60.27, it is proper exercise of sentencing court's discretion to require restitution to insurance company which has paid actual victim of defendant's

criminal activity. People v Lightfoot, 147 Misc. 2d 918, 559 N.Y.S.2d 936, 1990 N.Y. Misc. LEXIS 435 (N.Y. Dist. Ct. 1990).

11. —Employer of injured victim

Sentencing court acted properly in requiring defendant, convicted of burglary and attempted burglary, to make restitution of $500.34 to Nassau County, as employer of off-duty police officer, since county had become legally obligated to incur expenses for medical costs and sick leave because of injuries sustained by officer in attempting to arrest defendant. People v Cruz, 81 N.Y.2d 996, 599 N.Y.S.2d 533, 615 N.E.2d 1017, 1993 N.Y. LEXIS 1171 (N.Y. 1993).

Sentencing court properly required defendant to pay restitution to police department which had borne loss of sick time taken by off-duty detective who was injured by defendant during course of defendant's arrest since (1) department suffered loss in its role as employer, not as result of operational law enforcement activities, and (2) detective, who interrupted burglary which led to one of defendant's convictions, clearly was victim of offense arising from same criminal transaction as one of crimes for which defendant was convicted. People v Cruz, 80 N.Y.2d 928, 184 A.D.2d 521, 584 N.Y.S.2d 184, 1992 N.Y. App. Div. LEXIS 7632 (N.Y. App. Div. 2d Dep't 1992), aff'd, 81 N.Y.2d 996, 599 N.Y.S.2d 533, 615 N.E.2d 1017, 1993 N.Y. LEXIS 1171 (N.Y. 1993).

12. —Law enforcement agancy

Law enforcement agency is not "victim" as defined in CLS Penal § 60.27 and thus is not entitled to receive restitution from defendant of drug "buy" money expended in effectuating arrest; such expenditure is part of agency's normal operating costs. People v Rowe, 152 A.D.2d 907, 544 N.Y.S.2d 97, 1989 N.Y. App. Div. LEXIS 9739 (N.Y. App. Div. 4th Dep't 1989), aff'd, 75 N.Y.2d 948, 555 N.Y.S.2d 689, 554 N.E.2d 1277, 1990 N.Y. LEXIS 945 (N.Y. 1990).

Defendant could not be required as condition of probation to reimburse county for expense of transporting her back from Florida, since no provision of Penal Law vests court with such authority, and since county did not fall within coverage of victims' compensation statute; county was not party standing in shoes of "victim of crime" as contemplated by CLS Penal § 60.27, nor did transportation expense constitute "loss or damage" within meaning of that statute. People v Raines, 157 A.D.2d 874, 550 N.Y.S.2d 142, 1990 N.Y. App. Div. LEXIS 40 (N.Y. App. Div. 3d Dep't 1990).

Part of defendant's sentence which ordered restitution in sum of $20 to reimburse police department for pre-recorded buy money used in crack-cocaine sale on which prosecution was premised required vacation since law enforcement agency is not "victim" within meaning of CLS Penal § 60.27; because such restitution is unauthorized by statute, it required vacation even though defendant agreed to it as part of plea bargain. People v Simmons, 171 A.D.2d 822, 567 N.Y.S.2d 765, 1991 N.Y. App. Div. LEXIS 3687 (N.Y. App. Div. 2d Dep't 1991).

In prosecution for first degree attempted possession of controlled substance, court erred in ordering defendant to make restitution of unrecovered "buy" money in addition to imposing promised sentence; it is improper for court to order defendant to pay restitution for moneys expended in apprehending him. People v Vigoya, 173 A.D.2d 582, 570 N.Y.S.2d 1015, 1991 N.Y. App. Div. LEXIS 8307 (N.Y. App. Div. 2d Dep't 1991).

In prosecution for second degree sale of controlled substance, court improperly required defendant to make restitution of $700, which represented money used by undercover officer to purchase controlled substances from defendant, since police department was not victim within meaning of CLS Penal § 60.27, notwithstanding that defendant failed to protest directive at time it was issued. People v Hernandez, 173 A.D.2d 643, 570 N.Y.S.2d 224, 1991 N.Y. App. Div. LEXIS 8237 (N.Y. App. Div. 2d Dep't 1991).

In prosecution for fourth degree grand larceny in which defendant was arrested in Nebraska for auto theft, County Court erred in directing defendant to make reparations to county for expense of transporting arresting officer from Nebraska for trial, since county did not stand in shoes of victim. People v Stacey, 173 A.D.2d 960, 569 N.Y.S.2d 470, 1991 N.Y. App. Div. LEXIS 5613 (N.Y. App. Div. 3d Dep't), app. denied, 79 N.Y.2d 832, 580 N.Y.S.2d 213, 588 N.E.2d 111, 1991 N.Y. LEXIS 5809 (N.Y. 1991).

Restitution plus surcharge was improperly imposed for expenses incurred in returning defendant to state, even though Legislature had amended CLS Penal § 60.27 so that law enforcement agency could be considered victim under restitution statute, where (1) restitution was ordered prior to effective date of amendment, and (2) amendment only authorized restitution of funds expended in purchase of controlled substance. People v Snow, 180 A.D.2d 698, 579 N.Y.S.2d 714, 1992 N.Y. App. Div. LEXIS 1428 (N.Y. App. Div. 2d Dep't 1992).

In imposing plea-bargained prison sentence for second degree criminal sale of controlled substance, court erred in also ordering defendant to make restitution for unrecovered "buy money"; it was improper for court to order defendant to pay restitution for moneys expended in apprehending him. People v Murphy, 180 A.D.2d 763, 580 N.Y.S.2d 402, 1992 N.Y. App. Div. LEXIS 2635 (N.Y. App. Div. 2d Dep't 1992).

Where defendant's sentence of probation was revoked on finding that he had violated condition of probation, court improperly required defendant to pay $40 in restitution to district attorney's office since district attorney's office was not "victim" of crime pursuant to CLS Penal § 60.27. People v Logan, 185 A.D.2d 994, 587 N.Y.S.2d 998, 1992 N.Y. App. Div. LEXIS 10354 (N.Y. App. Div. 2d Dep't 1992).

Court would delete provision of sentence which required that defendant pay restitution in amount of $2,000, which represented "buy" money used in drug transaction with undercover officers, where sentence was imposed before passage of amendment to CLS Penal § 60.27 which authorized such restitution. People v Dubner, 186 A.D.2d 580, 588 N.Y.S.2d 802, 1992 N.Y. App. Div. LEXIS 11098 (N.Y. App. Div. 2d Dep't 1992).

Court improperly directed defendant to repay fees of assigned counsel as condition of probation since there is no statutory authority for such directive. People v Palmeri, 186 A.D.2d 1075, 588 N.Y.S.2d 227, 1992 N.Y. App. Div. LEXIS 11744 (N.Y. App. Div. 4th Dep't 1992).

Court erred in ordering defendant to pay restitution to reimburse sheriff for monies expended to secure defendant's return to New York on warrant issued for his failure to appear on DWI charge, for inasmuch as no bail jumping charge was ever filed, defendant did not commit "offense" within meaning of CLS Penal § 60.27(4)(a) for which restitution could properly be ordered; further, sheriff's department was not "victim" within meaning of CLS Penal § 60.27(4)(b), since expenditure of public monies by sheriff's department in returning defendant to jurisdiction of court for prosecution is part of normal law enforcement operating costs. People v Watson, 197 A.D.2d 880, 602 N.Y.S.2d 471, 1993 N.Y. App. Div. LEXIS 9286 (N.Y. App. Div. 4th Dep't 1993).

On defendant's conviction of third degree sale of drugs, court did not err in imposing $40 in restitution to reimburse police for funds used to purchase drugs, and court was not required to conduct hearing to determine amount of restitution. People v Mesquite, 234 A.D.2d 395, 651 N.Y.S.2d 546, 1996 N.Y. App. Div. LEXIS 13042 (N.Y. App. Div. 2d Dep't 1996), app. denied, 89 N.Y.2d 1013, 658 N.Y.S.2d 251, 680 N.E.2d 625, 1997 N.Y. LEXIS 1123 (N.Y. 1997), app. denied, 89 N.Y.2d 1013, 658 N.Y.S.2d 251, 680 N.E.2d 625 (N.Y. 1997).

Defendant who pleaded guilty to third degree criminal sale of controlled substance pursuant to negotiated plea bargain including sentence of imprisonment and $5,000 fine would also be ordered to make restitution to Drug Enforcement Administration (DEA) for $8,200 DEA paid to purchase controlled substance from defendant, since CLS Penal § 60.27(1) allows court to consider restitution in addition to any other dispositions authorized by CLS Penal Art 60, and DEA could be considered "victim" within meaning of § 60.27(1). People v Brown, 145 Misc. 2d 724, 547 N.Y.S.2d 987, 1989 N.Y. Misc. LEXIS 720 (N.Y. Sup. Ct. 1989).

Defendant could not be ordered to reimburse county for investigative costs as condition of probation, pursuant to CLS Penal §§ 60.27(1) and 65.10(2)(g), because such reimbursement would not constitute "restitution" as that term has been interpreted and defined by case law; however, such condition was authorized under CLS Penal § 65.10(5). People v Patino, 174 Misc. 2d 359, 664 N.Y.S.2d 406, 1997 N.Y. Misc. LEXIS 475 (N.Y. County Ct. 1997).

13. Need for hearing and findings

Where defendant's attorneys strenuously urged before sentencing that restitution amount was not adequately supported by record and sought hearing, court was required to grant hearing pursuant to CLS Penal § 60.27(2) irrespective of level of evidence in record, and to provide defendant with reasonable opportunity to contest People's evidence or supply evidence on his own behalf. People v Consalvo, 89 N.Y.2d 140, 651 N.Y.S.2d 963, 674 N.E.2d 672, 1996 N.Y. LEXIS 3577 (N.Y. 1996).

Court would reverse defendant's sentence which directed restitution of $7,242.49 to be paid over 52-month period as condition of 5-year term of probation, and new hearing would be ordered regarding those issues, where record and probation department's restitution summary were insufficient to enable court to determine amount of restitution and manner of performance. People v Miller, 133 A.D.2d 784, 520 N.Y.S.2d 67, 1987 N.Y. App. Div. LEXIS 51823 (N.Y. App. Div. 2d Dep't), app. denied, 70 N.Y.2d 934, 524 N.Y.S.2d 686, 519 N.E.2d 632, 1987 N.Y. LEXIS 19751 (N.Y. 1987).

Sentencing memorandum prepared by assistant district attorney was not sufficient basis on which to order restitution without hearing where no proof was otherwise presented as to amount of loss caused by offense; thus, order of restitution would be vacated and matter remitted for hearing thereon. People v Dixon, 134 A.D.2d 877, 522 N.Y.S.2d 49, 1987 N.Y. App. Div. LEXIS 51067 (N.Y. App. Div. 4th Dep't 1987).

Hearing was required on amount of loss caused by defendant in order to determine proper amount of restitution where (1) defendant was convicted on his plea of guilty, (2) defense counsel contested amount of loss claimed by People and expressly requested hearing, (3) record was insufficient to support finding of proper amount of restitution and (4) court improperly relied upon amounts recited in presentence report or in sentencing memorandum prepared by district attorney. People v Millar, 144 A.D.2d 1032, 534 N.Y.S.2d 631, 1988 N.Y. App. Div. LEXIS 14620 (N.Y. App. Div. 4th Dep't 1988).

No hearing was necessary to fix amount of restitution required by defendant who pleaded guilty to possession of stolen property where (1) at time of plea, court stated that defendant would be required to make restitution for any moneys received in amount agreed on between parties or, in absence of agreement, fixed by court after hearing, and (2) at time of sentencing, defense counsel stated for record that defendant and People had agreed that $40,000 in restitution was acceptable amount. People v Palella, 148 A.D.2d 838, 539 N.Y.S.2d 111, 1989 N.Y. App. Div. LEXIS 2816 (N.Y. App. Div. 3d Dep't), app. denied, 74 N.Y.2d 795, 545 N.Y.S.2d 556, 544 N.E.2d 234, 1989 N.Y. LEXIS 5062 (N.Y. 1989).

Sentence imposing restitution as part of sentence on conviction of fourth degree grand larceny, on plea of guilty, was inappropriate where defendant did not explicitly admit amount of victim's monetary loss, and thus hearing with respect to amount of restitution was required as matter of law. People v Kade, 153 A.D.2d 907, 545 N.Y.S.2d 609, 1989 N.Y. App. Div. LEXIS 11841 (N.Y. App. Div. 2d Dep't 1989).

In robbery prosecution, court did not err in failing to conduct hearing on amount of restitution before imposing sentence requiring defendant to pay $900 to victim, since record was sufficient to allow court to make finding as to fruits of offense. People v Welsher, 154 A.D.2d 915, 545 N.Y.S.2d 870, 1989 N.Y. App. Div. LEXIS 12917 (N.Y. App. Div. 4th Dep't), app. denied, 74 N.Y.2d 952, 550 N.Y.S.2d 287, 549 N.E.2d 489, 1989 N.Y. LEXIS 4614 (N.Y. 1989).

Court erred in ordering defendant to pay restitution without conducting hearing to determine correct amount where sole basis for restitution order was statement of assistant district attorney that insurance company had sustained loss in amount of $1,661.04 based on its reimbursement of one crime victim. People v Williams, 154 A.D.2d 945, 547 N.Y.S.2d 166, 1989 N.Y. App. Div. LEXIS 13091 (N.Y. App. Div. 4th Dep't 1989), app. denied, 75 N.Y.2d 819, 552 N.Y.S.2d 569, 551 N.E.2d 1247, 1990 N.Y. LEXIS 344 (N.Y. 1990).

In prosecution for second degree grand larceny arising from theft of over $1,000,000, defendants were entitled to vacatur of their sentences and hearing on restitution where (1) at time of guilty pleas, court declared its intention to impose sentence of one to 3 years, stated that it would hold restitution hearing, and also stated that it would impose harsher sentences if defendants failed to appear or had further trouble with law, and (2) at sentencing hearing, court noted that $700,000 remained unaccounted for, found that defendants had not complied with condition of restitution or even indicated location of assets which could be used for restitution, and sentenced defendants to harsher term than specified in plea agreement; court neither fulfilled promise to hold restitution hearing nor conformed to CLS Penal § 60.27(2) which requires such hearing. People v Alonzo, 155 A.D.2d 233, 546 N.Y.S.2d 617, 1989 N.Y. App. Div. LEXIS 13706 (N.Y. App. Div. 1st Dep't 1989).

In robbery prosecution in which defendant pleaded guilty, Appellate Division would delete provision of judgment which required defendant to make restitution in amount of $560.84 since plea record and presentence report were insufficient to enable court to determine proper amount of restitution, and thus hearing was required. People v Gudat, 155 A.D.2d 554, 547 N.Y.S.2d 585, 1989 N.Y. App. Div. LEXIS 14245 (N.Y. App. Div. 2d Dep't 1989).

In prosecution for welfare fraud in which defendant pleaded guilty to lesser charge of fourth degree grand larceny and agreed to serve definite sentence and make restitution in amount of $22,168, sentencing court erred in imposing restitution without making requisite findings of fact as to amount thereof where only information supplied to court was presentence probation report indicating that defendant stole estimated $22,168 in cash assistance and food stamps by falsely reporting her income. People v Baker, 156 A.D.2d 766, 549 N.Y.S.2d 187, 1989 N.Y. App. Div. LEXIS 15499 (N.Y. App. Div. 3d Dep't 1989).

Colloquy between court and counsel, and review of insurance company bill concerning cost of variety of repairs, which defendant did not concede warranted restitution and for which court did not determine responsibility, did not satisfy requirement that court conduct hearing and determine amount of loss and manner of payment. People v Mela, 172 A.D.2d 630, 568 N.Y.S.2d 432, 1991 N.Y. App. Div. LEXIS 4639 (N.Y. App. Div. 2d Dep't 1991).

Matter would be remitted for hearing with respect to appropriate amount of restitution where sentencing court improperly relied on figures in defendant's probation report in calculating amount of restitution and failed to require production of competent evidence sufficient to support independent findings of fact. People v Jones, 172 A.D.2d 693, 570 N.Y.S.2d 966, 1991 N.Y. App. Div. LEXIS 4887 (N.Y. App. Div. 2d Dep't 1991).

Hearing was warranted, as matter of law, with respect to proper amount of restitution since adequate basis for determining amount of loss caused by defendant's crime of third degree unauthorized use of motor vehicle was not sufficiently provided by (1) review of vehicle's repair bill, and (2) reluctant consent of defendant, who stated that he was unable to make restitution, to entry of civil judgment. People v Jackson, 180 A.D.2d 755, 580 N.Y.S.2d 390, 1992 N.Y. App. Div. LEXIS 2637 (N.Y. App. Div. 2d Dep't 1992).

Defendant was entitled to vacatur of sentencing provision which required him to make restitution of $16 million, and matter would be remitted for hearing in accordance with CLS CPL § 400.30 on issue of restitution, where court never made express finding that fruits of offenses amounted to $16 million, jury's verdict established only that defendant had stolen in excess of $1 million, and defendant's attorney raised issue at sentencing, even though defendant himself failed to appear. People v Weinberg, 183 A.D.2d 932, 586 N.Y.S.2d 132, 1992 N.Y. App. Div. LEXIS 7600 (N.Y. App. Div. 2d Dep't), app. denied, 80 N.Y.2d 977, 591 N.Y.S.2d 147, 605 N.E.2d 883, 1992 N.Y. LEXIS 4366 (N.Y. 1992).

Sentencing court properly ordered defendant to pay restitution without first conducting hearing where (1) defendant agreed with county probation department's report that restitution in specified amount was appropriate to compensate insurance company which had paid claim made by homeowner from whom defendant had stolen various items, and (2) defendant agreed to pay specified amount to police department which had borne loss of sick time taken by off-duty detective injured by defendant during

course of his arrest. People v Cruz, 80 N.Y.2d 928, 184 A.D.2d 521, 584 N.Y.S.2d 184, 1992 N.Y. App. Div. LEXIS 7632 (N.Y. App. Div. 2d Dep't 1992), aff'd, 81 N.Y.2d 996, 599 N.Y.S.2d 533, 615 N.E.2d 1017, 1993 N.Y. LEXIS 1171 (N.Y. 1993).

Restitution hearing was not required where parties stipulated as to amount that defendant received for illegal acts, and there was nothing in record to establish that he was entitled to offset against that amount. People v Feldman, 204 A.D.2d 347, 611 N.Y.S.2d 603, 1994 N.Y. App. Div. LEXIS 4526 (N.Y. App. Div. 2d Dep't 1994).

Court did not violate CLS Penal § 60.27 by imposing restitution without conducting hearing to determine proper amount where defendant, who was represented by counsel, voluntarily, knowingly and intelligently waived her right to hearing and stipulated to amount of restitution. People v Hill, 207 A.D.2d 1029, 617 N.Y.S.2d 676, 1994 N.Y. App. Div. LEXIS 10360 (N.Y. App. Div. 4th Dep't 1994).

Absent defendant's express consent to, or explicit admission or concession of, victim's monetary loss, and absent sufficient evidence in record as basis for court's determination, sentencing court must hold hearing to determine amount of restitution. People v Jody M., 208 A.D.2d 1019, 618 N.Y.S.2d 587, 1994 N.Y. App. Div. LEXIS 9678 (N.Y. App. Div. 3d Dep't 1994).

Where both the defendant and his counsel consented to amount of restitution ordered, court did not err in refusing to conduct hearing pursuant to CLS Penal § 60.27(2), or in relying on figures recited in 2 letters from victim, where defendant's extensive experience in numismatics, and his position as generous benefactor of his victim, provided him with unparalleled understanding of "tangible and intangible" damages which resulted from his theft of coins from victim. People v Suros, 209 A.D.2d 203, 618 N.Y.S.2d 532, 1994 N.Y. App. Div. LEXIS 10799 (N.Y. App. Div. 1st Dep't 1994), app. denied, 85 N.Y.2d 943, 627 N.Y.S.2d 1005, 651 N.E.2d 930, 1995 N.Y. LEXIS 2022 (N.Y. 1995), cert. denied, 516 U.S. 862, 116 S. Ct. 172, 133 L. Ed. 2d 113, 1995 U.S. LEXIS 6081 (U.S. 1995).

There was no need to conduct hearing as to proper amount of restitution where defendant explicitly admitted amount of victims' monetary loss. People v Stauss, 221 A.D.2d 387, 633 N.Y.S.2d 204, 1995 N.Y. App. Div. LEXIS 11215 (N.Y. App. Div. 2d Dep't), app. denied, 87 N.Y.2d 908, 641 N.Y.S.2d 237, 663 N.E.2d 1267, 1995 N.Y. LEXIS 5580 (N.Y. 1995), app. denied sub. nom., People v Strauss, 87 N.Y.2d 908, 641 N.Y.S.2d 238, 663 N.E.2d 1268, 1995 N.Y. LEXIS 5901 (N.Y. 1995).

Hearing must be conducted by court where trial or plea record and probation report do not provide sufficient basis on which to calculate proper restitution figure. People v Lambert, 221 A.D.2d 1015, 633 N.Y.S.2d 897, 1995 N.Y. App. Div. LEXIS 13541 (N.Y. App. Div. 4th Dep't 1995).

Court erred in ordering restitution without hearing to determine proper amount and defendant's ability to pay it, where trial evidence was insufficient to support finding as to dollar amount of fruits of offense and actual out-of-pocket loss to victims, and no evidence was adduced concerning defendant's financial situation or manner in which she should make restitution. People v Dominique, 229 A.D.2d 719, 645 N.Y.S.2d 625, 1996 N.Y. App. Div. LEXIS 7863 (N.Y. App. Div. 3d Dep't 1996), aff'd, 90 N.Y.2d 880, 661 N.Y.S.2d 597, 684 N.E.2d 27, 1997 N.Y. LEXIS 1401 (N.Y. 1997).

Court erred in summarily determining amount of restitution to reimburse New York State Police Department for cost of repairing police car damaged as direct result of defendant's criminal conduct, based on damage estimate provided by department during presentence investigation, where defendant did not make any statement at either plea hearing or sentencing sufficient to support determination of amount of restitution. People v Barnett, 237 A.D.2d 917, 654 N.Y.S.2d 918, 1997 N.Y. App. Div. LEXIS 3511 (N.Y. App. Div. 4th Dep't), app. denied, 90 N.Y.2d 855, 661 N.Y.S.2d 181, 683 N.E.2d 1055, 1997 N.Y. LEXIS 2379 (N.Y. 1997).

Court properly determined amount of restitution without conducting hearing where defendant agreed to amount during plea colloquy and did not object to amount at sentencing, and court had presentence report that detailed larceny victim's loss. People v McElrath, 241 A.D.2d 932, 661 N.Y.S.2d 361, 1997 N.Y. App. Div. LEXIS 7868 (N.Y. App. Div. 4th Dep't 1997).

Reversal of burglary conviction was not required by County Court's failure to conduct hearing to ascertain proper amount of restitution and to decide defendant's ability to pay, where defendant agreed, as part of his plea agreement, to waive hearing on restitution issue under CLS Penal § 60.27(2) and to pay restitution of $16,362.63, which was precise amount ordered by County Court, without objection, at sentencing. People v Ormsby, 242 A.D.2d 840, 662 N.Y.S.2d 619, 1997 N.Y. App. Div. LEXIS 8839 (N.Y. App. Div. 3d Dep't 1997), app. denied, 91 N.Y.2d 895, 669 N.Y.S.2d 10, 691 N.E.2d 1036, 1998 N.Y. LEXIS 487 (N.Y. 1998), app. denied, 91 N.Y.2d 975, 672 N.Y.S.2d 855, 695 N.E.2d 724, 1998 N.Y. LEXIS 1633 (N.Y. 1998).

Defense counsel's statement that burglary defendant "doesn't wish to contest [the amount of restitution] any further" was express waiver of defendant's right to restitution hearing. People v Chambers, 242 A.D.2d 860, 665 N.Y.S.2d 362, 1997 N.Y. App. Div. LEXIS 10382 (N.Y. App. Div. 4th Dep't 1997).

No hearing was required on amount of restitution where defendant agreed to amount. People v Aldinger, 242 A.D.2d 955, 665 N.Y.S.2d 373, 1997 N.Y. App. Div. LEXIS 10569 (N.Y. App. Div. 4th Dep't 1997).

In sentencing for first degree robbery, court properly imposed restitution without conducting hearing where amount of restitution ordered was condition of defendant's guilty plea, and defendant agreed to that amount at his plea allocution. People v Bushati, 246 A.D.2d 663, 666 N.Y.S.2d 953, 1998 N.Y. App. Div. LEXIS 580 (N.Y. App. Div. 2d Dep't), app. denied, 91 N.Y.2d 940, 671 N.Y.S.2d 720, 694 N.E.2d 889, 1998 N.Y. LEXIS 1098 (N.Y. 1998).

Victim witness statement, although properly considered in setting amount of restitution for third degree robbery, was insufficient basis on which to order restitution without hearing. People v Lynch, 255 A.D.2d 1001, 681 N.Y.S.2d 183, 1998 N.Y. App. Div. LEXIS 12300 (N.Y. App. Div. 4th Dep't 1998), app. denied, 92 N.Y.2d 1051, 685 N.Y.S.2d 429, 708 N.E.2d 186, 1999 N.Y. LEXIS 333 (N.Y. 1999).

On remission of case for resentencing, defendant convicted of second degree assault was entitled to hearing on amount of restitution where there was no evidence in plea agreement or in minutes of plea allocution to support amount of restitution ordered. People v Austin, 275 A.D.2d 913, 715 N.Y.S.2d 173, 2000 N.Y. App. Div. LEXIS 9697 (N.Y. App. Div. 4th Dep't 2000).

In prosecution for third degree arson, second degree criminal mischief, and child endangerment, defendant was entitled to hearing on amount of restitution to be paid, and case would be remitted for that purpose, where record did not contain sufficient evidence to support amount ordered. People v Wilson, 275 A.D.2d 1035, 714 N.Y.S.2d 920, 2000 N.Y. App. Div. LEXIS 9588 (N.Y. App. Div. 4th Dep't 2000), app. denied, 96 N.Y.2d 808, 726 N.Y.S.2d 386, 750 N.E.2d 88, 2001 N.Y. LEXIS 1817 (N.Y. 2001).

Sentence conditioned on payment of $19,501.23 in restitution would be remanded for hearing, although defendant had pleaded guilty and agreed to make restitution in that amount, where he made no statement to support amount of restitution ordered by court, record was otherwise devoid of basis for amount, and there was no waiver of restitution hearing. People v White, 282 A.D.2d 396, 723 N.Y.S.2d 665, 2001 N.Y. App. Div. LEXIS 4121 (N.Y. App. Div. 1st Dep't 2001).

Pursuant to N.Y. Penal Law § 60.27(2), a sentencing court must hold a hearing on the amount of restitution to be imposed if the record does not contain sufficient evidence to establish the amount or a hearing is requested by the defendant. People v Wright, 288 A.D.2d 899, 732 N.Y.S.2d 760, 2001 N.Y. App. Div. LEXIS 10779 (N.Y. App. Div. 4th Dep't), app. denied, 97 N.Y.2d 689, 738 N.Y.S.2d 306, 764 N.E.2d 410, 2001 N.Y. LEXIS 4586 (N.Y. 2001).

Trial court did not err in ordering defendant to pay restitution without holding a hearing because, under N.Y. Penal Law § 60.27(2), no hearing was required as defendant did not request a hearing and the record contained sufficient evidence to support the trial court's determination of the amount of the victims'

out-of-pocket losses. People v Charles, 309 A.D.2d 873, 766 N.Y.S.2d 42, 2003 N.Y. App. Div. LEXIS 10883 (N.Y. App. Div. 2d Dep't 2003), app. denied, 1 N.Y.3d 625, 777 N.Y.S.2d 24, 808 N.E.2d 1283, 2004 N.Y. LEXIS 704 (N.Y. 2004).

Since defendant's plea agreement did not mention restitution, a county court erred by ordering restitution as part of the sentence on defendant's guilty plea to arson without offering defendant an opportunity to either withdraw the guilty plea or accept the greater sentence that included restitution. On remand, a hearing under N.Y. Crim. Proc. Law § 400.30 on the proper amount to impose as restitution was required since the original amount set by the county court was not sufficiently supported by the record to satisfy N.Y. Penal Law § 60.27(2). People v Snyder, 23 A.D.3d 761, 803 N.Y.S.2d 779, 2005 N.Y. App. Div. LEXIS 12445 (N.Y. App. Div. 3d Dep't 2005).

Imposition of a restitution order for the first time at a reconvened sentence proceeding did not comply with N.Y. Penal Laws § 60.27. People v Donnelly, 23 A.D.3d 921, 804 N.Y.S.2d 459, 2005 N.Y. App. Div. LEXIS 13333 (N.Y. App. Div. 3d Dep't 2005).

Because the fines imposed on defendant exceeded the maximum authorized by N.Y. Penal Law § 80.00(1)(a) and because N.Y. Penal Law § 60.27(5)(b) required a hearing to establish the medical expenses actually incurred by the victim, the trial court erred in imposing the fines and restitution as part of defendant's sentence. People v Pena, 41 A.D.3d 250, 838 N.Y.S.2d 533, 2007 N.Y. App. Div. LEXIS 7557 (N.Y. App. Div. 1st Dep't), app. denied, 9 N.Y.3d 880, 842 N.Y.S.2d 792, 874 N.E.2d 759, 2007 N.Y. LEXIS 3001 (N.Y. 2007).

Trial court erred in imposing restitution without conducting a hearing to determine the amount thereof. People v Carter, 51 A.D.3d 1139, 857 N.Y.S.2d 356, 2008 N.Y. App. Div. LEXIS 4038 (N.Y. App. Div. 3d Dep't 2008).

Award of restitution was contrary to law because the trial court had to make the final determination based on record evidence, and could not rely on solely on the Probation Department's recommendations or delegate to the Probation Department its authority to set the amount of restitution; a hearing was required to determine the amount. The award of extradition costs as part of the restitution was also unsupported by law. People v Pelkey, 63 A.D.3d 1188, 879 N.Y.S.2d 842, 2009 N.Y. App. Div. LEXIS 4156 (N.Y. App. Div. 3d Dep't), app. denied, 13 N.Y.3d 748, 886 N.Y.S.2d 102, 914 N.E.2d 1020, 2009 N.Y. LEXIS 3699 (N.Y. 2009).

Because the trial record and presentence report did not contain sufficient information to accurately determine the proper amount of restitution under N.Y. Penal Law § 60.27(2), the trial court should have conducted a hearing upon receipt of the probation department's report. People v Rodriguez, 73 A.D.3d 815, 900 N.Y.S.2d 402, 2010 N.Y. App. Div. LEXIS 3893 (N.Y. App. Div. 2d Dep't), app. denied, 15 N.Y.3d 777, 907 N.Y.S.2d 466, 933 N.E.2d 1059, 2010 N.Y. LEXIS 2411 (N.Y. 2010).

Since defendant specifically requested a hearing on the issue of restitution, the county court erred in determining the amount of restitution without holding a hearing in accordance with N.Y. Penal Law § 60.27(2). People v Butti, 294 A.D.2d 591, 742 N.Y.S.2d 570, 2002 N.Y. App. Div. LEXIS 5550 (N.Y. App. Div. 2d Dep't), app. denied, 98 N.Y.2d 729, 749 N.Y.S.2d 479, 779 N.E.2d 190, 2002 N.Y. LEXIS 3592 (N.Y. 2002).

The trial court erred in imposing restitution against defendant without holding a hearing, as a restitution hearing was required when there was insufficient evidence in the record to support a finding of the actual amount of losses or when a hearing was requested by the defendant, N.Y. Penal Law § 60.27(2), and there was not sufficient evidence in the record to support the finding of restitution in the amount imposed by the trial court. People v Peters, 299 A.D.2d 663, 749 N.Y.S.2d 608, 2002 N.Y. App. Div. LEXIS 10750 (N.Y. App. Div. 3d Dep't 2002).

Since defendants did not request a restitution hearing, the record clearly established an evidentiary basis for the specific amounts the trial court ordered, and defendants did not object, the trial court properly ordered that restitution be made even though it did not hold a hearing and make specific findings. People v Lisyansky, 302 A.D.2d 278, 756 N.Y.S.2d 160, 2003 N.Y. App. Div. LEXIS 1532 (N.Y. App. Div. 1st Dep't), app. denied, 100 N.Y.2d 622, 767 N.Y.S.2d 405, 799 N.E.2d 628, 2003 N.Y. LEXIS 3806 (N.Y. 2003).

While defendant did not request a hearing regarding the amount of restitution he was ordered to pay, a hearing had to be held under N.Y. Penal Code § 60.27(2) and N.Y. Crim. Proc. Law § 400.30 because the plea minutes and record did not contain sufficient evidence to support a finding of the amount of restitution that was ordered. People v Harrington, 3 A.D.3d 737, 770 N.Y.S.2d 792, 2004 N.Y. App. Div. LEXIS 633 (N.Y. App. Div. 3d Dep't 2004).

Court vacated a restitution order because the trial court did not holding a hearing as was required under N.Y. Penal Law § 60.27(2) in cases where the record did not contain sufficient information to allow the court to make a finding as to restitution. People v Thomas, 6 A.D.3d 754, 773 N.Y.S.2d 621, 2004 N.Y. App. Div. LEXIS 3691 (N.Y. App. Div. 3d Dep't 2004).

Trial court improperly imposed restitution on defendant without a hearing under N.Y. Penal Law § 60.27(1) because the figure proposed by the People was not based entirely on the trial evidence but also upon an unsworn summary by the assistant attorney general of amounts invested by persons who did not testify at trial as well as upon an estimation of the amount the investors would have received if the project at issue had performed in accordance with defendant's representations. People v Rosado, 28 A.D.3d 215, 811 N.Y.S.2d 664, 2006 N.Y. App. Div. LEXIS 3975 (N.Y. App. Div. 1st Dep't 2006).

As correctly conceded by the People, the trial court erred in failing to conduct a hearing on the issue of restitution where the record did not contain sufficient evidence to accurately determine the proper amount of restitution and the proper manner of payment and there was no showing as to how the trial court determined the amount of restitution; the matter was remitted to the trial court to conduct a hearing on the issues with due consideration given to whether defendant had the ability to pay. People v Myron, 28 A.D.3d 681, 814 N.Y.S.2d 198, 2006 N.Y. App. Div. LEXIS 4600 (N.Y. App. Div. 2d Dep't), app. dismissed, 7 N.Y.3d 850, 823 N.Y.S.2d 780, 857 N.E.2d 75, 2006 N.Y. LEXIS 3464 (N.Y. 2006), app. dismissed, 7 N.Y.3d 886, 826 N.Y.S.2d 178, 859 N.E.2d 918, 2006 N.Y. LEXIS 3639 (N.Y. 2006), cert. denied, 549 U.S. 1326, 127 S. Ct. 1919, 167 L. Ed. 2d 572, 2007 U.S. LEXIS 3862 (U.S. 2007).

It was error to order defendant to pay restitution without conducting a hearing because defendant specifically requested a hearing. People v Perillo, 144 A.D.3d 1399, 41 N.Y.S.3d 776, 2016 N.Y. App. Div. LEXIS 7728 (N.Y. App. Div. 3d Dep't 2016), app. denied, 29 N.Y.3d 948, 76 N.E.3d 1082, 54 N.Y.S.3d 379, 2017 N.Y. LEXIS 863 (N.Y. 2017), app. denied, 29 N.Y.3d 951, 76 N.E.3d 1085, 54 N.Y.S.3d 382, 2017 N.Y. LEXIS 868 (N.Y. 2017).

Trial court erred in imposing restitution as part of defendant's sentence without a hearing because defendant contested the amount of restitution at sentencing and requested a hearing. People v Tyler, 140 A.D.3d 1617, 32 N.Y.S.3d 764, 2016 N.Y. App. Div. LEXIS 4384 (N.Y. App. Div. 4th Dep't), app. denied, 28 N.Y.3d 1127, 73 N.E.3d 364, 51 N.Y.S.3d 24, 2016 N.Y. LEXIS 4121 (N.Y. 2016).

Trial court erred in denying defendant's request for a restitution hearing because once the appellate court reversed the prior judgment and granted defendant a new trial, she was restored to the status obtained before the initial trial and, as a result, it was irrelevant that a hearing was held following the first trial. People v Case, 160 A.D.3d 1448, 76 N.Y.S.3d 696, 2018 N.Y. App. Div. LEXIS 2971 (N.Y. App. Div. 4th Dep't), app. denied, 31 N.Y.3d 1146, 108 N.E.3d 501, 83 N.Y.S.3d 427, 2018 N.Y. LEXIS 2335 (N.Y. 2018), app. denied, 31 N.Y.3d 1146, 108 N.E.3d 501, 83 N.Y.S.3d 427, 2018 N.Y. LEXIS 2353 (N.Y. 2018).

14. —Effect of failure to request hearing

Court was not required to hold hearing to determine actual amount of "out-of-pocket loss" in medical costs where (1) defendant did not request hearing on dollar amount of victim's medical expenses, (2) presentence probation report recited documented itemized-by-provider medical expenses as well as amount reimbursed by victim's health insurer, and (3) defense counsel stated in sentencing colloquy concerning restitution that there was no

dispute over accuracy of amount of victim's medical expenses set forth in presentence report. People v Kim, 91 N.Y.2d 407, 671 N.Y.S.2d 420, 694 N.E.2d 421, 1998 N.Y. LEXIS 596 (N.Y. 1998).

A sentence directing defendant convicted of criminal mischief to make restitution of $1,290 would be remitted for a hearing to determine the proper amount of restitution and manner of performance, even though Penal Law § 65.10 permitted the sentencing court to condition the sentence of probation on the requirement that defendant make restitution or reparation in an amount to be fixed by the court, where Penal Law § 60.27 required the trial court to conduct a hearing on the issue of the amount of reparation or restitution if the record was insufficient to enable the court to make a finding as to the fruits of the offense or the loss or damage caused thereby, and where the record and the presentence report were clearly insufficient to enable the court to determine that amount; moreover, defendant's failure at the time of sentencing to request a hearing on the issue of restitution did not constitute a forfeiture of his right to review, in that the failure to accord him a hearing on that issue constituted a departure from the essential nature of the right to be sentenced as provided by law. People v Clougher, 95 A.D.2d 860, 464 N.Y.S.2d 535, 1983 N.Y. App. Div. LEXIS 18812 (N.Y. App. Div. 2d Dep't 1983).

Defendant's failure to request hearing on matter of restitution did not constitute waiver, since hearing is required if record is insufficient to determine restitution. People v Dixon, 134 A.D.2d 877, 522 N.Y.S.2d 49, 1987 N.Y. App. Div. LEXIS 51067 (N.Y. App. Div. 4th Dep't 1987).

Notwithstanding defendant's failure to request it, hearing to determine amount of restitution to be made to victim was required where record did not contain sufficient evidence on which to premise finding as to value of stolen items. People v Andrea, 141 A.D.2d 740, 529 N.Y.S.2d 837, 1988 N.Y. App. Div. LEXIS 7009 (N.Y. App. Div. 2d Dep't 1988), app. denied, 73 N.Y.2d 888, 538 N.Y.S.2d 801, 535 N.E.2d 1341, 1989 N.Y. LEXIS 1050 (N.Y. 1989).

Matter would be remitted for hearing to determine proper amount of restitution where sentencing court had relied on probation or presentence report in fixing amount of restitution since such reports do not provide sufficient basis on which to order restitution without hearing, and no proof had been developed as to amount of loss sustained by victim because defendant had pleaded guilty; defendant's failure to request hearing at time of sentencing or object to court's summary imposition of restitution condition did not relieve court of its obligation to conduct hearing sua sponte because of essential nature of defendant's right to be sentenced as prescribed by law. People v West, 145 A.D.2d 980, 536 N.Y.S.2d 620, 1988 N.Y. App. Div. LEXIS 14078 (N.Y. App. Div. 4th Dep't 1988).

Assault conviction would be remitted for hearing and redetermination of proper amount of restitution to be paid by assailant to victim where trial court had calculated amount, based on lost wages and damage to victim's vehicle, after off-the-record discussion with probation officer; trial court's method of calculation was legally insufficient notwithstanding purported waiver of hearing by defendant's failure to request it. People v Bohart, 153 A.D.2d 963, 545 N.Y.S.2d 613, 1989 N.Y. App. Div. LEXIS 11526 (N.Y. App. Div. 3d Dep't 1989).

Defendant's failure at time of sentencing to request hearing on issue of proper amount of restitution did not constitute forfeiture of his right to appellate review of restitution order, as failure to accord him hearing on that issue constituted departure from essential nature of right to be sentenced as provided by law. People v Jackson, 175 A.D.2d 930, 573 N.Y.S.2d 630, 1991 N.Y. App. Div. LEXIS 11296 (N.Y. App. Div. 2d Dep't 1991).

Although defendant neither requested hearing as to amount of restitution nor objected to amount offered, she did not thereby forfeit or waive her right of review given essential nature of right to be sentenced in accordance with law. People v Lambert, 221 A.D.2d 1015, 633 N.Y.S.2d 897, 1995 N.Y. App. Div. LEXIS 13541 (N.Y. App. Div. 4th Dep't 1995).

Court did not err in imposing restitution without conducting evidentiary hearing as to victim's actual out-of-pocket losses and defendant's ability to pay where he never requested hearing, and there was sufficient evidence to support court's finding as to victim's actual out-of-pocket loss consisting of unreimbursed medical expenses. People v Gahrey M.O., 231 A.D.2d 909, 647 N.Y.S.2d 626, 1996 N.Y. App. Div. LEXIS 10777 (N.Y. App. Div. 4th Dep't 1996).

Defendant's failure to request hearing in accordance with CLS Penal § 60.27(2) did not constitute forfeiture of his right to have such issue reviewed by appellate court. People v Leonidow, 256 A.D.2d 917, 683 N.Y.S.2d 310, 1998 N.Y. App. Div. LEXIS 13965 (N.Y. App. Div. 3d Dep't 1998), app. denied, 93 N.Y.2d 875, 689 N.Y.S.2d 437, 711 N.E.2d 651, 1999 N.Y. LEXIS 996 (N.Y. 1999).

In third degree arson prosecution arising from fire at trailer home owned by defendant and his wife, matter was remitted for hearing on restitution because, although defendant did not request hearing, record was insufficient for sentencing court to have ordered restitution as it did where (1) insurance company representative testified as to limits of insurance policy but stated that no money was actually paid to defendant because his claim was denied, and (2) lienholder, who was loss payee for damage to structure and had financial interest of $14,856, testified that insurance company paid him "around $8,500." People v Mangan, 258 A.D.2d 819, 686 N.Y.S.2d 506, 1999 N.Y. App. Div. LEXIS 1959 (N.Y. App. Div. 3d Dep't), app. denied, 93 N.Y.2d 927, 693 N.Y.S.2d 510, 715 N.E.2d 513, 1999 N.Y. LEXIS 1723 (N.Y. 1999).

Restitution was properly ordered without hearing where defendant stipulated to amount of restitution and did not seek hearing to which he was entitled. People v Rocklin, 265 A.D.2d 920, 698 N.Y.S.2d 119, 1999 N.Y. App. Div. LEXIS 10050 (N.Y. App. Div. 4th Dep't 1999), app. denied, 94 N.Y.2d 906, 707 N.Y.S.2d 391, 728 N.E.2d 990, 2000 N.Y. LEXIS 769 (N.Y. 2000).

In prosecution for third and fifth degree possession of stolen property, defendant was properly ordered to pay restitution for stolen chainsaws, despite his contention that he did not steal them and there was no evidence produced or any hearing conducted as to their value, since defendant's "offense" included theft of chainsaws, victim impact statement and trial evidence on issue of valuation provided court with valid basis for fixing monetary value of chainsaws, and defendant made no request for hearing on restitution prior to sentencing. People v Sheehy, 274 A.D.2d 844, 711 N.Y.S.2d 856, 2000 N.Y. App. Div. LEXIS 8295 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 938, 721 N.Y.S.2d 615, 744 N.E.2d 151, 2000 N.Y. LEXIS 4107 (N.Y. 2000).

In prosecution for third degree criminal mischief, court properly fixed amount of restitution without hearing where defendant did not request hearing, and record contained sufficient evidence to support finding as to out-of-pocket loss that defendant caused. People v Stubbs, 281 A.D.2d 498, 721 N.Y.S.2d 562, 2001 N.Y. App. Div. LEXIS 2402 (N.Y. App. Div. 2d Dep't), app. denied, 96 N.Y.2d 908, 730 N.Y.S.2d 806, 756 N.E.2d 94, 2001 N.Y. LEXIS 2957 (N.Y. 2001).

Judgment convicting defendant of second degree robbery would be modified by vacating amount of restitution and remitting case for restitution hearing, even though defendant neither requested hearing nor objected to amount ordered, where neither plea agreement nor minutes of plea allocution supported amount ordered, and victim impact statement was unsworn and thus unreliable. People v Young, 281 A.D.2d 950, 723 N.Y.S.2d 588, 2001 N.Y. App. Div. LEXIS 2806 (N.Y. App. Div. 4th Dep't), app. denied, 96 N.Y.2d 909, 730 N.Y.S.2d 808, 756 N.E.2d 96, 2001 N.Y. LEXIS 2995 (N.Y. 2001).

Defendant's contention that the trial court erred in making a restitution determination under N.Y. Penal Law § 60.27 without a hearing was unavailing; the calculated restitution was a part of the plea bargain. Inasmuch as defendant failed to challenge the trial court's restitution determination or request a hearing on the issue, her current argument was unpreserved. People v Giovanni, 53 A.D.3d 778, 861 N.Y.S.2d 214, 2008 N.Y. App. Div. LEXIS 6532 (N.Y. App. Div. 3d Dep't), app. denied, 11 N.Y.3d 832, 868 N.Y.S.2d 606, 897 N.E.2d 1090, 2008 N.Y. LEXIS 3535 (N.Y. 2008).

15. Amount of restitution

Normally, court should determine amount of restitution at time of sentencing. People v Consalvo, 89 N.Y.2d 140, 651 N.Y.S.2d 963, 674 N.E.2d 672, 1996 N.Y. LEXIS 3577 (N.Y. 1996).

Defendant may concede facts necessary to establish amount of restitution as part of plea allocution; however, where there is no concession of facts, guilty plea alone is not sufficient to support determination of restitution contained in court's statements during plea allocution. People v Consalvo, 89 N.Y.2d 140, 651 N.Y.S.2d 963, 674 N.E.2d 672, 1996 N.Y. LEXIS 3577 (N.Y. 1996).

If court's determination is based on defendant's statement, amount of restitution must reflect more than just court's statement of dollar figure or defendant's conclusory admissions accompanying plea; defendant's statements must contain facts from which victim's actual out-of-pocket loss from offense can be inferred. People v Consalvo, 89 N.Y.2d 140, 651 N.Y.S.2d 963, 674 N.E.2d 672, 1996 N.Y. LEXIS 3577 (N.Y. 1996).

Award to the county social services department of an amount in excess of the $15,000 cap was permissible where the award reflected the actual amount by which the welfare recipient convicted of three counts of filing false instruments had been overpaid. People v Horne, 97 N.Y.2d 404, 740 N.Y.S.2d 675, 767 N.E.2d 132, 2002 N.Y. LEXIS 488 (N.Y. 2002).

When defendant, a general contractor, was convicted of criminal offenses in connection with submitting false subcontractor invoices to a city for which defendant performed work, the People, at a restitution hearing, had to deduct the value of the work defendant actually performed from the face amount of the improper invoices, and it was improper to place the burden of producing this evidence on defendant, under N.Y. Penal Law § 60.27 and N.Y. Crim. Proc. Law § 400.30. People v Tzitzikalakis, 8 N.Y.3d 217, 832 N.Y.S.2d 120, 864 N.E.2d 44, 2007 N.Y. LEXIS 117 (N.Y. 2007).

At a restitution hearing, once the People had established a prima facie case of the victim's out-of-pocket loss, the burden of going forward fell to the defendant to offer evidence contradicting the People's calculation. People v Tzitzikalakis, 8 N.Y.3d 217, 832 N.Y.S.2d 120, 864 N.E.2d 44, 2007 N.Y. LEXIS 117 (N.Y. 2007).

Restitution was the sum necessary to compensate a victim for out-of-pocket losses, under N.Y. Penal Law § 60.27(1), so courts had to consider not only the amount taken by a defendant but also the value of any benefit received by the victim, and a restitution order had to include appropriate offsets or other factors which could properly reduce the total amount. People v Tzitzikalakis, 8 N.Y.3d 217, 832 N.Y.S.2d 120, 864 N.E.2d 44, 2007 N.Y. LEXIS 117 (N.Y. 2007).

N.Y. Penal Law § 60.27 was designed to require a sentencing court to determine and fix the amount of restitution and reparation based upon the dollar amount of the fruits of an offense and the actual out-of-pocket loss to the crime victim, without respect to the extent to which the defendant profited by the offense, and if the court was unable to make a finding as to the actual out-of-pocket loss based on the record before it, or if the defendant so requested, the court had to conduct a hearing in accordance with the procedure set forth in N.Y. Crim. Proc. Law § 400.30, under N.Y. Penal Law § 60.27(2). People v Tzitzikalakis, 8 N.Y.3d 217, 832 N.Y.S.2d 120, 864 N.E.2d 44, 2007 N.Y. LEXIS 117 (N.Y. 2007).

At a restitution hearing, the People bore the burden of proving the victim's out-of-pocket loss - the amount necessary to make the victim whole - by a preponderance of the evidence, and, to meet that burden, the People had to show both components of the restitution equation, the amount taken minus the benefit conferred, as to hold otherwise would contravene both the words and the intent of the statute to prevent the victim from enjoying an unjust enrichment, and the defendant from suffering under an unduly harsh and unreasonable restitution order. People v Tzitzikalakis, 8 N.Y.3d 217, 832 N.Y.S.2d 120, 864 N.E.2d 44, 2007 N.Y. LEXIS 117 (N.Y. 2007).

People's burden of proof at a restitution hearing encompassed both the burden of producing evidence sufficient to establish a prima facie case of the proper restitution amount (the out-of-pocket loss, which included appropriate reductions) as well as the burden of persuasion - that is, the ultimate burden of convincing the hearing court, after all the evidence was submitted, that its restitution figure was, more likely than not, correct. People v Tzitzikalakis, 8 N.Y.3d 217, 832 N.Y.S.2d 120, 864 N.E.2d 44, 2007 N.Y. LEXIS 117 (N.Y. 2007).

Procedures employed at defendant's second restitution hearing were sufficient to comport with the statutory requirements because defendant was given the opportunity to cross-examine the People's witness and put his own witness on the stand at the initial hearing, and the county court offered him the opportunity to call witnesses or put in proof during the second hearing, as well; the trial court did not shift the burden of proof to defendant; and the county court, alone, determined the proper amount of restitution based upon relevant evidence not legally privileged, and after affording defendant a reasonable opportunity to contest the People's evidence and submit his own proof. People v Connolly, 27 N.Y.3d 355, 52 N.E.3d 1170, 33 N.Y.S.3d 144, 2016 N.Y. LEXIS 1099 (N.Y. 2016).

Amount and manner of restitution ordered by court was not excessive, and court properly determined that defendant was able to pay it, where defendant did not contest amount of damages caused by her criminal act and manner in which restitution was to be paid was suggested by her counsel and conceded to be within her means. People v Hall-Wilson, 129 A.D.2d 960, 514 N.Y.S.2d 665, 1987 N.Y. App. Div. LEXIS 45614 (N.Y. App. Div. 4th Dep't 1987).

Court would reduce amount defendant was required to pay for restitution to amount alleged in indictment to have been misappropriated, together with 5 percent surcharge, since defendant could not be ordered to make restitution of greater amount. People v Smith, 146 A.D.2d 722, 537 N.Y.S.2d 65, 1989 N.Y. App. Div. LEXIS 739 (N.Y. App. Div. 2d Dep't 1989).

Court properly ordered defendant to pay restitution of $180, even though defense counsel noted that he had seen no restitution figures other than those stated by district attorney (DA), since defendant was thereafter advised that he had right to hearing on amount of restitution and that one would be held if he disputed $180 figure stated by DA to have been expended by undercover officers, and defendant expressly consented to that amount; however, it was error to impose 5 percent surcharge, as prohibited by CLS Penal § 60.27(9). People v Perez, 203 A.D.2d 665, 610 N.Y.S.2d 643, 1994 N.Y. App. Div. LEXIS 3869 (N.Y. App. Div. 3d Dep't), app. denied, 83 N.Y.2d 970, 616 N.Y.S.2d 23, 639 N.E.2d 763, 1994 N.Y. LEXIS 2517 (N.Y. 1994).

Court improperly fixed amount of restitution without requiring People to provide documentation as to amount of victim's loss, even though defendant consented to pay restitution as part of his sentence, since he did so with proviso that People be required to provide some documentation as to amount of restitution that they requested court impose. People v Dunn, 224 A.D.2d 708, 638 N.Y.S.2d 744, 1996 N.Y. App. Div. LEXIS 1826 (N.Y. App. Div. 2d Dep't), app. denied, 88 N.Y.2d 984, 649 N.Y.S.2d 391, 672 N.E.2d 617, 1996 N.Y. LEXIS 3469 (N.Y. 1996).

Court erred in imposing surcharge of 10 percent of amount of total restitution ordered rather than surcharge of 5 percent directed by CLS Penal § 60.27(8) where there was no affidavit of official or organization designated pursuant to CLS CPL § 420.10(8); it was irrelevant that defendant agreed to amount of restitution and additional surcharge as part of plea agreement. People v Gahrey M.O., 231 A.D.2d 909, 647 N.Y.S.2d 626, 1996 N.Y. App. Div. LEXIS 10777 (N.Y. App. Div. 4th Dep't 1996).

In proceeding to determine amount of restitution defendant should be required to make following his plea of guilty to first degree offering false instrument for filing, court properly refused to consider evidence with respect to any obligations of defendant's girlfriend, or payments by her, because she was not before court and (unlike codefendant) was not legally responsible for paying restitution. People v Frisco, 237 A.D.2d 824, 655 N.Y.S.2d 200, 1997 N.Y. App. Div. LEXIS 2753 (N.Y. App. Div. 3d Dep't), app. denied, 90 N.Y.2d 1011, 666 N.Y.S.2d 106, 688 N.E.2d 1389, 1997 N.Y. LEXIS 3952 (N.Y. 1997).

People did not seek restitution in amount greater than that requested at sentencing where victim impact statement indicated that People might seek restitution in excess of their initial request, defense counsel had opportunity to litigate additional amount at restitution hearing, and information as to full extent of damages was not available for presentation to court at sentencing. People v Holden, 244 A.D.2d 961, 665 N.Y.S.2d 990, 1997 N.Y. App. Div. LEXIS 12364 (N.Y. App. Div. 4th Dep't 1997), app.

denied, 91 N.Y.2d 926, 670 N.Y.S.2d 408, 693 N.E.2d 755, 1998 N.Y. LEXIS 730 (N.Y. 1998).

Sentence of $2^1/_3$ to 7 years for third degree grand larceny, $1^1/_3$ to 4 years for 2 counts of first degree offering false instrument for filing and 2 counts of first degree falsifying business records, one year for second degree offering false instrument for filing and second degree falsifying business records, with all sentences to run concurrently, and payment of $21,062.20 plus surcharge of 5 percent in restitution would not be disturbed where defendant's criminal record included misdemeanor convictions for unauthorized use of motor vehicle and criminal mischief, 3 misdemeanor convictions for driving while intoxicated, and 2 for disorderly conduct. People v Burt, 246 A.D.2d 919, 668 N.Y.S.2d 413, 1998 N.Y. App. Div. LEXIS 729 (N.Y. App. Div. 3d Dep't), app. denied, 91 N.Y.2d 1005, 676 N.Y.S.2d 133, 698 N.E.2d 962, 1998 N.Y. LEXIS 1924 (N.Y. 1998).

Court erred in not determining amount of restitution that defendant was required to pay before sentencing date in order to receive bargained-for concurrent sentence were defendant himself did not concede facts necessary to show amount of restitution, and defense counsel's estimate did not bind defendant to make restitution in specific amount. People v Visser, 256 A.D.2d 1251, 683 N.Y.S.2d 466, 1998 N.Y. App. Div. LEXIS 14495 (N.Y. App. Div. 4th Dep't 1998).

Appellate Division would reverse sentence insofar as it directed defendant to pay restitution in unspecified amount and gave People 90 days to "verify" amount to be paid, and would remit matter to County Court for its determination of amount, manner and time for payment. People v Dickson, 260 A.D.2d 931, 690 N.Y.S.2d 282, 1999 N.Y. App. Div. LEXIS 4446 (N.Y. App. Div. 3d Dep't), app. denied, 93 N.Y.2d 1017, 697 N.Y.S.2d 576, 719 N.E.2d 937, 1999 N.Y. LEXIS 3093 (N.Y. 1999).

Despite the fact that the trial court granted defendant's request for an adjournment and granted defendant's motion for funds to employ a private investigator in preparation for a restitution hearing, defendant failed to offer any evidence to counter the People's evidence of the victim's out-of-pocket expenses; consequently, the amount of restitution owed by defendant under N.Y. Penal Law § 60.27(2) and N.Y. Crim. Proc. Law § 400.30(4) was proven by a preponderance of the evidence. People v Howell, 46 A.D.3d 1464, 847 N.Y.S.2d 811, 2007 N.Y. App. Div. LEXIS 12997 (N.Y. App. Div. 4th Dep't 2007), app. denied, 10 N.Y.3d 841, 859 N.Y.S.2d 400, 889 N.E.2d 87, 2008 N.Y. LEXIS 1701 (N.Y. 2008).

Because it could be inferred under N.Y. Lien Law § 79-a(1) that defendant intended to permanently deprive an owner of funds paid in trust to defendant's company, defendant's N.Y. Crim. Proc. Law § 440.20 motion to set aside a restitution order was properly denied because, under N.Y. Penal Law § 60.27(1), (5)(a), the amount was limited to the fruits of the offense, which were to be returned to the owner. People v Melino, 52 A.D.3d 1054, 860 N.Y.S.2d 660, 2008 N.Y. App. Div. LEXIS 5530 (N.Y. App. Div. 3d Dep't), app. denied, 11 N.Y.3d 791, 866 N.Y.S.2d 617, 896 N.E.2d 103, 2008 N.Y. LEXIS 3779 (N.Y. 2008).

Because the probation department provided an affidavit indicating that the actual cost of the collection and administration of restitution exceeded the initial 5% surcharge, pursuant to N.Y. Penal Law § 60.27(8), the trial court properly directed defendant to pay a 10% surcharge on the restitution ordered. People v Boyzuck, 72 A.D.3d 1530, 900 N.Y.S.2d 530, 2010 N.Y. App. Div. LEXIS 3482 (N.Y. App. Div. 4th Dep't 2010).

Because the victim authorized defendant to sign the victim's name as the victim's attorney-in-fact to 40 checks, which purported to be the authentic creations of the victim under N.Y. Penal Law § 170.00(4), it could not be said that the checks in question violated N.Y. Penal Law §§ 170.10(1), 170.25 even though the recitals in the instrument might have been false or defendant might have exceeded the scope of authority delegated to defendant by the victim; consequently, pursuant to N.Y. Penal Law § 60.27(2), defendant was entitled to a hearing on restitution. People v Ippolito, 89 A.D.3d 1369, 932 N.Y.S.2d 603, 2011 N.Y. App. Div. LEXIS 7950 (N.Y. App. Div. 4th Dep't 2011), aff'd, 20 N.Y.3d 615, 964 N.Y.S.2d 499, 987 N.E.2d 276, 2013 N.Y. LEXIS 612 (N.Y. 2013).

County court erred in imposing a 10 percent surcharge upon the amount of restitution to be collected from defendant in the absence of an affidavit indicating that the actual cost of collection exceeded 5 percent. People v Smith, 121 A.D.3d 1297, 995 N.Y.S.2d 280, 2014 N.Y. App. Div. LEXIS 7156 (N.Y. App. Div. 3d Dep't 2014), app. denied, 25 N.Y.3d 1172, 36 N.E.3d 106, 15 N.Y.S.3d 303, 2015 N.Y. LEXIS 2013 (N.Y. 2015).

People did not sufficiently establish the amount of restitution to be paid by defendant, as it failed to admit the client records into evidence, such that the auditor's testimony regarding defendant's gain from his alleged fraudulent Medicaid billing was conclusory and lacked a proper evidentiary basis. People v Pettersen, 130 A.D.3d 1536, 14 N.Y.S.3d 255, 2015 N.Y. App. Div. LEXIS 5926 (N.Y. App. Div. 4th Dep't), app. denied, 26 N.Y.3d 1010, 42 N.E.3d 221, 20 N.Y.S.3d 551, 2015 N.Y. LEXIS 3785 (N.Y. 2015).

Defendant's challenge to the amount of the restitution award survived his appeal waiver but was unpreserved given his failure to request a restitution hearing and his ultimate agreement to the amount awarded to the victim at sentencing. People v Hunter, 175 A.D.3d 1601, 108 N.Y.S.3d 527, 2019 N.Y. App. Div. LEXIS 6563 (N.Y. App. Div. 3d Dep't), app. denied, 34 N.Y.3d 1078, 139 N.E.3d 832, 116 N.Y.S.3d 174, 2019 N.Y. LEXIS 3748 (N.Y. 2019), app. denied, 34 N.Y.3d 1082, 139 N.E.3d 800, 116 N.Y.S.3d 142, 2019 N.Y. LEXIS 3855 (N.Y. 2019).

Amount of restitution payable to the Crime Victims Board for the family of the victim improperly exceeded $15,000 and violated the statutory cap. People v Grant, 185 A.D.3d 608, 127 N.Y.S.3d 120, 2020 N.Y. App. Div. LEXIS 3746 (N.Y. App. Div. 2d Dep't), app. denied, 35 N.Y.3d 1045, 151 N.E.3d 536, 127 N.Y.S.3d 855, 2020 N.Y. LEXIS 1785 (N.Y. 2020).

Restitution payable to the Crime Victims Board for a second victim's family, the amount in excess of $15,000 did not meet the requirements of this section, since the amount of the defendant's restitution set by the Supreme Court was not intended as reimbursement for the value of the property destroyed. People v Grant, 185 A.D.3d 608, 127 N.Y.S.3d 120, 2020 N.Y. App. Div. LEXIS 3746 (N.Y. App. Div. 2d Dep't), app. denied, 35 N.Y.3d 1045, 151 N.E.3d 536, 127 N.Y.S.3d 855, 2020 N.Y. LEXIS 1785 (N.Y. 2020).

Defendant convicted of conspiracy to sell heroin would be directed to make restitution of over $2 million to drug rehabilitation agency, designated by New York City mayor under CLS CPL § 420.10, based on amount of drugs seized at defendant's arrest, number of addicts drugs would have reached, and lowest annual cost of treating addict on outpatient basis. People v Lopez, 139 Misc. 2d 448, 528 N.Y.S.2d 748, 1988 N.Y. Misc. LEXIS 221 (N.Y. Sup. Ct. 1988), amended, aff'd, 162 A.D.2d 621, 557 N.Y.S.2d 93, 1990 N.Y. App. Div. LEXIS 7691 (N.Y. App. Div. 2d Dep't 1990).

Outside attorney fees expended by crime victim in connection with criminal proceedings reflect "actual out-of-pocket loss to the victim caused by the offense" within meaning of CLS Penal § 60.27(2), and may properly be awarded to victim as part of sentence. People v Young, 163 Misc. 2d 72, 618 N.Y.S.2d 983, 1994 N.Y. Misc. LEXIS 505 (N.Y. Sup. Ct. 1994).

Since the standard of proof at a restitution hearing is preponderance of the evidence, not beyond a reasonable doubt, there is no reason why statistics should not be used in a restitution hearing just as they are used in civil proceedings; therefore, the trial court did not err in considering statistical evidence to determine the amount of loss that was caused by defendant's Medicaid fraud for purposes of setting the amount of defendant's restitution. People v Consalvo, 303 A.D.2d 202, 756 N.Y.S.2d 541, 2003 N.Y. App. Div. LEXIS 2418 (N.Y. App. Div. 1st Dep't), app. denied, 100 N.Y.2d 593, 766 N.Y.S.2d 168, 798 N.E.2d 352, 2003 N.Y. LEXIS 3486 (N.Y. 2003).

Where significant proof against defendant was supplied by defendant's own admissions and by the testimony of defendant's receptionist, and where the trial court properly used statistical evidence and properly weighed conflicting testimony, the People established by a preponderance of the evidence that the loss caused by defendant's Medicaid fraud was at least $500,000; the trial court's consideration of the fact that defendant produced only 347 of the 2,147 patient charts that defendant was required

to keep pursuant to Medicaid regulations did not mean that defendant was improperly "punished" for failing to produce the records, as the trial court simply drew appropriate inferences from the absence of the records within the context of other evidence. People v Consalvo, 303 A.D.2d 202, 756 N.Y.S.2d 541, 2003 N.Y. App. Div. LEXIS 2418 (N.Y. App. Div. 1st Dep't), app. denied, 100 N.Y.2d 593, 766 N.Y.S.2d 168, 798 N.E.2d 352, 2003 N.Y. LEXIS 3486 (N.Y. 2003).

Court vacated a restitution order in excess of $15,000 because defendant did not consent to it, as required under N.Y. Penal Law § 60.27(5)(a) for restitution orders in excess of $15,000. People v Thomas, 6 A.D.3d 754, 773 N.Y.S.2d 621, 2004 N.Y. App. Div. LEXIS 3691 (N.Y. App. Div. 3d Dep't 2004).

When defendant, who pleaded guilty to possessing two forged checks, was ordered to pay restitution not only for the amount of the checks but also for the amount of another check and for damages to the office from which the forged checks were stolen, the record did not allow the appellate court to determine that the additional check and the property damage were part of the same criminal transaction to which defendant pleaded guilty, so the restitution order, as it related to these additional amounts, had to be vacated. People v Casiano, 8 A.D.3d 761, 779 N.Y.S.2d 259, 2004 N.Y. App. Div. LEXIS 7923 (N.Y. App. Div. 3d Dep't 2004).

Because a trial court improperly relieved the People of their burden of proving actual out-of-pocket loss and precluded defendant from introducing evidence of the fair market value of the goods and services, it violated N.Y. Penal Law § 60.27 and N.Y. Crim. Proc. Law § 400.30; therefore, defendant was entitled to a new restitution hearing. People v Tzitzikalakis, 25 A.D.3d 404, 807 N.Y.S.2d 360, 2006 N.Y. App. Div. LEXIS 290 (N.Y. App. Div. 1st Dep't 2006), aff'd, 8 N.Y.3d 217, 832 N.Y.S.2d 120, 864 N.E.2d 44, 2007 N.Y. LEXIS 117 (N.Y. 2007).

Trial court found that the juvenile, who committed six separate offenses which if committed by an adult would have amounted to six separate crimes, could be ordered to pay restitution of a statutory maximum of $1,500 for each separate offense provided that the juvenile agreed to an ACOD disposition on the five offenses not admitted or, in the alternative, that he specifically agree to restitution as to those five petitions if they were to be dismissed. Matter of K.L., 819 N.Y.S.2d 652, 13 Misc. 3d 319, 2006 N.Y. Misc. LEXIS 1918 (N.Y. Fam. Ct. 2006).

Victim's sworn testimony that the out-of-pocket expenses for counseling services sought for him and his wife between January 2010 and May 2010 totaled approximately $1,000 for each of them was sufficient to establish the loss incurred for purposes of restitution following defendant's arson conviction; a spreadsheet compiled by another victim itemizing the losses sustained by a business as a result of the fire, together with testimony that each item that was destroyed was located inside the building at the time of the fire, sufficiently established the losses claimed. People v Stevens, 84 A.D.3d 1424, 922 N.Y.S.2d 596, 2011 N.Y. App. Div. LEXIS 3601 (N.Y. App. Div. 3d Dep't), app. denied, 17 N.Y.3d 822, 929 N.Y.S.2d 811, 954 N.E.2d 102, 2011 N.Y. LEXIS 2842 (N.Y. 2011).

Amount of restitution ordered under CLS Penal § 60.27 on conviction of second degree grand larceny by false pretense, arising from physician's commission of Medicaid fraud, was not conclusive on amount of damage caused for purposes of applying doctrine of collateral estoppel to amount of state's treble damages claim under CLS Soc Serv § 145-b, as physician did not have full and fair opportunity to litigate issue in prior criminal proceedings in that (1) issue at trial was his guilt within certain range of damages, not precise amount of those damages, (2) his trial strategy was dedicated to proving his innocence, and he did not deny amount stolen, and (3) he was not allowed to litigate amount of damages at sentencing because sentencing court denied request for CLS Penal § 60.27(2) hearing. New York v Sokol (In re Sokol), 113 F.3d 303, 1997 U.S. App. LEXIS 21193 (2d Cir. N.Y. 1997).

16. —Crimes of theft

In a prosecution for three counts of petit larceny, the trial court's order that defendant make restitution in the amount of $958.80 would be reversed and the matter remitted for a hearing on the question of the amount of restitution owed by defendant where, as to the two counts on which defendant had been charged with third degree grand larceny, the jury's finding that defendant was guilty of only petit larceny necessarily implied that he had not stolen not more than $250 in each instance, so that, considering the fact that defendant was also found guilty of petit larceny in the amount of $117.85, the most defendant could have been found guilty of stealing was $617.85, and where, though defendant stipulated to an amount of restitution of "around a thousand dollars" at sentencing, he was not thereby foreclosed from challenging the amount of restitution set by the trial court in that, due to the "essential nature" of the right to be sentenced as provided by law, defendants may raise issues relating to sentencing on appeal even though such issues were not formerly raised at trial. People v Ramirez, 98 A.D.2d 985, 470 N.Y.S.2d 221, 1983 N.Y. App. Div. LEXIS 21327 (N.Y. App. Div. 4th Dep't 1983), app. denied, 61 N.Y.2d 911, 1984 N.Y. LEXIS 7577 (N.Y. 1984), app. denied, 61 N.Y.2d 911, 1984 N.Y. LEXIS 7568 (N.Y. 1984).

On conviction of attempted second degree robbery, record before court was sufficient to support finding as to $4,810 in restitution to be paid either to victim or its insurer, even though defendant did not request hearing as to extent of restitution and court accepted finding by county probation department as to victim's monetary loss, where department had inquired of victim and was advised that its loss was $4,810, of which it had been reimbursed for $4,310 by its insurer. People v Turco, 130 A.D.2d 785, 515 N.Y.S.2d 853, 1987 N.Y. App. Div. LEXIS 46818 (N.Y. App. Div. 2d Dep't 1987).

People established that defendant, in addition to uncontested $64,715.10 that he illegally obtained from complainant's general and payroll accounts, also embezzled cash received directly from complainant's customers given that (1) defendant's duties as bookkeeper included handling of virtually all checks and cash received from customers, (2) analysis of cash receipts journal revealed substantial discrepancies between amounts recorded as received and those actually deposited in complainant's account, and (3) there was $53,262.52 net shortage in complainant's account even after defendant had deposited $39,274.91 from his personal account; thus, since preponderance of evidence established that gain realized by defendant from his criminal activities exceeded $80,792.81 restitution ordered by court, defendant's request for reduction of restitution would be denied. People v Reiter, 133 A.D.2d 901, 520 N.Y.S.2d 274, 1987 N.Y. App. Div. LEXIS 51957 (N.Y. App. Div. 3d Dep't 1987), app. denied, 71 N.Y.2d 901, 527 N.Y.S.2d 1011, 523 N.E.2d 318, 1988 N.Y. LEXIS 1548 (N.Y. 1988).

Evidence at restitution hearing was sufficient to establish victims' loss from burglary where (1) they itemized their losses, which included cash, jewelry, and other personal property, and provided evidence as to value of items, (2) defendant's written admissions to police and other documentary evidence coincided with and supported victims' testimony as to both items and their value, and (3) defendant was allowed complete cross examination of witnesses and opportunity, which he declined, to call witnesses on his own behalf. People v David N., 140 A.D.2d 460, 527 N.Y.S.2d 871, 1988 N.Y. App. Div. LEXIS 4983 (N.Y. App. Div. 2d Dep't 1988).

Court properly relied on hearsay evidence to establish value of stolen property at restitution hearing. People v David N., 140 A.D.2d 460, 527 N.Y.S.2d 871, 1988 N.Y. App. Div. LEXIS 4983 (N.Y. App. Div. 2d Dep't 1988).

In second degree grand larceny prosecution, prison sentence of 3 ½ to 7 years and restitution of $30,000 was not unduly harsh and excessive given that defendant specifically acknowledged during plea allocution that such prison term could be imposed on his failure to satisfy original restitution terms, and as much as $81,000 had been stolen. 141 A.D.2d 889, 529 N.Y.S.2d 400.

Restitution ordered in amount of $40,000 did not impermissibly exceed defendant's gain from crimes involving filing of fraudulent insurance claims where (1) defendant acknowledged that he benefitted not only from crimes charged in indictment, but that he was involved in certain diverse other similar transactions, (2) defendant entered his plea of guilty in full satisfaction of indictment and, in addition, any charges that could arise under investigation from which indictment arose, (3) there was no

indication that defendant did not benefit from all his related crimes to extent of $40,000 or more, and (4) plea and sentence were bargained for and assented to by defendant. People v Palella, 148 A.D.2d 838, 539 N.Y.S.2d 111, 1989 N.Y. App. Div. LEXIS 2816 (N.Y. App. Div. 3d Dep't), app. denied, 74 N.Y.2d 795, 545 N.Y.S.2d 556, 544 N.E.2d 234, 1989 N.Y. LEXIS 5062 (N.Y. 1989).

In prosecution involving defendant's receipt of public assistance to which she was not entitled, court erred in requiring defendant, as condition of probation, to make restitution representing interest on cost of benefits provided to her where she had paid such cost in full prior to sentencing, which corresponded to amount set forth in indictment as fruits of crime. People v Martinez, 202 A.D.2d 735, 608 N.Y.S.2d 573, 1994 N.Y. App. Div. LEXIS 1798 (N.Y. App. Div. 3d Dep't 1994).

It was neither harsh nor excessive to impose $7,030 for restitution to be made to victim bank for robbery masterminded by defendant, who was bank's employee at time. People v Foster, 216 A.D.2d 115, 628 N.Y.S.2d 643, 1995 N.Y. App. Div. LEXIS 6507 (N.Y. App. Div. 1st Dep't), app. denied, 86 N.Y.2d 794, 632 N.Y.S.2d 507, 656 N.E.2d 606, 1995 N.Y. LEXIS 3904 (N.Y. 1995).

Fine of $1,000 was properly imposed on defendant, in addition to his prison sentence for first degree aggravated operation of unlicensed vehicle and fourth degree grand larceny, where court had informed defendant, before accepting his guilty plea, that imposition of $1,000 fine was possible, so that defendant had opportunity to withdraw his plea, there was no agreed-on sentence to which defendant pleaded, and defense counsel stated at sentencing that fines and restitution were still at issue. People v Pritchard, 238 A.D.2d 633, 656 N.Y.S.2d 966, 1997 N.Y. App. Div. LEXIS 3176 (N.Y. App. Div. 3d Dep't), app. denied, 90 N.Y.2d 862, 661 N.Y.S.2d 189, 683 N.E.2d 1063, 1997 N.Y. LEXIS 2567 (N.Y. 1997).

In prosecution of inn manager for first degree falsification of business records and second degree grand larceny, based on manager's computer entries of fictitious credits to customers, matter would be remitted for sole purpose of fixing restitution to inn owner in amount consistent with evidence where inn's comptroller testified on cross-examination that he made one $900 error, and there might have been other errors in comptroller's figures adopted by court. People v Potter, 255 A.D.2d 763, 682 N.Y.S.2d 238, 1998 N.Y. App. Div. LEXIS 12488 (N.Y. App. Div. 3d Dep't 1998).

Sentence of insurance agency office manager to $1^1/_3$ to 4 years for third degree grand larceny, with order to pay $35,000 restitution, was not excessive since term of imprisonment was within statutory range for class D felony, defendant's contentions that she was punished for going to trial rather than accepting plea offer were belied by sentencing minutes, and amount of restitution was less than amount shown by evidence to have been stolen from agency. People v Bisner, 260 A.D.2d 665, 688 N.Y.S.2d 270, 1999 N.Y. App. Div. LEXIS 3302 (N.Y. App. Div. 3d Dep't), app. denied, 93 N.Y.2d 1014, 697 N.Y.S.2d 573, 719 N.E.2d 934, 1999 N.Y. LEXIS 3023 (N.Y. 1999).

In prosecution for attempted second degree burglary, part of sentence requiring defendant to pay $3,573.90 in restitution would be vacated, and case would be remitted for hearing on amount of restitution, where defendant did not expressly agree to amount of restitution in his plea allocution, it was improper to rely exclusively on amounts recited in presentence investigation report, and fact that defendant neither requested hearing nor objected to amount was not waiver, given essential nature of right to be sentenced in accordance with law. People v White, 266 A.D.2d 831, 698 N.Y.S.2d 803, 1999 N.Y. App. Div. LEXIS 11846 (N.Y. App. Div. 4th Dep't 1999).

In prosecution for attempted second degree burglary, part of sentence requiring defendant to pay $3,573.90 in restitution would be vacated, and case would be remitted for hearing on amount of restitution, where (1) total amount sought was inconsistent with total of individual items in list supplied by victim, and thus it was not clear how court determined amount of restitution, (2) there was no sworn testimony sufficient to prove amount of lost wages, and (3) victim impact statement was not sworn and thus could not be relied on. People v White, 266 A.D.2d 831, 698 N.Y.S.2d 803, 1999 N.Y. App. Div. LEXIS 11846 (N.Y. App. Div. 4th Dep't 1999).

Because defendant's outstanding tax liabilities, interest, and penalties, were neither a "fruit" of the crime of third-degree grand larceny nor an "actual out-of-pocket loss caused" by the offense, pursuant to Penal Law § 60.27(1). the trial court erred in ordering restitution in that amount. People v Nelson, 38 A.D.3d 472, 833 N.Y.S.2d 53, 2007 N.Y. App. Div. LEXIS 3891 (N.Y. App. Div. 1st Dep't), app. denied, 9 N.Y.3d 879, 842 N.Y.S.2d 791, 874 N.E.2d 758, 2007 N.Y. LEXIS 2988 (N.Y. 2007).

County court properly fixed the amount of restitution under N.Y. Penal Law § 60.27(2) and N.Y. Crim. Proc. Law § 400.30(4) and ordered defendant to pay a portion of it to the victim's insurance company because the victim testified regarding her costs as a result of defendant stealing her bag, including the amount of cash and stamps in her bag, the costs of obtaining a new cell phone and car keys and replacing the exterior locks on her house, and the value of items which she did not replace. People v Russell, 41 A.D.3d 1094, 838 N.Y.S.2d 710, 2007 N.Y. App. Div. LEXIS 7938 (N.Y. App. Div. 3d Dep't 2007), app. denied, 10 N.Y.3d 964, 863 N.Y.S.2d 148, 893 N.E.2d 454, 2008 N.Y. LEXIS 2798 (N.Y. 2008).

Restitution and reparation provisions of Penal Law do not include appreciated value of property held and then sold by defendant after commission of crime which involved obtaining of that property. People v Young, 163 Misc. 2d 72, 618 N.Y.S.2d 983, 1994 N.Y. Misc. LEXIS 505 (N.Y. Sup. Ct. 1994).

Although a loan from a real estate broker to defendant constituted an out-of-pocket loss within the meaning of N.Y. Penal Law § 60.27(1), in determining the restitution due, defendant was entitled to additional credits for a referral fee and commissions received by the broker's company from three transactions. People v Evens, 837 N.Y.S.2d 848, 16 Misc. 3d 392, 2007 N.Y. Misc. LEXIS 3661 (N.Y. County Ct. 2007).

Defendant was improperly ordered to pay restitution for conduct that was not an offense within the meaning of N.Y. Penal Law § 60.27(4)(a) where the trial court ordered defendant to pay restitution (1) in an amount in excess of that which was alleged in the indictment; (2) to a victim not mentioned in the indictment, in addition to the victim mentioned in the indictment; and (3) for an offense that was not part of the same criminal transaction as defendant's offense of grand larceny in the third degree or contained in any other accusatory instrument disposed of by a guilty plea by defendant. People v Diola, 299 A.D.2d 962, 750 N.Y.S.2d 716, 2002 N.Y. App. Div. LEXIS 11065 (N.Y. App. Div. 4th Dep't 2002), app. denied, 99 N.Y.2d 581, 755 N.Y.S.2d 717, 785 N.E.2d 739, 2003 N.Y. LEXIS 759 (N.Y. 2003).

Defendant's confession of judgment was a critical aspect of defendant's plea agreement and the trial court erred by accepting defendant's initial plea of guilty to grand larceny in the third degree, convicting defendant of that offense, sentencing defendant to five years probation, and entering a confession of judgment not to exceed $100,000 after defendant refused to sign a confession of judgment. People v Hong Ping Lou, 299 A.D.2d 559, 751 N.Y.S.2d 44, 2002 N.Y. App. Div. LEXIS 11405 (N.Y. App. Div. 2d Dep't 2002).

Trial court employed the correct methodology in calculating the amount of restitution under N.Y. Penal Law § 60.27(1) for defendant's conviction of grand larceny in the third degree as the out-of-pocket loss of a store owner was not the amount of lottery winnings taken but the retail value of the lottery tickets stolen; the trial court did not err in ordering restitution over the $15,000 statutory cap under N.Y. Penal Law § 60.27(5) as in its discretion, the trial court could order additional restitution where that amount represented the return of the victim's property. People v Ayers, 45 A.D.3d 1290, 845 N.Y.S.2d 646, 2007 N.Y. App. Div. LEXIS 11478 (N.Y. App. Div. 4th Dep't 2007), app. denied, 10 N.Y.3d 808, 857 N.Y.S.2d 41, 886 N.E.2d 806, 2008 N.Y. LEXIS 1245 (N.Y. 2008).

17. —Property damage

Court failed to conform to CLS Penal § 60.27 in requiring defendant to make restitution in sum of $4,468 for damage to car he stole where only information before court regarding restitution

consisted of statement of assistant district attorney that sales manager of automobile dealership, who inspected car, gave it value of $2,800 before damage was done. People v Asch, 155 A.D.2d 735, 547 N.Y.S.2d 447, 1989 N.Y. App. Div. LEXIS 13855 (N.Y. App. Div. 3d Dep't 1989).

Sentence of 15 years, with payment of $16,362.63 in restitution plus surcharges and fees, for second degree burglary as second felony offender was neither harsh nor excessive where defendant had extensive criminal history, including similar prior felonies, he appeared to lack remorse, his guilty plea enabled him to substantially reduce his sentencing exposure if convicted of outstanding charges, and there was no evidence that sentencing court failed to consider mitigating factors. People v Ormsby, 242 A.D.2d 840, 662 N.Y.S.2d 619, 1997 N.Y. App. Div. LEXIS 8839 (N.Y. App. Div. 3d Dep't 1997), app. denied, 91 N.Y.2d 895, 669 N.Y.S.2d 10, 691 N.E.2d 1036, 1998 N.Y. LEXIS 487 (N.Y. 1998), app. denied, 91 N.Y.2d 975, 672 N.Y.S.2d 855, 695 N.E.2d 724, 1998 N.Y. LEXIS 1633 (N.Y. 1998).

Court properly directed restitution of repair expenses not yet incurred, since defendant's vandalism "caused" victim to sustain "out-of-pocket loss" although victim was uninsured and financially limited, and had thus been delayed in repairing damage. People v Christman, 265 A.D.2d 856, 696 N.Y.S.2d 594, 1999 N.Y. App. Div. LEXIS 9936 (N.Y. App. Div. 4th Dep't 1999), app. denied, 94 N.Y.2d 878, 705 N.Y.S.2d 10, 726 N.E.2d 487, 2000 N.Y. LEXIS 276 (N.Y. 2000).

Court properly directed restitution for both interim and final repairs of windows broken by defendant on evidence that temporary repairs were necessary, in stages, to protect interior of building from elements and prevent further loss, and later to enable victim to resume his business. People v Christman, 265 A.D.2d 856, 696 N.Y.S.2d 594, 1999 N.Y. App. Div. LEXIS 9936 (N.Y. App. Div. 4th Dep't 1999), app. denied, 94 N.Y.2d 878, 705 N.Y.S.2d 10, 726 N.E.2d 487, 2000 N.Y. LEXIS 276 (N.Y. 2000).

Amount of restitution ordered on conviction of third degree criminal mischief was not excessive where ordinary meaning of "restitution" is restoring someone to position occupied before particular event. People v Stubbs, 281 A.D.2d 498, 721 N.Y.S.2d 562, 2001 N.Y. App. Div. LEXIS 2402 (N.Y. App. Div. 2d Dep't), app. denied, 96 N.Y.2d 908, 730 N.Y.S.2d 806, 756 N.E.2d 94, 2001 N.Y. LEXIS 2957 (N.Y. 2001).

In prosecution for third degree criminal mischief, collection surcharge imposed under CLS Penal § 60.27(8) on amount of restitution was improperly calculated and would be reduced from 10 to 5 percent, absent affidavit indicating that actual cost of collection exceeded 5 percent. People v Arquette, 281 A.D.2d 652, 720 N.Y.S.2d 852, 2001 N.Y. App. Div. LEXIS 2041 (N.Y. App. Div. 3d Dep't 2001).

There was nothing plainly illegal about the $ 40,000 restitution award; first, defendant failed to preserve the issue, and preservation was required as defendant claimed restitution was about the statutory cap and was directed to a person or entity that was not a victim of the crime, and second, imposing joint and several liability on all perpetrators for the entire loss promoted the purposes of the restitution statute. People v Graves, 163 A.D.3d 16, 78 N.Y.S.3d 613, 2018 N.Y. App. Div. LEXIS 4439 (N.Y. App. Div. 4th Dep't 2018), app. denied, 35 N.Y.3d 970, 148 N.E.3d 509, 125 N.Y.S.3d 45, 2020 N.Y. LEXIS 1220 (N.Y. 2020).

In prosecution for operating motor vehicle while under influence of alcohol in violation of CLS Veh & Tr § 1192 resulting in property damage to another vehicle, proper amount of restitution defendant would be required to make to owner of other vehicle was sum which, when added to amount owner of damaged vehicle received from defendant's insurance carrier, would equal defendant's proportional liability for damage, since CLS Penal § 60.27 directs that restitution be ordered in amount representing loss or damage caused by defendant's offense, and payment from defendant's insurance carrier was not "collateral source" to be barred from use in mitigation of damages. People v Crossley, 134 Misc. 2d 742, 512 N.Y.S.2d 756, 1987 N.Y. Misc. LEXIS 2098 (N.Y. Dist. Ct. 1987).

Good cause existed to order defendant, who was found guilty of driving while intoxicated during course of his employment as bus driver, to pay restitution under CLS Penal § 60.27(5)(b) beyond usual $5,000 limit for misdemeanors, and to cover victim's actual loss where defendant drove his bus into wall of victim's house causing over $25,000 damage. People v Lightfoot, 147 Misc. 2d 918, 559 N.Y.S.2d 936, 1990 N.Y. Misc. LEXIS 435 (N.Y. Dist. Ct. 1990).

18. —Personal injury

During the victim's leave resulting from injuries inflicted by defendant in an assault, an amount was deducted from his pay for three days on which he would have received holiday pay if he had been working; this amount thus represented an out-of-pocket loss incurred by the victim as a direct result of defendant's actions and was properly ordered as restitution. However, meal and uniform allowances were reimbursements for expenses and losses actually incurred by working officers, and thus were not properly awarded to the victim as he was not required to forgo meal breaks nor wear his uniform during his disability leave and, thus, he did not incur these losses. People v Johnson, 91 A.D.3d 1121, 936 N.Y.S.2d 748, 2012 N.Y. App. Div. LEXIS 267 (N.Y. App. Div. 3d Dep't), app. denied, 18 N.Y.3d 959, 944 N.Y.S.2d 487, 967 N.E.2d 712, 2012 N.Y. LEXIS 1052 (N.Y. 2012).

Amount of restitution imposed was supported by the evidence and not excessive because the People submitted bills representing approximately $ 13,000 for the victim's initial medical care and an additional charge of approximately $ 7,000 for her subsequent care, obtained when the victim sought treatment for increased pain after an impact in the area of the existing orbital fracture caused by defendant. People v Baber, 182 A.D.3d 794, 123 N.Y.S.3d 222, 2020 N.Y. App. Div. LEXIS 2363 (N.Y. App. Div. 3d Dep't), app. denied, 35 N.Y.3d 1064, 152 N.E.3d 1167, 129 N.Y.S.3d 365, 2020 N.Y. LEXIS 2036 (N.Y. 2020).

Restitution or reparation ordered under § 60.27 is not limited to provable compensatory damages for medical expenses or lost wages but may include sum, within statutory limits, to compensate victim for fact of injury whether termed compensation for pain and suffering, punitive damages, general damages or some similar term; complainant who was struck in hand by barstool thrown at her by convicted defendant may be granted $100 in restitution despite absence of medical bill. People v Corey, 130 Misc. 2d 228, 495 N.Y.S.2d 620, 1985 N.Y. Misc. LEXIS 3164 (N.Y. City Ct. 1985).

Court would award insurance salesman $750 as compensation for loss of earning capacity during 3-week period when his mouth was injured by defendant's assault even though salesman was claiming nearly $1,500 in lost earnings since salesman failed to establish any particular sales which were irretrievably lost, but nonetheless was entitled to some business loss as self-employed person; additionally, court would award $1,000 in general or punitive damages because salesman was subjected to unprovoked assault while conducting business meeting in restaurant. People v Spector, 136 Misc. 2d 30, 517 N.Y.S.2d 862, 1987 N.Y. Misc. LEXIS 2371 (N.Y. City Ct. 1987).

19. —Ability to pay as factor

Sentencing court erred by ordering defendant to pay restitution in amount of $61,097.93 based on probation department's determination of victim's monetary loss, where defense counsel indicated that defendant lacked financial resources to pay restitution; matter would be remitted for hearing on proper amount of restitution, with due consideration for defendant's ability to pay, since there was no indication in record or presentence report as to whether calculation of victim's loss was proper restitution figure, and there was no showing as to how restitution was calculated. People v Barnes, 135 A.D.2d 825, 522 N.Y.S.2d 930, 1987 N.Y. App. Div. LEXIS 52756 (N.Y. App. Div. 2d Dep't 1987).

Restitution provision of defendant's sentence would be vacated and matter remanded for new determination of amount of restitution required and manner of payment where, apart from victim's statements, record contained no evidence to support probation department's assessment of damages caused by crime, and there was no evidence that probation department considered defendant's financial situation in fixing amount and manner of payment. People v Credidio, 141 A.D.2d 661, 529 N.Y.S.2d 374, 1988 N.Y. App. Div. LEXIS 6841 (N.Y. App. Div. 2d Dep't), app.

denied, 72 N.Y.2d 1044, 534 N.Y.S.2d 943, 531 N.E.2d 663, 1988 N.Y. LEXIS 5748 (N.Y. 1988).

Court would vacate portion of sentence which required defendant to pay reparation in amount of $6,050, since presentence report of probation department did not provide sufficient basis on which to calculate proper reparation figure without hearing, and insufficient consideration was given to whether defendant had ability to pay. People v Robinson, 156 A.D.2d 731, 549 N.Y.S.2d 484, 1989 N.Y. App. Div. LEXIS 16525 (N.Y. App. Div. 2d Dep't 1989).

Court failed to conform to CLS Penal § 60.27 in requiring defendant to make restitution where (1) court simply accepted amounts of damages contained in probation report, which were based on statements made to probation officer by victim and representative of insurance carrier which paid victim for her loss, (2) while probation officer apparently had access to proofs of loss, nothing indicated that court was privy to such material, and court made no finding as to loss or damage caused by offense, and (3) there was no evidence that defendant's financial situation was considered in determining restitution. People v Monette, 199 A.D.2d 589, 604 N.Y.S.2d 333, 1993 N.Y. App. Div. LEXIS 11203 (N.Y. App. Div. 3d Dep't 1993).

In ordering restitution as part of sentence for second degree burglary, court did not fail to consider defendant's ability to pay where court ordered immediate transfer of defendant's car to victim but postponed any scheduled payments until defendant was released from prison, during which period defendant would be unable to make any significant restitution. People v Chiera, 255 A.D.2d 685, 681 N.Y.S.2d 111, 1998 N.Y. App. Div. LEXIS 11926 (N.Y. App. Div. 3d Dep't 1998).

Court properly directed defendant to make complete restitution in 3 years, rather than over 5-year period of his probation; court gave adequate consideration to defendant's ability to pay by imposing small $65 monthly obligation, and defendant could apply for resentencing if unable to pay. People v Christman, 265 A.D.2d 856, 696 N.Y.S.2d 594, 1999 N.Y. App. Div. LEXIS 9936 (N.Y. App. Div. 4th Dep't 1999), app. denied, 94 N.Y.2d 878, 705 N.Y.S.2d 10, 726 N.E.2d 487, 2000 N.Y. LEXIS 276 (N.Y. 2000).

Defendant could apply to reduce a 10% surcharge, imposed pursuant to N.Y. Penal Law § 60.27(8), to 5% of the amount of restitution imposed on the ground of undue hardship. People v Bennett, 52 A.D.3d 1236, 859 N.Y.S.2d 826, 2008 N.Y. App. Div. LEXIS 5162 (N.Y. App. Div. 4th Dep't), app. denied, 11 N.Y.3d 785, 866 N.Y.S.2d 612, 896 N.E.2d 98, 2008 N.Y. LEXIS 3660 (N.Y. 2008).

Because defendant violated a protection order by going to the victim's apartment and hitting the victim with a hammer, defendant was properly convicted of aggravated criminal contempt and first-degree criminal contempt under N.Y. Penal Law §§ 215.52, 215.51(b)(v); however, there was no evidence of defendant's ability to pay the N.Y. Penal Law § 60.27 restitution order. People v Coston, 55 A.D.3d 943, 865 N.Y.S.2d 702, 2008 N.Y. App. Div. LEXIS 7762 (N.Y. App. Div. 3d Dep't 2008), app. denied, 11 N.Y.3d 924, 874 N.Y.S.2d 9, 2009 N.Y. LEXIS 449 (N.Y. 2009), overruled, People v Henry, 64 A.D.3d 804, 881 N.Y.S.2d 701, 2009 N.Y. App. Div. LEXIS 5375 (N.Y. App. Div. 3d Dep't 2009).

Defendant's sentence included incarceration and it did not require defendant to pay restitution as a probation condition; further N.Y. Crim. Proc. Law § 420.10 (5) provided that a defendant was allowed, at anytime, to request to be resentenced if it was subsequently determined that he was unable to pay the restitution as ordered. As a result, even if defendant preserved the issue, the trial court was not required to consider his ability to pay at the time it imposed restitution. People v Henry, 64 A.D.3d 804, 881 N.Y.S.2d 701, 2009 N.Y. App. Div. LEXIS 5375 (N.Y. App. Div. 3d Dep't), app. denied, 13 N.Y.3d 860, 891 N.Y.S.2d 694, 920 N.E.2d 99, 2009 N.Y. LEXIS 4779 (N.Y. 2009).

16. —Crimes of theft.

Trial court erroneously included the amount of $ 31,000 as restitution to the owner of restaurant B because the superior court information was the sole accusatory instrument filed and it covered crimes related only to restaurant A. People v Suits, 158 A.D.3d 949, 71 N.Y.S.3d 664, 2018 N.Y. App. Div. LEXIS 1085 (N.Y. App. Div. 3d Dep't 2018).

20. Defendant's failure to pay

In prosecution of attorney on charges in connection with his law practice, court properly ordered lump sum payment by attorney as restitution for various offenses against his clients, and also properly later revoked probation and imposed sentence of imprisonment after he failed to make payment, where (1) attorney conveyed marital residence to his wife at height of criminal investigation, when his financial problems had become quite apparent, (2) no consideration was paid by wife, and attorney continued to reside in residence after conveyance, and (3) residence was sold to third party and profit was realized; court properly found that conveyance was sham. People v Modjeska, 159 A.D.2d 873, 553 N.Y.S.2d 216, 1990 N.Y. App. Div. LEXIS 3063 (N.Y. App. Div. 3d Dep't), app. denied, 76 N.Y.2d 792, 559 N.Y.S.2d 998, 559 N.E.2d 692, 1990 N.Y. LEXIS 2806 (N.Y. 1990).

Attorney found guilty of second degree grand larceny for stealing money from estate of which he was executor, who had been sentenced to term of 2 to 6 years and ordered to make restitution to estate, would be resentenced to term of $2^1/_3$ to 7 years pursuant to CLS CPL § 420.10 and CLS Penal § 60.27 for his failure to make restitution, in view of his testimony that he owned real property worth in excess of amount of restitution ordered, and court would also direct district attorney to file civil suit to collect restitution under CLS CPL § 420.10. People v Bertucci, 132 Misc. 2d 1051, 506 N.Y.S.2d 399, 1986 N.Y. Misc. LEXIS 2833 (N.Y. Sup. Ct. 1986).

21. Appellate review

Defendant's purported waiver of hearing as to amount of restitution and manner of performance thereof did not constitute waiver of his right to review by appellate division, as failure to accord him such hearing was departure from essential nature of right to be sentenced as provided by law. People v Miller, 133 A.D.2d 784, 520 N.Y.S.2d 67, 1987 N.Y. App. Div. LEXIS 51823 (N.Y. App. Div. 2d Dep't), app. denied, 70 N.Y.2d 934, 524 N.Y.S.2d 686, 519 N.E.2d 632, 1987 N.Y. LEXIS 19751 (N.Y. 1987).

Court would delete that portion of defendant's sentence as to restitution and remit matter for new determination on proper amount of restitution and manner of payment thereof where there was insufficient information regarding manner in which amount of restitution was determined and manner in which defendant was to comply therewith. People v Walker, 140 A.D.2d 655, 528 N.Y.S.2d 998, 1988 N.Y. App. Div. LEXIS 5620 (N.Y. App. Div. 2d Dep't 1988).

Sentence of restitution would be vacated and remanded where sentencing court failed to fix time and manner of payment of restitution. People v Watkins, 155 A.D.2d 997, 549 N.Y.S.2d 625, 1989 N.Y. App. Div. LEXIS 14950 (N.Y. App. Div. 4th Dep't 1989).

Although record amply supported trial court's finding as to value of vehicle in prosecution for fourth degree grand larceny arising from theft of automobile from dealership, uncertainty as to disposition of recovered vehicle and whether dealership realized any proceeds therefrom required remission of matter to trial court for restitution hearing. People v Stacey, 173 A.D.2d 960, 569 N.Y.S.2d 470, 1991 N.Y. App. Div. LEXIS 5613 (N.Y. App. Div. 3d Dep't), app. denied, 79 N.Y.2d 832, 580 N.Y.S.2d 213, 588 N.E.2d 111, 1991 N.Y. LEXIS 5809 (N.Y. 1991).

Court would modify judgment by vacating condition of probation that ordered defendant to make restitution and would remit matter to conduct hearing to determine appropriate amount of restitution where there was no basis in record for finding that additional sum was sustained by 4 victims who did not complete victim statements and restitution claim forms, and court failed to consider that several items in defendant's possession that were "fruits" of offense were turned over to district attorney and sold at auction. People v Lambert, 221 A.D.2d 1015, 633 N.Y.S.2d 897, 1995 N.Y. App. Div. LEXIS 13541 (N.Y. App. Div. 4th Dep't 1995).

Portion of court's restitution order requiring defendant to return entire salary paid to him by his employer would be set aside as not authorized under CLS Penal § 60.27. People v Calvi, 224 A.D.2d 705, 638 N.Y.S.2d 736, 1996 N.Y. App. Div. LEXIS

1934 (N.Y. App. Div. 2d Dep't), modified, aff'd, 89 N.Y.2d 868, 653 N.Y.S.2d 89, 675 N.E.2d 843, 1996 N.Y. LEXIS 3586 (N.Y. 1996).

Sentence of restitution under CLS Penal § 60.27(1) would be vacated for failure to fix time and manner of payment, and matter would be remitted to decide time and manner of payment. People v Taylor, 242 A.D.2d 925, 662 N.Y.S.2d 894, 1997 N.Y. App. Div. LEXIS 10505 (N.Y. App. Div. 4th Dep't 1997).

Judgment convicting defendant of second degree burglary, petit larceny, and fifth degree possession of stolen property would be modified by vacating part of sentence that ordered defendant to pay 10 percent surcharge on amount of restitution rather than 5 percent directed by CLS Penal § 60.27(8) where additional 5 percent was thus unauthorized. People v Hodge, 255 A.D.2d 943, 681 N.Y.S.2d 718, 1998 N.Y. App. Div. LEXIS 12185 (N.Y. App. Div. 4th Dep't 1998), app. denied, 93 N.Y.2d 874, 689 N.Y.S.2d 436, 711 N.E.2d 650, 1999 N.Y. LEXIS 972 (N.Y. 1999), app. denied, 93 N.Y.2d 926, 693 N.Y.S.2d 509, 715 N.E.2d 512, 1999 N.Y. LEXIS 1699 (N.Y. 1999).

Judgment convicting defendant of attempted second degree mischief would be modified by vacating amount of restitution, and matter would be remitted for determination of amount of victim's out-of-pocket loss, where record did not support amount of restitution ordered. People v Linscott, 255 A.D.2d 1007, 679 N.Y.S.2d 865, 1998 N.Y. App. Div. LEXIS 12317 (N.Y. App. Div. 4th Dep't 1998).

Matter was remitted for resentencing where County Court ordered defendant to pay restitution in addition to negotiated sentence, it was unclear what court intended when it waived "court costs" on directing defendant to pay restitution, and People conceded that restitution was not warranted. People v Dunn, 270 A.D.2d 284, 705 N.Y.S.2d 376, 2000 N.Y. App. Div. LEXIS 2508 (N.Y. App. Div. 2d Dep't 2000).

Where sentencing is bifurcated by deferring issue of restitution, defendant may properly appeal as of right from both judgment of conviction and sentence as amended without need to seek leave to appeal from order of restitution. People v Swiatowy, 280 A.D.2d 71, 721 N.Y.S.2d 185, 2001 N.Y. App. Div. LEXIS 1083 (N.Y. App. Div. 4th Dep't), app. denied, 96 N.Y.2d 868, 730 N.Y.S.2d 43, 754 N.E.2d 1126, 2001 N.Y. LEXIS 2664 (N.Y. 2001).

Defendant's failure to request restitution hearing did not bar review by Appellate Division. People v White, 282 A.D.2d 396, 723 N.Y.S.2d 665, 2001 N.Y. App. Div. LEXIS 4121 (N.Y. App. Div. 1st Dep't 2001).

Because defendant did not request a hearing or otherwise challenge the amount of restitution during the sentencing proceeding, her various claims that the trial court did not comply with the provisions of N.Y. Penal Law § 60.27 when ordering restitution were not preserved. People v Waugh, 52 A.D.3d 853, 859 N.Y.S.2d 318, 2008 N.Y. App. Div. LEXIS 4839 (N.Y. App. Div. 3d Dep't), app. denied, 11 N.Y.3d 796, 866 N.Y.S.2d 622, 896 N.E.2d 108, 2008 N.Y. LEXIS 3788 (N.Y. 2008).

Where the trial court ordered defendant to pay restitution without first affording the opportunity to withdraw a guilty plea, imposed a restitution surcharge of 10 percent in the absence of a request by the People along with the requisite evidentiary showing as required by N.Y. Penal Law § 60.27(8), and defendant contented that the amount and the recipient of the restitution were improper under § 60.27(2) and N.Y. Crim. Proc. Law § 400.30, the appellate court exercised its power to review the contention as a matter of discretion in the interest of justice pursuant to N.Y. Crim. Proc. Law § 470.15(6)(a) and vacated the sentence. People v Delair, 6 A.D.3d 1152, 775 N.Y.S.2d 664, 2004 N.Y. App. Div. LEXIS 6228 (N.Y. App. Div. 4th Dep't 2004).

When defendant, who pleaded guilty to possessing two forged checks, was ordered to pay restitution not only for the amount of the checks but also for the amount of another check and for damages to the office from which the forged checks were stolen, his waiver of appeal and his consent and failure to object to the restitution amount did not preclude him from arguing that part of the restitution order was unauthorized, as he could not waive an objection to the legality of his sentence. People v Casiano, 8 A.D.3d 761, 779 N.Y.S.2d 259, 2004 N.Y. App. Div. LEXIS 7923 (N.Y. App. Div. 3d Dep't 2004).

Appellate court exercised its interest of justice discretion to take corrective action with respect to the amount of restitution ordered because, inter alia, at sentencing, the People stated that restitution would total $ 2,379.30, which the trial court indicated would be imposed in two orders, but the record contained three restitution orders totaling over $ 6,000 and the uniform sentence and commitment form reflected restitution of $ 4,006. People v Gardner, 129 A.D.3d 1386, 12 N.Y.S.3d 353, 2015 N.Y. App. Div. LEXIS 5392 (N.Y. App. Div. 3d Dep't 2015).

Trial court's order of restitution stemming from the December 18, 2014, uncharged burglary was not authorized because there were three separate burglaries, each committed days apart in which distinct materials were stolen, and each was completed when the perpetrator left the premises with the stolen materials; thus, the evidence established that the burglaries were separate "criminal transactions" and not integral parts of a single criminal venture. People v Pixley, 150 A.D.3d 1555, 56 N.Y.S.3d 578, 2017 N.Y. App. Div. LEXIS 4126 (N.Y. App. Div. 3d Dep't), app. denied, 30 N.Y.3d 952, 89 N.E.3d 526, 67 N.Y.S.3d 136, 2017 N.Y. LEXIS 3503 (N.Y. 2017).

Although defendant's challenge to the 10 percent surcharge on the $ 200,000 award of restitution was not preserved, the appellate court exercised its interest of justice jurisdiction to address the claim because the record did not include an affidavit indicating that the cost of collection and administration of the restitution imposed on the grand larceny conviction exceeded 5 percent of the amount awarded, as was necessary to justify the imposition of a 10 percent surcharge. People v Grumberg, 153 A.D.3d 1525, 62 N.Y.S.3d 199, 2017 N.Y. App. Div. LEXIS 6688 (N.Y. App. Div. 3d Dep't 2017).

Agency Opinions

Analysis

1. Who is entitled to restitution
2. Defendant's failure to pay

1. Who is entitled to restitution

In both civil and criminal matters brought under both CLS § 121 and town Dog Control Ordinance, town justice may order restitution, reparations, or other damages to dog attack victim. 2005 NY Ops Atty Gen I 05-12.

2. Defendant's failure to pay

A county official designated to receive payment of restitution must report to the court any failure to comply with an order of restitution. Restitution funds collected in instances where the victim cannot be located should be disposed of only as directed by the court. A county is not authorized to apply for resentence under Criminal Procedure Law, § 420.10(4) to restore restitution to a defendant. 1983 NY Ops Atty Gen Feb 4 (Informal).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 60.35; CLS CPL §§ 390.50, 420.10.

Confidentiality of pre-sentence reports and memoranda, CLS CPL § 390.50.

Procedure for determining the amount of a fine based upon the defendant's gain from the offense, CLS CPL § 400.30.

Collection of fines, restitution or reparation, CLS CPL § 420.10.

Collection of fines, restitution or reparation imposed upon corporations, CLS CPL § 420.20.

Remission of fines, restitution or reparation, CLS CPL § 420.30.

Fair treatment standards for crime victims, CLS Exec Art 23.

Jurisprudences:

54 NY Jur 2d Enforcement and Execution of Judgments § 255.

2A Am Jur Pl & Pr Forms (Rev ed), Assault and Battery, Form 72.1.

Law Reviews:

Investigating New York's 2001 Son of Sam Law: Problems with the recent extension of tort liability for people convicted of crimes. 48 NYL Sch L Rev 433 (2003/2004).

Annotations:

Propriety of condition of probation which requires defendant convicted of crime of violence to make reparation to injured victim. 79 ALR3d 976.

Measure and elements of restitution to which victim is entitled under state criminal statute. 15 A.L.R.5th 391.

Measure and elements of restitution to which victim is entitled under state criminal statute–payment for installation of alarm or locks or change of locks due to burglary, attempted burglary, or felonious breaking and entering. 44 ALR6th 301.

Matthew Bender's New York Practice Guides: New York Criminal Practice § 42.05 [18] Restitution and Reparations.

ARTICLE 70

SENTENCES OF IMPRISONMENT

HISTORY:

Add, L 1965, ch 1030, eff Sept 1, 1967.

§ 70.02. Sentence of imprisonment for a violent felony offense.

1. Definition of a violent felony offense. A violent felony offense is a class B violent felony offense, a class C violent felony offense, a class D violent felony offense, or a class E violent felony offense, defined as follows:

(a) Class B violent felony offenses: an attempt to commit the class A-I felonies of murder in the second degree as defined in section 125.25, kidnapping in the first degree as defined in section 135.25, and arson in the first degree as defined in section 150.20; manslaughter in the first degree as defined in section 125.20, aggravated manslaughter in the first degree as defined in section 125.22, rape in the first degree as defined in section 130.35, criminal sexual act in the first degree as defined in section 130.50, aggravated sexual abuse in the first degree as defined in section 130.70, course of sexual conduct against a child in the first degree as defined in section 130.75; assault in the first degree as defined in section 120.10, kidnapping in the second degree as defined in section 135.20, burglary in the first degree as defined in section 140.30, arson in the second degree as defined in section 150.15, robbery in the first degree as defined in section 160.15, sex trafficking as defined in paragraphs (a) and (b) of subdivision five of section 230.34, sex trafficking of a child as defined in section 230.34-a, incest in the first degree as defined in section 255.27, criminal possession of a weapon in the first degree as defined in section 265.04, criminal use of a firearm in the first degree as defined in section 265.09, criminal sale of a firearm in the first degree as defined in section 265.13, aggravated assault upon a police officer or a peace officer as defined in section 120.11, gang assault in the first degree as defined in section 120.07, intimidating a victim or witness in the first degree as defined in section 215.17, hindering prosecution of terrorism in the first degree as defined in section 490.35, criminal possession of a chemical weapon or biological weapon in the second degree as defined in section 490.40, and criminal use of a chemical weapon or biological weapon in the third degree as defined in section 490.47.

(b) Class C violent felony offenses: an attempt to commit any of the class B felonies set forth in paragraph (a) of this subdivision; aggravated criminally negligent homicide as defined in section 125.11, aggravated manslaughter in the second degree as defined in section 125.21, aggravated sexual abuse in the second degree as defined in section 130.67, assault on a peace officer, police officer, firefighter or emergency medical services professional as defined in section 120.08, assault on a judge as defined in section 120.09, gang assault in the second degree as defined in section 120.06, strangulation in the first degree as defined in section 121.13, aggravated strangulation as defined in section 121.13-a, burglary in the second degree as defined in section 140.25, robbery in the second degree as defined in section 160.10, criminal possession of a weapon in the second degree as defined in section 265.03, criminal use of a firearm in the second degree as defined in section 265.08, criminal sale of a firearm in the second degree as defined in section 265.12, criminal sale of a firearm with the aid of a minor as defined in section 265.14, aggravated criminal possession of a weapon as defined in section 265.19, soliciting or providing support for an act of terrorism in the first degree as defined in section 490.15, hindering prosecution of terrorism in the second degree as defined in section 490.30, and criminal possession of a chemical weapon or biological weapon in the third degree as defined in section 490.37.

(c) Class D violent felony offenses: an attempt to commit any of the class C felonies set forth in paragraph (b); reckless assault of a child as defined in section 120.02, assault in the second degree as defined in section 120.05, menacing a police officer or peace officer as defined in section 120.18, stalking in the first degree, as defined in subdivision one of section 120.60, strangulation in the second degree as defined in section 121.12, rape in the second degree as defined in section 130.30, criminal sexual act in the second degree as defined in section 130.45, sexual abuse in the first degree as defined in section 130.65, course of sexual conduct against a child in the second degree as defined in section 130.80, aggravated sexual abuse in the third degree as defined in section 130.66, facilitating a sex offense with a controlled substance as defined in section 130.90, labor trafficking as defined in paragraphs (a) and (b) of subdivision three of section 135.35, criminal possession of a weapon in the third degree as defined in subdivision five, six, seven, eight, nine or ten of section 265.02, criminal sale of a firearm in the third degree as defined in section 265.11, intimidating a victim or witness in the second degree as defined in section 215.16, soliciting or providing support for an act of terrorism in the second degree as defined in section 490.10, and making a terroristic threat as defined in section 490.20, falsely report-

ing an incident in the first degree as defined in section 240.60, placing a false bomb or hazardous substance in the first degree as defined in section 240.62, placing a false bomb or hazardous substance in a sports stadium or arena, mass transportation facility or enclosed shopping mall as defined in section 240.63, aggravated unpermitted use of indoor pyrotechnics in the first degree as defined in section 405.18, and criminal manufacture, sale, or transport of an undetectable firearm, rifle or shotgun as defined in section 265.50.

(d) Class E violent felony offenses: an attempt to commit any of the felonies of criminal possession of a weapon in the third degree as defined in subdivision five, six, seven or eight of section 265.02 as a lesser included offense of that section as defined in section 220.20 of the criminal procedure law, persistent sexual abuse as defined in section 130.53, aggravated sexual abuse in the fourth degree as defined in section 130.65-a, falsely reporting an incident in the second degree as defined in section 240.55 and placing a false bomb or hazardous substance in the second degree as defined in section 240.61.

2. Authorized sentence.

(a) [Eff until Sept 1, 2021] Except as provided in subdivision six of section 60.05, the sentence imposed upon a person who stands convicted of a class B or class C violent felony offense must be a determinate sentence of imprisonment which shall be in whole or half years. The term of such sentence must be in accordance with the provisions of subdivision three of this section.

(a) [Eff Sept 1, 2021] The sentence imposed upon a person who stands convicted of a class B or class C violent felony offense must be an indeterminate sentence of imprisonment. Except as provided in subdivision five of section 60.05, the maximum term of such sentence must be in accordance with the provisions of subdivision three of this section and the minimum period of imprisonment under such sentence must be in accordance with subdivision four of this section.

(b) Except as provided in paragraph (b-1) of this subdivision, subdivision six of section 60.05 and subdivision four of this section, the sentence imposed upon a person who stands convicted of a class D violent felony offense, other than the offense of criminal possession of a weapon in the third degree as defined in subdivision five, seven or eight of section 265.02 or criminal sale of a firearm in the third degree as defined in section 265.11, must be in accordance with the applicable provisions of this chapter relating to sentencing for class D felonies provided, however, that where a sentence of imprisonment is imposed which requires a commitment to the state department of corrections and community supervision, such sentence shall be a determinate sentence in accordance with paragraph (c) of subdivision three of this section.

(b-1) Except as provided in subdivision six of section 60.05, the sentence imposed upon a person who stands convicted of the class D violent felony offense of menacing a police officer or peace officer as defined in section 120.18 of this chapter must be a determinate sentence of imprisonment.

(c) Except as provided in subdivision six of section 60.05, the sentence imposed upon a person who stands convicted of the class D violent felony offenses of criminal possession of a weapon in the third degree as defined in subdivision five, seven, eight or nine of section 265.02, criminal sale of a firearm in the third degree as defined in section 265.11, the class E violent felonies of attempted criminal possession of a weapon in the third degree as defined in subdivision five, seven, eight or nine of section 265.02, or criminal manufacture, sale, or transport of an undetectable firearm, rifle or shotgun as defined in section 265.50 must be a sentence to a determinate period of imprisonment, or, in the alternative, a definite sentence of imprisonment for a period of no less than one year, except that:

(i) the court may impose any other sentence authorized by law upon a person who has not been previously convicted in the five years immediately preceding the commission of the offense for a class A misdemeanor defined in this chapter, if the court having regard to the nature and circumstances of the crime and to the history and character of the defendant, finds on the record that such sentence would be unduly harsh and that the alternative sentence would be consistent with public safety and does not deprecate the seriousness of the crime; and

(ii) the court may apply the provisions of paragraphs (b) and (c) of subdivision four of this section when imposing a sentence upon a person who has previously been convicted of a class A misdemeanor defined in this chapter in the five years immediately preceding the commission of the offense.

3. Term of sentence. The term of a determinate sentence for a violent felony offense must be fixed by the court as follows:

(a) For a class B felony, the term must be at least five years and must not exceed twenty-five years, provided, however, that the term must be: (i) at least ten years and must not exceed thirty years where the sentence is for the crime of aggravated assault upon a police officer or peace officer as defined in section 120.11 of this chapter; and (ii) at least ten years and must not exceed thirty years where the sentence is for the crime of aggravated manslaughter in the first degree as defined in section 125.22 of this chapter;

(b) For a class C felony, the term must be at least three and one-half years and must not exceed fifteen years, provided, however, that the term must be: (i) at least seven years and must not exceed twenty years where the sentence is for the crime of aggravated manslaughter in the second degree as defined in section 125.21 of this chapter; (ii) at least seven years and must not exceed twenty years where the sentence is for the crime of attempted aggravated assault upon a police officer or peace officer as

defined in section 120.11 of this chapter; (iii) at least three and one-half years and must not exceed twenty years where the sentence is for the crime of aggravated criminally negligent homicide as defined in section 125.11 of this chapter; and (iv) at least five years and must not exceed fifteen years where the sentence is imposed for the crime of aggravated criminal possession of a weapon as defined in section 265.19 of this chapter;

(c) For a class D felony, the term must be at least two years and must not exceed seven years, provided, however, that the term must be: (i) at least two years and must not exceed eight years where the sentence is for the crime of menacing a police officer or peace officer as defined in section 120.18 of this chapter; and (ii) at least three and one-half years and must not exceed seven years where the sentence is imposed for the crime of criminal possession of a weapon in the third degree as defined in subdivision ten of section 265.02 of this chapter;

(d) For a class E felony, the term must be at least one and one-half years and must not exceed four years.

4. (a) Except as provided in paragraph (b) of this subdivision, where a plea of guilty to a class D violent felony offense is entered pursuant to section 220.10 or 220.30 of the criminal procedure law in satisfaction of an indictment charging the defendant with an armed felony, as defined in subdivision forty-one of section 1.20 of the criminal procedure law, the court must impose a determinate sentence of imprisonment.

(b) In any case in which the provisions of paragraph (a) of this subdivision or the provisions of subparagraph (ii) of paragraph (c) of subdivision two of this section apply, the court may impose a sentence other than a determinate sentence of imprisonment, or a definite sentence of imprisonment for a period of no less than one year, if it finds that the alternate sentence is consistent with public safety and does not deprecate the seriousness of the crime and that one or more of the following factors exist:

(i) mitigating circumstances that bear directly upon the manner in which the crime was committed; or

(ii) where the defendant was not the sole participant in the crime, the defendant's participation was relatively minor although not so minor as to constitute a defense to the prosecution; or

(iii) possible deficiencies in proof of the defendant's commission of an armed felony.

(c) The defendant and the district attorney shall have an opportunity to present relevant information to assist the court in making a determination pursuant to paragraph (b) of this subdivision, and the court may, in its discretion, conduct a hearing with respect to any issue bearing upon such determination. If the court determines that a determinate sentence of imprisonment should not be imposed pursuant to the provisions of such paragraph (b), it shall make a statement on the record of the facts and circumstances upon which such determination is based. A transcript of the court's statement, which shall set forth the recommendation of the district attorney, shall be forwarded to the state division of criminal justice services along with a copy of the accusatory instrument.

HISTORY:

Add, L 1978, ch 481, § 3, eff Sept 1, 1978; amd, L 1980, ch 233, § 2, eff Aug 12, 1980; L 1980, ch 234, §§ 1, 2; L 1980, ch 583, § 1; L 1981, ch 175, § 1; L 1986, ch 124, § 1; L 1988, ch 450, § 3; L 1991, ch 496, § 4; L 1991, ch 521, § 1; L 1993, ch 291, §§ 1, 2, eff Nov 1, 1993; L 1995, ch 3, § 4, eff Oct 1, 1995; L 1996, ch 122, § 2; L 1996, ch 181, § 1, eff Nov 1, 1996; L 1996, ch 632, § 1; L 1996, ch 646, § 1; L 1996, ch 647, § 1, eff Nov 1, 1996; L 1998, ch 1, §§ 5–9, eff Aug 6, 1998; L 1998, ch 378, § 2, eff Nov 1, 1998; L 1999, ch 33, §§ 1–4, eff Nov 1, 1999; L 1999, ch 635, § 10, eff Dec 1, 1999; L 2000, ch 189, §§ 6, 7, eff Nov 1, 2000; L 2001, ch 300, § 2, eff Sept 17, 2001; L 2001, ch 301, § 8, eff Sept 17, 2001; L 2003, ch 264, § 6, eff Nov 1, 2003; L 2003, ch 584, § 3, eff Nov 1, 2003; L 2004, ch 1, § 6 (Part A), eff July 23, 2004; L 2005, ch 764, §§ 1, 4, eff Dec, 21, 2005; L 2005, ch 765, §§ 4–6, eff Dec 21, 2005; L 2006, ch 110, § 2, eff Nov 1, 2006; L 2006, ch 320, § 5, eff Nov 1, 2006; L 2007, ch 7, § 32, eff April 13, 2007; L 2010, ch 405, § 1, eff Nov 11, 2010; L 2011, ch 62, § 122 (Part C, Subpart B), eff March 31, 2011; L 2011, ch 148, § 2, eff Nov 17, 2011; L 2013, ch 1, §§ 27–30, eff March 16, 2013; L 2015, ch 368, § 3, effective January 19, 2016; L 2018, ch 189, § 3, effective November 13, 2018; L 2018, ch 476, § 239, effective December 28, 2018; L 2019, ch 134, §§ 4, 5, effective January 26, 2020; L 2020, ch 94, § 4, effective June 12, 2020.

Prior Law: Former § 70.02, add, L 1973, ch 276, § 10; repealed, L 1973, ch 277, § 9, eff Sept 1, 1973.

Editor's Notes Laws 1993, ch 291, § 4, eff Nov 1, 1993, provides as follows:

§ 4. This act shall take effect on the first day of November next succeeding the date on which it shall have become a law and shall apply to offenses committed on or after such date.

Laws 1995, ch 3, § 1, eff June 10, 1995, provides as follows:

Section 1. Short title. Sections one through forty-four-a of this act shall be known and may be cited as the "sentencing reform act of 1995."

Laws 1995, ch 3, § 74 e, g, eff June 10, 1995, provides as follows:

§ 74. This act shall take effect immediately; provided, however, that:

e. Sections one-a through six, subdivision 6 of section 70.06 of the penal law as added by section seven, sections eight through twenty, twenty-four through twenty-eight, thirty-two, thirty-five through thirty-nine, and forty-two through forty-four of this act shall apply to offenses committed on or after October 1, 1995, offenses committed prior to such date shall be governed by the provisions of law in effect at the time the offense was committed;.

g. Nothing contained in sections one through forty-six of this act shall be deemed to affect the expiration, reversion or repeal of any provision of law amended by any such section of this act and such provisions shall expire or revert or be deemed repealed in the same manner, to the same extent and on the same date as the case may be as otherwise provided by law;.

Laws 1995, ch 3, § 74, sub d, eff June 10, 1995, provides as follows:

§ 74. This act shall take effect immediately; provided, however, that:

d. Sections one-a through twenty, twenty-four through twenty-eight, thirty through thirty-nine, forty-two and forty-four of this act shall be deemed repealed on September 1, 2021 (Amd, L 2005, ch 56, § 20 (Part D), eff April 12, 2005, deemed eff on and after April 1, 2005; L 2009, ch 56, § 21 (Part U), eff April 7, 2009; L 2011, ch 57, § 20 (Part A), eff March 31, 2011; L 2013, ch 55, § 19 (Part E), eff March 28,

2013; L 2015, ch 55, § 19 (Part B), eff April 13, 2015, deemed eff on and after March 31, 2015; L 2017, ch 55, § 19 (Part A), eff April 20, 2017; L 2019, ch 55, § 19 (Part O), eff April 12, 2019, deemed eff on and after March 31, 2019; L 2020, ch 55, § 19 (Part A), eff April 3, 2020).

Laws 1996, ch 122, § 7, eff Aug 1, 1996, provides as follows:

§ 7. This act shall take effect on the first day of August next succeeding the date on which it shall have become a law and shall apply only to offenses occurring on or after such date.

Laws 1998, ch 1, § 44, eff Aug 6, 1998, provides as follows:

This act shall take effect immediately; provided, however that sections one through thirty-nine of this act shall apply to offenses committed on or after September 1, 1998, offenses committed prior to such date shall be governed by the provisions of law in effect at the time the offense was committed; provided, however, that nothing contained herein shall be deemed to affect the application, qualification, expiration, reversion or repeal of any provision of law amended by any section of this act and the provisions of this act shall be applied or qualified or shall expire or revert or be deemed repealed in the same manner, to the same extent and on the same date as the case may be as otherwise provided by law.

Laws 1999, ch 635, §§ 1, 2 and 17, eff Dec 1, 1999, provide as follows:

Section 1. Short title. This act shall be known and may be cited as the "clinic access and anti-stalking act of 1999."

Laws 2001, ch 300, § 1, eff Sept 17, 2001, provides as follows:

Section 1. This act shall be known and may be cited as the "anti-terrorism act of 2001".

Laws 2003, ch 584, § 4, eff Nov 1, 2003, provides as follows:

§ 4. This act shall take effect on the first of November next succeeding the date on which it shall have become a law; provided that any state agency and any political subdivision of the state are authorized to promulgate any and all rules and regulations and take any other measures necessary to implement this act on its effective date on or before such date.

Laws 2004, ch 1, § 1 (Part A), eff July 23, 2004, provides as follows:

Section 1. Legislative intent. The tragic events of the September 11, 2001 attack, together with the more recent arrests of members of alleged terrorist cells in Erie county and elsewhere throughout the world, underscore the compelling need for further anti-terror measures to enhance public safety. It is our nation's profound commitment to the principles of democracy and the rule of law that enables us to respond efficiently and effectively to the outrageous criminal acts of terrorists. Creating new criminal offenses and increasing penalties to enhance the powers of law enforcement are necessary to combat their cowardly and inhumane acts of terror.

A chemical or biological attack against a civilian population or the threat of such an attack, however unimaginable before September 11, 2001, has become a stark and disturbing reality. The subsequent outbreaks of anthrax, a deadly disease that caused death and illness across our nation, awakened us to a new type of crime, a crime so indecent that it threatens our values as well as our lives. Terrorists committed to causing death and destruction with deadly or incapacitating chemicals or biological weapons must be brought to justice and punished severely. Although federal law explicitly proscribes such monstrous conduct, state law does not. This act, modeled on federal law, punishes those who criminally use or possess chemical or biological weapons and imposes the penalty of life imprisonment without parole in appropriate cases.

The images of the savage attack on the World Trade Center and the Pentagon on September 11, 2001 will be forever emblazoned on the psyches of all Americans. The slaughter of innocent civilians, and the sacrifice of selfless police officers, brave firefighters, and other heroic emergency services personnel, will never be forgotten. A crime of unimaginable horror, terrorism tears at the very fabric of our society, threatening to rob us of our commitment to freedom, justice, and democracy. This act protects that commitment by providing law enforcement officials with appropriate and effective tools to investigate, prosecute, and punish terrorists.

Laws 2005, ch 764, § 8, eff Dec 21, 2005, provides as follows:

§ 8. This act shall take effect immediately; provided, however, that the amendments to paragraph (a) of subdivision 2 of section 70.02 of the penal law, made by section one of this act, shall be subject to the expiration and reversion of such paragraph, as provided in subdivision d of section 74 of chapter 3 of the laws of 1995, as amended.

Laws 2005, ch 765, § 1, eff Dec 21, 2005, provides as follows:

Section 1. Short title. This act shall be known and may be cited as the "crimes against police act."

Laws 2006, ch 110, § 1, eff Nov 1, 2006, provides as follows:

Section 1. This act shall be known and may be cited as "Cynthia's law".

Laws 2007, ch 7, §§ 1, 52 (a), eff April 13, 2007, provide as follows:

Section 1. Short title. This act shall be known and may be cited as the "sex offender management and treatment act."

§ 52. This act shall take effect on the thirtieth day after it shall have become a law; provided, however, that:

(a) the provisions of sections thirteen, twenty-nine, thirty, thirty-one, thirty-two, thirty-three, thirty-four, thirty-five, thirty-six, thirty-seven, thirty-eight, thirty-nine, thirty-nine-a, forty, forty-one, forty-two, forty-three, forty-four, forty-five, forty-six, forty-seven, forty-eight, forty-nine and fifty of this act shall only apply to crimes committed after the effective date of this act;

Laws 2015 ch 368, § 1, eff Jan 19, 2016, provide:

Section 1. Short title. This act shall be known and may be cited as the "trafficking victims protection and justice act".

Laws 2018, ch 189, § 24, eff November 13, 2018, provides:

§ 24. This act shall take effect on the ninetieth day after it shall have become a law.

Laws 2019, ch 134, § 8, eff January 26, 2020, provides:

§ 8. This act shall take effect on the one hundred eightieth day after it shall have become a law.

Laws 2020, ch 94, § 1, eff June 12, 2020, provides:

§ 1. This act shall be known and may be cited as the "Eric Garner anti-chokehold act ".

Amendment Notes 2013. Chapter 1, § 27 amended:

Sub 1, par (b) by adding the matter in italics.

Sub 1, par (c) by deleting at fig 1 "or" and adding the matter in italics.

2013. Chapter 1, § 28 amended:

Sub 2, par (c), opening par by deleting at figs 1, 3 "four,", at figs 2 and 4 "or", and adding the matter in italics.

2013. Chapter 1, § 29 amended:

Sub 3, par (b) by deleting at fig 1 "and" and adding the matter in italics.

2013. Chapter 1, § 30 amended:

Sub 3, par (c) by adding the matter in italics.

2011. Chapter 62, § 122 (Part C, Subpart B) amended:

Sub 2, par (b) by deleting at fig 1 "four," and adding the matter in italics.

2007. Chapter 7, § 32 amended:

Sub 1, par (d) by deleting at fig 1 "four" and adding the matter in italics.

2006. Chapter 320, § 5 amended:

Sub 1, par (a) by adding the matter in italics.

2005. Chapter 765, § 5 amended:

Sub 2, par (b) by adding the matter between figs 1 and 2.

By adding sub 2, par (b-1).

2005. Chapter 765, § 6 amended:

Sub 3, par (a) by adding the matter in italics.

1998. Chapter 1, § 5 amended:

Sub 2, par (a) by adding the matter in italics.

1998. Chapter 1, § 6 amended:
Sub 2, par (c), subpar (ii) by adding the matter in italics.
1998. Chapter 1, § 7 amended:
Sub 3, opening par by adding the matter in italics.
By addiing sub 3, par (d).
1998. Chapter 1, § 8 amended:
By repealing former sub 4.
1998. Chapter 1, § 9 amended:
By redesignating former sub 5 as sub 4.
Sub 4, par (a) by deleting at fig 1 "section", at fig 2 "an indeterminate", at fig 3 "pursuant to section 70.00" and adding the matter in italics.
Sub 4, par (b), opening par by deleting at fig 1 "hereof", at fig 2 "an indeterminate" and adding the matter in italics.
Sub 4, par (c) by deleting at fig 1 "hereof", at fig 2 "an indeterminate" and adding the matter in italics.
The 2015 amendment by ch 368, § 3, added "sex trafficking as defined in paragraphs (a) and (b) of subdivision five of section 230.34" in 1(a); and added "labor trafficking as defined in paragraphs (a) and (b) of subdivision three of section 135.35" in 1(c).
The 2018 amendment by ch 189, § 3, added "sex trafficking of a child as defined in section 230.34-a" in 1(a).
The 2018 amendment by ch 476, § 239, substituted "firefighter or emergency medical services" for "fireman or emergency medical services" in 1(b).
The 2019 amendments by ch 134, §§ 4, 5, added "and criminal manufacture, sale, or transport of an undetectable firearm, rile or shotgun as defined in section 265.50" in 1(c) and in the introductory language of 2(c); and made related changes.
The 2020 amendment by ch 94, § 4, added "aggravated strangulation as defined in section 121.13-a" in 1(b).

PRACTICE INSIGHTS:

Sentences Of Imprisonment For First Time Violent Felony Offender

By Spiros A. Tsimbinos, Esq., Member of New York Bar
General Editor, John M. Castellano, Esq., Member of New York Bar

INSIGHT

Violent felony offenses should immediately trigger a danger warning for any defense counsel. An offense specifically designated as a violent felony offense means mandatory jail time and increased imprisonment. The first thing that counsel must do is to identify whether the felony is categorized as a violent one and what class level it has been designated. Penal Law § 70.02 specifically defines all of the violent felonies according to their class categories. After identifying the class category, defense counsel should proceed to determine the parameters of the authorized sentence, which is covered in Penal Law § 70.02(2). If counsel is representing a first time violent felony offender with respect to an incident that has arisen as a result of domestic violence, the possibility exists for an alternative indeterminate sentence rather than a mandatory determinate term. Alternative definite sentences may also be available under certain circumstances with respect to Class D and E weapons possession cases.

ANALYSIS

Distinguishing violent felony offenses.

The legislature has repeatedly added to the list of violent felony offenses so that today at least 60 crimes are on the list. Check the list to see whether the felony with which the defendant is charged is designated as a violent felony. If so, both the form and the length of the defendant's sentence may be greatly enhanced. Review the list before advising defendant about possible sentencing options.

Length of determinate term for first time violent felony offender.

The length of the applicable term for a first time violent felony offender depends upon the class of felony for which the defendant has been convicted. Penal Law § 70.02(3) sets the term as follows:

Class B felony — 5 to 25 years
Class C felony — 3½ to 15 years
Class D felony — 2 to 7 years
Class E felony — 1½ to 4 years

The determinate sentence imposed must be in the form of a whole or half year.

Remember that period of post-release supervision is part of determinate term.

Defense counsel is reminded that the determinate term imposed also includes a period of post-release supervision as specified in Penal Law § 70.45. The applicable post-release periods for a first time violent felony offense are as follows:

Class B violent felony — 2½ to 5 years
Class C violent felony — 2½ to 5 years
Class D violent felony — 1½ to 3 years

Under legislation passed in 2007, these ranges are significantly higher for violent felony sex offenses, as defined under new Penal Law § 70.80.

Class B violent felony sex offense — 5 to 20 years
Class C violent felony sex offense — 5 to 15 years
Class D violent felony sex offense — 3 to 10 years
Class E violent felony sex offense — 3 to 10 years

Defense counsel must make certain that the defendant is aware of the period of post-release supervision and that it is mentioned and recorded as part of the sentencing judgment. The failure to do so will create issues on appeal and may lead to the vacating of the sentence, the undoing of any plea bargain, and possible allegations of ineffective assistance of counsel.

Be aware of reasons for determinate term and time frame of its applicability.

The legislative purpose in utilizing the determinate term was to basically remove all options of discretionary early release by parole authorities and to limit judicial discretion in imposing sentence. Discretionary early release was effectively removed by the elimination of minimum and maximum terms under the former indeterminate system and the reduction of the good behavior credit of one third of the maximum to one seventh when dealing with determinate terms. (*See* Corr. L. § 803(c)) Thus, for example, if a defendant is sentenced today for a Class C violent felony offense to a term of seven years in prison, he will actually serve six sevenths of that time or six years. This situation is in line with the current "Truth in Sentencing" philosophy where a violent felony offender is required to actually serve almost all of the time he is sentenced to rather than to obtain the benefits of substantial early release options.

Alternative sentencing for domestic violence and weapons possession cases.

Although the new determinate terms with the additional term of post-release supervision are mandated for violent felony offenses, a special narrow exception was created in Jenna's Law for domestic violence cases which may allow a defendant to escape both consequences. Viewed as a minor concession in order to achieve broader support for the bill, this exception was accomplished by adding new Penal Law § 60.12, entitled "Authorized disposition; alternative indeterminate sentences of imprisonment for domestic violence cases." Thus, if counsel has a matter involving a domestic violence issue, he or she should remind the judge about the indeterminate sentencing alternative and seek to obtain a disposition within the minimum range of the authorized sentence. An alternative definite sentence may also be possible for Class D and E weapons possession cases pursuant to Penal Law § 70.02(2).

After the 2012 Sandy Hook Elementary School tragedy in Connecticut, increased penalties were imposed for certain firearm-related offenses. Thus, a defendant who possesses an unloaded firearm while committing a drug trafficking felony, as defined in Penal Law § 10.00(21), is now guilty of a felony, instead of a misdemeanor. *See* P.L. § 265.02(9). The crime carries a mandatory minimum of a three and one-half year determinate sentence, unless a judge determines that a lower sentence is appropriate. P.L. §§ 60.11-a, 70.02(3)(c)(ii). Similarly, a defendant may receive increased punishment for the new crime of Aggravated Criminal Possession of a Weapon if

he or she commits the crime of second-degree criminal possession of a weapon and, in the same criminal transaction, commits a violent felony offenses or a drug trafficking felony. The mandatory minimum is five years. P.L. § 70.02(3)(b)(iv). Counsel should be sure to take these mandatory minimum sentences into account in negotiating a plea or arguing for a particular sentence.

Consequences of Persistent Violent Felony Offender Finding

By Spiros A. Tsimbinos, Esq., Member of New York Bar

General Editor, John M. Castellano, Esq., Member of New York Bar

INSIGHT

A defendant found to be a persistent violent felony offender faces the most severe imprisonment penalties, including a maximum of life. Carefully determine whether the criteria have been reached to place a defendant within the persistent felony offender category and whether any underlying predicates can be attacked. Verify information received from the defendant regarding prior felony history. Counsel should also seek ways to minimize the possible sentence by exploring, at an early stage, possible plea negotiations and making clear to the defendant the severe consequences of being found a persistent violent felony offender.

ANALYSIS

Factors to consider in determining whether defendant falls within persistent violent felony category.

It is important to immediately identify the violent felony status of the defendant. Eligibility for persistent violent felony status basically requires commission of two prior violent felonies with a 10-year period prior to commission of the new violent felony offense. The prior violent felonies may be New York convictions pursuant to the listing in Penal Law § 70.02, or can be offenses in other jurisdictions that have the same essential elements of the New York crime and for which a sentence in excess of one year was authorized (although not necessarily imposed). With respect to New York violent felony offenses, the listing in Penal Law § 70.02 currently consists of 58 crimes and is continually increasing. Penal Law § 70.08 specifically adopts the criteria applicable to second felony offenders in Penal Law § 70.04.

Verify information received regarding prior violent felonies.

Counsel can ascertain the defendant's prior felony status by speaking to the defendant, but should also check the official court and police records. Don't blindly accept the defendant's statements as to past offenses: Instead, verify any information furnished by referring to the official documents. Clearly establish the felony category (including Class B, C, D, and E) of the defendant's current charges. Also ascertain the circumstances of the prior felonies, especially those in other jurisdictions.

Consequences of being found persistent violent felony offender.

If a defendant is found to be a persistent violent felony offender under Penal Law § 70.08, he or she faces a possible minimum 12 to 25 year sentence and a maximum of life. The actual sentence imposed will depend on the felony category of the crime for which the defendant is currently being sentenced. Unlike the situation involving persistent felony offenders, a persistent violent felony offender faces mandatory sentencing within the specified ranges.

Practitioners should be aware of an unusual omission in Penal Law § 70.08 relating to the sentence for a Class E felony. This omission has resulted in years of litigation in New York with the New York Court of Appeals finally determining the issue in *People v. Green*, 68 N.Y.2d 151, 506 N.Y.S.2d 298, 497 N.E.2d 665 (1986), and *People v. Tolbert*, 93 N.Y.2d 86, 688 N.Y.S.2d 105, 710 N.E.2d 669 (1999). Based upon these Court of Appeals rulings, the authorized sentence for a persistent violent felony offender convicted of a Class E violent felony is a minimum of 3 to 4 years and a maximum of life. Counsel representing a Class E violent felony offender who falls within the persistent category must thus refer the sentencing court to the case law mentioned above since the legislature has repeatedly failed to fill-in this missing sentence gap.

Certain procedures required to determine persistent violent felony status.

CPL § 400.16 sets forth the procedures that must be followed before a defendant can be sentenced as a persistent violent felony offender. Basically, the prosecution is required to file a pre-sentence notice or statement designating the alleged prior felonies and a preliminary hearing must be held if the defendant contests the validity of the prior alleged felonies. Be aware that, in most cases, the defendant and defense counsel concede the prior felonies if there is no question as to their accuracy or legality. In rare situations, a challenge can be raised either to the time sequence, factual basis of the allegations, or legality or constitutionality of the alleged prior offenses. Carefully discuss this issue with the defendant to determine the proper course of action.

Counsel may also wish to consider attacking the constitutional validity of the statute under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), which generally requires any fact that elevates the range of available sentences to be pleaded and proved to a jury. While current law provides an exception for statutes elevating the sentencing range based on recidivism alone, *see Almendarez-Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998); *People v. Bell*, 15 N.Y.3d 935, 915 N.Y.S.2d 208, 940 N.E.2d 913 (2010), there may now be a majority in the Supreme Court in favor of eliminating this exception. *See Shepard v. United States*, 544 U.S. 13, 27-28, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005) (Thomas, J., concurring).

Minimizing full consequences of persistent violent felony offender designation.

Review the defendant's prior felony status immediately upon taking the case and discuss the possibility of early plea discussions with the defendant. Prosecutors in various counties, knowing jail time is mandated for persistent violent felony offenders, usually offer an early plea disposition in the minimum range provided the defendant pleads early so a lengthy trial and proceedings can be avoided. For example, if a defendant is offered a Class D violent felony plea with a minimum sentence of 12 years to life and it is clear that he or she is a persistent violent felony offender with the present case being strong, defense counsel may be well advised to recommend that defendant take this plea offer rather than being faced with the possibility of receiving a possible sentence of 25 years to life.

Notes to Decisions

Analysis

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17. Appellate review

1. In general

A CPLR article 78 proceeding in the nature of prohibition, an extraordinary remedy issued only in the sound discretion of the court, is an appropriate means to consider whether a defendant

charged with burglary in the first degree who pleaded guilty to a misdemeanor and received a sentence of probation, in violation of CPL 220.10 (subd 5, par [e]) which prohibits the court from accepting a guilty plea to anything less than a class D felony for a violent felony offense such as burglary in the first degree (Penal Law, § 70.02), should have her plea and sentence vacated and be ordered to stand trial on the original indictment because the Judge, District Attorney and defense counsel were unaware of section 70.02 of the Penal Law, since the defendant is threatened with jeopardy for a second time. Wadsworth v Mogavero, 71 A.D.2d 157, 422 N.Y.S.2d 499, 1979 N.Y. App. Div. LEXIS 13243 (N.Y. App. Div. 3d Dep't 1979).

Court erred in sentencing defendant to "split sentence" in accordance with CLS Penal § 60.01 (that is, definite sentence of 6 months to run concurrently with 5 years' probation for third degree weapon possession)where court expressly stated that definite one-year term or indeterminate term would not be unduly harsh; absent determination of undue harshness, CLS Penal § 70.02(2)(c) mandates that defendant be sentenced either to indeterminate period of imprisonment or to definite sentence of at least one year. People v Goetz, 141 A.D.2d 446, 529 N.Y.S.2d 782, 1988 N.Y. App. Div. LEXIS 7256 (N.Y. App. Div. 1st Dep't), aff'd, 73 N.Y.2d 751, 536 N.Y.S.2d 45, 532 N.E.2d 1273, 1988 N.Y. LEXIS 3327 (N.Y. 1988).

Appellate Division would not vacate sentence of imprisonment imposed on defendant's plea of guilty to class D violent felony, although sentencing court had erroneously stated that prison term was mandated for class D violent felony conviction, since defendant knew that he faced maximum 7-year prison term, he was allowed to plead guilty to one violent class D felony in full satisfaction of several serious crimes, his sentence was in middle range for indeterminate sentences, and there was no showing that sentencing court had considered anything less than indeterminate sentence. People v McPhail, 145 A.D.2d 975, 536 N.Y.S.2d 346, 1988 N.Y. App. Div. LEXIS 14065 (N.Y. App. Div. 4th Dep't 1988), app. denied, 73 N.Y.2d 893, 538 N.Y.S.2d 806, 535 N.E.2d 1346, 1989 N.Y. LEXIS 1175 (N.Y. 1989).

Defendant was not entitled to reversal of convictions for robbery, sodomy, assault, and grand larceny on ground that defense counsel improperly failed to advise court of viability of alternative sentencing recommendations, since court was not permitted to consider sentencing alternatives as defendant was convicted of several violent felony offenses and thus indeterminate term of imprisonment was mandatory. People v Wallis, 147 A.D.2d 821, 537 N.Y.S.2d 910, 1989 N.Y. App. Div. LEXIS 1586 (N.Y. App. Div. 3d Dep't 1989).

Although the People presented uncontroverted evidence that defendant missed several appointments with a probation officer and without a reasonable explanation, the appellate court was unable to determine whether defendant's designation as a violent felony offender under N.Y. Penal Law § 70.02(1)(d). People v Blue, 38 A.D.3d 1234, 831 N.Y.S.2d 792, 2007 N.Y. App. Div. LEXIS 3533 (N.Y. App. Div. 4th Dep't 2007).

While defendant's sentence as a first-time felony offender under N.Y. Penal Law § 70.02 to assault in the second degree should have included a mandatory component of post-release supervision under N.Y. Penal Law §§ 70.00(6), 70.45(1), no such period was included in the sentence as a handwritten notation in a sentence and commitment form imposing such supervision was not signed by the sentencing judge and, thus, was a nullity. People v Duncan, 42 A.D.3d 470, 840 N.Y.S.2d 805, 2007 N.Y. App. Div. LEXIS 8415 (N.Y. App. Div. 2d Dep't), app. denied, 9 N.Y.3d 961, 848 N.Y.S.2d 29, 878 N.E.2d 613, 2007 N.Y. LEXIS 3573 (N.Y. 2007).

Because first-degree sodomy was a violent felony offense under N.Y. Penal Law §§ 70.02, 130.50, and because the parole board considered all the relevant factors in N.Y. Exec. Law § 259-i, including defendant's positive institutional programming, minimal disciplinary record, and post-release plans and goals, defendant was not entitled to N.Y. C.P.L.R. art. 78 relief. Matter of Gutkaiss v New York State Div. of Parole, 50 A.D.3d 1418, 857 N.Y.S.2d 755, 2008 N.Y. App. Div. LEXIS 3707 (N.Y. App. Div. 3d Dep't 2008).

N.Y. Penal Law § 70.25(3) dealt with alternative definite sentences imposed under N.Y. Penal Law § 70.00(4) for class D and E felonies, not determinate sentences under N.Y. Penal Law § 70.02(b) for class C violent felonies. People v Blume, 92 A.D.3d 1025, 937 N.Y.S.2d 724, 2012 N.Y. App. Div. LEXIS 905 (N.Y. App. Div. 3d Dep't), app. denied, 19 N.Y.3d 957, 950 N.Y.S.2d 109, 973 N.E.2d 207, 2012 N.Y. LEXIS 2400 (N.Y. 2012).

Insofar as Penal Law § 70.02, which defines punishment for violent felony offenses, is retroactively applied to make offenses which at the time of commission were only felonies into violent felonies for purposes of finding a defendant a second violent-felony offender or a persistent violent-felony offender, it is unconstitutional as ex post facto. People v Barbour, 111 Misc. 2d 266, 443 N.Y.S.2d 815, 1981 N.Y. Misc. LEXIS 3259 (N.Y. Sup. Ct. 1981), rev'd, 96 A.D.2d 842, 465 N.Y.S.2d 599, 1983 N.Y. App. Div. LEXIS 19432 (N.Y. App. Div. 2d Dep't 1983).

At the time when defendant's crimes were committed, August, 1997, the provisions of N.Y. Penal Law § 70.02(4) (1995) were in effect, requiring that a first-time violent felon who was sentenced to state prison must have received a minimum term that was one-half of the maximum; hence, having been convicted as a first-time felony offender of second degree attempted robbery, a class D violent felony offense, defendant's sentence of 2 to 4 years' imprisonment was legal. People v McGuffie, 308 A.D.2d 636, 764 N.Y.S.2d 729, 2003 N.Y. App. Div. LEXIS 9554 (N.Y. App. Div. 3d Dep't), app. denied, 1 N.Y.3d 576, 775 N.Y.S.2d 792, 807 N.E.2d 905, 2003 N.Y. LEXIS 4644 (N.Y. 2003).

Defendant's conviction for aggravated criminal contempt for violating an order of protection could not serve as a predicate for a conviction of second degree assault on the theory that an assault was committed in the course of and in furtherance of the aggravated criminal contempt because otherwise every aggravated criminal contempt would also be a second degree assault, and the legislature, when elevating third degree reckless or intentional assault from a class A misdemeanor to a class D felony when committed in violation of an order of protection against the person for whose protection the order was issued, did not intend to elevate the assault to a class D violent felony, such as second degree assault. People v Huck, 1 A.D.3d 935, 767 N.Y.S.2d 555, 2003 N.Y. App. Div. LEXIS 12269 (N.Y. App. Div. 4th Dep't 2003).

Sentence imposed on defendant for rape, oral sodomy, and sexual abuse was not excessive, especially since it was within the statutory parameters for Class B violent felonies and was not even the maximum authorized. People v Morehouse, 5 A.D.3d 925, 774 N.Y.S.2d 100, 2004 N.Y. App. Div. LEXIS 2779 (N.Y. App. Div. 3d Dep't), app. denied, 3 N.Y.3d 644, 782 N.Y.S.2d 416, 816 N.E.2d 206, 2004 N.Y. LEXIS 3391 (N.Y. 2004).

Criminal possession of a weapon in the third degree, N.Y. Penal Law § 265.02(4), is defined by the penal law as a violent felony; a reputation for peacefulness was relevant to the guilt or innocence of possession of a weapon, and thus, a trial court's refusal to permit defendant's character witness to testify was error. People v Chisolm, 7 A.D.3d 728, 777 N.Y.S.2d 502, 2004 N.Y. App. Div. LEXIS 7075 (N.Y. App. Div. 2d Dep't 2004).

Defendant's three-year sentence for assault in the second degree was not unconstitutionally disproportionate to the crimes committed. People v Ellis, 8 A.D.3d 826, 778 N.Y.S.2d 555, 2004 N.Y. App. Div. LEXIS 8587 (N.Y. App. Div. 3d Dep't), app. denied, 3 N.Y.3d 673, 784 N.Y.S.2d 12, 817 N.E.2d 830, 2004 N.Y. LEXIS 3697 (N.Y. 2004).

Inmate had not demonstrated that there was an error of state law with regard to the sentence he received on sexual abuse charges, or with regard to the state appellate court's decision not to exercise its discretion to reduce it in the interests of justice, because while the aggregate term was 75 years determinate, by operation of New York statutory law, the aggregate term imposed was deemed to be fifty years, under N.Y. Penal Law §§ 70.30(1)(c), 70.30(1)(e)(vi), 70.02(1)(a). Campbell v Poole, 555 F. Supp. 2d 345, 2008 U.S. Dist. LEXIS 42888 (W.D.N.Y. 2008).

14. —Sex crimes

Defendant's sentences for multiple sex offenses committed against children were not harsh or excessive based on the circumstances of the crimes, defendant's repeated conduct

against the children, and that the sentences imposed were less than the maximum allowed for the class B and class D violent felonies. People v Thiel, 134 A.D.3d 1237, 21 N.Y.S.3d 745, 2015 N.Y. App. Div. LEXIS 9168 (N.Y. App. Div. 3d Dep't 2015), app. denied, 27 N.Y.3d 1156, 62 N.E.3d 129, 39 N.Y.S.3d 389, 2016 N.Y. LEXIS 2544 (N.Y. 2016).

2. Constitutional issues

Defendant's conviction of robbery in the first degree and sentence as a second violent felony offender under Penal Law §§ 70.02, 70.04, did not violate the ex post facto clause of the United States Constitution even though the conviction upon which the second felony offender status was predicated was obtained prior to the enactment of the statute. The increased punishment mandated by the violent felony offender statute was imposed only for the crime for which defendant was convicted in the instant proceeding and in no way affected the punishment for the previous conviction. People v Aiello, 93 A.D.2d 864, 461 N.Y.S.2d 370, 1983 N.Y. App. Div. LEXIS 17733 (N.Y. App. Div. 2d Dep't), app. denied, 60 N.Y.2d 588, 1983 N.Y. LEXIS 5814 (N.Y. 1983).

Sentence of 12 ½ to 25 years for first degree manslaughter was not excessive, even though defendant was only 19 years old and expressed remorse, where he was acquitted of second degree murder in shooting of victim, and he had criminal history. People v Owens, 251 A.D.2d 898, 674 N.Y.S.2d 847, 1998 N.Y. App. Div. LEXIS 7756 (N.Y. App. Div. 3d Dep't), app. denied, 92 N.Y.2d 951, 681 N.Y.S.2d 481, 704 N.E.2d 234, 1998 N.Y. LEXIS 4223 (N.Y. 1998).

Court improperly resentenced defendant to prison term of 2 to 6 years after originally sentencing him to prison term of 2 ½ to 5 years where his original sentence was governed by provisions of CLS Penal § 70.02(4) then in effect, requiring minimum term to be no greater than one-third of maximum term imposed; thus, higher maximum sentence imposed on defendant's second degree burglary conviction violated Double Jeopardy Clause in that after imposition of original sentence, defendant acquired legitimate expectation of finality of its maximum term. People v Trimm, 252 A.D.2d 673, 675 N.Y.S.2d 241, 1998 N.Y. App. Div. LEXIS 8151 (N.Y. App. Div. 3d Dep't), app. denied, 92 N.Y.2d 931, 680 N.Y.S.2d 472, 703 N.E.2d 284, 1998 N.Y. LEXIS 3954 (N.Y. 1998).

Where a 14-year-old juvenile offender, following his plea of guilty to a violent felony offense (Penal Law, § 30.00, subd 2), moves to dismiss the indictment against him on the grounds that the sentencing provisions of chapter 481 of the Laws of 1978 are violative of his constitutional rights to equal protection of the laws, due process of law and protection against cruel and inhuman punishment in that, because of the classification scheme created by such laws, he is being denied consideration for youthful offender treatment solely because of his age and he will be subject to a mandatory period of imprisonment if a simultaneous motion for removal to Family Court is not granted (Penal Law, § 70.05, subd 4), such grounds do not set forth a basis for dismissal of the indictment, particularly since the court has the option on sentencing to construe the challenged statute in a constitutional manner. Accordingly, under such circumstances, the court will treat the motion as one requesting that the allegedly unconstitutional portion of the statute be disregarded for purposes of sentencing, and that the defendant be considered as eligible for youthful offender treatment. People v Williams, 100 Misc. 2d 183, 418 N.Y.S.2d 737, 1979 N.Y. Misc. LEXIS 2437 (N.Y. County Ct. 1979).

Because petitioner's sentence was not outside of the applicable statutory range, his sentencing challenge did not present a constitutional claim upon which habeas relief could be granted; petitioner pleaded guilty to four counts of robbery in the first degree pursuant to N.Y. Penal Law § 160.15 (a class B violent felony offense), and N.Y. Penal Law § 70.02(2)(a) provided that the sentence imposed upon a person convicted of a class B violent felony offense had to be a determinate sentence of at least 5 years and must not exceed 25 years (defendant was sentenced to maximum determinate sentence of 20 years). Steele v Filion, 377 F. Supp. 2d 332, 2005 U.S. Dist. LEXIS 6895 (W.D.N.Y. 2005).

3. —Due process

There was no due process infirmity under either the Federal or the State Constitution in the requirment of Penal Law § 70.02(5) that defendant, who had been charged with an armed felony after he allegedly displayed both a knife and a pistol while stealing a "Grateful Dead" button from another passenger on a subway train and was permitted to plead guilty to a class D violent felony, receive an indeterminate sentence of one to three years unless the court found that the factors specified in the statute warranted imposition of less than an indeterminate sentence; the statute did not improperly subject defendant to enhanced punishment on the basis of an unproven charge that he was "armed," in that the statute does not give preclusive effect to the indictment's allegation; para (c) does not improperly place upon the defendant the burden of proving one or more of the ameliorating factors referred to in subd (b), for by pleading guilty to the class D violent felony the defendant in effect admitted for the purpose of sentence that he was armed as charged, and any new facts found in the postplea presentence hearing could only reduce, not enhance, the punishment imposed; due process is not offended by the probability that in most cases establishment of an ameliorative factor would require that defendant come forward with proof. People v Felix, 58 N.Y.2d 156, 460 N.Y.S.2d 1, 446 N.E.2d 757, 1983 N.Y. LEXIS 2835 (N.Y.), app. dismissed, 464 U.S. 802, 104 S. Ct. 47, 78 L. Ed. 2d 68, 1983 U.S. LEXIS 927 (U.S. 1983).

Defendant's sentence as a second felony offender under N.Y. Penal Law § 70.02, following his conviction for the crime of burglary in the second degree, to a prison term of ten and one-half years with post-release supervision was affirmed. Defendant neither overcame the presumption of constitutionality attached to the legislative classification, nor established any due process deprivation resulting from it. People v Johnson, 38 A.D.3d 1057, 832 N.Y.S.2d 312, 2007 N.Y. App. Div. LEXIS 2861 (N.Y. App. Div. 3d Dep't 2007).

4. Sentence as unduly harsh

Only prior New York Penal Law misdemeanor convictions automatically disqualify defendant from consideration of issue whether mandatory sentence would be "unduly harsh" under CLS Penal § 70.02(2)(c)(i). People v Williams, 79 N.Y.2d 281, 582 N.Y.S.2d 71, 590 N.E.2d 1199, 1992 N.Y. LEXIS 938 (N.Y. 1992).

Question of whether or not sentence of incarceration specified in CLS Penal § 70.02(2)(c) would be "unduly harsh," taking into account nature and circumstances of particular crime involved and history and character of defendant, rests within sound discretion of trial court. People v Goetz, 141 A.D.2d 446, 529 N.Y.S.2d 782, 1988 N.Y. App. Div. LEXIS 7256 (N.Y. App. Div. 1st Dep't), aff'd, 73 N.Y.2d 751, 536 N.Y.S.2d 45, 532 N.E.2d 1273, 1988 N.Y. LEXIS 3327 (N.Y. 1988).

Sentence of indeterminate term of $8^1/_3$ to 25 years on conviction of first degree manslaughter was unduly harsh, and would be reduced to indeterminate term of 5 to 15 years, where defendant continually expressed remorse over incident, he had no prior arrests or convictions, he was 35 years old, and he had history of gainful employment. People v Masa Kuramura, 148 A.D.2d 331, 538 N.Y.S.2d 545, 1989 N.Y. App. Div. LEXIS 2378 (N.Y. App. Div. 1st Dep't), app. denied, 74 N.Y.2d 812, 546 N.Y.S.2d 570, 545 N.E.2d 884, 1989 N.Y. LEXIS 3551 (N.Y. 1989).

Sentence of 6 ⅔ to 20 years' imprisonment for first degree manslaughter was unduly harsh, and should be reduced to prison term of 3 to 9 years, where defendant was 44 years old, and crime (stabbing of his wife) was his first felony conviction and appeared to have been aberrational unpremeditated act inconsistent with his essentially stable and law-abiding past existence. 159 A.D.2d 6.

Evidence was sufficient to sustain defendant's conviction for attempted murder in the second degree but appellate court found that trial court's decision to impose a 25-year determinate prison sentence on defendant who was 53 years old and had never been convicted of a felony was unduly harsh and excessive and it reduced defendant's sentence to a determinate prison term of 15 years. People v Demeritt, 291 A.D.2d 726, 738 N.Y.S.2d 727, 2002 N.Y. App. Div. LEXIS 2113 (N.Y. App. Div. 3d Dep't), app. denied, 98 N.Y.2d 650, 745 N.Y.S.2d 508, 772 N.E.2d 611, 2002 N.Y. LEXIS 2051 (N.Y. 2002).

Based on the infant victim's tender age, gravity of his injuries and defendant's failure to take responsibility for his actions, there was no abuse of discretion nor extraordinary circumstance such

as defendant's sentence for his violent felony offense as being unduly harsh or excessive that warranted a sentence reduction. People v Ash, 162 A.D.3d 1318, 80 N.Y.S.3d 495, 2018 N.Y. App. Div. LEXIS 4570 (N.Y. App. Div. 3d Dep't), app. denied, 32 N.Y.3d 1002, 111 N.E.3d 1116, 86 N.Y.S.3d 760, 2018 N.Y. LEXIS 3154 (N.Y. 2018).

Defendant's knowing, voluntary and intelligent guilty plea precluded his challenge to County Court's denial of his motion to sever counts 5 and 6 of the indictment from the remaining counts of the indictment. Defendant's negotiated sentence, which was below the statutory maximum was not harsh or excessive. People v Burks, 187 A.D.3d 1405, 133 N.Y.S.3d 333, 2020 N.Y. App. Div. LEXIS 6382 (N.Y. App. Div. 3d Dep't 2020).

In its reference to "any other sentence authorized by law" that court might impose on finding that one-year sentence would be unduly harsh, CLS Penal § 70.02(2)(c)(i) must be interpreted as referring to other sentences that would be less harsh; otherwise, "unduly harsh" escape value would be meaningless. People v Goetz, 137 Misc. 2d 380, 520 N.Y.S.2d 919, 1987 N.Y. Misc. LEXIS 2597 (N.Y. Sup. Ct. 1987), aff'd in part and rev'd in part, 141 A.D.2d 446, 529 N.Y.S.2d 782, 1988 N.Y. App. Div. LEXIS 7256 (N.Y. App. Div. 1st Dep't 1988).

Where defendant had never been informed that if defendant failed to complete a drug rehabilitation program, the sentence imposed under N.Y. Penal Law §§ 70.02(3)(c), 70.45(2) for violation of N.Y. Penal Law §§ 110.00, 160.10(1), would include a period of post-release supervision, pursuant to N.Y. Crim. Proc. Law § 470.15(6)(b), the sentence excessive. People v Rosenthal, 305 A.D.2d 327, 760 N.Y.S.2d 460, 2003 N.Y. App. Div. LEXIS 6122 (N.Y. App. Div. 1st Dep't 2003).

Defendant's sentence to an indeterminate sentence of 20 years' to life was reduced to an indeterminate sentence of 15 years' to life under N.Y. Crim. Proc. Law § 470.20(6) as although the trial court did not err in sentencing defendant as a persistent felony offender, the sentence was unduly harsh since even though a burglary offense under N.Y. Penal, Law § 140.25(2) was a violent felony offense under N,Y. Penal Law § 70.02(1)(b), defendant did not employ actual violence in the offense despite being confronted by the resident; with the possible exception of two misdemeanor convictions of resisting arrest and criminal possession of a weapon in the 1980's, and a 2001 burglary conviction, defendant never used or threatened violence in the commission of a crime during his lengthy criminal history. People v Smart, 100 A.D.3d 1473, 954 N.Y.S.2d 322, 2012 N.Y. App. Div. LEXIS 7782 (N.Y. App. Div. 4th Dep't 2012), aff'd, 23 N.Y.3d 213, 989 N.Y.S.2d 631, 12 N.E.3d 1061, 2014 N.Y. LEXIS 904 (N.Y. 2014).

Because petitioner's sentence of 10 years for burglary and larceny was well within the authorized statutory range, his claim that his sentence was unduly harsh and severe did not present a federal constitutional question cognizable on habeas review. Dalcin v New York, 438 F. Supp. 2d 176, 2006 U.S. Dist. LEXIS 47534 (W.D.N.Y. 2006).

5. Illegal sentence

A sentence of five to twenty-five years, and an additional term of one year in prison condition on failure to pay a fine of $1,500 by the end of the service of the minimum term, imposed upon defendant convicted of manslaughter, was illegal, since the minimum term for manslaughter must be one third of the maximum term imposed, since when a jail term for nonpayment of a fine is added together with the maximum term imposed the resulting sentence exceeds the maximum authorized term of imprisonment, and since, given the judge's intention to impose a minimum five-year term, the maximum term that could be imposed was fifteen years. People v Vigo, 100 A.D.2d 823, 474 N.Y.S.2d 762, 1984 N.Y. App. Div. LEXIS 17930 (N.Y. App. Div. 1st Dep't), app. denied, 63 N.Y.2d 680, 1984 N.Y. LEXIS 5625 (N.Y. 1984).

Court was not authorized to impose sentence of 2 ½ to 7 ½ years' imprisonment on defendant's plea of guilty to Class D felony of first degree sexual abuse since maximum permissible sentence for that crime is $2^1/_3$ to 7 years. People v Tulko, 135 A.D.2d 851, 522 N.Y.S.2d 678, 1987 N.Y. App. Div. LEXIS 52790 (N.Y. App. Div. 2d Dep't 1987), app. denied, 70 N.Y.2d 1011, 526 N.Y.S.2d 946, 521 N.E.2d 1089, 1988 N.Y. LEXIS 979 (N.Y. 1988).

Sentence of probation imposed on conviction for robbery in second degree, which was class C offense, was illegal; sentence of incarceration was statutorily mandated. People v Garcia, 143 A.D.2d 842, 533 N.Y.S.2d 383, 1988 N.Y. App. Div. LEXIS 10175 (N.Y. App. Div. 2d Dep't 1988).

It was unlawful to impose sentence of 12 ½ to 25 years' imprisonment on defendant's conviction of second degree attempted murder, class B violent felony offense, since minimum term for such crime must be fixed at $1/_3$ of maximum term imposed; thus, sentence would be reduced to $8^1/_3$ to 25 years. People v Oquendo, 147 A.D.2d 506, 537 N.Y.S.2d 598, 1989 N.Y. App. Div. LEXIS 1534 (N.Y. App. Div. 2d Dep't), app. denied, 74 N.Y.2d 667, 543 N.Y.S.2d 410, 541 N.E.2d 439, 1989 N.Y. LEXIS 2242 (N.Y. 1989).

Sentence would be vacated and matter would be remanded for resentencing where defendant was sentenced to indeterminate term of from 9 to 18 years pursuant to plea bargain under which he pleaded guilty to manslaughter in first degree since sentence was illegal under CLS Penal § 70.02(4). People v Marty, 150 A.D.2d 171, 540 N.Y.S.2d 783, 1989 N.Y. App. Div. LEXIS 5451 (N.Y. App. Div. 1st Dep't 1989).

Sentences imposed for first and second degree robbery were not legally permissible since defendant was not convicted of armed felony offenses and therefore minimum term of imprisonment should have been $1/_3$ of maximum term, rather than ½ of maximum term. People v Walker, 189 A.D.2d 564, 592 N.Y.S.2d 253, 1993 N.Y. App. Div. LEXIS 18 (N.Y. App. Div. 1st Dep't), app. denied, 81 N.Y.2d 978, 598 N.Y.S.2d 779, 615 N.E.2d 236, 1993 N.Y. LEXIS 2142 (N.Y. 1993).

Prison sentence of 12 ½ to 25 years imposed on defendant's first degree robbery conviction was illegal; thus, sentence would be modified by reducing minimum term to $1/_3$, rather than ½ , maximum term. People v Agramonte, 228 A.D.2d 607, 644 N.Y.S.2d 632, 1996 N.Y. App. Div. LEXIS 7189 (N.Y. App. Div. 2d Dep't), app. denied, 88 N.Y.2d 979, 649 N.Y.S.2d 386, 672 N.E.2d 612, 1996 N.Y. LEXIS 3360 (N.Y. 1996).

Indeterminate sentence of imprisonment of 5 to 15 years imposed for second degree assault was illegal since maximum sentence for that offense committed before October 1, 1995 was $2^1/_3$ to 7 years. People v Bates, 233 A.D.2d 937, 649 N.Y.S.2d 878, 1996 N.Y. App. Div. LEXIS 13479 (N.Y. App. Div. 4th Dep't 1996).

On defendant's conviction of second and third degree robbery, definite sentence of 7 years imposed on third degree count was illegal under CLS Penal § 70.06(3)(d) and would be reduced to concurrent term of 3 ½ to 7 years. People v Tyler, 245 A.D.2d 1100, 667 N.Y.S.2d 578, 1997 N.Y. App. Div. LEXIS 13894 (N.Y. App. Div. 4th Dep't 1997), app. denied, 91 N.Y.2d 978, 672 N.Y.S.2d 858, 695 N.E.2d 727, 1998 N.Y. LEXIS 1699 (N.Y. 1998).

Sentencing court was not authorized to fix minimum period of defendant's indeterminate sentence at one-third maximum term imposed on his guilty plea to attempted second degree burglary, and thus People's motion to set aside sentence as illegal should have been granted. People v Correa, 248 A.D.2d 630, 670 N.Y.S.2d 513, 1998 N.Y. App. Div. LEXIS 2926 (N.Y. App. Div. 2d Dep't 1998), aff'd, 93 N.Y.2d 821, 687 N.Y.S.2d 615, 710 N.E.2d 261, 1999 N.Y. LEXIS 1294 (N.Y. 1999).

Sentence of 25 years to life for second degree kidnapping would be reduced to $8^1/_3$ to 25 years where original sentence was illegal under CLS Penal §§ 70.00(2)(b) and 135.20, and court's intention to impose maximum sentence was clear. People v Gammon, 251 A.D.2d 512, 675 N.Y.S.2d 548, 1998 N.Y. App. Div. LEXIS 6927 (N.Y. App. Div. 2d Dep't), app. denied, 92 N.Y.2d 924, 680 N.Y.S.2d 466, 703 N.E.2d 278, 1998 N.Y. LEXIS 3803 (N.Y. 1998).

Sentence of 3 to 9 years for class D felony of second degree assault was unlawful and would be reduced to $2^1/_3$ to 7 years. People v Vukel, 263 A.D.2d 416, 695 N.Y.S.2d 73, 1999 N.Y. App. Div. LEXIS 8241 (N.Y. App. Div. 1st Dep't), app. denied, 94 N.Y.2d 830, 702 N.Y.S.2d 601, 724 N.E.2d 393, 1999 N.Y. LEXIS 4350 (N.Y. 1999), app. denied sub. nom., People v Vokel, 94 N.Y.2d 830, 702 N.Y.S.2d 601, 724 N.E.2d 393, 1999 N.Y. LEXIS 4779 (N.Y. 1999), overruled in part, People v Wells, 24 N.Y.3d 971, 996 N.Y.S.2d 569, 21 N.E.3d 198, 2014 N.Y. LEXIS 2820 (N.Y. 2014).

In prosecution for 3 counts of first degree rape and 6 counts of first degree sexual abuse of defendant's stepdaughter, who re-

ported at age 13 that defendant had molested her since age 6, sentence for first 6 counts exceeded maximum allowed by law where those counts were for crimes committed before October 1, 1995, effective date of amendment to CLS Penal § 70.02(4), and thus minimum term could be no greater than ⅓, rather than ½ , of maximum imposed by court. People v Carroll, 263 A.D.2d 768, 695 N.Y.S.2d 154, 1999 N.Y. App. Div. LEXIS 8287 (N.Y. App. Div. 3d Dep't 1999), rev'd, 95 N.Y.2d 375, 718 N.Y.S.2d 10, 740 N.E.2d 1084, 2000 N.Y. LEXIS 3524 (N.Y. 2000).

Sentence of 3 ½ to 7 years for first degree reckless endangerment would be reduced to 2 ½ to 7 years where original sentence was unlawful under CLS Penal §§ 70.00(2)(d) and (3)(b), 70.02(1)(c), and 120.25. People v Matthews, 273 A.D.2d 411, 711 N.Y.S.2d 332, 2000 N.Y. App. Div. LEXIS 7022 (N.Y. App. Div. 2d Dep't), app. denied, 95 N.Y.2d 906, 716 N.Y.S.2d 647, 739 N.E.2d 1152, 2000 N.Y. LEXIS 3674 (N.Y. 2000).

Despite People v Brown, 67 NY2d 555, defendant was properly convicted and sentenced for both first degree assault and first degree use of firearm where (1) clear intent of CLS Penal § 265.09(2), which contains language "Notwithstanding any other provision of law to the contrary," was that display of loaded weapon during commission of class B violent felony would automatically result in 5-year additional sentence, absent any mitigating factor set forth therein, and (2) to apply Brown in such cases would effectively repeal § 265.09(2) as to many violent felonies, which result legislature could not have intended. People v Rhodes, 281 A.D.2d 225, 723 N.Y.S.2d 2, 2001 N.Y. App. Div. LEXIS 2474 (N.Y. App. Div. 1st Dep't), app. denied, 96 N.Y.2d 906, 730 N.Y.S.2d 804, 756 N.E.2d 92, 2001 N.Y. LEXIS 2915 (N.Y. 2001).

There was no merit in defendant's claim that he was improperly sentenced under CLS Penal § 265.09(2) because he was not indicted for, or convicted of, "displaying" loaded weapon, which is essential element of that subdivision, where he was convicted under both CLS Penal § 265.09(1), which requires either possession of loaded operable weapon or display of apparent firearm, and CLS Penal § 120.10(1) for having shot victim, and thus jury necessarily found that defendant had displayed loaded weapon, and there was no violation of his right to have penalty-enhancing determinations made by jury. People v Rhodes, 281 A.D.2d 225, 723 N.Y.S.2d 2, 2001 N.Y. App. Div. LEXIS 2474 (N.Y. App. Div. 1st Dep't), app. denied, 96 N.Y.2d 906, 730 N.Y.S.2d 804, 756 N.E.2d 92, 2001 N.Y. LEXIS 2915 (N.Y. 2001).

Sentence of 2 to 6 years for second degree assault was illegal where sentencing statute in effect at time of crime required minimum sentence for class D violent felony of ½, rather than ⅓, of maximum term. People v Carter, 286 A.D.2d 773, 730 N.Y.S.2d 733, 2001 N.Y. App. Div. LEXIS 8692 (N.Y. App. Div. 2d Dep't), app. denied, 97 N.Y.2d 655, 737 N.Y.S.2d 56, 762 N.E.2d 934, 2001 N.Y. LEXIS 4198 (N.Y. 2001).

Trial court's sentence of imprisonment for a term of 12 ½ to 25 years on defendant convicted of manslaughter in the first degree was illegal and appellate court modified trial court's judgment by reducing defendant's sentence. People v White, 291 A.D.2d 842, 737 N.Y.S.2d 181, 2002 N.Y. App. Div. LEXIS 940 (N.Y. App. Div. 4th Dep't), app. denied, 98 N.Y.2d 656, 745 N.Y.S.2d 515, 772 N.E.2d 618, 2002 N.Y. LEXIS 2214 (N.Y. 2002).

Because the People conceded that defendant's sentence of seven years' imprisonment with five years' post-release supervision for third-degree robbery was illegal under N.Y. Penal Law §§ 70.06(2), (3)(d), (4)(b), 160.05, 70.02(1)(c), 70.45, the sentence was vacated. People v Rowlett, 29 A.D.3d 922, 815 N.Y.S.2d 707, 2006 N.Y. App. Div. LEXIS 6908 (N.Y. App. Div. 2d Dep't 2006).

Because defendant's conviction for second-degree assault under N.Y. Penal Law § 70.02(1)(c) required a determinate sentence of two to seven years, in accordance with § 70.02(2)(b), (3)(c), the trial court's imposition of an indeterminate sentence of one to three years in prison was illegal. People v Delorenzo, 34 A.D.3d 868, 823 N.Y.S.2d 564, 2006 N.Y. App. Div. LEXIS 13004 (N.Y. App. Div. 3d Dep't 2006).

Resentencing was required on defendant's conviction of criminal possession of a weapon in the third degree because the trial court incorrectly imposed an indeterminate sentence, and a determinate sentence was required. People v McLawrence, 108 A.D.3d 571, 968 N.Y.S.2d 569, 2013 N.Y. App. Div. LEXIS 4999 (N.Y. App. Div. 2d Dep't 2013), recalled, vacated, sub. op., 114 A.D.3d 964, 983 N.Y.S.2d 806, 2014 N.Y. App. Div. LEXIS 1295 (N.Y. App. Div. 2d Dep't 2014).

Determinate term of imprisonment imposed on one of two counts of sodomy in the first degree was illegal, as the People failed to prove that the crime in the subject count was committed on or after September 1, 1998, and, therefore, the only authorized sentence for that count was an indeterminate prison term pursuant to former N.Y. Penal Law § 70.02(3)(a). People v Mosca, 294 A.D.2d 938, 741 N.Y.S.2d 780, 2002 N.Y. App. Div. LEXIS 4544 (N.Y. App. Div. 4th Dep't), app. denied, 99 N.Y.2d 538, 752 N.Y.S.2d 599, 782 N.E.2d 577, 2002 N.Y. LEXIS 4161 (N.Y. 2002).

Where a trial court sua sponte changed defendant's sentence to a five-year term under N.Y. Penal Law § 70.45(2) because the three-year sentence under N.Y. Penal Law § 70.02 was unlawful (as defendant was not being sentenced as a violent felony offender), the trial court should have held a resentencing hearing; however, because defendant withdrew a N.Y. Crim. Proc. Law § 440.20 motion to vacate before it was decided, defendant waived the claim that the trial court erred by not holding a resentencing hearing. People v Hollis, 309 A.D.2d 764, 765 N.Y.S.2d 67, 2003 N.Y. App. Div. LEXIS 10463 (N.Y. App. Div. 2d Dep't 2003), app. denied, 1 N.Y.3d 597, 776 N.Y.S.2d 229, 808 N.E.2d 365, 2004 N.Y. LEXIS 349 (N.Y. 2004).

Where the trial court imposed a sentence of a minimum of 25 years and a maximum of 25 years imprisonment on each of defendant's convictions for attempted murder in the second degree in violation of N.Y. Penal Law §§ 110.00, 125.25 and kidnapping in the second degree in violation of N.Y. Penal Law § 135.20 for the crimes committed in 1996, the sentence was illegal under former N.Y. Penal Law § 70.02(3)(a). People v Reed, 2 A.D.3d 463, 767 N.Y.S.2d 821, 2003 N.Y. App. Div. LEXIS 12837 (N.Y. App. Div. 2d Dep't 2003), app. denied, 1 N.Y.3d 600, 776 N.Y.S.2d 232, 808 N.E.2d 368, 2004 N.Y. LEXIS 417 (N.Y. 2004), app. dismissed, 2 N.Y.3d 754, 778 N.Y.S.2d 458, 810 N.E.2d 911, 2004 N.Y. LEXIS 596 (N.Y. 2004).

Where defendant was convicted of third degree criminal possession of a weapon in violation of N.Y. Penal Law § 265.02(1), the trial court's imposition of a determinate term of three years in prison was erroneous; because the felony was nonviolent pursuant to N.Y. Penal Law § 70.02(1)(c), any term of incarceration had to be indeterminate pursuant to N.Y. Penal Law § 70.06(2), (3)(d), (4)(b). People v La Var, 4 A.D.3d 787, 771 N.Y.S.2d 458, 2004 N.Y. App. Div. LEXIS 1498 (N.Y. App. Div. 4th Dep't), app. denied, 3 N.Y.3d 642, 782 N.Y.S.2d 414, 816 N.E.2d 204, 2004 N.Y. LEXIS 3346 (N.Y. 2004).

Respective post release supervision periods imposed on defendant's convictions for strangulation in the second degree of five years was illegal because strangulation in the second degree is a class D violent felony and the permitted period of post release supervision is from one and one-half to three years only; therefore, the case was remitted to the county court to modify the post release supervision period. People v Manigault, 150 A.D.3d 1331, 54 N.Y.S.3d 193, 2017 N.Y. App. Div. LEXIS 3499 (N.Y. App. Div. 3d Dep't), app. denied, 29 N.Y.3d 1130, 86 N.E.3d 572, 64 N.Y.S.3d 680, 2017 N.Y. LEXIS 2815 (N.Y. 2017).

Defendant was illegally sentenced as a second violent felony offender because the People failed to demonstrate that the California offense of robbery in the first degree was equivalent to a New York criminal offense designated as a violent felony. People v Salako, 165 A.D.3d 846, 86 N.Y.S.3d 93, 2018 N.Y. App. Div. LEXIS 6694 (N.Y. App. Div. 2d Dep't 2018), app. denied, 32 N.Y.3d 1177, 121 N.E.3d 232, 97 N.Y.S.3d 604, 2019 N.Y. LEXIS 337 (N.Y. 2019).

Where an inmate was convicted of second degree assault and third degree criminal possession of a weapon, imposition of a determinate sentence of four and one-half years was proper as there was no requirement that sentences imposed pursuant to N.Y. Penal Law § 70.02 be only in "whole numbers." Willson v Berbary, 421 F. Supp. 2d 589, 2006 U.S. Dist. LEXIS 29281 (W.D.N.Y. 2006).

6. Persistent or repeat offenders

The convictions of three defendants sentenced as second or persistent violent felony offenders would be affirmed even though

the predicate convictions antedated the effective date of the statute classifying the crime on which the conviction was based as a violent felony offense, where the elements of the crime when committed were the same as those of an offense now defined as a violent felony offense by Penal Law § 70.02; such procedure does not violate the restriction against ex post facto laws contained in Article I of the United States Constitution; persistent violent felony adjudications against two defendants who pleaded guilty to two violent felony offenses on the same day, the charges having arisen out of separate incidents, and who were sentenced on a single day to concurrent prison sentences, would be vacated, and the cases remitted for sentencing of the defendants as second violent felony offenders, since the Legislature did not intend the persistent violent felony law (Penal Law § 70.08) to apply unless each of the two or more predicate violent felony convictions other than the first was for a felony which occurred after sentence had been imposed for the conviction which preceded it. People v Morse, 62 N.Y.2d 205, 476 N.Y.S.2d 505, 465 N.E.2d 12, 1984 N.Y. LEXIS 4286 (N.Y. 1984), app. dismissed, 469 U.S. 1186, 105 S. Ct. 951, 83 L. Ed. 2d 959, 1985 U.S. LEXIS 663 (U.S. 1985).

Where the predicate offense under the second violent offender law (Penal Law § 70.04) and the persistent violent offender law (Penal Law § 70.08) is only so classified because it occurs after a plea of guilty to a lesser included offense, there is no statutory infirmity in the failure to recite in the predicate felony information that the prior conviction was obtained upon a plea of guilty or any constitutional defect because the same offense would not be classified as a violent felony if conviction had been obtained after trial; there was no jurisdictional defect because the sentencing minutes include the Judge's statement that "there has been no jury connected with any of these prior criminal acts"; since the information stated the prior conviction to have been for attempted criminal possession of a weapon in the third degree and made specific reference to Penal Law § 70.02(1), which refers to a lesser included offense, it is clear that the offense could be a lesser included offense only when conviction is on a plea of guilty and not by verdict; therefore, the claimed missing allegation is sufficiently incorporated by reference. People v Morse, 62 N.Y.2d 205, 476 N.Y.S.2d 505, 465 N.E.2d 12, 1984 N.Y. LEXIS 4286 (N.Y. 1984), app. dismissed, 469 U.S. 1186, 105 S. Ct. 951, 83 L. Ed. 2d 959, 1985 U.S. LEXIS 663 (U.S. 1985).

Defendant was improperly sentenced as persistent class E violent felony offender based on his plea of guilty to top count of superior court information charging him with attempted third degree weapon possession in full satisfaction of all pending charges, since third degree weapon possession constitutes class E violent felony only when defendant is convicted of such charge as lesser included offense under indictment charging greater offense (CLS Penal § 70.02, CLS CPL § 220.20(1); sentence would be vacated, and since People's consent to plea was predicated on defendant receiving sentence he did, People would be permitted to withdraw their consent to plea agreement. People v Dickerson, 85 N.Y.2d 870, 626 N.Y.S.2d 50, 649 N.E.2d 1194, 1995 N.Y. LEXIS 686 (N.Y. 1995).

Defendants were not entitled to resentencing under the Drug Law Reform Act of 2009 because they had predicate violent felony convictions under N.Y. Crim. Proc. Law § 440.46(5)(a)(i) which excluded such resentencing; contrary to defendants' claims, it was evident from § 440.46(5)(a) that predicate felony convictions were not limited to convictions that had been so "adjudicated," particularly in light of § 440.46(5)(b)'s explicit language that an "exclusion offense" was also a second violent felony offense pursuant to N.Y. Penal Law § 70.06 or a persistent violent felony offender pursuant to N.Y. Penal Law § 70.08 for which the person had previously been adjudicated. By including a "prior adjudication" requirement in § 440.46(5)(b) (which did not include the 10-year limitation) but not § 440.46(5)(a), the legislature plainly intended that defendants with violent felony offenses did not need to be previously adjudicated as such before being rendered ineligible for resentencing under § 440.46(5)(a). People v Steward, 18 N.Y.3d 493, 941 N.Y.S.2d 17, 964 N.E.2d 388, 2012 N.Y. LEXIS 216 (N.Y. 2012).

Defendant's adjudication as a second violent felony offender was proper, where the instant offense was committed after the effective date of Penal Law §§ 70.02, 70.04, and constituted a violent felony, and where the crime of attempted robbery in the second degree of which defendant was convicted in 1977 and upon which the second violent felony offender status was predicated is now also classified as a violent felony offense, under such circumstances the second violent felony offender statutes do not violate the ex post facto clauses of the United States Constitution. People v Melvin, 99 A.D.2d 517, 470 N.Y.S.2d 690, 1984 N.Y. App. Div. LEXIS 16727 (N.Y. App. Div. 2d Dep't 1984).

Defendant was improperly sentenced as predicate violent felony offender on his plea of guilty to sodomy, sexual abuse, and unlawful imprisonment, based upon prior conviction for attempted sexual abuse in first degree, since that crime is not classified as violent felony offense under Penal Law § 70.02. People v Falk, 108 A.D.2d 925, 485 N.Y.S.2d 815, 1985 N.Y. App. Div. LEXIS 43259 (N.Y. App. Div. 2d Dep't 1985).

Defendant who had previously been convicted of third degree robbery was improperly sentenced as second violent felony offender, and was entitled to resentencing, since third degree robbery is not among offenses which may be used as predicate for second violent felony offender status. People v Le Grand, 123 A.D.2d 290, 506 N.Y.S.2d 443, 1986 N.Y. App. Div. LEXIS 60062 (N.Y. App. Div. 1st Dep't 1986).

Defendant was properly sentenced as persistent violent felony offender under CLS Penal § 70.02 where plea minutes, to which defense counsel did not object, stated that defendant had previously pleaded guilty to attempted criminal possession of dangerous weapon consisting of "loaded" revolver, and such plea had been made in satisfaction of indictment charging him with criminal possession of "loaded" firearm. People v Seaton, 127 A.D.2d 620, 511 N.Y.S.2d 417, 1987 N.Y. App. Div. LEXIS 43103 (N.Y. App. Div. 2d Dep't 1987).

Use of federal felony of bank robbery as defined in 18 USCS § 2113(a) as predicate for adjudicating defendant as second violent felony offender was improper since New York statutory analogue of federal offense is crime of robbery in third degree, which is not deemed violent for sentencing purposes. People v Smith, 129 A.D.2d 517, 514 N.Y.S.2d 369, 1987 N.Y. App. Div. LEXIS 45194 (N.Y. App. Div. 1st Dep't 1987).

Sentencing of defendant as persistent violent felony offender would be vacated and matter would be remanded for resentencing since prior conviction for criminal possession of defaced weapon was not offense designated as violent felony offense under CLS Penal § 70.02. People v Richardson, 142 A.D.2d 537, 531 N.Y.S.2d 218, 1988 N.Y. App. Div. LEXIS 8035 (N.Y. App. Div. 1st Dep't 1988), app. denied, 73 N.Y.2d 1020, 541 N.Y.S.2d 775, 539 N.E.2d 603, 1989 N.Y. LEXIS 1984 (N.Y. 1989).

Defendant with 2 prior convictions for third degree weapon possession, which is class D violent felony, was properly adjudicated to be persistent violent felony offender on convictions for second degree robbery, despite fact that he had not previously been sentenced as second felony offender. People v Solomon, 156 A.D.2d 400, 548 N.Y.S.2d 529, 1989 N.Y. App. Div. LEXIS 15370 (N.Y. App. Div. 2d Dep't 1989), app. denied, 75 N.Y.2d 871, 553 N.Y.S.2d 303, 552 N.E.2d 882, 1990 N.Y. LEXIS 883 (N.Y. 1990).

Defendant was improperly adjudicated second violent felony offender, rather than second felony offender, where his prior conviction was for third degree robbery, which is class D nonviolent felony. People v Bennett, 162 A.D.2d 694, 557 N.Y.S.2d 116, 1990 N.Y. App. Div. LEXIS 8160 (N.Y. App. Div. 2d Dep't), app. denied, 76 N.Y.2d 1019, 565 N.Y.S.2d 769, 566 N.E.2d 1174, 1990 N.Y. LEXIS 4780 (N.Y. 1990).

Defendant was improperly adjudicated as second violent felony offender based on his conviction of attempted second degree assault; such crime is not violent felony offense. People v McManus, 228 A.D.2d 453, 643 N.Y.S.2d 413, 1996 N.Y. App. Div. LEXIS 6209 (N.Y. App. Div. 2d Dep't 1996).

Defendant was properly sentenced as a second violent felony offender on drug charges as his prior conviction of attempted criminal possession of a weapon in the third degree under former N.Y. Penal Law § 265.02(4) was based on a guilty plea to that offense as a lesser included offense under N.Y. Crim. Proc. Law § 220.20 of criminal possession of a weapon in the third degree and thus was a class E violent felony offense under N.Y. Penal

Law § 70.02(d). People v Henry, 52 A.D.3d 841, 860 N.Y.S.2d 619, 2008 N.Y. App. Div. LEXIS 5774 (N.Y. App. Div. 2d Dep't), app. denied, 11 N.Y.3d 789, 866 N.Y.S.2d 615, 896 N.E.2d 101, 2008 N.Y. LEXIS 3881 (N.Y. 2008).

For purposes of a persistent-violent-felony-offender hearing, defendant's two previous convictions for violent felonies could be considered, notwithstanding that such convictions occurred prior to September 1, 1978, the effective date of the felony offender law. In addition, where defendant failed to raise the issue of the alleged unconstitutionality of the earliest of the two convictions when he was sentenced as a persistent felony-offender for the second conviction, defendant would be precluded from contesting the constitutionality of his first conviction. People v Graham, 111 Misc. 2d 666, 444 N.Y.S.2d 988, 1981 N.Y. Misc. LEXIS 3337 (N.Y. Sup. Ct. 1981).

Defendant's sentence for two recent violent felonies could be enhanced under Penal Law § 70.08 by the use of three prior convictions for criminal possession of a weapon, even though at the time defendant was convicted of possession, it was not defined in Penal Law § 70.02 as a violent felony, where an amendment to that statute redefined the crime as a violent felony, where § 70.08 was not an ex post facto law as applied to defendant in that both it and the statute redefining criminal possession of a weapon were in force and effect prior to defendant's commission of the most recent violent felonies, and where the fact that the sentences for defendant's convictions for criminal possession of a weapon ran concurrently would not alter his status as an individual with two or more previous violent felony convictions. People v Santana, 117 Misc. 2d 1016, 459 N.Y.S.2d 705, 1983 N.Y. Misc. LEXIS 3244 (N.Y. Sup. Ct. 1983), modified, 107 A.D.2d 613, 483 N.Y.S.2d 1020, 1985 N.Y. App. Div. LEXIS 49775 (N.Y. App. Div. 1st Dep't 1985).

Defendant was properly sentenced as a persistent violent felony offender where the trial court determined: (1) the assault was a violent felony offense; (2) defendant had previously been convicted of two predicate violent felonies as defined by N.Y. Penal Law § 70.04(1)(b), consisting of a 1994 conviction in New York of assault in the second degree, and a 1980 conviction in South Carolina for voluntary manslaughter; (3) the People proved the remaining requirements for sentencing as a persistent violent felony offender; and (4) defendant had been incarcerated for approximately 11 ½ years since the 1980 conviction, excluding that time under the tolling provision, which brought the 1980 predicate to within 10 years of the felony at issue. People v Sudan, 298 A.D.2d 620, 748 N.Y.S.2d 415, 2002 N.Y. App. Div. LEXIS 9644 (N.Y. App. Div. 3d Dep't 2002), app. denied, 99 N.Y.2d 620, 757 N.Y.S.2d 831, 787 N.E.2d 1177, 2003 N.Y. LEXIS 657 (N.Y. 2003).

Since defendant's predicate North Carolina conviction was equivalent to the crime of burglary in the third degree in New York, a nonviolent felony under N.Y. Penal Law §§ 70.02(1)(c), 140.20, the trial court erred in sentencing defendant as second violent felony offender in two New York cases. People v McKoy, 300 A.D.2d 601, 751 N.Y.S.2d 882, 2002 N.Y. App. Div. LEXIS 12705 (N.Y. App. Div. 2d Dep't 2002).

Defendant was improperly sentenced as a persistent violent felony offender pursuant to N.Y. Penal Law § 70.08(1)(a), where defendant was twice previously convicted of attempted criminal possession of a weapon in the third degree under N.Y. Penal Law § 110.00; defendant had not previously been convicted of two violent felonies as defined in N.Y. Penal Law § 70.02, because one of the attempted criminal possession convictions arose out of a plea to an offense of a lesser grade than the charged offense. People v Banuchi, 304 A.D.2d 402, 760 N.Y.S.2d 10, 2003 N.Y. App. Div. LEXIS 4102 (N.Y. App. Div. 1st Dep't 2003).

Adjudication as a persistent violent felony offender was proper because the People filed a persistent violent felony offender statement setting forth two prior violent felony convictions-a conviction of robbery in the second degree on June 18, 1993 and a conviction of attempted robbery in the second degree on March 7, 1995; inasmuch as the first violent felony conviction was 15 years and 119 days prior to defendant's commission of the instant offense, in order to have defendant adjudicated a persistent violent felony offender, the People had the burden of proving that he was incarcerated for at least five years and 119 days so as to bring the lapse within 10 years under N.Y. Penal Law § 70.04(1)(b)(v). The People demonstrated excludable periods of incarceration of approximately five years and 345 days, which was more than sufficient to sustain such burden. People v Shuler, 100 A.D.3d 1041, 952 N.Y.S.2d 687, 2012 N.Y. App. Div. LEXIS 7167 (N.Y. App. Div. 3d Dep't), app. denied, 20 N.Y.3d 988, 958 N.Y.S.2d 704, 982 N.E.2d 624, 2012 N.Y. LEXIS 3901 (N.Y. 2012).

7. Mitigating circumstances

The trial court properly sentenced a defendant convicted of two counts of manslaughter to the minimum term of two years, notwithstanding the facts offered in mitigation that he was a 28-year-old black male who had spent most of his life in the south, that he was in Binghamton attending a special remedial course geared to prepare him for ultimate enrollment in a regular curriculum, that he had never engaged previously in any violent or other criminal conduct, that he was characterized as passive, gentle, co-operative, posing no threat to society, and a person who would be especially vulnerable in a prison environment, that defendant's victims were violent men with lengthy criminal records, and that facts adduced at trial indicated that defendant had been attacked by his victims prior to arming himself with a butcher knife and killing them, since defendant was not that very rare case calling for judicial interference with the legislative prerogative, since he did not demonstrate any disproportionality in sentencing in comparison with equally serious crimes within the state or in the treatment of manslaughter in other jurisdictions, and since the trial court clearly took into account the mitigating circumstances in sentencing defendant to the minimum term authorized by law. People v Hooks, 96 A.D.2d 1001, 467 N.Y.S.2d 8, 1983 N.Y. App. Div. LEXIS 19611 (N.Y. App. Div. 3d Dep't 1983).

Total indeterminate prison sentence of 8 to 20 years imposed on conviction of 4 counts of second degree burglary, 2 counts of third degree grand larceny, and first and second degree possession of stolen property was well within statutory guidelines and not excessive where court considered mitigating factors of defendant's age and health. People v Mikolasko, 144 A.D.2d 760, 535 N.Y.S.2d 167, 1988 N.Y. App. Div. LEXIS 10916 (N.Y. App. Div. 3d Dep't 1988), app. denied, 74 N.Y.2d 666, 543 N.Y.S.2d 409, 541 N.E.2d 438, 1989 N.Y. LEXIS 2226 (N.Y. 1989).

Four concurrent terms of 12 ½ years in prison was not a harsh or excessive sentence for convictions for attempted murder in the second degree, gang assault in the first degree, and assault in the first degree (two counts) because defendant's conduct in repeatedly stabbing an unarmed victim was not mitigated by his youth, lack of significant criminal history, and childhood hardships; defendant's sentence was significantly more lenient than the maximum authorized under N.Y. Penal Law § 70.02(3)(a). People v Arnold, 32 A.D.3d 1051, 820 N.Y.S.2d 857, 2006 N.Y. App. Div. LEXIS 10687 (N.Y. App. Div. 3d Dep't 2006).

8. Plea bargaining

Where a defendant charged with burglary in the first degree pleaded guilty to a misdemeanor and received a sentence of probation, in violation of CPL 220.10 (subd 5, par [e]), which prohibits the court from accepting a guilty plea to anything less than a class D felony for a violent felony offense such as burglary in the first degree (Penal Law, § 70.02), the plea bargaining having been conducted in good faith, the trial court may, upon becoming aware of the relevant statutes, vacate the guilty plea and sentence and order the defendant to stand trial on the original indictment, since the plea was erroneous as a matter of law and the plea bargain a nullity; under the circumstances, the court had not only the power, but the inherent duty, to correct the error. Wadsworth v Mogavero, 71 A.D.2d 157, 422 N.Y.S.2d 499, 1979 N.Y. App. Div. LEXIS 13243 (N.Y. App. Div. 3d Dep't 1979).

On pleading guilty to manslaughter in first degree and other offenses, defendant was improperly sentenced to 12 ½ to 25 years on manslaughter count, even though facts of case established his use of gun, since manslaughter in first degree is violent felony offense but not armed felony offense for purpose of CLS Penal § 70.02(4), and thus minimum term of imprisonment could not exceed $^{1}/_{3}$ of maximum; since clear intent of sentencing court was to give maximum sentence, remand would not be required and

sentence would be modified to $8^1/_3$ to 25 years. People v Garcia, 129 A.D.2d 505, 514 N.Y.S.2d 344, 1987 N.Y. App. Div. LEXIS 45179 (N.Y. App. Div. 1st Dep't), app. denied, 70 N.Y.2d 704, 519 N.Y.S.2d 1038, 513 N.E.2d 715, 1987 N.Y. LEXIS 18081 (N.Y. 1987).

Prison sentence of $8^1/_3$ to 25 years, imposed on defendant's negotiated guilty plea to first degree manslaughter, was not excessive where facts presented strong case of second degree murder, penalty for which ranged from prison term of 15 years to life to term of 25 years to life. People v Bourne, 139 A.D.2d 210, 531 N.Y.S.2d 899, 1988 N.Y. App. Div. LEXIS 7981 (N.Y. App. Div. 1st Dep't), app. denied, 72 N.Y.2d 955, 534 N.Y.S.2d 668, 531 N.E.2d 300, 1988 N.Y. LEXIS 5630 (N.Y. 1988).

Sentence of 8 to 24 years' imprisonment, which was imposed after sentence of 10 to 20 years' imprisonment was vacated, did not violate plea agreement where (1) promised sentences could not be legally imposed, (2) defendant did not avail himself of opportunity to withdraw plea and proceed to trial, (3) court imposed less than original minimum term of imprisonment, which benefitted defendant because he became eligible for parole at earlier date, and (4) longer maximum term was required for sentence to be within legal parameters. People v Stewart, 144 A.D.2d 601, 534 N.Y.S.2d 439, 1988 N.Y. App. Div. LEXIS 11902 (N.Y. App. Div. 2d Dep't 1988), app. denied, 73 N.Y.2d 896, 538 N.Y.S.2d 809, 535 N.E.2d 1349, 1989 N.Y. LEXIS 1245 (N.Y. 1989).

On appeal from denial of defendant's motion to vacate his conviction of second degree murder and first degree burglary, matter would be remitted for hearing as to defendant's motivation for pleading guilty and extent to which court's unfulfilled promise induced his plea where court's unfulfilled promise was that sentence would not exceed 20 years to life in lieu of 25 years to life allowed under CLS Penal § 70.00(3)(a)(i), and defendant stated at his plea allocution that he was pleading guilty because he had no defense to prosecution's case, wished to avoid expense and time of trial, did not want to undergo pain and humiliation of trial, and did not want sentence to exceed 20 years to life. People v Di Donato, 263 A.D.2d 677, 695 N.Y.S.2d 145, 1999 N.Y. App. Div. LEXIS 8044 (N.Y. App. Div. 3d Dep't), app. denied, 94 N.Y.2d 798, 700 N.Y.S.2d 431, 722 N.E.2d 511, 1999 N.Y. LEXIS 3767 (N.Y. 1999).

On appellate counsel's motion to be relieved of assignment on ground that of lack of nonfrivolous issues, counsel would be relieved of his assignment, and new counsel would be assigned to consider whether defendant's sentence was properly enhanced where (1) in exchange for plea of guilty to first degree robbery as violent felony offender, defendant was promised sentence of 3 to 6 years, and (2) at sentencing, court imposed enhanced sentence of 5 to 10 years based on defendant's failure to cooperate with probation officers who were preparing presentence investigation report. People v Rucker, 281 A.D.2d 993, 727 N.Y.S.2d 833, 2001 N.Y. App. Div. LEXIS 2904 (N.Y. App. Div. 4th Dep't 2001).

Because the indeterminate sentence that defendant bargained for and received was impermissible under N.Y. Penal Law 70.06(6), the trial court properly reduced the conviction for falsely reporting an incident in the first degree from a class D violent felony under N.Y. Penal Law § 70.02 (1)(c) to a class E felony under N.Y. Penal Law §§ 110.00, 240.60(1). People v Surdis, 23 A.D.3d 841, 805 N.Y.S.2d 433, 2005 N.Y. App. Div. LEXIS 13123 (N.Y. App. Div. 3d Dep't 2005), app. denied, 6 N.Y.3d 818, 812 N.Y.S.2d 458, 845 N.E.2d 1289, 2006 N.Y. LEXIS 910 (N.Y. 2006).

Trial court properly denied defendant's motion to withdraw his guilty plea because it was a knowing, voluntary, and intelligent choice among alternative courses of action, the trial court was not required to engage in a factual recitation in order to establish the elements of the crime since defendant pleaded guilty to a lesser crime as part of a plea bargain, defendant made no factual admissions that were inconsistent with the crime to which he was pleading, the allocution was sufficient, and there were no extraordinary circumstances or abuse of discretion warranting a reduction of the agreed-upon sentence in the interest of justice inasmuch as it resolved other charges and was significantly less than the maximum permissible sentence. People v Hollenbeck, 152 A.D.3d 974, 60 N.Y.S.3d 521, 2017 N.Y. App. Div. LEXIS 5697 (N.Y. App. Div. 3d Dep't), app. denied, 30 N.Y.3d 1061, 94 N.E.3d 493, 71 N.Y.S.3d 11, 2017 N.Y. LEXIS 4001 (N.Y. 2017).

Where a defendant in a domestic violence prosecution previously refused to cooperate with the DA's office as a complainant in a high-profile case and thereafter filed lawsuits against members of the Domestic Violence Bureau in their individual and official capacities, those facts alone did not meet the high standard for removing the DA and appointing a special prosecutor. DA office's refusal to offer defendant, indicted for committing a class B violent felony offense, for which the minimum sentence was five years' incarceration, a non-incarceratory plea to a lesser charge was wholly consistent with the DA office's long-standing post-indictment plea policy, demonstrating the evenhanded manner in which it was administered. People v Barba, 60 Misc. 3d 1074, 82 N.Y.S.3d 820, 2018 N.Y. Misc. LEXIS 3343 (N.Y. Sup. Ct. 2018).

Sentence of 10 years of imprisonment imposed for a guilty plea to one count of first degree assault was proper because the 10-year term was within the statutory range as the offense was classified as a class B violent felony under N.Y. Penal Law § 70.02(1)(a), and the court was required to impose a determinate term of imprisonment of at lease five years and no more than 25 years. Willett v Berbary, 456 F. Supp. 2d 404, 2006 U.S. Dist. LEXIS 77685 (W.D.N.Y. 2006).

9. Sentences for particular crimes

Burglary in first degree as defined in CLS Penal § 140.30(2) (requiring that defendant cause physical injury in course of burglary) is not class B armed felony offense because it does not include elements enumerated in CLS CPL § 1.20(41) defining "armed felony," and thus minimum sentence for first degree burglary under § 140.30(2) must be one-third of maximum; a defendant may be sentenced to minimum of one-half of maximum on conviction of class B armed felony offense, but otherwise, minimum must be fixed at one-third of maximum. People v Edwards, 121 A.D.2d 254, 503 N.Y.S.2d 40, 1986 N.Y. App. Div. LEXIS 58238 (N.Y. App. Div. 1st Dep't 1986).

It was not abuse of court's discretion to impose sentence within permissible range and less than maximum allowable, notwithstanding defendant had no prior criminal record, since defendant was convicted of forcing his way into innocent woman's apartment, striking her, ripping off her clothes and attempting to sexually attack her; court properly characterized acts as violent and abhorrent crime. People v Frederickson, 122 A.D.2d 580, 504 N.Y.S.2d 925, 1986 N.Y. App. Div. LEXIS 59858 (N.Y. App. Div. 4th Dep't 1986).

Attempted second degree burglary may serve as predicate violent felony offense for purpose of imposing enhanced sentence for second degree burglary. People v Hemphill, 129 A.D.2d 460, 514 N.Y.S.2d 24, 1987 N.Y. App. Div. LEXIS 45159 (N.Y. App. Div. 1st Dep't 1987).

Imposition of maximum sentence for first degree assault was fully justified where defendant was convicted of severely beating woman he lived with, and of throwing pot of boiling oil at her, which caused her to suffer permanent scarring. People v Moloi, 135 A.D.2d 576, 521 N.Y.S.2d 794, 1987 N.Y. App. Div. LEXIS 52517 (N.Y. App. Div. 2d Dep't 1987), app. denied, 70 N.Y.2d 1009, 526 N.Y.S.2d 943, 521 N.E.2d 1086, 1988 N.Y. LEXIS 912 (N.Y. 1988).

There was no abuse of discretion in imposition of maximum sentence for second degree arson where defendant knew apartment house was occupied and he nonetheless deliberately set it on fire. People v Royce, 137 A.D.2d 931, 525 N.Y.S.2d 355, 1988 N.Y. App. Div. LEXIS 1741 (N.Y. App. Div. 3d Dep't), app. denied, 72 N.Y.2d 866, 532 N.Y.S.2d 516, 528 N.E.2d 906, 1988 N.Y. LEXIS 3904 (N.Y. 1988).

It was not abuse of discretion to sentence defendant to concurrent indeterminate terms of 5 to 15 years on convictions of first degree assault and second degree weapon possession in view of violent nature of crime and fact that sentence was within statutory limits. People v Buckhanon, 140 A.D.2d 850, 528 N.Y.S.2d 439, 1988 N.Y. App. Div. LEXIS 5318 (N.Y. App. Div. 3d Dep't), app. denied, 72 N.Y.2d 911, 532 N.Y.S.2d 760, 528 N.E.2d 1233, 1988 N.Y. LEXIS 2837 (N.Y. 1988).

Prison sentences of 6 to 25 years imposed on defendant's convictions for first degree manslaughter and first degree robbery, and sentence of 4 ½ to 15 years imposed on his second degree robbery conviction, were improper since court was required to set minimum at one third of maximum; thus, sentences would be modified by imposing minimum terms of $8^1/_3$ years on manslaughter and first degree robbery convictions and 5 years on second degree robbery conviction. People v Paxhia, 140 A.D.2d 962, 529 N.Y.S.2d 638, 1988 N.Y. App. Div. LEXIS 5920 (N.Y. App. Div. 4th Dep't), app. denied, 72 N.Y.2d 960, 534 N.Y.S.2d 674, 531 N.E.2d 306, 1988 N.Y. LEXIS 5850 (N.Y. 1988).

Sentences imposed on convictions for assault in first degree, criminal possession of weapon in second degree and criminal possession of weapon in third degree would be modified since offenses are not class B armed felonies and, pursuant to CLS Penal § 70.02(4), minimum sentence on those charges should have been fixed at $^1/_3$ of maximum. People v Bennett, 144 A.D.2d 564, 534 N.Y.S.2d 422, 1988 N.Y. App. Div. LEXIS 11920 (N.Y. App. Div. 2d Dep't 1988), app. denied, 73 N.Y.2d 889, 538 N.Y.S.2d 801, 535 N.E.2d 1341, 1989 N.Y. LEXIS 1058 (N.Y. 1989).

Statutory maximum sentence of $8^1/_3$ to 25 years' imprisonment was not excessive where (1) defendant pleaded guilty to single count of first degree burglary in full satisfaction of 7-count indictment which included felony murder, (2) he admitted conduct that would constitute felony murder as well as crime of burglary, and (3) court informed him, before accepting his plea, that he would very likely receive maximum sentence. People v D'Angelo, 145 A.D.2d 783, 535 N.Y.S.2d 765, 1988 N.Y. App. Div. LEXIS 13254 (N.Y. App. Div. 3d Dep't 1988), app. denied, 73 N.Y.2d 976, 540 N.Y.S.2d 1010, 538 N.E.2d 362, 1989 N.Y. LEXIS 1530 (N.Y. 1989), app. denied, 73 N.Y.2d 1013, 541 N.Y.S.2d 768, 539 N.E.2d 596, 1989 N.Y. LEXIS 1811 (N.Y. 1989), app. denied, 74 N.Y.2d 738, 545 N.Y.S.2d 112, 543 N.E.2d 755, 1989 N.Y. LEXIS 2432 (N.Y. 1989).

Defendant's sentence of 2 to 4 years' imprisonment for attempted second degree assault should be reduced to 1 ½ to 3 years where court was incorrectly informed that offense was violent felony offense and it was clear that greater sentence was imposed only due to such misinformation. People v King, 148 A.D.2d 382, 540 N.Y.S.2d 168, 1989 N.Y. App. Div. LEXIS 3853 (N.Y. App. Div. 1st Dep't), app. denied, 74 N.Y.2d 742, 545 N.Y.S.2d 116, 543 N.E.2d 759, 1989 N.Y. LEXIS 2529 (N.Y. 1989).

Sentence of 3 to 6 years' imprisonment on defendant's guilty plea to second degree assault was not harsh and excessive where, on pleading guilty, he was informed that he could receive maximum term of 7 years, crime stemmed from incident in which he pushed his girlfriend off porch railing, causing her to break her spinal column and to injure her spinal cord, and he had extensive criminal record including another assault conviction. People v Cummings, 172 A.D.2d 886, 568 N.Y.S.2d 185, 1991 N.Y. App. Div. LEXIS 4214 (N.Y. App. Div. 3d Dep't), app. denied, 78 N.Y.2d 1075, 577 N.Y.S.2d 238, 583 N.E.2d 950, 1991 N.Y. LEXIS 5239 (N.Y. 1991).

Court would reject contention that sentence imposed on defendant was harsh and excessive in light of more lenient sentences imposed on codefendants where (1) defendant pleaded guilty to class C violent felony of second degree burglary in satisfaction of 3-count indictment as well as 2 other pending indictments, and (2) codefendants pleaded guilty to class D violent felony of attempted second degree burglary. People v Hicks, 189 A.D.2d 1039, 593 N.Y.S.2d 99, 1993 N.Y. App. Div. LEXIS 759 (N.Y. App. Div. 3d Dep't), app. denied, 81 N.Y.2d 887, 597 N.Y.S.2d 948, 613 N.E.2d 980, 1993 N.Y. LEXIS 1438 (N.Y. 1993).

Concurrent sentence of 2 to 6 years on charges of second degree burglary and first degree reckless endangerment was not harsh and excessive where defendant was permitted to plead guilty to such offenses in satisfaction of 7-count indictment which included first and second degree burglary, first and second degree use of firearm, first degree robbery, first degree reckless endangerment and second degree kidnapping arising from incident during which defendant entered tavern, discharged .22-caliber rifle, left tavern, forcibly entered woman's home, and held her hostage at gunpoint for several hours before surrendering to police. People v Brown, 205 A.D.2d 854, 613 N.Y.S.2d 719, 1994 N.Y. App. Div. LEXIS 6071 (N.Y. App. Div. 3d Dep't), app. denied, 84 N.Y.2d 866, 618 N.Y.S.2d 12, 642 N.E.2d 331, 1994 N.Y. LEXIS 3904 (N.Y. 1994).

It was not excessive to sentence defendant to prison term of 4 to 12 years on his second degree burglary conviction, even though he was 17 at time of crime, where he engaged in such criminal activity less than 2 months after his release from county jail on serving 1-year sentence. People v Doane, 208 A.D.2d 971, 617 N.Y.S.2d 232, 1994 N.Y. App. Div. LEXIS 9657 (N.Y. App. Div. 3d Dep't 1994).

Sentence of 1 ½ to 3 years for attempted second degree burglary was not harsh or excessive where it was most lenient indeterminate sentence permissible for that crime and was agreed result of plea bargain under which 2 other charges against defendant were dropped. People v Clark, 240 A.D.2d 781, 659 N.Y.S.2d 798, 1997 N.Y. App. Div. LEXIS 6044 (N.Y. App. Div. 3d Dep't 1997).

Sentence of 3 to 6 years for first degree assault was not harsh or excessive where defendant had prior criminal history and received benefit of his plea bargain. People v Shabazz, 242 A.D.2d 764, 661 N.Y.S.2d 1012, 1997 N.Y. App. Div. LEXIS 8544 (N.Y. App. Div. 3d Dep't), app. denied, 91 N.Y.2d 836, 667 N.Y.S.2d 690, 690 N.E.2d 499, 1997 N.Y. LEXIS 4391 (N.Y. 1997).

Defendant's sentence of 25 years to life for first degree kidnapping would be reduced to 18 years to life in view of significant disparity between defendant's sentence and that imposed on prime perpetrator. People v Leonor, 245 A.D.2d 22, 665 N.Y.S.2d 76, 1997 N.Y. App. Div. LEXIS 12515 (N.Y. App. Div. 1st Dep't 1997), app. denied, 92 N.Y.2d 855, 677 N.Y.S.2d 85, 699 N.E.2d 445, 1998 N.Y. LEXIS 2534 (N.Y. 1998).

Sentence of 5 to 15 years for first degree assault, although maximum, was not excessive where it was consistent with plea agreement in satisfaction of 4-count indictment that included charge of attempted second degree murder. People v Catts, 245 A.D.2d 385, 665 N.Y.S.2d 586, 1997 N.Y. App. Div. LEXIS 12762 (N.Y. App. Div. 2d Dep't 1997).

Court properly imposed harshest permissible aggregate sentence of 10 ½ to 21 years for first and second degree assault and first degree reckless endangerment where those crimes involved multiple, brutal assaults on helpless newborn infant. People v Persons, 245 A.D.2d 845, 666 N.Y.S.2d 773, 1997 N.Y. App. Div. LEXIS 13196 (N.Y. App. Div. 3d Dep't 1997).

Sentence of 4 to 12 years for first degree assault was not excessive where it was within statutory limits and was result of plea bargain under which 3 other counts, including attempted second degree murder, were dropped, defendant's long criminal history included assaults on present victim, who was mother of his 2 children, and heinous present offense involved brutal beating that fractured victim's skull, facial bones, and wrist. People v Nichols, 245 A.D.2d 889, 666 N.Y.S.2d 55, 1997 N.Y. App. Div. LEXIS 13404 (N.Y. App. Div. 3d Dep't 1997), app. denied, 91 N.Y.2d 1011, 676 N.Y.S.2d 139, 698 N.E.2d 968, 1998 N.Y. LEXIS 2051 (N.Y. 1998).

Sentence of 3 ½ to 7 years for second degree assault as second felony offender was not excessive where defendant stabbed victim with knife, causing 4-inch laceration to victim's abdomen, defendant had extensive criminal history, he committed present crime while on parole, sentence was in accordance with plea agreement and statutory parameters, and there were no extraordinary circumstances warranting reduction in interest of justice. People v Lamica, 245 A.D.2d 897, 666 N.Y.S.2d 52, 1997 N.Y. App. Div. LEXIS 13603 (N.Y. App. Div. 3d Dep't 1997), app. denied, 91 N.Y.2d 942, 671 N.Y.S.2d 722, 694 N.E.2d 891, 1998 N.Y. LEXIS 1150 (N.Y. 1998).

Sentence of 2 to 4 years for second degree assault was not excessive, and would not be reduced in interest of justice, where defendant pleaded guilty to that charge in full satisfaction of 3-count indictment, thus significantly reducing his sentence exposure. People v Hicks, 245 A.D.2d 979, 667 N.Y.S.2d 130, 1997 N.Y. App. Div. LEXIS 13568 (N.Y. App. Div. 3d Dep't 1997).

Sentence of 3 ½ to 7 years for second degree assault would be reduced, in interest of justice, to $2^1/_3$ to 7 years where Appellate Division vacated defendant's adjudication as second felony offender. People v Robles, 251 A.D.2d 20, 673 N.Y.S.2d 654, 1998 N.Y. App. Div. LEXIS 6397 (N.Y. App. Div. 1st Dep't), app. denied,

92 N.Y.2d 904, 680 N.Y.S.2d 68, 702 N.E.2d 853, 1998 N.Y. LEXIS 3562 (N.Y. 1998).

Sentence of 7 ½ to 15 years for second degree burglary was not excessive, even though it was statutory maximum sentence, where defendant was second felony offender, he had entered victim's apartment with intent to commit sexual abuse, and there were no extraordinary circumstances warranting modification. People v Brown, 251 A.D.2d 694, 674 N.Y.S.2d 149, 1998 N.Y. App. Div. LEXIS 6456 (N.Y. App. Div. 3d Dep't), app. denied, 92 N.Y.2d 1029, 684 N.Y.S.2d 494, 707 N.E.2d 449, 1998 N.Y. LEXIS 4556 (N.Y. 1998).

Sentence to 2 concurrent prison terms of $1^1/_3$ to 4 years for attempted second degree assault and attempted third degree weapon possession was not excessive where defendant had long criminal history, and sentence was agreed to and was not harshest one possible. People v Green, 255 A.D.2d 833, 681 N.Y.S.2d 795, 1998 N.Y. App. Div. LEXIS 12766 (N.Y. App. Div. 3d Dep't 1998), app. denied, 93 N.Y.2d 971, 695 N.Y.S.2d 57, 716 N.E.2d 1102, 1999 N.Y. LEXIS 2500 (N.Y. 1999).

Consecutive sentences of 7 ½ to 15 years for attempted first degree robbery and 2 to 4 years for fourth degree conspiracy as second felony offender was not excessive, and would not be modified in interest of justice, where his serious crimes involved attempted gunpoint robbery of tavern and planning of robbery of jewelry store, he had extensive prior criminal record, he was fully apprised that he could face maximum penalty if he failed to cooperate with authorities, and there were no extraordinary mitigating circumstances. People v Fernandez, 263 A.D.2d 673, 696 N.Y.S.2d 242, 1999 N.Y. App. Div. LEXIS 8045 (N.Y. App. Div. 3d Dep't), app. denied, 94 N.Y.2d 822, 702 N.Y.S.2d 592, 724 N.E.2d 384, 1999 N.Y. LEXIS 4141 (N.Y. 1999).

Sentence of 6 to 12 years for first and second degree robbery and third degree sale of controlled substance was proper where it fell within statutory limits, despite defendant's claim that his crimes were motivated by drug addiction for which he intended to seek treatment. People v McKenzie, 263 A.D.2d 778, 694 N.Y.S.2d 793, 1999 N.Y. App. Div. LEXIS 8273 (N.Y. App. Div. 3d Dep't), app. denied, 93 N.Y.2d 1045, 697 N.Y.S.2d 877, 720 N.E.2d 97, 1999 N.Y. LEXIS 3537 (N.Y. 1999).

Sentence to concurrent prison terms of 3 to 6 years for second degree assault, 3 ½ to 7 years for second degree weapon possession, and one year for fourth degree possession of marijuana was not excessive where sentence was less than harshest allowed, and there was no manifestation that court abused its discretion or that extraordinary circumstances warranted modification. People v Hart, 266 A.D.2d 584, 698 N.Y.S.2d 72, 1999 N.Y. App. Div. LEXIS 11214 (N.Y. App. Div. 3d Dep't 1999), app. denied, 94 N.Y.2d 903, 707 N.Y.S.2d 388, 728 N.E.2d 987, 2000 N.Y. LEXIS 697 (N.Y. 2000).

Sentence of 7 years for second degree assault was not excessive, even though it was maximum sentence for second felony offender, where plea agreement included prosecution's dropping of first degree reckless endangerment count and not pursuing persistent felony offender status. People v Williams, 266 A.D.2d 647, 698 N.Y.S.2d 347, 1999 N.Y. App. Div. LEXIS 11410 (N.Y. App. Div. 3d Dep't 1999), app. denied, 94 N.Y.2d 886, 705 N.Y.S.2d 19, 726 N.E.2d 496, 2000 N.Y. LEXIS 490 (N.Y. 2000).

Sentences of 7 years in prison and fine of $5,000 for second degree assault and one year in jail and fine of $1,000 for child endangerment were not excessive where they were in accordance with favorable plea bargain, defendant had criminal history, and there were no extraordinary circumstances warranting modification. People v Schultz, 273 A.D.2d 508, 709 N.Y.S.2d 456, 2000 N.Y. App. Div. LEXIS 6431 (N.Y. App. Div. 3d Dep't 2000).

Sentence of 3 to 9 years for second degree conspiracy was not excessive where defendant tried to hire "hit man" to murder her husband, and mitigating circumstances of her troubled childhood, emotional problems, and concern over her ill child's health and well-being were before County Court at time of sentencing. People v Tasber, 273 A.D.2d 542, 709 N.Y.S.2d 242, 2000 N.Y. App. Div. LEXIS 6646 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 858, 714 N.Y.S.2d 9, 736 N.E.2d 870, 2000 N.Y. LEXIS 2781 (N.Y. 2000).

Sentence for first degree assault under CLS Penal § 120.10(1) would be vacated, and case would be remitted for resentencing, where that crime, when committed, was class C violent felony under CLS Penal § 70.02, which was later amended to reclassify that crime as class B felony, and record was unclear as to whether defendant was properly sentenced for class C violent felony or improperly for class B. People v Jennings, 273 A.D.2d 828, 709 N.Y.S.2d 305, 2000 N.Y. App. Div. LEXIS 6908 (N.Y. App. Div. 4th Dep't), app. denied, 95 N.Y.2d 890, 715 N.Y.S.2d 382, 738 N.E.2d 786, 2000 N.Y. LEXIS 3341 (N.Y. 2000).

Article 78 proceeding to amend inmate's correctional records to reflect that his 1983 sentence for attempted second degree assault had expired and that he was currently serving only his 1965 sentence for second degree murder was properly dismissed for failure to state cause of action where (1) defendant's 2 sentences ran consecutively, and thus, under CLS Penal § 70.25(2-a), he was still subject to 1983 conviction, (2) sentencing court's calculation of defendant's term was consistent with CLS Penal § 70.30(1)(b), and (3) § 70.30(1)(b) was in effect before defendant's 1983 conviction and thus did not violate ex post facto clause. Cook v Goord, 275 A.D.2d 819, 713 N.Y.S.2d 507, 2000 N.Y. App. Div. LEXIS 9189 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 769, 722 N.Y.S.2d 472, 745 N.E.2d 392, 2000 N.Y. LEXIS 3837 (N.Y. 2000).

Defendant's sentence would be vacated, and case would be remitted for either imposition of promised sentence or opportunity for defendant to withdraw his plea, where he pleaded guilty to second degree assault with understanding that he would be sentenced as second felony offender to incarceration for 3 years, and court imposed that sentence but further ordered him to pay restitution of $1,664.52. People v Austin, 275 A.D.2d 913, 715 N.Y.S.2d 173, 2000 N.Y. App. Div. LEXIS 9697 (N.Y. App. Div. 4th Dep't 2000).

Sentence for second degree assault would be modified from determinate term of 7 years to indeterminate term of 3 ½ to 7 years where original sentence was illegal under CLS Penal § 70.00(2) and (3)(b), and it was clear that sentencing court had intended to impose maximum sentence for that offense. People v Santiago, 281 A.D.2d 566, 721 N.Y.S.2d 832, 2001 N.Y. App. Div. LEXIS 2604 (N.Y. App. Div. 2d Dep't), app. denied, 96 N.Y.2d 867, 730 N.Y.S.2d 42, 754 N.E.2d 1125, 2001 N.Y. LEXIS 2637 (N.Y. 2001).

Sentence of 5 years in prison with mandatory 1 ½ years of postrelease supervision for second degree assault was unduly severe and would be reduced to statutory minimum term of 2 years where defendant had virtually no criminal record and no history of violent conduct, and he was hard-working person who was extensively involved in his community. People v Coleman, 281 A.D.2d 653, 721 N.Y.S.2d 160, 2001 N.Y. App. Div. LEXIS 2024 (N.Y. App. Div. 3d Dep't 2001).

Maximum sentence of 25 years, as second felony offender, for second degree arson and first degree reckless endangerment was not excessive and would not be reduced in interest of justice where fact that no one was injured by 5 separate fires set by defendant in theater complex was fortuitous rather than indicative of lack of vicious intent, defendant lacked remorse, and sentencing court properly considered defendant's suppressed confession to present arson as well as another in college dormitory. People v Brown, 281 A.D.2d 700, 728 N.Y.S.2d 100, 2001 N.Y. App. Div. LEXIS 2312 (N.Y. App. Div. 3d Dep't), app. denied, 96 N.Y.2d 826, 729 N.Y.S.2d 446, 754 N.E.2d 206, 2001 N.Y. LEXIS 2089 (N.Y. 2001).

Concurrent prison sentences of 7 years for second degree assault, 12 years for second degree weapon possession, and 3 ½ to 7 years for reckless endangerment would not be disturbed where defendant, who had prior criminal record, shot victim in foot and failed to identify any extraordinary circumstances warranting modification. People v Rivera, 281 A.D.2d 702, 721 N.Y.S.2d 429, 2001 N.Y. App. Div. LEXIS 2294 (N.Y. App. Div. 3d Dep't), app. denied, 96 N.Y.2d 805, 726 N.Y.S.2d 383, 750 N.E.2d 85, 2001 N.Y. LEXIS 1735 (N.Y. 2001).

Sentence to four consecutive 15-year prison terms for 4 separate second degree burglaries, and concurrent term of 7 ½ to 15 years for third degree arson, although long, was not excessive

where it fell within permissible range for those crimes, defendant had prior criminal record, and there were no extraordinary circumstances warranting modification. People v Cleveland, 281 A.D.2d 815, 721 N.Y.S.2d 876, 2001 N.Y. App. Div. LEXIS 3000 (N.Y. App. Div. 3d Dep't), app. denied, 96 N.Y.2d 900, 730 N.Y.S.2d 797, 756 N.E.2d 85, 2001 N.Y. LEXIS 2752 (N.Y. 2001).

Sentence to consecutive prison terms of 8 to 16 years for first degree manslaughter and 2 to 6 years for second degree assault where not excessive where those crimes involved separate and distinct acts and were violent, resulting in death of one victim and injury to the other. People v Carter, 286 A.D.2d 773, 730 N.Y.S.2d 733, 2001 N.Y. App. Div. LEXIS 8692 (N.Y. App. Div. 2d Dep't), app. denied, 97 N.Y.2d 655, 737 N.Y.S.2d 56, 762 N.E.2d 934, 2001 N.Y. LEXIS 4198 (N.Y. 2001).

Although aggregate sentence of 10 to 20 years was not unduly harsh, sentence of 7 ½ to 15 years on each conviction of second degree assault was illegal where that crime is class "D" violent felony offense, which at time of crime was punishable by indeterminate sentence with maximum term of 7 years and minimum term of ½ of maximum; thus, judgment of conviction would be modified by vacating sentences imposed on those counts and remitting case for resentencing on those counts. People v Fuller, 286 A.D.2d 910, 731 N.Y.S.2d 132, 2001 N.Y. App. Div. LEXIS 9157 (N.Y. App. Div. 4th Dep't), app. denied, 97 N.Y.2d 682, 738 N.Y.S.2d 297, 764 N.E.2d 401, 2001 N.Y. LEXIS 4382 (N.Y. 2001).

Judgment of conviction would be modified by vacating sentences imposed on 2 counts of first degree assault, and case would be remitted for resentencing on those counts, where there was discrepancy between sentencing minutes, which showed improper sentence of 4 to 20 years on those counts, and certificate of conviction, which showed legal sentence of 10 to 20 years on those counts. People v Fuller, 286 A.D.2d 910, 731 N.Y.S.2d 132, 2001 N.Y. App. Div. LEXIS 9157 (N.Y. App. Div. 4th Dep't), app. denied, 97 N.Y.2d 682, 738 N.Y.S.2d 297, 764 N.E.2d 401, 2001 N.Y. LEXIS 4382 (N.Y. 2001).

Maximum seven-year sentence under N.Y. Penal Law §§ 70.02. 70.15 for a defendant father's conviction of N.Y. Penal Law § 120.05(9) assault in the second degree of his four-month-old son that created bruising and broken bones was not an abuse of discretion. Even though the father had no prior felony convictions, the court noted the victim's age and the father's violent history and lack of remorse. People v Jennings, 20 A.D.3d 777, 798 N.Y.S.2d 597, 2005 N.Y. App. Div. LEXIS 7961 (N.Y. App. Div. 3d Dep't), app. denied, 5 N.Y.3d 829, 804 N.Y.S.2d 43, 837 N.E.2d 742, 2005 N.Y. LEXIS 3053 (N.Y. 2005).

At the time that an inmate committed his offense of attempted murder in the second degree and was sentenced, N.Y. Penal Law § 70.02(3)(a), (4) authorized his sentence of 8 to 16 years as a first offender convicted of a class B violent felony offense; the inmate was not entitled to an adjustment of his term of imprisonment. Matter of LaRocco v Goord, 43 A.D.3d 500, 840 N.Y.S.2d 477, 2007 N.Y. App. Div. LEXIS 8842 (N.Y. App. Div. 3d Dep't 2007).

Because the maximum permissible postrelease supervision for second-degree assault under N.Y. Penal Law §§ 70.02(1)(c), 70.45(2)(e) was three years, the trial court erred by imposing five years of postrelease supervision. People v Robertson, 46 A.D.3d 928, 846 N.Y.S.2d 755, 2007 N.Y. App. Div. LEXIS 12434 (N.Y. App. Div. 3d Dep't 2007), app. denied, 10 N.Y.3d 844, 859 N.Y.S.2d 402, 889 N.E.2d 89, 2008 N.Y. LEXIS 1764 (N.Y. 2008).

Criminal mischief in the third degree was not a violent felony, and the People conceded that defendant should have been sentenced to an indeterminate term as a second felony offender rather than a determinate term as a second violent felony offender for such crime. People v Ramos, 48 A.D.3d 984, 851 N.Y.S.2d 724, 2008 N.Y. App. Div. LEXIS 1633 (N.Y. App. Div. 3d Dep't), app. denied, 10 N.Y.3d 938, 862 N.Y.S.2d 345, 892 N.E.2d 411, 2008 N.Y. LEXIS 2368 (N.Y. 2008), cert. denied, 556 U.S. 1110, 129 S. Ct. 1595, 173 L. Ed. 2d 686, 2009 U.S. LEXIS 1896 (U.S. 2009).

Because defendant faced a minimum of five years and a maximum of 25 years in prison under N.Y. Penal Law § 70.02(3)(a) for her conviction of assault in the first degree and was only sentenced to 15 years followed by five years of postrelease supervision, defendant's sentence was not harsh or excessive under N.Y. Crim. Proc. Law § 470.15. People v Gratton, 51 A.D.3d 1219, 857 N.Y.S.2d 363, 2008 N.Y. App. Div. LEXIS 4236 (N.Y. App. Div. 3d Dep't), app. denied, 11 N.Y.3d 736, 864 N.Y.S.2d 395, 894 N.E.2d 659, 2008 N.Y. LEXIS 3002 (N.Y. 2008).

After convicting defendant of assault in the second degree under N.Y. Penal Law § 120.05, the trial court erred in imposing a five-year period of post-release supervision for a class D violent felony offense under N.Y. Penal Law §§ 70.02(1)(c), 70.45(2)(e) and, thus, reduced the period of post-release supervision to three years, which was the maximum allowed. People v Brown, 52 A.D.3d 1237, 859 N.Y.S.2d 548, 2008 N.Y. App. Div. LEXIS 5219 (N.Y. App. Div. 4th Dep't), app. denied, 10 N.Y.3d 956, 863 N.Y.S.2d 140, 893 N.E.2d 446, 2008 N.Y. LEXIS 2922 (N.Y. 2008).

Defendant was properly sentenced as a second felony offender in view of his two prior felony convictions, one in 1992 for attempted burglary in the second degree and one in 1996 for promoting prison contraband in the first degree (at which time he was sentenced as a second felony offender); although defendant contended at his sentencing here that he was told at the time of his 1992 plea to the burglary charge that it was a nonviolent felony, he failed to demonstrate good cause for his failure to contest that conviction at the time of his 1996 sentencing or on appeal therefrom. Thus, he waived any claim as to the unconstitutionality of the earlier conviction. People v Young, 86 A.D.3d 796, 927 N.Y.S.2d 221, 2011 N.Y. App. Div. LEXIS 5871 (N.Y. App. Div. 3d Dep't), app. denied, 17 N.Y.3d 905, 933 N.Y.S.2d 660, 957 N.E.2d 1164, 2011 N.Y. LEXIS 3507 (N.Y. 2011).

Defendant's maximum sentence for his conviction of burglary in the second degree was not an abuse of discretion in light of his extensive criminal history; furthermore, the fact that the accomplice received a lesser sentence was not a compelling reason to reduce defendant's sentence as the accomplice, unlike defendant, entered a plea agreement and, pursuant to it, testified against defendant. People v Garcia, 131 A.D.3d 732, 14 N.Y.S.3d 809, 2015 N.Y. App. Div. LEXIS 6316 (N.Y. App. Div. 3d Dep't 2015), app. denied, 27 N.Y.3d 997, 59 N.E.3d 1219, 38 N.Y.S.3d 107, 2016 N.Y. LEXIS 1367 (N.Y. 2016).

In 2003, defendant entered a plea of guilty to attempted criminal possession of a weapon in the third degree as the sole count of a superior court information. Therefore, his conviction of that crime, upon his plea of guilty, did not constitute a violent felony pursuant to N.Y. Penal Law § 70.02(1)(d); consequently, he should not have been adjudicated a second violent felony offender. People v Coleman, 148 A.D.3d 717, 48 N.Y.S.3d 478, 2017 N.Y. App. Div. LEXIS 1540 (N.Y. App. Div. 2d Dep't), app. denied, 29 N.Y.3d 1077, 86 N.E.3d 254, 64 N.Y.S.3d 167, 2017 N.Y. LEXIS 2036 (N.Y. 2017).

Given the violent nature of defendant's participation in an attack in which he and others were stomping on the defenseless victim, his lengthy prior criminal history and his inability to comply with supervision, the 12-year sentence for attempted gang assault and attempted assault, followed by 5 years of post-release supervision on each count, with the sentences to be served concurrently, which was less than the possible maximum, was proper. People v Coleman, 151 A.D.3d 1385, 58 N.Y.S.3d 631, 2017 N.Y. App. Div. LEXIS 5073 (N.Y. App. Div. 3d Dep't), app. denied, 29 N.Y.3d 1125, 86 N.E.3d 567, 64 N.Y.S.3d 675, 2017 N.Y. LEXIS 3016 (N.Y. 2017).

Defendant who pleaded guilty to 2 counts of attempted assault in first degree as lesser included offenses, after having been indicted for 2 counts of attempted manslaughter in first degree for shooting 2 individuals, would be given community-based sentence with "limited incarceration" on his consent to perform 600 hours of community service designed to educate public to problems associated with drug abuse, on basis of mitigating circumstances that defendant was 18 years old, had no criminal history, had weak motive and had committed irrational act under influence of alcohol and drugs, that defendant had also shot himself, that grand jury had made unsolicited extraneous conclusion as to existence of extreme emotional influence, that defendant suffered from personality disorder but had undergone extensive counseling, had made positive gains, and there was expert proof that he did not constitute threat to community, reconciliation had been accomplished between defendant and one victim, there was no

discernable sense of outrage in community, and defendant had remorseful attitude. People v Mooney, 133 Misc. 2d 313, 506 N.Y.S.2d 991, 1986 N.Y. Misc. LEXIS 2901 (N.Y. County Ct. 1986).

When defendant was sentenced to concurrent indeterminate prison terms of $8^1/_3$ to 25 years for first degree manslaughter and first degree robbery, each sentence was within the requisite statutory parameters, under N.Y. Penal Law § 70.02(3)(a), and would not be disturbed on appeal absent a showing that the trial court abused its discretion or that extraordinary circumstances existed in the record which warranted modification of the sentences, neither of which were present. People v Gilliam, 300 A.D.2d 701, 752 N.Y.S.2d 722, 2002 N.Y. App. Div. LEXIS 11596 (N.Y. App. Div. 3d Dep't 2002), app. denied, 99 N.Y.2d 628, 760 N.Y.S.2d 109, 790 N.E.2d 283, 2003 N.Y. LEXIS 1114 (N.Y. 2003).

Where defendant was convicted of second degree assault in violation of N.Y. Penal Law § 120.05(3), the trial court erroneously sentenced defendant to a determinate term of imprisonment based upon its misapprehension that such a sentence was mandatory for second degree assault; while a determinate term of imprisonment was authorized under N.Y. Penal Law § 70.02(2)(b), (3)(c), it was not required, and although some imprisonment was mandatory, N.Y. Penal Law § 60.05(5), a definite term of imprisonment of one year or less under N.Y. Penal Law § 70.00(4) or an intermittent term of imprisonment under N.Y. Penal Law §§ 60.05(5), 85.00 were also authorized, as was a split sentence of imprisonment and probation, N.Y. Penal Law § 60.01(2)(d). People v Endresz, 1 A.D.3d 888, 767 N.Y.S.2d 732, 2003 N.Y. App. Div. LEXIS 12406 (N.Y. App. Div. 4th Dep't 2003).

Imposition of a prison sentence close to the minimum authorized was not improvident in a case in which defendant participated with two co-defendants in assaulting a victim; the court was justifiably persuaded to deny youthful offender status by defendant's unrepentance and failure to accept responsibility. While defendant had been offered a plea deal with a recommendation for probation and youthful offender status, this would have been in exchange for testifying against his codefendants, which he rejected. People v Francis, 83 A.D.3d 1119, 922 N.Y.S.2d 581, 2011 N.Y. App. Div. LEXIS 2686 (N.Y. App. Div. 3d Dep't), app. denied, 17 N.Y.3d 806, 929 N.Y.S.2d 565, 953 N.E.2d 803, 2011 N.Y. LEXIS 2401 (N.Y. 2011).

10. —Homicide

The judgment of the trial court convicting defendant of two counts of manslaughter in the first degree and sentencing him to consecutive terms of not less than eight years nor more than 25 years and not less than two years nor more than six years would be modified to reduce the sentences to consecutive terms of not less than eight years nor more than 24 years and not less than two years nor more than six years where the defendant pleaded guilty to two separate counts of manslaughter, at that time the court expressed an intent to sentence the defendant to consecutive terms, the aggregate of which would approximate a minimum of ten years and a maximum of 30 years; under Penal Law § 70.02(4) the minimum sentence imposed for a class B violent felony offense, such as manslaughter in the first degree, must be fixed at one-third of the maximum term imposed, and as eight is slightly less than one-third of 25, the sentence would be modified on that count to impose a minimum of eight years and a maximum of 24 years. People v Feliciano, 92 A.D.2d 832, 460 N.Y.S.2d 334, 1983 N.Y. App. Div. LEXIS 17210 (N.Y. App. Div. 1st Dep't), app. denied, 59 N.Y.2d 765, 1983 N.Y. LEXIS 5088 (N.Y. 1983).

A sentence of twelve and one-half to twenty five years imprisonment on a plea of guilty to the offense of manslaughter in the first degree was improper and would be modified to impose a sentence of from eight and one-third to twenty five years since, absent a finding that defendant is a predicate felon, the minimum period of imprisonment that may imposed for a violent felony offense cannot exceed one-third of the maximum, unless the sentence is for a conviction of a class B armed felony offense, under Penal Law § 70.02(4), and since manslaughter in the first degree is not such an offense, neither possession nor display of a gun being a statutory element of the crime. People v Gonzalez, 99 A.D.2d 1001, 473 N.Y.S.2d 459, 1984 N.Y. App. Div. LEXIS 17427 (N.Y. App. Div. 1st Dep't 1984).

Manslaughter in the first degree is not an armed violent felony offense in that neither the possession nor display of a gun constitutes an element of the crime, and the trial court thus erred in sentencing defendant for that crime to incarceration for more than one third of the maximum term (Penal Law § 70.02(4)). People v Rhodes, 107 A.D.2d 582, 484 N.Y.S.2d 539, 1985 N.Y. App. Div. LEXIS 42580 (N.Y. App. Div. 1st Dep't 1985).

Where defendant was not found to be predicate felon, minimum period of imprisonment imposed for manslaughter conviction could not exceed one-third of maximum, unless sentence was for conviction of class B armed felony offense. People v Sellers, 113 A.D.2d 850, 493 N.Y.S.2d 586, 1985 N.Y. App. Div. LEXIS 52486 (N.Y. App. Div. 2d Dep't 1985).

Defendant who pled guilty to and was convicted of manslaughter in first degree arising from defendant's killing of his estranged wife by stabbing her repeatedly with knife was improperly sentenced to indeterminant term of imprisonment of $8^1/_3$ to 25 years, and sentence will be modified as matter of discretion in interest of justice, by reducing sentence to indeterminate term of 5 to 15 years, where defendant was acting in state of extreme emotional disturbance at time of homicide and where defendant has only one prior conviction, for petty larceny, which occurred several years prior. People v Maggio, 114 A.D.2d 522, 494 N.Y.S.2d 424, 1985 N.Y. App. Div. LEXIS 53225 (N.Y. App. Div. 2d Dep't 1985).

Manslaughter in first degree is not felony offense since neither possession nor display of gun is statutory element of crime; thus, although defendant admitted guns were used in killing, trial court erred in imposing enhanced minimum term of 12 ½ years under misapprehension that manslaughter in first degree was "armed felony". People v Roman, 114 A.D.2d 809, 495 N.Y.S.2d 649, 1985 N.Y. App. Div. LEXIS 53813 (N.Y. App. Div. 1st Dep't 1985).

Sentence of 8 to 16 years on conviction of first degree manslaughter was improper since, under CLS Penal § 70.02, minimum period of imprisonment for first conviction of violent felony offense cannot exceed $^1/_3$ of maximum unless sentence is for class B armed felony offense, and first degree manslaughter is not armed felony offense because neither possession nor display of gun is element of crime. People v Mercer, 121 A.D.2d 476, 503 N.Y.S.2d 579, 1986 N.Y. App. Div. LEXIS 58446 (N.Y. App. Div. 2d Dep't 1986).

Defendant convicted of first degree manslaughter was illegally sentenced as armed felony offender since use of gun is not element of first degree manslaughter, and therefore first degree manslaughter is not "armed felony offense" as defined in CLS CPL § 1.20. People v Campaneria, 123 A.D.2d 271, 506 N.Y.S.2d 344, 1986 N.Y. App. Div. LEXIS 60039 (N.Y. App. Div. 1st Dep't), app. denied, 69 N.Y.2d 709, 512 N.Y.S.2d 1035, 504 N.E.2d 403, 1986 N.Y. LEXIS 21391 (N.Y. 1986).

Sentence of first degree manslaughter defendant to indeterminate term of 12 ½ to 25 years' imprisonment should be modified to minimum term of $8^1/_3$ years since manslaughter is not armed felony offense and minimum term should be $^1/_3$ of maximum rather than ½ . People v Ramirez, 123 A.D.2d 890, 507 N.Y.S.2d 667, 1986 N.Y. App. Div. LEXIS 61005 (N.Y. App. Div. 2d Dep't 1986).

First degree manslaughter is not armed felony offense for purpose of calculating minimum term of imprisonment under CLS Penal § 70.02(4) since use of gun is not statutory element of crime. People v Garcia, 129 A.D.2d 505, 514 N.Y.S.2d 344, 1987 N.Y. App. Div. LEXIS 45179 (N.Y. App. Div. 1st Dep't), app. denied, 70 N.Y.2d 704, 519 N.Y.S.2d 1038, 513 N.E.2d 715, 1987 N.Y. LEXIS 18081 (N.Y. 1987).

Sentence on conviction of first degree manslaughter would be reduced from 6-18 years to 4-12 years in view of defendant's age, background, and future potential, and where his violent and unlawful behavior, after 40 years as law-abiding productive member of society, was apparently related to fears for his own future safety, inasmuch as victim had known history of threatening behavior. People v Rodriguez, 136 A.D.2d 509, 524 N.Y.S.2d 40, 1988 N.Y. App. Div. LEXIS 531 (N.Y. App. Div. 1st Dep't 1988).

Court improperly sentenced defendant as armed violent felony offender to 12 ½ to 25 years' imprisonment on his convictions for first degree manslaughter and first degree use of firearm, since first degree manslaughter does not contain, as element, any criteria set forth under CLS CPL § 1.20(41)(a) or (b), therefore it is not armed violent felony offense, and thus minimum sentence imposed on that conviction could only have been set at $^1/_3$ maximum; sentence would be modified to $8^1/_3$ to 25 years. People v Durakovic, 138 A.D.2d 395, 525 N.Y.S.2d 679, 1988 N.Y. App. Div. LEXIS 2152 (N.Y. App. Div. 2d Dep't), app. denied, 72 N.Y.2d 858, 532 N.Y.S.2d 508, 528 N.E.2d 898, 1988 N.Y. LEXIS 3698 (N.Y. 1988).

Prison term of 12 ½ to 25 years imposed on defendant's first degree manslaughter conviction would be reduced to $8^1/_3$ to 25 years since required minimum term was $^1/_3$ of maximum. People v Sterling, 141 A.D.2d 680, 529 N.Y.S.2d 382, 1988 N.Y. App. Div. LEXIS 6861 (N.Y. App. Div. 2d Dep't), app. denied, 73 N.Y.2d 790, 536 N.Y.S.2d 750, 533 N.E.2d 680, 1988 N.Y. LEXIS 6166 (N.Y. 1988).

Sentence of imprisonment for 4 to 12 years on plea of guilty to manslaughter in first degree was excessive and would be reduced to imprisonment for 2 to 6 years where (1) defendant, whose only prior conviction was for nonviolent misdemeanor in 1978, was present in his aunt's apartment when decedent, her boyfriend, stabbed her and murdered her son, defendant's cousin, (2) decedent fled apartment with defendant, who had grabbed metal pipe, in pursuit, (3) when defendant caught up with decedent, decedent slashed defendant's arm with murder weapon, (4) defendant hit decedent at least 4 times, and possibly as many as 15 times, with metal pipe, (5) defendant then took knife which decedent had dropped and stabbed him with it, causing his death, and (6) when police arrived, defendant was still standing over body of decedent. People v Cooper, 146 A.D.2d 494, 536 N.Y.S.2d 769, 1989 N.Y. App. Div. LEXIS 100 (N.Y. App. Div. 1st Dep't 1989).

Sentence of $8^1/_3$ to 25 years' imprisonment for first degree manslaughter would be reduced to term of 5 to 15 years where offense was committed when defendant was temporarily and uncharacteristically deprived of better judgment by extreme emotional disturbance, and he had no prior criminal record. People v Moye, 148 A.D.2d 345, 538 N.Y.S.2d 557, 1989 N.Y. App. Div. LEXIS 2704 (N.Y. App. Div. 1st Dep't 1989).

On conviction of white teenagers for second degree manslaughter and first degree assault arising out of confrontation with 3 black men which resulted in death of one man and serious beating of another man, sentences of imprisonment, longest of which was 2 consecutive terms of 5 to 15 years, were not harsh or excessive given defendants' vicious and wanton conduct motivated solely by color of victims' skin and defendants' lack of remorse. People v Kern, 149 A.D.2d 187, 545 N.Y.S.2d 4, 1989 N.Y. App. Div. LEXIS 10653 (N.Y. App. Div. 2d Dep't 1989), aff'd, 75 N.Y.2d 638, 555 N.Y.S.2d 647, 554 N.E.2d 1235, 1990 N.Y. LEXIS 669 (N.Y. 1990).

There was no merit to defendant's contention that, by imposing maximum sentence on first degree manslaughter conviction, court had improperly considered defendant to be cold blooded executioner despite defendant's acquittal of murder, since court, which was uniquely familiar with heinous aspects of case, expressed perceived extent of public condemnation and social outrage engendered by defendant's act, and court gave due consideration to circumstances of case, defendant's probation report, his prior criminal history, and comments of prosecutor, defense counsel and defendant. People v Harrison, 188 A.D.2d 374, 591 N.Y.S.2d 375, 1992 N.Y. App. Div. LEXIS 13783 (N.Y. App. Div. 1st Dep't 1992), aff'd, 82 N.Y.2d 693, 601 N.Y.S.2d 573, 619 N.E.2d 651, 1993 N.Y. LEXIS 2308 (N.Y. 1993).

Imposition of sentence of 12 ½ to 25 years' imprisonment for first degree manslaughter was illegal and would be vacated, since that crime is not armed violent felony offense. People v Aybar, 202 A.D.2d 600, 610 N.Y.S.2d 818, 1994 N.Y. App. Div. LEXIS 2619 (N.Y. App. Div. 2d Dep't), app. denied, 84 N.Y.2d 822, 617 N.Y.S.2d 142, 641 N.E.2d 163, 1994 N.Y. LEXIS 3512 (N.Y. 1994).

Sentence of 10 to 20 years for first degree manslaughter would be reduced to 6 ⅔ to 20 years where original sentence was based on mistaken belief that first degree manslaughter was armed felony offense; thus, minimum term should have been $^1/_3$, rather than ½, of maximum term. People v Wilson, 240 A.D.2d 603, 658 N.Y.S.2d 659, 1997 N.Y. App. Div. LEXIS 6926 (N.Y. App. Div. 2d Dep't 1997).

Sentence of 12 to 24 years for first degree manslaughter was not unduly harsh where defendant had obtained favorable plea bargain after being charged with second degree murder in connection with shooting death of his adoptive father. People v Thornton, 242 A.D.2d 784, 662 N.Y.S.2d 142, 1997 N.Y. App. Div. LEXIS 8672 (N.Y. App. Div. 3d Dep't), app. denied, 91 N.Y.2d 881, 668 N.Y.S.2d 580, 691 N.E.2d 652, 1997 N.Y. LEXIS 4752 (N.Y. 1997).

Imposition of long sentence for second degree murder and first degree manslaughter was proper where defendant caused death of her fiance's 2-year-old son by beating, punching, and kicking child in stomach. People v Soule, 251 A.D.2d 1056, 674 N.Y.S.2d 531, 1998 N.Y. App. Div. LEXIS 7145 (N.Y. App. Div. 4th Dep't), app. denied, 92 N.Y.2d 951, 681 N.Y.S.2d 482, 704 N.E.2d 235, 1998 N.Y. LEXIS 4243 (N.Y. 1998).

Defendant's agreed-upon 20-year prison sentence was not unduly harsh or excessive and a reduction of the sentence was not warranted because defendant engaged in protracted violent conduct with his young daughter in the house, holding his father hostage for hours while shooting in the father's vicinity at least 20 times to control his movements and then repeatedly shot his father in the head and body, for which defendant expressed no remorse; defendant pleaded guilty to manslaughter. People v Buck, 136 A.D.3d 1117, 25 N.Y.S.3d 402, 2016 N.Y. App. Div. LEXIS 1018 (N.Y. App. Div. 3d Dep't 2016).

It was illegal to sentence defendant, following his guilty plea to second degree manslaughter, as second violent felony offender to maximum determinate term of 15 years since second degree manslaughter was not enumerated violent felony under CLS Penal § 70.02(1). People v Hathaway, 173 Misc. 2d 701, 662 N.Y.S.2d 234, 1997 N.Y. Misc. LEXIS 367 (N.Y. Sup. Ct. 1997), aff'd, 260 A.D.2d 717, 688 N.Y.S.2d 720, 1999 N.Y. App. Div. LEXIS 3661 (N.Y. App. Div. 3d Dep't 1999).

Court would not vacate defendants' guilty plea to second degree manslaughter in satisfaction of indictment charging them with, inter alia, "depraved mind" murder, A-1 felony, even though second degree manslaughter was not listed in CLS Penal § 70.02(a)(b) definition of class C violent felony offenses, and CLS CPL § 220.10(5)(d)(i) required that any guilty plea to indictment charging class A felony include at least guilty plea to class C violent felony offense, where all parties thought that second degree manslaughter was class C violent felony offense, guilty plea was entered and accepted, sentences were imposed, defendants were committed to custody of Department of Correctional Services, and neither People nor defendants would consent to undoing of their bargain; moreover, there was no specific reference in CLS CPL § 220.10(5)(d)(i) to class C violent felony offense "as defined in" CLS Penal § 70.02(1)(b). People v Hathaway, 173 Misc. 2d 701, 662 N.Y.S.2d 234, 1997 N.Y. Misc. LEXIS 367 (N.Y. Sup. Ct. 1997), aff'd, 260 A.D.2d 717, 688 N.Y.S.2d 720, 1999 N.Y. App. Div. LEXIS 3661 (N.Y. App. Div. 3d Dep't 1999).

11. — —Murder

In a prosecution wherein the defendant was convicted of attempted murder in the second degree and sentenced to an indeterminate term of imprisonment of 12 and one-half to 25 years, the sentence would be modified to reduce it to an indeterminate term of imprisonment of 8 and one-third to 25 years, where the defendant's sentence was imposed pursuant to Penal Law § 70.02(4) authorizing the court to fix a minimum term of imprisonment between one-third and one-half the maximum, but the amendment authorizing a minimum in excess of one-third of the maximum took effect subsequent to the crime involved in this case at which time the statute directed merely a minimum term of imprisonment equal to one-third of the maximum; accordingly, the sentence must be modified to conform to the earlier statute. People v Farrow, 92 A.D.2d 847, 460 N.Y.S.2d 562, 1983 N.Y. App. Div. LEXIS 17217 (N.Y. App. Div. 1st Dep't), app. denied, 59 N.Y.2d 972, 1983 N.Y. LEXIS 5333 (N.Y. 1983).

Defendant's sentence to concurrent indeterminate prison terms of 12 ½ to 25 years for attempted murder and robbery, and from 5 to 15 years for assault, would be modified to the extent of

reducing the sentence for the attempted murder conviction to $8^1/_3$ to 25 years. The crime of attempted murder in the second degree is a Class B violent felony offense (Pen Law § 70.02[1][a]) and not an armed felony offense (CPL § 1.20[41]), and Penal Law § 70.02(4) states that "[t]he minimum period of imprisonment under an indeterminate sentence for a violent felony offense must be fixed by the court at one-third of the maximum term imposed," or $8^1/_3$ years on a 25-year maximum term. People v Maloney, 108 A.D.2d 673, 486 N.Y.S.2d 696, 1985 N.Y. App. Div. LEXIS 43017 (N.Y. App. Div. 1st Dep't), app. denied, 65 N.Y.2d 697, 491 N.Y.S.2d 1037, 481 N.E.2d 265, 1985 N.Y. LEXIS 14945 (N.Y. 1985).

A sentence of 7 ½ to 15 years, as a violent felony offender, on a count of attempted murder in the second degree was improper under Penal Law § 70.02 on the basis that it was in excess of one-third of the maximum, where under § 70.02(4), the minimum sentence to be imposed for attempted murder in the second degree, as a violent felony offense, must be fixed by the court at one-third of the maximum term imposed, except if the conviction is for a Class B armed felony offense, and where CPL § 1.20(41)(a) defines an armed felony as a violent felony, an element which includes possession of a loaded weapon or display of a firearm, but neither murder nor attempted murder in the second degree, as defined in Penal Law § 125.25 requires the use of a firearm. People v Colon, 111 A.D.2d 9, 488 N.Y.S.2d 668, 1985 N.Y. App. Div. LEXIS 51162 (N.Y. App. Div. 1st Dep't), app. denied, 65 N.Y.2d 977, 494 N.Y.S.2d 1046, 484 N.E.2d 676, 1985 N.Y. LEXIS 16342 (N.Y. 1985).

Attempted murder in second degree is class B violent felony offense for which sentence may be imposed under CLS Penal § 70.02, but is not armed felony offense as defined in CLS CPL § 1.20. People v Battles, 117 A.D.2d 509, 498 N.Y.S.2d 3, 1986 N.Y. App. Div. LEXIS 52790 (N.Y. App. Div. 1st Dep't), app. denied, 68 N.Y.2d 665, 505 N.Y.S.2d 1030, 496 N.E.2d 688, 1986 N.Y. LEXIS 19088 (N.Y. 1986).

Crime of attempted murder in second degree is not offense for which armed felony sentence may be imposed. People v Frawley, 117 A.D.2d 613, 497 N.Y.S.2d 955, 1986 N.Y. App. Div. LEXIS 52885 (N.Y. App. Div. 2d Dep't 1986).

Consecutive indeterminate sentences of 18 years to life for felony murder were not unduly harsh or severe where defendant drove perpetrators to crime scene, stood by while crimes were committed, and then drove getaway car; consecutive sentences were within court's discretion, indeterminate sentence with life maximum was required by law, and 18 year minimum took into account defendant's lack of extensive criminal record and fact that he did not personally rob or kill victims. People v Truesdell, 122 A.D.2d 444, 504 N.Y.S.2d 835, 1986 N.Y. App. Div. LEXIS 59743 (N.Y. App. Div. 3d Dep't 1986), aff'd, 70 N.Y.2d 809, 523 N.Y.S.2d 429, 517 N.E.2d 1315, 1987 N.Y. LEXIS 19038 (N.Y. 1987).

It was improper to impose minimum prison term that was ½ of maximum for defendant's convictions of second degree attempted murder since such crime is not armed felony offense and defendant was first felony offender. People v Newton, 138 A.D.2d 415, 525 N.Y.S.2d 699, 1988 N.Y. App. Div. LEXIS 2131 (N.Y. App. Div. 2d Dep't), app. denied, 72 N.Y.2d 864, 532 N.Y.S.2d 514, 528 N.E.2d 904, 1988 N.Y. LEXIS 3843 (N.Y. 1988).

It was error for court to have imposed minimum term that was ½ of maximum term on defendant's conviction for attempted murder in second degree because that crime is not armed felony offense by definition, and defendant was first felony offender; thus, defendant's sentence for that crime would be reduced from term of 12 ½ to 25 years to $8^1/_3$ to 25 years. People v Bartlett, 146 A.D.2d 705, 537 N.Y.S.2d 58, 1989 N.Y. App. Div. LEXIS 627 (N.Y. App. Div. 2d Dep't), app. denied, 74 N.Y.2d 845, 546 N.Y.S.2d 1009, 546 N.E.2d 192, 1989 N.Y. LEXIS 3805 (N.Y. 1989).

On conviction for attempted second degree murder, court erred in imposing minimum term that was ½ of maximum term since crime was not armed felony offense by definition and defendant was first felony offender; minimum sentence would be reduced to$^1/_3$ of maximum term. People v King, 155 A.D.2d 480, 547 N.Y.S.2d 140, 1989 N.Y. App. Div. LEXIS 13967 (N.Y. App. Div. 2d Dep't 1989), app. denied, 75 N.Y.2d 869, 553 N.Y.S.2d 301, 552 N.E.2d 880, 1990 N.Y. LEXIS 832 (N.Y. 1990).

Defendant's sentence for second degree murder and first degree robbery was not excessive as compared to that received by his codefendant where it was defendant who stabbed victim to death, and codefendant had cooperated with prosecution and negotiated plea to lesser crime. People v Merchant, 171 A.D.2d 887, 567 N.Y.S.2d 812, 1991 N.Y. App. Div. LEXIS 3921 (N.Y. App. Div. 2d Dep't 1991).

Court erred in imposing minimum term that was ½ of maximum term on defendant's conviction of second degree attempted murder since crime was not armed felony offense by definition and defendant was first felony offender; minimum term should have been$^1/_3$ of maximum term. People v Pride, 173 A.D.2d 651, 570 N.Y.S.2d 227, 1991 N.Y. App. Div. LEXIS 7629 (N.Y. App. Div. 2d Dep't), app. denied, 78 N.Y.2d 972, 574 N.Y.S.2d 952, 580 N.E.2d 424, 1991 N.Y. LEXIS 4527 (N.Y. 1991).

Imposition of sentence of 25 years to life for felony murder was excessive where (1) decedent's death resulted from subdural hematoma caused by single punch to eye during argument between victim and defendant, and (2) although defendant had numerous convictions stemming from his addiction to alcohol, he had never been convicted of felony. People v Doty, 175 A.D.2d 564, 572 N.Y.S.2d 230, 1991 N.Y. App. Div. LEXIS 10060 (N.Y. App. Div. 4th Dep't), app. denied, 78 N.Y.2d 1127, 578 N.Y.S.2d 884, 586 N.E.2d 67, 1991 N.Y. LEXIS 5482 (N.Y. 1991).

Sentence of defendant, who was first felony offender, to indeterminate term of 10 to 20 years on conviction of attempted second degree murder was unlawful, since CLS Penal § 70.02(4) authorizes minimum term that is between$^1/_3$ and ½ of maximum term for first felony offender convicted of class B armed felony offense, but attempted second degree murder is not "armed felony" offense by definition; thus, sentencing court erred in imposing minimum term that was ½ of maximum term. People v Keiffer, 207 A.D.2d 1022, 617 N.Y.S.2d 103, 1994 N.Y. App. Div. LEXIS 10325 (N.Y. App. Div. 4th Dep't 1994).

Court erred in sentencing defendant to concurrent prison terms of 10 to 20 years for his convictions of 2 counts of attempted second degree murder; since attempted murder is not armed felony, minimum period could be no more than $8^1/_3$ years on each count. People v Durran, 210 A.D.2d 34, 619 N.Y.S.2d 269, 1994 N.Y. App. Div. LEXIS 12365 (N.Y. App. Div. 1st Dep't 1994), app. denied, 84 N.Y.2d 1031, 623 N.Y.S.2d 187, 647 N.E.2d 459, 1995 N.Y. LEXIS 420 (N.Y. 1995).

It was error to impose minimum term of imprisonment that was ½ of maximum term on defendant's conviction of attempted second degree murder, since such crime is not armed felony offense, and defendant was first felony offender. People v Bernard, 214 A.D.2d 576, 625 N.Y.S.2d 78, 1995 N.Y. App. Div. LEXIS 3479 (N.Y. App. Div. 2d Dep't), app. denied, 86 N.Y.2d 732, 631 N.Y.S.2d 612, 655 N.E.2d 709, 1995 N.Y. LEXIS 3076 (N.Y. 1995).

Defendant, who was convicted of attempted second degree murder and attempted aggravated assault on police officer, was improperly sentenced as armed felon under CLS Penal § 70.02(4) since neither crime was class B armed felony; thus, his sentence of concurrent terms of 12 ½ to 25 years and 4 to 8 years, respectively, would be modified to extent of reducing minimum terms to $8^1/_3$ and 2 ⅓ years. People v Garcia, 226 A.D.2d 229, 640 N.Y.S.2d 756, 1996 N.Y. App. Div. LEXIS 3939 (N.Y. App. Div. 1st Dep't 1996), app. denied, 11 N.Y.3d 855, 872 N.Y.S.2d 77, 900 N.E.2d 560, 2008 N.Y. LEXIS 4066 (N.Y. 2008).

Because crime of attempted second degree murder does not meet definition of armed violent felony in CLS CPL § 1.20(41), imposition of minimum term of imprisonment that was ½ of maximum term for that count was improper, and sentence would be reduced from term of 6 to 12 years to term of 4 to 12 years. People v Staton, 242 A.D.2d 747, 663 N.Y.S.2d 57, 1997 N.Y. App. Div. LEXIS 9173 (N.Y. App. Div. 2d Dep't 1997).

Court erred in imposing, on defendant's convictions of attempted second degree murder, minimum terms of imprisonment that were one-half of maximum terms since such crime was not armed felony offense by definition. People v D'Lucca, 243 A.D.2d 487, 674 N.Y.S.2d 47, 1997 N.Y. App. Div. LEXIS 9306 (N.Y. App.

Div. 2d Dep't), app. denied, 91 N.Y.2d 872, 668 N.Y.S.2d 570, 691 N.E.2d 642, 1997 N.Y. LEXIS 4506 (N.Y. 1997).

Sentence of 18 years to life for second degree murder, 5 to 15 years for second degree weapon possession, and $2^1/_3$ to 7 years for third degree weapon possession would be modified by reducing weapon possession sentences to 3 to 9 years and 2 to 6 years where plea bargain to that effect was not kept. People v Pagan, 245 A.D.2d 533, 666 N.Y.S.2d 41, 1997 N.Y. App. Div. LEXIS 13294 (N.Y. App. Div. 2d Dep't 1997).

Defendant's sentence on each of 3 counts of attempted second degree murder would be reduced from term of 12 ½ to 25 years to term of $8^1/_3$ to 25 years where applicable law when attempted murders were committed directed minimum sentence of$^1/_3$, rather than ½ , of maximum term imposed. People v Mojica, 244 A.D.2d 138, 677 N.Y.S.2d 100, 1998 N.Y. App. Div. LEXIS 8128 (N.Y. App. Div. 1st Dep't), app. denied, 92 N.Y.2d 950, 681 N.Y.S.2d 481, 704 N.E.2d 234, 1998 N.Y. LEXIS 4213 (N.Y. 1998).

Concurrent sentences of 25 years to life for second degree murder and 5 to 15 years for third degree arson were not excessive where (1) defendant stabbed and slit victim's throat and then returned several hours later to pour gasoline over body, burning it and house in which it was located, (2) defendant had history of drug use and violent behavior, (3) sentences were imposed on guilty plea in satisfaction of 8-count indictment, with result that defendant's exposure to prison time was significantly reduced, and (4) there were no extraordinary circumstances warranting intervention in Appellate Division's discretion. People v Hickey, 251 A.D.2d 748, 674 N.Y.S.2d 795, 1998 N.Y. App. Div. LEXIS 6777 (N.Y. App. Div. 3d Dep't), app. denied, 92 N.Y.2d 898, 680 N.Y.S.2d 62, 702 N.E.2d 847, 1998 N.Y. LEXIS 3416 (N.Y. 1998).

Sentence of 25 years to life for second degree murder was not excessive, even though codefendant rather than defendant did actual stabbing of victim, and both defendant and codefendant received same sentence, where defendant nevertheless was involved in brutal and senseless crime, he had criminal history, and sentence given to codefendant was not controlling, because statutory guidelines had constrained court from imposing harsher sentence on codefendant. People v Fink, 251 A.D.2d 751, 674 N.Y.S.2d 793, 1998 N.Y. App. Div. LEXIS 6745 (N.Y. App. Div. 3d Dep't), app. denied, 92 N.Y.2d 924, 680 N.Y.S.2d 465, 703 N.E.2d 277, 1998 N.Y. LEXIS 3797 (N.Y. 1998).

Sentence of 12 ½ to 25 years for 3 counts of second degree murder and 2 counts of first degree robbery was not excessive where defendant had long criminal record, and present crime was brutally violent. People v Leo, 255 A.D.2d 458, 680 N.Y.S.2d 859, 1998 N.Y. App. Div. LEXIS 12393 (N.Y. App. Div. 2d Dep't 1998), app. denied, 93 N.Y.2d 973, 695 N.Y.S.2d 59, 716 N.E.2d 1104, 1999 N.Y. LEXIS 2563 (N.Y. 1999).

Sentence of 12 ½ to 25 years for attempted second degree murder would be reduced to $8^1/_3$ to 25 years where (1) defendant was originally sentenced as armed felony offender, (2) attempted second degree murder is not "armed felony" offense by definition, because possession, use, or display of weapon is not statutory element of that crime, (3) thus, minimum term should not have been ½ of maximum term, and (4) because court intended maximum allowable sentence, corrected sentence would reflect that intent. People v Roye, 255 A.D.2d 464, 682 N.Y.S.2d 217, 1998 N.Y. App. Div. LEXIS 11979 (N.Y. App. Div. 2d Dep't 1998), app. denied, 93 N.Y.2d 857, 688 N.Y.S.2d 505, 710 N.E.2d 1104, 1999 N.Y. LEXIS 631 (N.Y. 1999).

In prosecution for attempted second degree murder of defendant's wife, although defendant was sentenced as persistent felony offender after hearing under CLS CPL § 400.20, judgment would be modified by vacating sentence and remitting case for resentencing where court did not state on record its reasons for finding that "the history and character of the defendant and the nature and circumstances of his criminal conduct are such that extended incarceration and lifetime supervision of the defendant are warranted to best serve the public interest." People v Johnson, 275 A.D.2d 949, 713 N.Y.S.2d 410, 2000 N.Y. App. Div. LEXIS 9741 (N.Y. App. Div. 4th Dep't), app. denied, 95 N.Y.2d 965, 722 N.Y.S.2d 482, 745 N.E.2d 403, 2000 N.Y. LEXIS 4300 (N.Y. 2000).

Discretion was not abused in imposing maximum sentences for intentional murder of first victim and assault and attempted murder of second in light of defendant's felony record and brutal nature of crimes that ended one young life and severely impacted another. People v Walker, 279 A.D.2d 696, 719 N.Y.S.2d 322, 2001 N.Y. App. Div. LEXIS 275 (N.Y. App. Div. 3d Dep't), app. denied, 96 N.Y.2d 868, 730 N.Y.S.2d 43, 754 N.E.2d 1126, 2001 N.Y. LEXIS 2679 (N.Y. 2001).

There was no merit in defendant's claim that his plea of guilty to first degree murder was result of mistake of law, based on provisions of CLS Penal § 70.00(5) and CLS CPL § 400.27, where prosecution did not seek death penalty, prohibition against pleas and plea negotiations during pendency of death penalty notice thus was not implicated, and Supreme Court had statutory authority to sentence defendant to life imprisonment without parole. People v Mower, 280 A.D.2d 25, 719 N.Y.S.2d 780, 2001 N.Y. App. Div. LEXIS 983 (N.Y. App. Div. 3d Dep't 2001), aff'd, 97 N.Y.2d 239, 739 N.Y.S.2d 343, 765 N.E.2d 839, 2002 N.Y. LEXIS 183 (N.Y. 2002).

Court did not abuse its discretion in imposing maximum sentence on defendant convicted of intentional murder although he was only 20 years old and had no prior felony convictions, where his crime was motivated by anger over victim's refusal to let him to deal drugs from his apartment. People v Leader, 285 A.D.2d 823, 728 N.Y.S.2d 289, 2001 N.Y. App. Div. LEXIS 7540 (N.Y. App. Div. 3d Dep't 2001), app. denied, 97 N.Y.2d 756, 742 N.Y.S.2d 617, 769 N.E.2d 363, 2002 N.Y. LEXIS 1270 (N.Y. 2002).

Conviction in South Carolina for voluntary manslaughter under S.C. Code Ann. § 16-3-50, for which a sentence of 21 years was imposed was analogous to manslaughter in the first degree under N.Y. Penal Law § 125.20[2], a class B violent felony offense under N.Y. Penal Law §§ 70.02[1][a] and 70.04[1][b][i]. People v Sudan, 298 A.D.2d 620, 748 N.Y.S.2d 415, 2002 N.Y. App. Div. LEXIS 9644 (N.Y. App. Div. 3d Dep't 2002), app. denied, 99 N.Y.2d 620, 757 N.Y.S.2d 831, 787 N.E.2d 1177, 2003 N.Y. LEXIS 657 (N.Y. 2003).

Although a trial judge did not mention post-release supervision (PRS) in pronouncing an inmate's sentence for attempted second-degree murder, pursuant to N.Y. Penal Law §§ 70.02(6), 70.45, it automatically became a part of the sentence once the determinate sentence was pronounced; thus, the Department Of Corrections' inclusion of PRS in the inmate's sentence was not improper or unlawful. Matter of Quinones v State of New York Dept. of Correctional Servs., 824 N.Y.S.2d 877, 14 Misc. 3d 390, 2006 N.Y. Misc. LEXIS 3327 (N.Y. Sup. Ct. 2006), rev'd, 46 A.D.3d 1268, 848 N.Y.S.2d 757, 2007 N.Y. App. Div. LEXIS 13234 (N.Y. App. Div. 3d Dep't 2007).

12. —Theft crimes

Defendant's extensive criminal history and gravity of transgressions justified sentence of concurrent prison terms of 4 to 12 years for second degree robbery and 1 to 4 years for third degree grand larceny. People v Kinsman, 144 A.D.2d 772, 534 N.Y.S.2d 756, 1988 N.Y. App. Div. LEXIS 10979 (N.Y. App. Div. 3d Dep't 1988), app. denied, 73 N.Y.2d 1017, 541 N.Y.S.2d 771, 539 N.E.2d 599, 1989 N.Y. LEXIS 1904 (N.Y. 1989).

Sentence of 5 years for attempted second degree burglary was not excessive where he had extensive juvenile and adult criminal record, and he had agreed to that sentence as part of his guilty plea. People v Davis, 246 A.D.2d 931, 668 N.Y.S.2d 289, 1998 N.Y. App. Div. LEXIS 752 (N.Y. App. Div. 3d Dep't), app. denied, 91 N.Y.2d 1006, 676 N.Y.S.2d 134, 698 N.E.2d 963, 1998 N.Y. LEXIS 1944 (N.Y. 1998).

Sentence of 10 to 20 years for first degree burglary was not excessive, even though conviction was defendant's first for felony, where he had extensive criminal history, neither short-term incarceration nor probation had succeeded at quelling his aberrant behavior, and no extraordinary circumstances were presented. People v Kindred, 263 A.D.2d 672, 693 N.Y.S.2d 689, 1999 N.Y. App. Div. LEXIS 8014 (N.Y. App. Div. 3d Dep't), app. denied, 93 N.Y.2d 1021, 697 N.Y.S.2d 579, 719 N.E.2d 940, 1999 N.Y. LEXIS 3193 (N.Y. 1999).

Persistent felony offender finding would be vacated as matter of discretion in interest of justice, and thus defendant's sentence

would be reduced from 15 years to life to 3 ½ to 7 years where latter was maximum sentence authorized for predicate felon convicted of attempted second degree burglary committed before October 1, 1995. People v Collazo, 273 A.D.2d 93, 709 N.Y.S.2d 78, 2000 N.Y. App. Div. LEXIS 6577 (N.Y. App. Div. 1st Dep't 2000).

Trial court erred in sentencing the defendant as a persistent violent felony offender for his conviction of two counts of grand larceny in the fourth degree because those offenses were not violent felonies. People v McKinney, 302 A.D.2d 993, 755 N.Y.S.2d 541, 2003 N.Y. App. Div. LEXIS 1046 (N.Y. App. Div. 4th Dep't), app. denied, 100 N.Y.2d 584, 764 N.Y.S.2d 395, 796 N.E.2d 487, 2003 N.Y. LEXIS 3134 (N.Y. 2003).

Trial court did not abuse its discretion by imposing an aggregate prison term of eight years, followed by five years of postrelease supervision upon a verdict convicting defendant of, inter alia, burglary in the second degree because defendant committed the instant crimes while he was on parole for a prior burglary conviction and his sentence was only one year more than the minimum sentence required by law. People v Arce, 150 A.D.3d 1403, 55 N.Y.S.3d 465, 2017 N.Y. App. Div. LEXIS 3736 (N.Y. App. Div. 3d Dep't), app. denied, 29 N.Y.3d 1090, 85 N.E.3d 101, 63 N.Y.S.3d 6, 2017 N.Y. LEXIS 2363 (N.Y. 2017).

13. — —Robbery

Imposition of a three-year indeterminate term of imprisonment was appropriate where defendant, who was indicted for second-degree robbery as an armed and violent class C felony, pleaded guilty to class D violent felony, although the court had discretionary power to grant a lesser sentence. People v Felix, 87 A.D.2d 529, 447 N.Y.S.2d 945, 1982 N.Y. App. Div. LEXIS 15777 (N.Y. App. Div. 1st Dep't 1982), aff'd, 58 N.Y.2d 156, 460 N.Y.S.2d 1, 446 N.E.2d 757, 1983 N.Y. LEXIS 2835 (N.Y. 1983).

Defendant's sentence of from four to eight years for second-degree robbery would be reduced to two and two thirds to eight years, where under Penal Law § 70.02 the minimum term defendant could have received for second-degree robbery was one third of the maximum imposed by the court, and since the maximum imposed was eight years. People v Quitcon, 100 A.D.2d 801, 474 N.Y.S.2d 415, 1984 N.Y. App. Div. LEXIS 17902 (N.Y. App. Div. 1st Dep't 1984).

Robberies accomplished by displaying knife to victims were not "armed felony" offenses under CLS CPL § 1.20; thus, indeterminate sentences fixing minimum imprisonment at one-half of maximum imprisonment (12 ½ to 25 years) were illegal under CLS Penal § 70.02, and would be reduced to terms of $8^1/_3$ to 25 years. People v Edwards, 121 A.D.2d 886, 503 N.Y.S.2d 577, 1986 N.Y. App. Div. LEXIS 59018 (N.Y. App. Div. 1st Dep't), app. denied, 68 N.Y.2d 811, 507 N.Y.S.2d 1028, 499 N.E.2d 877, 1986 N.Y. LEXIS 20264 (N.Y. 1986).

Interests of justice did not require reduction of 12 ½ to 25 year sentence for class B armed felony (first degree robbery) where defendant had engaged in burglary and robbery spree, preying on elderly women and causing physical injury in some instances, and had received benefit of plea bargain. People v Edwards, 121 A.D.2d 886, 503 N.Y.S.2d 577, 1986 N.Y. App. Div. LEXIS 59018 (N.Y. App. Div. 1st Dep't), app. denied, 68 N.Y.2d 811, 507 N.Y.S.2d 1028, 499 N.E.2d 877, 1986 N.Y. LEXIS 20264 (N.Y. 1986).

Sentence of 12 ½ to 25 years imprisonment on conviction of first degree robbery was within statutory limits and was not excessive, since first degree robbery is class B violent felony offense, as well as armed felony offense, for which court may impose minimum term between $^1/_3$ and ½ of maximum term imposed. People v Coit, 122 A.D.2d 150, 504 N.Y.S.2d 620, 1986 N.Y. App. Div. LEXIS 59200 (N.Y. App. Div. 2d Dep't), app. denied, 68 N.Y.2d 810, 507 N.Y.S.2d 1027, 499 N.E.2d 876, 1986 N.Y. LEXIS 20239 (N.Y. 1986).

Indeterminate sentence of 5 to 15 years for one count of second degree robbery was not excessive where defendant's record showed prior arrests for prostitution, assault, battery, and robbery, and where defendant was well known to both local police and local probation department. People v Van Fonda, 122 A.D.2d 489, 505 N.Y.S.2d 249, 1986 N.Y. App. Div. LEXIS 59771 (N.Y. App. Div. 3d Dep't 1986).

Under CLS Penal § 70.02, minimum period of imprisonment under indeterminate sentence for class B violent felony must be fixed at one-third maximum term imposed except where conviction is for class B armed felony offense, in which case court may impose minimum term up to one-half maximum imposed; accordingly, minimum term of 5- to 10-year sentence imposed on defendant's first degree robbery conviction would be reduced to $3^1/_3$ years even though indictment specified that dangerous instrument used by defendant was pistol and defendant admitted use of gun during plea colloquy, since neither possession nor display of gun is statutory element of first degree robbery to qualify such crime as "armed felony" under CLS CPL § 1.20. People v Thorpe, 129 A.D.2d 822, 514 N.Y.S.2d 809, 1987 N.Y. App. Div. LEXIS 45524 (N.Y. App. Div. 2d Dep't 1987).

Minimum term of defendant's sentence for first degree robbery would be modified to one third of maximum, in place of one half of maximum as imposed by sentencing court based on alleged fact that first degree robbery, pursuant to CLS Penal § 160.15(3), was armed felony; crime is not armed felony since neither possession nor display of gun is statutory element of first degree robbery based on use or immediate threat of use of dangerous instrument. People v Ulses, 132 A.D.2d 584, 517 N.Y.S.2d 303, 1987 N.Y. App. Div. LEXIS 49124 (N.Y. App. Div. 2d Dep't 1987).

Sentence of 3 to 6 years imposed on defendant on conviction for second degree robbery was invalid, and would be reduced to 2 to 6 years, where defendant was not predicate felon, and his conviction under CLS Penal § 160.10 could not be considered armed felony since use, possession, or display of weapon is not element of second degree robbery. People v Aguilar, 135 A.D.2d 480, 523 N.Y.S.2d 23, 1987 N.Y. App. Div. LEXIS 52443 (N.Y. App. Div. 1st Dep't 1987), app. denied, 70 N.Y.2d 1003, 526 N.Y.S.2d 938, 521 N.E.2d 1081, 1988 N.Y. LEXIS 764 (N.Y. 1988).

Third degree robbery does not constitute violent felony. People v Webb, 135 A.D.2d 855, 522 N.Y.S.2d 948, 1987 N.Y. App. Div. LEXIS 52794 (N.Y. App. Div. 2d Dep't 1987).

Concurrent sentences of 7 to 25 years' imprisonment imposed on defendant's convictions on 2 counts of first degree robbery were not unduly harsh even though defendant was young, had no prior criminal record, and claimed that crimes were precipitated by drug and alcohol abuse for which he had sought counseling, since (1) defendant received less than maximum sentence, (2) he agreed to sentence as part of plea, (3) plea arrangement resulted in several other serious charges being dropped, and (4) defendant pleaded guilty to violent offenses involving brutal use of physical force. People v Mackey, 136 A.D.2d 780, 523 N.Y.S.2d 242, 1988 N.Y. App. Div. LEXIS 41 (N.Y. App. Div. 3d Dep't), app. denied, 71 N.Y.2d 899, 527 N.Y.S.2d 1008, 523 N.E.2d 315, 1988 N.Y. LEXIS 1479 (N.Y. 1988).

Conviction for first degree robbery of taxicab and sentence as armed violent felony offender would be modified to vacate sentence and for remand for resentencing where (1) court, in sentencing, took into account earlier arrest on weapons charges which were dismissed, earlier arrest for unauthorized use of vehicle which was dismissed, pending indictment for robbery of taxicab which resulted in acquittal, and unsupported allegations of crack use by defendant, (2) prosecutor urged court to consider 15 unsolved taxicab robberies that police suspected defendant of having committed, and (3) court held that defendant's crime conformed with his prior criminal behavior; sentencing record was so permeated with improper considerations and prejudicial references that defendant was deprived of due process of law. People v Villanueva, 144 A.D.2d 285, 534 N.Y.S.2d 166, 1988 N.Y. App. Div. LEXIS 15106 (N.Y. App. Div. 1st Dep't 1988), app. denied, 73 N.Y.2d 897, 538 N.Y.S.2d 810, 535 N.E.2d 1350, 1989 N.Y. LEXIS 1263 (N.Y. 1989).

Sentence of imprisonment for 6 to 18 years on plea of guilty to robbery in first degree was excessive and would be reduced to imprisonment for 3 to 9 years where (1) defendant pleaded guilty in satisfaction of 2 consolidated indictments, (2) judge told defendant that he would receive youthful offender status and probation if he stayed out of trouble and was not rearrested, but that he could be sentenced to maximum of 25 years if he got into trouble or was rearrested, and (3) prior to sentencing, defendant was rearrested on charge of criminal mischief which was subse-

quently dismissed. People v Blagrove, 146 A.D.2d 490, 536 N.Y.S.2d 82, 1989 N.Y. App. Div. LEXIS 99 (N.Y. App. Div. 1st Dep't 1989).

It was error to sentence defendant, as armed felon, to concurrent prison terms of 9 to 18 years on his convictions of first degree robbery under CLS Penal § 160.15(1) and second degree attempted murder since neither crime satisfied definition of armed felony because their elements did not include either possession of deadly weapon or display of firearm; thus, since minimum period of imprisonment under indeterminate sentence for violent felony offense, not otherwise designated as armed felony offense, must be fixed at $^1/_3$ of maximum term imposed, court would reduce minimum term of each sentence to 6 years. People v Drew, 147 A.D.2d 411, 538 N.Y.S.2d 9, 1989 N.Y. App. Div. LEXIS 1969 (N.Y. App. Div. 1st Dep't 1989).

Defendant was properly sentenced as armed felony offender where he pleaded guilty to committing first degree robbery while armed with pistol. People v Jiminez, 165 A.D.2d 692, 560 N.Y.S.2d 145, 1990 N.Y. App. Div. LEXIS 11060 (N.Y. App. Div. 1st Dep't), app. denied, 76 N.Y.2d 987, 563 N.Y.S.2d 775, 565 N.E.2d 524, 1990 N.Y. LEXIS 4626 (N.Y. 1990).

Defendant was properly adjudicated to be second violent felony offender where he had pleaded guilty to attempted second degree robbery for acts committed on December 23, 1978, and crime was classified as class C violent felony effective September 1, 1978. People v Graham, 185 A.D.2d 992, 587 N.Y.S.2d 997, 1992 N.Y. App. Div. LEXIS 10346 (N.Y. App. Div. 2d Dep't 1992).

Defendant, who was improperly sentenced as second violent felony offender to prison term of 5 to 10 years, was improperly resentenced, as first-time felony offender, to term of 5 to 15 years on his guilty plea to attempted first degree robbery where he had reasonable expectation of finality in 10-year maximum term originally imposed under his plea bargain, and minimum period of imprisonment for first-time attempted first degree robbery offender at time instant offense was committed was $^1/_3$ of maximum term; thus, sentence would be modified to $3^1/_3$ to 10 years. People v Gilchrist, 231 A.D.2d 424, 647 N.Y.S.2d 77, 1996 N.Y. App. Div. LEXIS 9335 (N.Y. App. Div. 1st Dep't 1996).

Sentence of 2 concurrent terms and one consecutive term of 3 ½ to 10 ½ years for 3 counts of second degree robbery was not harsh or excessive, given violent nature of crime, in which defendant and 2 codefendants forcibly took money from restaurant and pedestrian, and fact that sentence was within statutory parameters. People v Davila, 238 A.D.2d 625, 655 N.Y.S.2d 698, 1997 N.Y. App. Div. LEXIS 3161 (N.Y. App. Div. 3d Dep't 1997).

Despite defendant's expressions of remorse and plans to rehabilitate himself, aggregate sentence to concurrent terms of imprisonment totaling $8^1/_3$ to 25 years was not excessive for heinous crimes of first degree sodomy, second degree robbery (2 counts), and first degree unlawful imprisonment, where sentence comported with statutory parameters and resulted from plea bargain under which 4 other charges against defendant were dropped. People v McCann, 242 A.D.2d 762, 661 N.Y.S.2d 313, 1997 N.Y. App. Div. LEXIS 8527 (N.Y. App. Div. 3d Dep't 1997).

Sentence of 4 to 8 years for attempted first degree robbery as second felony offender, to be served consecutively with term of one to 3 years that defendant was already serving, was not excessive, even though present conviction was his first for violent felony, where he had amassed extensive history of criminal conduct over past 20 years, causing his probation officer to characterize him as "a habitual criminal," and sentence was imposed in accordance with plea bargain by which he was allowed to plead guilty to lesser crime than that originally charged. People v Kenyon, 245 A.D.2d 914, 666 N.Y.S.2d 56, 1997 N.Y. App. Div. LEXIS 13649 (N.Y. App. Div. 3d Dep't 1997), app. denied, 92 N.Y.2d 854, 677 N.Y.S.2d 85, 699 N.E.2d 445, 1998 N.Y. LEXIS 2525 (N.Y. 1998).

There was no error in court's failure to decide whether defendant was "eligible youth" at time of his conviction of first degree robbery or in its allegedly belated decision not to treat him as youthful offender where, on court's acceptance of defendant's plea of guilty to armed felony, defendant could be classified as eligible youth only in court's discretion, and there was no evidence of abuse of that discretion. People v Campbell, 245 A.D.2d 983, 667 N.Y.S.2d 128, 1997 N.Y. App. Div. LEXIS 13433 (N.Y. App. Div. 3d Dep't 1997).

Sentence of 12 ½ to 25 years for first degree robbery would not be vacated, even though Appellate Division vacated defendant's adjudication as second felony offender, where sentence was lawful for class B armed felony under former subdivision (4) of CLS Penal § 70.02, which was applicable at time of crime. People v Robles, 251 A.D.2d 20, 673 N.Y.S.2d 654, 1998 N.Y. App. Div. LEXIS 6397 (N.Y. App. Div. 1st Dep't), app. denied, 92 N.Y.2d 904, 680 N.Y.S.2d 68, 702 N.E.2d 853, 1998 N.Y. LEXIS 3562 (N.Y. 1998).

Sentences of 25 years to life for 2 counts of first degree robbery were not excessive where defendant had extensive criminal history. People v Roberts, 251 A.D.2d 431, 674 N.Y.S.2d 117, 1998 N.Y. App. Div. LEXIS 6550 (N.Y. App. Div. 2d Dep't), app. denied, 92 N.Y.2d 882, 678 N.Y.S.2d 29, 700 N.E.2d 567, 1998 N.Y. LEXIS 3019 (N.Y. 1998), app. denied, 92 N.Y.2d 904, 680 N.Y.S.2d 68, 702 N.E.2d 853, 1998 N.Y. LEXIS 3556 (N.Y. 1998).

Sentence of 12 ½ to 25 years for 3 counts of second degree murder and 2 counts of first degree robbery was not excessive where defendant had long criminal record, and present crime was brutally violent. People v Leo, 255 A.D.2d 458, 680 N.Y.S.2d 859, 1998 N.Y. App. Div. LEXIS 12393 (N.Y. App. Div. 2d Dep't 1998), app. denied, 93 N.Y.2d 973, 695 N.Y.S.2d 59, 716 N.E.2d 1104, 1999 N.Y. LEXIS 2563 (N.Y. 1999).

Maximum sentence of 12 ½ to 25 years for first degree robbery was not excessive where (1) court informed defendant during plea proceeding that such maximum sentence could be imposed if defendant failed to comply with plea bargain, (2) defendant failed to so comply, and (3) sentence reflected gravity of crime, which included threats to use firearm against tellers and others in bank during robbery. People v Paige, 266 A.D.2d 587, 697 N.Y.S.2d 771, 1999 N.Y. App. Div. LEXIS 11219 (N.Y. App. Div. 3d Dep't), app. denied, 94 N.Y.2d 827, 702 N.Y.S.2d 598, 724 N.E.2d 390, 1999 N.Y. LEXIS 4267 (N.Y. 1999).

Sentence of 8 ½ to 17 years for first degree robbery as second felony offender was not excessive where it was not maximum sentence allowed, and defendant's forcible seizure of 70-year-old victim's purse caused her to fall and break her arm. People v Smith, 266 A.D.2d 639, 698 N.Y.S.2d 343, 1999 N.Y. App. Div. LEXIS 11399 (N.Y. App. Div. 3d Dep't 1999), app. denied, 94 N.Y.2d 907, 707 N.Y.S.2d 392, 728 N.E.2d 991, 2000 N.Y. LEXIS 792 (N.Y. 2000).

Defendant was not subject to postrelease supervision imposed in CLS Penal § 70.45(1) where violent felonies of which he was convicted—first degree rape and first degree robbery—were committed before September 1, 1998. People v Copeland, 281 A.D.2d 985, 721 N.Y.S.2d 896, 2001 N.Y. App. Div. LEXIS 2910 (N.Y. App. Div. 4th Dep't), app. denied, 96 N.Y.2d 861, 730 N.Y.S.2d 35, 754 N.E.2d 1118, 2001 N.Y. LEXIS 2476 (N.Y. 2001).

Enhanced sentence for second degree robbery was properly imposed where court clearly warned defendant that if he failed to appear for sentencing, court would not be bound by its sentence promise and would impose enhanced sentence of up to 15 years in prison, defendant agreed to that condition but failed to appear for sentencing, and condition was not rendered invalid by fact that it was imposed after defendant entered guilty plea. People v Hines, 286 A.D.2d 987, 730 N.Y.S.2d 910, 2001 N.Y. App. Div. LEXIS 8996 (N.Y. App. Div. 4th Dep't), app. denied, 97 N.Y.2d 683, 738 N.Y.S.2d 298, 764 N.E.2d 402, 2001 N.Y. LEXIS 4407 (N.Y. 2001).

Defendant was not entitled to withdraw the guilty plea to robbery in the second degree in violation of N.Y. Penal Law § 160.10, where defendant asserted that the People had promised defendant a lesser sentence than the statutory minimum under N.Y. Penal Law § 70.02(3)(b) if defendant acted as a confidential informant for them; defendant admitted that defendant stopped cooperating because defendant feared retribution and because defendant was incarcerated on a new charge. People v Heffelfinger, 19 A.D.3d 508, 798 N.Y.S.2d 475, 2005 N.Y. App. Div. LEXIS 6590 (N.Y. App. Div. 2d Dep't), app. denied, 5 N.Y.3d 828, 804 N.Y.S.2d 43, 837 N.E.2d 742, 2005 N.Y. LEXIS 3042 (N.Y. 2005).

Defendant's sentence as a persistent violent felony offender for robbery in the third degree was illegal and was vacated because

the crime of robbery in the third degree was not a violent felony offense. People v Coleman, 23 A.D.3d 1033, 803 N.Y.S.2d 851, 2005 N.Y. App. Div. LEXIS 12449 (N.Y. App. Div. 4th Dep't 2005).

Although defendant's waiver of the right to appeal was invalid due to an insufficient explanation by the trial court and no indication that counsel did so, the sentence imposed was not harsh or excessive as it was only six months more than the statutorily permissible minimum sentence for second-degree robbery under N.Y. Penal Law § 70.02(1)(b), (3)(b). People v Edwards, 37 A.D.3d 871, 828 N.Y.S.2d 708, 2007 N.Y. App. Div. LEXIS 1022 (N.Y. App. Div. 3d Dep't), app. denied, 8 N.Y.3d 945, 836 N.Y.S.2d 556, 868 N.E.2d 239, 2007 N.Y. LEXIS 1337 (N.Y. 2007).

County court did not abuse its discretion in imposing the maximum permissible sentences for robbery where defendant had a prior criminal history and defendant's actions in the situation which led to these charges revealed that defendant was a danger to the community. People v Rumrill, 40 A.D.3d 1273, 836 N.Y.S.2d 333, 2007 N.Y. App. Div. LEXIS 6053 (N.Y. App. Div. 3d Dep't), app. denied, 9 N.Y.3d 926, 844 N.Y.S.2d 181, 875 N.E.2d 900, 2007 N.Y. LEXIS 3564 (N.Y. 2007).

Sentence of a term of 12 years, followed by 5 years of postrelease supervision, for a first degree robbery conviction was not unduly harsh; defendant, who was 27 years old at the time of sentencing, had 11 prior nonfelony convictions, including two for assault and one for unlawful imprisonment. Inasmuch as the relatively light sentences received for those prior convictions were ineffective in deterring criminal behavior, it was within the exercise of the trial court's discretion to impose a sentence higher than the minimum, although, significantly, still within the lower half of the statutory range of 5 to 25 years. People v Kadarko, 73 A.D.3d 639, 901 N.Y.S.2d 612, 2010 N.Y. App. Div. LEXIS 4426 (N.Y. App. Div. 1st Dep't), app. denied, 15 N.Y.3d 853, 909 N.Y.S.2d 30, 935 N.E.2d 822, 2010 N.Y. LEXIS 3169 (N.Y. 2010).

Determinate sentence of seven years imposed upon defendant's third degree robbery conviction was improper; for a second felony offender who was convicted of a class D nonviolent felony, , N.Y. Penal Law §§ 160.05, 70.02(1)(c), an indeterminate term of three and one-half to seven years was proper pursuant to N.Y. Penal Law § 70.06(3)(d), (4)(b). People v McKay, 10 A.D.3d 734, 782 N.Y.S.2d 128, 2004 N.Y. App. Div. LEXIS 11074 (N.Y. App. Div. 2d Dep't 2004).

Where defendant was convicted of robbery in the first degree and criminal use of a firearm in the first degree based on a bank robbery, defendant was properly sentenced as a persistent violent felony offender because the State complied with the applicable procedures and otherwise established that defendant was a persistent violent felony offender based on two qualifying predicate felonies. People v Kirton, 36 A.D.3d 1011, 827 N.Y.S.2d 352, 2007 N.Y. App. Div. LEXIS 231 (N.Y. App. Div. 3d Dep't), app. denied, 8 N.Y.3d 947, 836 N.Y.S.2d 557, 868 N.E.2d 240, 2007 N.Y. LEXIS 1416 (N.Y. 2007).

Defendant was properly sentenced as second felony offender for attempted first-degree robbery because the sentence was just above the minimum permitted for a class C violent felony and substantially less than the potential sentence if he were convicted of first-degree robbery as charged in the indictment and there was no abuse of discretion or extraordinary circumstances warranting a reduction of the agreed-upon sentence in the interest of justice given the nature of the crime and the favorable plea deal. People v Gutek, 151 A.D.3d 1281, 58 N.Y.S.3d 164, 2017 N.Y. App. Div. LEXIS 4834 (N.Y. App. Div. 3d Dep't 2017).

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14. —Sex crimes

The trial court erred by sentencing defendant who was convicted of sodomy in the first degree, Penal Law § 130.50, as an armed violent felony offender pursuant to Penal Law § 70.02(4); although sodomy in the first degree is a class B violent felony offense under Penal Law § 70.02, it is not an armed felony, since the requisite elements do not include either possession of a deadly weapon or display of a firearm. People v Valles, 99 A.D.2d 444, 471 N.Y.S.2d 271, 1984 N.Y. App. Div. LEXIS 16607 (N.Y. App. Div. 1st Dep't 1984).

Remittal for resentencing was required since minimum sentences were not $^1/_3$ of maximums imposed where defendant was given terms of 2 to 10 years for attempted rape and 3 to 15 years for sodomy; however, consecutive nature of terms was not improper where sodomy was separate and discrete offense occurring after victim successfully warded off rape attack and defendant then dragged her out of car. People v Maxwell, 122 A.D.2d 435, 504 N.Y.S.2d 832, 1986 N.Y. App. Div. LEXIS 59740 (N.Y. App. Div. 3d Dep't 1986).

Despite absence of any prior convictions, prison sentence of $2^1/_3$ to 7 years imposed on defendant's conviction for first degree sodomy was not excessive considering that violent act committed on 4-year-old child also involved serious breach of trust, given that defendant was victim's stepfather. People v Carlin, 136 A.D.2d 781, 523 N.Y.S.2d 244, 1988 N.Y. App. Div. LEXIS 25 (N.Y. App. Div. 3d Dep't 1988).

Sentence for first degree sodomy to indeterminate prison term of 3 to 12 years would be vacated, and matter would be remitted for resentencing, since minimum period of imprisonment was required to be $^1/_3$ of maximum period of imprisonment. People v Tice, 147 A.D.2d 776, 537 N.Y.S.2d 648, 1989 N.Y. App. Div. LEXIS 1128 (N.Y. App. Div. 3d Dep't), app. denied, 74 N.Y.2d 748, 545 N.Y.S.2d 122, 543 N.E.2d 765, 1989 N.Y. LEXIS 2674 (N.Y. 1989).

Sentence of 3 to 6 years for first degree sexual abuse was not harsh or excessive where defendant admitted having sexual contact with his 4-year-old stepdaughter over period of about 3 months. People v Bleecker, 165 A.D.2d 935, 561 N.Y.S.2d 99, 1990 N.Y. App. Div. LEXIS 11296 (N.Y. App. Div. 3d Dep't 1990), app. denied, 77 N.Y.2d 836, 567 N.Y.S.2d 204, 568 N.E.2d 653, 1991 N.Y. LEXIS 3652 (N.Y. 1991).

In prosecution for first degree rape, sodomy, and sexual abuse (2 counts) stemming from sexual acts perpetrated on 6-year-old child, it was not unduly harsh or excessive to sentence defendant to consecutive indeterminate prison terms of $8^1/_3$ to 25 years for rape and $8^1/_3$ to 25 years for sodomy, and 2 indeterminate prison terms of $2^1/_3$ to 7 years on sexual abuse charges to be served concurrently with sentences imposed on rape and sodomy convictions. People v Dworakowski, 208 A.D.2d 1129, 617 N.Y.S.2d 965, 1994 N.Y. App. Div. LEXIS 10573 (N.Y. App. Div. 3d Dep't 1994), app. denied, 84 N.Y.2d 1031, 623 N.Y.S.2d 187, 647 N.E.2d 459, 1995 N.Y. LEXIS 421 (N.Y. 1995).

Sentence of consecutive indeterminate prison terms of 2 ½ to 7 ½ years imposed on counts of first degree sexual abuse exceeded maximum permissible prison sentence of $2^1/_3$ to 7 years, and thus would be reduced to consecutive indeterminate prison terms of $2^1/_3$ to 7 years. People v Wingate, 225 A.D.2d 1085, 639 N.Y.S.2d 754, 1996 N.Y. App. Div. LEXIS 2945 (N.Y. App. Div. 4th Dep't), app. denied, 88 N.Y.2d 970, 647 N.Y.S.2d 724, 670 N.E.2d 1356, 1996 N.Y. LEXIS 2930 (N.Y. 1996).

Aggregate sentence of 25 to 75 years for first degree rape, first degree sexual abuse, and 2 counts of first degree sodomy was not harsh or excessive where crimes included sexual abuse of defendant's 2 stepdaughters, and he had history of pedophilia. People v Kent, 240 A.D.2d 772, 658 N.Y.S.2d 530, 1997 N.Y. App. Div. LEXIS 6009 (N.Y. App. Div. 3d Dep't), app. denied, 90 N.Y.2d 1012, 666 N.Y.S.2d 107, 688 N.E.2d 1391, 1997 N.Y. LEXIS 3984 (N.Y. 1997), app. denied, 91 N.Y.2d 875, 668 N.Y.S.2d 573, 691 N.E.2d 645, 1997 N.Y. LEXIS 4603 (N.Y. 1997).

In prosecution for first degree rape, first degree sodomy, and second degree trespass, sentence to concurrent terms of 10 to 20 years as second felony offender on rape and sodomy charges was not harsh or excessive, even though no weapon was used and victim was not kicked, punched, beaten, slapped, or bitten, where defendant used physical force, including holding sweatshirt over victim's face, and threatened to kill her if she did not do as he said. People v Ryan, 240 A.D.2d 775, 658 N.Y.S.2d 527, 1997 N.Y.

App. Div. LEXIS 6025 (N.Y. App. Div. 3d Dep't), app. denied, 90 N.Y.2d 910, 663 N.Y.S.2d 522, 686 N.E.2d 234, 1997 N.Y. LEXIS 3501 (N.Y. 1997).

Despite defendant's expressions of remorse and plans to rehabilitate himself, aggregate sentence to concurrent terms of imprisonment totaling $8^1/_3$ to 25 years was not excessive for heinous crimes of first degree sodomy, second degree robbery (2 counts), and first degree unlawful imprisonment, where sentence comported with statutory parameters and resulted from plea bargain under which 4 other charges against defendant were dropped. People v McCann, 242 A.D.2d 762, 661 N.Y.S.2d 313, 1997 N.Y. App. Div. LEXIS 8527 (N.Y. App. Div. 3d Dep't 1997).

Although aggregate maximum sentence of 60 years would be reduced in light of 50-year limitation provided in CLS Penal § 70.30(1)(e)(vi), sentence was neither harsh nor excessive where defendant was convicted of 4 counts of first degree sodomy and 4 counts of first degree sexual abuse involving innocent children committed to his care, and he had prior convictions for similar crimes. People v Crane, 242 A.D.2d 783, 661 N.Y.S.2d 679, 1997 N.Y. App. Div. LEXIS 8671 (N.Y. App. Div. 3d Dep't 1997).

Sentence to consecutive indeterminate prison terms of 10 to 20 years for first degree sodomy and 3 to 6 years for first degree sexual assault was not unduly harsh, given defendant's long criminal history, his status as second felony offender, and nature of his crimes against very young children. People v Farless, 245 A.D.2d 878, 666 N.Y.S.2d 832, 1997 N.Y. App. Div. LEXIS 13611 (N.Y. App. Div. 3d Dep't 1997), app. denied, 91 N.Y.2d 972, 672 N.Y.S.2d 851, 695 N.E.2d 720, 1998 N.Y. LEXIS 1541 (N.Y. 1998).

Sentence of $1^1/_3$ to 4 years for attempted first degree sexual abuse was not excessive, and it would not be reduced in interest of justice, where defendant pleaded guilty in full satisfaction of information charging first degree sexual abuse, he admitted heinous crime of attempting to sexually abuse 5-year-old child in his care, and his criminal history included conviction for endangering welfare of child. People v Rousseau, 245 A.D.2d 915, 666 N.Y.S.2d 57, 1997 N.Y. App. Div. LEXIS 13598 (N.Y. App. Div. 3d Dep't 1997).

Sentence of 4 ½ to 9 years for first degree sodomy was not excessive, in view of heinous nature of that crime, where defendant pleaded guilty to one such count in full satisfaction of 9-count indictment charging 4 counts of first degree sodomy and 5 counts of first degree sexual abuse. People v Fuller, 245 A.D.2d 987, 667 N.Y.S.2d 126, 1997 N.Y. App. Div. LEXIS 13727 (N.Y. App. Div. 3d Dep't 1997), app. denied, 91 N.Y.2d 941, 671 N.Y.S.2d 721, 694 N.E.2d 890, 1998 N.Y. LEXIS 1123 (N.Y. 1998), app. dismissed, 92 N.Y.2d 982, 683 N.Y.S.2d 763, 706 N.E.2d 751, 1998 N.Y. LEXIS 4403 (N.Y. 1998).

Penalty of parole revocation and imprisonment until maximum expiration date of prior manslaughter sentence of $8^1/_3$ to 25 years was not excessive where parolee committed forcible rape and sodomy. Velez v New York State Div. of Parole, 246 A.D.2d 833, 668 N.Y.S.2d 269, 1998 N.Y. App. Div. LEXIS 532 (N.Y. App. Div. 3d Dep't), app. denied, 91 N.Y.2d 813, 674 N.Y.S.2d 278, 697 N.E.2d 179, 1998 N.Y. LEXIS 1311 (N.Y. 1998).

Despite defendant's limited education, sentence of 4 to 12 years for attempted first degree sodomy was not excessive, given persistent nature of his actions and extremely advantageous plea bargain, where he had faced 18-count indictment for varying degrees of sexual abuse and sodomy carrying potential sentences totaling 17 ⅓ to 53 years. People v Gauthier, 246 A.D.2d 928, 667 N.Y.S.2d 866, 1998 N.Y. App. Div. LEXIS 742 (N.Y. App. Div. 3d Dep't), app. denied, 92 N.Y.2d 852, 677 N.Y.S.2d 82, 699 N.E.2d 442, 1998 N.Y. LEXIS 2467 (N.Y. 1998).

Sentence of 1 to 3 years for first degree sexual abuse and second degree bail jumping was not excessive, despite defendant's troubled childhood and alleged potential for rehabilitation, where sentence was not harshest one possible and was consistent with plea bargain, relevant statutory requirements, nature of his conduct, and his criminal history. People v Castellanos, 255 A.D.2d 836, 680 N.Y.S.2d 880, 1998 N.Y. App. Div. LEXIS 12814 (N.Y. App. Div. 3d Dep't), app. denied, 92 N.Y.2d 1030, 684 N.Y.S.2d 494, 707 N.E.2d 449, 1998 N.Y. LEXIS 4573 (N.Y. 1998).

Sentence of 3 ½ to 7 years for first degree sodomy was not excessive where crime was result of molestation of 6-year-old child, and there was no evidence of extraordinary circumstances warranting modification in interest of justice. People v Blair, 263 A.D.2d 614, 692 N.Y.S.2d 616, 1999 N.Y. App. Div. LEXIS 7838 (N.Y. App. Div. 3d Dep't), app. denied, 94 N.Y.2d 820, 702 N.Y.S.2d 590, 724 N.E.2d 382, 1999 N.Y. LEXIS 4073 (N.Y. 1999).

Sentence of 15 to 30 years for 3 counts of first degree rape, 2 counts of first degree sodomy, and first degree course of sexual conduct against child was not excessive, given heinous nature of crimes perpetrated against 3 young victims. People v Hines, 263 A.D.2d 682, 692 N.Y.S.2d 852, 1999 N.Y. App. Div. LEXIS 8053 (N.Y. App. Div. 3d Dep't), app. denied, 93 N.Y.2d 1019, 697 N.Y.S.2d 578, 719 N.E.2d 939, 1999 N.Y. LEXIS 3160 (N.Y. 1999).

With exception that terms for first and third degree aggravated sexual abuse had to run concurrently, rather than consecutively, sentence of 32 to 64 years for first and second degree sodomy and first and third degree aggravated sexual abuse, and second degree sexual abuse was not excessive, absent extraordinary circumstances, in view of egregious nature of those crimes, which involved defendant's insertion of his penis as well as grease gun filled with water into rectums of 11-year-old boy and 8-year-old girl, both of whom viewed him as grandfather figure. People v Pierce, 266 A.D.2d 721, 698 N.Y.S.2d 753, 1999 N.Y. App. Div. LEXIS 12157 (N.Y. App. Div. 3d Dep't 1999), app. denied, 94 N.Y.2d 951, 710 N.Y.S.2d 8, 731 N.E.2d 625, 2000 N.Y. LEXIS 1588 (N.Y. 2000).

After conviction of first degree sodomy, second degree rape, use of child in sexual performance, and promoting sexual performance by child, minimum sentence on one count of indictment would be reduced from 12 ½ years to $8^1/_3$ years to comply with CLS Penal § 70.02 as it provided in 1995 when crime was committed. People v Schultz, 266 A.D.2d 919, 698 N.Y.S.2d 180, 1999 N.Y. App. Div. LEXIS 11820 (N.Y. App. Div. 4th Dep't 1999), app. denied, 94 N.Y.2d 906, 707 N.Y.S.2d 391, 728 N.E.2d 990, 2000 N.Y. LEXIS 781 (N.Y. 2000).

Minimum sentence for first degree sexual abuse would be reduced from 2 years to 1 ¼ years to comply with CLS Penal § 70.02 as it provided in 1994 when crime was committed. People v Martin, 266 A.D.2d 921, 698 N.Y.S.2d 179, 1999 N.Y. App. Div. LEXIS 11831 (N.Y. App. Div. 4th Dep't 1999), app. denied, 94 N.Y.2d 922, 708 N.Y.S.2d 361, 729 N.E.2d 1160, 2000 N.Y. LEXIS 1238 (N.Y. 2000).

Sentence to concurrent terms of 25 years for first degree sodomy and 7 ½ to 15 years for use of child in sexual performance, involving 2 girls aged 8 and 9, was not excessive, given atrocious nature of his conduct, where he pleaded guilty knowing that he was second felony offender and that maximum sentence would be imposed. People v Tinkham, 273 A.D.2d 619, 711 N.Y.S.2d 522, 2000 N.Y. App. Div. LEXIS 7218 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 872, 715 N.Y.S.2d 227, 738 N.E.2d 375, 2000 N.Y. LEXIS 3231 (N.Y. 2000).

Sentence of 10 to 20 years for first degree sodomy was not excessive, despite joint recommendation of prosecutor and defense counsel that defendant be sentence to 6 to 12 years, where court made no such commitment, sentence was within statutory parameters, and defendant repeatedly victimized his stepdaughter for his own sexual gratification while she was 5 to 9 years old. People v Gero, 286 A.D.2d 789, 729 N.Y.S.2d 805, 2001 N.Y. App. Div. LEXIS 8474 (N.Y. App. Div. 3d Dep't), app. denied, 97 N.Y.2d 641, 735 N.Y.S.2d 498, 761 N.E.2d 3, 2001 N.Y. LEXIS 3654 (N.Y. 2001).

In prosecution for first degree rape, first degree sodomy, first degree sexual abuse, incest, and child endangerment, sentence was not illegal, even though it exceeded maximum aggregate term set forth in CLS Penal § 70.30(1)(e)(vi), where that section does not require Appellate Division to modify sentence but requires only that Department of Correctional Services determine aggregate maximum length of imprisonment consistent with applicable statutory limitations. People v Campbell, 286 A.D.2d 979, 730 N.Y.S.2d 762, 2001 N.Y. App. Div. LEXIS 9007 (N.Y. App. Div. 4th Dep't 2001), app. denied, 97 N.Y.2d 702, 739 N.Y.S.2d 102, 765 N.E.2d 305, 2002 N.Y. LEXIS 258 (N.Y. 2002).

After October 1, 1995, the maximum sentence imposed on a conviction of sexual abuse in the first degree may only be double the minimum sentence, not triple. N.Y. Pen. Law § 70.02(4), as

amended by 1995 N.Y. Laws ch. 3, § 4. People v Ocean, 292 A.D.2d 545, 739 N.Y.S.2d 735, 2002 N.Y. App. Div. LEXIS 2973 (N.Y. App. Div. 2d Dep't), app. denied, 98 N.Y.2d 700, 747 N.Y.S.2d 419, 776 N.E.2d 8, 2002 N.Y. LEXIS 3002 (N.Y. 2002).

Defendant's sentence was not excessive since it fell well within the permissible statutory range for rape in the first degree. People v Krzykowski, 293 A.D.2d 877, 742 N.Y.S.2d 138, 2002 N.Y. App. Div. LEXIS 3813 (N.Y. App. Div. 3d Dep't 2002), app. denied, 100 N.Y.2d 643, 769 N.Y.S.2d 209, 801 N.E.2d 430, 2003 N.Y. LEXIS 4291 (N.Y. 2003).

15. — —Rape

Indeterminate prison terms of 12 ½ to 25 years imposed on defendant's convictions for first degree rape and first degree sodomy would be modified by reducing minimum terms from 12 ½ years to $8^1/_3$ years since neither offense is armed felony and thus minimum term cannot exceed $^1/_3$ of maximum as provided by CLS Penal § 70.02. People v Samuels, 133 A.D.2d 785, 520 N.Y.S.2d 172, 1987 N.Y. App. Div. LEXIS 51825 (N.Y. App. Div. 2d Dep't 1987), app. denied, 70 N.Y.2d 959, 525 N.Y.S.2d 843, 520 N.E.2d 561, 1988 N.Y. LEXIS 487 (N.Y. 1988).

Defendant was properly sentenced to maximum term of $8^1/_3$ to 25 years in prison for first degree rape where rape occurred when defendant engaged in act of sexual intercourse with 7-year-old female and his prior criminal record, though minor, consisted of 2 prior convictions of driving while intoxicated, misdemeanor marijuana sale, and assault which was dismissed as family dispute. People v Williams, 137 A.D.2d 870, 524 N.Y.S.2d 551, 1988 N.Y. App. Div. LEXIS 814 (N.Y. App. Div. 3d Dep't 1988).

Minimum term of prison sentence imposed on defendant's first degree rape conviction would be reduced from 10 years to 6 ⅔ years where court erroneously sentenced defendant in belief that first degree rape was armed felony offense; first degree rape is class B violent felony, and thus defendant should have been sentenced to minimum term of $^1/_3$ of maximum. People v Ross, 141 A.D.2d 777, 530 N.Y.S.2d 20, 1988 N.Y. App. Div. LEXIS 7054 (N.Y. App. Div. 2d Dep't 1988).

Sentence of 12 ½ to 25 years for first degree rape was not authorized since offense is not armed violent felony; appropriate sentence would be $8^1/_3$ to 25 years, as class B violent felony. People v Powell, 151 A.D.2d 317, 543 N.Y.S.2d 903, 1989 N.Y. App. Div. LEXIS 7917 (N.Y. App. Div. 1st Dep't 1989).

Where defendant was found guilty of brutally raping 21-year-old lifelong acquaintance at knife point after returning from date, sentence to indeterminate term of 7 to 21 years was not unduly harsh or severe considering nature of crime, vicious nature in which it was carried out, defendant's use of weapon, his threats against the victim's sister, and his lack of remorse. People v Townes, 165 A.D.2d 761, 564 N.Y.S.2d 37, 1990 N.Y. App. Div. LEXIS 11259 (N.Y. App. Div. 1st Dep't 1990), app. denied, 77 N.Y.2d 844, 567 N.Y.S.2d 213, 568 N.E.2d 662, 1991 N.Y. LEXIS 3874 (N.Y. 1991).

Sentence of 4 to 12 years' imprisonment for attempted first degree rape was not harsh or excessive given heinous nature of crime (committed against female of approximately 4r1/2# years old), defendant had lengthy criminal record, and sentence was in accordance with negotiated plea agreement in full satisfaction of indictment charging him with 5 separate crimes arising from incident. Dunkin' Donuts Mid-Atlantic Distrib. Ctr. v Tax Appeals Tribunal, 225 A.D.2d 903, 639 N.Y.S.2d 168, 1996 N.Y. App. Div. LEXIS 2247 (N.Y. App. Div. 3d Dep't 1996).

Despite defendant's lack of criminal history and other mitigating factors, sentence of 3 to 6 years for attempted first degree rape of his wife was not excessive, given violent nature and circumstances of crime, where, during argument over her affair, defendant handcuffed her to bed, gagged her, "cracked" her neck, and threatened to kill her if she screamed any more, and when she later tried to flee from apartment with couple's 18-month-old son, defendant pulled her back, placed baby on couch, hit wife on neck, got on top of her, held her down, ripped off her clothes, and attempted to penetrate her. People v Hale, 245 A.D.2d 576, 664 N.Y.S.2d 845, 1997 N.Y. App. Div. LEXIS 12610 (N.Y. App. Div. 3d Dep't 1997).

Harshest possible sentence of 7 ½ to 15 years for attempted first degree rape was not excessive, despite defendant's lack of prior felony convictions, where he was allowed to plead guilty to lesser offense in satisfaction of 2-count indictment, and he knew that he would receive sentence ultimately imposed. People v Germaine, 263 A.D.2d 681, 692 N.Y.S.2d 620, 1999 N.Y. App. Div. LEXIS 8016 (N.Y. App. Div. 3d Dep't 1999).

Defendant's challenge to his sentence was not wholly frivolous, and thus, although defense counsel's application to be relieved of her assignment would be granted, new counsel would be assigned on appeal where defendant's plea bargain for sentence of 12 ½ years for first degree rape did not include waiver of his right to appeal, and enhanced sentence of 15 years was imposed after he failed to appear for sentencing and was apprehended and returned to state. People v Haight, 281 A.D.2d 648, 720 N.Y.S.2d 857, 2001 N.Y. App. Div. LEXIS 2019 (N.Y. App. Div. 3d Dep't 2001).

Defendant was not subject to postrelease supervision imposed in CLS Penal § 70.45(1) where violent felonies of which he was convicted—first degree rape and first degree robbery—were committed before September 1, 1998. People v Copeland, 281 A.D.2d 985, 721 N.Y.S.2d 896, 2001 N.Y. App. Div. LEXIS 2910 (N.Y. App. Div. 4th Dep't), app. denied, 96 N.Y.2d 861, 730 N.Y.S.2d 35, 754 N.E.2d 1118, 2001 N.Y. LEXIS 2476 (N.Y. 2001).

Where defendant was convicted of rape in the first degree in violation of N.Y. Penal Law § 130.35, defendant's sentence, pursuant to N.Y. Penal Law § 70.02, of 10 years in prison followed by a five-year period of postrelease supervision was not excessive, as defendant admitted that the sexual intercourse with the 13-year-old victim was not consensual, and the presentence investigation report revealed that both the victim and the victim's friend were traumatized by defendant's behavior. People v Horace, 8 A.D.3d 752, 778 N.Y.S.2d 238, 2004 N.Y. App. Div. LEXIS 7908 (N.Y. App. Div. 3d Dep't), app. denied, 3 N.Y.3d 675, 784 N.Y.S.2d 14, 817 N.E.2d 832, 2004 N.Y. LEXIS 2660 (N.Y. 2004).

16. —Weapon possession

Defendant was entitled to vacation of sentence for 2 charges of third degree weapon possession where trial court, in applying mitigation provisions of CLS Penal § 70.02(5)(b) based on manner in which crime was committed, paid little attention to making clear particular basis for mitigation, and instead referred to different basis—conduct of police in effecting arrest—in its discussion of issue; better procedure would be for trial courts to set forth in record statutory ground being relied on and circumstances of case supporting that reliance. People v Williams, 79 N.Y.2d 281, 582 N.Y.S.2d 71, 590 N.E.2d 1199, 1992 N.Y. LEXIS 938 (N.Y. 1992).

Under Penal Law §§ 70.00(3) and 70.02(1),(4), the minimum sentences imposed upon the convictions of criminal possession of a weapon in the second degree and reckless endangerment in the first degree should be one-third of the maximum terms. People v Dello, 85 A.D.2d 609, 444 N.Y.S.2d 680, 1981 N.Y. App. Div. LEXIS 16423 (N.Y. App. Div. 2d Dep't 1981), app. denied, 56 N.Y.2d 810, 1982 N.Y. LEXIS 6030 (N.Y. 1982).

A sentence of 30 days imprisonment and three years probation imposed on 46-year-old college educated man with two children, who pleaded guilty to criminal possession of a weapon in the fourth degree, who had never before been convicted of a crime and who was aware of the gun licensing requirement but claimed a gun was necessary because the tailor shop he operated was in a high crime area, was affirmed where there was no abuse of discretion or failure to observe sentencing principles and where, although defendant did not appear to be a danger to society or in apparent need of rehabilitation, the sentencing court viewed general deterrence as an overriding principle. People v Suitte, 90 A.D.2d 80, 455 N.Y.S.2d 675, 1982 N.Y. App. Div. LEXIS 18811 (N.Y. App. Div. 2d Dep't 1982).

Defendant's sentence of $8^1/_3$ to 25 years for criminal possession of a weapon would be vacated and resentencing ordered, where it appeared that the sentencing court misread Penal L § 70.02 and erroneously concluded that the sentence imposed was the minimum indeterminate sentence possible, and where the actual minimum sentence permissible was from 2 to 6 years. People v

McGonagle, 96 A.D.2d 1104, 467 N.Y.S.2d 75, 1983 N.Y. App. Div. LEXIS 19763 (N.Y. App. Div. 2d Dep't 1983).

Although defendant's old age and infirmity merited judicial compassion, Penal Law § 70.02[2][c], which provides for a prison sentence upon conviction of criminal possession of a weapon in the third degree (Penal Law § 265.02(4)), is mandatory, and defendant, who was upset at having been robbed earlier that day and who shot at police who were called to the scene, was properly sentenced to terms of one to three years in prison. People v Pedraza, 107 A.D.2d 572, 483 N.Y.S.2d 699, 1985 N.Y. App. Div. LEXIS 42575 (N.Y. App. Div. 1st Dep't), aff'd, 66 N.Y.2d 626, 495 N.Y.S.2d 30, 485 N.E.2d 237, 1985 N.Y. LEXIS 17153 (N.Y. 1985).

Criminal possession of weapon in third degree is violent felony offense only when weapon is firearm, and where weapon involved in case was "hatchet", defendant, who had previously been convicted of violent felony, was improperly adjudicated and sentenced as second violent felony offender. People v Dembo, 114 A.D.2d 317, 494 N.Y.S.2d 112, 1985 N.Y. App. Div. LEXIS 52991 (N.Y. App. Div. 1st Dep't 1985).

Defendant's adjudication as violent felon based on his conviction for possession of knife was improper, since only possession of firearms constitutes violent felony under sentencing statute, and thus sentence imposed was excessive as matter of law; even though not argued on appeal, court would notice such error in interest of justice. People v Oliver, 123 A.D.2d 262, 506 N.Y.S.2d 172, 1986 N.Y. App. Div. LEXIS 60028 (N.Y. App. Div. 1st Dep't 1986).

Court erred in sentencing defendant to 1 ½ to 3 years' imprisonment for attempted criminal possession of weapon in third degree, since crime was not class D armed felony offense and minimum sentence should have been one year as provided in CLS Penal § 70.00; thus, sentence would be reduced to term of one to 3 years. People v Mason, 125 A.D.2d 337, 509 N.Y.S.2d 65, 1986 N.Y. App. Div. LEXIS 62609 (N.Y. App. Div. 2d Dep't 1986).

Defendant's sentence for second degree weapon possession would be reduced from 7 ½ to 15 years' imprisonment to 5 to 15 years, since minimum term cannot exceed one third of maximum term for class C violent felony under CLS Penal § 70.02. People v Delgado, 136 A.D.2d 651, 523 N.Y.S.2d 884, 1988 N.Y. App. Div. LEXIS 429 (N.Y. App. Div. 2d Dep't), app. denied, 71 N.Y.2d 895, 527 N.Y.S.2d 1004, 523 N.E.2d 311, 1988 N.Y. LEXIS 1376 (N.Y. 1988).

Maximum sentences of $8^1/_3$ to 25 years for first degree manslaughter and $2^1/_3$ to 7 years for third degree weapon possession were not unduly harsh or excessive where defendant, at time of his arrest, was in possession of loaded weapon and 26 hollow-point bullets, indicating that he was not peaceful man, and he was convicted of first degree manslaughter as lesser included charge. People v Luzunaris, 162 A.D.2d 296, 556 N.Y.S.2d 642, 1990 N.Y. App. Div. LEXIS 7433 (N.Y. App. Div. 1st Dep't), app. denied, 76 N.Y.2d 941, 563 N.Y.S.2d 70, 564 N.E.2d 680, 1990 N.Y. LEXIS 4303 (N.Y. 1990).

Concurrent sentence of 7 to 14 years on charge of second degree weapon possession would be reduced to 4 ⅓ to 14 years, since under CLS Penal § 70.02(1)(b) offense is Class C violent felony and, as such, minimum period of imprisonment is required by CLS Penal § 70.02(4) to be fixed at $1^1/_3$ maximum term imposed. People v Pagan, 193 A.D.2d 508, 598 N.Y.S.2d 1, 1993 N.Y. App. Div. LEXIS 5009 (N.Y. App. Div. 1st Dep't), app. denied, 82 N.Y.2d 724, 602 N.Y.S.2d 821, 622 N.E.2d 322, 1993 N.Y. LEXIS 3638 (N.Y. 1993), app. denied sub. nom., People v Chino, 82 N.Y.2d 715, 602 N.Y.S.2d 812, 622 N.E.2d 313 (N.Y. 1993).

Indeterminate prison term of 7 to 14 years imposed on conviction for second degree weapon possession was unlawful; maximum sentence for that offense, class "C" violent felony, for first offender is indeterminate term of 4 ⅓ to 14 years' imprisonment. People v Nwobi, 233 A.D.2d 467, 650 N.Y.S.2d 600, 1996 N.Y. App. Div. LEXIS 12033 (N.Y. App. Div. 2d Dep't 1996), app. denied, 89 N.Y.2d 987, 656 N.Y.S.2d 746, 678 N.E.2d 1362, 1997 N.Y. LEXIS 947 (N.Y. 1997).

Defendant was properly sentenced as persistent felony offender to prison term of 15 years to life for third degree weapon possession where he had 6 prior misdemeanor and 2 prior felony convictions, he conspired while in prison to sell guns, and once out of prison he sold gun that led to his arrest. People v James, 251 A.D.2d 813, 674 N.Y.S.2d 809, 1998 N.Y. App. Div. LEXIS 7339 (N.Y. App. Div. 3d Dep't 1998).

Defendant was improperly sentenced as second violent felony offender for his conviction of third degree weapon possession under CLS Penal § 265.02(1), which is not classified as violent felony (CLS Penal § 70.02(1)(c)). People v Caldwell, 272 A.D.2d 87, 708 N.Y.S.2d 370, 2000 N.Y. App. Div. LEXIS 4934 (N.Y. App. Div. 1st Dep't), app. denied, 95 N.Y.2d 933, 721 N.Y.S.2d 609, 744 N.E.2d 145, 2000 N.Y. LEXIS 3967 (N.Y. 2000).

Sentence of 2 to 4 years for third degree weapon possession was not excessive, and no extraordinary circumstances warranted reduction in interest of justice, where defendant violated terms of his probation by failing to stay in contact with his probation officer, leaving state without permission, and committing misdemeanors. People v Wright, 275 A.D.2d 817, 713 N.Y.S.2d 508, 2000 N.Y. App. Div. LEXIS 9185 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 909, 716 N.Y.S.2d 650, 739 N.E.2d 1155, 2000 N.Y. LEXIS 3739 (N.Y. 2000).

Sentence of 25 years on conviction of first degree possession of dangerous weapon (pipe bomb with which defendant apparently planned to kill his former girlfriend) was not excessive, although it was defendant's first felony conviction and sentence imposed was maximum permissible, in light of defendant's past assaultive behavior and persistent substance abuse, and effect his conduct had on his intended victim and their children. People v Ward, 282 A.D.2d 819, 722 N.Y.S.2d 830, 2001 N.Y. App. Div. LEXIS 4172 (N.Y. App. Div. 3d Dep't), app. denied, 96 N.Y.2d 942, 733 N.Y.S.2d 383, 759 N.E.2d 382, 2001 N.Y. LEXIS 3597 (N.Y. 2001).

Sentence of $1^1/_3$ to 4 years for second and third degree weapon possession was not excessive where 14-year-old defendant brought loaded .22-caliber revolver to school, indicated that he intended to use it to threaten student who had been harassing him, and indicated that he would use it if student did not leave him alone. People v Charles M., 286 A.D.2d 942, 731 N.Y.S.2d 307, 2001 N.Y. App. Div. LEXIS 9066 (N.Y. App. Div. 4th Dep't), app. denied, 97 N.Y.2d 680, 738 N.Y.S.2d 295, 764 N.E.2d 399, 2001 N.Y. LEXIS 4458 (N.Y. 2001).

Criminal possession of a weapon in the third degree under N.Y. Penal Law § 265.02(1) is not classified as a violent felony under N.Y. Penal Law § 70.02(1)(c). People v Morales, 289 A.D.2d 61, 733 N.Y.S.2d 864, 2001 N.Y. App. Div. LEXIS 12112 (N.Y. App. Div. 1st Dep't 2001), app. denied, 97 N.Y.2d 707, 739 N.Y.S.2d 108, 765 N.E.2d 311, 2002 N.Y. LEXIS 379 (N.Y. 2002).

Defendant was erroneously sentenced as a persistent violent felony offender, as defendant's prior guilty plea to one charge of third degree attempted criminal possession of a weapon did not qualify as a violent felony under N.Y. Penal Law § 70.02(1)(d). People v Williams, 290 A.D.2d 570, 736 N.Y.S.2d 633, 2002 N.Y. App. Div. LEXIS 789 (N.Y. App. Div. 2d Dep't), app. denied, 98 N.Y.2d 682, 746 N.Y.S.2d 472, 774 N.E.2d 237, 2002 N.Y. LEXIS 2574 (N.Y. 2002).

In the absence of mitigating circumstances, defendant's conviction of criminal possession of a weapon in the third degree required a determinate rather than an indeterminate sentence of imprisonment, so his indeterminate sentence on that count was illegal, under N.Y. Penal Law §§ 265.02(4) and 70.02(1)(c) and (2)(c). People v Boyer, 31 A.D.3d 1136, 817 N.Y.S.2d 813, 2006 N.Y. App. Div. LEXIS 8914 (N.Y. App. Div. 4th Dep't), app. denied, 7 N.Y.3d 865, 824 N.Y.S.2d 610, 857 N.E.2d 1141, 2006 N.Y. LEXIS 3764 (N.Y. 2006), amended, 87 A.D.3d 1413, 930 N.Y.S.2d 503, 2011 N.Y. App. Div. LEXIS 6769 (N.Y. App. Div. 4th Dep't 2011).

It was error for the trial court to impose an indeterminate sentence after defendant was convicted of a criminal possession of a weapon in the third degree, in violation of N.Y. Penal Law § 265.02(4), and a determinate sentence was imposed instead. People v Rodriguez, 34 A.D.3d 1181, 824 N.Y.S.2d 536, 2006 N.Y. App. Div. LEXIS 14006 (N.Y. App. Div. 4th Dep't 2006), app. denied, 8 N.Y.3d 926, 834 N.Y.S.2d 517, 866 N.E.2d 463, 2007 N.Y. LEXIS 1216 (N.Y. 2007), amended, 87 A.D.3d 1413, 930 N.Y.S.2d 503, 2011 N.Y. App. Div. LEXIS 6765 (N.Y. App. Div. 4th Dep't 2011).

Based, inter alia, upon defendant's youth, family background, and community involvement, and the People's position on appeal that the sentence imposed was excessive, pursuant to N.Y. Penal Law §§ 70.02(2)(c), 70.45(1), defendant's sentence for third-degree criminal possession of a weapon was reduced to a definite term of imprisonment of one year. People v Meriwether, 51 A.D.3d 823, 859 N.Y.S.2d 208, 2008 N.Y. App. Div. LEXIS 4298 (N.Y. App. Div. 2d Dep't), app. denied, 10 N.Y.3d 962, 863 N.Y.S.2d 146, 893 N.E.2d 452, 2008 N.Y. LEXIS 2841 (N.Y. 2008).

After defendant was convicted of two counts of criminal possession of a weapon in the second degree, the imposition of an aggregate prison term of 14 years was neither harsh nor excessive because while defendant was just 16 years old at the time of the incident, the violent nature of the altercation left two people dead. People v Capers, 129 A.D.3d 1313, 12 N.Y.S.3d 317, 2015 N.Y. App. Div. LEXIS 5135 (N.Y. App. Div. 3d Dep't 2015), app. denied, 27 N.Y.3d 994, 59 N.E.3d 1216, 38 N.Y.S.3d 104, 2016 N.Y. LEXIS 1271 (N.Y. 2016).

Trial court acted within its discretion by imposing a 5-year sentence after the jury convicted defendant of criminal possession of a weapon in the second degree because while defendant was a first-time offender, defendant failed to take responsibility for his offenses and showed no remorse. People v Watson, 163 A.D.3d 855, 81 N.Y.S.3d 449, 2018 N.Y. App. Div. LEXIS 5218 (N.Y. App. Div. 2d Dep't), app. denied, 32 N.Y.3d 1009, 111 N.E.3d 1123, 86 N.Y.S.3d 767, 2018 N.Y. LEXIS 3141 (N.Y. 2018).

Where defendant was convicted upon his plea of guilty of the crimes of criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree, the trial court did not abuse its discretion in sentencing defendant to significantly less than the maximum allowable sentence under this section and Penal Law § 70.06(6)(b) since the court considered his long history of drug addiction. People v Zirpola, 171 A.D.3d 1245, 97 N.Y.S.3d 355, 2019 N.Y. App. Div. LEXIS 2595 (N.Y. App. Div. 3d Dep't 2019), app. denied, 34 N.Y.3d 1164, 142 N.E.3d 1148, 120 N.Y.S.3d 246, 2020 N.Y. LEXIS 527 (N.Y. 2020).

A defendant convicted of a class D violent felony of criminal possession of a weapon in the third degree, who had been previously convicted of a class E felony but determined not to be a second felony offender, under Penal Law § 70.06, was properly sentenced to five years' probation and required to pay a $75 mandatory surcharge, since Penal Law § 70.02(2) provides that the sentence imposed upon a person convicted of criminal possession of a weapon in the third degree must be a sentence to an indeterminate period of imprisonment or a definite sentence of imprisonment for a period of no less than one year, except that the court may impose any other sentence upon a person who had not been previously convicted in the five years immediately preceding commission of the offense for a class A misdemeanor and the court is of the opinion that such sentence would be unduly harsh; even assuming that the word "felony" was erroneously omitted in defining disqualification, the prior felony conviction of defendant is not such a disqualifier. People v Stephen, 122 Misc. 2d 592, 471 N.Y.S.2d 492, 1984 N.Y. Misc. LEXIS 2872 (N.Y. Sup. Ct. 1984).

Defendant, who was charged with the Class D felony of criminal possession of a weapon in the third degree (Penal Law § 265.02) based upon the inadvertent discovery of a loaded gun in his possession by hospital emergency room personnel after he was struck by a speeding, out-of-control taxi cab as he was walking on the sidewalk, would not be entitled to a dismissal of the felony indictment in furtherance of justice to allow him to plea guilty to a misdemeanor weapons charge and thereby avoid a mandatory felony sentence, notwithstanding defendant's stable employment history and trouble-free existence following his release from prison on a 1975 robbery conviction, since the sympathy-inducing circumstances leading to the discovery of the gun did not constitute mitigating circumstances which would allow the court to circumvent the mandatory sentencing structure of the 1980 gun control law for a second felony offender, nor did they fit within any of the ten categories that the court must consider in determining a motion to dismiss in furtherance of justice; the simple possession of a loaded firearm by a person previously convicted of a crime was one of the evils addressed by the gun control law through the establishment of a tough minimum sentence and restrictions on plea bargaining, and granting defendant's motion would defeat the purpose of the law and constitute rewriting the gun control legislation. People v Garcia, 126 Misc. 2d 579, 482 N.Y.S.2d 996, 1984 N.Y. Misc. LEXIS 3668 (N.Y. Sup. Ct. 1984).

It is appropriate for court, under CLS Penal § 70.02(2)(c)(i), without finding undue harshness, to impose another sentence that is at least equal in severity to presumptive one-year term for class D felony; accordingly, in absence of undue harshness in prosecution for third degree weapon possession, court would impose split sentence of 6 months imprisonment as condition of and to run concurrent with 5-year probationary period. People v Goetz, 137 Misc. 2d 380, 520 N.Y.S.2d 919, 1987 N.Y. Misc. LEXIS 2597 (N.Y. Sup. Ct. 1987), aff'd in part and rev'd in part, 141 A.D.2d 446, 529 N.Y.S.2d 782, 1988 N.Y. App. Div. LEXIS 7256 (N.Y. App. Div. 1st Dep't 1988).

Trial court improperly sentenced defendant as a persistent violent felony offender on the conviction for criminal possession of a weapon in the third degree under N.Y. Penal Law § 265.02(3), which related to defaced weapons, as weapon possession under § 265.02(3) was not classified as a violent felony under N.Y. Penal Law § 70.02(1)(c). People v Wicks, 2 A.D.3d 285, 768 N.Y.S.2d 596, 2003 N.Y. App. Div. LEXIS 13594 (N.Y. App. Div. 1st Dep't 2003), app. denied, 1 N.Y.3d 636, 777 N.Y.S.2d 34, 808 N.E.2d 1293, 2004 N.Y. LEXIS 920 (N.Y. 2004).

Lower court erred when it accepted defendant's plea of guilty to attempted possession of a weapon in the third degree, as part of defendant's parole violation, but imposed an indeterminate term of incarceration. People v Smith, 2 A.D.3d 1431, 770 N.Y.S.2d 527, 2003 N.Y. App. Div. LEXIS 14239 (N.Y. App. Div. 4th Dep't 2003), app. denied, 2 N.Y.3d 746, 778 N.Y.S.2d 471, 810 N.E.2d 924, 2004 N.Y. LEXIS 1265 (N.Y. 2004), app. denied, 2 N.Y.3d 806, 781 N.Y.S.2d 306, 814 N.E.2d 478, 2004 N.Y. LEXIS 2020 (N.Y. 2004).

Defendant was properly resentenced from a three-year to a five-year period of postrelease supervision because while possession of a weapon in the third degree was a class D violent felony, defendant was adjudicated a second felony offender and, therefore, sentenced pursuant to N.Y. Penal Law § 70.06(6) rather than N.Y. Penal Law § 70.02; thus, the imposition of a five-year period of postrelease supervision was statutorily required under N.Y. Penal Law § 70.45(2). People v Hawkins, 45 A.D.3d 989, 845 N.Y.S.2d 171, 2007 N.Y. App. Div. LEXIS 11179 (N.Y. App. Div. 3d Dep't 2007), app. denied, 9 N.Y.3d 1034, 852 N.Y.S.2d 20, 881 N.E.2d 1207, 2008 N.Y. LEXIS 369 (N.Y. 2008).

Sentence of 6 years in prison and 2 years of postrelease supervision for third degree weapon possession was not excessive, and no extraordinary circumstances warranted reduction in interest of justice, where, contrary to defendant's claim, sentencing court was aware of all pertinent factors concerning defendant's background, including his age, family background, minimal criminal record, reason for carrying weapon, expressions of remorse, and earlier rejected plea bargain. Marshall v Bush (Iowa 1844), aff'd, 47 U.S. 284, 12 L. Ed. 440, 1848 U.S. LEXIS 316 (U.S. 1848).

13. ——Robbery

Defendant's prison sentence for attempted robbery in the first degree, which he committed when he was 17, was vacated because he was entitled to an express determination of whether, notwithstanding his conviction for an armed felony, he was still eligible for youthful offender treatment based on the factors in N.Y. Crim. Proc. Law § 720.10(3), but the record did not conclusively establish that the trial court made such an express determination in the first instance; the court made no mention of the § 720.10(3) factors and, instead of first determining defendant's eligibility pursuant to that statute, appeared to have moved to the second step and determined youthful offender treatment was inappropriate under N.Y. Crim. Proc. Law § 720.20. People v Colon, 173 A.D.3d 1255, 102 N.Y.S.3d 753, 2019 N.Y. App. Div. LEXIS 4519 (N.Y. App. Div. 3d Dep't 2019).

16.5 Controlled substances.

Trial court did not err by using defendant's past violent felony to determine defendant's predicate felony status because defendant was afforded an opportunity to review the predicate felony statement, confer with counsel and acknowledged the conviction,

and defendant's challenge was that he filed a motion to vacate that prior conviction; defendant pleaded guilty to criminal possession of a controlled substance in the third degree and criminally using drug paraphernalia in the second degree. People v Gray, 152 A.D.3d 1068, 59 N.Y.S.3d 580, 2017 N.Y. App. Div. LEXIS 5809 (N.Y. App. Div. 3d Dep't), app. denied, 30 N.Y.3d 980, 89 N.E.3d 1262, 67 N.Y.S.3d 582, 2017 N.Y. LEXIS 3604 (N.Y. 2017).

17. Appellate review

The trial court in a robbery prosecution erred in vacating its original indeterminate sentence of defendant to a term of four and one-half to nine years' imprisonment and in resentencing defendant to an indeterminate term of six to 12 years' imprisonment as a second violent felony offender pursuant to Penal L § 70.02(1)(c), since defendant's predicate felony of third degree criminal possession of a weapon had not been deemed "violent" on the date defendant had committed the robbery, and the reclassifying amendment that deemed it such had not become effective until ten days after such crime had been committed. People v Griffin, 97 A.D.2d 481, 467 N.Y.S.2d 681, 1983 N.Y. App. Div. LEXIS 20070 (N.Y. App. Div. 2d Dep't 1983).

The trial court erred in sentencing defendant as a violent felony offender on his conviction of burglary in the third degree, since that crime is not classified as a violent felony offense under Penal Law § 70.02(1)(c); accordingly, the Appellate Division would reduce the sentence on the conviction to the maximum allowable for a class D felony conviction for a second felony offender, pursuant to Penal Law § 70.06(3). People v Malone, 102 A.D.2d 737, 477 N.Y.S.2d 6, 1984 N.Y. App. Div. LEXIS 18904 (N.Y. App. Div. 1st Dep't), app. denied, 63 N.Y.2d 947 (N.Y. 1984).

Where defendant, predicate felon, was sentenced upon plea of guilty to robbery in third degree, to 2 ½ to 5 years imprisonment, and where it was apparent that sentencing judge, who sought to sentence defendant, as predicate felon, to minimum term authorized for conviction of robbery in third degree, mistakenly believed that robbery in third degree was class D violent felony and thus sentenced defendant to minimum sentence imposed on second violent felony offender, court will modify sentence to 2 to 4 years imprisonment. People v Tomasullo, 112 A.D.2d 960, 492 N.Y.S.2d 472, 1985 N.Y. App. Div. LEXIS 52176 (N.Y. App. Div. 2d Dep't 1985).

Remand was unnecessary to correct illegal sentence imposed by trial court acting under misapprehension that first degree manslaughter is class B armed felony offense where defendant and People consented to reduction of minimum term of imprisonment, from one-half to one-third maximum term, in conformity with CLS Penal 70.02. People v Campaneria, 123 A.D.2d 271, 506 N.Y.S.2d 344, 1986 N.Y. App. Div. LEXIS 60039 (N.Y. App. Div. 1st Dep't), app. denied, 69 N.Y.2d 709, 512 N.Y.S.2d 1035, 504 N.E.2d 403, 1986 N.Y. LEXIS 21391 (N.Y. 1986).

Criminal Term erred in imposing minimum terms of ½ of maximum for convictions of manslaughter in first degree and attempted murder in second degree, despite defendant's use of gun in committing crimes, since possession of deadly weapon or display of firearm is not element of either offense, neither crime is thus armed felony offense as defined by CLS CPL § 1.20, and minimum period of imprisonment for violent felony offenses cannot exceed$^{1}/_{3}$ § 70.02; matter required remand to Criminal Term for resentencing since that court was intimately familiar with facts and circumstances underlying convictions. People v Leacock, 125 A.D.2d 185, 508 N.Y.S.2d 448, 1986 N.Y. App. Div. LEXIS 62458 (N.Y. App. Div. 1st Dep't 1986).

Defendant who was convicted of first degree robbery involving use of dangerous instrument under CLS Penal § 160.15(3) was improperly sentenced to indeterminate term of 10 to 20 years, since conviction did not qualify as class B armed violent felony offense, which requires possession of deadly weapon; as matter of discretion, appellate court would sentence defendant to term of 5 to 15 years rather than remanding for resentencing, in view of lengthy delay in prosecuting appeal, fact that defendant was first-time felon and only 18 years old at time of offense, and fact that People had originally recommended imposition of term of 5 to 15 years. People v Burgos, 136 A.D.2d 466, 523 N.Y.S.2d 105, 1988 N.Y. App. Div. LEXIS 39 (N.Y. App. Div. 1st Dep't 1988).

Habeas corpus relief was not available to prison inmate regarding his claims that he was improperly sentenced as second violent felony offender and that his prison term was improperly calculated where (1) claimed errors could have been advanced on direct appeal or in CLS CPL Art 440 motion or remedied by means of administrative appeal, (2) his 1985 conviction was affirmed in 1988, (3) dismissal of his Article 78 proceeding challenging recalculation of his sentence was affirmed in 1990, and (4) nothing was presented that would justify departure from traditional orderly procedure. People ex rel. Rolon v Travis, 273 A.D.2d 655, 711 N.Y.S.2d 362, 2000 N.Y. App. Div. LEXIS 7208 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 763, 715 N.Y.S.2d 376, 738 N.E.2d 780, 2000 N.Y. LEXIS 3406 (N.Y. 2000).

Sentences imposed against defendant upon his various convictions was not harsh or excessive, despite the fact that such was certainly greater than that proposed as part of a prior rejected plea agreement, where they were within the permissible statutory range. People v Torra, 309 A.D.2d 1074, 766 N.Y.S.2d 912, 2003 N.Y. App. Div. LEXIS 11229 (N.Y. App. Div. 3d Dep't), app. denied, 1 N.Y.3d 581, 775 N.Y.S.2d 797, 807 N.E.2d 910, 2003 N.Y. LEXIS 4753 (N.Y. 2003).

Defendant's waiver of the right to appeal foreclosed his challenge to the severity of his negotiated sentence, which was less than half of the maximum possible prison term. People v Stone, 9 A.D.3d 498, 779 N.Y.S.2d 302, 2004 N.Y. App. Div. LEXIS 9080 (N.Y. App. Div. 3d Dep't), app. denied, 3 N.Y.3d 712, 785 N.Y.S.2d 40, 818 N.E.2d 682, 2004 N.Y. LEXIS 3016 (N.Y. 2004).

As the People correctly conceded, the sentence imposed against a defendant on a third-degree criminal possession of a weapon conviction was improper, as said charge under N.Y. Penal Law § 265.02(3) was not a violent felony within the meaning of N.Y. Penal Law § 70.02. People v Fermin, 36 A.D.3d 934, 828 N.Y.S.2d 546, 2007 N.Y. App. Div. LEXIS 993 (N.Y. App. Div. 2d Dep't 2007).

Sentence of 25 years for conviction of gang assault was reduced to 15 years because defendant's conduct occurred after a chaotic and highly-charged confrontation late at night, which she did not initiate, when a group of friends burst into her home raising graphic allegations, confirmed as to her daughter, that the victim, a close friend who had babysat her five children many times, had severely sexually abused her young daughter; under the circumstances, defendant's role in this assault did not support the conclusion that she represented the type of "threat to public safety" that the enhanced crime against "assaults committed by gangs" was designed to target. Defendant's only prior felony was nonviolent (possession of a forged instrument), and she was on probation. People v Cordato, 85 A.D.3d 1304, 924 N.Y.S.2d 649, 2011 N.Y. App. Div. LEXIS 4819 (N.Y. App. Div. 3d Dep't), app. denied, 17 N.Y.3d 815, 929 N.Y.S.2d 803, 954 N.E.2d 94, 2011 N.Y. LEXIS 2789 (N.Y. 2011).

Where defendant pleaded guilty to second degree robbery, the county court misspoke when it referred to probation, as opposed to postrelease supervision, at the moment it pronounced sentence. However, where the court pronounces the imposition of postrelease supervision --- albeit mistakenly referring to it as probation -- and the sentence is authorized for the offense and consistent with the terms of the plea agreement, no corrective action is necessary. People v Kaetzel, 117 A.D.3d 1187, 985 N.Y.S.2d 734, 2014 N.Y. App. Div. LEXIS 3248 (N.Y. App. Div. 3d Dep't), app. denied, 24 N.Y.3d 962, 996 N.Y.S.2d 221, 20 N.E.3d 1001, 2014 N.Y. LEXIS 3024 (N.Y. 2014).

Defendant's adjudication as a second violent felony offender was vacated because trial court was not authorized to adjudicate such as his conviction for predatory sexual assault was for class A felony. However, since the statutory sentencing parameters for such offender did not include any specifications as to proper sentences for a class A felony as that crime was more serious than crimes specified in those parameters, error could not have affected the sentence imposed to defendant's detriment. People v Bell, 188 A.D.3d 904, 135 N.Y.S.3d 413, 2020 N.Y. App. Div. LEXIS 6737 (N.Y. App. Div. 2d Dep't 2020).

Notes to Unpublished Decisions

1. Sentences for particular crimes

Unpublished decision: Where a detainee received a sentence and the sentencing judge and commitment sheet did not mention

post-release supervision, the imposition of supervision by the New York State Department of Correctional Services was void because (1) the sentencing judge did not exercise discretion to impose a period of supervision, (2) the sentence was not corrected, (3) the announced sentence was irrebuttably presumed to have said what it was meant to say, and (4) the detainee did not waive the claim. People ex rel. White v Warden, Rikers Is. Correctional Facility, 2007 N.Y. Misc. LEXIS 228 (N.Y. Sup. Ct. 2007).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 60.05, 70.00, 70.04, 70.08, 70.10, 265.08, 265.09; CLS Corr § 149-a; CLS CPL §§ 1.20, 100.15, 215.10, 220.10, 220.30, 400.15, 400.16; CLS Exec § 837; CLS Jud § 849-b.

Class A misdemeanor, definition of, § 55.10(2).

Armed felony, definition of, CLS CPL § 1.20(41).

Plea; kinds of pleas, CLS CPL § 220.10.

Plea; meaning of lessor included offense for plea purposes, CLS CPL § 220.20.

Plea; plea of guilty to part of indictment; plea covering other indictments, CLS CPL § 220.30.

Jurisprudences:

35C NY Jur 2d Criminal Law Substantive Principles and Offenses §§ 1887, 1971.

92 Am Jur Trials 1, Criminal Defense: Assault and Battery Cases.

Annotations:

Validity of statutes prohibiting or restricting parole, probation, or suspension of sentence in cases of violent crimes. 100 ALR3d 431.

Adequacy of defense counsel's representation of criminal client regarding prior convictions. 14 ALR4th 227.

Matthew Bender's New York Criminal Practice: New York Criminal Practice § 42.05 [4][a][i][a] Sentences of Imprisonment for Violent Felony Offender.

PART THREE Specific Offenses

Title

H. Offenses Against the Person Involving Physical Injury, Sexual Conduct, Restraint and Intimidation

I. Offenses Involving Damage to and Intrusion Upon Property

K. Offenses Involving Fraud

L. Offenses Against Public Administration

M. Offenses Against Public Health and Morals

N. Offenses Against Public Order, Public Sensibilities and the Right to Privacy

P. Offenses Against Public Safety

HISTORY:

Add, L 1965, ch 1030, eff Sept 1, 1967.

TITLE H Offenses Against the Person Involving Physical Injury, Sexual Conduct, Restraint and Intimidation

Article 120. Assault and Related Offenses

Section

120.05. Assault in the second degree

Article 125. Homicide and Related Offenses

125.26. Aggravated murder

125.27. Murder in the first degree

HISTORY:

Add, L 1965, ch 1030, § 1, eff Sept 1, 1967.

ARTICLE 120

ASSAULT AND RELATED OFFENSES

HISTORY:

Add, L 1965, ch 1030, eff Sept 1, 1967.

§ 120.05. Assault in the second degree

A person is guilty of assault in the second degree when:

1. With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person; or

2. With intent to cause physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument; or

3. With intent to prevent a peace officer, a police officer, prosecutor as defined in subdivision thirty-one of section 1.20 of the criminal procedure law, registered nurse, licensed practical nurse, public health sanitarian, New York city public health sanitarian, sanitation enforcement agent, New York city sanitation worker, a firefighter, including a firefighter acting as a paramedic or emergency medical technician administering first aid in the course of performance of duty as such firefighter, an emergency medical service paramedic or emergency medical service technician, or medical or related personnel in a hospital emergency department, a city marshal, a school crossing guard appointed pursuant to section two hundred eight-a of the general municipal law, a traffic enforcement officer, traffic enforcement agent or employee of any entity governed by the public service law in the course of performing an essential service, from performing a lawful duty, by means including releasing or failing to control an animal under circumstances evincing the actor's intent that the animal obstruct the lawful activity of such peace officer, police officer, prosecutor as defined in subdivision thirty-one of section 1.20 of the criminal procedure law, registered nurse, licensed practical nurse, public health sanitarian, New York city public health sanitarian, sanitation enforcement agent, New York city sanitation worker, firefighter, paramedic, technician, city marshal, school crossing guard appointed pursuant to section two hundred eight-a of the general municipal law, traffic enforcement officer, traffic enforcement agent or employee of an entity governed by the public service law, he or she causes physical injury to such peace officer, police officer, prosecutor as defined in subdivision thirty-one of section 1.20 of the criminal procedure law, registered nurse, licensed practical nurse, public health sanitarian, New York city public health sanitarian, sanitation enforcement agent, New York city sanitation worker, firefighter, paramedic, technician or medical or related personnel in a hospital emergency department, city marshal, school crossing guard, traffic enforcement officer, traffic enforcement agent or employee of an entity governed by the public service law; or

3-a. With intent to prevent an employee of a local social services district directly involved in investigation of or response to alleged abuse or neglect of a child, a vulnerable elderly person or an incompetent or physically disabled person, from performing such investigation or response, the actor, not being such child, vulnerable elderly person or incompetent or physically disabled person, or with intent to prevent an employee of a local social services district directly involved in providing public assistance and care from performing his or her job, causes physical injury to such employee including by means of releasing or failing to control an animal under circumstances evincing the actor's intent that the animal obstruct the lawful activities of such employee; or

3-b. With intent to prevent an employee of the New York city housing authority from performing his or her lawful duties while located on housing project grounds, real property, or a building owned, managed, or operated by such authority he or she causes physical injury to such employee; or

3-c. With intent to prevent an employee providing direct patient care, who is not a nurse pursuant to title eight of the education law, whose principal employment responsibility is to carry out direct patient care for one or more patients in any hospital, nursing home, residential health care facility, general hospital, government agency including any chronic disease hospital, maternity hospital, outpatient department, emergency center or surgical center under article twenty-eight of the public health law, from performing a lawful duty, he or she causes physical injury to such employee providing direct patient care; or

4. He recklessly causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument; or

4-a. He recklessly causes physical injury to another person who is a child under the age of eighteen by intentional discharge of a firearm, rifle or shotgun; or

5. For a purpose other than lawful medical or therapeutic treatment, he intentionally causes stupor, unconsciousness or other physical impairment or injury to another person by administering to him, without his consent, a drug, substance or preparation capable of producing the same; or

6. In the course of and in furtherance of the commission or attempted commission of a felony, other than a felony defined in article one hundred thirty which requires corroboration for conviction, or of immediate flight therefrom, he, or another participant if there be any, causes physical injury to a person other than one of the participants; or

7. Having been charged with or convicted of a crime and while confined in a correctional facility, as defined in subdivision three of section forty of the correction law, pursuant to such charge or conviction, with intent to cause physical injury to another person, he causes such injury to such person or to a third person; or

8. Being eighteen years old or more and with intent to cause physical injury to a person less than eleven years old, the defendant recklessly causes serious physical injury to such person; or

9. Being eighteen years old or more and with intent to cause physical injury to a person less than seven years old, the defendant causes such injury to such person; or

10. Acting at a place the person knows, or reasonably should know, is on school grounds and with intent to cause physical injury, he or she:

(a) causes such injury to an employee of a school or public school district; or

(b) not being a student of such school or public school district, causes physical injury to another, and such other person is a student of such school who is attending or present for educational purposes. For purposes of this subdivision the term "school grounds" shall have the meaning set forth in subdivision fourteen of section 220.00 of this chapter; or

11. With intent to cause physical injury to a train operator, ticket inspector, conductor, signalperson, bus operator, station agent, station cleaner or terminal cleaner employed by any transit agency, authority or company, public or private, whose operation is authorized by New York state or any of its political subdivisions, a city marshal, a school crossing guard appointed pursuant to section two hundred eight-a of the general municipal law, a traffic enforcement officer, traffic enforcement agent, prosecutor as defined in subdivision thirty-one of section 1.20 of the criminal procedure law, sanitation enforcement agent, New York city sanitation worker, public health sanitarian, New York city public health sanitarian, registered nurse, licensed practical nurse, emergency medical service paramedic, or emergency medical service technician, he or she causes physical injury to such train operator, ticket inspector, conductor, signalperson, bus operator, station agent, station cleaner or terminal cleaner, city marshal, school crossing guard appointed pursuant to section two hundred eight-a of the general municipal law, traffic enforcement officer, traffic enforcement agent, prosecutor as defined in subdivision thirty-one of section 1.20 of the criminal procedure law, registered nurse, licensed practical nurse, public health sanitarian, New York city public health sanitarian, sanitation enforcement agent, New York city sanitation worker, emergency medical service paramedic, or emergency medical service technician, while such employee is performing an assigned duty on, or directly related to, the operation of a train or bus, including the cleaning of a train or bus station or terminal, or such city marshal, school crossing guard, traffic enforcement officer, traffic enforcement agent, prosecutor as defined in subdivision thirty-one of section 1.20 of the criminal procedure law, registered nurse, licensed practical nurse, public health sanitarian, New York city public health sanitarian, sanitation enforcement agent, New York

city sanitation worker, emergency medical service paramedic, or emergency medical service technician is performing an assigned duty; or

11-a. With intent to cause physical injury to an employee of a local social services district directly involved in investigation of or response to alleged abuse or neglect of a child, vulnerable elderly person or an incompetent or physically disabled person, the actor, not being such child, vulnerable elderly person or incompetent or physically disabled person, or with intent to prevent an employee of a local social services district directly involved in providing public assistance and care from performing his or her job, causes physical injury to such employee; or

11-b. With intent to cause physical injury to an employee of the New York city housing authority performing his or her lawful duties while located on housing project grounds, real property, or a building owned, managed, or operated by such authority he or she causes physical injury to such employee; or

11-c. With intent to cause physical injury to an employee providing direct patient care, who is not a nurse pursuant to title eight of the education law, whose principal employment responsibility is to carry out direct patient care for one or more patients in any hospital, nursing home, residential health care facility, general hospital, government agency including any chronic disease hospital, maternity hospital, outpatient department, emergency center or surgical center under article twenty-eight of the public health law, he or she causes physical injury to such employee providing direct patient care while such employee is performing a lawful duty; or

12. With intent to cause physical injury to a person who is sixty-five years of age or older, he or she causes such injury to such person, and the actor is more than ten years younger than such person; or

13. Being confined to a secure treatment facility, as such term is defined in subdivision (o) of section 10.03 of the mental hygiene law, and with intent to cause physical injury to an employee of such secure treatment facility performing his or her duties, he or she causes such injury to such person; or

14. With intent to prevent or obstruct a process server, as defined in section eighty-nine-t of the general business law, from performing a lawful duty pursuant to article three of the civil practice law and rules, or intentionally, as retaliation against such a process server for the performance of the process server's duties pursuant to such article, including by means of releasing or failing to control an animal evincing the actor's intent that the animal prevent or obstruct the lawful duty of the process server or as retaliation against the process server, he or she causes physical injury to such process server.

Assault in the second degree is a class D felony.

HISTORY:

Add, L 1965, ch 1030, with substance derived from §§ 2, 242, 243; amd, L 1967, ch 791, § 7; L 1968, ch 37, § 1; L 1972, ch 598, § 2; L 1974, ch 239, § 1; L 1974, ch 660, § 1; L 1975, ch 134, § 1; L 1975, ch 667, § 37, eff Aug 6, 1975, retroactive to and deemed to have been in full force and effect on and after April 1, 1975; L 1980, ch 471, § 25; L 1980, ch 843, § 39; L 1981, ch 372, §§ 4, 5, eff Sept 1, 1981; L 1984, ch 284, § 1; L 1985, ch 262, § 1, eff Sept 1, 1985; L 1990, ch 477, § 2, eff Nov 1, 1990; L 1996, ch 122, § 4, eff Aug 1, 1996; L 1998, ch 269, § 1, eff Nov 1, 1998; L 1998, ch 287, § 1, eff Nov 1, 1998; L 2000, ch 181, § 13, eff Nov 1, 2000; L 2002, ch 598, § 1, eff Nov 1, 2002; L 2003, ch 607, § 1, eff Nov 1, 2003; L 2006, ch 100, § 1, eff Nov 1, 2006; L 2008, ch 45, § 1, eff July 22, 2008; L 2008, ch 68, § 1, eff June 29, 2008; L 2010, ch 318, §§ 1, 2, eff Nov 1, 2010; L 2010, ch 345, § 1, eff Sept 12, 2010; L 2012, ch 377, § 1, eff Sept 16, 2012; L 2012, ch 434, § 1, eff Nov 1, 2012; L 2013, ch 1, § 32, eff March 16, 2013; L 2013, ch 259, §§ 1, 2, eff Jan 27, 2014; L 2014, ch 196, § 1, effective November 1, 2014; L 2014, ch 197, § 1, effective September 3, 2014; L 2015, ch 423, § 1, effective November 1, 2016; L 2015, ch 472, § 1, effective November 1, 2016; L 2015, ch 477, § 1, effective November 1, 2016; L 2015, ch 487, § 1, effective February 18, 2016; L 2016, ch 267, § 1, effective November 1, 2016; L 2016, ch 268, § 1, effective November 1, 2016; L 2016, ch 281, § 1, effective November 1, 2016.

Editor's Notes Laws 1996, ch 122, § 7, eff Aug 1, 1996, provides as follows:

§ 7. This act shall take effect on the first day of August next succeeding the date on which it shall have become a law and shall apply only to offenses occurring on or after such date.

Laws 2000, ch 181, §§ 1 and 24, eff Nov 1, 2000, provide as follows:

Section 1. This act shall be known and may be cited as "Project SAVE, Safe Schools Against Violence in Education Act".

§ 24. This act shall take effect November 1, 2000 provided that school districts shall be in full compliance with the provisions of this act by July 1, 2001, except that section seven of this act shall take effect July 1, 2001; section eight of this act shall take effect September 1, 2000; section twelve of this act shall apply to proceedings on or after such effective date; and sections nineteen through twenty-two of this act shall take effect on the first day of January next succeeding the date on which this act shall have become a law; provided, however that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for implementation of this act on its effective date are authorized and directed to be made and completed on or before such effective date.

Commission Staff Notes Subdivision 1 presents the most familiar form of felonious assault: intentional infliction of "serious physical injury," a term defined in the General Provisions [§ 10.00(9)]. This offense is substantially the same as the former second degree assault crime applicable to one who "wilfully and wrongfully wounds or inflicts grievous bodily harm upon another" [former P.L. § 242(3)]. While the latter provision did not expressly require a specific intent to accomplish the stated result, that element had been written into it by judicial construction [People v Katz, 290 NY 361, 49 NE2d 482 (1943)].

Subdivision 2 attaches felony liability to the intentional infliction of "physical injury," whether "serious" or otherwise, so long as it is committed with a "deadly weapon" or a "dangerous instrument," which includes assaults committed with knives, crowbars, etc., as well as those committed with firearms, blackjacks, metal knuckles, etc. (see § 10.00[8, 9, 11, 12]).

It is to be noted that the comparable provision of the former Penal Law [§ 242(4)] differs in that, on the one hand, it requires no actual infliction of injury but, on the other, requires, by judicial construction at least, an intent to inflict "grievous" bodily harm with the weapon [People v Katz (1943) 290 NY 361, 49 NE2d 482].

Subdivision 3 makes it second degree assault to inflict ordinary "physical injury" upon a peace officer with intent to prevent him from performing an official duty (cf. former P.L. § 242[5]).

Subdivision 4 raises reckless assault by means of "a deadly weapon or a dangerous instrument" from third degree or misdemeanor liability [§ 120.00(2)] to felony liability when the resulting "physical injury" is "serious."

Subdivision 5, suggested by a series of former provisions [former P.L. §§ 240(2), 242(1, 2), 1752], proceeds upon the premise that the unlawful, intentional causing of stupor or other physical impairment by means of drugs administered without the victim's consent merits a felony sanction regardless of whether the "physical injury" is "serious," as that term is defined in § 10.00(9).

Amendment Notes 2013. Chapter 1, § 32 amended:

By adding sub 4-a.

2013. Chapter 259, § 1 amended:

Sub 3 by adding the matter in italics.

2013. Chapter 259, § 2 amended:

Sub 11 by deleting at figs 1 and 2 "or" and adding the matter in italics.

2012. Chapter 434, § 1 amended:

By adding sub 3-a.

By adding sub 11-a.

2000. Chapter 181, § 13 amended:

Sub 9 by deleting at fig 1 a period and adding the matter in italics.

By adding sub 1.

2008. Chapter 68, § 1 amended:

By adding sub 12.

The 2014 amendment by ch 196, § **1**, in 3 and 11, added "a school crossing guard appointed pursuant to section two hundred eight-a of the general municipal law," "school crossing guard appointed pursuant to section two hundred eight-a of the general municipal law" and "school crossing guard" preceding "traffic enforcement officer."

The 2014 amendment by ch 197, § **1** added 3-b and 11-b.

The 2015 amendment by ch 423, § **1,** added 3-c and 11-c.

The 2015 amendment by ch 472, § **1,** added "public health sanitarian, New York city public health sanitarian" wherever it appears in 3 and 11.

The 2015 amendment by ch 477, § **1,** added 13.

The 2015 amendment by ch 487, § **1,** added "emergency medical service paramedic, or emergency medical service technician" throughout 11 and made related changes.

The 2016 amendment by ch 267, § **1,** in 3, added "or employee of any entity governed by the public service law in the course of performing an essential service," added "or employee of an entity governed by the public service law" preceding "he or she," and added "or employee of an entity governed by the public service law" following the last occurrence of "traffic enforcement agent."

The 2016 amendment by ch 268, § **1,** added 14 and made related changes.

The 2016 amendment by ch 281, § **1,** in 11 [eff Feb 18, 2016], added "station cleaner or terminal cleaner" twice and added "including the cleaning of a train or bus station or terminal" and made related changes.

The 2016 amendment by ch 281, § **2,** in 11 [eff Nov 1, 2016], added "station cleaner or terminal cleaner" twice and added "including the cleaning of a train or bus station or terminal" and made related changes.

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I. In General

1. Generally

Where defendants were initially prosecuted for weapon possession, bank robbery and criminal conspiracy under federal indictment alleging that they "assaulted" persons, "put in jeopardy" lives of persons, and (as overt act of criminal conspiracy) "fired

numerous shots at police officers" who pursued them as they fled from robbery, CLS CPL § 40.20(2)(b) did not prohibit subsequent state prosecution of same defendants for attempted murder of police officer under CLS Penal §§ 110.00 and 125.27(1)(A)(i) arising from same criminal transaction, nor did it prohibit conviction of one defendant of second degree assault under CLS Penal § 120.05(1) as lesser included offense. People v Bryant, 92 N.Y.2d 216, 677 N.Y.S.2d 286, 699 N.E.2d 910, 1998 N.Y. LEXIS 2151 (N.Y. 1998).

In trial of defendant charged with assaulting his former girlfriend wherein prospective juror stated that she did not think she should be sitting on case because she had studied domestic violence extensively and questioned whether she could be impartial, trial court's seating of that juror without first obtaining her unequivocal assurance that she could be fair required reversal of defendant's second and third degree assault convictions. People v Arnold, 96 N.Y.2d 358, 729 N.Y.S.2d 51, 753 N.E.2d 846, 2001 N.Y. LEXIS 1447 (N.Y. 2001).

Second-degree assault conviction was reversed where finding that codefendants were the aggressors was inconsistent with their calling police and remaining on scene until police arrived, and where one defendant pled guilty to possessing a pistol during the incident. People v Sohn, 43 A.D.2d 716, 350 N.Y.S.2d 198, 1973 N.Y. App. Div. LEXIS 2949 (N.Y. App. Div. 2d Dep't 1973).

Under statute defining "serious physical injury," defendant who caused protracted impairment of function of complainant's eye could be found guilty of causing "serious physical injury" and thus guilty of assault in the second degree. People v Rumaner, 45 A.D.2d 290, 357 N.Y.S.2d 735, 1974 N.Y. App. Div. LEXIS 4329 (N.Y. App. Div. 3d Dep't 1974).

Crime of assault in second degree is defined in section 120.05 of Penal Law rather than in section 120.25; reference to "assault in the second degree as defined in section 120.25," contained in subdivision 4 of section 60.05 of Penal Law, which deals with authorized disposition of such crimes, is clearly nothing but typographical error. People v Lirio, 54 A.D.2d 732, 387 N.Y.S.2d 658, 1976 N.Y. App. Div. LEXIS 14347 (N.Y. App. Div. 2d Dep't 1976).

Record disclosed that defendant, in pleading guilty to charge of assault in the second degree in satisfaction of a three-count indictment, had adequate notice of the charge, that his constitutional rights were respected, and that he adequately understood the consequences of his plea. People v Biauce, 55 A.D.2d 692, 389 N.Y.S.2d 147, 1976 N.Y. App. Div. LEXIS 15465 (N.Y. App. Div. 3d Dep't 1976).

In prosecution for robbery in first degree, criminal possession of weapon in second degree and assault in second degree, whether defendant was guilty was jury question. People v Johnson, 57 A.D.2d 844, 394 N.Y.S.2d 39, 1977 N.Y. App. Div. LEXIS 12056 (N.Y. App. Div. 2d Dep't 1977).

In a prosecution for four counts of murder in the second degree and two counts of assault in the second degree, the 16-year-old defendant's cold, detailed and impassive accounts of the two violent and brutal unrelated murders two hours apart did not evince an insane state of mind where no evidence existed that defendant was suffering from a mental disorder or defect at the time of the crimes. People v Boykins, 81 A.D.2d 922, 439 N.Y.S.2d 181, 1981 N.Y. App. Div. LEXIS 11647 (N.Y. App. Div. 2d Dep't), app. denied, 54 N.Y.2d 761, 1981 N.Y. LEXIS 5082 (N.Y. 1981).

Defendant's conviction for robbery and assault would be reversed, where the victim's initial description of her assailant and her trial description differed substantially, where neither description significantly matched defendant's appearance, where the prosecution made continual references, over objection and despite cautions not to do so, to the victim's direct identification, which had been suppressed as unreliable, where the only direct proof linking defendant to the crime was a commonly available cap, and where the people failed to prove beyond a reasonable doubt that a TV set carried by defendant's companion was the set taken in the robbery. People v Perez, 91 A.D.2d 921, 457 N.Y.S.2d 808, 1983 N.Y. App. Div. LEXIS 16202 (N.Y. App. Div. 1st Dep't 1983).

Although police did not inform defendant convicted of assault in second degree, upon arrest, as to offenses designated in arrest warrants, failure to comply strictly with CLS CPL § 120.80 does not diminish police officer's authority or render act of arrest illegal. People v Johnson, 115 A.D.2d 330, 495 N.Y.S.2d 847, 1985 N.Y. App. Div. LEXIS 54614 (N.Y. App. Div. 4th Dep't 1985).

Police officer's involvement in scuffle in which he fell on top of defendant and second officer was not intervening cause of second officer's injuries so as to require reversal of defendant's second degree assault conviction since defendant was initial aggressor whose conduct precipitated altercation. People v Douglas, 143 A.D.2d 452, 532 N.Y.S.2d 446, 1988 N.Y. App. Div. LEXIS 9138 (N.Y. App. Div. 3d Dep't 1988).

"Physical injury" element of second degree assault under CLS Penal § 120.05(3) is not unconstitutionally vague since prosecution must prove that victim suffered "impairment of physical condition or substantial pain" as provided by CLS Penal § 10.00(9). People v Cortez, 143 A.D.2d 464, 532 N.Y.S.2d 585, 1988 N.Y. App. Div. LEXIS 9229 (N.Y. App. Div. 3d Dep't 1988).

Although it is legally impossible to commit attempted second degree assault under CLS Penal § 120.05(3), which does not include intent to cause physical injury as necessary element, it is possible to commit such offense under CLS Penal § 120.05(2), which requires intent to cause physical injury. People v Munck, 190 A.D.2d 963, 594 N.Y.S.2d 77, 1993 N.Y. App. Div. LEXIS 1721 (N.Y. App. Div. 3d Dep't), app. denied, 81 N.Y.2d 974, 598 N.Y.S.2d 775, 615 N.E.2d 232, 1993 N.Y. LEXIS 2057 (N.Y. 1993).

In prosecution for second degree assault, there was no error in prosecutor's limited reference to definition of "serious physical injury" in order to give meaning to facts referenced in summation. People v Smith, 246 A.D.2d 852, 668 N.Y.S.2d 281, 1998 N.Y. App. Div. LEXIS 552 (N.Y. App. Div. 3d Dep't), app. denied, 91 N.Y.2d 977, 672 N.Y.S.2d 857, 695 N.E.2d 726, 1998 N.Y. LEXIS 1681 (N.Y. 1998).

In prosecution for second degree assault, any error in prosecutor's limited reference to definition of "serious physical injury" in summation was obviated by court's instruction that jury had to accept law as given to it by court. People v Smith, 246 A.D.2d 852, 668 N.Y.S.2d 281, 1998 N.Y. App. Div. LEXIS 552 (N.Y. App. Div. 3d Dep't), app. denied, 91 N.Y.2d 977, 672 N.Y.S.2d 857, 695 N.E.2d 726, 1998 N.Y. LEXIS 1681 (N.Y. 1998).

Police officers charged with second and third degree assault on handcuffed victim in police station's garage shortly after they had engaged in altercation with victim at nearby pub while they were off duty were not entitled to transactional immunity under CLS CPL §§ 50.10 and 190.40(2) by virtue of their nonincriminatory testimony, without having signed waivers of immunity, before different grand jury investigating events at pub, including injuries inflicted on victim while he was being physically subdued and arrested, where their testimony was not probative on issue of motive for later assault, motive was not element of assault, officers' conduct in garage was not "topic" discussed before grand jury, and mere temporal (½ hour) and geographic (2 miles) proximity between events was insufficient because victim's immobilization, arrest, and removal from scene was clear and significant break segregating events at pub from those in garage. People v McKenna, 250 A.D.2d 240, 685 N.Y.S.2d 110, 1998 N.Y. App. Div. LEXIS 14133 (N.Y. App. Div. 3d Dep't 1998), app. denied sub. nom., People v Bonanni, 93 N.Y.2d 850, 688 N.Y.S.2d 498, 710 N.E.2d 1097, 1999 N.Y. LEXIS 462 (N.Y. 1999), app. denied, 93 N.Y.2d 855, 688 N.Y.S.2d 503, 710 N.E.2d 1102, 1999 N.Y. LEXIS 587 (N.Y. 1999), app. dismissed, 93 N.Y.2d 859, 689 N.Y.S.2d 13, 711 N.E.2d 198, 1999 N.Y. LEXIS 772 (N.Y. 1999).

Court failed to make required inquiry of defendant to ensure that he knowingly waived defense of intoxication on pleading guilty to second degree assault where he described incident by stating that he did whatever victim said happened, court further inquired as to whether charge in indictment was accurate, whereupon defendant declared that "if it says so, I did it," he also indicated that he was intoxicated and reiterated that if "she (victim) said it, I did it," and court thereupon accepted defendant's guilty plea. People v Osgood, 254 A.D.2d 571, 681 N.Y.S.2d 365, 1998 N.Y. App. Div. LEXIS 11185 (N.Y. App. Div. 3d Dep't 1998).

In prosecution for second and third degree assault, inter alia, involving stabbing of defendant's ex-girlfriend, it was reversible error to deny defendant's challenge for cause to prospective juror who had stated "In my women's studies—I did a lot of research on

domestic violence and battered syndrome, and I have a problem with that," juror also stated that she may have problem refraining from voicing during deliberations what she had learned through her women's studies research, she expressed doubt as to her ability to be impartial or indicated that she might be unsworn expert witness injury room, and court failed to ascertain that her prior state of mind would not influence her verdict and that she would render impartial verdict based on evidence; later general acknowledgment by all prospective jurors that they would follow law did not establish impartiality of prospective juror in question. People v Arnold, 272 A.D.2d 857, 708 N.Y.S.2d 762, 2000 N.Y. App. Div. LEXIS 5228 (N.Y. App. Div. 4th Dep't 2000), aff'd, 96 N.Y.2d 358, 729 N.Y.S.2d 51, 753 N.E.2d 846, 2001 N.Y. LEXIS 1447 (N.Y. 2001).

In prosecution for attempted second degree murder, second degree assault, and third degree weapon possession, any Brady violation in failing to turn over information as to victim's prior misdemeanor conviction was harmless where disinterested eyewitnesses testified that defendant assaulted victim after threatening to kill him, one witness specifically saw what appeared to be knife course of brawl, and there was medical testimony that injuries inflicted were consistent with victim having been stabbed with knife or other sharp instrument and were unlikely to have been caused by his falling onto glass. People v Ingraham, 274 A.D.2d 828, 711 N.Y.S.2d 863, 2000 N.Y. App. Div. LEXIS 8249 (N.Y. App. Div. 3d Dep't 2000).

Appellate Division would dismiss defendant's conviction of second degree assault since it was lesser included offense of his conviction of first degree assault. People v Woods, 275 A.D.2d 332, 712 N.Y.S.2d 407, 2000 N.Y. App. Div. LEXIS 8554 (N.Y. App. Div. 2d Dep't 2000), app. denied, 96 N.Y.2d 740, 722 N.Y.S.2d 807, 745 N.E.2d 1030, 2001 N.Y. LEXIS 507 (N.Y. 2001).

In prosecution for first and second degree assault and resisting arrest, jury was free to reject insanity defense, even though psychiatrist who evaluated defendant after shooting incident opined that defendant's behavior was triggered by drug-induced psychosis precipitated by his excessive use of cocaine and PCP and that defendant thus lacked capacity to know right from wrong, where (1) same psychiatrist conceded that defendant's psychosis was self-induced, that when defendant was not under influence of drugs, he showed no signs of functional or "real" psychosis, and that testing of defendant's personality profile indicated that defendant might have been exaggerating his symptoms to support his defense, and (2) defendant's conduct after shooting was inconsistent with that of person suffering from functional psychosis. People v Gillis, 281 A.D.2d 698, 721 N.Y.S.2d 690, 2001 N.Y. App. Div. LEXIS 2316 (N.Y. App. Div. 3d Dep't), app. denied, 96 N.Y.2d 918, 732 N.Y.S.2d 635, 758 N.E.2d 661, 2001 N.Y. LEXIS 4106 (N.Y. 2001).

Trial court did not err by denying defendant's motion to vacate the judgment convicting him for assault in the second degree as he failed to prove that he was denied effective assistance of counsel, because defense counsel visited the crime scene at least 50 times, obtained surveillance videotapes from the bar, and had numerous telephone conversations with the bar owner concerning the existence and identity of witnesses to the incident. Defense counsel obtained two exculpatory witnesses who testified on defendant's behalf at trial -- a bouncer and a bar patron. 2014 N.Y. App. Div. LEXIS 2979, 2014 NY Slip Op 3069 (May 2, 2014).

Where allegations of disorderly conduct charged against defendant involved name calling and abusive language directed toward police officers, while indictment for assault, second degree, was based on physical attack and resultant physical injuries inflicted on police officer who arrested defendant for the disorderly conduct, trial of defendant on the indictment after he had pled guilty to the disorderly conduct charge would not constitute double jeopardy. People v Bynum, 81 Misc. 2d 358, 365 N.Y.S.2d 764, 1975 N.Y. Misc. LEXIS 2388 (N.Y. County Ct. 1975).

Defendant's entry in district court of guilty plea to charge of driving with a revoked license did not bar his prosecution in County Court for second-degree assault even though both offenses arose out of same criminal transaction, where there was no showing that joinable traffic offense was disposed of by trial or plea in same court or that separate accusatory instruments were filed in same court and that defendant applied for and was improperly denied consolidation of charges for trial purposes. People v Durant, 88 Misc. 2d 731, 389 N.Y.S.2d 533, 1976 N.Y. Misc. LEXIS 2736 (N.Y. County Ct. 1976).

A court does not abuse its discretion by setting bail at $500 and hence such bail cannot be deemed preventive detention under circumstances where the defendant was charged with assault in the second degree, a felony (Penal Law, § 120.05), assault in the third degree, a misdemeanor (Penal Law, § 120.00), resisting arrest, (Penal Law, § 205.30), and the defendant had been arrested seven times in the previous two months and had a bench warrant issued concerning court proceedings on those arrests. People v Maldonado, 95 Misc. 2d 113, 407 N.Y.S.2d 393, 1978 N.Y. Misc. LEXIS 2391 (N.Y. City Crim. Ct. 1978).

A person who starts a fire under circumstances evidencing a depraved indifference to human life and recklessly causes the death of another person may properly be charged with both arson and homicide. If the other person is not killed but is seriously injured, the perpetrator may then be properly charged with both arson and assault. If the other person is neither killed nor seriously injured, but is recklessly exposed to a grave risk of death, then the perpetrator may be properly charged with both arson and reckless endangerment. People v Rodriguez, 110 Misc. 2d 828, 442 N.Y.S.2d 948, 1981 N.Y. Misc. LEXIS 3170 (N.Y. Sup. Ct. 1981).

Defendant who sold firecrackers to 13-year-old boy, one of which prematurely exploded in boy's hand, could not be convicted of second degree assault charge under CLS Penal § 120.05(4) as he could not reasonably have been expected to foresee ultimate harm that occurred; evidence did not support finding that sale of fireworks was sufficiently direct cause of boy's injury. People v Suquisupa, 167 Misc. 2d 109, 637 N.Y.S.2d 302, 1996 N.Y. Misc. LEXIS 3 (N.Y. Sup. Ct. 1996).

Trial court's order dismissing charges of attempted assault in the second degree and criminal contempt in the first degree against defendant who was committed to a psychiatric center, pursuant to N.Y. Crim. Proc. Law § 730.50(3), (4), was not an action terminating the prosecution in defendant's favor within the meaning of N.Y. Crim. Proc. Law § 160.50(3), and the trial court held that it was not required by § 160.50 to seal the court's file or order that other records pertaining to defendant's arrest be sealed. People v Willingham, 195 Misc. 2d 241, 758 N.Y.S.2d 780, 2003 N.Y. Misc. LEXIS 233 (N.Y. Sup. Ct. 2003).

Upon defendant's knowing and voluntary pleas to second-degree assault and endangering the welfare of a child, his claims of ineffective assistance of counsel, that the lower court should have recused itself, and that his sentence was excessive, were all waived when the pleas were entered. People v Anderson, 304 A.D.2d 975, 756 N.Y.S.2d 916, 2003 N.Y. App. Div. LEXIS 4121 (N.Y. App. Div. 3d Dep't), app. denied, 100 N.Y.2d 578, 764 N.Y.S.2d 388, 796 N.E.2d 480, 2003 N.Y. LEXIS 2975 (N.Y. 2003).

Where the information given by a citizen informant identified the vehicle and at least one of the suspects and the police identified the witnesses prior to stopping defendant's vehicle, the information was not obtained from an anonymous source; the police had the requisite reasonable suspicion to stop the vehicle and arrest defendant, inter alia, for robbery and assault, in violation of N.Y. Penal Law §§ 160.10(1), (2)(a), 120.05. People v Van Every, 1 A.D.3d 977, 767 N.Y.S.2d 176, 2003 N.Y. App. Div. LEXIS 12224 (N.Y. App. Div. 4th Dep't 2003), app. denied, 1 N.Y.3d 602, 776 N.Y.S.2d 233, 808 N.E.2d 369, 2004 N.Y. LEXIS 454 (N.Y. 2004).

Defendant's conviction of assault in the second degree, N.Y. Penal Law § 120.05(2), was affirmed, because the trial court properly exercised its discretion pursuant to N.Y. Crim. Proc. Law 270.35 in discharging a juror whose daughter required hospitalization for a serious illness. People v Davis, 6 A.D.3d 1168, 775 N.Y.S.2d 650, 2004 N.Y. App. Div. LEXIS 6297 (N.Y. App. Div. 4th Dep't), app. denied, 3 N.Y.3d 639, 782 N.Y.S.2d 410, 816 N.E.2d 200, 2004 N.Y. LEXIS 3258 (N.Y. 2004).

Attorney, who pleaded guilty to assault in the second degree in violation of N.Y. Penal Law § 120.05(4), a class D felony, was automatically disbarred pursuant to N.Y. Jud. Law § 90(4); she was ordered to comply with the appellate court's rules governing

the conduct of disbarred attorneys set forth in N.Y. Comp. Codes R. & Regs. tit. 22, § 691.10. In re Brown, 10 A.D.3d 182, 780 N.Y.S.2d 788, 2004 N.Y. App. Div. LEXIS 10319 (N.Y. App. Div. 2d Dep't 2004).

N.Y. Penal Law § 120.05(12) did not violate the Equal Protection Clause, U.S. amend. V and XIV, as § 120.05(1) had a rational basis since the New York legislature had concerns about protecting the elderly, who were particularly susceptible to crimes of violence due to their age, and § 120.05(12) effectuated that interest. People v Riley, 920 N.Y.S.2d 617, 32 Misc. 3d 626, 2011 N.Y. Misc. LEXIS 1312 (N.Y. Sup. Ct. 2011).

N.Y. Penal Law § 120.05(12) was not unconstitutionally vague as the New York legislature clearly intended § 120.05(12) to be a strict liability statute in order to ensure the safety of the elderly; as individuals got older it was often hard to determine their age, and if the statute required knowledge, then the purpose of the statute would be significantly debilitated. People v Riley, 920 N.Y.S.2d 617, 32 Misc. 3d 626, 2011 N.Y. Misc. LEXIS 1312 (N.Y. Sup. Ct. 2011).

N.Y. Penal Law § 120.05(12) was not unconstitutional as applied to defendant as the statute was enacted to address predatory attacks by persons who targeted seniors, but the statute did not require that it be applied exclusively for predatory attacks; the fact that defendant claimed that defendant was not a person who targeted the elderly nor was defendant motivated by the victim's alleged senior status was not a defense as the statute was not limited to predatory attacks. People v Riley, 920 N.Y.S.2d 617, 32 Misc. 3d 626, 2011 N.Y. Misc. LEXIS 1312 (N.Y. Sup. Ct. 2011).

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N.Y. Penal Law § 120.05(12) is not overbroad as § 120.05(12) is clear in its application and can be applied constitutionally; the mere fact that § 120.05(12) is a strict liability statute does not make the statute overly broad as a variety of strict liability statutes in New York impose criminal liability upon individuals regardless of knowledge of the victim's age, such as the N.Y. Alco. Bev. Cont. Law § 65(1), and a person can suffer administrative sanctions for violating this statute irrespective of knowledge or intent. People v Riley, 920 N.Y.S.2d 617, 32 Misc. 3d 626, 2011 N.Y. Misc. LEXIS 1312 (N.Y. Sup. Ct. 2011).

N.Y. Penal Law § 120.05(12) is not unconstitutional as deeming age 65 as elderly is not arbitrary since legislatures choose different statutory age requirements for numerous things, such as voting, drinking alcoholic beverages, receiving social security benefits, and even the age of retirement for appointed state judges, and all of these age requirements have been upheld as constitutional because each law has been passed in order to further a rational state interest; the primary goal of the legislature is to protect individuals age sixty-five and older, who might suffer deteriorating physical capabilities, from assault by younger, more physically able persons, and the legislative determination that persons age 65 and older need additional protection is reasonable. People v Riley, 920 N.Y.S.2d 617, 32 Misc. 3d 626, 2011 N.Y. Misc. LEXIS 1312 (N.Y. Sup. Ct. 2011).

N.Y. Penal Law § 120.05(12) is not unconstitutional because it does not apply to individuals once they reach the age of 65 as individuals aged 65 or older may be charged with the lesser crime of assault in the third degree, which is consistent with the principle that individuals 65 and older may have deteriorating physical abilities; the purpose of § 120.05(12) is to protect the elderly from younger, more physically capable individuals, and the statute is not arbitrary, but consistent with the New York legislature's rationale of protecting the elderly. People v Riley, 920 N.Y.S.2d 617, 32 Misc. 3d 626, 2011 N.Y. Misc. LEXIS 1312 (N.Y. Sup. Ct. 2011).

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In a personal injury case, defendant's guilty plea to reckless assault based on the same underlying incident negated his affirmative defenses regarding plaintiff's culpable conduct, assumption of risk, justification, and failure to mitigate damages arising from that incident. Russo v Dement, 61 Misc. 3d 855, 84 N.Y.S.3d 754, 2018 N.Y. Misc. LEXIS 4288 (N.Y. Sup. Ct. 2018).

Defendant's guilty plea to reckless assault collaterally estopped him, in a personal injury action arising from the same incident, from making any attempted defense that he was somehow provoked by plaintiff, or acted in self-defense, because he had a full and fair opportunity to raise those defenses in the criminal case yet chose not to. Russo v Dement, 61 Misc. 3d 855, 84 N.Y.S.3d 754, 2018 N.Y. Misc. LEXIS 4288 (N.Y. Sup. Ct. 2018).

District court properly sentenced defendant to the mandatory minimum of 15 years' imprisonment under 18 U.S.C.S. § 924(e)(1) of the Armed Career Criminal Act (ACCA) upon his guilty-plea conviction of being a felon in possession of a firearm because his prior conviction for second-degree attempted assault under N.Y. Penal Law § 120.05(2) was a "violent felony" under the ACCA. United States v Walker, 442 F.3d 787, 2006 U.S. App. LEXIS 8195 (2d Cir. 2006).

In a 42 U.S.C.S. § 1983 case in which a district court sua sponte dismissed an inmate's Eighth Amendment excessive force claims, the Heck decision did not bar his claims as his claims did not depend on the invalidity of his N.Y. Penal Law § 120.05(7) assault conviction; the inmate's plausible claim of excessive force could be reconciled with his assault of a correctional officer, and was therefore not barred by the Heck decision. Shapard v Attea, 710 Fed. Appx. 15, 2017 U.S. App. LEXIS 20046 (2d Cir. N.Y. 2017).

Where a defendant appealed his 110-month sentence for violating 18 U.S.C.S. § 922(g), his conviction under N.Y. Penal Law § 120.05(2) constituted a crime of violence under U.S. Sentencing

Guidelines Manual § 2K2.1(a)(4)(A). United States v Rios, 717 Fed. Appx. 18, 2017 U.S. App. LEXIS 24320 (2d Cir. N.Y. 2017).

Denial of appellant's petition for relief under 28 U.S.C.S. § 2255 was affirmed because appellant's three prior convictions of assault with a deadly weapon, Mass. Gen. Laws ch. 265, § 15B(b), attempted second-degree assault, New York Penal Law § 120.05(7), and first-degree robbery, New York Penal Law § 160.15(4), were all predicate offenses under the Armed Career Criminal Act's, 18 U.S.C.S. § 924(e)(2)(B)(i), force clause making his sentence as an armed career criminal appropriate. Lassend v United States, 898 F.3d 115, 2018 U.S. App. LEXIS 21470 (1st Cir. Mass. 2018), cert. denied, 139 S. Ct. 1300, 203 L. Ed. 2d 422, 2019 U.S. LEXIS 1607 (U.S. 2019).

Magistrate judge correctly determined that a conviction under Penal § 120.05(6) was not a "crime of violence" under 18 USCS § 16(a) because a conviction under Penal § 120.05(6), while requiring proof of physical injury, did not require, as an element of the offense, that the defendant use physical force to inflict that injury. Persaud v McElroy, 225 F. Supp. 2d 420, 2002 U.S. Dist. LEXIS 19076 (S.D.N.Y. 2002).

Conviction under N.Y. Penal Law § 120.05(6) was not a "crime of violence" under 18 U.S.C.S. § 16(b) because the minimum criminal conduct necessary to sustain a conviction under N.Y. Penal Law § 120.05(6) need not have been conduct that by its nature presented a substantial risk that physical force may have been used by the defendant. Persaud v McElroy, 225 F. Supp. 2d 420, 2002 U.S. Dist. LEXIS 19076 (S.D.N.Y. 2002).

Conviction under N.Y. Penal Law § 120.05(6) does not constitute a conviction of an "aggravated felony" under 8 U.S.C.S. §§ 1101(a)(43)(F) and 1227(a)(2)(A)(iii) because it is not a "crime of violence" under 18 U.S.C.S. § 16. Persaud v McElroy, 225 F. Supp. 2d 420, 2002 U.S. Dist. LEXIS 19076 (S.D.N.Y. 2002).

Because there were questions of material fact as to whether probable cause existed to prosecute plaintiff two for assault and attempted assault in second degree and resisting arrest, summary judgment on plaintiffs' malicious prosecution claims as to county was inappropriate. Frederique v Cnty. of Nassau, 168 F. Supp. 3d 455, 2016 U.S. Dist. LEXIS 32084 (E.D.N.Y. 2016).

2. Jurisdiction and venue

Where defendant was acquitted of incest but convicted of second degree assault and impairing the morals of his 11-year-old daughter, it was held the judgment should be modified by reversing the conviction for assault and that charge transferred to the Family Court which had exclusive original jurisdiction over aggravated and felonious assaults within the family group. Since the charge of endangering the morals of a minor did not come within the statutory definition of either assault or disorderly conduct and was essentially "a different crime" from either, it was held the Family Court did not have exclusive original jurisdiction of that charge. People v Nuernberger, 25 N.Y.2d 179, 303 N.Y.S.2d 74, 250 N.E.2d 352, 1969 N.Y. LEXIS 1110 (N.Y. 1969).

Venue was properly laid in New York County where one defendant formulated requisite criminal intent to commit second degree assault in county by contacting second defendant and instructing him to assist third defendant in exacting retribution for prior physical altercation between third defendant and victim; whenever defendant commits act in county sufficient to establish element of charged offense, codefendants may likewise be tried in that county. People v Guidice, 83 N.Y.2d 630, 612 N.Y.S.2d 350, 634 N.E.2d 951, 1994 N.Y. LEXIS 1065 (N.Y. 1994).

Action for assault and harassment against stepfather for such conduct against stepson was not barred as there was no legal interdependence between the two where defendant and child's mother no longer lived together, thus precluding jurisdiction of family court. People v Weisman, 72 Misc. 2d 465, 339 N.Y.S.2d 482, 1973 N.Y. Misc. LEXIS 2331 (N.Y. City Crim. Ct. 1973).

In view of death of wife subsequent to alleged assault against her by husband, processes of family court had become inappropriate, and the matter would be transferred back to justice court of town for further criminal proceeding in that court. Hawley v Hawley, 78 Misc. 2d 55, 355 N.Y.S.2d 962, 1974 N.Y. Misc. LEXIS 1328 (N.Y. Fam. Ct. 1974).

Fact that the complainant sustained serious physical injury, which was an element required for both statutes, did not make Assault 2 (degrees) under N.Y. Penal Law § 120.05(1) a lesser included offense of Robbery 1 (degree) since the intent to cause such injury was not an element of the crime of Robbery 1 (degree); thus the Superior Court Information did not confer jurisdiction on the County Court under N.Y. Crim. Proc. Law § 195.20 and defendant's conviction for that charge could not stand, despite the undisputed fact that defendant consented to being so prosecuted and voluntarily pled guilty. People v Robinson, 919 N.Y.S.2d 299, 30 Misc. 3d 972, 2011 N.Y. Misc. LEXIS 71 (N.Y. County Ct. 2011).

Where the victim was directed by defendant to get back into the car, threatened and told to obtain money for the defendant and then driven to his grandfather's house and to get money for the defendant, and these acts were committed after an assault was completed, they constituted a separate crime and the merger doctrine was inapplicable. People v Howard, 305 A.D.2d 869, 761 N.Y.S.2d 115, 2003 N.Y. App. Div. LEXIS 5782 (N.Y. App. Div. 3d Dep't), app. denied, 100 N.Y.2d 583, 764 N.Y.S.2d 393, 796 N.E.2d 485, 2003 N.Y. LEXIS 3091 (N.Y. 2003).

3. Indictment and grand jury proceedings

Indictment for attempted rape in first degree and assault in second and third degrees would be reinstated after dismissal by Criminal Term on ground that grand jury minutes failed to sustain prima facie case where complainant testified that, while she was riding in elevator with her child, defendant pulled at her blouse and pants, banged her against sides of elevator car when she fought back, caused her pain and subsequent swelling, told her that "he wanted to fuck" her and "if I wouldn't give him no pussy he was going to kill me," placed her in fear by that threat, and fled when elevator doors opened; evidence of subjective pain felt by complainant in being slammed against wall, and swelling it induced, was sufficient at indictment stage to establish "physical injury" for purpose of assault in second degree. People v Richards, 128 A.D.2d 387, 512 N.Y.S.2d 395, 1987 N.Y. App. Div. LEXIS 44101 (N.Y. App. Div. 1st Dep't 1987).

Defendant was not entitled to dismissal of charge of attempted second degree assault allegedly committed while he was incarcerated at Elmira Correctional Facility on robbery conviction, on ground that indictment did not specifically allege that he was confined in correctional facility on prior conviction when claimed assault occurred as required by CLS Penal § 120.05(7), since indictment and attached information sufficiently informed him of crime for which he was indicted, as well as meeting statutory requirements, where indictment stated that attempted assault occurred at correctional facility, and defendant's prior robbery conviction was referred to in special information accompanying indictment; reference in indictment to prior conviction would have been legally impermissible. People v Sanchez, 147 A.D.2d 846, 538 N.Y.S.2d 335, 1989 N.Y. App. Div. LEXIS 1997 (N.Y. App. Div. 3d Dep't), app. denied, 74 N.Y.2d 746, 545 N.Y.S.2d 121, 543 N.E.2d 764, 1989 N.Y. LEXIS 2641 (N.Y. 1989).

Indictment charging defendant with second degree assault of correction officer was not defective because it only alleged that assault was committed "at the Elmira Correctional Facility" without stating that defendant was actually "confined" therein at time of incident; defendant could not claim prejudice by such omission since he knew of his own confinement at correctional institution. People v Harris, 151 A.D.2d 919, 543 N.Y.S.2d 535, 1989 N.Y. App. Div. LEXIS 8856 (N.Y. App. Div. 3d Dep't), app. denied, 74 N.Y.2d 847, 546 N.Y.S.2d 1012, 546 N.E.2d 195, 1989 N.Y. LEXIS 3876 (N.Y. 1989).

Defendant was entitled to reversal of second degree assault conviction where court, at close of proof, granted People's motion to amend count of indictment charging that crime in order to conform indictment (which originally accused defendant of hitting victim over head with ceramic lamp) to proof (which tended to show that victim was hit with baseball bat); by permitting amendment, court foreclosed defendant from arguing, as matter of law and fact, that blow from lamp did not cause "physical injury" within meaning of CLS Penal § 10.00. People v Powell, 153 A.D.2d 54, 549 N.Y.S.2d 276, 1989 N.Y. App. Div. LEXIS 16167 (N.Y. App. Div. 4th Dep't 1989), app. denied, 75 N.Y.2d 969,

556 N.Y.S.2d 254, 555 N.E.2d 626, 1990 N.Y. LEXIS 1880 (N.Y. 1990).

Indictment charging defendant with second and third degree assault, resisting arrest, and harassment against police officer was improperly dismissed on ground that prosecutor failed to inform grand jury that DMV revocation orders, which officer was attempting to execute, had been rescinded, since under no reasonable view of evidence could trier of fact rationally conclude that acts of spitting on officer and violently attacking him were perpetrated solely with intent to convince officer that revocation notices were mistake. People v Zupan, 184 A.D.2d 888, 585 N.Y.S.2d 545, 1992 N.Y. App. Div. LEXIS 7990 (N.Y. App. Div. 3d Dep't), app. denied, 80 N.Y.2d 978, 591 N.Y.S.2d 147, 605 N.E.2d 883, 1992 N.Y. LEXIS 4372 (N.Y. 1992).

Defendant was not entitled to dismissal of indictment charging second and third degree assault, resisting arrest, and harassment against police officer, on ground that prosecutor suppressed consideration by grand jury of justification defense since (1) defendant's act of spitting on officer occurred after officer had already announced his intent to immediately depart from premises, and (2) fact that defendant stated "[y]ou're not going any [expletive] place. I've got your car blocked in" when he shoved officer showed that act was not done with intent to eject him from premises. People v Zupan, 184 A.D.2d 888, 585 N.Y.S.2d 545, 1992 N.Y. App. Div. LEXIS 7990 (N.Y. App. Div. 3d Dep't), app. denied, 80 N.Y.2d 978, 591 N.Y.S.2d 147, 605 N.E.2d 883, 1992 N.Y. LEXIS 4372 (N.Y. 1992).

Evidence before grand jury was sufficient to indict defendant for second degree assault where it demonstrated that defendant fled following lawful arrest, and security officers' lawful attempt to detain him resulted in injuries to one officer, who was pulled down steep incline and crashed into concrete abutment while struggling with defendant to hold onto him and prevent his escape. People v Jensen, 203 A.D.2d 820, 611 N.Y.S.2d 363, 1994 N.Y. App. Div. LEXIS 4450 (N.Y. App. Div. 3d Dep't 1994), aff'd, 86 N.Y.2d 248, 630 N.Y.S.2d 989, 654 N.E.2d 1237, 1995 N.Y. LEXIS 2230 (N.Y. 1995).

Court erred in dismissing or reducing counts of indictment charging burglary and assault, all of which contained as element use or threatened use of dangerous instrument, on ground that defendant's teeth could not be considered dangerous instrument where evidence presented to grand jury indicated that defendant bit victim's finger to bone. People v Owusu, 248 A.D.2d 491, 669 N.Y.S.2d 366, 1998 N.Y. App. Div. LEXIS 2324 (N.Y. App. Div. 2d Dep't 1998), rev'd, 93 N.Y.2d 398, 690 N.Y.S.2d 863, 712 N.E.2d 1228, 1999 N.Y. LEXIS 1135 (N.Y. 1999).

Indictment charging second degree assault was not insufficient on ground that deputy sheriffs were no longer "performing (their) lawful dut(ies)" (CLS Penal § 120.05(3)) at time they were injured, because they had completed transporting defendant to correctional facility, since deputies' responsibility to "transport" defendant did not end as soon as their vehicle stopped moving, and they were injured as they were attempting to secure defendant inside facility. People v Townsend, 248 A.D.2d 811, 670 N.Y.S.2d 245, 1998 N.Y. App. Div. LEXIS 2497 (N.Y. App. Div. 3d Dep't), app. denied, 92 N.Y.2d 862, 677 N.Y.S.2d 92, 699 N.E.2d 452, 1998 N.Y. LEXIS 2709 (N.Y. 1998).

Court erred in granting defendant's motion to dismiss indictment on ground that evidence before grand jury was insufficient to support charges of second degree assault where evidence of subjective pain felt by each of police officers on being struck by defendant with wooden stick-type bat or club, swelling induced by injury, and length of time that pain and swelling continued was sufficient to show physical injury. People v Sylvester, 254 A.D.2d 711, 677 N.Y.S.2d 865, 1998 N.Y. App. Div. LEXIS 10384 (N.Y. App. Div. 4th Dep't 1998).

Evidence supported indictment counts charging first degree assault, first and second degree gang assault, and fourth degree weapon possession, even though defendant denied participating in attack, where he drove several accomplices to and from scene for purpose of exacting revenge on victim for earlier altercation, he was present at scene with baseball bat in his hands, and victim testified that all members of gang participated in assault. People v Kim, 255 A.D.2d 337, 681 N.Y.S.2d 549, 1998 N.Y. App. Div. LEXIS 11591 (N.Y. App. Div. 2d Dep't 1998).

People were properly permitted to amend count of indictment charging second degree assault, to delete word "serious" from before words "physical injury," where amendment was necessary so that indictment accurately reflected statutory language as well as actual charge voted on by grand jury, defendant was notified of error during People's direct case, and amendment did not change theory of People's case or otherwise prejudice defendant. People v Penna, 261 A.D.2d 641, 690 N.Y.S.2d 669, 1999 N.Y. App. Div. LEXIS 5667 (N.Y. App. Div. 2d Dep't), app. denied, 93 N.Y.2d 976, 695 N.Y.S.2d 62, 716 N.E.2d 1107, 1999 N.Y. LEXIS 2631 (N.Y. 1999).

People were allowed to amend indictment to delete word "serious" before phrase "physical injury" in second degree assault charge, where amendment was necessary in view of statutory language and jury's charge, and did not change theory of case or otherwise prejudice defendant. People v Clabeaux, 277 A.D.2d 988, 716 N.Y.S.2d 526, 2000 N.Y. App. Div. LEXIS 11566 (N.Y. App. Div. 4th Dep't 2000), app. denied, 96 N.Y.2d 781, 725 N.Y.S.2d 645, 749 N.E.2d 214, 2001 N.Y. LEXIS 1152 (N.Y. 2001).

Defendant's motion to dismiss second degree assault charge under CLS Penal § 120.05(7) at close of People's opening statement, based on People's failure to comply with CLS CPL § 200.60(2) and (3), was properly denied where (1) court instead directed People to file special information and defendant subsequently admitted to underlying conviction, as alleged in newly filed special information, outside of jury's presence, and (2) although People had stated in opening (without objection) that defendant was incarcerated, there was no prejudice to defendant because disclosure of his inmate status was unavoidable given that setting, participants and witnesses to assault necessarily put jury on notice that he was incarcerated and, moreover, he was also charged with promoting prison contraband, which required that he be confined to correctional facility, and to which protections of § 200.60 did not apply. People v Reynolds, 283 A.D.2d 771, 728 N.Y.S.2d 503, 2001 N.Y. App. Div. LEXIS 5189 (N.Y. App. Div. 3d Dep't), app. denied, 96 N.Y.2d 866, 730 N.Y.S.2d 41, 754 N.E.2d 1124, 2001 N.Y. LEXIS 2617 (N.Y. 2001), app. denied, 96 N.Y.2d 923, 732 N.Y.S.2d 640, 758 N.E.2d 666, 2001 N.Y. LEXIS 4003 (N.Y. 2001).

Because an offender's convictions of two counts of second-degree assault under N.Y. Penal Law § 120.05(1) were inclusory concurrent counts of his convictions of first-degree assault, the second-degree assault charges were vacated, along with the related sentences, and those counts were dismissed from the indictment pursuant to N.Y. Crim. Proc. Law § 300.40(3)(b). People v Hamm, 42 A.D.3d 550, 839 N.Y.S.2d 807, 2007 N.Y. App. Div. LEXIS 8721 (N.Y. App. Div. 2d Dep't), app. denied, 9 N.Y.3d 961, 848 N.Y.S.2d 30, 878 N.E.2d 614, 2007 N.Y. LEXIS 3477 (N.Y. 2007).

Defendants, acting in concert, allegedly committed one continuous assault on the complainant over a short period of time, with no pronounced break. That they allegedly used more than one dangerous instrument, and struck more than one blow, did not transform the single criminal incident into multiple assaults (N.Y. Penal Law § 120.05(2)) or acts of menacing (N.Y. Penal Law § 120.14(1)) that had to be charged by separate counts under N.Y. Crim. Proc. Law § 200.30(1). People v Kaid, 43 A.D.3d 1077, 841 N.Y.S.2d 784, 2007 N.Y. App. Div. LEXIS 11589 (N.Y. App. Div. 2d Dep't 2007).

In cases in which a grand jury has heard testimony against a person accused of committing a felony, but, instead of indicting has directed the district attorney to file a prosecutor's information charging the defendant with a misdemeanor, there is no need to hold a preliminary hearing despite provisions of CPL 170.75. People v McClafferty, 73 Misc. 2d 666, 342 N.Y.S.2d 208, 1973 N.Y. Misc. LEXIS 2114 (N.Y. City Crim. Ct. 1973).

An indictment charging the defendant with assault in the first degree, assault in the second degree and endangering the welfare of a child in that she failed to feed her child would be dismissed, since the duty to feed a child is limited to the means or ability to earn such means and the evidence was barely sufficient with regard to the defendant's ability to feed her children, since the

Grand Jury was not instructed that they must find that the defendant had the means or ability to provide her children with food and without such an instruction they were unable to evaluate the exculpatory evidence that defendant had attempted to receive public assistance but the payments were delayed and that defendant received at best $25 per week from the father of the child, since the Grand Jury was informed that the defendant's age was irrelevant when it was in fact relevant on the issue of her maturity and her awareness of the consequences of her actions, and since although the expert testimony produced was sufficient to prove that the defendant's failure to feed her child caused physical injury, no instruction was given regarding evaluation of the expert testimony. People v Gladden, 118 Misc. 2d 831, 462 N.Y.S.2d 115, 1983 N.Y. Misc. LEXIS 3407 (N.Y. Sup. Ct. 1983).

Indictment charging defendant with second degree assault (alleging that he recklessly caused serious injury by means of dangerous instrument) and assault by operation of vessel in second degree (alleging criminal negligence causing serious physical injury by operation of vessel while intoxicated) would be dismissed on double jeopardy grounds due to defendant's prior guilty plea to violation of operating vessel in intoxicated condition involving same incident since assault charges of causing physical injury are intrinsically tied to determination of nonintentional culpability based on intoxication, offense to which defendant had already pleaded guilty. People v Thompson, 136 Misc. 2d 740, 519 N.Y.S.2d 320, 1987 N.Y. Misc. LEXIS 2490 (N.Y. County Ct. 1987).

Attempted second degree assault charge arising from defendant's alleged violation of order of protection was dismissed on ground of impairment of integrity of grand jury proceeding, where evidence was presented that second order of protection was entered one day after attempted assault which constituted alleged violation of original order of protection, grand jurors' questions indicated that they were greatly confused by conflicting evidence concerning orders of protection, and existence of second order may have influenced grand jurors to reject defendant's claim that he used force against protected witness only in response to attack by her dog. People v Cullins, 170 Misc. 2d 207, 650 N.Y.S.2d 947, 1996 N.Y. Misc. LEXIS 426 (N.Y. Sup. Ct. 1996).

Defendant, charged with second degree assault arising out of incident at correctional facility wherein he allegedly "head butted" correction officer, was not entitled to dismissal of indictment based on "use immunity" conferred by 7 NYCRR 251-3.1(d) in Tier III prison disciplinary proceeding in connection with same incident, where district attorney affirmed that he did not hear or read defendant's statements made at Tier III hearing and that he did not receive any information "generated from" that hearing, and documentary evidence established independent source for People's grand jury evidence which predated Tier III hearing. People v Nation, 189 Misc. 2d 165, 730 N.Y.S.2d 848, 2001 N.Y. Misc. LEXIS 319 (N.Y. County Ct. 2001).

Trial court dismissed count 26, charging defendant with attempted assault in the second degree, where the indictment cited a different statutory subsection than the statutory subsection voted on by the grand jury and an attempt to amend would be change in substance, not merely form; however, the trial court directed the People that they could amend count 22, where the People cited an incorrect subsection, as an amendment there would merely be one of form, not of substance, especially since the People had cited the proper statutory section. People v Guccione, 837 N.Y.S.2d 552, 16 Misc. 3d 512, 237 N.Y.L.J. 106, 2007 N.Y. Misc. LEXIS 3782 (N.Y. Sup. Ct. 2007).

Count in an indictment charging defendant with assault in the second degree under N.Y. Penal Law § 120.05(8) had to be dismissed as the prosecutor failed to instruct the grand jury on the meaning of "serious physical injury" as defined in N.Y. Penal Law § 10.00(10); even if the grand jury had been properly instructed, insufficient proof of a serious physical injury had been presented as a femur fracture suffered by the two-year-old victim was not enough to fall within the statutory definition. People v Jerreld, 852 N.Y.S.2d 833, 19 Misc. 3d 595, 2008 N.Y. Misc. LEXIS 1044 (N.Y. County Ct. 2008).

Indictment stated N.Y. Penal Law § 120.05(6) facts and charged N.Y. Penal Law § 120.05(4) so State moved to correct the clerical error. As the grand jury's minutes showed that § 120.05(4) was the proper charge, the indictment was not jurisdictionally defective and the defendant's subsequent knowing, voluntary, and intelligent guilty plea to § 120.05(4) was enforceable. People v Champion, 20 A.D.3d 772, 798 N.Y.S.2d 567, 2005 N.Y. App. Div. LEXIS 7970 (N.Y. App. Div. 3d Dep't 2005).

Despite the fact that sufficient evidence of a bitten correctional officer's physical injury supported one count of second-degree assault, one additional count and two counts of attempted second-degree assault were dismissed, as defendant was not confined pursuant to a charge or conviction when she committed the same, but was confined as a youthful offender and an adjudication was not a judgment of conviction for a crime or any other offense as required by N.Y. Penal Law § 120.05(7). People v Hilliard, 806 N.Y.S.2d 403, 10 Misc. 3d 1038, 2005 N.Y. Misc. LEXIS 2809 (N.Y. App. Term 2005).

Claim that indictment in a case charging first degree assault, N.Y. Penal Law § 120.10(1), was rendered duplicitous by testimony was meritless because the evidence established that the multiple punches and/or kicks delivered by defendant constituted a single uninterrupted assault rather than a series of distinct criminal acts and the assault occurred over a short time frame, without apparent abeyance, and was triggered by a single incident of anger. People v Snyder, 100 A.D.3d 1367, 953 N.Y.S.2d 430, 2012 N.Y. App. Div. LEXIS 7366 (N.Y. App. Div. 4th Dep't 2012), app. denied, 21 N.Y.3d 1010, 971 N.Y.S.2d 262, 993 N.E.2d 1285, 2013 N.Y. LEXIS 2392 (N.Y. 2013), app. denied, 21 N.Y.3d 1010, 971 N.Y.S.2d 262, 993 N.E.2d 1285, 2013 N.Y. LEXIS 2374 (N.Y. 2013).

4. "Justification" defense

People adequately disproved defense of justification at trial on charge of second degree assault where victim had been disarmed of his "weapon" (i.e., small rubber-tipped hammer) before first stab wound was inflicted, victim was unarmed when stabbing occurred, and thus defendant could not have "reasonably believed" that victim would use imminently deadly physical force and that defendant himself would be compelled to resort to deadly physical force to avert perceived threat. People v Henegan, 150 A.D.2d 606, 541 N.Y.S.2d 476, 1989 N.Y. App. Div. LEXIS 6887 (N.Y. App. Div. 2d Dep't), app. denied, 74 N.Y.2d 810, 546 N.Y.S.2d 568, 545 N.E.2d 882, 1989 N.Y. LEXIS 3512 (N.Y. 1989).

In second degree assault trial, defendant was not denied effective assistance of counsel because counsel failed to interpose justification defense since counsel's decision to forego justification defense in favor of psychiatric testimony, and argument that defendant lacked requisite intent to cause physical injury, was supportable trial tactic in light of testimony by victim and witness that defendant was initial aggressor, and that victim never touched or threatened defendant. People v Ludwig, 155 A.D.2d 558, 547 N.Y.S.2d 414, 1989 N.Y. App. Div. LEXIS 14229 (N.Y. App. Div. 2d Dep't 1989), app. denied, 75 N.Y.2d 814, 552 N.Y.S.2d 565, 551 N.E.2d 1243, 1990 N.Y. LEXIS 353 (N.Y. 1990).

In prosecution for second degree assault arising from incident in which victim and others apprehended defendant after he broke into car and defendant slashed victim's hand with box cutter during escape attempt, court would not reach issue of whether victim had right to arrest defendant under CLS CPL § 140.30(1) because, even if arrest were unjustified, defendant was not permitted to use deadly physical force. People v Bonilla, 159 A.D.2d 439, 553 N.Y.S.2d 123, 1990 N.Y. App. Div. LEXIS 3074 (N.Y. App. Div. 1st Dep't), app. denied, 76 N.Y.2d 785, 559 N.Y.S.2d 990, 559 N.E.2d 684, 1990 N.Y. LEXIS 2615 (N.Y. 1990).

Defense of justification is not limited to any particular crime involving use of force or to any particular mens rea; thus, defense was available in regard to charge of second degree assault. People v Dare, 175 A.D.2d 586, 572 N.Y.S.2d 251, 1991 N.Y. App. Div. LEXIS 10095 (N.Y. App. Div. 4th Dep't), app. denied, 78 N.Y.2d 1127, 578 N.Y.S.2d 884, 586 N.E.2d 67, 1991 N.Y. LEXIS 5475 (N.Y. 1991).

People disproved defendant's justification defense to second degree assault where defendant, striking worker, threatened victim, temporary worker, at work site, followed him after work,

and struck him without provocation. People v Thomas, 224 A.D.2d 335, 638 N.Y.S.2d 311, 1996 N.Y. App. Div. LEXIS 1460 (N.Y. App. Div. 1st Dep't), app. denied, 88 N.Y.2d 854, 644 N.Y.S.2d 701, 667 N.E.2d 351, 1996 N.Y. LEXIS 2041 (N.Y. 1996).

Defendant's guilty plea to second degree assault was not rendered unknowing or involuntary by court's failure to inform him at plea hearing that defense of self-defense would be available to him if he chose to go to trial where court engaged in extended colloquy with defendant, who was represented by counsel, prior to accepting plea, asking him "Do you have any defense to the charge against you that you wanted to present at trial?," to which he responded "No"; court was not obligated to proceed further, having already obtained defendant's assurances that he had discussed ramifications of his plea with defense counsel. People v Ladd, 232 A.D.2d 687, 648 N.Y.S.2d 713, 1996 N.Y. App. Div. LEXIS 10056 (N.Y. App. Div. 3d Dep't 1996).

In prosecution for second degree assault, trial court's jury charge properly limited application of justification defense to circumstances in which use of deadly force would be justified where jury could not reasonably have found that defendant used merely ordinary physical force, as opposed to deadly physical force, in stabbing victim in back. People v Hyc, 240 A.D.2d 431, 658 N.Y.S.2d 1005, 1997 N.Y. App. Div. LEXIS 5739 (N.Y. App. Div. 2d Dep't), app. denied, 91 N.Y.2d 874, 668 N.Y.S.2d 573, 691 N.E.2d 645, 1997 N.Y. LEXIS 4585 (N.Y. 1997).

Evidence was sufficient to negate defense of justification in prosecution for first and second degree assault, and fourth degree weapon possession, where victim and 2 eyewitnesses testified that victim was unarmed when defendant stabbed him, and defendant testified that he did not know whether victim had weapon. People v Rosil, 240 A.D.2d 439, 659 N.Y.S.2d 289, 1997 N.Y. App. Div. LEXIS 5743 (N.Y. App. Div. 2d Dep't), app. denied, 90 N.Y.2d 910, 663 N.Y.S.2d 522, 686 N.E.2d 234, 1997 N.Y. LEXIS 3500 (N.Y. 1997).

Jury's verdict, rejecting defense of justification to charge of second degree assault, was not against weight of credible evidence, although defendant testified that he walked away from fellow jail inmate after knocking him down and that inmate resumed fight by pursuing and striking defendant from behind, where witnesses described inmate's blow as mere hit or "whack," not amounting to sufficient physical force to justify defendant picking up inmate and throwing him head first onto cement floor. People v Lane, 241 A.D.2d 763, 660 N.Y.S.2d 890, 1997 N.Y. App. Div. LEXIS 8077 (N.Y. App. Div. 3d Dep't), app. denied, 91 N.Y.2d 875, 668 N.Y.S.2d 574, 691 N.E.2d 646, 1997 N.Y. LEXIS 4608 (N.Y. 1997).

In prosecution for attempted second degree murder and second degree assault, involving repeated blows to victim's head and body with baseball bat, it was sound strategy for counsel to refrain from raising weak justification defense in order to concentrate on other defenses. People v Vukel, 263 A.D.2d 416, 695 N.Y.S.2d 73, 1999 N.Y. App. Div. LEXIS 8241 (N.Y. App. Div. 1st Dep't), app. denied, 94 N.Y.2d 830, 702 N.Y.S.2d 601, 724 N.E.2d 393, 1999 N.Y. LEXIS 4350 (N.Y. 1999), app. denied sub. nom., People v Vokel, 94 N.Y.2d 830, 702 N.Y.S.2d 601, 724 N.E.2d 393, 1999 N.Y. LEXIS 4779 (N.Y. 1999), overruled in part, People v Wells, 24 N.Y.3d 971, 996 N.Y.S.2d 569, 21 N.E.3d 198, 2014 N.Y. LEXIS 2820 (N.Y. 2014).

In prosecution for first degree manslaughter and second degree assault, court properly excluded defense witness' testimony concerning drug-selling activities of victim where there was no indication that witness had communicated his knowledge to defendant. People v Velez, 265 A.D.2d 162, 697 N.Y.S.2d 3, 1999 N.Y. App. Div. LEXIS 9708 (N.Y. App. Div. 1st Dep't), app. denied, 94 N.Y.2d 830, 702 N.Y.S.2d 601, 724 N.E.2d 393, 1999 N.Y. LEXIS 4348 (N.Y. 1999).

In prosecution for second degree manslaughter and second degree assault, defense of justification was disproved where defendant was initial aggressor, and victim was unarmed. People v Ortiz, 275 A.D.2d 752, 713 N.Y.S.2d 484, 2000 N.Y. App. Div. LEXIS 9250 (N.Y. App. Div. 2d Dep't), app. denied, 95 N.Y.2d 907, 716 N.Y.S.2d 648, 739 N.E.2d 1153, 2000 N.Y. LEXIS 3688 (N.Y. 2000).

People disproved defense of justification where it was undisputed that, during fight, defendant used knife against unarmed individual, witnesses testified that defendant threatened to stab both victim and his cousin before actual altercation, and victim testified that defendant started altercation by punching him in stomach. People v Mothon, 284 A.D.2d 568, 729 N.Y.S.2d 541, 2001 N.Y. App. Div. LEXIS 5984 (N.Y. App. Div. 3d Dep't), app. denied, 96 N.Y.2d 865, 730 N.Y.S.2d 40, 754 N.E.2d 1123, 2001 N.Y. LEXIS 2593 (N.Y. 2001).

Court erred in refusing to charge the jury on the justifiable use of deadly physical force to prevent or terminate a burglary pursuant to N.Y. Penal Law § 35.20(3) since there was a reasonable view of the evidence that the victim entered and remained inside defendant's house with the intent to commit a crime, i.e., an assault, where the victim initially chased defendant with a hatchet and returned swinging a two-by-four prior to defendant repeatedly slashing the victim with a hatchet. People v Fagan, 24 A.D.3d 1185, 807 N.Y.S.2d 239, 2005 N.Y. App. Div. LEXIS 14609 (N.Y. App. Div. 4th Dep't 2005).

In defendant's prosecution for, inter alia, assault in the second degree under N.Y. Penal Law § 120.05(4), defendant was not entitled to a justification charge as the justification defense was not available under N.Y. Penal Law § 35.15(1)(b), (2)(a) because defendant was the initial aggressor, used deadly physical force by stabbing the victim, and knew he could safely retreat to his girlfriend's car. People v Ryan, 55 A.D.3d 960, 865 N.Y.S.2d 146, 2008 N.Y. App. Div. LEXIS 7753 (N.Y. App. Div. 3d Dep't 2008).

Defendant was not entitled to a justification instruction under Penal Law § 35.15(1) in a trial for second degree assault because testimony showed that the other inmate was already subdued and was cooperating with officers by the time the victim intervened, and that defendant continued to struggle with the victim even after the other inmate was handcuffed; there was no evidence supporting a reasonable belief that, after the victim intervened, force was needed to avert a threat posed by the other inmate to defendant. People v Johnson, 91 A.D.3d 1121, 936 N.Y.S.2d 748, 2012 N.Y. App. Div. LEXIS 267 (N.Y. App. Div. 3d Dep't), app. denied, 18 N.Y.3d 959, 944 N.Y.S.2d 487, 967 N.E.2d 712, 2012 N.Y. LEXIS 1052 (N.Y. 2012).

Trial court erred in determining that defendant was not entitled to a justification charge based on defendant's own testimony that defendant stumbled into the victim when the victim began choking defendant, and thus that the victim's injuries were the result of an accident, because defendant testified that the victim was choking defendant. People v Liggins, 2 A.D.3d 1325, 770 N.Y.S.2d 263, 2003 N.Y. App. Div. LEXIS 14284 (N.Y. App. Div. 4th Dep't 2003).

Trial court properly declined to charge the jury on the defense of justification because no reasonable view of the evidence supported such a charge where defendant used deadly physical force when he struck the complainant in the face with the glass bottle, and his conviction for second-degree assault necessarily determined that he used deadly physical force. People v Mason, 132 A.D.3d 777, 17 N.Y.S.3d 768, 2015 N.Y. App. Div. LEXIS 7583 (N.Y. App. Div. 2d Dep't 2015).

Defendant was properly convicted of assault in the second degree, as he undisputedly stabbed the victim with either a stick or a fire poker and caused injuries, and the jury instructions on the justification defense were not erroneous. People v Daggett, 150 A.D.3d 1680, 54 N.Y.S.3d 803, 2017 N.Y. App. Div. LEXIS 3611 (N.Y. App. Div. 4th Dep't), app. denied, 29 N.Y.3d 1125, 86 N.E.3d 567, 64 N.Y.S.3d 675, 2017 N.Y. LEXIS 2992 (N.Y. 2017).

Where a verdict finding defendant guilty of assault in the second degree was supported by the weight of the evidence, defendant's justification defense failed because he did not reasonably believe that the victim was using or about to use deadly physical force against him so as to justify his actions since no weapons were displayed or used by the victim, and although defendant was later observed to have minor redness and abrasions, his own medical expert acknowledged were not clear indications of forcible choking. People v Signor, 173 A.D.3d 1264, 102 N.Y.S.3d 329, 2019 N.Y. App. Div. LEXIS 4526 (N.Y. App. Div. 3d Dep't 2019).

Debtor's defense that he stabbed the creditor in self-defense was tantamount to an admission that he willfully caused the creditor's injury under 11 U.S.C.S. § 523(a)(6) and his self-defense argument was without merit under N.Y. Penal Law § 35.15 because the debtor could not have reasonably believed that the unarmed creditor, who made every reasonable effort to avoid the debtor, was being stalked by the debtor through deserted streets for a half hour, and punched the debtor only after great provocation, was using or about to use deadly, physical force. Hernandez v Greene (In re Greene), 397 B.R. 688, 2008 Bankr. LEXIS 3379 (Bankr. S.D.N.Y. 2008).

5. —"Duty to retreat"

"Duty to retreat" element of justification defense applies to prosecution for assault. People v Macklowe, 131 A.D.2d 785, 517 N.Y.S.2d 73, 1987 N.Y. App. Div. LEXIS 48231 (N.Y. App. Div. 2d Dep't), app. denied, 70 N.Y.2d 705, 519 N.Y.S.2d 1040, 513 N.E.2d 717, 1987 N.Y. LEXIS 18102 (N.Y. 1987).

6. Separate and lesser offenses, generally

Failure of trial court to inform counsel, prior to summation, that it intended to consider assault in the second degree as a lesser included offense was reversible error necessitating a new trial as to that charge. People v Moody, 52 A.D.2d 959, 383 N.Y.S.2d 626, 1976 N.Y. App. Div. LEXIS 12824 (N.Y. App. Div. 2d Dep't 1976).

The motion of defendant charged with six counts of assault in the second degree, menacing and harassment, for severance and separate trials should have been granted pursuant to CPL § 200.20 where the first three counts and last three counts of the indictment covered two separate and unrelated incidents in which defendant allegedly engaged in assaultive and threatening behavior with a knife, and where there was therefore a strong possibility of a conviction by reason of the cumulative effect of the evidence rather than by its separate and distinct relevance to each incident. People v Stanley, 81 A.D.2d 842, 438 N.Y.S.2d 848, 1981 N.Y. App. Div. LEXIS 11518 (N.Y. App. Div. 2d Dep't), app. denied, 54 N.Y.2d 838, 1981 N.Y. LEXIS 5399 (N.Y. 1981).

In bench trial on charge of second degree assault arising from altercation with 2 correction officers, court's failure to inform counsel before summations that it would consider lesser included offenses in rendering its verdict, although error, was harmless where defendant testified that he threw items at correction officers in self-defense, and defense counsel in summation argued that defendant's use of force was justified under circumstances, so that such argument applied equally to offenses of second degree assault and attempted second degree assault. People v Harvey, 249 A.D.2d 951, 673 N.Y.S.2d 274, 1998 N.Y. App. Div. LEXIS 5064 (N.Y. App. Div. 4th Dep't 1998).

Because driving while ability impaired and second-degree assault under N.Y. Veh. & Traf. Law § 1192(4-a) and N.Y. Penal Law § 120.05(4) were not inclusory concurrent counts of aggravated vehicular assault and had different elements, they were not dismissed by defendant's conviction for aggravated vehicular assault under N.Y. Penal Law § 120.04-a(4). People v Joseph, 75 A.D.3d 1080, 903 N.Y.S.2d 651, 2010 N.Y. App. Div. LEXIS 5797 (N.Y. App. Div. 4th Dep't), app. denied, 15 N.Y.3d 853, 909 N.Y.S.2d 30, 935 N.E.2d 822, 2010 N.Y. LEXIS 3161 (N.Y. 2010).

Conviction of second degree assault, N.Y. Penal Law § 120.05(1), was reversed because defendant was also convicted of first degree gang assault, N.Y. Penal Law § 120.07, and assault was a lesser included offense of gang assault. People v Cordato, 85 A.D.3d 1304, 924 N.Y.S.2d 649, 2011 N.Y. App. Div. LEXIS 4819 (N.Y. App. Div. 3d Dep't), app. denied, 17 N.Y.3d 815, 929 N.Y.S.2d 803, 954 N.E.2d 94, 2011 N.Y. LEXIS 2789 (N.Y. 2011).

Defendant's conviction of the higher count, first degree gang assault, N.Y. Penal Law § 120.07, foreclosed her challenge to the trial court's refusal to charge the more remote lesser included offense of second degree assault, N.Y. Penal Law § 120.05(1). People v Cordato, 85 A.D.3d 1304, 924 N.Y.S.2d 649, 2011 N.Y. App. Div. LEXIS 4819 (N.Y. App. Div. 3d Dep't), app. denied, 17 N.Y.3d 815, 929 N.Y.S.2d 803, 954 N.E.2d 94, 2011 N.Y. LEXIS 2789 (N.Y. 2011).

Defendant's convictions for kidnapping in the second degree, robbery in the first degree, two counts of robbery in the second degree and assault in the second degree were inclusory concurrent counts of the corresponding convictions for sexually motivated felony; thus, the conviction for assault in the second degree under N.Y. Penal Law § 120.05(6), the corresponding sexually motivated felony, and the convictions for kidnapping in the second degree, robbery in the first degree, and two counts of robbery in the second degree had to be reversed and these counts of the indictment dismissed. People v Perez, 93 A.D.3d 1032, 942 N.Y.S.2d 227, 2012 N.Y. App. Div. LEXIS 2132 (N.Y. App. Div. 3d Dep't), app. denied, 19 N.Y.3d 1000, 951 N.Y.S.2d 476, 975 N.E.2d 922, 2012 N.Y. LEXIS 3099 (N.Y. 2012), app. denied, 19 N.Y.3d 1000, 951 N.Y.S.2d 476, 975 N.E.2d 922, 2012 N.Y. LEXIS 3440 (N.Y. 2012), app. denied, 19 N.Y.3d 1000, 951 N.Y.S.2d 476, 975 N.E.2d 922, 2012 N.Y. LEXIS 3441 (N.Y. 2012).

Defendant's conviction for aggravated criminal contempt for violating an order of protection could not serve as a predicate for a conviction of second degree assault on the theory that an assault was committed in the course of and in furtherance of the aggravated criminal contempt because otherwise every aggravated criminal contempt would also be a second degree assault, and the legislature, when elevating third degree reckless or intentional assault from a class A misdemeanor to a class D felony when committed in violation of an order of protection against the person for whose protection the order was issued, did not intend to elevate the assault to a class D violent felony, such as second degree assault. People v Huck, 1 A.D.3d 935, 767 N.Y.S.2d 555, 2003 N.Y. App. Div. LEXIS 12269 (N.Y. App. Div. 4th Dep't 2003).

7. —Separate and lesser assault offenses

It was error to refuse to charge assault in the second degree under subd 4 of Penal Law § 120.05, defined as recklessly causing serious physical injury by means of a deadly weapon or dangerous instrument, as a lesser included offense of assault in the first degree under subd 1 of Penal Law § 120.10, defined as intentionally causing such injury by the same means, where there was a reasonable view of the evidence from which the jury could have concluded that defendant committed the lesser but not the greater offense, and a new trial would be ordered; the error could not be considered harmless where the jury convicted defendant of attempted murder and assault in the first degree, since they were the only charges submitted and both involved intentional conduct, thus presenting no choice on the question of defendant's intent. People v Green, 56 N.Y.2d 427, 452 N.Y.S.2d 389, 437 N.E.2d 1146, 1982 N.Y. LEXIS 3451 (N.Y.), reh'g denied, 57 N.Y.2d 775, 454 N.Y.S.2d 1033, 440 N.E.2d 1343, 1982 N.Y. LEXIS 4368 (N.Y. 1982).

The crime of assault in the third degree (Penal Law § 120.00(1)) is not a lesser included offense of an assault in the second degree (Penal Law § 120.05(5)) in that it is possible to commit the latter without possessing the intent to injure, which is the gravamen of the former. People ex rel. Gray v Tekben, 57 N.Y.2d 651, 454 N.Y.S.2d 66, 439 N.E.2d 875, 1982 N.Y. LEXIS 3599 (N.Y. 1982).

In an assault, reckless endangerment, and criminal possession of a weapon prosecution of a 32-year-old man who fired a rifle at a tree on a warm late spring afternoon, knowing that beyond the tree was a school ball field, and who missed the tree and seriously injured an 11-year-old girl who had been watching a ball game, the trial court improperly dismissed the indictment, notwithstanding that the evidence presented to the grand jury was insufficient to support the offenses charged in that there was a lack of proof that the defendant intended to cause serious injury, to use the weapon unlawfully against another or, as he was not aware of the actual presence of people at the ball field that his conduct evinced a depraved indifference to human life, where the evidence did support the lesser included offenses of assault in the second degree, Penal Law, § 120.05(4), assault in the third degree, Penal Law, § 120.00(2) and (3), and reckless endangerment in the second degree, Penal Law, § 120.120, in that a jury could conclude that the defendant was aware of the risk inherent in his act and that he consciously disregarded that risk. People v Leonardo, 60 N.Y.2d 683, 468 N.Y.S.2d 466, 455 N.E.2d 1261, 1983 N.Y. LEXIS 3388 (N.Y. 1983).

Two counts in the indictment involving offenses of assault in the third and second degree upon a proprietor of a parking lot and

a police officer were undeniably similar and happened at very nearly the same time, and thus were not improperly joined. People v McDowell, 35 A.D.2d 611, 312 N.Y.S.2d 477, 1970 N.Y. App. Div. LEXIS 4111 (N.Y. App. Div. 3d Dep't 1970), modified, 28 N.Y.2d 373, 321 N.Y.S.2d 894, 270 N.E.2d 716, 1971 N.Y. LEXIS 1297 (N.Y. 1971).

Where the indictment charged the defendant with assault in the second degree committed in the course of and in the furtherance of the commission of a felony, to wit, rape, and since rape is a felony defined under Article 130 of the Penal Law, the indictment improperly charged defendant with the crime of assault in the second degree and the court could not find the defendant guilty of that crime nor any lesser included crime such as assault in the third degree. People v McEaddy, 36 A.D.2d 908, 320 N.Y.S.2d 645, 1971 N.Y. App. Div. LEXIS 4154 (N.Y. App. Div. 1st Dep't 1971), modified, 30 N.Y.2d 519, 330 N.Y.S.2d 65, 280 N.E.2d 891, 1972 N.Y. LEXIS 1506 (N.Y. 1972).

Where proof in record did not support conviction for second-degree assault, but was sufficient to sustain a verdict of guilty of lesser included offense of third-degree assault, conviction would be modified and case would be remanded to trial court for resentencing. People v Klosis, 48 A.D.2d 705, 368 N.Y.S.2d 58, 1975 N.Y. App. Div. LEXIS 9759 (N.Y. App. Div. 2d Dep't 1975).

Where charge of assault in third degree required proof of intent to cause physical injury, while greater offense charged, assault in second degree, did not require proof of any intent to cause physical injury, defendant could not be convicted of assault in third degree as lesser included offense of assault in second degree. People v Baglieri, 51 A.D.2d 587, 378 N.Y.S.2d 772, 1976 N.Y. App. Div. LEXIS 10884 (N.Y. App. Div. 2d Dep't 1976).

Despite fact that jury returned verdict of guilty of assault in the second degree but did not specify which subdivision of second-degree assault statute served as basis of its verdict and despite fact that, under facts of case, verdict of not guilty of assault in first degree precluded finding of guilty of violation of one subdivision of second-degree assault statute, where defendant agreed to charge that verdict of guilty of assault in the first, second, or third degrees was proper and where defendant did not object to verdict at time it was announced and could have been clarified, issue was not preserved as a question of law for appellate review because of defendant's failure to object. People v Incherchera, 56 A.D.2d 852, 392 N.Y.S.2d 62, 1977 N.Y. App. Div. LEXIS 11198 (N.Y. App. Div. 2d Dep't), app. denied, 41 N.Y.2d 1014, 1977 N.Y. LEXIS 3550 (N.Y. 1977).

Where evidence established that injuries were inflicted by means of a dangerous instrument and where trial judge submitted to jury crimes of assault in the first, second, or third degrees, verdict of not guilty of assault in the first degree precluded finding of guilty of violation of assault in the second degree based on subdivision of second-degree assault statute requiring intent to cause serious physical injury. People v Incherchera, 56 A.D.2d 852, 392 N.Y.S.2d 62, 1977 N.Y. App. Div. LEXIS 11198 (N.Y. App. Div. 2d Dep't), app. denied, 41 N.Y.2d 1014, 1977 N.Y. LEXIS 3550 (N.Y. 1977).

Where defendant was convicted of attempted assault in second degree, and lesser included crime of attempted assault in third degree was charged, objection that crime of menacing should have been charged was not available to her. People v Wallace, 57 A.D.2d 561, 393 N.Y.S.2d 87, 1977 N.Y. App. Div. LEXIS 11522 (N.Y. App. Div. 2d Dep't 1977).

A petition for a writ of habeas corpus would be sustained without prejudice to the commencement of appropriate proceedings to involuntarily commit petitioner to a mental institution pursuant to the provisions of the Mental Hygiene Law, where petitioner's detention in a psychiatric institution, following a hearing at which the court found him to be suffering from a dangerous mental disorder, was unlawful in that the court acted without subject matter jurisdiction when it rendered a verdict based on the crime of assault in the third degree as a lesser included offense of assault in the second degree (on which petitioner had been indicted), as it is possible to commit second-degree assault without possessing the intent to injure that is required for third-degree assault. People ex rel. Gray v Tekben, 86 A.D.2d 176, 449 N.Y.S.2d 276, 1982 N.Y. App. Div. LEXIS 15382 (N.Y. App. Div. 2d Dep't), aff'd, 57 N.Y.2d 651, 454 N.Y.S.2d 66, 439 N.E.2d 875, 1982 N.Y. LEXIS 3599 (N.Y. 1982).

By failing to raise the issue prior to the discharge of the jury, defendant's lawyer did not preserve for appellate review the question of whether defendant's conviction of assault, second degree, was repugnant to his acquittal of assault, third degree, with respect to the same victim, submitted as a lesser included offense of assault, second degree, under another count of the indictment. People v Johnson, 86 A.D.2d 755, 447 N.Y.S.2d 785, 1982 N.Y. App. Div. LEXIS 15328 (N.Y. App. Div. 4th Dep't), app. denied, 56 N.Y.2d 597, 1982 N.Y. LEXIS 5560 (N.Y. 1982).

In the prosecution of defendant for assault in the second degree, the trial court did not commit reversible error in refusing to charge assault in the third degree as a lesser included offense, where a reasonable view of the evidence could not support a finding that the victim had sustained "physical injury," under Penal Law § 120.00(1), requiring a showing of "impairment of physical condition or substantial pain," rather than "serious physical injury," under Penal Law § 120.05(1), requiring a showing of "a substantial risk of death or causing death of serious or protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ," inasmuch as the victim had sustained two wounds, one of which required 120 stitches and resulted in a substantial keloid scar on his neck. People v Greene, 111 A.D.2d 183, 488 N.Y.S.2d 812, 1985 N.Y. App. Div. LEXIS 51319 (N.Y. App. Div. 2d Dep't), app. denied, 65 N.Y.2d 981, 494 N.Y.S.2d 1049, 484 N.E.2d 679, 1985 N.Y. LEXIS 16418 (N.Y. 1985).

Court will modify conviction from assault in second degree to assault in third degree, with consequent reduction in sentence, where, despite fact that there was vicious attack justifying severe sentence, there was no "serious physical injury" within meaning of CLS Penal Law § 10.00 in that, although complainant suffered bruises, swollen eyes, and multiple contusions and pain lasting for 2 days, there was no substantial risk of death or serious and protracted disfigurement or impairment of health. People v Snipes, 112 A.D.2d 810, 492 N.Y.S.2d 401, 1985 N.Y. App. Div. LEXIS 52071 (N.Y. App. Div. 1st Dep't 1985).

Contemporaneous acquittal of attempted assault in second degree does not require finding that conviction of criminal possession of weapon in third degree is repugnant; to be found guilty of attempted assault, defendant must be shown to have had intent to cause physical injury, while in order to convict him of criminal possession of weapon, it need only be shown that defendant had intent to use weapon unlawfullly against another; thus, verdict of guilty on criminal possession charge is not necessarily negated by failure to find that defendant had requisite intent under assault charge. People v Martino, 112 A.D.2d 1049, 493 N.Y.S.2d 36, 1985 N.Y. App. Div. LEXIS 52252 (N.Y. App. Div. 2d Dep't), app. denied, 66 N.Y.2d 616, 494 N.Y.S.2d 1039, 485 N.E.2d 243, 1985 N.Y. LEXIS 17080 (N.Y. 1985).

Assault in third degree, as defined in Penal Law § 120.00, is not lesser included offense of felony assault under Penal Law § 120.05. People v Springer, 115 A.D.2d 915, 496 N.Y.S.2d 811, 1985 N.Y. App. Div. LEXIS 55275 (N.Y. App. Div. 3d Dep't 1985).

Defendant, guard in movie theater, who had struck theater patron on head with flashlight in altercation resulting from patron's refusal to remove his feet from theater seat, and who had been convicted of assault in second degree and criminal possession of weapon in fourth degree, was entitled to new trial since factual issue was presented for jury as to whether flashlight constituted dangerous instrument under circumstances in which it was used, and thus trial court erred in refusing defendant's request to submit lesser included offense of assault in third degree; such error also clearly affected defendant's conviction for possession of dangerous instrument. People v Colon, 121 A.D.2d 181, 503 N.Y.S.2d 8, 1986 N.Y. App. Div. LEXIS 58201 (N.Y. App. Div. 1st Dep't 1986).

Conviction of assault in third degree would be vacated where defendant was also convicted of assault in second degree for causing physical injury to victim with dangerous instrument, since assault in third degree is lesser included offense of assault in second degree. People v Claramunt, 121 A.D.2d 237, 503 N.Y.S.2d 275, 1986 N.Y. App. Div. LEXIS 58227 (N.Y. App. Div. 1st

Dep't), app. denied, 68 N.Y.2d 756, 506 N.Y.S.2d 1043, 497 N.E.2d 713, 1986 N.Y. LEXIS 19574 (N.Y. 1986).

Trial Court properly refused to instruct jury that defendant could be found guilty of third-degree assault as lesser included offense of second-degree assault, since only difference in crimes is use of dangerous instrument, where all evidence showed use of dangerous instrument: medical testimony was that wounds were caused by sharp instrument, prosecution's witness testified defendant struck victim with sharp metal object, and defendant's own witness testified victim was stabbed (albeit by someone other than defendant) with metal shank. People v Berry, 123 A.D.2d 477, 506 N.Y.S.2d 487, 1986 N.Y. App. Div. LEXIS 60231 (N.Y. App. Div. 3d Dep't 1986).

It would appear extremely doubtful that third degree assault can be regarded as lesser included offense to charge under felony assault statute (CLS Penal § 120.05), since assault in third degree (class A misdemeanor) specifically requires as element defendant's intent to cause physical injury to another person, which element is entirely absent from felony assault. People v Sanchez, 128 A.D.2d 377, 512 N.Y.S.2d 389, 1987 N.Y. App. Div. LEXIS 44095 (N.Y. App. Div. 1st Dep't 1987).

Second degree assault conviction would be reduced to third degree assault conviction where defendant struck victim with her hand after dropping aluminum chair she was swinging, and People failed to prove that victim's injury was caused by chair; use by average layperson of hand to strike blow is insufficient to sustain conviction of second degree assault, which involves causing physical injury by use of dangerous instrument. People v Austin, 131 A.D.2d 490, 516 N.Y.S.2d 248, 1987 N.Y. App. Div. LEXIS 47940 (N.Y. App. Div. 2d Dep't 1987).

Second degree assault conviction would be reversed where defendant was also convicted of first degree assault, since first and second degree assault charges constituted inclusory concurrent counts under CLS CPL § 300.30, and evidence supported conviction of first degree offense. People v Beatty, 134 A.D.2d 602, 521 N.Y.S.2d 500, 1987 N.Y. App. Div. LEXIS 50810 (N.Y. App. Div. 2d Dep't 1987), app. denied, 71 N.Y.2d 892, 527 N.Y.S.2d 1002, 523 N.E.2d 309, 1988 N.Y. LEXIS 1315 (N.Y. 1988).

Trial court properly refused to charge third degree assault as lesser included offense of second degree assault where (1) defendant's own testimony negated element of intent and thus if jury had chosen to believe him, it would have found him not guilty of both offenses, and (2) there was no rational basis on which jury could have selectively rejected portions of People's case to conclude that defendant committed lesser but not greater offense. People v Zayas, 140 A.D.2d 395, 527 N.Y.S.2d 571, 1988 N.Y. App. Div. LEXIS 4679 (N.Y. App. Div. 2d Dep't), app. denied, 72 N.Y.2d 869, 532 N.Y.S.2d 519, 528 N.E.2d 909, 1988 N.Y. LEXIS 3975 (N.Y. 1988).

Court properly denied motion to dismiss indictment for assault in second degree on defendant's assertion that state failed to present prima facie evidence of physical injury where evidence that defendant was confined in correctional facility and that he struck and kicked victim was legally sufficient to establish lesser included offense of attempted assault in second degree since jury could reasonably conclude that defendant intended to cause victim physical injury. People v Bouyea, 142 A.D.2d 757, 531 N.Y.S.2d 129, 1988 N.Y. App. Div. LEXIS 7251 (N.Y. App. Div. 3d Dep't 1988).

On defendant's conviction of first degree assault, count of second degree assault should have been dismissed as lesser included concurrent count. People v Allen, 147 A.D.2d 352, 537 N.Y.S.2d 174, 1989 N.Y. App. Div. LEXIS 942 (N.Y. App. Div. 1st Dep't), amended, 148 A.D.2d 394, 1989 N.Y. App. Div. LEXIS 4129 (N.Y. App. Div. 1st Dep't 1989), app. denied, 73 N.Y.2d 1010, 541 N.Y.S.2d 765, 539 N.E.2d 593, 1989 N.Y. LEXIS 1745 (N.Y. 1989).

Court did not err in refusing to charge reckless assault in third degree as lesser included offense of assault in second degree where defendant testified that complainant stabbed him in arm with knife, that he struggled with her in attempt to protect himself from serious injury or death, and that she suffered cuts to arm and wound to chest in course of struggle, since evidence, viewed favorably to defendant, supported his claim of justifiable conduct, but negated any claim of reckless conduct as much as it negated claim of intentional conduct. People v Walker, 151 A.D.2d 980, 542 N.Y.S.2d 69, 1989 N.Y. App. Div. LEXIS 8295 (N.Y. App. Div. 4th Dep't), app. denied, 74 N.Y.2d 853, 546 N.Y.S.2d 1018, 546 N.E.2d 201, 1989 N.Y. LEXIS 4008 (N.Y. 1989).

Court properly refused to charge second degree assault under CLS Penal § 120.05(2) as lesser included offense of first degree assault since there was no reasonable view of evidence to support finding that defendant intended to cause only physical injury to victim, rather than serious physical injury, where he stabbed victim 12 times with knife, striking her heart, neck, throat and chest. People v Cuba, 154 A.D.2d 703, 546 N.Y.S.2d 684, 1989 N.Y. App. Div. LEXIS 13755 (N.Y. App. Div. 2d Dep't 1989), app. denied, 75 N.Y.2d 811, 552 N.Y.S.2d 562, 551 N.E.2d 1240, 1990 N.Y. LEXIS 543 (N.Y. 1990).

Defendant in second degree assault trial was not entitled to charge on third degree assault since there was no reasonable view of evidence that would support finding that he committed lesser offense but not greater offense since (1) he admitted stabbing or poking victim with knife, and (2) there was nothing in record to controvert that knife was dangerous instrument. People v Johnson, 158 A.D.2d 939, 551 N.Y.S.2d 102, 1990 N.Y. App. Div. LEXIS 1454 (N.Y. App. Div. 4th Dep't), app. denied, 75 N.Y.2d 967, 556 N.Y.S.2d 252, 555 N.E.2d 624, 1990 N.Y. LEXIS 1838 (N.Y. 1990).

In prosecution for second degree assault arising from stabbing in street fight, trial court properly refused jury charge on lesser included offense of third degree assault where no reasonable view of evidence would support jury finding that defendant acted with criminal negligence as opposed to having acted with intent to cause physical injury, since defense witness testified that defendant obtained knife and went after victim, chased him down, and stabbed him in leg. People v Winbush, 165 A.D.2d 909, 560 N.Y.S.2d 520, 1990 N.Y. App. Div. LEXIS 11083 (N.Y. App. Div. 3d Dep't 1990), app. denied, 77 N.Y.2d 845, 567 N.Y.S.2d 214, 568 N.E.2d 663, 1991 N.Y. LEXIS 3903 (N.Y. 1991).

Defendant was not entitled to charge of third degree assault as lesser included offense of second degree assault on evidence that he had argued with long-time acquaintance, chased her into hallway of apartment building, carefully aimed loaded revolver at her, and shot once from distance of 5 to 6 feet, and that bullet entered her left leg, lodged in her right knee, and was still imbedded at time of trial, causing scarring and continuing pain. People v Caban, 181 A.D.2d 536, 581 N.Y.S.2d 42, 1992 N.Y. App. Div. LEXIS 3698 (N.Y. App. Div. 1st Dep't), app. denied, 79 N.Y.2d 1047, 584 N.Y.S.2d 1014, 596 N.E.2d 412, 1992 N.Y. LEXIS 2535 (N.Y. 1992).

Court properly refused to charge third degree assault as lesser included offense to second degree assault where there was evidence that defendant attacked complainant with shopping bag filled with bricks, defendant denied attack, and there was no reasonable view of evidence that attack was reckless or negligent. People v David, 187 A.D.2d 396, 590 N.Y.S.2d 208, 590 N.Y.S.2d 210, 1992 N.Y. App. Div. LEXIS 13349 (N.Y. App. Div. 1st Dep't 1992), app. denied, 81 N.Y.2d 884, 597 N.Y.S.2d 945, 613 N.E.2d 977, 1993 N.Y. LEXIS 1362 (N.Y. 1993).

In prosecution for second degree assault based on defendant's acting in concert with 5 other persons, defendant was not entitled to have jury instructed with regard to third degree assault as lesser included offense since there was no reasonable view of evidence to support conclusion that defendant intended to cause only "physical injury" and not "serious physical injury" where defendant may not have beaten victim severely, but he acted in concert with others who administered more serious beating. People v Johnson, 193 A.D.2d 1116, 598 N.Y.S.2d 641, 1993 N.Y. App. Div. LEXIS 5762 (N.Y. App. Div. 4th Dep't), app. denied, 82 N.Y.2d 721, 602 N.Y.S.2d 818, 622 N.E.2d 319, 1993 N.Y. LEXIS 3556 (N.Y. 1993).

Court properly declined to charge third degree assault as lesser included offense of second degree assault as there was no reasonable view of evidence that braided belt used to pummel victim was not "dangerous instrument" within meaning of CLS Penal § 10.00(13) or that defendant did not use belt in repeatedly striking victim. People v Curtis, 222 A.D.2d 237, 635 N.Y.S.2d 186, 1995 N.Y. App. Div. LEXIS 12720 (N.Y. App. Div. 1st Dep't

1995), aff'd, 89 N.Y.2d 1003, 657 N.Y.S.2d 395, 679 N.E.2d 634, 1997 N.Y. LEXIS 314 (N.Y. 1997).

Court properly refused to submit third degree assault as lesser included offense of second degree assault where relevant count in indictment alleged that defendant caused physical injury to victim by means of dangerous instrument, and evidence of physical injury consisted of victim's testimony that defendant and his accomplices stabbed him in his feet with knife while he was bound and gagged. People v Flanagan, 224 A.D.2d 633, 639 N.Y.S.2d 395, 1996 N.Y. App. Div. LEXIS 1361 (N.Y. App. Div. 2d Dep't), app. denied, 88 N.Y.2d 878, 645 N.Y.S.2d 453, 668 N.E.2d 424, 1996 N.Y. LEXIS 2145 (N.Y. 1996).

Trial court (as fact finder) properly considered third degree assault as lesser included offense of second degree assault where reasonable view of evidence supported finding that defendant intended to aid his accomplice in assault but may not have known, prior to assault, that accomplice was armed with brass knuckles or was going to use them to attack victim. People v Hanley, 227 A.D.2d 144, 642 N.Y.S.2d 22, 1996 N.Y. App. Div. LEXIS 4857 (N.Y. App. Div. 1st Dep't 1996).

Defendant's conviction of 2 counts of second degree assault would be set aside, and those counts would be dismissed as lesser-included offenses, where defendant was also convicted of first degree assault, and he could not have committed first degree assault without also committing second degree assault. People v Seaman, 238 A.D.2d 449, 656 N.Y.S.2d 350, 1997 N.Y. App. Div. LEXIS 3787 (N.Y. App. Div. 2d Dep't), app. denied, 90 N.Y.2d 863, 661 N.Y.S.2d 190, 683 N.E.2d 1064, 1997 N.Y. LEXIS 2598 (N.Y. 1997).

Court did not abuse its discretion in refusing to charge third degree assault as lesser included offense of second degree assault where injuries inflicted on victim were numerous and serious. People v Lane, 241 A.D.2d 763, 660 N.Y.S.2d 890, 1997 N.Y. App. Div. LEXIS 8077 (N.Y. App. Div. 3d Dep't), app. denied, 91 N.Y.2d 875, 668 N.Y.S.2d 574, 691 N.E.2d 646, 1997 N.Y. LEXIS 4608 (N.Y. 1997).

Court properly refused to charge third degree assault as lesser offense to second degree assault where there was evidence that defendant repeatedly struck prone victim, and there was no evidence of retreat by defendant. People v Carello, 241 A.D.2d 903, 660 N.Y.S.2d 515, 1997 N.Y. App. Div. LEXIS 8159 (N.Y. App. Div. 3d Dep't), app. denied, 90 N.Y.2d 938, 664 N.Y.S.2d 757, 687 N.E.2d 654, 1997 N.Y. LEXIS 3745 (N.Y. 1997).

Defendant was not entitled to dismissal of counts charging him with third degree assault and fourth degree grand larceny where those offenses were not inclusory concurrent counts of any other crimes charged—second degree robbery, second degree assault, and resisting arrest. People v Ross, 246 A.D.2d 561, 667 N.Y.S.2d 434, 1998 N.Y. App. Div. LEXIS 118 (N.Y. App. Div. 2d Dep't), app. denied, 91 N.Y.2d 1012, 676 N.Y.S.2d 140, 698 N.E.2d 969, 1998 N.Y. LEXIS 2089 (N.Y. 1998), app. dismissed, 92 N.Y.2d 985, 683 N.Y.S.2d 766, 706 N.E.2d 754, 1998 N.Y. LEXIS 4486 (N.Y. 1998).

Court properly declined to charge third degree assault as lesser included offense of second degree assault where no fair view of evidence would have supported finding of third degree assault. People v Smith, 246 A.D.2d 852, 668 N.Y.S.2d 281, 1998 N.Y. App. Div. LEXIS 552 (N.Y. App. Div. 3d Dep't), app. denied, 91 N.Y.2d 977, 672 N.Y.S.2d 857, 695 N.E.2d 726, 1998 N.Y. LEXIS 1681 (N.Y. 1998).

Appellate Division would not consider whether remote lesser included offense of third degree assault should have been submitted to jury where defendant was convicted of first degree assault, and jury never reached lesser included offense of second degree assault. People v Plumey, 255 A.D.2d 462, 680 N.Y.S.2d 861, 1998 N.Y. App. Div. LEXIS 11978 (N.Y. App. Div. 2d Dep't), app. denied, 92 N.Y.2d 1037, 684 N.Y.S.2d 502, 707 N.E.2d 457, 1998 N.Y. LEXIS 4746 (N.Y. 1998).

Third degree assault is not lesser included offense of second degree (felony) assault. People v Williams, 255 A.D.2d 610, 682 N.Y.S.2d 60, 1998 N.Y. App. Div. LEXIS 12828 (N.Y. App. Div. 2d Dep't 1998), app. denied, 93 N.Y.2d 880, 689 N.Y.S.2d 442, 711 N.E.2d 656, 1999 N.Y. LEXIS 1121 (N.Y. 1999).

Defendant was not entitled to jury charge on third degree assault as lesser included offense of second degree assault where there was no evidence of intoxication, no other evidence tending to disprove intent, and thus there was no reasonable view of evidence under which defendant acted recklessly rather than intentionally. People v Hill, 255 A.D.2d 969, 681 N.Y.S.2d 919, 1998 N.Y. App. Div. LEXIS 12235 (N.Y. App. Div. 4th Dep't 1998), app. denied, 92 N.Y.2d 1050, 685 N.Y.S.2d 428, 708 N.E.2d 185, 1999 N.Y. LEXIS 303 (N.Y. 1999).

Although attempted second degree assault is lesser included offense of second degree assault, defendant was not entitled to jury charge on attempt where he engaged in physical altercation with victim, claimed self-defense, and thus could not have committed lesser without greater offense. People v Brewer, 266 A.D.2d 577, 697 N.Y.S.2d 758, 1999 N.Y. App. Div. LEXIS 11197 (N.Y. App. Div. 3d Dep't 1999).

Defendant's conviction of second degree assault would be reversed, and that count of indictment would be dismissed, where he was also convicted of first degree assault, and he could not have committed first degree assault without also committing second degree assault. People v Walker, 275 A.D.2d 1009, 713 N.Y.S.2d 590, 2000 N.Y. App. Div. LEXIS 9652 (N.Y. App. Div. 4th Dep't 2000), app. denied, 96 N.Y.2d 739, 722 N.Y.S.2d 807, 745 N.E.2d 1030, 2001 N.Y. LEXIS 496 (N.Y. 2001).

Count of indictment charging second degree assault was not inclusory concurrent count of count charging first degree assault where assault second charge required that victim be "less than seven years old" (CLS Penal § 120.0(9)), element not required by first degree assault charge (CLS Penal § 120.10). People v Scavone, 284 A.D.2d 928, 728 N.Y.S.2d 615, 2001 N.Y. App. Div. LEXIS 5866 (N.Y. App. Div. 4th Dep't), app. denied, 96 N.Y.2d 942, 733 N.Y.S.2d 382, 759 N.E.2d 381, 2001 N.Y. LEXIS 3579 (N.Y. 2001).

Defendant was entitled to jury charge on second degree assault as lesser included offense of first degree assault where there was reasonable view of evidence under which victim suffered physical injury only, rather than serious physical injury; thus, judgment would be modified by reversing defendant's conviction on those counts of first degree assault and granting new trial on those counts. People v Fuller, 286 A.D.2d 910, 731 N.Y.S.2d 132, 2001 N.Y. App. Div. LEXIS 9157 (N.Y. App. Div. 4th Dep't), app. denied, 97 N.Y.2d 682, 738 N.Y.S.2d 297, 764 N.E.2d 401, 2001 N.Y. LEXIS 4382 (N.Y. 2001).

Trial court erred in convicting defendant of first degree assault under N.Y. Penal Law § 120.10(1) and second degree assault under N.Y. Penal Law § 120.05(2), because second degree assault was a lesser included offense of first degree assault and should have been presented only in the alternative as an inclusory concurrent count of first degree assault. People v Fort, 292 A.D.2d 821, 739 N.Y.S.2d 319, 2002 N.Y. App. Div. LEXIS 2636 (N.Y. App. Div. 4th Dep't), app. denied, 98 N.Y.2d 710, 749 N.Y.S.2d 7, 778 N.E.2d 558, 2002 N.Y. LEXIS 3229 (N.Y. 2002).

While evidence that during an altercation with defendant, a corrections officer suffered a blow to the check that caused pain and some swelling was insufficient to sustain defendant's conviction for assault in the second degree, it showed defendant's intent to cause injury to the officer, which supported a conviction of attempted assault in the second degree. People v Williams, 46 A.D.3d 1115, 847 N.Y.S.2d 717, 2007 N.Y. App. Div. LEXIS 13153 (N.Y. App. Div. 3d Dep't 2007), app. denied, 10 N.Y.3d 818, 857 N.Y.S.2d 51, 886 N.E.2d 816, 2008 N.Y. LEXIS 1292 (N.Y. 2008).

There was no error in denying defendant's request to charge the jury on third degree assault as a lesser-included offense of first and second degree assault; there was no reasonable view of the evidence that would have supported a jury finding that defendant acted with negligence rather than intent to cause serious physical injury or physical injury under circumstances in which, after the complainant banged on defendant's door for 10 minutes, defendant lunged at the complainant with a machete, striking him four times. People v Beckford, 49 A.D.3d 547, 853 N.Y.S.2d 582, 2008 N.Y. App. Div. LEXIS 1956 (N.Y. App. Div. 2d Dep't), app. denied, 10 N.Y.3d 859, 860 N.Y.S.2d 485, 890 N.E.2d 248, 2008 N.Y. LEXIS 2099 (N.Y. 2008).

No reasonable view of the evidence allowed submission of assault in the second degree under N.Y. Penal Law § 120.05(2) as a lesser included offense of assault in the first degree as defen-

dant's deliberate action of forcefully stabbing the victim in the head could not be viewed as based on an intent to cause a nonserious physical injury. People v Prince, 51 A.D.3d 1052, 857 N.Y.S.2d 320, 2008 N.Y. App. Div. LEXIS 3770 (N.Y. App. Div. 3d Dep't), app. denied, 10 N.Y.3d 938, 862 N.Y.S.2d 345, 892 N.E.2d 411, 2008 N.Y. LEXIS 2407 (N.Y. 2008).

Defendant was improperly denied a request to charge reckless assault in the third degree under N.Y. Penal Law § 120.00(2) as a lesser included offense of assault in the first degree under N.Y. Penal Law § 120.10(1); the elements of reckless assault in the third degree, i.e., recklessness and physical injury, were present in other lesser included charges to be submitted at the People's request under N.Y. Penal Law § 120.05(2), (4). People v Ryan, 55 A.D.3d 960, 865 N.Y.S.2d 146, 2008 N.Y. App. Div. LEXIS 7753 (N.Y. App. Div. 3d Dep't 2008).

Because defendant's conviction for assault in the first degree pursuant to N.Y. Penal Law § 120.10(2) was upheld, her conviction of assault in the second degree pursuant to N.Y. Penal Law § 120.05(2) should have been vacated and that count of the indictment dismissed because it was an inclusory concurrent count. People v Davis, 91 A.D.3d 567, 938 N.Y.S.2d 8, 2012 N.Y. App. Div. LEXIS 556 (N.Y. App. Div. 1st Dep't), app. denied, 19 N.Y.3d 863, 947 N.Y.S.2d 412, 970 N.E.2d 435, 2012 N.Y. LEXIS 1924 (N.Y. 2012).

Conviction of assault in the second degree was reversed because it was an inclusory concurrent count of the robbery in the second degree conviction. People v Perez, 93 A.D.3d 1032, 942 N.Y.S.2d 227, 2012 N.Y. App. Div. LEXIS 2132 (N.Y. App. Div. 3d Dep't), app. denied, 19 N.Y.3d 1000, 951 N.Y.S.2d 476, 975 N.E.2d 922, 2012 N.Y. LEXIS 3099 (N.Y. 2012), app. denied, 19 N.Y.3d 1000, 951 N.Y.S.2d 476, 975 N.E.2d 922, 2012 N.Y. LEXIS 3440 (N.Y. 2012), app. denied, 19 N.Y.3d 1000, 951 N.Y.S.2d 476, 975 N.E.2d 922, 2012 N.Y. LEXIS 3441 (N.Y. 2012).

At defendant's trial for assault in the second degree, the trial court erred because it failed to give a charge for the lesser included offense of assault in the third degree as requested by defense counsel. There was a reasonable view of the evidence to support a finding that defendant committed the crime of assault in the third degree, as the jury could find that defendant caused physical injury to the victim, but that he did not do so by means of a dangerous instrument. People v Brown, 117 A.D.3d 1536, 985 N.Y.S.2d 375, 2014 N.Y. App. Div. LEXIS 3312 (N.Y. App. Div. 4th Dep't 2014).

When defendant was charged with first-degree assault, the trial court did not err in refusing to consider the lesser included offense of second-degree assault, as the severity of the victim's injuries, including at least 20 stab wounds to the chest, a collapsed lung, a lacerated liver, and multiple fractures to her hand, did not support a finding that defendant intended to cause physical injury but not serious physical injury to the victim. People v Spencer, 183 A.D.3d 1258, 123 N.Y.S.3d 369, 2020 N.Y. App. Div. LEXIS 2602 (N.Y. App. Div. 4th Dep't), app. denied, 35 N.Y.3d 1070, 152 N.E.3d 1181, 129 N.Y.S.3d 380, 2020 N.Y. LEXIS 2034 (N.Y. 2020).

Charges were properly reduced pursuant to CLS CPL § 180.50 from felony second degree assault under CLS Penal § 120.05(3) to misdemeanor third degree assault under CLS Penal § 120.00(1), since criminal intent required to support new charge (that defendant intended to cause harm to another), while different from intent required to support original charge (that defendant intended to prevent peace officer from performing lawful duty), could be inferred from factual allegations that defendant struck and bit police officer. People v Harris, 148 Misc. 2d 408, 560 N.Y.S.2d 926, 1990 N.Y. Misc. LEXIS 468 (N.Y. City Crim. Ct. 1990).

County court was justified in considering attempted assault in the second degree as a lesser included offense of assault in the second degree in defendant's trial on stipulated facts where it was clear from the colloquy between defendant and the court that defendant was advised that, if defendant entered into the stipulation agreement, then the court would find defendant guilty of attempted assault in the second degree, and defendant then entered into the stipulation with full knowledge of the court's intention. People v Kitchings, 301 A.D.2d 749, 753 N.Y.S.2d 237, 2003 N.Y. App. Div. LEXIS 116 (N.Y. App. Div. 3d Dep't), app. denied, 99 N.Y.2d 629, 760 N.Y.S.2d 111, 790 N.E.2d 285, 2003 N.Y. LEXIS 1145 (N.Y. 2003).

Defendant's claim that his conviction of assault under N.Y. Penal Law § 120.05 was improper as he also pleaded guilty to vehicular assault under N.Y. Penal Law § 120.04, a more specific statute that he argued was the exclusive means of punishing his conduct, was rejected as in the absence of a legislative mandate directing the People to try such cases solely under § 120.04, the prosecutor had the discretion to choose the statue under which to proceed. People v Mahy, 305 A.D.2d 856, 761 N.Y.S.2d 122, 2003 N.Y. App. Div. LEXIS 5781 (N.Y. App. Div. 3d Dep't), app. denied, 100 N.Y.2d 622, 767 N.Y.S.2d 405, 799 N.E.2d 628, 2003 N.Y. LEXIS 3812 (N.Y. 2003).

Plea negotiations between the state and defendant, convicted of a violation of N.Y. Penal Law § 120.05, had a starting point of statutorily known components: a "D" violent felony which would confer, upon conviction, a "predicate felon" status, and a concomitant statutorily directed component of consecutive sentencing pursuant to N.Y. Penal Law § 70.25(5)(a) and both sides accepted and benefitted from the negotiated disposition agreed to and approved by and in the discretion of the court; defendant's motion pursuant to N.Y. Crim. Proc. Law § 440.20(1) to set aside his sentence was denied. People v Pena, 196 Misc. 2d 489, 764 N.Y.S.2d 501, 2003 N.Y. Misc. LEXIS 828 (N.Y. Sup. Ct.), aff'd, 309 A.D.2d 687, 766 N.Y.S.2d 196, 2003 N.Y. App. Div. LEXIS 11275 (N.Y. App. Div. 1st Dep't 2003).

Count of assault in the second degree constitutes a concurrent inclusory count of a conviction of assault in the first degree; thus, defendant's conviction of assault in the second degree was vacated where defendant was also convicted of assault in the first degree. People v Carew, 2 A.D.3d 742, 768 N.Y.S.2d 658, 2003 N.Y. App. Div. LEXIS 13889 (N.Y. App. Div. 2d Dep't 2003), app. denied, 1 N.Y.3d 625, 777 N.Y.S.2d 24, 808 N.E.2d 1283, 2004 N.Y. LEXIS 701 (N.Y. 2004).

Where defendant, a juvenile, was found to have committed attempted assault in the second degree in violation of N.Y. Penal Law §§ 110.00, 120.05 and menacing in the second degree in violation of N.Y. Penal Law § 120.14, the charges that defendant committed attempted assault in the third degree in violation of N.Y. Penal Law §§ 110.00, 120.00 and menacing in the third degree in violation of N.Y. Penal Law § 120.15 should have been dismissed as lesser included offenses of the second degree offenses. In re Jonathan M., 4 A.D.3d 154, 772 N.Y.S.2d 42, 2004 N.Y. App. Div. LEXIS 1657 (N.Y. App. Div. 1st Dep't 2004).

Jury's verdict acquitting defendant of assault in the second degree and convicting defendant of reckless endangerment was not inconsistent because the crimes required two different mental states. People v De Fayette, 16 A.D.3d 708, 790 N.Y.S.2d 301, 2005 N.Y. App. Div. LEXIS 2147 (N.Y. App. Div. 3d Dep't), app. denied, 4 N.Y.3d 885, 798 N.Y.S.2d 730, 831 N.E.2d 975, 2005 N.Y. LEXIS 1671 (N.Y. 2005).

Trial court improperly exercised its discretion in considering attempted assault in the second degree as a lesser-included offense of first-degree attempted assault; it was not until after summations that the court indicated it would consider attempted second-degree assault, a significant departure from the prosecution's theory of the case against defendant, requiring reversal. People v Garcia, 29 A.D.3d 255, 812 N.Y.S.2d 66, 2006 N.Y. App. Div. LEXIS 3714 (N.Y. App. Div. 1st Dep't), app. denied, 7 N.Y.3d 789, 821 N.Y.S.2d 818, 854 N.E.2d 1283, 2006 N.Y. LEXIS 2782 (N.Y. 2006).

Defendant's convictions of assault in the second degree were erroneous as those offenses were merely inclusory concurrent counts of robbery in the second degree. People v Nadal, 57 A.D.3d 574, 868 N.Y.S.2d 719, 2008 N.Y. App. Div. LEXIS 9252 (N.Y. App. Div. 2d Dep't 2008), app. denied, 12 N.Y.3d 786, 879 N.Y.S.2d 63, 906 N.E.2d 1097, 2009 N.Y. LEXIS 1521 (N.Y. 2009).

Because a jury could have believed from the complainant's testimony that defendant's objective was not to seriously injure the complainant, but to shake the complainant off a vehicle by operating it in a reckless manner, which ultimately injured the complainant, the trial court properly submitted the lesser-included offense of second-degree reckless assault under N.Y. Penal

Law § 120.05(4) to the jury. People v Moore, 66 A.D.3d 707, 886 N.Y.S.2d 468, 2009 N.Y. App. Div. LEXIS 7083 (N.Y. App. Div. 2d Dep't 2009), aff'd, 15 N.Y.3d 811, 908 N.Y.S.2d 146, 934 N.E.2d 879, 2010 N.Y. LEXIS 2222 (N.Y. 2010).

Attempted assault in the second degree pursuant to N.Y. Penal Law §§ 110.00, 120.05(2), was not a lesser included offense of attempted murder in the second degree, N.Y. Penal Law §§ 110.00, 125.25(1), because § 120.05(2) required an injury caused by means of a deadly weapon or a dangerous instrument, which was not an element of attempted murder in the second degree; although attempted assault in the second degree pursuant to N.Y. Penal Law §§ 110.00, 120.05(1), was a lesser included offense of attempted murder in the second degree, the trial court properly determined that there was no reasonable view of the evidence that would have supported a finding that defendant committed the lesser offense but not the greater. Indeed, the evidence established that the police recovered shell casings and spent bullets demonstrating that at least 26 shots were fired at the victim and his vehicle, in which his 10-year-old nephew was seated. People v Hymes, 70 A.D.3d 1371, 895 N.Y.S.2d 273, 2010 N.Y. App. Div. LEXIS 1209 (N.Y. App. Div. 4th Dep't), app. denied, 15 N.Y.3d 774, 907 N.Y.S.2d 463, 933 N.E.2d 1056, 2010 N.Y. LEXIS 2366 (N.Y. 2010).

Inmate was denied 28 U.S.C.S. § 2254 relief on his claim that his appellate counsel was ineffective for failing to argue that trial counsel was ineffective for failing to request that the court charge lesser-included offenses because no reasonable view of the evidence supported a finding that the inmate committed any lesser-included offenses; a factfinder could not reasonably view the evidence concerning the deli robbery and find that the inmate was guilty of second-degree assault under N.Y. Penal Law § 120.05 or third-degree assault under § 120.00, but not first-degree assault under § 120.10. The evidence showed that the inmate and his co-defendant beat the victim with their hands, kicked him, and hit with a stick, a dangerous instrument and potentially deadly weapon, causing the victim to suffer a broken arm and great pain. Lee v Ricks, 388 F. Supp. 2d 141, 2005 U.S. Dist. LEXIS 29705 (W.D.N.Y. 2005).

8. —Separate and lesser non-assault offense

Attempted second degree assault is lesser included offense of each attempted first and second degree murder. People v Cabassa, 79 N.Y.2d 722, 586 N.Y.S.2d 234, 598 N.E.2d 1, 1992 N.Y. LEXIS 1607 (N.Y.), cert. denied, 506 U.S. 1011, 113 S. Ct. 633, 121 L. Ed. 2d 563, 1992 U.S. LEXIS 7648 (U.S. 1992).

In prosecution of driver and passenger of automobile for first and second degree attempted murder based on their conduct during high-speed chase, it was reversible error to refuse to submit second degree attempted assault as lesser included offense where passenger was shooting at moving police vehicle approximately 50 feet away while traveling at high speeds and while both vehicles were frequently changing lanes, so that jury could have reasonably concluded that passenger was aiming and shooting at police and their vehicle (1) in order to distract operator of police vehicle in hope that he would lose control, (2) in order to hit some portion of car to cause serious accident, or (3) to hit officers, but only to seriously injure and incapacitate them so that they would abort pursuit; moreover, jury could find that, even if passenger intended to kill, driver did not share in that intent. People v Cabassa, 79 N.Y.2d 722, 586 N.Y.S.2d 234, 598 N.E.2d 1, 1992 N.Y. LEXIS 1607 (N.Y.), cert. denied, 506 U.S. 1011, 113 S. Ct. 633, 121 L. Ed. 2d 563, 1992 U.S. LEXIS 7648 (U.S. 1992).

Menacing (Penal Law § 120.15) is a lesser included offense of second degree assault (Penal Law § 120.05). People v Cionek, 43 A.D.2d 256, 351 N.Y.S.2d 177, 1974 N.Y. App. Div. LEXIS 5990 (N.Y. App. Div. 3d Dep't), aff'd, 35 N.Y.2d 924, 365 N.Y.S.2d 161, 324 N.E.2d 544, 1974 N.Y. LEXIS 1083 (N.Y. 1974).

Charge of kidnapping, which arose out of defendant's actions in grabbing victim around the neck and dragging her a distance of 70 feet into a garage where he assaulted her, merged with charges of assault in the second degree and attempted sexual abuse in the first degree, where any detention of the victim was incidental to the commission of the crimes of assault and attempted sexual assault. People v Cassidy, 50 A.D.2d 803, 375 N.Y.S.2d 403, 1975 N.Y. App. Div. LEXIS 11621 (N.Y. App. Div. 2d Dep't 1975), aff'd, 40 N.Y.2d 763, 390 N.Y.S.2d 45, 358 N.E.2d 870, 1976 N.Y. LEXIS 3106 (N.Y. 1976).

In a criminal prosecution defendant was improperly convicted of reckless endangerment in the second degree as a lesser included offense of the charged crime of felony assault, since reckless endangerment in the second degree requires proof of reckless conduct that creates a substantial risk of serious physical injury and neither of these elements is an element of the felony assault statute. People v Bryant, 85 A.D.2d 575, 445 N.Y.S.2d 711, 1981 N.Y. App. Div. LEXIS 16371 (N.Y. App. Div. 1st Dep't 1981).

In a rape and robbery prosecution defendant's acquittal of assault in the second degree did not render his conviction of attempted rape in the first degree an inconsistent verdict, since all that the acquittal of the assualt count showed was that defendant did not act with intent to cause a complaint of physical injury, while the conviction of attempted rape showed his intent to engage in sexual intercourse with her. People v Pereau, 99 A.D.2d 591, 471 N.Y.S.2d 416, 1984 N.Y. App. Div. LEXIS 16826 (N.Y. App. Div. 3d Dep't 1984), aff'd, 64 N.Y.2d 1055, 489 N.Y.S.2d 872, 479 N.E.2d 217, 1985 N.Y. LEXIS 14219 (N.Y. 1985).

Assault in second degree is not lesser included offense of attempted murder in second degree and therefore defendant's conviction for assault in second degree must be reversed. People v Weibke, 119 A.D.2d 890, 501 N.Y.S.2d 189, 1986 N.Y. App. Div. LEXIS 55835 (N.Y. App. Div. 3d Dep't 1986).

It was error to submit to jury charges of first degree assault under CLS Penal § 120.10(1) and second degree assault under CLS Penal § 120.05(4) as lesser included offenses under count charging attempted second degree murder, since those subsections of assault statutes require use of deadly weapon or dangerous instrument, which is not element of attempted second degree murder and thus it is theoretically possible to commit attempted second degree murder without committing first or second degree assault. People v Maldonado, 123 A.D.2d 788, 507 N.Y.S.2d 415, 1986 N.Y. App. Div. LEXIS 60926 (N.Y. App. Div. 2d Dep't 1986).

Court properly refused to dismiss second degree assault conviction on basis of defendant's contention that it was lesser included offense of his first degree burglary conviction since "intent to cause injury" is element of assault but not element of burglary and it is thus theoretically possible to commit burglary without also committing assault. People v Graham, 127 A.D.2d 443, 515 N.Y.S.2d 126, 1987 N.Y. App. Div. LEXIS 42573 (N.Y. App. Div. 3d Dep't 1987).

Defendant was not entitled to dismissal of second degree attempted assault charge in connection with his use of knife after raping victim since victim's testimony that defendant cut her leg while threatening to kill her unless she engaged in further sexual contact demonstrated requisite intent to inflict physical injury; merger doctrine (which precludes separate conviction for acts that comprise essential part of another substantive crime) was inapplicable. People v Hauver, 129 A.D.2d 889, 514 N.Y.S.2d 814, 1987 N.Y. App. Div. LEXIS 45572 (N.Y. App. Div. 3d Dep't 1987).

Court did not err in refusing to charge jury that first degree assault was lesser included offense of attempted second degree murder since it is theoretically possible to commit attempted second degree murder without at same time committing first degree assault or second degree assault. People v Sims, 135 A.D.2d 591, 522 N.Y.S.2d 170, 1987 N.Y. App. Div. LEXIS 52531 (N.Y. App. Div. 2d Dep't 1987), app. denied, 72 N.Y.2d 1050, 534 N.Y.S.2d 949, 531 N.E.2d 669, 1988 N.Y. LEXIS 6003 (N.Y. 1988).

Defendant's second degree assault conviction would be reversed as improper lesser included offense of second degree murder where court instructed jury to consider assault only in "relation to shooting of [victim] in the foot, which was not and did not cause death," for in light of undisputed medical testimony that victim was killed by shot to back, jury's acquittal of murder necessarily translated into rejection of prosecution's theory that defendant acted in concert with one or more shooters in shooting victim in back, and having been acquitted of act complained of in indictment, which indisputably occurred in manner alleged in indictment, defendant could not, under theory of lesser included offense, be charged with assault to foot, which, given jury's

verdict, was act not found to have been component part of nor was concomitantly committed by same conduct which formed basis for offense charged in indictment. People v Nieves, 136 A.D.2d 250, 526 N.Y.S.2d 954, 1988 N.Y. App. Div. LEXIS 3731 (N.Y. App. Div. 1st Dep't 1988).

Second degree kidnapping count could not be merged with second degree assault count where assault occurred only when victim attempted to flee. People v De Meo, 139 A.D.2d 758, 527 N.Y.S.2d 507, 1988 N.Y. App. Div. LEXIS 4503 (N.Y. App. Div. 2d Dep't), app. denied, 72 N.Y.2d 858, 532 N.Y.S.2d 508, 528 N.E.2d 898, 1988 N.Y. LEXIS 3688 (N.Y. 1988).

Court erred by dismissing those counts of indictment charging defendant with attempted second degree murder and first and second degree assault on ground of insufficiency of grand jury evidence since there was sufficient evidence before grand jury to support lessor included offense of third degree assault. People v Mandel, 141 A.D.2d 852, 530 N.Y.S.2d 194, 1988 N.Y. App. Div. LEXIS 7106 (N.Y. App. Div. 2d Dep't 1988).

Defendant was not entitled to dismissal of counts charging him with third degree assault and fourth degree grand larceny where those offenses were not inclusory concurrent counts of any other crimes charged—second degree robbery, second degree assault, and resisting arrest. People v Ross, 246 A.D.2d 561, 667 N.Y.S.2d 434, 1998 N.Y. App. Div. LEXIS 118 (N.Y. App. Div. 2d Dep't), app. denied, 91 N.Y.2d 1012, 676 N.Y.S.2d 140, 698 N.E.2d 969, 1998 N.Y. LEXIS 2089 (N.Y. 1998), app. dismissed, 92 N.Y.2d 985, 683 N.Y.S.2d 766, 706 N.E.2d 754, 1998 N.Y. LEXIS 4486 (N.Y. 1998).

Court properly charged attempted second degree assault as lesser included offense of attempted second degree murder where reasonable view of evidence supported conclusion that defendant committed lesser but not greater offense. People v Johnson, 263 A.D.2d 515, 691 N.Y.S.2d 922, 1999 N.Y. App. Div. LEXIS 8095 (N.Y. App. Div. 2d Dep't), app. denied, 94 N.Y.2d 824, 702 N.Y.S.2d 594, 724 N.E.2d 386, 1999 N.Y. LEXIS 4187 (N.Y. 1999).

Charge of assault in the second degree under N.Y. Penal Law § 120.05(9) against defendant, whose act of slamming her disabled child into the wooden portion of a couch resulted in the child's death, was dismissed as a lesser included offense under N.Y. Crim. Proc. Law § 1.20(37) as defendant was also convicted of manslaughter in the first degree under N.Y. Penal Law § 125.20(4) People v Griffin, 48 A.D.3d 1233, 851 N.Y.S.2d 808, 2008 N.Y. App. Div. LEXIS 1165 (N.Y. App. Div. 4th Dep't), app. denied, 10 N.Y.3d 840, 859 N.Y.S.2d 399, 889 N.E.2d 86, 2008 N.Y. LEXIS 1676 (N.Y. 2008).

Because the victim's restraint and asportation were so much the part of defendant's attempted robbery and assault of the victim under N.Y. Penal Law §§ 120.05(2), 110.00, 160.15(3) that those crimes could not have been committed without the acts comprising the kidnapping under N.Y. Penal Law § 135.20, the kidnapping conviction was precluded by the merger doctrine. People v Jacobs, 52 A.D.3d 1182, 859 N.Y.S.2d 541, 2008 N.Y. App. Div. LEXIS 5216 (N.Y. App. Div. 4th Dep't 2008), app. denied, 11 N.Y.3d 926, 874 N.Y.S.2d 11, 2009 N.Y. LEXIS 445 (N.Y. 2009).

Conviction of second degree assault, N.Y. Penal Law § 120.05(3), was reversed because the trial court refused to charge the lesser included offense of third degree obstructing governmental administration; the record contained evidence that a police officer who was kicked in the groin by defendant responded to another call after the incident, did not seek medical attention until he was directed to do so, declined medication, indicated that his pain was subsiding by the time he was discharged from the hospital a few hours after the incident, and that his discomfort over the next several days was vague. Under these circumstances, the jury could have found that defendant did not sustain a physical injury for purposes of second degree assault, and, thus, defendant was entitled to the requested charge down. People v Nisselbeck, 85 A.D.3d 1206, 923 N.Y.S.2d 801, 2011 N.Y. App. Div. LEXIS 4510 (N.Y. App. Div. 3d Dep't 2011).

Defendant's conviction for unlawful imprisonment should have been dismissed pursuant to the doctrine of judicial merger because his brief "abduction" of the victim when defendant grabbed him and pulled him outside the dwelling at issue was merely a preliminary, preparatory, or concurrent action in relation to the ultimate crime of assault. People v James, 114 A.D.3d 1202, 980 N.Y.S.2d 645, 2014 N.Y. App. Div. LEXIS 751 (N.Y. App. Div. 4th Dep't), app. denied, 22 N.Y.3d 1199, 986 N.Y.S.2d 420, 9 N.E.3d 915, 2014 N.Y. LEXIS 1181 (N.Y. 2014).

Offenses of driving with a revoked license and second-degree assault have substantially different elements and statutory provisions defining such offenses are designed to prevent different kinds of evil. People v Durant, 88 Misc. 2d 731, 389 N.Y.S.2d 533, 1976 N.Y. Misc. LEXIS 2736 (N.Y. County Ct. 1976).

Offenses of failing to dim headlights, driving with revoked license, resisting arrest, second-degree assault and attempted murder, offenses arising out of incident that occurred when police officers stopped automobile in which defendant was riding, words were exchanged and scuffle between defendant and police officers ensued, were part of single criminal transaction and therefore joinable in a single prosecution. People v Durant, 88 Misc. 2d 731, 389 N.Y.S.2d 533, 1976 N.Y. Misc. LEXIS 2736 (N.Y. County Ct. 1976).

Defendant's second degree assault conviction under N.Y. Penal Law § 140.30(2) was not a lesser-included offense of first degree burglary under N.Y. Penal Law § 120.05(6), because the assault required proof of infliction of physical injury in furtherance of the underlying felony, which was not required for the burglary. People v Curella, 296 A.D.2d 578, 746 N.Y.S.2d 30, 2002 N.Y. App. Div. LEXIS 7751 (N.Y. App. Div. 2d Dep't 2002).

An unlawful imprisonment count should have been dismissed because it merged with the second- and third-degree assault charges against a defendant, as: (1) the evidence showed that any restriction of the victim's movements was wholly incidental to the simultaneous commission of an assault; and, (2) the assault was not committed to further the unlawful imprisonment, as required by N.Y. Penal Law § 120.05(6), but, any unlawful imprisonment was committed in furtherance of the assault; thus, because the county court should have dismissed the unlawful imprisonment count under the merger doctrine, there was no underlying felony to serve as the basis for a felony assault. People v Swansbrough, 22 A.D.3d 877, 802 N.Y.S.2d 777, 2005 N.Y. App. Div. LEXIS 11164 (N.Y. App. Div. 3d Dep't 2005).

9. —Resisting arrest

The crime of resisting arrest, in violation of Penal Law § 205.30, is not a lesser included offense within the meaning of CPL § 1.20(37) of the crime of attempted assault in the second degree, Penal Law § 120.05(3), since the element of intentionally preventing an authorized arrest, which is necessary to establish the crime of resisting arrest, is not necessary to establish the crime of attempted assault in the second degree. People v Roberts, 99 A.D.2d 761, 471 N.Y.S.2d 680, 1984 N.Y. App. Div. LEXIS 17136 (N.Y. App. Div. 2d Dep't 1984).

In a prosecution for second-degree assault, it was error to add a second count of resisting arrest as a lesser included offense but as a separate crime, where defendant was entitled to have the jury consider only the crimes for which he was indicted and lesser included offenses properly contained in the indictment, and where the second count of resisting arrest was not charged in the indictment; defendant's conviction for assault would not be reversed, however, even though the court did not charge resisting arrest as a lesser included offense of assault, since on the facts of the case resisting arrest was not a lesser included offense of second-degree assault. People v Starling, 101 A.D.2d 704, 475 N.Y.S.2d 689, 1984 N.Y. App. Div. LEXIS 18266 (N.Y. App. Div. 4th Dep't), app. denied, 63 N.Y.2d 680, 1984 N.Y. LEXIS 5617 (N.Y. 1984).

Resisting arrest is not lesser included offense of second degree assault as defined by CLS Penal § 120.05(3) since it is theoretically possible to commit such assault without at same time committing resisting arrest. People v Sargent, 136 A.D.2d 869, 524 N.Y.S.2d 528, 1988 N.Y. App. Div. LEXIS 537 (N.Y. App. Div. 3d Dep't 1988).

Resisting arrest is not lesser included offense of second degree assault. People v Ranieri, 144 A.D.2d 1006, 534 N.Y.S.2d 287, 1988 N.Y. App. Div. LEXIS 14553 (N.Y. App. Div. 4th Dep't 1988), app. denied, 73 N.Y.2d 895, 538 N.Y.S.2d 807, 535 N.E.2d 1347, 1989 N.Y. LEXIS 1209 (N.Y. 1989), app. denied, 73 N.Y.2d 895,

538 N.Y.S.2d 807, 535 N.E.2d 1347, 1989 N.Y. LEXIS 1211 (N.Y. 1989).

10. —Robbery

Second degree assault (Penal Law § 120.05, subd 2) is not a lesser included offense of second degree attempted robbery (Penal Law § 160.10, subd 2(a)) or within the meaning of CPL § 1.20, subd 37. People v Flores, 42 A.D.2d 431, 348 N.Y.S.2d 425, 1973 N.Y. App. Div. LEXIS 3281 (N.Y. App. Div. 4th Dep't 1973).

Where it appeared that incident in back room of store where accomplice assaulted victims and appropriated a necklace was spontaneous and not related to original robbery plan, requisite mental culpability necessary to support defendant's conviction on additional counts of robbery in the second degree and of assault in the second degree was not established. People v Gwynn, 53 A.D.2d 565, 384 N.Y.S.2d 823, 1976 N.Y. App. Div. LEXIS 13188 (N.Y. App. Div. 1st Dep't 1976).

Assault in the second degree was not a lesser included offense of robbery where defendant used gratuitous violence during the robbery. People v Reynolds, 53 A.D.2d 877, 385 N.Y.S.2d 337, 1976 N.Y. App. Div. LEXIS 13707 (N.Y. App. Div. 2d Dep't 1976).

A conviction of assault in the second degree should not be dismissed as an inclusory concurrent count charging attempted robbery in the second degree pursuant to Penal Law § 160.10(2)(a), since, although when a verdict is comprised of conclusory concurrent counts a verdict of guilt on the greater count is deemed dismissal of every lesser count, assault in the second degree is not a lesser included offense of attempted robbery in the second degree in that both are class D felonies. People v Campbell, 86 A.D.2d 403, 450 N.Y.S.2d 210, 1982 N.Y. App. Div. LEXIS 15728 (N.Y. App. Div. 2d Dep't), app. denied, 57 N.Y.2d 684, 1982 N.Y. LEXIS 4146 (N.Y. 1982).

In a prosecution for attempted robbery in the first degree, a conviction for second-degree assault would be reversed since second-degree assault is not a lesser included offense of first-degree robbery in that it is possible to commit first-degree robbery without having the intent to injure, which is the gravamen of second-degree assault. People v Camilloni, 92 A.D.2d 745, 461 N.Y.S.2d 80, 1983 N.Y. App. Div. LEXIS 17069 (N.Y. App. Div. 4th Dep't 1983).

Assault in the second degree is an inclusory concurrent count of robbery in the second degree, and a guilty verdict of the greater offense required dismissal of the lesser offense. People v Wiley, 101 A.D.2d 818, 475 N.Y.S.2d 351, 1984 N.Y. App. Div. LEXIS 18479 (N.Y. App. Div. 2d Dep't), app. denied, 62 N.Y.2d 994, 1984 N.Y. LEXIS 8988 (N.Y. 1984).

Assault in second degree is not lesser included offense of attempted robbery in second degree. People v Walter R., 116 A.D.2d 673, 497 N.Y.S.2d 741, 1986 N.Y. App. Div. LEXIS 48175 (N.Y. App. Div. 2d Dep't 1986).

Charge of second degree assault was inclusory concurrent count of charge of second degree robbery, and guilty verdict on greater offense required dismissal of lesser offense. People v Dantzler, 123 A.D.2d 327, 506 N.Y.S.2d 220, 1986 N.Y. App. Div. LEXIS 60102 (N.Y. App. Div. 2d Dep't 1986).

Conviction of second degree assault would be reversed and count dismissed where defendant had also been convicted of second degree robbery since former is lesser included offense of latter. People v McGlynn, 129 A.D.2d 740, 514 N.Y.S.2d 500, 1987 N.Y. App. Div. LEXIS 45427 (N.Y. App. Div. 2d Dep't), app. denied, 70 N.Y.2d 801, 522 N.Y.S.2d 119, 516 N.E.2d 1232, 1987 N.Y. LEXIS 19499 (N.Y. 1987).

Defendant's acquittal on second and third degree robbery charges did not negate any essential element of his second degree assault conviction, and thus verdicts were not repugnant. People v Fasano, 129 A.D.2d 1004, 514 N.Y.S.2d 306, 1987 N.Y. App. Div. LEXIS 45701 (N.Y. App. Div. 4th Dep't), app. denied, 70 N.Y.2d 799, 522 N.Y.S.2d 117, 516 N.E.2d 1230, 1987 N.Y. LEXIS 19436 (N.Y. 1987).

Defendant charged with, inter alia, second degree robbery was improperly convicted of second degree assault allegedly committed during robbery, for once jury found him not guilty of second degree robbery, he could not be convicted of assault during robbery. People v Gillens, 138 A.D.2d 335, 526 N.Y.S.2d 460, 1988 N.Y. App. Div. LEXIS 3295 (N.Y. App. Div. 1st Dep't), app. denied, 72 N.Y.2d 859, 532 N.Y.S.2d 509, 528 N.E.2d 899, 1988 N.Y. LEXIS 3729 (N.Y. 1988).

Count charging defendant with second degree assault was inclusory concurrent count of second degree robbery; thus, guilty verdict on greater offense required dismissal of lesser offense. People v Rogers, 139 A.D.2d 782, 527 N.Y.S.2d 528, 1988 N.Y. App. Div. LEXIS 4509 (N.Y. App. Div. 2d Dep't 1988).

Defendant's second degree assault conviction under CLS Penal § 120.05(6) was not subject to dismissal as inclusory concurrent count of his first degree robbery conviction under CLS Penal § 160.15(3) since it is theoretically possible to use or threaten immediate use of dangerous instrument without also causing physical injury. People v Solomon, 141 A.D.2d 579, 529 N.Y.S.2d 188, 1988 N.Y. App. Div. LEXIS 6331 (N.Y. App. Div. 2d Dep't), app. denied, 72 N.Y.2d 913, 532 N.Y.S.2d 762, 528 N.E.2d 1235, 1988 N.Y. LEXIS 2891 (N.Y. 1988).

Defendant's acquittal on first degree robbery counts under CLS Penal §§ 160.10(2) and 160.15(3) did not require his acquittal on second degree assault count under CLS Penal § 120.05(2) since elements of such offenses do not overlap. People v Brooks, 154 A.D.2d 940, 546 N.Y.S.2d 69, 1989 N.Y. App. Div. LEXIS 13060 (N.Y. App. Div. 4th Dep't), app. denied, 75 N.Y.2d 768, 551 N.Y.S.2d 910, 551 N.E.2d 111, 1989 N.Y. LEXIS 4652 (N.Y. 1989).

Defendant's convictions of second degree assault would be reversed where he was also convicted of second degree robbery, of which second degree assault is lesser inclusory concurrent count. People v Brinson, 216 A.D.2d 900, 629 N.Y.S.2d 555, 1995 N.Y. App. Div. LEXIS 7222 (N.Y. App. Div. 4th Dep't), app. denied, 87 N.Y.2d 844, 638 N.Y.S.2d 603, 661 N.E.2d 1384, 1995 N.Y. LEXIS 5083 (N.Y. 1995).

Defendant's conviction of lesser included offense of second degree assault under CLS Penal § 120.05(6) would be reversed and that count dismissed since he was convicted of second degree robbery under CLS Penal § 160.10(2)(a). People v Tucker, 221 A.D.2d 670, 634 N.Y.S.2d 218, 1995 N.Y. App. Div. LEXIS 12421 (N.Y. App. Div. 2d Dep't 1995), app. denied, 87 N.Y.2d 978, 642 N.Y.S.2d 207, 664 N.E.2d 1270, 1996 N.Y. LEXIS 997 (N.Y. 1996).

Defendant's conviction of second degree assault would be reversed, and that count of indictment would be dismissed, where that offense was inclusory concurrent count of crime of second degree robbery, of which defendant was also convicted. People v Ross, 246 A.D.2d 561, 667 N.Y.S.2d 434, 1998 N.Y. App. Div. LEXIS 118 (N.Y. App. Div. 2d Dep't), app. denied, 91 N.Y.2d 1012, 676 N.Y.S.2d 140, 698 N.E.2d 969, 1998 N.Y. LEXIS 2089 (N.Y. 1998), app. dismissed, 92 N.Y.2d 985, 683 N.Y.S.2d 766, 706 N.E.2d 754, 1998 N.Y. LEXIS 4486 (N.Y. 1998).

Because the count of the indictment charging defendant with second-degree assault under N.Y. Penal Law § 120.05(6) was an inclusory, concurrent count of the second-degree robbery charge under N.Y. Penal Law § 160.10(2)(a) in the third count of the indictment, that assault count should have been dismissed. People v Maldonado, 46 A.D.3d 842, 847 N.Y.S.2d 649, 2007 N.Y. App. Div. LEXIS 12878 (N.Y. App. Div. 2d Dep't 2007), app. denied, 10 N.Y.3d 842, 859 N.Y.S.2d 400, 889 N.E.2d 87, 2008 N.Y. LEXIS 1730 (N.Y. 2008).

Defendant's conviction for assault in the second degree under N.Y. Penal Law § 120.05(6) was vacated as that offense was an inclusory concurrent count under N.Y. Crim. Proc. Law § 300.40(3)(b) of the crime of robbery in the second degree under N.Y. Penal Law § 160.10(2)(a) of which defendant was also convicted. People v Bailey, 54 A.D.3d 419, 862 N.Y.S.2d 296, 2008 N.Y. App. Div. LEXIS 6485 (N.Y. App. Div. 2d Dep't), app. denied, 11 N.Y.3d 853, 872 N.Y.S.2d 76, 900 N.E.2d 559, 2008 N.Y. LEXIS 4037 (N.Y. 2008).

Conviction of assault in the second degree, N.Y. Penal Law § 120.05(6) had to be vacated as that count was an inclusory concurrent count of defendant's conviction of second degree robbery, N.Y. Penal Law § 160.10(2)(a). People v Mitchell, 59 A.D.3d 739, 874 N.Y.S.2d 226, 2009 N.Y. App. Div. LEXIS 1415 (N.Y. App. Div. 2d Dep't), app. denied, 12 N.Y.3d 918, 884 N.Y.S.2d 699, 912 N.E.2d 1080, 2009 N.Y. LEXIS 3086 (N.Y. 2009).

Defendant's conviction for second-degree assault had to be vacated and that count of the indictment dismissed because it

was an inclusory concurrent count of second-degree robbery. People v Robinson, 117 A.D.3d 1099, 984 N.Y.S.2d 479, 2014 N.Y. App. Div. LEXIS 2913 (N.Y. App. Div. 3d Dep't), app. denied, 23 N.Y.3d 1059, 994 N.Y.S.2d 318, 18 N.E.3d 1139, 2014 N.Y. LEXIS 2565 (N.Y. 2014), app. denied, 23 N.Y.3d 1066, 994 N.Y.S.2d 325, 18 N.E.3d 1146, 2014 N.Y. LEXIS 2683 (N.Y. 2014).

Trial court properly denied defendant's motion to vacate his convictions for first- and second-degree robbery and second-degree assault because the victim testified to his account of the incident and the injuries he sustained when trying to retrieve his wallet from defendant, the police officers related how they apprehended defendant and found the victim's wallet and a box cutter in the same area, the assault conviction was not an inclusory concurrent count of the robbery convictions. People v Cruz, 152 A.D.3d 822, 57 N.Y.S.3d 753, 2017 N.Y. App. Div. LEXIS 5313 (N.Y. App. Div. 3d Dep't), app. denied, 30 N.Y.3d 1018, 93 N.E.3d 1215, 70 N.Y.S.3d 451, 2017 N.Y. LEXIS 3852 (N.Y. 2017).

In a prosecution for second-degree assault in which a prima facie case of assault in the second degree was proved under Penal Law § 120.05(2), but in which the prosecutor in arguing a motion to dismiss the assault charge made reference to Penal Law § 120.05(6) and to assaults committed in the course of the commission of the felony, the assault charge would be dismissed in light of the court's dismissal for failure to prove a prima facie case of the underlying felonies of attempted robbery and attempted grand larceny, since the policy considerations behind confining the prosecutor to proving what he sets forth in his response to a demand for a bill of particulars are equally present when he makes a statement under oath in response to a pretrial motion, and both the court and the respondent in a juvenile delinquency proceeding may rely on such a response, not only as an argument on the motion, but as a truthful statement of the prosecutor's position; there was nothing in either the bill of particulars or the petition to lead the respondent or any reasonable person to believe that the prosecution intended to prove anything other than what was stated in the prosecutor's oral argument. In re Elliton J., 120 Misc. 2d 392, 466 N.Y.S.2d 214, 1983 N.Y. Misc. LEXIS 3724 (N.Y. Fam. Ct. 1983).

11. —Possession of weapon

Possession of weapon by defendant who chased another person through streets of the city and shot at him several times, wounding him in the left leg and right shoulder, constituted a crime separate and independent from the crime of assault, with which defendant was also charged and of which he was also convicted. People v Hubbard, 48 A.D.2d 941, 369 N.Y.S.2d 34, 1975 N.Y. App. Div. LEXIS 10233 (N.Y. App. Div. 3d Dep't 1975).

A weapons possession count is not a lesser included offense of an attempted assault in the first degree count; each crime constitutes a separable and statutorily prescribed wrong. People v Fournier, 70 A.D.2d 491, 421 N.Y.S.2d 368, 1979 N.Y. App. Div. LEXIS 13075 (N.Y. App. Div. 2d Dep't), app. denied, 48 N.Y.2d 1030, 425 N.Y.S.2d 1049, 402 N.E.2d 150 (N.Y. 1979).

A jury's verdict finding defendant guilty of assault in the second degree is not repugnant to its verdict acquitting him of criminal possession of a weapon in the second degree, since the elements of these crimes are not identical, nor are said verdicts inconsistent, since the jury may have concluded that the defendant possessed the weapon initially without any intent to use it unlawfully, but that in the course of the altercation, he decided to and did use the weapon offensively, that is, beyond the lawful bounds of self-defense; in any event, verdicts which are inconsistent but not repugnant are valid. People v Garcia, 72 A.D.2d 356, 424 N.Y.S.2d 697, 1980 N.Y. App. Div. LEXIS 9690 (N.Y. App. Div. 1st Dep't), aff'd, 52 N.Y.2d 716, 436 N.Y.S.2d 273, 417 N.E.2d 567, 1980 N.Y. LEXIS 2833 (N.Y. 1980).

Jury's verdict of guilty of criminal possession of weapon in second degree was not repugnant to its acquittal of charge of assault in second degree where (1) elements of criminal possession of weapon were described in jury instructions as requiring only that jury find that defendant possessed loaded firearm with intent to use it unlawfully against another, and (2) elements of assault in second degree were described as requiring finding of intent on part of defendant to cause physical injury to victim, that defendant in fact caused such injury, and that such injury was caused by means of deadly weapon; jury could have concluded that defendant possessed weapon with intent to use it unlawfully against another, yet jury might not have been sufficiently convinced that defendant did actual shooting, or it might have entertained doubts as to whether defendant fired gun accidentally, or with intent only to frighten victim. People v Harris, 128 A.D.2d 432, 512 N.Y.S.2d 823, 1987 N.Y. App. Div. LEXIS 44139 (N.Y. App. Div. 1st Dep't 1987).

People were not collaterally estopped from reprosecuting defendant for third degree weapon possession following his acquittal of second degree assault since issue of defendant's possession of weapon was not fully and finally litigated inasmuch as jury could have rationally based its acquittal on assault count on finding that victim failed to sustain physical injury and not on its conclusion that defendant did not possess weapon. People v Marmorato, 138 A.D.2d 410, 525 N.Y.S.2d 693, 1988 N.Y. App. Div. LEXIS 2173 (N.Y. App. Div. 2d Dep't), app. denied, 71 N.Y.2d 970, 529 N.Y.S.2d 82, 524 N.E.2d 436, 1988 N.Y. LEXIS 1998 (N.Y. 1988).

In prosecution for second degree assault, evidence was sufficient to establish that complainant suffered physical injury within meaning of CLS Penal § 10.00(9) where he testified that he was beaten about his head and jaw, that his jaw was severely swollen, that he had lump on his head, and that he had blurred vision and headaches for several weeks after incident. People v Pike, 173 A.D.2d 649, 570 N.Y.S.2d 324, 1991 N.Y. App. Div. LEXIS 7670 (N.Y. App. Div. 2d Dep't), app. denied, 78 N.Y.2d 972, 574 N.Y.S.2d 952, 580 N.E.2d 424, 1991 N.Y. LEXIS 4520 (N.Y. 1991).

Criminal possession of weapon is not lesser included offense of assault; possession of weapon constitutes offense separate and distinct from its use. People v Mitchell, 216 A.D.2d 863, 628 N.Y.S.2d 914, 1995 N.Y. App. Div. LEXIS 7167 (N.Y. App. Div. 4th Dep't), app. denied, 86 N.Y.2d 798, 632 N.Y.S.2d 512, 656 N.E.2d 611, 1995 N.Y. LEXIS 4018 (N.Y. 1995).

12. Juveniles offenders

Child was properly adjudicated in Family Court to be juvenile delinquent where she responded to police officer's attempt to detain her on investigation of truancy with acts of resistance, including striking officer both before and after arrest, since, had acts been committed by adult, they would have constituted crimes of obstructing governmental administration, attempted second degree assault, and resisting arrest. In re Shannon B., 70 N.Y.2d 458, 522 N.Y.S.2d 488, 517 N.E.2d 203, 1987 N.Y. LEXIS 18970 (N.Y. 1987).

Evidence supported finding that juvenile committed acts which, if committed by adult, would constitute second degree robbery and second degree assault where complainant testified that he was "hurting badly" as result of juvenile's attack and was confined to bed for one month, and hospital records established that complainant suffered soft-tissue damage on his abdominal walls, thus satisfying element of "physical injury" as defined by CLS Penal § 10.00. In re Sean C., 124 A.D.2d 583, 507 N.Y.S.2d 729, 1986 N.Y. App. Div. LEXIS 61892 (N.Y. App. Div. 2d Dep't 1986).

Evidence supported determination that juvenile committed act which, if committed by adult, would have constituted attempted second degree assault where evidence showed that complainant viewed juvenile's face at close range under good lighting conditions when juvenile hit complainant with baseball bat, and that juvenile was previously known to complainant, who had seen him many times before incident. In re Sherwin S., 143 A.D.2d 756, 533 N.Y.S.2d 466, 1988 N.Y. App. Div. LEXIS 10070 (N.Y. App. Div. 2d Dep't 1988).

Evidence in juvenile delinquency proceeding was sufficient to support finding that juvenile committed act which, if committed by adult, would have constituted second degree assault where (1) juvenile testified that he struck fellow student during schoolroom argument after victim first hit him, (2) juvenile's own witness testified that, although victim made stabbing motion with pen toward juvenile, she did not touch him before he struck her, (3) both victim and teacher testified that victim did not strike juvenile, and (4) as result of juvenile's punch, victim suffered serious physical injury, including loss of tooth. In re Patrick W.,

166 A.D.2d 652, 561 N.Y.S.2d 78, 1990 N.Y. App. Div. LEXIS 12961 (N.Y. App. Div. 2d Dep't 1990).

Evidence supported finding that juvenile had committed acts which, if committed by adult, would have constituted second degree assault and fourth degree weapon possession, despite juvenile's contention that victim's description of occurrence revealed that she had no opportunity to observe identity of her assailant, where victim unequivocally testified that she observed juvenile shake open blade of box cutter and slash her arm. In re Judah J., 182 A.D.2d 621, 582 N.Y.S.2d 224, 1992 N.Y. App. Div. LEXIS 5634 (N.Y. App. Div. 2d Dep't 1992).

Evidence was insufficient to show that 13-year-old juvenile engaged in conduct which, if he were adult, would constitute second degree assault based merely on facts that he punched complainant once in jaw with unspecified amount of force and caused complainant substantial pain for one week, and temporary slight displacement of jaw and clicking of jaw, especially since displacement and clicking were expected to be resolved by conservative treatment in 2-6 months; however, evidence was sufficient to show that juvenile engaged in conduct which, if he were adult, would constitute third degree assault. In re Andre D., 182 A.D.2d 1108, 582 N.Y.S.2d 890, 1992 N.Y. App. Div. LEXIS 6989 (N.Y. App. Div. 4th Dep't 1992).

In juvenile delinquency proceeding based on acts that, if committed by adult, would be first, second, and third degree assault and second and third degree menacing, prompt hospital showup was not suggestive where juvenile did not prove that police officer told victim that he would be viewing individuals who had cut him. In re Lamar P., 255 A.D.2d 150, 682 N.Y.S.2d 127, 1998 N.Y. App. Div. LEXIS 11746 (N.Y. App. Div. 1st Dep't 1998).

Evidence supported adjudication of delinquency based on juvenile's commission of acts that would be crimes of attempted second degree assault, fourth degree weapon possession, and weapon possession by person under 16, and his defense of justification was disproved, where he sought out victim, initiated altercation with her, struck her, and stabbed her several times with scissors. In re Altagracia L., 266 A.D.2d 51, 698 N.Y.S.2d 457, 1999 N.Y. App. Div. LEXIS 11601 (N.Y. App. Div. 1st Dep't 1999), app. denied, 94 N.Y.2d 759, 706 N.Y.S.2d 80, 727 N.E.2d 577, 2000 N.Y. LEXIS 103 (N.Y. 2000).

Finding of juvenile delinquency would be upheld, despite discrepancies in testimony of school safety officers and inconsistency between their testimony and that of defense witness, where resolution of credibility issues was province of Family Court as finder of fact, and evidence supported juvenile's commission of acts that, if committed by adult, would be second degree assault and resisting arrest. In re Lamarr C., 273 A.D.2d 379, 711 N.Y.S.2d 729, 2000 N.Y. App. Div. LEXIS 7086 (N.Y. App. Div. 2d Dep't 2000).

Evidence supported finding of juvenile's delinquency where it could be reasonably inferred that she intended to cause physical injury when she hit victim repeatedly with chair leg, and thus she committed act that would be attempted second degree assault if committed by adult. In re Kyra C., 275 A.D.2d 678, 713 N.Y.S.2d 688, 2000 N.Y. App. Div. LEXIS 9937 (N.Y. App. Div. 1st Dep't 2000).

Juvenile was properly adjudicated delinquent where he committed acts that, if committed by adult, would be second degree assault, second degree menacing, and fourth degree weapon possession, and there was no reason to disturb court's decision to credit inculpatory part of victim's testimony. In re Nygee T., 281 A.D.2d 192, 721 N.Y.S.2d 528, 2001 N.Y. App. Div. LEXIS 2212 (N.Y. App. Div. 1st Dep't), app. denied, 96 N.Y.2d 716, 730 N.Y.S.2d 31, 754 N.E.2d 1114, 2001 N.Y. LEXIS 1906 (N.Y. 2001).

In juvenile delinquency proceedings in which it was alleged that the juvenile had committed acts which, if committed by an adult would have constituted assault in the first degree, assault in the second degree, and criminal possession of a weapon in the fourth degree, the District Attorney was not required to provide the juvenile with written notice of the fact that his identity was known to the complainant at the time of the crimes he allegedly committed or of the fact that the arresting officer was advised of the complainant's acquaintance with the juvenile, and therefore the juvenile's motion to preclude the identification testimony was denied. In re Darrold D., 111 Misc. 2d 189, 443 N.Y.S.2d 811, 1981 N.Y. Misc. LEXIS 3247 (N.Y. Fam. Ct. 1981).

Truant teenager may properly be charged with assault in second degree for his conduct in resisting officer's attempts to return him to school even though teenager's conduct, if directed against an attendance teacher trying to return him to school, would only constitute third degree assault. In re Julio R., 129 Misc. 2d 171, 492 N.Y.S.2d 912, 1985 N.Y. Misc. LEXIS 2733 (N.Y. Fam. Ct. 1985).

Where the family court found that defendant, a juvenile, committed acts that, if committed by an adult, would have constituted assault in the second degree under N.Y. Penal Law § 120.05, criminal possession of a weapon in the fourth degree in violation of N.Y. Penal Law § 265.01, and menacing in the second degree under N.Y. Penal Law § 120.14, the family court did not err in adjudicating defendant a juvenile delinquent; a preponderance of the evidence supported the family court's determination that defendant required supervision, treatment, or confinement pursuant to N.Y. Fam. Ct. Act § 352.1(1). In re Janay P., 11 A.D.3d 697, 783 N.Y.S.2d 293, 2004 N.Y. App. Div. LEXIS 12495 (N.Y. App. Div. 2d Dep't 2004).

Because the complainant sustained a "physical injury" within the meaning of N.Y. Penal Law § 10.00(9), the evidence was sufficient, beyond a reasonable doubt, to adjudicate a juvenile delinquent for committing the crimes of second- and third-degree assault under N.Y. Penal Law §§ 120.05(3), 120.00(1). Matter of Ashley M., 35 A.D.3d 612, 825 N.Y.S.2d 748, 2006 N.Y. App. Div. LEXIS 15013 (N.Y. App. Div. 2d Dep't 2006).

13. "Physical injury" established, generally

Whether the element of substantial pain necessary to establish a charge of assault in the second degree has been proved is generally a question for the trier of fact, and where there was testimony that a bullet fired by defendant caused a 1.5 inch laceration of the victim's back, the result of which was still visible at the time of trial and that the victim returned to the hospital the day following the assault to have the wound redressed because it was oozing, and where the doctor testified that the injury could have caused pain, the jury could infer that the pain was substantial even though the victim gave no testimony concerning the degree of pain he felt, the subjective reaction of the victim being but one factor for the jury to consider. People v Rojas, 61 N.Y.2d 726, 472 N.Y.S.2d 615, 460 N.E.2d 1100, 1984 N.Y. LEXIS 4024 (N.Y. 1984).

Evidence was sufficient for jury to find that victim of second degree assault suffered "physical injury" within meaning of CLS Penal § 10.00 where defendant tripped victim, sat on him, kicked him in ribs, and cut him over eye and on hand with knife, victim testified that he was "in terrible pains" and had "a lot" of pain, victim did not go to hospital but bled "all over" and had to wear bandages on lacerations for 3 weeks, and at time of trial victim had "permanent spots" on his hand as result of cuts. People v Greene, 70 N.Y.2d 860, 523 N.Y.S.2d 458, 517 N.E.2d 1344, 1987 N.Y. LEXIS 19069 (N.Y. 1987).

Proof was sufficient to establish physical injury by "impairment of physical condition" in prosecution for second degree assault, and first and second degree robbery, where complainant testified that victim hit him on forehead with barrel of pistol, causing wound that bled profusely, photographs taken 2 weeks later showed ½ -inch scar over complainant's right eye, and scar was still visible at time of trial more than 4 months later. People v Tejeda, 78 N.Y.2d 936, 573 N.Y.S.2d 633, 578 N.E.2d 431, 1991 N.Y. LEXIS 1007 (N.Y. 1991).

Jury at second degree assault trial was entitled to credit victim's testimony, regarding his sustaining "physical injury" or "substantial pain," that he lost sensation in his arm, that it became discolored and swollen, and that he suffered substantial pain as result of being struck with baseball bat; also, jury was entitled to believe victim's testimony that absence of medical intervention was due to his subjective ability to withstand pain and his lack of medical insurance. People v Guidice, 83 N.Y.2d 630, 612 N.Y.S.2d 350, 634 N.E.2d 951, 1994 N.Y. LEXIS 1065 (N.Y. 1994).

In prosecution for second degree assault, allegation in amended bill of particulars that defendant's acts caused victim substantial

head and shoulder pain did not preclude People from proving that defendant struck and damaged victim's eye. People v Wideman, 195 A.D.2d 582, 600 N.Y.S.2d 496, 1993 N.Y. App. Div. LEXIS 7396 (N.Y. App. Div. 2d Dep't), app. denied, 82 N.Y.2d 728, 602 N.Y.S.2d 826, 622 N.E.2d 327, 1993 N.Y. LEXIS 3750 (N.Y. 1993).

Defendant's convictions for four counts of assault in the second degree in violation of N.Y. Penal Law § 120.05(2), (7), were supported by legally sufficient evidence; head injuries to inmate and correction officer were sufficient to establish that each victim sustained a physical injury to support two of the assault counts. People v Conseillant, 289 A.D.2d 1048, 735 N.Y.S.2d 298, 2001 N.Y. App. Div. LEXIS 12808 (N.Y. App. Div. 4th Dep't 2001), app. denied, 98 N.Y.2d 674, 746 N.Y.S.2d 463, 774 N.E.2d 228, 2002 N.Y. LEXIS 2450 (N.Y. 2002).

Plaintiff's § 1983 and common-law false arrest claims must fail, where it is undisputed that plaintiff grabbed off-duty police officer and threw him so that he fell to ground, and then struck officer in face so hard that he suffered black eye and headaches for 6 months, even though plaintiff was acquitted of assault charges at trial, because testimony and grand jury findings show presence of probable cause to arrest plaintiff for assault in violation of CLS Penal Law § 120.05. Campanaro v City of Rome, 999 F. Supp. 277, 1998 U.S. Dist. LEXIS 4690 (N.D.N.Y. 1998).

Victim was whipped repeatedly all over his naked body with electrical extension cords and bound his arms and legs tightly, for long periods of time, with phone cable and speaker wire—the prosecutor, in describing the photographs of the victim taken at the time of the incident, noted that there were hundreds of marks all over his body—and when he evaluated and treated the child for his injuries at the hospital, the prosecution's medical doctor testified that he expected the scarring from the cuts and lacerations to be permanent, given the depth of the wounds. In light of this, it could not be said that the jury acted irrationally in concluding that the prosecutor had submitted sufficient evidence to prove, beyond a reasonable doubt, that the victim's injuries, caused by the inmate and his codefendant, caused serious and protracted disfigurement and therefore constituted serious physical injury as defined by N.Y. Penal Law § 10.00(9). Howard v McGinnis, 632 F. Supp. 2d 253, 2009 U.S. Dist. LEXIS 59768 (W.D.N.Y. 2009).

14. —First Department

Sufficient evidence was presented of the "physical injury" element, N.Y. Penal Law § 10.00(9), of second degree burglary, N.Y. Penal Law § 140.25, and second degree assault, N.Y. Penal Law § 120.05(6), because defendant's bite on the victim's finger had broken the fingernail and caused bleeding, the victim had testified that he suffered moderate pain, and the victim had sought medical treatment; defendant's motive was to escape the victim's hold and, thus, to cause as much pain as possible. People v Chiddick, 8 N.Y.3d 445, 834 N.Y.S.2d 710, 866 N.E.2d 1039, 2007 N.Y. LEXIS 895 (N.Y. 2007).

Victim of second degree assault suffered "protracted impairment of health" within meaning of CLS Penal § 10.00 based on evidence that she suffered fractured humerus requiring several weeks of immobilization. People v Mohammed, 162 A.D.2d 367, 557 N.Y.S.2d 35, 1990 N.Y. App. Div. LEXIS 7747 (N.Y. App. Div. 1st Dep't), app. denied, 76 N.Y.2d 861, 560 N.Y.S.2d 1001, 561 N.E.2d 901, 1990 N.Y. LEXIS 4005 (N.Y. 1990).

In trial for second degree robbery and second degree assault, jury's finding that victim sustained "physical injury" within meaning of CLS Penal § 10.00(9) was supported by evidence that defendant struck victim on forehead with pistol, resulting in wishbone-shaped scar about ½ inch in diameter. People v Tejeda, 165 A.D.2d 683, 560 N.Y.S.2d 142, 1990 N.Y. App. Div. LEXIS 11015 (N.Y. App. Div. 1st Dep't 1990), aff'd, 78 N.Y.2d 936, 573 N.Y.S.2d 633, 578 N.E.2d 431, 1991 N.Y. LEXIS 1007 (N.Y. 1991).

There was sufficient evidence of physical injury as defined in CLS Penal § 10.00(9) to support second degree assault conviction where (1) shot fired by defendant entered victim's body and exited within one inch of victim's spine causing 2 wounds, and (2) although physician testified that wounds were classified as superficial, victim testified that he was in great pain and suffered substantial discomfort such that, at time of trial, he still experienced pain in bending and certain movements. People v Ramos, 168 A.D.2d 352, 562 N.Y.S.2d 676, 1990 N.Y. App. Div. LEXIS 15485 (N.Y. App. Div. 1st Dep't 1990), app. denied, 77 N.Y.2d 910, 569 N.Y.S.2d 942, 572 N.E.2d 625, 1991 N.Y. LEXIS 1812 (N.Y. 1991).

Evidence of physical injury was sufficient to sustain conviction for second degree assault where victim suffered pain in neck, back, and leg for several days after she was dragged by defendant's automobile, she required medication, and she missed several days of work because she was unable to turn her head completely. People v Usman, 181 A.D.2d 628, 582 N.Y.S.2d 105, 1992 N.Y. App. Div. LEXIS 5189 (N.Y. App. Div. 1st Dep't), app. denied, 79 N.Y.2d 1055, 584 N.Y.S.2d 1023, 596 N.E.2d 421, 1992 N.Y. LEXIS 2949 (N.Y. 1992).

In trial for second degree assault in which defendant admitted that he attacked victim with broken glass bottle, proof established that victim sustained physical injury within meaning of CLS Penal § 10.00(9) where victim sustained pair of 2-inch lacerations to his face which caused him to bleed profusely and required 22 stitches. People v John, 186 A.D.2d 442, 589 N.Y.S.2d 24, 1992 N.Y. App. Div. LEXIS 12057 (N.Y. App. Div. 1st Dep't 1992), app. denied, 81 N.Y.2d 790, 594 N.Y.S.2d 736, 610 N.E.2d 409, 1993 N.Y. LEXIS 455 (N.Y. 1993).

Evidence was sufficient to establish physical injury element of second degree burglary and second degree assault where victim testified that, as result of being punched in chest, he coughed blood for 3 weeks and was in pain and unable to work, and that even at time of trial he was unable to resume heavy work and occasionally suffered chest pains. People v Rivera, 187 A.D.2d 379, 590 N.Y.S.2d 197, 590 N.Y.S.2d 99, 1992 N.Y. App. Div. LEXIS 13131 (N.Y. App. Div. 1st Dep't 1992), app. denied, 81 N.Y.2d 793, 594 N.Y.S.2d 740, 610 N.E.2d 413, 1993 N.Y. LEXIS 535 (N.Y. 1993).

Evidence of substantial pain was sufficient to support conviction for second degree assault where (1) defendant was apprehended after she stole wallet from victim's shoulder bag in store, (2) during struggle with security guard, she bit him in hand and scratched his arm, (3) security guard testified to his substantial pain, that he was transported to hospital by ambulance, that tetanus shot was required, and that his use of arm was restricted for 2 weeks, and (4) responding police officer testified to his observation that bite mark was bleeding and that security guard was visibly upset about his injuries. People v Durant, 190 A.D.2d 615, 593 N.Y.S.2d 819, 1993 N.Y. App. Div. LEXIS 1651 (N.Y. App. Div. 1st Dep't), app. denied, 81 N.Y.2d 1013, 600 N.Y.S.2d 201, 616 N.E.2d 858, 1993 N.Y. LEXIS 2427 (N.Y. 1993).

Evidence established physical injury in trial for second and third degree assault where victims, who were police officers, sustained partial shoulder separation and broken bone in hand. People v Lasanta, 203 A.D.2d 64, 609 N.Y.S.2d 606, 1994 N.Y. App. Div. LEXIS 3591 (N.Y. App. Div. 1st Dep't 1994).

In trial for second degree assault and second degree robbery, proof established that victim suffered "physical injury" under CLS Penal § 10.00(9) where victim testified that scuffle with defendant resulted in his sustaining "split lip" and "swollen" mouth, lasting almost one week, and causing him "sharp" pain that made it difficult for him to eat, and that he also received cut over his eye which had moderate swelling and caused him "pain like a headache" which was "sharp." People v Dailey, 222 A.D.2d 278, 650 N.Y.S.2d 637, 1995 N.Y. App. Div. LEXIS 12866 (N.Y. App. Div. 1st Dep't 1995), app. denied, 87 N.Y.2d 971, 642 N.Y.S.2d 201, 664 N.E.2d 1264, 1996 N.Y. LEXIS 841 (N.Y. 1996).

"Physical injury" was sufficiently established in prosecution for second degree assault by evidence that victim was struck twice in head with stick, causing bruises and cut on his forehead that required 3 stitches and resulted in permanent scar. People v Rivera, 223 A.D.2d 514, 637 N.Y.S.2d 377, 1996 N.Y. App. Div. LEXIS 712 (N.Y. App. Div. 1st Dep't), app. denied, 88 N.Y.2d 884, 645 N.Y.S.2d 458, 668 N.E.2d 429, 1996 N.Y. LEXIS 2283 (N.Y. 1996).

Physical injury element was shown by victim's testimony, corroborated by 2 police witnesses, that she sustained red mark under her eye and suffered permanent hair loss as result of incident, and that she temporarily lost consciousness and felt "a lot of pain" in her back for over one week. People v Ganz, 224

A.D.2d 190, 637 N.Y.S.2d 136, 1996 N.Y. App. Div. LEXIS 817 (N.Y. App. Div. 1st Dep't), app. denied, 88 N.Y.2d 878, 645 N.Y.S.2d 453, 668 N.E.2d 424, 1996 N.Y. LEXIS 2153 (N.Y. 1996).

Serious physical injury element of second degree assault was shown by facts that victim's jaw was fractured in 2 places, left side of his jaw was shattered, and he lost 2 teeth, necessitating 2 separate surgical procedures, causing his jaw to be closed for at least 3 months. People v Martinez, 224 A.D.2d 254, 637 N.Y.S.2d 698, 1996 N.Y. App. Div. LEXIS 1019 (N.Y. App. Div. 1st Dep't), app. denied, 88 N.Y.2d 989, 649 N.Y.S.2d 396, 672 N.E.2d 622, 1996 N.Y. LEXIS 3635 (N.Y. 1996).

Legally sufficient proof of "physical injury" was adduced by second degree robbery and assault victim's testimony that, as result of incident, he sustained scrapes to his hip, knee, hand and arm, throbbing pain in his head and neck, pain in his foot, dizziness, and rise in blood pressure, and that he continued to have pain in his hip, leg and knee for 2 or 3 days. People v Kim, 225 A.D.2d 496, 639 N.Y.S.2d 813, 1996 N.Y. App. Div. LEXIS 3281 (N.Y. App. Div. 1st Dep't), app. denied, 88 N.Y.2d 987, 649 N.Y.S.2d 394, 672 N.E.2d 620, 1996 N.Y. LEXIS 3559 (N.Y. 1996).

Physical injury element of second degree assault was shown by fact that victim suffered inch-deep stab wound near kidneys, resulting in, inter alia, overnight hospitalization with use of catheter and intravenous fluids to relieve difficult urination. People v Amon-Ra, 239 A.D.2d 200, 657 N.Y.S.2d 409, 1997 N.Y. App. Div. LEXIS 5159 (N.Y. App. Div. 1st Dep't), app. denied, 90 N.Y.2d 901, 663 N.Y.S.2d 513, 686 N.E.2d 225, 1997 N.Y. LEXIS 3280 (N.Y. 1997).

Evidence that victim suffered razor-induced injuries that necessitated medical treatment, including suturing, was sufficient to demonstrate physical injury as element of second degree assault. People v Carter, 265 A.D.2d 211, 696 N.Y.S.2d 808, 1999 N.Y. App. Div. LEXIS 10372 (N.Y. App. Div. 1st Dep't), app. denied, 94 N.Y.2d 861, 704 N.Y.S.2d 536, 725 N.E.2d 1098, 1999 N.Y. LEXIS 4402 (N.Y. 1999).

Evidence showed that victim sustained serious physical injury where he had multiple lacerations to his face and head that required sutures, including 2 large lacerations to his back that required more than dozen sutures each and that left permanent disfiguring scars. People v Edmonds, 267 A.D.2d 19, 699 N.Y.S.2d 54, 1999 N.Y. App. Div. LEXIS 12404 (N.Y. App. Div. 1st Dep't), app. denied, 94 N.Y.2d 862, 704 N.Y.S.2d 537, 725 N.E.2d 1099, 1999 N.Y. LEXIS 4432 (N.Y. 1999).

Element of physical injury required for conviction of second degree robbery and second degree assault was proved by testimony that officer was punched hard in face, causing swelling and tearing of eyes and requiring application of ice packs, and that, for about one week, officer had difficulty reading and sleeping and needed pain medication. People v Rollins, 273 A.D.2d 159, 712 N.Y.S.2d 7, 2000 N.Y. App. Div. LEXIS 7502 (N.Y. App. Div. 1st Dep't), app. denied, 95 N.Y.2d 938, 721 N.Y.S.2d 614, 744 N.E.2d 150, 2000 N.Y. LEXIS 4097 (N.Y. 2000).

In prosecution for second degree assault, element of physical injury was proved where jury could have reasonably concluded that victim's bloody stab wounds, which required stitching and produced scars, caused both impairment of physical condition and substantial pain. People v Rivers, 281 A.D.2d 342, 722 N.Y.S.2d 520, 2001 N.Y. App. Div. LEXIS 3201 (N.Y. App. Div. 1st Dep't), app. denied, 96 N.Y.2d 906, 730 N.Y.S.2d 804, 756 N.E.2d 92, 2001 N.Y. LEXIS 2919 (N.Y. 2001).

There was sufficient evidence to conclude that a victim suffered "physical injury" within the meaning of N.Y. Penal Law § 120.05(2) because (1) the victim testified that when defendant struck him on the head with a revolver, he temporarily lost consciousness and awoke bleeding and in pain; (2) the physician and hospital records established that the victim's head was cut and that staples were used to close the wound; and (3) the victim further testified that when he woke the next morning, his jaw was swollen, his face was numb, and he had difficulty eating. People v Samba, 97 A.D.3d 411, 948 N.Y.S.2d 58, 2012 N.Y. App. Div. LEXIS 5242 (N.Y. App. Div. 1st Dep't 2012), app. denied, 20 N.Y.3d 1065, 962 N.Y.S.2d 616, 985 N.E.2d 926, 2013 N.Y. LEXIS 426 (N.Y. 2013), app. denied, 20 N.Y.3d 1065, 962 N.Y.S.2d 616, 985 N.E.2d 926, 2013 N.Y. LEXIS 431 (N.Y. 2013).

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Defendant was properly convicted of second-degree assault because the victim suffered "physical injury," defendant's request for a charge on justification was properly denied inasmuch as there was nothing in the record to suggest that he was surrounded and/or that the victim brandished a knife, defendant's absence from the midtrial discussion of the facts underlying his prior conviction did not deprive him of an "opportunity for meaningful input" since the information imparted to the court and counsel, in defendant's absence, was specifically ruled on by the court in defendant's presence, and after defendant was informed of the information in an off-the-record conversation with his attorney, he did not testify. People v Alejandro, 156 A.D.3d 572, 68 N.Y.S.3d 62, 2017 N.Y. App. Div. LEXIS 9340 (N.Y. App. Div. 1st Dep't 2017), app. denied, 31 N.Y.3d 1077, 103 N.E.3d 1246, 79 N.Y.S.3d 99, 2018 N.Y. LEXIS 1873 (N.Y. 2018).

15. —Second Department

Evidence sustained second degree assault conviction although victim did not describe his pain since his testimony that pain lasted 2-3 weeks established its severity; furthermore, fact that he was dragged by his legs down flight of stairs while being punched provided basis for inference that pain was substantial. People v Hope, 128 A.D.2d 638, 512 N.Y.S.2d 885, 1987 N.Y. App. Div. LEXIS 44331 (N.Y. App. Div. 2d Dep't 1987).

Victim who was struck in face by defendant suffered "physical injury" within meaning of CLS Penal § 10.00 where he sustained swelling below his eye, was diagnosed as suffering from myalgia, required 5 days' bed rest and application of warm compresses and muscle relaxant, experienced throbbing pain for 2 to 3 days, and missed 4 days of work; thus, second degree assault conviction was proper. People v Sherrod, 132 A.D.2d 683, 518 N.Y.S.2d 53, 1987 N.Y. App. Div. LEXIS 49225 (N.Y. App. Div. 2d Dep't 1987).

Evidence of 72-year-old victim's physical injury was sufficient to sustain second degree assault charge where victim testified that she still felt pain in her arm 6 weeks after incident. In re Jaja E., 134 A.D.2d 588, 521 N.Y.S.2d 490, 1987 N.Y. App. Div. LEXIS 50796 (N.Y. App. Div. 2d Dep't 1987).

Evidence was sufficient to show that complainant sustained "physical injury," and to support conviction of second degree assault, where it was shown that defendant punched and kicked complainant in shoulder, ribs and legs, complainant received medical treatment immediately after attack, complainant's face was swollen, he had black eye and experienced pain, and he missed work for 3 weeks. People v Singleton, 140 A.D.2d 388, 527 N.Y.S.2d 867, 1988 N.Y. App. Div. LEXIS 4678 (N.Y. App. Div. 2d Dep't 1988).

Evidence was sufficient to establish that victim suffered "physical injury" in prosecution for second degree robbery and second degree assault where (1) victim testified, inter alia, that defendant had cut him in shoulder and he did not go to work next day, (2) police officer stated that he saw cut "possibly two inches maybe two and a half inches, long" on victim's right shoulder 3 days after crime, and (3) second police officer stated that he saw cut on victim's right shoulder 5 days after crime. People v Ball, 140 A.D.2d 447, 528 N.Y.S.2d 149, 1988 N.Y. App. Div. LEXIS 5052 (N.Y. App. Div. 2d Dep't), app. denied, 72 N.Y.2d 954, 534 N.Y.S.2d 668, 531 N.E.2d 300, 1988 N.Y. LEXIS 4011 (N.Y. 1988).

Evidence was sufficient to establish that police officer attacked by defendant suffered physical injury within meaning of CLS Penal §§ 10.00(9) and 120.05(3) where officer testified (1) that, as result of defendant punching him, his nose became reddened and

bloody and caused him to be absent from work for 2 days, (2) that pain persisted for few days, and (3) that he sought medical treatment at local hospital where his nose was X-rayed. People v Lundquist, 151 A.D.2d 505, 542 N.Y.S.2d 295, 1989 N.Y. App. Div. LEXIS 7393 (N.Y. App. Div. 2d Dep't), app. denied, 74 N.Y.2d 849, 546 N.Y.S.2d 1014, 546 N.E.2d 197, 1989 N.Y. LEXIS 3910 (N.Y. 1989).

In trial for second degree assault and second degree robbery, victim's testimony was sufficient to establish physical injury where she stated that she suffered physical pain for few days after incident as result of swollen glands from being choked and having chains pulled from around her neck, and from being seized by her neck and thrown down stairs. People v Vaughn, 155 A.D.2d 566, 547 N.Y.S.2d 587, 1989 N.Y. App. Div. LEXIS 14224 (N.Y. App. Div. 2d Dep't 1989).

Proof established that victim sustained physical injury as defined in CLS Penal § 10.00(9) so as to support second degree assault conviction where (1) defendant hit victim with his fist on side of her face and around her eye, (2) victim testified that whole side of her head was "killing" her and that pain continued for about one week, and (3) eyewitness testified that, after assault, victim was crying and had bruises on her face. People v Nix, 156 A.D.2d 722, 549 N.Y.S.2d 476, 1989 N.Y. App. Div. LEXIS 16450 (N.Y. App. Div. 2d Dep't 1989), app. denied, 75 N.Y.2d 870, 553 N.Y.S.2d 302, 552 N.E.2d 881, 1990 N.Y. LEXIS 856 (N.Y. 1990).

Second degree assault conviction for closing car window on arresting officer's arm would be affirmed where officer's testimony regarding extent and duration of pain, as well as his testimony concerning limitation of use and discoloration of arm, sufficed to show that he suffered "physical injury" as contemplated by CLS Penal § 10.00(9). People v Campbell, 157 A.D.2d 738, 550 N.Y.S.2d 33, 1990 N.Y. App. Div. LEXIS 493 (N.Y. App. Div. 2d Dep't 1990).

Police officer sustained physical injury within meaning of CLS Penal § 10.00(9) in assault by defendant where (1) officer testified that defendant choked him until he felt dizzy and scratched his neck and face, (2) officer further testified that he suffered very bad sore throat and sought emergency room treatment, he radioed station house to report incident and had to repeat himself several times to be heard, he lost his voice several times over next few days, and he could not eat solid foods for several days, and (3) another officer testified that injured officer still could not eat solid foods 3 days after assault. People v Daniels, 159 A.D.2d 631, 553 N.Y.S.2d 30, 1990 N.Y. App. Div. LEXIS 2971 (N.Y. App. Div. 2d Dep't), app. denied, 76 N.Y.2d 786, 559 N.Y.S.2d 992, 559 N.E.2d 686, 1990 N.Y. LEXIS 2660 (N.Y. 1990).

Evidence at trial for first degree burglary and second degree assault that defendant threw 10-inch-long knife at victim, striking her in hand, forearm and chest, and requiring 7 stitches, supported finding by jury that pain suffered by her was substantial, and that she suffered "physical injury" under CLS Penal § 10.00. People v Sutton, 161 A.D.2d 612, 555 N.Y.S.2d 187, 1990 N.Y. App. Div. LEXIS 5360 (N.Y. App. Div. 2d Dep't), app. denied, 76 N.Y.2d 866, 560 N.Y.S.2d 1006, 561 N.E.2d 906, 1990 N.Y. LEXIS 4125 (N.Y. 1990).

In trial for second degree assault under CLS Penal § 120.05(2), evidence supported jury's finding that victim suffered "physical injury" within meaning of CLS Penal § 10.00(9), since victim's vision in his left eye was impaired as result of assault. People v Goode, 179 A.D.2d 676, 578 N.Y.S.2d 611, 1992 N.Y. App. Div. LEXIS 246 (N.Y. App. Div. 2d Dep't), app. denied, 79 N.Y.2d 1001, 584 N.Y.S.2d 456, 594 N.E.2d 950, 1992 N.Y. LEXIS 2700 (N.Y. 1992).

In prosecution for, inter alia, second degree assault, evidence was sufficient to establish that victim suffered "physical injury" within meaning of CLS Penal § 10.00(9) where, as result of beating with metal handle of cane on head and face, victim bled profusely from head and face, sustained abrasion and swelling on right rear portion of skull, sustained large swelling and was diagnosed as having possible fracture near left eye, was given ice pack and medication, and subsequently had to wear corrective lenses as result of incident. People v Branch, 181 A.D.2d 902, 582 N.Y.S.2d 26, 1992 N.Y. App. Div. LEXIS 5237 (N.Y. App. Div. 2d Dep't), app. denied, 80 N.Y.2d 828, 587 N.Y.S.2d 913, 600 N.E.2d 640, 1992 N.Y. LEXIS 1971 (N.Y. 1992).

Evidence was sufficient to establish that 2 court officers suffered "physical injury" within meaning of CLS Penal § 10.00(9) so as to support convictions for 2 counts of second degree assault where first officer testified that both of his elbows were swollen, that he had one-inch laceration on left elbow, that both of his knees were swollen and discolored, that he had bruise on left shin that was bleeding, that he was treated at hospital emergency room and by orthopedic doctor for injuries to his knees, that he missed 3 days of work, and that he suffered from pain for 3 weeks, and second officer testified that he suffered scratches on his hands, bruises on his arms and shin, and swollen ankle, that he was treated by emergency medical technician, and that his ankle remained swollen and tender for 3 to 4 days after incident. People v Soto, 184 A.D.2d 673, 584 N.Y.S.2d 877, 1992 N.Y. App. Div. LEXIS 8075 (N.Y. App. Div. 2d Dep't), app. denied, 80 N.Y.2d 910, 588 N.Y.S.2d 835, 602 N.E.2d 243, 1992 N.Y. LEXIS 3741 (N.Y. 1992).

Evidence was sufficient to establish "physical injury" element of second degree assault in support of delinquency adjudication stemming from juvenile's participation in stealing car and endangering life of police officer, who was hit by car, propelled onto hood, carried on hood as vehicle proceeded at high speed, and eventually thrown to pavement when vehicle swerved, where (1) officer testified that he experienced extreme pain and was admitted to hospital for 3 days, (2) hospital records documented complaints of pain and noted swelling of ankles, cerebral hemorrhage, multiple contusions, concussion, dizziness and back pain, and (3) officer also testified that he continued to experience back problems necessitating bi-weekly visits to chiropractor. In re Effrin G., 185 A.D.2d 812, 586 N.Y.S.2d 313, 1992 N.Y. App. Div. LEXIS 9829 (N.Y. App. Div. 2d Dep't 1992), app. denied, 81 N.Y.2d 705, 595 N.Y.S.2d 399, 611 N.E.2d 300, 1993 N.Y. LEXIS 265 (N.Y. 1993).

Physical injury element of second degree assault was established where complainant testified that as result of beating administered by defendant, she continued to suffer pain in her left arm at time of trial, nearly 2 years after crime. People v Machado, 188 A.D.2d 665, 591 N.Y.S.2d 509, 1992 N.Y. App. Div. LEXIS 14595 (N.Y. App. Div. 2d Dep't 1992), app. denied, 81 N.Y.2d 888, 597 N.Y.S.2d 950, 613 N.E.2d 982, 1993 N.Y. LEXIS 1474 (N.Y. 1993).

In second degree assault trial, evidence established that officer struck by defendant suffered physical injury where officer testified (1) that he became dizzy from blow and was unable to drive his vehicle for 20 minutes, and that he was prescribed pain medication for throbbing in his head, (2) that he missed work and suffered stiffness in his neck and pounding in his head for 2 to 3 weeks, and (3) that bump on his head swelled from size of golfball to size of half of softball. People v Coker, 190 A.D.2d 814, 593 N.Y.S.2d 857, 1993 N.Y. App. Div. LEXIS 1452 (N.Y. App. Div. 2d Dep't), app. denied, 81 N.Y.2d 1012, 600 N.Y.S.2d 200, 616 N.E.2d 857, 1993 N.Y. LEXIS 2405 (N.Y. 1993).

Evidence was sufficient to establish physical injury element of second degree assault where (1) victim testified that she received multiple knife wounds and that she suffered "a lot of pain," (2) People submitted hospital records regarding injuries, and (3) victim exhibited scars from attack to jury. People v Easterling, 191 A.D.2d 579, 594 N.Y.S.2d 805, 1993 N.Y. App. Div. LEXIS 2294 (N.Y. App. Div. 2d Dep't 1993).

Evidence was sufficient to establish that police officers suffered physical injuries within meaning of CLS Penal § 10.00(9) during assaults by defendant where each officer missed several days of work as result of injuries sustained, each received medical attention for injuries, and each suffered pain. People v Morgan, 191 A.D.2d 649, 595 N.Y.S.2d 237, 1993 N.Y. App. Div. LEXIS 2650 (N.Y. App. Div. 2d Dep't), app. denied, 81 N.Y.2d 1077, 601 N.Y.S.2d 597, 619 N.E.2d 675, 1993 N.Y. LEXIS 2869 (N.Y. 1993).

Evidence of physical injury to victim was sufficient to support defendant's convictions of second degree robbery and second and third degree assault where (1) defendant and 2 others accosted slightly built, 63-year-old victim from behind, knocked and punched him to ground and proceeded to swing him around by his

belt, slamming him into ground and hitting and kicking him about face and chest, and (2) victim's eyes were blackened and swollen, he was bleeding and complained of chest pain when admitted to hospital, and one eyewitness described victim as looking like "Rocky." People v Butler, 192 A.D.2d 543, 596 N.Y.S.2d 93, 1993 N.Y. App. Div. LEXIS 3405 (N.Y. App. Div. 2d Dep't), app. denied, 82 N.Y.2d 715, 602 N.Y.S.2d 812, 622 N.E.2d 313, 1993 N.Y. LEXIS 3418 (N.Y. 1993).

Evidence was sufficient to establish physical injury element of second degree assault where victim, who was police officer, suffered sharp burning pain in knee, had difficulty on walking, missed 3 days of work, and was advised to keep knee elevated and to take medication to relieve pain. People v Piersa, 196 A.D.2d 896, 602 N.Y.S.2d 155, 1993 N.Y. App. Div. LEXIS 8753 (N.Y. App. Div. 2d Dep't), app. denied, 82 N.Y.2d 901, 610 N.Y.S.2d 168, 632 N.E.2d 478, 1993 N.Y. LEXIS 5078 (N.Y. 1993).

Evidence was sufficient to establish physical injury element of second degree assault where (1) defendant struck victim, who was parole officer, on chin, wrist, hand, elbow and forearm, (2) officer suffered from extreme pain, and his forearm was bruised, (3) officer's range of motion was limited in his forearm and neck, he could not hold weapon and he missed one week of work, and (4) officer sought medical treatment and was given medication and neck brace. People v Simmons, 196 A.D.2d 900, 602 N.Y.S.2d 154, 1993 N.Y. App. Div. LEXIS 8757 (N.Y. App. Div. 2d Dep't 1993), app. denied, 82 N.Y.2d 931, 610 N.Y.S.2d 183, 632 N.E.2d 493, 1994 N.Y. LEXIS 5343 (N.Y. 1994).

Evidence sustained jury's finding that police officer victim suffered "physical injury" within purview of CLS Penal § 10.00(9), and thus supported second degree assault conviction under CLS Penal § 120.05, where (1) at time of his arrest, defendant kicked officer, knocking him to ground, (2) officer landed on his knees, which became bruised and swollen and required immediate medical attention, (3) officer took prescribed pain medication and missed 9 days of work, and (4) at time of trial (14 months after incident), officer still experienced pain in knees. People v Daniels, 199 A.D.2d 332, 605 N.Y.S.2d 106, 1993 N.Y. App. Div. LEXIS 11862 (N.Y. App. Div. 2d Dep't 1993), app. denied, 83 N.Y.2d 804, 611 N.Y.S.2d 140, 633 N.E.2d 495, 1994 N.Y. LEXIS 487 (N.Y. 1994).

Evidence of victim's physical injury was sufficient to sustain defendant's conviction of second degree assault where victim (police officer) testified that he went to hospital to have injuries treated, that he missed 2 days of work because of injuries, and that he still had problems with his hand at time of trial 10 months after defendant resisted arrest. People v Curry, 199 A.D.2d 528, 605 N.Y.S.2d 410, 1993 N.Y. App. Div. LEXIS 12268 (N.Y. App. Div. 2d Dep't 1993), app. denied, 83 N.Y.2d 870, 613 N.Y.S.2d 131, 635 N.E.2d 300, 1994 N.Y. LEXIS 1918 (N.Y. 1994).

Evidence was sufficient to establish "physical injury" element of second degree assault by virtue of injury to officer's hand in course of struggle with defendant where (1) hand was swollen, black and blue, and stiff, (2) officer sought medical treatment, (3) injury was painful, and (4) officer was not able to return to work until 4 days after incident. People v Sheppard, 202 A.D.2d 701, 609 N.Y.S.2d 318, 1994 N.Y. App. Div. LEXIS 2932 (N.Y. App. Div. 2d Dep't), app. denied, 83 N.Y.2d 1007, 616 N.Y.S.2d 488, 640 N.E.2d 156, 1994 N.Y. LEXIS 3265 (N.Y. 1994).

In trial for second degree burglary and second and third degree assault, evidence established element of physical injury where supervising nurse who was attacked by defendant testified that she suffered substantial pain and that pain lasted over several months. People v Ayuso, 204 A.D.2d 472, 614 N.Y.S.2d 162, 1994 N.Y. App. Div. LEXIS 4780 (N.Y. App. Div. 2d Dep't), app. denied, 83 N.Y.2d 964, 616 N.Y.S.2d 16, 639 N.E.2d 756, 1994 N.Y. LEXIS 2351 (N.Y. 1994).

Indeterminate sentence of imprisonment of 5 to 15 years imposed for second degree assault was illegal since maximum sentence for that offense committed before October 1, 1995 was $2^1/_3$ to 7 years. People v Bates, 233 A.D.2d 937, 649 N.Y.S.2d 878, 1996 N.Y. App. Div. LEXIS 13479 (N.Y. App. Div. 4th Dep't 1996).

In second degree assault trial, jury could reasonably have inferred that police officer suffered substantial pain and impairment of his physical condition when kicked in chest by defendant where officer had black and blue marks and required medical treatment including application of ice packs and use of pain relievers. People v Belk, 241 A.D.2d 552, 661 N.Y.S.2d 239, 1997 N.Y. App. Div. LEXIS 8146 (N.Y. App. Div. 2d Dep't), app. denied, 90 N.Y.2d 938, 664 N.Y.S.2d 756, 687 N.E.2d 653, 1997 N.Y. LEXIS 3736 (N.Y. 1997).

Sufficient evidence of a physical injury to support a conviction for assault in the second degree under N.Y. Penal Law § 120.05 was presented because the victim testified that she sustained a cut to her ear which caused bleeding as well as bruising on her face after defendant struck her head with a television remote control; "substantial pain" under N.Y. Penal Law § 10.00(9) was demonstrated by testimony that the victim experienced pain for two weeks. People v Krotoszynski, 43 A.D.3d 450, 840 N.Y.S.2d 627, 2007 N.Y. App. Div. LEXIS 9065 (N.Y. App. Div. 2d Dep't), app. denied, 9 N.Y.3d 962, 848 N.Y.S.2d 31, 878 N.E.2d 615, 2007 N.Y. LEXIS 3664 (N.Y. 2007).

Because defendant caused physical injury to a police officer with the intent to prevent the officer from performing a lawful duty, and because defendant also caused serious physical injury to a bystander in the course of and in furtherance of the commission of a felony or immediate flight therefrom, defendant was properly convicted of first- and second-degree assault under N.Y. Penal Law §§ 120.05(3), 120.10(4). People v Jenkins, 49 A.D.3d 780, 853 N.Y.S.2d 629, 2008 N.Y. App. Div. LEXIS 2590 (N.Y. App. Div. 2d Dep't), app. denied, 10 N.Y.3d 935, 862 N.Y.S.2d 342, 892 N.E.2d 408, 2008 N.Y. LEXIS 2421 (N.Y. 2008).

Legally insufficient evidence was presented to show that a victim suffered a physical injury due to substantial pain as defined by N.Y. Penal Law §§ 10.00(9), 160.10(2), 120.05(6) based on evidence that defendant repeatedly banged the victim's head on her car door, causing her to sustain a black eye and bruising on her face, neck, and shoulders and to experience pain for almost a week; defendant was properly convicted of robbery in the second degree and assault in the second degree. People v Valencia, 50 A.D.3d 1163, 856 N.Y.S.2d 250, 2008 N.Y. App. Div. LEXIS 3907 (N.Y. App. Div. 2d Dep't), app. denied, 11 N.Y.3d 795, 866 N.Y.S.2d 622, 896 N.E.2d 108, 2008 N.Y. LEXIS 3803 (N.Y. 2008).

Where the victim was directed by defendant to get back into the car, threatened and told to obtain money for the defendant and then driven to his grandfather's house and to get money for the defendant, and these acts were committed after an assault was completed, they constituted a separate crime and the merger doctrine was inapplicable. People v Howard, 305 A.D.2d 869, 761 N.Y.S.2d 115, 2003 N.Y. App. Div. LEXIS 5782 (N.Y. App. Div. 3d Dep't), app. denied, 100 N.Y.2d 583, 764 N.Y.S.2d 393, 796 N.E.2d 485, 2003 N.Y. LEXIS 3091 (N.Y. 2003).

Defendant cut the complainant's hand with a butcher knife and the complainant suffered substantial pain and thus sustained a physical injury; the treating physician testified that the complainant was diagnosed with a laceration of the hand that was deep enough to penetrate into muscle of the hand, and as the People established substantial pain, they were not required to present evidence of impairment. People v Jaber, 172 A.D.3d 1227, 101 N.Y.S.3d 371, 2019 N.Y. App. Div. LEXIS 4001 (N.Y. App. Div. 2d Dep't), app. denied, 34 N.Y.3d 933, 133 N.E.3d 403, 109 N.Y.S.3d 703, 2019 N.Y. LEXIS 2812 (N.Y. 2019).

Verdict convicting defendant of assault in the first and second degree, Penal Law §§ 120.10(3), 120.05(4), for dropping bricks into traffic from an overpass, causing the victim's windshield to shatter and glass to enter her eye, was against the weight of the evidence because there was a lack of medical testimony to explain the seriousness of the eye injury; the convictions of were reduced to a conviction of assault in the third degree under Penal Law § 10.00(9). People v Palant, 176 A.D.3d 872, 111 N.Y.S.3d 361, 2019 N.Y. App. Div. LEXIS 7249 (N.Y. App. Div. 2d Dep't 2019).

16. —Third Department

In a prosecution for two counts of assault and one count of unlawful imprisonment, defendant's motion to dismiss the entire indictment for failure to prove that the victim suffered a serious physical injury was properly denied since the victim's loss of two front teeth was a permanent and serious injury within the meaning of Penal Law § 120.05. People v Howard, 79 A.D.2d

1064, 435 N.Y.S.2d 399, 1981 N.Y. App. Div. LEXIS 9987 (N.Y. App. Div. 3d Dep't 1981).

Evidence supported jury finding that defendant inflicted "physical injury" with his boots, within meaning of CLS Penal § 10.00, where testimony elicited from 2 nurses (including victim) and 2 physicians provided basis for concluding, inter alia, that victim suffered painful bruising of abdomen, back, thighs, and hips due to being kicked, that she passed blood in her urine as result of mauling, and that she needed emergency treatment and was unable to return to work, all because of battering received, of which kicking was integral part. People v O'Hara, 124 A.D.2d 895, 508 N.Y.S.2d 348, 1986 N.Y. App. Div. LEXIS 62223 (N.Y. App. Div. 3d Dep't 1986).

Physical injury element of second degree assault was established by victim's testimony as to sharp pain he suffered for months and by hospital records revealing that 11 stitches were necessary to close various stab wounds inflicted by defendant. People v Robinson, 141 A.D.2d 979, 530 N.Y.S.2d 857, 1988 N.Y. App. Div. LEXIS 7225 (N.Y. App. Div. 3d Dep't), app. denied, 73 N.Y.2d 789, 536 N.Y.S.2d 749, 533 N.E.2d 679 (N.Y. 1988), app. denied, 73 N.Y.2d 925, 539 N.Y.S.2d 310, 536 N.E.2d 639, 1989 N.Y. LEXIS 1436 (N.Y. 1989), app. denied, 74 N.Y.2d 818, 546 N.Y.S.2d 576, 545 N.E.2d 890, 1989 N.Y. LEXIS 3692 (N.Y. 1989).

Court properly denied motion to dismiss indictment for assault in second degree on defendant's assertion that state failed to present prima facie evidence of physical injury where victim testified that he was in great deal of pain, was nauseated, had headache, and took analgesic medication for number of days, and doctor testified that injuries sustained by victim could cause pain and that victim's physical condition was impaired. People v Bouyea, 142 A.D.2d 757, 531 N.Y.S.2d 129, 1988 N.Y. App. Div. LEXIS 7251 (N.Y. App. Div. 3d Dep't 1988).

Physical injury element of second degree assault was established by proof that victim (police officer) experienced "substantial pain" for which he sought medical attention, received medication, and as a result of which he lost time from work. People v Douglas, 143 A.D.2d 452, 532 N.Y.S.2d 446, 1988 N.Y. App. Div. LEXIS 9138 (N.Y. App. Div. 3d Dep't 1988).

Evidence was sufficient to prove that victim sustained physical injury within meaning of CLS Penal § 120.05(7) where victim testified that he received 2 puncture wounds to his back, one to his abdomen, and 2 to his arm, for which he sought medical treatment at hospital and which caused him pain thereafter, and disabled him from certain activities. People v O'Quinn, 147 A.D.2d 736, 537 N.Y.S.2d 626, 1989 N.Y. App. Div. LEXIS 759 (N.Y. App. Div. 3d Dep't 1989).

Evidence of physical injury was sufficient to support defendant's conviction of second degree assault where (1) trial testimony contained explicit description of effects of victim's injuries which included tooth aches, pain on chewing, sore and swollen jaw, pain when talking, excruciating pain on moving his head, and sharp pain down middle of his back, and (2) victim was treated at hospital, and then by physician, took Tylenol with codeine for pain, and missed about 2 weeks' work. People v Shepard, 165 A.D.2d 932, 561 N.Y.S.2d 96, 1990 N.Y. App. Div. LEXIS 11275 (N.Y. App. Div. 3d Dep't), app. denied, 76 N.Y.2d 1024, 565 N.Y.S.2d 774, 566 N.E.2d 1179, 1990 N.Y. LEXIS 4896 (N.Y. 1990).

Evidence was sufficient to establish that victim suffered substantial pain or impairment of physical condition constituting physical injury within meaning of CLS Penal § 10.00(9) as required for conviction of assault in second degree under CLS Penal § 120.05(2) where victim bled from his neck, felt pain for couple of days, required medical attention, and was scarred by puncture wound. People v McEachin, 166 A.D.2d 814, 562 N.Y.S.2d 816, 1990 N.Y. App. Div. LEXIS 12804 (N.Y. App. Div. 3d Dep't), app. denied, 76 N.Y.2d 1023, 565 N.Y.S.2d 773, 566 N.E.2d 1178, 1990 N.Y. LEXIS 4863 (N.Y. 1990).

Evidence was sufficient to establish physical injury element of second degree assault where victim, police officer, sustained injury to his thumb necessitating medical treatment and subsequent immobilization resulting in temporary loss of use, and officer testified that he experienced throbbing pain for several days and tenderness for several weeks. People v Fortuna, 188 A.D.2d 683, 591 N.Y.S.2d 212, 1992 N.Y. App. Div. LEXIS 13548 (N.Y. App. Div. 3d Dep't 1992), app. denied, 81 N.Y.2d 839, 595 N.Y.S.2d 738, 611 N.E.2d 777, 1993 N.Y. LEXIS 854 (N.Y. 1993).

Second degree robbery and second degree assault convictions were sustained by evidence that victim suffered physical injury within meaning of CLS Penal § 10.00(9) where (1) victim testified that he was struck on head, that he felt sharp pain and was rendered unconscious, and that he endured throbbing in his head which became worse over time, and (2) victim sustained cuts, swelling, and scarring, as well as cyst-like knot over ear, which was clotted with blood and had to be lanced and drained. People v Jacobs, 188 A.D.2d 897, 592 N.Y.S.2d 802, 1992 N.Y. App. Div. LEXIS 14632 (N.Y. App. Div. 3d Dep't 1992), app. denied, 81 N.Y.2d 887, 597 N.Y.S.2d 949, 613 N.E.2d 981, 1993 N.Y. LEXIS 1448 (N.Y. 1993), app. denied, 81 N.Y.2d 890, 597 N.Y.S.2d 952, 613 N.E.2d 984 (N.Y. 1993).

Physical injury element of second degree assault was established where (1) victim received cuts to face, and his glasses were broken, (2) he was taken to emergency room where he received shots, x-rays were taken, and he was treated by several physicians, (3) he testified that he was still suffering from back and neck pain and numbness in his leg, for which he was taking medication, more than one year after incident, and (4) he stated that he was having difficulty sleeping and could not sit or drive car for long period of time without difficulty. People v Abrams, 203 A.D.2d 723, 611 N.Y.S.2d 313, 1994 N.Y. App. Div. LEXIS 4108 (N.Y. App. Div. 3d Dep't), app. denied, 83 N.Y.2d 963, 616 N.Y.S.2d 16, 639 N.E.2d 756, 1994 N.Y. LEXIS 2335 (N.Y. 1994).

Physical injury element of second degree assault was established where (1) victim suffered contusions to his shoulder and elbow with swelling and substantial pain, (2) he immediately sought medical attentions, (3) his physician directed him to ice-pack area, ordered use of sling to immobilize arm and shoulder, prescribed narcotic pain killer, and excused him from work for several days, (4) victim testified that pain necessitated use of prescription medication, particularly at night, and required use of sling for 4 ½ days, (5) he missed several days of work, and (6) pain continued in significant manner for 2 weeks during which time he did not have full use of his arms. People v Judkins, 210 A.D.2d 523, 620 N.Y.S.2d 503, 1994 N.Y. App. Div. LEXIS 11877 (N.Y. App. Div. 3d Dep't 1994), app. denied, 85 N.Y.2d 939, 627 N.Y.S.2d 1001, 651 N.E.2d 926, 1995 N.Y. LEXIS 1923 (N.Y. 1995).

Physical injury element of second degree assault was shown by police officer's testimony that as result of altercation he received cut lip, abrasions, "choke marks" around his throat, scraped knee, and severe back pain from being bent backward during attack, and that he suffered substantial pain and muscle tightness for 7 days as result thereof, requiring him to take pain relievers and hot baths. People v Cancer, 232 A.D.2d 875, 649 N.Y.S.2d 492, 1996 N.Y. App. Div. LEXIS 11267 (N.Y. App. Div. 3d Dep't 1996), app. denied, 89 N.Y.2d 984, 656 N.Y.S.2d 742, 678 N.E.2d 1358, 1997 N.Y. LEXIS 854 (N.Y. 1997).

Evidence showed that, using dangerous instrument (scissors), defendant intentionally caused physical injury to victim consisting of physical impairment to her finger where victim testified that, after becoming upset with her, defendant through scissors at her causing laceration to finger on her hand which she was using to shield herself, he thereafter chased her and stabbed her in leg with scissors, cut on finger resulted in visible scar and she lost feeling to tip portion of finger which persisted as of time of trial, 2 years and 8 months later, and her family physician testified that he treated her about 4 days later and opined that she had sustained some nerve damage to finger and that injury was consistent with injury inflicted by scissors. People v West, 271 A.D.2d 806, 708 N.Y.S.2d 478, 2000 N.Y. App. Div. LEXIS 4438 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 893, 715 N.Y.S.2d 386, 738 N.E.2d 790, 2000 N.Y. LEXIS 3392 (N.Y. 2000).

Victim suffered physical injury sufficient to support conviction of second degree assault where (1) he testified that he chipped 2 teeth as result of being kicked in mouth, sprained ankle from slipping while trying to run away from defendant, and received lacerations on his head and back inflicted by box cutter and requiring sutures in hospital emergency room, (2) witness and investigating officer each saw victim bleeding from back of his

head, (3) officer described head wound as being 2 to 3 inches long and deep, and (4) officer also saw lacerations on victim's back, abrasions on his mouth, and cracked teeth. People v Shannon, 273 A.D.2d 505, 708 N.Y.S.2d 199, 2000 N.Y. App. Div. LEXIS 6446 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 892, 715 N.Y.S.2d 385, 738 N.E.2d 789, 2000 N.Y. LEXIS 3269 (N.Y. 2000).

In prosecution for second degree assault of parole officer, evidence was legally sufficient to establish physical injury where parole officer testified that defendant repeatedly struck him with steel rod, at one point jabbing it into his eye socket such that he almost lost his eyeball, and that he sustained painful blows and bruises to his chest and shoulder. People v Colantonio, 277 A.D.2d 498, 715 N.Y.S.2d 764, 2000 N.Y. App. Div. LEXIS 11134 (N.Y. App. Div. 3d Dep't 2000), app. denied, 96 N.Y.2d 781, 725 N.Y.S.2d 645, 749 N.E.2d 214, 2001 N.Y. LEXIS 1154 (N.Y. 2001).

Finding of physical injury in second degree assault case was supported by victim's testimony that punch to head caused abrasion-type cut on his cheek and deep bone bruise that was extremely sore for more than 10 days, and that he had headaches and required Advil daily for more than one week, and by medical testimony confirming his subjective complaints. People v Bernier, 279 A.D.2d 701, 719 N.Y.S.2d 186, 2001 N.Y. App. Div. LEXIS 287 (N.Y. App. Div. 3d Dep't), app. denied, 96 N.Y.2d 797, 726 N.Y.S.2d 375, 750 N.E.2d 77, 2001 N.Y. LEXIS 1536 (N.Y. 2001).

In trial for second degree assault under CLS Penal § 120.05(7), People established that victim, who was stabbed 6 times in fight with defendant, sustained requisite "personal injury" where correction officer testified that victim was bleeding from his wounds after fight and was sent to infirmary for medical attention, photographs of victim's wounds were introduced as evidence, and victim testified that his injuries left him stiff and sore for nearly one month. People v Reynolds, 283 A.D.2d 771, 728 N.Y.S.2d 503, 2001 N.Y. App. Div. LEXIS 5189 (N.Y. App. Div. 3d Dep't), app. denied, 96 N.Y.2d 866, 730 N.Y.S.2d 41, 754 N.E.2d 1124, 2001 N.Y. LEXIS 2617 (N.Y. 2001), app. denied, 96 N.Y.2d 923, 732 N.Y.S.2d 640, 758 N.E.2d 666, 2001 N.Y. LEXIS 4003 (N.Y. 2001).

Proof that defendant's victim suffered serious physical injury when he cut her neck with a knife was sufficient to support his conviction for second-degree assault under N.Y. Penal Law § 120.05(4); the record contained photographs of the wounds taken shortly after the attack which were fairly characterized as seriously disfiguring under N.Y. Penal Law § 10.00(10), and as to whether the condition was protracted, the appellate court deferred to the county court because, in addition to hearing testimony that the cuts were 13 centimeters in length and severed both nerves and muscles, it had the opportunity to view the scars. People v Coon, 34 A.D.3d 869, 823 N.Y.S.2d 566, 2006 N.Y. App. Div. LEXIS 12984 (N.Y. App. Div. 3d Dep't 2006).

Trier of fact's finding that a victim suffered a physical injury under N.Y. Penal Law §§ 160.10(2)(a), 120.05(6), and 10.00(9) was supported by evidence that: (1) the victim's back was injured when the vehicle operated by defendant pulled and twisted the victim, (2) later in the day, when the victim was interviewed by police, the victim stated that the victim's back condition was very uncomfortable and recalled having difficulty sitting in the chair during the interview, (3) the victim described a strained and twisted back, and sought medical care for the condition the next day, and (4) the victim described continuing pain for several days to such a degree that during that time the victim had difficulty caring for the victim's three-year-old child, stopped the victim's regular exercise routine, and experienced problems trying to sleep because of the discomfort. People v Rivera, 42 A.D.3d 587, 838 N.Y.S.2d 727, 2007 N.Y. App. Div. LEXIS 8151 (N.Y. App. Div. 3d Dep't), app. denied, 9 N.Y.3d 880, 842 N.Y.S.2d 792, 874 N.E.2d 759, 2007 N.Y. LEXIS 2937 (N.Y. 2007).

Evidence that corrections officer one suffered torn tendons in his arm during an altercation with defendant and that in the same altercation, officer two suffered a blow to the head that left a contusion that was tender for about 10 days, was sufficient to support defendant's convictions for assault in the second degree. People v Williams, 46 A.D.3d 1115, 847 N.Y.S.2d 717, 2007 N.Y. App. Div. LEXIS 13153 (N.Y. App. Div. 3d Dep't 2007), app. denied, 10 N.Y.3d 818, 857 N.Y.S.2d 51, 886 N.E.2d 816, 2008 N.Y. LEXIS 1292 (N.Y. 2008).

Evidence was legally sufficient to prove assault in the second degree under N.Y. Penal Law § 120.05(4) as the laceration to the victim's abdomen, which caused his small intestine to protrude and which required surgery, was a serious physical injury under N.Y. Penal Law § 10.00(10). People v Ryan, 55 A.D.3d 960, 865 N.Y.S.2d 146, 2008 N.Y. App. Div. LEXIS 7753 (N.Y. App. Div. 3d Dep't 2008).

Evidence at defendant's trial for second degree assault, N.Y. Penal Law § 120.05(2), sufficiently established that the victim suffered the requisite injury to sustain the assault conviction under circumstances in which the testimony of the victim and the medical examiner, a forensic pathologist, established that the victim sustained a very painful 29 centimeter cut which required 35 stitches. People v Gragnano, 63 A.D.3d 1437, 885 N.Y.S.2d 369, 2009 N.Y. App. Div. LEXIS 5184 (N.Y. App. Div. 3d Dep't 2009), app. denied, 13 N.Y.3d 939, 895 N.Y.S.2d 329, 922 N.E.2d 918, 2010 N.Y. LEXIS 539 (N.Y. 2010).

There was sufficient evidence to support defendant's convictions of first degree assault, N.Y. Penal Law § 120.10, and second degree assault, N.Y. Penal Law § 120.05; the victim's testimony that during the altercation defendant beat him with a gun and bit off a large piece of his ear, defendant's oral statement to police that he did what he needed to and bit the victim's ear off, and the medical evidence regarding the extensive damage to the victim's ear resulting in permanent disfigurement supported the convictions. People v Carter, 74 A.D.3d 1375, 903 N.Y.S.2d 172, 2010 N.Y. App. Div. LEXIS 4579 (N.Y. App. Div. 3d Dep't), app. denied, 15 N.Y.3d 772, 907 N.Y.S.2d 461, 933 N.E.2d 1054, 2010 N.Y. LEXIS 2348 (N.Y. 2010).

Sufficient evidence supported conviction of second degree assault, N.Y. Penal Law § 120.05(3), because the People presented evidence that a police officer suffered a physical injury when defendant kicked him in the groin; the officer described defendant kicking him with the force of someone kicking a football for a field goal, was seen to double over in pain, described the pain as substantial, sought medical attention, and was diagnosed with a scrotal contusion, which continued to cause pain and discomfort for several days. However, the conviction had to be reversed due to the trial court's refusal to charge the lesser included offense of third degree obstructing governmental administration. People v Nisselbeck, 85 A.D.3d 1206, 923 N.Y.S.2d 801, 2011 N.Y. App. Div. LEXIS 4510 (N.Y. App. Div. 3d Dep't 2011).

Where a physician's assistant testified that the victim, who was repeatedly stabbed about the head with a Plexiglas shank, sustained 2 puncture wounds and 8 lacerations to the head, requiring 14 sutures, and that the wounds would have been painful, such evidence would have allowed a jury to reasonably conclude that the wounds resulted in substantial pain within the meaning of N.Y. Penal Law § 10.00(9), and, thus, allowed a rational trier of fact to find that the "physical injury" element of the crime of assault in the second degree in violation of N.Y. Penal Law § 120.05(7) was proven beyond a reasonable doubt. People v Walley, 296 A.D.2d 717, 745 N.Y.S.2d 283, 2002 N.Y. App. Div. LEXIS 7490 (N.Y. App. Div. 3d Dep't 2002).

Evidence was sufficient to establish the elements of defendant's convictions for second degree assault and third degree assault where her testimony was not incredible as a matter of law, the resulting credibility question was within the jury's province, and the record supported its verdict, despite a lack of testimony showing the degree of the victim's pain, where the testimony showed the duration of her pain, her medical treatment, and the prescribed course, requiring her to wear a sling for almost two weeks. People v Black, 304 A.D.2d 905, 757 N.Y.S.2d 635, 2003 N.Y. App. Div. LEXIS 3854 (N.Y. App. Div. 3d Dep't), app. denied, 100 N.Y.2d 578, 764 N.Y.S.2d 388, 796 N.E.2d 480, 2003 N.Y. LEXIS 2989 (N.Y. 2003).

Evidence was legally sufficient (and conviction was not against the weight of the evidence) in the case of a prisoner accused of knocking over and kicking a guard who had come to move the prisoner and convicted of second-degree assault, based on the testimony of the guard, the treating nurse, and various bystanders. People v Porter, 305 A.D.2d 933, 761 N.Y.S.2d 691, 2003 N.Y. App. Div. LEXIS 6082 (N.Y. App. Div. 3d Dep't), app. denied, 100

N.Y.2d 586, 764 N.Y.S.2d 396, 796 N.E.2d 488, 2003 N.Y. LEXIS 3168 (N.Y. 2003).

Pain, bruising, swelling, and soreness in the victim's hand, which caused the victim to wear a supportive brace for three days and work light duty for one week, was legally sufficient evidence of physical injury under N.Y. Penal Law § 120.05. People v Ellis, 8 A.D.3d 826, 778 N.Y.S.2d 555, 2004 N.Y. App. Div. LEXIS 8587 (N.Y. App. Div. 3d Dep't), app. denied, 3 N.Y.3d 673, 784 N.Y.S.2d 12, 817 N.E.2d 830, 2004 N.Y. LEXIS 3697 (N.Y. 2004).

Second degree assault conviction was supported by sufficient evidence and was affirmed where the evidence showed, inter alia, that after the baby was left alone in defendant's care, the mother observed black and blue marks on the child's cheeks, nose, and lip, and under the child's eyes, and where the treating physician testified that the child had bruising around both eyes, a linear bruise down her right cheek, and a laceration on her lip, injuries that were consistent with child abuse; the treating physician also indicated that the child could not have sustained her injuries through her own actions and that, in his opinion, the injuries would have caused her substantial pain at the time of infliction. People v Tompkins, 8 A.D.3d 901, 780 N.Y.S.2d 387, 2004 N.Y. App. Div. LEXIS 8816 (N.Y. App. Div. 3d Dep't 2004).

Proof established that defendant knowingly entered (or remained unlawfully in) a victim's dwelling with the intent to commit a crime therein, by forcing himself into the victim's apartment and raping her, and that he intentionally caused her physical injury, using a dangerous instrument (a door), under N.Y. Penal Law §§ 120.05(2) and 140.30(2), when he slammed her head against the door when she tried to leave. People v Smith, 27 A.D.3d 894, 811 N.Y.S.2d 488, 2006 N.Y. App. Div. LEXIS 2870 (N.Y. App. Div. 3d Dep't), app. denied, 6 N.Y.3d 898, 817 N.Y.S.2d 633, 850 N.E.2d 680, 2006 N.Y. LEXIS 2009 (N.Y. 2006).

Because defendant's assault victim suffered, inter alia, a broken clavicle, bruised ribs, four broken facial bones, and extensive neck and facial bruises and lacerations, was in pain for more than one year, and would require plastic surgery, the victim sustained a "serious physical injury" as defined by N.Y. Penal Law § 10.00(10); therefore, defendant was properly found guilty of second-degree assault under N.Y. Penal Law § 120.05(1). People v Coy, 45 A.D.3d 1050, 845 N.Y.S.2d 854, 2007 N.Y. App. Div. LEXIS 11707 (N.Y. App. Div. 3d Dep't 2007).

Evidence was sufficient to support a conviction of assault in the second degree, N.Y. Penal Law § 120.05(1), under circumstances in which the testimony of the victim, coupled with medical records introduced at trial, established that he lost consciousness after the attack, was hospitalized and treated for a laceration to his face requiring 15 sutures and sustained skull, facial, and jaw fractures and a closed head injury, resulting in a subdural hematoma; upon discharge, he was prescribed pain medication and advised not to engage in strenuous activity, drive or return to work pending follow-up examinations, and, moreover, although a year passed since the assault, he had not yet been cleared to return to work and continued to suffer dizzy spells, bleeding from his ear, and memory difficulty. Such evidence, when viewed most favorably to the People, established a protracted impairment of health for purposes proving a serious physical injury. People v Casey, 61 A.D.3d 1011, 876 N.Y.S.2d 532, 2009 N.Y. App. Div. LEXIS 2487 (N.Y. App. Div. 3d Dep't), app. denied, 12 N.Y.3d 913, 884 N.Y.S.2d 694, 912 N.E.2d 1075, 2009 N.Y. LEXIS 2906 (N.Y. 2009).

Evidence at trial demonstrated beyond a reasonable doubt that defendant physically injured the victim because defendant attacked the victim by striking him with a wooden bar stool. People v Boddie, 126 A.D.3d 1129, 6 N.Y.S.3d 165, 2015 N.Y. App. Div. LEXIS 1964 (N.Y. App. Div. 3d Dep't), app. denied, 26 N.Y.3d 1085, 44 N.E.3d 940, 23 N.Y.S.3d 642, 2015 N.Y. LEXIS 4109 (N.Y. 2015).

Weight of the evidence supported the finding that the victim suffered a "serious physical injury" as a result of defendant's assault because, inter alia, defendant struck the victim on the face with a bar glass that shattered, and the victim received 150 stitches to close his facial wounds, was on prescription pain medication for approximately one week following the attack, missed three or four weeks of work, and had a scar on the left side of his face that was a few inches long. People v Jones, 136 A.D.3d 1153, 26 N.Y.S.3d 363, 2016 N.Y. App. Div. LEXIS 1225 (N.Y. App. Div. 3d Dep't 2016).

There was sufficient evidence of physical injury to support defendant's second-degree assault conviction, given testimony that the victim's face was bruised and he was unable to sleep normally due to pain. People v Fields, 160 A.D.3d 1116, 75 N.Y.S.3d 617, 2018 N.Y. App. Div. LEXIS 2529 (N.Y. App. Div. 3d Dep't), app. denied, 31 N.Y.3d 1120, 106 N.E.3d 762, 81 N.Y.S.3d 379, 2018 N.Y. LEXIS 2007 (N.Y. 2018), app. denied, 31 N.Y.3d 1116, 106 N.E.3d 759, 81 N.Y.S.3d 376, 2018 N.Y. LEXIS 1974 (N.Y. 2018).

There was sufficient evidence to establish the element of physical injury required for assault under N.Y. Penal Law § 120.05, as defined in N.Y. Penal Law § 10.00(9), when defendant stabbed the victim in the left temple and left abdomen and the victim had headaches, neck pain, and nightmares afterward. People v Diaz, 163 A.D.3d 110, 78 N.Y.S.3d 792, 2018 N.Y. App. Div. LEXIS 4359 (N.Y. App. Div. 3d Dep't), app. denied, 32 N.Y.3d 1110, 115 N.E.3d 634, 91 N.Y.S.3d 362, 2018 N.Y. LEXIS 3582 (N.Y. 2018).

Verdict was not against the weight of evidence due to the severity of infant victim's injuries and defendant's admission that he became agitated due to victim's crying and he aggressively picked up victim. The jury could infer from the circumstances that he had the intent to cause physical injury to the victim. People v Ash, 162 A.D.3d 1318, 80 N.Y.S.3d 495, 2018 N.Y. App. Div. LEXIS 4570 (N.Y. App. Div. 3d Dep't), app. denied, 32 N.Y.3d 1002, 111 N.E.3d 1116, 86 N.Y.S.3d 760, 2018 N.Y. LEXIS 3154 (N.Y. 2018).

Sufficient evidence supported defendant's conviction for assault in the second degree because during the struggle with defendant, a police officer felt sharp pains in his knee and ankle, and afterward, the officer limped away from the incident, sought treatment at a hospital, missed two days of work and, during that time, continued to experience pain and had difficulty walking. People v Oshintayo, 163 A.D.3d 1352, 82 N.Y.S.3d 223, 2018 N.Y. App. Div. LEXIS 5453 (N.Y. App. Div. 3d Dep't), app. denied, 32 N.Y.3d 1006, 111 N.E.3d 1121, 86 N.Y.S.3d 765, 2018 N.Y. LEXIS 3130 (N.Y. 2018).

17. —Fourth Department

In a prosecution for second-degree assault, a modification of the verdict to third-degree assault would be reversed where serious physical injury, as necessary to a verdict of second-degree assault, had been established in that more than a year after the incident the victim had pain in his jaw and had been unable to open his mouth more than one inch, and inasmuch as defendant had kicked the victim several times about his face and body while he was on the ground. People v Hall, 89 A.D.2d 788, 453 N.Y.S.2d 960, 1982 N.Y. App. Div. LEXIS 17905 (N.Y. App. Div. 4th Dep't 1982).

Defendant's conviction for second-degree assault based on his infliction of physical injury on a police officer was proper, where the officer's testimony and a photograph established that the blow inflicted on the officer resulted in a bleeding laceration approximately one inch long under his eye requiring medical attention, which stunned the officer and caused him substantial pain, resulting in his missing five days of work. People v Starling, 101 A.D.2d 704, 475 N.Y.S.2d 689, 1984 N.Y. App. Div. LEXIS 18266 (N.Y. App. Div. 4th Dep't), app. denied, 63 N.Y.2d 680, 1984 N.Y. LEXIS 5617 (N.Y. 1984).

Evidence of bruises on victim's neck and arm, brutal nature of assault, and victim's testimony of pain suffered from attack was sufficient proof that she suffered "physical injury" to support second degree assault conviction under CLS Penal § 120.05(6). People v Roberts, 140 A.D.2d 961, 529 N.Y.S.2d 636, 1988 N.Y. App. Div. LEXIS 5918 (N.Y. App. Div. 4th Dep't 1988).

Inmate was properly convicted of second degree assault arising from altercation with 2 correction officers where (1) he bit one officer on thumb, causing ½ -inch-long ¼ -inch-deep cut which was treated at hospital emergency room and later became infected, requiring antibiotics, (2) other officer suffered sprained knee, which also required hospital treatment and caused "heavy"

and "throbbing" pain and swelling, and (3) both officers were prevented from performing their regular duties for several days; proof of "physical injury" supported jury's verdict. People v Williams, 147 A.D.2d 920, 147 A.D.2d 960, 538 N.Y.S.2d 732, 1989 N.Y. App. Div. LEXIS 1189 (N.Y. App. Div. 4th Dep't), app. denied, 73 N.Y.2d 1023, 541 N.Y.S.2d 778, 539 N.E.2d 606, 1989 N.Y. LEXIS 2052 (N.Y. 1989).

Testimony of victim regarding degree and duration of pain resulting from injury to his hand, as well as impairment of its use, was sufficient to satisfy statutory threshold of "physical injury" for purposes of second degree assault conviction where defendant attempted to strike victim with his vehicle and victim was hit in hand as he tried to evade its path. People v Guerrero, 150 A.D.2d 489, 541 N.Y.S.2d 90, 1989 N.Y. App. Div. LEXIS 6489 (N.Y. App. Div. 2d Dep't 1989).

Defendant was properly found to have inflicted physical injury on victim "in course of" robbery, and thus was properly convicted of second degree robbery, first degree assault, second degree assault, and fourth degree weapon possession, where defendant and his companions removed foodstuffs from victim's grocery store, victim chastised them as they left, defendant and companions returned, still in possession of stolen property, carrying knives, they grabbed more foodstuffs from shelves, and when victim attempted to call police, defendant stabbed him over his eye and kicked him in face, breaking his nose; jury was entitled to find that initial entry, and subsequent return culminating in attack, was continuous act. People v Rios, 150 A.D.2d 620, 541 N.Y.S.2d 489, 1989 N.Y. App. Div. LEXIS 7048 (N.Y. App. Div. 2d Dep't), app. denied, 74 N.Y.2d 899, 548 N.Y.S.2d 432, 547 N.E.2d 959, 1989 N.Y. LEXIS 4340 (N.Y. 1989), disapproved, People v Rodriguez, 76 N.Y.2d 918, 563 N.Y.S.2d 48, 564 N.E.2d 658, 1990 N.Y. LEXIS 3308 (N.Y. 1990).

Evidence of "physical injury" as defined by CLS Penal § 10.00(9) was sufficient to support conviction of second degree assault where 2 victims of defendant's assaults with metal wrench sustained cuts to head requiring stitches and were in pain for a few days, and third victim suffered puncture wound and bruise to arm and was out of work for 2 weeks. People v Benton, 152 A.D.2d 992, 544 N.Y.S.2d 766, 1989 N.Y. App. Div. LEXIS 9920 (N.Y. App. Div. 4th Dep't), app. denied, 74 N.Y.2d 845, 546 N.Y.S.2d 1010, 546 N.E.2d 193, 1989 N.Y. LEXIS 3814 (N.Y. 1989).

Defendant's claim that evidence did not establish sufficient physical injury to sustain his conviction for second degree assault lacked merit, since each victim testified that injuries received caused pain and it thus became question for trier of fact whether pain was substantial. People v Felipe, 155 A.D.2d 900, 547 N.Y.S.2d 730, 1989 N.Y. App. Div. LEXIS 14739 (N.Y. App. Div. 4th Dep't 1989), app. denied, 75 N.Y.2d 868, 553 N.Y.S.2d 299, 552 N.E.2d 878, 1990 N.Y. LEXIS 799 (N.Y. 1990).

Evidence of physical injury was sufficient to support defendant's conviction of second degree assault where complainant (police officer) testified that (1) he suffered scrapes and bruises on his legs and bruises on his knees in scuffle with defendant, as well as bite wounds to left shoulder which broke skin and caused him "nagging pain" for several days, (2) he was given oxygen at scene and transported to hospital emergency room where he reported that he hurt "all over," and (3) he was given tetanus shot and pain medication and missed following 2 days of work. People v Block, 168 A.D.2d 940, 565 N.Y.S.2d 341, 1990 N.Y. App. Div. LEXIS 16483 (N.Y. App. Div. 4th Dep't 1990), app. denied, 77 N.Y.2d 875, 568 N.Y.S.2d 918, 571 N.E.2d 88, 1991 N.Y. LEXIS 1042 (N.Y. 1991).

Proof of "physical injury" was sufficient to support conviction for second degree assault where it was shown that defendant pushed one correction officer into wall, causing contusion and pain for approximately 2 weeks, and that defendant bit another correction officer's finger, severing fingernail, cutting finger pad, and causing severe pain for one week and absence from work for 8 weeks. People v Mallard, 207 A.D.2d 1018, 617 N.Y.S.2d 73, 1994 N.Y. App. Div. LEXIS 10295 (N.Y. App. Div. 4th Dep't), app. denied, 84 N.Y.2d 1013, 622 N.Y.S.2d 924, 647 N.E.2d 130, 1994 N.Y. LEXIS 5036 (N.Y. 1994).

Although defendant shot victim in foot, assault conviction would be reduced, in interest of justice, from second to third degree where prosecution failed to prove that injury created substantial risk of death or caused serious and disfigurement, protracted impairment of health, or impairment of function of any bodily organ. People v Bodford, 238 A.D.2d 928, 661 N.Y.S.2d 158, 1997 N.Y. App. Div. LEXIS 4741 (N.Y. App. Div. 4th Dep't), app. denied, 90 N.Y.2d 938, 664 N.Y.S.2d 756, 687 N.E.2d 653, 1997 N.Y. LEXIS 3738 (N.Y. 1997).

Physical injuries necessary to sustain conviction of second and third degree assault were proved by victim's testimony that (1) during one attack, she sustained cut on her arm, resulting in scar that was visible at trial, (2) during another attack, with pair of pliers, she sustained puncture wound on her shoulder, resulting in scar that was visible at trial, and (3) she suffered considerable pain from those wounds. People v Yeldon, 251 A.D.2d 1047, 675 N.Y.S.2d 262, 1998 N.Y. App. Div. LEXIS 7125 (N.Y. App. Div. 4th Dep't), app. denied, 92 N.Y.2d 908, 680 N.Y.S.2d 72, 702 N.E.2d 857, 1998 N.Y. LEXIS 3656 (N.Y. 1998).

Evidence of physical injury supported conviction of second degree assault where victim testified that, after blow to back with baseball bat, he felt severe pain, pain continued for several days, he took aspirin to relieve pain, there was red mark on his skin, and he knew "something was just not right" every time he moved his arm. People v Wiggins, 265 A.D.2d 905, 696 N.Y.S.2d 604, 1999 N.Y. App. Div. LEXIS 10029 (N.Y. App. Div. 4th Dep't 1999), app. denied, 94 N.Y.2d 908, 707 N.Y.S.2d 393, 728 N.E.2d 992, 2000 N.Y. LEXIS 815 (N.Y. 2000).

Victim's comminuted nose fracture, which required surgery, constituted serious physical injury. People v Willson, 272 A.D.2d 959, 708 N.Y.S.2d 668, 2000 N.Y. App. Div. LEXIS 8729 (N.Y. App. Div. 4th Dep't), app. denied, 95 N.Y.2d 873, 715 N.Y.S.2d 228, 738 N.E.2d 376, 2000 N.Y. LEXIS 3190 (N.Y. 2000).

In prosecution for second degree assault, evidence supported finding that victim sustained physical injury, defined in CLS Penal § 10.00(9) as "impairment of physical condition or substantial pain," where (1) he fell to ground and bled profusely after being struck on side of head with handgun, (2) he regained consciousness as he was being placed on stretcher and was transported to emergency room, (3) his treating physician testified that victim suffered jagged partial thickness laceration to side of head, (4) CT scan revealed swelling of soft tissue in area of wound, (5) physician cleaned wound, treated it with antiseptic solution, and recommended that victim take Tylenol for pain, and (6) victim took pain medication, remained out of work for one week, and continued to experience headaches after incident. People v Wooden, 275 A.D.2d 935, 713 N.Y.S.2d 415, 2000 N.Y. App. Div. LEXIS 9703 (N.Y. App. Div. 4th Dep't 2000), app. denied, 96 N.Y.2d 740, 722 N.Y.S.2d 807, 745 N.E.2d 1030, 2001 N.Y. LEXIS 506 (N.Y. 2001).

Physical injury element of second degree assault was shown by police officer's testimony that he sustained "soft tissue injury" resulting in "severe pain" in his ankle and shin, which caused pain and difficulty in walking for 2 days, and fact that officer was treated at hospital and was released from duty for 1 ½ days. People v Sullivan, 284 A.D.2d 917, 728 N.Y.S.2d 320, 2001 N.Y. App. Div. LEXIS 5935 (N.Y. App. Div. 4th Dep't), app. denied, 96 N.Y.2d 942, 733 N.Y.S.2d 382, 759 N.E.2d 381, 2001 N.Y. LEXIS 3590 (N.Y. 2001), app. denied, 97 N.Y.2d 658, 737 N.Y.S.2d 59, 762 N.E.2d 937, 2001 N.Y. LEXIS 4269 (N.Y. 2001).

Evidence was legally sufficient to sustain defendant's convictions for assault in the second degree, N.Y. Penal Law § 120.05(3), and assault in the third degree, N.Y. Penal Law § 120.00(1), because she struck a police officer in the head, causing him to see "stars" and suffer great pain, which fell within the definition of physical injury in N.Y. Penal Law § 10.00(9); the failure of the officer to seek medical treatment or to take off any time from work was not dispositive in determining whether he sustained a physical injury, People v Gerecke, 34 A.D.3d 1260, 823 N.Y.S.2d 797, 2006 N.Y. App. Div. LEXIS 15975 (N.Y. App. Div. 4th Dep't), app. denied, 7 N.Y.3d 925, 827 N.Y.S.2d 694, 860 N.E.2d 996, 2006 N.Y. LEXIS 4101 (N.Y. 2006).

Evidence was sufficient to support defendant's conviction for assault in the second degree, in violation of N.Y. Penal Law

§ 120.05(2), where he hit his wife in the head with a glass liquor bottle, knocking her to the ground and causing a hematoma on her head which required stitches; there was sufficient proof of a "physical injury" pursuant to N.Y. Penal Law § 10.00(9). People v Myers, 87 A.D.3d 826, 928 N.Y.S.2d 407, 2011 N.Y. App. Div. LEXIS 6191 (N.Y. App. Div. 4th Dep't 2011).

Because defendant struck a homeless panhandler in the head with a brick, which rendered the victim unconscious, fractured the victim's right lateral orbital wall fracture and left temporal bone transverse, and caused a subdural hematoma and a subarachnoid hemorrhage, the victim's injuries rose to the level of physical injury under N.Y. Penal Law § 10.00(9); therefore, defendant was properly convicted of second-degree assault under N.Y. Penal Law § 120.05(2). People v Noguel, 93 A.D.3d 1319, 940 N.Y.S.2d 756, 2012 N.Y. App. Div. LEXIS 2188 (N.Y. App. Div. 4th Dep't), app. denied, 19 N.Y.3d 965, 950 N.Y.S.2d 117, 973 N.E.2d 215, 2012 N.Y. LEXIS 2360 (N.Y. 2012).

Testimony that a cut to the victim's ear was "severe" and "terrible"; that part of the victim's ear was "hanging off"; and that the injury hurt "for a long time," was sufficient to convict defendant of second degree assault, under N.Y. Penal Law § 120.05(2). People v Coleman, 305 A.D.2d 1031, 758 N.Y.S.2d 878, 2003 N.Y. App. Div. LEXIS 4727 (N.Y. App. Div. 4th Dep't), app. denied, 100 N.Y.2d 579, 764 N.Y.S.2d 389, 796 N.E.2d 481, 2003 N.Y. LEXIS 3016 (N.Y. 2003).

After noting that defendant failed to preserve for appellate review his contention that his conviction for assault in the second degree was not supported by legally sufficient evidence, the appellate court held that the contention lacked merit because the testimony of an officer who was injured established that the officer sustained an impairment of his physical condition or substantial pain. People v Kelly, 309 A.D.2d 1149, 765 N.Y.S.2d 115, 2003 N.Y. App. Div. LEXIS 10229 (N.Y. App. Div. 4th Dep't), app. denied, 1 N.Y.3d 575, 775 N.Y.S.2d 791, 807 N.E.2d 904, 2003 N.Y. LEXIS 4617 (N.Y. 2003).

Sufficient evidence supported defendant's conviction for assault in the second degree because while an officer was hanging onto the door handle of defendant's vehicle, defendant accelerated quickly and drove away, sending the officer into the air and then onto the ground, and, as a result, the officer sustained injuries to his hip, knee, hamstring, back, and neck and was out of work for two weeks. People v Funk, 166 A.D.3d 1487, 87 N.Y.S.3d 419, 2018 N.Y. App. Div. LEXIS 7610 (N.Y. App. Div. 4th Dep't 2018), app. denied, 32 N.Y.3d 1172, 121 N.E.3d 264, 97 N.Y.S.3d 636, 2019 N.Y. LEXIS 537 (N.Y. 2019).

18. "Physical injury" not established, generally

Given that N.Y. Crim. Proc. Law § 470.15(2)(a) authorized the appellate division to modify a judgment by reducing a conviction to a lesser included offense if the evidence did not support defendant's conviction on the greater charge but was sufficient to establish the lesser offense, the appellate division correctly affirmed defendant's conviction of attempted assault in the second degree, which was a lesser included offense of assault in the second degree, upon concluding that the evidence of physical injury was insufficient to support defendant's conviction on the greater charge but was sufficient to establish defendant's guilt on the lesser included offense. People v Hawkins, 99 N.Y.2d 592, 757 N.Y.S.2d 810, 787 N.E.2d 1156, 2003 N.Y. LEXIS 144 (N.Y. 2003).

People failed to establish that complainant suffered physical injury in order to sustain second degree assault charge, even though complainant testified she was struck several times prior to rape, since she did not elaborate on her injuries and never testified as to duration of pain, and although she was examined at hospital, her records were lost by hospital and thus never received in evidence. People v Holden, 148 A.D.2d 635, 539 N.Y.S.2d 95, 1989 N.Y. App. Div. LEXIS 3851 (N.Y. App. Div. 2d Dep't), app. denied, 74 N.Y.2d 848, 546 N.Y.S.2d 1013, 546 N.E.2d 196, 1989 N.Y. LEXIS 3887 (N.Y. 1989).

Where there was no serious physical injury inflicted upon the victim as the result of the defendant's acts, no violations of subds 1 or 4 of § 120.05 of the Penal Law were established. In re Taylor, 62 Misc. 2d 529, 309 N.Y.S.2d 368, 1970 N.Y. Misc. LEXIS 1927 (N.Y. Fam. Ct. 1970).

19. —First Department

Evidence was not sufficient to sustain finding of physical injury, and thus did not support convictions for first degree burglary, second degree robbery, and second degree assault, where 80-year-old victim had merely bumped her head during struggle with defendant, and although her body was sore for about 3 weeks and her head was swollen, she did not see doctor or go to hospital. People v Brown, 145 A.D.2d 301, 535 N.Y.S.2d 366, 1988 N.Y. App. Div. LEXIS 12319 (N.Y. App. Div. 1st Dep't 1988), app. denied, 73 N.Y.2d 1012, 541 N.Y.S.2d 766, 539 N.E.2d 594, 1989 N.Y. LEXIS 1774 (N.Y. 1989).

20. —Second Department

In a prosecution for robbery in the second degree and assault in the second degree the evidence was insufficient for conviction where the victim testified that he had received blows to the side of the head and to the bridge of his nose resulting in bruises a headache and minor pain since physical injury, for purposes of proof of the crimes charged, must be impairment of physical condition or substantial pain. People v Reed, 83 A.D.2d 566, 441 N.Y.S.2d 10, 1981 N.Y. App. Div. LEXIS 14857 (N.Y. App. Div. 2d Dep't 1981).

In a prosecution for attempted rape and second-degree assault, defendant's conviction for second-degree assault would be vacated, where there was no evidence of physical impairment of the victim, where the issue of physical injury was submitted to the jury solely upon the basis of the victim's testimony that she suffered a very sore neck from the attack, and where such subjective testimony, without more, was insufficient to establish beyond a reasonable doubt that the victim suffered the requisite physical injury within the meaning of Penal Law §§ 120.05 and 10.00. People v Hargrove, 95 A.D.2d 864, 464 N.Y.S.2d 224, 1983 N.Y. App. Div. LEXIS 18815 (N.Y. App. Div. 2d Dep't), app. denied, 60 N.Y.2d 616, 1983 N.Y. LEXIS 6096 (N.Y. 1983).

In absence of evidence that injury would cause pain or was capable of causing pain, jury would be required to speculate in order to reach conclusion that victim in fact suffered pain; bullet wound per se is not "physical injury" where there is no evidence upon which to establish that injury caused pain; wound characterized as "deep scratch" which was treated by victim with large gauze bandages and for which victim did not seek professional medical assistance is not "physical injury" as matter of law. People v Francis, 112 A.D.2d 167, 490 N.Y.S.2d 850, 1985 N.Y. App. Div. LEXIS 56453 (N.Y. App. Div. 2d Dep't 1985).

Charges of burglary in first degree and assault in second degree were not supported by sufficient evidence that victims had suffered requisite "physical injury" where (1) testimony of minor victims and their minor siblings showed only that defendant had punched or slapped one victim in mouth, causing her lip to bleed, and slapped other victim hard enough to make her fall and cause her to cry, (2) neither victim requested nor received medical treatment after prompt arrival of police, and (3) no evidence was adduced as to resulting physical impairment or "substantial pain." People v Wainwright, 123 A.D.2d 894, 507 N.Y.S.2d 669, 1986 N.Y. App. Div. LEXIS 61012 (N.Y. App. Div. 2d Dep't 1986).

Evidence was insufficient to establish that police officer suffered "physical injury" as result of altercation with defendant, and to sustain defendant's conviction for second degree assault, even though officer testified that he received bruises which produced swelling and tenderness, experienced headaches for 2 or 3 days thereafter, and missed day of work, since officer did not testify that pain suffered from injuries was substantial, nor could pain of which officer complained be deemed to have reached objective level required to be substantial; moreover, there was no evidence to support conclusion that officer's physical condition was impaired as result of injuries. People v Goins, 129 A.D.2d 733, 514 N.Y.S.2d 494, 1987 N.Y. App. Div. LEXIS 45416 (N.Y. App. Div. 2d Dep't), app. denied, 70 N.Y.2d 704, 519 N.Y.S.2d 1039, 513 N.E.2d 716, 1987 N.Y. LEXIS 18083 (N.Y. 1987).

Court would reverse defendant's second degree assault conviction where complainant never stated that she had experienced any substantial pain, nor was there any evidence to support conclusion that complainant's physical condition was impaired from injuries sustained in incident. People v Jackson, 139 A.D.2d

766, 527 N.Y.S.2d 514, 1988 N.Y. App. Div. LEXIS 4464 (N.Y. App. Div. 2d Dep't 1988).

Evidence was legally insufficient to support conviction for assault in second degree since it did not show impairment of physical condition or substantial pain where (1) complainant testified that, when defendant struck her on right side of head, she fell to floor and that she had "great deal of pain" in her head and "pain around the eyes," but (2) complainant waited 2 days before seeking medical treatment, and when she finally went to hospital it was for treatment of preexisting eye condition. People v Anderson, 143 A.D.2d 760, 533 N.Y.S.2d 469, 1988 N.Y. App. Div. LEXIS 10045 (N.Y. App. Div. 2d Dep't), app. denied, 73 N.Y.2d 852, 537 N.Y.S.2d 499, 534 N.E.2d 337, 1988 N.Y. LEXIS 6446 (N.Y. 1988), app. denied, 73 N.Y.2d 919, 539 N.Y.S.2d 304, 536 N.E.2d 633, 1989 N.Y. LEXIS 1283 (N.Y. 1989).

Evidence that victim of alleged second degree assault was "slightly bruised" and "bleeding a little bit" and that he felt "a little sore, that's all" was insufficient to establish required "physical injury," defined by CLS Penal § 10.00(9) as "impairment of physical condition or substantial pain." People v Thomas, 160 A.D.2d 968, 554 N.Y.S.2d 691, 1990 N.Y. App. Div. LEXIS 4791 (N.Y. App. Div. 2d Dep't), app. denied, 76 N.Y.2d 796, 559 N.Y.S.2d 1002, 559 N.E.2d 696, 1990 N.Y. LEXIS 2910 (N.Y. 1990).

Defendant's conviction of second degree assault would be reversed for lack of sufficient evidence of physical injury involving substantial pain where complainant police officer merely sustained several cuts to his nose when defendant, handcuffed from behind, snapped at officer's face and struck his teeth into officer's nose, officer received medical attention shortly thereafter, including tetanus shot and penicillin, but was not prevented from working, and although officer testified that there were lacerations on his nose and he had headache next day, there was no scar, nor did he require stitches. People v Foster, 162 A.D.2d 703, 557 N.Y.S.2d 122, 1990 N.Y. App. Div. LEXIS 8158 (N.Y. App. Div. 2d Dep't), app. denied, 76 N.Y.2d 856, 560 N.Y.S.2d 996, 561 N.E.2d 896, 1990 N.Y. LEXIS 3880 (N.Y. 1990).

Evidence was insufficient to establish that juvenile committed act which, if committed by adult, would have constituted second degree assault where complainant testified merely that, after incident, "everything was sore on me," and that his leg, arm, upper back, and neck were "swollen." In re Robert C., 185 A.D.2d 845, 586 N.Y.S.2d 992, 1992 N.Y. App. Div. LEXIS 9884 (N.Y. App. Div. 2d Dep't 1992).

Evidence was insufficient to support conviction of third degree assault, even though victim went to hospital complaining of severe headache as result of being thrown against wall and punched in head by defendant, where prosecution failed to present any evidence as to physical impairment or extent of pain suffered by victim, so as to prove "physical injury" under CLS Penal § 10.00(9). People v Thorpe, 245 A.D.2d 472, 666 N.Y.S.2d 664, 1997 N.Y. App. Div. LEXIS 14150 (N.Y. App. Div. 2d Dep't 1997), app. denied, 91 N.Y.2d 945, 671 N.Y.S.2d 725, 694 N.E.2d 894, 1998 N.Y. LEXIS 1227 (N.Y. 1998).

Evidence was legally insufficient to support defendant's conviction of assault in the second degree in violation of N.Y. Penal Law § 120.05(3), as the People failed to establish that the complainant suffered physical injury pursuant to N.Y. Penal Law § 10.00(9) as a result of the alleged kicks to the complainant's arm and leg inflicted by defendant during the body cavity search. People v Manley, 13 A.D.3d 653, 789 N.Y.S.2d 502, 2004 N.Y. App. Div. LEXIS 15721 (N.Y. App. Div. 2d Dep't 2004), app. denied, 4 N.Y.3d 833, 796 N.Y.S.2d 588, 829 N.E.2d 681, 2005 N.Y. LEXIS 937 (N.Y. 2005).

Defendant's convictions for robbery in the second degree, pursuant to N.Y. Penal Law § 160.10(2)(a), assault in the second degree, pursuant to N.Y. Penal Law § 120.05(6), were vacated, along with the sentences imposed, because the prosecution failed to present legally sufficient evidence that the complainant sustained physical injury, as defined in N.Y. Penal Law § 10.00(9), to sustain the convictions. People v Almonte, 23 A.D.3d 392, 806 N.Y.S.2d 95, 2005 N.Y. App. Div. LEXIS 12296 (N.Y. App. Div. 2d Dep't 2005), app. denied, 6 N.Y.3d 831, 814 N.Y.S.2d 79, 847 N.E.2d 376, 2006 N.Y. LEXIS 968 (N.Y. 2006).

Assault conviction under N.Y. Penal Law § 120.05(2) was not supported by sufficient evidence as, although there was sufficient evidence that defendant was the assailant, neither victim two nor victim three suffered a physical injury under N.Y. Penal Law § 10.00(9) since neither of them experienced substantial pain or sought medical attention; victim two's upper back was bruised, and victim three suffered a small cut on victim three's head that did not require suturing. People v Baksh, 43 A.D.3d 1072, 845 N.Y.S.2d 343, 2007 N.Y. App. Div. LEXIS 9780 (N.Y. App. Div. 2d Dep't), app. denied, 9 N.Y.3d 989, 848 N.Y.S.2d 607, 878 N.E.2d 1023, 2007 N.Y. LEXIS 3820 (N.Y. 2007).

Appeals court reduced conviction of assault in the second degree to attempted assault in the second degree since there was insufficient evidence that complainant suffered substantial pain or impairment of his physical condition as defined in N.Y. Penal Law §§ 10.00(9) and require by N.Y. Penal Law § 120.05(2). There was no expert medical testimony and complainant cleaned and bandaged the injury himself and testified to only limited restrictions. People v Baez, 13 A.D.3d 463, 785 N.Y.S.2d 749, 2004 N.Y. App. Div. LEXIS 15204 (N.Y. App. Div. 2d Dep't 2004), app. denied, 4 N.Y.3d 851, 797 N.Y.S.2d 425, 830 N.E.2d 324, 2005 N.Y. LEXIS 1269 (N.Y. 2005).

Appellant was improperly adjudicated a juvenile delinquent based on a finding that she committed acts, which, if committed by an adult, would constitute assault in the second degree charged as a hate crime under N.Y. Penal Law §§ 485.05 and 120.05(1) because the complainant only suffered a cut above her eye and a cut on her ear, which did not establish a serious physical injury as defined in § 120.05(1). Matter of Anisha McG., 27 A.D.3d 749, 810 N.Y.S.2d 918, 2006 N.Y. App. Div. LEXIS 3746 (N.Y. App. Div. 2d Dep't 2006).

Trial court erred in convicting defendant of second-degree assault because the evidence was legally insufficient to establish that the victim suffered a physical injury by means of a dangerous instrument as a result of defendant's use of a bat. 2017 N.Y. App. Div. LEXIS 331.

21. —Third Department

Evidence was insufficient to establish that victim suffered "physical injury" within meaning of CLS Penal § 10.00(9), and thus second degree assault charge could not stand, where victim testified that defendant struck him several times on head and neck with handgun, that he bled and felt pain and that he went to hospital by ambulance, but victim also testified that his injuries were "just small cuts and abrasions" and did not need stitches. People v Brown, 187 A.D.2d 872, 590 N.Y.S.2d 309, 1992 N.Y. App. Div. LEXIS 13443 (N.Y. App. Div. 3d Dep't 1992), app. denied, 81 N.Y.2d 785, 594 N.Y.S.2d 732, 610 N.E.2d 405, 1993 N.Y. LEXIS 342 (N.Y. 1993).

Factual allegations in depositions were insufficient to establish physical injury within meaning of CLS Penal § 10.00(9) where victim stated that his finger was cut while trying to take knife away from respondent, and that his finger bled and had puss oozing out of it with resulting pain of one week's duration. In re Kurt EE., 199 A.D.2d 945, 606 N.Y.S.2d 371, 1993 N.Y. App. Div. LEXIS 12418 (N.Y. App. Div. 3d Dep't 1993).

Defendant's conviction of 2 counts of first degree burglary, 2 counts of first degree assault, and 3 counts of second degree assault, on jury's finding that victim suffered "serious physical injury" under CLS Penal § 10.00(10), was supported by evidence, including victim's testimony, that was awakened in bed by intruder who was beating her on head with brick, that when she attempted to crawl out of bed, intruder grabbed her, pulled her back, and repeatedly struck her on head, that as struggle continued she recognized defendant—nephew of her former husband—as intruder, that she suffered, among other injuries, head laceration requiring sutures, broken hand, and bruises on her shoulders, upper arms, left leg, and feet, and that personal items were missing from her home. People v Quesnel, 238 A.D.2d 725, 656 N.Y.S.2d 772, 1997 N.Y. App. Div. LEXIS 3930 (N.Y. App. Div. 3d Dep't), app. denied, 90 N.Y.2d 896, 662 N.Y.S.2d 439, 685 N.E.2d 220, 1997 N.Y. LEXIS 2861 (N.Y. 1997).

Victim of cuts with razor-blade knife did not suffer "impairment of physical condition or substantial pain" under CLS Penal § 10.00(9), so as to support charge of second degree assault,

where (1) victim received "two very clean lacerations of the tips of two fingers," (2) physician treated cuts with bandaids, which victim wore for 4 or 5 days, (3) although there was some bleeding, sutures were not required to close wounds, (4) no scars or disability resulted, and (5) no testimony was offered as to pain. In re Shawnell UU, 240 A.D.2d 947, 659 N.Y.S.2d 531, 1997 N.Y. App. Div. LEXIS 6991 (N.Y. App. Div. 3d Dep't 1997).

There was sufficient basis for jury to conclude that correction officer sustained "physical injury" within meaning of CLS Penal § 120.05(3) where he was diagnosed with crepitus in his arm and shoulder which prompted prescription for painkillers, and he suffered from substantial pain in his arm and shoulder for months after incident. People v Holloway, 261 A.D.2d 658, 691 N.Y.S.2d 583, 1999 N.Y. App. Div. LEXIS 4679 (N.Y. App. Div. 3d Dep't), app. denied, 93 N.Y.2d 972, 695 N.Y.S.2d 58, 716 N.E.2d 1103, 1999 N.Y. LEXIS 2524 (N.Y. 1999).

Evidence supported conviction of second degree assault under CLS Penal § 120.05(7), and of attempt to commit that crime, where (1) defendant, while incarcerated in correctional facility, intended to physically injure correction officer and did so by striking him in eye with compressed ball of wet toilet paper, (2) element of intent was proved by, inter alia, defendant's earlier threats against victim, and (3) element of physical injury was proved by, inter alia, victim's testimony that his eye pain lasted 1 ½ to 2 days and that his sight was impaired for about one week, and emergency room physician's assistant's testimony that victim sustained "pretty obvious" abrasion across cornea, which would impair vision and cause pain. People v Travis, 273 A.D.2d 544, 711 N.Y.S.2d 514, 2000 N.Y. App. Div. LEXIS 6697 (N.Y. App. Div. 3d Dep't 2000).

People failed to show physical injury element of second degree assault where victim only sought medical attention at direction of police and described his injury as being red, swollen, and stiff neck, he admitted that, although his neck was sore and tender, "it wasn't that bad," he had no trouble driving after incident, lost no time from work, and none of his activities were curtailed, and he acknowledged that, with exception of being "somewhat sore," injury did not affect his life. People v Thomas, 274 A.D.2d 761, 711 N.Y.S.2d 563, 2000 N.Y. App. Div. LEXIS 8095 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 939, 721 N.Y.S.2d 615, 744 N.E.2d 151, 2000 N.Y. LEXIS 4122 (N.Y. 2000).

Defendant's conviction of second degree assault of parole officer was reduced to attempted second degree assault, and matter was remitted for resentencing, as evidence did not sufficiently establish physical injury where parole officer testified that he received "very substantial" blow to chest which "hurt a lot" and caused him to lose his balance but, admittedly, any bruising he sustained did not interfere with his immediate efforts to apprehend defendant. People v Colantonio, 277 A.D.2d 498, 715 N.Y.S.2d 764, 2000 N.Y. App. Div. LEXIS 11134 (N.Y. App. Div. 3d Dep't 2000), app. denied, 96 N.Y.2d 781, 725 N.Y.S.2d 645, 749 N.E.2d 214, 2001 N.Y. LEXIS 1154 (N.Y. 2001).

Evidence that a corrections officer suffered a blow to his check that caused pain and some swelling was insufficient to support defendant's conviction for assault in the second degree as it did not show the necessary physical condition or substantial pain. People v Williams, 46 A.D.3d 1115, 847 N.Y.S.2d 717, 2007 N.Y. App. Div. LEXIS 13153 (N.Y. App. Div. 3d Dep't 2007), app. denied, 10 N.Y.3d 818, 857 N.Y.S.2d 51, 886 N.E.2d 816, 2008 N.Y. LEXIS 1292 (N.Y. 2008).

Conviction for N.Y. Penal Law § 120.05(3) second degree assault was reduced to lesser-included offense of N.Y. Penal Law §§ 110.00, 120.05 attempted second degree assault since there was not sufficient evidence that the bite that broke the officer's skin was a "physical injury" based on the officer's about one hour of pain and the officer not taking medication. People v Winchester, 14 A.D.3d 939, 790 N.Y.S.2d 238, 2005 N.Y. App. Div. LEXIS 620 (N.Y. App. Div. 3d Dep't), app. denied, 5 N.Y.3d 796, 801 N.Y.S.2d 817, 835 N.E.2d 677, 2005 N.Y. LEXIS 2462 (N.Y. 2005).

22. —Fourth Department

Evidence that victim sustained abrasions on neck, suffered slight pain, and had hoarseness of voice did not support second degree assault conviction where record did not show whether hoarseness was of such degree as to constitute impairment of physical condition as defined in CLS Penal § 10.00. People v Prosser, 130 A.D.2d 972, 516 N.Y.S.2d 559, 1987 N.Y. App. Div. LEXIS 46958 (N.Y. App. Div. 4th Dep't 1987).

Evidence did not support second degree assault conviction under CLS Penal § 120.05(6) since pain suffered by victim was not "substantial" and thus did not satisfy element of physical injury as defined by CLS Penal § 10.00, where victim was thrown to ground during scuffle and suffered scrape on his face and shoulder, there was some bleeding and victim felt "stinging" but no pain, victim did not seek medical attention, and scrapes healed in "a few days." People v Green, 145 A.D.2d 929, 536 N.Y.S.2d 611, 1988 N.Y. App. Div. LEXIS 13954 (N.Y. App. Div. 4th Dep't 1988).

Evidence was legally insufficient to establish "physical injury" in support of conviction of second degree assault, although victim testified that his face bled and "it hurt a little bit" when defendant pushed him to ground, where he did not testify regarding extent of pain suffered, nor that pain was substantial, and record lacked evidentiary support for conclusion that victim's physical condition was impaired because of injuries sustained in incident. People v Rankin, 155 A.D.2d 977, 547 N.Y.S.2d 783, 1989 N.Y. App. Div. LEXIS 14862 (N.Y. App. Div. 4th Dep't 1989), app. denied, 75 N.Y.2d 816, 552 N.Y.S.2d 566, 551 N.E.2d 1244, 1990 N.Y. LEXIS 394 (N.Y. 1990).

Evidence of physical injury, as defined in CLS Penal § 10.00(9), was insufficient to support defendant's conviction of second degree robbery and second degree assault where, as result of altercation with defendant, victim suffered minor cuts and bruises, and transient pain; victim's testimony that altercation caused "emotional upset" resulting in "flare up" of arthritis in his knee was insufficient without competent supporting medical proof to establish that defendant's conduct was proximate cause of arthritis recurrence. People v Patterson, 192 A.D.2d 1083, 596 N.Y.S.2d 234, 1993 N.Y. App. Div. LEXIS 4094 (N.Y. App. Div. 4th Dep't 1993).

Physical injury element of second degree assault was established by victim's testimony that he was stabbed in back of thigh, that he called for ambulance immediately after arriving at his residence, that he was in substantial pain at time, and that he received hospital treatment for stab wound. People v Owens, 256 A.D.2d 1220, 685 N.Y.S.2d 145, 1998 N.Y. App. Div. LEXIS 14392 (N.Y. App. Div. 4th Dep't 1998), app. denied, 93 N.Y.2d 877, 689 N.Y.S.2d 439, 711 N.E.2d 653, 1999 N.Y. LEXIS 1039 (N.Y. 1999), app. denied sub. nom., People v O. V., 93 N.Y.2d 877, 689 N.Y.S.2d 439, 711 N.E.2d 653 (N.Y. 1999), app. denied sub. nom., People v V. O., 93 N.Y.2d 880, 689 N.Y.S.2d 442, 711 N.E.2d 656, 1999 N.Y. LEXIS 4663 (N.Y. 1999).

Proof that victim sustained broken finger was insufficient to establish serious physical injury within meaning of CLS Penal § 120.05(1) but supported conviction of lesser included offense of third degree assault under CLS Penal § 120.00(1). People v White, 283 A.D.2d 964, 725 N.Y.S.2d 499, 2001 N.Y. App. Div. LEXIS 4635 (N.Y. App. Div. 4th Dep't 2001).

Defendant's convictions for felony assault and strangulation were not supported by legally sufficient evidence with respect to the element of physical injury, as the People failed to establish either physical impairment or substantial pain by evidence of the victim's minor pain, one-centimeter bruise, and swollen neck. People v Case, 150 A.D.3d 1634, 54 N.Y.S.3d 475, 2017 N.Y. App. Div. LEXIS 3610 (N.Y. App. Div. 4th Dep't 2017).

23. Deadly weapons or dangerous instruments, generally

A conviction for criminal possession of a weapon in the fourth degree was not repugnant to acquittals on robbery and assault counts, since a finding that defendant did not actually use the dangerous instrument in his possession does not ipso facto negate an intent to use the dangerous instrument in furtherance of the commission of crimes for which he was convicted had the need to use said instrument materialized, in that intent to use a dangerous instrument unlawfully is an essential element of the former count but not the latter two. People v Campbell, 86 A.D.2d 403, 450 N.Y.S.2d 210, 1982 N.Y. App. Div. LEXIS 15728 (N.Y. App. Div. 2d Dep't), app. denied, 57 N.Y.2d 684, 1982 N.Y. LEXIS 4146 (N.Y. 1982).

Contemporaneous acquittal of attempted assault in second degree does not require finding that conviction of criminal possession of weapon in third degree is repugnant; to be found guilty of attempted assault, defendant must be shown to have had intent to cause physical injury, while in order to convict him of criminal possession of weapon, it need only be shown that defendant had intent to use weapon unlawfullly against another; thus, verdict of guilty on criminal possession charge is not necessarily negated by failure to find that defendant had requisite intent under assault charge. People v Martino, 112 A.D.2d 1049, 493 N.Y.S.2d 36, 1985 N.Y. App. Div. LEXIS 52252 (N.Y. App. Div. 2d Dep't), app. denied, 66 N.Y.2d 616, 494 N.Y.S.2d 1039, 485 N.E.2d 243, 1985 N.Y. LEXIS 17080 (N.Y. 1985).

In second degree assault trial, evidence established that defendant used dangerous instrument to assault victim even though instrument was never recovered where witness testified that he saw object in defendant's hand during course of assault, and photograph of victim showed that he sustained deep laceration in his head. People v Pagan, 163 A.D.2d 681, 558 N.Y.S.2d 289, 1990 N.Y. App. Div. LEXIS 8383 (N.Y. App. Div. 3d Dep't 1990).

In prosecution for second degree assault, evidence was sufficient to show defendant's complicity in use of dangerous weapon where (1) as complainant was being pummeled by defendant and 2 others in unprovoked assault, defendant yelled "go get ," last word of which complainant could not make out, and (2) one of defendant's companions then left and, when he returned, complainant felt blows of heavy object he could not identify; this sufficed to show that defendant acted in concert in that he intended use of dangerous instrument and requested that his accomplice fetch weapon. People v Carey, 180 A.D.2d 431, 580 N.Y.S.2d 10, 1992 N.Y. App. Div. LEXIS 1172 (N.Y. App. Div. 1st Dep't), app. denied, 79 N.Y.2d 998, 584 N.Y.S.2d 453, 594 N.E.2d 947, 1992 N.Y. LEXIS 2562 (N.Y. 1992).

In prosecution for first and second degree assault, there was sufficient circumstantial evidence to prove that defendant used dangerous instrument to inflict injuries on victim where (1) defendant, while walking from shower to his prison cell, stopped in front of victim's cell, reached into cell through feed tray, made 2 lunging movements, and returned to his cell, (2) no one else was in vicinity of victim's cell immediately before or after incident, (3) within moments, correction officers went to victim's cell and found him bleeding profusely, and (4) victim's treating physician found large laceration in victim's neck and 10-inch laceration in his chest that penetrated to his sternum. People v Wilson, 240 A.D.2d 774, 658 N.Y.S.2d 524, 1997 N.Y. App. Div. LEXIS 6046 (N.Y. App. Div. 3d Dep't), app. denied, 90 N.Y.2d 899, 662 N.Y.S.2d 442, 685 N.E.2d 223, 1997 N.Y. LEXIS 2921 (N.Y. 1997).

Expert medical testimony may be used to show that injury was caused by dangerous instrument; thus, defendant's use of dangerous instrument was shown where emergency room nurse testified that nature of lacerations to victim were "clear-cut" with "no jagged edges" and concluded that they were caused by sharp instrument such as knife, blade, piece of glass, or scalpel. People v Santiago, 274 A.D.2d 438, 711 N.Y.S.2d 776, 2000 N.Y. App. Div. LEXIS 7700 (N.Y. App. Div. 2d Dep't), app. denied, 95 N.Y.2d 870, 715 N.Y.S.2d 225, 738 N.E.2d 373, 2000 N.Y. LEXIS 3138 (N.Y. 2000), app. denied, 96 N.Y.2d 738, 722 N.Y.S.2d 805, 745 N.E.2d 1028, 2001 N.Y. LEXIS 467 (N.Y. 2001).

Defendant's hitting of his victim on the back with an 18-inch board was his use of a dangerous instrument sufficient for an assault in the second conviction under N.Y. Penal Law § 120.05(2). People v Tedesco, 30 A.D.3d 1075, 816 N.Y.S.2d 269, 2006 N.Y. App. Div. LEXIS 7586 (N.Y. App. Div. 4th Dep't), app. denied, 7 N.Y.3d 818, 822 N.Y.S.2d 493, 855 N.E.2d 809, 2006 N.Y. LEXIS 3157 (N.Y. 2006).

Petitioner alien's 2nd-degree assault conviction under N.Y. Penal Law § 120.05(2) was a "crime of violence" and "aggravated felony" under 18 U.S.C.S. § 16(b), 8 U.S.C.S. § 1101(a)(43)(F), as it required intentionally causing physical injury by using a deadly weapon or dangerous instrument, necessarily involving use of physical force. Morris v Holder, 676 F.3d 309, 2012 U.S. App. LEXIS 8166 (2d Cir. 2012).

24. —Firearms

Trier of fact could reasonably conclude that defendant was aware of and consciously disregarded substantial and unjustifiable risk that his action in firing rifle inside residential dwelling would result in injury to victim, and thus defendant was properly found guilty of second degree assault, where (1) defendant, while intoxicated, loaded weapon himself, and slid bolt of rifle back several times prior to firing it, (2) he laughed prior to firing second shot into rug, stating that his purpose in firing was to see if he had used correct bullets, and (3) he fired third shot which struck and seriously injured victim. People v Harley, 150 A.D.2d 606, 541 N.Y.S.2d 475, 1989 N.Y. App. Div. LEXIS 6866 (N.Y. App. Div. 2d Dep't 1989).

Evidence at trial on charges of second degree weapon possession and second degree assault was legally sufficient to establish that weapon possessed and employed by defendant in course of assault was "firearm" within meaning of CLS Penal § 265.00(3), even though victim was unable to describe weapon (which went unrecovered) with which defendant shot him, where his detailed account of shooting, and reenactment in which he demonstrated defendant's stance and manner in which defendant held weapon, together with bullet recovered at hospital, supported reasonable inference that defendant employed firearm in shooting victim. People v McGrew, 150 A.D.2d 729, 541 N.Y.S.2d 597, 1989 N.Y. App. Div. LEXIS 6994 (N.Y. App. Div. 2d Dep't 1989).

Defendant was entitled to reversal of conviction and new trial on charges of second degree weapon possession and second degree assault where court failed to provide jury with applicable definition of "firearm" but instead charged jury on statutory definition which focused on subjective element of "concealability" rather than specific dimensions of weapon, which undermined key defense argument that hinged existence of reasonable doubt on absence of proof of nature or dimensions of weapon used. People v McGrew, 150 A.D.2d 729, 541 N.Y.S.2d 597, 1989 N.Y. App. Div. LEXIS 6994 (N.Y. App. Div. 2d Dep't 1989).

Defendant was properly convicted of second degree assault, despite his claim that handgun used to strike victim on side of head was not dangerous instrument; gun used as bludgeon is readily capable of causing death or other serious physical injury. People v Wooden, 275 A.D.2d 935, 713 N.Y.S.2d 415, 2000 N.Y. App. Div. LEXIS 9703 (N.Y. App. Div. 4th Dep't 2000), app. denied, 96 N.Y.2d 740, 722 N.Y.S.2d 807, 745 N.E.2d 1030, 2001 N.Y. LEXIS 506 (N.Y. 2001).

25. —Knives

Evidence, which failed to show that illegal juvenile delinquent either possessed knife or exercised dominion and control over it, and which also failed to show that juvenile, with requisite mental culpability, solicited, requested, commanded, importuned or intentionally aided another in possession of the knife, was insufficient to support finding that juvenile possessed the knife. In re Isaac F., 45 A.D.2d 705, 357 N.Y.S.2d 92, 1974 N.Y. App. Div. LEXIS 4572 (N.Y. App. Div. 1st Dep't 1974).

In trial for second degree assault, evidence supported finding that defendant used knife, although only one of several witnesses testified to seeing knife, where (1) waitress testified that she removed knife from defendant's hand during altercation and placed it on table, and (2) doctor who examined victim after altercation testified that his wounds could have been caused by knife; fact that no other witnesses saw knife did not render waitress' testimony unreliable since failure to see knife could be explained by vantage points from which other witnesses saw altercation. People v Kranz, 155 A.D.2d 555, 547 N.Y.S.2d 411, 1989 N.Y. App. Div. LEXIS 14296 (N.Y. App. Div. 2d Dep't 1989), app. denied, 76 N.Y.2d 859, 560 N.Y.S.2d 999, 561 N.E.2d 899, 1990 N.Y. LEXIS 3957 (N.Y. 1990).

Trial court properly convicted defendant of attempted assault in the first degree, assault in the second degree, criminal possession of a weapon in the third degree, and endangering the welfare of a child with regard to defendant's actions in attacking to males at a day-care center as the testimony revealed that the two male victims were not armed and that defendant pulled out a knife and repeatedly stabbed the pair as they wrestled defendant down. The fact that blood from the assault splashed on the hallway windows so that the children in the day-care saw the same was sufficient evidence to support defendant's conviction for endangering the welfare of a child. People v Lewis, 46 A.D.3d 943, 846

N.Y.S.2d 766, 2007 N.Y. App. Div. LEXIS 12425 (N.Y. App. Div. 3d Dep't 2007).

Based on appellant's use of a knife in an altercation with the complainant, the evidence was sufficient in a juvenile delinquency case to establish that appellant committed acts which, if committed by an adult, would have constituted the crimes of assault in the second degree, menacing in the second degree, and criminal possession of a weapon in the fourth degree. Matter of Robert C., 67 A.D.3d 790, 888 N.Y.S.2d 192, 2009 N.Y. App. Div. LEXIS 8068 (N.Y. App. Div. 2d Dep't 2009).

Jury's verdict convicting defendant of assault in the second degree and criminal possession of a weapon in the fourth degree were supported by the weight of the evidence. The victim's testimony and the testimony of the nurse who treated him at the hospital showed that the injury was consistent with a razor blade cut. A police officer who responded to the scene testified that a search of defendant's body revealed a box cutter in his right pocket with a reddish-brown stain. People v Wright, 160 A.D.3d 1110, 75 N.Y.S.3d 320, 2018 N.Y. App. Div. LEXIS 2514 (N.Y. App. Div. 3d Dep't), app. denied, 31 N.Y.3d 1154, 108 N.E.3d 510, 83 N.Y.S.3d 436, 2018 N.Y. LEXIS 2260 (N.Y. 2018).

26. —Motor vehicles

Motor vehicle constitutes dangerous instrument where it is operated by intoxicated driver who pulls out to pass car in front of him while in no-passing zone. People v Bell, 112 A.D.2d 27, 490 N.Y.S.2d 402, 1985 N.Y. App. Div. LEXIS 50662 (N.Y. App. Div. 4th Dep't 1985).

27. —Hands and feet

In view of evidence of use of defendant's boots to inflict serious physical injury upon complainant, they could be found to be a "dangerous instrument" within second-degree assault statute. People v Rumaner, 45 A.D.2d 290, 357 N.Y.S.2d 735, 1974 N.Y. App. Div. LEXIS 4329 (N.Y. App. Div. 3d Dep't 1974).

It was error to instruct jury that it could, under circumstances in which used, find defendant's hands, thumbs and body to be "dangerous instrument" in support of charge of assault in second degree where defendant wrapped his hands and thumbs around chest of nine month old child and pushed on his chest, fracturing child's ribs; as matter of law, uncovered parts of human body cannot be considered dangerous instruments. People v Johnson, 122 A.D.2d 341, 504 N.Y.S.2d 311, 1986 N.Y. App. Div. LEXIS 59675 (N.Y. App. Div. 3d Dep't 1986).

Jury justifiably concluded that defendant's leather, round-toed, mid-calf boots, with which he repeatedly kicked victim, constituted dangerous instruments within meaning of CLS Penal § 10.00, justifying his conviction of second-degree assault. People v O'Hara, 124 A.D.2d 895, 508 N.Y.S.2d 348, 1986 N.Y. App. Div. LEXIS 62223 (N.Y. App. Div. 3d Dep't 1986).

Shoe, sneaker, or boot with which juvenile allegedly kicked complainant during course of gang attack constituted "dangerous instrument" within meaning of CLS Penal § 10.00(13), and thus satisfied requirements of CLS Family Ct Act § 311.2(3) in petition alleging acts which, if committed by adult, would have constituted second degree assault. In re Jason J., 187 A.D.2d 652, 590 N.Y.S.2d 893, 1992 N.Y. App. Div. LEXIS 13081 (N.Y. App. Div. 2d Dep't 1992), app. denied, 81 N.Y.2d 706, 597 N.Y.S.2d 936, 613 N.E.2d 968, 1993 N.Y. LEXIS 746 (N.Y. 1993).

People failed to prove that victim's injury was caused by dangerous instrument where evidence merely indicated that cause of injury was single blow to face from defendant's hand. People v Nealy, 254 A.D.2d 505, 681 N.Y.S.2d 33, 1998 N.Y. App. Div. LEXIS 11218 (N.Y. App. Div. 2d Dep't 1998).

28. —Miscellaneous

In prosecution for second degree assault, rational factfinder could conclude that wad of paper towels used by defendant to gag his 10-year-old victim during assault was "dangerous instrument" within meaning of CLS Penal § 10.00(13), since this "ordinarily innocuous household item" had been wadded up with rubber bands to create dense ball that was shoved into victim's mouth with sufficient force to break tooth, and presumably to prevent victim (whose hands were bound) from spitting it out; used in such manner, wad of paper towels was capable of causing serious physical injury to young victim. People v Vasquez, 88 N.Y.2d 561, 647 N.Y.S.2d 697, 670 N.E.2d 1328, 1996 N.Y. LEXIS 1516 (N.Y. 1996).

Defendant's teeth did not constitute "dangerous instrument" under CLS Penal § 10.00(3) although he bit victim's finger so hard that nerves were severed, and Supreme Court correctly dismissed first degree burglary and first and second degree assault counts, and correctly reduced second degree burglary count to third degree burglary; in determining that teeth can be dangerous instruments, Appellate Division improperly applied "use-oriented approach." People v Owusu, 93 N.Y.2d 398, 690 N.Y.S.2d 863, 712 N.E.2d 1228, 1999 N.Y. LEXIS 1135 (N.Y. 1999).

In a prosecution for two counts of assault in the second degree arising from attacks on two victims with the same metal pipe, verdicts acquitting defendant of assault in the second degree but convicting him of assault in the third degree on the first count, and convicting him of assault in the second degree on the second count were repugnant since the verdict on the first count had required a finding that the metal pipe was not a dangerous weapon, while the verdict on the second count had required a finding that it was. The conviction on the second count would, accordingly, be reduced to assault in the third degree. People v Wimms, 80 A.D.2d 837, 436 N.Y.S.2d 332, 1981 N.Y. App. Div. LEXIS 10663 (N.Y. App. Div. 2d Dep't 1981).

Defendant's conviction for assault using a dangerous instrument was proper where she used cloth ankle and wrist restraints to immobilize her victim, in that such restraints could cause permanent contracture of the joints. People v Marshall, 105 A.D.2d 849, 482 N.Y.S.2d 45, 1984 N.Y. App. Div. LEXIS 20979 (N.Y. App. Div. 2d Dep't 1984).

Pool cue is dangerous instrument, and 2-inch head laceration victim receives when struck on head with cue is physical injury, within meaning of second degree assault statute (CLS Penal § 120.05). People v Naylor, 120 A.D.2d 940, 502 N.Y.S.2d 856, 1986 N.Y. App. Div. LEXIS 57027 (N.Y. App. Div. 4th Dep't 1986).

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In second degree assault trial, stick used in assault was properly found to be "dangerous instrument" within meaning of CLS Penal § 10.00(13) where there was ample evidence to support finding that defendant used stick in manner readily capable of causing serious physical injury. People v Ludwig, 155 A.D.2d 558, 547 N.Y.S.2d 414, 1989 N.Y. App. Div. LEXIS 14229 (N.Y. App. Div. 2d Dep't 1989), app. denied, 75 N.Y.2d 814, 552 N.Y.S.2d 565, 551 N.E.2d 1243, 1990 N.Y. LEXIS 353 (N.Y. 1990).

In prosecution of police officer for second degree assault involving incident which occurred while complainant was under arrest and in custody at police station, officer's use of dangerous instrument was sufficiently demonstrated by evidence that he used stun gun, and that stun gun could cause serious or protracted disfigurement, substantial pain and burns to body and, if applied to eye, could cause loss or impairment of functioning of eye. People v MacCary, 173 A.D.2d 646, 570 N.Y.S.2d 322, 1991 N.Y. App. Div. LEXIS 7646 (N.Y. App. Div. 2d Dep't), app. denied, 78 N.Y.2d 969, 574 N.Y.S.2d 949, 580 N.E.2d 421, 1991 N.Y. LEXIS 4454 (N.Y. 1991).

Defendant's conviction of second degree assault under CLS Penal § 120.05(2) was supported by victim's testimony that, immediately after defendant punched him, he saw that defendant was holding "printer's guide" inside his fist, since jury could properly conclude that printer's guide (solid metal cylindrical object measuring 2 inches in length and weighing about one and one-half pounds), which was used to reinforce impact of fist blow, was readily capable of causing serious physical injury and thus constituted "dangerous instrument" pursuant to CLS Penal § 10.00(13). People v Goode, 179 A.D.2d 676, 578 N.Y.S.2d 611, 1992 N.Y. App. Div. LEXIS 246 (N.Y. App. Div. 2d Dep't), app. denied, 79 N.Y.2d 1001, 584 N.Y.S.2d 456, 594 N.E.2d 950, 1992 N.Y. LEXIS 2700 (N.Y. 1992).

Wrench was "dangerous instrument" within meaning of CLS Penal § 120.05(2) where defendant struck victim in head with

wrench and caused 2-inch laceration, and physician testified that blow could have caused fractured skull, although it did not. People v White, 185 A.D.2d 460, 586 N.Y.S.2d 337, 1992 N.Y. App. Div. LEXIS 8963 (N.Y. App. Div. 3d Dep't), app. denied, 80 N.Y.2d 935, 589 N.Y.S.2d 863, 603 N.E.2d 968, 1992 N.Y. LEXIS 4203 (N.Y. 1992).

Defendant was properly convicted of first degree robbery and second degree assault since evidence established that bottle used to strike victim was dangerous instrument where victim sustained cuts, swelling, and scarring, as well as cyst-like knot over ear, which was clotted with blood and had to be lanced and drained. People v Jacobs, 188 A.D.2d 897, 592 N.Y.S.2d 802, 1992 N.Y. App. Div. LEXIS 14632 (N.Y. App. Div. 3d Dep't 1992), app. denied, 81 N.Y.2d 887, 597 N.Y.S.2d 949, 613 N.E.2d 981, 1993 N.Y. LEXIS 1448 (N.Y. 1993), app. denied, 81 N.Y.2d 890, 597 N.Y.S.2d 952, 613 N.E.2d 984 (N.Y. 1993).

Defendant was properly convicted of second degree assault where, using child's toy baseball bat, he hit victim on head twice and on arm once, causing contusions, headaches, and pain to arm, which restricted her use of arm for significant period of time and resulted in her absence from work for several days; as used, bat was capable of causing serious physical injury, and thus constituted "dangerous instrument." People v Torres, 211 A.D.2d 509, 621 N.Y.S.2d 340, 1995 N.Y. App. Div. LEXIS 390 (N.Y. App. Div. 1st Dep't), app. denied, 86 N.Y.2d 742, 631 N.Y.S.2d 622, 655 N.E.2d 719, 1995 N.Y. LEXIS 3311 (N.Y. 1995).

Court erred in dismissing those counts of indictment charging second degree assault for failure to show that, in manner in which they were used, belt and wall constituted dangerous instruments where there was testimony that defendant struck his 12-year-old son 6 or 7 times, and perhaps up to 10 times, in whipping motion with leather belt he usually wore with his police uniform, and that defendant struck back of son's head against wall in family home several times with sufficient force to crack wall. People v Prue, 219 A.D.2d 873, 632 N.Y.S.2d 347, 1995 N.Y. App. Div. LEXIS 11044 (N.Y. App. Div. 4th Dep't 1995).

Use of "dangerous instrument" was sufficiently established in prosecution for second degree assault by complainant's testimony that he saw "brown stick" approximately 15 to 16 inches long, and eyewitnesses' testimony describing foot-long dark object with strap hanging from it like "billy stick" or "black, long object." People v Rivera, 223 A.D.2d 514, 637 N.Y.S.2d 377, 1996 N.Y. App. Div. LEXIS 712 (N.Y. App. Div. 1st Dep't), app. denied, 88 N.Y.2d 884, 645 N.Y.S.2d 458, 668 N.E.2d 429, 1996 N.Y. LEXIS 2283 (N.Y. 1996).

Pen and pencil constituted dangerous instruments under CLS Penal § 120.05(2) where defendant used them in menacing manner and tried to stab police officer with pen. People v Molnar, 234 A.D.2d 988, 652 N.Y.S.2d 186, 1996 N.Y. App. Div. LEXIS 13764 (N.Y. App. Div. 4th Dep't 1996), app. denied, 89 N.Y.2d 1038, 659 N.Y.S.2d 869, 681 N.E.2d 1316, 1997 N.Y. LEXIS 1696 (N.Y. 1997).

Family Court properly found that juvenile committed acts which, if committed by adult, would constitute second degree menacing, fourth degree weapon possession and second degree attempted assault, where victim unequivocally testified that juvenile chased and struck him in back with baseball bat. In re Anthony D., 237 A.D.2d 706, 654 N.Y.S.2d 855, 1997 N.Y. App. Div. LEXIS 2261 (N.Y. App. Div. 3d Dep't 1997).

Conviction for second degree assault would be reduced to third degree assault where defendant was charged with causing physical injury to fellow jail inmate by means of dangerous instrument (his sneakers) but there was no proof that he was wearing sneakers or any other footwear; admission by defendant's attorney in his opening statement did not constitute evidence and did not relieve People of their burden of proof. People v Johnson, 241 A.D.2d 954, 661 N.Y.S.2d 326, 1997 N.Y. App. Div. LEXIS 7904 (N.Y. App. Div. 4th Dep't 1997).

Evidence showed that, using dangerous instrument (scissors), defendant intentionally caused physical injury to victim consisting of physical impairment to her finger where victim testified that, after becoming upset with her, defendant through scissors at her causing laceration to finger on her hand which she was using to shield herself, he thereafter chased her and stabbed her in leg with scissors, cut on finger resulted in visible scar and she lost feeling to tip portion of finger which persisted as of time of trial, 2 years and 8 months later, and her family physician testified that he treated her about 4 days later and opined that she had sustained some nerve damage to finger and that injury was consistent with injury inflicted by scissors. People v West, 271 A.D.2d 806, 708 N.Y.S.2d 478, 2000 N.Y. App. Div. LEXIS 4438 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 893, 715 N.Y.S.2d 386, 738 N.E.2d 790, 2000 N.Y. LEXIS 3392 (N.Y. 2000).

Assault conviction would be reduced from second to third degree where teeth are not "dangerous instrument" under Penal Law. People v Silva, 273 A.D.2d 417, 709 N.Y.S.2d 612, 2000 N.Y. App. Div. LEXIS 7032 (N.Y. App. Div. 2d Dep't), app. denied, 95 N.Y.2d 857, 714 N.Y.S.2d 9, 736 N.E.2d 870, 2000 N.Y. LEXIS 2762 (N.Y. 2000).

Defendant could not be convicted of second degree assault under CLS Penal § 120.05(2), or of attempt to commit that crime, where compressed balls of wet toilet paper that he threw at correction officer in jail from distance of 12 to 15 feet were not "readily capable of causing death or other serious physical injury" under CLS Penal § 10.00(13) and thus were not dangerous instruments under § 120.05(2). People v Travis, 273 A.D.2d 544, 711 N.Y.S.2d 514, 2000 N.Y. App. Div. LEXIS 6697 (N.Y. App. Div. 3d Dep't 2000).

Defendant's work boots were dangerous instrument so as to support conviction of attempted second degree assault where 28-year-old defendant used them to kick 15-year-old victim in head, chest, stomach, and legs, and thus boots were used in manner readily capable of causing serious physical injury. People v Ray, 273 A.D.2d 611, 710 N.Y.S.2d 138, 2000 N.Y. App. Div. LEXIS 7226 (N.Y. App. Div. 3d Dep't 2000).

In second degree assault trial, evidence that defendant was wearing work boots when he kicked victim and when he was subsequently arrested was sufficient for jury to find that he employed dangerous instrument during assault. People v Taylor, 276 A.D.2d 933, 714 N.Y.S.2d 785, 2000 N.Y. App. Div. LEXIS 10825 (N.Y. App. Div. 3d Dep't 2000), app. denied, 96 N.Y.2d 788, 725 N.Y.S.2d 653, 749 N.E.2d 222, 2001 N.Y. LEXIS 1323 (N.Y. 2001).

Defendant was properly convicted of attempted second degree assault on evidence that he used umbrella in manner that rendered it dangerous instrument. People v Dones, 279 A.D.2d 366, 720 N.Y.S.2d 101, 2001 N.Y. App. Div. LEXIS 671 (N.Y. App. Div. 1st Dep't), app. denied, 96 N.Y.2d 799, 726 N.Y.S.2d 377, 750 N.E.2d 79, 2001 N.Y. LEXIS 1583 (N.Y. 2001).

Evidence was legally sufficient to support defendant's conviction of assault in the second degree, a violation of N.Y. Penal Law § 120.05(2), where (1) even though a broom was not inherently dangerous, the evidence established that at least some of the multiple injuries sustained by defendant's wife were caused by means of a "dangerous instrument" within the meaning of N.Y. Penal Law § 10.00(13) where defendant used a broom as an instrument readily capable of causing serious physical injury under the facts of the case by striking his wife with the broom numerous times about the head, arms, and back, and (2) viewing the evidence in the light most favorable to the People, the evidence was legally sufficient to establish that the victim sustained physical injury within the meaning of N.Y. Penal Law § 10.00(9). People v Becker, 298 A.D.2d 986, 748 N.Y.S.2d 299, 2002 N.Y. App. Div. LEXIS 9156 (N.Y. App. Div. 4th Dep't), app. denied, 99 N.Y.2d 555, 754 N.Y.S.2d 207, 784 N.E.2d 80, 2002 N.Y. LEXIS 4258 (N.Y. 2002).

Defendant was properly convicted of assault in the second degree under N.Y. Penal Law § 120.05 after striking his girlfriend in the head with a television remote control because even an otherwise innocuous item such as a remote control could become a "dangerous instrument" depending on the manner in which it was used. People v Krotoszynski, 43 A.D.3d 450, 840 N.Y.S.2d 627, 2007 N.Y. App. Div. LEXIS 9065 (N.Y. App. Div. 2d Dep't), app. denied, 9 N.Y.3d 962, 848 N.Y.S.2d 31, 878 N.E.2d 615, 2007 N.Y. LEXIS 3664 (N.Y. 2007).

Legally sufficient evidence was presented to support defendant's conviction of assault in the second degree under N.Y. Penal Law § 120.05(2) by establishing defendant injured the victim by

using a dangerous instrument as the nature of the victim's wounds supported an inference that defendant used a sharp, dangerous instrument to inflict those wounds. People v Brown, 52 A.D.3d 1237, 859 N.Y.S.2d 548, 2008 N.Y. App. Div. LEXIS 5219 (N.Y. App. Div. 4th Dep't), app. denied, 10 N.Y.3d 956, 863 N.Y.S.2d 140, 893 N.E.2d 446, 2008 N.Y. LEXIS 2922 (N.Y. 2008).

Sufficient evidence was presented to the grand jury to support an indictment for second degree assault, N.Y. Penal Law § 120.05(2), based on the complainant's allegation that defendant threw her down a flight of stairs to a concrete landing below; based on the temporary use of the concrete landing, it satisfied the element of "dangerous instrument" for purposes of a charge of second degree assault. Any instrument, article or substance, no matter how innocuous it was when used for its legitimate purpose, became a dangerous instrument when used in a manner which rendered it readily capable of causing serious physical injury and, given the procedural posture of the case, the People were entitled to the favorable inference that defendant intended to injure the victim on the concrete landing. People v Warren, 98 A.D.3d 634, 949 N.Y.S.2d 496, 2012 N.Y. App. Div. LEXIS 5912 (N.Y. App. Div. 2d Dep't 2012).

Trial court properly granted defendant's motion to reduce his conviction of second-degree assault to third-degree assault because, while a sidewalk or concrete surface could, in certain circumstances, be "used" as a dangerous instrument and the victim's injuries were undoubtedly caused by his head striking a sidewalk, it could not be said that defendant, in the act of punching the victim, "used" the sidewalk such that he was "aware of and consciously disregarded a substantial and unjustified risk" that the sidewalk was "readily capable of causing serious physical injury." People v McElroy, 139 A.D.3d 980, 31 N.Y.S.3d 593, 2016 N.Y. App. Div. LEXIS 3762 (N.Y. App. Div. 2d Dep't 2016).

Trial court properly convicted defendant of attempted second-degree murder, first- and second-degree strangulation, and second-degree assault because he threatened to kill his 65-year-old mother after she accidentally woke him up and then brutally beat, kicked, and choked her to the point where she lost consciousness, the absence of a long-term serious injury to the mother did not preclude the finding of life-threatening actions by defendant, and the way that defendant used headphones—hitting the mother in the mouth and trying to shove them down her throat—qualified them as a dangerous instrument. People v Ryder, 146 A.D.3d 1022, 44 N.Y.S.3d 598, 2017 N.Y. App. Div. LEXIS 59 (N.Y. App. Div. 3d Dep't), app. denied, 29 N.Y.3d 1086, 86 N.E.3d 263, 64 N.Y.S.3d 176, 2017 N.Y. LEXIS 2285 (N.Y. 2017).

Rocks are not "deadly weapons" or "dangerous instrumentalities" within the meaning of the statute. In re Taylor, 62 Misc. 2d 529, 309 N.Y.S.2d 368, 1970 N.Y. Misc. LEXIS 1927 (N.Y. Fam. Ct. 1970).

Evidence was legally sufficient to establish beyond a reasonable doubt that defendant used a portion of a cement sidewalk as a dangerous instrument for purposes of N.Y. Penal Law §§ 10.00(13), 120.05(2), where (1) the testimony witnesses indicated that defendant stomped upon the victim's head and face as the victim lay prone upon a cement sidewalk; (2) the victim's injuries included straight abrasions on the victim's temple, indicating that the victim's head was in contact with a straight edge consistent with a curb; and (3) the medical testimony reflected that the fractures on the victim's jaw were consistent with being stomped upon. People v Melville, 298 A.D.2d 601, 749 N.Y.S.2d 65, 2002 N.Y. App. Div. LEXIS 10274 (N.Y. App. Div. 2d Dep't 2002), app. denied, 99 N.Y.2d 617, 757 N.Y.S.2d 828, 787 N.E.2d 1174, 2003 N.Y. LEXIS 587 (N.Y. 2003).

Conviction of second degree assault was based on legally sufficient evidence and was not against the weight of the evidence under circumstances in which, during the course of an argument with his girlfriend, the victim, defendant kicked her in the head with his steel-toed boot; steel-toed boots, worn while kicking someone in the head, could have constituted a dangerous instrument under the assault statute. The boots, together with the testimony of the victim, her treating medical provider and the arresting officer, constituted sufficient evidence that defendant was guilty of assault in the second degree, and the verdict was not against the weight of the evidence. People v Roblee, 70 A.D.3d 225, 890 N.Y.S.2d 166, 2009 N.Y. App. Div. LEXIS 8719 (N.Y. App. Div. 3d Dep't 2009).

Conviction of assault in the second degree was supported by sufficient evidence under circumstances in which, while attacking the victim, defendant used the kitchen floor and countertop as a dangerous instrument by repeatedly forcing the victim's head against each surface intending to cause her physical injury; although defendant argued that neither the floor nor the countertop were used as dangerous instruments, an expert called by defendant did not deny, under the facts presented, that the victim's head could have been forced against the countertop and floor during the encounter and that such contact could have caused her physical injury. People v Bonney, 69 A.D.3d 1116, 894 N.Y.S.2d 192, 2010 N.Y. App. Div. LEXIS 401 (N.Y. App. Div. 3d Dep't), app. denied, 14 N.Y.3d 838, 901 N.Y.S.2d 145, 927 N.E.2d 566, 2010 N.Y. LEXIS 1457 (N.Y. 2010).

In a case involving assault in the second degree, the grievous injuries suffered by a victim did not substitute for the absence of evidence that defendant was aware of and used a sidewalk as a dangerous instrument where the victim hit his head on the sidewalk after being punched by defendant; however, defendant's actions, especially in an intoxicated condition, in punching the unsuspecting victim about the head disregarded the risk that he would fall and be injured and showed recklessness. Therefore, the charge was reduced to third degree assault. People v McElroy, 981 N.Y.S.2d 298, 43 Misc. 3d 558, 2014 N.Y. Misc. LEXIS 711 (N.Y. Sup. Ct. 2014), aff'd, 139 A.D.3d 980, 31 N.Y.S.3d 593, 2016 N.Y. App. Div. LEXIS 3762 (N.Y. App. Div. 2d Dep't 2016).

29. Prevention of officer's performance of duty, generally

While § 120.05, subd 3 of the Penal Law requires no particular degree of physical impairment or substantial pain, under the definition of physical injury in the Penal Law, to sustain a conviction, there must be evidence establishing the one or the other. People v McDowell, 28 N.Y.2d 373, 321 N.Y.S.2d 894, 270 N.E.2d 716, 1971 N.Y. LEXIS 1297 (N.Y. 1971).

One is guilty of assault, second degree, if he causes physical injury to a peace officer with intent to prevent the officer from performing his duty. People v Moore, 47 A.D.2d 980, 367 N.Y.S.2d 123, 1975 N.Y. App. Div. LEXIS 9464 (N.Y. App. Div. 3d Dep't 1975).

Attempted second degree assault on peace officer is not fictitious crime. In re Belinda B., 133 A.D.2d 225, 519 N.Y.S.2d 28, 1987 N.Y. App. Div. LEXIS 49726 (N.Y. App. Div. 2d Dep't 1987).

CLS Penal § 120.05(3) does not violate equal protection by raising degree of assault where victim is peace officer, firefighter or paramedic; crime victim's status as peace officer performing his regular duties may properly be regarded as aggravating circumstance. People v Cortez, 143 A.D.2d 464, 532 N.Y.S.2d 585, 1988 N.Y. App. Div. LEXIS 9229 (N.Y. App. Div. 3d Dep't 1988).

Deputy's testimony that defendant interfered with investigation of domestic dispute call by refusing to get into patrol car, making scene and yelling, and not cooperating, was legally insufficient to establish "intent to prevent police offer from performing lawful duty," and thus did not support second degree assault convictions, where defendant, having been specifically told that he was not under arrest, merely did what he was entitled to do, and he became agitated and "disorderly" only when deputy remained adamant that he get into patrol car. People v William "EE" 276 A.D.2d 918, 714 N.Y.S.2d 590 (3d Dept 2000).

To establish defendant's guilt of resisting arrest, second degree assault, and second degree obstructing governmental administration, People were required to prove that officer had probable cause to arrest him for disorderly conduct, but were not required to prove that he actually committed disorderly conduct. People v McDermott, 279 A.D.2d 361, 719 N.Y.S.2d 76, 2001 N.Y. App. Div. LEXIS 415 (N.Y. App. Div. 1st Dep't), app. denied, 96 N.Y.2d 803, 726 N.Y.S.2d 381, 750 N.E.2d 83, 2001 N.Y. LEXIS 1677 (N.Y. 2001).

Where the verdict was based on legally sufficient evidence showing that defendant acted for purposes of sexual gratification, in violation of N.Y Penal Law § 130.00(3) and that defendant physically injured a police officer while intending to prevent the

officer from performing a lawful duty, in violation of N.Y. Penal Law § 120.05(3), the trial court properly denied defendant's N.Y. Crim. Proc. Law § 440.10 motion to vacate the judgment. People v Johnson, 6 A.D.3d 226, 774 N.Y.S.2d 532, 2004 N.Y. App. Div. LEXIS 4068 (N.Y. App. Div. 1st Dep't), app. denied, 3 N.Y.3d 642, 782 N.Y.S.2d 413, 816 N.E.2d 203, 2004 N.Y. LEXIS 3330 (N.Y. 2004), app. denied, 3 N.Y.3d 708, 785 N.Y.S.2d 35, 818 N.E.2d 677, 2004 N.Y. LEXIS 2925 (N.Y. 2004).

30. —Police officers

Eyewitness testimony that defendant kneed officer in groin, that codefendant joined in the assault, that police officer drew his revolver and told defendants they were under arrest, that both defendants continued to resist arrest and got away and that in the course and in furtherance of escape defendant shot and killed officer was sufficient to establish beyond a reasonable doubt the crimes of second degree assault (Penal Law § 120.05, subd 3), second degree escape (Penal Law § 205.10), and felony murder (Penal Law § 125.25, subd 3). People v Bornholdt, 33 N.Y.2d 75, 350 N.Y.S.2d 369, 305 N.E.2d 461, 1973 N.Y. LEXIS 985 (N.Y. 1973), cert. denied, 416 U.S. 905, 94 S. Ct. 1609, 40 L. Ed. 2d 109, 1974 U.S. LEXIS 687 (U.S. 1974).

It was reversible error to introduce into evidence a butcher knife taken from defendant during a scuffle with police, where defendant was not charged with possession of the knife and there was no testimony he had attempted to reach for or use the knife in any manner while resisting lawful apprehension in violation of former Penal Law § 242(5). People v Henry, 31 A.D.2d 943, 298 N.Y.S.2d 879, 1969 N.Y. App. Div. LEXIS 4453 (N.Y. App. Div. 2d Dep't 1969).

While there was no direct testimony by police officer as to his experiencing substantial pain and inference that a six-foot man weighing between 210 and 215 pounds, who struck him with a closed fist in the right eye knocking him to the ground, was sufficient to support a conviction for assault in the second degree. People v McDowell, 35 A.D.2d 611, 312 N.Y.S.2d 477, 1970 N.Y. App. Div. LEXIS 4111 (N.Y. App. Div. 3d Dep't 1970), modified, 28 N.Y.2d 373, 321 N.Y.S.2d 894, 270 N.E.2d 716, 1971 N.Y. LEXIS 1297 (N.Y. 1971).

At his trial on charges of obstructing governmental administration and assaulting several sheriff's deputies, it was not objectionable hearsay for the defendant, his brother and mother to testify that a justice of the peace had instructed the defendant and his brother that they would not be photographed or fingerprinted, where this evidence was offered to establish the reasonable belief by the defendant that the police officers were acting outside their lawful authority in processing him and his brother for commitment to the county jail on unrelated charges. People v Stewart, 37 A.D.2d 908, 325 N.Y.S.2d 533, 1971 N.Y. App. Div. LEXIS 3137 (N.Y. App. Div. 4th Dep't 1971).

In prosecution for, inter alia, assaulting two police officers, trial court's midtrial denial of defendant's request for continuance to enable him to subpoena witness whose statement had just been revealed to defendant by prosecution was prejudicial error, in view of fact that defendant asserted that he resisted plainclothes police officers because he did not know they were police officers and witness' statement asserted that defendant yelled "get the cops" during the struggle. People v Smith, 50 A.D.2d 670, 375 N.Y.S.2d 194, 1975 N.Y. App. Div. LEXIS 12508 (N.Y. App. Div. 3d Dep't 1975).

In a prosecution for second-degree assault, conviction would be reversed where a police officer's back pains, after being kicked and punched by defendant, had failed to rise to the level required in order to constitute physical injury absent impairment of the officer's physical condition. People v Marrero, 88 A.D.2d 998, 451 N.Y.S.2d 836, 1982 N.Y. App. Div. LEXIS 17402 (N.Y. App. Div. 2d Dep't 1982).

In a prosecution for assault on a police officer under Pen Law § 120.05(3), the six-foot-four-inch-tall, two-hundred-and-forty-five-pound officer sustained a "physical injury" within the meaning of the statute, where the officer testified that defendant's punch was a "hard blow" which drove him back a step or two, caused his face to go numb, induced bleeding from the nose, which recurred over the next three or four days, and generated a cut on the inside of his mouth, and further testified that his nose and lip "hurt quite well" during a three or four day period after the incident. People v Chesebro, 94 A.D.2d 897, 463 N.Y.S.2d 711, 1983 N.Y. App. Div. LEXIS 18351 (N.Y. App. Div. 3d Dep't 1983).

In a prosecution for second degree assault under Penal Law § 120.05(3), the evidence of "physical injury" under Penal Law § 10.00(9), inflicted on the complainant police officer, was sufficient to support defendant's conviction where the testimony and a photograph admitted into evidence established that the blow inflicted on the officer resulted in a bleeding laceration approximately one inch long under his eye that required medical attention, and where the officer testified that the blow "stunned" him, caused him to experience "substantial pain," and resulted in his missing five days of work. People v Starling, 104 A.D.2d 742 (N.Y. App. Div. 4th Dep't 1984).

In trial for assault in second degree for inflicting of physical injury on police officer when officer was in course of performing his duties, photographs depicting injuries inflicted by defendant are probative of element of physical injury and may be properly admitted. People v Cuffee, 112 A.D.2d 545, 491 N.Y.S.2d 483, 1985 N.Y. App. Div. LEXIS 55904 (N.Y. App. Div. 3d Dep't 1985).

Grand jury evidence was sufficient to establish prima facie case, based on accessorial liability, for reckless endangerment in first degree and assault in second degree where police officer testified that while holding onto limousine in attempt to stop vehicle from leaving scene he heard passenger (defendant) yell to driver "get out of here, go, go, go," whereupon driver accelerated vehicle and collided with bus, injuring officer; evidence, if unexplained, would tend to establish that defendant was cognizant of grave risk of death to officer if driver accelerated and, despite this awareness, instructed driver to accelerate in order to avoid apprehension. People v Fraser, 126 A.D.2d 740, 511 N.Y.S.2d 326, 1987 N.Y. App. Div. LEXIS 41891 (N.Y. App. Div. 2d Dep't 1987).

Police officer had probable cause to arrest defendant for criminal trespass where, during course of informing remaining tenants that they had to vacate condemned building, officer discovered defendant, who was not listed as tenant, inside apartment whose lock had been broken; thus, defendant was not entitled to dismissal of indictment charging him with second degree assault on ground that police officers, whom defendant attacked while being escorted to cellblock following his arrest, were not performing their lawful duties. People v Kent, 143 A.D.2d 278, 532 N.Y.S.2d 152, 1988 N.Y. App. Div. LEXIS 8900 (N.Y. App. Div. 2d Dep't), app. denied, 73 N.Y.2d 856, 537 N.Y.S.2d 503, 534 N.E.2d 341 (N.Y. 1988).

In prosecution for second degree assault under CLS Penal § 120.05(3), mere fact that police officers failed to inform defendant of charges contained in outstanding arrest warrant did not render their actions unlawful in attempting to arrest defendant. People v Douglas, 143 A.D.2d 452, 532 N.Y.S.2d 446, 1988 N.Y. App. Div. LEXIS 9138 (N.Y. App. Div. 3d Dep't 1988).

Police officer's statements that defendant injured officers by kicking, punching and biting them while they were making arrest, and scattering newspapers at nearby newsstand, if found to be true, would establish that defendant committed each element of crimes of second degree assault, menacing, resisting arrest, second degree obstruction of governmental administration, and fourth degree criminal mischief. In re Jeremy B., 151 A.D.2d 314, 542 N.Y.S.2d 582, 1989 N.Y. App. Div. LEXIS 7904 (N.Y. App. Div. 1st Dep't 1989).

Evidence supported convictions for second degree assault and resisting arrest where (1) officer had pursued defendant with lights and sirens activated in attempt to execute arrest warrant, (2) defendant finally stopped in front of his brother's house, (3) as officer attempted to execute warrant, defendant punched, kicked, and threatened him, and (4) as result of attack officer sustained large bruises, several cuts, and severe headache; defendant's testimony that officer initially attacked him without first telling him of arrest warrant merely raised credibility question for jury. People v Winslow, 153 A.D.2d 965, 545 N.Y.S.2d 405, 1989 N.Y. App. Div. LEXIS 11512 (N.Y. App. Div. 3d Dep't 1989).

Defendant's arrest for assaulting police officer and resisting arrest was not rendered illegal by arresting officer's failure to inform him of his authority and purpose and of reason for arrest, as required by CLS CPL § 140.15(2), even assuming that notice

requirement is element of proof in assault and resisting arrest prosecution, since officer's noncompliance with statute was excusable given that defendant's conduct, in refusing to stop and walking away from officer and then assaulting him, rendered compliance with statute impracticable. People v Battest, 168 A.D.2d 958, 564 N.Y.S.2d 910, 1990 N.Y. App. Div. LEXIS 16514 (N.Y. App. Div. 4th Dep't 1990), app. denied, 77 N.Y.2d 958, 570 N.Y.S.2d 491, 573 N.E.2d 579, 1991 N.Y. LEXIS 1362 (N.Y. 1991).

County Court properly refused to charge justification as defense to second degree assault where prosecution witnesses testified thatdefendant violently resisted arrest resulting in injuries to himself as well as police officers (which led to assault charge), and defense witness (defendant's wife) instead testified that defendant was victim of unprovoked police attack and did nothing to cause injury to himself or police. People v Fiacco, 172 A.D.2d 994, 569 N.Y.S.2d 219, 1991 N.Y. App. Div. LEXIS 4912 (N.Y. App. Div. 3d Dep't), app. denied, 78 N.Y.2d 965, 574 N.Y.S.2d 945, 580 N.E.2d 417, 1991 N.Y. LEXIS 4365 (N.Y. 1991).

Defendant was entitled to vacation of convictions for second degree assault where (1) at about 3:00 a.m., officers decided to approach automobile solely because surrounding location was high crime area and automobile was near house which was hangout for drugs and prostitution, (2) officer driving patrol car maneuvered it into position next to defendant's automobile and other officer asked driver to produce license and registration, (3) defendant gave officer finger and began to drive away, (4) officer maneuvered patrol car to block path of defendant's automobile, got of his car with revolver and flashlight, and approached passenger side of defendant's automobile, while other officer approached driver's side, (5) defendant ignored commands to exit his automobile and began to drive away, striking one officer, and (6) while officers began to shoot at him, defendant continued to drive away, hitting other officer; officers had no right to demand license and registration and had no right to arrest or detain defendant when he refused to comply, and thus officers were not performing lawful duty within meaning of CLS Penal § 120.05(3) at time they were injured. People v Voliton, 190 A.D.2d 764, 593 N.Y.S.2d 822, 1993 N.Y. App. Div. LEXIS 1011 (N.Y. App. Div. 2d Dep't 1993), aff'd, 83 N.Y.2d 192, 608 N.Y.S.2d 945, 630 N.E.2d 641, 1994 N.Y. LEXIS 163 (N.Y. 1994).

Second degree assault conviction was supported by evidence that, in attempt to arrest defendant, officer and defendant struggled until second officer arrived and defendant was restrained, and that during struggle, officer's finger was sprained. People v Pacheco, 204 A.D.2d 577, 612 N.Y.S.2d 179, 1994 N.Y. App. Div. LEXIS 5268 (N.Y. App. Div. 2d Dep't), app. denied, 83 N.Y.2d 970, 616 N.Y.S.2d 23, 639 N.E.2d 763, 1994 N.Y. LEXIS 2505 (N.Y. 1994).

Charged violations of CLS Penal §§ 120.05(3) and 205.30(a) and CLS Veh & Tr §§ 1225-a and 1102 could properly serve as predicate for action under CLS Gen Mun § 205-e where complaint alleged that (1) while on duty as police officer, plaintiff saw defendant drive vehicle onto sidewalk, (2) defendant refused plaintiff's continuing directions to stop and then jumped out of car and "came up at" him, and (3) defendant refused to be handcuffed and struggled with plaintiff, causing him to fall on ground and be injured. Healy v Moeller, 242 A.D.2d 366, 661 N.Y.S.2d 279, 1997 N.Y. App. Div. LEXIS 8466 (N.Y. App. Div. 2d Dep't 1997).

Police officers properly approached defendant in response to emergency call of shots fired minutes earlier at location where he was found, fact that he fled in his car on their approach gave them reasonable suspicion to stop and detain him, and thus they were engaged in lawful activity when they were injured by defendant during chase, for purpose of upholding his second degree assault convictions. People v Sawyer, 270 A.D.2d 293, 704 N.Y.S.2d 604, 2000 N.Y. App. Div. LEXIS 2473 (N.Y. App. Div. 2d Dep't), app. denied, 95 N.Y.2d 803, 711 N.Y.S.2d 172, 733 N.E.2d 244, 2000 N.Y. LEXIS 2153 (N.Y. 2000).

With regard to a second-degree assault conviction under N.Y. Penal Law § 120.05(3), the People had proven the legality of the police conduct in that there was probable cause to believe that an order of protection regarding defendant's girlfriend, which was the predicate for an arrest attempt during which an officer was injured, had been violated. Defendant's aggressive actions in the presence of the officers, the distraught condition of the girlfriend, and the disheveled condition of the apartment amounted to probable cause to believe that defendant had harassed, menaced, intimidated, or otherwise threatened her; moreover, her warning that defendant might grab a knife when he ran into the kitchen presented a safety situation for the officers, and they acted lawfully in attempting to restrain defendant. People v Rivera, 46 A.D.3d 349, 847 N.Y.S.2d 556, 2007 N.Y. App. Div. LEXIS 12715 (N.Y. App. Div. 1st Dep't 2007), app. denied, 10 N.Y.3d 815, 857 N.Y.S.2d 49, 886 N.E.2d 814, 2008 N.Y. LEXIS 1322 (N.Y. 2008).

Convictions for assault in the second degree, N.Y. Penal Law § 120.05(3), resisting arrest, N.Y. Penal Law § 205.30, and obstructing governmental administration in the second degree, N.Y. Penal Law § 195.05, were improper because there was insufficient evidence to establish that the arrest was lawful; officers lacked reasonable cause to believe that defendant committed offense in their presence, and defendant was not required to respond to the officers' request for identification or to open his door to the officers. Further, the officers were aware that defendant initially provided a fictitious name to them, and thus they lacked reasonable cause to believe that defendant had committed the crime of criminal impersonation. People v Perez, 47 A.D.3d 1192, 851 N.Y.S.2d 747, 2008 N.Y. App. Div. LEXIS 2857 (N.Y. App. Div. 4th Dep't), app. denied, 10 N.Y.3d 814, 857 N.Y.S.2d 48, 886 N.E.2d 813, 2008 N.Y. LEXIS 1266 (N.Y. 2008).

Defendant's conviction for assault in the second degree was not against the weight of the evidence because defendant, inter alia, refused to speak with the police, walked away, hit an officer in the face with a lemon wedge, broke free of an officer's grasp and bit him on the hand, punched and head butted a second officer, and refused repeated orders to stop struggling; defendant acknowledged that the occupants of the vehicle that approached her were in uniform. People v McLean, 128 A.D.3d 1106, 8 N.Y.S.3d 696, 2015 N.Y. App. Div. LEXIS 3842 (N.Y. App. Div. 3d Dep't), app. denied, 25 N.Y.3d 1204, 37 N.E.3d 1169, 16 N.Y.S.3d 526, 2015 N.Y. LEXIS 2402 (N.Y. 2015).

A petition to declare a girl a juvenile delinquent who bit a police officer on the arm as he was trying to put her into a police car, does not provide sufficient proof to adjudicate her guilty of conduct which would constitute assault in the second degree, i.e., causing injury to a peace officer with intent to prevent him from performing a lawful duty (Penal Law, § 120.05, subd 3), where the officer testified that she was not being arrested for alleged acts of criminal mischief, but, rather, was going to be taken home; even if she were intoxicated, as the officer suspected, such condition would not constitute a crime for which an arrest could be made; therefore, the attempt to put her in the police car was not a duty of the type authorized under the Family Court Act. In re Musso, 102 Misc. 2d 934, 424 N.Y.S.2d 855, 1980 N.Y. Misc. LEXIS 2039 (N.Y. Fam. Ct. 1980).

Defendant was properly charged with assault in the second degree (Pen Law § 120.05[3]) for causing physical injury to a police officer with intent to prevent the officer from performing a lawful duty, where the officer, who, while struggling with defendant to place him under arrest during a drug bust, cut his hand on a serrated kitchen knife in defendant's pocket. People v Rakusz, 127 Misc. 2d 1, 484 N.Y.S.2d 784, 1985 N.Y. Misc. LEXIS 2533 (N.Y. Sup. Ct. 1985).

31. —Correctional officers

In trial for second degree assault of prison guard arising from scuffle which occurred when guards entered defendant's cell to supervise his reassignment to segregated custody following his alleged attempted assault on another inmate, whether defendant was convicted of attempting to assault inmate or only charged with that crime was irrelevant to propriety of court's ruling during trial that defendant opened door to proof of attempted assault by suggesting to jury that there was no legitimate basis for his confinement, as allegation of attempted assault on inmate gave jail authorities valid basis to confine him as they did. People v Rojas, 97 N.Y.2d 32, 735 N.Y.S.2d 470, 760 N.E.2d 1265, 2001 N.Y. LEXIS 3373 (N.Y. 2001).

Defendant's conviction for second-degree assault upon a corrections officer would be affirmed, even though defendant testified that he merely acted in self-defense to the officer's unprovoked

attack, where the officer testified that defendant struck him during a pat-down search and had to be wrestled to the floor, causing the officer to sustain a neck injury, dizziness, blurred vision and a headache, and where the conflict in testimony presented questions of fact and credibility that the jury implicitly resolved against defendant. People v Roberts, 91 A.D.2d 1099, 458 N.Y.S.2d 355, 1983 N.Y. App. Div. LEXIS 16442 (N.Y. App. Div. 3d Dep't 1983).

In a prosecution for second-degree assault by a prisoner on a corrections officer, the court properly permitted an amendment to the indictment to delete a phrase describing what the prisoner was doing while he was being guarded, where the theory of the indictment was not altered by the deletion, in that the indictment still alleged that the defendant intended to prevent a peace officer from performing his lawful duty. People v La Boy, 91 A.D.2d 1102, 458 N.Y.S.2d 361, 1983 N.Y. App. Div. LEXIS 16445 (N.Y. App. Div. 3d Dep't 1983).

Testimony of 2 correctional officers that defendant and other inmates repeatedly attacked several officers during prison riot was sufficient to establish element of specific intent necessary for conviction under CLS Penal § 120.05; it was readily inferable that defendant and other inmates not only intended to inflict injury on guards, but also shared common purpose to prolong uprising and forestall its suppression through their indiscriminate assaults against officers, thereby establishing requisite intent to prevent guards from performing their lawful duties. People v Allah, 126 A.D.2d 778, 510 N.Y.S.2d 725, 1987 N.Y. App. Div. LEXIS 41938 (N.Y. App. Div. 3d Dep't 1987).

In prosecution of inmate for assault in second degree on prison guard, County Court did not abuse its discretion in permitting prosecution to show that inmate was subject to "cuff order" while imprisoned which required handcuffing and frisk before accompanying him to exercise facilities, since evidence was highly relevant to inmate's justification defense and question of whether guard was performing lawful duty in cuffing inmate when assault occurred. People v Sanders, 127 A.D.2d 937, 512 N.Y.S.2d 528, 1987 N.Y. App. Div. LEXIS 43426 (N.Y. App. Div. 3d Dep't), rev'd, 70 N.Y.2d 837, 523 N.Y.S.2d 444, 517 N.E.2d 1330, 1987 N.Y. LEXIS 19059 (N.Y. 1987).

Proof was sufficient to establish that inmate caused physical injury to correction officer within meaning of second degree assault statute (CLS Penal § 120.05) where, during struggle initiated by inmate as he was being escorted by officer to recreation yard, officer fell and landed on mop pail, resulting in 3 broken ribs and loss of 64 duty days. People v Wandell, 136 A.D.2d 771, 523 N.Y.S.2d 228, 1988 N.Y. App. Div. LEXIS 46 (N.Y. App. Div. 3d Dep't), app. denied, 71 N.Y.2d 974, 529 N.Y.S.2d 85, 524 N.E.2d 439, 1988 N.Y. LEXIS 2089 (N.Y. 1988).

Correction officers at county jail were "peace officers" within meaning of CLS Penal § 120.05(3). People v Velasquez, 202 A.D.2d 1037, 609 N.Y.S.2d 717, 1994 N.Y. App. Div. LEXIS 3419 (N.Y. App. Div. 4th Dep't), app. denied, 83 N.Y.2d 1008, 616 N.Y.S.2d 489, 640 N.E.2d 157, 1994 N.Y. LEXIS 3287 (N.Y. 1994), app. denied, 84 N.Y.2d 940, 621 N.Y.S.2d 537, 645 N.E.2d 1237, 1994 N.Y. LEXIS 4792 (N.Y. 1994).

Term "penal correctional institution" is sufficiently broad to include county jails, and therefore correction officer at Schenectady County Jail was "peace officer" within meaning of CLS Penal § 120.05(3). People v Holloway, 261 A.D.2d 658, 691 N.Y.S.2d 583, 1999 N.Y. App. Div. LEXIS 4679 (N.Y. App. Div. 3d Dep't), app. denied, 93 N.Y.2d 972, 695 N.Y.S.2d 58, 716 N.E.2d 1103, 1999 N.Y. LEXIS 2524 (N.Y. 1999).

32. —Miscellaneous officers

Evidence before grand jury was sufficient to establish that defendant intended to prevent campus public safety officer from performing lawful duty and caused her to sustain serious physical injuries, and thus charge of second degree assault was properly reinstated by Appellate Division, where officer had effected lawful arrest for larceny, defendant bolted from officer and ran under bridge, officer caught him by ankle on steep slope, and defendant rolled over and dragged her down slope until she hit concrete abutment, smashing her face and breaking her teeth. People v Jensen, 86 N.Y.2d 248, 630 N.Y.S.2d 989, 654 N.E.2d 1237, 1995 N.Y. LEXIS 2230 (N.Y. 1995).

Because it was not apparent whether a response to a request for medical assistance by an emergency medical technician (EMT) was "finished," the evidence was sufficient to conclude that when defendant attacked the EMT as the EMT entered an ambulance, defendant had the intent to prevent the EMT from performing a lawful duty in violation of N.Y. Penal Law § 120.05(3). People v Bueno, 18 N.Y.3d 160, 936 N.Y.S.2d 636, 960 N.E.2d 405, 2011 N.Y. LEXIS 3281 (N.Y. 2011).

Prosecution was properly allowed to reopen its case to present additional evidence that assault victim was peace officer under CLS Penal § 120.05(3) where (1) on direct examination, victim offered competent evidence that he qualified as peace officer under 2 categories in CLS CPL § 2.10 (uniformed court officer of Unified Court System and special patrolman of political subdivision appointed under CLS Gen Mun § 209-v), (2) defense counsel, instead of cross-examining victim on such status, made tactical decision to await close of prosecution's case and then move to dismiss indictment for failure to prove prima facie case, (3) prosecution, when first alerted to claim that its evidence was deficient, offered to submit additional evidence on status issue, and (4) defendant's sole claim of prejudice was that prosecution's additional evidence compelled finding that victim was peace officer. People v Hollis, 255 A.D.2d 615, 680 N.Y.S.2d 678, 1998 N.Y. App. Div. LEXIS 11691 (N.Y. App. Div. 3d Dep't), app. denied, 92 N.Y.2d 1033, 684 N.Y.S.2d 498, 707 N.E.2d 453, 1998 N.Y. LEXIS 4648 (N.Y. 1998).

In prosecution for second degree assault on peace officer, defendant was not denied effective assistance of counsel by counsel's failure to raise issue of whether victim qualified as peace officer until after prosecution had rested where (1) counsel used plausible tactic of awaiting close of prosecution's case and then moving to dismiss indictment for failure to prove prima facie case, and (2) regardless of whether alleged weakness in prosecution's evidence were "exposed" during its direct case or after it, result would have been same because of overwhelming evidence that victim qualified as peace officer. People v Hollis, 255 A.D.2d 615, 680 N.Y.S.2d 678, 1998 N.Y. App. Div. LEXIS 11691 (N.Y. App. Div. 3d Dep't), app. denied, 92 N.Y.2d 1033, 684 N.Y.S.2d 498, 707 N.E.2d 453, 1998 N.Y. LEXIS 4648 (N.Y. 1998).

Defendant's conviction for assault in the second degree was against the manifest weight of the evidence because while the trial evidence established that his brother was yelling profanities at the female officer and displaying irate behavior, the evidence was factually insufficient to prove that the female officer was engaged in a lawful duty, as that term was defined to the jury by the supreme court, at the time of the assault by him. People v Truluck, 173 A.D.3d 1070, 102 N.Y.S.3d 671, 2019 N.Y. App. Div. LEXIS 4897 (N.Y. App. Div. 2d Dep't 2019).

33. Physical impairment through administration of drugs

Defendant who injected her mother (who had Alzheimer's disease) with overdose of insulin, producing hypoglycemic coma, was not entitled to vacatur of second degree attempted assault conviction on ground that her plea allocution was insufficient because she had denied intent to kill or harm her mother, since deliberate injection substantiated her conviction regardless of her motive; CLS Penal § 120.05(5) is satisfied on proof of intent to cause stupor or unconsciousness, regardless of whether defendant views such results as harmful. People v Hibbard, 150 A.D.2d 929, 541 N.Y.S.2d 272, 1989 N.Y. App. Div. LEXIS 6544 (N.Y. App. Div. 3d Dep't), app. denied, 74 N.Y.2d 848, 546 N.Y.S.2d 1012, 546 N.E.2d 195, 1989 N.Y. LEXIS 3884 (N.Y. 1989).

Partnership, which operated proprietary hospital, could be charged, as an entity, in an indictment, which charged, in effect, that partnership had permitted unauthorized person to participate in a surgical procedure on an uninformed, nonconsenting patient and falsified records so as to conceal that crime, even if there was no showing of culpability on part of each of the 42 partners. People v Smithtown General Hospital, 92 Misc. 2d 144, 399 N.Y.S.2d 993, 1977 N.Y. Misc. LEXIS 2516 (N.Y. Sup. Ct. 1977).

Although a salesman of prosthetic devices unlawfully engaged in the practice of medicine without the informed consent of the patient (Education Law, § 6512) under circumstances which did not constitute an emergency (Education Law, § 6527, subd 4)

when he participated in a total hip arthroplasty surgical operation after the patient's hip joint became dislocated during the operation, defendants, two orthopedic surgeons, an anesthesiologist and a registered nurse, by unlawfully permitting the salesman to participate in a meaningful way in the surgical procedure, did not act in concert with each other in the commission of an assault within the meaning of subdivision 5 of section 120.05 of the Penal Law, which proscribes the unlawful administration of an anesthetic agent or other stupor producing drug upon a nonconsenting person for a "purpose other than lawful medical or therapeutic treatment" since the conduct of defendants, however ill-advised, was designed in good faith to improve the condition of the patient by the implantation of a total hip and was not by its nature or intent a criminal assault upon the patient within the meaning of the statute. People v Smithtown General Hospital, 93 Misc. 2d 736, 402 N.Y.S.2d 318, 1978 N.Y. Misc. LEXIS 2128 (N.Y. Sup. Ct. 1978).

34. Felony assault

Felony assault statute is unambiguous and demonstrates no intent to preclude its application where the underlying felony is nondangerous. People v Fonseca, 36 N.Y.2d 133, 365 N.Y.S.2d 818, 325 N.E.2d 143, 1975 N.Y. LEXIS 1722 (N.Y. 1975).

Due process does not preclude a legislative policy determination that a felon who proximately causes injury to another, irrespective of the nature of the underlying felonious act, may be held criminally accountable. People v Fonseca, 36 N.Y.2d 133, 365 N.Y.S.2d 818, 325 N.E.2d 143, 1975 N.Y. LEXIS 1722 (N.Y. 1975).

Felony assault statute does not unconstitutionally provide conclusive presumption that felon intends to cause or foresees a possibility of physical injuries resulting from his act but rather ascribes constructive malice to the felon who injures in the course and furtherance of the commission or attempted commission of a felony. People v Fonseca, 36 N.Y.2d 133, 365 N.Y.S.2d 818, 325 N.E.2d 143, 1975 N.Y. LEXIS 1722 (N.Y. 1975).

Criminal possession of a stolen vehicle could serve as felony predicate for application of criminal assault statute where defendant, while driving a stolen vehicle and being pursued by police, struck a taxicab and injured two of its occupants. People v Fonseca, 36 N.Y.2d 133, 365 N.Y.S.2d 818, 325 N.E.2d 143, 1975 N.Y. LEXIS 1722 (N.Y. 1975).

Felony assault statute, which ascribes constructive malice to felon who injures in the course of his felony, is not unconstitutional. People v Fonseca, 36 N.Y.2d 133, 365 N.Y.S.2d 818, 325 N.E.2d 143, 1975 N.Y. LEXIS 1722 (N.Y. 1975).

In a prosecution for rape and assault, defendants' convictions for assault would be dismissed where the People failed to prove that the victim of the alleged assault suffered physical injury within the meaning of Pen Law § 120.05(6) and § 10.00(9), in that the testimony that the victim suffered a one centimeter cut above her lip without more was inadequate to prove that the victim suffered either "substantial pain" or "impairment of physical condition." People v Jimenez, 55 N.Y.2d 895, 449 N.Y.S.2d 22, 433 N.E.2d 1270, 1982 N.Y. LEXIS 3097 (N.Y. 1982).

Issue of whether second degree assault (felony assault) occurred during immediate flight from predicate felony is question of fact to be decided by jury. People v Spivey, 81 N.Y.2d 356, 599 N.Y.S.2d 477, 615 N.E.2d 961, 1993 N.Y. LEXIS 1737 (N.Y. 1993).

Defendant need not be physically present at scene of second degree assault (felony assault) in order to be convicted of crime; it is sufficient that assault is made on nonparticipant of predicate felony "in furtherance of the commission or attempted commission of [the] felony...or of immediate flight therefrom." People v Spivey, 81 N.Y.2d 356, 599 N.Y.S.2d 477, 615 N.E.2d 961, 1993 N.Y. LEXIS 1737 (N.Y. 1993).

A conviction for second-degree assault under PenaL Law § 120.05(6) would be changed to a conviction for attempt to commit second-degree assault under Penal Law §§ 110.00 and 120.05(6), where the evidence that the complainant suffered a physical injury within the meaning of Penal Law § 10.00(9) was too insubstantial to permit any conviction of which physical injury was an essential element to stand. People v Hernandez, 91 A.D.2d 227, 458 N.Y.S.2d 227, 1983 N.Y. App. Div. LEXIS 16118 (N.Y. App. Div. 1st Dep't), rev'd, 59 N.Y.2d 881, 465 N.Y.S.2d 932, 452 N.E.2d 1260, 1983 N.Y. LEXIS 3211 (N.Y. 1983).

Defendant's conviction for first-degree robbery would be reversed and charge would be dismissed, and his conviction for second-degree assault would be reduced to conviction for third-degree assault pursuant to CLS CPL § 470.15, where victim got into argument with one of several codefendants about someone sitting on victim's car, defendant was one of several men who brutally beat victim after escalation of verbal altercation, and some unknown person robbed victim during incident; robbery conviction could not stand without proof of specific intent to steal, and although whichever person took victim's money clearly intended to do so, that unidentified person's intent could not be imputed to defendant, and second-degree assault conviction could not stand since there was no proof defendant committed or attempted to commit any underlying felony. People v De Jesus, 123 A.D.2d 563, 507 N.Y.S.2d 144, 1986 N.Y. App. Div. LEXIS 60699 (N.Y. App. Div. 1st Dep't 1986).

In prosecution for robbery, burglary, attempted rape, and felony assault, defendant's acquittal of all underlying crimes required vacatur of verdict convicting him of felony assault, since jury's determination on assault count was inconsistent with and repugnant to their finding of defendant's nonguilt on underlying counts given rule that conviction for either underlying felony or its attempted commission is essential element of crime of felony assault. People v Sanchez, 128 A.D.2d 377, 512 N.Y.S.2d 389, 1987 N.Y. App. Div. LEXIS 44095 (N.Y. App. Div. 1st Dep't 1987).

In reversing defendant's first degree robbery conviction for insufficient evidence, court would reduce defendant's second degree assault conviction to lesser included offense of third degree assault since no felony or attempted felony was proven, but there was sufficient evidence to support lesser charge. People v Morales, 130 A.D.2d 366, 515 N.Y.S.2d 27, 1987 N.Y. App. Div. LEXIS 46375 (N.Y. App. Div. 1st Dep't 1987).

In delinquency proceeding, juvenile could not be found guilty of attempting acts which, if committed by adult, would constitute second degree felony assault, since there is no such crime as attempted felony assault. In re Maldonado, 131 A.D.2d 367, 516 N.Y.S.2d 673, 1987 N.Y. App. Div. LEXIS 47848 (N.Y. App. Div. 1st Dep't), app. denied, 70 N.Y.2d 608, 521 N.Y.S.2d 224, 515 N.E.2d 909, 1987 N.Y. LEXIS 18931 (N.Y. 1987).

The intent necessary to sustain a conviction for felony assault may be inferred from the intent to commit the underlying felony, and the issue of whether the assault occurred during the immediate flight from a predicate felony is a question of fact to be decided by a jury; a defendant need not be physically present at the scene of an assault. People v Spivey, 177 A.D.2d 216, 581 N.Y.S.2d 739, 1992 N.Y. App. Div. LEXIS 3473 (N.Y. App. Div. 1st Dep't 1992), modified, aff'd, 81 N.Y.2d 356, 599 N.Y.S.2d 477, 615 N.E.2d 961, 1993 N.Y. LEXIS 1737 (N.Y. 1993).

There is no requirement that defendant be found guilty of completed robbery to sustain conviction for second degree assault. People v Butler, 187 A.D.2d 439, 589 N.Y.S.2d 542, 1992 N.Y. App. Div. LEXIS 12485 (N.Y. App. Div. 2d Dep't 1992), app. denied, 81 N.Y.2d 786, 594 N.Y.S.2d 732, 610 N.E.2d 405, 1993 N.Y. LEXIS 349 (N.Y. 1993).

Defendant's guilty plea to felony driving while intoxicated in violation of N.Y. Veh. & Traf. Law §§ 1192(2), (3), 1193(1)(c)(ii) could not serve as the underlying felonies for purposes of liability for assault in the second degree under an "in the course of and in furtherance of" provision in N.Y. Penal Law § 120.05(6), the court reversed defendant's assault conviction. However, it affirmed his convictions and sentences on the driving while intoxicated felony convictions. People v Rucinski, 24 A.D.3d 1171, 808 N.Y.S.2d 511, 2005 N.Y. App. Div. LEXIS 13914 (N.Y. App. Div. 4th Dep't 2005).

Conviction for a felony driving while intoxicated crime may not serve as the underlying felony for assault in the second degree under N.Y. Penal Law § 120.05(6). People v Rucinski, 24 A.D.3d 1171, 808 N.Y.S.2d 511, 2005 N.Y. App. Div. LEXIS 13914 (N.Y. App. Div. 4th Dep't 2005).

Evidence was legally insufficient to show that defendant violated N.Y. Penal Law § 120.05(7) because the evidence was insufficient to establish that the facility where the assault took place was a correctional facility within the meaning of former

N.Y. Correct. Law § 40(3); the plain language of former N.Y. Correct. Law § 40(3) supported the interpretation that the reference to a secure facility operated by the state division for youth in the statute's definition of a correctional facility applied only to N.Y. Correct. Law art. 3 and not to § 120.05(7). People v Skinner, 94 A.D.3d 1516, 943 N.Y.S.2d 338, 2012 N.Y. App. Div. LEXIS 3288 (N.Y. App. Div. 4th Dep't 2012).

Defendant's convictions for robbery in the first degree, criminal possession of a weapon in the second degree, and assault in the second degree were not against the manifest weight of the evidence because the victim's initial reluctance to cooperate with the police investigation and to testify at trial was adequately explained, and his testimony was corroborated by other evidence. People v Thomas, 176 A.D.3d 1639, 111 N.Y.S.3d 155, 2019 N.Y. App. Div. LEXIS 7199 (N.Y. App. Div. 4th Dep't), app. denied, 34 N.Y.3d 1082, 139 N.E.3d 824, 116 N.Y.S.3d 166, 2019 N.Y. LEXIS 3894 (N.Y. 2019), app. denied, 34 N.Y.3d 1080, 139 N.E.3d 824, 116 N.Y.S.3d 166, 2019 N.Y. LEXIS 3900 (N.Y. 2019).

Defendant's convictions for criminal possession of a weapon in the second degree and assault in the second degree were not against the manifest weight of the evidence because the jury could have reasonably inferred that he was aiming his gun at the victim with intent to cause him physical injury based on the evidence that he had been arguing with the victim prior to the shooting, and that witnesses testified that he fired multiple shots from close range in the victim's direction. People v Tripp, 177 A.D.3d 1409, 113 N.Y.S.3d 432, 2019 N.Y. App. Div. LEXIS 8354 (N.Y. App. Div. 4th Dep't 2019), app. denied, 34 N.Y.3d 1133, 141 N.E.3d 490, 118 N.Y.S.3d 534, 2020 N.Y. LEXIS 345 (N.Y. 2020).

Defendant may not be charged with felony assault when underlying felony is same assault, as statute requires felony independent of assault leading to injuries. People v Donahue, 130 Misc. 2d 1080, 498 N.Y.S.2d 988, 1986 N.Y. Misc. LEXIS 2470 (N.Y. County Ct. 1986).

Indictment for felony assault under CLS Penal § 120.05 need not specify underlying felony of which defendant is accused. People v Baker, 133 Misc. 2d 31, 505 N.Y.S.2d 995, 1986 N.Y. Misc. LEXIS 2961 (N.Y. Sup. Ct. 1986).

Exception contained in N.Y. Crim. Proc. Law § 20.30(1) to New York jurisdiction under N.Y. Crim. Proc. Law § 20.20 did not apply to a defendant's assaults of police officers who pursued him into New Jersey and attempted to effect his arrest there because defendant's conduct would have been an offense under New Jersey law, and the law in New York, N.Y. Penal Law § 120.05(3), and the law in New Jersey, N.J. Ct. R. 2C:12-1(b)(5)(a), were substantially the same. People v Muhammad, 13 A.D.3d 120, 787 N.Y.S.2d 8, 2004 N.Y. App. Div. LEXIS 15019 (N.Y. App. Div. 1st Dep't 2004), app. denied, 4 N.Y.3d 801, 795 N.Y.S.2d 176, 828 N.E.2d 92, 2005 N.Y. LEXIS 615 (N.Y. 2005), app. denied sub. nom., People v Brooks, 4 N.Y.3d 828, 796 N.Y.S.2d 583, 829 N.E.2d 676, 2005 N.Y. LEXIS 836 (N.Y. 2005).

In revoking defendant's supervised release for violating a mandatory condition, the district court did not violate defendant's right under the Confrontation Clause of the Sixth Amendment in admitting hearsay evidence from the victim because the district court did not abuse its discretion in balancing the interests under Fed. R. Crim. P. 32.1 and finding good cause to allow the admission of the hearsay evidence; the evidence presented at the violation of supervised release hearing was sufficient to support the district court's finding that defendant committed attempted felony assault under N.Y. Penal Law § 120.05(2). United States v Carthen, 681 F.3d 94, 2012 U.S. App. LEXIS 10428 (2d Cir. N.Y. 2012), cert. denied, 568 U.S. 1092, 133 S. Ct. 837, 184 L. Ed. 2d 664, 2013 U.S. LEXIS 589 (U.S. 2013).

35. Intent, generally

In a prosecution of two defendants for assault in the second degree, petit larceny, and criminal mischief in the fourth degree, the court erred in refusing to charge the jury on the lesser included offense of assault in the third degree where defendants did not concede that serious physical injury was the consequence that defendants had intended. People v Hall, 56 N.Y.2d 547, 449 N.Y.S.2d 960, 434 N.E.2d 1338, 1982 N.Y. LEXIS 3226 (N.Y. 1982).

There can be no attempt to commit second degree assault, since one cannot have specific intent to cause unintended injury. People v Campbell, 72 N.Y.2d 602, 535 N.Y.S.2d 580, 532 N.E.2d 86, 1988 N.Y. LEXIS 3363 (N.Y. 1988).

Intent necessary to sustain conviction of second degree assault (felony assault) is inferred from intent to commit underlying felony. People v Spivey, 81 N.Y.2d 356, 599 N.Y.S.2d 477, 615 N.E.2d 961, 1993 N.Y. LEXIS 1737 (N.Y. 1993).

Person who seeks to prevent police officer from performing lawful duty is criminally answerable under CLS Penal § 120.05(3) for injuring officer, even when there is no intent to injure; thus, in trial for second degree assault of prison guard arising from scuffle which occurred when guards entered defendant's cell to supervise his reassignment to segregated custody following his attempted assault on another inmate, defendant opened door to proof of his attempted assault on other inmate to disabuse jury of his contention that there was no legitimate reason for his confinement, notwithstanding argument that he was merely seeking to show that he lacked intent to injure guard. People v Rojas, 97 N.Y.2d 32, 735 N.Y.S.2d 470, 760 N.E.2d 1265, 2001 N.Y. LEXIS 3373 (N.Y. 2001).

The required intent of subdivision 3 of § 120.05 of the Penal Law is that the defendant intends to prevent a peace officer from performing a lawful duty. People v Wheeler, 36 A.D.2d 549, 317 N.Y.S.2d 111, 1971 N.Y. App. Div. LEXIS 4937 (N.Y. App. Div. 3d Dep't 1971).

Evidence that defendant, with a loaded handgun, chased complainant about the streets of the city of Albany and shot at him several times, wounding him in the left leg and right shoulder, and that, as a result, complainant was rendered unconscious and later underwent surgery would not have supported finding that defendant's actions were not intentional and not carried out by means of a deadly weapon so that trial court properly refused to instruct jury, which was considering charge of assault in the second degree, on assault in the third degree. People v Hubbard, 48 A.D.2d 941, 369 N.Y.S.2d 34, 1975 N.Y. App. Div. LEXIS 10233 (N.Y. App. Div. 3d Dep't 1975).

In an assault prosecution, the requisite intent to cause physical injury may be inferred by the trier of fact from the conduct of the accused. People v Danaher, 49 A.D.2d 984, 374 N.Y.S.2d 729, 1975 N.Y. App. Div. LEXIS 11303 (N.Y. App. Div. 3d Dep't 1975).

With respect to a charge dealing with first and second degree attempted assault, to which no objection was made, the trial court properly instructed the jury that the difference between the two crimes is one of intent in that defendant must have intended to cause serious physical injury to be guilty of the first degree attempted assault, and, if he only intended to cause physical injury, he could only be convicted of attempted assault in the second degree, and that they had to be satisfied beyond a reasonable doubt that defendant intended to cause serious physical injury before they could find him guilty of the crime of attempted assault in the first degree. People v Fournier, 70 A.D.2d 491, 421 N.Y.S.2d 368, 1979 N.Y. App. Div. LEXIS 13075 (N.Y. App. Div. 2d Dep't), app. denied, 48 N.Y.2d 1030, 425 N.Y.S.2d 1049, 402 N.E.2d 150 (N.Y. 1979).

For a prisoner to commit second-degree assault on a corrections officer under Penal Law § 120.05, it is necessary that defendant intend to prevent a peace officer from performing a lawful duty. People v La Boy, 91 A.D.2d 1102, 458 N.Y.S.2d 361, 1983 N.Y. App. Div. LEXIS 16445 (N.Y. App. Div. 3d Dep't 1983).

In a prosecution of defendant for murder, assault in and criminal possession of a weapon arising out of the shooting of the deceased and a bystander during a confrontation between the deceased and defendant, where the court charged justification as a defense to the murder count, and defendant was acquitted thereon, it was error not to so charge with respect to the assault count; the jury's determination that defendant was justified in killing the deceased precluded his conviction of assault in the second degree, and in the absence of any evidence supporting a finding that defendant was guilty of reckless or criminally negligent assault, the assault count would be dismissed; justification should also have been charged as a defense to the weapon possession count, and defendant's conviction on that count would be reversed and remitted for a new trial, since the jury could have

found that defendant did or did not have the required degree of intent. People v Morris, 109 A.D.2d 413, 491 N.Y.S.2d 860, 1985 N.Y. App. Div. LEXIS 48206 (N.Y. App. Div. 4th Dep't 1985), app. dismissed, 68 N.Y.2d 799, 506 N.Y.S.2d 859, 498 N.E.2d 423, 1986 N.Y. LEXIS 20110 (N.Y. 1986).

Jury verdicts finding defendant innocent of second-degree assault but guilty of first-degree rape were not inconsistent since intent to cause injury is necessary element of assault, but not of rape; also, jury's logic was supported by evidence that before entering bedroom where rape took place victim grabbed knife from defendant and was cut during ensuing struggle. People v Benson, 123 A.D.2d 470, 506 N.Y.S.2d 480, 1986 N.Y. App. Div. LEXIS 60227 (N.Y. App. Div. 3d Dep't 1986).

In trial for second degree assault, defendant did not waive his right to contend that he was incapable of forming requisite intent to commit crime because of intoxication by testifying that he was not intoxicated on morning of incident. People v Gordon, 156 A.D.2d 464, 548 N.Y.S.2d 914, 1989 N.Y. App. Div. LEXIS 15736 (N.Y. App. Div. 2d Dep't 1989), app. denied, 75 N.Y.2d 868, 553 N.Y.S.2d 300, 552 N.E.2d 879, 1990 N.Y. LEXIS 809 (N.Y. 1990).

In second degree assault trial, defendant's prior acts of violence against victim were relevant to issues of intent and absence of mistake or accident, and on issue of justification. People v Spotford, 217 A.D.2d 901, 629 N.Y.S.2d 601, 1995 N.Y. App. Div. LEXIS 8311 (N.Y. App. Div. 4th Dep't 1995).

In prosecution for attempted second degree murder, second degree assault, and fourth degree weapon possession, defendant was properly precluded from testifying that, at time of crimes, his state of mind was affected by his use of interferon prescribed to him for liver trouble where (1) he did not give prosecution timely written notice of such testimony as required by CLS CPL § 250.10, (2) although he argued that offered testimony was evidence of "intoxication" relevant to negate intent element of second degree crimes charged, any intoxication claim would have depended on assumption that interferon produced "intoxication" by affecting his mental condition, and (3) such claim came within purview of § 250.10. People v Rivers, 281 A.D.2d 348, 723 N.Y.S.2d 14, 2001 N.Y. App. Div. LEXIS 3132 (N.Y. App. Div. 1st Dep't), app. denied, 96 N.Y.2d 923, 732 N.Y.S.2d 641, 758 N.E.2d 667, 2001 N.Y. LEXIS 4008 (N.Y. 2001).

Reckless assault under N.Y. Penal Law § 120.05(4) does not require proof of intent. People v Covington, 298 A.D.2d 930, 748 N.Y.S.2d 94, 2002 N.Y. App. Div. LEXIS 9142 (N.Y. App. Div. 4th Dep't), app. denied, 99 N.Y.2d 557, 754 N.Y.S.2d 209, 784 N.E.2d 82, 2002 N.Y. LEXIS 4296 (N.Y. 2002).

Defendant's conviction for depraved indifference assault under N.Y. Penal Law § 120.10(3) for cutting his victim's neck with a knife was reduced to second-degree assault under N.Y. Penal Law 120.05(4) because, although defendant's voluntary cocaine intoxication did not negate recklessness under N.Y. Penal Law § 15.05(3), reckless conduct, alone, did not prove depraved indifference, and the evidence did not establish wanton cruelty, brutality, or callousness; moreover, a finding that he could not form specific criminal intent because of cocaine intoxication delirium caused by his voluntary use of crack cocaine meant that he was incapable of depraved indifference. People v Coon, 34 A.D.3d 869, 823 N.Y.S.2d 566, 2006 N.Y. App. Div. LEXIS 12984 (N.Y. App. Div. 3d Dep't 2006).

Because the evidence supported findings that the victim suffered a physical injury and that defendant intended to inflict a serious physical injury, the count for assault in the first degree was to be reduced to attempted assault in the first degree, pursuant to N.Y. Penal Law §§ 110.00 and 120.10(4), and the count for assault in the second degree was to be reduced to attempted assault in the second degree, pursuant to N.Y. Penal Law §§ 110.00 and 120.05(1). People v Alvarez, 38 A.D.3d 930, 830 N.Y.S.2d 848, 2007 N.Y. App. Div. LEXIS 2402 (N.Y. App. Div. 3d Dep't), app. denied, 8 N.Y.3d 981, 838 N.Y.S.2d 484, 869 N.E.2d 660, 2007 N.Y. LEXIS 1815 (N.Y. 2007).

The defendant, who accidentally injured a deputy sheriff in an attempt to escape from custody, was guilty of an assault upon a peace officer, since the only statutory intent required was that defendant intended to prevent a peace officer from performing a lawful duty. People v Wheeler, 59 Misc. 2d 825, 300 N.Y.S.2d 362, 1969 N.Y. Misc. LEXIS 1506 (N.Y. County Ct. 1969), aff'd, 36 A.D.2d 549, 317 N.Y.S.2d 111, 1971 N.Y. App. Div. LEXIS 4937 (N.Y. App. Div. 3d Dep't 1971).

Assault 2d requires a felonious intent to cause serious physical injury. In re Taylor, 62 Misc. 2d 529, 309 N.Y.S.2d 368, 1970 N.Y. Misc. LEXIS 1927 (N.Y. Fam. Ct. 1970).

Specific intent is not required by subd 2 of § 120.05 of the Penal Law. In re Taylor, 62 Misc. 2d 529, 309 N.Y.S.2d 368, 1970 N.Y. Misc. LEXIS 1927 (N.Y. Fam. Ct. 1970).

Alien's order of removal was reversed because the alien's crime of conviction for attempted second degree assault under N.Y. Penal Law § 120.05(4) did not constitute a crime involving moral turpitude under 8 U.S.C.S. § 1227(a)(2)(A)(i) because it lacked the requisite mental state. Gill v INS, 420 F.3d 82, 2005 U.S. App. LEXIS 17525 (2d Cir. 2005).

36. —Intent found

Juvenile's continued participation in beating, which involved repeated use of chain by one assailant over extended period, was sufficient to support conclusion in juvenile delinquency proceeding that he intentionally aided in assault with dangerous instrument. In re Juan J., 81 N.Y.2d 739, 593 N.Y.S.2d 768, 609 N.E.2d 121, 1992 N.Y. LEXIS 4228 (N.Y. 1992).

Although there was no testimony that defendant personally struck the state trooper, there was adequate evidence that he acted "with the mental culpability required for the commission" of the assault by his co-defendant, where the trooper's revolver had been removed from the rear while the co-defendant held a gun on him; where defendant had been seen immediately before behind the trooper, but no one else was observed at the scene; and where the co-defendant later possessed the trooper's revolver; as well as where the co-defendant promptly returned to the patrol car after he and defendant had driven off in a car operated by the defendant. People v Elfe, 37 A.D.2d 208, 323 N.Y.S.2d 114, 1971 N.Y. App. Div. LEXIS 3527 (N.Y. App. Div. 3d Dep't 1971).

Evidence that defendant wearing boots "stomped" complainant's face 10 to 12 times was sufficient to establish intent requisite for conviction for assault in the second degree. People v Rumaner, 45 A.D.2d 290, 357 N.Y.S.2d 735, 1974 N.Y. App. Div. LEXIS 4329 (N.Y. App. Div. 3d Dep't 1974).

Where it was established by direct proof that defendant, during the course of an argument and ensuing struggle, struck victim over the head with a baseball bat, and where the force of the blow necessary to produce the observed injuries was derived from medical testimony, the jury, in prosecution for second-degree assault, was free to infer and find that defendant intended to physically injure the victim. People v Danaher, 49 A.D.2d 984, 374 N.Y.S.2d 729, 1975 N.Y. App. Div. LEXIS 11303 (N.Y. App. Div. 3d Dep't 1975).

Convictions of attempted second degree murder, second degree assault, and second degree reckless endangerment were not against weight of evidence, although defendant adduced expert testimony that he suffered from "episodic dyscontrol paroxysm" preventing him from formulating requisite specific intent, and People did not adduce any scientific testimony to rebut this assertion, since jury was free to disbelieve testimony of defense experts, and trial court properly charged jury that defendant's ability to form necessary intent was element to be proved beyond reasonable doubt. People v Roudabush, 123 A.D.2d 649, 506 N.Y.S.2d 914, 1986 N.Y. App. Div. LEXIS 60798 (N.Y. App. Div. 2d Dep't 1986).

In prosecution for assault in second degree, testimony of various prosecution witnesses who attributed to defendant various threats was sufficient to establish that laceration of victim's finger was intentionally caused by defendant as he wielded machete. People v Smith, 125 A.D.2d 509, 509 N.Y.S.2d 421, 1986 N.Y. App. Div. LEXIS 62814 (N.Y. App. Div. 2d Dep't 1986).

In second degree assault trial arising from incident in which defendant hit victim with beer bottle in apparent belief that his wife and victim were leaving bar together, People proved intent beyond reasonable doubt where (1) defendant testified that he had punched 2 other people earlier that evening because he saw them with his wife, (2) defendant left bar in pursuit of victim, yelling, "Hey, where the hell are you going with my wife?" and (3)

defendant was seen striking victim. People v Sweet, 132 A.D.2d 795, 517 N.Y.S.2d 604, 1987 N.Y. App. Div. LEXIS 49299 (N.Y. App. Div. 3d Dep't 1987).

Evidence was sufficient to hold defendant accessorily liable for second degree attempted murder, first degree use of firearm, second degree assault, and second degree weapon possession where he participated in physical assault of victim prior to shooting, knew that one other participant was armed, chased victim during shooting, and fled with other participants after potentially fatal shots were fired. People v McClary, 138 A.D.2d 413, 525 N.Y.S.2d 697, 1988 N.Y. App. Div. LEXIS 2145 (N.Y. App. Div. 2d Dep't 1988).

Evidence supported finding that second degree assault defendant did not reasonably believe that victim had either used or threatened use of deadly physical force during initial confrontation where victim tapped his shoe twice against defendant's thigh as defendant lay working beneath his automobile, defendant told victim that no assistance was needed, victim walked away, and defendant nonetheless stopped work, obtained machete and pursued victim; defendant became aggressor when he actively pursued victim with machete and initiated second conflict, which ended when he knocked baseball bat from victim's grasp which victim had grabbed to defend himself, and struck blow to victim's head. People v White, 162 A.D.2d 297, 556 N.Y.S.2d 883, 1990 N.Y. App. Div. LEXIS 7415 (N.Y. App. Div. 1st Dep't 1990), app. denied, 77 N.Y.2d 883, 568 N.Y.S.2d 926, 571 N.E.2d 96, 1991 N.Y. LEXIS 1236 (N.Y. 1991).

Victim's testimony that defendant struck her with karate chop in course of violent struggle constituted adequate predicate from which jury could conclude that defendant intended to cause injury, and thus conviction of second degree assault would be affirmed. People v Mohammed, 162 A.D.2d 367, 557 N.Y.S.2d 35, 1990 N.Y. App. Div. LEXIS 7747 (N.Y. App. Div. 1st Dep't), app. denied, 76 N.Y.2d 861, 560 N.Y.S.2d 1001, 561 N.E.2d 901, 1990 N.Y. LEXIS 4005 (N.Y. 1990).

In prosecution of juvenile for commission of acts which, if committed by adult, would constitute second degree assault, inter alia, arising from participation of juvenile with 3 other perpetrators in fight during which victim was beaten with chain and his wallet taken by other perpetrators, evidence clearly established that juvenile shared necessary intent to use dangerous weapon since chain was used on victim openly and vigorously virtually from outset of attack, and juvenile's willing participation in attack, despite use of chain by another, was more than adequate to support inference that he shared intent to use chain. In re Juan J., 180 A.D.2d 495, 580 N.Y.S.2d 243, 1992 N.Y. App. Div. LEXIS 1617 (N.Y. App. Div. 1st Dep't), aff'd, 81 N.Y.2d 739, 593 N.Y.S.2d 768, 609 N.E.2d 121, 1992 N.Y. LEXIS 4228 (N.Y. 1992).

In prosecution for first degree manslaughter, attempted first degree manslaughter, and second degree assault, evidence was sufficient to establish that defendant acted with intent to kill his girlfriend and to seriously injure her mother, despite his intoxication, where he took large butcher knife from kitchen and began stabbing his girlfriend, first in leg and then in various other parts of her body, inflicting 8 stab wounds in all, and then stabbed mother 3 times. People v Angel, 185 A.D.2d 356, 586 N.Y.S.2d 622, 1992 N.Y. App. Div. LEXIS 9353 (N.Y. App. Div. 2d Dep't), app. denied, 80 N.Y.2d 1025, 592 N.Y.S.2d 674, 607 N.E.2d 821, 1992 N.Y. LEXIS 4630 (N.Y. 1992), app. denied, 81 N.Y.2d 1069, 601 N.Y.S.2d 588, 619 N.E.2d 666, 1993 N.Y. LEXIS 2669 (N.Y. 1993), app. denied, 81 N.Y.2d 1077, 601 N.Y.S.2d 597, 619 N.E.2d 675 (N.Y. 1993), app. denied, 81 N.Y.2d 1078, 601 N.Y.S.2d 598, 619 N.E.2d 676 (N.Y. 1993).

In prosecution for second degree assault, there was legally sufficient proof of defendant's intention to cause serious physical injury based on defendant's conduct in pushing victim while stabbing him with sharp pointed tool. People v Soriano, 188 A.D.2d 420, 591 N.Y.S.2d 1008, 1992 N.Y. App. Div. LEXIS 14507 (N.Y. App. Div. 1st Dep't 1992), app. denied, 81 N.Y.2d 847, 595 N.Y.S.2d 747, 611 N.E.2d 786, 1993 N.Y. LEXIS 1060 (N.Y. 1993).

Juvenile's intent to cause victim serious physical injury, to support determination finding that he committed acts constituting second and third degree assault, was shown by fact that he threw victim to ground with such force as to break his arm, requiring surgery and 5 casts, and causing pain, reduced use of arm, and continuing scarring and disfigurement. In re Sterling L., 224 A.D.2d 252, 638 N.Y.S.2d 299, 1996 N.Y. App. Div. LEXIS 1000 (N.Y. App. Div. 1st Dep't 1996).

Defendant's intent to cause serious physical injury was shown by facts that he punched victim in jaw, causing him to lose consciousness and fall to ground, and thereafter he punched victim 4 or 5 times "with all his might." People v Martinez, 224 A.D.2d 254, 637 N.Y.S.2d 698, 1996 N.Y. App. Div. LEXIS 1019 (N.Y. App. Div. 1st Dep't), app. denied, 88 N.Y.2d 989, 649 N.Y.S.2d 396, 672 N.E.2d 622, 1996 N.Y. LEXIS 3635 (N.Y. 1996).

In juvenile delinquency proceeding charging acts which, if committed by adult, would constitute attempted second degree assault and fourth degree weapon possession, evidence established that juvenile intended to cause physical injury to security guard when he threw aerosol can at him from 10 feet away, and that, when so used, aerosol can was readily capable of causing "serious physical injury" under CLS Penal § 10.00(1) and thus was "dangerous instrument" under CLS Penal § 10.00(13). In re Nehial W., 227 A.D.2d 101, 642 N.Y.S.2d 2, 642 N.Y.S.2d 3, 1996 N.Y. App. Div. LEXIS 4745 (N.Y. App. Div. 1st Dep't 1996).

In prosecution for attempted second degree murder, second degree weapon possession, and second degree assault, evidence that defendant's associate told victim, on occasion before victim was shot, "[t]hat he was going to have to pay for what he did"—that is, allow persons other than defendant's associates to sell cocaine from victim's apartment—was properly admitted to prove defendant's motive for shooting victim. People v Douglas, 238 A.D.2d 733, 656 N.Y.S.2d 500, 1997 N.Y. App. Div. LEXIS 3933 (N.Y. App. Div. 3d Dep't), app. denied, 90 N.Y.2d 892, 662 N.Y.S.2d 435, 685 N.E.2d 216, 1997 N.Y. LEXIS 2758 (N.Y. 1997).

Fact that defendant threw scalding water on victim after argument established intent to cause physical injury in prosecution for second degree assault. People v Cruz, 257 A.D.2d 664, 684 N.Y.S.2d 576, 1999 N.Y. App. Div. LEXIS 587 (N.Y. App. Div. 2d Dep't 1999).

Defendant's intent to cause serious physical injury were shown by evidence that he initially punched victim, causing him to fall to ground, whereupon victim got up and went to nearby fire alarm box to try to summon help, and when victim returned, defendant repeatedly punched him in face, despite fact that victim was bleeding from ears, nose, and mouth. People v Cruz, 267 A.D.2d 319, 699 N.Y.S.2d 889, 1999 N.Y. App. Div. LEXIS 12845 (N.Y. App. Div. 2d Dep't 1999), app. denied, 94 N.Y.2d 918, 708 N.Y.S.2d 357, 729 N.E.2d 1156, 2000 N.Y. LEXIS 1124 (N.Y. 2000).

Evidence showed that defendant intended to inflict serious physical injury on victim (his long-term girlfriend) where she testified that he repeatedly punched her in head, placed his hands around her neck and choked her, dragged her by hair, and threatened to kill her, thereby causing bruises and cuts to her face, head, neck, and arms; further, such protracted assaultive behavior toward victim while child was being held by her or in close proximity was sufficient to support charge of endangering welfare of child. People v West, 271 A.D.2d 806, 708 N.Y.S.2d 478, 2000 N.Y. App. Div. LEXIS 4438 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 893, 715 N.Y.S.2d 386, 738 N.E.2d 790, 2000 N.Y. LEXIS 3392 (N.Y. 2000).

Evidence showed that defendant specifically intended to harm victim, rather than accidentally injuring him in effort to injure his girlfriend, with whom he was arguing immediately before stabbing, where, as girlfriend was moving out of defendant's way, he was moving around her, not toward her, and he then had to go past 2 man sitting on stoop in order to reach man he stabbed. People v Caldwell, 272 A.D.2d 87, 708 N.Y.S.2d 370, 2000 N.Y. App. Div. LEXIS 4934 (N.Y. App. Div. 1st Dep't), app. denied, 95 N.Y.2d 933, 721 N.Y.S.2d 609, 744 N.E.2d 145, 2000 N.Y. LEXIS 3967 (N.Y. 2000).

Evidence supported conviction of second degree assault under CLS Penal § 120.05(7), and of attempt to commit that crime, where (1) defendant, while incarcerated in correctional facility, intended to physically injure correction officer and did so by striking him in eye with compressed ball of wet toilet paper, (2) element of intent was proved by, inter alia, defendant's earlier threats against victim, and (3) element of physical injury was

proved by, inter alia, victim's testimony that his eye pain lasted 1 ½ to 2 days and that his sight was impaired for about one week, and emergency room physician's assistant's testimony that victim sustained "pretty obvious" abrasion across cornea, which would impair vision and cause pain. People v Travis, 273 A.D.2d 544, 711 N.Y.S.2d 514, 2000 N.Y. App. Div. LEXIS 6697 (N.Y. App. Div. 3d Dep't 2000).

In prosecution for attempted second degree murder, first degree firearm use, second degree assault, and fourth degree weapon possession, court's error in ruling, at Sandoval hearing, that prosecution could cross-examine defendant, who was HIV positive, as to whether he had life-threatening disease was harmless where (1) there was ample testimony, by victim and 2 witnesses, that defendant had previously said that he was going to kill victim, and (2) such evidence was sufficient to prove requisite intent independent of defendant's medical condition. People v Felix-Torres, 281 A.D.2d 649, 721 N.Y.S.2d 415, 2001 N.Y. App. Div. LEXIS 2018 (N.Y. App. Div. 3d Dep't), app. denied, 97 N.Y.2d 681, 738 N.Y.S.2d 296, 764 N.E.2d 400, 2001 N.Y. LEXIS 4373 (N.Y. 2001).

It could be inferred that defendant's purpose in touching victim was sexual gratification, and thus evidence supported his conviction of first and second degree sexual abuse and second degree assault, where (1) defendant, who was not related to 13-year-old victim, ordered her family members to leave their house, forced her to remove her clothes and lie face-down on her bed, repeatedly hit her buttocks with electrical cord, removed her underwear, rubbed oil into her buttocks wounds, and reminded her that he "owned" her and that there was nothing that she could do about it, and (2) he did not offer innocent explanation or justification for touching but, rather, denied it entirely. People v Watson, 281 A.D.2d 691, 721 N.Y.S.2d 700, 2001 N.Y. App. Div. LEXIS 2311 (N.Y. App. Div. 3d Dep't), app. denied, 96 N.Y.2d 925, 732 N.Y.S.2d 643, 758 N.E.2d 669, 2001 N.Y. LEXIS 4065 (N.Y. 2001).

In prosecution for first and second degree assault and resisting arrest, jury was free to reject defendant's theory that his intoxication, from excessive use of cocaine and PCP, rendered him incapable of forming requisite intent to commit those crimes where jury was properly instructed, there was no procedural error in submission of that theory to jury, and evidence of intent was sufficient. People v Gillis, 281 A.D.2d 698, 721 N.Y.S.2d 690, 2001 N.Y. App. Div. LEXIS 2316 (N.Y. App. Div. 3d Dep't), app. denied, 96 N.Y.2d 918, 732 N.Y.S.2d 635, 758 N.E.2d 661, 2001 N.Y. LEXIS 4106 (N.Y. 2001).

Evidence that defendant choked the victim until she went numb, could not speak or breathe, and suffered from impaired vision, as well as threatened to kill her, supported a finding of intent to cause serious physical injury under N.Y. Penal Law §§ 110.00 and 120.05(1); thus, legally sufficient evidence was presented to support defendant's conviction of attempted assault in the second degree. People v Bruno, 47 A.D.3d 1064, 849 N.Y.S.2d 701, 2008 N.Y. App. Div. LEXIS 297 (N.Y. App. Div. 3d Dep't), app. denied, 10 N.Y.3d 809, 857 N.Y.S.2d 42, 886 N.E.2d 807, 2008 N.Y. LEXIS 1213 (N.Y. 2008).

Trial court properly denied defendant's request for the lesser charge of reckless assault because defendant readily admitted that he shot the victim intentionally, which was consistent with his statements after the shooting. Thus, there was no reasonable view of the evidence to support a finding that, in shooting the victim, defendant acted recklessly and not intentionally. People v Simmons, 111 A.D.3d 975, 974 N.Y.S.2d 185, 2013 N.Y. App. Div. LEXIS 7196 (N.Y. App. Div. 3d Dep't 2013), app. denied, 22 N.Y.3d 1203, 986 N.Y.S.2d 423, 9 N.E.3d 918, 2014 N.Y. LEXIS 1253 (N.Y. 2014).

Despite his intoxication, because defendant created a risk of harm to his wife when he punched and kicked her, and because he attempted to prevent police officers from effectuating his arrest, pursuant to N.Y. Penal Law § 15.05(3), defendant acted both recklessly and intentionally; accordingly, defendant was properly convicted of second-degree assault under N.Y. Penal Law § 120.05(4), and resisting arrest. People v Heier, 90 A.D.3d 1336, 935 N.Y.S.2d 208, 2011 N.Y. App. Div. LEXIS 9042 (N.Y. App. Div. 3d Dep't 2011), app. denied, 18 N.Y.3d 994, 945 N.Y.S.2d 649, 968 N.E.2d 1005, 2012 N.Y. LEXIS 1455 (N.Y. 2012).

Defendant's felony assault conviction was not against the weight of the evidence because defendant acknowledged that he was attempting to flee the scene and, as such, the jury could reasonably conclude that defendant intended to prevent the officer from effecting an arrest when he accelerated the vehicle and struck the officer. People v Hicks, 128 A.D.3d 1221, 9 N.Y.S.3d 474, 2015 N.Y. App. Div. LEXIS 4294 (N.Y. App. Div. 3d Dep't), app. denied, 26 N.Y.3d 930, 38 N.E.3d 839, 17 N.Y.S.3d 93, 2015 N.Y. LEXIS 3117 (N.Y. 2015).

Evidence was sufficient to support defendant's conviction for assault in the second degree; after being informed by the officer that he was conducting an investigation, defendant continued to swear at the officer and told him to leave, and while the officer walked away, defendant approached from behind and threatened to kill him, and thus he intended to prevent the officer from investigating. As the officer sustained injuries during the fight to subdue defendant, the officer sustained physical injury as defined in the statute. People v Metales, 171 A.D.3d 1562, 99 N.Y.S.3d 559, 2019 N.Y. App. Div. LEXIS 3233 (N.Y. App. Div. 4th Dep't), app. denied, 33 N.Y.3d 1107, 130 N.E.3d 1287, 106 N.Y.S.3d 677, 2019 N.Y. LEXIS 2338 (N.Y. 2019).

Defendant cut the complainant's hand with a butcher knife, and witnesses' testimony seeing defendant grab a large butcher knife, jump over the counter with it, and land only a few feet from the complainant while holding the knife over defendant's head, together with the recording of the complainant's 911 calls and the severity of the wound, entitled the jury to reasonably infer defendant's intent to cause physical injury to the complainant. People v Jaber, 172 A.D.3d 1227, 101 N.Y.S.3d 371, 2019 N.Y. App. Div. LEXIS 4001 (N.Y. App. Div. 2d Dep't), app. denied, 34 N.Y.3d 933, 133 N.E.3d 403, 109 N.Y.S.3d 703, 2019 N.Y. LEXIS 2812 (N.Y. 2019).

Evidence was legally sufficient to establish that defendant intended to cause serious physical injury to the victim because eyewitnesses to the altercation testified that defendant repeatedly punched the victim while he was lying unconscious on the sidewalk. People v Desius, 188 A.D.3d 1626, 135 N.Y.S.3d 214, 2020 N.Y. App. Div. LEXIS 6860 (N.Y. App. Div. 4th Dep't 2020).

37. —Intent not found

In view of defendant's testimony that on the day of the crimes charged, second-degree assault and disorderly conduct, he had consumed nine bottles of beer and was "fairly intoxicated," the jury could have found that, at the time in question, he was too intoxicated to intend to prevent a peace officer from performing his lawful duty and, accordingly, the trial court erred in not charging the jury in that regard. People v Piranian, 47 A.D.2d 668, 364 N.Y.S.2d 542, 1975 N.Y. App. Div. LEXIS 8876 (N.Y. App. Div. 2d Dep't 1975).

In light of the uncontested evidence that defendant had, shortly before shooting, consumed large quantities of alcohol and injected himself with heroin, jury could have found that he lacked the requisite intent to commit the crime of second-degree assault and possibly even the crime of weapons possession; at the very least, it was a question for the jury to determine, and an instruction as to intoxication was required in the interest of justice, there having been no request for such an instruction. People v Trisvan, 49 A.D.2d 913, 373 N.Y.S.2d 405, 1975 N.Y. App. Div. LEXIS 11169 (N.Y. App. Div. 2d Dep't 1975).

Defendant would be found guilty of assault in the third degree, rather than in the second degree, where he became involved in a fist fight between his codefendant and the complainant without knowing that the codefendant possessed a knife. People v Kane, 87 A.D.2d 578, 447 N.Y.S.2d 737, 1982 N.Y. App. Div. LEXIS 15844 (N.Y. App. Div. 2d Dep't 1982).

Conviction of defendant for assault in second degree would be reversed, despite her admission that she had been present in vehicle outside residence while it was burglarized by her alleged accomplices, where proof failed to show that she had acted with necessary mental culpability or that she had solicited or otherwise aided others to commit crimes, her mere presence at scene did not establish her intent to commit them, and proof did not negate reasonable possibility that defendant had accompanied others without foreknowledge of scheme to commit burglary.

People v Burke, 126 A.D.2d 938, 511 N.Y.S.2d 713, 1987 N.Y. App. Div. LEXIS 42039 (N.Y. App. Div. 4th Dep't 1987).

Defendant's intoxication did not warrant reversal of second degree assault conviction, which was based not on intent but upon her reckless conduct, which encompassed risks created by her drinking. People v Faison, 154 A.D.2d 923, 546 N.Y.S.2d 67, 1989 N.Y. App. Div. LEXIS 12963 (N.Y. App. Div. 4th Dep't), app. denied, 75 N.Y.2d 770, 551 N.Y.S.2d 912, 551 N.E.2d 113, 1989 N.Y. LEXIS 4706 (N.Y. 1989).

Evidence failed to establish the requisite mens rea of assault in the second degree and endangerment in the first degree. People v Peloso, 176 A.D.3d 1107, 113 N.Y.S.3d 87, 2019 N.Y. App. Div. LEXIS 7584 (N.Y. App. Div. 2d Dep't), app. dismissed, 176 A.D.3d 1110, 108 N.Y.S.3d 890, 2019 N.Y. App. Div. LEXIS 7613 (N.Y. App. Div. 2d Dep't 2019).

Defendant (16-year-old high school student) was not properly chargeable with second degree assault on grand jury evidence that he hit 66-year-old school aide, who then chased after him, kicked him, and collapsed shortly thereafter, dying 17 hours later as result of cardiac arrest due to cardiovascular arteriosclerosis, because lack of intent to cause serious physical injury was apparent where there was no evidence that defendant struck particularly forceful blows or persisted in attack when he was caught running away. People v Hiraldo, 177 Misc. 2d 33, 676 N.Y.S.2d 775, 1998 N.Y. Misc. LEXIS 255 (N.Y. Sup. Ct. 1998).

38. —Transferred intent

Even assuming that defendant swung cue stick at victim's brother and accidentally struck victim as she intervened, court would affirm defendant's second degree assault conviction since intent to cause injury may be transferred from intended victim to unintended third person under CLS Penal § 120.05, and there was sufficient evidence of manner in which defendant swung cue stick to permit jury to infer requisite intent to cause physical injury. People v Knox, 134 A.D.2d 704, 521 N.Y.S.2d 544, 1987 N.Y. App. Div. LEXIS 50902 (N.Y. App. Div. 3d Dep't 1987), app. denied, 70 N.Y.2d 1007, 526 N.Y.S.2d 942, 521 N.E.2d 1085, 1988 N.Y. LEXIS 875 (N.Y. 1988).

Defendant was properly convicted of second degree assault in connection with his shooting of bystander during incident in which he shot and killed another man, in view of provision for transferred intent under CLS Penal § 120.05(2). People v Fernandez, 135 A.D.2d 867, 522 N.Y.S.2d 264, 1987 N.Y. App. Div. LEXIS 52804 (N.Y. App. Div. 3d Dep't 1987), app. denied, 71 N.Y.2d 895, 527 N.Y.S.2d 1005, 523 N.E.2d 312, 1988 N.Y. LEXIS 1393 (N.Y. 1988).

Evidence was sufficient to establish that defendant had intent to injure victim, and thus he was properly convicted of second degree assault, even though it was accomplice who shot victim during robbery, where defendant was inside video arcade when robbery and shooting occurred, he had threatened victim, he gave some orders to accomplice while in arcade, and he left arcade with accomplice after shooting. People v Moore, 172 A.D.2d 855, 569 N.Y.S.2d 214, 1991 N.Y. App. Div. LEXIS 5368 (N.Y. App. Div. 2d Dep't), app. denied, 78 N.Y.2d 970, 574 N.Y.S.2d 950, 580 N.E.2d 422, 1991 N.Y. LEXIS 4484 (N.Y. 1991).

39. Conspiracy

Where defendants made concerted effort to start fight while armed with bats, court was entitled to decide that each defendant formed specific intent to do serious physical injury necessary for conviction, based on conspiracy theory, of assault in second degree, even though only one of defendants actually struck blows. People v Ozarowski, 38 N.Y.2d 481, 381 N.Y.S.2d 438, 344 N.E.2d 370, 1976 N.Y. LEXIS 2253 (N.Y. 1976).

Fact that one of defendants charged with conspiracy in third degree and assault in second degree, among other crimes, after arriving at shopping center, wandered off in search of candy store did not establish affirmative defense of renunciation of conspiracy. People v Ozarowski, 38 N.Y.2d 481, 381 N.Y.S.2d 438, 344 N.E.2d 370, 1976 N.Y. LEXIS 2253 (N.Y. 1976).

In order to uphold, on a conspiracy theory, convictions on charges of assault in second degree, court below was required to find from evidence of conspiracy itself that each defendant had specific intent to do serious physical injury as well as intent to do physical injury by means of a dangerous instrument. People v Ozarowski, 38 N.Y.2d 481, 381 N.Y.S.2d 438, 344 N.E.2d 370, 1976 N.Y. LEXIS 2253 (N.Y. 1976).

In prosecution of defendants for conspiracy in third degree and assault in second degree, among other crimes, corroboration of accomplice was not required to extend to every detail of such testimony; it was sufficient in that it tended to connect each defendant with crime. People v Ozarowski, 38 N.Y.2d 481, 381 N.Y.S.2d 438, 344 N.E.2d 370, 1976 N.Y. LEXIS 2253 (N.Y. 1976).

In prosecution for second degree manslaughter, second degree assault, and first degree reckless endangerment, evidence was sufficient to establish that defendant operated his snowmobile in reckless manner where (1) victims were struck by snowmobile at 7:15 p.m. along dark country road during major blizzard which curtailed visibility, and (2) at time of accident, defendant operated snowmobile along public road at excessive rate of speed and while under influence of cocaine and marijuana. People v Davis, 178 A.D.2d 714, 576 N.Y.S.2d 947, 1991 N.Y. App. Div. LEXIS 16011 (N.Y. App. Div. 3d Dep't 1991), app. denied, 79 N.Y.2d 946, 583 N.Y.S.2d 200, 592 N.E.2d 808, 1992 N.Y. LEXIS 2237 (N.Y. 1992).

40. Evidence, generally

Fact that evidence in prosecution for second degree assault revealed that defendant may also have been guilty of uncharged offense of sexual abuse in the first degree imposed no additional burden on people to corroborate the testimony of victim. People v Colclough, 32 N.Y.2d 227, 344 N.Y.S.2d 880, 298 N.E.2d 64, 1973 N.Y. LEXIS 1304 (N.Y. 1973).

Evidence concerning scratch on complainant's face, recovery from defendant's person of knife and cigarette lighter which complainant testified defendant had used to threaten her and complainant's immediate disclosure of alleged rape to police constituted ample corroboration of complainant's testimony that defendant had threatened her with knife and cigarette lighter and had raped her and sustained conviction of rape and related offenses. People v Johnson, 46 A.D.2d 55, 361 N.Y.S.2d 161, 1974 N.Y. App. Div. LEXIS 3594 (N.Y. App. Div. 1st Dep't 1974), aff'd, 38 N.Y.2d 956, 384 N.Y.S.2d 151, 348 N.E.2d 608, 1976 N.Y. LEXIS 2595 (N.Y. 1976).

In prosecutions of three defendants for second-degree assault, judgment of conviction of one defendant would be reversed, and the indictment against him dismissed, where witnesses had not identified the one defendant as an assailant, and where a codefendant had testified that the one defendant in question had only grabbed the third codefendant in an attempt to break up the fight. People v Hutchinson, 88 A.D.2d 921, 450 N.Y.S.2d 559, 1982 N.Y. App. Div. LEXIS 17257 (N.Y. App. Div. 2d Dep't), app. denied, 57 N.Y.2d 780, 1982 N.Y. LEXIS 4465 (N.Y. 1982).

Evidence of physical injury is sufficient to raise question of fact for jury's determination where assault victim testified that hand and face was bruised and swollen, that there was pain, and that she was treated at hospital at which X-rays were taken and that she took mild medication for pain. People v Fasano, 112 A.D.2d 791, 492 N.Y.S.2d 290, 1985 N.Y. App. Div. LEXIS 56036 (N.Y. App. Div. 4th Dep't), app. denied, 65 N.Y.2d 979, 494 N.Y.S.2d 1048, 484 N.E.2d 678, 1985 N.Y. LEXIS 16384 (N.Y. 1985).

Guilt was "overwhelmingly" established on charges of first and second degree robbery and second degree assault where police were driving victim of knife attack to hospital when, without prompting, victim identified defendant as his assailant on street near scene of attack and, on arresting defendant, police recovered from his person bloody knife and some items that had been stolen from victim. People v Evans, 123 A.D.2d 328, 506 N.Y.S.2d 221, 1986 N.Y. App. Div. LEXIS 60103 (N.Y. App. Div. 2d Dep't 1986).

Evidence was sufficient to convict second brother of assault in second degree where witness testified that she saw second brother take broken vodka bottle from first brother after first blow was struck and then strike second blow with bottle. People v Coelho, 124 A.D.2d 1007, 508 N.Y.S.2d 959, 1986 N.Y. App. Div. LEXIS 62343 (N.Y. App. Div. 4th Dep't 1986).

Evidence supported conviction of attempted robbery in second degree and assault in second degree despite fact that only one of 5 complaining witnesses was able to make positive identification of defendant as assailant. People v Burrell, 127 A.D.2d 675, 511

N.Y.S.2d 672, 1987 N.Y. App. Div. LEXIS 43163 (N.Y. App. Div. 2d Dep't 1987).

Convictions of second and third degree assault and fourth degree weapon possession were supported by (1) videotape made by defendant depicting him beating his wife and holding knife close to her, (2) photographs and medical evidence establishing physical injury, and (3) defendant's admissions, coupled with jury's rejection of his assertion that he was insane when he concededly committed acts with which he was charged. People v Weiss, 128 A.D.2d 743, 513 N.Y.S.2d 238, 1987 N.Y. App. Div. LEXIS 44427 (N.Y. App. Div. 2d Dep't 1987).

In trial for second degree assault, witness' testimony that she saw defendant hit victim with beer bottle was not incredible as matter of law, although incident took place in parking lot of bar at night while witness was inside bar, since witness testified that she was sitting 10 to 12 feet from plate glass front door of bar, that there were picture windows near door, and that parking lot was lit by street lights. People v Sweet, 132 A.D.2d 795, 517 N.Y.S.2d 604, 1987 N.Y. App. Div. LEXIS 49299 (N.Y. App. Div. 3d Dep't 1987).

In trial for second degree assault arising from incident in which prison inmate was burned as result of flammable liquid being thrown on him and ignited, defendant did not waive nurse-patient privilege on ground that he placed his physical condition in issue by telling police investigator that he scalded his hand while mishandling pot used to heat water in his cell, and thus it was error to admit in evidence nurse's testimony describing burns on defendant's hands and opining that they were not caused by scalding water. People v Fitzroy, 132 A.D.2d 810, 517 N.Y.S.2d 805, 1987 N.Y. App. Div. LEXIS 49309 (N.Y. App. Div. 3d Dep't), app. denied, 70 N.Y.2d 874, 523 N.Y.S.2d 501, 518 N.E.2d 12, 1987 N.Y. LEXIS 19141 (N.Y. 1987).

Verdicts convicting defendants of second degree assault were sufficiently supported by evidence that one defendant shot victim at close range several times while victim was being restrained by codefendant, and that assault had been premeditated. People v Marcus, 133 A.D.2d 708, 519 N.Y.S.2d 875, 1987 N.Y. App. Div. LEXIS 51751 (N.Y. App. Div. 2d Dep't), app. denied, 70 N.Y.2d 934, 524 N.Y.S.2d 686, 519 N.E.2d 632, 1987 N.Y. LEXIS 19735 (N.Y. 1987), app. denied, 71 N.Y.2d 970, 529 N.Y.S.2d 81, 524 N.E.2d 435, 1988 N.Y. LEXIS 1988 (N.Y. 1988).

Evidence sustained convictions of second degree robbery, third degree grand larceny, first degree burglary and second degree assault, although victims were unable to provide identification testimony, since defendant's involvement in commission of crimes was established by his statements, police testimony placing him and his accomplice in close proximity to crime scene shortly after crime occurred, and physical evidence linking him to one victim. People v Brown, 134 A.D.2d 439, 521 N.Y.S.2d 61, 1987 N.Y. App. Div. LEXIS 50625 (N.Y. App. Div. 2d Dep't 1987), app. denied, 70 N.Y.2d 953, 525 N.Y.S.2d 837, 520 N.E.2d 555, 1988 N.Y. LEXIS 311 (N.Y. 1988).

In trial for second degree assault, court committed harmless error in admitting testimony from 2 prosecution witnesses that improperly bolstered victim's identification of defendant, in light of victim's strong and unequivocal identification of defendant, who was victim's downstairs neighbor. People v Marks, 182 A.D.2d 1122, 583 N.Y.S.2d 331, 1992 N.Y. App. Div. LEXIS 7012 (N.Y. App. Div. 4th Dep't 1992).

Justification defense to second degree assault prosecution was disproved beyond reasonable doubt where complainant testified that following fist fight defendant ran after him and plunged knife into his chest; such testimony clearly established (1) that defendant could not have had reasonable belief that deadly physical force was about to be used on him, and (2) that he had every opportunity to retreat safely. People v King, 186 A.D.2d 683, 588 N.Y.S.2d 429, 1992 N.Y. App. Div. LEXIS 11271 (N.Y. App. Div. 2d Dep't 1992), app. denied, 81 N.Y.2d 842, 595 N.Y.S.2d 741, 611 N.E.2d 780, 1993 N.Y. LEXIS 926 (N.Y. 1993).

In prosecution for second degree assault based on incident which occurred while defendant was confined in special housing unit of correctional facility, defendant was not entitled to mistrial based on prosecutor's reference to defendant's confinement in correctional facility pursuant to conviction of crime where defendant refused opportunity to admit prior conviction and that he was confined in correctional facility thereunder, and there was no reference to nature of that crime. People v Gaddy, 191 A.D.2d 735, 594 N.Y.S.2d 407, 1993 N.Y. App. Div. LEXIS 2128 (N.Y. App. Div. 3d Dep't), app. denied, 82 N.Y.2d 718, 602 N.Y.S.2d 815, 622 N.E.2d 316, 1993 N.Y. LEXIS 3490 (N.Y. 1993).

In prosecution for second degree assault, second degree reckless endangerment, and endangering welfare of child, defendant was deprived of fair trial where 2 attending physicians testified that child's account of what had happened was different from account given by defendant, and prosecutor argued on summation that defendant was unwilling to leave child alone with health care workers out of fear that child would blurt out truth of what had occurred in her absence. People v Montesa, 211 A.D.2d 648, 621 N.Y.S.2d 359, 1995 N.Y. App. Div. LEXIS 119 (N.Y. App. Div. 2d Dep't 1995).

In prosecution for second degree assault, inter alia, defendant was not entitled to mistrial on basis of victim's single reference, which was elicited on defense counsel's cross-examination, to defendant's having been asked in past by judge to leave his apartment since defense counsel was allowing narrative responses from witnesses, and reference by victim, who was defendant's long-term girlfriend, was responsive. People v West, 271 A.D.2d 806, 708 N.Y.S.2d 478, 2000 N.Y. App. Div. LEXIS 4438 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 893, 715 N.Y.S.2d 386, 738 N.E.2d 790, 2000 N.Y. LEXIS 3392 (N.Y. 2000).

In prosecution for second degree assault and attempted second degree assault, defendant was not denied fair trial by prosecution's failure to timely provide him with exculpatory medical reports resulting from examinations of victim's injured eye by 2 optometrists where defendant received those reports about one week before trial, obtained 2-day adjournment of trial in order to prepare, used those reports effectively in cross-examining victim, called both optometrists as defense witnesses, and offered into evidence 2 photographs included in those reports. People v Travis, 273 A.D.2d 544, 711 N.Y.S.2d 514, 2000 N.Y. App. Div. LEXIS 6697 (N.Y. App. Div. 3d Dep't 2000).

In prosecution for second degree assault and attempted second degree assault, both committed against correction officer, court properly denied defendant's motion to compel production of allegedly potential Brady material, consisting of statements that defendant and others made in connection with administrative jail grievance for unfair treatment that defendant filed against assault victim, where statements at issue concerned events that occurred 6 months after assault and thus were not relevant, exculpatory, or discoverable. People v Travis, 273 A.D.2d 544, 711 N.Y.S.2d 514, 2000 N.Y. App. Div. LEXIS 6697 (N.Y. App. Div. 3d Dep't 2000).

Defendant's conviction for assault in the first degree, in violation of N.Y. Penal Law § 120.10(1), could not withstand challenge, as it was not supported by legally sufficient evidence on the element of serious physical injury; accordingly, a reduction to assault in the second degree under N.Y. Penal Law § 120.05(2) was warranted, based on the evidence presented by the prosecution. People v Wright, 107 A.D.3d 1398, 967 N.Y.S.2d 296, 2013 N.Y. App. Div. LEXIS 4051 (N.Y. App. Div. 4th Dep't 2013), app. denied, 23 N.Y.3d 1026, 992 N.Y.S.2d 809, 16 N.E.3d 1289, 2014 N.Y. LEXIS 1967 (N.Y. 2014).

Pursuant to N.Y. Penal Law § 120.05(3), and (7), defendant's conviction for assault in the second degree was not against the sufficiency of the evidence because the jury viewed the videotape of the attack where defendant, an inmate, kicked the injured correction officer, who had no previous contact with defendant, and testified that he almost passed out after being struck in the testicles, the injury caused him excruciating pain, and resulted in soreness, a swollen testicle and bruising which caused him to miss several days of work; the physician assistant who examined the correction officer shortly after the attack confirmed the existence of the injury, and opined that it would cause substantial pain. People v Porter, 304 A.D.2d 845, 759 N.Y.S.2d 773, 2003 N.Y. App. Div. LEXIS 3521 (N.Y. App. Div. 3d Dep't), app. denied, 100 N.Y.2d 565, 763 N.Y.S.2d 822, 795 N.E.2d 48, 2003 N.Y. LEXIS 2178 (N.Y. 2003).

State prisoner seeking federal habeas relief did not meet his burden of proving a Brady violation because he did not demonstrate that the testimony resulting from the evidence allegedly withheld by the prosecution had a reasonable probability of producing a different verdict. The evidence was of no relevance to the charges against the prisoner for possessing narcotics and resisting arrest, and the assertion that the prisoner did not kick or punch failed to undermine detailed testimony that he struggled with officers for five minutes while they tried to handcuff him; the prisoner did not have to attack the officer to be found guilty of assault under N.Y. Penal Law § 120.05(3) since he resisted arrest and his actions injured an officer, and so the statement about punching or kicking was not dispositive regarding the assault charge. Moore v Warden, 380 F. Supp. 2d 321, 2005 U.S. Dist. LEXIS 16230 (S.D.N.Y. 2005).

41. —Evidence properly suppressed or excluded

In prosecutions under Penal Law §§ 125.10, 125.15, 125.05 allegedly resulting from defendants' operation of motor vehicles, the results of tests performed on blood samples taken from defendants following the incidents without their consent and without court orders pursuant to CPL § 240.40 were properly suppressed. People v Moselle, 57 N.Y.2d 97, 454 N.Y.S.2d 292, 439 N.E.2d 1235, 1982 N.Y. LEXIS 3618 (N.Y. 1982).

In trial for second degree assault under CLS Penal § 120.05(2), court properly precluded portion of defendant's psychiatric evidence related to lack of assaultive intent where, despite court's warning and ongoing prosecution requests, defendant refused to identify whether he intended to rely on CLS CPL § 250.10(1)(a) or (1)(c) until 3 weeks before trial, he merely furnished written notice stating that he was diagnosed as suffering from "acute stress disorder" at time of alleged assault, and he did not reveal enough information to identify paragraph on which he intended to rely until eve of trial. People v Almonor, 93 N.Y.2d 571, 693 N.Y.S.2d 861, 715 N.E.2d 1054, 1999 N.Y. LEXIS 1420 (N.Y. 1999).

In trial for assault and related offenses involving defendants' alleged use of stun gun on victim, court properly refused to allow defense to present testimony that search was conducted of defendants' lockers 2 days after alleged incident and no stun gun was found since such evidence was too remote and was not probative of any issues in case. People v Pike, 131 A.D.2d 890, 517 N.Y.S.2d 246, 1987 N.Y. App. Div. LEXIS 48323 (N.Y. App. Div. 2d Dep't 1987).

Trial court did not abuse its discretion in refusing to allow defense attorney to introduce evidence, as prior inconsistent statement, that first degree robbery and second degree assault complainant had told friend that he knew defendant was not guilty, but that he had to blame someone, where there was evidence that complainant recognized defendant during knifepoint robbery after having pulled his mask off in struggle; moreover, in light of overwhelming evidence of guilt, any error in refusing to admit statement was harmless. People v Auricchio, 141 A.D.2d 552, 529 N.Y.S.2d 163, 1988 N.Y. App. Div. LEXIS 6294 (N.Y. App. Div. 2d Dep't), app. denied, 72 N.Y.2d 954, 534 N.Y.S.2d 668, 531 N.E.2d 300, 1988 N.Y. LEXIS 4009 (N.Y. 1988).

Court did not improperly limit cross-examination of victim as to, inter alia, his perception of violence in neighborhood and whether he had ever used and carried box cutter since those questions were not relevant, and defense counsel was otherwise afforded sufficient scope to prove justification defense in prosecution for second degree assault. People v Williams, 216 A.D.2d 201, 628 N.Y.S.2d 660, 1995 N.Y. App. Div. LEXIS 6959 (N.Y. App. Div. 1st Dep't), app. denied, 86 N.Y.2d 848, 634 N.Y.S.2d 457, 658 N.E.2d 235, 1995 N.Y. LEXIS 4723 (N.Y. 1995), app. denied, 86 N.Y.2d 848, 634 N.Y.S.2d 457, 658 N.E.2d 235, 1995 N.Y. LEXIS 4725 (N.Y. 1995).

Court properly excluded testimony concerning threats victim had purportedly made toward defendant prior to college fraternity house altercation where no reasonable view of evidence would support finding that victim was initial aggressor. People v Carello, 241 A.D.2d 903, 660 N.Y.S.2d 515, 1997 N.Y. App. Div. LEXIS 8159 (N.Y. App. Div. 3d Dep't), app. denied, 90 N.Y.2d 938, 664 N.Y.S.2d 757, 687 N.E.2d 654, 1997 N.Y. LEXIS 3745 (N.Y. 1997).

In trial arising from incident in which defendant attacked correction officer who was assisting another officer move him to cell on third floor, court did not err in denying defense request to call third-floor inmate whose statements allegedly convinced first correctional officer to move defendant to fourth floor rather than third floor, in order to show that alleged statements were never made and hence officers were not engaged in "lawful duty" within meaning of CLS Penal § 120.05(3) when charged incident occurred, as third-floor inmate's testimony would be "collateral" where (1) defendant did not challenge initial decision to move him to third floor, and (2) even if first officer's decision to move him to fourth floor instead of third floor was unjustified, second officer was merely assisting first officer in directing him to cell, which was clearly lawful. People v Holloway, 261 A.D.2d 658, 691 N.Y.S.2d 583, 1999 N.Y. App. Div. LEXIS 4679 (N.Y. App. Div. 3d Dep't), app. denied, 93 N.Y.2d 972, 695 N.Y.S.2d 58, 716 N.E.2d 1103, 1999 N.Y. LEXIS 2524 (N.Y. 1999).

In trial for second degree assault and first degree sexual abuse, court properly determined that presence of foreign semen on victim's underwear was irrelevant in absence of any evidence showing when and how it was deposited, where defendant's sperm was also found in victim's underwear and only his sperm was found in her vagina, and there was no indication that she had suffered any facial injuries prior to her contact with defendant. People v Mount, 285 A.D.2d 899, 727 N.Y.S.2d 819, 2001 N.Y. App. Div. LEXIS 7623 (N.Y. App. Div. 3d Dep't), app. denied, 97 N.Y.2d 642, 735 N.Y.S.2d 499, 761 N.E.2d 4, 2001 N.Y. LEXIS 3689 (N.Y. 2001).

In second degree attempted assault prosecution stemming from incident wherein defendant struck correction officer who was trying to remove him from special housing unit cell for recreation, court's "prospective ruling," in course of discussion regarding potential defense witnesses, indicating that defendant would be precluded from adducing evidence of his past conflicts with other correction officers on relevancy grounds, was not error where defendant was initial aggressor in instant case and had no prior contact whatsoever with correction officer in question. People v Thompson, 287 A.D.2d 794, 731 N.Y.S.2d 261, 2001 N.Y. App. Div. LEXIS 9727 (N.Y. App. Div. 3d Dep't), app. denied, 97 N.Y.2d 688, 738 N.Y.S.2d 304, 764 N.E.2d 408, 2001 N.Y. LEXIS 4554 (N.Y. 2001).

In a prosecution for driving while intoxicated and for second-degree assault stemming from an automobile accident, although the results of a blood test taken within two hours of defendant's arrest at a hospital to which he had been taken after the accident would be admissible on the driving-while-intoxicated charges, the results would be inadmissible on the assault charge, where the state failed to obtain a court order for the blood sample and failed to establish that defendant had been in the physical or mental condition necessary to knowingly and voluntarily consent to the withdrawal of the sample; at trial, defendant would be entitled to have the court instruct the jury that they could not consider the results in arriving at their determination of whether defendant acted recklessly as charged in the assault count. People v Wade, 118 Misc. 2d 330, 460 N.Y.S.2d 870, 1983 N.Y. Misc. LEXIS 3316 (N.Y. County Ct. 1983), disapproved, People v Dixon, 149 A.D.2d 75, 543 N.Y.S.2d 993, 1989 N.Y. App. Div. LEXIS 10464 (N.Y. App. Div. 2d Dep't 1989).

42. —Evidence improperly suppressed or excluded

Refusal, in second-degree assault prosecution of defendant who bit off part of victim's ear during altercation in front of tavern, to admit evidence of victim's prior specific acts of violence of which defendant had knowledge constituted reversible error. People v Dingley, 42 N.Y.2d 888, 397 N.Y.S.2d 789, 366 N.E.2d 877, 1977 N.Y. LEXIS 2226 (N.Y. 1977).

In prosecution for assault in the second degree and criminal possession of a weapon in the second degree, error in preventing defense from fully presenting to jury question of whether shooting victim was testifying against defendant in order to retain his freedom because of possibility that his activities on day of shooting might have violated his probation warranted reversal and new trial, particularly in view of fact that people's case depended entirely on shooting victim's credibility. People v Buch-

anan, 57 A.D.2d 686, 393 N.Y.S.2d 810, 1977 N.Y. App. Div. LEXIS 11720 (N.Y. App. Div. 3d Dep't 1977).

It was error for the trial court in a prosecution for assault in the second degree to have denied pretrial disclosure of a prior written statement by a defense witness where the statement contained exculpatory evidence regarding the first three counts of defendant's six-count indictment. People v Stanley, 81 A.D.2d 842, 438 N.Y.S.2d 848, 1981 N.Y. App. Div. LEXIS 11518 (N.Y. App. Div. 2d Dep't), app. denied, 54 N.Y.2d 838, 1981 N.Y. LEXIS 5399 (N.Y. 1981).

County Court erred in suppressing results of blood-alcohol test on ground that test had been administered more than 2 hours after defendant's arrest in case where defendant was charged with vehicular assault, assault in second and third degrees, and driving while under influence of alcohol, where first officer arrived at scene of traffic accident at approximately 4:30 and determined that defendant was intoxicated and should be arrested, but did not communicate that determination to defendant because of officer's need to help those injured and to direct traffic, second officer arrived and placed defendant under arrest at 5:19, and blood test was administered at 7:06; point at which defendant was in custody should have been determined by what reasonable and innocent person would have thought in circumstances, not police officer's subjective, unstated intent. People v Crocker, 125 A.D.2d 132, 512 N.Y.S.2d 589, 1987 N.Y. App. Div. LEXIS 40750 (N.Y. App. Div. 3d Dep't 1987).

Court erred in restricting defendant's testimony as to her state of mind at time of alleged second degree assault where she asserted defense of justification; however, error was harmless since defendant was permitted to testify that complainant approached her in threatening manner, and that she lifted her arms to block complainant, so that precluded testimony was cumulative to that heard by jury, and jury was nonetheless able to consider justification defense with knowledge of defendant's state of mind at pertinent time. People v Felton, 133 A.D.2d 232, 519 N.Y.S.2d 35, 1987 N.Y. App. Div. LEXIS 49733 (N.Y. App. Div. 2d Dep't), app. denied, 70 N.Y.2d 874, 523 N.Y.S.2d 501, 518 N.E.2d 12, 1987 N.Y. LEXIS 19136 (N.Y. 1987).

It was reversible error in second degree assault prosecution for court, in mistaken belief that victim's threats were admissible only if communicated to defendant, to refuse to allow defendant's girlfriend to testify concerning threats made by victim against defendant, especially given closeness of fact questions on defense of justification. People v Dixon, 138 A.D.2d 929, 526 N.Y.S.2d 269, 1988 N.Y. App. Div. LEXIS 14924 (N.Y. App. Div. 4th Dep't 1988).

Defendant was not entitled to reversal of second degree assault conviction on ground that his ballistics expert was improperly excluded from testifying that bullet lodged in victim's leg, as depicted in certain X-rays, was deformed in manner consistent with it having ricocheted up from ground (which was offered in support of defendant's claim that he did not intentionally aim his gun as victim) as ballistics expert was not qualified in reading X-rays, he was permitted to testify that bullet depicted in X-rays was deformed, and defendant was permitted to call witnesses who testified that he aimed gun at ground and not at victim, and to argue his theory of shooting in summation. People v Omar, 220 A.D.2d 239, 632 N.Y.S.2d 70, 1995 N.Y. App. Div. LEXIS 9823 (N.Y. App. Div. 1st Dep't 1995), modified, 1995 N.Y. App. Div. LEXIS 13162 (N.Y. App. Div. 1st Dep't).

In second degree assault trial, statement allegedly made by victim during prior altercation between her and defendant, which defendant offered to prove victim's potential to be aggressor and show he had reason to fear her, thus supporting his justification defense, was improperly excluded as hearsay; such statement was admissible as out-of-court statement to show state of mind of victim and defendant, and was not offered for its truth. People v Bruner, 222 A.D.2d 738, 634 N.Y.S.2d 862, 1995 N.Y. App. Div. LEXIS 12637 (N.Y. App. Div. 3d Dep't 1995), app. denied, 88 N.Y.2d 981, 649 N.Y.S.2d 387, 672 N.E.2d 613, 1996 N.Y. LEXIS 3394 (N.Y. 1996).

43. —Evidence properly allowed

In trial for second degree assault and fourth degree criminal mischief arising from fight between defendant and complainant wherein defense counsel elicited testimony that police officer handcuffed both men when he arrived at scene, officer was properly permitted to testify that he uncuffed complainant and arrested defendant after speaking with 2 bystanders, and reversal was not required on ground that reference to out-of-court statements of bystanders (who were unavailable to testify) inferentially bolstered complainant's testimony that defendant started fight, where court did not admit substance of officer's conversation with bystanders and promptly issued limiting instructions; furthermore, defendant himself invited admission of such testimony by eliciting that officer had handcuffed both men, which created material gap in narrative that People were entitled to explain. People v Rivera, 96 N.Y.2d 749, 725 N.Y.S.2d 264, 748 N.E.2d 1060, 2001 N.Y. LEXIS 232 (N.Y. 2001).

In trial for second degree assault of prison guard arising from scuffle which occurred when guards entered defendant's cell to supervise his reassignment to segregated custody following his alleged attempted assault on another inmate, court did not err in revisiting its pretrial order precluding People from introducing proof of alleged attempted assault on other inmate and, in its discretion, allowing such proof where (1) defense counsel, in his opening statement, suggested that jury should acquit defendant because he did nothing wrong but was abused by guards, culminating in scuffle in his cell, and (2) in cross-examinations, defense counsel attempted to further misleading impression that guards were not performing lawful duty. People v Rojas, 97 N.Y.2d 32, 735 N.Y.S.2d 470, 760 N.E.2d 1265, 2001 N.Y. LEXIS 3373 (N.Y. 2001).

In proceeding in which accused was convicted of robbery in first and second degrees and assault in second degree, evidence supported determinations that accused's incriminatory prearrest statement and his written confession were voluntary rather than the product of police brutality and coercion. People v McMillian, 56 A.D.2d 662, 391 N.Y.S.2d 911, 1977 N.Y. App. Div. LEXIS 10805 (N.Y. App. Div. 2d Dep't 1977).

In a prosecution for four counts of murder in the second degree and two counts of assault in the second degree, the testimony adduced at the suppression hearing from two detectives and from the 16-year-old defendant himself fully supported the trial court's determination that notwithstanding his age, defendant, before giving inculpatory statements, had interposed a knowing, intentional and voluntary waiver of his right to counsel where defendant was familiar with the criminal justice system, where he admitted he was not coerced into giving incriminatory statements to law enforcement officers and where he indicated he understood the meaning and significance of his pre-interrogation rights. Moreover, the trial court was warranted in holding that a parent or the parents of defendant were not denied access to him or to information regarding his whereabouts where defendant testified that he did not ask to speak to his parents and a detective testified that defendant did in fact speak to his mother. Furthermore, defendant was properly sentenced to consecutive sentences of 20 years to life on his convictions of murder with respect to each victim under the law applicable at the time of his sentencing in 1977. People v Boykins, 81 A.D.2d 922, 439 N.Y.S.2d 181, 1981 N.Y. App. Div. LEXIS 11647 (N.Y. App. Div. 2d Dep't), app. denied, 54 N.Y.2d 761, 1981 N.Y. LEXIS 5082 (N.Y. 1981).

In a prosecution for four counts of murder in the second degree and two counts of assault in the second degree, the trial court properly refused to suppress the weapons used and the money stolen during the two robberies where defendant's mother voluntarily gave permission to a police officer to retrieve such items from her apartment, in which they had been secreted by defendant, and where the mother's consent was not induced by promise, trick, cajolery or other improper method. People v Boykins, 81 A.D.2d 922, 439 N.Y.S.2d 181, 1981 N.Y. App. Div. LEXIS 11647 (N.Y. App. Div. 2d Dep't), app. denied, 54 N.Y.2d 761, 1981 N.Y. LEXIS 5082 (N.Y. 1981).

In prosecution for assault, trial court properly permitted use, on cross-examination, of a suppressed statement given by defendant to investigator and in permitting investigator to testify to statement on rebuttal, where defendant in his direct testimony testified to a version of the incident which differed materially from the statement he had given to the investigator and where on cross-examination defendant denied having made the admission

to the investigator. People v Guidice, 83 A.D.2d 756, 443 N.Y.S.2d 498, 1981 N.Y. App. Div. LEXIS 15074 (N.Y. App. Div. 4th Dep't 1981).

Defendant's conviction of assault in the second degree and reckless endangerment in the first degree would be affirmed where the trial court did not err in receiving testimony concerning the facts of a prior assault of the victim by defendant where, in light of the fact that defendant had presented alibi witnesses, the questioned testimony was properly received to demonstrate motive on the part of defendant for the crimes charged. People v Bink, 93 A.D.2d 920, 462 N.Y.S.2d 300, 1983 N.Y. App. Div. LEXIS 17812 (N.Y. App. Div. 3d Dep't 1983).

In trial on charges of first degree rape and second degree assault, codefendant was properly permitted to testify that, while he and defendant were seated in patrol car after their arrest, codefendant said "you better tell the police I had nothing to do with it," and defendant responded that he would do so; defendant's statement was properly admitted in evidence since it constituted admission. People v Harris, 122 A.D.2d 891, 506 N.Y.S.2d 2, 1986 N.Y. App. Div. LEXIS 59377 (N.Y. App. Div. 2d Dep't 1986).

Trial court did not abuse its discretion in receiving into evidence 8 color photographs depicting injuries inflicted upon 71-year-old complainant during armed robbery of her home, since photographs were probative on issue of whether defendant caused physical injury to victim as requisite element of second degree assault, first degree burglary, and second degree robbery, particularly in view of complainant's inability to describe how or when her injuries were inflicted. People v Shaw, 124 A.D.2d 686, 507 N.Y.S.2d 918, 1986 N.Y. App. Div. LEXIS 61989 (N.Y. App. Div. 2d Dep't 1986).

In prosecution of inmate for assault in second degree on prison guard, People were properly permitted to introduce letter written by inmate to his counselor approximately one week before incident which included statement, "I feel like assaulting one of the (correctional officers)" since letter was probative of inmate's state of mind during relevant time period even though it was not directly related to subject assault. People v Sanders, 127 A.D.2d 937, 512 N.Y.S.2d 528, 1987 N.Y. App. Div. LEXIS 43426 (N.Y. App. Div. 3d Dep't), rev'd, 70 N.Y.2d 837, 523 N.Y.S.2d 444, 517 N.E.2d 1330, 1987 N.Y. LEXIS 19059 (N.Y. 1987).

In trial for second degree assault arising from incident in which prison inmate was burned as result of flammable liquid being thrown on him and ignited, admission in evidence of testimony concerning burns on defendant's hands, in violation of defendant's nurse-patient privilege, constituted harmless error in view of testimony of fellow inmate who saw defendant commit crime and testimony of vocational instructor who observed defendant's efforts to hide his burned hand, and who testified that gasoline was available to inmates such as defendant who were enrolled in his class. People v Fitzroy, 132 A.D.2d 810, 517 N.Y.S.2d 805, 1987 N.Y. App. Div. LEXIS 49309 (N.Y. App. Div. 3d Dep't), app. denied, 70 N.Y.2d 874, 523 N.Y.S.2d 501, 518 N.E.2d 12, 1987 N.Y. LEXIS 19141 (N.Y. 1987).

Letters indicating consciousness of guilt written by defendant to assault victim were properly admitted in evidence on People's rebuttal, to counter defendant's testimony that he accidentally stabbed victim, where court had previously ruled that it would admit letters in evidence if defendant took stand and placed his state of mind in issue. People v Oglesby, 133 A.D.2d 284, 519 N.Y.S.2d 153, 1987 N.Y. App. Div. LEXIS 49772 (N.Y. App. Div. 2d Dep't), app. denied, 70 N.Y.2d 802, 522 N.Y.S.2d 120, 516 N.E.2d 1233, 1987 N.Y. LEXIS 19517 (N.Y. 1987).

Trial court did not err in admitting in evidence complainant's unredacted hospital records in second degree assault prosecution, pursuant to business records exception to hearsay rule; records, including portion which indicated that complainant had been "hit in face," were relevant to diagnosis and treatment of complainant's injuries. People v Singleton, 140 A.D.2d 388, 527 N.Y.S.2d 867, 1988 N.Y. App. Div. LEXIS 4678 (N.Y. App. Div. 2d Dep't 1988).

In prosecution for first degree rape, first degree sodomy, first degree sexual abuse, second degree assault, and endangering welfare of child, inter alia, it was proper exercise of discretion to allow in evidence photographs of victim taken just after attack, showing that she sustained brutal beating, as well as victim's ripped and bloodied nightgown, since such evidence tended to prove material issues and was corroborative of previous trial testimony. People v Harris, 140 A.D.2d 457, 528 N.Y.S.2d 156, 1988 N.Y. App. Div. LEXIS 4906 (N.Y. App. Div. 2d Dep't), app. denied, 72 N.Y.2d 957, 534 N.Y.S.2d 671, 531 N.E.2d 303 (N.Y. 1988).

Court properly admitted in evidence redacted videotape of defendant's attack on police officers where proper foundation was laid, prejudicial portions of tape were redacted, and jury was instructed not to speculate as to inaudible portions thereof. People v Kent, 143 A.D.2d 278, 532 N.Y.S.2d 152, 1988 N.Y. App. Div. LEXIS 8900 (N.Y. App. Div. 2d Dep't), app. denied, 73 N.Y.2d 856, 537 N.Y.S.2d 503, 534 N.E.2d 341 (N.Y. 1988).

In trial for second degree assault, court did not abuse its discretion in allowing police officer to testify that defendant pointed gun at him while fleeing from crime scene, since testimony was relevant to defendant's state of mind in possessing weapon and was integral part of narrative of events, and court promptly instructed jury that defendant was not being charged with shooting at police. People v Felipe, 155 A.D.2d 900, 547 N.Y.S.2d 730, 1989 N.Y. App. Div. LEXIS 14739 (N.Y. App. Div. 4th Dep't 1989), app. denied, 75 N.Y.2d 868, 553 N.Y.S.2d 299, 552 N.E.2d 878, 1990 N.Y. LEXIS 799 (N.Y. 1990).

Photographs of victim taken one day after second degree assault were admissible as tending to prove seriousness of her injuries sustained in attack where sole purpose of photographs was not to inflame jury. People v Burris, 160 A.D.2d 809, 553 N.Y.S.2d 846, 1990 N.Y. App. Div. LEXIS 4192 (N.Y. App. Div. 2d Dep't), app. denied, 76 N.Y.2d 785, 559 N.Y.S.2d 990, 559 N.E.2d 684, 1990 N.Y. LEXIS 2629 (N.Y. 1990).

In prosecution for second degree assault under CLS Penal § 120.05(2), wherein it was alleged that defendant punched victim with fist containing "printer's guide," court did not err in admitting, under business records exception to hearsay rule, portion of victim's hospital records indicating that victim had claimed he was hit with fist in which there was metal object, since such statement was relevant to diagnosis and treatment of victim's injuries. People v Goode, 179 A.D.2d 676, 578 N.Y.S.2d 611, 1992 N.Y. App. Div. LEXIS 246 (N.Y. App. Div. 2d Dep't), app. denied, 79 N.Y.2d 1001, 584 N.Y.S.2d 456, 594 N.E.2d 950, 1992 N.Y. LEXIS 2700 (N.Y. 1992).

In second degree assault prosecution, court properly allowed victim to show to jury scars on his chest and stomach to demonstrate seriousness of injuries inflicted on victim by defendant. People v Dananel, 183 A.D.2d 778, 584 N.Y.S.2d 485, 1992 N.Y. App. Div. LEXIS 6824 (N.Y. App. Div. 2d Dep't), app. denied, 80 N.Y.2d 902, 588 N.Y.S.2d 828, 602 N.E.2d 236, 1992 N.Y. LEXIS 3549 (N.Y. 1992).

In prosecution for second degree assault and resisting arrest, court properly admitted testimony concerning defendant's post-arrest threats to arresting officers to show intent in committing assaultive acts, as well as his consciousness of guilt. People v Smith, 211 A.D.2d 650, 621 N.Y.S.2d 99, 1995 N.Y. App. Div. LEXIS 121 (N.Y. App. Div. 2d Dep't), app. denied, 85 N.Y.2d 974, 629 N.Y.S.2d 734, 653 N.E.2d 630, 1995 N.Y. LEXIS 2537 (N.Y. 1995).

In prosecution for second degree assault, fourth degree weapon possession, and second degree reckless endangerment, evidence of defendant's prior and contemporaneous drug transactions was properly admitted to facilitate jurors' understanding of relationship among parties and to assist in their comprehension of crime. People v DeFina, 213 A.D.2d 665, 624 N.Y.S.2d 236, 1995 N.Y. App. Div. LEXIS 3168 (N.Y. App. Div. 2d Dep't), app. denied, 85 N.Y.2d 971, 629 N.Y.S.2d 731, 653 N.E.2d 627, 1995 N.Y. LEXIS 2319 (N.Y. 1995).

In prosecution for second degree assault and other crimes, evidence of prior incident in which defendant set one of his dogs on victim and called it off before serious injury was inflicted was properly introduced for its probative value on issue of intent. People v DeFina, 213 A.D.2d 665, 624 N.Y.S.2d 236, 1995 N.Y. App. Div. LEXIS 3168 (N.Y. App. Div. 2d Dep't), app. denied, 85

N.Y.2d 971, 629 N.Y.S.2d 731, 653 N.E.2d 627, 1995 N.Y. LEXIS 2319 (N.Y. 1995).

In trial of defendant for second degree assault of her 2-month-old son, causing multiple fractures to his ribs and arms, where defendant claimed that baby was injured when she rolled over him while they were sleeping, it was not error for court to permit introduction of defendant's prior convictions arising from child abuse; in domestic violence cases, evidence of prior bad acts is especially probative in overcoming defense based on mistake. People v Davis, 216 A.D.2d 485, 628 N.Y.S.2d 551, 1995 N.Y. App. Div. LEXIS 6426 (N.Y. App. Div. 2d Dep't 1995).

In prosecution for first degree burglary and attempted second degree assault, inter alia, court properly admitted in evidence portion of 911 tapes in which victims described their assailant. People v Sutherland, 219 A.D.2d 523, 645 N.Y.S.2d 466, 1995 N.Y. App. Div. LEXIS 9528 (N.Y. App. Div. 1st Dep't), app. denied, 87 N.Y.2d 908, 641 N.Y.S.2d 238, 663 N.E.2d 1268, 1995 N.Y. LEXIS 5587 (N.Y. 1995), app. denied, 88 N.Y.2d 886, 645 N.Y.S.2d 461, 668 N.E.2d 432, 1996 N.Y. LEXIS 2339 (N.Y. 1996).

In second degree assault trial wherein defendant contended that he acted defensively when accosted by store security personnel for no apparent reason, court properly allowed People to establish that defendant had entered store premises on various occasions during month prior to incident and had engaged in antisocial acts; such evidence was relevant background information, explaining actions of security personnel that led eventually to charged assault. People v Kellogg, 222 A.D.2d 309, 636 N.Y.S.2d 7, 1995 N.Y. App. Div. LEXIS 13017 (N.Y. App. Div. 1st Dep't 1995), app. denied, 87 N.Y.2d 974, 642 N.Y.S.2d 204, 664 N.E.2d 1267, 1996 N.Y. LEXIS 912 (N.Y. 1996).

In prosecution for second degree assault and attempted third degree burglary, wire pole and meat cleaver were properly admitted in evidence where they were found in close proximity to doors or locks of premises that appeared to have been tampered with, and defendant's fingerprints were on cleaver. People v Greene, 223 A.D.2d 474, 637 N.Y.S.2d 79, 1996 N.Y. App. Div. LEXIS 540 (N.Y. App. Div. 1st Dep't), app. denied, 88 N.Y.2d 879, 645 N.Y.S.2d 453, 668 N.E.2d 424, 1996 N.Y. LEXIS 2163 (N.Y. 1996).

Evidence of uncharged drug sales was properly admitted to show that defendant's motive for stabbing victim was to punish him for not turning over money owed for prior drug sales. People v Terry, 224 A.D.2d 202, 637 N.Y.S.2d 694, 1996 N.Y. App. Div. LEXIS 968 (N.Y. App. Div. 1st Dep't), app. denied, 88 N.Y.2d 943, 647 N.Y.S.2d 176, 670 N.E.2d 460, 1996 N.Y. LEXIS 2657 (N.Y. 1996).

In prosecution for second degree assault, court properly allowed prosecution to inquire into defendant's 15-year-old second degree burglary conviction, including its underpinnings, as well as his 6-year-old conviction for driving while intoxicated, both as to issue of defendant's credibility. People v Trichilo, 230 A.D.2d 926, 646 N.Y.S.2d 898, 1996 N.Y. App. Div. LEXIS 8345 (N.Y. App. Div. 3d Dep't), app. denied, 89 N.Y.2d 931, 654 N.Y.S.2d 733, 677 N.E.2d 305, 1996 N.Y. LEXIS 4957 (N.Y. 1996), app. denied, 89 N.Y.2d 930, 654 N.Y.S.2d 732, 677 N.E.2d 304, 1996 N.Y. LEXIS 4940 (N.Y. 1996), app. denied, 89 N.Y.2d 925, 654 N.Y.S.2d 727, 677 N.E.2d 299, 1996 N.Y. LEXIS 5320 (N.Y. 1996).

Fact that shooting victim and another prosecution witness were admitted drug dealers who were serving sentences at time of defendant's trial for second degree assault did not alone render their testimony incredible. People v Hubert, 238 A.D.2d 745, 656 N.Y.S.2d 493, 1997 N.Y. App. Div. LEXIS 3931 (N.Y. App. Div. 3d Dep't), app. denied, 90 N.Y.2d 859, 661 N.Y.S.2d 186, 683 N.E.2d 1060, 1997 N.Y. LEXIS 2488 (N.Y. 1997), app. denied sub. nom., People v King, 90 N.Y.2d 860, 661 N.Y.S.2d 186, 683 N.E.2d 1060, 1997 N.Y. LEXIS 4991 (N.Y. 1997).

In prosecution for second degree assault, prosecution was properly allowed to introduce evidence that defendant had sold drugs and that victim at one time sold drugs for defendant where that evidence tended to prove motive in light of victim's testimony that defendant had questioned him about invading defendant's "turf," and relationship between defendant and victim before and after day of shooting was inextricably interwoven with crime charged and provided narrative explaining defendant's conduct; thus, potential for unfair prejudice did not outweigh probative value of evidence. People v Hubert, 238 A.D.2d 745, 656 N.Y.S.2d 493, 1997 N.Y. App. Div. LEXIS 3931 (N.Y. App. Div. 3d Dep't), app. denied, 90 N.Y.2d 859, 661 N.Y.S.2d 186, 683 N.E.2d 1060, 1997 N.Y. LEXIS 2488 (N.Y. 1997), app. denied sub. nom., People v King, 90 N.Y.2d 860, 661 N.Y.S.2d 186, 683 N.E.2d 1060, 1997 N.Y. LEXIS 4991 (N.Y. 1997).

In second degree assault prosecution, prosecution was justified in asking defendant whether he had ever hit 2 women in past since his direct testimony tended to give jury misleading impression that he had no violent or abusive behavior in his background, thereby "opening the door" to examination on subject. People v Wilkens, 239 A.D.2d 105, 657 N.Y.S.2d 599, 1997 N.Y. App. Div. LEXIS 4472 (N.Y. App. Div. 1st Dep't), app. denied, 90 N.Y.2d 899, 662 N.Y.S.2d 442, 685 N.E.2d 223, 1997 N.Y. LEXIS 2916 (N.Y. 1997).

Probative value of assault victim's testimony, on redirect examination, that defendants were members of Hell's Angels motorcycle gang outweighed its potential for prejudice where that testimony was probative on issue of victim's credibility, which defendants had challenged on cross-examination, it was sole reference to Hell's Angels at trial, and prosecution did not take advantage of it. People v Vecchio, 240 A.D.2d 854, 658 N.Y.S.2d 720, 1997 N.Y. App. Div. LEXIS 6716 (N.Y. App. Div. 3d Dep't 1997).

Court properly admitted testimony concerning prior altercation between complainant and defendant in second degree assault prosecution where prior incident was not unduly remote and was highly relevant to motive, and court gave adequate limiting instructions when testimony was introduced. People v Maniram, 242 A.D.2d 472, 662 N.Y.S.2d 119, 1997 N.Y. App. Div. LEXIS 9032 (N.Y. App. Div. 1st Dep't 1997), app. denied, 91 N.Y.2d 894, 669 N.Y.S.2d 8, 691 N.E.2d 1034, 1998 N.Y. LEXIS 458 (N.Y. 1998).

In prosecution for first degree rape, second degree assault, and first degree sexual abuse, defendant was prevented from asserting adequate defense by court's Sandoval ruling that prosecutor could inquire into dates and charges of 8 prior misdemeanors, including attempted assault that defendant alleged was too similar to present allegations. People v Sager, 251 A.D.2d 433, 673 N.Y.S.2d 325, 1998 N.Y. App. Div. LEXIS 6561 (N.Y. App. Div. 2d Dep't), app. denied, 92 N.Y.2d 905, 680 N.Y.S.2d 69, 702 N.E.2d 854, 1998 N.Y. LEXIS 3573 (N.Y. 1998).

In prosecution for second and third degree assault and third degree weapon possession, court did not deprive defendant of fair trial by allowing prosecution to introduce evidence relating to defendant's prior assaults against victim where that evidence was admissible to prove his motive and intent and to refute his assertion of accidental injury. People v Underwood, 255 A.D.2d 405, 680 N.Y.S.2d 555, 1998 N.Y. App. Div. LEXIS 11758 (N.Y. App. Div. 2d Dep't 1998), app. denied, 93 N.Y.2d 879, 689 N.Y.S.2d 441, 711 N.E.2d 655, 1999 N.Y. LEXIS 1097 (N.Y. 1999).

In prosecution for first degree rape, attempted first degree rape, first degree sodomy, first degree sexual abuse, first and second degree assault, first, second, and third degree robbery, first and second degree burglary, and fifth degree possession of stolen property, defendant was not entitled to suppression of polymerase chain reaction (PCR) DNA evidence where (1) all 4 experts testified at pretrial hearing that PCR DNA testing produces results that are generally relied on by scientific community, (2) testing laboratory's geneticist/vice-president testified extensively as to controls, protocols, and procedures used in such testing, and (3) laboratory's senior forensic scientist, who performed subject tests, testified that he had previously performed such tests 10 to 20 times and that he followed proper protocol. People v Hamilton, 255 A.D.2d 693, 681 N.Y.S.2d 117, 1998 N.Y. App. Div. LEXIS 11925 (N.Y. App. Div. 3d Dep't), app. denied, 92 N.Y.2d 1032, 684 N.Y.S.2d 497, 707 N.E.2d 452, 1998 N.Y. LEXIS 4633 (N.Y. 1998).

Even if photo array were unduly suggestive, court properly allowed 2 assault victims to make in-court identifications of defendant where prosecution proved independent basis for those identifications. People v Saulters, 255 A.D.2d 896, 682 N.Y.S.2d 740, 1998 N.Y. App. Div. LEXIS 12085 (N.Y. App. Div. 4th Dep't),

app. denied, 92 N.Y.2d 1038, 684 N.Y.S.2d 503, 707 N.E.2d 458, 1998 N.Y. LEXIS 4768 (N.Y. 1998).

Court properly found that pediatrician with 16 years experience possessed requisite skill and experience to be considered medical expert on subject of causation of burns since he had treated children with burns of same nature as those received by victim, and his professional instruction to medical students included how to determine cause of burns. People v Cadell, 256 A.D.2d 134, 683 N.Y.S.2d 222, 1998 N.Y. App. Div. LEXIS 13758 (N.Y. App. Div. 1st Dep't 1998), app. denied, 93 N.Y.2d 871, 689 N.Y.S.2d 433, 711 N.E.2d 647, 1999 N.Y. LEXIS 891 (N.Y. 1999).

Evidence of defendant's prior sexual and physical abuse of victim was admissible where (1) it was probative of defendant's state of mind and relevant to prove "forcible compulsion" element of first degree sodomy, of which he was acquitted, (2) he was convicted of first degree burglary, second and third degree assault, and second degree menacing, and (3) probative value of evidence outweighed any prejudice to defendant. People v Wright, 266 A.D.2d 414, 701 N.Y.S.2d 61, 1999 N.Y. App. Div. LEXIS 11470 (N.Y. App. Div. 2d Dep't 1999), app. denied sub. nom., People v Freeman, 94 N.Y.2d 880, 705 N.Y.S.2d 12, 726 N.E.2d 489 (N.Y. 2000), app. denied, 94 N.Y.2d 886, 705 N.Y.S.2d 19, 726 N.E.2d 496, 2000 N.Y. LEXIS 497 (N.Y. 2000).

In prosecution for second degree assault, victim was properly allowed to testify that attack was precipitated by his failure to pay defendant $400 that he owed him for drugs where (1) defendant had demanded money minutes before and during assault, and thus unpaid drug transactions were inextricably interwoven with victim's recitation of events leading up to and during attack, (2) those transactions were especially relevant to defendant's motive for attack, and (3) probative value of testimony outweighed its potential for unfair prejudice, particularly in light of court's proper limiting instructions to jury. People v Shannon, 273 A.D.2d 505, 708 N.Y.S.2d 199, 2000 N.Y. App. Div. LEXIS 6446 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 892, 715 N.Y.S.2d 385, 738 N.E.2d 789, 2000 N.Y. LEXIS 3269 (N.Y. 2000).

In prosecution for second degree assault and attempted second degree assault, both committed against correction officer, victim was properly allowed to testify that, on day of assault, defendant had lost privilege of making phone calls as result of jail disciplinary proceeding, that victim then blocked defendant's attempt to make phone call, and that defendant retorted, "when I get off key block tomorrow you better watch the f**k out," where (1) CLS CPL § 240.43 is expressly limited to evidence of defendant's prior conduct that "prosecutor intends to use at trial for purposes of impeaching the credibility of the defendant," and (2) prosecution elicited testimony at issue during its case-in-chief as evidence of defendant's intent and not to impeach his testimony. People v Travis, 273 A.D.2d 544, 711 N.Y.S.2d 514, 2000 N.Y. App. Div. LEXIS 6697 (N.Y. App. Div. 3d Dep't 2000).

In prosecution for second degree assault and attempted second degree assault, both arising from incident in which defendant jail inmate threw balls of wet toilet paper at correction officer, one of which hit officer in eye and injured cornea, court properly admitted bag containing toilet paper and banana peel where (1) another correction officer who witnessed incident and gathered contents of evidence bag testified that exhibit contained all material thrown by defendant, some of which hit victim and some of which did not, and (2) court instructed jury that "there has been no testimony that the object that struck [victim], if that's what you believe, had any debris in it." People v Travis, 273 A.D.2d 544, 711 N.Y.S.2d 514, 2000 N.Y. App. Div. LEXIS 6697 (N.Y. App. Div. 3d Dep't 2000).

In prosecution for attempted second assault, third degree assault, and child endangerment, court properly allowed prosecution to introduce evidence of 2 prior incidents of defendant's behavior toward victim, who was 28-year-old defendant's 15-year-old stepbrother, where (1) in first incident 2 days before present assault, defendant threw victim against wall and threatened to kill him, (2) in second incident 7 months earlier, defendant kicked victim after placing himself in dispute between victim and their mother, (3) court precluded evidence of third incident that occurred years earlier, and (4) court properly instructed jury to consider prior incidents solely on issue of whether defendant's present acts of violence toward victim were intentional or resulted from mistake or accident. People v Ray, 273 A.D.2d 611, 710 N.Y.S.2d 138, 2000 N.Y. App. Div. LEXIS 7226 (N.Y. App. Div. 3d Dep't 2000).

In prosecution for second degree assault, second degree criminal contempt, and second degree aggravated harassment, uncharged crimes evidence concerning defendant's pattern of abuse of victim was admissible where (1) it provided complete picture of subject events and was necessary to explain that certain conduct by victim was product of fear, (2) its probative value outweighed its prejudicial effect, which was minimized by court's thorough limiting instructions, and (3) defendant was not prejudiced by court's failure to make advance Ventimiglia ruling, as requested by prosecution at outset of trial. People v Castillo, 275 A.D.2d 682, 713 N.Y.S.2d 526, 2000 N.Y. App. Div. LEXIS 10000 (N.Y. App. Div. 1st Dep't 2000), app. denied, 96 N.Y.2d 733, 722 N.Y.S.2d 799, 745 N.E.2d 1022, 2001 N.Y. LEXIS 323 (N.Y. 2001).

Police officer was properly permitted to testify in trial for second degree assault that, based on his experience, box cutter recovered from defendant was type in which blade is altered to facilitate its use as weapon. People v Stewart, 279 A.D.2d 335, 718 N.Y.S.2d 843, 2001 N.Y. App. Div. LEXIS 434 (N.Y. App. Div. 1st Dep't 2001).

Evidence of prior assaults was properly admitted in second degree assault trial where it was probative of defendant's motive and intent, provided background events explaining relationship among defendant, his former girlfriend and her new boyfriend, including defendant's jealousy and anger, and refuted defendant's justification defense. People v Mehmeti, 279 A.D.2d 420, 719 N.Y.S.2d 574, 2001 N.Y. App. Div. LEXIS 891 (N.Y. App. Div. 1st Dep't), app. denied, 96 N.Y.2d 832, 729 N.Y.S.2d 452, 754 N.E.2d 212, 2001 N.Y. LEXIS 2236 (N.Y. 2001).

In prosecution for second degree assault and fourth degree weapon possession, victim's treating doctor was properly allowed to testify as expert on subject of whether cut on defendant's forehead was caused by box cutter where doctor was first-year resident in emergency medicine with 10 months of experience in that field. People v Edmondson, 281 A.D.2d 184, 721 N.Y.S.2d 522, 2001 N.Y. App. Div. LEXIS 2197 (N.Y. App. Div. 1st Dep't 2001).

In prosecution for second degree assault and fourth degree weapon possession, court properly allowed prosecution to introduce evidence that rebutted defendant's claim that victim's injury resulted from blunt trauma rather than from sharp instrument where, to extent that such evidence could have been introduced on prosecution's direct case, court had discretion under CLS CPL § 260.30(7) to allow it to be introduced in rebuttal. People v Edmondson, 281 A.D.2d 184, 721 N.Y.S.2d 522, 2001 N.Y. App. Div. LEXIS 2197 (N.Y. App. Div. 1st Dep't 2001).

In prosecution for second degree robbery, second degree assault, and first degree reckless endangerment, defendant was not entitled to suppression of identification evidence where he met description that was sufficiently specific under geographic and temporal circumstances, and thus officer had reasonable suspicion to stop and detain defendant for investigative purposes and was entitled to pat down and handcuff him as safety precaution. People v Jennings, 281 A.D.2d 285, 722 N.Y.S.2d 141, 2001 N.Y. App. Div. LEXIS 2978 (N.Y. App. Div. 1st Dep't), app. denied, 96 N.Y.2d 903, 730 N.Y.S.2d 800, 756 N.E.2d 88, 2001 N.Y. LEXIS 2831 (N.Y. 2001).

In prosecution for second degree robbery, second degree assault, and first degree reckless endangerment, hospital showup was justified where it served purpose of procuring trustworthy identification while victims' memories were fresh. People v Jennings, 281 A.D.2d 285, 722 N.Y.S.2d 141, 2001 N.Y. App. Div. LEXIS 2978 (N.Y. App. Div. 1st Dep't), app. denied, 96 N.Y.2d 903, 730 N.Y.S.2d 800, 756 N.E.2d 88, 2001 N.Y. LEXIS 2831 (N.Y. 2001).

In prosecution for second degree robbery, second degree assault, and first degree reckless endangerment, hospital showup was not unduly suggestive where victims viewed defendant separately and without conferring. People v Jennings, 281 A.D.2d 285, 722 N.Y.S.2d 141, 2001 N.Y. App. Div. LEXIS 2978 (N.Y. App.

Div. 1st Dep't), app. denied, 96 N.Y.2d 903, 730 N.Y.S.2d 800, 756 N.E.2d 88, 2001 N.Y. LEXIS 2831 (N.Y. 2001).

In prosecution for first and third degree rape, first and third degree sodomy, first, second, and third degree sexual abuse, second and third degree assault, child endangerment, and second degree criminal contempt, committed against 2 sisters with whom defendant was residing, court's Ventimiglia ruling properly allowed introduction of evidence of defendant's prior uncharged crimes and other bad acts against victims' immediate family members for purpose of showing defendant's intent, motive, forcible compulsion, and absence of mistake where (1) that testimony primarily described defendant's physical abuse and control of 4 other members of victims' household, including threats, hitting of mother in front of children, and control of money, keys, activities, and household rules, (2) such information was explanatory of victims' behavior in that it completed narrative of abusive and controlling setting in which criminal acts occurred and defendant's motives and opportunity for perpetrating those acts, (3) in light of defendant's alibi that he was with his wife and not in victims' house at time of some crimes, such evidence also tended to prove defendant's identify as perpetrator, and (4) court repeatedly offered proper limiting instructions. People v Watson, 281 A.D.2d 691, 721 N.Y.S.2d 700, 2001 N.Y. App. Div. LEXIS 2311 (N.Y. App. Div. 3d Dep't), app. denied, 96 N.Y.2d 925, 732 N.Y.S.2d 643, 758 N.E.2d 669, 2001 N.Y. LEXIS 4065 (N.Y. 2001).

In prosecution for second degree assault, second degree weapon possession, and first degree reckless endangerment, evidence of defendant's prior and subsequent possession of firearm resembling that used in present crimes was admissible to identify defendant as perpetrator, and court properly instructed jury to consider that evidence only on issue of identity. People v Rivera, 281 A.D.2d 702, 721 N.Y.S.2d 429, 2001 N.Y. App. Div. LEXIS 2294 (N.Y. App. Div. 3d Dep't), app. denied, 96 N.Y.2d 805, 726 N.Y.S.2d 383, 750 N.E.2d 85, 2001 N.Y. LEXIS 1735 (N.Y. 2001).

In prosecution for second degree assault and third degree weapon possession, identification procedure was not unduly suggestive, even though each witness was present while the other viewed photo array, where police officer took steps to prevent consultation between witnesses and to preclude them from seeing which photo the other selected, each witness had ample time to observe defendant during events in question, and thus their identification of him had independent basis that alone rendered their testimony admissible. People v Burns, 281 A.D.2d 704, 722 N.Y.S.2d 76, 2001 N.Y. App. Div. LEXIS 2313 (N.Y. App. Div. 3d Dep't), app. denied, 96 N.Y.2d 826, 729 N.Y.S.2d 446, 754 N.E.2d 206, 2001 N.Y. LEXIS 2094 (N.Y. 2001).

In trial for second degree assault and first degree promoting prison contraband, evidence of defendant's status as gang member was properly admitted because it was relevant to establish motive and explain his connection with codefendant, and its probative value outweighed potential prejudice. People v Reynolds, 283 A.D.2d 771, 728 N.Y.S.2d 503, 2001 N.Y. App. Div. LEXIS 5189 (N.Y. App. Div. 3d Dep't), app. denied, 96 N.Y.2d 866, 730 N.Y.S.2d 41, 754 N.E.2d 1124, 2001 N.Y. LEXIS 2617 (N.Y. 2001), app. denied, 96 N.Y.2d 923, 732 N.Y.S.2d 640, 758 N.E.2d 666, 2001 N.Y. LEXIS 4003 (N.Y. 2001).

Photographs of child victim in assault prosecutions were properly allowed to show nature of injuries and thus to prove that defendant acted with requisite intent. People v Scavone, 284 A.D.2d 928, 728 N.Y.S.2d 615, 2001 N.Y. App. Div. LEXIS 5866 (N.Y. App. Div. 4th Dep't), app. denied, 96 N.Y.2d 942, 733 N.Y.S.2d 382, 759 N.E.2d 381, 2001 N.Y. LEXIS 3579 (N.Y. 2001).

Defendant convicted of second degree assault was not entitled to suppression of showup identification testimony where (1) victim's description was sufficient to provide reasonable suspicion to detain defendant for identification procedure, (2) although showup occurred in front of police station, crime had occurred about 35 minutes earlier a few blocks away, (3) victim, who had not been alerted that he was going to be given opportunity to make identification, identified defendant, who was not in handcuffs, without any prompting, (4) thus, circumstances were not unduly suggestive, and (5) exigent circumstances were present in that victim needed medical treatment. People v Smith, 286 A.D.2d 636, 730 N.Y.S.2d 495, 2001 N.Y. App. Div. LEXIS 8811 (N.Y. App. Div. 1st Dep't), app. denied, 97 N.Y.2d 688, 738 N.Y.S.2d 304, 764 N.E.2d 408, 2001 N.Y. LEXIS 4540 (N.Y. 2001).

In prosecution for second degree assault and second degree impersonation, evidence that defendant threatened to kill police officer involved in his arrest was admissible, despite lack of CLS CPL § 710.30 notice to defendant of that evidence, where defendant moved for suppression of that evidence, thus excusing notice requirement. People v Laws, 286 A.D.2d 991, 730 N.Y.S.2d 911, 2001 N.Y. App. Div. LEXIS 9010 (N.Y. App. Div. 4th Dep't 2001), app. denied, 97 N.Y.2d 706, 739 N.Y.S.2d 107, 765 N.E.2d 310, 2002 N.Y. LEXIS 355 (N.Y. 2002).

In defendant's appeal from trial court's judgment convicting defendant of first degree assault, second degree assault, criminal contempt, and five counts of endangering the welfare of a child, the appellate court held that (1) a reasonable person would not have believed he or she was in custody when a police officer asked for his or her name and date of birth with respect to the issuance of a warrant on a separate matter, and defendant's rights were not violated because the officer asked a subsequent, single investigatory question without reading defendant's Miranda rights; (2) the trial court properly exercised its discretion in permitting the prosecutor to ask defendant's son leading questions when defendant's son testified as a prosecution witness and to impeach defendant's son; (3) the trial court abused its discretion by permitting the prosecutor to question defendant about prior convictions for endangering the welfare of a child and assault in the second degree, but the error was harmless; and (4) the trial court had a reasonable basis for placing defendant in physical restraints in the courtroom. People v Jacobs, 298 A.D.2d 954, 748 N.Y.S.2d 110, 2002 N.Y. App. Div. LEXIS 9031 (N.Y. App. Div. 4th Dep't), app. denied, 99 N.Y.2d 559, 754 N.Y.S.2d 212, 784 N.E.2d 85, 2002 N.Y. LEXIS 4368 (N.Y. 2002).

Where, during the commission of an unrelated crime, defendant admitted to police, who had no knowledge of an assault case, that defendant shot a girl, there was no question of voluntariness requiring N.Y. Crim. Proc. Law § 710.30(1)(a) notice or a suppression hearing. People v Garcia-Lopez, 308 A.D.2d 366, 764 N.Y.S.2d 264, 2003 N.Y. App. Div. LEXIS 9385 (N.Y. App. Div. 1st Dep't), app. denied, 1 N.Y.3d 572, 775 N.Y.S.2d 789, 807 N.E.2d 902, 2003 N.Y. LEXIS 4557 (N.Y. 2003), cert. denied, 541 U.S. 1078, 124 S. Ct. 2424, 158 L. Ed. 2d 991, 2004 U.S. LEXIS 3936 (U.S. 2004).

That a victim suffered from dementia and was declared to be incompetent to testify at trial did not preclude the admission of her out-of-court statements implicating defendant in the crimes, because 1) witnesses' testimony established that she was alert and oriented when she made the statements and she made them while she was under the stress caused by an assault and attempted robbery, and they were thus admissible under the excited utterance exception to the hearsay rule; and 2) there was other corroborative evidence tending to establish both the commission of the underlying crimes and defendant's connection thereto. People v Cole, 150 A.D.3d 1476, 52 N.Y.S.3d 744, 2017 N.Y. App. Div. LEXIS 3921 (N.Y. App. Div. 3d Dep't 2017), app. denied, 31 N.Y.3d 1146, 108 N.E.3d 502, 83 N.Y.S.3d 428, 2018 N.Y. LEXIS 2234 (N.Y. 2018).

In connection with defendant's conviction of assault in the second degree, complainant's 911 calls were properly admitted into evidence as excited utterances; the nature of defendant's attack on the complainant with a butcher knife was the type of startling event that would cause physical shock, plus the 911 calls were made only approximately five minutes after the event, and in those intervening minutes, the complainant ran to his apartment to bandage his wound. People v Jaber, 172 A.D.3d 1227, 101 N.Y.S.3d 371, 2019 N.Y. App. Div. LEXIS 4001 (N.Y. App. Div. 2d Dep't), app. denied, 34 N.Y.3d 933, 133 N.E.3d 403, 109 N.Y.S.3d 703, 2019 N.Y. LEXIS 2812 (N.Y. 2019).

44. —Evidence improperly allowed

In trial for second degree assault on nine month old child, it was reversible error to allow testimony concerning prior, uncharged incident in which defendant had twisted same child's leg causing swelling and preventing child from putting weight on leg for several days, even though X-rays taken later showed leg had

been fractured at some point, since defendant had been playing with child at time of first incident and there was no evidence of intent to cause injury, nor could fracture be ascribed to that incident with certainty; therefore, probative value of incident on defendant's intention in connection with current crime was outweighed by potential for prejudice. People v Johnson, 122 A.D.2d 341, 504 N.Y.S.2d 311, 1986 N.Y. App. Div. LEXIS 59675 (N.Y. App. Div. 3d Dep't 1986).

At trial for second degree assault, prosecutor's reference in summation to contents of radio transmission and police report which allegedly indicated that gunshots had been fired, and which were not in evidence, was highly prejudicial where reference was improper attempt to corroborate complainant's testimony that he had been pistol-whipped and shot at by defendants, and defendants claimed they had no guns; prejudice resulted since element of offense requires physical injury to be caused by use of deadly weapon or dangerous instrument. People v Scoon, 130 A.D.2d 597, 515 N.Y.S.2d 306, 1987 N.Y. App. Div. LEXIS 46611 (N.Y. App. Div. 2d Dep't 1987).

In prosecution for second degree assault, inter alia, it was error to allow People to present evidence of defendant's prior convictions involving criminal behavior towards same complainant in order to prove intent; whether or not defendant previously assaulted complainant had greater prejudicial impact than probative value on issue of defendant's intention to seriously injure her on this occasion, and only served to establish defendant's criminal propensities. People v Carr, 208 A.D.2d 855, 618 N.Y.S.2d 379, 1994 N.Y. App. Div. LEXIS 10014 (N.Y. App. Div. 2d Dep't 1994), overruled, People v Johnson, 95 N.Y.2d 368, 718 N.Y.S.2d 1, 740 N.E.2d 1075, 2000 N.Y. LEXIS 2930 (N.Y. 2000).

In prosecution for attempted first and second degree robbery, second degree assault, and second and third degree weapon possession, lineup was unduly suggestive, and identification testimony of witnesses who viewed tainted lineup was inadmissible in absence of showing of independent source, where (1) witnesses had described one perpetrator as wearing dreadlocks and striped shirt, and (2) when defendant was shown to certain of those witnesses at lineup, he and 5 fillers wore baseball caps concealing their hair, but defendant was sole person wearing striped shirt. People v Riddick, 251 A.D.2d 517, 674 N.Y.S.2d 703, 1998 N.Y. App. Div. LEXIS 6814 (N.Y. App. Div. 2d Dep't), app. denied, 92 N.Y.2d 951, 681 N.Y.S.2d 481, 704 N.E.2d 234, 1998 N.Y. LEXIS 4232 (N.Y. 1998).

In prosecution for attempted second degree murder, first degree firearm use, second degree assault, and fourth degree weapon possession, court erroneously ruled, at Sandoval hearing, that prosecution could cross-examine defendant, who was HIV positive, as to whether he had life-threatening disease where there was no evidence that defendant was despondent, hostile, or vengeful as result of his disease or that he had reason to believe that he would not live long enough to be punished for his actions, and thus there was no basis for inference that defendant knew that he had nothing to lose and that he acted on that knowledge in committing crimes. People v Felix-Torres, 281 A.D.2d 649, 721 N.Y.S.2d 415, 2001 N.Y. App. Div. LEXIS 2018 (N.Y. App. Div. 3d Dep't), app. denied, 97 N.Y.2d 681, 738 N.Y.S.2d 296, 764 N.E.2d 400, 2001 N.Y. LEXIS 4373 (N.Y. 2001).

Trial court erred by permitting testimony regarding a series of prior bad acts and/or uncharged crimes that occurred in the two weeks preceding the incident because, even if they fell within one or more of the recognized Molineux exceptions, and indeed constituted relevant and probative evidence, the record failed to reflect that the trial court balanced the probative value of such evidence against its prejudicial effect. People v Elmy, 117 A.D.3d 1183, 984 N.Y.S.2d 672, 2014 N.Y. App. Div. LEXIS 3246 (N.Y. App. Div. 3d Dep't 2014).

45. Sufficient evidence to uphold conviction, generally

Evidence supported defendant's conviction for assault in the second degree because there was sufficient proof that defendant acted recklessly, pursuant to N.Y. Penal Law § 15.05, in operating a motor vehicle on a public road at an excessive rate of speed before crossing a double line on a curve and colliding with an oncoming vehicle. People v Asaro, 21 N.Y.3d 677, 976 N.Y.S.2d 10, 998 N.E.2d 810, 2013 N.Y. LEXIS 2909 (N.Y. 2013).

In prosecution for second degree assault and fourth degree weapon possession, People disproved justification defense by showing that (1) defendant had threatened to kill complainant when complainant intervened in fight between her and another, and (2) when defendant lunged at complainant with knife, cutting his arm, complainant had already put down dumbbells he had earlier picked up to defend himself after defendant's threat. People v Jackson, 157 A.D.2d 801, 550 N.Y.S.2d 403, 1990 N.Y. App. Div. LEXIS 690 (N.Y. App. Div. 2d Dep't), app. denied, 75 N.Y.2d 967, 556 N.Y.S.2d 252, 555 N.E.2d 624, 1990 N.Y. LEXIS 1835 (N.Y. 1990).

Defense of justification to charge of second degree assault was disproved beyond reasonable doubt where evidence showed that, after exposing himself to 10-year-old girl, defendant was confronted and chased by 3 unarmed youths who grabbed him and pushed him against car, and defendant, shouting "in the name of God I'm going to kill you," drew knife from back pocket and swung it, cutting one youth across his face and stabbing another in his forearm despite their efforts to back away. People v Varela, 164 A.D.2d 924, 559 N.Y.S.2d 756, 1990 N.Y. App. Div. LEXIS 10613 (N.Y. App. Div. 2d Dep't), app. denied, 76 N.Y.2d 1025, 565 N.Y.S.2d 775, 566 N.E.2d 1180, 1990 N.Y. LEXIS 4913 (N.Y. 1990).

Court properly denied defendant's motion for trial order of dismissal in prosection for first and second degree assault and first degree promoting prison contraband where (1) defendant and victim were alone in area separated from all other inmates and were fighting, (2) victim testified that he could not see who slashed him during fight, but that he knew defendant fought with him, (3) correction officers testified that they witnessed fight, that victim was badly cut, and that defendant had cuts on his hands consistent with razor cuts, and (4) razor was found on ground next to defendant. People v Davis, 208 A.D.2d 1062, 617 N.Y.S.2d 571, 1994 N.Y. App. Div. LEXIS 9844 (N.Y. App. Div. 3d Dep't), app. denied, 84 N.Y.2d 1010, 622 N.Y.S.2d 922, 647 N.E.2d 128, 1994 N.Y. LEXIS 5051 (N.Y. 1994).

In second degree assault trial, witness' testimony that she saw defendant pick something up and throw it in direction of police officers, offered in direct contradiction to defendant's assertion that he did not throw any objects, was rebuttal evidence admissible at close of defendant's case, not identification testimony that had to be offered on People's case-in-chief. People v Barker, 223 A.D.2d 899, 636 N.Y.S.2d 482, 1996 N.Y. App. Div. LEXIS 393 (N.Y. App. Div. 3d Dep't), app. denied, 88 N.Y.2d 964, 647 N.Y.S.2d 718, 670 N.E.2d 1350, 1996 N.Y. LEXIS 2776 (N.Y. 1996).

Testimony of two eyewitnesses as well as the victim was legally sufficient to establish that defendant, a juvenile, committed acts that if committed by an adult would have constituted assault in the second degree and criminal possession of a weapon in the second degree in violation of N.Y. Penal Law §§ 120.05(4) and 265.03. Matter of Marcus C., 46 A.D.3d 816, 848 N.Y.S.2d 317, 2007 N.Y. App. Div. LEXIS 12844 (N.Y. App. Div. 2d Dep't 2007).

There was sufficient evidence to support a defendant's convictions for assault in the second degree and criminal possession of a weapon in the third degree as it was within the province of the jury to believe the victim's version of the events, which was corroborated by the testifying detective who stated he observed a bloody knife at the scene and that he observed the bedroom door, which appeared to have been punctured or stabbed, which was consistent with the victim's testimony that the defendant attempted to break down the door to get to him. Further, a police officer testified that when he arrived on the scene, the defendant was walking in front of the apartment, there was blood on his clothing, and he was sweating, despite the cold temperature and, in addition, the knife that the defendant used to inflict the injuries constituted a deadly weapon or dangerous instrument and the defendant's intent to cause physical injury was inferable from his conduct and the surrounding circumstances. People v Gonzalez, 64 A.D.3d 1038, 882 N.Y.S.2d 598, 2009 N.Y. App. Div. LEXIS 5762 (N.Y. App. Div. 3d Dep't), app. denied, 13 N.Y.3d 796, 887 N.Y.S.2d 545, 916 N.E.2d 440, 2009 N.Y. LEXIS 4370 (N.Y. 2009).

In a case in which a jury convicted defendant of two counts of criminal possession of a weapon in the second degree and assault

in the second degree, the appellate division was satisfied that the jury's guilty verdict was supported by the weight of the evidence. While defendant premised his weight of the evidence argument on the lack of credibility of the victim and the victim's girlfriend, such matters were explored on cross-examination and presented an issue for the jury's resolution. People v Gunn, 144 A.D.3d 1193, 40 N.Y.S.3d 634, 2016 N.Y. App. Div. LEXIS 7120 (N.Y. App. Div. 3d Dep't 2016), app. denied, 28 N.Y.3d 1145, 74 N.E.3d 682, 52 N.Y.S.3d 297, 2017 N.Y. LEXIS 257 (N.Y. 2017).

Jury's verdict as to the defendant's conviction of assault in second degree was not against the weight of evidence because defendant struck the victim and evidence supported the conclusion that the victim's deep wound constituted a physical injury; the jury could have inferred that defendant intended to cause such injury. It was possible that the jury believed that the victim had no weapons and that defendant cut the victim with a knife rather than injury being caused by the broken glass face of cell phone. People v Williams, 161 A.D.3d 1296, 77 N.Y.S.3d 216, 2018 N.Y. App. Div. LEXIS 3367 (N.Y. App. Div. 3d Dep't), app. denied, 32 N.Y.3d 942, 109 N.E.3d 1169, 84 N.Y.S.3d 869, 2018 N.Y. LEXIS 2670 (N.Y. 2018).

Defendant's convictions for assault in second degree and attempted assault in second degree were proper because he pistol whipped one victim with the realized intent of causing physical injury and viciously stomped another victim in the head with the unrealized intent of causing serious physical injury. People v King, 162 A.D.3d 1228, 78 N.Y.S.3d 780, 2018 N.Y. App. Div. LEXIS 4333 (N.Y. App. Div. 3d Dep't 2018).

Defendant's claim that his convictions were not supported by legally sufficient evidence was without merit because the testimony that defendant struck the victim in the head with a hammer established that defendant intended to cause serious harm and the testimony that the victim sustained injuries that resulted in bleeding, swelling and substantial pain as a result of being struck by defendant established the elements of assault in the second degree. People v Gill, 168 A.D.3d 1140, 90 N.Y.S.3d 392, 2019 N.Y. App. Div. LEXIS 44 (N.Y. App. Div. 3d Dep't 2019).

Defendant's convictions for attempted assault in the first degree and assault in the second degree were proper because the medical evidence established that the victim had sustained several life-threatening stab wounds to his abdomen and arm from a slender sharp instrument and forensic evidence established that the blood found on the victim's jeans was also found under defendant's fingernails; a police officer also testified that he had known defendant for more than 20 years and recognized him as the assailant. People v Watson, 174 A.D.3d 1138, 105 N.Y.S.3d 199, 2019 N.Y. App. Div. LEXIS 5724 (N.Y. App. Div. 3d Dep't), app. denied, 34 N.Y.3d 955, 134 N.E.3d 657, 110 N.Y.S.3d 658, 2019 N.Y. LEXIS 3197 (N.Y. 2019).

In a case in which defendant was convicted of assault in the second degree, assault in the third degree, and resisting arrest, defendant failed to preserve for appellate review his contention that his convictions of assault in the second degree and assault in the third degree were not supported by legally sufficient evidence. In any event, viewing the evidence in the light most favorable to the prosecution, the appellate division found that the evidence was legally sufficient to establish defendant's guilt beyond a reasonable doubt as to all convictions. People v Janvier, 186 A.D.3d 1247, 130 N.Y.S.3d 486, 2020 N.Y. App. Div. LEXIS 4976 (N.Y. App. Div. 2d Dep't), app. denied, 36 N.Y.3d 929, 2020 N.Y. LEXIS 3006 (N.Y. 2020).

In trial for second degree assault, third degree intimidating witness and second degree menacing, People met their burden of laying proper foundation for introduction of expert testimony concerning battered woman's syndrome (BWS) with regard to complainant wife's trial testimony recanting or minimizing her grand jury testimony, where they presented evidence of characteristics of 3 stages in cycle of violence associated with BWS ("tension building," "explosion" and "honeymoon"), as well as other factors characteristic of BWS behavior, including evidence that complainant blamed herself for causing incidents, and minimized or denied severity of violence. People v Ellis, 170 Misc. 2d 945, 650 N.Y.S.2d 503, 1996 N.Y. Misc. LEXIS 420 (N.Y. Sup. Ct. 1996).

The evidence was legally sufficient to support defendant's conviction of assault in the second degree, N.Y. Penal Law § 120.05(2), as the People presented evidence that defendant hit one victim with a paddle and struck her head with a cane, and that she smashed the other victim's hand with a cane, fracturing two fingers, and ordered the dog owned by that victim to bite her leg, and that defendant's conduct caused fractures, bruises, or lacerations, and thus the evidence was legally sufficient with respect to the physical injury element of the statute. People v Dennee, 295 A.D.2d 1012, 743 N.Y.S.2d 798, 2002 N.Y. App. Div. LEXIS 6258 (N.Y. App. Div. 4th Dep't), app. denied, 99 N.Y.2d 534, 752 N.Y.S.2d 595, 782 N.E.2d 573, 2002 N.Y. LEXIS 4074 (N.Y. 2002).

Defendant's conviction of assault in the second degree, N.Y. Penal Law § 120.05(2), was supported by legally sufficient evidence because (1) the testimony of the victim that the victim had passed a group of teenagers, one of whom was holding a stick, that the victim heard a whipping sound in the air and was struck immediately thereafter, and that the victim then turned around and saw defendant in proximity to the victim with a stick in defendant's hand supported the inference that defendant struck the victim, (2) the testimony of a doctor established that the fracture of the victim's jaw was caused by the blow to the victim's face, (3) the testimony of the victim and the doctor established that the victim suffered a physical injury as defined in N.Y. Penal Law § 10.00(9), and (4) it did not appear that the trier of fact failed to give the evidence the weight it should have been accorded. People v Thomas, 300 A.D.2d 1034, 752 N.Y.S.2d 482, 2002 N.Y. App. Div. LEXIS 12934 (N.Y. App. Div. 4th Dep't 2002), app. denied, 99 N.Y.2d 633, 760 N.Y.S.2d 114, 790 N.E.2d 288, 2003 N.Y. LEXIS 1232 (N.Y. 2003).

Defendant's conviction of assault in the second degree, N.Y. Penal Law § 120.05, was supported by sufficient evidence; he trial evidence showed that defendant became embroiled in an argument with a New York City bus driver, grabbed the bus driver by the neck, and, holding a knife to the bus driver's neck, threatened to slash him, and that the bus driver was cut during the ensuing struggle, and the trier of fact could reasonably have conclude from this evidence that defendant intended to cause physical injury by means of a dangerous instrument, and did, in fact, cause such an injury. People v Williams, 301 A.D.2d 669, 754 N.Y.S.2d 338, 2003 N.Y. App. Div. LEXIS 587 (N.Y. App. Div. 2d Dep't), app. denied, 100 N.Y.2d 544, 763 N.Y.S.2d 10, 793 N.E.2d 424, 2003 N.Y. LEXIS 2021 (N.Y. 2003).

Evidence supported conviction for assault where injuries included a concussion, a "golf ball" sized lump on the head, two black eyes, swelling on both sides of the face, a large scrape along her neck and bruising on her neck and arms. People v Mack, 301 A.D.2d 863, 755 N.Y.S.2d 437, 2003 N.Y. App. Div. LEXIS 368 (N.Y. App. Div. 3d Dep't), app. denied, 100 N.Y.2d 540, 763 N.Y.S.2d 6, 793 N.E.2d 420, 2003 N.Y. LEXIS 1930 (N.Y. 2003).

Where defendant entered a subway carrying an incendiary devise that was in imminent peril of exploding, the verdict with respect to the convictions for second-degree attempted murder, first- and second-degree assault, and third-degree criminal possession of a weapon was based on legally sufficient evidence. People v Leary, 303 A.D.2d 256, 756 N.Y.S.2d 205, 2003 N.Y. App. Div. LEXIS 2677 (N.Y. App. Div. 1st Dep't), app. denied, 100 N.Y.2d 622, 767 N.Y.S.2d 405, 799 N.E.2d 628, 2003 N.Y. LEXIS 3803 (N.Y. 2003), cert. denied, 544 U.S. 1052, 125 S. Ct. 2303, 161 L. Ed. 2d 1095, 2005 U.S. LEXIS 4252 (U.S. 2005).

Defendant, a juvenile, engaged in reckless behavior that, if defendant had been an adult, would have been sufficient to support convictions of second degree assault in violation of N.Y. Penal Law § 120.05 and second degree reckless endangerment in violation of N.Y. Penal Law § 120.20, where defendant removed the magazine from a pistol, pointed the the pistol at the victim, squeezed the trigger, striking the victim with a chambered round. In re Koron B., 303 A.D.2d 314, 757 N.Y.S.2d 265, 2003 N.Y. App. Div. LEXIS 3264 (N.Y. App. Div. 1st Dep't), app. denied, 100 N.Y.2d 507, 763 N.Y.S.2d 813, 795 N.E.2d 39, 2003 N.Y. LEXIS 1684 (N.Y. 2003).

Defendant's conviction for assault in the second degree was not against the weight of the evidence. People v Gadsden, 303 A.D.2d

764, 760 N.Y.S.2d 180, 2003 N.Y. App. Div. LEXIS 3494 (N.Y. App. Div. 2d Dep't 2003).

Although the evidence was sufficient to convict defendant of second-degree assault under N.Y. Penal Law § 120.05(3) and to allow a jury to determine that the police officers sustained a physical injury within the meaning of N.Y. Penal Law § 10.00(9), the circumstances of defendant's criminal conduct did not warrant a persistent felony offender sentence under N.Y. Crim. Proc. Law § 400.20(1). People v Goico, 306 A.D.2d 828, 761 N.Y.S.2d 562, 2003 N.Y. App. Div. LEXIS 6857 (N.Y. App. Div. 4th Dep't 2003).

Defendant's conviction of assault in the second degree, N.Y. Penal Law § 120.05, was affirmed, because defendant's guilty plea was knowing, voluntary, and intelligent, and the conviction was supported by sufficient evidence, as defendant admitted to the reckless conduct as charged in the fourth count of the indictment, and this resulted in a skull fracture to the victim, which could be considered a serious injury. People v Wehrle, 308 A.D.2d 660, 764 N.Y.S.2d 668, 2003 N.Y. App. Div. LEXIS 9764 (N.Y. App. Div. 3d Dep't 2003).

Where the testimony of several witnesses established that defendant, while armed with a loaded firearm, unlawfully entered a home with the intent to commit armed robbery, that defendant forcibly stole property, and that defendant, in the course of the robbery, intentionally shot the victim, who was not a participant in the crime, there was sufficient evidence to convict defendant of first degree robbery in violation of N.Y. Penal Law § 160.15, two counts of first degree burglary in violation of N.Y. Penal Law § 140.30, two counts of second degree robbery in violation of N.Y. Penal Law § 160.10, second degree assault in violation of N.Y. Penal Law § 120.05, first degree criminal use of a firearm in violation of N.Y. Penal Law § 265.09, second degree criminal possession of a weapon in violation of N.Y. Penal Law § 265.03, second degree criminal use of a firearm in violation of N.Y. Penal Law § 265.08, and third degree criminal possession of a weapon in violation of N.Y. Penal Law § 265.02. People v Wright, 1 A.D.3d 707, 766 N.Y.S.2d 730, 2003 N.Y. App. Div. LEXIS 11733 (N.Y. App. Div. 3d Dep't 2003), app. denied, 1 N.Y.3d 636, 777 N.Y.S.2d 34, 808 N.E.2d 1293, 2004 N.Y. LEXIS 924 (N.Y. 2004).

Defendants' convictions of rape in the first degree, N.Y. Penal Law § 130.35(1), and assault in the second degree, N.Y. Penal Law § 120.05(2), (6), were affirmed; the convictions were not against the weight of the evidence, based on defendant's confession to the crimes and compelling DNA evidence presented by the People. People v Van Kuren, 1 A.D.3d 960, 767 N.Y.S.2d 323, 2003 N.Y. App. Div. LEXIS 12205 (N.Y. App. Div. 4th Dep't 2003), app. denied, 1 N.Y.3d 635, 777 N.Y.S.2d 34, 808 N.E.2d 1293, 2004 N.Y. LEXIS 911 (N.Y. 2004).

Where defendant allegedly bit a deputy sheriff on the finger and punched the deputy sheriff several times, there was sufficient evidence to convict defendant of assault in the second degree in violation of N.Y. Penal Law § 120.05(3) and resisting arrest in violation of N.Y. Penal Law § 205.30. People v Endresz, 1 A.D.3d 888, 767 N.Y.S.2d 732, 2003 N.Y. App. Div. LEXIS 12406 (N.Y. App. Div. 4th Dep't 2003).

Hiking boots worn by defendant during an assault in which he repeatedly kicked his victim in the head could have been a dangerous weapon for purposes of a second-degree assault charge; defendant's conviction of second degree assault was supported by sufficient evidence and was not against weight of evidence where medical testimony concluded that the victim's brain injuries were likely caused by repeated blows to the head and witnesses testified as to defendant's kicking motion to the victim's head. People v Deperna, 2 A.D.3d 900, 768 N.Y.S.2d 238, 2003 N.Y. App. Div. LEXIS 12795 (N.Y. App. Div. 3d Dep't 2003).

Defendant's conviction for second degree assault was not against the manifest weight of the evidence based upon the testimony of the sergeant who was struck and a correction officer who was present; their testimony established that defendant turned around suddenly while being escorted and, with a closed fist, struck the sergeant in the face, knocking off his glasses and causing a bruise on his face. People v Chasey, 5 A.D.3d 815, 772 N.Y.S.2d 629, 2004 N.Y. App. Div. LEXIS 2219 (N.Y. App. Div. 3d Dep't), app. denied, 2 N.Y.3d 797, 781 N.Y.S.2d 296, 814 N.E.2d 468, 2004 N.Y. LEXIS 1811 (N.Y. 2004).

Defendant's conviction for assault in the first degree was not against the weight of the evidence where the evidence showed that, as to the ability of the first victim to identify defendant, a police officer, who questioned that victim, described the victim as very coherent and able to give the officer a detailed description of the person who had assaulted him; additionally, the evidence showed that defendant employed a razor supported the conclusion that he formed the requisite intent to commit the crimes of which he was convicted. People v Perkins, 5 A.D.3d 801, 772 N.Y.S.2d 750, 2004 N.Y. App. Div. LEXIS 2216 (N.Y. App. Div. 3d Dep't), app. denied, 3 N.Y.3d 741, 786 N.Y.S.2d 821, 820 N.E.2d 300, 2004 N.Y. LEXIS 3659 (N.Y. 2004).

In an assault case where defendant used a stun gun to shock the victim twice on her abdomen, causing welts, and shot her with a BB gun, the evidence permitted the jury to find that the victim suffered physical injury as defined in N.Y. Penal Law § 10.00(9). Furthermore, it was not unreasonable for the jury to find that the stun gun was a dangerous instrument. People v Richard, 30 A.D.3d 750, 817 N.Y.S.2d 698, 2006 N.Y. App. Div. LEXIS 7939 (N.Y. App. Div. 3d Dep't), app. denied, 7 N.Y.3d 869, 824 N.Y.S.2d 614, 857 N.E.2d 1145, 2006 N.Y. LEXIS 3847 (N.Y. 2006).

Ample evidence supported defendant's conviction as an accomplice to second degree assault where it showed that defendant told her codefendant to "beat" and "get" one of two victims. People v Lazaro, 955 N.Y.S.2d 495, 38 Misc. 3d 697, 2012 N.Y. Misc. LEXIS 5531 (N.Y. Sup. Ct. 2012), aff'd, in part, 125 A.D.3d 1008, 4 N.Y.S.3d 300, 2015 N.Y. App. Div. LEXIS 1653 (N.Y. App. Div. 2d Dep't 2015).

Inmate's convictions for first degree assault under N.Y. Penal Law § 120.10(1) and second degree assault under N.Y. Penal Law § 120.05 were supported by sufficient evidence where since the inmate was under a porch at the time he fired his rifle, and he therefore could have only injured someone if he aimed his rifle low, that evidence strongly suggested intentional conduct on the part of the inmate. Moreover, the inmate's conduct cause serious physical injury to the victims. Gillis v Edwards, 445 F. Supp. 2d 221, 2006 U.S. Dist. LEXIS 57764 (N.D.N.Y. 2006).

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Evidence was legally sufficient to support defendant's conviction of first degree robbery, second degree burglary and second degree assault where it was shown that defendant and his accomplice were promptly and properly identified as perpetrators within several minutes after breaking and entering into theater where they beat and robbed porter, that watch stolen from porter was recovered from defendant, and that blue bag which accomplice had been carrying was found at arrest scene. People v Weeks, 156 A.D.2d 133, 548 N.Y.S.2d 179, 1989 N.Y. App. Div. LEXIS 15218 (N.Y. App. Div. 1st Dep't 1989), app. denied, 75 N.Y.2d 819, 552 N.Y.S.2d 569, 551 N.E.2d 1247, 1990 N.Y. LEXIS 337 (N.Y. 1990).

Evidence was sufficient to support conviction of second degree burglary, attempted first degree rape, first degree sexual abuse and second degree assault arising from incident in which defendant allegedly forced his way into apartment of his estranged wife, beat her, attempted to rape her, and beat female friend of wife over head with hammer, where (1) during incident, wife persistently asked friend to call police, (2) neighbor called police after having seen defendant prowling around outside with flashlight and beating friend in hallway, (3) responding police observed wife crying hysterically and also saw bloody lump on friend's head, and (4) medical evidence corroborated testimony concerning assaults, even though defendant asserted that wife permitted him to enter apartment, that she consented to his sexual advances, that they ended up in argument in which friend intervened with hammer, and that he accidentally hit friend with hammer while trying to disarm her. People v DeLarosa, 172 A.D.2d 156, 568 N.Y.S.2d 47, 1991 N.Y. App. Div. LEXIS 4115 (N.Y. App. Div. 1st Dep't), app. denied, 78 N.Y.2d 965, 574 N.Y.S.2d 944, 580 N.E.2d 416, 1991 N.Y. LEXIS 4345 (N.Y. 1991).

Evidence supported conviction for second degree assault on fellow inmate, despite fact that correction officer had perjured himself to extent that he attempted to protect fellow officer who

was required to be present in prisoner dormitory but had left without authorization to use bathroom, since there was no reason to believe that witness had not actually observed defendant participate in assault. People v Hernandez, 173 A.D.2d 382, 570 N.Y.S.2d 12, 1991 N.Y. App. Div. LEXIS 7597 (N.Y. App. Div. 1st Dep't), app. denied, 78 N.Y.2d 967, 574 N.Y.S.2d 947, 580 N.E.2d 419, 1991 N.Y. LEXIS 4403 (N.Y. 1991).

Defendant's guilt of second degree assault on acting in concert theory was established by evidence that (1) defendant and codefendants were principal participants in group attack on 3 young men, (2) as result of blows administered to face and body with wooden board one victim suffered broken jaw and nose, and fractured bones and lacerations so severe that bone was exposed, (3) defendant was observed by police officer in act of dragging victim along ground, and (4) both victims identified defendant as one attacker at on-scene show-up procedure. People v Calia, 184 A.D.2d 400, 585 N.Y.S.2d 356, 1992 N.Y. App. Div. LEXIS 8519 (N.Y. App. Div. 1st Dep't), app. denied, 80 N.Y.2d 973, 591 N.Y.S.2d 142, 605 N.E.2d 878, 1992 N.Y. LEXIS 4259 (N.Y. 1992).

Evidence was sufficient to support conviction for second degree assault, notwithstanding contention that People failed to prove that defendant intended to cause physical harm to correction officer, where there was evidence that defendant, during argument with officers, picked up chair, swung it over his head, lunged toward officer, and in fact hit and injured her. People v Rodriguez, 187 A.D.2d 401, 590 N.Y.S.2d 206, 1992 N.Y. App. Div. LEXIS 13326 (N.Y. App. Div. 1st Dep't 1992).

Evidence supported convictions for second degree assault and obstruction of governmental administration where (1) defendant was arrested and transported to precinct, (2) when handcuffs were thereafter removed, she became verbally and physically abusive, (3) before she could be subdued, she severely scratched face of officer standing by officer who removed handcuffs, and (4) injured officer was on duty standing by to assist officer assigned to process defendant. People v Lane, 190 A.D.2d 604, 593 N.Y.S.2d 802, 1993 N.Y. App. Div. LEXIS 1545 (N.Y. App. Div. 1st Dep't), app. denied, 81 N.Y.2d 1015, 600 N.Y.S.2d 203, 616 N.E.2d 860, 1993 N.Y. LEXIS 2486 (N.Y. 1993).

Juvenile's guilt of acts constituting attempted second and third degree assault and second degree menacing was shown by victim's testimony that juvenile twice hit him in face with his fist and 3 times in neck and back with metal pipe, while he was surrounded by several individuals, one of whom also hit him. In re Peter L., 233 A.D.2d 257, 650 N.Y.S.2d 543, 1996 N.Y. App. Div. LEXIS 12150 (N.Y. App. Div. 1st Dep't 1996).

In juvenile delinquency proceeding based on attempted second degree robbery and attempted second degree assault, defendant's intent to obtain victim's property by force was proved by testimony that after victim indicated that he did not have cigarette requested by defendant, defendant's cohorts surrounded victim, defendant began to strike victim with tree limb, defendant's cohorts joined in this attack, during which assailants tried to grab at victim's ring, watch, and pocket, and attack had no apparent motive other than robbery. In re Horatio B., 240 A.D.2d 197, 658 N.Y.S.2d 294, 1997 N.Y. App. Div. LEXIS 6168 (N.Y. App. Div. 1st Dep't 1997).

Evidence supported conviction of second degree assault and endangering welfare of child where there was conflicting expert testimony and ample evidence from which defendant's intent to cause serious physical injury could be inferred, including defendant's own statements. People v Turner, 251 A.D.2d 127, 672 N.Y.S.2d 737, 1998 N.Y. App. Div. LEXIS 6932 (N.Y. App. Div. 1st Dep't), app. denied, 92 N.Y.2d 907, 680 N.Y.S.2d 71, 702 N.E.2d 856, 1998 N.Y. LEXIS 3631 (N.Y. 1998).

Evidence supported conviction of second degree assault, even though no witness conclusively identified defendant as assailant who initially hit victim, knocking him to ground, where defendant's guilt was based on acting-in-concert theory, and all 3 participants shared requisite intent by collectively beating victim with wooden planks. People v Hill, 251 A.D.2d 129, 675 N.Y.S.2d 338, 1998 N.Y. App. Div. LEXIS 6959 (N.Y. App. Div. 1st Dep't), app. denied, 92 N.Y.2d 899, 680 N.Y.S.2d 63, 702 N.E.2d 848, 1998 N.Y. LEXIS 3420 (N.Y. 1998), app. denied, 92 N.Y.2d 899, 680 N.Y.S.2d 63, 702 N.E.2d 848 (N.Y. 1998).

Evidence supported conviction of second degree assault and fourth degree weapon possession where eyewitnesses testified that defendant cut victim's forehead with box cutter, and there was no reason to disturb jury's credibility determinations. People v Edmondson, 281 A.D.2d 184, 721 N.Y.S.2d 522, 2001 N.Y. App. Div. LEXIS 2197 (N.Y. App. Div. 1st Dep't 2001).

Jury verdict convicting defendant of second degree assault was not against weight of evidence where victim's physical injuries included bruised knee that caused him to walk with limp for 6 days, cuts on his arm, and stiff shoulder. People v Battle, 286 A.D.2d 625, 730 N.Y.S.2d 109, 2001 N.Y. App. Div. LEXIS 8598 (N.Y. App. Div. 1st Dep't), app. denied, 97 N.Y.2d 678, 738 N.Y.S.2d 293, 764 N.E.2d 397, 2001 N.Y. LEXIS 4303 (N.Y. 2001).

Jury verdict convicting defendant of second degree burglary and second degree assault was not against weight of evidence, and assault conviction was not tainted by burglary conviction, where (1) defendant's larcenous intent could be readily inferred from circumstances, including his behavior when confronted by victim, and (2) criminal act underlying assault conviction was both separate and overwhelming. People v Linares, 286 A.D.2d 629, 730 N.Y.S.2d 107, 2001 N.Y. App. Div. LEXIS 8589 (N.Y. App. Div. 1st Dep't), app. denied, 97 N.Y.2d 657, 737 N.Y.S.2d 58, 762 N.E.2d 936, 2001 N.Y. LEXIS 4230 (N.Y. 2001).

Convictions of obstructing governmental administration in the second degree and resisting arrest were supported by sufficient evidence where, when police accompanied defendant's mother to her apartment to serve defendant with a protective order, defendant responded belligerently and, ignoring an officer's suggestion that he calm down, repeatedly and aggressively sought to push past the officers and confront his mother; this provided probable cause for his arrest, and he violently resisted that lawful arrest, resulting in injuries to officers. People v Sowell, 25 A.D.3d 386, 808 N.Y.S.2d 46, 2006 N.Y. App. Div. LEXIS 150 (N.Y. App. Div. 1st Dep't), app. denied, 7 N.Y.3d 763, 819 N.Y.S.2d 889, 853 N.E.2d 260, 2006 N.Y. LEXIS 2378 (N.Y. 2006).

Because defendant was the "boss" of a well-organized gang, he actually handed an assailant one of the dangerous instruments used in an assault, and he gave the order for the attack to begin, there was ample evidence establishing defendant's accessorial liability with respect to second-degree assault under N.Y. Penal Law § 120.05(2) and criminal possession of a weapon in the third degree. People v Vaughn, 36 A.D.3d 434, 831 N.Y.S.2d 27, 2007 N.Y. App. Div. LEXIS 97 (N.Y. App. Div. 1st Dep't), app. denied, 9 N.Y.3d 870, 840 N.Y.S.2d 899, 872 N.E.2d 1205, 2007 N.Y. LEXIS 2544 (N.Y. 2007), cert. denied, 552 U.S. 1284, 128 S. Ct. 1711, 170 L. Ed. 2d 520, 2008 U.S. LEXIS 2878 (U.S. 2008).

Juvenile adjudication of assault in the second degree, attempted assault in the second degree, menacing in the second degree, criminal possession of a weapon, and reckless endangerment based on accessory liability under N.Y. Penal Law § 20.00 was proper because appellant's actions supported the inference that she knew of her companion's possession of and intent to use a knife during an assault on his victims and that she shared the state of mind required for the commission of the offenses based on the knife, intentionally aiding him in such conduct and sharing a "community of purpose" with him; while the companion attacked one of the victims with the knife, appellant was present, shouting threats and throwing punches, and she continued to participate in the attack after the companion began using the knife. Appellant's taking part in chasing, surrounding, threatening, and attacking the victims, after the companion attacked with the knife, justified the conclusion that she and the companion were working together to menace and attack the victims, which involved the use of the knife, and that she shared in the companion's intent to use the knife as part of the attack. Matter of Tatiana N., 73 A.D.3d 186, 899 N.Y.S.2d 21, 2010 N.Y. App. Div. LEXIS 2820 (N.Y. App. Div. 1st Dep't 2010).

Although it was alleged that defendant swung a knife, described as a dangerous instrument, at the victim's ribs, without a further description of the knife, there was sufficient evidence to convict defendant of attempted assault in the second degree in violation of N.Y. Penal Law §§ 110.00, 120.05 and menacing in the second degree in violation of N.Y. Penal Law § 120.14, as the factual allegations supported an inference that defendant at-

tempted to cause impairment of physical condition or substantial pain and that defendant placed or attempted to place the victim in reasonable fear of an imminent injury, and defendant's intent to cause physical injury to the victim and to place the victim in fear of physical injury could be inferred from the fact that defendant displayed and swung a knife at the victim, causing the victim to wrestle with defendant in self-defense. In re Jonathan M., 4 A.D.3d 154, 772 N.Y.S.2d 42, 2004 N.Y. App. Div. LEXIS 1657 (N.Y. App. Div. 1st Dep't 2004).

47. —Second Department

In prosecution for assault in second degree, evidence supported conclusion that laceration on victim's finger was caused by defendant as he wielded machete, despite evidence that there was broken glass in room from smashed mirror, where medical evidence indicated that laceration was "clearly incised" and would not have been caused by jagged edge of broken mirror glass. People v Smith, 125 A.D.2d 509, 509 N.Y.S.2d 421, 1986 N.Y. App. Div. LEXIS 62814 (N.Y. App. Div. 2d Dep't 1986).

Evidence sustained second degree assault conviction where defendant placed infant entrusted to his care into water he knew to be too hot and ignored infant's screams and attempts to extricate himself, in conscious disregard of risk that infant would be seriously burned, and where infant sustained second-degree burns over 23 percent of his body, endured substantial pain, and was scarred for life. People v Durkin, 132 A.D.2d 668, 518 N.Y.S.2d 38, 1987 N.Y. App. Div. LEXIS 49214 (N.Y. App. Div. 2d Dep't), app. denied, 70 N.Y.2d 799, 522 N.Y.S.2d 116, 516 N.E.2d 1229, 1987 N.Y. LEXIS 19429 (N.Y. 1987), app. denied, 70 N.Y.2d 799, 522 N.Y.S.2d 116, 516 N.E.2d 1230, 1987 N.Y. LEXIS 19433 (N.Y. 1987).

Defendant's guilt of first degree manslaughter, second degree assault, and second degree weapon possession was overwhelmingly proven beyond reasonable doubt where (1) 3 prosecution witnesses saw defendant take gun from his waistband, point it at one witness, and shoot him in chest, and (2) as they ran from scene, witnesses heard defendant fire 3 more shots, killing second victim. People v Blankumsee, 133 A.D.2d 640, 519 N.Y.S.2d 749, 1987 N.Y. App. Div. LEXIS 51679 (N.Y. App. Div. 2d Dep't 1987), app. denied, 70 N.Y.2d 1004, 526 N.Y.S.2d 939, 521 N.E.2d 1082, 1988 N.Y. LEXIS 783 (N.Y. 1988).

Evidence identifying defendant as assailant was sufficient to support convictions of sodomy, robbery, burglary, unlawful imprisonment, and assault where (1) victim recognized attacker's voice as that of defendant with whom she had been speaking only hours before attack, (2) victim's description of attacker fit defendant, and (3) photograph of defendant taken soon after his arrest showed him in clothing similar to that of attacker. People v Alston, 134 A.D.2d 433, 521 N.Y.S.2d 56, 1987 N.Y. App. Div. LEXIS 50619 (N.Y. App. Div. 2d Dep't 1987), app. dismissed, 71 N.Y.2d 966, 529 N.Y.S.2d 77, 524 N.E.2d 431, 1988 N.Y. LEXIS 1870 (N.Y. 1988), cert. denied, 488 U.S. 832, 109 S. Ct. 90, 102 L. Ed. 2d 66, 1988 U.S. LEXIS 3716 (U.S. 1988).

Evidence was sufficient to convict defendant of second degree assault and second degree weapon possession where (1) victim and defendant were only people in victim's locked apartment at least 5 minutes before incident, (2) victim's last recollection, prior to losing consciousness, was going from living room couch to kitchen while passing in front of defendant, who was pacing back and forth, (3) on regaining consciousness approximately one hour later, victim was lying in front of couch with bullet wound to his head, and (4) inside dead bolt lock had been disengaged, but snap lock, which locked when door was closed, was engaged. People v Leitzey, 138 A.D.2d 409, 525 N.Y.S.2d 692, 1988 N.Y. App. Div. LEXIS 2098 (N.Y. App. Div. 2d Dep't), app. denied, 72 N.Y.2d 862, 532 N.Y.S.2d 512, 528 N.E.2d 902, 1988 N.Y. LEXIS 3799 (N.Y. 1988).

In prosecution for first degree rape, first degree sexual abuse, and second degree assault, inter alia, defendant's identity as assailant was sufficiently established by evidence that victim had viewed assailant at close range for most of 20-minute attack which occurred in sufficiently illuminated location, and by victim's unequivocal identification of defendant as her assailant at local park 6 days after crime, and again at trial. People v Morales, 141 A.D.2d 567, 529 N.Y.S.2d 175, 1988 N.Y. App. Div. LEXIS 6268 (N.Y. App. Div. 2d Dep't), app. denied, 72 N.Y.2d 922, 532 N.Y.S.2d 856, 529 N.E.2d 186, 1988 N.Y. LEXIS 3167 (N.Y. 1988).

Unwavering identification testimony of woman who had escaped from assailant after he had slashed her face with razor, dragged her into woods, threatened to kill her, and partially stripped off her clothing, was itself sufficient to support convictions for first degree robbery, first and second degree assault, and first degree coercion; jury was entitled to give victim's testimony great weight and to reject testimony of alibi witnesses. People v Solomon, 141 A.D.2d 579, 529 N.Y.S.2d 188, 1988 N.Y. App. Div. LEXIS 6331 (N.Y. App. Div. 2d Dep't), app. denied, 72 N.Y.2d 913, 532 N.Y.S.2d 762, 528 N.E.2d 1235, 1988 N.Y. LEXIS 2891 (N.Y. 1988).

Evidence was sufficient to support convictions for second degree assault and resisting arrest where defendant attempted to evade arrest by struggling with police during pat down while officers were attempting to handcuff him, and one officer sustained injury as result of struggle. People v Cotton, 143 A.D.2d 680, 532 N.Y.S.2d 911, 1988 N.Y. App. Div. LEXIS 9500 (N.Y. App. Div. 2d Dep't 1988).

Evidence was legally sufficient to support verdicts of attempted first degree assault, second degree assault, second degree criminal mischief and third degree weapon possession where victim intervened in fight between defendant and another individual in front of victim's store, defendant slapped or punched victim and threatened him, defendant then got into his vehicle and attempted to strike victim with vehicle, injuring victim's hand, and defendant then drove vehicle directly into store where several people had assembled. People v Guerrero, 150 A.D.2d 489, 541 N.Y.S.2d 90, 1989 N.Y. App. Div. LEXIS 6489 (N.Y. App. Div. 2d Dep't 1989).

Evidence supported second degree assault conviction based on defendant's having caused physical injury to victim by use of dangerous instrument where witnesses testified that defendant plunged stick into victim's eye after being asked to leave victim's premises, notwithstanding testimony of defendant that he threw stick at victim during altercation in which victim accosted him and that he did not intend to cause injury. People v Ludwig, 155 A.D.2d 558, 547 N.Y.S.2d 414, 1989 N.Y. App. Div. LEXIS 14229 (N.Y. App. Div. 2d Dep't 1989), app. denied, 75 N.Y.2d 814, 552 N.Y.S.2d 565, 551 N.E.2d 1243, 1990 N.Y. LEXIS 353 (N.Y. 1990).

Conviction of second degree murder and second degree assault was supported by evidence that (1) defendant came to witness' apartment and asked if he and codefendant wanted "to do this with him," (2) witness declined but codefendant agreed, (3) defendant returned with shotgun several minutes later and asked witness again if he "was down with it," (4) witness heard shotgun blasts short time later, (5) defendant admitted to witness on following morning that he had participated in shooting, and (6) eyewitness who was also shot saw barrel of shotgun, though he was unable to see shooter. People v Beaudovin, 181 A.D.2d 736, 581 N.Y.S.2d 68, 1992 N.Y. App. Div. LEXIS 3255 (N.Y. App. Div. 2d Dep't 1992).

Evidence was sufficient to identify defendant as perpetrator of first and second degree robbery, second degree assault, and first degree burglary where (1) 2 men broke into victim's house, beat her, and robbed her, (2) victim testified that she saw defendant in well-lit hallway outside her bedroom door, and that their eyes briefly locked, (3) victim's neighbor testified that he saw defendant, face-to-face, in front of victim's house shortly before crime, and that he saw defendant jump over back fence shortly after crime, and (4) victim and neighbor picked defendant out of lineup 3 months later, and identified him at trial. People v Williams, 184 A.D.2d 606, 584 N.Y.S.2d 632, 1992 N.Y. App. Div. LEXIS 7945 (N.Y. App. Div. 2d Dep't), app. denied, 80 N.Y.2d 978, 591 N.Y.S.2d 147, 605 N.E.2d 883, 1992 N.Y. LEXIS 4369 (N.Y. 1992), app. denied, 82 N.Y.2d 729, 602 N.Y.S.2d 826, 622 N.E.2d 327, 1993 N.Y. LEXIS 3754 (N.Y. 1993).

Evidence supported defendant's convictions for second degree assault, first degree rape, and first degree sodomy where (1) he handcuffed and taped victim to pole, (2) he tore off her clothes and inserted his penis into her vagina and anus, and (3) he whipped victim with electrical cord, struck straight pins into her legs, and burned her with lighted paper bag and cigarette. People v

Stapleton, 204 A.D.2d 580, 612 N.Y.S.2d 178, 1994 N.Y. App. Div. LEXIS 5272 (N.Y. App. Div. 2d Dep't), app. denied, 84 N.Y.2d 872, 618 N.Y.S.2d 18, 642 N.E.2d 337, 1994 N.Y. LEXIS 4066 (N.Y. 1994).

Evidence supported conclusion that defendant acted in concert with codefendant and that he had mental culpability required for commission of attempted first and second degree murder, second degree assault, and second degree weapon possession in assault on off-duty police officer where (1) defendant and codefendant approached officer's motorcycle, displayed weapons, and attempted to steal motorcycle, (2) officer displayed his shield and yelled "police," after which codefendant fired shots at officer, and (3) gun fight ensued in which officer was shot in thigh. People v Smith, 210 A.D.2d 267, 620 N.Y.S.2d 67, 1994 N.Y. App. Div. LEXIS 12316 (N.Y. App. Div. 2d Dep't 1994), app. denied, 85 N.Y.2d 914, 627 N.Y.S.2d 337, 650 N.E.2d 1339, 1995 N.Y. LEXIS 1740 (N.Y. 1995).

Evidence supported conviction of second degree murder, first and second degree robbery, second degree assault, petit larceny, fourth degree weapon possession, and fifth degree possession of stolen property where defendant made oral and written confessions that were independently corroborated, and undisputed medical testimony proved causal link between defendant's acts and victim's fatal heart attack about one hour after he was beaten, bound, and gagged. People v Cowen, 255 A.D.2d 596, 682 N.Y.S.2d 59, 1998 N.Y. App. Div. LEXIS 12823 (N.Y. App. Div. 2d Dep't 1998), app. denied, 93 N.Y.2d 872, 689 N.Y.S.2d 434, 711 N.E.2d 648, 1999 N.Y. LEXIS 906 (N.Y. 1999), app. denied sub. nom., People v Cowan, 93 N.Y.2d 872, 689 N.Y.S.2d 434, 711 N.E.2d 648, 1999 N.Y. LEXIS 4693 (N.Y. 1999).

Evidence was insufficient to support conviction of second degree (felony) assault under CLS Penal § 120.05(6) where prosecution failed to prove that assault was committed in furtherance of underlying felonies of second or third degree weapon possession. People v Williams, 255 A.D.2d 610, 682 N.Y.S.2d 60, 1998 N.Y. App. Div. LEXIS 12828 (N.Y. App. Div. 2d Dep't 1998), app. denied, 93 N.Y.2d 880, 689 N.Y.S.2d 442, 711 N.E.2d 656, 1999 N.Y. LEXIS 1121 (N.Y. 1999).

Arresting officer's testimony that defendant injured him in course of chase, after officer told defendant that he was going to be arrested for disorderly conduct, supported People v Coulanges, 264 A.D.2d 853, 696 N.Y.S.2d 466, 1999 N.Y. App. Div. LEXIS 9353 (N.Y. App. Div. 2d Dep't 1999), app. denied, 94 N.Y.2d 878, 705 N.Y.S.2d 10, 726 N.E.2d 487, 2000 N.Y. LEXIS 288 (N.Y. 2000).

In prosecution for second degree assault, resisting arrest, and third degree unauthorized use of motor vehicle, court properly summarily denied defendant's oral motion to set aside jury's verdict of guilt on ground of newly discovered evidence where (1) defendant did not comply with requirements that motion be in writing, on reasonable notice, and supported by sworn allegations of fact, (2) defendant failed to prove that proposed evidence "could not have been produced by the defendant at the trial," and (3) proposed evidence, blood-stained tee-shirt, would not have contradicted prosecution witnesses' testimony that defendant sustained trauma to his nose. People v Fisher, 266 A.D.2d 308, 699 N.Y.S.2d 58, 1999 N.Y. App. Div. LEXIS 11302 (N.Y. App. Div. 2d Dep't 1999), app. denied, 94 N.Y.2d 880, 705 N.Y.S.2d 12, 726 N.E.2d 489, 2000 N.Y. LEXIS 321 (N.Y. 2000).

Defendant's guilt of criminally negligent homicide and second degree assault, inter alia, was supported by evidence showing that, having been drinking alcohol and smoking marijuana, he drove his vehicle at 65 to 75 miles per hour on winding and hilly road which posted speed limit of 30 miles per hour, his vehicle crossed over double yellow lines, went through 2 stop signs at high rate of speed without stopping, and then collided with another vehicle, which had right of way, in intersection, and collision resulted in death of one of defendant's passengers and serious physical injury to another. People v Owens, 271 A.D.2d 621, 707 N.Y.S.2d 180, 2000 N.Y. App. Div. LEXIS 4267 (N.Y. App. Div. 2d Dep't), app. denied, 95 N.Y.2d 856, 714 N.Y.S.2d 7, 736 N.E.2d 868, 2000 N.Y. LEXIS 2716 (N.Y. 2000).

Testimony of 5 eyewitnesses that defendant smashed victim's head with barstool many times while victim lay helpless on ground, and evidence that victim's face was covered with blood and that 60 sutures and 12 staples were needed to close gash in his head, sufficiently established defendant's guilt of second degree assault. People v Smalls, 282 A.D.2d 694, 723 N.Y.S.2d 701, 2001 N.Y. App. Div. LEXIS 4019 (N.Y. App. Div. 2d Dep't), app. denied, 96 N.Y.2d 868, 730 N.Y.S.2d 43, 754 N.E.2d 1126, 2001 N.Y. LEXIS 2652 (N.Y. 2001).

Evidence was legally sufficient to prove, beyond a reasonable doubt, that defendant was guilty of assault in the second degree, N.Y. Penal Law § 120.05(1) under circumstances in which the evidence established that the defendant bit off a mass of the victim's cheek near her left eye, causing permanent scarring, numbness, pain, and partial vision impairment, and which condition, even after what a plastic surgeon characterized as "successful" surgery, may have required additional procedures both to protect the victim's eye and to improve the appearance of her scarring; thus, the People proved that defendant caused the victim to suffer serious and protracted disfigurement. People v Whyte, 47 A.D.3d 852, 850 N.Y.S.2d 184, 2008 N.Y. App. Div. LEXIS 1363 (N.Y. App. Div. 2d Dep't 2008).

Convictions of assault in the second degree, N.Y. Penal Law § 120.05(3), assault in the third degree, N.Y. Penal Law § 120.00, and resisting arrest, N.Y. Penal Law § 205.30, were supported by sufficient evidence, including an officer's testimony that he observed defendant throw a bag of narcotics into an elevator and then enter the elevator, and that, after struggling to prevent defendant from closing the doors, he guided defendant to another officer, recovered a bag of narcotics from the elevator, and advised the other officers that defendant should be placed under arrest, and another officer's testimony that defendant did not succumb to the arrest, shouted that he was not going back to jail, flailed his arms, and charged toward the front door; in the ensuing struggle, two police officers were injured. However, the convictions for second degree assault and resisting arrest were against the weight of the evidence. People v Lindsey, 52 A.D.3d 527, 859 N.Y.S.2d 486, 2008 N.Y. App. Div. LEXIS 4972 (N.Y. App. Div. 2d Dep't 2008), app. denied, 2008 N.Y. LEXIS 3031 (N.Y. Aug. 18, 2008), app. denied, 11 N.Y.3d 738, 864 N.Y.S.2d 397, 894 N.E.2d 661, 2008 N.Y. LEXIS 3072 (N.Y. 2008).

Although defendant's argument that the evidence was legally insufficient to convict defendant of second degree assault pursuant to N.Y. Penal Law § 120.05(2) was unpreserved pursuant to N.Y. Crim. Proc. Law § 470.05(2), the trial court determined that, had the argument been preserved, it would have failed; there was sufficient evidence that was not against the manifest weight of the evidence pursuant to N.Y. Crim. Proc. Law § 470.15(5) to convict defendant where defendant allegedly restrained the victim while defendant's accomplices inflicted serious wounds upon the victim with blades and where defendant allegedly cut the victim with a sharp object. People v Fluker, 2 A.D.3d 648, 768 N.Y.S.2d 345, 2003 N.Y. App. Div. LEXIS 13379 (N.Y. App. Div. 2d Dep't 2003), app. denied, 1 N.Y.3d 627, 777 N.Y.S.2d 26, 808 N.E.2d 1285, 2004 N.Y. LEXIS 741 (N.Y. 2004).

There was sufficient evidence to find appellant, a juvenile, to have committed an act that would have constituted assault in the second degree under N.Y. Penal Law § 120.05(2); the complainant suffered physical injury under N.Y. Penal Law § 10.00(9), and appellant used a dangerous instrument by the manner in which appellant used boots to stomp on the complainant's face. Matter of Patricia A., 33 A.D.3d 699, 821 N.Y.S.2d 901, 2006 N.Y. App. Div. LEXIS 12290 (N.Y. App. Div. 2d Dep't 2006).

Evidence showing that juvenile appellant struck and broke the complainant's jaw, requiring it to be wired shut for six weeks, was sufficient to establish a "serious physical injury" within the meaning of Penal Law § 10.00(10) to uphold juvenile delinquency findings relating to robbery in the first degree and assault in the second degree. Matter of Tirell R., 33 A.D.3d 804, 822 N.Y.S.2d 615, 2006 N.Y. App. Div. LEXIS 12397 (N.Y. App. Div. 2d Dep't 2006).

Evidence was sufficient to convict defendant of assault in the second degree under Penal Law § 120.05(3) because the victim, an off-duty detective, had yelled "police" when defendant initially charged toward him, and that defendant, after briefly hesitating, continued his charge, which supported the jury's conclusion that

defendant heard what the victim had yelled; the lawful duty that the victim was performing involved his continuing efforts to safeguard, and to later turn in, the fake gun he initially seized from a juvenile as evidence of that separate crime; and the victim received a painful shoulder injury in the altercation, which required surgery and several months of physical therapy. People v Torres, 130 A.D.3d 1082, 14 N.Y.S.3d 151, 2015 N.Y. App. Div. LEXIS 6241 (N.Y. App. Div. 2d Dep't), app. denied, 26 N.Y.3d 1093, 44 N.E.3d 948, 23 N.Y.S.3d 650, 2015 N.Y. LEXIS 4219 (N.Y. 2015).

Where defendant was convicted of assault in the second degree and criminal possession of a weapon, sufficient evidence established that he used a sharp instrument to inflict lacerations on the complainant's cheek and finger because the complainant testified that defendant was holding a silver box cutter, about five inches long, with a sharp-edged razor blade. People v Braithwaite, 126 A.D.3d 993, 6 N.Y.S.3d 128, 2015 N.Y. App. Div. LEXIS 2522 (N.Y. App. Div. 2d Dep't), app. denied, 25 N.Y.3d 1198, 37 N.E.3d 1164, 16 N.Y.S.3d 521, 2015 N.Y. LEXIS 2310 (N.Y. 2015).

Sufficient evidence supported defendant's conviction for assault in the second degree because defendant and the 75-year-old victim, who suffered from dementia, were patients sharing a hospital room, the victim sustained an injury to his face, which included a laceration and fractures, a witness saw only the injured victim and defendant in the room, and defendant made inculpatory statements, inter alia, to the effect that he hit the victim because the victim hit him first. People v Warden, 166 A.D.3d 817, 87 N.Y.S.3d 307, 2018 N.Y. App. Div. LEXIS 7744 (N.Y. App. Div. 2d Dep't 2018), app. denied, 32 N.Y.3d 1210, 122 N.E.3d 1138, 99 N.Y.S.3d 225, 2019 N.Y. LEXIS 713 (N.Y. 2019).

Evidence was legally sufficient to sustain defendant's convictions of assault in the second degree and assault in the third degree where physical injury had been established by evidence that the complainant experienced substantial pain, a rational trier of fact could have concluded that defendant used a dangerous instrument against one of the complainants, both alone and in concert with others. Nonetheless, the assault in the third degree conviction had to be vacated as it was inclusive of the assault in the second degree conviction. People v Taylor, 185 A.D.3d 724, 127 N.Y.S.3d 555, 2020 N.Y. App. Div. LEXIS 3851 (N.Y. App. Div. 2d Dep't 2020).

Considered in the light most favorable to the prosecution, both the direct and circumstantial evidence presented at trial was sufficient for a rational jury to conclude that petitioner, acting in concert with others, forcibly stole property from a car service driver at gunpoint, and intentionally caused severe injuries to the victim using dangerous instrumentalities. Morales v Greiner, 273 F. Supp. 2d 236, 2003 U.S. Dist. LEXIS 12756 (E.D.N.Y. 2003), app. dismissed, 381 F.3d 47, 2004 U.S. App. LEXIS 17435 (2d Cir. 2004).

48. —Third Department

Where trial court charged jury that to find defendant guilty of assaulting two police officers there had to be "intent to prevent a police officer from performing a lawful duty," court's failure to give jury statement of law whereby jury could have determined whether police officers were or were not performing lawful duty when they initially attempted to restrain defendant was prejudicially erroneous; and defendant's submission to court that there was no evidence indicating that at time in question officers had been performing lawful duty could reasonably be construed as objection to charge as given. People v Smith, 50 A.D.2d 670, 375 N.Y.S.2d 194, 1975 N.Y. App. Div. LEXIS 12508 (N.Y. App. Div. 3d Dep't 1975).

Evidence was sufficient to convict defendant of vehicular assault, second degree assault, and drunk driving where (1) driver who was following defendant's vehicle testified that just prior to accident he observed defendant's car being driven in erratic manner, swerving from lane to lane, and that defendant's car struck victim's vehicle head on while defendant was operating his car in wrong lane, (2) driver, police officer, and emergency medical technician all testified as to their observations of defendant following accident and each concluded that he was intoxicated, and (3) doctor unequivocally testified that defendant's injuries could not have produced odor of alcohol on his breath, bloodshot eyes or slurred speech. People v Reynolds, 133 A.D.2d 499, 519 N.Y.S.2d 425, 1987 N.Y. App. Div. LEXIS 49962 (N.Y. App. Div. 3d Dep't), app. denied, 70 N.Y.2d 803, 522 N.Y.S.2d 121, 516 N.E.2d 1234, 1987 N.Y. LEXIS 19535 (N.Y. 1987).

Each element of second degree assault on correctional officer was established beyond reasonable doubt by evidence that inmate suddenly pulled officer's arm down and through hatch in cell door as officer was attempting to undo inmate's handcuff, which caused officer's arm to scrape against hatch and his body to be propelled against door, and which resulted in multiple abrasions, swelling, and numbness of his arm and fingers. People v Hilliard, 142 A.D.2d 885, 531 N.Y.S.2d 386, 1988 N.Y. App. Div. LEXIS 8026 (N.Y. App. Div. 3d Dep't 1988), rev'd, 73 N.Y.2d 584, 542 N.Y.S.2d 507, 540 N.E.2d 702, 1989 N.Y. LEXIS 658 (N.Y. 1989).

Evidence was sufficient to show recklessness and thus support conviction for assault in second degree where (1) defendant left bar after being refused further alcohol because he appeared intoxicated, but shortly returned and slapped woman who had refused to leave bar with him, (2) several of bar patrons then followed defendant outside to prevent further trouble, (3) defendant backed his vehicle into station wagon being driven past bar, (4) driver of station wagon then parked across rear exit of parking lot to prevent defendant's escape, (5) bar patron threw beer bottle at defendant's vehicle when it appeared that he would not stop, and defendant then stopped his vehicle, (6) while occupants of station wagon were in or exiting vehicle, defendant struck station wagon head on and pushed it 25 to 40 feet, and (7) as result, passenger in station wagon was knocked to ground and run over. People v Acton, 149 A.D.2d 839, 540 N.Y.S.2d 544, 1989 N.Y. App. Div. LEXIS 4872 (N.Y. App. Div. 3d Dep't 1989).

Evidence supported convictions of second degree assault, second degree manslaughter, and child endangerment in connection with death of 17-month-old child where (1) child was killed by blow to abdomen, (2) autopsy revealed prior physical injuries consistent with child abuse, (3) defendant was only person present when child died, (4) child's mother testified that child was fine when she left him, (5) defendant's testimony as to child's previously sustained physical injuries was false and conflicting, and (6) defendant delayed medical treatment for child and then obtained insufficient treatment. People v Engler, 150 A.D.2d 827, 540 N.Y.S.2d 591, 1989 N.Y. App. Div. LEXIS 5478 (N.Y. App. Div. 3d Dep't), app. denied, 75 N.Y.2d 770, 551 N.Y.S.2d 912, 551 N.E.2d 113, 1989 N.Y. LEXIS 4703 (N.Y. 1989).

In trial for second degree manslaughter, child endangerment, and second degree assault arising from death of 17-month-old child, where autopsy revealed that child had been physically abused and defendant claimed that child's previously sustained physical injuries resulted from accidents, evidence of defendant's physical abuse of his stepdaughter was admissible to show absence of mistake or accident since (1) issues of identity and mistake were significant, and (2) jury was instructed to consider such evidence only if it was clear and convincing, and then only on issues of identity and absence of accident or mistake, thus minimizing its prejudicial effect. People v Engler, 150 A.D.2d 827, 540 N.Y.S.2d 591, 1989 N.Y. App. Div. LEXIS 5478 (N.Y. App. Div. 3d Dep't), app. denied, 75 N.Y.2d 770, 551 N.Y.S.2d 912, 551 N.E.2d 113, 1989 N.Y. LEXIS 4703 (N.Y. 1989).

Defendant was not entitled to dismissal of indictment charging him with causing physical injury by kicking victim with shoes, following People's case in which shoes were presented as dangerous instrument required under CLS Penal § 120.05(2), although defendant contended that there was no proof that he was wearing shoes or that he kicked victim with them, since victim testified that he was kicked hard and evidence showed that incident occurred at end of December, weather was cold, and victim required 70 stitches to repair injuries; thus, jury could have concluded on facts presented that kicking was done while defendant was wearing shoes. People v Bidwell, 153 A.D.2d 960, 545 N.Y.S.2d 402, 1989 N.Y. App. Div. LEXIS 11528 (N.Y. App. Div. 3d Dep't 1989).

Convictions for second degree assault and first degree reckless endangerment were supported by victim's testimony that (1) he and defendant were co-workers, and that he had rented room to

defendant, (2) relationship deteriorated over living arrangement and defendant's alleged failure to pay rent, (3) defendant was fired from his job after he and defendant engaged in shouting match at their place of employment, (4) while he was asleep, defendant entered his bedroom with flaming papers in one hand and baseball bat in other hand, stated that he had made defendant lose his job, and hit him with bat, (5) he fell, and defendant placed burning papers on his back, (6) he awoke with room in flames, (7) he tried to leave house through front door, but defendant was there with baseball bat and stated that he would not be permitted to leave, and (8) he escaped house through second floor window and alerted downstairs tenants to fire; such testimony was corroborated by facts that police found baseball bat down street from house and on direct route to location where defendant was found and, during booking, defendant stated that owner of house had threatened his life in past and asked "doesn't that count?" People v Hameed, 163 A.D.2d 750, 558 N.Y.S.2d 330, 1990 N.Y. App. Div. LEXIS 8608 (N.Y. App. Div. 3d Dep't), app. denied, 76 N.Y.2d 986, 563 N.Y.S.2d 775, 565 N.E.2d 524, 1990 N.Y. LEXIS 4610 (N.Y. 1990).

Verdict convicting defendant of second degree assault was not against weight of evidence where victim testified that when he left saloon he was confronted by defendant, who pushed him down and stabbed him, and general surgeon testified that he treated victim on evening in question for stab wounds along rib cage and in lower abdomen; defendant's denial of crime and testimony of others as to his peaceful and truthful character merely created issue of credibility. People v June, 183 A.D.2d 960, 583 N.Y.S.2d 566, 1992 N.Y. App. Div. LEXIS 6738 (N.Y. App. Div. 3d Dep't), app. denied, 80 N.Y.2d 905, 588 N.Y.S.2d 830, 602 N.E.2d 238, 1992 N.Y. LEXIS 3614 (N.Y. 1992).

In trial for second degree aggravated unlicensed operation of motor vehicle, leaving scene of accident, and second degree assault arising from collision involving pink van registered to defendant's wife, defendant's identity as driver of van was established by circumstantial evidence, although witness was unable to identify defendant as driver who fled from scene, where it was shown that (1) defendant had been operating van several hours before accident, (2) witness' description of driver who fled was similar to that of defendant, (3) defendant had motive to flee accident scene because operation of vehicle violated condition of his parole, (4) defendant made efforts to remain out of public eye after accident and attempted to have his wife withdraw funds from his bank account on pretext that he had left town, and (5) neither defendant nor his wife had reported $36,000 van as stolen. People v Wells, 186 A.D.2d 867, 588 N.Y.S.2d 938, 1992 N.Y. App. Div. LEXIS 12128 (N.Y. App. Div. 3d Dep't 1992).

In second degree assault trial, evidence established use of dangerous instrument and recklessness in connection with incident in which defendant made his girlfriend's 7 ½ -year-old son sit in bathtub with scalding water, where (1) child testified that steam came up from bath water turned on by defendant, (2) defendant admitted that he knew water was too hot and that child was directed to sit in it while he added cold water, (3) girlfriend testified that water would steam when hot water faucet was turned on, and (4) treating pediatrician offered opinion that pattern of burns on child indicated that child sat in water, rather than reflecting accidental immersion, and suggested that child must have been in scalding water "a lot longer than he wanted to." People v Holden, 188 A.D.2d 757, 590 N.Y.S.2d 939, 1992 N.Y. App. Div. LEXIS 13892 (N.Y. App. Div. 3d Dep't 1992), app. denied, 81 N.Y.2d 887, 597 N.Y.S.2d 948, 613 N.E.2d 980, 1993 N.Y. LEXIS 1441 (N.Y. 1993).

Evidence supported convictions for first and second degree robbery and second degree assault arising from incident in which defendant and companion entered victim's apartment, hit him over head with bottle, and stole cash and other items from his person and apartment where (1) victim testified that defendant and companion were only people in his apartment at time of attack and that defendant was behind him at time he was struck on back of head with hard object, (2) beer bottle, which was not in apartment before attack, was found near victim's head when he awoke, and (3) physician testified that victim's wounds were consistent with being hit on head with bottle. People v Miller, 189 A.D.2d 1001, 592 N.Y.S.2d 805, 1993 N.Y. App. Div. LEXIS 419 (N.Y. App. Div. 3d Dep't), app. denied, 81 N.Y.2d 889, 597 N.Y.S.2d 951, 613 N.E.2d 983, 1993 N.Y. LEXIS 1502 (N.Y. 1993).

Evidence sustained assault conviction under CLS Penal § 120.05(4) (recklessly causing serious physical injury by means of deadly weapon or dangerous instrument) despite conflicting testimony proffered by defense witness, where police officer who was personally familiar with defendant identified him as having thrown rock that injured fellow officer, and defendant's friend admitted that she saw defendant bend down, pick something up, and throw it in direction of police officers. People v Barker, 223 A.D.2d 899, 636 N.Y.S.2d 482, 1996 N.Y. App. Div. LEXIS 393 (N.Y. App. Div. 3d Dep't), app. denied, 88 N.Y.2d 964, 647 N.Y.S.2d 718, 670 N.E.2d 1350, 1996 N.Y. LEXIS 2776 (N.Y. 1996).

Evidence supported defendant's second degree assault conviction where she was only person having access to her 22-month-old daughter at time child was scalded with hot water, scalding burns did not occur accidentally but were inflicted on child by another person, defendant gave misleading, inconsistent, and false accounts and explanations, and position of bathroom sink made it impossible for child to climb up on it, turn on hot water, and cause burns to her body. People v Mattison, 226 A.D.2d 924, 641 N.Y.S.2d 182, 1996 N.Y. App. Div. LEXIS 3909 (N.Y. App. Div. 3d Dep't), app. denied, 88 N.Y.2d 989, 649 N.Y.S.2d 396, 672 N.E.2d 622, 1996 N.Y. LEXIS 3639 (N.Y. 1996).

Defendant's second degree assault conviction was supported by evidence that victim and defendant agreed to "fair fight," that on night of fight defendant jumped victim from behind, and with help from 2 others beat victim with hammers and blackjack, and that assault left victim with black and blue marks all over his arms, back, and head, together with massive hemorrhage, headache, dizziness, and bleeding in several places, requiring 15 staples for one laceration. People v Trichilo, 230 A.D.2d 926, 646 N.Y.S.2d 898, 1996 N.Y. App. Div. LEXIS 8345 (N.Y. App. Div. 3d Dep't), app. denied, 89 N.Y.2d 931, 654 N.Y.S.2d 733, 677 N.E.2d 305, 1996 N.Y. LEXIS 4957 (N.Y. 1996), app. denied, 89 N.Y.2d 930, 654 N.Y.S.2d 732, 677 N.E.2d 304, 1996 N.Y. LEXIS 4940 (N.Y. 1996), app. denied, 89 N.Y.2d 925, 654 N.Y.S.2d 727, 677 N.E.2d 299, 1996 N.Y. LEXIS 5320 (N.Y. 1996).

In prosecution for second degree assault, evidence was sufficient to prove that defendant intended to, and did, cause "physical injury" to victim by shooting him where (1) victim testified that defendant shot him in arm, (2) friend of both defendant and victim testified that defendant admitted shooting victim over money because victim was selling drugs out of defendant's neighborhood, (3) physician who initially treated victim testified that he suffered from gunshot wound to his arm, that there existed both entrance and exit wounds, and that X-rays revealed bullet fragment in arm, and (4) photographs of victim's wounds were admitted into evidence. People v Hubert, 238 A.D.2d 745, 656 N.Y.S.2d 493, 1997 N.Y. App. Div. LEXIS 3931 (N.Y. App. Div. 3d Dep't), app. denied, 90 N.Y.2d 859, 661 N.Y.S.2d 186, 683 N.E.2d 1060, 1997 N.Y. LEXIS 2488 (N.Y. 1997), app. denied sub. nom., People v King, 90 N.Y.2d 860, 661 N.Y.S.2d 186, 683 N.E.2d 1060, 1997 N.Y. LEXIS 4991 (N.Y. 1997).

Second degree assault conviction was supported by evidence that defendant, while incarcerated in county jail, stole gold chain and medallion from fellow inmate and then, to prevent him from retrieving medallion, hit him repeatedly, fracturing his jaw, nasal bone and maxillary sinus area. People v Lane, 241 A.D.2d 763, 660 N.Y.S.2d 890, 1997 N.Y. App. Div. LEXIS 8077 (N.Y. App. Div. 3d Dep't), app. denied, 91 N.Y.2d 875, 668 N.Y.S.2d 574, 691 N.E.2d 646, 1997 N.Y. LEXIS 4608 (N.Y. 1997).

Defendant's conduct was reckless within meaning of CLS Penal § 120.05(4), even though it appeared that her companion unloaded rifle after defendant fired it first time, since rifle had automatic chambering mechanism, one round remained in chamber, defendant thereafter picked up rifle stating "stop, I'll shoot," and police investigator testified that defendant stated "I wanted to hurt (victim). If I wanted to kill her, I'd have shot her in the head." People v Kise, 248 A.D.2d 818, 670 N.Y.S.2d 238, 1998 N.Y. App. Div. LEXIS 2506 (N.Y. App. Div. 3d Dep't 1998).

Second and third degree reckless assault convictions were supported by evidence that defendant, after drinking as many as

7 cans of beer and volunteering to leave party to purchase more beer, exposed his passengers to danger by driving at excessive speed on hilly unlit road although he could have take more direct route, resulting in crash wherein one passenger was seriously injured. People v Grenier, 250 A.D.2d 874, 672 N.Y.S.2d 499, 1998 N.Y. App. Div. LEXIS 5339 (N.Y. App. Div. 3d Dep't), app. denied, 92 N.Y.2d 898, 680 N.Y.S.2d 62, 702 N.E.2d 847, 1998 N.Y. LEXIS 3400 (N.Y. 1998).

In prosecution for second degree manslaughter and second degree assault, evidence supported finding that defendant was driving while impaired by drugs at time of 12:35 a.m. accident, even though he denied having used marijuana after he smoked it in late afternoon, where (1) forensic toxicologist concluded, from THC levels in defendant's blood 2 hours after crash, that he used marijuana shortly before accident, and (2) sheriff's deputy, who qualified as expert capable of recognizing symptoms of drug and alcohol intoxication, testified that defendant exhibited several signs of marihuana intoxication, including bloodshot and glassy eyes, eye tremors, enlarged pupils, and decreased concentration, immediately after crash. People v Crandall, 255 A.D.2d 617, 681 N.Y.S.2d 99, 1998 N.Y. App. Div. LEXIS 11708 (N.Y. App. Div. 3d Dep't 1998).

In prosecution for second degree manslaughter and second degree assault, evidence supported finding that defendant knew serious risk posed by his actions, and thus acted recklessly in disregarding that risk, where (1) he was aware that he was driving between 70 and 78 miles per hour, that he was passing in no-passing lane, and that marihuana use affects one's concentration and reflexes, and (2) he heard, but elected not to heed, his passengers' entreaties to pull over, because he "thought [he] could make it" to Vermont border about one mile away before following police officer could catch him. People v Crandall, 255 A.D.2d 617, 681 N.Y.S.2d 99, 1998 N.Y. App. Div. LEXIS 11708 (N.Y. App. Div. 3d Dep't 1998).

Defendant was not denied effective assistance of counsel where (1) counsel made cogent opening and closing statements, aggressively cross-examined prosecution's witnesses, raised proper objections, and called several defense witnesses, (2) counsel's efforts resulted in acquittal of first degree burglary, although defendant was convicted of second degree assault, (3) counsel's decision not to have forensic tests conducted on baseball bat was explained by his presentation of evidence that defendant did not have bat and used only his fists in altercation, and (4) counsel's failure to object to introduction of photograph of victim's injuries and part of court's charge relating thereto did not change result, because there was eyewitness testimony that defendant struck victim in head with bat. People v Terwilliger, 255 A.D.2d 762, 682 N.Y.S.2d 109, 1998 N.Y. App. Div. LEXIS 12487 (N.Y. App. Div. 3d Dep't 1998), app. denied, 93 N.Y.2d 902, 689 N.Y.S.2d 715, 711 N.E.2d 991, 1999 N.Y. LEXIS 1574 (N.Y. 1999).

In prosecution for second degree assault, court properly denied defendant's trial order of dismissal where victim and eyewitness both testified that defendant purposely struck victim in back of legs with his car, causing him to land on hood of vehicle, and that defendant thereafter accelerated speed of his vehicle and applied his breaks in such fashion as to cause victim to fall to ground and sustain broken collar bone; such evidence was sufficient to show at least lesser included offense of third degree assault, which required only that defendant caused physical injury to victim by use of dangerous instrument (CLS Penal § 120.00(3)). People v Phillips, 256 A.D.2d 733, 682 N.Y.S.2d 685, 1998 N.Y. App. Div. LEXIS 13323 (N.Y. App. Div. 3d Dep't 1998).

Evidence supported conviction of second degree assault and third degree weapon possession, and verdict was not against weight of evidence, where (1) defendant admitted chasing victim and victim's friend into and around grocery store with baseball bat but denied intent to beat victim and testified that victim was injured outside store during struggle among the 3 men, (2) victim's friend and store owner both testified that defendant left store first and hit victim in back of head with bat when victim left, (3) victim did not see who hit him when he left store, and (4) although defendant's version of events was corroborated by his jail mate, who had extensive criminal history and claimed that he was outside store on day in question, jury was entitled to disbelieve defendant and jail mate. People v Coffin, 263 A.D.2d 780, 695 N.Y.S.2d 157, 1999 N.Y. App. Div. LEXIS 8275 (N.Y. App. Div. 3d Dep't 1999).

Evidence supported convictions of second degree assault and aggravated criminal contempt where (1) defendant admitted existence of order of protection and his presence at scene when his girlfriend was injured, (2) he insisted that she was intoxicated and was injured in fall on sidewalk as she jumped from his car, and (3) she testified that when she resisted his demand for money, he began to beat her in car, that she exited car as it slowed, and that he pursued and caught her, striking her repeatedly in face. People v Al-Shimari, 266 A.D.2d 586, 698 N.Y.S.2d 338, 1999 N.Y. App. Div. LEXIS 11216 (N.Y. App. Div. 3d Dep't 1999), app. denied, 94 N.Y.2d 916, 708 N.Y.S.2d 355, 729 N.E.2d 1154, 2000 N.Y. LEXIS 1070 (N.Y. 2000).

Evidence supported conviction of second degree assault where (1) according to victim's testimony, defendant slashed victim's head and back with box cutter and kicked him in mouth while repeatedly asking him about location of money owed to defendant for previously supplied drugs, (2) victim's testimony was corroborated in significant respects by friend who witnessed attack, and (3) although victim and friend at times testified in contradiction of their own previous testimony and each other, those inconsistencies were explored in detail during cross-examination and during defense counsel's summation, as was each witness's prior criminal history. People v Shannon, 273 A.D.2d 505, 708 N.Y.S.2d 199, 2000 N.Y. App. Div. LEXIS 6446 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 892, 715 N.Y.S.2d 385, 738 N.E.2d 789, 2000 N.Y. LEXIS 3269 (N.Y. 2000).

Evidence supported conviction of second degree assault under CLS Penal § 120.05(7), and of attempt to commit that crime, where (1) defendant, while incarcerated in correctional facility, intended to physically injure correction officer and did so by striking him in eye with compressed ball of wet toilet paper, (2) element of intent was proved by, inter alia, defendant's earlier threats against victim, and (3) element of physical injury was proved by, inter alia, victim's testimony that his eye pain lasted 1 ½ to 2 days and that his sight was impaired for about one week, and emergency room physician's assistant's testimony that victim sustained "pretty obvious" abrasion across cornea, which would impair vision and cause pain. People v Travis, 273 A.D.2d 544, 711 N.Y.S.2d 514, 2000 N.Y. App. Div. LEXIS 6697 (N.Y. App. Div. 3d Dep't 2000).

Evidence supported conviction of second degree assault where 7 witnesses testified that they saw defendant hit victim with bat, causing injury to her head, even though defendant denied ever having bat or hitting victim. People v Thomas, 273 A.D.2d 606, 712 N.Y.S.2d 640, 2000 N.Y. App. Div. LEXIS 7199 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 872, 715 N.Y.S.2d 227, 738 N.E.2d 375, 2000 N.Y. LEXIS 3230 (N.Y. 2000).

It could be inferred that defendant's purpose in touching victim was sexual gratification, and thus evidence supported his conviction of first and second degree sexual abuse and second degree assault, where (1) defendant, who was not related to 13-year-old victim, ordered her family members to leave their house, forced her to remove her clothes and lie face-down on her bed, repeatedly hit her buttocks with electrical cord, removed her underwear, rubbed oil into her buttocks wounds, and reminded her that he "owned" her and that there was nothing that she could do about it, and (2) he did not offer innocent explanation or justification for touching but, rather, denied it entirely. People v Watson, 281 A.D.2d 691, 721 N.Y.S.2d 700, 2001 N.Y. App. Div. LEXIS 2311 (N.Y. App. Div. 3d Dep't), app. denied, 96 N.Y.2d 925, 732 N.Y.S.2d 643, 758 N.E.2d 669, 2001 N.Y. LEXIS 4065 (N.Y. 2001).

Evidence supported conviction of second degree assault and third degree weapon possession, and verdict of guilty was not against weight of evidence, where (1) defendant swung at victim, who immediately suffered cut that bled profusely, (2) defendant fled scene, (3) razor blade was found at location of defendant's arrest, (4) defendant made inculpatory statement at police station regarding his finger having been cut by razor during bar fight, and (5) witness testified that after she saw blood streaming down victim's face, she watched defendant retrieve razor blade and try to swing at victim second time. People v Burns, 281

A.D.2d 704, 722 N.Y.S.2d 76, 2001 N.Y. App. Div. LEXIS 2313 (N.Y. App. Div. 3d Dep't), app. denied, 96 N.Y.2d 826, 729 N.Y.S.2d 446, 754 N.E.2d 206, 2001 N.Y. LEXIS 2094 (N.Y. 2001).

Gap of 2 days between fight and retrieval of some of victim's clothing did not render clothing inadmissible since delay or deficiencies in chain of custody went to weight of evidence and not its admissibility. People v Mothon, 284 A.D.2d 568, 729 N.Y.S.2d 541, 2001 N.Y. App. Div. LEXIS 5984 (N.Y. App. Div. 3d Dep't), app. denied, 96 N.Y.2d 865, 730 N.Y.S.2d 40, 754 N.E.2d 1123, 2001 N.Y. LEXIS 2593 (N.Y. 2001).

Evidence was sufficient to find defendant guilty of assault in the second degree, N.Y. Penal Law § 120.05, as a friend of a victim who accompanied that victim to the hospital testified that he saw defendant pull the victim's arm and stab the victim, and another witness testified that he saw defendant stab both victims. People v Moore, 29 A.D.3d 1077, 814 N.Y.S.2d 405, 2006 N.Y. App. Div. LEXIS 6067 (N.Y. App. Div. 3d Dep't 2006).

Sufficient evidence supported defendant's convictions for assault in the second degree and endangering the welfare of a child. The testimony of the assault victim and the physician's assistant who treated the victim, and the statements of defendant testified to by the investigating officers adequately demonstrated the sufficiency of the evidence. People v Betters, 41 A.D.3d 1040, 838 N.Y.S.2d 254, 2007 N.Y. App. Div. LEXIS 7595 (N.Y. App. Div. 3d Dep't 2007).

Conviction of assault in the second degree was supported by sufficient evidence, and was not against the manifest weight of the evidence under circumstances in which, inter alia, the victim testified that when he entered a trailer after hearing the sound of something breaking, defendant immediately approached him at close range and demanded that he leave, the victim stated that he brushed defendant back and told him to get out of his face, the victim stated that defendant responded by thrusting a knife into his abdomen and continuing to stab him elsewhere, the victim testified that a struggle ensued which ended with the two men lying on the floor and defendant finally surrendering the knife and leaving the scene, and the victim's version of the manner in which the altercation started was corroborated by the only eyewitness, an acquaintance who had accompanied him to the trailer; although defendant claimed that the victim was the aggressor and that defendant used the knife only in self-defense, a neighbor who saw defendant immediately after he fled the scene claimed that defendant proclaimed that he had stabbed the victim twice. Defendant's intent to injure the victim was established by the victim's testimony and that of the acquaintance, as well as defendant's actions before, during and after the incident. People v Zindle, 48 A.D.3d 971, 852 N.Y.S.2d 443, 2008 N.Y. App. Div. LEXIS 1649 (N.Y. App. Div. 3d Dep't), app. denied, 10 N.Y.3d 846, 859 N.Y.S.2d 405, 889 N.E.2d 92, 2008 N.Y. LEXIS 1780 (N.Y. 2008).

Because defendant dragged defendant's mother down the stairs and repeatedly kicked her, and was aware of the police officers' law enforcement status when he sought to prevent them from performing their lawful duties, pursuant to N.Y. Penal Law §§ 120.05(3), 10.00(9), 15.05(1), (3), the evidence was sufficient to convict him of second- and third-degree assault. People v Foster, 52 A.D.3d 957, 860 N.Y.S.2d 273, 2008 N.Y. App. Div. LEXIS 5310 (N.Y. App. Div. 3d Dep't), app. denied, 11 N.Y.3d 788, 866 N.Y.S.2d 614, 896 N.E.2d 100, 2008 N.Y. LEXIS 3726 (N.Y. 2008).

Because defendant was in the vicinity where the first victim was assaulted, and shot a gun in the vicinity where the second victim was shot, the evidence was sufficient to convict defendant of attempted first-degree gang assault, second-degree assault, second-degree criminal use of a firearm, and second-degree criminal possession of a weapon. People v Dixon, 62 A.D.3d 1036, 878 N.Y.S.2d 495, 2009 N.Y. App. Div. LEXIS 3544 (N.Y. App. Div. 3d Dep't), app. denied, 12 N.Y.3d 914, 884 N.Y.S.2d 695, 912 N.E.2d 1076, 2009 N.Y. LEXIS 2882 (N.Y. 2009), app. denied, 12 N.Y.3d 912, 884 N.Y.S.2d 693, 912 N.E.2d 1074, 2009 N.Y. LEXIS 2969 (N.Y. 2009).

Evidence at defendant's trial for second degree assault, N.Y. Penal Law § 120.05(2), sufficiently established that defendant inflicted the victim's injury by a deadly weapon or a dangerous instrument because, inter alia, the victim testified that defendant cut his arm, admitted that he had cut the victim, and then asked about his blade; the owner of the bar where the assault took place responded that he had kicked it out the door. Further, the medical examiner testified that the victim's cut was consistent with a sharp edged weapon or tool. People v Gragnano, 63 A.D.3d 1437, 885 N.Y.S.2d 369, 2009 N.Y. App. Div. LEXIS 5184 (N.Y. App. Div. 3d Dep't 2009), app. denied, 13 N.Y.3d 939, 895 N.Y.S.2d 329, 922 N.E.2d 918, 2010 N.Y. LEXIS 539 (N.Y. 2010).

Defendant's assault in the second degree convictions were supported by legally sufficient evidence and were against the weight of the evidence because, inter alia, from evidence that defendant engaged in a physical altercation involving several correction officers during which he threw chairs through glass windows and caused injuries to two correction officers, a rational person could have concluded that defendant intended to injure those correction officers. People v Tafari, 68 A.D.3d 1540, 891 N.Y.S.2d 711, 2009 N.Y. App. Div. LEXIS 9810 (N.Y. App. Div. 3d Dep't 2009).

Convictions of assault in the second degree and resisting arrest were supported by sufficient evidence where, when the officers arrived in response to a domestic violence complaint, witnesses pointed out defendant who was running along the driveway and whose hands, at that point, could not be seen, and, thus the officers had the right and duty, as part of their investigation of the complaint, to order defendant to stop; defendant's response, in forcefully throwing an officer to the ground and causing an injury to his arm, provided ample evidence of his intent to interfere with the officer's lawful duty and, thus, to support the assault second conviction. As the police had probable cause at that point to arrest defendant for assault, his continued resistance supported his resisting arrest conviction. People v Somerville, 72 A.D.3d 1285, 900 N.Y.S.2d 468, 2010 N.Y. App. Div. LEXIS 2985 (N.Y. App. Div. 3d Dep't 2010).

Because telephone records revealed an ongoing communication between defendant and a codefendant during the time immediately preceding and right after the codefendant's attack on the victim, the evidence was sufficient to find defendant guilty as an accomplice of second-degree assault. People v Thompson, 79 A.D.3d 1269, 912 N.Y.S.2d 326, 2010 N.Y. App. Div. LEXIS 9178 (N.Y. App. Div. 3d Dep't 2010).

Sufficient evidence supported convictions of attempted murder in the second degree, attempted assault in the first degree, assault in the second degree and criminal use of a firearm in the first degree under circumstances in which trial testimony established that, while defendant and the victim, her estranged husband, were living apart and going through a divorce, defendant went to the marital residence to search for personal property, and after a confrontation, defendant shot at the victim seven time, finally hitting him in the back; defendant admitted to a police investigator that she attempted to kill the victim. Shell casings were found scattered around the outside of the home. People v Rabideau, 82 A.D.3d 1283, 918 N.Y.S.2d 247, 2011 N.Y. App. Div. LEXIS 1516 (N.Y. App. Div. 3d Dep't), app. denied, 17 N.Y.3d 799, 929 N.Y.S.2d 107, 952 N.E.2d 1102, 2011 N.Y. LEXIS 2639 (N.Y. 2011).

Convictions of second degree assault, N.Y. Penal Law § 120.05, and third degree criminal possession of a weapon, N.Y. Penal Law §§ 265.01(2), 265.02(1), were supported by sufficient evidence because the People established that when defendant wielded his knife during a fight, he intended to use it against, or cause injury to, another person; the victims' injuries and other testimony established defendant's intent to harm the victims. The victims were not armed, there was evidence that defendant sustained only minor injuries, and several witnesses testified that the fight periodically abated such that defendant could have retreated to his car, which negated the justification defense under N.Y. Penal Law § 35.15(2)(a). People v Newland, 83 A.D.3d 1202, 921 N.Y.S.2d 396, 2011 N.Y. App. Div. LEXIS 2912 (N.Y. App. Div. 3d Dep't), app. denied, 17 N.Y.3d 798, 929 N.Y.S.2d 107, 952 N.E.2d 1102, 2011 N.Y. LEXIS 2564 (N.Y. 2011).

Where defendant confronted the victim about a handwritten list in which the victim had reportedly explicitly documented his sexual abuse of many children, defendant punched the victim in the face several times prior to escorting the victim down the

street to an apartment, and the victim was then severely beaten and died a week later due to blunt force trauma to the head, with others present, there was sufficient evidence to convict defendant for gang assault in the second degree and assault in the second degree. People v Smith, 89 A.D.3d 1126, 933 N.Y.S.2d 413, 2011 N.Y. App. Div. LEXIS 7575 (N.Y. App. Div. 3d Dep't 2011), app. denied, 18 N.Y.3d 962, 944 N.Y.S.2d 491, 967 N.E.2d 716, 2012 N.Y. LEXIS 1155 (N.Y. 2012).

Evidence was sufficient to support a conviction for second-degree assault under N.Y. Penal Law § 120.05(1) because defendant's intent to cause serious physical injury to the victim could be inferred from defendant's conduct in hitting and kicking the victim who was lying helpless on the ground, and the victim's extensive surgery established a protracted impairment of health under N.Y. Penal Law § 10.00(10). People v Nicholson, 97 A.D.3d 968, 948 N.Y.S.2d 465, 2012 N.Y. App. Div. LEXIS 5586 (N.Y. App. Div. 3d Dep't), app. denied, 19 N.Y.3d 1104, 955 N.Y.S.2d 560, 979 N.E.2d 821, 2012 N.Y. LEXIS 3788 (N.Y. 2012).

Evidence was sufficient to find defendant guilty of second-degree assault, either as a principal or an accessory, under N.Y. Penal Law §§ 120.05(1), 20.00, because witnesses identified defendant as being part of a group of individuals who were kicking the victim while the victim lay on the ground and was seriously injured. People v Baugh, 101 A.D.3d 1359, 956 N.Y.S.2d 313, 2012 N.Y. App. Div. LEXIS 8786 (N.Y. App. Div. 3d Dep't 2012), app. denied, 21 N.Y.3d 911, 966 N.Y.S.2d 362, 988 N.E.2d 891, 2013 N.Y. LEXIS 1242 (N.Y. 2013).

Conviction of assault in the second degree was supported by sufficient evidence that the victim saw a confrontation between defendant and a drunken patron, approached them and intervened by pushing defendant away, a group of patrons then gathered at the scene and various witnesses testified that, as defendant began to walk away and had gotten no more than five feet or so from the group, he turned and threw his plastic cup at them, hitting the victim in the forehead with such force that the cup shattered; the medical evidence established that the victim sustained fractured bones in her face and a four-inch laceration running down her forehead from her hairline to her nose and a plastic surgeon was called to suture the wound due to its depth and complexity. Pictures of the victim soon after the injury were entered into evidence and the jury was able to observe the victim's facial scar as it appeared at the time of trial. People v Powell, 101 A.D.3d 1369, 956 N.Y.S.2d 294, 2012 N.Y. App. Div. LEXIS 8773 (N.Y. App. Div. 3d Dep't 2012), app. denied, 21 N.Y.3d 1019, 971 N.Y.S.2d 501, 994 N.E.2d 397, 2013 N.Y. LEXIS 1955 (N.Y. 2013).

Evidence that defendant allowed former boyfriend to use defendant's mother's car earlier in the evening and that defendant drove the boyfriend to another person's residence later that same night, waited in the car while the boyfriend relit a fire the boyfriend had set at the residence, and drove the boyfriend to defendant's house after he restarted the fire was sufficient to corroborate the boyfriend's testimony that defendant knew the boyfriend was going to set the fire and assisted the boyfriend in doing so, and the appellate court sustained defendant's convictions on charges of burglary in the second degree, arson in the third degree, assault in the second degree, and criminal mischief in the second degree. People v Wood, 299 A.D.2d 739, 751 N.Y.S.2d 106, 2002 N.Y. App. Div. LEXIS 11391 (N.Y. App. Div. 3d Dep't 2002), app. denied, 99 N.Y.2d 621, 757 N.Y.S.2d 833, 787 N.E.2d 1179, 2003 N.Y. LEXIS 693 (N.Y. 2003).

Testimony of two correction officers who saw defendant punch another inmate was sufficient evidence that defendant intended to cause physical injury to another inmate and engaged in conduct tending to effect commission of that crime, which was sufficient to support defendant's conviction of attempted assault in the second degree under N.Y. Penal Law §§ 110.00, 120.05(7). People v Gannon, 301 A.D.2d 873, 754 N.Y.S.2d 107, 2003 N.Y. App. Div. LEXIS 380 (N.Y. App. Div. 3d Dep't 2003).

Evidence was sufficient to establish the elements of defendant's convictions for first degree rape, first degree sodomy, first degree sexual abuse, second degree assault and third degree assault where inconsistencies in the victim's descriptions and a lack of medical evidence did not render her testimony incredible as a matter of law, and the resulting credibility question was within the jury's province, and the record supported its verdict. People v Black, 304 A.D.2d 905, 757 N.Y.S.2d 635, 2003 N.Y. App. Div. LEXIS 3854 (N.Y. App. Div. 3d Dep't), app. denied, 100 N.Y.2d 578, 764 N.Y.S.2d 388, 796 N.E.2d 480, 2003 N.Y. LEXIS 2989 (N.Y. 2003).

Second-degree assault conviction was upheld, under N.Y. Penal Law § 120.05, where sufficient evidence through the testimony of the officer-victim and fellow officers established that after defendant punched him with a closed fist five or six times in the face and head, his left eye was swollen and it remained bruised for three weeks, a blood vessel in the corner of his eye ruptured, and he had scrapes, cuts, a welt or bruise under his left eye and a lump on the left side of his head. People v Brodus, 307 A.D.2d 643, 763 N.Y.S.2d 363, 2003 N.Y. App. Div. LEXIS 8537 (N.Y. App. Div. 3d Dep't), app. denied, 100 N.Y.2d 618, 767 N.Y.S.2d 401, 799 N.E.2d 624, 2003 N.Y. LEXIS 3708 (N.Y. 2003).

Evidence that defendant injured an estranged spouse by beating the spouse with a metal tool and throwing a space heater at the spouse was sufficient to support assault conviction. People v Amato, 1 A.D.3d 713, 766 N.Y.S.2d 735, 2003 N.Y. App. Div. LEXIS 11713 (N.Y. App. Div. 3d Dep't 2003), app. denied, 1 N.Y.3d 594, 776 N.Y.S.2d 226, 808 N.E.2d 362, 2004 N.Y. LEXIS 276 (N.Y. 2004).

Evidence that defendant's violent acts toward the victim left the victim unable to talk or breath normally, and unable to swallow food, for a period of six weeks could not be said to have been legally insufficient to support defendant's multiple convictions of attempted assault. People v Koufomichalis, 2 A.D.3d 987, 768 N.Y.S.2d 246, 2003 N.Y. App. Div. LEXIS 13158 (N.Y. App. Div. 3d Dep't 2003), app. denied, 2 N.Y.3d 742, 778 N.Y.S.2d 467, 810 N.E.2d 920, 2004 N.Y. LEXIS 1183 (N.Y. 2004).

There was sufficient evidence to support defendant's conviction for assault in the second degree in violation of N.Y. Penal Law § 120.05 where he was seen being hostile to the victim and his family in assorted instances throughout the day of the incident and just before physically fighting with the victim, evidencing his intention to harm the victim, and although the police did not recover a knife and defendant testified that he did not have one, other testimony indicated that defendant was observed with a knife and the victim's injury was consistent with a knife wound; accordingly, the trial court did not err in denying defendant's post-conviction motion to set aside the verdict pursuant to N.Y. Crim. Proc. Law § 330.30. People v Abera, 2 A.D.3d 1155, 768 N.Y.S.2d 702, 2003 N.Y. App. Div. LEXIS 13921 (N.Y. App. Div. 3d Dep't 2003), app. denied, 1 N.Y.3d 624, 777 N.Y.S.2d 23, 808 N.E.2d 1282, 2004 N.Y. LEXIS 669 (N.Y. 2004).

Despite defendant's claims that there was insufficient evidence that a metal rod he used as a makeshift weapon was a "dangerous instrument" under N.Y. Penal Law § 10.00(13), the court found that defendant's acts of repeatedly swinging the rod at the other inmate and striking him several times showed that the rod was readily capable of causing serious physical injury and thereby satisfied the statutory definition; there was sufficient evidence that defendant used a dangerous instrument with intent to cause physical injury to support defendant's conviction for attempted assault under N.Y. Penal Law §§ 110.00, 120.05(2). A correction officer who sew the entire incident testified that defendant emerged from his cell already holding the makeshift weapon and a shield, that defendant immediately ran towards the other inmate, and that defendant struck the other inmate several times; sufficient evidence support defendant's conviction and the convictions were not against the weight of the evidence where the reasonable inferences to be drawn from the evidence sufficiently supported the jury's verdict. People v Griffin, 24 A.D.3d 972, 805 N.Y.S.2d 482, 2005 N.Y. App. Div. LEXIS 14108 (N.Y. App. Div. 3d Dep't 2005), app. denied, 6 N.Y.3d 834, 814 N.Y.S.2d 82, 847 N.E.2d 379, 2006 N.Y. LEXIS 1035 (N.Y. 2006).

Where a hearsay statement was improperly admitted at trial, the error was harmless given the overwhelming evidence of defendant's guilt; the testimony of eyewitnesses provided ample independent evidence that defendant, in violation of N.Y. Penal Law § 120.05(2), intentionally caused physical injury to the victim by kicking the victim in the face while wearing work boots, and the slamming of the victim's head into the pavement numer-

ous times and kicking the victim in the face were unjustified under N.Y. Penal Law § 35.15(1). People v Ortiz, 33 A.D.3d 1044, 822 N.Y.S.2d 327, 2006 N.Y. App. Div. LEXIS 12447 (N.Y. App. Div. 3d Dep't 2006).

Conviction of assault in the second degree, N.Y. Penal Law § 120.05(1), was not against the weight of the credible evidence under circumstances in which the victim identified defendant as one of his assailants within days of the attack and provided a sworn statement to police which recounted defendant's participation in the assault and, at trial, the victim testified similarly to the events leading up to the assault, although he could not recall the details of the attack; the inconsistencies and shortcomings in the victim's testimony were fully explored at trial and his testimony was so inconsistent or at variance with his written statement as to be unworthy of belief or incredible as a matter of law. The jury had ample first-hand opportunity to observe his demeanor and assess his credibility and the jury gave the evidence the weight it deserved. People v Casey, 61 A.D.3d 1011, 876 N.Y.S.2d 532, 2009 N.Y. App. Div. LEXIS 2487 (N.Y. App. Div. 3d Dep't), app. denied, 12 N.Y.3d 913, 884 N.Y.S.2d 694, 912 N.E.2d 1075, 2009 N.Y. LEXIS 2906 (N.Y. 2009).

Conviction of second degree assault was supported by sufficient evidence where the combined testimony of the victim and three eyewitnesses established that defendant was with his codefendants when one codefendant aggressively confronted the victim, and that defendant stepped forward and actively joined in the attack after the codefendants assaulted the victim, and after the victim tried to fight back; this was sufficient to support the jury's conclusion that defendant acted in concert with his codefendants, intentionally aiding the attack, and the victim's ex-girlfriend testified that defendant was not initially within reach of the victim, and no one saw the victim hit defendant. The testimony established that defendant shared a community of purpose with the codefendants, and defendant's intent to injure the victim was easily inferable from his conduct. People v Francis, 83 A.D.3d 1119, 922 N.Y.S.2d 581, 2011 N.Y. App. Div. LEXIS 2686 (N.Y. App. Div. 3d Dep't), app. denied, 17 N.Y.3d 806, 929 N.Y.S.2d 565, 953 N.E.2d 803, 2011 N.Y. LEXIS 2401 (N.Y. 2011).

Conviction of attempted assault in the second degree, Penal Law § 120.05(1), was supported by sufficient evidence because the unrefuted testimony showed, inter alia, that defendant-unprovoked-repeatedly punched the victim in the head, kicked him in the ribs, and choked him, causing the victim extreme pain and difficulty breathing; defendant's intent to cause serious physical injury was readily inferable. The fact that the victim, a sizeable man with martial arts experience, was able to subdue defendant-who continued to try to further harm the victim-did not undermine the compelling inference that defendant intended to cause serious physical injury and engaged in conduct attempting to achieve that objective as this attempt crime did not require defendant's actual success in causing serious physical injury, only that he intended the injury and engaged in conduct directed at accomplishing that objective. People v Audi, 88 A.D.3d 1070, 931 N.Y.S.2d 418, 2011 N.Y. App. Div. LEXIS 7208 (N.Y. App. Div. 3d Dep't), app. denied, 18 N.Y.3d 856, 938 N.Y.S.2d 864, 962 N.E.2d 289, 2011 N.Y. LEXIS 3815 (N.Y. 2011).

Where a baby sustained bruises, a cut to his pallet, and three broken leg bones, as defendant was the only one who could have inflicted these injuries if they were intentionally caused, that there was only circumstantial evidence of his guilt did not preclude the jury from finding him guilty of first- and second-degree assault and endangering the welfare of a child. People v Ciccone, 90 A.D.3d 1141, 934 N.Y.S.2d 563, 2011 N.Y. App. Div. LEXIS 8676 (N.Y. App. Div. 3d Dep't 2011), app. denied, 19 N.Y.3d 863, 947 N.Y.S.2d 411, 970 N.E.2d 434, 2012 N.Y. LEXIS 1727 (N.Y. 2012).

Defendant's conviction under Penal Law §§ 110.00 and 120.05(2) was not against the weight of the evidence where the jury was free to disbelieve portions of defendant's testimony, accept the direct evidence proving that defendant possessed the blade, and reasonably infer that defendant was the only person who could have cut the victim with that blade and that he did so with the intention to inflict physical injury. People v Davis, 105 A.D.3d 1095, 962 N.Y.S.2d 739, 2013 N.Y. App. Div. LEXIS 2225 (N.Y. App. Div. 3d Dep't), app. denied, 21 N.Y.3d 1003, 971 N.Y.S.2d 255, 993 N.E.2d 1277, 2013 N.Y. LEXIS 2206 (N.Y. 2013).

Defendant's conviction for alcohol-based assault was supported by legally sufficient evidence and was not against the weight of the evidence because defendant admitted that he mixed vodka with juice and a water drink and provided them to the victim. Also, although he knew that the victim, his wife, was an alcoholic and had a preexisting liver condition, he admittedly continued to provide the victim with alcohol resulting in what a doctor stated was more than just drunk. People v Elmy, 117 A.D.3d 1183, 984 N.Y.S.2d 672, 2014 N.Y. App. Div. LEXIS 3246 (N.Y. App. Div. 3d Dep't 2014).

Verdict convicting defendant of attempted first degree assault and second degree assault was not against the manifest weight of the evidence because defendant repeatedly stabbed the alleged victim with the knife, striking her in the head, neck, back and chest. People v Pine, 126 A.D.3d 1112, 4 N.Y.S.3d 746, 2015 N.Y. App. Div. LEXIS 1969 (N.Y. App. Div. 3d Dep't 2015), app. denied, 27 N.Y.3d 1004, 59 N.E.3d 1225, 38 N.Y.S.3d 113, 2016 N.Y. LEXIS 1438 (N.Y. 2016).

Defendant's conviction for attempted assault in the second degree was supported by sufficient evidence and not against the weight of the evidence because defendant, an inmate in a correctional facility, engaged in a fight with another inmate, defendant was observed wielding a weapon that resembled an ice pick during the fight, and the victim sustained multiple puncture wounds that were consistent with the weapon that looked like an ice pick. People v Alexander, 127 A.D.3d 1429, 8 N.Y.S.3d 674, 2015 N.Y. App. Div. LEXIS 3149 (N.Y. App. Div. 3d Dep't), app. denied, 25 N.Y.3d 1197, 37 N.E.3d 1163, 16 N.Y.S.3d 520, 2015 N.Y. LEXIS 2267 (N.Y. 2015).

Trial court properly convicted defendant of second-degree assault because he attacked and stabbed a taxicab driver, the driver testified that the wound "was the worst pain I ever had," a medical doctor confirmed the severity of the injury, the medical description of the victim's injury gave the jury a basis to estimate the knife's size, penetrating power where it was sharp enough to penetrate the victim's wrist and cut a tendon, defendant's intent to cause injury could be inferred such from his conduct and the circumstances of the assault. People v Pigford, 148 A.D.3d 1299, 48 N.Y.S.3d 837, 2017 N.Y. App. Div. LEXIS 1715 (N.Y. App. Div. 3d Dep't), app. denied, 29 N.Y.3d 1085, 86 N.E.3d 262, 64 N.Y.S.3d 175, 2017 N.Y. LEXIS 2244 (N.Y. 2017).

Evidence was sufficient to support defendant's convictions of attempted robbery in the second-degree and assault in the second-degree, as eyewitnesses testified that they saw him drag the 92-year-old victim down a sidewalk, surveillance videos showed him stalking the victim, her properly admitted hearsay statements accused him of assaulting her and trying to steal her purse, and her physician testified as to the injuries that she sustained as a result of the assault, which included a fractured finger. People v Cole, 150 A.D.3d 1476, 52 N.Y.S.3d 744, 2017 N.Y. App. Div. LEXIS 3921 (N.Y. App. Div. 3d Dep't 2017), app. denied, 31 N.Y.3d 1146, 108 N.E.3d 502, 83 N.Y.S.3d 428, 2018 N.Y. LEXIS 2234 (N.Y. 2018).

Sufficient evidence supported defendant's conviction for assault in the second degree because, inter alia, after the officers identified themselves, defendant fled on foot, refused orders to stop, and struggled with officers once he was on the ground, wherein one officer discovered that he fractured and dislocated his finger and ruptured a tendon in the struggle to handcuff defendant. People v Dorsey, 151 A.D.3d 1391, 58 N.Y.S.3d 636, 2017 N.Y. App. Div. LEXIS 5070 (N.Y. App. Div. 3d Dep't), app. denied, 30 N.Y.3d 949, 89 N.E.3d 522, 67 N.Y.S.3d 132, 2017 N.Y. LEXIS 3414 (N.Y. 2017).

Defendant's convictions for second degree manslaughter, second and third degree assault, and reckless driving were not against the weight of the evidence, which included eyewitness testimony that four miles south of the accident defendant was seen speeding and passing other cases unsafely and recklessly. People v Crosby, 151 A.D.3d 1184, 56 N.Y.S.3d 376, 2017 N.Y. App. Div. LEXIS 4422 (N.Y. App. Div. 3d Dep't 2017).

Defendant was properly convicted of second-degree assault because a rational person could reach the conclusion reached by the jury, that a police officer was engaged in a lawful duty—responding to a noise complaint at defendant's residence—and that defendant acted with intent to prevent her from performing that lawful duty—spraying the officer with a canister of pepper spray—and the trial court properly allowed a photograph of the intubated officer into evidence and gave a limiting instruction inasmuch as it was probative of the officer's physical injury, a disputed and material issue, and also illustrated and corroborated the medical testimony. People v Molineaux, 156 A.D.3d 1250, 68 N.Y.S.3d 558, 2017 N.Y. App. Div. LEXIS 9281 (N.Y. App. Div. 3d Dep't 2017), app. denied, 31 N.Y.3d 1085, 103 N.E.3d 1253, 79 N.Y.S.3d 106, 2018 N.Y. LEXIS 1829 (N.Y. 2018).

Sufficient evidence supported defendant's assault convictions because (1) the victim's serious physical injury was shown, given the victim's symptoms at trial, (2) the jury resolved any testimonial discrepancies, (3) it was proper to let defendant be impeached with prior convictions and bad acts, (4) defendant's incidents with the victim on the same day and another correction officer 15 days earlier were admissible background information and evidence of motive and intent that was more probative than prejudicial, and (5) limiting instructions were given. People v Ford, 156 A.D.3d 1242, 68 N.Y.S.3d 566, 2017 N.Y. App. Div. LEXIS 9263 (N.Y. App. Div. 3d Dep't 2017), app. denied, 31 N.Y.3d 1013, 102 N.E.3d 1064, 78 N.Y.S.3d 283, 2018 N.Y. LEXIS 1288 (N.Y. 2018).

Sufficient evidence supported defendant's conviction for assault in the second degree because defendant grabbed the victim's chest and uniform, and shoved him against the door, the victim, a corrections officer, gave defendant an order to stop resisting, but defendant rammed him again, and defendant grabbed the victim's throat; the victim subsequently underwent shoulder surgery. People v Sands, 157 A.D.3d 1136, 69 N.Y.S.3d 745, 2018 N.Y. App. Div. LEXIS 373 (N.Y. App. Div. 3d Dep't), app. denied, 31 N.Y.3d 986, 102 N.E.3d 441, 77 N.Y.S.3d 664, 2018 N.Y. LEXIS 881 (N.Y. 2018).

Verdict finding defendant guilty of assault in the second degree was supported by the weight of the evidence because defendant's use of a knife caused deep wounds that required dozens of sutures to close and caused the victim to lose range of motion in one of his fingers. People v Signor, 173 A.D.3d 1264, 102 N.Y.S.3d 329, 2019 N.Y. App. Div. LEXIS 4526 (N.Y. App. Div. 3d Dep't 2019).

Defendant's convictions for attempted assault in the first degree and assault in the second degree were not against the weight of the evidence because, inter alia, defendant struck the victim in the head from behind with a bat and hit the victim a total of four to six times, including in the back, side of his head, shoulder and left forearm, and the victim received staples to close the wound on his head and underwent surgery for a broken left ulna in his forearm. People v Coppins, 173 A.D.3d 1459, 103 N.Y.S.3d 676, 2019 N.Y. App. Div. LEXIS 5015 (N.Y. App. Div. 3d Dep't), app. denied, 34 N.Y.3d 929, 133 N.E.3d 451, 109 N.Y.S.3d 745, 2019 N.Y. LEXIS 2796 (N.Y. 2019).

Jury's verdict convicting defendant of the crimes of criminal use of a firearm in the first degree, assault in the second degree and assault in the third degree, was not against the weight of the evidence because the circumstances supported the inference that he assaulted victim B; victim B observed defendant come toward him with a gun, the bartender witnessed the assault, and the bartender's brother, as well as the bar patron, saw defendant standing over and pointing a gun at victim B. People v Demellier, 174 A.D.3d 1120, 105 N.Y.S.3d 218, 2019 N.Y. App. Div. LEXIS 5718 (N.Y. App. Div. 3d Dep't), app. denied, 34 N.Y.3d 980, 137 N.E.3d 27, 113 N.Y.S.3d 657, 2019 N.Y. LEXIS 3361 (N.Y. 2019).

Defendant's convictions for burglary, robbery, murder, and assault as an accomplice under Penal Law §§ 20.00, 140.30[2], 160.15[1], 125.25[1], [3], and 120.05[6] were supported by evidence that he sought revenge against two former roommates for making a complaint against him and, with another man, entered their apartment, stole money and drugs, and the other man killed one roommate and raped and stabbed the other. People v Saunders, 176 A.D.3d 1384, 111 N.Y.S.3d 445, 2019 N.Y. App. Div. LEXIS 7660 (N.Y. App. Div. 3d Dep't 2019), app. denied, 35 N.Y.3d 973, 148 N.E.3d 476, 125 N.Y.S.3d 12, 2020 N.Y. LEXIS 1184 (N.Y. 2020).

Defendant's conviction was not against the weight of the evidence, as the jury's credibility determinations would allow the jury to justifiably conclude that defendant's ability to drive was impaired by alcohol, that he disregarded warnings to slow down and that he lost control while driving at an excessive speed without braking. People v Cole, 177 A.D.3d 1096, 114 N.Y.S.3d 132, 2019 N.Y. App. Div. LEXIS 8517 (N.Y. App. Div. 3d Dep't 2019).

Defendant's convictions for assault in the second degree and strangulation were not against the weight of the evidence because based upon the victim's testimony and the medical evidence, the jury could reasonably have concluded that defendant strangled the victim, threw a motel room telephone at the victim, causing an orbital fracture, and the telephone was a "dangerous instrument."People v Baber, 2020 N.Y. App. Div. LEXIS 2363 (April 16, 2020).

When defendant brandished a knife in a melee with the stated intent to "kill," charged at the first victim and then the second victim, and stabbed the second victim while they struggled on the ground, the proof legally sufficient for the jury to find that he intentionally injured the second victim by repeatedly stabbing him with the knife. People v Green, 2021 N.Y. App. Div. LEXIS 212 (N.Y. App. Div. 3d Dep't 2021).

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Defendant was properly convicted of second degree assault where (1) he hit victim in face with staple gun, knocking out several teeth and causing facial injuries, (2) staple gun with teeth embedded in it was found near victim, (3) he admitted to his friend that he hit victim, and (4) witness observed him kick victim in head and hit victim in face with staple gun. People v Blyden, 142 A.D.2d 959, 531 N.Y.S.2d 72, 1988 N.Y. App. Div. LEXIS 14988 (N.Y. App. Div. 4th Dep't), app. denied, 72 N.Y.2d 955, 534 N.Y.S.2d 668, 531 N.E.2d 300, 1988 N.Y. LEXIS 5665 (N.Y. 1988).

Evidence that defendant struck victim numerous times with baseball bat and metal pipe, breaking his wrists and ankle, supported jury finding that it was defendant's conscious objective to impair victim's physical condition or cause him substantial pain, warranting affirmance of conviction for second degree assault under CLS Penal § 120.05(2), and proof that attack was motivated by desire for revenge or to recover money lost in scam did not refute such evidence. People v Brooks, 154 A.D.2d 940, 546 N.Y.S.2d 69, 1989 N.Y. App. Div. LEXIS 13060 (N.Y. App. Div. 4th Dep't), app. denied, 75 N.Y.2d 768, 551 N.Y.S.2d 910, 551 N.E.2d 111, 1989 N.Y. LEXIS 4652 (N.Y. 1989).

Evidence supported conviction of mother for second degree assault and endangering welfare of child arising from beating of newborn infant where (1) mother admitted that she was infant's primary caretaker and that infant, who was born on March 19, was never out of her care prior to April 9, (2) mother denied noticing any injury on April 9 following single brief period during which infant was not in her care, (3) medical testimony established that injuries to infant's ribs occurred prior to April 9, (4) number and severity of injuries and medical testimony ruled out accidental injury, (5) mother gave numerous contradictory statements in attempts to explain injuries, and (6) mother told her mother and caseworker that she might as well take blame and that she could not put blame on her husband. People v Goble, 166 A.D.2d 894, 560 N.Y.S.2d 553, 1990 N.Y. App. Div. LEXIS 12140 (N.Y. App. Div. 4th Dep't), app. denied, 76 N.Y.2d 1021, 565 N.Y.S.2d 771, 566 N.E.2d 1176, 1990 N.Y. LEXIS 4822 (N.Y. 1990).

Evidence was sufficient to support conviction for second degree assault arising from stabbing at shelter for homeless men where defendant was initial aggressor, and he stabbed unarmed victim in back while he was sitting on bed drinking beer. People v Tolbert, 203 A.D.2d 901, 611 N.Y.S.2d 384, 1994 N.Y. App. Div. LEXIS 4880 (N.Y. App. Div. 4th Dep't), app. denied, 83 N.Y.2d 972, 616 N.Y.S.2d 25, 639 N.E.2d 765, 1994 N.Y. LEXIS 2561 (N.Y. 1994).

Conviction of second degree assault was supported by evidence that defendant hit victim several times with extension cord or

belt, stating that she would "feel it this time," and by whip marks on victim's arms and back that were observed and photographed by her teacher. People v Rozanski, 209 A.D.2d 1018, 619 N.Y.S.2d 441, 1994 N.Y. App. Div. LEXIS 12053 (N.Y. App. Div. 4th Dep't 1994), app. denied, 84 N.Y.2d 1038, 623 N.Y.S.2d 194, 647 N.E.2d 466, 1995 N.Y. LEXIS 602 (N.Y. 1995).

In second degree assault trial, element that victim suffered "substantial pain" was established by evidence that defendant and 3 or 4 other men viciously attacked and beat victim, who died from stab wound inflicted during beating, and that defendant repeatedly hit victim with pipe or stick, resulting in blunt force bruises and abrasions to victim's face, back and legs. People v Young, 236 A.D.2d 808, 653 N.Y.S.2d 879, 1997 N.Y. App. Div. LEXIS 1735 (N.Y. App. Div. 4th Dep't 1997).

Evidence of defendant's identity supported conviction of second degree assault where store security specialist recognized defendant from prior encounter and identified him from photo array, although victim and other customers on scene were unable to identify defendant from photo array. People v Wiggins, 265 A.D.2d 905, 696 N.Y.S.2d 604, 1999 N.Y. App. Div. LEXIS 10029 (N.Y. App. Div. 4th Dep't 1999), app. denied, 94 N.Y.2d 908, 707 N.Y.S.2d 393, 728 N.E.2d 992, 2000 N.Y. LEXIS 815 (N.Y. 2000).

Accomplice testimony was sufficiently corroborated to support conviction of first degree burglary and second degree assault where victims' neighbor testified that defendant approached her and told her not to tell police anything if they arrived, she saw defendant and 2 other men walk past her down street and down driveway toward door of victims' house, she heard defendant's voice from vicinity of victims' house, and she saw his accomplices walk past her several minutes later carrying stereo. People v Martinez, 266 A.D.2d 847, 698 N.Y.S.2d 806, 1999 N.Y. App. Div. LEXIS 11930 (N.Y. App. Div. 4th Dep't 1999), app. denied, 94 N.Y.2d 904, 707 N.Y.S.2d 389, 728 N.E.2d 988, 2000 N.Y. LEXIS 729 (N.Y. 2000).

Defendant's plea allocution was sufficient with respect to charges of attempted first degree robbery and second degree assault, and her guilty plea was properly accepted, where her admissions showed that she was accomplice, and there is no legal distinction between liability as principal and criminal culpability as accomplice. People v Webb, 286 A.D.2d 899, 730 N.Y.S.2d 926, 2001 N.Y. App. Div. LEXIS 9164 (N.Y. App. Div. 4th Dep't), app. denied, 97 N.Y.2d 659, 737 N.Y.S.2d 60, 762 N.E.2d 938, 2001 N.Y. LEXIS 4283 (N.Y. 2001).

Pursuant to N.Y. Penal Law § 120.05(2), defendant's conviction was not against the weight of the evidence where the jury was entitled to credit the testimony of both the victim and an eyewitness that defendant assaulted the victim with a metal pipe and, upon appellate review of the record, the appellate court could not conclude that the jury failed to give the evidence the weight it should be accorded. People v Henry, 294 A.D.2d 929, 741 N.Y.S.2d 774, 2002 N.Y. App. Div. LEXIS 4532 (N.Y. App. Div. 4th Dep't), app. denied, 98 N.Y.2d 676, 746 N.Y.S.2d 465, 774 N.E.2d 230, 2002 N.Y. LEXIS 2508 (N.Y. 2002).

Sufficient evidence supported defendant's convictions of two counts of burglary in the second degree, N.Y. Penal Law § 140.25(1)(b), and one count each of assault in the second degree, N.Y. Penal Law § 120.05(6), and criminal mischief in the fourth degree, N.Y. Penal Law § 145.00. People v Diefenbacher, 21 A.D.3d 1293, 801 N.Y.S.2d 466, 2005 N.Y. App. Div. LEXIS 10010 (N.Y. App. Div. 4th Dep't 2005), app. denied, 6 N.Y.3d 775, 811 N.Y.S.2d 342, 844 N.E.2d 797, 2006 N.Y. LEXIS 342 (N.Y. 2006).

Evidence was legally sufficient to support defendant's conviction of assault in the second degree under N.Y. Penal Law § 120.05(1), (2). A two-inch-wide belt and two-inch-thick hardcover book with which he repeatedly struck the victim, as well as the sneakers with which he repeatedly kicked the victim, all constituted dangerous instruments under the circumstances in which they were used (N.Y. Penal Law § 10.00(13)). People v Still, 26 A.D.3d 816, 810 N.Y.S.2d 271, 2006 N.Y. App. Div. LEXIS 1260 (N.Y. App. Div. 4th Dep't), app. denied, 6 N.Y.3d 853, 816 N.Y.S.2d 759, 849 N.E.2d 982, 2006 N.Y. LEXIS 1719 (N.Y. 2006).

Evidence was sufficient to convict defendant of assault in the second degree, as defendant's sole contention for the weight of the evidence being insufficient was that defendant was not the individual responsible; however, several witnesses testified that they had known defendant for significant periods of time and that defendant was the culprit, and it was up to the jury as the fact-finder to weigh the evidence and assess who was telling the truth. People v Austin, 38 A.D.3d 1246, 833 N.Y.S.2d 325, 2007 N.Y. App. Div. LEXIS 3318 (N.Y. App. Div. 4th Dep't), app. denied, 8 N.Y.3d 981, 838 N.Y.S.2d 484, 869 N.E.2d 660, 2007 N.Y. LEXIS 1854 (N.Y. 2007).

Not only did defendant fail to preserve defendant's claims for appellate review, the evidence was legally sufficient with respect the convictions for second-degree assault under N.Y. Penal Law § 120.05(3); contrary to defendant's further contention, the verdict was not against the weight of the evidence. People v Townsley, 50 A.D.3d 1610, 856 N.Y.S.2d 424, 2008 N.Y. App. Div. LEXIS 3628 (N.Y. App. Div. 4th Dep't), app. denied, 11 N.Y.3d 742, 864 N.Y.S.2d 400, 894 N.E.2d 664, 2008 N.Y. LEXIS 3115 (N.Y. 2008).

Because a juvenile defendant was not justified in striking the victim with a stick, and because the evidence was legally sufficient to establish that the victim sustained a physical injury, pursuant to N.Y. Penal Law §§ 35.15(1)(b), 10.00(13), the stick constituted a dangerous instrument capable of causing serious physical injury or death; therefore, the juvenile was properly convicted of second-degree assault and second-degree reckless endangerment under N.Y. Penal Law §§ 120.05(2), 120.20. Matter of Shakiea B., 53 A.D.3d 1057, 860 N.Y.S.2d 777, 2008 N.Y. App. Div. LEXIS 5926 (N.Y. App. Div. 4th Dep't 2008).

Defendant's conviction for assault in the second degree and criminal possession of a weapon in the third degree, in violation of N.Y. Penal Law §§ 120.05(2) and 265.02(1), was not against the weight of the evidence, as the testimony of the two main prosecution witnesses was not incredible as a matter of law. People v Myers, 87 A.D.3d 826, 928 N.Y.S.2d 407, 2011 N.Y. App. Div. LEXIS 6191 (N.Y. App. Div. 4th Dep't 2011).

Because the People proved that defendant intended to prevent the arresting officer from performing a lawful duty when the officer injured a knee while attempting to frisk defendant, there was sufficient evidence to convict defendant of second-degree assault under N.Y. Penal Law § 120.05(3). People v Stepney, 93 A.D.3d 1297, 940 N.Y.S.2d 752, 2012 N.Y. App. Div. LEXIS 2169 (N.Y. App. Div. 4th Dep't), app. denied, 19 N.Y.3d 968, 950 N.Y.S.2d 120, 973 N.E.2d 218, 2012 N.Y. LEXIS 2442 (N.Y. 2012).

Causation element of N.Y. Penal Law § 120.05(3) was satisfied when defendant's flight induced a police officer to engage in pursuit on foot and the officer was injury in the course of that pursuit. People v Cipollina, 94 A.D.3d 1549, 943 N.Y.S.2d 710, 2012 N.Y. App. Div. LEXIS 3311 (N.Y. App. Div. 4th Dep't), app. denied, 19 N.Y.3d 971, 950 N.Y.S.2d 354, 973 N.E.2d 764, 2012 N.Y. LEXIS 2520 (N.Y. 2012).

Convictions of second degree robbery, N.Y. Penal Law § 160.10(1), (2)(a), and second degree assault, N.Y. Penal Law § 120.05(6), were supported by sufficient evidence which showed that two passengers in a vehicle, one of whom was defendant, exited the vehicle, approached the victim, a pedestrian, knocked her cell phone from her hand and forcibly ripped her purse from her arm, injuring her; the victim saw her two assailants struggle to re-enter the backseat of the vehicle, saw three other individuals in the vehicle, memorized the license plate, and within minutes, called the police and described the vehicle and its occupants. Within an hour, the police stopped the vehicle and conducted a showup identification procedure and the victim identified defendant and another person as the individuals who stole her purse, and also identified the driver of the vehicle. People v Robinson, 104 A.D.3d 1312, 961 N.Y.S.2d 699, 2013 N.Y. App. Div. LEXIS 1891 (N.Y. App. Div. 4th Dep't), app. denied, 21 N.Y.3d 1008, 971 N.Y.S.2d 260, 993 N.E.2d 1283, 2013 N.Y. LEXIS 2351 (N.Y. 2013).

Evidence that defendants approached an undercover officers' vehicle, someone mentioned cutting the officers' throats, one defendant then punched the officer in the driver's seat in the side of head, causing a black eye, bloody lip and nose, and pain and swelling still present five days later, and that a $10 bill was missing from the officers, created a legally sufficient inference that defendants tried to steal the money and/or the vehicle from

the officers, and the pain and swelling, and the length of time it continued, was enough to show physical injury, in violation of N.Y. Penal Law § 120.05. People v Golden, 309 A.D.2d 1204, 764 N.Y.S.2d 761, 2003 N.Y. App. Div. LEXIS 10070 (N.Y. App. Div. 4th Dep't 2003).

Sufficient evidence existed to convict a defendant of assault in the second degree N.Y. Penal Law § 120.05(3), reckless endangerment in the first degree, N.Y. Penal Law § 120.25, and criminal mischief in the second degree, N.Y. Penal Law § 145.10 since the jury could best resolve credibility and N.Y. Penal Law § 40.15 insanity defense fact issues; he had the ability to understand that firing 59 shots at police and neighbors was wrong even though his expert psychiatrist testified he had a delusional disorder (paranoid schizophrenia) for years and was delusional the night of the shooting. People v Stoffel, 17 A.D.3d 992, 794 N.Y.S.2d 230, 2005 N.Y. App. Div. LEXIS 4520 (N.Y. App. Div. 4th Dep't), app. denied, 5 N.Y.3d 795, 801 N.Y.S.2d 816, 835 N.E.2d 676, 2005 N.Y. LEXIS 2431 (N.Y. 2005).

Because, pursuant to N.Y. Penal Law § 10.00(9), the victims experienced substantial pain in connection with the injuries inflicted by defendant, the trial court properly convicted defendant, inter alia, of second-degree assault and endangering the welfare of a child under N.Y. Penal Law §§ 120.05(2), 260.10(1). People v Sommerville, 30 A.D.3d 1093, 816 N.Y.S.2d 651, 2006 N.Y. App. Div. LEXIS 7704 (N.Y. App. Div. 4th Dep't), app. denied, 7 N.Y.3d 818, 822 N.Y.S.2d 493, 855 N.E.2d 809, 2006 N.Y. LEXIS 3150 (N.Y. 2006).

Weight and sufficiency of the evidence supported defendant's convictions for assault, criminal possession of a weapon, and attempted robbery because he was identified by one of the victims, he admitted his involvement in the home invasion/shooting in a notarized letter, and the circumstances supported the element of intent for purposes of the assault. People v Linder, 114 A.D.3d 1200, 979 N.Y.S.2d 754, 2014 N.Y. App. Div. LEXIS 749 (N.Y. App. Div. 4th Dep't), app. denied, 23 N.Y.3d 1022, 992 N.Y.S.2d 805, 16 N.E.3d 1285, 2014 N.Y. LEXIS 1880 (N.Y. 2014).

Defendant's conviction for assault in the second degree was not against the weight of the evidence because there was significant evidence, including video recordings, that the victim was beaten and humiliated in defendant's house, and testimony indicating that, in the recordings, defendant was directing the victim to stop resisting during the beating, and expert scientific evidence established that the victim's blood was found in numerous places in defendant's house. People v Woods, 142 A.D.3d 1356, 38 N.Y.S.3d 337, 2016 N.Y. App. Div. LEXIS 6222 (N.Y. App. Div. 4th Dep't 2016).

Evidence was sufficient to support defendant's conviction for assault in the second degree because defendant's two-month-old child sustained broken arms, legs, and ribs that were in various stages of healing and a recently inflicted fracture of the skull, while the child's mother testified to having observed defendant repeatedly strike the child with a closed fist the night before the child was treated at a hospital. People v Smith, 145 A.D.3d 1628, 44 N.Y.S.3d 658, 2016 N.Y. App. Div. LEXIS 8564 (N.Y. App. Div. 4th Dep't 2016), app. denied, 31 N.Y.3d 1017, 102 N.E.3d 1068, 78 N.Y.S.3d 287, 2018 N.Y. LEXIS 1335 (N.Y. 2018).

Sufficient evidence supported defendant's conviction for criminal possession of a weapon in the second degree and assault in the second degree because two eyewitnesses identified defendant as the shooter and described the gun, two cartridge cases were found at the scene, the People's expert testified that the cases came from one firearm, and the victim sustained a physical injury and experienced "substantial pain" from the gunshot. People v Butler, 140 A.D.3d 1610, 33 N.Y.S.3d 602, 2016 N.Y. App. Div. LEXIS 4400 (N.Y. App. Div. 4th Dep't), app. denied, 28 N.Y.3d 969, 66 N.E.3d 3, 43 N.Y.S.3d 257, 2016 N.Y. LEXIS 3283 (N.Y. 2016), app. denied, 28 N.Y.3d 970, 66 N.E.3d 4, 43 N.Y.S.3d 258, 2016 N.Y. LEXIS 3345 (N.Y. 2016).

Evidence was legally sufficient to establish defendant's identity as one of the people who opened fire on a crowded street, killing one person and injuring two others because defendant and a codefendant were driven to the scene of the shooting by defendant's sister, who testified that she heard gunshots moments after the two men exited the vehicle, the sister observed defendant in possession of a firearm, and ammunition matching that at the scene was found at the home of defendant's mother. People v Flowers, 166 A.D.3d 1492, 87 N.Y.S.3d 425, 2018 N.Y. App. Div. LEXIS 7534 (N.Y. App. Div. 4th Dep't), app. denied, 32 N.Y.3d 1125, 117 N.E.3d 822, 93 N.Y.S.3d 263, 2018 N.Y. LEXIS 3811 (N.Y. 2018).

Fourth Department held that nothing in N.Y. Penal Law § 120.05(12) requires that the actor know the age of the injured person; rather, by providing that the defendant must act with intent to cause physical injury to a person who is 65 years of age or older and must cause such injury to such person, the statute simply requires that the person whom the actor intentionally injures be, as a matter of fact, 65 years of age or older. People v Burman, 173 A.D.3d 1727, 102 N.Y.S.3d 849, 2019 N.Y. App. Div. LEXIS 4824 (N.Y. App. Div. 4th Dep't 2019).

Evidence was sufficient to support defendant's conviction for robbery in the first degree, criminal possession of a weapon in the second degree, and assault in the second degree because the victim's description of the incident and the perpetrator's clothing was consistent with street surveillance video that captured a portion of the incident including the shooting, and the evidence established that the perpetrator's clothing matched that worn by him in a photo on his social media account. People v Thomas, 176 A.D.3d 1639, 111 N.Y.S.3d 155, 2019 N.Y. App. Div. LEXIS 7199 (N.Y. App. Div. 4th Dep't), app. denied, 34 N.Y.3d 1082, 139 N.E.3d 824, 116 N.Y.S.3d 166, 2019 N.Y. LEXIS 3894 (N.Y. 2019), app. denied, 34 N.Y.3d 1080, 139 N.E.3d 824, 116 N.Y.S.3d 166, 2019 N.Y. LEXIS 3900 (N.Y. 2019).

50. Insufficient evidence to uphold conviction

Evidence was not legally sufficient to support conviction for assault in second degree where uncontroverted evidence showed that defendant was out of door of restaurant when coperpetrator, who was standing in restaurant approximately 20 feet from door, suddenly turned around and fired his gun at complaining witness, since record did not support finding that defendant possessed intent to cause physical injury to complaining witness. People v Padgett, 145 A.D.2d 443, 535 N.Y.S.2d 414, 1988 N.Y. App. Div. LEXIS 12929 (N.Y. App. Div. 2d Dep't 1988), app. denied, 73 N.Y.2d 894, 538 N.Y.S.2d 807, 535 N.E.2d 1347, 1989 N.Y. LEXIS 1195 (N.Y. 1989), app. denied, 73 N.Y.2d 981, 540 N.Y.S.2d 1015, 538 N.E.2d 367, 1989 N.Y. LEXIS 1649 (N.Y. 1989).

Verdict of guilty on counts of attempted first degree rape, first degree sexual abuse and second degree assault was against weight of evidence where (1) complainant testified that she did not hear front door of apartment building close behind defendant, who allegedly attacked her after she reached second floor apartment, even though defendant could not have entered building except with key or by permission of someone inside building, and door made very loud noise when it automatically shut, and (2) defendant testified that complainant had invited him inside. People v Pugh, 150 A.D.2d 734, 541 N.Y.S.2d 603, 1989 N.Y. App. Div. LEXIS 6937 (N.Y. App. Div. 2d Dep't 1989).

Evidence at trial for second degree assault was insufficient as matter of law to prove that blow defendant allegedly struck with ceramic lamp on victim's head caused "physical injury" where proof demonstrated that victim sustained only bump or bruise as result of being hit with lamp, and there was no evidence that blow from lamp caused any degree of pain to victim or that his physical condition was even minimally impaired as result. People v Powell, 153 A.D.2d 54, 549 N.Y.S.2d 276, 1989 N.Y. App. Div. LEXIS 16167 (N.Y. App. Div. 4th Dep't 1989), app. denied, 75 N.Y.2d 969, 556 N.Y.S.2d 254, 555 N.E.2d 626, 1990 N.Y. LEXIS 1880 (N.Y. 1990).

Second degree assault conviction would be reversed where victim testified that she did not know whether she had been stabbed by defendant, only witness to alleged stabbing gave account of incident that was both self-contradictory and contradictory to victim's testimony, and reasonable doubt existed as to whether victim's injuries were caused by defendant or by being dragged by bus. People v Roman, 160 A.D.2d 961, 554 N.Y.S.2d 684, 1990 N.Y. App. Div. LEXIS 4771 (N.Y. App. Div. 2d Dep't), app. denied, 76 N.Y.2d 795, 559 N.Y.S.2d 1000, 559 N.E.2d 694, 1990 N.Y. LEXIS 2875 (N.Y. 1990).

Evidence did not support Family Court's finding that juvenile had kicked prostrate victim in head with booted foot and thus committed act which, if committed by adult, would have constituted second degree assault where victim never stated that juvenile had kicked him, and juvenile's testimony that he was wearing sneakers on day of incident stood uncontradicted. In re James H., 164 A.D.2d 765, 558 N.Y.S.2d 954, 1990 N.Y. App. Div. LEXIS 9072 (N.Y. App. Div. 1st Dep't 1990), app. dismissed, 77 N.Y.2d 873, 568 N.Y.S.2d 915, 571 N.E.2d 85, 1991 N.Y. LEXIS 160 (N.Y. 1991).

Court would reverse order of disposition, deny petition charging juvenile with acts constituting second and third degree assault, and dismiss proceeding where juvenile's failure to flee to train station was objectively reasonable, in that (1) she was lying on ground with complainant on top of her at time she stabbed complainant, (2) they were surrounded by crowd encouraging complainant's acts and punching and kicking juvenile, and (3) it was undisputed that juvenile was blameless target of vicious attack by hostile group; under circumstances, juvenile's attempt to defend herself could not form basis on which to hold her responsible for consequences of unprovoked onslaught. In re Y. K., 213 A.D.2d 638, 624 N.Y.S.2d 243, 1995 N.Y. App. Div. LEXIS 3139 (N.Y. App. Div. 2d Dep't 1995), aff'd, 87 N.Y.2d 430, 639 N.Y.S.2d 1001, 663 N.E.2d 313, 1996 N.Y. LEXIS 72 (N.Y. 1996).

Evidence was insufficient to show that juvenile committed acts constituting second degree assault and second degree reckless endangerment where, inter alia, victim testified that she did not see anyone throw bottle, had not seen its flight, and only believed that it had come from direction of juvenile and his companions, and there was no evidence that juvenile or his companions ever possessed glass bottle or that they threw one. In re Paris M., 218 A.D.2d 554, 630 N.Y.S.2d 732, 1995 N.Y. App. Div. LEXIS 8737 (N.Y. App. Div. 1st Dep't 1995).

Evidence did not support defendant's second degree assault conviction under CLS Penal § 120.05(4) where he shot one victim in foot, causing him to endure substantial pain, but People failed to show that gunshot wound created substantial risk of death or that it caused serious and protracted disfigurement, protracted impairment of health, or protracted loss or impairment of function of any bodily organ. People v Bodford, 224 A.D.2d 927, 638 N.Y.S.2d 259, 1996 N.Y. App. Div. LEXIS 1559 (N.Y. App. Div. 4th Dep't 1996), reh'g denied, 1996 N.Y. App. Div. LEXIS 3039 (N.Y. App. Div. 4th Dep't Mar. 8, 1996), vacated, 227 A.D.2d 993, 643 N.Y.S.2d 444, 1996 N.Y. App. Div. LEXIS 7032 (N.Y. App. Div. 4th Dep't 1996), app. dismissed, 90 N.Y.2d 855, 661 N.Y.S.2d 182, 683 N.E.2d 1056, 1997 N.Y. LEXIS 2388 (N.Y. 1997).

Convictions of second degree assault and fourth degree weapon possession were not supported by evidence that defendant and victim had words, and that defendant may have punched victim in neck or pushed him, where there was no evidence identifying defendant as individual, among 3 assailants, who inflicted blows on victim with piece of wood. People v King, 265 A.D.2d 678, 697 N.Y.S.2d 371, 1999 N.Y. App. Div. LEXIS 10725 (N.Y. App. Div. 3d Dep't 1999), app. denied, 94 N.Y.2d 904, 707 N.Y.S.2d 389, 728 N.E.2d 988, 2000 N.Y. LEXIS 717 (N.Y. 2000).

Conviction for assault in the second degree, under N.Y. Penal Law § 120.05(3) was reversed where evidence did not sufficiently establish the required element that defendant caused physical injury to a police officer, in that the evidence did not establish that an officer suffered an impairment of physical condition or substantial pain. N.Y. Penal Law § 10.00(9). People v McFarlane, 288 A.D.2d 493, 733 N.Y.S.2d 879, 2001 N.Y. App. Div. LEXIS 11425 (N.Y. App. Div. 2d Dep't 2001), app. denied, 97 N.Y.2d 758, 742 N.Y.S.2d 618, 769 N.E.2d 364, 2002 N.Y. LEXIS 1301 (N.Y. 2002), app. denied, 98 N.Y.2d 653, 745 N.Y.S.2d 512, 772 N.E.2d 615, 2002 N.Y. LEXIS 2131 (N.Y. 2002).

Although there was ample evidence that a juvenile defendant was a participant in the crimes and not a bystander, the findings as to felony assault under N.Y. Penal Law § 120.05(6) and third-degree assault were vacated as there was no underlying felony other than the assault itself, and as a lesser-included offense under the remaining second-degree assault count. Matter of Joshua S., 49 A.D.3d 469, 853 N.Y.S.2d 877, 2008 N.Y. App. Div. LEXIS 2668 (N.Y. App. Div. 1st Dep't 2008).

Although convictions of second degree assault, N.Y. Penal Law § 120.05(3), and resisting arrest, N.Y. Penal Law § 205.30, were supported by sufficient evidence, the convictions were against the weight of the evidence; a second degree assault conviction required that the People establish that the injured police officer was engaged in a lawful duty at the time of the assault, and, similarly, a resisting arrest conviction required the People to establish that the police were engaged in authorized conduct. Probable cause for defendant's arrest was predicated almost entirely on an officer's testimony that he saw a bag of narcotics actually leave defendant's hand as he tossed it into an elevator, but defendant's acquittal on a drug possession charge indicated that jury did not find officer's testimony credible, and the jury thus failed to give its credibility finding the weight it was due with respect to the second degree assault and resisting arrest charges. People v Lindsey, 52 A.D.3d 527, 859 N.Y.S.2d 486, 2008 N.Y. App. Div. LEXIS 4972 (N.Y. App. Div. 2d Dep't 2008), app. denied, 2008 N.Y. LEXIS 3031 (N.Y. Aug. 18, 2008), app. denied, 11 N.Y.3d 738, 864 N.Y.S.2d 397, 894 N.E.2d 661, 2008 N.Y. LEXIS 3072 (N.Y. 2008).

Evidence was legally insufficient to establish felony assault in the second degree pursuant to N.Y. Penal Law § 120.05(6) because the presentment agency did not establish that the appellant, or another participant in the incident, caused serious physical injury to the complainant in the course of and in furtherance of a robbery, or in the immediate flight therefrom. Matter of Robert C., 67 A.D.3d 790, 888 N.Y.S.2d 192, 2009 N.Y. App. Div. LEXIS 8068 (N.Y. App. Div. 2d Dep't 2009).

Evidence was insufficient to convict defendant of assault in the second degree under count six of the indictment because defendant's convictions of robbery were vacated; and the conviction for assault in the second degree under count six of the indictment required a conviction of an underlying felony contained in the indictment or its attempted commission as an essential element of the crime. People v Torres, 130 A.D.3d 1082, 14 N.Y.S.3d 151, 2015 N.Y. App. Div. LEXIS 6241 (N.Y. App. Div. 2d Dep't), app. denied, 26 N.Y.3d 1093, 44 N.E.3d 948, 23 N.Y.S.3d 650, 2015 N.Y. LEXIS 4219 (N.Y. 2015).

As the evidence was insufficient to convict defendant of second-degree robbery, his conviction of second-degree assault under N.Y. Penal Law § 120.05(6) was reversed as well because a conviction of the underlying felony contained in the indictment or its attempted commission was an essential element of that crime. People v Caraballo, 136 A.D.3d 937, 26 N.Y.S.3d 148, 2016 N.Y. App. Div. LEXIS 1189 (N.Y. App. Div. 2d Dep't), app. denied, 27 N.Y.3d 1067, 60 N.E.3d 1203, 38 N.Y.S.3d 837, 2016 N.Y. LEXIS 1855 (N.Y. 2016).

County court erred in accepting defendant's Alford plea because the record lacked strong evidence that defendant caused injury to a person in the course of and in furtherance of the commission or attempted commission of that crime or during the immediate flight therefrom under N.Y. Penal Law § 120.05 (6). People v Johnson, 167 A.D.3d 1512, 89 N.Y.S.3d 505, 2018 N.Y. App. Div. LEXIS 8767 (N.Y. App. Div. 4th Dep't 2018), app. denied, 33 N.Y.3d 949, 123 N.E.3d 824, 100 N.Y.S.3d 165, 2019 N.Y. LEXIS 1163 (N.Y. 2019).

Family court erred, inter alia, in finding that a juvenile committed acts which, if committed by an adult, would constitute the crimes of second-degree robbery and second-degree assault because the complainant testified that the juvenile was not one of the persons who took his belt and watch, and as the presentment agency failed to proffer legally sufficient evidence to establish that the juvenile participated in the alleged robbery or in the "immediate flight therefrom," the evidence was legally insufficient to support the assault charge. Matter of Raees T.B., 172 A.D.3d 707, 100 N.Y.S.3d 271, 2019 N.Y. App. Div. LEXIS 3365 (N.Y. App. Div. 2d Dep't 2019).

51. Jury instructions, generally

Where defendant threw girl into canal in effort to cause death by drowning, trial court erred in charging attempted manslaughter second degree, and in failing to charge attempted assault second degree, in that one may not intentionally attempt to cause death of another human being by reckless act. People v Zimmerman, 46 A.D.2d 725, 360 N.Y.S.2d 127, 1974 N.Y. App. Div. LEXIS 3878 (N.Y. App. Div. 4th Dep't 1974).

Following acquittal on all 4 counts of underlying felonies of robbery, burglary, and attempted rape, and inconsistent conviction for felony assault (which required at least one underlying felony conviction), defendant could not be deemed to have waived his objection to verdict's repugnancy by his failure to object prior to discharge of jury, where court had instructed that jury deliberate on each count seriatim, ending with felony assault, and that if it convicted on any count it should report that conviction as its verdict without proceeding to consider any following count; it would be unrealistic to expect defendant's counsel to object so as to call for resubmission of entire case to jury for logical reconciliation of inconsistent verdict, which would put defendant's acquittal on more serious charges at risk of adverse reconsideration, as well as expose him to double jeopardy. People v Sanchez, 128 A.D.2d 377, 512 N.Y.S.2d 389, 1987 N.Y. App. Div. LEXIS 44095 (N.Y. App. Div. 1st Dep't 1987).

Court erred in instructing jury that it was necessary for prosecution to prove that defendant injured victim by way of his fists and blunt object to establish second degree assault, but error was harmless since any confusion from charge inured to benefit of defendant, and evidence amply established that defendant struck victim with some sort of stick or pipe, causing cut that required several stitches to his head. People v Davis, 208 A.D.2d 430, 617 N.Y.S.2d 180, 1994 N.Y. App. Div. LEXIS 9760 (N.Y. App. Div. 1st Dep't 1994).

Defendant was entitled to reversal of conviction for first degree assault and related crimes based on court's error in denying his request for adverse inference charge as to police report concerning his prior assault on same victim, which had been lost or destroyed prior to trial, where report related to victim's direct testimony and there was sufficient showing of prejudice. People v Lineszy, 222 A.D.2d 527, 635 N.Y.S.2d 537, 1995 N.Y. App. Div. LEXIS 12759 (N.Y. App. Div. 2d Dep't 1995).

In second degree assault prosecution, court's charge did not diminish People's burden of proof and mitigate seriousness of crime by omitting from definition of serious physical injury that it is "injury which creates a substantial risk of death, or which causes death"; such instruction actually limited jury to finding that defendant had inflicted serious physical injury under one of 3, rather than 4, of disjunctive definitions contained in statute. People v Martinez, 224 A.D.2d 254, 637 N.Y.S.2d 698, 1996 N.Y. App. Div. LEXIS 1019 (N.Y. App. Div. 1st Dep't), app. denied, 88 N.Y.2d 989, 649 N.Y.S.2d 396, 672 N.E.2d 622, 1996 N.Y. LEXIS 3635 (N.Y. 1996).

Error in instrucing jury that a fist could have been considered a dangerous weapon was harmless because the jury acquitted defendant of the charge of assault in the second degree pursuant to N.Y. Penal Law § 120.05(2), which requires the use of a deadly weapon or a dangerous instrument to cause physical injury and was premised on the People's theory that he struck the victim in the head with the BB gun; defendant was instead convicted of the lesser included offense of assault in the third degree, which did not require the use of a dangerous instrument N.Y. Penal Law § 120.00(1), and, given the victim's testimony that she did not know what defendant struck her with and defendant's claim that he used his fist, the acquittal indicated that the jury correctly determined that a fist is not a "dangerous instrument" despite the erroneous instruction, and found that the People did not prove beyond a reasonable doubt that defendant used anything but his fist. Defendant's other convictions involving dangerous instruments or dangerous weapons, N.Y. Penal Law §§ 160.15(3), 265.01(2)(5), were premised on his use, threatened use or possession of a BB gun rather than his fist and, given the overwhelming evidence supporting these convictions, there was no significant probability that he would have been acquitted if not for the erroneous instruction. People v Perez, 93 A.D.3d 1032, 942 N.Y.S.2d 227, 2012 N.Y. App. Div. LEXIS 2132 (N.Y. App. Div. 3d Dep't), app. denied, 19 N.Y.3d 1000, 951 N.Y.S.2d 476, 975 N.E.2d 922, 2012 N.Y. LEXIS 3099 (N.Y. 2012), app. denied, 19 N.Y.3d 1000, 951 N.Y.S.2d 476, 975 N.E.2d 922, 2012 N.Y. LEXIS 3440 (N.Y. 2012), app. denied, 19 N.Y.3d 1000, 951 N.Y.S.2d 476, 975 N.E.2d 922, 2012 N.Y. LEXIS 3441 (N.Y. 2012).

Jury's finding of guilt on the count charging him with robbery in the first degree was not irreconcilable with its acquittal of the defendant on the count charging him with assault in the second degree because as charged to the jury, the acquittal of menacing in the second degree did not negate any essential element of criminal possession of a weapon in the third degree. People v Colon, 2020 N.Y. App. Div. LEXIS 7429 (N.Y. App. Div. 2d Dep't 2020).

In prosecution in which defendant was charged with assault, robbery, and reckless endangerment, court properly instructed jury that it could find defendant guilty of felony assault if it found that he caused physical injury in course of, or in immediate flight from, commission of either robbery or grand larceny, despite fact that indictment mentioned only robbery as underlying felony to assault charge, since indictment was not required to specify underlying felony, jury instruction did not alter People's theory of case, defendant was not surprised because he was on notice of specific wrongful taking of property of which he was accused, and he denied any knowledge of property or its taking. People v Baker, 133 Misc. 2d 31, 505 N.Y.S.2d 995, 1986 N.Y. Misc. LEXIS 2961 (N.Y. Sup. Ct. 1986).

Defense counsel's theory of the case was that the inmate did not have the requisite intent to do serious harm to the victim; here, the inmate was contemporaneously saying that he did not have the requisite intent to do harm and that the jury should have been given a charge that included a required element of intent to do harm. Counsel's decision not to pursue such lesser included offense was not objectively unreasonable as seeking a second degree assault charge could have undermined the inmate's defense that he did not have intent to cause harm; based on the Strickland analysis, the inmate did not show that counsel operated outside professional norms and the claim was dismissed for lack of cause. Nunez v Conway, 473 F. Supp. 2d 465, 2007 U.S. Dist. LEXIS 11355 (S.D.N.Y. 2007).

52. —Separate and lesser offenses

In trial arising from second degree assault in which victim was beaten with belt, court's unchallenged instruction to jury concerning its fact-finding responsibility with respect to dangerous instrumentality element did not, by itself, create defense entitled to charge-down to third degree assault. People v Curtis, 89 N.Y.2d 1003, 657 N.Y.S.2d 395, 679 N.E.2d 634, 1997 N.Y. LEXIS 314 (N.Y. 1997).

Failure to charge on "serious physical injury" as an element of assault in the second degree, particularly where the seriousness of the injuries was disputed and where assault in the third degree was an includible crime, constituted fundamental and prejudicial error. People v Wrench, 34 A.D.2d 1055, 312 N.Y.S.2d 561, 1970 N.Y. App. Div. LEXIS 4355 (N.Y. App. Div. 3d Dep't 1970).

The court's charge was deficient in not marshaling or referring to the evidence to an extent that it was necessary to explain the application of the law to the facts as such a summary would have aided the jury in differentiating assault in the second and third degrees, which from the jury's request was a cause of concern, and in evaluating the defense of justification. People v Wrench, 34 A.D.2d 1055, 312 N.Y.S.2d 561, 1970 N.Y. App. Div. LEXIS 4355 (N.Y. App. Div. 3d Dep't 1970).

Under CPL § 470.55, defendant who was acquitted of second degree attempted robbery (Penal Law § 160.10, subd 2(a)) could not be retried for that offense or for offense of second degree assault (Penal Law § 120.05, subd 2) where court had erroneously charged second degree assault as lesser included offense of second degree attempted robbery. People v Flores, 42 A.D.2d 431, 348 N.Y.S.2d 425, 1973 N.Y. App. Div. LEXIS 3281 (N.Y. App. Div. 4th Dep't 1973).

Trial court did not err in instructing jury that they could find defendant, who was charged with assault in the first degree, guilty of assault in the second degree. People v Zimmer, 49 A.D.2d 792, 372 N.Y.S.2d 747, 1975 N.Y. App. Div. LEXIS 10840 (N.Y. App. Div. 3d Dep't 1975).

Court's charge, instructing jurors that they could find defendant guilty of first or second degree assault if they found that injury was caused by deadly weapon "or a dangerous instrument," did not improperly amend indictment, which charged defendant with first degree assault in that he intentionally caused serious physical injury by means of deadly weapon, since (1) defendant

was given fair notice of charges against him by fact that CLS Penal § 120.10(1), under which he was indicted, included language "by means of a deadly weapon or a dangerous instrument," (2) indictment referred to actual weapon used (knife), (3) weapon involved was characterized as dangerous instrument in separate indictment arising from same incident for which defendant was jointly tried, and (4) court merely tracked statutory language and did not change prosecution's theory of crime. People v Felton, 141 A.D.2d 839, 530 N.Y.S.2d 179, 1988 N.Y. App. Div. LEXIS 7194 (N.Y. App. Div. 2d Dep't 1988).

Court erred in refusing to charge assault in third degree as lesser included offense of assault in second degree, since court charged, with respect to assault in second degree, that whether baseball bat was dangerous instrument was factual issue for jury to decide, and therefore court necessarily concluded that there was reasonable view of evidence that bat was not dangerous instrument. People v Dickerson, 148 A.D.2d 970, 546 N.Y.S.2d 908, 1989 N.Y. App. Div. LEXIS 2626 (N.Y. App. Div. 4th Dep't), app. denied, 74 N.Y.2d 739, 545 N.Y.S.2d 113, 543 N.E.2d 756, 1989 N.Y. LEXIS 2445 (N.Y. 1989).

In prosecution for second degree assault, defendant was not entitled to instruction on lesser included offense of attempted second degree assault where correction officer testified that defendant struck him with sharpened 6-inch nail in right elbow when officer stepped in to stop fight between defendant and another inmate. People v Freeman, 184 A.D.2d 864, 585 N.Y.S.2d 113, 1992 N.Y. App. Div. LEXIS 8162 (N.Y. App. Div. 3d Dep't), app. denied, 80 N.Y.2d 903, 588 N.Y.S.2d 829, 602 N.E.2d 237, 1992 N.Y. LEXIS 3568 (N.Y. 1992).

Court properly denied defendant's request to charge attempted second degree assault as lesser included offense of second degree assault where defendant steadfastly denied any assault on victim, and thus by his own testimony negated element of intent. People v Abrams, 203 A.D.2d 723, 611 N.Y.S.2d 313, 1994 N.Y. App. Div. LEXIS 4108 (N.Y. App. Div. 3d Dep't), app. denied, 83 N.Y.2d 963, 616 N.Y.S.2d 16, 639 N.E.2d 756, 1994 N.Y. LEXIS 2335 (N.Y. 1994).

It was reversible error to deny defendant's request to charge third degree reckless assault as lesser included offense of second degree intentional assault where investigating officer testified that defendant made oral statement to effect that he had had too much to drink when he entered victim's apartment and assaulted her, and victim was impeached by prior statements she made to effect that defendant was drunk at time of assault. People v Williams, 212 A.D.2d 1065, 623 N.Y.S.2d 31, 1995 N.Y. App. Div. LEXIS 2049 (N.Y. App. Div. 4th Dep't), app. denied, 85 N.Y.2d 916, 627 N.Y.S.2d 339, 650 N.E.2d 1341, 1995 N.Y. LEXIS 1788 (N.Y. 1995).

Defendant's current claim that third degree assault should have been submitted to jury because defendant recklessly caused physical injury, under CLS Penal § 120.00(2), was not preserved for appellate review in accordance with CLS CPL § 300.50(2) where defendant's request that trial court charge jury on third degree assault as lesser included offense of second degree assault, under CLS Penal § 120.05(2), was based on entirely different theory, under CLS Penal § 120.00(1), than that of his current claim. People v Ramos, 242 A.D.2d 510, 663 N.Y.S.2d 828, 1997 N.Y. App. Div. LEXIS 9134 (N.Y. App. Div. 1st Dep't 1997), app. denied, 91 N.Y.2d 896, 669 N.Y.S.2d 10, 691 N.E.2d 1036, 1998 N.Y. LEXIS 507 (N.Y. 1998).

In prosecution for 2 counts of second degree assault, defendant was not entitled to have third degree assault submitted to jury as lesser included offense as to one victim where there was no reasonable view of evidence to support finding that defendant injured that victim without use of dangerous instrument, which was baseball bat. People v Valentin, 255 A.D.2d 126, 678 N.Y.S.2d 900, 1998 N.Y. App. Div. LEXIS 11641 (N.Y. App. Div. 1st Dep't 1998).

Court properly refused to charge third degree assault as lesser included offense of second degree assault given force of defendant's blow delivered suddenly and directly to victim's eye. People v Franco, 271 A.D.2d 383, 708 N.Y.S.2d 62, 2000 N.Y. App. Div. LEXIS 4637 (N.Y. App. Div. 1st Dep't), app. denied, 95 N.Y.2d 865, 715 N.Y.S.2d 220, 738 N.E.2d 368, 2000 N.Y. LEXIS 3029 (N.Y. 2000).

In prosecution for first degree robbery, attempted first degree robbery, second degree assault, fourth degree weapon possession, and fifth degree possession of stolen property, all arising from 2 separate incidents in which defendant grabbed taxi driver from behind, held knife to his throat, and demanded money, defendant was not entitled to have jury charged that it should consider evidence of each crime separately where that claim was unpreserved for appellate review, defendant was positively identified by each victim shortly after each incident, proof of each crime was presented separately and clearly and was easily separable and discernible in minds of jurors, and there was no "substantial likelihood that the jury would be unable to consider separately the proof as it relates to each offense" under CLS CPL § 200.20(3)(a). People v Jackson, 273 A.D.2d 253, 709 N.Y.S.2d 569, 2000 N.Y. App. Div. LEXIS 6207 (N.Y. App. Div. 2d Dep't), app. denied, 95 N.Y.2d 906, 716 N.Y.S.2d 646, 739 N.E.2d 1151, 2000 N.Y. LEXIS 3660 (N.Y. 2000).

Defendant waived his claim that court erred in charging third degree assault as lesser included offense of second degree assault where he requested such charge. People v Harris, 273 A.D.2d 807, 711 N.Y.S.2d 370, 2000 N.Y. App. Div. LEXIS 6791 (N.Y. App. Div. 4th Dep't), app. denied, 95 N.Y.2d 964, 722 N.Y.S.2d 481, 745 N.E.2d 401, 2000 N.Y. LEXIS 4271 (N.Y. 2000).

Court did not err in charging third degree assault as lesser included offense of second degree assault where, under view of evidence most favorable to defendant, he could have committed lesser offense without committing greater offense. People v Harris, 273 A.D.2d 807, 711 N.Y.S.2d 370, 2000 N.Y. App. Div. LEXIS 6791 (N.Y. App. Div. 4th Dep't), app. denied, 95 N.Y.2d 964, 722 N.Y.S.2d 481, 745 N.E.2d 401, 2000 N.Y. LEXIS 4271 (N.Y. 2000).

It was reversible error to refuse defendant's request to charge second degree obstructing governmental administration as lesser included offense of second degree assault. People v Sullivan, 284 A.D.2d 917, 728 N.Y.S.2d 320, 2001 N.Y. App. Div. LEXIS 5935 (N.Y. App. Div. 4th Dep't), app. denied, 96 N.Y.2d 942, 733 N.Y.S.2d 382, 759 N.E.2d 381, 2001 N.Y. LEXIS 3590 (N.Y. 2001), app. denied, 97 N.Y.2d 658, 737 N.Y.S.2d 59, 762 N.E.2d 937, 2001 N.Y. LEXIS 4269 (N.Y. 2001).

Trial court did not err in granting the People's request to charge the jury on third degree assault (reckless assault), a violation of N.Y. Penal Law § 120.00(2), as a lesser included offense of second degree assault (intentional assault), a violation of former N.Y. Penal Law § 120.05(9), as the testimony in the case revealed that the four-year-old victim's injuries may have resulted from the victim and defendant engaging in "slap-boxing," such that a reasonable view of the evidence allowed a finding that defendant committed the lesser offense but not the greater offense. People v Fenske, 298 A.D.2d 951, 748 N.Y.S.2d 106, 2002 N.Y. App. Div. LEXIS 9002 (N.Y. App. Div. 4th Dep't), app. denied, 98 N.Y.2d 768, 752 N.Y.S.2d 8, 781 N.E.2d 920, 2002 N.Y. LEXIS 3894 (N.Y. 2002).

Because it was possible to commit attempted first-degree murder under N.Y. Penal Law §§ 110.00 and 120.05(2) without committing attempted second-degree assault under N.Y. Penal Law §§ 110.00 and 125.27(1)(a), the trial court properly denied defendant's request for a lesser-included offense charge. People v Carter, 38 A.D.3d 1291, 833 N.Y.S.2d 323, 2007 N.Y. App. Div. LEXIS 3511 (N.Y. App. Div. 4th Dep't 2007).

Trial court properly denied defendant's request to charge third degree assault as a lesser-included offense of second degree assault because, even when viewing the evidence in the light most favorable to defendant, no reasonable view of the evidence supported a finding that defendant assaulted the complaining witness but did not use a deadly weapon or dangerous instrument. People v Hercules, 47 A.D.3d 835, 850 N.Y.S.2d 535, 2008 N.Y. App. Div. LEXIS 1368 (N.Y. App. Div. 2d Dep't), app. denied, 10 N.Y.3d 766, 854 N.Y.S.2d 327, 883 N.E.2d 1262, 2008 N.Y. LEXIS 896 (N.Y. 2008).

When defendant was charged with second-degree assault for using a stun gun to shock the victim twice on her abdomen, causing welts, and for shooting her with a BB gun, it was proper to deny an instruction on third-degree assault as to the BB gun

count, because the BB gun was a loaded weapon which discharged a shot that was readily capable of producing serious physical injury, making it a deadly weapon. It was error to deny the instruction as to the stun gun count, however, because a reasonable view of the evidence could support a finding that the stun gun was not readily capable of causing serious physical injury under the circumstances in which it was used and thus was not a dangerous instrument under N.Y. Penal Law § 10.00. People v Richard, 30 A.D.3d 750, 817 N.Y.S.2d 698, 2006 N.Y. App. Div. LEXIS 7939 (N.Y. App. Div. 3d Dep't), app. denied, 7 N.Y.3d 869, 824 N.Y.S.2d 614, 857 N.E.2d 1145, 2006 N.Y. LEXIS 3847 (N.Y. 2006).

Trial court properly denied defendant's request to charge assault in the second degree, N.Y. Penal Law § 120.05(2), as a lesser-included offense of assault in the first degree, N.Y. Penal Law § 120.10(1); the evidence at trial established that defendant shot at the victim seven times, striking him four times. Viewed in the light most favorable to defendant, there was no reasonable view of the evidence that would have supported a finding that he intended to cause the victim physical injury, but did not intend to cause him serious physical injury. People v Christiani, 96 A.D.3d 870, 946 N.Y.S.2d 235, 2012 N.Y. App. Div. LEXIS 4689 (N.Y. App. Div. 2d Dep't), app. denied, 19 N.Y.3d 1101, 955 N.Y.S.2d 557, 979 N.E.2d 818, 2012 N.Y. LEXIS 3677 (N.Y. 2012), app. denied, 19 N.Y.3d 1105, 955 N.Y.S.2d 561, 979 N.E.2d 822, 2012 N.Y. LEXIS 3714 (N.Y. 2012).

Trial court properly denied defendant's request to charge reckless assault in the second degree, N.Y. Penal Law § 120.05(4), as a lesser-included offense of assault in the first degree, N.Y. Penal Law § 120.10(1); the evidence at trial established that defendant shot at the victim seven times, striking him four times. Under the circumstances, there was no reasonable view of the evidence that defendant acted recklessly, as opposed to intentionally. People v Christiani, 96 A.D.3d 870, 946 N.Y.S.2d 235, 2012 N.Y. App. Div. LEXIS 4689 (N.Y. App. Div. 2d Dep't), app. denied, 19 N.Y.3d 1101, 955 N.Y.S.2d 557, 979 N.E.2d 818, 2012 N.Y. LEXIS 3677 (N.Y. 2012), app. denied, 19 N.Y.3d 1105, 955 N.Y.S.2d 561, 979 N.E.2d 822, 2012 N.Y. LEXIS 3714 (N.Y. 2012).

Since competent, conflicting evidence was presented regarding whether the victim's pertinent injury was caused by a fist or knife, defendant's request for the lesser included charge of assault in the second degree under N.Y. Penal Law § 120.05(1) as to count 3 should have been granted. People v Daniels, 97 A.D.3d 845, 948 N.Y.S.2d 431, 2012 N.Y. App. Div. LEXIS 5247 (N.Y. App. Div. 3d Dep't), app. denied, 20 N.Y.3d 931, 957 N.Y.S.2d 691, 981 N.E.2d 288, 2012 N.Y. LEXIS 3948 (N.Y. 2012).

Counsel was not ineffective for failing to request a lesser included charge of second degree assault, based on recklessness, because there was no reasonable view of the evidence that would support a finding that defendant acted recklessly in stabbing the victim as defendant testified that he intentionally stabbed the victim in self-defense; and because a jury charge on reckless assault as a lesser included offense would have had little or no chance of success. People v Henley, 145 A.D.3d 1578, 45 N.Y.S.3d 739, 2016 N.Y. App. Div. LEXIS 8497 (N.Y. App. Div. 4th Dep't 2016), app. denied, 29 N.Y.3d 998, 80 N.E.3d 412, 57 N.Y.S.3d 719, 2017 N.Y. LEXIS 1592 (N.Y. 2017).

Although first-degree attempted assault was not a lesser included offense of first-degree attempted murder, defendant failed to object to the jury instructions, and defendant's conviction of first-degree attempted murder when the jury had before it the purported lesser included offense of first-degree attempted assault foreclosed his challenge to the court's refusal to charge second-degree attempted assault as a lesser included offense; even though first-degree attempted assault was not an actual lesser included offense of attempted murder, the failure to submit lesser degrees of attempted assault could not have affected the jury's deliberations in this case. People v Vangorden, 147 A.D.3d 1436, 46 N.Y.S.3d 730, 2017 N.Y. App. Div. LEXIS 805 (N.Y. App. Div. 4th Dep't), app. denied, 29 N.Y.3d 1037, 84 N.E.3d 978, 62 N.Y.S.3d 306, 2017 N.Y. LEXIS 1977 (N.Y. 2017).

Counsel's decision to not request that the crime of third degree assault be submitted to the jury as a lesser included offense of second degree assault was properly raised by defendant in his motion to vacate judgment because that strategic decision by counsel was not discernable from the face of the record. People v Taylor, 156 A.D.3d 86, 64 N.Y.S.3d 714, 2017 N.Y. App. Div. LEXIS 7753 (N.Y. App. Div. 3d Dep't 2017), app. denied, 30 N.Y.3d 1120, 101 N.E.3d 986, 77 N.Y.S.3d 345, 2018 N.Y. LEXIS 645 (N.Y. 2018).

Defendant was not entitled to an instruction on assault in the second degree as a lesser included offense of assault in the first degree because the victim suffered eight knife wounds, including two "significant" wounds to the side of the chest and the back, lost a liter of blood, and would have died without medical treatment, and the evidence was inconsistent with a finding that defendant acted with mere recklessness. People v Farley, 164 A.D.3d 1633, 84 N.Y.S.3d 638, 2018 N.Y. App. Div. LEXIS 6411 (N.Y. App. Div. 4th Dep't 2018).

There was no way of knowing if the jurors acquitted defendant of the greater counts on the basis of justification so as to mandate acquittal on the lesser count because the verdict sheet did not mention justification, and the court did not instruct the jurors that if they were to find defendant not guilty of the greater counts of assault in the second degree on the basis of justification, they were not to consider the lesser count of obstructing governmental administration in the second degree. People v Gunther, 181 A.D.3d 712, 121 N.Y.S.3d 279, 2020 N.Y. App. Div. LEXIS 1633 (N.Y. App. Div. 2d Dep't 2020).

In trial arising from assault of victim who was shot in left leg and right knee during dispute with defendant, court correctly declined to charge third degree assault as lesser included offense of second degree assault because there was no reasonable view of evidence that would allow jury to find that defendant acted without weapon. Caban v Mitchell, 897 F. Supp. 759, 1995 U.S. Dist. LEXIS 16972 (S.D.N.Y. 1995).

53. —"Justification" defense

Defendant who was convicted, inter alia, of second degree manslaughter and second degree assault was entitled to new trial where he raised justification defense and jury was never instructed that (1) they should assess reasonableness of defendant's belief that he was in deadly peril by judging situation from point of view of defendant as though they were actually in his place, and (2) in deciding question of reasonableness, they must consider circumstances that defendant found himself in as well as defendant's background and other characteristics and attributes of other persons involved; trial judge's repetition of word "reasonable" and phrase "reasonably believed" was not sufficient to inform jurors that they should assess defendant's circumstances from defendant's position. People v Wesley, 76 N.Y.2d 555, 561 N.Y.S.2d 707, 563 N.E.2d 21, 1990 N.Y. LEXIS 3367 (N.Y. 1990).

Where defendant was convicted of second-degree assault, the trial court properly refused to instruct the jury on the defense of justification because there was no reasonable view of the evidence that would have permitted the jury to conclude that defendant was in danger of being physically harmed by the victim at the time defendant used force against him. People v Sparks, 29 N.Y.3d 932, 73 N.E.3d 354, 51 N.Y.S.3d 14, 2017 N.Y. LEXIS 720 (N.Y. 2017).

In a prosecution of defendant for murder, assault in and criminal possession of a weapon arising out of the shooting of the deceased and a bystander during a confrontation between the deceased and defendant, where the court charged justification as a defense to the murder count, and defendant was acquitted thereon, it was error not to so charge with respect to the assault count; the jury's determination that defendant was justified in killing the deceased precluded his conviction of assault in the second degree, and in the absence of any evidence supporting a finding that defendant was guilty of reckless or criminally negligent assault, the assault count would be dismissed; justification should also have been charged as a defense to the weapon possession count, and defendant's conviction on that count would be reversed and remitted for a new trial, since the jury could have found that defendant did or did not have the required degree of intent. People v Morris, 109 A.D.2d 413, 491 N.Y.S.2d 860, 1985 N.Y. App. Div. LEXIS 48206 (N.Y. App. Div. 4th Dep't 1985), app. dismissed, 68 N.Y.2d 799, 506 N.Y.S.2d 859, 498 N.E.2d 423, 1986 N.Y. LEXIS 20110 (N.Y. 1986).

In prosecution of defendant convicted of crime of assault in second degree, trial court committed reversible error in failing to specifically instruct that People had burden to disprove defendant's justification defense, and there is no merit to contention that defendant waived alleged error by failing to timely object to initial justification charge, since, at time request was made, trial court could have alleviated alleged error. People v Vasquez, 114 A.D.2d 589, 494 N.Y.S.2d 198, 1985 N.Y. App. Div. LEXIS 53289 (N.Y. App. Div. 3d Dep't 1985).

In prosecution for second degree assault, defendant was not entitled to instruction that he was justified in his assault on officers because their use of force was excessive in effecting arrest where defendant had assaulted officers without provocation. People v Rison, 130 A.D.2d 596, 515 N.Y.S.2d 304, 1987 N.Y. App. Div. LEXIS 46609 (N.Y. App. Div. 2d Dep't 1987).

Defendant on trial for second degree assault on correctional officer was not entitled to charge of justification, despite testimony of defense witnesses that, when officer removed defendant's handcuffs, officer pressed down and tightened cuffs, causing injury to defendant, where defendant did not testify and evidence showed that defendant suddenly pulled officer's arm down and through hatch in cell door as officer was attempting to undo handcuff, causing officer's arm to scrape against hatch and his body to be propelled against door; moreover, court properly instructed jury that, if it found defendant's conduct involuntary or reflex action resulting from stimuli applied to his wrist by officer, they should find defendant not guilty. People v Hilliard, 142 A.D.2d 885, 531 N.Y.S.2d 386, 1988 N.Y. App. Div. LEXIS 8026 (N.Y. App. Div. 3d Dep't 1988), rev'd, 73 N.Y.2d 584, 542 N.Y.S.2d 507, 540 N.E.2d 702, 1989 N.Y. LEXIS 658 (N.Y. 1989).

In trial for first degree promoting prison contraband and attempted second degree assault arising from incident in which defendant prison inmate ran after another inmate with board, court did not err in failing to charge justification defense, since first degree promoting prison contraband does not involve use of physical force and thus justification under CLS Penal § 35.15 was no defense, and justification defense under CLS Penal § 35.05 was not available because defendant admitted that he could have retreated from his alleged attacker. People v Diaz, 145 A.D.2d 833, 535 N.Y.S.2d 819, 1988 N.Y. App. Div. LEXIS 13455 (N.Y. App. Div. 3d Dep't 1988), app. denied, 73 N.Y.2d 1014, 541 N.Y.S.2d 768, 539 N.E.2d 596, 1989 N.Y. LEXIS 1821 (N.Y. 1989).

Defendant was entitled to reversal of conviction for second degree assault, submitted to jury as lesser included offense of first degree assault, since court erred as matter of law by denying defense request for justification charge under CLS Penal § 35.15(1), and by charging jury only as to circumstances under which deadly physical force could be used, pursuant to § 35.35(2), where People's evidence showed that defendant hit complainant on head with bottle without provocation, while defendant's evidence showed that he hit complainant in self-defense after complainant pushed him to the ground and was about to hit him again; whether physical force used by defendant was "deadly" was fact question for jury to decide. People v Jones, 148 A.D.2d 547, 538 N.Y.S.2d 876, 1989 N.Y. App. Div. LEXIS 2736 (N.Y. App. Div. 2d Dep't 1989).

In trial for second degree murder, second degree attempted murder and first degree assault, court erred in failing to charge justification as defense to lesser included offenses of second degree manslaughter and second degree assault since justification defense should not be limited to any particular mens rea or any particular crime involving use of force. People v Prather, 154 A.D.2d 561, 546 N.Y.S.2d 402, 1989 N.Y. App. Div. LEXIS 12728 (N.Y. App. Div. 2d Dep't), app. denied, 74 N.Y.2d 951, 550 N.Y.S.2d 285, 549 N.E.2d 487, 1989 N.Y. LEXIS 4568 (N.Y. 1989).

Defendant's second degree assault conviction would be reversed where court's charge on justification failed to instruct jurors that they should assess reasonableness of defendant's beliefs by judging situation from his point of view as though they were actually in his place. People v Spittler, 168 A.D.2d 919, 564 N.Y.S.2d 885, 1990 N.Y. App. Div. LEXIS 16448 (N.Y. App. Div. 4th Dep't 1990), app. denied, 77 N.Y.2d 882, 568 N.Y.S.2d 925, 571 N.E.2d 95, 1991 N.Y. LEXIS 1217 (N.Y. 1991).

Court improperly refused to charge jury on defense of justification in prosecution for second degree assault where defendant asserted that it was correction officers who were aggressors and that he used physical force only to defend himself from their use of excessive or unlawful force. People v Dare, 175 A.D.2d 586, 572 N.Y.S.2d 251, 1991 N.Y. App. Div. LEXIS 10095 (N.Y. App. Div. 4th Dep't), app. denied, 78 N.Y.2d 1127, 578 N.Y.S.2d 884, 586 N.E.2d 67, 1991 N.Y. LEXIS 5475 (N.Y. 1991).

Defendant was not entitled to justification charge in prosecution for second degree assault and resisting arrest involving attack on police officers, even accepting his testimony that he never heard plainclothed police officers identify themselves, since he admitted that officers had handcuffs and walkie-talkies visible, and officers testified that their badges were displayed. People v Angus, 192 A.D.2d 665, 597 N.Y.S.2d 87, 1993 N.Y. App. Div. LEXIS 3881 (N.Y. App. Div. 2d Dep't), app. denied, 81 N.Y.2d 1069, 601 N.Y.S.2d 588, 619 N.E.2d 666, 1993 N.Y. LEXIS 2670 (N.Y. 1993).

Court in second degree assault trial did not improperly charge justification defense only under theory of "deadly physical force," rather than under theory of mere "physical force," where record showed that defendant pulled screwdriver from his back pocket during altercation and hit victim in face with it, breaking his jaw, since it could not be said that defendant exercised only nondeadly force. People v Samuels, 198 A.D.2d 384, 603 N.Y.S.2d 344, 1993 N.Y. App. Div. LEXIS 10681 (N.Y. App. Div. 2d Dep't 1993), app. denied, 82 N.Y.2d 930, 610 N.Y.S.2d 182, 632 N.E.2d 492, 1994 N.Y. LEXIS 5344 (N.Y. 1994).

Defendant's testimony that wound to victim's chin was unintended result of struggle over broken plate did not defeat his entitlement to justification charge in second degree assault prosecution. People v Scott, 224 A.D.2d 926, 637 N.Y.S.2d 586, 1996 N.Y. App. Div. LEXIS 1558 (N.Y. App. Div. 4th Dep't 1996).

Court did not err in charging jury, over defendant's objection, on justified use of deadly physical force in addition to charge on justified use of physical force where evidence showed that assault victim sustained serious physical injuries when defendant beat him over head with cutting board. People v Brunson, 226 A.D.2d 1093, 641 N.Y.S.2d 935, 1996 N.Y. App. Div. LEXIS 5566 (N.Y. App. Div. 4th Dep't), app. dismissed, 88 N.Y.2d 981, 649 N.Y.S.2d 387, 672 N.E.2d 613, 1996 N.Y. LEXIS 3395 (N.Y. 1996).

Defendant was not entitled to justification charge where victim punched him in face and knocked him to ground after defendant twice pushed victim's daughter as she attempted to break up argument between defendant and another guest at daughter's party, defendant then ran outside toward shed followed by guest, who then became involved in fight with defendant, victim tried to break up that fight and swung plastic pipe at defendant, fight broke up and defendant went into house, and as victim was being escorted into house through back door, defendant appeared with knife that he had retrieved from kitchen and stabbed victim in face. People v Cleveland, 235 A.D.2d 929, 653 N.Y.S.2d 425, 1997 N.Y. App. Div. LEXIS 762 (N.Y. App. Div. 3d Dep't), app. denied, 89 N.Y.2d 1090, 660 N.Y.S.2d 384, 682 N.E.2d 985, 1997 N.Y. LEXIS 1872 (N.Y. 1997).

In trial for second and third degree assault and resisting arrest arising from altercation with village police officer who was dressed in civilian clothing and driving his own car, justification charge was warranted where officer had approached defendant in his driveway, and defendant testified that he was unaware that officer was police, that officer did not identify himself as police, and that he struck officer in self-defense after officer grabbed him. People v Cain, 236 A.D.2d 788, 653 N.Y.S.2d 739, 1997 N.Y. App. Div. LEXIS 1706 (N.Y. App. Div. 4th Dep't 1997).

In prosecution for second degree assault, jury charge on defense of justification was properly denied where defendant's use of dangerous instrument against unarmed victim could not be viewed as anything other than excessive use of force. People v Vecchio, 240 A.D.2d 854, 658 N.Y.S.2d 720, 1997 N.Y. App. Div. LEXIS 6716 (N.Y. App. Div. 3d Dep't 1997).

Where no reasonable view of eyewitness testimony, victim's testimony or defendant's confession, taken together, could support conclusion that victim, rather than defendant, was initial aggressor in college fraternity house altercation, court properly

refused to give justification charge in second degree assault case. People v Carello, 241 A.D.2d 903, 660 N.Y.S.2d 515, 1997 N.Y. App. Div. LEXIS 8159 (N.Y. App. Div. 3d Dep't), app. denied, 90 N.Y.2d 938, 664 N.Y.S.2d 757, 687 N.E.2d 654, 1997 N.Y. LEXIS 3745 (N.Y. 1997).

Court properly denied defendant's request to charge justification where no version of evidence showed that any officers used excessive force in effecting arrest of third person so as to justify force used by defendant against officer who was not even involved in arrest. People v Lucena, 243 A.D.2d 269, 662 N.Y.S.2d 320, 1997 N.Y. App. Div. LEXIS 9297 (N.Y. App. Div. 1st Dep't), app. denied, 91 N.Y.2d 876, 668 N.Y.S.2d 574, 691 N.E.2d 646, 1997 N.Y. LEXIS 4623 (N.Y. 1997).

In second degree assault prosecution, it was reversible error to deny defense request to charge jury on justification under CLS § 35.20(2) where defendant, who was taking care of his children at his estranged wife's rented home, heard noise and saw ladder positioned outside second-floor window, he then ran downstairs and opened door, and he claimed that person on ladder (landlord) fell off ladder when he opened door, although there was other evidence that landlord fell when defendant deliberately pushed ladder. People v Daniels, 248 A.D.2d 723, 670 N.Y.S.2d 566, 1998 N.Y. App. Div. LEXIS 3400 (N.Y. App. Div. 2d Dep't 1998).

Defendant was not denied effective assistance by counsel's failure to request justification charge in second degree assault prosecution since defense witness had testified that it was he and not defendant who kicked victim, and there was no testimony as to identity of initial aggressor. People v Fernandez, 248 A.D.2d 801, 670 N.Y.S.2d 251, 1998 N.Y. App. Div. LEXIS 2493 (N.Y. App. Div. 3d Dep't 1998).

It was reversible error in second degree assault prosecution for court to deny defendant's request for charge on defense of justification, even though he testified that injury to victim was unintended, since jury, based on defendant's version of events, could have reasonably found that victim and his brother were initial aggressors and that defendant's actions were justified. People v Neal, 254 A.D.2d 752, 678 N.Y.S.2d 556, 1998 N.Y. App. Div. LEXIS 10448 (N.Y. App. Div. 4th Dep't 1998).

In prosecution for attempted second degree murder and second degree assault, involving repeated blows to victim's head and body with baseball bat, court properly refrained from giving justification charge sua sponte where such action would have unlawfully interfered with defense strategy of not raising weak justification defense in order to concentrate on other defenses. People v Vukel, 263 A.D.2d 416, 695 N.Y.S.2d 73, 1999 N.Y. App. Div. LEXIS 8241 (N.Y. App. Div. 1st Dep't), app. denied, 94 N.Y.2d 830, 702 N.Y.S.2d 601, 724 N.E.2d 393, 1999 N.Y. LEXIS 4350 (N.Y. 1999), app. denied sub. nom., People v Vokel, 94 N.Y.2d 830, 702 N.Y.S.2d 601, 724 N.E.2d 393, 1999 N.Y. LEXIS 4779 (N.Y. 1999), overruled in part, People v Wells, 24 N.Y.3d 971, 996 N.Y.S.2d 569, 21 N.E.3d 198, 2014 N.Y. LEXIS 2820 (N.Y. 2014).

Defendant's use of knife constituted use of deadly physical force as matter of law, and thus court properly denied his request to charge justification through use of ordinary physical force, notwithstanding his assertion that he did not intend to use knife in deadly manner. People v Mothon, 284 A.D.2d 568, 729 N.Y.S.2d 541, 2001 N.Y. App. Div. LEXIS 5984 (N.Y. App. Div. 3d Dep't), app. denied, 96 N.Y.2d 865, 730 N.Y.S.2d 40, 754 N.E.2d 1123, 2001 N.Y. LEXIS 2593 (N.Y. 2001).

Denial of defendant's request for a justification charge under N.Y. Penal Law § 35.15(1) was error because testimony by defendant and his girlfriend that a crowd was following them and threatening to beat him up as he sought to leave an area supported a conclusion that he believed physical force was necessary to defend against the imminent use of physical force. and that a reasonable person would have the same belief under the circumstances; moreover, even if defendant was the initial aggressor in a prior confrontation, he withdrew from that encounter before his subsequent use of force against his pursuers. The jury could have concluded that defendant used no more than ordinary physical force and was justified in doing so. People v Powell, 101 A.D.3d 1369, 956 N.Y.S.2d 294, 2012 N.Y. App. Div. LEXIS 8773 (N.Y. App. Div. 3d Dep't 2012), app. denied, 21 N.Y.3d 1019, 971 N.Y.S.2d 501, 994 N.E.2d 397, 2013 N.Y. LEXIS 1955 (N.Y. 2013).

Intoxication defense was inconsistent with proffered defense of justification, based on defendant's own statements that he had bitten the police officer to defend himself against an unprovoked beating. People v Gary, 299 A.D.2d 960, 750 N.Y.S.2d 714, 2002 N.Y. App. Div. LEXIS 11064 (N.Y. App. Div. 4th Dep't 2002), app. denied, 99 N.Y.2d 582, 755 N.Y.S.2d 718, 785 N.E.2d 740, 2003 N.Y. LEXIS 767 (N.Y. 2003).

Defendant's conviction on lesser included offense of assault in the second degree was reversed where the trial court instructed the jury on justification but failed to instruct the jury that an acquittal on the greater offenses of attempted murder and/or assault in the first degree, based on a finding of justification, precluded a conviction for assault in the second degree. People v Ross, 2 A.D.3d 465, 767 N.Y.S.2d 819, 2003 N.Y. App. Div. LEXIS 12905 (N.Y. App. Div. 2d Dep't 2003), app. denied, 2 N.Y.3d 745, 778 N.Y.S.2d 471, 810 N.E.2d 924, 2004 N.Y. LEXIS 1255 (N.Y. 2004).

In defendant's trial on a charge of, inter alia, assault in the second degree, the jury instructions on the justification defense were proper, as any error in charging the jury in the conjunctive rather than the disjunctive by noting that the jury had to find that the victim "and others" rather than "or others" was harmless because defendant repeatedly contended that the victim and two others had threatened to attack him. People v Daggett, 150 A.D.3d 1680, 54 N.Y.S.3d 803, 2017 N.Y. App. Div. LEXIS 3611 (N.Y. App. Div. 4th Dep't), app. denied, 29 N.Y.3d 1125, 86 N.E.3d 567, 64 N.Y.S.3d 675, 2017 N.Y. LEXIS 2992 (N.Y. 2017).

In defendant's trial on a charge of, inter alia, assault in the second degree, the jury instructions on the justification defense were proper, as there was no basis to instruct the jury that defendant had no duty to retreat in his dwelling because there was no reasonable view of the evidence that he was in his dwelling at the time. People v Daggett, 150 A.D.3d 1680, 54 N.Y.S.3d 803, 2017 N.Y. App. Div. LEXIS 3611 (N.Y. App. Div. 4th Dep't), app. denied, 29 N.Y.3d 1125, 86 N.E.3d 567, 64 N.Y.S.3d 675, 2017 N.Y. LEXIS 2992 (N.Y. 2017).

54. —Miscellaneous instructions

Although at the trial of a defendant convicted of criminally negligent homicide, based upon an incident in which several men pulled the victim from his car and beat him, the court erroneously suggested in its instructions to the jury with respect to the section of the charge dealing with assault in the second degree, that all of the defendants should be treated as accessories, it was rendered harmless by eight other instructions on accessorial liability which occurred in the lengthy charge which was well balanced and fair; the evidence overwhelmingly demonstrated that defendant was an accessory and due to the evidence of concerted action, there was no significant probability that the jury would have found that defendant was acting independently and not as an accessory. People v Gramaglia, 71 A.D.2d 441, 423 N.Y.S.2d 78, 1979 N.Y. App. Div. LEXIS 13497 (N.Y. App. Div. 4th Dep't 1979).

Defendant charged with second degree assault was not entitled to jury charge of duress on basis of his testimony that correction officers found drugs planted in his prison cell, then promised him that he would not be punished for drug possession if he attacked fellow inmate, since there was no testimony concerning coercion of defendant by physical force. People v Robinson, 141 A.D.2d 979, 530 N.Y.S.2d 857, 1988 N.Y. App. Div. LEXIS 7225 (N.Y. App. Div. 3d Dep't), app. denied, 73 N.Y.2d 789, 536 N.Y.S.2d 749, 533 N.E.2d 679 (N.Y. 1988), app. denied, 73 N.Y.2d 925, 539 N.Y.S.2d 310, 536 N.E.2d 639, 1989 N.Y. LEXIS 1436 (N.Y. 1989), app. denied, 74 N.Y.2d 818, 546 N.Y.S.2d 576, 545 N.E.2d 890, 1989 N.Y. LEXIS 3692 (N.Y. 1989).

In trial for second degree assault, fifth degree conspiracy, second degree tampering with sports contest, and fourth degree weapon possession arising out of boxing match in which defendant fight manager conspired with codefendant fighter to remove padding from codefendant's boxing gloves, resulting in serious injury to other fighter, court did not err (1) in charging jury that person may not use physical force in combat by agreement if combat is not specifically authorized by law, and that violation of rules of State Athletic Commission deprives combat of its legality,

(2) in defining assault in terms of fighter punching another with knowledge that padding has been removed, with intent to cause physical injury to that other person, and with physical injury resulting, and (3) in further charging that fighter lost his legal right to strike his opponent, as matter of law, if such proof was established beyond reasonable doubt. People v Lewis, 166 A.D.2d 238, 560 N.Y.S.2d 630, 1990 N.Y. App. Div. LEXIS 11741 (N.Y. App. Div. 1st Dep't 1990).

Court did not err in charging jury on accessorial liability in second degree assault trial against 2 defendants, although single-count indictment did not contain words "acting in concert," since defendants were charged with committing same assault on same victim at same time, they were tried for crime for which they were indicted, and court's charge did not change theory of case as it was presented and tried. People v Grim, 166 A.D.2d 264, 560 N.Y.S.2d 639, 1990 N.Y. App. Div. LEXIS 11899 (N.Y. App. Div. 1st Dep't), app. denied, 76 N.Y.2d 986, 563 N.Y.S.2d 774, 565 N.E.2d 523, 1990 N.Y. LEXIS 4603 (N.Y. 1990), app. denied, 76 N.Y.2d 986, 563 N.Y.S.2d 775, 565 N.E.2d 524, 1990 N.Y. LEXIS 4606 (N.Y. 1990), cert. denied, 499 U.S. 976, 111 S. Ct. 1622, 113 L. Ed. 2d 719, 1991 U.S. LEXIS 2263 (U.S. 1991).

In second degree assault trial, court properly instructed jury regarding defendant's accomplice liability where (1) after victim and person named "Mike" had argument, Mike returned with 3 other individuals, including defendant, (2) Mike told defendant to shoot victim in leg and, although gun did not fire, defendant pulled trigger, and (3) victim was shot in hand as he ran from scene, and testified that all 3 individuals, including defendant, were shooting at him; evidence supported conclusion that defendant and 2 other individuals shared common purpose to injure victim. People v Floyd, 173 A.D.2d 211, 569 N.Y.S.2d 92, 1991 N.Y. App. Div. LEXIS 5524 (N.Y. App. Div. 1st Dep't), app. denied, 78 N.Y.2d 966, 574 N.Y.S.2d 945, 580 N.E.2d 417, 1991 N.Y. LEXIS 4367 (N.Y. 1991).

Trial court improperly instructed jury that they could not convict defendant, who was charged with assault while inmate of correctional facility, unless they found that he was incarcerated at time in question, where defendant had admitted prior conviction, and thus prosecution could not prove fact of prior conviction as part of its direct case; however, error was harmless where jury had already received evidence of defendant's confinement without objection. People v Richardson, 180 A.D.2d 902, 580 N.Y.S.2d 521, 1992 N.Y. App. Div. LEXIS 2664 (N.Y. App. Div. 3d Dep't 1992).

Defendant in second degree assault trial was properly denied intoxication instruction under CLS Penal § 15.25, although he testified that he may have lost control and hit victim because he had "had a couple of drinks" and "just got ripped off," and one arresting officer testified that defendant had glassy eyes and smelled of alcohol, since (1) defendant's testimony was, at best, equivocal, attributing assault in part to his anger at being "ripped off," (2) there was no evidence as to type or size of drinks defendant consumed or when he consumed them, and (3) defendant was able to give detailed testimony of events which occurred before, during, and after assault. People v Gaines, 195 A.D.2d 383, 600 N.Y.S.2d 232, 1993 N.Y. App. Div. LEXIS 7260 (N.Y. App. Div. 1st Dep't 1993), aff'd, 83 N.Y.2d 925, 615 N.Y.S.2d 309, 638 N.E.2d 954, 1994 N.Y. LEXIS 1279 (N.Y. 1994).

In prosecution for second degree assault under CLS Penal § 120.05(3), it was reversible error to instruct jury, inter alia, that if it found that officer in question was attempting to arrest defendant, then as matter of law "he was performing a lawful duty"; court's charge effectively removed from jury's consideration lawfulness of police conduct, and whether their actions were authorized under circumstances presented. People v Greene, 221 A.D.2d 559, 634 N.Y.S.2d 144, 1995 N.Y. App. Div. LEXIS 11928 (N.Y. App. Div. 2d Dep't 1995).

Court properly charged jury on theory that defendant was acting in concert with another individual in attack on victim where, inter alia, defendant admitted that he entered melee to aid that person. People v Weiner, 226 A.D.2d 757, 640 N.Y.S.2d 332, 1996 N.Y. App. Div. LEXIS 3492 (N.Y. App. Div. 3d Dep't 1996).

Defendant was not prejudiced by court's jury charge indicating that gun entered in evidence was loaded gun since defendant conceded that he possessed and fired gun admitted in evidence. People v Gordon, 235 A.D.2d 274, 653 N.Y.S.2d 297, 1997 N.Y. App. Div. LEXIS 287 (N.Y. App. Div. 1st Dep't), app. denied, 89 N.Y.2d 1035, 659 N.Y.S.2d 866, 681 N.E.2d 1313, 1997 N.Y. LEXIS 1502 (N.Y. 1997).

It was reversible error in second degree assault prosecution to instruct jury that court's prior ruling at pretrial suppression hearing that officer had probable cause to arrest meant that legality of officer's initial approach to defendant was "not an issue" for jury and that as matter of law officer was performing his "lawful duty" for purposes of CLS Penal § 120.05(3); by removing "lawful duty" element from jury's consideration, court usurped jury's role as ultimate arbiters of credibility. People v Milhouse, 246 A.D.2d 119, 676 N.Y.S.2d 555, 1998 N.Y. App. Div. LEXIS 8816 (N.Y. App. Div. 1st Dep't 1998).

In prosecution for second degree assault on peace officer, court properly charged jury that it could find defendant guilty only if it found that victim was court security officer and was acting in that capacity when assaulted where sole trial evidence on issue proved that if victim qualified as peace officer, it was as court security officer under either CLS CPL § 2.10(21)(a) or CLS CPL § 2.10(37) and CLS Gen Mun § 209-v(1), and court chose to tailor its instructions to evidence rather than remove "peace officer" element from crime. People v Hollis, 255 A.D.2d 615, 680 N.Y.S.2d 678, 1998 N.Y. App. Div. LEXIS 11691 (N.Y. App. Div. 3d Dep't), app. denied, 92 N.Y.2d 1033, 684 N.Y.S.2d 498, 707 N.E.2d 453, 1998 N.Y. LEXIS 4648 (N.Y. 1998).

In prosecution for second degree assault and fourth degree weapon possession, defendant was not entitled to jury charge on defense of intoxication, absent evidence as to number of drinks consumed by defendant, period during which he might have consumed them, whether drinks contained alcohol, or physical effects that consumption of alcohol might have had on defendant's behavior or mental state; witness's impression that defendant appeared to be "passed out" in rear of patrol car while being transported to crime scene for showup was insufficient to warrant intoxication charge. People v Hill, 255 A.D.2d 969, 681 N.Y.S.2d 919, 1998 N.Y. App. Div. LEXIS 12235 (N.Y. App. Div. 4th Dep't 1998), app. denied, 92 N.Y.2d 1050, 685 N.Y.S.2d 428, 708 N.E.2d 185, 1999 N.Y. LEXIS 303 (N.Y. 1999).

In prosecution for attempted second assault, third degree assault, and child endangerment, court properly allowed prosecution to introduce evidence of 2 prior incidents of defendant's behavior toward victim, who was 28-year-old defendant's 15-year-old stepbrother, where (1) in first incident 2 days before present assault, defendant threw victim against wall and threatened to kill him, (2) in second incident 7 months earlier, defendant kicked victim after placing himself in dispute between victim and their mother, (3) court precluded evidence of third incident that occurred years earlier, and (4) court properly instructed jury to consider prior incidents solely on issue of whether defendant's present acts of violence toward victim were intentional or resulted from mistake or accident. People v Ray, 273 A.D.2d 611, 710 N.Y.S.2d 138, 2000 N.Y. App. Div. LEXIS 7226 (N.Y. App. Div. 3d Dep't 2000).

Court's charge to jury on second and third degree assault was proper, even though it did not include words "by punching him," where it did not alter theory of crimes charged in indictment. People v Harris, 273 A.D.2d 807, 711 N.Y.S.2d 370, 2000 N.Y. App. Div. LEXIS 6791 (N.Y. App. Div. 4th Dep't), app. denied, 95 N.Y.2d 964, 722 N.Y.S.2d 481, 745 N.E.2d 401, 2000 N.Y. LEXIS 4271 (N.Y. 2000).

Court properly refused to instruct jury that "physical injury" of assault victim was to be measured by objective standard; jury could consider whether victim's reaction to and perception of pain qualified as physical injury, since pain is subjective and different persons tolerate it differently. People v Bernier, 279 A.D.2d 701, 719 N.Y.S.2d 186, 2001 N.Y. App. Div. LEXIS 287 (N.Y. App. Div. 3d Dep't), app. denied, 96 N.Y.2d 797, 726 N.Y.S.2d 375, 750 N.E.2d 77, 2001 N.Y. LEXIS 1536 (N.Y. 2001).

Under circumstances in which defendant was charged with assault in the second degree using the doctrine of transferred intent, in that, with intent to cause physical injury to the decedent, defendant caused physical injury to the complainant by

means of a handgun, instructions that the jury could find defendant guilty of that charge if it found that defendant's intent was to injure either the decedent or the complainant were proper; the identity of the intended target was not an essential element of the crime. People v Jones, 41 A.D.3d 507, 838 N.Y.S.2d 126, 2007 N.Y. App. Div. LEXIS 6863 (N.Y. App. Div. 2d Dep't), app. denied, 9 N.Y.3d 877, 842 N.Y.S.2d 789, 874 N.E.2d 756, 2007 N.Y. LEXIS 3053 (N.Y. 2007).

Record did not support the contention that defendant conceded the element that an arresting officer was engaged in a lawful duty at the time of defendant's alleged assault, N.Y. Penal Law § 120.05(3), and because the court's charge removed that element from the jury's consideration, defendant was entitled to a new trial. People v Martin, 36 A.D.3d 717, 826 N.Y.S.2d 747, 2007 N.Y. App. Div. LEXIS 431 (N.Y. App. Div. 2d Dep't 2007).

Defendant's conviction of second degree assault was reversed as the trial court's response to the jury's note incorrectly signaled that the accidental firing of a gun could support a conviction, which erroneously allowed the jury to find defendant guilty of intentional assault without finding the intent element of that crime. People v Lee, 116 A.D.3d 493, 983 N.Y.S.2d 524, 2014 N.Y. App. Div. LEXIS 2446 (N.Y. App. Div. 1st Dep't), app. denied, 23 N.Y.3d 1064, 994 N.Y.S.2d 323, 18 N.E.3d 1144, 2014 N.Y. LEXIS 2634 (N.Y. 2014).

There was a possibility that defendant was convicted of assault in the second degree on a different theory than that charged since the court instructed the jurors that they could consider any injuries that the victim sustained when she threw herself from the moving vehicle, but the indictment only cited the injuries defendant caused by striking the victim. People v Barber, 155 A.D.3d 1543, 64 N.Y.S.3d 430, 2017 N.Y. App. Div. LEXIS 7997 (N.Y. App. Div. 4th Dep't 2017).

55. Verdicts

Jury verdicts convicting two defendants of different degrees of assault under Penal Law §§ 120.10(1), 05(2), but acquitting them of different degrees of criminal possession of a weapon under Penal Law §§ 265.03(1)(b), 02(1), were not legally repugnant, based on the instructions that were given to the juries and viewed from a theoretical perspective without regard to the evidence presented at the trials, because the latter crime contained an essential element that the former did not: possession. People v Muhammad, 17 N.Y.3d 532, 935 N.Y.S.2d 526, 959 N.E.2d 463, 2011 N.Y. LEXIS 3130 (N.Y. 2011).

In a prosecution for assault in the second degree, predicated upon an allegation that defendant had caused physical injury to the complainant in the course of the crime of sexual abuse, first degree, the trial court erred in denying defendant's motion to withdraw his guilty plea when he appeared for sentencing on the asserted ground that defendant had pleaded guilty only to assault and not to a sex crime, where in denying that he had subjected complainant to the forcible sexual contact, defendant was negating an element of assaut in the second degree to which he had pleaded guilty. People v Pastrana, 90 A.D.2d 558, 455 N.Y.S.2d 140, 1982 N.Y. App. Div. LEXIS 18620 (N.Y. App. Div. 2d Dep't 1982).

In rape and robbery prosecution, defendant's acquittal of second degree assault did not render his conviction of attempted first degree rape inconsistent verdict, since all that acquittal of assault count showed was that defendant did not act with intent to cause complaint of physical injury, while conviction of attempted rape showed his intent to engage in sexual intercourse with her. People v Pereau, 99 A.D.2d 591, 471 N.Y.S.2d 416, 1984 N.Y. App. Div. LEXIS 16826 (N.Y. App. Div. 3d Dep't 1984), aff'd, 64 N.Y.2d 1055, 489 N.Y.S.2d 872, 479 N.E.2d 217, 1985 N.Y. LEXIS 14219 (N.Y. 1985).

Contemporaneous acquittal of attempted second degree assault does not require finding that conviction of third degree weapon possession is repugnant; to be found guilty of attempted assault, defendant must be shown to have had intent to cause physical injury, while in order to convict him of weapon possession, it need only be shown that defendant had intent to use weapon unlawfully against another; thus, verdict of guilty on possession charge is not necessarily negated by failure to find that defendant had requisite intent under assault charge. People v Martino, 112 A.D.2d 1049, 493 N.Y.S.2d 36, 1985 N.Y. App. Div. LEXIS 52252 (N.Y. App. Div. 2d Dep't), app. denied, 66 N.Y.2d 616, 494 N.Y.S.2d 1039, 485 N.E.2d 243, 1985 N.Y. LEXIS 17080 (N.Y. 1985).

Jury's verdict of guilty of second degree weapon possession was not repugnant to its acquittal of charge of second degree assault where (1) elements of weapon possession were described in jury instructions as requiring only that jury find that defendant possessed loaded firearm with intent to use it unlawfully against another, and (2) elements of second degree assault were described as requiring finding of intent on part of defendant to cause physical injury to victim, that defendant in fact caused such injury, and that such injury was caused by means of deadly weapon; jury could have concluded that defendant possessed weapon with intent to use it unlawfully against another, yet jury might not have been sufficiently convinced that defendant did actual shooting, or it might have entertained doubts as to whether defendant fired gun accidentally, or with intent only to frighten victim. People v Harris, 128 A.D.2d 432, 512 N.Y.S.2d 823, 1987 N.Y. App. Div. LEXIS 44139 (N.Y. App. Div. 1st Dep't 1987).

Defendant's acquittal on second and third degree robbery charges did not negate any essential element of his second degree assault conviction, and thus verdicts were not repugnant. People v Fasano, 129 A.D.2d 1004, 514 N.Y.S.2d 306, 1987 N.Y. App. Div. LEXIS 45701 (N.Y. App. Div. 4th Dep't), app. denied, 70 N.Y.2d 799, 522 N.Y.S.2d 117, 516 N.E.2d 1230, 1987 N.Y. LEXIS 19436 (N.Y. 1987).

Jury verdict convicting defendant of third degree weapon possession while acquitting him of second degree assault was not repugnant where evidence was presented by which jury could conclude that defendant intentionally stored ax handle in his vehicle's trunk for unlawful purpose without finding intent to injure someone. People v Green, 135 A.D.2d 565, 522 N.Y.S.2d 164, 1987 N.Y. App. Div. LEXIS 52509 (N.Y. App. Div. 2d Dep't 1987), app. denied, 71 N.Y.2d 897, 527 N.Y.S.2d 1006, 523 N.E.2d 313, 1988 N.Y. LEXIS 1428 (N.Y. 1988).

Defendant was properly convicted of fourth degree weapon possession and acquitted of assault, after nonjury trial, where court found that he had possessed dangerous instrumentality and intended to use it unlawfully but did not cause physical injury to victim; verdict was not repugnant or inconsistent, since weapons possession charge required possession and unlawful intent but did not require that intended crime be carried out, and fact that court found that People did not prove assault charge beyond reasonable doubt did not negate any element of weapons possession charge. People v Gonzalez, 138 A.D.2d 623, 526 N.Y.S.2d 209, 1988 N.Y. App. Div. LEXIS 3121 (N.Y. App. Div. 2d Dep't 1988).

Acquittal of defendant on charge of attempted second degree assault was not repugnant to conviction of third degree weapon possession since acquittal did not necessarily negate finding that weapon was possessed with intent to use it unlawfully against another. People v McDonald, 156 A.D.2d 591, 549 N.Y.S.2d 99, 1989 N.Y. App. Div. LEXIS 15954 (N.Y. App. Div. 2d Dep't 1989), app. denied, 75 N.Y.2d 921, 555 N.Y.S.2d 40, 554 N.E.2d 77, 1990 N.Y. LEXIS 1613 (N.Y. 1990).

Jury's acquittal of defendant on second degree robbery charge was not repugnant to defendant's conviction of second degree assault. People v Wilson, 156 A.D.2d 1037, 156 A.D.2d 743, 548 N.Y.S.2d 836, 549 N.Y.S.2d 494, 1989 N.Y. App. Div. LEXIS 16521 (N.Y. App. Div. 2d Dep't 1989).

Defendant's acquittal of first degree burglary was not repugnant to convictions for second degree assault and attempted second degree robbery since jury could have found that People established overlapping elements of all 3 offenses, but could have entertained doubt as to whether defendant "knowingly entered unlawfully" at victim's dwelling, which was charged as element of burglary but not other offenses. People v Fitzpatrick, 171 A.D.2d 972, 567 N.Y.S.2d 915, 1991 N.Y. App. Div. LEXIS 3971 (N.Y. App. Div. 3d Dep't), app. denied, 78 N.Y.2d 1075, 577 N.Y.S.2d 239, 583 N.E.2d 951, 1991 N.Y. LEXIS 5257 (N.Y. 1991).

Verdict convicting defendant of second degree assault, but acquitting him of all other felonies charged in indictment, was not repugnant since there is no requirement that defendant be found guilty of completed felony in order to sustain second degree

assault conviction under CLS Penal § 120.05(6). People v Ladson, 209 A.D.2d 640, 619 N.Y.S.2d 133, 1994 N.Y. App. Div. LEXIS 11494 (N.Y. App. Div. 2d Dep't 1994), amended, 1994 N.Y. App. Div. LEXIS 12620 (N.Y. App. Div. 2d Dep't Dec. 6, 1994), app. denied, 85 N.Y.2d 911, 627 N.Y.S.2d 334, 650 N.E.2d 1336, 1995 N.Y. LEXIS 1656 (N.Y. 1995).

In prosecution for second degree assault and third degree weapon possession arising from incident in which defendant attempted to stab victim with butcher's knife and then attempted to beat him with handle of knife after blade broke, verdict convicting defendant of attempted second degree assault and acquitting him of third degree weapon possession as to knife handle was not inconsistent since conviction was based on his use of knife, not knife handle. People v McCain, 211 A.D.2d 646, 620 N.Y.S.2d 489, 1995 N.Y. App. Div. LEXIS 117 (N.Y. App. Div. 2d Dep't), app. denied, 85 N.Y.2d 911, 627 N.Y.S.2d 334, 650 N.E.2d 1336, 1995 N.Y. LEXIS 1673 (N.Y. 1995).

Verdict finding defendant guilty of second degree assault and not guilty of fourth degree weapon possession was not repugnant where jury could have found that defendant initially possessed weapon without any intent to use it unlawfully prior to stabbing victim during struggle over defendant's refusal to pay commuter van fare. People v Holloway, 253 A.D.2d 767, 677 N.Y.S.2d 489, 1998 N.Y. App. Div. LEXIS 9451 (N.Y. App. Div. 2d Dep't), app. denied, 92 N.Y.2d 1033, 684 N.Y.S.2d 498, 707 N.E.2d 453, 1998 N.Y. LEXIS 4649 (N.Y. 1998).

Jury's verdict of guilt of second degree assault was not inconsistent with acquittal of first degree assault where jury reasonably could have found that defendant intended to use gun unlawfully and that he did so by recklessly, but not intentionally, causing injury to another. People v Hart, 266 A.D.2d 584, 698 N.Y.S.2d 72, 1999 N.Y. App. Div. LEXIS 11214 (N.Y. App. Div. 3d Dep't 1999), app. denied, 94 N.Y.2d 903, 707 N.Y.S.2d 388, 728 N.E.2d 987, 2000 N.Y. LEXIS 697 (N.Y. 2000).

While the crimes of which defendant was acquitted required the use of a weapon or dangerous instrument, defendant was convicted of violating N.Y. Penal Law § 120.05(1), which had no such element; thus, the acquittals did not negate any element of the crime of which defendant was convicted. People v Arroyo, 38 A.D.3d 383, 833 N.Y.S.2d 18, 2007 N.Y. App. Div. LEXIS 3686 (N.Y. App. Div. 1st Dep't), app. denied, 8 N.Y.3d 981, 838 N.Y.S.2d 484, 869 N.E.2d 660, 2007 N.Y. LEXIS 1800 (N.Y. 2007).

Jury verdict was not inconsistent because although the counts of assault in the second degree and gang assault in the second degree required different culpable mental states, reckless for assault under N.Y. Penal Law § 120.05(4) as opposed to intentional conduct for gang assault under N.Y. Penal Law § 120.06, each count involved a different result; defendant could have intended to cause physical injury to the victim by participating in a gang assault and could have, at the same time, recklessly created a grave risk that the victim would sustain a serious injury at the hands of a codefendant whom defendant knew to be armed with a knife. People v Williams, 45 A.D.3d 1466, 845 N.Y.S.2d 674, 2007 N.Y. App. Div. LEXIS 12044 (N.Y. App. Div. 4th Dep't 2007), app. denied, 10 N.Y.3d 818, 857 N.Y.S.2d 51, 886 N.E.2d 816, 2008 N.Y. LEXIS 1328 (N.Y. 2008).

56. Sentencing, generally

Because assault in the second degree may be "punishable" by imprisonment in a state prison, it is a felony, even though the offense may also be punishable by imprisonment in a penitentiary. People v Rytel, 284 N.Y. 242, 30 N.E.2d 578, 284 N.Y. (N.Y.S.) 242, 1940 N.Y. LEXIS 851 (N.Y. 1940).

Where defendants convicted of conspiracy in third degree and assault in second degree among other crimes, were punished as youthful offenders in less severe manner than if they had been sentenced as adults for same felonies of which they were found guilty, such sentencing was not violative of defendants' constitutional rights. People v Ozarowski, 38 N.Y.2d 481, 381 N.Y.S.2d 438, 344 N.E.2d 370, 1976 N.Y. LEXIS 2253 (N.Y. 1976).

Where respondent was convicted of several violent sex offenses, pleaded guilty to rape and assault, and continued to commit offenses while incarcerated, an expert testified that based on his review of respondent's criminal, prison, and mental health records, respondent suffered from a mental abnormality that predisposed him to commit sex offenses and caused him serious difficulty controlling that conduct. The court held that respondent was a dangerous sex offender in need of confinement. Matter of State of New York v Charada T., 23 N.Y.3d 355, 991 N.Y.S.2d 9, 14 N.E.3d 362, 2014 N.Y. LEXIS 1000 (N.Y. 2014).

Court did not err in denying defendant youthful offender status despite her lack of prior criminal record where crime she committed (second degree assault) was premeditated, senseless and violent, and resulted in permanent injuries to unresisting victim. People v Vera, 206 A.D.2d 494, 614 N.Y.S.2d 547, 1994 N.Y. App. Div. LEXIS 7472 (N.Y. App. Div. 2d Dep't 1994).

Defendant was improperly adjudicated as second violent felony offender based on his conviction of attempted second degree assault; such crime is not violent felony offense. People v McManus, 228 A.D.2d 453, 643 N.Y.S.2d 413, 1996 N.Y. App. Div. LEXIS 6209 (N.Y. App. Div. 2d Dep't 1996).

Judgment imposing sentence of 3 to 6 years for second degree assault would be affirmed where County Court had resolved discrepancy between court reporter's minutes and court clerk's minutes to reflect sentence actually imposed, and there was no contention that term of 3 to 6 years was excessive under circumstances of case. People v Banks, 242 A.D.2d 726, 663 N.Y.S.2d 46, 1997 N.Y. App. Div. LEXIS 9156 (N.Y. App. Div. 2d Dep't), app. denied, 91 N.Y.2d 868, 668 N.Y.S.2d 567, 691 N.E.2d 639, 1997 N.Y. LEXIS 4439 (N.Y. 1997).

Sentence for attempted second degree assault would be vacated, and matter would be remitted for resentencing on that count, where there was discrepancy between sentencing minutes, which indicated determinate sentence of 2 years, and certificate of conviction, which indicated indeterminate sentence of $1^1/_3$ to 3 years. People v Ingram, 263 A.D.2d 959, 695 N.Y.S.2d 453, 1999 N.Y. App. Div. LEXIS 7931 (N.Y. App. Div. 4th Dep't 1999).

Sentencing court did not err when it imposed order of protection on defendant convicted of second degree assault, but it erred in setting order's expiration date 12 years after conviction, where defendant received determinate sentence of 7 years in prison; maximum duration of order of protection was 10 years. People v Wheeler, 268 A.D.2d 448, 701 N.Y.S.2d 442, 2000 N.Y. App. Div. LEXIS 165 (N.Y. App. Div. 2d Dep't), app. denied, 94 N.Y.2d 926, 708 N.Y.S.2d 366, 729 N.E.2d 1165, 2000 N.Y. LEXIS 1346 (N.Y. 2000).

On remission of case for resentencing, defendant convicted of second degree assault was entitled to hearing on amount of restitution where there was no evidence in plea agreement or in minutes of plea allocution to support amount of restitution ordered. People v Austin, 275 A.D.2d 913, 715 N.Y.S.2d 173, 2000 N.Y. App. Div. LEXIS 9697 (N.Y. App. Div. 4th Dep't 2000).

Sentence of 2 to 6 years for second degree assault was illegal where sentencing statute in effect at time of crime required minimum sentence for class D violent felony of ½, rather than ⅓, of maximum term. People v Carter, 286 A.D.2d 773, 730 N.Y.S.2d 733, 2001 N.Y. App. Div. LEXIS 8692 (N.Y. App. Div. 2d Dep't), app. denied, 97 N.Y.2d 655, 737 N.Y.S.2d 56, 762 N.E.2d 934, 2001 N.Y. LEXIS 4198 (N.Y. 2001).

Although aggregate sentence of 10 to 20 years was not unduly harsh, sentence of 7 ½ to 15 years on each conviction of second degree assault was illegal where that crime is class "D" violent felony offense, which at time of crime was punishable by indeterminate sentence with maximum term of 7 years and minimum term of ½ of maximum; thus, judgment of conviction would be modified by vacating sentences imposed on those counts and remitting case for resentencing on those counts. People v Fuller, 286 A.D.2d 910, 731 N.Y.S.2d 132, 2001 N.Y. App. Div. LEXIS 9157 (N.Y. App. Div. 4th Dep't), app. denied, 97 N.Y.2d 682, 738 N.Y.S.2d 297, 764 N.E.2d 401, 2001 N.Y. LEXIS 4382 (N.Y. 2001).

Because defendant waived the right to appeal before being advised of the potential periods of imprisonment that could be imposed under N.Y. Penal Law § 120.05(4), the valid waiver did not encompass defendant's contention with respect to the severity of the sentence; nevertheless, the sentence was not unduly harsh or severe. People v Mingo, 38 A.D.3d 1270, 832 N.Y.S.2d 721, 2007 N.Y. App. Div. LEXIS 3541 (N.Y. App. Div. 4th Dep't 2007).

After convicting defendant of assault in the second degree under N.Y. Penal Law § 120.05, the trial court erred in imposing a five-year period of post-release supervision for a class D violent felony offense under N.Y. Penal Law §§ 70.02(1)(c), 70.45(2)(e) and, thus, reduced the period of post-release supervision to three years, which was the maximum allowed. People v Brown, 52 A.D.3d 1237, 859 N.Y.S.2d 548, 2008 N.Y. App. Div. LEXIS 5219 (N.Y. App. Div. 4th Dep't), app. denied, 10 N.Y.3d 956, 863 N.Y.S.2d 140, 893 N.E.2d 446, 2008 N.Y. LEXIS 2922 (N.Y. 2008).

Trial court erred in sentencing defendant to 10 years of post-release supervision because the only permissible term of such supervision under N.Y. Penal Law § 70.45(2) was five years where defendant was found guilty of second-degree assault under N.Y. Penal Law § 120.05(7) and sentenced to a determinate term of six years in prison under N.Y. Penal Law § 70.06(6)(c). People v Boyd, 97 A.D.3d 898, 948 N.Y.S.2d 450, 2012 N.Y. App. Div. LEXIS 5478 (N.Y. App. Div. 3d Dep't 2012), app. denied, 20 N.Y.3d 1009, 960 N.Y.S.2d 352, 984 N.E.2d 327, 2013 N.Y. LEXIS 648 (N.Y. 2013).

Trial court erred in sentencing defendant to 10 years of post-release supervision because the only permissible term of such supervision under N.Y. Penal Law § 70.45(2) was five years where defendant was found guilty of second-degree assault under N.Y. Penal Law § 120.05(7) and sentenced to a determinate term of six years in prison under N.Y. Penal Law § 70.06(6)(c). People v Boyd, 97 A.D.3d 898, 948 N.Y.S.2d 450, 2012 N.Y. App. Div. LEXIS 5478 (N.Y. App. Div. 3d Dep't 2012), app. denied, 20 N.Y.3d 1009, 960 N.Y.S.2d 352, 984 N.E.2d 327, 2013 N.Y. LEXIS 648 (N.Y. 2013).

Because the maximum period of postrelease supervision that could be imposed upon defendant's conviction of assault in the second degree was three years, not three and a half years, the period of postrelease supervision imposed upon the conviction was illegal. People v Jones, 146 A.D.3d 1078, 45 N.Y.S.3d 261, 2017 N.Y. App. Div. LEXIS 217 (N.Y. App. Div. 3d Dep't), app. denied, 29 N.Y.3d 999, 80 N.E.3d 413, 57 N.Y.S.3d 720, 2017 N.Y. LEXIS 1562 (N.Y. 2017), app. dismissed, 172 A.D.3d 1774, 100 N.Y.S.3d 799, 2019 N.Y. App. Div. LEXIS 4045 (N.Y. App. Div. 3d Dep't 2019).

Upon defendant's plea of guilty to assault second degree, a class D violent felony offense, the defendant would be sentenced as a persistent violent felony offender where the prosecutor proved three prior separate felony convictions in federal court for bank robbery, two of which included charges of putting lives in jeopardy. The fact that two of the convictions were entered in the same federal court on the same day and that the sentences in all three were ordered to run concurrently did not render the persistent violent felony offender statute, Penal Law § 70.08, inapplicable. People v Ayala, 107 Misc. 2d 874, 436 N.Y.S.2d 161, 1981 N.Y. Misc. LEXIS 2106 (N.Y. Sup. Ct. 1981).

Appellate court could not consider defendant's challenge to an enhanced sentence imposed following his guilty plea to assault in the second degree, N.Y. Penal Law § 120.05, and criminal mischief in the third degree, N.Y. Penal Law § 145.05 (2003); as part of the plea agreement, defendant knowingly, intelligently, and voluntarily waived his right to appeal the sentence. People v Schryver, 306 A.D.2d 626, 759 N.Y.S.2d 904, 2003 N.Y. App. Div. LEXIS 6635 (N.Y. App. Div. 3d Dep't), app. denied, 100 N.Y.2d 598, 766 N.Y.S.2d 174, 798 N.E.2d 358, 2003 N.Y. LEXIS 3621 (N.Y. 2003).

Trial court properly vacated defendant's sentence pursuant to N.Y. Crim. Proc. Law § 440.40(1) to a determinate five-year prison term followed by two years of postrelease supervision upon defendant's conviction of second degree assault under N.Y. Penal Law § 120.05(2); the original sentence was illegal, because N.Y. Penal Law § 70.45(2) mandated that a determinate sentence imposed upon conviction of a class D felony had to include five years of postrelease supervision. People v Matthews, 306 A.D.2d 863, 763 N.Y.S.2d 385, 2003 N.Y. App. Div. LEXIS 6870 (N.Y. App. Div. 4th Dep't 2003).

Defendant had to be allowed to withdraw his guilty plea to charges of assault in the second degree and attempted assault the second degree pursuant to N.Y. Penal Law §§ 120.05, 110.00 (2003), because the trial court failed to inform defendant that a sentence imposed would be followed by postrelease supervision. People v Hazen, 308 A.D.2d 637, 764 N.Y.S.2d 289, 2003 N.Y. App. Div. LEXIS 9535 (N.Y. App. Div. 3d Dep't 2003).

Where defendant was convicted of second degree assault in violation of N.Y. Penal Law § 120.05(3), the trial court erroneously sentenced defendant to a determinate term of imprisonment based upon its misapprehension that such a sentence was mandatory for second degree assault; while a determinate term of imprisonment was authorized under N.Y. Penal Law § 70.02(2)(b), (3)(c), it was not required, and although some imprisonment was mandatory, N.Y. Penal Law § 60.05(5), a definite term of imprisonment of one year or less under N.Y. Penal Law § 70.00(4) or an intermittent term of imprisonment under N.Y. Penal Law §§ 60.05(5), 85.00 were also authorized, as was a split sentence of imprisonment and probation, N.Y. Penal Law § 60.01(2)(d). People v Endresz, 1 A.D.3d 888, 767 N.Y.S.2d 732, 2003 N.Y. App. Div. LEXIS 12406 (N.Y. App. Div. 4th Dep't 2003).

Where defendant, a juvenile, was found to have committed acts that constituted attempted second degree assault, N.Y. Penal Law §§ 110.00, 120.05(2), and fourth degree criminal possession of a weapon, N.Y. Penal Law § 265.01(2), the trial court, placing defendant in a limited secure facility for 18 months, carefully considered, pursuant to N.Y. Fam. Ct. Act § 352.2(2), the less restrictive alternatives to defendant's placement and properly balanced the needs of defendant and the need for the protection of the community, and its dispositional order was entitled to deference under N.Y. Fam. Ct. Act § 141. Matter of Carliph T., 26 A.D.3d 440, 808 N.Y.S.2d 909, 2006 N.Y. App. Div. LEXIS 2125 (N.Y. App. Div. 2d Dep't 2006).

Because the trial court erred in sentencing defendant to a five-year period of postrelease supervision under N.Y. Penal Law § 70.45(2) for second-degree assault under N.Y. Penal Law § 120.05(2), and in fixing the duration of an order of protection without taking into account the jail time credit to which defendant was entitled, defendant had to be resentenced. People v Clinkscales, 35 A.D.3d 1266, 825 N.Y.S.2d 395, 2006 N.Y. App. Div. LEXIS 15655 (N.Y. App. Div. 4th Dep't 2006).

57. —Consecutive sentences

Sentencing court had authority to impose consecutive sentences on defendant's conviction of 3 counts of second degree assault where each assault was separate act against different victim. People v Mullgrav, 137 A.D.2d 839, 525 N.Y.S.2d 302, 1988 N.Y. App. Div. LEXIS 2005 (N.Y. App. Div. 2d Dep't), app. denied, 71 N.Y.2d 1030, 530 N.Y.S.2d 566, 526 N.E.2d 58, 1988 N.Y. LEXIS 2325 (N.Y. 1988).

Court properly imposed consecutive sentences on defendant's' convictions for second degree murder and second degree assault arising out of incident in which defendant, to avoid police and while under influence of cocaine, drove at 70 to 100 miles per hour through narrow aperture between 2 rows of cars stopped at red light, hitting one or more cars, running over and killing pedestrian, and striking another car and injuring its driver, since there were 2 separate victims and there was no overlap in elements of crimes; although defendant hit both victims with car he was driving, there were nevertheless 2 separate "acts" for purposes of CLS Penal § 70.25(2), resulting in separate injuries. People v Shabaz, 173 A.D.2d 498, 569 N.Y.S.2d 971, 1991 N.Y. App. Div. LEXIS 7074 (N.Y. App. Div. 2d Dep't 1991), app. denied, 79 N.Y.2d 923, 582 N.Y.S.2d 83, 590 N.E.2d 1211 (N.Y. 1992).

It was improper to order that sentence for second degree weapon possession run consecutively to sentence imposed for second degree assault since possession of weapon was material element of assault charge. People v Crespo, 188 A.D.2d 483, 591 N.Y.S.2d 57, 1992 N.Y. App. Div. LEXIS 13597 (N.Y. App. Div. 2d Dep't 1992), app. denied, 81 N.Y.2d 883, 597 N.Y.S.2d 944, 613 N.E.2d 976, 1993 N.Y. LEXIS 1356 (N.Y. 1993).

Imposition of consecutive sentences for 2 second degree assault convictions was proper, even though assaults occurred during course of single extended transaction, since they were separate and distinct acts, in that defendant initially attacked police officer reading protective order, and attack on second officer occurred shortly thereafter as he attempted to effect defendant's arrest for attack on first officer. People v Fortuna, 188 A.D.2d 683, 591 N.Y.S.2d 212, 1992 N.Y. App. Div. LEXIS 13548 (N.Y. App. Div. 3d

Dep't 1992), app. denied, 81 N.Y.2d 839, 595 N.Y.S.2d 738, 611 N.E.2d 777, 1993 N.Y. LEXIS 854 (N.Y. 1993).

It was not improper to impose consecutive prison sentences on defendant's second degree assault convictions, even if there was continuous course of activity, where he was charged in count 3 with, and admitted to, intermittently assaulting his wife and causing her physical injury by striking, kicking, and biting her between May 13, 1994 and May 16, 1994, and as to count 4 he admitted on May 14, 1994 he also assaulted his wife with dangerous instrument causing her physical injury. People v Harris, 235 A.D.2d 941, 653 N.Y.S.2d 403, 1997 N.Y. App. Div. LEXIS 777 (N.Y. App. Div. 3d Dep't 1997).

Imposition of consecutive sentences of 7 years and 1 ½ to 3 years for second degree robbery and attempted second degree assault was not excessive where convictions arose out of 2 separate incidents, and sentences were imposed in accordance with plea agreement under which defendant was permitted to plead to lesser crimes and separate charge against him was dropped. People v Cross, 242 A.D.2d 803, 661 N.Y.S.2d 877, 1997 N.Y. App. Div. LEXIS 8659 (N.Y. App. Div. 3d Dep't), app. denied, 91 N.Y.2d 833, 667 N.Y.S.2d 687, 690 N.E.2d 496, 1997 N.Y. LEXIS 4314 (N.Y. 1997).

Imposition of consecutive indeterminate prison terms for 2 counts of attempted aggravated assault on police officer was improper and would be modified to make terms run concurrently. People v Morales, 245 A.D.2d 530, 666 N.Y.S.2d 34, 1997 N.Y. App. Div. LEXIS 13230 (N.Y. App. Div. 2d Dep't 1997), app. denied, 91 N.Y.2d 943, 671 N.Y.S.2d 723, 694 N.E.2d 892, 1998 N.Y. LEXIS 1183 (N.Y. 1998).

Defendant was properly sentenced to consecutive terms for first and second degree assault where he fired several shots into car, and there was no claim that same shot injured both victims. People v Saulters, 255 A.D.2d 896, 682 N.Y.S.2d 740, 1998 N.Y. App. Div. LEXIS 12085 (N.Y. App. Div. 4th Dep't), app. denied, 92 N.Y.2d 1038, 684 N.Y.S.2d 503, 707 N.E.2d 458, 1998 N.Y. LEXIS 4768 (N.Y. 1998).

Court lawfully imposed consecutive sentences for defendant's separate and distinct acts of assault, rape, and sodomy where his assault on victim by cutting her face with broken bottle as she tried to evade him, causing permanent disfigurement, was completed before subsequent rape and sodomy, which were perpetrated by means of other acts of forcible compulsion, and original assault was not material element of those crimes. People v Williams, 262 A.D.2d 19, 690 N.Y.S.2d 594, 1999 N.Y. App. Div. LEXIS 6135 (N.Y. App. Div. 1st Dep't), app. denied, 94 N.Y.2d 831, 702 N.Y.S.2d 602, 724 N.E.2d 394, 1999 N.Y. LEXIS 4359 (N.Y. 1999).

Article 78 proceeding to amend inmate's correctional records to reflect that his 1983 sentence for attempted second degree assault had expired and that he was currently serving only his 1965 sentence for second degree murder was properly dismissed for failure to state cause of action where (1) defendant's 2 sentences ran consecutively, and thus, under CLS Penal § 70.25(2-a), he was still subject to 1983 conviction, (2) sentencing court's calculation of defendant's term was consistent with CLS Penal § 70.30(1)(b), and (3) § 70.30(1)(b) was in effect before defendant's 1983 conviction and thus did not violate ex post facto clause. Cook v Goord, 275 A.D.2d 819, 713 N.Y.S.2d 507, 2000 N.Y. App. Div. LEXIS 9189 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 769, 722 N.Y.S.2d 472, 745 N.E.2d 392, 2000 N.Y. LEXIS 3837 (N.Y. 2000).

Sentence for second degree murder was properly ordered to run consecutively to sentence for attempted murder and second degree assault on evidence that defendant's first shot killed first victim and slightly wounded second, and that defendant then moved closer and shot second victim again, causing serious injury. People v Figueroa, 279 A.D.2d 357, 719 N.Y.S.2d 249, 2001 N.Y. App. Div. LEXIS 413 (N.Y. App. Div. 1st Dep't), app. denied, 96 N.Y.2d 783, 725 N.Y.S.2d 647, 749 N.E.2d 216, 2001 N.Y. LEXIS 1195 (N.Y. 2001).

It was not illegal to impose consecutive sentences on defendant's convictions of third degree weapon possession and second degree assault where weapon charge was complete when defendant drew knife in apparent attempt to intimidate and threaten victim, and only after defendant chased victim and struggled with him over knife did defendant stab victim, causing serious physical injury. People v Porter, 284 A.D.2d 931, 725 N.Y.S.2d 909, 2001 N.Y. App. Div. LEXIS 5882 (N.Y. App. Div. 4th Dep't), app. denied, 96 N.Y.2d 906, 730 N.Y.S.2d 804, 756 N.E.2d 92, 2001 N.Y. LEXIS 2905 (N.Y. 2001).

Sentence to consecutive prison terms of 8 to 16 years for first degree manslaughter and 2 to 6 years for second degree assault where not excessive where those crimes involved separate and distinct acts and were violent, resulting in death of one victim and injury to the other. People v Carter, 286 A.D.2d 773, 730 N.Y.S.2d 733, 2001 N.Y. App. Div. LEXIS 8692 (N.Y. App. Div. 2d Dep't), app. denied, 97 N.Y.2d 655, 737 N.Y.S.2d 56, 762 N.E.2d 934, 2001 N.Y. LEXIS 4198 (N.Y. 2001).

Imposition of consecutive sentences on convictions of second degree assault and first degree attempted escape was error; the jury convicted defendant of assault for causing physical injury to a police officer with intent to prevent her from performing a lawful duty, and defendant was found guilty of attempted escape for, after having been arrested for a class B felony, attempting escape from custody. Inasmuch as the "attempt to escape from custody" and the "intent to prevent a police officer from performing a lawful duty" described essentially the same act, the charges necessarily involved the same material element. People v Johnson, 33 A.D.3d 939, 826 N.Y.S.2d 295, 2006 N.Y. App. Div. LEXIS 12737 (N.Y. App. Div. 2d Dep't), app. denied, 7 N.Y.3d 925, 827 N.Y.S.2d 694, 2006 N.Y. LEXIS 4099 (N.Y. 2006).

Consecutive prison terms were improper for second degree murder and second degree assault convictions under circumstances in which the decedent was shot five times, five shell casings were found at the scene, there was no evidence that the decedent and the complainant were hit by different bullets, and nothing indicated that more than five bullets were involved; thus, defendant's acts were not separate and distinct. People v Jones, 41 A.D.3d 507, 838 N.Y.S.2d 126, 2007 N.Y. App. Div. LEXIS 6863 (N.Y. App. Div. 2d Dep't), app. denied, 9 N.Y.3d 877, 842 N.Y.S.2d 789, 874 N.E.2d 756, 2007 N.Y. LEXIS 3053 (N.Y. 2007).

Defendant convicted of second degree assault committed inside prison facility under CLS Penal § 120.05(7) could be given sentence to run consecutive to sentence not yet imposed for previously committed crime of attempted first degree rape. People v Smith, 171 Misc. 2d 804, 655 N.Y.S.2d 819, 1997 N.Y. Misc. LEXIS 70 (N.Y. Sup. Ct. 1997).

Conviction under CLS Penal § 120.05(7) for assault committed inside prison facility presumptively requires imposition of consecutive sentence. People v Smith, 171 Misc. 2d 804, 655 N.Y.S.2d 819, 1997 N.Y. Misc. LEXIS 70 (N.Y. Sup. Ct. 1997).

Plea negotiations between the state and defendant, convicted of a violation of N.Y. Penal Law § 120.05, had a starting point of statutorily known components: a "D" violent felony which would confer, upon conviction, a "predicate felon" status, and a concomitant statutorily directed component of consecutive sentencing pursuant to N.Y. Penal Law § 70.25(5)(a) and both sides accepted and benefitted from the negotiated disposition agreed to and approved by and in the discretion of the court; defendant's motion pursuant to N.Y. Crim. Proc. Law § 440.20(1) to set aside his sentence was denied. People v Pena, 196 Misc. 2d 489, 764 N.Y.S.2d 501, 2003 N.Y. Misc. LEXIS 828 (N.Y. Sup. Ct.), aff'd, 309 A.D.2d 687, 766 N.Y.S.2d 196, 2003 N.Y. App. Div. LEXIS 11275 (N.Y. App. Div. 1st Dep't 2003).

Kidnapping in the second degree involves abducting another person, while assault in the second degree involves causing physical injury by means of a deadly weapon or dangerous instrument with the intent to cause such injury. Thus, the trial court legally imposed consecutive sentences because the crimes involved separate and distinct actions. People v Richard, 30 A.D.3d 750, 817 N.Y.S.2d 698, 2006 N.Y. App. Div. LEXIS 7939 (N.Y. App. Div. 3d Dep't), app. denied, 7 N.Y.3d 869, 824 N.Y.S.2d 614, 857 N.E.2d 1145, 2006 N.Y. LEXIS 3847 (N.Y. 2006).

Consecutive sentences were authorized and justified for convictions of attempted assault in the second degree and criminal contempt in the first degree given that defendant's crimes were distinct and arose from separate acts; notably, defendant was not so intoxicated as to be unable to form the requisite intent and,

after the assault, had ample opportunity to reflect on the consequences of his violent actions and to decide not to engage in further criminal behavior but, instead, embarked on a separate criminal course. People v Audi, 88 A.D.3d 1070, 931 N.Y.S.2d 418, 2011 N.Y. App. Div. LEXIS 7208 (N.Y. App. Div. 3d Dep't), app. denied, 18 N.Y.3d 856, 938 N.Y.S.2d 864, 962 N.E.2d 289, 2011 N.Y. LEXIS 3815 (N.Y. 2011).

As defendant's second-degree assault conviction was based on his forcing a baby wipe into a child's mouth—the same act that led to defendant's first-degree assault conviction—his sentence had to be modified because these convictions did not involve separate and distinct acts allowing imposition of consecutive sentences. People v Ciccone, 90 A.D.3d 1141, 934 N.Y.S.2d 563, 2011 N.Y. App. Div. LEXIS 8676 (N.Y. App. Div. 3d Dep't 2011), app. denied, 19 N.Y.3d 863, 947 N.Y.S.2d 411, 970 N.E.2d 434, 2012 N.Y. LEXIS 1727 (N.Y. 2012).

58. —Concurrent sentences

Sentence of concurrent prison terms of 12 ½ to 25 years on first degree rape and first degree sodomy convictions and 3 ½ to 7 years on second degree assault conviction was not excessive, in view of defendant's outrageous conduct, where defendant struck victim on head with hammer and then forcibly raped and repeatedly sodomized her. People v Butler, 132 A.D.2d 771, 517 N.Y.S.2d 580, 1987 N.Y. App. Div. LEXIS 49285 (N.Y. App. Div. 3d Dep't), app. denied, 70 N.Y.2d 873, 523 N.Y.S.2d 500, 518 N.E.2d 11, 1987 N.Y. LEXIS 19112 (N.Y. 1987).

It was not excessive to impose concurrent sentences of $8^1/_3$ to 25 years on each of defendant's convictions for first degree burglary and robbery and $2^1/_3$ to 7 years on his second degree assault conviction in light of defendant's lengthy criminal history and violent nature of crimes. People v Collins, 136 A.D.2d 720, 523 N.Y.S.2d 1018, 1988 N.Y. App. Div. LEXIS 883 (N.Y. App. Div. 2d Dep't), app. denied, 71 N.Y.2d 894, 527 N.Y.S.2d 1003, 523 N.E.2d 310, 1988 N.Y. LEXIS 1358 (N.Y. 1988).

Sentences of one year imprisonment for second degree criminal trespass, 3 to 6 years each for second degree assault and attempted first degree assault, and 10 to 20 years for first degree burglary, all running concurrently, were not excessive considering defendant's previous felony conviction and circumstances of crimes, in which defendant broke down locked door of his former girlfriend's apartment, threw her to floor, choked her, and stabbed her. People v Neer, 136 A.D.2d 801, 523 N.Y.S.2d 630, 1988 N.Y. App. Div. LEXIS 305 (N.Y. App. Div. 3d Dep't 1988).

It was neither harsh nor excessive to sentence defendant to 6 months' imprisonment, to run concurrently with and as condition of 5 years' probation, conditioned upon performance of 400 hours of community service, notwithstanding his cooperative efforts with law enforcement officials, his remorsefulness, and his limited role in attack, where defendant's conviction on his guilty plea to second degree assault arose from his involvement in brutal, racially-motivated attack on 3 black men, one of whom died while attempting to flee. People v Riley, 152 A.D.2d 757, 545 N.Y.S.2d 37, 1989 N.Y. App. Div. LEXIS 10642 (N.Y. App. Div. 2d Dep't 1989).

Defendant's sentence for second degree assault should have been made to run concurrently with his sentences for rape and sodomy since his conviction on assault charge was predicated on same acts which gave rise to his convictions for rape and sodomy. People v Cropper, 202 A.D.2d 603, 609 N.Y.S.2d 288, 1994 N.Y. App. Div. LEXIS 2623 (N.Y. App. Div. 2d Dep't), app. denied, 84 N.Y.2d 824, 617 N.Y.S.2d 144, 641 N.E.2d 165, 1994 N.Y. LEXIS 3562 (N.Y. 1994).

It was error to impose consecutive sentences on defendant's convictions for second degree assault and first degree burglary where same conduct which resulted in conviction for assaults established that he used dangerous instrument to commit burglary. People v Plater, 235 A.D.2d 597, 652 N.Y.S.2d 636, 1997 N.Y. App. Div. LEXIS 7 (N.Y. App. Div. 3d Dep't), app. denied, 89 N.Y.2d 1039, 659 N.Y.S.2d 870, 681 N.E.2d 1317, 1997 N.Y. LEXIS 1716 (N.Y. 1997).

Court should have made prison terms imposed on second degree assault conviction run concurrently with prison terms imposed on first degree kidnapping convictions where convictions were based on offenses committed through single act. People v Jian Hong Lin, 267 A.D.2d 249, 701 N.Y.S.2d 77, 1999 N.Y. App. Div. LEXIS 12626 (N.Y. App. Div. 2d Dep't 1999), app. denied, 94 N.Y.2d 949, 710 N.Y.S.2d 5, 731 N.E.2d 622, 2000 N.Y. LEXIS 1527 (N.Y. 2000).

Court improperly denied defendant's motion under CLS CPL § 440.20 to modify sentence to provide that consecutive prison term imposed on conviction of aggravated criminal contempt should run concurrently with prison terms imposed on convictions of attempted second degree assault and third degree weapon possession where intent to cause physical injury was material element of aggravated criminal contempt and attempted second degree assault, those crimes arose out of single incident, and court imposed concurrent prison terms on convictions of third degree weapon possession and attempted second degree assault. People v Dickens, 269 A.D.2d 463, 702 N.Y.S.2d 925, 2000 N.Y. App. Div. LEXIS 1398 (N.Y. App. Div. 2d Dep't), app. denied, 95 N.Y.2d 852, 714 N.Y.S.2d 3, 736 N.E.2d 864, 2000 N.Y. LEXIS 2614 (N.Y. 2000).

Judgment would be modified by providing that prison terms run concurrently where there was no evidence that first degree burglary offense involved disparate or separate acts from first and second degree assault offenses. People v Gabbidon, 272 A.D.2d 411, 707 N.Y.S.2d 901, 2000 N.Y. App. Div. LEXIS 5041 (N.Y. App. Div. 2d Dep't), app. denied, 95 N.Y.2d 835, 713 N.Y.S.2d 141, 735 N.E.2d 421, 2000 N.Y. LEXIS 2431 (N.Y. 2000).

Judgment would be modified to provide that sentence for second degree assault would run concurrently, rather than consecutively, with concurrent sentences for second degree murder and third degree weapon possession where murder was underlying felony for assault count. People v Williams, 275 A.D.2d 967, 713 N.Y.S.2d 422, 2000 N.Y. App. Div. LEXIS 9645 (N.Y. App. Div. 4th Dep't 2000).

59. —Predicate felony

The trial court improperly sentenced defendant who had been convicted of assault in the second degree, as a predicate felon where the predicate felony was a federal conviction for a crime which would not have constituted a felony in New York. In determining whether an out-of-state conviction is cognizable as a felony in New York, the statute upon which the indictment was drawn necessarily defines and measures the crime. People v Martin, 81 A.D.2d 765, 439 N.Y.S.2d 111, 1981 N.Y. App. Div. LEXIS 11401 (N.Y. App. Div. 1st Dep't 1981).

Sentence of 3 ½ to 7 years for second degree assault would be reduced, in interest of justice, to $2^1/_3$ to 7 years where Appellate Division vacated defendant's adjudication as second felony offender. People v Robles, 251 A.D.2d 20, 673 N.Y.S.2d 654, 1998 N.Y. App. Div. LEXIS 6397 (N.Y. App. Div. 1st Dep't), app. denied, 92 N.Y.2d 904, 680 N.Y.S.2d 68, 702 N.E.2d 853, 1998 N.Y. LEXIS 3562 (N.Y. 1998).

In prosecution for attempted second degree murder, first degree rape, first degree sodomy, and first and second degree assault, defendant was entitled to hearing on his motion to set aside his sentence where (1) he was sentenced as second felony offender based on Vermont conviction of sexual assault, (2) he asserted that he was only 19 and that victim was only 15 at time of that offense, (3) his acts in Vermont would have been misdemeanor of sexual misconduct in New York and thus could not be predicate felony under CLS Penal § 70.06, (4) although Vermont plea sheet did not contain age of victim, prosecution did not offer any evidence to refute defendant's claim, and (5) defendant's trial counsel neither investigated issue nor contested defendant's status as second felony offender. People v Perron, 273 A.D.2d 549, 710 N.Y.S.2d 134, 2000 N.Y. App. Div. LEXIS 6669 (N.Y. App. Div. 3d Dep't 2000).

Defendant was properly sentenced for attempted assault in the second degree, a violation of N.Y. Penal Law §§ 110.00, 120.05(7), as a second felony offender because, excluding defendant's intervening periods of incarceration, defendant's 1989 conviction of assault in the second degree occurred within the 10-year period preceding the September 2000, commission of the attempted assault, and, thus, the prior assault was properly considered as a predicate felony under N.Y. Penal Law § 70.06(1)(b)(iv). People v

Gannon, 301 A.D.2d 873, 754 N.Y.S.2d 107, 2003 N.Y. App. Div. LEXIS 380 (N.Y. App. Div. 3d Dep't 2003).

60. —Sentence found excessive

Defendant's sentence of 2 to 4 years' imprisonment for attempted second degree assault should be reduced to 1 ½ to 3 years where court was incorrectly informed that offense was violent felony offense and it was clear that greater sentence was imposed only due to such misinformation. People v King, 148 A.D.2d 382, 540 N.Y.S.2d 168, 1989 N.Y. App. Div. LEXIS 3853 (N.Y. App. Div. 1st Dep't), app. denied, 74 N.Y.2d 742, 545 N.Y.S.2d 116, 543 N.E.2d 759, 1989 N.Y. LEXIS 2529 (N.Y. 1989).

Sentence of 3 to 9 years for class D felony of second degree assault was unlawful and would be reduced to $2^1/_3$ to 7 years. People v Vukel, 263 A.D.2d 416, 695 N.Y.S.2d 73, 1999 N.Y. App. Div. LEXIS 8241 (N.Y. App. Div. 1st Dep't), app. denied, 94 N.Y.2d 830, 702 N.Y.S.2d 601, 724 N.E.2d 393, 1999 N.Y. LEXIS 4350 (N.Y. 1999), app. denied sub. nom., People v Vokel, 94 N.Y.2d 830, 702 N.Y.S.2d 601, 724 N.E.2d 393, 1999 N.Y. LEXIS 4779 (N.Y. 1999), overruled in part, People v Wells, 24 N.Y.3d 971, 996 N.Y.S.2d 569, 21 N.E.3d 198, 2014 N.Y. LEXIS 2820 (N.Y. 2014).

Where defendant was convicted of 6 counts of second degree assault and one count of second degree attempted assault for causing injury to 4 correction officers as they were attempting to move him from keeplock cell, 14- to 28-year prison sentence resulting from imposition of consecutive sentences, while not illegal, would be modified to impose concurrent terms on 3 counts, yielding cumulative total sentence of 7 to 14 years, where melee at issue was resolved within minutes and no correction officer sustained injuries more serious that bruises and contusions. People v Harmon, 264 A.D.2d 941, 695 N.Y.S.2d 758, 1999 N.Y. App. Div. LEXIS 9553 (N.Y. App. Div. 3d Dep't 1999).

Defendant's sentence would be vacated, and case would be remitted for either imposition of promised sentence or opportunity for defendant to withdraw his plea, where he pleaded guilty to second degree assault with understanding that he would be sentenced as second felony offender to incarceration for 3 years, and court imposed that sentence but further ordered him to pay restitution of $1,664.52. People v Austin, 275 A.D.2d 913, 715 N.Y.S.2d 173, 2000 N.Y. App. Div. LEXIS 9697 (N.Y. App. Div. 4th Dep't 2000).

Sentence for second degree assault would be modified from determinate term of 7 years to indeterminate term of 3 ½ to 7 years where original sentence was illegal under CLS Penal § 70.00(2) and (3)(b), and it was clear that sentencing court had intended to impose maximum sentence for that offense. People v Santiago, 281 A.D.2d 566, 721 N.Y.S.2d 832, 2001 N.Y. App. Div. LEXIS 2604 (N.Y. App. Div. 2d Dep't), app. denied, 96 N.Y.2d 867, 730 N.Y.S.2d 42, 754 N.E.2d 1125, 2001 N.Y. LEXIS 2637 (N.Y. 2001).

Sentence of 5 years in prison with mandatory 1 ½ years of postrelease supervision for second degree assault was unduly severe and would be reduced to statutory minimum term of 2 years where defendant had virtually no criminal record and no history of violent conduct, and he was hard-working person who was extensively involved in his community. People v Coleman, 281 A.D.2d 653, 721 N.Y.S.2d 160, 2001 N.Y. App. Div. LEXIS 2024 (N.Y. App. Div. 3d Dep't 2001).

61. —Sentence found not excessive

Sentence of two years and four months to seven years' imprisonment imposed upon conviction for crime of assault in the second degree arising out of a knife attack was not excessive. People v Zimmer, 49 A.D.2d 792, 372 N.Y.S.2d 747, 1975 N.Y. App. Div. LEXIS 10840 (N.Y. App. Div. 3d Dep't 1975).

Indefinite sentence of imprisonment for a maximum term of five years for second-degree assault offense involving biting off of an ear was not excessive. People v Dingley, 50 A.D.2d 361, 378 N.Y.S.2d 90, 1976 N.Y. App. Div. LEXIS 10629 (N.Y. App. Div. 3d Dep't 1976), rev'd, 42 N.Y.2d 888, 397 N.Y.S.2d 789, 366 N.E.2d 877, 1977 N.Y. LEXIS 2226 (N.Y. 1977).

Sentence to an indeterminate term of not more than three years, for assault in the second degree, was not excessive. People v Dean, 51 A.D.2d 612, 378 N.Y.S.2d 115, 1976 N.Y. App. Div. LEXIS 10937 (N.Y. App. Div. 3d Dep't), app. denied, 39 N.Y.2d 748, 1976 N.Y. LEXIS 3623 (N.Y. 1976).

It was not abuse of discretion to impose maximum sentence for second degree assault where defendant had criminal record and particularly heinous crime was involved; fact that sentence imposed was greater than that offered as part of plea bargain did not automatically establish that court improperly increased defendant's punishment solely for asserting his right to trial. People v Durkin, 132 A.D.2d 668, 518 N.Y.S.2d 38, 1987 N.Y. App. Div. LEXIS 49214 (N.Y. App. Div. 2d Dep't), app. denied, 70 N.Y.2d 799, 522 N.Y.S.2d 116, 516 N.E.2d 1229, 1987 N.Y. LEXIS 19429 (N.Y. 1987), app. denied, 70 N.Y.2d 799, 522 N.Y.S.2d 116, 516 N.E.2d 1230, 1987 N.Y. LEXIS 19433 (N.Y. 1987).

Sentencing of defendant to maximum prison sentence for burglary in second degree, attempted assault in second degree, and criminal possession of weapon in fourth degree was not abuse of discretion, notwithstanding defendant's contention that sentence was exacerbated because of factual misstatements and intemperate comments by prosecution, in light of (1) fact that defendant's claims were unsupported by record, and (2) seriousness of crimes, which involved burglarizing home of elderly woman and attempted assault upon police officer. People v Shaffer, 144 A.D.2d 182, 534 N.Y.S.2d 500, 1988 N.Y. App. Div. LEXIS 10329 (N.Y. App. Div. 3d Dep't 1988).

Sentence of 3 to 6 years' imprisonment on defendant's guilty plea to second degree assault was not harsh and excessive where, on pleading guilty, he was informed that he could receive maximum term of 7 years, crime stemmed from incident in which he pushed his girlfriend off porch railing, causing her to break her spinal column and to injure her spinal cord, and he had extensive criminal record including another assault conviction. People v Cummings, 172 A.D.2d 886, 568 N.Y.S.2d 185, 1991 N.Y. App. Div. LEXIS 4214 (N.Y. App. Div. 3d Dep't), app. denied, 78 N.Y.2d 1075, 577 N.Y.S.2d 238, 583 N.E.2d 950, 1991 N.Y. LEXIS 5239 (N.Y. 1991).

It was not excessive to impose prison term of 1 ½ to 4 ½ years on defendant's conviction of second degree assault where he had lengthy criminal history, and incident involved violent act against his wife in presence of his 3 young children. People v Soares, 224 A.D.2d 830, 638 N.Y.S.2d 366, 1996 N.Y. App. Div. LEXIS 1265 (N.Y. App. Div. 3d Dep't 1996).

Determinate prison term of 5 ½ years was not excessive on conviction based on guilty plea to second degree assault where charges resulted from incident in which victim lost eye after defendant hit him with broken glass, and defendant had lengthy criminal history. People v Beha, 241 A.D.2d 572, 659 N.Y.S.2d 558, 1997 N.Y. App. Div. LEXIS 7235 (N.Y. App. Div. 3d Dep't 1997).

Court properly imposed harshest permissible aggregate sentence of 10 ½ to 21 years for first and second degree assault and first degree reckless endangerment where those crimes involved multiple, brutal assaults on helpless newborn infant. People v Persons, 245 A.D.2d 845, 666 N.Y.S.2d 773, 1997 N.Y. App. Div. LEXIS 13196 (N.Y. App. Div. 3d Dep't 1997).

Sentence of 3 ½ to 7 years for second degree assault as second felony offender was not excessive where defendant stabbed victim with knife, causing 4-inch laceration to victim's abdomen, defendant had extensive criminal history, he committed present crime while on parole, sentence was in accordance with plea agreement and statutory parameters, and there were no extraordinary circumstances warranting reduction in interest of justice. People v Lamica, 245 A.D.2d 897, 666 N.Y.S.2d 52, 1997 N.Y. App. Div. LEXIS 13603 (N.Y. App. Div. 3d Dep't 1997), app. denied, 91 N.Y.2d 942, 671 N.Y.S.2d 722, 694 N.E.2d 891, 1998 N.Y. LEXIS 1150 (N.Y. 1998).

Sentence of 2 to 4 years for second degree assault was not excessive, and would not be reduced in interest of justice, where defendant pleaded guilty to that charge in full satisfaction of 3-count indictment, thus significantly reducing his sentence exposure. People v Hicks, 245 A.D.2d 979, 667 N.Y.S.2d 130, 1997 N.Y. App. Div. LEXIS 13568 (N.Y. App. Div. 3d Dep't 1997).

Sentence to 2 concurrent prison terms of $1^1/_3$ to 4 years for attempted second degree assault and attempted third degree weapon possession was not excessive where defendant had long

criminal history, and sentence was agreed to and was not harshest one possible. People v Green, 255 A.D.2d 833, 681 N.Y.S.2d 795, 1998 N.Y. App. Div. LEXIS 12766 (N.Y. App. Div. 3d Dep't 1998), app. denied, 93 N.Y.2d 971, 695 N.Y.S.2d 57, 716 N.E.2d 1102, 1999 N.Y. LEXIS 2500 (N.Y. 1999).

It was not excessive to sentence defendant to negotiated concurrent terms of one to 3 years for second degree assault and 2 to 6 years for fifth degree possession of controlled substance in light of his prior criminal history and nature of crimes. People v Whittaker, 257 A.D.2d 854, 685 N.Y.S.2d 130, 1999 N.Y. App. Div. LEXIS 527 (N.Y. App. Div. 3d Dep't), app. denied, 93 N.Y.2d 880, 689 N.Y.S.2d 442, 711 N.E.2d 656, 1999 N.Y. LEXIS 1118 (N.Y. 1999).

Three year sentence was not excessive for inmate who pleaded guilty to second degree assault in connection with altercation involving 2 correction officers considering seriousness of crime and fact that he was sentenced in accordance with plea agreement to lightest sentence allowed by statute. People v Depta, 257 A.D.2d 916, 682 N.Y.S.2d 648, 1999 N.Y. App. Div. LEXIS 762 (N.Y. App. Div. 3d Dep't), app. denied, 93 N.Y.2d 923, 693 N.Y.S.2d 507, 715 N.E.2d 510, 1999 N.Y. LEXIS 1639 (N.Y. 1999).

Sentence to concurrent prison terms of 3 to 6 years for second degree assault, 3 ½ to 7 years for second degree weapon possession, and one year for fourth degree possession of marijuana was not excessive where sentence was less than harshest allowed, and there was no manifestation that court abused its discretion or that extraordinary circumstances warranted modification. People v Hart, 266 A.D.2d 584, 698 N.Y.S.2d 72, 1999 N.Y. App. Div. LEXIS 11214 (N.Y. App. Div. 3d Dep't 1999), app. denied, 94 N.Y.2d 903, 707 N.Y.S.2d 388, 728 N.E.2d 987, 2000 N.Y. LEXIS 697 (N.Y. 2000).

Sentence of 7 years for second degree assault was not excessive, even though it was maximum sentence for second felony offender, where plea agreement included prosecution's dropping of first degree reckless endangerment count and not pursuing persistent felony offender status. People v Williams, 266 A.D.2d 647, 698 N.Y.S.2d 347, 1999 N.Y. App. Div. LEXIS 11410 (N.Y. App. Div. 3d Dep't 1999), app. denied, 94 N.Y.2d 886, 705 N.Y.S.2d 19, 726 N.E.2d 496, 2000 N.Y. LEXIS 490 (N.Y. 2000).

Sentences of 7 years in prison and fine of $5,000 for second degree assault and one year in jail and fine of $1,000 for child endangerment were not excessive where they were in accordance with favorable plea bargain, defendant had criminal history, and there were no extraordinary circumstances warranting modification. People v Schultz, 273 A.D.2d 508, 709 N.Y.S.2d 456, 2000 N.Y. App. Div. LEXIS 6431 (N.Y. App. Div. 3d Dep't 2000).

Seven-year sentence on second degree assault conviction of inmate who attacked prison disciplinary hearing officer was not harsh or excessive since in fell within statutory limits for second violent felony offender, and defendant had extensive criminal record with propensity for violent behavior while incarcerated. People v Bernier, 279 A.D.2d 701, 719 N.Y.S.2d 186, 2001 N.Y. App. Div. LEXIS 287 (N.Y. App. Div. 3d Dep't), app. denied, 96 N.Y.2d 797, 726 N.Y.S.2d 375, 750 N.E.2d 77, 2001 N.Y. LEXIS 1536 (N.Y. 2001).

Concurrent prison sentences of 7 years for second degree assault, 12 years for second degree weapon possession, and 3 ½ to 7 years for reckless endangerment would not be disturbed where defendant, who had prior criminal record, shot victim in foot and failed to identify any extraordinary circumstances warranting modification. People v Rivera, 281 A.D.2d 702, 721 N.Y.S.2d 429, 2001 N.Y. App. Div. LEXIS 2294 (N.Y. App. Div. 3d Dep't), app. denied, 96 N.Y.2d 805, 726 N.Y.S.2d 383, 750 N.E.2d 85, 2001 N.Y. LEXIS 1735 (N.Y. 2001).

Sentence to consecutive prison terms of 8 to 16 years for first degree manslaughter and 2 to 6 years for second degree assault where not excessive where those crimes involved separate and distinct acts and were violent, resulting in death of one victim and injury to the other. People v Carter, 286 A.D.2d 773, 730 N.Y.S.2d 733, 2001 N.Y. App. Div. LEXIS 8692 (N.Y. App. Div. 2d Dep't), app. denied, 97 N.Y.2d 655, 737 N.Y.S.2d 56, 762 N.E.2d 934, 2001 N.Y. LEXIS 4198 (N.Y. 2001).

Appellate court was not persuaded to exercise its interest of justice jurisdiction to reduce defendant's sentence of 15 years for gang assault in the second degree and assault in the second degree in association with the beating death of someone accused of sexually assaulting children. While defendant received the maximum aggregate sentence as a second felony offender, and he only had one predicate felony, a low level drug possession, the evidence demonstrated that he initiated the highly-charged and ultimately fatal group confrontation of the victim. People v Smith, 89 A.D.3d 1126, 933 N.Y.S.2d 413, 2011 N.Y. App. Div. LEXIS 7575 (N.Y. App. Div. 3d Dep't 2011), app. denied, 18 N.Y.3d 962, 944 N.Y.S.2d 491, 967 N.E.2d 716, 2012 N.Y. LEXIS 1155 (N.Y. 2012).

Sentence of an aggregate prison term of 10 ½ years with 6 years of postrelease supervision was neither harsh nor excessive for two counts of assault in the second degree; defendant's claim that the sentence was imposed in retaliation for his rejection of a plea offer was both unpreserved and unsupported. In view of the brutal nature of defendant's conduct and his failure to express remorse for its devastating consequences to the victim, there was no abuse of discretion or extraordinary circumstances warranting reduction. People v Ingram, 95 A.D.3d 1376, 943 N.Y.S.2d 311, 2012 N.Y. App. Div. LEXIS 3483 (N.Y. App. Div. 3d Dep't), app. denied, 19 N.Y.3d 974, 950 N.Y.S.2d 357, 973 N.E.2d 767, 2012 N.Y. LEXIS 2539 (N.Y. 2012).

Defendant's conviction of assault in the second degree, N.Y. Penal Law § 120.05, was affirmed; defendant failed to preserve for review a claim that his guilty plea was involuntary, and the trial court thoroughly explained the plea and defendant acknowledged the abandonment of his rights, and based on defendant's extensive criminal record, there was no basis to disturb the sentence imposed. People v Urbina, 1 A.D.3d 717, 766 N.Y.S.2d 640, 2003 N.Y. App. Div. LEXIS 11712 (N.Y. App. Div. 3d Dep't 2003), app. denied, 1 N.Y.3d 602, 776 N.Y.S.2d 233, 808 N.E.2d 369, 2004 N.Y. LEXIS 450 (N.Y. 2004).

Defendant's three-year sentence for assault in the second degree was not unconstitutionally disproportionate to the crimes committed. People v Ellis, 8 A.D.3d 826, 778 N.Y.S.2d 555, 2004 N.Y. App. Div. LEXIS 8587 (N.Y. App. Div. 3d Dep't), app. denied, 3 N.Y.3d 673, 784 N.Y.S.2d 12, 817 N.E.2d 830, 2004 N.Y. LEXIS 3697 (N.Y. 2004).

Where defendant was convicted of attempted robbery in the second-degree and assault in the second-degree, a sentence of concurrent prison terms of seven years followed by three years of postrelease supervision was not harsh or excessive, as he attacked an elderly woman suffering from dementia and expressed no remorse, and he had an extensive criminal history; there were no extraordinary circumstances or an abuse of discretion that would warrant a reduction of the sentence in the interest of justice. People v Cole, 150 A.D.3d 1476, 52 N.Y.S.3d 744, 2017 N.Y. App. Div. LEXIS 3921 (N.Y. App. Div. 3d Dep't 2017), app. denied, 31 N.Y.3d 1146, 108 N.E.3d 502, 83 N.Y.S.3d 428, 2018 N.Y. LEXIS 2234 (N.Y. 2018).

II. Former law

62. Under former § 2

Because assault in the second degree may be "punishable" by imprisonment in a state prison, it is a felony, even though the offense may also be punishable by imprisonment in a penitentiary. People v Field, 15 N.Y.S.2d 561, 1939 N.Y. Misc. LEXIS 2431 (N.Y. City Ct. 1939).

63. Under former § 242

The common-law distinction between aggravated assaults and simple assaults is carried out by the article, §§ 240 and 242 dealing aggravated assaults which require a felonious intent, and § 244 dealing with simple assault. People v Katz, 290 N.Y. 361, 49 N.E.2d 482, 290 N.Y. (N.Y.S.) 361, 1943 N.Y. LEXIS 1089 (N.Y. 1943).

Under subd. 3 of this section, guilt is attached to willful and wrongful wounding or infliction of grievous bodily harm upon the person of another, with or without a weapon. People v Alexander, 42 Misc. 2d 927, 249 N.Y.S.2d 275, 1964 N.Y. Misc. LEXIS 1822 (N.Y. Sup. Ct. 1964), aff'd, 24 A.D.2d 934, 264 N.Y.S.2d 1010, 1965 N.Y. App. Div. LEXIS 6346 (N.Y. App. Div. 2d Dep't 1965).

64. —Intent

Where defendant, under arrest for drunkenness, obtained possession of the holstered pistol of an officer while being taken to

a magistrate, and the officer was shot in attempting to recover the pistol, the defendant was improperly found guilty of assault in the second degree since the intent to inflict bodily harm was lacking. People v Osinski, 281 N.Y. 129, 22 N.E.2d 311, 281 N.Y. (N.Y.S.) 129, 1939 N.Y. LEXIS 989 (N.Y. 1939).

That part of § 242 which declares guilty of assault in second degree a person who "3. Wilfully and wrongfully wounds or inflicts grievous bodily harm upon another," requires specific intent to inflict grievous bodily harm and failure of trial judge to reiterate its necessity constitutes reversible error. People v Katz, 290 N.Y. 361, 49 N.E.2d 482, 290 N.Y. (N.Y.S.) 361, 1943 N.Y. LEXIS 1089 (N.Y. 1943).

Where a defendant is charged with assault in the second degree and admits that he severely injured the complaining witness but insists that he was acting in self-defense, he can properly be convicted of the lesser offense of third-degree assault if the jury finds that, although he committed an assault, it was not intended to cause the degree of injury actually inflicted. People v Lindsey, 12 N.Y.2d 421, 240 N.Y.S.2d 441, 190 N.E.2d 904, 1963 N.Y. LEXIS 1213 (N.Y. 1963).

To make out a prima facie case of "grievous bodily harm" under subdivision 3 by proof of injuries inflicted by defendant's fist, the injuries must be attributable to such blows, must be serious enough in themselves to constitute such harm apart from the subsequent drowning of the person assaulted, which is isolated from the assault, and must have been inflicted with the intent to cause such harm. People v Finn, 275 A.D. 65, 87 N.Y.S.2d 798, 1949 N.Y. App. Div. LEXIS 3707 (N.Y. App. Div. 1949).

Criminal intent, united with an overt act concurring in point of time, is a necessary ingredient of the crime of assault in the second degree. People v Walrath, 279 A.D. 56, 108 N.Y.S.2d 54, 1951 N.Y. App. Div. LEXIS 2862 (N.Y. App. Div. 1951).

Where the proof showed that a shot gun was discharged into the ground, the jury might have found that the element of intent referred to in this section was not present but that there was guilt of third degree assault nevertheless. A request to charge different degrees of the crime should have been granted to the extent of charging with respect to assault in the third degree. There was no error in refusing to grant the request to charge that there must be an intent to both wound and inflict grievous bodily harm. People v Hunter, 282 A.D. 722, 122 N.Y.S.2d 210, 1953 N.Y. App. Div. LEXIS 4796 (N.Y. App. Div. 1953).

In a prosecution for assault in the second degree, the indictment charged in two counts: (1) assault with a sharp instrument and (2) felonious assault which inflicted grievous bodily harm. The charge arose out of an incident in a tavern where the defendant swung a glass of beer, missed one patron who received the contents of the glass, and struck plaintiff in face. Jury found defendant not guilty of first count. In its charge, the trial court touched on the element of intent but did not tell the jury that to convict for a second count it must find the defendant had intent to inflict grievous bodily harm. The trial court also failed to charge assault in the third degree. The conviction was reversed and a new trial was ordered. People v Ball, 283 A.D. 285, 127 N.Y.S.2d 371, 1954 N.Y. App. Div. LEXIS 4666 (N.Y. App. Div. 1954).

Conviction of an assault in the second degree under an indictment charging such assault by aiming a shotgun at complainants, with a threat to shoot, was reversed and a new trial ordered where the uncontradicted testimony of defendant indicated that the gun was unloaded and the court failed to charge that intent to commit an assault was a necessary element, as the jury would be entitled to find defendant guilty of assault in the third degree. People v Wood, 10 A.D.2d 231, 199 N.Y.S.2d 342, 1960 N.Y. App. Div. LEXIS 10859 (N.Y. App. Div. 3d Dep't 1960).

It was error for the trial court not to give a charge on third-degree assault where there was evidence that defendant was in an intoxicated condition at the time, although the indictment was for second-degree assault and defendant's assigned counsel did not request such an instruction, as the jury, under the circumstances, could have found that the element of intent was not present. People v Kent, 10 A.D.2d 662, 196 N.Y.S.2d 154, 1960 N.Y. App. Div. LEXIS 11868 (N.Y. App. Div. 4th Dep't 1960).

Evidence that defendant kicked the deceased in the abdomen with such force as to rupture her liver, resulting in her death, is not sufficient to sustain a conviction under subd. 3 of this section without evidence that he intended to inflict "grievous bodily harm" on decedent, intent being an essential element of the crime of assault in the second degree. People v Hull, 12 A.D.2d 815, 209 N.Y.S.2d 917, 1961 N.Y. App. Div. LEXIS 13124 (N.Y. App. Div. 2d Dep't 1961).

There was no basis for reversing a conviction of assault in the second degree where the verdict was not against the weight of the evidence and there were no exceptions to the judge's charge nor any request to add to the charge concerning the element of intent, notwithstanding criticism of the instructions to the jury by dissenting justices. People v Carter, 14 A.D.2d 492, 217 N.Y.S.2d 165, 1961 N.Y. App. Div. LEXIS 9709 (N.Y. App. Div. 4th Dep't 1961), cert. denied, 368 U.S. 994, 82 S. Ct. 613, 7 L. Ed. 2d 531, 1962 U.S. LEXIS 1862 (U.S. 1962).

There is no such crime as an "attempt to commit manslaughter", as the crime of manslaughter involves no intent whereas an essential element of an attempt is intention to commit a specific crime. People v Brown, 21 A.D.2d 738, 249 N.Y.S.2d 922, 1964 N.Y. App. Div. LEXIS 3824 (N.Y. App. Div. 4th Dep't 1964).

A charge of disorderly conduct based on cutting an officer's ear with a razor blade is not the same offense as a charge of felonious assault, as the latter requires proof of the additional fact of specific intent to inflict grievous bodily harm, and accordingly neither can be raised as involving jeopardy of the other. Covington v Supreme Court, 21 A.D.2d 822, 251 N.Y.S.2d 529, 1964 N.Y. App. Div. LEXIS 3489 (N.Y. App. Div. 2d Dep't 1964), aff'd, 15 N.Y.2d 855, 257 N.Y.S.2d 962, 205 N.E.2d 880, 1965 N.Y. LEXIS 1540 (N.Y. 1965).

In a prosecution for first degree assault which resulted in a verdict of guilty of assault in the second degree, the evidence showed was that the defendant, operating a motor vehicle and accompanied by his 14-year-old son, pursued another vehicle operated by a man who had been keeping company with defendant's estranged wife, that the son had a firearm, and that the defendant said to him: "If you are going to shoot, fire now". The son testified that he then fired at the trunk of the other car, having no intention of killing but only meaning to scare the person driving it. On this evidence the conviction was reversed, the court saying that where the defendant fires the shot or otherwise commits an assault the necessary intent may be established by inference from the act itself but where the intent can be established only by inference from another fact which is not shown by direct evidence but must itself be derived from the existence of another event, the testimony is ordinarily too slight to permit the question to be submitted to the jury. And the court held that the finding of the jury that the defendant possessed the intent to kill or to do bodily harm would be no more than a surmise on the evidence presented, further stating that in the event of a new trial the court should charge the jury as to the crime of third degree assault. People v Walls, 24 A.D.2d 529, 261 N.Y.S.2d 447, 1965 N.Y. App. Div. LEXIS 3836 (N.Y. App. Div. 4th Dep't 1965).

Where the defendant had been convicted under the above statute of assaulting a police officer engaged in the process of lawfully apprehending him, it was held that the requisite criminal intent was established. People v Gavin, 24 A.D.2d 656, 261 N.Y.S.2d 98, 1965 N.Y. App. Div. LEXIS 3634 (N.Y. App. Div. 3d Dep't 1965).

Where defendant had been convicted under the above statute of assaulting a police officer engaged in the process of lawfully apprehending him, it was held that the case was submitted to the jury with a proper charge as to the burden on the People to prove both the commission of the assault and the existence of the necessary general and specific criminal intents involved in the crime charged. People v Gavin, 24 A.D.2d 656, 261 N.Y.S.2d 98, 1965 N.Y. App. Div. LEXIS 3634 (N.Y. App. Div. 3d Dep't 1965).

Under subd 5 of the above statute it is not necessary to establish an intent to inflict grievous bodily harm but merely one to prevent a lawful arrest. People v Gavin, 24 A.D.2d 656, 261 N.Y.S.2d 98, 1965 N.Y. App. Div. LEXIS 3634 (N.Y. App. Div. 3d Dep't 1965).

Assault may be committed within the meaning of §§ 242 and 244, notwithstanding the absence of intent to injure the person

assaulted. People ex rel. Starvis v Rogers, 10 N.Y.S.2d 722, 170 Misc. 609, 1939 N.Y. Misc. LEXIS 1627 (N.Y. City Ct. 1939).

65. —What constitutes instrument or thing likely to produce bodily harm

A blackjack is an "instrument or thing likely to produce grievous bodily harm." People v Wagner, 245 N.Y. 143, 156 N.E. 644, 245 N.Y. (N.Y.S.) 143, 1927 N.Y. LEXIS 601 (N.Y. 1927).

Evidence that a club with which the defendant struck his victim was a "weapon or other instrument or thing likely to produce grievous bodily harm" within subd. 4 and that it was used with the intention to inflict such harm, sustained a finding that the defendant was guilty of assault in the second degree. People v Rytel, 284 N.Y. 242, 30 N.E.2d 578, 284 N.Y. (N.Y.S.) 242, 1940 N.Y. LEXIS 851 (N.Y. 1940).

An indictment is sufficient to charge an offense under subd. 3 of this section where it charges that defendant assaulted another by willfully and wrongfully wounding and inflicting grievous bodily harm upon him with a dangerous weapon, to wit: "A post hole digger," as, whether or not a post hole digger is a "weapon", use of a weapon is not necessary to constitute the crime charged. People v Polsinelli, 14 A.D.2d 470, 217 N.Y.S.2d 362, 1961 N.Y. App. Div. LEXIS 9788 (N.Y. App. Div. 3d Dep't 1961).

Under statute making it an assault second degree to wilfully and wrongfully assault another by the use of a weapon, or other instrument or thing likely to produce grievous bodily harm, court held that hands are not such "instruments". People v Moody, 129 N.Y.S.2d 722, 205 Misc. 514, 1954 N.Y. Misc. LEXIS 3214 (N.Y. County Ct. 1954).

66. —Resisting arrest

An order which dismissed a charge brought under § 242(5) of the Penal Law was reversed, where the arrest warrants were valid on their face, although later proven to be based upon insufficient evidence. People v Briggs, 19 N.Y.2d 37, 277 N.Y.S.2d 662, 224 N.E.2d 93, 1966 N.Y. LEXIS 886 (N.Y. 1966).

In the trial of an indictment for assault upon police officers allegedly made to prevent arrest, the court erred when it failed to charge the jury that an officer had no right to make an arrest without a warrant for a misdemeanor unless the person arrested had actually committed the offense charged in the officer's presence and that it was the arresting officer's duty to inform the person arrested of the "cause of the arrest". People v Dority, 282 A.D. 995, 125 N.Y.S.2d 526, 1953 N.Y. App. Div. LEXIS 5644 (N.Y. App. Div. 1953).

A resistance to an unlawful arrest is not assault in any degree. Thus, where officer attempted to arrest defendant without informing him of the cause of the arrest and without a warrant defendant's resistance did not constitute an assault in any degree. People v Daniels, 285 A.D. 619, 139 N.Y.S.2d 597, 1955 N.Y. App. Div. LEXIS 5553 (N.Y. App. Div. 1955).

Where an assault charge was based on resisting arrest by a state trooper for disorderly conduct at a dance hall, and the evidence showed that the disorderly conduct, if any, was not committed in the officer's presence and that he had no warrant for arrest, it was insufficient to sustain a conviction of second-degree assault and the court likewise committed reversible error in refusing to charge the jury, as requested, that the officer could not legally make an arrest for such an offense without a warrant unless it was committed in his presence. People v Pitcher, 9 A.D.2d 1016, 194 N.Y.S.2d 337, 1959 N.Y. App. Div. LEXIS 5427 (N.Y. App. Div. 4th Dep't 1959).

A conviction of assault, second degree, under subd 5 of this section, could not be sustained where it merely appeared that the assault took place when patrolmen were attempting to arrest defendant for addressing vile and insulting language to one of them, as such conduct by defendant did not constitute ground for arrest. People v Vest, 11 A.D.2d 1080, 206 N.Y.S.2d 471, 1960 N.Y. App. Div. LEXIS 7620 (N.Y. App. Div. 4th Dep't 1960).

Conviction of defendants for assault in the second degree with intent to prevent and resist lawful apprehension could not be sustained where the court charged that the officer's right to make the arrest depended upon a finding that defendants had committed a "breach of the peace," and the evidence did not establish beyond a reasonable doubt that their conduct was such that a breach of the peace was imminent, intended, or might reasonably be expected. People v Lewis, 13 A.D.2d 714, 213 N.Y.S.2d 861, 1961 N.Y. App. Div. LEXIS 11574 (N.Y. App. Div. 4th Dep't 1961).

Conviction of defendant for assault second degree required reversal and a new trial where there was a serious question as to whether arrest of defendant by a police officer, which defendant resisted and out of which the assault charge grew, was lawful and authorized, but the judge failed to instruct the jury concerning lawful and unlawful arrests and the right to resist unlawful arrest, failed to instruct concerning the elements of assault except for bare reading of the statute, gave misleading and harmful instructions by reading subds. 2 and 3 of § 244 to the jury, having no proper application to the charge, and there were likewise certain other defects in the charge and circumstances rendering some of the prosecution's testimony incredible. People v McCutcheon, 14 A.D.2d 482, 217 N.Y.S.2d 973, 1961 N.Y. App. Div. LEXIS 9864 (N.Y. App. Div. 4th Dep't 1961).

In a prosecution for assault second degree, the assault consisting of resisting arrest by a police officer, wherein the arresting officer claimed that the right to arrest arose from the manner in which defendant drove a stolen car, subds. 2 and 3 of § 244 had no possible bearing upon the crime charged and conduct of the trial judge in reading them to the jury was particularly harmful and misleading. People v McCutcheon, 14 A.D.2d 482, 217 N.Y.S.2d 973, 1961 N.Y. App. Div. LEXIS 9864 (N.Y. App. Div. 4th Dep't 1961).

The evidence was sufficient to sustain a charge of second degree assault under subd. 5 of this section where it clearly appeared that defendant ran through a road block set up by police after they saw him in the act of driving across a double white line on the pavement, tried to arrest him, but he evaded them because of fear of another arrest for driving without a driver's license and deliberately ran through the road block, notwithstanding flashing signals, causing an officer at that point to jump out of his way to avoid injury. People v Knapp, 17 A.D.2d 65, 231 N.Y.S.2d 341, 1962 N.Y. App. Div. LEXIS 8464 (N.Y. App. Div. 3d Dep't 1962).

67. —Indictments, lesser offenses and the like

Defendants were indicted by a grand jury in a long-form indictment for the single account of assault 2nd. But during the course of their trial, new count of assault 3rd was added by the trial court on its own order. And the court directed a verdict of not guilty on the assault 2nd count. But defendants were convicted of assault 3rd. Held: the trial court did not have the inherent or statutory authority to amend the long-form indictment. Judgment of conviction reversed and indictment dismissed. People v Kuehn, 5 A.D.2d 516, 173 N.Y.S.2d 366, 1958 N.Y. App. Div. LEXIS 6034 (N.Y. App. Div. 4th Dep't 1958).

Where an indictment for assault did not charge that defendants had inflicted grievous bodily harm on an officer attempting to arrest them for breach of the peace, or had used a weapon likely to cause such harm, their use of excessive force in self defense would have at most warranted conviction for assault in the third, not the second, degree. People v Lewis, 13 A.D.2d 714, 213 N.Y.S.2d 861, 1961 N.Y. App. Div. LEXIS 11574 (N.Y. App. Div. 4th Dep't 1961).

An indictment is insufficient to charge an offense under subd. 4 of this section where it fails to allege that defendant "willfully and wrongfully" assaulted the person in question. People v Polsinelli, 14 A.D.2d 470, 217 N.Y.S.2d 362, 1961 N.Y. App. Div. LEXIS 9788 (N.Y. App. Div. 3d Dep't 1961).

Although the evidence is insufficient to establish specific intent to commit a felony and will not sustain a conviction for assault second degree, it may be sufficient to sustain conviction for third degree assault. People v Kay, 17 A.D.2d 773, 232 N.Y.S.2d 293, 1962 N.Y. App. Div. LEXIS 7934 (N.Y. App. Div. 1st Dep't 1962).

Where a defendant has been indicted for criminal negligence in the operation of a motor vehicle resulting in death under former Penal Law § 1053-a a court does not have jurisdiction to accept his plea of guilty to assault in the second degree under the above statute since such assault is not a crime of lesser degree than that charged in the indictment, the punishment prescribed for it in Penal Law § 243 is not less than that prescribed for such negligence by Criminal Law § 1053-b, and the only authority to

accept such a plea is Criminal Code § 342-a authorizing such action where the plea is to a crime for a lesser degree or one for which a lesser punishment is prescribed than the crime or offense charged. People v Maxwell, 23 A.D.2d 700, 258 N.Y.S.2d 220, 1965 N.Y. App. Div. LEXIS 4589 (N.Y. App. Div. 2d Dep't 1965).

Where grand jury had jurisdiction in first instance of defendant, charged with assault in second degree under this section, which crime is felony, grand jury had right to indict defendant for assault in third degree, misdemeanor if in its wisdom there was insufficient evidence to hold defendant for assault in second degree. People v Cooper, 286 N.Y.S. 961, 158 Misc. 419, 1936 N.Y. Misc. LEXIS 1054 (N.Y. County Ct. 1936).

Where an indictment contained no statement of previous conviction, and sentence imposed increased punishment, the conviction was not void but the accused was entitled only to be resentenced. People ex rel. Donato v Foster, 57 N.Y.S.2d 737, 1945 N.Y. Misc. LEXIS 2330 (N.Y. Sup. Ct. 1945).

68. —Assault as involving moral turpitude

Record of conviction under this section without specification of the offense committed was not sufficient to warrant deportation since not all of offenses under that section involve moral turpitude. United States ex rel. Zaffarano v Corsi, 63 F.2d 757, 1933 U.S. App. LEXIS 3552, 1933 U.S. App. LEXIS 3553 (2d Cir. N.Y. 1933).

Provisions of this section do not necessarily involve crime of moral turpitude. United States ex rel. Valenti v Karmuth, 1 F. Supp. 370, 1932 U.S. Dist. LEXIS 1741 (D.N.Y. 1932).

69. —Effect of laws of other jurisdictions

Relator was properly sentenced as a second felony offender where he was previously convicted by a United States Military court martial of a violation of the 93rd Article of War, the specifications under such charge being assault with intent to do bodily harm accomplished by cutting his victim on the head with a dangerous instrument, to wit, a knife. People ex rel. Fajen v Fay, 8 A.D.2d 745, 187 N.Y.S.2d 430, 1959 N.Y. App. Div. LEXIS 8468 (N.Y. App. Div. 2d Dep't 1959).

An information reciting that defendant had previously been convicted in Pennsylvania of the crime of aggravated assault and battery by automobile does not charge a felony in New York, within the requirements of § 1941. People v Stovali, 15 N.Y.S.2d 498, 172 Misc. 469, 1939 N.Y. Misc. LEXIS 2419 (N.Y. County Ct. 1939).

An act which gave rise to a court-martial and which consisted of an assault by the defendant upon his jail keeper, tying and binding him and escaping lawful confinement, constituted an assault with intent to avoid legal detention and was a felony under this section, but where the Navy statute defining the crime provided punishment for a person who "quarrels with, strikes, or assaults, or uses provoking or reproachful words, gestures, or menaces toward, any person in the Navy," such section would not constitute a felony under New York law but simply the misdemeanor of assault in the third degree and the defendant was improperly sentenced as a second felony offender. People v McDowell, 105 N.Y.S.2d 971, 200 Misc. 46, 1951 N.Y. Misc. LEXIS 1986 (N.Y. Gen. Sess. 1951).

Conviction of defendant in Virginia upon a plea of guilty to shooting, stabbing, or wounding another person with intent to maim or disfigure him, but without malice, was for an offense comparable to subd. 4 of this section and accordingly for felony, subjecting him to sentence as a multiple felony offender. People v Burnette, 38 Misc. 2d 572, 235 N.Y.S.2d 948, 1962 N.Y. Misc. LEXIS 2096 (N.Y. County Ct. 1962).

Both a North Carolina conviction for assault with a dangerous weapon with intent to kill, and a Pennsylvania conviction for aggravated assault would, under the statutes of those states defining the offense in question, constitute felonies under New York law. People v Bryant, 226 N.Y.S.2d 78 (N.Y. County Ct. 1962).

70. —Family Court jurisdiction

Second degree assault case wherein wife lived in Ohio and husband in Pennsylvania was not for Family Court whose jurisdiction extends only within boundaries of New York and conciliation procedures contemplated under Family Court Act could not be utilized because of distances involved and lack of jurisdiction. Parrett v Parrett, 46 Misc. 2d 573, 260 N.Y.S.2d 382, 1965 N.Y. Misc. LEXIS 1812 (N.Y. Fam. Ct. 1965).

The application of a defendant charged with felonious assault to transfer the matter to the Family Court was properly granted, where the defendant and prosecuting witness shared the same apartment and held themselves out to be man and wife, although they had never legally been married. People v Johnson, 48 Misc. 2d 536, 265 N.Y.S.2d 260, 1965 N.Y. Misc. LEXIS 1423 (N.Y. Dist. Ct. 1965).

71. —Other applications

A defendant who is pointing a rifle at another in a threatening manner, with intent to injure him if he fails to comply with the defendant's demands, is guilty of assault in the second degree, and, if a third person is killed while the assault is continuing, the defendant is guilty of murder in the first degree. People v Luscomb, 292 N.Y. 390, 55 N.E.2d 469, 292 N.Y. (N.Y.S.) 390, 1944 N.Y. LEXIS 1354 (N.Y. 1944).

Evidence that complainant had suffered a number of "lacerated, jagged, and bleeding" wounds which confined him to his room for several weeks as the result of an attack by three persons acting in concert is sufficient to sustain a conviction under this section. People v Potskowski, 298 N.Y. 299, 83 N.E.2d 125, 298 N.Y. (N.Y.S.) 299, 1948 N.Y. LEXIS 787 (N.Y. 1948).

Defendant cannot be convicted of assault in second degree, under subd. 3 of this section where proof is that, having no weapon, he merely struck complainant without wounding him, or causing blood to flow, or breaking skin, or causing any injury, or that severe pain was inflicted. People v Fein, 162 A.D. 765, 147 N.Y.S. 966, 1914 N.Y. App. Div. LEXIS 9328 (N.Y. App. Div. 1914).

The mere presence of the defendant near the scene of the crime is not enough to sustain a conviction of assault in the second degree. People v Millet, 275 A.D. 1060, 92 N.Y.S.2d 153, 1949 N.Y. App. Div. LEXIS 5807 (N.Y. App. Div. 1949).

As the assaults for which the defendant was sentenced were punishable as second degree assaults only because of the use of the revolver, he could not be punished for possession of the revolver by the imposition of sentence to run consecutively with the assault sentences. People v Romero, 41 A.D.2d 744, 341 N.Y.S.2d 245, 1973 N.Y. App. Div. LEXIS 4982 (N.Y. App. Div. 2d Dep't 1973).

Evidence of conviction of defendant's employees of third degree assault in violation of former Penal L § 244 in connection with incident out of which wrongful death action occurred was not conclusive of defendant employer's liability for unlawfully causing decedent's death. Brereton v McEvoy, 44 A.D.2d 594, 353 N.Y.S.2d 512, 1974 N.Y. App. Div. LEXIS 5381 (N.Y. App. Div. 2d Dep't 1974).

One who threatens with a loaded revolver an officer seeking to serve process, who was not attempting a forcible entry, was guilty of an assault. People ex rel. Paul v Warden of City Prison, 74 N.Y.S.2d 438, 190 Misc. 528, 1947 N.Y. Misc. LEXIS 3257 (N.Y. Sup. Ct. 1947).

Evidence, though circumstantial, convincingly established beyond reasonable doubt that each of the alleged victims was calculatedly wounded by intentional discharge of a firearm held in defendant's hands and deliberately aimed at them, although no one actually saw the gun and could identify it as a sawed-off rifle, as alleged. People v Alexander, 42 Misc. 2d 927, 249 N.Y.S.2d 275, 1964 N.Y. Misc. LEXIS 1822 (N.Y. Sup. Ct. 1964), aff'd, 24 A.D.2d 934, 264 N.Y.S.2d 1010, 1965 N.Y. App. Div. LEXIS 6346 (N.Y. App. Div. 2d Dep't 1965).

72. Under former § 243

Within the limits fixed by former §§ 243 and 245 the appellate division has plenary discretion as to the punishment that should be meted out and the exercise of that discretion is not subject to review by the court of appeals, except that where that court finds error in the classification of the crime it may remit the case to the appellate division for a reconsideration of the appropriate sentence. People v Rytel, 284 N.Y. 242, 30 N.E.2d 578, 284 N.Y. (N.Y.S.) 242, 1940 N.Y. LEXIS 851 (N.Y. 1940).

Assault in the second degree is a felony. People v Katz, 290 N.Y. 361, 49 N.E.2d 482, 290 N.Y. (N.Y.S.) 361, 1943 N.Y. LEXIS 1089 (N.Y. 1943).

While the offense of assault second degree may be punished by imprisonment in the state prison under this section, and former § 2182 sub 2 of the Penal Law provides that should imprisonment in state prison be ordered the minimum term of such imprisonment shall be one year, no minimum term is set forth in this section so that the Appellate Division on appeal may reduce a sentence of one year and three months to two and a half years imposed by the trial court to not less than one year. People v Potskowski, 298 N.Y. 299, 83 N.E.2d 125, 298 N.Y. (N.Y.S.) 299, 1948 N.Y. LEXIS 787 (N.Y. 1948).

The provision of this section as to the term of imprisonment applies only to the term of absolute imprisonment, which the defendant must necessarily undergo, and not to imprisonment, to which he is subjected as a means to compel him to pay the fine. People ex rel. Gately v Sage, 13 A.D. 135, 43 N.Y.S. 372, 1897 N.Y. App. Div. LEXIS 41 (N.Y. App. Div. 1897).

The punishment provided determines whether the offense is a felony. People v Stacy, 119 A.D. 743, 104 N.Y.S. 615, 1907 N.Y. App. Div. LEXIS 3239 (N.Y. App. Div. 1907), aff'd, 192 N.Y. 577, 85 N.E. 1114, 192 N.Y. (N.Y.S.) 577, 1908 N.Y. LEXIS 995 (N.Y. 1908).

Where law, at time relator committed assault, made maximum sentence five years and minimum three and one-half years, including all commutation to which he would have been entitled, he cannot complain, when he was subsequently sentenced, after suspended sentence, under Parole Commission Law, that latter was ex post facto as to him, for maximum sentence under latter act is three years, and there is no limit to minimum which rests in discretion of commissioners. People ex rel. Liebowitz Warden, 186 A.D. 730, 174 N.Y.S. 823, 1919 N.Y. App. Div. LEXIS 5906 (N.Y. App. Div. 1919).

Defendant convicted on both counts of an indictment, one for assault in second degree and other for carrying dangerous weapon cannot be punished as second offender under second count where only record of previous offense was his conviction on first count. People ex rel. Smith v Martin, 264 A.D. 976, 37 N.Y.S.2d 236, 1942 N.Y. App. Div. LEXIS 5596 (N.Y. App. Div. 1942).

Where a defendant has been indicted for criminal negligence in the operation of a motor vehicle resulting in death under former Penal Law § 1053-a, a court does not have jurisdiction to accept his plea of guilty to assault in the second degree under Penal Law § 242 since such assault is not a crime of lesser degree than that charged in the indictment, the punishment prescribed for it in the above statute is not less than that prescribed for such negligence by Criminal Law § 1053-b, and the only authority to accept such a plea is Criminal Code § 342-a authorizing such action where the plea is to a crime of a lesser degree or one for which a lesser punishment is prescribed than the crime or offense charged. People v Maxwell, 23 A.D.2d 700, 258 N.Y.S.2d 220, 1965 N.Y. App. Div. LEXIS 4589 (N.Y. App. Div. 2d Dep't 1965).

The absence of any provision for a hearing prior to the imposition of a one day to life sentence under former Penal Law § 243 does not violate the due process clause of the Fourteenth Amendment of the United States Constitution. People ex rel. Smith v La Vallee, 29 A.D.2d 248, 287 N.Y.S.2d 601, 1968 N.Y. App. Div. LEXIS 4661 (N.Y. App. Div. 4th Dep't 1968).

Where an indictment contained no statement of previous conviction, and sentence imposed increased punishment, the conviction was not void but the accused was entitled only to be resentenced. People ex rel. Donato v Foster, 57 N.Y.S.2d 737, 1945 N.Y. Misc. LEXIS 2330 (N.Y. Sup. Ct. 1945).

Testimony of 2 psychiatrists, based upon a single 45-minute interview, that defendant had committed two sex offenses separated by an interval of 10 years, that he was less likely to commit sex offenses of a heterosexual character if he were kept away from females than if he were not, and that there was a possibility that he might benefit from treatment of an undescribed sort was not the type of clear, unequivocal, and convincing evidence necessary to support a court's determination that the defendant was a danger to society or was capable of being benefitted by the indeterminate one day to life sentence envisaged under former Penal Law § 243. Hollis v Smith, 571 F.2d 685, 1978 U.S. App. LEXIS 13021, 1978 U.S. App. LEXIS 13215 (2d Cir. N.Y. 1978).

Defendant convicted of assault in the second degree with intent to commit rape was neither entitled to representation by counsel nor to a jury trial at a post-conviction examination by psychiatrists required by statute prior to the imposition of an indeterminate one day to life sentence. Hollis v Smith, 571 F.2d 685, 1978 U.S. App. LEXIS 13021, 1978 U.S. App. LEXIS 13215 (2d Cir. N.Y. 1978).

Psychiatric examination of defendant convicted of assault in the second degree with intent to commit rape did not violate defendant's right against self-incrimination. Hollis v Smith, 571 F.2d 685, 1978 U.S. App. LEXIS 13021, 1978 U.S. App. LEXIS 13215 (2d Cir. N.Y. 1978).

As a second felony offender, petitioner was required to receive a minimum mandatory sentence; although if sentenced as a first felony offender, he would not have been required to receive a minimum mandatory sentence. Therefore, petitioner's application for a writ of habeas corpus in connection with a prior prison sentence which he had already served was properly before the Federal District Court. United States ex rel. Williams v Warden of Sing Sing Prison, 274 F. Supp. 597, 1967 U.S. Dist. LEXIS 8141 (S.D.N.Y. 1967), aff'd, 389 F.2d 1002, 1968 U.S. App. LEXIS 8398 (2d Cir. N.Y. 1968).

73. Under former § 1752

An information that defendant illegally possessed "a narcotic drug" without alleging what drug, is sufficient. People v Lee Foon, 275 N.Y. 229, 9 N.E.2d 847, 275 N.Y. (N.Y.S.) 229, 1937 N.Y. LEXIS 1420 (N.Y. 1937).

A court was without jurisdiction to impose sentence under this section for an offense committed under former repealed § 1746. People v Quartararo, 133 N.Y.S. 985, 76 Misc. 55, 1912 N.Y. Misc. LEXIS 755 (N.Y. Sup. Ct. 1912).

Notes to Unpublished Decisions

Analysis

I. In General

1. Felony assault

I. In General

1. Felony assault

Unpublished decision: Because, at sentencing, appellant did not object to the presentence investigation report's statement of fact that he pulled out a handgun and shot the victim in the foot, the district court did not clearly err in finding that appellant shot the victim and thus committed a second-degree felony assault under N.Y. Penal Law § 120.05(2). United States v Anderson, 339 Fed. Appx. 906, 2009 U.S. App. LEXIS 16951 (11th Cir. 2009).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 60.05, 70.02, 70.25, 460.10; CLS CPL § 700.05; CLS Family Ct Act §§ 117, 301.2.

Correctional facility, definition of, CLS Correc § 40.

Eavesdropping warrants in assault cases, CLS CPL §§ 700.05 et seq.

Federal Aspects:

Assault, 18 USCS §§ 111 et seq.

Jurisprudences:

35 NY Jur 2d Criminal Law Substantive Principles and Offenses §§ 205, 311, 357, 396, 400, 417, 419–423, 425, 427, 434, 435, 443.

35A NY Jur 2d Criminal Law Substantive Principles and Offenses § 586.

35B NY Jur 2d Criminal Law Substantive Principles and Offenses §§ 1327, 1328, 1441.

35C NY Jur 2d Criminal Law Substantive Principles and Offenses § 1853.

6 Am Jur 2d, Assault and Battery §§ 1 et seq., 50.

25 Am Jur 2d, Drugs and Controlled Substances §§ 17, 19, 33, 69, 72, 75, 76, 120–124, 126, 127, 130, 141, 191, 206.

2A Am Jur Pl & Pr Forms (Rev ed), Assault and Battery Forms 1 et seq.

2 Am Jur Proof of Facts 81, Assault and Battery.

118 Am Jur Proof of Facts 3d 297, Proof of Elder Abuse in Civil and Criminal Actions.

92 Am Jur Trials 1, Criminal Defense: Assault and Battery Cases.

Law Reviews:

Assault, battery, and maiming in New York: from common law origins to enlightened revision. 34 Fordham L. Rev. 613.

Matthew Bender's New York Civil Practice:

2 Carrieri, Lansner, New York Civil Practice: Family Court Proceedings § 36.04.

4 Lansner, Reichler, New York Civil Practice: Matrimonial Actions § 66.02.

3 Rohan, New York Civil Practice: EPTL ¶ 5-4.1.

Annotations:

What constitutes assault "resulting in serious bodily injury" within the special maritime or territorial jurisdiction of the United States for purposes of 18 USCS § 113(f), providing punishment for such act. 55 ALR Fed 895.

Kicking as aggravated assault, or assault with dangerous or deadly weapon. 33 ALR3d 922.

What constitutes obstructing or resisting an officer, in the absence of actual force. 44 ALR3d 1018.

Modern status of rules as to right to forcefully resist illegal arrest. 44 ALR3d 1078.

Consent as defense to charge of criminal assault and battery. 58 ALR3d 662.

Assault and battery: sexual nature of physical contact as aggravating offense. 63 ALR3d 225.

Automobile as dangerous or deadly weapon within meaning of assault or battery statute. 89 ALR3d 1026.

Constitutionality of assault and battery laws limited to protection of females only or which provide greater penalties for males than for females. 5 ALR4th 708.

Walking cane as deadly or dangerous weapon for purpose of statutes aggravating offenses such as assault and robbery. 8 ALR4th 842.

Parts of the human body, other than feet, as deadly or dangerous weapons for purposes of statutes aggravating offenses such as assault and robbery. 8 A.L.R.4th 1268.

Attempt to commit assault as criminal offense. 93 A.L.R.5th 683.

Parts of Human Body, other than Feet, as Deadly or Dangerous Weapons or Instrumentalities for Purposes of Statutes Aggravating Offenses such as Assault and Robbery. 67 ALR6th 103.

Criminal Jury Instructions: Assault, second degree (serious physical injury; intent). CJI2d [NY] Penal Law § 120.05(1).

Assault, second degree (physical injury; intent; weapon). CJI2d [NY] Penal Law § 120.05(2).

Assault, second degree (interference with public servants). CJI2d [NY] Penal Law § 120.05(3).

Assault, second degree (serious physical injury; reckless; weapon). CJI2d [NY] Penal Law § 120.05(4).

Assault, second degree (unlawful administration of drugs). CJI2d [NY] Penal Law § 120.05(5).

Assault, second degree (felony assault; physical injury). CJI2d [NY] Penal Law § 120.05(6).

Assault, second degree (inmate causes physical injury). CJI2d [NY] Penal Law § 120.05(7).

Assault, second degree (child assault). CJI2d [NY] Penal Law § 120.05(8).

Assault, second degree (defendant 18 or more; victim less than 7). CJI2d [NY] Penal Law § 120.05(9).

Assault, second degree (assault of school employee). CJI2d [NY] Penal Law § 120.05(10)(a).

Assault, second degree (assault of student). CJI2d [NY] Penal Law § 120.05(10)(b).

Assault, second degree (physical injury; transit operators). CJI2d [NY] Penal Law § 120.05(11).

Texts: Rothblattt, Criminal Law of New York (Penal) §§ 3, 57, 59–62.

ARTICLE 125

HOMICIDE AND RELATED OFFENSES

HISTORY:

Add, L 1965, ch 1030, eff Sept 1, 1967; L 2019, ch 1, § 5, effective January 22, 2019.

§ 125.26. Aggravated murder

A person is guilty of aggravated murder when:

1. With intent to cause the death of another person, he or she causes the death of such person, or of a third person who was a person described in subparagraph (i), (ii), (ii-a) or (iii) of paragraph (a) of this subdivision engaged at the time of the killing in the course of performing his or her official duties; and

(a) Either:

(i) the intended victim was a police officer as defined in subdivision thirty-four of section 1.20 of the criminal procedure law who was at the time of the killing engaged in the course of performing his or her official duties, and the defendant knew or reasonably should have known that the victim was a police officer; or

(ii) the intended victim was a peace officer as defined in paragraph a of subdivision twenty-one, subdivision twenty-three, twenty-four or sixty-two (employees of the division for youth) of section 2.10 of the criminal procedure law who was at the time of the killing engaged in the course of performing his or her official duties, and the defendant knew or reasonably should have known that the victim was such a uniformed court officer, parole officer, probation officer, or employee of the division for youth; or

(ii-a) the intended victim was a firefighter, emergency medical technician, ambulance driver, paramedic, physician or registered nurse involved in a first response team, or any other individual who, in the course of official duties, performs emergency response activities and was engaged in such activities at the time of killing and the defendant knew or reasonably should have known that the intended victim was such firefighter, emergency medical technician, ambulance driver, paramedic, physician or registered nurse; or

(iii) the intended victim was an employee of a state correctional institution or was an employee of a local correctional facility as defined in subdivision two of section forty of the correction law, who was at the time of the killing engaged in the course of performing his or her official duties, and the defendant knew or reasonably should have known that the victim was an employee of a state correctional institution or a local correctional facility; and

(b) The defendant was more than eighteen years old at the time of the commission of the crime; or

2. (a) With intent to cause the death of a person less than fourteen years old, he or she causes the death of such person, and the defendant acted in an especially cruel and wanton manner pursuant to a course of conduct intended to inflict and inflicting torture upon the victim prior to the victim's death.

As used in this subdivision, "torture" means the intentional and depraved infliction of extreme physical pain that is separate and apart from the pain which otherwise would have been associated with such cause of death; and

(b) The defendant was more than eighteen years old at the time of the commission of the crime.

3. In any prosecution under subdivision one or two of this section, it is an affirmative defense that:

(a)

(i) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, aggravated manslaughter in the first degree, manslaughter in the first degree or any other crime except murder in the second degree. (ii) It shall not be a "reasonable explanation or excuse" pursuant to subparagraph (i) of this paragraph when the defendant's conduct resulted from the discovery, knowledge or disclosure of the victim's sexual orientation, sex, gender, gender identity, gender expression or sex assigned at birth; or

(b) The defendant's conduct consisted of causing or aiding, without the use of duress or deception, another person to commit suicide. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, aggravated manslaughter in the second degree, manslaughter in the second degree or any other crime except murder in the second degree.

Aggravated murder is a class A-I felony.

HISTORY:

Add, L 2005, ch 765, § 13, eff Dec 21, 2005; amd, L 2009, ch 482, § 1, eff Oct 9, 2009; L 2013, ch 1, §§ 34, 35, eff March 16, 2013; L 2019, ch 45, § 2, effective June 30, 2019.

Editor's Notes: Laws 2005, ch 765, § 1, eff Dec 21, 2005, provides as follows:

Section 1. Short title. This act shall be known and may be cited as the "crimes against police act."

Laws 2013, ch 1, § 33, eff March 16, 2013, provides as follows:

§ 33. Sections 34, 35 and 36 of this act shall be known and may becited as "Mark's Law".

Amendment Notes: The 2019 amendment by ch 45, § 2, added the 3(a)(i) designation; and added 3(a)(ii).

2013. Chapter 1, § 34 amended:

Sub 1, opening by adding the matter in italics.

2013. Chapter 1, § 35 amended:

By adding sub 1, par (1), subpar (ii-a).

2009. Chapter 482, § 1 amended:

Sub 1, par (b) by deleting at fig 1 a period and adding the matter in italics.

By redesignating former sub 2 as sub 3.

By adding sub 2.

Sub 3, opening par by adding the matter in italics.

Notes to Decisions

Even if the trial court inaccurately conveyed the potential sentence that defendant was facing for attempted aggravated murder, a class B felony under N.Y. Penal Law §§ 110.05(3), 125.26, it properly granted each side 15 peremptory challenges under N.Y. Crim. Proc. Law § 270.25(2)(b), and adequately informed defendant of the potential liability that defendant was facing. People v Banyan, 833 N.Y.S.2d 841, 15 Misc. 3d 425, 237 N.Y.L.J. 34, 2007 N.Y. Misc. LEXIS 269 (N.Y. Sup. Ct. 2007).

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

Annotations:

Sufficiency of evidence to support homicide conviction where no body was produced. 65 ALR6th 359.

Criminal Jury Instructions: Aggravated murder. CJI2d [NY] Penal Law § 125.26.

§ 125.27. Murder in the first degree

A person is guilty of murder in the first degree when:

1. With intent to cause the death of another person, he causes the death of such person or of a third person; and

(a) Either:

(i) the intended victim was a police officer as defined in subdivision 34 of section 1.20 of the criminal procedure law who was at the time of the killing engaged in the course of performing his official duties, and the defendant knew or reasonably should have known that the intended victim was a police officer; or

(ii) the intended victim was a peace officer as defined in paragraph a of subdivision twenty-one, subdivision twenty-three, twenty-four or sixty-two (employees of the division for youth) of section 2.10 of the criminal procedure law who was at the time of the killing engaged in the course of performing his official duties, and the defendant knew or reasonably should have known that the intended victim was such a uniformed court officer, parole officer, probation officer, or employee of the division for youth; or

(ii-a) the intended victim was a firefighter, emergency medical technician, ambulance driver, paramedic, physician or registered nurse involved in a first response team, or any other individual who, in the course of official duties, performs emergency response activities and was engaged in such activities at the time of killing and the defendant knew or reasonably should have known that the intended victim was such firefighter, emergency medical technician, ambulance driver, paramedic, physician or registered nurse; or

(iii) the intended victim was an employee of a state correctional institution or was an employee of a local correctional facility as defined in subdivision two of section forty of the correction law, who was at the time of the killing engaged in the course of performing his official duties, and the defendant knew or reasonably should have known that the intended victim was an employee of a state correctional institution or a local correctional facility; or

(iv) at the time of the commission of the killing, the defendant was confined in a state correctional institution or was otherwise in custody upon a sentence for the term of his natural life, or upon a sentence commuted to one of natural life, or upon a sentence for an indeterminate term the minimum of

which was at least fifteen years and the maximum of which was natural life, or at the time of the commission of the killing, the defendant had escaped from such confinement or custody while serving such a sentence and had not yet been returned to such confinement or custody; or

(v) the intended victim was a witness to a crime committed on a prior occasion and the death was caused for the purpose of preventing the intended victim's testimony in any criminal action or proceeding whether or not such action or proceeding had been commenced, or the intended victim had previously testified in a criminal action or proceeding and the killing was committed for the purpose of exacting retribution for such prior testimony, or the intended victim was an immediate family member of a witness to a crime committed on a prior occasion and the killing was committed for the purpose of preventing or influencing the testimony of such witness, or the intended victim was an immediate family member of a witness who had previously testified in a criminal action or proceeding and the killing was committed for the purpose of exacting retribution upon such witness for such prior testimony. As used in this subparagraph "immediate family member" means a husband, wife, father, mother, daughter, son, brother, sister, stepparent, grandparent, stepchild or grandchild; or

(vi) the defendant committed the killing or procured commission of the killing pursuant to an agreement with a person other than the intended victim to commit the same for the receipt, or in expectation of the receipt, of anything of pecuniary value from a party to the agreement or from a person other than the intended victim acting at the direction of a party to such agreement; or

(vii) the victim was killed while the defendant was in the course of committing or attempting to commit and in furtherance of robbery, burglary in the first degree or second degree, kidnapping in the first degree, arson in the first degree or second degree, rape in the first degree, criminal sexual act in the first degree, sexual abuse in the first degree, aggravated sexual abuse in the first degree or escape in the first degree, or in the course of and furtherance of immediate flight after committing or attempting to commit any such crime or in the course of and furtherance of immediate flight after attempting to commit the crime of murder in the second degree; provided however, the victim is not a participant in one of the aforementioned crimes and, provided further that, unless the defendant's criminal liability under this subparagraph is based upon the defendant having commanded another person to cause the death of the victim or intended victim pursuant to section 20.00 of this chapter, this subparagraph shall not apply where the defendant's criminal liability is based upon the conduct of another pursuant to section 20.00 of this chapter; or

(viii) as part of the same criminal transaction, the defendant, with intent to cause serious physical injury to or the death of an additional person or persons, causes the death of an additional person or persons; provided, however, the victim is not a participant in the criminal transaction; or

(ix) prior to committing the killing, the defendant had been convicted of murder as defined in this section or section 125.25 of this article, or had been convicted in another jurisdiction of an offense which, if committed in this state, would constitute a violation of either of such sections; or

(x) the defendant acted in an especially cruel and wanton manner pursuant to a course of conduct intended to inflict and inflicting torture upon the victim prior to the victim's death. As used in this subparagraph, "torture" means the intentional and depraved infliction of extreme physical pain; "depraved" means the defendant relished the infliction of extreme physical pain upon the victim evidencing debasement or perversion or that the defendant evidenced a sense of pleasure in the infliction of extreme physical pain; or

(xi) the defendant intentionally caused the death of two or more additional persons within the state in separate criminal transactions within a period of twenty-four months when committed in a similar fashion or pursuant to a common scheme or plan; or

(xii) the intended victim was a judge as defined in subdivision twenty-three of section 1.20 of the criminal procedure law and the defendant killed such victim because such victim was, at the time of the killing, a judge; or

(xiii) the victim was killed in furtherance of an act of terrorism, as defined in paragraph (b) of subdivision one of section 490.05 of this chapter; and

(b) The defendant was more than eighteen years old at the time of the commission of the crime.

2. In any prosecution under subdivision one, it is an affirmative defense that:

(a) (i) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime except murder in the second degree. (ii) It shall not be a "reasonable explanation or excuse" pursuant to subparagraph (i) of this paragraph when the defendant's conduct resulted from the discovery, knowledge or disclosure of the victim's sexual orientation, sex, gender, gender identity, gender expression or sex assigned at birth; or

(b) The defendant's conduct consisted of causing or aiding, without the use of duress or deception, another person to commit suicide. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the second degree or any other crime except murder in the second degree.

Murder in the first degree is a class A-I felony.

HISTORY:

Add, L 1974, ch 367, § 5, eff Sept 1, 1974; amd, L 1995, ch 1, § 7, eff Sept 1, 1995; L 2001, ch 300, § 3, eff Sept 17, 2001; L 2003, ch 264, § 11, eff Nov 1, 2003; L 2013, ch 1, § 36, eff March 16, 2013; L 2019, ch 45, § 3, effective June 30, 2019.

Editor's Notes: Laws 1995, ch 1, § 38, eff Sept 1, 1995, provides as follows:

§ 38. This act shall take effect on the first day of September next succeeding the date on which it shall have become a law and shall apply only to offenses committed on or after such date; offenses committed prior to such date shall be governed by the provisions of law in effect at the time the offense was committed; provided, further, however, that sections twenty-nine, thirty-five and thirty-six of this act shall take effect April 1, 1995.

Laws 2001, ch 300, § 1, eff Sept 17, 2001, provides as follows:

Section 1. This act shall be known and may be cited as the "anti-terrorism act of 2001".

Laws 2013, ch 1, § 33, eff March 16, 2013, provides as follows:

§ 33. Sections 34, 35 and 36 of this act shall be known and may becited as "Mark's Law".

Amendment Notes: The 2019 amendment by ch 45, § 3, added the 2(a)(i) designation; and added 2(a)(ii).

2013. Chapter 1, § 36 amended:

By adding sub 1, par (a), subpar (ii-a).

2003. Chapter 264, § 11 amended:

Sub 1, par (a), subpar (vii) by deleting at fig 1 "sodomy" and adding the matter in italics.

2001. Chapter 300, § 3 amended:

Sub 1, par (a) subpar (xii) by deleting at fig 1 "and" and adding the matter in italics.

By adding sub 1, par (a) subpar (xiii).

Notes to Decisions

Analysis

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1. In general

While the facts support a conviction of the crime of murder in the second degree, proof of guilt beyond a reasonable doubt as to all of the elements of the crime of murder in the first degree is not made out by a showing that defendant killed a policeman who asserted that he was an officer when restrained by defendant from leaving a supermarket on his way to report for duty, since there continues to be doubt concerning whether the victim was acting in the line of duty when he was killed, which is one of the elements of murder in the first degree as specified by the Legislature. People v Davis, 43 N.Y.2d 17, 400 N.Y.S.2d 735, 371 N.E.2d 456, 1977 N.Y. LEXIS 2434 (N.Y. 1977), cert. denied, 435 U.S. 998, 98 S. Ct. 1653, 56 L. Ed. 2d 88, 1978 U.S. LEXIS 1645 (U.S. 1978), cert. denied, 438 U.S. 914, 98 S. Ct. 3143, 57 L. Ed. 2d 1160, 1978 U.S. LEXIS 2435 (U.S. 1978).

There is proof beyond a reasonable doubt of guilt of murder in the first degree by a defendant who, while attempting to escape custody, shot a corrections officer, and defendant, accordingly, comes within New York's death penalty statute which provides a mandatory death sentence for all persons over 18 years of age found to have intentionally caused the death of a police officer or a State or local corrections facility officer in the line of duty, where defendant knew or had reason to know the victim was such an officer or employee, or caused the death of anyone if defendant was confined or in custody for a life term or upon an indeterminate sentence with a maximum of life and a minimum of at least 15 years or if defendant had escaped from such confinement or custody and had not yet been returned. People v Davis, 43 N.Y.2d 17, 400 N.Y.S.2d 735, 371 N.E.2d 456, 1977 N.Y. LEXIS 2434 (N.Y. 1977), cert. denied, 435 U.S. 998, 98 S. Ct. 1653, 56 L. Ed. 2d 88, 1978 U.S. LEXIS 1645 (U.S. 1978), cert. denied, 438 U.S. 914, 98 S. Ct. 3143, 57 L. Ed. 2d 1160, 1978 U.S. LEXIS 2435 (U.S. 1978).

Defendant's conviction for first degree murder under Penal Law § 125.27(1)(a)(iii), based on his killing of a corrections officer while he was serving an indeterminate sentence of from 25 years to life, was supported by proof beyond a reasonable doubt where the evidence linked defendant to a bite mark on the correction officer's body, and the remaining circumstantial evidence established that defendant had had both the opportunity, and access to the materials, for killing the corrections officer and disposing of her body. People v Smith, 63 N.Y.2d 41, 479 N.Y.S.2d 706, 468 N.E.2d 879, 1984 N.Y. LEXIS 4533 (N.Y. 1984), cert. denied, 469 U.S. 1227, 105 S. Ct. 1226, 84 L. Ed. 2d 364, 1985 U.S. LEXIS 1107 (U.S. 1985).

Second prong of exception under CLS CPL § 40.20(2)(b) did not prohibit prosecution of defendants for attempted murder under CLS Penal §§ 110.00 and 125.27(1)(A)(i) and knowing possession of defaced firearms under CLS Penal § 265.02(3) following federal prosecution arising from same criminal transaction, because kinds of harm or evil sought to be regulated under federal and state statutes were "very different" in that purpose of federal crimes for which defendants were charged (bank robbery under 18 USCS §§ 2113(a) and (d), using and possessing firearms under 18 USCS § 924(c), and conspiracy under 18 USCS § 371) was protection of financial institutions in which government has interest and deterrence of use of weapons in connection with crimes against such institutions, while state weapons offense committed by defendants was intended to curtail availability of defaced firearms which prevent detection of crime, and state homicide offense focused exclusively on prevention of killing police officers. People v Bryant, 92 N.Y.2d 216, 677 N.Y.S.2d 286, 699 N.E.2d 910, 1998 N.Y. LEXIS 2151 (N.Y. 1998).

Phrase "committed in a similar fashion" pursuant to CLS Penal § 125.27(1)(a)(xi) does not have well-settled legal meaning in New York jurisprudence, and thus Court of Appeals could not provide more definite resolution of nature of "similarity" beyond determination of facts presented in defendant's particular case. People v Mateo, 93 N.Y.2d 327, 690 N.Y.S.2d 527, 712 N.E.2d 692, 1999 N.Y. LEXIS 1140 (N.Y. 1999).

In context of accomplice-liability aggravating factor which can elevate murder to first degree rank, word "command" has commonly accepted meaning (i.e., to direct authoritatively) and is not impermissibly vague. People v Couser, 94 N.Y.2d 631, 709 N.Y.S.2d 155, 730 N.E.2d 953, 2000 N.Y. LEXIS 887 (N.Y. 2000).

Capital defendant does not have unqualified right to plead guilty to entire indictment until deliberative process has been completed, either by filing of death penalty notice, announcement of intention not to seek death penalty, or expiration of statutory period for district attorney to deliberate on that decision under CLS CPL § 250.40; to extent that CLS CPL §§ 220.10(2) and 220.60(2) conflict with § 250.40, § 250.40 prevails. Francois v Dolan, 95 N.Y.2d 33, 709 N.Y.S.2d 898, 731 N.E.2d 614, 2000 N.Y. LEXIS 908 (N.Y. 2000).

Invalidation of plea provisions of death penalty statute (CLS CPL § 220.10(5)(e) and CLS CPL § 220.30(3)(b)(vii)) did not eliminate statutory authorization to sentence defendant to life in prison without possibility of parole, where defendant pleaded guilty to first degree murder on last day for People to file CLS CPL § 250.40 notice of intent to seek death penalty, without ever facing death penalty, and thus court's sentencing authority was

derived from CLS CPL § 400.27(1), not from invalidated plea provisions. People v Mower, 97 N.Y.2d 239, 739 N.Y.S.2d 343, 765 N.E.2d 839, 2002 N.Y. LEXIS 183 (N.Y. 2002).

Statutory term of art "criminal transaction" in N.Y. Penal Law § 125.27(1)(a)(viii) should be construed as incorporating the technical definition given the phrase in N.Y. Crim. Proc. Law § 40.10(2) and, as a result, the definition of "criminal transaction" means that first-degree murder liability attaches when a defendant intends to kill one person but kills another contemporaneously. People v Duggins, 3 N.Y.3d 522, 788 N.Y.S.2d 638, 821 N.E.2d 942, 2004 N.Y. LEXIS 3730 (N.Y. 2004).

Defendant's sentences for two counts of first degree murder had to be served concurrently under Penal Law § 70.25(2) where the actus reus under Penal Law § 125.27(a)(a)(viii) and (b) was that the defendant intentionally murdered one victim and caused the death of another, with the intent of causing either death or serious physical injury to the second victim, it was the same murder that formed the basis for each offense, and thus, both offenses were committed through a single actus reus. People v Rosas, 8 N.Y.3d 493, 836 N.Y.S.2d 518, 868 N.E.2d 199, 2007 N.Y. LEXIS 991 (N.Y. 2007).

Consecutive sentences for defendant's convictions of first degree murder N.Y. Penal Law § 125.27(1)(a)(viii), and second degree criminal possession of a weapon, N.Y. Penal Law § 265.03(2), were prohibited by N.Y. Penal Law § 70.25(2) because the offense of possessing a gun with unlawful intent was only completed upon defendant's commission of the ensuing substantive crime of shooting the victims; in weapons possession cases, to determine whether a single act constituted both offenses under prong one of § 70.25(2), courts look to when the crime of possession-necessarily encompassing both actus reus and mens rea elements-was completed. Only where the act of possession is accomplished before the commission of the ensuing crime and with a mental state that both satisfies the statutory mens rea element and is discrete from that of the underlying crime may consecutive sentences be imposed. People v Wright, 19 N.Y.3d 359, 948 N.Y.S.2d 228, 971 N.E.2d 358, 2012 N.Y. LEXIS 1284 (N.Y. 2012).

Where defendant was indicted for murder in the first degree on charges involving separate, unrelated homicides, and pleaded guilty to manslaughter in first degree in each case, and court thereafter refused to accept pleas on ground that there was no admission to murder, it would have been appropriate for court to have afforded defendant option of withdrawing pleas, in view of possible defense of self-defense or, if court on basis of original and supplemental probation report concluded that "promised" sentence of three to nine years incarceration was inadequate, to have given defendant alternative of either withdrawing his pleas and standing trial or allowing pleas to remain if he was willing to accept sentence other than "promised." Fernandez v Silbowitz, 59 A.D.2d 837, 398 N.Y.S.2d 896, 1977 N.Y. App. Div. LEXIS 13979 (N.Y. App. Div. 1st Dep't 1977).

Because the first degree murder statute under which defendant was convicted is invalid, his conviction on such charge would be modified to one of murder in the second degree, and the case would be remitted for resentencing on that count pursuant to CPL § 470.20(4). People v Alston, 104 A.D.2d 653, 480 N.Y.S.2d 115, 1984 N.Y. App. Div. LEXIS 20069 (N.Y. App. Div. 2d Dep't 1984).

Defendant charged with first degree murder had absolute right to nonjury trial under CLS NY Const Art I § 2, despite language of CLS CPL § 320.10 purporting to preclude waiver of jury trial where indictment charges first degree murder; language in question was added in 1974 to comport with newly-enacted mandatory death penalty statute (CLS Penal § 60.06), and was no longer controlling in light of Court of Appeals' intervening holding that death penalty statute was unconstitutional. People v Swan, 130 A.D.2d 6, 519 N.Y.S.2d 581, 1987 N.Y. App. Div. LEXIS 45059 (N.Y. App. Div. 4th Dep't), app. denied, 70 N.Y.2d 804, 522 N.Y.S.2d 122, 516 N.E.2d 1235, 1987 N.Y. LEXIS 19561 (N.Y. 1987), app. denied, 70 N.Y.2d 878, 523 N.Y.S.2d 505, 518 N.E.2d 16, 1987 N.Y. LEXIS 19232 (N.Y. 1987).

First degree murder conviction did not require vacation merely because death penalty statute (CLS Penal § 60.06) was declared unconstitutional, since crime of first degree murder has not been so declared. People v Edgehill, 130 A.D.2d 761, 516 N.Y.S.2d 55, 1987 N.Y. App. Div. LEXIS 46780 (N.Y. App. Div. 2d Dep't 1987).

Consecutive sentences were properly imposed for each of 3 counts of attempted first degree murder where, during confrontation with police, defendant pointed his gun at each of 3 officers and either fired or misfired his gun; evidence established that defendant committed separate acts against separate victims, and consecutive sentences were within discretion of court. People v Danielson, 184 A.D.2d 723, 585 N.Y.S.2d 78, 1992 N.Y. App. Div. LEXIS 8540 (N.Y. App. Div. 2d Dep't), app. denied, 80 N.Y.2d 928, 589 N.Y.S.2d 856, 603 N.E.2d 961, 1992 N.Y. LEXIS 4030 (N.Y. 1992).

Court erred in directing that sentence for attempted second degree murder run consecutively to sentences for first degree burglary and first degree robbery where conduct resulting in defendant's conviction for murder also constituted physical injury element of burglary and serious physical injury element of robbery. People v Pringle, 216 A.D.2d 863, 629 N.Y.S.2d 364, 1995 N.Y. App. Div. LEXIS 7168 (N.Y. App. Div. 4th Dep't), app. denied, 86 N.Y.2d 845, 634 N.Y.S.2d 455, 658 N.E.2d 233, 1995 N.Y. LEXIS 4669 (N.Y. 1995).

Jury's deliberative process was not unfairly skewed by placement of names of 5 alleged victims of attempted first degree murder and attempted aggravated assault on police officer beneath respective counts to be considered and beside possible verdicts, where form was entirely neutral and did not contain parenthetical references to prejudicial facts. People v Collins, 238 A.D.2d 435, 656 N.Y.S.2d 356, 1997 N.Y. App. Div. LEXIS 3780 (N.Y. App. Div. 2d Dep't), app. denied, 90 N.Y.2d 903, 663 N.Y.S.2d 515, 686 N.E.2d 227, 1997 N.Y. LEXIS 3323 (N.Y. 1997), app. denied, 91 N.Y.2d 890, 669 N.Y.S.2d 4, 691 N.E.2d 1030, 1998 N.Y. LEXIS 355 (N.Y. 1998).

Inclusion of dates of crimes on verdict form could only have clarified, rather than skewed, jury's deliberations on counts of attempted first degree murder and attempted aggravated assault on police officer where trial involved 2 separate indictments, for crimes committed on 2 different dates, and cases were joined because of common evidence. People v Collins, 238 A.D.2d 435, 656 N.Y.S.2d 356, 1997 N.Y. App. Div. LEXIS 3780 (N.Y. App. Div. 2d Dep't), app. denied, 90 N.Y.2d 903, 663 N.Y.S.2d 515, 686 N.E.2d 227, 1997 N.Y. LEXIS 3323 (N.Y. 1997), app. denied, 91 N.Y.2d 890, 669 N.Y.S.2d 4, 691 N.E.2d 1030, 1998 N.Y. LEXIS 355 (N.Y. 1998).

Jury instructions on attempted first degree murder did not unfairly marshal evidence against defendant where charge benefited defendant by applying term "a police officer" to one specific officer, rather than to group of 3 officers at which defendant shot, even though prosecution was not required to link intent element to specific officer. People v Perry, 266 A.D.2d 151, 700 N.Y.S.2d 107, 1999 N.Y. App. Div. LEXIS 12351 (N.Y. App. Div. 1st Dep't 1999), app. denied, 95 N.Y.2d 856, 714 N.Y.S.2d 7, 736 N.E.2d 868, 2000 N.Y. LEXIS 2719 (N.Y. 2000).

County Court properly refused to accept petitioner's guilty plea to indictment charging him with, inter alia, first degree murder where 120-day period within which People could file notice of intention to seek death penalty (CLS CPL § 250.40(2)) had not yet expired. Schroedel v LaBuda, 264 A.D.2d 136, 707 N.Y.S.2d 252, 2000 N.Y. App. Div. LEXIS 4205 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 754, 711 N.Y.S.2d 156, 733 N.E.2d 228, 2000 N.Y. LEXIS 998 (N.Y. 2000), cert. denied, 531 U.S. 860, 121 S. Ct. 147, 148 L. Ed. 2d 97, 2000 U.S. LEXIS 5675 (U.S. 2000).

Term "pending" in CLS CPL § 250.40(2) should be interpreted as meaning both after notice of intent is filed and served and during 120 days in which People may file notice. Schroedel v LaBuda, 264 A.D.2d 136, 707 N.Y.S.2d 252, 2000 N.Y. App. Div. LEXIS 4205 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 754, 711 N.Y.S.2d 156, 733 N.E.2d 228, 2000 N.Y. LEXIS 998 (N.Y. 2000), cert. denied, 531 U.S. 860, 121 S. Ct. 147, 148 L. Ed. 2d 97, 2000 U.S. LEXIS 5675 (U.S. 2000).

Court would dismiss proceeding seeking to compel County Judge to entertain petitioner's unconditional guilty plea to indictment charging him with, inter alia, first degree murder since there is no constitutional right that proffered guilty plea be

accepted, and County Court correctly concluded that, since 120-day period within which People could file notice of intention to seek death penalty (CLS CPL § 250.40(2)) had not expired, legal bar existed to acceptance of plea. Schroedel v LaBuda, 264 A.D.2d 136, 707 N.Y.S.2d 252, 2000 N.Y. App. Div. LEXIS 4205 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 754, 711 N.Y.S.2d 156, 733 N.E.2d 228, 2000 N.Y. LEXIS 998 (N.Y. 2000), cert. denied, 531 U.S. 860, 121 S. Ct. 147, 148 L. Ed. 2d 97, 2000 U.S. LEXIS 5675 (U.S. 2000).

Aggregating factor of multiple killings necessary to elevate offense to first degree murder (CLS Penal § 125.27(1)(a)(viii)) may be met by evidence of accessorial liability; fact that statute refers to single actors does not preclude interpretation applying law to multiple actors. People v Reed, 265 A.D.2d 56, 705 N.Y.S.2d 592, 2000 N.Y. App. Div. LEXIS 2802 (N.Y. App. Div. 2d Dep't), app. denied, 95 N.Y.2d 832, 713 N.Y.S.2d 138, 735 N.E.2d 418, 2000 N.Y. LEXIS 2516 (N.Y. 2000), app. denied sub. nom., People v Warren, 95 N.Y.2d 855, 714 N.Y.S.2d 10, 736 N.E.2d 868, 2000 N.Y. LEXIS 2799 (N.Y. 2000).

Fact that legislature expressly limited accessorial liability in first degree felony murder cases so that nonshooter can be convicted of crime only if, during perpetration of designated felony, nonshooter expressly "commanded" shooter to kill (CLS Penal § 125.27(1)(a)(vii)) does not give rise to inference that legislature intended to limit normal rules of accessorial liability in multiple killings paragraph of first degree murder statute; legislature did not intend to alter ordinary rules of accomplice liability as applied to multiple killers. People v Reed, 265 A.D.2d 56, 705 N.Y.S.2d 592, 2000 N.Y. App. Div. LEXIS 2802 (N.Y. App. Div. 2d Dep't), app. denied, 95 N.Y.2d 832, 713 N.Y.S.2d 138, 735 N.E.2d 418, 2000 N.Y. LEXIS 2516 (N.Y. 2000), app. denied sub. nom., People v Warren, 95 N.Y.2d 855, 714 N.Y.S.2d 10, 736 N.E.2d 868, 2000 N.Y. LEXIS 2799 (N.Y. 2000).

In first degree murder prosecution involving murder of police officer during shootout resulting from botched drug sale to undercover officer, potential juror's statements about close friendship with police captain assigned to narcotics squad did not warrant dismissal for cause, even though juror testified at reconstruction hearing that he would presently feel uncomfortable sitting on jury in case in which police officer was involved, since he also stated that he did not recall if he had expressed such concern 4 years earlier, at time of voir dire, lead prosecutor testified at reconstruction hearing that his regular jury selection practice involved specific inquiry of every juror whether he or she could be fair and impartial, and defense counsel confirmed that he thought juror at issue was asked such question, juror in question also testified at reconstruction hearing that he was "pretty sure" that he was asked if he could be fair and impartial juror, and "probably" said he could be, and assistant prosecutor's notes and lead prosecutor's notation on jury selection sheet supported conclusion that juror had retreated from his original positioned, indicating that his friendships would not affect his ability to be fair and impartial. People v Degondea, 269 A.D.2d 243, 705 N.Y.S.2d 20, 2000 N.Y. App. Div. LEXIS 1565 (N.Y. App. Div. 1st Dep't), app. denied, 95 N.Y.2d 834, 713 N.Y.S.2d 140, 735 N.E.2d 420, 2000 N.Y. LEXIS 2403 (N.Y. 2000).

Defendant's challenge to validity of his guilty plea entered under statutory provisions struck from state's death penalty law by Court of Appeals prior to his sentencing fell within category of claims that could not be waived. People v Edwards, 274 A.D.2d 754, 712 N.Y.S.2d 71, 2000 N.Y. App. Div. LEXIS 8060 (N.Y. App. Div. 3d Dep't 2000), rev'd, 96 N.Y.2d 445, 729 N.Y.S.2d 410, 754 N.E.2d 169, 2001 N.Y. LEXIS 2015 (N.Y. 2001).

There was no merit in defendant's claim that his plea of guilty to first degree murder was result of mistake of law, based on provisions of CLS Penal § 70.00(5) and CLS CPL § 400.27, where prosecution did not seek death penalty, prohibition against pleas and plea negotiations during pendency of death penalty notice thus was not implicated, and Supreme Court had statutory authority to sentence defendant to life imprisonment without parole. People v Mower, 280 A.D.2d 25, 719 N.Y.S.2d 780, 2001 N.Y. App. Div. LEXIS 983 (N.Y. App. Div. 3d Dep't 2001), aff'd, 97 N.Y.2d 239, 739 N.Y.S.2d 343, 765 N.E.2d 839, 2002 N.Y. LEXIS 183 (N.Y. 2002).

Defendant's allegation that he was improperly charged, under N.Y. Penal Law § 125.27(1)(a)(ix), with having committed a murder after being previously convicted of murder in another state, because the previous conviction was for second degree murder, was waived when he pled guilty. People v Williamson, 301 A.D.2d 860, 755 N.Y.S.2d 443, 2003 N.Y. App. Div. LEXIS 343 (N.Y. App. Div. 3d Dep't), app. denied, 100 N.Y.2d 567, 763 N.Y.S.2d 824, 795 N.E.2d 50, 2003 N.Y. LEXIS 2230 (N.Y. 2003).

N.Y. Penal Law § 60.06 allowed the trial court to sentence defendant who was convicted of murder in the first degree, in violation of N.Y. Penal Law § 125.27, to life imprisonment with a minimum period of incarceration ranging from 20 to 25 years, and the trial court erred by concluding that it had to sentence defendant to life imprisonment without the possibility of parole. People v Wiggins, 304 A.D.2d 322, 758 N.Y.S.2d 26, 2003 N.Y. App. Div. LEXIS 3488 (N.Y. App. Div. 1st Dep't), app. denied, 100 N.Y.2d 625, 767 N.Y.S.2d 409, 799 N.E.2d 632, 2003 N.Y. LEXIS 3898 (N.Y. 2003).

Trial court erred in its accomplice liability charge as it related to defendant's first-degree felony murder count, as the trial court only gave the N.Y. Penal Law § 20.00 definition of accomplice liability without any adjustment for the first-degree murder count; N.Y. Penal Law § 125.27(l)(a)(vii) provides that N.Y. Penal Law § 20.00 is not applicable to first-degree felony murder unless defendant's criminal liability is based upon defendant having commanded another person to cause the death of the victim or intended victim pursuant to § 20.00. People v Taylor, 1 A.D.3d 619, 767 N.Y.S.2d 640, 2003 N.Y. App. Div. LEXIS 12472 (N.Y. App. Div. 2d Dep't 2003), app. denied, 1 N.Y.3d 635, 777 N.Y.S.2d 33, 808 N.E.2d 1292, 2004 N.Y. LEXIS 899 (N.Y. 2004), app. denied, 2 N.Y.3d 746, 778 N.Y.S.2d 472, 810 N.E.2d 925, 2004 N.Y. LEXIS 1274 (N.Y. 2004).

Where defendant argued that, because attempted robbery was an element of murder in the first degree under N.Y. Penal Law § 125.27(1)(a)(vii), the trial court erred in directing that the 15-year determinate sentences of imprisonment imposed for the two counts of attempted robbery in the first degree in violation of N.Y. Penal Law §§ 110.00, 160.15(2) were to run consecutively to the sentences of life imprisonment without parole, which were indeterminate sentences pursuant to N.Y. Penal Law § 70.00(5), imposed for the two counts of first degree murder under N.Y. Penal Law § 125.27(1)(a)(vii), the argument failed; the trial court imposed the attempted robbery sentences consecutive to each other, not consecutive to the murder sentences, and this was proper in light of the act that there were two robbery victims. People v Switzer, 15 A.D.3d 913, 788 N.Y.S.2d 760, 2005 N.Y. App. Div. LEXIS 1104 (N.Y. App. Div. 4th Dep't), app. denied, 5 N.Y.3d 770, 801 N.Y.S.2d 264, 834 N.E.2d 1274, 2005 N.Y. LEXIS 2154 (N.Y. 2005).

Where defendant was convicted of murder in the first degree in violation of N.Y. Penal Law § 125.27(1)(a)(vii), (viii) and murder in the second degree in violation of N.Y. Penal Law § 125.25(3), the verdict was not against the weight of the evidence, as the jury was permitted to infer defendant's intent to kill from defendant's conduct and the surrounding circumstances. People v Switzer, 15 A.D.3d 913, 788 N.Y.S.2d 760, 2005 N.Y. App. Div. LEXIS 1104 (N.Y. App. Div. 4th Dep't), app. denied, 5 N.Y.3d 770, 801 N.Y.S.2d 264, 834 N.E.2d 1274, 2005 N.Y. LEXIS 2154 (N.Y. 2005).

Defendant's consecutive life sentences for first-degree murder violated N.Y. Penal Law § 70.25(1) and (2) and were modified to be concurrent sentences as defendant was convicted of violating N.Y. Penal Law § 125.27(1)(a)(viii) and, although two separate shots were fired, the murder of the wife was a material element of the offense as to the husband and vice-versa. People v Rosas, 30 A.D.3d 545, 818 N.Y.S.2d 126, 2006 N.Y. App. Div. LEXIS 8042 (N.Y. App. Div. 2d Dep't), app. denied, 7 N.Y.3d 762, 819 N.Y.S.2d 888, 853 N.E.2d 259, 2006 N.Y. LEXIS 2355 (N.Y. 2006), aff'd, 8 N.Y.3d 493, 836 N.Y.S.2d 518, 868 N.E.2d 199, 2007 N.Y. LEXIS 991 (N.Y. 2007).

Defendant engaged in conduct constituting the crime of attempted robbery and this same conduct was a material element of the crime of felony murder, N.Y. Penal Law § 125.27(1)(vii); therefore, consecutive sentences based on defendant's guilty pleas to felony murder and attempted robbery were improper. The fact

that defendant pleaded guilty to the subsection of attempted robbery which involved being "aided by another person actually present" rather than the subsection which involved causing physical injury was inconsequential. People v Middleton, 32 A.D.3d 557, 818 N.Y.S.2d 873, 2006 N.Y. App. Div. LEXIS 9828 (N.Y. App. Div. 3d Dep't 2006).

Adjudication of defendant as a level three sex offender under the Sex Offender Registration Act, N.Y. Correct. Law art. 6-C, was proper because defendant, who was 20 years and 9 months old at the time of the offense at issue, was properly assessed points for the risk factor that assessed 10 points if offender's first sex crime occurred at age 20 or less; the board's construction and interpretation of its own regulations and of the statute under which it functioned was entitled to the greatest weight, and, moreover, a person who was between his or her twentieth and twenty-first birthdays would normally have been regarded as being age 20. Cases interpreting the phrase "more than eighteen years old" contained in N.Y. Penal Law § 125.27(1)(b) were inapplicable because of the difference between the phrases "age [x] or less," and "more than [x] years old." People v Faison, 46 A.D.3d 316, 847 N.Y.S.2d 527, 2007 N.Y. App. Div. LEXIS 12678 (N.Y. App. Div. 1st Dep't 2007), app. denied, 10 N.Y.3d 705, 857 N.Y.S.2d 37, 886 N.E.2d 802, 2008 N.Y. LEXIS 615 (N.Y. 2008).

While there was evidence that defendant refused to get medical assistance for the victim out of concern that he would go to the police, the victim was not a witness to a crime committed on a prior occasion as contemplated by N.Y. Penal Law § 125.27(1)(v) where the victim was beaten and tortured throughout the day until he died. People v Adamson, 47 A.D.3d 318, 849 N.Y.S.2d 674, 2007 N.Y. App. Div. LEXIS 13179 (N.Y. App. Div. 3d Dep't 2007), app. denied, 10 N.Y.3d 807, 857 N.Y.S.2d 41, 886 N.E.2d 806, 2008 N.Y. LEXIS 1184 (N.Y. 2008).

Trial court properly refused to sever counts charging first degree murder, N.Y. Penal Law § 125.27(1)(a), from counts charging first degree rape, N.Y. Penal Law § 130.35(1), because first degree rape was the underlying felony for each count of felony murder, and the People thus had to establish defendant's rape of the felony murder victims; the counts were properly joined inasmuch as the offenses were "similar in law" and defendant failed to establish good cause for severance. People v Owens, 51 A.D.3d 1369, 856 N.Y.S.2d 793, 2008 N.Y. App. Div. LEXIS 3918 (N.Y. App. Div. 4th Dep't), app. denied, 11 N.Y.3d 740, 864 N.Y.S.2d 398, 894 N.E.2d 662, 2008 N.Y. LEXIS 3016 (N.Y. 2008).

Life sentence without parole was not unduly harsh or severe for convictions of murder in the first degree, N.Y. Penal Law § 125.27(1)(a)(viii), (b), murder in the second degree N.Y. Penal Law § 125.25(1), and attempted murder in the second degree, N.Y. Penal Law §§ 110.00, 125.25(1); defendant was convicted of attempting to kill two children and killing four people, one of whom was holding her 11-month-old baby in her arms. People v Thompson, 59 A.D.3d 1115, 873 N.Y.S.2d 834, 2009 N.Y. App. Div. LEXIS 1059 (N.Y. App. Div. 4th Dep't), app. denied, 12 N.Y.3d 860, 881 N.Y.S.2d 672, 909 N.E.2d 595, 2009 N.Y. LEXIS 2724 (N.Y. 2009), app. denied, 12 N.Y.3d 852, 881 N.Y.S.2d 664, 909 N.E.2d 587, 2009 N.Y. LEXIS 4034 (N.Y. 2009).

After being convicted of two counts of first degree murder and criminal possession of a weapon in the third degree, the trial court acted within its discretion in sentencing defendant to an aggregate term of life in prison without the possibility of parole because, inter alia, the sentence was within the permissible statutory range, defendant acted with a shocking and profound level of violence when he took the victims' lives, and defendant lacked remorse. People v Ramos, 133 A.D.3d 904, 20 N.Y.S.3d 183, 2015 N.Y. App. Div. LEXIS 8103 (N.Y. App. Div. 3d Dep't 2015), app. denied, 26 N.Y.3d 1149, 51 N.E.3d 574, 32 N.Y.S.3d 63, 2016 N.Y. LEXIS 528 (N.Y. 2016), app. denied, 26 N.Y.3d 1143, 51 N.E.3d 568, 32 N.Y.S.3d 57, 2016 N.Y. LEXIS 668 (N.Y. 2016).

CLS Penal § 125.27(1) covers persons who have reached their eighteenth birthday at time of offense; term "more than eighteen years old" must be deemed to be synonymous with term "eighteen years old or more." People v Carr, 159 Misc. 2d 1093, 608 N.Y.S.2d 48, 1994 N.Y. Misc. LEXIS 24 (N.Y. Sup. Ct. 1994).

Defendant, charged in felony complaint with first degree murder, was not entitled to order compelling District Attorney's office to turn over statements he made and other materials constituting discovery prior to defendant testifying before grand jury, notwithstanding that crime of first degree murder carries with it potential for death penalty. People v Bastien, 170 Misc. 2d 103, 649 N.Y.S.2d 979, 1996 N.Y. Misc. LEXIS 402 (N.Y. Sup. Ct. 1996).

New York State Legislature, in authorizing imposition of death penalty for first degree murder, did not create "heightened due process" standard for death penalty cases. People v Gordon, 175 Misc. 2d 67, 667 N.Y.S.2d 626, 1997 N.Y. Misc. LEXIS 598 (N.Y. Sup. Ct. 1997).

CLS Penal § 125.27(1)(a)(vii) requires that defendant intentionally cause death of another individual in course of and in furtherance of felony, while CLS Penal § 125.25(3) does not require intentional conduct; element of intent distinguishes cases in which death penalty may be imposed from those in which it may not. People v Mateo, 175 Misc. 2d 192, 664 N.Y.S.2d 981, 1997 N.Y. Misc. LEXIS 469 (N.Y. County Ct. 1997), aff'd, 249 A.D.2d 894, 672 N.Y.S.2d 594, 1998 N.Y. App. Div. LEXIS 4973 (N.Y. App. Div. 4th Dep't 1998).

Indictment charging first degree murder in violation of CLS Penal § 125.27(1)(a)(xi) did not constitute impermissible retroactive application of statute, and would not be dismissed, although indictment was based partially on acts (other homicides) allegedly committed prior to effective date of statute, since earlier homicides were merely antecedent events that were elements of later homicide allegedly committed by defendant after statute's effective date. People v Mateo, 175 Misc. 2d 192, 664 N.Y.S.2d 981, 1997 N.Y. Misc. LEXIS 469 (N.Y. County Ct. 1997), aff'd, 249 A.D.2d 894, 672 N.Y.S.2d 594, 1998 N.Y. App. Div. LEXIS 4973 (N.Y. App. Div. 4th Dep't 1998).

Ex Post Facto Clause of United States Constitution was not violated by indictment charging first degree murder under CLS Penal § 125.27(1)(a)(xi), although statute enhanced punishment for later homicide based on commission of additional prior homicides that occurred before enactment of statute, since statute did not bestow additional penalty for predicate homicides but merely provided stiffened penalty for later crime. People v Mateo, 175 Misc. 2d 192, 664 N.Y.S.2d 981, 1997 N.Y. Misc. LEXIS 469 (N.Y. County Ct. 1997), aff'd, 249 A.D.2d 894, 672 N.Y.S.2d 594, 1998 N.Y. App. Div. LEXIS 4973 (N.Y. App. Div. 4th Dep't 1998).

Where "serial killer" provision of CLS Penal § 125.27(1)(a)(xi) did not apply to link earlier homicides with later homicides, court would sever counts of indictment charging former crimes from those charging later crimes. People v Mateo, 175 Misc. 2d 192, 664 N.Y.S.2d 981, 1997 N.Y. Misc. LEXIS 469 (N.Y. County Ct. 1997), aff'd, 249 A.D.2d 894, 672 N.Y.S.2d 594, 1998 N.Y. App. Div. LEXIS 4973 (N.Y. App. Div. 4th Dep't 1998).

Court accepted defendant's plea of guilty to first degree murder after prosecutor withdrew People's intent to seek death penalty, where defendant sought to end case, admit his guilt, waive his right to appeal and receive sentence of life imprisonment without parole. People v Van Dyne, 179 Misc. 2d 467, 685 N.Y.S.2d 591, 1999 N.Y. Misc. LEXIS 11 (N.Y. County Ct. 1999), rev'd, 12 A.D.3d 120, 784 N.Y.S.2d 795, 2004 N.Y. App. Div. LEXIS 13945 (N.Y. App. Div. 4th Dep't 2004).

Defendant charged with capital murder was not allowed to withdraw plea of guilty to first degree murder which called for her to testify against codefendant in exchange for sentence of 25 years to life, on ground that plea was product of duress of facing death penalty, where she offered no claim of innocence, fraud or mistake in inducement of plea, and her claim that she was unable to think rationally when she entered plea was refuted by record of conference and plea proceedings. People v Arroyo, 180 Misc. 2d 558, 691 N.Y.S.2d 734, 1999 N.Y. Misc. LEXIS 177 (N.Y. County Ct. 1999), aff'd, 42 A.D.3d 818, 838 N.Y.S.2d 920, 2007 N.Y. App. Div. LEXIS 8794 (N.Y. App. Div. 3d Dep't 2007).

Defendant charged with capital murder was not entitled to withdraw his plea of guilty to first degree murder based solely on Court of Appeals' subsequent invalidation of plea provisions of CLS CPL § 220.10(5)(e) and CLS CPL § 220.30(3)(b)(vii), where his plea was entered either after notice of intent to seek death penalty was withdrawn or in conjunction with withdrawal of notice of intent. People v Edwards, 180 Misc. 2d 564, 690 N.Y.S.2d 404, 1999 N.Y. Misc. LEXIS 176 (N.Y. County Ct. 1999), rev'd, 274

A.D.2d 754, 712 N.Y.S.2d 71, 2000 N.Y. App. Div. LEXIS 8060 (N.Y. App. Div. 3d Dep't 2000).

Criminal defendant's motion to enjoin state from seeking death penalty was not ripe for judicial review where he was arraigned on indictment charging him with second degree murder and other crimes, and People reserved right to file capital murder indictment should evidence become available supporting such charges; harm to defendant was contingent on filing first degree murder indictment against him and filing notice of intent to seek death penalty, both of which events might never occur. People v Attawwab, 182 Misc. 2d 824, 700 N.Y.S.2d 395, 1999 N.Y. Misc. LEXIS 530 (N.Y. Sup. Ct. 1999).

County Court lacked jurisdiction in potential death penalty case to grant defendant's request that records of any jail visits be sealed and their confidentiality maintained, on ground that People's access to such records would inform them of defense strategy and preparation; even if court were vested with such authority, defendant would ultimately be required to disclose names of his experts (CLS CPL § 240.30(2)), and other safeguards were in place, including sanctions and remedies at trial, to ensure that prosecution did not misuse such information in interim. People v Owens, 182 Misc. 2d 828, 701 N.Y.S.2d 604, 1999 N.Y. Misc. LEXIS 523 (N.Y. County Ct. 1999).

In death penalty case, defendant was granted 10-week adjournment, rather than requested 3-month adjournment, for further pretrial preparation following Capital Defender Office's appointment as exclusive lead counsel following completion of individual voir dire, due to serious illness of original defense counsel, where Capital Defender Office was aware from time it was appointed as co-lead counsel 10 weeks earlier that it might be required to assume role as sole lead counsel, during that period it had access to defendant's entire file, and defendant's associate counsel who worked on case with former lead counsel for more than 15 months worked diligently with Capital Defender Officer to prepare for trial. People v Owens, 186 Misc. 2d 767, 720 N.Y.S.2d 764, 2001 N.Y. Misc. LEXIS 6 (N.Y. Sup. Ct. 2001).

2. Constitutional issues

State statutes imposing the death penalty for first degree murder (Penal Law, §§ 60.06, 125.27) carry with them a strong presumption of constitutionality and should be stricken as unconstitutional only as a last resort without substitution of the judgment of the courts for that of the Legislature as to the wisdom and expendiency of the legislation. People v Davis, 43 N.Y.2d 17, 400 N.Y.S.2d 735, 371 N.E.2d 456, 1977 N.Y. LEXIS 2434 (N.Y. 1977), cert. denied, 435 U.S. 998, 98 S. Ct. 1653, 56 L. Ed. 2d 88, 1978 U.S. LEXIS 1645 (U.S. 1978), cert. denied, 438 U.S. 914, 98 S. Ct. 3143, 57 L. Ed. 2d 1160, 1978 U.S. LEXIS 2435 (U.S. 1978).

Unconstitutionality of New York's death penalty statute for murder of a corrections officer (Penal Law, §§ 60.06, 125.27, subd 1, par [a], cl [ii]) is indicated by the fact that the statute provides neither for the furnishing of information, without which there can be no consideration of the individual offender and the circumstances of a particular offense, nor standards to guide the sentencing authority in the use of that information had it been furnished. People v Davis, 43 N.Y.2d 17, 400 N.Y.S.2d 735, 371 N.E.2d 456, 1977 N.Y. LEXIS 2434 (N.Y. 1977), cert. denied, 435 U.S. 998, 98 S. Ct. 1653, 56 L. Ed. 2d 88, 1978 U.S. LEXIS 1645 (U.S. 1978), cert. denied, 438 U.S. 914, 98 S. Ct. 3143, 57 L. Ed. 2d 1160, 1978 U.S. LEXIS 2435 (U.S. 1978).

Although the statutory framework of New York's death penalty statute for murder of a corrections officer (Penal Law, §§ 60.06, 125.27, subd 1, par [a], cl [ii]) may in some manner reflect various mitigating factors as defenses, that is not enough to save New York's death penalty statute from constitutional infirmity, since similar defenses are found in other jurisdictions, including those whose death penalty statute has been held unconstitutional by the Supreme Court, and such limitations do not afford individualized consideration of the offender because defenses relate to guilt or innocence, whereas a mitigating factor may be of no significance to a determination of criminal culpability and will not rise to the level of a defense. People v Davis, 43 N.Y.2d 17, 400 N.Y.S.2d 735, 371 N.E.2d 456, 1977 N.Y. LEXIS 2434 (N.Y. 1977), cert. denied, 435 U.S. 998, 98 S. Ct. 1653, 56 L. Ed. 2d 88, 1978 U.S. LEXIS 1645 (U.S. 1978), cert. denied, 438 U.S. 914, 98 S. Ct. 3143, 57 L. Ed. 2d 1160, 1978 U.S. LEXIS 2435 (U.S. 1978).

Since the New York death penalty statute for murder of a corrections officer (Penal Law, §§ 60.06, 125.27, subd 1, par [a], cl [ii]) "does not allow consideration of particularized mitigating factors" for purposes of "the capital sentencing decision" as to "the particular offender", it is unconstitutional. People v Davis, 43 N.Y.2d 17, 400 N.Y.S.2d 735, 371 N.E.2d 456, 1977 N.Y. LEXIS 2434 (N.Y. 1977), cert. denied, 435 U.S. 998, 98 S. Ct. 1653, 56 L. Ed. 2d 88, 1978 U.S. LEXIS 1645 (U.S. 1978), cert. denied, 438 U.S. 914, 98 S. Ct. 3143, 57 L. Ed. 2d 1160, 1978 U.S. LEXIS 2435 (U.S. 1978).

CLS Penal § 125.27 remains viable as substantive basis for charge of attempted murder in first degree; first degree murder did not become nonexistent crime by virtue of case People v Smith (1984) 63 NY2d 41, 479 NYS2d 706, 468 NE2d 879, cert den 469 US 1227, 84 L Ed 2d 364, 105 S Ct 1226, reh den 471 US 1049, 85 L Ed 2d 340, 105 S Ct 2042. invalidating mandatory capital sentence imposed by CLS Penal § 60.06. People v Silva, 69 N.Y.2d 858, 514 N.Y.S.2d 710, 507 N.E.2d 303, 1987 N.Y. LEXIS 15905 (N.Y. 1987).

Pursuant to severability clause of death penalty statute (L 1995, ch 1 § 37), constitutional infirmity of plea provisions set forth in CLS CPL §§ 220.10(5)(e) and 220.30(3)(b)(vii) did not invalidate entire statute, as plea provisions were discrete and their removal would not affect either classification of capital offenses, or conduct of trial or penalty phase of capital cases. Hynes v Tomei, 92 N.Y.2d 613, 684 N.Y.S.2d 177, 706 N.E.2d 1201, 1998 N.Y. LEXIS 4140 (N.Y. 1998), cert. denied, 527 U.S. 1015, 119 S. Ct. 2359, 144 L. Ed. 2d 254, 1999 U.S. LEXIS 4184 (U.S. 1999).

Defendant who was charged with first degree felony murder had standing to assert that word "command" as used in CLS Penal § 125.27(1) was unconstitutionally vague, although he was not yet convicted of anything and was not subject to death sentence. People v Couser, 94 N.Y.2d 631, 709 N.Y.S.2d 155, 730 N.E.2d 953, 2000 N.Y. LEXIS 887 (N.Y. 2000).

Defendant's guilty plea to first degree murder while People's CLS CPL § 250.40 notice was still pending did not, standing alone, violate his Fifth Amendment privilege against self-incrimination or his Sixth Amendment right to trial by jury, even if it was exclusive means by which he avoided exposure to risk of imposition of death penalty. People v Edwards, 96 N.Y.2d 445, 729 N.Y.S.2d 410, 754 N.E.2d 169, 2001 N.Y. LEXIS 2015 (N.Y. 2001).

First degree murder charge under CLS Penal § 125.27 is viable although death sentence has been held to be unconstitutional. People v Swan, 130 A.D.2d 6, 519 N.Y.S.2d 581, 1987 N.Y. App. Div. LEXIS 45059 (N.Y. App. Div. 4th Dep't), app. denied, 70 N.Y.2d 804, 522 N.Y.S.2d 122, 516 N.E.2d 1235, 1987 N.Y. LEXIS 19561 (N.Y. 1987), app. denied, 70 N.Y.2d 878, 523 N.Y.S.2d 505, 518 N.E.2d 16, 1987 N.Y. LEXIS 19232 (N.Y. 1987).

Court did not err in accepting defendant's guilty plea to first degree murder, even though CLS CPL § 220.10(5)(e) prohibits defendant from entering such plea, since statute's provision was enacted as part of legislative scheme to enact mandatory death penalty, death penalty was subsequently declared unconstitutional, and thus rationale behind provision is no longer applicable. People v Edgehill, 130 A.D.2d 761, 516 N.Y.S.2d 55, 1987 N.Y. App. Div. LEXIS 46780 (N.Y. App. Div. 2d Dep't 1987).

Petition for mandamus, prohibition, injunctive relief and declaratory judgment with respect to implementation of Executive Order No. 27 (9 NYCRR § 5.27), which required Attorney-General to appear and supersede Bronx District Attorney in potential death penalty case because of district attorney's previously expressed intention not to utilize death penalty provisions of CLS Penal § 125.27, was properly dismissed for lack of justiciability, as petitioners failed to show that governor acted without constitutional or statutory authority; governor's apparent objective was to assure that state laws were applied in uniform fashion throughout state's 62 counties, and emergent nature of his intervention was justified by possibility that Bronx District Attorney might take action foreclosing appropriate consideration of death penalty pursuant to CLS CPL § 250.40. Johnson v Pataki, 229 A.D.2d 242, 655 N.Y.S.2d 463, 1997 N.Y.

App. Div. LEXIS 5952 (N.Y. App. Div. 1st Dep't), app. denied, 90 N.Y.2d 900, 662 N.Y.S.2d 430, 685 N.E.2d 211, 1997 N.Y. LEXIS 2686 (N.Y. 1997), aff'd, 91 N.Y.2d 214, 668 N.Y.S.2d 978, 691 N.E.2d 1002, 1997 N.Y. LEXIS 3703 (N.Y. 1997).

Plea bargain provisions of death penalty statute, which enable defendant charged with capital murder to avoid any possibility of death sentence by entering into plea bargain agreement with People (CLS CPL §§ 220.10(5)(e), 220.30(3)(b)(vii), 220.60(2)(a)), do not unconstitutionally penalize capital defendant's right to jury trial by exposing such defendant to risk of death only when exercising that right; thus, justice erred in declaring those provisions to be unconstitutional in reliance on decision in United States v Jackson, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138, 1968 U.S. LEXIS 2002 (U.S. 1968).Hynes v Tomei, 237 A.D.2d 52, 666 N.Y.S.2d 687, 1997 N.Y. App. Div. LEXIS 13300 (N.Y. App. Div. 2d Dep't 1997), app. denied, 91 N.Y.2d 811, 671 N.Y.S.2d 715, 694 N.E.2d 884, 1998 N.Y. LEXIS 1003 (N.Y. 1998), rev'd, 92 N.Y.2d 613, 684 N.Y.S.2d 177, 706 N.E.2d 1201, 1998 N.Y. LEXIS 4140 (N.Y. 1998).

Provisions of CLS CPL §§ 220.10(5)(e), 220.30(3)(b)(vii), and 220.60(2)(a), governing pleas in capital cases, did not violate defendant's constitutional right to jury trial by needlessly encouraging guilty pleas. Relin v Connell, 251 A.D.2d 1041, 674 N.Y.S.2d 192, 1998 N.Y. App. Div. LEXIS 7112 (N.Y. App. Div. 4th Dep't), app. denied, 92 N.Y.2d 809, 678 N.Y.S.2d 595, 700 N.E.2d 1231, 1998 N.Y. LEXIS 2887 (N.Y. 1998), rev'd sub. nom., Hynes v Tomei, 92 N.Y.2d 613, 684 N.Y.S.2d 177, 706 N.E.2d 1201, 1998 N.Y. LEXIS 4140 (N.Y. 1998).

Limitation on accomplice liability set forth in statutory definition of first degree felony murder was not unconstitutionally vague under due process clauses of federal or state constitution, as applied to defendant in noncapital murder case who, while incarcerated, allegedly directed member of his gang to kill intended victim where evidence, if believed, established that defendant acted as "boss-accomplice" to order member of his gang to commit crime. People v Couser, 258 A.D.2d 74, 695 N.Y.S.2d 781, 1999 N.Y. App. Div. LEXIS 7903 (N.Y. App. Div. 4th Dep't 1999), aff'd, 94 N.Y.2d 631, 709 N.Y.S.2d 155, 730 N.E.2d 953, 2000 N.Y. LEXIS 887 (N.Y. 2000).

There was no Brady violation, in prosecution for attempted first degree murder, first and second degree robbery, first degree use of firearm, attempted aggravated assault on police officer, and second degree weapon possession, where prosecution disclosed potential witness's address and telephone number during jury selection, as directed by court on defense counsel's claim that witness's statement contained potentially exculpatory information, and although witness ultimately could not be located by either party, defendant did not show that earlier disclosure would have resulted in witness's availability or that witness's testimony would have been exculpatory. People v Perry, 266 A.D.2d 151, 700 N.Y.S.2d 107, 1999 N.Y. App. Div. LEXIS 12351 (N.Y. App. Div. 1st Dep't 1999), app. denied, 95 N.Y.2d 856, 714 N.Y.S.2d 7, 736 N.E.2d 868, 2000 N.Y. LEXIS 2719 (N.Y. 2000).

There is no constitutional impediment to predicating charge of first degree murder on accessorial liability; accessories who are major participants in intentional killings can be subjected to capital prosecution for their accessorial conduct without violating Eighth Amendment's proscription against cruel and unusual punishment. People v Reed, 265 A.D.2d 56, 705 N.Y.S.2d 592, 2000 N.Y. App. Div. LEXIS 2802 (N.Y. App. Div. 2d Dep't), app. denied, 95 N.Y.2d 832, 713 N.Y.S.2d 138, 735 N.E.2d 418, 2000 N.Y. LEXIS 2516 (N.Y. 2000), app. denied sub. nom., People v Warren, 95 N.Y.2d 855, 714 N.Y.S.2d 10, 736 N.E.2d 868, 2000 N.Y. LEXIS 2799 (N.Y. 2000).

Life sentences without parole did not violate eighth Amendment where defendants, who could have been sentenced to death, were convicted of noncapital first degree murder for having perpetrated multiple killings by each shooting one rival drug dealer in concerted effort to kill off 2 competitors. People v Reed, 265 A.D.2d 56, 705 N.Y.S.2d 592, 2000 N.Y. App. Div. LEXIS 2802 (N.Y. App. Div. 2d Dep't), app. denied, 95 N.Y.2d 832, 713 N.Y.S.2d 138, 735 N.E.2d 418, 2000 N.Y. LEXIS 2516 (N.Y. 2000), app. denied sub. nom., People v Warren, 95 N.Y.2d 855, 714 N.Y.S.2d 10, 736 N.E.2d 868, 2000 N.Y. LEXIS 2799 (N.Y. 2000).

First degree murder statute is not unconstitutionally vague and overly broad insofar as it purports to punish multiple killings that are perpetrated as part of "same criminal transaction" (CLS Penal § 125.27(1)(a)(viii)) without supplying definition of "same criminal transaction"; statutory definition of "criminal transaction" used for double jeopardy purposes (CLS CPL § 40.10)) may be properly borrowed for application in first degree murder statute. People v Reed, 265 A.D.2d 56, 705 N.Y.S.2d 592, 2000 N.Y. App. Div. LEXIS 2802 (N.Y. App. Div. 2d Dep't), app. denied, 95 N.Y.2d 832, 713 N.Y.S.2d 138, 735 N.E.2d 418, 2000 N.Y. LEXIS 2516 (N.Y. 2000), app. denied sub. nom., People v Warren, 95 N.Y.2d 855, 714 N.Y.S.2d 10, 736 N.E.2d 868, 2000 N.Y. LEXIS 2799 (N.Y. 2000).

In first degree murder prosecution, defendant was not denied his right to present witnesses when court denied his request for 1-day adjournment to secure presence of his expert pathologist, who would have provided testimony contradictory to that of medical examiner as to undercover's positioning during shooting, where there was no evidence that witness had been subpoenaed, or had previously been present in court, and there was no indication as to any discussion between counsel and potential witness as to timing of his testimony, or any possible scheduling conflicts. People v Degondea, 269 A.D.2d 243, 705 N.Y.S.2d 20, 2000 N.Y. App. Div. LEXIS 1565 (N.Y. App. Div. 1st Dep't), app. denied, 95 N.Y.2d 834, 713 N.Y.S.2d 140, 735 N.E.2d 420, 2000 N.Y. LEXIS 2403 (N.Y. 2000).

Mere offer of plea bargain to first degree murder while death notice is pending presents capital defendant with same unconstitutional choice of either exercising Fifth and Sixth Amendment rights and risk death, or abandon those rights and avoid possibility of death; thus, it is constitutionally impermissible for prosecutors to negotiate guilty pleas to first degree murder while notice of intent to seek death penalty is pending. People v Edwards, 274 A.D.2d 754, 712 N.Y.S.2d 71, 2000 N.Y. App. Div. LEXIS 8060 (N.Y. App. Div. 3d Dep't 2000), rev'd, 96 N.Y.2d 445, 729 N.Y.S.2d 410, 754 N.E.2d 169, 2001 N.Y. LEXIS 2015 (N.Y. 2001).

In prosecution for first degree murder of defendant's parents, failure of CLS Penal § 125.27(1)(a)(viii) to define "same criminal transaction" did not render that statute unconstitutionally vague where statute unambiguously proscribes multiple killings, which is specific conduct easily comprehended and avoided by innocent-minded persons. People v Mower, 280 A.D.2d 25, 719 N.Y.S.2d 780, 2001 N.Y. App. Div. LEXIS 983 (N.Y. App. Div. 3d Dep't 2001), aff'd, 97 N.Y.2d 239, 739 N.Y.S.2d 343, 765 N.E.2d 839, 2002 N.Y. LEXIS 183 (N.Y. 2002).

Failure of CLS Penal § 125.27(1)(b) to define "more than eighteen years old" did not render that statute unconstitutionally vague where defendant was born on April 25, 1997, turned 18 on April 25, 1995, committed first degree murder on March 26, 1996, and thus was 18 years and 11 months old at time of murder; person concludes first 18 years of life on his or her 18th birthday and begins 19th year of life on that day. People v Mower, 280 A.D.2d 25, 719 N.Y.S.2d 780, 2001 N.Y. App. Div. LEXIS 983 (N.Y. App. Div. 3d Dep't 2001), aff'd, 97 N.Y.2d 239, 739 N.Y.S.2d 343, 765 N.E.2d 839, 2002 N.Y. LEXIS 183 (N.Y. 2002).

Defendant was not entitled to heightened due process analysis during guilt phase of prosecution for first degree murder where he had not yet been convicted and exposed to death penalty, and thus he was entitled to only standard due process under Fourteenth Amendment rather than review under Eighth Amendment. People v Mower, 280 A.D.2d 25, 719 N.Y.S.2d 780, 2001 N.Y. App. Div. LEXIS 983 (N.Y. App. Div. 3d Dep't 2001), aff'd, 97 N.Y.2d 239, 739 N.Y.S.2d 343, 765 N.E.2d 839, 2002 N.Y. LEXIS 183 (N.Y. 2002).

N.Y. Penal Law § 125.27(1)(a)(vii) is not unconstitutionally under inclusive. People v Owens, 51 A.D.3d 1369, 856 N.Y.S.2d 793, 2008 N.Y. App. Div. LEXIS 3918 (N.Y. App. Div. 4th Dep't), app. denied, 11 N.Y.3d 740, 864 N.Y.S.2d 398, 894 N.E.2d 662, 2008 N.Y. LEXIS 3016 (N.Y. 2008).

Where defendant was convicted of robbery and attempted murder, to the extent he was subjected to custodial interrogation, as his unwarned answer to such questioning, i.e., that he did not know his gun-discarding companion, was of minimal impact in

demonstrating defendant's guilt of the charged crimes, any error by the trial court in refusing to suppress that single statement was harmless beyond a reasonable doubt. People v Hough, 151 A.D.3d 1591, 57 N.Y.S.3d 780, 2017 N.Y. App. Div. LEXIS 4514 (N.Y. App. Div. 4th Dep't), app. denied, 30 N.Y.3d 950, 89 N.E.3d 523, 67 N.Y.S.3d 133, 2017 N.Y. LEXIS 3418 (N.Y. 2017), reh'g denied, 153 A.D.3d 1676, 60 N.Y.S.3d 911, 2017 N.Y. App. Div. LEXIS 6743 (N.Y. App. Div. 4th Dep't 2017).

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Defendants who are charged with capital offenses are not entitled to heightened due process at every stage of proceeding, and thus first degree murder indictment would not be dismissed on ground that defendants were not afforded meaningful opportunity to testify before grand jury because they were not granted indefinite open-ended adjournment to complete their investigation; defendants were not prejudiced where they never suggested what, if anything, they believed they would discover if additional time were granted to them. People v Rodriguez, 168 Misc. 2d 219, 647 N.Y.S.2d 350, 1996 N.Y. Misc. LEXIS 23 (N.Y. Sup. Ct. 1996), aff'd, People v Sanchez, 268 A.D.2d 364, 702 N.Y.S.2d 261, 2000 N.Y. App. Div. LEXIS 735 (N.Y. App. Div. 1st Dep't 2000).

In potential death penalty case, defendant was not entitled to court order requiring preservation and nonexhaustion of all evidence and permitting defense experts to be present during and to observe all testing of evidence by prosecution and government experts; discovery which in unavailable pursuant to statute may not be ordered based on principles of due process since there is no general constitutional right to discovery in criminal cases. People v Williamson, 172 Misc. 2d 172, 657 N.Y.S.2d 318, 1997 N.Y. Misc. LEXIS 134 (N.Y. County Ct. 1997).

Phrases "in the course of," "in furtherance of," "in the same criminal transaction," and "especially cruel and wanton" as used in statutes defining first and second degree murder were not unconstitutionally vague and overbroad, and thus indictment charging such crimes was not subject to dismissal pursuant to CLS CPL §§ 210.20(1)(a) and 210.25(3). People v Gordon, 175 Misc. 2d 67, 667 N.Y.S.2d 626, 1997 N.Y. Misc. LEXIS 598 (N.Y. Sup. Ct. 1997).

Murder defendant lacked standing to claim that CLS Penal § 125.27(1)(a)(vii) was unconstitutionally vague on its face, since statute involved no First Amendment concerns. People v Mateo, 175 Misc. 2d 192, 664 N.Y.S.2d 981, 1997 N.Y. Misc. LEXIS 469 (N.Y. County Ct. 1997), aff'd, 249 A.D.2d 894, 672 N.Y.S.2d 594, 1998 N.Y. App. Div. LEXIS 4973 (N.Y. App. Div. 4th Dep't 1998).

Murder defendant lacked standing to claim that CLS Penal § 125.27(1)(a)(vii) was overbroad on its face and as applied to him, since statute affected conduct and did not involve or affect speech. People v Mateo, 175 Misc. 2d 192, 664 N.Y.S.2d 981, 1997 N.Y. Misc. LEXIS 469 (N.Y. County Ct. 1997), aff'd, 249 A.D.2d 894, 672 N.Y.S.2d 594, 1998 N.Y. App. Div. LEXIS 4973 (N.Y. App. Div. 4th Dep't 1998).

Phrase "in the course of and in furtherance of" is not unconstitutionally vague as used in CLS Penal § 125.25(3) and CLS Penal § 125.27(1)(a)(vii). People v Mateo, 175 Misc. 2d 192, 664 N.Y.S.2d 981, 1997 N.Y. Misc. LEXIS 469 (N.Y. County Ct. 1997), aff'd, 249 A.D.2d 894, 672 N.Y.S.2d 594, 1998 N.Y. App. Div. LEXIS 4973 (N.Y. App. Div. 4th Dep't 1998).

Phrase "commanded another person" is not unconstitutionally vague as used in CLS Penal § 125.27(1)(a)(vii). People v Mateo, 175 Misc. 2d 192, 664 N.Y.S.2d 981, 1997 N.Y. Misc. LEXIS 469 (N.Y. County Ct. 1997), aff'd, 249 A.D.2d 894, 672 N.Y.S.2d 594, 1998 N.Y. App. Div. LEXIS 4973 (N.Y. App. Div. 4th Dep't 1998).

Word "commanded," as used in CLS Penal § 125.27(1)(a)(vii), establishing criminal liability for having commanded another person to cause death of victim, is not unconstitutionally vague. People v Mateo, 175 Misc. 2d 192, 664 N.Y.S.2d 981, 1997 N.Y. Misc. LEXIS 469 (N.Y. County Ct. 1997), aff'd, 249 A.D.2d 894, 672 N.Y.S.2d 594, 1998 N.Y. App. Div. LEXIS 4973 (N.Y. App. Div. 4th Dep't 1998).

Eighth Amendment requires that higher level of scrutiny be applied at any stage of capital case that directly affects sentencing determination, i.e., whenever fact-finding process as to appropriateness of death penalty is affected, and such higher procedural standards "are not cabined strictly within the capital sentencing process authorized by CLS CPL § 400.27. People v Arthur, 175 Misc. 2d 742, 673 N.Y.S.2d 486, 1997 N.Y. Misc. LEXIS 673 (N.Y. Sup. Ct. 1997).

Higher level of scrutiny applies to defendant's constitutional right to discovery incorporated in CLS CPL § 240.20(1)(h) when it affects sentencing determination in capital case. People v Arthur, 175 Misc. 2d 742, 673 N.Y.S.2d 486, 1997 N.Y. Misc. LEXIS 673 (N.Y. Sup. Ct. 1997).

In potential death penalty case, court allowed defendant to present ex parte application for judicial subpoenas duces tecum, and would rule whether notice to prosecutor's office should be required consistent with law and defendant's due process right to fair opportunity to prepare defense, where stated basis for request was that defendant wished to obtain mitigating evidence for penalty phase of trial and decide whether to present information to prosecutor's office before prosecutor's office determined whether to seek death penalty, without having to reveal aspects of defense strategy and preparation to prosecution. People v Van Dyne, 175 Misc. 2d 558, 669 N.Y.S.2d 199, 1998 N.Y. Misc. LEXIS 17 (N.Y. County Ct. 1998).

Failure to define what constitutes "command" under either CLS Penal § 20.00 or CLS Penal § 125.27(1)(a)(vii) renders § 125.27(1)(a)(vii) unconstitutionally vague. People v Couser, 176 Misc. 2d 86, 674 N.Y.S.2d 887, 1998 N.Y. Misc. LEXIS 120 (N.Y. County Ct. 1998), rev'd, 258 A.D.2d 74, 695 N.Y.S.2d 781, 1999 N.Y. App. Div. LEXIS 7903 (N.Y. App. Div. 4th Dep't 1999).

New York's statutory scheme for selecting candidates for death penalty does not violate due process or constitutional prohibition against cruel and unusual punishment on ground that it provides no guidelines or procedures for prosecution to follow in selecting cases in which to seek death penalty, as prosecutors have wide latitude to charge offenses, charging decisions are generally beyond judicial review, and prosecutors in capital cases are not held to higher standard of accountability. People v Harris, 177 Misc. 2d 102, 675 N.Y.S.2d 743, 1998 N.Y. Misc. LEXIS 237 (N.Y. Sup. Ct. 1998).

Supreme Court did not have jurisdiction over capital defendant's claim that legislature's failure to designate maximum number of Supreme Court judges permitted by state constitution for election in Second Judicial District, and practice of assigning judges of Court of Claims and New York City Civil and Criminal Courts to serve as acting Supreme Court justices in Kings County, illegally diluted voting strength of minority community in Kings County, thereby violating his rights under Fifteenth Amendment and federal Voting Rights Act (42 USCS § 1973) and precluding People from seeking death penalty in his case, as United States District Courts have jurisdiction of proceedings instituted under Voting Rights Act. People v Harris, 177 Misc. 2d 154, 675 N.Y.S.2d 746, 1998 N.Y. Misc. LEXIS 257 (N.Y. Sup. Ct. 1998).

Practice of assigning judges of Court of Claims and New York City Civil and Criminal Courts to serve as acting Supreme Court judges did not violate first degree murder defendant's right under CLS NY Const Art II § 1 to vote for all officers elected by people, although CLS NY Const Art VI § 6 provides that Supreme Court judges are to be chosen by electors of judicial district in which they serve, as CLS NY Const Art VI § 26 provides for temporary assignment of Court of Claims and New York City Civil and Criminal Courts judges to Supreme Court in any judicial district. People v Harris, 177 Misc. 2d 154, 675 N.Y.S.2d 746, 1998 N.Y. Misc. LEXIS 257 (N.Y. Sup. Ct. 1998).

In capital murder case, constitutional motions challenging legality of death penalty as applied to defendants would (except

for issue related to lethal injection) be decided prior to jury selection, because critical trial strategies would necessarily come into play as early as jury selection. People v Arroyo, 178 Misc. 2d 653, 683 N.Y.S.2d 788, 1998 N.Y. Misc. LEXIS 528 (N.Y. County Ct. 1998).

No discriminatory enforcement was shown by white defendant's claim that prosecutor needed white conviction statistics to balance number of black convictions, and female defendant's claim that prosecutor needed conviction statistics for women to balance those for men, where there was no specific abuse on part of prosecutor in electing to seek death penalty, and defendants' alleged conduct satisfied statutory criteria of CLS Penal § 125.27(1)(a)(vi). People v Arroyo, 178 Misc. 2d 653, 683 N.Y.S.2d 788, 1998 N.Y. Misc. LEXIS 528 (N.Y. County Ct. 1998).

Trial court rejected defendants' arguments that death penalty runs counter to prevailing societal standards of decency, in view of United States Supreme Court's acceptance of capital punishment and New York's significant and persistent history of death penalty legislation. People v Arroyo, 178 Misc. 2d 653, 683 N.Y.S.2d 788, 1998 N.Y. Misc. LEXIS 528 (N.Y. County Ct. 1998).

Capital defendant was not entitled to actively participate with her attorneys beyond conferring and consulting with them and making recommendations and suggestions to them, where she did not seek to assert her right to self-representation or even "hybrid" representation, and thus court denied her request for permission to be involved in voir dire and opening and closing statements, and to give "short unsworn statement" to jury at sentencing; both defendant's and People's interests would be best served by disallowing defendant's participation, to assure that she received optimum benefit of assistance of counsel, and to assure most efficient and unprejudiced disposition of her case. People v Arroyo, 178 Misc. 2d 658, 682 N.Y.S.2d 545, 1998 N.Y. Misc. LEXIS 532 (N.Y. Sup. Ct. 1998).

In capital murder case, defendant had constitutional and statutory right to proceed pro se at trial, where he was award of exactly what he was doing, what choices he was exercising, and risks he was shouldering; counsel representing defendant at time of his application to proceed pro se was directed to remain on case as "advisory counsel." People v Gordon, 179 Misc. 2d 940, 688 N.Y.S.2d 380, 1999 N.Y. Misc. LEXIS 91 (N.Y. Sup. Ct. 1999).

Holding in Matter of Hynes v Tomei, 92 NY2d 613, that "a defendant may not plead guilty to first degree murder while a notice of intent to seek the death penalty is pending" was not violated where (1) defendant offered to so plead if district attorney (DA) withdrew notice of intent, (2) DA expressed willingness to do so if agreed sentence would be imposed and defendant would give full and truthful allocution, (3) defendant gave full allocution, (4) DA consented to plea, withdrew notice, and joined in defendant's motion that plea be accepted, and (5) court granted motion, accepted plea, and ordered it entered. People v Smelefsky, 182 Misc. 2d 11, 695 N.Y.S.2d 689, 1999 N.Y. Misc. LEXIS 396 (N.Y. Sup. Ct. 1999).

Defendant charged with first degree murder and other offenses could not plead to entire indictment and thus avoid possibility of death penalty verdict without consent of prosecutor or court, even though notice of intent to seek death penalty had not been filed, where 120-day period for such filing under CLS CPL § 250.40 had not expired, clear legislative intent was to give prosecutor sufficient time to decide tough and troubling question of whether to seek death penalty, and defendant was attempting to usurp prosecutor's statutory right to seek death penalty. People v Schroedel, 182 Misc. 2d 154, 697 N.Y.S.2d 904, 1999 N.Y. Misc. LEXIS 450 (N.Y. County Ct. 1999).

First degree murder defendant's constitutional challenge to CLS CPL § 320.10(1), and to portion of NY Const Art I § 2 which prohibits nonjury trials in guilt phase of death penalty cases, was not ripe for determination where defendant had yet to request bench trial. People v Owens, 184 Misc. 2d 600, 710 N.Y.S.2d 790, 2000 N.Y. Misc. LEXIS 228 (N.Y. Sup. Ct. 2000).

Phrases "in the course of" and "in furtherance of" in first degree murder statute, CLS Penal § 125.27(1)(a)(vii), were not unconstitutionally vague, and indictment would not be dismissed on that ground. People v Owens, 185 Misc. 2d 490, 713 N.Y.S.2d 256, 2000 N.Y. Misc. LEXIS 358 (N.Y. Sup. Ct. 2000).

First degree murder statute, CLS Penal § 125.27(1)(a)(vii), was not irrationally underinclusive in rendering "death eligible" murder committed during certain felonies but not others; nor was statute unconstitutional for its exclusion of premeditated murders, and thus indictment would not be dismissed on such grounds. People v Owens, 185 Misc. 2d 490, 713 N.Y.S.2d 256, 2000 N.Y. Misc. LEXIS 358 (N.Y. Sup. Ct. 2000).

Defendant's guilty plea to first degree murder was not rendered invalid by the fact that the prosecution had not, in writing, withdrawn notice of its intent to seek the death penalty, where the prosecution had orally withdrawn the notice and the appellate decision holding that a defendant could not plead guilty to first degree murder while a notice of intent to seek the death penalty was pending had not yet been issued. People v Williamson, 301 A.D.2d 860, 755 N.Y.S.2d 443, 2003 N.Y. App. Div. LEXIS 343 (N.Y. App. Div. 3d Dep't), app. denied, 100 N.Y.2d 567, 763 N.Y.S.2d 824, 795 N.E.2d 50, 2003 N.Y. LEXIS 2230 (N.Y. 2003).

Eighth Amendment does not require that sentencing jury in capital case be instructed about consequence of jury deadlock concerning what sentence to impose (i.e., either death or life imprisonment without possibility of release). Jones v United States, 527 U.S. 373, 119 S. Ct. 2090, 144 L. Ed. 2d 370, 1999 U.S. LEXIS 4201 (U.S.), reh'g denied, 527 U.S. 1058, 120 S. Ct. 22, 144 L. Ed. 2d 826, 1999 U.S. LEXIS 4645 (U.S. 1999).

Petitioner's argument that a trial court violated his constitutional right against double jeopardy when it convicted petitioner of both first-degree murder under the felony provision, under N.Y. Penal Law § 125.27(1)(a)(vii), and of the lesser-included counts of intentional and felony second-degree murder, under N.Y. Penal Law § 125.25(1), (3), because (1) the trial judge sentenced petitioner to life imprisonment without parole on the first-degree murder conviction, so the convictions and sentences on the lesser-included crimes were superfluous; (2) there was nothing to suggest that the trial judge imposed a greater sentence on the first-degree murder count because of petitioner's convictions on the second-degree murder counts; (3) a dismissal of the lesser-included charges would have had no effect on petitioner's ultimate sentence; and (4) petitioner had not shown that he suffered punishment above what the legislature intended from his concurrent sentences. Rodriguez v Smith, 485 F. Supp. 2d 368, 2007 U.S. Dist. LEXIS 29376 (S.D.N.Y. 2007).

Inmate was unsuccessful in challenging his two convictions for committing first degree murder, in violation of N.Y. Penal Law § 125.27(1)(a)(viii), in a federal habeas corpus proceeding on grounds that his appellate attorney was ineffective, in violation of U.S. Const. amend. VI, in failing to raise on appeal a claim that one of the inmate's trial attorneys should have been disqualified; it was not unreasonable for appellate counsel to omit the argument because it was wholly without merit. Hall v Conway, 630 F. Supp. 2d 283, 2009 U.S. Dist. LEXIS 55603 (W.D.N.Y. 2009).

Inmate's two convictions for committing first degree murder, in violation of N.Y. Penal Law § 125.27(1)(a)(viii), and two convictions for committing second degree murder, in violation of N.Y. Penal Law § 125.25(1), in connection with the killing of two individuals could not be challenged on double jeopardy grounds in the inmate's federal habeas corpus proceeding because the double jeopardy claim was procedurally defaulted where federal constitutional claims were waived as part of the inmate's valid guilty plea. Hall v Conway, 630 F. Supp. 2d 283, 2009 U.S. Dist. LEXIS 55603 (W.D.N.Y. 2009).

Inmate's plea of guilty to two charges of first degree murder under N.Y. Penal Law § 125.27(1)(a)(viii) was valid where it was entered while notice of intent to seek the death penalty was not pending, no such notice was ever filed, the inmate was sentenced to life imprisonment, not the death penalty, and the plea was entered knowingly and voluntarily. Hall v Conway, 630 F. Supp. 2d 283, 2009 U.S. Dist. LEXIS 55603 (W.D.N.Y. 2009).

Inmate was unsuccessful in challenging his two convictions for committing first degree murder, in violation of N.Y. Penal Law § 125.27(1)(a)(viii), in a federal habeas corpus proceeding on grounds that one of the attorneys appointed to him under N.Y. Jud. Ct. Acts Law § 35-b(2) should have been disqualified as having a conflict of interest because the claim was procedurally barred due to the inmate's failure to raise it on direct appeal. Hall

v Conway, 630 F. Supp. 2d 283, 2009 U.S. Dist. LEXIS 55603 (W.D.N.Y. 2009).

3. Indictment and grand jury proceedings

Grand jury evidence was legally insufficient to establish "committed in a similar fashion" element of CLS Penal § 125.27(1)(a)(xi) in shooting deaths of 4 young men, where victims were of different ethnic and racial backgrounds, they ranged in age from 16 to 20 years old, various guns were used, motive for each shooting was different, wounds inflicted on each victim differed, and locations of killings were different. People v Mateo, 93 N.Y.2d 327, 690 N.Y.S.2d 527, 712 N.E.2d 692, 1999 N.Y. LEXIS 1140 (N.Y. 1999).

Grand jury evidence supported first degree felony murder on theory that defendant "commanded" members of his gang to kill certain individuals which resulted in death of unintended victim, where gang associate testified that actual killer told him that defendant ordered murders from his jail cell, that he himself ultimately participated in shooting knowing that plan was directed by defendant, and that when he was subsequently incarcerated in same jail as defendant, defendant asked him about details of shooting and was upset that intended victim had not been killed. People v Couser, 94 N.Y.2d 631, 709 N.Y.S.2d 155, 730 N.E.2d 953, 2000 N.Y. LEXIS 887 (N.Y. 2000).

Indictment charging defendant with first degree murder, N.Y. Penal Law § 125.27(1)(a)(vii), and first degree kidnapping, N.Y. Penal Law § 135.25(3), was legally sufficient under circumstances in which the indictment alleged that defendant intentionally killed the victim in the course of kidnapping the victim, that defendant abducted the victim, and that the victim died during the abduction; there was no "double counting" defect because the murder and the predicate kidnapping that served as an aggravation arose from two distinct intents-the intent to kill the victim and the intent to abduct him. It was irrelevant that a factual circumstance other than defendant's intent-the victim's death-was an element of both the murder and the predicate kidnapping. People v Lucas, 11 N.Y.3d 218, 868 N.Y.S.2d 570, 897 N.E.2d 1052, 2008 N.Y. LEXIS 3250 (N.Y. 2008).

Court properly dismissed those counts of indictment charging defendant with first-degree murder where evidence before grand jury was insufficient to show that defendant's motive and method in each of four murders were similar and that circumstances surrounding each of murders were similar. People v Mateo, 249 A.D.2d 894, 672 N.Y.S.2d 594, 1998 N.Y. App. Div. LEXIS 4973 (N.Y. App. Div. 4th Dep't 1998), aff'd, 93 N.Y.2d 327, 690 N.Y.S.2d 527, 712 N.E.2d 692, 1999 N.Y. LEXIS 1140 (N.Y. 1999).

People were not obligated to present evidence regarding defendant's inebriation, nor to charge grand jury with respect thereto, where even if grand jury had been presented with and had credited such evidence, thereby negating element of intent in first degree murder charge, evidence would have warranted depraved indifference murder charge. People v Johnson, 277 A.D.2d 702, 717 N.Y.S.2d 668, 2000 N.Y. App. Div. LEXIS 12253 (N.Y. App. Div. 3d Dep't 2000), app. denied, 96 N.Y.2d 831, 729 N.Y.S.2d 451, 754 N.E.2d 211, 2001 N.Y. LEXIS 2208 (N.Y. 2001).

Three counts charging defendant with murder in the first degree under N.Y. Penal Law § 125.27(1)(a)(viii) were not duplicitous as each of the counts charged defendant with a single crime as required by N.Y. Crim. Proc. Law § 200.30(1) and were not multiplicitous as the same crime was not charged in more than one of the counts. People v Timmons, 54 A.D.3d 883, 864 N.Y.S.2d 111, 2008 N.Y. App. Div. LEXIS 6840 (N.Y. App. Div. 2d Dep't 2008).

Defendant's convictions for murder in the second degree had to be reversed because they were inclusory concurrent counts of the convictions for murder in the first degree, as they arose from the same two deaths. People v Ashline, 124 A.D.3d 1258, 3 N.Y.S.3d 469, 2015 N.Y. App. Div. LEXIS 170 (N.Y. App. Div. 4th Dep't 2015), app. denied, 27 N.Y.3d 1128, 61 N.E.3d 508, 39 N.Y.S.3d 109, 2016 N.Y. LEXIS 2102 (N.Y. 2016).

First-degree attempted murder counts were not jurisdictionally defective as by alleging that defendant committed that crime, those counts adopted the title of the first-degree murder statute and incorporated all of the elements of that crime, including the age element, thereby affording defendant fair notice of the charges against him. People v Vangorden, 147 A.D.3d 1436, 46 N.Y.S.3d 730, 2017 N.Y. App. Div. LEXIS 805 (N.Y. App. Div. 4th Dep't), app. denied, 29 N.Y.3d 1037, 84 N.E.3d 978, 62 N.Y.S.3d 306, 2017 N.Y. LEXIS 1977 (N.Y. 2017).

Indictment was not jurisdictionally defective because the murder counts did not allege that defendant was more than 18 years old as by alleging that defendant committed first-degree murder, those counts adopted the title of the first-degree murder statute and incorporated all of the elements of that crime, including the age element, thereby affording defendant fair notice of the charges against him. People v Taylor, 158 A.D.3d 1095, 72 N.Y.S.3d 256, 2018 N.Y. App. Div. LEXIS 782 (N.Y. App. Div. 4th Dep't), reh'g denied, 160 A.D.3d 1506, 72 N.Y.S.3d 918, 2018 N.Y. App. Div. LEXIS 2995 (N.Y. App. Div. 4th Dep't 2018), app. denied, 32 N.Y.3d 941, 109 N.E.3d 1168, 84 N.Y.S.3d 868, 2018 N.Y. LEXIS 2808 (N.Y. 2018), cert. denied, 140 S. Ct. 482, 205 L. Ed. 2d 269, 2019 U.S. LEXIS 6738 (U.S. 2019).

First degree murder indictment would not be dismissed on ground that refusal to stay grand jury proceeding deprived defendant of opportunity to present mitigating evidence on issue of whether he should be charged with first degree murder, because question of mitigation of punishment is not issue that may properly be presented to grand jury, and defendant was not entitled to heightened due process merely because he was charged with capital offense. People v Rodriguez, 168 Misc. 2d 219, 647 N.Y.S.2d 350, 1996 N.Y. Misc. LEXIS 23 (N.Y. Sup. Ct. 1996), aff'd, People v Sanchez, 268 A.D.2d 364, 702 N.Y.S.2d 261, 2000 N.Y. App. Div. LEXIS 735 (N.Y. App. Div. 1st Dep't 2000).

Defendants were not entitled to dismissal of first degree murder indictment on ground that they were denied due process by denial of their request for stay of grand jury proceedings in order to conduct extra legal research necessitated by complexity of capital cases and fact that their case was first prosecution in county under new capital offense law; mere fact that time frame shorter than defendants would have preferred impacted on their ability to formulate optimal strategy, or hastened their decision whether to testify, did not rise to level of deprivation of due process. People v Rodriguez, 168 Misc. 2d 219, 647 N.Y.S.2d 350, 1996 N.Y. Misc. LEXIS 23 (N.Y. Sup. Ct. 1996), aff'd, People v Sanchez, 268 A.D.2d 364, 702 N.Y.S.2d 261, 2000 N.Y. App. Div. LEXIS 735 (N.Y. App. Div. 1st Dep't 2000).

Defendants were not entitled to dismissal of first degree murder indictment on ground that they were denied due process because People failed to turn over Brady material, including their statements to police, prior to indictment; in addition to fact that defendants' statements were inculpatory, not exculpatory, Criminal Procedure Law does not require People to turn over defendant's statements until after indictment. People v Rodriguez, 168 Misc. 2d 219, 647 N.Y.S.2d 350, 1996 N.Y. Misc. LEXIS 23 (N.Y. Sup. Ct. 1996), aff'd, People v Sanchez, 268 A.D.2d 364, 702 N.Y.S.2d 261, 2000 N.Y. App. Div. LEXIS 735 (N.Y. App. Div. 1st Dep't 2000).

Defendants were not entitled to dismissal of first degree murder indictment based on People's failure to inform them of specific acts that formed basis of charges against them and theory on which prosecution before grand jury was proceeding; defendants were not entitled to heightened due process merely because they were charged with capital offenses. People v Rodriguez, 168 Misc. 2d 219, 647 N.Y.S.2d 350, 1996 N.Y. Misc. LEXIS 23 (N.Y. Sup. Ct. 1996), aff'd, People v Sanchez, 268 A.D.2d 364, 702 N.Y.S.2d 261, 2000 N.Y. App. Div. LEXIS 735 (N.Y. App. Div. 1st Dep't 2000).

There was no requirement that grand jury be instructed that matter before it was potential capital case, that grand jury be informed of "specific methods for an execution," or that there be individualized voir dire of jurors to determine their review on capital punishment. People v Bastien, 170 Misc. 2d 103, 649 N.Y.S.2d 979, 1996 N.Y. Misc. LEXIS 402 (N.Y. Sup. Ct. 1996).

Defendant was not entitled to grand jury instruction as to mitigating factors relevant to first degree murder charges, including full recital of all mitigating circumstances as defined in CLS CPL § 400.27(8). People v Bastien, 170 Misc. 2d 103, 649 N.Y.S.2d 979, 1996 N.Y. Misc. LEXIS 402 (N.Y. Sup. Ct. 1996).

If defendant offered evidence of extreme emotional disturbance for which there was reasonable explanation or cause, instruction to grand jury on impact of such evidence would be appropriate. People v Bastien, 170 Misc. 2d 103, 649 N.Y.S.2d 979, 1996 N.Y. Misc. LEXIS 402 (N.Y. Sup. Ct. 1996).

In potential capital offense case where defendant offers evidence of extreme emotional disturbance for which there is reasonable explanation or cause, prosecutor must instruct grand jury as to impact of such evidence, in view of stringent statutorily imposed plea bargaining limitations, and in interest of avoiding unnecessary first degree murder prosecution. People v Prater, 170 Misc. 2d 327, 648 N.Y.S.2d 228, 1996 N.Y. Misc. LEXIS 366 (N.Y. Sup. Ct. 1996), overruled in part, People v Harris, 98 N.Y.2d 452, 749 N.Y.S.2d 766, 779 N.E.2d 705, 2002 N.Y. LEXIS 1993 (N.Y. 2002).

Grand jury appropriately charged defendant with first degree murder attempt where he tried to kill 4 people in same transaction; killing many people in one incident is worse than killing people in separate incidents. People v Fernandez, 173 Misc. 2d 938, 662 N.Y.S.2d 349, 1997 N.Y. Misc. LEXIS 349 (N.Y. Sup. Ct. 1997).

Defendant's attempts to kill his wife and children by first shooting his wife in chest, then shooting his 3 children, and then shooting his wife again, constituted one continuing crime (first degree attempted murder); thus, 3 counts of first degree attempted murder in indictment, each including defendant's wife and one child, were multiplicitous. People v Fernandez, 173 Misc. 2d 938, 662 N.Y.S.2d 349, 1997 N.Y. Misc. LEXIS 349 (N.Y. Sup. Ct. 1997).

Failure to apprise defendant of possibility of his being indicted for first degree murder did not deprive him of adequate notice of his opportunity to testify before grand jury on scheduled date because defendant is not entitled to notice of actual offenses to be presented to grand jury. People v Cajigas, 174 Misc. 2d 472, 665 N.Y.S.2d 789, 1997 N.Y. Misc. LEXIS 510 (N.Y. County Ct. 1997).

In potential death penalty case, People were not obligated to reply to defense application for advance evidentiary rulings, or indicate in writing what instructions would be given to grand jurors respecting accessorial liability or voluntariness of any alleged statements which were to be introduced before grand jury. People v Cajigas, 174 Misc. 2d 472, 665 N.Y.S.2d 789, 1997 N.Y. Misc. LEXIS 510 (N.Y. County Ct. 1997).

In potential death penalty case, defendant was not entitled to present mitigating evidence before grand jury, nor was he entitled to adjournment or delay in grand jury process for him to accumulate mitigating evidence. People v Cajigas, 174 Misc. 2d 472, 665 N.Y.S.2d 789, 1997 N.Y. Misc. LEXIS 510 (N.Y. County Ct. 1997).

In potential death penalty case, defendant was not entitled to delay grand jury proceedings to allow him more time to prepare his possible testimony, on basis that "heightened due process" should apply. People v Cajigas, 174 Misc. 2d 472, 665 N.Y.S.2d 789, 1997 N.Y. Misc. LEXIS 510 (N.Y. County Ct. 1997).

Defendant was not entitled to dismissal of first degree murder indictment on ground that grand jury presentation was defective because his statement to police concerning his ingestion of drugs and alcohol prior to participating in robbery warranted instruction on intoxication but none was given, where his statement described (at most) felony murder accidentally caused during course of robbery, and his intoxication claim, taken in context of his version of incident, bore no relationship to murder charge; moreover, intoxication is mitigating factor rather than complete defense and therefore need not be charged to grand jury. People v Harris, 174 Misc. 2d 654, 666 N.Y.S.2d 876, 1997 N.Y. Misc. LEXIS 545 (N.Y. Sup. Ct. 1997).

Counts charging first degree murder were not duplicitous in violation of federal and state constitutions where counts charged felony murder of same individuals during commission of different underlying felonies; fact that legislature chose to list series of felonies together within subparagraph vii of CLS Penal § 125.27(1)(a) could not be taken to mean that it intended to allow only one count of intentional murder during course of felony to be charged where killing was committed in furtherance of multiple felonies. People v Gordon, 175 Misc. 2d 67, 667 N.Y.S.2d 626, 1997 N.Y. Misc. LEXIS 598 (N.Y. Sup. Ct. 1997).

Counts charging felony murder during commission of burglary were not duplicitous where counts involved different victims or different residences. People v Gordon, 175 Misc. 2d 67, 667 N.Y.S.2d 626, 1997 N.Y. Misc. LEXIS 598 (N.Y. Sup. Ct. 1997).

Two counts charging felony murder during commission of sodomy were not duplicitous where 2 different acts formed basis of 2 sodomies; similarly, 2 counts charging felony murder during commission of sexual abuse were not duplicitous where 2 different acts formed basis of 2 different sexual abuse conducts. People v Gordon, 175 Misc. 2d 67, 667 N.Y.S.2d 626, 1997 N.Y. Misc. LEXIS 598 (N.Y. Sup. Ct. 1997).

Court would not dismiss indictment for felony murder during commission of burglary on ground that People failed to allege what particular crime defendant intended to commit as part of burglary. People v Gordon, 175 Misc. 2d 67, 667 N.Y.S.2d 626, 1997 N.Y. Misc. LEXIS 598 (N.Y. Sup. Ct. 1997).

In charging felony murder, indictment did not impermissibly "double count" defendant's use of weapon to establish both means for committing murder and element of underlying felony of first degree burglary; nor did indictment "double count" defendant's intent to kill as both element of murder and basis of criminal intent at time of entry. People v Gordon, 175 Misc. 2d 67, 667 N.Y.S.2d 626, 1997 N.Y. Misc. LEXIS 598 (N.Y. Sup. Ct. 1997).

Court would not dismiss, as duplicitous, count of indictment charging that defendant committed first degree murder under CLS Penal § 125.27(1)(a)(vii) by shooting victim and by commanding another person to kill him, since People were not required to specify whether defendant was shooter or commander, and indictment and bill of particulars clearly set forth single theory of prosecution—that defendant intentionally caused death in course of kidnapping, or that he acted with intent to cause death by commanding another person to kill victim. People v Mateo, 175 Misc. 2d 192, 664 N.Y.S.2d 981, 1997 N.Y. Misc. LEXIS 469 (N.Y. County Ct. 1997), aff'd, 249 A.D.2d 894, 672 N.Y.S.2d 594, 1998 N.Y. App. Div. LEXIS 4973 (N.Y. App. Div. 4th Dep't 1998).

Court would not dismiss indictment charging defendant with first degree murder under CLS Penal § 125.27(1)(a)(vii) on ground that indictment charged defendant as both principal and accomplice and there was no guarantee that 12 grand jurors concurred as to defendant's status, since there is no legal distinction between liability as principal and as accomplice, and it was irrelevant whether some grand jurors voted to indict defendant as principal and others voted to indict him as accomplice. People v Mateo, 175 Misc. 2d 192, 664 N.Y.S.2d 981, 1997 N.Y. Misc. LEXIS 469 (N.Y. County Ct. 1997), aff'd, 249 A.D.2d 894, 672 N.Y.S.2d 594, 1998 N.Y. App. Div. LEXIS 4973 (N.Y. App. Div. 4th Dep't 1998).

Court would not dismiss indictment charging defendant with first degree murder under CLS Penal § 125.27(1)(a)(xi) on ground that no distinction had been made between defendant's acts as principal and as accomplice, and that prior homicides charged were thus not committed in "similar fashion" as required by statute, since there is no legal distinction between criminal liability as principal and as accomplice, and thus integrity of grand jury was not impaired. People v Mateo, 175 Misc. 2d 192, 664 N.Y.S.2d 981, 1997 N.Y. Misc. LEXIS 469 (N.Y. County Ct. 1997), aff'd, 249 A.D.2d 894, 672 N.Y.S.2d 594, 1998 N.Y. App. Div. LEXIS 4973 (N.Y. App. Div. 4th Dep't 1998).

Indictment charging defendant with commission of homicides "in similar fashion" in violation of CLS Penal § 125.27(1)(a)(xi) was not supported by legally sufficient grand jury evidence, and would be dismissed, where it was shown only that 4 homicides committed by defendant all involved young men, shot with firearms to left side of head, on west side of City of Rochester, in cold-blooded fashion, but there was nothing unique, ritualistic, or signature-like about homicides to support indictment. People v Mateo, 175 Misc. 2d 192, 664 N.Y.S.2d 981, 1997 N.Y. Misc. LEXIS 469 (N.Y. County Ct. 1997), aff'd, 249 A.D.2d 894, 672 N.Y.S.2d 594, 1998 N.Y. App. Div. LEXIS 4973 (N.Y. App. Div. 4th Dep't 1998).

In potential death penalty case, Fourteenth Amendment did not support defendant's request to stay ongoing grand jury proceeding while he considered whether or not to testify or present mitigating evidence; Fourteenth Amendment does not mandate that states prosecute any felony by indictment, much less impose criteria suggested by defendant. People v Leftenant, 175 Misc. 2d 605, 671 N.Y.S.2d 917, 1998 N.Y. Misc. LEXIS 22 (N.Y. County Ct. 1998).

In potential death penalty case, defendant was not entitled to stay of ongoing grand jury proceeding to further investigate case and consider whether to present evidence or testify, because there is no common law right to discovery prior to indictment, and legislature has not provided right to discovery based on filing of felony complaint. People v Leftenant, 175 Misc. 2d 605, 671 N.Y.S.2d 917, 1998 N.Y. Misc. LEXIS 22 (N.Y. County Ct. 1998).

Defendant was not denied reasonable and meaningful opportunity to testify before grand jury in potential death penalty case when People presented case against him before responding to letter that he faxed to prosecutor one day before CLS CPL § 180.80 deadline, asking that prosecutor disclose exculpatory evidence and present mitigating evidence to grand jury, as (1) defendant was not statutorily entitled to discovery at point of grand jury presentations, and (2) by refusing to waive § 180.80, withdraw his CLS CPL § 190.50 notice or testify before receiving requested information, he forced prosecutor to act. People v Campos, 176 Misc. 2d 637, 672 N.Y.S.2d 1001, 1998 N.Y. Misc. LEXIS 159 (N.Y. Sup. Ct. 1998).

Counts of indictment, charging defendant with killing 2 victims in different sequences and with attempted murder of surviving victim followed by one of 3 intentional murders, were not multiplicitous because (1) it was crucial, under first degree murder statute, that prosecution frame indictment to cover every possible chronology, (2) mere existence in indictment of 6 counts did not mean that each would be submitted to jury, (3) even if more than one first degree murder count was submitted to jury and defendant was convicted on all counts submitted, instructions to jury at sentencing stage of trial could clarify number of aggravating factors to be considered, and (4) in any event, it was logically impossible for defendant to receive multiple punishments no matter how many first degree murder counts were before jury for sentence. People v Harris, 177 Misc. 2d 259, 676 N.Y.S.2d 798, 1998 N.Y. Misc. LEXIS 270 (N.Y. Sup. Ct. 1998).

Counts of indictment charging first degree intentional felony murder and first degree attempted felony murder, which alleged that victim "was killed while the defendant was in the course of...and in furtherance of" committing robbery, were sufficiently clear to satisfy requirements of CLS CPL § 200.50 even though they did not also allege that victim was killed "in furtherance of" robbery pursuant to CLS Penal § 125.27(1)(a)(vii). People v Harris, 177 Misc. 2d 259, 676 N.Y.S.2d 798, 1998 N.Y. Misc. LEXIS 270 (N.Y. Sup. Ct. 1998).

Counts of indictment charging first degree murder, read in conjunction with People's bill of particulars specifying that defendant was charged as principal and not accessory, satisfied specificity requirements for indictment under CLS CPL § 200.50(7)(a). People v Rivera, 182 Misc. 2d 235, 697 N.Y.S.2d 831, 1999 N.Y. Misc. LEXIS 444 (N.Y. Sup. Ct. 1999).

Court would grant People's motion to amend 2 counts of indictment charging first degree murder under CLS Penal § 125.27(1)(a)(vii) so as to delete words "acting in concert with another" therefrom since proposed amendment would not add charge nor change named and cited statute, counts at issue were legally sufficient, and proposed amendment would not in any way change theory of prosecution nor prejudice defendant. People v Rivera, 182 Misc. 2d 235, 697 N.Y.S.2d 831, 1999 N.Y. Misc. LEXIS 444 (N.Y. Sup. Ct. 1999).

In death penalty case involving defendant who was charged with first degree murder of 2 victims in separate incidents but not indicted as serial murderer, court denied defense motion to release grand jury minutes where in camera inspection revealed that there was sufficient evidence to support indictment, charges mirrored well-established noncapital crimes and posed no novel concepts, grand jury proceeding was not defective, and there was no Brady material in minutes. People v Owens, 184 Misc. 2d 597, 711 N.Y.S.2d 884, 2000 N.Y. Misc. LEXIS 234 (N.Y. County Ct. 2000).

Although the statutory scheme seemingly permits an indictment to take several offenses and combine them into one indictment, it does not require it, and a defendant's due process rights are not necessarily violated by the multiplicity of the charges. People v Taylor, 190 Misc. 2d 124, 738 N.Y.S.2d 497, 2002 N.Y. Misc. LEXIS 3 (N.Y. Sup. Ct. 2002).

The relevant definition of first-degree murder necessarily contemplates the possibility that the crime will be committed, not through a single and continuing offense, but through the commission, as part of the same criminal transaction, of two or more separate and distinct offenses, each constituting an intentional murder, and therefore requiring separate indictments for each element of the crime. People v Taylor, 190 Misc. 2d 124, 738 N.Y.S.2d 497, 2002 N.Y. Misc. LEXIS 3 (N.Y. Sup. Ct. 2002).

Indictment charging defendant with first degree murder based on the aggravating factor of a previous murder conviction, under N.Y. Penal Law § 125.27(1)(a)(ix), was not rendered jurisdictionally defective by the fact that the charge was based on a conviction for second degree murder in another state, as the indictment fully informed defendant of the charge against him, and an accompanying special information gave him notice of the specific prior conviction being relied on. People v Williamson, 301 A.D.2d 860, 755 N.Y.S.2d 443, 2003 N.Y. App. Div. LEXIS 343 (N.Y. App. Div. 3d Dep't), app. denied, 100 N.Y.2d 567, 763 N.Y.S.2d 824, 795 N.E.2d 50, 2003 N.Y. LEXIS 2230 (N.Y. 2003).

4. Separate and lesser offenses

Attempted second degree assault is lesser included offense of each attempted first and second degree murder. People v Cabassa, 79 N.Y.2d 722, 586 N.Y.S.2d 234, 598 N.E.2d 1, 1992 N.Y. LEXIS 1607 (N.Y.), cert. denied, 506 U.S. 1011, 113 S. Ct. 633, 121 L. Ed. 2d 563, 1992 U.S. LEXIS 7648 (U.S. 1992).

In prosecution of driver and passenger of automobile for first and second degree attempted murder based on their conduct during high-speed chase, it was reversible error to refuse to submit second degree attempted assault as lesser included offense where passenger was shooting at moving police vehicle approximately 50 feet away while traveling at high speeds and while both vehicles were frequently changing lanes, so that jury could have reasonably concluded that passenger was aiming and shooting at police and their vehicle (1) in order to distract operator of police vehicle in hope that he would lose control, (2) in order to hit some portion of car to cause serious accident, or (3) to hit officers, but only to seriously injure and incapacitate them so that they would abort pursuit; moreover, jury could find that, even if passenger intended to kill, driver did not share in that intent. People v Cabassa, 79 N.Y.2d 722, 586 N.Y.S.2d 234, 598 N.E.2d 1, 1992 N.Y. LEXIS 1607 (N.Y.), cert. denied, 506 U.S. 1011, 113 S. Ct. 633, 121 L. Ed. 2d 563, 1992 U.S. LEXIS 7648 (U.S. 1992).

Where defendants were initially prosecuted for weapon possession, bank robbery and criminal conspiracy under federal indictment alleging that they "assaulted" persons, "put in jeopardy" lives of persons, and (as overt act of criminal conspiracy) "fired numerous shots at police officers" who pursued them as they fled from robbery, CLS CPL § 40.20(2)(b) did not prohibit subsequent state prosecution of same defendants for attempted murder of police officer under CLS Penal §§ 110.00 and 125.27(1)(A)(i) arising from same criminal transaction, nor did it prohibit conviction of one defendant of second degree assault under CLS Penal § 120.05(1) as lesser included offense. People v Bryant, 92 N.Y.2d 216, 677 N.Y.S.2d 286, 699 N.E.2d 910, 1998 N.Y. LEXIS 2151 (N.Y. 1998).

Because defendant did not object to a jury charge where the jury was not told to consider the counts in any particular sequence, and defense counsel did not object to the continuation of deliberations after a partial verdict was rendered, defendant was properly found guilty of both first- and second-degree murder under N.Y. Penal Law §§ 125.27(1)(a)(viii), 125.25(1). People v Echevarria, 6 N.Y.3d 89, 809 N.Y.S.2d 509, 843 N.E.2d 149, 2005 N.Y. LEXIS 3430 (N.Y. 2005).

Where defendants were convicted of first degree murders that were committed during a robbery and during a burglary, it was

appropriate to modify their convictions on appeal by dismissing, pursuant to N.Y. Crim. Proc. Law § 300.40(3)(b), two second degree murder counts as inclusory concurrent counts; the second degree murder counts were lesser included, within the meaning of N.Y. Crim. Proc. Law § 300.30(4), under the first degree murder convictions, and felony murder is a lesser-included crime under intentional felony murder for purposes of N.Y. Crim. Proc. Law § 1.20(37), although the felonies predicating intentional felony murder under N.Y. Penal Law § 125.27(1)(a)(vii) are not identical to those underlying ordinary felony murder under N.Y. Penal Law § 125.25(3). People v Miller, 6 N.Y.3d 295, 812 N.Y.S.2d 20, 845 N.E.2d 451, 2006 N.Y. LEXIS 156 (N.Y. 2006).

Felony murder is a lesser-included crime under intentional felony murder. People v Miller, 6 N.Y.3d 295, 812 N.Y.S.2d 20, 845 N.E.2d 451, 2006 N.Y. LEXIS 156 (N.Y. 2006).

In a prosecution of the defendant for intentional murder, the trial court properly submitted the charge of criminally negligent homicide to the jury as a lesser included offense where the defendant expressly requested that the charge be submitted over the objection of the district attorney, and where the evidence could have supported the finding that the defendant committed the lesser offense but did not commit the greater. People v Lewis, 84 A.D.2d 715, 444 N.Y.S.2d 450, 1981 N.Y. App. Div. LEXIS 15871 (N.Y. App. Div. 1st Dep't 1981).

Court properly refused to instruct jury on second degree attempted assault as lesser included offense of attempted murder in first and second degrees, since element of deadly weapon or dangerous instrument is not element of attempted murder charges, and thus it would be possible to commit greater crimes without concomitantly, by same conduct, committing lesser offense. People v Martinez, 134 A.D.2d 458, 521 N.Y.S.2d 80, 1987 N.Y. App. Div. LEXIS 50646 (N.Y. App. Div. 2d Dep't 1987), app. denied, 70 N.Y.2d 957, 525 N.Y.S.2d 841, 520 N.E.2d 559, 1988 N.Y. LEXIS 429 (N.Y. 1988).

In prosecution for first degree attempted murder, defendant was not denied effective assistance by counsel's failure to request submission of second degree attempted assault as lesser included offense where ballistics expert testified that shell from sawed off shotgun which defendant fired from distance of 30 to 40 feet from his intended victim contained hundreds of pellets emitted with each round and that weapon was designed to spread those shots as they travelled further from barrel, so that shotgun was not capable of pinpoint wound-but-not-kill accuracy claimed by defendant. People v Smith, 198 A.D.2d 187, 604 N.Y.S.2d 86, 1993 N.Y. App. Div. LEXIS 11135 (N.Y. App. Div. 1st Dep't 1993), app. denied, 83 N.Y.2d 810, 611 N.Y.S.2d 146, 633 N.E.2d 501, 1994 N.Y. LEXIS 645 (N.Y. 1994).

Defendant was not entitled to jury charge of attempted aggravated assault on police officer as lesser-included offense of attempted first degree murder where, under statute in force at time of trial, aggravated assault on police officer required firearm, whereas first degree murder did not. People v Van Buren, 213 A.D.2d 504, 623 N.Y.S.2d 906, 1995 N.Y. App. Div. LEXIS 2689 (N.Y. App. Div. 2d Dep't), app. denied, 86 N.Y.2d 847, 634 N.Y.S.2d 457, 658 N.E.2d 235, 1995 N.Y. LEXIS 4714 (N.Y. 1995).

Because it was possible to commit attempted first-degree murder under N.Y. Penal Law §§ 110.00 and 120.05(2) without committing attempted second-degree assault under N.Y. Penal Law §§ 110.00 and 125.27(1)(a), the trial court properly denied defendant's request for a lesser-included offense charge. People v Carter, 38 A.D.3d 1291, 833 N.Y.S.2d 323, 2007 N.Y. App. Div. LEXIS 3511 (N.Y. App. Div. 4th Dep't 2007).

Defendant's conviction of a murder in the second degree count under N.Y. Penal Law § 125.25(3) and a robbery in the third degree count under N.Y. Penal Law § 160.05 had to be reversed and dismissed under N.Y. Crim. Proc. Law § 300.40(3)(b) because defendant had been convicted of the inclusory concurrent counts of murder in the first degree under N.Y. Penal Law § 125.27(1)(a)(vii), (b) and robbery in the first degree (two counts) under N.Y. Penal Law § 160.15(1), (2). People v Horton, 46 A.D.3d 1225, 850 N.Y.S.2d 650, 2007 N.Y. App. Div. LEXIS 13247 (N.Y. App. Div. 3d Dep't 2007), app. denied, 10 N.Y.3d 766, 854 N.Y.S.2d 328, 883 N.E.2d 1263, 2008 N.Y. LEXIS 897 (N.Y. 2008).

Defendant's convictions of murder in the second degree under counts two and three of the indictment were reversed and dismissed because he was convicted of murder in the first degree upon a count of intentional felony murder pursuant to N.Y. Penal Law § 125.27(1)(a)(vii) and (1)(b) as a verdict of guilty upon the greatest count submitted is deemed a dismissal of every lesser count submitted, but not an acquittal thereon. People v Jeremiah, 147 A.D.3d 1199, 47 N.Y.S.3d 490, 2017 N.Y. App. Div. LEXIS 1390 (N.Y. App. Div. 3d Dep't), app. denied, 29 N.Y.3d 1033, 84 N.E.3d 974, 62 N.Y.S.3d 302, 2017 N.Y. LEXIS 1940 (N.Y. 2017), app. denied, 29 N.Y.3d 1031, 84 N.E.3d 972, 62 N.Y.S.3d 300, 2017 N.Y. LEXIS 1832 (N.Y. 2017).

Trial court erred when it did not instruct the jury to consider counts one and two in the alternative because count two, which charged defendant with murder in the second degree, was a lesser included offense of murder in the first degree, the offense charged in count one of the indictment; the court should have instructed the jury to consider count two only in the alternative as an inclusory concurrent count of count one. People v Smith, 186 A.D.3d 1106, 129 N.Y.S.3d 234, 2020 N.Y. App. Div. LEXIS 4795 (N.Y. App. Div. 4th Dep't 2020).

Prosecution witness who participated with defendant and others in chain of burglaries at 3 grocery stores might have been accomplice, as matter of fact, to felony murder which allegedly occurred when defendant shot employee of fourth store in attempt to enter store while witness was on street outside, but witness was not accomplice on charge of intentional murder since, as matter of law, he could not reasonably be considered to have participated in "offense charged" on that count nor "offense based upon the same or some of the same facts or conduct which constitute the offense charged," in that any other offense that witness might reasonably have been found to participate in, such as attempted burglary or attempted robbery, was not "based upon" shooting of victim. People v Sledge, 136 Misc. 2d 705, 519 N.Y.S.2d 195, 1987 N.Y. Misc. LEXIS 2486 (N.Y. Sup. Ct. 1987), aff'd, 162 A.D.2d 481, 556 N.Y.S.2d 688, 1990 N.Y. App. Div. LEXIS 7008 (N.Y. App. Div. 2d Dep't 1990).

Defendant was properly denied a jury charge on criminal facilitation in the fourth degree because that offense was not a lesser included offense of first-degree murder under the provision for hired killings. People v Powell, 304 A.D.2d 410, 757 N.Y.S.2d 297, 2003 N.Y. App. Div. LEXIS 4110 (N.Y. App. Div. 1st Dep't), app. denied, 1 N.Y.3d 578, 775 N.Y.S.2d 794, 807 N.E.2d 907, 2003 N.Y. LEXIS 4684 (N.Y. 2003).

N.Y. Penal Law 125.27(1)(a)(vii), (viii) define the different ways in which murder can be committed, i.e., a person is guilty of murder when, with intent to cause the death of another, he or she does so in the course of the attempted commission of a robbery, N.Y. Penal Law 125.27(1)(a)(vii), or, when, with intent to cause the death of another, he or she does so and, as part of the same criminal transaction, with the intent to cause the death of an additional person, he or she causes the death of such additional person, N.Y. Penal Law 125.27(1)(a)(viii); because the New York Legislature has provided different ways in which murder in the first degree can occur, each of the cited subsections constitutes a separate and distinct offense, and, therefore, those counts of an indictment charging defendant with murder under two different subsections of the New York Penal Law constitute noninclusory counts, because neither count contains all of the elements of the other and conviction on each is permissible, N.Y. Crim. Proc. Law § 300.30(4). People v Lebron, 305 A.D.2d 799, 759 N.Y.S.2d 575, 2003 N.Y. App. Div. LEXIS 5525 (N.Y. App. Div. 3d Dep't), app. denied, 100 N.Y.2d 581, 764 N.Y.S.2d 391, 796 N.E.2d 486, 2003 N.Y. LEXIS 3112 (N.Y. 2003).

With respect to N.Y. Penal Law 125.27(1)(a)(vii), (viii), the New York Legislature contemplates multiple convictions on noninclusory concurrent counts when it provides for separate but concurrent sentences on each such count, N.Y. Crim. Proc. Law § 300.30(3); N.Y. Penal Law § 70.25(2). People v Lebron, 305 A.D.2d 799, 759 N.Y.S.2d 575, 2003 N.Y. App. Div. LEXIS 5525 (N.Y. App. Div. 3d Dep't), app. denied, 100 N.Y.2d 581, 764 N.Y.S.2d 391, 796 N.E.2d 486, 2003 N.Y. LEXIS 3112 (N.Y. 2003).

Appeals court affirmed defendant's conviction of two counts of murder each for killing each of two persons, under N.Y. Penal

Law § 125.27(1)(a)(vii), (viii); double jeopardy was not violated since killing while attempting robbery had elements separate from killing when another person was present. People v Lebron, 305 A.D.2d 799, 759 N.Y.S.2d 575, 2003 N.Y. App. Div. LEXIS 5525 (N.Y. App. Div. 3d Dep't), app. denied, 100 N.Y.2d 581, 764 N.Y.S.2d 391, 796 N.E.2d 486, 2003 N.Y. LEXIS 3112 (N.Y. 2003).

Defendant's conviction for murder in the first degree contained the lesser included offense of murder in the second degree and defendant's conviction on the greatest of several concurrent counts was a dismissal of all lesser counts, so defendant's convictions for murder in the second degree had to be vacated. People v Rodriguez, 7 A.D.3d 545, 776 N.Y.S.2d 79, 2004 N.Y. App. Div. LEXIS 6439 (N.Y. App. Div. 2d Dep't), app. denied, 3 N.Y.3d 646, 782 N.Y.S.2d 418, 816 N.E.2d 208, 2004 N.Y. LEXIS 3438 (N.Y. 2004), aff'd sub. nom., People v Miller, 6 N.Y.3d 295, 812 N.Y.S.2d 20, 845 N.E.2d 451, 2006 N.Y. LEXIS 156 (N.Y. 2006).

Defendant who fired shots at two officers who stopped his vehicle should not have been convicted of attempted murder in the first degree and reckless endangerment in the first degree arising out of the same act and causing the same result, and the appellate court exercised its power to review defendant's convictions as a matter of discretion, pursuant to N.Y. Crim. Proc. Law § 470.15(6)(a), and ordered a new trial on those charges. People v Robinson, 8 A.D.3d 1028, 778 N.Y.S.2d 808, 2004 N.Y. App. Div. LEXIS 8241 (N.Y. App. Div. 4th Dep't 2004), aff'd sub. nom., People v Daniels, 5 N.Y.3d 738, 800 N.Y.S.2d 369, 833 N.E.2d 704, 2005 N.Y. LEXIS 1252 (N.Y. 2005).

After a defendant drove a stolen truck into a policeman in an unmarked police car, N.Y. Penal Law §§ 110.00, 125.27(1)(a)(i) attempted murder in the first degree and one of the N.Y. Penal Law §§ 110.00, 120.10 attempted assault in the first degree charges were not "duplicitous" so as to constitute just one offense; they were noninclusory concurrent counts, N.Y. Crim. Proc. Law § 300.30(4) and it was within trial court's discretion to consider both in rendering its verdict, N.Y. Crim. Proc. Law § 300.40(3)(a) even though the sentences had to be concurrent, N.Y. Crim. Proc. Law § 300.30(3), N.Y. Penal Law § 70.25(2). That was because each crime required proof of an additional fact that the other did not. People v Thomson, 13 A.D.3d 805, 786 N.Y.S.2d 262, 2004 N.Y. App. Div. LEXIS 15344 (N.Y. App. Div. 3d Dep't 2004), app. denied, 4 N.Y.3d 836, 796 N.Y.S.2d 591, 829 N.E.2d 684, 2005 N.Y. LEXIS 1002 (N.Y. 2005).

Defendant's second-degree murder convictions and their sentences were vacated and they were dismissed from the indictment as they were inclusory concurrent counts of defendant's first-degree murder convictions. People v Rosas, 30 A.D.3d 545, 818 N.Y.S.2d 126, 2006 N.Y. App. Div. LEXIS 8042 (N.Y. App. Div. 2d Dep't), app. denied, 7 N.Y.3d 762, 819 N.Y.S.2d 888, 853 N.E.2d 259, 2006 N.Y. LEXIS 2355 (N.Y. 2006), aff'd, 8 N.Y.3d 493, 836 N.Y.S.2d 518, 868 N.E.2d 199, 2007 N.Y. LEXIS 991 (N.Y. 2007).

Defendant's conviction for assault in the first degree was not a lesser included offense of attempted murder in the first degree because it was theoretically possible to attempt to murder a person without using a dangerous instrument or deadly weapon and without causing serious physical injury. People v Faulkner, 36 A.D.3d 1009, 826 N.Y.S.2d 526, 2007 N.Y. App. Div. LEXIS 230 (N.Y. App. Div. 3d Dep't), app. denied, 8 N.Y.3d 944, 836 N.Y.S.2d 554, 868 N.E.2d 237, 2007 N.Y. LEXIS 1311 (N.Y. 2007).

As defendant committed separate acts with the requisite criminal intent, and there was no overlap of statutory elements in his convictions for murder in the first degree and criminal possession of a weapon in the second degree, in violation of N.Y. Penal Law §§ 125.27(1)(a)(viii) and 265.03(1)(b), the imposition of consecutive terms of imprisonment on him was proper and lawful under N.Y. Penal Law § 70.25(2). People v Wright, 87 A.D.3d 229, 926 N.Y.S.2d 43, 2011 N.Y. App. Div. LEXIS 5250 (N.Y. App. Div. 1st Dep't 2011), aff'd in part, modified, 19 N.Y.3d 359, 948 N.Y.S.2d 228, 971 N.E.2d 358, 2012 N.Y. LEXIS 1284 (N.Y. 2012).

5. Attempts

Evidence was insufficient to show that defendant shared intent of his codefendant and aided him in commission of attempted murder since defendant's mere presence at scene was not sufficient to establish his guilt, and defendant's other conduct at scene—ducking down in front seat of car before codefendant drew gun and initiated shoot-out with police—was equivocal. People v Yarrell, 75 N.Y.2d 828, 552 N.Y.S.2d 557, 551 N.E.2d 1235, 1990 N.Y. LEXIS 138 (N.Y. 1990).

Evidence was sufficient to support convictions for first and second degree attempted murder where defendants, driver and passenger of vehicle, ignored police officers' direction to pull over, proceeded to drive at high rate of speed through city streets to avoid arrest, during which driver continually changed lanes, moving from right lane to left and back to right, thereby enabling passenger to obtain direct line of fire toward pursuing police vehicle, and then proceeded to drive vehicle directly toward roadblock, where 2 uniformed officers stood next to patrol car, permitting passenger to aim and fire his weapon at one officer; under circumstances, jury could find that passenger's actions in firing at officers was not "spontaneous" or unanticipated by driver. People v Cabassa, 79 N.Y.2d 722, 586 N.Y.S.2d 234, 598 N.E.2d 1, 1992 N.Y. LEXIS 1607 (N.Y.), cert. denied, 506 U.S. 1011, 113 S. Ct. 633, 121 L. Ed. 2d 563, 1992 U.S. LEXIS 7648 (U.S. 1992).

In determining whether New York's statutory double jeopardy provision permits sequential federal and state prosecutions for offenses arising from same criminal transaction, first prong of exception under CLS CPL § 40.20(2)(b) requires comparison of charges to determine whether each federal offense contains element that is not element of any state offense charged, and vice versa; thus, state prosecution of defendants for attempted murder under CLS Penal §§ 110.00 and 125.27(1)(A)(i) and knowing possession of defaced firearms under CLS Penal § 265.02(3) was not barred by prior federal prosecution for bank robbery under 18 USCS §§ 2113(a) and (d), using and possessing firearms under 18 USCS § 924(c), and conspiracy under 18 USCS § 371. People v Bryant, 92 N.Y.2d 216, 677 N.Y.S.2d 286, 699 N.E.2d 910, 1998 N.Y. LEXIS 2151 (N.Y. 1998).

Where the evidence showed that defendant fired a gun in the direction of two detectives but did not definitively establish the identity of his intended victim, a single charge of attempted intentional murder was not duplicitous under N.Y. Crim. Proc. Law art. 200.30(1); as actual death was not an element of attempted murder, the identity of the intended victim was not relevant in determining whether the crime was committed. Thus, the trial court was not obliged to instruct the jury to unanimously determine which person was the intended victim. People v Wells, 7 N.Y.3d 51, 817 N.Y.S.2d 590, 850 N.E.2d 637, 2006 N.Y. LEXIS 1307 (N.Y. 2006).

Sentence imposed on defendant convicted of attempted murder of policeman and possession of weapon as felony of some 21 years to life and seven years respectively was excessive, and sentence for attempted murder would be modified, in exercise of discretion, to 15 years to life. People v Kenyatta, 52 A.D.2d 783, 383 N.Y.S.2d 20, 1976 N.Y. App. Div. LEXIS 12565 (N.Y. App. Div. 1st Dep't 1976).

Notwithstanding that New York's death penalty statute for murder in the first degree has been held to be unconstitutional, defendant was properly convicted by a jury of attempted murder in the first degree as a result of an incident in which he shot a police officer in the back with a rifle, since, to the extent Penal Law § 125.27 may provide a substantive basis for a charge of attempted murder in the first degree, its vitality continues to exist for the reason that there was no similar interdependence between Penal Law § 60.06 (the death penalty statute) and the crime of attempted murder in the first degree, and a conviction for that offense does not require the decision of the death penalty, and since the crime of attempted murder in the first degree has its own sentencing provision. People v Carr, 87 A.D.2d 969, 450 N.Y.S.2d 94, 1982 N.Y. App. Div. LEXIS 16501 (N.Y. App. Div. 4th Dep't), app. denied, 56 N.Y.2d 809, 1982 N.Y. LEXIS 6014 (N.Y. 1982).

Evidence was insufficient to sustain those counts of indictment charging passenger and driver of limousine with first and second degree attempted murder after police officer was injured while hanging onto driver's arm in attempt to stop vehicle from leaving scene, since it could not be inferred that limousine was deliberately driven to cause death of officer but only that driver accelerated to dislodge officer's grip in order to avoid apprehension.

People v Fraser, 126 A.D.2d 740, 511 N.Y.S.2d 326, 1987 N.Y. App. Div. LEXIS 41891 (N.Y. App. Div. 2d Dep't 1987).

Statutory provision of CLS CPL § 30.30 excluding certain crimes from limitation periods uses unambiguous language and does not extend to offenses involving attempt to commit enumerated crimes; accordingly, indictment charging defendant with attempted murder in first degree was subject to 6-month speedy trial limitation. People v Quinones, 126 A.D.2d 757, 511 N.Y.S.2d 341, 1987 N.Y. App. Div. LEXIS 41913 (N.Y. App. Div. 2d Dep't 1987).

Evidence was sufficient to sustain defendant's conviction for attempted first degree murder of 2 police officers who, after identifying themselves to occupant of apartment, saw defendant holding shotgun pointed to floor as door swung open, whereupon defendant, before officers could draw their own weapons or take cover, raised gun and aimed it at officers' heads, pulled trigger hard enough so that officers and defendant's companion heard click, jumped up and back in anticipation of force of discharge, then fled when gun failed to fire. People v Deresky, 137 A.D.2d 704, 525 N.Y.S.2d 49, 1988 N.Y. App. Div. LEXIS 1765 (N.Y. App. Div. 2d Dep't), app. denied, 71 N.Y.2d 1025, 530 N.Y.S.2d 560, 526 N.E.2d 52, 1988 N.Y. LEXIS 2186 (N.Y. 1988).

It was no defense to first degree attempted murder prosecution that crime was factually impossible because shotgun malfunctioned when defendant pulled trigger while aiming at police officers. People v Deresky, 137 A.D.2d 704, 525 N.Y.S.2d 49, 1988 N.Y. App. Div. LEXIS 1765 (N.Y. App. Div. 2d Dep't), app. denied, 71 N.Y.2d 1025, 530 N.Y.S.2d 560, 526 N.E.2d 52, 1988 N.Y. LEXIS 2186 (N.Y. 1988).

Evidence was legally sufficient to establish defendant's guilt of 2 counts of attempted first degree murder where, during his arrest after drug transaction, he aimed partially loaded revolver at 2 arresting officers and pulled trigger twice on 2 empty chambers, and he was subdued prior to his squeezing trigger third time on loaded chamber; defendant's intent to kill 2 officers could be readily inferred. People v Orama, 150 A.D.2d 505, 541 N.Y.S.2d 102, 1989 N.Y. App. Div. LEXIS 6460 (N.Y. App. Div. 2d Dep't), app. denied, 74 N.Y.2d 744, 545 N.Y.S.2d 119, 543 N.E.2d 762, 1989 N.Y. LEXIS 2587 (N.Y. 1989).

Indictment for first degree attempted murder was sufficient since whether indictment charged that defendant discharged gun "at" or "in direction of" police officers was not critical, as long as he did so with intent to cause death by his actions. People v Nicholas, 163 A.D.2d 844, 558 N.Y.S.2d 373, 1990 N.Y. App. Div. LEXIS 9525 (N.Y. App. Div. 4th Dep't), app. denied, 76 N.Y.2d 989, 563 N.Y.S.2d 778, 565 N.E.2d 527, 1990 N.Y. LEXIS 4673 (N.Y. 1990).

Proof was sufficient to establish intent in regard to charges of first degree attempted murder and first degree attempted assault with respect to police officer where (1) defendant took woman hostage at airport and demanded airplane to fly him to Japan, (2) after woman escaped, defendant ran at police officer while holding 5-inch serrated steak knife, and (3) when defendant, with knife raised, was within 4 feet of officer, officer shot him twice in leg to stop his advance. People v Taylor, 163 A.D.2d 902, 558 N.Y.S.2d 425, 1990 N.Y. App. Div. LEXIS 9624 (N.Y. App. Div. 4th Dep't), app. denied, 76 N.Y.2d 944, 563 N.Y.S.2d 74, 564 N.E.2d 684, 1990 N.Y. LEXIS 4382 (N.Y. 1990).

Evidence was sufficient to support convictions on 3 separate counts of attempted first degree murder where defendant initiated armed confrontation with police and, during confrontation, he pointed his gun at each of 3 officers and either fired or misfired his gun. People v Danielson, 184 A.D.2d 723, 585 N.Y.S.2d 78, 1992 N.Y. App. Div. LEXIS 8540 (N.Y. App. Div. 2d Dep't), app. denied, 80 N.Y.2d 928, 589 N.Y.S.2d 856, 603 N.E.2d 961, 1992 N.Y. LEXIS 4030 (N.Y. 1992).

Evidence supported convictions of attempted first degree murder and related offenses arising from incident in which defendant and another shot at 2 police officers from their car, despite claim that defendant was merely unsuspecting occupant of car, where (1) driver testified that he had seen defendant holding gun, (2) ballistics evidence showed that 2 weapons were fired at officers, and (3) spent shells recovered in area of incident were found not to have come from gun recovered from defendant's companion. People v La Torres, 186 A.D.2d 479, 590 N.Y.S.2d 187, 1992 N.Y. App. Div. LEXIS 12437 (N.Y. App. Div. 1st Dep't 1992), app. denied, 81 N.Y.2d 842, 595 N.Y.S.2d 741, 611 N.E.2d 780, 1993 N.Y. LEXIS 937 (N.Y. 1993), app. denied, 81 N.Y.2d 892, 597 N.Y.S.2d 954, 613 N.E.2d 986, 1993 N.Y. LEXIS 1541 (N.Y. 1993), app. denied, 81 N.Y.2d 1015, 600 N.Y.S.2d 204, 616 N.E.2d 861, 1993 N.Y. LEXIS 2491 (N.Y. 1993).

Evidence was sufficient to support conviction for first degree attempted murder where it was shown that, while being chased by officers after attempted robbery, defendant turned around, assumed combat stance, and shot 3 rounds from pistol at officers. People v Santos, 202 A.D.2d 258, 608 N.Y.S.2d 645, 1994 N.Y. App. Div. LEXIS 2296 (N.Y. App. Div. 1st Dep't), app. denied, 83 N.Y.2d 1007, 616 N.Y.S.2d 488, 640 N.E.2d 156, 1994 N.Y. LEXIS 3259 (N.Y. 1994).

In attempted first degree murder trial, consecutive sentences were legally imposedwhere jury found that defendant had tried to kill 2 police officers, since each attempted killing, which involved firing of separate shots, constituted distinct act perpetrated against separate victim. People v Ramos, 205 A.D.2d 404, 613 N.Y.S.2d 879, 1994 N.Y. App. Div. LEXIS 6360 (N.Y. App. Div. 1st Dep't), app. denied, 84 N.Y.2d 831, 617 N.Y.S.2d 151, 641 N.E.2d 172, 1994 N.Y. LEXIS 3733 (N.Y. 1994).

Evidence was sufficient to support conviction of attempted first degree murder where defendant removed gun hidden in stolen car next to where he was standing and shot police officer standing nearby with his back to defendant; although defendant denied intent to kill officer, intent to kill could be inferred from fact that he directed gun at officer and pulled trigger. People v Francis, 209 A.D.2d 539, 619 N.Y.S.2d 71, 1994 N.Y. App. Div. LEXIS 11196 (N.Y. App. Div. 2d Dep't 1994), app. denied, 85 N.Y.2d 909, 627 N.Y.S.2d 331, 650 N.E.2d 1333, 1995 N.Y. LEXIS 1603 (N.Y. 1995).

Evidence supported conclusion that defendant acted in concert with codefendant and that he had mental culpability required for commission of attempted first and second degree murder, second degree assault, and second degree weapon possession in assault on off-duty police officer where (1) defendant and codefendant approached officer's motorcycle, displayed weapons, and attempted to steal motorcycle, (2) officer displayed his shield and yelled "police," after which codefendant fired shots at officer, and (3) gun fight ensued in which officer was shot in thigh. People v Smith, 210 A.D.2d 267, 620 N.Y.S.2d 67, 1994 N.Y. App. Div. LEXIS 12316 (N.Y. App. Div. 2d Dep't 1994), app. denied, 85 N.Y.2d 914, 627 N.Y.S.2d 337, 650 N.E.2d 1339, 1995 N.Y. LEXIS 1740 (N.Y. 1995).

Defendant's conviction of attempted first degree murder was supported by evidence that he pointed his gun at police officer and fired it. People v Van Buren, 213 A.D.2d 504, 623 N.Y.S.2d 906, 1995 N.Y. App. Div. LEXIS 2689 (N.Y. App. Div. 2d Dep't), app. denied, 86 N.Y.2d 847, 634 N.Y.S.2d 457, 658 N.E.2d 235, 1995 N.Y. LEXIS 4714 (N.Y. 1995).

Grand jury evidence was legally sufficient to establish elements of attempted first degree murder where defendant, while in police custody, suddenly pulled loaded weapon from his waistband, placed his finger on trigger, and pointed weapon at arresting officers' midsections. People v Chen, 217 A.D.2d 637, 629 N.Y.S.2d 771, 1995 N.Y. App. Div. LEXIS 7810 (N.Y. App. Div. 2d Dep't 1995).

Conviction of attempted first degree murder, first degree reckless endangerment, and second, third, and fourth degree weapon possession was supported by evidence that defendant repeatedly tried to pull trigger while gun was pointed at officer's face during struggle over gun. People v Vega, 238 A.D.2d 278, 657 N.Y.S.2d 30, 1997 N.Y. App. Div. LEXIS 4308 (N.Y. App. Div. 1st Dep't), app. denied, 90 N.Y.2d 911, 663 N.Y.S.2d 523, 686 N.E.2d 235, 1997 N.Y. LEXIS 3544 (N.Y. 1997).

Defendant's intent to cause death of uniformed police officer who was pursuing him was shown by fact that defendant pointed his gun at officer and fired twice within about 10 feet of officer's body. People v German, 243 A.D.2d 647, 663 N.Y.S.2d 259, 1997 N.Y. App. Div. LEXIS 10184 (N.Y. App. Div. 2d Dep't 1997), app. denied, 91 N.Y.2d 892, 669 N.Y.S.2d 6, 691 N.E.2d 1032, 1998 N.Y. LEXIS 404 (N.Y. 1998).

Evidence that defendant momentarily pointed loaded gun at chest of police officer from distance of 25 feet was insufficient to prove first degree attempted murder, where there was no proof that defendant had his finger on trigger or otherwise came very near to accomplishing intended crime, and fact that he had fired shots in direction of civilians moments before his encounter with police was insufficient to permit inference that his finger remained on trigger. People v Chandler, 250 A.D.2d 410, 673 N.Y.S.2d 100, 1998 N.Y. App. Div. LEXIS 5423 (N.Y. App. Div. 1st Dep't 1998).

Jury verdict convicting defendant of attempted first and second degree murder and second degree weapon possession was not against weight of evidence where defendant's intent to kill 2 civilians and police officer could be reasonably be inferred from evidence, including testimony that defendant aimed and fired at each of 3 victims and then, during police pursuit, turned, advanced in direction of officer, and continued to fire. People v Peets, 286 A.D.2d 624, 730 N.Y.S.2d 108, 2001 N.Y. App. Div. LEXIS 8593 (N.Y. App. Div. 1st Dep't), app. denied, 97 N.Y.2d 686, 738 N.Y.S.2d 302, 764 N.E.2d 406, 2001 N.Y. LEXIS 4501 (N.Y. 2001).

Sufficient evidence supported defendant's conviction of four counts of attempted murder in the first degree in violation of N.Y. Penal Law §§ 110.00, 125.27(1)(a)(viii), (b); there was evidence establishing that defendant had the requisite intent to kill or seriously injure additional persons other than defendant's intended victim by shooting at them, as the intent to harm additional persons could have been inferred from defendant's actions in shooting into a crowd and pursuing individuals as they entered an apartment building. People v McLee, 32 A.D.3d 1315, 821 N.Y.S.2d 720, 2006 N.Y. App. Div. LEXIS 11666 (N.Y. App. Div. 4th Dep't 2006), app. denied, 8 N.Y.3d 847, 862 N.E.2d 798, 2007 N.Y. LEXIS 426 (N.Y. 2007).

Evidence was sufficient to convict defendant of attempted murder in violation of N.Y. Penal Law §§ 110.00, 125.27 because there was evidence that defendant pointed a loaded revolver at close range at a police officer who was chasing him, but that the officer was able to grab the gun away from defendant after a struggle. People v Smith, 32 A.D.3d 1318, 821 N.Y.S.2d 723, 2006 N.Y. App. Div. LEXIS 11701 (N.Y. App. Div. 4th Dep't), app. denied, 7 N.Y.3d 929, 827 N.Y.S.2d 698, 860 N.E.2d 1000, 2006 N.Y. LEXIS 4169 (N.Y. 2006).

Verdict convicting defendant of attempted first degree murder was supported by the weight of evidence because there was sufficient corroborating evidence to support accomplice testimony that defendant made repeated solicitation for the participation of his coconspirators to shoot and rob the victim, other evidence were his own tweets and text messages between himself and coconspirators, and neurosurgeon's testimony on the need for immediate life-saving surgery on traumatic wounds to victim's brain. People v Chapman, 182 A.D.3d 862, 123 N.Y.S.3d 236, 2020 N.Y. App. Div. LEXIS 2436 (N.Y. App. Div. 3d Dep't 2020).

Evidence before grand jury was insufficient to support charge of attempted first degree murder of police officer where (1) officer was off duty, not in uniform, and did not display shield or service revolver, (2) prior to walking his cousin to her automobile because she feared group of individuals who had threatened her, officer never called for assistance and did not do so until after shots were fired, (3) officer's actions in helping his cousin were no different from actions which any civilian might have taken under same circumstances, and (4) cousin's testimony that group yelled "if you are cops...show us your weapon" was consistent with defendant's lack of awareness as to officer's status. People v Martin, 163 Misc. 2d 799, 622 N.Y.S.2d 665, 1994 N.Y. Misc. LEXIS 622 (N.Y. Sup. Ct. 1994).

In prosecution arising out of defendant's pointing of gun at police officer who was trying to detain him, defendant's assaultive behavior immediately prior to his pointing gun and his statement afterward evinced his intent to shoot officer and supported indictment for attempted first degree murder; grand jury could have inferred that actions of officers who came to detaining officer's aid was only thing that stopped defendant from pulling trigger. People v Dixon, 167 Misc. 2d 612, 640 N.Y.S.2d 403, 1996 N.Y. Misc. LEXIS 62 (N.Y. Sup. Ct. 1996).

Since second degree intentional murder can be charged as attempt, core conduct of first degree intentional murder, as set out in main clause of CLS Penal § 125.27, can be attempted. People v Fernandez, 173 Misc. 2d 938, 662 N.Y.S.2d 349, 1997 N.Y. Misc. LEXIS 349 (N.Y. Sup. Ct. 1997).

Defendant went beyond mere preparation, and was properly charged with first degree attempted murder based on his hiring of someone to procure hit man, even though that person went to police as informant and never intended to carry out his role, based on grand jury evidence that he gave $10,000 to informant for hit man and promised $20,000 more on confirmation of victim's death, gave victim's picture and pertinent information to informant, and even demanded that victim's body be found in public. People v Sabo, 179 Misc. 2d 396, 687 N.Y.S.2d 513, 1998 N.Y. Misc. LEXIS 653 (N.Y. Sup. Ct. 1998).

Defendant's conviction and 25-year sentence of attempted murder in the second degree, criminal use of a firearm in the first degree, assault in the first degree, and criminal possession of a weapon in the third degree, based on his drive-by shooting at a pedestrian were affirmed; police response in four minutes to stop red car with white occupants, as described by victim and a bystander, was based on reasonable suspicion, so evidence was not suppressed. iven the callous and random nature of the crime, the fact that defendant was on a specific mission that morning to intentionally shoot someone in this particular neighborhood and the fact that defendant had a recent conviction of similar ilk, we find the 25- year sentence to be neither harsh nor excessive People v Berry, 306 A.D.2d 623, 762 N.Y.S.2d 139, 2003 N.Y. App. Div. LEXIS 6636 (N.Y. App. Div. 3d Dep't), app. denied, 100 N.Y.2d 618, 767 N.Y.S.2d 401, 799 N.E.2d 624, 2003 N.Y. LEXIS 3702 (N.Y. 2003).

Defendant's guilty plea to the charge of first-degree attempted murder was knowingly and voluntarily made where a review of the record indicated that the county court engaged in a thorough plea colloquy, during which defendant acknowledged that he understood the rights he was giving up, he had not been coerced, he was not under the influence of medication or alcohol, his mind was clear, he had ample opportunity to discuss the ramifications of his plea with counsel and he did, in fact, commit the crime as charged. People v Hodge, 4 A.D.3d 676, 772 N.Y.S.2d 748, 2004 N.Y. App. Div. LEXIS 2043 (N.Y. App. Div. 3d Dep't), app. denied, 2 N.Y.3d 800, 781 N.Y.S.2d 300, 814 N.E.2d 472, 2004 N.Y. LEXIS 1886 (N.Y. 2004).

Where a trial court charged the jury pursuant to defendant's request on justification as it related to the defense of defendant under N.Y. Penal Law § 35.15(2)(a) rather than as it related to the defense of a premises during a burglary under N.Y. Penal Law § 35.20(3), defendant waived the contention that defendant was deprived of a fair trial; in any event, the evidence was legally sufficient to establish that defendant attempted to cause the death of another person that he knew or should have known was a police officer, in violation of N.Y. Penal Law §§ 125.27(1)(a)(i), 110.00. People v Rocker, 5 A.D.3d 1106, 773 N.Y.S.2d 318, 2004 N.Y. App. Div. LEXIS 2902 (N.Y. App. Div. 4th Dep't 2004).

Evidence was sufficient to support defendant's conviction for attempted first-degree murder of police officer under Penal § 125.27(1)(a)(i), where defendant pointed loaded gun at officer, officer heard loud metallic click, hammer of gun recovered from scene contained cartridge in its firing chamber, hammer of gun was down, and cartridge's primer was slightly dented. Leslie v Artuz, 72 F. Supp. 2d 267, 1999 U.S. Dist. LEXIS 16438 (S.D.N.Y. 1999), aff'd, 230 F.3d 25, 2000 U.S. App. LEXIS 25710 (2d Cir. N.Y. 2000).

Where evidence indicated that petitioner fired at police officers at least twice and the officers testified that petitioner assumed what they termed a "combat stance" and used both hands to aim the gun at them when he fired, and because gun is inherently a deadly weapon, petitioner failed to show that no reasonable jury could conclude that he intended to kill the officers when he shot at them. Douglas v Portuondo, 232 F. Supp. 2d 106, 2002 U.S. Dist. LEXIS 21583 (S.D.N.Y. 2002).

6. Affirmative defenses

The defenses under New York's death penalty statute for murder of a corrections officer (Penal Law, §§ 60.06, 125.27, subd

1, par [a], cl [ii]) do not allow an individualized consideration of the character, propensity, record or attributes of the individual offender as required by the Supreme Court, since the defenses simply do not present the required information and do not permit a jury which has rejected these defenses and has found a defendant guilty of murder in the first degree to then mitigate the punishment by resurrecting the defenses. People v Davis, 43 N.Y.2d 17, 400 N.Y.S.2d 735, 371 N.E.2d 456, 1977 N.Y. LEXIS 2434 (N.Y. 1977), cert. denied, 435 U.S. 998, 98 S. Ct. 1653, 56 L. Ed. 2d 88, 1978 U.S. LEXIS 1645 (U.S. 1978), cert. denied, 438 U.S. 914, 98 S. Ct. 3143, 57 L. Ed. 2d 1160, 1978 U.S. LEXIS 2435 (U.S. 1978).

People did not preserve for appellate review issue of whether defense of extreme emotional disturbance is applicable to attempted murder where People did not argue that point in opposition to defendant's request for charge on extreme emotional disturbance. People v Tabarez, 69 N.Y.2d 663, 511 N.Y.S.2d 832, 503 N.E.2d 1369, 1986 N.Y. LEXIS 21265 (N.Y. 1986).

Defense of extreme emotional disturbance under CLS Penal Law § 125.27(2)(a) is applicable to attempted murder in first degree, since, applying principal that Penal Law is not to be strictly construed (CLS Penal Law § 5.00), defendant, acting under influence of extreme emotional disturbance, who shoots at police officer and misses, should not be convicted of class A-1 felony, while he would be subject only to conviction for class B felony had his bullet found its mark and killed officer. People v Tabarez, 113 A.D.2d 461, 497 N.Y.S.2d 80, 1985 N.Y. App. Div. LEXIS 52944 (N.Y. App. Div. 2d Dep't 1985), aff'd, 69 N.Y.2d 663, 511 N.Y.S.2d 832, 503 N.E.2d 1369, 1986 N.Y. LEXIS 21265 (N.Y. 1986).

Court committed reversible error during prosecution of defendant convicted of attempted murder in first degree, robbery in third degree and criminal possession of weapon in third degree, by refusing defendant's request to instruct jury on affirmative defense of extreme emotional disturbance under CLS Penal Law § 125.27(2)(a), since there was ample objective and opinion evidence from which jury might have concluded that at time defendant turned and fired at police officer, he was suffering from extreme emotional disturbance, and that explanation offered by defendant was "objectively" reasonable, and not attributable to robbery which preceded shooting incident, where evidence indicates that defendant's disturbance could have predated robbery and, taking into account his inadequate personality and borderline retardation, could have been triggered by stress of his prolong unemployment, as well as residual effects of his ingestion of toxic fruit as youngster. People v Tabarez, 113 A.D.2d 461, 497 N.Y.S.2d 80, 1985 N.Y. App. Div. LEXIS 52944 (N.Y. App. Div. 2d Dep't 1985), aff'd, 69 N.Y.2d 663, 511 N.Y.S.2d 832, 503 N.E.2d 1369, 1986 N.Y. LEXIS 21265 (N.Y. 1986).

Defendant's assertion that court erred in refusing to charge affirmative defense of extreme emotional disturbance is without merit, since defendant's sworn testimony that he did not intend to hit police officer or to harm him in any way, but intended only to provoke police officer into shooting back, is incompatible with affirmative defense of extreme emotional disturbance. People v Lyness, 115 A.D.2d 333, 495 N.Y.S.2d 848, 1985 N.Y. App. Div. LEXIS 54618 (N.Y. App. Div. 4th Dep't 1985), cert. denied, 481 U.S. 1070, 107 S. Ct. 2465, 95 L. Ed. 2d 873, 1987 U.S. LEXIS 2320 (U.S. 1987).

Manslaughter defendant was properly precluded from offering evidence as to 3 instances of victim's violent behavior of which defendant had knowledge, although evidence of other instances of victim's violent behavior was permitted, where 3 instances were not reasonably related in time and quality to particular justification defense advanced by defendant at trial. People v Tumerman, 133 A.D.2d 714, 519 N.Y.S.2d 880, 1987 N.Y. App. Div. LEXIS 51761 (N.Y. App. Div. 2d Dep't), app. denied, 70 N.Y.2d 938, 524 N.Y.S.2d 690, 519 N.E.2d 636, 1987 N.Y. LEXIS 19851 (N.Y. 1987), cert. denied, 485 U.S. 969, 108 S. Ct. 1245, 99 L. Ed. 2d 443, 1988 U.S. LEXIS 1278 (U.S. 1988), app. denied, 72 N.Y.2d 867, 532 N.Y.S.2d 517, 528 N.E.2d 908, 1988 N.Y. LEXIS 3945 (N.Y. 1988).

In prosecution for first degree attempted murder of police officers, court properly refused to submit defense of extreme emotional disturbance to jury, notwithstanding that defendant and his female companion argued prior to arrival of police and despite fact that defendant may have used drugs in past and smelled of liquor at time of incident, since there was no evidence of loss of self-control or reasonable excuse for such emotional state. People v Deresky, 137 A.D.2d 704, 525 N.Y.S.2d 49, 1988 N.Y. App. Div. LEXIS 1765 (N.Y. App. Div. 2d Dep't), app. denied, 71 N.Y.2d 1025, 530 N.Y.S.2d 560, 526 N.E.2d 52, 1988 N.Y. LEXIS 2186 (N.Y. 1988).

Defendant, associated with "Black Liberation Army" and being sought in connection with prior robbery, was not entitled to jury charge of justification in prosecution for first degree attempted murder of police officers, which arose when he fired gun at officers following high speed car chase, since (1) defendant could have peacefully surrendered prior to escalating confrontation by merely pulling his car over after observing police car, which had merely activated its roof rack lights and siren, (2) defendant's assertion that he reasonably feared that police were intent on killing him even before he attempted to flee rested on wholly subjective perception that pursuing officers would employ unwarranted deadly force in effecting his arrest since law enforcement personnel had allegedly used "oppressive tactics" against black activists in past, (3) although police had twice struck defendant's car with their vehicle, they did so only after he materially heightened intensity of chase by recklessly traversing highway median, and (4) immediately before second collision, defendant's accomplice fired at officers in order to deter their pursuit. People v Odinga, 143 A.D.2d 202, 531 N.Y.S.2d 818, 1988 N.Y. App. Div. LEXIS 8446 (N.Y. App. Div. 2d Dep't), app. denied, 73 N.Y.2d 853, 537 N.Y.S.2d 500, 534 N.E.2d 338, 1988 N.Y. LEXIS 6198 (N.Y. 1988), app. denied, 73 N.Y.2d 858, 537 N.Y.S.2d 505, 534 N.E.2d 343, 1988 N.Y. LEXIS 6318 (N.Y. 1988).

In prosecution for first degree attempted murder, defendant was not entitled to jury charge on defense of extreme emotional disturbance where he had testified that he believed his behavior was entirely rational and justified from his own point of view, and he never suggested that his thinking was disturbed or that he suffered any loss of self-control or "'mental infirmity,' not rising to level of insanity" usually associated with such defense. People v Odinga, 143 A.D.2d 202, 531 N.Y.S.2d 818, 1988 N.Y. App. Div. LEXIS 8446 (N.Y. App. Div. 2d Dep't), app. denied, 73 N.Y.2d 853, 537 N.Y.S.2d 500, 534 N.E.2d 338, 1988 N.Y. LEXIS 6198 (N.Y. 1988), app. denied, 73 N.Y.2d 858, 537 N.Y.S.2d 505, 534 N.E.2d 343, 1988 N.Y. LEXIS 6318 (N.Y. 1988).

First degree murder defendant's statement that "you can do anything you want to as long as you go for psychiatric help" was admissible to rebut his insanity defense by showing his understanding of how feigned insanity could be to his advantage. People v Swan, 158 A.D.2d 158, 557 N.Y.S.2d 791, 1990 N.Y. App. Div. LEXIS 9757 (N.Y. App. Div. 4th Dep't), app. denied, 76 N.Y.2d 991, 563 N.Y.S.2d 780, 565 N.E.2d 529, 1990 N.Y. LEXIS 4730 (N.Y. 1990).

At first degree murder trial in which defendant raised insanity defense, defendant's psychiatrist was properly cross-examined concerning his testimony at prior retention hearings since expert's track record is clearly probative of his competence and expertise. People v Swan, 158 A.D.2d 158, 557 N.Y.S.2d 791, 1990 N.Y. App. Div. LEXIS 9757 (N.Y. App. Div. 4th Dep't), app. denied, 76 N.Y.2d 991, 563 N.Y.S.2d 780, 565 N.E.2d 529, 1990 N.Y. LEXIS 4730 (N.Y. 1990).

In attempted first degree murder trial, no reasonable view of evidence could establish elements of defense of justification where, although police officer had drawn his gun, he merely requested defendant to stop, defendant instead hid behind car and then deliberately shot at officer, who had identified himself as police officer and was in uniform, and defendant fired 6 to 8 shots at officer at close range, and continued to shoot at officer after he had fallen. People v Douglas, 160 A.D.2d 1015, 554 N.Y.S.2d 727, 1990 N.Y. App. Div. LEXIS 4985 (N.Y. App. Div. 2d Dep't), app. denied, 76 N.Y.2d 855, 560 N.Y.S.2d 995, 561 N.E.2d 895, 1990 N.Y. LEXIS 3848 (N.Y. 1990).

In trial for attempted first degree murder, jury properly rejected affirmative defense of extreme emotional disturbance on basis of evidence that defendant, while clearly angry with his wife

and son in period of time preceding shootout, confronted police officers in calm and controlled manner, aimed his handgun at them, and ordered them to drop their weapons; defendant did not exhibit loss of self-control generally associated with defense of extreme emotional disturbance. People v Marinaccio, 190 A.D.2d 819, 593 N.Y.S.2d 856, 1993 N.Y. App. Div. LEXIS 1479 (N.Y. App. Div. 2d Dep't), app. denied, 81 N.Y.2d 1016, 600 N.Y.S.2d 204, 616 N.E.2d 861, 1993 N.Y. LEXIS 2503 (N.Y. 1993).

In prosecution for first degree murder arising out of defendant's shooting of 2 police officers, defendant's alleged extreme emotional disturbance was not reasonably explained by actions of police officer 4 months earlier in allegedly abusing and threatening defendant during interrogation since neither defendant nor anyone else present at such interrogation testified to what occurred there, and only testimony concerning event was given by defendant's expert witness psychologist, who recited what defendant had told him, which was hearsay inadmissible to prove truth of facts related by defendant. People v Manzella, 199 A.D.2d 964, 606 N.Y.S.2d 471, 1993 N.Y. App. Div. LEXIS 12544 (N.Y. App. Div. 4th Dep't 1993), app. denied, 83 N.Y.2d 807, 611 N.Y.S.2d 143, 633 N.E.2d 498, 1994 N.Y. LEXIS 569 (N.Y. 1994).

Trial court was not obligated to instruct jury sua sponte regarding justification in prosecution for multiple offenses, including attempted first degree murder, attempted second degree murder, attempted aggravated assault on police officer and first degree assault, where defendant's trial counsel made proper strategic decision in not requesting jury charge regarding justification, because such defense was unsupported by evidence and would have posed risk of undermining defense of lack of intent. People v Midgette, 242 A.D.2d 492, 662 N.Y.S.2d 479, 1997 N.Y. App. Div. LEXIS 9119 (N.Y. App. Div. 1st Dep't), app. denied, 91 N.Y.2d 835, 667 N.Y.S.2d 689, 690 N.E.2d 498, 1997 N.Y. LEXIS 4364 (N.Y. 1997).

Because a jury instruction precluded the jury, in assessing the reasonableness of defendant's belief that he was in deadly peril, from considering all of the circumstances surrounding him from his point of view at the time that he used deadly force, the charge was erroneous and the error could not be deemed harmless beyond a reasonable doubt. People v Young, 33 A.D.3d 1120, 825 N.Y.S.2d 147, 2006 N.Y. App. Div. LEXIS 12681 (N.Y. App. Div. 3d Dep't 2006), app. denied, 8 N.Y.3d 921, 834 N.Y.S.2d 511, 866 N.E.2d 457, 2007 N.Y. LEXIS 1240 (N.Y. 2007).

Pursuant to N.Y. Crim. Proc. Law § 250.10, a defendant who intends to interpose an affirmative defense of extreme emotional disturbance is required to serve and file a notice of intent to proffer psychiatric evidence and to submit to an exam by a psychiatrist designated by the People, even though he only intends to present lay testimony in support of that defense. People v Diaz, 62 A.D.3d 157, 876 N.Y.S.2d 69, 2009 N.Y. App. Div. LEXIS 1963 (N.Y. App. Div. 2d Dep't 2009), aff'd, 15 N.Y.3d 40, 904 N.Y.S.2d 343, 930 N.E.2d 264, 2010 N.Y. LEXIS 1149 (N.Y. 2010).

Trial court erred in denying defendant's N.Y. Crim. Proc. Law art. 440 motion, alleging ineffective assistance of counsel, without a hearing, under circumstances in which defendant claimed that counsel advised him, inter alia, that he had an excellent defense of extreme emotional disturbance; the affirmative defense of extreme emotional disturbance was only a defense to intentional murder, and defendant was not charged with that crime. People v Hampton, 64 A.D.3d 872, 883 N.Y.S.2d 338, 2009 N.Y. App. Div. LEXIS 5569 (N.Y. App. Div. 3d Dep't), app. denied, 13 N.Y.3d 796, 887 N.Y.S.2d 546, 916 N.E.2d 441, 2009 N.Y. LEXIS 4389 (N.Y. 2009).

Because defendant's N.Y. Crim. Proc. Law § 250.10(2) notice of a psychiatric defense was untimely and inadequate, and because defendant repeatedly ignored legitimate requests made by the prosecution for more information regarding the specifics of defendant's N.Y. Penal Law § 125.27(2)(a) defense, the trial court properly precluded defendant from asserting the defense or presenting lay evidence of defendant's alleged extreme emotional disturbance. People v Muller, 72 A.D.3d 1329, 899 N.Y.S.2d 425, 2010 N.Y. App. Div. LEXIS 3157 (N.Y. App. Div. 3d Dep't), app. denied, 15 N.Y.3d 776, 907 N.Y.S.2d 465, 933 N.E.2d 1058, 2010 N.Y. LEXIS 2403 (N.Y. 2010).

Admission of challenged testimony was harmless in light of the overwhelming evidence establishing both defendant's guilt beyond a reasonable doubt and his corresponding failure to prove his affirmative defense of extreme emotional disturbance by a preponderance of the evidence. People v Pavone, 117 A.D.3d 1329, 986 N.Y.S.2d 674, 2014 N.Y. App. Div. LEXIS 3841 (N.Y. App. Div. 3d Dep't 2014), aff'd, 26 N.Y.3d 629, 47 N.E.3d 56, 26 N.Y.S.3d 728, 2015 N.Y. LEXIS 3926 (N.Y. 2015).

Evidence was legally sufficient to support defendant's convictions for murder in the first degree because he failed to sufficiently establish the defense of extreme emotional disturbance. People v Ashline, 124 A.D.3d 1258, 3 N.Y.S.3d 469, 2015 N.Y. App. Div. LEXIS 170 (N.Y. App. Div. 4th Dep't 2015), app. denied, 27 N.Y.3d 1128, 61 N.E.3d 508, 39 N.Y.S.3d 109, 2016 N.Y. LEXIS 2102 (N.Y. 2016).

Statute declaring it to be an affirmative defense to charge of murder that the defendant acted under the influence of extreme emotional disturbance unconstitutionally shifts burden of proof to the defendant by obliging him to plead and prove an affirmative defense on the issue of the degree of culpability; when the defense of extreme emotional disturbance is pleaded to a murder indictment, state must prove its absence beyond a reasonable doubt. People v Balogun, 82 Misc. 2d 907, 372 N.Y.S.2d 384, 1975 N.Y. Misc. LEXIS 2843 (N.Y. Sup. Ct. 1975).

United States Supreme Court decision holding that due process requires the prosecution to prove, beyond a reasonable doubt, the absence of the influence of extreme emotional disturbance when this issue is properly presented in trial of murder indictment applies only to cases in which the trial commences after June 9, 1975. People v Balogun, 82 Misc. 2d 907, 372 N.Y.S.2d 384, 1975 N.Y. Misc. LEXIS 2843 (N.Y. Sup. Ct. 1975).

The affirmative defense of extreme emotional disturbance (Penal Law, § 125.27, subd 2, par [a]) must be submitted to the jury on the highest count against defendant, attempted murder in the first degree, since the extreme emotional disturbance formulation, which has significantly expanded upon the heat of passion concept, may be charged in attempted murder in the first degree where a three-pronged formulation is met: that the extreme emotional disturbance is the emotional state of a person who has no mental disease or defect that rises to the level established by section 30.05 of the Penal Law, who is exposed to an extremely unusual and overwhelming stress and has an extreme emotional reaction to it, as a result of which there is a loss of self-control, and reason is overborne by intense feelings; therefore, since defendant's psychological condition is relevant in relation to his emotional state and testimony relevant to defendant's plea of insanity is applicable to the affirmative defense of extreme emotional disturbance, both must be submitted to the jury. People v Ford, 102 Misc. 2d 160, 423 N.Y.S.2d 402, 1979 N.Y. Misc. LEXIS 2841 (N.Y. Sup. Ct. 1979).

In prosecution for first and second degree murder and other crimes, prosecution had right under CLS CPL § 250.10 to independent examination of defendant by expert of its choosing, even though defendant was not examined by any expert who would testify on her behalf during guilt phase of trial, and no expert would be testifying on her behalf during guilt phase, where defendant served notice of intent to rely on defense of diminished capacity, which she planned to prove through her school grades and I.Q. and psychological tests performed at her schools, to negate element of intent of crimes charged; it would be unfair for defendant to raise defense involving her mental capacity and then hide behind her constitutional rights, thus making insurmountable prosecution's burden of proving intent beyond reasonable doubt. People v Irwin, 182 Misc. 2d 113, 695 N.Y.S.2d 906, 1999 N.Y. Misc. LEXIS 398 (N.Y. County Ct. 1999).

Because the defense of extreme emotional disturbance in N.Y. Penal Law §§ 125.25(1)(a), 125.27(2)(a) was only available to a defendant charged with first- or second-degree murder or attempted murder, defendant's application to have it available as a possible affirmative defense to the charge of first-degree assault in N.Y. Penal Law § 120.10 was denied as a matter of law. People v Charles, 821 N.Y.S.2d 878, 13 Misc. 3d 985, 2006 N.Y. Misc. LEXIS 2703 (N.Y. Sup. Ct. 2006).

7. Evidence

In a murder prosecution, the admission of certain inculpatory statements by defendant that had been taken by police in violation of defendant's right to counsel was harmless error, since there was no reasonable possibility that the erroneously admitted statements contributed to defendant's conviction in that defendant's claim that he killed the victim in self defense was overwhelmingly refuted by evidence that the stab wounds in the victim's body were in his back, that defendant had expressed an intent to kill the victim, that defendant had told a neighbor not to call the police after the crime, that defendant had attempted to hide after the homicide, and that defendant had never mentioned self defense to anyone he had informed about the homicide prior to turning himself in to the police. People v Flecha, 60 N.Y.2d 766, 469 N.Y.S.2d 671, 457 N.E.2d 777, 1983 N.Y. LEXIS 3447 (N.Y. 1983).

Photographs of victim's corpse are likely to arouse passions and resentment of jury in homicide case, and thus should not be admitted unless they tend to prove or disprove material fact. People v Stevens, 76 N.Y.2d 833, 560 N.Y.S.2d 119, 559 N.E.2d 1278, 1990 N.Y. LEXIS 1987 (N.Y. 1990).

When People demonstrate that photographs of victim's corpse are relevant in homicide trial, question of whether jury should be permitted to view them is addressed to trial court's discretion; availability of other evidence on point is factor but not dispositive factor, and court may find it appropriate to admit photographs to illustrate, elucidate, or corroborate other evidence. People v Stevens, 76 N.Y.2d 833, 560 N.Y.S.2d 119, 559 N.E.2d 1278, 1990 N.Y. LEXIS 1987 (N.Y. 1990).

Basic principles applying to admissibility of photographs of victim's corpse in homicide case also apply to "portraits" or photographs of victim taken when he or she was alive. People v Stevens, 76 N.Y.2d 833, 560 N.Y.S.2d 119, 559 N.E.2d 1278, 1990 N.Y. LEXIS 1987 (N.Y. 1990).

"Portraits," or photographs of homicide victim taken when he or she was alive, may arouse jury's emotions, particularly when presented in before-and-after format with photographs of corpse, and should not be admitted unless relevant to material fact to be proved at trial. People v Stevens, 76 N.Y.2d 833, 560 N.Y.S.2d 119, 559 N.E.2d 1278, 1990 N.Y. LEXIS 1987 (N.Y. 1990).

Relevance of "portraits," or photographs of homicide victim taken when he or she was alive, must be independently established; fact that photographs of victim's corpse have been found to be relevant does not necessarily establish relevance, and hence admissibility, of portraits. People v Stevens, 76 N.Y.2d 833, 560 N.Y.S.2d 119, 559 N.E.2d 1278, 1990 N.Y. LEXIS 1987 (N.Y. 1990).

When defendant was prosecuted for assaulting his wife with a baseball bat and then entering her hospital room, where he poisoned her, resulting in her death, while there was sufficient evidence to allow the jury to find that the murder was committed to preclude his wife's testimony against him regarding the assault, allowing imposition of the death penalty under N.Y. Penal Law § 125.27(1)(a)(v), the weight of the evidence did not support this finding, as there was no indication that his wife would have been able to testify against him regarding the assault, nor was it likely, given his confession, that he could have avoided a conviction for this crime in any event, so his conviction of first degree murder, under this provision, had to be vacated. People v Cahill, 2 N.Y.3d 14, 777 N.Y.S.2d 332, 809 N.E.2d 561, 2003 N.Y. LEXIS 3978 (N.Y. 2003).

When defendant was prosecuted for assaulting his wife with a baseball bat and then entering her hospital room, where he poisoned her, resulting in her death, he could not properly be convicted of first degree murder, allowing imposition of the death penalty, under N.Y. Penal Law § 125.27(1)(a)(vii), for committing a murder in the course of burglarizing his wife's hospital room because his criminal intent to commit murder could not be used both to elevate his criminal trespass of the hospital room to a burglary and to elevate his intentional murder of his wife to first degree murder, as his intent to commit burglary had to be distinct from his intent to commit murder, so his first degree murder conviction under § 125.27(1)(a)(vii) had to be reversed. People v Cahill, 2 N.Y.3d 14, 777 N.Y.S.2d 332, 809 N.E.2d 561, 2003 N.Y. LEXIS 3978 (N.Y. 2003).

Direct and circumstantial evidence, including various statements made by defendant, was legally sufficient to prove defendant killed the victim either by actually shooting or by commanding an accomplice to shoot; after reviewing the evidence in support of both theories of the occurrence, the state's highest court concluded that a verdict of guilty on either basis was not against the weight of the evidence. People v Mateo, 2 N.Y.3d 383, 779 N.Y.S.2d 399, 811 N.E.2d 1053, 2004 N.Y. LEXIS 263 (N.Y.), cert. denied, 542 U.S. 946, 124 S. Ct. 2929, 159 L. Ed. 2d 828, 2004 U.S. LEXIS 4736 (U.S. 2004).

Court of Appeals of New York has determined that there is no reason to hold that similarity must be shown by the killing act alone. People v Shulman, 6 N.Y.3d 1, 809 N.Y.S.2d 485, 843 N.E.2d 125, 2005 N.Y. LEXIS 2703 (N.Y. 2005), cert. denied, 547 U.S. 1043, 126 S. Ct. 1623, 164 L. Ed. 2d 339, 2006 U.S. LEXIS 2562 (U.S. 2006).

Evidence was sufficient to support an appellant's conviction under N.Y. Penal Law § 125.27(1)(a)(xi) where, in all three murders, the appellant brought the women to the room where he lived and killed them by repeatedly beating them about the face and head with a heavy, blunt object, using such force that he split their skulls open. Afterward, the appellant hacked off the victims' hands or limbs and disposed of the bodies in garbage receptacles, and threw away their severed hands and limbs in trash locations away from the spots where he disposed of their bodies. People v Shulman, 6 N.Y.3d 1, 809 N.Y.S.2d 485, 843 N.E.2d 125, 2005 N.Y. LEXIS 2703 (N.Y. 2005), cert. denied, 547 U.S. 1043, 126 S. Ct. 1623, 164 L. Ed. 2d 339, 2006 U.S. LEXIS 2562 (U.S. 2006).

In a murder case, a police detective ended up testifying beyond any cognizable field of expertise as an apparently omniscient expositor of the facts of the case. Although considerable portions of the detective's testimony were admitted in error, the proof of defendant's commission of the charged crimes was overwhelming, and the court of appeals perceived no significant probability that, but for the error, the verdict, as it bore upon defendant, would have been less adverse. People v Inoa, 25 N.Y.3d 466, 34 N.E.3d 839, 13 N.Y.S.3d 329, 2015 N.Y. LEXIS 1363 (N.Y. 2015).

Had a police detective in a murder case been qualified to testify simply as to the meaning of coded expressions in telephone recordings and his expert testimony been accordingly limited in scope, the receipt of that testimony would not have been problematic for its subject matter. The detective, however, was qualified not simply to decode what was coded, but to decode telephone conversations generally and, as the trial progressed, it became evident that the trial court understood that permission to extend to explaining the meaning of virtually everything that was said during the recorded conversations, whether it was coded or not. People v Inoa, 25 N.Y.3d 466, 34 N.E.3d 839, 13 N.Y.S.3d 329, 2015 N.Y. LEXIS 1363 (N.Y. 2015).

Evidence did not support defendant's convictions for attempted murder in the first and second degrees because the evidence failed to prove that defendant and his feigned confederate took any actual step toward accomplishing defendant's plan to kill his wife and mother-in-law beyond mere conversations and planning, and, thus, none of the acts put forth by the People could satisfy the dangerous-proximity test. People v Lendof-Gonzalez, 2020 N.Y. LEXIS 2639 (N.Y. 2020).

In prosecution for aggravated assault upon police officer under CLS Penal § 120.11 and attempted murder in first degree under CLS Penal § 125.27, testimony that on night of incident police detectives were properly looking for defendant in order to arrest him is admissible as being directly relevant and necessary to establish elements of crime charged; trial court prevents defendant from suffering undue prejudice from admission of such testimony by refusing to permit People to introduce evidence of nature of offense for which defendant was sought and by properly instructing jury as to how to consider testimony in question. People v Simon, 118 A.D.2d 883, 500 N.Y.S.2d 367, 1986 N.Y. App. Div. LEXIS 54739 (N.Y. App. Div. 2d Dep't 1986).

Evidence adduced at trial supported charge of attempted first degree murder, and thus trial court properly denied defendant's motion to dismiss under CLS CPL § 290.10, since defendant's

intent could have been to cause death, not merely inflict serious physical injury, where he fired gun at 2 police officers who pursued him as he fled scene of another shooting. People v Ciola, 136 A.D.2d 557, 523 N.Y.S.2d 553, 1988 N.Y. App. Div. LEXIS 334 (N.Y. App. Div. 2d Dep't), app. denied, 71 N.Y.2d 893, 527 N.Y.S.2d 1003, 523 N.E.2d 310, 1988 N.Y. LEXIS 1347 (N.Y. 1988).

Court properly allowed testimony that certain items in defendant's vehicle were stolen property taken during robbery since that testimony was probative of defendant's motive and intent in engaging in later shooting incident with police which resulted in charges of first and second degree attempted murder, and court carefully circumscribed scope of testimony and instructed jury as to limited use for which it could be used. People v Maggio, 137 A.D.2d 623, 524 N.Y.S.2d 511, 1988 N.Y. App. Div. LEXIS 1035 (N.Y. App. Div. 2d Dep't), app. denied, 71 N.Y.2d 1029, 530 N.Y.S.2d 564, 526 N.E.2d 57, 1988 N.Y. LEXIS 2294 (N.Y. 1988).

People's inadvertent destruction of gun did not warrant dismissal of first degree attempted murder indictment where there was no evidence of bad faith by law enforcement officials, absence of gun from trial had no bearing on question of defendant's guilt or innocence, and defendant's inaction in failing to inspect gun prior to trial negated any claim of prejudice since gun was not essential element in preparation of his trial strategy; under circumstances, suppression of ballistics reports and preclusion of expert testimony was proper sanction. People v Deresky, 137 A.D.2d 704, 525 N.Y.S.2d 49, 1988 N.Y. App. Div. LEXIS 1765 (N.Y. App. Div. 2d Dep't), app. denied, 71 N.Y.2d 1025, 530 N.Y.S.2d 560, 526 N.E.2d 52, 1988 N.Y. LEXIS 2186 (N.Y. 1988).

Evidence supported defendant's conviction of first degree attempted murder where he had pursued and fired shots at off-duty police officer, who moments before had identified himself as such, whereupon officer displayed his shield and, in his capacity as police officer, began to fire back at defendant. People v Woods, 141 A.D.2d 684, 529 N.Y.S.2d 384, 1988 N.Y. App. Div. LEXIS 6559 (N.Y. App. Div. 2d Dep't), app. denied, 72 N.Y.2d 926, 532 N.Y.S.2d 860, 529 N.E.2d 190, 1988 N.Y. LEXIS 3291 (N.Y. 1988).

In trial for attempted first degree murder arising from incident in which defendant became angry after he was given 3 traffic summonses by officer, drove to his residence and obtained shotgun, and then located officer and shot him in face, evidence of defendant's past violent and antisocial behavior, as well as his actions prior to shooting, supported jury's conclusion that defendant acted out of simple malevolence rather than extreme emotional disturbance. People v Ludwigsen, 159 A.D.2d 591, 552 N.Y.S.2d 450, 1990 N.Y. App. Div. LEXIS 2745 (N.Y. App. Div. 2d Dep't), app. denied, 76 N.Y.2d 738, 558 N.Y.S.2d 900, 557 N.E.2d 1196, 1990 N.Y. LEXIS 2228 (N.Y. 1990).

In attempted first degree murder trial, evidence that defendant fired 6 to 8 shots at uniformed police officer at close range, and continued to shoot at officer after he had fallen, was sufficient to establish his intent to cause death. People v Douglas, 160 A.D.2d 1015, 554 N.Y.S.2d 727, 1990 N.Y. App. Div. LEXIS 4985 (N.Y. App. Div. 2d Dep't), app. denied, 76 N.Y.2d 855, 560 N.Y.S.2d 995, 561 N.E.2d 895, 1990 N.Y. LEXIS 3848 (N.Y. 1990).

Attempted first degree murder conviction was supported by evidence that (1) defendant twice compressed his forearm on police officer's throat and caused him to black out, and twice grabbed for officer's gun and attempted to gain control of it, and (2) defendant did not take advantage of opportunity to flee during altercation and, according to eyewitness, was going to kill officer despite presence of crowd. People v Wiggins, 191 A.D.2d 364, 595 N.Y.S.2d 416, 1993 N.Y. App. Div. LEXIS 2796 (N.Y. App. Div. 1st Dep't), app. denied, 81 N.Y.2d 1021, 600 N.Y.S.2d 210, 616 N.E.2d 867, 1993 N.Y. LEXIS 2637 (N.Y. 1993).

In prosecution for first degree murder arising out of defendant's shooting of 2 police officers, court properly admitted evidence of defendant's prior arrests and confrontations with police as bearing on his state of mind—namely, his hostility toward police, which preceded his alleged abuse by police during an interrogation 4 months prior to shootings; such evidence was highly probative to rebut defense of extreme emotional disturbance. People v Manzella, 199 A.D.2d 964, 606 N.Y.S.2d 471, 1993 N.Y. App. Div. LEXIS 12544 (N.Y. App. Div. 4th Dep't 1993), app. denied, 83 N.Y.2d 807, 611 N.Y.S.2d 143, 633 N.E.2d 498, 1994 N.Y. LEXIS 569 (N.Y. 1994).

In prosecution for first degree murder arising out of defendant's shooting of 2 police officers, court properly excluded evidence concerning propensities of police officer who allegedly abused defendant prior to shootings, proffered in support of defense of extreme emotional disturbance, since evidence of prior assaults or abuse is not admissible as evidence of habit because of varying circumstances under which those actions are committed. People v Manzella, 199 A.D.2d 964, 606 N.Y.S.2d 471, 1993 N.Y. App. Div. LEXIS 12544 (N.Y. App. Div. 4th Dep't 1993), app. denied, 83 N.Y.2d 807, 611 N.Y.S.2d 143, 633 N.E.2d 498, 1994 N.Y. LEXIS 569 (N.Y. 1994).

In trial for, inter alia, second degree murder and attempted first and second degree murder, element of intent was established by evidence that (1) defendant, armed with loaded shotgun, followed 2 acquaintances after he had engaged in altercation with them, shot at them twice from 3 feet away as they attempted to flee, and chased them until he saw them approach 2 police officers, and (2) when officers pursued defendant, he ran into yard where he took cover and fired several shots at both officers from 10 to 20 feet away, killing one officer. People v Campbell, 208 A.D.2d 641, 617 N.Y.S.2d 195, 1994 N.Y. App. Div. LEXIS 9531 (N.Y. App. Div. 2d Dep't 1994), app. denied, 84 N.Y.2d 1029, 623 N.Y.S.2d 185, 647 N.E.2d 457, 1995 N.Y. LEXIS 388 (N.Y. 1995).

Marine on weekend pass who claimed to have shot "suppressive fire" at officers who were pursuing him after attempted robbery was sufficiently shown to have had requisite intent to be convicted of attempted first and second degree murder, since conclusion that he aimed at officers could readily be inferred from his conduct and surrounding circumstances. People v Hernandez, 257 A.D.2d 664, 684 N.Y.S.2d 573, 1999 N.Y. App. Div. LEXIS 584 (N.Y. App. Div. 2d Dep't), app. denied, 93 N.Y.2d 874, 689 N.Y.S.2d 436, 711 N.E.2d 650, 1999 N.Y. LEXIS 968 (N.Y. 1999).

Defendants were properly convicted of noncapital first degree murder for having perpetrated multiple killings by each shooting one rival drug dealer in concerted effort to kill off 2 competitors where murder weapons were traced back to defendants, and each defendant's killing of one victim was shown beyond reasonable doubt, even though it could not be established which defendant used which gun. People v Reed, 265 A.D.2d 56, 705 N.Y.S.2d 592, 2000 N.Y. App. Div. LEXIS 2802 (N.Y. App. Div. 2d Dep't), app. denied, 95 N.Y.2d 832, 713 N.Y.S.2d 138, 735 N.E.2d 418, 2000 N.Y. LEXIS 2516 (N.Y. 2000), app. denied sub. nom., People v Warren, 95 N.Y.2d 855, 714 N.Y.S.2d 10, 736 N.E.2d 868, 2000 N.Y. LEXIS 2799 (N.Y. 2000).

Evidence supported conviction of attempted first degree murder where defendant's homicidal intent was proved by (1) "combat stance" that he took while carefully aiming at officers and firing at least 2 shots and (2) fact that he hit van behind which officers had taken cover. People v Douglas, 273 A.D.2d 24, 709 N.Y.S.2d 527, 2000 N.Y. App. Div. LEXIS 6364 (N.Y. App. Div. 1st Dep't), app. denied, 95 N.Y.2d 889, 715 N.Y.S.2d 381, 738 N.E.2d 785, 2000 N.Y. LEXIS 3313 (N.Y. 2000).

In prosecution for attempted first degree murder and first degree robbery, lineup was not unduly suggestive where fillers were reasonably similar to defendant and had variety of hairstyles, and defendant's unusual hairstyle was product of his hasty efforts to alter his appearance and was substantially different from style that he was described as wearing at time of crime. People v Douglas, 273 A.D.2d 24, 709 N.Y.S.2d 527, 2000 N.Y. App. Div. LEXIS 6364 (N.Y. App. Div. 1st Dep't), app. denied, 95 N.Y.2d 889, 715 N.Y.S.2d 381, 738 N.E.2d 785, 2000 N.Y. LEXIS 3313 (N.Y. 2000).

Evidence supported conviction of first degree murder where killing occurred "while the defendant was in the course of committing or attempting to commit and in furtherance of robbery" under CLS Penal § 125.27(1)(a)(vii). People v Striplin, 273 A.D.2d 120, 711 N.Y.S.2d 716, 2000 N.Y. App. Div. LEXIS 7121 (N.Y. App. Div. 1st Dep't), app. denied, 95 N.Y.2d 893, 715 N.Y.S.2d 385, 738 N.E.2d 789, 2000 N.Y. LEXIS 3377 (N.Y. 2000).

In prosecution for first degree murder and second degree weapon possession, defendant's uncharged crimes were admissible where they were relevant to motive, necessary to complete

narrative, and inextricably intertwined with charged crimes. People v Capace, 273 A.D.2d 320, 710 N.Y.S.2d 529, 2000 N.Y. App. Div. LEXIS 6469 (N.Y. App. Div. 2d Dep't), app. denied, 95 N.Y.2d 933, 721 N.Y.S.2d 609, 744 N.E.2d 145, 2000 N.Y. LEXIS 3969 (N.Y. 2000).

Statements made by murder victim prior to his death while lying on pavement moments after he was shot at close range, and comments uttered by him less than one hour later at hospital as he was about to undergo emergency surgery, were admissible as excited utterances at defendant's first degree murder trial. People v Johnson, 277 A.D.2d 702, 717 N.Y.S.2d 668, 2000 N.Y. App. Div. LEXIS 12253 (N.Y. App. Div. 3d Dep't 2000), app. denied, 96 N.Y.2d 831, 729 N.Y.S.2d 451, 754 N.E.2d 211, 2001 N.Y. LEXIS 2208 (N.Y. 2001).

Statements made by defendant in hours preceding shooting incident, that he intended to "get" victim and that "someone was going to get it," were properly admitted in People's case-in-chief as proof of defendant's intent to commit first degree murder, particularly as they tended to show that shooting was not accidental. People v Johnson, 277 A.D.2d 702, 717 N.Y.S.2d 668, 2000 N.Y. App. Div. LEXIS 12253 (N.Y. App. Div. 3d Dep't 2000), app. denied, 96 N.Y.2d 831, 729 N.Y.S.2d 451, 754 N.E.2d 211, 2001 N.Y. LEXIS 2208 (N.Y. 2001).

In prosecution for attempted first degree murder and second and third degree weapon possession, court properly rule, after Sandoval hearing, that if defendant took the stand, prosecutor could question her about her 4 prior petit larceny convictions and their underlying facts, her use of aliases, and her status as alien. People v Medina, 281 A.D.2d 563, 721 N.Y.S.2d 829, 2001 N.Y. App. Div. LEXIS 2596 (N.Y. App. Div. 2d Dep't), app. denied, 96 N.Y.2d 863, 730 N.Y.S.2d 37, 754 N.E.2d 1120, 2001 N.Y. LEXIS 2578 (N.Y. 2001).

Permissible inferences of intent, forcible rape, and forcible sodomy based on the evidence at trial supported defendant's two convictions of first degree murder as set forth in N.Y. Penal Law § 125.27(1)(a)(vii), (b), especially since defendant's version of events, in which defendant claimed that the victim engaged in consensual sex and that defendant lacked the requisite intent, contained unexplained contradictions and was inconsistent with the physical evidence that was presented at trial. People v Ogletree, 295 A.D.2d 967, 743 N.Y.S.2d 372, 2002 N.Y. App. Div. LEXIS 6308 (N.Y. App. Div. 4th Dep't), app. denied, 98 N.Y.2d 731, 749 N.Y.S.2d 481, 779 N.E.2d 192, 2002 N.Y. LEXIS 3646 (N.Y. 2002).

Circumstantial evidence was sufficient to convict defendant of first degree murder where a valid line of reasoning and permissible inferences could lead a rational juror to find defendant killed the victim in furtherance of a robbery, and the jury could reasonably infer defendant forced the victim to reveal her personal identification number, which he used to withdraw money from her bank account. People v Rodriguez, 302 A.D.2d 240, 756 N.Y.S.2d 145, 2003 N.Y. App. Div. LEXIS 1290 (N.Y. App. Div. 1st Dep't), app. denied, 99 N.Y.2d 658, 760 N.Y.S.2d 122, 790 N.E.2d 296, 2003 N.Y. LEXIS 1625 (N.Y. 2003).

Pursuant to N.Y. Penal Law § 125.27(1)(a)(i), defendant's conviction for murder in the first degree was not against the sufficiency of the evidence based upon witness identifications of a photo array, physical evidence recovered, and the testimony of two passengers of a vehicle who were present when a police officer was shot and killed. People v Parker, 304 A.D.2d 146, 755 N.Y.S.2d 521, 2003 N.Y. App. Div. LEXIS 952 (N.Y. App. Div. 4th Dep't), app. denied, 100 N.Y.2d 585, 764 N.Y.S.2d 396, 796 N.E.2d 488, 2003 N.Y. LEXIS 3156 (N.Y. 2003).

Evidence was legally sufficient to establish defendant's guilt under a theory of transferred intent in a case where the wrong person was killed in a murder-for-hire scheme involving defendant and two other persons, the unintended victim was shot in the vicinity of the expected location of the intended victim, and the unintended victim was shot solely because a co-defendant who fired the fatal shots mistook the unintended victim for the intended victim. People v Powell, 304 A.D.2d 410, 757 N.Y.S.2d 297, 2003 N.Y. App. Div. LEXIS 4110 (N.Y. App. Div. 1st Dep't), app. denied, 1 N.Y.3d 578, 775 N.Y.S.2d 794, 807 N.E.2d 907, 2003 N.Y. LEXIS 4684 (N.Y. 2003).

Where defendant stabbed a first correctional officer and bit the finger of a second officer, the evidence was sufficient to conclude that defendant intentionally engaged in conduct tending to cause the death of a state correctional institution employee in violation of N.Y. Penal Law §§ 110.00, 125.27(1)(a)(ii). People v Logan, 305 A.D.2d 797, 761 N.Y.S.2d 111, 2003 N.Y. App. Div. LEXIS 5523 (N.Y. App. Div. 3d Dep't), app. denied, 100 N.Y.2d 584, 764 N.Y.S.2d 394, 796 N.E.2d 486, 2003 N.Y. LEXIS 3115 (N.Y. 2003).

Trial court properly denied defendant's motion to suppress evidence, pursuant to N.Y. Crim. Proc. Law § 710.20, in a trial for first degree murder, N.Y. Penal Law § 125.27; the circumstances indicated that defendant's incriminating statements were voluntarily made after knowingly and voluntarily waiving his Miranda rights. People v Duggins, 1 A.D.3d 450, 766 N.Y.S.2d 702, 2003 N.Y. App. Div. LEXIS 11803 (N.Y. App. Div. 2d Dep't 2003), aff'd, 3 N.Y.3d 522, 788 N.Y.S.2d 638, 821 N.E.2d 942, 2004 N.Y. LEXIS 3730 (N.Y. 2004).

Evidence was legally sufficient to convict defendant of murder in the first degree pursuant to N.Y. Penal Law § 125.27(1)(a)(vii) and the verdict was not against the weight of the evidence under N.Y. Crim. Proc. Law § 470.15(5), where there was sufficient evidence from which a rational trier of fact could have found that defendant, with the intent to kill, shot the victim once, this wound contributed to the victim's death, and defendant did this in the course of, and in furtherance of, a robbery. People v Harrell, 5 A.D.3d 503, 772 N.Y.S.2d 581, 2004 N.Y. App. Div. LEXIS 2485 (N.Y. App. Div. 2d Dep't), app. denied, 3 N.Y.3d 641, 782 N.Y.S.2d 412, 816 N.E.2d 202, 2004 N.Y. LEXIS 3311 (N.Y. 2004).

Evidence was legally sufficient to convict defendant of murder in the first degree pursuant to N.Y. Penal Law § 125.27(1)(a)(vii) and the verdict was not against the weight of the evidence under N.Y. Crim. Proc. Law § 470.15(5), where there was sufficient evidence from which a rational trier of fact could have found that defendant, with the intent to kill, shot the victim once, this wound contributed to the victim's death, and defendant did this in the course of, and in furtherance of, a robbery. People v Parker, 5 A.D.3d 507, 772 N.Y.S.2d 584, 2004 N.Y. App. Div. LEXIS 2439 (N.Y. App. Div. 2d Dep't), app. denied, 2 N.Y.3d 804, 781 N.Y.S.2d 303, 814 N.E.2d 475, 2004 N.Y. LEXIS 1963 (N.Y. 2004).

Although defendant argued that the evidence was insufficient to show capital murder for hire where in the end the hired killer had been unable to complete the murder, so that defendant had to strike the blow, defendant could be found guilty as a principal in the main attack just as well. People v Glanda, 5 A.D.3d 945, 774 N.Y.S.2d 576, 2004 N.Y. App. Div. LEXIS 3439 (N.Y. App. Div. 3d Dep't), app. denied, 3 N.Y.3d 640, 782 N.Y.S.2d 412, 816 N.E.2d 202, 2004 N.Y. LEXIS 3295 (N.Y. 2004), app. denied, 3 N.Y.3d 674, 784 N.Y.S.2d 13, 817 N.E.2d 831, 2004 N.Y. LEXIS 2641 (N.Y. 2004), cert. denied, 543 U.S. 1093, 125 S. Ct. 973, 160 L. Ed. 2d 906, 2005 U.S. LEXIS 707 (U.S. 2005).

Defendant's first-degree murder, intentional second-degree murder, and attempted intentional second-degree murder convictions were reversed, where no record evidence was presented demonstrating that defendant shared a community of purpose with his co-conspirators to kill anyone other than the complaining witness, but the entire record was consistent with a spontaneously formed decision by the co-conspirators to shoot the family members of the complaining witness, a decision in which defendant took no purposeful part. People v Couser, 12 A.D.3d 1040, 785 N.Y.S.2d 212, 2004 N.Y. App. Div. LEXIS 14033 (N.Y. App. Div. 4th Dep't 2004), app. denied, 4 N.Y.3d 762, 792 N.Y.S.2d 6, 825 N.E.2d 138, 2005 N.Y. LEXIS 295 (N.Y. 2005).

There was sufficient evidence to support defendant's conviction for murder in the first degree, in violation of N.Y. Penal Law § 125.27(1)(a)(vii), where defendant committed a burglary of the victim's apartment with the intent to assault the occupants and to get payment for drugs, and while there, he fatally stabbed one of the occupants seven times and caused him other injuries from being beaten and cut; other evidence that implicated defendant was his boasting of having committed the crime to others, eyewitness accounts of his physical attack on the victim by defendant's accomplices, and blood on defendant's clothing. People v Johnson, 20 A.D.3d 808, 799 N.Y.S.2d 276, 2003 N.Y. App. Div. LEXIS 14627 (N.Y. App. Div. 3d Dep't), app. denied, 5

N.Y.3d 853, 806 N.Y.S.2d 173, 840 N.E.2d 142, 2005 N.Y. LEXIS 3517 (N.Y. 2005).

Evidence was sufficient to convict defendant of attempted murder in the first degree, conspiracy in the second degree, and assault in the first degree when the victim identified defendant as the shooter and various witnesses testified about conversations between defendant and codefendant regarding the codefendant's desire to get back at the victim for allegedly stealing drugs, as well as defendant's statements that he could take care of the problem for the right price. Defendant had been seen prior to the incident at the bar where the shooting occurred, police had found car keys at the scene, and there was evidence that defendant had picked up money from the codefendant. People v Faulkner, 36 A.D.3d 1009, 826 N.Y.S.2d 526, 2007 N.Y. App. Div. LEXIS 230 (N.Y. App. Div. 3d Dep't), app. denied, 8 N.Y.3d 944, 836 N.Y.S.2d 554, 868 N.E.2d 237, 2007 N.Y. LEXIS 1311 (N.Y. 2007).

Although defendant's sexual assault of the victim occurred in Connecticut, after a prolonged break in time, defendant continued to restrain the victim and tried to kill the victim in New York; therefore, the evidence was sufficient to support defendant's convictions for first-degree kidnapping and attempted first-degree murder under N.Y. Penal Law §§ 135.25(2)(a), 110.00, 125.27(1)(a)(v). People v McIntosh, 53 A.D.3d 1, 860 N.Y.S.2d 64, 2008 N.Y. App. Div. LEXIS 5338 (N.Y. App. Div. 1st Dep't), app. denied, 11 N.Y.3d 833, 868 N.Y.S.2d 608, 897 N.E.2d 1092, 2008 N.Y. LEXIS 3528 (N.Y. 2008).

Evidence was legally sufficient to satisfy the element of intent for the crimes of first-degree murder and conspiracy, of which defendant was convicted. The trial evidence and defendant's written statements revealed that defendant played an active and instrumental role in obtaining the murder weapon and the phone used by defendant's accomplices to lure the victim to his death and that, prior to obtaining these items, defendant had full knowledge that they would be used to cause the victim's death. People v Booker, 53 A.D.3d 697, 862 N.Y.S.2d 139, 2008 N.Y. App. Div. LEXIS 6037 (N.Y. App. Div. 3d Dep't), app. denied, 11 N.Y.3d 853, 872 N.Y.S.2d 76, 900 N.E.2d 559, 2008 N.Y. LEXIS 4026 (N.Y. 2008), app. denied, 2008 N.Y. LEXIS 4050 (N.Y. Nov. 12, 2008).

Evidence that a murder victim was shot from inside a hunting camp which had been broken into; that defendant was seen driving the victim's truck after the murder; that the camp owner's rifle and the victim's credit card were found in defendant's possession; that the rifle fired the fatal bullets; that defendant's fingerprints and DNA were found in the victim's abandoned truck; and that the truck was worth more than $2000, was sufficient to convict him of first degree murder (N.Y. Penal Law § 125.27(1)(a)), first degree burglary (N.Y. Penal Law § 140.30(1)), and three counts of fourth degree grand larceny (N.Y. Penal Law § 155.30). People v Race, 78 A.D.3d 1217, 910 N.Y.S.2d 271, 2010 N.Y. App. Div. LEXIS 7875 (N.Y. App. Div. 3d Dep't 2010), app. denied, 16 N.Y.3d 835, 921 N.Y.S.2d 199, 946 N.E.2d 187, 2011 N.Y. LEXIS 1056 (N.Y. 2011).

Conviction of murder in the first degree was supported by sufficient evidence including, inter alia, the victim's girlfriend found defendant in her apartment, the victim had been shot to death and his body was also in the apartment, the girlfriend observed defendant, face to face and in good lighting, and the girlfriend's description matched defendant's general characteristics, as well as the clothing he was wearing when arrested about eight hours later; a firearms examiner testified that the .40 caliber bullets recovered at the scene were the same style of bullet as those contained in a box of ammunition found in defendant's backpack, and, further, that the expended shell casings recovered at the scene bore the same manufacturer's stamp as those present in that box of ammunition. Defendant's fingerprints were found on a table in the apartment, the victim's fingerprints were found on a bag inside the backpack and security cameras at the apartment complex showed an individual matching defendant's description exiting the premises with a plastic bag around the time of the murder. People v Burnell, 89 A.D.3d 1118, 931 N.Y.S.2d 776, 2011 N.Y. App. Div. LEXIS 7610 (N.Y. App. Div. 3d Dep't 2011), app. denied, 18 N.Y.3d 922, 942 N.Y.S.2d 461, 965 N.E.2d 963, 2012 N.Y. LEXIS 719 (N.Y. 2012).

Murder conviction was not against the weight of the evidence where the shooting was witnessed by several different people who saw defendant fire multiple shots in the victim's direction; contrary to defendant's assertion on appeal, his criminal intent was readily inferable from his conduct because the testimony established that defendant called out to the victim and, when the victim turned, shot at him from close range, and then, as the victim ran, defendant continued to shoot until he eventually inflicted a fatal wound in the victim's back. People v Guy, 93 A.D.3d 877, 939 N.Y.S.2d 613, 2012 N.Y. App. Div. LEXIS 1524 (N.Y. App. Div. 3d Dep't), app. denied, 19 N.Y.3d 961, 950 N.Y.S.2d 113, 973 N.E.2d 211, 2012 N.Y. LEXIS 2429 (N.Y. 2012).

People sufficiently established defendant's identity as the shooter in a drive-by shooting, and the verdict convicting defendant attempted murder in the first degree, N.Y. Penal Law §§ 110.00, 125.27(1)(a)(i), 20.00, reckless endangerment in the first degree, N.Y. Penal Law §§ 120.25, 20.00, and criminal possession of a weapon in the second degree, N.Y. Penal Law § 265.03(3), was not against the weight of the evidence on the identification issue where the two police officers and the two civilian witnesses who saw the shooting testified unequivocally that the shooter was situated in the front passenger seat of the vehicle, during the shooting, the shooter's hat blew off of his head and landed in the middle of the street, and DNA testing matched defendant's DNA to that found on the hat; defendant was also the source of the major DNA profile extracted from the gun recovered in the parking lot where defendant was apprehended, and four fired cartridge cases recovered by the police in the area of the shooting exhibited "class characteristics" consistent with being fired from that gun. Further, a jailhouse informant testified that defendant admitted that he was the shooter. People v Carr, 99 A.D.3d 1173, 952 N.Y.S.2d 342, 2012 N.Y. App. Div. LEXIS 6630 (N.Y. App. Div. 4th Dep't 2012), app. denied, 20 N.Y.3d 1010, 960 N.Y.S.2d 353, 984 N.E.2d 328, 2013 N.Y. LEXIS 645 (N.Y. 2013).

Evidence was sufficient to support defendant's first-degree murder conviction because it showed that: (1) defendant's accomplices testified that defendant suggested that they "get some free money" and that seconds after defendant reached the victim a gunshot was heard; (2) defendant admitted to shooting the victim in two letters he wrote from jail; (3) a witness saw someone matching defendant's description crouched down near the victim's body before fleeing the scene; (4) cell phone evidence placed defendant in the vicinity of the crime at the time of the murder; and (5) the doctor who performed the autopsy on the victim testified that the gun was very close to his head when the bullet was fired, and was possibly touching it. People v Callicutt, 101 A.D.3d 1256, 956 N.Y.S.2d 607, 2012 N.Y. App. Div. LEXIS 8575 (N.Y. App. Div. 3d Dep't 2012), app. denied, 20 N.Y.3d 1096, 965 N.Y.S.2d 792, 988 N.E.2d 530, 2013 N.Y. LEXIS 879 (N.Y. 2013), app. denied, 20 N.Y.3d 1097, 965 N.Y.S.2d 793, 988 N.E.2d 531, 2013 N.Y. LEXIS 957 (N.Y. 2013).

Even in the absence of a definitive time of death for the victims, a married couple, it was clear that their deaths occurred in sufficient proximity to one another to be deemed part of the same criminal transaction because they were unaccounted for at the same time and the manner of death was the same. People v Dashnaw, 116 A.D.3d 1222, 983 N.Y.S.2d 681, 2014 N.Y. App. Div. LEXIS 2563 (N.Y. App. Div. 3d Dep't), app. denied, 23 N.Y.3d 1019, 992 N.Y.S.2d 802, 16 N.E.3d 1282, 2014 N.Y. LEXIS 1801 (N.Y. 2014).

Defendant's first-degree murder convictions were not against the weight of the evidence because there was overwhelming proof to establish defendant as the perpetrator of the charged crimes; defendant's DNA was found in the victims' residence and he used the victims' credit cards and cashed three of their checks. The requisite intent was inferred based on the multiple stab wounds inflicted upon each victim and the defensive injuries sustained by the husband. People v Dashnaw, 116 A.D.3d 1222, 983 N.Y.S.2d 681, 2014 N.Y. App. Div. LEXIS 2563 (N.Y. App. Div. 3d Dep't), app. denied, 23 N.Y.3d 1019, 992 N.Y.S.2d 802, 16 N.E.3d 1282, 2014 N.Y. LEXIS 1801 (N.Y. 2014).

Evidence was legally sufficient to support defendant's convictions for, inter alia, first degree murder, as the evidence established that defendant was the person who committed the crimes

and that he acted with intent as opposed to depraved indifference when he killed the victims. People v McCray, 121 A.D.3d 1549, 993 N.Y.S.2d 413, 2014 N.Y. App. Div. LEXIS 6660 (N.Y. App. Div. 4th Dep't 2014), app. denied sub. nom., People v "Murder", 25 N.Y.3d 1205, 37 N.E.3d 1170, 16 N.Y.S.3d 527, 2015 N.Y. LEXIS 2254 (N.Y. 2015), app. denied, 25 N.Y.3d 1204, 37 N.E.3d 1169, 16 N.Y.S.3d 526, 2015 N.Y. LEXIS 2404 (N.Y. 2015), app. denied sub. nom., People v "Matt", 25 N.Y.3d 1204, 37 N.E.3d 1169, 16 N.Y.S.3d 526, 2015 N.Y. LEXIS 2460 (N.Y. 2015), app. denied sub. nom., "Murder Matt", People v, 25 N.Y.3d 1205, 37 N.E.3d 1170, 16 N.Y.S.3d 527, 2015 N.Y. LEXIS 2430 (N.Y. 2015), app. denied sub. nom., People v "Mac", 25 N.Y.3d 1204, 37 N.E.3d 1169, 16 N.Y.S.3d 526, 2015 N.Y. LEXIS 2435 (N.Y. 2015).

Proof to corroborate defendant's admission that a homicide occurred during an attempted robbery was not required for the counts charging defendant with felony murder and murder in the first degree because the fact that the victim was found dead as the result of a gunshot wound was sufficient corroboration. People v Harper, 132 A.D.3d 1230, 17 N.Y.S.3d 797, 2015 N.Y. App. Div. LEXIS 7011 (N.Y. App. Div. 4th Dep't 2015), app. denied, 27 N.Y.3d 998, 59 N.E.3d 1220, 38 N.Y.S.3d 108, 2016 N.Y. LEXIS 1338 (N.Y. 2016).

Defendant's convictions for murder in the first degree were not against the weight of the evidence because several individuals testified they saw defendant at victim A's apartment, defendant's bloody palm print was found in the apartment, defendant's DNA was found on several items that were in the apartment, and a shoe print matching the shoe recovered from defendant's home was found on victim's B's coat People v Ramos, 133 A.D.3d 904, 20 N.Y.S.3d 183, 2015 N.Y. App. Div. LEXIS 8103 (N.Y. App. Div. 3d Dep't 2015), app. denied, 26 N.Y.3d 1149, 51 N.E.3d 574, 32 N.Y.S.3d 63, 2016 N.Y. LEXIS 528 (N.Y. 2016), app. denied, 26 N.Y.3d 1143, 51 N.E.3d 568, 32 N.Y.S.3d 57, 2016 N.Y. LEXIS 668 (N.Y. 2016).

Trial court's pretrial Molineux ruling was not an abuse of discretion because the evidence regarding defendant's drug dealing enterprise was inextricably intertwined with the victim's murder, tended to establish defendant's motive for procuring the commission of the killing, and provided necessary background information with respect to defendant's relationship with the People's witnesses. People v Resto, 147 A.D.3d 1331, 47 N.Y.S.3d 522, 2017 N.Y. App. Div. LEXIS 830 (N.Y. App. Div. 4th Dep't), app. denied, 29 N.Y.3d 1000, 80 N.E.3d 415, 57 N.Y.S.3d 722, 2017 N.Y. LEXIS 1636 (N.Y. 2017).

Defendant's first-degree attempted murder conviction was reduced to second-degree attempted murder as there was insufficient evidence of defendant's age, and the jury's opportunity to observe defendant's appearance during his trial in 2012 did not satisfy the People's obligation to prove defendant's age; there was sufficient evidence that defendant intended to kill each of the officers and the verdict was not against the weight of the evidence with respect to his intent. People v Vangorden, 147 A.D.3d 1436, 46 N.Y.S.3d 730, 2017 N.Y. App. Div. LEXIS 805 (N.Y. App. Div. 4th Dep't), app. denied, 29 N.Y.3d 1037, 84 N.E.3d 978, 62 N.Y.S.3d 306, 2017 N.Y. LEXIS 1977 (N.Y. 2017).

Evidence was sufficient to convict defendant of robbery and attempted murder, as the testimony of his accomplice was sufficiently corroborated and the jury did not fail to give that testimony the weight it should be accorded on the issue of defendant's identity as the robber and shooter. People v Hough, 151 A.D.3d 1591, 57 N.Y.S.3d 780, 2017 N.Y. App. Div. LEXIS 4514 (N.Y. App. Div. 4th Dep't), app. denied, 30 N.Y.3d 950, 89 N.E.3d 523, 67 N.Y.S.3d 133, 2017 N.Y. LEXIS 3418 (N.Y. 2017), reh'g denied, 153 A.D.3d 1676, 60 N.Y.S.3d 911, 2017 N.Y. App. Div. LEXIS 6743 (N.Y. App. Div. 4th Dep't 2017).

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Sufficient evidence established defendant's identity as the perpetrator through permissible inferences because: (1) defendant's vehicle or one strikingly similar was seen in the driveway of the site shortly before the victims went to that home; (2) the victims' blood was found in defendant's car and on items found inside defendant's residence; and (3) the victims' cell phones were located in a bag with a receipt linked to defendant's girlfriend. People v Taylor, 158 A.D.3d 1095, 72 N.Y.S.3d 256, 2018 N.Y. App. Div. LEXIS 782 (N.Y. App. Div. 4th Dep't), reh'g denied, 160 A.D.3d 1506, 72 N.Y.S.3d 918, 2018 N.Y. App. Div. LEXIS 2995 (N.Y. App. Div. 4th Dep't 2018), app. denied, 32 N.Y.3d 941, 109 N.E.3d 1168, 84 N.Y.S.3d 868, 2018 N.Y. LEXIS 2808 (N.Y. 2018), cert. denied, 140 S. Ct. 482, 205 L. Ed. 2d 269, 2019 U.S. LEXIS 6738 (U.S. 2019).

Sufficient evidence supported defendant's murder convictions because the People were not required to establish that the murders were necessary to advance the purpose of the burglary, and there was a logical nexus between a murder and a felony; the murder convictions were not against the weight of the evidence. People v Taylor, 158 A.D.3d 1095, 72 N.Y.S.3d 256, 2018 N.Y. App. Div. LEXIS 782 (N.Y. App. Div. 4th Dep't), reh'g denied, 160 A.D.3d 1506, 72 N.Y.S.3d 918, 2018 N.Y. App. Div. LEXIS 2995 (N.Y. App. Div. 4th Dep't 2018), app. denied, 32 N.Y.3d 941, 109 N.E.3d 1168, 84 N.Y.S.3d 868, 2018 N.Y. LEXIS 2808 (N.Y. 2018), cert. denied, 140 S. Ct. 482, 205 L. Ed. 2d 269, 2019 U.S. LEXIS 6738 (U.S. 2019).

Evidence was sufficient to support defendant's convictions for murder in first and second degree, Penal Law §§ 125.27 and 125.25, because security footage showed defendant was only person to enter the victim's building the night of the murder, and he had the victim's DNA on his pants and possessed the victim's property, including his cell phone. People v Valcarcel, 160 A.D.3d 1034, 75 N.Y.S.3d 598, 2018 N.Y. App. Div. LEXIS 2377 (N.Y. App. Div. 3d Dep't), app. denied, 31 N.Y.3d 1088, 103 N.E.3d 1257, 79 N.Y.S.3d 110, 2018 N.Y. LEXIS 1637 (N.Y. 2018), app. denied, 31 N.Y.3d 1081, 103 N.E.3d 1250, 79 N.Y.S.3d 103, 2018 N.Y. LEXIS 1817 (N.Y. 2018).

Sufficient evidence did not support defendant's convictions for attempted murder in the first degree and in the second degree because while defendant planned the crimes, discussed them with the inmate in the next cell and with that inmate's girlfriend, and exchanged notes about them, the People failed to establish that any accessory took any step that brought the crimes "dangerously near" to completion; neither the inmate nor his girlfriend did anything to effectuate the crimes. People v Lendofgonzalez, 170 A.D.3d 1508, 95 N.Y.S.3d 675, 2019 N.Y. App. Div. LEXIS 1976 (N.Y. App. Div. 4th Dep't), app. denied, 33 N.Y.3d 1070, 129 N.E.3d 330, 105 N.Y.S.3d 10, 2019 N.Y. LEXIS 2134 (N.Y. 2019), aff'd, 2020 N.Y. LEXIS 2639 (N.Y. Nov. 24, 2020).

Sufficient evidence supported defendant's convictions for murder and robbery because an inmate testified that defendant admitted to him that he went to "some guy's" house to steal an amplifier and music equipment but, because it did not go well and, an argument occurred and then there was a rope around the guy's neck. Evidence showed that items belonging to the victim were missing and forensic testing revealed the presence of defendant's DNA at the crime scene. People v Wakefield, 175 A.D.3d 158, 107 N.Y.S.3d 487, 2019 N.Y. App. Div. LEXIS 6153 (N.Y. App. Div. 3d Dep't), app. denied, 34 N.Y.3d 1083, 139 N.E.3d 816, 116 N.Y.S.3d 158, 2019 N.Y. LEXIS 3747 (N.Y. 2019).

Sufficient evidence established that defendant procured commission of the killing of his wife pursuant to an agreement with the principal, who was defendant's former employee, because there was ample evidence from which a jury could have inferred that the principal killed the victim at the behest of defendant, who provided the principal with key logistical support. People v Clayton, 175 A.D.3d 963, 108 N.Y.S.3d 94, 2019 N.Y. App. Div. LEXIS 6289 (N.Y. App. Div. 4th Dep't 2019).

Sufficient evidence established that, pursuant to an agreement, the principal committed the killing of defendant's wife for the receipt, or in expectation of the receipt, of a thing of pecuniary value because defendant offered several things of pecuniary value

to the principal, including a bicycle, a promise to pay an outstanding fine, and referrals for new employment, and the principal requested a payment of money from defendant only five days before the murder. People v Clayton, 175 A.D.3d 963, 108 N.Y.S.3d 94, 2019 N.Y. App. Div. LEXIS 6289 (N.Y. App. Div. 4th Dep't 2019).

Late filing of notice of intention to present psychiatric evidence was allowed, considering defendant's constitutional right to present probative evidence in his defense, minimal prejudice to People in permitting late notice to stand, voluminous motion practice previously conducted and issues underlying potential imposition of death penalty, physical illness of defense counsel, and recent fire at counsel's home. People v Holland, 173 Misc. 2d 286, 660 N.Y.S.2d 822, 1997 N.Y. Misc. LEXIS 325 (N.Y. County Ct. 1997).

In death penalty case, evidence of prior inconsistent statements, bad acts, criminal convictions and other general impeachment material not qualifying as "exculpatory" under court's definition, need only be disclosed to extent required by CLS CPL §§ 240.44 and 240.45. People v Arthur, 175 Misc. 2d 742, 673 N.Y.S.2d 486, 1997 N.Y. Misc. LEXIS 673 (N.Y. Sup. Ct. 1997).

In death penalty case arising from robbery and murder of high school teacher, lesson plans or other documents reflecting victim's views of capital punishment would not be admissible at sentencing proceeding as mitigating factor under CLS CPL § 400.27(9)(f). People v Arthur, 175 Misc. 2d 742, 673 N.Y.S.2d 486, 1997 N.Y. Misc. LEXIS 673 (N.Y. Sup. Ct. 1997).

In capital murder trial under so-called "commander" section of first degree murder statute, court deferred defendant's obligation to file notice of intent to offer psychiatric evidence under CLS CPL § 400.27(13) until completion of guilt phase of trial where he affirmatively stated that there would be no psychiatric evidence submitted by him before penalty phase of trial. People v Mateo, 177 Misc. 2d 814, 676 N.Y.S.2d 903, 1998 N.Y. Misc. LEXIS 359 (N.Y. County Ct. 1998).

In capital murder trial, People were not precluded from arguing or suggesting that defendant caused victim's death by shooting him with gun on basis that they had argued, at previous trial of defendant's wife arising from same murder, that she was actual shooter, where People's position had always been that they could not say with certainty which perpetrator pulled trigger and which commanded other to pull trigger, and they maintained that their arguments in each case were based on reasonable view of evidence presented to that jury. People v Mateo, 177 Misc. 2d 817, 676 N.Y.S.2d 908, 1998 N.Y. Misc. LEXIS 372 (N.Y. County Ct. 1998).

In death penalty case, members of victims' families could testify at guilt phase of trial even if People could establish prima facie case without them, where their testimony was relevant to prove victims' identities and establish victims' relationships to one another and to social club where they were murdered, and was not unfairly prejudicial. People v Harris, 177 Misc. 2d 903, 679 N.Y.S.2d 242, 1998 N.Y. Misc. LEXIS 380 (N.Y. Sup. Ct. 1998).

First degree murder defendant was not entitled to order precluding "any state actor from assigning, encouraging, or permitting an inmate snitch...to exact a statement, confession and/or admission from defendant about [his] case, without prior notice to defense counsel and opportunity for counsel to be present," as he did not allege any misconduct or negligence on part of prosecution, which logically prevented him from showing prejudice resulting therefrom, and he could later challenge admissibility of any statements which he felt were unlawfully procured. People v Morgan, 178 Misc. 2d 551, 681 N.Y.S.2d 723, 1998 N.Y. Misc. LEXIS 509 (N.Y. County Ct. 1998).

Live photographs of both victims were admissible during guilt phase of first degree murder trial where People intended to offer testimony of witnesses who would be able to identify each victim as she was observed with defendant prior to her death, and both victims were unrecognizable in photographs after death due to their wounds. People v Owens, 187 Misc. 2d 644, 727 N.Y.S.2d 264, 2001 N.Y. Misc. LEXIS 112 (N.Y. Sup. Ct. 2001).

Petitioner's claim that there was insufficient evidence to support his convictions of murder in the first degree, under N.Y. Penal Law § 125.27(1)(a)(vii), two counts of murder in the second degree, under N.Y. Penal Law § 125.25(1) and (3), and robbery in the first degree, under N.Y. Penal Law § 160.15(1), was rejected as a rational trier of fact could have found petitioner guilty of the robbery, the first-degree murder, and the second-degree felony murder charges because (1) the People introduced evidence that petitioner and the victim rented a hotel room together, petitioner used the victim's bank card around the time that the medical examiner estimated that the victim died, petitioner was seen dragging a bag away from the room, the victim's body was later found in the room, petitioner was arrested with two of the victim's identification cards in his possession, and petitioner attempted to dispose of the bank card when police arrested him; (2) the People also established that a toilet top cover, the alleged murder weapon, was missing from the bathroom of the room where the victim's body was discovered; and (3) taken together, these events could have led a rational trier of fact to determine that petitioner murdered the victim in furtherance of a robbery, namely to obtain the PIN number on her ATM card. Rodriguez v Smith, 485 F. Supp. 2d 368, 2007 U.S. Dist. LEXIS 29376 (S.D.N.Y. 2007).

When an inmate pled guilty to two charges of first degree murder under N.Y. Penal Law § 125.27(1)(a)(viii), the inmate waived his claim that the prosecutor exceeded his authority under N.Y. Crim. Proc. Law § 610.20 by issuing a subpoena duces tecum to gather information he sought to use in deciding whether to seek the death penalty, and even if the claim had not been waived, such issues of state law were not cognizable in federal habeas corpus proceedings. Hall v Conway, 630 F. Supp. 2d 283, 2009 U.S. Dist. LEXIS 55603 (W.D.N.Y. 2009).

Evidence at the first trial was sufficient to a permit rational jury to find the prisoner guilty beyond a reasonable doubt of first-degree witness-elimination murder, and thus, the Double Jeopardy Clause did not bar his retrial following the reversal of his initial conviction based on an error in swearing the venire panel. Hoffler v Bezio, 726 F.3d 144, 2013 U.S. App. LEXIS 16398 (2d Cir. N.Y. 2013).

7.5. Ineffective assistance

Defense counsel's advice that defendant could receive an additional consecutive sentence if he went to trial did not constitute ineffective assistance because at the time of sentencing, the Fourth Department had yet to address the issue of whether the sentence on a first-degree felony murder charge had to run concurrently with the sentence imposed on the underlying felony while the Second and Third Departments determined the sentences had to run concurrently. People v Couser, 28 N.Y.3d 368, 68 N.E.3d 26, 45 N.Y.S.3d 301, 2016 N.Y. LEXIS 3607 (N.Y. 2016).

8. Under former § 125.30

Writ of prohibition would not issue to prevent county court from proceeding of criminal trial as against contentions that defendant should be allowed to waive jury in case in which he might be sentenced to death and that applicable homicide statute with respect to a sentence for murder was unconstitutional, where such matters could be properly reviewed on appeal. People v Fitzpatrick, 34 A.D.2d 730, 311 N.Y.S.2d 577, 1970 N.Y. App. Div. LEXIS 5156 (N.Y. App. Div. 4th Dep't), app. dismissed, 27 N.Y.2d 742, 314 N.Y.S.2d 992, 263 N.E.2d 390, 1970 N.Y. LEXIS 1094 (N.Y. 1970), app. dismissed, 27 N.Y.2d 816, 1970 N.Y. LEXIS 2304 (N.Y. 1970).

A defendant, who pled guilty to murder, was not entitled to relief as, even if he would have invoked his right to a trial but for the possibility of the imposition of the death penalty, his plea was not thereby rendered involuntary and under the terms of the statute, the death penalty may be imposed only upon a jury verdict of guilty. People v Black, 34 A.D.2d 999, 312 N.Y.S.2d 658, 312 N.Y.S.2d 849, 1970 N.Y. App. Div. LEXIS 4432 (N.Y. App. Div. 2d Dep't 1970), aff'd, 30 N.Y.2d 593, 330 N.Y.S.2d 804, 281 N.E.2d 849, 1972 N.Y. LEXIS 1457 (N.Y. 1972).

The homicide statutes are constitutional. People v Fitzpatrick, 61 Misc. 2d 1043, 308 N.Y.S.2d 18, 1970 N.Y. Misc. LEXIS 1906 (N.Y. County Ct.), app. denied, 34 A.D.2d 730, 311 N.Y.S.2d 577, 1970 N.Y. App. Div. LEXIS 5156 (N.Y. App. Div. 4th Dep't 1970), app. dismissed, 27 N.Y.2d 742, 314 N.Y.S.2d 992, 263 N.E.2d 390, 1970 N.Y. LEXIS 1094 (N.Y. 1970).

9. Under former § 125.35

Since Penal L § 125.35, subdivision 5 leaves infliction of death penalty solely to discretion of jury, such penalty constitutes cruel

and unusual punishment in violation of Eighth Amendment of US Constitution. People v Fitzpatrick, 32 N.Y.2d 499, 346 N.Y.S.2d 793, 300 N.E.2d 139, 1973 N.Y. LEXIS 1178 (N.Y.), cert. denied, 414 U.S. 1033, 94 S. Ct. 462, 38 L. Ed. 2d 324, 1973 U.S. LEXIS 1455 (U.S. 1973), cert. denied, 414 U.S. 1050, 94 S. Ct. 554, 38 L. Ed. 2d 338, 1973 U.S. LEXIS 1540 (U.S. 1973).

10. Under former § 1045

The purpose of this section was to make murder convictions more certain. People v Hicks, 287 N.Y. 165, 38 N.E.2d 482, 287 N.Y. (N.Y.S.) 165, 1941 N.Y. LEXIS 1382 (N.Y. 1941).

Sections 1044, 1045 and 1045-a of the Penal Law and § 42 of the Code of Criminal Procedure, and a sentence of death pursuant to them, do not violate the Constitution of the United States as based upon information supplied by persons with whom the accused has not been confronted and as to whom he has had no opportunity for cross-examination or rebuttal. People v Williams, 298 N.Y. 863, 84 N.E.2d 446, 298 N.Y. (N.Y.S.) 863, 1949 N.Y. LEXIS 1725 (N.Y.), aff'd, Williams v New York, 337 U.S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337, 1949 U.S. LEXIS 2308 (U.S. 1949).

Section 1045 as amended by L 1937 c 67 and § 1045-a, as added by said chapter, give trial court discretion as to sentence in case of felony murder conviction, where jury makes recommendation of life imprisonment. People v Smith, 297 N.Y.S. 489, 163 Misc. 469, 1937 N.Y. Misc. LEXIS 1384 (N.Y. Sup. Ct. 1937).

Since, under subd. 3 of this section, added in 1963, the death penalty cannot be imposed upon a defendant charged with murder in the first degree committed while he was under 18 years of age, a demand for a special jury pursuant to § 749-aa of the Judiciary Law need not be granted in the absence of showing circumstances in addition to the nature of the crime charged. People v Courtney, 40 Misc. 2d 682, 243 N.Y.S.2d 800, 1963 N.Y. Misc. LEXIS 1612 (N.Y. Sup. Ct. 1963).

Amendment of this section by ch 994 of the Laws of 1963 was not invalid as to a person convicted of felony murder prior to the amendment as subjecting him to an ex post facto law. People ex rel. Lonschein v Warden, Queens House of Detention for Men, 43 Misc. 2d 109, 250 N.Y.S.2d 15, 1964 N.Y. Misc. LEXIS 1729 (N.Y. Sup. Ct.), aff'd, 15 N.Y.2d 663, 255 N.Y.S.2d 876, 204 N.E.2d 206, 1964 N.Y. LEXIS 801 (N.Y. 1964).

The amendment of this section by ch 994 of the Laws of 1963 was not invalid as ex post facto as changing the nature of evidence admissible in sentencing a defendant found guilty of felony murder or as inflicting a greater or additional punishment. People ex rel. Lonschein v Warden, Queens House of Detention for Men, 43 Misc. 2d 109, 250 N.Y.S.2d 15, 1964 N.Y. Misc. LEXIS 1729 (N.Y. Sup. Ct.), aff'd, 15 N.Y.2d 663, 255 N.Y.S.2d 876, 204 N.E.2d 206, 1964 N.Y. LEXIS 801 (N.Y. 1964).

Capital case is one of "importance" within that standard set for the ordering special jury by Judiciary Law 749-aa, subd 4, and case is brought within such standard by simple allegation that indictment is for murder in first degree. Possibility of imposing capital punishment is enough alone to be sufficient to justify use of such jury. People v Blanchfield, 45 Misc. 2d 536, 257 N.Y.S.2d 438, 1965 N.Y. Misc. LEXIS 2220 (N.Y. Sup. Ct. 1965).

11. Under former § 1045-a

Section 1045-a does not expressly, or by fair implication, provide that jury finding defendant guilty shall render verdict of "guilty" without recommendation of life imprisonment where jurors have not agreed upon such verdict, since until jury has reached agreement upon every part of verdict it has not agreed upon any verdict. People v Hicks, 287 N.Y. 165, 38 N.E.2d 482, 287 N.Y. (N.Y.S.) 165, 1941 N.Y. LEXIS 1382 (N.Y. 1941).

The burden of proving that the defendant is not entitled to recommendation of life imprisonment is not placed upon the people by the statute. People v Mardavich, 287 N.Y. 344, 39 N.E.2d 906, 287 N.Y. (N.Y.S.) 344, 1942 N.Y. LEXIS 1116 (N.Y. 1942).

County court is without power to furnish, gratis, to defendant, appealing from conviction of robbery a transcript of the minutes of trial, after trial. Where the judgment is of death, or, of life imprisonment following a recommendation of a jury pursuant to § 1045-a, a transcript may be furnished without charge. People v Raymondi, 43 N.Y.S.2d 217, 180 Misc. 973, 1943 N.Y. Misc. LEXIS 2160 (N.Y. County Ct. 1943), app. dismissed, 268 A.D. 863, 50 N.Y.S.2d 678, 1944 N.Y. App. Div. LEXIS 3925 (N.Y. App. Div. 1944).

12. —Jury's recommendation of mercy as binding

The jury's recommendation of a life sentence for a person convicted of first degree murder is not binding on the court. People v Ertel, 283 N.Y. 519, 29 N.E.2d 70, 283 N.Y. (N.Y.S.) 519, 1940 N.Y. LEXIS 904 (N.Y. 1940).

Under § 1045-a trial judge in felony murder case may or may not follow recommendation of jury that defendant be sentenced to life imprisonment, but when requested so to do trial judge should charge jury that he is not bound by law to follow such a recommendation, if one should be made. People v Cole, 285 N.Y. 838, 35 N.E.2d 503, 285 N.Y. (N.Y.S.) 838, 1941 N.Y. LEXIS 1805 (N.Y. 1941).

Word "may," as used in § 1045-a, which provides that court "may" sentence to life imprisonment a person who has been found guilty of murder in first degree, with recommendation of jury that he be sentenced to life imprisonment, means "must." People v De Renna, 2 N.Y.S.2d 694, 166 Misc. 582, 1938 N.Y. Misc. LEXIS 1333 (N.Y. County Ct. 1938).

Under § 1045-a, permitting a jury to make a recommendation of life imprisonment in case of felony murder, as a part of its verdict, and providing that on such recommendation the court "may" sentence the defendant to imprisonment for life, the court is not required to give its reasons for following such finding, but it should follow the recommendation in every instance save where such recommendation is improper, unduly influenced or without any basis in fact or circumstances. People v Ray, 16 N.Y.S.2d 224, 172 Misc. 1004, 1939 N.Y. Misc. LEXIS 2518 (N.Y. Sup. Ct. 1939), app. dismissed, 282 N.Y. 680, 26 N.E.2d 811, 282 N.Y. (N.Y.S.) 680, 1940 N.Y. LEXIS 1482 (N.Y. 1940), aff'd, 259 A.D. 1065, 22 N.Y.S.2d 119, 1940 N.Y. App. Div. LEXIS 7976 (N.Y. App. Div. 1940).

13. — —Factors considered by court

On prosecution for a felony murder under subd. 2 the defendant was sentenced to life imprisonment on recommendation of the jury where the defendant was mentally ill and had previously been of good repute. People v Smith, 297 N.Y.S. 489, 163 Misc. 469, 1937 N.Y. Misc. LEXIS 1384 (N.Y. Sup. Ct. 1937).

The age and immaturity of a defendant 20 years of age was held ample reason for following the jury's recommendation of a life sentence. People v Ray, 16 N.Y.S.2d 224, 172 Misc. 1004, 1939 N.Y. Misc. LEXIS 2518 (N.Y. Sup. Ct. 1939), app. dismissed, 282 N.Y. 680, 26 N.E.2d 811, 282 N.Y. (N.Y.S.) 680, 1940 N.Y. LEXIS 1482 (N.Y. 1940), aff'd, 259 A.D. 1065, 22 N.Y.S.2d 119, 1940 N.Y. App. Div. LEXIS 7976 (N.Y. App. Div. 1940).

14. —Court's charge to jury

It was reversible error for court to charge jurors that if they found defendant guilty of felony murder, they should then proceed to consider whether to recommend that punishment be life imprisonment rather than death, but that if "not unanimous on that proposition it is nevertheless your duty to bring in the verdict of murder in the first degree." People v Hicks, 287 N.Y. 165, 38 N.E.2d 482, 287 N.Y. (N.Y.S.) 165, 1941 N.Y. LEXIS 1382 (N.Y. 1941).

In a proceeding under the above statute it is not error to fail to charge that there is any burden of proof on either side. People v Dusablon, 16 N.Y.2d 9, 261 N.Y.S.2d 38, 209 N.E.2d 90, 1965 N.Y. LEXIS 1269 (N.Y. 1965).

Where in a proceeding under the above statute the court charged the jury that it would be possible for a defendant who had been sentenced to life imprisonment to be placed on parole after he had served 26 years and eight months, such charge was in performance of the obligation imposed by subd 4 of such statute requiring that the jury be charged as to the law relating to the possible release on parole of a person sentenced to life imprisonment. People v Dusablon, 16 N.Y.2d 9, 261 N.Y.S.2d 38, 209 N.E.2d 90, 1965 N.Y. LEXIS 1269 (N.Y. 1965).

15. —Evidence at sentencing hearing

Sections 1044, 1045 and 1045-a of the Penal Law and § 42 of the Code of Criminal Procedure, and a sentence of death pursuant to them, do not violate the Constitution of the United States as

based upon information supplied by persons with whom the accused has not been confronted and as to whom he has had no opportunity for cross-examination or rebuttal. People v Williams, 298 N.Y. 863, 84 N.E.2d 446, 298 N.Y. (N.Y.S.) 863, 1949 N.Y. LEXIS 1725 (N.Y.), aff'd, Williams v New York, 337 U.S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337, 1949 U.S. LEXIS 2308 (U.S. 1949).

Although the defendant was found legally sane during his trial for murder, it was error to exclude evidence of his mental condition at the sentencing hearing and such error must result in remand to the trial court for an automatic sentence of life imprisonment. People v Moseley, 20 N.Y.2d 64, 281 N.Y.S.2d 762, 228 N.E.2d 765, 1967 N.Y. LEXIS 1381 (N.Y. 1967).

At the sentencing stage of a trial a defendant is not entitled to prior notice that the prosecution is planning to introduce a confession, and is not automatically entitled to a "Huntley hearing" on its voluntariness prior to introduction. People v Jackson, 20 N.Y.2d 440, 285 N.Y.S.2d 8, 231 N.E.2d 722, 1967 N.Y. LEXIS 1152 (N.Y. 1967), cert. denied, 391 U.S. 928, 88 S. Ct. 1815, 20 L. Ed. 2d 668, 1968 U.S. LEXIS 1757 (U.S. 1968).

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4 Carrieri, Lansner, New York Civil Practice: Family Court Proceedings § 61.10.

2 Rohan, New York Civil Practice: EPTL ¶ 4-1.5, 4-1.6.

Annotations:

What constitutes murder by torture. 83 ALR3d 1222.

Modern status of the rules requiring malice "aforethought," "deliberation," or "premeditation," as elements of murder in the first degree. 18 ALR4th 961.

Sufficiency of evidence to support homicide conviction where no body was produced. 65 ALR6th 359.

Criminal Jury Instructions: Additional charges: affirmative defenses-extreme emotional disturbance. CJI2d [NY] Penal Law §§ 125.25(1)(a), 125.27(2).

Extreme emotional disturbance defense. CJI2d [NY] Penal Law § 125.25(1)(a).

Affirmative defense of assisting suicide. CJI2d [NY] Penal Law § 125.25(1)(b).

Murder, first degree (intentional murder of police officer). CJI2d [NY] Penal Law § 125.27(1)(a)(i).

Murder, first degree (intentional murder of peace officer). CJI2d [NY] Penal Law § 125.27(1)(a)(ii).

Murder, first degree (intentional murder of correctional employee). CJI2d [NY] Penal Law § 125.27(1)(a)(iii).

Murder, first degree (intentional murder while confined to life sentence). CJI2d [NY] Penal Law § 125.27(1)(a)(iv).

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Murder, first degree (intentional murder of witness to prevent witness's testimony). CJI2d [NY] Penal Law § 125.27(1)(a)(v) (Revised May 20, 2004).

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Murder, first degree (intentional murder in course and furtherance of commission of or immediate flight from designated crime; actual killer). CJI2d [NY] Penal Law § 125.27(1)(a)(vii).

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Murder, first degree (intentional murder-prior murder conviction). CJI2d [NY] Penal Law § 125.27(1)(a)(ix).

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Murder, first degree (intentional murder of judge). CJI2d [NY] Penal Law § 125.27(1)(a)(xii).

Murder, first degree (intentional murder in furtherance of act of terrorism). CJI2d [NY] Penal Law § 125.27(1)(a)(xiii).

Murder, first degree (intentional murder-two additional homicides within 24 months). CJI2d [NY] Penal Law § 125.27(1)(a)(xi) (Revised June 3, 2005).

Additional charges: definitions-transferred intent. CJI2d [NY] Penal Law § 125.27(1).

Texts: New York Criminal Practice Ch. 58.

TITLE I Offenses Involving Damage to and Intrusion Upon Property

Article 145. Criminal Mischief and Related Offenses

Section

145.00. Criminal mischief in the fourth degree
145.05. Criminal mischief in the third degree

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150.20. Arson in the first degree

HISTORY:
Add, L 1965, ch 1030, § 1, eff Sept 1, 1967.

ARTICLE 145

CRIMINAL MISCHIEF AND RELATED OFFENSES

HISTORY:
Add, L 1965, ch 1030, § 1, eff Sept 1, 1967.

§ 145.00. Criminal mischief in the fourth degree

A person is guilty of criminal mischief in the fourth degree when, having no right to do so nor any reasonable ground to believe that he or she has such right, he or she:

1. Intentionally damages property of another person; or

2. Intentionally participates in the destruction of an abandoned building as defined in section one thousand nine hundred seventy-one-a of the real property actions and proceedings law; or

3. Recklessly damages property of another person in an amount exceeding two hundred fifty dollars; or

4. With intent to prevent a person from communicating a request for emergency assistance, intentionally disables or removes telephonic, TTY or similar communication sending equipment while that person: (a) is attempting to seek or is engaged in the process of seeking emergency assistance from police, law enforcement, fire or emergency medical services personnel; or (b) is attempting to seek or is engaged in the process of seeking emergency assistance from another person or entity in order to protect himself, herself or a third person from imminent physical injury. The fact that the defendant has an ownership interest in such equipment shall not be a defense to a charge pursuant to this subdivision.

Criminal mischief in the fourth degree is a class A misdemeanor.

HISTORY:
Add, L 1965, ch 1030, § 1, with substance derived from §§ 223, 463, 464, 466, 1420, 1420–a, 1421, 1423, 1423–a, 1423–b, 1423–c, 1424, 1425, 1426, 1427(2), 1428, 1430, 1431, 1432, 1433, 1873, 1906(1, 2), 1911, 1991; amd, L 1967, ch 791, § 17, eff Sept 1, 1967; L 1971, ch 961, § 1, eff Sept 1, 1971; L 1983, ch 496, § 3, eff Sept 1, 1983; L 2008, ch 69, § 1, eff July 6, 2008.

Commission Staff Notes: See Commission Staff Notes under § 120.05.
See Commission Staff Notes under Art 145.

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I. In General

1. In general

Where 17-year-old defendant had record of several arrests and two convictions and had completely failed to cooperate with authorities after having previously been granted youthful offender status, trial court properly denied defendant youthful offender status in connection with indictments for criminal possession of stolen property and fourth-degree criminal mischief. People v Bruce, 57 A.D.2d 1024, 395 N.Y.S.2d 252, 1977 N.Y. App. Div. LEXIS 12324 (N.Y. App. Div. 3d Dep't 1977).

Property owners' conclusory statements of amount of damage to their property, as set forth in depositions annexed to juvenile delinquency petition, were legally insufficient to sustain counts of petition alleging commission of acts which, if committed by adult, would have constituted third and fourth degree criminal mischief. In re John B., 261 A.D.2d 471, 690 N.Y.S.2d 109, 1999 N.Y. App. Div. LEXIS 4783 (N.Y. App. Div. 2d Dep't), app. dismissed, 94 N.Y.2d 797, 700 N.Y.S.2d 429, 722 N.E.2d 509, 1999 N.Y. LEXIS 3720 (N.Y. 1999).

Breaking of car window in course of committing petit larceny of car's contents constituted first degree auto stripping (CLS Penal former § 165.10(1)) as well as fourth degree criminal mischief. People v Robinson, 265 A.D.2d 241, 697 N.Y.S.2d 23, 1999 N.Y. App. Div. LEXIS 10862 (N.Y. App. Div. 1st Dep't 1999), aff'd, 95 N.Y.2d 179, 711 N.Y.S.2d 148, 733 N.E.2d 220, 2000 N.Y. LEXIS 1839 (N.Y. 2000).

Court properly joined for trial 2 indictments, each of which charged, inter alia, third degree burglary and criminal mischief, where, in each case, police responded to burglar alarm at store located in one-story shopping center in early morning hours, found that roof had been broken through, and saw defendant near store carrying stolen merchandise. People v Hall, 272 A.D.2d 412, 708 N.Y.S.2d 125, 2000 N.Y. App. Div. LEXIS 5049 (N.Y. App. Div.

2d Dep't), app. denied, 95 N.Y.2d 853, 714 N.Y.S.2d 4, 736 N.E.2d 865, 2000 N.Y. LEXIS 2648 (N.Y. 2000).

Defendant, a juvenile, could not claim a justification defense under N.Y. Penal Law § 35.25 to a criminal mischief in the fourth degree charge under N.Y. Penal Law § 145.00(1) because § 35.25 only justified the use of physical force upon another person rather than against property; defendant was not entitled to strike the victim's car with a metal pole because defendant thought the victim was committing a larceny by impounding defendant's puppies to entice defendant to attend school. Matter of Timothy HH., 41 A.D.3d 913, 838 N.Y.S.2d 226, 2007 N.Y. App. Div. LEXIS 6849 (N.Y. App. Div. 3d Dep't 2007).

Because defendant, who matched the victim's description, was seen carrying a white plastic bag near the scene of a reported burglary, and because defendant was evasive and fled from the police, they had probable cause to pursue and arrest defendant for second-degree burglary, petit larceny, and fourth-degree criminal mischief, violations of N.Y. Penal Law §§ 140.25(2), 155.25, 145.00(1), prior to a showup identification. People v Davis, 48 A.D.3d 1120, 851 N.Y.S.2d 320, 2008 N.Y. App. Div. LEXIS 851 (N.Y. App. Div. 4th Dep't), app. denied, 10 N.Y.3d 957, 863 N.Y.S.2d 141, 893 N.E.2d 447, 2008 N.Y. LEXIS 2908 (N.Y. 2008).

Fourth degree criminal mischief (Penal L § 145.00) is a Class A misdemeanor over which a Village Justice has original jurisdiction under the Uniform Justice Court Act § 2001, subd 1. People v Krstovich, 72 Misc. 2d 90, 338 N.Y.S.2d 132, 1972 N.Y. Misc. LEXIS 1392 (N.Y. County Ct. 1972).

A charge of criminal mischief under Penal L § 145.00 for writing the words "Satan Spades" on a subway station wall was not precluded merely because such act may also have been a violation of Penal L § 145.30 (unlawful advertising) or of a city's transit rules and regulations. In re Charles W., 72 Misc. 2d 370, 339 N.Y.S.2d 193, 1972 N.Y. Misc. LEXIS 1249 (N.Y. Fam. Ct. 1972).

That administrator of leased premises, appointed to collect rents and remedy conditions, obtained from housing court hearing officer an ex parte order to effect that administrator was only person authorized to run building did not so effectively prohibit president of corporate owner from entering building's basement, where he had stored personalty, as to sustain charges of criminal mischief and criminal trespass. People v Mauer, 82 Misc. 2d 753, 370 N.Y.S.2d 443, 1975 N.Y. Misc. LEXIS 2671 (N.Y. City Crim. Ct. 1975).

Neither fact that the United Nations and/or its representative was the complainant in the case charging defendant with criminal mischief in having sprayed red paint on the outside wall of the United Nations headquarters, nor fact that the property involved was internationally owned was such as to deprive the Criminal Court of the City of New York of its jurisdiction of the person of defendant or of the subject matter where, by reason of a treaty known as the "Headquarters Agreement" between the United States and the United Nations, infractions on property located within headquarters district were, for jurisdictional purposes, to be considered solely as a crime committed against property located in New York County. Neither fact that situs of offense, i. e., criminal mischief, was the headquarters of the United Nations, nor fact that the defendant was apprehended by a United Nations guard who himself was an alien and a foreign complainant, both individually and as a representative of the United Nations, was sufficient to strip the district attorney of New York County of his authority to prosecute defendant in view of the applicable provisions of the County Law and the "Headquarters Agreement" between the United States and the United Nations. People v Weiner, 85 Misc. 2d 161, 378 N.Y.S.2d 966, 1976 N.Y. Misc. LEXIS 1974 (N.Y. City Crim. Ct. 1976).

Offense of criminal mischief is not within Family Court jurisdiction as delineated in CLS Family Ct Act § 812 and CLS CPL § 530.11, and thus exclusion provision of CLS CPL § 100.07 does not apply to such offense. Defendant can be subject to both Family Court proceeding involving charge of disorderly conduct and criminal proceeding involving charge of criminal mischief, even though both arise from same transaction, since family offense proceedings are civil in nature and there is no constitutional prohibition against concurrent criminal and civil remedies for same acts or transactions. People v Bulin, 142 Misc. 2d 776, 538 N.Y.S.2d 436, 1989 N.Y. Misc. LEXIS 115 (N.Y. Dist. Ct. 1989).

Former employee of car service was not entitled to dismissal of fourth degree criminal mischief and third degree criminal tampering charges where he was alleged to have possessed 2-way radio tuned to radio frequency owned by car service, and to have played music over that frequency so as to render radio communications of car service inoperable; while radio frequency and right to use radio frequency were not tangible property subject to statutes, radio signals generated by car service and its employees, and electronic equipment used to transmit and receive those signals, were tangible property subject to statutes. People v Choo, 152 Misc. 2d 324, 576 N.Y.S.2d 486, 1991 N.Y. Misc. LEXIS 623 (N.Y. City Crim. Ct. 1991).

Defendant could not be charged with fourth degree criminal mischief arising from incident in which he destroyed property jointly or co-owned by him and victim, who was his wife, as proof that person other than defendant owned property that was damaged is essential element of offense. People v Kheyfets, 174 Misc. 2d 516, 665 N.Y.S.2d 802, 1997 N.Y. Misc. LEXIS 498 (N.Y. Sup. Ct. 1997).

CLS Penal § 155.00(5) definition of "owner" applies only to Title J of Penal Law, and did not apply to charge of attempted fourth degree criminal mischief, which is part of Title I. People v Brown, 185 Misc. 2d 326, 711 N.Y.S.2d 707, 2000 N.Y. Misc. LEXIS 297 (N.Y. City Crim. Ct. 2000).

Trial court denied defendant's motion to dismiss the charges against defendant in a case involving defendant crashing a county police car that defendant was driving as part of defendant's employment with the county police; the information filed against defendant, which included information from two witnesses, sufficiently established charges against defendant of reckless driving, reckless endangerment in the second degree, and criminal mischief in the fourth degree where defendant drove with the car's lights off, late at night, at a high rate of speed, and lost control of the vehicle. People v Muscarnera, 842 N.Y.S.2d 241, 16 Misc. 3d 622, 237 N.Y.L.J. 95, 2007 N.Y. Misc. LEXIS 3843 (N.Y. Dist. Ct. 2007).

Defendant's intent was to injure the complainant, not to damage her phone, and thus the mens rea requirement of intent for establishing a violation of the statute was not sufficiently pleaded; the count charging defendant with criminal mischief in the fourth degree was facially insufficient, since it failed to allege facts of an evidentiary character supporting or tending to support that charge or demonstrating reasonable cause to believe that defendant had committed that offense, and the entire accusatory instrument was dismissed. People v Toro, 61 Misc. 3d 26, 79 N.Y.S.3d 844, 2018 N.Y. Misc. LEXIS 2713 (N.Y. App. Term 2018).

Bay constable acted reasonably in believing that storeowner acted intentionally in damaging town property, and thus constable had probable cause to arrest storeowner for fourth degree criminal mischief, and was entitled to qualified immunity in storeowner's malicious prosecution action as matter of law, where storeowner had picked up traffic barricades belonging to town, had broken them by throwing them against building, and had driven his vehicle over remaining barricades and tapped constable with bumper. O'Neill v Babylon, 986 F.2d 646, 1993 U.S. App. LEXIS 2412 (2d Cir. N.Y. 1993).

A town may provide for the payment of a reward for information leading to the detection, arrest and conviction of persons guilty of vandalism in the town. 1978 Op St Comp File #787.

2. Constitutional considerations

Family Court's reversal of its prior decision to dismiss delinquency petition for failure to establish prima facie elements of fourth degree criminal mischief, third degree unauthorized use of vehicle, and possession of burglar's tools did not expose juvenile to double jeopardy where court had erroneously granted dismissed motion under misapprehension that it was necessary to show that automobile was stolen to establish elements of those crimes; court's reinstatement of charges on discovery of its mistake was correction of legal error, which did not require further adjudication of facts but merely reconsideration of applicable law. In re Lionel F., 152 A.D.2d 571, 543 N.Y.S.2d 696, 1989

N.Y. App. Div. LEXIS 9672 (N.Y. App. Div. 2d Dep't 1989), aff'd, 76 N.Y.2d 747, 559 N.Y.S.2d 228, 558 N.E.2d 30, 1990 N.Y. LEXIS 1338 (N.Y. 1990).

Trial court was not required to hold a hearing, pursuant to N.Y. Crim. P. Law art. 730, to determine if defendant who had a history of mental illness was competent to stand trial before it accepted his guilty plea, and the appellate court rejected defendant's claims that he was denied effective assistance of counsel because his counsel did not request a competency hearing and that his guilty plea to criminal mischief in the fourth degree was involuntary because the court did not hold a competency 730 hearing. People v Barclay, 1 A.D.3d 705, 766 N.Y.S.2d 636, 2003 N.Y. App. Div. LEXIS 11714 (N.Y. App. Div. 3d Dep't), app. denied, 1 N.Y.3d 567, 775 N.Y.S.2d 785, 807 N.E.2d 898, 2003 N.Y. LEXIS 4472 (N.Y. 2003).

3. Evidence; admissibility

In trial for second degree assault and fourth degree criminal mischief arising from fight between defendant and complainant wherein defense counsel elicited testimony that police officer handcuffed both men when he arrived at scene, officer was properly permitted to testify that he uncuffed complainant and arrested defendant after speaking with 2 bystanders, and reversal was not required on ground that reference to out-of-court statements of bystanders (who were unavailable to testify) inferentially bolstered complainant's testimony that defendant started fight, where court did not admit substance of officer's conversation with bystanders and promptly issued limiting instructions; furthermore, defendant himself invited admission of such testimony by eliciting that officer had handcuffed both men, which created material gap in narrative that People were entitled to explain. People v Rivera, 96 N.Y.2d 749, 725 N.Y.S.2d 264, 748 N.E.2d 1060, 2001 N.Y. LEXIS 232 (N.Y. 2001).

In prosecution of landlord for fourth degree criminal mischief stemming from her entry into tenant's home on tenant's default in paying rent, and her removal of various cabinets, countertops, and household fixtures which she had installed at commencement of tenancy, trial court erred in curtailing defense counsel's efforts to elicit landlord's testimony as to her state of mind, since criminal mischief requires showing that defendant had no right to damage property and that she had no reasonable ground to believe she had such right, and thus landlord should have been permitted to testify to her belief that she was entitled to remove from premises property to which she held title. People v Reed, 121 A.D.2d 574, 503 N.Y.S.2d 624, 1986 N.Y. App. Div. LEXIS 58561 (N.Y. App. Div. 2d Dep't 1986).

In prosecution for fourth degree mischief arising from incident in which defendant allegedly drove school bus through red light and collided with another vehicle, court erred in refusing to admit in evidence, as excited utterances, defendant's statements to bus matron, only passenger on school bus, immediately following accident, to effect that driver of car ran red light, since statements were made while he was still under influence of crash. Court's refusal to admit defendant's hearsay statements into evidence did not constitute harmless error in prosecution for fourth degree mischief where proof of recklessness was not overwhelmingly shown, and statements in question were to effect that driver of other vehicle involved in accident ran red light. People v Cannon, 228 A.D.2d 513, 644 N.Y.S.2d 311, 1996 N.Y. App. Div. LEXIS 6586 (N.Y. App. Div. 2d Dep't 1996).

In prosecution for attempted third degree burglary, fourth degree mischief, and trespass, defendant was not entitled to suppression of eyewitness's identification testimony where eyewitness's viewing of defendant as he was led out of station house in handcuffs was accidental and neither unduly suggestive nor result of questionable police practice. People v Marino, 245 A.D.2d 529, 666 N.Y.S.2d 41, 1997 N.Y. App. Div. LEXIS 13216 (N.Y. App. Div. 2d Dep't 1997), app. denied, 91 N.Y.2d 928, 670 N.Y.S.2d 409, 693 N.E.2d 756, 1998 N.Y. LEXIS 772 (N.Y. 1998).

In prosecution for second degree burglary, fourth degree mischief, child endangerment, and second degree harassment, prosecution was properly allowed to elicit evidence of defendant's past thefts from, and acts of violence against, victim where those prior bad acts were probative of defendant's intent to commit crime when he broke down door of victim's residence. People v Springs, 255 A.D.2d 609, 685 N.Y.S.2d 69, 1998 N.Y. App. Div. LEXIS 12831 (N.Y. App. Div. 2d Dep't 1998), app. denied, 93 N.Y.2d 902, 689 N.Y.S.2d 714, 711 N.E.2d 990, 1999 N.Y. LEXIS 1567 (N.Y. 1999).

4. —Sufficiency

Trial court's judgments of conviction finding defendant guilty of 12 counts of criminal mischief had to be reversed, except for one count of criminal mischief in the third degree; defendant could not be acquitted of "making graffiti," as he was by the jury and be convicted of 11 of the 12 counts because they were all based on the same conduct. alleged spray-painting, and, thus, the verdict was repugnant. Colavito v New York Organ Donor Network, Inc., 6 N.Y.3d 820, 813 N.Y.S.2d 37, 846 N.E.2d 467, 2006 N.Y. LEXIS 517 (N.Y. 2006).

Evidence, particularly testimony of police officer specially trained in identifying suspects, that defendant was perpetrator she saw in her house, was sufficient to support conviction for second degree burglary, petit larceny and criminal mischief in fourth degree despite testimony of defendant's family that he was home at time of occurrence. People v Cerulli, 126 A.D.2d 736, 511 N.Y.S.2d 323, 1987 N.Y. App. Div. LEXIS 41885 (N.Y. App. Div. 2d Dep't 1987).

Evidence established that juvenile committed act which if done by adult would have constituted fourth degree criminal mischief where he grabbed chain and medallion from undercover officer's neck, dropping them when apprehended; officer's testimony that she felt chain snap when juvenile grabbed it established that he damaged chain, and his breaking of clasp to ensure fast removal of chain demonstrated intent to damage officer's property. In re Eric H., 129 A.D.2d 638, 514 N.Y.S.2d 265, 1987 N.Y. App. Div. LEXIS 45319 (N.Y. App. Div. 2d Dep't 1987).

Defendant was properly convicted of 2 counts of fourth degree criminal mischief where he admitted breaking windows in each of 2 apartments without license to do so; defendant's statement to detective, that if any persons had tried to stop him "I'd break their heads with my bare hands...I wouldn't need the brick" furnished sufficient evidence of his criminal intent. People v Waterman, 131 A.D.2d 524, 516 N.Y.S.2d 125, 1987 N.Y. App. Div. LEXIS 47982 (N.Y. App. Div. 2d Dep't 1987).

By removing vehicle hood from its mounting, defendants could be found to have damaged vehicle sufficiently to be guilty of fourth degree criminal mischief, and guilt was established beyond reasonable doubt where defendants were apprehended running out of woods 50 yards from where 3 men were seen running from 2 vehicles—one registered to codefendant and one stolen and partially dismantled—and men fit general description of those who had driven cars into area, who were seen leaning over engine area of stolen car (hood of which had been removed and was lying on ground), and who had fled into woods when police arrived. People v MacDonnell, 133 A.D.2d 177, 518 N.Y.S.2d 688, 1987 N.Y. App. Div. LEXIS 49686 (N.Y. App. Div. 2d Dep't 1987).

Conviction of third degree weapon possession and fourth degree criminal mischief, based on possessing Molotov Cocktail and causing damage to house by throwing it against wall, was supported by evidence that bottle recovered from house was filled with gasoline, contained wick, and bore defendant's fingerprints and scrapings of paint matching scratches on wall of house. People v Webb, 134 A.D.2d 303, 520 N.Y.S.2d 629, 1987 N.Y. App. Div. LEXIS 50488 (N.Y. App. Div. 2d Dep't), app. denied, 70 N.Y.2d 939, 524 N.Y.S.2d 690, 519 N.E.2d 636, 1987 N.Y. LEXIS 19861 (N.Y. 1987).

Evidence was sufficient to support defendant's convictions for second degree burglary, petit larceny, and fourth degree criminal mischief based on (1) victim's testimony that small red bank had been broken and lid removed from glass jar, and that money had been taken from each, (2) defendant's fingerprints obtained from both items, and (3) testimony of victim and investigating officer describing damage done to screen window by which entry was obtained. People v Caffey, 134 A.D.2d 923, 521 N.Y.S.2d 937, 1987 N.Y. App. Div. LEXIS 51122 (N.Y. App. Div. 4th Dep't), app. denied, 70 N.Y.2d 930, 524 N.Y.S.2d 681, 519 N.E.2d 627, 1987 N.Y. LEXIS 19626 (N.Y. 1987).

Defendant's guilt of third degree burglary, fourth degree criminal mischief, and possession of burglar's tools was established by

facts that (1) police observed defendant exit through third-story window at 3:00 a.m., (2) prompt search of building revealed property damage, including indentations in wood frame of window through which defendant had exited, broken window lock, and indentations in wood frame of internal set of double doors which led to office containing valuable office equipment, with moulding between doors having been removed, and (3) 14-inch screwdriver and tin snip were found on floor near window through which defendant had exited, with screwdriver having black sticky substance similar to that seen on defendant's hands during his arrest. People v Lowman, 137 A.D.2d 622, 524 N.Y.S.2d 510, 1988 N.Y. App. Div. LEXIS 1037 (N.Y. App. Div. 2d Dep't 1988).

Defendant's guilt of first degree possession of stolen property, third degree attempted burglary, and fourth degree criminal mischief was supported by evidence that police, in response to radio call of burglary in progress, (1) arrived at scene and saw defendant and codefendant exiting through chainlink fence which surrounded premises, (2) observed defendants run toward nearby vehicle, with defendant opening its door, and then run away as officers approached, (3) found vehicle's motor running, its ignition ripped out, and slotted screwdriver on floor, and (4) discovered that vehicle was stolen and found that warehouse door had been pried open. People v Atson, 139 A.D.2d 520, 526 N.Y.S.2d 618, 1988 N.Y. App. Div. LEXIS 3772 (N.Y. App. Div. 2d Dep't), app. denied, 72 N.Y.2d 856, 532 N.Y.S.2d 506, 528 N.E.2d 896, 1988 N.Y. LEXIS 3624 (N.Y. 1988).

In trial for fourth degree criminal mischief, evidence was sufficient to prove that defendant intentionally damaged property of another where he had kicked in paneling in utility closet in order to gain entrance to doctor's office. People v Selby, 146 A.D.2d 655, 536 N.Y.S.2d 552, 1989 N.Y. App. Div. LEXIS 410 (N.Y. App. Div. 2d Dep't 1989).

Police officer's statements that defendant injured officers by kicking, punching and biting them while they were making arrest, and scattering newspapers at nearby newsstand, if found to be true, would establish that defendant committed each element of crimes of second degree assault, menacing, resisting arrest, second degree obstruction of governmental administration, and fourth degree criminal mischief. In re Jeremy B., 151 A.D.2d 314, 542 N.Y.S.2d 582, 1989 N.Y. App. Div. LEXIS 7904 (N.Y. App. Div. 1st Dep't 1989).

Evidence supported convictions for third degree burglary, fourth degree criminal mischief, and possession of burglar's tools where (1) defendant was observed by police breaking into building, (2) defendant then attempted to break into real estate office in building, which was secured by locked metal door, (3) when efforts proved futile, defendant ventured behind stairwell and broke through padlock and hinge which secured door to basement, (4) defendant was apprehended by police as he left premises, (5) police recovered screwdriver from defendant's person, and (6) pry marks, indentations and scratches were later found on various doors in premises. People v Johnson, 155 A.D.2d 555, 547 N.Y.S.2d 410, 1989 N.Y. App. Div. LEXIS 14297 (N.Y. App. Div. 2d Dep't 1989), app. denied, 75 N.Y.2d 814, 552 N.Y.S.2d 564, 551 N.E.2d 1242, 1990 N.Y. LEXIS 483 (N.Y. 1990).

Evidence was sufficient to establish defendant's guilt of third degree burglary, and third and fourth degree criminal mischief, where he and his codefendant were discovered in predawn hours holding up steel gate which secured entrance to shopping mall, accomplice was crawling out from underneath gate clutching leather coat, glass behind gate was smashed and curtains enclosing 2 booths inside mall were ripped or slashed, cash registers in both booths were broken, and leather coats and jackets were strewn on floor with footprints on them, with some missing. People v Williams, 171 A.D.2d 827, 567 N.Y.S.2d 756, 1991 N.Y. App. Div. LEXIS 3663 (N.Y. App. Div. 2d Dep't), app. denied, 78 N.Y.2d 976, 574 N.Y.S.2d 956, 580 N.E.2d 429, 1991 N.Y. LEXIS 4633 (N.Y. 1991).

Evidence was sufficient to support conviction for fourth degree criminal mischief where radio of recently stolen car was sitting on front seat, dashboard of car was damaged, and screwdriver was found on front passenger's side where defendant was observed by police shortly before his arrest. People v Williams, 172 A.D.2d 706, 568 N.Y.S.2d 964, 1991 N.Y. App. Div. LEXIS 4876 (N.Y. App. Div. 2d Dep't 1991).

Evidence was sufficient to support convictions for second degree arson, third degree assault, and fourth degree criminal mischief where (1) defendant, and 2 accomplices who testified for People at trial, attempted to collect drug money from 3 women who sold crack on behalf of defendant, and (2) when unsuccessful, defendant beat each of 3 women, ransacked their respective rooms, and set fire to bed in third room, which then spread. People v Barnes, 180 A.D.2d 605, 580 N.Y.S.2d 315, 1992 N.Y. App. Div. LEXIS 2818 (N.Y. App. Div. 1st Dep't), app. denied, 79 N.Y.2d 1046, 584 N.Y.S.2d 1013, 596 N.E.2d 411, 1992 N.Y. LEXIS 2493 (N.Y. 1992).

Evidence was sufficient to establish that juvenile committed act which, if committed by adult, would have constituted second degree auto stripping and fourth degree criminal mischief where juvenile was in possession of stolen automobile that had broken steering column. In re Tyson M., 195 A.D.2d 558, 600 N.Y.S.2d 481, 1993 N.Y. App. Div. LEXIS 7352 (N.Y. App. Div. 2d Dep't 1993).

Evidence supported conviction for fourth degree criminal mischief, although owner of premises did not testify that he did not give defendant permission to enter premises, where defendant entered tavern at 2:30 a.m. by breaking window, and tavern manager testified that defendant did not have permission to enter tavern or to take money from tavern. People v Battle, 202 A.D.2d 1045, 609 N.Y.S.2d 716, 1994 N.Y. App. Div. LEXIS 3434 (N.Y. App. Div. 4th Dep't), app. denied, 83 N.Y.2d 908, 614 N.Y.S.2d 390, 637 N.E.2d 281, 1994 N.Y. LEXIS 1650 (N.Y. 1994).

Evidence was sufficient to support conviction of fourth degree criminal mischief where defendant intentionally disabled telephone in order to keep victims from calling police. People v Bigwarfe, 219 A.D.2d 775, 631 N.Y.S.2d 453, 1995 N.Y. App. Div. LEXIS 9505 (N.Y. App. Div. 3d Dep't 1995), app. denied, 88 N.Y.2d 845, 644 N.Y.S.2d 691, 667 N.E.2d 341, 1996 N.Y. LEXIS 1800 (N.Y. 1996).

Finding that juvenile committed acts constituting fourth degree criminal mischief was supported by evidence that he actively assisted in breaking into house, resulting in damage thereto. In re Wendy J., 219 A.D.2d 874, 632 N.Y.S.2d 42, 1995 N.Y. App. Div. LEXIS 11048 (N.Y. App. Div. 4th Dep't 1995).

In juvenile delinquency proceeding, respondent's commission of conduct constituting fourth degree criminal mischief was established by testimony of schoolmate, that he saw respondent damaging complainant's bicycle by repeatedly stomping on it and bending its frame and front and rear rims. In re Joshua J., 227 A.D.2d 707, 641 N.Y.S.2d 741, 1996 N.Y. App. Div. LEXIS 4765 (N.Y. App. Div. 3d Dep't 1996).

Mens rea requirement of intent to damage property was shown by evidence that victim's car was struck by several bullets from gun that defendant fired at victim. People v Bodine, 231 A.D.2d 840, 648 N.Y.S.2d 394, 1996 N.Y. App. Div. LEXIS 14197 (N.Y. App. Div. 4th Dep't), app. denied, 89 N.Y.2d 862, 653 N.Y.S.2d 285, 675 N.E.2d 1238, 1996 N.Y. LEXIS 4478 (N.Y. 1996).

Police officer's unrebutted testimony that defendant had repeatedly kicked and damaged holding room door after he had been taken into custody supported conviction for fourth degree mischief. People v Ellis, 233 A.D.2d 692, 650 N.Y.S.2d 329, 1996 N.Y. App. Div. LEXIS 12106 (N.Y. App. Div. 3d Dep't 1996).

In delinquency proceeding, evidence supported finding that juvenile committed acts that, if committed by adult, would be second and third degree burglary, second and third degree trespass, petty larceny, fourth degree mischief, and fifth degree possession of stolen property where victim saw accused juvenile, moments after crime, exiting adjacent building with several individuals, one of whom victim had seen in his apartment, and victim later saw police recover part of his property from each member of group of 3 persons that included accused juvenile. In re Jay R., 255 A.D.2d 134, 681 N.Y.S.2d 15, 1998 N.Y. App. Div. LEXIS 11722 (N.Y. App. Div. 1st Dep't 1998).

Evidence supported conviction of third degree weapon possession and fourth degree mischief where there was ample evidence that defendant intended to use baseball bat unlawfully against

another, including evidence from which jury could find intent to menace victim. People v Reese, 255 A.D.2d 230, 679 N.Y.S.2d 824, 1998 N.Y. App. Div. LEXIS 12446 (N.Y. App. Div. 1st Dep't 1998).

Evidence failed to show that damage to property exceeded $1,500 where no expert testified as to value, no documentary proof as to cost of repair or replacement was introduced, and complainant's testimony that repair and replacement cost over $1,500 was insufficient since that testimony was unsupported by documentation or other evidence; thus, defendant's conviction of second degree mischief would be reduced to fourth degree mischief. People v Wilson, 284 A.D.2d 420, 728 N.Y.S.2d 174, 2001 N.Y. App. Div. LEXIS 6129 (N.Y. App. Div. 2d Dep't), app. denied, 96 N.Y.2d 926, 732 N.Y.S.2d 643, 758 N.E.2d 669, 2001 N.Y. LEXIS 4077 (N.Y. 2001).

Evidence of defendant's threats to go to victim's home and harm him, together with damage done to victim's apartment and car thought to be victim's, supported fourth degree criminal mischief conviction. People v McDonald, 287 A.D.2d 655, 732 N.Y.S.2d 32, 2001 N.Y. App. Div. LEXIS 9784 (N.Y. App. Div. 2d Dep't), app. denied, 97 N.Y.2d 685, 738 N.Y.S.2d 300, 764 N.E.2d 404, 2001 N.Y. LEXIS 4468 (N.Y. 2001).

Evidence was legally sufficient to support his convictions of burglary in the third degree, a violation of N.Y. Penal Law § 140.20; criminal mischief in the fourth degree, a violation of N.Y. Penal Law § 145.00(1); and petit larceny, a violation of N.Y. Penal Law § 155.25 where the owner of the bar which defendant had entered after hours and from defendant took money, testified that defendant did not have permission to enter the bar after hours, to damage property, or to take money from the bar, such that there was a valid line of reasoning and permissible inferences to lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial despite defendant's assertion that defendant believed that defendant had permission to enter the bar to take the money at issue. People v Prober, 298 A.D.2d 966, 748 N.Y.S.2d 118, 2002 N.Y. App. Div. LEXIS 9010 (N.Y. App. Div. 4th Dep't), app. denied, 99 N.Y.2d 538, 752 N.Y.S.2d 599, 782 N.E.2d 577, 2002 N.Y. LEXIS 4171 (N.Y. 2002).

Sufficient evidence supported defendant's convictions of two counts of burglary in the second degree, N.Y. Penal Law § 140.25(1)(b), and one count each of assault in the second degree, N.Y. Penal Law § 120.05(6), and criminal mischief in the fourth degree, N.Y. Penal Law § 145.00. The term "entry" for burglary had to be redefined for the jury. People v Diefenbacher, 21 A.D.3d 1293, 801 N.Y.S.2d 466, 2005 N.Y. App. Div. LEXIS 10010 (N.Y. App. Div. 4th Dep't 2005), app. denied, 6 N.Y.3d 775, 811 N.Y.S.2d 342, 844 N.E.2d 797, 2006 N.Y. LEXIS 342 (N.Y. 2006).

Evidence was sufficient to support defendant's conviction for criminal mischief in the fourth degree, N.Y. Penal Law § 145.00(1), as the victim testified that she heard loud banging and the sound of glass shattering in the victim's apartment in the early morning, and defendant then entered the victim's bedroom and punched the victim in the face and head. The testimony of the victim and neighbors established that the victim's front door was broken, and the jury was entitled to infer therefrom that defendant entered the victim's apartment with the intent to assault the victim and that defendant intended to break the door in order to gain entry into the apartment. People v Jackson, 46 A.D.3d 1408, 847 N.Y.S.2d 800, 2007 N.Y. App. Div. LEXIS 13094 (N.Y. App. Div. 4th Dep't 2007), app. denied, 10 N.Y.3d 841, 859 N.Y.S.2d 400, 889 N.E.2d 87, 2008 N.Y. LEXIS 1750 (N.Y. 2008).

Weight of the evidence, which included testimony that defendant went to the victim's apartment seeking return of his cell phone and threatened to kill her if she did not open the door, the victim and her child came outside, and defendant attacked the victim, readily supported defendant's convictions for burglary in the second degree, robbery in the second degree, grand larceny in the fourth degree, assault in the third degree, criminal mischief in the fourth degree and endangering the welfare of a child. People v Curry, 152 A.D.3d 818, 59 N.Y.S.3d 161, 2017 N.Y. App. Div. LEXIS 5311 (N.Y. App. Div. 3d Dep't), app. denied, 30 N.Y.3d 948, 89 N.E.3d 522, 67 N.Y.S.3d 132, 2017 N.Y. LEXIS 3501 (N.Y. 2017).

Mother established, by a preponderance of the evidence, that the father committed criminal mischief in the fourth degree because the father got upset when he saw that the older child was recording the altercation, and the father grabbed the older child's cell phone and threw it to the ground, breaking it. Matter of Joan WW. v Peter WW., 173 A.D.3d 1380, 104 N.Y.S.3d 358, 2019 N.Y. App. Div. LEXIS 4766 (N.Y. App. Div. 3d Dep't 2019).

Juvenile defendant's admission to breaking a window failed to establish that defendant recklessly damaged property in an amount exceeding $250, as the petition did not allege a monetary amount and no evidence of the window's value was adduced. Even if the petition was liberally construed to have charged defendant with the intentional conduct subdivision of criminal mischief, dismissal was warranted because defendant's admission failed to show that she intentionally broke the window. Matter of P., 175 A.D.3d 1298, 109 N.Y.S.3d 310, 2019 N.Y. App. Div. LEXIS 6497 (N.Y. App. Div. 2d Dep't 2019).

Defendant's verdict of criminal mischief in the third degree and other crimes was not against the weight of evidence because defendant and her codefendant unlawfully broke into the building's garage and caused damage to the garage door and personal property belonging to other tenants in the building, and the property manager testified that the damage to the garage door was well in excess of $250. People v Saunders, 181 A.D.3d 1049, 120 N.Y.S.3d 658, 2020 N.Y. App. Div. LEXIS 1739 (N.Y. App. Div. 3d Dep't 2020).

Defendant was guilty of attempted fourth degree criminal mischief where he deliberately crashed car into light pole, despite agreement that entitled him to share use of car, where title to car was not in defendant's name and there was no doubt that car was "property of another person." People v Brown, 185 Misc. 2d 326, 711 N.Y.S.2d 707, 2000 N.Y. Misc. LEXIS 297 (N.Y. City Crim. Ct. 2000).

Verdict finding defendant guilty of assault in the first degree, criminal mischief in the fourth degree, and criminal possession of a weapon in the fourth degree, was not against the weight of the evidence despite defendant's defense of justification, as the consistent and credible testimony of the People's witnesses indicated that defendant was the initial aggressor of the attack which caused serious physical injury to the complainant. People v Williams, 304 A.D.2d 595, 759 N.Y.S.2d 329, 2003 N.Y. App. Div. LEXIS 3690 (N.Y. App. Div. 2d Dep't), app. denied, 100 N.Y.2d 567, 763 N.Y.S.2d 824, 795 N.E.2d 50, 2003 N.Y. LEXIS 2225 (N.Y. 2003).

In a proceeding pursuant to N.Y. Fam. Ct. Act art. 3, the family court properly adjudicated a juvenile as a delinquent; the evidence supported the conclusion that the juvenile intentionally caused actual damage to property that, if done by an adult, would have constituted criminal mischief pursuant to N.Y. Penal Law § 145.00(1). In re Joshua F., 309 A.D.2d 1012, 765 N.Y.S.2d 670, 2003 N.Y. App. Div. LEXIS 10986 (N.Y. App. Div. 3d Dep't 2003).

Evidence was sufficient to support defendant's conviction for criminal mischief in the fourth degree where there was testimony that defendant tore a metal heater cover from a wall and swung it around the cell to bang it against other objects, which established that defendant intended to damage a heater cover. People v Liggins, 2 A.D.3d 1325, 770 N.Y.S.2d 263, 2003 N.Y. App. Div. LEXIS 14284 (N.Y. App. Div. 4th Dep't 2003).

Criminal mischief charge against defendant juvenile was established by evidence that defendant chose, as a means of attacking another person, to throw glass objects that almost certainly would have to shatter in order to injure his opponent, thereby evincing an intent to also destroy property. Matter of Carlos M., 32 A.D.3d 686, 820 N.Y.S.2d 581, 2006 N.Y. App. Div. LEXIS 10554 (N.Y. App. Div. 1st Dep't 2006).

Although the victim testified that her television, glasses, a framed picture and a pair of mukluks were damaged in the incident, the record was devoid of any proof as to the reasonable cost of repairing and/or replacing this property, and neither the victim's conclusory and unsubstantiated testimony regarding the value of the items in question nor the photo evidence contained in the record was sufficient to establish that the damage to the victim's property exceeded $250 for purposes of the third degree criminal mischief conviction; the record was, however, sufficient

to establish that defendant intentionally damaged the victim's property and, therefore, defendant's conviction was reduced to criminal mischief in the fourth degree. People v Beauvais, 105 A.D.3d 1081, 962 N.Y.S.2d 764, 2013 N.Y. App. Div. LEXIS 2227 (N.Y. App. Div. 3d Dep't 2013).

5. — —Circumstantial evidence

Circumstantial evidence was sufficient to support convictions for attempted third degree burglary, fourth degree criminal mischief, and possession of burglar's tools where (1) police officer, responding to anonymous phone call reporting burglary in progress at tire store, saw defendant and accomplice, who matched descriptions provided by caller, standing in front of premises, (2) defendant and accomplice began to walk away from store as unmarked police car approached, and officer stopped them for questioning, and (3) officer saw defendant drop screwdriver under front of police car, and it was subsequently determined that screwdriver matched pry marks around lock of store, and those on molding which had been pried away from windows of store. People v Letieri, 154 A.D.2d 622, 546 N.Y.S.2d 451, 1989 N.Y. App. Div. LEXIS 13501 (N.Y. App. Div. 2d Dep't 1989).

In trial for third degree burglary and fourth degree criminal mischief, proof was sufficient to permit inference that defendant entered premises with intent to commit crime, in light of fact that he used force in obtaining entry by smashing glass in interior door, buttressed by numerous other factors, including his unexplained and unauthorized presence on premises in middle of night. People v Gates, 170 A.D.2d 971, 566 N.Y.S.2d 137, 1991 N.Y. App. Div. LEXIS 1696 (N.Y. App. Div. 4th Dep't), app. denied, 78 N.Y.2d 922, 573 N.Y.S.2d 475, 577 N.E.2d 1067, 1991 N.Y. LEXIS 2334 (N.Y. 1991).

6. — —Corroboration

In prosecution for second degree burglary and criminal mischief in fourth degree, independent evidence was sufficient to corroborate accomplice's testimony where (1) arresting officer, who had proceeded to scene of crime in response to radio call of burglary in progress, established that defendant and accomplice were found sitting on front stoop of burglarized premises, (2) officer recovered pieces of metal in doorjamb of premises which matched knife recovered from accomplice, and (3) neighbor testified that defendant had placed his hand through broken garage window in apparent attempt to gain entry to premises. People v Dawkins, 151 A.D.2d 495, 542 N.Y.S.2d 284, 1989 N.Y. App. Div. LEXIS 7494 (N.Y. App. Div. 2d Dep't), app. denied, 74 N.Y.2d 846, 546 N.Y.S.2d 1011, 546 N.E.2d 194, 1989 N.Y. LEXIS 3839 (N.Y. 1989).

7. — —Grand jury proceedings

Evidence before grand jury was sufficient to sustain indictment for reckless endangerment in first degree, criminal mischief in fourth degree, and falsely reporting incident in third degree where testimony showed that deer slug had been fired through victim's trailer window following defendant's threat on victim's life, shotgun had been found next day along road where defendant had been stopped by sheriff during investigation on night of shooting, defendant reported theft of same shotgun from his home on next day, and defendant told fellow prisoner while in custody that he had fired shotgun blast through trailer of person he had argued with. People v McCarthy, 126 A.D.2d 935, 511 N.Y.S.2d 708, 1987 N.Y. App. Div. LEXIS 42034 (N.Y. App. Div. 4th Dep't 1987).

Grand jury evidence supported indictment on charges of third degree burglary and fourth degree criminal mischief where defendant was found in apartment whose door lock and windows were broken and from which television was missing, without authority or permission to be there. People v Scott, 131 A.D.2d 893, 517 N.Y.S.2d 248, 1987 N.Y. App. Div. LEXIS 48328 (N.Y. App. Div. 2d Dep't 1987).

Court erred in dismissing count of indictment charging fourth degree criminal mischief for insufficient proof of ownership of damaged apartment door where manager testified that he knew owner of complex and managed apartments for owner, collected rent, and performed all necessary maintenance and repairs, that he did not personally know defendant but knew of him, and that he had never given defendant permission to break window in screen door; under circumstances, grand jury could reasonably infer that owner of damaged property was someone other than defendant, which was all People were required to establish. People v Cannon, 210 A.D.2d 764, 620 N.Y.S.2d 539, 1994 N.Y. App. Div. LEXIS 13018 (N.Y. App. Div. 3d Dep't 1994).

Allegation that defendant applied glue to wall and covered wall with advertisements was sufficient to charge him with fourth degree criminal mischief, which must contain facts tending to show defendant's "intent to damage" property of another, even though defendant's argument that his sole intent was to place advertisements on wall might prevail at trial. People v Vinolas, 174 Misc. 2d 740, 667 N.Y.S.2d 198, 1997 N.Y. Misc. LEXIS 564 (N.Y. City Crim. Ct. 1997).

Sufficient evidence supported the burglary, criminal mischief, and unlawful imprisonment charges contained in a grand jury indictment against defendant as the evidence established that defendant remained at the residence at issue after he was told to leave and then he purposefully swept bobblehead dolls off a table and grabbed his girlfriend, dragging her from the residence. People v Huntington, 867 N.Y.S.2d 377, 20 Misc. 3d 1114(A), 240 N.Y.L.J. 25, 2008 N.Y. Misc. LEXIS 7175 (N.Y. County Ct.), aff'd, 57 A.D.3d 1238, 869 N.Y.S.2d 702, 2008 N.Y. App. Div. LEXIS 9806 (N.Y. App. Div. 3d Dep't 2008).

8. — —Insufficient evidence

Defendant was improperly convicted of fourth degree criminal mischief based on evidence that, in midst of dispute with neighbor over border of their properties, she pulled up marker stake that had been positioned by surveyor hired by neighbor and threw it several feet, where there was no proof of damage to property demarcated by stake or to stake itself, and People did not identify any other property that was allegedly damaged by defendant's actions. People v Hills, 95 N.Y.2d 947, 722 N.Y.S.2d 460, 745 N.E.2d 379, 2000 N.Y. LEXIS 3880 (N.Y. 2000).

Defendant's conviction of fourth degree criminal mischief would be reversed, even though People demonstrated that premises which defendant and 3 others rented was damaged, since People failed to prove that defendant caused damage. People v Capozzi, 133 A.D.2d 481, 519 N.Y.S.2d 210, 1987 N.Y. App. Div. LEXIS 49949 (N.Y. App. Div. 3d Dep't 1987).

Court would reverse defendant's conviction of fourth degree criminal mischief under CLS Penal § 145.00(1), which requires specific intent to damage property of another, since evidence established only that defendant's intent was directed at complainant and that damage to complainant's table occurred during course of struggle. People v Roberts, 140 A.D.2d 961, 529 N.Y.S.2d 636, 1988 N.Y. App. Div. LEXIS 5918 (N.Y. App. Div. 4th Dep't 1988).

Evidence was insufficient to establish that damage to premises exceeded $1,500, and thus defendant's conviction of second degree criminal mischief would be reduced to fourth degree criminal mischief, where proof consisted merely of testimony of owner and his employee that repairs had cost about $2,500 which was unsupported by documentation or other evidence that amount represented reasonable cost of repairs. People v Jackson, 168 A.D.2d 633, 563 N.Y.S.2d 468, 1990 N.Y. App. Div. LEXIS 16077 (N.Y. App. Div. 2d Dep't 1990), app. denied, 77 N.Y.2d 962, 570 N.Y.S.2d 495, 573 N.E.2d 583, 1991 N.Y. LEXIS 1455 (N.Y. 1991).

Evidence was insufficient to establish that juvenile, who was discovered as passenger in back seat of stolen and extensively damaged automobile, committed act which, if committed by adult, would have constituted fourth degree criminal mischief since circumstantial evidence did not show that juvenile was individual who damaged vehicle or that he acted in concert with individual who damaged vehicle. In re Garfield H., 185 A.D.2d 846, 587 N.Y.S.2d 351, 1992 N.Y. App. Div. LEXIS 9886 (N.Y. App. Div. 2d Dep't 1992).

Court properly dismissed charges for possession of burglar's tools and fourth degree criminal mischief where People lost bolt cutter allegedly used by defendant and lock alleged to have been cut. People v Cobb, 198 A.D.2d 128, 604 N.Y.S.2d 54, 1993 N.Y. App. Div. LEXIS 10802 (N.Y. App. Div. 1st Dep't 1993).

Conviction of third degree criminal mischief was improper absent proof of monetary amount of damages to property; review-

ing court would reduce defendant's conviction to fourth degree offense, which requires no monetary element. People v Pluff, 217 A.D.2d 744, 629 N.Y.S.2d 333, 1995 N.Y. App. Div. LEXIS 7745 (N.Y. App. Div. 3d Dep't 1995).

Defendant's convictions for fourth degree mischief and petit larceny would be reversed, those counts of indictment dismissed, and sentences imposed thereon vacated since he had equitable interest in items he was charged with damaging or stealing. People v Person, 239 A.D.2d 612, 658 N.Y.S.2d 372, 1997 N.Y. App. Div. LEXIS 5623 (N.Y. App. Div. 2d Dep't), app. denied, 91 N.Y.2d 878, 668 N.Y.S.2d 576, 691 N.E.2d 648, 1997 N.Y. LEXIS 4666 (N.Y. 1997).

Juvenile delinquent did not engage in reckless conduct under CLS Penal §§ 15.05(3) and 145.00(3), and thus did not engage in illegal conduct in violation of condition of his probation, where he accidentally broke elementary school window while trying to throw rock onto school roof, and it was common activity for children to throw rocks onto school roof, because presence of raised incline made it easy to do so. In re Mark "PP", 281 A.D.2d 689, 721 N.Y.S.2d 156, 2001 N.Y. App. Div. LEXIS 2030 (N.Y. App. Div. 3d Dep't 2001).

Court would dismiss count of information charging fourth degree criminal mischief where there was no allegation that defendant was more than mere passenger in stolen and damaged car; only possible evidence of criminal mischief would be inference that recent and unexplained possession of newly damaged property implied that possessor was responsible for damage, but since mere passenger cannot possess car, no such inference could be drawn. People v Simmons, 139 Misc. 2d 859, 528 N.Y.S.2d 984, 1988 N.Y. Misc. LEXIS 286 (N.Y. Crim. Ct. 1988).

Where the only proof that the damage caused by defendant was over $1500 was given by the complainant, the evidence was insufficient to support defendant's conviction of criminal mischief in the second degree, and defendant should have been convicted of criminal mischief in the fourth degree. People v Deolall, 7 A.D.3d 635, 777 N.Y.S.2d 173, 2004 N.Y. App. Div. LEXIS 6901 (N.Y. App. Div. 2d Dep't), app. denied, 3 N.Y.3d 658, 782 N.Y.S.2d 700, 816 N.E.2d 573, 2004 N.Y. LEXIS 3062 (N.Y. 2004).

Since it was impossible to infer the requisite intent that a juvenile intended to damage a door, it was improper to find him a delinquent based on acts that would have constituted criminal mischief. In re Brandon S., 8 A.D.3d 31, 777 N.Y.S.2d 638, 2004 N.Y. App. Div. LEXIS 7592 (N.Y. App. Div. 1st Dep't 2004).

Defendant's conviction for criminal for criminal mischief in the fourth degree was not supported by legally sufficient evidence because an essential element of the crime, under N.Y. Penal Law § 145.00(1), is that defendant damaged the property of another person, and the People failed to prove that the residence that defendant damaged was owned by another person. People v Bertone, 16 A.D.3d 710, 790 N.Y.S.2d 311, 2005 N.Y. App. Div. LEXIS 2165 (N.Y. App. Div. 3d Dep't), app. denied, 5 N.Y.3d 759, 801 N.Y.S.2d 253, 834 N.E.2d 1263, 2005 N.Y. LEXIS 1921 (N.Y. 2005).

Jury's verdict, which found defendant guilty of criminal mischief in the fourth degree under N.Y. Penal Law § 145.00(1), was against the weight of the evidence because the jury failed to give the evidence the weight it should have been accorded on the issue of defendant's intent. Specifically, although defendant might have acted recklessly with respect to damage to a victim's car, the evidence weighed heavily in favor of a finding that defendant did not specifically intend to damage the car. People v Terborg, 35 A.D.3d 1169, 825 N.Y.S.2d 897, 2006 N.Y. App. Div. LEXIS 15591 (N.Y. App. Div. 4th Dep't 2006), app. denied, 2007 N.Y. LEXIS 1250 (N.Y. Mar. 29, 2007), app. denied, 8 N.Y.3d 927, 834 N.Y.S.2d 518, 866 N.E.2d 464, 2007 N.Y. LEXIS 1226 (N.Y. 2007).

Evidence did not support conclusion that juvenile was the initial aggressor, because juvenile's insults were not sufficient to make him the initial aggressor in the altercation, and allegations that juvenile committed acts which, had they been committed by an adult, would have constituted the crimes of assault and criminal mischief must be dismissed since they were based upon conduct which were justified in the juvenile's self-defense. Matter of Mondy E., 121 A.D.3d 785, 994 N.Y.S.2d 173, 2014 N.Y. App. Div. LEXIS 6820 (N.Y. App. Div. 2d Dep't 2014).

While defendant assaulted the victim while the victim was trying to make a 911 call, tied the victim's hands with the telephone cord, and slammed the telephone on the victim's hands/fingers, because defendant did not remove or disable the telephone, defendant did not violate N.Y. Penal Law § 145.00(4); therefore, pursuant to N.Y. Crim. Proc. Law § 330.30(1) the criminal mischief guilty verdict was set aside. People v Syville, 938 N.Y.S.2d 882, 35 Misc. 3d 435, 2012 N.Y. Misc. LEXIS 581 (N.Y. Sup. Ct. 2012).

9. Jury instructions

Refusal to charge on crime of criminal mischief was not error where defendant was charged solely with attempted burglary and neither intentional nor reckless destruction of property was necessary element of charged crime. People v Henderson, 41 N.Y.2d 233, 391 N.Y.S.2d 563, 359 N.E.2d 1357, 1976 N.Y. LEXIS 3148 (N.Y. 1976).

In a prosecution for fourth degree criminal mischief arising out of a barroom incident during which defendant broke the glass in an emergency fire exit door, the trial court committed reversible error by failing to charge the jury on the defense of justification pursuant to Penal Law § 35.05, since defendant's testimony that he pushed on the door frame and broke the glass in an attempt to retreat from an unprovoked assault by the bar owner was a sufficient basis for the requested charge, and, though defendant never admitted that he intended to cause the property damage, the availability of the justification defense is not limited to cases in which the act committed in avoidance of the allegedly greater injury is admitted to have been intentional. People v Padgett, 60 N.Y.2d 142, 468 N.Y.S.2d 854, 456 N.E.2d 795, 1983 N.Y. LEXIS 3411 (N.Y. 1983).

A conviction of criminal mischief in the third degree would be reduced to criminal mischief in the fourth degree where the trial court improperly refused to charge the fourth-degree offense inasmuch as defendant did not intentionally damage property in an amount exceeding $250. People v Benigno, 87 A.D.2d 597, 447 N.Y.S.2d 748, 1982 N.Y. App. Div. LEXIS 15872 (N.Y. App. Div. 2d Dep't), app. denied, 56 N.Y.2d 808, 1982 N.Y. LEXIS 5990 (N.Y. 1982).

Court properly refused to charge fourth degree criminal mischief as lesser included offense of second degree criminal mischief where no reasonable view of evidence could support finding that damage inflicted by defendant was less than $250. People v Simpson, 132 A.D.2d 894, 518 N.Y.S.2d 453, 1987 N.Y. App. Div. LEXIS 49360 (N.Y. App. Div. 3d Dep't), app. denied, 70 N.Y.2d 937, 524 N.Y.S.2d 689, 519 N.E.2d 635, 1987 N.Y. LEXIS 19828 (N.Y. 1987).

There was no reasonable view of evidence to support finding that defendant slashed victim's tire as necessary emergency measure to avoid imminent injury so as to justify jury charge on justification defense in prosecution for fourth degree criminal mischief where confrontation between defendant and victim had already ended and defendant was completely free to leave area at time he committed offense. People v Bolton, 213 A.D.2d 660, 624 N.Y.S.2d 210, 1995 N.Y. App. Div. LEXIS 3160 (N.Y. App. Div. 2d Dep't), app. denied, 85 N.Y.2d 970, 629 N.Y.S.2d 730, 653 N.E.2d 626, 1995 N.Y. LEXIS 2269 (N.Y. 1995).

In prosecution for second degree escape and fourth degree criminal mischief, it was reversible error to deny defendant's request to charge justification defense where he testified that, while he was being transported by parole officers to county jail after being arrested on parole revocation warrant, parole officers began to taunt him, and that, while they were stopped at red light, one officer held him while other officer punched him, and he stated that he kicked out window of vehicle and escaped because he was being attacked and feared for his life. People v Mercer, 267 A.D.2d 1019, 701 N.Y.S.2d 551, 1999 N.Y. App. Div. LEXIS 13771 (N.Y. App. Div. 4th Dep't 1999).

Indictment counts charging defendant with reckless endangerment of property and fourth degree criminal mischief, as well as jury's findings of guilt on both counts, were not inconsistent, and thus jury charge under CLS CPL § 300.40(5) was not required, where (1) despite same mental state of recklessness involved in both crimes, results of damage to property as opposed to risk of damage to property were different, (2) acts constituting offenses

were different, (3) court instructed jury that alleged conduct causing damage to property supporting reckless endangerment of property was defendant's jumping from moving truck, and (4) although court referred to no specific conduct while instructing on mischief charge, jury could have found that requisite risk of damage to truck arose earlier when defendant recklessly drove into field. People v Swart, 273 A.D.2d 503, 709 N.Y.S.2d 653, 2000 N.Y. App. Div. LEXIS 6436 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 908, 716 N.Y.S.2d 649, 739 N.E.2d 1154, 2000 N.Y. LEXIS 3723 (N.Y. 2000).

New trial was required on charges of burglary in the second degree and criminal mischief in the fourth degree; the trial court erred in denying defendant's request for a charge on intoxication and the error was not harmless given the evidence of defendant's intent on those charges was not overwhelming. People v Velez, 132 A.D.3d 916, 17 N.Y.S.3d 780, 2015 N.Y. App. Div. LEXIS 7763 (N.Y. App. Div. 2d Dep't 2015).

10. Lesser included offenses

Where evidence established that defendants inflicted intentional damage to an automobile but did not show that the value of the automobile exceed $250, their convictions for criminal mischief in the third degree would be modified by reducing the convictions to the lesser included offense of criminal mischief in the fourth degree. People v Johnson, 58 A.D.2d 662, 395 N.Y.S.2d 524, 1977 N.Y. App. Div. LEXIS 12761 (N.Y. App. Div. 3d Dep't 1977).

In a prosecution for attempted robbery in the second degree the defendant was improperly convicted of attempted larceny in the second degree as a lesser included offense, since grand larceny in the second degree is not a lesser included offense of robbery. Since there was no proof of the value of the property which the defendant allegedly had attempted to steal, there was insufficient proof of the commission of a felony upon which a felony assault conviction could have been based. However, evidence did support conviction for the crime of reckless endangerment in the second degree, where the defendant had attacked a taxi driver, knocked him down and kicked him in the eye. But, since the evidence did not reveal a specific intent directed toward the victim's eyeglasses which were broken during the attack, it did not support conviction of criminal mischief in the fourth degree. People v Bryant, 82 A.D.2d 758, 440 N.Y.S.2d 204, 1981 N.Y. App. Div. LEXIS 14397 (N.Y. App. Div. 1st Dep't), op. withdrawn, 85 A.D.2d 575, 445 N.Y.S.2d 711, 1981 N.Y. App. Div. LEXIS 16371 (N.Y. App. Div. 1st Dep't 1981).

Defendant's conviction for third-degree criminal mischief would be reduced to fourth-degree criminal mischief, where to support a conviction for third-degree criminal mischief the people had to prove beyond a reasonable doubt that the damage to the victim's property exceeded $250, where the evidence showed only that there was one small hole in one of the panes of glass in an office window and bent protective bars, where that evidence did not establish the requisite value, and where the evidence was sufficient only to support the jury's determination that defendant had intentionally damaged the property of another person. People v Cunningham, 95 A.D.2d 680, 463 N.Y.S.2d 470, 1983 N.Y. App. Div. LEXIS 18584 (N.Y. App. Div. 1st Dep't), app. denied, 60 N.Y.2d 615, 1983 N.Y. LEXIS 6063 (N.Y. 1983).

Court properly refused to charge fourth degree criminal mischief as lesser included offense of second degree criminal mischief where no reasonable view of evidence could support finding that damage inflicted by defendant was less than $250. People v Simpson, 132 A.D.2d 894, 518 N.Y.S.2d 453, 1987 N.Y. App. Div. LEXIS 49360 (N.Y. App. Div. 3d Dep't), app. denied, 70 N.Y.2d 937, 524 N.Y.S.2d 689, 519 N.E.2d 635, 1987 N.Y. LEXIS 19828 (N.Y. 1987).

In prosecution arising from incident in which defendant removed water heater from victim's house and placed it on his truck, possibly injuring heater, third degree criminal mischief conviction would be reduced to fourth degree for lack of proof that damage to property exceeded $250, since (1) People did not adduce proof of monetary amount of damages to heater itself, and thus jury could only consider cost for reinstalling water heater, not cost of new water heater, and (2) jury could only conclude that cost for installation was about $120 in view of evidence that it cost $355 to install heater but $234 of that amount was attributable to cost of new heater. People v David, 133 A.D.2d 277, 519 N.Y.S.2d 67, 1987 N.Y. App. Div. LEXIS 49766 (N.Y. App. Div. 2d Dep't 1987).

Criminal mischief in fourth degree is not lesser included offense of second degree arson since it is possible to commit greater offense (e.g., by setting fire to one's own residence) without concomitantly committing lesser offense. In re Christopher E., 171 A.D.2d 976, 567 N.Y.S.2d 918, 1991 N.Y. App. Div. LEXIS 3838 (N.Y. App. Div. 3d Dep't 1991).

Court should have charged fourth degree criminal mischief as lesser included offense in trial for third degree criminal mischief, since jury could have found that defendant acted recklessly rather than intentionally in damaging his girlfriend's car as he left party, where there was evidence that defendant had drunk 2 40-ounce containers of beer and (with his cousin) pint of gin before going to party, and that while at party, defendant drank beer, alcoholic punch, and brandy. People v Young, 207 A.D.2d 1011, 617 N.Y.S.2d 254, 1994 N.Y. App. Div. LEXIS 10271 (N.Y. App. Div. 4th Dep't 1994).

Conviction of third degree criminal mischief would be reduced to fourth degree criminal mischief where evidence did not prove that amount of damage to vehicle intentionally caused by defendant exceeded $250. People v Duran, 238 A.D.2d 351, 656 N.Y.S.2d 56, 1997 N.Y. App. Div. LEXIS 3375 (N.Y. App. Div. 2d Dep't 1997).

11. Sentencing

It was error to sentence defendant to concurrent prison terms of one year on his convictions of fourth degree weapon possession and fourth degree criminal mischief, both class A misdemeanors, and sentence would be modified to concurrent 6-month terms. People v Freeman, 133 A.D.2d 842, 520 N.Y.S.2d 359, 1987 N.Y. App. Div. LEXIS 51892 (N.Y. App. Div. 2d Dep't), app. denied, 70 N.Y.2d 931, 524 N.Y.S.2d 683, 519 N.E.2d 629, 1987 N.Y. LEXIS 19664 (N.Y. 1987).

Defendant convicted of first degree criminal contempt, third degree assault, and fourth degree mischief was properly sentenced to consecutive prison terms where each offense consisted of separate act, and none of acts constituting each offense was material element of another. People v Frederick, 281 A.D.2d 963, 723 N.Y.S.2d 302, 2001 N.Y. App. Div. LEXIS 2826 (N.Y. App. Div. 4th Dep't), app. denied, 96 N.Y.2d 829, 729 N.Y.S.2d 449, 754 N.E.2d 209, 2001 N.Y. LEXIS 2151 (N.Y. 2001).

Consecutive sentences for robbery in the third degree, N.Y. Penal Law § 160.05, criminal mischief in the fourth degree, N.Y. Penal Law § 145.00(3), and endangering the welfare of a child, N.Y. Penal Law § 260.10(1), based upon defendant's theft of two pairs of shoes from a department store while his two young children were present were illegal; the acts which constituted the crime of endangering the welfare of a child were not separate and distinct from the acts which constituted the crimes of robbery and criminal mischief. Further, the evidence established that, during his flight from the department store, defendant "floored" his vehicle in reverse with his driver's side door open, striking a security guard as well as the vehicle parked beside his vehicle, which acts served as the basis for the criminal mischief count and for the "use of physical force" element of the robbery count and thus the sentences imposed on the robbery and the criminal mischief counts also had to run concurrently. People v Dekenipp, 105 A.D.3d 1346, 964 N.Y.S.2d 792, 2013 N.Y. App. Div. LEXIS 2790 (N.Y. App. Div. 4th Dep't), app. denied, 21 N.Y.3d 1041, 972 N.Y.S.2d 538, 995 N.E.2d 854, 2013 N.Y. LEXIS 2586 (N.Y. 2013).

12. Verdict

Verdict finding defendant guilty of discharging firearm across public highway was not repugnant to his acquittal on charges of first degree reckless endangerment and fourth degree criminal mischief since intent is not element of discharging firearm across public highway. People v Maille, 136 A.D.2d 829, 523 N.Y.S.2d 667, 1988 N.Y. App. Div. LEXIS 364 (N.Y. App. Div. 3d Dep't 1988).

Indictment counts charging defendant with reckless endangerment of property and fourth degree criminal mischief, as well as jury's findings of guilt on both counts, were not inconsistent, and

thus jury charge under CLS CPL § 300.40(5) was not required, where (1) despite same mental state of recklessness involved in both crimes, results of damage to property as opposed to risk of damage to property were different, (2) acts constituting offenses were different, (3) court instructed jury that alleged conduct causing damage to property supporting reckless endangerment of property was defendant's jumping from moving truck, and (4) although court referred to no specific conduct while instructing on mischief charge, jury could have found that requisite risk of damage to truck arose earlier when defendant recklessly drove into field. People v Swart, 273 A.D.2d 503, 709 N.Y.S.2d 653, 2000 N.Y. App. Div. LEXIS 6436 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 908, 716 N.Y.S.2d 649, 739 N.E.2d 1154, 2000 N.Y. LEXIS 3723 (N.Y. 2000).

Defendant's convictions for criminal mischief were reversed where defendant was acquitted of making graffiti charges based on the same alleged act of vandalism as the only evidence of property damage submitted to the jury was of spray-painting. People v Wallender, 27 A.D.3d 955, 812 N.Y.S.2d 157, 2006 N.Y. App. Div. LEXIS 3579 (N.Y. App. Div. 3d Dep't 2006).

II. Under Former Law

13. Under former § 464

No person, except by authority of the Legislature, or of the authorized agents of the state, has a right to tap the state dam, and draw off the waters of the artificial pond which is created by such dam for public purposes. Varick v Smith, 1835 N.Y. LEXIS 224 (N.Y. Mar. 17, 1835).

14. Under former § 1423

One who maliciously throws a switch without authority and thereby stops certain machinery violates subd. Smith v Bell & Fyfe Foundry Co., 127 A.D. 278, 111 N.Y.S. 202, 1908 N.Y. App. Div. LEXIS 1954 (N.Y. App. Div. 1908).

State was not liable for accident caused by ice on highway brought about by obstruction of a gutter by an adjoining owner, where evidence established that the failure of owner to remove the obstruction was the proximate cause of the action and the driver of the automobile was contributorily negligent Rasher v State, 3 Misc. 2d 324, 154 N.Y.S.2d 621, 1956 N.Y. Misc. LEXIS 1618 (N.Y. Ct. Cl. 1956), app. dismissed, 7 A.D.2d 954, 182 N.Y.S.2d 1018, 1959 N.Y. App. Div. LEXIS 9995 (N.Y. App. Div. 3d Dep't 1959).

A person who wilfully or maliciously removes a highway sign designating a highway may be punished under the provisions of sub 11 of this section 1952 Ops St Compt, File #5757.

15. Under former § 1425; in general

To establish the offense it is simply necessary to show that the act was done intentionally without the consent of the owner and without right. Anderson v How, 116 N.Y. 336, 22 N.E. 695, 116 N.Y. (N.Y.S.) 336, 1889 N.Y. LEXIS 1340 (N.Y. 1889).

Section 1425 and prosecution for violation of subd. 11-a by placing emery dust in complainant's motor truck, evidence to rebut defendant's denial that defendant on another occasion put emery dust in another vehicle held inadmissible. People v Edwards, 282 N.Y. 413, 26 N.E.2d 957, 282 N.Y. (N.Y.S.) 413, 1940 N.Y. LEXIS 950 (N.Y. 1940).

Defendant charged with publicly defiling and casting contempt on flag, contrary to subd. 16, is not entitled to certificate that prosecution should be by indictment because court, in zeal for fairness, should not be carried too far by claim that trial before jury not yet summoned will not be fair. Burden is on applicant to demonstrate that fair trial cannot be had where offense was allegedly committed. People v Katzowitz, 267 N.Y.S. 748, 150 Misc. 63, 1933 N.Y. Misc. LEXIS 1710 (N.Y. County Ct. 1933).

Court will not enjoin use of similar trade-mark where buyers could not be misled. Durable Toy & Novelty Corp. v J. Chein & Co., 133 F.2d 853, 1943 U.S. App. LEXIS 3905 (2d Cir. N.Y.), cert. denied, 320 U.S. 211, 63 S. Ct. 1447, 87 L. Ed. 1849, 1943 U.S. LEXIS 1244 (U.S. 1943).

16. —Particular acts as malicious mischief

Cutting down plaintiff's land, which was higher than appellant's land, was wilful and unlawful and within subd. Hazak, Inc. v Robertson Goetz Bldg. Co., 289 N.Y. 478, 46 N.E.2d 893, 289 N.Y. (N.Y.S.) 478, 1943 N.Y. LEXIS 1148 (N.Y. 1943).

Letting air out of the tires of another's automobile is a misdemeanor if there is an injury to the automobile. People v Costello, 305 N.Y. 63, 110 N.E.2d 880, 305 N.Y. (N.Y.S.) 63, 1953 N.Y. LEXIS 836 (N.Y. 1953).

Evidence revealing that defendant's companion had thrown a litter basket at the complaining witness and struck the witness' car, and that defendant had punched and kicked at the complaining witness' friends was insufficient to support a conviction under a complaint charging malicious mischief. People v Washington, 18 N.Y.2d 366, 275 N.Y.S.2d 508, 222 N.E.2d 378, 1966 N.Y. LEXIS 984 (N.Y. 1966).

Removal of soil which may in a given instance be done without injury to real property comes within § 1425; but the same act which injures and destroys real proeprty comes within § 1433, subd. 3. New York Institute for Education of Blind v Colonial Sand & Stone Co., 264 A.D. 339, 35 N.Y.S.2d 368, 1942 N.Y. App. Div. LEXIS 4144 (N.Y. App. Div. 1942).

Where shots are fired into an automobile, damaging it and causing it to overturn, killing the operator, the offense under this section of causing damage to property is distinct and not merged in a homicide or manslaughter charge based on the operator's death. People v Nicoll, 3 A.D.2d 64, 158 N.Y.S.2d 279, 1956 N.Y. App. Div. LEXIS 3490 (N.Y. App. Div. 4th Dep't 1956).

The evidence was not sufficient to sustain conviction for malicious injury to property where it merely showed that defendant was observed standing alongside the smashed window of a parked car with dirty and blood smeared hands and two slightly flattened balls of tinfoil in his pockets, plus testimony of a police officer who had experience as an auto mechanic that tinfoil could be used for "jumping" the ignition switch in order to start a car. People v Lashway, 16 A.D.2d 637, 227 N.Y.S.2d 202, 1962 N.Y. App. Div. LEXIS 10211 (N.Y. App. Div. 1st Dep't 1962).

Family court did not err in granting the petitioner's application for an order of protection because petitioner prove that respondent committed criminal mischief because he intentionally damaged petitioner's property when he kicked the door and broke the glass in the upper part of the door. Matter of Bedford v Seeley, 176 A.D.3d 1338, 112 N.Y.S.3d 295, 2019 N.Y. App. Div. LEXIS 7522 (N.Y. App. Div. 3d Dep't 2019).

One who enters on a forest reserve and cuts trees violates subd. 1 of this section. People v Gallagher, 111 N.Y.S. 473, 58 Misc. 512, 1908 N.Y. Misc. LEXIS 387 (N.Y. Sup. Ct. 1908).

Landlord who, before expiration of lease and in violation thereof, by means which violate no existing statute, re-enters premises in absence of tenant, to make repairs, is mere trespasser and commits no crime by such act. People v Zittel, 186 N.Y.S. 648, 114 Misc. 33, 1920 N.Y. Misc. LEXIS 1976 (N.Y. Gen. Sess. 1920).

Whatever rights the public may have to catch freely moving fish in navigable waters, the public does not have the right to rake for shellfish in private lands under those waters. People v Johnson, 7 Misc. 2d 385, 166 N.Y.S.2d 732, 1957 N.Y. Misc. LEXIS 2419 (N.Y. Police Ct. 1957).

17. — —Flag involved

Judgments convicting defendants of desecrating flag of United States of America are affirmed, where jury could properly find that automobile of defendants, on which appeared at six different places defendants' name, emblem and appeal to "Travel America," constituted one advertisement to which flag of United States of America was affixed, in violation of statute. People v Picking, 263 A.D. 366, 33 N.Y.S.2d 317, 1942 N.Y. App. Div. LEXIS 6892 (N.Y. App. Div.), aff'd, 288 N.Y. 644, 42 N.E.2d 741, 288 N.Y. (N.Y.S.) 644, 1942 N.Y. LEXIS 1486 (N.Y. 1942).

The statute was unconstitutionally applied insofar as it permitted a person to be punished merely for speaking defiant or contemptuous words about the American flag. A state may not constitutionally inflict criminal punishment upon a person for publicly defying or casting contempt upon the American flag by words where (1) the person, after setting the American flag on fire, was standing on a street corner and speaking to a small crowd, (2) he said to the crowd "we don't need no damn flag," and when questioned by a police officer, he said "we don't need an

American flag," (3) the crowd did not obstruct the street or sidewalk and was not unruly or threatening, (4) the person's words, taken alone, did not urge anyone to do anything unlawful, but amounted only to somewhat excited public advocacy of the idea that the United States should abandon, at least temporarily, one of its national symbols, (5) the statute making it a misdemeanor publicly to defy or cast contempt upon the flag by words did not purport to punish only those defiant or contemptuous words which amounted to incitement, and there was no evidence that the state courts regarded the statute as so limited, (6) the person's remarks were not so inherently inflammatory as to amount to fighting words which were likely to provoke the average person to retaliation and thereby cause a breach of the peace, (7) the statute was not narrowly drawn so as to punish only such fighting words, and there was no indication that it had been so interpreted by the state courts, (8) the person's words were not likely to have any shock effect on passers-by, and (9) there was no indication that the state court regarded the statute as limited to words which were likely to have such shock effect. Street v New York, 394 U.S. 576, 89 S. Ct. 1354, 22 L. Ed. 2d 572, 1969 U.S. LEXIS 3189 (U.S. 1969).

18. — —Seals involved

Where a defendant, after purchasing a farm upon which he gave a purchase money mortgage, cut certain timber with as he claimed, the consent of the complaining witness for use in either repairing a barn or selling it to defray the cost of such repairs, it was questionable whether the defendant could properly have been convicted of anything more than a misdemeanor of malicious injury to property. People v Moltesen, 282 A.D. 1090, 126 N.Y.S.2d 217, 1953 N.Y. App. Div. LEXIS 5892 (N.Y. App. Div. 1953).

19. — —Timber involved

Allowing treble damages for injury to trees was improper where subdivision 1 of § 1425 of the former Penal Law dealt specifically with injuries to trees and did not provide for civil liability of treble damages. Voetsch v Mt. Vernon Contracting Corp., 35 A.D.2d 677, 314 N.Y.S.2d 933, 1970 N.Y. App. Div. LEXIS 3883 (N.Y. App. Div. 2d Dep't 1970).

20. Under former § 1427

Joint owner of cemetery lot who removes inscription from tombstone against protest of other owners, is not guilty of crime under subd. 2 of this section. People v Otis, 137 A.D. 426, 121 N.Y.S. 810, 1910 N.Y. App. Div. LEXIS 698 (N.Y. App. Div.), app. dismissed, 200 N.Y. 555, 93 N.E. 1128, 200 N.Y. (N.Y.S.) 555, 1910 N.Y. LEXIS 1512 (N.Y. 1910).

Justice of the Peace was not disqualified to try defendants on charge of malicious mischief merely because information stated that defendants placed a gravestone on the lawn of the Justice's house. People v McDonald, 8 Misc. 2d 50, 167 N.Y.S.2d 394, 1957 N.Y. Misc. LEXIS 2288 (N.Y. County Ct. 1957).

Defendant could not be convicted under § 1433 for injury to an azalea bush, since it is an ornamental plant and is covered by § 1427. People v Edstrom, 15 Misc. 2d 567, 185 N.Y.S.2d 181, 1958 N.Y. Misc. LEXIS 3218 (N.Y. County Ct. 1958).

21. Under former § 1435

Acquittal of assault charge is not inconsistent with conviction of malicious mischief. Querze v Querze, 288 N.Y. 620, 42 N.E.2d 615, 288 N.Y. (N.Y.S.) 620, 1942 N.Y. LEXIS 1464 (N.Y. 1942).

A warrant for the arrest of one under this section should allege that the accused "unlawfully and wilfully" did the act charged. Krauskopf v Tallman, 38 A.D. 273, 56 N.Y.S. 967, 1899 N.Y. App. Div. LEXIS 502 (N.Y. App. Div. 1899), aff'd, 170 N.Y. 561, 62 N.E. 1096, 170 N.Y. (N.Y.S.) 561, 1902 N.Y. LEXIS 1089 (N.Y. 1902).

Possession awarded receivers by court order of appointment during pendency of action to foreclose mortgage on theatre premises constitutes in them special property in realty and fixtures, which possession and special property is that "of another," capable of being injured and destroyed by wilful and malicious acts. People v Reade, 247 A.D. 376, 287 N.Y.S. 473, 1936 N.Y. App. Div. LEXIS 8269 (N.Y. App. Div. 1936).

This section is not applicable where plaintiff acquiesced in conversion, and where no crime was committed. Rock v Belmar Contracting Co., 252 N.Y.S. 463, 141 Misc. 242, 1930 N.Y. Misc. LEXIS 1814 (N.Y. Sup. Ct. 1930).

Conviction is defective where prisoner was convicted and sentenced for malicious mischief in violation of this section without specifying value of property destroyed or diminution in value of property by reason of injury since there is nothing to show whether prisoner was convicted of misdemeanor or felony. People ex rel. Sweet v Lewis, 271 N.Y.S. 154, 150 Misc. 650, 1934 N.Y. Misc. LEXIS 1251 (N.Y. County Ct. 1934).

Judgment of conviction on information which charges defendant with willful injury to property, in violation of § 1433, must be reversed, where allegation showing the value or diminution in value of said property to be $250 or less was omitted from information, inasmuch as such omission is more than a mere irregularity and renders the information insufficient to confer jurisdiction of the court of special sessions. People v Freer, 12 N.Y.S.2d 856, 171 Misc. 478, 1939 N.Y. Misc. LEXIS 1961 (N.Y. County Ct. 1939).

Arrest of bankrupt on body execution for non-payment of judgment for treble damages for unlawful and wilful destruction and injury to real property is justifiable, since "unlawful and wilful" are practically synonymous with "wilful and malicious," and therefore arrest is upon a debt not dischargeable in bankruptcy by virtue of Bankruptcy Act, USC, Title 11, § 35. Ex parte Goldstein, 30 F. Supp. 443, 1939 U.S. Dist. LEXIS 2061 (D.N.Y. 1939).

22. —Nature and elements of offense

There must be proved an unlawful as well as a wilful destruction of property. People v Kane, 131 N.Y. 111, 29 N.E. 1015, 131 N.Y. (N.Y.S.) 111, 1892 N.Y. LEXIS 1000 (N.Y. 1892).

The word "wilfully" would seem to include and require that the element of intent to do the damage complained of, or at least an intent to damage property must be shown to sustain a conviction. People v Washington, 18 N.Y.2d 366, 275 N.Y.S.2d 508, 222 N.E.2d 378, 1966 N.Y. LEXIS 984 (N.Y. 1966).

A conviction for unlawful entry may not be sustained in the absence of proof from which an inference may be drawn that defendant had an intent to commit a crime at the time of entry. People v Hamilton, 18 A.D.2d 871, 237 N.Y.S.2d 97, 1963 N.Y. App. Div. LEXIS 4925 (N.Y. App. Div. 4th Dep't 1963).

A conviction of malicious mischief cannot be sustained where there is no evidence that the injury to the property was willful. People v Callahan, 19 A.D.2d 889, 244 N.Y.S.2d 766, 1963 N.Y. App. Div. LEXIS 3003 (N.Y. App. Div. 2d Dep't 1963), cert. denied, 376 U.S. 966, 84 S. Ct. 1130, 11 L. Ed. 2d 983, 1964 U.S. LEXIS 1574 (U.S. 1964).

To sustain a conviction for violation of this section it must appear that defendant wilfully destroyed or injured some property of another, and it is not sufficient to show that he intended to injure the person of another. People v Hackley, 20 A.D.2d 534, 245 N.Y.S.2d 58, 1963 N.Y. App. Div. LEXIS 2695 (N.Y. App. Div. 1st Dep't 1963).

This section is not applicable where no evidence of actual physical damage to the property of another is shown. Cherno v Bank of Babylon, 54 Misc. 2d 277, 282 N.Y.S.2d 114, 1967 N.Y. Misc. LEXIS 1399 (N.Y. Sup. Ct. 1967), aff'd, 29 A.D.2d 767, 288 N.Y.S.2d 862, 1968 N.Y. App. Div. LEXIS 4697 (N.Y. App. Div. 2d Dep't 1968).

23. —Liability for treble damages

Action by assignee of contract for purchase of dwelling house against owners and vendors thereof, to recover damages for injuries alleged to have been wilfully, maliciously and wantonly inflicted thereon by owners pending contract and conveyance, is maintainable, but plaintiff in such action is not entitled to treble damages, because his ownership during contract period is merely equitable, and not such as to entitle him to benefit of this section which applies only to damages to "real or personal property of another"—that is to one holding legal title. Potter v Bierwirth, 171 A.D. 175, 157 N.Y.S. 25, 1916 N.Y. App. Div. LEXIS 10328 (N.Y. App. Div. 1916).

In action to recover damages for unlawful and wilful injury to personal property, plaintiff has right, under subd. 3, to judgment for treble amount of actual damages found by jury. Alloway v Hickok, 215 A.D. 86, 213 N.Y.S. 192, 1925 N.Y. App. Div. LEXIS

5369 (N.Y. App. Div. 1925), aff'd, 243 N.Y. 615, 154 N.E. 628, 243 N.Y. (N.Y.S.) 615, 1926 N.Y. LEXIS 905 (N.Y. 1926).

Plaintiff is entitled to permanent injunction restraining defendants from entering upon plaintiff's tract and unlawfully and willfully destroying and injuring the real property, and to recover from defendant sand company, treble damages, under § 1433, subd. 3 where evidence established that while wrongful acts of sand company were not willful when it entered upon plaintiff's property on representations made by individual defendant, the proof shows that after being advised that the company should stop taking top soil belonging to plaintiff, it continued its acts of removing soil without making any search or obtaining any proper survey of property. New York Institute for Education of Blind v Colonial Sand & Stone Co., 264 A.D. 339, 35 N.Y.S.2d 368, 1942 N.Y. App. Div. LEXIS 4144 (N.Y. App. Div. 1942).

Judgment for the plaintiff in an action for treble damages sustained when the defendant ran his boat into and rammed the plaintiff's boat affirmed. Lindsey v Zagame, 275 A.D. 720, 88 N.Y.S.2d 254, 1949 N.Y. App. Div. LEXIS 4198 (N.Y. App. Div. 1949).

Treble damages cannot be awarded for a mere trespass to real property by defendant, in the absence of proof that the trespass was both unlawful and willful, and proof establishing that it was willful is not, of itself, sufficient to show that it was likewise unlawful and with criminal intent. MacDonald v Parama, Inc., 15 A.D.2d 797, 224 N.Y.S.2d 854, 1962 N.Y. App. Div. LEXIS 11599 (N.Y. App. Div. 2d Dep't 1962).

To recover treble damages pursuant to former Penal Law § 1433 requires a finding of criminality. Kessler v Hunter, 30 A.D.2d 573, 291 N.Y.S.2d 268, 1968 N.Y. App. Div. LEXIS 3864 (N.Y. App. Div. 2d Dep't 1968).

Where the grantee of land on which was located a wooden structure which did not pass with the land, brought action for injury to such building it was held such grantee could not obtain treble damages under this section. Sacret Heart Roman Catholic Church v Vedder, 142 N.Y.S. 870, 80 Misc. 541, 1913 N.Y. Misc. LEXIS 1194 (N.Y. County Ct. 1913).

This section is not applicable where, in view of stipulation of parties, they intended that trial justice should determine single damages and not treble damages. Rock v Belmar Contracting Co., 252 N.Y.S. 463, 141 Misc. 242, 1930 N.Y. Misc. LEXIS 1814 (N.Y. Sup. Ct. 1930).

Where plaintiff and defendant own adjoining lots on which is a two-family building, defendant is not liable for treble damages on tearing down his half of building. A claim for treble damages, under Real Prop. Law, § 535, Penal Law, § 1433, subd. 3, and Civil Practice Act, § 435, cannot be raised for the first time after a decision is rendered, when the complaint did not ask for treble damages. Schneider v 44-84 Realty Corp., 7 N.Y.S.2d 305, 169 Misc. 249, 1938 N.Y. Misc. LEXIS 2046 (N.Y. Sup. Ct. 1938), aff'd, 257 A.D. 932, 12 N.Y.S.2d 1022, 1939 N.Y. App. Div. LEXIS 8484 (N.Y. App. Div. 1939).

Acquittal on a criminal prosecution is no defense to an action to recover treble damages. Von Hoffman v Kendall, 17 N.Y.S. 713, 63 Hun 628, 1892 N.Y. Misc. LEXIS 474 (N.Y. Sup. Ct. 1892), app. dismissed, 138 N.Y. 629, 33 N.E. 1084 (N.Y. 1893).

Plaintiff is entitled to treble damages as a matter of right, where judgment was for willful and unlawful injury to real property. Marconi Realty Corp. v Goldstein, 13 N.Y.S.2d 547, 1939 N.Y. Misc. LEXIS 2071 (N.Y. App. Term 1939).

24. — —Stating cause of civil action

In a civil action under subdivision 3 of this section, a complaint must state facts sufficient to constitute a crime under the section. Polychrome Corp. v Lithotech Corp., 4 A.D.2d 968, 168 N.Y.S.2d 346, 1957 N.Y. App. Div. LEXIS 3850 (N.Y. App. Div. 2d Dep't 1957).

A cause of action for inducing a breach of contract was dismissed as insufficient, since this section deals with malicious mischief involving legal ownership of real and personal property and to support a recovery of treble damages, the cause must set forth facts to constitute a crime within the statute. Frischman v Metropolitan Tobacco Co., 104 N.Y.S.2d 446, 199 Misc. 844, 1951 N.Y. Misc. LEXIS 1755 (N.Y. Sup. Ct. 1951).

A complaint seeking treble damages for trespass must state facts sufficient to constitute a crime under this section and to show that the trespass caused unlawful and willful destruction or injury to real or personal property of plaintiff. Goldson v Englard, 219 N.Y.S.2d 898 (N.Y. Sup. Ct. 1961).

Where plaintiff alleged that defendants, with knowledge of plaintiff's contractual rights with a corporation, conspired to deprive plaintiff of the benefits thereof, and alleged various acts in furtherance of the conspiracy including, among others, opening plaintiff's mail, slandering his business reputation and ability, and destroying plaintiff's property without justification and actuated solely by malice against the plaintiff, such allegations state a cause of action under §§ 1433 and 1436. Vassardakis v Parish, 36 F. Supp. 1002, 1941 U.S. Dist. LEXIS 3833 (D.N.Y. 1941).

25. —Admissibility of evidence

Injury to window and electric globe is within section. People v Paterra, 265 N.Y. 445, 193 N.E. 263, 265 N.Y. (N.Y.S.) 445, 1934 N.Y. LEXIS 1059 (N.Y. 1934).

In prosecution of union members for placing emery in crank cases of taxicabs of corporation, evidence that later defendant had possession of emery and also threatened to burn taxicabs of such corporation, held inadmissible and prejudicial. People v Horie, 258 A.D. 246, 16 N.Y.S.2d 235, 1939 N.Y. App. Div. LEXIS 6412 (N.Y. App. Div. 1939).

26. —Particular acts

Evidence revealing that defendant's companion had thrown a litter basket at the complaining witness and struck the witness' car, and that defendant had punched and kicked at the complaining witness' friends was insufficient to support a conviction under a complaint charging malicious mischief. People v Washington, 18 N.Y.2d 366, 275 N.Y.S.2d 508, 222 N.E.2d 378, 1966 N.Y. LEXIS 984 (N.Y. 1966).

Sawing off fence posts and filing post holes, pursuant to state highway contract, held not violation of this section. McPhilomy v Williams, 249 A.D. 689, 291 N.Y.S. 278, 1936 N.Y. App. Div. LEXIS 5487 (N.Y. App. Div. 1936).

The action of a landlord of a six-family house in cutting the wires leading from a window television aerial to the apartment of a tenant and twisting the antenna when the tenant refused to remove it pursuant to the landlord's demand, constitutes a violation of this section. People v Stein, 277 A.D. 996, 100 N.Y.S.2d 41, 1950 N.Y. App. Div. LEXIS 4221 (N.Y. App. Div. 1950).

A claim of malicious interference with a contract is not made out by a showing that defendant told mutual customers that he would not sell them any merchandise unless they ceased purchasing Japanese merchandise sold by the plaintiffs. Photographic Importing & Distributing Corp. v Elgeet Optical Co., 282 A.D. 223, 122 N.Y.S.2d 215, 1953 N.Y. App. Div. LEXIS 4438 (N.Y. App. Div.), app. denied, 282 A.D. 836, 124 N.Y.S.2d 341, 1953 N.Y. App. Div. LEXIS 5090 (N.Y. App. Div. 1953).

Upon an examination of the entire record in a case where there had been a conviction under the above statute, on appeal the Appellate Division found that the record contained ample evidence to sustain the verdict of the jury and saw no reason to disturb it, holding further that the defendant had a fair trial, that the case was submitted to the jury upon a clear and comprehensive charge, and that the sentence was not excessive. People v Chambers, 24 A.D.2d 656, 261 N.Y.S.2d 171, 1965 N.Y. App. Div. LEXIS 3635 (N.Y. App. Div. 3d Dep't 1965), aff'd, 18 N.Y.2d 819, 275 N.Y.S.2d 526, 222 N.E.2d 391, 1966 N.Y. LEXIS 1024 (N.Y. 1966).

Defendants are not entitled to dismissal of complaint, charging them with malicious mischief, where it alleges that prior to foreclosure sale of certain real property, on which complainant held purchase-money mortgage of one of defendants, defendants removed plumbing equipment, mirrors and other articles attached to realty, to its damage. People ex rel. Scharfstein v Rader, 251 N.Y.S. 539, 140 Misc. 707, 1931 N.Y. Misc. LEXIS 1454 (N.Y. Magis. Ct. 1931).

27. — —Injury to incorporeal rights

Subdivision 3 of this section is intended to apply to actual physical damage to property, in the nature of mischief; and is not

intended to apply to violations of incorporeal rights. And mere breaches of contract or interference with contract rights or acts which do not constitute a crime under the section do not give rise to a civil cause of action. Polychrome Corp. v Lithotech Corp., 4 A.D.2d 968, 168 N.Y.S.2d 346, 1957 N.Y. App. Div. LEXIS 3850 (N.Y. App. Div. 2d Dep't 1957).

28. — —Acts covered by other statutes

Where plaintiff's civil action involves acts specifically covered, as to criminal punishment, by § 1425, subd. 4, § 1433, subd. 3 has no application, and there is no authority for trebling damages assessed by jury. Hazak, Inc. v Robertson Goetz Bldg. Co., 289 N.Y. 478, 46 N.E.2d 893, 289 N.Y. (N.Y.S.) 478, 1943 N.Y. LEXIS 1148 (N.Y. 1943).

This section does not apply to a case where the punishment is especially prescribed by another statute. People v Costello, 305 N.Y. 63, 110 N.E.2d 880, 305 N.Y. (N.Y.S.) 63, 1953 N.Y. LEXIS 836 (N.Y. 1953).

Removal of soil which may in a given instance be done without injury to real property comes within § 1425; but the same act which injures and destroys real property comes within § 1433, subd. 3. New York Institute for Education of Blind v Colonial Sand & Stone Co., 264 A.D. 339, 35 N.Y.S.2d 368, 1942 N.Y. App. Div. LEXIS 4144 (N.Y. App. Div. 1942).

This section was not applicable where the alleged waste amounted to theft and larceny and the motivation for the waste was personal profit rather than disinterested malevolence. Golding v Golding, 4 A.D.2d 65, 163 N.Y.S.2d 118, 1957 N.Y. App. Div. LEXIS 5363 (N.Y. App. Div. 1st Dep't 1957).

Allowing treble damages for injury to trees was improper where subdivision 1 of § 1425 of the former Penal Law dealt specifically with injuries to trees and did not provide for civil liability of treble damages. Voetsch v Mt. Vernon Contracting Corp., 35 A.D.2d 677, 314 N.Y.S.2d 933, 1970 N.Y. App. Div. LEXIS 3883 (N.Y. App. Div. 2d Dep't 1970).

Defendants, who entered church cemetery, and who knocked down and damaged monument stones, were improperly charged under subd. 2 of this section, since offense was expressly covered by § 1427 and § 1430 of the penal code. People v Wozniak, 14 Misc. 2d 909, 180 N.Y.S.2d 532, 1958 N.Y. Misc. LEXIS 2230 (N.Y. County Ct. 1958).

Defendant could not be convicted under this section for injury to an azalea bush, since it is an ornamental plant and is covered by § 1427. People v Edstrom, 15 Misc. 2d 567, 185 N.Y.S.2d 181, 1958 N.Y. Misc. LEXIS 3218 (N.Y. County Ct. 1958).

29. Under former § 1873

Refusal to permit a sheriff to take possession of an automobile levied upon by him, upon advice of counsel, may be a violation of this section. Williamson Mill & Lumber Co. v Valentine, 206 A.D. 252, 200 N.Y.S. 527, 1923 N.Y. App. Div. LEXIS 7187 (N.Y. App. Div. 1923).

Agency Opinions

Analysis

I. Under Former Law

1. Under former § 1423
2. Under former § 1425; in general
3. —Particular acts as malicious mischief
4. — —Flag involved
5. — —Seals involved
6. Under former § 1435
7. —Sentence

I. Under Former Law

1. Under former § 1423

Removal or destruction of parkway right of way monuments is punishable as a penal offense pursuant to provisions of Penal Law, § 1423, and the common law action, quaere clausum fregit is also available pursuant to authority conferred by Conser. Law, § 50. 1937 N.Y. Op. Att'y Gen. No. 234.

2. Under former § 1425; in general

3. —Particular acts as malicious mischief

4. — —Flag involved

State prohibition against display of national flag for advertising purposes does not contemplate official advertising of government for recruiting purposes. 1917 N.Y. Op. Att'y Gen. No. 395.

Citizens of foreign state may send letterheads and booklets, bearing imprint of shield or design of U.S. flag, into this state despite provision of penal law prohibiting citizens of this state issuing letterheads or booklets bearing such imprints. 1922 N.Y. Op. Att'y Gen. No. 124.

Use of representation of flag of United States or state upon bank check is prohibited by L 1922 c 270. 1922 N.Y. Op. Att'y Gen. No. 142.

Use, by Boy Scouts of America, of calendar picture which shows American Flag, is not violation of Penal Law, although calendars are to be sold to raise money for Scouts. 1928 N.Y. Op. Att'y Gen. No. 189.

5. — —Seals involved

While device in obvious, though not accurate, imitation of state seal might not subject maker to criminal prosecution, its use might have bearing upon opinion of secretary of state as to trustworthiness of private detective employing it. 1928 N.Y. Op. Att'y Gen. No. 160.

Impressions from metallic great seal of state ought not to be made upon anything but official documents, and use of pictorial representations thereof would seem to be against public policy. 1930 N.Y. Op. Att'y Gen. No. 115.

Map may not use shield of State, nor use words "Official Map," when not so authorized by legislation. 1937 N.Y. Op. Att'y Gen. No. 239.

Great seal of state may not be used on badges and badges must not misrepresent status or authority of officer. 1943 NY Ops Atty Gen Mar 24.

Reproduction of Great Seal of State of New York for private purposes is strongly against public policy; private use of Arms of State is regulated by § 1425, which excepts certain articles from prohibition against use on "articles of merchandise"; enforcement is for District Attorney. 1947 NY Ops Atty Gen Dec 12.

Destruction or removal of gates if done with wilful intent is also violation of this section and punishable as misdemeanor. 1935 N.Y. Op. Att'y Gen. No. 306.

Section 1425, subd. 16, is enforceable by criminal prosecution by district attorneys and is not in jurisdiction of state officers. 1943 NY Ops Atty Gen Mar. 23.

A right reserved by the State's grantor of forest preserve lands to maintain, use, control and operate a dam at the outlet of a lake on the lands conveyed and to enter upon such lands for the purpose of constructing, repairing, maintaining and operating the dam does not entitle the gate tender of the dam to live upon the lands conveyed or to cut firewood thereon or cultivate a portion thereof. 1949 NY Ops Atty Gen July 5.

6. Under former § 1435

7. —Sentence

The commitment of a first felony offender to the Reception Center under a maximum sentence of four years is proper. 1955 NY Ops Atty Gen Mar 28.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Intentionally, definition of, § 15.05(1).

Recklessly, definition of, § 15.05(3).

Certification of dwelling abandonment, CLS RPAPL § 1971.

Jurisprudences:

18 NY Jur 2d Cemeteries and Dead Bodies § 99.

35A NY Jur 2d Criminal Law Substantive Principles and Offenses §§ 849, 853, 861, 871, 877.

52 Am Jur 2d, Malicious Mischief § 3.

Criminal Jury Instructions: Criminal mischief, fourth degree (intentionally damaging another's property). CJI2d [NY] Penal Law § 145.00(1).

Criminal mischief, fourth degree (destruction of abandoned building). CJI2d [NY] Penal Law § 145.00(2).

Criminal mischief, fourth degree (recklessly damaging property; damage more than $250). CJI2d [NY] Penal Law § 145.00(3).

Texts: 1 Bergman on New York Mortgage Foreclosures (Matthew Bender) § 9.04.

New York Criminal Practice Ch. 62.

§ 145.05. Criminal mischief in the third degree

A person is guilty of criminal mischief in the third degree when, with intent to damage property of another person, and having no right to do so nor any reasonable ground to believe that he or she has such right, he or she:

1. damages the motor vehicle of another person, by breaking into such vehicle when it is locked with the intent of stealing property, and within the previous ten year period, has been convicted three or more times, in separate criminal transactions for which sentence was imposed on separate occasions, of criminal mischief in the fourth degree as defined in section 145.00, criminal mischief in the third degree as defined in this section, criminal mischief in the second degree as defined in section 145.10, or criminal mischief in the first degree as defined in section 145.12 of this article; or

2. damages property of another person in an amount exceeding two hundred fifty dollars.

Criminal mischief in the third degree is a class E felony.

HISTORY:

Add, L 1965, ch 1030, § 1, with substance derived from §§ 223, 463, 464, 466, 1420, 1420–a, 1421, 1423, 1423–a, 1423–b, 1423–c, 1424, 1425, 1426, 1427(2), 1428, 1430, 1431, 1432, 1433, 1873, 1906(1, 2), 1911, 1991; amd, L 1971, ch 961, § 2, eff Sept 1, 1971; L 2003, ch 276, § 1, eff Nov 1, 2003.

Commission Staff Notes: See Commission Staff Notes under Art 145.

Notes to Decisions

Analysis

1. In general
2. Constitutional considerations
3. Lesser included offenses
4. Sentencing
5. Verdict
6. Evidence sufficient
7. Evidence insufficient
8. Weight of evidence

1. In general

Where union failed to ascertain its rights from National Labor Relations Board in advance of its picketing of private property and defendant picketers insistently continued to picket after reasonable requests by store manager and police to move some few feet away from store entrance, National Labor Relations Act did not preempt enforcement of state criminal trespass statute against defendants. People v Bush, 39 N.Y.2d 529, 384 N.Y.S.2d 733, 349 N.E.2d 832, 1976 N.Y. LEXIS 2679 (N.Y. 1976).

In juvenile delinquency proceedings, a boy would not be guilty of third-degree criminal mischief absent intent to damage a banister in the courthouse, where he had damaged the banister while swinging a metal sign holder in an attempt to defend himself from other boys who had pursued him into the building. In re "K", 89 A.D.2d 630, 453 N.Y.S.2d 96, 1982 N.Y. App. Div. LEXIS 17740 (N.Y. App. Div. 3d Dep't 1982).

It was not abuse of discretion to require defendant convicted of third degree criminal mischief to pay portion of restitution to victim's insurance carrier since carrier had reimbursed victim for damage to her car and was therefore "victim" under CLS Penal §§ 60.27 and 65.10. People v Chery, 126 A.D.2d 659, 511 N.Y.S.2d 88, 1987 N.Y. App. Div. LEXIS 41789 (N.Y. App. Div. 2d Dep't 1987).

Defendant was properly convicted of third degree burglary, third degree criminal mischief, and possession of burglar's tools where police, notified by security company of possible burglary at client's premises, arrived at scene and heard noises inside building, shortly thereafter saw defendant on roof near only available means of ingress and egress from that part of building, observed defendant as he scurried about, but finding no means of escape, surrendered shouting "all right, you got me now, don't shoot," whereupon search of premises revealed pick and axe located on top of safe which had been damaged, as well as 40 missing cartons of cigarettes. People v Goods, 129 A.D.2d 735, 514 N.Y.S.2d 495, 1987 N.Y. App. Div. LEXIS 45419 (N.Y. App. Div. 2d Dep't 1987).

Evidence that defendant, while committing burglary, inflicted damage on property of another resulting in repair costs in excess of $250 sustained conviction of third degree criminal mischief. People v Jackson, 134 A.D.2d 283, 520 N.Y.S.2d 453, 1987 N.Y. App. Div. LEXIS 50466 (N.Y. App. Div. 2d Dep't), app. denied, 70 N.Y.2d 933, 524 N.Y.S.2d 684, 519 N.E.2d 630, 1987 N.Y. LEXIS 19704 (N.Y. 1987).

Defendant was not entitled to vacation of judgment of third degree criminal mischief based on new evidence, despite claim that his cousin had admitted, after trial, that it was he, not defendant, who had broken vehicle's window with rock, where admission was of dubious authenticity in that it was made one week after expiration of statute of limitations for crime, defendant's conviction was based on testimony of 2 eyewitnesses and police officer, and it was thus unlikely that such "new evidence" would result in different verdict. People v Green, 135 A.D.2d 565, 522 N.Y.S.2d 164, 1987 N.Y. App. Div. LEXIS 52509 (N.Y. App. Div. 2d Dep't 1987), app. denied, 71 N.Y.2d 897, 527 N.Y.S.2d 1006, 523 N.E.2d 313, 1988 N.Y. LEXIS 1428 (N.Y. 1988).

Evidence was insufficient to establish that damage to property exceeded $250 to sustain defendant's conviction for third degree criminal mischief based solely on owner's testimony that "approximate cost" of replacing glass and fixing door frame "and everything" was $325 "the best I can recall," which was not supported by any documentation or other proof that such amount represented reasonable cost of repairs. People v Gaines, 136 A.D.2d 731, 524 N.Y.S.2d 70, 1988 N.Y. App. Div. LEXIS 852 (N.Y. App. Div. 2d Dep't), app. denied, 71 N.Y.2d 896, 527 N.Y.S.2d 1005, 523 N.E.2d 312, 1988 N.Y. LEXIS 1406 (N.Y. 1988).

Evidence supported conviction for third degree criminal mischief where general foreman of board of education testified that cost of repair of window and doors damaged during break-in at school was $343 since testimony was sufficient proof that value of damaged property exceeded $250. People v Woodard, 148 A.D.2d 997, 539 N.Y.S.2d 229, 1989 N.Y. App. Div. LEXIS 2651 (N.Y. App. Div. 4th Dep't), app. denied, 74 N.Y.2d 749, 545 N.Y.S.2d 124, 543 N.E.2d 767, 1989 N.Y. LEXIS 2701 (N.Y. 1989).

Evidence was insufficient to support conviction for third degree criminal mischief based on damage caused when defendant, while fleeing from police, recklessly disregarded substantial and unjustifiable risk that he would cause damage to vehicle he was driving; under circumstances, element of intent was not shown. People v Ruiz, 159 A.D.2d 656, 553 N.Y.S.2d 173, 1990 N.Y. App. Div. LEXIS 2995 (N.Y. App. Div. 2d Dep't), app. denied, 76 N.Y.2d 742, 558 N.Y.S.2d 904, 557 N.E.2d 1200, 1990 N.Y. LEXIS 2314 (N.Y. 1990).

In bench trial for third degree criminal mischief, court erred in constructively amending indictment, which alleged that defendant damaged door of vehicle in amount exceeding $250, by considering evidence of damage to vehicle's ignition as well, even though vehicle's owner testified that when he parked his car earlier in day both door lock and ignition were in good condition, where defendant testified before grand jury that he intended only to steal radio and that he did not tamper with lock or ignition, and indictment voted by grand jury alleged only damage to door, thus

at least partially crediting his testimony. People v Rodriguez, 164 A.D.2d 832, 559 N.Y.S.2d 725, 1990 N.Y. App. Div. LEXIS 10815 (N.Y. App. Div. 1st Dep't 1990).

Evidence was sufficient to establish defendant's guilt of third degree burglary, and third and fourth degree criminal mischief, where he and his codefendant were discovered in predawn hours holding up steel gate which secured entrance to shopping mall, accomplice was crawling out from underneath gate clutching leather coat, glass behind gate was smashed and curtains enclosing 2 booths inside mall were ripped or slashed, cash registers in both booths were broken, and leather coats and jackets were strewn on floor with footprints on them, with some missing. People v Williams, 171 A.D.2d 827, 567 N.Y.S.2d 756, 1991 N.Y. App. Div. LEXIS 3663 (N.Y. App. Div. 2d Dep't), app. denied, 78 N.Y.2d 976, 574 N.Y.S.2d 956, 580 N.E.2d 429, 1991 N.Y. LEXIS 4633 (N.Y. 1991).

In prosecution for third degree criminal mischief, testimony by complainant was sufficient to establish that damage to his automobile exceeded $250 in value where complainant was not simply lay witness, but was treated as expert. People v Dixon, 184 A.D.2d 725, 587 N.Y.S.2d 185, 1992 N.Y. App. Div. LEXIS 8536 (N.Y. App. Div. 2d Dep't 1992).

Evidence supported conviction for third degree criminal mischief arising from high speed chase in which defendant was apprehended while driving stolen vehicle where it was shown that defendant intended to damage police vehicle when he struck it in rear during chase. In trial for, inter alia, third degree criminal mischief arising from high speed chase during which defendant struck police vehicle in rear, defendant was not entitled to have jury charged as to criminal mischief in fourth degree as lesser included offense since crimes had same elements with exception of dollar value of damage, and evidence clearly established that damage to police vehicle exceeded $250. People v Cammorto, 185 A.D.2d 986, 587 N.Y.S.2d 408, 1992 N.Y. App. Div. LEXIS 10336 (N.Y. App. Div. 2d Dep't), app. denied, 80 N.Y.2d 1025, 592 N.Y.S.2d 675, 607 N.E.2d 822, 1992 N.Y. LEXIS 4647 (N.Y. 1992).

Conviction of third degree criminal mischief was improper absent proof of monetary amount of damages to property; reviewing court would reduce defendant's conviction to fourth degree offense, which requires no monetary element. People v Pluff, 217 A.D.2d 744, 629 N.Y.S.2d 333, 1995 N.Y. App. Div. LEXIS 7745 (N.Y. App. Div. 3d Dep't 1995).

Defendant's severance motion was properly denied where crimes charged (third degree burglary, possession of burglar's tools, and third degree mischief) were same or similar, jury considered each count separately based on its acquittal on 3 of original 5 charges, including 2 charges solely related to first incident, proof of each crime was separately presented, uncomplicated, and easily distinguishable in jury's mind, and there was substantial difference in quantum of proof. People v Burnett, 228 A.D.2d 788, 644 N.Y.S.2d 79, 1996 N.Y. App. Div. LEXIS 6713 (N.Y. App. Div. 3d Dep't 1996).

In prosecution for 2 counts of third degree criminal mischief involving defendant's repeated firing of shotgun at 2 1979 Chevrolet Camaros, prosecution proved that defendant caused damage of at least $250 to each car, as required by CLS Penal § 145.05, where professional body shop owner and auto dealer testified that each car had value of $1,200 to $1,500 before incident and that cost of repairing shotgun damage would be $1,355.06 for one car and $2,165.80 for other, thus permitting finding that each car was damaged in amount of $1,200 or more, and owner testified that sale prices after repair of damage were $900 and $500. Reversal of defendant's conviction was not required by prosecution's failure to make pretrial disclosure of photograph of one car where (1) photograph had limited evidentiary value, was found on forgotten roll of undeveloped film, and was provided to defendant promptly after it was discovered and made available to prosecution, (2) defendant sought no continuance and had ample opportunity to examine photograph before cross-examination of car owner, and (3) defendant was able to take advantage of disclosure by offering several photographs on roll of film, which were received in evidence without objection. People v Katovich, 238 A.D.2d 751, 656 N.Y.S.2d 499, 1997 N.Y. App. Div. LEXIS 3951 (N.Y. App. Div. 3d Dep't 1997).

In prosecution for third degree mischief, court properly ruled that evidence of harassing conduct exhibited by defendant toward victim during previous 3 years, including gifts sent to her, was admissible for purposes of establishing identity of perpetrator, motive, and intent. People v Shiffer, 256 A.D.2d 818, 682 N.Y.S.2d 266, 1998 N.Y. App. Div. LEXIS 13596 (N.Y. App. Div. 3d Dep't 1998), app. denied, 93 N.Y.2d 878, 689 N.Y.S.2d 440, 711 N.E.2d 654, 1999 N.Y. LEXIS 1071 (N.Y. 1999).

Property owners' conclusory statements of amount of damage to their property, as set forth in depositions annexed to juvenile delinquency petition, were legally insufficient to sustain counts of petition alleging commission of acts which, if committed by adult, would have constituted third and fourth degree criminal mischief. In re John B., 261 A.D.2d 471, 690 N.Y.S.2d 109, 1999 N.Y. App. Div. LEXIS 4783 (N.Y. App. Div. 2d Dep't), app. dismissed, 94 N.Y.2d 797, 700 N.Y.S.2d 429, 722 N.E.2d 509, 1999 N.Y. LEXIS 3720 (N.Y. 1999).

Jury was entitled to conclude that defendant intended to damage patrol car, in prosecution for third degree criminal mischief, on deputy sheriff's uncontroverted eyewitness testimony that he was verbally combative, repeatedly hit his head against car's window, and kicked windows out of back of car. People v De Chellis, 265 A.D.2d 735, 697 N.Y.S.2d 711, 1999 N.Y. App. Div. LEXIS 10953 (N.Y. App. Div. 3d Dep't 1999).

Evidence that it cost $692.95 to have patrol car repaired established that damage exceeded statutory threshold in prosecution for third degree criminal mischief based on defendant's conduct in repeatedly hitting his head against car's window and kicking windows out of back of car. People v De Chellis, 265 A.D.2d 735, 697 N.Y.S.2d 711, 1999 N.Y. App. Div. LEXIS 10953 (N.Y. App. Div. 3d Dep't 1999).

Court properly joined for trial 2 indictments, each of which charged, inter alia, third degree burglary and criminal mischief, where, in each case, police responded to burglar alarm at store located in one-story shopping center in early morning hours, found that roof had been broken through, and saw defendant near store carrying stolen merchandise. People v Hall, 272 A.D.2d 412, 708 N.Y.S.2d 125, 2000 N.Y. App. Div. LEXIS 5049 (N.Y. App. Div. 2d Dep't), app. denied, 95 N.Y.2d 853, 714 N.Y.S.2d 4, 736 N.E.2d 865, 2000 N.Y. LEXIS 2648 (N.Y. 2000).

Evidence supported conviction of attempted third degree grand larceny and third degree criminal mischief where owner of car that defendant tried to steal testified as to prior good condition of car, expert witness properly relied on car industry valuation books and conversations with owner in appraising car, and thus there was sufficient proof that value of car exceeded $3,000 and that damage to car caused by defendant exceeded $250. People v Brown, 275 A.D.2d 668, 713 N.Y.S.2d 726, 2000 N.Y. App. Div. LEXIS 10023 (N.Y. App. Div. 1st Dep't 2000), app. denied, 96 N.Y.2d 732, 722 N.Y.S.2d 799, 745 N.E.2d 1022, 2001 N.Y. LEXIS 314 (N.Y. 2001).

Denial of motion to dismiss defamation complaint was error because, inter alia, certain statements referring to plaintiff's alleged criminal conduct were made in the context of plaintiff's purported demolition/reconstruction activities for which legitimate issues of fact existed, i.e., whether they were duly authorized by a village in each instance and whether they encroached upon the owner's property rights; arguably, plaintiff could have been subject to prosecution for felonious criminal mischief. Galasso v Saltzman, 42 A.D.3d 310, 839 N.Y.S.2d 731, 2007 N.Y. App. Div. LEXIS 8178 (N.Y. App. Div. 1st Dep't 2007).

Conviction of criminal mischief in the third degree was based on legally sufficient evidence and was not against the weight of the evidence under circumstances in which, in one of her statements to police, defendant admitted that she scratched the victim's car; the victim testified that defendant had no right to damage the vehicle, and both the victim and a detective testified that the car had deep scratches all along both sides and on the hood. The victim testified that she received three estimates and had the repairs performed by the shop with the lowest estimate, approximately $2,600, and that shop's written estimate was admitted into evidence. People v Hooks, 71 A.D.3d 1184, 896

N.Y.S.2d 501, 2010 N.Y. App. Div. LEXIS 1678 (N.Y. App. Div. 3d Dep't 2010).

Since the value of the property damages is an ingredient which determines the degree of the felony, an omission to allege such fact renders an indictment insufficient to charge the crime of criminal mischief in the second degree, a felony which can only prevail where damaged property of another person exceeds $250. People v Vieira, 65 Misc. 2d 390, 317 N.Y.S.2d 946, 1970 N.Y. Misc. LEXIS 1252 (N.Y. County Ct. 1970).

There was ample evidentiary support for the trial court's conclusion that repair costs of at least $250 were proved, to support defendant's conviction for criminal mischief in the third degree; photographic evidence of damage to a wall unit and, particularly, to a television screen, in addition to the victim's testimony as to what she paid for those items, together with her claim that the repair cost would be $500 for the wall unit and $700 for the television, were sufficient to establish repair costs in excess of $250. People v Garcia, 29 A.D.3d 255, 812 N.Y.S.2d 66, 2006 N.Y. App. Div. LEXIS 3714 (N.Y. App. Div. 1st Dep't), app. denied, 7 N.Y.3d 789, 821 N.Y.S.2d 818, 854 N.E.2d 1283, 2006 N.Y. LEXIS 2782 (N.Y. 2006).

Because the evidence was legally sufficient to establish that a juvenile intended to damage a vehicle when the juvenile drove into it, the family court properly adjudicated the juvenile delinquent for committing acts that, if committed by an adult, would constitute the crimes of third-degree criminal mischief and third-degree unauthorized use of a vehicle under N.Y. Penal Law §§ 145.05(2), 165.05(1). Matter of Kayla C., 35 A.D.3d 1187, 826 N.Y.S.2d 549, 2006 N.Y. App. Div. LEXIS 15616 (N.Y. App. Div. 4th Dep't 2006).

Although the victim testified that her television, glasses, a framed picture and a pair of mukluks were damaged in the incident, the record was devoid of any proof as to the reasonable cost of repairing and/or replacing this property, and neither the victim's conclusory and unsubstantiated testimony regarding the value of the items in question nor the photo evidence contained in the record was sufficient to establish that the damage to the victim's property exceeded $250 for purposes of the third degree criminal mischief conviction; the record was, however, sufficient to establish that defendant intentionally damaged the victim's property and, therefore, defendant's conviction was reduced to criminal mischief in the fourth degree. People v Beauvais, 105 A.D.3d 1081, 962 N.Y.S.2d 764, 2013 N.Y. App. Div. LEXIS 2227 (N.Y. App. Div. 3d Dep't 2013).

2. Constitutional considerations

State criminal trespass statute is not unconstitutional for vagueness. People v Bush, 39 N.Y.2d 529, 384 N.Y.S.2d 733, 349 N.E.2d 832, 1976 N.Y. LEXIS 2679 (N.Y. 1976).

Legislature's classification of third degree criminal mischief as class E felony did not violate defendant's constitutional right to equal protection, as classification was rationally related to legitimate state purpose of punishing those who destroy property. People v Davis, 227 A.D.2d 983, 643 N.Y.S.2d 835, 1996 N.Y. App. Div. LEXIS 6954 (N.Y. App. Div. 4th Dep't 1996).

3. Lesser included offenses

In order to sustain defendants' convictions for third-degree criminal mischief as result of damage inflicted on an automobile, there had to be proof beyond a reasonable doubt not only that the damage inflicted on the automobile exceeded $250 but also that the value of the automobile was $250 or more; and, where evidence established that defendants inflicted intentional damage to an automobile but did not show that the value of the automobile exceeded $250, their convictions for criminal mischief in the third degree would be modified by reducing the convictions to the lesser included offense of criminal mischief in the fourth degree. People v Johnson, 58 A.D.2d 662, 395 N.Y.S.2d 524, 1977 N.Y. App. Div. LEXIS 12761 (N.Y. App. Div. 3d Dep't 1977).

A conviction of criminal mischief in the third degree would be reduced to criminal mischief in the fourth degree where the trial court improperly refused to charge the fourth-degree offense inasmuch as defendant did not intentionally damage property in an amount exceeding $250. People v Benigno, 87 A.D.2d 597, 447 N.Y.S.2d 748, 1982 N.Y. App. Div. LEXIS 15872 (N.Y. App. Div. 2d Dep't), app. denied, 56 N.Y.2d 808, 1982 N.Y. LEXIS 5990 (N.Y. 1982).

Defendant's conviction for third-degree criminal mischief would be reduced to fourth-degree criminal mischief, where to support a conviction for third-degree criminal mischief the people had to prove beyond a reasonable doubt that the damage to the victim's property exceeded $250, where the evidence showed only that there was one small hole in one of the panes of glass in an office window and bent protective bars, where that evidence did not establish the requisite value, and where the evidence was sufficient only to support the jury's determination that defendant had intentionally damaged the property of another person. People v Cunningham, 95 A.D.2d 680, 463 N.Y.S.2d 470, 1983 N.Y. App. Div. LEXIS 18584 (N.Y. App. Div. 1st Dep't), app. denied, 60 N.Y.2d 615, 1983 N.Y. LEXIS 6063 (N.Y. 1983).

In prosecution arising from incident in which defendant removed water heater from victim's house and placed it on his truck, possibly injuring heater, third degree criminal mischief conviction would be reduced to fourth degree for lack of proof that damage to property exceeded $250, since (1) People did not adduce proof of monetary amount of damages to heater itself, and thus jury could only consider cost for reinstalling water heater, not cost of new water heater, and (2) jury could only conclude that cost for installation was about $120 in view of evidence that it cost $355 to install heater but $234 of that amount was attributable to cost of new heater. People v David, 133 A.D.2d 277, 519 N.Y.S.2d 67, 1987 N.Y. App. Div. LEXIS 49766 (N.Y. App. Div. 2d Dep't 1987).

Conviction would be reversed where defendant was charged with reckless endangerment in first degree in violation of CLS Penal 120.25 and entered plea of guilty to criminal mischief in third degree in violation of CLS Penal § 145.05 in satisfaction of indictment, since criminal mischief in third degree was not lesser included offense of reckless endangerment in first degree. People v Sicurella, 149 A.D.2d 983, 543 N.Y.S.2d 352, 1989 N.Y. App. Div. LEXIS 6072 (N.Y. App. Div. 4th Dep't 1989).

Defendant's conviction for third degree criminal mischief would be reduced to fourth degree criminal mischief based on insufficient evidence to prove that damage to complainant's vehicle exceeded $250, even though appraiser estimated that new ignition would cost $210 and repair to passenger door lock would cost $145, where indictment voted by grand jury alleged only damage to door. People v Rodriguez, 164 A.D.2d 832, 559 N.Y.S.2d 725, 1990 N.Y. App. Div. LEXIS 10815 (N.Y. App. Div. 1st Dep't 1990).

Defendant was entitled to vacatur of conviction for third degree criminal mischief where he was charged with second degree criminal mischief, neither party requested charge of third degree criminal mischief as lesser included offense, court charged jury only as to second degree criminal mischief, jury was given verdict sheet which misstated that charge was third degree criminal mischief and returned verdict of guilty on that charge, and error was never discovered by trial court. People v Klos, 190 A.D.2d 754, 593 N.Y.S.2d 545, 1993 N.Y. App. Div. LEXIS 994 (N.Y. App. Div. 2d Dep't), app. denied, 81 N.Y.2d 972, 598 N.Y.S.2d 774, 615 N.E.2d 231, 1993 N.Y. LEXIS 2015 (N.Y. 1993).

Court should have charged fourth degree criminal mischief as lesser included offense in trial for third degree criminal mischief, since jury could have found that defendant acted recklessly rather than intentionally in damaging his girlfriend's car as he left party, where there was evidence that defendant had drunk 2 40-ounce containers of beer and (with his cousin) pint of gin before going to party, and that while at party, defendant drank beer, alcoholic punch, and brandy. People v Young, 207 A.D.2d 1011, 617 N.Y.S.2d 254, 1994 N.Y. App. Div. LEXIS 10271 (N.Y. App. Div. 4th Dep't 1994).

Conviction of third degree criminal mischief would be reduced to fourth degree criminal mischief where evidence did not prove that amount of damage to vehicle intentionally caused by defendant exceeded $250. People v Duran, 238 A.D.2d 351, 656 N.Y.S.2d 56, 1997 N.Y. App. Div. LEXIS 3375 (N.Y. App. Div. 2d Dep't 1997).

Defendant waived his challenge to the legal sufficiency of the evidence supporting his conviction of criminal mischief in the fourth degree inasmuch as he asked the trial court to charge that

crime as a lesser included offense of criminal mischief in the third degree and he ultimately was convicted of the lesser included offense. People v Daniels, 75 A.D.3d 1169, 904 N.Y.S.2d 859, 2010 N.Y. App. Div. LEXIS 6117 (N.Y. App. Div. 4th Dep't), app. denied, 15 N.Y.3d 892, 912 N.Y.S.2d 581, 938 N.E.2d 1016, 2010 N.Y. LEXIS 3413 (N.Y. 2010).

4. Sentencing

Sentence of one year in jail imposed on defendant's conviction for third degree criminal mischief was not unduly harsh in view of his prior criminal record and fact that he smashed roof, hood, windows, and lights of his former girlfriend's parked car, causing over $3,200 in damage. People v Wright, 233 A.D.2d 618, 649 N.Y.S.2d 844, 1996 N.Y. App. Div. LEXIS 11707 (N.Y. App. Div. 3d Dep't 1996).

Court erred in sentencing defendant to 1 ½ to 3 years imprisonment for third degree criminal mischief since such crime was not violent felony, and defendant was not found to be prior felony offender; thus, sentence would be reduced to 1 to 3 years imprisonment. People v Stinson, 272 A.D.2d 483, 707 N.Y.S.2d 675, 2000 N.Y. App. Div. LEXIS 5533 (N.Y. App. Div. 2d Dep't), app. denied, 95 N.Y.2d 858, 714 N.Y.S.2d 9, 736 N.E.2d 870, 2000 N.Y. LEXIS 2779 (N.Y. 2000).

In prosecution for third degree criminal mischief, court properly fixed amount of restitution without hearing where defendant did not request hearing, and record contained sufficient evidence to support finding as to out-of-pocket loss that defendant caused. People v Stubbs, 281 A.D.2d 498, 721 N.Y.S.2d 562, 2001 N.Y. App. Div. LEXIS 2402 (N.Y. App. Div. 2d Dep't), app. denied, 96 N.Y.2d 908, 730 N.Y.S.2d 806, 756 N.E.2d 94, 2001 N.Y. LEXIS 2957 (N.Y. 2001).

Amount of restitution ordered on conviction of third degree criminal mischief was not excessive where ordinary meaning of "restitution" is restoring someone to position occupied before particular event. People v Stubbs, 281 A.D.2d 498, 721 N.Y.S.2d 562, 2001 N.Y. App. Div. LEXIS 2402 (N.Y. App. Div. 2d Dep't), app. denied, 96 N.Y.2d 908, 730 N.Y.S.2d 806, 756 N.E.2d 94, 2001 N.Y. LEXIS 2957 (N.Y. 2001).

Sentence of one to 3 years for third degree criminal mischief was not excessive and would not be reduced in interest of justice where it was within permissible statutory range, it was in accordance with plea agreement in full satisfaction of 12-count information, defendant had extensive criminal record, and no extraordinary circumstances existed. People v Arquette, 281 A.D.2d 652, 720 N.Y.S.2d 852, 2001 N.Y. App. Div. LEXIS 2041 (N.Y. App. Div. 3d Dep't 2001).

In prosecution for third degree criminal mischief, collection surcharge imposed under CLS Penal § 60.27(8) on amount of restitution was improperly calculated and would be reduced from 10 to 5 percent, absent affidavit indicating that actual cost of collection exceeded 5 percent. People v Arquette, 281 A.D.2d 652, 720 N.Y.S.2d 852, 2001 N.Y. App. Div. LEXIS 2041 (N.Y. App. Div. 3d Dep't 2001).

Concurrent indeterminate sentences of three to six years imprisonment, which were imposed on defendant's convictions of two counts of criminal mischief in the third degree under N.Y. Penal Law § 145.05, were illegal under N.Y. Penal Law § 70.06(3)(e) and, thus, had to be vacated. People v Penna, 47 A.D.3d 844, 849 N.Y.S.2d 161, 2008 N.Y. App. Div. LEXIS 1358 (N.Y. App. Div. 2d Dep't), app. denied, 10 N.Y.3d 843, 859 N.Y.S.2d 402, 889 N.E.2d 89, 2008 N.Y. LEXIS 1741 (N.Y. 2008).

Criminal mischief in the third degree was not a violent felony, and the People conceded that defendant should have been sentenced to an indeterminate term as a second felony offender rather than a determinate term as a second violent felony offender for such crime. People v Ramos, 48 A.D.3d 984, 851 N.Y.S.2d 724, 2008 N.Y. App. Div. LEXIS 1633 (N.Y. App. Div. 3d Dep't), app. denied, 10 N.Y.3d 938, 862 N.Y.S.2d 345, 892 N.E.2d 411, 2008 N.Y. LEXIS 2368 (N.Y. 2008), cert. denied, 556 U.S. 1110, 129 S. Ct. 1595, 173 L. Ed. 2d 686, 2009 U.S. LEXIS 1896 (U.S. 2009).

Appellate court could not consider defendant's challenge to an enhanced sentence imposed following his guilty plea to assault in the second degree, N.Y. Penal Law § 120.05, and criminal mischief in the third degree, N.Y. Penal Law § 145.05 (2003); as part of the plea agreement, defendant knowingly, intelligently, and voluntarily waived his right to appeal the sentence. People v Schryver, 306 A.D.2d 626, 759 N.Y.S.2d 904, 2003 N.Y. App. Div. LEXIS 6635 (N.Y. App. Div. 3d Dep't), app. denied, 100 N.Y.2d 598, 766 N.Y.S.2d 174, 798 N.E.2d 358, 2003 N.Y. LEXIS 3621 (N.Y. 2003).

Although the sentence imposed upon defendant was the maximum, the sentence was neither harsh nor excessive because defendant engaged in a deliberate plan to set an interior fire to an apartment building with several occupants, endangering their lives; defendant caused significant burn damage to an apartment's doorway area and carpeting. People v Launder, 132 A.D.3d 1151, 18 N.Y.S.3d 747, 2015 N.Y. App. Div. LEXIS 7929 (N.Y. App. Div. 3d Dep't 2015), app. denied, 27 N.Y.3d 1153, 62 N.E.3d 127, 39 N.Y.S.3d 387, 2016 N.Y. LEXIS 2521 (N.Y. 2016).

Trial court properly imposed consecutive sentences because while defendant's crimes of criminal possession of stolen property in the fourth degree, based on his possession of the subject stolen vehicle, and criminal mischief in the third degree, based on him intentionally causing certain damage to a State Police vehicle during the police pursuit, albeit while operating that stolen vehicle, occurred in the course of one continuous criminal incident, the charges arose from separate, distinct acts. People v Light, 184 A.D.3d 904, 125 N.Y.S.3d 185, 2020 N.Y. App. Div. LEXIS 3262 (N.Y. App. Div. 3d Dep't 2020).

5. Verdict

Trial court's judgments of conviction finding defendant guilty of 12 counts of criminal mischief had to be reversed, except for one count of criminal mischief in the third degree; defendant could not be acquitted of "making graffiti," as he was by the jury and be convicted of 11 of the 12 counts because they were all based on the same conduct. alleged spray-painting, and, thus, the verdict was repugnant. Colavito v New York Organ Donor Network, Inc., 6 N.Y.3d 820, 813 N.Y.S.2d 37, 846 N.E.2d 467, 2006 N.Y. LEXIS 517 (N.Y. 2006).

Jury verdict finding defendant guilty of third degree criminal mischief was not repugnant with his acquittal of fourth degree criminal mischief where he drove his car into and intended to damage one vehicle, while not intending to damage another vehicle which he hit. People v Samiec, 181 A.D.2d 983, 586 N.Y.S.2d 535, 1992 N.Y. App. Div. LEXIS 4573 (N.Y. App. Div. 4th Dep't 1992).

Defendant's convictions for criminal mischief were reversed where defendant was acquitted of making graffiti charges based on the same alleged act of vandalism as the only evidence of property damage submitted to the jury was of spray-painting. People v Wallender, 27 A.D.3d 955, 812 N.Y.S.2d 157, 2006 N.Y. App. Div. LEXIS 3579 (N.Y. App. Div. 3d Dep't 2006).

Conviction of criminal mischief in the third degree was based on legally sufficient evidence and was not against the weight of the evidence under circumstances in which, in one of her statements to police, defendant admitted that she scratched the victim's car; the victim testified that defendant had no right to damage the vehicle, and both the victim and a detective testified that the car had deep scratches all along both sides and on the hood. The victim testified that she received three estimates and had the repairs performed by the shop with the lowest estimate, approximately $2,600, and that shop's written estimate was admitted into evidence. People v Hooks, 71 A.D.3d 1184, 896 N.Y.S.2d 501, 2010 N.Y. App. Div. LEXIS 1678 (N.Y. App. Div. 3d Dep't 2010).

6. Evidence sufficient

Defendant's conviction for criminal mischief in the third degree was in accord with the weight of the evidence because defendant admitted to having thrown a dumbbell through the victim's living room window, and the victim testified that the resulting damage to her fish tank and furnishings totaled $ 1,600. People v Odofin, 153 A.D.3d 972, 59 N.Y.S.3d 842, 2017 N.Y. App. Div. LEXIS 5952 (N.Y. App. Div. 3d Dep't 2017).

Sufficient evidence supported defendant's criminal mischief in the third degree convictions because there was significant burn damage to the doorway area and carpeting of a specific apartment

from a fire started by defendant, and the damage totaled $1,450, and the damage to the security cameras defendant spray-painted several days after the fire was just under $700. People v Launder, 132 A.D.3d 1151, 18 N.Y.S.3d 747, 2015 N.Y. App. Div. LEXIS 7929 (N.Y. App. Div. 3d Dep't 2015), app. denied, 27 N.Y.3d 1153, 62 N.E.3d 127, 39 N.Y.S.3d 387, 2016 N.Y. LEXIS 2521 (N.Y. 2016).

Defendant's verdict of criminal mischief in the third degree and other crimes was not against the weight of evidence because defendant and her codefendant unlawfully broke into the building's garage and caused damage to the garage door and personal property belonging to other tenants in the building, and the property manager testified that the damage to the garage door was well in excess of $250. People v Saunders, 181 A.D.3d 1049, 120 N.Y.S.3d 658, 2020 N.Y. App. Div. LEXIS 1739 (N.Y. App. Div. 3d Dep't 2020).

7. Evidence insufficient

Evidence was legally insufficient to establish defendant's guilt of criminal mischief in the third degree because the evidence did not establish, beyond a reasonable doubt, that the damage to the subject property exceeded the sum of $250. People v Casiano, 148 A.D.3d 1044, 50 N.Y.S.3d 439, 2017 N.Y. App. Div. LEXIS 2015 (N.Y. App. Div. 2d Dep't 2017).

8. Weight of evidence

Defendant's convictions for criminal mischief in the third degree and assault in the third degree were not against the weight of the evidence. There was no reason to disturb the county court's credibility determinations with respect to whether defendant intended to violate the order of protection, whether he was the initial aggressor in starting a brawl, or whether he was still capable of forming the requisite criminal intent for the crimes despite evidence he was intoxicated. People v Barrett, 188 A.D.3d 1736, 2020 N.Y. App. Div. LEXIS 7125 (N.Y. App. Div. 4th Dep't), app. dismissed, 188 A.D.3d 1739, 132 N.Y.S.3d 706, 2020 N.Y. App. Div. LEXIS 7096 (N.Y. App. Div. 4th Dep't 2020).

Notes to Unpublished Decisions

1. In general

Unpublished decision: As there was no explanation as to why defendant's girlfriend did not testify as to the damage defendant did to her car for purposes of a criminal mischief charge under N.Y. Penal Law § 145.05(2) to revoke his supervised release, her hearsay statements were erroneously admitted under Fed. R. Crim. P. 32.1(b)(2)(C), and, while it would have been preferable for the district court to have signaled its intent to take judicial notice of the amount of damage caused to the girlfriend's car prior to rendering its decision, it was not obligated to do so under Fed. R. Evid. 201(f), and since there was other testimony and photographs of the damage, any error in taking judicial notice of significant damages, clearly in excess of the relatively low statutory threshold of $250, was not plain. United States v Bryant, 402 Fed. Appx. 543, 2010 U.S. App. LEXIS 20466 (2d Cir. N.Y. 2010).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 460.10; CLS CPL § 700.05.

Eavesdropping warrants in cases of criminal mischief in the second degree, CLS CPL §§ 700.05(8), 700.10–700.70.

Federal Aspects:

Malicious mischief, 18 USCS §§ 1361 et seq.

Jurisprudences:

18 NY Jur 2d Cemeteries and Dead Bodies § 99.

35 NY Jur 2d Criminal Law Substantive Principles and Offenses § 357.

35A NY Jur 2d Criminal Law Substantive Principles and Offenses §§ 850, 861, 871, 877.

75A NY Jur 2d Logs and Timber § 28.

52 Am Jur 2d, Malicious Mischief § 3.

Criminal Jury Instructions: Criminal mischief, third degree (intentionally damaging another's property; amount more than $250). CJI2d [NY] Penal Law § 145.05.

Texts: 1 Bergman on New York Mortgage Foreclosures (Matthew Bender) § 9.04.

New York Criminal Practice Ch. 62.

§ 145.10. Criminal mischief in the second degree

A person is guilty of criminal mischief in the second degree when with intent to damage property of another person, and having no right to do so nor any reasonable ground to believe that he has such right, he damages property of another person in an amount exceeding one thousand five hundred dollars.

Criminal mischief in the second degree is a class D felony.

HISTORY:

Add, L 1965, ch 1030, § 1, with substance derived from §§ 223, 463, 464, 466, 1420, 1420–a, 1421, 1423, 1423–a, 1423–b, 1423–c, 1424, 1425, 1426, 1427(2), 1428, 1430, 1431, 1432, 1433, 1873, 1906(1, 2), 1911, 1991; amd, L 1971, ch 961, § 3, eff Sept 1, 1971.

Commission Staff Notes: See Commission Staff Notes under Art 145.

Notes to Decisions

In juvenile delinquency proceeding in which defendant was accused of committing act which, if committed by adult, would constitute crime of second degree criminal tampering, defendant had burden to establish by preponderance of evidence affirmative defense that he did not engage in conduct of which he was accused for larcenous or otherwise unlawful or wrongful purpose. In re Rodney B., 69 N.Y.2d 687, 512 N.Y.S.2d 17, 504 N.E.2d 384, 1986 N.Y. LEXIS 21305 (N.Y. 1986).

Indeterminate sentences of three and one-half to ten years and two and one-third to seven years, respectively, imposed after defendant's conviction of first-degree burglary and second-degree criminal mischief, were not excessive; and, where convictions for first-degree burglary and second-degree criminal mischief were based on separate and distinct acts, sentences on such convictions were properly made to be served consecutively. People v Longendyke, 56 A.D.2d 683, 391 N.Y.S.2d 732, 1977 N.Y. App. Div. LEXIS 10840 (N.Y. App. Div. 3d Dep't 1977).

The monetary damage to each of nine vehicles could not be aggregated to charge defendants accused of slashing the tires of the nine automobiles with criminal mischief in the second degree, where, although the tire slashings may have been the product of a single intent and design, they were separate acts against various owners and, therefore, could not be considered together to constitute a single crime of criminal mischief in the second degree. People v Bornstein, 96 A.D.2d 722, 465 N.Y.S.2d 361, 1983 N.Y. App. Div. LEXIS 19293 (N.Y. App. Div. 4th Dep't), app. denied, 60 N.Y.2d 822, 1983 N.Y. LEXIS 6439 (N.Y. 1983).

People failed to establish value of subject property in excess of $1,500 to support convictions for attempted grand larceny in second degree and criminal mischief in second degree where only evidence of value consisted of improperly admitted hearsay testimony that value of property was $7,000 as set forth by "the engineering group." People v Butler, 123 A.D.2d 877, 507 N.Y.S.2d 477, 1986 N.Y. App. Div. LEXIS 60988 (N.Y. App. Div. 2d Dep't 1986).

To extent that it is necessary to demonstrate value of damaged property for criminal mischief purposes (i.e., to show that value of property prior to infliction of damage was not less than amount of damage necessary to convict defendant of second degree criminal mischief), it is sufficient to define value in terms of cost of repair of property, so long as property is repairable; thus, People sufficiently demonstrated amount of damage to complainant's truck by showing that truck was repairable and was repaired for over $1,500. In prosecution for second degree criminal mischief based on incident where defendant damaged complainant's property shortly after complainant had fired him, court properly allowed complainant to testify concerning defendant's swearing and threats made to complainant on learning he was fired, and concerning prior incident where defendant removed keys from complainant's car to prevent complainant from leaving defendant; evidence was interwoven with complainant's recitation of incident, was relevant with regard to defendant's state of mind,

and related to defendant's intent and motive to damage complainant's property. Court properly refused to charge fourth degree criminal mischief as lesser included offense of second degree criminal mischief where no reasonable view of evidence could support finding that damage inflicted by defendant was less than $250. People v Simpson, 132 A.D.2d 894, 518 N.Y.S.2d 453, 1987 N.Y. App. Div. LEXIS 49360 (N.Y. App. Div. 3d Dep't), app. denied, 70 N.Y.2d 937, 524 N.Y.S.2d 689, 519 N.E.2d 635, 1987 N.Y. LEXIS 19828 (N.Y. 1987).

Appellate court would reduce conviction of second degree criminal mischief to third degree offense where (1) only evidence as to value of damaged property was testimony of victim, who was not expert, (2) no evidence was offered to support his claim that replacement of property was necessary at cost of $10,000, and (3) defendant conceded that damage exceeded $250. People v Gina, 137 A.D.2d 555, 524 N.Y.S.2d 296, 1988 N.Y. App. Div. LEXIS 718 (N.Y. App. Div. 2d Dep't), app. denied, 71 N.Y.2d 1027, 530 N.Y.S.2d 562, 526 N.E.2d 54, 1988 N.Y. LEXIS 2230 (N.Y. 1988).

Although court improperly received claims form submitted by victim to her insurance company as business record in prosecution for second degree criminal mischief and second degree reckless endangerment, error was harmless since proof of value was derived not from claims form submitted by victim but from appraisal forms which were properly received into evidence. People v Caufield, 148 A.D.2d 985, 539 N.Y.S.2d 221, 1989 N.Y. App. Div. LEXIS 2567 (N.Y. App. Div. 4th Dep't 1989).

Evidence was legally sufficient to support verdicts of attempted first degree assault, second degree assault, second degree criminal mischief and third degree weapon possession where victim intervened in fight between defendant and another individual in front of victim's store, defendant slapped or punched victim and threatened him, defendant then got into his vehicle and attempted to strike victim with vehicle, injuring victim's hand, and defendant then drove vehicle directly into store where several people had assembled. People v Guerrero, 150 A.D.2d 489, 541 N.Y.S.2d 90, 1989 N.Y. App. Div. LEXIS 6489 (N.Y. App. Div. 2d Dep't 1989).

Defendant was properly convicted of CLS Penal § 145.10 second degree criminal mischief in connection with hiring contractor to widen town road constituting principal access to his property, where contractor's bulldozer operator testified that defendant instructed him to take down stone walls abutting road and remove anything else needed to make road wider, including wire fences and trees, and push debris off to side of road onto property of another landowner. People v Misevis, 155 A.D.2d 729, 547 N.Y.S.2d 439, 1989 N.Y. App. Div. LEXIS 13849 (N.Y. App. Div. 3d Dep't 1989), aff'd, 76 N.Y.2d 777, 559 N.Y.S.2d 957, 559 N.E.2d 651, 1990 N.Y. LEXIS 1451 (N.Y. 1990).

Evidence was insufficient to establish that damage to premises exceeded $1,500, and thus defendant's conviction of second degree criminal mischief would be reduced to fourth degree criminal mischief, where proof consisted merely of testimony of owner and his employee that repairs had cost about $2,500 which was unsupported by documentation or other evidence that amount represented reasonable cost of repairs. People v Jackson, 168 A.D.2d 633, 563 N.Y.S.2d 468, 1990 N.Y. App. Div. LEXIS 16077 (N.Y. App. Div. 2d Dep't 1990), app. denied, 77 N.Y.2d 962, 570 N.Y.S.2d 495, 573 N.E.2d 583, 1991 N.Y. LEXIS 1455 (N.Y. 1991).

In trial for second degree criminal mischief, evidence failed to establish that property damage exceeded $1,500 where no expert testified as to value of damaged property, no documentary proof as to cost of repair or replacement was introduced, and victim's testimony that repairs cost $4,500 was unsupported by documentation or other evidence that such cost was reasonable. People v Hoppe, 184 A.D.2d 582, 584 N.Y.S.2d 860, 1992 N.Y. App. Div. LEXIS 7896 (N.Y. App. Div. 2d Dep't 1992).

Evidence supported conviction of second degree criminal mischief arising out of vandalizing of car of victim who allegedly owed defendant money, where defendant admitted that he had left note with victim which threatened "big problems" if victim failed to pay him by certain date, and evidence showed that defendant told victim's foreman after incident "today is the car and tomorrow it is him," since such evidence, together with evidence of defendant's hostility in dealing with both victim and victim's foreman, established that either defendant or someone acting at his behest did indeed cause "big problems" by severely damaging victim's car. People v Chillino, 186 A.D.2d 260, 588 N.Y.S.2d 321, 1992 N.Y. App. Div. LEXIS 10847 (N.Y. App. Div. 2d Dep't), app. denied, 80 N.Y.2d 973, 591 N.Y.S.2d 143, 605 N.E.2d 879, 1992 N.Y. LEXIS 4264 (N.Y. 1992).

Evidence failed to support conviction for second degree criminal mischief arising from incident in which inmate ripped hot water heater from wall of prison cell since conviction required proof of damage in minimum amount of $1,500, and maintenance employee at prison testified only that electrical fixtures would have to be checked out and that they were probably damaged; judgment would be modified to reduce conviction to fourth degree criminal mischief. People v Brantley, 186 A.D.2d 1036, 588 N.Y.S.2d 475, 1992 N.Y. App. Div. LEXIS 11610 (N.Y. App. Div. 4th Dep't 1992), app. denied, 81 N.Y.2d 785, 594 N.Y.S.2d 731, 610 N.E.2d 404, 1993 N.Y. LEXIS 335 (N.Y. 1993).

Court did not err in submitting both first degree reckless endangerment count and second degree criminal mischief count to jury without providing charge under CLS CPL § 300.40(5) since there is nothing inconsistent about one acting with intent to cause property damage, as required for criminal mischief, while at same time evidencing conscious disregard for risk of death created by same actions, as required for reckless endangerment. People v McGrath, 195 A.D.2d 831, 601 N.Y.S.2d 200, 1993 N.Y. App. Div. LEXIS 7508 (N.Y. App. Div. 3d Dep't), app. denied, 82 N.Y.2d 851, 606 N.Y.S.2d 603, 627 N.E.2d 525, 1993 N.Y. LEXIS 4731 (N.Y. 1993).

Sufficient evidence supported conviction of second degree criminal mischief and second degree criminal contempt arising out of incident in which defendant sprayed acid on his ex-girlfriend's car in violation of protective order, where complainant testified that she observed defendant spraying liquid on her car, and operator of collision shop testified that, in his expert opinion, cost of repairing vehicle would be $1,963.93. In prosecution for second degree criminal mischief and second degree criminal contempt for violation of protective order, trial court properly denied defendant's request for moral certainty charge on circumstantial evidence, given direct testimony of complainant that she saw defendant vandalizing her car. Court properly refused to admit damaged vehicle or photographs of vehicle where there was no assurance that condition of vehicle had not changed between time of incident and time when photographs were taken shortly before trial. People v Smeraldo, 242 A.D.2d 886, 662 N.Y.S.2d 883, 1997 N.Y. App. Div. LEXIS 10436 (N.Y. App. Div. 4th Dep't), app. denied, 91 N.Y.2d 880, 668 N.Y.S.2d 579, 691 N.E.2d 651, 1997 N.Y. LEXIS 4729 (N.Y. 1997).

In prosecution for attempted first degree coercion and second degree mischief, court properly admitted direct testimony about incident in which defendant and other union plumbers went through work site in manner that caused nonunion plumbers to leave; such testimony properly showed that defendant used "strong-arm" tactics as part of wide-ranging scheme or plan to pressure nonunion businesses or contractors into hiring union plumbers. People v Martello, 251 A.D.2d 187, 675 N.Y.S.2d 33, 1998 N.Y. App. Div. LEXIS 7434 (N.Y. App. Div. 1st Dep't 1998), aff'd, 93 N.Y.2d 645, 695 N.Y.S.2d 525, 717 N.E.2d 684, 1999 N.Y. LEXIS 1425 (N.Y. 1999).

In juvenile delinquency proceeding based on charges of conduct that would be second degree arson and second degree mischief if committed by adult, petition was sufficient on its face, despite juvenile's claim that his mother's statement that he communicated to her by signing that he used matches to start fire was not admission, because it was nonverbal communication; witness may testify concerning statement made by another person who communicates nonverbally by sign language, and juvenile did not prove that his method of communication with his mother was unreliable. In re Terrance W., 251 A.D.2d 1004, 674 N.Y.S.2d 529, 1998 N.Y. App. Div. LEXIS 7021 (N.Y. App. Div. 4th Dep't), app. denied, 92 N.Y.2d 810, 680 N.Y.S.2d 54, 702 N.E.2d 839, 1998 N.Y. LEXIS 3180 (N.Y. 1998).

Judgment convicting defendant of attempted second degree mischief would be modified by vacating amount of restitution, and matter would be remitted for determination of amount of

victim's out-of-pocket loss, where record did not support amount of restitution ordered. People v Linscott, 255 A.D.2d 1007, 679 N.Y.S.2d 865, 1998 N.Y. App. Div. LEXIS 12317 (N.Y. App. Div. 4th Dep't 1998).

Defendant's fiancee's general approximation of cost of repairing or replacing various property items was insufficient to show amount of damage to support conviction for second degree mischief; thus, judgment would be modified by reducing conviction to fourth degree mischief. People v Jackson, 269 A.D.2d 867, 703 N.Y.S.2d 804, 2000 N.Y. App. Div. LEXIS 1836 (N.Y. App. Div. 4th Dep't), app. denied, 95 N.Y.2d 798, 711 N.Y.S.2d 166, 733 N.E.2d 238, 2000 N.Y. LEXIS 2022 (N.Y. 2000).

In prosecution for third degree arson, second degree criminal mischief, and child endangerment, defendant was entitled to hearing on amount of restitution to be paid, and case would be remitted for that purpose, where record did not contain sufficient evidence to support amount ordered. People v Wilson, 275 A.D.2d 1035, 714 N.Y.S.2d 920, 2000 N.Y. App. Div. LEXIS 9588 (N.Y. App. Div. 4th Dep't 2000), app. denied, 96 N.Y.2d 808, 726 N.Y.S.2d 386, 750 N.E.2d 88, 2001 N.Y. LEXIS 1817 (N.Y. 2001).

Evidence failed to show that damage to property exceeded $1,500 where no expert testified as to value, no documentary proof as to cost of repair or replacement was introduced, and complainant's testimony that repair and replacement cost over $1,500 was insufficient since that testimony was unsupported by documentation or other evidence; thus, defendant's conviction of second degree mischief would be reduced to fourth degree mischief. People v Wilson, 284 A.D.2d 420, 728 N.Y.S.2d 174, 2001 N.Y. App. Div. LEXIS 6129 (N.Y. App. Div. 2d Dep't), app. denied, 96 N.Y.2d 926, 732 N.Y.S.2d 643, 758 N.E.2d 669, 2001 N.Y. LEXIS 4077 (N.Y. 2001).

Defendant was properly convicted of criminal mischief on evidence that he sprayed a solution containing chicken excrement all over the Hall of the Court of Appeals of New York, destroying the court's banner, and causing the State to incur thousands of dollars of expense in seeking to eradicate the stench, which lingered for many months. People v Collins, 288 A.D.2d 756, 733 N.Y.S.2d 289, 2001 N.Y. App. Div. LEXIS 11525 (N.Y. App. Div. 3d Dep't 2001), app. denied, 97 N.Y.2d 752, 742 N.Y.S.2d 612, 769 N.E.2d 358, 2002 N.Y. LEXIS 1156 (N.Y. 2002).

Because the evidence was legally sufficient to prove, beyond a reasonable doubt, that defendant caused damage exceeding $1,500 to the complainant's vehicle, defendant was properly found guilty of second-degree criminal mischief under N.Y. Penal Law 145.10. People v Ramirez, 49 A.D.3d 667, 853 N.Y.S.2d 604, 2008 N.Y. App. Div. LEXIS 2112 (N.Y. App. Div. 2d Dep't), app. denied, 10 N.Y.3d 963, 863 N.Y.S.2d 147, 893 N.E.2d 453, 2008 N.Y. LEXIS 2789 (N.Y. 2008).

Evidence supported defendant's conviction for criminal mischief, as when the victim went to her car after leaving a bar, she saw something move in her car, the car's rear window then shattered, and defendant climbed out of the car; according to the appraiser from the victim's automobile insurer, it would cost over $4,500 to restore the car to its pre-loss condition. People v Stacconi, 151 A.D.3d 1395, 58 N.Y.S.3d 201, 2017 N.Y. App. Div. LEXIS 5068 (N.Y. App. Div. 3d Dep't 2017).

Evidence was sufficient to support defendant's conviction for criminal mischief in second degree under Penal Law § 145.10 because the victim testified that defendant punched and kicked her car eight or nine times resulting in dents in hood and all the way down the side of her car and a broken sun visor, and a repair shop estimated the cost to repair the damage to the car at $ 2,280, thus exceeding the statutory requirement of $1,500. People v Bombard, 159 A.D.3d 1119, 71 N.Y.S.3d 759, 2018 N.Y. App. Div. LEXIS 1531 (N.Y. App. Div. 3d Dep't), app. denied, 31 N.Y.3d 1145, 108 N.E.3d 501, 83 N.Y.S.3d 427, 2018 N.Y. LEXIS 2421 (N.Y. 2018).

Verdict that convicted defendant of burglary in the third degree, criminal mischief, and petit larceny was not against the weight of the evidence where testimony indicated that defendant and four other employees resembled the individual depicted on a video prying open the door, blood found on the doorway matched defendant's DNA, and defendant testified that the blood might have transferred to the doorway as he had suffered an injury and went into the office to get a bandage. People v Young, 160 A.D.3d 1206, 75 N.Y.S.3d 645, 2018 N.Y. App. Div. LEXIS 2655 (N.Y. App. Div. 3d Dep't), app. denied, 31 N.Y.3d 1155, 108 N.E.3d 510, 83 N.Y.S.3d 436, 2018 N.Y. LEXIS 2419 (N.Y. 2018).

There was nothing plainly illegal about the $ 40,000 restitution award; first, defendant failed to preserve the issue, and preservation was required as defendant claimed restitution was about the statutory cap and was directed to a person or entity that was not a victim of the crime, and second, imposing joint and several liability on all perpetrators for the entire loss promoted the purposes of the restitution statute. People v Graves, 163 A.D.3d 16, 78 N.Y.S.3d 613, 2018 N.Y. App. Div. LEXIS 4439 (N.Y. App. Div. 4th Dep't 2018), app. denied, 35 N.Y.3d 970, 148 N.E.3d 509, 125 N.Y.S.3d 45, 2020 N.Y. LEXIS 1220 (N.Y. 2020).

Defendant confessed to police and two eyewitnesses definitively identified defendant as one of the vandals; he thereby qualified for accessorial liability, in connection with his criminal mischief trial. People v Graves, 163 A.D.3d 16, 78 N.Y.S.3d 613, 2018 N.Y. App. Div. LEXIS 4439 (N.Y. App. Div. 4th Dep't 2018), app. denied, 35 N.Y.3d 970, 148 N.E.3d 509, 125 N.Y.S.3d 45, 2020 N.Y. LEXIS 1220 (N.Y. 2020).

Jury was instructed in defendant's criminal mischief trial that the extent or degree of his personal participation in the vandalism did not matter to his guilt, and since it was undisputed that the group as a whole did well over $ 1,500 in damage, it did not matter whether the People proved that defendant personally caused damage to such an extent or degree. People v Graves, 163 A.D.3d 16, 78 N.Y.S.3d 613, 2018 N.Y. App. Div. LEXIS 4439 (N.Y. App. Div. 4th Dep't 2018), app. denied, 35 N.Y.3d 970, 148 N.E.3d 509, 125 N.Y.S.3d 45, 2020 N.Y. LEXIS 1220 (N.Y. 2020).

Jury had ample basis to infer that the dealership was either a private corporation or a partnership, and either qualified as an appropriate nonhuman person, for purposes of defendant's criminal mischief in the second degree conviction; in light of the description of the enterprise offered by the employees, formal corporate documentation was not strictly necessary to prove that the dealership qualified as an appropriate nonhuman person. People v Graves, 163 A.D.3d 16, 78 N.Y.S.3d 613, 2018 N.Y. App. Div. LEXIS 4439 (N.Y. App. Div. 4th Dep't 2018), app. denied, 35 N.Y.3d 970, 148 N.E.3d 509, 125 N.Y.S.3d 45, 2020 N.Y. LEXIS 1220 (N.Y. 2020).

Evidence was not legally sufficient to establish defendant's guilt beyond a reasonable doubt on the fourteenth and sixteenth counts of the indictment as the evidence failed to establish that defendant intended to damage police vehicle unit 305 and failed to establish that the amount of the damage caused to police vehicle unit 322 exceeded $ 1,500. People v Peloso, 176 A.D.3d 1107, 113 N.Y.S.3d 87, 2019 N.Y. App. Div. LEXIS 7584 (N.Y. App. Div. 2d Dep't), app. dismissed, 176 A.D.3d 1110, 108 N.Y.S.3d 890, 2019 N.Y. App. Div. LEXIS 7613 (N.Y. App. Div. 2d Dep't 2019).

Finding that defendant was a persistent felony offender was vacated in the interest of justice where it was unduly harsh and severe because, despite defendant's frequent involvement with law enforcement, he had only two prior felony convictions (one in 1981 one in 2002), and because a sentence of 20 years to life was a particularly harsh penalty in light of the People's final pretrial plea offer of 6 to 9 years' incarceration. Moreover, because the trial court did not include the sentence on defendant's conviction for second-degree criminal in the persistent felony offender sentence, it imposed a sentence on that count that was illegal whether defendant was sentenced as a persistent felony offender or a second felony offender. People v Garno, 184 A.D.3d 1106, 125 N.Y.S.3d 816, 2020 N.Y. App. Div. LEXIS 3415 (N.Y. App. Div. 4th Dep't), app. denied, 35 N.Y.3d 1065, 152 N.E.3d 1191, 129 N.Y.S.3d 389, 2020 N.Y. LEXIS 2129 (N.Y. 2020).

Court would not dismiss counts of indictment charging defendant with second and fourth degree criminal mischief arising from his act of widening town road without authority since (1) evidence showed that he intentionally damaged land adjacent to road (which was owned by another) by destroying walls, fences, and trees, and by piling debris on land, (2) he was not town superintendent, and thus he derived no authority to widen road based on CLS High § 189, which authorizes town superintendent to widen lands used by public as highway for 10 years or more,

and (3) therewas no reasonable ground for him to believe that he had right to widen road because § 189 does not authorize appropriation of lands not actually in use as roads without consent of owner or payment of just compensation. People v Misevis, 138 Misc. 2d 1097, 526 N.Y.S.2d 387, 1988 N.Y. Misc. LEXIS 78 (N.Y. County Ct. 1988).

In trial for second degree criminal mischief, any reduced usefulness or loss of efficiency that resulted from defendant's conduct of spraying chicken feces on marble exterior of court building was sufficient for jury to find damages even though facade of building was not physically damaged, and amount of clean-up costs was properly considered in determining amount of damage to building. People v Collins, 183 Misc. 2d 303, 704 N.Y.S.2d 791, 2000 N.Y. Misc. LEXIS 22 (N.Y. Sup. Ct.), review or reh'g denied, People ex rel. Collins v Perlman, 95 N.Y.2d 899, 716 N.Y.S.2d 637, 739 N.E.2d 1141, 2000 N.Y. LEXIS 3778 (N.Y. 2000).

Evidence that defendant allowed former boyfriend to use defendant's mother's car earlier in the evening and that defendant drove the boyfriend to another person's residence later that same night, waited in the car while the boyfriend relit a fire the boyfriend had set at the residence, and drove the boyfriend to defendant's house after he restarted the fire was sufficient to corroborate the boyfriend's testimony that defendant knew the boyfriend was going to set the fire and assisted the boyfriend in doing so, and the appellate court sustained defendant's convictions on charges of burglary in the second degree, arson in the third degree, assault in the second degree, and criminal mischief in the second degree. People v Wood, 299 A.D.2d 739, 751 N.Y.S.2d 106, 2002 N.Y. App. Div. LEXIS 11391 (N.Y. App. Div. 3d Dep't 2002), app. denied, 99 N.Y.2d 621, 757 N.Y.S.2d 833, 787 N.E.2d 1179, 2003 N.Y. LEXIS 693 (N.Y. 2003).

Where the only proof that the damage caused by defendant was over $1500 was given by the complainant, the evidence was insufficient to support defendant's conviction of criminal mischief in the second degree, and defendant should have been convicted of criminal mischief in the fourth degree. People v Deolall, 7 A.D.3d 635, 777 N.Y.S.2d 173, 2004 N.Y. App. Div. LEXIS 6901 (N.Y. App. Div. 2d Dep't), app. denied, 3 N.Y.3d 658, 782 N.Y.S.2d 700, 816 N.E.2d 573, 2004 N.Y. LEXIS 3062 (N.Y. 2004).

Intent could have been inferred from the act itself or from the defendant's conduct and the surrounding circumstances, and there was legally sufficient evidence from which the jury could have inferred that defendant intended to place the victim in reasonable fear of physical injury by, inter alia, displaying a tire iron, that defendant intended to damage the victim's vehicle, and that defendant intended to use a dangerous instrument, his own vehicle, against the victim. People v Bryant, 13 A.D.3d 1170, 787 N.Y.S.2d 540, 2004 N.Y. App. Div. LEXIS 16299 (N.Y. App. Div. 4th Dep't 2004), review denied, 4 N.Y.3d 884, 798 N.Y.S.2d 729, 831 N.E.2d 974, 2005 N.Y. LEXIS 1646 (N.Y. 2005).

Sufficient evidence existed to convict a defendant of assault in the second degree N.Y. Penal Law § 120.05(3), reckless endangerment in the first degree, N.Y. Penal Law § 120.25, and criminal mischief in the second degree, N.Y. Penal Law § 145.10 since the jury could best resolve credibility and N.Y. Penal Law § 40.15 insanity defense fact issues; he had the ability to understand that firing 59 shots at police and neighbors was wrong even though his expert psychiatrist testified he had a delusional disorder (paranoid schizophrenia) for years and was delusional the night of the shooting. People v Stoffel, 17 A.D.3d 992, 794 N.Y.S.2d 230, 2005 N.Y. App. Div. LEXIS 4520 (N.Y. App. Div. 4th Dep't), app. denied, 5 N.Y.3d 795, 801 N.Y.S.2d 816, 835 N.E.2d 676, 2005 N.Y. LEXIS 2431 (N.Y. 2005).

Defendant's convictions for criminal mischief were reversed where defendant was acquitted of making graffiti charges based on the same alleged act of vandalism as the only evidence of property damage submitted to the jury was of spray-painting. People v Wallender, 27 A.D.3d 955, 812 N.Y.S.2d 157, 2006 N.Y. App. Div. LEXIS 3579 (N.Y. App. Div. 3d Dep't 2006).

Defendant's conviction for criminal mischief, for which defendant was not charged with making graffiti based on the same alleged acts of vandalism, was supported by the weight of the evidence as a witness testified that defendant was dressed in black at a party and that either defendant or another individual stated that "You will hear about it tomorrow"; there was also testimony that defendant admitted participating in the vandalism, although aspects of this evidence were incredible. People v Wallender, 27 A.D.3d 955, 812 N.Y.S.2d 157, 2006 N.Y. App. Div. LEXIS 3579 (N.Y. App. Div. 3d Dep't 2006).

Evidence was sufficient to support a conviction for criminal mischief in the second degree, pursuant to N.Y. Penal Law § 145.10, when the evidence showed that defendant had shot at his former girlfriend's home with a shotgun and had caused at least $1,500 in damage to the home. People v Gray, 30 A.D.3d 771, 816 N.Y.S.2d 609, 2006 N.Y. App. Div. LEXIS 8001 (N.Y. App. Div. 3d Dep't), app. denied, 7 N.Y.3d 848, 823 N.Y.S.2d 777, 857 N.E.2d 72, 2006 N.Y. LEXIS 3423 (N.Y. 2006).

Defendant's claim that, in a case trying a charge of criminal mischief, his counsel ineffectively pursued supposed defense that his conduct did not rise to the level of criminal activity was meritless. Counsel raised the issue of intent in both his opening and closing statements, and presented testimony that defendant's purpose in cutting, trimming, and removing plantings at a leased residence was to make the property safer and more aesthetically pleasing. Experts were consulted by defense counsel and one was scheduled to testify but did not appear because his travel was delayed and the trial court denied counsel's request for a continuance to accommodate the witness. People v Varden, 34 A.D.3d 926, 823 N.Y.S.2d 597, 2006 N.Y. App. Div. LEXIS 13197 (N.Y. App. Div. 3d Dep't), app. denied, 7 N.Y.3d 929, 827 N.Y.S.2d 698, 860 N.E.2d 1000, 2006 N.Y. LEXIS 4163 (N.Y. 2006).

Denial of motion to dismiss defamation complaint was error because, inter alia, certain statements referring to plaintiff's alleged criminal conduct were made in the context of plaintiff's purported demolition/reconstruction activities for which legitimate issues of fact existed, i.e., whether they were duly authorized by a village in each instance and whether they encroached upon the owner's property rights; arguably, plaintiff could have been subject to prosecution for felonious criminal mischief. Galasso v Saltzman, 42 A.D.3d 310, 839 N.Y.S.2d 731, 2007 N.Y. App. Div. LEXIS 8178 (N.Y. App. Div. 1st Dep't 2007).

Based, inter alia, on defendant's complaint about a store, defendant's admission to starting a fire, and leaving the scene without ascertaining that the fire was out or that the building's occupants knew about it, defendant was properly convicted of second-degree arson, second-degree criminal mischief and first-degree reckless endangerment under N.Y. Penal Law §§ 150.15, 145.10, 120.25. People v Hodges, 66 A.D.3d 1228, 888 N.Y.S.2d 224, 2009 N.Y. App. Div. LEXIS 7568 (N.Y. App. Div. 3d Dep't 2009), app. denied, 13 N.Y.3d 939, 895 N.Y.S.2d 330, 922 N.E.2d 919, 2010 N.Y. LEXIS 525 (N.Y. 2010).

Trial court's judgments of conviction finding defendant guilty of 12 counts of criminal mischief had to be reversed, except for one count of criminal mischief in the third degree; defendant could not be acquitted of "making graffiti," as he was by the jury and be convicted of 11 of the 12 counts because they were all based on the same conduct. alleged spray-painting, and, thus, the verdict was repugnant. Colavito v New York Organ Donor Network, Inc., 6 N.Y.3d 820, 813 N.Y.S.2d 37, 846 N.E.2d 467, 2006 N.Y. LEXIS 517 (N.Y. 2006).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 460.10; CLS CPL § 700.05.

Eavesdropping warrants in cases of criminal mischief in the first degree, CLS CPL §§ 700.05(8), 700.10–700.70.

Federal Aspects:

Malicious mischief, 18 USCS §§ 1361 et seq.

Jurisprudences:

18 NY Jur 2d Cemeteries and Dead Bodies § 99.

35 NY Jur 2d Criminal Law Substantive Principles and Offenses § 357.

35A NY Jur 2d Criminal Law Substantive Principles and Offenses §§ 851, 861, 871, 877.

31 Am Jur 2d, Explosions and Explosives §§ 123, 126 et seq.

52 Am Jur 2d, Malicious Mischief § 3.

Criminal Jury Instructions: Criminal mischief, second degree (intentionally damaging another's property; amount more than $1,500). CJI2d [NY] Penal Law § 145.10.

Texts: 1 Bergman on New York Mortgage Foreclosures (Matthew Bender) § 9.04.

New York Criminal Practice Ch. 62.

§ 145.12. Criminal mischief in the first degree

A person is guilty of criminal mischief in the first degree when with intent to damage property of another person, and having no right to do so nor any reasonable ground to believe that he has such right, he damages property of another person by means of an explosive.

Criminal mischief in the first degree is a class B felony.

HISTORY:

Add, L 1971, ch 961, § 4, eff Sept 1, 1971.

Notes to Decisions

Sentencing court properly denied youthful offender treatment to defendant convicted of first degree criminal mischief in light of serious nature of crime (pipe bombing of 2 residences which caused property damage). People v Parmelee, 184 A.D.2d 534, 584 N.Y.S.2d 318, 1992 N.Y. App. Div. LEXIS 7636 (N.Y. App. Div. 2d Dep't 1992).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 60.05, 460.10; CLS CPL § 700.05.

Jurisprudences:

18 NY Jur 2d Cemeteries and Dead Bodies § 99.

35 NY Jur 2d Criminal Law Substantive Principles and Offenses § 357.

35A NY Jur 2d Criminal Law Substantive Principles and Offenses §§ 852, 861, 871, 877.

52 Am Jur 2d, Malicious Mischief § 3.

Criminal Jury Instructions: Criminal mischief, first degree (intentionally damaging another's property by explosive). CJI2d [NY] Penal Law § 145.12.

Texts: 1 Bergman on New York Mortgage Foreclosures (Matthew Bender) § 9.04.

New York Criminal Practice Ch. 62.

§ 145.13. Definitions

For the purposes of sections 145.00, 145.05, 145.10 and 145.12 of this article:

"Property of another" shall include all property in which another person has an ownership interest, whether or not a person who damages such property, or any other person, may also have an interest in such property.

HISTORY:

Add, L 2008, ch 601, § 1, eff Nov 1, 2008; amd, L 2009, ch 45, § 1, eff May 29, 2009.

Amendment Notes:

2009. Chapter 45, § 1 amended:

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

35A NY Jur 2d Criminal Law Substantive Principles and Offenses §§ 861, 871.

§ 145.15. Criminal tampering in the second degree

A person is guilty of criminal tampering in the second degree when, having no right to do so nor any reasonable ground to believe that he has such right, he or she tampers or makes connection with property of a gas, electric, sewer, steam or water-works corporation, telephone or telegraph corporation, common carrier, nuclear powered electric generating facility, or public utility operated by a municipality or district; except that in any prosecution under this section, it is an affirmative defense that the defendant did not engage in such conduct for a larcenous or otherwise unlawful or wrongful purpose.

Criminal tampering in the second degree is a class A misdemeanor.

HISTORY:

Add, L 1965, ch 1030, § 1, with substance derived from §§ 463, 1422, 1423–a, 1423–b, 1424, 1427, 1431, 1432, 1432–a, 1433, 1911, 1991; amd, L 1969, ch 862, § 1; L 1978, ch 420, § 2, eff Jan 1, 1979; L 2006, ch 585, § 1, eff Aug 16, 2006.

Commission Staff Notes: See Commission Staff Notes under Art 145.

Notes to Decisions

Analysis

1. In general
2. Under former § 1423

1. In general

In juvenile delinquency proceeding in which defendant was accused of committing act which, if committed by adult, would constitute crime of second degree criminal tampering, defendant had burden to establish by preponderance of evidence affirmative defense that he did not engage in conduct of which he was accused for larcenous or otherwise unlawful or wrongful purpose. In re Rodney B., 69 N.Y.2d 687, 512 N.Y.S.2d 17, 504 N.E.2d 384, 1986 N.Y. LEXIS 21305 (N.Y. 1986).

Trial court's acquittal of defendant on greater charges of arson in first, second and third degrees was not inconsistent with his conviction of fourth degree arson, since verdict was logically explained as limited acceptance of intoxication defense to extent of finding that defendant intentionally set fire but recklessly, not intentionally, damaged building. People v Gerasimovic, 124 A.D.2d 593, 507 N.Y.S.2d 873, 1986 N.Y. App. Div. LEXIS 61905 (N.Y. App. Div. 2d Dep't 1986).

By pushing metal rod up and down in subway turnstile's token slot, defendant engaged in "tampering" within meaning of CLS Penal § 145.15. People v Gittens, 279 A.D.2d 291, 719 N.Y.S.2d 230, 2001 N.Y. App. Div. LEXIS 92 (N.Y. App. Div. 1st Dep't), app. denied, 96 N.Y.2d 829, 729 N.Y.S.2d 449, 754 N.E.2d 209, 2001 N.Y. LEXIS 2164 (N.Y. 2001).

Evidence that defendant used jumper cables at meter box at his home that allowed him to use 10 percent of the electricity without its being recorded by the meter, and testimony from the company's security investigator that the cables did not belong in the meter box, was sufficient to establish that the cables were placed in the box without the company's consent. Therefore, defendant was properly convicted of criminal tampering in the second degree under N.Y. Pen. Law § 145.15. People v Myles, 58 A.D.3d 889, 870 N.Y.S.2d 598, 2009 N.Y. App. Div. LEXIS 55 (N.Y. App. Div. 3d Dep't 2009), app. denied, 14 N.Y.3d 890, 903 N.Y.S.2d 779, 929 N.E.2d 1014, 2010 N.Y. LEXIS 1860 (N.Y. 2010).

2. Under former § 1423

Subdivision 6 of this section, which punishes the conscious and deliberate tapping of telephones within the State, does not offend the Supremacy Clause of the U. S. Constitution (Art 6 § 2) on the ground that Congress in enacting § 605 of the Federal Communications Act intended to usurp the field. The word "wilfully" in the phrase "unlawfully and wilfully" in that part of § 1423 prohibiting wire tapping, means deliberately. This being so, when the word "wilfully" was carried into former § 738, the new statutory section forbidding eavesdropping, the same meaning applies. People v Broady, 5 N.Y.2d 500, 186 N.Y.S.2d 230, 158 N.E.2d 817, 1959 N.Y. LEXIS 1447 (N.Y.), cert. denied, 361 U.S. 8, 80 S. Ct. 57, 4 L. Ed. 2d 49, 1959 U.S. LEXIS 348 (U.S. 1959).

Evidence as to a crime obtained by the police by tapping telephone wire should not be excluded upon the ground that the police in obtaining the information violated § 552 and this section. People v McDonald, 177 A.D. 806, 165 N.Y.S. 41, 1917 N.Y. App. Div. LEXIS 6441 (N.Y. App. Div. 1917).

Where the subscriber consents to the use of his telephone by an employee, a member of his household or by his wife there is a condition implied that the telephone will not be used to the detriment of the subscriber's business, household or marital status and, in order to determine if his line is being so used he may have his own line tapped. People v Appelbaum, 277 A.D. 43, 97 N.Y.S.2d 807, 1950 N.Y. App. Div. LEXIS 2988 (N.Y. App. Div.), aff'd, 301 N.Y. 738, 95 N.E.2d 410, 301 N.Y. (N.Y.S.) 738, 1950 N.Y. LEXIS 1033 (N.Y. 1950).

A defendant's statutory and constitutional rights are not infringed by the attachment of a recording device to his telephone showing only the numbers dialed thereon and the time of such dialing where such device was attached by the telephone company at the request of a person at whose complaint a charge is pending against defendant for violation of the provision of subd 6 of above statute making it a crime to use a telephone line to make calls to a place of business for the purpose of keeping the line busy in order to injure such business. People v Schneider, 45 Misc. 2d 680, 257 N.Y.S.2d 876, 1965 N.Y. Misc. LEXIS 2247 (N.Y. Sup. Ct. 1965).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Burden of proving affirmative defense, § 25.00.

Theft of services by mechanical tampering, § 165.15.

Jurisprudences:

18 NY Jur 2d Cemeteries and Dead Bodies § 99.

35A NY Jur 2d Criminal Law Substantive Principles and Offenses §§ 861, 862, 871.

7A Am Jur 2d, Automobiles and Highway Traffic §§ 420–423.

74 Am Jur 2d, Telecommunications § 207.

Annotations:

Validity and construction of statute making it a criminal offense to "tamper" with motor vehicle or contents, or to obscure registration plates. 57 A.L.R.3d 606.

Criminal prosecutions for use of "blue box" or similar device permitting user to make long-distance telephone calls without incurring charges. 78 ALR3d 449.

Criminal Jury Instructions: Criminal tampering, second degree (tampering or making connection with utility company property). CJI2d [NY] Penal Law § 145.15.

Texts: New York Criminal Practice Ch. 62.

§ 145.20. Criminal tampering in the first degree

A person is guilty of criminal tampering in the first degree when, with intent to cause a substantial interruption or impairment of a service rendered to the public, and having no right to do so nor any reasonable ground to believe that he or she has such right, he or she damages or tampers with property of a gas, electric, sewer, steam or water-works corporation, telephone or telegraph corporation, common carrier, nuclear powered electric generating facility, or public utility operated by a municipality or district, and thereby causes such substantial interruption or impairment of service.

Criminal tampering in the first degree is a class D felony.

HISTORY:

Add, L 1965, ch 1030, § 1, with substance derived from §§ 1422, 1423, 1423–a, 1431; amd, L 1969, ch 861, § 1, eff Sept 1, 1969; L 2006, ch 585, § 2, eff Aug 16, 2006.

Commission Staff Notes: See Commission Staff Notes under Art 145.

Notes to Decisions

Analysis

1. In general
2. Under former § 1423

1. In general

A bridge may be considered a "public utility" operated by a municipality within the meaning of Penal Law § 145.20. Bridge operators who left their bridges open while on strike could properly be charged with first degree criminal tampering under Penal L § 145.20, bridges coming within the broad meaning of "public utility" as used in such statute. The term "public utility" means the furnishing of services to the public by a governmental authority. People v Siciliano, 40 A.D.2d 818, 338 N.Y.S.2d 478, 1972 N.Y. App. Div. LEXIS 3228 (N.Y. App. Div. 1st Dep't 1972), aff'd, 34 N.Y.2d 575, 354 N.Y.S.2d 945, 310 N.E.2d 542, 1974 N.Y. LEXIS 1808 (N.Y. 1974).

2. Under former § 1423

A labor management contract which permits the union to direct its members who were employed to send both domestic telegraph messages and cablegrams while remaining on the job not to transmit cablegrams during a strike of union members engaged exclusively in transmitting cablegrams would be invalid as a violation of this section and therefore in the event of ambiguity such a contract must be construed not to authorize such a stoppage. Western Union Tel. Co. v American Communications Ass'n, C. I. O., 299 N.Y. 177, 86 N.E.2d 162, 299 N.Y. (N.Y.S.) 177, 1949 N.Y. LEXIS 980 (N.Y. 1949).

Where defendant, upon buying his premises from former owner, bought latter's share in telephone line, cut wire across his property and removed it after his telephone was disconnected for failure to pay charge assessed for use of telephone, having given one day notice to other landowners of his intention, it cannot be said that defendant violated this section. People v Raeder, 292 N.Y.S. 447, 161 Misc. 557, 1937 N.Y. Misc. LEXIS 1474 (N.Y. County Ct. 1937).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS CPL § 700.05.

Eavesdropping warrants in cases of criminal tampering in the first degree, CLS CPL §§ 700.05(8), 700.10–700.70.

Jurisprudences:

18 NY Jur 2d Cemeteries and Dead Bodies § 99.

35A NY Jur 2d Criminal Law Substantive Principles and Offenses §§ 861, 863, 871.

74 Am Jur 2d, Telecommunications § 207.

Annotations:

Validity and construction of statute making it a criminal offense to "tamper" with motor vehicle or contents, or to obscure registration plates. 57 A.L.R.3d 606.

Criminal prosecutions for use of "blue box" or similar device permitting user to make long-distance telephone calls without incurring charges. 78 ALR3d 449.

Criminal Jury Instructions: Criminal tampering, first degree (damaging or tampering with utility company property; intent to interrupt service). CJI2d [NY] Penal Law § 145.20.

Texts: New York Criminal Practice Ch. 62.

§ 145.25. Reckless endangerment of property

A person is guilty of reckless endangerment of property when he recklessly engages in conduct which creates a substantial risk of damage to the property of another person in an amount exceeding two hundred fifty dollars.

Reckless endangerment of property is a class B misdemeanor.

HISTORY:

Add, L 1965, ch 1030, § 1, eff Sept 1, 1967.

Commission Staff Notes: See Commission Staff Notes under Art 145.

Notes to Decisions

Indictment counts charging defendant with reckless endangerment of property and fourth degree criminal mischief, as well as jury's findings of guilt on both counts, were not inconsistent, and thus jury charge under CLS CPL § 300.40(5) was not required, where (1) despite same mental state of recklessness involved in both crimes, results of damage to property as opposed to risk of damage to property were different, (2) acts constituting offenses were different, (3) court instructed jury that alleged conduct causing damage to property supporting reckless endangerment of property was defendant's jumping from moving truck, and (4) although court referred to no specific conduct while instructing on mischief charge, jury could have found that requisite risk of damage to truck arose earlier when defendant recklessly drove into field. People v Swart, 273 A.D.2d 503, 709 N.Y.S.2d 653, 2000 N.Y. App. Div. LEXIS 6436 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 908, 716 N.Y.S.2d 649, 739 N.E.2d 1154, 2000 N.Y. LEXIS 3723 (N.Y. 2000).

Establishment of fraud allegations in handling of strike ballot on part of union officers would result in such officers lacking standing to invoke provisions of the Taylor Law, statute authorizing collective bargaining for public employees, as a defense to criminal charges of reckless endangerment and related crimes arising from calling strike of firemen. Trial jury could properly find beyond a reasonable doubt that the callousness of conduct of defendant union leaders in calling strike of city's firemen on basis of allegedly phony strike "mandate" thereby creating a substantial risk to property and persons in the city for mere personal or pecuniary gain amounted to "recklessness" under the reckless endangerment statutes. A strike by firemen may properly be the subject of a prosecution for reckless endangerment notwithstanding contention that reckless endangerment sections were not intended to apply to conduct not involving the performance of a physical act. People v Vizzini, 78 Misc. 2d 1040, 359 N.Y.S.2d 143, 1974 N.Y. Misc. LEXIS 1554 (N.Y. Sup. Ct. 1974).

Police officer had probable cause to arrest juvenile for second degree reckless endangerment and reckless endangerment of property, at minimum, where juvenile deliberately threw lit fireworks in path of moving vehicular traffic on city street. In re William H., 177 Misc. 2d 196, 675 N.Y.S.2d 851, 1998 N.Y. Misc. LEXIS 277 (N.Y. Fam. Ct. 1998).

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

35A NY Jur 2d Criminal Law Substantive Principles and Offenses §§ 871, 877.

Criminal Jury Instructions: Reckless endangerment of property (risk of damage of more than $250). CJI2d [NY] Penal Law § 145.25.

Texts: New York Criminal Practice Ch. 62.

ARTICLE 150

ARSON

HISTORY:

Add, L 1965, ch 1030, § 1, eff Sept 1, 1967.

§ 150.00. Arson; definitions

As used in this article,

1. "Building", in addition to its ordinary meaning, includes any structure, vehicle or watercraft used for overnight lodging of persons, or used by persons for carrying on business therein. Where a building consists of two or more units separately secured or occupied, each unit shall not be deemed a separate building.

2. "Motor vehicle", includes every vehicle operated or driven upon a public highway which is propelled by any power other than muscular power, except (a) electrically-driven invalid chairs being operated or driven by an invalid, (b) vehicles which run only upon rails or tracks, and (c) snowmobiles as defined in article forty-seven of the vehicle and traffic law.

HISTORY:

Add, L 1965, ch 1030, § 1, with substance derived from § 220; amd, L 1979, ch 225, § 17, eff Sept 1, 1979.

Commission Staff Notes: See Commission Staff Notes under Art 150.

Notes to Decisions

Analysis

1. In general
2. Under former § 220
3. Under former § 227

1. In general

Evidence held insufficient to warrant conviction of arson where evidence would not reasonably exclude the electrical lead furnishing current for pin up lamp as exposed to the interior wall of a closet as the source of fire. People v Trippoda, 40 A.D.2d 388, 341 N.Y.S.2d 66, 1973 N.Y. App. Div. LEXIS 5379 (N.Y. App. Div. 3d Dep't 1973).

Sentence of 15 years, with no minimum term, for arson of a motel was proper where psychotherapy treatment under protective conditions was not available to defendant due to overcrowded conditions in public clinics. People v Gatti, 41 A.D.2d 593, 340 N.Y.S.2d 412, 1973 N.Y. App. Div. LEXIS 5305 (N.Y. App. Div. 4th Dep't 1973).

Within statute defining "building" for purposes of arson statute as meaning, in addition to its ordinary meaning, structure, vehicle or watercraft used for overnight lodging of persons or used by persons for carrying on business therein, the modifying phrase as to use for overnight lodging or for carrying on business therein has no application to the phrase " 'building,' in addition to its ordinary meaning." People v Richberg, 56 A.D.2d 279, 392 N.Y.S.2d 16, 1977 N.Y. App. Div. LEXIS 10429 (N.Y. App. Div. 1st Dep't 1977).

People proved that "sugar shack" was "building" in accordance with arson statute, where its owner testified that it was constructed on concrete slab, had roof, and contained equipment used for production of maple syrup. People v Letendre, 264 A.D.2d 943, 696 N.Y.S.2d 538, 1999 N.Y. App. Div. LEXIS 9567 (N.Y. App. Div. 3d Dep't 1999).

Structure built by homeless people, which consisted of carpets draped over clotheslines running between two fixed fences, plywood providing additional support to one side of the structure, an entrance covered by shower curtains and blankets, a tarp covering the entire structure, and carpeting on the ground, and had diverted electrical service from a nearby subway station, was a "building," under N.Y. Penal Law 150.00(1), which could be the subject of second degree arson, because it was utilized for overnight lodging and because it fit within the ordinary meaning of the term "building," so substantial evidence supported defendant's arson conviction under N.Y. Penal Law § 150.15. People v Fox, 3 A.D.3d 577, 771 N.Y.S.2d 156, 2004 N.Y. App. Div. LEXIS 709 (N.Y. App. Div. 2d Dep't), app. denied, 2 N.Y.3d 739, 778 N.Y.S.2d 465, 810 N.E.2d 918, 2004 N.Y. LEXIS 1128 (N.Y. 2004).

Defendant's conviction for arson in the third degree was supported by sufficient evidence because the trailer that defendant set fire to was within the definition of "building," as it was enclosed by walls, covered by a roof, designed to stand permanently, and served a useful purpose. People v Norcutt, 115 A.D.3d 1306, 982 N.Y.S.2d 661, 2014 N.Y. App. Div. LEXIS 2110 (N.Y. App. Div. 4th Dep't), app. denied, 23 N.Y.3d 966, 988 N.Y.S.2d 573, 11 N.E.3d 723, 2014 N.Y. LEXIS 1657 (N.Y. 2014).

Defendant's conviction for arson in the third degree was supported by sufficient evidence because the trailer that defendant set fire to was within the definition of "building," as it was used

for overnight lodging on vacations or weekend retreats. People v Norcutt, 115 A.D.3d 1306, 982 N.Y.S.2d 661, 2014 N.Y. App. Div. LEXIS 2110 (N.Y. App. Div. 4th Dep't), app. denied, 23 N.Y.3d 966, 988 N.Y.S.2d 573, 11 N.E.3d 723, 2014 N.Y. LEXIS 1657 (N.Y. 2014).

2. Under former § 220

Where a defendant makes false and fraudulent claims to a fire insurance company as to the origin of a fire, and he is later acquitted of an arson charge, a subsequent trial for false swearing is not barred by the former trial. People v Berger, 106 N.Y.S.2d 761, 199 Misc. 543, 1950 N.Y. Misc. LEXIS 2558 (N.Y. County Ct. 1950).

"Goods" within a village ordinance requiring sprinkler systems in cellar areas used for storage of combustible goods or merchandise included office records to be stored in such an area. Strauss v Schlimm, 144 N.Y.S.2d 229, 1955 N.Y. Misc. LEXIS 3710 (N.Y. Sup. Ct. 1955).

If a building is generally occupied by persons lodging therein at night, it is a "dwelling house" within the meaning of this section, even though it would not ordinarily be regarded as a dwelling house. People v Orcutt (1851) 1 Park Crim 252.

3. Under former § 227

A person may be guilty of arson in burning his own building. Shepherd v People, 19 N.Y. 537, 19 N.Y. (N.Y.S.) 537, 1859 N.Y. LEXIS 66 (N.Y. 1859).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:
Night time, CLS Gen Const § 51.

Jurisprudences:
35A NY Jur 2d Criminal Law Substantive Principles and Offenses §§ 877, 885, 886.
5 Am Jur 2d, Arson and Related Offenses §§ 1, 2.
19 Am Jur Trials 685, Preparation and Trial of Arson Case.

Annotations:
Vacancy or nonoccupancy of building as affecting its character as "dwelling" as regards arson. 44 ALR2d 1456.

Texts: New York Criminal Practice Ch. 63.

§ 150.01. Arson in the fifth degree

A person is guilty of arson in the fifth degree when he or she intentionally damages property of another without consent of the owner by intentionally starting a fire or causing an explosion.

Arson in the fifth degree is a class A misdemeanor.

HISTORY:
Add, L 2001, ch 224, § 1, eff Nov 1, 2001.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:
35A NY Jur 2d Criminal Law Substantive Principles and Offenses §§ 877, 878.

Criminal Jury Instructions: Arson, fifth degree. CJI2d [NY] Penal Law § 150.01.

§ 150.05. Arson in the fourth degree

1. A person is guilty of arson in the fourth degree when he recklessly damages a building or motor vehicle by intentionally starting a fire or causing an explosion.

2. In any prosecution under this section, it is an affirmative defense that no person other than the defendant had a possessory or proprietary interest in the building or motor vehicle.

Arson in the fourth degree is a class E felony.

HISTORY:
Add, L 1965, ch 1030, § 1; amd, L 1971, ch 961, § 5; L 1971, ch 961, eff Sept 1, 1971; L 1979, ch 225, § 18, eff Sept 1, 1979.

Commission Staff Notes: See Commission Staff Notes under Art 150.

Notes to Decisions

Analysis

1. In general
2. Under former § 223

1. In general

In a prosecution of the proprietors of the burned building for arson, the court's engaging in an off-the-record conference with a witness, the fire marshal, and thereafter stating, "After a colloquy with the witness, his answer is that he could not say with any reasonable degree of certainty that the gasoline was wilfully ignited. It could have been accidentally ignited, but in a case like this you do not have a spontaneous combustion, it does not ignite by itself," was prejudicial error. People v Schatz, 37 A.D.2d 584, 322 N.Y.S.2d 802, 1971 N.Y. App. Div. LEXIS 3914 (N.Y. App. Div. 2d Dep't 1971).

Where at time of entry of guilty plea parties apparently relied on Penal L § 150.05 as it read prior to 1971 amendment which raised attempted arson in the third degree from a class A misdemeanor to the class D felony; thus guilty plea in sentence should be vacated and case remitted. People v Bradshaw, 41 A.D.2d 658, 340 N.Y.S.2d 669, 1973 N.Y. App. Div. LEXIS 5163 (N.Y. App. Div. 2d Dep't 1973).

In prosecution wherein defendant was adjudged to be a youthful offender, after being found guilty of arson, fourth degree, remark by witness that defendant liked to start fires was not prejudicial where it was elicited by defendant's attorney and court immediately instructed jury to disregard it. People v U, 47 A.D.2d 791, 365 N.Y.S.2d 570, 1975 N.Y. App. Div. LEXIS 9106 (N.Y. App. Div. 3d Dep't 1975).

Evidence was sufficient to support crime of arson in the fourth degree, in that record justified finding that defendant threw lighted cigarette into upstairs hayloft knowing it was lit and without caring whether fire started therefrom. People v U, 47 A.D.2d 791, 365 N.Y.S.2d 570, 1975 N.Y. App. Div. LEXIS 9106 (N.Y. App. Div. 3d Dep't 1975).

Acquittals on counts charging arson second degree and arson third degree did not bar defendant's retrial on lowest submitted count of arson fourth degree, as to which count jury disagreed, since conviction of arson fourth degree, which requires finding of intent to start fire or cause explosion recklessly resulting in damage to building, would not be inconsistent with acquittals on higher counts which required, in addition to proof of intent to start fire, proof of intent to damage building, and since subparagraph of statute, preventing retrial for submitted offense upon which jury could not agree if that offense and some other submitted offense of higher or equal grade which was subject of verdict of conviction were so related that consecutive sentences thereon could not have been imposed, was not applicable. Doolen v Darrigrand, 58 A.D.2d 1028, 397 N.Y.S.2d 283, 1977 N.Y. App. Div. LEXIS 13254 (N.Y. App. Div. 4th Dep't), app. denied, 42 N.Y.2d 810, 1977 N.Y. LEXIS 3906 (N.Y. 1977).

In a prosecution for felony murder based upon allegations that defendant started a fire in a dwelling which caused the death of two occupants, it was not error to charge the elements of arson i the fourth degree as the predicate for felony murder despite the fact that the jury was not asked to determine defendant's guilt of arson in the fourth degree as a separately charged substantive crime and even though the jury acquitted defendant of arson in the second degree. People v Wroblewski, 109 A.D.2d 39, 489 N.Y.S.2d 797, 1985 N.Y. App. Div. LEXIS 47924 (N.Y. App. Div. 4th Dep't 1985), aff'd, 67 N.Y.2d 933, 502 N.Y.S.2d 719, 493 N.E.2d 943, 1986 N.Y. LEXIS 18080 (N.Y. 1986).

Court properly refused to charge fourth degree arson as lesser included offense of second degree arson where no reasonable view of evidence could support finding that defendant "recklessly" started fire inasmuch as 2 separate and "uncommunicated" fires were set and defendant pushed 2 burning chairs against front door of house to block occupants from exiting. People v Clinkscales, 134 A.D.2d 889, 522 N.Y.S.2d 390, 1987 N.Y. App.

Div. LEXIS 51081 (N.Y. App. Div. 4th Dep't 1987), app. denied, 70 N.Y.2d 1005, 526 N.Y.S.2d 940, 521 N.E.2d 1083, 1988 N.Y. LEXIS 808 (N.Y. 1988).

Conviction for fourth degree arson by starting fire in apartment was sufficiently established, even though building itself did not burn, where evidence showed that fire was started by putting match to combustible liquid poured on mattress, and that fire caused smoke damage to ceiling and walls, heat damage to light fixture, and charring of mattress and bed frame. People v Fleming, 164 A.D.2d 942, 560 N.Y.S.2d 50, 1990 N.Y. App. Div. LEXIS 10833 (N.Y. App. Div. 2d Dep't), app. denied, 76 N.Y.2d 1021, 565 N.Y.S.2d 771, 566 N.E.2d 1176, 1990 N.Y. LEXIS 4815 (N.Y. 1990).

Court properly denied defendant's request to charge attempted fourth degree arson as lesser included offense of attempted third degree arson since there is no such crime; person is guilty of CLS Penal § 150.05(1) fourth degree arson when he recklessly damages building or motor vehicle by intentionally starting fire or causing explosion (damage must thus ensue from reckless conduct), but person is guilty of attempt to commit crime only when he intends to commit that crime. People v DeJesus, 190 A.D.2d 1012, 593 N.Y.S.2d 633, 1993 N.Y. App. Div. LEXIS 1206 (N.Y. App. Div. 4th Dep't), app. denied, 81 N.Y.2d 969, 598 N.Y.S.2d 770, 615 N.E.2d 227, 1993 N.Y. LEXIS 1938 (N.Y. 1993).

Court properly submitted fourth degree arson as lesser included offense of third degree arson where evidence of defendant's intoxication was sufficient to negate intent element and allow finding of recklessness, leaving to fact finder whether extent of intoxication acted to negate intent element; fact that counts of third degree arson and fourth degree arson required showing of different culpable mental states did not preclude finding that latter was lesser included offense of former. People v Borst, 232 A.D.2d 727, 648 N.Y.S.2d 720, 1996 N.Y. App. Div. LEXIS 10257 (N.Y. App. Div. 3d Dep't 1996), app. denied, 89 N.Y.2d 940, 655 N.Y.S.2d 891, 678 N.E.2d 504, 1997 N.Y. LEXIS 535 (N.Y. 1997).

Court erred in dismissing fourth degree arson charge under CLS CPL § 210.20(1)(b) where grand jury evidence indicated that defendants were inside vacant building hours before it was destroyed by fire, that they rolled up newspapers and set them on fire to use as torches to see inside building, that they attempted to extinguish torches and discarded one in area where most significant charring was detected (which is usually origin of fire), and that investigation by fire officials ruled out other causes of fire. People v Goins, 234 A.D.2d 996, 653 N.Y.S.2d 51, 1996 N.Y. App. Div. LEXIS 13809 (N.Y. App. Div. 4th Dep't 1996), app. denied, 89 N.Y.2d 1012, 658 N.Y.S.2d 250, 680 N.E.2d 624, 1997 N.Y. LEXIS 1078 (N.Y. 1997), app. denied sub. nom., People v Pick, 89 N.Y.2d 1014, 658 N.Y.S.2d 252, 680 N.E.2d 626, 1997 N.Y. LEXIS 1140 (N.Y. 1997), app. denied sub. nom., People v Burdick, 89 N.Y.2d 1009, 658 N.Y.S.2d 248, 680 N.E.2d 622, 1997 N.Y. LEXIS 1026 (N.Y. 1997).

In prosecution for fourth degree arson, defendant's actions in reporting fire he had set and acknowledging his culpability to fire marshals was sufficient to show that he had been "aware of and consciously disregarded(ed) a substantial and unjustifiable risk" (CLS Penal § 15.05(3)). People v Calderon, 256 A.D.2d 122, 682 N.Y.S.2d 38, 1998 N.Y. App. Div. LEXIS 13267 (N.Y. App. Div. 1st Dep't 1998), app. denied, 93 N.Y.2d 851, 688 N.Y.S.2d 498, 710 N.E.2d 1097 (N.Y. 1999), app. denied, 93 N.Y.2d 851, 688 N.Y.S.2d 498, 710 N.E.2d 1097, 1999 N.Y. LEXIS 474 (N.Y. 1999).

Blistering and smoke damage, which resulted from fire, was sufficient to show damage element of fourth degree arson. People v Calderon, 256 A.D.2d 122, 682 N.Y.S.2d 38, 1998 N.Y. App. Div. LEXIS 13267 (N.Y. App. Div. 1st Dep't 1998), app. denied, 93 N.Y.2d 851, 688 N.Y.S.2d 498, 710 N.E.2d 1097 (N.Y. 1999), app. denied, 93 N.Y.2d 851, 688 N.Y.S.2d 498, 710 N.E.2d 1097, 1999 N.Y. LEXIS 474 (N.Y. 1999).

In a case in which defendant was convicted of the crime of arson in the fourth degree, defendant's sentence was not harsh and excessive because, while the county court had the authority to sentence defendant to an indeterminate prison sentence with a maximum of four years, the court exercised its discretion to impose an alternative definite sentence of one year in jail; and, in view of that, coupled with defendant's prior criminal history and the circumstances surrounding the crime, there was no abuse of discretion or extraordinary circumstances warranting a reduction of defendant's sentence in the interest of justice. People v McGowan, 149 A.D.3d 1161, 53 N.Y.S.3d 205, 2017 N.Y. App. Div. LEXIS 2636 (N.Y. App. Div. 3d Dep't), app. denied, 29 N.Y.3d 999, 80 N.E.3d 414, 57 N.Y.S.3d 721, 2017 N.Y. LEXIS 1648 (N.Y. 2017).

Evidence was sufficient to convict defendant of the crime of arson in the fourth degree because, after his estranged wife rejected defendant's sexual advances, he angrily grabbed her lingerie from her dresser drawer, placed it in the bathtub and then set fire to a piece of her underwear with a lighter, saying, that if he could not have her, than no one could; and the jury was permitted to reasonably and logically find that defendant then placed the burning piece of underwear on the pile of lingerie in the bathtub, making his intent to start the fire that caused the damage to the marital home clearly inferable. People v McGowan, 149 A.D.3d 1161, 53 N.Y.S.3d 205, 2017 N.Y. App. Div. LEXIS 2636 (N.Y. App. Div. 3d Dep't), app. denied, 29 N.Y.3d 999, 80 N.E.3d 414, 57 N.Y.S.3d 721, 2017 N.Y. LEXIS 1648 (N.Y. 2017).

Defendant's claim that his conviction for the crime of arson in the fourth degree was against the manifest weight of the evidence was without merit because it was undisputed that defendant intentionally set fire to clothing and other personal items in his cell; moreover, an expert in arson investigation who responded to the incident testified that he had discovered areas of defendant's cell where spalling had created a crater in the wall due to the fire which defendant intentionally started. People v Rice, 162 A.D.3d 1244, 78 N.Y.S.3d 776, 2018 N.Y. App. Div. LEXIS 4349 (N.Y. App. Div. 3d Dep't), app. denied, 32 N.Y.3d 940, 109 N.E.3d 1167, 84 N.Y.S.3d 867, 2018 N.Y. LEXIS 2814 (N.Y. 2018).

An indictment for second degree arson pursuant to Penal L § 150.15, based on an allegation that defendant had set fire to a garage and that the fire had spread to an inhabited building next door, would be dismissed with leave to the People to represent the charge to a new grand jury pursuant to CPL § 210.20(4) where, though a grand jury could find circumstantial evidence of defendant's intent to burn the inhabited building by starting the fire in the garage, the grand jury had erroneously been instructed that intent to damage the inhabited building was not required; however, a related charge of fourth degree arson arising out of damage caused by the fire to a parked motor vehicle would be deemed sufficient, since the indictment therefor contained an allegation that defendant intended to damage the vehicle itself by starting a fire in the garage next door. People v Keech, 121 Misc. 2d 368, 467 N.Y.S.2d 786, 1983 N.Y. Misc. LEXIS 3933 (N.Y. Sup. Ct. 1983).

Defendant's voluntary act of imbibing alcoholic beverage, knowing that he was prone to criminal acts while drunk and that consumption of even one drink would destroy his ability to resist further drinking, to point of intoxication, constituted recklessness per se; thus, although defendant was not guilty of second degree arson for setting fire to his apartment while intoxicated since he lacked specific intent to damage building, he was guilty of lesser included offense of fourth degree arson, defined as "recklessly damag[ing] building...by intentionally starting fire," and also first degree reckless endangerment. People v Tocco, 138 Misc. 2d 510, 525 N.Y.S.2d 137, 1988 N.Y. Misc. LEXIS 50 (N.Y. Sup. Ct. 1988).

Because a showup identification was not unduly suggestive even though it was conducted simultaneously with a confirmatory showup by another witness, because the trial court properly admitted testimony that defendant unsuccessfully attempted to purchase a rifle the day before the crimes, defendant was properly convicted of attempted second-degree murder, third-degree criminal possession of a weapon, and fourth-degree arson under N.Y. Penal Law §§ 110.00, 125.25(1), 265.02(1), 150.05(1). People v Rodriguez, 32 A.D.3d 1203, 821 N.Y.S.2d 331, 2006 N.Y. App. Div. LEXIS 11145 (N.Y. App. Div. 4th Dep't 2006), app. denied, 8 N.Y.3d 849, 830 N.Y.S.2d 708, 862 N.E.2d 800, 2007 N.Y. LEXIS 456 (N.Y. 2007).

2. Under former § 223

Evidence of defendant's drinking liquor subsequent to the fire was admissible, as bearing upon the question of guilt, intending to show what was his conduct and demeanor when engaged in

matters connected with the fire, and in the course and disposition of which he was principally interested and a prominent actor. People v O'Neil, 112 N.Y. 355, 19 N.E. 796, 112 N.Y. (N.Y.S.) 355, 20 N.Y. St. 754, 1889 N.Y. LEXIS 830 (N.Y. 1889).

This section is limited and qualified by § 225. People v Fanshawe, 137 N.Y. 68, 32 N.E. 1102, 137 N.Y. (N.Y.S.) 68, 1893 N.Y. LEXIS 657 (N.Y. 1893).

An expression of intent to burn out a neighbor when not followed by any overt act for two years, is of slight consequence to prove that the person who threatened carried out the threat, since threats alone are not sufficient to identify the person who commits a crime. Circumstantial evidence, in order to sustain a conviction, must exclude every other reasonable hypothesis except the guilt of the defendant as an explanation of the circumstances proven. People v Whitlock, 187 A.D. 863, 176 N.Y.S. 436, 1919 N.Y. App. Div. LEXIS 7117 (N.Y. App. Div. 1919).

Evidence was not admissible, as part of the res gestae, as to the statements made by a man who entered the burning house and received burns from which he soon died, as to the conditions that he observed therein, as he was away from the fire at the time and a substantial time had elapsed between the occurrence and the statements, and they were made in response to questions by third persons. People v Chapman, 191 A.D. 660, 181 N.Y.S. 750, 1920 N.Y. App. Div. LEXIS 4779 (N.Y. App. Div. 1920).

If the testimony of an accomplice has been corroborated by facts and circumstances which tend to connect the defendant with the crime, it will be sufficient for a conviction even though the accomplice has been several times convicted of crime. People v Smith, 177 N.Y.S. 519, 108 Misc. 240, 1919 N.Y. Misc. LEXIS 857 (N.Y. Sup. Ct. 1919).

Agency Opinions

1. In general

Person convicted of arson in any degree is, by statute, ineligible to become member of volunteer fire company, but issuance to that person of unrestricted certificate of relief from disabilities prevents automatic statutory disqualification; however, certificate does not prevent fire company or fire district commissioners from exercising discretion to deny membership based on facts and circumstances surrounding arson conviction. Person convicted of arson in any degree is, by statute, ineligible to hold office of fire district commissioner; certificate of relief from disabilities does not apply to public office such as fire district commissioner. 1998 NY Ops Atty Gen I 98-50.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS CPL § 700.05; CLS Gen Mun § 204-e.

Intentionally, definition of, § 15.05(1).

Recklessly, definition of, § 15.05(3).

Eavesdropping warrants in third degree arson cases, CLS CPL §§ 700.05(8), 700.10–700.70.

Federal Aspects:

Arson, 18 USCS § 81.

Jurisprudences:

35A NY Jur 2d Criminal Law Substantive Principles and Offenses §§ 877, 879, 883, 885.

35A NY Jur 2d Criminal Law Substantive Principles and Offenses § 877.

5 Am Jur 2d, Arson and Related Offenses § 5.

19 Am Jur Trials 685, Preparation and Trial of Arson Case.

Criminal Jury Instructions: Arson, fourth degree (recklessly damaging property by fire or explosion). CJI2d [NY] Penal Law § 150.05.

Texts: New York Criminal Practice Ch. 63.

§ 150.10. Arson in the third degree

1. A person is guilty of arson in the third degree when he intentionally damages a building or motor vehicle by starting a fire or causing an explosion.

2. In any prosecution under this section, it is an affirmative defense that (a) no person other than the defendant had a possessory or proprietary interest in the building or motor vehicle, or if other persons had such interests, all of them consented to the defendant's conduct, and (b) the defendant's sole intent was to destroy or damage the building or motor vehicle for a lawful and proper purpose, and (c) the defendant had no reasonable ground to believe that his conduct might endanger the life or safety of another person or damage another building or motor vehicle.

Arson in the third degree is a class C felony.

HISTORY:

Add, L 1965, ch 1030, § 1; amd, L 1971, ch 961, § 6, eff Sept 1, 1971; L 1979, ch 225, § 18, eff Sept 1, 1979.

Commission Staff Notes: See Commission Staff Notes under Art 150.

Notes to Decisions

Analysis

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I. Generally

1. In general

Evidence on motion to dismiss arson count of indictment that structure in question was an empty, vandalized and perhaps abandoned building presented at most a question of fact as to whether the structure was a "building" which could be the subject of the crime of arson in the third degree, and thus question was for determination by jury as part of the whole case and not by judge sitting without jury trying the matter as a separate issue. People v Richberg, 56 A.D.2d 279, 392 N.Y.S.2d 16, 1977 N.Y. App. Div. LEXIS 10429 (N.Y. App. Div. 1st Dep't 1977).

Court erred in failing to determine whether defendant had possible defense to charge of arson in third degree where defendant pleaded guilty and, when asked why he started fire, stated that he was drunk and on drugs since arson in third degree requires specific intent to damage building and intoxication could have negated specific intent. People v Zeth, 148 A.D.2d 960, 538 N.Y.S.2d 963, 1989 N.Y. App. Div. LEXIS 2635 (N.Y. App. Div. 4th Dep't 1989).

Fact that court found defendant not guilty of arson did not mean that she could not be convicted of third degree insurance fraud where proof was overwhelming that defendant was aware that fire was intentionally set to collect on insurance policy. People v Michael, 210 A.D.2d 874, 620 N.Y.S.2d 637, 1994 N.Y. App. Div. LEXIS 13321 (N.Y. App. Div. 4th Dep't 1994), app. denied, 84 N.Y.2d 1035, 623 N.Y.S.2d 191, 647 N.E.2d 463, 1995 N.Y. LEXIS 538 (N.Y. 1995).

Defendant's inability to recall events of fire did not affect her ability to understand consequences of agreement by which she pleaded guilty to third degree arson. Defendant's contention that her guilty plea to third degree arson was involuntary because she

did not specifically waive insanity defense was without merit where, as part of plea agreement, she explicitly waived any viable defenses, she was adequately represented by counsel, and she informed County Court during prior court appearance that she was adamant that mental defect defense would not be raised at trial. People v Hall-Mizrahi, 238 A.D.2d 627, 655 N.Y.S.2d 697, 1997 N.Y. App. Div. LEXIS 3154 (N.Y. App. Div. 3d Dep't 1997).

In third degree arson prosecution arising from fire at trailer home owned by defendant and his wife, matter was remitted for hearing on restitution because, although defendant did not request hearing, record was insufficient for sentencing court to have ordered restitution as it did where (1) insurance company representative testified as to limits of insurance policy but stated that no money was actually paid to defendant because his claim was denied, and (2) lienholder, who was loss payee for damage to structure and had financial interest of $14,856, testified that insurance company paid him "around $8,500." People v Mangan, 258 A.D.2d 819, 686 N.Y.S.2d 506, 1999 N.Y. App. Div. LEXIS 1959 (N.Y. App. Div. 3d Dep't), app. denied, 93 N.Y.2d 927, 693 N.Y.S.2d 510, 715 N.E.2d 513, 1999 N.Y. LEXIS 1723 (N.Y. 1999).

Officer's observation of van emerging from driveway of burning animal kennel after business hours justified initial stop of van, in which defendant was passenger. People v Pistone, 284 A.D.2d 415, 727 N.Y.S.2d 439, 2001 N.Y. App. Div. LEXIS 6120 (N.Y. App. Div. 2d Dep't), app. denied, 97 N.Y.2d 642, 735 N.Y.S.2d 499, 761 N.E.2d 4, 2001 N.Y. LEXIS 3697 (N.Y. 2001).

Based on information that one accomplice planned to purchase cocaine from another, along with evidence that the conspiracy had been ongoing, officers had probable cause to believe that defendant committed a conspiracy offense, but the People did not prove that officers had reasonable suspicion that defendant was concealing drug evidence at the time of the strip search; as there was a reasonable possibility that the admission of the cocaine and testimony regarding the search contributed to his convictions, they were reversed. People v Turner, 178 A.D.3d 70, 111 N.Y.S.3d 718, 2019 N.Y. App. Div. LEXIS 7512 (N.Y. App. Div. 3d Dep't 2019).

Where a fireman died from a heart attack while fighting a fire which was the result of arson, the statutory requirement that a felony murder pursuant to Penal Law § 125.25 be committed in the course of an furtherance of the crime of arson was neither comprehensible nor applicable since arson is the only crime to which felony murder applies which is inherently dangerous to human life and where there is little likelihood of a personal confrontation. People v Lozano, 107 Misc. 2d 345, 434 N.Y.S.2d 588, 1980 N.Y. Misc. LEXIS 2891 (N.Y. Sup. Ct. 1980).

Appeals court affirmed judgment convicting defendant of three counts of N.Y. Penal Law § 150.10(1) arson in the third degree; defendant's guilty plea was knowing and voluntary, established guilt of each element of charges, and was not improvident or baseless. People v Page, 302 A.D.2d 628, 753 N.Y.S.2d 763, 2003 N.Y. App. Div. LEXIS 846 (N.Y. App. Div. 3d Dep't), app. denied, 99 N.Y.2d 657, 760 N.Y.S.2d 121, 790 N.E.2d 295, 2003 N.Y. LEXIS 1603 (N.Y. 2003).

Defendant's third-degree arson conviction was upheld, despite his reliance upon an affirmative defense under N.Y. Penal Law § 150.10(2), as: (1) he failed to establish that he was the only person with a possessory or proprietary interest in the affected building; (2) his own testimony confirmed that at least one of the individuals who was residing in the house was a month-to-month tenant to whom he failed to give the requisite 30 days notice before forcing him to vacate the premises; (3) given the arrears award owed to his ex-wife, coupled with his stated intent that he committed the arson and other crimes to preclude her from recovering those funds, he failed to establish her lack of a proprietary interest in the property; and (4) all of the aforementioned undermined his claim that his intent was for a lawful and proper purpose. People v Gigliuto, 22 A.D.3d 890, 803 N.Y.S.2d 216, 2005 N.Y. App. Div. LEXIS 11173 (N.Y. App. Div. 3d Dep't 2005), app. denied, 7 N.Y.3d 789, 821 N.Y.S.2d 819, 854 N.E.2d 1283, 2006 N.Y. LEXIS 2785 (N.Y. 2006).

Appeals court rejected defendant's claim of error that the felony complaint filed against him, quoting the language of a Penal Law section different from the language in the section set forth in the felony complaint, rendered the superior court information and the waiver of indictment jurisdictionally defective, as a specific reference in the felony complaint to N.Y. Penal Law § 150.10(1), along with the factual recitation, rendered the felony complaint legally sufficient to charge defendant with third-degree arson. People v Chianese, 41 A.D.3d 1168, 837 N.Y.S.2d 820, 2007 N.Y. App. Div. LEXIS 6999 (N.Y. App. Div. 4th Dep't 2007), app. denied, 9 N.Y.3d 1032, 852 N.Y.S.2d 17, 881 N.E.2d 1204, 2008 N.Y. LEXIS 356 (N.Y. 2008).

2. Evidence; admissibility

Failure to edit out portion of confession of defendant charged with arson in the second degree referring to the setting of other fires was error in that any probative value of said evidence was clearly outweighed by its prejudicial effect. People v Chaffee, 42 A.D.2d 172, 346 N.Y.S.2d 30, 1973 N.Y. App. Div. LEXIS 3770 (N.Y. App. Div. 3d Dep't 1973).

Evidence of oral and written statements given by the defendant in an arson prosecution to a State Police investigator were properly admitted where district attorney had served defendant with an amended CPL § 710.30 notice, and where defendant's confession was properly corroborated by testimony of fire officials concerning the suspicious circumstances of the fire and by testimony from one of defendant's friends that defendant had admitted setting the fire. But trial court committed reversible error in holding that prosecution would be permitted to cross-examine defendant in regards to a prior arson which had occurred six years previously and for which defendant had never been charged since the court's ruling prevented the defendant from taking the stand, presumably out of fear of the impact of the impeachment testimony. People v Anderson, 80 A.D.2d 33, 437 N.Y.S.2d 985, 1981 N.Y. App. Div. LEXIS 9741 (N.Y. App. Div. 4th Dep't), app. denied, 54 N.Y.2d 682, 1981 N.Y. LEXIS 4671 (N.Y. 1981).

It was reversible error to allow evidence that defendant, charged with arson in third degree, had made insurance claims on 2 prior fire losses where there was no showing that prior fires were products of arson and such incidents had no direct connection with current case. Testimony was properly received in third degree arson case that defendant illegally offered to allow those persons who actually set fire to use credit cards in defendant's possession because arson and credit card scheme were inextricably intertwined and could not be divorced without emasculating People's case; however, it was not proper to admit testimony concerning other, irrelevant credit card crimes. People v Simpson, 122 A.D.2d 383, 505 N.Y.S.2d 201, 1986 N.Y. App. Div. LEXIS 59706 (N.Y. App. Div. 3d Dep't 1986).

Defendant could not be convicted of third degree arson where only evidence linking him to crime was testimony of witness who saw unidentified man outside warehouse one hour before fire was discovered, although vehicle used by unidentified man matched vehicle defendant was seen using on night in question; assuming, arguendo, that man seen at warehouse was defendant, jury could not reasonably infer that defendant set fire. People v Mills, 138 A.D.2d 638, 526 N.Y.S.2d 222, 1988 N.Y. App. Div. LEXIS 3110 (N.Y. App. Div. 2d Dep't 1988).

In trial for third degree arson, court properly permitted testimony by undercover officer as to conversation between informant, officer and detective in which defendant asked whether he could participate in "other jobs" because he needed money; testimony was not evidence of uncharged crimes, since only actual crimes that have occurred can be uncharged crimes, but alluded more to defendant's character than any actual criminal activity committed by him. People v Morgan, 145 A.D.2d 442, 535 N.Y.S.2d 97, 1988 N.Y. App. Div. LEXIS 12932 (N.Y. App. Div. 2d Dep't 1988).

Prosecution in arson trial failed to lay proper foundation for reliability of accelerant-sniffing dog where neither fire investigator testified to past performance or effectiveness of dog as accelerant sniffer. People v Dix, 242 A.D.2d 912, 662 N.Y.S.2d 879, 1997 N.Y. App. Div. LEXIS 10473 (N.Y. App. Div. 4th Dep't 1997).

It was reversible error to allow defendant's unredacted statement to be admitted into evidence where bad acts and uncharged crimes referenced therein had no material bearing on third degree arson charges against him and could have only served to severely prejudice his case, court's sua sponte curative instructions at close of People's case compounded error by implying to

jury that they could consider other matters in statement as to shooting of defendant's father and stabbing and bludgeoning of his former bosses in determining whether he was guilty of instant crimes, and statement was sent to jury for consideration during deliberations. People v Letendre, 247 A.D.2d 796, 669 N.Y.S.2d 439, 1998 N.Y. App. Div. LEXIS 1856 (N.Y. App. Div. 3d Dep't 1998), aff'd, 94 N.Y.2d 939, 709 N.Y.S.2d 497, 731 N.E.2d 153, 2000 N.Y. LEXIS 525 (N.Y. 2000).

Court erred in allowing fire investigator to testify that "some human person ignited those fires"; however, error was harmless in light of overwhelming evidence of guilt. People v Champion, 247 A.D.2d 901, 668 N.Y.S.2d 857, 1998 N.Y. App. Div. LEXIS 1239 (N.Y. App. Div. 4th Dep't), app. denied, 91 N.Y.2d 971, 672 N.Y.S.2d 850, 695 N.E.2d 719, 1998 N.Y. LEXIS 1511 (N.Y. 1998).

In a prosecution of the defendant for arson second degree, arson third degree, and the felony murder second degree of a fireman who died of a heart attack, the fact that the fireman had a previous weakened heart and might have met a similar fate from natural or accidental fires was of no legal consequence since the evidence established a direct spatiotemporal nexus between the fire and the death sufficient to warrant holding the defendant for a trial by jury on the charge of murder. People v Lozano, 107 Misc. 2d 345, 434 N.Y.S.2d 588, 1980 N.Y. Misc. LEXIS 2891 (N.Y. Sup. Ct. 1980).

3. —Circumstantial

Third degree arson conviction was supported by circumstantial evidence where defendant was only person in building at time of fire, he acknowledged that earlier same morning he was in basement where gasoline was found, he was seen removing items from house shortly before fire, and he had taken out renter's insurance policy day before fire. People v Flick, 147 A.D.2d 957, 537 N.Y.S.2d 403, 1989 N.Y. App. Div. LEXIS 1424 (N.Y. App. Div. 4th Dep't), app. denied, 73 N.Y.2d 921, 539 N.Y.S.2d 306, 536 N.E.2d 635, 1989 N.Y. LEXIS 1334 (N.Y. 1989).

Circumstantial evidence was legally sufficient to support third degree arson conviction arising from fire at defendant's home, although there was virtually no evidence of defendant's motive, where fire investigator testified that fire had several separate points of origin and that he had eliminated all accidental sources of fire. People v Stabell, 270 A.D.2d 894, 706 N.Y.S.2d 553, 2000 N.Y. App. Div. LEXIS 3573 (N.Y. App. Div. 4th Dep't), app. denied, 95 N.Y.2d 804, 711 N.Y.S.2d 173, 733 N.E.2d 245, 2000 N.Y. LEXIS 2178 (N.Y. 2000).

Sufficient circumstantial evidence supported defendant's conviction for arson in the third degree because, inter alia, a volunteer firefighter testified that he observed a green sedan parked across the street from a barn and then spotted a masked individual standing in the weeds, holding a red gas can, and a second eyewitness, who was driving by the barn, testified that she observed an individual run into the road carrying a red gas can and get into a green sedan. People v Marryshow, 162 A.D.3d 1313, 79 N.Y.S.3d 377, 2018 N.Y. App. Div. LEXIS 4546 (N.Y. App. Div. 3d Dep't 2018).

4. —Insufficient

The conviction of a defendant for arson is reversed, the defendant having been convicted of arson, conspiracy and criminal solicitation, since although there was competent evidence from which defendant's guilt of conspiracy and solicitation could be inferred, this evidence did not create more than an inference of some undefined involvement by the defendant in the eventual arson itself, and the defendant was not so connected on the basis of the other circumstantial evidence in the case with the actual commission of the arson to the degree that his conduct negated a reasonable and innocent explanation; any inference of guilt drawn was within the range of conjecture and, accordingly, for the jury to have found the defendant guilty of the arson, it had to have done so on the strength of a few facts, which, viewed most favorably to the People, were inadequate as a matter of law to support an ultimate conclusion of guilt beyond a reasonable doubt. Although they may have furnished some grounds of suspicion, the episodes described were so riddled with subjective inferential links based on probabilities of low grade or insufficient degree that, on examining the evidence as a whole, the circumstantial evidence fell below the standards for determining its sufficiency. People v Piazza, 48 N.Y.2d 151, 422 N.Y.S.2d 9, 397 N.E.2d 700, 1979 N.Y. LEXIS 2343 (N.Y. 1979).

A grand jury indictment for third degree arson under Penal Law § 150.10 would be dismissed where the evidence presented to the grand jury was legally insufficient to support an arson indictment in that the arson statute contemplates a motor vehicle in operable condition, and the evidence presented indicated that defendant had set fire to a tow truck that had no battery and contained "no electric whatever," and where the prosecutor's instructions to the grand jury that "a motor vehicle is any vehicle not propelled by muscular power" but which omitted the phrase "operated . . . on a public highway" from the definition of "motor vehicle" were incorrect and so emasculated the statutory definition of "motor vehicle" in the context of the limited testimony provided to the grand jury as to prejudice the interests of defendant and impair the integrity of the grand jury. People v Carey, 120 Misc. 2d 862, 466 N.Y.S.2d 887, 1983 N.Y. Misc. LEXIS 3812 (N.Y. County Ct. 1983).

5. —Sufficient

Evidence was sufficient to present jury question with respect to damage within meaning of CLS Penal Law § 150.10, stating that person is guilty of arson in third degree when he intentionally "damages" building or motor vehicle, where fire expert testified that fire had caused charring to building's clapboards in 2 locations and that such charring, along with incidental damage cause by firefighters in pulling some boards away from foundation, plus owner's failure to repair building in 8 months since fire, had diminished value of building, despite opinion of officer of corporate owner of building that fire had not caused diminution of value or damage to building, and that corporation had made no insurance claim for property loss resulting from fire. People v McDonald, 68 N.Y.2d 1, 505 N.Y.S.2d 824, 496 N.E.2d 844, 1986 N.Y. LEXIS 19362 (N.Y. 1986).

Defendant was properly convicted of arson in the third degree on evidence that the fire had been deliberately set, that he had previously owned the property damaged by the fire, that he believed that the present owner to whom he had sold the property had not paid him enough for it, and that he had a relative drive him to within one-half mile of the property shortly before the fire, told her to keep the engine running, returned in 10 to 15 minutes breathing hard and said "lets get out of here", took the wheel and drove away at a fast rate of speed. People v Landers, 107 A.D.2d 1022, 486 N.Y.S.2d 522, 1985 N.Y. App. Div. LEXIS 42834 (N.Y. App. Div. 4th Dep't), app. denied, 65 N.Y.2d 696, 491 N.Y.S.2d 1036, 481 N.E.2d 264, 1985 N.Y. LEXIS 14928 (N.Y. 1985).

Defendant's guilt of fourth degree conspiracy, third degree arson, and second degree murder was established by evidence that defendant (1) importuned coconspirator to throw military smoke-producing grenade, supplied by defendant, through living room window of house at time when he knew occupants would be asleep, (2) was aware that grenade explosion would emit flame likely to set carpet afire, and (3) intended to damage home by smoke from grenade; on these facts, jury was justified in concluding that defendant intentionally damaged house by starting fire or causing explosion, thereby establishing his guilt to arson, and hence felony murder as result of death of woman and her 3 children. People v Cisco, 129 A.D.2d 805, 514 N.Y.S.2d 796, 1987 N.Y. App. Div. LEXIS 45499 (N.Y. App. Div. 2d Dep't 1987).

Evidence was sufficient to support defendant's conviction for third degree arson involving building in which defendant operated dry-cleaning business where (1) defendant's brother was seen running from building immediately after fire started, (2) defendant and his brother, on day of fire, moved clothing from store and filled gas can found at scene, and (3) defendant doubled his business insurance coverage one month prior to fire and requested confirmation of increase less than one week before incident. People v Karadimas, 134 A.D.2d 952, 522 N.Y.S.2d 84, 1987 N.Y. App. Div. LEXIS 51160 (N.Y. App. Div. 4th Dep't), app. denied, 70 N.Y.2d 933, 524 N.Y.S.2d 685, 519 N.E.2d 631, 1987 N.Y. LEXIS 19713 (N.Y. 1987).

Evidence supported third degree arson conviction, despite contention that there was no proof that defendant acted with requisite intent to damage building either by starting fire or

acting as accessory to person who actually lit fire, where (1) defendant conceded that he was present inside building at time crime was committed, (2) fire was started with lighter and matches for express purpose of hiding fingerprints, (3) defendant had obtained books of matches earlier in same evening, and (4) defendant gave written statement to police that, after leaving building, he and companion looked back "to see if the fire was catching." People v Ames, 159 A.D.2d 1008, 552 N.Y.S.2d 735, 1990 N.Y. App. Div. LEXIS 3330 (N.Y. App. Div. 4th Dep't 1990).

Evidence was sufficient to support conviction for third degree arson arising from fire at house which had recently been rented to city for purpose of housing foster children where (1) defendant and others were active in neighborhood organizations formed to oppose city's plans, and had threatened to burn house down, (2) on night of fire, codefendant lured security guard away from house, told uninvolved neighbor to stay in his house, and telephoned television news station to tell them that house might be burned down, (3) defendant joined with other codefendants and walked to rear of house, (4) sound of breaking glass was then heard and house was soon filled with smoke and flames, and (5) as house burned, defendant and others stood watching from across street and toasted fire with glasses of liquor. People v Amato, 173 A.D.2d 714, 570 N.Y.S.2d 817, 1991 N.Y. App. Div. LEXIS 7836 (N.Y. App. Div. 2d Dep't), app. denied, 78 N.Y.2d 919, 573 N.Y.S.2d 472, 577 N.E.2d 1064, 1991 N.Y. LEXIS 2262 (N.Y. 1991), app. denied, 78 N.Y.2d 961, 574 N.Y.S.2d 940, 580 N.E.2d 412, 1991 N.Y. LEXIS 4251 (N.Y. 1991), cert. denied, 502 U.S. 1058, 112 S. Ct. 935, 117 L. Ed. 2d 107, 1992 U.S. LEXIS 391 (U.S. 1992).

Conviction for attempted third degree arson was supported by evidence that defendant, after having argument with complainant, stated that he was going to burn her car, and that complainant and 2 other people then saw defendant pour gasoline on tire and hood of car and put flaming cigarette lighter, which was extinguished by wind, near gasoline. People v Clemmons, 173 A.D.2d 723, 570 N.Y.S.2d 611, 1991 N.Y. App. Div. LEXIS 8207 (N.Y. App. Div. 2d Dep't), app. denied, 78 N.Y.2d 964, 574 N.Y.S.2d 943, 580 N.E.2d 415, 1991 N.Y. LEXIS 4321 (N.Y. 1991).

Conviction for third degree arson was supported by evidence that defendant had made threats against complainant and then left burning trash bag against door of his apartment, thus allowing jury to reasonably infer that defendant intended that building would be damaged by fire. People v Utsey, 182 A.D.2d 575, 582 N.Y.S.2d 433, 1992 N.Y. App. Div. LEXIS 6355 (N.Y. App. Div. 1st Dep't), app. denied, 80 N.Y.2d 839, 587 N.Y.S.2d 923, 600 N.E.2d 650, 1992 N.Y. LEXIS 2061 (N.Y. 1992).

Defendant's conviction for third degree arson was supported by his admission to police, 2 days after fire at his place of employment, that he broke into building and poured gasoline around inside, and that he must have started fire but could not remember; although he took stand at trial and denied his participation in arson, there was no evidence to support reasonable alternative explanation for arson as cause of fire. People v Coneen, 191 A.D.2d 839, 594 N.Y.S.2d 897, 1993 N.Y. App. Div. LEXIS 2384 (N.Y. App. Div. 3d Dep't), app. denied, 81 N.Y.2d 1012, 600 N.Y.S.2d 200, 616 N.E.2d 857, 1993 N.Y. LEXIS 2406 (N.Y. 1993).

Defendant's guilt of third degree arson was supported by his financial motive, his sole opportunity to set fire, and his suspicious conduct observed only minutes before fire was set. People v Weiss, 269 A.D.2d 267, 704 N.Y.S.2d 210, 2000 N.Y. App. Div. LEXIS 1570 (N.Y. App. Div. 1st Dep't), app. denied, 94 N.Y.2d 954, 710 N.Y.S.2d 10, 731 N.E.2d 627, 2000 N.Y. LEXIS 1648 (N.Y. 2000).

Defendant's guilt of third degree arson was supported by evidence showing that, on day before fire, he moved his personal belongings out of his mobile home and dug his automobile out of snow and moved it across street from his mobile home, he told one witness of his plan to set his mobile home on fire, he purchased insurance policy on mobile home few weeks before fire, and witnesses observed him in his automobile leaving area of mobile home in haste shortly before fire. People v Beyor, 272 A.D.2d 929, 708 N.Y.S.2d 535, 2000 N.Y. App. Div. LEXIS 5322 (N.Y. App. Div. 4th Dep't), app. denied, 95 N.Y.2d 832, 713 N.Y.S.2d 139, 735 N.E.2d 419, 2000 N.Y. LEXIS 2365 (N.Y. 2000).

Defendant's arson conviction under N.Y. Penal Law § 150.10(1) was supported by sufficient evidence, was not against the manifest weight of the evidence, and was corroborated under N.Y. Crim. Proc. Law § 60.50 where: (1) defendant's written statement provided that she used her cigarette lighter to set fire to the interior of her neighbor's garage, went home and called 911; (2) defendant was home on the night of the fire; (3) the origin of the fire was consistent with defendant's description; and (4) the neighbor testified that, in addition to notifying him of the fire on the night in question, defendant approached him the following day and expressed an interest in purchasing the property. People v Flemming, 101 A.D.3d 1483, 956 N.Y.S.2d 678, 2012 N.Y. App. Div. LEXIS 9082 (N.Y. App. Div. 3d Dep't 2012), app. denied, 21 N.Y.3d 942, 968 N.Y.S.2d 4, 990 N.E.2d 138, 2013 N.Y. LEXIS 1510 (N.Y. 2013).

Defendant's arson conviction under N.Y. Penal Law § 150.10(1) was supported by sufficient evidence, was not against the manifest weight of the evidence, and was corroborated under N.Y. Crim. Proc. Law § 60.50 where: (1) defendant's written statement indicated that she approached the back porch of her prior residence, after sliding open a window, used her cigarette lighter to set fire to a set of sheer curtains, returned to her residence, could hear the smoke alarm going off and called the Sheriff's Department; (2) although defendant told a trooper that she had heard the smoke alarm from inside her own kitchen, two troopers did not hear the alarm when they exited their vehicles and could not hear it until they actually approached the residence; (3) a trooper saw the fire directly beneath the window; (4) defendant' was in the general vicinity of the fire on the night in question; and (5) the troopers' testimony as to the location of the fire and observation of a melted curtain near the rear window were consistent with defendant's statement. People v Flemming, 101 A.D.3d 1483, 956 N.Y.S.2d 678, 2012 N.Y. App. Div. LEXIS 9082 (N.Y. App. Div. 3d Dep't 2012), app. denied, 21 N.Y.3d 942, 968 N.Y.S.2d 4, 990 N.E.2d 138, 2013 N.Y. LEXIS 1510 (N.Y. 2013).

Defendant's arson conviction under N.Y. Penal Law § 150.10(1) was supported by sufficient evidence, was not against the manifest weight of the evidence, and was corroborated under N.Y. Crim. Proc. Law § 60.50 where: (1) defendant's written statement indicated that she used the cigarette she was smoking to set fire to the papers in her husband's truck, the fire spread to the center console area and rear floor board, she struck up a conversation with her neighbors, and a neighbor noticed the fire and extinguished it with a garden hose; (2) the neighbor attested the her conversation with defendant and role in extinguishing the fire; and (3) the fire investigator opined that the fire started in the center console, ruled out all natural and/or accidental causes of the fire, and opined that if papers had been set on fire underneath or near the rear of the center console/armrest, that was consistent with a possible cause of the fire. People v Flemming, 101 A.D.3d 1483, 956 N.Y.S.2d 678, 2012 N.Y. App. Div. LEXIS 9082 (N.Y. App. Div. 3d Dep't 2012), app. denied, 21 N.Y.3d 942, 968 N.Y.S.2d 4, 990 N.E.2d 138, 2013 N.Y. LEXIS 1510 (N.Y. 2013).

Defendant's attempted arson conviction under N.Y. Penal Law §§ 110.00 and 150.10(1) was supported by sufficient evidence, was not against the manifest weight of the evidence, and was corroborated under N.Y. Crim. Proc. Law § 60.50 where: (1) defendant's written statement indicated that she entered the rear porch of that residence and, using her cigarette lighter, set fire to some cardboard and papers inside of a recycling bin, that as she was reentering her back yard, she heard someone on the rear porch of the residence and returned to discover the homeowner dousing the fire with water, and that she then used some dirt to help put out the fire, returned home and called 911; (2) a fire investigator observed some charred cardboard on the porch of the residence next to the recycling bin; (3) a cigarette butt was found at the scene; and (4) the DNA on the cigarette butt matched defendant's DNA. People v Flemming, 101 A.D.3d 1483, 956 N.Y.S.2d 678, 2012 N.Y. App. Div. LEXIS 9082 (N.Y. App. Div. 3d Dep't 2012), app. denied, 21 N.Y.3d 942, 968 N.Y.S.2d 4, 990 N.E.2d 138, 2013 N.Y. LEXIS 1510 (N.Y. 2013).

N.Y. Penal Law § 150.15, relying on the definition of a person in N.Y. Penal Law § 10.00, requires that the person be alive when the fire is started; there was insufficient evidence to support

defendant's second-degree arson conviction since there was no evidence that the victims were still alive when defendant set the fires, but there was sufficient evidence to support a third-degree arson conviction as defendant intentionally damaged a building by starting a fire in the home. People v Taylor, 158 A.D.3d 1095, 72 N.Y.S.3d 256, 2018 N.Y. App. Div. LEXIS 782 (N.Y. App. Div. 4th Dep't), reh'g denied, 160 A.D.3d 1506, 72 N.Y.S.3d 918, 2018 N.Y. App. Div. LEXIS 2995 (N.Y. App. Div. 4th Dep't 2018), app. denied, 32 N.Y.3d 941, 109 N.E.3d 1168, 84 N.Y.S.3d 868, 2018 N.Y. LEXIS 2808 (N.Y. 2018), cert. denied, 140 S. Ct. 482, 205 L. Ed. 2d 269, 2019 U.S. LEXIS 6738 (U.S. 2019).

An indictment for second degree arson pursuant to Penal L § 150.15, based on an allegation that defendant had set fire to a garage and that the fire had spread to an inhabited building next door, would be dismissed with leave to the People to re=present the charge to a new grand jury pursuant to CPL § 210.20(4) where, though a grand jury could find circumstantial evidence of defendant's intent to burn the inhabited building by starting the fire in the garage, the grand jury had erroneously been instructed that intent to damage the inhabited building was not required; however, a related charge of fourth degree arson arising out of damage caused by the fire to a parked motor vehicle would be deemed sufficient, since the indictment therefor contained an allegation that defendant intended to damage the vehicle itself by starting a fire in the garage next door. People v Keech, 121 Misc. 2d 368, 467 N.Y.S.2d 786, 1983 N.Y. Misc. LEXIS 3933 (N.Y. Sup. Ct. 1983).

Evidence that defendant allowed former boyfriend to use defendant's mother's car earlier in the evening and that defendant drove the boyfriend to another person's residence later that same night, waited in the car while the boyfriend relit a fire the boyfriend had set at the residence, and drove the boyfriend to defendant's house after he restarted the fire was sufficient to corroborate the boyfriend's testimony that defendant knew the boyfriend was going to set the fire and assisted the boyfriend in doing so, and the appellate court sustained defendant's convictions on charges of burglary in the second degree, arson in the third degree, assault in the second degree, and criminal mischief in the second degree. People v Wood, 299 A.D.2d 739, 751 N.Y.S.2d 106, 2002 N.Y. App. Div. LEXIS 11391 (N.Y. App. Div. 3d Dep't 2002), app. denied, 99 N.Y.2d 621, 757 N.Y.S.2d 833, 787 N.E.2d 1179, 2003 N.Y. LEXIS 693 (N.Y. 2003).

Evidence was legally sufficient to support a conviction for third degree arson because the People presented evidence establishing that defendant had stated that he was going to get the arson victim, he wanted the building to burn down once it caught fire, he admitted setting the fire, and his hands smelled of gasoline. People v Adams, 43 A.D.3d 1423, 842 N.Y.S.2d 848, 2007 N.Y. App. Div. LEXIS 10174 (N.Y. App. Div. 4th Dep't), app. denied, 9 N.Y.3d 1004, 850 N.Y.S.2d 392, 880 N.E.2d 878, 2007 N.Y. LEXIS 3900 (N.Y. 2007).

Based on evidence that the fire was set intentionally, that defendant was the only person in the building with access to the location where the fire started near the time when the fire was detected, and that defendant was having financial difficulty at the time, the jury's verdict was not against the weight of the evidence; to the extent that defendant's arson investigator testified-in contrast to the opinions provided by the People's witnesses-that the fire started in the ceiling between the first and second floors of the common hallway and that an electrical cause could not be ruled out, that testimony presented a credibility determination for the jury. People v Stevens, 84 A.D.3d 1424, 922 N.Y.S.2d 596, 2011 N.Y. App. Div. LEXIS 3601 (N.Y. App. Div. 3d Dep't), app. denied, 17 N.Y.3d 822, 929 N.Y.S.2d 811, 954 N.E.2d 102, 2011 N.Y. LEXIS 2842 (N.Y. 2011).

Defendant's conviction for arson in the third degree was supported by sufficient evidence because the trailer that defendant set fire to was within the definition of "building," as it was enclosed by walls, covered by a roof, designed to stand permanently, and served a useful purpose. People v Norcutt, 115 A.D.3d 1306, 982 N.Y.S.2d 661, 2014 N.Y. App. Div. LEXIS 2110 (N.Y. App. Div. 4th Dep't), app. denied, 23 N.Y.3d 966, 988 N.Y.S.2d 573, 11 N.E.3d 723, 2014 N.Y. LEXIS 1657 (N.Y. 2014).

Defendant's conviction for arson in the third degree was supported by sufficient evidence because the trailer that defendant set fire to was within the definition of "building," as it was used for overnight lodging on vacations or weekend retreats. People v Norcutt, 115 A.D.3d 1306, 982 N.Y.S.2d 661, 2014 N.Y. App. Div. LEXIS 2110 (N.Y. App. Div. 4th Dep't), app. denied, 23 N.Y.3d 966, 988 N.Y.S.2d 573, 11 N.E.3d 723, 2014 N.Y. LEXIS 1657 (N.Y. 2014).

Defendant's conviction for arson in the third degree was not against the weight of the evidence because there was no evidence that the jury was swayed by improper factors. People v Norcutt, 115 A.D.3d 1306, 982 N.Y.S.2d 661, 2014 N.Y. App. Div. LEXIS 2110 (N.Y. App. Div. 4th Dep't), app. denied, 23 N.Y.3d 966, 988 N.Y.S.2d 573, 11 N.E.3d 723, 2014 N.Y. LEXIS 1657 (N.Y. 2014).

6. Lesser included offenses

Court properly denied defendant's request to charge attempted fourth degree arson as lesser included offense of attempted third degree arson since there is no such crime; person is guilty of CLS Penal § 150.05(1) fourth degree arson when he recklessly damages building or motor vehicle by intentionally starting fire or causing explosion (damage must thus ensue from reckless conduct), but person is guilty of attempt to commit crime only when he intends to commit that crime. People v DeJesus, 190 A.D.2d 1012, 593 N.Y.S.2d 633, 1993 N.Y. App. Div. LEXIS 1206 (N.Y. App. Div. 4th Dep't), app. denied, 81 N.Y.2d 969, 598 N.Y.S.2d 770, 615 N.E.2d 227, 1993 N.Y. LEXIS 1938 (N.Y. 1993).

Court properly submitted fourth degree arson as lesser included offense of third degree arson where evidence of defendant's intoxication was sufficient to negate intent element and allow finding of recklessness, leaving to fact finder whether extent of intoxication acted to negate intent element; fact that counts of third degree arson and fourth degree arson required showing of different culpable mental states did not preclude finding that latter was lesser included offense of former. People v Borst, 232 A.D.2d 727, 648 N.Y.S.2d 720, 1996 N.Y. App. Div. LEXIS 10257 (N.Y. App. Div. 3d Dep't 1996), app. denied, 89 N.Y.2d 940, 655 N.Y.S.2d 891, 678 N.E.2d 504, 1997 N.Y. LEXIS 535 (N.Y. 1997).

As defendant orally admitted that he intentionally set a fire on his mother's apartment porch, which resulted in the destruction or damage to several apartment buildings and injuries to two volunteer firefighters, and he further admitted that he knew or should have known that the building was occupied and that firefighters would have been called to the scene, his convictions for arson in the third degree and reckless endangerment in the first degree, in violation of N.Y. Penal Law §§ 150.10(1) and 120.25, were proper; the element of defendant's scienter was sufficiently proved by his admissions and the plea colloquy. People v Anderson, 38 A.D.3d 1061, 831 N.Y.S.2d 582, 2007 N.Y. App. Div. LEXIS 2862 (N.Y. App. Div. 3d Dep't), app. denied, 8 N.Y.3d 981, 838 N.Y.S.2d 484, 869 N.E.2d 660, 2007 N.Y. LEXIS 1864 (N.Y. 2007).

7. Sentencing

Where at time of entry of guilty plea parties apparently relied on Penal L § 150.05 as it read prior to 1971 amendment which raised attempted arson in the third degree from a class A misdemeanor to the class D felony; thus guilty plea in sentence should be vacated and case remitted. People v Bradshaw, 41 A.D.2d 658, 340 N.Y.S.2d 669, 1973 N.Y. App. Div. LEXIS 5163 (N.Y. App. Div. 2d Dep't 1973).

Where indictment charged arson in the second degree but facts contained in indictment were sufficient only to sustain charge of arson in third degree and defendant pled guilty to facts amounting to arson in third degree, sentence for arson in the second degree was improper and would be remanded for resentencing for crime of arson in third degree. People v Hutchins, 43 A.D.2d 412, 352 N.Y.S.2d 520, 1974 N.Y. App. Div. LEXIS 5665 (N.Y. App. Div. 3d Dep't 1974).

Seven-year sentence of imprisonment imposed upon twenty-two year-old defendant convicted on guilty plea to arson in third degree would be modified, in interest of justice, as matter of discretion, by reducing sentence to maximum term of three years where, inter alia, defendant's record was unblemished until incident occurred which resulted in present conviction and where

one of defendant's former employers furnished court with testimonial respecting defendant's good character. People v Record, 51 A.D.2d 677, 378 N.Y.S.2d 156, 1976 N.Y. App. Div. LEXIS 11040 (N.Y. App. Div. 4th Dep't 1976).

Sentence of indeterminate term of imprisonment not to exceed four years imposed upon defendant who was convicted of arson in the third degree as the result of fire in the home where defendant resided with his wife and two children and a vacant house next door was not unduly harsh or excessive. People v Perry, 52 A.D.2d 963, 382 N.Y.S.2d 845, 1976 N.Y. App. Div. LEXIS 12831 (N.Y. App. Div. 3d Dep't 1976).

Court properly imposed harshest penalty for third degree arson conviction (5 to 15 years in prison), despite facts that defendant was acquitted on related murder charges and he had not been previously convicted of any prior felony, where he set fire to house to prevent or hinder authorities from obtaining evidence of 3 vicious murders. People v La Veglia, 215 A.D.2d 836, 626 N.Y.S.2d 314, 1995 N.Y. App. Div. LEXIS 4787 (N.Y. App. Div. 3d Dep't 1995).

Sentence of 3 to 6 years for third degree arson as second felony offender was not excessive where it was in accordance with plea agreement, and there were no extraordinary circumstances warranting reduction under CLS CPL § 470.15(6)(b). People v Trumbach, 246 A.D.2d 912, 667 N.Y.S.2d 322, 1998 N.Y. App. Div. LEXIS 744 (N.Y. App. Div. 3d Dep't 1998).

Court properly enhanced defendant's sentence for attempted third degree arson, as second felony offender, to 3 ½ to 7 years where defendant violated his cooperation agreement to fully, fairly, and truthfully disclose all information, as determined by prosecution. People v Anonymous, 251 A.D.2d 179, 675 N.Y.S.2d 865, 1998 N.Y. App. Div. LEXIS 7369 (N.Y. App. Div. 1st Dep't 1998).

In prosecution for third degree arson, second degree criminal mischief, and child endangerment, defendant was entitled to hearing on amount of restitution to be paid, and case would be remitted for that purpose, where record did not contain sufficient evidence to support amount ordered. People v Wilson, 275 A.D.2d 1035, 714 N.Y.S.2d 920, 2000 N.Y. App. Div. LEXIS 9588 (N.Y. App. Div. 4th Dep't 2000), app. denied, 96 N.Y.2d 808, 726 N.Y.S.2d 386, 750 N.E.2d 88, 2001 N.Y. LEXIS 1817 (N.Y. 2001).

Maximum sentence of 25 years, as second felony offender, for second degree arson and first degree reckless endangerment was not excessive and would not be reduced in interest of justice where fact that no one was injured by 5 separate fires set by defendant in theater complex was fortuitous rather than indicative of lack of vicious intent, defendant lacked remorse, and sentencing court properly considered defendant's suppressed confession to present arson as well as another in college dormitory. People v Brown, 281 A.D.2d 700, 728 N.Y.S.2d 100, 2001 N.Y. App. Div. LEXIS 2312 (N.Y. App. Div. 3d Dep't), app. denied, 96 N.Y.2d 826, 729 N.Y.S.2d 446, 754 N.E.2d 206, 2001 N.Y. LEXIS 2089 (N.Y. 2001).

Sentence to four consecutive 15-year prison terms for 4 separate second degree burglaries, and concurrent term of 7 ½ to 15 years for third degree arson, although long, was not excessive where it fell within permissible range for those crimes, defendant had prior criminal record, and there were no extraordinary circumstances warranting modification. People v Cleveland, 281 A.D.2d 815, 721 N.Y.S.2d 876, 2001 N.Y. App. Div. LEXIS 3000 (N.Y. App. Div. 3d Dep't), app. denied, 96 N.Y.2d 900, 730 N.Y.S.2d 797, 756 N.E.2d 85, 2001 N.Y. LEXIS 2752 (N.Y. 2001).

Defendant's sentence to imprisonment upon his conviction for arson in the third degree was not unduly harsh or severe because he had a significant criminal history and was thus properly sentenced as a persistent felony offender. People v Norcutt, 115 A.D.3d 1306, 982 N.Y.S.2d 661, 2014 N.Y. App. Div. LEXIS 2110 (N.Y. App. Div. 4th Dep't), app. denied, 23 N.Y.3d 966, 988 N.Y.S.2d 573, 11 N.E.3d 723, 2014 N.Y. LEXIS 1657 (N.Y. 2014).

8. Verdict

Trial court's acquittal of defendant on greater charges of arson in first, second and third degrees was not inconsistent with his conviction of fourth degree arson, since verdict was logically explained as limited acceptance of intoxication defense to extent of finding that defendant intentionally set fire but recklessly, not intentionally, damaged building. People v Gerasimovic, 124 A.D.2d 593, 507 N.Y.S.2d 873, 1986 N.Y. App. Div. LEXIS 61905 (N.Y. App. Div. 2d Dep't 1986).

Notwithstanding that single overt act alleged in conspiracy count was setting of fire identically described in arson count, defendants' conviction for conspiracy was not fatally inconsistent with their acquittal on arson count; crime of conspiracy is embracive and covers all overt acts and substantive crimes in persisting criminal enterprise, proof of any of which may support conviction, and since there was ample evidence of other conduct which jury could find was in furtherance of conspiracy, verdicts were not repugnant. People v Springer, 127 A.D.2d 250, 514 N.Y.S.2d 555, 1987 N.Y. App. Div. LEXIS 41509 (N.Y. App. Div. 3d Dep't 1987), aff'd, 71 N.Y.2d 997, 529 N.Y.S.2d 275, 524 N.E.2d 876, 1988 N.Y. LEXIS 715 (N.Y. 1988).

Jury verdict convicting defendant of first degree insurance fraud was not repugnant to acquittal of third degree arson since (1) jury could have found that People failed to prove that fire intentionally set by defendant resulted in "damage" to building, which was necessary element of arson under CLS Penal § 150.10, and (2) such determination was not inconsistent with jury's further finding that defendant intentionally set fire in attempt to obtain property in excess of $1,500 through fraudulent insurance claim, in violation of CLS Penal former § 176.20. People v Amar, 134 A.D.2d 601, 522 N.Y.S.2d 5, 1987 N.Y. App. Div. LEXIS 50808 (N.Y. App. Div. 2d Dep't 1987).

Court properly set aside jury verdict finding defendant guilty of third degree arson, first degree insurance fraud, and second degree grand larceny, despite fact that there was evidence to show that defendant had possible motive to start fire at his restaurant, since (1) People did not establish when fire started, (2) there was one-hour hiatus between time of defendant's presence at restaurant and time when fire department responded to alarm, (3) defendant was not only person with access to restaurant keys, and (4) there was no evidence connecting defendant to accelerant used to start fire. People v Zurzolo, 143 A.D.2d 286, 532 N.Y.S.2d 173, 1988 N.Y. App. Div. LEXIS 8930 (N.Y. App. Div. 2d Dep't 1988), aff'd, 74 N.Y.2d 680, 543 N.Y.S.2d 385, 541 N.E.2d 414, 1989 N.Y. LEXIS 653 (N.Y. 1989).

Defendant's conviction of reckless endangerment in the second degree was not inconsistent with her acquittal of arson in the third degree because, although defendant argued that the acquittal of arson, when viewed in tandem with her conviction of conspiracy in the fourth and fifth degrees and insurance fraud in the third degree, implied that the jury found that she had not started the fire either personally or acting in concert with others, conspiracy was an embracive crime, covering all of the overt acts and substantive crimes in the persisting criminal enterprise, and not necessarily the actual commission of the crime that was the object of the conspiracy; hence, contrary to defendant's argument, the jury was not required to determine that defendant intentionally damaged the apartment building by setting a fire in order to convict defendant upon the conspiracy counts, but, rather, the jury was required to find that defendant committed an overt act in furtherance of the conspiracy. Likewise, insurance fraud required a finding that defendant intentionally concealed the cause of the fire on her insurance claim, and the jury was not further obliged to find that she intended to damage the apartment building by setting the fire. People v Pagan, 87 A.D.3d 1181, 929 N.Y.S.2d 332, 2011 N.Y. App. Div. LEXIS 6325 (N.Y. App. Div. 3d Dep't 2011), app. denied, 18 N.Y.3d 885, 939 N.Y.S.2d 755, 2012 N.Y. LEXIS 405 (N.Y. 2012).

II. Under Former § 222

9. In general

Knowledge by defendant of existence of fire insurance on contents of building, which he is charged with attempting to burn, is essential to conviction under § 222, subd. 5. People v Popoff, 289 N.Y. 344, 45 N.E.2d 904, 289 N.Y. (N.Y.S.) 344, 1942 N.Y. LEXIS 957 (N.Y. 1942).

Where there is no proof that defendant, insurance adjuster, had knowledge of insurance of building, defendant could not have intended to defraud and injure insurance company. People v

Shields, 242 A.D. 846, 275 N.Y.S. 483, 1934 N.Y. App. Div. LEXIS 7884 (N.Y. App. Div. 2d Dep't 1934), aff'd, 266 N.Y. 200, 194 N.E. 407, 266 N.Y. (N.Y.S.) 200, 1935 N.Y. LEXIS 1358 (N.Y. 1935).

To convict of arson in the second degree it must be shown that the building touched another, or was within the curtilage thereof. Peverelly v People (1855) 3 Park Crim 59.

10. Indictment

District attorney was not bound to elect under what subdivision of this section he was proceeding. Indictment is not insufficient in that it charged defendant with attempt to burn his own house. People v Rosen, 251 A.D. 584, 297 N.Y.S. 877, 1937 N.Y. App. Div. LEXIS 7003 (N.Y. App. Div.), aff'd, 275 N.Y. 627, 11 N.E.2d 790, 275 N.Y. (N.Y.S.) 627, 1937 N.Y. LEXIS 1599 (N.Y. 1937).

Where a first indictment by one grand jury was for second degree arson under subd. 2 of this section, and likewise for perjury, that indictment was dismissed with a direction to resubmit the matter to the same grand jury, instead of which it was resubmitted to a different Grand Jury which, without hearing witnesses anew, indicted defendant for violating subd. 5 of this section, validity of the second indictment was at least doubtful. People v Decker, 11 A.D.2d 600, 200 N.Y.S.2d 655, 1960 N.Y. App. Div. LEXIS 9963 (N.Y. App. Div. 3d Dep't 1960), limited, People v Grossman, 35 Misc. 2d 488, 230 N.Y.S.2d 852, 1962 N.Y. Misc. LEXIS 2867 (N.Y. County Ct. 1962).

A count of an indictment charging attempted arson of a building with intent to defraud the insurer thereof should be dismissed where there is no proof of any insurance on the building, notwithstanding proof of existence of insurance on its contents. People v Moore, 18 A.D.2d 417, 239 N.Y.S.2d 967, 1963 N.Y. App. Div. LEXIS 3801 (N.Y. App. Div. 1st Dep't), aff'd, 13 N.Y.2d 1070, 246 N.Y.S.2d 216, 195 N.E.2d 894, 1963 N.Y. LEXIS 820 (N.Y. 1963).

Count in indictment which charges defendant with setting fire to building with intent to burn same, which building was insured against loss and damage by fire, with unlawful and fraudulent intent to defraud insurer is sufficient under subd. 5, of this section without alleging name of insurer. Count in indictment which charges defendant with setting fire to building with intent to burn it, which building adjoined and stood in close proximity to inhabited building in which there was human being at time is sufficient under subd. 3 this section. Question whether or not burned building was in close proximity to another building which was inhabited is question to be determined on trial and cannot be considered on demurrer. People v Kalbfeld, 207 N.Y.S. 744, 124 Misc. 200, 1924 N.Y. Misc. LEXIS 1094 (N.Y. County Ct. 1924).

A prisoner may be convicted of arson in the second degree under an indictment charging that offense, even though the facts would have justified a conviction of a higher grade of crime under an indictment properly framed. People v Durkin (1862) 5 Park Crim 243.

11. Admissibility and competency of evidence

No inference of incendiarism could be properly drawn from fact that defendant, after discovery of fire, sought to protect his house, rather than to extinguish fire in barn which was filled with hay and was bound to be consumed no matter what efforts might be made to stop it, since under such circumstances the only rational course for defendant to pursue was to protect his residence, if possible. People v Lewis, 275 N.Y. 33, 9 N.E.2d 765, 275 N.Y. (N.Y.S.) 33, 1937 N.Y. LEXIS 1397 (N.Y. 1937).

Evidence as to insurance policies owned by the defendant's uncle, covering the burned house, was erroneously admitted where there was no claim of complicity of the uncle in the crime. People v Nicolia, 287 N.Y. 398, 39 N.E.2d 929, 287 N.Y. (N.Y.S.) 398, 1942 N.Y. LEXIS 1097 (N.Y. 1942).

On a trial for arson it is error to admit evidence of an admission by the defendant to an insurance adjuster that he had fires at three other places within two years. People v Brown, 110 A.D. 490, 96 N.Y.S. 957, 1906 N.Y. App. Div. LEXIS 12 (N.Y. App. Div. 1906), aff'd, 188 N.Y. 554, 80 N.E. 1115, 188 N.Y. (N.Y.S.) 554, 1907 N.Y. LEXIS 1178 (N.Y. 1907).

Evidence of insurance is admissible on the question of motive, and also as one of the existing circumstances, particularly where consideration of subd. 5 has been withdrawn from the jury. People v Rosen, 251 A.D. 584, 297 N.Y.S. 877, 1937 N.Y. App. Div. LEXIS 7003 (N.Y. App. Div.), aff'd, 275 N.Y. 627, 11 N.E.2d 790, 275 N.Y. (N.Y.S.) 627, 1937 N.Y. LEXIS 1599 (N.Y. 1937).

The surrounding facts and circumstances, relative to the fire, are always material and proper as evidence. People v Bloodgood, 251 A.D. 593, 298 N.Y.S. 91, 1937 N.Y. App. Div. LEXIS 7005 (N.Y. App. Div. 1937).

In the trial, on a charge of arson, where the defendant's confession stated that he lighted the fire which resulted in his indictment and prosecution by throwing a lighted cigarette into a closet of his home in which had been placed a model airplane containing inflammable liquid, it was no abuse of the trial court's discretion to refuse, on the voir dire examination to determine the admissibility of the confession, to permit defendant's counsel to perform an experiment designed to demonstrate conditions which it was claimed would result in the snuffing of a lighted cigarette, when the demonstration had none of the characteristics which obtained in the defendant's home on the day of the fire. People v Bolster, 24 A.D.2d 774, 263 N.Y.S.2d 574, 1965 N.Y. App. Div. LEXIS 3194 (N.Y. App. Div. 3d Dep't 1965).

12. —Accomplice testimony

In a prosecution for attempted arson, admissions by co-conspirator or accomplice, made during the commission of the crime or in furtherance of its purpose, are competent, but statements made by him after the crime has been consummated are incompetent and inadmissible. People v Vaccaro, 288 N.Y. 170, 42 N.E.2d 472, 288 N.Y. (N.Y.S.) 170, 1942 N.Y. LEXIS 1023 (N.Y. 1942).

Judgment convicting the defendant of the crime of arson in the second degree must be reversed and a new trial granted where it appears that the defendant was charged with employing codefendants to burn a building "with intent to prejudice or defraud the insurer thereof," in violation of § 222, subd. 5; that the verdict of conviction is against the weight of the credible evidence; that the attempted corroboration of the accomplices, who testified for the prosecution, was insufficient; that the charge of the trial court on corroboration was erroneous in that it was not sufficiently full, clear and explicit as to the testimony of the corroborating witnesses, and that the evidence failed to establish intent to defraud the insurer of the premises. People v Lashkowitz, 257 A.D. 518, 13 N.Y.S.2d 663, 1939 N.Y. App. Div. LEXIS 7796 (N.Y. App. Div.), reh'g denied, 258 A.D. 828, 15 N.Y.S.2d 625, 1939 N.Y. App. Div. LEXIS 7138 (N.Y. App. Div. 1939).

Where the only evidence against the defendant was that of accomplices who were unsatisfactorily corroborated, it was not sufficient for a conviction. People v Neilson, 261 A.D. 1021, 25 N.Y.S.2d 853, 1941 N.Y. App. Div. LEXIS 8577 (N.Y. App. Div. 1941).

13. Jury questions

In a prosecution under subd. 5, where there was no evidence connecting the defendant with the insurance or proof that he had knowledge of the insurance, and nothing from which an inference could be drawn that he attempted to burn the premises so that his brother-in-law, the owner, could collect the insurance, it was error for the court to allow the jury to take into consideration the fact that the owner was insured. People v Goldberg, 146 A.D. 335, 130 N.Y.S. 708, 1911 N.Y. App. Div. LEXIS 1887 (N.Y. App. Div. 1911).

Whether the defendant acted innocently or in furtherance of a criminal conspiracy to burn a building is a question for the jury. People v Bloodgood, 251 A.D. 593, 298 N.Y.S. 91, 1937 N.Y. App. Div. LEXIS 7005 (N.Y. App. Div. 1937).

14. Sufficiency of evidence

An admission by the defendant that he hired another to burn an insured building is sufficient to sustain a conviction. People v La Barbera, 274 N.Y. 339, 8 N.E.2d 884, 274 N.Y. (N.Y.S.) 339, 1937 N.Y. LEXIS 851 (N.Y. 1937).

A farmer has prima facie no motive for burning his barn, but rather strong motive to the contrary, and evidence that he had stocked his barn with grain for his dairy herd after issuance of the insurance established a lack of motive. Evidence that defendant purchased can of kerosene; that he was seen going to milk house in southeast corner of barn with what looked like a can; that thereafter flames were seen coming from west or south end of

barn and that wind was blowing from southwest, was insufficient to sustain theory that defendant entered milk house with kerosene, left it by way of door opening into alleyway, proceeded along alleyway to cow stable, and through cow stable to main floor where he set barn on fire at a point which wind would be expected to carry flames so that entire barn might be consumed. People v Lewis, 275 N.Y. 33, 9 N.E.2d 765, 275 N.Y. (N.Y.S.) 33, 1937 N.Y. LEXIS 1397 (N.Y. 1937).

A conviction cannot be had under subd. 5 of this section upon proof that the defendant committed arson in the third degree as defined in § 223, by hiring two persons to burn his wife's barn not necessarily found by the jury, under the instructions of the court, to have been insured. People v Butler, 62 A.D. 508, 71 N.Y.S. 129, 1901 N.Y. App. Div. LEXIS 1285 (N.Y. App. Div. 1901).

A conviction under subd. 5 may be sustained on evidence tending to show that the defendant transferred the property in question to a third person, without the payment of any consideration, under an agreement with said third person to burn the property so that the defendant could procure the insurance. People v Badger, 217 A.D. 424, 216 N.Y.S. 723, 1926 N.Y. App. Div. LEXIS 7826 (N.Y. App. Div.), aff'd, 243 N.Y. 632, 154 N.E. 635, 243 N.Y. (N.Y.S.) 632, 1926 N.Y. LEXIS 927 (N.Y. 1926).

Conviction of arson in second degree was substantiated by evidence of kerosene all around the premises, together with bags of waste and candles, where defendant's shoes smelled of kerosene immediately after fire and he was only person who had means of access to store. People v Weiss, 263 A.D. 722, 30 N.Y.S.2d 638, 1941 N.Y. App. Div. LEXIS 4713 (N.Y. App. Div. 1941).

Agency Opinions

Analysis

I. Generally

1. In general

I. Generally

1. In general

Person convicted of arson in any degree is, by statute, ineligible to become member of volunteer fire company, but issuance to that person of unrestricted certificate of relief from disabilities prevents automatic statutory disqualification; however, certificate does not prevent fire company or fire district commissioners from exercising discretion to deny membership based on facts and circumstances surrounding arson conviction. Person convicted of arson in any degree is, by statute, ineligible to hold office of fire district commissioner; certificate of relief from disabilities does not apply to public office such as fire district commissioner. 1998 NY Ops Atty Gen I 98-50.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 60.05; CLS CPL § 700.05; CLS Family Ct Act § 308.1.

Intentionally, definition of, § 15.05(1).

Eavesdropping warrants in second degree arson cases, CLS CPL §§ 700.05(8), 700.10–700.70.

Federal Aspects:

Arson, 18 USCS § 81.

Jurisprudences:

35A NY Jur 2d Criminal Law Substantive Principles and Offenses §§ 880, 885, 88.

35A NY Jur 2d Criminal Law Substantive Principles and Offenses § 877.

5 Am Jur 2d, Arson and Related Offenses § 5.

19 Am Jur Trials 685, Preparation and Trial of Arson Case.

Annotations:

Liability for spread of fire purposely and lawfully kindled. 24 ALR2d 241.

Criminal Jury Instructions: Arson, third degree (intentionally damaging a building by fire or explosion). CJI2d [NY] Penal Law § 150.10.

Texts: New York Criminal Practice Ch. 63.

§ 150.15. Arson in the second degree

A person is guilty of arson in the second degree when he intentionally damages a building or motor vehicle by starting a fire, and when (a) another person who is not a participant in the crime is present in such building or motor vehicle at the time, and (b) the defendant knows that fact or the circumstances are such as to render the presence of such a person therein a reasonable possibility.

Arson in the second degree is a class B felony.

HISTORY:

Add, L 1965, ch 1030, § 1; amd, L 1967, ch 791, § 18; L 1971, ch 961, § 7, eff Sept 1, 1971; L 1979, ch 225, § 18, eff Sept 1, 1979.

Commission Staff Notes: See Commission Staff Notes under Art 150.

Notes to Decisions

Analysis

I. Generally

1. In general
2. Constitutional considerations
3. Evidence; admissibility
4. —Sufficiency
5. — —Circumstantial evidence
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9. Lesser included offenses
10. Sentencing
11. Verdict

II. Under Former Law

12. Under former § 221
13. Under former § 224
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15. Under former § 226
16. Under former § 1895

I. Generally

1. In general

Statute providing that person is guilty of arson in second degree when he attempts to damage building by starting fire, rather than statute providing that person is guilty of arson in first degree for intentionally damaging building by causing explosion, applied to conduct of defendant, who threw Molotov cocktail through window of ground floor apartment where alleged assailant of defendant lived. People v McCrawford, 47 A.D.2d 318, 366 N.Y.S.2d 424, 1975 N.Y. App. Div. LEXIS 9235 (N.Y. App. Div. 1st Dep't 1975).

People were properly permitted to amend indictment during second degree arson trial, even though indictment charged defendant with setting fire to "building," where evidence and instructions provided to grand jury had specified "dwelling" and amendment did not change People's theory of case so as to prejudice defendant on merits, or cure legal insufficiency in respect to factual allegations. People v Jones, 186 A.D.2d 46, 587 N.Y.S.2d 646, 1992 N.Y. App. Div. LEXIS 10588 (N.Y. App. Div. 1st Dep't 1992), app. denied, 81 N.Y.2d 842, 595 N.Y.S.2d 741, 611 N.E.2d 780, 1993 N.Y. LEXIS 922 (N.Y. 1993).

Defendant's responses during plea allocution did not prove elements of second degree arson and even negated at least one element, and thus conviction of that crime on his guilty plea would be reversed, where he did not admit that he intended to damage occupied building when he set fire to unoccupied building connected to occupied building by breezeway, he admitted placing burning papers in basement of unoccupied building with intent to "burn that building down," and he confirmed court's statement that he intentionally damaged building that was not occupied; negation of element of crime brought defendant's appeal within

exception to preservation rule despite absence of motion to withdraw or vacate plea. People v Makas, 273 A.D.2d 510, 709 N.Y.S.2d 650, 2000 N.Y. App. Div. LEXIS 6448 (N.Y. App. Div. 3d Dep't 2000).

Trial court erred in denying defendant's motion to withdraw his plea because defendant's sworn affidavit, together with the comments by the prosecutor and the court at sentencing, that he was intoxicated at the time of a fire and that he was never advised of the impact of intoxication on the intent required for the crime of arson under N.Y. Penal Law § 150.15 raised the possibility of an intoxication defense. People v Maxson, 101 A.D.3d 1384, 956 N.Y.S.2d 301, 2012 N.Y. App. Div. LEXIS 8783 (N.Y. App. Div. 3d Dep't 2012).

Where defendant was accused of setting fire to uninhabited building, and fire spread to adjacent inhabited building, such occurrence was foreseeable consequence of original act without any supervening cause, and defendant could properly be charged with arson in second degree. People v Davis, 89 Misc. 2d 535, 392 N.Y.S.2d 195, 1977 N.Y. Misc. LEXIS 1892 (N.Y. Sup. Ct. 1977).

Reasonable cause exists for the belief that defendants, both 14 years old, by lighting a torch for the purpose of illumination during the commission of a burglary and then leaving the fire burning on the wooden floor in close proximity to readily combustible objects ultimately resulting in the deaths of six persons, committed the crimes of arson in the second degree (Penal Law, § 150.15) and felony murder (Penal Law, § 125.25, subd 3) and, accordingly, their cases must be held for the action of the Grand Jury and cannot be removed to Family Court over the objection of the District Attorney. People v Torres, 99 Misc. 2d 767, 417 N.Y.S.2d 575, 1978 N.Y. Misc. LEXIS 2930 (N.Y. City Crim. Ct. 1978).

In a prosecution of the defendant for arson second degree, arson third degree, and the felony murder second degree of a fireman who died of a heart attack, the fact that the fireman had a previous weakened heart and might have met a similar fate from natural or accidental fires was of no legal consequence since the evidence established a direct spatiotemporal nexus between the fire and the death sufficient to warrant holding the defendant for a trial by jury on the charge of murder. Where a fireman died from a heart attack while fighting a fire which was the result of arson, the statutory requirement that a felony murder pursuant to Penal Law § 125.25 be committed in the course of an furtherance of the crime of arson was neither comprehensible nor applicable since arson is the only crime to which felony murder applies which is inherently dangerous to human life and where there is little likelihood of a personal confrontation. People v Lozano, 107 Misc. 2d 345, 434 N.Y.S.2d 588, 1980 N.Y. Misc. LEXIS 2891 (N.Y. Sup. Ct. 1980).

An indictment for second degree arson pursuant to Penal L § 150.15, based on an allegation that defendant had set fire to a garage and that the fire had spread to an inhabited building next door, would be dismissed with leave to the People to represent the charge to a new grand jury pursuant to CPL § 210.20(4) where, though a grand jury could find circumstantial evidence of defendant's intent to burn the inhabited building by starting the fire in the garage, the grand jury had erroneously been instructed that intent to damage the inhabited building was not required; however, a related charge of fourth degree arson arising out of damage caused by the fire to a parked motor vehicle would be deemed sufficient, since the indictment therefor contained an allegation that defendant intended to damage the vehicle itself by starting a fire in the garage next door. People v Keech, 121 Misc. 2d 368, 467 N.Y.S.2d 786, 1983 N.Y. Misc. LEXIS 3933 (N.Y. Sup. Ct. 1983).

In a case in which an alien, who was a lawful permanent resident, appealed the Board of Immigration Appeals' order affirming an immigration judge's finding that he was removable and ineligible for cancellation of removal, the appellate court lacked jurisdiction. The alien had pled guilty to attempted arson in the second degree, in violation of N.Y. Penal Law §§ 150.15 and 110.00, and he was sentenced to a term of imprisonment of 18 to 54 months; attempted arson in the second degree was a crime of violence under 18 U.S.C.S. § 16(b), and an aggravated felony under Immigration and Nationality Act § 101(a)(43)(F) and (U). Santana v Holder, 714 F.3d 140, 2013 U.S. App. LEXIS 7925 (2d Cir. 2013).

2. Constitutional considerations

A defendant was properly convicted of attempted arson and his motion to suppress certain of his inculpatory statements for alleged violations of his right to counsel was properly denied where it was clear from the record that he had not requested an attorney prior to his being questioned. People v Morris, 83 A.D.2d 691, 442 N.Y.S.2d 606, 1981 N.Y. App. Div. LEXIS 15003 (N.Y. App. Div. 3d Dep't 1981).

In prosecution for second degree arson, inter alia, defendant was not deprived of effective assistance because of counsel's failure to object to admission of testimony as to defendant's prior assault on his wife's boyfriend since counsel used that testimony as strategy to convince jury that residents of building where boyfriend lived wrongly accused defendant of arson because they held grudge against him as result of assault. People v Key, 151 A.D.2d 782, 542 N.Y.S.2d 759, 1989 N.Y. App. Div. LEXIS 9212 (N.Y. App. Div. 2d Dep't 1989), app. denied, 75 N.Y.2d 967, 556 N.Y.S.2d 252, 555 N.E.2d 624, 1990 N.Y. LEXIS 1841 (N.Y. 1990), app. denied, 76 N.Y.2d 790, 559 N.Y.S.2d 996, 559 N.E.2d 690, 1990 N.Y. LEXIS 2756 (N.Y. 1990).

3. Evidence; admissibility

Although trial court, in prosecution for arson, should have allowed defendant to read to jury portions of transcript of testimony given by defendant in his civil claim to recover insurance proceeds for fire loss after the People read approximately 50 lines from the 70-page transcript as portions he sought to read were plainly relevant to explain and offset that portion presented by prosecution, failure to admit such could be deemed harmless error. People v Spano, 57 A.D.2d 715, 395 N.Y.S.2d 548, 1977 N.Y. App. Div. LEXIS 11768 (N.Y. App. Div. 4th Dep't 1977).

In prosecution for arson, testimony that one of the defendants was a "problem" and sometimes stole pizzas from the premises in question and that he was told by the witness "to behave himself" and not come back constituted inadmissible testimony of other crimes and improper conduct having no bearing on the charge for which defendants were being tried, adduced at a time when they had not put their character or credibility in issue, and was not admissible as motive testimony. People v Napoletano, 58 A.D.2d 83, 395 N.Y.S.2d 469, 1977 N.Y. App. Div. LEXIS 11834 (N.Y. App. Div. 2d Dep't 1977).

Where alibi witness on cross-examination in arson prosecution denied having told prosecutor that defendants had said to him "Wouldn't it be funny if [the premises in question] burned down," such negative answer was binding on the People, and testimony of investigator from the district attorney's office in rebuttal that the alibi witness had indeed uttered such a statement was improperly received. People v Napoletano, 58 A.D.2d 83, 395 N.Y.S.2d 469, 1977 N.Y. App. Div. LEXIS 11834 (N.Y. App. Div. 2d Dep't 1977).

In arson trial, court abused its discretion in admitting into evidence tape-recorded conversation in Spanish between defendant and prosecution informant (who volunteered to wear tape recorder and transmitting device), since tape was not sufficiently audible to permit production of reasonable transcript by third party, where (1) official court translator was unable to produce satisfactory translation at audibility hearing, (2) even after translator was permitted to remove tape for private listening, resulting transcription contained numerous notations of inaudibility, and (3) only incriminatory portions of transcript were hearsay statements of informant, including repeated comment suggesting defendant's incriminatory involvement, even though defendant admitted no involvement in reply; thus, probative value of tape was outweighed by potential for prejudice. People v Carrasco, 125 A.D.2d 695, 509 N.Y.S.2d 879, 1986 N.Y. App. Div. LEXIS 62954 (N.Y. App. Div. 2d Dep't 1986).

In arson trial, it was not improper to permit fire marshal to testify that he had eliminated all possible natural and accidental causes of fire to reasonable degree of scientific certainty since he did not testify that fire was incendiary in nature or that it was intentionally set and thus rule that ultimate fact question is for jury to decide was not violated. Fire marshal's testimony that

debris which he found at point of origin of fire "smelled of gasoline" was admissible as factual observation regarding condition of premises which he inspected. People v Rivera, 131 A.D.2d 518, 516 N.Y.S.2d 474, 1987 N.Y. App. Div. LEXIS 47973 (N.Y. App. Div. 2d Dep't 1987).

It was proper to admit testimony of defendant's prior assault on his wife's boyfriend as probative of his motive to commit arson at building where boyfriend resided. People v Key, 151 A.D.2d 782, 542 N.Y.S.2d 759, 1989 N.Y. App. Div. LEXIS 9212 (N.Y. App. Div. 2d Dep't 1989), app. denied, 75 N.Y.2d 967, 556 N.Y.S.2d 252, 555 N.E.2d 624, 1990 N.Y. LEXIS 1841 (N.Y. 1990), app. denied, 76 N.Y.2d 790, 559 N.Y.S.2d 996, 559 N.E.2d 690, 1990 N.Y. LEXIS 2756 (N.Y. 1990).

In prosecution for second degree arson, inter alia, it was reversible error to allow fire marshal to testify that fire was deliberately set since such testimony invaded jury's exclusive province of determining ultimate facts. People v Bajraktari, 154 A.D.2d 542, 546 N.Y.S.2d 384, 1989 N.Y. App. Div. LEXIS 12744 (N.Y. App. Div. 2d Dep't 1989), app. denied, 75 N.Y.2d 963, 556 N.Y.S.2d 248, 555 N.E.2d 620, 1990 N.Y. LEXIS 1749 (N.Y. 1990).

In second degree arson prosecution, testimony of fire marshal as to cause of fire did not usurp jury's function where he did not testify that fire was incendiary in nature or that it was intentionally set. People v Luckerson, 170 A.D.2d 695, 567 N.Y.S.2d 110, 1991 N.Y. App. Div. LEXIS 3137 (N.Y. App. Div. 2d Dep't), app. denied, 77 N.Y.2d 997, 571 N.Y.S.2d 923, 575 N.E.2d 409, 1991 N.Y. LEXIS 2110 (N.Y. 1991).

In second degree arson trial, court properly precluded testimony that occupant of trailer had previously fallen asleep and dropped cigarettes on floor and furniture, causing fire, where such evidence was inconsistent with physical evidence as to cause of fire in defendant's case and thus could not provide "clear link" establishing that someone else caused fire. People v Beebe, 217 A.D.2d 950, 630 N.Y.S.2d 170, 1995 N.Y. App. Div. LEXIS 8372 (N.Y. App. Div. 4th Dep't), app. denied, 86 N.Y.2d 872, 635 N.Y.S.2d 953, 659 N.E.2d 776, 1995 N.Y. LEXIS 4771 (N.Y. 1995), reh'g denied, 1995 N.Y. App. Div. LEXIS 11111 (N.Y. App. Div. 4th Dep't Sept. 29, 1995).

Court properly allowed defendant's wife to testify that he admitted setting fire at issue where it was clearly shown that arson was directed against wife. People v Capobianco, 218 A.D.2d 707, 630 N.Y.S.2d 386, 1995 N.Y. App. Div. LEXIS 8683 (N.Y. App. Div. 2d Dep't), app. denied, 86 N.Y.2d 841, 634 N.Y.S.2d 450, 658 N.E.2d 228, 1995 N.Y. LEXIS 4548 (N.Y. 1995).

In second degree arson prosecution, court properly allowed testimony of defendant's stepdaughter that his wife exclaimed "(h)e set the house on fire," as she ran from house immediately after fire started; testimony was properly admitted under present sense impression exception to hearsay rule. People v Carvalho, 249 A.D.2d 945, 673 N.Y.S.2d 277, 1998 N.Y. App. Div. LEXIS 5051 (N.Y. App. Div. 4th Dep't 1998).

In juvenile delinquency proceeding based on charges of conduct that would be second degree arson and second degree mischief if committed by adult, petition was sufficient on its face, despite juvenile's claim that his mother's statement that he communicated to her by signing that he used matches to start fire was not admission, because it was nonverbal communication; witness may testify concerning statement made by another person who communicates nonverbally by sign language, and juvenile did not prove that his method of communication with his mother was unreliable. In re Terrance W., 251 A.D.2d 1004, 674 N.Y.S.2d 529, 1998 N.Y. App. Div. LEXIS 7021 (N.Y. App. Div. 4th Dep't), app. denied, 92 N.Y.2d 810, 680 N.Y.S.2d 54, 702 N.E.2d 839, 1998 N.Y. LEXIS 3180 (N.Y. 1998).

Defendant's counsel was not ineffective for failing to pursue an intoxication defense in his criminal matter involving charges of arson, as defendant had admitted that he intentionally damaged a building by setting a fire and he knew it was probably occupied, and he failed to show the absence of strategic or other legitimate explanations for counsel's decision. People v Russell, 133 A.D.3d 1199, 20 N.Y.S.3d 760, 2015 N.Y. App. Div. LEXIS 8370 (N.Y. App. Div. 4th Dep't 2015), app. denied, 26 N.Y.3d 1149, 51 N.E.3d 574, 32 N.Y.S.3d 63, 2016 N.Y. LEXIS 505 (N.Y. 2016).

Trial court properly denied defendant's motion to vacate his arson conviction; admission of the statements he made at the crime scene did not violate his Miranda rights, as he was not then in custody and the officer's questions about how the fire had started and if anyone else was inside the residence were proper under the emergency doctrine. People v Harris, 129 A.D.3d 1522, 11 N.Y.S.3d 359, 2015 N.Y. App. Div. LEXIS 4996 (N.Y. App. Div. 4th Dep't 2015), app. denied, 27 N.Y.3d 998, 59 N.E.3d 1220, 38 N.Y.S.3d 108, 2016 N.Y. LEXIS 1358 (N.Y. 2016).

In prosecution under indictment which charged second-degree arson, first-degree reckless endangerment and third-degree assault, defendant was not entitled to suppression of testimonial evidence concerning observations of defendant's apartment and photographs taken therein by two fire marshals shortly after the fire which gave rise to the charges where, under all circumstances, fire marshals' warrantless entry was reasonable and lawful. People v Calhoun, 90 Misc. 2d 88, 393 N.Y.S.2d 529, 1977 N.Y. Misc. LEXIS 1996 (N.Y. Sup. Ct. 1977), aff'd, 67 A.D.2d 1110, 413 N.Y.S.2d 535, 1979 N.Y. App. Div. LEXIS 15193 (N.Y. App. Div. 2d Dep't 1979).

4. —Sufficiency

Defendant was properly convicted of second degree arson on theory of accessorial liability arising from fire in building that housed nightclub owned by him, and it was error to set aside verdict under CLS CPL § 290.10 where, inter alia, there had been numerous complaints about club filed with police, its liquor license was in danger of being revoked, defendant's investment in nightclub was at risk if liquor license was revoked, fire was intentionally set, fire alarm system had been intentionally disabled, there was no evidence of break-in, expensive lighting system was removed from club shortly before fire and hidden at defendant's house, and defendant had lied about "destruction" of that system in fire. People v Grassi, 92 N.Y.2d 695, 685 N.Y.S.2d 903, 708 N.E.2d 976, 1999 N.Y. LEXIS 27 (N.Y. 1999).

A conviction for second-degree attempted arson was proper, after defendant was permitted to plead guilty in full satisfaction of an indictment for second-degree arson, in that sufficient factual basis for the plea was established by defendant's statement to the trial court that he intentionally aided and abetted another person in setting the fire, and that he knew or should have known that the building in question was occupied at the time. People v Paige, 92 A.D.2d 653, 460 N.Y.S.2d 147, 1983 N.Y. App. Div. LEXIS 16921 (N.Y. App. Div. 3d Dep't 1983).

Sufficient evidence existed to sustain conviction of arson in second degree where it was shown that building was damaged and that defendant knew there were people in building when he started fire; defendant's statement to police, given after voluntary waiver of right, when viewed in conjunction with circumstantial evidence, established that defendant intentionally started fire intending to cause damage by piling rags next to wooden door, holding match to them until they started burning, and then leaving fire unattended. People v Fisher, 112 A.D.2d 1008, 492 N.Y.S.2d 816, 1985 N.Y. App. Div. LEXIS 52217 (N.Y. App. Div. 2d Dep't 1985).

Evidence was sufficient to prove intent in second degree arson case where defendant admitted causing fire in his wife's residence building but contended it was accidental, and where defendant, on date of fire, had threatened to burn dwelling and was observed entering cellar carrying containers and hurriedly leaving shortly thereafter when fire began. People v Harris, 122 A.D.2d 493, 505 N.Y.S.2d 254, 1986 N.Y. App. Div. LEXIS 59774 (N.Y. App. Div. 3d Dep't 1986).

Evidence supported convictions of second degree arson and first degree reckless endangerment where (1) fire was set with combustible materials or liquid in at least 3 locations inside building, and gas leak was deliberately started inside building, resulting in explosion, and (2) only means of ingress or egress was front door, one defendant was seen working on heater inside building prior to explosion, both defendants left building together 15 minutes before explosion, defendants locked security gates behind them, no one else was seen entering or leaving building thereafter, and expert testified that it would have taken 20 minutes or less for enough gas to accumulate to result in explosion. People v Mann,

125 A.D.2d 711, 510 N.Y.S.2d 196, 1986 N.Y. App. Div. LEXIS 62963 (N.Y. App. Div. 2d Dep't 1986).

Evidence was sufficient to support convictions for second degree arson, third degree assault, and fourth degree criminal mischief where (1) defendant, and 2 accomplices who testified for People at trial, attempted to collect drug money from 3 women who sold crack on behalf of defendant, and (2) when unsuccessful, defendant beat each of 3 women, ransacked their respective rooms, and set fire to bed in third room, which then spread. People v Barnes, 180 A.D.2d 605, 580 N.Y.S.2d 315, 1992 N.Y. App. Div. LEXIS 2818 (N.Y. App. Div. 1st Dep't), app. denied, 79 N.Y.2d 1046, 584 N.Y.S.2d 1013, 596 N.E.2d 411, 1992 N.Y. LEXIS 2493 (N.Y. 1992).

Convictions of second degree arson and first degree reckless endangerment were supported by evidence that defendant, disgruntled over being evicted, painted hate message on another tenant's door and liberally doused halls and stairways of 4 story apartment building with gasoline, and left when several other tenants came out and angrily confronted her. People v Johnson, 186 A.D.2d 363, 588 N.Y.S.2d 162, 1992 N.Y. App. Div. LEXIS 11023 (N.Y. App. Div. 1st Dep't), app. denied, 81 N.Y.2d 763, 594 N.Y.S.2d 725, 610 N.E.2d 398, 1992 N.Y. LEXIS 4862 (N.Y. 1992).

People established that there were persons other than person who set fire present in building in second degree arson prosecution where fire department lieutenant who responded to scene of fire testified that he observed persons exiting building. People v Grogan, 192 A.D.2d 719, 597 N.Y.S.2d 151, 1993 N.Y. App. Div. LEXIS 4286 (N.Y. App. Div. 2d Dep't), app. denied, 81 N.Y.2d 1073, 601 N.Y.S.2d 593, 619 N.E.2d 671, 1993 N.Y. LEXIS 2779 (N.Y. 1993).

Evidence sustained attempted second degree arson conviction where defendant was seen splashing gasoline on his ex-girlfriend's house, occupants ran out after smelling gasoline and heard him say that he thought everyone inside was asleep and that "you all supposed to burn," 2 lighters were found on him, and he had been at house twice that night smashing windows and threatening to kill his ex-girlfriend; lack of evidence that defendant attempted to ignite gasoline did not mean that he was not dangerously close to completion. People v Adams, 222 A.D.2d 1124, 635 N.Y.S.2d 906, 1995 N.Y. App. Div. LEXIS 14322 (N.Y. App. Div. 4th Dep't 1995), app. denied, 87 N.Y.2d 1016, 644 N.Y.S.2d 150, 666 N.E.2d 1064, 1996 N.Y. LEXIS 1193 (N.Y. 1996).

Evidence that portions of building exhibited burn pattern and charring as result of fire was sufficient to establish "damage" element of second degree arson. People v Jackson, 265 A.D.2d 343, 696 N.Y.S.2d 75, 1999 N.Y. App. Div. LEXIS 9602 (N.Y. App. Div. 2d Dep't), app. denied, 94 N.Y.2d 824, 702 N.Y.S.2d 594, 724 N.E.2d 386, 1999 N.Y. LEXIS 4184 (N.Y. 1999).

Proof that defendant intentionally tampered with electric water heater located in basement of house with intent to set fire to house, and did so knowing that his estranged wife and their children were inside house, supported second degree attempted arson conviction. People v Krug, 282 A.D.2d 874, 725 N.Y.S.2d 409, 2001 N.Y. App. Div. LEXIS 3941 (N.Y. App. Div. 3d Dep't 2001), app. denied, 98 N.Y.2d 652, 745 N.Y.S.2d 511, 772 N.E.2d 614, 2002 N.Y. LEXIS 2112 (N.Y. 2002).

Structure built by homeless people, which consisted of carpets draped over clotheslines running between two fixed fences, plywood providing additional support to one side of the structure, an entrance covered by shower curtains and blankets, a tarp covering the entire structure, and carpeting on the ground, and had diverted electrical service from a nearby subway station, was a "building," under N.Y. Penal Law 150.00(1), which could be the subject of second degree arson, because it was utilized for overnight lodging and because it fit within the ordinary meaning of the term "building," so substantial evidence supported defendant's arson conviction under N.Y. Penal Law § 150.15. People v Fox, 3 A.D.3d 577, 771 N.Y.S.2d 156, 2004 N.Y. App. Div. LEXIS 709 (N.Y. App. Div. 2d Dep't), app. denied, 2 N.Y.3d 739, 778 N.Y.S.2d 465, 810 N.E.2d 918, 2004 N.Y. LEXIS 1128 (N.Y. 2004).

Sufficient evidence supported defendant's conviction for arson in the second degree, as an arson investigator testified that the fire originated on the front left burner of the stove in defendant's business and was caused by that burner being turned on high heat while a pan of grease was on the burner; defendant and his girlfriend were the last ones to leave. Defendant admittedly owed more than $30,000 in debts related to the business, and his $20,000 insurance policy covering the contents of the business was set to expire approximately one month from the date of the fire. People v Cushner, 46 A.D.3d 1121, 847 N.Y.S.2d 723, 2007 N.Y. App. Div. LEXIS 13173 (N.Y. App. Div. 3d Dep't 2007), app. denied, 10 N.Y.3d 809, 857 N.Y.S.2d 43, 886 N.E.2d 808, 2008 N.Y. LEXIS 1247 (N.Y. 2008).

Because defendant acknowledged committing acts that constituted third-degree criminal possession of a weapon and attempted second-degree arson under N.Y. Penal Law §§ 265.02(4), 110.00, 150.15, defendant's contentions that the trial court abused its discretion in denying defendant's motion to withdraw the pleas as involuntary and that defendant's counsel was ineffective lacked merit. People v Powell, 46 A.D.3d 1457, 848 N.Y.S.2d 464, 2007 N.Y. App. Div. LEXIS 12955 (N.Y. App. Div. 4th Dep't 2007), app. denied, 10 N.Y.3d 770, 854 N.Y.S.2d 332, 883 N.E.2d 1267, 2008 N.Y. LEXIS 844 (N.Y. 2008).

Based, inter alia, on defendant's complaint about a store, defendant's admission to starting a fire, and leaving the scene without ascertaining that the fire was out or that the building's occupants knew about it, defendant was properly convicted of second-degree arson, second-degree criminal mischief and first-degree reckless endangerment under N.Y. Penal Law §§ 150.15, 145.10, 120.25. People v Hodges, 66 A.D.3d 1228, 888 N.Y.S.2d 224, 2009 N.Y. App. Div. LEXIS 7568 (N.Y. App. Div. 3d Dep't 2009), app. denied, 13 N.Y.3d 939, 895 N.Y.S.2d 330, 922 N.E.2d 919, 2010 N.Y. LEXIS 525 (N.Y. 2010).

Because defendant's friend, defendant's estranged wife, and the man with whom she was living testified, inter alia, that defendant hired the friend to start two fires and that defendant had threatened the wife and the man, the evidence was sufficient to convict defendant of second- and third-degree arson and fourth-degree conspiracy. People v Burns, 68 A.D.3d 1246, 889 N.Y.S.2d 775, 2009 N.Y. App. Div. LEXIS 8928 (N.Y. App. Div. 3d Dep't 2009), app. denied, 14 N.Y.3d 798, 899 N.Y.S.2d 132, 925 N.E.2d 936, 2010 N.Y. LEXIS 931 (N.Y. 2010).

Conviction of second degree attempted arson was supported by sufficient evidence where a resident of the subject building testified that she and defendant had argued, that she had been on the porch approximately 20 minutes before the subject incident, it had appeared dry, and there was not a lighter fluid bottle or matches in the vicinity at that time; a neighbor testified that she observed defendant squirt or throw a clear liquid onto the first-floor resident's porch and then make motions with her hands as if she was striking matches. When police arrived, they recovered matches, an empty matchbook and an empty bottle of lighter fluid from the porch, observed that the porch was wet, and smelled lighter fluid. People v Abare, 86 A.D.3d 803, 927 N.Y.S.2d 233, 2011 N.Y. App. Div. LEXIS 5866 (N.Y. App. Div. 3d Dep't 2011), app. denied, 19 N.Y.3d 861, 947 N.Y.S.2d 410, 970 N.E.2d 433, 2012 N.Y. LEXIS 1571 (N.Y. 2012).

Defendant's arson conviction was not against the weight of the evidence because defendant, who was angry with his neighbors, admitted that "he would use lighter fluid to start a fire" outside their door and he ought to "set their house on fire," surveillance video implicated defendant, and there was physical evidence that a lighter fluid was used as an accelerant. People v Launder, 132 A.D.3d 1151, 18 N.Y.S.3d 747, 2015 N.Y. App. Div. LEXIS 7929 (N.Y. App. Div. 3d Dep't 2015), app. denied, 27 N.Y.3d 1153, 62 N.E.3d 127, 39 N.Y.S.3d 387, 2016 N.Y. LEXIS 2521 (N.Y. 2016).

Evidence supported defendant's conviction for arson in the second degree, based on allegations that defendant intentionally set fire to the family's residence in the middle of the night, killing family members who were inside the residence at the time, because defendant admitted to a friend and a sibling's paramour that defendant started the fire and defendant reeked of gasoline when defendant was taken into custody within hours after the fire erupted. In addition, defendant confessed defendant's guilt to the police. People v Pilato, 145 A.D.3d 1593, 46 N.Y.S.3d 313, 2016 N.Y. App. Div. LEXIS 8519 (N.Y. App. Div. 4th Dep't 2016),

app. denied, 29 N.Y.3d 951, 76 N.E.3d 1085, 54 N.Y.S.3d 382, 2017 N.Y. LEXIS 875 (N.Y. 2017).

Defendant was properly convicted of murder, arson, and abortion, because the weight of the evidence established that he caused the death of the victim by strangling her and setting her on fire and, as a consequence, also caused the death of her unborn child. Witness testimony and DNA evidence showed that he was in the victim's apartment, had sex with the victim just hours before her death, was the father of her unborn child and had urged her to get an abortion; samples of the ignitable liquid taken from the victim's bedroom were identified as gasoline. People v Vega, 170 A.D.3d 1266, 95 N.Y.S.3d 620, 2019 N.Y. App. Div. LEXIS 1676 (N.Y. App. Div. 3d Dep't), app. denied, 33 N.Y.3d 1074, 129 N.E.3d 368, 105 N.Y.S.3d 48, 2019 N.Y. LEXIS 2182 (N.Y. 2019).

Defendant did not sufficiently rebut the evidence presented at his trial to the extent necessary to warrant habeas relief; the fire marshall's testimony concerning the extent of damage that the building suffered was not given in an evidentiary vacuum, but was corroborated by pictorial evidence that illustrated quite clearly that the cell was indeed damaged by the fires. Further, the context of defendant's questioning clearly indicated that when he said charring and blackening, he was referring to the door, floor, and walls of the cell and a rational trier of fact could have found proof of guilt beyond a reasonable doubt. Dixon v McGinnis, 492 F. Supp. 2d 343, 2007 U.S. Dist. LEXIS 44198 (S.D.N.Y. 2007).

Defendant's convictions for attempted arson in the second degree and two counts of endangering the welfare of a child (two counts) were not against the weight of the evidence because a witness saw defendant enter his home with two red gasoline cans, defendant doused a bedroom in his home with gasoline, threatened to burn the house down, and several members of defendant's family, including his two young grandchildren, were in the home at the time. People v Lind, 133 A.D.3d 914, 18 N.Y.S.3d 786, 2015 N.Y. App. Div. LEXIS 8102 (N.Y. App. Div. 3d Dep't 2015), app. denied, 27 N.Y.3d 1153, 62 N.E.3d 127, 39 N.Y.S.3d 387, 2016 N.Y. LEXIS 2530 (N.Y. 2016).

5. — —Circumstantial evidence

There was no danger that jury improperly bridged gaps in evidence by drawing improper inferences at second degree arson trial, and thus defendant was not entitled to circumstantial evidence charge, where evidence established that defendant had set fire to apartment that his brother had recently vacated because he had been dispossessed, owner testified that she had confrontation with defendant several days before fire, tenants saw defendant placing debris in bathtub and furniture near oven shortly before fire, and as fire burned, one tenant overheard defendant, who was at scene, expressing his lack of concern for his actions. People v Garcia, 162 A.D.2d 150, 556 N.Y.S.2d 89, 1990 N.Y. App. Div. LEXIS 6975 (N.Y. App. Div. 1st Dep't 1990).

Circumstantial evidence was sufficient to establish defendant's guilt of second degree arson where he had recently been asked to move out of trailer he shared with his estranged girlfriend, he had argued with her on night before fire, 3 witnesses heard and saw defendant's car at scene immediately before fire broke out, butane lighter and several books of matches were found in his car, and expert testimony established non-accidental cause for fire. People v Brown, 231 A.D.2d 956, 648 N.Y.S.2d 198, 1996 N.Y. App. Div. LEXIS 10960 (N.Y. App. Div. 4th Dep't 1996).

Evidence supported conviction of second degree arson and first degree reckless endangerment where defendant was seen going back into theater in which he had viewed movie after all showings were completed, he was seen running from theater in which fire had been set while alarm was sounding, he was seen leaving theater through rear exit rather than through front entrance as he had claimed in statement to police, clothes matching description of his clothing on night of fire and exhibiting presence of accelerant were later found in his apartment, and although each of those facts individually could lead to inferences equally consistent with innocence as with guilt, jury could have rationally inferred essential elements of crimes charged beyond reasonable doubt from combination of those facts. People v Brown, 281 A.D.2d 700, 728 N.Y.S.2d 100, 2001 N.Y. App. Div. LEXIS 2312 (N.Y. App. Div. 3d Dep't), app. denied, 96 N.Y.2d 826, 729 N.Y.S.2d 446, 754 N.E.2d 206, 2001 N.Y. LEXIS 2089 (N.Y. 2001).

6. — —Corroboration

In prosecution for second degree arson, People sufficiently corroborated defendant's admission to support conviction, as required by CLS CPL § 60.50, on proof that (1) defendant was present at scene of crime 12 to 15 minutes prior to its discovery, (2) defendant had motive for setting fire, since he had been fired by firm which occupied building only one week prior to incident, and (3) fire was product of human agency. People v Noren, 123 A.D.2d 453, 506 N.Y.S.2d 756, 1986 N.Y. App. Div. LEXIS 60203 (N.Y. App. Div. 2d Dep't 1986).

There was sufficient independent evidence that arson had been committed at tavern to corroborate defendant's admissions of guilt where (1) defendant had been involved in altercation with another patron and bar's owner, and angrily left after being refused last drink before establishment was closed, (2) fire was discovered within 15 minutes after defendant left, (3) fire's origin was pinpointed at location where defendant said she set it, (4) on day after fire defendant requested that friend wash any traces of smoke from jeans and shoes she had worn on previous night, and (5) arson investigation excluded most other possible causes of fire. People v Fiacco, 132 A.D.2d 887, 518 N.Y.S.2d 231, 1987 N.Y. App. Div. LEXIS 49357 (N.Y. App. Div. 3d Dep't), app. denied, 70 N.Y.2d 874, 523 N.Y.S.2d 501, 518 N.E.2d 12, 1987 N.Y. LEXIS 19138 (N.Y. 1987).

Because defendant's accomplice testified that defendant ignited the gasoline after the accomplice poured it on the victim's porch, and because that testimony was corroborated by the testimony of other witnesses in accordance with N.Y. Crim. Proc. Law § 60.22(1), defendant was properly convicted of second-degree arson and first-degree reckless endangerment under N.Y. Penal Law §§ 150.15, 120.25. People v Self, 75 A.D.3d 924, 906 N.Y.S.2d 164, 2010 N.Y. App. Div. LEXIS 6306 (N.Y. App. Div. 3d Dep't), app. denied, 15 N.Y.3d 895, 912 N.Y.S.2d 583, 938 N.E.2d 1018, 2010 N.Y. LEXIS 3356 (N.Y. 2010).

7. — —Expert witness testimony

Defendant was properly convicted of second degree arson where People's expert testified that fire was started with flammable fluid and that point of origin was defendant's kitchen floor, and where 2 witnesses saw defendant enter his apartment minutes before fire broke out; proof was not defective merely because expert could not identify accelerant used, and reasonable doubt was not created by testimony of defense expert who viewed photographs of site and hypothesized that fire could be attributed to nonsuspect causes, but conceded that he could not determine that fire was nonincendiary without viewing site. People v Herrera, 136 A.D.2d 567, 523 N.Y.S.2d 562, 1988 N.Y. App. Div. LEXIS 340 (N.Y. App. Div. 2d Dep't), app. denied, 70 N.Y.2d 1007, 526 N.Y.S.2d 941, 521 N.E.2d 1084, 1988 N.Y. LEXIS 856 (N.Y. 1988).

Convictions for arson in second degree and reckless endangerment in second degree were not against weight of evidence where (1) woman moved out of premises she had shared with defendant for 12 years and moved in with cousin, (2) about 2 months later, woman was escorted by police to and from defendant's residence 5 times in one day and, during visits, defendant attempted to persuade her to return and also stated that she would not spend one more night with cousin, (3) that night, cousin's household was awakened by loud crash to find public hallway in front of entrance to apartment in flames, (4) as fire erupted, tenant observed man fleeing from building and identified man as defendant, and (5) expert eliminated accident and spontaneous combustion as causes of fire and testified that fire was caused by ignition of flammable liquid; facts established all elements of crime of which defendant was convicted and did not require jury to leap logical gaps to arrive at determination of guilty. People v McCaskill, 144 A.D.2d 496, 533 N.Y.S.2d 1020, 1988 N.Y. App. Div. LEXIS 11814 (N.Y. App. Div. 2d Dep't 1988).

Juvenile was entitled to reversal of determination that he committed act which, if committed by adult, would constitute second degree arson, since fire investigator was improperly permitted to testify that fire was incendiary in origin and that it had

been intentionally set; while it is proper for expert in arson trial to testify that he or she has eliminated all possible natural and accidental causes of fire, it is not proper for expert to testify that fire was incendiary or that it was intentionally set. In re Ralph YY., 192 A.D.2d 762, 596 N.Y.S.2d 202, 1993 N.Y. App. Div. LEXIS 3544 (N.Y. App. Div. 3d Dep't 1993).

In prosecution for second degree arson, court properly denied defendant's mid-trial request for adjournment to secure services of unidentified voice analysis expert witness where value of expert's testimony was speculative at best, and defendant took no steps to pursue that issue until after trial had started, even though he knew more than 5 months before trial that prosecution had tape recording purporting to be of his voice. People v Houghton, 245 A.D.2d 135, 665 N.Y.S.2d 884, 1997 N.Y. App. Div. LEXIS 13004 (N.Y. App. Div. 1st Dep't 1997), app. denied, 91 N.Y.2d 973, 672 N.Y.S.2d 853, 695 N.E.2d 722, 1998 N.Y. LEXIS 1582 (N.Y. 1998).

8. — —Insufficient

Where indictment charged arson in the second degree but facts contained in indictment were sufficient only to sustain charge of arson in third degree and defendant pled guilty to facts amounting to arson in third degree, sentence for arson in the second degree was improper and would be remanded for resentencing for crime of arson in third degree. People v Hutchins, 43 A.D.2d 412, 352 N.Y.S.2d 520, 1974 N.Y. App. Div. LEXIS 5665 (N.Y. App. Div. 3d Dep't 1974).

Evidence did not sustain second degree arson conviction where (1) inference that defendant possessed accelerant was not supported by discovery of accelerant containers at scene after fire, (2) defendant was observed at scene 40 minutes before fire started and "a while" after it started, but not at time fire began, and (3) defendant's false or inaccurate statements to police were not inconsistent with his innocence; evidence of defendant's threats and motive could not substitute for proof that he committed crime. People v Hamilton, 129 A.D.2d 859, 513 N.Y.S.2d 887, 1987 N.Y. App. Div. LEXIS 45551 (N.Y. App. Div. 3d Dep't 1987).

While the evidence was sufficient to establish that defendant was aware of circumstances that would render the presence of another person in the building a reasonable possibility, the evidence was legally insufficient to prove that a resident of one of the apartments was actually present in the building when the fire was set; therefore, defendant was improperly convicted of violating N.Y. Penal Law § 150.15(a). People v Harris, 72 A.D.3d 1110, 900 N.Y.S.2d 137, 2010 N.Y. App. Div. LEXIS 3395 (N.Y. App. Div. 2d Dep't 2010).

9. Lesser included offenses

Court properly refused to charge fourth degree arson as lesser included offense of second degree arson where no reasonable view of evidence could support finding that defendant "recklessly" started fire inasmuch as 2 separate and "uncommunicated" fires were set and defendant pushed 2 burning chairs against front door of house to block occupants from exiting. People v Clinkscales, 134 A.D.2d 889, 522 N.Y.S.2d 390, 1987 N.Y. App. Div. LEXIS 51081 (N.Y. App. Div. 4th Dep't 1987), app. denied, 70 N.Y.2d 1005, 526 N.Y.S.2d 940, 521 N.E.2d 1083, 1988 N.Y. LEXIS 808 (N.Y. 1988).

Criminal mischief in fourth degree is not lesser included offense of second degree arson since it is possible to commit greater offense (e.g., by setting fire to one's own residence) without concomitantly committing lesser offense. In re Christopher E., 171 A.D.2d 976, 567 N.Y.S.2d 918, 1991 N.Y. App. Div. LEXIS 3838 (N.Y. App. Div. 3d Dep't 1991).

Defendant's voluntary act of imbibing alcoholic beverage, knowing that he was prone to criminal acts while drunk and that consumption of even one drink would destroy his ability to resist further drinking, to point of intoxication, constituted recklessness per se; thus, although defendant was not guilty of second degree arson for setting fire to his apartment while intoxicated since he lacked specific intent to damage building, he was guilty of lesser included offense of fourth degree arson, defined as "recklessly damag[ing] building...by intentionally starting fire," and also first degree reckless endangerment. People v Tocco, 138 Misc. 2d 510, 525 N.Y.S.2d 137, 1988 N.Y. Misc. LEXIS 50 (N.Y. Sup. Ct. 1988).

10. Sentencing

In view of seriousness of offense and its hostile nature, it was not abuse of court's discretion to deny youthful offender status and to sentence defendant, convicted upon his plea of guilty to crime of arson in second degree, to indeterminate term of imprisonment not to exceed seven years. People v Wood, 57 A.D.2d 663, 393 N.Y.S.2d 485, 1977 N.Y. App. Div. LEXIS 11689 (N.Y. App. Div. 3d Dep't 1977).

Intermittent sentence imposed upon defendant who was convicted of arson in second degree, a class B felony, was invalid as a matter of law; it could only be imposed upon conviction of class D or E felony, or for offense not felony, provided defendant was not second or persistent felony offender. People v Pazkowski, 57 A.D.2d 846, 394 N.Y.S.2d 37, 1977 N.Y. App. Div. LEXIS 12059 (N.Y. App. Div. 2d Dep't 1977).

There was no abuse of discretion in imposition of maximum sentence for second degree arson where defendant knew apartment house was occupied and he nonetheless deliberately set it on fire. People v Royce, 137 A.D.2d 931, 525 N.Y.S.2d 355, 1988 N.Y. App. Div. LEXIS 1741 (N.Y. App. Div. 3d Dep't), app. denied, 72 N.Y.2d 866, 532 N.Y.S.2d 516, 528 N.E.2d 906, 1988 N.Y. LEXIS 3904 (N.Y. 1988).

Court did not abuse its discretion in directing that sentences for second degree arson and first degree reckless endangerment run consecutively to sentences for first degree manslaughter and first degree burglary where defendant had strangled woman following some drinking and alleged altercation in her apartment, and he then removed some of her personal property and set fire to cover homicide and theft. People v Cody, 207 A.D.2d 962, 617 N.Y.S.2d 77, 1994 N.Y. App. Div. LEXIS 10131 (N.Y. App. Div. 4th Dep't 1994), app. denied, 85 N.Y.2d 860, 624 N.Y.S.2d 379, 648 N.E.2d 799, 1995 N.Y. LEXIS 835 (N.Y. 1995).

It was not excessive to impose prison sentence of 5 to 15 years on defendant's conviction of second degree arson given serious nature of crime and his criminal background. People v Smith, 214 A.D.2d 845, 625 N.Y.S.2d 684, 1995 N.Y. App. Div. LEXIS 4425 (N.Y. App. Div. 3d Dep't), app. denied, 86 N.Y.2d 741, 631 N.Y.S.2d 622, 655 N.E.2d 719, 1995 N.Y. LEXIS 3289 (N.Y. 1995).

Sentence would be modified so that sentence for second degree arson would run concurrently, rather than consecutively, with sentences for second degree murder and first degree kidnapping where those convictions were based on same act. People v Torres, 266 A.D.2d 409, 697 N.Y.S.2d 528, 1999 N.Y. App. Div. LEXIS 11571 (N.Y. App. Div. 2d Dep't 1999), app. denied, 94 N.Y.2d 885, 705 N.Y.S.2d 18, 726 N.E.2d 495, 2000 N.Y. LEXIS 472 (N.Y. 2000).

Defendant's sentence of five years in prison with three years of postrelease supervision was not harsh or excessive for a conviction of attempted arson in the second degree; the permissible range was 3 ½ to 15 years, and given defendant's criminal history and the serious nature of the crime, there was no abuse of discretion nor extraordinary circumstances warranting a reduction of the sentence imposed. Defendant's alcohol abuse did not mitigate in her favor, in light of her squandered opportunities to address her alcohol problem in the past. People v Abare, 86 A.D.3d 803, 927 N.Y.S.2d 233, 2011 N.Y. App. Div. LEXIS 5866 (N.Y. App. Div. 3d Dep't 2011), app. denied, 19 N.Y.3d 861, 947 N.Y.S.2d 410, 970 N.E.2d 433, 2012 N.Y. LEXIS 1571 (N.Y. 2012).

Although the sentence imposed upon defendant was the maximum, the sentence was neither harsh nor excessive because defendant engaged in a deliberate plan to set an interior fire to an apartment building with several occupants, endangering their lives. People v Launder, 132 A.D.3d 1151, 18 N.Y.S.3d 747, 2015 N.Y. App. Div. LEXIS 7929 (N.Y. App. Div. 3d Dep't 2015), app. denied, 27 N.Y.3d 1153, 62 N.E.3d 127, 39 N.Y.S.3d 387, 2016 N.Y. LEXIS 2521 (N.Y. 2016).

11. Verdict

Trial court's acquittal of defendant on greater charges of arson in first, second and third degrees was not inconsistent with his conviction of fourth degree arson, since verdict was logically explained as limited acceptance of intoxication defense to extent of finding that defendant intentionally set fire but recklessly, not intentionally, damaged building. People v Gerasimovic, 124

A.D.2d 593, 507 N.Y.S.2d 873, 1986 N.Y. App. Div. LEXIS 61905 (N.Y. App. Div. 2d Dep't 1986).

II. Under Former Law

12. Under former § 221

Arson may be committed by one in burning his own dwelling house. Shepherd v People, 19 N.Y. 537, 19 N.Y. (N.Y.S.) 537, 1859 N.Y. LEXIS 66 (N.Y. 1859).

A conviction for arson in the first degree was proper where it appeared that defendant, intending to defraud an insurance company, which insured his personal effects in a trunk, set fire to the trunk in his room with the intent of destroying the insured goods but with no intent to destroy the building, since it is not necessary to charge in the indictment or to prove at the trial that the defendant set the fire with the intent to destroy the building. People v Fanshawe, 137 N.Y. 68, 32 N.E. 1102, 137 N.Y. (N.Y.S.) 68, 1893 N.Y. LEXIS 657 (N.Y. 1893).

The provision in the New York City Charter that evidence taken on investigation into fires shall not be used in criminal action, does not apply to admission of a defendant to fire marshal in informal conversation. People v Ales, 247 N.Y. 351, 160 N.E. 395, 247 N.Y. (N.Y.S.) 351, 1928 N.Y. LEXIS 1078 (N.Y. 1928).

Evidence that the defendant owed $3980 was insufficient to show a motive for burning a restaurant, allegedly to get back investment of $7000, where he had $1000 in the bank and the restaurant was a profitable and growing business. People v Ice, 265 A.D. 46, 38 N.Y.S.2d 32, 1942 N.Y. App. Div. LEXIS 5675 (N.Y. App. Div. 1942).

For a conviction of arson in the first degree, a willful criminal intention to set fire to a dwelling house in which there is a human being, in the night time, must be shown. Evidence that the defendant three years before the fire had made threats to kill his wife, who was in the burned building, were admissible to show motive. People v Bates, 271 A.D. 550, 67 N.Y.S.2d 1, 1947 N.Y. App. Div. LEXIS 5105 (N.Y. App. Div.), app. denied, 332 U.S. 789, 68 S. Ct. 94, 92 L. Ed. 371, 1947 U.S. LEXIS 1738 (U.S. 1947).

An indictment for arson is good which charges in one count that the building is the property of one person and in a second count that it is the property of another, but both counts allege it is in the same city and occupied by the same five persons. People v Lafunay, 217 N.Y.S. 696, 127 Misc. 862, 1926 N.Y. Misc. LEXIS 713 (N.Y. County Ct. 1926).

Where a defendant makes false and fraudulent claims to a fire insurance company as to the origin of a fire, and he is later acquitted of an arson charge, a subsequent trial for false swearing is not barred by the former trial. People v Berger, 106 N.Y.S.2d 761, 199 Misc. 543, 1950 N.Y. Misc. LEXIS 2558 (N.Y. County Ct. 1950).

Responsibility for the crime of arson, in its several degrees, is limited to one who willfully burns or sets on fire any of the structures and chattels specified in §§ 221–223 of the Penal Law, the common-law definition of the crime thus being redefined by the Legislature. People v Roderman, 34 Misc. 2d 497, 229 N.Y.S.2d 209, 1962 N.Y. Misc. LEXIS 3229 (N.Y. County Ct. 1962).

Setting fire to a building usually occupied by persons lodging therein is arson in the first degree, though not a dwelling house in the ordinary acceptation of the term. People v Orcutt (1851) 1 Park Crim 252.

13. Under former § 224

Court denied certificate of reasonable doubt on the ground that sentence of one year for attempted arson was excessive where such sentence represented a carefully considered exercise of discretion. People v Dashnaw, 4 Misc. 2d 60, 157 N.Y.S.2d 729, 1956 N.Y. Misc. LEXIS 1298 (N.Y. Sup. Ct. 1956).

14. Under former § 225

This section limits and qualifies the provisions of § 223, defining arson in the third degree, that does not limit or qualify the definition or arson in the first or second degree as given in §§ 221 and 222. People v Fanshawe, 137 N.Y. 68, 32 N.E. 1102, 137 N.Y. (N.Y.S.) 68, 1893 N.Y. LEXIS 657 (N.Y. 1893).

15. Under former § 226

Where a prisoner set fire to a house, and thirty-five were burned, he was properly indicted for firing all. Woodford v People, 3 Hun 310 (N.Y.), aff'd, 62 N.Y. 117, 62 N.Y. (N.Y.S.) 117, 1875 N.Y. LEXIS 483 (N.Y. 1875).

If a person sets fire to a building which communicates to an adjoining one, he may be convicted of firing the latter. Hennessey v People, 21 How. Pr. 239, 1861 N.Y. Misc. LEXIS 153 (N.Y. Sup. Ct. June 1, 1861).

16. Under former § 1895

Words "although no damage is done," as used in this section do not exclude cases where actual damage is sustained, or limit application of this section to those cases where, for any reason, no damage followed placing of explosive. People v Graffeo, 172 A.D. 694, 158 N.Y.S. 1038, 1916 N.Y. App. Div. LEXIS 6051 (N.Y. App. Div. 1916), aff'd, 220 N.Y. 722, 116 N.E. 1064, 220 N.Y. (N.Y.S.) 722, 1917 N.Y. LEXIS 1190 (N.Y. 1917).

Agency Opinions

Analysis

I. Generally

1. In general

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1. In general

Person convicted of arson in any degree is, by statute, ineligible to become member of volunteer fire company, but issuance to that person of unrestricted certificate of relief from disabilities prevents automatic statutory disqualification; however, certificate does not prevent fire company or fire district commissioners from exercising discretion to deny membership based on facts and circumstances surrounding arson conviction. Person convicted of arson in any degree is, by statute, ineligible to hold office of fire district commissioner; certificate of relief from disabilities does not apply to public office such as fire district commissioner. 1998 NY Ops Atty Gen I 98-50.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 10.00, 30.00, 70.02; CLS CPL §§ 1.20, 190.71, 700.05; CLS Family Ct Act §§ 117, 301.2.

Intentionally, definition of, § 15.05(1).

Eavesdropping warrants in first degree arson cases, CLS CPL §§ 700.05(8), 700.10–700.70.

Federal Aspects:

Arson, 18 USCS § 81.

Jurisprudences:

35 NY Jur 2d Criminal Law Substantive Principles and Offenses § 73.

35A NY Jur 2d Criminal Law Substantive Principles and Offenses §§ 877, 881, 885.

5 Am Jur 2d, Arson and Related Offenses § 5.

Criminal Jury Instructions: Arson, second degree (intentionally damaging a building by fire when another person is present). CJI2d [NY] Penal Law § 150.15.

Texts: New York Criminal Practice Ch. 63.

§ 150.20. Arson in the first degree

1. A person is guilty of arson in the first degree when he intentionally damages a building or motor vehicle by causing an explosion or a fire and when (a) such explosion or fire is caused by an incendiary device propelled, thrown or placed inside or near such building or motor vehicle; or when such explosion or fire is caused by an explosive; or when such explosion or fire either (i) causes serious physical injury to another person other than a participant, or (ii) the explosion or fire was caused with the expectation or receipt of financial advantage or pecuniary profit by the actor; and when (b) another person who is not a participant in the crime is present in such building or motor vehicle at the time; and (c) the

defendant knows that fact or the circumstances are such as to render the presence of such person therein a reasonable possibility.

2. As used in this section, "incendiary device" means a breakable container designed to explode or produce uncontained combustion upon impact, containing flammable liquid and having a wick or a similar device capable of being ignited.

Arson in the first degree is a class A-I felony.

HISTORY:

Add, L 1980, ch 152, § 1; amd, L 1981, ch 71, § 1, eff Sept 1, 1981; L 1984, ch 950, § 1, eff Nov 1, 1984.

Prior Law: Former § 150.20, add, L 1971, ch 961, § 8; amd, L 1973, ch 276, § 15, L 1979, ch 225, § 19; repealed, L 1980, ch 152, § 1, eff Sept 1, 1980.

Notes to Decisions

In a prosecution for first-degree arson, any error in admitting expert testimony about the causes of the fires was harmless, because the evidence of defendant's guilt was overwhelming and there was no significant probability that the jury would have acquitted defendant without the expert testimony. People v. Grutz, 212 N.Y. 72 (1914), to the extent it held that expert testimony as to whether a fire was intentionally set was inadmissible in an arson case, was overruled. People v Rivers, 18 N.Y.3d 222, 936 N.Y.S.2d 650, 960 N.E.2d 419, 2011 N.Y. LEXIS 3321 (N.Y. 2011).

Determination whether a Molotov cocktail is an "explosive substance" within purview of penal law provision for possession of weapon, dangerous instrument and appliance as a felony, or can cause an "explosion" within purview of penal law provision for arson in the first degree, must take into account any previous interpretation and application and intent of legislature including prior determination that bottle filled with kerosene, under provisions of labor law, general business law, and vehicle and traffic law, was inflammable but not explosive substance. Statute providing that person is guilty of arson in second degree when he attempts to damage building by starting fire, rather than statute providing that person is guilty of arson in first degree for intentionally damaging building by causing explosion, applied to conduct of defendant, who threw Molotov cocktail through window of ground floor apartment where alleged assailment of defendant lived. Defendant, who was improperly convicted of arson in first degree, and acquitted of arson in second degree, which was applicable offense, could not have conviction for arson in first degree reduced to lesser offense of arson in third degree in view of, inter alia, such improper conviction and acquittal. People v McCrawford, 47 A.D.2d 318, 366 N.Y.S.2d 424, 1975 N.Y. App. Div. LEXIS 9235 (N.Y. App. Div. 1st Dep't 1975).

Upon a new trial for the crime of arson and attempted grand larceny, a witness qualified as an expert in determining the causes of fire and explosions should not be permitted again to testify that the fire was set intentionally where the physical facts concerning the origin of the fire can be readily understood when properly described; it will be for the jury to draw the appropriate conclusion. Upon a prosecution for arson and attempted grand larceny arising from the burning of defendant's insured residence, it is reversible error for the People to offer proof of a prior fire in defendant's residence and many of its attendant circumstances, without directly connecting defendant with that fire and failing to prove its incendiary nature, inasmuch as the evidence is of no probative force and its receipt is fraught with undue prejudice; nor is evidence of the prior fire admissible as bearing upon defendant's motive, intent or mental state concerning the attempted grand larceny count since defendant's guilt of the attempt to steal is wholly dependent upon his culpability in the burning of the building, and his intention to defraud the insurance carrier is easily to be inferred from proof of the act of arson itself and, as such, the exclusion of the disputed evidence on the arson count applies with equal force to its introduction on the attempted grand larceny count. People v Vincek, 75 A.D.2d 412, 429 N.Y.S.2d 928, 1980 N.Y. App. Div. LEXIS 11715 (N.Y. App. Div. 4th Dep't), app. denied, 51 N.Y.2d 776, 1980 N.Y. LEXIS 4299 (N.Y. 1980).

Trial court's acquittal of defendant on greater charges of arson in first, second and third degrees was not inconsistent with his conviction of fourth degree arson, since verdict was logically explained as limited acceptance of intoxication defense to extent of finding that defendant intentionally set fire but recklessly, not intentionally, damaged building. People v Gerasimovic, 124 A.D.2d 593, 507 N.Y.S.2d 873, 1986 N.Y. App. Div. LEXIS 61905 (N.Y. App. Div. 2d Dep't 1986).

Defendant was properly granted trial order of dismissal as to count of first degree arson and 2 counts of first degree reckless endangerment where People never directly connected him with fire or with means to start it, and were unable to establish cause of fire. People v Rohany, 134 A.D.2d 626, 521 N.Y.S.2d 521, 1987 N.Y. App. Div. LEXIS 50838 (N.Y. App. Div. 2d Dep't 1987), app. denied, 70 N.Y.2d 1010, 526 N.Y.S.2d 945, 521 N.E.2d 1088, 1988 N.Y. LEXIS 952 (N.Y. 1988).

It was not improper to accept defendant's guilty plea to first degree attempted arson on ground that defendant's statements at time of plea made clear that he only intended to "annoy" police officer when he threw explosive device at officer's home and did not intend to cause damage, since requisite intent for defendant's plea could be inferred from acts which he admitted, and his self-serving explanation of his motive was not at odds with intent required for first degree attempted arson, inasmuch as damaging person's house would be effective method of annoying that person. It was neither harsh nor excessive to sentence defendant to 5 to 15 years' imprisonment, considering that he had prior criminal record and was allowed to plead to first degree attempted arson in satisfaction of indictment charging arson, criminal mischief and reckless endangerment, all in first degree, for throwing explosive device at police officer's home. People v Bankowski, 134 A.D.2d 768, 521 N.Y.S.2d 809, 1987 N.Y. App. Div. LEXIS 50943 (N.Y. App. Div. 3d Dep't 1987).

Convictions of first degree arson and attempted second degree murder based on accessorial conduct would be reversed, even though defendant had helped codefendant transport gasoline and tow chain to location of codefendant's disabled vehicle near convenience store immediately prior to codefendant's hurling of Molotov cocktail through store window in retaliation for racial slur which store clerk had earlier uttered against codefendant, where People failed to show that defendant had any motive to be angry at clerk, that codefendant had told him of his criminal design, that defendant had known that gasoline would be used for making bomb rather than for innocent purpose of starting codefendant's vehicle, or that defendant knew tow chain would be used for moving vehicle away from store to facilitate codefendant's getaway rather than for simply towing vehicle from area. People v Chapman, 137 A.D.2d 884, 524 N.Y.S.2d 863, 1988 N.Y. App. Div. LEXIS 1654 (N.Y. App. Div. 3d Dep't 1988).

First degree arson and second degree murder convictions were sustained by proof that fire was deliberately set with petroleum accelerant, that defendant purchased gasoline in metal can shortly before fire, that he smelled of smoke and had burned hair shortly after fire, that he knew victims and was familiar with premises, and that he subsequently admitted to fellow tavern patron that he "got even" when he "torched the place." People v Pierce, 150 A.D.2d 948, 541 N.Y.S.2d 866, 1989 N.Y. App. Div. LEXIS 7096 (N.Y. App. Div. 3d Dep't), app. denied, 74 N.Y.2d 817, 546 N.Y.S.2d 575, 545 N.E.2d 889, 1989 N.Y. LEXIS 3669 (N.Y. 1989).

Conviction of, inter alia, first degree arson was supported by 2 detailed statements—one written and one videotaped—in which defendant admitted setting fire because he was angry with his wife. People v Maldonado, 157 A.D.2d 674, 549 N.Y.S.2d 775, 1990 N.Y. App. Div. LEXIS 268 (N.Y. App. Div. 2d Dep't), app. denied, 75 N.Y.2d 921, 555 N.Y.S.2d 40, 554 N.E.2d 77, 1990 N.Y. LEXIS 1606 (N.Y. 1990).

In first degree arson trial, circumstantial evidence established that defendant set fire which resulted in deaths of 2 persons and serious injury to third person where (1) defendant had frequented apartment on numerous occasions to smoke cocaine, (2) she had threatened to set apartment on fire just hours before fire broke

out, (3) she was seen entering building with plastic jug and exiting 5 or 10 minutes later without it, and (4) fire marshals testified that, in their opinion, fire was deliberately set by ignition of highly flammable liquid poured onto floor near entrance to apartment. Defendant was properly convicted of 3 counts of first degree arson, although she set only one fire, since her conduct resulted in serious injuries to 3 separate persons; each injury constituted element of separate crime of first degree arson. People v Perez, 173 A.D.2d 162, 569 N.Y.S.2d 72, 1991 N.Y. App. Div. LEXIS 5296 (N.Y. App. Div. 1st Dep't), app. denied, 78 N.Y.2d 925, 573 N.Y.S.2d 478, 577 N.E.2d 1070, 1991 N.Y. LEXIS 2403 (N.Y. 1991).

In prosecution for second degree murder and first degree arson, defendant was not entitled to jury charge on issue of whether principal prosecution witness was accomplice under CLS CPL § 60.22(2)(a), notwithstanding that witness admitted to initially lying to investigators of arson after defendant fled scene, where (1) there was no proof to controvert witness' statement that he was unwilling bystander, and (2) witness was also victim of crimes given that his residence and all of his possessions were destroyed by fire that was set in his apartment. People v Montgomery, 178 A.D.2d 663, 578 N.Y.S.2d 224, 1991 N.Y. App. Div. LEXIS 16899 (N.Y. App. Div. 2d Dep't 1991), app. denied, 79 N.Y.2d 1005, 584 N.Y.S.2d 459, 594 N.E.2d 953, 1992 N.Y. LEXIS 2884 (N.Y. 1992).

In trial for, inter alia, first degree arson, expert testimony of fire marshal as to cause of fire usurped jury's function where fire marshal testified that his findings were consistent with bottle of flammable liquid being thrown through window of building which burned down, since testimony was not factual observation of conditions but instead confirmed prosecutor's theory that fire was deliberately set. People v Johnson, 186 A.D.2d 584, 588 N.Y.S.2d 381, 1992 N.Y. App. Div. LEXIS 11103 (N.Y. App. Div. 2d Dep't), app. denied, 81 N.Y.2d 763, 594 N.Y.S.2d 725, 610 N.E.2d 398, 1992 N.Y. LEXIS 4865 (N.Y. 1992).

Evidence supported conviction for first degree arson and second degree murder where (1) minutes before fire started, 2 witnesses saw defendant carrying soda bottle filled with "brownish liquid," (2) one witness saw defendant standing outside house that burned down holding bottle with rag in it, threatening to burn victim if she did not let defendant inside, (3) after neighbor heard window break and explosion, he saw that defendant no longer held bottle and that second floor window was broken, (4) defendant later told neighbor that she threw bottle because victim would not let her get her shoes, and (5) witness heard defendant muttering that she would fix everybody in house that burned. People v Johnson, 186 A.D.2d 584, 588 N.Y.S.2d 381, 1992 N.Y. App. Div. LEXIS 11103 (N.Y. App. Div. 2d Dep't), app. denied, 81 N.Y.2d 763, 594 N.Y.S.2d 725, 610 N.E.2d 398, 1992 N.Y. LEXIS 4865 (N.Y. 1992).

In first degree arson trial, defendant was entitled to redaction of statement he made to police, since admission of that part of statement regarding previous fires at houses owned by defendant was highly prejudicial and irrelevant, as there was no proof that any of previous fires were result of arson or that defendant had been charged with insurance fraud as consequence of those fires. People v Mitchell, 203 A.D.2d 948, 611 N.Y.S.2d 400, 1994 N.Y. App. Div. LEXIS 4961 (N.Y. App. Div. 4th Dep't), app. denied, 83 N.Y.2d 969, 616 N.Y.S.2d 22, 639 N.E.2d 762, 1994 N.Y. LEXIS 2491 (N.Y. 1994).

Defendant's awareness that his wife and son were present in house at time he set fire was shown by facts that he made his escape by jumping from window located on second floor, which contained 3 bedrooms, and defendant admitted to psychiatrist that he ran through all floors of house after he set fire. People v Harvey, 224 A.D.2d 713, 638 N.Y.S.2d 963, 1996 N.Y. App. Div. LEXIS 1974 (N.Y. App. Div. 2d Dep't), app. denied, 88 N.Y.2d 879, 645 N.Y.S.2d 454, 668 N.E.2d 425, 1996 N.Y. LEXIS 2174 (N.Y. 1996), cert. denied, 520 U.S. 1121, 117 S. Ct. 1257, 137 L. Ed. 2d 337, 1997 U.S. LEXIS 1730 (U.S. 1997).

Court in nonjury trial properly rejected insanity defense to first degree arson where, inter alia, People's psychiatrist testified, based on 2 interviews with defendant as well as examination of his file, that defendant did not lack substantial capacity to know that he was starting fire, that such fire could burn down building and injure occupants therein, and that such conduct was wrong, and defendant's repeated assertions of severe depressions, suicidal intentions, or psychiatric history prior to fire could not be independently documented or confirmed. People v Harvey, 224 A.D.2d 713, 638 N.Y.S.2d 963, 1996 N.Y. App. Div. LEXIS 1974 (N.Y. App. Div. 2d Dep't), app. denied, 88 N.Y.2d 879, 645 N.Y.S.2d 454, 668 N.E.2d 425, 1996 N.Y. LEXIS 2174 (N.Y. 1996), cert. denied, 520 U.S. 1121, 117 S. Ct. 1257, 137 L. Ed. 2d 337, 1997 U.S. LEXIS 1730 (U.S. 1997).

Expert testimony regarding personality profile of arsonist was improperly admitted where prosecution failed to prove that profile was generally accepted by scientific community or that subject was beyond ordinary ken of jury. Expert opinion testimony that fire was set by an individual was improperly admitted in arson trial because it invaded province of jury to decide whether fire was intentionally set. People v Avellanet, 242 A.D.2d 865, 662 N.Y.S.2d 345, 1997 N.Y. App. Div. LEXIS 10399 (N.Y. App. Div. 4th Dep't), app. denied, 91 N.Y.2d 868, 668 N.Y.S.2d 566, 691 N.E.2d 638, 1997 N.Y. LEXIS 4434 (N.Y. 1997).

Evidence was sufficient to support conviction of attempted first degree arson and first degree reckless endangerment where accomplice testified, with sufficient corroboration, that (1) 2 days after he sustained serious injuries in altercation at particular apartment, defendant asked him to point out that apartment, which he did, (2) defendant then parked his car some distance away, got out, carried bottle with rag wrapped around it in direction of apartment, returned, and told accomplice "that's the way we do it in Massachusetts," and (3) accomplice then saw flames emanating from apartment. People v Harrison, 251 A.D.2d 893, 677 N.Y.S.2d 637, 1998 N.Y. App. Div. LEXIS 7764 (N.Y. App. Div. 3d Dep't), app. denied, 92 N.Y.2d 949, 681 N.Y.S.2d 480, 704 N.E.2d 233, 1998 N.Y. LEXIS 4188 (N.Y. 1998).

Cash recovered from defendant's premises and biological evidence from victim's vaginal swabs were admissible in prosecution for second degree murder, first degree arson, rape, and robbery where prosecution provided reasonable assurances that evidence submitted at trial was identical to that involved in crimes, that evidence was in unchanged condition, and that no tampering had occurred. People v Pettigrew, 255 A.D.2d 969, 681 N.Y.S.2d 712, 1998 N.Y. App. Div. LEXIS 12236 (N.Y. App. Div. 4th Dep't), app. denied, 92 N.Y.2d 1037, 684 N.Y.S.2d 502, 707 N.E.2d 457, 1998 N.Y. LEXIS 4743 (N.Y. 1998).

Evidence supported conviction of first degree arson where fire, which was neither accidental nor result of natural causes, originated in corner of dining room, victim was discovered in adjoining bedroom, victim was rendered unconscious by strangulation and later died of strangulation and smoke inhalation, defendant raped and murdered victim and stole property from her apartment, and defendant had motive—to hide his other criminal acts. People v Pettigrew, 255 A.D.2d 969, 681 N.Y.S.2d 712, 1998 N.Y. App. Div. LEXIS 12236 (N.Y. App. Div. 4th Dep't), app. denied, 92 N.Y.2d 1037, 684 N.Y.S.2d 502, 707 N.E.2d 457, 1998 N.Y. LEXIS 4743 (N.Y. 1998).

In prosecution for first degree arson and second degree murder for defendant's setting fire in which her 2 small children were killed, court properly admitted evidence in form of full-sized replica of children's bedroom. People v Kanner, 272 A.D.2d 866, 708 N.Y.S.2d 659, 2000 N.Y. App. Div. LEXIS 5232 (N.Y. App. Div. 4th Dep't), app. denied, 95 N.Y.2d 867, 715 N.Y.S.2d 222, 738 N.E.2d 370, 2000 N.Y. LEXIS 3065 (N.Y. 2000).

Court properly admitted in evidence threats by defendant to burn down her house and kill her children to show defendant's intent to commit arson (CLS Penal § 150.20(1)) and creation of grave risk of death to her children (CLS Penal § 125.25(4)). People v Kanner, 272 A.D.2d 866, 708 N.Y.S.2d 659, 2000 N.Y. App. Div. LEXIS 5232 (N.Y. App. Div. 4th Dep't), app. denied, 95 N.Y.2d 867, 715 N.Y.S.2d 222, 738 N.E.2d 370, 2000 N.Y. LEXIS 3065 (N.Y. 2000).

In a prosecution for first-degree arson in violation of N.Y. Penal Law § 150.20, evidence that an apartment fire in which defendant's child was killed had multiple points of origin and was set by an ignitable liquid; that defendant was the only adult present; that she claimed to have rescued her older children from the fire, but neither she nor they smelled of smoke or had symptoms

consistent with being in a burning building, was sufficient to support the conviction. People v Casey, 37 A.D.3d 1113, 829 N.Y.S.2d 309, 2007 N.Y. App. Div. LEXIS 1219 (N.Y. App. Div. 4th Dep't), app. denied, 8 N.Y.3d 983, 838 N.Y.S.2d 486, 869 N.E.2d 662, 2007 N.Y. LEXIS 1776 (N.Y. 2007).

Conviction of defendant for arson in the first degree was not against manifest weight of the evidence because the proof adduced at trial established that the fire was not natural or accidental in origin and caused damage to the building, as well as that she knew or could reasonably suspect that the tenant was present. People v Permaul, 174 A.D.3d 1127, 105 N.Y.S.3d 214, 2019 N.Y. App. Div. LEXIS 5720 (N.Y. App. Div. 3d Dep't), app. denied, 34 N.Y.3d 983, 137 N.E.3d 40, 113 N.Y.S.3d 670, 2019 N.Y. LEXIS 3322 (N.Y. 2019).

Based on information that one accomplice planned to purchase cocaine from another, along with evidence that the conspiracy had been ongoing, officers had probable cause to believe that defendant committed a conspiracy offense, but the People did not prove that officers had reasonable suspicion that defendant was concealing drug evidence at the time of the strip search; as there was a reasonable possibility that the admission of the cocaine and testimony regarding the search contributed to his convictions, they were reversed. People v Turner, 178 A.D.3d 70, 111 N.Y.S.3d 718, 2019 N.Y. App. Div. LEXIS 7512 (N.Y. App. Div. 3d Dep't 2019).

Agency Opinions

Person convicted of arson in any degree is, by statute, ineligible to become member of volunteer fire company, but issuance to that person of unrestricted certificate of relief from disabilities prevents automatic statutory disqualification; however, certificate does not prevent fire company or fire district commissioners from exercising discretion to deny membership based on facts and circumstances surrounding arson conviction. Person convicted of arson in any degree is also, by statute, ineligible to hold office of fire district commissioner; certificate of relief from disabilities does not apply to public office such as fire district commissioner. 1998 NY Ops Atty Gen I 98-50.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 10.00, 30.00, 70.02, CLS CPL §§ 1.20, 190.71, 700.05; CLS Family Ct Act §§ 117, 301.2.

Intentionally, definition of, § 15.05(1).

Federal Aspects:

Arson, 18 USCS § 81.

Jurisprudences:

35 NY Jur 2d Criminal Law Substantive Principles and Offenses § 73.

35A NY Jur 2d Criminal Law Substantive Principles and Offenses §§ 881, 882, 885.

35A NY Jur 2d Criminal Law Substantive Principles and Offenses § 877.

5 Am Jur 2d, Arson and Related Offenses § 5.

Matthew Bender's New York Civil Practice:

4 Carrieri, Lansner, New York Civil Practice: Family Court Proceedings § 61.10.

Criminal Jury Instructions: Arson, first degree (intentionally damaging a building by incendiary device when another person is present). CJI2d [NY] Penal Law § 150.20.

Arson, first degree (intentionally damaging a building by explosive when another person is present). CJI2d [NY] Penal Law § 150.20.

Arson, first degree (intentionally damaging a building and causing serious physical injury to another person). CJI2d [NY] Penal Law § 150.20.

Arson, first degree (intentionally damages a building for financial gain). CJI2d [NY] Penal Law § 150.20.

Texts: New York Criminal Practice Ch. 63.

TITLE K Offenses Involving Fraud

Article 190. Other Frauds

Section
190.25. Criminal impersonation in the second degree

HISTORY:

Add, L 1965, ch 1030, § 1, eff Sept 1, 1967.

ARTICLE 190

OTHER FRAUDS

HISTORY:

Add, L 1965, ch 1030, § 1, eff Sept 1, 1967.

§ 190.25. Criminal impersonation in the second degree

A person is guilty of criminal impersonation in the second degree when he:

1. Impersonates another and does an act in such assumed character with intent to obtain a benefit or to injure or defraud another; or

2. Pretends to be a representative of some person or organization and does an act in such pretended capacity with intent to obtain a benefit or to injure or defraud another; or

3. (a) Pretends to be a public servant, or wears or displays without authority any uniform, badge, insignia or facsimile thereof by which such public servant is lawfully distinguished, or falsely expresses by his words or actions that he is a public servant or is acting with approval or authority of a public agency or department; and (b) so acts with intent to induce another to submit to such pretended official authority, to solicit funds or to otherwise cause another to act in reliance upon that pretense.

4. Impersonates another by communication by internet website or electronic means with intent to obtain a benefit or injure or defraud another, or by such communication pretends to be a public servant in order to induce another to submit to such authority or act in reliance on such pretense.

Criminal impersonation in the second degree is a class A misdemeanor.

HISTORY:

Add, L 1965, ch 1030, § 1, eff Sept 1, 1967, with substance derived from §§ 854, 928, 930, 931, 936–b, 942, 1278, 1846; amd, L 1980, ch 27, § 1, eff Sept 1, 1980; L 2008, ch 304, § 1, eff Nov 1, 2008.

Commission Staff Notes: This section, which is a substantial restatement of former law, is designed to replace a variety of former Penal Law provisions which prohibited the impersonation of public officers (former §§ 854, 931, 936-b, 1846) and private persons (former §§ 928, 930, 942, 1278).

Notes to Decisions

Analysis

I. Generally

1. In general
2. Sufficiency of evidence

II. Under Former Law

2. Under former § 928
3. Under former § 930
4. Under former § 931
5. Under former § 1846

I. Generally

1. In general

Charge that defendant impersonated FBI agent for entire 5 years that he knew complainant was not unreasonably broad

time period, and did not require dismissal of indictment, since criminal impersonation can constitute continuing offense, in that one can impersonate another with intent to defraud with single act or series of acts constituting pattern of behavior. People v Sanchez, 84 N.Y.2d 440, 618 N.Y.S.2d 887, 643 N.E.2d 509, 1994 N.Y. LEXIS 3389 (N.Y. 1994).

Defendant's act of producing driver's license and registration in name other than his real name, after being stopped by policeman who suspected that he was driving while under influence of alcohol, did not constitute crime of criminal impersonation where record indicated that legitimate license had been issued by Department of Motor Vehicles for person named on defendant's license, where People failed to prove that name on license was anything but name used by defendant to secure license, and where defendant was even indicted in name shown on license. People v Powell, 59 A.D.2d 950, 399 N.Y.S.2d 477, 1977 N.Y. App. Div. LEXIS 14203 (N.Y. App. Div. 2d Dep't 1977).

Evidence was not legally sufficient to support conviction for second degree criminal impersonation where People did not establish at trial that defendant assumed identity of real person. In trial for second degree criminal impersonation, court improperly instructed jury that defendant could be found guilty on finding that he pretended to be person with "a certain status, with a certain occupation or of a certain official character"; court should have instructed jury to determine whether "defendant impersonated another person, to wit (name of person impersonated)." People v Sadiq, 236 A.D.2d 638, 654 N.Y.S.2d 35, 1997 N.Y. App. Div. LEXIS 1580 (N.Y. App. Div. 2d Dep't), app. denied sub. nom., People v Sikandar, 89 N.Y.2d 1100, 660 N.Y.S.2d 394, 682 N.E.2d 995, 1997 N.Y. LEXIS 2136 (N.Y. 1997).

Defendant's conviction of first degree impersonation would be reduced to second degree where there was no longer predicate felony because defendant's conviction of third degree weapon possession had been reversed. People v Archer, 238 A.D.2d 183, 656 N.Y.S.2d 237, 1997 N.Y. App. Div. LEXIS 3717 (N.Y. App. Div. 1st Dep't 1997).

In prosecution for third degree sodomy, Pennsylvania statute was not sufficiently analogous to CLS Penal § 170.10 to render Pennsylvania conviction predicate felony under CLS Penal § 70.06 where (1) § 170.10 penalizes false making, completion, or alteration of written instrument "with intent to defraud, deceive or injure another," (2) Pennsylvania statute allows conviction even where there is simply "knowledge [on the part of the defendant] that he is facilitating a fraud or injury to be perpetrated by anyone," which cannot be equated with intent that other person succeed, and thus is more akin to misdemeanor of fourth degree facilitation under CLS Penal § 115.00, and (3) Pennsylvania statute further proscribes unauthorized use of "any writing [which includes a credit card] so that it purports to be the act of another," which is analogous to misdemeanor of second degree impersonation under CLS Penal § 190.25. People v Rota, 245 A.D.2d 133, 665 N.Y.S.2d 661, 1997 N.Y. App. Div. LEXIS 12998 (N.Y. Sup. Ct. 1997).

In trial for second degree criminal impersonation and related offenses claiming that defendant sold house barge belonging to complainant without authorization, defendant was deprived of his constitutional right to confront witnesses and present his agency defense when court refused to allow him to cross-examine complainant concerning his need to acquire money while distancing himself from sale of his house barge to avoid charges of defrauding his creditors. People v Panetta, 250 A.D.2d 710, 673 N.Y.S.2d 434, 1998 N.Y. App. Div. LEXIS 5493 (N.Y. App. Div. 2d Dep't), app. denied, 92 N.Y.2d 903, 680 N.Y.S.2d 67, 702 N.E.2d 852, 1998 N.Y. LEXIS 3522 (N.Y. 1998).

Defendant's guilt of second degree criminal impersonation was supported by evidence that he gained entry to victim's home by posing as utility company repairman. People v Mitchell, 254 A.D.2d 830, 679 N.Y.S.2d 761, 1998 N.Y. App. Div. LEXIS 10572 (N.Y. App. Div. 4th Dep't), app. denied, 92 N.Y.2d 984, 683 N.Y.S.2d 765, 706 N.E.2d 753, 1998 N.Y. LEXIS 4455 (N.Y. 1998).

In prosecution for second degree assault and second degree impersonation, evidence that defendant threatened to kill police officer involved in his arrest was admissible, despite lack of CLS CPL § 710.30 notice to defendant of that evidence, where defendant moved for suppression of that evidence, thus excusing notice requirement. People v Laws, 286 A.D.2d 991, 730 N.Y.S.2d 911, 2001 N.Y. App. Div. LEXIS 9010 (N.Y. App. Div. 4th Dep't 2001), app. denied, 97 N.Y.2d 706, 739 N.Y.S.2d 107, 765 N.E.2d 310, 2002 N.Y. LEXIS 355 (N.Y. 2002).

Evidence was legally sufficient to establish defendant's guilt of criminal impersonation in the second degree under circumstances in which, in a written statement to police, defendant admitted pretending to be the victim when calling the police in an effort to close a criminal mischief case against her, as well as leaving her home phone number for the police to ostensibly contact the victim; the detective testified that he twice called the number that defendant left with the police and talked to a woman who identified herself as the victim, and during the second call, the victim was actually present at the police station, so the person the detective spoke to could not possibly have been the victim, and the victim stated that she had not previously spoken to the detective by phone. People v Hooks, 71 A.D.3d 1184, 896 N.Y.S.2d 501, 2010 N.Y. App. Div. LEXIS 1678 (N.Y. App. Div. 3d Dep't 2010).

There was no probable cause for defendant's arrest for criminal impersonation, N.Y. Penal Law § 190.25(1), during a traffic stop; while defendant had another person's driver's license in his possession, he did not offer it as his own and he did not impersonate anyone. The police never even asked defendant to produce a driver's license. People v Omowale, 83 A.D.3d 614, 923 N.Y.S.2d 442, 2011 N.Y. App. Div. LEXIS 3265 (N.Y. App. Div. 1st Dep't), app. dismissed, in part, aff'd, 18 N.Y.3d 825, 938 N.Y.S.2d 831, 962 N.E.2d 252, 2011 N.Y. LEXIS 3591 (N.Y. 2011).

People's alternative argument that there was probable cause to arrest defendant for attempted criminal impersonation, N.Y. Penal Law § 190.25(1), during a traffic stop was not persuasive; while defendant had another person's driver's license in his possession, he did not offer it as his own and he did not impersonate anyone. Defendant's mere act of holding the driver's license in apparent preparation for a criminal impersonation does not constitute a punishable attempt. People v Omowale, 83 A.D.3d 614, 923 N.Y.S.2d 442, 2011 N.Y. App. Div. LEXIS 3265 (N.Y. App. Div. 1st Dep't), app. dismissed, in part, aff'd, 18 N.Y.3d 825, 938 N.Y.S.2d 831, 962 N.E.2d 252, 2011 N.Y. LEXIS 3591 (N.Y. 2011).

Off-duty auxiliary policeman could not be convicted of criminal impersonation under Penal Law § 190.25, subd 3 where, encouraged by his neighbors, he entered the police room of a housing project and, identifying himself as a policeman, asked a real police officer what was transpiring therein. People v Jackson, 72 Misc. 2d 297, 339 N.Y.S.2d 429, 1972 N.Y. Misc. LEXIS 1256 (N.Y. City Crim. Ct. 1972).

Defendant's failure to properly identify himself to a police officer was not an offense proscribed by an existing statute and was thus not "an independently unlawful act" on which a finding of guilty of obstructing governmental administration (Penal Law § 195.05) could be based, where defendant's conduct did not amount to criminal impersonation (Penal Law § 190.25) or the making of an apparently sworn false statement (Penal Law § 210.35). People v Gaissert, 75 Misc. 2d 478, 348 N.Y.S.2d 82, 1973 N.Y. Misc. LEXIS 1598 (N.Y. County Ct. 1973).

Defendant was guilty of criminal impersonation where he sought to impersonate transit authority conductor and displayed conductor's badge in effort to prevent police officer from arresting him for possession of a weapon. Fact that arrest of defendant for possession of dangerous weapon was invalid did not taint subsequent arrest of defendant for criminal impersonation where such impersonation was attempted to avoid original arrest. People v Diamond, 77 Misc. 2d 412, 353 N.Y.S.2d 688, 1974 N.Y. Misc. LEXIS 1152 (N.Y. City Crim. Ct. 1974).

In absence of presentence report, trial court did not have discretion to sentence defendant convicted of criminal imperson-

ation, a Class A misdemeanor, to more than 90 days' imprisonment. Imposition of nine months' sentence was excessive upon conviction of criminal impersonation, a Class A misdemeanor, based on charges stemming from defendant's signing name other than her own to supermarket cash register receipt in amount of $35, when she had only $26, and failure to return with balance as she promised. People v Bentley, 78 Misc. 2d 578, 359 N.Y.S.2d 391, 1974 N.Y. Misc. LEXIS 1451 (N.Y. App. Term 1974).

Statute providing that person is guilty of criminal impersonation when he impersonates another and does an act in such assumed character with intent to injure or defraud another does not proscribe cross-dressing. People v Simmons, 79 Misc. 2d 249, 357 N.Y.S.2d 362, 1974 N.Y. Misc. LEXIS 1640 (N.Y. City Crim. Ct. 1974).

Mere proof that defendant gave police name other than his own, standing alone, would be insufficient to establish that defendant committed criminal impersonation without demonstration that name given was that of real person and that purpose of impersonation was to obtain benefit or injure or defraud another. People v Jones, 84 Misc. 2d 737, 376 N.Y.S.2d 885, 1975 N.Y. Misc. LEXIS 3207 (N.Y. Sup. Ct. 1975).

Defendants, who had solicited money from residents of an area while pretending that they represented the junior class of a high school collecting for the cancer fund and had used the money for their own purposes and who upon arraignment in Justice Court pleaded guilty to criminal impersonation and petit larceny, may not be prosecuted under indictments charging them with scheme to defraud in the first degree; when the defendants pleaded guilty they were, in effect, pleading guilty to the equivalent of scheme to defraud in the second degree, the necessary elements of which are criminal impersonation and larceny, and scheme to defraud in the second degree is a lesser included offense of scheme to defraud in the first degree. A plea to the lesser included offense bars a plea to the greater offense under the circumstances. People v Lasek, 94 Misc. 2d 1007, 405 N.Y.S.2d 991, 1978 N.Y. Misc. LEXIS 2337 (N.Y. County Ct. 1978).

In a prosecution for criminal impersonation pursuant to Penal Law § 190.25(1) the information would be dismissed for being insufficient on its face where defendant allegedly gave a police officer an erroneous date of birth when stopped for a traffic infraction and the gravamen of the offense was holding oneself out as some other specific individual. People v Danisi, 113 Misc. 2d 753, 449 N.Y.S.2d 874, 1982 N.Y. Misc. LEXIS 3374 (N.Y. Dist. Ct. 1982).

A verdict convicting defendant of resisting arrest under Penal Law § 205.30 and criminal impersonation under Penal Law § 190.25 would be set aside on the ground that the initial arrest was unauthorized pursuant to CPL § 140.25, where a railroad policeman, who was driving a railroad-owned vehicle on a city street to and from a railroad-owned facility on his tour of duty made a warrantless arrest of defendant for blowing his horn on a city street, in that the arresting peace officer was not acting pursuant to his "special duties" in the situation, it was not established that the offense was committed in the arresting peace officer's presence, nor was there evidence that the peace officer actually observed defendant touching his horn or that defendant was not properly sounding his horn to warn a person or animal of danger; further, the charge that defendant, by telling the arresting officer that he was "one of you" and that he had left his badge at home was guilty of impersonating a peace officer cannot stand, where it was not established that defendant, a retired city police detective working as a licensed detective at a race track, was not a peace officer entitled to carry a badge. People v Hartman, 114 Misc. 2d 138, 451 N.Y.S.2d 347, 1982 N.Y. Misc. LEXIS 3447 (N.Y. City Crim. Ct. 1982).

A defendant, who when apprehended for traffic violations lied to the police officer about his identity using a fictitious or assumed name and who admitted that he had disposed of his wallet to avoid prosecution under his real name, did not violate Penal Law § 190.25(1) where, although he did intend to obtain a benefit by using another name, he had not passed himself off as another real person having a certain identity. People v Sherman, 116 Misc. 2d 109, 455 N.Y.S.2d 528, 1982 N.Y. Misc. LEXIS 3842 (N.Y. City Ct. 1982).

Trial court found no basis to dismiss an information against defendant pursuant to N.Y. Crim. Proc. Law §§ 100.40(1) and 100.15(3), as the information was legally sufficient based on defendant's having been stopped for a traffic offense, after which defendant showed the police officer a fake detective shield and told him that he was a member of the New York City detective force; defendant's intent to induce the officer to act in reliance on his pretense for purposes of N.Y. Penal Law § 190.25(3) was inferred, the fake shield constituted a "forged instrument" under N.Y. Penal Law § 170.00(7) for purposes of a charge under N.Y. Penal Law § 170.20, and defendant allegedly did not possess a valid license for purposes of N.Y. Veh. & Traf. Law § 509(1). People v Makwana, 844 N.Y.S.2d 607, 17 Misc. 3d 296, 238 N.Y.L.J. 37, 2007 N.Y. Misc. LEXIS 5368 (N.Y. City Crim. Ct. 2007).

N.Y. Penal Law § 170.00(7) "forged instrument" definition does not encompass possession of a facsimile of a police badge, which is expressly dealt with in N.Y. Penal Law §§ 190.25, 190.26. People v Simmons, 774 N.Y.S.2d 284, 2 Misc. 3d 728, 2003 N.Y. Misc. LEXIS 1631 (N.Y. City Crim. Ct. 2003).

Evidence was legally sufficient to establish defendant's guilt of criminal impersonation in the second degree under circumstances in which, in a written statement to police, defendant admitted pretending to be the victim when calling the police in an effort to close a criminal mischief case against her, as well as leaving her home phone number for the police to ostensibly contact the victim; the detective testified that he twice called the number that defendant left with the police and talked to a woman who identified herself as the victim, and during the second call, the victim was actually present at the police station, so the person the detective spoke to could not possibly have been the victim; and the victim stated that she had not previously spoken to the detective by phone. People v Hooks, 71 A.D.3d 1184, 896 N.Y.S.2d 501, 2010 N.Y. App. Div. LEXIS 1678 (N.Y. App. Div. 3d Dep't 2010).

Unexcused, belated disclosure of e-mails between the prosecutor and a mother of a minor who defendant allegedly engaged in improper sexual conduct with, which showed the minor's motive to lie, did not affect the verdict with respect to sodomy charges relating to another minor or some of the misdemeanor charges, in violation of N.Y. Penal Law §§ 130.45, 130.40, 190.25(1), and 240.50(3)(a), as the evidence against defendant was overwhelming; there was no reasonable possibility that the serious disclosure failures by the prosecution affected the verdict in that regard. People v Sinha, 84 A.D.3d 35, 922 N.Y.S.2d 275, 2011 N.Y. App. Div. LEXIS 2750 (N.Y. App. Div. 1st Dep't 2011), aff'd, 19 N.Y.3d 932, 951 N.Y.S.2d 697, 976 N.E.2d 223, 2012 N.Y. LEXIS 1837 (N.Y. 2012).

Two counts in a grand jury indictment charging defendant with the crime of coercion required dismissal as the People instructed the grand jury on the law but did not specify the location, or anything else, for either count. The procedure utilized gave the appearance that the grand jury only voted on the accusatory part of the indictment, leaving it to the People to determine and fill in the factual statement supporting each count, including which coercion count applied to the events at one victim's home, at another location, and who the victim was for each of the counts. People v Huntington, 867 N.Y.S.2d 377, 20 Misc. 3d 1114(A), 240 N.Y.L.J. 25, 2008 N.Y. Misc. LEXIS 7175 (N.Y. County Ct.), aff'd, 57 A.D.3d 1238, 869 N.Y.S.2d 702, 2008 N.Y. App. Div. LEXIS 9806 (N.Y. App. Div. 3d Dep't 2008).

Defendant's motion to dismiss a superseding information pursuant to CPL 170.40 was denied because there existed no compelling factor, consideration, or circumstance demonstrating that conviction or prosecution of defendant upon the counts charged in the superseding information would constitute or result in an injustice as defendant was alleged to have identified himself as a corrections officer during and after his arrest for criminal mischief, menacing, disorderly conduct, and harassment. People v Copeland, 52 Misc. 3d 372, 29 N.Y.S.3d 132, 2016 N.Y. Misc. LEXIS 1361 (N.Y. City Crim. Ct. 2016).

Where an arrestee alleged that an officer asked whether the arrestee was an officer only after the officer had reached into the arrestee's wallet without the arrestee's permission and removed the

arrestee's police union membership card, the officer was not entitled to summary judgment based on qualified immunity as to the arrestee's false arrest claims, because viewing the full factual context in the light most favorable to the arrestee, there was a genuine issue for a jury as to whether the officer had probable cause to arrest the arrestee for criminal impersonation. Simpson v City of New York, 793 F.3d 259, 2015 U.S. App. LEXIS 12163 (2d Cir. N.Y. 2015).

Because petitioner was convicted under overbroad version of New York criminal impersonation statute that had been narrowed by the state court, some of his convictions were invalid as jury could have impermissibly convicted him on those counts based on overbroad interpretation of "injure." Golb v AG of N.Y., 870 F.3d 89, 2017 U.S. App. LEXIS 16746 (2d Cir. 2017), cert. denied, 138 S. Ct. 988, 200 L. Ed. 2d 251, 2018 U.S. LEXIS 1034 (U.S. 2018).

Petitioner's First Amendment facial challenge to New York criminal impersonation statute failed because it was not unconstitutionally vague or overbroad as it was fairly clear what conduct fell within it. Golb v AG of N.Y., 870 F.3d 89, 2017 U.S. App. LEXIS 16746 (2d Cir. 2017), cert. denied, 138 S. Ct. 988, 200 L. Ed. 2d 251, 2018 U.S. LEXIS 1034 (U.S. 2018).

Plaintiff submitted sufficient evidence to create a genuine issue of fact that precluded summary judgment on the N.Y. Gen. Mun. Law § 205-e claim based upon an alleged violation of N.Y. Penal Law § 190.25(3) where one defendant created the false impression at the scene that he was acting with the approval or authority of the Nassau County Police Department, and caused others to rely upon that pretense. Breitkopf v Gentile, 41 F. Supp. 3d 220, 2014 U.S. Dist. LEXIS 121581 (E.D.N.Y. 2014).

2. Sufficiency of evidence

Where defendant started an Internet campaign to promote the views of his father while attacking the integrity and reputation of other Dead Sea Scrolls scholars, the mere creation of email accounts in the names of four individuals did not constitute criminal impersonation because defendant did not cause any pecuniary loss or interfere with governmental operations. Therefore, the evidence was insufficient to support his convictions. People v Golb, 23 N.Y.3d 455, 991 N.Y.S.2d 792, 15 N.E.3d 805, 2014 N.Y. LEXIS 1093 (N.Y.), reh'g denied, 24 N.Y.3d 932, 993 N.Y.S.2d 543, 17 N.E.3d 1139, 2014 N.Y. LEXIS 2379 (N.Y. 2014), cert. denied, 574 U.S. 1079, 135 S. Ct. 1009, 190 L. Ed. 2d 839, 2015 U.S. LEXIS 87 (U.S. 2015).

II. Under Former Law

2. Under former § 928

False personation of another and in such assumed character marriage to woman with her connivance is violation of § 928 and the woman may be convicted as a principal. People v Thompson, 276 N.Y. 640, 12 N.E.2d 798, 276 N.Y. (N.Y.S.) 640, 1938 N.Y. LEXIS 1228 (N.Y. 1938).

An action to restrain a woman from holding herself out as the lawful wife of plaintiff's husband is not within this section. Hodecker v Stricker, 20 A.D. 245, 46 N.Y.S. 808, 1897 N.Y. App. Div. LEXIS 1717 (N.Y. App. Div. 1897).

In order to sustain a conviction for falsely personating another in violation of subd 5 of this section it is necessary to show not only an act of false personation of another by the party charged with the crime, but also that there was some act which if done by the person falsely personated might result to that person's injury or disadvantage. It is not essential to a conviction that the act on the part of the person falsely personating another would necessarily subject the party personated, if doing the same act, to a charge, forfeiture or penalty, but it is sufficient if the act done, if done by the personated "might, in any event," lead to the imposition of a penalty. One who appears and answers in criminal proceeding in which defendant is charged with disorderly conduct and falsely personates true defendant therein is guilty of violation of subd 5 of this section. People ex rel. Harris v Mallon, 191 A.D. 443, 181 N.Y.S. 487, 1920 N.Y. App. Div. LEXIS 4736 (N.Y. App. Div. 1920).

3. Under former § 930

Purpose of § 930 as to prevent impositions upon persons who part with their property as result of commendable charitable impulses, though buyer paid market value therefor. People v Yarmish, 68 N.Y.S.2d 618, 189 Misc. 1041, 1947 N.Y. Misc. LEXIS 2103 (N.Y. Gen. Sess. 1947).

4. Under former § 931

Conviction under this section was sustained over contention that a detective had been improperly committed to corroborate identification previously made by the complainant. People v Dancyger, 308 N.Y. 1040, 127 N.E.2d 870, 308 N.Y. (N.Y.S.) 1040, 1955 N.Y. LEXIS 1263 (N.Y. 1955).

Conviction of defendant of falsely impersonating state motor vehicle inspector and threatening to place driver of motor vehicle under arrest unless he paid defendant small sum of money, is against weight of evidence where it appears that, although gravamen of offense, according to information, is impersonation of public officer for purpose of obtaining paltry sum as bribe to refrain from making arrest, yet defendant immediately sought to put matter in hands of an unknown and independent officer of law and also evinced no interest in obtaining possession of money. People v Nastri, 220 A.D. 141, 221 N.Y.S. 182, 1927 N.Y. App. Div. LEXIS 9250 (N.Y. App. Div. 1927).

Court of special sessions has jurisdiction of violation of this section. People ex rel. Bailey v McCann, 222 A.D. 465, 226 N.Y.S. 449, 1928 N.Y. App. Div. LEXIS 8089 (N.Y. App. Div. 1928).

Arrest, search, and seizure of defendant, charged with false impersonation of a police officer, was not rendered unlawful because the case was submitted by the trial judge to the jury under § 1846 of the Penal Law instead of under this section. People v Manasek, 20 A.D.2d 661, 246 N.Y.S.2d 567, 1964 N.Y. App. Div. LEXIS 4536 (N.Y. App. Div. 2d Dep't), cert. denied, 379 U.S. 867, 85 S. Ct. 139, 13 L. Ed. 2d 70, 1964 U.S. LEXIS 781 (U.S. 1964).

Revenue agent or officer is a public officer within the meaning of the statute. People v Chesnik, 205 N.Y.S. 146, 123 Misc. 509, 1922 N.Y. Misc. LEXIS 1702 (N.Y. Spec. Sess. 1922).

5. Under former § 1846

"Revenue agent or officer" is "public officer" within meaning of this section, but revenue agent is not a "peace officer" under Code of Criminal Procedure, §§ 154 and 960. Though this section makes it misdemeanor to hold oneself out as peace officer, or to exercise functions of such without due authority, verdict adjudging various defendants guilty upon count in indictment under this section will be set aside where evidence is insufficient to show that they acted or pretended to act "under pretense or color of any process." People v Chesnik, 205 N.Y.S. 146, 123 Misc. 509, 1922 N.Y. Misc. LEXIS 1702 (N.Y. Spec. Sess. 1922).

The legality of an arrest cannot be considered in determining the jurisdiction of a court to hear evidence of commission of a crime. Rose v McKean, 76 N.Y.S.2d 391, 190 Misc. 982, 1948 N.Y. Misc. LEXIS 2065 (N.Y. Sup. Ct. 1948).

One who, when approached by detectives suspecting him of burglary, flashes a police badge and claims to be, himself, a police officer, is subject to arrest and search without warrant as having committed a crime in the presence of the arresting officer, under § 177 of the Code of Criminal Procedure. People v Manasek, 33 Misc. 2d 832, 225 N.Y.S.2d 673, 1961 N.Y. Misc. LEXIS 2032 (N.Y. County Ct. 1961).

Notes to Unpublished Decisions

I. Generally

1. In general

Unpublished decision: Defendants had at least arguable probable cause to file criminal charges against plaintiff for impersonating a police officer; the fact that plaintiff was suspended, rather than terminated, at the time of the traffic stop did not change the court's analysis because plaintiff arguably could have violated the criminal impersonation statute because he lacked authority to act as a police officer while suspended. Barcomb v Sabo, 487 Fed. Appx. 645, 2012 U.S. App. LEXIS 14009 (2d Cir. N.Y. 2012).

Agency Opinions

Analysis

I. Generally

1. In general

II. Under Former Law

2. Under former § 931

I. Generally

1. In general

Railroad policemen may wear the Device of Arms of the State, with appropriate identifying inscription, on badges or shoulder patches. 1968 NY Ops Atty Gen Dec 16.

Although there appears to be no statutorily prohibited conflict of interest, the operation of a collection agency by a village police officer is fraught with the possibility of abuse. 1973 NY Ops Atty Gen Sept 24 (informal).

Civil defense auxiliary police may not operate vehicles owned by a police department unless the insignia on such vehicles unmistakably indicate from a distance that such vehicles are being operated by auxiliary police and not by members of the police department. 1981 NY Ops Atty Gen Dec 22.

II. Under Former Law

2. Under former § 931

Physician who is delivering course of lectures at theaters, on public health topics, and who falsely represents to owners of theaters that he is representative of or authorized by state department of health, thereby obtaining free use of such theaters, is by such false representations violating provisions of this section or § 1290. 1930 N.Y. Op. Att'y Gen. No. 360.

Great seal of state may not be used on badges and badges must not misrepresent status or authority of officer. 1943 NY Ops Atty Gen Mar 24.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Impersonation in connection with civil service examination, CLS Civ S § 106.

Unauthorized practice of profession, or aiding an unlicensed person to practice, a misdemeanor, CLS Educ § 6512.

Unauthorized use of professional title, a misdemeanor, CLS Educ § 6513.

Improper use of certain designations in connection with practice of public accountancy, a misdemeanor, CLS Educ § 7408(2).

Advertising as agent of owners or consignees of vessel or line, without written authorization, CLS Gen Bus § 117.

Unauthorized wearing or use of badge, name or insignia of certain orders and societies, CLS Gen Bus § 137.

Wearing industry badges, or other insignia of identification by unauthorized persons, CLS Gen Bus § 140.

Unlawful possession or use of identification card issued by United Nations, CLS Gen Bus § 142.

Fraudulently wearing uniform, badge, or other insignia, CLS Mil §§ 238, 238-c.

Use of false or fictitious name or address in application for vehicle certificate of title, CLS Veh & Tr § 2130.

Persons pretending to be city marshals, CLS NYC Civ Ct Act § 1603.

Jurisprudences:

35B NY Jur 2d Criminal Law Substantive Principles and Offenses §§ 1122, 1255, 1256, 1258, 1259, 1260.

32 Am Jur 2d, False Pretenses §§ 1, 2.

Criminal Jury Instructions: Criminal impersonation, second degree (of another person). CJI2d [NY] Penal Law § 190.25(1) (Revised August 3, 2004).

Criminal impersonation, second degree (impersonation of a representative). CJI2d [NY] Penal Law § 190.25(2). (Revised August 3, 2004).

Criminal impersonation, second degree (of a public servant). CJI2d [NY] Penal Law § 190.25(3) (Revised August 3, 2004).

Texts: New York Criminal Practice Ch. 68.

TITLE L Offenses Against Public Administration

Article 195. Official Misconduct and Obstruction of Public Servants Generally

Section

195.00. Official misconduct
195.05. Obstructing governmental administration in the second degree
195.07. Obstructing governmental administration in the first degree
195.15. Obstructing firefighting operations
195.16. Obstructing emergency medical services
195.17. Obstruction of governmental duties by means of a bomb, destructive device, explosive, or hazardous substance

HISTORY:

Add, L 1965, ch 1030, § 1, eff Sept 1, 1967.

ARTICLE 195

OFFICIAL MISCONDUCT AND OBSTRUCTION OF PUBLIC SERVANTS GENERALLY

HISTORY:

Add, L 1965, ch 1030, § 1, eff Sept 1, 1967.

§ 195.00. Official misconduct

A public servant is guilty of official misconduct when, with intent to obtain a benefit or deprive another person of a benefit:

1. He commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized; or

2. He knowingly refrains from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office.

Official misconduct is a class A misdemeanor.

HISTORY:

Add, L 1965, ch 1030, § 1, with substance derived from §§ 373, 461, 462, 489, 854, 997, 1231, 1792, 1830, 1839, 1840–1844, 1847, 1857, 1862–1867, 1869, 1874–1876.; amd, L 1990, ch 906, § 1, eff Nov 1, 1990.

Commission Staff Notes: This section replaces some thirty former Penal Law provisions which defined misdemeanor offenses of misfeasance and nonfeasance by public servants (see Table II). Most of the crimes were very narrow ones of commission and omission involving violations of specific duties by specified public officers. In the main, they were virtually crimes of absolute liability; little was required in the way of criminal intent, a "willful" commission of a proscribed act or a neglect of an official duty ordinarily being sufficient. While one such provision, applying to "public officers" generally, appeared to define an offense of general application, it was expressly limited to violations of duty not covered by any of the more specific sections (former PL § 1841).

This section condenses this general area of official misconduct into one offense. Subdivision 1 covers conduct of commission, and subdivision 2 conduct of omission. A specific mens rea is predicated: criminal liability attaches only when the offender intends "to obtain a benefit or to injure or deprive another person of a benefit." This excludes unauthorized conduct or neglect of duty, which, though possibly a proper basis for removal or disciplinary action in some instances, does not seem a fair basis for the automatic imposition of criminal sanctions.

Notes to Decisions

Analysis

I. Generally

1. In general
2. Police; correction officers

3. Judges; district attorneys

II. Under Former Law

A. Under Former § 1857

4. In general
5. Jurisdiction
6. Indictment
7. Practice and procedure, generally
8. Particular acts as omission of duty
9. —Failure of official to file report
10. —Failure of police official to enforce laws

B. Under Other Former Laws

11. Under former § 854
12. —Injunction to restrain violation
13. —Particular acts as oppression
14. Under former § 885
15. Under former § 997
16. Under former § 1830
17. Under former § 1839
18. Under former § 1841
19. Under former § 1844
20. Under former § 1862
21. Under former § 1863
22. Under former § 1864
23. Under former § 1865
24. Under former § 1866
25. Under former § 1867
26. Under former § 1874

I. Generally

1. In general

In absence of showing of same single scheme to collect corrupt payments from architect and contractor in connection with single school construction project or any equivalent indentity of time, place and circumstances or persons from whom payments were to be exacted, evidence as to payments to architect was inadmissible to show common scheme or plan to receive similar corrupt payments from contractor, in prosecution based on payments to contractor. People v Fiore, 34 N.Y.2d 81, 356 N.Y.S.2d 38, 312 N.E.2d 174, 1974 N.Y. LEXIS 1601 (N.Y. 1974).

Dismissal of indictment charging official misconduct and accepting a bribe was proper, where there was no testimony before grand jury showing proof of a "benefit" to defendant. People v Ioppolo, 45 A.D.2d 745, 356 N.Y.S.2d 662, 1974 N.Y. App. Div. LEXIS 4719 (N.Y. App. Div. 2d Dep't 1974).

Village mayor's acts constituted unauthorized exercise of his official functions, and he was properly found guilty of official misconduct, where he threatened to fire village clerk if she testified against his wife in harassment trial; verbal expressions constitute acts just as do physical movements, and defendant had spoken in his capacity as mayor. People v Perlman, 121 A.D.2d 765, 503 N.Y.S.2d 174, 1986 N.Y. App. Div. LEXIS 58741 (N.Y. App. Div. 3d Dep't 1986).

Verdict convicting defendant of official misconduct, and acquitting him of second degree bribe receiving and receiving unlawful gratuities, was not repugnant where court instructed jury that one element of bribe receiving and receiving unlawful gratuities was that defendant solicited, accepted "and" agreed to accept benefit, rather than solicited "or" agreed; thus, jury could have concluded that defendant did not actually accept money but that he still committed unauthorized act constituting official misconduct. People v Funchus, 133 A.D.2d 843, 520 N.Y.S.2d 209, 1987 N.Y. App. Div. LEXIS 51893 (N.Y. App. Div. 2d Dep't 1987).

In prosecution charging police officer with petit larceny, third degree possession of controlled substance, and official misconduct for theft of narcotics, "coke user's kit" recovered during lawful search of officer's car was properly admitted in evidence, even though it constituted evidence of uncharged crimes, since officer's intent was not readily inferable from his acts, and "kit" created inference of guilty knowledge with respect to crimes charged. Court properly allowed officer to be questioned regarding his failure to report seizure of narcotics and his alleged attempted narcotics arrest since officer was under obligation to speak and his silence was patently inconsistent with his defense that his failure to report attempted arrest or seizure and his failure to voucher narcotics was due to injuries he sustained during attempted arrest and his concern for recovery of his gun. People v Hardwick, 137 A.D.2d 714, 524 N.Y.S.2d 798, 1988 N.Y. App. Div. LEXIS 1762 (N.Y. App. Div. 2d Dep't), app. denied, 71 N.Y.2d 969, 529 N.Y.S.2d 80, 524 N.E.2d 434, 1988 N.Y. LEXIS 1950 (N.Y. 1988).

Evidence established official misconduct by defendant deputy city clerk where undercover officer represented to defendant that he was contractor interested in obtaining city contract for purchase and development of particular plot of land owned by city, defendant stated to witness that he expected $50,000 "consulting fee" from contractor, at meeting with witness and undercover officer defendant made statements indicating that he could assist officer in obtaining contract, and defendant furtively gave witness unpublished prospectus 8 days before announcement of public bidding on contract and directed him to transfer it to undercover officer. People v Hurst, 160 A.D.2d 1023, 554 N.Y.S.2d 945, 1990 N.Y. App. Div. LEXIS 5012 (N.Y. App. Div. 2d Dep't 1990).

Defendant's background as police officer who had abused his position by improper conduct over lengthy time period warranted consecutive sentences for his convictions of official misconduct, second degree aggravated harassment, and first and second degree harassment. People v Maloney, 233 A.D.2d 681, 650 N.Y.S.2d 342, 1996 N.Y. App. Div. LEXIS 12071 (N.Y. App. Div. 3d Dep't 1996).

Defendant's convictions for official misconduct and coercion were not supported by sufficient evidence that defendant had the requisite mental state, as it was not shown that he knew that certain directives regarding a citizen's application to become a village police officer were not authorized. People v Hutchins, 136 A.D.3d 1148, 25 N.Y.S.3d 699, 2016 N.Y. App. Div. LEXIS 1222 (N.Y. App. Div. 3d Dep't 2016).

Although an EMT did not render emergency aid to an ill citizen despite being asked for assistance, the city, the fire department, and emergency medical services were not liable because, even if the EMT was guilty of misconduct, the violation of this statute did not give rise to a special duty so as to impose tort liability; the citizen was not of a class for whose particular benefit the statute was enacted. Rennix v Jackson, 152 A.D.3d 551, 59 N.Y.S.3d 57, 2017 N.Y. App. Div. LEXIS 5307 (N.Y. App. Div. 2d Dep't 2017).

Attorney was suspended from the practice of law for two years because the attorney was convicted of the serious crime of official misconduct, adversely reflecting on the attorney's fitness as a lawyer, in the attorney's capacity as a public official, based on acts committed knowingly and with venal purpose to defend the attorney against a sexual harassment claim, when the attorney threatened to transfer an employee unless the employee provided the attorney with evidence incriminating another employee alleging the sexual harassment. Matter of Bonilla, 154 A.D.3d 117, 60 N.Y.S.3d 405, 2017 N.Y. App. Div. LEXIS 6342 (N.Y. App. Div. 2d Dep't 2017).

In order for an indictment to charge the criminal act of official misconduct, it must contain a factual allegation of the defendant's intent to benefit by his refraining from making the arrest which, must be a venal or culpable motive for failing to perform his duty. A culpable motive is required which must be directly connected with the duty which the public servant refrains from performing, and such motive must be of a venal nature. People v Thompson, 58 Misc. 2d 511, 296 N.Y.S.2d 166, 1969 N.Y. Misc. LEXIS 1857 (N.Y. County Ct. 1969).

A criminal offense constitutes an unauthorized act whenever such offense arises from and relates to the function of the perpetrator's public office, and particularly so, whenever such offense occurs while the public servant is on duty, or for that matter, whenever such offense occurs, either directly or indirectly, in the course of the public servant's work, employment, or duty. People v Volpicello, 72 Misc. 2d 641, 340 N.Y.S.2d 154, 1972 N.Y. Misc. LEXIS 1222 (N.Y. County Ct. 1972).

New statute extending limitation of time for bringing prosecution action for offenses in the nature of misconduct in public office was held not be ex post facto as applied to prosecution which was

not barred at time new limitation statute was adopted; thus indictment dated after running of statute of limitations in effect at time of offense was not untimely. People v Pfitzmayer, 72 Misc. 2d 739, 340 N.Y.S.2d 85, 1972 N.Y. Misc. LEXIS 1223 (N.Y. County Ct. 1972).

Although third count of indictment was in language of the official misconduct statute it was legally insufficient where it did not specify the conduct underlying the charge nor reveal any facts supporting it. People v Gibson, 77 Misc. 2d 49, 354 N.Y.S.2d 273, 1972 N.Y. Misc. LEXIS 1187 (N.Y. Sup. Ct.), modified, 40 A.D.2d 818, 338 N.Y.S.2d 478, 1972 N.Y. App. Div. LEXIS 3228 (N.Y. App. Div. 1st Dep't 1972).

That count of indictment did not charge defendant state legislator with appointing person to job which defendant knew would not be performed by such person but merely charging the appointment of such person and alleging defendant's corrupt reason, namely to obtain a benefit, failed to sufficiently charge crime of official misconduct since statute requires that in addition to the corrupt motive the act itself be unauthorized and without scope of defendant's official duties. Officer may perform his official duties for an unworthy and illegal purpose without violating official misconduct statute, although he would be in violation of other provisions of law of penal nature such as Public Officers Law relating to unlawful fees and payments. People v Hochberg, 87 Misc. 2d 1024, 386 N.Y.S.2d 740, 1976 N.Y. Misc. LEXIS 2618 (N.Y. Sup. Ct. 1976), aff'd, 62 A.D.2d 239, 404 N.Y.S.2d 161, 1978 N.Y. App. Div. LEXIS 10444 (N.Y. App. Div. 3d Dep't 1978).

Acceptance by a deputy building commissioner of moneys for preparation of plans which are subject to his approval would be an unauthorized exercise of his official functions under provisions of Penal Law governing official misconduct. People v Pinto, 88 Misc. 2d 303, 387 N.Y.S.2d 385, 1976 N.Y. Misc. LEXIS 2669 (N.Y. City Ct. 1976).

The administrator of a county civil service employees' association benefit and legal services funds was not a "public officer" within the meaning of Pen Law § 10.00(15) and could not therefore be charged with the bribery and official misconduct offenses defined by Pen Law §§ 195.00, 200.10, 200.25, and 200.35; defendant was, however, a "labor official" within the meaning of Pen Law § 180.10 for purposes of charging violations of Pen Law §§ 105.05 and 180.25. People v Confoy, 110 Misc. 2d 252, 441 N.Y.S.2d 941, 1981 N.Y. Misc. LEXIS 3073 (N.Y. Sup. Ct. 1981).

Public servant, to be guilty of official misconduct, must intend to obtain benefit for himself. People v Esposito, 144 Misc. 2d 919, 545 N.Y.S.2d 468, 1989 N.Y. Misc. LEXIS 499 (N.Y. Sup. Ct. 1989), aff'd, 160 A.D.2d 378, 554 N.Y.S.2d 16, 1990 N.Y. App. Div. LEXIS 3957 (N.Y. App. Div. 1st Dep't 1990).

Emergency medical technician was not entitled to dismissal of count of official misconduct on basis that his employer was private corporation and he was not public employee as defined in CLS Penal 10.00(15), since his employer was provided, maintained and operated pursuant to CLS Unconsol § 7385(9) by New York City Health and Hospitals Corporation, which was public benefit corporation. In trial of emergency medical technician on charges of official misconduct and third degree sexual abuse, in which it was alleged that he touched private parts of female complainant while she was being taken by ambulance to hospital, court did not err in precluding defense from cross-examining complainant as to amount of damages she was seeking in related civil suit. People v Abranko, 162 Misc. 2d 739, 621 N.Y.S.2d 433, 1994 N.Y. Misc. LEXIS 585 (N.Y. App. Term 1994).

CLS Penal § 195.00(2), whereby public servant is accused of failing to perform "duty clearly inherent in the nature of his office," sufficiently apprises reasonable man of nature of acts prohibited and of what conduct is required of him to comply with due process protections. Indictment charging defendant with official misconduct was not facially insufficient where it tracked language of CLS Penal § 195.00(2) under which defendant was charged; bill of particulars and supplementation requested by defendant would provide him with fair notice of accusations against him and enable him to prepare adequate defense. School board member who voted to approve paid services of insurance consultant with whom he had preexisting fee sharing arrangement, and voted to approve contracts with insurance provider from which he benefited financially, while supposedly acting under CLS Educ § 1709(34-a), was properly charged with official misconduct where grand jury evidence indicated that he was aware of his statutory duties, including his ethical obligation to perform those duties free from conflicts and disclose such conflicts; mere fact that conduct charged was also prohibited by rules of ethical conduct adopted by school board under CLS Gen Mun § 806 did not preclude criminal prosecution. People v Lynch, 176 Misc. 2d 430, 674 N.Y.S.2d 894, 1998 N.Y. Misc. LEXIS 117 (N.Y. County Ct. 1998).

Defendant's motion pursuant to N.Y. Crim. Proc. Law § 100.15(3), seeking to dismiss a charge against her of official misconduct, in violation of N.Y. Penal Law § 195.00(2), due to facial insufficiency, lacked merit, as the complaint sufficiently alleged on its face what defendant intended to obtain as a benefit for her failure to provide treatment to a restaurant worker who had fallen ill; there was no requirement that the complaint specifically indicate which allegation constituted the "benefit." People v Jackson, 938 N.Y.S.2d 726, 35 Misc. 3d 179, 2011 N.Y. Misc. LEXIS 6545 (N.Y. City Crim. Ct. 2011).

Defendant's motion pursuant to N.Y. Crim. Proc. Law § 100.15(3), seeking to dismiss a charge against her of official misconduct, in violation of N.Y. Penal Law § 195.00(2), due to facial insufficiency, lacked merit, as the complaint sufficiently alleged that defendant knowingly refrained from performing a duty imposed upon her by law or clearly inherent in the nature of her office where she refrained from helping a restaurant worker who had fallen ill. People v Jackson, 938 N.Y.S.2d 726, 35 Misc. 3d 179, 2011 N.Y. Misc. LEXIS 6545 (N.Y. City Crim. Ct. 2011).

Unauthorized conduct with an intent to benefit is within the ambit of N.Y. Penal Law § 195.00, while unauthorized conduct in the absence of an intent to benefit is not a crime; where an officer's function was to receive a report of suspected drug activity and to refer the informant to a detective, the officer engaged in official misconduct when he telephoned the suspect's mother and warned her that her son should stay away from the site of the suspected activity. People v Lucarelli, 300 A.D.2d 1013, 753 N.Y.S.2d 638, 2002 N.Y. App. Div. LEXIS 12865 (N.Y. App. Div. 4th Dep't 2002).

Where a town highway superintendent admitted to official misconduct in exercising his duties as a town officer in violation of N.Y. Penal Law § 195.00(1), summary removal under N.Y. Pub. Off. Law § 36 was warranted for the misconduct, which violated the public trust. Grady v Yeno, 302 A.D.2d 385, 754 N.Y.S.2d 562, 2003 N.Y. App. Div. LEXIS 776 (N.Y. App. Div. 2d Dep't 2003).

Defendant's conviction for official misconduct was reversed because, at trial, there was a variance between the proof and the indictment, as amplified by a bill of particulars, and the proof was directed exclusively to a theory other than that charged in the indictment, so the proof was insufficient to support the conviction. People v Burnett, 306 A.D.2d 947, 760 N.Y.S.2d 800, 2003 N.Y. App. Div. LEXIS 6863 (N.Y. App. Div. 4th Dep't 2003).

Appellate court confirmed a hearing panel's finding that an attorney who pled guilty to a charge of official misconduct, in violation of N.Y. Penal Law § 195.00(1), after he falsified a memorandum signed by a City of New York (New York) employee to make it appear as if he had received a salary increase, violated N.Y. Code Prof. Resp. DR 1-102(a)(3), (4), and (7), and it suspended the attorney for six months. In re Vasquez, 1 A.D.3d 16, 766 N.Y.S.2d 419, 2003 N.Y. App. Div. LEXIS 10934 (N.Y. App. Div. 1st Dep't 2003).

In spite of mitigating evidence, an attorney who was convicted of official misconduct pursuant to Penal Law § 195 while serving as a county official and who also was convicted in an unrelated incident of second degree coercion and harassment was suspended from practicing law for two years for violating N.Y. Code Prof. Resp. DR 1-102(A)(3), (7), (22 NYCRR 1200.3(a)(3), (7)), with credit for an interim suspension imposed immediately upon his conviction pursuant to N.Y. Jud. Ct. Acts Law § 90(4)(f); notwithstanding mitigating evidence, which included his unawareness of the bidding requirements he violated, his payment of restitution and resignation from his position, his lack of prior

disciplinary history, and his enrollment in divinity studies in a seminary, he had been convicted of a serious crime and other offenses committed in his capacity as a public official. Matter of Sylver, 33 A.D.3d 266, 820 N.Y.S.2d 643, 2006 N.Y. App. Div. LEXIS 10460 (N.Y. App. Div. 2d Dep't 2006).

Prosecution of an election official accused of electioneering within a polling place in violation of his official function was not constitutionally impaired because the term electioneering was not constitutionally vague because the statutes required an intent to influence voters to vote in a particular way, law enforcement officials were not left to apply an undefined standard, and the determination of whether a violation of a statute occurred was not equated with vagueness but rather one of sufficiency of proof to meet a standard of conduct which was prohibited. People v Maldonado, 63 Misc. 3d 716, 97 N.Y.S.3d 408, 2019 N.Y. Misc. LEXIS 1181 (N.Y. Dist. Ct. 2019).

2. Police; correction officers

Police officer on trial for official misconduct failed to preserve for appellate review his contention that People had not established that he had duty to make arrest (as element of crime under CLS Penal § 195.00) where he argued before trial court only that there was no evidence that he had received benefit from his actions. People v Logan, 74 N.Y.2d 859, 547 N.Y.S.2d 828, 547 N.E.2d 83, 1989 N.Y. LEXIS 2983 (N.Y. 1989).

Police officers, although purportedly acting under authority of police department and while on duty, were properly convicted of official misconduct based on their unlawful entry into 2 apartments where they restrained and threatened occupants in attempt to recover police radio; their intent was not some general societal benefit in reducing crime, but rather to benefit themselves. In trial of police officers for official misconduct arising out of their entry into 2 apartments, where they restrained and threatened occupants in attempt to recover police radio, court's jury charge did not confuse constitutional unlawfulness (for which there are no criminal sanctions) with criminal unlawfulness under Penal Law; although it may have been better practice to avoid word "unlawful" in describing reasonable searches, instruction as to when search of apartment would be lawful was necessary for defense. Defendant police officers were not entitled to reversal of official misconduct convictions arising out of their unlawful entry into 2 apartments (where they restrained and threatened occupants in attempt to recover police radio) even though court erred by instructing jury that "stop and frisk" is permitted only in public places instead of correctly instructing jury that police officer justifiably present in private apartment may frisk occupant under reasonable belief that his or her safety is in jeopardy, where jury found defendants guilty of trespass, thereby necessarily determining that they were not "justifiably present" in apartment. People v Feerick, 93 N.Y.2d 433, 692 N.Y.S.2d 638, 714 N.E.2d 851, 1999 N.Y. LEXIS 1288 (N.Y. 1999).

Sufficient evidence supported defendant's convictions for conspiracy in the sixth degree and official misconduct based on the evidence showing that, as the detective sergeant in charge of asset forfeiture for a police department, he used his position, along with his accomplices, to orchestrate the return of unvouchered evidence to high school authorities with the goal of terminating the open felony investigation of his friend's son and preventing the son's imminent arrest. People v Flanagan, 28 N.Y.3d 644, 71 N.E.3d 541, 49 N.Y.S.3d 50, 2017 N.Y. LEXIS 62 (N.Y. 2017).

Trial court erred by dismissing the indictment because the evidence presented to the grand jury was legally sufficient to support the charge of official misconduct based on defendant's failure to file a written report concerning the incident until ordered to. While defendant notified superiors about the prisoner's attempted escape, he did not notify anyone about the level of his subsequent force used, and he thereafter repeatedly inquired of fellow officers what the prisoner had said to them, from which the grand jury could rationally have drawn an inference that his failure to file the required paperwork was done with the intent to benefit himself by secreting his use of force. People v Castaldo, 146 A.D.3d 797, 46 N.Y.S.3d 115, 2017 N.Y. App. Div. LEXIS 182 (N.Y. App. Div. 2d Dep't 2017).

In prosecution of community services worker for official misconduct, People failed to establish prima facie case that worker exercised his discretion to permit female conjugal visits with her inmate husband in return for "sexual favors" for himself, since worker had no authority to grant or deny conjugal visits as his duties were narrowly confined by correctional services directive to gathering information upon which his superiors granted or denied requests for conjugal visits, and thus worker could not be indicted for exercising authority he did not have. People v Groskin, 122 A.D.2d 561, 505 N.Y.S.2d 475, 1986 N.Y. App. Div. LEXIS 59836 (N.Y. App. Div. 4th Dep't 1986).

In trial for second degree bribe receiving and official misconduct, where driver of car testified that defendant police officers solicited sex from her in exchange for not arresting her for traffic violation and possession of drugs, court properly refused to submit to jury, as question of fact, issue of whether male and female passengers were accomplices where (1) male passenger left car before females went with officers and there was no evidence that he knew where women went or why they were going with officers, and (2) female passenger did not participate in giving any benefit to officers, nor was it clear that she knew why she and driver were getting into officers' car. It was error for court to fail to charge jury that driver was accomplice as matter of law concerning official misconduct counts where it charged that she was accomplice as matter of law as to bribe receiving count, since all counts arose out of same transaction and facts; however, error was harmless in light of corroborating testimony given by passenger in car and court's charge on corroborating testimony. People v Teitelbaum, 138 A.D.2d 647, 526 N.Y.S.2d 230, 1988 N.Y. App. Div. LEXIS 3189 (N.Y. App. Div. 2d Dep't 1988).

Police lieutenant was properly convicted of official misconduct where he inexcusably failed to restrain his subordinates during their assault on prisoner, during which he was present. People v Cheswick, 166 A.D.2d 88, 570 N.Y.S.2d 318, 1991 N.Y. App. Div. LEXIS 7644 (N.Y. App. Div. 2d Dep't), aff'd, 78 N.Y.2d 1119, 578 N.Y.S.2d 873, 586 N.E.2d 56, 1991 N.Y. LEXIS 4919 (N.Y. 1991).

In Article 78 proceeding to review termination of state police officer's employment, substantial evidence supported finding that he was guilty of knowingly engaging in official misconduct by buying .32-caliber semiautomatic pistol from fellow officer while knowing that fellow officer did not lawfully possess it and that gun was nuisance weapon that should have been surrendered to police superintendent. Doolittle v McMahon, 245 A.D.2d 736, 665 N.Y.S.2d 739, 1997 N.Y. App. Div. LEXIS 12957 (N.Y. App. Div. 3d Dep't 1997).

Penalty of dismissal from employment as state police officer was not so disproportionate as to shock one's sense of fairness where officer committed crimes of fourth degree grand larceny, offering false instrument for filing, and official misconduct by purchasing .32-caliber semiautomatic pistol from fellow officer, while knowing that fellow officer did not lawfully possess it and that gun was nuisance weapon that should have been surrendered to police superintendent, and by attempting to convert it as his own property by filling out false form. Doolittle v McMahon, 245 A.D.2d 736, 665 N.Y.S.2d 739, 1997 N.Y. App. Div. LEXIS 12957 (N.Y. App. Div. 3d Dep't 1997).

Charge specifying "unauthorized exercise of (police officer's) official functions," in violation of New York City Police Department Patrol Guide's prohibition against "conduct prejudicial to good order, efficiency or discipline of the department," was not barred by 18-month Statute of Limitations in CLS Civ S § 75(4) since misconduct charged also constituted crime of official misconduct under CLS Penal § 195.00(1), which is expressly excluded from time bar of CLS Civ S § 75(4). Mieles v Safir, 272 A.D.2d 199, 707 N.Y.S.2d 437, 2000 N.Y. App. Div. LEXIS 5660 (N.Y. App. Div. 1st Dep't 2000).

Police officer was entitled to summary judgment dismissing claim for unauthorized exercise of official functions in violation of CLS Penal § 195.00 arising from incident that occurred when, after his future stepdaughter told him that plaintiff had followed her and made "hang-up" phone calls to her home, he went to school where plaintiff worked while wearing his uniform, falsely represented to school secretary that "we have a complaint against [plaintiff]" and, after being escorted to plaintiff's classroom, told

plaintiff to stay away from his future stepdaughter, as there was no evidence that he intended to obtain benefit from his actions or to deprive plaintiff of benefit, his actions did not rise to level of flagrant and intentional abuse of authority intended by legislature, and plaintiff did not appear to be member of class for whose benefit § 195.00 was enacted. Tourge v City of Albany, 285 A.D.2d 785, 727 N.Y.S.2d 753, 2001 N.Y. App. Div. LEXIS 7432 (N.Y. App. Div. 3d Dep't 2001), overruled, Yonaty v Mincolla, 97 A.D.3d 141, 945 N.Y.S.2d 774, 2012 N.Y. App. Div. LEXIS 5397 (N.Y. App. Div. 3d Dep't 2012).

Although defendant, a sheriff, violated N.Y. Penal Law § 195.00(1) by directing investigations of defendant's opponents and critics for purely political purpose, potential prejudice arose under N.Y. Crim. Proc. Law art. 190, § 210.20(1)(c) when the victims' family members were allowed to determine whether to indict defendant. People v Connolly, 63 A.D.3d 1703, 881 N.Y.S.2d 257, 2009 N.Y. App. Div. LEXIS 4719 (N.Y. App. Div. 4th Dep't 2009).

Evidence did not support an official misconduct charge because the People had not established that defendant's actions in flashing her police badge to encourage a pharmacist to fill prescriptions faster constituted criminal conduct as opposed to professional misconduct. People v Barnes, 117 A.D.3d 1203, 984 N.Y.S.2d 693, 2014 N.Y. App. Div. LEXIS 3253 (N.Y. App. Div. 3d Dep't 2014).

State's duty to defend a correctional officer (CO) in an inmate's 42 U.S.C.S. § 1983 suit did not cease when CO pled guilty to official misconduct as: (1) neither CO's allocution nor the elements of official misconduct established that the acts alleged in the civil suit occurred while CO was acting outside the scope of his employment or that the inmate's damages were due to CO's intentional wrongdoing; (2) CO did not particularize the crime to the acts alleged in the inmate's suit in his allocution; (3) the amended bill of particulars could not provide the missing factual detail; and (4) the guilty plea did not establish whether CO intentionally authored false statements or reports that resulted in disciplinary action against the inmate. Matter of Rademacher v Schneiderman, 155 A.D.3d 1459, 66 N.Y.S.3d 541, 2017 N.Y. App. Div. LEXIS 8476 (N.Y. App. Div. 3d Dep't 2017).

City police officers who allegedly knowingly participated in illegal card games within the limits of the city and failed in the performance of their duty to make proper arrests violated statute. People v Heckt, 62 Misc. 2d 287, 306 N.Y.S.2d 320, 1969 N.Y. Misc. LEXIS 950 (N.Y. County Ct. 1969).

Unauthorized act of correction officer in assaulting inmate was an act relating to his office within the meaning of Penal L § 195.00. People v Volpicello, 72 Misc. 2d 641, 340 N.Y.S.2d 154, 1972 N.Y. Misc. LEXIS 1222 (N.Y. County Ct. 1972).

Defendant was acting within her colorable authority as police officer when she allegedly filed false charges against complainant and solicited bribe for rescinding them, and she was properly charged with first degree attempted coercion, second degree attempted grand larceny, third degree bribe receiving, fourth degree criminal solicitation and official misconduct where she summoned fellow officers, informed them of fact that she was police officer, directed them to arrest complainant, then tried to use her position as police officer and her special relationship with district attorney's office to effect dismissal of false charges; qualification that defendant was off-duty and out of uniform at time of incident, versus on-duty, was distinction without difference. People v Gray, 172 Misc. 2d 14, 656 N.Y.S.2d 145, 1997 N.Y. Misc. LEXIS 97 (N.Y. Sup. Ct. 1997).

Because going to a doctor was not clearly inherent in the office of a corrections officer, and because there was no legally sufficient evidence presented to a grand jury that supported an allegation that defendant failed to go to a chiropractor on the days defendant sought N.Y. Gen. Mun. Law § 207-c benefits, pursuant to N.Y. Crim. Proc. Law §§ 170.30(a), 100.35, 200.50(7), the information charging defendant with official misconduct under N.Y. Penal Law § 195.00(2) was dismissed as legally insufficient. People v Ridge, 887 N.Y.S.2d 811, 25 Misc. 3d 432, 242 N.Y.L.J. 22, 2009 N.Y. Misc. LEXIS 1795 (N.Y. Dist. Ct. 2009).

Defendant's failure to disclose the fact that a suspect was incarcerated on the date of a charged robbery was not a violation of a duty to discluse exculpatory information as there was no question that the suspect knew, or should have known, that he was incarcerated on that date and could not have committed the alleged robbery on that date. People v Lemma, 959 N.Y.S.2d 655, 39 Misc. 3d 399, 2013 N.Y. Misc. LEXIS 511 (N.Y. Dist. Ct. 2013), rev'd, in part, 50 Misc. 3d 34, 22 N.Y.S.3d 280, 2015 N.Y. Misc. LEXIS 3548 (N.Y. App. Term 2015).

Trial court erred in dismissing a count of an indictment, charging official misconduct pursuant to N.Y. Penal Law § 195.00(1), because one of the victims testified that defendant, a police officer, followed her vehicle while driving his patrol vehicle, pulled her vehicle over, and kissed her cheek. People v Watson, 32 A.D.3d 1199, 821 N.Y.S.2d 328, 2006 N.Y. App. Div. LEXIS 11141 (N.Y. App. Div. 4th Dep't), app. denied, 7 N.Y.3d 929, 827 N.Y.S.2d 698, 860 N.E.2d 1000, 2006 N.Y. LEXIS 4109 (N.Y. 2006).

Alleged improper time reporting by defendant correction officer provided defendant a benefit because her paycheck would have been less had she properly recorded her time. People v Simmons, 55 Misc. 3d 575, 49 N.Y.S.3d 615, 2017 N.Y. Misc. LEXIS 324 (N.Y. County Ct. 2017).

Defendant's actions constituted a flagrant, significant, and intentional abuse of authority by someone empowered to enforce the law that warranted an official misconduct charge, rather than a mere serious error in judgment, which could be properly addressed in a disciplinary forum, where defendant reported to work as a police officer when intoxicated, drove a police vehicle, and responded in a bizarre and aberrational manner to a call involving what appeared to be a mere noise complaint; defendant acted with the intent to deprive his partner, his fellow police officers and the citizens of the benefit of a sober police officer. People v Evans, 57 Misc. 3d 320, 63 N.Y.S.3d 196, 2017 N.Y. Misc. LEXIS 2591 (N.Y. Sup. Ct. 2017).

In an action by a former city investigator against a city, city agency, and police department, alleging, inter alia, violation of 42 U.S.C.S. § 1983, false arrest, malicious prosecution, and abuse of process, following the investigator's acquittal on charges of petit larceny, in violation of N.Y. Penal Law § 155.25, falsifying business records in the first degree, in violation of N.Y. Penal Law § 175.10, offering a false instrument in the first degree, in violation of N.Y. Penal Law § 175.35, and official misconduct, in violation of N.Y. Penal Law § 195.00, the city, city agency, and police department were entitled to qualified immunity on the investigator's claims because, regarding the investigator's 42 U.S.C.S. § 1983 malicious prosecution claim, it was the investigator's burden to rebut the presumption of probable cause that arose from his indictment, and the investigator failed to present evidence other than mere conjecture that his indictment was procured as a result of conduct undertaken by the city, city agency, or police department in bad faith, and, regarding the investigator's 42 U.S.C.S. § 1983 false arrest and abuse of process claims, the evidence created a sufficient basis for a reasonable officer to believe that the investigator had stolen a ring and, therefore, that probable cause existed for his arrest, and there was no evidence of any abuse of process surrounding the investigator's arrest and prosecution. Savino v City of New York, 331 F.3d 63, 2003 U.S. App. LEXIS 10263 (2d Cir. N.Y. 2003).

Police officer who took woman into custody, implying that she was under arrest, telling her that she could be placed in jail for years and never be able to work again, and coerced woman into having sexual intercourse with him in return for which police officer would destroy alleged arrest record, was guilty of official oppression as police officer was public officer acting under color of legal authority and injured person in her person, property and rights. Government of Virgin Islands v Derricks, 810 F.2d 50, 23 V.I. 449, 1987 U.S. App. LEXIS 1181 (3d Cir. V.I. 1987).

3. Judges; district attorneys

An order affirming the dismissal of an indictment charging defendant, a Supreme Court Justice, with issuing a false certificate and official misconduct is affirmed; the trial court had found that "interest-of-justice considerations by themselves" did not provide a sufficient basis for dismissal of the indictment, but had dismissed the indictment for "various [other] legal reasons . . . and in the interest of justice". People v Tyler, 46 N.Y.2d 251, 413

N.Y.S.2d 295, 385 N.E.2d 1224, 1978 N.Y. LEXIS 2416 (N.Y. 1978).

An indictment charging a Judge with official misconduct under subdivision 2 of section 195.00 of the Penal Law, which provides that a public servant is guilty of official misconduct when, with intent to obtain a benefit or to injure or deprive another person of a benefit, he knowingly refrains from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office, is insufficient and is dismissed where, for the purpose of defining the duty "clearly inherent in the nature of his office" which allegedly was violated, it only incorporates by reference the provisions of the Code of Judicial Conduct, since the Legislature may not delegate the essentially legislative function of definition of a substantive criminal offense and no legislative enactment incorporates or otherwise adopts the provisions of the Code of Judicial Conduct, and the disciplining of Judges for violation of ethical standards not involving independently criminal conduct has been reserved by the State Constitution (NY Const, art VI, § 22) to proceedings instituted before the Commission on Judicial Conduct. People v La Carrubba, 46 N.Y.2d 658, 416 N.Y.S.2d 203, 389 N.E.2d 799, 1979 N.Y. LEXIS 1902 (N.Y. 1979).

The conduct of law enforcement agents creating the predicate for a defendant's crime by contriving a criminal case which could be "fixed" by the defendant, while he was an Assistant District Attorney, did not offend due process and the defendant's prosecution which resulted in his conviction of bribe receiving and receiving a reward for official misconduct was, therefore, proper. The government did not manufacture a crime which otherwise would not likely have occurred; the defendant's participation in the corrupt scheme was not the least bit reluctant and was not the product of active encouragement or instigation by the government; the government's motivation was to weed out existing corruption and restore the integrity of the criminal justice system in the county, and its conduct was consistent with a sense of justice and respect for the defendant's fundamental rights. People v Archer, 68 A.D.2d 441, 417 N.Y.S.2d 507, 1979 N.Y. App. Div. LEXIS 10959 (N.Y. App. Div. 2d Dep't 1979), aff'd, 49 N.Y.2d 978, 428 N.Y.S.2d 949, 406 N.E.2d 804, 1980 N.Y. LEXIS 2325 (N.Y. 1980).

Indictment charging official misconduct, stated in language of statute, and further alleging that defendant district attorney secured the release of students from attendance at school for unauthorized purposes, substantially conformed to statutory requirements and was legally sufficient, notwithstanding fact that indictment did not specify "benefit" that district attorney received from his actions. Where indictment charging district attorney with official misconduct, unlawful imprisonment, endangering welfare of child, criminal possession of forged instrument, forgery, and assault, arose out of allegations that district attorney improperly used official documents to secure release of female students from schools and bound and gagged them, joinder of all counts in one indictment was proper. People v D'Arcy, 79 Misc. 2d 113, 359 N.Y.S.2d 453, 1974 N.Y. Misc. LEXIS 1595 (N.Y. County Ct. 1974).

Defendant cannot be charged with a violation of N.Y. Jud. Law § 18 twice, once for having given advice and a second time for having received compensation because the prohibition is directed, not at advice and compensation separately, but at compensation for advice; thus, where defendant, who was a judge, was charged with three counts of official misdconduct under N.Y. Penal Law § 195.00 premised upon his alleged violation of the prohibition against compensation for advice under N.Y. Jud. Law § 18, the evidence was legally sufficient to support one, but only one, count of official misconduct, and the two remaining counts were dismissed. People v Garson, 775 N.Y.S.2d 827, 4 Misc. 3d 258, 2004 N.Y. Misc. LEXIS 473 (N.Y. Sup. Ct. 2004), aff'd, 17 A.D.3d 695, 793 N.Y.S.2d 539, 2005 N.Y. App. Div. LEXIS 4427 (N.Y. App. Div. 2d Dep't 2005).

Defendant cannot be charged with a violation of N.Y. Jud. Law § 18 twice, once for having given advice and a second time for having received compensation because the prohibition is directed, not at advice and compensation separately, but at compensation for advice; thus, where defendant, who was a judge, was charged with three counts of official misdconduct under N.Y. Penal Law § 195.00 premised upon his alleged violation of the prohibition against compensation for advice under N.Y. Jud. Law § 18, the evidence was legally sufficient to support one, but only one, count of official misconduct, and the two remaining counts were dismissed. People v Garson, 775 N.Y.S.2d 827, 4 Misc. 3d 258, 2004 N.Y. Misc. LEXIS 473 (N.Y. Sup. Ct. 2004), aff'd, 17 A.D.3d 695, 793 N.Y.S.2d 539, 2005 N.Y. App. Div. LEXIS 4427 (N.Y. App. Div. 2d Dep't 2005).

II. Under Former Law

A. Under Former § 1857

4. In general

The term "person," as used in this section, includes a corporation. People v Long I. R. Co., 134 N.Y. 506, 31 N.E. 873, 134 N.Y. (N.Y.S.) 506, 1892 N.Y. LEXIS 1544 (N.Y. 1892).

This section applies only to wilful neglect or omission to perform duties specifically enjoined by law, and this refers to some duty or duties more definitely enjoined by law than the defendants general responsibility for the management and supervision of the personnel of the Nassau County Children's Shelter. People v Shapiro, 20 N.Y.2d 694, 282 N.Y.S.2d 762, 229 N.E.2d 442, 1967 N.Y. LEXIS 1293 (N.Y. 1967).

Offenses by public officials, even though acting in a judicial or semi-judicial capacity, are punishable under this section. People ex rel. Devery v Jerome, 73 N.Y.S. 306, 36 Misc. 256, 1901 N.Y. Misc. LEXIS 739 (N.Y. Sup. Ct. 1901).

Where a municipal officer violates this section mandamus will not issue to him if there is an adequate remedy by the ordinary process of the courts. People ex rel. Clapp v Listman, 82 N.Y.S. 263, 40 Misc. 372, 1903 N.Y. Misc. LEXIS 172 (N.Y. Sup. Ct.), aff'd, 84 A.D. 633, 82 N.Y.S. 784, 1903 N.Y. App. Div. LEXIS 1883 (N.Y. App. Div. 1903).

A duly elected and qualified member of a town board of assessors who refuses to perform the duties of his office is entitled to the salary as fixed by the town board. 1946 Ops St Compt 281.

5. Jurisdiction

The city court of Long Beach has exclusive jurisdiction of prosecution of police officer for wilful neglect of duty, subject only to right of removal as prescribed in Code of Criminal Procedure. People ex rel. Kohut v Hendrickson, 249 A.D. 528, 293 N.Y.S. 323, 1937 N.Y. App. Div. LEXIS 9639 (N.Y. App. Div.), aff'd, 276 N.Y. 563, 12 N.E.2d 577, 276 N.Y. (N.Y.S.) 563, 1937 N.Y. LEXIS 1132 (N.Y. 1937), aff'd, 276 N.Y. 564, 12 N.E.2d 577, 276 N.Y. (N.Y.S.) 564, 1937 N.Y. LEXIS 1133 (N.Y. 1937), aff'd, 276 N.Y. 566, 12 N.E.2d 578, 276 N.Y. (N.Y.S.) 566, 1937 N.Y. LEXIS 1134 (N.Y. 1937).

The county court has jurisdiction to try a person accused of violating this section, although the crime was committed in a village of the first class having a police justice with jurisdiction of misdemeanors. People ex rel. Smith v McClellan, 232 N.Y.S. 9, 133 Misc. 280, 1928 N.Y. Misc. LEXIS 1169 (N.Y. Sup. Ct. 1928).

6. Indictment

An indictment charging a County Treasurer with violating this section by failing to keep true account of all receipts and expenditures in books provided by the county for that purpose pursuant to § 550 of the County Law was insufficient to inform defendant of the charge against him for lack of specificity as to books involved and the nature of the omissions, inaccuracies, etc., forming the basis of the charge. People v Field, 20 A.D.2d 609, 245 N.Y.S.2d 447, 1963 N.Y. App. Div. LEXIS 2600 (N.Y. App. Div. 3d Dep't 1963).

An indictment was sufficient where it charged police officer with wilful omission to perform duties required by the police department under authority of city charter. People v Grawunder, 2 Misc. 2d 126, 151 N.Y.S.2d 137, 1956 N.Y. Misc. LEXIS 1924 (N.Y. Sup. Ct. 1956).

An indictment against the warden of Sing Sing prison charging that he "unlawfully and wilfully did commit various unlawful and unnatural acts with the inmates," does not charge a crime under this section. People v Osborne, 158 N.Y.S. 419 (N.Y. Sup. Ct. 1916).

Indictment was sufficient to accuse a police charge captain of official misconduct and obstruction of governmental administra-

tion, in violation of Penal Law § 195.00, because it alleged that he failed to conduct a breath test of a detective within two hours of an alleged drunk driving accident, with the goal of avoiding criminal charges. People v Yaguchi, 62 Misc. 3d 1054, 91 N.Y.S.3d 862, 2019 N.Y. Misc. LEXIS 171 (N.Y. Sup. Ct. 2019).

7. Practice and procedure, generally

It was reversible error for the prosecution, in selecting a jury, to refer to the defendant as a suspended police officer. Also, it was error to charge that the defendant could be found guilty of violating § 1857 of the Penal Law if he had reasonably suspected that a crime had been committed, but did not arrest the suspected perpetrator, since that charge failed to correlate reasonable suspicion and temporary questioning on one hand and reasonable cause and arrest on the other. People v Davies, 26 A.D.2d 573, 271 N.Y.S.2d 132, 1966 N.Y. App. Div. LEXIS 3951 (N.Y. App. Div. 2d Dep't 1966).

8. Particular acts as omission of duty

The wilful neglect of a board of excise to decide a case submitted to it is an unlawful neglect to perform a duty imposed by law. People v Meakim, 133 N.Y. 214, 30 N.E. 828, 133 N.Y. (N.Y.S.) 214, 1892 N.Y. LEXIS 1302 (N.Y. 1892).

There is no statute requiring directors of a trust company to administer its affairs diligently and honestly, and consequently such directors cannot be indicted for neglect of duty in that regard as public officers. People v Knapp, 206 N.Y. 373, 99 N.E. 841, 206 N.Y. (N.Y.S.) 373, 1912 N.Y. LEXIS 980 (N.Y. 1912).

Where petition for removal from office of chief city magistrate of city of New York, charged that he held certain defendants, arrested for unlawful assembly (a misdemeanor), without bail in violation of this section, respondent is not guilty of any violation of law, where information charges crime of riot (a felony) as well as misdemeanor, and no application was made to admit defendants to bail, and where petition contains no charge of corrupt intent, malice, unfairness or bias. American Civil Liberties Union, Inc. v McAdoo, 229 A.D. 511, 242 N.Y.S. 696, 1930 N.Y. App. Div. LEXIS 10431 (N.Y. App. Div. 1930).

A district attorney who surrenders the minutes of the grand jury, except when lawfully superseded, or upon a court order, violates this section. In re Osborne, 117 N.Y.S. 169, 62 Misc. 575, 1909 N.Y. Misc. LEXIS 603 (N.Y. Gen. Sess. 1909).

Duty prescribed by rules and regulations of department of correction is not a duty enjoined by law and therefore willful omission by warden of New York County Penitentiary to perform such duty is not a misdemeanor under §§ 1841 or 1857. People v McCann, 273 N.Y.S. 839, 151 Misc. 792, 1934 N.Y. Misc. LEXIS 1567 (N.Y. Gen. Sess.), aff'd, 242 A.D. 515, 275 N.Y.S. 887, 1934 N.Y. App. Div. LEXIS 6112 (N.Y. App. Div. 1934).

The officials of a town whose duty it is to furnish funds for home relief may be punished for failure to provide the necessary cash for cash relief. 1946 Op St Compt No. 46–258.

9. —Failure of official to file report

Where a town supervisor willfully refuses to furnish a monthly report pursuant to Town Law § 119 he may be removed from office and/or prosecuted for the violation of this section and/or § 1841 of the Penal Law. 1957 Ops St Compt 250.

10. —Failure of police official to enforce laws

A police captain of the City of New York who fails to perform the general duty imposed upon him as a peace officer to suppress houses of prostitution located within his precinct, or the special duty imposed upon him by § 315 of the Greater New York Charter with reference to such houses, is guilty under this section and § 1841. People v Herlihy, 66 A.D. 534, 73 N.Y.S. 236, 1901 N.Y. App. Div. LEXIS 2443 (N.Y. App. Div. 1901), aff'd, 170 N.Y. 584, 63 N.E. 1120, 170 N.Y. (N.Y.S.) 584, 1902 N.Y. LEXIS 1132 (N.Y. 1902).

Failure of a police officer to make an arrest for a misdemeanor committed in his presence renders him liable to prosecution. Sharp v Erie R. Co., 90 A.D. 502, 85 N.Y.S. 553, 1904 N.Y. App. Div. LEXIS 77 (N.Y. App. Div. 1904), rev'd, 184 N.Y. 100, 76 N.E. 923, 184 N.Y. (N.Y.S.) 100, 1906 N.Y. LEXIS 1341 (N.Y. 1906).

B. Under Other Former Laws

11. Under former § 854

A deputy police commissioner acts judicially in trying members of the police force, but this does not protect him from indictment where he is guilty of oppression. People ex rel. Devery v Jerome, 73 N.Y.S. 306, 36 Misc. 256, 1901 N.Y. Misc. LEXIS 739 (N.Y. Sup. Ct. 1901).

12. —Injunction to restrain violation

Equity will not intervene to restrain the police authorities from stationing officers outside of a place having a liquor tax certificate, when such authorities suspect the place of being conducted as a disorderly house, and from notifying customers who are in the place and those who are about to enter the same that it is a disorderly house which is likely to be raided at any moment, and that those who are on the premises at the time of such raid are liable to arrest. The proprietor of the place, if oppressed or injured by any unlawful act of the authorities, may invoke this section or he may maintain an action at law for damages. Delaney v Flood, 183 N.Y. 323, 76 N.E. 209, 183 N.Y. (N.Y.S.) 323, 1906 N.Y. LEXIS 785 (N.Y. 1906).

An action to restrain the police authorities from posting patrolmen in front of one's premises, who is suspected of conducting a poolroom in violation of law, should be brought under this section. Stevens v McAdoo, 112 A.D. 458, 98 N.Y.S. 553, 1906 N.Y. App. Div. LEXIS 706 (N.Y. App. Div. 1906).

Where the plaintiff was engaged in an honest and reputable business selling wallpaper and paints, equity will enjoin the action of the police in stationing officers on his premises and interfering with customers desiring to enter the building for the transaction of business, in the absence of evidence that plaintiff conducted or the premises were used for unlawful activities. McGorie v McAdoo, 113 A.D. 271, 99 N.Y.S. 47, 1906 N.Y. App. Div. LEXIS 1409 (N.Y. App. Div. 1906).

Injunction will not be granted to restrain arrest of plaintiff, proprietor of moving picture show, for opening it on Sunday contrary to conditions of license granted to him by mayor of city, but if plaintiff is oppressed or injured by any unlawful act of defendant, chief of police, he may invoke this section, or bring action against him for damages. Equity will not restrain enforcement of criminal law, no matter how mistaken such enforcement may be. Person oppressed or injured by such unlawful enforcement may invoke this section, or bring action at law for damages. Klinger v Ryan, 153 N.Y.S. 937, 91 Misc. 71, 1915 N.Y. Misc. LEXIS 759 (N.Y. Sup. Ct. 1915).

To grant injunction restraining police from entering premises without warrant is to determine without evidence that future acts of police will be unlawful. Unity Contract Bridge Club, Inc. v Wallander, 63 N.Y.S.2d 455, 187 Misc. 23, 1946 N.Y. Misc. LEXIS 2429 (N.Y. Sup. Ct. 1946).

13. —Particular acts as oppression

Evidence that a police officer who had been assaulted by the complainant had requested and received payment of money from complainant to avoid jail sentence was sufficient to raise question for jury on a charge of oppression. People v Rudolph, 303 N.Y. 73, 100 N.E.2d 142, 303 N.Y. (N.Y.S.) 73, 1951 N.Y. LEXIS 689 (N.Y. 1951).

Charges against defendant of extortion (§ 850) and oppression (§ 854), in that he obtained money from complaining witness by threatening to report him to commissioner of motor vehicles and thereby cause him to fear he would lose his automobile operator's license, were not sustained, where evidence was sufficient to convict complaining witness of driving a motor vehicle while intoxicated, and such conviction would have been sufficient cause for revocation of his operator's license. People v Learman, 261 A.D. 748, 28 N.Y.S.2d 360, 1941 N.Y. App. Div. LEXIS 7428 (N.Y. App. Div. 1941).

Where a police captain, accompanied by three patrolmen, entered a retail cigar and tobacco store, and remained in possession all one day, and then continuously for eleven days, and refused to go on demand and protest of the proprietor saying that they were officers, and by their presence gave the store a bad name, injuring complainant's good name and business, said acts fully make out the crime of oppression under this section. People v Summers, 82 N.Y.S. 297, 40 Misc. 384, 1903 N.Y. Misc. LEXIS 510 (N.Y. Sup. Ct. 1903).

Where a person went to a poolroom to collect a bill and while there the place was raided by police officers upon information that

gambling was in progress and an officer, though informed of the lawful purpose for which such person was upon the premises, called him an opprobrious name, struck him and took him before a magistrate upon a charge of disorderly conduct, upon which the magistrate discharged him, and it does not appear that he was engaged either in gambling or in the commission of any overt act which would subject him to arrest, the officer is guilty of oppression under this section. People ex rel. Reardon v Flynn, 111 N.Y.S. 1065, 58 Misc. 621, 1908 N.Y. Misc. LEXIS 417 (N.Y. Sup. Ct. 1908).

14. Under former § 885

An intent to defraud is not an element under this section. Marden v Dorthy, 160 N.Y. 39, 54 N.E. 726, 160 N.Y. (N.Y.S.) 39, 1899 N.Y. LEXIS 1136 (N.Y. 1899).

In trial on indictment under this section charging that commissioner of deeds "willfully certified falsely" that certain mortgage was duly acknowledged before him by person purporting to be mortgagor, in order to show knowledge, intention and absence of mistake, district attorney has right to prove similar acts, done under similar circumstances at about same time, with intent to defraud same person by same means. People v Marrin, 205 N.Y. 275, 98 N.E. 474, 205 N.Y. (N.Y.S.) 275, 1912 N.Y. LEXIS 1217 (N.Y. 1912).

An attorney may be subject to disbarment for executing false acknowledgments. In re Gottheim, 153 A.D. 779, 138 N.Y.S. 636, 1912 N.Y. App. Div. LEXIS 11185 (N.Y. App. Div. 1st Dep't 1912).

15. Under former § 997

The fact that the chief of police placed individuals under arrest and placed them in custody is prima facie evidence that there was no failure to inform. In re Doherty, 58 Misc. 2d 347, 295 N.Y.S.2d 368, 1964 N.Y. Misc. LEXIS 1225 (N.Y. Sup. Ct. 1964).

16. Under former § 1830

Sections 1826 and 1830 of the Penal Law are not violated by New York City Police Commissioner regulations requiring fingerprinting of all cabaret employees who come in contact with patrons and further requiring them to obtain identification cards for which a two-dollar charge is imposed. Simone v Kennedy, 26 Misc. 2d 748, 212 N.Y.S.2d 838, 1961 N.Y. Misc. LEXIS 3336 (N.Y. Sup. Ct. 1961).

17. Under former § 1839

The crime of committing "any unlawful act tending to hinder justice," dealt with in subd 2 of this section, by "justice" means that end which ought to be reached in a case by the regular administration of the principles of law involved as applied to the facts, and by "hinder" to "obstruct," impede, or prevent, with or without use of direct force or means. An indictment charging police officers with transporting a woman who had confessed to commission of certain acts which would make her a vagrant, with knowledge of her guilt and likewise with knowledge of the identity of a male participant in such acts, from Syracuse to Rochester, was sufficient to charge them with committing an unlawful act tending to hinder justice under subd 2 of this section. People v Longo, 16 A.D.2d 297, 227 N.Y.S.2d 815, 1962 N.Y. App. Div. LEXIS 9807 (N.Y. App. Div. 4th Dep't 1962).

18. Under former § 1841

The removal of a commissioner of excise of the City of New York, under § 109 of the Consolidation Act, was not a punishment within the meaning of this section. People v Meakim, 133 N.Y. 214, 30 N.E. 828, 133 N.Y. (N.Y.S.) 214, 1892 N.Y. LEXIS 1302 (N.Y. 1892).

A wilful failure to arraign a prisoner promptly is a crime, but such wrongful detention, without more, does not invalidate the confession obtained during the detention. People v Mummiani, 258 N.Y. 394, 180 N.E. 94, 258 N.Y. (N.Y.S.) 394, 1932 N.Y. LEXIS 1198 (N.Y. 1932).

This section applies only to wilful neglect or omission to perform duties specifically enjoined by law, and this refers to some duty or duties more definitely enjoined by law than the defendants general responsibility for the management and supervision of the personnel of the Nassau County Children's Shelter. People v Shapiro, 20 N.Y.2d 694, 282 N.Y.S.2d 762, 229 N.E.2d 442, 1967 N.Y. LEXIS 1293 (N.Y. 1967).

A captain of police in the city of New York, who omits to discharge the duty imposed on him to suppress houses of prostitution, is punishable under this section and § 1857, in spite of the special provisions of the charter vesting the power of punishing officers in the police board. People v Herlihy, 66 A.D. 534, 73 N.Y.S. 236, 1901 N.Y. App. Div. LEXIS 2443 (N.Y. App. Div. 1901), aff'd, 170 N.Y. 584, 63 N.E. 1120, 170 N.Y. (N.Y.S.) 584, 1902 N.Y. LEXIS 1132 (N.Y. 1902).

City Court of Long Beach, subject only to the right of removal as prescribed in the Code of Criminal Procedure, § 57, has exclusive jurisdiction of prosecution of police officers for willful negligence and omission to perform duty enjoined upon them by law in permitting maintenance and operation of certain gambling house within city under this section and § 1857. People ex rel. Kohut v Hendrickson, 249 A.D. 528, 293 N.Y.S. 323, 1937 N.Y. App. Div. LEXIS 9639 (N.Y. App. Div.), aff'd, 276 N.Y. 563, 12 N.E.2d 577, 276 N.Y. (N.Y.S.) 563, 1937 N.Y. LEXIS 1132 (N.Y. 1937), aff'd, 276 N.Y. 564, 12 N.E.2d 577, 276 N.Y. (N.Y.S.) 564, 1937 N.Y. LEXIS 1133 (N.Y. 1937), aff'd, 276 N.Y. 566, 12 N.E.2d 578, 276 N.Y. (N.Y.S.) 566, 1937 N.Y. LEXIS 1134 (N.Y. 1937).

An indictment against a county official for violation of this section was dismissed. The indictment charged that the official had failed to see to it that goods in excess of $1,000 were purchased in compliance with competitive bidding requirements. But there was no evidence that he had knowledge that the goods were purchased wrongfully. People v Hattemer, 4 A.D.2d 674, 164 N.Y.S.2d 188, 1957 N.Y. App. Div. LEXIS 5259 (N.Y. App. Div. 2d Dep't 1957), aff'd, 4 N.Y.2d 837, 173 N.Y.S.2d 812, 150 N.E.2d 239, 1958 N.Y. LEXIS 1079 (N.Y. 1958).

A wilful omission by a deputy police commissioner to cause an arrest may be a violation of this section. People v Porter, 189 N.Y.S. 664, 115 Misc. 301, 1921 N.Y. Misc. LEXIS 1602 (N.Y. Gen. Sess. 1921).

Duty prescribed by rules and regulations of department of correction of city of New York, adopted pursuant to statutory authority given to commissioner of department, is not duty enjoined by law, and therefore willful omission by warden of New York county penitentiary to perform such duty is not misdemeanor under this section or § 1857. People v McCann, 273 N.Y.S. 839, 151 Misc. 792, 1934 N.Y. Misc. LEXIS 1567 (N.Y. Gen. Sess.), aff'd, 242 A.D. 515, 275 N.Y.S. 887, 1934 N.Y. App. Div. LEXIS 6112 (N.Y. App. Div. 1934).

An indictment was sufficient where it charged police officer with wilful omission to perform duties required by the police department under authority of city charter. People v Grawunder, 2 Misc. 2d 126, 151 N.Y.S.2d 137, 1956 N.Y. Misc. LEXIS 1924 (N.Y. Sup. Ct. 1956).

Where a town supervisor willfully refuses to furnish a monthly report pursuant to Town Law § 119, he may be removed from office and/or prosecuted for the violation of this section and/or § 1857 of the Penal Law. 1957 Ops St Compt 250.

19. Under former § 1844

A confession obtained from accused while being unlawfully detained in violation of the "prompt arraignment" statutes and after his attorney has requested and been denied access to him is inadmissible and requires reversal of conviction as in violation of due process regardless of what other evidence lawfully admitted would indicate his guilt. People v Donovan, 13 N.Y.2d 148, 243 N.Y.S.2d 841, 193 N.E.2d 628, 1963 N.Y. LEXIS 973 (N.Y. 1963), limited, People v Gunner, 15 N.Y.2d 226, 257 N.Y.S.2d 924, 205 N.E.2d 852, 1965 N.Y. LEXIS 1537 (N.Y. 1965).

Disobedience by a policeman to the instructions of a police lieutenant, after having arrested another on a criminal charge, does not constitute a violation of this section. People ex rel. Flood v Baker, 150 A.D. 250, 134 N.Y.S. 917, 1912 N.Y. App. Div. LEXIS 7097 (N.Y. App. Div. 1912).

Police officers have no discretion as to when a prisoner should be arraigned and where officer detained a prisoner for 24 hours because of desire to obtain evidence of guilt through confessions, officer was guilty of a misdemeanor under this section. People v Kelly, 264 A.D. 14, 35 N.Y.S.2d 55, 1942 N.Y. App. Div. LEXIS 4055 (N.Y. App. Div. 1942).

Holding incommunicado for fifteen hours an eighteen-year-old boy charged with arson, until a confession was obtained from him after an assault by the arresting officer, made the officer guilty of a crime, requiring new trial for the boy. People v Redmond, 265 A.D. 307, 38 N.Y.S.2d 727, 1942 N.Y. App. Div. LEXIS 5741 (N.Y. App. Div. 1942).

In a rape prosecution, the refusal to charge on the failure of authorities promptly to arraign defendant as bearing on the validity of his confession was reversible error. People v Richmond, 266 A.D. 903, 42 N.Y.S.2d 745, 1943 N.Y. App. Div. LEXIS 5099 (N.Y. App. Div. 1943).

An unexplained delay of sixty-two hours in arraigning a defendant after his arrest constituted grounds for reversal where a confession had been made during this period which influenced the jury and the defendant claimed that he was ill when the so-called confession was made. People v Trinchillo, 2 A.D.2d 146, 153 N.Y.S.2d 685, 1956 N.Y. App. Div. LEXIS 4622 (N.Y. App. Div. 4th Dep't 1956).

20. Under former § 1862

The recording officer may refuse to register a deed acknowledged before one who had no title to the office by virtue of which he claimed to take the acknowledgment. People ex rel. Oaklawn Corp. v Donegan, 226 N.Y. 84, 123 N.E. 71, 226 N.Y. (N.Y.S.) 84, 1919 N.Y. LEXIS 837 (N.Y. 1919).

21. Under former § 1863

An indictment which in one count charges the defendant with the crime of auditing and allowing, as a public officer, a false and fraudulent claim, is not bad for duplicity because, in addition to stating acts constituting the crime charged, it also states acts constituting the crime of fraudulently presenting a false account to a public officer for allowance. This section is distinguished from § 1872 in that the crime under this section can be committed only by a public officer, while that under § 1872 may be committed by a person who, in the form prescribed by law, presents for audit a false and fraudulent charge or claim against a municipal corporation. People v Klipfel, 160 N.Y. 371, 54 N.E. 788, 160 N.Y. (N.Y.S.) 371, 1899 N.Y. LEXIS 1167 (N.Y. 1899).

No claim of falsity or fraud can be predicated upon the presentation of a claim the terms of which are correct, but the sums charged therefor are excessive. People v King, 43 N.Y.S. 975, 19 Misc. 98, 1897 N.Y. Misc. LEXIS 3 (N.Y. County Ct.), aff'd, 15 A.D. 84, 44 N.Y.S. 287, 1897 N.Y. App. Div. LEXIS 404 (N.Y. App. Div. 1897).

An indictment which charges the defendant, as a member of a board of supervisors, possessing the power to audit and allow claims against the county, with knowingly and corruptly using the power to allow a dishonest demand, and to authorize the county auditor to pay it, in violation of this section, and which also charges him with presenting a fraudulent claim (being the same claim presented to the county auditor), to an auditing board for allowance and payment in violation of § 1872, is bad for duplicity as it charges in one count, two specific crimes. People v Stock, 47 N.Y.S. 94, 21 Misc. 147, 1897 N.Y. Misc. LEXIS 543 (N.Y. Sup. Ct. 1897).

Where there are two indictments charging defendant with auditing fraudulent claims in violation of this section and jury has disagreed on trial under first indictment, motion by defendant to quash certain counts in first indictment which allege same crimes as certain counts in second indictment will be granted as matter of right. People v Sloan, 24 N.Y.S.2d 381, 175 Misc. 618, 1940 N.Y. Misc. LEXIS 2493 (N.Y. Sup. Ct. 1940).

An indictment charging defendant with violating this section was not supported by sufficient evidence where it charged him with fraudulent certification of payrolls for employees improperly appointed and was predicated upon the assumption of his guilt on counts of perjury set forth in another indictment, no factual basis having been established. People v Wright, 28 Misc. 2d 719, 214 N.Y.S.2d 461, 1961 N.Y. Misc. LEXIS 2943 (N.Y. County Ct. 1961).

The knowledge of the defendant must be shown to be knowledge that the claim when certified to was false and fraudulent, and, where the act itself has no necessary element of criminal character, the guilty intent becomes an independent act and must be proved accordingly. People v Gresser, 124 N.Y.S. 581 (N.Y. Sup. Ct. 1910).

An ineligible person appointed to public office may not continue holding the office nor receive the salary for the balance of the term after discovery of the ineligibility. 1967 Ops St Compt File #474.

22. Under former § 1864

Transfers of city funds, made by direction of defendant mayor, from one bank to another bank, which latter bank was subsequently closed by the superintendent of banks, are not "transfers" within the meaning of this section. People v Frankel, 264 N.Y. 658, 191 N.E. 612, 264 N.Y. (N.Y.S.) 658, 1934 N.Y. LEXIS 1690 (N.Y. 1934).

Evidence that the defendant, a Commissioner of Public Welfare, aided codefendant drug store proprietors in receiving drugs at an institutional discount by receiving the drugs ostensibly ordered for a county home by the drug store proprietors at his residence was sufficient to warrant a return of indictments against him for violation of this section. People v Kirkup, 4 N.Y.2d 209, 173 N.Y.S.2d 574, 149 N.E.2d 866, 1958 N.Y. LEXIS 1068 (N.Y. 1958).

Defendant who had a false name placed on a city payroll and each week drew pay thereunder without doing any work for the city, was properly convicted under this section, although not a public officer. People v Reilly, 255 A.D. 109, 6 N.Y.S.2d 161, 1938 N.Y. App. Div. LEXIS 4670 (N.Y. App. Div. 1938), aff'd, 280 N.Y. 509, 19 N.E.2d 919, 280 N.Y. (N.Y.S.) 509, 1939 N.Y. LEXIS 1351 (N.Y. 1939).

The fine imposed by this section is imposed as punishment and not as restitution and cannot be turned into private use by payment to the surety who has made good the town's loss. No civil right or remedy of either town or surety was in any way impaired or affected by criminal prosecution of accomplice of one convicted of violating this section or by payment of fine as result of her conviction. American Surety Co. v Islip, 268 A.D. 92, 48 N.Y.S.2d 749, 1944 N.Y. App. Div. LEXIS 3116 (N.Y. App. Div. 1944).

A state civil servant employed as a foreman in the Correction Department was not entitled to an order directing the Civil Service Commission to reinstate him where he had been suspended in 1948 for conniving with a fellow employee on the audit of an unlawful claim against the state. Charges of misconduct and incompetency were not served until three years after his suspension. While subdivision 2 of section 22 of the Civil Service Law requires that charges be preferred and determined promptly. Special Term had the power to deny a mandatory order of reinstatement in the light of the employee's laches in moving for reinstatement and conceded misconduct. Fay v Lyons, 282 A.D. 90, 121 N.Y.S.2d 878, 1953 N.Y. App. Div. LEXIS 4402 (N.Y. App. Div. 1953).

The purpose of this section is to punish those who aid in the conversion of property held by, or in the possession of, the State or one of its subdivisions. People v Freistadt, 3 A.D.2d 937, 163 N.Y.S.2d 772, 1957 N.Y. App. Div. LEXIS 5297 (N.Y. App. Div. 2d Dep't 1957), rev'd, 4 N.Y.2d 209, 173 N.Y.S.2d 574, 149 N.E.2d 866, 1958 N.Y. LEXIS 1068 (N.Y. 1958).

Defendant, a case worker for a City Welfare Department, was properly found guilty of violating §§ 1864 and 1865 of the Penal Law upon evidence that she fraudulently caused checks to be issued to welfare recipients and then induced the recipients to indorse the checks back to her or turn over cash received by telling them that the checks were issued by mistake. People v Meadows, 17 A.D.2d 640, 230 N.Y.S.2d 419, 1962 N.Y. App. Div. LEXIS 8685 (N.Y. App. Div. 2d Dep't 1962).

Crime of conniving at audit and payment of false and fraudulent claims against county, whereby accused obtained money of county, was not shown where, in constructing highway, accused was employed as supervisor, and where, being also a truck owner, he circumvented regulations by transferring his trucks, in form only, to his drivers and where they, although merely dummies, presented claims and received payment for work actually done, which accused paid, since claims were not false in absence of showing that services were not rendered or materials not furnished. People v Dally, 24 N.Y.S.2d 692, 175 Misc. 680, 1941 N.Y. Misc. LEXIS 1387 (N.Y. Sup. Ct. 1941).

Since this section proscribes the willful audit of a false claim against the county or the wrongful interference with property held by the county, it would seem to require a specific intent by the defendant to do the county a disservice, as distinct from a general purpose to do an act which might be reprehensible for other reasons. People v Freistadt, 23 Misc. 2d 534, 196 N.Y.S.2d 147, 1960 N.Y. Misc. LEXIS 3830 (N.Y. Sup. Ct. 1960).

23. Under former § 1865

A conviction of violating this section requires the disbarment of an attorney. In re Case, 259 A.D. 1029, 20 N.Y.S.2d 697 (N.Y. App. Div. 1940).

Where defendant "knowingly" kept false accounts and made false entries in cashbook, term "knowingly" means more than carelessness and imports guilty knowledge or evil or fraudulent intent. People v McHugh, 271 A.D. 135, 63 N.Y.S.2d 319, 1946 N.Y. App. Div. LEXIS 2707 (N.Y. App. Div. 1946).

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The deposit of funds into a bank account, without the alteration of any record, does not violate § 1865 of the Penal Law since it does not involve a fraudulent alteration, falsification, or concealment of an account. People v Baranello, 24 A.D.2d 637, 262 N.Y.S.2d 382, 1965 N.Y. App. Div. LEXIS 3497 (N.Y. App. Div. 2d Dep't 1965).

24. Under former § 1866

This section is all-inclusive and relates to the violation of any provisions of law relating to official conduct, since such wilful and corrupt misconduct in office of public officers is an indictable offense and does not come within any of the subdivisions of § 56 of the Code of Criminal Procedure. In re Wilcox, 276 N.Y.S. 117, 153 Misc. 761, 1934 N.Y. Misc. LEXIS 1863 (N.Y. Sup. Ct. 1934).

25. Under former § 1867

A county treasurer was indicted and convicted under this section. He was charged with violating only that portion of the section which reads "or who is guilty of any other malfeasance or wilful neglect of duty in his office." Specifically, he was charged with failing to remove a deputy county treasurer after he knew the deputy had appropriated county money. Held: indictment dismissed for insufficient proof and conviction reversed. There was a serious question as to the validity of that portion of the section under which the treasurer had been indicted, but since there was no proof to sustain a conviction, the court did not pass on the statute's validity. People v Avery, 9 A.D.2d 34, 189 N.Y.S.2d 734, 1959 N.Y. App. Div. LEXIS 7387 (N.Y. App. Div. 3d Dep't 1959).

26. Under former § 1874

The law presumes that all officers entrusted with the custody of public files and records will perform their official duty by keeping the same safely in their offices, and if a paper is not found where, if in existence, it ought to be deposited or recorded, the presumption thereupon arises that no such document has ever been in existence, and until this presumption is rebutted it must stand as proof of such non-existence. Deshong v New York, 176 N.Y. 475, 68 N.E. 880, 176 N.Y. (N.Y.S.) 475, 14 N.Y. Ann. Cas. 169, 1903 N.Y. LEXIS 827 (N.Y. 1903).

The stenographic minutes, including the judges' charge, in a criminal trial were records or other papers in a public office, and a newspaper could compel the stenographer to furnish it with a transcript thereof. New York Post Corp. v Leibowitz, 2 N.Y.2d 677, 163 N.Y.S.2d 409, 143 N.E.2d 256, 1957 N.Y. LEXIS 1009 (N.Y. 1957).

Agency Opinions

Analysis

I. Generally

1. In general

II. Under Former Law

A. Under Former § 1857

2. Particular acts as omission of duty
3. —Failure of official to file report

B. Under Other Former Laws

4. Under former § 854
5. Under former § 1830
6. Under former § 1840
7. Under former § 1865

I. Generally

1. In general

Upon the conviction of a mayor of a city of the crimes of official misconduct and obstructing governmental administration, the office becomes vacant automatically by operation of law. The conviction occurs at the time of the jury verdict of guilt or the entry of a plea of guilty, notwithstanding that no sentence has been imposed and that an appeal has been filed. 1983 NY Ops Atty Gen Mar 28 (informal).

District attorney might, depending upon his or her findings, contend that members of public body violated CLS Penal § 195.00, which concerns "official misconduct," when they violated Open Meetings Law. Comm on Open Gov't OML-AO-2385.

II. Under Former Law

A. Under Former § 1857

2. Particular acts as omission of duty

3. —Failure of official to file report

Any city, town or village officer who fails to make report to local health officer of poor or indigent insane violates this section. 1912 N.Y. Op. Att'y Gen. No. 431.

B. Under Other Former Laws

4. Under former § 854

The "felony" disqualification under Real Property Law § 44-a applies to one convicted in a federal court of extortion by wrongful use of his official power. The felony defined by 18 U.S.C. § 872 is similar to that defined by the Penal Law. 1954 NY Ops Atty Gen Feb 16.

5. Under former § 1830

A notary public, by asking and receiving unauthorized fees for service, subjects himself to criminal prosecution, civil action and possible removal. NY Ops Atty Gen 12 State Dept. 507 (1917).

6. Under former § 1840

A sheriff must accept a prisoner for a county jail when lawfully committed thereto. 1959 NY Ops Atty Gen Dec. 14 (informal).

7. Under former § 1865

Docketing of convictions under Motor Vehicle Law by a justice of the peace as convictions under Penal Law §§ 43 and 1530, is violative of this section. 1926 N.Y. Op. Att'y Gen. No. 92.

Where justice of peace has imposed and collected fines for violations of Vehicle and Traffic Law and has wilfully failed to pay same over to state in accordance with § 73 of this law, he may be prosecuted under this section. 1933 N.Y. Op. Att'y Gen. No. 175.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Extortion by instilling fear that actor will use or abuse his position as a public servant, §§ 155.05(2)(e)(viii), 155.40.

Misconduct relating to banking organizations, CLS Bank §§ 660 et seq.

Timeliness of prosecutions, CLS CPL § 30.10.

Failure to file campaign receipts and expenditure statement, CLS Elec § 14-126.

Selling or fraudulently furnishing a nursing home administrator diploma, license, record, or certificate of registration, or aiding or abetting the same, CLS Pub Health § 2897-b.

Failure to execute mandate and make return, CLS Pub O § 72-a.

Employee or agent of commissioner of transportation divulging confidential information, CLS Trans § 82.

Failure to obey order of Commissioner of Transportation, or other violation of transportation law provisions, CLS Trans §§ 131, 133.

Failure to report a conviction, bail forfeiture, or the fact that a person failed to appear or answer pursuant to a summons, CLS Veh & Tr § 514(7).

Audit and payment of claims in violation of law, CLS Vill § 5-524.

Federal Aspects:

Bribery, graft, and conflicts of interest of public officials, 18 USCS §§ 201 et seq.

Jurisprudences:

35B NY Jur 2d Criminal Law Substantive Principles and Offenses §§ 1312–1321.

31A Am Jur 2d, Extortion, Blackmail, and Threats §§ 7–11.

63C Am Jur 2d, Public Officers and Employees §§ 414 et seq.

Law Reviews:

Ethical standards in government. 18 Alb. L. Rev. 276.

Constructive trust as a remedy for corruption in public office. 54 Colum. L. Rev. 214.

Recovery by municipality against public officials on theory of constructive trust. 55 Colum. L. Rev. 1085.

Municipal conflicts of interest: inconsistencies and patchwork prohibitions. 58 Colum. L. Rev. 157.

Annotations:

What constitutes offense of official oppression. 83 ALR2d 1007.

Liability of governmental unit for intentional assault by employee other than police officer. 17 ALR4th 881.

Criminal Jury Instructions: Official misconduct. CJI2d [NY] Penal Law § 195.00.

§ 195.05. Obstructing governmental administration in the second degree

A person is guilty of obstructing governmental administration when he intentionally obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference, or by means of any independently unlawful act, or by means of interfering, whether or not physical force is involved, with radio, telephone, television or other telecommunications systems owned or operated by the state, or a county, city, town, village, fire district or emergency medical service or by means of releasing a dangerous animal under circumstances evincing the actor's intent that the animal obstruct governmental administration.

Obstructing governmental administration is a class A misdemeanor.

HISTORY:

Add, L 1965, ch 1030, § 1, with substance derived from §§ 196, 490, 1320, 1322, 1824, 1825, 1851; amd, L 1984, ch 956, § 1; L 1998, ch 269, § 2, eff Nov 1, 1998.

Commission Staff Notes: The former Penal Law contained a variety of provisions which punished specific conduct that in some manner obstructed or hampered governmental functions (former §§ 196, 490, 1320, 1322, 1824, 1825, 1851). There was no comprehensive provision directed at such conduct generally. This new section is designed to fill this gap.

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I. Generally

1. In general

As used in statute providing that person is guilty of obstructing governmental administration when he obstructs administration of law by physical force or interference, "interference" must be physical interference. If every element of crime of obstructing governmental administration is not properly recited in the factual parts of an information and the accompanying deposition, review of that issue is not barred by plea of guilty. A citizens band radio message from one motor vehicle operator to another as to the highway location of a radar speed checkpoint does not constitute the crime of obstructing governmental administration. People v Case, 42 N.Y.2d 98, 396 N.Y.S.2d 841, 365 N.E.2d 872, 1977 N.Y. LEXIS 2109 (N.Y. 1977).

Petition alleging that juvenile committed acts which if done by adult would constitute crimes of resisting arrest and second degree obstructing governmental administration was jurisdictionally defective on its face where arresting officer's supporting affidavit simply stated that juvenile kicked him in groin and physically resisted being placed in handcuffs, with intent to prevent him from performing his lawful duty of placing her under arrest; petition failed to allege that underlying arrest (which constituted official function performed by police) was authorized, and thus allegations of petition were insufficient to establish all essential elements of crimes charged. In re Verna C., 143 A.D.2d 94, 531 N.Y.S.2d 344, 1988 N.Y. App. Div. LEXIS 8140 (N.Y. App. Div. 2d Dep't 1988).

While interference necessary to support charge of second degree obstructing governmental administration must at least be physical in nature, inappropriate or disruptive conduct at scene of performance of official function is within ambit of CLS Penal § 195.05, even if no physical force is involved. Willinger v City of New Rochelle, 212 A.D.2d 526, 622 N.Y.S.2d 321, 1995 N.Y. App. Div. LEXIS 1111 (N.Y. App. Div. 2d Dep't 1995).

In prosecution for second degree obstructing governmental administration, it was reversible error to instruct jury that, as matter of law, issuing desk appearance ticket was "official function" of police officer, without also instructing jury to consider whether officer's actions were authorized. People v Greene, 221 A.D.2d 559, 634 N.Y.S.2d 144, 1995 N.Y. App. Div. LEXIS 11928 (N.Y. App. Div. 2d Dep't 1995).

Court properly denied defendant's request to charge justification where no version of evidence showed that any officers used excessive force in effecting arrest of third person so as to justify force used by defendant against officer who was not even involved

in arrest. People v Lucena, 243 A.D.2d 269, 662 N.Y.S.2d 320, 1997 N.Y. App. Div. LEXIS 9297 (N.Y. App. Div. 1st Dep't), app. denied, 91 N.Y.2d 876, 668 N.Y.S.2d 574, 691 N.E.2d 646, 1997 N.Y. LEXIS 4623 (N.Y. 1997).

To establish defendant's guilt of resisting arrest, second degree assault, and second degree obstructing governmental administration, People were required to prove that officer had probable cause to arrest him for disorderly conduct, but were not required to prove that he actually committed disorderly conduct. People v McDermott, 279 A.D.2d 361, 719 N.Y.S.2d 76, 2001 N.Y. App. Div. LEXIS 415 (N.Y. App. Div. 1st Dep't), app. denied, 96 N.Y.2d 803, 726 N.Y.S.2d 381, 750 N.E.2d 83, 2001 N.Y. LEXIS 1677 (N.Y. 2001).

It was reversible error to refuse defendant's request to charge second degree obstructing governmental administration as lesser included offense of second degree assault. People v Sullivan, 284 A.D.2d 917, 728 N.Y.S.2d 320, 2001 N.Y. App. Div. LEXIS 5935 (N.Y. App. Div. 4th Dep't), app. denied, 96 N.Y.2d 942, 733 N.Y.S.2d 382, 759 N.E.2d 381, 2001 N.Y. LEXIS 3590 (N.Y. 2001), app. denied, 97 N.Y.2d 658, 737 N.Y.S.2d 59, 762 N.E.2d 937, 2001 N.Y. LEXIS 4269 (N.Y. 2001).

Convictions of obstructing governmental administration in the second degree and resisting arrest were supported by sufficient evidence where, when police accompanied defendant's mother to her apartment to serve defendant with a protective order, defendant responded belligerently and, ignoring an officer's suggestion that he calm down, repeatedly and aggressively sought to push past the officers and confront his mother; this provided probable cause for his arrest, and he violently resisted that lawful arrest, resulting in injuries to officers. People v Sowell, 25 A.D.3d 386, 808 N.Y.S.2d 46, 2006 N.Y. App. Div. LEXIS 150 (N.Y. App. Div. 1st Dep't), app. denied, 7 N.Y.3d 763, 819 N.Y.S.2d 889, 853 N.E.2d 260, 2006 N.Y. LEXIS 2378 (N.Y. 2006).

Conviction of second degree assault, N.Y. Penal Law § 120.05(3), was reversed because the trial court refused to charge the lesser included offense of third degree obstructing governmental administration; the record contained evidence that a police officer who was kicked in the groin by defendant responded to another call after the incident, did not seek medical attention until he was directed to do so, declined medication, indicated that his pain was subsiding by the time he was discharged from the hospital a few hours after the incident, and that his discomfort over the next several days was vague. Under these circumstances, the jury could have found that defendant did not sustain a physical injury for purposes of second degree assault, and, thus, defendant was entitled to the requested charge down. People v Nisselbeck, 85 A.D.3d 1206, 923 N.Y.S.2d 801, 2011 N.Y. App. Div. LEXIS 4510 (N.Y. App. Div. 3d Dep't 2011).

Defendant's conviction for obstructing governmental administration in the second degree was not against the weight of the evidence because defendant, inter alia, refused to speak with the police, walked away, hit an officer in the face with a lemon wedge, broke free of an officer's grasp and bit him on the hand, punched and head butted a second officer, and refused repeated orders to stop struggling; defendant acknowledged that the occupants of the vehicle that approached her were in uniform. People v McLean, 128 A.D.3d 1106, 8 N.Y.S.3d 696, 2015 N.Y. App. Div. LEXIS 3842 (N.Y. App. Div. 3d Dep't), app. denied, 25 N.Y.3d 1204, 37 N.E.3d 1169, 16 N.Y.S.3d 526, 2015 N.Y. LEXIS 2402 (N.Y. 2015).

There was no way of knowing if the jurors acquitted defendant of the greater counts on the basis of justification so as to mandate acquittal on the lesser count because the verdict sheet did not mention justification, and the court did not instruct the jurors that if they were to find defendant not guilty of the greater counts of assault in the second degree on the basis of justification, they were not to consider the lesser count of obstructing governmental administration in the second degree. People v Gunther, 181 A.D.3d 712, 121 N.Y.S.3d 279, 2020 N.Y. App. Div. LEXIS 1633 (N.Y. App. Div. 2d Dep't 2020).

Trial court properly, upon a jury verdict, convicted defendant of second-degree obstructing governmental administration and resisting arrest because defendant failed to object to the trial court's plan to declare a mistrial, despite an opportunity to do so, the charges were not necessarily based on the acts that were the basis for the charges of which defendant was acquitted, and there was a manifest necessity for a mistrial where one of the jurors was appropriately discharged for misconduct, there were no alternate jurors available—defendant had refused to allow any such replacement and would not proceed without the required jury of 12, and the obstruction and resisting arrest charges were not necessarily based on the acts that were the basis for the charges of which defendant was acquitted. People v Alman, 185 A.D.3d 714, 126 N.Y.S.3d 730, 2020 N.Y. App. Div. LEXIS 3862 (N.Y. App. Div. 2d Dep't), app. denied, 35 N.Y.3d 1092, 155 N.E.3d 780, 131 N.Y.S.3d 287, 2020 N.Y. LEXIS 2382 (N.Y. 2020).

The proof of facts necessary to sustain a charge of assault in the third degree and a charge of resisting arrest are not identical, and therefore the two crimes are different and separate as a matter of fact and law, and a plea of double jeopardy or prior acquittal of the crime of resisting a public officer in the discharge of his duty was without merit. Although the facts may be closely related, the crimes of resisting arrest and assault in the third degree are separate and distinct as a matter of law. People v Minton, 54 Misc. 2d 552, 283 N.Y.S.2d 73, 1967 N.Y. Misc. LEXIS 1325 (N.Y. Dist. Ct. 1967).

A verbal act alone does not constitute physical force or interference with the governmental administration of justice. The gravamen of the charge of obstructing governmental administration is the obstruction, impairment and perversion of the administration of law and forbidding the police officers from conducting an undercover investigation. People v Longo, 71 Misc. 2d 385, 336 N.Y.S.2d 85, 1971 N.Y. Misc. LEXIS 1347 (N.Y. County Ct. 1971).

Statutory definitions of crimes of resisting arrest and obstructing governmental justice include acts which are, in their very nature, attempts; therefore, there can be no such crime as attempt to resist arrest or attempt to obstruct governmental administration. People v Schmidt, 76 Misc. 2d 976, 352 N.Y.S.2d 399, 1974 N.Y. Misc. LEXIS 1986 (N.Y. City Crim. Ct. 1974).

Defendant, who when apprehended for traffic offenses lied to a police officer about his identity using a fictitious or assumed name, and who admitted that he had disposed of his wallet to avoid prosecution under his real name, did not obstruct governmental administration in violation of Penal Law § 195.05, since verbally transmitting information to a police officer does not constitute intimidation, physical force or interference. People v Sherman, 116 Misc. 2d 109, 455 N.Y.S.2d 528, 1982 N.Y. Misc. LEXIS 3842 (N.Y. City Ct. 1982).

A local ordinance of the City of Buffalo entitled "Resisting Officer in Discharge of Duty," which makes it illegal for a person to "refuse to obey a reasonable order or request of a police officer in the discharge of his regular duty" or to "resist or interfere with any officer or employee of the City in the discharge of his regular duty," would not be deemed to be invalid on preemption grounds, since the gravamen of the State obstruction of governmental administration statute (Pen Law § 195.05) is the prohibition of an intentional obstruction by means of intimidation, physical force, or interference, or by means of any independently unlawful act, while the local ordinance restricts less serious behavior than that proscribed by the State statute. People v Flinn, 126 Misc. 2d 570, 482 N.Y.S.2d 418, 1984 N.Y. Misc. LEXIS 3666 (N.Y. City Ct. 1984), aff'd, 130 Misc. 2d 877, 497 N.Y.S.2d 994, 1986 N.Y. Misc. LEXIS 2443 (N.Y. County Ct. 1986).

There was nothing improper in court responding "yes" to juror's inquiry "Does intimidation include verbal?" following supplemental instructions that person is guilty of obstructing governmental administration in second degree under CLS Penal § 195.05 when he intentionally obstructs or attempts to prevent public servant from performing official function by means of "intimidation, physical force or interference," since (1) court's reply was intended to convey that words could constitute part of defendant's attempt to intimidate public officer's performance of official

function and did not imply that "mere words alone" could constitute "intimidation" sufficient to support charge, and (2) legislature's inclusion of word "intimidate" in statute was intended to provide for something other than physical force; thus, defendants' motion to set aside verdict on ground that court provided jury with additional factual consideration affecting verdict would be denied. Misdemeanor information stating that "defendants...with intent to prevent deponent, a Police Officer, from performing his lawful duty...did fight with deponent, jumping on his back and causing him to fall on the ground" was sufficient to allege that defendants physically interfered with police officer's performance of official function in violation of CLS Penal § 195.05, second degree obstruction of governmental administration. People v Jimenez, 138 Misc. 2d 867, 525 N.Y.S.2d 482, 1988 N.Y. Misc. LEXIS 110 (N.Y. Crim. Ct. 1988).

Toy or imitation nature of pistol need not be proven as element of charge of obstruction of governmental administration in second degree arising from use of imitation pistol to threaten government agent about to tow automobile. People v Wilfong, 141 Misc. 2d 574, 533 N.Y.S.2d 814, 1988 N.Y. Misc. LEXIS 652 (N.Y. Crim. Ct. 1988).

Information charging violation of CLS Penal § 195.05, second degree obstruction of governmental administration, which alleged only that defendant threw crack pipe to ground causing it to break as police officer approached, was facially insufficient since essential element of crime is that defendant's conduct involve intimidation, physical force or interference, or independently unlawful act. People v Simon, 145 Misc. 2d 518, 547 N.Y.S.2d 199, 1989 N.Y. Misc. LEXIS 686 (N.Y. City Crim. Ct. 1989).

Information charging violation of CLS Penal § 195.05, second degree obstruction of governmental administration, which alleged only that defendant threw crack pipe to ground causing it to break as police officer approached, was facially insufficient in failing to allege essential element of crime, namely, that defendant's conduct prevented public servant from performing official function. People v Simon, 145 Misc. 2d 518, 547 N.Y.S.2d 199, 1989 N.Y. Misc. LEXIS 686 (N.Y. City Crim. Ct. 1989).

Motion to dismiss information charging defendant with second degree obstruction of governmental administration would be denied where conduct alleged—swallowing of vial of crack cocaine to prevent or impede its recovery by police—constituted "physical interference" with public servant as contemplated by statute, and allegation that police officer attempted to keep defendant from swallowing vial was sufficient to establish that officer was engaged in official police function. Bare allegation that police officer broke her finger in attempting to keep defendant from swallowing vial of crack cocaine failed to establish "physical force" to prevent officer from carrying out official function as necessary element of second degree obstruction of governmental administration, since there were no factual allegations connecting officer's injury to specific acts of force by defendant. People v Ravizee, 146 Misc. 2d 679, 552 N.Y.S.2d 503, 1990 N.Y. Misc. LEXIS 76 (N.Y. City Crim. Ct. 1990).

Defendants who sat and went limp after being arrested for participation in antiabortion demonstration, requiring police to carry them away, could not be convicted of resisting arrest or obstruction of governmental administration in second degree since their conduct did not prevent police from effecting authorized arrest. People v McDaniel, 154 Misc. 2d 89, 593 N.Y.S.2d 154, 1992 N.Y. Misc. LEXIS 595 (N.Y. App. Term 1992), app. denied, 81 N.Y.2d 889, 597 N.Y.S.2d 950, 613 N.E.2d 982, 1993 N.Y. LEXIS 1488 (N.Y. 1993), app. denied, 81 N.Y.2d 892, 597 N.Y.S.2d 954, 613 N.E.2d 986 (N.Y. 1993), app. denied, 81 N.Y.2d 894, 597 N.Y.S.2d 956, 613 N.E.2d 988 (N.Y. 1993).

Information charging defendant with second degree obstructing governmental administration by assaulting police officer who "was in uniform and on patrol performing lawful police duties" was legally insufficient in failing to satisfy statutory element that defendant must have intended to interfere with specific official function. People v Joseph, 156 Misc. 2d 192, 592 N.Y.S.2d 238, 1992 N.Y. Misc. LEXIS 564 (N.Y. City Crim. Ct. 1992).

After rendition of jury verdict convicting defendant of obstructing governmental administration for offering to pay money to 3 police officers so that they would not serve him with Criminal Court summons, it was error to set aside verdict on sole ground that underlying accusatory instrument was facially insufficient because it did not allege that officers' service of Criminal Court summons was "authorized." People v Pappalardo, 180 Misc. 2d 707, 693 N.Y.S.2d 835, 1999 N.Y. Misc. LEXIS 265 (N.Y. App. Term 1999).

Allegation that defendant released live crickets into public auction room, causing attendees to scream, climb onto chairs and run to exits, resulting in suspension of proceedings, sufficiently demonstrated physical interference and independent unlawful act to plead prima facie case of second degree obstruction of governmental administration. People v Spiegel, 181 Misc. 2d 48, 693 N.Y.S.2d 393, 1999 N.Y. Misc. LEXIS 231 (N.Y. City Crim. Ct. 1999).

Court would dismiss, for facial insufficiency, information charging second degree obstructing governmental administration where it was alleged that defendant "a suspect in a narcotics investigation ... ran from the (investigating) officer, thereby preventing (the officer) from conducting an investigation"; fleeing from police officer conducting investigation, by itself, does not constitute "physical" interference with investigation of police officer within meaning of CLS Penal § 195.05. People v Tillman, 184 Misc. 2d 20, 706 N.Y.S.2d 819, 2000 N.Y. Misc. LEXIS 82 (N.Y. City Ct. 2000).

Accusatory instrument charging obstruction of governmental administration need not use words "authorized arrest" so long as factual allegations delineate what obstruction and official function consisted of; however, when arrest forms basis of official function interfered with, defendant may use unauthorized arrest as defense and it is duty of trier of fact to determine if arrest was, in fact, authorized. People v Cacsere, 185 Misc. 2d 92, 712 N.Y.S.2d 298, 2000 N.Y. Misc. LEXIS 325 (N.Y. App. Term 2000).

In prosecution for third degree trespass and second degree obstructing governmental administration arising from confrontation in which defendants attempted to prevent city from clearing "community garden" located on city-owned property, defendants were not entitled to proffer justification defense where confrontation occurred 7 hours before onset of bulldozers and thus impending injury to garden was not "imminent," they failed to explain why they sought no alternative legal remedies in time available to them, and they did not establish that gravity of harm which they sought to avoid could justify their illegal activities. People v Shenker, 187 Misc. 2d 521, 725 N.Y.S.2d 519, 2001 N.Y. Misc. LEXIS 68 (N.Y. City Crim. Ct. 2001).

Inasmuch as the information alleged that defendant took money from people so that he could swipe them into the subway system with a forged metrocard and that he prevented the New York City Transit Authority from collecting the lawful fare, it sufficiently established all of the elements of the charge of obstructing governmental administration in the second degree, for pleading purposes. People v Dixson, 798 N.Y.S.2d 659, 9 Misc. 3d 358, 2005 N.Y. Misc. LEXIS 1286 (N.Y. City Crim. Ct. 2005).

Information charging second degree obstructing governmental administration, N.Y. Penal Law § 195.05, based on defendant's failure to provide a DNA sample was insufficient because there was no allegation that notice of the obligation to provide a sample was ever properly provided to defendant or that he ever refused to comply upon service of such notice. People v Davis, 865 N.Y.S.2d 545, 21 Misc. 3d 953, 2008 N.Y. Misc. LEXIS 6057 (N.Y. City Ct. 2008).

Because defendant refused to leave a park so that it could be cleaned, sat down, and interlocked arms with other persons, the accusatory instrument sufficiently alleged the elements of trespass, disorderly conduct, and second-degree obstructing governmental administration under N.Y. Penal Law §§ 140.00(5), 240.20(6), 195.05; accordingly, there was no basis to dismiss the accusatory instrument under N.Y. Crim. Proc. Law § 170.30(1)(a), (f). People v Nunez, 943 N.Y.S.2d 857, 36 Misc. 3d 172, 2012 N.Y. Misc. LEXIS 1586 (N.Y. City Crim. Ct. 2012).

Trial court found that the interest of justice required it to dismiss an information charging a 17-year-old high school student who was arrested while demonstrating against the war in Iraq with one count of obstruction of governmental administration in the second degree, in violation of N.Y. Penal Law § 195.05,

and two counts of disorderly conduct, in violation of N.Y. Penal Law § 240.20(5) and (6). People v Gragert, 765 N.Y.S.2d 471, 1 Misc. 3d 646, 2003 N.Y. Misc. LEXIS 1239 (N.Y. City Crim. Ct. 2003).

Because an information merely alleged that defendant was seen with what appeared to be marijuana, running into traffic, and dropping the object, pursuant to N.Y. Crim. Proc. Law § 100.15, the information was insufficient to support charges for reckless endangerment, second-degree obstruction of governmental administration, and attempted tampering with physical evidence under Penal Law §§ 120.20, 195.05, 110, 215.40(2). People v Beam, 866 N.Y.S.2d 564, 22 Misc. 3d 306, 240 N.Y.L.J. 91, 2008 N.Y. Misc. LEXIS 6384 (N.Y. City Crim. Ct. 2008).

Trial court erred in convicting defendant of resisting arrest because, while the accusatory instrument sufficiently alleged that the arresting officer had probable cause to believe that defendant committed the offense of second-degree obstructing governmental administration, the trial court's jury charge suggested that defendant could be found guilty of the crime of resisting arrest, even if the arrest were unauthorized, if she used physical force. People v Aitkens, 995 N.Y.S.2d 899, 45 Misc. 3d 50, 2014 N.Y. Misc. LEXIS 4329 (N.Y. App. Term 2014).

2. Constitutional considerations

Having determined that statute prohibiting divulging of eavesdropping warrant was unconstitutional as applied, to petitioner for habeas corpus relief, a private citizen who was convicted thereunder, additional charge of obstructing governmental administration had to also fall since his act could not be independently unlawful; that is, if his speech was constitutionally protected, he could not be punished for exercising that right by giving his alleged criminal act a different name. People ex rel. Serra v Warden, Rikers Island Men's House of Detention, 90 Misc. 2d 654, 395 N.Y.S.2d 602, 1977 N.Y. Misc. LEXIS 2126 (N.Y. Sup. Ct. 1977).

The arrest of a juvenile for obstructing governmental administration, Penal Law § 195.05, was not unlawful as an infringement of freedom of speech and validly served as the predicate for the "authorized arrest" component of the crime of resisting arrest, where eliminating all the speech elements of the juvenile's conduct there was reasonable cause to arrest based solely upon the juvenile's physical presence in a proscribed area and his refusal to obey four lawful police commands to leave the area. In re W., 109 Misc. 2d 788, 441 N.Y.S.2d 188, 1981 N.Y. Misc. LEXIS 2473 (N.Y. Fam. Ct. 1981).

CLS Penal § 195.05 is not void for vagueness in that (1) what is and is not "administration of law or other governmental function" is not beyond understanding of average person, and (2) statute's prohibition of preventing or attempting to prevent "a public servant from performing an official function, by means of intimidation, physical force or interference, or by means of any independently unlawful act" is neither ambiguous nor subject to arbitrary interpretation. People v Santos, 182 Misc. 2d 764, 700 N.Y.S.2d 381, 1999 N.Y. Misc. LEXIS 512 (N.Y. City Crim. Ct. 1999).

Since defendant, a non-suspect believed by police to have witnessed a crime, was not required to respond to officers' questions, there were no grounds for immediately arresting defendant for obstruction of governmental administration; since the arrest was invalid, so was a charge of resisting that arrest, and a disorderly conduct charge was also groundless where it was based on defendant's verbal protest to the unauthorized arrest. People v Ferreira, 807 N.Y.S.2d 832, 10 Misc. 3d 441, 234 N.Y.L.J. 79, 2005 N.Y. Misc. LEXIS 2263 (N.Y. City Crim. Ct. 2005).

Where protesters were arrested after they failed to comply with police instructions to move from a no-demonstration zone to a demonstration area, the protesters' Fourth Amendment claims failed because officers had probable cause to arrest them for obstruction of governmental administration under N.Y. Penal Law § 195.05 since they rejected 17 directives to leave the no-demonstration zone, and an audio recording showed indisputably that they were neither courteous nor compliant. Marcavage v City of New York, 689 F.3d 98, 2012 U.S. App. LEXIS 16081 (9th Cir. Nev. 2012), cert. denied, 568 U.S. 1212, 133 S. Ct. 1492, 185 L. Ed. 2d 548, 2013 U.S. LEXIS 1951 (U.S. 2013).

Penal Law § 195.05, prohibiting obstructing governmental administration, held not constitutionally invalid on its face. Bishop v Golden, 302 F. Supp. 502, 1969 U.S. Dist. LEXIS 9867 (E.D.N.Y. 1969).

In an action under 42 U.S.C.S. § 1983 in which a plaintiff alleged that his civil rights were violated when he was falsely arrested and charged with, inter alia, obstructing governmental information in violation of N.Y. Penal Law § 195.05, an arresting police officer had not established that he was entitled to summary judgment on the claim because there were factual issues remaining concerning whether or not plaintiff's conduct in the courtroom while attending a hearing on a parking ticket provided sufficient probable cause for the arrest and charges. Searles v Pompilio, 652 F. Supp. 2d 432, 2009 U.S. Dist. LEXIS 64725 (S.D.N.Y. 2009).

3. Dealings with police

Defendant, who resisted a police officer's execution of a warrant to search his apartment, was properly convicted of obstructing governmental administration under Penal L § 195.05, although the papers upon which the issuance of the warrant had been based were defective, where the warrant had not be invalid on its face and where defendant had appeared at the hearing on the state's motion for the search warrant. People v Coffaro, 52 N.Y.2d 932, 437 N.Y.S.2d 666, 419 N.E.2d 344, 1981 N.Y. LEXIS 2164 (N.Y. 1981).

Child was properly adjudicated in Family Court to be juvenile delinquent where she responded to police officer's attempt to detain her on investigation of truancy with acts of resistance, including striking officer both before and after arrest, since, had acts been committed by adult, they would have constituted crimes of obstructing governmental administration, attempted second degree assault, and resisting arrest. In re Shannon B., 70 N.Y.2d 458, 522 N.Y.S.2d 488, 517 N.E.2d 203, 1987 N.Y. LEXIS 18970 (N.Y. 1987).

Police officer's statements that defendant injured officers by kicking, punching and biting them while they were making arrest, and scattering newspapers at nearby newsstand, if found to be true, would establish that defendant committed each element of crimes of second degree assault, menacing, resisting arrest, second degree obstruction of governmental administration, and fourth degree criminal mischief. In re Jeremy B., 151 A.D.2d 314, 542 N.Y.S.2d 582, 1989 N.Y. App. Div. LEXIS 7904 (N.Y. App. Div. 1st Dep't 1989).

Evidence supported conviction for second degree obstruction of governmental administration arising from incident in which defendant approached officer from behind in threatening manner while officer was arresting and subduing another individual, despite contention that officer was not aware of defendant's presence and that defendant did not actually come into physical contact with officer, since (1) approach of defendant required that another officer divert his assistance in arrest and intervene to protect officer from defendant, and (2) approach of defendant constituted knowing, physical interference with and disruption of arrest being performed by officer. People v Tarver, 188 A.D.2d 938, 591 N.Y.S.2d 907, 1992 N.Y. App. Div. LEXIS 14675 (N.Y. App. Div. 3d Dep't 1992), app. denied, 81 N.Y.2d 893, 597 N.Y.S.2d 955, 613 N.E.2d 987, 1993 N.Y. LEXIS 1609 (N.Y. 1993).

Evidence was insufficient to support conviction for second degree obstruction of governmental administration where defendant was alleged to have walked away from arresting officer in disobedience to order to stop and to have struggled with police to avoid being handcuffed, since police were not authorized to attempt to detain defendant as they did not possess reasonable suspicion that he was engaged in criminal activity. Defendant may not be convicted of obstructing governmental administration or interfering with police officer in performance of official duty unless it is established that police were engaged in authorized conduct. People v Lupinacci, 191 A.D.2d 589, 595 N.Y.S.2d 76, 1993 N.Y. App. Div. LEXIS 2309 (N.Y. App. Div. 2d Dep't 1993).

Defendant was not victim of selective prosecution for resisting arrest and obstructing governmental administration arising from incident in which he became embroiled in argument with pizza shop employees after they refused to serve his brother, where evidence showed that pizza shop employees immediately complied with police officers' order to stop fighting and that sole basis

for defendant's prosecution was his subsequent attack on police officers. People v England, 191 A.D.2d 706, 595 N.Y.S.2d 793, 1993 N.Y. App. Div. LEXIS 3110 (N.Y. App. Div. 2d Dep't 1993).

Physical interference and obstruction of official duties being performed by police officers was adequately established by evidence that defendant, appearing upset, approached officer who was administering sobriety tests to defendant's friend, and that second officer directed defendant to stop, but defendant pushed past second officer toward first officer. People v Godbold, 207 A.D.2d 1008, 617 N.Y.S.2d 70, 1994 N.Y. App. Div. LEXIS 10256 (N.Y. App. Div. 4th Dep't 1994), app. denied, 85 N.Y.2d 862, 624 N.Y.S.2d 381, 648 N.E.2d 801, 1995 N.Y. LEXIS 869 (N.Y. 1995).

Defendant may not be convicted of interfering with police officer in performance of official function unless it is shown that police were engaged in "authorized" conduct. People v Greene, 221 A.D.2d 559, 634 N.Y.S.2d 144, 1995 N.Y. App. Div. LEXIS 11928 (N.Y. App. Div. 2d Dep't 1995).

Juvenile's acts would not, if committed by adult, be second degree obstruction of governmental administration where her initial untruthfulness about presence of weapon inside apartment, followed by her refusal to disclose its location, did not satisfy elements of CLS Penal § 195.05. In re Kezzia T., 273 A.D.2d 13, 709 N.Y.S.2d 401, 2000 N.Y. App. Div. LEXIS 6104 (N.Y. App. Div. 1st Dep't 2000).

Evidence was legally insufficient to support conviction for obstructing governmental administration in the second degree, N.Y. Penal Law § 195.05, because the arresting officer testified that he was not arresting defendant's son, as charged in the indictment, but another person, when defendant allegedly interfered with performance of the officer's duties. People v Gerecke, 34 A.D.3d 1260, 823 N.Y.S.2d 797, 2006 N.Y. App. Div. LEXIS 15975 (N.Y. App. Div. 4th Dep't), app. denied, 7 N.Y.3d 925, 827 N.Y.S.2d 694, 860 N.E.2d 996, 2006 N.Y. LEXIS 4101 (N.Y. 2006).

Convictions for assault in the second degree, N.Y. Penal Law § 120.05(3), resisting arrest, N.Y. Penal Law § 205.30, and obstructing governmental administration in the second degree, N.Y. Penal Law § 195.05, were improper because there was insufficient evidence to establish that the arrest was lawful; officers lacked reasonable cause to believe that defendant committed offense in their presence, and defendant was not required to respond to the officers' request for identification or to open his door to the officers. Further, the officers were aware that defendant initially provided a fictitious name to them, and thus they lacked reasonable cause to believe that defendant had committed the crime of criminal impersonation. People v Perez, 47 A.D.3d 1192, 851 N.Y.S.2d 747, 2008 N.Y. App. Div. LEXIS 2857 (N.Y. App. Div. 4th Dep't), app. denied, 10 N.Y.3d 814, 857 N.Y.S.2d 48, 886 N.E.2d 813, 2008 N.Y. LEXIS 1266 (N.Y. 2008).

Conviction of resisting arrest was supported by sufficient evidence because, inter alia, an officer's testimony supported a finding that he could have reasonably believed that defendant was recklessly creating a risk of public inconvenience, annoyance, or alarm by his conduct during a traffic stop of another individual and the area in which the traffic stop occurred included a municipal building, a diner and private homes and that defendant was swearing and appeared to be shouting at the stopped individual that he was going to kill him; thus, there was probable cause to arrest defendant for disorderly conduct and obstructing governmental administration. The testimony of two officers concerning defendant's body language and conduct in refusing to allow them to handcuff him, and the fact that it took two officers to restrain him, demonstrated his intent to resist arrest. People v Lepard, 83 A.D.3d 1214, 922 N.Y.S.2d 585, 2011 N.Y. App. Div. LEXIS 2913 (N.Y. App. Div. 3d Dep't 2011), app. denied, 18 N.Y.3d 925, 942 N.Y.S.2d 464, 965 N.E.2d 966, 2012 N.Y. LEXIS 763 (N.Y. 2012).

Defendant-bar owner's guilt of the crime of "obstructing governmental administration" would be established, as alleged in the information, challenged as not alleging an offense, if proof later showed that, when police officers sought to make an inspection pursuant to statute of premises licensed to sell alcoholic beverages, defendant stood in officer's way and stated his bar was private and officer would have to lock him up if he wanted to check the bar. People v De Martino, 67 Misc. 2d 11, 323 N.Y.S.2d 297, 1971 N.Y. Misc. LEXIS 1521 (N.Y. Dist. Ct. 1971).

Any action which would bar a police officer from effecting a lawful arrest in a peaceable manner or prevent a police officer from conveying a lawfully arrested person to the police station without physical interference, is proscribed by the statute. People v Shea, 68 Misc. 2d 271, 326 N.Y.S.2d 70, 1971 N.Y. Misc. LEXIS 1135 (N.Y. Spec. Sess. 1971).

Defendant's failure to properly identify himself to a police officer was not an offense proscribed by an existing statute and was thus not "an independently unlawful act" on which a finding of guilty of obstructing governmental administration (Penal Law § 195.05) could be based, where defendant's conduct did not amount to criminal impersonation (Penal Law § 190.25) or the making of an apparently sworn false statement (Penal Law § 210.35). People v Gaissert, 75 Misc. 2d 478, 348 N.Y.S.2d 82, 1973 N.Y. Misc. LEXIS 1598 (N.Y. County Ct. 1973).

Under city ordinance giving police authority to arrest for failure of citizen to comply with police request, resisting arrest conviction could not be based on scuffle which ensued when defendant, after refusing to show police officers a sample of literature he was distributing on street corner, and having promptly and properly identified himself, was informed that he was under arrest; police could not use ordinance as a pretext for discovering probable cause to arrest for violation of General Business Law § 330 where there were no suspicious circumstances, contents of literature were unknown to officers, and no citizen complaints were made or being investigated. People v Ailey, 76 Misc. 2d 589, 350 N.Y.S.2d 981, 1974 N.Y. Misc. LEXIS 1990 (N.Y. City Ct. 1974).

Defendants arrested for alleged operation and control of stolen vehicle did not violate Penal Law § 195.05 by giving false names, addresses, and ages to arresting officer who requested such information. People v Ketter, 76 Misc. 2d 698, 351 N.Y.S.2d 579, 1974 N.Y. Misc. LEXIS 2005 (N.Y. City Crim. Ct. 1974).

A motion by defendant to dismiss charges of obstructing governmental administration (Penal Law, § 195.05) and resisting arrest (Penal Law, § 205.30) is properly denied as the People have met their burden of establishing reasonable cause under circumstances where the defendant, upon being approached by three uniformed policemen after he was observed purchasing a glassine envelope containing white powder, locked his car door, and once told that he was under arrest, ate the envelope, whereupon one officer broke the car window and forcibly removed the defendant from the vehicle while another officer struggled with defendant in an attempt to recover the envelope from his mouth. People v Traynham, 95 Misc. 2d 145, 407 N.Y.S.2d 408, 1978 N.Y. Misc. LEXIS 2395 (N.Y. City Crim. Ct. 1978).

An accusatory instrument, in order to be valid, must state not only the crime with which a defendant is charged but also the particular acts constituting the crime; accordingly, a motion to dismiss a charge of obstructing governmental administration (Penal Law, § 195.05), after the close of the People's case, is properly granted under circumstances where the complaint states only that "the defendant did flee in attempt to avoid being summoned" by a police officer, as fleeing from an officer prior to arrest is not a crime and while the alleged act of flight may have been further defined by the evidence during trial, such acts were not charged in the information. People v Offen, 96 Misc. 2d 147, 408 N.Y.S.2d 914, 1978 N.Y. Misc. LEXIS 2569 (N.Y. City Crim. Ct. 1978).

Obstructing governmental administration (Penal Law, § 195.05) was intended to make criminal conduct designed to interrupt or shut down administrative governmental operations; it was not designed for the situation where defendant recognized a plainclothes police officer on a subway platform and warned those within hearing, including a suspect the officer claims he then had under surveillance, that complainant was a police officer. People v Lopez, 97 Misc. 2d 124, 410 N.Y.S.2d 787, 1978 N.Y. Misc. LEXIS 2758 (N.Y. City Crim. Ct. 1978).

Resistance to a police arrest unaccompanied by intimidation, physical force or some other physical act, does not support a charge of Obstructing Governmental Administration under Penal Law § 195.05 because it does not constitute an "independently

unlawful act" as required by the statute. In re M., 108 Misc. 2d 376, 437 N.Y.S.2d 565, 1981 N.Y. Misc. LEXIS 2210 (N.Y. Fam. Ct. 1981).

Defendant, who when apprehended for traffic offenses lied to a police officer about his identity using a fictitious or assumed name, and who admitted that he had disposed of his wallet to avoid prosecution under his real name, did not obstruct governmental administration in violation of Penal Law § 195.05, since verbally transmitting information to a police officer does not constitute intimidation, physical force or interference. People v Sherman, 116 Misc. 2d 109, 455 N.Y.S.2d 528, 1982 N.Y. Misc. LEXIS 3842 (N.Y. City Ct. 1982).

Reliance upon inspections by police officers of taverns is essential to effective enforcement of Alcoholic Beverage Control Law, and thus, defendant tavern owner's failure to make available to policemen records of his purchases and sales of alcohol, which were requested while inspecting tavern, was interference within meaning of CLS Penal Law § 195.05, since policemen were engaged in authorized government function and power to inspect licensed premises includes power to inspect books and records. People v Stumpp, 129 Misc. 2d 703, 493 N.Y.S.2d 679, 1985 N.Y. Misc. LEXIS 2722 (N.Y. Dist. Ct. 1985), aff'd, 132 Misc. 2d 3, 505 N.Y.S.2d 758, 1986 N.Y. Misc. LEXIS 2626 (N.Y. App. Term 1986).

Owner of premises which sold liquor for on-premises consumption was properly convicted of obstructing governmental administration for refusing police officer access to books and records, since police officer is permitted to inspect premises selling liquor for on-premises consumption and such inspection includes right to inspect books and records. People v Stumpp, 132 Misc. 2d 3, 505 N.Y.S.2d 578 (Sup App T 1986).

Court would reverse defendant's conviction of obstructing governmental administration, which was based on her refusal to allow her former husband to see their children after police requested her to do so, since police did not, sua sponte, have authority to enforce visitation order and there was no proof that wife interfered "by means of intimidation, physical force...or by means of any independently unlawful act." People v Lawler, 140 Misc. 2d 661, 531 N.Y.S.2d 861, 1988 N.Y. Misc. LEXIS 484 (N.Y. County Ct. 1988).

Defendant who was chained to door at time of arrest in connection with antiabortion demonstration could not be convicted of resisting arrest or obstruction of governmental administration in second degree since there was complete absence of proof of element of intent to commit crimes charged. People v McDaniel, 154 Misc. 2d 89, 593 N.Y.S.2d 154, 1992 N.Y. Misc. LEXIS 595 (N.Y. App. Term 1992), app. denied, 81 N.Y.2d 889, 597 N.Y.S.2d 950, 613 N.E.2d 982, 1993 N.Y. LEXIS 1488 (N.Y. 1993), app. denied, 81 N.Y.2d 892, 597 N.Y.S.2d 954, 613 N.E.2d 986 (N.Y. 1993), app. denied, 81 N.Y.2d 894, 597 N.Y.S.2d 956, 613 N.E.2d 988 (N.Y. 1993).

Allegation that defendant threw marihuana cigarette into sewer to prevent police officer from retrieving it was facially insufficient to charge second degree obstructing governmental administration because, absent any indication that defendant disposed of marihuana cigarette in response to actions or order of officer, there was no indication that he acted with intent to obstruct officer. People v Vargas, 179 Misc. 2d 236, 684 N.Y.S.2d 848, 1998 N.Y. Misc. LEXIS 627 (N.Y. City Crim. Ct. 1998).

Defendant was properly charged with second degree obstructing governmental administration where she allegedly refused to comply with police officer's repeated instructions to walk through magnetometer in courthouse, impeded other people standing behind her from walking through magnetometer, flailed her arms and kicked when officer tried to arrest and handcuff her, and stated "Fuck you, I don't have to do what you say. I'll blow up the building, shoot you and put a bullet in your head." People v Barrett, 179 Misc. 2d 261, 684 N.Y.S.2d 818, 1998 N.Y. Misc. LEXIS 633 (N.Y. City Crim. Ct. 1998).

Defendant was properly charged with second degree obstructing governmental administration for preventing police officer from fingerprinting her following her arrest. People v Santos, 182 Misc. 2d 764, 700 N.Y.S.2d 381, 1999 N.Y. Misc. LEXIS 512 (N.Y. City Crim. Ct. 1999).

Information charging second degree obstruction of governmental administration met requirements of CLS CPL §§ 100.15(3) and 100.40(1)(b) where it stated that defendant attempted to prevent uniformed police officer from arresting her husband by grabbing officer's arm while he was attempting to take her husband into custody for driving while intoxicated, and that she was then advised that she was under arrest for obstructing governmental administration. People v Cacsere, 185 Misc. 2d 92, 712 N.Y.S.2d 298, 2000 N.Y. Misc. LEXIS 325 (N.Y. App. Term 2000).

The statute was not designed for a situation where a defendant is suspected of a violation of an ordinance, and then doesn't stop for a police officer; it was, rather, intended to make criminal conduct designed to interrupt or shut down administrative governmental operations. People v Bryan, 190 Misc. 2d 818, 741 N.Y.S.2d 669, 2002 N.Y. Misc. LEXIS 196 (N.Y. City Ct. 2002).

Although defendant's conduct in signing his birth name rather than his legal name to a fingerprint card may have been inappropriate, it was not sufficient to support his conviction on a charge of obstruction of governmental administrationin the second degree under N.Y. Penal Law § 195.05; regardless of the name defendant used to sign the cards, defendant's fingerprints were taken and the card was sent in for checking, and therefore, there was no showing that defendant had obstructed, impaired, or perverted the administration of law or other governmental function. People v Anzisi, 798 N.Y.S.2d 843, 8 Misc. 3d 85, 2005 N.Y. Misc. LEXIS 946 (N.Y. App. Term), app. denied, 5 N.Y.3d 784, 801 N.Y.S.2d 805, 835 N.E.2d 665, 2005 N.Y. LEXIS 2215 (N.Y. 2005).

Motion to dismiss an information charging obstructing governmental administration was denied because the allegation that defendant physically "came between" an officer and unapprehended individuals satisfied the requirement that the interference have been physical in nature; in any event, defendant's actions of intentionally and physically placing himself between the officer and other unapprehended individuals, screaming at them, and refusing repeated requests to move as the officer attempted to investigate an assault in progress, satisfied the element of interference and met the specifications of N.Y. Penal Law § 195.05. The officer had the right to approach the unapprehended individuals to request information after arriving at the scene of the radio call alleging an assault in progress. People v Yarborough, 852 N.Y.S.2d 751, 19 Misc. 3d 520, 2008 N.Y. Misc. LEXIS 783 (N.Y. Sup. Ct. 2008).

Charges of resisting arrest and second-degree obstructing governmental administration, stemming from an officer's attempt to cite defendant for having an open container in an public place (an elevator), were facially insufficient because an interior, common area of an apartment building did not constitute a "public place" as defined in New York City, N.Y., Admin. Code § 10-125(b)); thus, the officer was not authorized to issue defendant a summons for public consumption of alcohol. People v Chavez, 972 N.Y.S.2d 858, 41 Misc. 3d 526, 2013 N.Y. Misc. LEXIS 3582 (N.Y. City Crim. Ct. 2013).

Under N.Y. Crim. Proc. Law § 410.70(2), (3), a defendant's parole revocation was proper: by a preponderance of the evidence, defendant (1) consumed alcohol, and (2) obstructed governmental administration in second degree, N.Y. Penal Law § 195.05, (with no physical violence, interfering with officers who were arresting the defendant's girlfriend). People v Romeo, 9 A.D.3d 744, 779 N.Y.S.2d 860, 2004 N.Y. App. Div. LEXIS 9943 (N.Y. App. Div. 3d Dep't 2004).

Information failed to adequately allege a charge of obstruction of governmental administration, N.Y. Penal Law § 195.05, based on defendant's alleged refusal to open an apartment door in response to an officer's attempt to execute an arrest warrant for an arrestee who was not defendant; there was no indication that the officer had a search warrant in addition to the arrest warrant, and the information failed to allege that the apartment was the arrestee's dwelling or that the officer announced his purpose and authority before demanding entry into the apartment. By failing to allege that the apartment was the arrestee's dwelling, the information did not adequately plead that the governmental function was authorized, and if the officer's demand for entry was

unauthorized, then defendant's refusal to open the door was not the predicate for an obstruction charge. People v Rodriquez, 851 N.Y.S.2d 342, 19 Misc. 3d 302, 239 N.Y.L.J. 50, 2008 N.Y. Misc. LEXIS 445 (N.Y. City Crim. Ct. 2008).

Warrantless entry into defendant's home lawful under the emergency doctrine, and the police had probable cause to arrest defendant for obstruction of governmental administration in the second degree, after defendant tried to physically stop officers responding to mental health complaint from entering the home. People v Ormanian, 55 Misc. 3d 566, 47 N.Y.S.3d 847, 2016 N.Y. Misc. LEXIS 4947 (N.Y. City Ct. 2016).

Accusatory instrument charging a defendant with obstruction of governmental administration was facially sufficient because the defendant allegedly placed himself between an officer and the intended recipient of the summons, told the intended recipient not to identify himself and slapped the officer's hand down. People v Lawrence, 59 Misc. 3d 215, 70 N.Y.S.3d 798, 2018 N.Y. Misc. LEXIS 383 (N.Y. City Crim. Ct. 2018).

Citizen's silence could not constitute any element of obstructing governmental administration, even if such interfered with officers' attempt to investigate whether he was violating park rules, the district court failed to convey that obstruction required a physical act, and to the extent the instruction implied that sometimes refusal to respond to police might be considered obstruction, the instruction mischaracterized the law; jurors could have concluded that probable cause existed for the citizen's arrest for obstruction without considering whether probable cause supported his arrest for disorderly conduct, and the verdict was vacated. Uzoukwu v City of New York, 805 F.3d 409, 2015 U.S. App. LEXIS 19372 (2d Cir. N.Y. 2015).

Police officer lacked probable cause to arrest plaintiff for obstructing governmental administration in violation of New York Penal Law based on his refusal to comply with a stop, to comply with an order to turn over his cell phone, and his asserted attempt to flee. Even if the stop was lawful, plaintiff's refusal to respond was protected under the state constitution and was not a crime; further, his actions could not have obstructed governmental administration because the officer's Terry stop and frisk were unauthorized. Dancy v McGinley, 843 F.3d 93, 2016 U.S. App. LEXIS 21753 (2d Cir. N.Y. 2016).

In a § 1983 suit filed against police officers, the district court did not err in denying the police officers' motions for JMOL on the false arrest claim because they did not have probable cause to arrest plaintiff for disorderly conduct or obstruction of governmental administration. A reasonable jury could have found that plaintiff did not physically interfere with the officers' investigation, because he simply asked why he and his companions had to leave; but did not raise his voice, curse, or do anything outside of normal conversation. Ekukpe v Santiago, 823 Fed. Appx. 25, 2020 U.S. App. LEXIS 26275 (2d Cir. N.Y. 2020).

Family Court order authorized the police officers' entry during the June 29-30 incident, and they were performing an official function within the meaning of the obstructing governmental administration statute; the residents' refusal to allow officers to lawfully enter their home was not pure speech, and New York courts had found that one could obstruct governmental administration by refusing to comply with a search warrant. Shaheed v Kroski, 2020 U.S. App. LEXIS 34985 (2d Cir. N.Y. Nov. 3, 2020).

Deputy sheriff had probable cause to arrest automobile accident victim for second degree obstructing governmental administration where (1) victim failed to comply with sheriff's instructions to "step back" from accident scene, and physically broke away from sheriff, who had been called to assist in rescue attempt, and (2) victim approached another rescue worker, touched his arm, and asked him questions while worker was trying to save another victim's life; furthermore, even if there was no probable cause, deputy sheriff reasonably believed that he had probable cause, and thus was entitled to qualified immunity in victim's subsequent § 1983 action for false arrest and false imprisonment. Decker v Campus, 981 F. Supp. 851, 1997 U.S. Dist. LEXIS 18029 (S.D.N.Y. 1997).

Arrestee's claims for false arrest, unlawful imprisonment, and malicious prosecution under both § 1983 and New York law must fail, where investigators pursuing potential robbery suspect were obstructed when he attempted to lock door of van and hold it closed, and resisted when he grabbed steering wheel to prevent investigators from taking him out of van, because probable cause existed for his arrest, detention, and prosecution for violating Penal §§ 195.05 and 205.30. Diehl v Munro, 170 F. Supp. 2d 311, 2001 U.S. Dist. LEXIS 16141 (N.D.N.Y. 2001).

Arresting officer was not entitled to qualified immunity on plaintiff's Fourth Amendment claims against him because there was no probable cause to arrest plaintiff for obstruction; plaintiff alleged that his ambiguous response of "What?" to the officer constituted only a querulous reaction to someone speaking to him, not an affirmation of identity, and the officer did not check plaintiff's person for identification after he was in handcuffs (ignoring an officer's request for identification was not a crime, nor did that act supply any such element). Williams v City of Mt. Vernon, 428 F. Supp. 2d 146, 2006 U.S. Dist. LEXIS 15504 (S.D.N.Y. 2006).

It was undisputed that the arrestee interfered with the dog control officer's attempt to seize his dog by refusing physical access to his residence and/or the dog in a manner that was hostile and profane, and based on the circumstances with which the police officer was confronted and the plain language of N.Y. Penal Law § 195.05, the police officer had probable cause to issue the arrestee the appearance ticket, and, consequently, the arrestee's false arrest claim had to be dismissed. Because the existence of probable cause also served as an absolute defense to a cause of action for malicious prosecution, the arrestee's malicious prosecution claim against the police officer and the dog control officer was also dismissed. Skinner v Chapman, 680 F. Supp. 2d 470, 2010 U.S. Dist. LEXIS 7730 (W.D.N.Y. 2010), aff'd, 412 Fed. Appx. 387, 2011 U.S. App. LEXIS 4338 (2d Cir. N.Y. 2011).

No reasonable trier of fact could conclude that the officers lacked probable cause to arrest plaintiff for obstruction of government administration in the second degree, pursuant to N.Y. Penal Law § 195.05, because she engaged in multiple attempts to interrupt her husband's arrest, confronting the arresting officers and even attempting to free her husband from police custody by opening the door of the patrol car in which he had been placed. Yevstifeev v Steve, 860 F. Supp. 2d 217, 2012 U.S. Dist. LEXIS 69470 (W.D.N.Y. 2012).

Plaintiff was in close proximity to the arrest, which alone did not provide probable cause to arrest him for obstructing governmental administration. Charles v City of New York, 2014 U.S. Dist. LEXIS 46741 (S.D.N.Y. Mar. 31, 2014).

Asking why you are being arrested, while simultaneously obeying police commands, does not constitute obstructive conduct. Charles v City of New York, 2014 U.S. Dist. LEXIS 46741 (S.D.N.Y. Mar. 31, 2014).

Where protesters were arrested after they failed to comply with a police order to disperse, defendant law enforcement officials were entitled to qualified immunity with respect to the protesters' civil rights claims of false arrest and malicious prosecution because there was probable cause to arrest for obstructing governmental administration and disorderly conduct and it was reasonable for defendants to believe that the order to disperse was lawfully given as a means to clear the public entrance to a police station house and direct the protesters to an alternate barricaded area. Olugbenga Akinnagbe v City of New York, 128 F. Supp. 3d 539, 2015 U.S. Dist. LEXIS 117375 (E.D.N.Y. 2015), dismissed, 2015 U.S. Dist. LEXIS 141646 (E.D.N.Y. Oct. 18, 2015).

4. —Undercover investigations

Juvenile committed act which, if committed by adult, would constitute second degree obstructing governmental administration where he intentionally rode his bicycle into specific area of police undercover narcotics "buy operation" at storefront after police told him to leave area and not get involved, and he yelled "cops, cops...watch out...police are coming" as he pedaled past storefront. In re Davan L., 91 N.Y.2d 88, 666 N.Y.S.2d 1015, 689 N.E.2d 909, 1997 N.Y. LEXIS 3716 (N.Y. 1997).

The gravamen of the charge of obstructing governmental administration is the obstruction, impairment and perversion of the administration of law and forbidding the police officers from

conducting an undercover investigation. People v Longo, 71 Misc. 2d 385, 336 N.Y.S.2d 85, 1971 N.Y. Misc. LEXIS 1347 (N.Y. County Ct. 1971).

Where there was no proof before the grand jury that the defendant spoke to someone in such a way as to reveal the identity of an undercover agent or physically interfered with the functioning of such agent, indictment charging obstruction of governmental administration was insufficient. People v Longo, 71 Misc. 2d 385, 336 N.Y.S.2d 85, 1971 N.Y. Misc. LEXIS 1347 (N.Y. County Ct. 1971).

Superseding information, charging defendant with second degree obstructing governmental administration for identifying on-duty undercover officer as being police officer by "stating loudly that said undercover officer was a police officer," was dismissed as (1) it was facially insufficient where, other than conclusory assertion that officer was "on duty," there was no indication that undercover operation was in progress, and (2) speedy trial period had elapsed. People v Hinkson, 184 Misc. 2d 496, 708 N.Y.S.2d 546, 2000 N.Y. Misc. LEXIS 205 (N.Y. City Crim. Ct. 2000).

Misdemeanor complaint sufficiently set forth factual basis for charge of second degree obstructing governmental administration by alleging, inter alia, that defendant approached 2 undercover police officers who were engaged in narcotics "buy and bust" operation and told deponent officer that he knew he was "a cop," that while in close proximity to both officers' faces told them to "go home because you will get hurt if you stay here any longer, I am going to let them know," and that he then walked away and stopped to talk to 2 individuals, pointing out 2 officers to those individuals. People v Williams, 186 Misc. 2d 705, 721 N.Y.S.2d 456, 2000 N.Y. Misc. LEXIS 570 (N.Y. App. Term 2000), app. denied, 96 N.Y.2d 789, 725 N.Y.S.2d 654, 749 N.E.2d 223, 2001 N.Y. LEXIS 1349 (N.Y. 2001).

4.5 Sufficiency of accusatory instrument

Misdemeanor complaint charging defendant with obstructing governmental administration in the second degree was jurisdictionally defective because the factual part of the complaint merely stated that the officer was attempting to effectuate the arrest of defendant's brother, but the complaint contained no factual allegations that would establish, if true, that the underlying arrest of defendant's brother was authorized. People v Sumter, 151 A.D.3d 556, 58 N.Y.S.3d 304, 2017 N.Y. App. Div. LEXIS 4816 (N.Y. App. Div. 1st Dep't 2017).

Misdemeanor complaint charging defendant with obstructing governmental administration in the second degree was jurisdictionally defective because the factual part of the complaint merely stated that the officer was attempting to effectuate the arrest of defendant's brother, but the complaint contained no factual allegations that would establish, if true, that the underlying arrest of defendant's brother was authorized. People v Sumter, 151 A.D.3d 556, 58 N.Y.S.3d 304, 2017 N.Y. App. Div. LEXIS 4816 (N.Y. App. Div. 1st Dep't 2017).

Information contained nothing more than an allegation indicating that the correction officer was on duty; the absence of any factual allegations identifying an official function necessitated dismissal of the charge of Penal Law § 195.05. Additionally, since the element of an official function had not been alleged, the information failed to establish that defendant, by throwing an unknown liquid at the correction officer, acted with the intent to prevent a public servant in the performance of that official function. People v Ford, 53 Misc. 3d 318, 36 N.Y.S.3d 374, 2016 N.Y. Misc. LEXIS 2658 (N.Y. City Crim. Ct. 2016).

Trial court erred in convicting defendant, upon his plea of guilty, of second-degree obstructing governmental administration because the information was facially insufficient inasmuch as defendant's alleged actions—taking money from another in exchange for swiping a MetroCard through a subway turnstile—were not physical in nature nor could they be considered "minimal interference set in motion to frustrate police activity," and a violation of the unauthorized sale of transportation services statute could not be considered an "independently unlawful act" under the obstruction statute since it encompassed the same conduct as that which was considered to have obstructed the Transit Authority's function. People v Collins (Clinton), 58 Misc. 3d 10, 64 N.Y.S.3d 851, 2017 N.Y. Misc. LEXIS 4253 (N.Y. App. Term 2017).

Information sufficiently alleged the charge of obstructing governmental administration in the second degree based on factual questions existing whether the bar was open for business at the approximately 3:30 a.m.-or-later hour, and whether the employee roster was actually available upon the premises at that time—or, indeed, whether such a roster existed at all—when the police officer sought to inspect. People v Salgado, 58 Misc. 3d 820, 69 N.Y.S.3d 785, 2018 N.Y. Misc. LEXIS 118 (N.Y. City Crim. Ct. 2018).

Information was facially sufficient to charge obstructing governmental administration, because defendant refused the police officers instructions to move away and stop blocking the building entrance to permit their entry into the location to investigate a crime in progress. People v Broughton, 63 Misc. 3d 435, 94 N.Y.S.3d 830, 2019 N.Y. Misc. LEXIS 795 (N.Y. City Crim. Ct. 2019).

5. Evidence

Television films of events alleged to constitute the crime charged did not, as a matter of law, establish that there was a reasonable doubt as to the guilt of defendant where it was stipulated that the films were not in sequence and were cut and spliced and there was no testimony elicited upon the trial as to whether the events depicted in the television tape represented a complete pictorial record of the facts and circumstances leading to defendant's arrest. People v Eisenberg, 22 N.Y.2d 99, 291 N.Y.S.2d 318, 238 N.E.2d 719, 1968 N.Y. LEXIS 1362 (N.Y.), reh'g denied, 22 N.Y.2d 884, 1968 N.Y. LEXIS 2262 (N.Y. 1968).

At his trial on charges of obstructing governmental administration and assaulting several sheriffs deputies, it was not objectionable hearsay for the defendant, his brother and mother to testify that a justice of the peace had instructed the defendant and his brother that they would not be photographed or fingerprinted, where this evidence was offered to establish the reasonable belief by the defendant that the police officers were acting outside their lawful authority in processing him and his brother for commitment to the county jail on unrelated charges. People v Stewart, 37 A.D.2d 908, 325 N.Y.S.2d 533, 1971 N.Y. App. Div. LEXIS 3137 (N.Y. App. Div. 4th Dep't 1971).

Finding of malice on part of officer who arrested plaintiff for obstructing governmental administration was against the great weight of the evidence even assuming a lack of probable cause and thus an inference of malice. Martin v Albany, 51 A.D.2d 596, 377 N.Y.S.2d 774, 1976 N.Y. App. Div. LEXIS 10907 (N.Y. App. Div. 3d Dep't 1976), rev'd, 42 N.Y.2d 13, 396 N.Y.S.2d 612, 364 N.E.2d 1304, 1977 N.Y. LEXIS 2092 (N.Y. 1977).

Evidence that arrestees, who had originally been charged with, inter alia, bribery, pleaded guilty solely to a charge of obstructing governmental administration and admitted that they had attempted to prevent a police lieutenant from performing an official function, i. e., the processing of their arrest, by means of an independently unlawful act was insufficient to show that the $25,000 in cash in their possession at the time of their arrest was to be used to attempt to bribe the police officer and thus was insufficient to show that arrestees were not entitled to return of the money. Burden of proof was on police department property clerk to demonstrate that money found in possession of arrestees at the time of arrest was contraband and to show specifically that it was an instrumentality of the crime in question. Clay v McCabe, 56 A.D.2d 747, 392 N.Y.S.2d 29, 1977 N.Y. App. Div. LEXIS 10994 (N.Y. App. Div. 1st Dep't 1977).

City's police chief was improperly convicted of second degree obstruction of governmental administration arising out of his alleged disruption of undercover narcotics investigation conducted in city by sheriff's department where he told sheriff that if sheriff's department had manpower to police city, then it had manpower to transport its own prisoners between court and jail, which historically had been provided by city police as courtesy to sheriff, since (1) sheriff's agreement to limit his investigation within city would not be improper per se in view of overlapping jurisdictions and legitimate concern for effective deployment of manpower, and (2) there was no basis to interject intimidation into conversation at which cessation of transportation was dis-

cussed. People v Dolan, 172 A.D.2d 68, 576 N.Y.S.2d 901, 1991 N.Y. App. Div. LEXIS 15097 (N.Y. App. Div. 3d Dep't 1991), app. denied, 79 N.Y.2d 946, 583 N.Y.S.2d 200, 592 N.E.2d 808, 1992 N.Y. LEXIS 2247 (N.Y. 1992).

City's police chief was properly convicted of second degree obstructing governmental administration, arising out of his intentional disruption of controlled drug purchases by drug task force, where he dispatched officers in marked police cars to undercover drug purchase, and personally appeared in uniform at scene. People v Dolan, 172 A.D.2d 68, 576 N.Y.S.2d 901, 1991 N.Y. App. Div. LEXIS 15097 (N.Y. App. Div. 3d Dep't 1991), app. denied, 79 N.Y.2d 946, 583 N.Y.S.2d 200, 592 N.E.2d 808, 1992 N.Y. LEXIS 2247 (N.Y. 1992).

Evidence supported convictions for second degree assault and obstruction of governmental administration where (1) defendant was arrested and transported to precinct, (2) when handcuffs were thereafter removed, she became verbally and physically abusive, (3) before she could be subdued, she severely scratched face of officer standing by officer who removed handcuffs, and (4) injured officer was on duty standing by to assist officer assigned to process defendant. People v Lane, 190 A.D.2d 604, 593 N.Y.S.2d 802, 1993 N.Y. App. Div. LEXIS 1545 (N.Y. App. Div. 1st Dep't), app. denied, 81 N.Y.2d 1015, 600 N.Y.S.2d 203, 616 N.E.2d 860, 1993 N.Y. LEXIS 2486 (N.Y. 1993).

Evidence established that juvenile committed act which, if committed by adult, would have constituted second degree obstructing governmental administration where (1) officer responded to report that female was calling for help from building, (2) as officer exited his marked patrol car and entered building, juvenile ran out of doorway and pushed past officer by striking him with both hands in chest, and (3) officer ordered juvenile to stop and, when he refused to do so, grabbed his sweatshirt and struggle ensued. In re Jose M., 210 A.D.2d 228, 619 N.Y.S.2d 349, 1994 N.Y. App. Div. LEXIS 12266 (N.Y. App. Div. 2d Dep't 1994).

Respondent's acts of holding on to officer and refusing to let go despite repeated orders to do so constituted "knowing physical interference" which disrupted officer's performance of official function for purposes of establishing guilt of second degree obstructing governmental administration under CLS Penal § 195.05, where officer was engaged in controlling crowd to prevent injury to fellow officers who were attempting to effect arrest of another individual. In re Samuel VV, 217 A.D.2d 863, 629 N.Y.S.2d 843, 1995 N.Y. App. Div. LEXIS 8169 (N.Y. App. Div. 3d Dep't 1995).

Court erred in allowing witness' unredacted testimony during People's direct case against defendant's mother, codefendant in joint trial, on charge of second degree obstructing governmental administration, that codefendant had asked witness outside court "Can you say that another guy had kicked the door instead of [defendant]? Because he's on parole, probation, and he will get violated or the state will pick it up"; however, error was harmless given overwhelming evidence of guilt. People v Cancer, 232 A.D.2d 875, 649 N.Y.S.2d 492, 1996 N.Y. App. Div. LEXIS 11267 (N.Y. App. Div. 3d Dep't 1996), app. denied, 89 N.Y.2d 984, 656 N.Y.S.2d 742, 678 N.E.2d 1358, 1997 N.Y. LEXIS 854 (N.Y. 1997).

Family Court properly found that juvenile committed act constituting second degree obstructing governmental administration when, having been warned by police to leave area where officers intended to arrest certain drug dealers, juvenile instead rode his bicycle past targeted location, shouting "Cops" and "Five-O." In re Davan L., 248 A.D.2d 473, 669 N.Y.S.2d 513, 1998 N.Y. App. Div. LEXIS 2258 (N.Y. App. Div. 2d Dep't 1998).

Testimony that respondent grabbed a flashlight from an officer and raised it as if to strike the officer while the police were attempting to arrest his father was legally sufficient to establish that respondent was attempting to interfere with the arrest of his father, and was sufficient to establish that respondent committed acts that, if committed by an adult, would have constituted obstruction of governmental administration. Matter of Daniel M., 37 A.D.3d 1101, 830 N.Y.S.2d 410, 2007 N.Y. App. Div. LEXIS 1150 (N.Y. App. Div. 4th Dep't 2007).

Evidence at trial was legally sufficient to support defendant's convictions for obstructing governmental administration in the second degree and resisting arrest, and the convictions were not against the weight of the evidence where, after a traffic stop, defendant refused the officer's request to turn over her license and registration and then, after being told that she was about to be placed under arrest for that refusal, she physically resisted the efforts of that officer and others to obtain the requested paperwork, to remove her from the vehicle, and to place her under arrest; among other obstructive actions, defendant closed her vehicle's window on the officer's arm, causing him injury, and flailed and kicked as she was handcuffed. People v Sibblies, 98 A.D.3d 458, 949 N.Y.S.2d 685, 2012 N.Y. App. Div. LEXIS 5988 (N.Y. App. Div. 1st Dep't 2012), rev'd, dismissed, 22 N.Y.3d 1174, 985 N.Y.S.2d 474, 8 N.E.3d 852, 2014 N.Y. LEXIS 702 (N.Y. 2014).

Evidence was sufficient to adjudicate a juvenile as delinquent for second-degree unlawful imprisonment under N.Y. Penal Law § 135.05, but not second-degree obstructing governmental administration under N.Y. Penal Law § 195.05 because the juvenile grabbed the complaining witness by the waist and spun her around, but immediately released her when she ordered him to do so. Matter of Terry J.P., 106 A.D.3d 1092, 966 N.Y.S.2d 200, 2013 N.Y. App. Div. LEXIS 3767 (N.Y. App. Div. 2d Dep't 2013).

Defendant's conviction for obstructing governmental administration in the second degree was not contrary to the weight of the evidence because, inter alia, defendant physically attacked the arresting officer and knocked him to the ground, a second officer pulled defendant off of the arresting officer while defendant was throwing fists and kicking, and a third officer deployed two cartridges of his taser on defendant, which failed to fully subdue him. People v Jasiewicz, 162 A.D.3d 1398, 79 N.Y.S.3d 755, 2018 N.Y. App. Div. LEXIS 4632 (N.Y. App. Div. 3d Dep't), app. denied, 32 N.Y.3d 1005, 111 N.E.3d 1119, 86 N.Y.S.3d 763, 2018 N.Y. LEXIS 3108 (N.Y. 2018).

Convictions of obstructing governmental administration and menacing, based on charges that defendant committed such crimes using imitation pistol, would not be set aside due to fact that prosecution witnesses uniformly testified that defendant possessed real gun, since nature of object used in commission of crimes charged was immaterial to charges and beyond what was necessary to sustain convictions. People v Wilfong, 146 Misc. 2d 577, 557 N.Y.S.2d 829, 1990 N.Y. Misc. LEXIS 304 (N.Y. App. Term), app. denied, 76 N.Y.2d 798, 559 N.Y.S.2d 1003, 559 N.E.2d 697, 1990 N.Y. LEXIS 2948 (N.Y. 1990).

Information charging second degree obstructing governmental administration would not be dismissed for failure to meet requirements of CLS CPL § 100.40, where it alleged that defendant intentionally interfered with investigation of automobile accident by locking himself in his car, that police officer was engaged in specific official activity when defendant locked himself in car, and that defendant told officer that only way to get him out of car was to call emergency services to forcibly remove him; element of "physical interference" was satisfied by allegation that defendant locked himself in car. People v Salter, 167 Misc. 2d 877, 638 N.Y.S.2d 566, 1996 N.Y. Misc. LEXIS 36 (N.Y. Dist. Ct. 1996).

Facts alleged in an information did not support the charge of obstructing governmental administration in the second degree because the accusatory instrument alleged that defendant, upon being approached by a plain-clothed officer who observed defendant purchasing a small object containing white powder, swallowed the object when the officer identified herself as a police officer. The complaint was insufficient because it did not allege that the object was contraband, nor did the police tell defendant that he was under arrest or not to do anything with the small object. People v Berdini, 845 N.Y.S.2d 717, 18 Misc. 3d 221, 238 N.Y.L.J. 106, 2007 N.Y. Misc. LEXIS 7523 (N.Y. City Crim. Ct. 2007).

Evidence did not demonstrate whatsoever that it was defendant's intent to obstruct, impair or pervert the administration of law, or prevent or attempt to prevent the performance of that function by failing to advise anyone that a suspect was incarcerated on the date when the charged robbery occurred. While defendant's silence was demonstrated to have been the result of neglect, carelessness, callousness or indifference, that was not the same thing as a conscious objective or purpose to affect the administration of justice in any way. People v Lemma, 959 N.Y.S.2d 655, 39 Misc. 3d 399, 2013 N.Y. Misc. LEXIS 511 (N.Y.

Dist. Ct. 2013), rev'd, in part, 50 Misc. 3d 34, 22 N.Y.S.3d 280, 2015 N.Y. Misc. LEXIS 3548 (N.Y. App. Term 2015).

Obstruction charge against defendant juvenile was established by evidence that the police were performing an official function of securing a crime scene and making an investigation, when defendant interfered by pushing and trying to choke an officer. Matter of Carlos M., 32 A.D.3d 686, 820 N.Y.S.2d 581, 2006 N.Y. App. Div. LEXIS 10554 (N.Y. App. Div. 1st Dep't 2006).

Defendant was properly convicted of second-degree obstructing governmental administration because he prevented police officers from performing an official function, regardless of whether the underlying arrest was authorized, where his successful avoidance of being fingerprinted was independent, remote, completely attenuated from the arrest People v Qureshi, 996 N.Y.S.2d 462, 45 Misc. 3d 57, 2014 N.Y. Misc. LEXIS 4327 (N.Y. App. Term 2014), app. denied, 24 N.Y.3d 1122, 27 N.E.3d 477, 3 N.Y.S.3d 763, 2015 N.Y. LEXIS 457 (N.Y. 2015), cert. denied, 577 U.S. 978, 136 S. Ct. 485, 193 L. Ed. 2d 355, 2015 U.S. LEXIS 7084 (U.S. 2015).

City court properly convicted defendant, upon a jury verdict, of second-degree obstructing governmental administration because he admitted that he drove his vehicle backwards at a high rate of speed in an attempt to elude police officers, the accusatory instrument did not have to allege facts to establish that the arrest was authorized, a valid warrant for the search of defendant's vehicle was in effect, and a video recording purporting to depict defendant's violent encounter with the police on a prior occasion would have been largely cumulative of defendant's description of the incident, the People were entitled to present some evidence of the background to their execution of the warrant. People v Wheeler, 61 Misc. 3d 30, 85 N.Y.S.3d 329, 2018 N.Y. Misc. LEXIS 4308 (N.Y. App. Term 2018), rev'd, 34 N.Y.3d 1134, 141 N.E.3d 136, 118 N.Y.S.3d 68, 2020 N.Y. LEXIS 129 (N.Y. 2020).

Upon review of the case law cited, a motion to dismiss the count of obstructing governmental administration in the second degree, Penal Law § 195.05, was decided correctly where the language of the statute and the statute's history, application, and interpretation led to the conclusion that an element of the crime was the prevention of a specific official function, and there were no evidentiary facts specifying that the corrections officer was engaged in an official function. People v Darby, 61 Misc. 3d 881, 85 N.Y.S.3d 739, 2018 N.Y. Misc. LEXIS 4466 (N.Y. Sup. Ct. 2018).

In a 42 U.S.C.S. § 1983 action, police officers who claimed qualified immunity were not entitled to judgment as a matter of law under Fed. R. Civ. P. 50(b) on plaintiff's Fourth Amendment false arrest and malicious prosecution claims because the officers did not have arguable probable cause to arrest plaintiff for disorderly conduct in violation of N.Y. Penal Law § 240.20(5), (6), or (7) or interference with a governmental function in violation of N.Y. Penal Law § 195.05. Viewed in plaintiff's favor, the evidence showed that plaintiff respectfully informed the officers at a demonstration protesting construction of a housing development that an injunction enjoining the construction would be arriving shortly, that plaintiff did not sit down on a road used by construction vehicles or tell others to sit down, and that the officers did not give plaintiff any order; thus, a reasonable officer would not have believed that plaintiff obstructed traffic, that plaintiff refused to comply with an order to disperse, that plaintiff created a hazardous condition by an act that served no legitimate purpose, or that plaintiff interfered with the performance of the officers' duties. Zellner v Summerlin, 494 F.3d 344, 2007 U.S. App. LEXIS 17272 (2d Cir. N.Y. 2007).

Defendants had probable cause to arrest a demonstrator for violation of N.Y. Penal Law § 195.05 when the demonstrator ignored three orders to move away from what was soon to be a zone of danger, and the demonstrator's presence in the area would have preventing local officials from removing a tree, the subject of the demonstration. Wilder v Vill. of Amityville, 288 F. Supp. 2d 341, 2003 U.S. Dist. LEXIS 19297 (E.D.N.Y. 2003), aff'd, 111 Fed. Appx. 635, 2004 U.S. App. LEXIS 22148 (2d Cir. N.Y. 2004).

Court granted summary judgment to defendants on the N.Y. Penal Law § 195.05-based N.Y. Gen. Mun. Law § 205-e claims because (1) no reasonable jury could conclude that defendants intended to prevent decedent from performing his duties; and (2) that the effect of their actions obstructed decedent did not mean they intended to obstruct his performance of his duties. Breitkopf v Gentile, 41 F. Supp. 3d 220, 2014 U.S. Dist. LEXIS 121581 (E.D.N.Y. 2014).

Plaintiff was entitled to judgment on her claim against arresting officer for false arrest because her statements to officer, coupled with her physical actions, did not provide officer with adequate probable cause to believe that she was attempting to interfere with his ability to secure crime scene, and determination that officer lacked probable cause to arrest plaintiff for obstruction of governmental administration compelled determination that he lacked probable cause to arrest plaintiff for resisting arrest; although arresting officer was not entitled to qualified immunity on false arrest claim because information he possessed at the time of arrest did not add up to probable cause, assisting officer was entitled to qualified immunity because he acted reasonably in coming to arresting officer's aid when he observed that arresting officer was struggling to arrest plaintiff. McKnight v Vasile, 2017 U.S. Dist. LEXIS 47970 (W.D.N.Y. Mar. 30, 2017).

6. Public servants; persons performing governmental functions

Juvenile delinquency petition sufficiently charged respondent with committing acts constituting second degree obstruction of governmental administration where supporting deposition of truant officer established that, while acting in his official capacity, he observed respondent in public during school hours and approached him in order to return him to school, and that respondent ran away, disregarded order to stop, hid nearby, and cursed and screamed when officer found and apprehended him. In re Michael C., 264 A.D.2d 842, 695 N.Y.S.2d 423, 1999 N.Y. App. Div. LEXIS 9375 (N.Y. App. Div. 2d Dep't 1999).

School teachers and their superiors are persons performing such governmental functions within the purview of § 195.05 of the Penal Law; however to maintain a finding of juvenile delinquency based on allegations in compliance with such statutes, there must be present an intent to interfere with a teacher or other school personnel's performance of his official role and an isolated minor disruption lacking such intent cannot be considered the violation of the statute. In re Walter S., 71 Misc. 2d 1032, 337 N.Y.S.2d 774, 1972 N.Y. Misc. LEXIS 1423 (N.Y. Fam. Ct. 1972).

A special patrolman was a "public servant," and thus defendants could properly be charged with obstructing governmental administration, notwithstanding fact that alleged victim of such obstruction was a special patrolman. Authority to issue an appearance ticket renders a nonpolice officer a "public servant." People v Lewis, 87 Misc. 2d 806, 386 N.Y.S.2d 560, 1976 N.Y. Misc. LEXIS 2309 (N.Y. City Crim. Ct. 1976).

Federal marshall is "public servant" within meaning of statute where he is engaged in operation of state law enforcement function and is acting under auspices of joint federal and state task force designed to execute large number of state bench warrants outstanding for persons who have failed to appear in court on serious crimes. People v Smith, 128 Misc. 2d 733, 491 N.Y.S.2d 236, 1985 N.Y. Misc. LEXIS 2986 (N.Y. Crim. Ct. 1985).

Defendant's motion to dismiss a charge of obstructing governmental administration in the second degree, N.Y. Penal Law § 195.05, was granted, because defendant's alleged harassment of a postal clerk did not constitute a violation of the statute as the clerk was a federal employee, and federal employees did not meet the definition of a public servant under N.Y. Penal Law § 10.00(15). People v Bilus, 804 N.Y.S.2d 670, 10 Misc. 3d 761, 234 N.Y.L.J. 106, 2005 N.Y. Misc. LEXIS 2626 (N.Y. Dist. Ct. 2005).

Supporting deposition of the arresting officer contained sufficient nonhearsay allegations to establish defendant's commission of obstructing governmental administration where deposition showed that, during school hours, the arresting officer told defendant to go to school, and defendant repeatedly refused, responded with obscenities, and became louder and more agitated, refused to comply with the officer's demands, and resisted the officer's attempts to handcuff him. In re Darnell C., 305

A.D.2d 405, 759 N.Y.S.2d 739, 2003 N.Y. App. Div. LEXIS 5117 (N.Y. App. Div. 2d Dep't 2003).

Defendant's motion to dismiss a charge of obstructing governmental administration in the second degree, N.Y. Penal Law § 195.05, was granted, because defendant's alleged harassment of a postal clerk did not constitute a violation of the statute as the clerk was a federal employee, and federal employees did not meet the definition of a public servant under N.Y. Penal Law § 10.00(15). People v Bilus, 804 N.Y.S.2d 670, 10 Misc. 3d 761, 234 N.Y.L.J. 106, 2005 N.Y. Misc. LEXIS 2626 (N.Y. Dist. Ct. 2005).

Arrestee's false arrest claim must fail, where arrestee admits ignoring sheriff's instruction to "step back," and admits approaching rescue worker, touching his arm, and asking him questions, while worker was trying to save life of arrestee's wife, who was trapped in convertible, because in so doing arrestee obstructed duties of 2 governmental officials, risked delaying rescue of his wife, and probably "obstructed governmental administration" in violation of CLS Penal Law § 195.05. Decker v Campus, 981 F. Supp. 851, 1997 U.S. Dist. LEXIS 18029 (S.D.N.Y. 1997).

7. School disruptions

School teachers and their superiors are persons performing such governmental functions within the purview of § 195.05 of the Penal Law; however to maintain a finding of juvenile delinquency based on allegations in compliance with such statutes, there must be present an intent to interfere with a teacher or other school personnel's performance of his official role and an isolated minor disruption lacking such intent cannot be considered the violation of the statute. In re Walter S., 71 Misc. 2d 1032, 337 N.Y.S.2d 774, 1972 N.Y. Misc. LEXIS 1423 (N.Y. Fam. Ct. 1972).

8. Selective Service demonstrations

An information charging defendant with obstructing governmental administration, to wit, being "near the premises of the Selective Service . . . Utica, New York, while inductees were boarding a bus for induction, he intentionally obstructed the administration of law by placing himself in the rear of the bus preventing its departure and prevented a public servant from performing an official function" should have been dismissed as the statute was not intended to apply to the administration of Federal law and that Federal agents and employees were not within the definition of "public servant" as used in the statute. People ex rel. Penree v Garfield, 63 Misc. 2d 79, 312 N.Y.S.2d 830, 1970 N.Y. Misc. LEXIS 1645 (N.Y. City Ct. 1970).

Defendants could not be prosecuted under the statute under evidence that they forcibly entered the waiting area of a Selective Service Board office, interfering with and disrupting the orderly course of business necessary for the induction process and refused to leave when requested to do so, inasmuch as such acts violated the Federal Selective Service Act and federal courts had exclusive jurisdiction of violations of the Act. People v Arvio, 66 Misc. 2d 474, 321 N.Y.S.2d 382, 1971 N.Y. Misc. LEXIS 1610 (N.Y. J. Ct. 1971).

9. Sentence; penalty

An attorney, an administrative hearing officer in charge of the Brooklyn office of the parking violations bureau, who dismissed some parking violations summonses, reduced the fines on others and caused them to be entered on the records as though the recipients had appeared and who was convicted, upon his plea of guilty, of conspiracy in the third degree, a class A misdemeanor (two counts), and obstructing governmental administration, a class A misdemeanor, is suspended for two years and until further order of the court. In re Israel, 67 A.D.2d 1, 414 N.Y.S.2d 582, 1979 N.Y. App. Div. LEXIS 10065 (N.Y. App. Div. 2d Dep't 1979).

In a prosecution for obstructing governmental administration, the trial court erred in imposing jail time upon a defendant, where the jury rejected a contention that the defendant caused a police officer serious injury from assault, where fellow rioters and obstructors of justice involved in a general melee were not sentenced to any jail time, and where the defendant's presentence report did not recommend jail time while noting that the defendant had been incarcerated pending trial for five days. People v Jiminez, 82 A.D.2d 996, 442 N.Y.S.2d 156, 1981 N.Y. App. Div. LEXIS 14727 (N.Y. App. Div. 3d Dep't 1981).

Defendant's probation would be revoked under CPL §§ 410.10, 410.70 where defendant pleaded guilty in Indiana to resisting law enforcement and admitted that, after running a toll booth in Indiana, he was chased by police at high speeds across various lanes of traffic for approximately 20 miles, during the course of which police chase vehicles were damaged, and where such conduct would constitute obstructing governmental administration, a misdemeanor in New York under Penal Law § 95.05. People v Risi, 113 Misc. 2d 1009, 450 N.Y.S.2d 359, 1982 N.Y. Misc. LEXIS 3413 (N.Y. Sup. Ct. 1982).

Court would sentence defendants to conditional discharge with no conditions imposed on their convictions of second degree obstruction of governmental administration arising from incident in which they placed themselves between transit authority police officer and man officer sought to question concerning dispute aboard subway train, since probationary supervision would serve no purpose and might be deleterious to defendants' futures. People v Jimenez, 138 Misc. 2d 867, 525 N.Y.S.2d 482, 1988 N.Y. Misc. LEXIS 110 (N.Y. Crim. Ct. 1988).

10. Tampering with public property

Evidence supported counts charging bridge operators, who left bridges in open position after rendering them inoperable by removal of part of electrical equipment, with having obstructed and impaired governmental administration by unlawful act of tampering; bridge operators, who took such action during course of strike by municipal employees, were not being prosecuted for union activities. People v Gibson, 77 Misc. 2d 49, 354 N.Y.S.2d 273, 1972 N.Y. Misc. LEXIS 1187 (N.Y. Sup. Ct.), modified, 40 A.D.2d 818, 338 N.Y.S.2d 478, 1972 N.Y. App. Div. LEXIS 3228 (N.Y. App. Div. 1st Dep't 1972).

II. Under Former Law

A. Under Former § 1851

11. In general

An article in Time, which stated that Hearst's Journal-American had received the week before, a letter from the "Mad Bomber," and instead of printing the letter, it decided to withhold the letter from the police and ran an item in its personal column intimating that it would help the bomber, was not libelous per se. The plaintiffs, the owners of the Journal-American, argued on appeal that, they were being charged with being accessories to the bomber's crimes within the meaning of § 2 of the Penal Law; but the publication cannot be reasonably read as saying, within the frame of the statute that, the newspaper aided the offender "with intent that he may avoid or escape from arrest." Neither did the publication, by any possible pleading of construction or innuendo charge the wilful obstruction of a public officer in performance of a duty within the meaning of Penal Law § 1851. Berkson v Time, Inc., 8 A.D.2d 352, 187 N.Y.S.2d 849, 1959 N.Y. App. Div. LEXIS 7772 (N.Y. App. Div. 1st Dep't 1959), aff'd, 7 N.Y.2d 1007, 200 N.Y.S.2d 51, 166 N.E.2d 847, 1960 N.Y. LEXIS 1407 (N.Y. 1960).

Ordinance of city of Utica imposing penalty not to exceed fifty dollars upon person who shall resist or obstruct police officer of city in discharging or attempting to discharge his duties is not inconsistent with Second Class Cities Law, §§ 30 and 42, or Penal Law, §§ 1825 and 1851. People v Stewart, 47 N.Y.S.2d 349, 183 Misc. 212, 1944 N.Y. Misc. LEXIS 1772 (N.Y. City Ct. 1944).

A contention that village ordinances are invalid where covering the same acts as are prohibited by Penal Law, §§ 722, 723, and this section, cannot be raised in a proceeding under CPA art 78, petitioner's remedy by appeal being adequate. Brewer v Watson, 77 N.Y.S.2d 97, 191 Misc. 117, 1947 N.Y. Misc. LEXIS 3668 (N.Y. Sup. Ct. 1947).

This section applies to anyone who willfully resists or obstructs a public officer in discharging his duty, and is not limited to acts of third persons other than the one whom the officer is trying to arrest or curb. There is no basis for a contention that a charge or conviction for violating this section, in addition to being charged and convicted for the offense for which the person was arrested, is a violation of constitutional rights. People ex rel. Howell v Knight, 35 Misc. 2d 216, 228 N.Y.S.2d 981, 1962 N.Y. Misc. LEXIS 3273 (N.Y. Magis. Ct. 1962).

12. "Public officer"

A police officer is a public officer within the meaning of this section. People v Stewart, 47 N.Y.S.2d 349, 183 Misc. 212, 1944 N.Y. Misc. LEXIS 1772 (N.Y. City Ct. 1944).

13. Relation to other offenses

A charge of disorderly conduct based on cutting an officer's ear with a razor blade is not the same offense as a charge of felonious assault, as the latter requires proof of the additional fact of specific intent to inflict grievous bodily harm, and accordingly neither can be raised as involving jeopardy of the other. Covington v Supreme Court, 21 A.D.2d 822, 251 N.Y.S.2d 529, 1964 N.Y. App. Div. LEXIS 3489 (N.Y. App. Div. 2d Dep't 1964), aff'd, 15 N.Y.2d 855, 257 N.Y.S.2d 962, 205 N.E.2d 880, 1965 N.Y. LEXIS 1540 (N.Y. 1965).

Charges of disorderly conduct and delaying or obstructing an officer represent separate offenses, and convictions on both counts does not constitute double punishment for same act. People v Crayton, 55 Misc. 2d 213, 284 N.Y.S.2d 672, 1967 N.Y. Misc. LEXIS 1159 (N.Y. App. Term 1967).

14. Jurisdiction

A justice of the peace of the town of Clarkstown has no jurisdiction of the offense charged in an information that defendant unlawfully resisted a public officer in violation of this section. People v Kischel, 276 N.Y. 116, 11 N.E.2d 559, 276 N.Y. (N.Y.S.) 116, 1937 N.Y. LEXIS 1040 (N.Y. 1937).

15. Indictment

An indictment alleging that a motorist failed to stop on demand of officers is defective when it fails to show that the officers had cause to believe that an examination of the defendant's automobile would disclose evidence that the defendant had violated the conservation law, since the acts of the officers were illegal, under Civil Rights Law, § 8, and therefore the defendant was not required to stop. People v Hill, 227 N.Y.S. 285, 131 Misc. 521, 1928 N.Y. Misc. LEXIS 727 (N.Y. County Ct. 1928).

16. Particular acts as resistance

Probable cause for prosecution of plaintiff for interfering with public officers in discharge of their duties existed to preclude action for malicious prosecution where plaintiffs repeatedly removed pump from manhole to prevent it from flooding their farmland despite warning by police officer and police court judge that such action would lead to their arrest. Colaruotolo v Cohoes, 44 A.D.2d 616, 353 N.Y.S.2d 542, 1974 N.Y. App. Div. LEXIS 5499 (N.Y. App. Div. 3d Dep't 1974), aff'd, 36 N.Y.2d 716, 367 N.Y.S.2d 485, 327 N.E.2d 638, 1975 N.Y. LEXIS 1756 (N.Y. 1975).

Where the police officer was in full uniform, arrived in a clearly marked police vehicle, and he thought that a crime or offense had been committed in his presence, the defendant may be found guilty of interference with a public officer contrary to the statute, even though, the ordinance with which the defendant was charged was held unconstitutional and the defendant was found not guilty on another charge. People v Mastrup, 58 Misc. 2d 316, 295 N.Y.S.2d 138, 1968 N.Y. Misc. LEXIS 1032 (N.Y. Dist. Ct. 1968), aff'd, 61 Misc. 2d 1027, 307 N.Y.S.2d 601, 1970 N.Y. Misc. LEXIS 1995 (N.Y. App. Term 1970).

17. —Passive resistance

Where defendants refused to leave a building as directed by police officers in the performance of their duties, the fact that their resistance was passive, nevertheless constitutes resistance under the statute. People v Williams, 25 N.Y.2d 86, 302 N.Y.S.2d 780, 250 N.E.2d 201, 1969 N.Y. LEXIS 1152 (N.Y. 1969).

Passive resistance is nonetheless resistance to an officer attempting to make an arrest and a violation of this section, and a person placed under arrest by an officer can be convicted of violating it because he passively resists the officer in taking him into custody to such extent that he has to be forcibly handled, carried, or dragged. People ex rel. Howell v Knight, 35 Misc. 2d 216, 228 N.Y.S.2d 981, 1962 N.Y. Misc. LEXIS 3273 (N.Y. Magis. Ct. 1962).

Penal L § 1851 explicitly included delay and obstruction in any form in addition to physical resistance, the intent of statute being that the police go about their business without any obstacles put in their way. People v Crayton, 55 Misc. 2d 213, 284 N.Y.S.2d 672, 1967 N.Y. Misc. LEXIS 1159 (N.Y. App. Term 1967).

Going limp upon arrest as part of group action, requiring the arresting officers to carry the group, including each defendant, to patrol wagon, was manifestly resisting a public officer in discharge of his duty in violation of Penal L § 1851. People v Crayton, 55 Misc. 2d 213, 284 N.Y.S.2d 672, 1967 N.Y. Misc. LEXIS 1159 (N.Y. App. Term 1967).

18. —Resisting unlawful arrest

Force used to regain a diamond ring seized by an officer unlawfully, and without warrant or arrest, merely to discover possible grounds yet unknown for arrest or accusation, does not constitute a violation of this section. People v Richter, 265 A.D. 767, 40 N.Y.S.2d 751, 1943 N.Y. App. Div. LEXIS 6413 (N.Y. App. Div.), aff'd, 291 N.Y. 161, 51 N.E.2d 690, 291 N.Y. (N.Y.S.) 161, 1943 N.Y. LEXIS 1048 (N.Y. 1943).

Defendant, who urged two women not to get into a patrol wagon, did not violate this section, where arrest of women was illegal. People v Papp, 19 Misc. 2d 331, 185 N.Y.S.2d 907, 1959 N.Y. Misc. LEXIS 4111 (N.Y. Gen. Sess. 1959).

A conviction under this section will not lie where the arrest is unlawful. People v Lasko, 43 Misc. 2d 693, 252 N.Y.S.2d 209, 1964 N.Y. Misc. LEXIS 1555 (N.Y. County Ct. 1964).

A 15-year-old boy, who contended that he was resisting unlawful arrest when an officer attempted to handcuff him to a fence for conduct which constituted a violation of Penal Law § 43 was guilty of disorderly conduct and the facts did not establish the allegation of resisting arrest. In re Rooney, 48 Misc. 2d 890, 266 N.Y.S.2d 217, 1965 N.Y. Misc. LEXIS 1215 (N.Y. Fam. Ct. 1965).

B. Under Other Former Laws

19. Under former § 196

This section is not unconstitutional as giving public monies to an individual. American Soc., P. C. A. v New York, 205 A.D. 335, 199 N.Y.S. 728, 1923 N.Y. App. Div. LEXIS 5019 (N.Y. App. Div. 1923).

20. Under former § 1824

Where relator admitted to police officers that he was conducting poolroom over his saloon and intended to go on and do business and at once made his way to door to poolroom and beckoned other to go with him, it is right and duty of police officers to accompany relator into premises for purpose of preventing pool-selling, and any interference on relator's part, as blocking entrance of police with his body, is violation of this section and relator is not entitled to be released from custody on habeas corpus after he has been arrested for such violation. People ex rel. Fried v Frank, 130 N.Y.S. 807, 73 Misc. 1, 1911 N.Y. Misc. LEXIS 461 (N.Y. Sup. Ct. 1911).

A deputy police commissioner cannot be convicted of an attempt to prevent police officer from making an arrest on the uncorroborated testimony of the officers, since by acceding to his request they became accomplices with him. People v Porter, 189 N.Y.S. 664, 115 Misc. 301, 1921 N.Y. Misc. LEXIS 1602 (N.Y. Gen. Sess. 1921).

The owner of personal property is liable to indictment for using force to prevent an officer from levying upon such property, by virtue of an execution against another person, where the officer acts in good faith, believing the property to be that of the execution debtor. People v Hall, 31 Hun 404 (N.Y.).

21. Under former § 1825

Resistance to search by a police officer on the part of one arrested, without a warrant, for a misdemeanor not committed in the presence of the arresting officer is not a violation of this section, the arrest being illegal. People v O'Connor, 257 N.Y. 473, 178 N.E. 762, 257 N.Y. (N.Y.S.) 473, 1931 N.Y. LEXIS 880 (N.Y. 1931).

A town justice of the peace, as a Court of Special Sessions, lacks jurisdiction to entertain a prosecution for the misdemeanor of resisting arrest under § 56 of the Code of Criminal Procedure. People v Nicometi, 12 N.Y.2d 428, 240 N.Y.S.2d 589, 191 N.E.2d 79, 1963 N.Y. LEXIS 1180 (N.Y. 1963).

A conviction under the above statute was held good even if defendant's arrest for jaywalking and disorderly conduct was

unlawful, where he punched a police officer when ordered out of a police car after being transported some four or five blocks to a police station, the court holding that such physical attack could not under the circumstances be considered reasonable resistance to unlawful arrest, and that such combative behavior stemming from an initial reasonable request by the policeman that the defendant identify himself for the purpose of receiving a summons for jaywalking and occurring at a time and place removed from that at which he was taken into custody, must be viewed as a counterattack, pursued for the sake of revenge or the infliction of needless injury. People v McNeil, 15 N.Y.2d 717, 256 N.Y.S.2d 614, 204 N.E.2d 648, 1965 N.Y. LEXIS 1705 (N.Y. 1965).

Ordinance of city of Utica imposing penalty not to exceed fifty dollars upon person who shall resist or obstruct police officer of city in discharging or attempting to discharge his duties is not inconsistent with this section. A police officer is an executive officer within the meaning of this section. People v Stewart, 47 N.Y.S.2d 349, 183 Misc. 212, 1944 N.Y. Misc. LEXIS 1772 (N.Y. City Ct. 1944).

Resistance to arrest without warrant by officer not witness to offense, does not constitute crime. People v McCarthy, 67 N.Y.S.2d 560, 188 Misc. 132, 1947 N.Y. Misc. LEXIS 1989 (N.Y. Sup. Ct. 1947).

If a police officer fails to establish his identity sufficiently, as a police officer, a person might well be within his right as a citizen to resist arrest. People v Galick, 11 Misc. 2d 961, 176 N.Y.S.2d 479, 1958 N.Y. Misc. LEXIS 2868 (N.Y. County Ct. 1958).

Conviction for resisting arrest by an officer cannot stand, if arrest is for violation of an unconstitutional statute, or if there is a fatally defective information. People v Stevens, 16 Misc. 2d 162, 183 N.Y.S.2d 968, 1959 N.Y. Misc. LEXIS 4278 (N.Y. County Ct. 1959).

22. Under former § 1839

The crime of committing "any unlawful act tending to hinder justice," dealt with in subd 2 of this section, by "justice" means that end which ought to be reached in a case by the regular administration of the principles of law involved as applied to the facts, and by "hinder" to "obstruct," impede, or prevent, with or without use of direct force or means. An indictment charging police officers with transporting a woman who had confessed to commission of certain acts which would make her a vagrant, with knowledge of her guilt and likewise with knowledge of the identity of a male participant in such acts, from Syracuse to Rochester, was sufficient to charge them with committing an unlawful act tending to hinder justice under subd 2 of this section. People v Longo, 16 A.D.2d 297, 227 N.Y.S.2d 815, 1962 N.Y. App. Div. LEXIS 9807 (N.Y. App. Div. 4th Dep't 1962).

Notes to Unpublished Decisions

Analysis

I. Generally

1. In General
2. Dealings with police
3. Evidence

I. Generally

1. In General

Unpublished decision: Where an arrestee and an officer had an altercation on a mall escalator, officers were not entitled to summary judgment as to the arrestee's false arrest and excessive force claims, because the arrestee's version of events did not support an inference of probable cause since the arrestee's version contained no support for the inference that the arrestee intended to obstruct the officer. Barksdale v Colavita, 506 Fed. Appx. 82, 2012 U.S. App. LEXIS 26331 (2d Cir. N.Y. 2012).

Unpublished decision: Officers were entitled to qualified immunity in plaintiff's 42 U.S.C.S. § 1983 action claiming false arrest in violation of the Fourth Amendment because reasonable officer could have determined that it was lawful to arrest plaintiff for obstruction of governmental administration by physical interference under circumstances in which plaintiff repeatedly declined to move out of officer's way. Basinski v City of New York, 706 Fed. Appx. 693, 2017 U.S. App. LEXIS 16162 (2d Cir. 2017).

2. Dealings with police

Unpublished decision: Police officer presented with the following undisputed facts would have a reasonable belief that there was probable cause to arrest a subject for disorderly conduct where (1) the subject told his niece not to cooperate with police officers' request for her identification, (2) when a police officer asked the subject to leave the scene, the subject refused, despite warnings from that officer that if the subject did not stop interfering with the officers' questioning of the subject's niece, he would be arrested. It is also undisputed that a crowd of some 30 people had gathered at the scene by the time of the arrest. Crenshaw v City of Mount Vernon, 372 Fed. Appx. 202, 2010 U.S. App. LEXIS 8189 (2d Cir. N.Y. 2010).

3. Evidence

Unpublished decision: Denial of defendant police officer's motion for judgment as a matter of law on his defense of qualified immunity from plaintiff's false arrest claim was affirmed because the facts, viewed in the light most favorable to plaintiff, did not provide a basis to think that plaintiff intended to disrupt police efforts or cause public inconvenience; plaintiff testified that while he was trapped in a dense crowd of protestors, a line of officers moving into the crowd bumped into him, he fell, he quickly rolled onto his stomach, face-down on the sidewalk, to protect himself as the line passed overhead, he felt someone grab his arm, lift him partway off the sidewalk, then drop him, and he was placed under arrest. Bradley v Jusino, 374 Fed. Appx. 144, 2010 U.S. App. LEXIS 7683 (2d Cir. N.Y. 2010).

Agency Opinions

Analysis

I. Generally

1. In General
2. Public servants; persons performing governmental functions
3. School disruptions

II. Under Former Law

A. Under Former § 1851

4. In general

I. Generally

1. In General

In instances of concurrent police department and fire department jurisdiction, the determination as to which of the two has primary jurisdiction over the event in question is dependent upon the circumstances of the particular case. In general, a fire department is in absolute command at the scene of a fire emergency until such time as, in the judgment of the fire chief, the premises are free from immediate danger of fire or explosion and safe for occupancy. N.Y. Op. Att'y Gen. No. 83-67.

2. Public servants; persons performing governmental functions

Upon the conviction of a mayor of a city of the crimes of official misconduct and obstructing governmental administration, the office becomes vacant automatically by operation of law. The conviction occurs at the time of the jury verdict of guilt or the entry of a plea of guilty, notwithstanding that no sentence has been imposed and that an appeal has been filed. 1983 NY Ops Atty Gen Mar 28 (informal).

Superintendent of highways' conviction of crime of obstructing governmental administration on basis of actions purportedly taken in exercise of his official responsibilities would involve violation of his oath of office, and his office becomes vacant upon conviction of crime involving violation of his oath of office. NY Ops Atty Gen 89-10 (Informal).

3. School disruptions

A fire alarm at a school creates authority for firemen to enter the school and it is their duty to do so. The school principal obstructs governmental authority by keeping them out and

determining when the fire is out and the building is safe for occupancy. A false alarm does not alter the foregoing. 1981 NY Ops Atty Gen Jan 27 (informal).

II. Under Former Law

A. Under Former § 1851

4. In general

Public officer must not be delayed or obstructed in performance of his duty, where no warrant has been issued, and there is no proof that felony has in fact been committed. 1927 N.Y. Op. Att'y Gen. No. 152.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Interference with officers discharging duty as to animals, CLS Agr & M § 369.

Federal Aspects:

Bribery, graft, and conflicts of interest of public officials, 18 USCS §§ 201 et seq.

Obstruction of justice, 18 USCS §§ 1501 et seq.

Jurisprudences:

35 NY Jur 2d Criminal Law Substantive Principles and Offenses § 160.

35B NY Jur 2d Criminal Law Substantive Principles and Offenses §§ 1242, 1312, 1313, 1327, 1328, 1331–1335, 1453.

Annotations:

Interference with enforcement of judgment in criminal or juvenile delinquent case as contempt. 8 ALR3d 657.

Scienter as element of offense of assaulting, resisting, or impeding federal officer (18 USC § 111). 10 ALR3d 833.

Criminal liability for obstructing process as affected by invalidity or irregularity of the process. 10 ALR3d 1146.

Modern status of rules as to right to forcefully resist illegal arrest. 44 ALR3d 1078.

Admissibility in criminal case, on issue of defendant's guilt, of evidence that third person has attempted to influence a witness not to testify or to testify falsely. 79 ALR3d 1156.

Validity, construction, and application of state statutes imposing criminal penalties for influencing, intimidating, or tampering with witness. 8 ALR4th 769.

Attorney's conduct in delaying or obstructing discovery as basis for contempt proceeding. 8 ALR4th 1181.

Construction and application of 18 USCS § 1503 making it a federal offense to endeavor to influence, intimidate, impede, or injure witness, juror, or officer in federal court, or to obstruct the due administration of justice. 20 ALR Fed 731.

Criminal Jury Instructions: Obstructing governmental administration, second degree. CJI2d [NY] Penal Law § 195.05.

§ 195.07. Obstructing governmental administration in the first degree

A person is guilty of obstructing governmental administration in the first degree when he commits the crime of obstructing governmental administration in the second degree by means of interfering with a telecommunications system thereby causing serious physical injury to another person.

Obstructing governmental administration in the first degree is a class E felony.

HISTORY:

Add, L 1984, ch 956, § 2, eff Nov 1, 1984.

Notes to Decisions

Defendant may not be convicted of obstructing governmental administration or interfering with police officer in performance of official duty unless it is established that police were engaged in authorized conduct. People v Lupinacci, 191 A.D.2d 589, 595 N.Y.S.2d 76, 1993 N.Y. App. Div. LEXIS 2309 (N.Y. App. Div. 2d Dep't 1993).

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

35B NY Jur 2d Criminal Law Substantive Principles and Offenses §§ 1312, 1313, 1327, 1453.

Criminal Jury Instructions: Obstructing governmental administration, first degree. CJI2d [NY] Penal Law § 195.07.

§ 195.15. Obstructing firefighting operations

A person is guilty of obstructing firefighting operations when he or she intentionally and unreasonably obstructs the efforts of any:

1. firefighter in extinguishing a fire, or prevents or dissuades another from extinguishing or helping to extinguish a fire;

2. firefighter, police officer or peace officer in performing his or her duties in circumstances involving an imminent danger created by an explosion, threat of explosion or the presence of toxic fumes or gases; or

3. firefighter performing emergency medical care on a sick or injured person.

Obstructing firefighting operations is a class A misdemeanor.

HISTORY:

Add, L 1965, ch 1030, § 1, with substance derived from §§ 1906(4), 1914; amd, L 1969, ch 314, § 1; L 1981, ch 731, § 1, eff Sept 1, 1981; L 2017, ch 124, § 1, effective November 1, 2017.

Commission Staff Notes: This section substantially restates former Penal Law § 1901.

Editor's Notes Laws 2017, ch 124, § 2, eff Nov 1, 2017, provides:

§ 2. This act shall take effect on the first of November next succeeding the date on which it shall have become a law.

Amendment Notes The 2017 amendment by ch 124, § 1 substituted "he or she" for "he" in the introductory language; substituted "firefighter" for "fireman" in 1 and 2; substituted "his or her" for "his" in 2; added 3; and made a related change.

Notes to Decisions

Analysis

1. In general
2. Under former § 1906

1. In general

Defendants could be convicted of attempt to obstruct firefighting operations even though fire was already extinguished when fire trucks arrived; phrase "in extinguishing a fire" (CLS Penal § 195.15) includes period following elimination of any flame up to point when it has been determined by firefighters that there is no longer danger of additional fire, and conduct that will violate statute must be determined on case-by-case basis. People v Melendez, 180 Misc. 2d 48, 688 N.Y.S.2d 870, 1999 N.Y. Misc. LEXIS 87 (N.Y. City Crim. Ct. 1999).

Officer was not entitled to summary judgment on a patient's false arrest and false imprisonment claims because, with respect to the patient's obstructing a firefighting arrest, no firefighting operation was occurring when the officer took action relating to the patient's refusal to be transported to a hospital. Holland v City of Poughkeepsie, 90 A.D.3d 841, 935 N.Y.S.2d 583, 2011 N.Y. App. Div. LEXIS 9102 (N.Y. App. Div. 2d Dep't 2011).

Based on undisputed actions of plaintiff that deputy observed, including plaintiff's movement around house and among electrical wires and his interactions with firefighters, and based on fire chief's statement that deputy had no reason to doubt, deputy had probable cause to arrest plaintiff for violation of Penal § 195.15. Greene v David (1999, ND NY) 41 F Supp 2d 167, affd, without op

(1999, CA2 NY) 199 F3d 1322, reported in full (1999, CA2 NY) 1999 US App LEXIS 28473 and petition for certiorari filed (Jan 26, 2000).

2. Under former § 1906

A fire warden under the conservation law may lawfully order a citizen to aid in fighting a forest fire. Jones v State, 50 N.Y.S.2d 877, 183 Misc. 239, 1944 N.Y. Misc. LEXIS 2430 (N.Y. Ct. Cl. 1944), aff'd, 269 A.D. 920, 57 N.Y.S.2d 582, 1945 N.Y. App. Div. LEXIS 4473 (N.Y. App. Div. 1945).

Agency Opinions

Analysis

1. In general
2. Under former § 1906
3. Under former § 1914

1. In general

A fire alarm at a school creates authority for firemen to enter the school and it is their duty to do so. The school principal has no authority to keep them out or determine when the fire is out and the building is safe for occupancy. A false alarm does not alter the foregoing. 1981 NY Ops Atty Gen Jan 27 (informal).

In instances of concurrent police department and fire department jurisdiction, the determination as to which of the two has primary jurisdiction over the event in question is dependent upon the circumstances of the particular case. In general, a fire department is in absolute command at the scene of a fire emergency until such time as, in the judgment of the fire chief, the premises are free from immediate danger of fire or explosion and safe for occupancy. N.Y. Op. Att'y Gen. No. 83-67.

2. Under former § 1906

A volunteer fire department is required to answer calls to fight forest or grass fires. 1951 NY Ops Atty Gen May 28.

3. Under former § 1914

Any person interfering with lawful efforts of a fire company to extinguish a fire is guilty of a misdemeanor. 1958 NY Ops Atty Gen Apr 3 (informal).

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

35B NY Jur 2d Criminal Law Substantive Principles and Offenses §§ 1312, 1313, 1328, 1345, 1346, 1453.

55 NY Jur 2d Environmental Rights and Remedies § 295 .

Criminal Jury Instructions: Obstructing firefighting operations (obstructing firefighter). CJI2d [NY] Penal Law § 195.15(1).

Obstructing firefighting operations (obstructing firefighter, police or peace officer). CJI2d [NY] Penal Law § 195.15(2).

§ 195.16. Obstructing emergency medical services

A person is guilty of obstructing emergency medical services when he or she intentionally and unreasonably obstructs the efforts of any service, technician, personnel, system or unit specified in section three thousand one of the public health law in the performance of their duties.

Obstructing emergency medical services is a class A misdemeanor.

HISTORY:

Add, L 2003, ch 600, § 1, eff Nov 1, 2003.

Notes to Decisions

N.Y. Penal Law § 195.16 clearly only prohibits "unreasonable" interference with emergency medical personnel. Stein v County of Nassau, 642 F. Supp. 2d 135, 2009 U.S. Dist. LEXIS 63794 (E.D.N.Y. 2009), aff'd in part, vacated in part, 419 Fed. Appx. 67, 2011 U.S. App. LEXIS 7296 (2d Cir. N.Y. 2011).

Court would not hold as a matter of law that plaintiff acted "unreasonably" if she had a legal right, as her husband's health care agent, to decide where her husband got treated, she obstructed the Individual defendants in an attempt to enforce that legal right, and prevent her husband's potentially unlawful removal to a hospital she did not choose, nor was the court prepared to say, as a matter of law, that defendant had "probable cause" to remove plaintiff from the room and temporarily detain her, based upon the apparently incorrect belief that health care agents had no authority outside of a hospital setting, and that plaintiff was thus acting unreasonably in obstructing the emergency medical personnel. Stein v County of Nassau, 642 F. Supp. 2d 135, 2009 U.S. Dist. LEXIS 63794 (E.D.N.Y. 2009), aff'd in part, vacated in part, 419 Fed. Appx. 67, 2011 U.S. App. LEXIS 7296 (2d Cir. N.Y. 2011).

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

35B NY Jur 2d Criminal Law Substantive Principles and Offenses §§ 1312, 1313, 1347, 1348, 1453.

12 Am Jur 2d, Breach of Promis § 31.

Annotations:

Construction and application of statutory provision requiring motorists to yield right-of-way to emergency vehicle. 87 ALR5th 1.

§ 195.17. Obstruction of governmental duties by means of a bomb, destructive device, explosive, or hazardous substance

A person is guilty of obstruction of governmental duties by means of a bomb, destructive device, explosive, or hazardous substance when he or she, in furtherance of a felony offense, knowingly and unlawfully installs or causes to be installed a bomb, destructive device, explosive, or hazardous substance, in any object, place, or compartment that is subject to a search so as to obstruct, prevent, hinder or delay the administration of law or performance of a government function.

Obstruction of governmental duties by means of a bomb, destructive device, explosive, or hazardous substance is a class D felony.

HISTORY:

Add, L 2011, ch 327, § 1, eff Nov 1, 2011.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

35B NY Jur 2d Criminal Law Substantive Principles and Offenses §§ 1312, 1313, 1453.

TITLE M Offenses Against Public Health and Morals

Article 225. Gambling Offenses

Section
225.00. Gambling offenses; definitions of terms

HISTORY:

Add, L 1965, ch 1030, § 1, eff Sept 1, 1967.

ARTICLE 225

GAMBLING OFFENSES

HISTORY:

Add, L 1965, ch 1030, § 1, eff Sept 1, 1967.

§ 225.00. Gambling offenses; definitions of terms

The following definitions are applicable to this article:

1. "Contest of chance" means any contest, game, gaming scheme or gaming devise in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein.

2. "Gambling." A person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome.

3. "Player" means a person who engages in any form of gambling solely as a contestant or bettor, without receiving or becoming entitled to receive any profit therefrom other than personal gambling winnings, and without otherwise rendering any material assistance to the establishment, conduct or operation of the particular gambling activity. A person who gambles at a social game of chance on equal terms with the other participants therein does not otherwise render material assistance to the establishment, conduct or operation thereof by performing, without fee or remuneration, acts directed toward the arrangement or facilitation of the game, such as inviting persons to play, permitting the use of premises therefor and supplying cards or other equipment used therein. A person who engages in "bookmaking", as defined in this section is not a "player."

4. "Advance gambling activity." A person "advances gambling activity" when, acting other than as a player, he engages in conduct which materially aids any form of gambling activity. Such conduct includes but is not limited to conduct directed toward the creation or establishment of the particular game, contest, scheme, device or activity involved, toward the acquisition or maintenance of premises, paraphernalia, equipment or apparatus therefor, toward the solicitation or inducement of persons to participate therein, toward the actual conduct of the playing phases thereof, toward the arrangement of any of its financial or recording phases, or toward any other phase of its operation. One advances gambling activity when, having substantial proprietary or other authoritative control over premises being used with his knowledge for purposes of gambling activity, he permits such to occur or continue or makes no effort to prevent its occurrence or continuation.

5. "Profit from gambling activity." A person "profits from gambling activity" when, other than as a player, he accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he participates or is to participate in the proceeds of gambling activity.

6. "Something of value" means any money or property, any token, object or article exchangeable for money or property, or any form of credit or promise directly or indirectly contemplating transfer of money or property or of any interest therein, or involving extension of a service, entertainment or a privilege of playing at a game or scheme without charge.

7. "Gambling device" means any device, machine, paraphernalia or equipment which is used or usable in the playing phases of any gambling activity, whether such activity consists of gambling between persons or gambling by a person involving the playing of a machine. Notwithstanding the foregoing, lottery tickets, policy slips and other items used in the playing phases of lottery and policy schemes are not gambling devices.

7-a. A "coin operated gambling device" means a gambling device which operates as a result of the insertion of something of value. A device designed, constructed or readily adaptable or convertible for such use is a coin operated gambling device notwithstanding the fact that it may require adjustment, manipulation or repair in order to operate as such. A machine which awards free or extended play is not a gambling device merely because such free or extended play may constitute something of value provided that the outcome depends upon the skill of the player and not in a material degree upon an element of chance.

8. "Slot machine" means a gambling device which, as a result of the insertion of a coin or other object, operates, either completely automatically or with the aid of some physical act by the player, in such manner that, depending upon elements of chance, it may eject something of value. A device so constructed, or readily adaptable or convertible to such use, is no less a slot machine because it is not in working order or because some mechanical act of manipulation or repair is required to accomplish its adaptation, conversion or workability. Nor is it any less a slot machine because, apart from its use or adaptability as such, it may also sell or deliver something of value on a basis other than chance. A machine which sells items of merchandise which are of equivalent value, is not a slot machine merely because such items differ from each other in composition, size, shape or color.

9. "Bookmaking" means advancing gambling activity by unlawfully accepting bets from members of the public as a business, rather than in a casual or personal fashion, upon the outcomes of future contingent events.

10. "Lottery" means an unlawful gambling scheme in which (a) the players pay or agree to pay something of value for chances, represented and differentiated by numbers or by combinations of numbers or by some other media, one or more of which chances are to be designated the winning ones; and (b) the winning chances are to be determined by a drawing or by some other method based upon the element of chance; and (c) the holders of the winning chances are to receive something of value provided, however, that in no event shall the provisions of this subdivision be construed to include a raffle as such term is defined in subdivision three-b of section one hundred eighty-six of the general municipal law.

11. "Policy" or "the numbers game" means a form of lottery in which the winning chances or plays are not determined upon the basis of a drawing or other act on the part of persons conducting or connected with the scheme, but upon the basis of the outcome or outcomes of a future contingent event or events otherwise unrelated to the particular scheme.

12. "Unlawful" means not specifically authorized by law.

13. "Authorized gaming establishment" means any structure, structure and adjacent or attached structure, or grounds adjacent to a structure in which casino gaming, conducted pursuant to article thirteen of the racing, pari-mutuel wagering and breeding law, or Class III gaming, as authorized pursuant to a compact reached between the state of New York and a federally recognized Indian nation or tribe under the federal Indian Gaming Regulatory Act of 1988, is conducted and shall include all public and non-public areas of any such building, except for such areas of a building where either Class I or II gaming are conducted or any building or grounds known as a video gaming entertainment facility, including facilities where food and drink are served, as well as those areas not normally open to the public, such as where records related to video lottery gaming operations are kept, except shall not include the racetracks or such areas where such video lottery gaming operations or facilities do not take place or exist, such as racetrack areas or fairgrounds which are wholly unrelated to video lottery gaming operations, pursuant to section sixteen hundred seventeen-a and paragraph five of subdivision a of section sixteen hundred twelve of the tax law, as amended and implemented.

14. "Authorized gaming operator" means an enterprise or business entity authorized by state or federal law to operate casino or video lottery gaming.

15. "Casino gaming" means games authorized to be played pursuant to a license granted under article thirteen of the racing, pari-mutuel wagering and breeding law or by federally recognized Indian nations or tribes pursuant to a gaming compact reached in accordance with the federal Indian Gaming Regulatory Act of 1988, Pub. L. 100-497, 102 Stat. 2467, codified at 25 U.S.C. §§ 2701-21 and 18 U.S.C. §§ 1166-68.

16. "Cash equivalent" means a treasury check, a travelers check, wire transfer of funds, transfer check, money order, certified check, cashiers check, payroll check, a check drawn on the account of the authorized gaming operator payable to the patron or to the authorized gaming establishment, a promotional coupon, promotional chip, promotional cheque, promotional token, or a voucher recording cash drawn against a credit card or charge card.

17. "Cheques" or "chips" or "tokens" means non-metal, metal or partly metal representatives of value, redeemable for cash or cash equivalent, and issued and sold by an authorized casino operator for use at an authorized gaming establishment. The value of such cheques or chips or tokens shall be considered equivalent in value to the cash or cash equivalent exchanged for such cheques or chips or tokens upon purchase or redemption.

18. "Class I gaming" and "Class II gaming" means those forms of gaming that are not Class III gaming, as defined in subsection eight of section four of the federal Indian Gaming Regulatory Act, 25 U.S.C. § 2703.

19. "Class III gaming" means those forms of gaming that are not Class I or Class II gaming, as defined in subsections six and seven of section four of the federal Indian Gaming Regulatory Act, 25 U.S.C. § 2703 and those games enumerated in the Appendix of a gaming compact.

20. "Compact" or "gaming compact" means the agreement between a federally recognized Indian tribe and the state of New York regarding Class III gaming activities entered into pursuant to the federal Indian Gaming Regulatory Act, Pub. L. 100-497, 102 Stat. 2467, codified at 25 U.S.C. §§ 2701-21 and 18 U.S.C. §§ 1166-68 (1988 & Supp. II).

21. "Gaming equipment or device" means any machine or device which is specially designed or manufactured for use in the operation of any Class III or video lottery game.

22. "Gaming regulatory authority" means, with respect to any authorized gaming establishment on Indian lands, territory or reservation, the Indian nation or tribal gaming commission, its authorized officers, agents and representatives acting in their official capacities or such other agency of a nation or tribe as the nation or tribe may designate as the agency responsible for the regulation of Class III gaming, jointly with the state gaming agency, conducted pursuant to a gaming compact between the nation or tribe and the state of New York, or with respect to any casino gaming authorized pursuant to article thirteen of the racing, pari-mutuel wagering and breeding law or video lottery gaming conducted pursuant to section sixteen hundred seventeen-a and paragraph five of subdivision a of section sixteen hundred twelve of the tax law, as amended and implemented.

23. "Premises" includes any structure, parking lot, building, vehicle, watercraft, and any real property.

24. "Sell" means to sell, exchange, give or dispose of to another.

25. "State gaming agency" shall mean the New York state gaming commission, its authorized officials, agents, and representatives acting in their official capacities as the regulatory agency of the state which has responsibility for regulation with respect to video lottery gaming or casino gaming.

26. "Unfair gaming equipment" means loaded dice, marked cards, substituted cards or dice, or fixed roulette wheels or other gaming equipment which has been altered in a way that tends to deceive or tends to alter the elements of chance or

normal random selection which determine the result of the game or outcome, or the amount or frequency of the payment in a game.

27. "Unlawful gaming property" means:

(a) any device, not prescribed for use in casinio [casino]* gaming by its rules, which is capable of assisting a player:

(i) to calculate any probabilities material to the outcome of a contest of chance; or

(ii) to receive or transmit information material to the outcome of a contest of chance; or

(b) any object or article which, by virtue of its size, shape or any other quality, is capable of being used in casino gaming as an improper substitute for a genuine chip, cheque, token, betting coupon, debit instrument, voucher or other instrument or indicia of value; or

(c) any unfair gaming equipment.

28. "Video lottery gaming" has the meaning set forth in subdivision six of section sixteen hundred two of the tax law.

29. "Voucher" means an instrument of value generated by a video lottery terminal representing a monetary amount and/or play value owed to a customer at a specific video lottery terminal based on video lottery gaming winnings and/or amounts not wagered.

HISTORY:

Add, L 1965, ch 1030, § 1, eff Sept 1, 1967; amd, L 1967, ch 791, § 31; L 1987, ch 632, §§ 1, 2, eff Nov 1, 1987; L 1994, ch 550, § 1, eff Jan 22, 1995; L 2011, ch 8, § 1, eff March 25, 2011; L 2013, ch 174, § 3, eff July 30, 2013; L 2013, ch 175, § 3, eff July 30, 2013; L 2015, ch 59, § 2 (Part OO), effective May 13, 2015.

Editor's Notes: Laws 2013, ch 174, § 1, eff as stated in 2013 note below, provides as follows:

Section 1. This act shall be known and may be cited as the "upstate New York gaming economic development act of 2013."

Laws 2013, ch 174, § 52(a), eff July 30, 2013, provides as follows:

§ 52. This act shall take effect immediately; provided, however, that:

(a) sections one, two, five, nine, ten, twenty-seven and thirty-one of this act shall take effect on the first of January next succeeding the date upon which the people shall approve and ratify amendments to subdivision 1 of section 9 of article I of the constitution by a majority of the electors voting thereon relating to casino gambling in the state;

Laws 2013, ch 174, § 3, eff July 30, 2013 purported to add 18 new subdivisions 13–30 but only added 17 new subdivisions 13–29.

Commission Staff Notes: See Commission Staff Notes under Article 225.

Amendment Notes: 2013. Chapter 174, § 3 amended:
By adding sub 13.
By adding sub 14.
By adding sub 16.
By adding sub 17.
By adding sub 18.
By adding sub 19.
By adding sub 20.
By adding sub 21.
By adding sub 22.
By adding sub 23.
By adding sub 24.
By adding sub 25.
By adding sub 26.
By adding sub 27.
By adding sub 28.
By adding sub 29.

2013. Chapter 175, § 3 amended:
Sub 15 by deleting at fig 1 "valid".

2011. Chapter 8 § 1 amended:
Sub 7-a by adding the matter in italics.
Sub 8 by deleting at fig 1 "A machine which awards free or extended play is not a slot machine merely because such free or extended play may constitute something of value provided that the outcome depends in a material degree upon the skill of the player and not in a material degree upon an element of chance".

The 2015 amendment by ch 59, § 2 (Part OO), substituted "has the meaning set forth in subdivision six of section sixteen hundred two of the tax law" for "means any lottery game played on a video lottery terminal, which consists of multiple players competing for a chance to win a random drawn prize pursuant to section sixteen hundred seventeen-a and paragraph five of subdivision a of section sixteen hundred twelve of the tax law, as amended and implemented" in 28.

Notes to Decisions

Analysis

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1. In general

Evidence was sufficient to sustain conviction of promoting gambling in first degree, contrary to contention that it was not proven that accused accepted more than $5,000 in bets during one day because of failure to distinguish between calls made by bookmakers, as to which accused claimed he was merely acting as an agent, and calls made by other players, since, even as to calls by bookmakers, there was sufficient evidence that defendant advanced unlawful gambling by receiving or accepting them. People v Audi, 54 A.D.2d 805, 388 N.Y.S.2d 351, 1976 N.Y. App. Div. LEXIS 14498 (N.Y. App. Div. 3d Dep't 1976).

Charitable organization which sponsored raffle could not be compelled to award winning prize or value thereof where it was uncontroverted that raffle of new car did not fall within exceptions to prohibitions against illegal gambling under CLS NY Const Art I § 9(2), and raffle, in which "contribution" of $10 purchased 5 chances to win car, constituted lottery proscribed by CLS Penal § 225.00(10); under circumstances, raffle constituted illegal contract in violation of CLS Gen Oblig § 5-417 and was void and unenforceable. Harris v Economic Opportunity Comm'n, Inc., 171 A.D.2d 223, 575 N.Y.S.2d 672, 1991 N.Y. App. Div. LEXIS 13739 (N.Y. App. Div. 2d Dep't 1991).

Construction of quarter horse racing track at which parimutuel betting would be conducted was not subject to town

*The bracketed word has been inserted by the Publisher.

zoning ordinance requiring a building permit. Brookhaven v Suffolk Meadows Quarter Horse Racing Ass'n, 76 Misc. 2d 175, 350 N.Y.S.2d 525, 1973 N.Y. Misc. LEXIS 1436 (N.Y. Sup. Ct. 1973).

Defendants charged in information with being a "dealer," "cutter," "moneyman/manager" or "security," had fair notice of conduct forbidden by gambling statute. People v Shing, 83 Misc. 2d 462, 371 N.Y.S.2d 322, 1975 N.Y. Misc. LEXIS 2924 (N.Y. City Crim. Ct. 1975).

In proceeding in which accused were convicted of promoting gambling in second degree and possession of gambling device, evidence that cash was accepted at gambling tables, that gambling activities, which were purportedly engaged in on behalf of charitable organizations, were conducted without knowledge and consent of charities, that charities only received 10% of proceeds and that a charity was dissatisfied with its share of proceeds and terminated doing business with accused was relevant to issues involved and was admissible, notwithstanding assertion that such evidence was used to show that accused were guilty of criminal acts not charged in indictment. People v Berk, 83 Misc. 2d 711, 373 N.Y.S.2d 748, 1975 N.Y. Misc. LEXIS 2966 (N.Y. App. Term 1975).

2. Constitutionality

Language "materially aids" in statutory definition of advancing gambling activity was not unconstitutionally vague. People v Shing, 83 Misc. 2d 462, 371 N.Y.S.2d 322, 1975 N.Y. Misc. LEXIS 2924 (N.Y. City Crim. Ct. 1975).

3. Relationship to other laws

Penal Law § 225.00 definitions relating to gambling offenses are instructive in determining whether alcoholic beverage licensee has suffered or permitted gambling on premises in violation of Al Bev Law § 106. Plato's Cave Corp. v State Liquor Authority, 115 A.D.2d 426, 496 N.Y.S.2d 436, 1985 N.Y. App. Div. LEXIS 54818 (N.Y. App. Div. 1st Dep't 1985), aff'd, 68 N.Y.2d 791, 506 N.Y.S.2d 856, 498 N.E.2d 420, 1986 N.Y. LEXIS 20104 (N.Y. 1986).

Mere possession or use of gambling device, as defined in Penal Law § 225.00, on premises of alcoholic beverage licensee, in violation of Al Bev § 106, is not disorderly conduct, as set forth in Penal Law § 240.20 and accordingly does not constitute operation of disorderly premises in violation of Al Bev § 106. Plato's Cave Corp. v State Liquor Authority, 115 A.D.2d 426, 496 N.Y.S.2d 436, 1985 N.Y. App. Div. LEXIS 54818 (N.Y. App. Div. 1st Dep't 1985), aff'd, 68 N.Y.2d 791, 506 N.Y.S.2d 856, 498 N.E.2d 420, 1986 N.Y. LEXIS 20104 (N.Y. 1986).

4. Local laws

State does not have exclusive regulatory power in gambling field so as to prevent city from prohibiting pinball machines or games of chance. Albert Simon, Inc. v Myerson, 36 N.Y.2d 300, 367 N.Y.S.2d 755, 327 N.E.2d 801, 1975 N.Y. LEXIS 1764 (N.Y.), reh'g denied, 37 N.Y.2d 740, 1975 N.Y. LEXIS 2979 (N.Y. 1975), app. dismissed, 423 U.S. 908, 96 S. Ct. 209, 46 L. Ed. 2d 137, 1975 U.S. LEXIS 3013 (U.S. 1975).

Local law proscribing gambling was beyond city's power to legislate under NY Const Art 9 § 2 subd c ¶ 10, and Art 9 § 3 subd d ¶ 1, and General City L § 20(13) where state had pre-empted field of anti-gambling laws by passage of Penal L § 225.00, and 225.30. People v Wilkerson, 73 Misc. 2d 895, 342 N.Y.S.2d 936, 1973 N.Y. Misc. LEXIS 1993 (N.Y. County Ct. 1973).

5. Particular statutory terms

A gambling device promotes an operation based on chance, and possession of such a device is a class A misdemeanor. Beamel Amusement Corp. v Police Dep't of Suffolk County, 54 Misc. 2d 946, 283 N.Y.S.2d 760, 1967 N.Y. Misc. LEXIS 1179 (N.Y. Sup. Ct. 1967).

Raffle run by charitable institution to raise funds for scholarship fund fell within definition of lottery contained in CLS Penal § 225.00, and thus it was not game of chance which could be conducted pursuant to CLS Gen Mun Art 9-A. Harris v Economic Opportunity Comm'n, Inc., 142 Misc. 2d 980, 542 N.Y.S.2d 913, 1989 N.Y. Misc. LEXIS 378 (N.Y. App. Term 1989), aff'd, 171 A.D.2d 223, 575 N.Y.S.2d 672, 1991 N.Y. App. Div. LEXIS 13739 (N.Y. App. Div. 2d Dep't 1991).

Definition of "unlawful" in CLS Penal § 225.00(12), which uses phrase "not specifically authorized by law," is to be interpreted as referring to laws of New York and not to laws of sister states. People v Kim, 154 Misc. 2d 346, 585 N.Y.S.2d 310, 1992 N.Y. Misc. LEXIS 261 (N.Y. City Crim. Ct. 1992).

Accusatory instrument was facially insufficient with respect to charge of possession of gambling device where instrument charged that defendant operated lotto machine from which detective obtained receipt for Florida lotto ticket; lotto machine was not gambling device within meaning of CLS Penal § 225.00(7). People v Kim, 154 Misc. 2d 346, 585 N.Y.S.2d 310, 1992 N.Y. Misc. LEXIS 261 (N.Y. City Crim. Ct. 1992).

Respondents engaged in conduct that materially aided gambling activity in violation of CLS Penal § 225.00(4) and violated CLS Penal § 225.05, where they operated offshore casino that offered gambling to Internet users in New York, and they actively targeted New York as location where they conducted many of their allegedly illegal activities. People v World Interactive Gaming Corp., 185 Misc. 2d 852, 714 N.Y.S.2d 844, 1999 N.Y. Misc. LEXIS 425 (N.Y. Sup. Ct. 1999).

Conduct encouraging continuance of gambling site by ensuring proprietor of "protection" is activity materially aiding gambling and falls within Penal Law § 225.00(4). United States v Lombardozzi, 620 F. Supp. 587, 1985 U.S. Dist. LEXIS 14539 (E.D.N.Y. 1985), aff'd, 788 F.2d 6 (2d Cir. N.Y. 1986).

6. —"Gambling"

State Liquor Authority properly relied on definition of "gambling" in CLS Penal Law § 225.00 in determining that licensee violated CLS Al Bev Law § 106 by permitting on its premises "Joker Poker" machine which awarded free games to winning players. Plato's Cave Corp. v State Liquor Auth., 68 N.Y.2d 791, 506 N.Y.S.2d 856, 498 N.E.2d 420, 1986 N.Y. LEXIS 20104 (N.Y. 1986).

Gambling is defined as parting with value on the chance of receiving a return of value, the material element being chance though skill may be somewhat involved. Beamel Amusement Corp. v Police Dep't of Suffolk County, 54 Misc. 2d 946, 283 N.Y.S.2d 760, 1967 N.Y. Misc. LEXIS 1179 (N.Y. Sup. Ct. 1967).

Wagering by the participants to the outcome of a game of skill is not gambling and billiards is a game of skill. People v Stiffel, 61 Misc. 2d 1100, 308 N.Y.S.2d 64, 1969 N.Y. Misc. LEXIS 1042 (N.Y. App. Term 1969).

Defendant was entitled to dismissal of information charging possession of gambling device in violation of CLS Penal § 225.30(2), arising from allegation that he ran game of 3-card monte, since 3-card monte is not contest of chance and thus does not fall within definition of gambling. People v Hunt, 162 Misc. 2d 70, 616 N.Y.S.2d 168, 1994 N.Y. Misc. LEXIS 350 (N.Y. City Crim. Ct. 1994).

Defendant was entitled to dismissal of information charging second degree promotion of gambling in violation of CLS Penal § 225.05, arising from allegation that he ran game of 3-card monte, since 3-card monte is not contest of chance and thus does not fall within definition of gambling. People v Hunt, 162 Misc. 2d 70, 616 N.Y.S.2d 168, 1994 N.Y. Misc. LEXIS 350 (N.Y. City Crim. Ct. 1994).

Gambling with dice, per se, is not illegal; gambling becomes illegal only if person advances gambling activity when acting other than as player. People v Davidson, 181 Misc. 2d 999, 696 N.Y.S.2d 640, 1999 N.Y. Misc. LEXIS 414 (N.Y. Sup. Ct. 1999), rev'd, 291 A.D.2d 810, 737 N.Y.S.2d 467, 2002 N.Y. App. Div. LEXIS 1087 (N.Y. App. Div. 4th Dep't 2002).

Three-card monte (and, by inference. "the shell game") is game of skill in which accuracy of player's eye competes with speed of dealer's hand, and thus does not constitute gambling under CLS Penal § 225.00(2). People v Mohammed, 187 Misc. 2d 729, 724 N.Y.S.2d 803, 2001 N.Y. Misc. LEXIS 105 (N.Y. City Crim. Ct. 2001).

Fantasy sports contests (IFS) were games determined by skill and chance, and IFS therefore constituted gambling within the prohibition in N.Y. Const. art. I, § 9; N.Y. Racing, Pari-Mutuel

Wagering and Breeding Law § 1400 et seq., was unconstitutional to the extent that it authorized IFS, but not to the extent it defined gambling in the penal law. White v Cuomo, 62 Misc. 3d 877, 87 N.Y.S.3d 805, 2018 N.Y. Misc. LEXIS 5158 (N.Y. Sup. Ct. 2018), reh'g denied, 2019 N.Y. Misc. LEXIS 4811 (N.Y. Sup. Ct. Mar. 5, 2019), rev'd, in part, modified, 181 A.D.3d 76, 118 N.Y.S.3d 775, 2020 N.Y. App. Div. LEXIS 956 (N.Y. App. Div. 3d Dep't 2020).

Post-verdict judgment of acquittal, setting aside guilty verdicts on violations of Illegal Gambling Business Act (IGBA), and conspiring to do so, was error because IGBA's plain language covered defendant's "Texas Hold'em" poker business; 18 U.S.C.S. § 1955(b)(2) did not include language limiting it to include only games analogous to those enumerated and it was not disputed that poker was gambling under N.Y. Penal Law § 225.00(2). United States v DiCristina, 726 F.3d 92, 2013 U.S. App. LEXIS 16197 (2d Cir. N.Y. 2013), cert. denied, 571 U.S. 1197, 134 S. Ct. 1281, 188 L. Ed. 2d 299, 2014 U.S. LEXIS 1457 (U.S. 2014).

Trading card manufacturer's conduct in charging additional consideration for each packages of cards, for chance of winning extra-value "chase" card which could immediately be exchanged for cash in secondary market, violated New York's gambling laws. Schwartz v Upper Deck Co., 967 F. Supp. 405, 1997 U.S. Dist. LEXIS 7989 (S.D. Cal. 1997), vacated, 104 F. Supp. 2d 1228, 2000 U.S. Dist. LEXIS 11863 (S.D. Cal. 2000).

7. —"Slot machine"

Fact that "Lucky Shamrock Vending Machine" installed in bar did not contain random number generator or other device to determine winners did not prevent it from being gambling device in violation of CLS Al Bev § 106(6) and 9 NYCRR § 53.1(t) where CLS Penal § 225.00(8) provides that "'[s]lot machine' means a gambling device which, as a result of the insertion of a coin or other object, operates, either completely automatically or with the aid of some physical act by the player, in such manner that, depending upon elements of chance, it may eject something of value" and that device is no "less a slot machine because, apart from its use or adaptability as such, it may also sell or deliver something of value on a basis other than chance." Black North Assocs. v Kelly, 281 A.D.2d 974, 722 N.Y.S.2d 666, 2001 N.Y. App. Div. LEXIS 3046 (N.Y. App. Div. 4th Dep't 2001).

Pinball machines fall specifically within the framework of the general definition of "slot machines," and thus are excluded from the more broadly defined area of "gambling devices" per se. Beamel Amusement Corp. v Police Dep't of Suffolk County, 54 Misc. 2d 946, 283 N.Y.S.2d 760, 1967 N.Y. Misc. LEXIS 1179 (N.Y. Sup. Ct. 1967).

Since under this section before a device may be called a slot machine, it must be shown to be capable of actually ejecting something of value, pinball machines which do not eject things, value, or anything else are not susceptible of characterization as slot machine gambling devices. Beamel Amusement Corp. v Police Dep't of Suffolk County, 54 Misc. 2d 946, 283 N.Y.S.2d 760, 1967 N.Y. Misc. LEXIS 1179 (N.Y. Sup. Ct. 1967).

Because the Joker Poker machine located in defendant's establishment and described in the information was slot machine, as defined in N.Y. Penal Law § 225.00(8), the information was sufficient to withstand defendant's motion to dismiss the charge of possession of a gambling device under N.Y. Penal Law § 225.30(a)(1). People v Delacruz, 872 N.Y.S.2d 876, 23 Misc. 3d 720, 241 N.Y.L.J. 34, 2009 N.Y. Misc. LEXIS 218 (N.Y. City Crim. Ct. 2009).

8. Video games

Joker-poker videogame, outcome of which depends in material degree upon draw of cards, is gambling device notwithstanding degree of skill and concentration involved in playing poker, where person playing game may win credits for winning hand and use credits for continued play without further payment. Plato's Cave Corp. v State Liquor Authority, 115 A.D.2d 426, 496 N.Y.S.2d 436, 1985 N.Y. App. Div. LEXIS 54818 (N.Y. App. Div. 1st Dep't 1985), aff'd, 68 N.Y.2d 791, 506 N.Y.S.2d 856, 498 N.E.2d 420, 1986 N.Y. LEXIS 20104 (N.Y. 1986).

Substantial evidence supported determination that liquor licensee suffered or permitted gambling on licensed premises and permitted keeping or maintaining of video display game machine of type prohibited under rule 36.1(t) of Rules of State Liquor Authority (9 NYCRR § 53.1(t)) where "Big Apple" video game present on premises rewarded winning poker hand with opportunity to prolong initial play by means of playing high-low double-up feature, which was not available to person who drew losing poker hand; such extension of play was "something of value" within meaning of CLS Penal § 225.00(6) and, therefore, "gambling" within meaning of § 225.00(2). Cos Dei San, Inc. v New York State Liquor Authority, 147 A.D.2d 370, 537 N.Y.S.2d 536, 1989 N.Y. App. Div. LEXIS 1280 (N.Y. App. Div. 1st Dep't), app. denied, 74 N.Y.2d 611, 546 N.Y.S.2d 556, 545 N.E.2d 870, 1989 N.Y. LEXIS 2883 (N.Y. 1989).

9. Under former § 1370; in general

The word "lottery" has no technical legal meaning, and must be construed in the popular sense and with a view of remedying the mischief intended to be prevented. Wilkinson v Gill, 74 N.Y. 63, 74 N.Y. (N.Y.S.) 63, 1878 N.Y. LEXIS 707 (N.Y. 1878).

It cannot be successfully contended, because the lottery laws were enacted before the game of "policy" came into being, that, therefore, there may be no prosecution of "policy" under the lottery statute, since the statute is comprehensive and there is no need of a new statute every time ingenuity invents a new form of game in which the fundamental principal of chance is the same. People v Hines, 284 N.Y. 93, 29 N.E.2d 483, 284 N.Y. (N.Y.S.) 93, 1940 N.Y. LEXIS 865 (N.Y. 1940), overruled, People v Kohut, 30 N.Y.2d 183, 331 N.Y.S.2d 416, 282 N.E.2d 312, 1972 N.Y. LEXIS 1409 (N.Y. 1972).

The laws of New York prohibiting lotteries apply not merely to pure gambling operations, but also to business operations conducted as lotteries. State by Lefkowitz v ITM, Inc., 52 Misc. 2d 39, 275 N.Y.S.2d 303, 1966 N.Y. Misc. LEXIS 1486 (N.Y. Sup. Ct. 1966).

10. —Elements of lottery, generally

The three essential elements which go to make up a game of chance or a lottery are consideration, chance and prize. People v Cadle, 114 N.Y.S.2d 451, 202 Misc. 415, 1952 N.Y. Misc. LEXIS 2917 (N.Y. County Ct. 1952).

Three elements enter into a lottery, a consideration, chance, and a prize or some advantage or in a quality in amount or value, which is in the nature of a prize, the presence of consideration is a most essential element of the lottery. People v Psallis, 12 N.Y.S.2d 796, 1939 N.Y. Misc. LEXIS 1950 (N.Y. Magis. Ct. 1939).

11. — —Consideration

To make the "bank nite" scheme a lottery there must be either payment of a valuable consideration or an agreement to pay for the chance to win a prize. Requirement of the presence of the participant in the theater or lobby within 5 minutes is not such a consideration. People v Shafer, 289 N.Y.S. 649, 160 Misc. 174, 1936 N.Y. Misc. LEXIS 1371 (N.Y. County Ct.), aff'd, 273 N.Y. 475, 6 N.E.2d 410, 273 N.Y. (N.Y.S.) 475, 1936 N.Y. LEXIS 1486 (N.Y. 1936).

Where there was definite proof that participation in drawing for valuable prizes was absolutely free, there was no violation of § 1370. People v Psallis, 12 N.Y.S.2d 796, 1939 N.Y. Misc. LEXIS 1950 (N.Y. Magis. Ct. 1939).

12. — —Chance

Where the element of chance so permeates a scheme to induce sales by giving credits for leads to potential sales to others, such action must be condemned as a lottery. State by Lefkowitz v ITM, Inc., 52 Misc. 2d 39, 275 N.Y.S.2d 303, 1966 N.Y. Misc. LEXIS 1486 (N.Y. Sup. Ct. 1966).

There is no "lot" or "chance" involved in a retirement plan in the sense such elements contaminate a contract, because uncertainties result from the possibility that an employee may die or be discharged or withdraw from employment before retirement. Wells v J. C. Penny Co., 250 F.2d 221, 1957 U.S. App. LEXIS 4577 (9th Cir. Or. 1957).

13. — —Prize

To constitute a lottery, the prizes need not be in money. People v Psallis, 12 N.Y.S.2d 796, 1939 N.Y. Misc. LEXIS 1950 (N.Y. Magis. Ct. 1939).

14. —Illegal and legal activities distinguished

The basic distinction between the illegal gambling transaction and the legitimate speculative investment turns on the nature of the stake. If a sum of money is put up merely to abide a contingent event, at which time the event will determine to whom the money shall go, the transaction is clearly a wager. If, on the other hand, the money is used in the speculative enterprise, the reward of success is deemed a return on investment. The difference is that the investor does something or attempts to do something to influence the favorable outcome of the venture, while the gambler passively awaits the happening of the fortuitous event. The absence or a working investment, with money passing only after the event, is one of the indicia of an illegal investment. Liss v Manuel, 58 Misc. 2d 614, 296 N.Y.S.2d 627, 1968 N.Y. Misc. LEXIS 946 (N.Y. Civ. Ct. 1968).

Risk is not the element which makes the transaction a gamble. When a party has a genuine personal stake in the outcome of future events, as when he has an insurable interest, an investment, a contract involving goods, commodities, work, labor or services, it is an approved and judicially enforceable mode or form of business and regardless of risk, not a bet, wager or illegal gamble. Liss v Manuel, 58 Misc. 2d 614, 296 N.Y.S.2d 627, 1968 N.Y. Misc. LEXIS 946 (N.Y. Civ. Ct. 1968).

15. —Indictment; and information

Crime of operating lottery is sufficiently indicated by reference in information to violation of this section, which defines lottery, for by constitution lottery is illegal. St. Lawrence County v Goldberg, 175 A.D. 88, 161 N.Y.S. 641, 1916 N.Y. App. Div. LEXIS 8280 (N.Y. App. Div. 1916).

This section defines a lottery as a scheme for the distribution of property by chance, among persons who have paid or agreed to pay for "a valuable consideration for the chance. . . . " An indictment charging violations of former §§ 1370, 1372 and 1376 prohibiting operation of a lottery, which stated that participants paid $1 for use of a folding chair, should not have been dismissed on the ground that, it failed to allege payment of consideration and that, therefore, no lottery took place. The alleged participants were not paying merely for the privilege of sitting down, but were paying for a chair at a bingo game. The allegation of payment of $1 at least raised a question of fact as what the $1 was paid for. People v Cadle, 7 A.D.2d 65, 180 N.Y.S.2d 576, 1958 N.Y. App. Div. LEXIS 3799 (N.Y. App. Div. 4th Dep't 1958).

16. —Evidence

Evidence given by police department engineer, who testified that in four games which he played with his eyes open and intent upon winning, he achieved success in an average of twenty-six throws and then in a fifth did so with his eyes shut in twenty-one throws, tended to prove that game constitute lottery within meaning of former §§ 1370 and 1376. People ex rel. Ehrman v Kearney, 292 N.Y. 627, 55 N.E.2d 505, 292 N.Y. (N.Y.S.) 627, 1944 N.Y. LEXIS 1784 (N.Y. 1944).

17. —Particular activities as constituting lottery

The sale of "prize candy" in boxes, each box being represented to contain a prize of money or jewelry, and the purchaser selecting his box in ignorance of its contents, held a lottery. Hull v Ruggles, 56 N.Y. 424, 56 N.Y. (N.Y.S.) 424, 1874 N.Y. LEXIS 142 (N.Y. 1874).

A scheme providing for the distribution of a sum of money and a quantity of cigars among the purchasers of certain brands who should estimate most closely the number of cigars of all brands upon which the government would collect taxes during the month named, conceding that the distribution does not depend exclusively on chance, but to some extent is affected by the exercise of judgment, is a lottery within the meaning of this section, and under § 1374, advertising it is a misdemeanor. People ex rel. Ellison v Lavin, 179 N.Y. 164, 71 N.E. 753, 179 N.Y. (N.Y.S.) 164, 1904 N.Y. LEXIS 1082 (N.Y. 1904).

Payment which entitles one to ticket of admission to theatre, plus chance to win prize, constitutes payment of valuable consideration for chance, within meaning of this section, defining "lottery". People v Miller, 271 N.Y. 44, 2 N.E.2d 38, 271 N.Y. (N.Y.S.) 44, 1936 N.Y. LEXIS 1162 (N.Y. 1936).

Numbers game or policy, whereby player selected number of 3 figures, which was given with amount bet to collector, and winning number was determined by chance, and paid 600 times amount bet, held lottery within § 1370. People v Hines, 284 N.Y. 93, 29 N.E.2d 483, 284 N.Y. (N.Y.S.) 93, 1940 N.Y. LEXIS 865 (N.Y. 1940), overruled, People v Kohut, 30 N.Y.2d 183, 331 N.Y.S.2d 416, 282 N.E.2d 312, 1972 N.Y. LEXIS 1409 (N.Y. 1972).

Sales technique involving an "endless chain transaction" consisting of referral-type sales, where buyer is promised a specific sum for each sale resulting from his submission of names, and the element of chance permeates the entire scheme, is a lottery within the meaning of this section, a public nuisance within meaning of Penal Law § 1371, and is persistently illegal within meaning of Executive Law § 63 subsection 12. State by Lefkowitz v ITM, Inc., 52 Misc. 2d 39, 275 N.Y.S.2d 303, 1966 N.Y. Misc. LEXIS 1486 (N.Y. Sup. Ct. 1966).

Under a contract or writing that a party was to furnish the money for a perfectly legal purchase of stock; that the other party was to furnish specialized or "inside" information as to the identity of the stock, and the timing of the sale; that plaintiff would make the initial investment, and he and the defendant would each get 50 percent of the net profits, while defendant was to bear all the losses, there existed a joint venture in which each party was to furnish money or knowledge of a particular transaction, and was to share the profits and losses in accordance with a specified formula. Liss v Manuel, 58 Misc. 2d 614, 296 N.Y.S.2d 627, 1968 N.Y. Misc. LEXIS 946 (N.Y. Civ. Ct. 1968).

Sale of bonds of a foreign country, the purchaser of which has a chance to obtain a prize, dependent upon lot, is a lottery. Horner v United States, 147 U.S. 449, 13 S. Ct. 409, 37 L. Ed. 237, 1893 U.S. LEXIS 2173 (U.S. 1893).

18. — —Bingo

Under the State Constitution and implementing statutes, the game of bingo may not be conducted in the absence of affirmative referendum. It is not necessary to show that consideration was paid or agreed to be paid to play bingo. The game itself is controlled and the old lottery statute, Penal Law § 1370 et seq., is not in effect and prosecutions for unauthorized bingo must now be made under the General Municipal Law. Italian Community Home Federation, Inc. v Kelly, 12 Misc. 2d 33, 178 N.Y.S.2d 694, 1958 N.Y. Misc. LEXIS 2968 (N.Y. Sup. Ct. 1958).

Bingo and related games have been held illegal because they are in violation of those sections of the Penal Law forbidding lotteries. Cotroneo v Townsend, 111 N.Y.S.2d 491, 1952 N.Y. Misc. LEXIS 2532 (N.Y. Sup. Ct. 1952).

19. — —Drawings

Where retail dealer in dry goods, to promote trade, offered for sale at twenty-five cents each certain small "banks" numbered consecutively from 500 to 999, keeping record of name of each purchaser of bank as sold, and each day name of some one purchaser was drawn and number of bank corresponding to such name was displayed in window of store, one for each day, permitting person whose number was thus displayed to select merchandise of retail value of one dollar, each purchaser's number sooner or later similarly appearing, it must be held that scheme is within condemnation of this section. Carl Co. v Lennon, 148 N.Y.S. 375, 86 Misc. 255, 1914 N.Y. Misc. LEXIS 932 (N.Y. Sup. Ct. 1914).

Scheme to attract customers to defendant's lunch wagon, whereby certificates were distributed with each purchase, the certificate holders being entitled to participate in drawing cash prizes and to redeem the certificates for valuable articles, held not a lottery. People v Psallis, 12 N.Y.S.2d 796, 1939 N.Y. Misc. LEXIS 1950 (N.Y. Magis. Ct. 1939).

Agency Opinions

Analysis

1. In general
2. Constitutionality
3. Particular statutory terms
4. —"Gambling"

1. In general

All gambling is illegal in New York except as expressly authorized by the Constitution and statutes enacted thereunder. The proposed computer games are not lotteries within the constitutional and statutory definitions and would constitute illegal gambling activity. 1981 NY Ops Atty Gen Sept 8 (Formal).

It is unlawful in the State of New York to raffle off a parcel of real estate. 1981 NY Ops Atty Gen Nov 13 (Formal).

Machine which dispenses lottery ticket only after insertion of money to pay for heart and stress test is illegal gambling scheme, notwithstanding fact that at one time purchase was not necessary to obtain lottery ticket. 1986 N.Y. Op. Att'y Gen. No. 86-27.

2. Constitutionality

A proposal authorizing the Division of the Lottery to conduct a game in which bets are placed on the outcome of pro sports events would require an amendment to the State Constitution in order to be implemented. The Constitution, both through its specific bans on bookmaking and pool-selling and through its general ban on all forms of gambling not expressly authorized, forbids the kinds of gambling involved in the proposed sports betting game. N.Y. Op. Att'y Gen. No. 84-F1.

3. Particular statutory terms

4. —"Gambling"

A promotion to be conducted at a race track whereby for the purchase of an admission ticket the patron is entitled to participate in a contest to select the order of finish of all horses in the eighth race for a prize of $250 constitutes unlawful gambling. 1974 NY Ops Atty Gen June 12 (formal).

Raffle whose participants must purchase season's ticket to football games in order to participate constitutes gambling as defined under CLS Penal Law. 1985 NY Ops Atty Gen No. 85-50 (Informal).

The operation of video games that electronically simulate the play of card and dice games involving a material element of chance, with a pay-off consisting of extended play, constitutes gambling as defined under section 225.00 of the Penal Law. N.Y. Op. Att'y Gen. No. 85-12.

All gambling is illegal in New York except as expressly authorized by the Constitution and statutes enacted thereunder. The proposed computer games are not lotteries within the constitutional and statutory definitions and would constitute illegal gambling activity. 1981 NY Ops Atty Gen Sept 8 (Formal).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS Gen Mun § 186; CLS Racing & Wagering § 214; CLS Real P Actions & Pr § 715.

Bingo licensing law, CLS Gen Mun §§ 475 et seq.

Codes, Rules and Regulations:

Horse racing. 9 NYCRR §§ 4000.1 et seq.

State lottery. 9 NYCRR §§ 5000.1 et seq.

Off-track pari-mutuel betting. 9 NYCRR §§ 5200.1 et seq.

State bingo control commission. 9 NYCRR §§ 5800.1 et seq.

Federal Aspects:

Gambling devices, 15 USCS §§ 1171 et seq.

Lottery offenses, 18 USCS §§ 1301 et seq.

State-conducted lotteries exempted from federal criminal laws, 18 USCS § 1307.

Travel or transportation in aid of gambling enterprises, 18 USCS § 1952.

Interstate transportation of wagering paraphernalia, 18 USCS § 1953.

Prohibition of illegal gambling businesses, 18 USCS § 1955.

Jurisprudences:

62 NY Jur 2d Gambling §§ 2, 3, 6, 51, 92.

38 Am Jur 2d, Gambling §§ 1–9, 44 et seq., 65.

12B Am Jur Pl & Pr Forms (Rev ed), Gambling, Forms 4 et seq.

19 Am Jur Proof of Facts 647, Unlawful Gambling Games.

Annotations:

Private rights and remedies growing out of prize-winning contests. 87 ALR2d 649.

Coin-operated pinball machine or similar device, played for amusement only or confining reward to privilege of free replays, as prohibited or permitted by antigambling laws. 89 ALR2d 815.

Criminal conspiracies as to gambling. 91 ALR2d 1148.

Bridge as within gambling laws. 97 ALR2d 1420.

Gambling in private residence as prohibited or permitted by anti-gambling laws. 27 ALR3d 1074.

Promotion schemes of retail stores as criminal offense under anti-gambling laws. 29 ALR3d 888.

Right or duty to refuse telephone, telegraph, or other wire service in aid of illegal gambling operations. 30 ALR3d 1143.

Validity of pyramid distribution plan. 54 ALR3d 217.

Construction and application of state or municipal enactments relating to policy or numbers games. 70 ALR3d 897.

Law of forum against wagering transactions as precluding enforcement of claim based on gambling transactions valid under applicable foreign law. 71 ALR3d 178.

Lease provisions allowing termination or forfeiture for violation of law. 92 ALR3d 967.

Criminal liability of member or agent of private club or association, or of owner or lessor of its premises, for violation of state or local liquor or gambling laws thereon. 98 ALR3d 694.

Validity, construction, and application of statutes or ordinances involved in prosecutions for possession of bookmaking paraphernalia. 51 ALR4th 796.

Validity, construction, and application of statutes or ordinances involved in prosecutions for transmission of wagers or wagering information related to bookmaking. 53 ALR4th 801.

Validity of statute or ordinance prohibiting or regulating bookmaking or pool selling. 80 ALR4th 1079.

Construction and application of statute or ordinance prohibiting or regulating bookmaking or pool selling. 84 ALR4th 740.

Validity, construction, and application of 18 USCS sec. 1955 prohibiting illegal gambling businesses. 21 ALR Fed 708.

Texts: New York Criminal Practice Ch. 76.

TITLE N Offenses Against Public Order, Public Sensibilities and the Right to Privacy

Article 240. Offenses Against Public Order

Section
240.50. Falsely reporting an incident in the third degree
240.55. Falsely reporting an incident in the second degree
240.60. Falsely reporting an incident in the first degree

HISTORY:

Add, L 1965, ch 1030, § 1, eff Sept 1, 1967.

ARTICLE 240

OFFENSES AGAINST PUBLIC ORDER

HISTORY:

Add, L 1965, ch 1030, § 1, eff Sept 1, 1967.

§ 240.50. Falsely reporting an incident in the third degree

A person is guilty of falsely reporting an incident in the third degree when, knowing the information reported, conveyed or circulated to be false or baseless, he or she:

1. Initiates or circulates a false report or warning of an alleged occurrence or impending occurrence of

a crime, catastrophe or emergency under circumstances in which it is not unlikely that public alarm or inconvenience will result; or

2. Reports, by word or action, to an official or quasi-official agency or organization having the function of dealing with emergencies involving danger to life or property, an alleged occurrence or impending occurrence of a catastrophe or emergency which did not in fact occur or does not in fact exist; or

3. Gratuitously reports to a law enforcement officer or agency (a) the alleged occurrence of an offense or incident which did not in fact occur; or (b) an allegedly impending occurrence of an offense or incident which in fact is not about to occur; or (c) false information relating to an actual offense or incident or to the alleged implication of some person therein; or

4. Reports, by word or action, an alleged occurrence or condition of child abuse or maltreatment or abuse or neglect of a vulnerable person which did not in fact occur or exist to:

(a) the statewide central register of child abuse and maltreatment, as defined in title six of article six of the social services law or the vulnerable persons' central register as defined in article eleven of such law, or

(b) any person required to report cases of suspected child abuse or maltreatment pursuant to subdivision one of section four hundred thirteen of the social services law or to report cases of suspected abuse or neglect of a vulnerable person pursuant to section four hundred ninety-one of such law, knowing that the person is required to report such cases, and with the intent that such an alleged occurrence be reported to the statewide central register or vulnerable persons' central register.

Falsely reporting an incident in the third degree is a class A misdemeanor.

HISTORY:

Add, L 1965, ch 1030, § 1, with substance derived from L 1909, §§ 727, 1250–b in part, 1424, 1786; amd, L 1971, ch 357, § 1; L 1973, ch 276, § 30, eff Sept 1, 1973; L 1976, ch 185, § 1; L 1979, ch 146, § 1, eff Sept 26, 1979; L 2001, ch 301, § 1, eff Sept 17, 2001; L 2001, ch 302, § 1, eff Sept 17, 200; L 2008, ch 400, § 1, eff Feb 1, 2009; L 2012, ch 501, § 1 (Part G), eff Jan 17, 2013.

Commission Staff Notes: Subdivisions 1 and 2 define a genuine disorderly conduct offense found in a more limited form in former provisions dealing with false bomb scares and fire alarms (former PL §§ 727, 1424).

Subdivision 3, dealing with the giving of false information to law enforcement authorities, proscribes an area of "harassing" conduct which, prior to 1964, was limited to kidnapping cases [former PL § 1250-b(3)]. At the 1964 legislative session a new § 728 was added to the former Penal Law (Laws 1964, ch 445). This section was substantially similar to subd 3.

See also Commission Staff Notes under § 240.25.

Amendment Notes: 2012. Chapter 501, § 1 (Part G) amended:

Opening par by adding the matter in italics.

Sub 4, opening par by adding the matter in italics.

Sub 4, par (a) by adding the matter in italics.

Sub 4, par (b) by adding the matter in italics.

2001. Chapter 301, § 1 amended:

Closing par by deleting at fig 1 "B" and adding the matter in italics.

2001. Chapter 301, § 2 amended:

Sub 3 by deleting at fig 1 a period and adding the matter in italics.

Notes to Decisions

Analysis

1. In general
1.5. Sufficient evidence.
2. Under former § 728

1. In general

Where officer applying for search warrant testified under oath before magistrate as to observations of informant whose identity was then made known to magistrate who examined informant, but not under oath, and magistrate concluded that statement of informant, who could be prosecuted for false report if he had lied, was essentially the same as police officer's, there was adequate demonstration of informant's credibility and issuance of search warrant was proper. People v Brown, 40 N.Y.2d 183, 386 N.Y.S.2d 359, 352 N.E.2d 545, 1976 N.Y. LEXIS 2870 (N.Y. 1976).

Defendant was wrongly charged with falsely reporting an incident within Penal Law § 240.50 where her statements were made in response to inquiry by police officer, under which circumstances it could not be said that defendant "gratuitously" reported false information within the terms of the statute. People v Clairborne, 36 A.D.2d 500, 323 N.Y.S.2d 527, 1971 N.Y. App. Div. LEXIS 3901 (N.Y. App. Div. 2d Dep't 1971), rev'd, 29 N.Y.2d 950, 329 N.Y.S.2d 580, 280 N.E.2d 366, 1972 N.Y. LEXIS 1546 (N.Y. 1972).

Fact that policeman had been reinstated for approximately one year following nine-month suspension pending criminal proceeding in which he pled guilty to misdemeanor of falsely reporting an accident did not estop the city police commissioner from thereafter dismissing the policeman on the basis of his misdemeanor conviction following a departmental trial where the plea of guilty had been subject to the commissioner's ordering a departmental trial. Arroya v Codd, 50 A.D.2d 752, 376 N.Y.S.2d 158, 1975 N.Y. App. Div. LEXIS 11540 (N.Y. App. Div. 1st Dep't 1975).

Evidence before grand jury was sufficient to sustain indictment for reckless endangerment in first degree, criminal mischief in fourth degree, and falsely reporting incident in third degree where testimony showed that deer slug had been fired through victim's trailer window following defendant's threat on victim's life, shotgun had been found next day along road where defendant had been stopped by sheriff during investigation on night of shooting, defendant reported theft of same shotgun from his home on next day, and defendant told fellow prisoner while in custody that he had fired shotgun blast through trailer of person he had argued with. People v McCarthy, 126 A.D.2d 935, 511 N.Y.S.2d 708, 1987 N.Y. App. Div. LEXIS 42034 (N.Y. App. Div. 4th Dep't 1987).

Proof that defendant announced presence of bomb on premises and called for evacuation of building supported conviction of first degree falsely reporting incident rather than merely third degree offense, since warning of bomb's existence carried with it implication of impending explosion. People v Surdis, 275 A.D.2d 553, 711 N.Y.S.2d 875, 2000 N.Y. App. Div. LEXIS 8650 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 908, 716 N.Y.S.2d 649, 739 N.E.2d 1154, 2000 N.Y. LEXIS 3722 (N.Y. 2000).

Convictions of falsely reporting an incident in the third degree, N.Y. Penal Law § 240.50(3)(a), were affirmed because, although defendant claimed on appeal that, in instructing the jury, the trial court erred in omitting the element that the false report must be "gratuitously" made, he did not object to the instruction at trial, and the appellate court rejected his request that it exercise its interest of justice jurisdiction; measured against the elements as charged to the jury without exception, the evidence was legally sufficient to establish defendant's guilt beyond a reasonable doubt. People v Taylor, 79 A.D.3d 944, 913 N.Y.S.2d 308, 2010 N.Y. App. Div. LEXIS 9456 (N.Y. App. Div. 2d Dep't 2010), app.

denied, 16 N.Y.3d 837, 921 N.Y.S.2d 201, 946 N.E.2d 189, 2011 N.Y. LEXIS 1077 (N.Y. 2011).

Trial court erred in convicting defendant of third-degree falsely reporting an incident because the issues of whether a burglary occurred and whether defendant provided false information about it were relevant to the element of whether defendant knew the reported information was false or baseless or he reasonably believed that a burglary had occurred, and the trial court did not provide the jury with the legal definition of burglary. People v Sassi, 122 A.D.3d 779, 995 N.Y.S.2d 611, 2014 N.Y. App. Div. LEXIS 7590 (N.Y. App. Div. 2d Dep't 2014), app. denied, 24 N.Y.3d 1221, 28 N.E.3d 45, 4 N.Y.S.3d 609, 2015 N.Y. LEXIS 602 (N.Y. 2015).

There is a duty when reporting an occurrence calling for police, fire or other emergency service entailing rapid vehicular response, to do so truthfully and this is a duty of reasonable conduct imposed by common law as well as by statute. Daas v Pearson, 66 Misc. 2d 95, 319 N.Y.S.2d 537, 1971 N.Y. Misc. LEXIS 1810 (N.Y. Sup. Ct.), aff'd, 37 A.D.2d 921, 325 N.Y.S.2d 1011, 1971 N.Y. App. Div. LEXIS 6970 (N.Y. App. Div. 2d Dep't 1971).

Where the alleged false information was given to the police during the course of an investigation and in response to questions put to the petitioner concerning place of death of person with whom he was sniffing carbona, statement was not given "gratuitously" within the meaning of that word as used in Penal Law § 240.50(3). People ex rel. Morris v Skinner, 67 Misc. 2d 221, 323 N.Y.S.2d 905, 1971 N.Y. Misc. LEXIS 1371 (N.Y. Sup. Ct. 1971).

The statute providing that "a person may not be convicted of any offense solely upon evidence of a confession or admission made by him without additional proof that the offense charged has been committed" (CPL 60.50), is satisfied by the production of some proof, of whatever weight, either direct or circumstantial, that a crime was committed by someone; the proof need not be of such character as would be sufficient to sustain a conviction, but there must be at least some proof tending to show the commission of a crime; accordingly, since possession of a weapon is the *corpus delicti* and defendant, who told police that five males had robbed him of a gun recovered by the police from the area in which the five men were standing, had neither actual physical possession nor constructive possession of the gun which was not in a place in the control or reach of the defendant, and no other evidence independent of defendant's confession was adduced to show that a crime was committed, the felony charge of unlawful possession of a weapon must be dismissed and the charge of falsely reporting an incident (Penal Law, § 240.50, subd 3) must likewise be dismissed since no testimony was offered independent of the defendant's statements to show that the robbery did not occur. People v Barclift, 97 Misc. 2d 994, 412 N.Y.S.2d 991, 1979 N.Y. Misc. LEXIS 2029 (N.Y. City Crim. Ct. 1979).

Even if accepted as true, defendant's factual allegations that his mental condition and inadequate medication to control his condition impacted his conduct at time of offense (third degree falsely reporting incident) did not warrant dismissal of information in furtherance of justice. People v Dodard, 178 Misc. 2d 242, 680 N.Y.S.2d 393, 1998 N.Y. Misc. LEXIS 451 (N.Y. City Crim. Ct. 1998).

Charge of third degree "falsely reporting an incident" required that People state in pleadings that defendant knew incident "did not in fact occur." People v Torres, 188 Misc. 2d 58, 727 N.Y.S.2d 587, 2001 N.Y. Misc. LEXIS 127 (N.Y. City Crim. Ct. 2001).

Because defendant failed to seek medical care of a dog after it developed significant physical maladies as a result of defendant's neglect, and because defendant falsely reported that the dog's maladies developed while another person had custody of it, the evidence was legally sufficient to establish defendant's guilt under N.Y. Agric. & Mkts. Law § 353 and N.Y. Penal Law § 240.50(3)(c). People v Romano (Stacey), 908 N.Y.S.2d 520, 29 Misc. 3d 9, 2010 N.Y. Misc. LEXIS 4052 (N.Y. App. Term 2010), app. denied, 16 N.Y.3d 899, 926 N.Y.S.2d 34, 949 N.E.2d 982, 2011 N.Y. LEXIS 1908 (N.Y. 2011).

Defendant's motion to dismiss a charge of falsely reporting an incident under N.Y. Penal Law § 240.50(3)(a) was denied; defendant started a chain of events resulting in police questioning and therefore was responsible for initiating police contact, and therefore defendant's false statement that a police officer had stolen money from defendant was gratuitous, as it was not the product of solicitation by law enforcement. People v Oliver, 193 Misc. 2d 250, 750 N.Y.S.2d 449, 2002 N.Y. Misc. LEXIS 1440 (N.Y. City Ct. 2002).

Unexcused, belated disclosure of e-mails between the prosecutor and a mother of a minor who defendant allegedly engaged in improper sexual conduct with, which showed the minor's motive to lie, did not affect the verdict with respect to sodomy charges relating to another minor or some of the misdemeanor charges, in violation of N.Y. Penal Law §§ 130.45, 130.40, 190.25(1), and 240.50(3)(a), as the evidence against defendant was overwhelming; there was no reasonable possibility that the serious disclosure failures by the prosecution affected the verdict in that regard. People v Sinha, 84 A.D.3d 35, 922 N.Y.S.2d 275, 2011 N.Y. App. Div. LEXIS 2750 (N.Y. App. Div. 1st Dep't 2011), aff'd, 19 N.Y.3d 932, 951 N.Y.S.2d 697, 976 N.E.2d 223, 2012 N.Y. LEXIS 1837 (N.Y. 2012).

Count in a misdemeanor information charging defendant with falsely reporting an incident in the third degree was sufficiently pleaded because the information alleged that defendant "admitted that no assault had occurred," which constituted both an admission by a party opponent and a declaration against the defendant's penal interest. People v Marian, 49 Misc. 3d 562, 16 N.Y.S.3d 683, 2015 N.Y. Misc. LEXIS 2421 (N.Y. City Crim. Ct. 2015).

here was an issue of fact whether the alleged false reporting of a medical emergency and asking to be brought to a hospital within the geographical jurisdiction of the court was materially harmful to the City of Hudson and whether such alleged criminal act harmed the well-being of the City of Hudson as a whole; these questions of fact were within the realm of the trier of fact, namely the jury. People v Jerome, 59 Misc. 3d 338, 71 N.Y.S.3d 809, 2018 N.Y. Misc. LEXIS 477 (N.Y. City Ct. 2018).

Where an arrestee had filed a domestic incident report (DIR) indicating that an ex-boyfriend called her from jail, although the ex-boyfriend's probation officer told the detective investigating the DIR that the ex-boyfriend was released from prison one month before the alleged phone call to the arrestee was made, the detective, who arrested the arrestee for falsifying a police incident report in violation of N.Y. Penal Law § 240.50(3)(c), was not entitled to sovereign immunity on the arrestee's false arrest claim because the detective did not at the time the arrestee was initially seized have information supporting the inference that the arrestee knew that the ex-boyfriend was out of jail at the time of the phone call. Brewton v City of New York, 550 F. Supp. 2d 355, 2008 U.S. Dist. LEXIS 36455 (E.D.N.Y. 2008).

1.5. Sufficient evidence.

Sufficient evidence supported defendant's conviction for falsely reporting an incident in the third degree because the medical evidence, including, inter alia, a lack of cuts or bruises on defendant's head and no ligature marks, provided compelling proof that defendant was not hit on the head with a toilet tank lid and strangled as he had claimed, but instead lied to the police about being attacked so he could obtain prescription pain medication; defendant called 911 to report he was assaulted. People v Barto, 144 A.D.3d 1641, 41 N.Y.S.3d 838, 2016 N.Y. App. Div. LEXIS 7637 (N.Y. App. Div. 4th Dep't 2016), app. denied, 28 N.Y.3d 1142, 74 N.E.3d 679, 52 N.Y.S.3d 294, 2017 N.Y. LEXIS 278 (N.Y. 2017).

2. Under former § 728

The fact that the defendant informed the police that he was operating a motor vehicle when it was involved in an accident and the information was received at the very time the police were investigating the accident and it was alleged that someone other than the defendant was actually operating the vehicle at the time and defendant was attempting to protect the actual driver, the information, though false, was not made "with intent to harass, annoy or alarm another," and hence was not punishable under this section. People v Komosa, 47 Misc. 2d 634, 263 N.Y.S.2d 153, 1965 N.Y. Misc. LEXIS 1545 (N.Y. City Ct. 1965).

Notes to Unpublished Decisions

1. In general

Unpublished decision: Officers had at least arguable probable cause to arrest plaintiff where he made statement to his wife at

airport after he was asked to exit security line to place jar of peanut butter in his checked luggage that "they're looking to confiscate my explosives." While statement was arguably not false report or warning of alleged occurrence or impending occurrence of explosion, in violation of N.Y. Penal Law section that he was arrested for violating, it arguably was violation of two other statutes that, taken together, rendered his statement, taken at face value, false statement that he was committing crime of possessing explosives. Hannibal v Sanchez, 2014 U.S. Dist. LEXIS 107514 (E.D.N.Y. Aug. 5, 2014).

Agency Opinions

1. In general

An individual making a false request for ambulance service can be charged with falsely reporting an incident in the third degree. Failure to pay for ambulance service constitutes a civil, not a criminal, offense. 1981 NY Ops Atty Gen July 1 (Informal Opinion).

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

35C NY Jur 2d Criminal Law Substantive Principles and Offenses §§ 1836, 1838.

31A Am Jur 2d, Explosions and Explosives § 237.

12A Am Jur Pl & Pr Forms (Rev ed), Fraud and Deceit, Form 30.1.

4 Am Jur Proof of Facts 727, Explosions.

Annotations:

Criminal offense of bomb hoax or making false report as to planting of explosive. 93 ALR2d 304.

Misuse of telephone as minor criminal offense. 97 ALR2d 503.

Giving false information to federal police agency or agent as violation of 18 USC § 1001, making it a criminal offense to make false statements in any matter within the jurisdiction of an agency of the United States. 1 ALR Fed 370.

Texts: New York Criminal Practice Ch. 79.

§ 240.55. Falsely reporting an incident in the second degree

A person is guilty of falsely reporting an incident in the second degree when, knowing the information reported, conveyed or circulated to be false or baseless, he or she:

1. Initiates or circulates a false report or warning of an alleged occurrence or impending occurrence of a fire, explosion, or the release of a hazardous substance under circumstances in which it is not unlikely that public alarm or inconvenience will result;

2. Reports, by word or action, to any official or quasi-official agency or organization having the function of dealing with emergencies involving danger to life or property, an alleged occurrence or impending occurrence of a fire, explosion, or the release of a hazardous substance which did not in fact occur or does not in fact exist; or

3. Knowing the information reported, conveyed or circulated to be false or baseless and under circumstances in which it is likely public alarm or inconvenience will result, he or she initiates or circulates a report or warning of an alleged occurrence or an impending occurrence of a fire, an explosion, or the release of a hazardous substance upon any private premises.

Falsely reporting an incident in the second degree is a class E felony.

HISTORY:

Add, L 1973, ch 276, § 30; amd, L 1979, ch 146, § 2; L 1989, ch 477, § 3, eff Nov 1, 1989 (see 1989 note below); L 1999, ch 561, § 2, eff Dec 1, 1999; L 2001, ch 301, §§ 2, 3, eff Sept 17, 2001; L 2001, ch 302, §§ 2, 3, eff Sept 17, 2001.

Editor's Notes: Laws 1989, ch 477, § 4, eff Nov 1, 1989, provides as follows:

§ 4. This act shall take effect on the first day of November next succeeding the date on which it shall have become a law, provided however, that effective immediately, the addition, amendment and/or repeal of any rules or regulations necessary for the implementation of the foregoing sections of this act on its effective date are authorized and directed to be made and completed on or before such effective date.

Amendment Notes: 2001. Chapter 301, § 2 amended:
By adding sub 4.
2001. Chapter 301, § 3 amended:
Closing par by deleting at fig 1 "A misdemeanor" and adding the matter in italics.
2001. Chapter 302, § 2 amended:
By repealing former sub 3.
2001. Chapter 302, § 3 amended:
By redesignating sub 4 as sub 3.

Notes to Decisions

Defendant could be convicted of second degree falsely reporting incident where, in response to fire on his neighbor's property, he set off town fire alarm even though fire was under control of firefighters on scene, fire posed no threat, and defendant had been so advised. People v Bayes, 78 N.Y.2d 546, 577 N.Y.S.2d 585, 584 N.E.2d 643, 1991 N.Y. LEXIS 5128 (N.Y. 1991).

Fact that false alarm was directed at fire department rather than general public was no defense to charge of second degree falsely reporting incident since, by communicating report of fire in manner that required fire department to respond, defendant made it "not unlikely" that public alarm or inconvenience would result given facts that residents within earshot of alarm were also alerted to existence of fire, rapidly moving emergency vehicles were placed on road, and firefighters could have been kept from attending genuine emergency elsewhere. People v Bayes, 78 N.Y.2d 546, 577 N.Y.S.2d 585, 584 N.E.2d 643, 1991 N.Y. LEXIS 5128 (N.Y. 1991).

In criminal prosecution of defendant for having falsely reported incident of child neglect to Statewide Central Register of Child Abuse and Maltreatment, where People sought unsealing and disclosure of Child Protective Service records regarding unfounded report previously filed about defendant, court would conduct in camera inspection to determine whether any information contained in sealed records might be probative of charges against defendant. People v Berliner, 179 Misc. 2d 844, 686 N.Y.S.2d 673, 1999 N.Y. Misc. LEXIS 68 (N.Y. City Ct. 1999).

In prosecution under CLS Penal § 240.55 for falsely reporting incident of child neglect to Statewide Central Register of Child Abuse and Maltreatment, defendant was not entitled to unsealing and disclosure of Child Protective Service file concerning neighbor about whom false report was made, as neighbor was not charged with or accused of any further charges, and defendant was private citizen rather than governmental agency seeking access to confidential information. People v Berliner, 179 Misc. 2d 844, 686 N.Y.S.2d 673, 1999 N.Y. Misc. LEXIS 68 (N.Y. City Ct. 1999).

Notes to Unpublished Decisions

Unpublished decision: Officers had at least arguable probable cause to arrest plaintiff where he made statement to his wife at airport after he was asked to exit security line to place jar of peanut butter in his checked luggage that "they're looking to confiscate my explosives." While statement was arguably not false report or warning of alleged occurrence or impending occurrence of explosion, in violation of N.Y. Penal Law section that he was arrested for violating, it arguably was violation of two

other statutes that, taken together, rendered his statement, taken at face value, false statement that he was committing crime of possessing explosives. Hannibal v Sanchez, 2014 U.S. Dist. LEXIS 107514 (E.D.N.Y. Aug. 5, 2014).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 240.60.

Jurisprudences:

35C NY Jur 2d Criminal Law Substantive Principles and Offenses §§ 1837, 1838.

12A Am Jur Pl & Pr Forms (Rev ed), Fraud and Deceit, Form 30.1.

Annotations:

Criminal offense of bomb hoax or making false report as to planting of explosive. 93 ALR2d 304.

Misuse of telephone as minor criminal offense. 97 ALR2d 503.

Giving false information to federal police agency or agent as violation of 18 USC § 1001, making it a criminal offense to make false statements in any matter within the jurisdiction of an agency of the United States. 1 ALR Fed 370.

Matthew Bender's New York Practice Guides: 3 New York Practice Guide: Domestic Relations § 37.03.

Texts: New York Criminal Practice Ch. 83.
New York Criminal Practice Ch. 80.

§ 240.60. Falsely reporting an incident in the first degree

A person is guilty of falsely reporting an incident in the first degree when he:

1. commits the crime of falsely reporting an incident in the second degree as defined in section 240.55 of this article, and has previously been convicted of that crime; or

2. commits the crime of falsely reporting an incident in the third degree as defined in subdivisions one and two of section 240.50 of this article or falsely reporting an incident in the second degree as defined in subdivisions one and two of section 240.55 of this article and another person who is an employee or member of any official or quasi-official agency having the function of dealing with emergencies involving danger to life or property; or who is a volunteer firefighter with a fire department, fire company, or any unit thereof as defined in the volunteer firefighters' benefit law; or who is a volunteer ambulance worker with a volunteer ambulance corporation or any unit thereof as defined in the volunteer ambulance workers' benefit law suffers serious physical injury or is killed in the performance of his or her official duties in traveling to or working at or returning to a firehouse, police station, quarters or other base facility from the location identified in such report; or

3. commits the crime of falsely reporting an incident in the third degree as defined in subdivisions one and two of section 240.50 of this article or falsely reporting an incident in the second degree as defined in subdivisions one and two of section 240.55 of this article and another person suffers serious physical injury or is killed as a result of any vehicular or other accident involving any emergency vehicle which is responding to, operating at, or returning from the location identified in such report.

4. An emergency vehicle as referred to in subdivision three of this section shall include any vehicle operated by any employee or member of any official or quasi-official agency having the function of dealing with emergencies involving danger to life or property and shall include, but not necessarily be limited to, an emergency vehicle which is operated by a volunteer firefighter with a fire department, fire company, or any unit thereof as defined in the volunteer firefighters' benefit law; or by a volunteer ambulance worker with a volunteer ambulance corporation, or any unit thereof as defined in the volunteer ambulance workers' benefit law.

5. Knowing the information reported, conveyed or circulated to be false or baseless and under circumstances in which it is likely public alarm or inconvenience will result, he or she initiates or circulates a report or warning of an alleged occurrence or an impending occurrence of a fire, an explosion, or the release of a hazardous substance upon school grounds and it is likely that persons are present on said grounds.

6. Knowing the information reported, conveyed or circulated to be false or baseless and under circumstances in which it is likely public alarm or inconvenience will result, he or she initiates or circulates a report or warning of an alleged occurrence or impending occurrence of a fire, explosion or the release of a hazardous substance in or upon a sports stadium or arena, mass transportation facility, enclosed shopping mall, any public building or any public place, and it is likely that persons are present. For purposes of this subdivision, the terms "sports stadium or arena, mass transportation facility or enclosed shopping mall" shall have their natural meaning and the term "public building" shall have the meaning set forth in section four hundred one of the executive law.

Falsely reporting an incident in the first degree is a class D felony.

HISTORY:

Add, L 1977, ch 485, § 1; amd, L 1990, ch 576, § 1, eff Nov 1, 1990; L 1995, ch 528, § 1, eff Nov 1, 1995; L 1999, ch 561, § 3, eff Dec 1, 1999; L 2001, ch 244, § 1, eff Nov 1, 2001; L 2001, ch 301, § 4, eff Nov 1, 2001.

Prior Law: Former § 240.60, add, L 1973, ch 276, § 31; amd, L 1975, ch 31, § 1; repealed, L 1977, ch 485, § 1, eff Sept 1, 1977.

Notes to Decisions

Proof that defendant announced presence of bomb on premises and called for evacuation of building supported conviction of first degree falsely reporting incident rather than merely third degree offense, since warning of bomb's existence carried with it implication of impending explosion. People v Surdis, 275 A.D.2d 553, 711 N.Y.S.2d 875, 2000 N.Y. App. Div. LEXIS 8650 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 908, 716 N.Y.S.2d 649, 739 N.E.2d 1154, 2000 N.Y. LEXIS 3722 (N.Y. 2000).

Telephone company investigator did not provide necessary foundation for admission of another telephone carrier's record that showed originating number of pay phone call, in prosecution for first degree falsely reporting incident, where he failed to testify that he had such knowledge of other carrier's recordkeeping procedures that he could state that record was made in regular course of its business and contemporaneously to phone

call. People v Surdis, 275 A.D.2d 553, 711 N.Y.S.2d 875, 2000 N.Y. App. Div. LEXIS 8650 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 908, 716 N.Y.S.2d 649, 739 N.E.2d 1154, 2000 N.Y. LEXIS 3722 (N.Y. 2000).

Erroneous admission of telephone carrier's record that showed originating number of pay phone call was harmless, in prosecution for first degree falsely reporting incident, in light of overwhelming evidence of guilt, including another similar call made by defendant and testimony of witnesses who recognized his voice, and absence of significant probability that he would otherwise have been acquitted. People v Surdis, 275 A.D.2d 553, 711 N.Y.S.2d 875, 2000 N.Y. App. Div. LEXIS 8650 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 908, 716 N.Y.S.2d 649, 739 N.E.2d 1154, 2000 N.Y. LEXIS 3722 (N.Y. 2000).

Timing of second bomb-threat phone call, less than 3 hours after first call, and similarity in proof of subsequent crime with earlier crime, including origination of calls from same pay phone and witness recognition of defendant's voice, raised strong inference that defendant was perpetrator of both calls in prosecution for first degree falsely reporting incident. People v Surdis, 275 A.D.2d 553, 711 N.Y.S.2d 875, 2000 N.Y. App. Div. LEXIS 8650 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 908, 716 N.Y.S.2d 649, 739 N.E.2d 1154, 2000 N.Y. LEXIS 3722 (N.Y. 2000).

Because the indeterminate sentence that defendant bargained for and received was impermissible under N.Y. Penal Law 70.06(6), the trial court properly reduced the conviction for falsely reporting an incident in the first degree from a class D violent felony under N.Y. Penal Law § 70.02 (1)(c) to a class E felony under N.Y. Penal Law §§ 110.00, 240.60(1). People v Surdis, 23 A.D.3d 841, 805 N.Y.S.2d 433, 2005 N.Y. App. Div. LEXIS 13123 (N.Y. App. Div. 3d Dep't 2005), app. denied, 6 N.Y.3d 818, 812 N.Y.S.2d 458, 845 N.E.2d 1289, 2006 N.Y. LEXIS 910 (N.Y. 2006).

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

35C NY Jur 2d Criminal Law Substantive Principles and Offenses § 1838.

Texts: New York Criminal Practice Ch. 83.

New York Criminal Practice Ch. 80.

TITLE P Offenses Against Public Safety

Article 265. Firearms and Other Dangerous Weapons

Section
265.00. Definitions. [Effective until April 3, 2021]
265.00. Definitions. [Effective April 3, 2021]

Article 270. Other Offenses Relating to Public Safety

270.00. Unlawfully dealing with fireworks and dangerous fireworks
270.15. Unlawfully refusing to yield a party line

HISTORY:

Add, L 1965, ch 1030, § 1, eff Sept 1, 1967.

ARTICLE 265

FIREARMS AND OTHER DANGEROUS WEAPONS

HISTORY:

Add, L 1965, ch 1030, § 1, eff Sept 1, 1967.

§ 265.00. Definitions. [Effective until April 3, 2021]

As used in this article and in article four hundred, the following terms shall mean and include:

1. "Machine-gun" means a weapon of any description, irrespective of size, by whatever name known, loaded or unloaded, from which a number of shots or bullets may be rapidly or automatically discharged from a magazine with one continuous pull of the trigger and includes a sub-machine gun.

2. "Firearm silencer" means any instrument, attachment, weapon or appliance for causing the firing of any gun, revolver, pistol or other firearms to be silent, or intended to lessen or muffle the noise of the firing of any gun, revolver, pistol or other firearms.

3. "Firearm" means (a) any pistol or revolver; or (b) a shotgun having one or more barrels less than eighteen inches in length; or (c) a rifle having one or more barrels less than sixteen inches in length; or (d) any weapon made from a shotgun or rifle whether by alteration, modification, or otherwise if such weapon as altered, modified, or otherwise has an overall length of less than twenty-six inches; or (e) an assault weapon. For the purpose of this subdivision the length of the barrel on a shotgun or rifle shall be determined by measuring the distance between the muzzle and the face of the bolt, breech, or breechlock when closed and when the shotgun or rifle is cocked; the overall length of a weapon made from a shotgun or rifle is the distance between the extreme ends of the weapon measured along a line parallel to the center line of the bore. Firearm does not include an antique firearm.

3-a. "Major component of a firearm, rifle or shotgun" means the barrel, the slide or cylinder, the frame, or receiver of the firearm, rifle, or shotgun.

4. "Switchblade knife" means any knife which has a blade which opens automatically by hand pressure applied to a button, spring or other device in the handle of the knife.

5. "Gravity knife" means any knife which has a blade which is released from the handle or sheath thereof by the force of gravity or the application of centrifugal force which, when released, is locked in place by means of a button, spring, lever or other device.

5-a. "Pilum ballistic knife" means any knife which has a blade which can be projected from the handle by hand pressure applied to a button, lever, spring or other device in the handle of the knife.

5-b. "Metal knuckle knife" means a weapon that, when closed, cannot function as a set of plastic knuckles or metal knuckles, nor as a knife and when open, can function as both a set of plastic knuckles or metal knuckles as well as a knife.

5-c. "Automatic knife" includes a stiletto, a switchblade knife, a cane sword, a pilum ballistic knife, and a metal knuckle knife.

5-d. "Undetectable knife" means any knife or other instrument, which does not utilize materials that are detectable by a metal detector or magnetometer when set at a standard calibration, that is capable of ready use as a stabbing or cutting weapon and was commercially manufactured to be used as a weapon.

6. "Dispose of" means to dispose of, give, give away, lease-loan, keep for sale, offer, offer for sale, sell, transfer and otherwise dispose of.

7. "Deface" means to remove, deface, cover, alter

or destroy the manufacturer's serial number or any other distinguishing number or identification mark.

8. "Gunsmith" means any person, firm, partnership, corporation or company who engages in the business of repairing, altering, assembling, manufacturing, cleaning, polishing, engraving or trueing, or who performs any mechanical operation on, any firearm, large capacity ammunition feeding device or machine-gun.

9. "Dealer in firearms" means any person, firm, partnership, corporation or company who engages in the business of purchasing, selling, keeping for sale, loaning, leasing, or in any manner disposing of, any assault weapon, large capacity ammunition feeding device, pistol or revolver.

10. "Licensing officer" means in the city of New York the police commissioner of that city; in the county of Nassau the commissioner of police of that county; in the county of Suffolk the sheriff of that county except in the towns of Babylon, Brookhaven, Huntington, Islip and Smithtown, the commissioner of police of that county; for the purposes of section 400.01 of this chapter the superintendent of state police; and elsewhere in the state a judge or justice of a court of record having his office in the county of issuance.

11. "Rifle" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed metallic cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger.

12. "Shotgun" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger.

13. "Cane Sword" means a cane or swagger stick having concealed within it a blade that may be used as a sword or stilletto.

14. [There are two subs 14] "Chuka stick" means any device designed primarily as a weapon, consisting of two or more lengths of a rigid material joined together by a thong, rope or chain in such a manner as to allow free movement of a portion of the device while held in the hand and capable of being rotated in such a manner as to inflict serious injury upon a person by striking or choking. These devices are also known as nunchakus and centrifugal force sticks.

14. [There are two subs 14] "Antique firearm" means:

Any unloaded muzzle loading pistol or revolver with a matchlock, flintlock, percussion cap, or similar type of ignition system, or a pistol or revolver which uses fixed cartridges which are no longer available in the ordinary channels of commercial trade.

15. "Loaded firearm" means any firearm loaded with ammunition or any firearm which is possessed by one who, at the same time, possesses a quantity of ammunition which may be used to discharge such firearm.

15-a. "Electronic dart gun" means any device designed primarily as a weapon, the purpose of which is to momentarily stun, knock out or paralyze a person by passing an electrical shock to such person by means of a dart or projectile.

15-b. "Kung Fu star" means a disc-like object with sharpened points on the circumference thereof and is designed for use primarily as a weapon to be thrown.

15-c. "Electronic stun gun" means any device designed primarily as a weapon, the purpose of which is to stun, cause mental disorientation, knock out or paralyze a person by passing a high voltage electrical shock to such person.

16. "Certified not suitable to possess a self-defense spray device, a rifle or shotgun" means that the director or physician in charge of any hospital or institution for mental illness, public or private, has certified to the superintendent of state police or to any organized police department of a county, city, town or village of this state, that a person who has been judicially adjudicated incompetent, or who has been confined to such institution for mental illness pursuant to judicial authority, is not suitable to possess a self-defense spray device, as defined in section 265.20 of this article, or a rifle or shotgun.

17. "Serious offense" means (a) any of the following offenses defined in the former penal law as in force and effect immediately prior to September first, nineteen hundred sixty-seven: illegally using, carrying or possessing a pistol or other dangerous weapon; making or possessing burglar's instruments; buying or receiving stolen property; unlawful entry of a building; aiding escape from prison; that kind of disorderly conduct defined in subdivisions six and eight of section seven hundred twenty-two of such former penal law; violations of sections four hundred eighty-three, four hundred eighty-three-b, four hundred eighty-four-h and article one hundred six of such former penal law; that kind of criminal sexual act or rape which was designated as a misdemeanor; violation of section seventeen hundred forty-seven-d and seventeen hundred forty-seven-e of such former penal law; any violation of any provision of article thirty-three of the public health law relating to narcotic drugs which was defined as a misdemeanor by section seventeen hundred fifty-one-a of such former penal law, and any violation of any provision of article thirty-three-A of the public health law relating to depressant and stimulant drugs which was defined as a misdemeanor by section seventeen hundred forty-seven-b of such former penal law.

(b) [As amended, L 2010, ch 232, § 2] any of the following offenses defined in the penal law: illegally using, carrying or possessing a pistol or other dangerous weapon; possession of burglar's tools; criminal possession of stolen property in the third degree;

escape in the third degree; jostling; fraudulent accosting; endangering the welfare of a child; the offenses defined in article two hundred thirty-five; issuing abortional articles; permitting prostitution; promoting prostitution in the third degree; stalking in the fourth degree; stalking in the third degree; the offenses defined in article one hundred thirty; the offenses defined in article two hundred twenty.

(b) [As amended, L 2010, ch 232, § 3] any of the following offenses defined in the penal law: illegally using, carrying or possessing a pistol or other dangerous weapon; possession of burglar's tools; criminal possession of stolen property in the third degree; escape in the third degree; jostling; fraudulent accosting; endangering the welfare of a child; the offenses defined in article two hundred thirty-five; issuing abortional articles; permitting prostitution; promoting prostitution in the third degree; stalking in the third degree; stalking in the fourth degree; the offenses defined in article one hundred thirty; the offenses defined in article two hundred twenty.

(c) any of the following offenses, where the defendant and the person against whom the offense was committed were members of the same family or household as defined in subdivision one of section 530.11 of the criminal procedure law and as established pursuant to section 370.15 of the criminal procedure law: assault in the third degree; menacing in the third degree; menacing in the second degree; criminal obstruction of breathing or blood circulation; unlawful imprisonment in the second degree; coercion in the third degree; criminal tampering in the third degree; criminal contempt in the second degree; harassment in the first degree; aggravated harassment in the second degree; criminal trespass in the third degree; criminal trespass in the second degree; arson in the fifth degree; or attempt to commit any of the above-listed offenses.

18. "Armor piercing ammunition" means any ammunition capable of being used in pistols or revolvers containing a projectile or projectile core, or a projectile or projectile core for use in such ammunition, that is constructed entirely (excluding the presence of traces of other substances) from one or a combination of any of the following: tungsten alloys, steel, iron, brass, bronze, beryllium copper, or uranium.

19. "Duly authorized instructor" means (a) a duly commissioned officer of the United States army, navy, marine corps or coast guard, or of the national guard of the state of New York; or (b) a duly qualified adult citizen of the United States who has been granted a certificate as an instructor in small arms practice issued by the United States army, navy or marine corps, or by the adjutant general of this state, or by the national rifle association of America, a not-for-profit corporation duly organized under the laws of this state; (c) by a person duly qualified and designated by the department of environmental conservation under paragraph c of subdivision three of section 11-0713 of the environmental conservation law as its agent in the giving of instruction and the making of certifications of qualification in responsible hunting practices; or (d) a New York state 4-H certified shooting sports instructor.

20. "Disguised gun" means any weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive and is designed and intended to appear to be something other than a gun.

21. "Semiautomatic" means any repeating rifle, shotgun or pistol, regardless of barrel or overall length, which utilizes a portion of the energy of a firing cartridge or shell to extract the fired cartridge case or spent shell and chamber the next round, and which requires a separate pull of the trigger to fire each cartridge or shell.

22. "Assault weapon" means

(a) a semiautomatic rifle that has an ability to accept a detachable magazine and has at least one of the following characteristics:

(i) a folding or telescoping stock;

(ii) a pistol grip that protrudes conspicuously beneath the action of the weapon;

(iii) a thumbhole stock;

(iv) a second handgrip or a protruding grip that can be held by the non-trigger hand;

(v) a bayonet mount;

(vi) a flash suppressor, muzzle break, muzzle compensator, or threaded barrel designed to accommodate a flash suppressor, muzzle break, or muzzle compensator;

(vii) a grenade launcher; or

(b) a semiautomatic shotgun that has at least one of the following characteristics:

(i) a folding or telescoping stock;

(ii) a thumbhole stock;

(iii) a second handgrip or a protruding grip that can be held by the non-trigger hand;

(iv) a fixed magazine capacity in excess of seven rounds;

(v) an ability to accept a detachable magazine; or

(c) a semiautomatic pistol that has an ability to accept a detachable magazine and has at least one of the following characteristics:

(i) a folding or telescoping stock;

(ii) a thumbhole stock;

(iii) a second handgrip or a protruding grip that can be held by the non-trigger hand;

(iv) capacity to accept an ammunition magazine that attaches to the pistol outside of the pistol grip;

(v) a threaded barrel capable of accepting a barrel extender, flash suppressor, forward handgrip, or silencer;

(vi) a shroud that is attached to, or partially or completely encircles, the barrel and that permits the shooter to hold the firearm with the non-trigger hand without being burned;

(vii) a manufactured weight of fifty ounces or more when the pistol is unloaded; or

(viii) a semiautomatic version of an automatic rifle, shotgun or firearm;

(d) a revolving cylinder shotgun;

(e) a semiautomatic rifle, a semiautomatic shotgun or a semiautomatic pistol or weapon defined in subparagraph (v) of paragraph (e) of subdivision twenty-two of section 265.00 of this chapter as added by chapter one hundred eighty-nine of the laws of two thousand and otherwise lawfully possessed pursuant to such chapter of the laws of two thousand prior to September fourteenth, nineteen hundred ninety-four;

(f) a semiautomatic rifle, a semiautomatic shotgun or a semiautomatic pistol or weapon defined in paragraph (a), (b) or (c) of this subdivision, possessed prior to the date of enactment of the chapter of the laws of two thousand thirteen which added this paragraph;

(g) provided, however, that such term does not include:

(i) any rifle, shotgun or pistol that (A) is manually operated by bolt, pump, lever or slide action; (B) has been rendered permanently inoperable; or (C) is an antique firearm as defined in 18 U.S.C. 921(a)(16);

(ii) a semiautomatic rifle that cannot accept a detachable magazine that holds more than five rounds of ammunition;

(iii) a semiautomatic shotgun that cannot hold more than five rounds of ammunition in a fixed or detachable magazine; or

(iv) a rifle, shotgun or pistol, or a replica or a duplicate thereof, specified in Appendix A to 18 U.S.C. 922 as such weapon was manufactured on October first, nineteen hundred ninety-three. The mere fact that a weapon is not listed in Appendix A shall not be construed to mean that such weapon is an assault weapon;

(v) any weapon validly registered pursuant to subdivision sixteen-a of section 400.00 of this chapter. Such weapons shall be subject to the provisions of paragraph (h) of this subdivision;

(vi) any firearm, rifle, or shotgun that was manufactured at least fifty years prior to the current date, but not including replicas thereof that is validly registered pursuant to subdivision sixteen-a of section 400.00 of this chapter;

(h) Any weapon defined in paragraph (e) or (f) of this subdivision and any large capacity ammunition feeding device that was legally possessed by an individual prior to the enactment of the chapter of the laws of two thousand thirteen which added this paragraph, may only be sold to, exchanged with or disposed of to a purchaser authorized to possess such weapons or to an individual or entity outside of the state provided that any such transfer to an individual or entity outside of the state must be reported to the entity wherein the weapon is registered within seventy-two hours of such transfer. An individual who transfers any such weapon or large capacity ammunition device to an individual inside New York state or without complying with the provisions of this paragraph shall be guilty of a class A misdemeanor unless such large capacity ammunition feeding device, the possession of which is made illegal by the chapter of the laws of two thousand thirteen which added this paragraph, is transferred within one year of the effective date of the chapter of the laws of two thousand thirteen which added this paragraph.

23. "Large capacity ammunition feeding device" means a magazine, belt, drum, feed strip, or similar device, that (a) has a capacity of, or that can be readily restored or converted to accept, more than ten rounds of ammunition, or [pars (b) and (c) are suspended and not effective as stated in Laws 2013, ch 1, § 58, sub b note below] (b) contains more than seven rounds of ammunition, or (c) is obtained after the effective date of the chapter of the laws of two thousand thirteen which amended this subdivision and has a capacity of, or that can be readily restored or converted to accept, more than seven rounds of ammunition; provided, however, that such term does not include an attached tubular device designed to accept, and capable of operating only with, .22 caliber rimfire ammunition or a feeding device that is a curio or relic. A feeding device that is a curio or relic is defined as a device that (i) was manufactured at least fifty years prior to the current date, (ii) is only capable of being used exclusively in a firearm, rifle, or shotgun that was manufactured at least fifty years prior to the current date, but not including replicas thereof, (iii) is possessed by an individual who is not prohibited by state or federal law from possessing a firearm and (iv) is registered with the division of state police pursuant to subdivision sixteen-a of section 400.00 of this chapter, except such feeding devices transferred into the state may be registered at any time, provided they are registered within thirty days of their transfer into the state. Notwithstanding paragraph (h) of subdivision twenty-two of this section, such feeding devices may be transferred provided that such transfer shall be subject to the provisions of section 400.03 of this chapter including the check required to be conducted pursuant to such section.

24. "Seller of ammunition" means any person, firm, partnership, corporation or company who engages in the business of purchasing, selling or keeping ammunition.

25. "Qualified retired New York or federal law enforcement officer" means an individual who is a retired police officer as police officer is defined in subdivision thirty-four of section 1.20 of the criminal procedure law, a retired peace officer as peace officer is defined in section 2.10 of the criminal procedure law or a retired federal law enforcement officer as federal law enforcement officer is defined in section 2.15 of the criminal procedure law, who: (a) separated from service in good standing from a public agency located in New York state in which such person served as either a police officer, peace officer or federal law enforcement officer; and (b) before such separation, was authorized by law to engage in or supervise the prevention, detection, investiga-

tion, or prosecution of, or the incarceration of any person for, any violation of law, and had statutory powers of arrest, pursuant to their official duties, under the criminal procedure law; and (c) (i) before such separation, served as either a police officer, peace officer or federal law enforcement officer for five years or more and at the time of separation, is such an officer; or (ii) separated from service with such agency, after completing any applicable probationary period of such service, due to a service-connected disability, as determined by such agency at or before the time of separation; and (d)(i) has not been found by a qualified medical professional employed by such agency to be unqualified for reasons relating to mental health; or (ii) has not entered into an agreement with such agency from which the individual is separating from service in which that individual acknowledges he or she is not qualified for reasons relating to mental health; and (e) is not otherwise prohibited by New York or federal law from possessing any firearm.

26. "Rapid-fire modification device" means any bump stock, trigger crank, binary trigger system, burst trigger system, or any other device that is designed to accelerate the rate of fire of a semi-automatic firearm, rifle or shotgun.

27. "Bump stock" means any device or instrument that increases the rate of fire achievable with a semi-automatic firearm, rifle or shotgun by using energy from the recoil of the weapon to generate a reciprocating action that facilitates repeated activation of the trigger.

28. "Trigger crank" means any device or instrument that repeatedly activates the trigger of a semi-automatic firearm, rifle or shotgun through the use of a lever or other part that is turned in a circular motion and thereby accelerates the rate of fire of such firearm, rifle or shotgun, provided, however, that "trigger crank" shall not include any weapon initially designed and manufactured to fire through the use of a crank or lever.

29. "Binary trigger system" means any device that, when installed in or attached to a semi-automatic firearm rifle, or shotgun causes that weapon to fire once when the trigger is pulled and again when the trigger is released.

30. "Burst trigger system" means any device that, when installed in or attached to a semi-automatic firearm, rifle, or shot gun, allows that weapon to discharge two or more shots with a single pull or the trigger by altering the trigger reset.

31. "New York state 4-H certified shooting instructor" means a certified shooting sports instructor of the National 4-H Shooting Sports, a non-profit organization, engaged in shooting education and youth development programming that is administered by the National Institute of Food and Agriculture of the United States department of agriculture.

HISTORY:

Add, L 1965, ch 1030, § 1, eff Sept 1, 1967, with substance derived from § 1896; amd, L 1967, ch 791, § 46; L 1969, ch 123, § 1, eff Sept 1, 1969; L 1972, ch 588, § 1; L 1972, ch 605, § 1; L 1974, ch 179, § 1, eff Sept 1, 1974; L 1974, ch 986, §§ 1, 2; L 1974, ch 1041, § 1, eff Sept 1, 1974; L 1976, ch 217, § 1, eff Sept 1, 1976; L 1982, ch 492, § 1; L 1985, ch 61, § 1, eff Nov 1, 1985; L 1986, ch 328, § 2, eff Nov 1, 1986; L 1986, ch 646, § 1, eff Nov 1, 1986; L 1988, ch 264, § 1; L 1990, ch 264, § 1, eff Nov 1, 1990; L 1995, ch 219, § 2, eff Nov 1, 1995; L 1996, ch 354, § 2, eff Nov 1, 1996; L 1997, ch 446, § 2, eff Aug 25, 1997; L 1998, ch 378, § 1, eff Nov 1, 1998; L 1999, ch 210, § 1, eff Nov 1, 1999; L 1999, ch 635, §§ 11, 15, eff Dec 1, 1999; L 2000, ch 189, §§ 8–10, eff Nov 1, 2000; L 2008, ch 257, § 3, eff Nov 1, 2008; L 2010, ch 232, §§ 2, 3, eff July 30, 2010; L 2013, ch 1, § 37, eff Jan 15, 2013; L 2013, ch 1, § 38, eff April 15, 2013; L 2013, ch 1, § 39, eff March 16, 2013; L 2013, ch 98, § 1, eff July 5, 2013; L 2018, ch 60, § 1, effective June 11, 2018; L 2019, ch 34, § 3, effective May 30, 2019; L 2019, ch 130, § 1, effective July 29, 2019; L 2019, ch 134, § 1, effective January 26, 2020; L 2019, ch 146, § 1, effective November 1, 2019; L 2020, ch 150, §§ 1, 3, effective August 24, 2020.

Editor's Notes Laws 1997, ch 446, §§ 1, 7, eff Aug 25, 1997, provide as follows:

Section 1. This act shall be known and may be cited as the "Westchester county handgun record-keeping and accountability act". (Amd, L 1997, ch 447, § 1, eff Aug 25, 1997.).

§ 7. This act shall take effect immediately and in Westchester county shall apply to licenses issued on or after such date. (Amd, L 1997, ch 447, § 4, eff Aug 25, 1997.).

Laws 1997, ch 447, § 5, eff Aug 25, 1997, provides as follows:

§ 5. This act shall take effect on the same date as a chapter of the laws of 1997, amending the penal law enacting the Westchester county handgun record-keeping and accountability act, as proposed in legislative bills numbers S. 5498-A and A. 8311-A, takes effect, and nothing contained in such chapter shall be construed as abridging the five year period applicable within Suffolk county with respect to the expiration of licenses to carry or possess a revolver.

Laws 1999, ch 635, §§ 1, 2 and 17, eff Dec 1, 1999, provide as follows:

Section 1. Short title. This act shall be known and may be cited as the "clinic access and anti-stalking act of 1999."

§ 2. Legislative intent. The legislature finds and declares that criminal stalking behavior, including threatening, violent or other criminal conduct has become more prevalent in New York state in recent years. The unfortunate reality is that stalking victims have been intolerably forced to live in fear of their stalkers. Stalkers who repeatedly follow, phone, write, confront, threaten or otherwise unacceptably intrude upon their victims, often inflict immeasurable emotional and physical harm upon them. Current law does not adequately recognize the damage to public order and individual safety caused by these offenders. Therefore, our laws must be strengthened to provide clear recognition of the dangerousness of stalking.

The high correlation between stalking behavior and the infliction of physical violence or sexual assault is demonstrated by two federal studies. A recent FBI crime report shows that thirty percent of all murdered women are killed by their husbands or boyfriends who stalked them. A November 1997 National Institute of Justice study of stalking found that eighty percent of stalking victims who were stalked by their current or former intimate partner had, at some point in their relationship, been physically assaulted by their partner and thirty-one percent had been sexually assaulted by their partner. In recognition of the real and substantial risk of harm associated with stalking behavior, 49 states have enacted anti-stalking laws.

In 1992, the Legislature took an important step towards recognizing that stalking requires stronger enforcement measures by amending New York's menacing and harassment sections to include stalking behavior within the definition of these crimes. With this act, New York creates the separate crime of stalking. This act will protect victims by providing real and effective sanctions for stalking conduct even at its earliest stages. It will also provide increased

penalties for repeat offenders, for those offenders who stalk children, for those offenders who possess weapons when stalking, and for those offenders who commit stalking in violation of an order of protection.

The legislature also finds that criminal acts involving violence and intolerance at health care facilities and places of religious worship have become more prevalent in recent years. Medical clinics, physicians' offices and other facilities throughout the state have become targets in a campaign of obstruction and terrorism aimed at closing the facilities and intimidating those who seek to obtain or provide reproductive health services. In addition, places of religious worship have regrettably been targets of vandals thereby threatening these havens of peaceful prayer and meditation. Despite the passage of a 1994 federal law that makes it a federal crime for a person to deny access to or vandalize health care facilities and places of religious worship, state legislation is necessary to supplement federal law by empowering state and local officials to assist in combating violence and acts of vandalism at health care facilities and places of religious worship. It is therefore the intent of the legislature to provide state criminal penalties against anyone who, by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with another person or attempts to injure, intimidate or interfere with another person, because such other person was or is seeking to obtain or provide or assist in the provision of reproductive health services or exercise the right of religious freedom.

§ 17. Nothing contained in this act shall be construed to eliminate, limit or impair any sanction or remedy not provided by the provisions of this act which is otherwise available to punish or prohibit the criminal interference with health care services or religious worship.

§ 28. This act shall take effect immediately; provided, however, that:

1. Sections one through three, six through nineteen and twenty-three and twenty-four of this act shall take effect on the first day of November next succeeding the date on which it shall have become a law; provided, further, however, that effective immediately the division of state police is authorized and directed to promulgate such rules and regulations as may be necessary to effectuate the provisions of sections three and four of this act; provided, further, that the amendments to subdivision 3 of section 265.00 of the penal law made by section eight of this act shall apply to offenses committed in violation of article 265 or 400 of the penal law on or after the first day of November next succeeding the date on which this act shall have become a law; and.

Laws 2007, ch 510, §§ 1, 5, eff Feb 11, 2008, provide:

Section 1. Legislative intent. It is the intent of the legislature to facilitate the establishment of certain museums that are dedicated to cataloging, inventorying, exhibiting or displaying cutlery and knives made in New York state. This act will particularly help municipalities and interested groups located in the Hudson valley, which has a long history of manufacturing knives, to establish a cutlery and knife museum to offer for public display or exhibition of, among other exhibits, certain automatic knives. During the early twentieth century, the counties of Orange, Sullivan, and Ulster manufactured approximately fifty percent of all knives manufactured in the United States. There are persons who are interested in local history and are planning to establish a local museum to display all the various kinds of cutlery and knives that were manufactured in the Hudson valley and throughout the United States. However, while certain military and police personnel and those who hold a hunting or fishing license are able to legally possess certain automatic knives, museums and other institutions, incorporated for the promotion of art, education, history, and science, are not legally permitted to possess or own such artifacts. This act remedies this situation in a way that still places these knives in a secure environment and out of general circulation.

§ 5. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided that any and all rules and regulations and any other measures necessary to implement any provision of this act on its effective date may be promulgated and taken, respectively, on or before the effective date of such provision.

Laws 2013, ch 1, § 58, sub b, eff Jan 15, 2013, provides as follows:

§ 58. This act shall take effect immediately; provided, however, that:

b. The amendments to subdivision 23 of section 265.00 of the penal law made by section thirty-eight of this act shall take effect on the ninetieth day after this act shall have become a law, except that the amendments designating paragraph (a) of subdivision 23 shall take effect immediately; and provided further that the effective date of the amendments adding paragraphs (b) and (c) to such subdivision shall be suspended and not effective; (Amd, L 2013, ch 57, § 4 (Part FF), eff March 29, 2013, deemed in full force and eff March 16, 2013)

Laws 2018, ch 60, § 8, eff June 11, 2018, provides:

§ 8. This act shall take effect on the sixtieth day after it shall have become a law.

Laws 2019, ch 130, § 7, eff July 29, 2019, provides:

§ 7. This act shall take effect immediately; provided, however, that section two of this act shall take effect on the one hundred twentieth day after it shall have become a law.

Laws 2019, ch 134, § 8, eff January 26, 2020, provides:

§ 8. This act shall take effect on the one hundred eightieth day after it shall have become a law.

Laws 2019, ch 146, § 4, eff November 4, 2019, provides:

§ 4. This act shall take effect on the first of November next succeeding the date on which it shall have become a law.

Laws 2020, ch 55, § 4 (Part N), eff April 3, 2020, provides:

§ 4. This act shall take effect immediately; provided, however, that sections one and two of this act shall take effect one year after it shall have become a law and shall apply to out-of-state convictions entered in such jurisdictions on or after such date.

Amendment Notes The 2018 amendment by ch 60, § 1, added 17(c).

The 2019 amendment by ch 34, § 3, deleted "a gravity knife" following "switchblade knife" in 5-c.

The 2019 amendment by ch 130, § 1, added 26 through 30.

The 2019 amendment by ch 134, § 1, added 3-a.

The 2019 amendment by ch 146, § 1, added 5-d.

The 2020 amendment by ch 55, § 1 (Part N), deleted former 17(a); redesignated and rewrote former 17(b) [first setout] as 17(a); deleted former 17(b) [second setout], which read: "any of the following offenses defined in the penal law: illegally using, carrying or possessing a pistol or other dangerous weapon; possession of burglar's tools; criminal possession of stolen property in the third degree; escape in the third degree; jostling; fraudulent accosting; endangering the welfare of a child; the offenses defined in article two hundred thirty-five; issuing abortional articles; permitting prostitution; promoting prostitution in the third degree; stalking in the third degree; stalking in the fourth degree; the offenses defined in article one hundred thirty; the offenses defined in article two hundred twenty"; redesignated former 17(c) as 17(b); added "defined in the current penal law and any offense in any jurisdiction or in the former penal law that includes all of the essential elements of any of the following offenses" in 17(b); and added 17(c).

The 2020 amendment by ch 150, §§ 1, 3, substituted "paragraph c of subdivision three of section 11-0713 of the environmental conservation law" for "paragraph d of subdivision six of section 11-0713 of the environmental conservation law" in 19(c); added 19(d); added 31; and made a related change.

2013. Chapter 1, § 37 amended:

By deleting former sub 22, pars (a)–(e).

By adding sub 22, pars (a)–(h).

2013. Chapter 1, § 38 amended:

Sub 23 by deleting at fig 1 "manufactured after September thirteenth, nineteen hundred ninety-four," and adding the matter in italics.

2013. Chapter 1, § 39 amended:

By adding sub 24.

2013. Chapter 98, § 1 amended:

By adding sub 25.

2010. Chapter 232, § 2 amended:

Sub 17, par (b) [first setout] by deleting at fig 1 "that kind of loitering defined in subdivision three of section 240.35".

2010. Chapter 232, § 3 amended:

Sub 17, par (b) [second setout] by deleting at fig 1 "that kind of loitering defined in subdivision three of section 240.35".

2007. Chapter 510, § 3 amended:

By adding sub 5-c.

Notes to Decisions

Analysis

1. In general
2. Firearms, generally
3. —Pistols and revolvers
4. —Shotguns
5. —Rifles
6. Knives, generally
7. Deface
8. Antique firearm
9. Preemption of local laws
10. Possession of dangerous weapon
11. Licensing requirement
12. Under former § 1896

1. In general

Possession of weapons vis-a-vis the arresting officers was independent of and not a lesser included offense of robbery charge. People v Reynolds, 53 A.D.2d 877, 385 N.Y.S.2d 337, 1976 N.Y. App. Div. LEXIS 13707 (N.Y. App. Div. 2d Dep't 1976).

Application for firearm license is properly denied where applicant has prior conviction for serious offense, as defined in CLS Penal § 265.00, of unlawful entry into building and has also been convicted of driving while impaired and of driving while intoxicated, with latter conviction stemming from arrest occurring only several weeks prior to submission of license application. Schnell v Spano, 120 A.D.2d 669, 502 N.Y.S.2d 263, 1986 N.Y. App. Div. LEXIS 56774 (N.Y. App. Div. 2d Dep't 1986).

Defendant's conviction of fourth degree weapon possession would be reversed, in interest of justice, since trial court's refusal to present weapon charge to jury at first trial warranted inference that charge was dismissed for insufficient evidence, and therefore defendant should not have been retired on that charge. People v Kluck, 131 A.D.2d 590, 516 N.Y.S.2d 298, 1987 N.Y. App. Div. LEXIS 48053 (N.Y. App. Div. 2d Dep't 1987).

Dealer in firearms cannot lawfully possess or dispose of firearm silencers and machine guns, and gunsmith cannot lawfully dispose of machine guns and cannot lawfully possess or dispose of firearm silencers. Oefinger v New York State Police, 146 A.D.2d 186, 540 N.Y.S.2d 360, 1989 N.Y. App. Div. LEXIS 4881 (N.Y. App. Div. 3d Dep't 1989).

CLS Penal § 265.00 is definitional in nature and thus could not be read to provide applicable standard of care such that violation of it would constitute negligence. McDonald v Cook, 252 A.D.2d 302, 681 N.Y.S.2d 900, 1998 N.Y. App. Div. LEXIS 13874 (N.Y. App. Div. 3d Dep't 1998), app. denied, 93 N.Y.2d 812, 695 N.Y.S.2d 540, 717 N.E.2d 699, 1999 N.Y. LEXIS 1870 (N.Y. 1999).

The State has the power to dispense with the element of *scienter* in defining a crime if it is necessary to do so in the public interest where the offenses prohibited and made punishable are capable of inflicting widespread injury, and where the requirement of proof of the offender's guilty knowledge and wrongful intent would render enforcement of the prohibition difficult if not impossible, tending to nullify the statute; accordingly, the fact that a loaded firearm is capable of inflicting widespread injury furnishes a justifiable basis for eliminating the need to prove intent or guilty knowledge as elements of the crime of illegally possessing a loaded firearm and no different rule should be applied where the possession of a loaded firearm merely raises the degree of the crime or mandates increased punishment. People v A., 97 Misc. 2d 1053, 413 N.Y.S.2d 92, 1979 N.Y. Misc. LEXIS 2035 (N.Y. County Ct. 1979).

A police commissioner would be compelled to accept petitioner's application for a target pistol license, notwithstanding that the application had been refused on the basis that the applicant was under 21 years of age, since the controlling provisions of Penal Law §§ 265.00, 400.00, do not set forth a minimum age for handgun license applicants and a judicial determination has been made prohibiting the denial of target pistol licenses solely on the grounds for age. De Vito v McGuire, 124 Misc. 2d 65, 475 N.Y.S.2d 730, 1984 N.Y. Misc. LEXIS 3149 (N.Y. Sup. Ct. 1984).

State was required to prove that stud gun was operable instrument capable of inflicting harm so as to be classified as weapon for purposes of revoking parole on basis of possession of dangerous weapon in violation of conditions of parole. People ex rel. Spann v Rodriguez, 130 Misc. 2d 1077, 498 N.Y.S.2d 957, 1986 N.Y. Misc. LEXIS 2469 (N.Y. Sup. Ct. 1986).

Weapon found in defendant's possession was "gravity knife" within meaning of CLS Penal § 265.00(5), justifying his conviction of fourth degree weapon possession, since knife, in its folded position, had hinge on one end connecting 2 narrow handles and locking or safety device on other end, with blade concealed between handles, so that if locking device were in place, knife became operational by merely pushing locking lever, whereby blade became exposed either by force of gravity or centrifugal force; further, if knife were carried without safety lever in position, blade could be similarly exposed by force of gravity or centrifugal force. People v Dolson, 140 Misc. 2d 240, 530 N.Y.S.2d 427, 1987 N.Y. Misc. LEXIS 2827 (N.Y. City Ct. 1987).

Counts of indictment charging burglary and weapon possession were not barred on double jeopardy grounds based on prior Family Court disposition imposed against defendant for violating order of protection based on allegation that he forced his way into his wife's home and menaced her with knife, as violation of protective order did not include elements of burglary or weapons statutes (namely, unlawful entry into building with intent to commit crime or possession of weapon with intent to use unlawfully against another). People v Arnold, 174 Misc. 2d 585, 664 N.Y.S.2d 1008, 1997 N.Y. Misc. LEXIS 488 (N.Y. Sup. Ct. 1997).

Verdict finding defendant guilty of menacing in the second degree was not against the weight of the evidence because the evidence was legally sufficient to establish that defendant displayed what appeared to be a pistol or firearm. People v Colon, 116 A.D.3d 1234, 984 N.Y.S.2d 438, 2014 N.Y. App. Div. LEXIS 2566 (N.Y. App. Div. 3d Dep't), app. denied, 24 N.Y.3d 959, 996 N.Y.S.2d 219, 20 N.E.3d 999, 2014 N.Y. LEXIS 2974 (N.Y. 2014).

Where any inconsistencies existed between the firearms examiner's report and grand jury testimony, the court concluded it would not have a material influence upon the grand jury, as credibility factors should be more appropriately reserved for presentation to the petit jury; the People called a firearms examiner who testified that he inspected all of the weapons at issue and concluded that each was capable of accepting a detachable magazine. People v Perkins, 58 Misc. 3d 171, 64 N.Y.S.3d 454, 2017 N.Y. Misc. LEXIS 3518 (N.Y. County Ct. 2017).

Ban on gravity knives was not void for vagueness under Fourteenth Amendment because it provided sufficient notice that knives were unlawful to possess as law was similarly enforced prior to instant action and courts had upheld law's application to common folding knives by wrist-flick test. Copeland v Vance, 893 F.3d 101, 2018 U.S. App. LEXIS 16957 (2d Cir. N.Y. 2018), cert. denied, 139 S. Ct. 2714, 204 L. Ed. 2d 1123, 2019 U.S. LEXIS 4081 (U.S. 2019).

2. Firearms, generally

Definition of "firearm" in Penal Law § 265.00 is limited to the possession, use and purchase of firearms and the licensing and destruction of weapons; and, because neither is related in any way to a prosecution for perjury, § 265.00 by its express language precludes reliance upon its firearm definition in such a prosecu-

tion, except as a question or answer may have been specifically addressed to that definition. People v Neumann, 51 N.Y.2d 658, 435 N.Y.S.2d 956, 417 N.E.2d 69, 1980 N.Y. LEXIS 2778 (N.Y. 1980), reh'g denied, 52 N.Y.2d 1073, 1981 N.Y. LEXIS 5955 (N.Y. 1981), cert. denied, 452 U.S. 918, 101 S. Ct. 3056, 69 L. Ed. 2d 423, 1981 U.S. LEXIS 2436 (U.S. 1981).

In prosecution for attempted second degree weapon possession and related offenses, allegation that respondent carried weapon on public street, and that weapon was loaded, was sufficient to support inference that respondent believed and intended firearm to be operable. In re Lavar D., 90 N.Y.2d 963, 665 N.Y.S.2d 612, 688 N.E.2d 486, 1997 N.Y. LEXIS 3215 (N.Y. 1997).

Defendant's plea of guilty to first degree robbery was inappropriate where gun which he displayed during robbery was "beebee" gun; however, display of "beebee" gun would support conviction of second degree robbery. People v Bowman, 133 A.D.2d 701, 519 N.Y.S.2d 951, 1987 N.Y. App. Div. LEXIS 51736 (N.Y. App. Div. 2d Dep't 1987), app. denied, 70 N.Y.2d 953, 525 N.Y.S.2d 836, 520 N.E.2d 554, 1988 N.Y. LEXIS 304 (N.Y. 1988).

Evidence at trial on charges of second degree weapon possession and second degree assault was legally sufficient to establish that weapon possessed and employed by defendant in course of assault was "firearm" within meaning of CLS Penal § 265.00(3), even though victim was unable to describe weapon (which went unrecovered) with which defendant shot him, where his detailed account of shooting, and reenactment in which he demonstrated defendant's stance and manner in which defendant held weapon, together with bullet recovered at hospital, supported reasonable inference that defendant employed firearm in shooting victim. People v McGrew, 150 A.D.2d 729, 541 N.Y.S.2d 597, 1989 N.Y. App. Div. LEXIS 6994 (N.Y. App. Div. 2d Dep't 1989).

Phrase "as defined in section 265.00" under CLS Penal § 140.17(2) requires operability of firearm, rifle, or shotgun. People v Cruz, 272 A.D.2d 922, 709 N.Y.S.2d 717, 2000 N.Y. App. Div. LEXIS 5294 (N.Y. App. Div. 4th Dep't 2000), aff'd, 96 N.Y.2d 857, 730 N.Y.S.2d 29, 754 N.E.2d 1112, 2001 N.Y. LEXIS 1870 (N.Y. 2001).

Court was not required to define "firearm"(CLS Penal § 265.00(3)) with respect to length of barrel of sawed-off shotgun in trial for attempted first degree robbery, since robbery statute requires only display of what appears to be firearm, and testimony was clear that weapon displayed by defendant appeared to complainant to be pistol. People v Jennings, 279 A.D.2d 284, 720 N.Y.S.2d 4, 2001 N.Y. App. Div. LEXIS 149 (N.Y. App. Div. 1st Dep't), app. denied, 96 N.Y.2d 830, 729 N.Y.S.2d 451, 754 N.E.2d 211, 2001 N.Y. LEXIS 2201 (N.Y. 2001).

Legally sufficient evidence supported defendant's conviction for criminal possession of a weapon in the second degree under N.Y. Penal Law § 265.03(3) because there was evidence at trial that the shotgun barrel had been sawed off to less than 18 inches (a firearm under N.Y. Penal Law § 265.00(3)), the gun was operable, the ammunition in defendant's pocket could be used in that weapon (a loaded firearm under N.Y. Penal Law § 265.00(15)), and the police saw defendant possessing the toy alligator in which the weapon had been placed. People v Tillery, 60 A.D.3d 1203, 875 N.Y.S.2d 343, 2009 N.Y. App. Div. LEXIS 1876 (N.Y. App. Div. 3d Dep't), app. denied, 12 N.Y.3d 860, 881 N.Y.S.2d 672, 909 N.E.2d 595, 2009 N.Y. LEXIS 2787 (N.Y. 2009).

Trial court erred in dismissing an owner's action pursuant to N.Y. C.P.L.R. art. 78 seeking to compel police to return firearms seized from the owner's home; although continued police custody of the firearms was proper, the trial court erred by not holding a hearing as required by Trial court erred in dismissing an owner's action seeking to compel police to return firearms seized from the owner's home; although continued police custody of the firearms was proper, the trial court erred by not holding a hearing as required by N.Y. Penal Law § 265.00(16). Caso v Nassau County Police Dep't, 306 A.D.2d 473, 761 N.Y.S.2d 303, 2003 N.Y. App. Div. LEXIS 7412 (N.Y. App. Div. 2d Dep't 2003).

Second count of the indictment was properly dismissed because, by test-firing defendant's weapon two days after his arrest, with ammunition belonging to the State Police and not with that found with the weapon, the People failed to present sufficient evidence to the grand jury to charge defendant with possession of a loaded firearm, under N.Y. Penal Law § 265.00(15). A necessary element of that crime was that the ammunition be live. People v Colon, 15 A.D.3d 777, 790 N.Y.S.2d 288, 2005 N.Y. App. Div. LEXIS 1919 (N.Y. App. Div. 3d Dep't 2005), app. denied, 6 N.Y.3d 811, 812 N.Y.S.2d 450, 845 N.E.2d 1281, 2006 N.Y. LEXIS 746 (N.Y. 2006), app. denied, 6 N.Y.3d 811, 812 N.Y.S.2d 451, 845 N.E.2d 1282, 2006 N.Y. LEXIS 747 (N.Y. 2006).

Verdict on second degree robbery was not against the weight of the evidence because, although the witness's testimony was somewhat inconsistent or unclear as to whether he believed that defendant had an actual firearm as opposed to a BB gun, the evidence was legally sufficient to establish that defendant displayed what appeared to be a pistol or firearm while in immediate flight from the commission of a robbery. People v Colon, 116 A.D.3d 1234, 984 N.Y.S.2d 438, 2014 N.Y. App. Div. LEXIS 2566 (N.Y. App. Div. 3d Dep't), app. denied, 24 N.Y.3d 959, 996 N.Y.S.2d 219, 20 N.E.3d 999, 2014 N.Y. LEXIS 2974 (N.Y. 2014).

In a prosecution for second-degree criminal possession of a weapon, the evidence was legally sufficient to establish the operability of the firearm; although its barrel was loose and the loading gate would not remain closed, a firearms examiner testified that neither fact affected the operability of the firearm itself, and it was operational when the firearms examiner test-fired it with the ammunition that had been loaded in it at the time it was recovered. People v Hailey, 128 A.D.3d 1415, 7 N.Y.S.3d 808, 2015 N.Y. App. Div. LEXIS 3691 (N.Y. App. Div. 4th Dep't), app. denied, 26 N.Y.3d 929, 38 N.E.3d 838, 17 N.Y.S.3d 92, 2015 N.Y. LEXIS 3098 (N.Y. 2015).

Trial court properly convicted defendant of second-degree criminal possession of a weapon and third-degree criminal possession of marijuana because the jury did not fail to give the evidence the weight it should be accorded, the verdict, based on the applicability of the automobile presumption, was not against the weight of the evidence, the jury was entitled to find defendant guilty pursuant to a theory of constructive possession on the basis that he jointly possessed the firearm with his acquaintance as part of the same criminal operation, and the jury was entitled to find that defendant possessed an operable firearm loaded with live ammunition. People v Watkins, 151 A.D.3d 1913, 57 N.Y.S.3d 841, 2017 N.Y. App. Div. LEXIS 5467 (N.Y. App. Div. 4th Dep't), app. denied, 30 N.Y.3d 984, 89 N.E.3d 1266, 67 N.Y.S.3d 586, 2017 N.Y. LEXIS 3539 (N.Y. 2017).

While a different verdict would not have been unreasonable, the verdict convicting defendant of criminal possession of a weapon was not against the weight of the evidence because a finding of exclusive access to the area where the weapon was found was not necessary to establish constructive possession, constructive possession may have been established through circumstantial evidence, and defendant's claim that the witness was not credible was explored during cross-examination and was a matter for the jury's consideration. People v Jemmott, 164 A.D.3d 953, 82 N.Y.S.3d 657, 2018 N.Y. App. Div. LEXIS 5576 (N.Y. App. Div. 3d Dep't), app. denied, 32 N.Y.3d 1112, 115 N.E.3d 635, 91 N.Y.S.3d 363, 2018 N.Y. LEXIS 3521 (N.Y. 2018).

There was no merit to defendant's argument that firearms found along with associated ammunition under a step on a stairway could not be considered "loaded" because the associated ammunition was found separate from the firearms. People v McCoy, 169 A.D.3d 1260, 95 N.Y.S.3d 441, 2019 N.Y. App. Div. LEXIS 1453 (N.Y. App. Div. 3d Dep't), app. denied, 33 N.Y.3d 1033, 126 N.E.3d 167, 102 N.Y.S.3d 517, 2019 N.Y. LEXIS 1814 (N.Y. 2019).

Evidence was legally sufficient to support defendant's conviction of criminal possession of a weapon in the third degree under Penal Law § 265.02(7) relating to his possession of assault weapons, given the rifles and photographs of them were admitted into evidence and they met the statutory definition of an assault weapon. People v Steinmetz, 177 A.D.3d 1292, 112 N.Y.S.3d 833, 2019 N.Y. App. Div. LEXIS 8044 (N.Y. App. Div. 4th Dep't 2019), app. denied, 34 N.Y.3d 1133, 141 N.E.3d 486, 118 N.Y.S.3d 530, 2020 N.Y. LEXIS 252 (N.Y. 2020).

Inmate's claim that the gun he admitted to possessing was not loaded was incorrect as although the ammunition was not in the gun's chamber, it was on his person. People v Lewis, 989 N.Y.S.2d

590, 45 Misc. 3d 396, 2014 N.Y. Misc. LEXIS 3050 (N.Y. Sup. Ct. 2014), aff'd, 129 A.D.3d 637, 14 N.Y.S.3d 328, 2015 N.Y. App. Div. LEXIS 5470 (N.Y. App. Div. 1st Dep't 2015).

3. —Pistols and revolvers

Reversal of defendant's conviction of criminal possession of a weapon was mandated, where the prosecution presented no evidence at trial that the .22 caliber gun found in defendant's glove compartment was operable, and thereby failed to prove that defendant was in possession of "firearm" within the meaning of Pen Law § 265.00(3). People v Actie, 99 A.D.2d 815, 472 N.Y.S.2d 147, 1984 N.Y. App. Div. LEXIS 17207 (N.Y. App. Div. 2d Dep't 1984).

Conviction of third degree criminal possession of weapon (revolver) would not be reversed on defendant's assertion that jury had not been properly instructed on issue of whether revolver was operable where trial court initially gave no instruction on operability, but after defendant's exception, charged that gun which cannot be fired does not fit within statute; trial court should have included charge on operability in its initial instructions, but jury was able to gather correct rules on basis of entire charge. People v Ramsey, 124 A.D.2d 835, 508 N.Y.S.2d 553, 1986 N.Y. App. Div. LEXIS 62169 (N.Y. App. Div. 2d Dep't 1986).

Term "handgun" in indictment constituted sufficient factual support for subject element of first and second degree robbery, and first and second degree criminal use of firearm, as well as sufficiently specific description of what implement allegedly displayed by defendant appeared to be, even though term is not specifically included within definition of "firearm" under CLS Penal § 265.00 and is not among any of enumerated implements contained in statutes defining crimes with which defendant was charged, since CLS CPL § 200.50 requires simply that defendant be notified of crime of which he stands indicted. People v Singleton, 130 A.D.2d 598, 515 N.Y.S.2d 307, 1987 N.Y. App. Div. LEXIS 46612 (N.Y. App. Div. 2d Dep't 1987), aff'd, 72 N.Y.2d 845, 531 N.Y.S.2d 798, 527 N.E.2d 281, 1988 N.Y. LEXIS 1643 (N.Y. 1988).

Penal Law contemplates "imitation pistol" in reality of its use, while Administrative Code contemplates same in reality of its appearance; under either statute, "imitation pistol" is not actual firearm which can discharge projectile or which acts by force of gunpowder, nor is it an inoperable pistol which can be readily made operable. People v Webb, 78 Misc. 2d 253, 356 N.Y.S.2d 494, 1974 N.Y. Misc. LEXIS 1376 (N.Y. City Crim. Ct. 1974).

4. —Shotguns

Sawed-off shotgun which had overall size of 27 inches in length with padded stock or butt measuring 12 inches in circumference was not a "firearm" as defined in Penal Law section defining firearm as any pistol, revolver, sawed-off shotgun or other firearm of a size which may be concealed under the person; thus, its possession did not constitute the crime of possession of a firearm. People v Eldridge, 53 A.D.2d 1037, 385 N.Y.S.2d 912, 1976 N.Y. App. Div. LEXIS 15848 (N.Y. App. Div. 4th Dep't 1976).

Sawed off shotgun 23 ½ inches in length was not "firearm" within the meaning of Penal Law § 265.00, subdivision 3, as it was not of a size that could be concealed upon the person. People v Roberts, 73 Misc. 2d 500, 342 N.Y.S.2d 757, 1973 N.Y. Misc. LEXIS 2020 (N.Y. Dist. Ct. 1973), app. dismissed, 79 Misc. 2d 243, 360 N.Y.S.2d 151, 1974 N.Y. Misc. LEXIS 1637 (N.Y. App. Term 1974).

With regard to offense of possession of a firearm, sawed-off shotgun, which was 22 ½ inches long, was not a "concealed weapon" within meaning of statute which provides that the term "firearm" means any pistol, revolver, sawed-off shotgun or other firearm of a size which may be concealed upon the person. In re Peabody, 86 Misc. 2d 520, 382 N.Y.S.2d 934, 1976 N.Y. Misc. LEXIS 2478 (N.Y. Fam. Ct. 1976).

The issue of whether a sawed-off shotgun measuring 27 inches in length is a "firearm" within the meaning of subdivision 3 of section 265.00 of the Penal Law, which defines "firearm" as a "sawed-off shotgun or other firearm of a size which may be concealed upon the person", is a factual question as to whether it is concealable upon the person to be resolved by the jury and is not a legal matter to be resolved by the court. People v Ahern, 104 Misc. 2d 13, 427 N.Y.S.2d 549, 1980 N.Y. Misc. LEXIS 2383 (N.Y. Sup. Ct. 1980).

A 22 inch sawed-off shotgun was a firearm capable of concealment within the meaning of Penal § 265(3) where the defendant had actually concealed the weapon in his back pocket covered by his outer clothes. People v Davis, 107 Misc. 2d 1, 433 N.Y.S.2d 56, 1980 N.Y. Misc. LEXIS 2816 (N.Y. City Crim. Ct. 1980).

Where a sawed-off shotgun, possession of which by defendants resulted in their indictment for criminal possession of a weapon in the third degree, was 26 and $^3/_8$ inches long, approximately half the heighth of each of the defendants, and where there was no evidence presented to the grand jury indicating that the defendants on the summer night of their arrest were garbed in a manner to aid, rather than hinder, concealment of the weapon, the grand jury minutes were therefore legally insufficient to establish concealability of the guns, presumptions that any sawed-off shotgun up to 18 inches in length is concealable, any sawed-off shotgun between 18 and 24 inches in length creates a fact question for judge or jury as to its concealability, and any sawed-off shotgun in excess of 24 inches would be considered not concealable in the absence of special circumstances relating to dress, or other factor which would manifest concealability; when given its common sense meaning the controlling statute was not subject to a constitutional attack for vagueness. People v Cortez, 110 Misc. 2d 652, 442 N.Y.S.2d 873, 1981 N.Y. Misc. LEXIS 3137 (N.Y. Sup. Ct. 1981).

In a prosecution for possession of a weapon in the fourth degree, defendant's motion to set aside his conviction based upon the alleged error of the court in submitting to the jury the issue of whether the sawed-off shotgun in question was a concealable weapon was denied, since it was proper for the jury in the instant prosecution to determine whether a shotgun measuring 27 and one-quarter incles in length is concealable and therefore a proscribed "firearm" as statutorily defined. People v Davis, 112 Misc. 2d 138, 446 N.Y.S.2d 159, 1981 N.Y. Misc. LEXIS 3413 (N.Y. City Crim. Ct. 1981).

In the prosecution of defendant, who had been arrested while lying on a bed, apparently asleep, with a sawed-off shotgun cradled in his arms, for criminal possession of a weapon in the fourth degree (Penal Law, § 265.01, subd [1]), the trial court properly refused to instruct the jury that subd 1 of § 265.01 should be construed as defining a crime requiring the elements of scienter or mental culpability, since scienter, guilty knowledge or intent, was not a necessary element of the crime; moreover, although criminal liability required proof of a voluntary act, there was no necessity that an instruction as to an involuntary act or an innocent act, which would have had an effect on defendant's possession of a weapon (Penal Law, § 10.00, subd 8), be given in the absence of any evidence of intoxication or other involuntary act. Further, the issue of whether the gun was concealable, and therefore a proscribed firearm as defined in Penal Law § 265.00, subd 3, was properly submitted to the jury where the gun, which measured 27 ½ inches in length, could have been concealed by the defendant, who was about 5 feet 10 inches tall, and where defendant was carefully viewed by the jury during trial. People v Davis, 112 Misc. 2d 138, 446 N.Y.S.2d 159, 1981 N.Y. Misc. LEXIS 3413 (N.Y. City Crim. Ct. 1981).

CLS Penal § 265.00(3)(b) outlaws any "shotgun" or "weapon made from a shotgun" if barrel measures less than 18 inches no matter what over-all length of gun; § 265.00(3)(b) also contains separate, distinct and additional prohibition against any "weapon made from a shotgun" if such weapon has over-all length of less than 26 inches, no matter what its barrel length. People v Santiago, 133 Misc. 2d 161, 506 N.Y.S.2d 136, 1986 N.Y. Misc. LEXIS 2843 (N.Y. Sup. Ct. 1986).

District Attorney properly instructed grand jury that "firearm" was defined "in pertinent part as a shotgun having one or more barrels less than eighteen inches in length," without instructing grand jury to consider over-all length of gun or to distinguish between "shotgun" and "weapon made from a shotgun," since CLS Penal § 265.00(3)(b) must be read in disjunctive to outlaw any "shotgun" or "weapon made from a shotgun" if barrel measures less than 18 inches, no matter what its over-all length. People v

Santiago, 133 Misc. 2d 161, 506 N.Y.S.2d 136, 1986 N.Y. Misc. LEXIS 2843 (N.Y. Sup. Ct. 1986).

CLS Penal § 265.00(3) is not unconstitutionally vague since it clearly establishes 2 types of separate standards for 2 separate weapons—i.e., shotguns and weapons made from shotguns. People v Crivillaro, 142 Misc. 2d 527, 538 N.Y.S.2d 152, 1989 N.Y. Misc. LEXIS 54 (N.Y. Sup. Ct. 1989).

CLS Penal § 265.00(3) is properly read in disjunctive so that only element required to bring shotgun within definition of firearm is that of barrel length of less than 18 inches, and shotgun is not also required to have overall length of less than 26 inches. People v Crivillaro, 142 Misc. 2d 527, 538 N.Y.S.2d 152, 1989 N.Y. Misc. LEXIS 54 (N.Y. Sup. Ct. 1989).

Indictment charging defendant with third degree weapon possession would be dismissed where weapon in question was 29 inches in length and, although shotgun originally, had been altered so as to be incapable of being fired from shoulder; in order for weapon made from shotgun to be considered firearm within statutory definitions found in CLS Penal §§ 265.00(3) and 265.00(12), it must be less than 26 inches in length and capable of being fired from shoulder. People v C. C., 144 Misc. 2d 350, 544 N.Y.S.2d 950, 1989 N.Y. Misc. LEXIS 503 (N.Y. Sup. Ct. 1989).

Count of indictment charging defendant with fourth degree grand larceny under CLS Penal § 155.30(7) for stealing shotgun was reduced to petit larceny charge where no evidence was provided to grand jury that shotgun was "operable" as defined in CLS Penal § 265.00(12), nor was grand jury charged regarding this requirement. People v Ewing, 172 Misc. 2d 120, 656 N.Y.S.2d 849, 1997 N.Y. Misc. LEXIS 121 (N.Y. County Ct. 1997).

5. —Rifles

Gun with barrel length of $17^{7}/_{8}$ inches qualified as "firearm" under CLS Penal § 265.00, even though its over-all length of approximately 29 inches exceeded statutory limit, since statute should be read in disjunctive so that barrel length limitation may be applied independently of over-all length limitation. People v Villani, 141 A.D.2d 883, 530 N.Y.S.2d 209, 1988 N.Y. App. Div. LEXIS 7125 (N.Y. App. Div. 2d Dep't), app. denied, 72 N.Y.2d 926, 532 N.Y.S.2d 860, 529 N.E.2d 190, 1988 N.Y. LEXIS 3272 (N.Y. 1988).

Court should have charged on requirement that barrel of gun be shorter than 18 inches, in trial for second degree weapon possession, where testimony of People's ballistics expert as to length of barrel was vague and there was no other testimony on subject except for complaining witness' inexact demonstration. People v Jennings, 279 A.D.2d 284, 720 N.Y.S.2d 4, 2001 N.Y. App. Div. LEXIS 149 (N.Y. App. Div. 1st Dep't), app. denied, 96 N.Y.2d 830, 729 N.Y.S.2d 451, 754 N.E.2d 211, 2001 N.Y. LEXIS 2201 (N.Y. 2001).

A rifle which has been reduced, by sawing off the barrel, to a size that it may be concealed on the person loses its statutory exemption from provision relating to concealment of a dangerous weapon. People v Caffrey, 73 Misc. 2d 504, 342 N.Y.S.2d 754, 1973 N.Y. Misc. LEXIS 2021 (N.Y. City Crim. Ct. 1973).

Grand jury evidence was not legally sufficient to charge third and fourth degree possession of "assault weapons" where arresting officer described 4 rifles in question as semi-automatic rifles with detachable magazines and additional characteristics satisfying statutory definition under CLS Penal § 265.00(22), but ballistic reports, while concluding that all 4 rifles were semi-automatic and operable, did not mention special characteristics testified to by arresting officer, and all but one rifle was observed to have no magazine; preferable practice would be to include all necessary characteristics needed for "assault weapons" charge in ballistics report. People v Digaetano, 188 Misc. 2d 771, 729 N.Y.S.2d 614, 2001 N.Y. Misc. LEXIS 283 (N.Y. Sup. Ct. 2001).

County court erred, after determining that operability was a necessary finding to convict defendant of the crime of fourth-degree criminal possession of stolen property, in refusing to grant defendant's additional instruction request to include the words "under this Count, the rifle need not be loaded, but it must be operable. To be operable, the rifle must be capable of discharging ammunition," as such was contained in the pattern criminal jury instruction, despite reading the definition of a rifle as detailed in N.Y. Penal Law § 265.00(11); further, such error was not harmless, as it denied defendant a fair trial and entitled him to a new trial be had. People v Rowland, 14 A.D.3d 886, 787 N.Y.S.2d 741, 2005 N.Y. App. Div. LEXIS 433 (N.Y. App. Div. 3d Dep't 2005).

Because the destruction of an owner's rifles, shotgun, and shooting accessories was not permissible under the version of N.Y. Penal Law §§ 265.00(3), 400.05(6) in effect at the time of the destruction, due process was not satisfied by N.Y. Fam. Ct. Act § 842-a(7); accordingly, the owner properly brought a 42 U.S.C.S. § 1983 action against the sheriff's department. Maio v Kralik, 70 A.D.3d 1, 888 N.Y.S.2d 582, 2009 N.Y. App. Div. LEXIS 8062 (N.Y. App. Div. 2d Dep't 2009).

6. Knives, generally

Defendant was properly convicted of fourth-degree criminal possession of a weapon because the accusatory instrument was facially sufficient where it stated that the knife at issue, once opened, locked "automatically in place," which was synonymous to the statutory phrase "by means of a device," and the accusatory instrument sufficiently pleaded that the arresting police officer exercised his expertise by testing the knife and determining that it opened and locked in the manner proscribed by the gravity knife statute. 2015 N.Y. LEXIS 3239.

Court correctly instructed jury that, in order to convict defendant of possessing gravity knife, prosecution had to prove that defendant knew he had a knife in his possession, not that he knew it was specifically a gravity knife, and that knife fit legal description of gravity knife under CLS Penal § 265.00(5); knowledge that thing possessed answers description of prohibited instrument is not element of third degree criminal possession of weapon. People v Berrier, 223 A.D.2d 456, 637 N.Y.S.2d 69, 1996 N.Y. App. Div. LEXIS 489 (N.Y. App. Div. 1st Dep't), app. denied, 88 N.Y.2d 876, 645 N.Y.S.2d 450, 668 N.E.2d 421, 1996 N.Y. LEXIS 5037 (N.Y. 1996).

Defendant's conviction of possession of a weapon in the fourth degree, N.Y. Penal Law § 265.01(1) was not supported by sufficient evidence; the knife possessed by defendant, known as a butterfly knife, did not satisfy the statutory definition of a gravity knife under N.Y. Penal Law § 265.00(5), as the knife required manual locking. People v Zuniga, 303 A.D.2d 773, 759 N.Y.S.2d 86, 2003 N.Y. App. Div. LEXIS 3353 (N.Y. App. Div. 2d Dep't 2003).

Where a trial court's credibility determinations were supported by the record, the fact that a gravity knife malfunctioned during trial demonstrations did not defeat the proof of operability; therefore, the evidence supported defendant's conviction for criminal possession of a weapon under N.Y. Penal Law §§ 265.00(5), 265.01(1), 265.02(1) and defendant's suppression motion was properly denied. People v Smith, 309 A.D.2d 608, 765 N.Y.S.2d 777, 2003 N.Y. App. Div. LEXIS 10707 (N.Y. App. Div. 1st Dep't), app. denied, 1 N.Y.3d 580, 775 N.Y.S.2d 796, 807 N.E.2d 909, 2003 N.Y. LEXIS 4734 (N.Y. 2003).

Legally sufficient evidence supported defendant's conviction for criminal possession of a weapon in the third degree as the People proved the operability of the gravity knife at issue within the meaning of N.Y. Penal Law §§ 265.00(5), 265.01(1), and 265.02(1) based on a police officer's testimony regarding his testing of the knife after defendant's arrest; the officer described the manner in which the knife operated and demonstrated its operability in open court. People v Birth, 49 A.D.3d 290, 853 N.Y.S.2d 317, 2008 N.Y. App. Div. LEXIS 1874 (N.Y. App. Div. 1st Dep't), app. denied, 10 N.Y.3d 859, 860 N.Y.S.2d 486, 890 N.E.2d 249, 2008 N.Y. LEXIS 2123 (N.Y. 2008).

Because a police officer's description and demonstration for the jury of the manner in which a gravity knife recovered from defendant operated conformed to definition of a gravity knife in N.Y. Penal Law § 265.00(5),defendant's argument to the contrary was based on a misinterpretation of the officer's testimony. People v Jouvert, 50 A.D.3d 504, 856 N.Y.S.2d 84, 2008 N.Y. App. Div. LEXIS 3596 (N.Y. App. Div. 1st Dep't), app. denied, 11 N.Y.3d 790, 866 N.Y.S.2d 616, 896 N.E.2d 102, 2008 N.Y. LEXIS 3772 (N.Y. 2008).

Trial court properly convicted defendant of second-degree criminal possession of a weapon because the mere fact that he

might have only fired one round from his rifle neither precluded nor negated a finding that it was a "repeating rifle," the weapon was only required to have the ability to accept a detachable magazine, not that the magazine be utilized every time the weapon was fired, and the presence of a spring in the magazine did not take the rifle outside the statutory definition. People v Gray, 151 A.D.3d 1470, 57 N.Y.S.3d 561, 2017 N.Y. App. Div. LEXIS 5188 (N.Y. App. Div. 3d Dep't), app. denied, 30 N.Y.3d 949, 89 N.E.3d 523, 67 N.Y.S.3d 133, 2017 N.Y. LEXIS 3371 (N.Y. 2017), cert. denied, 138 S. Ct. 1295, 200 L. Ed. 2d 483, 2018 U.S. LEXIS 1843 (U.S. 2018).

Weapon found in defendant's possession was "gravity knife" within meaning of CLS Penal § 265.00(5), justifying his conviction of fourth degree weapon possession, since knife, in its folded position, had hinge on one end connecting 2 narrow handles and locking or safety device on other end, with blade concealed between handles, so that if locking device were in place, knife became operational by merely pushing locking lever, whereby blade became exposed either by force of gravity or centrifugal force; further, if knife were carried without safety lever in position, blade could be similarly exposed by force of gravity or centrifugal force. People v Dolson, 140 Misc. 2d 240, 530 N.Y.S.2d 427, 1987 N.Y. Misc. LEXIS 2827 (N.Y. City Ct. 1987).

Knife whose blade does not lock into place "when released" from its cover is not "gravity knife" under CLS Penal § 265.00, even if blade can be released from its sheath by flick of wrist. People v Dolson, 142 Misc. 2d 779, 538 N.Y.S.2d 393, 1989 N.Y. Misc. LEXIS 116 (N.Y. County Ct. 1989).

Defendant was not allowed to withdraw guilty pleas to weapons possession charges under N.Y. Penal Law § 265.01 because the sole basis proffered was that the allocution failed to establish the operability of the gravity knives at issue, but defendant admitted that the knives were gravity knives, and, in any event, all that was required was defendant's knowledge that he possessed a knife, not that he knew that it the statutory description of a gravity knife; the court allocuted defendant as to all necessary elements of the crime and apprised him of the rights and privileges that he would be waiving by pleading guilty. People v Daly, 932 N.Y.S.2d 845, 33 Misc. 3d 963, 2011 N.Y. Misc. LEXIS 4966 (N.Y. City Crim. Ct. 2011).

Information that stated that an officer tested a knife and that the blade released from the handle by force of gravity or centrifugal force and locked in place by means of a button, spring, lever or other device in the handle was facially sufficient, even though the officer did not mention his training and experience, as ultimately testing and personal knowledge as to the operability of a gravity knife, and not training and experience, were the key components of a N.Y. Penal Law § 265.00 charge. People v Octavio, 932 N.Y.S.2d 803, 34 Misc. 3d 790, 2011 N.Y. Misc. LEXIS 5466 (N.Y. City Crim. Ct. 2011).

Officer did not have to state what test he used to determine that a knife was a gravity knife to support the sufficiency of an information on a N.Y. Penal Law § 265.00 charge. People v Octavio, 932 N.Y.S.2d 803, 34 Misc. 3d 790, 2011 N.Y. Misc. LEXIS 5466 (N.Y. City Crim. Ct. 2011).

Complaint that indicated that after a knife was tested certain results occurred was sufficient to charge a N.Y. Penal Law § 265.00 offense where the results were the same as the statutory definition; that the allegations tracked the statutory language was not a defect as it was the only way that a complaint could be pled to sufficiently distinguish a gravity knife from all other knives that were not per se weapons. People v Octavio, 932 N.Y.S.2d 803, 34 Misc. 3d 790, 2011 N.Y. Misc. LEXIS 5466 (N.Y. City Crim. Ct. 2011).

In an action for declaratory and injunctive relief in which plaintiffs invoked 42 U.S.C.S. § 1983 to charge defendants with applying New York law criminalizing the possession of "gravity knives," three plaintiffs (an artist, an art dealer, and a retail store) had standing to challenge defendants' application of N.Y. Penal Law §§ 265.00(5) and 265.01(1) because each had expressed present intent to possess such knives (but for defendants' challenged enforcement actions) and each had demonstrated a credible threat of prosecution; however, two organizational plaintiffs did not have standing to sue on their own behalf or on behalf of their members. Knife Rights, Inc. v Vance, 802 F.3d 377, 2015 U.S. App. LEXIS 16814 (2d Cir. N.Y. 2015).

Even if the officer had reasonable suspicion to initially stop defendant, which he did not, there was no probable cause to arrest him; the tool which was recovered was not a gravity knife and the officer could not have reasonably believed it to be one—it was designed, sold, and used as a folding knife. Although the officer was ultimately able to open the tool with centrifugal force at the hearing, it was obviously not designed to be opened in this fashion and did not readily open through such force; defendant's expert, as well as a representative of the retailer, each testified that the tool was not intended to be opened with centrifugal force and was not treated as a weapon by its designer, manufacturer, seller, or users. United States v Irizarry, 509 F. Supp. 2d 198, 2007 U.S. Dist. LEXIS 64365 (E.D.N.Y. 2007).

7. Deface

Proof that weapon was sawed off, without more, does not fall within definition of "deface" in CLS Penal § 265.00(7) and is insufficient to support conviction of third degree weapon possession. People v Blair, 242 A.D.2d 883, 662 N.Y.S.2d 649, 1997 N.Y. App. Div. LEXIS 10434 (N.Y. App. Div. 4th Dep't 1997).

It is apparent from the statutory definition that the legislature intended "deface" to mean something quite different than the adaptation of a weapon to make it concealable and that such definition would not apply to sawing off a shotgun to make it concealable in the absence of any evidence that the manufacturer's serial number or other distinguishing number was altered. People v Caffrey, 73 Misc. 2d 504, 342 N.Y.S.2d 754, 1973 N.Y. Misc. LEXIS 2021 (N.Y. City Crim. Ct. 1973).

Merely sawing off a portion of a weapon is not an act sufficient within itself to establish that weapon has been "defaced" for purposes of statute providing that it is criminal possession of weapon in third degree when person "knowingly has in his possession a machine-gun or firearm which has been defaced for the purpose of concealment or prevention of the detection of a crime or misrepresenting the identity of such machine-gun or firearm." In re Peabody, 86 Misc. 2d 520, 382 N.Y.S.2d 934, 1976 N.Y. Misc. LEXIS 2478 (N.Y. Fam. Ct. 1976).

8. Antique firearm

Term "muzzle loading . . . revolver" within statute exempting certain antique firearms from designation as prohibited weapons is sufficiently ambiguous to require full factual inquiry into historical and commonly understood use of the term; though there may be no such thing as a revolver which loads through the barrel, if it should be established that a certain class of revolvers were historically and are now commonly known as "muzzle loaders," the exemption would extend to such class. Long Island Antique Gun Collectors Asso. v Frank, 53 A.D.2d 644, 384 N.Y.S.2d 500, 1976 N.Y. App. Div. LEXIS 13364 (N.Y. App. Div. 2d Dep't 1976).

A defendant who possessed a partially-loaded, muzzle-loading pistol would be guilty of criminal possession of a weapon in the third degree as possessing "a loaded firearm" under Penal Law § 265.02(4) since, although antique weapons are excluded from the definition of firearms pursuant to Penal Law § 265.00(3), the weapon possessed must be loaded; in enacting the exemption for antique weapons, it was the intention to include only unloaded weapons, and possession of a partially loaded pistol together with the ammunition necessary to fire the gun is not within this exception. People v Mott, 112 Misc. 2d 833, 447 N.Y.S.2d 632, 1982 N.Y. Misc. LEXIS 3200 (N.Y. Sup. Ct. 1982).

9. Preemption of local laws

State law which evinced intent to cover most of possible categories of weapons for which it deemed some sanction necessary when weapons were used with illegal intent did not preempt field of legislation with respect to criminality in connection with toy guns and was not at odds with city ordinance making it unlawful to possess toy pistol resembling real one in certain particulars. People v Judiz, 38 N.Y.2d 529, 381 N.Y.S.2d 467, 344 N.E.2d 399, 1976 N.Y. LEXIS 2260 (N.Y. 1976).

Defendant's conviction of unlawful possession of assault weapon under Rochester City Code § 47-5(F) was not preempted by CLS Penal Art 265, which regulates firearms and other

dangerous weapons; mere fact that local ordinance has some connection with subject on which state statute exists does not automatically vitiate it. People v Stagnitto, 261 A.D.2d 890, 691 N.Y.S.2d 223, 1999 N.Y. App. Div. LEXIS 4939 (N.Y. App. Div. 4th Dep't), app. denied, 93 N.Y.2d 1028, 697 N.Y.S.2d 587, 719 N.E.2d 948, 1999 N.Y. LEXIS 3372 (N.Y. 1999).

Article 265 of the Penal Law does not treat so extensively with the subject of the control of rifles and shotguns as to evidence any design or intention by the state to preempt the entire field. Grimm v New York, 56 Misc. 2d 525, 289 N.Y.S.2d 358, 1968 N.Y. Misc. LEXIS 1721 (N.Y. Sup. Ct. 1968).

Statute providing that any person having in his possession any imitation pistol with intent to use same unlawfully against another is guilty of class A misdemeanor does not so extensively treat subject of imitation pistols as to evidence intent or desire by State Legislature that it be sole and exclusive legislation in this area. People v Webb, 78 Misc. 2d 253, 356 N.Y.S.2d 494, 1974 N.Y. Misc. LEXIS 1376 (N.Y. City Crim. Ct. 1974).

City ordinance that regulated semiautomatic rifles and shotguns with ammunition feeding devices permitting them to be loaded with combination of more than 6 rounds was not preempted by state gun control laws (e.g., CLS Gen Mun § 139-d, CLS Civ R § 4, and CLS Penal Art 265 and Art 400); state has not, directly or indirectly, regulated all aspects of gun possession and use as to time, place, and circumstance. Citizens for a Safer Community v City of Rochester, 164 Misc. 2d 822, 627 N.Y.S.2d 193, 1994 N.Y. Misc. LEXIS 671 (N.Y. Sup. Ct. 1994).

N.Y. Penal Law § 400.00 preempted Nassau County, N.Y., Ordinance No. 5-2008, as amended by Nassau County, N.Y., Ordinance 9-2008 (Ordinance), which banned the possession of "deceptively colored" firearms because § 400.00(2) specifically precluded from licensing assault weapons and disguised guns and the comprehensive and detailed regulatory language and scheme of § 400.00 demonstrated the legislature's intent to preempt the field of firearm regulation; the Ordinance interfered with the licensing provisions set forth in N.Y. Penal Law § 265.00 et seq. and N.Y. Penal Law § 400.00 et seq. by making it illegal for an individual to possess a deceptively colored handgun in Nassau County even though such individual held a valid firearms license under state law. Matter of Chwick v Mulvey, 81 A.D.3d 161, 915 N.Y.S.2d 578, 2010 N.Y. App. Div. LEXIS 9817 (N.Y. App. Div. 2d Dep't 2010).

10. Possession of dangerous weapon

Since city ordinance making it unlawful to possess toy pistol resembling real gun in certain particulars is constitutional and had not been preempted by state law, conviction of defendant, who was apprehended while in possession of toy pistol resembling gun known as a Luger, was proper under such ordinance. People v Judiz, 38 N.Y.2d 529, 381 N.Y.S.2d 467, 344 N.E.2d 399, 1976 N.Y. LEXIS 2260 (N.Y. 1976).

Possession of weapon must be voluntary, in order to be culpable. People v Valentine, 54 A.D.2d 568, 387 N.Y.S.2d 25, 1976 N.Y. App. Div. LEXIS 13900 (N.Y. App. Div. 2d Dep't 1976).

Sentence of probation for five years on conviction on plea of guilty to attempted possession of a weapon was not excessive even in light of defendant's unblemished prior record. People v Manners, 54 A.D.2d 938, 388 N.Y.S.2d 141, 1976 N.Y. App. Div. LEXIS 14811 (N.Y. App. Div. 2d Dep't 1976), app. denied, 41 N.Y.2d 867, 1977 N.Y. LEXIS 3232 (N.Y. 1977).

Although police officers' testimony to the effect that gun was removed from defendant's person, if credited, would certainly support verdict finding defendant guilty of possession of a weapon as a felony, if the jury believed defendant's claim that he found the gun and gave it to the police, his properly explained temporary possession would not have been unlawful; accordingly, reversible error occurred when the court refused defendant's sufficiently articulated request for an appropriate charge as to innocent possession. People v Richardson, 55 A.D.2d 514, 389 N.Y.S.2d 14, 1976 N.Y. App. Div. LEXIS 15146 (N.Y. App. Div. 1st Dep't 1976).

Defendant's possession of glass with intent to use it unlawfully against another within meaning of CLS Penal §§ 265.01(2) and 265.02(1) was established by evidence that, during altercation at bar, defendant struck victim twice in face with glass, glass broke on first impact, and victim sustained injury when struck second time. People v Tellone, 155 A.D.2d 631, 548 N.Y.S.2d 46, 1989 N.Y. App. Div. LEXIS 14437 (N.Y. App. Div. 2d Dep't 1989), app. denied, 76 N.Y.2d 744, 558 N.Y.S.2d 905, 557 N.E.2d 1201, 1990 N.Y. LEXIS 2357 (N.Y. 1990).

Evidence supported convictions for first degree robbery and third degree weapon possession since jury was entitled to conclude that defendant used force and threatened use of dangerous instrument (razor blade) to prevent store security guard from regaining possession of stolen items. People v Gill, 191 A.D.2d 321, 595 N.Y.S.2d 46, 1993 N.Y. App. Div. LEXIS 2587 (N.Y. App. Div. 1st Dep't), app. denied, 81 N.Y.2d 1073, 601 N.Y.S.2d 592, 619 N.E.2d 670, 1993 N.Y. LEXIS 2769 (N.Y. 1993).

In trial for possession of drugs and weapons, defendant's dominion and control over apartment was established by evidence of his residence and presence in apartment, his possession of keys fitting front door locks, and his involvement in prior drug transaction in apartment. People v Bernard, 237 A.D.2d 210, 655 N.Y.S.2d 931, 1997 N.Y. App. Div. LEXIS 2768 (N.Y. App. Div. 1st Dep't), app. denied, 90 N.Y.2d 855, 661 N.Y.S.2d 182, 683 N.E.2d 1056, 1997 N.Y. LEXIS 2386 (N.Y. 1997).

Defendant's adjudication of delinquency for acts which, if committed by an adult, would have constituted criminal possession of a weapon under an accomplice liability theory was supported by sufficient evidence as: (1) after police heard gunshots in the area, defendant was observed holding a bulge that was visible at his waistband which, according to one of the officers, was consistent with the carrying of a gun; (2) upon seeing the officer, defendant immediately fled, holding his waistband with his right hand as he ran; and (3) defendant threw a firearm to the ground with his right hand during the officers' pursuit. The adjudication was not against the weight of the evidence. Matter of Ya-Sin S., 122 A.D.3d 751, 996 N.Y.S.2d 319, 2014 N.Y. App. Div. LEXIS 7602 (N.Y. App. Div. 2d Dep't 2014).

Since intent is not required for a violation of statute prohibiting possession of weapons and dangerous instruments and appliances, defendant's contention that he believed the weapon, a sawed off shotgun 23 ½ inches long, to be inoperable and the fact that there was no ammunition found for it were not defenses to the action. People v Roberts, 73 Misc. 2d 500, 342 N.Y.S.2d 757, 1973 N.Y. Misc. LEXIS 2020 (N.Y. Dist. Ct. 1973), app. dismissed, 79 Misc. 2d 243, 360 N.Y.S.2d 151, 1974 N.Y. Misc. LEXIS 1637 (N.Y. App. Term 1974).

Fact that defendant was seen as a passenger in a taxicab carrying on his lap, in open view, a loaded, sawed-off .22 caliber rifle was sufficient evidence to warrant holding him for action of grand jury on charge of possession of dangerous weapon. People v Caffrey, 73 Misc. 2d 504, 342 N.Y.S.2d 754, 1973 N.Y. Misc. LEXIS 2021 (N.Y. City Crim. Ct. 1973).

By prohibiting possession of any imitation pistol with intent to use same unlawfully against another, state statute does not impliedly permit possession of imitation pistol in all other circumstances. People v Webb, 78 Misc. 2d 253, 356 N.Y.S.2d 494, 1974 N.Y. Misc. LEXIS 1376 (N.Y. City Crim. Ct. 1974).

Administrative Code provision making it unlawful for any person to possess or use any imitation pistol which substantially duplicates actual pistol, with certain exceptions, is not invalid as attempt to regulate in field preempted by state law nor is it an improper exercise of police power. People v Webb, 78 Misc. 2d 253, 356 N.Y.S.2d 494, 1974 N.Y. Misc. LEXIS 1376 (N.Y. City Crim. Ct. 1974).

For purposes of prosecution involving multiple counts of possession of dangerous weapon consisting of homemade devices containing "an explosive substance," term "explosive" (not defined in Penal Law but defined in CLS Labor § 451) meant something that was capable of exploding and causing death or injury to person or property. People v Getman, 188 Misc. 2d 809, 729 N.Y.S.2d 858, 2001 N.Y. Misc. LEXIS 273 (N.Y. County Ct. 2001).

11. Licensing requirement

Pistol licensing officer who is also county judge need not issue order in his judicial capacity when denying permit application. Lehner v Humphreys, 156 A.D.2d 867, 550 N.Y.S.2d 88, 1989 N.Y. App. Div. LEXIS 15876 (N.Y. App. Div. 3d Dep't 1989).

Appropriate procedure to seek review of determination of County Court Judge, acting in his administrative capacity as firearms licensing officer for Westchester County under CLS Penal §§ 400.00(11) and 265.00(10), was not by direct appeal but by commencement of CLS CPLR Art 78 proceeding in Appellate Division. County of Westchester v D'Ambrosio, 244 A.D.2d 334, 663 N.Y.S.2d 886, 1997 N.Y. App. Div. LEXIS 10998 (N.Y. App. Div. 2d Dep't 1997).

Although county attorney had sought revocation of appellant's pistol licenses, county attorney was not proper party to appellant's Article 78 proceeding to review judge's revocation of those licenses, in light of CLS Penal §§ 260.00(10) and 400.00(1),(3), and (10). Romanoff v Lange, 281 A.D.2d 551, 721 N.Y.S.2d 821, 2001 N.Y. App. Div. LEXIS 2643 (N.Y. App. Div. 2d Dep't 2001).

Where agency investigations relied on by county judge as the basis for his denial of application for pistol license were not available to applicant or supreme court, such denial could not be evaluated by such court in an Article 78 proceeding. Guida v Dier (1975) 84 Misc 2d 110, 375 NYS2d 826, mod (1976, 3d Dept) 54 App Div 2d 86, 387 NYS2d 720, holding that applicant was entitled to notice of objections that had been submitted to county judge in opposition to his application and a reasonable opportunity to submit proof to respond thereto.

New York State firearm licensing laws did not violate Second Amendment by conditioning right to obtain at-home permit on good moral character, integrity and absence of good cause to deny license and by requiring those conditions plus showing of proper cause in order to obtain concealed-carry permit because circuit precedent foreclosed challenge to "proper cause" prerequisite for concealed-carry permit, and "good moral character" and "good cause" requirements for at-home permit were not onerous, complaint did not allege that any law-abiding, responsible citizen who applied for firearm license had been denied at-home permit, and there was close relationship between licensing regime and State's interests in public safety and crime prevention. Libertarian Party v Cuomo, 970 F.3d 106, 2020 U.S. App. LEXIS 25323 (2d Cir. N.Y. 2020).

12. Under former § 1896

A "machine gun" which was without two vital parts, so that it was impossible to fire more than one shot at a time and the gun had to be separately loaded for each successive shot, is not a "machine gun" within the meaning of the statute. The statute is constitutional. People v Woods, 114 N.Y.S.2d 611, 202 Misc. 562, 1952 N.Y. Misc. LEXIS 2946 (N.Y. Magis. Ct. 1952).

Subdivision 11 of above statute obviously does not apply to persons who are under 16 years of age since it was passed at same time as subd 6 of § 1897 forbidding possession of a rifle by any person who had been convicted of crime and a person under 16 years of age cannot be convicted of any crime except murder. In re Faber, 45 Misc. 2d 360, 255 N.Y.S.2d 415, 1965 N.Y. Misc. LEXIS 2386 (N.Y. Fam. Ct. 1965).

Notes to Unpublished Decisions

1. In general

Unpublished decision: Public employees were entitled to qualified immunity from plaintiff's false arrest and malicious prosecution claims because an officer of reasonable competence could have concluded that he violated the law, as it was not clearly established that the law defining "assault weapon" excluded rifles whose banned features were obscured or disguised, that N.Y. Penal Law § § 265.10(3) (banning the sale of assault weapons to the general public) required knowledge of such features, or that licensed firearms dealers like plaintiff were exempt. Sanseviro v New York, 685 Fed. Appx. 75, 2017 U.S. App. LEXIS 5757 (2d Cir. N.Y. 2017).

Agency Opinions

Analysis

1. Firearms, generally
2. Knives, generally
3. Licensing requirement

1. Firearms, generally

Flare launchers approved by the Coast Guard and not capable of firing conventional ammunition are not firearms as defined in the Penal Law. 1981 NY Ops Atty Gen Dec 23.

2. Knives, generally

Municipality may not lawfully display knives designated as illegal to possess under CLS Penal § 265.01(1), unless they are disabled in such manner as to bring them outside scope of applicable Penal Law definitions. 2004 NY Ops Atty Gen I 04-2.

None of exemptions in CLS Penal § 265.20 covers possession by local government, municipal agency, or museum for display purposes of knives otherwise illegal to possess under Penal Law. 2004 NY Ops Atty Gen I 04-2.

3. Licensing requirement

Under the presently effective Village Law and under the new Village Law, the Mayor of the Village of Floral Park is not a sworn officer of the village police department within the contemplation of Criminal Procedure Law, § 1.20(34)(d), whether or not he is the Police Commissioner of the village and consequently may not possess a pistol or revolver without a license therefor. 1973 NY Ops Atty Gen July 16 (informal).

Museums are not exempt from the firearm licensing requirements of Penal Law, § 400 and application for the requisite firearm license should be made by an appropriate individual on behalf of the museum. 1975 NY Ops Atty Gen Feb 3.

The Legislature, in enacting chapter 986 of the Laws of 1974, impliedly repealed those provisions of section 400.00(2)(f) of the Penal Law requiring the licensing of "antique pistols"; and "antique firearms" as defined in section 265.00 of the Penal Law are not subject to the licensing requirements contained in section 400.00. 1975 NY Ops Atty Gen Nov 13.

Unloaded replica muzzle loading percussion pistols may be sold, purchased and possessed without a license. Simultaneous possession of these pistols and the necessary ammunition to discharge them required a license. 1977 NY Ops Atty Gen Dec 19 (Informal).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 140.17, 155.30, 165.45, 265.01, 400.00.

Codes, Rules and Regulations:

Firearms, rifles and shotguns at state universities. 8 NYCRR §§ 590.1 et seq.

Firearms at mental hygiene institutions. 14 NYCRR §§ 45.1 et seq.

Federal Aspects:

Regulation of firearms, 18 USCS §§ 921 et seq.

Licensing of firearms, 18 USCS §§ 923 et seq.

Effect of federal firearm regulation on state law, 18 USCS § 927.

Nonmailable firearms, 18 USCS § 1715.

Disposition of firearms possessed by convicted felons, 18 USCS § 3665.

Seizure and forfeiture of carriers transporting illegal firearms, 49 USCS § 80303.

Brady Handgun Violence Prevention Act, P L 103–159 §§ 101 et seq.

Jurisprudences:

25 NY Jur 2d Counties, Towns, and Municipal Corporations § 172.

35A NY Jur 2d Criminal Law Substantive Principles and Offenses §§ 811, 933.

35B NY Jur 2d Criminal Law Substantive Principles and Offenses § 1081.

35C NY Jur 2d Criminal Law Substantive Principles and Offenses §§ 1849–1866, 1878, 1890, 1891, 1893, 1894, 1922, 1923, 1926, 1937, 1948.

79 Am Jur 2d Weapons and Firearms §§ 1–4.

Causes of Action:

Cause of Action Against Manufacturer for Negligent Marketing of Firearm, 15 COA2d 1.

Law Reviews:
Dorf, "Use" and the irresistible impulse to legislate. 12 Touro L. Rev. 123.

Annotations:
Validity and construction of gun control laws. 28 ALR3d 845.

Dog as deadly or dangerous weapon for purposes of statutes aggravating offenses such as assault and robbery. 7 ALR4th 607.

Sufficiency of evidence as to nature of firearm in prosecution under state statute prohibiting persons under indictment for, or convicted of, crime from acquiring, having, carrying, or using firearms. 37 ALR4th 1179.

Validity, construction, and application of 18 USCS § 922(a)(6), making it unlawful to knowingly make any false or fictitious oral or written statement in connection with the acquisition or attempted acquisition of any firearm or ammunition. 43 ALR Fed 338.

Meaning of "engage in business" under 18 USCS § 923(a), providing that no person shall engage in business as a firearms or ammunition importer, manufacturer, or dealer without a federal license. 53 ALR Fed 932.

Propriety of imposing consecutive sentences upon convictions, under federal statutes, of unlawful receipt, transportation, or making and possession of same firearm. 55 ALR Fed 633.

Criminal Jury Instructions: Additional charges: definition of firearm as other than a pistol or revolver. CJI2d [NY] Penal Law § 265.00(3).

Texts: Bogacz, New York Juvenile Delinquency Practice (1998, LLP) p 772.

New York Criminal Practice Ch. 82.

§ 265.00. Definitions. [Effective April 3, 2021]

As used in this article and in article four hundred, the following terms shall mean and include:

1. "Machine-gun" means a weapon of any description, irrespective of size, by whatever name known, loaded or unloaded, from which a number of shots or bullets may be rapidly or automatically discharged from a magazine with one continuous pull of the trigger and includes a sub-machine gun.

2. "Firearm silencer" means any instrument, attachment, weapon or appliance for causing the firing of any gun, revolver, pistol or other firearms to be silent, or intended to lessen or muffle the noise of the firing of any gun, revolver, pistol or other firearms.

3. "Firearm" means (a) any pistol or revolver; or (b) a shotgun having one or more barrels less than eighteen inches in length; or (c) a rifle having one or more barrels less than sixteen inches in length; or (d) any weapon made from a shotgun or rifle whether by alteration, modification, or otherwise if such weapon as altered, modified, or otherwise has an overall length of less than twenty-six inches; or (e) an assault weapon. For the purpose of this subdivision the length of the barrel on a shotgun or rifle shall be determined by measuring the distance between the muzzle and the face of the bolt, breech, or breechlock when closed and when the shotgun or rifle is cocked; the overall length of a weapon made from a shotgun or rifle is the distance between the extreme ends of the weapon measured along a line parallel to the center line of the bore. Firearm does not include an antique firearm.

3-a. "Major component of a firearm, rifle or shotgun" means the barrel, the slide or cylinder, the frame, or receiver of the firearm, rifle, or shotgun.

4. "Switchblade knife" means any knife which has a blade which opens automatically by hand pressure applied to a button, spring or other device in the handle of the knife.

5. "Gravity knife" means any knife which has a blade which is released from the handle or sheath thereof by the force of gravity or the application of centrifugal force which, when released, is locked in place by means of a button, spring, lever or other device.

5-a. "Pilum ballistic knife" means any knife which has a blade which can be projected from the handle by hand pressure applied to a button, lever, spring or other device in the handle of the knife.

5-b. "Metal knuckle knife" means a weapon that, when closed, cannot function as a set of plastic knuckles or metal knuckles, nor as a knife and when open, can function as both a set of plastic knuckles or metal knuckles as well as a knife.

5-c. "Automatic knife" includes a stiletto, a switchblade knife, a cane sword, a pilum ballistic knife, and a metal knuckle knife.

5-d. "Undetectable knife" means any knife or other instrument, which does not utilize materials that are detectable by a metal detector or magnetometer when set at a standard calibration, that is capable of ready use as a stabbing or cutting weapon and was commercially manufactured to be used as a weapon.

6. "Dispose of" means to dispose of, give, give away, lease-loan, keep for sale, offer, offer for sale, sell, transfer and otherwise dispose of.

7. "Deface" means to remove, deface, cover, alter or destroy the manufacturer's serial number or any other distinguishing number or identification mark.

8. "Gunsmith" means any person, firm, partnership, corporation or company who engages in the business of repairing, altering, assembling, manufacturing, cleaning, polishing, engraving or trueing, or who performs any mechanical operation on, any firearm, large capacity ammunition feeding device or machine-gun.

9. "Dealer in firearms" means any person, firm, partnership, corporation or company who engages in the business of purchasing, selling, keeping for sale, loaning, leasing, or in any manner disposing of, any assault weapon, large capacity ammunition feeding device, pistol or revolver.

10. "Licensing officer" means in the city of New York the police commissioner of that city; in the county of Nassau the commissioner of police of that county; in the county of Suffolk the sheriff of that county except in the towns of Babylon, Brookhaven, Huntington, Islip and Smithtown, the commissioner of police of that county; for the purposes of section 400.01 of this chapter the superintendent of state police; and elsewhere in the state a judge or justice of a court of record having his office in the county of issuance.

11. "Rifle" means a weapon designed or redesigned, made or remade, and intended to be fired

from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed metallic cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger.

12. "Shotgun" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger.

13. "Cane Sword" means a cane or swagger stick having concealed within it a blade that may be used as a sword or stilletto.

14. [There are two subs 14] "Chuka stick" means any device designed primarily as a weapon, consisting of two or more lengths of a rigid material joined together by a thong, rope or chain in such a manner as to allow free movement of a portion of the device while held in the hand and capable of being rotated in such a manner as to inflict serious injury upon a person by striking or choking. These devices are also known as nunchakus and centrifugal force sticks.

14. [There are two subs 14] "Antique firearm" means:

Any unloaded muzzle loading pistol or revolver with a matchlock, flintlock, percussion cap, or similar type of ignition system, or a pistol or revolver which uses fixed cartridges which are no longer available in the ordinary channels of commercial trade.

15. "Loaded firearm" means any firearm loaded with ammunition or any firearm which is possessed by one who, at the same time, possesses a quantity of ammunition which may be used to discharge such firearm.

15-a. "Electronic dart gun" means any device designed primarily as a weapon, the purpose of which is to momentarily stun, knock out or paralyze a person by passing an electrical shock to such person by means of a dart or projectile.

15-b. "Kung Fu star" means a disc-like object with sharpened points on the circumference thereof and is designed for use primarily as a weapon to be thrown.

15-c. "Electronic stun gun" means any device designed primarily as a weapon, the purpose of which is to stun, cause mental disorientation, knock out or paralyze a person by passing a high voltage electrical shock to such person.

16. "Certified not suitable to possess a self-defense spray device, a rifle or shotgun" means that the director or physician in charge of any hospital or institution for mental illness, public or private, has certified to the superintendent of state police or to any organized police department of a county, city, town or village of this state, that a person who has been judicially adjudicated incompetent, or who has been confined to such institution for mental illness pursuant to judicial authority, is not suitable to possess a self-defense spray device, as defined in section 265.20 of this article, or a rifle or shotgun.

17. "Serious offense" means (a) any of the following offenses defined in the current penal law and any offense in any jurisdiction or the former penal law that includes all of the essential elements of any of the following offenses: illegally using, carrying or possessing a pistol or other dangerous weapon; possession of burglar's tools; criminal possession of stolen property in the third degree; escape in the third degree; jostling; fraudulent accosting; endangering the welfare of a child; obscenity in the third degree; issuing abortional articles; permitting prostitution; promoting prostitution in the third degree; stalking in the fourth degree; stalking in the third degree; sexual misconduct; forcible touching; sexual abuse in the third degree; sexual abuse in the second degree; criminal possession of a controlled substance in the seventh degree; criminally possessing a hypodermic instrument; criminally using drug paraphernalia in the second degree; criminal possession of methamphetamine manufacturing material in the second degree; and a hate crime defined in article four hundred eighty-five of this chapter.

(b) any of the following offenses defined in the current penal law and any offense in any jurisdiction or in the former penal law that includes all of the essential elements of any of the following offenses, where the defendant and the person against whom the offense was committed were members of the same family or household as defined in subdivision one of section 530.11 of the criminal procedure law and as established pursuant to section 370.15 of the criminal procedure law: assault in the third degree; menacing in the third degree; menacing in the second degree; criminal obstruction of breathing or blood circulation; unlawful imprisonment in the second degree; coercion in the third degree; criminal tampering in the third degree; criminal contempt in the second degree; harassment in the first degree; aggravated harassment in the second degree; criminal trespass in the third degree; criminal trespass in the second degree; arson in the fifth degree; or attempt to commit any of the above-listed offenses.

(c) any misdemeanor offense in any jurisdiction or in the former penal law that includes all of the essential elements of a felony offense as defined in the current penal law.

18. "Armor piercing ammunition" means any ammunition capable of being used in pistols or revolvers containing a projectile or projectile core, or a projectile or projectile core for use in such ammunition, that is constructed entirely (excluding the presence of traces of other substances) from one or a combination of any of the following: tungsten alloys, steel, iron, brass, bronze, beryllium copper, or uranium.

19. "Duly authorized instructor" means (a) a duly commissioned officer of the United States army, navy, marine corps or coast guard, or of the national guard of the state of New York; or (b) a duly qualified

adult citizen of the United States who has been granted a certificate as an instructor in small arms practice issued by the United States army, navy or marine corps, or by the adjutant general of this state, or by the national rifle association of America, a not-for-profit corporation duly organized under the laws of this state; (c) by a person duly qualified and designated by the department of environmental conservation under paragraph c of subdivision three of section 11-0713 of the environmental conservation law as its agent in the giving of instruction and the making of certifications of qualification in responsible hunting practices; or (d) a New York state 4-H certified shooting sports instructor.

20. "Disguised gun" means any weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive and is designed and intended to appear to be something other than a gun.

21. "Semiautomatic" means any repeating rifle, shotgun or pistol, regardless of barrel or overall length, which utilizes a portion of the energy of a firing cartridge or shell to extract the fired cartridge case or spent shell and chamber the next round, and which requires a separate pull of the trigger to fire each cartridge or shell.

22. "Assault weapon" means

(a) a semiautomatic rifle that has an ability to accept a detachable magazine and has at least one of the following characteristics:

(i) a folding or telescoping stock;

(ii) a pistol grip that protrudes conspicuously beneath the action of the weapon;

(iii) a thumbhole stock;

(iv) a second handgrip or a protruding grip that can be held by the non-trigger hand;

(v) a bayonet mount;

(vi) a flash suppressor, muzzle break, muzzle compensator, or threaded barrel designed to accommodate a flash suppressor, muzzle break, or muzzle compensator;

(vii) a grenade launcher; or

(b) a semiautomatic shotgun that has at least one of the following characteristics:

(i) a folding or telescoping stock;

(ii) a thumbhole stock;

(iii) a second handgrip or a protruding grip that can be held by the non-trigger hand;

(iv) a fixed magazine capacity in excess of seven rounds;

(v) an ability to accept a detachable magazine; or

(c) a semiautomatic pistol that has an ability to accept a detachable magazine and has at least one of the following characteristics:

(i) a folding or telescoping stock;

(ii) a thumbhole stock;

(iii) a second handgrip or a protruding grip that can be held by the non-trigger hand;

(iv) capacity to accept an ammunition magazine that attaches to the pistol outside of the pistol grip;

(v) a threaded barrel capable of accepting a barrel extender, flash suppressor, forward handgrip, or silencer;

(vi) a shroud that is attached to, or partially or completely encircles, the barrel and that permits the shooter to hold the firearm with the non-trigger hand without being burned;

(vii) a manufactured weight of fifty ounces or more when the pistol is unloaded; or

(viii) a semiautomatic version of an automatic rifle, shotgun or firearm;

(d) a revolving cylinder shotgun;

(e) a semiautomatic rifle, a semiautomatic shotgun or a semiautomatic pistol or weapon defined in subparagraph (v) of paragraph (e) of subdivision twenty-two of section 265.00 of this chapter as added by chapter one hundred eighty-nine of the laws of two thousand and otherwise lawfully possessed pursuant to such chapter of the laws of two thousand prior to September fourteenth, nineteen hundred ninety-four;

(f) a semiautomatic rifle, a semiautomatic shotgun or a semiautomatic pistol or weapon defined in paragraph (a), (b) or (c) of this subdivision, possessed prior to the date of enactment of the chapter of the laws of two thousand thirteen which added this paragraph;

(g) provided, however, that such term does not include:

(i) any rifle, shotgun or pistol that (A) is manually operated by bolt, pump, lever or slide action; (B) has been rendered permanently inoperable; or (C) is an antique firearm as defined in 18 U.S.C. 921(a)(16);

(ii) a semiautomatic rifle that cannot accept a detachable magazine that holds more than five rounds of ammunition;

(iii) a semiautomatic shotgun that cannot hold more than five rounds of ammunition in a fixed or detachable magazine; or

(iv) a rifle, shotgun or pistol, or a replica or a duplicate thereof, specified in Appendix A to 18 U.S.C. 922 as such weapon was manufactured on October first, nineteen hundred ninety-three. The mere fact that a weapon is not listed in Appendix A shall not be construed to mean that such weapon is an assault weapon;

(v) any weapon validly registered pursuant to subdivision sixteen-a of section 400.00 of this chapter. Such weapons shall be subject to the provisions of paragraph (h) of this subdivision;

(vi) any firearm, rifle, or shotgun that was manufactured at least fifty years prior to the current date, but not including replicas thereof that is validly registered pursuant to subdivision sixteen-a of section 400.00 of this chapter;

(h) Any weapon defined in paragraph (e) or (f) of this subdivision and any large capacity ammunition feeding device that was legally possessed by an individual prior to the enactment of the chapter of the laws of two thousand thirteen which added this paragraph, may only be sold to, exchanged with or disposed of to a purchaser authorized to possess

such weapons or to an individual or entity outside of the state provided that any such transfer to an individual or entity outside of the state must be reported to the entity wherein the weapon is registered within seventy-two hours of such transfer. An individual who transfers any such weapon or large capacity ammunition device to an individual inside New York state or without complying with the provisions of this paragraph shall be guilty of a class A misdemeanor unless such large capacity ammunition feeding device, the possession of which is made illegal by the chapter of the laws of two thousand thirteen which added this paragraph, is transferred within one year of the effective date of the chapter of the laws of two thousand thirteen which added this paragraph.

23. "Large capacity ammunition feeding device" means a magazine, belt, drum, feed strip, or similar device, that (a) has a capacity of, or that can be readily restored or converted to accept, more than ten rounds of ammunition, or [pars (b) and (c) are suspended and not effective as stated in Laws 2013, ch 1, § 58, sub b note below] (b) contains more than seven rounds of ammunition, or (c) is obtained after the effective date of the chapter of the laws of two thousand thirteen which amended this subdivision and has a capacity of, or that can be readily restored or converted to accept, more than seven rounds of ammunition; provided, however, that such term does not include an attached tubular device designed to accept, and capable of operating only with, .22 caliber rimfire ammunition or a feeding device that is a curio or relic. A feeding device that is a curio or relic is defined as a device that (i) was manufactured at least fifty years prior to the current date, (ii) is only capable of being used exclusively in a firearm, rifle, or shotgun that was manufactured at least fifty years prior to the current date, but not including replicas thereof, (iii) is possessed by an individual who is not prohibited by state or federal law from possessing a firearm and (iv) is registered with the division of state police pursuant to subdivision sixteen-a of section 400.00 of this chapter, except such feeding devices transferred into the state may be registered at any time, provided they are registered within thirty days of their transfer into the state. Notwithstanding paragraph (h) of subdivision twenty-two of this section, such feeding devices may be transferred provided that such transfer shall be subject to the provisions of section 400.03 of this chapter including the check required to be conducted pursuant to such section.

24. "Seller of ammunition" means any person, firm, partnership, corporation or company who engages in the business of purchasing, selling or keeping ammunition.

25. "Qualified retired New York or federal law enforcement officer" means an individual who is a retired police officer as police officer is defined in subdivision thirty-four of section 1.20 of the criminal procedure law, a retired peace officer as peace officer is defined in section 2.10 of the criminal procedure law or a retired federal law enforcement officer as federal law enforcement officer is defined in section 2.15 of the criminal procedure law, who: (a) separated from service in good standing from a public agency located in New York state in which such person served as either a police officer, peace officer or federal law enforcement officer; and (b) before such separation, was authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law, and had statutory powers of arrest, pursuant to their official duties, under the criminal procedure law; and (c) (i) before such separation, served as either a police officer, peace officer or federal law enforcement officer for five years or more and at the time of separation, is such an officer; or (ii) separated from service with such agency, after completing any applicable probationary period of such service, due to a service-connected disability, as determined by such agency at or before the time of separation; and (d)(i) has not been found by a qualified medical professional employed by such agency to be unqualified for reasons relating to mental health; or (ii) has not entered into an agreement with such agency from which the individual is separating from service in which that individual acknowledges he or she is not qualified for reasons relating to mental health; and (e) is not otherwise prohibited by New York or federal law from possessing any firearm.

26. "Rapid-fire modification device" means any bump stock, trigger crank, binary trigger system, burst trigger system, or any other device that is designed to accelerate the rate of fire of a semi-automatic firearm, rifle or shotgun.

27. "Bump stock" means any device or instrument that increases the rate of fire achievable with a semi-automatic firearm, rifle or shotgun by using energy from the recoil of the weapon to generate a reciprocating action that facilitates repeated activation of the trigger.

28. "Trigger crank" means any device or instrument that repeatedly activates the trigger of a semi-automatic firearm, rifle or shotgun through the use of a lever or other part that is turned in a circular motion and thereby accelerates the rate of fire of such firearm, rifle or shotgun, provided, however, that "trigger crank" shall not include any weapon initially designed and manufactured to fire through the use of a crank or lever.

29. "Binary trigger system" means any device that, when installed in or attached to a semi-automatic firearm rifle, or shotgun causes that weapon to fire once when the trigger is pulled and again when the trigger is released.

30. "Burst trigger system" means any device that, when installed in or attached to a semi-automatic firearm, rifle, or shot gun, allows that weapon to discharge two or more shots with a single pull or the trigger by altering the trigger reset.

31. "New York state 4-H certified shooting instructor" means a certified shooting sports instructor of the National 4-H Shooting Sports, a non-profit organization, engaged in shooting education and youth development programming that is administered by the National Institute of Food and Agriculture of the United States department of agriculture.

HISTORY:
Add, L 1965, ch 1030, § 1, eff Sept 1, 1967, with substance derived from § 1896; amd, L 1967, ch 791, § 46; L 1969, ch 123, § 1, eff Sept 1, 1969; L 1972, ch 588, § 1; L 1972, ch 605, § 1; L 1974, ch 179, § 1, eff Sept 1, 1974; L 1974, ch 986, §§ 1, 2; L 1974, ch 1041, § 1, eff Sept 1, 1974; L 1976, ch 217, § 1, eff Sept 1, 1976; L 1982, ch 492, § 1; L 1985, ch 61, § 1, eff Nov 1, 1985; L 1986, ch 328, § 2, eff Nov 1, 1986; L 1986, ch 646, § 1, eff Nov 1, 1986; L 1988, ch 264, § 1; L 1990, ch 264, § 1, eff Nov 1, 1990; L 1995, ch 219, § 2, eff Nov 1, 1995; L 1996, ch 354, § 2, eff Nov 1, 1996; L 1997, ch 446, § 2, eff Aug 25, 1997; L 1998, ch 378, § 1, eff Nov 1, 1998; L 1999, ch 210, § 1, eff Nov 1, 1999; L 1999, ch 635, §§ 11, 15, eff Dec 1, 1999; L 2000, ch 189, §§ 8–10, eff Nov 1, 2000; L 2008, ch 257, § 3, eff Nov 1, 2008; L 2010, ch 232, §§ 2, 3, eff July 30, 2010; L 2013, ch 1, § 37, eff Jan 15, 2013; L 2013, ch 1, § 38, eff April 15, 2013; L 2013, ch 1, § 39, eff March 16, 2013; L 2013, ch 98, § 1, eff July 5, 2013; L 2018, ch 60, § 1, effective June 11, 2018; L 2019, ch 34, § 3, effective May 30, 2019; L 2019, ch 130, § 1, effective July 29, 2019; L 2019, ch 134, § 1, effective January 26, 2020; L 2019, ch 146, § 1, effective November 1, 2019; L 2020, ch 150, §§ 1, 3, effective August 24, 2020; L 2020, ch 55, § 1 (Part N), effective April 3, 2021.

ARTICLE 270

OTHER OFFENSES RELATING TO PUBLIC SAFETY

HISTORY:
Add, L 1965, ch 1030, § 1, eff Sept 1, 1967.

§ 270.00. Unlawfully dealing with fireworks and dangerous fireworks

1. Definition of "fireworks" and "dangerous fireworks". (a) The term "fireworks," as used in this section, includes:

(i) display fireworks, which means fireworks devices in a finished state, exclusive of mere ornamentation, primarily intended for commercial displays which are designed to produce visible and/or audible effects by combustion, deflagration or detonation, including, but not limited to, salutes containing more than one hundred thirty milligrams (two grains) of explosive composition, aerial shells containing more than forty grams of chemical composition exclusive of lift charge, and other exhibition display items that exceed the limits of consumer fireworks contained in the American Pyrotechnic Association (APA) Standard 87-1, 2001 edition;

(ii) articles pyrotechnic, which means pyrotechnic devices for professional use similar to consumer fireworks in chemical composition and construction but not intended for consumer use and which articles meet the weight limits for consumer fireworks but are not labeled as such and are classified by the United States department of transportation in 49 CFR 172.101 as UN0431;

(iii) special effects, which means any combination of chemical elements or chemical compounds capable of burning independently of the oxygen of the atmosphere, and designed and intended to produce an audible, visual, mechanical, or thermal effect as an integral part of a motion picture, radio, television, theatrical, or opera production, or live entertainment;

(iv) consumer fireworks which are aerial in performance and are commonly referred to as sky rockets, bottle rockets, missile type rockets, helicopters, aerial spinners, roman candles, mines, shell devices, aerial shell kits, reloadables and audible ground devices which are commonly referred to as firecrackers and chasers, as well as metal wire handheld sparklers;

(v) any blank cartridge, blank cartridge pistol, or toy cannon in which explosives are used, firecrackers, or any preparation containing any explosive or inflammable compound or any tablets or other device commonly used and sold as fireworks containing nitrates, chlorates, oxalates, sulphides of lead, barium, antimony, arsenic, mercury, nitroglycerine, phosphorus or any compound containing any of the same or other explosives, or any substance or combination of substances, or article prepared for the purpose of producing a visible or an audible effect by combustion, explosion, deflagration or detonation, or other device containing any explosive substance, other than sparkling devices as defined in subparagraph (vi) of this paragraph; and

(vi) "sparkling devices," as used in this section, includes:

(1) sparkling devices which are ground-based or hand-held devices that produce a shower of white, gold, or colored sparks as their primary pyrotechnic effect. Additional effects may include a colored flame, an audible crackling effect, an audible whistle effect, and smoke. These devices do not rise into the air, do not fire inserts or projectiles into the air, and do not explode or produce a report (an audible crackling-type effect is not considered to be a report). Ground-based or hand-held devices that produce a cloud of smoke as their sole pyrotechnic effect are also included in this category. Types of devices in this category include:

(A) cylindrical fountain: cylindrical tube containing not more than seventy-five grams of pyrotechnic composition that may be contained in a different shaped exterior such as a square, rectangle, cylinder or other shape but the interior tubes are cylindrical in shape. Upon ignition, a shower of colored sparks, and sometimes a whistling effect or smoke, is produced. This device may be provided with a spike for insertion into the ground (spike fountain), a wood or plastic base for placing on the ground (base fountain), or a wood or cardboard handle to be hand held (handle fountain). When more than one tube is mounted on a common base, total pyrotechnic composition may not exceed two hundred grams, and when tubes are securely attached to a base and the tubes are separated from each other on the base by a distance of at least half an inch (12.7 millimeters),

a maximum total weight of five hundred grams of pyrotechnic composition shall be allowed.

(B) cone fountain: cardboard or heavy paper cone containing not more than fifty grams of pyrotechnic composition. The effect is the same as that of a cylindrical fountain. When more than one cone is mounted on a common base, total pyrotechnic composition may not exceed two hundred grams, as is outlined in this subparagraph.

(C) wooden sparkler/dipped stick: these devices consist of a wood dowel that has been coated with pyrotechnic composition. Upon ignition of the tip of the device, a shower of sparks is produced. Sparklers may contain up to one hundred grams of pyrotechnic composition per item.

(2) novelties which do not require approval from the United States department of transportation and are not regulated as explosives, provided that they are manufactured and packaged as described below:

(A) party popper: small devices with paper or plastic exteriors that are actuated by means of friction (a string or trigger is typically pulled to actuate the device). They frequently resemble champagne bottles or toy pistols in shape. Upon activation, the device expels flame-resistant paper streamers, confetti, or other novelties and produces a small report. Devices may contain not more than sixteen milligrams (0.25 grains) of explosive composition, which is limited to potassium chlorate and red phosphorus. These devices must be packaged in an inner packaging which contains a maximum of seventy-two devices.

(B) snapper: small, paper-wrapped devices containing not more than one milligram of silver fulminate coated on small bits of sand or gravel. When dropped, the device explodes, producing a small report. Snappers must be in inner packages not to exceed fifty devices each, and the inner packages must contain sawdust or a similar, impact-absorbing material.

(b) The term "dangerous fireworks" means any fireworks capable of causing serious physical injury and which are: firecrackers containing more than fifty milligrams of any explosive substance, torpedoes, skyrockets and rockets including all devices which employ any combustible or explosive substance and which rise in the air during discharge, Roman candles, and bombs, provided, however, that in cities with a population of one million or more, the term "dangerous fireworks" shall also include sparklers more than ten inches in length or one-fourth of one inch in diameter, or chasers including all devices which dart or travel about the surface of the ground during discharge.

(c) "Fireworks" and "dangerous fireworks" shall not be deemed to include the following nor shall the purchase and use of any items listed below be subject to the provisions of section 61 of title 12 of the New York state codes, rules and regulations or section four hundred eighty, four hundred eighty-one, four hundred eighty-two or four hundred eighty-three of the general business law:

(i) flares of the type used by railroads or any warning lights commonly known as red flares, or marine distress signals of a type approved by the United States coast guard, or

(ii) toy pistols, toy canes, toy guns or other devices in which paper caps containing twenty-five hundredths grains or less of explosive compound are used, providing they are so constructed that the hand cannot come in contact with the cap when in place for use, and toy pistol paper caps which contain less than twenty-hundredths grains of explosive mixture, the sale and use of which shall be permitted at all times, or

(iii) bank security devices which contain not more than fifty grams of any compound or substance or any combination thereof, together with an igniter not exceeding 0.2 gram, capable of producing a lachrymating and/or visible or audible effect, where such device is stored or used only by banks, national banking associations, trust companies, savings banks, savings and loan associations, industrial banks, or credit unions, or by any manufacturer, wholesaler, dealer, jobber or common carrier for such devices and where the total storage on any one premises does not exceed one hundred devices, or

(iv) except in cities with a population of one million or more, "fireworks" and "dangerous fireworks" shall not be deemed to include "sparkling devices" as defined in subparagraph (vi) of paragraph (a) of this subdivision. The storage and retail sale of sparkling devices shall be regulated in a manner that is not in conflict with the provisions of NFPA 1124, 2006 edition.

2. Offense. (a) Except as herein otherwise provided, or except where a permit is obtained pursuant to section 405.00 of this chapter:

(i) any person who shall offer or expose for sale, sell or furnish, any fireworks or dangerous fireworks is guilty of a class B misdemeanor;

(ii) any person who shall offer or expose for sale, sell or furnish any fireworks or dangerous fireworks valued at five hundred dollars or more shall be guilty of a class A misdemeanor;

(iii) any person who shall possess, use, explode or cause to explode any fireworks or dangerous fireworks is guilty of a violation;

(iv) any person who shall offer or expose for sale, sell or furnish, any dangerous fireworks, fireworks or sparkling devices to any person who is under the age of eighteen is guilty of a class A misdemeanor.

(b) A person who has previously been convicted of a violation of subparagraph (iv) of paragraph (a) of this subdivision within the preceding five years and who shall offer or expose for sale, sell or furnish, any dangerous fireworks to any person who is under the age of eighteen, shall be guilty of a class E felony.

(c) Possession of fireworks or dangerous fireworks valued at one hundred fifty dollars or more shall be a presumption that such fireworks were intended to be offered or exposed for sale.

3. Exceptions. (a) The provisions of this section shall not apply to:

(i) fireworks, dangerous fireworks, and sparkling devices while in possession of railroads, common or contract carriers, retailers, wholesalers, distributors, jobbers and transportation companies or transportation agencies for the purpose of transportation to points without the state, the shipment of which is not prohibited by interstate commerce commission regulations as formulated and published from time to time, unless they be held voluntarily by such railroads, common or contract carriers, retailers, wholesalers, distributors, jobbers and transportation agencies or transporting companies as warehousemen for delivery to points within the state;

(ii) signaling devices used by railroad companies or motor vehicles referred to in subdivision seventeen of section three hundred seventy-five of the vehicle and traffic law;

(iii) high explosives for blasting or similar purposes;

(iv) fireworks, dangerous fireworks and sparkling devices for the use thereof by the United States military, and departments of the state and federal government;

(v) the use, transportation and storage of fireworks, dangerous fireworks and sparkling devices and special effects materials in connection with the production of motion pictures, television programs, commercials, and all entertainment media recorded in any current or to be designed format when such use, transportation and storage has been appropriately permitted by the local governmental subdivision having jurisdiction.

(b) Nothing in this article shall be construed to prohibit:

(i) any manufacturer, wholesaler, retailer, dealer or jobber from manufacturing, possessing or selling at wholesale a sparkling device to municipalities, religious or civic organizations, fair associations, amusement parks, or other organizations authorized by the state to store, transport, possess and use or to individuals to store, transport, possess and use;

(ii) the sale or use of blank cartridges for a motion picture, television program, commercial and all entertainment media, or for signal purposes in athletic sports, or for dog trials or dog training;

(iii) the use, storage, transportation or sale or transfer for use of fireworks and sparkling devices in the preparation for or in connection with motion pictures, television programs, commercials, and all entertainment media recorded in any current or to be designed format when such use, transportation and storage has been appropriately permitted by the local governmental subdivision having jurisdiction;

(iv) the manufacture or sale of sparkling devices provided they are to be shipped directly out of such city and any such items are sold in accordance with the provisions of this article; or

(v) except in cities with a population of one million or more, possession of sparkling devices lawfully obtained in another jurisdiction.

4. Sales of ammunition not prohibited. Nothing contained in this section shall be construed to prevent, or interfere in any way with, the sale of ammunition for revolvers or pistols of any kind, or for rifles, shot guns, or other arms, belonging or which may belong to any persons whether as sporting or hunting weapons or for the purpose of protection to them in their homes, or, as they may go abroad; and manufacturers are authorized to continue to manufacture, and wholesalers and dealers to continue to deal in and freely to sell ammunition to all such persons for such purposes.

5. Notwithstanding the provisions of subdivision four of this section, it shall be unlawful for any dealer in firearms to sell any ammunition designed exclusively for use in a pistol or revolver to any person, not authorized to possess a pistol or revolver. The violation of this section shall constitute a class B misdemeanor.

HISTORY:

Add, L 1965, ch 1030, § 1, with substance derived from § 1894–a; amd, L 1967, ch 791, § 1; L 1969, ch 709, § 1, eff Sept 1, 1969; L 1975, ch 840, § 1, eff Sept 1, 1975; L 1978, ch 286, § 1; L 1986, ch 166, § 1; L 1997, ch 180, § 1, eff Nov 1, 1997; L 2014, ch 477, § 1, effective December 21, 2014; L 2017, ch 371, § 1, effective January 21, 2018.

Commission Staff Notes: This section states the provisions of former Penal Law § 1894-a(1-a, 2, 6, 7).

Editor's Notes Laws 2017, ch 371, § 3, eff Jan 21, 2018, provides:

§ 3. This act shall take effect on the ninetieth day after it shall have become a law.

Amendment Notes The 2014 amendment by ch 477, § 1 rewrote 1 through 3.

The 2017 amendment by ch 371, § 1, in 1(c)(iv), deleted "in those counties and cities that opt by local law pursuant to paragraph (b) of subdivision five of section 405.00 of this chapter" following "one million or more" in the first sentence and added the second sentence; substituted "another jurisdiction" for "a jurisdiction that did opt by local law pursuant to paragraph (b) of subdivision five of section 405.00 of this chapter to exclude 'sparkling devices' from the definitions of 'fireworks' and 'dangerous fireworks', for the purpose of lawful use in another jurisdiction that did opt by local law pursuant to paragraph (b) of subdivision five of section 405.00 of this chapter to exclude 'sparkling devices' from the definitions of 'fireworks' and 'dangerous fireworks'. The superintendent of state police shall annually publish a list of those jurisdictions that have opted by local law pursuant to paragraph (b) of subdivision five of section 405.00 of this chapter to exclude "sparkling devices" from the definitions of "fireworks" and 'dangerous fireworks' " in 3(b)(v).

Notes to Decisions

Analysis

1. In general
2. Under former § 1894-a

1. In general

Where defendant had been observed by police officer apparently selling items from open trunk of his automobile, which items were in open view and included a starter's pistol and blank cartridges, and defendant was arrested for unlawfully dealing in fireworks upon the immediate search of an automobile, which search revealed a revolver in arm rest in front seat, was justified as incident to a valid arrest. People v McCaskey, 46 A.D.2d 692, 360 N.Y.S.2d 270, 1974 N.Y. App. Div. LEXIS 3824 (N.Y. App. Div. 2d Dep't 1974).

Although order purporting to deny the People's request for a reconsideration of prior order granting defendant's motion to suppress evidence was not appealable as such, an appeal would lie since the court reconsidered its prior order and adhered to original determination; and in seeking reconsideration the People's supporting papers included a request for alternative relief which had not been advanced on the prior motion and on the renewed motion the court considered for the first time that the defendant had initially been placed under arrest for allegedly unlawfully dealing with fireworks. People v McCaskey, 46 A.D.2d 692, 360 N.Y.S.2d 270, 1974 N.Y. App. Div. LEXIS 3824 (N.Y. App. Div. 2d Dep't 1974).

A manufacturer is not entitled to a judgment restraining and enjoining the defendant District Attorney from interfering with the sale, transportation, and distribution of its product, nor is it entitled to a declaration that the item in question does not fall within the definition of the term "fireworks" contained in section 270.00 of the Penal Law and therefore can be legally sold within the State, since the jurisdiction to render a declaratory judgment is discretionary in character and such discretion is not unlimited and is generally abused when a declaratory judgment is issued in an action which seeks to enjoin enforcement of the Penal Law, unless the sole issue is one of law, there would be irreparable injury, or there is a constitutional issue. Snap 'N' Pops, Inc. v Dillon, 66 A.D.2d 219, 412 N.Y.S.2d 646, 1979 N.Y. App. Div. LEXIS 10003 (N.Y. App. Div. 2d Dep't 1979).

A claim against the State for allegedly having unlawfully seized and destroyed fireworks was properly dismissed where there was nothing in the record to establish that the plaintiff's interest in the property destroyed was sufficient to create a triable issue of fact. Clemens v State, 79 A.D.2d 772, 435 N.Y.S.2d 361, 1980 N.Y. App. Div. LEXIS 14169 (N.Y. App. Div. 3d Dep't 1980), aff'd, 55 N.Y.2d 620, 446 N.Y.S.2d 264, 430 N.E.2d 1317, 1981 N.Y. LEXIS 3215 (N.Y. 1981).

In trial for unlawfully dealing in fireworks, evidence established defendants' possession of fireworks since (1) first defendant, who was manager of store in which fireworks were found, exercised sufficient dominion and control over fireworks to be deemed in constructive possession, and (2) second defendant, who was store employee, was also in constructive possession of fireworks that were situated next to or near her in Plexiglas enclosed area to which customers had no access. People v Whitehead, 159 A.D.2d 741, 552 N.Y.S.2d 685, 1990 N.Y. App. Div. LEXIS 3594 (N.Y. App. Div. 2d Dep't 1990).

Model rocket engines containing sodium or potassium nitrate are not fireworks by definition of the statute proscribing unlawful dealing therein. People v Bochter, 63 Misc. 2d 249, 311 N.Y.S.2d 186, 1970 N.Y. Misc. LEXIS 1627 (N.Y. Dist. Ct. 1970).

Prohibition against unlawful possession of blank cartridge pistol in Penal Law § 270.00, subd 2 is constitutional on its face notwithstanding claim that it would make a criminal out of a starter at a track meet. People v Jackson, 76 Misc. 2d 872, 352 N.Y.S.2d 376, 1974 N.Y. Misc. LEXIS 1967 (N.Y. County Ct. 1974), aff'd, 36 N.Y.2d 726, 367 N.Y.S.2d 975, 328 N.E.2d 487, 1975 N.Y. LEXIS 1762 (N.Y. 1975).

Under Penal Law 1965 § 270.00 prohibiting the sale, possession or use of any fireworks and which defines "fireworks as including a blank cartridge pistol was sufficient to give adequate notice that the possession of a blank cartridge pistol was forbidden conduct and the statute was not unconstitutionally vague. Criminal intent was not element of offense of unlawfully dealing with fireworks by possessing a blank cartridge pistol. Therefore mere possession of a blank cartridge pistol constituted a violation. People v Johnson, 77 Misc. 2d 228, 354 N.Y.S.2d 85, 1974 N.Y. Misc. LEXIS 1112 (N.Y. City Crim. Ct. 1974).

Subdivision 2 of section 265.02 of the Penal Law, providing that a person is guilty of criminal possession of a weapon in the third degree when he possesses any explosive or incendiary bomb, does not pertain to fireworks; as such, the possession of fireworks, covered by section 270.00 of the Penal Law, cannot be a lesser included offense of the crime of criminal possession of a weapon in the third degree. People v Santorelli, 95 Misc. 2d 886, 408 N.Y.S.2d 893, 1978 N.Y. Misc. LEXIS 2522 (N.Y. Sup. Ct. 1978).

In prosecution for unlawfully dealing with fireworks, People violated CLS Penal § 405.05 where fireworks seized from defendant were destroyed prior to trial without permission from Magistrate after defendant twice informed People of their duty to preserve evidence and his intention to seek its return. People v Christopher, 167 Misc. 2d 468, 634 N.Y.S.2d 948, 1995 N.Y. Misc. LEXIS 552 (N.Y. City Crim. Ct. 1995).

In prosecution under CLS Penal § 270.00, People's claim that depository where fireworks were kept was ill-equipped to store them for extended period of time did not justify depriving defendant of opportunity to inspect fireworks seized from him by destroying them without permission from Magistrate, in violation of CLS Penal § 405.05; People should have facility that can handle storage of explosive materials. People v Christopher, 167 Misc. 2d 468, 634 N.Y.S.2d 948, 1995 N.Y. Misc. LEXIS 552 (N.Y. City Crim. Ct. 1995).

Requirements of CLS Penal § 405.05 are not limited solely to owner of fireworks, as portion of statute concerning preservation of evidence for person accused of violating CLS Penal § 270.00 clearly concerns rights of person arrested. People v Christopher, 167 Misc. 2d 468, 634 N.Y.S.2d 948, 1995 N.Y. Misc. LEXIS 552 (N.Y. City Crim. Ct. 1995).

In prosecution for unlawfully dealing with fireworks under CLS Penal § 270.00, where People destroyed fireworks in violation of CLS Penal § 405.05, proper sanction was for court to give adverse inference charge; dismissal of charges or suppression of evidence was not warranted where defendant did not specify how he was prejudiced and People did not destroy fireworks in bad faith or to try to dispose of exculpatory evidence. People v Christopher, 167 Misc. 2d 468, 634 N.Y.S.2d 948, 1995 N.Y. Misc. LEXIS 552 (N.Y. City Crim. Ct. 1995).

In prosecution for unlawfully dealing with fireworks under CLS Penal § 270.00 and unlawful storage, sale and transportation of fireworks under NYC Admin Code § 27-4044(a), where People destroyed fireworks in violation of CLS Penal § 405.05, defendant was entitled to adverse inference charge with respect to both charges, even though no specific statutory duty existed to preserve fireworks when accused was charged only with violation of New York City Administrative Code, as People's intentional destruction of discoverable evidence violated defendant's due process rights. People v Christopher, 167 Misc. 2d 468, 634 N.Y.S.2d 948, 1995 N.Y. Misc. LEXIS 552 (N.Y. City Crim. Ct. 1995).

2. Under former § 1894-a

A fireworks company may not apply for a permit to exhibit, but it may contract to exhibit fireworks for an agricultural society which was granted a permit. Kingsland v Erie County Agr. Soc., 298 N.Y. 409, 84 N.E.2d 38, 298 N.Y. (N.Y.S.) 409, 1949 N.Y. LEXIS 1023 (N.Y. 1949).

The legislature contemplated that a contract for the exhibition of fireworks might be entered into by a fair company with a fireworks company as evidenced by sub 5 of the statute which provides that the permit authority shall require an adequate bond from the applicant or from the person to whom a contract for such display shall be awarded. It follows therefore that the fireworks company is not limited to a mere sale of the fireworks to a fair company so as to make the display of fireworks solely the work of the fair company. Kingsland v Erie County Agr. Soc., 298 N.Y. 409, 84 N.E.2d 38, 298 N.Y. (N.Y.S.) 409, 1949 N.Y. LEXIS 1023 (N.Y. 1949).

The Legislature has recognized that the unsupervised discharge of fireworks is so fraught with serious dangers that their possession or use, not in compliance with stringent requirements, has been made a crime. Caldwell v Island Park, 304 N.Y. 268, 107 N.E.2d 441, 304 N.Y. (N.Y.S.) 268, 1952 N.Y. LEXIS 740 (N.Y. 1952).

The provisions of the Administrative Code of the City of New York requiring a permit for the storage of toy pistol caps containing less than *r20/100# grains of explosive mixture are inconsistent with the state law. Schranz & Bieber Co. v Quayle, 106 N.Y.S.2d 887, 201 Misc. 516, 1951 N.Y. Misc. LEXIS 2250 (N.Y. Sup. Ct. 1951).

Evidence was sufficient to sustain a conviction under this section where the proof showed that the defendant had control of a car from which a companion threw a firecracker which exploded in front of a moving automobile and proof also showed that after this happened a second time, a police officer found firecrackers under the rear of the car. Upon such evidence a jury could properly infer that the defendant driver had knowledge and had been aiding the defendant who actually exploded the firecrackers. People v Armstrong, 114 N.Y.S.2d 871, 203 Misc. 105, 1952 N.Y. Misc. LEXIS 1584 (N.Y. County Ct. 1952).

In a prosecution under this section, criminal intent is always a necessary element. People v Armstrong, 114 N.Y.S.2d 871, 203 Misc. 105, 1952 N.Y. Misc. LEXIS 1584 (N.Y. County Ct. 1952).

Disallowing the defendant's demurrer and his motion to dismiss the indictment charging him with misdemeanor manslaughter, the court held that whether the commission of the misdemeanor was one that "affected" the person of the victim was a question of fact to be determined by the jury, and that the indictment sufficiently apprised the defendant of the crime charged. The court also held that the misdemeanor of possessing and/or firing and setting off a firecracker is separate and distinct from the homicide, and that there was no such merger as is commonly found in the case of assault followed by death. People v Carnrite, 55 Misc. 2d 1087, 287 N.Y.S.2d 571, 1968 N.Y. Misc. LEXIS 1719 (N.Y. County Ct. 1968).

A town may not issue a permit for a private display of fireworks for private family entertainment. 1952 Ops St Compt, 257.

Agency Opinions

Analysis

1. In general
2. Under former § 1894-a

1. In general

Flare launchers approved by the Coast Guard and not capable of firing conventional ammunition are not firearms as defined in the Penal Law. 1981 NY Ops Atty Gen Dec 23.

A local government may not authorize and regulate the private display of fireworks. 1991 NY Ops Atty Gen I 91-17.

The Town's permit authority is authorized, pursuant to state law, to issue permits for the private display of fireworks in response to qualified applications. N.Y. Op. Att'y Gen. No. 2010-1, 2010 N.Y. AG LEXIS 2.

Approval and issuance of a fireworks display permit is a discretionary act. Failure to grant a permit by the time of a planned display effectively functions as a denial of an application for a permit. A town may not impose additional permitting requirements or supersede the fireworks permitting system established in the Penal Law. N.Y. Op. Att'y Gen. No. 2011-8, 2011 N.Y. AG LEXIS 9.

2. Under former § 1894-a

The exception of toy pistols and paper caps from the prohibition of the sale and use of fireworks has safeguarding restrictions permitting only firing devices in which caps cannot be touched when in position to be exploded, and single caps of less than twenty-hundredths grains of explosive mixture. 1950 NY Ops Atty Gen Dec 12.

The use of certain firecrackers by farmers in order to prevent damage to cherry orchards and ripened corn by blackbirds and starlings does not violate this section. 1954 NY Ops Atty Gen July 19.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 270.05, 405.00, 405.05; CLS Art & Cult Affrs § 61.07.

Federal Aspects:

Transportation of fireworks into state prohibiting sale or use, 18 USCS § 836.

Jurisprudences:

35C NY Jur 2d Criminal Law Substantive Principles and Offenses §§ 1959, 1962, 1963, 1968.

31A Am Jur 2d, Explosions and Explosives § 122.

10A Am Jur Pl and Pr Forms (Rev ed), Explosions and Explosives, Forms 91 et seq.

2 Am Jur Proof of Facts 557, Blasting.

23 Am Jur Proof of Facts 393, Toys Causing Injury and Disease.

Annotations:

Possession of bomb, Molotov cocktail, or similar device as criminal offense. 42 ALR3d 1230.

Criminal liability for transportation of explosives and other dangerous articles under 18 USC §§ 831-835 and implementing regulations. 8 ALR Fed 816.

Texts: New York Criminal Practice Ch. 83.

§ 270.15. Unlawfully refusing to yield a party line

1. As used in this section:

(a) "Party line" means a subscriber's line telephone circuit, consisting of two or more main telephone stations connected therewith, each station with a distinctive ring or telephone number.

(b) "Emergency call" means a telephone call to a police or fire department, or for medical aid or ambulance service, necessitated by a situation in which human life or property is in jeopardy and prompt summoning of aid is essential.

2. A person is guilty of unlawfully refusing to yield a party line when, being informed that a party line is needed for an emergency call, he refuses immediately to relinquish such line.

Unlawfully refusing to yield a party line is a class B misdemeanor.

HISTORY:

Add, L 1965, ch 1030, § 1, eff Sept 1, 1967, with substance derived from § 1424–a.

Commission Staff Notes: This section substantially restates former Penal Law § 1424-a(1, 2). Subdivision 3 of former § 1424-a is transferred to the General Business Law.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Notice explaining the offense of "unlawfully refusing to yield a party line" to be published in telephone directories, CLS Gen Bus § 336.

Jurisprudences:

35C NY Jur 2d Criminal Law Substantive Principles and Offenses § 1970.

Texts: New York Criminal Practice Ch. 83.

PART FOUR Administrative Provisions

Title

W. Provisions Relating to Firearms, Fireworks, Pornography Equipment and Vehicles Used in the Transportation of Gambling Records

HISTORY:

Add, L 1965, ch 1030, § 1, eff Sept 1, 1967.

TITLE W Provisions Relating to Firearms, Fireworks, Pornography Equipment and Vehicles Used in the Transportation of Gambling Records

Article 405. Licensing and Other Provisions Relating to Fireworks

Section

405.00. Permits for public displays of fireworks

405.05. Seizure and destruction of fireworks
405.10. Permits for indoor pyrotechnics
405.12. Unpermitted use of indoor pyrotechnics in the second degree
405.14. Unpermitted use of indoor pyrotechnics in the first degree
405.16. Aggravated unpermitted use of indoor pyrotechnics in the second degree
405.18. Aggravated unpermitted use of indoor pyrotechnics in the first degree

HISTORY:
Add, L 1965, ch 1030, § 1, eff Sept 1, 1967; amd, L 1969, ch 920, § 1, eff Sept 1, 1969.

ARTICLE 405

LICENSING AND OTHER PROVISIONS RELATING TO FIREWORKS

HISTORY:
Add, L 1965, ch 1030, § 1, eff Sept 1, 1967.

§ 405.00. Permits for public displays of fireworks

1. Definition of "permit authority." The term "permit authority," as used in this section, means and includes the agency authorized to grant and issue the permits provided in this section. The permit authority on or within state property shall be the office of fire prevention and control. The permit authority for territory within a county park shall be the county park commission, or such other agency having jurisdiction, control and/or operation of the parks or parkways within which any fireworks are to be displayed. The permit authority in a city shall be the duly constituted licensing agency thereof and, in the absence of such agency, shall be an officer designated for the purpose by the legislative body thereof. The permit authority in a village shall be an officer designated for the purpose by the board of trustees thereof and the permit authority in the territory of a town outside of villages shall be an officer designated for the purpose by the town board thereof.

2. Permits for fireworks displays. Notwithstanding the provisions of section 270.00 of this chapter, the permit authority for state property, county parks, cities, villages, or towns may grant a permit for the display of fireworks to municipalities, fair associations, amusement parks, persons, or organizations of individuals that submit an application in writing. The application for such permit shall set forth:

(a) The name of the body sponsoring the display and the names of the persons actually to be in charge of the firing of the display who shall possess a valid certificate of competence as a pyrotechnician as required under the general business law and article sixteen of the labor law. The permit application shall further contain a verified statement from the applicant identifying the individuals who are authorized to fire the display including their certificate numbers, and that such individuals possess a valid certificate of competence as a pyrotechnician.

(b) The date and time of day at which the display is to be held.

(c) The exact location planned for the display.

(d) The number and kind of fireworks to be discharged.

(e) The manner and place of storage of such fireworks prior to the display.

(f) A diagram of the grounds on which the display is to be held showing the point at which the fireworks are to be discharged, the location of all buildings, highways and other lines of communication, the lines behind which the audience will be restrained and the location of all nearby trees, telegraph or telephone lines or other overhead obstructions.

(g) Such other information as the permit authority may deem necessary to protect persons or property.

3. Applications for permits. All applications for permits for the display of fireworks shall be made at least five days in advance of the date of the display and the permit shall contain provisions that the actual point at which the fireworks are to be fired be in accordance with the rules promulgated by the commissioner of labor pursuant to section four hundred sixty-two of the labor law and that all the persons in actual charge of firing the fireworks shall be over the age of eighteen years, competent and physically fit for the task, that there shall be at least two such operators constantly on duty during the discharge and that at least two approved type fire extinguishers shall be kept at as widely separated points as possible within the actual area of the display. For any applications made for the display of fireworks on state property, the state fire administrator shall coordinate the issuance of such permits with the head of the police or fire department or both, where there are such departments. The legislative body of a county park, city, village or town may provide for approval of such permit by the head of the police or fire department or both where there are such departments. No permit granted and issued hereunder shall be transferable. After such permit shall have been granted, sales, possession, use and distribution of fireworks for such display shall be lawful solely therefor.

3-a. Notwithstanding the provisions of subdivision three of this section, no permit may be issued to conduct a display of fireworks upon any property where the boundary line of such property is less than five hundred yards from the boundary line of any property which is owned, leased or operated by any breeder as defined in subdivision four of section two hundred fifty-one of the racing, pari-mutuel wagering and breeding law.

4. Bonds. Before granting and issuing a permit for a display of fireworks as herein provided, the permit authority shall require an adequate bond from the applicant therefor, unless it is a state entity, county park, city, village or town, in a sum to be fixed by the permit authority, which, however,

shall not be less than one million dollars, conditioned for the payment of all damages, which may be caused to a person or persons or to property, by reason of the display so permitted and arising from any acts of the permittee, his or her agents, employees, contractors or subcontractors. Such bond shall run to the state if the permit is granted for a display on state property, or to the county park, city, village or town in which the permit is granted and issued and shall be for the use and benefit of any person or persons or any owner or owners of any property so injured or damaged, and such person or persons or such owner or owners are hereby authorized to maintain an action thereon, which right of action also shall accrue to the heirs, executors, administrators, successors or assigns of such person or persons or such owner or owners. The permit authority may accept, in lieu of such bond, an indemnity insurance policy with liability coverage and indemnity protection equivalent to the terms and conditions upon which such bond is predicated and for the purposes provided in this section.

5. Local ordinances superseded.

(a) All local ordinances regulating or prohibiting the display of fireworks are hereby superseded by the provisions of this section. Every city, town or village shall have the power to enact ordinances or local laws regulating or prohibiting the use, or the storage, transportation or sale for use of fireworks in the preparation for or in connection with television broadcasts.

(b) Notwithstanding any inconsistent provision of law, a county may enact a local law to prohibit the sale and use of "sparkling devices", as such term is defined in section 270.00 of this chapter, provided, however, any such local law shall not establish:

(i) an offense greater than a violation for a person who shall use, explode or cause to be exploded a sparkling device; or

(ii) an offense greater than a class B misdemeanor for a person who shall offer or expose for sale, sell or furnish a sparkling device valued at less than five hundred dollars unless such offer, sale or furnishing is to a person less than eighteen years of age.

(c) Notwithstanding paragraph (b) of this subdivision, any city wholly contained within the county of Orange may enact a local law to prohibit the sale and use of "sparkling devices" as defined in section 270.00 of this chapter, in accordance with subparagraphs (i) and (ii) of paragraph (b) of this subdivision, notwithstanding that such county has not enacted a local law to prohibit the sale and use of such sparkling devices.

HISTORY:

Add, L 1965, ch 1030, § 1, eff Sept 1, 1967, with substance derived from § 1894–a; amd, L 1972, ch 661, § 9, eff Sept 1, 1972; L 2002, ch 151, § 1, eff Oct 21, 2002; L 2009, ch 57, § 21 (Part CC), eff Oct 4, 2009; L 2013, ch 127, § 2, eff July 12, 2013; L 2014, ch 477, § 2, effective December 21, 2014; L 2016, ch 458, § 1, effective November 28, 2016; L 2017, ch 371, § 2, effective January 21, 2018.

Editor's Notes Laws 2017, ch 371, § 3, eff Jan 21, 2018, provides:

§ 3. This act shall take effect on the ninetieth day after it shall have become a law.

Amendment Notes: 2013. Chapter 127, § 2 amended:

Sub 1 by deleting at fig 1 ", which agency in the territory within a state park shall be the state agency having custody and control thereof, in the", at figs 2 and 3 a comma and adding the matter in italics.

Sub 2, opening par by deleting at fig 1 "of a", at fig 2 "park", at fig 3 "park, city, village or town" and adding the matter in italics.

Sub 3 by deleting at fig 1 "state park" and adding the matter in italics.

Sub 4 by deleting at fig 1 "park", at fig 2 "park," and adding the matter in italics.

The 2014 amendment by ch 477, § 2 added the 5(a) designation; and added 5(b).

The 2016 amendment by ch 458, § 1, added 5(c).

The 2017 amendment by ch 371, § 2, rewrote 5(b) and 5(c).

Notes to Decisions

Analysis

1. In general
2. Under former § 1894-a

1. In general

In the absence of proof of a causal connection, municipality would not be liable for personal injuries for failure to require full compliance with statutory requirements prerequisite to issuance of permit for fireworks. Rill v Chiarella, 30 A.D.2d 852, 293 N.Y.S.2d 1, 1968 N.Y. App. Div. LEXIS 3414 (N.Y. App. Div. 2d Dep't), app. dismissed, 22 N.Y.2d 914, 295 N.Y.S.2d 43, 242 N.E.2d 81, 1968 N.Y. LEXIS 1137 (N.Y. 1968), aff'd, 25 N.Y.2d 702, 306 N.Y.S.2d 955, 255 N.E.2d 183, 1969 N.Y. LEXIS 954 (N.Y. 1969).

In an action by a resident of a cooperative housing project against the corporate manager thereof and the manufacturer of a peephole in the door of the plaintiff's apartment, for damages resulting from serious eye injuries sustained when a firecracker exploded outside the door as plaintiff peered through the hole after an unidentified person had rung her doorbell, a verdict in favor of plaintiff would be reversed where plaintiff's evidence was that the project manager failed to take reasonable security precautions, in violation of Penal Law § 405.00, by encouraging the use of firecrackers in certain areas of the project, the nearest of which was a block from plaintiff's apartment building, in that the immediate effective cause of plaintiff's injuries was the intervening criminal act of the unknown person who ignited the firecracker, and plaintiff failed to show a causal connection between defendant's alleged tolerance of firecrackers in the project and the independent assault which caused plaintiff's injury. Bridges v Riverbay Corp., 102 A.D.2d 800, 477 N.Y.S.2d 157, 1984 N.Y. App. Div. LEXIS 18960 (N.Y. App. Div. 1st Dep't 1984), aff'd, 64 N.Y.2d 1075, 489 N.Y.S.2d 904, 479 N.E.2d 249, 1985 N.Y. LEXIS 14208 (N.Y. 1985).

Plaintiff, who allegedly sustained ear injury from fireworks explosion in front of defendants' business, was not entitled to directed verdict on ground that defendants admittedly possessed fireworks without permit in violation of CLS Penal § 405.00, since fact issue existed as to whether defendants' failure to obtain permit was proximate cause of injury. Azzue v Galore Realty, Inc., 172 A.D.2d 467, 568 N.Y.S.2d 955, 1991 N.Y. App. Div. LEXIS 5185 (N.Y. App. Div. 1st Dep't), app. denied, 78 N.Y.2d 856, 574 N.Y.S.2d 937, 580 N.E.2d 409, 1991 N.Y. LEXIS 3934 (N.Y. 1991).

Pursuant to state law, town's permit authority is authorized to issue permits for private display of fireworks, in response to qualified applications. 2010 NY Ops Atty Gen 2010-01 (Informal), N.Y. Op. Att'y Gen. No. 2010-1, 2010 N.Y. AG LEXIS 2.

Approval and issuance of fireworks display permit is discretionary, but town may not impose additional permitting requirements or supersede fireworks permitting system established in Penal

Law; failure of permitting authority to grant permit by time of planned display effectively functions as denial of application for permit. 2011 NY Ops Atty Gen 2011-08 (Informal), N.Y. Op. Att'y Gen. No. 2011-8, 2011 N.Y. AG LEXIS 9.

2. Under former § 1894-a

By reason of the display site being located within the confines of the Village of Tuckahoe, the Village is the "permit authority" under this section. Rill v Chiarella, 50 Misc. 2d 105, 269 N.Y.S.2d 736, 1966 N.Y. Misc. LEXIS 2004 (N.Y. Sup. Ct. 1966), modified, 30 A.D.2d 852, 293 N.Y.S.2d 1, 1968 N.Y. App. Div. LEXIS 3414 (N.Y. App. Div. 2d Dep't 1968).

The legislature by this provision was insuring the financial responsibility or solvency of the applicant, not creating absolute liability. Rill v Chiarella, 50 Misc. 2d 105, 269 N.Y.S.2d 736, 1966 N.Y. Misc. LEXIS 2004 (N.Y. Sup. Ct. 1966), modified, 30 A.D.2d 852, 293 N.Y.S.2d 1, 1968 N.Y. App. Div. LEXIS 3414 (N.Y. App. Div. 2d Dep't 1968).

A village did not violate the statute by accepting an insurance policy written by a foreign corporation, since there is no express or implicit provision in the statute requiring the insurer to be a domestic corporation; nor was the village negligent in accepting insurance from a company which became insolvent, where there was no showing that the insurer was insolvent when the policy was written or when the village issued a permit for the fireworks display. Rill v Chiarella, 50 Misc. 2d 105, 269 N.Y.S.2d 736, 1966 N.Y. Misc. LEXIS 2004 (N.Y. Sup. Ct. 1966), modified, 30 A.D.2d 852, 293 N.Y.S.2d 1, 1968 N.Y. App. Div. LEXIS 3414 (N.Y. App. Div. 2d Dep't 1968).

Agency Opinions

1. In general

A village may not prohibit the public display of fireworks, nor adopt regulations more stringent than those provided by section 405 of the Penal Law. 1982 NY Ops Atty Gen March 11 (informal).

A city may not issue a permit for public display of fireworks pursuant to conditions which are violative of the requirements contained in CLS Penal § 405.00. 1987 NY Ops Atty Gen No. 87-34 (Informal).

A local government may not authorize and regulate the private display of fireworks. 1991 NY Ops Atty Gen I 91-17.

Adirondack Park Agency is not type of "state agency" having custody and control of state park within meaning of CLS Penal § 405.00. 2004 NY Ops Atty Gen F 04-7.

Hudson River-Black River Regulating District is not "permit authority" authorized to issue permit under CLS Penal § 405.00 for public fireworks display on District property subject to access permit; rather, city, town or village in which property is located is proper permit authority. 2004 N.Y. Op. Att'y Gen. No. 2004-F7, 2004 N.Y. AG LEXIS 24.

Town may not issue fireworks display permit to wedding party for fireworks display to be held as part of private wedding reception. 2006 NY Ops Atty Gen I 07-3.

Fact that fireworks display as part of private gathering on private property is visible from nearby public roads would not make such display "public display" under CLS Penal § 405.00. 2006 NY Ops Atty Gen I 07-3.

It is target audience, rather than status of property on which fireworks display is held, that renders display public or private. 2006 NY Ops Atty Gen I 07-3.

Wedding party is not included in "organization of individuals" under CLS Penal § 405.00(2). 2006 NY Ops Atty Gen I 07-3.

Town may not require that applicant for fireworks display permit also obtain noise permit; local provisions regarding regulating fireworks displays are superseded by CLS Penal § 405.00. 2006 NY Ops Atty Gen I 07-3.

Town's permit authority is authorized, pursuant to state law, to issue permits for private display of fireworks in response to qualified applications. 2010 NY Ops Atty Gen I 10-1.

The Town's permit authority is authorized, pursuant to state law, to issue permits for the private display of fireworks in response to qualified applications. N.Y. Op. Att'y Gen. No. 2010-1, 2010 N.Y. AG LEXIS 2.

Approval and issuance of a fireworks display permit is a discretionary act. Failure to grant a permit by the time of a planned display effectively functions as a denial of an application for a permit. A town may not impose additional permitting requirements or supersede the fireworks permitting system established in the Penal Law. N.Y. Op. Att'y Gen. No. 2011-8, 2011 N.Y. AG LEXIS 9.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 270.00; CLS Gen Mun § 204-a.

Federal Aspects:

Transportation of fireworks into state prohibiting sale or use, 18 USCS § 836.

Jurisprudences:

35C NY Jur 2d Criminal Law Substantive Principles and Offenses §§ 1959–1961, 1963.

8 Am Jur Legal Forms 2d, Explosions and Explosives, Forms 106:5–106:10.

§ 405.05. Seizure and destruction of fireworks

Fireworks possessed unlawfully may be seized by any peace officer, acting pursuant to his special duties, or police officer, who must deliver the same to the magistrate before whom the person arrested is required to be taken. The magistrate must, upon the examination of the defendant, or if such examination is delayed or prevented, without awaiting such examination, determine whether the fireworks had been possessed by the defendant in violation of the provisions of section 270.00; and if he finds that the fireworks had been so possessed by the defendant, he must cause such fireworks to be destroyed, in a way safe for the particular type of such fireworks, or to be delivered to the district attorney of the county in which the defendant is liable to indictment or trial, as the interests of justice and public safety may, in his opinion, require. Upon the conviction of the defendant, the district attorney must cause to be destroyed, in a way safe for the particular type of such fireworks, the fireworks in respect whereof the defendant stands convicted, and which remain in the possession or under the control of the district attorney.

HISTORY:

Add, L 1965, ch 1030, § 1, with substance derived from § 1894–a; amd, L 1980, ch 843, § 52, eff Sept 1, 1980.

Notes to Decisions

A claim against the State for allegedly having unlawfully seized and destroyed fireworks was properly dismissed where there was nothing in the record to establish that the plaintiff's interest in the property destroyed was sufficient to create a triable issue of fact. Clemens v State, 79 A.D.2d 772, 435 N.Y.S.2d 361, 1980 N.Y. App. Div. LEXIS 14169 (N.Y. App. Div. 3d Dep't 1980), aff'd, 55 N.Y.2d 620, 446 N.Y.S.2d 264, 430 N.E.2d 1317, 1981 N.Y. LEXIS 3215 (N.Y. 1981).

In prosecution for unlawfully dealing with fireworks, People violated CLS Penal § 405.05 where fireworks seized from defendant were destroyed prior to trial without permission from Magistrate after defendant twice informed People of their duty to preserve evidence and his intention to seek its return. People v Christopher, 167 Misc. 2d 468, 634 N.Y.S.2d 948, 1995 N.Y. Misc. LEXIS 552 (N.Y. City Crim. Ct. 1995).

In prosecution under CLS Penal § 270.00, People's claim that depository where fireworks were kept was ill-equipped to store them for extended period of time did not justify depriving defendant of opportunity to inspect fireworks seized from him by destroying them without permission from Magistrate, in violation of CLS Penal § 405.05; People should have facility that can

handle storage of explosive materials. People v Christopher, 167 Misc. 2d 468, 634 N.Y.S.2d 948, 1995 N.Y. Misc. LEXIS 552 (N.Y. City Crim. Ct. 1995).

Requirements of CLS Penal § 405.05 are not limited solely to owner of fireworks, as portion of statute concerning preservation of evidence for person accused of violating CLS Penal § 270.00 clearly concerns rights of person arrested. People v Christopher, 167 Misc. 2d 468, 634 N.Y.S.2d 948, 1995 N.Y. Misc. LEXIS 552 (N.Y. City Crim. Ct. 1995).

In prosecution for unlawfully dealing with fireworks under CLS Penal § 270.00, where People destroyed fireworks in violation of CLS Penal § 405.05, proper sanction was for court to give adverse inference charge; dismissal of charges or suppression of evidence was not warranted where defendant did not specify how he was prejudiced and People did not destroy fireworks in bad faith or to try to dispose of exculpatory evidence. People v Christopher, 167 Misc. 2d 468, 634 N.Y.S.2d 948, 1995 N.Y. Misc. LEXIS 552 (N.Y. City Crim. Ct. 1995).

In prosecution for unlawfully dealing with fireworks under CLS Penal § 270.00 and unlawful storage, sale and transportation of fireworks under NYC Admin Code § 27-4044(a), where People destroyed fireworks in violation of CLS Penal § 405.05, defendant was entitled to adverse inference charge with respect to both charges, even though no specific statutory duty existed to preserve fireworks when accused was charged only with violation of New York City Administrative Code, as People's intentional destruction of discoverable evidence violated defendant's due process rights. People v Christopher, 167 Misc. 2d 468, 634 N.Y.S.2d 948, 1995 N.Y. Misc. LEXIS 552 (N.Y. City Crim. Ct. 1995).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Unlawfully dealing with fireworks and dangerous fireworks, § 270.00.

Federal Aspects:

Transportation of fireworks into state prohibiting sale or use, 18 USCS § 836.

Jurisprudences:

35C NY Jur 2d Criminal Law Substantive Principles and Offenses § 1962.

60 NY Jur 2d Forfeitures and Penalties §§ 1, 2, 4, 22.

§ 405.10. Permits for indoor pyrotechnics

1. Definitions. For the purposes of this section, the following terms have the following meanings:

a. Airburst. A pyrotechnic device that is suspended in the air to simulate outdoor aerial fireworks shells without producing hazardous debris.

b. Areas of public assembly. All buildings or portions of buildings used for gathering together fifty or more persons for amusement, athletic, civic, dining, educational, entertainment, patriotic, political, recreational, religious, social, or similar purposes, the entire fire area of which they are a part, and the means of egress therefrom.

c. Assistant. A person who works under the supervision of the pyrotechnic operator.

d. Audience. Spectators whose primary purpose is to view a performance.

e. Building. A combination of any materials, whether portable or fixed, having a roof, to form a structure affording shelter for persons, animals, or property. The word "building" shall be construed for the purposes of this section as though followed by the words "or part or parts thereof", unless the context clearly requires a different meaning.

f. Concussion mortar. A device specifically designed and constructed to produce a loud noise and a violent jarring shock for dramatic effect without producing any damage.

g. Fallout area. The area in which any hazardous debris falls after a pyrotechnic device is fired. The fallout area is defined as a circle that, in turn, is defined by the fallout radius.

h. Fallout radius. A line that defines the fallout area of a pyrotechnic device. The line is defined by two points. The first point is at the center of a pyrotechnic device. The second point is the point most distant from the center of the pyrotechnic device at which any hazardous debris from the device can fall.

i. Fire area. The floor area of a story of a building within exterior walls, party walls, fire walls, or any combination thereof.

j. Hazardous debris. Any debris, produced or expelled by the functioning of a pyrotechnic device, that is capable of causing personal injury or unpredicted property damage. This includes, but is not limited to, hot sparks, heavy casing fragments, and unignited components. Materials such as confetti, lightweight foam pieces, feathers, or novelties are not to be construed as hazardous debris.

k. Owner. Any person, agent, firm, association, limited liability company, partnership, or corporation having a legal or equitable interest in the property.

l. Performance. The enactment of a musical, dramatic, operatic, or other entertainment production. The enactment may begin and progress to its end according to a script, plan, or other preconceived list of events, or deviate therefrom. A performance includes any encores.

m. Performer. Any person active in a performance during which pyrotechnics are used and who is not part of the audience or support personnel. Among others, performers include, but are not limited to, actors, singers, musicians, and acrobats.

n. Permit authority. The agency authorized to grant and issue the permits provided for in this section on or within state property shall be the office of fire prevention and control, in the territory within a county park shall be the county park commission, or such other agency having jurisdiction, control, and/or operation of the parks or parkways within which any pyrotechnics are to be used, in a city shall be the duly constituted licensing agency thereof and, in the absence of such agency, shall be an officer designated for the purpose by the legislative body thereof, in a village shall be an officer designated for the purpose by the board of trustees thereof, and, in the territory of a town outside of villages, shall be an officer designated for the purpose by the town board thereof.

o. Permittee. (1) The person or persons who are responsible, as provided in subparagraph two of this paragraph, for obtaining the necessary permit or permits for the use of indoor pyrotechnics in areas of public assembly or for a production, or who are responsible for obtaining such permit or permits

under an applicable local law or ordinance authorized pursuant to subdivision five of this section.

(2) The owner of a place of public assembly or building in which pyrotechnics are to be used shall be responsible for obtaining such permit or permits; provided, however, that such owner, in writing, by agreement or lease, may require or otherwise authorize a lessee, licensee, pyrotechnic operator, or other party to be responsible for obtaining such permit or permits, in which case such other party or parties shall be deemed responsible for obtaining such permit or permits and shall be the permittee for purposes of this article; provided further that the structure is otherwise appropriate for such use under the New York state fire prevention and building code or other such applicable code.

p. Producer. An individual who has overall responsibility for the operation and management of the performance where the pyrotechnics are to be used. Generally, the producer is an employee of the promotion company, entertainment company, festival, theme park, or other entertainment group.

q. Production. All the performances of a musical, dramatic, operatic, or other show or series of shows.

r. Pyrotechnic device. Any device containing pyrotechnic materials and capable of producing a special effect as defined in this subdivision.

s. Pyrotechnic material (Pyrotechnic special effects material). A chemical mixture used in the entertainment industry to produce visible or audible effects by combustion, deflagration, or detonation. Such a chemical mixture consists predominantly of solids capable of producing a controlled, self-sustaining, and self-contained exothermic chemical reaction that results in heat, gas, sound, light, or a combination of these effects. The chemical reaction functions without external oxygen.

t. Pyrotechnic operator (Special effects operator). An individual who has responsibility for pyrotechnic safety and who controls, initiates, or otherwise creates special effects.

u. Pyrotechnic special effect. A special effect created through the use of pyrotechnic materials and devices.

v. Pyrotechnics. Controlled exothermic chemical reactions that are timed to create the effects of heat, gas, sound, dispersion of aerosols, emission of visible electromagnetic radiation, or a combination of these effects to provide the maximum effect from the least volume.

w. Rocket. A pyrotechnic device that moves by the ejection of matter produced by the internal combustion of propellants.

x. Special effect. A visual or audible effect used for entertainment purposes, often produced to create an illusion. For example, smoke might be produced to create the impression of fog being present, or a puff of smoke, a flash of light, and a loud sound might be produced to create the impression that a cannon has been fired.

y. Support personnel. Any individual who is not a performer or member of the audience. Among others, support personnel include the road crew of any production, stage hands, property masters, security guards, fire watch officers, janitors, or any other employee.

z. Venue manager. An individual who has overall responsibility for the operation and management of the facility where pyrotechnics are to be used in a performance.

2. Permit requirements. a. All uses of all pyrotechnics in areas of public assembly shall be approved by the permit authority. The permit authority shall determine that appropriate measures are established to provided [provide]* acceptable crowd management, security, fire protection, (including sprinklers), and other emergency services. All planning and use of pyrotechnics shall be coordinated with the venue manager and producer.

b. Before the performance of any production, the permittee shall submit a plan for the use of pyrotechnics to the permit authority. After a permit has been granted, the permittee shall keep the plan available at the site for safety inspectors or other designated agents of the permit authority. Any addition of pyrotechnics to a performance or any significant change in the presentation of pyrotechnics shall require approval by the permit authority, except that reducing the number or size of pyrotechnics to be used in a performance shall not be considered to be a significant change in the presentation.

c. (1) The plan for the use of pyrotechnics shall be made in writing or such other form as is required or approved by the permit authority.

(2) The plan shall provide the following:

(a) Name of the person, group, organization, or other entity sponsoring the production.

(b) Date and time of day of the production.

(c) Exact location of the production.

(d) Name of the person actually in charge of firing the pyrotechnics (i.e., the pyrotechnic operator).

(e) Number, names, and ages of all assistants who are to be present.

(f) Qualifications of the pyrotechnic operator.

(g) Pyrotechnic experience of the operator.

(h) Confirmation of any applicable local, state, and federal licenses held by the operator or assistant.

(i) Evidence of the permittee's insurance carrier or financial responsibility.

(j) Number and types of pyrotechnic devices and materials to be used, the operator's experience with those devices and effects, and a definition of the general responsibilities of assistants.

(k) Diagram of the grounds or facilities where the production is to be held. This diagram shall show the point at which the pyrotechnic devices are to be fired, the fallout radius for each pyrotechnic device

*The bracketed word has been inserted by the Publisher.

used in the performance, the lines behind which the audience shall be restrained, and the placement of sprinkler systems.

(*l*) Point of on-site assembly of pyrotechnic devices.

(m) Manner and place of storage of the pyrotechnic materials and devices.

(n) Material safety data sheet (MSDS) for the pyrotechnic materials to be used.

(o) Certification that the set, scenery, and rigging materials are inherently flame-retardant or have been treated to achieve flame retardancy.

(p) Certification that all materials worn by performers in the fallout area during use of pyrotechnic effects shall be inherently flame-retardant or have been treated to achieve flame retardancy.

(3) All plans shall be submitted as soon as is possible so that the permit authority has time to be present and to notify other interested parties. In no event shall such advance notice be less than five business days.

d. A walk-through and a representative demonstration of the pyrotechnics shall be approved by the permit authority before a permit is approved. The permit authority may waive this requirement based on past history, prior knowledge, and other factors; provided that the authority is confident that the discharge of pyrotechnics can be conducted safely. The demonstration shall be scheduled with sufficient time allowed to reset/reload the pyrotechnics before the arrival of the audience.

e. All pyrotechnic operators shall be at least twenty-one years old and licensed or approved by the permit authority in accordance with all applicable laws, if any. All assistants shall be at least eighteen years old.

3. Conduct of pyrotechnic performances. a. Two or more fire extinguishers of the proper classification and size as approved by the permit authority shall be readily accessible while the pyrotechnics are being loaded, prepared for firing, or fired. In all cases, at least two pressurized water or pump extinguishers shall be available. Additional fire extinguishing equipment shall be provided as required by the permit authority. Personnel who have a working knowledge of the use of the applicable fire extinguishers shall be present while the pyrotechnics are being handled, used, or removed. No personnel shall use or handle pyrotechnic materials or devices while under the influence of intoxicating beverages, narcotics, controlled substances, and prescription or nonprescription drugs that can impair judgment. Fire detection and life safety systems shall not be interrupted during the operation of pyrotechnic effects.

b. (1) All pyrotechnic devices shall be mounted in a secure manner to maintain their proper positions and orientations so that, when they are fired, the pyrotechnic effects described in the plan submitted by the permittee are produced. Pyrotechnic devices shall be mounted so that no fallout from the device endangers human lives, results in personal injury, or damages property. Pyrotechnic materials shall be fired only from equipment specifically constructed for the purpose of firing pyrotechnic materials. The pyrotechnic operator shall be responsible for selecting equipment and materials that are compatible.

(2) Where rockets are launched before an audience, performers, or support personnel, the rockets shall be attached securely to a guide wire or cable with both ends securely attached and placed on an impact-resistant surface located at the terminal end of the guide. This guide wire or cable shall be of sufficient strength and flame resistance to withstand the exhaust from the rocket. An effective arrangement to stop the rocket shall be provided.

(3) Pyrotechnics shall be: (a) placed so that any hazardous debris falls into a safe, flame-resistant area; (b) fired so that the trajectory of their pyrotechnic material is not carried over the audience; and (c) placed for firing so that no flammable materials are within their fallout area.

(4) Pyrotechnic devices and materials used indoors shall be specifically manufactured and marked for indoor use by the manufacturer.

(5) Airbursts shall be permitted to be fired above the assembled audience, subject to the following conditions:

(a) The airburst shall be suspended by a minimum 30-gauge metal wire that is attached securely to a secure support acceptable to the authority having jurisdiction.

(b) The airburst shall occur at a minimum height of three times the diameter of the effect.

(c) Where the effect is demonstrated, there shall be no burning or glowing particles below the fifteen-foot level above the floor.

c. Each pyrotechnic device fired during a performance shall be separated from the audience by at least fifteen feet but not by less than twice the fallout radius of the device. Concussion mortars shall be separated from the audience by a minimum of twenty-five feet. There shall be no glowing or flaming particles within ten feet of the audience.

d. (1) The facility where pyrotechnic materials and devices are handled and used shall be maintained in a neat and orderly condition and shall be kept free of any conditions that can create a fire hazard.

(2) Smoking shall not be permitted within twenty-five feet of the area where pyrotechnics are being handled or fired; provided that smoking by performers as part of the performance shall be permitted as blocked in rehearsals and if expressly approved by the pyrotechnic operator and the permit authority.

e. (1) The pyrotechnic effect operator shall advise all performers and support personnel that they are exposed to a potentially hazardous situation when performing or otherwise carrying out their responsibilities in the vicinity of a pyrotechnic effect. Performers and support personnel familiar and ex-

perienced with the pyrotechnic effects being used shall be permitted to be in the area of a pyrotechnic effect, but only voluntarily and in the performance of their duties.

(2) No part, projectile, or debris from the pyrotechnic material or device shall be propelled so that it damages overhead properties, overhead equipment, or the ceiling and walls of the facility.

(3) Immediately before any performance, the pyrotechnic operator shall make a final check of wiring, positions, hook-ups, and pyrotechnic devices to ensure that they are in proper working order. The pyrotechnic operator also shall verify safety distances.

(4) The placement and wiring of all pyrotechnic devices shall be designed to minimize the possibility of performers and support personnel disturbing the devices during a performance.

(5) The pyrotechnic operator shall exercise extreme care throughout the performance to ensure that the pyrotechnic devices function correctly and that the performers, support personnel, and audience are clear of the devices.

(6) When pyrotechnics are fired, the quantity of smoke developed shall be controlled so as not to obscure the visibility of exit signs or paths of egress.

4. Bonds. Before granting and issuing a permit for a use of pyrotechnics as provided in this section, the permit authority shall require an adequate bond from the applicant therefor, unless such applicant is a state entity, county park, city, village, or town, or from the person to whom a contract for such use shall be awarded, in a sum to be fixed by the permit authority, which, however, shall not be less than five hundred thousand dollars, conditioned for the payment of all damages which may be caused to a person or persons or to property by reason of the use so permitted and arising from any acts of the permittee, his or her agents, employees, contractors, or subcontractors. Such bond shall run to the owner of the facility for which the permit is granted and issued and shall be for the use and benefit of any person or persons or any owner or owners of any property so injured or damaged, and such person or persons or such owner or owners are hereby authorized to maintain an action thereon, which right of action also shall accrue to the heirs, executors, administrators, successors, or assigns of such person or persons or such owner or owners. The permit authority may accept, in lieu of such bond, an indemnity insurance policy with liability coverage and indemnity protection equivalent to the terms and conditions upon which such bond is predicated and for the purposes herein provided.

5. Local laws or ordinances superseded. All local laws or ordinances regulating the use of pyrotechnics within the contemplation of this section are hereby superseded by the provisions of this section, with the exception of:

a. all laws or ordinances enacted by a city of one million or more; and

b. other local laws or ordinances that prohibit the use of indoor pyrotechnics.

HISTORY:

Add, L 2003, ch 584, § 1, eff Nov 1, 2003 (see 2003 note below); amd, L 2013, ch 127, § 3, eff July 12, 2013.

Editor's Notes: Laws 2003, ch 584, § 4, eff Nov 1, 2003, provides as follows:

§ 4. This act shall take effect on the first of November next succeeding the date on which it shall have become a law; provided that any state agency and any political subdivision of the state are authorized to promulgate any and all rules and regulations and take any other measures necessary to implement this act on its effective date on or before such date.

Amendment Notes: 2013. Chapter 127, § 3 amended:

Sub 1, par n by deleting at fig 1 ", which agency in the territory within a state park shall be the state agency having custody and control thereof" and adding the matter in italics.

Sub 4 by deleting at fig 1 "park" and adding the matter in italics.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

35C NY Jur 2d Criminal Law Substantive Principles and Offenses §§ 1964–1966.

§ 405.12. Unpermitted use of indoor pyrotechnics in the second degree

A person is guilty of unpermitted use of indoor pyrotechnics in the second degree when he or she is responsible for obtaining a necessary permit to use indoor pyrotechnics, as required by paragraph o of subdivision one of section 405.10 of this article, and, without obtaining such permit or knowing that he or she is not in compliance with the terms of a permit, he or she intentionally ignites or detonates pyrotechnics for which such permit is required, or knowingly permits another to ignite or detonate such pyrotechnics, in a building, as defined in paragraph e of subdivision one of section 405.10 of this article.

Unpermitted use of indoor pyrotechnics in the second degree is a class A misdemeanor.

HISTORY:

Add, L 2003, ch 584, § 2, eff Nov 1, 2003 (see 2003 note below).

Editor's Notes: Laws 2003, ch 584, § 4, eff Nov 1, 2003, provides as follows:

§ 4. This act shall take effect on the first of November next succeeding the date on which it shall have become a law; provided that any state agency and any political subdivision of the state are authorized to promulgate any and all rules and regulations and take any other measures necessary to implement this act on its effective date on or before such date.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

35C NY Jur 2d Criminal Law Substantive Principles and Offenses § 1967.

§ 405.14. Unpermitted use of indoor pyrotechnics in the first degree

A person is guilty of unpermitted use of indoor pyrotechnics in the first degree when he or she commits the crime of unpermitted use of indoor pyrotechnics in the second degree, as defined in section 405.12 of this article, and, within the previous five year period, he or she has been convicted one or more times of the crime of unpermitted use of

indoor pyrotechnics in the second degree, as defined in section 405.12 of this article, or unpermitted use of indoor pyrotechnics in the first degree, as defined in this section.

Unpermitted use of indoor pyrotechnics in the first degree is a class E felony.

HISTORY:

Add, L 2003, ch 584, § 2, eff Nov 1, 2003 (see 2003 note below).

Editor's Notes: Laws 2003, ch 584, § 4, eff Nov 1, 2003, provides as follows:

§ 4. This act shall take effect on the first of November next succeeding the date on which it shall have become a law; provided that any state agency and any political subdivision of the state are authorized to promulgate any and all rules and regulations and take any other measures necessary to implement this act on its effective date on or before such date.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

35C NY Jur 2d Criminal Law Substantive Principles and Offenses § 1967.

§ 405.16. Aggravated unpermitted use of indoor pyrotechnics in the second degree

A person is guilty of aggravated unpermitted use of indoor pyrotechnics in the second degree when he or she commits the crime of unpermitted use of indoor pyrotechnics in the second degree, as defined in section 405.12 of this article, and, by means of igniting or detonating such indoor pyrotechnics, he or she recklessly: (1) causes physical injury to another person; or (2) damages the property of another person in an amount that exceeds two hundred fifty dollars.

Aggravated unpermitted use of indoor pyrotechnics in the second degree is a class E felony.

HISTORY:

Add, L 2003, ch 584, § 2, eff Nov 1, 2003 (see 2003 note below).

Editor's Notes: Laws 2003, ch 584, § 4, eff Nov 1, 2003, provides as follows:

§ 4. This act shall take effect on the first of November next succeeding the date on which it shall have become a law; provided that any state agency and any political subdivision of the state are authorized to promulgate any and all rules and regulations and take any other measures necessary to implement this act on its effective date on or before such date.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

35C NY Jur 2d Criminal Law Substantive Principles and Offenses § 1967.

§ 405.18. Aggravated unpermitted use of indoor pyrotechnics in the first degree

A person is guilty of aggravated unpermitted use of indoor pyrotechnics in the first degree when he or she commits the crime of unpermitted use of indoor pyrotechnics in the second degree, as defined in section 405.12 of this article, and, by means of igniting or detonating such indoor pyrotechnics, he or she recklessly causes serious physical injury or death to another person.

Aggravated unpermitted use of indoor pyrotechnics in the first degree is a class D felony.

HISTORY:

Add, L 2003, ch 584, § 2, eff Nov 1, 2003 (see 2003 note below).

Editor's Notes: Laws 2003, ch 584, § 4, eff Nov 1, 2003, provides as follows:

§ 4. This act shall take effect on the first of November next succeeding the date on which it shall have become a law; provided that any state agency and any political subdivision of the state are authorized to promulgate any and all rules and regulations and take any other measures necessary to implement this act on its effective date on or before such date.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

35C NY Jur 2d Criminal Law Substantive Principles and Offenses § 1967.

PUBLIC AUTHORITIES LAW

Article
2. Park, Parkway and Highway Authorities
5. Public Utility Authorities

HISTORY:
Add, L 1939, ch 870, eff June 15, 1939.

ARTICLE 2 Park, Parkway and Highway Authorities

Title 9. New York State Thruway Authority

Section
378-a. Emergency service permits

HISTORY:
Add, L 1939, ch 870.

TITLE 9 New York State Thruway Authority

HISTORY:
Add, L 1950, ch 143.

§ 378-a. Emergency service permits

1. The authority is hereby authorized and directed to issue refunds for tolls incurred by ambulances or fire vehicles engaged in an emergency operation, or, at the option of the authority, to issue emergency services permits for use by ambulances and fire vehicles which shall provide for travel at no charge between interchanges and barriers while such vehicles are engaged in an emergency operation. For purposes of this section, the term "ambulance" shall have the same meaning as such term is defined by section one hundred-b of the vehicle and traffic law, the term "fire vehicle" shall have the same meaning as such term is defined by section one hundred fifteen-a of the vehicle and traffic law, and the term "emergency operation" shall have the same meaning as such term is defined by section one hundred fourteen-b of the vehicle and traffic law. In any rules and regulations promulgated for the implementation of this section, the authority may establish the type of documentation or other proof satisfactory to the authority that an ambulance or fire vehicle was engaged in an emergency operation at the time a toll was incurred.

2. If, upon the completion of an audit conducted by a certified public accountant selected by the authority, the authority can demonstrate that the issuance of refunds or permits as authorized in subdivision one of this section causes a significant loss of revenue to the authority, the authority is authorized, pursuant to a resolution of the board, to offer such refunds or permits at a discount of the cash cost per mile; provided, however, that, prior to such board resolution, the authority shall hold at least two public hearings, at a time and location which will, to the extent practicable, maximize the participation of the general public.

HISTORY:
Add, L 2010, ch 23, § 2, eff June 1, 2012.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:
40 Am Jur 2d, Highways, Streets, and Bridges §§ 680, 682.

ARTICLE 5 Public Utility Authorities

Title 11. Metropolitan Commuter Transportation Authority

Section
1266-b. Medical emergency services plan; implementation on Long Island Rail Road

HISTORY:
Add, L 1939, ch 870.

TITLE 11 Metropolitan Commuter Transportation Authority

HISTORY:
Add, L 1965, ch 324, § 3, eff June 1, 1965.

§ 1266-b. Medical emergency services plan; implementation on Long Island Rail Road

1. a. The authority in consultation with the Long Island Rail Road is hereby authorized and directed to implement a comprehensive medical emergency services program, including an emergency response protocol, not later than September first, two thousand five, for the benefit of persons utilizing transportation and other related services of the Long Island Rail Road. Such program shall include but not be limited to provision for the following: The training of designated employees in first aid, emergency techniques and procedures, handling and positioning of stricken commuters, knowledge of procedures and equipment used for respiratory and cardiac emergencies and an emergency response protocol for all employees.

b. Such program and plan shall be submitted to the temporary president of the senate, the speaker of the assembly and the governor on or before September first, two thousand five, and shall be updated as necessary. The authority will issue an annual report on or before April first of each year beginning April first, two thousand six, which will include current updates, descriptions of medical emergencies, responses and outcomes since the most recent report, information regarding training of personnel, analysis of the current plan and any recommendations for improving the program.

2. Notwithstanding any inconsistent provision of any general, special or local law, a designated employee employed upon facilities of the Long Island Rail Road who has been trained in first aid, emergency techniques and procedures, handling and positioning of stricken commuters, and the applicable

procedures and equipment used for respiratory and cardiac emergencies who voluntarily and without the expectation of monetary compensation renders any of the foregoing treatment in an emergency to a commuter upon facilities of the Long Island Rail Road who is unconscious, ill or injured shall not be liable for damages for injuries alleged to have been sustained by such commuter or for damages for the death of such commuter alleged to have occurred by reason of an act or omission in the rendering of such treatment in an emergency unless it is established that such injuries were or such death was caused by gross negligence on the part of such designated employee.

HISTORY:

Add, L 1978, ch 370, § 1; amd, L 1979, ch 506, § 1, eff July 10, 1979; L 2005, ch 396, § 1, eff Aug 2, 2005.

PUBLIC HEALTH LAW

Article
5. Laboratories
13-E. Regulation of Smoking and Vaping in Certain Public Areas
21. Control of Acute Communicable Diseases
27-F. Hiv and AIDS Related Information
29-B. Orders Not to Resuscitate for Residents of Mental Hygiene Facilities
29-C. Health Care Agents and Proxies
30. Emergency Medical Services
30-B. Emergency Medical, Trauma and Disaster Care
30-C. Emergency Medical Services for Children

HISTORY:
Add, L 1953, ch 879, eff June 1, 1954.

ARTICLE 5 Laboratories

Title V. Clinical Laboratory and Blood Banking Services

Section
579. Scope and exceptions

HISTORY:
Add, L 1953, ch 879, eff June 1, 1954.

TITLE V Clinical Laboratory and Blood Banking Services

HISTORY:
Add, L 1964, ch 217, eff April 1, 1964; amd, L 1993, ch 436, § 1, eff July 1, 1994.

§ 579. Scope and exceptions

1. This title is applicable to all clinical laboratories and blood banks operating within the state, except clinical laboratories and blood banks operated by the federal government and clinical laboratories operated by a licensed physician, osteopath, dentist, midwife, nurse practitioner, optometrist performing a clinical laboratory test that does not use an invasive modality as defined in section seventy-one hundred one of the education law or podiatrist who performs laboratory tests or procedures, personally or through his or her employees, solely as an adjunct to the treatment of his or her own patients; to the extent authorized by federal and state law, including the education law.

2. This title shall not be applicable to and the department shall not have the power to regulate pursuant to this title: (a) any examination performed by a state or local government of materials derived from the human body for use in criminal identification or as evidence in a criminal proceeding or for investigative purposes; (b) any test conducted pursuant to paragraph (c) of subdivision four of section eleven hundred ninety-four of the vehicle and traffic law and paragraph (c) of subdivision eight of section 25.24 of the parks, recreation and historic preservation law; (c) any examination performed by a state or local agency of materials derived from the body of an inmate, pretrial releasee, parolee, conditional releasee or probationer to (i) determine, measure or otherwise describe the presence or absence of any substance whose possession, ingestion or use is prohibited by law, the rules of the department of corrections and community supervision, the conditions of release established by the board of parole, the conditions of release established by a court or a local conditional release commission or the conditions of any program to which such individuals are referred and (ii) to determine whether there has been a violation thereof; or (d) any examination performed by a coroner or medical examiner for the medical-legal investigation of a death. Nothing herein shall prevent the department from consulting with the division of criminal justice services, the department of corrections and community supervision, the state police, or any other state agency or commission, at the request of the division of criminal justice services, the department of corrections and community supervision, the state police, or such other agency or commission, concerning examination of materials for purposes other than public health.

3. (a) This title shall not be applicable to any person, partnership, corporation or other entity performing any waived test or provider-performed microscopy procedure, provided such person, partnership, corporation or other legal entity: (i) holds a valid certificate of registration issued by the department authorizing the performance of one or more waived tests or provider-performed microscopy procedures; and (ii) only performs tests authorized by the certificate of registration; and (iii) otherwise complies with all applicable requirements of this subdivision.

(b) The department may issue a certificate of registration authorizing the performance of one or more waived tests or provider-performed microscopy procedures for a period of up to two years if the applicant: (i) files a completed application with the department on such forms as the commissioner may prescribe; (ii) provides documentation acceptable to the department demonstrating the ability to comply with the requirements of this subdivision; and (iii) pays a two hundred dollar biennial registration fee for each location where services are rendered; except that a voluntary ambulance service as defined in article thirty of the public health law and operated under section two hundred nine-b of the general municipal law shall be exempt from the requirement to pay a fee to obtain this certificate of registration; and except that the following may operate multiple locations under a single registration and pay a single registration fee: (A) not-for-profit, state or local government laboratories or programs engaged in limited public health testing not exceeding fifteen types of tests per registration; or (B) applicants that

maintain a fixed location in the state and are approved by the department to move from testing site to testing site.

(c) Laboratory test registrants shall: (i) provide only the tests and services listed on the registration issued by the department hereunder; (ii) advise the department of any change in the registrant's name, ownership, location or qualified health care professional or laboratory director designated to supervise testing within thirty days of such change; (iii) provide the department with immediate access to all facilities, equipment, records, and personnel as required by the department to determine compliance with this subdivision; (iv) comply with all public health law and federal requirements for reporting reportable diseases and conditions to the same extent and in the same manner as a clinical laboratory; (v) perform one or more tests as required by the department to determine the proficiency of the persons performing such tests; and (vi) designate a qualified health care professional or qualified individual holding a certificate of qualification pursuant to section five hundred seventy-three of this title, who shall be jointly and severally responsible for: (A) establishing, approving and continuously updating policies, procedures and personnel qualifications for each test employed; (B) establishing a comprehensive quality assurance system which includes, but is not limited to, test selection, test quality, laboratory proficiency and personnel competency; (C) ensuring all tests are performed in accordance with the manufacturers' instructions and standards of practice in laboratory medicine; (D) maintaining complete and accurate records of the tests performed, including but not limited to, the patient's name, results, person performing the test, and quality control data; (E) ensuring that persons do not participate in diagnostic or treatment decisions using such test results unless such persons are authorized by law to do so; (F) ensuring that provider-performed microscopy procedures are performed only by a qualified health care professional operating within the scope of practice for his or her profession and as part of the physical examination performed by such professional; and (G) complying with other applicable laws, rules and regulations.

(d) A certificate of registration shall become void by a change in the owner of the laboratory test registrant or location of testing.

(e) Notwithstanding the foregoing, if the commissioner determines that the performance of a particular waived test or provider-performed microscopy procedure in a facility or location which does not possess a New York state clinical laboratory permit creates a risk of harm to the subjects of such test, the commissioner may issue an order prohibiting such test from being performed in any location other than a permitted clinical laboratory, physician's office or other location exempted by subdivision one or two of this section.

(f) Registration under this subdivision may be denied, limited, suspended, revoked or annulled by the department upon a determination that a laboratory services registrant: (i) failed to comply with the requirements of this subdivision; (ii) provided services that constitute an unwarranted risk to human health; (iii) intentionally provided any false or misleading information to the department relating to registration or performing laboratory services; or (iv) has demonstrated incompetence or shown consistent errors in the performance of examinations or procedures. A registration shall not be limited, suspended, revoked or annulled without a hearing conducted in accordance with subdivision four of section five hundred seventy-seven of this title. However, a registration may be temporarily limited, suspended, revoked or annulled without a hearing for a period not to exceed thirty days upon notice to the registrant following a finding by the department that the public health, safety or welfare is in imminent danger.

(g) The commissioner may adopt such rules and regulations as may be necessary to effectuate the purposes of this subdivision.

(h) Any person, partnership, corporation or other entity performing waived tests or provider-performed microscopy procedures without being authorized to do so pursuant to this title shall be subject to a civil penalty of up to five hundred dollars for each test performed, not to exceed two thousand dollars per day for each day tests are performed, in violation of this subdivision.

(i) All fees and civil penalties collected pursuant to this subdivision shall be deposited in the special revenue account established for the receipt of inspection and reference fees collected pursuant to section five hundred seventy-six of this title and shall be subtracted from the operating expenses of the department prior to calculation of such inspection and reference fees.

HISTORY:

Add, L 1964, ch 217, § 1; amd, L 1986, ch 801, § 3, eff April 1, 1987, provided, however, that effective April 1, 1986 all state laboratories participate in the laboratory reference system; L 1993, ch 436, § 1, eff July 1, 1994; L 2003, ch 585, § 1, eff Sept 22, 2003; L 2004, ch 397, § 1, eff Aug 17, 2004 (see 2004 note below); L 2004, ch 440, § 1, eff Sept 14, 2004, deemed eff on after Sept 22, 2003; L 2008, ch 204, § 3, eff Aug 6, 2008; L 2011, ch 62, § 128 (Part C, Subpart B), eff March 31, 2011; L 2013, ch 444, § 2, eff Oct 23, 2013; L 2013, ch 479, § 1, eff Nov 13, 2013; L 2015, ch 376, § 2, effective October 26, 2015.

Editor's Notes: Laws 2004, ch 397, § 2, eff Aug 17, 2004, provides as follows:

§ 2. The amendments to the public health law made by section one of this act shall not be construed to expand or contract the scope of practice of any health care professional under title 8 of the education law.

Laws 2015 ch 376, § 11, eff Oct 26, 2015, provide:

§ 11. The amendments to the public health law, the education law, the general business law and the vehicle and traffic law enacted by this act shall not be construed to expand or contract the scope of practice of any health care professional under title 8 of the education law.

Amendment Notes: 2013. Chapter 444, § 2 amended:
Sub 1 by adding the matter in italics.

2013. Chapter 479, § 1 amended:
Sub 3, par (b) by adding the matter in italics.

2011. Chapter 62, § 128 (Part C, Subpart B) amended:

Sub 2 by deleting at fig 1 "(b)", at fig 2 "four", at figs 3–5 "correctional services" and adding the matter in italics.

The 2015 amendment by ch 376, § 2, deleted "and consistent with any applicable written practice agreement" after "education law" at the end of 1.

Notes to Decisions

The purpose of Public Health Law § 579 is not to restrict eligibility for a permit but to exclude certain specific categories of laboratories, such as that operated by a licensed physician, etc., for his own patrons from the need for licensing and the statute has no application to and does not proscribe a permit for an out-of-state laboratory. People by Lefkowitz v Biochemical Procedures, Inc., 38 A.D.2d 925, 329 N.Y.S.2d 878, 1972 N.Y. App. Div. LEXIS 5145 (N.Y. App. Div. 1st Dep't), aff'd, 31 N.Y.2d 792, 339 N.Y.S.2d 115, 291 N.E.2d 393, 1972 N.Y. LEXIS 994 (N.Y. 1972).

The Pomeroy-Metcalf Act, which requires that persons acting as directors of clinical laboratories must secure a certificate of competence issued by the Department of Health, is not an unconstitutional denial of equal protection of the law, and the exemption of physicians who perform tests in connection with the treatment of their own patients and of licensed directors of State or Federal laboratories was not arbitrary or discriminatory. Derman v Ingraham, 47 Misc. 2d 346, 262 N.Y.S.2d 533, 1965 N.Y. Misc. LEXIS 1717 (N.Y. Sup. Ct. 1965), aff'd, 25 A.D.2d 795, 269 N.Y.S.2d 382, 1966 N.Y. App. Div. LEXIS 4388 (N.Y. App. Div. 3d Dep't 1966).

In considering whether N.Y. Pub. Health Law § 580(4) was ambiguous, the language of N.Y. Pub. Health Law § 579 did not convince the court that § 580(4) was ambiguous, Scher v Bayer Corp., 258 F. Supp. 2d 190, 2003 U.S. Dist. LEXIS 7711 (E.D.N.Y. 2003).

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

64 NY Jur 2d Health and Sanitation § 51.

ARTICLE 13-E Regulation of Smoking and Vaping in Certain Public Areas

Section

1399-n. Definitions
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HISTORY:

Add, L 1989, ch 244, § 5, eff Jan 1, 1990; L 2017, ch 335, § 3, effective November 22, 2017.

§ 1399-n. Definitions

For purposes of this article:

1. "Bar" means any area, including outdoor seating areas, devoted to the sale and service of alcoholic beverages for on-premises consumption and where the service of food is only incidental to the consumption of such beverages.

2. "Employer" means any person, partnership, association, limited liability company, corporation or nonprofit entity which employs one or more persons, including the legislative, executive and judicial branches of state government and any political subdivision of the state.

3. "Food service establishment" means any area, including outdoor seating areas, or portion thereof in which the business is the sale of food for on-premises consumption.

4. "Membership association" means a not-for-profit entity which has been created or organized for a charitable, philanthropic, educational, political, social or other similar purpose.

5. "Place of employment" means any indoor area or portion thereof under the control of an employer in which employees of the employer perform services, and shall include, but not be limited to, offices, school grounds, retail stores, banquet facilities, theaters, food stores, banks, financial institutions, factories, warehouses, employee cafeterias, lounges, auditoriums, gymnasiums, restrooms, elevators, hallways, museums, libraries, bowling establishments, employee medical facilities, rooms or areas containing photocopying equipment or other office equipment used in common, and company vehicles.

6. "School grounds" means any building, structure, and surrounding outdoor grounds contained within a public or private pre-school, nursery school, elementary or secondary school's legally defined property boundaries as registered in a county clerk's office, and any vehicles used to transport children or school personnel.

7. "Retail tobacco business" means a sole proprietorship, limited liability company, corporation, partnership or other enterprise in which the primary activity is the retail sale of tobacco products and accessories, and in which the sale of other products is merely incidental.

8. "Smoking" means the burning of a lighted cigar, cigarette, pipe or any other matter or substance which contains tobacco or marihuana as defined in section thirty-three hundred two of this chapter.

9. "Vaping" means the use of an electronic cigarette.

10. "Electronic cigarette" shall have the same meaning as in subdivision thirteen of section thirteen hundred ninety-nine-aa of this chapter.

11. "Retail electronic cigarette store" means a retail store devoted primarily to the sale of electronic cigarettes, and in which the sale of other products is merely incidental. The sale of such other products shall be considered incidental if such sales generate less than twenty-five percent of the total annual gross sales.

HISTORY:

Add, L 1989, ch 244, § 5, eff Jan 1, 1990; amd, L 1994, ch 565, § 1, eff Aug 25, 1994; L 2003, ch 13, § 1, eff July 24, 2003; L 2017, ch 335, § 1, effective November 22, 2017; L 2019, ch 131, § 8, effective August 28, 2019.

Editor's Notes Laws 2017, ch 335, § 13, eff Nov 22, 2017, provides:

§ 13. This act shall take effect on the thirtieth day after it shall have become a law; provided, however, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this

act on its effective date is authorized and directed to be made and completed on or before such effective date.

Laws 2019, ch 131, § 9, eff August 28, 2019, provides:

§ 9. This act shall take effect on the thirtieth day after it shall have become a law.

Amendment Notes The 2017 amendment by ch 335, § 1, added 9 through 11.

The 2019 amendment by ch 131, § 8, added "or marihuana as defined in section thirty-three hundred two of this chapter" in 8.

Notes to Decisions

Clean Indoor Air Act, CLS Pub Health Art 13-E, which establishes comprehensive plan regulating smoking in public areas, does not unconstitutionally delegate police power or utilize vague definitions. Fagan v Axelrod, 146 Misc. 2d 286, 550 N.Y.S.2d 552, 1990 N.Y. Misc. LEXIS 1 (N.Y. Sup. Ct. 1990).

Clean Indoor Air Act, CLS Pub Health Art 13-E, which establishes comprehensive plan regulating smoking in public areas, does not unconstitutionally delegate police power or utilize vague definitions. Fagan v Axelrod, 146 Misc. 2d 286, 550 N.Y.S.2d 552, 1990 N.Y. Misc. LEXIS 1 (N.Y. Sup. Ct. 1990).

Where petitioner union sought review of an order of respondent Federal Labor Relations Authority that denied the union's exceptions to an arbitrator's decision denying a grievance as to a new policy by the New York Division of Military and Naval Affairs implementing a state-wide smoking ban at its facilities after the passage of N.Y. Pub. Health Law §§ 1399-o(1), -n(2), and the parties had not stipulated that an unfair labor practice (ULP) claim was before the arbitrator, and the arbitrator found the collective bargaining agreement was not violated because the smoking ban was a statutory requirement that did not have to be negotiated, because the Authority did not engage in any substantive discussion of a ULP claim in its order, but instead explicitly found that the arbitrator was justified in concluding that the substance of the ULP claim was not part of the dispute, the Authority's order did not "involve" a ULP and the court had no jurisdiction under 5 U.S.C.S. § 7123(a)(1) to review the order. Ass'n of Civilian Technicians v FLRA, 507 F.3d 697, 378 U.S. App. D.C. 335, 2007 U.S. App. LEXIS 25286 (D.C. Cir. 2007), reh'g, en banc, denied, 2008 U.S. App. LEXIS 1575 (D.C. Cir. Jan. 18, 2008), reh'g denied, 2008 U.S. App. LEXIS 1704 (D.C. Cir. Jan. 18, 2008), cert. denied, 555 U.S. 819, 129 S. Ct. 344, 172 L. Ed. 2d 30, 2008 U.S. LEXIS 6719 (U.S. 2008).

Farmer's action against town supervisor, zoning officer, town clerk, and court-appointed receiver must fail, where gist of complaint is that defendants all contributed to confiscation of "40 year collection of vehicles and other items" from farm, incarceration of farmer for not complying with order to clean up property, and exposure of farmer to cigarette smoke daily during his incarceration in violation of his due process rights and CLS Pub Health Law § 1399-n, because no named defendants had any responsibility for jail's rules or operation, so they were not personally involved in nor liable for allegedly wrongful involuntary exposure to environmental tobacco smoke. Brown v Costello, 905 F. Supp. 65, 1995 U.S. Dist. LEXIS 16483 (N.D.N.Y. 1995), aff'd, 101 F.3d 685, 1996 U.S. App. LEXIS 39572 (2d Cir. N.Y. 1996).

New York State and New York City legislators had a rational basis to enact the smoking bans in Chapter 13 of the Laws of 2003, N.Y. Pub. Health Law § 1399-n et seq., which amended certain provisions of the New York State Clean Indoor Air Act (CIAA), and New York City Local Law 47 of 2002, New York City, N.Y., Admin. Code § 17-501 et seq., and such enactments were a valid exercise of the state's police powers over the health and welfare of its citizens. New York City C.L.A.S.H. v City of New York, 315 F. Supp. 2d 461, 2004 U.S. Dist. LEXIS 5946 (S.D.N.Y. 2004).

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

64 NY Jur 2d Health and Sanitation §§ 104, 105 .

Matthew Bender's New York Practice Guides: 4 New York Practice Guide: Business and Commercial §§ 25.12, 25.22.

§ 1399-o. Smoking and vaping restrictions

1. Smoking and vaping shall not be permitted and no person shall smoke or vape in the following indoor areas:

a. places of employment;

b. bars;

c. food service establishments, except as provided in subdivision six of section thirteen hundred ninety-nine-q of this article;

d. enclosed indoor areas open to the public containing a swimming pool;

e. public means of mass transportation, including subways, underground subway stations, and when occupied by passengers, buses, vans, taxicabs and limousines;

f. ticketing, boarding and waiting areas in public transportation terminals;

g. youth centers and facilities for detention as defined in sections five hundred twenty-seven-a and five hundred three of the executive law;

h. any facility that provides child care services as defined in section four hundred ten-p of the social services law, provided, however, that rooms in such a facility that is a private home shall be regulated by this paragraph as follows:

(i) when such private home is not required to be licensed or registered for such services by the office of children and family services, rooms in such home are excluded from the prohibition of this paragraph during periods when children receiving such services are not present; and

(ii) when such private home is required to be licensed or registered for such services by the office of children and family services, rooms in such home are included within the prohibition of this paragraph, regardless of whether or not children receiving such services are present.

i. child day care centers as defined in section three hundred ninety of the social services law and child day care centers licensed by the city of New York;

j. group homes for children as defined in section three hundred seventy-one of the social services law;

k. public institutions for children as defined in section three hundred seventy-one of the social services law;

l. residential treatment facilities for children and youth as defined in section 1.03 of the mental hygiene law;

m. all public and private colleges, universities and other educational and vocational institutions, including dormitories, residence halls, and other group residential facilities that are owned or operated by such colleges, universities and other educational and vocational institutions, except that these restrictions shall not apply in any off-campus residential unit occupied by a person who is not enrolled as an undergraduate student in such college, university or other educational or vocational institution;

n. general hospitals and residential health care facilities as defined in article twenty-eight of this

chapter, and other health care facilities licensed by the state in which persons reside; provided, however, that the provisions of this subdivision shall not prohibit smoking and vaping by patients in separate enclosed rooms of residential health care facilities, adult care facilities established or certified under title two of article seven of the social services law, community mental health residences established under section 41.44 of the mental hygiene law, or facilities where day treatment programs are provided, which are designated as smoking and vaping rooms for patients of such facilities or programs;

o. commercial establishments used for the purpose of carrying on or exercising any trade, profession, vocation or charitable activity;

p. indoor arenas;

q. zoos; and

r. bingo facilities.

2. Smoking and vaping shall not be permitted and no person shall smoke or vape in the following outdoor areas:

a. ticketing, boarding or platform areas of railroad stations operated by the metropolitan transportation authority or its subsidiaries.

b. on the grounds of general hospitals and residential health care facilities as defined in article twenty-eight of this chapter, within fifteen feet of a building entrance or exit or within fifteen feet of the entrance to or exit from the grounds of any such general hospital or residential health care facility. This subdivision shall not prohibit smoking and vaping by a patient or a visitor or guest of a patient of a residential health care facility in a separate area on the grounds designated as a smoking and vaping area by the residential health care facility, provided such designated smoking and vaping area is not within thirty feet of any building structure (other than a non-residential structure wholly contained within the designated smoking and vaping area), including any overhang, canopy, awning, entrance, exit, window, intake or exhaust.

3. Smoking and vaping shall not be permitted and no person shall smoke or vape within one hundred feet of the entrances, exits or outdoor areas of any public or private elementary or secondary schools; provided, however, that the provisions of this subdivision shall not apply to smoking or vaping in a residence, or within the real property boundary lines of such residential real property. The provisions of section thirteen hundred ninety-nine-p of this article shall not apply to this subdivision.

4. Smoking and vaping shall not be permitted and no person shall smoke or vape within one hundred feet of the entrances, exits or outdoor areas of any after-school program licensed or registered pursuant to section three hundred ninety of the social services law; provided, however, that the provisions of this subdivision shall only apply on those days and during those hours in which such after-school programs are operational; and provided, further, that the provisions of this subdivision shall not apply to smoking or vaping in a residence, or within the real property boundary lines of such residential real property.

5.

a. Use of an electronic cigarette or e-cigarette shall not be permitted on school grounds, as defined in subdivision six of section thirteen hundred ninety-nine-n of this article.

b. "Electronic cigarette" or "e-cigarette" shall have the same meaning as in subdivision thirteen of section thirteen hundred ninety-nine-aa of this chapter.

6. Smoking shall not be permitted and no person shall smoke within one hundred feet of the entrances, exits or outdoor areas of any public or association library as defined in subdivision two of section two hundred fifty-three of the education law; provided, however, that the provisions of this subdivision shall not apply to smoking in a residence, or within the real property boundary lines of such residential real property.

HISTORY:

Add, L 1989, ch 244, § 5; amd, L 1994, ch 565, § 2; L 2003, ch 13, § 2, eff July 24, 2003; L 2008, ch 154, § 1, eff Aug 15, 2008; L 2011, ch 389, § 1, eff Nov 13, 2011; L 2012, ch 449, § 1, eff Sept 5, 2012; L 2013, ch 179, § 1, eff Oct 29, 2013; L 2015, ch 100, § 1, effective September 12, 2015; L 2017, ch 102, § 1, effective July 25, 2017; L 2017, ch 335, § 4, effective November 22, 2017; L 2018, ch 201, § 1, effective November 18, 2018; L 2018, ch 420, § 1, effective June 19, 2019.

Prior Law: Former § 1399-o, add, L 1975, ch 80, § 1; repealed, L 1989, ch 244, § 5, eff Jan 1, 1990.

Editor's Notes: Laws 1994, ch 565, § 8, eff Aug 25, 1994, provides as follows:

§ 8. This act shall take effect 30 days after it shall have become a law, except that the provisions of sections three and four of this act shall not supercede any collective bargaining agreement, during its term, in existence on the effective date of this act.

Laws 2017, ch 335, § 13, eff Nov 22, 2017, provides:

§ 13. This act shall take effect on the thirtieth day after it shall have become a law; provided, however, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date is authorized and directed to be made and completed on or before such effective date.

Laws 2018, ch 201, § 2, eff November 18, 2018, provides:

§ 2. This act shall take effect on the ninetieth day after it shall have become a law.

Laws 2018, ch 420, § 2, eff June 19, 2019, provides:

§ 2. This act shall take effect on the one hundred eightieth day after it shall have become a law.

Amendment Notes: 2013. Chapter 179, § 1 amended:

By redesignating part of sub 2 as sub 2, opening par and sub 2, par a.

By adding sub 2, par b.

2012. Chapter 449, § 1 amended:

By adding sub 3.

2011. Chapter 389, § 1 amended:

By redesignating opening par as sub 1, opening par.

By redesignating subs 1–18 as sub 1, pars a–r, respectively.

The 2015 amendment by ch 100, § 1, added 4.

The 2017 amendment by ch 102, § 1, added 5.

The 2017 amendment by ch 335, § 4, substituted "Smoking and vaping" for "Smoking" in the section heading; substituted "smoking and vaping" for "smoking" throughout the section; and substituted "smoke or vape" for "smoke" in the introductory languages of 1 and 2.

The 2018 amendment by ch 201, § 1, redesignated and rewrote former 1h as the introductory language of 1h; and added 1h(i) and 1h(2).

The 2018 amendment by ch 420, § 1, added 6.

Notes to Decisions

CLS Pub Health Art 13-E does not preclude negotiation over issue of smoking on school buses in absence of pupils since statutory scheme contains no explicit or implied prohibition against smoking under such circumstance, CLS Pub Health § 1399-o(6)(d) permits smoking by driver of vehicle that has no passengers, and CLS Pub Health § 1399-o(6)(i) mandates that any smoking restrictions above statutory minimum be subject to collective bargaining. Newark Valley Cent. Sch. Dist. v Public Employment Relations Bd., 83 N.Y.2d 315, 610 N.Y.S.2d 134, 632 N.E.2d 443, 1994 N.Y. LEXIS 281 (N.Y. 1994).

Clean Indoor Air Act, CLS Pub Health Art 13-E, which establishes comprehensive plan regulating smoking in public areas, does not infringe "right of liberty and privacy" to smoke since regulation of smoking is valid exercise of state's police power; there is no more fundamental right to smoke cigarettes than there is to ingest illegal drugs or run red light, and it is within province of state to prohibit sale of cigarettes entirely. Fagan v Axelrod, 146 Misc. 2d 286, 550 N.Y.S.2d 552, 1990 N.Y. Misc. LEXIS 1 (N.Y. Sup. Ct. 1990).

Article 78 proceeding was not proper vehicle to challenge constitutionality of Clean Indoor Air Act, CLS Pub Health Art 13-E, which establishes comprehensive plan regulating smoking in public areas; however, proceeding would be converted into declaratory judgment action. Fagan v Axelrod, 146 Misc. 2d 286, 550 N.Y.S.2d 552, 1990 N.Y. Misc. LEXIS 1 (N.Y. Sup. Ct. 1990).

Clean Indoor Air Act, CLS Pub Health Art 13-E, which establishes comprehensive plan regulating smoking in public areas, does not unconstitutionally restrict access of smokers to public places, since it restricts only right to smoke therein. Fagan v Axelrod, 146 Misc. 2d 286, 550 N.Y.S.2d 552, 1990 N.Y. Misc. LEXIS 1 (N.Y. Sup. Ct. 1990).

Even if general "right of privacy" to smoke tobacco exists, Clean Indoor Air Act, CLS Pub Health Art 13-E, which establishes comprehensive plan regulating smoking in public areas, is not violative of such right, since it merely requires smokers to exercise right outdoors or in private. Fagan v Axelrod, 146 Misc. 2d 286, 550 N.Y.S.2d 552, 1990 N.Y. Misc. LEXIS 1 (N.Y. Sup. Ct. 1990).

Classification of smokers and nonsmokers created by Clean Indoor Air Act, CLS Pub Health Art 13-E, which establishes comprehensive plan regulating smoking in public areas, is rationally related to legislative objective of protecting health of nonsmokers, and since statute does not create suspect class or affect fundamental right, it is valid under Equal Protection Clause because rationally based. Fagan v Axelrod, 146 Misc. 2d 286, 550 N.Y.S.2d 552, 1990 N.Y. Misc. LEXIS 1 (N.Y. Sup. Ct. 1990).

Petitioners sufficiently demonstrated standing, in Article 78 proceeding brought to challenge constitutionality of Clean Indoor Air Act, CLS Pub Health Art 13-E, which establishes comprehensive plan regulating smoking in public areas, in alleging that they were citizens and taxpayers of New York who, as regular users of tobacco in public and private places, were prejudiced and adversely affected by statute and its implementation. Fagan v Axelrod, 146 Misc. 2d 286, 550 N.Y.S.2d 552, 1990 N.Y. Misc. LEXIS 1 (N.Y. Sup. Ct. 1990).

In view of weight of scientific evidence showing that secondhand smoke represents significant health hazard to nonsmokers, Clean Indoor Air Act, CLS Pub Health Art 13-E, which establishes comprehensive plan regulating smoking in public areas, represents appropriate response by legislature to need to protect citizens from involuntary exposure to environmental tobacco smoke. Fagan v Axelrod, 146 Misc. 2d 286, 550 N.Y.S.2d 552, 1990 N.Y. Misc. LEXIS 1 (N.Y. Sup. Ct. 1990).

Clean Indoor Air Act, CLS Pub Health Art 13-E, which establishes comprehensive plan regulating smoking in public areas, does not unconstitutionally delegate police power or utilize vague definitions. Fagan v Axelrod, 146 Misc. 2d 286, 550 N.Y.S.2d 552, 1990 N.Y. Misc. LEXIS 1 (N.Y. Sup. Ct. 1990).

Employee established prima facie case of retaliatory action under CLS Labor § 740 based on her termination from employment for "excessive absenteeism" during 3-month probationary period after she filed complaint with county health officials concerning employer's failure to maintain smoke-free work area for nonsmoking employees, since exposure of office employees to secondhand smoke constitutes substantial and specific danger to public health or safety within meaning of statute, especially given CLS Pub Health § 1399-o, and county laws, regulating smoking in workplace. Bompane v Enzolabs, Inc., 160 Misc. 2d 315, 608 N.Y.S.2d 989, 1994 N.Y. Misc. LEXIS 58 (N.Y. Sup. Ct. 1994).

Substantial evidence supported a decision by a health board that a bar owner violated N.Y. Pub. Health Law § 1399-o where the evidence showed: (1) that a health department representative mentioned to a bartender in the bar that people were smoking in violation of the law, but the bartender told the representative that she would not enforce the smoking ban; (2) that when a deputy sheriff delivered a letter to the premises, several people were smoking and using beer cans with the tops removed as ashtrays; and (3) that a witness observed not only patrons, but the bartender, smoking and using ashtrays on the bar. Allen v Cattaraugus County Bd. of Health, 777 N.Y.S.2d 886, 4 Misc. 3d 383, 2004 N.Y. Misc. LEXIS 652 (N.Y. Sup. Ct. 2004).

When the language of N.Y. Pub. Health Law §§ 1399-o, 1399-s is taken together, it is clear that in order to avoid liability under N.Y. Pub. Health Law § 1399-o, bar owners who control the premises where illegal smoking occurs must do more than provide notice of a violation to their customers; merely posting signs and informing patrons of the law is insufficient. Matter of Buies Inc. v Morrow, 812 N.Y.S.2d 862, 12 Misc. 3d 541, 2006 N.Y. Misc. LEXIS 767 (N.Y. Sup. Ct. 2006).

Determination of Commissioner of the Department of Health Services that three pubs violated Public Health Law § 1399-o was annulled as, inter alia, Public Health Law § 1399-o did not inform proprietors of what affirmative steps needed to be taken to insure smoking was not permitted and those pubs had prominently displayed "No Smoking" signs. Matter of Patricia Ann Cottage Pub, Inc. v Mermelstein, 36 A.D.3d 816, 830 N.Y.S.2d 184, 2007 N.Y. App. Div. LEXIS 750 (N.Y. App. Div. 2d Dep't 2007).

Location restrictions in New York City's youth-tobacco ordinance did not impose obligations "with respect to" advertising as that phrase is used in Federal Cigarette Labeling and Advertising Act (15 USCS § 1334(b)) where provisions restricted only physical placement of tobacco advertising signs in manner akin to run-of-the-mill zoning regulation. Greater N.Y. Metro. Food Council, Inc. v Giuliani, 195 F.3d 100, 1999 U.S. App. LEXIS 26815 (2d Cir. N.Y. 1999), cert. denied, 529 U.S. 1066, 120 S. Ct. 1671, 146 L. Ed. 2d 481, 2000 U.S. LEXIS 2585 (U.S. 2000).

New York City's "tombstone" provision (NYC Admin Code §§ 27-508.1 to 27-508.6, known as "Article 17-A") banning all tobacco advertising except black-and-white signs stating "TOBACCO PRODUCTS SOLD HERE" was "requirement...based on smoking and health...with respect to advertising or promotion of cigarettes," and thus was preempted under Federal Cigarette Labeling and Advertising Act (15 USCS § 1334(b)). Greater N.Y. Metro. Food Council, Inc. v Giuliani, 195 F.3d 100, 1999 U.S. App. LEXIS 26815 (2d Cir. N.Y. 1999), cert. denied, 529 U.S. 1066, 120 S. Ct. 1671, 146 L. Ed. 2d 481, 2000 U.S. LEXIS 2585 (U.S. 2000).

Where petitioner union sought review of an order of respondent Federal Labor Relations Authority that denied the union's exceptions to an arbitrator's decision denying a grievance as to a new policy by the New York Division of Military and Naval Affairs implementing a state-wide smoking ban at its facilities after the passage of N.Y. Pub. Health Law §§ 1399-o(1), -n(2), and the parties had not stipulated that an unfair labor practice (ULP) claim was before the arbitrator, and the arbitrator found the collective bargaining agreement was not violated because the smoking ban was a statutory requirement that did not have to be negotiated, because the Authority did not engage in any substantive discussion of a ULP claim in its order, but instead explicitly found that the arbitrator was justified in concluding that the substance of the ULP claim was not part of the dispute, the Authority's order did not "involve" a ULP and the court had no

jurisdiction under 5 U.S.C.S. § 7123(a)(1) to review the order. Ass'n of Civilian Technicians v FLRA, 507 F.3d 697, 378 U.S. App. D.C. 335, 2007 U.S. App. LEXIS 25286 (D.C. Cir. 2007), reh'g, en banc, denied, 2008 U.S. App. LEXIS 1575 (D.C. Cir. Jan. 18, 2008), reh'g denied, 2008 U.S. App. LEXIS 1704 (D.C. Cir. Jan. 18, 2008), cert. denied, 555 U.S. 819, 129 S. Ct. 344, 172 L. Ed. 2d 30, 2008 U.S. LEXIS 6719 (U.S. 2008).

Challenge by three bars/restaurants to a determination by the board of health services that they had each violated the New York State Clean Indoor Act, at N.Y. Pub. Health Law § 1399-o, was not upheld by a court where the testimony of an investigator for the board established that each restaurant had posted the necessary "no smoking" signs and had removed the ashtrays; the investigator had indicated that when she walked into each restaurant, there were people already smoking and liquid-filled cups that acted as ashtrays for the smokers, but there was no indication whether the bartenders had previously informed the patrons to stop smoking and accordingly, the board's finding was deemed arbitrary and capricious. Matter of Patricia Ann Cottage Pub, Inc. v Mermelstein, 786 N.Y.S.2d 283, 6 Misc. 3d 492, 2004 N.Y. Misc. LEXIS 2467 (N.Y. Sup. Ct. 2004), app. dismissed, vacated, 36 A.D.3d 816, 830 N.Y.S.2d 184, 2007 N.Y. App. Div. LEXIS 750 (N.Y. App. Div. 2d Dep't 2007).

RESEARCH REFERENCES AND PRACTICE AIDS

Law Reviews:

Hermer, Municipal home rule in New York: tobacco control at the local level. 65 Brook. L. Rev. 321.

Matthew Bender's New York Practice Guides: 4 New York Practice Guide: Business and Commercial § 25.12.

§ 1399-o-1. Smoking and vaping restrictions; certain outdoor areas

1. Smoking and vaping shall not be permitted and no person shall smoke or vape during the hours between sunrise and sunset, when one or more persons under the age of twelve are present at any playground. For the purposes of this section, the term "playground" means an improved area designed, equipped, and set aside for play of six or more children which is not intended for use as an athletic playing field or athletic court, and shall include any play equipment, surfacing, fencing, signs, internal pathways, internal land forms, vegetation, and related structures. Playgrounds or playground equipment constructed upon one, two and three-family residential real property are exempt from the requirements of this section. This section shall not apply to any playground located within the city of New York.

2. No police officer, peace officer, regulatory officer or law enforcement official may arrest, ticket, stop or question any person based solely or in part on an alleged violation of subdivision one of this section, nor may an alleged violation of subdivision one of this section support probable cause to conduct any search or limited search of any person or his or her immediate surroundings.

HISTORY:

Add, L 2013, ch 102, § 1, eff Oct 10, 2013; L 2017, ch 335, § 5, effective November 22, 2017.

Editor's Notes Laws 2017, ch 335, § 13, eff Nov 22, 2017, provides:

§ 13. This act shall take effect on the thirtieth day after it shall have become a law; provided, however, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date is authorized and directed to be made and completed on or before such effective date.

Amendment Notes The 2017 amendment by ch 335, § 5, substituted "Smoking and vaping" for "Smoking" in the section heading; and substituted "smoking and vaping" for "smoking" twice in the first sentence of 1.

§ 1399-p. Posting of signs

1. "Smoking" or "No Smoking" signs, or "Vaping" or "No Vaping" signs, or the international "No Smoking" symbol, which consists of a pictorial representation of a burning cigarette enclosed in a circle with a bar across it, shall be prominently posted and properly maintained where smoking and vaping are regulated by this article, by the owner, operator, manager or other person having control of such area.

2. The owner, operator or manager of a hotel or motel that chooses to develop and implement a smoking and vaping policy for rooms rented to guests shall post a notice at the reception area of the establishment as to the availability, upon request, of rooms in which no smoking and vaping are allowed.

3. The provisions of this section shall apply to after-school programs that are subject to the provisions of subdivision four of section thirteen hundred ninety-nine-o of this article, provided that signs posted pursuant to this subdivision shall specify the specific time period during which smoking and vaping shall be prohibited.

HISTORY:

Add, L 1989, ch 244, § 5, eff Jan 1, 1990; amd, L 2003, ch 13, § 3, eff July 24, 2003; L 2015, ch 100, § 2, effective September 12, 2015; L 2017, ch 335, § 6, effective November 22, 2017.

Prior Law: Former § 1399–p, add, L 1975, ch 80, § 1; repealed, L 1989, ch 244, § 5, eff Jan 1, 1990.

Editor's Notes Laws 2017, ch 335, § 13, eff Nov 22, 2017, provides:

§ 13. This act shall take effect on the thirtieth day after it shall have become a law; provided, however, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date is authorized and directed to be made and completed on or before such effective date.

Amendment Notes: The 2015 amendment by ch 100, § 2, added 3.

The 2017 amendment by ch 335, § 6, in 1, added "or 'Vaping' or 'No Vaping' signs" and substituted "smoking and vaping are regulated" for "smoking is regulated"; in 2, substituted "smoking and vaping policy" for "smoking policy" and "smoking and vaping are allowed" for "smoking is allowed"; and substituted "smoking and vaping" for "smoking" in 3.

Notes to Decisions

Determination of Commissioner of the Department of Health Services was modified with respect to one pub to find that pub guilty of violating Public Health Law § 1399-p(1), where there was conflicting testimony about whether the required "No Smoking" signs were displayed; the owner testified that one such sign was up over the cash register, but no evidence to the affect was presented. Matter of Patricia Ann Cottage Pub, Inc. v Mermelstein, 36 A.D.3d 816, 830 N.Y.S.2d 184, 2007 N.Y. App. Div. LEXIS 750 (N.Y. App. Div. 2d Dep't 2007).

Clean Indoor Air Act, CLS Pub Health Art 13-E, which establishes comprehensive plan regulating smoking in public areas, does not infringe "right of liberty and privacy" to smoke since regulation of smoking is valid exercise of state's police power; there is no more fundamental right to smoke cigarettes than

there is to ingest illegal drugs or run red light, and it is within province of state to prohibit sale of cigarettes entirely. Fagan v Axelrod, 146 Misc. 2d 286, 550 N.Y.S.2d 552, 1990 N.Y. Misc. LEXIS 1 (N.Y. Sup. Ct. 1990).

Article 78 proceeding was not proper vehicle to challenge constitutionality of Clean Indoor Air Act, CLS Pub Health Art 13-E, which establishes comprehensive plan regulating smoking in public areas; however, proceeding would be converted into declaratory judgment action. Fagan v Axelrod, 146 Misc. 2d 286, 550 N.Y.S.2d 552, 1990 N.Y. Misc. LEXIS 1 (N.Y. Sup. Ct. 1990).

Clean Indoor Air Act, CLS Pub Health Art 13-E, which establishes comprehensive plan regulating smoking in public areas, does not unconstitutionally restrict access of smokers to public places, since it restricts only right to smoke therein. Fagan v Axelrod, 146 Misc. 2d 286, 550 N.Y.S.2d 552, 1990 N.Y. Misc. LEXIS 1 (N.Y. Sup. Ct. 1990).

Even if general "right of privacy" to smoke tobacco exists, Clean Indoor Air Act, CLS Pub Health Art 13-E, which establishes comprehensive plan regulating smoking in public areas, is not violative of such right, since it merely requires smokers to exercise right outdoors or in private. Fagan v Axelrod, 146 Misc. 2d 286, 550 N.Y.S.2d 552, 1990 N.Y. Misc. LEXIS 1 (N.Y. Sup. Ct. 1990).

Classification of smokers and nonsmokers created by Clean Indoor Air Act, CLS Pub Health Art 13-E, which establishes comprehensive plan regulating smoking in public areas, is rationally related to legislative objective of protecting health of nonsmokers, and since statute does not create suspect class or affect fundamental right, it is valid under Equal Protection Clause because rationally based. Fagan v Axelrod, 146 Misc. 2d 286, 550 N.Y.S.2d 552, 1990 N.Y. Misc. LEXIS 1 (N.Y. Sup. Ct. 1990).

Petitioners sufficiently demonstrated standing, in Article 78 proceeding brought to challenge constitutionality of Clean Indoor Air Act, CLS Pub Health Art 13-E, which establishes comprehensive plan regulating smoking in public areas, in alleging that they were citizens and taxpayers of New York who, as regular users of tobacco in public and private places, were prejudiced and adversely affected by statute and its implementation. Fagan v Axelrod, 146 Misc. 2d 286, 550 N.Y.S.2d 552, 1990 N.Y. Misc. LEXIS 1 (N.Y. Sup. Ct. 1990).

In view of weight of scientific evidence showing that secondhand smoke represents significant health hazard to nonsmokers, Clean Indoor Air Act, CLS Pub Health Art 13-E, which establishes comprehensive plan regulating smoking in public areas, represents appropriate response by legislature to need to protect citizens from involuntary exposure to environmental tobacco smoke. Fagan v Axelrod, 146 Misc. 2d 286, 550 N.Y.S.2d 552, 1990 N.Y. Misc. LEXIS 1 (N.Y. Sup. Ct. 1990).

Clean Indoor Air Act, CLS Pub Health Art 13-E, which establishes comprehensive plan regulating smoking in public areas, does not unconstitutionally delegate police power or utilize vague definitions. Fagan v Axelrod, 146 Misc. 2d 286, 550 N.Y.S.2d 552, 1990 N.Y. Misc. LEXIS 1 (N.Y. Sup. Ct. 1990).

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

64 NY Jur 2d Health and Sanitation §§ 104, 106 .

§ 1399-q. Smoking and vaping restrictions inapplicable

This article shall not apply to:

1. Private homes, private residences and private automobiles;

2. A hotel or motel room rented to one or more guests;

3. Retail tobacco businesses;

4. Membership associations; provided, however, that smoking and vaping shall only be allowed in membership associations in which all of the duties with respect to the operation of such association, including, but not limited to, the preparation of food and beverages, the service of food and beverages, reception and secretarial work, and the security services of the membership association are performed by members of such membership association who do not receive compensation of any kind from the membership association or any other entity for the performance of such duties;

5. Cigar bars that, in the calendar year ending December thirty-first, two thousand two, generated ten percent or more of its total annual gross income from the on-site sale of tobacco products and the rental of on-site humidors, not including any sales from vending machines, and is registered with the appropriate enforcement officer, as defined in subdivision one of section thirteen hundred ninety-nine-t of this article. Such registration shall remain in effect for one year and shall be renewable only if: (a) in the preceding calendar year, the cigar bar generated ten percent or more of its total annual gross income from the on-site sale of tobacco products and the rental of on-site humidors, and (b) the cigar bar has not expanded its size or changed its location from its size or location since December thirty-first, two thousand two;

6. Outdoor dining areas of food service establishments with no roof or other ceiling enclosure; provided, however, that smoking and vaping may be permitted in a contiguous area designated for smoking and vaping so long as such area: (a) constitutes no more than twenty-five percent of the outdoor seating capacity of such food service establishment, (b) is at least three feet away from the outdoor area of such food service establishment not designated for smoking and vaping, and (c) is clearly designated with written signage as a smoking and vaping area;

7. Enclosed rooms in food service establishments, bars, catering halls, convention halls, hotel and motel conference rooms, and other such similar facilities during the time such enclosed areas or rooms are being used exclusively for functions where the public is invited for the primary purpose of promoting and sampling tobacco products or electronic cigarettes, and the service of food and drink is incidental to such purpose, provided that the sponsor or organizer gives notice in any promotional material or advertisements that smoking and vaping will not be restricted, and prominently posts notice at the entrance of the facility and has provided notice of such function to the appropriate enforcement officer, as defined in subdivision one of section thirteen hundred ninety-nine-t of this article, at least two weeks prior to such function. The enforcement officer shall keep a record of all tobacco sampling events, and such record shall be made available for public inspection. No such facility shall permit smoking and vaping under this subdivision for more than two days in any calendar year; and

8. Retail electronic cigarette stores, provided however, that such stores may only permit the use of electronic cigarettes.

HISTORY:

Add, L 1989, ch 244, § 5; amd, L 2003, ch 13, § 4, eff July 24, 2003; L 2017, ch 335, § 2, effective November 22, 2017.

Prior Law: Former § 1399–q, add, L 1975, ch 80, § 1; repealed, L 1989, ch 244, § 5, eff Jan 1, 1990.

Editor's Notes Laws 2017, ch 335, § 13, eff Nov 22, 2017, provides:

§ 13. This act shall take effect on the thirtieth day after it shall have become a law; provided, however, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date is authorized and directed to be made and completed on or before such effective date.

Amendment Notes The 2017 amendment by ch 335, § 2, substituted "Smoking and vaping" for "Smoking" in the section heading; substituted "smoking and vaping" for "smoking" throughout 4, 6, and 7; added "or electronic cigarettes" in the first sentence of 7; added 8; and made a related change.

Notes to Decisions

Clean Indoor Air Act, CLS Pub Health Art 13-E, which establishes comprehensive plan regulating smoking in public areas, does not infringe "right of liberty and privacy" to smoke since regulation of smoking is valid exercise of state's police power; there is no more fundamental right to smoke cigarettes than there is to ingest illegal drugs or run red light, and it is within province of state to prohibit sale of cigarettes entirely. Fagan v Axelrod, 146 Misc. 2d 286, 550 N.Y.S.2d 552, 1990 N.Y. Misc. LEXIS 1 (N.Y. Sup. Ct. 1990).

Article 78 proceeding was not proper vehicle to challenge constitutionality of Clean Indoor Air Act, CLS Pub Health Art 13-E, which establishes comprehensive plan regulating smoking in public areas; however, proceeding would be converted into declaratory judgment action. Fagan v Axelrod, 146 Misc. 2d 286, 550 N.Y.S.2d 552, 1990 N.Y. Misc. LEXIS 1 (N.Y. Sup. Ct. 1990).

Clean Indoor Air Act, CLS Pub Health Art 13-E, which establishes comprehensive plan regulating smoking in public areas, does not unconstitutionally restrict access of smokers to public places, since it restricts only right to smoke therein. Fagan v Axelrod, 146 Misc. 2d 286, 550 N.Y.S.2d 552, 1990 N.Y. Misc. LEXIS 1 (N.Y. Sup. Ct. 1990).

Even if general "right of privacy" to smoke tobacco exists, Clean Indoor Air Act, CLS Pub Health Art 13-E, which establishes comprehensive plan regulating smoking in public areas, is not violative of such right, since it merely requires smokers to exercise right outdoors or in private. Fagan v Axelrod, 146 Misc. 2d 286, 550 N.Y.S.2d 552, 1990 N.Y. Misc. LEXIS 1 (N.Y. Sup. Ct. 1990).

Classification of smokers and nonsmokers created by Clean Indoor Air Act, CLS Pub Health Art 13-E, which establishes comprehensive plan regulating smoking in public areas, is rationally related to legislative objective of protecting health of nonsmokers, and since statute does not create suspect class or affect fundamental right, it is valid under Equal Protection Clause because rationally based. Fagan v Axelrod, 146 Misc. 2d 286, 550 N.Y.S.2d 552, 1990 N.Y. Misc. LEXIS 1 (N.Y. Sup. Ct. 1990).

Petitioners sufficiently demonstrated standing, in Article 78 proceeding brought to challenge constitutionality of Clean Indoor Air Act, CLS Pub Health Art 13-E, which establishes comprehensive plan regulating smoking in public areas, in alleging that they were citizens and taxpayers of New York who, as regular users of tobacco in public and private places, were prejudiced and adversely affected by statute and its implementation. Fagan v Axelrod, 146 Misc. 2d 286, 550 N.Y.S.2d 552, 1990 N.Y. Misc. LEXIS 1 (N.Y. Sup. Ct. 1990).

In view of weight of scientific evidence showing that secondhand smoke represents significant health hazard to nonsmokers, Clean Indoor Air Act, CLS Pub Health Art 13-E, which establishes comprehensive plan regulating smoking in public areas, represents appropriate response by legislature to need to protect citizens from involuntary exposure to environmental tobacco smoke. Fagan v Axelrod, 146 Misc. 2d 286, 550 N.Y.S.2d 552, 1990 N.Y. Misc. LEXIS 1 (N.Y. Sup. Ct. 1990).

Clean Indoor Air Act, CLS Pub Health Art 13-E, which establishes comprehensive plan regulating smoking in public areas, does not unconstitutionally delegate police power or utilize vague definitions. Fagan v Axelrod, 146 Misc. 2d 286, 550 N.Y.S.2d 552, 1990 N.Y. Misc. LEXIS 1 (N.Y. Sup. Ct. 1990).

In action by tenant seeking return of her security deposit, landlord was awarded counterclaim damages where tenant's excessive smoking had caused residue to collect on various surfaces of house, creating offensive odor and potential health risk to others who might use premises; while CLS Pub Health article 13-E does not apply to private residences, and landlord did not specifically prohibit smoking inside house as part of lease, tenant had to reimburse landlord for cleaning costs to remedy problems resulting from her failure to use reasonable care to prevent indoor air pollution. McCormick v Moran, 182 Misc. 2d 568, 699 N.Y.S.2d 273, 1999 N.Y. Misc. LEXIS 505 (N.Y. City Ct. 1999).

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

64 NY Jur 2d Health and Sanitation §§ 104, 105 .

§ 1399-r. General provisions

1. Nothing in this article shall be construed to deny the owner, operator or manager of a place covered by this article the right to designate the entire place, or any part thereof, as a nonsmoking and nonvaping area.

2. The provisions of this article shall apply to the legislative, executive and judicial branches of state government and any political subdivision of the state.

3. Smoking and vaping may not be permitted where prohibited by any other law, rule, or regulation of any state agency or any political subdivision of the state. Nothing herein shall be construed to restrict the power of any county, city, town, or village to adopt and enforce additional local law, ordinances, or regulations which comply with at least the minimum applicable standards set forth in this article.

HISTORY:

Add, L 1989, ch 244, § 5, eff Jan 1, 1990; L 2017, ch 335, § 7, effective November 22, 2017.

Editor's Notes Laws 2017, ch 335, § 13, eff Nov 22, 2017, provides:

§ 13. This act shall take effect on the thirtieth day after it shall have become a law; provided, however, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date is authorized and directed to be made and completed on or before such effective date.

Amendment Notes The 2017 amendment by ch 335, § 7, added "and nonvaping" in 1; and substituted "Smoking and vaping" for "Smoking" in the first sentence of 3.

Notes to Decisions

Petition was properly dismissed for failure to exhaust administrative remedies where petitioner sought order compelling Department of Correctional Services and others to comply with smoking ban guidelines at state correctional facility, but failed to avail himself of procedures set forth in CLS Pub Health Art 13-E before commencing proceeding. Alamin v New York State Dep't of Correctional Servs., 241 A.D.2d 586, 660 N.Y.S.2d 746, 1997 N.Y. App. Div. LEXIS 7233 (N.Y. App. Div. 3d Dep't 1997).

Clean Indoor Air Act, CLS Pub Health Art 13-E, which establishes comprehensive plan regulating smoking in public areas, does not infringe "right of liberty and privacy" to smoke since regulation of smoking is valid exercise of state's police power; there is no more fundamental right to smoke cigarettes than there is to ingest illegal drugs or run red light, and it is within province of state to prohibit sale of cigarettes entirely. Fagan v

Axelrod, 146 Misc. 2d 286, 550 N.Y.S.2d 552, 1990 N.Y. Misc. LEXIS 1 (N.Y. Sup. Ct. 1990).

Article 78 proceeding was not proper vehicle to challenge constitutionality of Clean Indoor Air Act, CLS Pub Health Art 13-E, which establishes comprehensive plan regulating smoking in public areas; however, proceeding would be converted into declaratory judgment action. Fagan v Axelrod, 146 Misc. 2d 286, 550 N.Y.S.2d 552, 1990 N.Y. Misc. LEXIS 1 (N.Y. Sup. Ct. 1990).

Clean Indoor Air Act, CLS Pub Health Art 13-E, which establishes comprehensive plan regulating smoking in public areas, does not unconstitutionally restrict access of smokers to public places, since it restricts only right to smoke therein. Fagan v Axelrod, 146 Misc. 2d 286, 550 N.Y.S.2d 552, 1990 N.Y. Misc. LEXIS 1 (N.Y. Sup. Ct. 1990).

Even if general "right of privacy" to smoke tobacco exists, Clean Indoor Air Act, CLS Pub Health Art 13-E, which establishes comprehensive plan regulating smoking in public areas, is not violative of such right, since it merely requires smokers to exercise right outdoors or in private. Fagan v Axelrod, 146 Misc. 2d 286, 550 N.Y.S.2d 552, 1990 N.Y. Misc. LEXIS 1 (N.Y. Sup. Ct. 1990).

Classification of smokers and nonsmokers created by Clean Indoor Air Act, CLS Pub Health Art 13-E, which establishes comprehensive plan regulating smoking in public areas, is rationally related to legislative objective of protecting health of nonsmokers, and since statute does not create suspect class or affect fundamental right, it is valid under Equal Protection Clause because rationally based. Fagan v Axelrod, 146 Misc. 2d 286, 550 N.Y.S.2d 552, 1990 N.Y. Misc. LEXIS 1 (N.Y. Sup. Ct. 1990).

Petitioners sufficiently demonstrated standing, in Article 78 proceeding brought to challenge constitutionality of Clean Indoor Air Act, CLS Pub Health Art 13-E, which establishes comprehensive plan regulating smoking in public areas, in alleging that they were citizens and taxpayers of New York who, as regular users of tobacco in public and private places, were prejudiced and adversely affected by statute and its implementation. Fagan v Axelrod, 146 Misc. 2d 286, 550 N.Y.S.2d 552, 1990 N.Y. Misc. LEXIS 1 (N.Y. Sup. Ct. 1990).

In view of weight of scientific evidence showing that secondhand smoke represents significant health hazard to nonsmokers, Clean Indoor Air Act, CLS Pub Health Art 13-E, which establishes comprehensive plan regulating smoking in public areas, represents appropriate response by legislature to need to protect citizens from involuntary exposure to environmental tobacco smoke. Fagan v Axelrod, 146 Misc. 2d 286, 550 N.Y.S.2d 552, 1990 N.Y. Misc. LEXIS 1 (N.Y. Sup. Ct. 1990).

Clean Indoor Air Act, CLS Pub Health Art 13-E, which establishes comprehensive plan regulating smoking in public areas, does not unconstitutionally delegate police power or utilize vague definitions. Fagan v Axelrod, 146 Misc. 2d 286, 550 N.Y.S.2d 552, 1990 N.Y. Misc. LEXIS 1 (N.Y. Sup. Ct. 1990).

Directive promulgated by county commissioner of department of corrections, prohibiting county jail inmates from smoking and from possessing any smoking materials, and prohibiting sale of smoking products through inmate commissary, was not arbitrary and capricious, did not exceed state and county law, and did not deny inmates equal protection of law. Jarrett v Westchester County Dep't of Health, 169 Misc. 2d 320, 646 N.Y.S.2d 223, 1996 N.Y. Misc. LEXIS 250 (N.Y. Sup. Ct. 1996).

County board of health exceeded its authority as administrative body by enacting ordinance prohibiting smoking in bowling centers, which included significant provisions based on nonhealth-related considerations. Nassau Bowling Proprietors Ass'n v County of Nassau, 965 F. Supp. 376, 1997 U.S. Dist. LEXIS 7970 (E.D.N.Y. 1997).

County board of health exceeded its authority under Pub Health § 1399-r(3) as state administrative agency and violated separation of powers doctrine of New York Constitution in purporting to regulate smoking in public places, where board considered nonhealth factors of social and economic concerns in enacting regulations, and regulation was much more restrictive than state law regulating smoking in public places, rather than merely filling in details of state law. Dutchess/Putnam Rest. & Tavern Ass'n v Putnam County Dep't of Health, 178 F. Supp. 2d 396, 2001 U.S. Dist. LEXIS 21562 (S.D.N.Y. 2001).

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

64 NY Jur 2d Health and Sanitation §§ 104, 105 .

§ 1399-s. Violations

1. It shall be unlawful for any person, firm, limited liability company, corporation or other entity that owns, manages, operates or otherwise controls the use of an area in which smoking and vaping is prohibited or restricted pursuant to section thirteen hundred ninety-nine-o of this article to fail to comply with the provisions of this article. For violations of this subdivision, it shall be an affirmative defense that during the relevant time period actual control of the area was not exercised by the respondent, but rather by a lessee, the sublessee or any other person. To establish an affirmative defense, the respondent shall submit an affidavit and may submit any other relevant proof indicating that the respondent did not exercise actual control of said area during the relevant time period. Such affidavit and other proof shall be mailed by certified mail to the appropriate enforcement officer within thirty days of receipt of such notice of violation.

2. It shall be unlawful for an employer whose place of employment is subject to subdivision one of section thirteen hundred ninety-nine-o of this article to fail to comply with the provisions of such subdivision. For violations of such subdivision, it shall be an affirmative defense that the employer has made good faith efforts to ensure that employees comply with the provisions of this article.

3. It shall be unlawful for any person to smoke or vape in any area where smoking and vaping is prohibited or restricted under section thirteen hundred ninety-nine-o of this article.

HISTORY:

Add, L 1989, ch 244, § 5; amd, L 2003, ch 13, § 5, eff July 24, 2003; L 2017, ch 335, § 8, effective November 22, 2017.

Editor's Notes Laws 2017, ch 335, § 13, eff Nov 22, 2017, provides:

§ 13. This act shall take effect on the thirtieth day after it shall have become a law; provided, however, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date is authorized and directed to be made and completed on or before such effective date.

Amendment Notes The 2017 amendment by ch 335, § 8, added "and vaping" following "smoking" in the first sentence of 1 and in 3; and added "or vape" following "smoke" in 3.

Notes to Decisions

When the language of N.Y. Pub. Health Law §§ 1399-o, 1399-s is taken together, it is clear that in order to avoid liability under N.Y. Pub. Health Law § 1399-o, bar owners who control the premises where illegal smoking occurs must do more than provide notice of a violation to their customers; merely posting signs and informing patrons of the law is insufficient. Matter of Buies Inc. v Morrow, 812 N.Y.S.2d 862, 12 Misc. 3d 541, 2006 N.Y. Misc. LEXIS 767 (N.Y. Sup. Ct. 2006).

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

Law Reviews:

Hermer, Municipal home rule in New York: tobacco control at the local level. 65 Brook. L. Rev. 321.

§ 1399-t. Enforcement

1. For the purpose of this article the term "enforcement officer" shall mean the board of health of a county or part county health district established pursuant to title three of article three of this chapter, or in the absence thereof, an officer of a county designated for such purpose by resolution of the elected county legislature or board of supervisors adopted within sixty days after the effective date of this article. Any such designation shall be filed with the commissioner within thirty days after adoption. If no such designation is made, the county will be deemed to have designated the department as its enforcement officer. Any county that does not designate an enforcement officer during the time period specified above may do so at any time, thereafter, such designation will be effective thirty days after it is filed with the commissioner. The enforcement officer shall have sole jurisdiction to enforce the provisions of this article on a county-wide basis pursuant to rules and regulations promulgated by the commissioner. In a city with a population of more than one million the enforcement officer shall be the department of health and mental hygiene of such city which shall have sole jurisdiction to enforce the provisions of this article in such city.

2. If the enforcement officer determines after a hearing that a violation of this article has occurred, a civil penalty may be imposed by the enforcement officer pursuant to section thirteen hundred ninety-nine-v of this article. When the enforcement officer is the commissioner, the hearing shall be conducted pursuant to the provisions of section twelve-a of this chapter. When the enforcement officer is a board of health or in a city with a population of more than one million, the department of health and mental hygiene, or an officer designated to enforce the provisions of this article, the hearing shall be conducted pursuant to procedures set forth in the county sanitary code, or health code of such city, or in the absence thereof, pursuant to procedures established by the elected county legislature or board of supervisors. No other penalty, fine or sanction may be imposed, provided that nothing herein shall be construed to prohibit an enforcement officer from commencing a proceeding for injunctive relief to compel compliance with this article.

3. Any person who desires to register a complaint under this article may do so with the appropriate enforcement officer.

4. The owner, manager, operator or other person having control of any area subject to the provisions of this article, shall inform, or shall designate an agent who shall be responsible for informing individuals smoking or vaping in an area in which smoking or vaping is not permitted that they are in violation of this article.

5. Any person aggrieved by the decision of an enforcement officer other than the commissioner may appeal to the commissioner to review such decision within thirty days of such decision. The decision of any enforcement officer shall be reviewable pursuant to article seventy-eight of the civil practice law and rules.

6. The enforcement officer, subsequent to any appeal having been finally determined, may bring an action to recover the civil penalty provided in section thirteen hundred ninety-nine-v of this article in any court of competent jurisdiction.

7. An enforcement officer who discovers a retail dealer who or which does not display a retail dealer certificate of license or registration from the department of taxation and finance issued pursuant to section four hundred eighty-a of the tax law shall notify the commissioner of taxation and finance within thirty days of the name and address of any such establishment so that the commissioner of taxation and finance can take appropriate action.

HISTORY:

Add, L 1989, ch 244, § 5, eff Sept 3, 1989; amd, L 1997, ch 433, § 76, eff Oct 1, 1997 (see 1997 note below); L 2003, ch 13, § 6, eff July 24, 2003; L 2017, ch 335, § 9, effective November 22, 2017.

Editor's Notes: Laws 1997, ch 433, § 78(d), eff Aug 20, 1997, provides as follows:

§ 78. This act shall take effect immediately; provided, however, that:

(d) provided, further, that nothing contained herein shall be deemed to affect the application, qualification, expiration, reversion or repeal of any provision of law amended by any section of this act and the provisions of this act shall be applied or qualified or shall expire or revert or be deemed repealed in the same manner, to the same extent and on the same date as the case may be as otherwise provided by law.

Laws 2017, ch 335, § 13, eff Nov 22, 2017, provides:

§ 13. This act shall take effect on the thirtieth day after it shall have become a law; provided, however, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date is authorized and directed to be made and completed on or before such effective date.

Amendment Notes The 2017 amendment by ch 335, § 9, substituted "smoking or vaping" for "smoking" twice in 4.

Notes to Decisions

Petition was properly dismissed for failure to exhaust administrative remedies where petitioner sought order compelling Department of Correctional Services and others to comply with smoking ban guidelines at state correctional facility, but failed to avail himself of procedures set forth in CLS Pub Health Art 13-E before commencing proceeding. Alamin v New York State Dep't of Correctional Servs., 241 A.D.2d 586, 660 N.Y.S.2d 746, 1997 N.Y. App. Div. LEXIS 7233 (N.Y. App. Div. 3d Dep't 1997).

Determination that petitioner's restaurant violated Smoke-Free Air Act (NYC Admin Code tit 17, ch 5) lacked rational basis, where health inspector incorrectly had concluded that upstairs dining area was not in public use and thus excluded it for purposes of calculating proportion of smoking and nonsmoking areas, and hearing examiner did not reject petitioner's assertion that upstairs dining area was sometimes used for public dining, but permitted inspector to exclude upstairs dining area from space calculation because it was in limited or restricted use; there is no statutory exclusion for areas that are available only intermittently for public dining. Bleiburg Restaurant v New York City Dep't of Health, 172 Misc. 2d 495, 658 N.Y.S.2d 574, 1997 N.Y. Misc. LEXIS 239 (N.Y. Sup. Ct. 1997).

Municipality's use of its health inspection authority to enforce municipal and state smoking bans through warrantless inspections of commercial premises did not violate the Fourth Amendment because the commercial establishments affected were considered closely regulated businesses and the applicable health inspection regulations including, N.Y. Pub. Health Law § 1399-

t(1), made clear that the food service establishments' receipt of a city license was granted subject to the licensees' agreement to submit to frequent inspections to secure the food service establishments' compliance with public health-related laws. Players, Inc. v City of New York, 371 F. Supp. 2d 522, 2005 U.S. Dist. LEXIS 13780 (S.D.N.Y. 2005).

Municipality's use of its health inspection authority to enforce municipal and state smoking bans through warrantless inspections of commercial premises did not violate the Fourth Amendment because the commercial establishments affected were considered closely regulated businesses and the applicable health inspection regulations including, N.Y. Pub. Health Law § 1399-t(1), made clear that the food service establishments' receipt of a city license was granted subject to the licensees' agreement to submit to frequent inspections to secure the food service establishments' compliance with public health-related laws. Players, Inc. v City of New York, 371 F. Supp. 2d 522, 2005 U.S. Dist. LEXIS 13780 (S.D.N.Y. 2005).

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:
64 NY Jur 2d Health and Sanitation §§ 101, 175 .

Law Reviews:
Hermer, Municipal home rule in New York: tobacco control at the local level. 65 Brook. L. Rev. 321.

§ 1399-u. Waiver

1. The enforcement officer may grant a waiver from the application of a specific provision of this article, provided that prior to the granting of any such waiver the applicant for a waiver shall establish that:

(a) compliance with a specific provision of this article would cause undue financial hardship; or

(b) other factors exist which would render compliance unreasonable.

2. Every waiver granted shall be subject to such conditions or restrictions as may be necessary to minimize the adverse effects of the waiver upon persons subject to an involuntary exposure to second-hand smoke or vaping and to ensure that the waiver is consistent with the general purpose of this article.

HISTORY:
Add, L 1989, ch 244, § 5; amd, L 2003, ch 13, § 7, eff July 24, 2003; L 2017, ch 335, § 10, effective November 22, 2017.

Editor's Notes Laws 2017, ch 335, § 13, eff Nov 22, 2017, provides:

§ 13. This act shall take effect on the thirtieth day after it shall have become a law; provided, however, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date is authorized and directed to be made and completed on or before such effective date.

Amendment Notes The 2017 amendment by ch 335, § 10, substituted "smoking or vaping" for "smoking" in 2.

§ 1399-v. Penalties

The commissioner may impose a civil penalty for a violation of this article in an amount not to exceed that set forth in subdivision one of section twelve of this chapter. Any other enforcement officer may impose a civil penalty for a violation of this article in an amount not to exceed that set forth in paragraph f of subdivision one of section three hundred nine of this chapter.

HISTORY:
Add, L 1989, ch 244, § 5, eff Jan 1, 1990.

Notes to Decisions

Penalties imposed for violations of Clean Indoor Air Act, CLS Pub Health Art 13-E, which establishes comprehensive plan regulating smoking in public areas, are not unreasonable, disproportionate to offense, shocking or bizarre, being simply same penalties long prescribed elsewhere in Public Health Law. Fagan v Axelrod, 146 Misc. 2d 286, 550 N.Y.S.2d 552, 1990 N.Y. Misc. LEXIS 1 (N.Y. Sup. Ct. 1990).

Penalties imposed for violations of Clean Indoor Air Act, CLS Pub Health Art 13-E, which establishes comprehensive plan regulating smoking in public areas, are not unreasonable, disproportionate to offense, shocking or bizarre, being simply same penalties long prescribed elsewhere in Public Health Law. Fagan v Axelrod, 146 Misc. 2d 286, 550 N.Y.S.2d 552, 1990 N.Y. Misc. LEXIS 1 (N.Y. Sup. Ct. 1990).

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:
64 NY Jur 2d Health and Sanitation § 175 .

ARTICLE 21 Control of Acute Communicable Diseases

Title III. Human Immunodeficiency Virus

Section
2130. AIDS and HIV infection; duty to report
2131. Municipal health commissioner; duty to report
2132. Reporting of HIV infection after death
2133. Contact tracing of cases of AIDS, HIV related illness or HIV infection
2134. Disclosure of medical information
2135. Confidentiality
2136. Liability
2137. Domestic violence recognition
2138. Anonymous testing
2139. Rules and regulations

HISTORY:
Add, L 1953, ch 879, § 1, eff June 1, 1954.

TITLE III Human Immunodeficiency Virus

HISTORY:
Add, L 1998, ch 163, § 1, eff Jan 3, 1999.

§ 2130. AIDS and HIV infection; duty to report

1. Every physician or other person authorized by law to order diagnostic tests or make a medical diagnosis, or any laboratory performing such tests shall immediately (a) upon determination that a person is infected with human immunodeficiency virus (HIV), (b) upon diagnosis that a person is afflicted with the disease known as acquired immune deficiency syndrome (AIDS), (c) upon diagnosis that a person is afflicted with HIV related illness, and (d) upon periodic monitoring of HIV infection by any laboratory tests report such case or data to the commissioner.

2. The commissioner shall promptly forward such report to the health commissioner of the municipality where such disease, illness or infection occurred. When cases of such disease, illness or infection occur in a municipality not having a health commissioner, such reports shall be forwarded directly to the district health officer.

3. Such report shall contain such information concerning the case as shall be required by the

commissioner. Such report shall include information identifying the protected individual as well as the names, if available, of any contacts of the protected individual, as defined in subdivision ten of section twenty-seven hundred eighty of this chapter, known to the physician or provided to the physician by the infected person.

HISTORY:

Add, L 1998, ch 163, § 1, eff Jan 3, 1999; amd, L 2010, ch 308, § 5, eff Sept 1, 2010 (see 2010 note below).

Prior Law: Former § 2130, add, L 1953, ch 879, § 1, with substance derived from former § 310; repealed, L 1968, ch 1094, § 2, eff Jan 1, 1969.

Editor's Notes: Laws 2010, ch 308, § 10, eff Sept 1, 2010, provides as follows:

§ 10. This act shall take effect September 1, 2010; provided, however, that the commissioner of health is authorized to adopt rules and regulations necessary to implement this act prior to such effective date.

Amendment Notes: 2010. Chapter 308, § 5 amended:

Sub 1 by deleting at fig 1, 3 and 5 "initial", at figs 2 and 4 "or" and adding the matter in italics.

RESEARCH REFERENCES AND PRACTICE AIDS

Federal Aspects:

Ricky Ray hemophilia relief fund act of 1998, P. L. 105-369.

Jurisprudences:

64 NY Jur 2d Health and Sanitation § 76 .

Law Reviews:

Gostin, Burns, Lazzarini, The law and the public's health: a study of infectious disease law in the United States. 99 Colum. L. Rev. 58.

§ 2131. Municipal health commissioner; duty to report

If any contact resides in a county or district other than the one where the protected individual is found, the health officer receiving the report shall refer the contact report to the health officer in the county or district where the contact resides, who shall then make a good faith effort to notify such contact and otherwise comply with the provisions of section twenty-one hundred thirty-three of this title.

HISTORY:

Add, L 1998, ch 163, § 1, eff Jan 3, 1999.

Prior Law: Former § 2131, add, L 1953, ch 879, § 1, with substance derived from former § 310; repealed, L 1968, ch 1094, § 2, eff Jan 1, 1969.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

64 NY Jur 2d Health and Sanitation § 76 .

Law Reviews:

Gostin, Burns, Lazzarini, The law and the public's health: a study of infectious disease law in the United States. 99 Colum. L. Rev. 58.

§ 2132. Reporting of HIV infection after death

If a coroner, pathologist, medical examiner, or other person qualified to conduct an examination of a deceased person discovers that at the time of death the individual was afflicted with AIDS, HIV related illness or HIV infection, he or she shall report the case promptly to the commissioner according to the manner provided in this title as if the diagnosis had been established prior to death.

HISTORY:

Add, L 1998, ch 163, § 1, eff Jan 3, 1999.

Prior Law: Former § 2132, add, L 1953, ch 879, § l, with substance derived from former § 311; amd, L 1966, ch 162; repealed, L 1968, ch 1094, § 2, eff Jan 1, 1969.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

64 NY Jur 2d Health and Sanitation § 76 .

Law Reviews:

Gostin, Burns, Lazzarini, The law and the public's health: a study of infectious disease law in the United States. 99 Colum. L. Rev. 58.

§ 2133. Contact tracing of cases of AIDS, HIV related illness or HIV infection

1. Every municipal health commissioner or the department's district health officer, upon determination that such reported case or, any other known case of HIV infection merits contact tracing in order to protect the public health, shall personally or through their qualified representatives notify the known contacts of the protected individual. Such contact tracing shall be done consistent with protocols developed pursuant to section twenty-one hundred thirty-seven of this title.

2. Such contact shall also be informed of (a) the nature of HIV, (b) the known routes of transmission of the virus, (c) as circumstances may require, the risks of prenatal and perinatal transmission, (d) actions he or she can take to limit further transmission of the virus, (e) other facilities or community based organizations which are accessible to the person that provide counseling, medical care and treatment, further information or other appropriate services for persons infected with HIV.

3. In notifying any contact identified in the course of any investigation conducted pursuant to this section, the physician or public health officer shall not disclose the identity of the protected individual or the identify [identity]* of any other contact.

4. A physician or public health officer making a notification to a contact pursuant to this section shall make such notification in person except where circumstances reasonably prevent doing so.

HISTORY:

Add, L 1998, ch 163, § 1, eff Jan 3, 1999.

Prior Law: Former § 2133, add, L 1953, ch 879, § 1; repealed, L 1954, ch 318, ch 318, § 1, eff June 1, 1954.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

Causes of Action:

Cause of Action to Recover Damages for Transmission of AIDS Through Negligence, Misrepresentation or Nondisclosure of Infected Status, 39 COA2d 211.

§ 2134. Disclosure of medical information

Disclosure of medical information obtained in accordance with this title, including a diagnosis of HIV infection, may be made only to (a) the protected

*The bracketed word has been inserted by the Publisher.

individual, (b) the municipal health commissioner or district health officer if such commissioner or officer is not the examining physician, and (c) without specifically revealing the identity of the protected individual, contacts as defined pursuant to subdivision ten of section twenty-seven hundred eighty of this chapter.

HISTORY:
Add, L 1998, ch 163, § 1, eff Jan 3, 1999.

Prior Law: Former § 2134, add, L 1953, ch 879, § 1, with substance derived from former § 25; repealed, L 1968, ch 1094, § 2, eff Jan 1, 1969.

RESEARCH REFERENCES AND PRACTICE AIDS

Federal Aspects:
Ricky Ray hemophilia relief fund act of 1998, P. L. 105-369.

Jurisprudences:
64 NY Jur 2d Health and Sanitation § 76 .

§ 2135. Confidentiality

All reports or information secured by the department, municipal health commissioner or district health officer under the provisions of this title shall be confidential except: (a) in so far as is necessary to carry out the provisions of this title; (b) when used in the aggregate, without patient specific identifying information, in programs approved by the commissioner for the improvement of the quality of medical care provided to persons with HIV/AIDS; (c) when used within the state or local health department by public health disease programs to assess co-morbidity or completeness of reporting and to direct program needs, in which case patient specific identifying information shall not be disclosed outside the state or local health department; or (d) when used for purposes of patient linkage and retention in care, patient specific identified information may be shared between local and state health departments and health care providers currently treating the patient as approved by the commissioner.

HISTORY:
Add, L 1998, ch 163, § 1, eff Jan 3, 1999; amd, L 2010, ch 308, § 3, eff Sept 1, 2010 (see 2010 note below); L 2014, ch 60, § 3 (Part A), effective March 31, 2014.

Editor's Notes: Laws 2010, ch 308, § 10, eff Sept 1, 2010, provides as follows:

§ 10. This act shall take effect September 1, 2010; provided, however, that the commissioner of health is authorized to adopt rules and regulations necessary to implement this act prior to such effective date.

Amendment Notes: The 2014 amendment by ch 60, (Part A) § 3 added (d); and made a related change.

2010. Chapter 308, § 3 amended:
By adding the matter in italics.

RESEARCH REFERENCES AND PRACTICE AIDS

Federal Aspects:
Ricky Ray hemophilia relief fund act of 1998, P. L. 105-369.

Jurisprudences:
64 NY Jur 2d Health and Sanitation § 76 .

§ 2136. Liability

1. Good faith reporting or disclosure pursuant to this title shall not constitute libel or slander or a violation of the right of privacy or privileged communication.

2. Any person who in good faith complies with this title shall be immune from civil and criminal liability for any action taken in compliance with its provisions.

3. No criminal or civil liability shall arise against any protected individual solely due to his or her failure to cooperate in contact tracing conducted pursuant to section twenty-one hundred thirty-three of this title.

HISTORY:
Add, L 1998, ch 163, § 1, eff Jan 3, 1999.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

Causes of Action:
Cause of Action to Recover Damages for Transmission of AIDS Through Negligence, Misrepresentation or Nondisclosure of Infected Status, 39 COA2d 211.

§ 2137. Domestic violence recognition

The department shall, in consultation with the office for the prevention of domestic violence and statewide organizations and community based organizations, develop a protocol for the identification and screening of victims of domestic violence who may either be a protected individual or a contact as used in this title.

HISTORY:
Add, L 1998, ch 163, § 1, eff Jan 3, 1999.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

Causes of Action:
Cause of Action to Recover Damages for Transmission of AIDS Through Negligence, Misrepresentation or Nondisclosure of Infected Status, 39 COA2d 211.

§ 2138. Anonymous testing

Nothing in this article shall be interpreted to eliminate the anonymous testing option provided for in section twenty seven [twenty-seven]* hundred eighty-one of this chapter.

HISTORY:
Add, L 1998, ch 163, § 1, eff Jan 3, 1999.

§ 2139. Rules and regulations

The commissioner shall promulgate such rules and regulations as shall be necessary and proper to effectuate the purposes of this title.

HISTORY:
Add, L 1998, ch 163, § 1, eff Jan 3, 1999.

ARTICLE 27-F Hiv and AIDS Related Information

Section
2780. Definitions
2781. HIV related testing
2781-a. Required offering of HIV related testing
2782. Confidentiality and disclosure

*The bracketed word has been inserted by the Publisher.

2783. Penalties; immunities
2784. Applicability to insurance institutions and insurance support organizations
2785. Court authorization for disclosure of confidential HIV related information
2785-a. Court order for HIV related testing in certain cases
2786. Rules and regulations; forms; report
2787. Separability

HISTORY:
Add, L 1988, ch 584, § 2, eff Feb 1, 1989.

§ 2780. Definitions

As used in this article, the following terms shall have the following meanings:

1. "AIDS" means acquired immune deficiency syndrome, as may be defined from time to time by the centers for disease control of the United States public health service.

2. "HIV infection" means infection with the human immunodeficiency virus or any other related virus identified as a probable causative agent of AIDS.

3. "HIV related illness" means any illness that may result from or may be associated with HIV infection.

4. "HIV related test or HIV related testing" means any laboratory test, tests or series of tests approved for the diagnosis of HIV.

4-a. "Rapid HIV test or testing" means any laboratory screening test or tests approved for detecting antibodies to HIV, that produce results in sixty minutes or less, and encompasses a confirmatory HIV related test if the screening test is reactive.

5. "Capacity to consent" means an individual's ability, determined without regard to the individual's age, to understand and appreciate the nature and consequences of a proposed health care service, treatment, or procedure, or of a proposed disclosure of confidential HIV related information, as the case may be, and to make an informed decision concerning the service, treatment, procedure or disclosure.

6. "Protected individual" means a person who is the subject of an HIV related test or who has been diagnosed as having HIV infection, AIDS or HIV related illness.

7. "Confidential HIV related information" means any information, in the possession of a person who provides one or more health or social services or who obtains the information pursuant to a release of confidential HIV related information, concerning whether an individual has been the subject of an HIV related test, or has HIV infection, HIV related illness or AIDS, or information which identifies or reasonably could identify an individual as having one or more of such conditions, including information pertaining to such individual's contacts.

8. "Health or social service" means any public or private care, treatment, clinical laboratory test, counseling or educational service for adults or children, and acute, chronic, custodial, residential, outpatient, home or other health care provided pursuant to this chapter or the social services law; public assistance or care as defined in article one of the social services law; employment-related services, housing services, foster care, shelter, protective services, day care, or preventive services provided pursuant to the social services law; services for the mentally disabled as defined in article one of the mental hygiene law; probation services, provided pursuant to articles twelve and twelve-A of the executive law; parole services, provided pursuant to article eight of the correction law; corrections and community supervision, provided pursuant to the correction law; detention and rehabilitative services provided pursuant to article nineteen-G of the executive law; and the activities of the health care worker HIV/HBV advisory panel pursuant to article twenty-seven-DD of this chapter.

9. "Release of confidential HIV related information" means a written authorization for disclosure of confidential HIV related information which is signed by the protected individual, or if the protected individual lacks capacity to consent, a person authorized pursuant to law to consent to health care for the individual. Such release shall be dated and shall specify to whom disclosure is authorized, the purpose for such disclosure and the time period during which the release is to be effective. A general authorization for the release of medical or other information shall not be construed as a release of confidential HIV related information, unless such authorization specifically indicates its dual purpose as a general authorization and an authorization for the release of confidential HIV related information and complies with the requirements of this subdivision.

10. "Contact" means an identified spouse or sex partner of the protected individual, a person identified as having shared hypodermic needles or syringes with the protected individual or a person who the protected individual may have exposed to HIV under circumstances that present a risk of transmission of HIV, as determined by the commissioner.

11. "Person" includes any natural person, partnership, association, joint venture, trust, public or private corporation, or state or local government agency.

12. "Health facility" means a hospital as defined in section two thousand eight hundred one of this chapter, blood bank, blood center, sperm bank, organ or tissue bank, clinical laboratory, or facility providing care or treatment to persons with a mental disability as defined in article one of the mental hygiene law.

13. "Health care provider" means any physician, nurse, provider of services for the mentally disabled as defined in article one of the mental hygiene law, or other person involved in providing medical, nursing, counseling, or other health care or mental health service, including those associated with, or under contract to, a health maintenance organization or medical services plan.

14. "Child" means any protected individual actually or apparently under eighteen years of age.

15. "Authorized agency" means any agency defined by section three hundred seventy-one of the social services law and, for the purposes of this article, shall include such corporations incorporated or organized under the laws of the state as may be specifically authorized by their certificates of incorporation to receive children for the purposes of adoption or foster care.

16. "Insurance institution" means any corporation, association, partnership, reciprocal exchange, interinsurer, fraternal benefits society, agent, broker or other entity including, but not limited to, any health maintenance organization, medical service plan, or hospital plan which: (a) is engaged in the business of insurance; (b) provides health services coverage plans; or (c) provides benefits under, administers, or provides services for, an employee welfare benefit plan as defined in 29 U.S.C. 1002(1).

17. "Insurance support organization" means any person who regularly engages, in whole or in part, in the practice of assembling or collecting information about natural persons for the primary purpose of providing the information to an insurance institution for insurance transactions, including: (a) the furnishing of consumer reports or investigative consumer reports to an insurance instititution [institution][*] for use in connection with an insurance transaction; or (b) the collection of personal information from insurance institutions or other insurance support organizations for the purpose of detecting or preventing fraud, material misrepresentation, or material non-disclosure in connection with insurance underwriting or insurance claim activity. The following persons shall not be considered "insurance-support organizations" for the purposes of this article: government institutions, insurance institutions, health facilities and health care providers.

HISTORY:

Add, L 1988, ch 584, § 2, eff Feb 1, 1989 (see 1988 note below); amd, L 1990, ch 592, § 1, eff July 18, 1990; L 1991, ch 193, § 2; L 1992, ch 786, § 4, eff Feb 1, 1993 (see 1992 note below); L 1998, ch 163, § 2, eff Jan 3, 1999; L 2010, ch 308, § 4, eff Sept 1, 2010 (see 2010 note below); L 2011, ch 62, § 129 (Part C, Subpart B), eff March 31, 2011.

Editor's Notes: Laws 1988, ch 584, § 6, eff Feb 1, 1989, provides as follows:

§ 6. This act shall take effect on February first, nineteen hundred eighty-nine; provided, however, that any state or local government entity or official, which or who is authorized under this act to promulgate rules or regulations or take other actions necessary to enforce or implement the provisions of this act, may adopt, amend, suspend or repeal any such rules or regulations and take such other actions prior to and in preparation for the timely implementation of this act on its effective date; provided further, however, that such rules, regulations and other actions shall not have legal effect until the effective date of this act.

Laws 1992, ch 786, § 10, eff Feb 1, 1993, provides as follows:

§ 10. This act shall take effect February 1, 1993, provided, however, that the commissioners of health and education may immediately take such steps as are necessary in order to ensure that this act is fully implemented on such effective date.

Laws 2010, ch 308, § 10, eff Sept 1, 2010, provides as follows:

§ 10. This act shall take effect September 1, 2010; provided, however, that the commissioner of health is authorized to adopt rules and regulations necessary to implement this act prior to such effective date.

Amendment Notes: 2011. Chapter 62, § 129 (Part C, Subpart B) amended:

Sub 8 by deleting at fig 1 "twelve-B of the executive law", at fig 2 "correctional services" and adding the matter in italics.

2010. Chapter 308, § 4 amended:

Sub 4 by deleting at fig 1 "for any virus, antibody, antigen or etiologic agent whatsoever thought to cause or to indicate the presence of AIDS" and adding the matter in italics.

By adding sub 4-a.

Notes to Decisions

Requiring client of Division of AIDS Services Income Support (DASIS) who suffered from clinical symptomatic HIV to submit to Eligibility Verification Review (EVR) investigation after completing his application and submitting all necessary documents constituted additional eligibility requirement which contravened NYC Admin Code § 21-128(a); NYC Local Law No. 49 mandates that DASIS staff, not EVR investigators, must ensure access to benefits and services, including establishing eligibility and elements required to maintain eligibility. Hernandez v Barrios-Paoli, 93 N.Y.2d 781, 698 N.Y.S.2d 590, 720 N.E.2d 866, 1999 N.Y. LEXIS 3430 (N.Y. 1999).

In action against decedent's estate arising out of decedent's alleged wrongful transmission of AIDS virus to plaintiff, cause of action for alleged violation of CLS Pub Health § 2307 (which punishes "any person who, knowing himself to be infected with an infectious venereal disease, has sexual intercourse with another") was properly dismissed, even if decedent knew that he was HIV positive when he had sex with plaintiff; CLS Pub Health Art 27-F, in providing separate statutory scheme for HIV-related testing, clearly excludes HIV infection from category of "venereal disease." Plaza v Estate of Wisser, 211 A.D.2d 111, 626 N.Y.S.2d 446, 1995 N.Y. App. Div. LEXIS 4569 (N.Y. App. Div. 1st Dep't 1995).

Treating physician breached her duty under CLS Pub Health Art 27-F not to disclose confidential HIV-related records by releasing patient's medical records, including confidential information that he had tested positive for HIV, to Pennsylvania Workers' Compensation Board pursuant to subpoena, although workers' compensation system is "insurance institution" to which disclosure of otherwise confidential HIV-related information may be made under CLS Pub Health § 2780(16), since patient's "medical authorizations" accompanying subpoena, being general in nature, were insufficient under CLS Pub Health §§ 2780(9) and 2782(1)(j) to serve as waiver authorizing specific release of confidential HIV-related information. Doe v Roe, 155 Misc. 2d 392, 588 N.Y.S.2d 236, 1992 N.Y. Misc. LEXIS 407 (N.Y. Sup. Ct. 1992), modified, aff'd, 190 A.D.2d 463, 599 N.Y.S.2d 350, 1993 N.Y. App. Div. LEXIS 5673 (N.Y. App. Div. 4th Dep't 1993).

Claimant inmate failed to establish that the State violated N.Y. Pub. Health Law art. 2F by disclosing his HIV-related information; that a prison nurse advised security staff, based on her interview with claimant, that he had sexual contacts with five other inmates in violation of prison regulations was not a release of information that reasonably could identify claimant's HIV status. D.H. v State of New York, 54 Misc. 3d 390, 41 N.Y.S.3d 356, 2015 N.Y. Misc. LEXIS 5067 (N.Y. Ct. Cl. 2015), aff'd, 144 A.D.3d 1559, 40 N.Y.S.3d 323, 2016 N.Y. App. Div. LEXIS 7386 (N.Y. App. Div. 4th Dep't 2016).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Definitions, § 2801.

Definitions, CLS Soc Serv § 371.

Federal Aspects:

Ricky Ray hemophilia relief fund act of 1998, P. L. 105-369.

[*]The bracketed word has been inserted by the Publisher.

Jurisprudences:
64 NY Jur 2d Health and Sanitation §§ 76—78, 82, 84.

Law Reviews:
Murtha, Underutilized weapon against AIDS-the workplace: a strategic approach. 10 Pace L. Rev. 45.

Annotations:
AIDS infection as affecting right to attend public school. 60 ALR4th 15.

Texts: Liddle & Marino, Labor and Employment in New York (Michie) pp 16-5.4.
1 New York Trial Guide (Matthew Bender) § 7.23.

§ 2781. HIV related testing

1. Except as provided in section three thousand one hundred twenty-one of the civil practice law and rules, or unless otherwise specifically authorized or required by a state or federal law, no person shall order the performance of an HIV related test without first, at a minimum, orally advising the protected individual, or, when the protected individual lacks capacity to consent, a person authorized to consent to health care for such individual, that an HIV-related test is being performed, or over the objection of such individual or authorized persons. Such advisement and objection, when applicable shall be noted in the individual's record.

2. A person ordering the performance of an HIV related test shall provide either directly or through a representative to the subject of an HIV related test or, if the subject lacks capacity to consent, to a person authorized pursuant to law to consent to health care for the subject, an explanation that:

(a) HIV causes AIDS and can be transmitted through sexual activities and needle-sharing, by pregnant women to their fetuses, and through breastfeeding infants;

(b) there is treatment for HIV that can help an individual stay healthy;

(c) individuals with HIV or AIDS can adopt safe practices to protect uninfected and infected people in their lives from becoming infected or multiply infected with HIV;

(d) testing is voluntary and can be done anonymously at a public testing center;

(e) the law protects the confidentiality of HIV related test results;

(f) the law prohibits discrimination based on an individual's HIV status and services are available to help with such consequences; and

(g) the law requires that an individual be advised before an HIV-related test is performed, and that no test shall be performed over his or her objection.

Protocols shall be in place to ensure compliance with this section.

2-a. [Repealed]

3. [None]

4. A person authorized pursuant to law to order the performance of an HIV related test shall provide directly or through a representative to the person seeking such test, an opportunity to remain anonymous through use of a coded system with no linking of individual identity to the test request or results. A health care provider who is not authorized by the commissioner to provide HIV related tests on an anonymous basis shall refer a person who requests an anonymous test to a test site which does provide anonymous testing. The provisions of this subdivision shall not apply to a health care provider ordering the performance of an HIV related test on an individual proposed for insurance coverage.

5. At the time of communicating the test result to the subject of the test, a person ordering the performance of an HIV related test shall, directly or through a representative:

(a) in the case of a test indicating evidence of HIV infection, provide the subject of the test or, if the subject lacks capacity to consent, the person authorized pursuant to law to consent to health care for the subject with counseling or referrals for counseling: (i) for coping with the emotional consequences of learning the result; (ii) regarding the discrimination problems that disclosure of the result could cause; (iii) for behavior change to prevent transmission or contraction of HIV infection; (iv) to inform such person of available medical treatments; and (v) regarding the need to notify his or her contacts; and

(b) in the case of a test not indicating evidence of HIV infection, provide (in a manner which may consist of oral or written reference to information previously provided) the subject of the test, or if the subject lacks capacity to consent, the person authorized pursuant to law to consent to health care for the subject, with information concerning the risks of participating in high risk sexual or needle-sharing behavior.

5-a. With the consent of the subject of a test indicating evidence of HIV infection or, if the subject lacks capacity to consent, with the consent of the person authorized pursuant to law to consent to health care for the subject, the person who ordered the performance of the HIV related test, or such person's representative, shall provide or arrange with a health care provider for an appointment for follow-up medical care for HIV for such subject.

6. The provisions of this section shall not apply to the performance of an HIV related test:

(a) by a health care provider or health facility in relation to the procuring, processing, distributing or use of a human body or a human body part, including organs, tissues, eyes, bones, arteries, blood, semen, or other body fluids, for use in medical research or therapy, or for transplantation to individuals provided, however, that where the test results are communicated to the subject, post-test counseling, as described in subdivision five of this section, shall nonetheless be required; or

(b) for the purpose of research if the testing is performed in a manner by which the identity of the test subject is not known and may not be retrieved by the researcher; or

(c) on a deceased person, when such test is conducted to determine the cause of death or for epidemiological purposes; or

(d) conducted pursuant to section twenty-five hundred-f of this chapter; or

(e) in situations involving occupational exposures which create a significant risk of contracting or transmitting HIV infection, as defined in regulations of the department and pursuant to protocols adopted by the department,

(i) provided that:

(A) the person who is the source of the occupational exposure is deceased, comatose or is determined by his or her attending health care professional to lack mental capacity to consent to an HIV related test and is not reasonably expected to recover in time for the exposed person to receive appropriate medical treatment, as determined by the exposed person's attending health care professional who would order or provide such treatment;

(B) there is no person available or reasonably likely to become available who has the legal authority to consent to the HIV related test on behalf of the source person in time for the exposed person to receive appropriate medical treatment; and

(C) the exposed person will benefit medically by knowing the source person's HIV test results, as determined by the exposed person's health care professional and documented in the exposed person's medical record;

(ii) in which case

(A) a provider shall order an anonymous HIV test of the source person; and

(B) the results of such anonymous test, but not the identity of the source person, shall be disclosed only to the attending health care professional of the exposed person solely for the purpose of assisting the exposed person in making appropriate decisions regarding post-exposure medical treatment; and

(C) the results of the test shall not be disclosed to the source person or placed in the source person's medical record.

7. In the event that an HIV related test is ordered by a physician or certified nurse practitioner pursuant to the provisions of the education law providing for non-patient specific regimens, then for the purposes of this section the individual administering the test shall be deemed to be the individual ordering the test.

HISTORY:

Add, L 1988, ch 584, § 2, eff Feb 1, 1989 (see 1988 note under § 2780); amd, L 1996, ch 220, § 2, eff June 26, 1996; L 2005, ch 429, § 1, eff Aug 2, 2005; L 2010, ch 308, § 1, eff Sept 1, 2010 (see 2010 note below); L 2014, ch 60, § 2 (Part A), effective March 31, 2014; L 2015, ch 57, § 1 (Part I), effective April 13, 2015; L 2016, ch 502, § 1, effective November 28, 2016.

Editor's Notes: Laws 2010, ch 308, § 10, eff Sept 1, 2010, provides as follows:

§ 10. This act shall take effect September 1, 2010; provided, however, that the commissioner of health is authorized to adopt rules and regulations necessary to implement this act prior to such effective date.

Amendment Notes: 2010. Chapter 308, § 1 amended:

Sub 1 by deleting at fig 1 "receiving", at fig 2 "A physician or other person authorized pursuant to law to order the performance of an HIV related test shall certify, in the order for the performance of an HIV related test, that informed consent required by this section has been received prior to ordering such test by a laboratory or other facility." and adding the matter in italics.

By designating former sub 2, opening par as entire par 2 and deleting sub 2, pars (a)–(c).

Sub 2 by deleting at fig 1 "Informed", at fig 2 "an", at fig 3 "text", at fig 4 "which includes at least the follows:" and adding the matter in italics.

By adding subs 2-a, 2-b and 2-c.

By designating entire sub 3 as sub 3, opening par and adding sub 3, pars (a)–(g) and sub 3, closing par.

Sub 3, opening par by deleting at fig 1 "a", at fig 2 "of the nature of AIDS and HIV related illness, information about discrimination problems that disclosure of the test result could cause and legal protections against such discrimination, and information about behavior known to pose risks for transmission and contraction of HIV infection." and adding the matter in italics.

Sub 4 by adding the matter in italics.

sBy designating entire sub 5 as sub 5, opening par and sub 5, par (a) and adding sub 5, par (b).

Sub 5, opening par by adding the matter in italics.

Sub 5, par (a) by deleting at fig 1 "(a)", at fig 2 "(b)", at fig 3 "(c)", at fig 4 "(d)", at fig 5 "(e)", at fig 6 "test subject's" and adding the matter in italics.

By adding sub 5-a.

Sub 6, par (c) by deleting at fig 1 a semi-colon and adding the matter in italics.

Sub 6, par (d) by deleting a period and adding the matter in italics.

By adding sub 6, par (e).

The 2014 amendment by ch 60, (Part A) § 2, in 1, deleted "the written or, where authorized by this subdivision, oral" following "received" in the first sentence, deleted the former second sentence, which read: "When the test being ordered is a rapid HIV test, such informed consent may be obtained orally and shall be documented in the subject of the test's medical record by the person ordering the performance of the test" and added the second sentence; deleted former 2 and 2-a; redesignated and revised former 2-b and 2-c as 2 and 2-a; deleted "Prior to the execution of written, or obtaining and documenting oral, informed consent" at the beginning of the introductory language of 3; in 3(g), added "related" preceding "test" and deleted "or expires by its terms" at the end; deleted "and to provide written, informed consent or authorize documentation of oral informed consent" following "anonymous" in the first sentence of 4; and made related and stylistic changes.

The 2015 amendment by ch 57, § 1 (Part I), repealed 2-a, which read: "The provisions of this section regarding informed consent shall not apply to tests performed in a facility operated under the correction law. For tests conducted in a facility under the correction law, individual consent for HIV related testing must be in writing."

The 2016 amendment by ch 502, § 1, rewrote 1, which formerly read: "Except as provided in section three thousand one hundred twenty-one of the civil practice law and rules, or unless otherwise specifically authorized or required by a state or federal law, no person shall order the performance of an HIV related test without first having received informed consent of the subject of the test who has capacity to consent or, when the subject lacks capacity to consent, of a person authorized pursuant to law to consent to health care for such individual. In order for there to be informed consent, the person ordering the test shall, prior to obtaining informed consent, at a minimum advise the protected individual that an HIV-related test is being performed"; deleted former 2; redesignated former 3 as 2; and rewrote 2(g), which formerly read: "the law allows an individual's informed consent for HIV related testing to be valid for such testing until such consent is revoked by the subject of the HIV related test."

Notes to Decisions

Family Court properly denied law guardian's motion to compel respondent, man with whom child was living, to submit blood sample for HIV-related blood test, since proof that respondent

was infected with HIV was not in any way probative of whether he perpetrated particular acts of sodomy and sexual abuse charged; only way to determine if child had been infected would be to test child himself, with result, if positive, providing some evidence that he was abused, thus tending to establish allegations of petition to much greater degree than would test of respondent, and possibly also providing probable cause, coupled with remainder of allegations of petition, for testing respondent to determine if he was possible source of child's infection. In re Michael WW., 203 A.D.2d 763, 611 N.Y.S.2d 47, 1994 N.Y. App. Div. LEXIS 4091 (N.Y. App. Div. 3d Dep't 1994).

Defendant in rape prosecution, who told complainant that he had AIDS, would be ordered to provide blood samples as nontestimonial evidence under CLS CPL § 240.40(2)(b)(v), notwithstanding contention that such testing was prohibited by CLS Pub Health § 2781, since defendant himself placed his physical condition in issue, taking of blood sample would be done within constitutional limitations, and People's request was not detrimental to defendant's health or violative of his religious beliefs. People v Durham, 146 Misc. 2d 913, 553 N.Y.S.2d 944, 1990 N.Y. Misc. LEXIS 107 (N.Y. Sup. Ct. 1990).

Law guardian for 8-year-old child was not entitled to order pursuant to CLS Family Ct Act § 1038-a for compulsory HIV test of respondent, notwithstanding child's fear that he had AIDS because respondent anally penetrated him, since (1) there was no basis set forth in pleadings or in guardian's affidavit to believe that respondent had AIDS, and (2) there was no nexus shown between allegations in petition, which alleged abuse and neglect, and need for testing. In re Harry G., 157 Misc. 2d 959, 599 N.Y.S.2d 425, 1993 N.Y. Misc. LEXIS 235 (N.Y. Fam. Ct. 1993).

Language of CLS Family Ct Act § 1038-a did not provide authority for court to direct HIV testing of respondent to determine whether additional counts of abuse could be added to petition which alleged abuse and neglect of 8-year-old child. In re Harry G., 157 Misc. 2d 959, 599 N.Y.S.2d 425, 1993 N.Y. Misc. LEXIS 235 (N.Y. Fam. Ct. 1993).

Claimant inmate failed to establish that the State violated N.Y. Pub. Health Law art. 2F by disclosing his HIV-related information; that a prison nurse advised security staff, based on her interview with claimant, that he had sexual contacts with five other inmates in violation of prison regulations was not a release of information that reasonably could identify claimant's HIV status. D.H. v State of New York, 54 Misc. 3d 390, 41 N.Y.S.3d 356, 2015 N.Y. Misc. LEXIS 5067 (N.Y. Ct. Cl. 2015), aff'd, 144 A.D.3d 1559, 40 N.Y.S.3d 323, 2016 N.Y. App. Div. LEXIS 7386 (N.Y. App. Div. 4th Dep't 2016).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 2783, 2786.

Physical or mental examination, CLS CPLR § 3121.

Codes, Rules and Regulations:

Confidentiality of HIV- and AIDS-related information. 9 NYCRR §§ 8011.1 et seq.

AIDS, HIV infection and facility policy. 14 NYCRR Part 309.

Federal Aspects:

Ricky Ray hemophilia relief fund act of 1998, P. L. 105-369.

Jurisprudences:

31 NY Jur 2d Criminal Law § 693 .

64 NY Jur 2d Health and Sanitation §§ 78, 84 .

Law Reviews:

Murtha, Underutilized weapon against AIDS-the workplace: a strategic approach. 10 Pace L. Rev. 45.

Annotations:

AIDS infection as affecting right to attend public school. 60 ALR4th 15.

Matthew Bender's New York Practice Guides: 4 New York Practice Guide: Business and Commercial §§ 25.12, 25.22.

§ 2781-a. Required offering of HIV related testing

1. Every individual age thirteen and older (or younger than thirteen if there is evidence or indication of risk activity) who receives health services as an inpatient or in the emergency department of a general hospital defined in subdivision ten of section twenty-eight hundred one of this chapter or who receives primary care services in an outpatient department of such hospital or in a diagnostic and treatment center licensed under article twenty-eight of this chapter or from a physician, physician assistant, nurse practitioner, or midwife providing primary care shall in accordance with subdivision one of section two thousand seven hundred eighty-one of this article be offered an HIV related test unless the health care practitioner providing such services reasonably believes that (a) the individual is being treated for a life threatening emergency; or (b) the individual has previously been offered or has been the subject of an HIV related test (except that a test shall be offered if otherwise indicated); or (c) the individual lacks capacity to consent to an HIV related test.

2. As used in this section, "primary care" means the medical fields of family medicine, general pediatrics, primary care, internal medicine, primary care obstetrics, or primary care gynecology, without regard to board certification.

3. The offering of HIV related testing under this section shall be culturally and linguistically appropriate in accordance with rules and regulations promulgated by the commissioner.

4. This section shall not affect the scope of practice of any health care practitioner or diminish any authority or legal or professional obligation of any health care practitioner to offer an HIV related test or to provide services or care for the subject of an HIV related test.

HISTORY:

Add, L 2010, ch 308, § 2, eff Sept 1, 2010 (see 2010 note below); L 2016, ch 502, § 2, effective November 28, 2016.

Editor's Notes: Laws 2010, ch 308, § 10, eff Sept 1, 2010, provides as follows:

§ 10. This act shall take effect September 1, 2010; provided, however, that the commissioner of health is authorized to adopt rules and regulations necessary to implement this act prior to such effective date.

Amendment Notes The 2016 amendment by ch 502, § 2, in 1, substituted "age thirteen and older (or younger than thirteen" for "between the ages of thirteen and sixty-four years (or younger or older" and added "in accordance with subdivision one of section two thousand seven hundred eighty-one of this article."

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

39 Am Jur 2d, Health § 98.

§ 2782. Confidentiality and disclosure

1. No person who obtains confidential HIV related information in the course of providing any health or social service or pursuant to a release of confidential HIV related information may disclose or be compelled to disclose such information, except to the following:

(a) the protected individual or, when the protected individual lacks capacity to consent, a person

authorized pursuant to law to consent to health care for the individual;

(b) any person to whom disclosure is authorized pursuant to a release of confidential HIV related information;

(c) an agent or employee of a health facility or health care provider if (1) the agent or employee is permitted to access medical records, (2) the health facility or health care provider itself is authorized to obtain the HIV related information, and (3) the agent or employee provides health care to the protected individual, or maintains or processes medical records for billing or reimbursement;

(d) a health care provider or health facility when knowledge of the HIV related information is necessary to provide appropriate care or treatment to the protected individual, a child of the individual, a contact of the protected individual or a person authorized to consent to health care for such a contact;

(e) a health facility or health care provider, in relation to the procurement, processing, distributing or use of a human body or a human body part, including organs, tissues, eyes, bones, arteries, blood, semen, or other body fluids, for use in medical education, research, therapy, or for transplantation to individuals;

(f) health facility staff committees or accreditation or oversight review organizations authorized to access medical records; provided that such committees or organizations may only disclose confidential HIV related information: (1) back to the facility or provider of a health or social service; (2) to carry out the monitoring, evaluation, or service review for which it was obtained; or (3) to a federal, state or local government agency for the purposes of and subject to the conditions provided in subdivision six of this section;

(g) a federal, state, county or local health officer when such disclosure is mandated by federal or state law;

(h) an authorized agency in connection with foster care or adoption of a child. Such agency shall be authorized to redisclose such information only pursuant to this article or in accordance with the provisions of subdivision eight of section three hundred seventy-two and section three hundred seventy-three-a of the social services law;

(i) third party reimbursers or their agents to the extent necessary to reimburse health care providers for health services; provided that, where necessary, an otherwise appropriate authorization for such disclosure has been secured by the provider;

(j) an insurance institution, for other than the purpose set forth in paragraph (i) of this subdivision, provided the insurance institution secures a dated and written authorization that indicates that health care providers, health facilities, insurance institutions, and other persons are authorized to disclose information about the protected individual, the nature of the information to be disclosed, the purposes for which the information is to be disclosed and which is signed by: (1) the protected individual; (2) if the protected individual lacks the capacity to consent, such other person authorized pursuant to law to consent for such individual; or (3) if the protected individual is deceased, the beneficiary or claimant for benefits under an insurance policy, a health services plan, or an employee welfare benefit plan as defined in 29 U.S.C. 1002(1), covering such protected individual;

(k) any person to whom disclosure is ordered by a court of competent jurisdiction pursuant to section twenty-seven hundred eighty-five of this article;

(*l*) an employee or agent of the department of corrections and community supervision, in accordance with paragraph (a) of subdivision two of section twenty-seven hundred eighty-six of this article, to the extent the employee or agent is authorized to access records containing such information in order to carry out the department's functions, powers and duties with respect to the protected individual, pursuant to section two hundred fifty-nine-a of the executive law;

(m) an employee or agent of the office of probation and correctional alternatives or any local probation department, in accordance with paragraph (a) of subdivision two of section twenty-seven hundred eighty-six of this article, to the extent the employee or agent is authorized to access records containing such information in order to carry out the office's or department's functions, powers and duties with respect to the protected individual, pursuant to articles twelve and twelve-A of the executive law;

(n) a medical director of a local correctional facility as defined in section forty of the correction law, in accordance with paragraph (a) of subdivision two of section twenty-seven hundred eighty-six of this article, to the extent the medical director is authorized to access records containing such information in order to carry out his or her functions, powers and duties with respect to the protected individual;

(o) an employee or agent of the commission of correction or the board of correction of the city of New York, in accordance with paragraph (a) of subdivision two of section twenty-seven hundred eighty-six of this article, to the extent the employee or agent is authorized to access records containing such information in order to carry out the commission's functions, powers and duties with respect to the protected individual, pursuant to article three of the correction law;

(p) an attorney appointed to represent a minor pursuant to the social services law or the family court act, with respect to confidential HIV related information relating to the minor and for the purpose of representing the minor. If the minor has the capacity to consent, the minor's attorney may not redisclose confidential HIV related information without the minor's permission. If the minor lacks capacity to consent, the minor's attorney may redisclose confidential HIV related information for the sole purpose of representing the minor. This para-

graph shall not limit the ability of the minor's attorney to seek relief under section twenty-seven hundred eighty-five of this chapter.

(q) an executor or an administrator of an estate shall have access to the confidential HIV information of a deceased person as needed to fulfill his or her responsibilities/duties as an executor or administrator.

(r) qualified researchers for medical research purposes upon the approval of a research protocol by a human research review committee established and approved under the provisions of article twenty-four-A of this chapter or by an institutional review board established and approved under the provisions of 45 CFR part 46 or 42 USC 300 V-1, for the purpose of reviewing and monitoring research involving human subjects, provided that in no event shall any qualified researcher disclose information tending to identify the subjects of the research.

2. A state, county or local health officer may disclose confidential HIV related information when:

(a) disclosure is specifically authorized or required by federal or state law; or

(b) disclosure is made pursuant to a release of confidential HIV related information; or

(c) disclosure is requested by a physician pursuant to subdivision four of this section; or

(d) disclosure is authorized by court order pursuant to the provisions of section twenty-seven hundred eighty-five of this article.

3. No person to whom confidential HIV related information has been disclosed pursuant to this article shall disclose the information to another person except as authorized by this article, provided, however, that the provisions of this subdivision shall not apply:

(a) to the protected individual; or

(b) to a natural person who is authorized pursuant to law to consent to health care for the protected individual; or

(c) to a protected individual's foster parent as defined in section three hundred seventy-one of the social services law and subject to regulations promulgated pursuant to paragraph (a) of subdivision two of section twenty-seven hundred eighty-six of this article, for the purpose of providing care, treatment or supervision of the protected individual; or

(d) a prospective adoptive parent as specified in section three hundred seventy-three-a of the social services law and subject to regulations promulgated pursuant to paragraph (a) of subdivision two of section twenty-seven hundred eighty-six of this article with whom a child who is the protected individual has been placed for adoption; or

(e) to a relative or other person legally responsible to whom a child who is the protected individual is to be placed or discharged pursuant to section ten hundred seventeen or ten hundred fifty-five of the family court act and subject to regulations promulgated pursuant to paragraph (a) of subdivision two of section twenty-seven hundred eighty-six of this article, for the purpose of providing care, treatment or supervision of the protected individual.

4. (a) A physician may disclose confidential HIV related information under the following conditions:

(1) disclosure is made to a contact, to a public health officer for the purpose of making the disclosure to said contact and pursuant to section twenty-one hundred thirty of this chapter; or

(2) the physician believes disclosure is medically appropriate and there is a significant risk of infection to the contact; and

(3) the physician has counseled the protected individual regarding the need to notify the contact; and

(4) the physician has informed the protected individual of his or her intent to make such disclosure to a contact, the physician's responsibility to report the infected individual's case pursuant to section twenty-one hundred thirty of this chapter and has given the protected individual the opportunity to express a preference as to whether disclosure should be made by the physician directly or to a public health officer for the purpose of said disclosure. If the protected individual expresses a preference for disclosure by a public health officer, the physician shall honor such preference.

(5) If a physician chooses to make a notification pursuant to this section, he or she shall report to the municipal health commissioner of [or]* district health officer on his or her efforts to notify the contacts of the protected individual. Such report shall be in a manner and on forms prescribed by the commissioner and shall include the identity of the protected individual and any contacts as well as information as to whether the contacts were successfully notified.

(6) Within a reasonable time of receiving a report that a physician or his or her designated agent did not notify or verify notification of contacts provided by the protected individual, the health commissioner or district health officer of the municipality from which the report originates shall take reasonable measures to notify such contacts and otherwise comply with the provisions of this chapter.

(b) When making such disclosures to the contact, the physician or public health officer shall provide or make referrals for the provision of the appropriate medical advice and counseling for coping with the emotional consequences of learning the information and for changing behavior to prevent transmission or contraction of HIV infection. The physician or public health officer shall not disclose the identity of the protected individual or the identity of any other contact. A physician or public health officer making a notification pursuant to this subdivision shall make such disclosure in person, except where circumstances reasonably prevent doing so.

*The bracketed word has been inserted by the Publisher.

(c) A physician or public health officer shall have no obligation to identify or locate any contact except as provided pursuant to title three of article twenty-one of this chapter.

(d) A physician may, upon the consent of a parent or guardian, disclose confidential HIV related information to a state, county, or local health officer for the purpose of reviewing the medical history of a child to determine the fitness of the child to attend school.

(e) A physician may disclose confidential HIV related information pertaining to a protected individual to a person (known to the physician) authorized pursuant to law to consent to health care for a protected individual when the physician reasonably believes that: (1) disclosure is medically necessary in order to provide timely care and treatment for the protected individual; and (2) after appropriate counseling as to the need for such disclosure, the protected individual will not inform a person authorized by law to consent to health care; provided, however, that the physician shall not make such disclosure if, in the judgment of the physician: (A) the disclosure would not be in the best interest of the protected individual; or (B) the protected individual is authorized pursuant to law to consent to such care and treatment. Any decision or action by a physician under this paragraph, and the basis therefor, shall be recorded in the protected individual's medical record.

5. (a) Whenever disclosure of confidential HIV related information is made pursuant to this article, except for disclosures made pursuant to paragraphs (a), (d) and (i) of subdivision one of this section or paragraph (a) or (e) of subdivision four of this section, such disclosure shall be accompanied or followed by a statement in writing which includes the following or substantially similar language: "This information has been disclosed to you from confidential records which are protected by state law. State law prohibits you from making any further disclosure of this information without the specific written consent of the person to whom it pertains, or as otherwise permitted by law. Any unauthorized further disclosure in violation of state law may result in a fine or jail sentence or both. A general authorization for the release of medical or other information is NOT sufficient authorization for further disclosure." An oral disclosure shall be accompanied or followed by such a notice within ten days.

(b) Except for disclosures made pursuant to paragraph (c) of subdivision one of this section, or to persons reviewing information or records in the ordinary course of ensuring that a health facility is in compliance with applicable quality of care standards or any other authorized program evaluation, program monitoring or service review, or to governmental agents requiring information necessary for payments to be made on behalf of patients or clients pursuant to contract or in accordance to law, a notation of all such disclosures shall be placed in the medical record of a protected individual, who shall be informed of such disclosures upon request; provided, however, that for disclosures made to insurance institutions such a notation need only be entered at the time the disclosure is first made.

6. (a) The provisions of this subdivision shall apply where a provider of a health or social service possesses confidential HIV related information relating to individuals who are recipients of the service, and a federal, state or local government agency supervises or monitors the provider or administers the program under which the service is provided.

(b) Confidential HIV related information relating to a recipient of such service may be disclosed in accordance with regulations promulgated pursuant to paragraph (a) of subdivision two of section twenty-seven hundred eighty-six of this article to an authorized employee or agent of such provider or government agency, when reasonably necessary for such supervision, monitoring, administration, or provision of such service. The term "authorized employee or agent", as used in this subdivision shall only include any employee or agent who would, in the ordinary course of business of the provider or government agency, have access to records relating to the care of, treatment of, or provision of a health or social service to the protected individual.

7. Nothing in this section shall limit a person's or agency's responsibility or authority to report, investigate, or redisclose, child protective and adult protective services information in accordance with title six of article six and titles one and two of article nine-B of the social services law, or to provide or monitor the provision of child and adult protective or preventive services.

8. Confidential HIV related information shall be recorded in the medical record of the protected individual. The provisions of this section shall not prohibit the listing of acquired immune deficiency syndrome, HIV related illness or HIV infection in a certificate of death, autopsy report or related documents prepared pursuant to article forty-one of this chapter or other applicable laws, ordinances, rules or regulations relating to the documentation of cause of death, nor shall this section be construed to modify any laws, ordinances, rules or regulations relative to access to death certificates, autopsy reports or such other related documents. Under no circumstances shall confidential HIV related information be disclosable pursuant to article six of the public officers law. Notwithstanding the foregoing, confidential HIV information obtained pursuant to section 390.15 of the criminal procedure law or section 347.1 of the family court act by either court order or consent of the protected individual shall not be recorded in the medical record of the protected individual unless he or she consents to the recording of such information in a written statement containing the relevant information specified in subdivision two of section two thousand seven hundred eighty-one of this article.

9. Confidential HIV related information shall be disclosed upon the request of the health care worker HIV/HBV advisory panel, established pursuant to article twenty-seven-DD of this chapter, to the panel or its designee only when reasonably necessary for the evaluation of a worker who has voluntarily sought the panel's review.

HISTORY:

Add, L 1988, ch 584, § 2, eff Feb 1, 1989; amd, L 1990, ch 592, §§ 2–4, eff July 18, 1990; L 1991, ch 193, § 3, eff July 21, 1991; L 1992, ch 786, § 5, eff Feb 1, 1993; L 1995, ch 76, § 3, eff Aug 1, 1995; L 1996, ch 684, §§ 2, 3, eff Dec 31, 1996; L 1998, ch 163, §§ 3–5, eff Jan 3, 1999; L 2010, ch 41, § 90, eff April 14, 2010; L 2010, ch 56, § 43 (Part A), eff June 22, 2010; L 2010, ch 308, §§ 6, 7, eff Sept 1, 2010; L 2011, ch 62, § 134 (Part C, Subpart B), eff March 31, 2011; L 2016, ch 461, § 1, effective March 28, 2017; L 2020, ch 312, § 2, effective December 2, 2020.

Editor's Notes: Laws 1992, ch 786, § 10, eff Feb 1, 1993, provides as follows:

§ 10. This act shall take effect February 1, 1993, provided, however, that the commissioners of health and education may immediately take such steps as are necessary in order to ensure that this act is fully implemented on such effective date.

Laws 1995, ch 76, § 5, eff Aug 1, 1995, provides as follows:

§ 5. This act shall take effect on August 1, 1995 and permit court-ordered testing of persons convicted and adjudicated on and after such date.

Laws 2010, ch 308, § 10, eff Sept 1, 2010, provides as follows:

§ 10. This act shall take effect September 1, 2010; provided, however, that the commissioner of health is authorized to adopt rules and regulations necessary to implement this act prior to such effective date.

Amendment Notes: 2011. Chapter 62, § 134 (Part C, Subpart B) amended:

Sub 1, par (l) by deleting at fig 1 "division of parole", at fig 2 "division's" and adding the matter in italics.

2010. Chapter 41, § 90 amended:

Sub 1, par (p) by deleting at fig 1 "a law guardian," at figs 2 and 3 "law guardian", at fig 4 "a law guardian's" and added the matter in italics.

2010. Chapter 56, § 43 (Part A) amended:

Sub 1, par (m) by deleting at fig 1 "division", at fig 2 "division's" and adding the matter in italics.

2010. Chapter 308, § 6 amended:

By adding sub 1, par (q).

2010. Chapter 308, § 7 amended:

Sub 5, par (a) by deleting at fig 1 "paragraph" and adding the matter in italics.

The 2016 amendment by ch 461, § 1, added 1(r).

2010 Recommendations of the Family Court Advisory and Rules Committee:

Following numerous statewide hearings and extensive research, in February, 2006, the Matrimonial Commission, which was appointed by former Chief Judge Judith S. Kaye and chaired by former Supreme Court, Appellate Division, Second Department Judge Sondra Miller, issued its comprehensive report. The Commission recommended, *inter alia,* that the title "law guardian" be replaced by "attorney for the child," which it characterized as a "necessary language change that more accurately reflects the attorney's role:"

From the testimony at the hearings and the written submissions received, it is clear that there exists a misconception that a law guardian plays a neutral role in these adversarial proceedings ….

The attorney for the child is not a mental health professional, a mediator, a fiduciary or, most importantly, an arm of the court ….

The Commission reiterates that at all times during the proceeding, the attorney for the child is subject to the same rules of good lawyering and professional responsibility applicable to any attorney in a civil proceeding or action, and must represent the client within those bounds.

Report of the Matrimonial Commission (Feb., 2006), at pps. 17, 18, 40.

The Family Court Advisory and Rules Committee has joined with the Statewide Advisory Committee on Attorneys for Children in recommending that the Legislature adopt the Commission's long-overdue change. The proposal would amend the Civil Practice Law and Rules, the Executive Law, the Judiciary Law, the Family Court Act, the Public Health Law and the Social Services Law to substitute "attorney" or "counsel" for "law guardian." With respect to the appointment of attorneys for children in voluntary foster care placement proceedings, it would correct a decade-old error. Although Family Court Act § 249 was amended in 1999 to require such appointments and such appointments have become routine, the references in section 358-a of the Social Services Law to these appointments as discretionary were never changed. *See* Laws of 1999, ch. 506.

New York State's tradition of affording legal representation to children in a variety of proceedings is long-standing and nationally recognized. Its Family Court Act, enacted in 1962, was cited by the United States Supreme Court in its seminal decision in *Matter of Gault,* 387 U.S. 1 (1967), which required counsel in juvenile delinquency proceedings and equated its role with counsel in criminal cases. However, almost from its inception, the ambiguous term "law guardian," although defined in Family Court Act § 242 as an attorney, has created debate and confusion. It suggests a role that combines attributes of the attorney-advocate with those of a guardian *ad litem,* functions that are inherently incompatible. This ambiguity has fostered uncertainty not only among children's lawyers but also among other participants in family law proceedings, including judges, parents, and parents' attorneys, on such fundamental issues as attorney-client confidentiality, ex parte communications and the impact of the child's preferences on litigation goals. The result has all too often been misunderstanding and clashing expectations about the actions and intentions of the child's lawyer, adding needless complexity and confusion to cases involving children.

Consistent with both Rule 7.2 of the *Rules of the Chief Judge* [22 NYCRR § 7.2] and the NYS Bar Association standards for the representation of children,47 this change in language is long overdue. In fact, in removing an appellate attorney for failing to consult with his 11 year old client, the Appellate Division, Third Dept., in its decision in Mark T. v. Joyanna U., 64 A.D.3d 1092 (3rd Dept., 2009), recently emphasized that client-informed advocacy, rather than guardian-type judgments in the abstract about a child client's best interests without consultation, must be the linchpin of representation. See also Van Dee v. Bean, 66 A.D.3d 1253 (3rd Dept., 2009). Clearly the terminology used to label the child's attorney should match the court's (and the court rule's) definition of the attorney's role. The term "law guardian" confuses the attorney's role; "attorney for the child" defines it. In proposing this important language change, the Committees are continuing a practice already begun by the Legislature. Chapters 473 and 476 of the Laws of 2009, Chapter 626 of the Laws of 2007 and Chapter 576 of the Laws of 2008, for example, use the term "attorney for the child." Further, shortly after the Matrimonial Commission report, Rule 7.2 of the *Rules of the Chief Judge* was promulgated, which also used the term "attorney for the child" and clarified the role as unquestionably that of an attorney. Along with Rule 7.2, the Administrative Board of the Courts approved the "Summary of Responsibilities of the Attorney for the Child," outlining the essential elements of effective legal representation. Appellate courts have continued the trend toward a change in terminology, both in its identification of counsel and in the text of opinions. In Naomi C. v. Russell A., 48 A.D.3d 203 (1st Dept., 2008), for example, the Appellate Division, First Department, referred to "Law Guardian (now

called Attorney for the Child)." *See also,* Bonthu v. Bonthu, -A.D.3d-, 2009 WL 3859919 (2d Dept., 2009); Sarah Ann K. v. Armando Charles C., - A.D.3d-, 2009 WL 3818370 (1st Dept., 2009).

Clearly, the time has come for a comprehensive legislative change of title, a change that will provide a more consistent understanding of the function of the child's attorney and remove a major, persistent source of confusion about this vital role.

From the testimony at the hearings and the written submissions received, it is clear that there exists a misconception that a law guardian plays a neutral role in these adversarial proceedings...

The attorney for the child is not a mental health professional, a mediator, a fiduciary or, most importantly, an arm of the court...

The Commission reiterates that at all times during the proceeding, the attorney for the child is subject to the same rules of good lawyering and professional responsibility applicable to any attorney in a civil proceeding or action, and must represent the client within those bounds.

Report of the Matrimonial Commission (Feb., 2006), at pps. 17, 18, 40.

The Family Court Advisory and Rules Committee has joined with the Statewide Advisory Committee on Attorneys for Children in recommending that the Legislature adopt the Commission's long-overdue change. The proposal would amend the Civil Practice Law and Rules, the Executive Law, the Judiciary Law, the Family Court Act, the Public Health Law and the Social Services Law to substitute "attorney" or "counsel" for "law guardian." With respect to the appointment of attorneys for children in voluntary foster care placement proceedings, it would correct a decade-old error. Although Family Court Act § 249 was amended in 1999 to require such appointments and such appointments have become routine, the references in section 358-a of the Social Services Law to these appointments as discretionary were never changed. *See* Laws of 1999, ch. 506.

New York State's tradition of affording legal representation to children in a variety of proceedings is long-standing and nationally recognized. Its Family Court Act, enacted in 1962, was cited by the United States Supreme Court in its seminal decision in *Matter of Gault,* 387 U.S. 1 (1967), which required counsel in juvenile delinquency proceedings and equated its role with counsel in criminal cases. However, almost from its inception, the ambiguous term "law guardian," although defined in Family Court Act § 242 as an attorney, has created debate and confusion. It suggests a role that combines attributes of the attorney-advocate with those of a guardian *ad litem,* functions that are inherently incompatible. This ambiguity has fostered uncertainty not only among children's lawyers but also among other participants in family law proceedings, including judges, parents, and parents' attorneys, on such fundamental issues as attorney-client confidentiality, ex parte communications and the impact of the child's preferences on litigation goals. The result has all too often been misunderstanding and clashing expectations about the actions and intentions of the child's lawyer, adding needless complexity and confusion to cases involving children.

Consistent with both Rule 7.2 of the *Rules of the Chief Judge* [22 NYCRR § 7.2] and the NYS Bar Association standards for the representation of children,47 this change in language is long overdue. In fact, in removing an appellate attorney for failing to consult with his 11 year old client, the Appellate Division, Third Dept., in its decision in Mark T. v. Joyanna U., 64 A.D.3d 1092 (3rd Dept., 2009), recently emphasized that client-informed advocacy, rather than guardian-type judgments in the abstract about a child client's best interests without consultation, must be the linchpin of representation. See also Van Dee v. Bean, 66 A.D.3d 1253 (3rd Dept., 2009). Clearly the terminology used to label the child's attorney should match the court's (and the court rule's) definition of the attorney's role. The term "law guardian" confuses the attorney's role; "attorney for the child" defines it. In proposing this important language change, the Committees are continuing a practice already begun by the Legislature. Chapters 473 and 476 of the Laws of 2009, Chapter 626 of the Laws of 2007 and Chapter 576 of the Laws of 2008, for example, use the term "attorney for the child." Further, shortly after the Matrimonial Commission report, Rule 7.2 of the *Rules of the Chief Judge* was promulgated, which also used the term "attorney for the child" and clarified the role as unquestionably that of an attorney. Along with Rule 7.2, the Administrative Board of the Courts approved the "Summary of Responsibilities of the Attorney for the Child," outlining the essential elements of effective legal representation. Appellate courts have continued the trend toward a change in terminology, both in its identification of counsel and in the text of opinions. In Naomi C. v. Russell A., 48 A.D.3d 203 (1st Dept., 2008), for example, the Appellate Division, First Department, referred to "Law Guardian (now called Attorney for the Child)." *See also,* Bonthu v. Bonthu, -A.D.3d-, 2009 WL 3859919 (2d Dept., 2009); Sarah Ann K. v. Armando Charles C., - A.D.3d-, 2009 WL 3818370 (1st Dept., 2009).

Clearly, the time has come for a comprehensive legislative change of title, a change that will provide a more consistent understanding of the function of the child's attorney and remove a major, persistent source of confusion about this vital role.

Notes to Decisions

Analysis

1. In general
2. Applicability of disclosure bar
3. —Exception for disclosure to officials
4. Actions for breach of confidentiality

1. In general

In physician's action against county for negligent infliction of emotional distress arising out of fear of contracting AIDS resulting from his performance of surgical procedures on arrestee without knowing that arrestee had tested positive for HIV virus, county did not breach duty to disclose patient's HIV status to physician since (1) it had duty to protect confidentiality of such status under CLS Pub Health Art 27-F, which prohibits disclosure of HIV-related information solely to carry out infection control precautions, and (2) there was no indication that patient's treatment would have been altered if disclosure had been made. Ordway v County of Suffolk, 154 Misc. 2d 269, 583 N.Y.S.2d 1014, 1992 N.Y. Misc. LEXIS 237 (N.Y. Sup. Ct. 1992).

In class action on behalf of persons with mental illness who were treated on outpatient or inpatient basis both in city jails and while incarcerated in hospital psychiatric wards, claiming inadequate discharge planning in violation of CLS Men Hyg § 29.15(f) and 14 NYCRR §§ 587.1 et seq., documents sought by plaintiffs —mental health/discharge planning records of 500 former inmates of city jails who were likely class members, divided according to whether individuals were HIV positive or negative —would be material and necessary to prosecution of their motion to hold defendants in contempt for failure to comply with preliminary injunction where it was difficult for plaintiffs' attorneys to determine who were members of plaintiff class and to find and communicate with them regarding contempt motion. Brad H. v City of New York, 188 Misc. 2d 470, 729 N.Y.S.2d 348, 2001 N.Y. Misc. LEXIS 221 (N.Y. Sup. Ct. 2001).

In class action on behalf of persons with mental illness who were treated on outpatient or inpatient basis both in city jails and while incarcerated in hospital psychiatric wards, claiming inadequate discharge planning in violation of CLS Men Hyg § 29.15(f) and 14 NYCRR §§ 587.1 et seq., sealing provision in CLS CPL § 160.50 did not bar, by analogy, plaintiffs from obtaining disclosure of mental health/discharge planning records of 500 former inmates of city jails who were likely class members, divided according to whether individuals were HIV positive or negative, where § 160.50 applies only to court records of criminal actions or proceedings. Brad H. v City of New York, 188 Misc. 2d 470, 729 N.Y.S.2d 348, 2001 N.Y. Misc. LEXIS 221 (N.Y. Sup. Ct. 2001).

2. Applicability of disclosure bar

In action for damages arising out of defendant physician's disclosure, pursuant to subpoena, of plaintiff patient's HIV-positive status to attorney representing patient's employer in Pennsylvania workers' compensation proceeding, issues regarding propriety of disclosure would be determined by New York rather than Pennsylvania law, since (1) disclosure was made by New York physician from her office in New York, (2) physician's oral promise to patient to preserve confidentiality of information was allegedly made in New York, and (3) strong public policy concerns weighed in New York's favor given enactment of CLS Pub Health Art 27-F defining confidentiality rights of HIV-infected persons. Doe v Roe, 190 A.D.2d 463, 599 N.Y.S.2d 350, 1993 N.Y. App. Div. LEXIS 5673 (N.Y. App. Div. 4th Dep't), app. dismissed, 82 N.Y.2d 846, 606 N.Y.S.2d 597, 627 N.E.2d 519, 1993 N.Y. LEXIS 4307 (N.Y. 1993).

Physician who, pursuant to subpoena, disclosed patient's HIV-positive status to attorney representing patient's employer in Pennsylvania workers' compensation proceeding violated confidentiality provisions of CLS Pub Health Art 27-F, notwithstanding existence of authorizations for release of medical information executed by patient in past and fact that CLS Pub Health § 2782(1)(b) permits disclosure if there is "release of confidential HIV related information," since (1) authorizations in question were not dated, did not reveal time period during which they were to be effective and were not prepared on form approved by Commissioner of Health, and (2) although CLS Pub Health § 2782(1)(j) permits protected person to authorize disclosure of HIV related information to insurance institution, disclosures were made to attorney for patient's employer who had neither been retained nor was acting on behalf of employer's insurer. Doe v Roe, 190 A.D.2d 463, 599 N.Y.S.2d 350, 1993 N.Y. App. Div. LEXIS 5673 (N.Y. App. Div. 4th Dep't), app. dismissed, 82 N.Y.2d 846, 606 N.Y.S.2d 597, 627 N.E.2d 519, 1993 N.Y. LEXIS 4307 (N.Y. 1993).

In action against decedent's estate arising out of decedent's alleged wrongful transmission of AIDS virus to plaintiff, plaintiff had compelling need for decedent's confidential HIV-related information, and thus was entitled to disclosure under CLS Pub Health § 2785; statute overcame physician-patient privilege, and purpose of preserving confidentiality of HIV-related information (to encourage voluntary HIV testing) was not implicated because medical records were those of deceased person. Plaza v Estate of Wisser, 211 A.D.2d 111, 626 N.Y.S.2d 446, 1995 N.Y. App. Div. LEXIS 4569 (N.Y. App. Div. 1st Dep't 1995).

Statutes relating to confidentiality of AIDS and HIV diagnoses apply to health care providers and certain others; not news media. Cruz v Latin News Impacto Newspaper, 216 A.D.2d 50, 627 N.Y.S.2d 388, 1995 N.Y. App. Div. LEXIS 6113 (N.Y. App. Div. 1st Dep't 1995).

In negligence and malpractice action in which it was alleged that infant plaintiff, who suffered from hemophilia, sustained injury to his head at school, that injury was not properly diagnosed and treated, and that he thus sustained permanent injuries, defendant was entitled to determination that CLS Pub Health §§ 2780 et seq. did not prevent disclosure at trial of information that plaintiff was HIV positive since (1) in bringing action, plaintiff placed in issue not only his past and present medical condition, but also permanency of injuries, and (2) fact that plaintiff was HIV positive was relevant to his life expectancy. Dwight B. v Board of Educ., 157 Misc. 2d 1004, 600 N.Y.S.2d 414, 1993 N.Y. Misc. LEXIS 249 (N.Y. Sup. Ct. 1993).

In assault case in which defendant was accused of having bitten complainant, and in which People had inadvertently turned over to defense counsel medical report making reference to complainant's HIV status, court would grant People's motion for redaction from report of all references to complainant's HIV status, provided that People arranged to disclose such information to defendant through physician or health officer, but would deny People's request that defense counsel be ordered not to disclose HIV information to defendant; court could not bar defense counsel from making disclosure to her client, but would strongly recommend that disclosure be made through physician or health officer instead. People v Pedro M., 165 Misc. 2d 710, 630 N.Y.S.2d 208, 1995 N.Y. Misc. LEXIS 290 (N.Y. City Crim. Ct. 1995).

In class action on behalf of persons with mental illness who were treated on outpatient or inpatient basis both in city jails and while incarcerated in hospital psychiatric wards, claiming inadequate discharge planning in violation of CLS Men Hyg § 29.15(f) and 14 NYCRR §§ 587.1 et seq., plaintiffs were entitled to disclosure of mental health/discharge planning records of 500 former inmates of city jails who were likely class members, divided according to whether individuals were HIV positive or negative, where confidentiality of class members regarding their HIV status and possible substance abuse was protected by law, parties' confidentiality agreement, sensitive order proposed by plaintiffs' attorneys, and court's decision and order. Brad H. v City of New York, 188 Misc. 2d 470, 729 N.Y.S.2d 348, 2001 N.Y. Misc. LEXIS 221 (N.Y. Sup. Ct. 2001).

CLS Pub Health § 2872 was inapplicable to action challenging defendant pharmacists' purchase and sale of customers' medical and prescription information without customers' knowledge or consent, as pharmacists merely administer receipt of prescription drugs and do not provide medical treatment and, even assuming they were deemed to be providing medical services, their disclosure of prescription information to another pharmacist would be medically necessary so that customers who might suffer grave illnesses due to HIV and AIDS could continue to receive life-saving prescription medication. Anonymous v CVS Corp., 188 Misc. 2d 616, 728 N.Y.S.2d 333, 2001 N.Y. Misc. LEXIS 227 (N.Y. Sup. Ct. 2001).

Although an advocacy group that provided support for HIV-affected Hispanic people generally could not obtain protective orders that shielded it from providing all information about its clients, it was protected from discovery questions that could have forced it to identify persons infected with the virus. Hispanic Aids Forum v Estate of Bruno, 195 Misc. 2d 366, 759 N.Y.S.2d 291, 2003 N.Y. Misc. LEXIS 172 (N.Y. Sup. Ct. 2003).

Correctional officer is not an "authorized agent" of the N.Y. State Commission of Correction under either N.Y. Comp. Codes R. & Regs. tit. 9, § 7064.8 or N.Y. Pub. Health Law art. 27-F; thus, after a correction officer who worked at a drug treatment campus became aware of an inmate's HIV status, the hospital where the inmate was being seen for a determination of the efficacy of the inmate's HIV related medications should have served a N.Y. Pub. Health Law § 2782(5)(a) written notice advising him that disclosure of the confidential information to other staff members at the drug treatment campus was prohibited. Melendez v Strong Mem. Hosp., Univ. of Rochester, Inc., 804 N.Y.S.2d 626, 9 Misc. 3d 938, 234 N.Y.L.J. 38, 2005 N.Y. Misc. LEXIS 1942 (N.Y. Sup. Ct. 2005).

3. —Exception for disclosure to officials

Trial court properly granted a board's cross motion to compel compliance with its subpoena because allegations of physician misconduct at issue related directly to the treatment of patients with HIV whose files were sought, the board showed that it had a good faith basis to issue the subpoena, and disclosure was warranted under N.Y. Pub. Health Law § 2785(2)(d); however, in recognition of the need for confidentiality, any disclosure order had to provide for redactions of material that was not necessary for the conduct of the investigation and otherwise comply with § 2785(6). Anonymous v New York State Dep't of Health, 65 A.D.3d 491, 884 N.Y.S.2d 410, 2009 N.Y. App. Div. LEXIS 6142 (N.Y. App. Div. 1st Dep't 2009).

CLS Pub Health Art 27-F, and § 2782 thereof, dealing with confidentiality requirements for HIV- and AIDS-related information, did not bar release of patient records of deceased dentist who had been infected with HIV virus in response to subpoena duces tecum issued by Commissioner of Health in connection with epidemiological investigation of deceased dentist's patients, since commissioner did not seek HIV information, only patient records, and there was no showing that release of records would also result in release of HIV- and AIDS-related information regarding patients. McBarnette v Feldman, 153 Misc. 2d 627, 582 N.Y.S.2d 900, 1992 N.Y. Misc. LEXIS 96 (N.Y. Sup. Ct. 1992).

CLS Pub Health Art 27-F, and § 2782 thereof, dealing with confidentiality requirements for HIV- and AIDS-related information, did not bar release of patient records of deceased dentist who

had been infected with HIV virus in response to subpoena duces tecum issued by Commissioner of Health, which was engaged in epidemiological investigation of deceased dentist's patients, since § 2782(g) allows disclosure to be made to state health officer when mandated by state law, such as requirement of CLS Pub Health § 206 that commissioner conduct investigations, studies and research to protect public health. McBarnette v Feldman, 153 Misc. 2d 627, 582 N.Y.S.2d 900, 1992 N.Y. Misc. LEXIS 96 (N.Y. Sup. Ct. 1992).

4. Actions for breach of confidentiality

Court properly determined that patient had right to maintain private cause of action against physician for violating confidentiality provisions of CLS Pub Health Art 27-F by disclosing patient's HIV-positive status to attorney representing patient's employer in Pennsylvania workers' compensation proceeding, although CLS Pub Health § 2783, which authorizes civil and criminal penalties for certain violations of Art 27-F, contains no express provision authorizing private cause of action, since § 2783(3), which provides for grant of immunity for certain disclosures, would have meaning only if private right of action existed, legislative history indicated intention to create such right, recognition of private cause of action would promote legislative purpose and be consistent with common law cause of action for physician's breach of confidentiality, and patient was "protected individual" within meaning of CLS Pub Health § 2780(6) and thus was member of class for whose benefit statute was enacted. Doe v Roe, 190 A.D.2d 463, 599 N.Y.S.2d 350, 1993 N.Y. App. Div. LEXIS 5673 (N.Y. App. Div. 4th Dep't), app. dismissed, 82 N.Y.2d 846, 606 N.Y.S.2d 597, 627 N.E.2d 519, 1993 N.Y. LEXIS 4307 (N.Y. 1993).

New York physician who disclosed plaintiff patient's HIV-positive status to attorney representing patient's employer in Pennsylvania workers' compensation proceeding violated confidentiality provisions of CLS Pub Health § 2782, notwithstanding fact that disclosure was made pursuant to subpoena, since (1) under 10 NYCRR 63.5(k) no disclosure of HIV related information may be made pursuant to subpoena, (2) subpoena in question had no compulsory effect on physician outside of Pennsylvania, (3) even if it did, subpoena directed defendant to bring medical records with her to hearing, not to deliver them to employer's attorney, and (4) physician's disclosure did not contain statement prohibiting redisclosure, as required by CLS Pub Health § 2782(5) and 10 NYCRR 63.4(b). Doe v Roe, 190 A.D.2d 463, 599 N.Y.S.2d 350, 1993 N.Y. App. Div. LEXIS 5673 (N.Y. App. Div. 4th Dep't), app. dismissed, 82 N.Y.2d 846, 606 N.Y.S.2d 597, 627 N.E.2d 519, 1993 N.Y. LEXIS 4307 (N.Y. 1993).

Punitive damages may be allowed in patient's private action against physician for violation of CLS Pub Health Art 27-F, and specifically CLS Pub Health § 2782, by disclosing patient's HIV-positive status, although Art 27-F does not expressly authorize award of punitive damages for improper disclosure of HIV-related information, since award of punitive damages is consistent with legislative scheme and intent, and availability of punitive damages advances strong public policy of protecting confidentiality of patient's HIV status, and its condemnation of breach of physician's duty to protect that confidentiality; while CLS Pub Health § 2783 provides criminal sanction and civil penalty for violation of CLS Pub Health § 2782, recovery of punitive damages for violation of statutory duties is allowed despite availability of criminal and civil sanctions. Doe v Roe, 190 A.D.2d 463, 599 N.Y.S.2d 350, 1993 N.Y. App. Div. LEXIS 5673 (N.Y. App. Div. 4th Dep't), app. dismissed, 82 N.Y.2d 846, 606 N.Y.S.2d 597, 627 N.E.2d 519, 1993 N.Y. LEXIS 4307 (N.Y. 1993).

In action for damages against New York physician for her disclosure, pursuant to subpoena, of patient's HIV-positive status to attorney representing patient's employer in Pennsylvania workers' compensation proceeding, in violation of CLS Pub Health § 2782, court erred in finding that physician's conduct did not rise to level of culpability required for imposition of punitive damages, although physician contended that she merely responded to subpoena, since subpoena had no compulsory effect in New York and inference could be drawn that she disclosed confidential information merely to avoid inconvenience of appearing at Pennsylvania hearing, and there was no reasonable basis for physician's reliance on authorizations executed by patient permitting disclosure of medical records, which were signed 2 years prior to physician's express promise to preserve confidentiality of patient's HIV status and were, in any event, insufficient to allow disclosure under CLS Pub Health § 2782. Doe v Roe, 190 A.D.2d 463, 599 N.Y.S.2d 350, 1993 N.Y. App. Div. LEXIS 5673 (N.Y. App. Div. 4th Dep't), app. dismissed, 82 N.Y.2d 846, 606 N.Y.S.2d 597, 627 N.E.2d 519, 1993 N.Y. LEXIS 4307 (N.Y. 1993).

N.Y. Pub. Health Law art. 27-F was enacted to protect a vulnerable class of individuals and in this regard, is dissimilar to a standard personal injury action to which CLS Uncons Laws of New York § 7401 and N.Y. Gen. Mun. Law § 50-e apply. Thus, the requirement of the Unconsolidated Laws for service of a notice of claim within a shortened statute of limitations does not apply to an action under art. 27-5. Doe v Belmare, 920 N.Y.S.2d 623, 31 Misc. 3d 904, 245 N.Y.L.J. 76, 2011 N.Y. Misc. LEXIS 1570 (N.Y. Sup. Ct. 2011).

Although prison officials' act of disclosing a prisoner's medical records constituted a violation of N.Y. Pub. Health Law § 2782, the claims court properly determined the amount of the penalty to award under N.Y. Pub. Health Law § 2783 after prison officials improperly disclosed the prisoner's medical information to the prisoner's children; the disclosure was inadvertent, and was meant for the prisoner's wife, who was authorized to receive the information. Tatta v State, 20 A.D.3d 825, 799 N.Y.S.2d 610, 2005 N.Y. App. Div. LEXIS 8105 (N.Y. App. Div. 3d Dep't 2005).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Court authorization for disclosure of confidential HIV related information, § 2785.

Rules and regulations; forms; report, § 2786.

Definitions, CLS Correc § 40.

Division of parole; functions, powers and duties, CLS Exec § 259-a.

Medical histories, CLS Soc Serv § 373-a.

Codes, Rules and Regulations:

Confidentiality of HIV- and AIDS-related information. 9 NYCRR §§ 8011.1 et seq.

Federal Aspects:

Ricky Ray hemophilia relief fund act of 1998, P. L. 105-369.

Jurisprudences:

64 NY Jur 2d Health and Sanitation § 77.

Law Reviews:

Murtha, Underutilized weapon against AIDS-the workplace: a strategic approach. 10 Pace L. Rev. 45.

Annotations:

AIDS infection as affecting right to attend public school. 60 ALR4th 15.

Texts: 4 Bender's New York Evidence § 160.03.

1-12 New Appleman New York Insurance Law § 12.06.

Weinstein, Korn, Miller, CPLR Manual (Matthew Bender) §§ 9.06[e], 20.02[b], 34.02.

§ 2783. Penalties; immunities

1. Any person who shall:

(a) perform, or permit or procure the performance of, an HIV related test in violation of section twenty-seven hundred eighty-one of this article; or

(b) disclose, or compel another person to disclose, or procure the disclosure of, confidential HIV related information in violation of section twenty-seven hundred eighty-two of this article; shall be subject to a civil penalty not to exceed five thousand dollars for each occurrence. Such penalty may be recovered in the same manner as the penalty provided in section twelve of this chapter.

2. Any person who willfully commits an act enumerated in subdivision one of this section shall be guilty of a misdemeanor and subject to the penalties provided in section twelve-b of this chapter.

3. There shall be no criminal sanction or civil liability on the part of, and no cause of action for damages shall arise against any physician, his or her employer, or a physician's designated agent, or health facility or health care provider with which the physician is associated, or public health officer, on account of:

(a) the failure to disclose confidential HIV related information to a contact or person authorized pursuant to law to consent to health care for a protected individual; or

(b) the disclosure of confidential HIV related information to a contact or person authorized pursuant to law to consent to health care for a protected individual, when carried out in compliance with this article; or

(c) the disclosure of confidential HIV related information to any person, agency, or officer authorized to receive such information, when carried out in good faith and without malice, and in compliance with the provisions of this article; or

(d) the municipal health commissioner or district health officer's failure to notify contacts pursuant to this chapter.

4. Any cause of action to recover damages based on a failure to provide information, explanations, or counseling prior to the execution of a written informed consent, or based on a lack of informed consent in the ordering or performance of an HIV related test in violation of this article shall be governed by the provisions of section two thousand eight hundred five-d of this chapter.

HISTORY:

Add, L 1988, ch 584, § 2, eff Feb 1, 1989 (see 1988 note under § 2780); amd, L 1990, ch 592, § 5; L 1998, ch 163, § 6, eff Jan 3, 1999.

Notes to Decisions

Court properly determined that patient had right to maintain private cause of action against physician for violating confidentiality provisions of CLS Pub Health Art 27-F by disclosing patient's HIV-positive status to attorney representing patient's employer in Pennsylvania workers' compensation proceeding, although CLS Pub Health § 2783, which authorizes civil and criminal penalties for certain violations of Art 27-F, contains no express provision authorizing private cause of action, since § 2783(3), which provides for grant of immunity for certain disclosures, would have meaning only if private right of action existed, legislative history indicated intention to create such right, recognition of private cause of action would promote legislative purpose and be consistent with common law cause of action for physician's breach of confidentiality, and patient was "protected individual" within meaning of CLS Pub Health § 2780(6) and thus was member of class for whose benefit statute was enacted. Doe v Roe, 190 A.D.2d 463, 599 N.Y.S.2d 350, 1993 N.Y. App. Div. LEXIS 5673 (N.Y. App. Div. 4th Dep't), app. dismissed, 82 N.Y.2d 846, 606 N.Y.S.2d 597, 627 N.E.2d 519, 1993 N.Y. LEXIS 4307 (N.Y. 1993).

Punitive damages may be allowed in patient's private action against physician for violation of CLS Pub Health Art 27-F, and specifically CLS Pub Health § 2782, by disclosing patient's HIV-positive status, although Art 27-F does not expressly authorize award of punitive damages for improper disclosure of HIV-related information, since award of punitive damages is consistent with legislative scheme and intent, and availability of punitive damages advances strong public policy of protecting confidentiality of patient's HIV status, and its condemnation of breach of physician's duty to protect that confidentiality; while CLS Pub Health § 2783 provides criminal sanction and civil penalty for violation of CLS Pub Health § 2782, recovery of punitive damages for violation of statutory duties is allowed despite availability of criminal and civil sanctions. Doe v Roe, 190 A.D.2d 463, 599 N.Y.S.2d 350, 1993 N.Y. App. Div. LEXIS 5673 (N.Y. App. Div. 4th Dep't), app. dismissed, 82 N.Y.2d 846, 606 N.Y.S.2d 597, 627 N.E.2d 519, 1993 N.Y. LEXIS 4307 (N.Y. 1993).

Statutes relating to confidentiality of AIDS and HIV diagnoses apply to health care providers and certain others; not news media. Cruz v Latin News Impacto Newspaper, 216 A.D.2d 50, 627 N.Y.S.2d 388, 1995 N.Y. App. Div. LEXIS 6113 (N.Y. App. Div. 1st Dep't 1995).

Patient can maintain private cause of action against physician under CLS Pub Health Art 27-F for unauthorized disclosure of AIDS-related information, not limited by $5,000 penalty provision of CLS Pub Health § 2783(1)(b), which refers only to civil penalties recoverable by Commissioner of Health. Doe v Roe, 155 Misc. 2d 392, 588 N.Y.S.2d 236, 1992 N.Y. Misc. LEXIS 407 (N.Y. Sup. Ct. 1992), modified, aff'd, 190 A.D.2d 463, 599 N.Y.S.2d 350, 1993 N.Y. App. Div. LEXIS 5673 (N.Y. App. Div. 4th Dep't 1993).

Although prison officials' act of disclosing a prisoner's medical records constituted a violation of N.Y. Pub. Health Law § 2782, the claims court properly determined the amount of the penalty to award under N.Y. Pub. Health Law § 2783 after prison officials improperly disclosed the prisoner's medical information to the prisoner's children; the disclosure was inadvertent, and was meant for the prisoner's wife, who was authorized to receive the information. Tatta v State, 20 A.D.3d 825, 799 N.Y.S.2d 610, 2005 N.Y. App. Div. LEXIS 8105 (N.Y. App. Div. 3d Dep't 2005).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Wilful violation of health laws, § 12-b.

Violations of health laws or regulations; penalties and injunctions, § 12.

HIV related testing, § 2781.

Confidentiality and disclosure, § 2782.

Limitation of medical, dental or podiatric malpractice action based on lack of informed consent, § 2805-d.

Jurisprudences:

64 NY Jur 2d Health and Sanitation § 78 .

Law Reviews:

Murtha, Underutilized weapon against AIDS-the workplace: a strategic approach. 10 Pace L. Rev. 45.

Annotations:

AIDS infection as affecting right to attend public school. 60 ALR4th 15.

§ 2784. Applicability to insurance institutions and insurance support organizations

Except for disclosure to third party reimbursers and insurance institutions pursuant to paragraphs (i) and (j) of subdivision one of section twenty-seven hundred eighty-two of this article and except for disclosures pursuant to section twenty-seven hundred eighty-five of this article, the provisions of this article shall not apply to insurance institutions and insurance support organizations, except that health care providers associated with or under contract to a health maintenance organization or other medical services plan shall be subject to the provisions of this article.

HISTORY:

Add, L 1988, ch 584, § 2, eff Feb 1, 1989 (see 1988 note under § 2780).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Confidentiality and disclosure, § 2782.

Court authorization for disclosure of confidential HIV related information, § 2785.

Federal Aspects:

Ricky Ray hemophilia relief fund act of 1998, P. L. 105-369.

Jurisprudences:

64 NY Jur 2d Health and Sanitation § 77.

Law Reviews:

Murtha, Underutilized weapon against AIDS-the workplace: a strategic approach. 10 Pace L. Rev. 45.

Annotations:

AIDS infection as affecting right to attend public school. 60 ALR4th 15.

§ 2785. Court authorization for disclosure of confidential HIV related information

1. Notwithstanding any other provision of law, no court shall issue an order for the disclosure of confidential HIV related information, except a court of record of competent jurisdiction in accordance with the provisions of this section.

2. A court may grant an order for disclosure of confidential HIV related information upon an application showing: (a) a compelling need for disclosure of the information for the adjudication of a criminal or civil proceeding; (b) a clear and imminent danger to an individual whose life or health may unknowingly be at significant risk as a result of contact with the individual to whom the information pertains; (c) upon application of a state, county or local health officer, a clear and imminent danger to the public health; or (d) that the applicant is lawfully entitled to the disclosure and the disclosure is consistent with the provisions of this article.

3. Upon receiving an application for an order authorizing disclosure pursuant to this section, the court shall enter an order directing that all pleadings, papers, affidavits, judgments, orders of the court, briefs and memoranda of law which are part of the application or the decision thereon, be sealed and not made available to any person, except to the extent necessary to conduct any proceedings in connection with the determination of whether to grant or deny the application, including any appeal. Such an order shall further direct that all subsequent proceedings in connection with the application shall be conducted in camera, and, where appropriate to prevent the unauthorized disclosure of confidential HIV related information, that any pleadings, papers, affidavits, judgments, orders of the court, briefs and memoranda of law which are part of the application or the decision thereon not state the name of the individual concerning whom confidential HIV related information is sought.

4. (a) The individual concerning whom confidential HIV related information is sought and any person holding records concerning confidential HIV related information from whom disclosure is sought shall be given adequate notice of such application in a manner which will not disclose to any other person the identity of the individual, and shall be afforded an opportunity to file a written response to the application, or to appear in person for the limited purpose of providing evidence on the statutory criteria for the issuance of an order pursuant to this section.

(b) The court may grant an order without such notice and opportunity to be heard, where an ex parte application by a public health officer shows that a clear and imminent danger to an individual whose life or health may unknowingly be at risk requires an immediate order.

(c) Service of a subpoena shall not be subject to this subdivision.

5. In assessing compelling need and clear and imminent danger, the court shall provide written findings of fact, including scientific or medical findings, citing specific evidence in the record which supports each finding, and shall weigh the need for disclosure against the privacy interest of the protected individual and the public interest which may be disserved by disclosure which deters future testing or treatment or which may lead to discrimination.

6. An order authorizing disclosure of confidential HIV related information shall:

(a) limit disclosure to that information which is necessary to fulfill the purpose for which the order is granted; and

(b) limit disclosure to those persons whose need for the information is the basis for the order, and specifically prohibit redisclosure by such persons to any other persons, whether or not they are parties to the action; and

(c) to the extent possible consistent with this section, conform to the provisions of this article; and

(d) include such other measures as the court deems necessary to limit any disclosures not authorized by its order.

HISTORY:

Add, L 1988, ch 584, § 2, eff Feb 1, 1989 (see 1988 note under § 2780).

Notes to Decisions

In action against decedent's estate arising out of decedent's alleged wrongful transmission of AIDS virus to plaintiff, plaintiff had compelling need for decedent's confidential HIV-related information, and thus was entitled to disclosure under CLS Pub Health § 2785; statute overcame physician-patient privilege, and purpose of preserving confidentiality of HIV-related information (to encourage voluntary HIV testing) was not implicated because medical records were those of deceased person. Plaza v Estate of Wisser, 211 A.D.2d 111, 626 N.Y.S.2d 446, 1995 N.Y. App. Div. LEXIS 4569 (N.Y. App. Div. 1st Dep't 1995).

In sexual abuse proceeding, father did not show compelling need for disclosure of any confidential HIV-related information as to child where abuse petition did not charge him with infecting her, there was no proof that he was HIV positive, and even if child were HIV negative, that fact would not undermine proof of abuse against father in view of incubation period of disease and nature of sexual activities involved. In re R. Children, 216 A.D.2d 6, 627 N.Y.S.2d 376, 1995 N.Y. App. Div. LEXIS 5852 (N.Y. App. Div. 1st Dep't 1995).

Defendants and their attorneys did not compel plaintiff to disclose his health status at his deposition, or otherwise violate his right under CLS Pub Health Art 27-F to have his health status kept confidential, and thus motion to hold them in contempt on that basis was properly denied, where plaintiff was represented by counsel and could have refused to answer any question that might divulge his health status, thereby requiring

defendants to put issue before court, but instead he volunteered information about his health status in response to proper question concerning whether his inability to work was due to his "liver problems or some other medical condition"; since plaintiff's status was already on record, his motion for protective order against use of his medical records was properly denied. Trevino v Davis, 283 A.D.2d 156, 724 N.Y.S.2d 56, 2001 N.Y. App. Div. LEXIS 4270 (N.Y. App. Div. 1st Dep't 2001).

Supreme court erred in granting a motion to compel the release of medical and clinical records, including the results of HIV and hepatitis tests taken by a patient where the petition requesting the same failed to allege any material facts to demonstrate that the disclosure of the patient's confidential HIV information was warranted by a clear and imminent danger to the petitioner In re Garinger, 305 A.D.2d 677, 759 N.Y.S.2d 550, 2003 N.Y. App. Div. LEXIS 5947 (N.Y. App. Div. 2d Dep't 2003).

Supreme court erred in granting a motion to compel the release of medical and clinical records, including the results of HIV and hepatitis tests taken by a patient where the petition requesting the same failed to allege any material facts to demonstrate that the disclosure of the patient's confidential HIV information was warranted by a clear and imminent danger to the petitioner, pursuant to N.Y. Pub. Health § 2785(2)(b), or that the patient's clinical records should have been disclosed based on a finding that the interests of justice significantly outweighed the need for confidentiality, as required by N.Y. Mental Hyg. Law § 33.13(c)(1). In re Garinger, 305 A.D.2d 677, 759 N.Y.S.2d 550, 2003 N.Y. App. Div. LEXIS 5947 (N.Y. App. Div. 2d Dep't 2003).

In a dental malpractice action, the trial court had to reconsider a protective order request related to a discovery request for first plaintiff's medical records insofar as they contained HIV-related information because it had to apply the compelling need for disclosure standard in N.Y. Pub. Health Law § 2785(5) rather than the general standard in N.Y. C.P.L.R. 3101(a). Catherine D. v Judy, 38 A.D.3d 258, 832 N.Y.S.2d 154, 2007 N.Y. App. Div. LEXIS 2676 (N.Y. App. Div. 1st Dep't 2007).

Trial court properly granted a board's cross motion to compel compliance with its subpoena because allegations of physician misconduct at issue related directly to the treatment of patients with HIV whose files were sought, the board showed that it had a good faith basis to issue the subpoena, and disclosure was warranted under N.Y. Pub. Health Law § 2785(2)(d); however, in recognition of the need for confidentiality, any disclosure order had to provide for redactions of material that was not necessary for the conduct of the investigation and otherwise comply with § 2785(6). Anonymous v New York State Dep't of Health, 65 A.D.3d 491, 884 N.Y.S.2d 410, 2009 N.Y. App. Div. LEXIS 6142 (N.Y. App. Div. 1st Dep't 2009).

In a wrongful death action, defendants failed to offer any direct evidence suggesting that the decedent had HIV or AIDS; hence, they were not entitled to production of the decedent's medical records under Public Health Law § 2785(2) on that basis. Abdur-Rahman v Pollari, 107 A.D.3d 452, 967 N.Y.S.2d 31, 2013 N.Y. App. Div. LEXIS 4031 (N.Y. App. Div. 1st Dep't 2013).

In action seeking damages arising out of decedent's fraudulent concealment of AIDS from plaintiff, with whom he had unprotected sexual relations, court would deny relief requested by decedent's personal representative, including (1) amendment of caption substituting pseudonyms for true names, (2) anonymity of defendants in perpetuity, (3) nondisclosure of identity of defendants and medical condition of decedent except by court order, (4) exclusion of persons except parties and counsel from all hearings, and (5) sealing of file in office of county clerk; neither CLS CPLR § 3103(a) nor CLS Pub Health § 2785 authorized such extraordinary relief. Flynn v Doe, 146 Misc. 2d 934, 553 N.Y.S.2d 288, 1990 N.Y. Misc. LEXIS 115 (N.Y. Sup. Ct. 1990).

Claimant, who became contaminated with AIDS virus when correction officers failed to restrain HIV-infected inmate patient in hospital where she worked, was entitled to limited disclosure of inmate's medical and prison records and autopsy report containing references to HIV tests and infection; however, in order to carry out "maximum confidentiality" mandate of CLS Pub Health Art 27-F, records would be redacted to remove any reference to inmate's name and other identifying information. Doe v State, 152 Misc. 2d 922, 579 N.Y.S.2d 822, 1991 N.Y. Misc. LEXIS 756 (N.Y. Ct. Cl. 1991).

In attempted murder prosecution of defendant who had AIDS, based on his having bitten police officer during his arrest for assault, 26-month preindictment delay did not violate defendant's due process right to speedy trial where delay resulted from time spent litigating privacy issue in connection with court proceedings that ultimately resulted in defendant being ordered to undergo AIDS blood test and to permit disclosure of results to grand jury; there was justifiable excuse for delay and lack of actual prejudice to defendant. People v Juan R., 153 Misc. 2d 400, 589 N.Y.S.2d 256, 1992 N.Y. Misc. LEXIS 396 (N.Y. Sup. Ct. 1992).

In attempted murder prosecution of defendant who had AIDS, based on his having bitten police officer while trying to avoid arrest, People were not chargeable for 202-day period spent litigating privacy issue in connection with court proceedings which ultimately resulted in defendant being ordered to undergo AIDS blood test and to permit disclosure of results to grand jury, since People had good-faith basis to investigate whether defendant had AIDS and they exercised due diligence to obtain such evidence; additionally, delay was excludable because of "exceptional circumstances" under CLS CPL § 30.30(4)(g). People v Juan R., 153 Misc. 2d 400, 589 N.Y.S.2d 256, 1992 N.Y. Misc. LEXIS 396 (N.Y. Sup. Ct. 1992).

County court had jurisdiction to compel defendant to submit to blood test for determination of HIV-related information where defendant, who was at high risk of AIDS and HIV infection due to her life-style as prostitute and intravenous drug user, allegedly bit 2 people while trying to avoid arrest and then publicly stated that she was HIV positive; statutory confidentiality protection pertaining to HIV-related information (CLS Pub Health Art 27-F) did not prevent disclosure of test results to district attorney's office for purposes of adjudicating criminal proceeding since (1) there was compelling need for disclosure, and clear and imminent danger to health of individuals who might unknowingly be at risk as result of contact with defendant, and (2) there was no evidence that disclosure would deter further testing or treatment, or lead to discrimination. People v Anonymous, 153 Misc. 2d 436, 582 N.Y.S.2d 350, 1992 N.Y. Misc. LEXIS 70 (N.Y. County Ct. 1992).

In action against treating physician for breach of duty under CLS Pub Health Art 27-F not to disclose confidential HIV-related records, by releasing patient's medical records (including confidential information that he had tested positive for HIV) to Pennsylvania Workers' Compensation Board pursuant to subpoena, patient was not entitled to protective order preventing physician's discovery of information relating to his HIV illness, since physician demonstrated "compelling need" for disclosure of HIV-related information under CLS Pub Health § 2785(2)(a) in that determination of patient's pecuniary injury for wrongful disclosure necessarily involved his mental and HIV-related physical history. Doe v Roe, 155 Misc. 2d 392, 588 N.Y.S.2d 236, 1992 N.Y. Misc. LEXIS 407 (N.Y. Sup. Ct. 1992), modified, aff'd, 190 A.D.2d 463, 599 N.Y.S.2d 350, 1993 N.Y. App. Div. LEXIS 5673 (N.Y. App. Div. 4th Dep't 1993).

In wrongful death action arising out of blood bank's allegedly negligent screening of donors, resulting in decedent's contraction of AIDS from transfusion of contaminated blood from single, identifiable HIV-positive blood donor, plaintiff was not entitled to unlimited disclosure of donor's name for purpose of deposing donor since plaintiff failed to satisfy requirements of CLS Pub Health § 2785(2) where he (1) failed to establish sufficient relevance of proposed inquiry to show compelling need for desired discovery, (2) failed to adequately confine scope of disclosure request, and (3) did not profess willingness to limit access to information. Roth v New York Blood Ctr., Inc., 157 Misc. 2d 122, 596 N.Y.S.2d 639, 1993 N.Y. Misc. LEXIS 97 (N.Y. Sup. Ct. 1993).

In wrongful death action arising out of blood bank's allegedly negligent screening of donors, resulting in decedent's contraction of AIDS from transfusion of contaminated blood from single, identifiable HIV-positive blood donor, plaintiff was not entitled to depose donor's relatives, in event donor was deceased, regarding donor's prior health history since only blood bank's screening procedures were at issue. Roth v New York Blood Ctr., Inc., 157

Misc. 2d 122, 596 N.Y.S.2d 639, 1993 N.Y. Misc. LEXIS 97 (N.Y. Sup. Ct. 1993).

People were entitled to order under CLS Pub Health § 2785(2)(a) directing disclosure of certified results of HIV test results of defendant charged with first degree reckless endangerment arising from incident in which defendant bit mental health worker since (1) there was compelling need for proof on issue of defendant's HIV status for adjudication of criminal proceeding as, without such proof, People would be unable to prove defendant's state of mind or existence of grave risk of death to victim, and (2) defendant effectively waived her privacy interest in test result as she announced publicly on more than one occasion that she was HIV positive. In re Gribetz, 159 Misc. 2d 550, 605 N.Y.S.2d 834, 1993 N.Y. Misc. LEXIS 496 (N.Y. County Ct. 1993).

In assault case in which defendant was accused of having bitten complainant, and in which People had inadvertently turned over to defense counsel medical report making reference to complainant's HIV status, court would grant People's motion for redaction from report of all references to complainant's HIV status, provided that People arranged to disclose such information to defendant through physician or health officer, but would deny People's request that defense counsel be ordered not to disclose HIV information to defendant; court could not bar defense counsel from making disclosure to her client, but would strongly recommend that disclosure be made through physician or health officer instead. People v Pedro M., 165 Misc. 2d 710, 630 N.Y.S.2d 208, 1995 N.Y. Misc. LEXIS 290 (N.Y. City Crim. Ct. 1995).

In an effort to balance the discovery rights of defendants in motor accident cases against New York's strong public policy of encouraging HIV/AIDS testing by protecting against disclosure of HIV status, a court ordered that the injured person, whose HIV positive status, as it affected life expectancy, might well prove relevant to determination of future damages, submit medical records for in camera review by medical experts and the court; the court would determine, after a hearing, if there was a compelling need for further disclosure and, if so, would make all required redactions. Doe v G.J. Adams Plumbing, Inc., 794 N.Y.S.2d 636, 8 Misc. 3d 610, 2005 N.Y. Misc. LEXIS 884 (N.Y. Sup. Ct. 2005).

The trial court in a personal injury action appropriately referred the matter to a special referee to "hear and report" on the "statutorily required findings," which meant the required findings under N.Y. Pub. Health Law § 2785(2)(a), (5) for the discovery of confidential HIV-related information; plaintiff put his HIV status in issue by bringing this action and alleging that he suffered permanent injuries and a total disability as a result of the accident. Further, plaintiff's life expectancy was relevant to an award of damages, and ignoring plaintiff's HIV status would have violated the owner's right to a fair trial by seriously hindering the owner's ability to mount a defense based on a claimed shortened life expectancy. Doe v Sutlinger Realty Corp., 96 A.D.3d 898, 947 N.Y.S.2d 153, 2012 N.Y. App. Div. LEXIS 4889 (N.Y. App. Div. 2d Dep't 2012).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 2782, 2784, 2786.

Jurisprudences:

44A NY Jur 2d Disclosure § 323 .

64 NY Jur 2d Health and Sanitation §§ 77, 78, 84 .

76 NY Jur 2d Malpractice § 284 .

Annotations:

AIDS infection as affecting right to attend public school. 60 ALR4th 15.

Texts: 1-12 New Appleman New York Insurance Law § 12.06.

1 New York Trial Guide (Matthew Bender) § 7.23; 3 New York Trial Guide (Matthew Bender) § 51.11.

Weinstein, Korn, Miller, CPLR Manual (Matthew Bender) §§ 16.05[a], 20.02[b], 34.02.

§ 2785-a. Court order for HIV related testing in certain cases

1. Notwithstanding any contrary provision of law or regulation, a state, county or local public health officer to whom an order or a consent for an HIV test is addressed or sent, in accordance with section 390.15 of the criminal procedure law or section 347.1 of the family court act, must cause HIV related testing to be administered to the subject named therein and, if the test is pursuant to court order, must immediately provide to the court that issued the order a written report specifying the date on which such test was completed. Such report to the court shall not, however, disclose the results of such test. Such officer must disclose the results of the testing to the victim indicated in the order or consent and must also disclose the results to the person tested, unless the person tested has been asked to but declines to authorize such disclosure to himself or herself.

2. At the time of communicating the test results to the subject or the victim, such public health officer shall directly provide the victim and person tested with (a) counseling or referrals for counseling for the purposes specified in subdivision five of section two thousand seven hundred eighty-one of this article; (b) counseling with regard to HIV disease and HIV testing in accordance with law and consistent with subdivision five of section two thousand seven hundred eighty-one of this article; and (c) appropriate health care and support services, or referrals to such available services. If at the time of communicating the test results, the person tested is in the custody of the department of corrections and community supervision, office of children and family services, office of mental health or a local correctional institution, the counseling and services required by this subdivision may be provided by a public health officer associated with the county or facility within which the person tested is confined.

3. Unless inconsistent with this section, the provisions of this article regarding the confidentiality and disclosure of HIV related information shall apply to proceedings conducted pursuant to section 390.15 of the criminal procedure law or section 347.1 of the family court act.

HISTORY:

Add, L 1995, ch 76, § 4, eff Aug 1, 1995 (see 1995 note below); amd, L 2011, ch 62, § 130 (Part C, Subpart B), eff March 31, 2011.

Editor's Notes: Laws 1995, ch 76, § 5, eff Aug 1, 1995, provides as follows:

§ 5. This act shall take effect on August 1, 1995 and permit court-ordered testing of persons convicted and adjudicated on and after such date.

Amendment Notes: 2011. Chapter 62, § 130 (Part C, Subpart B) amended:

Sub 2 by deleting at fig 1 "correctional services", at fig 2 "division for youth" and adding the matter in italics.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

64 NY Jur 2d Health and Sanitation §§ 77, 85 .

§ 2786. Rules and regulations; forms; report

1. The commissioner shall promulgate rules and regulations concerning implementation of this article for health facilities, health care providers and other persons to whom this article is applicable. The

commissioner shall also develop standardized model forms to be used for informed consent for HIV related testing and for the release of confidential HIV related information and materials for pre-test counseling as required by subdivision three of section twenty-seven hundred eighty-one of this article, and for post-test counseling as required by subdivision five of section twenty-seven hundred eighty-one of this article. Persons, health facilities and health care providers may use forms for informed consent for HIV related testing, and for the release of confidential HIV related information other than those forms developed pursuant to this section, provided they contain information consistent with the standardized model forms developed by the commissioner. All forms developed or used pursuant to this section shall be written in a clear and coherent manner using words with common, everyday meanings. The commissioner, in consultation with the AIDS institute advisory council, shall promulgate regulations to identify those circumstances which create a significant risk of contracting or transmitting HIV infection; provided, however, that such regulations shall not be determinative of any significant risk determined pursuant to paragraph (a) of subdivision four of section twenty-seven hundred eighty-two or section twenty-seven hundred eighty-five of this article.

2. (a) Each state agency authorized pursuant to this article to obtain confidential HIV related information and the board of correction of the city of New York shall, in consultation with the department of health, promulgate regulations: (1) to provide safequards to prevent discrimination, abuse or other adverse actions directed toward protected individuals; (2) to prohibit the disclosure of such information except in accordance with this article; (3) to seek to protect individuals in contact with the protected individual when such contact creates a significant risk of contracting or transmitting HIV infection through the exchange of body fluids, and (4) to establish criteria for determining when it is reasonably necessary for a provider of a health or social service or the state agency or a local government agency to have or to use confidential HIV related information for supervision, monitoring, investigation, or administration and for determining which employees and agents may, in the ordinary course of business of the agency or provider, be authorized to access confidential HIV related information pursuant to the provisions of paragraphs (l) and (m) of subdivision one and subdivision six of section twenty-seven hundred eighty-two of this article; and provided further that such regulations shall be promulgated by the chairperson of the commission of correction where disclosure is made pursuant to paragraphs (n) and (o) of subdivision one of section twenty-seven hundred eighty-two of this article.

(b) The department of health, in consultation with agencies referred to in paragraph (a) of this subdivision, shall submit a report to the legislature by December first, nineteen hundred eighty-nine, outlining the status and content of such regulations, their effect on the regulated facilities and the protected individuals served by them, the extent to which they conform with current medical and scientific knowledge on the transmissibility of HIV infection, and any recommendations for changes in said regulations.

HISTORY:

Add, L 1988, ch 584, § 2, eff Feb 1, 1989 (see 1988 note under § 2780); amd, L 2010, ch 308, § 8, eff Sept 1, 2010 (see 2010 note below); L 2020, ch 312, § 3, effective December 2, 2020.

Editor's Notes: Laws 2010, ch 308, § 10, eff Sept 1, 2010, provides as follows:

§ 10. This act shall take effect September 1, 2010; provided, however, that the commissioner of health is authorized to adopt rules and regulations necessary to implement this act prior to such effective date.

Amendment Notes: 2010. Chapter 308, § 8 amended:

Sub 1 by deleting at fig 1 "that the person, health facility or health care provider doing so receives prior authorization from", at fig 2 "authorized" and adding the matter in italics.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 2782.

HIV related testing, § 2781.

Confidentiality and disclosure, § 2782.

Court authorization for disclosure of confidential HIV related information, § 2785.

Codes, Rules and Regulations:

AIDS confidentiality. 7 NYCRR §§ 7.1 et seq.

Requirements regarding testing, confidentiality and precautions concerning HIV and AIDS. 9 NYCRR §§ 164.1 et seq.

Intra-agency access to and disclosure of personal health-related information. 10 NYCRR §§ 50-4.1 et seq.

Jurisprudences:

Law Reviews:

Murtha, Underutilized weapon against AIDS-the workplace: a strategic approach. 10 Pace L. Rev. 45.

Annotations:

AIDS infection as affecting right to attend public school. 60 ALR4th 15.

§ 2787. Separability

If any section, clause or provision of this article shall be deemed by any court of competent jurisdiction to be unconstitutional or ineffective in whole or in part, to the extent that it is not unconstitutional or ineffective, it shall be valid and effective and no other section, clause or provision shall on account thereof be deemed invalid or ineffective.

HISTORY:

Add, L 1988, ch 584, § 2, eff Feb 1, 1989 (see 1988 note under § 2780).

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

Annotations:

AIDS infection as affecting right to attend public school. 60 ALR4th 15.

ARTICLE 29-B Orders Not to Resuscitate for Residents of Mental Hygiene Facilities

Section

2960. Legislative findings and purpose.

2961. Definitions
2962. Presumption in favor of resuscitation; lawfulness of order; effectiveness of order; duty to provide information; no duty to expand equipment
2963. Determination of capacity to make a decision regarding cardiopulmonary resuscitation.
2964. Decision-making by an adult with capacity
2965. Surrogate decision-making
2966. Decision-making on behalf of an adult patient without capacity for whom no surrogate is available
2967. Decision-making on behalf of a minor patient.
2968. Effect of order not to resuscitate on other treatment
2969. Revocation of consent to order not to resuscitate.
2970. Physician, nurse practitioner and physician assistant review of the order not to resuscitate.
2971. Interinstitutional transfers
2972. Dispute mediation system
2973. Judicial review
2974. Immunity
2975. Effect of order not to resuscitate on insurance and health care services
2976. Judicially approved order not to resuscitate.
2978. Regulations
2979. Rights to be publicized

HISTORY:
Add, L 1987, ch 818, § 1, eff April 1, 1988; amd, L 2010, ch 8, § 4, eff June 1, 2010.

§ 2960. Legislative findings and purpose.

The legislature finds that, although cardiopulmonary resuscitation has proved invaluable in the prevention of sudden, unexpected death, it is appropriate for an attending practitioner, in certain circumstances, to issue an order not to attempt cardiopulmonary resuscitation of a patient where appropriate consent has been obtained. The legislature further finds that there is a need to clarify and establish the rights and obligations of patients, their families, and health care providers regarding cardiopulmonary resuscitation and the issuance of orders not to resuscitate.

HISTORY:
Add, L 1987, ch 818, § 1, eff April 1, 1988; L 2017, ch 430, § 1, effective May 28, 2018; L 2019, ch 708, § 1, effective June 17, 2020.

Editor's Notes Laws 1987, ch 818, § 2, eff April 1, 1988, provides as follows:

§ 2. This act shall take effect April first, nineteen hundred eighty-eight, provided, that effective immediately, the addition, amendment, and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized and directed to be made and completed on or before such effective date.

Laws 2017, ch 430, § 33, eff May 28, 2018, provides:

§ 33. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided that, effective immediately, any rules and regulations necessary to implement the provisions of this act on its effective date are authorized and directed to be amended, repealed and/or promulgated on or before such date.

Laws 2019, ch 708, § 38, eff June 17, 2020, provides:

§ 38. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided, however that if chapter 342 of the laws of 2018 shall not have taken effect on or before such date, then sections seventeen, eighteen, nineteen and twenty of this act shall take effect on the same date and in the same manner as such chapter 342 of the laws of 2018, takes effect. Effective immediately, any rules and regulations necessary to implement the provisions of this act on its effective date are authorized and directed to be amended, repealed and/or promulgated on or before such date.

Amendment Notes The 2017 amendment by ch 430, § 1, added "or attending nurse practitioner" in the first sentence.

The 2019 amendment by ch 708 § 1, deleted "physician or attending nurse" following "attending" in the first sentence.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:
Procedures governing do not resuscitate (DNR) orders. 14 NYCRR § 633.18.

Law Reviews:
Sorum, Limiting cardiopulmonary resuscitation. 57 Alb. L. Rev. 617.

Texts: 2 Drafting New York Wills § 20.03.

§ 2961. Definitions

The following words or phrases, as used in this article, shall have the following meanings unless the context otherwise requires:

1. "Adult" means any person who is eighteen years of age or older, or is the parent of a child, or has married.

2. "Attending practitioner" means the physician, nurse practitioner, or physician assistant, licensed or certified pursuant to title eight of the education law, selected by or assigned to a patient in a hospital who has primary responsibility for the treatment and care of the patient. Where more than one physician, nurse practitioner, or physician assistant shares such responsibility, any such physician, nurse practitioner, or physician assistant may act as the attending practitioner pursuant to this article.

3. "Capacity" means the ability to understand and appreciate the nature and consequences of an order not to resuscitate, including the benefits and disadvantages of such an order, and to reach an informed decision regarding the order.

4. "Cardiopulmonary resuscitation" means measures to restore cardiac function or to support ventilation in the event of a cardiac or respiratory arrest. Cardiopulmonary resuscitation shall not include measures to improve ventilation and cardiac functions in the absence of an arrest.

5. "Close friend" means any person, eighteen years of age or older, who is a close friend of the patient, or relative of the patient (other than a spouse, adult child, parent, brother or sister) who has maintained such regular contact with the patient as to be familiar with the patient's activities, health, and religious or moral beliefs and who presents a signed statement to that effect to the attending practitioner.

5-a. "Correctional facilities medical care personnel" means personnel engaged in providing health care at correctional facilities, as that term is defined

in subdivision four of section two of the correction law.

6. "Developmental disability" means a developmental disability as defined in subdivision twenty-two of section 1.03 of the mental hygiene law.

6-a. "Domestic partner" means a person who, with respect to another person:

(a) is formally a party in a domestic partnership or similar relationship with the other person, entered into pursuant to the laws of the United States or of any state, local or foreign jurisdiction, or registered as the domestic partner of the other person with any registry maintained by the employer of either party or any state, municipality, or foreign jurisdiction; or

(b) is formally recognized as a beneficiary or covered person under the other person's employment benefits or health insurance; or

(c) is dependent or mutually interdependent on the other person for support, as evidenced by the totality of the circumstances indicating a mutual intent to be domestic partners including but not limited to: common ownership or joint leasing of real or personal property; common householding, shared income or shared expenses; children in common; signs of intent to marry or become domestic partners under paragraph (a) or (b) of this subdivision; or the length of the personal relationship of the persons.

Each party to a domestic partnership shall be considered to be the domestic partner of the other party. "Domestic partner" shall not include a person who is related to the other person by blood in a manner that would bar marriage to the other person in New York state. "Domestic partner" also shall not include any person who is less than eighteen years of age or who is the adopted child of the other person or who is related by blood in a manner that would bar marriage in New York state to a person who is the lawful spouse of the other person.

7. [Repealed]

8. "Health care agent" means a health care agent of the patient designated pursuant to article twenty-nine-C of this chapter.

9. "Hospital" means a hospital as defined in subdivision ten of section 1.03 of the mental hygiene law or a school named in section 13.17 of the mental hygiene law.

10. [Repealed]

11. "Hospitalization" means the period during which a person is a patient in, or a resident of, a hospital.

12. "Medically futile" means that cardiopulmonary resuscitation will be unsuccessful in restoring cardiac and respiratory function or that the patient will experience repeated arrest in a short time period before death occurs.

13. [Repealed]

14. "Mental illness" means a mental illness as defined in subdivision twenty of section 1.03 of the mental hygiene law, provided, however, that mental illness shall not include dementia, such as Alzheimer's disease or other disorders related to dementia.

15. "Minor" means any person who is not an adult.

16. "Nurse practitioner" means a nurse practitioner certified pursuant to section sixty-nine hundred ten of the education law who is practicing in accordance with subdivision three of section sixty-nine hundred two of the education law.

17. "Order not to resuscitate" means an order not to attempt cardiopulmonary resuscitation in the event a patient suffers cardiac or respiratory arrest.

18. "Parent" means a parent who has custody of the minor.

19. "Patient" means a person admitted to a hospital.

20. "Reasonably available" means that a person to be contacted can be contacted with diligent efforts by an attending practitioner or another person acting on behalf of the attending practitioner or the hospital.

21. "Surrogate" means the person selected to make a decision regarding resuscitation on behalf of another person pursuant to section twenty-nine hundred sixty-five of this article.

22. "Surrogate list" means the list set forth in subdivision two of section twenty-nine hundred sixty-five of this article.

23. "Terminal condition" means an illness or injury from which there is no recovery, and which reasonably can be expected to cause death within one year.

HISTORY:

Add, L 1987, ch 818, § 1, eff April 1, 1988; amd, L 1991, ch 370, § 1, eff July 15, 1991; L 1993, ch 577, §§ 1, 2, eff July 28, 1993; L 2010, ch 8, §§ 5–7, eff June 1, 2010; L 2017, ch 430, § 2, effective May 28, 2018; L 2019, ch 708, §§ 2, 3, effective June 17, 2020.

Editor's Notes Laws 2010, ch 8, § 29, eff March 16, 2010, provides as follows:

§ 29. This act shall take effect immediately; provided that sections one through twenty-six of this act shall take effect on the first of June next succeeding the date on which this act shall have become a law; and provided further that effective immediately it shall be lawful for a hospital, as defined in subdivision 18 of section 2994-a of the public health law, as added by this act to adopt a policy that is consistent with the requirements of article 29-CC of the public health law as added by section two of this act or the mental hygiene law as amended by sections twenty-five and twenty-six of this act and for a health care provider to accept and carry out a health care decision in accordance with such requirements for a patient in a hospital that has adopted such policy.

Laws 2017, ch 430, § 33, eff May 28, 2018, provides:

§ 33. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided that, effective immediately, any rules and regulations necessary to implement the provisions of this act on its effective date are authorized and directed to be amended, repealed and/or promulgated on or before such date.

Laws 2019, ch 708, § 38, eff June 17, 2020, provides:

§ 38. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided, however that if chapter 342 of the laws of 2018 shall not have taken effect on or before such date, then sections seventeen, eighteen, nineteen and twenty of this act shall take effect on the same date and in the same manner as such chapter 342 of the laws of 2018, takes effect. Effective immediately, any rules and regulations necessary to implement the provisions of this

act on its effective date are authorized and directed to be amended, repealed and/or promulgated on or before such date.

Amendment Notes The 2017 amendment by ch 430, § 2, in the second sentence of 2, added "and/or nurse practitioner", "or nurse practitioner" and "or attending nurse practitioner"; added 2-a; added "or attending nurse practitioner" in 5; added 16; and added "attending nurse practitioner" twice in 20.

The 2019 amendments by ch 708 §§ 2, 3, rewrote 2, which formerly read: "'Attending physician' means the physician selected by or assigned to a patient in a hospital who has primary responsibility for the treatment and care of the patient. Where more than one physician and/or nurse practitioner shares such responsibility, any such physician or nurse practitioner may act as the attending physician or attending nurse practitioner pursuant to this article"; deleted former 2-a; deleted "physician, attending nurse" following "the attending" in 5; and in 20, deleted "physician, attending nurse" following "attending" twice.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 2992.

Texts: 2 Drafting New York Wills § 20.03.

§ 2962. Presumption in favor of resuscitation; lawfulness of order; effectiveness of order; duty to provide information; no duty to expand equipment

1. Every person admitted to a hospital shall be presumed to consent to the administration of cardiopulmonary resuscitation in the event of cardiac or respiratory arrest, unless there is consent to the issuance of an order not to resuscitate as provided in this article.

2. It shall be lawful for the attending practitioner to issue an order not to resuscitate a patient, provided that the order has been issued pursuant to the requirements of this article. The order shall be included in writing in the patient's chart. An order not to resuscitate shall be effective upon issuance.

3. Before obtaining, pursuant to this article, the consent of the patient, or of the surrogate of the patient, or parent or legal guardian of the minor patient, to an order not to resuscitate, the attending practitioner shall provide to the person giving consent information about the patient's diagnosis and prognosis, the reasonably foreseeable risks and benefits of cardiopulmonary resuscitation for the patient, and the consequences of an order not to resuscitate.

4. Nothing in this article shall require a hospital to expand its existing equipment and facilities to provide cardiopulmonary resuscitation.

5. (a) The provisions of article twenty-nine-C of this chapter, governing health care proxies and agents, take precedence over conflicting provisions of this article.

(b) When a patient who has a health care agent lacks capacity, the agent shall have the rights and authority that a patient with capacity would have under this article, subject to the terms of the health care proxy and article twenty-nine-C of this chapter.

HISTORY:

Add, L 1987, ch 818, § 1, eff April 1, 1988; amd, L 1991, ch 370, § 2, eff July 15, 1991; L 2017, ch 430, § 3, effective May 28, 2018; L 2019, ch 708, § 4, effective June 17, 2020.

Editor's Notes Laws 2017, ch 430, § 33, eff May 28, 2018, provides:

§ 33. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided that, effective immediately, any rules and regulations necessary to implement the provisions of this act on its effective date are authorized and directed to be amended, repealed and/or promulgated on or before such date.

Laws 2019, ch 708, § 38, eff June 17, 2020, provides:

§ 38. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided, however that if chapter 342 of the laws of 2018 shall not have taken effect on or before such date, then sections seventeen, eighteen, nineteen and twenty of this act shall take effect on the same date and in the same manner as such chapter 342 of the laws of 2018, takes effect. Effective immediately, any rules and regulations necessary to implement the provisions of this act on its effective date are authorized and directed to be amended, repealed and/or promulgated on or before such date.

Amendment Notes The 2017 amendment by ch 430, § 3, added "or attending nurse practitioner" in the first sentence of 2 and in 3.

The 2019 amendment by ch 708 § 4, deleted "physician or attending nurse" following "the attending" in the first sentence of 2 and in 3.

Agency Opinions

1. In general

Non-hospital do-not-resuscitate orders made under CLS Pub Health Art 29-B do not apply to health care staff at correctional facilities or at non-licensed medical center operated by Department of Correctional Services; department health care staff may, however, honor wishes of patients expressed in accordance with standards established by Court of Appeals, and patients may employ health care proxies to convey their wishes as to medical treatment or to designate third parties to make health care decisions. 1992 N.Y. Op. Att'y Gen. No. 92-F4, 1992 N.Y. AG LEXIS 60.

Where patient is incapacitated and did not consent to entry of do-not-resuscitate order prior to becoming incapacitated, CLS Pub Health Law requires physician to obtain consent of patient's health care agent or surrogate before entering do-not-resuscitate order, even if physician concludes that administration of cardiopulmonary resuscitation would be "medically futile"; only where no health care agent was appointed by patient and no competent surrogate is reasonably available and willing to make decision may physician enter do-not-resuscitate order based on medical futility without obtaining agent's or surrogate's consent, and then only on concurrence of another physician that resuscitative efforts would be medically futile or after obtaining court order. 2003 N.Y. Op. Att'y Gen. No. 2003-F1, 2003 N.Y. AG LEXIS 7.

RESEARCH REFERENCES AND PRACTICE AIDS

Texts: 2 Drafting New York Wills § 20.03.

§ 2963. Determination of capacity to make a decision regarding cardiopulmonary resuscitation.

1. Every adult shall be presumed to have the capacity to make a decision regarding cardiopulmonary resuscitation unless determined otherwise pursuant to this section or pursuant to a court order or unless a guardian is authorized to decide about health care for the adult pursuant to article eighty-one of the mental hygiene law or article seventeen-A of the surrogate's court procedure act. The attending practitioner shall not rely on the presumption stated in this subdivision if clinical indicia of incapacity are present.

2. A determination that an adult patient lacks capacity shall be made by the attending practitioner to a reasonable degree of medical certainty. The determination shall be made in writing and shall contain such attending practitioner's opinion regarding the cause and nature of the patient's incapacity as well as its extent and probable duration. The determination shall be included in the patient's medical chart.

3.

(a) At least one other physician, selected by a person authorized by the hospital to make such selection, must concur in the determination that an adult lacks capacity. The concurring determination shall be made in writing after personal examination of the patient and shall contain the physician's opinion regarding the cause and nature of the patient's incapacity as well as its extent and probable duration. Each concurring determination shall be included in the patient's medical chart.

(b) If the attending practitioner determines that a patient lacks capacity because of mental illness, the concurring determination required by paragraph (a) of this subdivision shall be provided by a physician licensed to practice medicine in New York state, who is a diplomate or eligible to be certified by the American Board of Psychiatry and Neurology or who is certified by the American Osteopathic Board of Neurology and Psychiatry or is eligible to be certified by that board.

(c) If the attending practitioner determines that a patient lacks capacity because of a developmental disability, the concurring determination required by paragraph (a) of this subdivision shall be provided by a physician or psychologist employed by a developmental disabilities services office named in section 13.17 of the mental hygiene law, or who has been employed for a minimum of two years to render care and service in a facility operated or licensed by the office for people with developmental disabilities, or who has been approved by the commissioner of developmental disabilities in accordance with regulations promulgated by such commissioner. Such regulations shall require that a physician or psychologist possess specialized training or three years experience in treating developmental disabilities.

4. Notice of a determination that the patient lacks capacity shall promptly be given (a) to the patient, where there is any indication of the patient's ability to comprehend such notice, together with a copy of a statement prepared in accordance with section twenty-nine hundred seventy-eight of this article, and (b) to the person on the surrogate list highest in order of priority listed, when persons in prior subparagraphs are not reasonably available. Nothing in this subdivision shall preclude or require notice to more than one person on the surrogate list.

5. A determination that a patient lacks capacity to make a decision regarding an order not to resuscitate pursuant to this section shall not be construed as a finding that the patient lacks capacity for any other purpose.

HISTORY:

Add, L 1987, ch 818, § 1, eff April 1, 1988; amd, L 1994, ch 23, § 1, eff March 28, 1994; L 2010, ch 8, § 8, eff June 1, 2010; L 2012, ch 56, § 5 (Part J), eff March 30, 2012; L 2017, ch 430, § 4, effective May 28, 2018; L 2019, ch 708, § 5, effective June 17, 2020.

Editor's Notes Laws 2008, ch 210, § 3, provides as follows:

§ 3. Notwithstanding the provisions of sections 2963, 2965, 2981 and 2983 of the public health law, a health care agent appointed pursuant to subdivision (e) of section 33.03 of the mental hygiene law may make any and all decisions authorized by articles 29-B and 29-C of the public health law, regardless of the principal's capacity, provided that the principal has elected to authorize such agent and that any such decision is made in direct consultation with the principal and the attending physician.

Laws 2010, ch 8, § 29, eff March 16, 2010, provides as follows:

§ 29. This act shall take effect immediately; provided that sections one through twenty-six of this act shall take effect on the first of June next succeeding the date on which this act shall have become a law; and provided further that effective immediately it shall be lawful for a hospital, as defined in subdivision 18 of section 2994-a of the public health law, as added by this act to adopt a policy that is consistent with the requirements of article 29-CC of the public health law as added by section two of this act or the mental hygiene law as amended by sections twenty-five and twenty-six of this act and for a health care provider to accept and carry out a health care decision in accordance with such requirements for a patient in a hospital that has adopted such policy.

Laws 2012, ch 56, §§ 20, 21 (Part J), eff March 30, 2012, provide as follows:

§ 20. [Expires March 31, 2013] The commissioner of the office for people with developmental disabilities shall provide notification to the temporary president of the senate and the speaker of the assembly sixty days prior to a reduction in capacity of twenty persons or more or closure of a developmental center or other institutional setting which is subject to such reduction or closure pursuant to such commissioner's planned downsizing and closing of institutional capacity.

§ 21. This act shall take effect immediately, provided however, that on or before May 31, 2012 the office for people with developmental disabilities shall submit a report to the temporary president of the senate and the speaker of the assembly on implementation related to the restructuring of developmental disabilities services offices. The office shall also publish the report on the office's website. The report shall include but not be limited to: the plan timeline for transition of each of the developmental disabilities service offices into a state operations offices of the office for people with developmental disabilities; the location of each state operations office, its catchment area, and a list of services that will be administered under its jurisdiction; and the location of each developmental disabilities regional office, its catchment area, and a list of programs under its jurisdiction; and provided further that section twenty of this act shall expire and be deemed repealed on March 31, 2013.

Laws 2017, ch 430, § 33, eff May 28, 2018, provides:

§ 33. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided that, effective immediately, any rules and regulations necessary to implement the provisions of this act on its effective date are authorized and directed to be amended, repealed and/or promulgated on or before such date.

Laws 2019, ch 708, § 38, eff June 17, 2020, provides:

§ 38. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided, however that if chapter 342 of the laws of 2018 shall not have taken effect on or before such date, then sections seventeen, eighteen, nineteen and twenty of this act shall take effect on the same date and in the same manner as such chapter 342 of the laws of 2018, takes effect. Effective immediately, any rules

and regulations necessary to implement the provisions of this act on its effective date are authorized and directed to be amended, repealed and/or promulgated on or before such date.

Amendment Notes The 2017 amendment by ch 430, § 4, added "or attending nurse practitioner" and variants wherever it appears in 1 through 3.

The 2019 amendment by ch 708 § 5, deleted "physician or attending nurse" following "the attending" or variants in the second sentence of 1, in the first sentence of 2, in 3(b) and 3(c); and deleted "physician's or attending nurse" following "such attending" in the second sentence of 2.

RESEARCH REFERENCES AND PRACTICE AIDS

Texts: 2 Drafting New York Wills § 20.03.

§ 2964. Decision-making by an adult with capacity

1. (a) The consent of an adult with capacity must be obtained prior to issuing an order not to resuscitate, except as provided in subdivision three of this section.

(b) If the adult has capacity at the time the order is to be issued, the consent must be obtained at or about such time, notwithstanding any prior oral or written consent.

2.

(a) During hospitalization, an adult with capacity may express a decision consenting to an order not to resuscitate orally in the presence of at least two witnesses eighteen years of age or older, one of whom is a physician, nurse practitioner, or physician assistant affiliated with the hospital in which the patient is being treated. Any such decision shall be recorded in the patient's medical chart.

(b) Prior to or during hospitalization, an adult with capacity may express a decision consenting to an order not to resuscitate in writing, dated and signed in the presence of at least two witnesses eighteen years of age or older who shall sign the decision.

(c) An attending practitioner who is provided with or informed of a decision pursuant to this subdivision shall record or include the decision in the patient's medical chart if the decision has not been recorded or included, and either:

(i) promptly issue an order not to resuscitate the patient or issue an order at such time as the conditions, if any, specified in the decision are met, and inform the hospital staff responsible for the patient's care of the order; or

(ii) promptly make his or her objection to the issuance of such an order and the reasons therefor known to the patient and either make all reasonable efforts to arrange for the transfer of the patient to another physician, nurse practitioner or physician assistant, if necessary, or promptly submit the matter to the dispute mediation system.

(d) Prior to issuing an order not to resuscitate a patient who has expressed a decision consenting to an order not to resuscitate under specified medical conditions, the attending practitioner must make a determination, to a reasonable degree of medical certainty, that such conditions exist, and include the determination in the patient's medical chart.

3. If the patient is in or is transferred from a correctional facility, notice of the patient's consent to an order not to resuscitate shall be given to the facility director and reasonable efforts shall be made to provide notice to an individual designated by the patient to receive such notification prior to the issuance of the order not to resuscitate. Notification to the facility director or the individual designated by the patient shall not unreasonably delay issuance of an order not to resuscitate.

HISTORY:

Add, L 1987, ch 818, § 1, eff April 1, 1988; amd, L 1991, ch 370, § 3, eff July 15, 1991; L 1993, ch 577, § 3, eff July 28, 1993; L 2010, ch 8, § 9, eff June 1, 2010; L 2017, ch 430, §§ 5, 6, effective May 28, 2018; L 2019, ch 708, § 6, effective June 17, 2020.

Editor's Notes Laws 2010, ch 8, § 29, eff March 16, 2010, provides as follows:

§ 29. This act shall take effect immediately; provided that sections one through twenty-six of this act shall take effect on the first of June next succeeding the date on which this act shall have become a law; and provided further that effective immediately it shall be lawful for a hospital, as defined in subdivision 18 of section 2994-a of the public health law, as added by this act to adopt a policy that is consistent with the requirements of article 29-CC of the public health law as added by section two of this act or the mental hygiene law as amended by sections twenty-five and twenty-six of this act and for a health care provider to accept and carry out a health care decision in accordance with such requirements for a patient in a hospital that has adopted such policy.

Laws 2017, ch 430, § 33, eff May 28, 2018, provides:

§ 33. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided that, effective immediately, any rules and regulations necessary to implement the provisions of this act on its effective date are authorized and directed to be amended, repealed and/or promulgated on or before such date.

Laws 2019, ch 708, § 38, eff June 17, 2020, provides:

§ 38. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided, however that if chapter 342 of the laws of 2018 shall not have taken effect on or before such date, then sections seventeen, eighteen, nineteen and twenty of this act shall take effect on the same date and in the same manner as such chapter 342 of the laws of 2018, takes effect. Effective immediately, any rules and regulations necessary to implement the provisions of this act on its effective date are authorized and directed to be amended, repealed and/or promulgated on or before such date.

Amendment Notes The 2017 amendment by ch 430, §§ 5, 6, added "or attending nurse practitioner" wherever it appears in 2; and redesignated former 5 as 3.

The 2019 amendment by ch 708 § 6, added "or physician assistant" in 2(a) and 2(c)(ii); deleted "physician or attending nurse" following "An attending" in the introductory language of (2)(c); deleted "physician or attending nurse" following "the attending" in 2(d); and made related changes.

Notes to Decisions

1. In general

Court properly dismissed complaint on ground that in absence of valid health care proxy, order not to resuscitate, or court order, there could be no action against hospital for saving plaintiff's life after she attempted to commit suicide; to extent that "living will" executed by plaintiff could be construed as order not resuscitate, it concededly contained signature of only one witness and thus did not comply with CLS Pub Health § 2964(2)(b). Haymes v Brookdale Hosp. Med. Ctr., 287 A.D.2d 486, 731 N.Y.S.2d 215, 2001 N.Y. App. Div. LEXIS 9387 (N.Y. App. Div. 2d Dep't 2001), app. denied, 97 N.Y.2d 608, 739 N.Y.S.2d 97, 765 N.E.2d 300, 2002 N.Y. LEXIS 49 (N.Y. 2002).

Court would grant request by mentally competent 88-year-old retired nurse (petitioner) for order to withhold all medical treatment except that necessary to alleviate pain where, inter alia, she was dependent on life support apparatus, almost 100 percent deaf, severely myopic, and incapable of speaking due to endotracheal tube, no compelling state interest had been identified, there was no showing of irresponsibility, overreaching, or financial gain by petitioner's grandson, and there was no indication whether respondents counseled petitioner as to her quality of life if she underwent tracheostomy surgery. Blackman v New York City Health & Hosps. Corp., 173 Misc. 2d 562, 660 N.Y.S.2d 643, 1997 N.Y. Misc. LEXIS 258 (N.Y. Sup. Ct. 1997), rev'd, 249 A.D.2d 539, 671 N.Y.S.2d 339, 1998 N.Y. App. Div. LEXIS 4608 (N.Y. App. Div. 2d Dep't 1998).

Agency Opinions

1. In general

Where patient is incapacitated and did not consent to entry of do-not-resuscitate order prior to becoming incapacitated, CLS Pub Health Law requires physician to obtain consent of patient's health care agent or surrogate before entering do-not-resuscitate order, even if physician concludes that administration of cardiopulmonary resuscitation would be "medically futile"; only where no health care agent was appointed by patient and no competent surrogate is reasonably available and willing to make decision may physician enter do-not-resuscitate order based on medical futility without obtaining agent's or surrogate's consent, and then only on concurrence of another physician that resuscitative efforts would be medically futile or after obtaining court order. 2003 N.Y. Op. Att'y Gen. No. 2003-F1, 2003 N.Y. AG LEXIS 7.

RESEARCH REFERENCES AND PRACTICE AIDS

Law Reviews:

Sorum, Limiting cardiopulmonary resuscitation. 57 Alb. L. Rev. 617.

Texts: 2 Drafting New York Wills § 20.03.

§ 2965. Surrogate decision-making

1. (a) The consent of a surrogate or health care agent acting on behalf of an adult patient who lacks capacity or on behalf of an adult patient for whom consent by a surrogate or health care agent is authorized by subdivision three of section twenty-nine hundred sixty-four of this article must be obtained prior to issuing an order not to resuscitate the patient, except as provided in paragraph (b) of this subdivision or section twenty-nine hundred sixty-six of this article.

(b) The consent of a surrogate or health care agent shall not be required where the adult had, prior to losing capacity, consented to an order not to resuscitate pursuant to subdivision two of section twenty-nine hundred sixty-four of this article.

(c) A decision regarding cardiopulmonary resuscitation by a health care agent on a principal's behalf is governed by article twenty-nine-C of this chapter and shall have priority over decisions by any other person, except the patient or as otherwise provided in the health care proxy.

2. (a) One person from the following list, to be chosen in order of priority listed, when persons in the prior subparagraphs are not reasonably available, willing to make a decision regarding issuance of an order not to resuscitate, and competent to make a decision regarding issuance of an order not to resuscitate, shall have the authority to act as surrogate on behalf of the patient. However, such person may designate any other person on the list to be surrogate, provided no one in a higher class than the person designated objects:

(i) a guardian authorized to decide about health care pursuant to article eighty-one of the mental hygiene law or a guardian of a person appointed under article seventeen-A of the surrogate's court procedure act, provided that this paragraph shall not be construed to require the appointment of a guardian for the purpose of making the resuscitation decision;

(ii) the spouse, if not legally separated from the patient, or the domestic partner;

(iii) a son or daughter eighteen years of age or older;

(iv) a parent;

(v) a brother or sister eighteen years of age or older; and

(vi) a close friend.

(b) After the surrogate has been identified, the name of such person shall be included in the patient's medical chart.

3.

(a) The surrogate shall make a decision regarding cardiopulmonary resuscitation on the basis of the adult patient's wishes including a consideration of the patient's religious and moral beliefs, or, if the patient's wishes are unknown and cannot be ascertained, on the basis of the patient's best interests.

(b) Notwithstanding any law to the contrary, the surrogate shall have the same right as the patient to receive medical information and medical records.

(c) A surrogate may consent to an order not to resuscitate on behalf of an adult patient only if there has been a determination by an attending practitioner with the concurrence of another physician, nurse practitioner or physician assistant selected by a person authorized by the hospital to make such selection, given after personal examination of the patient that, to a reasonable degree of medical certainty:

(i) the patient has a terminal condition; or

(ii) the patient is permanently unconscious; or

(iii) resuscitation would be medically futile; or

(iv) resuscitation would impose an extraordinary burden on the patient in light of the patient's medical condition and the expected outcome of resuscitation for the patient.

Each determination shall be included in the patient's medical chart.

4.

(a) A surrogate shall express a decision consenting to an order not to resuscitate either (i) in writing, dated, and signed in the presence of one witness eighteen years of age or older who shall sign the decision, or (ii) orally, to two persons eighteen years of age or older, one of whom is a physician, nurse practitioner or physician assistant affiliated with the hospital in which the patient is being treated. Any such decision shall be recorded in the patient's medical chart.

(b) The attending practitioner who is provided with the decision of a surrogate shall include the

decision in the patient's medical chart and, if the surrogate has consented to the issuance of an order not to resuscitate, shall either:

(i) promptly issue an order not to resuscitate the patient and inform the hospital staff responsible for the patient's care of the order; or

(ii) promptly make the attending practitioner's objection to the issuance of such an order known to the surrogate and either make all reasonable efforts to arrange for the transfer of the patient to another physician, nurse practitioner or physician assistant, if necessary, or promptly refer the matter to the dispute mediation system.

(c) If the attending practitioner has actual notice of opposition to a surrogate's consent to an order not to resuscitate by any person on the surrogate list, the physician, nurse practitioner or physician assistant shall submit the matter to the dispute mediation system and such order shall not be issued or shall be revoked in accordance with the provisions of subdivision three of section twenty-nine hundred seventy-two of this article.

5. [Repealed]

HISTORY:

Add, L 1987, ch 818, § 1, eff April 1, 1988; amd, L 1991, ch 370, §§ 4–7, eff July 15, 1991; L 2010, ch 8, §§ 10–12, eff June 1, 2010; L 2017, ch 430, § 7, effective May 28, 2018; L 2019, ch 708, § 7, effective June 17, 2020.

Editor's Notes Laws 1991, ch 370, § 20, eff July 15, 1991, provides as follows:

§ 20. This act shall take effect immediately, provided however, that (a) any person designated as a surrogate by an adult pursuant to subdivision 3 of section 2965 of the public health law, as added by chapter 818 of the laws of 1987 and repealed by section five of this act, shall continue to have the authority and responsibilities accorded by chapter 818 of the laws of 1987, if the designation occurred prior to January 1, 1992; (b) section 2977 of this act shall take effect January 1, 1992; and (c) section nineteen of this act shall take effect September 1, 1992.

Laws 2008, ch 210, § 3, provides as follows:

§ 3. Notwithstanding the provisions of sections 2963, 2965, 2981 and 2983 of the public health law, a health care agent appointed pursuant to subdivision (e) of section 33.03 of the mental hygiene law may make any and all decisions authorized by articles 29-B and 29-C of the public health law, regardless of the principal's capacity, provided that the principal has elected to authorize such agent and that any such decision is made in direct consultation with the principal and the attending physician.

Laws 2010, ch 8, § 29, eff March 16, 2010, provides as follows:

§ 29. This act shall take effect immediately; provided that sections one through twenty-six of this act shall take effect on the first of June next succeeding the date on which this act shall have become a law; and provided further that effective immediately it shall be lawful for a hospital, as defined in subdivision 18 of section 2994-a of the public health law, as added by this act to adopt a policy that is consistent with the requirements of article 29-CC of the public health law as added by section two of this act or the mental hygiene law as amended by sections twenty-five and twenty-six of this act and for a health care provider to accept and carry out a health care decision in accordance with such requirements for a patient in a hospital that has adopted such policy.

Laws 2017, ch 430, § 33, eff May 28, 2018, provides:

§ 33. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided that, effective immediately, any rules and regulations necessary to implement the provisions of this act on its effective date are authorized and directed to be amended, repealed and/or promulgated on or before such date.

Laws 2019, ch 708, § 38, eff June 17, 2020, provides:

§ 38. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided, however that if chapter 342 of the laws of 2018 shall not have taken effect on or before such date, then sections seventeen, eighteen, nineteen and twenty of this act shall take effect on the same date and in the same manner as such chapter 342 of the laws of 2018, takes effect. Effective immediately, any rules and regulations necessary to implement the provisions of this act on its effective date are authorized and directed to be amended, repealed and/or promulgated on or before such date.

Amendment Notes The 2017 amendment by ch 430, § 7, added "or attending nurse practitioner" and "or nurse practitioner" wherever it appears in 3 and 4.

The 2019 amendment by ch 708 § 7, in the introductory language of 3(c), deleted "physician or attending nurse" following "an attending" and added "or physician assistant"; in 4(a), added "or physician assistant"; deleted "physician or attending nurse" following "The attending" in the introductory language of (4)(b); in 4(b)(ii), deleted "physician's or attending nurse" following "the attending" and added "or physician assistant"; in 4(c), deleted "physician or attending nurse" following "If the attending" and added "or physician assistant"; and made related changes.

Notes to Decisions

1. In general

Appellate Division would modify Supreme Court's judgment by vacating its declaration that CLS Pub Health § 2965(3)(c)(iv) is unconstitutionally vague, since Supreme Court should not have reached constitutional issue given that there were alternative grounds on which to dispose of proceeding. Finn v Leonard C., 221 A.D.2d 896, 634 N.Y.S.2d 262, 1995 N.Y. App. Div. LEXIS 12341 (N.Y. App. Div. 3d Dep't 1995), app. denied, 87 N.Y.2d 810, 642 N.Y.S.2d 859, 665 N.E.2d 661, 1996 N.Y. LEXIS 340 (N.Y. 1996).

Proceeding seeking to remove and rescind "do not resuscitate" order was premature where parties did not submit their disagreement to dispute mediation system. Finn v Leonard C., 221 A.D.2d 896, 634 N.Y.S.2d 262, 1995 N.Y. App. Div. LEXIS 12341 (N.Y. App. Div. 3d Dep't 1995), app. denied, 87 N.Y.2d 810, 642 N.Y.S.2d 859, 665 N.E.2d 661, 1996 N.Y. LEXIS 340 (N.Y. 1996).

Agency Opinions

1. In general

Where patient is incapacitated and did not consent to entry of do-not-resuscitate order prior to becoming incapacitated, CLS Pub Health Law requires physician to obtain consent of patient's health care agent or surrogate before entering do-not-resuscitate order, even if physician concludes that administration of cardiopulmonary resuscitation would be "medically futile"; only where no health care agent was appointed by patient and no competent surrogate is reasonably available and willing to make decision may physician enter do-not-resuscitate order based on medical futility without obtaining agent's or surrogate's consent, and then only on concurrence of another physician that resuscitative efforts would be medically futile or after obtaining court order. 2003 N.Y. Op. Att'y Gen. No. 2003-F1, 2003 N.Y. AG LEXIS 7.

RESEARCH REFERENCES AND PRACTICE AIDS

Law Reviews:

Goldberg, Choosing life after death: Respecting religious beliefs and moral convictions in near death decisions. 39 Syracuse L. Rev. 1197.

Matthew Bender's New York Practice Guides: 1 New York Practice Guide: Probate and Estate Administration § 16.19a.

Texts: 2 Drafting New York Wills § 20.03.

§ 2966. Decision-making on behalf of an adult patient without capacity for whom no surrogate is available

Decision-making on behalf of an adult patient

without capacity for whom no surrogate is available.

1. If no surrogate is reasonably available, willing to make a decision regarding issuance of an order not to resuscitate, and competent to make a decision regarding issuance of an order not to resuscitate on behalf of an adult patient who lacks capacity and who had not previously expressed a decision regarding cardiopulmonary resuscitation, an attending practitioner (a) may issue an order not to resuscitate the patient, provided that the attending practitioner determines, in writing, that, to a reasonable degree of medical certainty, resuscitation would be medically futile, and another physician, nurse practitioner or physician assistant selected by a person authorized by the hospital to make such selection, after personal examination of the patient, reviews and concurs in writing with such determination, or, (b) shall issue an order not to resuscitate the patient, provided that, pursuant to subdivision one of section twenty-nine hundred seventy-six of this article, a court has granted a judgment directing the issuance of such an order.

2. Notwithstanding any other provision of this section, where a decision to consent to an order not to resuscitate has been made, notice of the decision shall be given to the patient where there is any indication of the patient's ability to comprehend such notice. If the patient objects, an order not to resuscitate shall not be issued.

HISTORY:

Add, L 1987, ch 818, § 1, eff April 1, 1988; amd, L 2010, ch 8, §§ 13, 14, eff June 1, 2010; L 2017, ch 430, § 8, effective May 28, 2018; L 2019, ch 708, § 8, effective June 17, 2020.

Editor's Notes Laws 2010, ch 8, § 29, eff March 16, 2010, provides as follows:

§ 29. This act shall take effect immediately; provided that sections one through twenty-six of this act shall take effect on the first of June next succeeding the date on which this act shall have become a law; and provided further that effective immediately it shall be lawful for a hospital, as defined in subdivision 18 of section 2994-a of the public health law, as added by this act to adopt a policy that is consistent with the requirements of article 29-CC of the public health law as added by section two of this act or the mental hygiene law as amended by sections twenty-five and twenty-six of this act and for a health care provider to accept and carry out a health care decision in accordance with such requirements for a patient in a hospital that has adopted such policy.

Laws 2017, ch 430, § 33, eff May 28, 2018, provides:

§ 33. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided that, effective immediately, any rules and regulations necessary to implement the provisions of this act on its effective date are authorized and directed to be amended, repealed and/or promulgated on or before such date.

Laws 2019, ch 708, § 38, eff June 17, 2020, provides:

§ 38. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided, however that if chapter 342 of the laws of 2018 shall not have taken effect on or before such date, then sections seventeen, eighteen, nineteen and twenty of this act shall take effect on the same date and in the same manner as such chapter 342 of the laws of 2018, takes effect. Effective immediately, any rules and regulations necessary to implement the provisions of this act on its effective date are authorized and directed to be amended, repealed and/or promulgated on or before such date.

Amendment Notes The 2017 amendment by ch 430, § 8, in the second sentence, added "or attending nurse practitioner" twice and added "or nurse practitioner."

The 2019 amendment by ch 708 § 8, deleted "physician or attending nurse" following "attending" in 1 and 1(a); added "physician assistant" in 1(a); and made a related change.

Agency Opinions

1. In general

Where patient is incapacitated and did not consent to entry of do-not-resuscitate order prior to becoming incapacitated, CLS Pub Health Law requires physician to obtain consent of patient's health care agent or surrogate before entering do-not-resuscitate order, even if physician concludes that administration of cardiopulmonary resuscitation would be "medically futile"; only where no health care agent was appointed by patient and no competent surrogate is reasonably available and willing to make decision may physician enter do-not-resuscitate order based on medical futility without obtaining agent's or surrogate's consent, and then only on concurrence of another physician that resuscitative efforts would be medically futile or after obtaining court order. 2003 N.Y. Op. Att'y Gen. No. 2003-F1, 2003 N.Y. AG LEXIS 7.

RESEARCH REFERENCES AND PRACTICE AIDS

Texts: 2 Drafting New York Wills § 20.03.

§ 2967. Decision-making on behalf of a minor patient.

1. An attending practitioner, in consultation with a minor's parent or legal guardian, shall determine whether a minor has the capacity to make a decision regarding resuscitation.

2.

(a) The consent of a minor's parent or legal guardian and the consent of the minor, if the minor has capacity, must be obtained prior to issuing an order not to resuscitate the minor.

(b) Where the attending practitioner has reason to believe that there is another parent or a non-custodial parent who has not been informed of a decision to issue an order not to resuscitate the minor, the attending practitioner, or someone acting on behalf of the practitioner, shall make reasonable efforts to determine if the uninformed parent or non-custodial parent has maintained substantial and continuous contact with the minor and, if so, shall make diligent efforts to notify that parent or non-custodial parent of the decision prior to issuing the order.

3. A parent or legal guardian may consent to an order not to resuscitate on behalf of a minor only if there has been a written determination by the attending practitioner, with the written concurrence of another physician, nurse practitioner or physician assistant selected by a person authorized by the hospital to make such selections given after personal examination of the patient, that, to a reasonable degree of medical certainty, the minor suffers from one of the medical conditions set forth in paragraph (c) of subdivision three of section twenty-nine hundred sixty-five of this article. Each determination shall be included in the patient's medical chart.

4.

(a) A parent or legal guardian of a minor, in making a decision regarding cardiopulmonary resuscitation, shall consider the minor patient's wishes, including a consideration of the minor pa-

tient's religious and moral beliefs, and shall express a decision consenting to issuance of an order not to resuscitate either (i) in writing, dated and signed in the presence of one witness eighteen years of age or older who shall sign the decision, or (ii) orally, to two persons eighteen years of age or older, one of whom is a physician, nurse practitioner or physician assistant affiliated with the hospital in which the patient is being treated. Any such decision shall be recorded in the patient's medical chart.

(b) The attending practitioner who is provided with the decision of a minor's parent or legal guardian, expressed pursuant to this subdivision, and of the minor if the minor has capacity, shall include such decision or decisions in the minor's medical chart and shall comply with the provisions of paragraph (b) of subdivision four of section twenty-nine hundred sixty-five of this article.

(c) If the attending practitioner has actual notice of the opposition of a parent or non-custodial parent to consent by another parent to an order not to resuscitate a minor, the physician, nurse practitioner or physician assistant shall submit the matter to the dispute mediation system and such order shall not be issued or shall be revoked in accordance with the provisions of subdivision three of section twenty-nine hundred seventy-two of this article.

HISTORY:

Add, L 1987, ch 818, § 1, eff April 1, 1988; amd, L 1991, ch 370, §§ 9–11, eff July 15, 1991; L 2010, ch 8, § 15, eff June 1, 2010; L 2017, ch 430, § 9, effective May 28, 2018; L 2019, ch 708, § 9, effective June 17, 2020.

Editor's Notes Laws 2010, ch 8, § 29, eff March 16, 2010, provides as follows:

§ 29. This act shall take effect immediately; provided that sections one through twenty-six of this act shall take effect on the first of June next succeeding the date on which this act shall have become a law; and provided further that effective immediately it shall be lawful for a hospital, as defined in subdivision 18 of section 2994-a of the public health law, as added by this act to adopt a policy that is consistent with the requirements of article 29-CC of the public health law as added by section two of this act or the mental hygiene law as amended by sections twenty-five and twenty-six of this act and for a health care provider to accept and carry out a health care decision in accordance with such requirements for a patient in a hospital that has adopted such policy.

Laws 2017, ch 430, § 33, eff May 28, 2018, provides:

§ 33. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided that, effective immediately, any rules and regulations necessary to implement the provisions of this act on its effective date are authorized and directed to be amended, repealed and/or promulgated on or before such date.

Laws 2019, ch 708, § 38, eff June 17, 2020, provides:

§ 38. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided, however that if chapter 342 of the laws of 2018 shall not have taken effect on or before such date, then sections seventeen, eighteen, nineteen and twenty of this act shall take effect on the same date and in the same manner as such chapter 342 of the laws of 2018, takes effect. Effective immediately, any rules and regulations necessary to implement the provisions of this act on its effective date are authorized and directed to be amended, repealed and/or promulgated on or before such date.

Amendment Notes The 2017 amendment by ch 430, § 9, added "or attending nurse practitioner" throughout the section; and added "or nurse practitioner" in 3, 4(a) and 4(c).

The 2019 amendment by ch 708 § 9, deleted "physician or attending nurse" following "An attending" in 1; in 2(b), deleted "physician or attending nurse" following "the attending" and deleted "attending physician or attending nurse" following "someone acting on behalf of the"; in 3, deleted "physician or attending nurse" following "the attending" and added "or physician assistant"; added "or physician assistant" in 4(a)(ii); deleted "physician or attending nurse" following "The attending" in 4(b); in 4(c) deleted "physician or attending nurse" following "the attending"and added "or physician assistant"; and made related changes.

RESEARCH REFERENCES AND PRACTICE AIDS

Texts: 2 Drafting New York Wills § 20.03.

§ 2968. Effect of order not to resuscitate on other treatment

Consent to the issuance of an order not to resuscitate shall not constitute consent to withhold or withdraw medical treatment other than cardiopulmonary resuscitation.

HISTORY:

Add, L 1987, ch 818, § 1, eff April 1, 1988.

RESEARCH REFERENCES AND PRACTICE AIDS

Law Reviews:

Sorum, Limiting cardiopulmonary resuscitation. 57 Alb. L. Rev. 617.

Texts: 2 Drafting New York Wills § 20.03.

§ 2969. Revocation of consent to order not to resuscitate.

1. A person may, at any time, revoke his or her consent to an order not to resuscitate himself or herself by making either a written or an oral declaration to a physician or member of the nursing staff at the hospital where he or she is being treated, or by any other act evidencing a specific intent to revoke such consent.

2. Any surrogate, parent, or legal guardian may at any time revoke his or her consent to an order not to resuscitate a patient by (a) notifying a physician or member of the nursing staff of the revocation of consent in writing, dated and signed, or (b) orally notifying the attending practitioner in the presence of a witness eighteen years of age or older.

3. Any physician, nurse practitioner or physician assistant who is informed of or provided with a revocation of consent pursuant to this section shall immediately include the revocation in the patient's chart, cancel the order, and notify the hospital staff responsible for the patient's care of the revocation and cancellation. Any member of the nursing staff, other than a nurse practitioner or physician assistant, who is informed of or provided with a revocation of consent pursuant to this section shall immediately notify a physician, nurse practitioner or physician assistant of such revocation.

HISTORY:

Add, L 1987, ch 818, § 1, eff April 1, 1988; amd, L 1991, ch 370, § 12, eff July 15, 1991; L 2017, ch 430, § 10, effective May 28, 2018; L 2019, ch 708, § 10, effective June 17, 2020.

Editor's Notes Laws 2017, ch 430, § 33, eff May 28, 2018, provides:

§ 33. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided that, effective immediately, any rules and regulations necessary to implement the provisions of this act on its effective date are authorized and directed to be amended, repealed and/or promulgated on or before such date.

Laws 2019, ch 708, § 38, eff June 17, 2020, provides:

§ 38. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided, however that if chapter 342 of the laws of 2018 shall not have taken effect on or before such date, then sections seventeen, eighteen, nineteen and twenty of this act shall take effect on the same date and in the same manner as such chapter 342 of the laws of 2018, takes effect. Effective immediately, any rules and regulations necessary to implement the provisions of this act on its effective date are authorized and directed to be amended, repealed and/or promulgated on or before such date.

Amendment Notes The 2017 amendment by ch 430, § 10, added "or attending nurse practitioner" in 2; in 3, added "or nurse practitioner" in the first sentence, and added "other than a nurse practitioner" and "or nurse practitioner" in the second sentence.

The 2019 amendment by ch 708 § 10, deleted "physician or attending nurse" following "the attending" in 2; added "or physician assistant" three times in 3; and made related changes.

RESEARCH REFERENCES AND PRACTICE AIDS

Texts: 2 Drafting New York Wills § 20.03.

§ 2970. Physician, nurse practitioner and physician assistant review of the order not to resuscitate.

1. For each patient for whom an order not to resuscitate has been issued, the attending practitioner shall review the patient's chart to determine if the order is still appropriate in light of the patient's condition and shall indicate on the patient's chart that the order has been reviewed each time the patient is required to be seen by a physician but at least every sixty days.

Failure to comply with this subdivision shall not render an order not to resuscitate ineffective.

2.

(a) If the attending practitioner determines at any time that an order not to resuscitate is no longer appropriate because the patient's medical condition has improved, the physician, nurse practitioner or physician assistant shall immediately notify the person who consented to the order. Except as provided in paragraph (b) of this subdivision, if such person declines to revoke consent to the order, the physician, nurse practitioner or physician assistant shall promptly (i) make reasonable efforts to arrange for the transfer of the patient to another physician or (ii) submit the matter to the dispute mediation system.

(b) If the order not to resuscitate was entered upon the consent of a surrogate, parent, or legal guardian and the attending practitioner who issued the order, or, if unavailable, another attending practitioner at any time determines that the patient does not suffer from one of the medical conditions set forth in paragraph (c) of subdivision three of section twenty-nine hundred sixty-five of this article, the attending practitioner shall immediately include such determination in the patient's chart, cancel the order, and notify the person who consented to the order and all hospital staff responsible for the patient's care of the cancellation.

(c) If an order not to resuscitate was entered upon the consent of a surrogate and the patient at any time gains or regains capacity, the attending practitioner who issued the order, or, if unavailable, another attending practitioner shall immediately cancel the order and notify the person who consented to the order and all hospital staff directly responsible for the patient's care of the cancellation.

HISTORY:

Add, L 1987, ch 818, § 1, eff April 1, 1988; amd, L 1991, ch 370, §§ 13, 14, eff July 15, 1991; L 2010, ch 8, § 16, eff June 1, 2010; L 2017, ch 430, § 11, effective May 28, 2018; L 2019, ch 708, § 11, effective June 17, 2020.

Editor's Notes Laws 2010, ch 8, § 29, eff March 16, 2010, provides as follows:

§ 29. This act shall take effect immediately; provided that sections one through twenty-six of this act shall take effect on the first of June next succeeding the date on which this act shall have become a law; and provided further that effective immediately it shall be lawful for a hospital, as defined in subdivision 18 of section 2994-a of the public health law, as added by this act to adopt a policy that is consistent with the requirements of article 29-CC of the public health law as added by section two of this act or the mental hygiene law as amended by sections twenty-five and twenty-six of this act and for a health care provider to accept and carry out a health care decision in accordance with such requirements for a patient in a hospital that has adopted such policy.

Laws 2017, ch 430, § 33, eff May 28, 2018, provides:

§ 33. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided that, effective immediately, any rules and regulations necessary to implement the provisions of this act on its effective date are authorized and directed to be amended, repealed and/or promulgated on or before such date.

Laws 2019, ch 708, § 38, eff June 17, 2020, provides:

§ 38. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided, however that if chapter 342 of the laws of 2018 shall not have taken effect on or before such date, then sections seventeen, eighteen, nineteen and twenty of this act shall take effect on the same date and in the same manner as such chapter 342 of the laws of 2018, takes effect. Effective immediately, any rules and regulations necessary to implement the provisions of this act on its effective date are authorized and directed to be amended, repealed and/or promulgated on or before such date.

Amendment Notes The 2017 amendment by ch 430, § 11, added "or attending nurse practitioner" in the section heading; added "or attending nurse practitioner" throughout the section; and added "or nurse practitioner" in the first and second sentence of 2(a).

The 2019 amendment by ch 708 § 11, added "and physician assistant" in the section heading; deleted "physician or attending nurse" following "the attending" in the first paragraph of 1; in (2)(a), in the first sentence, deleted "physician or attending nurse" following "If the attending" and added "or physician assistant" and added "physician assistant" in the second sentence; deleted "physician or attending nurse" following "the attending" or variants three times in 2(b) and twice in 2(c); and made related changes.

Agency Opinions

1. In general

Where patient is incapacitated and did not consent to entry of do-not-resuscitate order prior to becoming incapacitated, CLS

Pub Health Law requires physician to obtain consent of patient's health care agent or surrogate before entering do-not-resuscitate order, even if physician concludes that administration of cardiopulmonary resuscitation would be "medically futile"; only where no health care agent was appointed by patient and no competent surrogate is reasonably available and willing to make decision may physician enter do-not-resuscitate order based on medical futility without obtaining agent's or surrogate's consent, and then only on concurrence of another physician that resuscitative efforts would be medically futile or after obtaining court order. 2003 N.Y. Op. Att'y Gen. No. 2003-F1, 2003 N.Y. AG LEXIS 7.

RESEARCH REFERENCES AND PRACTICE AIDS

Texts: 2 Drafting New York Wills § 20.03.

§ 2971. Interinstitutional transfers

If a patient for whom an order not to resuscitate has been issued is transferred from a hospital to a different hospital the order shall remain effective, unless revoked pursuant to this article, until the attending practitioner first examines the transferred patient, whereupon the attending practitioner must either:

1. Issue an order continuing the prior order not to resuscitate. Such order may be issued without obtaining further consent from the patient, surrogate or parent pursuant to this article; or

2. Cancel the order not to resuscitate, provided the attending practitioner immediately notifies the person who consented to the order and the hospital staff directly responsible for the patient's care of the cancellation. Such cancellation does not preclude the entry of a new order pursuant to this article.

3. For purposes of this section, an order not to resuscitate issued by a general hospital as defined in subdivision ten of section twenty-eight hundred one of this chapter, or by a residential health care facility as defined in subdivision three of section twenty-eight hundred one of this chapter, shall be deemed a hospital order not to resuscitate.

HISTORY:

Add, L 1987, ch 818, § 1, eff April 1, 1988; amd, L 1991, ch 370, § 15, eff July 15, 1991; L 2010, ch 8, § 17, eff June 1, 2010; L 2017, ch 430, § 12, effective May 28, 2018; L 2019, ch 708, § 12, effective June 17, 2020.

Editor's Notes Laws 2010, ch 8, § 29, eff March 16, 2010, provides as follows:

§ 29. This act shall take effect immediately; provided that sections one through twenty-six of this act shall take effect on the first of June next succeeding the date on which this act shall have become a law; and provided further that effective immediately it shall be lawful for a hospital, as defined in subdivision 18 of section 2994-a of the public health law, as added by this act to adopt a policy that is consistent with the requirements of article 29-CC of the public health law as added by section two of this act or the mental hygiene law as amended by sections twenty-five and twenty-six of this act and for a health care provider to accept and carry out a health care decision in accordance with such requirements for a patient in a hospital that has adopted such policy.

Laws 2017, ch 430, § 33, eff May 28, 2018, provides:

§ 33. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided that, effective immediately, any rules and regulations necessary to implement the provisions of this act on its effective date are authorized and directed to be amended, repealed and/or promulgated on or before such date.

Laws 2019, ch 708, § 38, eff June 17, 2020, provides:

§ 38. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided, however that if chapter 342 of the laws of 2018 shall not have taken effect on or before such date, then sections seventeen, eighteen, nineteen and twenty of this act shall take effect on the same date and in the same manner as such chapter 342 of the laws of 2018, takes effect. Effective immediately, any rules and regulations necessary to implement the provisions of this act on its effective date are authorized and directed to be amended, repealed and/or promulgated on or before such date.

Amendment Notes The 2017 amendment by ch 430, § 12, added "or attending nurse practitioner" twice in the introductory language and in the first sentence of 2.

The 2019 amendment by ch 708 § 12, deleted "physician or attending nurse" following "the attending" twice in the opening paragraph and in the first sentence of 2.

§ 2972. Dispute mediation system

1.

(a) Each hospital shall establish a mediation system for the purpose of mediating disputes regarding the issuance of orders not to resuscitate.

(b) The dispute mediation system shall be described in writing and adopted by the hospital's governing authority. It may utilize existing hospital resources, such as a patient advocate's office or hospital chaplain's office, or it may utilize a body created specifically for this purpose, but, in the event a dispute involves a patient deemed to lack capacity pursuant to (i) paragraph (b) of subdivision three of section twenty-nine hundred sixty-three of this article, the system must include a physician, nurse practitioner or physician assistant eligible to provide a concurring determination pursuant to such subdivision, or a family member or guardian of the person of a person with a mental illness of the same or similar nature, or (ii) paragraph (c) of subdivision three of section twenty-nine hundred sixty-three of this article, the system must include a physician, nurse practitioner or physician assistant eligible to provide a concurring determination pursuant to such subdivision, or a family member or guardian of the person of a person with a developmental disability of the same or similar nature.

2. The dispute mediation system shall be authorized to mediate any dispute, including disputes regarding the determination of the patient's capacity, arising under this article between the patient and an attending practitioner or the hospital that is caring for the patient and, if the patient is a minor, the patient's parent, or among an attending practitioner, a parent, non-custodial parent, or legal guardian of a minor patient, any person on the surrogate list, and the hospital that is caring for the patient.

3. After a dispute regarding the issuance of an order not to resuscitate has been submitted to the dispute mediation system, an order not to resuscitate shall not be issued or shall be revoked and may not be reissued until (a) the dispute has been resolved or the system has concluded its effort to resolve the dispute or (b) seventy-two hours have elapsed from the time of the submission of the

dispute, whichever shall occur first. Persons participating in the dispute mediation system shall be informed of their right to judicial review.

4. If a dispute between a patient who expressed a decision rejecting cardiopulmonary resuscitation and an attending practitioner or the hospital that is caring for the patient is submitted to the dispute mediation system, and either:

(a) the dispute mediation system has concluded its efforts to resolve the dispute, or (b) seventy-two hours have elapsed from the time of submission without resolution of the dispute, whichever shall occur first, the attending practitioner shall either: (i) promptly issue an order not to resuscitate the patient or issue the order at such time as the conditions, if any, specified in the decision are met, and inform the hospital staff responsible for the patient's care of the order; or (ii) promptly arrange for the transfer of the patient to another physician, nurse practitioner, physician assistant or hospital.

5. Persons appointed pursuant to this section to participate in the dispute mediation system shall not have authority to determine whether a do not resuscitate order shall be issued.

HISTORY:

Add, L 1987, ch 818, § 1, eff April 1, 1988; amd, L 1991, ch 370, § 16, eff July 15, 1991; L 2010, ch 8, § 18, eff June 1, 2010; L 2017, ch 430, § 13, effective May 28, 2018; L 2019, ch 708, § 13, effective June 17, 2020.

Editor's Notes Laws 2010, ch 8, § 29, eff March 16, 2010, provides as follows:

§ 29. This act shall take effect immediately; provided that sections one through twenty-six of this act shall take effect on the first of June next succeeding the date on which this act shall have become a law; and provided further that effective immediately it shall be lawful for a hospital, as defined in subdivision 18 of section 2994-a of the public health law, as added by this act to adopt a policy that is consistent with the requirements of article 29-CC of the public health law as added by section two of this act or the mental hygiene law as amended by sections twenty-five and twenty-six of this act and for a health care provider to accept and carry out a health care decision in accordance with such requirements for a patient in a hospital that has adopted such policy.

Laws 2017, ch 430, § 33, eff May 28, 2018, provides:

§ 33. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided that, effective immediately, any rules and regulations necessary to implement the provisions of this act on its effective date are authorized and directed to be amended, repealed and/or promulgated on or before such date.

Laws 2019, ch 708, § 38, eff June 17, 2020, provides:

§ 38. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided, however that if chapter 342 of the laws of 2018 shall not have taken effect on or before such date, then sections seventeen, eighteen, nineteen and twenty of this act shall take effect on the same date and in the same manner as such chapter 342 of the laws of 2018, takes effect. Effective immediately, any rules and regulations necessary to implement the provisions of this act on its effective date are authorized and directed to be amended, repealed and/or promulgated on or before such date.

Amendment Notes The 2017 amendment by ch 430, § 13, added "or nurse practitioner" twice in the second sentence of (1)(b); added "attending nurse practitioner" twice in (2); added "attending nurse practitioner" in the introductory language of (4); and added "or attending nurse practitioner" in (4)(b).

The 2019 amendment by ch 708 § 13, added "physician assistant" twice in the second sentence of 1(b); in 2, deleted "physician, attending nurse" following "patient and an attending" and deleted "physician, an attending nurse" following "or among an attending"; in the introductory language of 4, deleted "physician, attending nurse" following "and an attending"; in the introductory language of 4(b), deleted "physician or attending nurse" following "the attending" and added "physician assistant"; and made related changes.

Notes to Decisions

1. In general

Proceeding seeking to remove and rescind "do not resuscitate" order was premature where parties did not submit their disagreement to dispute mediation system. Finn v Leonard C., 221 A.D.2d 896, 634 N.Y.S.2d 262, 1995 N.Y. App. Div. LEXIS 12341 (N.Y. App. Div. 3d Dep't 1995), app. denied, 87 N.Y.2d 810, 642 N.Y.S.2d 859, 665 N.E.2d 661, 1996 N.Y. LEXIS 340 (N.Y. 1996).

Agency Opinions

1. In general

Where patient is incapacitated and did not consent to entry of do-not-resuscitate order prior to becoming incapacitated, CLS Pub Health Law requires physician to obtain consent of patient's health care agent or surrogate before entering do-not-resuscitate order, even if physician concludes that administration of cardiopulmonary resuscitation would be "medically futile"; only where no health care agent was appointed by patient and no competent surrogate is reasonably available and willing to make decision may physician enter do-not-resuscitate order based on medical futility without obtaining agent's or surrogate's consent, and then only on concurrence of another physician that resuscitative efforts would be medically futile or after obtaining court order. 2003 N.Y. Op. Att'y Gen. No. 2003-F1, 2003 N.Y. AG LEXIS 7.

§ 2973. Judicial review

1. The patient, an attending practitioner, a parent, non-custodial parent, or legal guardian of a minor patient, any person on the surrogate list, the hospital that is caring for the patient and the facility director, may commence a special proceeding pursuant to article four of the civil practice law and rules, in a court of competent jurisdiction, with respect to any dispute arising under this article, except that the decision of a patient not to consent to issuance of an order not to resuscitate may not be subjected to judicial review. In any proceeding brought pursuant to this subdivision challenging a decision regarding issuance of an order not to resuscitate on the ground that the decision is contrary to the patient's wishes or best interests, the person or entity challenging the decision must show, by clear and convincing evidence, that the decision is contrary to the patient's wishes including consideration of the patient's religious and moral beliefs, or, in the absence of evidence of the patient's wishes, that the decision is contrary to the patient's best interests. In any other proceeding brought pursuant to this subdivision, the court shall make its determination based upon the applicable substantive standards and procedures set forth in this article.

2. In any proceeding brought pursuant to this section, the court may issue an order, pursuant to the standards applicable to the issuance of a temporary restraining order according to section six thousand three hundred thirteen of the civil practice law

and rules, which shall suspend the order not to resuscitate to permit review of the matter by the court.

3. Where a person or entity may invoke the dispute mediation system, no such proceeding shall be commenced until the dispute mediation system has concluded its efforts to resolve the dispute or seventy-two hours have elapsed from the submission of the dispute to the dispute mediation system, whichever shall occur first, provided, however, that the patient may commence an action for relief with respect to any dispute under this article at any time and provided further that the department of health or any other duly authorized state agency may commence an action or proceeding to enjoin a violation of this article at any time.

HISTORY:

Add, L 1987, ch 818, § 1, eff April 1, 1988; amd, L 1993, ch 577, § 4, eff July 28, 1993; L 2010, ch 8, § 19, eff June 1, 2010; L 2017, ch 430, § 14, effective May 28, 2018; L 2019, ch 708, § 14, effective June 17, 2020.

Editor's Notes Laws 2010, ch 8, § 29, eff March 16, 2010, provides as follows:

§ 29. This act shall take effect immediately; provided that sections one through twenty-six of this act shall take effect on the first of June next succeeding the date on which this act shall have become a law; and provided further that effective immediately it shall be lawful for a hospital, as defined in subdivision 18 of section 2994-a of the public health law, as added by this act to adopt a policy that is consistent with the requirements of article 29-CC of the public health law as added by section two of this act or the mental hygiene law as amended by sections twenty-five and twenty-six of this act and for a health care provider to accept and carry out a health care decision in accordance with such requirements for a patient in a hospital that has adopted such policy.

Laws 2017, ch 430, § 33, eff May 28, 2018, provides:

§ 33. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided that, effective immediately, any rules and regulations necessary to implement the provisions of this act on its effective date are authorized and directed to be amended, repealed and/or promulgated on or before such date.

Laws 2019, ch 708, § 38, eff June 17, 2020, provides:

§ 38. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided, however that if chapter 342 of the laws of 2018 shall not have taken effect on or before such date, then sections seventeen, eighteen, nineteen and twenty of this act shall take effect on the same date and in the same manner as such chapter 342 of the laws of 2018, takes effect. Effective immediately, any rules and regulations necessary to implement the provisions of this act on its effective date are authorized and directed to be amended, repealed and/or promulgated on or before such date.

Amendment Notes The 2017 amendment by ch 430, § 14, added "attending nurse practitioner" in the first sentence of 1.

The 2019 amendment by ch 708 § 14, deleted "physician, attending nurse" following "The patient, an attending" in the first sentence of 1.

Notes to Decisions

1. In general

Proceeding seeking to remove and rescind "do not resuscitate" order was premature where parties did not submit their disagreement to dispute mediation system. Finn v Leonard C., 221 A.D.2d 896, 634 N.Y.S.2d 262, 1995 N.Y. App. Div. LEXIS 12341 (N.Y. App. Div. 3d Dep't 1995), app. denied, 87 N.Y.2d 810, 642 N.Y.S.2d 859, 665 N.E.2d 661, 1996 N.Y. LEXIS 340 (N.Y. 1996).

Agency Opinions

1. In general

Where patient is incapacitated and did not consent to entry of do-not-resuscitate order prior to becoming incapacitated, CLS Pub Health Law requires physician to obtain consent of patient's health care agent or surrogate before entering do-not-resuscitate order, even if physician concludes that administration of cardiopulmonary resuscitation would be "medically futile"; only where no health care agent was appointed by patient and no competent surrogate is reasonably available and willing to make decision may physician enter do-not-resuscitate order based on medical futility without obtaining agent's or surrogate's consent, and then only on concurrence of another physician that resuscitative efforts would be medically futile or after obtaining court order. 2003 N.Y. Op. Att'y Gen. No. 2003-F1, 2003 N.Y. AG LEXIS 7.

§ 2974. Immunity

1. No physician, health care professional, nurse's aide, hospital or person employed by or under contract with the hospital shall be subject to criminal prosecution, civil liability, or be deemed to have engaged in unprofessional conduct for carrying out in good faith pursuant to this article a decision regarding cardiopulmonary resuscitation by or on behalf of a patient or for those actions taken in compliance with the standards and procedures set forth in this article.

2. No physician, health care professional, nurse's aide, hospital, or person employed by or under contract with the hospital shall be subjected to criminal prosecution, civil liability, or be deemed to have engaged in unprofessional conduct for providing cardiopulmonary resuscitation to a patient for whom an order not to resuscitate has been issued, provided such physician or person;

(a) reasonably and in good faith was unaware of the issuance of an order not to resuscitate; or

(b) reasonably and in good faith believed that consent to the order not to resuscitate had been revoked or cancelled.

3. No person shall be subject to criminal prosecution or civil liability for consenting or declining to consent in good faith, on behalf of a patient, to the issuance of an order not to resuscitate pursuant to this article.

4. No person shall be subject to criminal prosecution or civil liability or be deemed to have engaged in unprofessional conduct for acts performed in good faith as a mediator in the dispute mediation system established by this article.

HISTORY:

Add, L 1987, ch 818, § 1, eff April 1, 1988.

§ 2975. Effect of order not to resuscitate on insurance and health care services

1. No policy of life insurance shall be legally impaired, modified, or invalidated in any manner by the issuance of an order not to resuscitate notwithstanding any term of the policy to the contrary.

2. A person may not prohibit or require the issuance of an order not to resuscitate for an individual as a condition for such individual's being insured or for receiving health care services.

HISTORY:
Add, L 1987, ch 818, § 1, eff April 1, 1988.

§ 2976. Judicially approved order not to resuscitate.

1. If no surrogate is reasonably available, willing to make a decision regarding issuance of an order not to resuscitate, and competent to make a decision regarding issuance of an order not to resuscitate on behalf of an adult patient who lacks capacity and who had not previously expressed a decision regarding cardiopulmonary resuscitation pursuant to this article, an attending practitioner or hospital may commence a special proceeding pursuant to article four of the civil practice law and rules, in a court of competent jurisdiction, for a judgment directing the physician, nurse practitioner or physician assistant to issue an order not to resuscitate where the patient has a terminal condition, is permanently unconscious, or resuscitation would impose an extraordinary burden on the patient in light of the patient's medical condition and the expected outcome of resuscitation for the patient, and issuance of an order not to resuscitate is consistent with the patient's wishes including a consideration of the patient's religious and moral beliefs or, in the absence of evidence of the patient's wishes, the patient's best interests.

2. Nothing in this article shall be construed to preclude a court of competent jurisdiction from approving the issuance of an order not to resuscitate under circumstances other than those under which such an order may be issued pursuant to this article.

HISTORY:
Add, L 1987, ch 818, § 1, eff April 1, 1988; L 2017, ch 430, § 15, effective May 28, 2018; L 2019, ch 708, § 15, effective June 17, 2020.

Editor's Notes Laws 2017, ch 430, § 33, eff May 28, 2018, provides:

§ 33. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided that, effective immediately, any rules and regulations necessary to implement the provisions of this act on its effective date are authorized and directed to be amended, repealed and/or promulgated on or before such date.

Laws 2019, ch 708, § 38, eff June 17, 2020, provides:

§ 38. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided, however that if chapter 342 of the laws of 2018 shall not have taken effect on or before such date, then sections seventeen, eighteen, nineteen and twenty of this act shall take effect on the same date and in the same manner as such chapter 342 of the laws of 2018, takes effect. Effective immediately, any rules and regulations necessary to implement the provisions of this act on its effective date are authorized and directed to be amended, repealed and/or promulgated on or before such date.

Amendment Notes The 2017 amendment by ch 430, § 15, in 1, added "or attending nurse practitioner" and "or nurse practitioner."

The 2019 amendment by ch 708 § 15, in 1, deleted "physician or attending nurse" following "pursuant to this article, an attending" and added "or physician assistant"; and made a related change.

Notes to Decisions

1. Minor patient

Since CLS Pub Health § 2976(2) authorizes court to issue "Do Not Resuscitate" (DNR) order for minor patient only after issuance of DNR order by attending physician, court has no authority to issue DNR order exclusively on application of guardian of minor patient. Application of director of county social services department, as guardian of terminally ill child suffering from multiple medical problems, for order directing natural and prospective adoptive parents to show cause why court should not authorize "Do Not Resuscitate" (DNR) order for child would be denied without prejudice to reapplication based on proof of full compliance with CLS Pub Health § 2976(2), including requirement that DNR order be issued by attending physician. In re Richardson, 153 Misc. 2d 376, 581 N.Y.S.2d 708, 1992 N.Y. Misc. LEXIS 66 (N.Y. Sup. Ct. 1992).

§ 2978. Regulations

The commissioners of mental health and the office for people with developmental disabilities shall establish such regulations as may be necessary for implementation of this article with respect to those persons in mental hygiene facilities.

HISTORY:
Formerly § 2977, add, L 1987, ch 818, § 1; renumbered § 2978, L 1991, ch 370, § 17, eff July 15, 1991; amd, L 2010, ch 8, § 21, eff June 1, 2010; L 2019, ch 672, § 22, effective December 16, 2019.

Editor's Notes Laws 2010, ch 8, § 29, eff March 16, 2010, provides as follows:

§ 29. This act shall take effect immediately; provided that sections one through twenty-six of this act shall take effect on the first of June next succeeding the date on which this act shall have become a law; and provided further that effective immediately it shall be lawful for a hospital, as defined in subdivision 18 of section 2994-a of the public health law, as added by this act to adopt a policy that is consistent with the requirements of article 29-CC of the public health law as added by section two of this act or the mental hygiene law as amended by sections twenty-five and twenty-six of this act and for a health care provider to accept and carry out a health care decision in accordance with such requirements for a patient in a hospital that has adopted such policy.

Amendment Notes The 2019 amendment by ch 672 § 22, substituted "the office for people with developmental disabilities" for "mental retardation and developmental disabilities" in the introductory paragraph.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

Office of mental retardation and developmental disabilities: procedure governing orders not to resuscitate. 14 NYCRR § 633.18.

§ 2979. Rights to be publicized

1. The commissioners of mental health and the office for people with developmental disabilities shall prepare a statement summarizing the rights, duties, and requirements of this article and shall require that a copy of such statement:

(a) be furnished by the hospital to patients or to persons on the surrogate list known to the hospital at or prior to the time of admission to the hospital, and at the time of the first decision made pursuant to sections twenty-nine hundred sixty-four, twenty-nine hundred sixty-five, twenty-nine hundred sixty-six, or twenty-nine hundred sixty-seven of this article or as soon thereafter as practicable and to each member of the hospital's staff involved in the provision of medical care; and

(b) is posted in a public place in each hospital.

2. The statement of rights required by this section may be included in any other statement of

patient's rights required by other provisions of this chapter.

HISTORY:
Formerly § 2978, add, L 1987, ch 818, § 1; renumbered § 2979, L 1991, ch 370, § 17, eff July 15, 1991; amd, L 2010, ch 8, § 22, eff June 1, 2010; L 2019, ch 672, § 23, effective December 16, 2019.

Editor's Notes Laws 2010, ch 8, § 29, eff March 16, 2010, provides as follows:

§ 29. This act shall take effect immediately; provided that sections one through twenty-six of this act shall take effect on the first of June next succeeding the date on which this act shall have become a law; and provided further that effective immediately it shall be lawful for a hospital, as defined in subdivision 18 of section 2994-a of the public health law, as added by this act to adopt a policy that is consistent with the requirements of article 29-CC of the public health law as added by section two of this act or the mental hygiene law as amended by sections twenty-five and twenty-six of this act and for a health care provider to accept and carry out a health care decision in accordance with such requirements for a patient in a hospital that has adopted such policy.

Amendment Notes The 2019 amendment by ch 672 § 23, substituted "the office for people with developmental disabilities" for "mental retardation and developmental disabilities" in the introductory language of 1.

RESEARCH REFERENCES AND PRACTICE AIDS

Texts: 2 Drafting New York Wills § 20.03.

ARTICLE 29-C Health Care Agents and Proxies

Section

2980. Definitions
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2982. Rights and duties of agent
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2992. Special proceeding authorized
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2994. Rights to be publicized

HISTORY:
Add, L 1990, ch 752, § 2, eff Jan 18, 1991.

§ 2980. Definitions

The following words or phrases, used in this article, shall have the following meanings, unless the context otherwise requires:

1. "Adult" means any person who is eighteen years of age or older, or is the parent of a child, or has married.

2. "Attending practitioner" means the physician, physician assistant, or nurse practitioner, licensed or certified pursuant to title eight of the education law, selected by or assigned to a patient, who has primary responsibility for the treatment and care of the patient. Where more than one physician, physician assistant, or nurse practitioner shares such responsibility, or where a physician, physician assistant, or nurse practitioner is acting on the attending practitioner's behalf, any such physician, nurse practitioner, or physician assistant may act as the attending practitioner pursuant to this article.

2-a. "Nurse practitioner" means a nurse practitioner certified under section sixty-nine hundred ten of the education law, practicing within his or her scope of practice.

2-b. "Psychiatric nurse practitioner" means a nurse practitioner certified by the department of education as a psychiatric nurse practitioner.

3. "Capacity to make health care decisions" means the ability to understand and appreciate the nature and consequences of health care decisions, including the benefits and risks of and alternatives to any proposed health care, and to reach an informed decision.

4. "Health care" means any treatment, service or procedure to diagnose or treat an individual's physical or mental condition.

5. "Health care agent" or "agent" means an adult to whom authority to make health care decisions is delegated under a health care proxy.

6. "Health care decision" means any decision to consent or refuse to consent to health care.

7. "Health care provider" means an individual or facility licensed, certified, or otherwise authorized or permitted by law to administer health care in the ordinary course of business or professional practice.

8. "Health care proxy" means a document delegating the authority to make health care decisions, executed in accordance with the requirements of this article.

9. "Hospital" means a general hospital as defined in subdivision ten of section two thousand eight hundred one of this chapter and a residential health care facility as defined in subdivision three of section two thousand eight hundred one of this chapter, and a mental hygiene facility as defined in subdivision ten of this section and a hospice as defined in subdivision one of section four thousand two of this chapter.

9-a. "Life-sustaining treatment" means any medical treatment or procedure without which the patient will die within a relatively short time, as determined by an attending practitioner to a reasonable degree of medical certainty. For purposes of this article, cardiopulmonary resuscitation is presumed to be a life sustaining treatment without the necessity of a determination by an attending practitioner.

10. "Mental hygiene facility" means a residential facility, excluding family care homes, operated or licensed by the office of mental health or the office for people with developmental disabilities.

11. "Mental illness" means a mental illness as defined in subdivision twenty of section 1.03 of the mental hygiene law, provided, however, that mental illness shall not include dementia, such as alzheimer's disease or other disorders related to dementia.

12. "Principal" means a person who has executed a health care proxy.

13. "Reasonably available" means that a person to be contacted can be contacted with diligent efforts by an attending practitioner or another person acting on behalf of the attending practitioner or the hospital.

14. "Residential health care facility" means a residential health care facility as defined in subdivision three of section two thousand eight hundred one of this chapter.

15. "Qualified psychiatrist" means, for the purposes of this article, a physician licensed to practice medicine in New York state who: (a) is a diplomate of the American Board of Psychiatry and Neurology or is eligible to be certified by that board; or (b) is certified by the American Osteopathic Board of Neurology and Psychiatry or is eligible to be certified by that board.

HISTORY:

Add, L 1990, ch 752, § 2, eff Jan 18, 1991; amd, L 1994, ch 23, §§ 2, 3, eff March 28, 1994; L 2010, ch 8, § 24, eff June 1, 2010; L 2018, ch 342, § 1, effective February 3, 2019; L 2019, ch 672, § 24, effective December 16, 2019; L 2019, ch 708, §§ 16, 17, effective June 17, 2020.

Editor's Notes Laws 1990, ch 752, § 3, eff Jan 18, 1991, provides as follows:

§ 3. This act shall take effect 180 days after it shall have become a law, provided, that effective immediately, the addition, amendment, and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized and directed to be made and completed on or before such date.

Laws 2010, ch 8, § 29, eff March 16, 2010, provides as follows:

§ 29. This act shall take effect immediately; provided that sections one through twenty-six of this act shall take effect on the first of June next succeeding the date on which this act shall have become a law; and provided further that effective immediately it shall be lawful for a hospital, as defined in subdivision 18 of section 2994-a of the public health law, as added by this act to adopt a policy that is consistent with the requirements of article 29-CC of the public health law as added by section two of this act or the mental hygiene law as amended by sections twenty-five and twenty-six of this act and for a health care provider to accept and carry out a health care decision in accordance with such requirements for a patient in a hospital that has adopted such policy.

Laws 2018, ch 342, § 5, eff February 3, 2019, provides:

§ 5. This act shall take effect on the ninetieth day after it shall have become a law. Effective immediately, any rules and regulations necessary to implement the provisions of this act on its effective date are authorized and directed to be amended, repealed and/or promulgated on or before such date.

Laws 2019, ch 708, § 38, eff June 17, 2020, provides:

§ 38. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided, however that if chapter 342 of the laws of 2018 shall not have taken effect on or before such date, then sections seventeen, eighteen, nineteen and twenty of this act shall take effect on the same date and in the same manner as such chapter 342 of the laws of 2018, takes effect. Effective immediately, any rules and regulations necessary to implement the provisions of this act on its effective date are authorized and directed to be amended, repealed and/or promulgated on or before such date.

Amendment Notes The 2018 amendment by ch 342, § 1, added 2-a through 2-c.

The 2019 amendment by ch 672 § 24, substituted "for people with developmental disabilities" for "of mental retardation and developmental disabilities" in 10.

The 2019 amendments by ch 708 §§ 17, 16, rewrote 2, which formerly read: "Attending physician practitioner" means the physician, physician assistant, or nurse practitioner, licensed or certified pursuant to title eight of the education law, selected by or assigned to a patient, who has primary responsibility for the treatment and care of the patient. Where more than one physician, physician assistant, or nurse practitioner shares such responsibility, or where a physician, physician assistant, or nurse practitioner is acting on the attending physician's practitioner's behalf, any such physician, nurse practitioner, or physician assistant may act as the attending physician practitioner pursuant to this article"; deleted 2-c; and added "attending practitioner" for "attending physician" twice in the first and second sentences of 9-a and twice in 13.

Notes to Decisions

1. In general

Although the adult child of a former patient of an institutional health care provider did not fall under the definition of a qualified person within the meaning of N.Y. Pub. Health Law § 18, the child was nonetheless entitled to be given access to the parent's records, even after discharge from the facility, under the terms of the medical directive that established the child as the parent's agent. Matter of Mougiannis v North Shore-Long Is. Jewish Health Sys. Inc., 25 A.D.3d 230, 806 N.Y.S.2d 623, 2005 N.Y. App. Div. LEXIS 13296 (N.Y. App. Div. 2d Dep't 2005).

RESEARCH REFERENCES AND PRACTICE AIDS

Texts: 2 Drafting New York Wills § 20.03.

§ 2981. Appointment of health care agent; health care proxy

1. Authority to appoint agent; presumption of competence. (a) A competent adult may appoint a health care agent in accordance with the terms of this article.

(b) For the purposes of this section, every adult shall be presumed competent to appoint a health care agent unless such person has been adjudged incompetent or otherwise adjudged not competent to appoint a health care agent, or unless a committee or guardian of the person has been appointed for the adult pursuant to article seventy-eight of the mental hygiene law or article seventeen-A of the surrogate's court procedure act.

2. Health care proxy; execution; witnesses. (a) A competent adult may appoint a health care agent by a health care proxy, signed and dated by the adult in the presence of two adult witnesses who shall also sign the proxy. Another person may sign and date the health care proxy for the adult if the adult is unable to do so, at the adult's direction and in the adult's presence, and in the presence of two adult witnesses who shall sign the proxy. The witnesses shall state that the principal appeared to execute the proxy willingly and free from duress. The person appointed as agent shall not act as witness to execution of the health care proxy.

(b) For persons who reside in a mental hygiene facility operated or licensed by the office of mental health, at least one witness shall be an individual who is not affiliated with the facility and, if the mental hygiene facility is also a hospital as defined in subdivision ten of section 1.03 of the mental

hygiene law, at least one witness shall be a qualified psychiatrist or psychiatric nurse practitioner.

(c) For persons who reside in a mental hygiene facility operated or licensed by the office for people with developmental disabilities, at least one witness shall be an individual who is not affiliated with the facility and at least one witness shall be a physician, nurse practitioner, physician assistant or clinical psychologist who either is employed by a developmental disabilities services office named in section 13.17 of the mental hygiene law or who has been employed for a minimum of two years to render care and service in a facility operated or licensed by the office for people with developmental disabilities, or has been approved by the commissioner of developmental disabilities in accordance with regulations approved by the commissioner. Such regulations shall require that a physician, nurse practitioner, physician assistant, or clinical psychologist possess specialized training or three years experience in treating developmental disabilities.

3. Restrictions on who may be and limitations on a health care agent. (a) An operator, administrator or employee of a hospital may not be appointed as a health care agent by any person who, at the time of the appointment, is a patient or resident of, or has applied for admission to, such hospital.

(b) The restriction in paragraph (a) of this subdivision shall not apply to:

(i) an operator, administrator or employee of a hospital who is related to the principal by blood, marriage or adoption; or

(ii) a physician, physician assistant, or nurse practitioner, subject to the limitation set forth in paragraph (c) of this subdivision, except that no physician or nurse practitioner affiliated with a mental hygiene facility or a psychiatric unit of a general hospital may serve as agent for a principal residing in or being treated by such facility or unit unless the physician is related to the principal by blood, marriage or adoption.

(c) If a physician, physician assistant, or nurse practitioner is appointed agent, the physician, physician assistant, or nurse practitioner shall not act as the patient's attending practitioner after the authority under the health care proxy commences, unless the physician, physician assistant, or nurse practitioner declines the appointment as agent at or before such time.

(d) No person who is not the spouse, child, parent, brother, sister or grandparent of the principal, or is the issue of, or married to, such person, shall be appointed as a health care agent if, at the time of appointment, he or she is presently appointed health care agent for ten principals.

4. Commencement of agent's authority. The agent's authority shall commence upon a determination, made pursuant to subdivision one of section two thousand nine hundred eighty-three of this article, that the principal lacks capacity to make health care decisions.

5. Contents and form of health care proxy. (a) The health care proxy shall:

(i) identify the principal and agent; and

(ii) indicate that the principal intends the agent to have authority to make health care decisions on the principal's behalf.

(b) The health care proxy may include the principal's wishes or instructions about health care decisions, and limitations upon the agent's authority.

(c) The health care proxy may provide that it expires upon a specified date or upon the occurrence of a certain condition. If no such date or condition is set forth in the proxy, the proxy shall remain in effect until revoked. If, prior to the expiration of a proxy, the authority of the agent has commenced, the proxy shall not expire while the principal lacks capacity.

(d) A health care proxy may, but need not, be in the following form:

Health Care Proxy

I (name of principal) hereby appoint (name, home address and telephone number of agent) as my health care agent to make any and all health care decisions for me, except to the extent I state otherwise.

This health care proxy shall take effect in the event I become unable to make my own health care decisions.

NOTE: Although not necessary, and neither encouraged nor discouraged, you may wish to state instructions or wishes, and limit your agent's authority. Unless your agent knows your wishes about artificial nutrition and hydration, your agent will not have authority to decide about artificial nutrition and hydration. If you choose to state instructions, wishes, or limits, please do so below:

_____

_____

_____

I direct my agent to make health care decisions in accordance with my wishes and instructions as stated above or as otherwise known to him or her. I also direct my agent to abide by any limitations on his or her authority as stated above or as otherwise known to him or her.

In the event the person I appoint above is unable, unwilling or unavailable to act as my health care agent, I hereby appoint (name, home address and telephone number of alternate agent) as my health care agent.

I understand that, unless I revoke it, this proxy will remain in effect indefinitely or until the date or occurrence of the condition I have stated below:

(Please complete the following if you do NOT want this health care proxy to be in effect indefinitely):

This proxy shall expire: (Specify date or condition)

Signature:

Address:

Date:

I declare that the person who signed or asked another to sign this document is personally known to me and appears to be of sound mind and acting willingly and free from duress. He or she signed (or asked another to sign for him or her) this document in my presence and that person signed in my presence. I am not the person appointed as agent by this document.

Witness:
Address:
Witness:
Address:

(e) The health care proxy shall not be executed on a form or other writing that also includes the execution of a power of attorney, provided, however, that nothing in this paragraph shall invalidate a delegation of the authority to make health care decisions executed prior to the enactment of this article.

(f) A health care proxy may include the principal's wishes or instructions regarding organ and tissue donation and may limit the health care agent's authority to consent to organ or tissue donation or designate another person to do so, under article forty-three of this chapter. Failure to state wishes or instructions shall not be construed to imply a wish not to donate.

6. Alternate agent. (a) A competent adult may designate an alternate agent in the health care proxy to serve in place of the agent when:

(i) the attending practitioner has determined in a writing signed by the physician, physician assistant, or nurse practitioner (A) that the person appointed as agent is not reasonably available, willing and competent to serve as agent, and (B) that such person is not expected to become reasonably available, willing and competent to make a timely decision given the patient's medical circumstances;

(ii) the agent is disqualified from acting on the principal's behalf pursuant to subdivision three of this section or subdivision two of section two thousand nine hundred ninety-two of this article, or

(iii) under conditions set forth in the proxy.

(b) If, after an alternate agent's authority commences, the person appointed as agent becomes available, willing and competent to serve as agent:

(i) the authority of the alternate agent shall cease and the authority of the agent shall commence; and

(ii) the attending practitioner shall record the change in agent and the reasons therefor in the principal's medical record.

HISTORY:

Add, L 1990, ch 752, § 2, eff Jan 18, 1991; amd, L 1994, ch 23, § 4, eff March 28, 1994; L 2000, ch 540, § 1, eff Oct 4, 2000; L 2009, ch 348, § 3, eff Oct 25, 2009; L 2012, ch 56, § 6 (Part J), eff March 30, 2012; L 2018, ch 342, § 2, effective February 3, 2019; L 2019, ch 708, § 18, effective June 17, 2020.

Editor's Notes Laws 1990, ch 752, § 3, eff Jan 18, 1991, provides as follows:

§ 3. This act shall take effect 180 days after it shall have become a law, provided, that effective immediately, the addition, amendment, and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized and directed to be made and completed on or before such date.

Laws 2008, ch 210, § 3, provides as follows:

§ 3. Notwithstanding the provisions of sections 2963, 2965, 2981 and 2983 of the public health law, a health care agent appointed pursuant to subdivision (e) of section 33.03 of the mental hygiene law may make any and all decisions authorized by articles 29-B and 29-C of the public health law, regardless of the principal's capacity, provided that the principal has elected to authorize such agent and that any such decision is made in direct consultation with the principal and the attending physician.

Laws 2012, ch 56, §§ 20, 21 (Part J), eff March 30, 2012, provide as follows:

§ 20. [Expires March 31, 2013] The commissioner of the office for people with developmental disabilities shall provide notification to the temporary president of the senate and the speaker of the assembly sixty days prior to a reduction in capacity of twenty persons or more or closure of a developmental center or other institutional setting which is subject to such reduction or closure pursuant to such commissioner's planned downsizing and closing of institutional capacity.

§ 21. This act shall take effect immediately, provided however, that on or before May 31, 2012 the office for people with developmental disabilities shall submit a report to the temporary president of the senate and the speaker of the assembly on implementation related to the restructuring of developmental disabilities services offices. The office shall also publish the report on the office's website. The report shall include but not be limited to: the plan timeline for transition of each of the developmental disabilities service offices into a state operations offices of the office for people with developmental disabilities; the location of each state operations office, its catchment area, and a list of services that will be administered under its jurisdiction; and the location of each developmental disabilities regional office, its catchment area, and a list of programs under its jurisdiction; and provided further that section twenty of this act shall expire and be deemed repealed on March 31, 2013.

Laws 2018, ch 342, § 5, eff February 3, 2019, provides:

§ 5. This act shall take effect on the ninetieth day after it shall have become a law. Effective immediately, any rules and regulations necessary to implement the provisions of this act on its effective date are authorized and directed to be amended, repealed and/or promulgated on or before such date.

Laws 2019, ch 708, § 38, eff June 17, 2020, provides:

§ 38. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided, however that if chapter 342 of the laws of 2018 shall not have taken effect on or before such date, then sections seventeen, eighteen, nineteen and twenty of this act shall take effect on the same date and in the same manner as such chapter 342 of the laws of 2018, takes effect. Effective immediately, any rules and regulations necessary to implement the provisions of this act on its effective date are authorized and directed to be amended, repealed and/or promulgated on or before such date.

Amendment Notes The 2018 amendment by ch 342, § 2, added "or nurse practitioner" twice in 3(b)(ii), three times in 3(c) and in 6(a)(i); added "or attending nurse practitioner" in 3(c), in 6(a)(i) and 6(b)(ii); added "or psychiatric nurse practitioner" in 2(b); and added "nurse practitioner" twice in 2(c).

The 2019 amendment by ch 708 § 18, in 2(c), added "physician assistant" twice in the first and second sentences; added "physician assistant" in 3(b)(ii); in 3(c), added "physician assistant" three times and deleted "physician or attending nurse" following "the patient's attending"; in (6)(a)(i), deleted "physician or attending nurse" preceding "practitioner has determined" and added "physician assistant"; and deleted "physician or attending nurse" preceding "practitioner shall record" in 6(b)(ii).

Notes to Decisions

Analysis

1. In general
2. Temporary guardian

1. In general

Court properly dismissed complaint on ground that in absence of valid health care proxy, order not to resuscitate, or court order, there could be no action against hospital for saving plaintiff's life after she attempted to commit suicide; to extent that "living will" executed by plaintiff could be construed as order not resuscitate, it concededly contained signature of only one witness and thus did not comply with CLS Pub Health § 2964(2)(b). Haymes v Brookdale Hosp. Med. Ctr., 287 A.D.2d 486, 731 N.Y.S.2d 215, 2001 N.Y. App. Div. LEXIS 9387 (N.Y. App. Div. 2d Dep't 2001), app. denied, 97 N.Y.2d 608, 739 N.Y.S.2d 97, 765 N.E.2d 300, 2002 N.Y. LEXIS 49 (N.Y. 2002).

Trial court properly appointed an independent guardian for an incapacitated person and removed the incapacitated person's niece as a health care proxy pursuant to N.Y. Mental Hyg. Law §§ 81.02(a)(2), 81.19(d), and N.Y. Pub. Health Law § 2981; the incapacitated person's niece had dissipated certain income and/or accounts, and transferred to herself certain stock, which constituted self-dealing. Nora McL. C. v Peggy D., 308 A.D.2d 445, 764 N.Y.S.2d 128, 2003 N.Y. App. Div. LEXIS 9280 (N.Y. App. Div. 2d Dep't 2003).

As a patient's siblings failed to establish any ground upon which his wife should be removed be removed as an agent and they had not established that the agent was acting in bad faith, having determined that the Health Care Proxy was valid, there was no need for a guardian pursuant to N.Y. Mental Hyg. Law § 81.02. S.I. v R.S., 877 N.Y.S.2d 860, 24 Misc. 3d 567, 2009 N.Y. Misc. LEXIS 845 (N.Y. Sup. Ct. 2009).

2. Temporary guardian

Court would lack authority to appoint temporary guardian with authority to appoint successor health care agent on behalf of incapacitated person under health care proxy law (CLS Pub Health art 29-C) even if petitioner made showing of necessity, as CLS Pub Health § 2981(1) expressly requires that principal be competent in first instance to appoint health care agent. In re Lowe, 180 Misc. 2d 404, 688 N.Y.S.2d 389, 1999 N.Y. Misc. LEXIS 146 (N.Y. Sup. Ct. 1999).

Agency Opinions

1. In general

Non-hospital do-not-resuscitate orders made under CLS Pub Health Art 29-B do not apply to health care staff at correctional facilities or at non-licensed medical center operated by Department of Correctional Services; department health care staff may, however, honor wishes of patients expressed in accordance with standards established by Court of Appeals, and patients may employ health care proxies to convey their wishes as to medical treatment or to designate third parties to make health care decisions. 1992 N.Y. Op. Att'y Gen. No. 92-F4, 1992 N.Y. AG LEXIS 60.

RESEARCH REFERENCES AND PRACTICE AIDS

Matthew Bender's New York Practice Guides: 1 New York Practice Guide: Probate and Estate Administration § 16.19a.

Texts: 2 Drafting New York Wills § 20.07.

§ 2982. Rights and duties of agent

1. Scope of authority. Subject to any express limitations in the health care proxy, an agent shall have the authority to make any and all health care decisions on the principal's behalf that the principal could make. Such authority shall be subject to the provisions of section twenty-nine hundred eighty-nine of this article.

2. Decision-making standard. After consultation with a licensed physician, registered nurse, licensed psychologist, licensed master social worker, or a licensed clinical social worker, the agent shall make health care decisions: (a) in accordance with the principal's wishes, including the principal's religious and moral beliefs; or (b) if the principal's wishes are not reasonably known and cannot with reasonable diligence be ascertained, in accordance with the principal's best interests; provided, however, that if the principal's wishes regarding the administration of artificial nutrition and hydration are not reasonably known and cannot with reasonable diligence be ascertained, the agent shall not have the authority to make decisions regarding these measures.

3. Right to receive information. Notwithstanding any law to the contrary, the agent shall have the right to receive medical information and medical and clinical records necessary to make informed decisions regarding the principal's health care.

4. Priority over other surrogates. Health care decisions by an agent on a principal's behalf pursuant to this article shall have priority over decisions by any other person, except as otherwise provided in the health care proxy or in subdivision five of section two thousand nine hundred eighty-three of this article.

HISTORY:

Add, L 1990, ch 752, § 2, eff Jan 18, 1991; amd, L 1991, ch 370, § 18, eff July 15, 1991; L 2004, ch 230, § 27, eff July 27, 2004.

Editor's Notes Laws 1990, ch 752, § 3, eff Jan 18, 1991, provides as follows:

§ 3. This act shall take effect 180 days after it shall have become a law, provided, that effective immediately, the addition, amendment, and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized and directed to be made and completed on or before such date.

Notes to Decisions

Analysis

1. In general
2. Guardian
3. Access to records

1. In general

Because the statute empowers health care agents "to make any and all decisions" that a principal can make, this means that health care agents must be able to make the kinds of decisions that do not take place in hospitals, and thus do not occur in hospital settings. N.Y. Pub. Health Law § 2982 applies everywhere. Stein v County of Nassau, 642 F. Supp. 2d 135, 2009 U.S. Dist. LEXIS 63794 (E.D.N.Y. 2009), aff'd in part, vacated in part, 419 Fed. Appx. 67, 2011 U.S. App. LEXIS 7296 (2d Cir. N.Y. 2011).

Only restrictions that N.Y. Pub. Health Law § 2982 imposes upon the proxy's authority are (1) a procedural requirement that the agent first consult with one of the listed professionals before making a decision, and (2) a substantive requirement that the agent act in accord with the principal's wishes or, failing that, the principal's best interests. Stein v County of Nassau, 642 F. Supp. 2d 135, 2009 U.S. Dist. LEXIS 63794 (E.D.N.Y. 2009), aff'd in part, vacated in part, 419 Fed. Appx. 67, 2011 U.S. App. LEXIS 7296 (2d Cir. N.Y. 2011).

Because the court's holding that emergency responders had to honor health care proxies outside of a hospital setting under N.Y. Pub. Health Law § 2982 was a matter of first impression,

defendants did not violate clearly established law in refusing to honor plaintiff's status as her husband's health care agent, and defendants were entitled to qualified immunity on plaintiff's claims arising from that refusal. Stein v County of Nassau, 642 F. Supp. 2d 135, 2009 U.S. Dist. LEXIS 63794 (E.D.N.Y. 2009), aff'd in part, vacated in part, 419 Fed. Appx. 67, 2011 U.S. App. LEXIS 7296 (2d Cir. N.Y. 2011).

2. Guardian

As a patient's siblings failed to establish any ground upon which his wife should be removed be removed as an agent and they had not established that the agent was acting in bad faith, having determined that the Health Care Proxy was valid, there was no need for a guardian pursuant to N.Y. Mental Hyg. Law § 81.02. S.I. v R.S., 877 N.Y.S.2d 860, 24 Misc. 3d 567, 2009 N.Y. Misc. LEXIS 845 (N.Y. Sup. Ct. 2009).

3. Access to records

Although the adult child of a former patient of an institutional health care provider did not fall under the definition of a qualified person within the meaning of N.Y. Pub. Health Law § 18, the child was nonetheless entitled to be given access to the parent's records, even after discharge from the facility, under the terms of the medical directive that established the child as the parent's agent. Matter of Mougiannis v North Shore-Long Is. Jewish Health Sys. Inc., 25 A.D.3d 230, 806 N.Y.S.2d 623, 2005 N.Y. App. Div. LEXIS 13296 (N.Y. App. Div. 2d Dep't 2005).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 2985, 2992.

Texts: 2 Drafting New York Wills § 20.07.

§ 2983. Determination of lack of capacity to make health care decisions for the purpose of empowering agent.

1. Determination by attending practitioner. (a) A determination that a principal lacks capacity to make health care decisions shall be made by the attending practitioner to a reasonable degree of medical certainty. The determination shall be made in writing and shall contain such attending practitioner's opinion regarding the cause and nature of the principal's incapacity as well as its extent and probable duration. The determination shall be included in the patient's medical record. For a decision to withdraw or withhold life-sustaining treatment, the attending practitioner who makes the determination that a principal lacks capacity to make health care decisions must consult with another physician, physician assistant, or nurse practitioner to confirm such determination. Such consultation shall also be included within the patient's medical record.

(b) If an attending practitioner of a patient in a general hospital or mental hygiene facility determines that a patient lacks capacity because of mental illness, the attending practitioner who makes the determination must be, or must consult, for the purpose of confirming the determination, with a qualified psychiatrist. A record of such consultation shall be included in the patient's medical record.

(c) If the attending practitioner determines that a patient lacks capacity because of a developmental disability, the attending practitioner who makes the determination must be, or must consult, for the purpose of confirming the determination, with a physician, nurse practitioner, physician assistant, or clinical psychologist who either is employed by a developmental disabilities services office named in section 13.17 of the mental hygiene law, or who has been employed for a minimum of two years to render care and service in a facility operated or licensed by the office for people with developmental disabilities, or has been approved by the commissioner of developmental disabilities in accordance with regulations promulgated by such commissioner. Such regulations shall require that a physician, nurse practitioner, physician assistant, or clinical psychologist possess specialized training or three years experience in treating developmental disabilities. A record of such consultation shall be included in the patient's medical record.

(d) A physician, physician assistant, or nurse practitioner who has been appointed as a patient's agent shall not make the determination of the patient's capacity to make health care decisions.

2. Request for a determination. If requested by the agent, an attending practitioner shall make a determination regarding the principal's capacity to make health care decisions for the purposes of this article.

3. Notice of determination. Notice of a determination that a principal lacks capacity to make health care decisions shall promptly be given: (a) to the principal, orally and in writing, where there is any indication of the principal's ability to comprehend such notice; (b) to the agent; (c) if the principal is in or is transferred from a mental hygiene facility, to the facility director; and (d) to the conservator for, or committee of, the principal.

4. Limited purpose of determination. A determination made pursuant to this section that a principal lacks capacity to make health care decisions shall not be construed as a finding that the patient lacks capacity for any other purpose.

5. Priority of principal's decision. Notwithstanding a determination pursuant to this section that the principal lacks capacity to make health care decisions, where a principal objects to the determination of incapacity or to a health care decision made by an agent, the principal's objection or decision shall prevail unless the principal is determined by a court of competent jurisdiction to lack capacity to make health care decisions.

6. Confirmation of lack of capacity. (a) The attending practitioner shall confirm the principal's continued incapacity before complying with an agent's health care decisions, other than those decisions made at or about the time of the initial determination made pursuant to subdivision one of this section. The confirmation shall be stated in writing and shall be included in the principal's medical record.

(b) The notice requirements set forth in subdivision three of this section shall not apply to the confirmation required by this subdivision.

7. Effect of recovery of capacity. In the event the attending practitioner determines that the principal has regained capacity, the authority of the agent shall cease, but shall recommence if the principal subsequently loses capacity as determined pursuant to this section.

HISTORY:

Add, L 1990, ch 752, § 2, eff Jan 18, 1991; amd, L 1994, ch 23, § 5, eff March 28, 1994; L 2012, ch 56, § 7 (Part J), eff March 30, 2012; L 2018, ch 342, § 3, effective February 3, 2019; L 2019, ch 708, § 19, effective June 17, 2020.

Editor's Notes Laws 1990, ch 752, § 3, eff Jan 18, 1991, provides as follows:

§ 3. This act shall take effect 180 days after it shall have become a law, provided, that effective immediately, the addition, amendment, and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized and directed to be made and completed on or before such date.

Laws 2008, ch 210, § 3, provides as follows:

§ 3. Notwithstanding the provisions of sections 2963, 2965, 2981 and 2983 of the public health law, a health care agent appointed pursuant to subdivision (e) of section 33.03 of the mental hygiene law may make any and all decisions authorized by articles 29-B and 29-C of the public health law, regardless of the principal's capacity, provided that the principal has elected to authorize such agent and that any such decision is made in direct consultation with the principal and the attending physician.

Laws 2012, ch 56, §§ 20, 21 (Part J), eff March 30, 2012, provide as follows:

§ 20. [Expires March 31, 2013] The commissioner of the office for people with developmental disabilities shall provide notification to the temporary president of the senate and the speaker of the assembly sixty days prior to a reduction in capacity of twenty persons or more or closure of a developmental center or other institutional setting which is subject to such reduction or closure pursuant to such commissioner's planned downsizing and closing of institutional capacity.

§ 21. This act shall take effect immediately, provided however, that on or before May 31, 2012 the office for people with developmental disabilities shall submit a report to the temporary president of the senate and the speaker of the assembly on implementation related to the restructuring of developmental disabilities services offices. The office shall also publish the report on the office's website. The report shall include but not be limited to: the plan timeline for transition of each of the developmental disabilities service offices into a state operations offices of the office for people with developmental disabilities; the location of each state operations office, its catchment area, and a list of services that will be administered under its jurisdiction; and the location of each developmental disabilities regional office, its catchment area, and a list of programs under its jurisdiction; and provided further that section twenty of this act shall expire and be deemed repealed on March 31, 2013.

Laws 2018, ch 342, § 5, eff February 3, 2019, provides:

§ 5. This act shall take effect on the ninetieth day after it shall have become a law. Effective immediately, any rules and regulations necessary to implement the provisions of this act on its effective date are authorized and directed to be amended, repealed and/or promulgated on or before such date.

Laws 2019, ch 708, § 38, eff June 17, 2020, provides:

§ 38. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided, however that if chapter 342 of the laws of 2018 shall not have taken effect on or before such date, then sections seventeen, eighteen, nineteen and twenty of this act shall take effect on the same date and in the same manner as such chapter 342 of the laws of 2018, takes effect. Effective immediately, any rules and regulations necessary to implement the provisions of this act on its effective date are authorized and directed to be amended, repealed and/or promulgated on or before such date.

Amendment Notes The 2018 amendment by ch 342, § 3, added "or attending nurse practitioner" in 1; added "or attending nurse practitioner" wherever it appears in 1, 2, 6, and 7; added "or nurse practitioner" in the second to the last sentences of 1(a) and in 1(d); and added "nurse practitioner" in the first and second sentences of 1(c).

The 2019 amendment by ch 708 § 19, deleted "physician or attending nurse" following "by attending" in 1; in 1(a), deleted "physician or attending nurse" following "the attending" in the first sentence, "physician or attending nurse" following "such attending" in the second sentence, and, in the third sentence, deleted "physician or attending nurse" following "the attending" and added "physician assistant"; in 1(b), deleted "physician or attending nurse" following "attending" twice; in 1(c), deleted "physician or attending nurse" following "the attending" twice in the first sentence and added "physician assistant" in the first and second sentence; deleted "physician or attending nurse" following "attending" in 2; deleted "physician or attending nurse" following "attending" in the first sentence of 6(a); and deleted "physician or attending nurse" following "the attending" in 7.

Notes to Decisions

1. In general

Trial court erred in denying a nursing home operator's motion to dismiss a wife's fifth counterclaim because she lacked standing to assert a claim for relief based on the alleged failure of the operator to properly or timely invoke a health care proxy that was executed by the wife's husband before his death. Long Is. Care Ctr., Inc. v Goodman, 137 A.D.3d 874, 26 N.Y.S.3d 595, 2016 N.Y. App. Div. LEXIS 1645 (N.Y. App. Div. 2d Dep't 2016).

Notes to Unpublished Decisions

1. In general

Unpublished decision: Even assuming that plaintiff wife had authority pursuant to N.Y. Pub. Health Law § 2983(1) based on her health care proxy to direct defendant emergency responders to transport her husband to a particular hospital, her authority to do so was not clearly established, and defendants were entitled to qualified immunity on her claims for violation of the Fourth, Fifth, and Fourteenth Amendments. Stein v Barthelson, 419 Fed. Appx. 67, 2011 U.S. App. LEXIS 7296 (2d Cir. N.Y. 2011).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 2981, 2982, 2984.

Texts: 2 Drafting New York Wills § 20.07.

§ 2984. Provider's obligations

1. A health care provider who is provided with a health care proxy shall arrange for the proxy or a copy thereof to be inserted in the principal's medical record if the health care proxy has not been included in such record.

2. A health care provider shall comply with health care decisions made by an agent in good faith under a health care proxy to the same extent as if such decisions had been made by the principal, subject to any limitations in the health care proxy and pursuant to the provisions of subdivision five of section two thousand nine hundred eighty-three of this article.

3. Notwithstanding subdivision two of this section, nothing in this article shall be construed to require a private hospital to honor an agent's health care decision that the hospital would not honor if the decision had been made by the principal because the decision is contrary to a formally adopted policy of the hospital that is expressly based on religious beliefs or sincerely held moral convictions central to the facility's operating principles and the hospital would be permitted by law to refuse to honor the decision if made by the principal, provided:

(a) the hospital has informed the patient or the health care agent of such policy prior to or upon admission, if reasonably possible; and

(b) the patient is transferred promptly to another hospital that is reasonably accessible under the circumstances and is willing to honor the agent's decision and pending transfer the hospital complies with subdivision five of this section. If the agent is unable or unwilling to arrange such a transfer, the hospital may intervene to facilitate such a transfer. If such a transfer is not effected, the hospital shall seek judicial relief in accordance with section twenty-nine hundred ninety-two of this article or honor the agent's decision.

4. Notwithstanding subdivision two of this section, nothing in this article shall be construed to require an individual as a health care provider to honor an agent's health care decision that the individual would not honor if the decision had been made by the principal because the decision is contrary to the individual's religious beliefs or sincerely held moral convictions, provided the individual health care provider promptly informs the health care agent and the hospital of his or her refusal to honor the agent's decision. In such event, the hospital shall promptly transfer responsibility for the patient to another individual health care provider willing to honor the agent's decision. The individual health care provider shall cooperate in facilitating such transfer of the patient and comply with subdivision five of this section.

5. Notwithstanding the provisions of this section or subdivision two of section twenty-nine hundred eighty-nine of this article, if an agent directs the provision of life-sustaining treatment, the denial of which in reasonable medical judgment would be likely to result in the death of the patient, a hospital or individual health care provider that does not wish to provide such treatment shall nonetheless comply with the agent's decision pending either transfer of the patient to a willing hospital or individual health care provider, or judicial review in accordance with section twenty-nine hundred ninety-two of this article.

HISTORY:

Add, L 1990, ch 752, § 2, eff Jan 18, 1991; amd, L 2010, ch 8, § 23, eff June 1, 2010.

Editor's Notes Laws 1990, ch 752, § 3, eff Jan 18, 1991, provides as follows:

§ 3. This act shall take effect 180 days after it shall have become a law, provided, that effective immediately, the addition, amendment, and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized and directed to be made and completed on or before such date.

Laws 2010, ch 8, § 29, eff March 16, 2010, provides as follows:

§ 29. This act shall take effect immediately; provided that sections one through twenty-six of this act shall take effect on the first of June next succeeding the date on which this act shall have become a law; and provided further that effective immediately it shall be lawful for a hospital, as defined in subdivision 18 of section 2994-a of the public health law, as added by this act to adopt a policy that is consistent with the requirements of article 29-CC of the public health law as added by section two of this act or the mental hygiene law as amended by sections twenty-five and twenty-six of this act and for a health care provider to accept and carry out a health care decision in accordance with such requirements for a patient in a hospital that has adopted such policy.

RESEARCH REFERENCES AND PRACTICE AIDS

Texts: 2 Drafting New York Wills § 20.07.

§ 2985. Revocation

1. Means of revoking proxy. (a) A competent adult may revoke a health care proxy by notifying the agent or a health care provider orally or in writing or by any other act evidencing a specific intent to revoke the proxy.

(b) For the purposes of this section, every adult shall be presumed competent unless determined otherwise pursuant to court order.

(c) A health care proxy shall also be revoked upon execution by the principal of a subsequent health care proxy.

(d) The creation by the principal of written wishes or instructions about health care, or limitations upon the agent's authority, shall not revoke a health care proxy unless such wishes, instructions or limitations expressly provide otherwise. Such wishes, instructions or limitations shall constitute evidence of the principal's wishes for purposes of subdivision two of section two thousand nine hundred eighty-two of this article.

(e) The appointment of the principal's spouse as health care agent shall be revoked upon the divorce or legal separation of the principal and spouse, unless the principal specifies otherwise.

2. Duty to record revocation. (a) A physician, physician assistant, or nurse practitioner who is informed of or provided with a revocation of a health care proxy shall immediately (i) record the revocation in the principal's medical record and (ii) notify the agent and the medical staff responsible for the principal's care of the revocation.

(b) Any member of the staff of a health care provider informed of or provided with a revocation of a health care proxy pursuant to this section shall immediately notify a physician, physician assistant, or nurse practitioner of such revocation.

HISTORY:

Add, L 1990, ch 752, § 2, eff Jan 18, 1991; L 2018, ch 342, § 4, effective February 3, 2019; L 2019, ch 708, § 20, effective June 17, 2020.

Editor's Notes Laws 1990, ch 752, § 3, eff Jan 18, 1991, provides as follows:

§ 3. This act shall take effect 180 days after it shall have become a law, provided, that effective immediately, the addition, amendment, and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized and directed to be made and completed on or before such date.

Laws 2018, ch 342, § 5, eff February 3, 2019, provides:

§ 5. his act shall take effect on the ninetieth day after it shall have become a law. Effective immediately, any rules and regulations necessary to implement the provisions of this act on its effective date are authorized and directed to be amended, repealed and/or promulgated on or before such date.

Laws 2019, ch 708, § 38, eff June 17, 2020, provides:

§ 38. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided, however that if chapter 342 of the laws of 2018 shall not have taken effect on or before such date, then sections seventeen, eighteen, nineteen and twenty of this act shall take effect on the same date and in the same manner as such chapter 342 of the laws of 2018, takes effect. Effective immediately, any rules and regulations necessary to implement the provisions of this act on its effective date are authorized and directed to be amended, repealed and/or promulgated on or before such date.

Amendment Notes The 2018 amendment by ch 342, § 4, added "or nurse practitioner" in 2(a) and 2(b).

The 2019 amendment by ch 708 § 20, added "physician assistant" in 2(a) and 2(b).

Notes to Decisions

1. In general

Terminally ill patient's living will/power of attorney was deemed revoked and a health care proxy was deemed revoked by implication, pursuant to N.Y. Pub. Health Law § 2985(a)(1), where her agents under the power of attorney indicated that she had told them that she did not fully understand the implications of the documents, that it was against her religious beliefs to terminate life, and that she had intended to revoke the documents; accordingly, a hospital that sought to remove or override the agents' decision not to sign a do not resuscitate form was found to not meet its burden of proof in order to be granted the relief requested, pursuant to N.Y. Pub. Health Law § 2992. In re Uni v Hosp. of the State Univ. of N.Y. Upstate Med. Univ., 194 Misc. 2d 372, 754 N.Y.S.2d 153, 2002 N.Y. Misc. LEXIS 1701 (N.Y. Sup. Ct. 2002).

RESEARCH REFERENCES AND PRACTICE AIDS

Texts: 2 Drafting New York Wills § 20.07.

§ 2986. Immunity

1. Provider immunity. No health care provider or employee thereof shall be subjected to criminal or civil liability, or be deemed to have engaged in unprofessional conduct, for honoring in good faith a health care decision by an agent, or for other actions taken in good faith pursuant to this article.

2. Agent immunity. No person acting as agent pursuant to a health care proxy shall be subjected to criminal or civil liability for making a health care decision in good faith pursuant to this article.

HISTORY:

Add, L 1990, ch 752, § 2, eff Jan 18, 1991.

Editor's Notes Laws 1990, ch 752, § 3, eff Jan 18, 1991, provides as follows:

§ 3. This act shall take effect 180 days after it shall have become a law, provided, that effective immediately, the addition, amendment, and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized and directed to be made and completed on or before such date.

Notes to Decisions

1. In general

In affirming that relatives could not recover against a medical center and physician for their pain and suffering and loss of income for the death of a patient, the appeals court stated that N.Y. Pub. Health Law art. 29-C contained no provision permitting recovery by a health care proxy for the proxy's individual emotional or pecuniary damages, and none could be judicially engrafted, and that, under Pub. Health Law § 2986(1), the physician and medical center were not liable to a health care agents for honoring their requests. DeCintio v Lawrence Hosp., 299 A.D.2d 165, 753 N.Y.S.2d 26, 2002 N.Y. App. Div. LEXIS 10614 (N.Y. App. Div. 1st Dep't 2002), app. denied, 100 N.Y.2d 549, 762 N.Y.S.2d 871, 793 N.E.2d 408, 2003 N.Y. LEXIS 1401 (N.Y. 2003).

RESEARCH REFERENCES AND PRACTICE AIDS

Texts: 2 Drafting New York Wills § 20.07.

§ 2987. Liability for health care costs

Liability for the cost of health care provided pursuant to an agent's decision shall be the same as if the health care were provided pursuant to the principal's decision.

HISTORY:

Add, L 1990, ch 752, § 2, eff Jan 18, 1991.

Editor's Notes Laws 1990, ch 752, § 3, eff Jan 18, 1991, provides as follows:

§ 3. This act shall take effect 180 days after it shall have become a law, provided, that effective immediately, the addition, amendment, and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized and directed to be made and completed on or before such date.

RESEARCH REFERENCES AND PRACTICE AIDS

Texts: 2 Drafting New York Wills § 20.07.

§ 2988. Requiring or prohibiting execution of proxy

No person may require or prohibit the execution of a health care proxy by an individual as a condition for providing health care services or insurance to such individual.

HISTORY:

Add, L 1990, ch 752, § 2, eff Jan 18, 1991.

Editor's Notes Laws 1990, ch 752, § 3, eff Jan 18, 1991, provides as follows:

§ 3. This act shall take effect 180 days after it shall have become a law, provided, that effective immediately, the addition, amendment, and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized and directed to be made and completed on or before such date.

RESEARCH REFERENCES AND PRACTICE AIDS

Texts: 2 Drafting New York Wills § 20.07.

§ 2989. Effects on other rights

1. A competent adult's failure to appoint a health care agent or to provide the agent with specific health care instructions pursuant to this article shall create no presumptions regarding the adult's wishes about health care.

2. Nothing in this article creates, expands, diminishes, impairs or supersedes any authority that a principal may have under law to make or express decisions, wishes or instructions regarding health care, including decisions about life sustaining treatment, whether or not expressed in a health care proxy.

3. This article is not intended to permit or promote suicide, assisted suicide, or euthanasia; accordingly, nothing herein shall be construed to permit an agent to consent to any act or omission to which the principal could not consent under law.

HISTORY:

Add, L 1990, ch 752, § 2, eff Jan 18, 1991.

Editor's Notes Laws 1990, ch 752, § 3, eff Jan 18, 1991, provides as follows:

§ 3. This act shall take effect 180 days after it shall have become a law, provided, that effective immediately, the addition, amendment, and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized and directed to be made and completed on or before such date.

RESEARCH REFERENCES AND PRACTICE AIDS

Texts: 2 Drafting New York Wills § 20.07.

§ 2990. Proxies executed in other states

A health care proxy or similar instrument executed in another state or jurisdiction in compliance with the law of that state or jurisdiction shall be considered validly executed for purposes of this article.

HISTORY:

Add, L 1990, ch 752, § 2, eff Jan 18, 1991.

Editor's Notes Laws 1990, ch 752, § 3, eff Jan 18, 1991, provides as follows:

§ 3. This act shall take effect 180 days after it shall have become a law, provided, that effective immediately, the addition, amendment, and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized and directed to be made and completed on or before such date.

RESEARCH REFERENCES AND PRACTICE AIDS

Texts: 2 Drafting New York Wills § 20.07.

§ 2991. Creation and use of proxies in residential health care and mental hygiene facilities

1. Residential health care facilities and mental hygiene facilities shall establish procedures:

(a) to provide information to adult residents about their right to create a health care proxy under this article;

(b) to educate adult residents about the authority delegated under a health care proxy, what a proxy may include or omit, and how a proxy is created and revoked;

(c) to help ensure that each resident who creates a proxy while residing at the facility does so voluntarily.

2. Such procedures shall be established in accordance with regulations issued by the commissioners of health, mental health, and the office for people with developmental disabilities for facilities subject to their respective regulatory authorities.

HISTORY:

Add, L 1990, ch 752, § 2, eff Jan 18, 1991; L 2019, ch 672, § 25, effective December 16, 2019.

Editor's Notes Laws 1990, ch 752, § 3, eff Jan 18, 1991, provides as follows:

§ 3. This act shall take effect 180 days after it shall have become a law, provided, that effective immediately, the addition, amendment, and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized and directed to be made and completed on or before such date.

Laws 2008, ch 210, § 2, provides as follows:

§ 2. Notwithstanding the provisions of section 2991 of the public health law, facilities licensed or authorized pursuant to article 16 of the mental hygiene law may utilize the simplified advance health care directives form, established pursuant to subdivision (e) of section 33.03 of the mental hygiene law, in fulfillment of their responsibilities pursuant to such section of the public health law.

Amendment Notes The 2019 amendment by ch 672 § 25, substituted "the office for people with developmental disabilities" for "mental retardation and developmental disabilities" in 2.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 2993.

Texts: 2 Drafting New York Wills § 20.07.

§ 2992. Special proceeding authorized

The health care provider, the conservator for, or committee of the principal, members of the principal's family, a close friend of the principal as defined in subdivision five of section two thousand nine hundred sixty-one of this chapter, or the commissioner of health, mental health, or developmental disabilities may commence a special proceeding pursuant to article four of the civil practice law and rules, in a court of competent jurisdiction, with respect to any dispute arising under this article, including, but not limited to, a proceeding to:

1. determine the validity of the health care proxy;

2. have the agent removed on the ground that the agent (a) is not reasonably available, willing and competent to fulfill his or her obligations under this article; (b) is acting in bad faith; or (c) is the subject of an order of protection protecting the principal or has been arrested or charged for a criminal act that allegedly caused the principal's lack of capacity or substantially injured or impaired the health status of the principal, provided that the application of this provision in a particular case may be waived or modified in the interest of justice; or

3. override the agent's decision about health care treatment on the grounds that: (a) the decision was made in bad faith or (b) the decision is not in accordance with the standards set forth in subdivision one or two of section two thousand nine hundred eighty-two of this article.

HISTORY:

Add, L 1990, ch 752, § 2, eff Jan 18, 1991; L 2014, ch 93, § 1, effective July 22, 2014.

Editor's Notes Laws 1990, ch 752, § 3, eff Jan 18, 1991, provides as follows:

§ 3. This act shall take effect 180 days after it shall have become a law, provided, that effective immediately, the addition, amendment, and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized and directed to be made and completed on or before such date.

Amendment Notes The 2014 amendment by ch 93, § 1 deleted "mental retardation and" preceding "developmental" in the opening paragraph; added 2(c); and made a related change.

Notes to Decisions

Analysis

1. In general
2. Revocation
3. Modification
4. Guardian

1. In general

In proceeding under CLS Pub Health § 2992, withholding of certain medication from ward by his health care agents did not

violate terms of his living will where living will showed that ward held firm and settled commitment to termination of life-supporting medicine that would only artificially prolong his life, his current condition was terminal, and he would want his medical care to cease. In re Albert S. , 286 A.D.2d 684, 730 N.Y.S.2d 128, 2001 N.Y. App. Div. LEXIS 8429 (N.Y. App. Div. 2d Dep't 2001).

2. Revocation

Daughters were properly appointed as guardians of their mother's person and property and a power of attorney the mother had executed in favor of her husband was properly revoked as the daughters showed that the mother was an incapacitated person and that the power of attorney was executed while the mother was incapacitated; the daughters also showed that the husband was no longer reasonably available, willing, and competent to fulfill his obligations under N.Y. Pub. Health Law art. 29-C, thereby warranting revocation of a health care proxy. Matter of Susan Jane G., 33 A.D.3d 700, 823 N.Y.S.2d 102, 2006 N.Y. App. Div. LEXIS 12295 (N.Y. App. Div. 2d Dep't 2006).

Terminally ill patient's living will/power of attorney was deemed revoked and a health care proxy was deemed revoked by implication, pursuant to N.Y. Pub. Health Law § 2985(a)(1), where her agents under the power of attorney indicated that she had told them that she did not fully understand the implications of the documents, that it was against her religious beliefs to terminate life, and that she had intended to revoke the documents; accordingly, a hospital that sought to remove or override the agents' decision not to sign a do not resuscitate form was found to not meet its burden of proof in order to be granted the relief requested, pursuant to N.Y. Pub. Health Law § 2992. In re Uni v Hosp. of the State Univ. of N.Y. Upstate Med. Univ., 194 Misc. 2d 372, 754 N.Y.S.2d 153, 2002 N.Y. Misc. LEXIS 1701 (N.Y. Sup. Ct. 2002).

3. Modification

In proceeding under CLS Pub Health § 2992, imposition on ward's health care agents of condition that they forgo any steps to hasten his death unless and until death was imminent and inevitable was improper where condition was contrary to terms of ward's living will, and there is no authority in Public Health Law enabling court to modify living will. In re Albert S. , 286 A.D.2d 684, 730 N.Y.S.2d 128, 2001 N.Y. App. Div. LEXIS 8429 (N.Y. App. Div. 2d Dep't 2001).

4. Guardian

In proceeding under CLS Pub Health § 2992, establishment of guardianship for person and property of ward was improper where ward had made living will with durable power of attorney, and trust had been set up with sufficient funds to pay for his care; guardian is to be appointed solely as last resort—that is, when no available resources or other alternative will adequately protect person. In re Albert S. , 286 A.D.2d 684, 730 N.Y.S.2d 128, 2001 N.Y. App. Div. LEXIS 8429 (N.Y. App. Div. 2d Dep't 2001).

RESEARCH REFERENCES AND PRACTICE AIDS

Texts: 2 Drafting New York Wills § 20.07.

§ 2993. Regulations.

The commissioner of health, in consultation with the commissioners of the office of mental health and the office for people with developmental disabilities, shall establish such regulations as may be necessary for the implementation of this article, subject to the provisions of subdivision two of section two thousand nine hundred ninety-one of this article.

HISTORY:

Add, L 1990, ch 752, § 2, eff Jan 18, 1991; L 2019, ch 672, § 26, effective December 16, 2019.

Editor's Notes Laws 1990, ch 752, § 3, eff Jan 18, 1991, provides as follows:

§ 3. This act shall take effect 180 days after it shall have become a law, provided, that effective immediately, the addition, amendment, and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized and directed to be made and completed on or before such date.

Amendment Notes The 2019 amendment by ch 672 § 26, substituted "for people with developmental disabilities" for "of mental retardation and developmental disabilities."

RESEARCH REFERENCES AND PRACTICE AIDS

Texts: 2 Drafting New York Wills § 20.07.

§ 2994. Rights to be publicized

The commissioner of health shall prepare a statement summarizing the rights, duties and requirements of this article and shall require that a copy of such statement:

1. Be furnished to patients or their families at or prior to the time of admission to a hospital, and to each member of the hospital's staff; and

2. Be posted in a public place in each hospital.

The statement of rights required by this section may be included in any other statement of patients' rights required by other provisions of this chapter.

HISTORY:

Add, L 1990, ch 752, § 2, eff Jan 18, 1991.

Editor's Notes Laws 1990, ch 752, § 3, eff Jan 18, 1991, provides as follows:

§ 3. This act shall take effect 180 days after it shall have become a law, provided, that effective immediately, the addition, amendment, and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized and directed to be made and completed on or before such date.

RESEARCH REFERENCES AND PRACTICE AIDS

Texts: 2 Drafting New York Wills § 20.07.

ARTICLE 30 Emergency Medical Services

Section

3000-a. Emergency medical treatment
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3012. Enforcement

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HISTORY:
Add, L 1974, ch 1053, § 2, eff April 1, 1975.

§ 3000-a. Emergency medical treatment

1. Except as provided in subdivision six of section six thousand six hundred eleven, subdivision two of section six thousand five hundred twenty-seven, subdivision one of section six thousand nine hundred nine and sections six thousand five hundred forty-seven and six thousand seven hundred thirty-seven of the education law, any person who voluntarily and without expectation of monetary compensation renders first aid or emergency treatment at the scene of an accident or other emergency outside a hospital, doctor's office or any other place having proper and necessary medical equipment, to a person who is unconscious, ill, or injured, shall not be liable for damages for injuries alleged to have been sustained by such person or for damages for the death of such person alleged to have occurred by reason of an act or omission in the rendering of such emergency treatment unless it is established that such injuries were or such death was caused by gross negligence on the part of such person. Nothing in this section shall be deemed or construed to relieve a licensed physician, dentist, nurse, physical therapist or registered physician's assistant from liability for damages for injuries or death caused by an act or omission on the part of such person while rendering professional services in the normal and ordinary course of his or her practice.

2. (i) Any person or entity that purchases, operates, facilitates implementation or makes available resuscitation equipment that facilitates first aid, an automated external defibrillator or an epinephrine auto-injector device as required by or pursuant to law or local law, or that conducts training under section three thousand-c of this article, or (ii) an emergency health care provider under a collaborative agreement pursuant to section three thousand-b of this article with respect to an automated external defibrillator, or (iii) a health care practitioner that prescribes, dispenses or provides an epinephrine auto-injector device under section three thousand-c of this article, shall not be liable for damages arising either from the use of that equipment by a person who voluntarily and without expectation of monetary compensation renders first aid or emergency treatment at the scene of an accident or medical emergency, or from the use of defectively manufactured equipment; provided that this subdivision shall not limit the person's or entity's, the emergency health care provider's, or other health care practitioner's liability for his, her or its own negligence, gross negligence or intentional misconduct.

HISTORY:
Add, L 1984, ch 943, § 1; amd, L 1994, ch 69, § 1, eff Oct 19, 1994; L 1998, ch 552, § 2, eff Aug 5, 1998; L 1999, ch 578, § 1, eff Nov 1, 1999; L 1999, ch 583, § 2, eff Nov 1, 1999; L 2010, ch 243, § 1, eff July 30, 2010; L 2016, ch 373, § 2, effective March 28, 2017.

Editor's Notes Laws 2016, ch 373, § 3, eff March 28, 2017, provides:

§ 3. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided that, effective immediately, the commissioner of health shall make regulations and take other actions necessary to implement this act on such effective date.

Amendment Notes The 2016 amendment by ch 373, § 2, in 2, deleted "partnership, corporation, firm or society" following "entity" or variants, added "or that conducts training under section three thousand-c of this article," substituted "a health care practitioner that prescribes, dispenses or provides an epinephrine auto-injector device" for "the emergency health care provider with a collaborative agreement," deleted "with respect to use of an epinephrine auto-injector device" preceding "shall not be" and made a stylistic change.

Notes to Decisions

Analysis

1. In general
2. Health clubs

1. In general

CLS Pub Health § 3000-a was not applicable to situation where plaintiff's companion allegedly informed train crew that plaintiff had not been hit by train, that he was all right, and that companion and another would take plaintiff home, and companion neither provided first aid nor emergency care to plaintiff at scene. Salvia v Long Island R.R., 207 A.D.2d 534, 616 N.Y.S.2d 93, 1994 N.Y. App. Div. LEXIS 8603 (N.Y. App. Div. 2d Dep't 1994).

Doctor's motion for summary judgment in medical malpractice action is properly granted where doctor was called upon to come to aid of person and doctor merely took person's pulse and heart rate and called police in order to have ambulance come and take person to hospital, where person later died, and further, as doctor treated decedent in apparent emergency situation, and plaintiff does not allege gross negligence, doctor is protected from liability for damages for decedent's death pursuant to CLS Pub Health § 3000-a, Good Samaritan Law. Rodriguez v New York City Health & Hospitals Corp., 132 Misc. 2d 705, 505 N.Y.S.2d 345, 1986 N.Y. Misc. LEXIS 2763 (N.Y. Sup. Ct. 1986).

Although the court declined to stretch the good Samaritan provision in N.Y. Pub. Health Law § 3000-a to include the emergency medical responders who worked on a correction officer, because the responders did not depart from the appropriate standard of care in their treatment of the officer, summary judgment was appropriate. King v St. Barnabas Hosp., 242 N.Y.L.J. 11, 2009 N.Y. Misc. LEXIS 2531 (N.Y. Sup. Ct. July 7, 2009), rev'd, 87 A.D.3d 238, 927 N.Y.S.2d 34, 2011 N.Y. App. Div. LEXIS 5508 (N.Y. App. Div. 1st Dep't 2011).

2. Health clubs

N.Y. Gen. Bus. Law § 627-a does not create a duty running from a health club to its members to use an Automatic External Defibrillator (AED) required by that provision to be maintained onsite; the provisions of § 627-a, read together with N.Y. Public Health Law §§ 3000-a and 3000-b, to which they explicitly refer, and the words "volunteer," § 627-a(1), and "voluntarily," § 627-a(3), evince the Legislature's intent to protect health clubs and their employees from the risk of liability for ordinary negligence with respect to AEDs. Miglino v Bally Total Fitness of Greater N.Y., Inc., 20 N.Y.3d 342, 961 N.Y.S.2d 364, 985 N.E.2d 128, 2013 N.Y. LEXIS 111 (N.Y. 2013).

N.Y. Gen. Bus. Law § 627-a imposes an inherent duty on health clubs and gyms to make use of a statutorily required automated external defibrillator device. Miglino v Bally Total Fitness of Greater N.Y., Inc., 92 A.D.3d 148, 937 N.Y.S.2d 63, 2011 N.Y. App. Div. LEXIS 9478 (N.Y. App. Div. 2d Dep't 2011), aff'd, in part, 20 N.Y.3d 342, 961 N.Y.S.2d 364, 985 N.E.2d 128, 2013 N.Y. LEXIS 111 (N.Y. 2013).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Special provisions, CLS Educ § 6527.

Emergency services rendered by physician's assistant, CLS Educ § 6547.

Special provisions, CLS Educ § 6611.

Non-liability of licensed physical therapists for first aid or emergency treatment, CLS Educ § 6737.

Special provisions, CLS Educ § 6909.

Annotations:

Construction and application of "Good Samaritan" statutes. 68 ALR4th 294.

§ 3000-b. Automated external defibrillators: Public access providers

1. Definitions. As used in this section, unless the context clearly requires otherwise, the following terms shall have the following meanings:

(a) "Automated external defibrillator" means a medical device, approved by the United States food and drug administration, that: (i) is capable of recognizing the presence or absence, in a patient, of ventricular fibrillation and rapid ventricular tachycardia; (ii) is capable of determining, without intervention by an operator, whether defibrillation should be performed on the patient; (iii) upon determining that defibrillation should be performed, automatically charges and requests delivery of an electrical impulse to the patient's heart; and (iv) then, upon action by an operator, delivers an appropriate electrical impulse to the patient's heart to perform defibrillation.

(b) "Emergency health care provider" means (i) a physician with knowledge and experience in the delivery of emergency cardiac care; (ii) a physician assistant or nurse practitioner with knowledge and experience in the delivery of emergency cardiac care, and who is acting within his or her scope of practice; or (iii) a hospital licensed under article twenty-eight of this chapter that provides emergency cardiac care.

(c) "Public access defibrillation provider" means a person, firm, organization or other entity possessing or operating an automated external defibrillator pursuant to a collaborative agreement under this section.

(d) "Nationally-recognized organization" means a national organization approved by the department for the purpose of training people in use of an automated external defibrillator.

2. Collaborative agreement. A person, firm, organization or other entity may purchase, acquire, possess and operate an automated external defibrillator pursuant to a collaborative agreement with an emergency health care provider. The collaborative agreement shall include a written agreement and written practice protocols, and policies and procedures that shall assure compliance with this section. The public access defibrillation provider shall file a copy of the collaborative agreement with the department and with the appropriate regional council prior to operating the automated external defibrillator.

3. Possession and operation of automated external defibrillator. Possession and operation of an automated external defibrillator by a public access defibrillation provider shall comply with the following:

(a) No person may operate an automated external defibrillator unless the person has successfully completed a training course in the operation of an automated external defibrillator approved by a nationally-recognized organization or the state emergency medical services council. However, this section shall not prohibit operation of an automated external defibrillator, (i) by a health care practitioner licensed or certified under title VIII of the education law or a person certified under this article acting within his or her lawful scope of practice; (ii) by a person acting pursuant to a lawful prescription; or (iii) by a person who operates the automated external defibrillator other than as part of or incidental to his or her employment or regular duties, who is acting in good faith, with reasonable care, and without expectation of monetary compensation, to provide first aid that includes operation of an automated external defibrillator; nor shall this section limit any good samaritan protections provided in section three thousand-a of this article.

(b) The public access defibrillation provider shall cause the automated external defibrillator to be maintained and tested according to applicable standards of the manufacturer and any appropriate government agency.

(c) The public access defibrillation provider shall notify the regional council of the existence, location and type of any automated external defibrillator it possesses.

(d) Every use of an automated external defibrillator on a patient shall be immediately reported to the appropriate local emergency medical services system, emergency communications center or emergency vehicle dispatch center as appropriate and promptly reported to the emergency health care provider.

(e) The emergency health care provider shall participate in the regional quality improvement program pursuant to subdivision one of section three thousand four-a of this article.

(f) The public access defibrillation provider shall post a sign or notice at the main entrance to the facility or building in which the automated external defibrillator is stored, indicating the location where any such automated external defibrillator is stored or maintained in such building or facility on a regular basis.

4. Application of other laws. (a) Operation of an automated external defibrillator pursuant to this section shall be considered first aid or emergency treatment for the purpose of any statute relating to liability.

(b) Operation of an automated external defibrillator pursuant to this section shall not constitute the unlawful practice of a profession under title VIII of the education law.

HISTORY:

Add, L 1998, ch 552, § 1, eff Aug 5, 1998; amd, L 1999, ch 583,

§§ 1, 2, eff Nov 1, 1999; L 2007, ch 236, § 1, eff Nov 15, 2007; L 2010, ch 243, § 2, eff July 30, 2010; L 2017, ch 119, § 1, effective January 21, 2018.

Editor's Notes Laws 2017, ch 119, § 2, eff Jan 21, 2018, provides:

§ 2. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided that, effective immediately, the addition, amendment, and/or repeal of any rules and regulations necessary to implement the provisions of this act on its effective date are authorized and directed to be completed on or before such effective date.

Amendment Notes The 2017 amendment by ch 119, § 1, added "a physician assistant or nurse practitioner with knowledge and experience in the delivery of emergency cardiac care, and who is acting within his or her scope of practice; or (iii)" in 1(b); and made a related change.

§ 3000-c. Epinephrine auto-injector devices

1. Definitions. As used in this section:

(a) "Eligible person or entity" means: (i) an ambulance service or advanced life support first response service; a certified first responder, firefighter in a city, town or village having a population of less than one million, emergency medical technician, or advanced emergency medical technician, who is employed by or an enrolled member of any such service; (ii) a children's overnight camp as defined in subdivision one of section thirteen hundred ninety-two of this chapter, a summer day camp as defined in subdivision two of section thirteen hundred ninety-two of this chapter, a traveling summer day camp as defined in subdivision three of section thirteen hundred ninety-two of this chapter or a person employed by such a camp; (iii) a school district, board of cooperative educational services, county vocational education and extension board, charter school, and non-public elementary and secondary school in this state or any person employed by any such entity, or employed by a contractor of such an entity while performing services for the entity; (iv) a sports, entertainment, amusement, education, government, day care or retail facility; an educational institution, youth organization or sports league; an establishment that serves food; or a person employed by such entity; (v) a police officer or peace officer in a city, town or village having a population of less than one million; and (vi) any other person or entity designated or approved, or in a category designated or approved pursuant to regulations of the commissioner in consultation with other appropriate agencies.

(b) "Epinephrine auto-injector device" means a single-use device used for the automatic injection of a premeasured dose of epinephrine into the human body for the purpose of emergency treatment of a person appearing to experience anaphylactic symptoms approved by the food and drug administration.

(c) "Health care practitioner" means a health care practitioner licensed, certified, or authorized to practice under title eight of the education law who is authorized thereby to administer drugs, and who is acting within the scope of his or her practice.

2. Possession and use.

(a) Any eligible person or entity may purchase, acquire, possess and use epinephrine auto-injector devices for emergency treatment of a person appearing to experience anaphylactic symptoms, under this section.

(b) An eligible person or entity shall designate one or more individuals who have completed the training required by paragraph (c) of this subdivision to be responsible for the storage, maintenance, control, and general oversight of the epinephrine auto-injectors acquired by the eligible person or entity.

(c) No one may use an epinephrine auto-injector device on behalf of an eligible person or entity unless he or she has successfully completed a training course in the use of epinephrine auto-injector devices conducted by a nationally recognized organization experienced in training laypersons in emergency health treatment or by an entity or individual approved by the commissioner , or is directed in a specific instance to use an epinephrine auto-injector device by a health care practitioner. The training required by this paragraph shall include (i) how to recognize signs and symptoms of severe allergic reactions, including anaphylaxis; (ii) recommended dosage for adults and children; (iii) standards and procedures for the storage and administration of an epinephrine auto-injector; and (iv) emergency follow-up procedures.

(d) This section does not prohibit the use of an epinephrine auto-injector device (i) by a health care practitioner or (ii) by a person acting pursuant to a lawful patient-specific prescription.

(e) Every eligible person and entity authorized to possess and use epinephrine auto-injector devices pursuant to this section shall use, maintain and dispose of such devices pursuant to regulations of the department.

(f) Nothing in this section shall require any eligible person or entity to acquire, possess, store, make available, or administer an epinephrine auto-injector.

3. Prescriptions.

(a) A health care practitioner who is authorized to prescribe drugs may prescribe, dispense or provide an epinephrine auto-injector device to or for an eligible person or entity by a non-patient-specific prescription.

(b) A pharmacist may dispense an epinephrine auto-injector pursuant to a non-patient-specific prescription under this subdivision.

(c) This subdivision does not limit any other authority a health care practitioner or pharmacist has to prescribe, dispense, provide or administer an epinephrine auto-injector device.

4. Application of other laws.

(a) Use of an epinephrine auto-injector device pursuant to this section shall be considered first aid or emergency treatment for the purpose of any statute relating to liability.

(b) Purchase, acquisition, possession or use of an epinephrine auto-injector device pursuant to this

section shall not constitute the unlawful practice of a profession or other violation under title eight of the education law or article thirty-three of this chapter.

(c) Any person otherwise authorized to sell or provide an epinephrine auto-injector device may sell or provide it to a person or entity authorized to possess it pursuant to this section.

HISTORY:

Add, L 1999, ch 578, § 2, eff Nov 1, 1999; amd, L 2001, ch 350, § 6, eff Sept 19, 2001; L 2014, ch 424, § 1, effective February 27, 2015; L 2016, ch 373, § 1, effective March 28, 2017; L 2017, ch 200, § 1, effective December 19, 2017; L 2019, ch 633, § 2, effective January 11, 2020.

Editor's Notes Laws 2014, ch 424, § 3, eff Feb 27, 2015, provides:

§ 3. This act shall take effect on the one hundred twentieth day after it shall have become a law. Effective immediately, the commissioner of health, in consultation with the commissioner of education, may promulgate any rule or regulation necessary for the timely implementation of this act on its effective date.

Laws 2016, ch 373, § 3, eff March 28, 2017, provides:

§ 3. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided that, effective immediately, the commissioner of health shall make regulations and take other actions necessary to implement this act on such effective date.

Laws 2017, ch 200, § 3, eff Dec 19, 2017, provides:

§ 3. This act shall take effect on the one hundred twentieth day after it shall have become a law. Effective immediately, the commissioner of health, in consultation with the commissioner of education, may promulgate any rule or regulation necessary for the timely implementation of this act.

Laws 2019, ch 633, § 1, eff December 12, 2019, provides:

Section 1. This act shall be known and may be cited as "Gio's Law".

Laws 2019, ch 633, § 3, eff December 12, 2019, provides:

§ 3. This act shall take effect on the thirtieth day after it shall have become a law. Effective immediately the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized to be made on or before such date.

Amendment Notes

The 2014 amendment by ch 424, § 1 added 1(a)(iii); and redesignated former 1(a)(iii) as (1)(a)(iv).

The 2016 amendment by ch 373, § 1, rewrote the section.

The 2017 amendment by ch 200, § 1 added "or employed by a contractor of such an entity while performing services for the entity" in 1(a).

The 2019 amendment by ch 633, § 2, added "firefighter in a city, town or village having a population of less than one million" in 1(a)(i); added 1(a)(v); redesignated former 1(a)(v) as 1(a)(vi); and made stylistic and related changes.

§ 3000-d. Availability of resuscitation equipment in certain public places

1. For the purposes of this section, the following terms shall be defined as follows:

a. "Bar" means any establishment which is devoted to the sale and service of alcoholic beverages for on-premises consumption and in which the service of food, if served at all, is incidental to the consumption of such beverages.

b. "Health club" means any commercial establishment offering instruction, training or assistance and/or the facilities for the preservation, maintenance, encouragement or development of physical fitness or well-being. "Health club" as defined herein shall include, but not be limited to health spas, health studios, gymnasiums, weight control studios, martial arts and self-defense schools or any other commercial establishment offering a similar course of physical training.

c. "Owner or operator" means the owner, manager, operator or other person having control of an establishment.

d. "Public place" means a restaurant, bar, theater or health club.

e. "Restaurant" means any commercial eating establishment which is devoted, wholly or in part, to the sale of food for on-premises consumption.

f. "Resuscitation equipment" means: (i) an adult exhaled air resuscitation mask, for which the federal food and drug administration has granted permission to market, accompanied by a pair of disposable gloves, and (ii) a pediatric exhaled air resuscitation mask, for which the federal food and drug administration has granted permission to market, accompanied by a pair of disposable gloves.

g. "Theater" means a motion picture theater, concert hall, auditorium or other building used for, or designed for the primary purpose of, exhibiting movies, stage dramas, musical recitals, dance or other similar performances.

2. The owner or operator of a public place shall have available in such public place resuscitation equipment in quantities deemed adequate by the department. Such equipment shall be readily accessible for use during medical emergencies. Any information deemed necessary by the commissioner shall accompany the resuscitation equipment. Resuscitation equipment shall be discarded after a single use.

3. The owner or operator of a public place shall provide notice to patrons, by means of signs, printed material or other means of written communication, indicating the availability of resuscitation equipment for emergency use and providing information on how to obtain cardiopulmonary resuscitation training. The type, size, style, location and language of such notice shall be determined in accordance with rules, promulgated by the commissioner. In promulgating such rules, the commissioner shall take into consideration the concerns of the public places within the scope of this section. If the department shall make signs available pursuant to this subdivision, it may charge a fee to cover printing, postage and handling expenses.

4. Any owner or operator of a public place, his or her employee or other agent, or any other person who voluntarily and without expectation of monetary compensation renders emergency treatment using the resuscitation equipment required pursuant to this section, to a person who is unconscious, ill or injured, shall only be liable pursuant to section three thousand-a of this article.

5. Nothing contained in this section shall impose any duty or obligation on any owner or operator of a public place, his or her employee or other agent, or any other person to provide resuscitation assistance to the victim of a medical emergency.

6. Nothing in this section shall be construed to restrict the power of any county, city, town, or village to adopt and enforce additional local laws, ordinances, or regulations which comply with at least the minimum applicable standards set forth in this article.

HISTORY:

Add, L 2001, ch 349, § 2, eff March 18, 2002.

Editor's notes Laws 2001, ch 349, §§ 1 and 3, eff March 18, 2002, provide as follows:

Section 1. Declaration of legislative findings and intent. The legislature recognizes the need to support and develop policies which promote the good health of all the people in New York state. The legislature also finds that an essential element of such policies must be encouragement of public intervention and aid during medical emergencies.

Unfortunately, emergency medical professionals have discovered in responding to medical emergencies that many individuals, who are otherwise qualified to provide life saving assistance, such as mouth-to-mouth resuscitation, are afraid to do so because of the perceived health risks of such activities. Such hesitation can cost the lives of individuals who require prompt medical attention to insure recovery.

Therefore, the legislature, in order to encourage qualified persons to provide life saving assistance while reducing the risk of potential exposure to disease, deems it necessary to the health, safety and well-being of the public to require the availability of exhaled air resuscitation masks and disposable gloves in certain public places.

§ 3. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided, however that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized and directed to be made and completed on or before such effective date.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

Department of health: resuscitation equipment in public places. 10 NYCRR Part 801.

§ 3001. Definitions

As used in this article, unless the context otherwise requires:

1. "Emergency medical service" means initial emergency medical assistance including, but not limited to, the treatment of trauma, burns, respiratory, circulatory and obstetrical emergencies.

2. "Ambulance service" means an individual, partnership, association, corporation, municipality or any legal or public entity or subdivision thereof engaged in providing emergency medical care and the transportation of sick or injured persons by motor vehicle, aircraft or other forms of transportation to, from, or between general hospitals or other health care facilities.

3. "Voluntary ambulance service" means an ambulance service (i) operating not for pecuniary profit or financial gain, and (ii) no part of the assets or income of which is distributable to, or enures to the benefit of, its members, directors or officers except to the extent permitted under this article.

4. "Voluntary advanced life support first response service" means advanced life support first response service (i) operating not for pecuniary profit or financial gain, and (ii) no part of the assets or income of which is distributable to, or enures to the benefit of, its members, directors or officers except to the extent permitted under this article.

5. "Certified first responder" means an individual who meets the minimum requirements established by regulations pursuant to section three thousand two of this article and who is responsible for administration of initial life saving care of sick and injured persons.

6. "Emergency medical technician" means an individual who meets the minimum requirements established by regulations pursuant to section three thousand two of this article and who is responsible for administration or supervision of initial emergency medical care and transportation of sick or injured persons.

7. "Advanced emergency medical technician" means an emergency medical technician who has satisfactorily completed an advanced course of training approved by the state council under regulations pursuant to section three thousand two of this article.

8. "State council" means the New York state emergency medical services council established pursuant to this article.

9. "Regional council" means a regional emergency medical services council established pursuant to this article.

10. "Enrolled member" means any member of a voluntary ambulance service or voluntary advanced life support first response service who provides emergency medical care or transportation of sick or injured persons without expectation of monetary compensation.

11. "Advanced life support care" means definitive acute medical care provided, under medical control, by advanced emergency medical technicians within an advanced life support system.

12. "Advanced life support system" means an organized acute medical care system to provide advanced life support care on site or en route to, from, or between general hospitals or other health care facilities.

13. "Advanced life support mobile unit" means an ambulance or advanced life support first response vehicle approved to provide advanced life support services pursuant to this article.

14. "Qualified medical and health personnel" means physicians, registered professional nurses and advanced emergency medical technicians competent in the management of patients requiring advanced life support care.

15. "Medical control" means: (a) advice and direction provided by a physician or under the direction of a physician to certified first responders, emergency medical technicians or advanced emergency medical technicians who are providing medical care at the scene of an emergency or en route to a health care facility; and (b) indirect medical control including the written policies, procedures, and protocols for prehospital emergency medical care and transporta-

tion developed by the state emergency medical advisory committee, approved by the state emergency medical services council and the commissioner, and implemented by regional medical advisory committees.

16. "Regional medical advisory committee" means a group of five or more physicians, and one or more non-voting individuals representative of each of the following: hospitals, basic life support providers, advanced life support providers and emergency medical services training sponsor medical directors approved by the affected regional emergency medical services councils.

17. "Advanced life support first response service" means an organization which provides advanced life support care, but does not transport patients.

18. "EMS program agency" means a not-for-profit corporation or municipality designated by the state council and approved by the affected regional council or councils to facilitate the development and operation of an emergency medical services system within a region as directed by the regional council under this article.

19. "Operator" means any person who by reason of a direct or indirect ownership interest (whether of record or beneficial) has the ability, acting either alone or in concert with others with ownership interests, to direct or cause the direction of the management or policies of an ambulance service or advanced life support first response service.

20. "Mutual aid agreement" means a written agreement, entered into by two or more ambulance services or advanced life support first response services possessing valid ambulance service or advanced life support first response service certificates or statements of registration, for the organized, coordinated, and cooperative reciprocal mobilization of personnel, equipment, services, or facilities for back-up or support upon request as required pursuant to a written mutual aid plan. An ambulance service and advanced life support first response service may participate in one or more mutual aid agreements.

21. "Primary territory" means the geographic area or subdivisions listed on an ambulance service certificate or statement of registration within which the ambulance service may receive patients for transport.

HISTORY:

Add, L 1974, ch 1053, § 2; amd, L 1977, ch 338, § 1; L 1977, ch 742, § 1; L 1979, ch 439, § 1; L 1981, ch 252 § 2, eff June 15, 1981; L 1992, ch 804, § 2, eff July 1, 1993; L 1993, ch 445, § 1, eff July 26, 1993, deemed eff July 1, 1993.

Prior Law: Former § 3001, add, L 1966, ch 949, § 1; repealed, L 1974, ch 1053, § 1, eff April 1, 1975.

Agency Opinions

1. In general

Article 30 of the Public Health Law applies to an emergency rescue squad whose members are volunteer firemen that transport sick, disabled or injured persons to or from facilities providing hospital services. A fire department rescue squad providing volunteer ambulance service is required to obtain an ambulance service statement of registration pursuant to section 3004 of the Public Health Law. A fire department rescue squad is not required to obtain an ambulance service certificate pursuant to section 3006 of the Public Health Law. Volunteer firemen who render emergency medical assistance are protected by section 205-b of the General Municipal Law, which relieves volunteer firemen engaged in the performance of duty from civil liability except for willful negligence or malfeasance. 1975 NY Ops Atty Gen May 13 (Informal), 1975 N.Y. AG LEXIS 120.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 3013; CLS Exec § 172-a; CLS Men Hyg §§ 9.27, 9.45, 9.55, 9.59; CLS Tax § 289-c; CLS Veh & Tr § 115-c.

Codes, Rules and Regulations:

Definitions. 10 NYCRR §§ 800.3.

Matthew Bender's New York Practice Guides: 1 New York Practice Guide: Business and Commercial § 3.23.

§ 3002. New York state emergency medical services council

1. There is hereby created in the department of health the New York state emergency medical services council. The state council shall consist of thirty-two members. Fourteen members to the state council shall be appointed by the commissioner and shall be representative of each geographic area of the state. At least one member shall be representative of the interests of the general public. Other members shall be knowledgeable in various aspects of emergency medical services and shall include, but not be limited to, representatives of voluntary ambulance services, advanced life support first response services, ambulance services operating for profit, municipal ambulance services, hospitals, a statewide organization representing volunteer fire services, municipal tax districts providing ambulance services, physicians, and nurses. The commissioner shall also appoint a representative from each regional council, from nominations received from the appropriate regional council. The members of the state council shall elect a chairperson from among the members of the state council by a majority vote of those present, who shall serve for a term of one year and until a successor is elected.

2. The state council shall have the power, by an affirmative vote of a majority of those present, subject to approval by the commissioner, to enact, and from time to time, amend and repeal, rules and regulations establishing minimum standards for ambulance services, ambulance service certification, advanced life support first response services, the provision of prehospital emergency medical care, public education, the development of a statewide emergency medical services system, the provision of ambulance services outside the primary territory specified in the ambulance services' certificate and the training, examination, and certification of certified first responders, emergency medical technicians, and advanced emergency medical technicians; provided, however, that such minimum standards must be consistent with the staffing standards established by section three thousand five-a of this article. Such training shall be made available by

video or computer to the maximum extent possible. Until January first, nineteen hundred ninety-seven, no minimum standards shall be established for services provided by a voluntary ambulance service operating solely pursuant to a statement of registration issued under section three thousand four. The curriculum for certified first responder training shall not exceed fifty-one hours including prerequisites. The state council shall have the same powers granted to regional councils by this article in any region of the state in which a regional council has not been established.

2-a. In furtherance of the powers set forth in subdivision two of this section, the state council shall provide to the trustees of the state university of New York such information and recommendations as may be requested by such trustees to assist such trustees' study of the feasibility of community colleges' and state university of New York agricultural and technical colleges' offering credit and noncredit courses which would satisfy the educational requirements for certification and recertification of emergency medical technicians and advanced emergency medical technicians.

2-b. [Expires and repealed July 1, 2021] The commissioner, in consultation with the state emergency medical services council, shall develop a program to allow certified first responders, emergency medical technicians and advanced emergency medical technicians who have been in continuous practice, who have demonstrated competence in applicable behavioral and performance objectives, and who have demonstrated completion of appropriate continuing education, to renew their certification under subdivision two of this section without requiring the completion of a written examination. In implementing this program, the commissioner shall contract with and use the standards established by a nationally recognized organization that certifies certified first responders, emergency medical technicians and advanced emergency medical technicians. Renewals of certification under the program shall be deemed equivalent to renewals under subdivision two of this section for purposes of this article.

3. Upon appeal from the appropriate regional council, the state council shall have the power, by an affirmative vote of a majority of those present, to amend, modify and reverse determinations of the regional councils made pursuant to subdivision five of section three thousand three and section three thousand eight of this article. All determinations of the state council respecting applications for ambulance service certificates or statements of registration or respecting the revocation, suspension (except temporary suspension), limitation or annulment of an ambulance service certificate shall be subject to review as provided in article seventy-eight of the civil practice law and rules. Application for such review must be made within sixty days after service in person or by registered or certified mail of a copy of the determination upon the applicant or holder of the certificate.

3-a. Upon appeal from the applicant, the department, or any concerned party, the state council shall have the power, by an affirmative vote of a majority of those present, to amend, modify and reverse determinations of the regional councils made pursuant to subdivision five-a of section three thousand three of this article. All determinations of the state council with respect to exemptions shall be subject to review as provided in article seventy-eight of the civil practice law and rules. Application for such review must be made within sixty days after service in person or by registered or certified mail.

4. The term of office of each member shall be two years. Vacancies shall be filled by appointment for the remainder of an unexpired term. The members shall continue in office until the expiration of their terms and until their successors are appointed and have qualified. No member shall be appointed to the state council for more than four consecutive terms.

5. The state council shall meet as frequently as its business may require. The presence of a majority of the members shall constitute a quorum. The members of the state council shall receive no compensation for their services as members, but each shall be allowed the necessary and actual expenses incurred in the performance of his or her duties under this section.

6. The commissioner, upon request of the state council, shall designate an officer or employee of the department to act as secretary of the state council, and shall assign from time to time such other employees as the state council may require.

7. No civil action shall be brought in any court against any member, officer or employee of the state council for any act done, failure to act, or statement or opinion made, while discharging his or her duties as a member, officer or employee of the state council, without leave from a justice of the supreme court, first had and obtained. In no event shall such member, officer or employee be liable for damages in any such action if he or she shall have acted in good faith, with reasonable care and upon probable cause.

8. The state council shall, after consultation with the department and the regional councils, forward to the commissioner not later than December first an estimate of the amounts needed to provide adequate funding for emergency medical services training including advanced life support at the local level, regional medical emergency services councils, emergency medical services program agencies, the state emergency medical services council or other emergency medical services training programs to carry out the purposes of this article and article thirty-A of this chapter. Such estimate shall be transmitted without change by the commissioner to the governor, the division of the budget, the temporary president of the senate, the speaker of the assembly, and the fiscal and health committees of each house of the legislature.

HISTORY:

Add, L 1974, ch 1053, § 2; amd, L 1974, ch 1054, § 1; L 1977,

ch 338, § 2; L 1977, ch 742, § 2; L 1981, ch 252, § 3; L 1988, ch 9, § 2; L 1988, ch 176, § 1, eff Sept 1, 1988; L 1992, ch 804, § 3, eff July 1, 1993; L 1996, ch 459, § 1, eff Aug 8, 1996; L 2004, ch 282, § 1, eff Aug 3, 2004; L 2007, ch 580, § 3, eff Aug 15, 2007; L 2019, ch 87, § 1, effective July 3, 2019.

Prior Law: Former § 3002, add, L 1966, ch 949, § 1; amd, L 1969, ch 407, § 94; repealed, L 1974, ch 1053, § 1, eff April 1, 1975.

Editor's Notes Laws 1996, ch 459, § 2, eff Aug 8, 1996, provides as follows:

§ 2. This act shall take effect immediately and shall expire and be deemed repealed July 1, 2021 (Amd, L 2001, ch 190, § 1, eff Aug 17, 2001; L 2006, ch 119, § 1, eff July 5, 2006; L 2011, ch 106, § 1, eff June 30, 2011; L 2015, ch 57, § 26 (Part D), eff April 13, 2015; L 2019, ch 87, § 2, eff July 3, 2019).

Laws 2019, ch 87, § 4, eff July 30, 2019, provides:

§ 3. This act shall take effect immediately; provided, however, that the amendments to subdivision 2-b of section 3002 of the public health law made by section one of this act shall not affect the repeal of such subdivision, and shall be deemed repealed therewith.

Amendment Notes The 2019 amendment by ch 87, § 1, in 2-b, substituted "develop a program to allow certified first responders" for "develop a pilot program in at least six regions of the state (including the western New York and capital regions) to allow" in the first sentence, added "certified first responders" in the second sentence, deleted the former third sentence: which said: "However, no pilot program shall include employees of a municipal ambulance service in cities with a population over one million," deleted "demonstration" preceding "program" in the last sentence, and deleted the former last sentence, which said: "Within one year of developing the demonstration program and annually thereafter, the commissioner shall report to the legislature on the impact of the program on the quality of patient care, the effectiveness of the program in retaining certified emergency medical technicians and advanced emergency medical technicians, and the feasibility of replacing the state's certification program with a national certification program"; and made a stylistic change.

Notes to Decisions

1. In general

County properly dismissed emergency services dispatchers who failed to acquire recertification as emergency medical technicians, despite their claim that, as former medical emergency dispatchers and radio operators, they were "covered in" to position of emergency services dispatcher when former positions were combined and reclassified as competitive position, where dispatchers were not required to pass examination to be appointed to reclassified title, they in fact met all requirements for that title at time of reclassification, including holding of certification, and thus rationale for "covering in" (which offers protection to employee in noncompetitive job whose position is reclassified and made competitive) did not apply. Naliboff v Davis, 133 A.D.2d 632, 519 N.Y.S.2d 740, 1987 N.Y. App. Div. LEXIS 51672 (N.Y. App. Div. 2d Dep't 1987), app. denied, 71 N.Y.2d 805, 529 N.Y.S.2d 76, 524 N.E.2d 430, 1988 N.Y. LEXIS 623 (N.Y. 1988).

City did not have capacity to bring declaratory judgment action to challenge the Department of Health's interpretation of N.Y. Pub. Health Law § 3008(7) and seek a declaration that it did not need to submit to a determination of public need from a regional emergency medical services council (REMSCO) pursuant to N.Y. Pub. Health Law §§ 3003(5), 3005(6), 3008(1) prior to the renewal of its certification for ambulance services because the city could only appeal from a final determination as to public need for ambulance services administratively and then challenge by commencing a N.Y. C.P.L.R. art. 78 proceeding under N.Y. Pub. Health Law § 3002(3). City of Utica v Daines, 53 A.D.3d 922, 862 N.Y.S.2d 173, 2008 N.Y. App. Div. LEXIS 6164 (N.Y. App. Div. 3d Dep't 2008).

Agency Opinions

1. In general

There is no statutory prohibition on individual becoming member of fire company and member of volunteer ambulance corps at same time. 1997 Op St Compt No. 97-23, 1997 N.Y. Comp. LEXIS 23.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 3001, 3011, 3016; CLS Work Comp § 10.

Proceeding against body or officer, CLS CPLR §§ 7801 et seq.

§ 3002-a. State emergency medical advisory committee

1. There shall be a state emergency medical advisory committee of the state emergency medical services council consisting of thirty-one members. Twenty-three members shall be physicians appointed by the commissioner, including one nominated by each regional emergency medical services council, an additional physician from the city of New York, one pediatrician, one trauma surgeon, one psychiatrist and the chairperson. Each of the physicians shall have demonstrated knowledge and experience in emergency medical services. There shall be eight non-physician non-voting members appointed by the chairperson of the state council, at least five of whom shall be members of the state emergency medical services council at the time of their appointment. At least one of the eight shall be an emergency nurse, at least one shall be an advanced emergency medical technician, at least one shall be a basic emergency medical technician, and at least one shall be employed in a hospital setting with administrative responsibility for a hospital emergency department or service.

2. The committee shall develop and recommend to the state council statewide minimum standards for: (a) medical control; (b) treatment, transportation and triage protocols, including protocols for invasive procedures and infection control; and (c) the use of regulated medical devices and drugs by emergency medical services personnel certified pursuant to this article. The state emergency medical advisory committee, with the consent of the commissioner, may issue advisory guidelines in any of these areas, which shall not have the force and effect of law unless adopted as rules and regulations by the state emergency medical services council. The state emergency medical advisory committee shall advise the state emergency medical services council prior to the issuance of any guidelines. The committee shall also review protocols developed by regional emergency medical advisory committees for consistency with statewide standards.

2-a. Any decision of the state emergency medical advisory committee regarding medical control, protocols for treatment, triage, or transportation, or the use of regulated medical devices may be appealed to the commissioner by any required regional emergency medical services council, regional emergency medical advisory committee, ambulance service or advanced life support service, or certified first responder, emergency medical technician, or advanced emergency medical technician adversely affected.

3. Each member shall have a term of two years, except that five of those first appointed shall have a term of three years. Members may succeed themselves.

4. The committee shall meet as frequently as its business may require. The presence of a majority of the members shall constitute a quorum. The members of the committee shall receive no compensation for their services as members, but each shall be allowed the necessary and actual expenses incurred in the performance of his or her duties under this section.

5. No civil action shall be brought in any court against any member, officer or employee of the committee for any act done, failure to act, or statement or opinion made, while discharging his or her duties as a member, officer, or employee of the committee, without leave from a justice of the supreme court, first had and obtained. In no event shall such member, officer, or employee be liable for damages in any such action if he or she shall have acted in good faith, with reasonable care and upon probable cause.

HISTORY:

Add, L 1992, ch 804, § 4, eff July 1, 1993; amd, L 1993, ch 445, § 2, eff July 26, 1993, deemed eff July 1, 1993; L 2011, ch 567, § 1, eff Jan 21, 2012.

Editor's Notes Laws 2011, ch 567, § 2, eff Jan 21, 2012, provides as follows:

§ 2. This act shall take effect on the one hundred twentieth day after it shall have become a law; provided, however, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized and directed to be made and completed on or before such effective date.

§ 3003. Regional emergency medical services councils

1. The commissioner, with the approval of the state council, shall designate regional emergency medical services councils on or before January first, nineteen hundred seventy-eight but in no event shall the number of regional councils exceed eighteen. Such regional councils shall be established on the basis of application for designation as regional councils submitted by local organizations, the members of which are knowledgeable in various aspects of emergency medical services. Such application shall describe the geographic area to be served and contain a list of nominees for appointment to membership on such regional councils and a statement as to the proposed method of operation in such detail as the commissioner, with the approval of the state council, shall prescribe.

2. Each regional council shall be comprised of at least fifteen but not more than thirty members to be initially appointed by the commissioner, with the approval of the state council, from nominations submitted by local organizations applying for establishment as the regional council. Not less than one-third of the membership of the regional councils shall be representatives of ambulance services and the remaining membership of the regional councils shall consist of, but not be limited to, representatives of existing local emergency medical care committees, physicians, nurses, hospitals, health planning agencies, fire department emergency and rescue squads, public health officers and the general public. The county EMS coordinator, established pursuant to section two hundred twenty-three-b of the county law, of any county within the region shall serve as an ex officio member of the regional council; provided, however, nothing in this subdivision shall prevent a county EMS coordinator from serving as a voting member of a regional council. Members of each regional council shall be residents living within the geographic area to be served by the regional council. The presence of a majority of members shall constitute a quorum.

3. Each regional council shall have the power to:

(a) have a seal and alter the same at pleasure;

(b) acquire, lease, hold, and dispose of real and personal property or any interest therein for its purposes;

(c) make and alter by-laws for its organization and internal management, and rules and regulations governing the exercise of its powers and the fulfillment of its purposes under this article; such rules and regulations must be filed with the secretary of state and the state EMS council;

(d) enter into contracts for employment of such officers and employees as it may require for the performance of its duties; and to fix and determine their qualifications, duties, and compensation, and to retain and employ such personnel as may be required for its purposes; and private consultants on a contract basis or otherwise, for the rendering of professional or technical services and advice;

(e) enter into contracts, leases, and subleases and to execute all instruments necessary or convenient for the conduct of its business, including contracts with the commissioner and any state agency or municipal entity; and contracts with hospitals and physicians for the purposes of carrying out its powers under this article;

(f) undertake or cause to be undertaken plans, surveys, analyses and studies necessary, convenient or desirable for the effectuation of its purposes and powers, and to prepare recommendations and reports in regard thereto;

(g) fix and collect reasonable fees, rents, and other charges for the use of its equipment and the provision of its services;

(h) contract for and to accept any gifts or grants, subsidies, or loans of funds or property, or financial or other aid in any form from the federal or state government or any agency or instrumentality thereof; or from any other source, public or private, and to comply, subject to the provisions of this article, with the terms and conditions thereof; provided, however, that the councils may contract for payment of debt evidenced by bonds or notes or other evidence of indebtedness, either directly or through a lease purchase agreement;

(i) recommend to the department approval of training course sponsors within its region, and to develop, promulgate and implement annually an EMS training plan which addresses the needs of its region;

(j) enter into contracts or memoranda of agreement with other regional councils to provide services in a joint or cooperative manner; and to enter into contracts or memoranda of agreement with an EMS program agency to carry out one or more of its responsibilities under this article;

(k) procure insurance against any loss or liability in connection with the use, management, maintenance, and operation of its equipment and facilities, in such amounts and from such insurers as it reasonably deems necessary;

(*l*) approve regional medical advisory committee nominees;

(m) provide focused technical assistance and support to those voluntary ambulance services operating under exemptions, to assist such services in progressing toward the uniform standards established pursuant to this section. Such assistance and support shall include, but not be limited to, volunteer recruitment and management training; and

(n) do all things necessary, convenient and desirable to carry out its purposes and for the exercise of the powers granted in this article.

4. Each regional council shall have the responsibility to coordinate emergency medical services programs within its region, including but not limited to, the establishment of emergency medical technician courses and the issuance of uniform emergency medical technician insignia and certificates. Such training courses shall be made available by video or computer to the maximum extent possible.

5. The regional council shall have the responsibility to make determinations of public need for the establishment of additional emergency medical services and ambulance services and to make the determinations of public need as provided in section three thousand eight. The regional council shall make such determination by an affirmative vote of a majority of all of those members consisting of voting members.

5-a. The regional emergency medical services council is authorized to grant an exemption from the staffing standards set forth in section three thousand five-a of this article to a voluntary ambulance service operating solely with enrolled members or paid emergency medical technicians which has demonstrated a good faith effort to meet the standards and is unable to meet such standards because of factors deemed appropriate by the regional council. An exemption shall be for a period not to exceed two years and shall be conditioned on the participation by the voluntary service in a program to achieve compliance which shall include technical assistance and support from the regional council tailored to the needs and resources at the local level, as provided by paragraph (m) of subdivision three of this section, to be funded by the New York state emergency medical services training account established pursuant to section ninety-seven-q of the state finance law, such account as funded by a chapter of the laws of nineteen hundred ninety-three. Nothing shall prevent the regional council from issuing subsequent exemptions. Such exemptions shall have no effect whatsoever on the insurability of the organization receiving such exemption and such exemption shall not be used as a basis for increasing insurance rates or premiums related thereto, notwithstanding any other provision of law, rule, regulation, or commissioner's ruling or advisory to the contrary. Prior to issuing an exemption, the regional council shall provide written notice by certified mail to the chief executive officers of all general hospitals and municipalities in the county or counties within which the service requesting an exemption operates. Such notice shall provide opportunity for comment on the issuance of the exemption. Notice of the determination of the regional council shall be provided within ten days of the determination to the applicant, the department, and any party receiving notification of the application who requests notice of the determination. The applicant, the department, or any concerned party may appeal the determination of the regional council to the state council within thirty days after the regional council makes its determination.

6. The term of office of members of the regional council shall be four years, except that of those members first appointed, at least one-half but not more than two-thirds shall be for terms not to exceed two years.

7. Each regional council shall meet as frequently as its business may require.

8. The commissioner, upon request of the regional council, may designate an officer or employee of the department to act as secretary of the regional council, and may assign from time to time such other employees as the regional council may require.

9. No civil action shall be brought in any court against any member, officer or employee of any designated regional council for any act done, failure to act, or statement or opinion made, while discharging his duties as a member, officer or employee of the regional council, without leave from a justice of the supreme court, first had and obtained. In any event such member, officer or employee shall not be liable for damages in any such action if he shall have acted in good faith, with reasonable care and upon probable cause.

10. (a) The department shall provide each regional council with the funds necessary to enable such regional council to carry out its responsibilities as mandated under this section within amounts appropriated therefor.

(b) Such funds shall be provided upon approval by the department of an application submitted by a regional council. The application shall contain such information and be in such form as the commis-

sioner shall require pursuant to rules and regulations which he shall promulgate after consultation with the state council in order to effect the purposes and provisions of this subdivision.

HISTORY:

Add, L 1974, ch 1053, § 2, eff April 1, 1975; amd, L 1974, ch 1054, § 2, eff April 1, 1975; L 1981, ch 252, § 4; L 1981, ch 1016, § 1, eff Nov 6, 1981; L 1992, ch 804, §§ 5-8, eff July 1, 1993; L 1993, ch 445, § 3, eff July 26, 1993, deemed eff July 1, 1993; L 2007, ch 580, § 4, eff Aug 15, 2007.

Prior Law: Former § 3003, add, L 1966, ch 949, § 1; repealed, L 1974, ch 1053, § 1, eff April 1, 1975.

Editor's Notes Laws 1974, ch 1054, amended Laws 1974, ch 1053, so as to change the effective date of this section from September 1, 1974 to April 1, 1975.

Notes to Decisions

1. In general

City did not have capacity to bring declaratory judgment action to challenge the Department of Health's interpretation of N.Y. Pub. Health Law § 3008(7) and seek a declaration that it did not need to submit to a determination of public need from a regional emergency medical services council (REMSCO) pursuant to N.Y. Pub. Health Law §§ 3003(5), 3005(6), 3008(1) prior to the renewal of its certification for ambulance services because the city could only appeal from a final determination as to public need for ambulance services administratively and then challenge by commencing a N.Y. C.P.L.R. art. 78 proceeding under N.Y. Pub. Health Law § 3002(3). City of Utica v Daines, 53 A.D.3d 922, 862 N.Y.S.2d 173, 2008 N.Y. App. Div. LEXIS 6164 (N.Y. App. Div. 3d Dep't 2008).

Although a regional council did not adhere to the Department of Health's policy to provide prompt written notification regarding a decision on a volunteer ambulance service's application under N.Y. Pub. Health Law §§ 3003(5) and 3008(1), such writing was not required by § 3008(4) and (5); further, a timely appeal was measured from the time of the actual decision. Matter of Richmondville Volunteer Emergency Squad, Inc. v New York State Dept. of Health, 107 A.D.3d 1098, 966 N.Y.S.2d 592, 2013 N.Y. App. Div. LEXIS 3989 (N.Y. App. Div. 3d Dep't), app. denied, 22 N.Y.3d 854, 977 N.Y.S.2d 183, 999 N.E.2d 548, 2013 N.Y. LEXIS 2945 (N.Y. 2013).

As a volunteer ambulance service's administrative appeal to a state council of the Department of Health from a decision of the regional council, denying its application under N.Y. Pub. Health Law §§ 3003(5) and 3008(1), was not filed within 30 days of the actual decision, the determination of untimeliness was not arbitrary and capricious; the service's petition for review under N.Y. C.P.L.R. art. 78 was properly dismissed. Matter of Richmondville Volunteer Emergency Squad, Inc. v New York State Dept. of Health, 107 A.D.3d 1098, 966 N.Y.S.2d 592, 2013 N.Y. App. Div. LEXIS 3989 (N.Y. App. Div. 3d Dep't), app. denied, 22 N.Y.3d 854, 977 N.Y.S.2d 183, 999 N.E.2d 548, 2013 N.Y. LEXIS 2945 (N.Y. 2013).

Agency Opinions

1. In general

Members of Regional Emergency Medical Services Councils and Regional Emergency Medical Advisory Committees are eligible to receive defense and indemnification under CLS Pub O § 17. 1996 N.Y. Op. Att'y Gen. No. 96-F9, 1996 N.Y. AG LEXIS 33.

If bill is for ambulance services, transportation company that has entered into subcontracting agreement with another transportation company to provide services to no-fault claimants may, if it has obtained valid assignment of benefits from no-fault claimants and if sub-contractor is properly registered or certified to provide such services (or is exempted from such requirements), bill no-fault insurer for such service that has been performed by sub-contractor for no-fault claimants, but not if bill is for other reasonable and necessary expenses; while no-fault claimant has right to be reimbursed for such expenses, he or she cannot assign such right to reimbursement to person who has not performed health services. N.Y. Ins. Dep't Gen. Counsel Op. No. 00-05-03, 2000 91.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 3002.

§ 3003-a. EMS program agencies

1. As provided by agreement with the commissioner or regional councils based on needs identified by the regional emergency medical services councils, an EMS program agency may be responsible for facilitating quality improvement of emergency medical care within its region, staffing the regional emergency medical advisory committees provided for in section three thousand four-a of this article, providing prehospital education programs approved by the department, and other activities to support and facilitate regional emergency medical services systems.

2. The programs developed by the agencies established by subdivision one of this section shall be implemented beginning in nineteen hundred ninety-three using funds collected by the New York state emergency medical services training account, established within the miscellaneous special revenue fund – 339 by section ninety-seven-q of the state finance law.

3. The portion of the funds collected by the emergency medical services training New York state account, established and allocated within the miscellaneous special revenue fund – 339 by section ninety-seven-q of the state finance law, shall be adequate to support the costs incurred in implementing the programs described in subdivision one of this section.

HISTORY:

Add, L 1992, ch 804, § 10, eff July 1, 1993.

§ 3003-b. [Expired and repealed]

HISTORY:

Add, L 1997, ch 674, § 1, eff Nov 7, 1997, expired and repealed Dec 30, 2002; amd, L 1998, ch 572, § 1, eff Aug 5, 1998; L 2000, ch 527, § 1, eff Oct 4, 2000.

Editor's Notes Laws 1997, ch 674, § 2, eff Nov 7, 1997, provides as follows:

§ 2. This act shall take effect on the thirtieth day after it shall have become a law and shall expire and be deemed repealed on December 30, 2002 (Amd, L 1998, ch 572, § 2, eff Aug 5, 1998, L 2000, ch 527, § 2, eff Oct 4, 2000.).

Laws 1998, ch 572, § 3, eff Aug 5, 1998, provides as follows:

§ 3. This act shall take effect immediately; provided, however, the amendment to section 3003-b of the public health law, made by section one of this act, shall not affect the expiration and repeal of such section, and shall be deemed repealed therewith.

Laws 2000, ch 527, § 3, eff Oct 4, 2000, provides as follows:

§ 3. This act shall take effect immediately; provided, however, the amendment to section 3003-b of the public health law, made by section one of this act, shall not affect the expiration and repeal of such section, and shall be deemed repealed therewith.

§ 3004-a. Regional emergency medical advisory committees

1. Regional emergency medical advisory commit-

tees shall develop policies, procedures, and triage, treatment, and transportation protocols which are consistent with the standards of the state emergency medical advisory committee and which address specific local conditions. Regional emergency medical advisory committees may also approve physicians to provide on line medical control, coordinate the development of regional medical control systems, and participate in quality improvement activities addressing system-wide concerns. Hospitals and prehospital medical care services shall be authorized to release patient outcome information to regional emergency medical advisory committees for purposes of assessing prehospital care concerns. Regional quality improvement programs shall be presumed to be an extension of the quality improvement program set forth in section three thousand six of this article, and the provisions of subdivisions two and three of such section three thousand six shall apply to such programs.

2. The committee shall nominate to the commissioner a physician with demonstrated knowledge and experience in emergency medical services to serve on the state emergency medical advisory committee.

3. No civil action shall be brought in any court against any member, officer or employee of the committee for any act done, failure to act, or statement or opinion made, while discharging his or her duties as a member, officer, or employee of the committee, without leave from a justice of the supreme court, first had and obtained. In no event shall such member, officer, or employee be liable for damages in any such action if he or she shall have acted in good faith, with reasonable care and upon probable cause.

4. Any decision of a regional emergency medical advisory committee regarding provision of a level of care, including staffing requirements, may be appealed to the state emergency medical advisory committee by any regional EMS council, ambulance service, advanced life support service, certified first responder, emergency medical technician, or advanced emergency medical technician adversely affected. No action shall be taken to implement a decision regarding existing levels of care or staffing while an appeal of such decision is pending. Any decision of the state emergency medical advisory committee may be appealed pursuant to subdivision two-a of section three thousand two-a of this article.

HISTORY:

Add, L 1992, ch 804, § 10, eff July 1, 1993; amd, L 1993, ch 445, § 4, eff July 26, 1993, deemed eff July 1, 1993.

Agency Opinions

1. In general

Article 30 of the Public Health Law applies to an emergency rescue squad whose members are volunteer firemen that transport sick, disabled or injured persons to or from facilities providing hospital services. A fire department rescue squad providing volunteer ambulance service is required to obtain an ambulance service statement of registration pursuant to section 3004 of the Public Health Law. A fire department rescue squad is not required to obtain an ambulance service certificate pursuant to section 3006 of the Public Health Law. Volunteer firemen who render emergency medical assistance are protected by section 205-b of the General Municipal Law, which relieves volunteer firemen engaged in the performance of duty from civil liability except for willful negligence or malfeasance. 1975 NY Ops Atty Gen May 13 (Informal), 1975 N.Y. AG LEXIS 120.

A volunteer fire company providing ambulance service on April 1, 1975, that has registered with the appropriate emergency medical services council prior to September 1, 1975 and has not changed its area of operation, has satisfied the registration requirements of Article 30 of the Public Health Law. 1985 N.Y. Op. Att'y Gen. No. 85-27.

Members of Regional Emergency Medical Services Councils and Regional Emergency Medical Advisory Committees are eligible to receive defense and indemnification under CLS Pub O § 17. 1996 N.Y. Op. Att'y Gen. No. 96-F9, 1996 N.Y. AG LEXIS 33.

A village may not make a gift of funds to a volunteer ambulance service but may contract with it for the rendering of ambulance service to the village. This assumes, of course, that the volunteer ambulance service possess a valid voluntary ambulance service statement of registration. 1979 Op St Compt No. 79-492.

§ 3005. Ambulance service certificates

1. No ambulance service operating for profit, hospital ambulance service or municipal ambulance service of a city of over one million population shall operate on or after September first, nineteen hundred seventy-five unless it possesses a valid ambulance service certificate issued pursuant to this article. Effective January first, nineteen hundred ninety-seven, no ambulance service shall be operated unless it possesses a valid ambulance service operating certificate issued pursuant to this article or has been issued a statement of registration. No advanced life support first response service shall operate unless it possesses a valid advanced life support first responder service operating certificate. Effective January first, two thousand, no ambulance service shall be operated unless it possesses a valid operating certificate.

2. The department shall issue an initial certificate to an ambulance service certified prior to the effective date of this section upon submission of proof that it is the holder of a valid ambulance service certificate and is otherwise in compliance with provisions of section three thousand nine of this article.

2-a. Prior to January first, two thousand, the department shall issue an initial certificate to a registered ambulance service in possession of a valid registration provided that such service has been issued an exemption issued by a regional council pursuant to subdivision five-a of section three thousand three of this article.

3. The department shall issue an initial certificate to an advanced life support first response service upon submission of proof that such advanced life support first response service is staffed and equipped in accordance with rules and regulations promulgated pursuant to this article and is otherwise in compliance with provisions of section three thousand nine of this article.

4. A certificate issued to an ambulance service or advanced life support first response service shall be

valid for two years. The initial certification fee shall be one hundred dollars. Thereafter the biennial fee shall be in accordance with the schedule of fees established by the commissioner pursuant to this article. However, there shall be no initial or renewal certification fee required of a voluntary ambulance service or voluntary advanced life support first response service.

5. No initial certificate (except initial certificates issued pursuant to subdivision two of this section) shall be issued unless the commissioner finds that the proposed operator or operators are competent and fit to operate the service and that the ambulance service or advanced life support first response service is staffed and equipped in accordance with rules and regulations promulgated pursuant to this article.

6. No ambulance service or advanced life support first response service shall begin operation without prior approval of the appropriate regional council, or if there is no appropriate regional council established such ambulance service or advanced life support first response service shall apply for approval from the state council as to the public need for the establishment of additional ambulance service or advanced life support first response service, pursuant to section three thousand eight of this article.

7. Applications for a certificate shall be made by the owner of an ambulance service or advanced life support first response service operating for profit or the responsible official of a voluntary ambulance service or advanced life support first response service upon forms provided by the department. The application shall state the name and address of the owner and such other information as the department may require pursuant to rules and regulations.

8. For purposes of this article, competent means that any proposed operator of any ambulance service or advanced life support first response service who is already or had been within the last ten years an incorporator, director, sponsor, principal stockholder, or operator of any ambulance service, hospital, private proprietary home for adults, residence for adults, or non-profit home for the aged or blind which has been issued an operating certificate by the state department of social services, or a halfway house, hostel, or other residential facility or institution for the care, custody, or treatment of the mentally disabled subject to the approval by the department of mental hygiene, or any invalid coach service subject to approval by the department of transportation, is rendering or did render a substantially consistent high level of care. For purposes of this subdivision, the state emergency medical services council shall adopt rules and regulations, subject to the approval of the commissioner, to establish the criteria to be used to define substantially consistent high level of care with respect to ambulance services, advanced life support first response services, and invalid coaches, except that the commissioner may not find that a consistently high level of care has been rendered where there have been violations of the state EMS code, or other applicable rules and regulations, that (i) threatened to directly affect the health, safety, or welfare of any patient, and (ii) were recurrent or were not promptly corrected. For purposes of this article, the rules adopted by the state hospital review and planning council with respect to subdivision three of section twenty-eight hundred one-a of this chapter shall apply to other types of operators. Fit means that the operator or proposed operator (a) has not been convicted of a crime or pleaded nolo contendere to a felony charge involving murder, manslaughter, assault, sexual abuse, theft, robbery, fraud, embezzlement, drug abuse, or sale of drugs and (b) is not or was not subject to a state or federal administrative order relating to fraud or embezzlement, unless the commissioner finds that such conviction or such order does not demonstrate a present risk or danger to patients or the public.

HISTORY:

Add, L 1974, ch 1053, § 2, eff April 1, 1975; amd, L 1974, ch 1054, § 4; L 1992, ch 804, § 11, eff July 1, 1993; L 1993, ch 445, § 5, eff July 26, 1993, deemed eff July 1, 1993.

Prior Law: Former § 3005, add, L 1966, ch 949, § 1; repealed, L 1974, ch 1053, § 1, eff April 1, 1975.

Editor's Notes Laws 1974, ch 1054, amended Laws 1974, ch 1053, so as to change the effective date of this section from September 1, 1974 to April 1, 1975.

Notes to Decisions

1. In general

In Article 78 proceeding, court would reduce, from $6,750 to $2,000, civil penalty imposed on petitioner by Department of Health for violation of CLS Pub Health § 3005 in accordance with parties' stipulation whereby department agreed to limit penalty if petitioner admitted to underlying facts since (1) evidence that department's attorney stated on record that "the department would be willing to so stipulate" established that stipulation was made, (2) department's attorney was authorized to agree to limitation of penalty pursuant to 10 NYCRR § 51.10(a), (3) petitioner relied on stipulation, and (4) department benefitted from stipulation. Able Medical Transp., Inc. v Axelrod, 139 A.D.2d 921, 527 N.Y.S.2d 911, 1988 N.Y. App. Div. LEXIS 4266 (N.Y. App. Div. 4th Dep't 1988).

Ambulance company lacked standing to challenge, in Article 78 proceeding, state health department's issuance of ambulance service certificate allowing another ambulance company to operate in same county where (1) legislative intent in enacting CLS Pub Health Art 30 was to protect public, not to shield ambulances services from competition, and thus company's claimed competitive injury was not within zone of interest protected by Article 30, and (2) company could not claim that its injury fell within zone of interest protected by any constitutional guarantee, because it had not proved that health department violated any such guarantee. Lasalle Ambulance v New York State Dep't of Health, 245 A.D.2d 724, 665 N.Y.S.2d 747, 1997 N.Y. App. Div. LEXIS 12962 (N.Y. App. Div. 3d Dep't 1997), app. denied, 91 N.Y.2d 810, 670 N.Y.S.2d 404, 693 N.E.2d 751, 1998 N.Y. LEXIS 893 (N.Y. 1998).

County resident, who was also member of local volunteer ambulance corp, lacked standing to maintain Article 78 proceeding challenging health department's amendment of respondent's ambulance service certificate to include entire county on basis that spreading existing call volume among additional providers, without first undertaking public need inquiry, would have adverse impact on services provided for county residents and would ultimately undermine availability of ambulances within county, as such conclusory allegations were insufficient to show injury different in kind or degree from that suffered by public at large.

Parkland Ambulance Serv., Inc. v State Dep't of Health, 261 A.D.2d 770, 689 N.Y.S.2d 769, 1999 N.Y. App. Div. LEXIS 5329 (N.Y. App. Div. 3d Dep't), app. denied, 93 N.Y.2d 818, 697 N.Y.S.2d 566, 719 N.E.2d 927, 1999 N.Y. LEXIS 2988 (N.Y. 1999).

City did not have capacity to bring declaratory judgment action to challenge the Department of Health's interpretation of N.Y. Pub. Health Law § 3008(7) and seek a declaration that it did not need to submit to a determination of public need from a regional emergency medical services council (REMSCO) pursuant to N.Y. Pub. Health Law §§ 3003(5), 3005(6), 3008(1) prior to the renewal of its certification for ambulance services because the city could only appeal from a final determination as to public need for ambulance services administratively and then challenge by commencing a N.Y. C.P.L.R. art. 78 proceeding under N.Y. Pub. Health Law § 3002(3). City of Utica v Daines, 53 A.D.3d 922, 862 N.Y.S.2d 173, 2008 N.Y. App. Div. LEXIS 6164 (N.Y. App. Div. 3d Dep't 2008).

Agency Opinions

1. In general

If bill is for ambulance services, transportation company that has entered into subcontracting agreement with another transportation company to provide services to no-fault claimants may, if it has obtained valid assignment of benefits from no-fault claimants and if sub-contractor is properly registered or certified to provide such services (or is exempted from such requirements), bill no-fault insurer for such service that has been performed by sub-contractor for no-fault claimants, but not if bill is for other reasonable and necessary expenses; while no-fault claimant has right to be reimbursed for such expenses, he or she cannot assign such right to reimbursement to person who has not performed health services. N.Y. Ins. Dep't Gen. Counsel Op. No. 00-05-03, 2000 91.

Under CLS Ins §§ 3216(h)(24), 3221(l)(15) and 4303(aa), ambulance company issued certificate to operate under CLS Pub Health § 3005 may not bill patient directly for prehospital emergency ambulance services where New York authorized insurer or HMO has made partial payment of bill under insurance contract that provides major medical or similar comprehensive-type coverage; however, if such contract is not involved, these provisions do not apply and there is no prohibition in Insurance Law against ambulance company billing patient directly for balance of bill. N.Y. Ins. Dep't Gen. Counsel Op. No. 06-06-02, 2006 113.

Medical provider, such as ambulance company issued certificate to operate under CLS Pub Health § 3005, may bill patient directly for prehospital emergency ambulance services where New York authorized insurer or health maintenance organization has denied payment entirely, subject to remedies available to patient. N.Y. Ins. Dep't Gen. Counsel Op. No. 06-06-02, 2006 113.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 3004, 3009, 3012.

Matthew Bender's New York Practice Guides: 1 New York Practice Guide: Business and Commercial § 3.23.

§ 3005-a. Staffing standards; ambulance services and advanced life support first response services

1. The following staffing standards shall be in effect unless otherwise provided by this section:

(a) effective January first, nineteen hundred ninety-seven the minimum staffing standard for a registered ambulance service shall be a certified first responder with the patient;

(b) effective January first, two thousand, the minimum staffing standard for a voluntary ambulance service shall be an emergency medical technician with the patient;

(c) the minimum staffing standard for all other ambulance services shall be an emergency medical technician with the patient; and

(d) the minimum staffing standard for an advanced life support first response service shall be an advanced emergency medical technician with the patient. Circumstances permitting other than advanced life support care by an advanced life support first response service may be established by rule by the state council, subject to the approval of the commissioner.

2. Any service granted an exemption by the regional council pursuant to subdivision five-a of section three thousand three of this article shall be subject to the standards and terms of the exemption.

3. Notwithstanding any other provision of this article, the effective date of the standards established by this section shall be delayed by one year for each fiscal year, prior to January first, two thousand, in which the amounts appropriated are less than that which would have been expended pursuant to the provisions of section ninety-seven-q of the state finance law.

HISTORY:

Add, L 1992, ch 804, § 12, eff July 1, 1993; amd, L 1993, ch 445, § 6, eff July 26, 1993, deemed eff July 1, 1993.

§ 3005-b. [Expires and repealed July 1, 2023] Emergency medical technician five year re-certification demonstration program

1. There is hereby created within the department a demonstration program (referred to in this section as the "program") to allow emergency medical technicians and advanced emergency medical technicians who have been in continuous practice and who have demonstrated competence in applicable behavioral and performance objectives, to be re-certified for a five year period. No person shall be re-certified under the program unless he or she has completed at least one hundred thirty hours of instruction in emergency medical services as approved by the commissioner including but not limited to pediatrics, geriatrics, environmental emergencies, legal issues, emergency vehicle operations course and medical emergencies. Renewals of certification under the program shall be deemed equivalent to renewals under subdivision two of section three thousand two of this article.

2. The program shall be limited to persons who are employed by the New York city fire department or who are in practice in the following counties: Delaware, Fulton, Hamilton, Montgomery, Nassau, Otsego, Schoharie or Suffolk. The commissioner may limit the number of participants in the program, except that such limit shall be no less than four thousand participants.

3. Within a year after implementing the program and annually thereafter, the commissioner shall report to the governor and the legislature on the impact of the program on the quality of patient care and the effectiveness of the program in retaining and recruiting certified emergency medical technicians and advanced emergency medical technicians.

4. The commissioner, in consultation with the state emergency medical services council, shall

make regulations necessary to implement this section.

HISTORY:

Add, L 2001, ch 563, § 1, eff Dec 19, 2001; amd, L 2006, ch 643, § 1, eff Aug 16, 2006.

Editor's Notes Laws 2001, ch 563, § 2, eff Dec 19, 2001, provides as follows:

§ 2. This act shall take effect immediately and shall expire and be deemed repealed July 1, 2023 (Amd, L 2008, ch 147, § 1, eff June 30, 2008; L 2013, ch 78, § 1, eff June 30, 2013; L 2018, ch 102, § 1, eff July 1, 2018).

Laws 2006, ch 643, § 2, eff Aug 16, 2006, provides as follows:

§ 2. This act shall take effect immediately; provided, however that the amendments to subdivision 2 of section 3005-b of the public health law made by section one of this act shall not affect the repeal of such section and shall be deemed repealed therewith.

§ 3006. Quality improvement program

1. By January first, nineteen hundred ninety-seven, every ambulance service and advanced life support first response service shall establish or participate in a quality improvement program, which shall be an ongoing system to monitor and evaluate the quality and appropriateness of the medical care provided by the ambulance service or advanced life support first response service, and which shall pursue opportunities to improve patient care and to resolve identified problems. The quality improvement program may be conducted independently or in collaboration with other services, with the appropriate regional council, with an EMS program agency, with a hospital, or with another appropriate organization approved by the department. Such program shall include a committee of at least five members, at least three of whom do not participate in the provision of care by the service. At least one member shall be a physician, and the others shall be nurses, or emergency medical technicians, or advanced emergency medical technicians, or other appropriately qualified allied health personnel. The quality improvement committee shall have the following responsibilities:

(a) to review the care rendered by the service, as documented in prehospital care reports and other materials. The committee shall have the authority to use such information to review and to recommend to the governing body changes in administrative policies and procedures, as may be necessary, and shall notify the governing body of significant deficiencies;

(b) to periodically review the credentials and performance of all persons providing emergency medical care on behalf of the service;

(c) to periodically review information concerning compliance with standard of care procedures and protocols, grievances filed with the service by patients or their families, and the occurrence of incidents injurious or potentially injurious to patients. A quality improvement program shall also include participation in the department's prehospital care reporting system and the provision of continuing education programs to address areas in which compliance with procedures and protocols is most deficient and to inform personnel of changes in procedures and protocols. Continuing education programs may be provided by the service itself or by other organizations; and

(d) to present data to the regional medical advisory committee and to participate in system-wide evaluation.

2. The information required to be collected and maintained, including information from the prehospital care reporting system which identifies an individual, shall be kept confidential and shall not be released except to the department or pursuant to section three thousand four-a of this article.

3. Notwithstanding any other provisions of law, none of the records, documentation, or committee actions or records required pursuant to this section shall be subject to disclosure under article six of the public officers law or article thirty-one of the civil practice law and rules, except as hereinafter provided or as provided in any other provision of law. No person in attendance at a meeting of any such committee shall be required to testify as to what transpired thereat. The prohibition related to disclosure of testimony shall not apply to the statements made by any person in attendance at such a meeting who is a party to an action or proceeding the subject of which was reviewed at the meeting. The prohibition of disclosure of information from the prehospital care reporting system shall not apply to information which does not identify a particular ambulance service or individual.

4. Any person who in good faith and without malice provides information to further the purpose of this section or who, in good faith and without malice, participates on the quality improvement committee shall not be subject to any action for civil damages or other relief as a result of such activity.

HISTORY:

Add, L 1992, ch 804, § 13, eff July 1, 1993; amd, L 1993, ch 445, § 7, eff July 26, 1993, deemed eff July 1, 1993.

Prior Law: Former § 3006, add, L 1974, ch 1053, § 2; amd, L 1979, ch 473, § 2; repealed, L 1992, ch 804, § 13, eff July 1, 1993.

Prior § 3006, add, L 1966, ch 949, § 1; repealed, L 1974, ch 1053, § 1, eff April 1, 1975.

Agency Opinions

1. In general

Article 30 of the Public Health Law applies to an emergency rescue squad whose members are volunteer firemen that transport sick, disabled or injured persons to or from facilities providing hospital services. A fire department rescue squad providing volunteer ambulance service is required to obtain an ambulance service statement of registration pursuant to section 3004 of the Public Health Law. A fire department rescue squad is not required to obtain an ambulance service certificate pursuant to section 3006 of the Public Health Law. Volunteer firemen who render emergency medical assistance are protected by section 205-b of the General Municipal Law, which relieves volunteer firemen engaged in the performance of duty from civil liability except for willful negligence or malfeasance. 1975 NY Ops Atty Gen May 13 (Informal), 1975 N.Y. AG LEXIS 120.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 3009, 3011, 3012; CLS Work Comp § 3.

§ 3006-a. Patient privacy.

1. As used in this section:

(a) "Individual identifying information" means information identifying or tending to identify a patient.

(b) "Marketing" means advertising, detailing, marketing, promotion, or any other activity that is intended to be used to influence business volume, sales or market share or evaluate the effectiveness of marketing practices or marketing personnel, regardless of whether the beneficiary of the marketing is a governmental, for-profit, or not-for-profit entity.

2. No ambulance service, advanced life support first response service, or employee, member or agent thereof shall disclose, sell, transfer, exchange, provide or use any individual identifying information to any person or entity for the purpose of marketing.

3. Notwithstanding subdivision two of this section, and subject to otherwise applicable law, individual identifying information may be:

(a) disclosed, sold, transferred or exchanged to:

(i) the patient who is the subject of the information, or a person authorized to make health care decisions for the patient;

(ii) a health care provider providing care or treatment to the patient, for the purpose of such care or treatment; or a health information system subject to regulations of the department, for the purpose of such care or treatment;

(iii) an officer, inspector or investigator for a government health, licensing or law enforcement agency acting under appropriate legal authority;

(iv) a person authorized by a court order or a subpoena to receive such information;

(v) the patient's health plan, insurer, or third party payer, or an agent thereof, for the purpose of payment or reimbursement for health care services, including determining compliance with the terms of coverage or medical necessity, or utilization review;

(vi) a person or entity to whom, and for a purpose for which, disclosure or transfer is otherwise explicitly authorized or required by law;

(vii) a person or entity, for the purpose of conducting quality assurance or evaluating the performance of an ambulance service, advanced life support first response service, or any employee, member or agent thereof;

(viii) a person or entity acting as an employee or agent of a person or entity under any preceding paragraph of this subdivision, for the purpose of and consistent with that paragraph; or

(ix) a government entity as provided by law; and

(b) used by such ambulance service, advanced life support first responder service, or employee, member or agent thereof, for training, promotion, staff recognition or recruitment purposes, consistent with applicable law, provided the patient or a qualified person as defined by paragraph (G) of subdivision one of section eighteen of this chapter has provided consent to such use in a separate, stand-alone document. Such consent shall be limited to the particular type or types of use and specific transaction or transactions for which such consent is given.

4. Nothing in this section shall prohibit the collection, use, transfer, or sale of patient data by zip code, geographic region, or medical specialty for marketing purposes, providing it does not contain individual identifying information.

5. This section shall not prevent a person from disclosing, selling, transferring, or exchanging for value his or her own individual identifying information, for any purpose; provided that the information does not include individual identifying information pertaining to any other person.

6. This section does not prohibit a not-for-profit or governmental ambulance service or advanced life support first response service, or agent thereof, from using a patient's name and address in order to contact such patient or a family member at such address with requests for donations to such service; providing that such use shall not include disclosing any individual identifying information.

7. No person or entity to whom or which individual identifying information is disclosed, sold, transferred or exchanged shall disclose, sell, transfer or exchange it to any person or entity other than for the lawful purpose for which it was disclosed, sold, transferred or exchanged to the person or entity, and without satisfactory assurance that the recipient will safeguard the records from being disclosed or used for marketing purposes.

8. This section does not authorize any disclosure, sale, transfer, or exchange of individual identifying information that is not otherwise authorized or required by law.

9. In addition to the commissioner's authority to enforce this section under section three thousand twelve of this article, the attorney general shall have the authority to bring an action to enforce compliance with this section without referral by the commissioner.

HISTORY:

L 2019, ch 358, § 1, effective April 4, 2020.

Editor's Notes Laws 2019, ch 358, § 2, eff April 4, 2020, provides:

§ 2. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided that, effective immediately, the commissioner of health may make regulations and take other actions reasonably necessary to implement this act on such date.

§ 3007. Notice of alternative destination

In any city having a population of one million or more, whenever an individual is transported by ambulance from one facility to a second facility and the destination is changed, it shall be the responsibility of the senior ambulance dispatcher to inform the facility of origin by telephone of the ultimate destination immediately upon arrival thereat.

HISTORY:

Add, L 1989, ch 123, § 1, eff July 2, 1989.

Prior Law: Former § 3007, add, L 1974, ch 1053, § 2; amd, L 1974, ch 1054, § 5; repealed, L 1981, ch 252, § 5, eff June 15, 1981.

Prior § 3007, add, L 1966, ch 949, § 1; amd, L 1968, ch 553, § 1; repealed, L 1974, ch 1053, § 1, eff April 1, 1975.

§ 3008. Applications for determinations of public need

1. Every application for a determination of public need shall be made in writing to the appropriate regional council, shall specify the primary territory within which the applicant requests to operate, be verified under oath, and shall be in such form and contain such information as required by the rules and regulations promulgated pursuant to this article.

2. Notice of the application shall be forwarded by registered or certified mail by the appropriate regional council to the chief executive officers of all general hospitals, ambulance services, and municipalities operating within the same county or counties where the services seeks [seek]* to operate. The notice shall provide opportunity for comment.

3. Notice pursuant to this section shall be deemed filed with the ambulance service and municipality upon being mailed by the appropriate regional or state council by registered or certified mail.

4. The appropriate regional council or the state council shall make its determination of public need within sixty days after receipt of the application.

5. The applicant or any concerned party may appeal the determination of the appropriate regional council to the state council within thirty days after the regional council makes its determination.

6. In the case of an application for certification under this article by a municipal ambulance service to serve the area within the municipality, and the municipal ambulance service meets appropriate training, staffing and equipment standards, there should be a presumption in favor of approving the application.

7. (a) Notwithstanding any other provision of law and subject to the provisions of this article, any municipality within this state, or fire district acting on behalf of any such municipality, and acting through its local legislative body, is hereby authorized and empowered to adopt and amend local laws, ordinances or resolutions to establish and operate advanced life support first responder services or municipal ambulance services within the municipality, upon meeting or exceeding all standards set by the department for appropriate training, staffing and equipment, and upon filing with the New York state emergency medical services council, a written request for such authorization. Upon such filing, such municipal advanced life support first responder service or municipal ambulance service shall be deemed to have satisfied any and all requirements for determination of public need for the establishment of additional emergency medical services pursuant to this article for a period of two years following the date of such filing. Nothing in this article shall be deemed to exclude the municipal advanced life support first responder service or municipal ambulance service authorized to be established and operated pursuant to this article from complying with any other requirement or provision of this article or any other applicable provision of law.

(b) In the case of an application for certification pursuant to this subdivision, for a municipal advanced life support or municipal ambulance service, to serve the area within the municipality, where the proposed service meets or exceeds the appropriate training, staffing and equipment standards, there shall be a strong presumption in favor of approving the application. Notwithstanding any other provision of this article, any city with a population of fourteen thousand seven hundred or sixty-two thousand two hundred thirty-five, according to the two thousand ten federal decennial census, or fire district acting on behalf of any such city, that applies for permanent certification pursuant to this section at the conclusion of the two year period provided in this subdivision, shall not be required to apply to its regional emergency medical services council or the state emergency medical services council for a determination of need, and the application shall be submitted to and approved by the commissioner unless the commissioner finds that the municipal advanced life support first responder service or municipal ambulance service has failed to meet the appropriate training, staffing and equipment standards.

HISTORY:

Add, L 1974, ch 1053, § 2, eff April 1, 1975; amd, L 1981, ch 252, § 6; L 1992, ch 804, § 14, eff July 1, 1993; L 1992, ch 850, § 1, eff Nov 17, 1992; L 1997, ch 510, § 1, eff Sept 3, 1997; L 2012, ch 464, § 1, eff Oct 3, 2012.

Prior Law: Former § 3008, add, L 1966, ch 949, § 1; repealed, L 1974, ch 1053, § 1, eff April 1, 1975.

Editor's Notes Laws 1974, ch 1054, amended Laws 1974, ch 1053, so as to change the effective date of this section from September 1, 1974 to April 1, 1975.

Laws 2012, ch 464, § 2, eff Oct 3, 2012, provides as follows:

§ 2. This act shall take effect immediately and shall apply to any municipality or fire district that has a temporary determination of public need under paragraph (a) of subdivision 7 of section 3008 of the public health law at the time this act becomes a law, and to any application made by a municipality or fire district under such section that is pending in any administrative or judicial appeal process at the time this act becomes a law.

Notes to Decisions

Analysis

1. In general
2. Standing
3. Jurisdiction
4. Declaratory judgment
5. Appeals

*The bracketed word has been inserted by the Publisher.

1. In general

Although a regional council did not adhere to the Department of Health's policy to provide prompt written notification regarding a decision on a volunteer ambulance service's application under N.Y. Pub. Health Law §§ 3003(5) and 3008(1), such writing was not required by § 3008(4) and (5); further, a timely appeal was measured from the time of the actual decision. Matter of Richmondville Volunteer Emergency Squad, Inc. v New York State Dept. of Health, 107 A.D.3d 1098, 966 N.Y.S.2d 592, 2013 N.Y. App. Div. LEXIS 3989 (N.Y. App. Div. 3d Dep't), app. denied, 22 N.Y.3d 854, 977 N.Y.S.2d 183, 999 N.E.2d 548, 2013 N.Y. LEXIS 2945 (N.Y. 2013).

New York State Emergency Medical Services Council failed to adhere to the statutory framework established by Public Health Law article 30, neglected to follow the Department of Health's interpretation thereof and, most notably, failed to actually afford petitioner city's application the strong presumption of approval to which it was entitled per Public Health Law § 3008(7)(b). Matter of City of Utica v Daines, 95 A.D.3d 1467, 944 N.Y.S.2d 361, 2012 N.Y. App. Div. LEXIS 3684 (N.Y. App. Div. 3d Dep't 2012), rev'd, 21 N.Y.3d 878, 965 N.Y.S.2d 777, 988 N.E.2d 513, 2013 N.Y. LEXIS 582 (N.Y. 2013).

2. Standing

Ambulance company lacked standing to challenge, in Article 78 proceeding, state health department's issuance of ambulance service certificate allowing another ambulance company to operate in same county where (1) legislative intent in enacting CLS Pub Health Art 30 was to protect public, not to shield ambulances services from competition, and thus company's claimed competitive injury was not within zone of interest protected by Article 30, and (2) company could not claim that its injury fell within zone of interest protected by any constitutional guarantee, because it had not proved that health department violated any such guarantee. Lasalle Ambulance v New York State Dep't of Health, 245 A.D.2d 724, 665 N.Y.S.2d 747, 1997 N.Y. App. Div. LEXIS 12962 (N.Y. App. Div. 3d Dep't 1997), app. denied, 91 N.Y.2d 810, 670 N.Y.S.2d 404, 693 N.E.2d 751, 1998 N.Y. LEXIS 893 (N.Y. 1998).

3. Jurisdiction

Long line of precedent clearly limited the scope of permissible inquiries by a bankruptcy court into matters related to an exercise of police power; any proceeding addressing whether the ambulance operating authority could be reinstated would have involved a matter of vital concern affecting the public health, safety and welfare, N.Y. Pub. Health Law § 3000. The bankruptcy court, accordingly, lacked jurisdiction to adjudicate this issue. In re Cabrini Med. Ctr., 440 B.R. 54, 2010 Bankr. LEXIS 1222 (Bankr. S.D.N.Y. 2010).

4. Declaratory judgment

City did not have capacity to bring declaratory judgment action to challenge the Department of Health's interpretation of N.Y. Pub. Health Law § 3008(7) and seek a declaration that it did not need to submit to a determination of public need from a regional emergency medical services council (REMSCO) pursuant to N.Y. Pub. Health Law §§ 3003(5), 3005(6), 3008(1) prior to the renewal of its certification for ambulance services because the city could only appeal from a final determination as to public need for ambulance services administratively and then challenge by commencing a N.Y. C.P.L.R. art. 78 proceeding under N.Y. Pub. Health Law § 3002(3). City of Utica v Daines, 53 A.D.3d 922, 862 N.Y.S.2d 173, 2008 N.Y. App. Div. LEXIS 6164 (N.Y. App. Div. 3d Dep't 2008).

5. Appeals

As a volunteer ambulance service's administrative appeal to a state council of the Department of Health from a decision of the regional council, denying its application under N.Y. Pub. Health Law §§ 3003(5) and 3008(1), was not filed within 30 days of the actual decision, the determination of untimeliness was not arbitrary and capricious; the service's petition for review under N.Y. C.P.L.R. art. 78 was properly dismissed. Matter of Richmondville Volunteer Emergency Squad, Inc. v New York State Dept. of Health, 107 A.D.3d 1098, 966 N.Y.S.2d 592, 2013 N.Y. App. Div. LEXIS 3989 (N.Y. App. Div. 3d Dep't), app. denied, 22 N.Y.3d 854, 977 N.Y.S.2d 183, 999 N.E.2d 548, 2013 N.Y. LEXIS 2945 (N.Y. 2013).

Agency Opinions

1. In general

Provision of CLS Pub Health § 3008(7) does not provide alternative means for fire district to establish emergency or general ambulance services; fire districts continue to be subject to prohibition under CLS Gen Mun § 209-b(4) against imposition of fees and charges for either general or emergency ambulance service provided by emergency rescue and first aid squad. 1998 Op St Compt No. 98-18, 1998 N.Y. Comp. LEXIS 18.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 3002–3005.

§ 3009. Continuation of existing services

1. Notwithstanding the provisions of sections three thousand four and three thousand five of this article, if any ambulance service or a predecessor in interest was in bona fide operation as an ambulance service on April first, nineteen hundred seventy-five, within the territory for which application for an ambulance service certificate or voluntary ambulance service statement of registration is made pursuant to any provisions of this article, and has so operated since that time, the department shall issue such certificate or statement of registration without requiring proof that there is a public need for such ambulance service and without further proceedings, provided application for such certificate or statement of registration is submitted to the department in accordance with this article prior to September first, nineteen hundred seventy-five. Pending the determination of any such application the continuance of such operation shall be lawful. In all other cases the application shall be decided in accordance with the procedures provided for in section three thousand four or three thousand five of this article and such application shall be approved or denied accordingly. An application pursuant to this section shall be deemed filed with the department upon being mailed to the department by registered or certified mail.

2. Notwithstanding the provisions of subdivision six of section three thousand five of this article, if any advanced life support first response service or a predecessor in interest was in bona fide operation as an advanced life support first response service at the intermediate, critical care, or paramedic level on January first, nineteen hundred ninety-three, within the territory for which application for a certificate is made pursuant to any provisions of this article, and has so operated since that time, the department shall issue such certificate without requiring that there is a public need for such service and without further proceedings, provided application for such certificate or statement of registration is submitted to the department in accordance with this article prior to January first, nineteen hundred ninety-eight. Notwithstanding the provisions of subdivision six of section three thousand five of this article, if any advanced life support first response service or a predecessor in interest was in bona fide

operation as an advanced life support first response service at the emt-defibrillation level on July first, nineteen hundred ninety-three, within the territory for which application for a certificate is made pursuant to any provisions of this article, and has so operated since that time, the department shall issue such certificate without requiring that there is a public need for such service and without further proceedings, provided application for such certificate or statement of registration is submitted to the department in accordance with this article prior to January first, nineteen hundred ninety-four. Pending the determination of any such application, the continuance of such operation shall be lawful. In all other cases the application shall be decided in accordance with the procedures provided in section three thousand five of this article and such application shall be approved or denied accordingly. An application pursuant to this section shall be deemed filed with the department upon being mailed to the department by certified or registered mail.

HISTORY:

Add, L 1974, ch 1053, § 2; amd, L 1974, ch 1054, § 6; L 1981, ch 252, § 7; L 1992, ch 804, § 15; L 1993, ch 445, § 8, eff July 26, 1993, deemed eff July 1, 1993; L 1996, ch 726, § 1, eff Jan 30, 1997.

Agency Opinions

1. In general

A volunteer fire company providing ambulance service on April 1, 1975, that has registered with the appropriate emergency medical services council prior to September 1, 1975 and has not changed its area of operation, has satisfied the registration requirements of Article 30 of the Public Health Law. 1985 N.Y. Op. Att'y Gen. No. 85-27.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 3004, 3005.

§ 3010. Area of operation; transfers

1. Every ambulance service certificate or statement of registration issued under this article shall specify the primary territory within which the ambulance service shall be permitted to operate. An ambulance service shall receive patients only within the primary territory specified on its ambulance service certificate or statement of registration, except: (a) when receiving a patient which it initially transported to a facility or location outside its primary territory; (b) as required for the fulfillment of a mutual aid agreement authorized by the regional council; (c) upon express approval of the department and the appropriate regional emergency medical services council for a maximum of sixty days if necessary to meet an emergency need; provided that in order to continue such operation beyond the sixty day maximum period necessary to meet an emergency need, the ambulance service must satisfy the requirements of this article, regarding determination of public need and specification of the primary territory on the ambulance service certificate or statement of registration; or (d) an ambulance service or advanced life support first response service organization formed to serve the need for the provision of emergency medical services in accordance with the religious convictions of a religious denomination may serve such needs in an area adjacent to such primary territory and, while responding to a call for such service, the needs of other residents of such area at the emergency scene. Any ambulance service seeking to operate in more than one region shall make application to each appropriate regional council. Whenever an application is made simultaneously to more than one regional council, the applications submitted to the regional councils shall be identical, or copies of each application shall be submitted to all the regional councils involved.

2. No ambulance service certificate shall be transferable unless the regional council and the department reviews and approves the transfer as follows:

a. Any change in the individual who is the sole proprietor of an ambulance service shall only be approved upon a determination that the proposed new operator is competent and fit to operate the service.

b. Any change in a partnership which is the owner of an ambulance service shall be approved based upon a determination that the new partner or partners are competent and fit to operate the service. The remaining partners shall not be subject to a character and fitness review.

c. Any transfer, assignment or other disposition of ten percent or more of the stock or voting rights thereunder of a corporation which is the owner of an ambulance service, or any transfer, assignment or other disposition of the stock or voting rights thereunder of such a corporation which results in the ownership or control of ten percent or more of the stock or voting rights thereunder by any person, shall be approved based upon a determination that the new stockholder or stockholder proposing to obtain ten percent or more of the stock or voting rights thereunder of such corporation is competent and fit to operate the service. The remaining stockholders shall not be subject to a character and fitness review.

d. Any transfer of all or substantially all of the assets of a corporation which owns or operates a certified ambulance service shall be approved based upon a determination that the individual, partnership, or corporation proposing to obtain all or substantially all of the assets of the corporation is competent and fit to operate the service.

e. Any transfer affected in the absence of the review and approval required by this section shall be null and void and the certificate of such ambulance service shall be subject to revocation or suspension.

3. Nothing contained in this section shall be construed to prohibit any voluntary ambulance service authorized by its governing authority to do so from transporting any sick or injured resident of its primary territory from any general hospital or other health care facility licensed by the department, whether or not such general hospital or health care

facility is within the service's primary territory, to any other general hospital or health care facility licensed by the department for further care, or to such resident's home. Nothing contained in this section shall be construed to prohibit any proprietary ambulance service authorized by its governing body to do so from transporting any sick or injured patient from any general hospital or other health care facility licensed by the department whether or not such general hospital or health care facility is within the service's primary territory, to any other general hospital or health care facility licensed by the department within the service's primary territory for further care, or to such patient's home, if such patient's home is within its primary territory. Any ambulance service owned by or under contract to a general hospital licensed by the department may transport any specialty patient from any other general hospital or health care facility licensed by the department to the hospital owning such ambulance service, or with which it has a contract. Categories of specialty patients shall be defined by rule by the state emergency medical services council, subject to the approval of the commissioner.

4. No ambulance service certificate of an ambulance service which has discontinued operations for a continuous period in excess of thirty days shall be transferable without the approval of the appropriate regional council.

HISTORY:

Add, L 1974, ch 1053, § 2; amd, L 1981, ch 252, § 8; L 1989, ch 735, § 2; L 1992, ch 804, § 16, eff July 1, 1993; L 1993, ch 445, § 9, eff July 26, 1993, deemed eff July 1, 1993; L 1993, ch 588, § 1, eff July 28, 1993, deemed eff July 1, 1993.

Notes to Decisions

Analysis

1. In general
2. Standing
3. Jurisdiction
4. Transfer of assets

1. In general

Public Health Law § 3010 is merely a control measure which enables appropriate regional services council to be aware of various emergency medical units within region so that it may perform its responsibility of coordinating emergency medical services more efficiently; section does not limit ambulance service solely to area specified in statement of registration. Evidence did not support determination of Department of Health that ambulance service violated CLS Pub Health § 3010(1) by operating outside of its usual territory as specified in its registration, even though department's "enforcement guideline" restricted operation of services to territory specified in registration. Mohawk Valley Ambulance Corps., Inc. v New York State Dep't of Health, 164 A.D.2d 968, 559 N.Y.S.2d 414 (N.Y. App. Div. 4th Dep't 1990), app. denied, 77 N.Y.2d 801, 566 N.Y.S.2d 586, 567 N.E.2d 980, 1991 N.Y. LEXIS 44 (N.Y. 1991).

2. Standing

Neither competing ambulance service nor its individual employees had standing to bring Article 78 proceeding to challenge Department of Health's transfer of ambulance certificates where sole allegation of harm was competitive injury. Troy Ambulance Serv. v New York State Dep't of Health, 260 A.D.2d 715, 687 N.Y.S.2d 493, 1999 N.Y. App. Div. LEXIS 3289 (N.Y. App. Div. 3d Dep't 1999).

3. Jurisdiction

Long line of precedent clearly limited the scope of permissible inquiries by a bankruptcy court into matters related to an exercise of police power; any proceeding addressing whether the ambulance operating authority could be reinstated would have involved a matter of vital concern affecting the public health, safety and welfare, N.Y. Pub. Health Law § 3000. The bankruptcy court, accordingly, lacked jurisdiction to adjudicate this issue. In re Cabrini Med. Ctr., 440 B.R. 54, 2010 Bankr. LEXIS 1222 (Bankr. S.D.N.Y. 2010).

4. Transfer of assets

Applicability of CLS Pub Health § 3010(2)(b) does not require transfer of corporate ownership but instead expressly refers to transfer of "all or substantially all" corporate assets. Schenectady Ambulance & Oxygen Serv. v New York State Dep't of Health, 267 A.D.2d 846, 700 N.Y.S.2d 762, 1999 N.Y. App. Div. LEXIS 13583 (N.Y. App. Div. 3d Dep't 1999).

Agency Opinions

1. In general

An ambulance service providing emergency medical services may leave the service area specified in its statement of registration in order to deliver patients to a hospital. 1982 Op St Compt No. 82-185, 1982 N.Y. Comp. LEXIS 536.

§ 3011. Powers and duties of the department and the commissioner

1. The department may inquire into the operation of ambulance services and advanced life support first response services and conduct periodic inspections of facilities, communication services, vehicles, methods, procedures, materials, staff and equipment. It may also evaluate data received from ambulance services and advanced life support first response services.

2. The department may require ambulance services and advanced life support first response services to submit periodic reports of calls received, services performed and such other information as may be necessary to carry out the provisions of this article.

3. The commissioner, with the advice and consent of the state council, shall designate not more than eighteen geographic areas within the state wherein a regional emergency medical services council shall be established. In making the determination of a geographic area, the commissioner shall take into consideration the presence of ambulance services, hospital facilities, existing emergency medical services committees, trained health personnel, health planning agencies and communication and transportation facilities; and shall establish separate regional emergency medical services councils for the counties of Nassau and Westchester. The commissioner shall promote and encourage the establishment of a regional emergency medical services council in each of said designated areas.

3-a. Notwithstanding any inconsistent provision of this article:

a. The creation of any regional council or emergency medical services program agency on or after January first, two thousand shall not diminish any then existing funding appropriated after the effective date of this subdivision to regional councils or emergency medical services program agencies;

b. Subject to the provisions of paragraph c of this subdivision, funding for regional councils and emergency medical services program agencies existing on or after January first, two thousand shall be increased in proportion to any funding appropriated therefor by the department and in such proportion as determined by the department;

c. Funding for any regional council or emergency medical services program agency created on or after January first, two thousand shall be in addition to any funds appropriated on the effective date of this subdivision for regional councils or emergency medical services program agencies existing on January first, two thousand. Funding for any regional council or emergency medical services program agency created after January first, two thousand shall be in an amount at least equal to the minimum funding level appropriated to regional councils or emergency medical services program agencies existing on such date, or in an amount equal to the proportion that such new regional council or emergency medical services program agency represented on the basis of population in its former regional council or emergency medical services program agency, whichever is larger.

4. The commissioner may propose rules and regulations and amendments thereto for consideration by the state council. The commissioner shall establish a schedule of certification fees for ambulance services and advanced life support first response services other than voluntary ambulance services and voluntary advanced life support first response services.

5. For the purpose of promoting the public health, safety and welfare the commissioner is hereby authorized and empowered to contract with voluntary ambulance services and municipal ambulance services, or with the fire commissioners of fire districts operating voluntary ambulance services, upon such terms and conditions as he shall deem appropriate and within amounts made available therefor, for reimbursement of the necessary and incidental costs incurred by such ambulance services in order to effectuate the provisions of this article.

6. The commissioner is hereby authorized, for the purposes of effectuating the provisions of this article in the development of a statewide emergency medical service system, to contract with any ambulance service or with the fire commissioners of fire districts operating certified voluntary ambulance services for the use of necessary equipment upon such terms and conditions as the commissioner shall deem appropriate.

7. The commissioner may recommend to the state council minimum qualifications for certified first responders (which shall not exceed fifty-one hours), emergency medical technicians and advanced emergency medical technicians in all phases of emergency medical technology including but not limited to, communications, first aid, equipment, maintenance, emergency techniques and procedures, patient management and knowledge of procedures and equipment for emergency medical care.

8. The commissioner shall provide every certified ambulance service and advanced life support first response service with an official insignia which may be attached to every vehicle owned or operated by a certified ambulance service or advanced life support first response service.

9. The department shall provide the state council with such assistance as the council may request in order to carry out its responsibilities as set forth in subdivision two-a of section three thousand two of this article.

10. The commissioner is hereby authorized and empowered to extend the certification for emergency medical technicians, advanced emergency medical technicians or certified first responders who have been ordered to active military duty, other than for training, on or after the eleventh day of September, two thousand one and whose certification will expire during their military duty or within the six months immediately following separation from military service. The extended certification shall be for the period of military duty and for twelve months after they have been released from active military duty.

11. The commissioner, with the advice and consent of the state council, shall promulgate rules and regulations necessary to ensure compliance with the provisions of subdivision two of section sixty-seven hundred thirteen of the education law.

HISTORY:

Add, L 1974, ch 1053, § 2; amd, L 1981, ch 252, § 9; L 1985, ch 680, § 2, eff July 1, 1985, expired and deemed repealed, eff July 1, 1988; L 1988, ch 9, § 3; L 1991, ch 403, § 1; L 1992, ch 804, § 17, eff July 1, 1993; L 1995, ch 542, § 3, eff Aug 2, 1995; L 2000, ch 501, § 1, eff Oct 4, 2000; L 2003, ch 106, § 29, eff July 1, 2003; L 2003, ch 343, § 1, eff Aug 19, 2003; L 2008, ch 206, § 1, eff July 7, 2008.

Editor's Notes Laws 1985, ch 680, § 7, provides as follows:

§ 7. This act shall take effect July first, nineteen hundred eighty-five, and shall remain in full force and effect until July first, nineteen hundred eighty-eight at which time it shall be deemed repealed (Amd, L 1987, ch 189, § 1, eff June 29, 1987.).

Laws 1995, ch 542, § 4 eff Aug, 2, 1995, provides as follows:

§ 4. This act shall take effect immediately, provided however, that any rule or regulation necessary for the implementation of the foregoing sections of this act on their effective date are authorized and directed to be made and completed within 180 days after such effective date.

Laws 2003, ch 106, §§ 1 and 1-a, eff July 1, 2003, provide as follows:

Section 1. Legislative findings and intent. The legislature recognizes that the individuals who are members of the military make a tremendous sacrifice, especially in times like these when our military personnel are in many locations throughout the world and here in New York fighting against terrorism. This sacrifice is just as real for the men and women who comprise our reserve armed forces and state organized militia. For those who are not full-time active duty in the military, but instead are called to active duty as a member of the reserve armed forces or state organized militia, the rest of their lives must be put on hold to accommodate that service. However, such military personnel continue to be responsible for their own well-being and the

well-being of their families and they must still face the obligations that exist in their everyday lives. Steps have been taken to ease some of the burdens that these brave men and women encounter, to allow them to focus their full energy on defending our country; however, the legislature recognizes that more must be done to ensure that military personnel engaged in active duty are not troubled by their obligations at home. In addition, the legislature recognizes that members of the military should not be discriminated against based upon their military status in areas such as housing, employment and education.

§ 1-a. Short title. This act shall be known as the "Patriot Plan".

Notes to Decisions

1. Hearing

In Article 78 proceeding to review determination that petitioner operated improperly equipped ambulance, court erred in ordering Commissioner of Health to conduct hearing as to whether petitioner violated any rules concerning operation of invalid coach, since Legislature had divested health commissioner of jurisdiction over invalid coach services (L 1981, ch 252). Varin's Ambulance Service v New York State Dep't of Health, 134 A.D.2d 689, 521 N.Y.S.2d 542, 1987 N.Y. App. Div. LEXIS 50894 (N.Y. App. Div. 3d Dep't 1987).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

New York state emergency medical services council, § 3002.

Codes, Rules and Regulations:

Emergency medical services. 10 NYCRR §§ 800.1. et seq.

§ 3012. Enforcement

1. Any ambulance service or advanced life support first response service certificate issued pursuant to section three thousand five of this article may be revoked, suspended, limited or annulled by the department upon proof that the operator or certificate holder or one or more enrolled members or one or more persons in his employ:

(a) has been guilty of misrepresentation in obtaining the certificate or in the operation of the ambulance service or advanced life support first response service; or

(b) has not been competent in the operation of the service or has shown inability to provide adequate ambulance services or advanced life support first response service; or

(c) has failed to pay the biennial certification fee as required except in the case of any voluntary ambulance service or voluntary advanced life support first response service; or

(d) has failed to file any report required by the provisions of this article or the rules and regulations promulgated thereunder; or

(e) has violated or aided and abetted in the violation of any provision of this article, the rules and regulations promulgated or continued thereunder, or the state sanitary code; or

(f) had discontinued operations for a period in excess of one month; or

(g) a voluntary ambulance service or voluntary advanced life support first response service has failed to meet the minimum staffing standard and has not been issued an exemption, except that such certificate shall not be suspended or revoked unless the commissioner finds that an adequate alternative service exists. The commissioner shall consider the recommendation of the regional emergency medical services council in making a finding; or

(h) an ambulance service operating for profit has failed to meet the minimum staffing standard; or

(i) has been convicted of a crime or pleaded nolo contendere to a felony charge involving murder, manslaughter, assault, sexual abuse, theft, robbery, fraud, embezzlement, drug abuse, or sale of drugs, unless the commissioner finds that such conviction does not demonstrate a present risk or danger to patients or the public; or

(j) is or was subject to a state or federal administrative order relating to fraud or embezzlement, unless the commissioner finds that such order does not demonstrate a present risk or danger to patients or the public.

2. Proceedings under this section may be initiated by any person, corporation, association, or public officer, or by the department by the filing of written charges with the department. Whenever the department seeks revocation or suspension of a certificate of an ambulance service or an advanced life support first response service, a copy of the charges shall be referred to the appropriate regional council for review and recommendation to the department prior to a hearing. Such recommendation shall include a determination as to whether the public need would be served by a revocation, suspension, annulment or limitation. If there is no appropriate regional council established, the state council shall make such determination and present to the department its recommendations.

3. No certificate shall be revoked, suspended, limited or annulled without a hearing. However, a certificate may be temporarily suspended without a hearing and without the approval of the appropriate regional council or state council for a period not in excess of thirty days upon notice to the certificate holder following a finding by the department that the public health, safety or welfare is in imminent danger.

4. The commissioner shall fix a time and place for the hearing. A copy of the charges and the recommendations of the appropriate regional council or state council together with the notice of the time and place of the hearing, shall be mailed to the certificate holder by registered or certified mail, at the address specified on the certificate, at least fifteen days before the date fixed for the hearing. The appropriate regional council may be a party to such hearing. The certificate holder may file with the department, not less than five days prior to the hearing, a written answer to the charges.

HISTORY:

Add, L 1974, ch 1053, § 2, eff April 1, 1975; amd, L 1981, ch 252, § 10, eff June 15, 1981; L 1992, ch 804, § 18; L 1993, ch 445, § 10, eff July 26, 1993, deemed eff July 1, 1993.

Editor's Notes Laws 1974, ch 1054, amended Laws 1974, ch 1053, so as to change the effective date of this section from September 1, 1974 to April 1, 1975.

Notes to Decisions

Analysis

1. In general
2. Penalties

1. In general

Supreme Court erred in annulling determination by Commissioner of Health that vehicle used to transport nursing home patient to hospital was improperly equipped ambulance where vehicle was marked as ambulance, registered as ambulance, bore ambulance license plates, and was inspected as ambulance; although petitioner contended that he was operating vehicle as invalid coach, he produced no evidence showing that Transportation Department inspectors had approved of vehicle for that purpose as required by 17 NYCRR § 720.2. Varin's Ambulance Service v New York State Dep't of Health, 134 A.D.2d 689, 521 N.Y.S.2d 542, 1987 N.Y. App. Div. LEXIS 50894 (N.Y. App. Div. 3d Dep't 1987).

Commissioner of Public Health had rational basis to conclude that failure to transport unresponsive patient to hospital, on single occasion, demonstrated petitioner's inability to provide adequate ambulance service and sustained finding that it violated CLS Pub Health § 3012(1). Lakeland Fire Dep't v De Buono, 250 A.D.2d 987, 673 N.Y.S.2d 244, 1998 N.Y. App. Div. LEXIS 5685 (N.Y. App. Div. 3d Dep't 1998).

2. Penalties

Enforcement under CLS Pub Health § 3012(1) permits but does not require Department of Health to impose penalties where warranted. Schenectady Ambulance & Oxygen Serv. v New York State Dep't of Health, 267 A.D.2d 846, 700 N.Y.S.2d 762, 1999 N.Y. App. Div. LEXIS 13583 (N.Y. App. Div. 3d Dep't 1999).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

State sanitary code, §§ 225 et seq.

§ 3013. Immunity from liability

1. Notwithstanding any inconsistent provision of any general, special or local law, a voluntary ambulance service or voluntary advanced life support first response service described in section three thousand one of this article and any member thereof who is a certified first responder, an emergency medical technician, an advanced emergency medical technician or a person acting under the direction of an emergency medical technician or advanced emergency medical technician and who voluntarily and without the expectation of monetary compensation renders medical assistance in an emergency to a person who is unconscious, ill or injured shall not be liable for damages for injuries alleged to have been sustained by such person or for damages for the death of such person alleged to have occurred by reason of an act or omission in the rendering of such medical assistance in an emergency unless it is established that such injuries were or such death was caused by gross negligence on the part of such certified first responder, emergency medical technician or advanced emergency medical technician or person acting under the direction of an emergency medical technician or advanced emergency medical technician.

2. Nothing in this section shall be deemed to relieve any such voluntary ambulance service or voluntary advanced life support first response service from liability for damages or injuries or death caused by an act or omission on the part of any person other than a certified first responder, an emergency medical technician, advanced emergency medical technician or person acting under the direction of an emergency medical technician or advanced emergency medical technician acting in behalf of the voluntary ambulance service or voluntary advanced life support first response service.

3. Nothing in this section shall be deemed to relieve or alter the liability of any such voluntary ambulance service or members for damages or injuries or death arising out of the operation of motor vehicles.

4. A certified first responder, emergency medical technician or advanced emergency medical technician, whether or not he or she is acting on behalf of an ambulance service or advanced life support first response service, who voluntarily and without the expectation of monetary compensation renders medical assistance in an emergency to a person who is unconscious, ill or injured shall not be liable for damages alleged to have been sustained by such person or for damages for the death of such person alleged to have occurred by reason of an act or omission in the rendering of such medical assistance in an emergency unless it is established that such injuries were or such death was caused by gross negligence on the part of such certified first responder, emergency medical technician or advanced emergency medical technician.

5. Notwithstanding any inconsistent provision of any general, special or local law, any physician who voluntarily and without the expectation of monetary compensation provides indirect medical control, as defined in paragraph (b) of subdivision fifteen of section three thousand one of this article, to a voluntary ambulance service or voluntary advanced life support first response service described in section three thousand one of this article shall not be liable for damages for injuries or death alleged to have been sustained by any person as a result of such medical direction unless it is established that such injuries or death were caused by gross negligence on the part of such physician.

6. The availability of an award or other benefit under article eleven-AA or article eleven-AAA of the general municipal law shall not be deemed monetary compensation for the purposes of this section.

HISTORY:

Add, L 1974, ch 1053, § 2, eff April 1, 1975; amd, L 1977, ch 338, § 3; L 1992, ch 804, § 19, eff July 1, 1993; L 1993, ch 445, § 11, eff July 26, 1993, deemed eff July 1, 1993; L 2005, ch 290, § 1, eff July 26, 2005.

Editor's Notes Laws 1974, ch 1054, amended Laws 1974, ch 1053, so as to change the effective date of this section from September 1, 1974 to April 1, 1975.

Notes to Decisions

Analysis

1. In general
2. Summary judgment
3. Affirmative defenses

1. In general

Action against volunteer ambulance squad for injuries allegedly sustained by plaintiff while he was being transported from site of accident to hospital emergency room was properly dismissed at close of plaintiff's case, since no reasonable view of evidence would support conclusion that ambulance squad or its employees were grossly negligent, and thus they were immune from liability for medical services rendered to plaintiff. Kapinos v Alvarado, 143 A.D.2d 332, 532 N.Y.S.2d 416, 1988 N.Y. App. Div. LEXIS 9183 (N.Y. App. Div. 2d Dep't 1988).

Wife of deceased heart attack victim must show gross negligence by medics to recover from U.S., where medics who responded to emergency call at military academy were on duty for Army and received Army pay, and U.S. did not charge a fee or earn profit from such emergency medical services, because medics are shielded from liability for ordinary negligence pursuant to NY Pub Health Law § 3013 since military is under no duty to provide emergency relief to civilians on its property. Clarken v United States, 791 F. Supp. 1029, 1992 U.S. Dist. LEXIS 15124 (D.N.J. 1992).

2. Summary judgment

Volunteer rescue squad was entitled to summary judgment on wrongful death claim where one of deceased's drinking companions called squad because deceased was shaking, shivering, vomiting and having seizure-like fits when drinking party arrived at one member's home, deceased appeared healthy and refused treatment when squad arrived, police arrived and excused rescue squad, police determined that deceased was not disabled and left him in care of his companions, and companions left deceased in stalled car at side of road where he died of exposure. Rider v Gaslight Tavern Corp., 125 A.D.2d 144, 512 N.Y.S.2d 553, 1987 N.Y. App. Div. LEXIS 40753 (N.Y. App. Div. 3d Dep't 1987).

Individual defendants' motion for summary judgment should have been granted where they established a prima facie entitlement to summary judgment by demonstrating that they were not grossly negligent in rendering medical assistance to the decedent. Estate of Klinger v Corona Cmty. Ambulance Corps., 301 A.D.2d 495, 753 N.Y.S.2d 126, 2003 N.Y. App. Div. LEXIS 218 (N.Y. App. Div. 2d Dep't 2003).

3. Affirmative defenses

In action for negligence, inter alia, it was error to deny motion by ambulance company to amend its answer to assert 2 affirmative defenses under provisions of CLS Pub Health § 3013 exempting voluntary ambulance services from liability for ordinary negligence, since plaintiffs were not prejudiced or surprised by amendment and, notwithstanding that ambulance company billed plaintiffs for its services, proposed affirmative defenses were not clearly and patently insufficient on their face. Hopper v Hise, 131 A.D.2d 814, 517 N.Y.S.2d 178, 1987 N.Y. App. Div. LEXIS 48259 (N.Y. App. Div. 2d Dep't 1987).

Agency Opinions

1. In general

Article 30 of the Public Health Law applies to an emergency rescue squad whose members are volunteer firemen that transport sick, disabled or injured persons to or from facilities providing hospital services. A fire department rescue squad providing volunteer ambulance service is required to obtain an ambulance service statement of registration pursuant to section 3004 of the Public Health Law. A fire department rescue squad is not required to obtain an ambulance service certificate pursuant to section 3006 of the Public Health Law. Volunteer firemen who render emergency medical assistance are protected by section 205-b of the General Municipal Law, which relieves volunteer firemen engaged in the performance of duty from civil liability except for willful negligence or malfeasance. 1975 NY Ops Atty Gen May 13 (Informal), 1975 N.Y. AG LEXIS 120.

The immunity provisions contained in General Municipal Law §§ 205-b, 209-b and Public Health Law §§ 3000 through 3016 (Art 30) may both apply to a volunteer fireman, and in the event of suit, both should be pleaded as separate, affirmative defenses unless it is clear that only one applies. 1976 NY Ops Atty Gen Dec 6 (Informal), 1976 N.Y. AG LEXIS 186.

A certified emergency medical technician, whether or not a member of a squad, has immunity when rendering medical assistance in an emergency to a person who is unconscious, ill or injured anywhere within the State. The immunity granted a voluntary ambulance service in Public Health Law § 3013, subdivision 1, does not apply to a squad. The liability or immunity of the squad, as such, is derived from and through the fire department or company of which it is a part. For this purpose, a squad is not a legal entity and the question is irrelevant. All members of duly organized volunteer fire companies, as well as members of squads, have immunity when transporting patients under emergency conditions and, if general ambulance service has been authorized, they also have immunity for transporting non-emergency patients. An emergency medical technician who is not a member of a squad has immunity under Public Health Law § 3013 only for acts in rendering emergency medical assistance to a person who is unconscious, ill or injured. However, if, during the course of transportation of a sick, disabled or injured person under conditions which are not an emergency, that person's condition develops into or reverts to an emergency condition, the technician would receive immunity for the acts done relating to the emergency condition. 1976 NY Ops Atty Gen Dec 6 (Informal), 1976 N.Y. AG LEXIS 186.

RESEARCH REFERENCES AND PRACTICE AIDS

Annotations:

Contributory negligence as affecting liability of operator of ambulance service for personal injuries to person being transported. 21 ALR2d 919.

Liability for personal injury or property damage from operation of ambulance. 84 ALR2d 121.

Construction and application of "Good Samaritan" statutes. 68 ALR4th 294.

Liability for negligence of ambulance attendants, emergency medical technicians, and the like, rendering emergency medical care outside hospital. 16 ALR5th 605.

Matthew Bender's New York Practice Guides: LexisNexis AnswerGuide New York Negligence § 7.20 Raising Defense of Good Samaritan Laws.

§ 3030. Advanced life support services

Advanced life support services provided by an advanced emergency medical technician, shall be (1) provided under the direction of qualified medical and health personnel utilizing patient information and data transmitted by voice or telemetry, (2) limited to the category or categories in which the advanced emergency medical technician is certified pursuant to this article, and (3) recorded for each patient, on an individual treatment-management record.

HISTORY:

Add, L 1979, ch 439, § 2, eff July 5, 1979.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 3032.

Annotations:

Tortious maintenance or removal of life supports. 58 ALR4th 222.

§ 3031. Advanced life support system

Advanced life support system must (1) be under the overall supervision and direction of a qualified physician with respect to the advanced life support services provided, (2) be staffed by qualified medical and health personnel, (3) utilize advanced emergency medical technicians whose certification is appropriate to the advanced life support services provided, (4) utilize advanced support mobile units

appropriate to the advanced life support services provided, (5) maintain a treatment-management record for each patient receiving advanced life support services, and (6) be integrated with a hospital emergency, intensive care, coronary care or other appropriate service.

HISTORY:
Add, L 1979, ch 439, § 2, eff July 5, 1979.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:
This section referred to in § 3032.

§ 3032. Rules and regulations

The state council, with the approval of the commissioner, shall promulgate rules and regulations to effectuate the purposes of sections three thousand thirty and three thousand thirty-one of this article.

HISTORY:
Add, L 1979, ch 439, § 2; amd, L 1993, ch 445, § 12, eff July 26, 1993, deemed eff July 1, 1993.

RESEARCH REFERENCES AND PRACTICE AIDS

Annotations:
Judicial power to order discontinuance of life-sustaining treatment. 48 ALR4th 67.

ARTICLE 30-B Emergency Medical, Trauma and Disaster Care

Section

3060. Short title
3061. Declaration of purpose
3062. Definitions
3063. State emergency medical advisory committee
3064. State trauma advisory committee
3065. Regional trauma advisory committees
3066. Powers and duties of the department

HISTORY:
Add, L 2005, ch 449, § 1, eff Aug 9, 2005.

§ 3060. Short title

This article shall be known and may be cited as the "emergency medical, trauma care, and disaster preparedness act".

HISTORY:
Add, L 2005, ch 449, § 1, eff Aug 9, 2005.

§ 3061. Declaration of purpose

Trauma is the leading cause of death and disability during the first four decades of life. In the aftermath of the events of September eleventh, two thousand one, the medical response to natural and man-made disasters is also recognized as a public concern of the highest order. The furnishing of emergency medical, trauma, and disaster care is therefore a matter of vital concern affecting the public health, safety and welfare. Emergency medical, trauma, and disaster care, the planning and coordination of such care between prehospital and inhospital personnel and collaborating public health, safety, and welfare officials, the quality management and review of such care, and the development and maintenance of a statewide system for interfacility transfer, including but not limited to aeromedical transport, of critically ill or injured patients between general hospitals and other health care facilities, are essential public health services. It is the purpose of this article to promote the public health, safety and welfare by providing for development and maintenance of systems for emergency medical, trauma, and disaster care, and for expeditious transfer of patients in need of such care to facilities appropriately staffed and equipped to provide this care in a timely and effective manner.

HISTORY:
Add, L 2005, ch 449, § 1, eff Aug 9, 2005.

§ 3062. Definitions

As used in this article:

1. "Emergency medical care" means the initial management, treatment, and transfer of suddenly ill or injured patients.

2. "Trauma care" means health care provided to patients at high risk of death or disability from multiple and severe injuries.

3. "Emergency patient" means any patient making an unscheduled visit to a hospital emergency facility for emergency medical care.

4. "Emergency department" means a hospital department consisting of staff, facilities, and resources to provide emergency medical care for large numbers of emergency patients.

5. "Emergency service" means a hospital department consisting of staff, facilities, and resources to provide emergency medical care for small numbers of emergency patients.

6. "Emergency physician" means a staff physician providing emergency medical care in an emergency department or emergency service.

7. "Emergency nurse" means a staff nurse providing nursing services in an emergency department or emergency service.

8. "Trauma patient" means a patient at high risk of death or disability from multiple and severe injuries.

9. "Trauma system" means an organized health care system to provide trauma care in, or en route to, from, or between general hospitals or other health care facilities.

10. "Trauma center" means a facility capable of providing definitive trauma care.

11. "Trauma station" means a facility capable of providing sustentative trauma care followed by expeditious transfer to a trauma center.

12. "Trauma surgeon" means a staff surgeon providing trauma care in a trauma center or trauma station or during aeromedical transport.

13. "Trauma nurse" means a staff nurse providing nursing services in a trauma center or trauma station, or during aeromedical transport.

14. "Prehospital transport" means emergency ambulance transport from the scene of a sudden illness or injury requiring emergency medical care

or trauma care to a general hospital or other health care facility, conducted in accordance with article thirty of this chapter.

15. "Interfacility transfer" means emergency ambulance transport from, to, or between general hospitals or other health care facilities, conducted in accordance with article thirty of this chapter.

16. "Aeromedical transport" means prehospital transport or interfacility transfer conducted in rotary wing or fixed wing aircraft.

17. "Transport system" means an organized health care and transportation system to provide prehospital transport and interfacility transfer to critically ill or injured patients.

18. "Critically ill or injured" means at high risk of dying from illnesses or injuries.

19. "Disaster preparedness" means the state of readiness necessary to respond to natural or manmade disasters, including but not limited to biologic, nuclear, incendiary, chemical, and explosive disasters.

20. "Interoperability" means the capacity of all emergency medical, trauma care, and disaster preparedness response systems to collaborate and communicate during an emergency, trauma, or disaster response.

21. "State hospital review and planning council" means the state hospital review and planning council established by section twenty-nine hundred four of this chapter.

22. "State emergency medical services council" means the state emergency medical services council established by section three thousand two of this chapter.

23. "State emergency medical advisory committee" means the state emergency medical advisory committee established by section three thousand two-a of this chapter.

24. "State trauma advisory committee" means the state trauma advisory committee continued by this article.

25. "Regional emergency medical services council" means a regional emergency medical services council established by section three thousand three of this chapter.

26. "Regional emergency medical advisory committee" means a regional emergency medical advisory committee established by section three thousand four-a of this chapter.

27. "Regional trauma advisory committee" means a regional trauma advisory committee continued or established by this article.

28. "Regional trauma program agency" means an entity that may be contracted by the department to assist the department in providing the ways and means necessary for a regional trauma advisory committee to perform the duties specified under this article.

HISTORY:
Add, L 2005, ch 449, § 1, eff Aug 9, 2005.

§ 3063. State emergency medical advisory committee

1. The state emergency medical advisory committee, in addition to the powers and responsibilities described in section three thousand two-a of this chapter, shall advise the department and the commissioner regarding emergency medical care, and assist the department and the commissioner in the development, periodic revision, and application of appropriateness review standards and quality improvement guidelines for emergency medical care, emergency departments and emergency services, under articles twenty-eight and thirty of this chapter.

2. The commissioner shall designate an officer or employee of the department to assist the state emergency medical advisory committee in the performance of its duties under this section.

HISTORY:
Add, L 2005, ch 449, § 1, eff Aug 9, 2005.

§ 3064. State trauma advisory committee

1. There is hereby continued in the department the state trauma advisory committee. It shall consist of trauma surgeons, trauma nurses, emergency physicians, emergency nurses, and other emergency medical and trauma care professionals appointed by the commissioner. It shall be representative of each geographic area of the state and those medical and nursing specialties and subspecialties regularly involved in trauma care. It shall advise the department and the commissioner regarding trauma and disaster care within the state, and assist the department and the commissioner in the coordination of trauma and disaster care, including but not limited to, the development, periodic revision, and application of statewide appropriateness review standards, quality improvement guidelines for trauma and disaster care, trauma systems, trauma centers and trauma stations, in a manner consistent with the intent and provisions of sections twenty-eight hundred five-j and three thousand two-a of this chapter, and similar advisory guidelines for trauma and disaster care with the consent of the commissioner, which shall not have the force and effect of law unless adopted as rules and regulations by the state hospital review and planning council, subject to approval by the commissioner. The commissioner shall appoint a physician to chair the committee.

2. The state trauma advisory committee shall continue to meet as frequently as its business may require. The members of the state trauma advisory committee shall receive no compensation for their services as members, but each shall be allowed the necessary and actual expenses incurred in the performance of his or her duties under this section.

3. The commissioner shall designate an officer or employee of the department to assist the state trauma advisory committee in the performance of its duties under this section.

4. In no event shall any member, officer, or employee of the state trauma advisory committee be

liable for damages in any civil action for any act done, failure to act, or statement or opinion made, while discharging his or her duties as a member, officer, or employee of the state trauma advisory committee if he or she shall have acted in good faith, with reasonable care.

HISTORY:
Add, L 2005, ch 449, § 1, eff Aug 9, 2005.

§ 3065. Regional trauma advisory committees

1. There are hereby continued or established in the department regional trauma advisory committees in each geographic area of the state. They shall consist of trauma surgeons, trauma nurses, emergency physicians, emergency nurses, and other emergency and trauma care professionals from trauma centers, emergency departments, and emergency services designated by the department within each region. They shall be representative of the communities and health care facilities within the region and those medical and nursing specialties and subspecialities regularly involved in trauma care. They shall advise the state trauma advisory committee, the department, and the commissioner regarding trauma and disaster care within each region, and assist the state trauma advisory committee, the department, and the commissioner with the coordination of trauma and disaster care within each region, including, but not limited to, the implementation of statewide quality improvement guidelines for trauma and disaster care, trauma systems, trauma centers, and trauma stations within each region, in a manner consistent with the intent and provisions of sections twenty-eight hundred five-j and three thousand four-a of this chapter. The state trauma advisory committee shall authorize the bylaws of each regional trauma advisory committee, subject to approval by the commissioner.

2. The regional trauma advisory committees shall continue to meet as frequently as their business may require. The members of the regional trauma advisory committees shall receive no compensation for their services as members.

3. The department shall determine the ways and means necessary to assist the regional trauma advisory committees in performing the duties specified under this section, and may contract with regional trauma program agencies to provide such assistance.

4. In no event shall any member, officer, or employee of the state trauma advisory committee be liable for damages in any civil action for any act done, failure to act, or statement of opinion made, while discharging his or her duties as a member, officer, or employee of the regional trauma advisory committee if he or she shall have acted in good faith, with reasonable care.

HISTORY:
Add, L 2005, ch 449, § 1, eff Aug 9, 2005.

§ 3066. Powers and duties of the department

1. The department shall continue facilitation, development, and periodic revision of appropriateness review standards for emergency medical and trauma care, including appropriateness review standards for emergency departments and services and trauma centers and stations under article twenty-eight of this chapter, by the state emergency medical advisory committee or the state trauma advisory committee, as appropriate, for adoption by the state hospital review and planning council, subject to approval by the commissioner.

2. The department shall continue the categorization of general hospitals and other health care facilities for emergency medical care and trauma care under article twenty-eight of this chapter, and the designation of emergency facilities in general hospitals and other health care facilities, as emergency departments or emergency services appropriate for emergency medical care and general hospitals and other health care facilities as trauma centers or trauma stations appropriate for trauma care, based upon such categorization, after appropriate on-site verification.

3. The department shall continue development and maintenance of statewide and regional quality improvement programs for trauma and disaster care in a manner consistent with the intent and provisions of sections twenty-eight hundred five-j, three thousand two-a and three thousand four-a of this chapter, incorporating quality improvement programs for all components of the trauma system involved in trauma care including, but not limited to fully integrated statewide and regionwide trauma registries, and the ways and means to support them.

4. The department shall develop and periodically revise a comprehensive emergency medical and trauma care plan with the advice of the state emergency medical services council, the state emergency medical advisory committee and the state trauma advisory committee, incorporating injury control programs and ongoing quality assurance measures for all components of the trauma system involved in trauma care.

5. The department shall develop and periodically revise medical and operational guidelines for a fully integrated statewide transport system, with the advice of the state emergency medical services council, the state emergency medical advisory committee and the state trauma advisory committee subject to approval by the commissioner, and shall develop and maintain a statewide system for coordination of interfacility transfers.

6. The department shall develop and periodically revise medical and operational guidelines for a fully integrated statewide medical disaster preparedness response, with the advice of the state emergency medical services council, the state emergency medical advisory committee, and the state trauma advisory committee, subject to approval by the commissioner, and shall develop and maintain a statewide system for coordination of medical disaster preparedness and trauma system planning.

7. The department shall facilitate the coordination and implementation of regional emergency medical system, trauma system, and medical disaster preparedness response plans, with the advice of the regional emergency medical services councils, the regional emergency medical advisory committees, and the regional trauma advisory committees, and shall promote full interoperability of all response and communications systems.

HISTORY:
Add, L 2005, ch 449, § 1, eff Aug 9, 2005; L 2014, ch 348, § 1, effective September 4, 2014.

Amendment Notes The 2014 amendment by ch 348, § 1 added "and ongoing quality assurance measures" in 4.

ARTICLE 30-C Emergency Medical Services for Children

Section

3070. Short title
3071. Declaration of purpose
3072. Description
3073. Definitions
3074. State emergency medical services for children advisory committee
3075. Powers and duties of the department

HISTORY:
Add, L 2006, ch 614, § 1, eff Aug 16, 2006.

§ 3070. Short title

This act shall be known and may be cited as the "emergency medical services for children act".

HISTORY:
Add, L 2006, ch 614, § 1, eff Aug 16, 2006.

§ 3071. Declaration of purpose

Sudden illness and injury in children within the state of New York are responsible for five percent of all ambulance calls in children under ten years of age, ten percent of all ambulance calls in children under eighteen years of age, twenty-five percent of emergency department visits in urban areas, and forty percent of emergency department visits in rural areas. More than fifty percent of all such emergencies are caused by traumatic injuries, which alone are responsible for more than half of all childhood deaths within the state of New York regardless of cause. The provision of timely and effective emergency medical services for children, including pediatric emergency medical, trauma, and disaster care, are therefore public health priorities of the highest order. It is the purpose and intent of this article to ensure that such services are immediately available to all children within the state of New York.

HISTORY:
Add, L 2006, ch 614, § 1, eff Aug 16, 2006.

§ 3072. Description

Emergency medical services for children is a system for the immediate recognition and management of sudden illness and injury in children that embraces the continuum of pediatric emergency medical, trauma, and disaster care, from prevention through rehabilitation, and addresses emergency medical dispatch, prehospital emergency care, in-hospital emergency care, and primary, secondary, and tertiary health care, in support of pediatric care provided within the child's medical home. It is not separate from, but fully integrated with, the emergency medical services system at all levels of emergency medical services system organization, in the community, in the region, and in the state.

HISTORY:
Add, L 2006, ch 614, § 1, eff Aug 16, 2006.

§ 3073. Definitions

As used in this article:

1. "State emergency medical services for children advisory committee" means the state emergency medical services for children advisory committee continued under this article.

2. "State emergency medical services council" means the state emergency medical services council established under article thirty of this chapter.

3. "State emergency medical advisory committee" means the state emergency medical advisory committee established under article thirty of this chapter.

4. "State trauma advisory committee" means the state trauma advisory committee continued under article thirty-B of this chapter.

5. "Pediatric care" means medical care provided to neonates, infants, toddlers, preschoolers, school agers, and adolescents.

6. "Medical home" means an organized system of medical care for an individual patient that embraces all of the patient's potential medical needs, including primary, secondary, and tertiary health care as well as emergency care.

HISTORY:
Add, L 2006, ch 614, § 1, eff Aug 16, 2006.

§ 3074. State emergency medical services for children advisory committee

1. There is hereby continued in the department the state emergency medical services for children advisory committee. It shall consist of child health professionals and child health advocates representative of all geographic areas of the state and of those occupations regularly involved in the care of children with emergency health care needs. Its members shall include, but not necessarily be limited to, a pediatric emergency medicine physician and nurse, a pediatric critical care physician and nurse, a pediatric surgeon, a pediatric physiatrist, a pediatric primary care physician, an emergency medicine physician, a pediatric emergency medical services physician, a pediatric toxicologist physician, a prehospital care provider, a school nurse, a hospital administrator, the parent of a previously ill or injured child, and the parent of a child with special health care needs, appointed by the commis-

sioner upon recommendation of the appropriate statewide professional or parental organizations for terms of four years, which may be renewed. It shall advise the department, the commissioner, the state emergency medical services council, the state emergency medical advisory committee, and the state trauma advisory committee regarding all aspects of emergency medical services for children, including, but not necessarily limited to, pediatric emergency medical, trauma, and disaster care, and the early care of maltreated children and children with special health care needs. The state emergency medical services director, the state emergency medical services medical director, the state emergency medical services for children program director, the state emergency medical services for children program coordinator, the state trauma medical director, the state trauma program manager, the governor's highway traffic safety administrator, and the state emergency medical services for children data manager, shall also serve as nonvoting members ex officio. The commissioner shall appoint a physician to chair the committee.

2. The state emergency medical services for children advisory committee shall meet as frequently as its business may require, but ordinarily no less than quarterly. The members of the state emergency medical services for children advisory committee shall receive no compensation for their services as members, but each shall be allowed the necessary and actual expenses incurred in the performance of his or her duties under this section.

3. The commissioner shall designate an officer or employee of the department to assist the state emergency medical services for children advisory committee in the performance of its duties under this section, to coordinate the activities of the state emergency medical services for children program and to facilitate communication with the state emergency medical services council, the state emergency medical advisory committee, and the state trauma advisory committee.

4. In no event shall any member, officer, or employee of the state emergency medical services for children advisory committee be liable for damages in any civil action for any act done, failure to act, or statement or opinion made, while discharging his or her duties as a member, officer, or employee of the state emergency medical services for children advisory committee if he or she shall have acted in good faith, with reasonable care.

HISTORY:
Add, L 2006, ch 614, § 1, eff Aug 16, 2006.

§ 3075. Powers and duties of the department

1. The department shall develop and maintain, with the advice of the state emergency medical services for children advisory committee, the state emergency medical services council, the state emergency medical advisory committee, and the state trauma advisory committee, a statewide system for recognition of facilities able to provide sustentative or definitive specialty pediatric emergency medical and trauma care for sudden childhood illness and injury and for preferential transport of suddenly ill or injured children to such facilities, and shall promote the use of such facilities in accordance with written protocols or transfer agreements as appropriate.

2. The department shall develop and maintain, with the advice of the state emergency medical services for children advisory committee, the state emergency medical services council, the state emergency medical advisory committee, and the state trauma advisory committee, a statewide system for provision of prehospital medical oversight, including direct and indirect medical control, for pediatric emergencies.

3. The department shall develop, maintain, and offer, with the advice of the state emergency medical services for children advisory committee, the state emergency medical services council, the state emergency medical advisory committee, and the state trauma advisory committee, statewide educational programs for initial and continuing education in pediatric prehospital basic and advanced life support, including child maltreatment recognition and management, consistent with those of national professional organizations concerned with child health and emergency care.

4. The department shall develop, maintain, and adopt, with the advice of the state emergency medical services for children advisory committee, the state emergency medical services council, the state emergency medical advisory committee, and the state trauma advisory committee, statewide equipment guidelines for basic and advanced life support of pediatric emergencies, consistent with those of national professional organizations concerned with child health and emergency care.

5. The department shall ensure that all other aspects of emergency medical services for children are also properly integrated with all other emergency medical services, trauma care, and disaster preparedness programs, with the advice of the state emergency medical services for children advisory committee, and shall facilitate timely communication among the state emergency medical services for children advisory committee, the state emergency medical services council, the state emergency medical advisory committee, and the state trauma advisory committee as appropriate.

HISTORY:
Add, L 2006, ch 614, § 1, eff Aug 16, 2006.

PUBLIC HOUSING LAW

Article
I. Short Title; Policy of State and Purpose of Chapter; Definitions
V. Municipal Aid

HISTORY:
Add, L 1939, ch 808, eff July 1, 1939.

ARTICLE I Short Title; Policy of State and Purpose of Chapter; Definitions

Section
3. Definitions

HISTORY:
Add, L 1939, ch 808, eff July 1, 1939.

§ 3. Definitions

The following terms, whenever used or referred to in this chapter, shall have the following meaning, unless a different meaning clearly appears from the context:

1. The term "commissioner" means the state commissioner of housing and community renewal. Reference in this chapter or in any other general, special or local law to state commissioner of housing shall be deemed to mean and refer to the state commissioner of housing and community renewal which is hereby made the new title of such office.

2. The term "authority" means a public corporation which is a corporate governmental agency (except a county or municipal corporation) organized pursuant to law to accomplish any or all of the purposes specified in article eighteen of the constitution and includes the following municipal housing authorities established prior to the first day of January, nineteen hundred thirty-nine pursuant to chapter four of the laws of nineteen hundred thirty-four* and amendments thereof, namely, Buffalo municipal housing authority, Lackawanna municipal housing authority, New York city housing authority, Peekskill housing authority, Port Jervis housing authority, Schenectady municipal housing authority, Syracuse municipal housing authority, Tarrytown municipal housing authority, Tuckahoe housing authority, municipal housing authority of the city of Utica, New York, and Yonkers housing authority.

3. The term "housing company" means a limited profit or limited dividend housing corporation organized pursuant to articles two or four of the private housing finance law.

4. The term "multiple dwelling" means an existing building accommodating three or more families living independently of each other.

5. The terms "municipal corporation" and "municipality" mean a city, town or village; and the term "municipal" shall be deemed to relate to a city, town or village.

6. The term "mayor" means the chief executive officer of a municipality.

7. The term "local legislative body" means: (a) in a city, the board of aldermen, common council, council, commission or other board or body now or hereafter vested by its charter or other law with jurisdiction to enact ordinances or local laws, except that in a city having a population of one million or more the term shall, as to such city, mean the officer or agency vested with power under the charter of such city, or by other law, to act pursuant to this chapter; (b) in a town, the town board; (c) in a village, the board of trustees.

7-a. The term "governing body of a district" means: (a) in a school district, the board of education or board of trustees; in the case of common school districts having one trustee, such trustee; (b) in a fire alarm district or a fire protection district, the town board; (c) in a fire district, the board of fire district commissioners; (d) in an improvement district, the town board, except that if there be a separate board of commissioners, the term shall mean the town board acting with the approval of the board of commissioners.

8. The term "state comptroller" means the comptroller of the state of New York.

9. The term "municipal comptroller" means the comptroller in a municipality having a comptroller; in a municipality having no comptroller, it means the chief financial officer of such municipality.

10. The term "state" means New York state.

11. The term "government" includes the state, a municipality and the federal government, and any agency or instrumentality, corporate or otherwise, of any of them acting for and on behalf of the state, a municipality or the federal government.

12. The term "area" means a section of the municipality wherein the commissioner or an authority or a municipality finds that insanitary or substandard housing conditions exist. An area may include land whether improved or unimproved, and buildings or improvements not in themselves insanitary or substandard, the inclusion of which is deemed necessary by the authority or the municipality or the commissioner, or for projects of housing companies by the commissioner, for the effective clearance, replanning, reconstruction or rehabilitation of the area of which such land or property is a part.

13. The term "plan" means a plan or undertaking for the clearance, replanning and reconstruction or rehabilitation of a substandard and insanitary area or areas and for recreational and other facilities incidental or appurtenant thereto to effectuate the purposes of article eighteen of the constitution or any other provision of the constitution delegating

*Repealed, Laws 1939, ch 808, § 227.

any similar power or providing homes for persons of low income.

14. The term "project" means a specific work or improvement to effectuate all or any part of a plan. The term shall include the lands, buildings or any dwelling units therein, and improvements acquired, owned, constructed, managed or operated hereunder, to provide dwelling accommodations for persons of low income, and such stores, offices and other non-housing facilities as well as social, recreational or communal facilities, as may be deemed by the authority or municipality to be incidental or appurtenant to a project. Subject to the provisions of article eighteen of the constitution with respect to state projects, such dwelling accommodations may be provided in any section of the municipality, whether or not such section has insanitary or substandard housing conditions. A project may be a federal project, a state project, a municipal project or, subject to the limitations contained in section seventy-five of this chapter, any combination of these.

15. The term "federal project" means a project aided or financed in whole or in part, by the federal government.

16. The term "state project" means a project aided or financed in whole or in part by the state and not by the federal government, except as may be provided in section seventy-five of this chapter.

17. The term "municipal project" means a project other than a state project or a federal project.

18. The terms "persons of low income" and "families of low income" mean persons or families who are in the low income groups and who cannot afford to pay enough to cause private enterprise in their municipality to build a sufficient supply of adequate, safe and sanitary dwellings.

19. The term "mortgage" means mortgages, deeds of trust, building and loan contracts or other instruments creating a lien.

20. The terms "real property" or "property" shall include lands and improvements, lands under water, waterfront property, the water of any lake, pond or stream, and any and all easements, franchises and hereditaments, corporeal or incorporeal, and every estate, interest and right therein, legal and equitable, in lands or water, and right, interest, privilege, easement and franchise relating to the same, including terms for years and liens by way of judgment, mortgage or otherwise.

21. The term "obligee" shall include any bondholder, trustee or trustees for any bondholders or any lessor demising property to an authority or municipality used in connection with a project or an assignee or assignees of such lessor's interest, and a government, which is a party to any contract with the authority or municipality.

22. The term "going state rate of interest" means, at any time, the annual rate of interest specified in the bonds of the state issued to provide funds for a loan to effectuate the provisions of this chapter, and if no such bonds have been issued, then the term means an annual interest rate of two and one-half per centum.

23. The term "low rent housing" means dwellings within the financial reach of families of low income and embraces recreational and other facilities incidental and appurtenant thereto.

24. The term "project cost" means the cost of any or all undertakings necessary for planning, financing (including payment of carrying charges), land acquisition, demolition, construction, equipment, and site development of new buildings, reconstruction, rehabilitation, repair or remodeling of existing buildings, but, except as to existing housing company projects, or parts thereof, sold, leased or otherwise conveyed to an authority, not beyond the point of physical completion, and the cost of tenant placement service in connection with a project. In the case of new construction, the "project cost" shall be sufficient to encourage excellence of architectural design, variety and interest in building materials, and aesthetic objectives compatible with prudent budgeting. Where a housing company project, or a part thereof, is purchased by, leased or otherwise conveyed to an authority, the term "project cost" may include the cost of such purchase, lease or other conveyance as determined and certified by the commissioner.

25. The term "condemnation" means the acquisition of real property in the manner provided by the eminent domain procedure law by the municipality in which the real property is to be taken.

26. The term "planning commission" means any agency of a municipality authorized to prepare, adopt or amend the map of the municipality or empowered to prepare and adopt and from time to time modify a comprehensive or master plan of the municipality.

27. The term "tenant services" shall include but not be limited to counseling on household management, housekeeping, budgeting, money management, child care, and similar matters or services which are directly related to meeting tenant needs and providing a wholesome living environment; and referral to appropriate agencies when necessary for the provision of such services.

HISTORY:

Add, L 1939, ch 808, eff July 1, 1939; amd, L 1940, ch 148, § 1; L 1940, ch 444, § 1, eff April 13, 1940; L 1941, ch 294, § 1; L 1942, ch 620, § 1, eff May 3, 1942; L 1956, ch 830, § 1, eff April 19, 1956; L 1960, ch 668, § 3; L 1961, ch 398, § 1, eff April 11, 1961; L 1961, ch 804, § 2, eff March 1, 1962, with substance transferred to CLS Priv Hous Fin § 2, sub 22; L 1964, ch 428, § 5, eff April 10, 1964; L 1964, ch 576, § 72, eff April 16, 1964; L 1968, ch 147, eff April 8, 1968; L 1970, ch 220, eff Sept 1, 1970; L 1977, ch 840, § 73, eff July 1, 1978 (see 1978 note below).

Revision Notes: See 1961 notes under §§ 2 and 10.

Editor's Notes: Laws 1977, ch 841, eff July 1, 1978, amended L 1977, ch 840, § 73, so as to change the effective date of the amendment of sub 25 from Jan 1, 1978 to July 1, 1978.

Notes to Decisions

Analysis

1. In general
2. Project, project costs, and debt limit
3. Status of housing authority
4. Appointment of members of housing authority
5. Status of employees of housing authority
6. Income of tenants, low-cost housing
7. Local appropriations and taxes

1. In general

It is constitutional for the legislature to define such terms as "sanitary dwellings," "persons of low income" and "low rent housing," in general terms, and to leave their application to local authorities. Davidson v Elmira, 44 N.Y.S.2d 302, 180 Misc. 1052, 1943 N.Y. Misc. LEXIS 2433 (N.Y. Sup. Ct.), aff'd, 267 A.D. 797, 46 N.Y.S.2d 655, 1943 N.Y. App. Div. LEXIS 6261 (N.Y. App. Div. 1943).

The intention of the legislature as indicated by this and other sections was to place all authority in housing matters for the city of New York in the hands of the board of estimate and city planning commission. Neufeld v O'Dwyer, 79 N.Y.S.2d 53, 192 Misc. 538, 1948 N.Y. Misc. LEXIS 2361 (N.Y. Sup. Ct. 1948).

2. Project, project costs, and debt limit

The term "project" in the Public Housing Law is to be interpreted broadly. Margulis v Lindsay, 31 N.Y.2d 167, 335 N.Y.S.2d 285, 286 N.E.2d 724, 1972 N.Y. LEXIS 1130 (N.Y. 1972).

The phrase "facilities . . . incidental or appurtenant to a project" may not be held to exclude in every case and in all circumstances a public school, so that the city may never resort to the 2 per cent housing debt limit in financing its cost. Diehl v O'Dwyer, 84 N.Y.S.2d 109, 193 Misc. 1032, 1948 N.Y. Misc. LEXIS 3514 (N.Y. Sup. Ct. 1948).

Whether a particular public school is a facility incidental to a housing project, so that its cost may be charged to the special debt limit for housing projects, is a question involving many factual issues and cannot be answered on a motion for summary judgment. Diehl v O'Dwyer, 84 N.Y.S.2d 109, 193 Misc. 1032, 1948 N.Y. Misc. LEXIS 3514 (N.Y. Sup. Ct. 1948).

Resident of middle-income housing developed under N.Y. Priv. Hous. Fin. Law art. 2 was entitled to disclosure of apartment waiting lists under N.Y. Pub. Off. Law §§ 87 and 89 by a city housing department. Under N.Y. Pub. Hous. Law § 3(14), the exemptions of N.Y. Pub. Hous. Law § 159 applied only to public housing projects; disclosure would not constitute an unwarranted invasion of privacy because income information was not included in the lists and was not the type of personal information expressly excluded under N.Y. Pub. Off. Law § 89(2)(b); and New York City, N.Y., R. tit. 28, § 3-02(h)(10) expressly required that such lists be made available. Matter of Thomas v City of N.Y. Dept. of Hous. Preserv. & Dev., 817 N.Y.S.2d 864, 12 Misc. 3d 547, 235 N.Y.L.J. 81, 2006 N.Y. Misc. LEXIS 783 (N.Y. Sup. Ct. 2006).

3. Status of housing authority

The New York City Housing Authority, organized under the Municipal Housing Authorities Law, L 1934, ch 4, comprising §§ 60 to 78 inclusive, is a public corporation and as such is not subject to examination before trial. Smith v Citizens Sav. Bank, 2 N.Y.S.2d 213, 166 Misc. 843, 1938 N.Y. Misc. LEXIS 1271 (N.Y. Sup. Ct. 1938).

A municipal housing authority is not a public corporation as defined in the general corporation law, and accordingly chapter 694 of the laws of 1945, providing for correction of defects in notices of claims before trial, does not apply to such authorities. Kaufman v New York City Housing Authority, 67 N.Y.S.2d 174, 188 Misc. 877, 1946 N.Y. Misc. LEXIS 3473 (N.Y. Sup. Ct. 1946), aff'd, 272 A.D. 829, 70 N.Y.S.2d 329, 1947 N.Y. App. Div. LEXIS 3824 (N.Y. App. Div. 1947).

The Municipal Housing Authority of the City of Utica is not an integral part of the municipal corporation known as the City of Utica, but rather is a public corporation with an independent corporate entity authorized by the legislature to conduct its affairs in the manner prescribed by this chapter, and accordingly a taxpayer's action will not lie against officers acting on behalf of the state, the State Housing Commissioner or the Municipal Housing Authority of the City of Utica, under § 51 of the General Municipal Law. Borek v Golder, 74 N.Y.S.2d 675, 190 Misc. 366, 1947 N.Y. Misc. LEXIS 3299 (N.Y. Sup. Ct. 1947).

The New York City Housing Authority is a public corporation within the purview of § 50-e of the General Municipal Law. Valente v New York City Housing Authority, 109 N.Y.S.2d 883, 201 Misc. 24, 1951 N.Y. Misc. LEXIS 2759 (N.Y. Sup. Ct. 1951).

4. Appointment of members of housing authority

In cities having a city manager form of government the city manager is the chief executive officer of the city with power to appoint members of the municipal housing authority. Schlobohm v Municipal Housing Authority, 270 A.D. 1022, 62 N.Y.S.2d 541, 1946 N.Y. App. Div. LEXIS 5176 (N.Y. App. Div. 1946), aff'd, 297 N.Y. 911, 79 N.E.2d 742, 297 N.Y. (N.Y.S.) 911, 1948 N.Y. LEXIS 1003 (N.Y. 1948).

5. Status of employees of housing authority

Although a public housing authority is stated to be an agent or instrumentality of the state under § 2 of the Public Housing Law, and under § 51 of such law may act as agent of the municipality in which it was established, such an authority is not an instrumentality of the state in the sense that its employees may be examined before trial as employees of the state, but is a public corporation having a distinct entity under art 18 § 2 of the Constitution and § 3 sub 2 of the Public Housing Law, as shown by an analysis of various of the sections of the Public Housing Law. Ciulla v State, 77 N.Y.S.2d 545, 191 Misc. 528, 1948 N.Y. Misc. LEXIS 2164 (N.Y. Ct. Cl. 1948).

6. Income of tenants, low-cost housing

It is not necessary that public housing be designed for the very lowest income group for it to come within the authorization of this section. Neufeld v O'Dwyer, 79 N.Y.S.2d 53, 192 Misc. 538, 1948 N.Y. Misc. LEXIS 2361 (N.Y. Sup. Ct. 1948).

A proposed housing project which would provide dwellings for families with incomes up to $4,500 per year at a rental of $12.50 per room may be low rent housing within the meaning of this section if persons earning such a sum cannot afford to pay sufficient rent to cause private industry to build enough adequate dwellings to accommodate them. Neufeld v O'Dwyer, 79 N.Y.S.2d 53, 192 Misc. 538, 1948 N.Y. Misc. LEXIS 2361 (N.Y. Sup. Ct. 1948).

The fact that the rents contemplated in a public housing project are equal to or in excess of those currently charged in privately owned dwellings of similar quality does not prevent such a project from coming within the definition of low-cost housing within the meaning of this section if such rents are too low to cause private enterprise to provide an adequate supply of satisfactory rental units at such rates. Neufeld v O'Dwyer, 79 N.Y.S.2d 53, 192 Misc. 538, 1948 N.Y. Misc. LEXIS 2361 (N.Y. Sup. Ct. 1948).

It should be noted that the New York Constitution and Public Housing Law refer to "low income" persons as beneficiaries of such projects whereas the Federal Statute refers to persons of "lowest income," thus giving rise to a marked distinction in objective. Chelcy v Buffalo Municipal Housing Authority, 24 Misc. 2d 598, 206 N.Y.S.2d 158, 1960 N.Y. Misc. LEXIS 2300 (N.Y. Sup. Ct. 1960).

Standards of income and rent vary in different communities, in peace and war times, and leaving application of the general definitions in the Public Housing Law to the local authority is constitutional. Chelcy v Buffalo Municipal Housing Authority, 24 Misc. 2d 598, 206 N.Y.S.2d 158, 1960 N.Y. Misc. LEXIS 2300 (N.Y. Sup. Ct. 1960).

7. Local appropriations and taxes

Municipal Housing Authority was subject to the levy of Westchester County sanitary sewer taxes in view of the fact that the state legislature, in enacting the Westchester County Sanitary Sewer Law specifically made all properties, other than those specifically exempted by the said statute, subject to the sewer tax. New Rochelle Municipal Housing Authority v New Rochelle, 53 Misc. 2d 1059, 280 N.Y.S.2d 604, 1967 N.Y. Misc. LEXIS 1521 (N.Y. Sup. Ct. 1967).

The town of North Hempstead may turn over to the North Hempstead Housing Authority, in a lump sum, an amount not to exceed $10,000, appropriated by it for such Authority pursuant to Public Authorities Law, section 1275. 1946 Ops St Compt 295.

Agency Opinions

Analysis

1. In general
2. Project, project costs, and debt limit
3. Status of housing authority
4. Appointment of members of housing authority
5. Status of employees of housing authority

1. In general

The provisions of General Construction Law § 41 are applicable to the Rochester Housing Authority. 1978 NY Ops Atty Gen Oct 27.

2. Project, project costs, and debt limit

By authority of subd 25 of this section, and N. Y. Const., Art. VII, § 12, interest charges during the construction of a housing project may reasonably be included in the project cost and paid out of the proceeds of loans for the said construction period, "but not beyond the point of physical completion." 1940 NY Ops Atty Gen April 2.

In evaluating property included in a state project for the purpose of estimating the amount of the subsidy granted to the municipality in meeting its subsidy obligations pursuant to § 73, by way of tax exemption it is not proper to include offsite property which is ceded to the municipality, although it continues to serve the project purpose and is incidental thereto. The maximum assessment of property "included in a project" (§ 52, subd. 4) by a municipality is measured by the "actual cost of the project" which is construed as synonymous with entire cost of project. 1944 NY Ops Atty Gen Dec. 11.

3. Status of housing authority

The Municipal Housing Authority of Utica, New York is a public entity. 1972 NY Ops Atty Gen Sept. 11 (informal).

Municipal Housing Authorities are public benefit corporations, and as such are required to procure suitable products from qualified and approved charitable non-profit-making agencies for the blind and other severely handicapped whenever such products are available. 1978 NY Ops Atty Gen Nov 9 (Informal), 1978 N.Y. AG LEXIS 21.

Suffolk County is not authorized under New York State Law to actively engage in the development or operation of low-income housing and, therefore, may not act as a "public housing agency" under the Federal Housing and Community Development Act of 1974. 1978 NY Ops Atty Gen May 12.

Municipal housing authorities in New York are subject to Freedom of Information Law since CLS Pub Hous § 3(2) states that municipal housing authorities are public corporations. Comm on Open Gov't FOIL-AO-12634.

4. Appointment of members of housing authority

A member appointed to a municipal housing authority who is a tenant in a project under a lease entered into with the authority prior to his appointment, with full disclosure by him of such lease given to the authority before his appointment, may continue as a member of the authority and a tenant in the project during the duration of the lease, provided there be no renewal of such lease. 1967 NY Ops Atty Gen May 18.

A common law conflict of interest would ensue if the same person at the same time served as an officer or employee and commissioner for a municipal housing authority. Pursuant to Public Housing Law, § 30(5), a tenant of the Buffalo Municipal Housing Authority, who is also an employee of said Authority, may lawfully seek the office of commissioner of said Authority and if successful may become a commissioner upon resigning his position of employment. 1978 NY Ops Atty Gen Feb 22 (Informal).

5. Status of employees of housing authority

Where the project adviser, clerk and auditor for projects are named and assigned to a project by the commissioner and subject to his directions, they are state employees, despite their salaries being payable by the city housing authority pursuant to a loan contract, but for purposes of workmen's compensation alone they are regarded as employees of the authority. 1941 NY Ops Atty Gen March 29.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS Gen City § 20; CLS Loc Fin § 2.00; CLS Priv Hous Fin §§ 2, 1021.

Definitions, CLS Loc Fin § 2.00.

Deductions for self-liquidating housing projects, CLS Loc Fin § 152.00.

Definitions, CLS Pub A §§ 351, 526, 551, 576, 652, 1299-bb, 1301, 1326, 1426, 1590-b, 1599-a, 1599-b, 1599-bb, 1599-bbb, 1972, 2016, 2302.

Limited-profit housing companies, CLS Priv Hous Fin, Art II, §§ 10 et seq.

Federal Aspects:

Fair Housing Act, 42 USCS §§ 3601 et seq.

Jurisprudences:

87 NY Jur 2d Public Debt Limitations § 62 .

87 NY Jur 2d Public Housing and Urban Renewal §§ 1-3, 14, 31 .

1 Am Jur Proof of Facts 2d 401, Blighted Area.

4 Am Jur Proof of Facts 649, Eminent Domain.

Annotations:

What constitutes "blighted area" within urban renewal and redevelopment statutes. 45 ALR3d 1096.

ARTICLE V Municipal Aid

Section

99. Municipal services
101. [Duty to provide police, fire and health protection services]

HISTORY:

Add, L 1939, ch 808, eff July 1, 1939.

§ 99. Municipal services

In connection with projects located within its respective territorial boundaries, a municipality, a school district, a fire alarm district, a fire district, a fire protection district, or an improvement district may, upon such terms, with or without consideration, as the local legislative body of such municipality or the governing body of such district may deem advisable, render or contract to render services to an authority, housing company or a government, or provide and maintain parks, sewerage, or other facilities adjacent to or in connection with a project. A municipality or a district hereinabove described may also render or contract to render such services and to provide such facilities in connection with projects located outside its respective territorial boundaries upon such terms and consideration as shall, in the determination of the local legislative body of such municipality or the governing body of such district, which determination shall be conclusive, compensate such municipality or district for the cost of furnishing such services and facilities. A municipality may enter into an agreement with an authority, housing company or a government, upon such terms as it shall determine, with or without compensation, to open, pave, install, close or change the grade of streets, roads, roadways, alleys, sidewalks, or other places, to change the municipal map,

to plan, replan, zone or rezone any section of the municipality. In connection with the exercise of this power a municipality may, if it deems advisable, incur the entire expense of any such public improvements located within its territorial boundaries without assessment against abutting property owners, or contract with an authority upon such terms, with or without consideration, as it may deem advisable, with respect to the exercise by the municipality or government of its powers relating to the repair, closing or demolition of unsafe, insanitary, or unfit dwellings, and with respect to aid and cooperation by the municipality or government in the planning, undertaking, construction or operation of projects.

HISTORY:

Add, L 1939, ch 808; amd, L 1940, ch 393, § 3; L 1942, ch 620, § 6, eff May 3, 1942.

Notes to Decisions

A city's contract to furnish municipal services such as fire, police and health protection, etc., is authorized as to all such services by this section and is not illegal or a waste of city money in the sense used in General Municipal Law, § 51. Borek v Golder, 74 N.Y.S.2d 675, 190 Misc. 366, 1947 N.Y. Misc. LEXIS 3299 (N.Y. Sup. Ct. 1947).

The undertaking by a city to widen certain streets without assessing a part of the cost of such improvement upon the property owners is not illegal, in view of this section. Borek v Golder, 74 N.Y.S.2d 675, 190 Misc. 366, 1947 N.Y. Misc. LEXIS 3299 (N.Y. Sup. Ct. 1947).

This section grants authority to amend an original contract for a housing project under this chapter. Borek v Golder, 74 N.Y.S.2d 675, 190 Misc. 366, 1947 N.Y. Misc. LEXIS 3299 (N.Y. Sup. Ct. 1947).

A city is authorized under this section to donate sewage, drainage, sanitation, and other services and facilities to a housing project within its boundaries. Neufeld v O'Dwyer, 79 N.Y.S.2d 53, 192 Misc. 538, 1948 N.Y. Misc. LEXIS 2361 (N.Y. Sup. Ct. 1948).

Where land abutting on an existing street is condemned, cutting off the remainder of the parcel from access to the highway, the burden of the expense of new roads affording access to the cut off property will fall either on the city at large or on the municipal housing authority and the city may agree to accept such expenses. George F. Weaver Sons Co. v Utica, 92 N.Y.S.2d 372, 196 Misc. 634, 1949 N.Y. Misc. LEXIS 2832 (N.Y. Sup. Ct. 1949).

An undertaking by a city to zone the area within which a housing project is to be located and to "endeavor to maintain such zoning without variance," does not preclude the city from granting a variance with respect to use of nearby property in accordance with the regular provisions of its zoning laws with respect to variances. New York City Housing Authority v Foley, 32 Misc. 2d 41, 223 N.Y.S.2d 621, 1961 N.Y. Misc. LEXIS 1877 (N.Y. Sup. Ct. 1961).

Legislative power to give a municipality authority to enter into an agreement for zoning or rezoning any section of the municipality in connection with a proposed housing development exists in Art. XVIII, §§ 1 and 10 of the Constitution. Chase v Glen Cove, 34 Misc. 2d 810, 227 N.Y.S.2d 131, 1962 N.Y. Misc. LEXIS 3588 (N.Y. Sup. Ct. 1962).

The authority conferred by this section to enter into a zoning agreement with a municipality in connection with a proposed housing project does not preclude scrutiny of the proposed zoning change under § 155 as to conformity with the General City Law. Chase v Glen Cove, 34 Misc. 2d 810, 227 N.Y.S.2d 131, 1962 N.Y. Misc. LEXIS 3588 (N.Y. Sup. Ct. 1962).

Municipal housing authority may provide its employees with health and dental benefits, but such authority may not do so jointly with municipality for which authority was established. Ops St Compt 88-64.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 219-d.

Jurisprudences:

87 NY Jur 2d Public Housing and Urban Renewal §§ 56, 63, 65 .

9B Am Jur Legal Forms 2d, Housing Laws and Urban Redevelopment, Forms 138:2–138:7.

Annotations:

Relief under Federal Civil Rights Act of 1871 (42 USCS § 1983) against denial of building permit or zoning change for privately sponsored low- or moderate-income housing projects, on grounds of racial discrimination. 12 ALR Fed 964.

§ 101. [Duty to provide police, fire and health protection services]*

Notwithstanding any local or special law or charter provision, a municipality shall, irrespective of the boundaries of a project, provide for the tenants of such project, police, fire and health protection services of the same character and to the same extent as those provided for other residents of the municipality.

HISTORY:

Add, L 1963, ch 878, § 1, eff April 26, 1963, applicable to all projects heretofore or hereafter constructed within the territorial boundaries of the municipality.

Prior Law: Former § 101, add, L 1939, ch 808; repealed, L 1943, ch 712, § 3.

Agency Opinions

While under its general powers the Village of Nyack Housing Authority may invoke speed, fire zone and parking regulations on streets under its jurisdiction within a housing project, such rules and regulations not having been invoked by the Village of Nyack may not be enforced by the police of such Village. 1974 NY Ops Atty Gen Nov. 25.

*The bracketed section heading has been supplied by the Publisher.

PUBLIC OFFICERS LAW

Article
1. Short Title; Definitions
2. Appointment and Qualification of Public Officers
3. Creation and Filling of Vacancies
6. Freedom of Information Law
6-A. Personal Privacy Protection Law
7. Open Meetings Law

HISTORY:
Add, L 1909, ch 51, eff Feb 17, 1909.

ARTICLE 1 Short Title; Definitions

Section
2. Definitions

HISTORY:
Add, L 1909, ch 51, eff Feb 17, 1909.

§ 2. Definitions

The term "state officer" includes every officer for whom all the electors of the state are entitled to vote, members of the legislature, justices of the supreme court, regents of the university, and every officer, appointed by one or more state officers, or by the legislature, and authorized to exercise his official functions throughout the entire state, or without limitation to any political subdivision of the state, except United States senators, members of congress, and electors for president and vice-president of the United States. The term "local officer" includes every other officer who is elected by the electors of a portion only of the state, every officer of a political subdivision or municipal corporation of the state, and every officer limited in the execution of his official functions to a portion only of the state. The office of a state officer is a state office. The office of a local officer is a local office.

HISTORY:
Add, L 1909, ch 51 eff Feb 17, 1909.

Notes to Decisions

Analysis

1. In general
2. Who are public officers, generally
3. —Persons holding school or educational positions
4. —Other particular positions; public officer
5. —Other particular positions; not public officer
6. State officers
7. Local officers
8. —Police officers, sheriffs, and deputy sheriffs
9. —Judges and court personnel
10. —County or city officers
11. —Town or village officers
12. District attorney or assistants as state or local officers
13. —State liability
14. —Compensation

1. In general

The State is not liable for the negligence of an employee of a city civil service commission in giving a test for the position of policeman. Sofka v State, 115 N.Y.S.2d 421, 202 Misc. 235, 1952 N.Y. Misc. LEXIS 1689 (N.Y. Ct. Cl. 1952).

The State is not liable for errors of a judicial officer, and hence the State is not liable, following the setting aside of a felony conviction for error of the judge in not informing the defendant of his right to counsel, in damages for the period of imprisonment endured before the conviction was vacated. Cole v State, 19 Misc. 2d 589, 196 N.Y.S.2d 775, 1959 N.Y. Misc. LEXIS 3192 (N.Y. Ct. Cl. 1959).

2. Who are public officers, generally

The indicia of a public officer, as opposed to an employee, are to be found in the nature of the office, the functions and duties performed, and the tenure of the occupant. Haller v Carlson, 42 A.D.2d 829, 346 N.Y.S.2d 108, 1973 N.Y. App. Div. LEXIS 3884 (N.Y. App. Div. 4th Dep't 1973).

3. —Persons holding school or educational positions

Community superintendent of school district was "public officer" since (1) superintendent's position was referred to in both Education Law and in his contract of employment as chief executive officer of community school board and educational system (CLS Educ §§ 2590-f and 2566), (2) although he was employed pursuant to contract, superintendent's position was created, and his powers and duties prescribed, by statute (CLS Educ §§ 2590-e and 2590-f), and (3) superintendent was vested with certain powers which he could exercise without school board's approval. Petrella v Siegel, 136 A.D.2d 81, 526 N.Y.S.2d 137, 1988 N.Y. App. Div. LEXIS 3120 (N.Y. App. Div. 2d Dep't), aff'd, 73 N.Y.2d 846, 537 N.Y.S.2d 124, 534 N.E.2d 41, 1988 N.Y. LEXIS 3534 (N.Y. 1988).

Since members and officers of local boards of education are public officers within the definition of this section, and parents have an obvious interest in the school records of their children, in the absence of statute or regulation to the contrary a parent has the right, as matter of law, to inspect school records concerning his child. Van Allen v McCleary, 27 Misc. 2d 81, 211 N.Y.S.2d 501, 1961 N.Y. Misc. LEXIS 3539 (N.Y. Sup. Ct. 1961).

Elected members of school board are public officers within the meaning of Public Officers Law § 2. Komyathy v Board of Education, 75 Misc. 2d 859, 348 N.Y.S.2d 28, 1973 N.Y. Misc. LEXIS 1387 (N.Y. Sup. Ct. 1973).

School superintendents should, as matter of sound public policy, take and file timely oaths subsequent to each appointment, inasmuch as other school personnel in positions of responsibility are required by statute to do so. 1999 Op Comm Ed No. 14,185.

The director of elementary school education of a school district is not the incumbent of a public office. 1968 Ops St Compt File #291.

4. —Other particular positions; public officer

The park commissioner of a city is a public officer. People ex rel. Sherwood v Board of State Canvassers, 129 N.Y. 360, 29 N.E. 345, 129 N.Y. (N.Y.S.) 360, 1891 N.Y. LEXIS 1174 (N.Y. 1891).

A notary public is a public officer within the meaning of the constitutional prohibition against accepting free transportation. People v Rathbone, 145 N.Y. 434, 40 N.E. 395, 145 N.Y. (N.Y.S.) 434, 1895 N.Y. LEXIS 832 (N.Y. 1895).

An assistant building inspector who possesses the same powers as a building inspector is a public officer. Winkler v Moore, 110 Misc. 2d 785, 442 N.Y.S.2d 937, 1981 N.Y. Misc. LEXIS 3160 (N.Y. Sup. Ct. 1981).

Taxpayers properly asserted claims against Town Trustees for misuse and waste of public funds since the Trustees were a public governmental agency and public officers of the Town which were not financially independent from the Town and the Town Board, and were in the financial position of an administrative unit of the Town. Gessin v Throne-Holst, 979 N.Y.S.2d 776, 43 Misc. 3d 517, 2014 N.Y. Misc. LEXIS 518 (N.Y. Sup. Ct. 2014), rev'd, in part, dismissed, 134 A.D.3d 31, 20 N.Y.S.3d 367, 2015 N.Y. App. Div. LEXIS 6799 (N.Y. App. Div. 2d Dep't 2015).

5. —Other particular positions; not public officer

Comptroller correctly determined that individuals, who held respective positions of automobile facilities inspector, motor ve-

hicle inspector and motor vehicle license examiner with Department of Motor Vehicles, and senior right-of-way agent with Department of Transportation, were merely public employees and not public officers since (1) there was no showing that their positions were created or their duties and responsibilities were prescribed by statute, (2) there was nothing to suggest that positions were other than administratively created and graded within competitive civil service class by employing state agency and Civil Service Commission under purely permissive general statutory authority, and (3) positions were subordinate in hierarchy of agencies in which they were created and individuals were always subject to direct and immediate supervision of superiors; thus, determination disallowing reimbursement under CLS NY Const Art XIII § 13 for expenses incurred in prosecuting those individuals for bribery was proper and should have been upheld. County of Suffolk v State, 138 A.D.2d 815, 525 N.Y.S.2d 923, 1988 N.Y. App. Div. LEXIS 2412 (N.Y. App. Div. 3d Dep't), aff'd, 73 N.Y.2d 838, 537 N.Y.S.2d 482, 534 N.E.2d 320, 1988 N.Y. LEXIS 3544 (N.Y. 1988).

Appointees of the Superintendent of Public Buildings are employees and not public officers. In re Ostrander, 34 N.Y.S. 295, 12 Misc. 476, 1895 N.Y. Misc. LEXIS 444 (N.Y. Sup. Ct.), aff'd, 146 N.Y. 404, 42 N.E. 543, 146 N.Y. (N.Y.S.) 404, 1895 N.Y. LEXIS 726 (N.Y. 1895).

A receiver is not a public officer within the meaning of this law. Mechanics Lumber Co. v Cohen, 18 N.Y.S.2d 547, 173 Misc. 605, 1940 N.Y. Misc. LEXIS 1532 (N.Y. App. Term), aff'd, 260 A.D. 863, 23 N.Y.S.2d 557, 1940 N.Y. App. Div. LEXIS 5107 (N.Y. App. Div. 1940).

The chief engineer of a fire department is not a public officer within the meaning of § 2 but is an employee and § 36 has no application in respect of his removal from office. Application of Barber, 100 N.Y.S.2d 668, 198 Misc. 135, 1950 N.Y. Misc. LEXIS 2169 (N.Y. Sup. Ct. 1950), aff'd, 278 A.D. 600, 101 N.Y.S.2d 924, 1951 N.Y. App. Div. LEXIS 4071 (N.Y. App. Div. 1951).

Under the definitions found in § 2 and other sections of the Public Officers Law and § 2 of the Election law, it is clear that the position of chairman of a political party is not a public office. Sulli v Board of Supervisors, 24 Misc. 2d 310, 200 N.Y.S.2d 218, 1960 N.Y. Misc. LEXIS 3054 (N.Y. Sup. Ct. 1960).

Under New York law, County Committee members are neither federal, state or local officers, nor are they even public officers at all. Doherty v Meisser, 66 Misc. 2d 550, 321 N.Y.S.2d 32, 1971 N.Y. Misc. LEXIS 1632 (N.Y. Sup. Ct. 1971).

6. State officers

A member of the state board of licensing for professional engineers is a state officer. New York City Employees' Retirement System v Eliot, 267 N.Y. 193, 196 N.E. 23, 267 N.Y. (N.Y.S.) 193, 1935 N.Y. LEXIS 1206 (N.Y. 1935).

Superintendent of banks is state officer by reason of this section. In re Union Bank of Brooklyn, 176 A.D. 477, 163 N.Y.S. 485, 1917 N.Y. App. Div. LEXIS 5156 (N.Y. App. Div. 1917).

The office of sheriff is a local office and employees or appointees of sheriffs are local officers. Winkler v Sheriff of Queens County, 256 A.D. 770, 12 N.Y.S.2d 290, 1939 N.Y. App. Div. LEXIS 4842 (N.Y. App. Div. 1939).

A county judge is not a "state officer" within the meaning of the Court of Claims Act. His jurisdiction is limited to a particular county, he is paid from the funds of such county and is not subject to the direction of any state agency. Jameison v State, 7 A.D.2d 944, 182 N.Y.S.2d 41, 1959 N.Y. App. Div. LEXIS 10052 (N.Y. App. Div. 3d Dep't 1959).

A county judge is not a state officer within the meaning of Court of Claims Act. Rossman v State, 40 A.D.2d 1046, 338 N.Y.S.2d 916, 1972 N.Y. App. Div. LEXIS 3093 (N.Y. App. Div. 3d Dep't 1972).

A County Judge is a State Officer or employee for whose conduct the State may be liable. Mullen v State, 122 A.D.2d 300, 504 N.Y.S.2d 270, 1986 N.Y. App. Div. LEXIS 59644 (N.Y. App. Div. 3d Dep't), app. denied, 68 N.Y.2d 609, 508 N.Y.S.2d 1026, 501 N.E.2d 36, 1986 N.Y. LEXIS 20510 (N.Y. 1986), cert. denied, 480 U.S. 938, 107 S. Ct. 1586, 94 L. Ed. 2d 775, 1987 U.S. LEXIS 1337 (U.S. 1987).

Commissioners of Finger Lakes State Parks Commission are officers of state within meaning of this section. Hulbert v Craig, 207 N.Y.S. 710, 124 Misc. 273, 1925 N.Y. Misc. LEXIS 625 (N.Y. Sup. Ct.), aff'd, 213 A.D. 865, 209 N.Y.S. 850, 1925 N.Y. App. Div. LEXIS 9210 (N.Y. App. Div. 1925).

Employee of state insurance fund, a public agency, with the title of principal underwriter and appointed as such by executive director of the fund pursuant to Work Comp § 82, subd 2, and who took the oath of office provided for in Civ S § 30, was a public officer as defined by Civ S § 27, and a state officer as defined by Pub O § 2. Hazelton v Connelly, 25 N.Y.S.2d 74, 175 Misc. 765, 1941 N.Y. Misc. LEXIS 1413 (N.Y. Sup. Ct. 1941).

The Commissioners of the State Insurance Fund are state officers. Commissioners of State Ins. Fund v Dinowitz, 39 N.Y.S.2d 34, 179 Misc. 278, 1942 N.Y. Misc. LEXIS 2289 (N.Y. Sup. Ct. 1942).

7. Local officers

The register of New York county is a "local officer" and not a "state officer." Miller v State, 279 N.Y. 74, 17 N.E.2d 773, 279 N.Y. (N.Y.S.) 74, 1938 N.Y. LEXIS 798 (N.Y. 1938).

Members of a village board of health are local officers. In re Board of Health, 43 A.D. 236, 60 N.Y.S. 27, 1899 N.Y. App. Div. LEXIS 1960 (N.Y. App. Div. 1899).

Members of county rent guidelines boards are local officers within the meaning of section 2 of the Public Officers Law, since board members are limited, under the Emergency Tenant Protection Act, in the execution of their official functions to the particular city, town or village within the enumerated municipalities which has declared a housing emergency. Great Neck Plaza v Nassau County Rent Guidelines Board, 69 A.D.2d 528, 418 N.Y.S.2d 796, 1979 N.Y. App. Div. LEXIS 11833 (N.Y. App. Div. 2d Dep't 1979).

A claim against the State of New York arising out of claimant's arrest, indictment and acquittal of the charge of criminal sale of a controlled substance in the third degree, where the State's liability is predicated on the allegedly tortious conduct of a District Attorney, an Assistant District Attorney, and five New York City police officers, fails to state a cause of action and must be dismissed, since such liability as may exist for the acts of District Attorneys, Assistant District Attorneys, and municipal police officers, all of whom are "local officers" (Public Officers Law, § 2), devolves upon the governmental subdivision which employs them, in this case the City of New York. Murph v State, 98 Misc. 2d 324, 413 N.Y.S.2d 854, 1979 N.Y. Misc. LEXIS 2074 (N.Y. Ct. Cl. 1979), reh'g denied, 105 Misc. 2d 684, 432 N.Y.S.2d 833, 1980 N.Y. Misc. LEXIS 2709 (N.Y. Ct. Cl. 1980).

A village assessor or a village building inspector is a local public officer within the meaning of this section. 1957 Ops St Compt 212.

A deputy registrar is neither a city employee nor the employee of the registrar but rather is a local officer of the primary registration district, at least under general legal principles. 1967 Ops St Compt File #553.

8. —Police officers, sheriffs, and deputy sheriffs

City marshals are independent contractors rather than employees, since they maintain their own offices, employ their own staff, pay their own expenses, set their own schedules, derive their own income from fees, and since the state lacks any control whatsoever respecting the manner in which their work is to be performed; moreover, city marshals are local and not state officers, appointed by the mayor and not paid by the state, and if they could be deemed "employees" of any governmental body, pursuant to the Jud Law § 39(3)(c) they would be employees of the city, not the state. In re Unified Court System, 58 N.Y.2d 876, 460 N.Y.S.2d 493, 447 N.E.2d 41, 1983 N.Y. LEXIS 2860 (N.Y. 1983).

A sheriff and his deputies are local officers. People ex rel. Andrus v Board of Auditors, 37 N.Y.S. 633, 16 Misc. 92, 1896 N.Y. Misc. LEXIS 131 (N.Y. Sup. Ct. 1896); Isereau v State, 139 N.Y.S.2d 739, 207 Misc. 665, 1954 N.Y. Misc. LEXIS 3658 (N.Y. Ct. Cl. 1954), aff'd, 3 A.D.2d 813, 160 N.Y.S.2d 839, 1957 N.Y. App. Div. LEXIS 6237 (N.Y. App. Div. 4th Dep't 1957), aff'd, 3 A.D.2d 812, 160 N.Y.S.2d 840, 1957 N.Y. App. Div. LEXIS 6236 (N.Y. App. Div. 4th Dep't 1957), limited, Foyster v Tutuska, 44 Misc. 2d 303,

253 N.Y.S.2d 634, 1964 N.Y. Misc. LEXIS 1340 (N.Y. County Ct. 1964).

A city police officer is a local public officer. Sullivan v Whitney, 25 N.Y.S.2d 762, 1941 N.Y. Misc. LEXIS 1494 (N.Y. Sup. Ct. 1941).

9. —Judges and court personnel

City marshals were properly determined to be independent contractors rather than employees, since they maintain their own offices, employ their own staff, pay their own expenses, set their own schedules, and derive their own income from fees, and since the state lacks any control whatsoever respecting the manner in which their work is to be performed; moreover, city marshals are local and not state officers, appointed by the mayor and not paid by the state, and if they could be deemed "employees" of any governmental body, pursuant to the Jud Law § 39(3)(c) they would be employees of the city, not the state. In re Unified Court System, 58 N.Y.2d 876, 460 N.Y.S.2d 493, 447 N.E.2d 41, 1983 N.Y. LEXIS 2860 (N.Y. 1983).

Candidates for supreme court stenographer come within the term local officers. Hammond v Rice, 239 A.D. 539, 267 N.Y.S. 534, 1933 N.Y. App. Div. LEXIS 8089 (N.Y. App. Div. 1933).

Surrogate is a local officer and not a state officer. In re Pardee's Estate, 259 A.D. 101, 18 N.Y.S.2d 413, 1940 N.Y. App. Div. LEXIS 6055 (N.Y. App. Div. 1940).

Inasmuch as Public Officers Law clearly establishes that family court judge is "local officer" and not "state officer," State could not be held liable for any injury to infant allegedly resulting from negligent acts and omissions of family court judge and family court employees. Palmer v State, 59 A.D.2d 976, 399 N.Y.S.2d 328, 1977 N.Y. App. Div. LEXIS 14243 (N.Y. App. Div. 3d Dep't 1977), app. denied, 43 N.Y.2d 648, 1978 N.Y. LEXIS 2625 (N.Y. 1978).

The requirements of filing an oath and giving a bond mark the position of the municipal court clerk as one belonging to the class of public officers and a civil service reclassification from the exempt to the competitive class does not destroy its character as a public office. In re Weppler, 10 N.Y.S.2d 1003, 170 Misc. 933, 1939 N.Y. Misc. LEXIS 1673 (N.Y. Sup. Ct.), aff'd, 257 A.D. 940, 13 N.Y.S.2d 280, 1939 N.Y. App. Div. LEXIS 8544 (N.Y. App. Div. 1939).

A Supreme Court attendant is a local officer within the intent of § 2 of the Public Officers Law when he acts as a peace officer in making an arrest. Jacobson v State, 69 Misc. 2d 114, 329 N.Y.S.2d 496, 1970 N.Y. Misc. LEXIS 1695 (N.Y. Ct. Cl. 1970).

10. —County or city officers

A warden of the city prison in New York is a county or city officer. People ex rel. Fallon v Wright, 150 N.Y. 444, 44 N.E. 1036, 150 N.Y. (N.Y.S.) 444, 1896 N.Y. LEXIS 994 (N.Y. 1896).

The offices of trustee of Hunter College, member of the Hunter College Teachers' Retirement Board and member of the Board of Higher Education of the City of New York are connected with the government of the city of New York and although education is a state or governmental function this does not mean that one fulfilling such a function is invariably a state as distinguished from a city officer. Metzger v Swift, 258 N.Y. 440, 180 N.E. 112, 258 N.Y. (N.Y.S.) 440, 1932 N.Y. LEXIS 1203 (N.Y. 1932).

A member of the uniformed force of the street cleaning department of the city of New York is not an officer of the city but merely a laborer. Tepidino v New York, 98 N.Y.S. 693, 50 Misc. 324, 1906 N.Y. Misc. LEXIS 76 (N.Y. App. Term 1906).

The administrator of a county civil service employees' association benefit and legal services funds was not a "public officer" within the meaning of Pen Law § 10.00(15) and could not therefore be charged with the bribery and official misconduct offenses defined by Pen Law §§ 195.00, 200.10, 200.25, and 200.35; defendant was, however, a "labor official" within the meaning of Pen Law § 180.10 for purposes of charging violations of Pen Law §§ 105.05 and 180.25. People v Confoy, 110 Misc. 2d 252, 441 N.Y.S.2d 941, 1981 N.Y. Misc. LEXIS 3073 (N.Y. Sup. Ct. 1981).

Member of a city charter commission established pursuant to City Home Rule Law, section 20, is a city officer. 1947 Ops St Compt 428.

A sergeant on a city police force may not also serve as a member of the board of education of the city school district. 1964 Ops St Compt File #939.

11. —Town or village officers

Village trustees are public officers. Abell v Hunter, 211 A.D. 467, 207 N.Y.S. 203, 1924 N.Y. App. Div. LEXIS 7850 (N.Y. App. Div. 1924), aff'd, 240 N.Y. 702, 148 N.E. 765, 240 N.Y. (N.Y.S.) 702, 1925 N.Y. LEXIS 948 (N.Y. 1925).

Where statute creating position of town building inspector gave him power of general and executive administration of the zoning ordinance and Town Law § 138 gave him power of enforcement of various codes, ordinances, rules and regulations, and his functions and duties directly affected the citizens of the town and involved the exercise of police powers of the political subdivision, position was a public office requiring holder thereof to be resident of town. Haller v Carlson, 42 A.D.2d 829, 346 N.Y.S.2d 108, 1973 N.Y. App. Div. LEXIS 3884 (N.Y. App. Div. 4th Dep't 1973).

The Town Superintendent of Highways is a town officer. Weiler v Osceola, 51 Misc. 2d 163, 273 N.Y.S.2d 90, 1966 N.Y. Misc. LEXIS 1679 (N.Y. Sup. Ct. 1966), aff'd, 29 A.D.2d 737, 287 N.Y.S.2d 365, 1968 N.Y. App. Div. LEXIS 5458 (N.Y. App. Div. 4th Dep't 1968).

A town supervisor is a county officer as well as a town officer, being a member of the board of supervisors. He is a county officer when in the performance of duties for the county and a town officer when performing town duties. 1955 Ops St Compt 157.

A town supervisor is a county officer as well as a town officer, being a member of the board of supervisors. He is a county officer when in the performance of duties for the county and a town officer when performing town duties. 1955 Ops St Compt 157.

12. District attorney or assistants as state or local officers

By statutory definition, the district attorney is a "local officer" and is not included within the definition of a "state officer". Ritter v State, 283 A.D. 833, 128 N.Y.S.2d 830, 1954 N.Y. App. Div. LEXIS 5453 (N.Y. App. Div. 1954).

District attorney is constitutional state officer whose status is not changed by classification of public officials into "state officers" and "local officers" in this section, and is not subject to regulation by city government as to his power of appointment and fixing of salaries of his appointees. People v Fuller, 282 N.Y.S. 28, 156 Misc. 404, 1935 N.Y. Misc. LEXIS 1393 (N.Y. Gen. Sess. 1935).

A District Attorney, who is elected within the county, discharges his functions within the county, and is paid by the county, is a local officer as distinguished from a state officer, as those terms are defined in this section, but he is not necessarily a county officer. Raynor v Kirk, 30 Misc. 2d 1041, 219 N.Y.S.2d 661, 1961 N.Y. Misc. LEXIS 2492 (N.Y. Dist. Ct. 1961).

The fact that a District Attorney is declared to be a "local officer" does not make him the servant or employee of the locality "government" within the borders of which he is limited in the execution of his official functions. Zimmerman v New York, 52 Misc. 2d 797, 276 N.Y.S.2d 711, 1966 N.Y. Misc. LEXIS 1247 (N.Y. Sup. Ct. 1966).

The district attorney is "local officer" and not "state officer" within Public Officers Law, and, in proceeding to compel inspection and copying of certain checks and account records relative to travel and other reimbursable expenses of the district attorney's office, service of order to show cause upon district attorney rather than Attorney General was sufficient. Dillon v Cahn, 79 Misc. 2d 300, 359 N.Y.S.2d 981, 1974 N.Y. Misc. LEXIS 1651 (N.Y. Sup. Ct. 1974).

Under New York law, district attorneys and assistant district attorneys are generally presumed to be local county officers, not state officers; however, narrow exception to this general rule exists when prosecutor makes individual determinations about whether to prosecute violations of state penal laws. Myers v County of Orange, 157 F.3d 66, 1998 U.S. App. LEXIS 21598 (2d Cir. N.Y. 1998), cert. denied, 525 U.S. 1146, 119 S. Ct. 1042, 143 L. Ed. 2d 49, 1999 U.S. LEXIS 1130 (U.S. 1999).

County was properly found liable to defendant in underlying criminal case for district attorney policy that directed city police and county assistant district attorneys (ADAs) to engage in "first-come, first-served" investigative procedures that violated

defendant's equal protection rights, even though county cannot be held liable for ADA's improper filing of indictment, since county can be liable based on its "long history of negligent disciplinary practices regarding law enforcement personnel, which gave rise to the individual defendants' conduct in promoting the malicious prosecution of plaintiffs." Myers v County of Orange, 157 F.3d 66, 1998 U.S. App. LEXIS 21598 (2d Cir. N.Y. 1998), cert. denied, 525 U.S. 1146, 119 S. Ct. 1042, 143 L. Ed. 2d 49, 1999 U.S. LEXIS 1130 (U.S. 1999).

N.Y. Pub. Off. Law § 2; N.Y. Const. art. XIII, § 7, and the decisional law of New York's courts construing these authorities all strongly led the bankruptcy court to a view that under the "documents of origin," a district attorney in New York was not considered to be a state officer of purposes of U.S. Const. amend. XI. AJ Contr. Co. v City of New York (In re AJ Contr. Co.), 300 B.R. 182, 2003 Bankr. LEXIS 1343 (Bankr. S.D.N.Y. 2003).

District attorneys in N. Y., though classed by statute as local officers, are part of judicial system of state, and, in enforcing state laws of general application by criminal prosecution, perform state function within their respective counties and are officers of state within meaning of Fed. Jud. Code § 266. Spielman Motor Sales Co. v Dodge, 295 U.S. 89, 55 S. Ct. 678, 79 L. Ed. 1322, 1935 U.S. LEXIS 309 (U.S. 1935).

13. —State liability

Under the definitions of "state officer" and "local officer" in this section, an Assistant District Attorney is not a state, but a local, officer and the State cannot be held liable for his misconduct resulting in an unlawful conviction of crime. Fisher v State, 10 N.Y.2d 60, 217 N.Y.S.2d 52, 176 N.E.2d 72, 1961 N.Y. LEXIS 1165 (N.Y. 1961).

With respect to a claim against the state based on purported suppression of evidence by an assistant district attorney in a criminal action against claimant, the state's responsibility in damages for the officer's tort was not demonstrated. Fisher v State, 13 A.D.2d 608, 212 N.Y.S.2d 209, 1961 N.Y. App. Div. LEXIS 11837 (N.Y. App. Div. 3d Dep't), aff'd, 10 N.Y.2d 60, 217 N.Y.S.2d 52, 176 N.E.2d 72, 1961 N.Y. LEXIS 1165 (N.Y. 1961).

State was not responsible for alleged tortious acts committed by district attorneys' offices in New York and Kings counties and by members of New York City police department, allegedly amounting to false arrest and imprisonment, and malicious prosecution. Whitmore v State, 55 A.D.2d 745, 389 N.Y.S.2d 443, 1976 N.Y. App. Div. LEXIS 15527 (N.Y. App. Div. 3d Dep't 1976), app. denied, 42 N.Y.2d 810, 1977 N.Y. LEXIS 3901 (N.Y. 1977).

An assistant district attorney is not a state officer for whose tortious acts the State may be held liable, but is a local officer for whose torts the State is not responsible. Whitmore v State, 55 A.D.2d 745, 389 N.Y.S.2d 443, 1976 N.Y. App. Div. LEXIS 15527 (N.Y. App. Div. 3d Dep't 1976), app. denied, 42 N.Y.2d 810, 1977 N.Y. LEXIS 3901 (N.Y. 1977).

The District Attorney of New York County and his assistants are not officers or employees of the State, for whose misconduct the State can be held responsible in damages, each of them being a "local officer" or county officer. Fisher v State, 23 Misc. 2d 935, 203 N.Y.S.2d 363, 1959 N.Y. Misc. LEXIS 3193 (N.Y. Ct. Cl. 1959), aff'd, 13 A.D.2d 608, 212 N.Y.S.2d 209, 1961 N.Y. App. Div. LEXIS 11837 (N.Y. App. Div. 3d Dep't 1961).

A claim against the State of New York arising out of claimant's arrest, indictment and acquittal of the charge of criminal sale of a controlled substance in the third degree, where the State's liability is predicated, inter alia, on the allegedly tortious conduct of a District Attorney and an Assistant District Attorney, fails to state a cause of action and must be dismissed since such liability as may exist for the acts of District Attorneys and Assistant District Attorneys, both of whom are "local officers" (Public Officers Law, § 2), devolves upon the governmental subdivision which employs them, in this case the City of New York. Murph v State, 98 Misc. 2d 324, 413 N.Y.S.2d 854, 1979 N.Y. Misc. LEXIS 2074 (N.Y. Ct. Cl. 1979), reh'g denied, 105 Misc. 2d 684, 432 N.Y.S.2d 833, 1980 N.Y. Misc. LEXIS 2709 (N.Y. Ct. Cl. 1980).

14. —Compensation

A county board of supervisors may not increase the compensation of a district attorney during his term of office by local law or otherwise. 1966 Ops St Compt File #1107.

Agency Opinions

Analysis

1. In general
2. Who are public officers, generally
3. —Persons holding school or educational positions
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6. State officers
7. Local officers
8. —Police officers, sheriffs, and deputy sheriffs
9. —Judges and court personnel
10. —County or city officers
11. —Town or village officers
12. District attorney or assistants as state or local officers
13. —Compensation

1. In general

In view of the provisions of the New York State Constitution, Article XIII, § 7, neither the Legislature nor the board of supervisors may increase or diminish the compensation of a district attorney during his term of office. Consequently, the increase in compensation of district attorneys as provided by Judiciary Law, § 183-a, becomes effective only as these officers begin new terms of office. 1972 NY Ops Atty Gen Aug. 10 (informal).

A county by local law may supersede the County Law and provide that vacancies in any county elective office other than county judge, surrogate, or family court judge are to be filled by the county legislature. The local law is not subject to a referendum. 1980 NY Ops Atty Gen May 29 (Informal), 1980 N.Y. AG LEXIS 117.

A trustee of a cooperative library system vacates his office when he ceases to be a resident of the area served by the system. 1979 Op St Compt File #255.

The city of Ithaca cannot use its home rule authority to extend the residency requirement established for members of the Ithaca Housing Authority board by Public Housing Law § 429. N.Y. Op. Att'y Gen. No. 2011-1, 2011 N.Y. AG LEXIS 2.

2. Who are public officers, generally

3. —Persons holding school or educational positions

Members of local school boards, whether elective or appointive, are public officers. 1971 NY Ops Atty Gen July 12 (formal).

Non-voting student members of the Board of Trustees of the State University of New York, the Councils of state-operated institutions, Universities, the Board of Higher Education of the City of New York and the Board of Trustees of each Community College holding office under the provisions of Laws of 1975, chapter 587, are not public officers as defined in Public Officers Law, § 2, and, therefore, the provisions of Public Officers Law, §§ 10, 17, and 73 through 78, are not applicable to the non-voting student members of these boards. 1975 NY Ops Atty Gen Nov. 25.

Student members of community college boards of trustees are public officers but need not be residents of sponsoring municipality; they must file oaths of office with clerk of sponsoring municipality. 1985 NY Ops Atty Gen No. 85-F14.

4. —Other particular positions; public officer

Member of board of managers of public general hospital is a public officer and holds over after expiration of his term of office until his successor is chosen and has qualified. 1955 NY Ops Atty Gen 58 (informal).

Certain correction officers employed by the Department of Correctional Services and certain other persons in the Department who have been designated as peace officers by rules of the Department are public officers subject to the provisions of the Public Officers Law. 1983 N.Y. Op. Att'y Gen. No. 83-F4.

A member of an industrial development agency is a public officer subject to the residency requirements of Public Officers Law, § 3. 1979 Op St Compt File #189.

5. —Other particular positions; not public officer

The attorney for the urban renewal agency of the City of Newburgh is not a public officer and may, therefore, be a nonresident. 1964 NY Ops Atty Gen Feb. 25.

Position of dietician, responsible for nutritional care of residents at county nursing home, is not public office. 1992 NY Ops Atty Gen I 92-41.

Determination whether member of fire police squad is public officer requires evaluation of whether powers and duties of that member meet standards for public officer status. 1992 NY Ops Atty Gen I 92-47.

6. State officers

Commissioners of reservation at Niagara are state officers. 1912 N.Y. Op. Att'y Gen. No. 113.

Trustees of savings bank life insurance fund are state officers and should file oaths of office with secretary of state. 1946 NY Ops Atty Gen Aug. 19.

A member of a board of visitors of a hospital in the Department of Mental Hygiene is an officer of the State for purposes of section 17 of the Public Officers Law. 1977 NY Ops Atty Gen May 18.

The New York members of the Lake Champlain Bridge Commission are officers of the State within the meaning of Public Officers Law, § 17, and entitled to indemnification. 1978 NY Ops Atty Gen August 8.

7. Local officers

8. —Police officers, sheriffs, and deputy sheriffs

The Undersheriff of Tioga County who was in office on December 31, 1974, remains in office until the new Sheriff assuming office on January 1, 1975 has appointed, pursuant to County Law, § 652, a qualified person to become the new Undersheriff, and until such qualified person takes and files the required oath of office. 1975 NY Ops Atty Gen March 12.

9. —Judges and court personnel

Judges of the New York City Civil and Criminal Courts temporarily assigned as justices of the Supreme Court may perform a wedding ceremony anywhere in the state. NY Ops Atty Gen 1985 85-F 18.

Officers and employees of supreme court whose functions are limited to particular county are "local officers" and under jurisdiction of civil service of county; if functions are not so limited but extend over judicial district, they are local officers, not state officers, but not subject to county civil service. 1944 NY Ops Atty Gen July 3.

A family court judge is a "local officer" within the meaning of this section. 1962 NY Ops Atty Gen Aug. 6.

A justice of the peace is a local and not a state officer, and the state is not liable for errors of local judicial officers, nor is the Attorney General required to defend a civil action against a town or a justice based on errors allegedly committed by him. 1964 NY Ops Atty Gen April 21.

Peace officers of Unified Court System whose duties, as determined by Office of Court Administration, include delegation of portion of sovereign powers of government are public officers subject to provisions of CLS Pub Off Law § 3, imposing State residency requirement. N.Y. Op. Att'y Gen. No. 89-F4.

10. —County or city officers

Under section 5 of the Public Officers Law, the chairperson of a county legislature is entitled to hold the position of chairperson until a successor is chosen. NY Ops Atty Gen 1985 85-9.

"Director of Prevention and Patient Services," position in County Public Health Service having responsibility for planning, organizing, directing, coordinating and evaluating patient health care services provided by certified home health agency and other nursing services related to public health care programs, is public office. 1992 NY Ops Atty Gen I 92-41.

"Director of Special Clinical Services," responsible for planning, organizing, directing, coordinating and evaluating patient care services provided in county jail and other medical services in public health care programs, is public office. 1992 NY Ops Atty Gen I 92-41.

"Director of Community Mental Health Services," executive officer of county agency responsible for community mental health program, is public office. 1992 NY Ops Atty Gen I 92-41.

"Deputy Director of Administration and Planning," who assists Public Health Director in administration of all activities of county public health services, is public office. 1992 NY Ops Atty Gen I 92-41.

11. —Town or village officers

A village plumbing inspector is a village officer and may not be directly or indirectly interested in a contract or in furnishing work as a plumber to a village of which he is an officer. 1959 NY Ops Atty Gen Nov. 16 (informal).

A town budget officer must be a resident of the town in which he serves. 1979 Op St Compt File #107.

Because the functions and responsibilities of a director of a suburban town department of local law enforcement are comparable to those of a town building inspector, who is a public officer, and because the Suburban Town Law refers to department heads as officers, it would be reasonable to conclude that the position of director similarly is a public office. 1981 Op St Compt File #81-44.

Whether the Director of the Division of Law Enforcement/Security, which is a division of a suburban town Department of Public Safety, is a public officer depends upon factors which are indicative of a public officer under the common law. 1981 Op St Compt File #81-121.

Residence requirements applicable to members of the authority; such members are public officers and, as their function is limited in geographic area, local officers; so, consequently, they must reside in the specific locality, namely, the City of Rome. 1967 NY Ops Atty Gen July 25.

The Executive Director of the Batavia Housing Authority is a local officer within the purview of Public Officers Law § 2 and since his position is of a full-time nature he is disqualified from employment as a pari-mutuel clerk under the provisions of Pari-Mutuel Law § 63. 1969 NY Ops Atty Gen July 7.

Members of a town planning board and members of a town zoning board of appeals are local public officers and are required to file an oath of office before they are entitled to enter upon the discharge of any of their official duties. 1972 NY Ops Atty Gen March 14 (informal).

The members of the Board of the Spring Valley Parking Authority are local officers within the meaning of § 2 of the Public Officers Law and as such must reside within the jurisdiction of the Authority, the Village of Spring Valley, in order to serve in such capacity as required by § 3 of the Public Officers Law. 1973 NY Ops Atty Gen Sept. 28 (informal).

With the exception of the student member, members of boards of trustees of community colleges are local officers. They must at the time of appointment reside within the geographical boundaries of the local sponsor and are required to file an oath of office within the time period provided by law. 1982 NY Ops Atty Gen March 15 (informal).

A member of the Chemung County Elmira Sewer District Administrative Board is a local officer within the meaning of Public Officers Law, § 2. His office becomes vacant upon his conviction of a felony. 1978 Op St Compt File #738.

12. District attorney or assistants as state or local officers

13. —Compensation

Although a district attorney is a local officer for purposes of providing for his legal defense and indemnification, he is a state officer for purposes of the constitutional provision which bars an increase or decrease in the compensation of each State officer named in the Constitution during a term of office. 1980 Op St Compt File #194.

An assistant district attorney must be a resident of the county in which his official functions are required to be exercised. 1965 NY Ops Atty Gen March 29.

A vacancy in the office of Onondaga County District Attorney caused by resignation of the incumbent thereof before expiration of term must be filled by the Governor under authority of County Law § 400(7) and not by the County Executive. 1967 NY Ops Atty Gen Jan. 16.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS Exec § 96; CLS Racing & Wagering § 107.

Definitions, CLS Elec § 17-100.

Jurisprudences:
18A NY Jur 2d Civil Servants and Other Public Officers and Employees §§ 18–20, 24, 25 .
67A NY Jur 2d Injunctions § 146 .
92 NY Jur 2d Records and Recording § 60 .
63C Am Jur 2d, Public Officers and Employees § 17.
20B Am Jur Pl & Pr Forms (Rev ed), Public Officers and Employees, Forms 4–7.

Law Reviews:
De facto officer doctrine. 63 Colum. L. Rev. 909.

Annotations:
Constitutional or statutory provision referring to "employees" as including public officers. 5 ALR2d 415.
Powers and duties of a public administrator. 56 ALR2d 1183.

Texts: 1 Frumer & Biskind, Bender's New York Evidence —CPLR § 1.14; 5 Frumer & Biskind, Bender's New York Evidence—CPLR § 23.25.

ARTICLE 2 Appointment and Qualification of Public Officers

Section
3. Qualifications for holding office.
5. Holding over after expiration of term
10. Official oaths
18. Defense and indemnification of officers and employees of public entities

HISTORY:
Add, L 1909, ch 51, eff Feb 17, 1909.

§ 3. Qualifications for holding office.

1. No person shall be capable of holding a civil office who shall not, at the time he or she shall be chosen thereto, have attained the age of eighteen years, except that in the case of youth boards, youth commissions, recreation commissions, or community boards in the city of New York only, members of such boards or commissions may be under the age of eighteen years, but must have attained the age of sixteen years on or before appointment to such youth board, youth commission, recreation commission, or community board in the city of New York, be a citizen of the United States, a resident of the state, and if it be a local office, a resident of the political subdivision or municipal corporation of the state for which he or she shall be chosen, or within which the electors electing him or her reside, or within which his or her official functions are required to be exercised, or who shall have been or shall be convicted of a violation of the selective draft act of the United States, enacted May eighteenth, nineteen hundred seventeen, or the acts amendatory or supplemental thereto, or of the federal selective training and service act of nineteen hundred forty or the acts amendatory thereof or supplemental thereto.

* * * * *

4. Except as otherwise provided in subdivision nine of this section, persons heretofore or hereafter employed in the paid fire department of a city, town, village or fire district shall not be deemed to be holding a civil office or a local office within the meaning of this section and the provisions of this section shall not apply to such persons. The provisions of any general, special or local law, city or village charter, code or ordinance, or any rule or regulation requiring a person to be a resident of the political subdivision or municipal corporation of the state for which he shall be chosen or within which his official functions are required to be exercised shall not apply to the appointment or continuance in office of any such person so employed, if such person resides in the county, or one of the counties, in which such political subdivision or municipal corporation is located.

5. Volunteer firefighters and volunteer fire officers of a fire department or any company or unit thereof shall not be deemed to be holding a civil office or a local office within the meaning of this section and the provisions of this section shall not apply to such volunteer firefighters and volunteer fire officers. This subdivision shall not be deemed to amend, modify or supersede any other general, special or local law, city or village charter, code or ordinance, or any rule or regulation governing any such fire department, which prescribes the qualifications which a person must have to be a volunteer firefighter or a volunteer fire officer of a political subdivision or municipal corporation.

* * * * *

HISTORY:
Add, L 1909, ch 51; amd, L 1922, ch 180; L 1925, ch 30; L 1942, ch 198; L 1953, ch 780; L 1957, ch 709, § 2; L 1958, ch 480, eff April 9, 1958; L 1959, ch 547; L 1960, ch 226, §§ 1, 2; L 1960, ch 456, § 2, eff April 12, 1960; L 1960, ch 861, § 2, eff May 15, 1960; L 1960, ch 1084, § 1; L 1961, ch 895, § 1; L 1961, ch 964, § 1, eff April 24, 1961; L 1962, ch 248, § 1; L 1962, ch 969, § 1; L 1962, ch 976, § 1; L 1963, ch 375, § 1; L 1964, ch 522, eff April 10, 1964; L 1965, ch 657, eff July 2, 1965; L 1965, ch 865, § 1, eff July 16, 1965; L 1965, ch 985, §§ 1, 2, eff July 19, 1965; L 1965, ch 1003, eff July 19, 1965; L 1966, ch 1004, eff Aug 4, 1966; L 1971, ch 168; L 1972, ch 456, § 1; L 1972, ch 868, § 1; L 1973, ch 12, § 1, eff Feb 12, 1973; L 1974, ch 632, § 1, eff May 30, 1974; L 1974, ch 940, § 1; L 1975, ch 347, § 1, eff July 1, 1975; L 1976, ch 56, § 1, eff March 16, 1976; L 1977, ch 199, § 2, eff July 1, 1977; L 1977, ch 386, § 2; L 1977, ch 585, § 2, eff Aug 1, 1977; L 1982, ch 44, § 1, eff April 5, 1982; L 1982, ch 70, § 2; L 1983, ch 346, § 2, eff June 21, 1983; L 1985, ch 746, § 1; L 1986, ch 146, § 2; L 1986, ch 509, § 1, eff July 22, 1986; L 1987, ch 164, § 2; L 1987, ch 211, § 1, eff July 7, 1987; L 1987, ch 216, § 2, eff July 7, 1987; L 1987, ch 715, § 1, eff Aug 5, 1987; L 1987, ch 725, § 1, eff Aug 5, 1987; L 1988, ch 143, § 2, eff June 20, 1988; L 1989, ch 264, § 2, eff July 7, 1989; L 1989, ch 486, § 1; L 1989, ch 497, § 1; L 1990, ch 267, § 3; L 1990, ch 273, § 2, eff June 24, 1990; L 1990, ch 307, § 2; L 1990, ch 400, § 1; L 1990, ch 472, § 2, eff July 11, 1990; L 1990, ch 614, § 2, eff July 18, 1990; L 1990, ch 628, § 2; L 1990, ch 719, § 2; L 1991, ch 354, §§ 1, 2, eff July 15, 1991; L 1991, ch 561, § 2, eff July 23, 1991; L 1991, ch 747, § 1, eff Dec 31, 1991; L 1992, ch 213, § 1, eff June 23, 1992, deemed eff April 1, 1989; L 1992, ch 267, § 1, eff June 30, 1992; L 1993, ch 151, § 1, eff June 28, 1993; L 1993, ch 201, § 5; L 1993, ch 206, § 1; L 1993, ch 625, § 2; L 1994, ch 174, § 1, eff June 14, 1994; L 1994, ch 229, § 1, eff July 6, 1994; L 1994, ch 456, § 1, eff July 20, 1994; L 1994, ch 473, § 2, eff July 20, 1994; L 1994, ch 628, § 2, eff July 26, 1994; L 1995, ch 207, § 2, eff July 26, 1995; L 1995, ch 633, § 1; L 1996, ch 265, § 1, eff July 2, 1996; L 1998, ch 174, § 1, eff July 7, 1998; L 1998, ch 203, § 2, eff July 7, 1998; L 1998, ch 272, § 2, eff July 10, 1998; L 1998, ch 273, § 2, eff July 10, 1998; L 1998, ch 436, § 1, eff July 22, 1998; L 1999, ch 90, § 1, eff June 22, 1999; L 1999, ch 546, § 2, eff Oct 5, 1999; L 2000, ch 243, § 1, eff Aug 16, 2000; L 2000, ch 249, § 2, eff Aug 16, 2000; L 2000, ch 317, § 1, eff Aug 23, 2000; L 2000, ch 457, § 1; L 2001, ch 99, § 2, eff July 17, 2001; L 2001, ch 206, §§ 1, 2, eff Aug 20, 2001; L 2001, ch 238, § 2, eff Sept 4,

2001; L 2001, ch 584, § 2, eff Dec 28, 2001; L 2002, ch 448, § 2, eff Aug 20, 2002; L 2002, ch 517, § 1, eff Sept 17, 2002; L 2002, ch 518, § 1, eff Sept 17, 2002; L 2002, ch 621, § 1, eff Oct 2, 2002; L 2003, ch 129, § 1, eff July 22, 2003; L 2003, ch 313, § 1, eff Aug 5, 2003; L 2003, ch 397, § 2, eff Aug 19, 2003; L 2003, ch 408, § 2, eff Aug 26, 2003; L 2003, ch 471, § 2, eff Sept 9, 2003; L 2003, ch 472, § 2, eff Sept 9, 2003; L 2003, ch 535, § 2, eff Sept 17, 2003; L 2004, ch 256, § 1, eff July 27, 2004; L 2004, ch 281, § 2, eff Aug 3, 2004; L 2004, ch 323, § 2, eff Aug 10, 2004; L 2004, ch 551, § 1, eff Oct 5, 2004; L 2004, ch 665, § 1, eff Oct 26, 2004; L 2005, ch 81, § 2, eff June 7, 2005; L 2005, ch 98, § 2, eff June 14, 2005; L 2005, ch 388, § 1, eff Aug 2, 2005; L 2005, ch 444, § 2, eff Aug 9, 2005; L 2005, ch 760, § 1, eff Dec 20, 2005; L 2006, ch 200, § 1, eff July 26, 2006, deemed eff on and after Dec 20, 2005; L 2006, ch 209, § 1, eff July 26, 2006; L 2006, ch 475, § 2, eff Aug 16, 2006; L 2006, ch 663, § 1, eff Sept 13, 2006; L 2007, ch 442, § 1, eff Aug 1, 2007; L 2007, ch 554, § 2, eff Aug 28, 2007; L 2008, ch 222, § 1, eff July 7, 2008; L 2008, ch 250, § 1, eff July 7, 2008; L 2008, ch 265, § 1, eff July 7, 2008; L 2008, ch 281, § 1, eff July 7, 2008; L 2008, ch 464, § 1, eff Aug 5, 2008; L 2008, ch 618, § 1, eff Sept 25, 2008; L 2009, ch 301, § 2, eff Aug 11, 2009; L 2009, ch 329, §§ 9, 10, eff Aug 11, 2009; L 2009, ch 375, § 2, eff Aug 26, 2009; L 2010, ch 119, § 1, eff June 15, 2010; L 2011, ch 128, § 2, eff July 15, 2011; L 2011, ch 129, § 2, eff July 15, 2011; L 2011, ch 314, § 2, eff Aug 3, 2011; L 2011, ch 465, § 2, eff Aug 17, 2011; L 2012, ch 290, § 2, eff Aug 1, 2012; L 2012, ch 292, § 2, eff Aug 1, 2012; L 2012, ch 338, § 2, eff Aug 1, 2012; L 2012, ch 354, § 1, eff Aug 1, 2012; L 2012, ch 499, § 1, eff Dec 17, 2012; L 2013, ch 8, § 1, eff March 15, 2013; L 2013, ch 45, § 2, eff May 28, 2013; L 2013, ch 139, § 2, eff July 12, 2013; L 2013, ch 143, § 2, eff July 12, 2013; L 2013, ch 145, § 2, eff July 12, 2013; L 2013, ch 156, § 2, eff July 12, 2013; L 2013, ch 255, § 1, eff July 31, 2013; L 2013, ch 452, eff Oct 23, 2013; L 2014, ch 55, § 31–b (Part H, Subpart A), eff April 30, 2014; L 2014, ch 102, § 2, effective July 22, 2014; L 2014, ch 140, § 2, effective July 22, 2014; L 2014, ch 177, § 2, effective July 22, 2014; L 2014, ch 211, § 2, effective August 7, 2014; L 2014, ch 225, § 1, effective August 7, 2014; L 2014, ch 251, § 1, effective August 11, 2014; L 2015, ch 139, § 1, effective August 13, 2015; L 2015, ch 312, § 2, effective September 25, 2015; L 2016, ch 203, § 2, effective July 21, 2016; L 2016, ch 282, § 2, effective August 23, 2016; L 2016, ch 306, § 3, effective September 9, 2016; L 2017, ch 38, § 2, effective June 23, 2017; L 2017, ch 74, § 2, effective June 29, 2017; L 2017, ch 113, § 1, effective July 25, 2017; L 2017, ch 118, § 2, effective July 25, 2017; L 2017, ch 130, § 1, effective July 25, 2017; L 2017, ch 159, § 1, effective July 25, 2017; L 2017, ch 191, § 2, effective August 21, 2017; L 2017, ch 226, § 2, effective August 21, 2017; L 2018, ch 136, § 2, effective July 31, 2018; L 2018, ch 149, § 3, effective July 31, 2018; L 2018, ch 172, § 3, effective July 31, 2018; L 2018, ch 185, § 1, effective July 31, 2018; L 2018, ch 220, § 1, effective August 24, 2018; L 2018, ch 254, § 2, effective August 24, 2018; L 2018, ch 338, § 3, effective November 5, 2018; L 2018, ch 340, § 1, effective November 5, 2018; L 2018, ch 352, § 2, effective November 5, 2018; L 2018, ch 476, § 7, effective December 28, 2018; L 2019, ch 292, § 1, effective September 13, 2019; L 2019, ch 327, § 1, effective October 3, 2019; L 2019, ch 333, § 1, effective October 3, 2019; L 2019, ch 349, § 1, effective October 4, 2019; L 2019, ch 396, § 1, effective October 23, 2019; L 2019, ch 461, § 1, effective November 8, 2019; L 2019, ch 464, § 1, effective November 8, 2019; L 2019, ch 466, § 2, effective November 8, 2019; L 2019, ch 503, § 3, effective November 20, 2019; L 2019, ch 527, § 1, effective November 20, 2019; L 2019, ch 645, § 1, effective December 12, 2019; L 2020, ch 175, § 2, effective September 21, 2020; L 2020, ch 176, § 1, effective September 21, 2020; L 2020, ch 193, § 1, effective September 21, 2020; L 2020, ch 197, § 1, effective September 21, 2020; L 2020, ch 207, § 1, effective October 7, 2020; L 2020, ch 244, § 2, effective October 7, 2020.

Editor's Notes: Laws 1990, ch 388, § 2, eff July 10, 1990, provides as follows:

§ 2. This act shall take effect immediately and shall apply to the appointments of all current and future appointed officers.

Laws 1990, ch 472, § 3, eff July 11, 1990, provides as follows:

§ 3. This act shall take effect immediately and shall not affect the validity and application of chapter 486 of the laws of 1989.

Laws 2009, ch 329, § 14, eff Aug 11, 2009, provides as follows:

§ 14. This act shall take effect immediately; provided that the provisions of sections eight and ten of this act shall expire August 11, 2021 and section thirteen of this act shall expire December 31, 2017, when upon such date the provisions of such sections shall be deemed repealed (Amd, L 2015, ch 146, § 1, eff Aug 13, 2015; L 2017, ch 97, § 1, eff July 24, 2017; L 2019, ch 155, § 1, eff Aug 9, 2019).

Laws 2014, ch 55, §§ 1, 39 (Part H, Subpart A), eff April 30, 2014, provide as follows:

Section 1. This act shall be known and may be cited as the "Public Trust Act".

§ 39. This act shall take effect on the thirtieth day after it shall have become a law and shall only apply to acts committed on or after such date.

2001 Legislative Program of the New York State Judiciary: There are 61 City Courts outside New York City. These courts exercise limited civil jurisdiction: i.e., hearing causes for monetary damages no greater than $15,000, small claims, landlord and tenant disputes and small commercial claims. They also serve as local criminal courts for their respective communities - trying offenses of misdemeanor grade or less and non-felony traffic offenses, arraigning persons charged with felonies, and issuing orders of protection for family offense victims and search/arrest warrants. Many serve as drug courts. Despite these broad responsibilities, these courts have no uniform structure. Some are large, full-time courts situated in major metropolitan areas; some, in large, essentially suburban communities, have a blend of full-time and part-time judges; and some, in small cities, have but two part-time judges.

Nearly two decades ago, the Legislature put in place a special salary structure for part-time judges of the City Courts. It was designed to provide a fair measure of compensation for the attorneys whose service as judges, while limited, comes at the expense of a sacrifice in their law businesses. Times change, however, and the Legislature has been quick to recognize this. Acknowledging that evolving demographics and crime rates can have major impact upon the workload faced by part-time judges, the Legislature has regularly re-examined the part-time salary structure and made adjustments to it as appropriate. The last such re-examination occurred seven years ago and a further one now is in order. To this end, the Deputy Chief Administrative Judge for the Courts outside New York City empaneled a committee of City Court Judges, along with a representative of the Fund for Modern Courts, to study the workload and demographics of each of the 61 City Courts. The report of this committee recommends a number of changes in the part-time salary structure, including several changes in positions from part-time to full-time. We will submit legislation to implement these recommendations.

Amendment Notes: The 2015 amendment by ch 312, § 2, added 64 [second setout].

The 2015 amendment by ch 139, § 1, added 64 [first setout].

The 2014 amendment by ch 211, § 2 added 62 [fourth setout].

The 2014 amendment by ch 225, § 1 added 62 [fifth setout].

The 2014 amendment by ch 251, § 1, in 1, added "or community boards in the city of New York" and "or community board in the city of New York"; and made related and gender neutral changes.

The 2014 amendment by ch 177, § 2 added 62 [third setout].

The 2014 amendment by ch 140, § 2 added 62 [second setout] and 63.

The 2014 amendment by ch 102, § 2 added (62)[first setout].

2014. Chapter 55, § 31-b (Part H, Subpart A) amended:
By adding sub 1-a.
2013. Chapter 8, § 1 amended:
By repealing sub 59 [fourth setout].
2013. Chapter 45, § 2 amended:
By adding sub 60 [first setout].
By adding sub 61 [first setout].
2013. Chapter 139, § 2 amended:
By adding sub 60 [second setout].
By adding sub 61 [second setout].
2013. Chapter 143, § 2 amended:
By adding sub 60 [third setout].
2013. Chapter 145, § 2 amended:
By adding sub 60 [fourth setout].
2013. Chapter 156, § 2 amended:
By adding sub 60 [fifth setout].
2013. Chapter 255, § 1 amended:
By adding sub 60 [sixth setout].
2013. Chapter 452, § 1 amended:
By adding sub 60 [seventh setout].
2012. Chapter 290, § 2 amended:
By adding sub 59 [first setout].
2012. Chapter 292, § 2 amended:
By adding sub 59 [second setout].
2012. Chapter 338, § 2 amended:
By adding sub 59 [third setout].
2012. Chapter 354, § 1 amended:
By adding sub 11-a.
2011. Chapter 128, § 2 amended:
By adding sub 58 [first setout].
2011. Chapter 129, § 2 amended:
By adding sub 58 [second setout].
2011. Chapter 314, § 2 amended:
By adding sub 58 [third setout].
2011. Chapter 465, § 2 amended:
By adding sub 58 [fourth setout].
2010. Chapter 119, § 1 amended:
By adding sub 57.
2009. Chapter 301, § 2 amended:
By adding sub 56 [first setout].
2009. Chapter 329, § 9 amended:
By adding a new sub 35 and repealing old sub 35.
2009. Chapter 375, § 2 amended:
By adding sub 56 [second setout].
2008. Chapter 222, § 1 amended:
By adding sub 2-d.
2008. Chapter 250, § 1 amended:
By adding sub 55 [first setout].
2008. Chapter 265, § 1 amended:
By adding sub 55 [second setout].
2008. Chapter 281, § 1 amended:
By adding sub 55 [third setout].
2008. Chapter 464, § 1 amended:
By adding sub 55 [fourth setout].
2008. Chapter 618, § 1 amended:
By adding sub 55 [fifth setout].
2007. Chapter 442, § 1 amended:
By adding sub 54 [first setout].
2006. Chapter 200, § 1 amended:
Sub 2-a by deleting at fig 1 "municipality", at fig 2 "described in paragraph (b) of this subdivision", at fig 3 "contiguous to a county described in paragraph (c) of this subdivision" and adding the matter in italics.
2006. Chapter 209, § 1 amended:
Sub 9, by adding the matter in italics.
2006. Chapter 475, § 2 amended:
By adding sub 53 [first setout].
2006. Chapter 554, § 2 amended:
By adding sub 54 [second setout].
2006. Chapter 663, § 1 amended:
By adding sub 53 [second setout].
The 2016 amendment by ch 282, § 2, added 65 [second setout].
The 2016 amendment by ch 306, § 3, added 65 [third setout].
The 2016 amendment by ch 203, § 2, added 65 [first setout].
The 2017 amendment by ch 38, § 2, added 66 [first setout].
The 2017 amendment by ch 74, § 2, added 66 [second setout].
The 2017 amendment by ch 113, § 1, added 66 [third setout].
The 2017 amendment by ch 118, § 2, added 66 [fourth setout].
The 2017 amendment by ch 130, § 1, added 66 [fifth setout].
The 2017 amendment by ch 159, § 1, in 17, in the first sentence, substituted "which he or she shall be chosen or within which his or her official" for "which he shall be chosen or within which his official," added "the county of Dutchess"; added the second sentence; and made a related change.
The 2017 amendment by ch 191, § 2, added 66 [sixth setout].
The 2017 amendment by ch 226, § 2, added 66 [seventh setout].
The 2018 amendment by ch 136, § 2, added 67 [first setout].
The 2018 amendment by ch 149, § 3, added 67 [second setout].
The 2018 amendment by ch 172, § 3, added 67 [third setout].
The 2018 amendment by ch 185, § 1, added 67 [fourth setout].
The 2018 amendment by ch 220, § 1, added "or in the case of a member of the department of sanitation in a city with a population of one million or more who has two or more years of service to such city" in the second sentence of 2-a.
The 2018 amendment by ch 254, § 2, added 67 [fifth setout].
The 2018 amendment by ch 338, § 3, added 67 [sixth setout].
The 2018 amendment by ch 340, § 1, added 67 [seventh setout].
The 2018 amendment by ch 352, § 2, added 67 [eighth setout].
The 2018 amendment by ch 476, § 7, substituted "firefighters" for "firemen" or variants wherever it appears in 5.
The 2019 amendment by ch 292, § 1, added 68 and 69.
The 2019 amendment by ch 327, § 1, added "or the office of receiver of taxes" in 15; and made a related change.
The 2019 amendment by ch 333, § 1, added 68 [second setout].
The 2019 amendment by ch 349, § 1, added 68 [third setout].
The 2019 amendment by ch 396, § 1, added 68 [fourth setout].
The 2019 amendment by ch 461, § 1, added 68 [fifth setout].
The 2019 amendment by ch 464, § 1, added 68 [sixth setout].
The 2019 amendment by ch 466, § 2, added 68 [seventh setout].
The 2019 amendment by ch 503, § 3, added 68 [eighth setout].
The 2019 amendment by ch 527, § 1, added 68 [ninth setout].
The 2019 amendment by ch 645, § 1, added 68 [tenth setout].
The 2020 amendment by ch 175, § 2, added 70.
The 2020 amendment by ch 176, § 1, added 70.
The 2020 amendment by ch 193, § 1, added 70.
The 2020 amendment by ch 197, § 1, added 70.
The 2020 amendment by ch 206, § 1, added 70.
The 2020 amendment by ch 244, § 2, added (70).

Repeal Notes: [1965; ch 985] Former subdivision six of section three of the public officers law repealed by this act, excluded firemen, in certain cases, from the provisions of section three requiring a person to be a resident of the

political subdivision or municipal corporation of the state for which he is chosen or within which his official functions are required to be performed.

Notes to Decisions

Analysis

I. In General

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II. Residency

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20. — —Residency credits
21. —Highways, streets and water officers
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28. — —Length of residency
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36. Effect of change of residence
37. —Proof of change

I. In General

1. In general

Qualifications for public office may be established by the Legislature so long as these qualifications do not work arbitrary exclusions from office. De Hond v Nyquist, 65 Misc. 2d 526, 318 N.Y.S.2d 650, 1971 N.Y. Misc. LEXIS 1892 (N.Y. Sup. Ct. 1971).

The Public Officers Law deals primarily with the qualifications of those who shall hold public office in the state of New York, the manner and conditions which should govern their appointment and incidental details involved in the tenure of their office; it does not deal with the machinery whereby such officers shall be nominated and elected. Mark v Van Wart, 68 Misc. 2d 40, 325 N.Y.S.2d 767, 1971 N.Y. Misc. LEXIS 1216 (N.Y. Sup. Ct. 1971).

The names and pay scales of public employees, both temporary and permanent, are matters of public record and are subject to inspection, but the employees' home addresses do not carry the same prima facie public importance and unless a specific private need is shown for them, they need not be disclosed. Winston v Mangan, 72 Misc. 2d 280, 338 N.Y.S.2d 654, 1972 N.Y. Misc. LEXIS 1297 (N.Y. Sup. Ct. 1972).

A city has the power to enact local laws that are not inconsistent with the laws of the state in respect to the qualifications of its officers. A city may not adopt local laws inconsistent with the laws of the state. 1955 Ops St Compt 368.

Eligibility and qualifications for holding town office are set forth in Public Officers Law § 3 and Town Law § 23. 1955 Ops St Compt 586.

A town planning board may consist of five or seven members. 1957 Ops St Compt 38.

2. Qualification requirements and grounds for disqualification, generally

Rule which was promulgated by municipal civil service commission to induce young men to undertake police cadet program and which contained statement in capital letters and bold face that "WITHOUT ANY ADDITIONAL WRITTEN EXAMINATION, AUTOMATICALLY BECOME A PROBATIONARY PATROLMAN" was not ambiguous and was such as to entitle petitioners to employment upon their completion of police cadet program. Dougherty v Makowski, 47 A.D.2d 580, 363 N.Y.S.2d 175, 1975 N.Y. App. Div. LEXIS 8675 (N.Y. App. Div. 4th Dep't), app. denied, 36 N.Y.2d 644, 1975 N.Y. LEXIS 2512 (N.Y. 1975).

Absence of any reference to sex in this section indicates that it was never intended to bar either a man or woman from holding any office simply because of his or her sex. Burton v Schmidt, 218 N.Y.S. 416, 128 Misc. 270, 1926 N.Y. Misc. LEXIS 778 (N.Y. Sup. Ct. 1926).

Application for order of mandamus to compel respondent's removal from office of commissioner of records, Kings county, is denied, where proof establishes that respondent was legally appointed, that he has qualifications required by law, that he is efficient officeholder, and that he has fulfilled his duties in capable manner. Pomerantz v Jacoby, 266 N.Y.S. 691, 149 Misc. 99, 1933 N.Y. Misc. LEXIS 1881 (N.Y. Sup. Ct. 1933), aff'd, 241 A.D. 739, 270 N.Y.S. 948, 1934 N.Y. App. Div. LEXIS 9303 (N.Y. App. Div. 1934).

A candidate possessing all the statutory and constitutional qualifications for office is qualified whether or not he be unfit for the office. Fitness is a matter for the elector. Aurelio v Cohen, 44 N.Y.S.2d 145, 1943 N.Y. Misc. LEXIS 2402 (N.Y. Sup. Ct.), aff'd, 266 A.D. 603, 44 N.Y.S.2d 11, 1943 N.Y. App. Div. LEXIS 3629 (N.Y. App. Div. 1943).

The mayor of a village was not holding his office illegally because at the time of his nomination to such office and his election thereto he was the owner of a business wherein alcoholic beverages were sold for off-premises consumption. Harrell v Goldin, 124 N.Y.S.2d 627, 1953 N.Y. Misc. LEXIS 2222 (N.Y. Sup. Ct. 1953).

The fact that a person formerly held the office of village mayor does not disqualify him from appointment to fill a vacancy in such office if he is otherwise qualified and under no disability. 1957 Ops St Compt 214.

There is no authority for an arrangement by three villages for the employment of a single individual as village treasurer. 1960 Ops St Compt File #458.

A resident of the City of Dunkirk, owner of a sporting goods store within the city, may not be appointed deputy town clerk of the town of Dunkirk, for the sole purpose of issuing hunting and fishing licenses. 1960 Ops St Compt File #760.

3. —Health of officer

One who stands adjudicated an insane person cannot hold public office. In re Killeen, 201 N.Y.S. 209, 121 Misc. 482, 1923 N.Y. Misc. LEXIS 1234 (N.Y. Sup. Ct. 1923).

4. —Police or fire protection

A volunteer fireman is in "the public service" and a public servant, despite the fact that he receives no salary, in view of the fact that he is entitled to certain statutory benefits and exemptions, and an applicant to membership in a volunteer fire company may not be denied employment solely on racial grounds. Everett v Riverside Hose Co., 261 F. Supp. 463, 1966 U.S. Dist. LEXIS 10491 (S.D.N.Y. 1966).

5. —Person holding another office

While there is no incompatibility between the offices of member of a village planning board and member of a town planning board,

appointment of members of village planning board to town planning board is not recommended. 1957 Ops St Compt 38.

A village board of trustees may not legally appoint any of its number to membership on a regional planning board. 1968 Ops St Compt File #172.

A city, by the adoption of a local law, may authorize the city attorney to hold the office of acting city court judge. 1956 Ops St Compt 270.

6. —Conviction of crime or other indicia of prior misconduct as disqualification

Person to be nominated under Election Law must be one who, at time of his election, can take and hold his office and it is not contemplated that prison convict, who could not hold office if elected, can be a nominee. Application of Lindgren, 232 N.Y. 59, 133 N.E. 353, 232 N.Y. (N.Y.S.) 59, 1921 N.Y. LEXIS 475 (N.Y. 1921).

Removal from office effected by operation of CLS Pub O § 30(1)(e) results in bar to officeholder's seeking same office for duration of term for which officer had been elected; thus, state senator convicted of federal felony was precluded from seeking election to unexpired term of very office from which he had been removed. Alamo v Strohm, 74 N.Y.2d 801, 545 N.Y.S.2d 689, 544 N.E.2d 608, 1989 N.Y. LEXIS 2708 (N.Y. 1989).

A person, to hold the office of village treasurer or village clerk, must be qualified as prescribed in Village Law § 42 and Public Officers Law § 3 and must be under no other disability resulting from previous wrongdoing. 1956 Ops St Compt File #7965.

7. Age

Public Officers Law § 3 means that no person shall be capable of holding a civil office who shall not have attained the age of 21 [now 18] years at the time of his appointment to public office or at the time he has been chosen for. Mark v Van Wart, 68 Misc. 2d 40, 325 N.Y.S.2d 767, 1971 N.Y. Misc. LEXIS 1216 (N.Y. Sup. Ct. 1971).

Where petitioner had been nominated as an independent candidate for the office of councilman but would not meet age requirement of this section the 19th day of January, 1972, it was held that the petitioner, within the time for filing his oath for the office of councilman, would have all of the qualifications required for the office to which he had been nominated and his name should appear upon the ballot. Mark v Van Wart, 68 Misc. 2d 40, 325 N.Y.S.2d 767, 1971 N.Y. Misc. LEXIS 1216 (N.Y. Sup. Ct. 1971).

Where Education Law, providing in pertinent part that no person was eligible for office of member of board of education who was not qualified voter of city school district and having effect of permitting 18-year-old person to seek such office by virtue of Twenty-Sixth Amendment's enfranchising of 18-year-olds, was in conflict with Public Officers Law, providing that no person could hold civil office without having attained the age of 21 [now 18] years, Education Law, under well established principle of statutory construction that general statute must yield to specific statute when both deal with same general subject matter, being more specific statute, took precedence to permit 18-year-old person to seek office of school board member. Spencer v Board of Education, 69 Misc. 2d 1091, 333 N.Y.S.2d 308, 1972 N.Y. Misc. LEXIS 1827 (N.Y. Sup. Ct.), rev'd, 31 N.Y.2d 810, 339 N.Y.S.2d 461, 291 N.E.2d 585, 1972 N.Y. LEXIS 976 (N.Y. 1972).

8. Citizenship

A person who is not a citizen of the United States may not be appointed to a village planning board. 1956 Ops St Compt 66.

9. Ownership of property

Trustees of a village public library must be residents of the village but are not required to be the owners of real property. 1956 Ops St Compt 168.

Appointees to a town hospital board of managers need not be property owners in the town. 1960 Ops St Compt File #755.

10. Ineligible persons holding office, de facto officers

The appropriate remedy to remove an incumbent town supervisor exercising the functions of his office under claim and color of right so as to constitute him a de facto officer on the ground of his ineligibility to hold office for lack of residence in the town is an action in the nature of quo warranto and mandamus is not an appropriate remedy. Holzberger v Schoentag, 54 Misc. 2d 547, 283 N.Y.S.2d 92, 1967 N.Y. Misc. LEXIS 1347 (N.Y. Sup. Ct. 1967).

The acts of de facto public officers are valid and beyond challenge so far as third parties are concerned. Hence, the court would not disturb the election of a borough president in the City of New York upon the ground that a borough commissioner of borough works was not qualified to vote at such election although he had been in office more than six months and performed all the functions thereof. Schick v Impellitteri, 122 N.Y.S.2d 729, 1953 N.Y. Misc. LEXIS 1880 (N.Y. Sup. Ct.), aff'd, 282 A.D. 663, 122 N.Y.S.2d 794, 1953 N.Y. App. Div. LEXIS 4578 (N.Y. App. Div. 1953).

An ineligible person appointed to public office may not continue holding the office nor receive the salary for the balance of the term after discovery of the ineligibility. 1967 Ops St Compt File #474.

A person illegally purporting to occupy the office of village clerk-treasurer is not entitled to any reimbursement of expenses incurred in the performance of the duties of such office. 1967 Ops St Compt File #668.

II. Residency

11. In general

City was bound to comply with residence requirements of United States Comprehensive Employment and Training Act of 1973 as precondition for eligibility for federal funding. Carritue v Beame, 90 Misc. 2d 504, 395 N.Y.S.2d 573, 1976 N.Y. Misc. LEXIS 2873 (N.Y. Sup. Ct. 1976), aff'd, 61 A.D.2d 957, 402 N.Y.S.2d 1012, 1978 N.Y. App. Div. LEXIS 10556 (N.Y. App. Div. 1st Dep't 1978).

12. State residency

Privileges and immunities clause of United States Constitution did not afford New York City firefighters living outside state "fundamental right" to be employed by city, in face of amendments to CLS Pub O §§ 3 and 30 requiring public officers living outside state to move to one of designated counties within one year of effective date, since public employment is not privilege which "bears upon the vitality of the Nation as a single entity." Winkler v Spinnato, 72 N.Y.2d 402, 534 N.Y.S.2d 128, 530 N.E.2d 835, 1988 N.Y. LEXIS 2702 (N.Y. 1988), cert. denied, 490 U.S. 1005, 109 S. Ct. 1640, 104 L. Ed. 2d 155, 1989 U.S. LEXIS 1702 (U.S. 1989).

Equal protection clauses of United States and state constitutions did not afford New York City firefighters living outside state "fundamental right" to be employed by city, in face of amendments to CLS Pub O §§ 3 and 30 requiring public officers living outside state to move to one of designated counties within one year of effective date, since firefighters were not suspect class, and state has long-standing interest in requiring its officers to be state residents; moreover, amendments rationally required in-state officers to move to designated counties only if they should move from their current residences in non-designated counties, since such limited accommodation was extended only to those who had already satisfied in-state residency requirement. Winkler v Spinnato, 72 N.Y.2d 402, 534 N.Y.S.2d 128, 530 N.E.2d 835, 1988 N.Y. LEXIS 2702 (N.Y. 1988), cert. denied, 490 U.S. 1005, 109 S. Ct. 1640, 104 L. Ed. 2d 155, 1989 U.S. LEXIS 1702 (U.S. 1989).

Residency requirements applicable to New York City firefighters, as embodied in CLS Pub O §§ 3(19) and 30(5-a), have rational basis, and thus do not violate equal protection provisions of federal and state constitutions, even though they arbitrarily discriminate against firefighters residing out of state, since state has legitimate economic self-interest in encouraging residency in state; those who reside in New York are more likely to spend money in state, to own New York real estate (and so pay property taxes), and to pay resident state income tax. Winkler v Spinnato, 134 A.D.2d 66, 523 N.Y.S.2d 530, 1987 N.Y. App. Div. LEXIS 50868 (N.Y. App. Div. 2d Dep't 1987), aff'd, 72 N.Y.2d 402, 534 N.Y.S.2d 128, 530 N.E.2d 835, 1988 N.Y. LEXIS 2702 (N.Y. 1988).

CLS Pub O §§ 3(19) and 30(5-a), which require New York City firefighters to reside in state, do not violate privileges and immunities clause of U.S. Constitution since state and local employment is not "privilege" which bears on vitality of nation as

single entity, and such laws directly implicate state's sovereignty and further state's rightful goal of limiting privilege of public employment to its own citizens. Winkler v Spinnato, 134 A.D.2d 66, 523 N.Y.S.2d 530, 1987 N.Y. App. Div. LEXIS 50868 (N.Y. App. Div. 2d Dep't 1987), aff'd, 72 N.Y.2d 402, 534 N.Y.S.2d 128, 530 N.E.2d 835, 1988 N.Y. LEXIS 2702 (N.Y. 1988).

Submission by a political party's former nominee of his out-of-state driver's license and lease established his intent to reside outside of New York State, thereby disqualifying him under N.Y. Elec. Law § 6-122 and N.Y. Pub. Off. Law § 3(1) for the office he had sought. Therefore, the New York State Board of Elections erred in not accepting the party's certificate of nomination and authorization as to its replacement nominee. Matter of Kryzan v New York State Bd. of Elections, 55 A.D.3d 1217, 865 N.Y.S.2d 793, 2008 N.Y. App. Div. LEXIS 8129 (N.Y. App. Div. 3d Dep't 2008).

Only requirement imposed by New York State's Election Law is that the candidate be a resident at the time of the election. Accordingly, New York State's statutory provisions do not run afoul of the Qualifications Clause, U.S. Const. art. I, § 2, cl. 2. Matter of Kryzan v New York State Bd. of Elections, 55 A.D.3d 1217, 865 N.Y.S.2d 793, 2008 N.Y. App. Div. LEXIS 8129 (N.Y. App. Div. 3d Dep't 2008).

13. Local residency, generally

Local law establishing two-year residency requirement for eligibility to hold certain city offices invidiously discriminates against potential candidates and voters and violates equal protection and due process clauses of Federal and State Constitutions. Phelan v Buffalo, 54 A.D.2d 262, 388 N.Y.S.2d 469, 1976 N.Y. App. Div. LEXIS 13765 (N.Y. App. Div. 4th Dep't 1976).

City was not precluded from enacting a local code to adopt N.Y. Pub. Off. Law §§ 3(12), 30(6), which required police officers employed by the city to reside within the city limits, as N.Y. Pub. Off. Law §§ 3(12), 30(6), which regulated all other public officers did not conflict with N.Y. Pub. Off. Law § 30(4)(3), which regulated the residency of police officers. Troy Police Benevolent & Protective Ass'n v City of Troy, 299 A.D.2d 710, 750 N.Y.S.2d 352, 2002 N.Y. App. Div. LEXIS 10746 (N.Y. App. Div. 3d Dep't 2002), app. denied, 100 N.Y.2d 507, 763 N.Y.S.2d 813, 795 N.E.2d 39, 2003 N.Y. LEXIS 1693 (N.Y. 2003).

A municipality may require that a candidate for a position be a resident prior to examination. Hanlon v Harrolds, 82 Misc. 2d 839, 371 N.Y.S.2d 223, 1974 N.Y. Misc. LEXIS 2048 (N.Y. Sup. Ct. 1974).

In proceedings under N.Y. Elec. Law § 16-102, certificates of disqualification filed by a city council member who had been appointed to a state position after accepting the nomination for re-election were valid under N.Y. Elec. Law § 6-148(1) as the member would not be able to satisfy the residency requirements under N.Y. Pub. Off. Law § 3(1) at the time of the general election as the member had moved to another city to begin his position with the state. Matter of Justice v Gamache, 45 A.D.3d 508, 845 N.Y.S.2d 382, 2007 N.Y. App. Div. LEXIS 11131 (N.Y. App. Div. 2d Dep't 2007).

14. —Residency at time of petition or nomination

New York law does not require that candidate for public office be resident of election unit at time designating petition is filed; CLS Elec § 6-122 simply prohibits person from being designated or nominated for public office who cannot meet statutory or constitutional qualifications at "commencement of the term of such office," and CLS Pub O § 3(1) adds that candidates must satisfy residency requirements as of time they are elected. Weidman v Starkweather, 80 N.Y.2d 955, 590 N.Y.S.2d 873, 605 N.E.2d 360, 1992 N.Y. LEXIS 3477 (N.Y. 1992).

Where at time of nomination candidate was not resident of county, he was not "capable of holding" office within meaning of this section. Brickman v Board of Elections, 248 A.D. 467, 290 N.Y.S. 805, 1936 N.Y. App. Div. LEXIS 6172 (N.Y. App. Div. 1936).

Court erred in determining that appellant did not meet residency requirements of CLS Elec § 6-122 because she was not resident of district to which she sought election, since there is no requirement that candidate be resident of district at time of filing petition, only requirement being that candidate be resident at time of election. Clark v McCoy, 196 A.D.2d 607, 601 N.Y.S.2d 190, 1993 N.Y. App. Div. LEXIS 8145 (N.Y. App. Div. 2d Dep't), app. denied, 82 N.Y.2d 653, 602 N.Y.S.2d 802, 622 N.E.2d 303, 1993 N.Y. LEXIS 3020 (N.Y. 1993).

Where there was no evidence that candidate in designating petitions was a resident of the political subdivision in question, the designating petitions were declared void. Aiello v Power, 9 Misc. 2d 523, 167 N.Y.S.2d 338, 1957 N.Y. Misc. LEXIS 2564 (N.Y. Sup. Ct.), aff'd, 4 A.D.2d 833, 166 N.Y.S.2d 793, 1957 N.Y. App. Div. LEXIS 4669 (N.Y. App. Div. 2d Dep't 1957).

Individual who is not resident of town may not be nominated as candidate for elective office in that town. 1987 Op St Compt No. 87-32.

15. Application of local residency requirement to particular persons

New York City may not, through Local Law No. 20 of 1978 (Administrative Code of City of New York, §§ B49-4.0–B49-4.2), make a residency requirement for municipal officers and employees applicable to members of its police, fire, correction and sanitation departments, since the law as applicable to these persons is inconsistent with exemptions from municipal residency requirements contained in section 3 (subds 2, 2-a, 9) and section 30 (subds 4, 4-a, 5) of the Public Officers Law, which sections may not be superseded by local law under municipal home rule as they do not relate "to the property, affairs or government" of the city by "special law" (NY Const, art IX, § 2); the provisions of said statutes are not infirm because they may affect less than all cities, since what is required is that the classification be defined by conditions common to the class and related to the subject of the statute, and it has long been recognized that New York City and other large municipal centers might reasonably receive different treatment. Uniformed Firefighters Asso. v New York, 50 N.Y.2d 85, 428 N.Y.S.2d 197, 405 N.E.2d 679, 1980 N.Y. LEXIS 2271 (N.Y. 1980).

Town did not err in adopting a local law changing the requirements for the position of commissioner of public works because the residency requirements of N.Y. Pub. Off. Law § 3(11)-(58) and N.Y. Town Law § 23(2)-(24) could be superseded by the local law, and the appointed commissioner was not engaged in or required to practice engineering while holding the position. Matter of Ricket v Mahan, 97 A.D.3d 1062, 949 N.Y.S.2d 272, 2012 N.Y. App. Div. LEXIS 5712 (N.Y. App. Div. 3d Dep't 2012).

16. —Building inspectors

Where statute creating position of town building inspector gave him power of general and executive administration of the zoning ordinance and Town Law § 138 gave him power of enforcement of various codes, ordinances, rules and regulations, and his functions and duties directly affected the citizens of the town and involved the exercise of police powers of the political subdivision, position was a public office requiring holder thereof to be resident of town. Haller v Carlson, 42 A.D.2d 829, 346 N.Y.S.2d 108, 1973 N.Y. App. Div. LEXIS 3884 (N.Y. App. Div. 4th Dep't 1973).

Because an assistant building inspector was a public officer within the meaning of Public Officers Law § 3(1), she was subject to the residency requirement of that statute; nevertheless, the acts of the assistant building inspector were not thereby rendered null and void because the residency requirement of § 3(1) was not jurisdictional in nature, and a city had the authority to prosecute a citizen's violations of the New York State Uniform Fire Prevention and Building Code 19 NYCRR 1219.1 et seq. Matter of Ophardt v Vasquez, 74 A.D.3d 1742, 904 N.Y.S.2d 835, 2010 N.Y. App. Div. LEXIS 4958 (N.Y. App. Div. 4th Dep't), app. dismissed, app. denied, 15 N.Y.3d 867, 910 N.Y.S.2d 33, 936 N.E.2d 915, 2010 N.Y. LEXIS 2988 (N.Y. 2010).

17. —District attorneys, counsel for political subdivisions, etc.

Corporation counsel, who was "the official legal adviser of the council and all boards and officers of the city," and who, when directed by council, was required to defend all actions by and against city, and such counsel's assistants were not "public officials" within meaning of statutory provision that "no person shall be capable of holding a civil office who shall not, at the time he shall be chosen thereto, be . . . if it be local office, a resident of

the . . . municipal corporation"; overruling Thompson v Hofstatter, 265 N.Y. 54, 191 N.E. 772, 265 N.Y. (N.Y.S.) 54, 1934 N.Y. LEXIS 995 (N.Y. 1934).

Residency requirements of CLS Pub O § 3(1) did not preclude Attorney General from appointing member of his staff as Assistant Attorney General to perform prosecutorial duties under direction of county district attorney in local criminal matter; eligibility features § 3(1) are not jurisdictional in nature. Haggerty v Himelein, 89 N.Y.2d 431, 654 N.Y.S.2d 705, 677 N.E.2d 276, 1997 N.Y. LEXIS 102 (N.Y. 1997).

Section 3 of the Public Officers Law was not violated by the fact that a nonresident of the city of Cohoes acted as counsel on behalf of the city in a proceeding by the mayor to remove from his office for malfeasance the Commissioner of Public Works, since the attorney was neither appointed nor elected to office but retained in his professional capacity pursuant to an applicable section of the city charter. Senecal v Cohoes, 27 A.D.2d 773, 277 N.Y.S.2d 51, 1967 N.Y. App. Div. LEXIS 4894 (N.Y. App. Div. 3d Dep't 1967).

Reappointment of individual as assistant district attorney for county violated CLS Pub O § 3 because individual had changed his residence to different county prior to reappointment. Brindisi v Donalty, 171 A.D.2d 1039, 579 N.Y.S.2d 614, 1991 N.Y. App. Div. LEXIS 6768 (N.Y. App. Div. 4th Dep't), app. denied, 78 N.Y.2d 855, 573 N.Y.S.2d 645, 578 N.E.2d 443, 1991 N.Y. LEXIS 1287 (N.Y. 1991).

Employment of corporation counsel and his two assistants for a limited term by city was within exception, from municipal code provision, that nonresidents could be temporarily employed for a specific project or undertaking requiring "special skill, technical knowledge or professional ability which in the opinion of the council is not possessed by any resident." Rappel v Roberts, 79 Misc. 2d 201, 359 N.Y.S.2d 133, 1973 N.Y. Misc. LEXIS 1270 (N.Y. Sup. Ct. 1973).

Assistant district attorney who did not reside in Franklin County was not qualified to assist Franklin County district attorney in criminal proceeding in Franklin County Court, and was removed as Franklin County Assistant District Attorney, where defendant, who resided in Franklin County, objected to his appointment prior to conclusion of criminal proceeding. Mileto v Sleight, 178 Misc. 2d 562, 681 N.Y.S.2d 189, 1998 N.Y. Misc. LEXIS 514 (N.Y. Sup. Ct. 1998), app. denied, 260 A.D.2d 977, 690 N.Y.S.2d 149, 1999 N.Y. App. Div. LEXIS 4419 (N.Y. App. Div. 3d Dep't 1999).

A town may not appoint a non-resident as town attorney where there is an attorney residing in the town. 1971 Ops St Compt File #946.

18. —Firefighters

Requirement that applicants for proposed positions as Model Cities aides for police and firemen be residents of Model Cities violated constitutional and statutory requirements with respect to police and firemen. Maye v Lindsay, 33 N.Y.2d 552, 347 N.Y.S.2d 439, 301 N.E.2d 425, 1973 N.Y. LEXIS 1137 (N.Y.), cert. denied, 414 U.S. 1069, 94 S. Ct. 579, 38 L. Ed. 2d 474, 1973 U.S. LEXIS 4065 (U.S. 1973).

In Article 78 proceeding by candidates on then-current eligible list for appointment to firefighter position, cause of action alleging that respondents intended to appoint candidates from subsequent eligible list prior to expiration of current list, in violation of Civil Service Law, was properly dismissed where (1) no appointments had yet been made at time proceeding was commenced and claim consisted of wholly speculative assertion of anticipated illegal action, and (2) such claim became moot when petitioners' list expired without any intervening appointments from subsequent list. Altamore v Barrios-Paoli, 90 N.Y.2d 378, 660 N.Y.S.2d 834, 683 N.E.2d 740, 1997 N.Y. LEXIS 1369 (N.Y. 1997).

There was no need for judicial declaration that New York City firefighters whose families resided out of state could nevertheless establish in-state residence necessary to retain employment under CLS Pub O §§ 3 and 30 where fire department officials had not taken contrary position and had not established irrebuttable presumption that firefighter's residence was same as that of his family, and thus there was no genuine dispute between parties. Winkler v Spinnato, 134 A.D.2d 66, 523 N.Y.S.2d 530, 1987 N.Y. App. Div. LEXIS 50868 (N.Y. App. Div. 2d Dep't 1987), aff'd, 72 N.Y.2d 402, 534 N.Y.S.2d 128, 530 N.E.2d 835, 1988 N.Y. LEXIS 2702 (N.Y. 1988).

A requirement that an appointee to a city fire department be a resident of the city violates Public Officers Law section providing that any law, ordinance or regulation requiring a person to be resident of political subdivision or municipal corporation within which his official functions are exercised does not apply to an appointment to a paid fire department of a city, or fire district if person resides in county in which political subdivision is located. Hanlon v Harrolds, 82 Misc. 2d 839, 371 N.Y.S.2d 223, 1974 N.Y. Misc. LEXIS 2048 (N.Y. Sup. Ct. 1974).

A person who actually resides outside a fire district may not, by merely declaring himself a resident, qualify himself for election as a commissioner. 1955 Ops St Compt 584.

Because a fire surgeon is an employee of a city, and not an officer, the Public Officers Law does not require the incumbent of that position to be a resident of such city. 1967 Ops St Compt File #407.

19. — —Paid fighters

Provision of Public Officers Law allowing paid member of uniformed force of paid fire department to reside in specified areas outside political subdivision in which he performs his function was enacted for benefit of municipalities so that they would not encounter difficulties in recruiting firemen and had no relevancy to, and would not be allowed to thwart, rehiring under the United States Comprehensive Employment and Training Act of 1973 of those firemen who resided in city in satisfaction of residency requirements imposed under Act; grant of federal funding under Act to fiscally troubled city was made on temporary basis to provide "conditional employment" in areas of substantial unemployment within entire political subdivision, such as city, and was not intended to deal with problems in less affected suburban communities. Carritue v Beame, 90 Misc. 2d 504, 395 N.Y.S.2d 573, 1976 N.Y. Misc. LEXIS 2873 (N.Y. Sup. Ct. 1976), aff'd, 61 A.D.2d 957, 402 N.Y.S.2d 1012, 1978 N.Y. App. Div. LEXIS 10556 (N.Y. App. Div. 1st Dep't 1978).

Paid firemen of a fire district may live outside the county in which the fire district is located and may live outside the state. 1967 Ops St Compt File #701.

A paid fireman in a fire district is not a public officer and may, therefore, reside outside the State of New York. 1970 Ops St Compt File #73.

A municipality may not require a paid fireman to reside within the city as a condition of appointment or retention, but it may require him to live within the county or counties in which the city is located. A city may impose reasonable residence qualifications applicable to employment and continuation in employment provided that such requirements are not inconsistent with any general law. 1983 Op St Comp File #83-118.

20. — —Residency credits

In Article 78 proceeding alleging that respondents violated CLS Pub O §§ 3(9) and 30(5) and constitutional requirements for civil service appointments (CLS NY Const Art V § 6) by letting prior eligible list for firefighter position expire for purpose of favoring New York City residents who would receive 5-point residency credit on subsequent firefighter examination, candidates on prior eligible list were not aggrieved by application of residency credit and thus lacked standing to seek to enjoin its use, where no residency credit was applied to their examination, they did not allege that they sat for subsequent examination, and they did not allege that all appointments could not lawfully be fulfilled from subsequent list unless residency credit was dropped as factor in determining that list. Altamore v Barrios-Paoli, 90 N.Y.2d 378, 660 N.Y.S.2d 834, 683 N.E.2d 740, 1997 N.Y. LEXIS 1369 (N.Y. 1997).

CLS Pub O §§ 3(9) and 30(5), which permit firefighters and certain other New York City employees to reside in nearby counties notwithstanding existence of other applicable statutory or regulatory local residency requirements, do not necessarily invalidate 5-point residency credit added to scores of qualifying New York City residents; thus, personnel director's motive in

letting current eligible list expire in order to appoint from more recent eligible list reflecting residency credit did not, in and of itself, establish contrariness or bad faith, and therefore did not establish clear legal right to relief sought, as is required for mandamus to lie. Altamore v Barrios-Paoli, 90 N.Y.2d 378, 660 N.Y.S.2d 834, 683 N.E.2d 740, 1997 N.Y. LEXIS 1369 (N.Y. 1997).

State Constitution's merit and fitness standard for civil service was not violated by firefighters examination scoring credit for New York City residency, which, after calculating written and physical examination scores, simply added additional factor to various qualifications deemed pertinent, including economic and public safety benefits; further, credit did not violate CLS Pub O § 3(9) nor veteran's preference of CLS Civ S § 85. McGuinn v City of New York, 248 A.D.2d 282, 670 N.Y.S.2d 460, 1998 N.Y. App. Div. LEXIS 3214 (N.Y. App. Div. 1st Dep't 1998).

21. —Highways, streets and water officers

City of Ithaca cannot use its home rule authority to extend residency requirement established for members of Ithaca Housing Authority board by CLS Pub Hous § 429. 2011 NY Ops Atty Gen 2011-01 (Informal), N.Y. Op. Att'y Gen. No. 2011-1, 2011 N.Y. AG LEXIS 2.

A village street commissioner must be a resident of the village as a qualification to the holding of his office, unless the board of trustees provides that he may reside within a town in which the village is wholly or partially situated. 1968 Ops St Compt File #197.

22. —Housing and urban renewal officers

General manager of a housing project is a public officer and required to reside within the municipality for which the project is established. 1954 Ops St Compt 142.

No requirement of village residency applies to executive director, administrative assistant or attorney of village urban renewal agency. 1965 Ops St Compt File #558.

Members of urban renewal agency are public officers and required to be residents of municipality for which such agency is established. 1966 Ops St Compt File #18.

23. —Judges and court personnel

Candidates who have passed state civil service examination for "supreme court stenographer, first and second judicial districts," in order to be entitled to appointment in Kings county, must be residents of that county. Hammond v Rice, 239 A.D. 539, 267 N.Y.S. 534, 1933 N.Y. App. Div. LEXIS 8089 (N.Y. App. Div. 1933).

Court attendants in city of N.Y. are within provisions of this section, notwithstanding repeal of Greater N. Y. Charter, § 1394. People ex rel. Distler v McGuire, 125 N.Y.S. 90, 68 Misc. 516, 1910 N.Y. Misc. LEXIS 465 (N.Y. Sup. Ct. 1910).

A nonresident of a town may not be appointed as clerk to a justice of the peace of the town. 1964 Ops St Compt #496.

24. —Members of local governing or legislative bodies

It was improper to invalidate petition designating resident of both town and incorporated village within town as candidate for town superintendent of highways since candidate met one of alternative requirements of CLS Pub O § 3(1) for civil office eligibility in that he was resident of political subdivision or municipal corporation for which he would be chosen, and although village charter barred village residents from voting for office of town superintendent of highways, it did not prohibit village resident from seeking such office. Bates v D'Apice, 153 A.D.2d 714, 544 N.Y.S.2d 881, 1989 N.Y. App. Div. LEXIS 11057 (N.Y. App. Div. 2d Dep't 1989).

In the absence of any contrary statute, candidate for New York City councilman position was obliged to reside in the district from which he sought election during year in which councilmanic districts were reapportioned. Rudiano v Mattera, 73 Misc. 2d 983, 344 N.Y.S.2d 669, 1973 N.Y. Misc. LEXIS 1949 (N.Y. Sup. Ct.), rev'd, Verdi v Mattera, 41 A.D.2d 945, 343 N.Y.S.2d 1004, 1973 N.Y. App. Div. LEXIS 4454 (N.Y. App. Div. 2d Dep't 1973).

Where the politician was purchasing a house in the legislative district approximately a month and a half before the election, the politician was to satisfy the public office residency requirements of N.Y. Pub. Off. Law § 3 and N.Y. Elec. Law § 6-122. Campbell v Tunny, 196 Misc. 2d 860, 764 N.Y.S.2d 163, 2003 N.Y. Misc. LEXIS 985 (N.Y. Sup. Ct. 2003).

Because an incumbent's action to invalidate a candidate's designating petition was untimely under N.Y. Elec. Law § 16-102(2), and as the candidate's residency was valid under N.Y. Village Law § 3-300(2), N.Y. Elec. Law § 6-122, and N.Y. Pub. Off. Law § 3(1), the incumbent was not entitled to the relief sought. De Caprio v Rockland County Bd. of Elections, 931 N.Y.S.2d 468, 33 Misc. 3d 217, 2011 N.Y. Misc. LEXIS 3913 (N.Y. Sup. Ct. 2011).

Town board members may live within or outside a village. 1946 Ops St Compt 48.

A non-resident may not hold the office of town councilman. 1956 Ops St Compt 279.

A mayor or member of a board of trustees of a village must reside in the village and a village board cannot provide that a holder of either of these offices may reside outside of the village. 1967 Ops St Compt File #817.

25. —Planning and zoning board members

Representatives on regional planning board of municipalities are not "public officers" under subdivision 1 of Public Officers Law § 3, and there is no requirement (under subdivision (b) of General Municipal Law § 239) that each municipality involved should select a separate representative or that the representative need be a resident of the municipality selecting him, and there is no inference under paragraph 9 of subdivision (d) of General Municipal Law § 239 that regional planning board is exercising sovereign power. Lowell v Browner, 47 Misc. 2d 729, 263 N.Y.S.2d 93, 1965 N.Y. Misc. LEXIS 2190 (N.Y. Sup. Ct. 1965).

City's charter, rather than CLS Gen City § 81, governs with respect to terms of office of zoning board of appeals members and date on which their terms commence. 2012 NY Ops Atty Gen 2012-02 (Informal), 2012 N.Y. Op. Att'y Gen. No. 2012-2, 2012 N.Y. AG LEXIS 2.

A "summer resident" and property owner in a village who votes in another municipality may not be appointed a member of the village board of zoning appeals. 1960 Ops St Compt File #610.

A resident of a village may serve on the planning board of a town in which the village is situate. 1968 Ops St Compt File #819.

26. —Police

Town board properly terminated policeman under a resolution, adopted pursuant to Public Officers Law § 30, subd 4, requiring that all town policemen reside in town, where evidence showed that policeman spent some time at his parents' in-town home, but spent most of his off-duty hours at the out-of-town residence of his wife and children. Contento v Kohinke, 42 A.D.2d 1025, 348 N.Y.S.2d 392, 1973 N.Y. App. Div. LEXIS 3331 (N.Y. App. Div. 3d Dep't 1973).

A patrolman of the New York City Housing Authority Police Department is a member of the police force of any "municipal corporation of the state" within the meaning of the Public Officers Law §§ 3, 30. Maye v Lindsay, 69 Misc. 2d 276, 330 N.Y.S.2d 14, 1972 N.Y. Misc. LEXIS 2133 (N.Y. Sup. Ct. 1972), vacated, 41 A.D.2d 127, 341 N.Y.S.2d 371, 1973 N.Y. App. Div. LEXIS 4941 (N.Y. App. Div. 1st Dep't 1973).

Section 822 of the New York City Charter, which provides that all New York City employees who are or become nonresidents of the City of New York shall agree to pay to the city an amount equal to the New York City resident income tax less any city earnings or personal income tax imposed on them during the same taxable period, is a valid condition of city employment and does not constitute a *de facto* residency requirement as it is common knowledge that a large percentage of New York City employees reside out of the City of New York; consequently, the statute, in and of itself, is not inconsistent with subdivision 4 of section 30 of the Public Officers Law which prohibits certain municipalities from removing a police officer from his office on the grounds of nonresidency, nor is it inconsistent with subdivision 2 of section 3 of the Public Officers Law which prohibits a municipality from denying certain nonresidents appointment to its police force. Watts v McGuire, 102 Misc. 2d 711, 424 N.Y.S.2d 327, 1979 N.Y. Misc. LEXIS 2916 (N.Y. Sup. Ct. 1979), aff'd, 81 A.D.2d

791, 441 N.Y.S.2d 387, 1981 N.Y. App. Div. LEXIS 11438 (N.Y. App. Div. 1st Dep't 1981).

The apparent intent of a local law adopted by the City of Kingston was to require all members of the police force to reside in the city and non-compliance with or any violation of such law by a prospective appointee or member would prohibit an appointment to the force or would create a vacancy in the office. The law, however, needs to be clarified and is in conflict with the provisions of a certain statute and an examination announcement. 1968 Ops St Compt File #615.

27. — —Members of forces of less than 200

A village may pass a local residency law for members of the police department as long as the force does not consist of more than 200 full time members and the law does not apply to persons appointed prior to July 1, 1961 who then resided in the county or a contiguous county and continue to reside there. 1961 Ops St Compt #628.

A city may not limit application for appointment to its police force to residents of the city, but it may, if it has a police force of less than 200 full-time members, require those members appointed to the force after July 1, 1961, to become residents. 1963 Ops St Compt #223.

A village with a police force of less than 200 officers may require that its members reside within the village or within the town in which the village is located. 1974 Ops St Compt File #1329.

A city may not establish residency requirements for the appointment of members of a police force if they reside within certain geographic areas outside of the municipality, except that where a police force consists of less than two-hundred members, a municipality may require that the members reside within the municipality or within certain geographic areas. A city may impose reasonable residence qualifications applicable to employment and continuation in employment provided that such requirements are not inconsistent with any general law. 1983 Op St Comp File #83-118.

28. — —Length of residency

Where a city, pursuant to authority granted by this section, amended its charter, so as to permit residents of county to be members of police force of the city, a directive by county civil service commission requiring applicants for promotional examinations to be residents of the city for two years prior to examination, was arbitrary, capricious, unreasonable and illegal. Giacobbe v Onondaga County Civil Service Com., 21 Misc. 2d 188, 191 N.Y.S.2d 900, 1959 N.Y. Misc. LEXIS 2839 (N.Y. Sup. Ct. 1959).

29. — —Village police

A person living outside the county may not be appointed as a village policeman even though he had previously, but invalidly, been appointed a deputy sheriff in the county wherein the village was situated. 1954 Ops St Compt 31.

Enactment of a village ordinance requiring local residency for members of its police department is permissible, but applicants for the police force need not be village residents prior to becoming members of the force. 1961 Ops St Compt #628.

In the absence of local legislation to the contrary, village police officers may reside outside of the village and within the geographical areas designated in Public Officers Law, § 30(4). 1974 Ops St Compt File #1329.

30. —Sealers of weights and measures

The sealer of weights and measures of a city is a public officer and must be a resident of the city. 1955 Ops St Compt 368.

31. —Sheriffs and constables

Sheriff's department is not a "police force of the county" for purpose of exemption from residence requirement of public officers law and sheriff may lawfully discipline or remove deputy who violates department rule requiring that deputies be residents of the county. Mazzo v County of Monroe, 58 A.D.2d 1017, 397 N.Y.S.2d 274, 1977 N.Y. App. Div. LEXIS 13238 (N.Y. App. Div. 4th Dep't 1977).

Requirement that deputy sheriff be resident of county within which his official functions are to be exercised does not violate the equal protection clause. Mazzo v County of Monroe, 58 A.D.2d 1017, 397 N.Y.S.2d 274, 1977 N.Y. App. Div. LEXIS 13238 (N.Y. App. Div. 4th Dep't 1977).

In an Article 78 proceeding seeking reinstatement of deputy sheriffs who were dismissed for failure to comply with the requirement that they reside in the county in which they held office, the deputy sheriffs were properly dismissed where they were not exempt from the residency requirements as were the members of the police force. Myles v Phillips, 87 A.D.2d 614, 448 N.Y.S.2d 31, 1982 N.Y. App. Div. LEXIS 15916 (N.Y. App. Div. 2d Dep't), aff'd, 57 N.Y.2d 692, 454 N.Y.S.2d 536, 440 N.E.2d 536, 1982 N.Y. LEXIS 3620 (N.Y. 1982).

A sheriff and his deputies must be residents of the county for which they were elected or appointed. People ex rel. Andrus v Board of Auditors, 37 N.Y.S. 633, 16 Misc. 92, 1896 N.Y. Misc. LEXIS 131 (N.Y. Sup. Ct. 1896).

Town constable must be resident of town. 1953 Ops St Compt 71.

An appointee to the office of town constable must be a resident of the town in which he is appointed. 1967 Ops St Compt File #778.

32. —Town and village clerks

Village clerk must reside within village. State Comptroller has no authority to waive this provision of law. 1945 Ops St Compt 18.

33. —Town engineers

A town may not appoint a non-resident as town engineer when there are qualified engineers residing in the town, even though such resident engineers refuse to accept the appointment. 1956 Ops St Compt 184.

34. —Town managers or supervisors

A resident of a village, otherwise qualified, is eligible for supervisor of town in which the village is located. 1945 Ops St Compt 431.

35. —Treasurers, budget officers, etc.

A town board may not supersede by local law the statutory residency requirement for a town comptroller. 1985 Op St Compt No. 85-16.

36. Effect of change of residence

Where a provisional appointee to the position of assistant building inspector was not a resident of or elector in the town on the date of his appointment, and thus the town board acted improperly in appointing him to probationary status, the appointee became a permanent appointee on probationary status at the time he notified the town board by letter that he had become a town resident and stated an address which he declared to be his legal residence, and he could no longer be removed at will; thus, the termination of the appointee on the grounds of improper residency was ineffective. Winkler v Moore, 110 Misc. 2d 785, 442 N.Y.S.2d 937, 1981 N.Y. Misc. LEXIS 3160 (N.Y. Sup. Ct. 1981).

A person who moves outside the village may not continue to hold the office of village police judge. 1954 Ops St Compt 15.

Acts performed by a town assessor who has ceased to be a resident of the town are valid as to third parties. 1956 Ops St Compt 9.

A town supervisor who ceases to be a resident elector of the town may not continue to hold such office. 1957 Ops St Compt 71.

A police officer, appointed January 1, 1959, may, as a matter of right, change his residence to a county contiguous to the county in which he is now employed and retain his position. 1967 Ops St Compt File #539.

An immediate vacancy in the office of town constable occurs automatically when the incumbent ceases to be a resident of the town. 1967 Ops St Compt File #778.

Where a town clerk ceases to be a resident of the town, a vacancy occurs which may be filled by the town board. 1971 Ops St Compt File #992.

37. —Proof of change

Evidence in proceedings to invalidate candidacy of Democratic candidate for primary election was insufficient to show that he abandoned permanently and irrevocably his residence in the ward. Tucker v Donohue, 28 A.D.2d 739, 280 N.Y.S.2d 628, 1967 N.Y. App. Div. LEXIS 3933 (N.Y. App. Div. 3d Dep't), aff'd, 20

N.Y.2d 673, 282 N.Y.S.2d 281, 229 N.E.2d 61, 1967 N.Y. LEXIS 1367 (N.Y. 1967).

Unless it is proven that a duly elected town assessor has actually ceased to be a resident of the town, his office may not be declared vacant and his salary may not be discontinued. 1969 Ops St Compt File #579.

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I. In General

1. In general

Since village policemen are public officers rather than public employees they may not now be paid compensation for overtime. 1957 NY Ops Atty Gen 35 (informal).

Members of municipal urban renewal agencies created by special act of the Legislature pursuant to General Municipal Law, Art XV-A, are public officers and as such must qualify under Public Officers Law § 3 and must take and file an oath of office as required by Public Officers Law § 10. 1965 NY Ops Atty Gen April 7.

The County of Niagara is not authorized to enact a charter provision that, in the event of a vacancy, created other than by expiration of term, in the offices of County Legislator or elected County Executive, either of such offices could be filled by the County Legislature through the appointment of a qualified elector having the same political affiliation as the person last selected for such office. 1974 NY Ops Atty Gen Aug. 5.

Parole officers, senior parole officers, and supervising parole officers in the division of parole are public officers subject to the provisions of CLS Public Officers Law § 3. 1990 NY Ops Atty Gen F 90-8.

New York State Independent Living Council is subject to appointment provisions of Public Officers Law and quorum requirements of CLS Gen Const § 41. 1997 N.Y. Op. Att'y Gen. No. 97-F11, 1997 N.Y. AG LEXIS 92.

Town may enact local law providing broader residency requirement for positions of superintendent of highways and deputy superintendent of highways. 2000 NY Ops Atty Gen I 00-5.

Members of town board of assessment review are appointed town officials and subject to provisions of both the Public Officers Law and Town Law. Proceeding pursuant to Article 78 of the CPLR is proper procedure by which to review qualifications of members of such board, where there are no questions of fact and no ambiguities in statutory law invoked. In any other circumstance, proper action would be one in the nature of quo warranto brought by attorney general. 7 Op Counsel SBEA No. 104 (1981, October 9).

2. Qualification requirements and grounds for disqualification, generally

3. —Health of officer

The town board may not require an elected town superintendent of highways to have a medical examination as a condition of holding office, and the town board may not require the town superintendent of highways to have a medical examination as a condition of operating town highway equipment. 1974 NY Ops Atty Gen April 15.

4. —Police or fire protection

The Undersheriff of Tioga County who was in office on December 31, 1974, remains in office until the new Sheriff assuming office on January 1, 1975 has appointed, pursuant to County Law, § 652, a qualified person to become the new Undersheriff, and until such qualified person takes and files the required oath of office. 1975 NY Ops Atty Gen March 12.

Members of the County Fire Safety Advisory Board are public officers who must comply with statutory requirements for holding public office. 1983 NY Ops Atty Gen Feb 10 (Informal).

5. —Person holding another office

The Executive Director of the Batavia Housing Authority is a local officer within the purview of Public Officers Law § 2 and since his position is of a full-time nature he is disqualified from employment as a pari-mutuel clerk under the provisions of Pari-Mutuel Law § 63. 1969 NY Ops Atty Gen July 7.

The same person simultaneously may hold the two elective public offices of town superintendent of highways and commissioner of a fire district organized and operating under authority of Town Law Article 11. 1980 NY Ops Atty Gen Jan 9 (informal).

It is against public policy for an appointing board to appoint one of its own members to a public office. 1983 NY Ops Atty Gen Feb 10 (Informal).

New York State Commission on Uniform State Laws, which was established to promote uniformity of law among states, is "a public office or trust" as defined in CLS NY Const Art VI § 20(b) as it effectively serves as arm or instrument of other "public offices" in legislative branch, and its accountability to legislative branch implicates policy interest underlying § 20(b)'s restriction, barring certain judges from holding other such positions (namely, to conserve judges' time to perform their work, and to preserve separation of powers). 2002 NY Ops Atty Gen F 02-F2.

Positions of deputy supervisor and confidential secretary to town supervisor are incompatible, since, when exercising duties of deputy supervisor, such individual will be in direct supervisory role with respect to confidential secretary. 2006 NY Ops Atty Gen I 06-3.

6. —Conviction of crime or other indicia of prior misconduct as disqualification

A person convicted of a federal offense upon which sentence has been suspended is not barred from subsequently holding public office. 1954 NY Ops Atty Gen 96 (informal).

A town supervisor removed from office for misconduct may be nominated and elected to a new term as town supervisor. 1979 Op St Compt File #588.

Offices of town planning board member and mayor of village are compatible, as are offices of member of town zoning board of appeals and members of board of trustees of village, however, it may be necessary that person holding these offices rescue himself from participating in certain matters. 1986 NY Ops Atty Gen No. 86-68 (informal).

It would appear that a person with the part-time position of administrative aide to the town budget officer is an employee rather than an officer and therefore is exempt from the requirements of being an elector or resident of the town in which he has that position. 1978 Op St Compt File #427.

Discussion of training and background requirements for being appointed as public fiscal officer. 1978 Op St Compt File #596.

A town may not appoint a corporation to be its assessor. The Public Officers Law § 3(1) which refers to age and residency in qualifications for holding a public office, clearly describes a human being and not a corporation. (1990) 9 Op Counsel SBEA No 37.

Although there is no specific constitutional or statutory requirement that the Attorney General be an attorney at law, in view of his broad powers and duties as the chief legal officer of the State it is an implicit necessity that he be qualified as an attorney. 1950 NY Ops Atty Gen Nov. 22.

7. Age

Members of the County Youth Board are not public officers as described in Public Officers Law and, therefore, youths under the age of 21 [now 18] may be appointed to that Board. 1971 NY Ops Atty Gen Feb. 11 (informal).

Chapter 868 of the Laws of 1972, which amended Public Officers Law, § 3, by lowering the minimum age for holding public office in this State from 21 to 18, authorizes the appointment of notaries public at age 18. 1972 NY Ops Atty Gen July 10.

An appointee to fill a vacancy in the office of town clerk and an appointee to fill a vacancy in the office of town justice must run for election to fill the unexpired portions of the terms. The fact that the appointees had previously been elected to and served in those offices has no relevancy to the question of whether an election must be held. An 18 year old who is otherwise qualified may be appointed to the office of deputy town clerk. 1972 NY Ops Atty Gen July 27 (informal), 1972 N.Y. AG LEXIS 118.

Special enrollments are effective immediately and such an enrollee, if otherwise qualified, may be appointed an inspector of election. Eighteen year old enrollees may hold this office. 1973 NY Ops Atty Gen June 18 (informal).

A person eighteen years of age, who is otherwise qualified, is eligible to be elected or appointed as mayor, trustee, or member of any village board or commission. 1973 NY Ops Atty Gen Feb. 21.

8. Citizenship

Citizenship is not essential to qualify person for employment as public health nurse. 1922 N.Y. Op. Att'y Gen. No. 115.

Civil Service Law § 53 does not require employee in noncompetitive class to be a citizen of the United States and such an employee is not a Public Officer under § 3 of Public Officers Law. 1967 NY Ops Atty Gen March 1.

An individual must be a citizen of the United States in order to be appointed Director of Finance of a town. 1979 NY Ops Atty Gen Dec 27 (informal).

A probation officer must be a United States citizen. 1983 NY Ops Atty Gen Feb 10 (Formal).

Clerk of town justice court is not public officer and thus is not required to be citizen of United States. 1997 NY Ops Atty Gen I 97-48.

9. Ownership of property

The Rockland County Clerk must comply with the requirements of this section, but does not have to be an owner of real property within the county in which he holds office. 1961 NY Ops Atty Gen Aug. 24.

A member of a village municipal housing authority must be a resident of the village within which his official functions are required to be exercised, but, as he is not a village officer, he is not required to be an owner of record of real property in such village. 1966 NY Ops Atty Gen July 6.

It is not necessary for a person to be the owner of property within a fire district assessed upon the latest completed assessment rolls of the town in which such district is located to qualify for the office of deputy fire district treasurer. 1967 NY Ops Atty Gen April 4.

Members of a village urban renewal agency must be residents of the village but are not required to be the owners of real property within the village. 1967 NY Ops Atty Gen May 17.

10. Ineligible persons holding office, de facto officers

Village clerk must be resident of village, or by action of the village, of the town in which village is wholly or partly located; no salary recovers against de facto officer acting in good faith; town board may not be held for erroneous payment in good faith; acts of de facto officer valid. 1966 NY Ops Atty Gen June 8.

The city of Ithaca cannot use its home rule authority to extend the residency requirement established for members of the Ithaca Housing Authority board by Public Housing Law § 429. N.Y. Op. Att'y Gen. No. 2011-1, 2011 N.Y. AG LEXIS 2.

II. Residency

11. In general

Term "resident" is synonymous with "domicile." 1922 N.Y. Op. Att'y Gen. No. 60.

Residence qualifications for holding village office are construed to mean domicile. A person may have several residences in the normal sense of the word but only one domicile. 1974 NY Ops Atty Gen Aug. 7.

Only a court can determine domicile. 1977 NY Ops Atty Gen Nov 3.

Residency requirement of CLS Pub Off L § 3 is rendered "special" law only to extent of exception created by state legislature for particular office; however, local governments may not establish residency requirement that is broader than exception created by legislature. NY Ops Atty Gen 89-14 (Informal).

12. State residency

There is no precise statutory requirement that every state employee be a resident of the state although public officers and certain employees in the competitive class of civil service must be such residents. The establishment of a residence in this state requires no definite period of time. 1953 NY Ops Atty Gen 53 (informal).

A staff attorney employed by the Temporary State Commission on Judicial Conduct is not a public officer and need not be a resident of the State of New York. 1975 NY Ops Atty Gen Jan. 31.

Town by local law may establish State of New York as residency required for appointive town officer. 1995 NY Ops Atty Gen I 95-5.

Peace officers of Unified Court System whose duties, as determined by Office of Court Administration, include delegation of portion of sovereign powers of government are public officers subject to provisions of CLS Pub Off Law § 3, imposing State residency requirement. N.Y. Op. Att'y Gen. No. 89-F4.

13. Local residency, generally

Residence requirements applicable to members of the authority; such members are public officers and, as their function is limited in geographic area, local officers; so, consequently, they must reside in the specific locality, namely, the City of Rome. 1967 NY Ops Atty Gen July 25.

A local law may not modify the residency qualification contained in Public Officers Law, § 3. 1971 NY Ops Atty Gen Jan. 7.

Qualifications of officers and employees include residence. A city, by local law, may impose reasonable residence qualifications applicable to employment and continuation in employment of municipal employees but a local law requiring present employees living outside of the city to move into the city in order to continue to qualify to be city employees could well be construed by the Courts to be an improper exercise of the home rule power. The foregoing opinion does not apply to certain particular employments if the residence qualifications therefor are prescribed by a general state statute. 1976 NY Ops Atty Gen Feb 23 (informal).

The term "political subdivision" as used in the Public Officers Law means the area from which an officer is selected and in the

case of an elective officer, the area in which the people who elect him reside. 1977 NY Ops Atty Gen Aug 18 (Informal), 1977 N.Y. AG LEXIS 64.

A village in making appointments from promotional lists to positions in the competitive class of the civil service, may not give preference to village residents. Subject to certain restrictions, a village may establish a residency requirement for appointment of village employees. 1981 NY Ops Atty Gen Aug 18 (Informal).

Commissioner of improvement district must remain domiciled in district during his tenure in office. 1987 NY Ops Atty Gen No. 87-17 (informal).

City may enact local law requiring that appointive city officers reside in county in which city is located. 1987 NY Ops Atty Gen No. 87-32 (informal).

A city may enact a local law requiring that appointed city officers reside in the county in which the city is located. 1987 NY Ops Atty Gen No. 87-32 (Informal).

It is unlikely that rational basis can be established for imposition of durational residency requirement on all employees of county government. 1993 NY Ops Atty Gen I 93-55.

14. Application of local residency requirement to particular persons

15. —Building inspectors

Village Building Inspector is an employee, not an officer, of the village and Public Officers Law § 3 and Village Law § 4–404(2), as they relate to residence of village officers, do not apply unless the board of trustees has made such position a village office, pursuant to authority of Village Law § 4406(2[f]). 1968 NY Ops Atty Gen Jan. 5.

For a person to hold at the same time the several offices of Town Engineer and Town Zoning and Building Inspector that person must be a "resident" of the town and an "elector" of the town. To hold the offices of Town Zoning and Building Inspector he would have to be a "resident" of the town. To hold the office of Town Engineer he would have to be a "resident" of the town and an "elector" of the town, unless there is no "resident" engineer in the town. 1971 NY Ops Atty Gen Oct. 7.

A town may enact a local law authorizing its building inspector to reside anywhere in the county in which the town is located. 1991 NY Ops Atty Gen I 91-37.

Village building inspector is public officer, and thus must reside in village; board of trustees may, however, enact resolution to authorize building inspector to reside anywhere in county within which village is wholly or partially located. 1995 NY Ops Atty Gen I 95-40.

16. —Community college trustees

Member of a municipal housing authority must be a resident of the municipality for which the authority is established. 1941 NY Ops Atty Gen Sept. 10.

With the exception of the student member, members of boards of trustees of community colleges are local officers. They must at the time of appointment reside within the geographical boundaries of the local sponsor and are required to file an oath of office within the time period provided by law. 1982 NY Ops Atty Gen March 15 (informal).

Student members of community college boards of trustees are public officers but need not be residents of sponsoring municipality; they must file oaths of office with clerk of sponsoring municipality. 1985 NY Ops Atty Gen No. 85-F14.

17. —Conservation board members

Members of Town of Mendon's conservation board need not reside within town since board is strictly advisory in nature. 1995 NY Ops Atty Gen I 95-4.

Positions of member of environmental conservation board and wetlands inspector of public offices are subject to residency requirements of § 3 of the Public Officers Law. NY Ops Atty Gen 89-56 (Informal).

18. —District attorneys, counsel for political subdivisions, etc.

An assistant district attorney must be a resident of the county in which his official functions are required to be exercised. 1965 NY Ops Atty Gen March 29.

Rule-making authorities for New York City Criminal Court should decide where arraignments are to be held. District Attorney of one of New York City Counties should appoint an Assistant residing in his county to handle criminal matters arising in his county and prosecuted by him. 1967 NY Ops Atty Gen Dec. 13.

The Schenectady County Civil Service Commission may not require that the confidential secretary to the district attorney of that county be a resident thereof. 1972 NY Ops Atty Gen Jan. 27.

The Common Council of the City of White Plains is authorized to enact a local law exempting the City of White Plains from the provisions of Public Officers Law, § 3(l), relating to the residency requirement of the Corporation Counsel of the City of White Plains. 1975 NY Ops Atty Gen March 1.

A law assistant to the County Attorney must be a resident of the County in which his official functions are required to be exercised. 1976 NY Ops Atty Gen Dec 10 (informal).

Dutchess County is not authorized to enact a local law superseding the residency requirement contained in section 3(1) of the Public Officers Law as it applies to assistant county attorneys in Dutchess County. 1977 NY Ops Atty Gen May 23.

A town may employ a law firm as an independent contractor for the purpose of conducting prosecutions in the town justice court. The members of such law firm need not be residents of the town. To the extent that prior opinions are inconsistent, they are superseded (12 Opns St Comp, 1956, p 51; 2 Opns St Comp, 1946, p 470). 1980 Op St Compt File #379.

19. —Firefighters

20. — —Paid fighters

It is believed a paid city fireman is a public officer. 1954 NY Ops Atty Gen 47 (informal).

Paid firemen of paid fire departments are public employees and not public officers; their residence qualifications are determined on that basis. 1975 NY Ops Atty Gen Aug. 20.

In a fire district functioning under the provisions of Article 11 of the Town Law (§§ 170 through 189), a paid fireman is not a public officer unless some overt act has occurred or a positive step has been taken to convert the department from a voluntary to a professional department: such a paid fireman is an employee of the fire district. The board of commissioners of a fire district have no authority to impose residency restrictions upon employees. The state or local civil service commissions may require applicants for employment to live in a restricted area but can not control residence after appointment and such restrictions do not apply to promotional positions; however, the board of commissioners of the fire district may require that eligibles for appointment (as distinguished from promotion) who are residents of the fire district, be certified first. 1975 NY Ops Atty Gen Feb. 27.

CLS Pub O § 3(9) does not pertain to paid members of uniformed force of paid fire department of City of Syracuse; thus, such members are governed by CLS Pub O § 3(4) and must reside within Onondaga County. 2007 NY Ops Atty Gen I 07-10.

21. —Health and sanitation officers

A member of the Board of Managers of the Herkimer Memorial Hospital, a village public general hospital, which is situated in the Village of Herkimer must be a resident of the Village of Herkimer. 1969 NY Ops Atty Gen Aug. 11.

An elected commissioner of Sanitary District No. 2 in the Town of Hempstead in the County of Nassau is a public officer of a political subdivision and not of a municipality; such a commissioner must be a resident of the sanitary district at the time of election; and if the sanitary district commissioner moves from that district to a new residence outside of the district, even though in the same town, the office becomes vacant under Public Officers Law § 30 subdivision 1 paragraph d. The provision of Public Officers Law § 30 subdivision 4-a, by its own terms, is confined in its operation to members of the department of sanitation of a municipality so it is not applicable to an officer of this political subdivision. 1977 NY Ops Atty Gen Aug 18 (Informal), 1977 N.Y. AG LEXIS 64.

Officers and employees of a municipal department of sanitation who reside in a county contiguous to such municipality may not be required to reside within the municipality. 1980 Op St Compt File #11.

If the word "resident" in the City of Jamestown's Charter means the same as it does in Public Officers Law, § 3, then a physician who lives outside the city but has an office in the city may not serve as Chairman of the Jamestown General Hospital Board. 1980 Op St Compt File #32.

22. —Highways, streets and water officers

To be capable of holding the office of a Water Commissioner of the Franklin Square Water District of the Town of Hempstead, a person must be a resident of such district. 1973 NY Ops Atty Gen Oct. 5 (informal).

Town may enact local law authorizing its superintendent of highways to reside outside of town. 1987 NY Ops Atty Gen No. 87-52 (Informal).

Discussion of residency requirements for a village street and water superintendent, and the adoption of local laws superseding Village Law § 3-300(2) and Public Officers Law § 3(1) relative thereto. 1978 Op St Compt File #572.

23. —Housing and urban renewal officers

A member of a city urban renewal agency must be a resident of the city. 1963 NY Ops Atty Gen Nov. 4.

Members of municipal urban renewal agencies are public officers and, as such, are required to be residents of the municipality within which their official functions are exercised. Such members serve at the pleasure of the appointing authority. 1966 NY Ops Atty Gen Oct. 4.

The Executive Secretary of the Troy Housing Authority is an employee and not a public officer, and the residency requirement of Public Officers Law § 3 therefore does not apply. 1969 NY Ops Atty Gen Nov. 13.

Members of Troy Municipal Housing Authority are required to reside in City of Troy. 1995 NY Ops Atty Gen I 95-19.

Chairman of Port Jervis Housing Authority is local officer subject to provisions of CLS Pub Off §§ 3 and 30, and therefore, must be resident of city at time of his appointment and throughout his term of office. NY Ops Atty Gen 88-45 (Informal).

24. —Judges and court personnel

Officers and employees of county courts are county officers or employees and must reside in county for which they are elected or appointed. 1925 N.Y. Op. Att'y Gen. No. 90.

The marshals of the Police Justice Court of the village of Port Chester are officers of that village, and as such, are required to be residents thereof. 1970 NY Ops Atty Gen July 20.

A non-resident of a village may not be appointed to fill a vacancy in the office of Village Police Justice, but any resident of the county in which any part of the village lies may be appointed to the office of Acting Police Justice if that person is a justice of the peace, police justice or attorney at law. The office of Acting Police Justice may be filled even though no person has been elected or appointed Village Police Justice. 1971 NY Ops Atty Gen Oct. 18.

A village has no authority to change by local law the residency qualification or restriction for its village justice. 1975 NY Ops Atty Gen Oct. 3 (informal).

A clerk to the town justice must file an oath of office and post a bond and is required to meet the local residency requirements established by section 3 of the Public Officers Law. 1983 N.Y. Op. Att'y Gen. No. 83-63.

Legislative body of city may enact local law permitting city court judge to reside in county. 1988 NY Ops Atty Gen No. 88-27 (Informal).

Village Justice's temporary residence outside village does not affect his statutory eligibility to continue serving village in such public office. 1999 NY Ops Atty Gen I 99-37.

Judge of city court is required to be resident of city in which he or she is elected or appointed. 2002 NY Ops Atty Gen I 2002-6.

25. —Members of local governing or legislative bodies

A village board of trustees of a village having less than three thousand population may change the residence qualification applicable to the office of village justice; the change must be effected by local law so as to allow a resident of the county in which the village is situate, even if that person does not reside in the village, to hold the elective village office of village justice; the authorization contained in the statute must be utilized precisely as contained therein, without alteration, so the enlargement, if availed of, must be county-wide; but such a change may not be made effective retroactively, one reason being the provision of Election Law § 15-126 subd 1. 1979 NY Ops Atty Gen May 17. (Informal), 1979 N.Y. AG LEXIS 116.

A member of the village board of trustees must be domiciled within the village in order to continue in office. Domicile is determined by applying the facts of each case. 1983 N.Y. Op. Att'y Gen. No. 83-44.

If the domicile of a serviceman on active duty is still within the town in which he was elected councilman, he may continue to serve in that office. However, whether his domicile is still within the town is a question of fact to be determined initially by local officials. 1982 Op St Compt File #82-34.

26. —Planning and zoning board members

A member of a Town Planning Board must be a qualified elector of the town. 1961 NY Ops Atty Gen Aug. 10.

The City of Port Jervis is authorized to enact a local law dispensing with the residence requirements for the Director of the Community Development Department who is a resident of the County of Orange wherein the City of Port Jervis is situated but is not a resident of said City. 1978 NY Ops Atty Gen Sept 28.

The offices of member of a town zoning board of appeals and member of a planning board of a village located within the town are not incompatible. The individual seeking to hold these positions must meet the residency requirements for the offices. 1984 N.Y. Op. Att'y Gen. No. 84-20.

A member of an industrial development agency is a public officer subject to the residency requirements of Public Officers Law, § 3. 1979 Op St Compt File #189.

27. —Police

28. — —Members of forces of less than 200

A village with a police force of less than 200 officers may require that its members reside within the village. 1980 Op St Compt File #11.

29. — —Length of residency

In view of the provisions of Public Officers Law § 3, a town policeman may be appointed if a resolution or ordinance of the town board so provides so long as he shall have resided at least six months in the county. 1957 NY Ops Atty Gen 27 (informal).

30. — —Village police

Provided the provisions of this section are complied with, a village police officer who resides "just outside the corporate limits of the village" in the county may properly be appointed. 1953 NY Ops Atty Gen 61 (informal).

A non-resident of a village may be appointed a village policeman provided the terms of this section are complied with. 1954 NY Ops Atty Gen 21 (informal).

Under the above sections, a resident and owner of real property in the Village of East Syracuse, which Village is located entirely within the boundaries of the Town of DeWitt, is an elector of said Town and would be qualified to act as a police commissioner of the police department of said Town established under provisions of Town Law, Section 150, even though there is a separate Village police department and the Town police department does not exercise jurisdiction within the boundary of the Village of East Syracuse. 1972 NY Ops Atty Gen Jan. 25.

Public Officers Law § 3(2) superseded all city and village charters, general, special and local laws, and ordinances, rules and regulations relating to residency for appointment of police department personnel and can not be amended by local legislative action. It imposes a uniform state standard. However, Public Officers Law § 30(4) authorizes local action in certain circumstances allowing a municipality to require police department personnel, after appointment, to reside in or near the municipality where serving. Different requirements apply to applicants and active police force members. 1974 NY Ops Atty Gen Sept. 18.

A uniform state standard applies to residency of persons for appointment as members of a police department but a municipality, under certain circumstances, may create residence requirements for such members subsequent to their appointment. 1974 NY Ops Atty Gen Dec. 18.

A local law enforcement official deputized under County Law § 654 need not meet any additional residency requirements. 1991 NY Ops Atty Gen I 91-16.

"Contiguous" as used in CLS Pub O § 3(2) means "sharing a border" or "touching." 2008 NY Ops Atty Gen I 08-10.

Police officers for city of Syracuse may not live in Oneida County because such county is not contiguous to Onondaga County. 2008 NY Ops Atty Gen I 08-10.

Discussion of residency requirement for part-time village police officers, and enforcement thereof. 1978 Op St Compt File #1055.

Enclosure of 1974 Atty. Gen. 330 discussing residency requirements of policemen. 1979 Op St Compt File #50.

31. —Probation officers

Probation officers heretofore or hereafter appointed are not required to be residents of the political subdivision of the state for which chosen but are subject to residence requirements, if any, of any other general, special or local law, charter, code or ordinance, rule or regulation. 1965 NY Ops Atty Gen March 11.

32. —Sealers of weights and measures

County sealer of weights and measures should be resident of that part of county not included in a city. 1919 N.Y. Op. Att'y Gen. No. 175.

33. —Sheriffs and constables

Non-resident employees of operating gas supply companies are ineligible for appointment as deputy sheriffs in this State. To satisfy the residence requirements for such appointment a person must not only be a resident of the State, but also of the county for which he is appointed. 1950 NY Ops Atty Gen Nov. 1.

A deputy sheriff of the County of Rockland is not a member of a "police force" within the meaning of Public Officers Law, § 3(2) and as a local officer is required to be a resident of the county pursuant to Public Officers Law, § 3(1). 1973 NY Ops Atty Gen Sept. 6 (informal).

34. —Town and village clerks

City Clerks or City Chamberlains and Registrars of Vital Statistics and their deputies are all local public officers and, as such, are required to be residents of the municipality within which their official functions are required to be exercised. 1971 NY Ops Atty Gen April 20 (Informal), 1971 N.Y. AG LEXIS 65.

The person to be appointed to the office of village clerk or to hold the office of village clerk must reside within the municipal boundaries of the village. 1977 NY Ops Atty Gen Jan 6 (informal).

The Board of Trustees of the Village of Bellerose, by local law duly enacted, may provide that in lieu of any other residency requirement imposed by law, the village clerk may reside within the county within which the village is wholly or partially situated. 1977 NY Ops Atty Gen Apr 11.

A deputy town clerk, regardless of the manner of appointment, must be a town resident. 1978 Op St Compt File #1067.

A village may not adopt a local law to permit the village clerk-treasurer to reside outside the county in which the village is situate. 1981 Op St Compt File #81-101.

A village may enact a local law authorizing the board of trustees to provide that the village clerk or deputy clerk need not be residents of the village but must be residents of the county in which the village is located or an abutting or adjacent county. 1983 NY Ops Atty Gen April 29 (informal).

35. —Town engineers

A town engineer must be a resident and elector of the town unless there is no qualified resident engineer living therein. 1976 NY Ops Atty Gen Dec 20 (informal).

36. —Town managers or supervisors

The position of town manager of the Town of Fallsburg is a public office and, therefore, the occupant of such office is subject to the residency requirements contained in section 3(1) of the Public Officers Law and section 23 of the Town Law. 1978 Op St Compt File #370.

37. —Treasurers, budget officers, etc.

Schenectady County Deputy Commissioner of Finance is a local public officer and is subject to the residency requirements expressed in Public Officers Law, § 3. 1978 NY Ops Atty Gen Nov 28.

The Commissioner of Finance of the City of Poughkeepsie is a public officer and therefore is required under Public Officers Law, § 3 to reside within the city. The city is authorized, however, to enact a local law dispensing with this residence requirement. 1983 N.Y. Op. Att'y Gen. No. 83-68.

The supervisor's bookkeeper need not be a resident of the town. 1978 Op St Compt File #309.

It would appear that a person with the part-time position of administrative aide to the town budget officer is an employee rather than an officer and therefore is exempt from the requirements of being an elector or resident of the town in which he has that position. 1978 Op St Compt File #427.

Discussion of residency requirement for town comptroller. 1978 Op St Compt File #1009.

A town budget officer must be a resident of the town in which he serves. 1979 Op St Compt File #107.

Generally, a town comptroller, being a public officer, would be required to be a town resident. A town may engage the services of an accountant to perform auditing and bookkeeping services as an employee of the town, without regard to such residency requirement. 1979 Op St Compt File #515.

A village may not adopt a local law to permit the village clerk-treasurer to reside outside the county in which the village is situate. 1981 Op St Compt File #81-101.

A village may enact a local law authorizing the board of trustees to provide that the village treasurer and deputy treasurer need not be residents of the village but must be residents of the county in which the village is located or an abutting or adjacent county. 1983 NY Ops Atty Gen April 29 (informal).

A village treasurer must be a resident of the village unless the village board provides that such officer be a resident of a county within which the village is wholly or partially situated. 1979 Op St Compt File #121.

The council of the City of Auburn is empowered by the Legislature to create appointive local public offices by ordinance. The position of Public Safety Commissioner created by ordinance adopted February 15, 1968 is such an appointive local public office. Thus the residence requirements of § 3 to the incumbent thereof. 1968 NY Ops Atty Gen March 7.

The members of the Board of the Spring Valley Parking Authority are local officers within the meaning of section 2 of the Public Officers Law and as such must reside within the jurisdiction of the Authority, the Village of Spring Valley, in order to serve in such capacity as required by section 3 of the Public Officers Law. 1973 NY Ops Atty Gen Sept. 28.

An otherwise qualified person may be a candidate for coroner from a particular coroner district in Niagara County despite the fact that he or she is a domiciliary of another coroner district within Niagara County. 1975 NY Ops Atty Gen Apr. 16.

Residency in city is required to qualify for appointment as trustee to city public library. 1985 NY Ops Atty Gen No. 85-36 (Informal).

City's youth bureau director is public officer who must reside within city at time of appointment and throughout term of office since said director has responsibility for administering state and federally funded programs, as well as supervising all youth bureau staff, thus requiring exercise of sovereign powers of government. NY Ops Atty Gen 89-59 (Informal).

A village dog warden must be a resident of the village unless the village board provides that it is sufficient for him to be a resident of a county in which the village is wholly or partially situate. 1979 Op St Compt File #616.

Deputy assistant public defender, with authority to act as public defender during absence or inability to serve of public defender, is public officer who is required to reside within county. 1988 NY Ops Atty Gen No. 88-22 (Informal).

38. Effect of change of residence

39. —Temporary change

An Assistant to the District Attorney of Onondaga County may maintain her residency in that County within the meaning of Section 3 of the Public Officers Law, despite the fact that she is temporarily living with her husband in assigned on-base housing in Seneca County while her husband is on active military duty. Living with her husband during this period is not in itself a

change of domicile that would invoke the vacancy provision of Section 30 of the Public Officers Law. 1974 NY Ops Atty Gen Oct. 16.

Removal of domicile by member of municipal urban renewal agency vacates such office and authorizes appointment of successor thereto. Where special statute creating such agency prescribes definite terms of office of members thereof, they do not serve at pleasure of appointing authority. 1966 NY Ops Atty Gen Dec. 6.

Only in a county of over 300,000 population may one member of a city or village planning commission reside outside such city or village. Removal from the city or village by any other member vacates the office. 1966 NY Ops Atty Gen March 17.

A member of the Board of County Legislators of Oneida County elected from one of the Legislative Districts in the City of Rome vacates his office upon changing his residency from such district. 1973 NY Ops Atty Gen Jan. 15.

When in a village which has adopted the ward system for the election of trustees, a trustee moves to a different ward in the village, a vacancy in office is created. 1976 NY Ops Atty Gen Nov 24 (informal).

A trustee of a cooperative library system vacates his office when he ceases to be a resident of the area served by the system. 1979 Op St Compt File #255.

The office of a town board member who moves out of the town becomes vacant automatically when he ceases to reside in the town. 1982 Op St Compt File #82-259.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS Alt Co Gov § 153; CLS Town § 30.

Creation of vacancies, § 30.

Consequence of sentence to imprisonment for life, CLS Civ R § 79-a.

Forfeiture of office and suspension of civil rights, CLS Civ R § 79.

Criminal liability for conduct of another, CLS Penal § 20.00.

Coercion in the second degree, CLS Penal § 135.60.

Coercion in the first degree, CLS Penal § 135.65.

Larceny; defined, CLS Penal § 155.05.

Official misconduct, CLS Penal § 195.00.

Obstructing governmental administration in the second degree, CLS Penal § 195.05.

Bribe giving for public office, CLS Penal § 200.45.

Bribe receiving for public office, CLS Penal § 200.50.

Removal from office for misconduct, CLS NY Const Art XIII, § 5.

Federal Aspects:

The Selective Draft Act of 1917, cited in statutory text, formerly appeared as 50 USCS Appx §§ 201 et seq. prior to its omission as obsolete and repealed.

The Selective Training and Service Act of 1940, cited in statutory text, formerly appeared as 50 USCS Appx §§ 301 et seq. prior to its omission as obsolete.

Jurisprudences:

63C Am Jur 2d, Public Officers and Employees §§ 48, 49, 53–56.

Annotations:

Construction and Application of Statutes and Ordinances Concerning Establishment of Residency, as Condition for Running for Municipal Office. 74 ALR6th 209.

§ 5. Holding over after expiration of term

Every officer except a judicial officer, a notary public, a commissioner of deeds and an officer whose term is fixed by the constitution, having duly entered on the duties of his office, shall, unless the office shall terminate or be abolished, hold over and continue to discharge the duties of his office, after the expiration of the term for which he shall have been chosen, until his successor shall be chosen and qualified; but after the expiration of such term, the office shall be deemed vacant for the purpose of choosing his successor. An officer so holding over for one or more entire terms, shall, for the purpose of choosing his successor, be regarded as having been newly chosen for such terms. An appointment for a term shortened by reason of a predecessor holding over, shall be for the residue of the term only.

HISTORY:

Add, L 1909, ch 51, eff Feb 17, 1909.

Notes to Decisions

Analysis

1. In general
2. What officers hold over
3. —County officers
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8. Basis or reason for holding over
9. —Failure to hold election or to elect successor
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11. —Failure to confirm or approve appointment of successor
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13. Filling of vacancy
14. —Length of appointment
15. —Who may fill vacancy
16. Compensation of officers
17. Power to act, and effect of acts, during holdover period

1. In general

Where assistant attorney-general alleged that his position was improperly classified as "exempt" under CLS Civ S § 41(1)(b) and that his dismissal violated hold-over provisions of CLS Pub O § 5, court held petitioner had no right of entitlement in the position, and thus no holdover status under § 5, which protects an appointee after expiration of "the term for which he shall have been chosen;" letter of appointment made clear that petitioner would hold his position at the pleasure of the Attorney-General, and specifically provided that the appointment was "terminable by me at will." Herman v Vacco, 89 N.Y.2d 1024, 658 N.Y.S.2d 239, 680 N.E.2d 612, 1997 N.Y. LEXIS 488 (N.Y. 1997).

Mayor is not required to go through formality of appointing successor in order to obtain judicial declaration as to whether office is vacant, and as long as declaratory judgment action is limited to resolving question of law it is appropriate alternative to Article 78 proceeding and does not thwart policies underlying restriction of remedy of quo warranto to actions brought by attorney general. La Polla v De Salvatore, 112 A.D.2d 6, 490 N.Y.S.2d 396, 1985 N.Y. App. Div. LEXIS 50634 (N.Y. App. Div. 4th Dep't 1985).

The purpose of this section is to insure a continuance of government where a vacancy occurs by expiration of term and there is a failure of election or appointment, and it applies whenever the office vacated can be identified with a particular incumbent, but not if the office vacated cannot be identified, even though those still in office try to effect the same result by all but one resigning. Foley v McNab, 42 Misc. 2d 460, 248 N.Y.S.2d 354, 1964 N.Y. Misc. LEXIS 2072 (N.Y. Sup. Ct. 1964).

This section has no application whatever to termination of tenure of office by removal. In re Application of Dayton, 201 N.Y.S.2d 33 (N.Y. Sup. Ct. 1960).

A village board of trustees may not appoint members of the zoning board of appeals to terms of less than three years. 1953 Ops St Compt 204.

2. What officers hold over

School board members whose appointive terms expired December 31st pursuant to New York Constitution Article 13 § 3 were permitted to remain in office under provisions of Public Officers

Law § 5. Roher v Dinkins, 32 N.Y.2d 180, 344 N.Y.S.2d 841, 298 N.E.2d 37, 1973 N.Y. LEXIS 1360 (N.Y. 1973).

Petitioner had no right of entitlement in his position as assistant attorney general, and thus no holdover status under CLS Pub O § 5, where he was appointed by former Attorney-General, and his letter of appointment made clear that he would hold his position at pleasure of Attorney-General and that appointment was "terminable by me at will." Herman v Vacco, 234 A.D.2d 76, 650 N.Y.S.2d 232, 1996 N.Y. App. Div. LEXIS 12379 (N.Y. App. Div. 1st Dep't 1996), app. dismissed, 89 N.Y.2d 1024, 658 N.Y.S.2d 239, 680 N.E.2d 612, 1997 N.Y. LEXIS 488 (N.Y. 1997), app. denied, 90 N.Y.2d 803, 661 N.Y.S.2d 179, 683 N.E.2d 1053, 1997 N.Y. LEXIS 2247 (N.Y. 1997).

Until his successor was appointed and had qualified, relator would hold over as Commissioner of Elections and be entitled to discharge duties of office and receive its emoluments. People ex rel. Woods v Flynn, 142 N.Y.S. 230, 81 Misc. 279, 1913 N.Y. Misc. LEXIS 960 (N.Y. Sup. Ct. 1913).

This section is broad enough to cover temporary as well as permanent state officers and accordingly permits members of the State Temporary Commission of Investigation to hold over after expiration of their terms in the absence of appointment of successors. In re Calise, 40 Misc. 2d 867, 243 N.Y.S.2d 802, 1963 N.Y. Misc. LEXIS 1511 (N.Y. Sup. Ct.), aff'd, 19 A.D.2d 947, 245 N.Y.S.2d 312, 1963 N.Y. App. Div. LEXIS 6464 (N.Y. App. Div. 1st Dep't 1963).

Since a reviewing court is guided by the principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is clearly wrong, the court will not disregard the construction of section 5 of the Public Officers Law by prior Mayors of New York City, which interpretation included city marshals in the group of public officers who continue in office after the expiration of their terms until a successor is chosen and qualified, and will not, therefore, make a finding which would, in effect, declare all actions taken by marshals whose terms had expired to be without legal authority, since section 5 of the Public Officers Law is the only statute setting forth a legal basis for a public officer to hold over. Moses v Koch, 97 Misc. 2d 243, 411 N.Y.S.2d 484, 1978 N.Y. Misc. LEXIS 2778 (N.Y. Sup. Ct. 1978), aff'd, 67 A.D.2d 862, 413 N.Y.S.2d 404, 1979 N.Y. App. Div. LEXIS 10589 (N.Y. App. Div. 1st Dep't 1979).

Deputy commissioner of public welfare appointed by former commissioner holds over in office until successor is appointed and qualifies. 1953 Ops St Compt 109.

3. —County officers

County attorney is not public officer under this section and does not hold over after expiration of term. People ex rel. Dawson v Knox, 231 A.D. 490, 247 N.Y.S. 731, 1931 N.Y. App. Div. LEXIS 16084 (N.Y. App. Div. 1931), aff'd, 267 N.Y. 565, 196 N.E. 582, 267 N.Y. (N.Y.S.) 565, 1935 N.Y. LEXIS 1295 (N.Y. 1935).

Where county hospital superintendent was appointed by county executive during executive's first elected term but not reappointed after commencement of executive's new term of office following reelection, subsequent termination of superintendent's employment by written notice without pretermination hearing did not violate sections of county charter and county administrative code providing that such officer shall not be removed from office without hearing prior to end of term for which he was appointed; after last day of term for which he was appointed, hospital superintendent was "hold-over" in office, and his office was deemed vacant for purpose of choosing his successor, and he could be removed at the will of the appointing authority. Ause v Regan, 59 A.D.2d 317, 399 N.Y.S.2d 526, 1977 N.Y. App. Div. LEXIS 13569 (N.Y. App. Div. 4th Dep't 1977).

County hospital superintendent, who was appointed by county executive during executive's first elected term but not reappointed after commencement of county executive's new term of office following reelection, was occupying his position only as holdover and thus did not have sufficient expectancy of continued employment to constitute protected property interest, within due process guarantee. Ause v Regan, 59 A.D.2d 317, 399 N.Y.S.2d 526, 1977 N.Y. App. Div. LEXIS 13569 (N.Y. App. Div. 4th Dep't 1977).

In the light of the history of the County Law, a county attorney is a public officer within the meaning of this section and holds over until his successor has been appointed. Des Pres v Niagara County Board of Supervisors, 37 Misc. 2d 1087, 236 N.Y.S.2d 484, 1963 N.Y. Misc. LEXIS 2342 (N.Y. Sup. Ct. 1963).

4. —Judicial officers

Housing Court judges may hold over after expiration of their 5-year terms, even though amendments to CLS NYC Civil Ct Act § 110 changed references to "hearing officers" of Housing Part to "hearing judges," and judicial officers may not hold over under CLS Pub O § 5, since hearing officers were previously not prohibited from holding over after their terms expired, and amendments to Civil Court Act were enacted only to change title of "officers" to "judges" to improve stature and effectiveness of court, not to confer any additional jurisdiction, powers or benefits on Housing Part judges. Met Council v Crosson, 84 N.Y.2d 328, 618 N.Y.S.2d 617, 642 N.E.2d 1073, 1994 N.Y. LEXIS 3386 (N.Y. 1994).

Although public officers may hold over and continue to discharge duties of their office after expiration of their term until successor is chosen, such provision does not apply to judicial officers since their term is prescribed by the legislature and fixed at four official years. Etelson v Jacaruso, 80 Misc. 2d 685, 364 N.Y.S.2d 103, 1975 N.Y. Misc. LEXIS 2238 (N.Y. Sup. Ct.), aff'd, 47 A.D.2d 715, 366 N.Y.S.2d 389, 1975 N.Y. App. Div. LEXIS 13136 (N.Y. App. Div. 2d Dep't 1975).

5. —Municipal and town officers and boards

An employee of the municipal court of the city of New York legally appointed for a fixed term to an office in the exempt class may legally hold over at the expiration of his term as provided for in this section notwithstanding that prior to the expiration of the term the position had been transferred to the competitive class. Sanford v Finegan, 276 N.Y. 70, 11 N.E.2d 356, 276 N.Y. (N.Y.S.) 70, 1937 N.Y. LEXIS 1033 (N.Y. 1937).

In an Article 78 proceeding to compel reinstatement of petitioner to the position of town engineer, it was error for the trial court to award petitioner salary for one year while at the same time finding that he had no right to reinstatement as a permanent civil service employee; petitioner served at the will of the respondents pursuant to Pub O § 5, without the protections accorded by Civ S Law § 75, where he was appointed pursuant to Town Law §§ 20, 24 for the term of years prescribed therein, and where he was not reappointed when his initial term expired. Berg v Gerber, 78 A.D.2d 888, 433 N.Y.S.2d 42, 1980 N.Y. App. Div. LEXIS 13619 (N.Y. App. Div. 2d Dep't 1980), aff'd, 54 N.Y.2d 854, 444 N.Y.S.2d 66, 428 N.E.2d 398, 1981 N.Y. LEXIS 3053 (N.Y. 1981).

Although the Mayor of New York City is authorized, but not required, to appoint successors to city marshals whose terms have expired (CCA, § 1601), the Mayor does not have the power to terminate the office of a marshal whose term has expired, since city marshals are public officers, each occupying a separate and distinct office which can only be abolished by the Legislature, and hold over in office until a successor is chosen and qualified (Public Officers Law, § 5). Accordingly, notices sent by the Mayor to marshals whose terms of office had expired, purporting to terminate those offices, are null and void. Moses v Koch, 97 Misc. 2d 243, 411 N.Y.S.2d 484, 1978 N.Y. Misc. LEXIS 2778 (N.Y. Sup. Ct. 1978), aff'd, 67 A.D.2d 862, 413 N.Y.S.2d 404, 1979 N.Y. App. Div. LEXIS 10589 (N.Y. App. Div. 1st Dep't 1979).

A justice of the peace may not hold over in office pending the qualification of his successor. Where there is an unlawful holdover there may be no remuneration for such services. 1955 Ops St Compt 85.

6. — —Planning and zoning boards

Member of zoning board of appeals was not disqualified from continuing to act in such position by the expiration of his term where no successor had been chosen or qualified. Rumsey v Crate, 22 A.D.2d 995, 254 N.Y.S.2d 842, 1964 N.Y. App. Div. LEXIS 2446 (N.Y. App. Div. 3d Dep't 1964).

7. — —Town or village attorneys

Petitioner was entitled to mandamus compelling town board to recognize him as holdover town attorney and to pay him salary and benefits until his successor was appointed, despite absence of statutory mandate to have town attorney, since petitioner had been appointed town attorney and thus was public officer who continued to hold office until appointment of his successor, as provided in CLS Pub O § 5. Riester v Reilly, 138 Misc. 2d 68, 524 N.Y.S.2d 165, 1988 N.Y. Misc. LEXIS 14 (N.Y. Sup. Ct. 1988).

8. Basis or reason for holding over

Where ineligible candidate had been appointed to fill unexpired term and was pretending to hold office at time of election, office was without incumbent at time of election because of ineligibility and this section providing for holding over does not apply. People ex rel. Stalter v Lynch, 219 A.D. 1, 219 N.Y.S. 52, 1926 N.Y. App. Div. LEXIS 5832 (N.Y. App. Div. 1926), aff'd, 245 N.Y. 534, 157 N.E. 847, 245 N.Y. (N.Y.S.) 534, 1927 N.Y. LEXIS 689 (N.Y. 1927).

The court has no authority to determine title to public office by way of a declaratory judgment that the elected successor to the office is not eligible and that the incumbent holds over under § 5 of this law. The rights of the incumbent may be protected by his awaiting an action pursuant to § 80 when the successor attempts to take office. Seavey v Van Hatten, 276 A.D. 260, 94 N.Y.S.2d 402, 1949 N.Y. App. Div. LEXIS 3159 (N.Y. App. Div. 1949).

Appointments to municipal government postions whose terms were to expire on a specific date by a mayor whose term of office was to expire on the same date were valid but only for that portion of the unexpired term; however, the appointed individuals could continue to serve as holdovers pursuant to Pub O § 5 until their offices were appointed in order to prevent a lapse or disruption of essential governmental service. La Polla v De Salvatore, 124 Misc. 2d 788, 477 N.Y.S.2d 248, 1984 N.Y. Misc. LEXIS 3334 (N.Y. Sup. Ct. 1984), modified, 112 A.D.2d 6, 490 N.Y.S.2d 396, 1985 N.Y. App. Div. LEXIS 50634 (N.Y. App. Div. 4th Dep't 1985).

Where candidates for membership on school board are elected on at large basis, candidates do not fill specific vacancy and candidates are elected by receiving highest number of votes, there is no method by which it can be determined which vacancy particular candidate was elected to fill and former board member, contending that candidate did not timely file his oath of office, is not entitled to holdover status on basis that she was senior of two retiring members. Re Horne, Op Comr Educ No. 9985.

9. —Failure to hold election or to elect successor

When there is an ineffectual attempt to elect a candidate, the incumbent continues as a holdover under this section. Felice v Swezey, 278 A.D. 958, 105 N.Y.S.2d 486, 1951 N.Y. App. Div. LEXIS 5368 (N.Y. App. Div. 1951).

Petitioner is entitled to mandamus in proceeding involving his right to exercise powers of town supervisor, where returns of biennial town meeting resulted in tie vote and no person has been certified as being elected to said office. Petitioner, incumbent of office, must hold over under this section, and is entitled to discharge duties of his office until such time as successor has been appointed or declared elected and qualified under Town Law, § 130. Williamson v Corscadden, 255 N.Y.S. 597, 143 Misc. 249, 1932 N.Y. Misc. LEXIS 1380 (N.Y. Sup. Ct. 1932).

Where fire district fails to hold annual election, commissioners in office hold over until successors are appointed. 1947 Ops St Compt 520.

Where, through inadvertence, an office of the fire district is left off the ballot, the person holding the said office at the time of the election shall hold over until a successor is chosen. 1956 Ops St Compt 27.

10. —Failure to appoint successor

Where president of common council illegally casts deciding vote on appointment of city clerk, and issues certificate of election to supposed clerk, vote is a nullity and certificate invalid, and present incumbent continues as holdover as result of tie vote of those legally entitled to vote. In re Heafy, 247 A.D. 277, 285 N.Y.S. 188, 1936 N.Y. App. Div. LEXIS 8240 (N.Y. App. Div.), aff'd, 270 N.Y. 616, 1 N.E.2d 357, 270 N.Y. (N.Y.S.) 616, 1936 N.Y. LEXIS 1669 (N.Y. 1936).

A village attorney continued in office as a holdover after expiration of his term under Pub O § 5 where the village board of trustees' appointment of a successor was invalid in that the appointment resolution was not enacted in accord with a local law. D'Ambrosio v Reile, 106 A.D.2d 856, 483 N.Y.S.2d 555, 1984 N.Y. App. Div. LEXIS 21757 (N.Y. App. Div. 4th Dep't 1984).

Employee who was not reappointed to position as Village Administrator properly continued to perform duties of that position while waiting for village mayor and board of trustees to appoint her successor, and mayor and trustees improperly removed employee from that position without appointing her successor. Enos v Vill. of Seneca Falls, 288 A.D.2d 853, 732 N.Y.S.2d 785, 2001 N.Y. App. Div. LEXIS 10578 (N.Y. App. Div. 4th Dep't 2001).

Appointment of supervisor was unauthorized by a vote of two members of town board which was constituted by law at five members, and petition in a proceeding by one appointed to compel the respondent, who is holding over as supervisor (Pub Off Law, § 5), to surrender books, records and property pertaining to the office, is properly dismissed. Application of Crosby, 36 N.Y.S.2d 301, 178 Misc. 746, 1942 N.Y. Misc. LEXIS 1786 (N.Y. Sup. Ct.), aff'd, 265 A.D. 92, 37 N.Y.S.2d 745, 1942 N.Y. App. Div. LEXIS 5686 (N.Y. App. Div. 1942).

Where board of education consists of six members, the votes of four members for the same individual are necessary to appoint a clerk. In the absence of requisite four votes, former clerk continues in office until successor is appointed. 1947 Ops St Compt 368.

If Board of Supervisors fails to appoint Elections Commissioner for a party, former incumbent holds over and is entitled to salary. 1951 Ops St Compt 125.

11. —Failure to confirm or approve appointment of successor

County social services commissioner who was replaced on expiration of his term by acting commissioner was not entitled to hold over in office until permanent successor was chosen, confirmed and qualified, since acting commissioner constitutes successor within meaning of CLS Pub O § 5. Fiorella v Glenzer, 126 A.D.2d 937, 511 N.Y.S.2d 711, 1987 N.Y. App. Div. LEXIS 42036 (N.Y. App. Div. 4th Dep't 1987).

12. Existence of vacancy

Where an officer is holding over after the expiration of his term the office is deemed vacant for the purpose of electing a successor. People ex rel. Lovett v Randall, 151 N.Y. 497, 45 N.E. 841, 151 N.Y. (N.Y.S.) 497, 1897 N.Y. LEXIS 854 (N.Y. 1897).

Legislature intended by words in this section, "After expiration of such term, office shall be deemed vacant for purpose of choosing his successor" that office be deemed vacant in every respect so far as it relates to new incumbent as fully as if provision for holdover had not been therein included. People ex rel. Mitchell v Sohmer, 209 N.Y. 151, 102 N.E. 593, 209 N.Y. (N.Y.S.) 151, 1913 N.Y. LEXIS 811 (N.Y. 1913).

Where person re-elected in November died before January first, person appointed under Town Law, § 130, by town board to fill vacancy held office until January first. Under §§ 5 and 30 of this statute, vacancy existed again after January first, and new town board had right to fill vacancy on January first and action of old town board in appointing person to hold office until next biennial election was illegal. People ex rel. Green v Black, 229 A.D. 47, 241 N.Y.S. 244, 1930 N.Y. App. Div. LEXIS 10305 (N.Y. App. Div. 1930).

Office of school board member appointed to fill vacancy was deemed vacant as of January 1 of the year following appointment only for the purposes of choosing their successors. Roher v Dinkins, 40 A.D.2d 956, 338 N.Y.S.2d 441, 1972 N.Y. App. Div. LEXIS 3216 (N.Y. App. Div. 1st Dep't 1972), aff'd, 32 N.Y.2d 180, 344 N.Y.S.2d 841, 298 N.E.2d 37, 1973 N.Y. LEXIS 1360 (N.Y. 1973).

Under this section, whether a vacancy arises by ineligibility or by failure to qualify the incumbent would ordinarily hold over and the office be deemed vacant only for the purpose of appointing a successor. Foley v McNab, 42 Misc. 2d 460, 248 N.Y.S.2d 354, 1964 N.Y. Misc. LEXIS 2072 (N.Y. Sup. Ct. 1964).

Appointments are vitiated and the offices ipso facto vacant where appointees fail to take and file official oaths. Where appointees take and file official oaths, the offices are not vacated by reason of their failure to act, and subsequent attempts to appoint to fill the same offices during their terms are invalid. Appointments to the board of appeals are for terms of three years from the date of appointment, unless to fill an unexpired term of former incumbent. Members of a planning board serve for various terms. 1954 Ops St Compt 332.

13. Filling of vacancy

In a proceeding under Art 78 of the Civil Practice Act, where it is alleged that the petitioner was appointed village trustee to fill an unexpired term until a definite time, and that the pseudo-successor was nominated for the office of trustee on a tie vote, the petition is prima facie sufficient, and where there is no disputed question of material fact the court must retain jurisdiction and may not remit the parties to relief by quo warranto. Felice v Swezey, 278 A.D. 958, 105 N.Y.S.2d 486, 1951 N.Y. App. Div. LEXIS 5368 (N.Y. App. Div. 1951).

In an annual village election to fill the office of trustee, two of the candidates tied, and because of said tie were not able to take office, thereby creating a vacancy. Later the terms of two incumbent trustees expired and the mayor arbitrarily appointed one of the incumbents to act as a carry-over trustee until said vacancy created by the tie vote had been filled. In this action by a taxpayer to declare all matters voted upon by said appointed trustee null and void, the lack of an allegation setting forth the reason that the board of trustees did not determine by lot, as provided in § 53 of the Village Law, which of the two trustees should be deemed elected, is not fatal. Pansmith v Williams, 106 N.Y.S.2d 11, 201 Misc. 759, 1951 N.Y. Misc. LEXIS 1988 (N.Y. Sup. Ct. 1951).

14. —Length of appointment

Under the above statute successors of officers holding over for part of a term are validly appointed only for the residue of such terms. Di Paola v Reilly, 22 A.D.2d 910, 255 N.Y.S.2d 532, 1964 N.Y. App. Div. LEXIS 2463 (N.Y. App. Div. 2d Dep't 1964).

15. —Who may fill vacancy

Where the office of town supervisor becomes vacant by reason of a tie in the election returns, the town board may appoint a qualified person to that office and upon such appointment, the encumbent will cease to be a holdover in the office. Furk v Board of Supervisors, 1 N.Y.2d 128, 151 N.Y.S.2d 12, 134 N.E.2d 104, 1956 N.Y. LEXIS 913 (N.Y. 1956).

Vacancy in the office of fire district commissioner may be filled by the Governor. 1964 Ops St Compt #788.

Board of fire commissioners should appoint a commissioner to fill a vacancy on the board where the annual election was not held because of failure, by oversight, to publish the required notice of election. 1968 Ops St Compt File #1027.

A vacancy in the elective office of fire district treasurer, resulting from an expiration of the term of the office and an erroneous exclusion by a board of fire commissioners of such office at the annual fire district election, thereby depriving district voters of the right to choose a new treasurer, may be filled by appointment of said board for a period ending on the thirty-first day of December next succeeding the first annual district election held thereafter. A new treasurer should be elected at said election to fill the unexpired term. 1969 Ops St Compt File #86.

16. Compensation of officers

Whether appointment was provisional or absolute is of no importance as to appointee's right to hold office and perform its functions and receive its salary. It only affects occupant's security of tenure. Such appointee is successor within meaning of that word as used in this section. People ex rel. Ewell v Robson, 253 A.D. 127, 1 N.Y.S.2d 476, 1937 N.Y. App. Div. LEXIS 5125 (N.Y. App. Div. 1937), reh'g denied, 254 A.D. 635, 4 N.Y.S.2d 166, 1938 N.Y. App. Div. LEXIS 6805 (N.Y. App. Div. 1938), aff'd, 278 N.Y. 585, 16 N.E.2d 112, 278 N.Y. (N.Y.S.) 585, 1938 N.Y. LEXIS 1414 (N.Y. 1938).

Petitioner, although barred from performing his duties following expiration of his term, was entitled to back pay for holdover period in which successor had not been chosen. Cutrone v Village Bd. of Trustees, 226 A.D.2d 459, 640 N.Y.S.2d 599, 1996 N.Y. App. Div. LEXIS 3587 (N.Y. App. Div. 2d Dep't 1996).

Where various town officers hold over in office after the expiration of their respective terms, due to the failure of the election inspectors to complete and file the election returns, such holdover officers are entitled to the salaries fixed for such offices. 1956 Ops St Compt 298.

A member of a town planning board, who has reached the mandatory retirement age, may not receive compensation as a holdover officer subsequent thereto. 1968 Ops St Compt File #846.

Where a holdover by a municipal officer is not in compliance with statutory provisions and is improper, he may not be compensated therefor. Payment of compensation shall be made to his successor who was chosen and qualified. 1969 Ops St Compt File #519.

17. Power to act, and effect of acts, during holdover period

The vote of a Civil Service Commissioner whose term had expired and who was holding over in office until his successor could be appointed was valid and sufficient to effect petitioner's discharge as the executive secretary of the commission. Williamson v Fermoile, 31 A.D.2d 438, 298 N.Y.S.2d 557, 1969 N.Y. App. Div. LEXIS 4279 (N.Y. App. Div. 4th Dep't 1969), aff'd, 26 N.Y.2d 731, 309 N.Y.S.2d 35, 257 N.E.2d 285, 1970 N.Y. LEXIS 1673 (N.Y. 1970).

Under this section an officer holding over has full authority to act. Jennings v Wilson, 40 N.Y.S.2d 400, 179 Misc. 358, 1942 N.Y. Misc. LEXIS 2380 (N.Y. Sup. Ct. 1942), app. dismissed, 74 N.Y.S.2d 418 (N.Y. App. Div. 1947).

Verification of tax roll by prior assessor 3 days after appointment of new assessor was valid, where new assessor had not filed oath of office, since by virtue of the provisions of § 25 of the town law, and § 5 of the Public Officers Law, the prior assessor held over and was authorized to discharge the duties of assessor until such time as the new assessor qualified. Dells, Inc. v Ossman, 15 Misc. 2d 237, 184 N.Y.S.2d 884, 1958 N.Y. Misc. LEXIS 2983 (N.Y. Sup. Ct. 1958).

A holdover officer does not have to execute and file a new oath. Vescio v City Manager of Yonkers, 69 Misc. 2d 68, 329 N.Y.S.2d 357, 1972 N.Y. Misc. LEXIS 2172 (N.Y. Sup. Ct. 1972), aff'd, 41 A.D.2d 833, 342 N.Y.S.2d 376, 1973 N.Y. App. Div. LEXIS 4819 (N.Y. App. Div. 2d Dep't 1973).

Holdover county commissioner of social services could continue to discharge duties of office until his successor was chosen and qualified. Boisvert v County of Ontario, 89 Misc. 2d 183, 391 N.Y.S.2d 49, 1977 N.Y. Misc. LEXIS 1857 (N.Y. Sup. Ct.), aff'd, 57 A.D.2d 1051, 395 N.Y.S.2d 617, 1977 N.Y. App. Div. LEXIS 12360 (N.Y. App. Div. 4th Dep't 1977).

Because a parole commissioner's authority to serve after the expiration of the commissioner's term fell within the holdover provision of N.Y. Pub. Off. Law § 5, and because the parole board considered the necessary factors in N.Y. Exec. Law § 259-i(1)(a), an inmate was not entitled to N.Y. C.P.L.R. art. 78 relief. Matter of Garofolo v Rosa, 891 N.Y.S.2d 899, 26 Misc. 3d 969, 243 N.Y.L.J. 3, 2009 N.Y. Misc. LEXIS 3470 (N.Y. Sup. Ct. 2009).

Agency Opinions

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1. In general

Discussion of problems arising where it appears that one of two trustees elected at an annual election is ineligible for office. 1964 NY Ops Atty Gen March 27.

An elected or appointed officer holds office for the legal term of the office even though the election or appointment was thought to be for a term of different length. 1971 NY Ops Atty Gen Jan 13 (informal).

Election or appointment to public office must be for the term prescribed by law, even though erroneously otherwise designated on the ballot or in the appointment itself. 1972 NY Ops Atty Gen Jan 5.

A public officer holds over and continues to perform the duties of his office until a successor is chosen and qualified but the office is vacant for the purpose of selecting a successor. 1979 NY Ops Atty Gen Aug 13 (Informal), 1979 N.Y. AG LEXIS 69.

A village board of trustees of a village having less than three thousand population may change the residence qualification applicable to the office of village justice; the change must be effected by local law so as to allow a resident of the county in which the village is situate, even if that person does not reside in the village, to hold the elective village office of village justice; the authorization contained in the statute must be utilized precisely as contained therein, without alteration, so the enlargement, if availed of, must be county-wide; but such a change may not be made effective retroactively, one reason being the provision of Election Law § 15-126 subd 1. 1979 NY Ops Atty Gen May 17. (Informal), 1979 N.Y. AG LEXIS 116.

When county legislators serve staggered four-year terms, the county attorney's term of appointment runs during the two-year term of the appointing county legislature. 2014 N.Y. Op. Att'y Gen. No. 2014-3, 2014 N.Y. AG LEXIS 84.

2. What officers hold over

3. —County officers

An appointive county officer holds over in office, at the expiration of his term, until his successor is appointed. 1959 NY Ops Atty Gen Nov 20 (informal).

List of county officers who hold over until appointment of successor under this section. 1961 NY Ops Atty Gen Dec. 28.

Differentiation between county officers and county employees with respect to holding over until appointment of successor under this section. 1961 NY Ops Atty Gen Dec. 28.

Under section 5 of the Public Officers Law, the chairperson of a county legislature is entitled to hold the position of chairperson until a successor is chosen. 1985 N.Y. Op. Att'y Gen. No. 85-9.

4. —Health and hospital officers and boards

Member of board of managers of public general hospital is a public officer and holds over after expiration of his term of office until his successor is chosen and has qualified. 1955 NY Ops Atty Gen 58 (informal).

A local health officer is an independent public officer. His oath of office is to be filed in the office of the county clerk of the county of his residence. Failure to file vacates the office. An encumbent, reappointed to succeed himself, but who fails to file his new oath of office, holds over in office. 1973 NY Ops Atty Gen June 28 (informal).

5. —Judicial officers

An acting village justice may not hold over beyond the expiration of his term of office until his successor is chosen and has qualified. 1982 NY Ops Atty Gen May 12 (informal).

6. —Municipal and town officers and boards

7. — —Planning and zoning boards

A member of the planning board may remain in office after the expiration of his term until the town board appoints a successor. 1980 Op St Compt File # 169.

8. — —Town or village attorneys

The mayor of a village appoints the village attorney subject to the approval of the board of trustees. Upon a failure to appoint a village attorney, the incumbent continues to carry out the duties of the position. 1983 N.Y. Op. Att'y Gen. No. 83-31.

Town attorney holds over beyond expiration of his or her term of office until his or her successor has been chosen and has qualified. 1994 NY Ops Atty Gen I 94-9.

Municipal officer appointed to Housing Authority for a definite term continues in office after expiration of his municipal office until appointment of successor. 1944 NY Ops Atty Gen Jan. 24.

A village trustee continues as a holdover, after his term has expired, unless his successor is duly chosen and qualified. 1953 NY Ops Atty Gen 60 (informal).

An appointive city officer holds over at the expiration of his term until his successor is chosen and qualified. 1955 NY Ops Atty Gen 211 (informal).

The Public Works Commissioner of the City of Little Falls holds over beyond the end of his term and until his successor is duly appointed and qualifies, in default of a contrary provision in the city charter. 1963 NY Ops Atty Gen Jan 17.

A member of a Village Board of Water Commissioners holds over in office after the expiration of his term and until a successor has been chosen. 1966 NY Ops Atty Gen June 17.

Upon enactment of chapter 900 of the Laws of 1986, the members of the Metropolitan Transportation Authority's board selected under prior law to represent the Counties of Dutchess, Orange, Putnam and Rockland cease to hold over in office. 1986 NY Ops Atty Gen No. 86-F13.

Where an individual who was re-appointed to the office of village treasurer failed to take and file the oath of office on time but continued to perform the duties of the office, the individual would be deemed holding over to fill the vacancy in the office. 1978 Op St Compt File #833.

Water district commissioner is public officer of water district and incumbent holds over until successor is chosen. 1940 N.Y. Op. Att'y Gen. No. 135.

Member of board of visitors of reformatory is a public officer and, as such, comes within provisions of § 5. 1945 NY Ops Atty Gen May 9.

Social Welfare Law contemplates that term of office of members of board of social welfare shall begin on July 1 and end five years thereafter; statutory limitation prohibits an individual from serving longer than ten years even though his present term has not expired at that time, and after ten years a member may not hold over until appointment of a successor; in determining limitation it is not required that a person appointed to fill a vacancy count length of service of his predecessor. 1946 NY Ops Atty Gen July 5.

Members of board of bridge authority hold over after expiration of appointed terms and before reappointment. 1946 NY Ops Atty Gen July 26.

The failure to hold an election in December of 1974 for the office of Commissioner of the Improvement District of East Greenbush creates a vacancy in that office as of January 1, 1975, but the former Commissioner holds over and continues to exercise the powers and duties of the office. The vacancy must be filled by the Town Board of the Town of East Greenbush; and if the Board fails to make an appointment, a proceeding to compel the Board to act may be commenced. 1975 NY Ops Atty Gen Feb 26.

Upon failure to appoint village building inspector, incumbent holds over and continues to exercise duties of his office until successor is chosen and is qualified; deputy building inspector does not assume duties of building inspector. 1987 NY Ops Atty Gen No. 87-84. (Informal).

9. Basis or reason for holding over

10. —Failure to hold election or to elect successor

Where there has been tie vote, present incumbent continues in office until successor is chosen and qualified. 1911 N.Y. Op. Att'y Gen. No. 520.

A tie vote for assessor results in no election and the incumbent holds over until his successor is appointed or elected. 1961 NY Ops Atty Gen Dec 7.

In the event of a tie vote for fire district commissioners, the incumbent holds over until his successor is chosen. 1961 NY Ops Atty Gen Dec 7.

Where a vacancy occurs in the office of city alderman because of a tie vote in attempting to elect a successor, pending a special election to break the tie, the incumbent alderman remains in office until his successor has been elected and qualifies. 1961 NY Ops Atty Gen Nov 17.

An immediate special election to fill vacancies in village offices could not be held where the statutory time had elapsed for calling one; thus a special election to fill vacancies for the unexpired portion of the terms of two trustees would be held concurrently with the general village election. 1979 NY Ops Atty Gen Aug 13 (informal).

Where village fails to hold election for office of village justice prior to the expiration of the term of office of the present incumbent, the office becomes vacant on the first day of the next official year. The person who formerly served as justice may be appointed to fill the vacancy and, where a general village election is scheduled for the next year, a person should be elected to fill the remainder of the unexpired term at that election. 1980 Op St Compt File #305.

11. —Failure to confirm or approve appointment of successor

Official appointed by governor during recess of senate continues at least as de facto official after expiration of his term through failure of senate to confirm him, and his acts are valid as to third persons. 1943 N.Y. Op. Att'y Gen. No. 443.

Effect of nonaction by Senate for 20 days after commencement of session on interim appointment by Governor is that the status of the appointee at most is that of a de facto officer and the validity of his acts is questionable. 1955 NY Ops Atty Gen 117, 256, 257.

Constitutional provisions requiring senatorial confirmation of interim gubernatorial appointments must be given effect although the provision that such confirmation must be taken within 20 days after the Legislature convenes is statutory and may be changed but requires an emergency message from the Governor. 1955 N.Y. Op. Att'y Gen. No. 257.

The incumbent city attorney of the City of Beacon does not hold over when the city council fails to consent to appointment by the mayor of a city attorney. 1962 NY Ops Atty Gen Jan. 10; 1962 NY Ops Atty Gen Feb 1.

If a village officer appointed by the mayor is not approved by the board of trustees pursuant to Village Law, § 3-301(3), the incumbent officer continues in office beyond the date of the expiration of his term. If the board of trustees fails to approve the officer's appointment, the board of trustees does not have independent authority to appoint a village officer. A local village law which transfers the power of appointment from the mayor to the board of trustees is subject to a mandatory referendum. Members of the village planning board are village officers appointed by the village board of trustees. If the board of trustees fails to approve appointments by the mayor to the board of fire commissioners pursuant to Village Law, § 3-308, the incumbent members continue in office beyond the date of the expiration of their term of office. 1974 NY Ops Atty Gen April 11.

An acting village justice may not hold over in office where no attempt is made to appoint a successor or where an appointment is made of the same or another individual by the mayor of the village but the appointment has not been approved by the village board of trustees. 1977 NY Ops Atty Gen Apr 13.

The mayor of a city is empowered to make appointments of appointive city officers only to the extent such power is conferred upon him by city charter or other statute (or local enactment). All other appointments are made by the governing body. Where the city charter requires the consent of the governing body of appointments made by the mayor, and the governing body does not confirm an appointment in a given instance, the incumbent holds over beyond the end of his term until a successor is duly appointed. Where the vote of the governing body with respect to an appointment results in a tie and the mayor, as a member thereof, is entitled by law to vote in the event of a tie, he may break the tie by voting for his nominee. 1982 Op St Compt File #82-23.

Where law is amended so as to postpone date for election of officer, person in office shall hold over beyond expiration of term, until successor is chosen and qualified. 1930 N.Y. Op. Att'y Gen. No. 397.

Where the elected candidate for the office of village trustee is found to be ineligible to hold that office, the defeated candidate does not become entitled thereto, but the trustee whose office was the subject of the election holds over until his successor is chosen. 1949 NY Ops Atty Gen Oct. 5.

Where, under present city charter, candidates for two offices were elected at the general election to take office on January 1, and at same election new city charter was approved to be effective on following January 1, which new charter provided those offices would be appointive and filled for terms commencing on effective date, elective offices were abolished and appointive offices created on effective date; the successful candidates at the election will not take office; the offices are to be filled by appointment; if no appointments are made, present incumbents of the elective offices will hold over. 1977 NY Ops Atty Gen Dec 14 (Informal).

Member of zoning board of appeals may be reappointed to succeed himself, and is required to file a new oath of office upon reappointment; failure to do so makes him a holdover. Board action is nevertheless legal. 1979 NY Ops Atty Gen September 11 (informal).

Trustee whose term expired in 1979, and who was elected to succeed himself, but who failed to file his oath of office, continues in office as a holdover trustee. 1979 NY Ops Atty Gen Aug 13 (informal).

Trustee whose term expired in 1979, and who was elected Mayor, but who failed to file his oath of office, continues to be a trustee as a holdover in office. 1979 NY Ops Atty Gen Aug 13 (informal).

There is no authority for the trustees of a village scheduled to be dissolved to extend the terms of current elected officers until the date of dissolution. Upon failure to fill these offices, the incumbents will hold over beyond the expiration of their terms. The Governor could call a special election to fill these offices. 1985 N.Y. Op. Att'y Gen. No. 85-14.

Appointment to Board of Assessment Review was consistent with CLS RPTL § 523(1)(c) where term of predecessor expired on September 30, successor was appointed in December, predecessor was holdover until successor was qualified to serve, and, on qualification, successor holds office for balance of unexpired term. 2008 NY Ops Atty Gen I 08-12.

Where an individual who was re-appointed to the office of village treasurer failed to take and file the oath of office on time but continued to perform the duties of the office, the individual would be deemed holding over to fill the vacancy in the office. 1978 Op St Compt File #833.

12. Existence of vacancy

By reason of the termination of their membership in the Legislature, former Senators and Assemblymen who were appointed as members of the Buffalo Port Facilities Commission cease to be such members. 1951 N.Y. Op. Att'y Gen. No. 207.

Upon occurrence of a vacancy in an elective office, filled by appointment, failure to elect a successor for the balance of the unexpired term creates a continuing vacancy commencing on the next January first which cannot be filled by appointment and must be filled at a special election proclaimed by the Governor or ordered by a court. A person appointed to the office on or after the next January first is only a de facto officer. His acts as such cannot be attacked collaterally. 1973 NY Ops Atty Gen July 2 (informal).

Where the elected town clerk and a councilman simultaneously resign in futuro and at same time town board passes a resolution appointing the councilman as town clerk, resolution has no effect, town councilman was still member of town board and vacancy in town clerk's office did not then exist. Elected town clerk's resignation must be filed with Secretary of State. When filed in town clerk's office, it has no effect so town clerk still holds office. Where resignation purported to be for balance of present and all of forthcoming term the resignation, even if properly filed, would be inoperative as to forthcoming term and present town clerk will hold over in office until qualifying for new term. If clerk fails to qualify for new term, town board may appoint. 1975 NY Ops Atty Gen Dec 31 (informal).

When the office of village clerk becomes vacant because of expiration of the term, the appointment of a successor is made by the mayor with the approval of the board of trustees and in the event the trustees do not approve of the appointment, the office continues to be vacant; the former incumbent holds over until a new appointment is made and a hold-over officer has full authority to act and is entitled to the salary of the office. 1977 NY Ops Atty Gen March 25.

Failure of the newly elected mayor and three trustees to qualify for office by filing their constitutional oaths of office within 30 days created vacancies in the offices of mayor, one trustee for one year and two trustees for two years. 1979 NY Ops Atty Gen Aug 13 (Informal), 1979 N.Y. AG LEXIS 69.

Where a town clerk is re-elected and subsequently resigns prior to the expiration of his current term, two vacancies arise—one for the current term and one for the new term. The vacancies may not be filled until they actually occur, however, and an attempt to fill a prospective vacancy is null and void. 1982 Op St Compt File #82-30.

13. Filling of vacancy

14. —Anticipated or prospective vacancy

Village board has authority to appoint a village health officer to hold office for four years from date of his appointment, but such board has no power to appoint a health officer to fill an anticipated vacancy which will occur after such board has been replaced by a new village board. 1941 NY Ops Atty Gen April 23.

Where a town clerk is re-elected and subsequently resigns prior to the expiration of his current term, two vacancies arise—one for the current term and one for the new term. The vacancies may not be filled until they actually occur, however, and an attempt to fill a prospective vacancy is null and void. 1982 Op St Compt File #82-30.

15. —Length of appointment

An appointment to fill the position of a holdover is for the balance of the term. 1962 NY Ops Atty Gen Feb 20.

Upon the failure to hold the required election to fill a vacancy in an elective office, the person appointed to temporarily fill the vacancy may not hold over beyond December 31 following the date on which the election should have been held. 1984 N.Y. Op. Att'y Gen. No. 84-67.

16. —Special election to fill vacancy

If a board of trustees, consisting of a trustee whose term has not expired and two holdover trustees, cannot agree unanimously on an individual to be appointed to fill the office of mayor, then the village clerk should notify the office of the Governor that there are vacancies in four village elective offices and request the Governor to proclaim a special election to fill the vacancies. 1979 NY Ops Atty Gen Aug 13 (informal).

A vacancy in the office of alderman occurring at the end of the term by virtue of a tie vote at the preceding general election may be filled at a special election proclaimed by the Governor under Public Officers Law, § 42, subd 3; the vacancy may not be filled by appointment under section 3.9 of the Oneonta City Charter. 1979 NY Ops Atty Gen Dec 21 (formal).

17. —Who may fill vacancy

Where a vacancy in the office of mayor of a village occurs by reason of failure to elect to that office, the incumbent thereof holds over until a successor is chosen and the board of trustees is empowered to fill such vacancy for the balance of the current official year prior to the expiration of which the vacancy should further be filled by election in accordance with Village Law § 4-422(4). 1967 NY Ops Atty Gen April 19.

Where there is a tie vote for an elective office a vacancy will exist at the expiration of the current term. The vacancy must be filled by the appointing board. If the appointing board fails to act, the Governor may require a special election. A special proceeding may be brought to compel the board to act, and if the board then fails, the judgment may require a special election. Appointing officer holds office until following December 31, and balance of term is filled at November election. Officer elected at special election holds for balance of unexpired term. 1973 NY Ops Atty Gen Nov 30.

The mayor has the prerogative of filling the vacancy in elective village office. Where vacancy occurs less than twenty days before General Village Election, appointee serves until end of official year, at which time a second appointment may be made to complete the next official year. The first appointee may hold over in office for one year if the subsequent appointment is not made. 1974 NY Ops Atty Gen April 10 (informal).

If a village officer appointed by the mayor is not approved by the board of trustees pursuant to Village Law, Section 3-301(3), the incumbent officer continues in office beyond the date of the expiration of his term. If the board of trustees fails to approve the officer's appointment, the board of trustees does not have independent authority to appoint a village officer. A local village law which transfers the power of appointment from the mayor to the board of trustees is subject to a mandatory referendum. Members of the village planning board are village officers appointed by the village board of trustees. If the board of trustees fails to approve appointments by the mayor to the board of fire commissioners pursuant to Village Law, Section 3-308, the incumbent members continue in office beyond the date of the expiration of their term of office. 1974 NY Ops Atty Gen April 11 (informal).

Where there is a vacancy in the office of village mayor the board of trustees may fill that vacancy. 1979 NY Ops Atty Gen Aug 13 (Informal), 1979 N.Y. AG LEXIS 69.

Where the Schenectady County Sheriff was elected at the General Election of 1967 to a new term for a period of four years, his term will expire on December 31, 1970. Procedures for filling the vacancy outlined. 1970 NY Ops Atty Gen Dec 28.

An appointee to fill a vacancy in the office of town clerk and an appointee to fill a vacancy in the office of town justice must run for election to fill the unexpired portions of the terms. The fact that the appointees had previously been elected to and served in those offices has no relevancy to the question of whether an election must be held. An 18 year old who is otherwise qualified may be appointed to the office of deputy town clerk. 1972 NY Ops Atty Gen July 27 (informal), 1972 N.Y. AG LEXIS 118.

There is no such thing in the contemplation of the law as a hold over vacancy which continues beyond the normal expiration date of the term of the office. Where there is a difference in the means of filling a vacancy in office occurring before the expiration of the term thereof and the means of filling an office vacant because of the expiration of the term thereof, the means used must be appropriate to the vacancy which exists. Where a vacancy in office occurred prior to the expiration of the term thereof and was not filled before the commencement of the current village official year, the vacancy has been converted by the passage of time to a vacancy in office due to expiration of term and may be filled only pursuant to the provisions of Village Law, § 4-400, subdivision 1, paragraph c. 1976 NY Ops Atty Gen July 19.

At the 1979 election, successors had to be elected for both trustees whose elective terms were expiring in 1979, and for the mayor and the trustee who occupied their offices by appointment. 1979 NY Ops Atty Gen Aug 13 (Informal), 1979 N.Y. AG LEXIS 69.

The trustees have no authority to make an appointment to fill a vacancy in the office of trustee, which is a power given only to the mayor. 1979 NY Ops Atty Gen Aug 13 (Informal), 1979 N.Y. AG LEXIS 69.

A newly appointed mayor may fill the vacancies on the village board of trustees, which appointments may be of any individuals qualified to hold the offices, including those who had been elected to the offices but who failed to qualify. 1979 NY Ops Atty Gen Aug 13 (informal).

When a member of a town zoning board of appeals holds over after the expiration of his term, a new five-year term commences at the expiration date and the town board should appoint a successor to fill the unexpired term. 1978 Op St Compt File #179.

18. Compensation of officers

Appointed justice of peace holds office to Election Day and should not be paid thereafter. Elected justice of peace to fill vacancy takes office as soon after Election Day as he files oath of office and as Board of Canvassers finds and certifies his election. His salary should commence when both these acts have been completed. 1969 NY Ops Atty Gen Jan 22.

Where the Governor has made interim appointments while the Senate was not in session, such appointees serve for a term expiring 20 days after the Senate convenes. Until confirmed by the Senate (or until the appointment and qualification of a successor), they continue to serve as holdovers and in such capacity, remain on the State payroll. If the Senate disapproves their nomination for permanent appointment, such action terminates their holdover status and removes them from the payroll as of the end of the day on which the Senate acts. 1979 NY Ops Atty Gen Jan 21.

19. Power to act, and effect of acts, during holdover period

The same person may not act at the same time in holding the elective town offices of councilman and while holding over as supervisor. 1964 NY Ops Atty Gen Jan 7.

A municipal board consisting of five members can act only by the affirmative vote of at least three members; so if there are three people who can act on the village board of trustees, if they act unanimously, their acts have validity. 1979 NY Ops Atty Gen Aug 13 (informal).

Holdover trustees, by unanimous action, may appoint a village mayor but none of them may be appointed to that office (Wood v Whitehall (1923) 120 Misc 124, affd 197 NYS 789, on the opinion below 206 AD 786, 201 NYS 959 [1923]). 1979 NY Ops Atty Gen Aug 13 (informal).

The acts of a board of trustees which are unanimously voted upon by a remaining trustee and two holdover trustees are valid unless more than a simple majority vote is required for passage. 1979 NY Ops Atty Gen Aug 13 (informal).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 39; CLS Alt Co Gov §§ 150, 202; CLS Men Hyg § 80.05; CLS Town § 341; CLS Ct Cl Act § 2.

New York state board of elections; membership; organization, CLS Elec § 3-100.

Jurisprudences:

6 NY Jur 2d Article 78 and Related Proceedings § 110 .

18A NY Jur 2d Civil Servants and Other Public Officers and Employees §§ 20, 97–99 .

25 NY Jur 2d Counties, Towns, and Municipal Corporations § 359 .

49 NY Jur 2d Elections § 59 .

63C Am Jur 2d, Public Officers and Employees §§ 149–151.

Annotations:

Injunction as remedy against removal of public officer. 34 ALR2d 554.

§ 10. Official oaths

Every officer shall take and file the oath of office required by law, and every judicial officer of the unified court system, in addition, shall file a copy of said oath in the office of court administration, before he shall be entitled to enter upon the discharge of any of his official duties. An oath of office may be administered by a judge of the court of appeals, the attorney general, or by any officer authorized to take, within the state, the acknowledgment of the execution of a deed of real property, or by an officer in whose office the oath is required to be filed or by his duly designated assistant, or may be administered to any member of a body of officers, by a presiding officer or clerk, thereof, who shall have taken an oath of office. An oath of office may be administered to any state or local officer who is a member of the armed forces of the United States by any commissioned officer, in active service, of the armed forces of the United States. In addition to the requirements of any other law, the certificate of the officer in the armed forces administering the oath of office under this section shall state (a) the rank of the officer administering the oath, and (b) that the person taking the oath was at the time, enlisted, inducted, ordered or commissioned in or serving with, attached to or accompanying the armed forces of the United States. The fact that the officer administering the oath was at the time duly commissioned and in active service with the armed forces, shall be certified by the secretary of the army, secretary of the air force or by the secretary of the navy, as the case may be, of the United States, or by a person designated by him to make such certifications, but the place where such oath was administered need not be disclosed. The oath of office of a notary public or commissioner of deeds shall be filed in the office of the clerk of the county in which he shall reside. The oath of office of every state officer shall be filed in the office of the secretary of state; of every officer of a municipal corporation, including a school district, with the clerk thereof; and of every other officer, including the trustees and officers of a public library and the officers of boards of cooperative educational services, in the office of the clerk of the county in which he shall reside, if no place be otherwise provided by law for the filing thereof.

HISTORY:

Add, L 1909, ch 51; amd, L 1913, ch 59; L 1945, ch 795; L 1952, ch 467, § 1; L 1961, ch 359, § 2; L 1962, ch 277, § 1; L 1964, ch 341; L 1974, ch 615, § 14; L 1977, ch 29, § 1, eff March 29, 1977.

Notes to Decisions

Analysis

1. In general
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1. In general

N.Y. C.P.L.R. 213(7) six-year statute of limitations governed a school district's claim against a member instead of the N.Y. C.P.L.R. 214(4) three-year period because N.Y. C.P.L.R. 213(7) extended the limitations period to six years for an action by a corporation against a present or former officer to recover damages for waste or for an injury to property, or for an accounting, and the school district was both a municipal corporation and a public corporation. Roslyn Union Free School Dist. v Barkan, 16 N.Y.3d 643, 926 N.Y.S.2d 349, 950 N.E.2d 85, 2011 N.Y. LEXIS 654 (N.Y. 2011).

It was error to dismiss village fire chief's Article 78 petition for reinstatement on ground that his appointment as public officer was vitiated by his failure to have taken and filed oath of office as required by CLS Pub O § 10, since petitioner was not public officer in that his position was not created by statute but was administrative post requiring him to answer to village board of trustees on all personnel and budgetary matters. Stork v Board of Trustees, 179 A.D.2d 1058, 579 N.Y.S.2d 797, 1992 N.Y. App. Div. LEXIS 2406 (N.Y. App. Div. 4th Dep't 1992).

Public officer within meaning of CLS Pub O § 10, in contrast to subordinate public employee, is person whose position is created, whose powers and duties are prescribed, by statute, and who exercises high degree of initiative and independent judgment.

Stork v Board of Trustees, 179 A.D.2d 1058, 579 N.Y.S.2d 797, 1992 N.Y. App. Div. LEXIS 2406 (N.Y. App. Div. 4th Dep't 1992).

Defendant member of city board of education is not required to take constitutional oath of office because of Education Law §§ 2 and 223. Donovan v Reynolds, 63 N.Y.S.2d 565, 187 Misc. 895, 1946 N.Y. Misc. LEXIS 2458 (N.Y. Sup. Ct. 1946), app. dismissed, 296 N.Y. 885, 72 N.E.2d 615, 296 N.Y. (N.Y.S.) 885, 1947 N.Y. LEXIS 1659 (N.Y. 1947).

Assuming arguendo that respondents vacated their positions by failing to file proper oaths of office in accordance with Public Officers Law, petitions to remove them from office were rendered moot by their subsequent reappointments followed by timely and proper filing of their oaths; likewise, removal petitions were moot as to respondents who, having failed to properly execute and file oaths of office, "resigned" their offices, were appointed to fill vacancies created by their resignations, and immediately took and filed oaths in compliance with law. 1999 Op Comm Ed No. 14,185.

The salaries of a town tax collector and a town justice of the peace elected to fill vacancies commence as of the date they qualify by filing their constitutional oaths and official bonds or undertakings. 1957 Ops St Compt 236.

Members and officers of school boards and library trustees are required to take a constitutional oath before assuming office and this must be filed in the office of either the clerk of the board or the county clerk as the case may be. Teachers are required to take a similar oath which must be filed with the clerk of the school district, and a record thereof must be kept by the school district. 1967 Ops St Compt File #1016.

Attorney whose nomination to position of judge of Court of Claims had been confirmed by New York State Senate could continue to practice law until oath of office was taken and filed under CLS Pub O §§ 10 and 30. Ops Adv Comm Jud Ethics No. 98-92.

2. Particular positions requiring oaths

Surrogate is a "local officer" and must take and file his oath before entering upon and discharging duties of office. In re Pardee's Estate, 259 A.D. 101, 18 N.Y.S.2d 413, 1940 N.Y. App. Div. LEXIS 6055 (N.Y. App. Div. 1940).

3. —Law enforcement

Members of a fire police squad are required to take and file the constitutional oath of office. 1955 Ops St Compt File #7153.

4. —Library trustees

The trustees of a town public library must file an oath of office. 1959 Ops St Compt #23.

The members of the board of trustees of a cooperative library system and the treasurer elected by them (if not a member of the board) must take the constitutional oath of office prescribed by Article XIII, section 1 of the New York State Constitution. 1967 Ops St Compt File #860.

5. —Oaths for successive terms

Village treasurer and superintendent of public works must take an oath of office at commencement of each term of office. A village policeman appointed pursuant to Section 188 of the Village Law is a public officer whose term expires at the end of each official year. Such policeman must take and file an oath of office with the commencement of each term. A member of a village police department appointed pursuant to Section 188-a of the Village Law does not serve for a fixed term and need only take and file an oath of office before the commencement of his official duties. 1945 Ops St Compt 95.

6. Who may administer oaths

Official oath may be administered to town officers by town clerk and must be filed in county clerk's office and in office of town clerk. 1946 Ops St Compt 7.

The form of oath of office required of members of fire police squads, is prescribed by the Constitution, Art XIII, Sec 1. It may be administered by the persons designated in this section and should be filed in the office of the clerk of the county where he resides. If a member of a fire police squad fails to take such oath, he holds office in a de facto capacity and is not prevented from discharging his duties as a fire policeman. 1955 Ops St Compt 507.

Members of a fire district fire police squad may take the constitutional oath of office before any notary public, the county clerk, or a judge of the Court of Appeals. 1955 Ops St Compt 585.

The town clerk is not, by virtue of his office, a person authorized to take an acknowledgment for a deed of real property, and unless otherwise qualified pursuant to law, he may not administer the oath of office to members of fire police squads. 1955 Ops St Compt File #7599.

A village clerk may administer the oath of office to a village police justice. 1967 Ops St Compt File #632.

Secretary of fire district may administer oath of office to district commissioner, but treasurer of fire district may not administer such oath. 1987 Op St Compt No. 87-60.

7. Filing of oaths

Timely filing of an oath of a town official in either the County Clerk's office or the Town Clerk's office is sufficient to satisfy the statutory requirements, and oaths taken before and in the possession of the Town Clerk were sufficient to constitute filing with him. Entwistle v Murtaugh, 17 N.Y.2d 6, 266 N.Y.S.2d 969, 214 N.E.2d 153, 1966 N.Y. LEXIS 1638 (N.Y. 1966).

The official oath of a member of the Board of Health of a village should be filed in the village clerk's office. In re Board of Health, 43 A.D. 236, 60 N.Y.S. 27, 1899 N.Y. App. Div. LEXIS 1960 (N.Y. App. Div. 1899).

Where the oath of office of an individual was submitted to the city clerk and stamped for filing, such oath was lawfully on file. Freeman v Lamb, 33 A.D.2d 974, 307 N.Y.S.2d 752, 1970 N.Y. App. Div. LEXIS 5796 (N.Y. App. Div. 4th Dep't), app. dismissed, 26 N.Y.2d 967, 311 N.Y.S.2d 11, 259 N.E.2d 482, 1970 N.Y. LEXIS 1436 (N.Y. 1970).

8. Failure to take and file oath

Holdover Kings County Republican Commissioner to New York City Board of Elections was not entitled to occupy position for remainder of term where certificate of appointment filed in 1993 (which recommended that he continue in position) was invalid, and majority of Republican members of New York City Council voted in 1995 for another individual to be given position, as he was not choice of majority vote of Republican Party County Committee, and he neither took oath of office nor filed certificate of appointment as required by CLS Pub O § 10 and CLS Elec § 3-210. D'Angelo v Velella, 167 Misc. 2d 719, 634 N.Y.S.2d 1011, 1995 N.Y. Misc. LEXIS 566 (N.Y. Sup. Ct. 1995).

Where one appointed as village street commissioner failed to take the required oath and served for only a short time prior to becoming ill the office could be treated as vacant. Furnia v Murphy, 31 N.Y.S.2d 875, 1941 N.Y. Misc. LEXIS 2466 (N.Y. Sup. Ct. 1941), modified, 264 A.D. 809, 35 N.Y.S.2d 460, 1942 N.Y. App. Div. LEXIS 4813 (N.Y. App. Div. 1942).

Former village administrator's due process rights were not violated by the administrator's dismissal because the administrator had no property right in the position, having failed to file a properly executed oath of office under N.Y. Pub. Off. Law § 10. Cushman v Vill. of Ilion, 317 F. Supp. 2d 120, 2004 U.S. Dist. LEXIS 1639 (N.D.N.Y. 2004).

School district officials who vacated their positions by operation of law, for failure to file proper oaths of office in accordance with Public Officers Law, were not "removed" from office so as to be ineligible under CLS Educ § 2103 to be reappointed by board of education within one year. 1999 Op Comm Ed No. 14,185.

Petitioner's seat on board of education was vacated as of August 1, 2001 and his execution of oath of office on August 8, 2001 did not permit him to fill entire 3-year term to which he was duly elected on May 15, 2001, although board supported his request to have his term of office reinstated through June 30, 2004, where he was originally elected to 3-year term in May 1998, and he was reelected in May 2001, but he did not attend board's reorganization meeting on July 2, 2001 and therefore did not complete and file oath of office within 30 days of commencement of term of office to which he was elected; when petitioner was appointed on September 5, 2001 and presumably executed and filed his oath

properly, board had no authority to appoint him to term beyond next election. 2001 Op Comm Ed No. 14,710.

9. —Validity of subsequent acts

Special district attorney was not subject to disqualification, notwithstanding his late filing of oath of office, since (1) duties performed by special district attorney were enforceable and valid as performance by de facto officer, and (2) oath would be considered filed nunc pro tunc as of date of appointment. People v Rossney, 178 A.D.2d 765, 577 N.Y.S.2d 683, 1991 N.Y. App. Div. LEXIS 16729 (N.Y. App. Div. 3d Dep't 1991), app. denied, 79 N.Y.2d 1007, 584 N.Y.S.2d 461, 594 N.E.2d 955, 1992 N.Y. LEXIS 2990 (N.Y. 1992), overruled in part, People v Nicholas, 118 A.D.3d 1183, 988 N.Y.S.2d 277, 2014 N.Y. App. Div. LEXIS 4467 (N.Y. App. Div. 3d Dep't 2014).

The actions of a de facto officer are valid and binding despite the fact that he has not taken his oath of office as provided for by this section. Application of Delehanty, 115 N.Y.S.2d 602, 202 Misc. 33, 1952 N.Y. Misc. LEXIS 1720 (N.Y. Sup. Ct.), aff'd, 280 A.D. 542, 115 N.Y.S.2d 614, 1952 N.Y. App. Div. LEXIS 3515 (N.Y. App. Div. 1952).

The failure of an incumbent member of a village planning board to take the required oath of office did not affect the action of the board in approving a subdivision plot. Waters v Connor, 11 Misc. 2d 174, 169 N.Y.S.2d 526, 1957 N.Y. Misc. LEXIS 2169 (N.Y. Sup. Ct. 1957).

Defendant, who needed assistance of Spanish-English interpreter, did not knowingly, voluntarily, and intelligently relinquish his rights at plea proceeding, where court appointed defendant's wife as temporary interpreter without (1) ascertaining whether official interpreter was otherwise employed, as provided by CLS Jud § 387, (2) administering constitutional oath required by CLS Pub O § 10, and (3) assuring that defendant's wife had adequate language skills to understand and translate proceedings; consequently, defendant's conviction resulting from his guilty plea was unconstitutional, and defendant could not be sentenced as second felony offender based on such conviction. People v Medrano, 133 Misc. 2d 811, 508 N.Y.S.2d 375, 1986 N.Y. Misc. LEXIS 2955 (N.Y. County Ct. 1986).

Defendant was not entitled to dismissal of indictment on ground that special district attorney (SDA), who was appointed by court to investigate and present evidence of possible criminal acts involving defendant, neglected to take and file official oath of office as prescribed by CLS Pub O § 10 and CLS County § 402, for inasmuch as appointment of SDA was temporary in nature, limited in scope, and had no degree of permanency, SDA was not official required to take and file oath; moreover, even if SDA was public official required to take and file oath, his actions were nonetheless "as valid and of as full force and effect as if such oath had been duly taken and filed" as provided by CLS Pub O § 15. People v Schongar, 140 Misc. 2d 66, 530 N.Y.S.2d 478, 1988 N.Y. Misc. LEXIS 354 (N.Y. County Ct. 1988).

Participation in a meeting of the village board by a trustee who has failed to file his oath of office does not void any of the proceedings of the board. 1955 Ops St Compt 565.

Where newly appointed village trustee fails to file oath of office and participates in meeting of village board, despite timely protest, legality of board's actions is not affected. He is, however, guilty of a misdemeanor. 1955 Ops St Compt 580.

Failure of an elected town justice of the peace to file his official oath and official undertaking within the prescribed time does not affect the validity of his acts as a de facto officer, notwithstanding he violates the law by undertaking official acts without qualification. 1964 Ops St Compt #323.

Agency Opinions

Analysis

1. In general
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4. —Oaths for successive terms
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7. Failure to take and file oath
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1. In general

Members of the County Fire Safety Advisory Board are public officers who must comply with statutory requirements for holding public office. It is against public policy for an appointing board to appoint one of its own members to a public office. 1983 NY Ops Atty Gen Feb 10 (Informal).

Industrial development agencies are not subject to Civil Service Laws; agency members are public officers and must take the oath of office; it is not mandatory that agency personnel be bonded; agencies are not subject to competitive bidding statutes; Comptroller may require agencies to submit annual financial reports. 1980 Op St Compt File #370.

2. Particular positions requiring oaths

3. —Law enforcement

The Undersheriff of Tioga County who was in office on December 31, 1974 remains in office until the new Sheriff assuming office on January 1, 1975 has appointed, pursuant to County Law, § 652, a qualified person to become the new Undersheriff, and until such qualified person takes and files the required oath of office. 1975 NY Ops Atty Gen March 12.

4. —Oaths for successive terms

Deputy sheriffs who are in the competitive class of the civil service are not required to file successive oaths of office subsequent to each election of a sheriff. 1984 N.Y. Op. Att'y Gen. No. 84-2.

Members of municipal urban renewal agencies created by special act of the Legislature pursuant to General Municipal Law, Art XV-A, are public officers and, as such, must qualify under Public Officers Law § 3 and must take and file an oath of office as required by Public Officers Law § 10. 1965 NY Ops Atty Gen April 7.

Members of a town planning board and members of a town zoning board of appeals are local public officers and are required to file an oath of office before they are entitled to enter upon the discharge of any of their official duties. 1972 NY Ops Atty Gen March 14 (informal).

A county director of probation and his deputies are public officers and, therefore, must file an oath of office with the county clerk. 1981 NY Ops Atty Gen March 30 (informal).

With the exception of the student member, members of boards of trustees of community colleges are local officers. They must at the time of appointment reside within the geographical boundaries of the local sponsor and are required to file an oath of office within the time period provided by law. 1982 NY Ops Atty Gen March 15 (informal).

5. Who may administer oaths

A village clerk may administer an official oath of office to a fire policeman. 1957 NY Ops Atty Gen 89 (informal).

The Town Law and the Public Officers Law contain conflicting provisions prescribing the officers before whom the oaths of office of town officers may be taken. The provisions of the Public Officers Law control. 1976 NY Ops Atty Gen Jan 16 (informal).

6. Filing of oaths

Registrar of vital statistics is an independent local officer whose oath is required to be filed in office of county clerk as required by § 10. 1944 NY Ops Atty Gen Oct 16.

City clerk who under charter of city is also ex officio registrar of vital statistics need not file separate oath as such, filing of his oath as city clerk in office of city clerk being sufficient. 1944 NY Ops Atty Gen Oct 16.

Trustees of savings bank life insurance fund should file oaths of office with secretary of state. 1946 NY Ops Atty Gen Aug 19.

A local health officer is an independent public officer. His oath of office is to be filed in the office of the county clerk of the county of his residence. Failure to file vacates the office. An encumbent, reappointed to succeed himself, but who fails to file his new oath of office, holds over in office. 1973 NY Ops Atty Gen June 28 (informal).

The Town Law and the Public Officers Law contain conflicting provisions prescribing the officers before whom the oaths of office

of town officers may be taken and as to when such oaths and the undertakings of town officers, when required, must be filed. The provisions of the Public Officers Law control. 1976 NY Ops Atty Gen Jan 16 (informal).

Filing by town assessor of her oath of office within 30 days of her appointment, in office of town clerk, complied with requirements of law for filing of oath. 1988 NY Ops Atty Gen No. 88-9 (Informal).

Upon appointment to office or reappointment to a new term of office, an assessor or county director must take and file an oath of office within 30 days of the beginning of an initial or subsequent term of office. 9 Op Counsel SBEA No 44 (1991).

7. Failure to take and file oath

8. —Validity of subsequent acts

Where the office of assessor becomes vacant through failure to take and file the oath of office and the assessor continues to perform the functions of the office, the officer is a de facto officer whose acts have the same validity as they would if they had been performed by a de jure officer. 1977 NY Ops Atty Gen Aug 8 (Informal), 1977 N.Y. AG LEXIS 70.

Member of zoning board of appeals may be reappointed to succeed himself and is required to file a new oath of office upon reappointment; failure to do so makes him a holdover. Board action is nevertheless legal. 1979 NY Ops Atty Gen September 11 (informal).

Action of board of health, in displacing health officer, because of his failure to take oath of office, and appointing another, is legal. 1910 N.Y. Op. Att'y Gen. No. 799.

The oath which an officer must take and file is the oath prescribed in Public Officers Law § 10 and failure to take and file a new oath of office upon reappointment following the expiration of a term creates a vacancy in office. Civil Service Law § 62 does not apply to public officers. 1976 NY Ops Atty Gen Dec 30 (informal).

If a town assessor fails to take and file the constitutional oath of office within the prescribed time, the office becomes vacant. 1977 NY Ops Atty Gen Aug 8 (Informal), 1977 N.Y. AG LEXIS 70.

Failure of the newly elected mayor and three trustees to qualify for office by filing their constitutional oaths of office within 30 days created vacancies in the offices of mayor, one trustee for one year and two trustees for two years. 1979 NY Ops Atty Gen Aug 13 (Informal), 1979 N.Y. AG LEXIS 69.

Trustee whose term expired in 1979, and who was elected to succeed himself, but who failed to file his oath of office, continues in office as a holdover trustee. 1979 NY Ops Atty Gen Aug 13 (informal).

Trustee whose term expired in 1979, and who was elected mayor, but who failed to file his oath of office, continues to be a trustee as a holdover in office. 1979 NY Ops Atty Gen Aug 13 (informal).

Under the above sections, a State officer who has assumed the duties of his office on the first day of his term is entitled to his statutory rate of compensation from this day until at least the 30th day of his term, whether or not he has taken and filed his oath of office within this period. 1979 NY Ops Atty Gen Jan 15.

Where an individual who was re-appointed to the office of village treasurer failed to take and file the oath of office on time but continued to perform the duties of the office, the individual would be deemed holding over to fill the vacancy in the office. 1978 Op St Compt File #833.

A vacancy exists in the office of town superintendent of highways upon the failure of the incumbent thereof to file his oath of office as required by statute. 1983 Op St Compt File #83-213.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS Alt Co Gov § 611; CLS County § 402; CLS Unconsol Ch 80, § 14.

Validation of official acts performed before filing official oath or undertaking, § 15.

Constitutional oath upon appointment, CLS Civ S § 62.

Oath of office, CLS County § 402.

Procedure of appointment; fees and commissions, CLS Exec § 131.

Powers and duties; in general; of notaries public who are attorneys at law, CLS Exec § 135-a.

Oath of commissioner of deeds, CLS Exec §§ 139–141.

Validity of acts of notaries public and commissioners of deeds notwithstanding certain defects, CLS Exec § 142-a.

Oath, affidavit and swear, CLS Gen Const § 36.

Powers of official referees, CLS Jud § 117.

Duties of clerk of court of appeals, CLS Jud § 256.

Duties of clerk of appellate division in each department, CLS Jud § 264.

Oath of jury commissioner, deputies and employees, CLS Jud § 655.

Oaths of office and undertaking, CLS Town § 25.

Powers and duties of town superintendent of highways and deputy superintendent, CLS Town § 32.

Conduct of election, CLS Vill § 2-220.

Clerk, CLS Vill § 4-402.

Oath of office; no other test for public office, CLS NY Const Art XIII, § 1.

Jurisprudences:

1 NY Jur 2d Acknowledgements, Affidavits, Oaths, Notaries, and Commissioners § 61 .

18A NY Jur 2d Civil Servants and Other Public Officers and Employees §§ 20, 84, 86 .

19 NY Jur 2d Civil Servants and Other Public Officers and Employees § 355 .

25 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 348, 350 .

43 NY Jur 2d Declaratory Judgments and Agreed Case § 41 .

49 NY Jur 2d Elections § 73 .

64 NY Jur 2d Health and Sanitation § 34 .

75 NY Jur 2d Libraries § 25 .

109 NY Jur 2d Workers' Compensation § 155 .

63A Am Jur 2d, Public Officers and Employees §§ 131, 132, 134.

15A Am Jur Legal Forms 2d, Public Officers, Forms 213:20 et seq.

Annotations:

Validity of governmental requirement of oath of allegiance or loyalty. 18 ALR2d 268.

§ 18. Defense and indemnification of officers and employees of public entities

1. As used in this section, unless the context otherwise requires:

(a) The term "public entity" shall mean (i) a county, city, town, village or any other political subdivision or civil division of the state, (ii) a school district, board of cooperative educational services, or any other governmental entity or combination or association of governmental entities operating a public school, college, community college or university, (iii) a public improvement or special district, (iv) a public authority, commission, agency or public benefit corporation, or (v) any other separate corporate instrumentality or unit of government; but shall not include the state of New York or any other public entity the officers and employees of which are covered by section seventeen of this chapter or by defense and indemnification provisions of any other state statute taking effect after January first, nineteen hundred seventy-nine.

(b) The term "employee" shall mean any commissioner, member of a public board or commission, trustee, director, officer, employee, volunteer expressly authorized to participate in a publicly sponsored volunteer program, or any other person holding a position by election, appointment or

employment in the service of a public entity, whether or not compensated, but shall not include the sheriff of any county or an independent contractor. The term "employee" shall include a former employee, his estate or judicially appointed personal representative.

(c) The term "governing body" shall mean the board or body in which the general legislative, governmental or public powers of the public entity are vested and by authority of which the business of the public entity is conducted.

2. The provisions of this section shall apply to any public entity:

(a) whose governing body has agreed by the adoption of local law, by-law, resolution, rule or regulation (i) to confer the benefits of this section upon its employees, and (ii) to be held liable for the costs incurred under these provisions; or

(b) where the governing body of a municipality, for whose benefit the public entity has been established, has agreed by the adoption of local law or resolution (i) to confer the benefits of this section upon the employees of such public entity, and (ii) to be held liable for the costs incurred under these provisions.

3. (a) Upon compliance by the employee with the provisions of subdivision five of this section, the public entity shall provide for the defense of the employee in any civil action or proceeding, state or federal, arising out of any alleged act or omission which occurred or allegedly occurred while the employee was acting within the scope of his public employment or duties. This duty to provide for a defense shall not arise where such civil action or proceeding is brought by or at the behest of the public entity employing such employee.

(b) Subject to the conditions set forth in paragraph (a) of this subdivision, the employee shall be entitled to be represented by private counsel of his choice in any civil action or proceeding whenever the chief legal officer of the public entity or other counsel designated by the public entity determines that a conflict of interest exists, or whenever a court, upon appropriate motion or otherwise by a special proceeding, determines that a conflict of interest exists and that the employee is entitled to be represented by counsel of his choice, provided, however, that the chief legal officer or other counsel designated by the public entity may require, as a condition to payment of the fees and expenses of such representation, that appropriate groups of such employees be represented by the same counsel. Reasonable attorneys' fees and litigation expenses shall be paid by the public entity to such private counsel from time to time during the pendency of the civil action or proceeding with the approval of the governing body of the public entity.

(c) Any dispute with respect to representation of multiple employees by a single counsel or the amount of litigation expenses or the reasonableness of attorneys' fees shall be resolved by the court upon motion or by way of a special proceeding.

(d) Where the employee delivers process and a written request for a defense to the public entity under subdivision five of this section, the public entity shall take the necessary steps on behalf of the employee to avoid entry of a default judgment pending resolution of any question pertaining to the obligation to provide for a defense.

4. (a) The public entity shall indemnify and save harmless its employees in the amount of any judgment obtained against such employees in a state or federal court, or in the amount of any settlement of a claim, provided that the act or omission from which such judgment or claim arose occurred while the employee was acting within the scope of his public employment or duties; provided further that in the case of a settlement the duty to indemnify and save harmless shall be conditioned upon the approval of the amount of settlement by the governing body of the public entity.

(b) Except as otherwise provided by law, the duty to indemnify and save harmless prescribed by this subdivision shall not arise where the injury or damage resulted from intentional wrongdoing or recklessness on the part of the employee.

(c) Nothing in this subdivision shall authorize a public entity to indemnify or save harmless an employee with respect to punitive or exemplary damages, fines or penalties, or money recovered from an employee pursuant to section fifty-one of the general municipal law; provided, however, that the public entity shall indemnify and save harmless its employees in the amount of any costs, attorneys' fees, damages, fines or penalties which may be imposed by reason of an adjudication that an employee, acting within the scope of his public employment or duties, has, without willfulness or intent on his part, violated a prior order, judgment, consent decree or stipulation of settlement entered in any court of this state or of the United States.

(d) Upon entry of a final judgment against the employee, or upon the settlement of the claim, the employee shall serve a copy of such judgment or settlement, personally or by certified or registered mail within thirty days of the date of entry or settlement, upon the chief administrative officer of the public entity; and if not inconsistent with the provisions of this section, the amount of such judgment or settlement shall be paid by the public entity.

5. The duty to defend or indemnify and save harmless prescribed by this section shall be conditioned upon: (i) delivery by the employee to the chief legal officer of the public entity or to its chief administrative officer of a written request to provide for his defense together with the original or a copy of any summons, complaint, process, notice, demand or pleading within ten days after he is served with such document, and (ii) the full cooperation of the employee in the defense of such action or proceeding and in defense of any action or proceeding against the public entity based upon the same act or omission, and in the prosecution of any appeal.

6. The benefits of this section shall inure only to employees as defined herein and shall not enlarge or diminish the rights of any other party nor shall any provision of this section be construed to affect, alter or repeal any provision of the workers' compensation law.

7. This section shall not in any way affect the obligation of any claimant to give notice to the public entity under section ten of the court of claims act, section fifty-e of the general municipal law, or any other provision of law.

8. Any public entity is hereby authorized and empowered to purchase insurance from any insurance company created by or under the laws of this state, or authorized by law to transact business in this state, against any liability imposed by the provisions of this section, or to act as a self-insurer with respect thereto.

9. All payments made under the terms of this section, whether for insurance or otherwise, shall be deemed to be for a public purpose and shall be audited and paid in the same manner as other public charges.

10. The provisions of this section shall not be construed to impair, alter, limit or modify the rights and obligations of any insurer under any policy of insurance.

11. Except as otherwise specifically provided in this section, the provisions of this section shall not be construed in any way to impair, alter, limit, modify, abrogate or restrict any immunity to liability available to or conferred upon any unit, entity, officer or employee of any public entity by, in accordance with, or by reason of, any other provision of state or federal statutory or common law.

12. Except as otherwise provided in this section, benefits accorded to employees under this section shall be in lieu of and take the place of defense or indemnification protections accorded the same employees by another enactment; unless the governing body of the public entity shall have provided that these benefits shall supplement, and be available in addition to, defense or indemnification protection conferred by another enactment.

13. The provisions of this section shall also be applicable to any public library supported in whole or in part by a public entity whose governing body has determined by adoption of a local law, ordinance, bylaw, resolution, rule or regulation to confer the benefits of this section upon the employees of such public library and to be held liable for the costs incurred under these provisions.

14. If any provision of this section or the application thereof to any person or circumstance be held unconstitutional or invalid in whole or in part by any court, such holding of unconstitutionality or invalidity shall in no way affect or impair any other provision of this section or the application of any such provision to any other person or circumstance.

HISTORY:

Add, L 1981, ch 277, § 1, eff June 22, 1981; amd, L 1982, ch 521, § 1, eff July 13, 1982; L 1983, ch 737, § 1, eff July 27, 1983; L 1984, ch 532, § 1, eff Nov 24, 1984.

Editor's Notes: Laws 1983, ch 737, § 2, provides as follows:

§ 2. This act shall take effect immediately; provided, however, that it shall not apply to a public entity as defined in section eighteen of the public officers law which has heretofore adopted the provisions of such section eighteen, unless such public entity shall hereafter adopt the provisions of this act.

Laws 1984, ch 532, § 2, provides as follows:

§ 2. This act shall take effect on the one hundred twentieth day after it shall have become a law, except that any local law, ordinance, bylaw, resolution, rule or regulation specified in this act may be adopted or promulgated on or before the effective date of this act to take effect on or after such effective date.

1981 Recommondations of the Law Revision Commission: The enactment in 1978 of new section 17 of the Public Officers Law 1.Chapter 466 of the laws of 1978, § 1; amended L 1980, ch 704, § 1; L 1980, ch 366, § 8. (hereinafter referred to as "POL § 17') , which provides for the defense and indemnification of State officers and employees against claims arising out of their public employment or duties, failed to solve the problems noted in the Governor's 1976 veto message 2. July 26, 1976, Governor's Veto message Nos. 81 and 82. in which he referred to the confusing patchwork of indemnity provisions relating to municipal employees" and called for "comprehensive legislation which would deal with the indemnification of municipal employees in a uniform and logical way" (emphasis added). Notwithstanding this plea, municipal employees were left out of this 1978 defense and indemnification act, as were the officers and employees of other political subdivisions and civil divisions of the State, including school districts and other governmental entities operating public schools, colleges and universities, public improvement and special districts, public authorities, commissions and public benefit corporations and other public agencies, instrumentalities or units of government exercising governmental powers under the laws of the State. 3 POL § 17, as enacted in 1978, not only provides defense and indemnification protections for all officers and employees of the State but gives like protection to certain licensed medical professionals and certified social workers rendering professional services at the request of the Department of Correctional Services or Offices of the Department of Mental Hygiene, and to designated foster parents employed by the Division for Youth.

The Commission, since 1976, has been involved in the study of all laws which protect, in some manner, public officers and employees against claims arising out of their acts or omissions occurring within the scope of their public employment or duties. During this time, it has submitted to the Governor 4. See, 1977 Governor's Program Bill (S. 6603, A. 8091) and the 1978 Report of the Law Revision Commission to the Governor (1978 McKinney's Session Laws of New York, pp. 1605-1621). and to the Legislature5. See, Legislative Document (1979) No. 65[R], published in the 1979 McKinney's Session Laws of New York, pp. 1549-1555. various recommendations for statutes which would protect uniformly all such officers and employees. One of the statutes proposed by the Commission in 1978 became the basis of the bill 6. 1978 Senate Bill No. 10146, Assembly Bill No. 12927. that was enacted into law (chapter 466 of the laws of 1978) creating POL § 17. As this bill failed to include coverage for officers and employees of public entities, other than the State of New York, the Commission has continued its research into this area of law and to recommend legislation that would protect, in the same manner as POL § 17, all other public officers and employees.

Apart from POL § 17, there are at the present duties ,time various types of statutes giving defense and indemnification protection to specific public officers or employees. Some of these were enacted before 1978 and some after 1978. With

two exceptions, all of the post-1978 statutes follow POL § 17 language with respect to provisions for defense and indemnification. The remaining two statutes also use POL § 17 language as to indemnification but do not provide for private counsel fees paid by the public employer where the counsel for the public employer cannot represent the employee due to a conflict of interest between employer and employee. 7. See, for example, General Municipal Law § 50-k (L. 1979, ch 673) and Pari-Mutuel Revenue Law § 158-a (L. 1980, ch 702 [McKinney's Unconsolidated Laws of New York, § 8099-a]).

Pre-1978 statutes, naturally, show no similarity to, or influence by, POL § 17 and vary widely in their protection of covered public employees. For example, they include (1) statutes conferring immunity against civil suit in State courts, 8. Correction Law § 24, Executive Law § 259-q, General Municipal Law § 50-j (set out second) , and Public Health Law § 230 (subd. 8) (2) statutes limiting personal liability,9. See, for example, Public Authorities Law §§ 666-a, 1071, 1111, 1171, 1225-in, 1249, 1691, 1985, 2034, 2333, 2417, 2448, 2482, 2520 and 2547. (3) statutes substituting public employer liability for that of the public employee,10 General Municipal Law §§ 50-a, 50-b, 50-c, 50-d and 50-j (set Out first) . (4) statutes to save harmless" and "protect" or "indemnify" public officers or employees when sued for acts occurring within their public employment or duties,11. See, for example, County Law § 533, Education Law §§ 507 and 3023, Executive Law § 257-a, and Mental Hygiene Law § 41.29. and (5) statutes providing for payment of private attorney fees and defense expenses by the public employe12. Education Law §§ 3028 and 3811, Executive Law § 257-a. in suits against public officers and employees. These older statutes also differ from POL § 17 and subsequent statutes in the scope of defense available to covered public employees and in the standards of employee conduct required to qualify for indemnification protection.

For example, many pre-1978 indemnification statutes contain no provisions for the defense of public employees who are sued for acts or omissions within the scope of their public employment or duties. Those that do, with few exceptions,13. Education Law §§ 3028 and 3811, Executive Law 257-a, and State Urban Development Act § 4 (L 1975, ch 61, § 5). limit such defense to representation by an attorney charged also with the duty of representing the public employer. 14. County Law § 501, Education Law § 507, General Municipal Law §§ 50-j (set out second), Workers' Compensation Law §§ 87-a, 87-b and 87-c. Also, indemnification under these statutes is subject to various standards of conduct. 15. County Law § 533, Education Law §§ 507, 3023, 3311, Executive Law § 257-a, General Municipal Law § 50-j (set out second) and Mental Hygiene Law § 41.29. For example, some permit indemnification as to any "accidental" damage while others prohibit indemnification where the act complained of was not done in"good faith" or constituted a willful and wrongful act or gross negligence.

The enactment of POL § 17 has not stemmed the Legislature's piecemeal approach to enacting defense and indemnification protection for various municipal employees and other public officers and employees omitted from POL § 17. Numerous proposals for the inclusion of additional persons within the protections of section 17, accompanied by a proliferation of proposed new indemnification and defense statutes, have been made since 1978. 16. 1979 Dept. of Health Legislative Proposal #H.D. 13-79, N.Y.S. Housing Finance Agency Legislative Proposal #2-79, Dept. of Mental Hygiene Legislative Proposals Nos. 2 and 4, Division of Military and Naval Affairs Legislative Proposal #10 (rev'd), 1980 Office of Public Health Legislative Proposal #H.D. 50-80, SUNY Legislative Proposal #1, 1979-80 Assembly Bill Nos. 2190, 5963, 5965-A and 11303-A, Senate Bill Nos. 2622, 5292, 5428-A, 6372, 8402, 8836-A, and 9049-A (to cite only those which have come to the attention of Commission Staff from late 1978 to mid-1980) . Only a fraction of those proposed have been enacted into law17. Chapters 305, 442 and 673 of the laws of 1979; chapters 454, 456, 457, 488, 702, 704 and 866 of the laws of 1980. but these are sufficient to illustrate the dangers of not having comprehensive legislation uniformly dealing with indemnification and defense of public employees.

For example, POL § 17 (subdivision 1) has been amended twice since its enactment, by chapters 704 and 866 of the laws of 1980. These amendments added to the definition of "employees", covered by section 17, the "members, officers and other persons in the employment of" the New York State Energy Research and Development Authority and "persons who assist the" Education Department or the Department of Health "as consultants or expert witnesses in the investigation or prosecution of alleged professional misconduct pursuant to title eight of the [E]ducation [L]aw or title II-A of the [P]ublic [H]ealth [L]aw". In addition, POL § 17 protections have been conferred upon physicians, dentists and nurses rendering professional treatment at the request of the Department of Health,18. Public Health Law § 14 (L 1979, ch 442). members of the Board of Trustees of the City University of New York and members of the teaching or supervising staff, officers and employees of senior colleges under its jurisdiction, 19. Education Law § 6205, subdivision 1 (L 1979, ch 305). and members, officers and employees of the New York State Housing Finance Agency.20. Private Housing Finance Law § 56-a (L 1980, ch 456). In this way, the Legislature has given section 17 defense and indemnification protections, at State expense, to a growing number of persons who are not employees of the State of New York. On the other hand, most employees of other such separate and distinct public corporate entities at all levels of government remain unprotected by section 17 or by similar statutes.

At the municipal level, the Legislature has mandated indemnification and defense protections (similar to that given by POL § 17) for members, officers and employees of the New York City Housing Authority,21. Public Housing Law § 402-a (L 1980, ch 488). at the Authority's expense, and to trustees, officers and employees of community colleges outside of New York City, 22. Education Law § 6308 (L 1980, ch 457). at the expense of the local sponsor of the employer-community college. Officers and employees of the City of New York (City) and of other public entities supported in whole or in part by the City (except public authorities, public benefit corporations and Boards of Education unless otherwise provided by law) are covered by General Municipal Law § 50-k 23.Chapter 673 of the laws of 1979. (hereinafter referred to as "GML § 50-k"). GML § 50-k differs from POL § 17 in that it does not provide for representation of City employees by private attorneys,24. Section 17 provides for the defense of state officers and employees in all civil actions or proceedings, state or federal, arising out of any act or omission which occurred or is alleged to have occurred within the scope of the defendant's public employment or duties except when such action or proceeding is brought by or on behalf of the State. This defense protection includes the payment of private attorneys' fees where representation by the Attorney General would be inappropriate. at City expense, where there is a conflict of interest between the City and the employee.25. See Canon 5 of the New York Bar Association's Code of Professional Responsibility. Under section 50-k, a conflict of interest could arise, for example, whenever the City is sued for the same alleged act or omission for which the defendant-employee is being sued and the possibility arises that the defendant-employee may have acted outside the scope of his or her public employment or that the act may have involved a violation of a rule or regulation of the employer. It is also noted that the defense available under section 50-k would be suspended while the City employee is involved in a disciplinary proceeding based upon the same act or omission until he or she has been exonerated. The only defense provided by section 50-k is that by the Corporation Counsel of the City. GML § 50-k also differs from POL § 17 in that the City's Corporation Counsel has the sole discretion for determining whether the act or omission occurred within the scope of the defendant-employee's public employment 26. Under POL § 17, should the Attorney General fail to determine that a conflict of interest exists, the court, upon appropriate motion

or by a special proceeding, may find that a conflict does exist and that the employee is entitled to be represented by private counsel of his choice, with counsels' fees and expenses to be paid by the State. and GML § 50-k does not expressly preclude indemnification for punitive or exemplary damages assessed against the defendant-employee, or for fines or penalties or money recovered from an employee pursuant to § 51 of the General Municipal Law.

The Commission feels that City employees are not adequately protected by the "defense" provisions of GML § 50-k, and that the City should not be required to indemnify for punitive or exemplary damages, fines or penalties levied against a defendant-employee, or money recovered pursuant to GML § 51.27. Section 51 of the General Municipal Law is the municipal equivalent of article 7-A of the State Finance Law (see, Public Officers Law § 17 [subdivision 3(c)]). In brief, GML § 51 provides for the "prosecution of officers for illegal acts" by way of taxpayer suits against such officers (and others) to prevent waste of municipal funds or to enforce restitution to the municipality of moneys wrongfully paid out of municipal funds through the collusion or connivance of such officers. The Commission's views are based on the following reasons: . (1) In its 1977 study, the Commission found that the most serious flaw in any defense and indemnification statute was the absence of a provision for financing the defense of employees where the counsel representing the public employer could not represent the defendant-employee due to a conflict of interest. This was brought to the attention of the Commission by State Assistant Attorneys General called upon to represent State officers and employees against claims arising out of the Attica incident when they also had the duty to represent and protect the State against claims arising out of the same acts or omissions. The section 17 of the Public Officers Law existing at that time did not provide for private counsel fees (paid for by the State) in such cases and, until the enactment of new POL § 17, such officers and employees paid for their own defense, a situation thought to be unjust; and (2) Punitive damages, fines and like assessments levied by the courts against defendants are intended to penalize defendants for aggravating behavior evidencing a high degree of misconduct causing damage to others, and to deter future misconduct. If these amounts are indemnified by public employers from public funds, the entire purpose of their imposition would be thwarted;

Another problem with recent legislation in this area is that at the time new GML § 50-k was enacted, 28. Chapter 673 of the laws of 1979. the Legislature also amended sections 50-a, 50-b, 50-c, 50-d, 50-j (L 1974, ch 406), and 50-j (L 1974, ch 1026) of the General Municipal Law (hereinafter referred to as the "GML") to expressly exclude "the city of New York" from their provisions. In the same bill, 29. Id. former sections 50-k (L 1976, ch 832), 50-1 (L 1976, ch 392) and 50-n (id.) of the General Municipal Law were repealed and section 2560 of the Education Law was amended. By such act, City employees were deprived of the save harmless, immunity or other protections against liability granted them by these earlier statutes.30. These statutes governed liability with respect to vehicular torts occurring within the scope of municipal employment (GML §§ 50-a, 50-b and 50-c), negligence of police officers (GML §§ 50-j [L 1974, ch 406], 50-k [L 1976, ch 832], and 50-1 [L 1976, ch 392]), negligence of firemen (GML §§ 50-1 and 50-m [L 1976, ch 392]) , negligence of city correction officers (GML § 50-j [L 1974, ch 1826]), and negligence of teachers, members and other employees of school boards of the City (Education Law § 2560) In exchange, all City employees, including police and firemen, correction employees, and teachers, received new indemnification and defense protections pursuant to new GML § 50-k. This constituted some reduction in protective rights for some of the persons previously protected by statute 31. For example, under some statutes, indemnification had been available: as to all vehicular negligence (GML §§ 50-a, 50-b, and 50-c) , negligence by policemen (GML § 50-j [L 1974, ch 406]), negligence by firemen (GML § 50-1 [L 1976, ch 392]), negligence by school board members and board employees (Education Law § 2560) , without regard to the degree of wrongdoing as to judgments of a U.S. court against correction officers, without regard to the degree of negligence, unless the act sued upon was found to be in violation of law or of a rule or regulation of the Department (GML § 50-j [L 1974, ch 1026]); or as to judgments of a U.S. court against police and firemen, without regard to the degree of negligence, unless the act sued upon was the basis of a departmental disciplinary proceeding and the employee was not exonerated (GML §§ 50-k [L 1976, ch 832], 50-m [L 1976, ch 392]). In addition, employees of the City Correction Department had immunity from civil suit in New York State courts under GML § 50-j (L 1974, ch 1026). This is no longer available to them.

Under new GML § 30-k, indemnification is available only if the act sued upon is not in violation of a rule or regulation of the City employer or did not result from intentional wrongdoing or recklessness on the part of the defendant-employee. but resulted in an increase in liability protection for those City officers and employees never before protected by indemnification, defense or immunity statutes.

In contrast to these legislative developments, the Commission has taken the position that public officers and employees should not receive less protection than they have had in the past 31. The Public Officers Law § 18 proposed by the Commission provides that there be no impairment of immunity available under any other provision of state or federal statutory or common law (subd. 11) and that its provisions shall apply in lieu of existing protections unless the governing body of the public entity has provided that this section shall supplement, and be available in addition to, such other defense or indemnification statutes. under such statutes. Also, chapter 466 of the laws of 1978, by which POL § 17 was enacted, was carefully drafted to avoid reducing protections held by certain state officers and employees under other statutes 33. See, Correction Law § 24 (subdivisions 1 and 2), Executive Law 7secmk;259-q (subdivisions 3 and 4), Mental Hygiene Law § 19.13 (subdivisions c and d), Public Authorities Law§ 3020 (subdivision 3) , and Workers Compensation Law §§ 87-a (subdivision 3) and 87-b (subdivision 3); as modified by sections 2, 3, 7, 8, 13, 14, 19, 22 and 23 of chapter 466 of the laws of 1978. by providing that the provisions of any other section "shall supplement, and be available in addition to, the provisions of section seventeen of the public officers law and, insofar as [such] section is inconsistent with section seventeen . . . , the provisions of [such] section shall be controlling." 34. See Executive Law § 259-q (subd. 4) and Mental Hygiene Law§ 19.13 (subd. d), as added by sections 8 and 14 of chapter 466 of the laws of 1978. Subdivision 9 of Public Officers Law § 17 also acts to prevent any reduction in protections previously acquired by public officers and employees covered by the section.

Other examples of recent piecemeal legislation in this area are: (1) the amendment to the Pari-Mutuel Revenue Law 35. Chapter 254 of the laws of 1940 (McKinney's Unconsolidated Laws of N.Y., § 7951 et seq.). to add a new section 158-a, 36.Chapter 702 of the laws of 1980 (Id., § 8099-a). giving indemnification and defense protections to officers, directors and employees of the New York City Off-Track Betting Corporation (Corporation); 37. Section 158-a provides that the Corporation "shall provide for the defense of the employee" and shall "indemnify and hold harmless its employees." However, it then indicates that the defense will be by the Corporation Counsel of the City of New York who, with the Comptroller of the City, must also approve indemnification funded by the Corporation. Like, GML § 50-k, there is no express provision for private counsels' fees should a conflict of interest arise. and (2) employees of community colleges under the jurisdiction of the City University of New York are given indemnification and defense protections under subdivision 2 of section 6205 of the Education Law. 38. Chapter 454 of the laws of 1980. This subdivision follows POL § 17 in its "defense" provisions (not GML § 50-k) except that the immediate employer (the City University) does not provide the defense or pay for the indemnification of its community college employees. Instead, the City of New York

(the local sponsor) pays for the defense, including private counsels' fees, and for the indemnification of these community college employees in claims arising out of their City University employment. This creates an inequity because, when there is a conflict of interest between the City and a defendant-employee of a community college under the jurisdiction of the City University (a separate corporate entity), private attorneys' fees will be paid at City expense (Education Law § 6205, subd. 2, para. [c]). On the other hand, if the City's own employees are sued for acts or omissions within the scope of their City employment, and a conflict of interest arises, private attorneys' fees will not by the responsibility of the City, but must be paid by the defendant-employee (GML § 50-k).

The Commission believes that it is piecemeal legislation that causes such inequities to exist and it again recommends the adoption of a uniform system for the defense and indemnification of all public employees. Piecemeal legislation may solve the problems of officers and employees of one specific city or of specific public agencies but it ignores the problems of equally deserving employees of other municipalities and governmental entities.

Costs.

In 1977, after the Commission recommended the adoption of a statute which would confer defense and indemnification protections uniformly on all public employees, 39. See footnote 4, supra. an objection was raised that the bill would "mandate additional costs upon local governments." It is recognized that local governments are facing rapidly increasing insurance costs for protection against claims arising out of the daily operation of government.40. The Commission believes that some thought should be given to a suggestion made during the course of its 1977 study that legislation be enacted to create a state-wide insurance "poo1" through which municipalities and other public governmental entities could obtain liability insurance coverage at reasonable costs. However, it should also be recognized that local governments and other public entities are already subject to liability for the acts of their officers and employees under existing State statutes,41. See footnotes 7, 9, 13, 15, 21, 22, 22, 29, 40 and 41 supra. under local laws,42. Barr v. County of Albany, 50 NY2d 247; Corning v. Village of Laurel Hollow, 48 NY2d 348 (dicta). under § 1983 of the Federal Civil Rights Act (42 U.S.C.), 43.Monell v. Dept. of Social Services of the City of New York, 436 U.S. 658; Fitzpatrick v. Bitzer, 427 U.S. 445. or under the theory of respondeat superior, particularly in areas where there is the greatest likelihood of suit (i.e., police and fire protection and the education of children). Because of this existing exposure to liability, it may well be that any additional costs to public entities would be minimal.

By reason of the reluctance on the part of the New York Legislature to mandate costs upon municipalities in 1978, the Commissions's 1979 recommendation for defense and indemnification of public officers and employees (those not covered by POL § 17) was put in the form of local option.44. See footnote 5, supra. Under such option, protection comparable to that mandated for state officers and employees (and others) pursuant to POL § 17 may be conferred by a municipality or other public entity by the adoption of local law, by-law, resolution, rule or regulation (a) upon its own employees, or (b) upon the employees of another public entity which has been established and exists for the benefit of the municipality.45. See prposed statute POL § 18 (subd. 2), p. 23, infra. This "local option" provision is again included in the Commission's recommendations for 1981 for the same reason as in 1979 (i.e., to avoid mandating costs upon municipalities and other public entities).

Conclusions.

The Commission remains convinced that there is a definite need for general legislation setting up uniform provisions for the defense and indemnification of public officers and employees, like those found in POL § 17 with respect to State officers and employees. Suits against public officers and employees are increasing, particularly at the municipal level of government. 46.Barr v. County of Albany, 50 NY2d 247; Corning v. Village of Laurel Hollow, 48 NY2d 349; 3/27/77, N.Y. Times, p. 5; 3/27/77, Albany Times Union, p. 3; and 8/17/78, N.Y. Law Journal, pp. 1, 4, 13. Defense and indemnification statutes are intended to offer protection to public officials and employees who are exposed to suits during the course of, and as a result of, their public employment. Without such statutes, it may be difficult for many public entities to attract and keep competent public officers and employees, especially in areas where the compensation is minimal or nonexistent. Government cannot effectively function without some assurance that its members will not be called upon to personally defend themselves against claims arising out of the daily operation of the government or to account in damages thereof or.

Under POL § 17, uniformity in protection is available to all state employees and to relatively few non-state public employees whose defense and indemnification has by statute been assumed by the State, or by their public entity-employer, or by local public sponsor (municipality). Similar benefits should be made available to all other public employees.47.Sheriffs are excluded from the Commission's proposed bill only because of the existence of § 13 of article 13 of the New York Constitution which provides that "the county shall never be made responsible for the acts of the sheriff" (Barr v. County of Albany, 50 NY2d 247). The Commission believes that its proposed POL § 18 (infra) would promote uniformity in provisions and would give assurance to officers and employees covered by the act that they are adequately protected against most claims arising out of their governmental employment. It might also stem the flow of piecemeal legislation.

The Commission has also considered, and rejected, a proposal to expressly exclude "the City of New York" (and certain other public entities) from its proposed statute. Its reasons for rejecting this approach are that the proposed statute, merely by its enactment, would not conflict with existing CML § 50-k or any other statute (a) because it is written in terms of local option and (b) subdivisions 11 and 12 of proposed POL § 18 would cure any other potential conflict. No municipality or other public entity, including the City of New York, is covered by proposed POL § 18 unless and until its governing body affirmatively, by local law, resolution or other appropriate act, agrees to assume responsibility and cover its employees under the statute. If the governing body of New York City wishes POL § 18 protections for its employees, it would have to seek the repeal of GML § 50-k by the State Legislature and then, by its own act, adopt the provisions of POL § 18. The Commission has included in POL § 18 a provision to cover any possible inconsistency or conflict between its POL § 18 and any other statute, be it § 50-k or otherwise (see footnote 32, supra).

Recommendations.

The Commission's proposals for the defense and indemnification of public officers and employees (infra) follow the provisions of POL § 17 as closely as is possible under the circumstances. The Commission's statute differs only (a) in its "local option" Provision, which allows each local government or other public entity to "elect" coverage of its officers and employees, (b) in some of its definitions, and (c) in the manner in which it handles possible conflicts with other statutes (necessitated by the optional nature of this statute).

The Commission believes that the alternative defense at public expense found in POL § 17 should also available in its proposed POL § 18 in cases where the public employer must withdraw from or refuse to undertake the defense of the employee because of a conflict of interest. 48.Duverney v. State of New York, 96 Misc 2d 898; Rodriguez v. City of New York, 7/24/78 N.Y. Law Journal. It believes this because the cost of retaining outside counsel and out-of-pocket expenses

to defend cannot fairly be imposed upon public officers and employees.

The Commission is of the view that the indemnification provisions of its POL § 18 should be those of POL § 17 in that there should be no duty to indemnify where the public employee has been guilty of intentional or reckless conduct. The Commission believes that the terms "intentional wrongdoing" and "recklessness" (found in POL § 17) are more meaningful than "willful and wrongful" and "gross negligence" (term found in some pre-1978 statutes).49. See also, Restatement, Second, Torts §§ 8A, 16 and 500 and Public Officers Law § 17 (subd. 3[a]). In addition, indemnification of amounts assessed in punitive or exemplary damages, fines and other penalties, or recovered against public officials pursuant to § 51 of the General Municipal Law should be expressly prohibited, as in POL § 17.50.POL § 17 necessarily uses Article 7-A of the State Finance Law instead of GML § 51, because it covers State officers and employees and not those of municipalities.

The Commission further believes that the procedural aspects of POL § 17 should be included in its POL § 18 insofar as they are applicable to municipalities and other public entities opting POL § 18 coverage for their employees.

Notes to Decisions

Analysis

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1. In general

Village, consistent with its obligations under this statute and Freeport, N.Y., Village Code § 130-6, could withdraw its defense and indemnification of village officials and officers in a civil action for their failure to accept a reasonable settlement offer; First Amendment, U.S. Const. amend. I, concerns with respect to the settlement's nondisclosure clause did not warrant a different conclusion. Matter of Lancaster v Incorporated Vil. of Freeport, 22 N.Y.3d 30, 978 N.Y.S.2d 101, 1 N.E.3d 302, 2013 N.Y. LEXIS 3156 (N.Y. 2013).

Absence of a provision in this statute allowing a village to settle without the public employees' consent is not dispositive of the village's authority to do so as it is inconceivable that the New York legislature intends a restricted meaning of the cooperation provision so as to permit a current or former public employee to refuse a generous settlement offer and expose a municipality to potentially ruinous liability; public employees are required to cooperate in both the defense and the settlement of an action under this statute. Matter of Lancaster v Incorporated Vil. of Freeport, 22 N.Y.3d 30, 978 N.Y.S.2d 101, 1 N.E.3d 302, 2013 N.Y. LEXIS 3156 (N.Y. 2013).

Provisions of CLS Pub A § 1020-bb providing for immunity, defense and indemnification of trustees and officers of Long Island Power Authority from personal or civil liability resulting from carrying out authority'spurposes do not violate CLS NY Const Art VII § 8, which proscribes giving or lending of credit of state in aid of public corporation, since statute creates no state debt, does not require any borrowing by state, and does not confer gift, regardless of whether authority is involved in governmental or proprietary activity. Long Island Lighting Co. v Mack, 137 A.D.2d 285, 529 N.Y.S.2d 502, 1988 N.Y. App. Div. LEXIS 5490 (N.Y. App. Div. 2d Dep't 1988), app. dismissed, 74 N.Y.2d 804, 546 N.Y.S.2d 561, 545 N.E.2d 875, 1989 N.Y. LEXIS 2721 (N.Y. 1989).

Provisions of CLS Pub A § 1020-bb providing for immunity, defense and indemnification of trustees and officers of Long Island Power Authority from personal or civil liability resulting from carrying out authority's purposes do not conflict with Federal Securities Acts of 1933 and 1934, and thus do not violate Supremacy Clause, even though authority might sell bonds or float securities in order to finance acquisition of another company, since CLS Pub A § 1020-bb accomplishes its purpose by making provisions of CLS Pub O §§ 17 and 18 applicable to authority trustees, both CLS Pub O §§ 17 and 18 deny indemnification to employee who engages in intentional wrongdoing, and federal statutes apply to authority as political subdivision of state, if at all, only in cases of intentional wrongdoing. Long Island Lighting Co. v Mack, 137 A.D.2d 285, 529 N.Y.S.2d 502, 1988 N.Y. App. Div. LEXIS 5490 (N.Y. App. Div. 2d Dep't 1988), app. dismissed, 74 N.Y.2d 804, 546 N.Y.S.2d 561, 545 N.E.2d 875, 1989 N.Y. LEXIS 2721 (N.Y. 1989).

In combined Article 78 proceeding and declaratory judgment action commenced by order to show cause which, by its terms, temporarily restrained town from expending any further amounts for payment of legal fees of town officials in their defense of 2 lawsuits, court properly dismissed petitioners' motion to hold respondents in contempt for allegedly violating terms of temporary restraining order, where evidence established only that town paid some legal fees during relevant period, not that amounts paid were attributable to lawsuits at issue. Bauernfeind v Doetsch (In re Schulz), 217 A.D.2d 861, 629 N.Y.S.2d 841, 1995 N.Y. App. Div. LEXIS 8171 (N.Y. App. Div. 3d Dep't 1995).

Court properly dismissed, for failure to state cause of action, combined Article 78 proceeding and declaratory judgment action in which petitioners sought to recover from town officials amounts that town paid for legal fees in connection with 2 lawsuits against those officials, where local law authorized town to pay counsel fees incurred for defense of officers and employees "in any civil action or proceeding" arising out of that party's public employment or duties in accordance with CLS Pub O § 18; town did not improperly expend funds in underlying lawsuits, which arose out of officials' public employment, and town was not forbidden from providing defense simply because officials' acts could be characterized as intentional wrongdoing. Bauernfeind v Doetsch (In re Schulz), 217 A.D.2d 861, 629 N.Y.S.2d 841, 1995 N.Y. App. Div. LEXIS 8171 (N.Y. App. Div. 3d Dep't 1995).

Simply because County District Attorney commenced grand jury proceeding and removal proceeding against town supervisor did not warrant conclusion that they were brought "by or at the behest of the public entity employing such an employee" (CLS Pub O § 18(3)(a) so as to justify refusal to defend supervisor. Hunt v Hamilton County, 235 A.D.2d 758, 652 N.Y.S.2d 402, 1997 N.Y. App. Div. LEXIS 350 (N.Y. App. Div. 3d Dep't 1997).

In action for assault and battery, individual defendant was not entitled to compel city defendant pay his legal fees under CLS Pub O § 18(3) where he failed to commence timely Article 78 proceeding challenging corporation counsel's decision dated January 30, 1996. Piquette v City of New York, 263 A.D.2d 501, 692 N.Y.S.2d 611, 1999 N.Y. App. Div. LEXIS 8110 (N.Y. App. Div. 2d Dep't 1999).

Local law which sets up procedure to provide sheriff and deputies defense and indemnification in accordance with CLS Pub O § 18, in accordance with collective bargaining agreement with county, does not waive county's absolute immunity against action for malicious prosecution and abuse of process arising out of alleged tortious acts of sheriff and deputies in performance of official duties. Nichols v County of Rensselaer, 132 Misc. 2d 489, 504 N.Y.S.2d 373, 1986 N.Y. Misc. LEXIS 2722 (N.Y. Sup. Ct. 1986), aff'd, 129 A.D.2d 167, 517 N.Y.S.2d 315, 1987 N.Y. App. Div. LEXIS 43957 (N.Y. App. Div. 3d Dep't 1987).

Since public officials were guaranteed a right to private counsel in lawsuits arising out of the performance of their duties, a trial court's award denying indemnification for fees and costs incurred in defending an appeal in an underlying proceeding was unreasonable per se; a stipulation of settlement between the public employee and the employing agency did not render moot the

resolution of special proceedings for the award of counsel fees. Matter of Graziano v County of Albany, 25 A.D.3d 1059, 807 N.Y.S.2d 478, 2006 N.Y. App. Div. LEXIS 637 (N.Y. App. Div. 3d Dep't 2006).

Town councilpersons were necessary parties to a N.Y. C.P.L.R. art. 78 proceeding under N.Y. C.P.L.R. § 1001(a) as their interests could be adversely affected if a board resolution conferring a defense under N.Y. Pub. Off. Law § 18 for a defamation action was declared invalid; expiration of the statute of limitations did not remove the councilpersons from the court's jurisdiction, and thus, the proceeding could not be dismissed. Matter of Duquette v Town of Peru Town Bd., 843 N.Y.S.2d 916, 18 Misc. 3d 174, 2007 N.Y. Misc. LEXIS 7251 (N.Y. Sup. Ct. 2007).

Given the legislative history of N.Y. Pub. Off. Law § 18 and the general principles governing the duties to defend and indemnify, a school district did not err in determining that it did not have a duty to defend or indemnify an employee in an action brought by a school board against the employee. Matter of Barkan v Roslyn Union Free School Dist., 67 A.D.3d 61, 886 N.Y.S.2d 420, 2009 N.Y. App. Div. LEXIS 6373 (N.Y. App. Div. 2d Dep't 2009).

Government lawyer assigned to represent individual constituent should be alert to statutes governing representation of agency employees and officials, and should advise individual client about them, as relevant, when discussing conflicts of interest. Asso Bar City of New York, Comm on Prof and Jud Ethics, Formal Opinions No. 2004-1.

In New York, payments of settlements of claims against corrections officers in prisoner civil rights cases, within certain limits, are subject to approval by senior officials of the N.Y. Department of Correctional and Community Services (DOCCS) and are made from DOCCS's departmental budget. Such settlements and payments are consistent with this statute, authorizing indemnification of state employees successfully sued for wrongful actions occurring within the scope of their employment. Gross v Lunduski, 304 F.R.D. 136, 2014 U.S. Dist. LEXIS 182239 (W.D.N.Y. 2014).

2. Failure of locality to adopt

City which did not adopt provisions of CLS Pub O § 18 authorizing public employee to retain counsel of his or her choice at public expense, in event of conflict of interest in action against city and public employee, was not required to pay for counsel of police officer's choice in § 1983 civil rights action against city and officer that arose from officer's alleged beating of handcuffed arrestee. Mothersell v City of Syracuse, 952 F. Supp. 112, 1997 U.S. Dist. LEXIS 555 (N.D.N.Y. 1997).

County resolution did not adopt statutory reimbursement provision of CLS Pub O § 18 where it made no reference to such provision and did not formally adopt any law. Hennessy v Robinson, 985 F. Supp. 283, 1997 U.S. Dist. LEXIS 18771 (N.D.N.Y. 1997).

Private attorney representing county employees is not entitled to order setting reasonable attorney's fees to be paid by county under CLS Pub O Law § 18(3)(c), where county has adopted resolution setting up its own self-insurance program for legal defense of employees sued for actions within scope of their employment, because § 18 is inapplicable absent local enactment making specific and formal reference to § 18. Hennessy v Robinson, 985 F. Supp. 283, 1997 U.S. Dist. LEXIS 18771 (N.D.N.Y. 1997).

3. Criminal proceedings

County could not refuse to defend county employee on ground that because grand jury proceeding might have resulted in criminal charges against employee, proceeding was not civil in nature, since District Attorney himself admitted that he did not intend to pursue criminal charges against employee in grand jury matter. Hunt v Hamilton County, 235 A.D.2d 758, 652 N.Y.S.2d 402, 1997 N.Y. App. Div. LEXIS 350 (N.Y. App. Div. 3d Dep't 1997).

In absence of pre-existing authority under state statute, local law, or collective bargaining agreement provision, village may not pay legal expenses incurred by village police officers in connection with criminal proceedings; village may not pay as moral or equitable obligation legal expenses of village police officers arising out of allegations of misconduct. 2000 Op St Compt No. 00-1.

4. Notice requirements

Court improperly found that police officer's failure to comply with 10-day notice requirement of CLS Pub O § 18(5) released city from obligation to defend and indemnify, since even if city could have disclaimed obligation based on late notice of underlying action, it was precluded from doing so because such ground was not raised in letter of disclaimer sent to officer. Polak v Schenectady, 181 A.D.2d 233, 585 N.Y.S.2d 844, 1992 N.Y. App. Div. LEXIS 8892 (N.Y. App. Div. 3d Dep't 1992).

Court improperly found that 10-day notice requirement of CLS Pub O § 18(5) constituted strict condition precedent, and that police officer's failure to comply therewith discharged city's obligation to defend and indemnify him, since purpose of 10-day notice requirement is merely to prevent default and afford municipality opportunity to promptly investigate incident. Polak v Schenectady, 181 A.D.2d 233, 585 N.Y.S.2d 844, 1992 N.Y. App. Div. LEXIS 8892 (N.Y. App. Div. 3d Dep't 1992).

Police officer's failure to comply with 10-day notice requirement of CLS Pub O § 18(5) did not release city from obligation to defend and indemnify, even if notice requirement were condition precedent to city's obligation, since city's failure to plead officer's nonperformance of condition constituted waiver. Polak v Schenectady, 181 A.D.2d 233, 585 N.Y.S.2d 844, 1992 N.Y. App. Div. LEXIS 8892 (N.Y. App. Div. 3d Dep't 1992).

Plaintiff was not required by CLS Gen Mun § 50-e(1)(a) to serve notice of claim as condition precedent to commencing action for false arrest, abuse of process and trespass against county sheriff since service of notice of claim on officer, appointee or employee of county is not condition precedent to commencement of action against such person unless county is required to indemnify such person, and while county is required to indemnify its employees for claims which arise while they are acting within scope of their employment, county sheriff is specifically excluded as person entitled to indemnification by CLS Pub O § 18(1)(b). Bardi v Warren County Sheriff's Dep't, 194 A.D.2d 21, 603 N.Y.S.2d 90, 1993 N.Y. App. Div. LEXIS 10087 (N.Y. App. Div. 3d Dep't 1993).

Public employee's failure to comply with notice requirements of CLS Pub O § 18(5) did not warrant denial of his claim for reimbursement of expenses and counsel fees in connection with defense of grand jury proceeding and removal proceeding where both proceedings concerned employee's actions as public servant, county was well aware of both proceedings, employee personally notified County Attorney of his need for counsel in grand jury matter, removal proceeding was interconnected with grand jury proceeding, and county had not designated any other officer to serve as its agent for purpose of receiving statutory notice after County Attorney recused himself prior to employee's being summoned to appear. Hunt v Hamilton County, 235 A.D.2d 758, 652 N.Y.S.2d 402, 1997 N.Y. App. Div. LEXIS 350 (N.Y. App. Div. 3d Dep't 1997).

County Treasurer's failure to tender required written notice for defense under CLS Pub O § 18(5) did not preclude representation thereunder where it was undisputed that Treasurer was acting within scope of his employment as public employee, that he was sued as result of acts taken by him in that capacity, and that County was aware of proceedings at their commencement and had ample opportunity to investigate. Walsh v County of Saratoga, 256 A.D.2d 953, 681 N.Y.S.2d 889, 1998 N.Y. App. Div. LEXIS 13903 (N.Y. App. Div. 3d Dep't 1998).

Medical malpractice action against a physician who was acting as an unpaid designee of a non-physician county mental health director when he examined the patient was subject to the notice of claim and limitations requirements applicable to all actions against public officers; if the physician was entitled to indemnification by the county, the statutes applicable to actions against a local governmental entity applied. Anderson v House of the Good Samaritan Hosp., 194 Misc. 2d 171, 752 N.Y.S.2d 815, 2002 N.Y. Misc. LEXIS 1576 (N.Y. Sup. Ct. 2002), app. dismissed, 5 A.D.3d 1058, 773 N.Y.S.2d 687, 2004 N.Y. App. Div. LEXIS 3122 (N.Y. App. Div. 4th Dep't 2004).

5. Action against officer or employee in personal or individual capacity

Benefit of § 18 is available to public employee in any proceeding arising out of official act, and is not limited to civil action against employee in personal capacity. Williams v Rensselaer County Bd. of Elections, 118 A.D.2d 966, 500 N.Y.S.2d 190, 1986 N.Y. App. Div. LEXIS 54782 (N.Y. App. Div. 3d Dep't), app. dismissed, 68 N.Y.2d 809, 507 N.Y.S.2d 1025, 499 N.E.2d 874, 1986 N.Y. LEXIS 20197 (N.Y. 1986).

Employee's failure to file a notice of claim pursuant to N.Y. Gen. Mun. Law § 50-e as imposed by N.Y. County Law § 52, did not require dismissal of the sexual harassment action against a county library coworker or supervisor. Indeed, the conduct of the coworkers as alleged in the complaint amounted to intentional torts and, thus, fell outside the scope of their employment. Grasso v Schenectady County Pub. Lib, 30 A.D.3d 814, 817 N.Y.S.2d 186, 2006 N.Y. App. Div. LEXIS 7968 (N.Y. App. Div. 3d Dep't 2006).

Commissioner of social services was required to provide for the defense of an employee in grand jury proceedings, as the commissioner had adopted this section, the grand jury subpoenas stemmed from actions undertaken in the course of the employee's public duties, and the grand jury proceeding constituted a "civil action or proceeding" since there was no indication that criminal charges were being contemplated. Matter of Mossman v County of Columbia, 127 A.D.3d 1352, 7 N.Y.S.3d 636, 2015 N.Y. App. Div. LEXIS 2968 (N.Y. App. Div. 3d Dep't 2015).

6. Scope of employment

In proceeding brought by police officer to require city employer to defend and indemnify him in civil action arising out of incident in which he placed loaded gun to forehead of fellow officer, city properly determined that officer was not acting within scope of his employment, thereby relieving city of its obligations under CLS Pub O § 18, in light of officer's admitted violation of respondent's rules regarding firearms and fact that officer's conduct was entirely unrelated to city's business. Polak v Schenectady, 181 A.D.2d 233, 585 N.Y.S.2d 844, 1992 N.Y. App. Div. LEXIS 8892 (N.Y. App. Div. 3d Dep't 1992).

Record did not contain sufficient evidence on which to resolve issue as to whether individual defendants were acting within scope of their employment in committing alleged tortious acts for purposes of determining whether county employer was obligated to indemnify them, and whether CLS Gen Mun §§ 50-e and 50-i applied to claims against them, where there was no affidavit, deposition or documentary evidence identifying their employment positions, work duties associated therewith, or manner in which alleged conduct fell within scope of their employment. International Shared Servs. v County of Nassau, 222 A.D.2d 407, 634 N.Y.S.2d 722, 1995 N.Y. App. Div. LEXIS 12583 (N.Y. App. Div. 2d Dep't 1995).

In Article 78 proceeding to compel city transit authority to pay employee's legal fees under CLS Pub O § 18(3)(b) in connection with his defense of underlying tort action, employee was not acting within scope of his employment, and thus petition was properly dismissed, where underlying incident had its origins in personal dispute that occurred while employee was off duty and on vacation. DeRespiris v New York City Transit Auth., 251 A.D.2d 503, 674 N.Y.S.2d 716, 1998 N.Y. App. Div. LEXIS 6876 (N.Y. App. Div. 2d Dep't 1998).

It was proper to deny New York City Transit Police Officer's request to compel City to assume cost of his defense in underlying personal injury action where altercation giving rise to action was personal in nature, and officer was not acting within scope of his employment, since altercation was caused by traffic dispute while officer was off-duty, and during course of confrontation, officer failed to identify himself as law-enforcement official. Sanchez v New York City Transit Auth., 254 A.D.2d 345, 678 N.Y.S.2d 664, 1998 N.Y. App. Div. LEXIS 10872 (N.Y. App. Div. 2d Dep't 1998).

In a proceeding filed pursuant to N.Y. C.P.L.R. art. 78, because claims in two federal complaints filed against a Deputy Commissioner of Public Safety contained allegations that she was acting within the scope of her employment at the time of the alleged wrongdoing, the trial court properly found that she was entitled to a defense under the relevant city code, which was identical to N.Y. Pub. Off. Law § 18(3)(a). Matter of Dreyer v City of Saratoga Springs, 43 A.D.3d 586, 840 N.Y.S.2d 680, 2007 N.Y. App. Div. LEXIS 8890 (N.Y. App. Div. 3d Dep't 2007).

In action against city and three police officers arising out of incident where police officers abused their power and harassed plaintiff, city's duty to defend police officer pursuant to CLS Pub Off § 18(3)(a) is triggered by allegations made in complaint, and city's determination of whether defendant was acting within scope of his or her employment is not relevant. Hassan v Fraccola, 851 F.2d 602, 1988 U.S. App. LEXIS 9425 (2d Cir. N.Y. 1988).

City's duty to defend police officer under CLS Pub O § 18 is triggered by allegations in complaint; city's determination of whether officer was acting within scope of employment is not relevant. Hassan v Fraccola, 851 F.2d 602, 1988 U.S. App. LEXIS 9425 (2d Cir. N.Y. 1988).

Pub O § 18(3)(a) did not require city to indemnify police officers or to pay attorney's fees that officers incurred in connection with civil and criminal proceedings against them arising from their alleged rape of civilian police dispatcher, because alleged acts, even if consensual, occurred while officers were off-duty, and did not occur when officers were acting within scope of their employment. Fernandez v DeLeno, 71 F. Supp. 2d 224, 1999 U.S. Dist. LEXIS 8001 (S.D.N.Y. 1999).

7. Conflict of interest

Police officers are not entitled to have city provide them with counsel of choice in pending federal civil action in which no present conflict of interest exist based on possibility that conflict of interest may arise in future. Galligan v Schenectady, 116 A.D.2d 798, 497 N.Y.S.2d 186, 1986 N.Y. App. Div. LEXIS 51636 (N.Y. App. Div. 3d Dep't), app. denied, 67 N.Y.2d 607, 502 N.Y.S.2d 1026, 494 N.E.2d 112, 1986 N.Y. LEXIS 18131 (N.Y. 1986).

Conflict of interest existed at time County Legislature adopted resolution authorizing payment of legal fees and expenses of sheriff's department personnel named as individual defendants in civil action, which fulfilled requirements of CLS Pub O § 18(3)(b), where, in second amended answer to underlying complaint, county attorney asserted defenses alleging that individual defendants "were not the agents of (the County)" and that conduct complained of was not "pursuant to a custom or policy adopted by (the County)." Merrill v County of Broome, 244 A.D.2d 590, 664 N.Y.S.2d 144, 1997 N.Y. App. Div. LEXIS 11147 (N.Y. App. Div. 3d Dep't 1997).

Conflict of interest identified after finding is made that alleged act "occurred" or "allegedly occurred" within scope of employment invokes the CLS Pub O § 18(3)(b) and should not destroy determination made under CLS Pub O § 18(3)(a). Merrill v County of Broome, 244 A.D.2d 590, 664 N.Y.S.2d 144, 1997 N.Y. App. Div. LEXIS 11147 (N.Y. App. Div. 3d Dep't 1997).

Town's police chief is denied substitute counsel under Pub O § 18(3)(a), where he and police officer are being sued by arrestee following incident in which they removed political campaign literature from parked cars after it had been placed there by arrestee's son and friend, because chief cannot show any actual or potential conflict of interest between himself and officer, and town retained right to select counsel for its employees. Fanelli v Town of Harrison, 46 F. Supp. 2d 254, 1999 U.S. Dist. LEXIS 6252 (S.D.N.Y. 1999).

Defendant individual, a public employee, was afforded the full benefits of N.Y. Pub. Off. Law § 18 and, as such, was entitled to be represented in the action by private counsel of his choice. Whether defendant town was obligated to indemnify the individual was an issue of fact that would be determined at a later stage in the proceedings. Higgins v Town of Southampton, 613 F. Supp. 2d 327, 2009 U.S. Dist. LEXIS 41473 (E.D.N.Y. 2009).

8. Effectiveness of counsel

In a libel action brought against two District Attorneys and a County, the trial court properly granted a motion by one individual defendant to remove the County Attorney as her counsel, to substitute her own independent counsel, and to require that the County pay the reasonable fees of said independent counsel, where the County Attorney appeared to be less zealous in his defense of the individual defendant, than of the other defendants, which could prejudice the jury against her and increase the

possibility that punitive damages might be assessed. Death v Salem, 111 A.D.2d 778, 490 N.Y.S.2d 526, 1985 N.Y. App. Div. LEXIS 50033 (N.Y. App. Div. 2d Dep't 1985).

In action against police officers and town defendants for alleged use of excessive force in arrest of plaintiff, town was directed under CLS Pub O § 18(3)(b) to permit police officers to be represented by counsel of their choice, as it was doubtful that multiple representation by town's counsel would effectively serve their interests where counsel failed to adequately advise them as to scope of their potential liability, counsel was not cooperative in providing them with copies of pleadings and motion papers, and answer interposed on their behalf did not assert good-faith immunity defense. England v Town of Clarkstown, 166 Misc. 2d 834, 634 N.Y.S.2d 958, 1995 N.Y. Misc. LEXIS 563 (N.Y. Sup. Ct. 1995).

9. Punitive damages

Punitive damages may be assessed against municipal employee who engages in intentional wrongdoing in excess of scope of his official duties; under such circumstances, employee will not be entitled to indemnification pursuant to CLS Pub O § 18(4)(b). Rosen & Bardunias v County of Westchester, 158 A.D.2d 679, 552 N.Y.S.2d 134, 1990 N.Y. App. Div. LEXIS 2292 (N.Y. App. Div. 2d Dep't), app. denied, 76 N.Y.2d 703, 559 N.Y.S.2d 982, 559 N.E.2d 676, 1990 N.Y. LEXIS 1378 (N.Y. 1990), cert. denied, 498 U.S. 1086, 111 S. Ct. 962, 112 L. Ed. 2d 1049, 1991 U.S. LEXIS 1131 (U.S. 1991).

In a tort action against a police officer whom a municipality has the duty to indemnify, the municipality is the real party in issue and, therefore, the ban against punitive damages being levied against the state or any of its political subdivisions would apply in an action against city police officers charged with assault and false imprisonment while acting within the scope of their employment, despite the apparent intent of the Legislature not to exclude punitive damages in actions against police officers covered by the indemnification provisions of Gen Mun Law § 50-j. Myers v Rochester, 116 Misc. 2d 83, 455 N.Y.S.2d 188, 1982 N.Y. Misc. LEXIS 3836 (N.Y. Sup. Ct. 1982).

10. Application to particular positions or entities

Town's furnishing of defense to town assessors and town board members in 2 lawsuits arising out of those officials' public employment, in accordance with local law and CLS Pub O § 18, did not violate constitutional prohibition against municipality giving or lending money or property to individual (CLS NY Const Art VIII § 1) or laws governing municipal conflicts of interest (CLS Gen Mun §§ 800 et seq.) as amounts expended were viewed as additional remuneration for officials' services to town, which constituted lawful public expense. Bauernfeind v Doetsch (In re Schulz), 217 A.D.2d 861, 629 N.Y.S.2d 841, 1995 N.Y. App. Div. LEXIS 8171 (N.Y. App. Div. 3d Dep't 1995).

Village code enforcement officer, who issued building permit that was subsequently invalidated by village zoning board of appeals, was entitled to representation at village's expense under CLS Pub O § 18 in proceeding to annul board's determination since officer did not volunteer to be named as party respondent in proceeding and, having been so named, it was incumbent on him to, at very least, serve answer, and there was no dispute that officer was sued by virtue of actions taken by him in scope of his public employment. Hogue v Zoning Bd. of Appeals, 239 A.D.2d 807, 657 N.Y.S.2d 462, 1997 N.Y. App. Div. LEXIS 5553 (N.Y. App. Div. 3d Dep't 1997).

Municipality, by extending protection of CLS Pub O § 18 to municipal hospital, did not thereby assume role of primary insurer and effectively relegate hospital's liability insurance carriers to roles of excess insurance carriers, where statutory right of indemnification would be triggered if and only if insurance policies were insufficient to indemnify insureds, and policies issued to hospital referred to other insurance coverage in describing themselves as "excess" coverage, but did not explicitly refer to right of indemnification afforded by CLS Pub O § 18. Town of Massena v Healthcare Underwriters Mut. Ins. Co., 281 A.D.2d 107, 724 N.Y.S.2d 107, 2001 N.Y. App. Div. LEXIS 4180 (N.Y. App. Div. 3d Dep't 2001), aff'd in part, modified, 98 N.Y.2d 435, 749 N.Y.S.2d 456, 779 N.E.2d 167, 2002 N.Y. LEXIS 2729 (N.Y. 2002).

Town may purchase liability insurance to protect town justices, however, town may not, pursuant to either CLS Gen Mun § 52 or CLS Pub O § 18, purchase insurance which provides coverage for disciplinary or removal proceedings brought against town or village justices. 1987 Op St Compt No. 86-89.

11. —Housing and community development

Town board, by local law or resolution, may agree to confer benefits of CLS Pub O § 18 on employees of housing authority and to be held liable for costs incurred under that statute. 1998 Op St Compt No. 98-17.

12. —Industrial development

Pursuant to CLS Pub Off Law § 18, city may defend and indemnify members and employees of industrial development agency established for benefit of city, as CLS Gen Mun Law § 856(2) provides that industrial development agency is corporate governmental agency, constituting public benefit corporation. Ops St Compt 90-7.

13. —Libraries

There are 2 alternatives for conferring benefits of CLS Pub O § 18 on employees of public library; either board of trustees may elect to confer such benefits as public library expense, or governing board of sponsoring municipality or school district may confer such benefits as direct expense of sponsor. 2001 Opns St Compt No. 01-12.

14. —Superintendent of highways

Town's superintendent of highways was not entitled to dismissal of defamation action on ground that plaintiff failed to timely file notice of claim against town pursuant to CLS Gen Mun § 50-e since (1) action was brought against superintendent individually, not in his capacity as town employee, and town was not named as defendant, (2) service of notice of claim was required only if town had statutory obligation to indemnify superintendent, and (3) town was not obligated to indemnify superintendent because CLS Pub O § 18 had never been adopted by local governing body; under local law, town had duty to defend defendant, not indemnify him. Wyman v Zeltins, 142 A.D.2d 913, 531 N.Y.S.2d 144, 1988 N.Y. App. Div. LEXIS 8019 (N.Y. App. Div. 3d Dep't 1988).

Under local law which authorized representation of town employees under circumstances resembling those under which representation may be provided state or municipal employees under Public Officers Law §§ 17 and 18, in determining whether the town superintendent of highways, who, after being advised that the town attorney would not represent him in its individual capacity, retained his own counsel without the prior consent of the town board, should be reimbursed for legal expenses, consideration must be given to scope of employment issues and the effect of contrasting allegations in the complaint, i.e. (1) acting in scope of employment, and (2) acting in individual capacity. Also, absence of prior town board approval of retention of attorney to defend, the doctrine of ratification should also be considered. As to the duty of the state or a municipality to provide a legal defense to an employee under Public Officers Law § 17 or § 18 respectively, the courts have equated the duty under those sections to the duty of an insurance company to provide a defense under an insurance policy, and correspondently the duty to defend has been said to be broader than the duty to indemnify. 1982 Op St Compt 82-243 and other prior opinions are superseded to the extent they are inconsistent. 1990 Op St Compt 90-47.

Agency Opinions

Analysis

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1. In general

Mount Vernon city marshalls, not being employees of the city within the meaning of Public Officers Law § 18, are not eligible for defense and indemnification by the city. 1990 NY Ops Atty Gen I 90-78.

Municipality by local law may provide for defense and indemnification provided that expenditure of funds fulfills public purpose. 1993 NY Ops Atty Gen I 93-53.

CLS Pub O § 18 is not exclusive scheme for defense and indemnification by local government; local government may provide for defense and indemnification by local law. 1998 NY Ops Atty Gen I 98-4.

General provisions defining scope of CLS Pub O §§ 17 and 18 contemplate coverage of particular entities rather than distinguishing among categories of entity's personnel. 2004 NY Ops Atty Gen F 04-6.

There is no statutory authority allowing a town officer to be reimbursed for expenses incurred in hiring private legal counsel to challenge a proceeding instituted at the behest of a town board to investigate an allegation of misconduct made against such officer and, therefore no such reimbursement may be made. 1983 Op St Compt File #83-191.

The directors of the Independent Livery Driver Benefit Fund are not eligible for the defense, indemnification, and immunity that may be accorded to public officers. N.Y. Op. Att'y Gen. No. 2011-9, 2011 N.Y. AG LEXIS 10.

2. Method of adoption

Defense and indemnification of local employees under CLS Pub O § 18 may be adopted by local legislative body by either resolution or local law. 2000 NY Ops Atty Gen I 00-7.

3. Failure of locality to adopt

A village, as part of its parking regulations, may require that the owner or operator of a vehicle pay towing or impoundment charges. A village may not defend and indemnify an officer personally sued for acts or omissions committed during the course of his public duties unless it has enacted legislation authorizing such defense and indemnification. 1986 N.Y. Op. Att'y Gen. No. 86-5.

4. Administrative proceedings

CLS Pub O § 18 does not authorize reimbursement of defense costs relating to defense of employee in administrative proceeding before local board of ethics. 1993 NY Ops Atty Gen I 93-23.

5. Criminal proceedings

Village may authorize reimbursement of legal expenses of employee incurred in successful defense of criminal action; such reimbursement, however, is not authorized by CLS Pub O § 18. 1988 NY Ops Atty Gen No. 88-6 (Informal).

Town may not reimburse costs incurred by town supervisor who pled guilty to criminal charges pending against him; town may not reimburse legal costs incurred by town employees called to assist in investigation and prosecution against town supervisor. 2003 NY Ops Atty Gen I 2003-16.

6. Action against officer or employee in personal or individual capacity

The defense and indemnification protections afforded by this section do not rest upon the plaintiff's characterization or title of the action, that is, whether the plaintiff names the employee in his "individual" or "official" capacity. 1982 Op St Compt File #82-243.

If a village has not adopted the provisions of Public Officers Law, § 18, and no other State or local legislation exists, it appears that, based on *Corning v Village of Laurel Hollow,* 48 NY2d 348, 422 NYS2d 932, 398 NE2d 537 [1979], a village may not defend or indemnify a village officer or employee who is sued in his or her individual capacity. 1983 Op St Compt File #83-5.

7. Scope of employment

Under § 18 of CLS Public Officers Law, a local public entity only may defend its employees in an action or proceeding in state or federal court arising out of an act or omission allegedly occurring while the employee was acting within the scope of his public employment or duties; a local government may extend its obligation to provide defense through the enactment of a local law. 1987 NY Ops Atty Gen No. 87-28 (Informal).

A local government by local law may provide for defense and indemnification of employees as to civil actions brought against them under the provisions of civil rights laws; defense and indemnification, however, is limited to actions committed within the scope of public employment. 1992 NY Ops Atty Gen I 92-12.

Under CLS Pub O § 18 and parallel provisions of town code, town is authorized to provide defense to one of its employees if complaint alleges behavior within scope of employee's duties, or if town board determines that such is case. 1995 NY Ops Atty Gen I 95-6.

Defense and indemnification of municipal employee, whether sued in individual or official capacity, may be provided on proper finding that employee acted within scope of his or her employment. 1997 NY Ops Atty Gen I 97-40.

8. Punitive damages

CLS Gen Mun § 50-j authorizes enactment of local legislation providing for defense and indemnification of police officers for punitive damages; local government by local law may provide for defense and indemnification of civilian employees of police department for punitive damages provided that employee was acting within scope of his employment at time of negligent act or tort. 1993 NY Ops Atty Gen I 93-22.

9. Application to particular positions or entities

10. —Housing and community development

Neither section 17 nor section 18 of the Public Officers Law covers officers and directors of Safe Affordable Housing, Inc., a not-for-profit community development corporation organized by the Division of Housing and Community Renewal, even though the officers and directors are also officers and employees of the division. The corporation is authorized to indemnify its officers and directors. 1982 N.Y. Op. Att'y Gen. No. 32, 1982 N.Y. AG LEXIS 49.

The Yonkers Municipal Housing Authority is covered by the provisions of Public Officers Law § 18. 1992 NY Ops Atty Gen I 92-19.

11. —Industrial development

A county legislative body may provide for the defense and indemnity of the officers and employees of an industrial development agency formed for its benefit. 1990 N.Y. Op. Att'y Gen. No. I90-41.

12. —Libraries

Board members named in lawsuit could participate in village and library boards' deliberations, as to village's and library's liability as named entities in lawsuit, and could be present when boards convened in executive session to receive advice of counsel. 1997 NY Ops Atty Gen I 97-32.

A school district public library may not limit the amount of liability it assumes under this section. In general, a school district may not issue bonds to pay a judgment or settlement against an employee of the school district public library, which liability the library has assumed. The board of trustees of a school district public library may call a special district meeting to vote on having the school district levy a supplemental tax to pay for a judgment or settlement against a library employee, the liability for which the library has assumed pursuant to Pub O, § 18. 1982 Op St Compt File #82-37.

An endorsement naming a fire department or company, fire commissioners and/or fire chiefs as additional insureds cannot be added to nor form a part of a fire district's Volunteer Firemen's Benefit Law insurance policy originally issued to take effect on or after March 1, 1962. A fire district may purchase liability insurance for the fire departments or companies, fire commissioners and fire chiefs serving the district. 1983 NY Ops Atty Gen April 14 (informal).

Labor Department employees serving as members of private industry councils receive defense and indemnification for these activities under CLS Pub O § 17; municipalities in service

delivery area may elect to confer benefits of CLS Pub O § 18 upon members of incorporated private industry councils serving their areas. 1987 NY Ops Atty Gen No 87-F10.

Employees of Interest on Lawyer Account (IOLA) Fund are eligible for state-provided defense and indemnification for acts and omissions within scope of their employment, subject to limitations and procedural requirements set forth in CLS Pub O § 17(3) and (4). 2004 NY Ops Atty Gen F 04-6.

Directors of Independent Livery Driver Benefit Fund are not eligible for defense, indemnification, and immunity that may be accorded to public officers. 2011 N.Y. Op. (Inf.) Att'y Gen. 09.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS County § 501; CLS Educ §§ 507, 6280; CLS Pub A §§ 1048-z, 1197-e.

Notice of claim, CLS Gen Mun § 50-e.

Prosecution of officers for illegal acts, CLS Gen Mun § 51.

Time of filing claims and notices of intention to file claims, CLS Ct C Act § 10.

Jurisprudences:

6A NY Jur 2d Attorneys at Law § 87.

18A NY Jur 2d Civil Servants and Other Public Officers and Employees § 212–216.

25 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 110, 399.

31 NY Jur 2d Criminal Law § 110.

62 NY Jur 2d Government Tort Liability § 46.

62A NY Jur 2d Government Tort Liability § 352.

85 NY Jur 2d Police, Sheriffs, and Related Officers §§ 19, 129.

Law Reviews:

Cole, Defense and indemnification of local officials: constitutional and other concerns. 58 Alb. L. Rev. 789.

Annotations:

Validity and construction of statute authorizing or requiring governmental unit to procure liability insurance covering public officers or employees for liability arising out of performance of public duties. 71 ALR3d 6.

Validity and construction of statute authorizing or requiring governmental unit to indemnify public officer or employee for liability arising out of performance of public duties. 71 ALR3d 90.

ARTICLE 3 Creation and Filling of Vacancies

Section
30. Creation of vacancies
36. Removal of town, village, improvement district or fire district officer by court

HISTORY:

Add, L 1909, ch 51, eff Feb 17, 1909.

§ 30. Creation of vacancies

1. Every office shall be vacant upon the happening of one of the following events before the expiration of the term thereof:

a. The death of the incumbent;

b. His resignation;

c. His removal from office;

d. His ceasing to be an inhabitant of the state, or if he be a local officer, of the political subdivision, or municipal corporation of which he is required to be a resident when chosen;

e. His conviction of a felony, or a crime involving a violation of his oath of office, provided, however, that a non-elected official may apply for reinstatement to the appointing authority upon reversal or the vacating of such conviction where the conviction is the sole basis for the vacancy. After receipt of such application, the appointing authority shall afford such applicant a hearing to determine whether reinstatement is warranted. The record of the hearing shall include the final judgment of the court which reversed or vacated such conviction and may also include the entire employment history of the applicant and any other submissions which may form the basis of the grant or denial of reinstatement notwithstanding the reversal or vacating of such conviction. Notwithstanding any law to the contrary, after review of such record, the appointing authority may, in its discretion, reappoint such nonelected official to his former office, or a similar office if his former office is no longer available. In the event of such reinstatement, the appointing authority may, in its discretion, award salary or compensation in full or in part for the period from the date such office became vacant to the date of reinstatement or any part thereof;

f. The entry of a judgment or order of a court of competent jurisdiction declaring him to be incompetent;

g. The judgment of a court, declaring void his election or appointment, or that his office is forfeited or vacant;

h. His refusal or neglect to file his official oath or undertaking, if one is required, before or within thirty days after the commencement of the term of office for which he is chosen, if an elective office, or if an appointive office, within thirty days after notice of his appointment, or within thirty days after the commencement of such term; or to file a renewal undertaking within the time required by law, or if no time be so specified, within thirty days after notice to him in pursuance of law, that such renewal undertaking is required. The neglect or failure of any state or local officer to execute and file his oath of office and official undertaking within the time limited therefor by law, shall not create a vacancy in the office if such officer was on active duty in the armed forces of the United States and absent from the county of his residence at the time of his election or appointment, and shall take his oath of office and execute his official undertaking within thirty days after receipt of notice of his election or appointment, and provided such oath of office and official undertaking be filed within ninety days following the date it has been taken and subscribed, any inconsistent provision of law, general, special, or local to the contrary, notwithstanding.

2. When a new or an additional office shall be created, such office shall for the purposes of an appointment or election, be vacant from the date of its creation, until it shall be filled by election or appointment.

3. When any member of a board, commission, committee or authority, holding office by appointment of the governor, fails to attend three consecutive regular meetings of such board, commission,

committee or authority, unless such absence is for good cause and is excused by the chairman or other presiding officer thereof, or, in the case of such chairman or other presiding officer, by the governor, the office may be deemed vacant for purposes of the nomination and appointment of a successor.

4. Neither the provisions of this section, nor of any general, special or local law, charter, code, ordinance, resolution, rule or regulation, creating a vacancy in a local office of a political subdivision or municipal corporation if the incumbent thereof ceases to be a resident of such political subdivision or municipal corporation, shall apply in the case of a person who is a member of the police force of any political subdivision or municipal corporation of the state and who while a member of such force resides (a) in the county in which such political subdivision or municipal corporation is located; or (b) in a county within the state contiguous to the county in which such political subdivision or municipal corporation is located; or (c) in a county within the state contiguous to such political subdivision or municipal corporation; or (d) in a county within the state contiguous to a county described in item (c) hereof where the former is less than fifteen miles from such political subdivision or municipal corporation, measured from their respective nearest boundary lines; or (e) in a county within the state contiguous to a county described in item (d) hereof where the former is less than thirty miles from such political subdivision or municipal corporation, measured from their respective nearest boundary lines:

(1) If such person was appointed as a member of such police force prior to July first, nineteen hundred sixty-one, shall reside in any such county on such date and shall continue to reside in any such county after such date, or

(2) If the police force of which he is a member consists of two hundred or more full-time members or shall have consisted of two hundred or more full-time members when, as a member of such police force, he shall have resided in such county and shall continue to reside in any such county thereafter, or

(3) If the police force of which he is a member consists of less than two hundred full-time members; provided, however, that the local legislative body of such political subdivision or municipal corporation having such police force shall have power to adopt and amend local laws, ordinances or resolutions of general application requiring members of such police force, other than those members covered by paragraph one or paragraph two of this subdivision, to reside in such political subdivision or municipal corporation, or permitting them to reside in specified areas of such counties or within specified distances from the political subdivision or municipal corporation provided such local legislative body shall determine that a police officer may respond therefrom promptly and be available to render active service in such political subdivision or municipal corporation.

4-a. Neither the provisions of this section, nor of any general, special or local law, charter, code, ordinance, resolution, rule or regulation, creating a vacancy in a local office of a political subdivision or municipal corporation if the incumbent thereof ceases to be a resident of such political subdivision or municipal corporation, shall apply in the case of a member of the department of sanitation of any municipality who resides in a county within the state contiguous to such municipality.

4-b. Except as otherwise provided in subdivision five of this section, neither the provisions of this section, nor of any general, special or local law, charter, code, ordinance, resolution, rule or regulation, creating a vacancy in a local office of a political subdivision or municipal corporation of the state if the incumbent thereof ceases to be a resident of such political subdivision or municipal corporation shall apply to the appointment or continuance in office or position of an officer or member of a paid fire department in any political subdivision or municipal corporation of the state, if such person resides in the county, or one of the counties, in which such political subdivision or municipal corporation is located.

5. Neither the provisions of this section, nor of any general, special or local law, charter, code, ordinance, resolution, rule or regulation, creating a vacancy in a local office of a political subdivision or municipal corporation if the incumbent thereof ceases to be a resident of such political subdivision or municipal corporation, shall apply in the case of a paid member of the uniformed force of a paid fire department, who, for purposes of this section shall include persons employed as fire alarm dispatchers, or in the case of a person employed in a department of correction in the correction service of the classified civil service, or in the case of a member of the department of sanitation of any political subdivision or municipal corporation who has five or more years of service, or in the case of officers and inspectors employed in a department of health of a city of over one million population, or in the case of a member of the department of sanitation in a city with a population of one million or more who has two or more years of service to such city who resides (a) in the county in which said city is located; or (b) in a county within the state contiguous to the county in which said city is located; or (c) in a county within the state contiguous to such city; or (d) in a county within the state which is not more than fifteen miles from said city; or (e) in a county within the state contiguous to a county described in item (d) hereof where the former is less than thirty miles from such political subdivision or municipal corporation, measured from their respective nearest boundary lines.

5-a. Any person who resides in this state and who is currently employed as a member of the police force, a paid member of the uniformed force of a paid fire department, or department of corrections in the correctional service classification of the classified civil service, of a city of over one million population,

shall be exempt from the provisions of paragraph (d) of subdivision one and subdivisions four and five of this section upon compliance with the procedure set forth in this subdivision. Any person seeking to benefit from the exemption created by this subdivision shall notify his respective employer in writing of said intention within thirty days from the effective date of this subdivision and shall specify his then current residence address. The exemption created by this subdivision shall be applicable only to said actual designated residence and not to any residence that any subject currently employed member may thereafter establish; provided, however, that any such currently employed member who resides outside this state shall have one year from the effective date of this subdivision within which to establish residence as required pursuant to paragraph (d) of subdivision one, and subdivisions four and five of this section and comply with the notice requirements of this subdivision. Said residence shall constitute a lawful residence for all purposes notwithstanding any provision to the contrary of any general, special or local law, charter, code, ordinance, resolution, rule or regulation.

6. Neither the provisions of this section, nor of any general, special or local law, charter, code, ordinance, resolution, rule or regulation, creating a vacancy in a local office of a political subdivision or municipal corporation if the incumbent thereof ceases to be a resident of such political subdivision or municipal corporation, shall apply in the case of appointed public officers in the city of Troy, except the city manager of such city, who reside in the county of Rensselaer.

7. Neither the provisions of this section, nor of any general, special or local law, charter, code, ordinance, resolution, rule or regulation, creating a vacancy in a local office of a political subdivision or municipal corporation of the state if the incumbent thereof ceases to be a resident of such political subdivision or municipal corporation, shall apply in the case of the city court judge in the city of Hudson, provided that such person resides in the county in which such city is located.

8. Neither the provisions of this section, nor of any general, special or local law, charter, code, ordinance, resolution, rule or regulation, creating a vacancy in a local office of a political subdivision or municipal corporation of the state if the incumbent thereof ceases to be a resident of such political subdivision or municipal corporation, shall apply in the case of a person holding the office of deputy sheriff in the county of Nassau, provided that such person resides in Nassau county or any adjoining county within New York state.

HISTORY:

Add, L 1909, ch 51, eff Feb 17, 1909; amd, L 1944, ch 748, § 1; L 1952, ch 467, § 2; L 1954, ch 209, eff March 24, 1954; L 1960, ch 1084; L 1961, ch 895, § 2, eff July 1, 1961; L 1961, ch 964, § 2, eff April 24, 1961; L 1962, ch 173, eff March 20, 1962; L 1962, ch 248, § 2; L 1962, ch 969, § 2; L 1962, ch 976, § 2; L 1963, ch 375, § 2; L 1965, ch 865, § 2; L 1965, ch 985, § 3, eff July 19, 1965; L 1967, ch 560, eff April 24, 1967; L 1967, ch 692, § 1, eff April 27, 1967; L 1975, ch 347, § 2, eff July 1, 1975; L 1976, ch 56, § 2, eff March 16, 1976; L 1978, ch 550, § 39, eff July 24, 1978; L 1986, ch 509, § 2, eff July 22, 1986; L 1987, ch 454, § 1, eff July 27, 1987 (see 1987 note below); L 2004, ch 551, § 2, eff Oct 5, 2004; L 2006, ch 200, § 2, eff July 26, 2006, deemed eff on and after Dec 20, 2005; L 2006, ch 209, § 2, eff July 26, 2006; L 2018, ch 220, § 2, effective August 24, 2018; L 2018, ch 476, § 8, effective December 28, 2018.

Editor's Notes; Laws 1987, ch 454, § 2, eff July 7, 1987, provides as follows:

§ 2. This act shall take effect immediately and shall apply to all convictions reversed or vacated on or after such effective date.

Amendment Notes: 2006. Chapter 200, § 2 amended:

Sub 5 by adding the matter in italics.

2006. Chapter 209, § 2 amended:

Sub 5 by adding the matter between figs 1 and 2.

The 2018 amendment by ch 220, § 2, added "or in the case of a member of the department of sanitation in a city with a population of one million or more who has two or more years of service to such city" in 5.

The 2018 amendment by ch 476, § 8, substituted "police officer" for "policemen" in 4(3).

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1. In general

Section 1373 of Greater New York charter must be read in connection with §§ 30 and 38. People ex rel. Domschke v Messenger, 200 A.D. 418, 192 N.Y.S. 734, 1922 N.Y. App. Div. LEXIS 8190 (N.Y. App. Div.), aff'd, 233 N.Y. 687, 135 N.E. 971, 233 N.Y. (N.Y.S.) 687, 1922 N.Y. LEXIS 1115 (N.Y. 1922).

It is clear that N.Y. Pub. Off. Law § 30(1)(e) is a condition on which the job held; it is not within the control of the employer but is a limitation as explicit as a clause in an employment contract.

Bolden v City of New York, 256 F. Supp. 2d 193, 2003 U.S. Dist. LEXIS 5489 (S.D.N.Y. 2003).

When the legislature flatly determines that a felony or oath of office conviction is serious enough, without more, to justify automatic removal, it may decree, as it has under N.Y. Pub. Off. Law § 30(1), that there is nothing more to hear and that no amount of mitigation or explanation can override a conviction of that tenor or abide the officer's continued employment. Bolden v City of New York, 256 F. Supp. 2d 193, 2003 U.S. Dist. LEXIS 5489 (S.D.N.Y. 2003).

In the context of N.Y. Pub. Off. Law § 30(1), a public officer should understand that a public officer is vulnerable to summary dismissal if it appears that the public officer fails to meet the conditions of employment as specified in N.Y. Pub. Off. Law § 30(1). Bolden v City of New York, 256 F. Supp. 2d 193, 2003 U.S. Dist. LEXIS 5489 (S.D.N.Y. 2003).

Removals pursuant to N.Y. Pub. Off. Law § 30(1) do not require a pre-termination hearing in order to satisfy due process. Bolden v City of New York, 256 F. Supp. 2d 193, 2003 U.S. Dist. LEXIS 5489 (S.D.N.Y. 2003).

A city has the power to enact local laws that are not inconsistent with the laws of the state in respect to the qualifications of its officers. It may not adopt local laws inconsistent with the laws of the state. 1955 Ops St Compt 368.

Removal of public officer under CLS Pub O § 36 is for entire term of that office; however, officer may subsequently be elected to new term of same office. 1994 Op St Compt No. I 94-33.

Attorney whose nomination to position of judge of Court of Claims had been confirmed by New York State Senate could continue to practice law until oath of office was taken and filed under CLS Pub O §§ 10 and 30. Ops Adv Comm Jud Ethics No. 98-92.

2. Officers within purview of section

Section of the Public Officers Law providing that an office becomes vacant upon officeholder's conviction of a felony or a crime involving a violation of his oath of office does not apply to judicial officers. La Carrubba v Klein, 59 A.D.2d 99, 397 N.Y.S.2d 806, 1977 N.Y. App. Div. LEXIS 12465 (N.Y. App. Div. 2d Dep't 1977), aff'd, 46 N.Y.2d 1009, 416 N.Y.S.2d 243, 389 N.E.2d 838, 1979 N.Y. LEXIS 1923 (N.Y. 1979), limited, County of Broome v Conte, 120 Misc. 2d 1050, 466 N.Y.S.2d 1003, 1983 N.Y. Misc. LEXIS 3847 (N.Y. Sup. Ct. 1983).

Termination of petitioner's employment as county director of probation on ground that petitioner failed to take and file oath of office was illegal since director of probation was not public officer required to take oath within 30 days after commencement of his term, but was instead public employee required only to take oath on original appointment; significant to conclusion was fact that petitioner was promoted to position as director from position as assistant director by means of successful completion of competitive civil service examination and that petitioner's appointment was not for fixed term. Fanelli v O'Rourke, 146 A.D.2d 771, 537 N.Y.S.2d 252, 1989 N.Y. App. Div. LEXIS 855 (N.Y. App. Div. 2d Dep't 1989).

City's assistant director of purchasing was "public officer" within CLS Pub O § 30(1)(e), and therefore was properly discharged without civil service hearing on his conviction of felony, where his duties included assisting in purchase of wide variety of commodities, analyzing informal bids, selecting suppliers, directing small number of clerical employees, contacting private companies to negotiate purchase of materials and equipment, preparing purchase orders, and maintaining records on vast array of financial transactions. Papa v DeLuca, 160 A.D.2d 876, 554 N.Y.S.2d 310, 1990 N.Y. App. Div. LEXIS 4499 (N.Y. App. Div. 2d Dep't 1990).

A receiver is not a public officer within the meaning of this law. Mechanics Lumber Co. v Cohen, 18 N.Y.S.2d 547, 173 Misc. 605, 1940 N.Y. Misc. LEXIS 1532 (N.Y. App. Term), aff'd, 260 A.D. 863, 23 N.Y.S.2d 557, 1940 N.Y. App. Div. LEXIS 5107 (N.Y. App. Div. 1940).

City police captain is a public officer under this section. Smith v Noeppel, 120 N.Y.S.2d 466, 204 Misc. 49, 1953 N.Y. Misc. LEXIS 1632 (N.Y. Sup. Ct. 1953).

Attendant in a state hospital for the criminally insane was not a "public officer" so that his commitment to a state mental hospital for observation and treatment would justify an order declaring his civil service position vacant without notice and hearing. Application of Sweeney, 1 Misc. 2d 125, 147 N.Y.S.2d 612, 1955 N.Y. Misc. LEXIS 2087 (N.Y. Sup. Ct. 1955).

The statute applies equally to appointed and elected officials. Entwistle v Murtaugh, 44 Misc. 2d 1022, 255 N.Y.S.2d 422, 1964 N.Y. Misc. LEXIS 1129 (N.Y. Sup. Ct. 1964), aff'd, 24 A.D.2d 842, 264 N.Y.S.2d 230, 1965 N.Y. App. Div. LEXIS 6062 (N.Y. App. Div. 4th Dep't 1965).

A patrolman of the New York City Housing Authority Police Department is a member of the police force of any "municipal corporation of the state" within the meaning of the Public Officers Law §§ 3, 30. Maye v Lindsay, 69 Misc. 2d 276, 330 N.Y.S.2d 14, 1972 N.Y. Misc. LEXIS 2133 (N.Y. Sup. Ct. 1972), vacated, 41 A.D.2d 127, 341 N.Y.S.2d 371, 1973 N.Y. App. Div. LEXIS 4941 (N.Y. App. Div. 1st Dep't 1973).

Parole officer is public officer for purposes of CLS Pub O § 30(1)(e) and is automatically terminated upon conviction of felony, since parole officer serves important part in criminal justice system, is equivalent of police officer or correction officer, and must be held to same high standards of conduct in order to achieve respect of his parolees and public. Ring v Rodriguez, 141 Misc. 2d 164, 532 N.Y.S.2d 1009, 1988 N.Y. Misc. LEXIS 556 (N.Y. Sup. Ct. 1988).

3. Acts or circumstances creating vacancy, generally

Although provisions of this section do not include case where there is failure to elect and there is no incumbent at expiration of term preceding that for which election is held, nevertheless, there is vacancy in fact at beginning of term for which election is held. People ex rel. Stalter v Lynch, 219 A.D. 1, 219 N.Y.S. 52, 1926 N.Y. App. Div. LEXIS 5832 (N.Y. App. Div. 1926), aff'd, 245 N.Y. 534, 157 N.E. 847, 245 N.Y. (N.Y.S.) 534, 1927 N.Y. LEXIS 689 (N.Y. 1927).

Actions taken by board of regents of state university, in which certain regents who had been improperly elected participated, were valid acts and binding as against third parties despite fact that joint session of legislature convened in order to elect such members was declared invalid as not being duly convened. Anderson v Krupsak, 51 A.D.2d 229, 381 N.Y.S.2d 135, 1976 N.Y. App. Div. LEXIS 10681 (N.Y. App. Div. 3d Dep't), rev'd, 40 N.Y.2d 397, 386 N.Y.S.2d 859, 353 N.E.2d 822, 1976 N.Y. LEXIS 2898 (N.Y. 1976).

Section 30 does not include the expiration of a term of office by reason of adoption of the constitutional amendment, Art. IX, § 15. Fitzgerald v Cohen, 22 N.Y.S.2d 863, 175 Misc. 148, 1940 N.Y. Misc. LEXIS 2240 (N.Y. Sup. Ct.), aff'd, 260 A.D. 804, 22 N.Y.S.2d 527, 1940 N.Y. App. Div. LEXIS 4731 (N.Y. App. Div. 1940).

The Mayor of a village was not holding his office illegally because at the time of his nomination to such office and his election thereto he was the owner of a business wherein alcoholic beverages were sold for off-premises consumption. Harrell v Goldin, 124 N.Y.S.2d 627, 1953 N.Y. Misc. LEXIS 2222 (N.Y. Sup. Ct. 1953).

Because Cortland County, N.Y., Code of Ethics art. III(C)(5) was inconsistent with, and was superseded by, N.Y. Pub. Off. Law §§ 30, 34, N.Y. Elec. Law §§ 3-200(7), 3-204, the county legislature lacked the authority to declare a vacancy as a result of an election commissioner's apparent violation of the prohibition against dual office-holding; pursuant to N.Y. C.P.L.R. art. 78, the commissioner was entitled to compensation for the remainder of the commissioner's term. Matter of Wood v County of Cortland, 874 N.Y.S.2d 359, 23 Misc. 3d 913, 2009 N.Y. Misc. LEXIS 323 (N.Y. Sup. Ct. 2009), aff'd, 72 A.D.3d 1447, 899 N.Y.S.2d 450, 2010 N.Y. App. Div. LEXIS 3446 (N.Y. App. Div. 3d Dep't 2010).

The removal of a town assessor from office is within the jurisdiction of the supreme court. 1956 Ops St Compt 31.

4. —Salary or reimbursement ineligibility

An official's right to salary ceases only when he ceases to hold the office, whether by expiration of term, death, disqualification, or removal, continuing, from the time he qualifies and takes

charge of the office, as long as he rightfully holds it. 1961 Ops St Compt File #271.

An ineligible person appointed to public office may not continue holding the office nor receive the salary for the balance of the term after discovery of the ineligibility. 1967 Ops St Compt File #474.

A person illegally purporting to occupy the office of village clerk-treasurer is not entitled to any reimbursement of expenses incurred in the performance of the duties of such office. 1967 Ops St Compt File #668.

5. Death

Where person re-elected in November died before January first, person appointed under Town Law, § 130, by town board to fill vacancy held office until January first. Under §§ 5 and 30 of this statute vacancy existed again after January first, new town board had right to fill vacancy on January first, and action of old town board in appointing person to hold office until next biennial election was illegal. People ex rel. Green v Black, 229 A.D. 47, 241 N.Y.S. 244, 1930 N.Y. App. Div. LEXIS 10305 (N.Y. App. Div. 1930).

6. Resignation

A public officer may resign at any time, even pending removal proceedings. People v Harris, 294 N.Y. 424, 63 N.E.2d 17, 294 N.Y. (N.Y.S.) 424, 1945 N.Y. LEXIS 767 (N.Y. 1945).

Where at annual election of incorporated village, office of police justice was discontinued and abolished from and after expiration of term of then incumbent, then police justice resigned his office, action of trustees of village in appointing another in his stead upon theory that such resignation created vacancy in office was proper. People ex rel. Hoban v Bates, 142 N.Y.S. 893, 81 Misc. 12, 1913 N.Y. Misc. LEXIS 647 (N.Y. Sup. Ct. 1913).

Sections 30 and 31 work vacancy in each office immediately upon delivery of resignations to proper officers, so that offices are vacant on filing of resignations. Statute makes no provision for resignation prospective or conditional in character. Cassedy v Wilkins, 244 N.Y.S. 445, 137 Misc. 748, 1930 N.Y. Misc. LEXIS 1504 (N.Y. Sup. Ct. 1930).

Where county judge resigned office by letter dated August 4, 1975, which letter stated that resignation was to be effective on such date, resignation was effective only on August 5, less than three months before 1975 general elections, and election for vacancy could therefore be held no earlier than Tuesday after first Monday of November, 1976. Rawlins v McCaughey, 83 Misc. 2d 986, 373 N.Y.S.2d 816, 1975 N.Y. Misc. LEXIS 3026 (N.Y. Sup. Ct.), rev'd, 49 A.D.2d 1015, 374 N.Y.S.2d 468, 1975 N.Y. App. Div. LEXIS 11369 (N.Y. App. Div. 4th Dep't 1975).

Appointment to fill a vacancy in a public office may not be made prior to the effective date of the resignation and subsequent vacancy. A member of the city council may not be appointed to the office of commissioner of assessments and taxation during the period for which he was elected. 1956 Ops St Compt 94.

In order for the resignation of a town officer to be effective, it must be submitted in writing. Whether an elected town officer has ceased to be an inhabitant of the town, thus creating a vacancy, is a question of fact. 1969 Ops St Compt File #79.

7. Conviction of crime

A statute which provides for the vacatur of a public office when its incumbent is convicted of a felony is not applicable to a municipal employee who, under a grant of immunity, admitted that he received unlawful gratuities. Binghamton Civil Service Forum v Binghamton, 44 N.Y.2d 23, 403 N.Y.S.2d 482, 374 N.E.2d 380, 1978 N.Y. LEXIS 1791 (N.Y. 1978).

Petitioner's office as a New York City policeman became vacant upon rendition of a verdict convicting him of the felony of bribe receiving in the second degree, pursuant to section 30 (subd 1, par e) of the Public Officers Law which provides that a public office shall become vacant upon the officeholder's conviction of a felony, and his retirement application, which was filed after the jury verdict but before entry of judgment on the verdict, was properly never processed; CPL 1.20 (subd 13) provides that a conviction occurs upon a verdict of guilty and there is no sound reason to differentiate between a conviction for purposes of criminal law and the Public Officers Law. To permit a public officer, found guilty by a jury of his peers, to remain in office pending sentencing and thereby afford him the opportunity to obtain a lifetime pension would circumvent the clearly defined purpose of section 30 of the Public Officers Law. Gunning v Codd, 49 N.Y.2d 495, 427 N.Y.S.2d 209, 403 N.E.2d 1208, 1980 N.Y. LEXIS 2168 (N.Y. 1980).

For misdemeanor convictions arising outside line of duty, CLS Pub O § 30(1)(e) applies to crimes that, as defined in Penal Law, arise from knowing or intentional conduct indicative of lack of moral integrity; for crime to be one demonstrating lack of moral integrity, it must be one involving willful deceit or calculated disregard for honest dealings, and thus more than intent or criminal mens rea is needed for summary dismissal from office. Duffy v Ward, 81 N.Y.2d 127, 596 N.Y.S.2d 746, 612 N.E.2d 1213, 1993 N.Y. LEXIS 635 (N.Y. 1993).

The word "conviction" as used in subd. 1, par. e, of this section requires not only an adjudication of guilt, by plea or verdict, but in addition, a judgment whether such judgment imposes a sentence or suspends sentence. Keogh v Wagner, 20 A.D.2d 380, 247 N.Y.S.2d 269, 1964 N.Y. App. Div. LEXIS 4296 (N.Y. App. Div. 1st Dep't), aff'd, 15 N.Y.2d 569, 254 N.Y.S.2d 833, 203 N.E.2d 298, 1964 N.Y. LEXIS 843 (N.Y. 1964).

State senator, who automatically forfeited seat pursuant to CLS Pub O § 30(1)(e) after having been convicted of felony of making false statement on loan application, was properly declared ineligible to participate as candidate in primary election to fill unexpired term of same office he forfeited. Alamo v Strohm, 153 A.D.2d 542, 545 N.Y.S.2d 1, 1989 N.Y. App. Div. LEXIS 11207 (N.Y. App. Div. 1st Dep't), aff'd, 74 N.Y.2d 801, 545 N.Y.S.2d 689, 544 N.E.2d 608, 1989 N.Y. LEXIS 2708 (N.Y. 1989).

The legislature enacted statute, providing that every office held by a public officer shall be vacant in the event of conviction of the office holder of a felony or a crime involving a violation of his oath of office, under the permissive portions of constitutional articles governing removal from office for misconduct and when an office is deemed vacant, and thus said statute applied to claimant seeking salary and fringe benefits from period of date of conviction of felony to date he resigned as Justice of the Supreme Court. Thaler v State, 79 Misc. 2d 621, 360 N.Y.S.2d 986, 1974 N.Y. Misc. LEXIS 1720 (N.Y. Ct. Cl. 1974).

New Jersey conviction of tenured New York City correction officer for possession of weapon as first-time offender, which did not subject him to imprisonment, could not be deemed "felony" for purposes of automatic termination provisions of CLS Pub O § 30(1)(e). Quaranta v Jacobson, 167 Misc. 2d 1035, 641 N.Y.S.2d 1013, 1996 N.Y. Misc. LEXIS 123 (N.Y. Sup. Ct. 1996).

In an action pursuant to N.Y. C.P.L.R. art. 78, the court determined that the denial of former police officers' petition for reinstatement to a city police department pursuant to N.Y. Pub. Off. Law § 30(1)(e) was proper, as the officers had relayed inconsistent accounts of the events surround an assault on a prisoner by other police officers, and it did not matter that they were conviction free given the lingering doubts about their credibility. Matter of Bruder v Kelly, 844 N.Y.S.2d 621, 17 Misc. 3d 372, 238 N.Y.L.J. 25, 2007 N.Y. Misc. LEXIS 5881 (N.Y. Sup. Ct. 2007).

Once a public officer is convicted and the condition of N.Y. Pub. Off. Law § 30(1)(e) fulfilled, that employee loses any property interest in their job. Bolden v City of New York, 256 F. Supp. 2d 193, 2003 U.S. Dist. LEXIS 5489 (S.D.N.Y. 2003).

N.Y. Pub. Off. Law § 30(1) does not offend due process because public officers convicted of felonies lose their property right in their jobs immediately upon conviction. Bolden v City of New York, 256 F. Supp. 2d 193, 2003 U.S. Dist. LEXIS 5489 (S.D.N.Y. 2003).

Dismissal pursuant to N.Y. Pub. Off. Law § 30(1)(e) is proper since the public has a right to rest assured that its police officers are individuals of moral integrity. Bolden v City of New York, 256 F. Supp. 2d 193, 2003 U.S. Dist. LEXIS 5489 (S.D.N.Y. 2003).

8. —Automatic vacation, operation of law

When New York City police officer is convicted of felony or "oath of office" crime, police commissioner may proceed under CLS Pub O § 30(1)(e) and result is automatic expulsion; however, for other convictions, administrative hearing is required under NYC Ad-

min Code § 14-115(b). Foley v Bratton, 92 N.Y.2d 781, 686 N.Y.S.2d 359, 709 N.E.2d 100, 1999 N.Y. LEXIS 24 (N.Y. 1999).

Upon the conviction of Justice of the Supreme Court of a felony, the office held by Justice became vacant by operation of law at time of the jury verdict of guilty, and no salary or fringe benefits were thereafter due. Thaler v State, 79 Misc. 2d 621, 360 N.Y.S.2d 986, 1974 N.Y. Misc. LEXIS 1720 (N.Y. Ct. Cl. 1974).

Where a former corrections officer's pled guilty to stalking (18 Pa.C.S. § 2709.1(a)), as that crime carried a possible penalty of over one year's imprisonment under Pennsylvania law and thus would have been in felony under New York law, pursuant to N.Y. Pub. Off. Law § 30(1)(e), his office became vacant automatically upon his conviction and without any required government action; therefore, he had not been entitled to a disciplinary hearing before he was discharged. Matter of Rodriguez v Schriro, 936 N.Y.S.2d 838, 34 Misc. 3d 781, 2011 N.Y. Misc. LEXIS 5816 (N.Y. Sup. Ct. 2011), aff'd, 95 A.D.3d 634, 944 N.Y.S.2d 536, 2012 N.Y. App. Div. LEXIS 3835 (N.Y. App. Div. 1st Dep't 2012).

Pennsylvania's stalking statute, 18 Pa.C.S. § 2709.1(a), requires a course of conduct or repeated commission of the elements of the offense; therefore § 2709.1(a) is misdemeanor involving lack of moral integrity for purposes of N.Y. Pub. Off. Law § 30(1)(e). Therefore, upon a corrections officer's conviction of that crime, his office automatically became vacant and he had not been entitled to a disciplinary hearing before he was terminated. Matter of Rodriguez v Schriro, 936 N.Y.S.2d 838, 34 Misc. 3d 781, 2011 N.Y. Misc. LEXIS 5816 (N.Y. Sup. Ct. 2011), aff'd, 95 A.D.3d 634, 944 N.Y.S.2d 536, 2012 N.Y. App. Div. LEXIS 3835 (N.Y. App. Div. 1st Dep't 2012).

In a N.Y. C.P.L.R. art. 78 proceeding, the dismissal of a veteran New York City police officer was neither arbitrary nor capricious because the officer was automatically terminated from service by operation of N.Y. Pub. Off. Law § 30(1)(e) when he pleaded guilty to Offering a False Instrument for Filing in the Second Degree, N.Y. Penal Law § 175.30, which constituted a violation of the officer's oath of office, and, as such, no pretermination hearing was required. Matter of Depamphilis v Kelly, 944 N.Y.S.2d 861, 36 Misc. 3d 514, 2012 N.Y. Misc. LEXIS 2323 (N.Y. Sup. Ct. 2012), aff'd, 107 A.D.3d 611, 967 N.Y.S.2d 645, 2013 N.Y. App. Div. LEXIS 4791 (N.Y. App. Div. 1st Dep't 2013).

Although the conduct that led to a police officer's conviction of endangering the welfare of a child, a misdemeanor, involved sex with a 16-year-old, the offense could be committed without the commission of any sexual or violent acts, so the offense was not a misdemeanor that resulted in the automatic termination of public employment; therefore, the officer was to be reinstated, with back pay, pending the holding of a due process hearing. Feola v Carroll, 25 A.D.3d 697, 810 N.Y.S.2d 92, 2006 N.Y. App. Div. LEXIS 719 (N.Y. App. Div. 2d Dep't), app. dismissed, 6 N.Y.3d 891, 817 N.Y.S.2d 625, 850 N.E.2d 672, 2006 N.Y. LEXIS 1352 (N.Y. 2006), rev'd, 10 N.Y.3d 569, 860 N.Y.S.2d 457, 890 N.E.2d 219, 2008 N.Y. LEXIS 1476 (N.Y. 2008).

On his claims of discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., 42 U.S.C.S. § 1981, and New York Human Rights Law, appellant's guilty plea to the charge of endangering the welfare of a child resulted in his automatic termination under N.Y. Pub. Off. Law § 30(1)(e), he could not prove an adverse employment action for any of the measures taken after his guilty plea; further, his suspension with pay pending the investigation was not, in these circumstances, an adverse employment action, and appellant had no constitutionally recognized cause of action for deprivation of professional courtesy that police sometimes extend to their fellow officers. His discrimination claims, therefore, failed as a matter of law. Brown v City of Syracuse, 673 F.3d 141, 2012 U.S. App. LEXIS 5281 (2d Cir. 2012).

Tenured employee was denied partial summary judgment on his claim that the board of education violated due process in terminating him and rescinding his executory contract to become school superintendent because disputed factual issues remained as to whether his duties as assistant superintendent rendered him a public officer under New York law whose position automatically became vacant upon a felony conviction; whether his state law claims were barred by his failure to participate in an examination under N.Y. Gen. Mun. Law § 50-h as requested by the board; and whether he failed to commence a proceeding challenging the board's actions. Nichiporuk v Bd. of Educ., 415 F. Supp. 2d 242, 2006 U.S. Dist. LEXIS 6904 (W.D.N.Y. 2006).

Police officer's guilty plea conviction for a violation of N.Y. Penal Law § 260.10 was a crime that involved a violation of the officer's oath of office, and his position of a police officer was automatically terminated by an operation of law without benefit of a due process hearing. Brown v City of Syracuse, 648 F. Supp. 2d 461, 2009 U.S. Dist. LEXIS 78565 (N.D.N.Y. 2009).

9. —Hearing

Police officer who was terminated from his position when he was convicted of felony had no right to reinstatement hearing where his conviction was reversed on appeal; under CLS Pub O Law § 30, his position became vacant at time of his conviction, and he no longer had protectable property interest in his former office. Briggins v McGuire, 67 N.Y.2d 965, 502 N.Y.S.2d 985, 494 N.E.2d 90, 1986 N.Y. LEXIS 18591 (N.Y.), cert. denied, 479 U.S. 930, 107 S. Ct. 399, 93 L. Ed. 2d 353, 1986 U.S. LEXIS 4493 (U.S. 1986).

Any hearing into the facts underlying a police officer's conviction of endangering the welfare of a child, N.Y. Penal Law § 260.10(1), was unnecessary prior to his termination pursuant to N.Y. Pub. Off. Law § 30(1)(e) because one who knowingly engaged in conduct likely to be injurious to a child's welfare was deemed wanting in moral integrity; dismissal of the police officer's N.Y. C.P.L.R. art. 78 proceeding against a city and a commissioner, seeking reinstatement and demanding a hearing pursuant to N.Y. Civ. Serv. Law § 75 was proper. Matter of Feola v Carroll, 10 N.Y.3d 569, 860 N.Y.S.2d 457, 890 N.E.2d 219, 2008 N.Y. LEXIS 1476 (N.Y. 2008).

New York City Police Commissioner had discretion to dismiss police officers without administrative hearing under NYC Admin Code § 14-115(a) where each had been convicted of crime following full trial. Griffin v Bratton, 248 A.D.2d 242, 670 N.Y.S.2d 34, 1998 N.Y. App. Div. LEXIS 2575 (N.Y. App. Div. 1st Dep't 1998), rev'd, 92 N.Y.2d 781, 686 N.Y.S.2d 359, 709 N.E.2d 100, 1999 N.Y. LEXIS 24 (N.Y. 1999).

City correction officers were not entitled to pretermination hearing where they necessarily admitted in connection with their guilty pleas that "with intent to evade any tax imposed under ... (an) income or earnings tax statute, or any requirement thereof or any lawful requirement of the tax commission thereunder," they either "fail(ed) to make, render, sign, certify or file any return, or to supply any information within the time required by or under the provisions of such article or any such statute," or "with like intent, (did) supply any false or fraudulent information" (CLS Tax § 1801(a)), their public offices were vacated automatically on conviction, misdemeanors of which they were convicted having involved willful deceit or calculated disregard for honest dealings. Bowman v Kerik, 271 A.D.2d 225, 706 N.Y.S.2d 327, 2000 N.Y. App. Div. LEXIS 3838 (N.Y. App. Div. 1st Dep't 2000).

Police officer, who was convicted of misdemeanor, was entitled to police department hearing prior to her discharge from office under NYC Admin Code § 14-115(a). Brapham v Safir, 172 Misc. 2d 767, 659 N.Y.S.2d 710, 1997 N.Y. Misc. LEXIS 196 (N.Y. Sup. Ct. 1997).

Police officer who was dismissed from police force upon conviction of crime without pre-dismissal hearing to determine if his conviction constituted violation of his oath of office was not denied equal protection or due process, where officer failed to show that any other officer who committed misdemeanor while on-duty was given pre-dismissal hearing or permitted to retain his job, and where conviction for violation of oath of office negated any property or liberty interest in prior position. Weissinger v Ward, 704 F. Supp. 349, 1989 U.S. Dist. LEXIS 1117 (E.D.N.Y.), aff'd, 880 F.2d 1320, 1989 U.S. App. LEXIS 10938 (2d Cir. N.Y. 1989).

Because defendants, the department of corrections and its commissioner, and the city, did not invoke N.Y. Pub. Off. Law § 30(1)(e) until over two years after plaintiff former corrections officer's conviction for third degree sexual abuse, and instead elected a disciplinary process under N.Y. Civ. Serv. Law § 75, provided counseling, and then engaged in a lengthy negotiation

process, defendants indicated that the offense was insufficient for automatic termination under § 30(1)(e), and that a factual hearing would be necessary; once deciding that the offense did not fall under the purview of § 30(1)(e) and that disciplinary proceedings would be more appropriate, defendants could not later seek to revoke that determination in order to avoid the procedural requirements of N.Y. Civ. Serv. Law § 75(1), and thus defendant's motion to dismiss under Fed. R. Civ. P. 12(b)(6) was denied. Whitfield v Fraser, 272 F. Supp. 2d 340, 2003 U.S. Dist. LEXIS 12292 (S.D.N.Y. 2003).

While a public officer, including one who may otherwise be removed only pursuant to the Civil Service Law, automatically forfeits his office upon conviction of a felony, or a crime involving a violation of his oath of office, a municipal employee may not be similarly dismissed upon such a conviction, but, rather, may be removed only pursuant to a hearing under the Civil Service Law. 1975 Ops St Compt File #643.

10. —Violation of federal law

Removal from office effected by operation of CLS Pub O § 30(1)(e) results in bar to officeholder's seeking same office for duration of term for which officer had been elected; thus, state senator convicted of federal felony was precluded from seeking election to unexpired term of very office from which he had been removed. Alamo v Strohm, 74 N.Y.2d 801, 545 N.Y.S.2d 689, 544 N.E.2d 608, 1989 N.Y. LEXIS 2708 (N.Y. 1989).

The word "felony" as used in par. 1-e of this section is restricted to crimes which are felonies under the laws of New York, and since the crime of conspiracy to obstruct justice is merely a misdemeanor under § 580 of the Penal Law, a conviction for such offense under federal law making it a felony could not give rise to a vacancy in the office of Supreme Court Justice which would preclude the Justice so convicted from applying for, and being entitled to, retirement allowance under the New York City Employees Retirement System, particularly where only a jury verdict had been returned in Federal Court, without sentence pronounced, when the application for retirement was duly made. Keogh v Wagner, 20 A.D.2d 380, 247 N.Y.S.2d 269, 1964 N.Y. App. Div. LEXIS 4296 (N.Y. App. Div. 1st Dep't), aff'd, 15 N.Y.2d 569, 254 N.Y.S.2d 833, 203 N.E.2d 298, 1964 N.Y. LEXIS 843 (N.Y. 1964).

Petitioner's employment as correction officer was properly terminated under automatic vacatur provision of CLS Pub O § 30 on his conviction of federal felony of mail fraud (18 USCS § 1341). Graham v Coughlin, 135 A.D.2d 1014, 522 N.Y.S.2d 738, 1987 N.Y. App. Div. LEXIS 52893 (N.Y. App. Div. 3d Dep't 1987), aff'd, 72 N.Y.2d 1014, 534 N.Y.S.2d 919, 531 N.E.2d 640, 1988 N.Y. LEXIS 2703 (N.Y. 1988).

A conviction in the Federal court of conspiring to teach the overthrow of the United States Government by force results in the vacatur of the office of city councilman under this section. Davis v Impelliteri, 94 N.Y.S.2d 159, 197 Misc. 162, 1950 N.Y. Misc. LEXIS 1336 (N.Y. Sup. Ct. 1950).

State Comptroller's removal of state senator from payroll upon his conviction of federal felony of making false statement on loan application did not impermissibly interfere with Senate's control over its own members or diminish separation of powers principle underlying CLS NY Const Art III § 9, since incumbent's conviction of felony or crime involving violation of oath of office abridges office and automatically terminates its duration under CLS Pub O § 30(1); thus, Article 78 petition for judgment directing comptroller to reinstate petitioner as state senator would be denied. Ruiz v Regan, 143 Misc. 2d 773, 542 N.Y.S.2d 469, 1989 N.Y. Misc. LEXIS 299 (N.Y. Sup. Ct. 1989).

Where two former public officers were terminated from their jobs pursuant to N.Y. Pub. Off. Law § 30(1)(e) after being convicted of violating 18 U.S.C.S. §§ 287, 3351, the public officers lost any property interest they had in their job, and the court granted the State of New York's Fed. R. Civ. P. 12(b)(6) motion. Bolden v City of New York, 256 F. Supp. 2d 193, 2003 U.S. Dist. LEXIS 5489 (S.D.N.Y. 2003).

11. —Violation of oath of office

Criminal trespass is not sort of misdemeanor that can be construed facially as crime "involving violation of [the] oath of office" for purposes of CLS Pub O § 30(1)(e), and thus police officer convicted of second degree criminal trespass was entitled to hearing rather than summary dismissal from office, since lack of moral integrity is not implicit in elements of offense. Duffy v Ward, 81 N.Y.2d 127, 596 N.Y.S.2d 746, 612 N.E.2d 1213, 1993 N.Y. LEXIS 635 (N.Y. 1993).

Misdemeanor conviction for conduct outside line of duty is "a crime involving a violation of [the] oath of office" under CLS Pub O § 30(1)(e) only if violation is apparent from Penal Law's definition of crime. Duffy v Ward, 81 N.Y.2d 127, 596 N.Y.S.2d 746, 612 N.E.2d 1213, 1993 N.Y. LEXIS 635 (N.Y. 1993).

Automatic termination of Article 78 petitioner's employment as police officer under CLS Pub O § 30(1)(e) could not be supported by petitioner's conviction of second degree criminal trespass for entering vestibule of residence to continue argument over off-duty traffic accident; a misdemeanor conviction for conduct outside the line of duty will be "a crime involving a violation of [the] oath of office" under § 30 (1) (e) only if the violation is misdemeanor that demonstrates a lack of moral integrity and for a crime to be one demonstrating a lack of moral integrity, it must be one involving willful deceit or a calculated disregard for honest dealings. Duffy v Ward, 81 N.Y.2d 127, 596 N.Y.S.2d 746, 612 N.E.2d 1213, 1993 N.Y. LEXIS 635 (N.Y. 1993).

For purpose of statute providing that office shall be vacant upon incumbent's conviction of felony or crime involving violation of oath of office, conspiracy to bribe is no less a violation of police officer's oath of office than the acceptance or giving of the bribe itself. Sroka v Municipal Civil Service Com., 57 A.D.2d 1064, 395 N.Y.S.2d 854, 1977 N.Y. App. Div. LEXIS 12376 (N.Y. App. Div. 4th Dep't 1977).

Receiving an unlawful gratuity (Penal Law 200.35) is a violation involving a uniformed officer's oath of office, and immediately upon an officer's conviction of the offense, his position automatically becomes vacant rendering any subsequent departmental proceeding related to that office without effect. Pesale v Beekman, 81 A.D.2d 590, 437 N.Y.S.2d 448, 1981 N.Y. App. Div. LEXIS 11075 (N.Y. App. Div. 2d Dep't), aff'd, 54 N.Y.2d 707, 442 N.Y.S.2d 989, 426 N.E.2d 483, 1981 N.Y. LEXIS 2635 (N.Y. 1981).

In view of strong public policy in favor of effectuating mandate of CLS Pub O § 30(1)(e), automatic termination is not waived by commencement of disciplinary proceedings; thus, city was entitled to summary judgment dismissing action by police officer seeking back pay for period in which disciplinary proceedings were conducted following his conviction of perjury for making false statements in affidavit submitted in support of search warrant application. Lemieux v Niagara Falls, 138 A.D.2d 945, 526 N.Y.S.2d 281, 1988 N.Y. App. Div. LEXIS 2752 (N.Y. App. Div. 4th Dep't), app. denied, 72 N.Y.2d 806, 532 N.Y.S.2d 847, 529 N.E.2d 177, 1988 N.Y. LEXIS 2468 (N.Y. 1988).

Police officer violated his oath of office and was thus subject to automatic termination under CLS Pub O § 30 for making false statements in search warrant application. Lemieux v Niagara Falls, 138 A.D.2d 945, 526 N.Y.S.2d 281, 1988 N.Y. App. Div. LEXIS 2752 (N.Y. App. Div. 4th Dep't), app. denied, 72 N.Y.2d 806, 532 N.Y.S.2d 847, 529 N.E.2d 177, 1988 N.Y. LEXIS 2468 (N.Y. 1988).

City police commissioner properly determined not to reappoint petitioner as city police officer, and thus petitioner's Article 78 proceeding would be dismissed, where (1) petitioner admitted to ongoing relationship with, and acceptance of gratuity from, tow truck operator regulated by police commissioner, and (2) petitioner had been found present at tow truck operator's shop for personal reasons while on duty. Saporita v Brown, 180 A.D.2d 597, 580 N.Y.S.2d 306, 1992 N.Y. App. Div. LEXIS 2809 (N.Y. App. Div. 1st Dep't 1992).

Second degree menacing is crime involving violation of police officer's oath of office under CLS Pub O § 30(1)(e). Segars v City of Buffalo, 237 A.D.2d 910, 654 N.Y.S.2d 919, 1997 N.Y. App. Div. LEXIS 3505 (N.Y. App. Div. 4th Dep't 1997), app. denied, 1997 N.Y. App. Div. LEXIS 6453 (N.Y. App. Div. 4th Dep't May 30, 1997).

Police officer, who lost his position automatically under CLS Pub O § 30(1)(e) following his conviction of second degree menacing, was not entitled to pretermination hearing pursuant to

CLS Civ S § 75. Segars v City of Buffalo, 237 A.D.2d 910, 654 N.Y.S.2d 919, 1997 N.Y. App. Div. LEXIS 3505 (N.Y. App. Div. 4th Dep't 1997), app. denied, 1997 N.Y. App. Div. LEXIS 6453 (N.Y. App. Div. 4th Dep't May 30, 1997).

Petitioner could be terminated from his position as New York City police officer without hearing after he was convicted of second degree aggravated harassment arising from conduct committed in line of duty, which constituted violation of his oath of office. Pirozzi v Safir, 270 A.D.2d 2, 703 N.Y.S.2d 185, 2000 N.Y. App. Div. LEXIS 2263 (N.Y. App. Div. 1st Dep't), app. denied, 95 N.Y.2d 756, 712 N.Y.S.2d 448, 734 N.E.2d 760, 2000 N.Y. LEXIS 1713 (N.Y. 2000).

The office of an election commissioner convicted of the misdemeanor of offering a false instrument for filing would be properly declared vacant, pursuant to Pub O § 30(1)(e), which applies to the public office of election commissioner, since the conviction was for a crime involving a violation of defendant's oath of office. County of Broome v Conte, 120 Misc. 2d 1050, 466 N.Y.S.2d 1003, 1983 N.Y. Misc. LEXIS 3847 (N.Y. Sup. Ct. 1983), aff'd, 101 A.D.2d 905, 476 N.Y.S.2d 261, 1984 N.Y. App. Div. LEXIS 18628 (N.Y. App. Div. 3d Dep't 1984).

New Jersey conviction of tenured New York City correction officer for possession of weapon as first-time offender did not involve violation of his oath of office for purposes of automatic termination provisions of CLS Pub O § 30(1)(e), which contemplates conduct indicating lack of moral integrity; if commissioner sought to justify termination on that basis, he must first afford correction officer opportunity to present his version of incident. Quaranta v Jacobson, 167 Misc. 2d 1035, 641 N.Y.S.2d 1013, 1996 N.Y. Misc. LEXIS 123 (N.Y. Sup. Ct. 1996).

Although violations of N.Y. Tax Law § 1817(b)(1) were misdemeanors, a county legislator's plea of guilty properly resulted in the automatic vacatur of his seat under N.Y. Pub. Off. Law § 30(1)(e) because the crime involved the filing of documents not believed to be true as to every material matter and, thus, demonstrated a calculated disregard for honest dealings and a violation of the legislator's oath of office. Matter of Holt v Marinelli, 45 A.D.3d 1317, 845 N.Y.S.2d 639, 2007 N.Y. App. Div. LEXIS 11460 (N.Y. App. Div. 4th Dep't 2007), app. denied, 10 N.Y.3d 702, 853 N.Y.S.2d 543, 883 N.E.2d 370, 2008 N.Y. LEXIS 192 (N.Y. 2008).

Councilmember could not continue to serve on the town board because he had pled guilty to attempted criminal contempt; one who engages in conduct likely to violate a court order is someone wanting in moral integrity for purposes of Public Officers Law § 30. The charge arose from an incident hours in which the councilmember allegedly pursued his wife aggressively on the thruway, hours after issuance of a stay away order. Matter of Town of Cheektowaga v Rogowski, 61 Misc. 3d 587, 84 N.Y.S.3d 332, 2018 N.Y. Misc. LEXIS 3960 (N.Y. Sup. Ct. 2018).

12. —Effect of vacatur or reversal

Abridgment of term of public officer upon his conviction of felony is not punishment for his offense. It is automatic limitation upon duration of his office, and application of statute is not defeated by possibility that judgment may be reversed. In re Obergfell, 239 N.Y. 48, 145 N.E. 323, 239 N.Y. (N.Y.S.) 48, 1924 N.Y. LEXIS 475 (N.Y.), reh'g denied, 239 N.Y. 589, 147 N.E. 207, 239 N.Y. (N.Y.S.) 589, 1924 N.Y. LEXIS 633 (N.Y. 1924).

After a deputy police commissioner had been convicted of accepting bribes, a vacancy occurred in that office and petitioner was not reinstated after his conviction had been reversed. Thus, since petitioner's civil service had been discontinued through no fault or delinquency on his part he was entitled to a retirement allowance under Civil Service Law § 77. Pauley v McGovern, 1 N.Y.2d 261, 152 N.Y.S.2d 3, 134 N.E.2d 819, 1956 N.Y. LEXIS 875 (N.Y. 1956).

In accordance with section 30 of the Public Officers Law, every public office becomes vacant upon the officer's conviction of a felony, and the contingency of reversal of the judgment of conviction does not defeat the operation of this statutory directive. Toro v Malcolm, 44 N.Y.2d 146, 404 N.Y.S.2d 558, 375 N.E.2d 739, 1978 N.Y. LEXIS 1859 (N.Y.), reh'g denied, 45 N.Y.2d 776, 1978 N.Y. LEXIS 3339 (N.Y. 1978), cert. denied, 439 U.S. 837, 99 S. Ct. 121, 58 L. Ed. 2d 133, 1978 U.S. LEXIS 2757 (U.S. 1978), limited, Briggins v McGuire, 118 Misc. 2d 964, 462 N.Y.S.2d 357, 1983 N.Y. Misc. LEXIS 3429 (N.Y. Sup. Ct. 1983).

City correction officer was not entitled to the compensation he would have received as a public officer from date his office was vacated by reason of his conviction to date of reinstatement after it was determined that his conviction was based on a mistaken identification and accordingly reversed. Toro v Malcolm, 44 N.Y.2d 146, 404 N.Y.S.2d 558, 375 N.E.2d 739, 1978 N.Y. LEXIS 1859 (N.Y.), reh'g denied, 45 N.Y.2d 776, 1978 N.Y. LEXIS 3339 (N.Y. 1978), cert. denied, 439 U.S. 837, 99 S. Ct. 121, 58 L. Ed. 2d 133, 1978 U.S. LEXIS 2757 (U.S. 1978), limited, Briggins v McGuire, 118 Misc. 2d 964, 462 N.Y.S.2d 357, 1983 N.Y. Misc. LEXIS 3429 (N.Y. Sup. Ct. 1983).

Where, by operation of law, the office held by the decedent became vacant upon his conviction of a felony, the reinstatement of the deceased to his former office was improper under evidence that the decedent appealed his conviction to the Appellate Division, which affirmed, he then appealed to the Court of Appeals and, while the appeal was pending, he died, and due to his death the Court of Appeals dismissed the appeal and directed a vacatur of the conviction and a dismissal of the indictment, since the vacatur, because of death while the appeal was pending, did not restore the decedent to his former office. Breslin v Leary, 35 A.D.2d 794, 315 N.Y.S.2d 766, 1970 N.Y. App. Div. LEXIS 3461 (N.Y. App. Div. 1st Dep't 1970).

Reversal of officer's misdemeanor conviction and dismissal of indictment may have removed officer's disability to hold office but could not entitle him to reinstatement with back pay. Sroka v Municipal Civil Service Com., 57 A.D.2d 1064, 395 N.Y.S.2d 854, 1977 N.Y. App. Div. LEXIS 12376 (N.Y. App. Div. 4th Dep't 1977).

Notwithstanding possibility that former officer's conviction may be reversed, CLS Public Officers Law § 30 automatically acts to vacate office upon conviction; legislature has differentiated between high standard that must be satisfied for serving in public office, and unrelated standard of proof necessary to support criminal conviction. Briggins v McGuire, 112 A.D.2d 827, 492 N.Y.S.2d 746, 1985 N.Y. App. Div. LEXIS 52078 (N.Y. App. Div. 1st Dep't 1985), aff'd, 67 N.Y.2d 965, 502 N.Y.S.2d 985, 494 N.E.2d 90, 1986 N.Y. LEXIS 18591 (N.Y. 1986).

Petitioner, whose felony conviction had been reversed on appeal, was not entitled to a post-termination hearing on his application for reinstatement; the office having been vacated long before the application for reinstatement, all rights to the office disappeared at that time. Briggins v McGuire, 112 A.D.2d 827, 492 N.Y.S.2d 746, 1985 N.Y. App. Div. LEXIS 52078 (N.Y. App. Div. 1st Dep't 1985), aff'd, 67 N.Y.2d 965, 502 N.Y.S.2d 985, 494 N.E.2d 90, 1986 N.Y. LEXIS 18591 (N.Y. 1986).

Reversal of a conviction and dismissal of an indictment may remove a disability to hold office, but it does not entitle one to automatic reinstatement. Discretion in such matters rightfully resides in the governmental agency in which the officer was employed. Briggins v McGuire, 112 A.D.2d 827, 492 N.Y.S.2d 746, 1985 N.Y. App. Div. LEXIS 52078 (N.Y. App. Div. 1st Dep't 1985), aff'd, 67 N.Y.2d 965, 502 N.Y.S.2d 985, 494 N.E.2d 90, 1986 N.Y. LEXIS 18591 (N.Y. 1986).

CLS Pub O § 30(1)(e) (which mandates reinstatement hearing where non-elected official is stripped of office based solely on his conviction of felony or crime involving violation of oath of office, and such conviction is later reversed or vacated) did not apply where petitioner's conviction of second degree manslaughter was reversed because of trial court's erroneous jury charge and, when retried, petitioner was found not guilty by reason of mental disease or defect; statute was not meant to encompass acquittal since one who is acquitted is not stripped of office and his office is not then vacant by operation of statute. Hays v Ward, 179 A.D.2d 427, 578 N.Y.S.2d 168, 1992 N.Y. App. Div. LEXIS 170 (N.Y. App. Div. 1st Dep't), app. denied, 80 N.Y.2d 754, 587 N.Y.S.2d 906, 600 N.E.2d 633, 1992 N.Y. LEXIS 1804 (N.Y. 1992).

Police officer was not entitled to reinstatement hearing mandated by July 27, 1987 amendment to CLS Pub O § 30(1)(e) where his conviction of second degree manslaughter was reversed on July 13, 1987 based on trial court's erroneous jury charge, since amendment was remedial and would be applied prospec-

tively only. Hays v Ward, 179 A.D.2d 427, 578 N.Y.S.2d 168, 1992 N.Y. App. Div. LEXIS 170 (N.Y. App. Div. 1st Dep't), app. denied, 80 N.Y.2d 754, 587 N.Y.S.2d 906, 600 N.E.2d 633, 1992 N.Y. LEXIS 1804 (N.Y. 1992).

Under this section a public office instantaneously becomes vacant upon conviction of incumbent of a felony, and a reversal of conviction and dismissal of indictment does not entitle former officer to resume position. Smith v Noeppel, 120 N.Y.S.2d 466, 204 Misc. 49, 1953 N.Y. Misc. LEXIS 1632 (N.Y. Sup. Ct. 1953).

Former police officer, whose manslaughter conviction was reversed prior to effective date of amendment to CLS Pub O § 30(1)(e) granting nonelected public official right to reinstatement hearing upon reversal of felony conviction resulting in vacatur of office, would be granted such hearing where he was retried and acquitted upon verdict of not responsible by reason of mental disease or defect after effective date of statutory amendment. Hays v Ward, 144 Misc. 2d 227, 542 N.Y.S.2d 949, 1989 N.Y. Misc. LEXIS 339 (N.Y. Sup. Ct. 1989).

Condition of Public Officers Law 30(1)(e) is not unconstitutional for arbitrariness, and police officers were not deprived of any constitutionally protected property right as result of police commissioner's decison not to rehire them following reversal of their bribery convictions. Greene v McGuire, 683 F.2d 32, 1982 U.S. App. LEXIS 18387 (2d Cir. N.Y. 1982).

Police officer's property interest in position is extinguished by conviction of criminal offense, and property interest in employment is not revived upon later reversal of conviction. Santoli v New York, 612 F. Supp. 938, 1985 U.S. Dist. LEXIS 18394 (S.D.N.Y. 1985).

13. Illness or insanity

County employee was unlawfully terminated by personal action of the County Executive acting without authority, since the power to remove an appointee is incident to the power to appoint, and that power resided with the director of the department, and since the County Executive lacked the power to appoint himself acting director, even though the director of the department was in the hospital, that disability not creating a vacancy in the position (Pub O § 30). Furthermore, the fact that the County Executive had notified the director that he would be replaced did not mean that he had been removed, since no qualified person had been found for the position of director and the director was still receiving compensation. Bosco v County of Oneida, 106 Misc. 2d 872, 435 N.Y.S.2d 876, 1980 N.Y. Misc. LEXIS 2794 (N.Y. Sup. Ct. 1980), aff'd, 79 A.D.2d 1092, 436 N.Y.S.2d 1021, 1981 N.Y. App. Div. LEXIS 10031 (N.Y. App. Div. 4th Dep't 1981).

A commitment order of a county judge pursuant to § 74 of the Mental Hygiene Law is not an order of a court of competent jurisdiction within the meaning of this section providing for forfeiture of office for insanity. Sullivan v Whitney, 25 N.Y.S.2d 762, 1941 N.Y. Misc. LEXIS 1494 (N.Y. Sup. Ct. 1941).

Upon adjudication of insanity or incompetency the offices held by the petitioner immediately became vacant. Application of Carter, 72 N.Y.S.2d 666, 1947 N.Y. Misc. LEXIS 2833 (N.Y. Sup. Ct. 1947).

When by reason of illness a town assessor is unable to temporarily perform his duties as such, supervisor or town board may not employ another person to perform such duties and direct the assessor to pay for such services from the salary received by him. 1945 Ops St Compt 400.

A Town Board has no authority to declare an office vacant and appoint a new incumbent, merely because a councilman or justice of the peace is incapacitated due to sickness, though it can do so if he has been judicially declared insane or incompetent. 1961 Ops St Compt #922.

14. Failure to file oath or undertaking

Where a public official failed to file his official oath of office within the time prescribed by this section, the appointment was vitiated and the office became vacant. Ginsberg v Long Beach, 286 N.Y. 400, 36 N.E.2d 637, 286 N.Y. (N.Y.S.) 400, 1941 N.Y. LEXIS 1452 (N.Y. 1941).

No vacancy is created if incumbent files oath as required by statute after delayed issuance of certificate of election even though more than the time prescribed by the statute has elapsed after term of office would otherwise have begun. Application of Cosgrove, 292 N.Y. 50, 54 N.E.2d 3, 292 N.Y. (N.Y.S.) 50, 1944 N.Y. LEXIS 1405 (N.Y. 1944).

It is only after the expiration of the statutory period that failure to file the oath and proof of eligibility would result in the office being declared vacant. Mazzotti v Swezey, 103 N.Y.S.2d 956, 199 Misc. 987, 1951 N.Y. Misc. LEXIS 1697 (N.Y. Sup. Ct.), app. dismissed, 278 A.D. 958, 105 N.Y.S.2d 993, 1951 N.Y. App. Div. LEXIS 5367 (N.Y. App. Div. 1951).

Though the treasurer of a school district was required by N.Y. Public Officers Law § 30(h)(1) to execute his oath of office within 30 days of his appointment, as the 30 days did not begin to run until the school district clerk provided him notice of his appointment, and he executed the oath less than 30 days thereafter, the execution was timely and he was thus entitled to all statutory protections afforded to that position. Matter of Scro v Board of Educ. of the Jordan-Elbridge Cent. School Dist., 921 N.Y.S.2d 795, 31 Misc. 3d 1029, 2011 N.Y. Misc. LEXIS 1881 (N.Y. Sup. Ct.), rev'd, 87 A.D.3d 1342, 930 N.Y.S.2d 706, 2011 N.Y. App. Div. LEXIS 6642 (N.Y. App. Div. 4th Dep't 2011).

School board position is not vacant for failure of elected official to file oath within 30 days of commencement of term where candidate left for Europe before he received notification of his election in writing from clerk and on his return 7 weeks later executed and filed oath on same day he was formally notified of his election. Re Horne, Op Comr Educ No. 9985.

Appointments are vitiated and the offices ipso facto vacant where appointees fail to take and file official oaths. Where appointees take and file official oaths, the offices are not vacated by reason of their failure to act, and subsequent attempts to appoint to fill the same offices during their terms are invalid. 1954 Ops St Compt 332.

15. —Particular offices

Upon refusal or neglect of city health officer to file official oath within the time prescribed after commencement of his term of office, office becomes ipso facto vacant, without judicial procedure or notice, and vacancy may be then filled by proper appointive power. People ex rel. Walton v Hicks, 173 A.D. 338, 158 N.Y.S. 757, 1916 N.Y. App. Div. LEXIS 6006 (N.Y. App. Div. 1916), aff'd, 221 N.Y. 503, 116 N.E. 1069, 221 N.Y. (N.Y.S.) 503, 1917 N.Y. LEXIS 1352 (N.Y. 1917).

The failure of the former members of the Lackawanna Housing Authority to file their oaths of office, as required by this section, made the offices vacant and the newly appointed officers, having filed their oaths, could maintain an action of mandamus compelling defendants to deliver all property of the authority to the petitioners and restraining defendants from acting as members of the authority, where the facts are not in dispute and the only question to be determined is a question of law, although ordinarily a proceeding in the nature of quo warranto is the only action which lies to try title to public office. Sylvester v Mescall, 277 A.D. 961, 99 N.Y.S.2d 984, 1950 N.Y. App. Div. LEXIS 4001 (N.Y. App. Div. 1950).

Court erred in annulling city mayor's determination that position held by respondent as member of municipal housing authority was vacant and in refusing to uphold mayor's appointment of another to respondent's position since respondent did not file his oath of office within 30 days of his reappointment as required by CLS Pub O § 30, making him mere holdover until his successor was chosen and qualified. Staniszewski v Lackawanna Mun. Hous. Auth., 191 A.D.2d 1048, 595 N.Y.S.2d 160, 1993 N.Y. App. Div. LEXIS 3061 (N.Y. App. Div. 4th Dep't 1993).

County commissioner of social services was public officer not employee, was required to file oath of office within 30 days of reappointment to office, and office was vacant by reason of his failure to file required oath. Boisvert v County of Ontario, 89 Misc. 2d 183, 391 N.Y.S.2d 49, 1977 N.Y. Misc. LEXIS 1857 (N.Y. Sup. Ct.), aff'd, 57 A.D.2d 1051, 395 N.Y.S.2d 617, 1977 N.Y. App. Div. LEXIS 12360 (N.Y. App. Div. 4th Dep't 1977).

Action to preclude candidates from holding dual offices was timely because one candidate had already taken the oath of office as a county legislator, while two other candidates held off taking the oath pending the outcome of the actions; a failure to take and

file an oath of office within 30 days of commencement of the term created a vacancy in that office. Spencer v Cristo, 893 N.Y.S.2d 761, 27 Misc. 3d 334, 2010 N.Y. Misc. LEXIS 145 (N.Y. Sup. Ct.), aff'd, 70 A.D.3d 1297, 895 N.Y.S.2d 598, 2010 N.Y. App. Div. LEXIS 1652 (N.Y. App. Div. 3d Dep't 2010).

Petitioner's seat on board of education was vacated as of August 1, 2001 and his execution of oath of office on August 8, 2001 did not permit him to fill entire 3-year term to which he was duly elected on May 15, 2001, although board supported his request to have his term of office reinstated through June 30, 2004, where he was originally elected to 3-year term in May 1998, and he was reelected in May 2001, but he did not attend board's reorganization meeting on July 2, 2001 and therefore did not complete and file oath of office within 30 days of commencement of term of office to which he was elected; when petitioner was appointed on September 5, 2001 and presumably executed and filed his oath properly, board had no authority to appoint him to term beyond next election. 2001 Op Comm Ed No. 14,710.

16. — —Town offices

Town board properly declared office of assessor vacant where appointee did not file his oath of office until more than 30 days after both notification of his appointment and commencement of his term. Lombino v Town Bd., 206 A.D.2d 462, 614 N.Y.S.2d 564, 1994 N.Y. App. Div. LEXIS 7488 (N.Y. App. Div. 2d Dep't), app. denied, 84 N.Y.2d 807, 621 N.Y.S.2d 516, 645 N.E.2d 1216, 1994 N.Y. LEXIS 3465 (N.Y. 1994).

Failure of one elected to office of Town Tax Collector to file undertaking as provided by Town Law § 25 results, in conjunction with this section, in office of tax collector being declared vacant. Longobardi v Oakley, 51 Misc. 2d 424, 273 N.Y.S.2d 367, 1966 N.Y. Misc. LEXIS 1781 (N.Y. Sup. Ct. 1966).

A defect caused by the failure of one assessor, who nevertheless exercised the functions of office, to file his oath, thereby creating a vacancy in the office, and causing a town to have one less assessor than is called for by Town Law § 20, is overcome by Public Officers Law § 15 which validates and makes his acts of as much force and effect as if such oath had been taken and filed, notwithstanding any law declaring the office to be vacant. Wood v La Rose, 67 Misc. 2d 597, 324 N.Y.S.2d 788, 1971 N.Y. Misc. LEXIS 1237 (N.Y. Sup. Ct. 1971), rev'd, 39 A.D.2d 469, 336 N.Y.S.2d 795, 1972 N.Y. App. Div. LEXIS 3604 (N.Y. App. Div. 3d Dep't 1972).

17. — —Village offices

Where one appointed as village street commissioner failed to take the required oath and served for only a short time prior to becoming ill, the office could be treated as vacant. Furnia v Murphy, 31 N.Y.S.2d 875, 1941 N.Y. Misc. LEXIS 2466 (N.Y. Sup. Ct. 1941), modified, 264 A.D. 809, 35 N.Y.S.2d 460, 1942 N.Y. App. Div. LEXIS 4813 (N.Y. App. Div. 1942).

Village treasurer and superintendent of public works must take an oath of office at commencement of each term of office. Such term, except in case of vacancy, commences at noon of the first Monday in the month following the annual village election and is for a period of two years. A village policeman appointed pursuant to § 188 of the Village Law is a public officer whose term expires at the end of each official year. Such policemen must take and file an oath of office with the commencement of each term. A member of a village police department appointed pursuant to § 188-a of the Village Law does not serve for a fixed term and need only take and file an oath of office before the commencement of his official duties. 1945 Ops St Compt 95.

A village street commissioner must take and file oath of office before commencement of each one-year term. A village health officer must take and file an oath of office before commencement of each four-year term. 1945 Ops St Compt 115.

A village treasurer and a village clerk must take and file the constitutional oath of office upon the commencement of each term of office. Such term of office, except in the case of a vacancy, is for a period of two official years. 1946 Ops St Compt 235.

Participation in a meeting of the village board by a trustee who has failed to file his oath of office, does not void any of the proceedings of the board. 1955 Ops St Compt 565.

18. Absence, military service

Absence on military service does not create a vacancy in the office of district attorney. People v Jackson, 48 N.Y.S.2d 401, 1944 N.Y. Misc. LEXIS 1949 (N.Y. County Ct. 1944).

Commissioner upheld determination that petitioner vacated his seat on board of education by missing 3 successive meetings where petitioner introduced no evidence, other than his own assertions, that he obtained board approval prior to his absences, and his claims were directly contradicted by sworn statements from board members and district clerk; petitioner did not offer personal illness as excuse but, rather, claimed that he was absent due to "an emotionally draining estrangement from [his] spouse [which] involved court proceedings." 2008 Op Comm Ed No. 15,757.

Village mayor is entitled to salary even though he absents himself from the village for extended periods of time. 1955 Ops St Compt 413.

19. Acceptance of second office, incompatible offices

Acceptance of office of member of board of health vacates offices held in educational system. Metzger v Swift, 258 N.Y. 440, 180 N.E. 112, 258 N.Y. (N.Y.S.) 440, 1932 N.Y. LEXIS 1203 (N.Y. 1932).

Acceptance of a second office creates a vacancy in the first if the two offices are incompatible, and the offices of justice of the peace and town clerk are incompatible. People ex rel. Earwicker v Dillon, 38 A.D. 539, 56 N.Y.S. 416, 1899 N.Y. App. Div. LEXIS 561 (N.Y. App. Div. 1899).

There was no vacancy in the office of village police justice at the time a village council attempted to appoint petitioner to the position, merely because the prior police justice had been elected Family Court judge and his term of office as Family Court judge had already commenced, where such prior justice had not yet resigned from his office as police judge, taken the oath of office as Family Court judge, or otherwise taken any definitive step indicating acceptance of the Family Court office, and petitioner's appointment as police justice was accordingly premature and invalid. Fauci v Lee, 38 Misc. 2d 564, 237 N.Y.S.2d 469, 1963 N.Y. Misc. LEXIS 2301 (N.Y. Sup. Ct.), aff'd, 19 A.D.2d 777, 242 N.Y.S.2d 630, 1963 N.Y. App. Div. LEXIS 6046 (N.Y. App. Div. 3d Dep't 1963).

Offices of justice of the peace and coroner are incompatible. 1946 Ops St Compt 137.

20. Residency requirements, generally

Equal protection clauses of United States and state constitutions did not afford New York City firefighters living outside state "fundamental right" to be employed by city, in face of amendments to CLS Pub O §§ 3 and 30 requiring public officers living outside state to move to one of designated counties within one year of effective date, since firefighters were not suspect class, and state has long-standing interest in requiring its officers to be state residents; moreover, amendments rationally required in-state officers to move to designated counties only if they should move from their current residences in non-designated counties, since such limited accommodation was extended only to those who had already satisfied in-state residency requirement. Winkler v Spinnato, 72 N.Y.2d 402, 534 N.Y.S.2d 128, 530 N.E.2d 835, 1988 N.Y. LEXIS 2702 (N.Y. 1988), cert. denied, 490 U.S. 1005, 109 S. Ct. 1640, 104 L. Ed. 2d 155, 1989 U.S. LEXIS 1702 (U.S. 1989).

Privileges and immunities clause of United States Constitution did not afford New York City firefighters living outside state "fundamental right" to be employed by city, in face of amendments to CLS Pub O §§ 3 and 30 requiring public officers living outside state to move to one of designated counties within one year of effective date, since public employment is not privilege which "bears upon the vitality of the Nation as a single entity." Winkler v Spinnato, 72 N.Y.2d 402, 534 N.Y.S.2d 128, 530 N.E.2d 835, 1988 N.Y. LEXIS 2702 (N.Y. 1988), cert. denied, 490 U.S. 1005, 109 S. Ct. 1640, 104 L. Ed. 2d 155, 1989 U.S. LEXIS 1702 (U.S. 1989).

Hearing panel of town board failed to apply proper construction of term "inhabitant" in CLS Pub O § 30(1)(d) in determining that petitioner vacated his position as town police officer under statute

by virtue of having "resided" in Pennsylvania after certain date, since statutory term "inhabitant" refers to public officer's domicile rather than residence, and proof that petitioner continued his New York domicile for sole purpose of maintaining employment with town supported rather than defeated his cause. Larkin v Herbert, 185 A.D.2d 607, 586 N.Y.S.2d 679, 1992 N.Y. App. Div. LEXIS 9596 (N.Y. App. Div. 3d Dep't 1992).

Where petitioner seeks respondent's removal from office as board of education member upon respondent's failure to maintain legal residence within school district, appeal will be dismissed since, inter alia, petitioner has offered no official record to support allegation. Re Application of Ellen M. Wiernicki, 1986 Op Comm Ed No. 11657.

21. —Particular offices

Requirement that applicants for proposed positions as Model Cities aides for police and firemen be residents of Model Cities violated constitutional and statutory requirements with respect to police and firemen. Maye v Lindsay, 33 N.Y.2d 552, 347 N.Y.S.2d 439, 301 N.E.2d 425, 1973 N.Y. LEXIS 1137 (N.Y.), cert. denied, 414 U.S. 1069, 94 S. Ct. 579, 38 L. Ed. 2d 474, 1973 U.S. LEXIS 4065 (U.S. 1973).

Where petitioner seeks respondent's removal from office as board of education member upon respondent's failure to maintain legal residence within school district, appeal will be dismissed since, inter alia, petitioner has offered no official record to support allegation. Re Application of Ellen M. Wiernicki, 1986 Op Comm Ed No. 11657.

The sealer of weights and measures of a city is a public officer and must be a resident of the city. 1955 Ops St Compt 368.

An appointee to the office of town constable must be a resident of the town in which he is appointed. 1967 Ops St Compt File #778.

22. — —Village clerks and treasurers

Village clerk must reside within village. State Comptroller has no authority to waive this provision of law. 1945 Ops St Compt 18.

23. — —Police department

Determination that police officer had not established residence within town or village in compliance with village resolution and police regulations was supported by substantial evidence despite fact that officer, who continued to list his phone number as that of his wife's residence in Buffalo, had rented an unfurnished apartment in the village. Nigro v Board of Trustees, 57 A.D.2d 695, 395 N.Y.S.2d 544, 1977 N.Y. App. Div. LEXIS 11731 (N.Y. App. Div. 4th Dep't 1977).

Village resolution and police regulation requiring residency in town or village contemplated continual or at least extended physical presence at an abode within the town or village. Nigro v Board of Trustees, 57 A.D.2d 695, 395 N.Y.S.2d 544, 1977 N.Y. App. Div. LEXIS 11731 (N.Y. App. Div. 4th Dep't 1977).

The in-State residence requirement for public officers set out in section 30 of the Public Officers Law was not enforced against 36 plaintiffs, New York City Housing Authority police officers who reside in New Jersey and Connecticut. Brennan v New York City Housing Authority, 72 A.D.2d 410, 424 N.Y.S.2d 687, 1980 N.Y. App. Div. LEXIS 9696 (N.Y. App. Div. 1st Dep't 1980).

Subd 4 of this statute is a general law. General statute relating to matter of State concern and applying to all localities having a given population is not thereby rendered local. Act need not apply to all persons, places, or things in the State to be deemed general if it applies to class and class constituted by act may be based on population. Such a statute will be upheld if conditions caused by population can be recognized as possibly common to class and are reasonably related to subject of the statute. Hesselgrave v King, 45 Misc. 2d 256, 256 N.Y.S.2d 753, 1965 N.Y. Misc. LEXIS 2357 (N.Y. Sup. Ct. 1965).

Section 822 of the New York City Charter, which provides that all New York City employees who are or become nonresidents of the City of New York shall agree to pay to the city an amount equal to the New York City resident income tax less any city earnings or personal income tax imposed on them during the same taxable period, is a valid condition of city employment and does not constitute a *de facto* residency requirement as it is common knowledge that a large percentage of New York City employees reside out of the City of New York; consequently, the statute, in and of itself, is not inconsistent with subdivision 4 of section 30 of the Public Officers Law which prohibits certain municipalities from removing a police officer from his office on the grounds of nonresidency, nor is it inconsistent with subdivision 2 of section 3 of the Public Officers Law which prohibits a municipality from denying certain nonresidents appointment to its police force. Watts v McGuire, 102 Misc. 2d 711, 424 N.Y.S.2d 327, 1979 N.Y. Misc. LEXIS 2916 (N.Y. Sup. Ct. 1979), aff'd, 81 A.D.2d 791, 441 N.Y.S.2d 387, 1981 N.Y. App. Div. LEXIS 11438 (N.Y. App. Div. 1st Dep't 1981).

The apparent intent of a local law adopted by the City of Kingston was to require all members of the police force to reside in the city and non-compliance with or any violation of such law by a prospective appointee or member would prohibit an appointment to the force or would create a vacancy in the office. The law, however, needs to be clarified and is in conflict with the provisions of a certain statute and an examination announcement. 1968 Ops St Compt File #615.

In the absence of local legislation to the contrary, village police officers may reside outside of the village and within the geographical areas designated in Public Officers Law, § 30(4). 1974 Ops St Compt File #1329.

24. — — —Police force under 200

A village may pass a local residency law for members of the police department as long as the force does not consist of more than 200 full time members and the law does not apply to persons appointed prior to July 1, 1961 who then resided in the county or a contiguous county and continue to reside there. 1961 Ops St Compt #628.

A municipal corporation or political subdivision having a police force of less than 200 full-time members can adopt regulations containing residence requirements for its police officers appointed prior to the adoption of the regulations, with certain exceptions. 1964 Ops St Compt #738.

A village with a police force of less than 200 officers may require that its members reside within the village or within the town in which the village is located. 1974 Ops St Compt File #1329.

A city may not establish residency requirements for the appointment of members of a police force if they reside within certain geographic areas outside of the municipality, except that where a police force consists of less than 200 members, a municipality may require that the members reside within the municipality or within certain geographic areas. A city may impose reasonable residence qualifications applicable to employment and continuation in employment provided that such requirements are not inconsistent with any general laws. 1983 Op St Comp File #83-118.

25. — —Fire department

In Article 78 proceeding alleging that respondents violated CLS Pub O §§ 3(9) and 30(5) and constitutional requirements for civil service appointments (CLS NY Const Art V § 6) by letting prior eligible list for firefighter position expire for purpose of favoring New York City residents who would receive 5-point residency credit on subsequent firefighter examination, candidates on prior eligible list were not aggrieved by application of residency credit and thus lacked standing to seek to enjoin its use, where no residency credit was applied to their examination, they did not allege that they sat for subsequent examination, and they did not allege that all appointments could not lawfully be fulfilled from subsequent list unless residency credit was dropped as factor in determining that list. Altamore v Barrios-Paoli, 90 N.Y.2d 378, 660 N.Y.S.2d 834, 683 N.E.2d 740, 1997 N.Y. LEXIS 1369 (N.Y. 1997).

CLS Pub O §§ 3(9) and 30(5), which permit firefighters and certain other New York City employees to reside in nearby counties notwithstanding existence of other applicable statutory or regulatory local residency requirements, do not necessarily invalidate 5-point residency credit added to scores of qualifying New York City residents; thus, personnel director's motive in letting current eligible list expire in order to appoint from more recent eligible list reflecting residency credit did not, in and of itself, establish contrariness or bad faith, and therefore did not

establish clear legal right to relief sought, as is required for mandamus to lie. Altamore v Barrios-Paoli, 90 N.Y.2d 378, 660 N.Y.S.2d 834, 683 N.E.2d 740, 1997 N.Y. LEXIS 1369 (N.Y. 1997).

In Article 78 proceeding by candidates on then-current eligible list for appointment to firefighter position, cause of action alleging that respondents intended to appoint candidates from subsequent eligible list prior to expiration of current list, in violation of Civil Service Law, was properly dismissed where (1) no appointments had yet been made at time proceeding was commenced and claim consisted of wholly speculative assertion of anticipated illegal action, and (2) such claim became moot when petitioners' list expired without any intervening appointments from subsequent list. Altamore v Barrios-Paoli, 90 N.Y.2d 378, 660 N.Y.S.2d 834, 683 N.E.2d 740, 1997 N.Y. LEXIS 1369 (N.Y. 1997).

Residency requirements applicable to New York City firefighters, as embodied in CLS Pub O §§ 3(19) and 30(5-a), have rational basis, and thus do not violate equal protection provisions of federal and state constitutions, even though they arbitrarily discriminate against firefighters residing out of state, since state has legitimate economic self-interest in encouraging residency in state; those who reside in New York are more likely to spend money in state, to own New York real estate (and so pay property taxes), and to pay resident state income tax. Winkler v Spinnato, 134 A.D.2d 66, 523 N.Y.S.2d 530, 1987 N.Y. App. Div. LEXIS 50868 (N.Y. App. Div. 2d Dep't 1987), aff'd, 72 N.Y.2d 402, 534 N.Y.S.2d 128, 530 N.E.2d 835, 1988 N.Y. LEXIS 2702 (N.Y. 1988).

CLS Pub O §§ 3(19) and 30(5-a), which require New York City firefighters to reside in state, do not violate privileges and immunities clause of U.S. Constitution since state and local employment is not "privilege" which bears on vitality of nation as single entity, and such laws directly implicate state's sovereignty and further state's rightful goal of limiting privilege of public employment to its own citizens. Winkler v Spinnato, 134 A.D.2d 66, 523 N.Y.S.2d 530, 1987 N.Y. App. Div. LEXIS 50868 (N.Y. App. Div. 2d Dep't 1987), aff'd, 72 N.Y.2d 402, 534 N.Y.S.2d 128, 530 N.E.2d 835, 1988 N.Y. LEXIS 2702 (N.Y. 1988).

There was no need for judicial declaration that New York City firefighters whose families resided out of state could nevertheless establish in-state residence necessary to retain employment under CLS Pub O §§ 3 and 30 where fire department officials had not taken contrary position and had not established irrebuttable presumption that firefighter's residence was same as that of his family, and thus there was no genuine dispute between parties. Winkler v Spinnato, 134 A.D.2d 66, 523 N.Y.S.2d 530, 1987 N.Y. App. Div. LEXIS 50868 (N.Y. App. Div. 2d Dep't 1987), aff'd, 72 N.Y.2d 402, 534 N.Y.S.2d 128, 530 N.E.2d 835, 1988 N.Y. LEXIS 2702 (N.Y. 1988).

Paid firemen of a fire district may live outside the county in which the fire district is located and may live outside the state. 1967 Ops St Compt File #701.

A person who is not a resident elector of a fire district may not serve as a fire district commissioner. 1974 Ops St Compt File #714.

A municipality may not require a paid fireman to reside within the city as a condition of appointment or retention, but it may require him to live within the county or counties in which the city is located. A city may impose reasonable residence qualifications applicable to employment and continuation in employment provided that such requirements are not inconsistent with any general law. 1983 Op St Comp File #83-118.

26. —Incorporation of area as a city

Where a police justice is required to be a resident of the town for which he was elected and a portion of such town is separated therefrom and made a city, the office of such police justice becomes vacant if after such division he resides in the city. People ex rel. Grogan v Glass, 19 A.D. 454, 46 N.Y.S. 572, 1897 N.Y. App. Div. LEXIS 1453 (N.Y. App. Div. 1897).

27. Change of residence, removal from district

When a public officer ceases to be an inhabitant of the state, or if he be a local officer, of the political subdivision or municipal corporation of which he is required to be a resident when chosen, the office automatically becomes vacant and he need not resign. 1956 Ops St Compt 61.

Where an officer ceases to be a resident of the political subdivision of which he is required to be a resident when chosen, a vacancy is created in said office. The salary of such officer runs only from the time he qualifies and takes charge of said office, and continues only so long as he rightfully holds the office. 1956 Ops St Compt 326.

28. —Particular offices

Board of education member vacated his office when he moved from district and established legal residence elsewhere, where (1) member purchased home in another county, (2) member has listed other county address on his driver's license and automobile registration, (3) member has telephone at his other county address, and telephone directory has such residential listing for member at that address, (4) member's children attend public school outside district and (5) member has changed his voter registration address to outside county. Re Nadine Willard 1984 Op Comr Ed No. 11277.

A town supervisor who ceases to be a resident elector of the town may not continue to hold such office. 1957 Ops St Compt 71.

An immediate vacancy in the office of town constable occurs automatically when the incumbent ceases to be a resident of the town. 1967 Ops St Compt File #778.

29. — —Assessors

Acts performed by a town assessor who has ceased to be a resident of the town are valid as to third parties. 1956 Ops St Compt 9.

Unless it is proven that a duly elected town assessor has actually ceased to be a resident of the town, his office may not be declared vacant and his salary may not be discontinued. 1969 Ops St Compt File #579.

30. — —Justices of the peace, police judges

A person who moves outside the village may not continue to hold the office of village police judge. 1954 Ops St Compt 15.

31. — —Members of governing body

A county legislator's action in moving outside his legislative district, thus creating a vacancy as of the date he moved pursuant to Pub O § 30(1)(d), and in submitting a letter of resignation effective approximately one and one-half months later, would not render the common council's appointment of a replacement within 30 days of the effective date of resignation invalid, notwithstanding the requirement that the office be filled by special election if the vacancy is not filled within 30 days of its creation, since the council's appointment was made in a timely manner. Poughkeepsie v County of Dutchess, 120 Misc. 2d 1024, 466 N.Y.S.2d 949, 1983 N.Y. Misc. LEXIS 3843 (N.Y. Sup. Ct. 1983).

32. — —Members of planning board or urban renewal agency

When a member of the town planning board ceases to be a resident of such town, he automatically vacates his office. 1960 Ops St Compt File #771.

33. — —Police and fire personnel

Town board properly terminated policeman under a resolution, adopted pursuant to Public Officers Law § 30, subd 4, requiring that all town policemen reside in town, where evidence showed that policeman spent some time at his parents' in-town home, but spent most of his off-duty hours at the out-of-town residence of his wife and children. Contento v Kohinke, 42 A.D.2d 1025, 348 N.Y.S.2d 392, 1973 N.Y. App. Div. LEXIS 3331 (N.Y. App. Div. 3d Dep't 1973).

It was proper to terminate petitioner's employment under CLS Pub O § 30 on finding that he ceased to be inhabitant of geographical area required for members of Town of Clarkstown Police Department when he moved to Warrant County, even though he may have occasionally stayed at apartment of his in-laws within that geographical area. O'Connor v Police Comm'n, 221 A.D.2d 444, 633 N.Y.S.2d 552, 1995 N.Y. App. Div. LEXIS 11887 (N.Y. App. Div. 2d Dep't 1995).

Finding that police officer lived with his fiancee in condominium that he owned in Fort Lee, New Jersey, outside of geographical area required for members of New York City Police Department under CLS Pub O § 30(1)(d) and (4) was supported

by substantial evidence, including contradictory testimony of officer's aunt as to his claim that he shared bedroom with his cousin in aunt's Bronx apartment, testimony of officer's neighbors in New Jersey condo that he lived there, and admitted fact that officer worked part-time as condo's superintendent when off duty. Cullen v Bratton, 240 A.D.2d 161, 658 N.Y.S.2d 26, 1997 N.Y. App. Div. LEXIS 5925 (N.Y. App. Div. 1st Dep't 1997).

Police officer's suspension without pay for 20 days, with concurrent placement on one year's disciplinary probation, was not shocking penalty for living outside of geographical area required for members of New York city Police Department under CLS Pub O § 30(1)(d) and (4) where similar residency violations had resulted in termination, officer admitted additional violation of prohibition against off-duty employment without permission, and his otherwise good service record was expressly considered. Cullen v Bratton, 240 A.D.2d 161, 658 N.Y.S.2d 26, 1997 N.Y. App. Div. LEXIS 5925 (N.Y. App. Div. 1st Dep't 1997).

Although a police officer's termination pursuant to N.Y. Pub. Off. Law § 30(1)(d) did not entitle the officer to a pre-termination hearing under N.Y. Civ. Serv. Law § 75, because the officer was not given notice of, or an opportunity to respond to, an allegation, due process was not satisfied; therefore, the termination determination was properly annulled. Matter of Sorano v City of Yonkers, 37 A.D.3d 839, 830 N.Y.S.2d 590, 2007 N.Y. App. Div. LEXIS 2321 (N.Y. App. Div. 2d Dep't 2007).

The office of fire commissioner automatically becomes vacant upon the incumbent's ceasing to be a resident of the district and it is not necessary for him to resign the office. 1956 Ops St Compt 117.

A police officer, appointed January 1, 1959, may as a matter of right change his residence to a county contiguous to the county in which he is now employed and retain his position. 1967 Ops St Compt File #539.

The office of fire district commissioner automatically becomes vacant upon the incumbent's removal of his residence from the fire district. 1974 Ops St Compt File #714.

34. — —Town or village clerks

The office of a town clerk who removes into another town thereby becomes vacant, but if he continues to act as town clerk and maintains his office within the town where it was located prior to his removal without objection and with the acquiescence of other town officers, he is a de facto town clerk and his acts are valid. In re Collins, 75 A.D. 87, 77 N.Y.S. 702, 1902 N.Y. App. Div. LEXIS 2085 (N.Y. App. Div. 1902).

Where a town clerk ceases to be a resident of the town, a vacancy occurs which may be filled by the town board. 1971 Ops St Compt File #992.

35. Creation of new offices

Proposition was properly barred from appearing on ballot since it created only 3 new or additional city council seats, and it improperly violated CLS NY Const Art XIII § 8 by requiring that terms of office of 4 incumbent council members expire in middle of even-numbered year and that elections therefor be held in April of even-numbered year, where (1) city had city-manager form of government with mayor and 4 council members, (2) proposition provided for abolition of city manager, establishment of mayor independent of city council and creation of 7-member city council, and (3) proposition also provided that current city council would continue until May 1992 and that new city council and mayor would take office in June 1992 after election in April 1992. Charter League & Citizens Council, Inc. v Sunderland, 176 A.D.2d 227, 574 N.Y.S.2d 55, 1991 N.Y. App. Div. LEXIS 11481 (N.Y. App. Div. 2d Dep't 1991).

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36. Creation of new offices

1. In general

County commissioner of public works, elected for fixed term, may not be suspended without pay pending determination of charges. 1994 NY Ops Atty Gen I 94-47.

The city of Ithaca cannot use its home rule authority to extend the residency requirement established for members of the Ithaca Housing Authority board by Public Housing Law § 429. N.Y. Op. Att'y Gen. No. 2011-1, 2011 N.Y. AG LEXIS 2.

2. Officers within purview of section

Certain correction officers employed by the Department of Correctional Services and certain other persons in the Department who have been designated as peace officers by rules of the Department are public officers subject to the provisions of the Public Officers Law. 1983 N.Y. Op. Att'y Gen. No. 83-F4.

Filing by town assessor of her oath of office within 30 days of her appointment, in office of town clerk, complied with requirements of law for filing of oath. 1988 NY Ops Atty Gen No. 88-9 (Informal).

Persons having status as public officers must file oath of office. Indicia of status of public officer are the authority to exercise a portion of sovereign powers of government and vested discretion as to how to perform duties. Other indicia of public office are the statutory designation of the position as an "office", the requirement to take an oath of office or file bonds, the appointment for a definite term, and receipt of a commission of office or official seal. 1990 N.Y. Op. Att'y Gen. No. I90-29.

A member of the Chemung County Elmira Sewer District Administrative Board is a local officer within the meaning of Public Officers Law, § 2. His office becomes vacant upon his conviction of a felony. 1978 Op St Compt File #738.

3. Acts or circumstances creating vacancy, generally

4. —Declaration of vacancy by town board

Where it is believed that an elected town officer has ceased to be the owner of record of real property in the town, the town board may not on its own motion declare the office to be vacant. Resort must be had to the procedure outlined in Town Law § 23-a or by an action in quo warranto. 1954 NY Ops Atty Gen 85 (informal).

A town board does not have authority to pass a local law requiring town board members to attend regular board meetings and work sessions and, in default of such attendance, empowering the town board to declare the office vacant. 1978 NY Ops Atty Gen June 22 (Informal), 1978 N.Y. AG LEXIS 106.

5. —Holding over

Where election of coroner results in tie vote, vacancy exists and present incumbent holds over until appointee of governor qualifies. 1924 N.Y. Op. Att'y Gen. No. 118.

A public officer holds over and continues to perform the duties of his office until a successor is chosen and qualified but the office is vacant for the purpose of selecting a successor. 1979 NY Ops Atty Gen Aug 13 (Informal), 1979 N.Y. AG LEXIS 69.

A person, otherwise qualified, elected to the office of village trustee is not barred from holding the office because he is indebted to the village for unpaid taxes and water assessments. 1959 NY Ops Atty Gen April 9 (informal).

An Acting County Executive, appointed and qualified pursuant to Rensselaer County Charter, § 3.02, would, in the event that the office of the elected County Executive be vacated by reason of death, resignation or legal disability, as provided for in Public Officers Law, § 30, serve only until such time as the office of County Executive is filled pursuant to law by either election or appointment. The new County Executive, within 30 days of his qualifying for such office, should designate an Acting County Executive, said designation being subject to confirmation by the County Legislature. 1974 NY Ops Atty Gen Oct. 2.

Where an oath of office is filed a year or more late a vacancy in office is created and the vacancy can be filled by appointment. 1975 NY Ops Atty Gen Aug. 29 (informal).

If member of Long Island Rail Committee's Council (LIRRCC) is absent without good cause from 3 consecutive regular meetings, his or her position on LIRRCC may be deemed vacant by governor; any resulting vacancy shall be filled by appointment of governor on recommendation of county executive, under provisions of CLS Pub A § 1266-d(2). 1998 NY Ops Atty Gen F 98-5.

Where a local law is adopted and approved by the voters abolishing the elective office of town superintendent of highways and establishing the appointive office of town superintendent, the appointive office comes into existence at the precise moment when the local law takes effect, notwithstanding that the current elective term is thereby abridged. 1978 Op St Compt File #510.

6. Death

Appointment as acting mayor does not expire upon the death of the mayor who made such appointment. Vacancy in the office of mayor may be filled by the board of trustees. 1953 NY Ops Atty Gen 96 (informal).

Party nominations for office of County Judge, the incumbent of which office died July 5, 1968, are made pursuant to Election Law Section 131, subdivision 7. 1968 NY Ops Atty Gen July 15 (Informal), 1968 N.Y. AG LEXIS 82.

Whether or not the Common Council of the City of White Plains fills the vacancy, created by the death of the Mayor on July 21, 1974, by appointment to said office of a qualified person prior to the general election November 5, 1974, the person elected to said office, on November 5, 1974 would take such office on January 1, 1975, upon being duly qualified. 1974 NY Ops Atty Gen Aug. 9 (informal).

7. Resignation

Where county judge resigns, his office becomes vacant, and special judge performs duties at compensation fixed by board of supervisors. 1928 N.Y. Op. Att'y Gen. No. 233.

A board of trustees may not properly fill a vacancy in a village office before the effective date of the resignation submitted by the resigning officer. 1955 NY Ops Atty Gen 186 (informal).

Where the Mayor of the Village of Fort Johnson has submitted his resignation effective July 6, 1972, a vacancy in that office will occur on that date and said vacancy is to be filled by the Board of Trustees of said Village pursuant to provisions of Village Law, § 4-422, subd. 3(b)(1), but the Acting Mayor would act as Mayor until the vacancy in the office of Mayor is filled. 1972 NY Ops Atty Gen June 28.

Where a member of a Board of Fire Commissioners of the Montauk Fire District resigned his office on December 27, 1972, to be effective on December 31, 1972, a vacancy in that office did not occur until January 1, 1973, and any action of the Board of Fire Commissioners to fill such vacancy prior to January 1, 1973 was null and void. 1973 NY Ops Atty Gen Jan. 12.

Public Officers Law, § 42(1), is a general law and may not be amended by an inconsistent local law. Accordingly, where a City Councilman of the City of Port Jervis, who was elected at the general election in November of 1977 for a two-year term commencing on January 1, 1978 and terminating on December 31, 1979, resigned his office effective as of May 1, 1978, such resignation created a vacancy in said office which must be filled at the general election in November of 1978 for the remainder of said Councilman's term. The person appointed in 1978 to fill such vacancy may hold such office only until January 1, 1979. 1978 NY Ops Atty Gen May 11.

The provisions of Public Officers Law, § 31, are the exclusive method by which the Mayor of the Village of Richfield Springs may voluntarily resign from his office. There is no provision of law authorizing a resignation or suspension prospective or conditional in nature. 1978 NY Ops Atty Gen June 30.

Where a town clerk is re-elected and subsequently resigns prior to the expiration of his current term, two vacancies arise—one for the current term and one for the new term. The vacancies may not be filled until they actually occur, however, and an attempt to fill a prospective vacancy is null and void. 1982 Op St Compt File #82-30.

8. Conviction of crime

9. —Automatic vacation, operation of law

Upon the conviction of a mayor of a city of the crimes of official misconduct and obstructing governmental administration, the office becomes vacant automatically by operation of law. The conviction occurs at the time of the jury verdict of guilt or the entry of a plea of guilty, notwithstanding that no sentence has been imposed and that an appeal has been filed. 1983 NY Ops Atty Gen Mar 28 (informal).

Public officer's conviction for off-duty behavior constituting crime of fourth degree grand larceny resulted in officer's removal by operation of law. 1997 NY Ops Atty Gen F 97-7.

Trustee of board of education of union free school district vacated her office by operation of law on her guilty plea to petit larceny. 1999 NY Ops Atty Gen I 99-3.

10. —Violation of federal law

Office of member of Senate became vacant by operation of law immediately upon verdict that Senator was guilty of Federal felony, even though there is no matching state felony; automatic vacancy is not delayed until sentencing; fact that appeal has been filed has no effect upon vacancy created at moment of conviction. NY Ops Atty Gen 89-F 1.

Since criminal contempt is not a felony under either Federal or State law, and inasmuch as no violation of oath of office is herein involved, a member of the Board of Education of the Schenectady City School District does not vacate his office solely on the ground that he was convicted of the offense of criminal contempt in a Federal Court. 1973 NY Ops Atty Gen Feb. 27.

The office of a State assemblyman becomes vacant upon the assemblyman's conviction by a jury verdict of guilty of a violation of a federal statute which constituted the conviction of a felony under the Public Officers law. 1978 NY Ops Atty Gen August 3.

11. —Violation of oath of office

The conviction of a village building inspector of the misdemeanor of unlawfully receiving a gratuity constitutes a violation of his oath of office within the meaning of section 30 of the Public Officers Law, thereby creating a vacancy in that office. 1976 NY Ops Atty Gen May 26.

Superintendent of highways' conviction of crime of obstructing governmental administration on basis of actions purportedly taken in exercise of his official responsibilities would involve violation of his oath of office, and his office becomes vacant upon conviction of crime involving violation of his oath of office. NY Ops Atty Gen 89-10 (Informal).

Notary public forfeits his office on conviction of felony. 1929 N.Y. Op. Att'y Gen. No. 314.

A public office is vacant when the incumbent is convicted of a felony. 1979 NY Ops Atty Gen September 25 (informal).

The conviction of a person of a felony resulting in a sentence of probation and a fine does not render the individual ineligible to run for public office. 1983 N.Y. Op. Att'y Gen. No. 83-60.

Conviction under CLS Pub O § 30(1)(e) creates vacancy in office which disqualifies convicted person from that office for balance of term; future employment of person convicted of crimes to position of police officer in competitive class of civil service is dependent on finding that individual is fit and of good moral character to hold position. 1993 NY Ops Atty Gen I 93-13.

Analysis of whether persons convicted of state felonies or misdemeanor crimes of domestic violence may be appointed as peace officers or whether their convictions preclude such appointments because they are prohibited from possessing firearms under Federal Gun Control Act or state law. 1998 N.Y. Op. Att'y Gen. No. 98-F8, 1998 N.Y. AG LEXIS 41.

12. Illness or insanity

A village officer is entitled to salary therefor by law. A village board of trustees may not declare a village office vacant because the holder thereof is receiving medical treatment for a mental illness. There must be a judgment of a court to accomplish this result. 1953 NY Ops Atty Gen 144 (informal).

A vacancy in the office of chairman of the Board of Commissioners of a garbage district occurs at time of entry of a judgment or order of a court of competent jurisdiction declaring him to be insane or incompetent. 1963 NY Ops Atty Gen Oct. 30.

13. Failure to file oath or undertaking

14. —Particular offices

15. — —Town offices

Neglect or omission to file on oath of office creates a vacancy in the office which may be filled by Town Board. 1956 NY Ops Atty Gen March 5 (informal).

If a town assessor fails to take and file the constitutional oath of office within the prescribed time, the office becomes vacant. 1977 NY Ops Atty Gen Aug 8 (Informal), 1977 N.Y. AG LEXIS 70.

Failure of a Town Building and Zoning Inspector to take and file the oath of office creates a vacancy in the office. 1977 NY Ops Atty Gen Dec 20 (Informal).

The failure of a town superintendent of highways timely to file his oath of office results in a vacancy in the office occurring by operation of law. 1984 N.Y. Op. Att'y Gen. No. 84-17.

A failure of a town officer to file his oath of office within the time prescribed by law creates a vacancy in the office. 1978 Op St Compt File #380.

A vacancy exists in the office of town superintendent of highways upon the failure of the incumbent thereof to file his oath of office as required by statute. 1983 Op St Compt File #83-213.

16. — —Village offices

A failure to file an official oath and affidavit of eligibility within thirty days after the commencement of the term of the office of village trustee creates a vacancy in the office. 1953 NY Ops Atty Gen 26 (informal).

A resolution creating the second office of village justice is subject to a permissive referendum and is not effective until after the referendum or after the time within which a referendum can be demanded. When the resolution becomes effective there is a vacancy in office which can be filled by appointment until the next date for conducting a regular or special village election. The term of the first elected second village justice will be for such time that thereafter one village justice will be elected each two years for a four-year term. 1975 NY Ops Atty Gen May 2.

With the creation of a new town from parts of two existing towns and the coincident reduction in the geographic area of each of those two existing towns for the purpose of the exercise of governmental functions, the former governmental structure continues in the original geographic areas until the new offices in the new town can be filled; because these offices have just been created, they forthwith became vacant for the purose of an election which will be held at the first biennial election following the creation of the new town, i.d., on November 8, 1977. 1977 NY Ops Atty Gen Apr 6.

Where an individual who was re-appointed to the office of village treasurer failed to take and file the oath of office on time but continued to perform the duties of the office, the individual would be deemed holding over to fill the vacancy in the office. 1978 Op St Compt File #833.

Where the office of assessor becomes vacant through failure to take and file the oath of office and the assessor continues to perform the functions of the office, the officer is a de facto officer whose acts have the same validity as they would if they had been performed by a de jure officer. 1977 NY Ops Atty Gen Aug 8 (Informal), 1977 N.Y. AG LEXIS 70.

Failure of the newly elected mayor and three trustees to qualify for office by filing their constitutional oaths of office within 30 days created vacancies in the offices of mayor, one trustee for one year and two trustees for two years. 1979 NY Ops Atty Gen Aug 13 (Informal), 1979 N.Y. AG LEXIS 69.

Trustee whose term expired in 1979 and who was elected mayor, but who failed to file his oath of office, continues to be a trustee as a holdover in office. 1979 NY Ops Atty Gen Aug 13 (informal).

Trustee whose term expired in 1979 and who was elected to succeed himself, but who failed to file his oath of office, continues in office as a holdover trustee. 1979 NY Ops Atty Gen Aug 13 (informal).

The oath which an officer must take and file is the oath prescribed in Public Officers Law § 10 and failure to take and file a new oath of office upon reappointment following the expiration of a term creates a vacancy in office. Civil Service Law § 62 does not apply to public officers. 1976 NY Ops Atty Gen Dec 30.

Under the above sections, a State officer who has assumed the duties of his office on the first day of his term is entitled to his statutory rate of compensation from this day until at least the 30th day of his term, whether or not he has taken and filed his oath of office within this period. 1979 NY Ops Atty Gen Jan 15.

Deputy sheriffs who are in the competitive class of the civil service are not required to file successive oaths of office subsequent to each election of a sheriff. 1984 N.Y. Op. Att'y Gen. No. 84-2.

Public officer's failure to timely file oath of office creates vacancy by operation of law which cannot be cured by late filing. 1986 NY Ops Atty Gen No. 86-41 (Informal).

Refusal or neglect by public officer to file required undertaking within time required by law automatically creates vacancy in such office. 1986 NY Ops Atty Gen No. 86-55 (Informal).

Persons having status as public officers must file oath of office. Indicia of status of public officer are the authority to exercise a portion of sovereign powers of government and vested discretion as to how to perform duties. Other indicia of public office are the statutory designation of the position as an "office", the requirement to take an oath of office or file bonds, the appointment for a definite term, and receipt of a commission of office or official seal. 1990 N.Y. Op. Att'y Gen. No. I90-29.

Where an elective officer has not filed his oath of office within the time prescribed by law, the office becomes vacant, although he may thereafter be appointed to fill the vacancy upon a proper filing of his oath. 1978 Op St Compt File #312.

17. Absence, military service

Where residence of commissioner of elections is unknown and he has been absent from county and he does not exercise powers of his office, vacancy exists which may be filled by appointing power. 1914 N.Y. Op. Att'y Gen. No. 131.

A public officer who has been called to active military duty may be a candidate for re-election. 1962 NY Ops Atty Gen March 1.

A city recreation commission may not include in its rules of procedure a provision for removal of a member upon his failure to attend a specified number of meetings. The legislative body of the city may establish attendance requirements for appointive city offices. 1985 N.Y. Op. Att'y Gen. No. 85-31.

If the domicile of a serviceman on active duty is still within the town in which he was elected councilman, he may continue to serve in that office. However, whether his domicile is still within the town is a question of fact to be determined initially by local officials. 1982 Op St Compt File #82-34.

18. Acceptance of second office, incompatible offices

A councilman may not resign that office and thereafter be appointed by the council to the office of supervisor. 1966 NY Ops Atty Gen Feb. 10.

Under Town Law Section 64(5) and Public Officers Law Section 30(2), a member of the Town Board of the Town of Amherst which

created the position of Second Deputy Town Attorney may be appointed by said Board to such position, following the resignation from said Board. 1971 NY Ops Atty Gen Feb. 5 (informal).

Offices of town planning board member and mayor of village are compatible, as are offices of member of town zoning board of appeals and members of board of trustees of village, however, it may be necessary that person holding these offices rescue himself from participating in certain matters. 1986 NY Ops Atty Gen No. 86-68 (informal).

Positions of town clerk and fire district commissioner are compatible. 1999 NY Ops Atty Gen I 99-40.

19. Residency requirements, generally

20. —Particular offices

21. — —Assistant District Attorney

An assistant district attorney must be a resident of the county in which his official functions are required to be exercised. 1965 NY Ops Atty Gen March 29.

Rule-making authorities for New York City Criminal Court should decide where arraignments are to be held. District Attorney of one of New York City Counties should appoint an Assistant residing in his county to handle criminal matters arising in his county and prosecuted by him. 1967 NY Ops Atty Gen Dec. 13.

22. — —Housing Authority members

Members of Troy Municipal Housing Authority are required to reside in City of Troy. 1995 NY Ops Atty Gen I 95-19.

Chairman of Port Jervis Housing Authority is local officer subject to provisions of CLS Pub Off §§ 3 and 30, and therefore, must be resident of city at time of his appointment and throughout his term of office. NY Ops Atty Gen 88-45 (Informal).

23. — —Judges and justices

A non-resident of a village may not be appointed to fill a vacancy in the office of Village Police Justice, but any resident of the county in which any part of the village lies may be appointed to the office of Acting Police Justice if that person is a justice of the peace, police justice or attorney at law. The office of Acting Police Justice may be filled even though no person has been elected or appointed Village Police Justice. 1971 NY Ops Atty Gen Oct. 18.

A village has no authority to change by local law the residency qualification or restriction for its village justice. 1975 NY Ops Atty Gen Oct. 3 (informal).

Legislative body of city may enact local law permitting city court judge to reside in county. 1988 NY Ops Atty Gen No. 88-27 (Informal).

24. — —Village clerks and treasurers

A village treasurer must be a resident of the village. 1953 NY Ops Atty Gen 40 (informal).

A village may enact a local law authorizing the board of trustees to provide that the village clerk, deputy clerk, village treasurer and deputy treasurer need not be residents of the village but must be residents of the county in which the village is located or in an abutting or adjacent county. 1983 NY Ops Atty Gen April 29 (informal).

25. — —Police department

26. — — —Police force under 200

A village with a police force of less than 200 officers may require that its members reside within the village. 1980 Op St Compt File #11.

Subdivision 4 of this section is not applicable to a deputy sheriff who is not a member of a police force. 1963 NY Ops Atty Gen March 8.

Under statute, a resident and owner of real property in the Village of East Syracuse, which Village is located entirely within the boundaries of the Town of DeWitt, and is an elector of said Town, would be qualified to act as a police commissioner of the police department of said Town established under provisions of Town Law, Section 150, even though there is a separate Village police department and the Town police department does not exercise jurisdiction within the boundary of the Village of East Syracuse. 1972 NY Ops Atty Gen Jan. 25.

A uniform state standard applies to residency of persons for appointment as members of a police department but a municipality, under certain circumstances, may create residence requirements for such members subsequent to their appointment. 1974 NY Ops Atty Gen Dec. 18.

Discussion of residency requirement for part-time village police officers, and enforcement thereof. 1978 Op St Compt File #1055.

Enclosure of 1974 Atty. Gen. 330 discussing residency requirements of policemen. 1979 Op St Compt File #50.

27. — —Fire department

Paid firemen of paid fire departments are public employees and not public officers; their residence qualifications are determined on that basis. 1975 NY Ops Atty Gen Aug. 20 (informal).

In a fire district functioning under the provisions of Article 11 of the Town Law (§§ 170 through 189), a paid fireman is not a public officer unless some overt act has occurred or a positive step has been taken to convert the department from a voluntary to a professional department. Such a paid fireman is an employee of the fire district. The board of commissioners of a fire district have no authority to impose residency restrictions upon employees. The state or local civil service commissions may require applicants for employment to live in a restricted area but cannot control residence after appointment and such restrictions do not apply to promotional positions; however, the board of commissioners of the fire district may require that eligibles for appointment (as distinguished from promotion) who are residents of the fire district, be certified first. 1975 NY Ops Atty Gen Feb. 27.

A fire district commissioner who moves out of the fire district is ineligible to remain in office or to run for re-election. 1982 Op St Compt File #82-69.

To hold the office of town assessor a person must be an inhabitant of the town. 1954 NY Ops Atty Gen 3 (informal).

Probation officers heretofore or hereafter appointed are not required to be residents of the political subdivision of the state for which chosen but are subject to residence requirements, if any, of any other general, special or local law, charter, code or ordinance, rule or regulation. 1965 NY Ops Atty Gen March 11.

With the exception of the student member, members of boards of trustees of community colleges are local officers. They must at the time of appointment reside within the geographical boundaries of the local sponsor and are required to file an oath of office within the time period provided by law. 1982 NY Ops Atty Gen March 15 (informal).

A member of the village board of trustees must be domiciled within the village in order to continue in office. Domicile is determined by applying the facts of each case. 1983 N.Y. Op. Att'y Gen. No. 83-44.

A town may enact a local law authorizing its building inspector to reside anywhere in the county in which the town is located. 1991 NY Ops Atty Gen I 91-37.

Positions of member of environmental conservation board and wetlands inspector of public offices are subject to residency requirements of § 3 of the Public Officers Law. NY Ops Atty Gen 89-56 (Informal).

The reasonable cost of investigating whether a town board member is still a town resident is a proper town charge in order to determine whether a vacancy exists. 1978 Op St Compt File #239.

Officers and employees of a municipal department of sanitation who reside in a county contiguous to such municipality may not be required to reside within the municipality. 1980 Op St Compt File #11.

28. —Incorporation of area as a city

Town officers residing in a village which will be incorporated as a city will vacate their town offices upon such incorporation unless the Legislature specifically provides to the contrary. 1962 NY Ops Atty Gen May 28.

Residence qualifications for holding village office are construed to mean domicile. A person may have several residences in the normal sense of the word but only one domicile. 1974 NY Ops Atty Gen Aug. 7 (informal).

Qualifications of officers and employees include residence. A city, by local law, may impose reasonable residence qualifications applicable to employment and continuation in employment of municipal employees but a local law requiring present employees living outside of the city to move into the city in order to continue

to qualify to be city employees could well be construed by the Courts to be an improper exercise of the home rule power. The foregoing opinion does not apply to certain particular employments if the residence qualifications therefor are prescribed by a general state statute. 1976 NY Ops Atty Gen Feb 23 (informal).

Only a court can determine domicile. 1977 NY Ops Atty Gen Nov 3.

The term "political subdivision" as used in the Public Officers Law means the area from which an officer is selected and in the case of an elective officer, the area in which the people who elect him reside. 1977 NY Ops Atty Gen Aug 18 (Informal), 1977 N.Y. AG LEXIS 64.

A village in making appointments from promotional lists to positions in the competitive class of the civil service, may not give preference to village residents. Subject to certain restrictions, a village may establish a residency requirement for appointment of village employees. 1981 NY Ops Atty Gen Aug 18 (Informal).

City may enact local law requiring that appointive city officers reside in county in which city is located. 1987 NY Ops Atty Gen No. 87-32 (informal).

It is unlikely that rational basis can be established for imposition of durational residency requirement on all employees of county government. 1993 NY Ops Atty Gen I 93-55.

29. Change of residence, removal from district

30. —Particular offices

31. — —Justices of the peace, police judges

When justice of peace moves from town in which he was elected, vacancy is created. 1921 N.Y. Op. Att'y Gen. No. 283.

32. — —Members of governing body

A member of the Board of County Legislators of Oneida County elected from one of the Legislative Districts in the City of Rome vacates his office upon changing his residency from such district. 1973 NY Ops Atty Gen Jan. 15.

When in a village which has adopted the ward system for the election of trustees, a trustee moves to a different ward in the village, a vacancy in office is created. 1976 NY Ops Atty Gen Nov 24 (informal).

A town board may not commence a proceeding for the removal of a town board member under Public Officers Law, § 36, or pay for the legal expense of such a proceeding but may commence an action at town expense for a declaratory judgment to determine whether a town board member has moved his residence and that as a result a vacancy exists on the board. 1978 NY Ops Atty Gen June 22.

The office of a town board member who moves out of the town becomes vacant automatically when he ceases to reside in the town. 1982 Op St Compt File #82-259.

33. — —Members of planning board or urban renewal agency

Removal of domicile by member of municipal urban renewal agency vacates such office and authorizes appointment of successor thereto. Where special statute creating such agency prescribes definite terms of office of members thereof, they do not serve at pleasure of appointing authority. 1966 NY Ops Atty Gen Dec. 6.

Only in a county of over 300,000 population may one member of a city or village planning commission reside outside such city or village. Removal from the city or village by any other member vacates the office. 1966 NY Ops Atty Gen March 17.

Members of Village Planning Boards or Commissions are public officers and, as such, vacate their offices upon removal of their residences from the village unless the Village Board has, by resolution, provided that appointive officers may reside outside the village but in the town in which the village is located. One member of a Village Planning Commission in a county containing a population of over 300,000 may reside outside of such village. 1971 NY Ops Atty Gen Oct. 14.

34. — —Police and fire personnel

Where a fire district commissioner ceases to be a resident of the fire district he vacates his office. However, an "extended vacation" by a fire commissioner does not provoke a vacancy in that office. 1959 NY Ops Atty Gen June 17 (informal).

35. — —Town or village clerks

The fact that a town clerk has a temporary abode outside of the town does not necessarily mean that she has vacated her office, because residence in the town may depend on intent. 1978 Op St Compt File #515.

Removal from district of member of board of visitors of hospital creates vacancy in office. 1929 N.Y. Op. Att'y Gen. No. 225.

An Assistant to the District Attorney of Onondaga County may maintain her residency in that County within the meaning of Section 3 of the Public Officers Law, despite the fact that she is temporarily living with her husband in assigned on-base housing in Seneca County while her husband is on active military duty. Living with her husband during this period is not in itself a change of domicile that would invoke the vacancy provision of Section 30 of the Public Officers Law. 1974 NY Ops Atty Gen Oct. 16.

A member of the Rochester-Monroe County Port Authority appointed by the Mayor of the City of Rochester, as a resident, to represent said City on said Authority, forfeits his office immediately by changing his residence from the City of Rochester to one of the towns within Monroe County. However, where a member's term expires and the appointing officer fails to appoint a successor, such member if otherwise qualified shall continue as a member of the Authority until his successor is appointed in accordance with Public Officers Law, § 5. 1976 NY Ops Atty Gen May 11.

An elected commissioner of Sanitary District No. 2 in the Town of Hempstead in the County of Nassau is a public officer of a political subdivision and not of a municipality; such a commissioner must be a resident of the sanitary district at the time of election; and if the sanitary district commissioner moves from that district to a new residence outside of the district, even though in the same town, the office becomes vacant under Public Officers Law § 30 subdivision 1 paragraph d. The provision of Public Officers Law § 30 subdivision 4-a, by its own terms, is confined in its operation to members of the department of sanitation of a municipality so it is not applicable to an officer of this political subdivision. 1977 NY Ops Atty Gen Aug 18 (Informal), 1977 N.Y. AG LEXIS 64.

A trustee of a cooperative library system vacates his office when he ceases to be a resident of the area served by the system. 1979 Op St Compt File #255.

The office of a special district commissioner becomes vacant when the office holder ceases to be a resident of the district. 1979 Op St Compt File #409.

Where an elected city officer ceases to be a resident of the city, a vacancy in his office is thereby created. 1955 NY Ops Atty Gen 83 (informal).

36. Creation of new offices

Where village establishes new office, board may designate an acting officer until regularly elected officer can qualify. 1926 N.Y. Op. Att'y Gen. No. 238.

Where a new office of judge of the Children's Court is created by resolution of a county board of supervisors and a certificate thereof is filed with the Secretary of State prior to August 1, a vacancy in office occurs which must be filled at the next general election. 1950 NY Ops Atty Gen June 22.

Upon the adoption of a resolution creating additional trustees in a village, vacancies in these offices may not be filled by appointment of the village board but by election at the next annual election. 1953 NY Ops Atty Gen 15 (informal).

Where a town has determined to increase the number of councilmen, the offices may not be filled as in the case of vacancies to newly created offices, but rather the offices should be filled at the next biennial town election. 1955 NY Ops Atty Gen 213 (informal).

When a village establishes the new office of Village Justice and an appointment is made to fill the office until a successor can be elected in due course, the successor, who is the first elected incumbent of the office, holds that office for a full-four year term. 1973 NY Ops Atty Gen Jan. 18.

The term of office of a village justice is four years. Where, through error, a village justice was elected on a ballot which specified a two-year term, the village justice serves the legal

four-year term. When the new office of village justice went into effect that office became vacant. The vacancy would be filled by an appointment until the next village election, at which time the office had to be filled for the statutory four-year term. 1975 NY Ops Atty Gen Oct. 3 (informal).

The eleven additional judgeships on the New York City Civil Court authorized by Chapter 500 of the Laws of 1982 may not be filled by appointment. It was the intent of the Legislature that these judges first be elected from districts established by law. Such districts never having been drawn, the offices were not created. 1983 NY Ops Atty Gen 83-F16.

Upon establishing the office of second village justice, the office may not be filled by appointment until such time as an election can be held. 1983 N.Y. Op. Att'y Gen. No. 83-32.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS County §§ 400, 402; CLS Gen City § 2-a.

Criminal liability for conduct of another, CLS Penal § 20.

Official misconduct, CLS Penal § 195.00.

Grand jury; protection of certain enumerated rights; waiver of immunity by public officers required, CLS NY Const Art I, § 6.

Vacancies in office; how filled, CLS NY Const Art XIII, § 3.

Removal from office for misconduct, CLS NY Const Art XIII, § 5.

When office to be deemed vacant; legislature may declare, CLS NY Const Art XIII, § 6.

Law enforcement and other officers, CLS NY Const Art XIII, § 13.

Jurisprudences:

18A NY Jur 2d Civil Servants and Other Public Officers and Employees §§ 59, 62, 63, 101, 102, 109, 148–157.

19 NY Jur 2d Civil Servants and Other Public Officers and Employees § 352.

26 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 510, 513, 529, 872, 865, 895.

35 NY Jur 2d Criminal Law § 3536.

35 NY Jur 2d Criminal Law Substantive Principles and Offenses § 223.

43 NY Jur 2d Declaratory Judgments and Agreed Case § 38.

64 NY Jur 2d Health and Sanitation § 34 .

88 NY Jur 2d Public Welfare and Old Age Assistance § 33.

97 NY Jur 2d Statutes § 183.

63C Am Jur 2d, Public Officers and Employees §§ 110, 113, 117, 122.

1 Am Jur Proof of Facts 45, Absence.

Annotations:

Conviction of offense under federal law or law of another state or country as vacating accused's holding of state or local office or as ground of removal. 20 ALR2d 732.

Injunction as remedy against removal of public officer. 34 ALR2d 554.

Assertion of immunity as ground for removing or discharging public officer or employee. 44 ALR2d 789.

What constitutes conviction within statutory or constitutional provision making conviction of crime ground of disqualification for, removal from, or vacancy in, public office. 71 ALR2d 593.

Elections: effect of conviction under federal law, or law of another state or country, on right to vote or hold public office. 39 ALR3d 303.

§ 36. Removal of town, village, improvement district or fire district officer by court

Any town, village, improvement district or fire district officer, except a justice of the peace, may be removed from office by the supreme court for any misconduct, maladministration, malfeasance or malversation in office. An application for such removal may be made by any citizen resident of such town, village, improvement district or fire district or by the district attorney of the county in which such town, village or district is located, and shall be made to the appellate division of the supreme court held within the judicial department embracing such town, village, improvement district or fire district. Such application shall be made upon notice to such officer of not less than eight days, and a copy of the charges upon which the application will be made must be served with such notice.

HISTORY:

Add, L 1909, ch 51; amd, L 1935, ch 377; L 1940, ch 543, eff April 15, 1940.

Notes to Decisions

Analysis

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1. In general

CLS Pub O § 36 was not exclusive procedural vehicle for removal of village superintendent of public works on misconduct charges and, in any event, court was foreclosed from considering whether charges under CLS Civ S § 75 were improper since issue had been raised and rejected in prior Article 78 proceeding from which no appeal was perfected. Logan v New Paltz, 129 A.D.2d 935, 514 N.Y.S.2d 573, 1987 N.Y. App. Div. LEXIS 45597 (N.Y. App. Div. 3d Dep't 1987).

Absent specific statutory authority to do so, public employer may not suspend employee, even where it has power to terminate his or her employment permanently, since power to suspend is not inherent lesser power included within power to terminate public employment. Whelan v Pitts, 150 A.D.2d 380, 540 N.Y.S.2d 536, 1989 N.Y. App. Div. LEXIS 5481 (N.Y. App. Div. 2d Dep't 1989).

Proceeding under CLS Pub O § 36 to remove certain town officers was moot as to those individuals who no longer held public office; petitioner's request that court make findings of misconduct which could then be raised against those individuals should they seek reelection would improperly add aspects of punishment to such proceeding and would represent nothing more than pointless exercise, for such findings are not bar to reelection. DeFalco v Doetsch, 208 A.D.2d 1047, 617 N.Y.S.2d 415, 1994 N.Y. App. Div. LEXIS 9842 (N.Y. App. Div. 3d Dep't 1994).

Court would dismiss petitions brought under CLS Pub O § 36 to remove public officers from their official positions for failing to execute waivers of immunity before testifying before grand jury where officials were subpoenaed to testify before grand jury investigating their conduct and were requested to execute waivers under penalty of removal from office. Curry v Rogers, 210 A.D.2d 784, 620 N.Y.S.2d 521, 1994 N.Y. App. Div. LEXIS 13071 (N.Y. App. Div. 3d Dep't 1994).

Public employee's failure to comply with notice requirements of CLS Pub O § 18(5) did not warrant denial of his claim for reimbursement of expenses and counsel fees in connection with defense of grand jury proceeding and removal proceeding where both proceedings concerned employee's actions as public servant,

county was well aware of both proceedings, employee personally notified County Attorney of his need for counsel in grand jury matter, removal proceeding was interconnected with grand jury proceeding, and county had not designated any other officer to serve as its agent for purpose of receiving statutory notice after County Attorney recused himself prior to employee's being summoned to appear. Hunt v Hamilton County, 235 A.D.2d 758, 652 N.Y.S.2d 402, 1997 N.Y. App. Div. LEXIS 350 (N.Y. App. Div. 3d Dep't 1997).

Simply because County District Attorney commenced grand jury proceeding and removal proceeding against town supervisor did not warrant conclusion that they were brought "by or at the behest of the public entity employing such an employee" (CLS Pub O § 18(3)(a) so as to justify refusal to defend supervisor. Hunt v Hamilton County, 235 A.D.2d 758, 652 N.Y.S.2d 402, 1997 N.Y. App. Div. LEXIS 350 (N.Y. App. Div. 3d Dep't 1997).

In action under CLS Pub O § 36 to remove town supervisor from office, costs of $750 would be assessed against supervisor under CLS Unif Tr Ct Rls § 130-1.1(c)(2) (22 NYCRR § 130-1.1(c)(2)), for conduct "undertaken primarily to delay or prolong the resolution of the litigation," where, after supervisor and his attorney asserted that attorney's testimony would not be required and that therefore no conflict of interests existed, supervisor submitted affidavit stating for first time that he intended to call his attorney as witness, which necessitated change of counsel and caused delay and expense to petitioners. West v Grant, 238 A.D.2d 803, 656 N.Y.S.2d 516, 1997 N.Y. App. Div. LEXIS 4139 (N.Y. App. Div. 3d Dep't 1997).

Where a town highway superintendent admitted to official misconduct in exercising his duties as a town officer in violation of N.Y. Penal Law § 195.00(1), summary removal under N.Y. Pub. Off. Law § 36 was warranted for the misconduct, which violated the public trust. Grady v Yeno, 302 A.D.2d 385, 754 N.Y.S.2d 562, 2003 N.Y. App. Div. LEXIS 776 (N.Y. App. Div. 2d Dep't 2003).

Grand jury's indictment of town supervisor for various crimes did not bar, under doctrine of collateral estoppel, bringing of proceeding to remove supervisor from office. Application of Baker, 87 Misc. 2d 592, 386 N.Y.S.2d 313, 1976 N.Y. Misc. LEXIS 2261 (N.Y. Sup. Ct. 1976).

Public officer appointed for fixed statutory term may be removed prior to expiration of term only by proceedings under this section; whether individual is public officer or employee depends on number of factors including whether, in carrying out duties of position, individual exercises some part of sovereign power. Ops St Compt 88-49.

2. Constitutionality

Statute authorizing Supreme Court to remove town officer for malfeasance, misconduct, maladminsitration and malversation in office is not an unconstitutional delegation of legislative power. Application of Baker, 87 Misc. 2d 592, 386 N.Y.S.2d 313, 1976 N.Y. Misc. LEXIS 2261 (N.Y. Sup. Ct. 1976).

Statute authorizing Supreme Court to remove a town officer for malfeasance, misconduct, maladministration and malversation in office is not unconstitutionally vague or overbroad. Application of Baker, 87 Misc. 2d 592, 386 N.Y.S.2d 313, 1976 N.Y. Misc. LEXIS 2261 (N.Y. Sup. Ct. 1976).

3. Authority of town or village board

Town Law, § 20, provides that a town board may establish the office of "town attorney" and fix his salary, but no power is granted to such board to remove a town attorney, duly appointed and qualified, from his office, and he may be removed only by proceedings under Pub § 36. Sullivan v Taylor, 279 N.Y. 364, 18 N.E.2d 531, 279 N.Y. (N.Y.S.) 364, 1939 N.Y. LEXIS 865 (N.Y. 1939).

Employee who was reappointed to position as Village Clerk was a public officer and village mayor and board of trustees improperly removed employee from that position by meeting in executive session and voting to terminate her employment. Enos v Vill. of Seneca Falls, 288 A.D.2d 853, 732 N.Y.S.2d 785, 2001 N.Y. App. Div. LEXIS 10578 (N.Y. App. Div. 4th Dep't 2001).

4. Who may make application for removal

The Appellate Division of the Supreme Court has no authority to entertain an original proceeding for removal of a town officer, under § 36 of the Public Officers Law, where the petitioner is an Assistant Attorney-General specially appointed under subd. 2 of § 63 of the Executive Law who is neither a resident of the town nor District Attorney of the county. Application of Tompkins, 11 A.D.2d 895, 202 N.Y.S.2d 894, 896, 1960 N.Y. App. Div. LEXIS 8432 (N.Y. App. Div. 3d Dep't 1960).

Corporation composed of citizens of village was not "citizen resident" of village and therefore had no standing to bring action to remove village trustees. In re Citizens Council New Hyde Park, Inc., 55 A.D.2d 911, 390 N.Y.S.2d 438, 1977 N.Y. App. Div. LEXIS 10156 (N.Y. App. Div. 2d Dep't 1977).

A citizen and taxpayer of the City of New York had standing to bring an action for a judgment directing the mayor of the City of New York to discharge the corporation counsel of the city. Blaikie v Lindsay, 66 Misc. 2d 668, 321 N.Y.S.2d 388, 1971 N.Y. Misc. LEXIS 1667 (N.Y. Sup. Ct. 1971).

5. Who may be removed

Water commissioner is not town officer within meaning of this section. Bryan v Town Board of Brighton, 232 N.Y.S. 18, 133 Misc. 315, 1928 N.Y. Misc. LEXIS 1171 (N.Y. Sup. Ct. 1928).

The chief engineer of a fire department is not a public officer within the meaning of § 2 but is an employee and § 36 has no application in respect of his removal from office. Application of Barber, 100 N.Y.S.2d 668, 198 Misc. 135, 1950 N.Y. Misc. LEXIS 2169 (N.Y. Sup. Ct. 1950), aff'd, 278 A.D. 600, 101 N.Y.S.2d 924, 1951 N.Y. App. Div. LEXIS 4071 (N.Y. App. Div. 1951).

Procedure for removal of town officer, except justice of the peace. 1946 Ops St Compt 462.

Although a town comptroller is not within the protection of § 75 of the Civil Service Law, he can be removed from office, prior to expiration of his term, only pursuant to proceedings conforming to this section. 1961 Ops St Compt #550.

The chairman of the Board of Fire Commissioners, elected pursuant to § 176 of the Town Law, is subject to removal under this section. 1961 Ops St Compt #616.

A member of a board of assessment review may be removed from office pursuant to section 36 of the Public Officers Law and section 75 of the Civil Service Law. 4 Op Counsel, SBEA #27.

6. Grounds for removal

Where public officer is guilty of illegal act or omission with respect to his office, he may be removed whether or not act was done maliciously or corruptly. In re Moran, 145 A.D. 642, 130 N.Y.S. 432, 1911 N.Y. App. Div. LEXIS 4810 (N.Y. App. Div. 1911).

Public Officers Law § 36 empowers court to remove public official for what amounts to intentional wrongdoing, moral turpitude, or a violation of a public trust. In re Pisciotta, 41 A.D.2d 949, 343 N.Y.S.2d 992, 1973 N.Y. App. Div. LEXIS 4415 (N.Y. App. Div. 2d Dep't 1973).

Section 36 of the Public Officers Law, which provides that a town officer may be removed for any misconduct, maladministration, malfeasance or malversation in office, was intended to improve public service, not to punish the offender, and, generally, the courts have declined to remove an officer where the charges are not based on any malicious or corrupt acts but involve minor neglect of duties, administrative oversights, or violations of law. Deats v Carpenter, 61 A.D.2d 320, 403 N.Y.S.2d 128, 1978 N.Y. App. Div. LEXIS 9740 (N.Y. App. Div. 3d Dep't 1978).

A petition to remove respondent from the office of village clerk would be dismissed, where the record did not establish the intentional wrongdoing, moral turpitude or violation of public trust required by Pub O § 36 to justify removal. In re Greco, 99 A.D.2d 810, 472 N.Y.S.2d 140, 1984 N.Y. App. Div. LEXIS 17200 (N.Y. App. Div. 2d Dep't 1984).

Resident's allegations in a proceeding seeking to remove trustees, which claimed that the trustees, in a meeting addressing the proposed location of a skateboard park, improperly returned to open session after going into executive session, on the record but in the absence of members of the public, withdrew its informal, preliminary approval for the skateboard park at a location discussed with members of the public earlier, and failed to note a change of position in the board's minutes or notify the public of a change in the date of its next meeting, at which the board, in open session, voted to preliminarily approve another site, did not rise

to the level of unscrupulous conduct or gross dereliction of duty or connote a pattern of misconduct and abuse of authority justifying removal. Matter of Hart v Trumansburg Bd. of Trustees, 41 A.D.3d 1025, 838 N.Y.S.2d 246, 2007 N.Y. App. Div. LEXIS 7334 (N.Y. App. Div. 3d Dep't 2007).

On proper application, proceedings may be instituted before the Appellate Division for removal of the fire district treasurer for nonfeasance. 1967 Ops St Compt File #1025.

7. —Acts prior to current term of office

Where petition to remove trustee or other village official sets up acts prior to election, court has no statutory authority to act. Court may only remove officer for misconduct while in office. In re Myers, 170 A.D. 947, 155 N.Y.S. 1126, 1915 N.Y. App. Div. LEXIS 5642 (N.Y. App. Div. 1915).

Election of supervisor for his present third term is not bar to proceeding for his removal for alleged misconduct during his prior terms, where it appears that alleged misdeeds were not known to people of his town at time of election. Newman v Strobel, 236 A.D. 371, 259 N.Y.S. 402, 1932 N.Y. App. Div. LEXIS 5975 (N.Y. App. Div. 1932).

In proceedings to remove from office a town Superintendent of Highways, who had been in office from 1952 to 1959, for allegedly taking kickbacks on various road oil purchases for the town in the years 1953 to 1957, a prosecution could not be considered as barred by the fact that his misconduct was not based on acts committed in his present or prior term of office, or by limitations found in §§ 50 and 52 of the Civil Practice Act. Corwin v Mercier, 14 A.D.2d 652, 218 N.Y.S.2d 718, 1961 N.Y. App. Div. LEXIS 9439 (N.Y. App. Div. 3d Dep't 1961).

It is clear that a public officer may be removed for acts within the purview of this section committed during his preceding term of office, such as larceny of public funds. Application of Abare, 21 A.D.2d 84, 248 N.Y.S.2d 826, 1964 N.Y. App. Div. LEXIS 3998 (N.Y. App. Div. 3d Dep't 1964).

Conviction of a public officer of larceny of public funds was prima facie evidence of misconduct on his part within the coverage of this section, including intent to defraud or appropriate, and his re-election to the same office while the charges were still pending against him, after informing the public that he would acquit himself of the charges, would not require dismissal of the proceedings to remove him under this section, particularly in view of the fact that he pleaded guilty to the charges after re-election. Application of Abare, 21 A.D.2d 84, 248 N.Y.S.2d 826, 1964 N.Y. App. Div. LEXIS 3998 (N.Y. App. Div. 3d Dep't 1964).

Court would grant application for removal of respondent from his position as town superintendent of highways following his conviction in federal court for violating 18 USCS § 1341, involving scheme to defraud town, notwithstanding that voters were fully informed of his conviction when they reelected him. Phillips v Dally, 143 A.D.2d 273, 532 N.Y.S.2d 32, 1988 N.Y. App. Div. LEXIS 8912 (N.Y. App. Div. 2d Dep't 1988).

Removal of town supervisor was appropriate, even though his conviction for violation of CLS Gen Mun §§ 801 and 805 occurred and was well publicized prior to his last reelection, since he conveniently pleaded guilty 4 days prior to election, and he had no opponent. West v Grant, 243 A.D.2d 815, 662 N.Y.S.2d 863, 1997 N.Y. App. Div. LEXIS 10114 (N.Y. App. Div. 3d Dep't 1997).

Reelection of town supervisor after his alleged violations of the public Officers Law did not constitute a condonation of his alleged acts of misconduct where citizens of town were not apprised of all charges made against town supervisor until after his election and supervisor emphatically denied any wrongdoing or misconduct on his part. Application of Baker, 87 Misc. 2d 592, 386 N.Y.S.2d 313, 1976 N.Y. Misc. LEXIS 2261 (N.Y. Sup. Ct. 1976).

8. —Particular conduct

Despite evidence of technical violations of the Village Law, certain administrative oversights and some municipal accounting deficiencies, mayor of village would not be removed pursuant to Public Officers Law § 36 as most of the problems were attributable to his inexperience in handling affairs of newly incorporated village; however, should the technical violations of the Village Law and the municipal accounting deficiencies continue unabated, such continuation may well be deemed an intentional disregard of official responsibilities, sufficient to constitute a new basis for removal proceedings. In re Pisciotta, 41 A.D.2d 949, 343 N.Y.S.2d 992, 1973 N.Y. App. Div. LEXIS 4415 (N.Y. App. Div. 2d Dep't 1973).

A petition for the removal of a Town Supervisor and Town Clerk, whose actions resulted in delaying a duly scheduled special election, is dismissed; the petition contains no allegations of self-dealing, corrupt activities, conflict of interest, moral turpitude, intentional wrongdoing or violation of a public trust, and the conduct of the officers, while justifiably subject to criticism, is not such as to warrant their removal pursuant to section 36 of the Public Officers Law, which provides that a town officer may be removed for any misconduct, maladministration, malfeasance or malversation in office. Deats v Carpenter, 61 A.D.2d 320, 403 N.Y.S.2d 128, 1978 N.Y. App. Div. LEXIS 9740 (N.Y. App. Div. 3d Dep't 1978).

Removal of a village mayor from office pursuant to Pub O § 36 was warranted by his conviction of the crime of official misconduct for his attempt to use his office to influence a witness's testimony. Smith v Perlman, 105 A.D.2d 878, 482 N.Y.S.2d 77, 1984 N.Y. App. Div. LEXIS 21007 (N.Y. App. Div. 3d Dep't 1984).

Summary disposition of proceeding under CLS Pub O § 36 to remove fire district commissioner for his "malicious or corrupt acts" was not warranted, and thus matter would be remitted for full hearing, even though commissioner had pleaded guilty to 2 counts of harassment, since such convictions were not sufficient, standing alone, to warrant imposition of sanction of removal from office without hearing; however, removal from office might be warranted if allegations concerning commissioner's involvement in transactions underlying convictions were proved true, and if some connection between transactions and his office were shown. Henry v Audette, 148 A.D.2d 452, 538 N.Y.S.2d 609, 1989 N.Y. App. Div. LEXIS 2484 (N.Y. App. Div. 2d Dep't 1989).

Petition failed to state cause of action to remove Town Superintendent of Highways as allegations that respondent acted in derogation of his oath of office and Highway Law, by ordering discontinuation of portion of certain town road, did not constitute sort of unscrupulous conduct or gross dereliction of duty contemplated by CLS Pub O § 36. Salvador v Naylor, 222 A.D.2d 931, 635 N.Y.S.2d 769, 1995 N.Y. App. Div. LEXIS 13373 (N.Y. App. Div. 3d Dep't 1995).

Removal of town supervisor was warranted where his personally owned insurance agency brokered town's insurance, he shared commissions therein, he took steps to disguise situation by having another broker named as broker of record, he was aware prior to being elected that there was conflict of interest, and he was convicted on his guilty plea to violation of CLS §§ 801 and 805 for willful and knowing violation of conflict of interest provisions as to his personal interest in town's insurance business. West v Grant, 243 A.D.2d 815, 662 N.Y.S.2d 863, 1997 N.Y. App. Div. LEXIS 10114 (N.Y. App. Div. 3d Dep't 1997).

Removal from office was justified where village clerk/treasurer engaged in pattern of intentional misconduct over 2-year period involving misappropriation of village funds. Kenyon v Pifer, 255 A.D.2d 986, 679 N.Y.S.2d 859, 1998 N.Y. App. Div. LEXIS 12264 (N.Y. App. Div. 4th Dep't 1998).

Pattern of routine disregard of mandates of law and procedure by various village officials was suggestive of gross dereliction or intentional disregard of duties that could justify their removal from public office under CLS Pub O § 36. Gumo v Canzoneri, 263 A.D.2d 456, 693 N.Y.S.2d 618, 1999 N.Y. App. Div. LEXIS 7805 (N.Y. App. Div. 2d Dep't 1999).

The Mayor of a village was not holding his office illegally because at the time of his nomination to such office and his election thereto he was the owner of a business wherein alcoholic beverages were sold for off-premises consumption. Harrell v Goldin, 124 N.Y.S.2d 627, 1953 N.Y. Misc. LEXIS 2222 (N.Y. Sup. Ct. 1953).

Because neither a fire district commissioner's alleged misconduct in disclosing the confidential contents of a letter nor the treasurer's alleged shortcomings in managing records and transferring funds demonstrated unscrupulous conduct or gross dereliction of duty or otherwise connoted a pattern of misconduct and abuse of authority, removal under N.Y. Pub. Off. Law § 36 was

not warranted. Matter of Chandler v Weir, 30 A.D.3d 795, 817 N.Y.S.2d 194, 2006 N.Y. App. Div. LEXIS 7955 (N.Y. App. Div. 3d Dep't 2006).

Resident's petition to remove a town supervisor under N.Y. Pub. Off. Law § 36 failed to state a cause of action; even if true, the allegation that the supervisor failed to submit an officer's statement with a contract payment voucher, as required by N.Y. Town Law § 118, did not constitute the unscrupulous conduct or gross dereliction of duty needed for removal. Matter of Price v Evers, 45 A.D.3d 1075, 845 N.Y.S.2d 553, 2007 N.Y. App. Div. LEXIS 11719 (N.Y. App. Div. 3d Dep't 2007).

Removal of fire district commissioners who have authorized a contract between the district and a fire company of which they are members discussed. 1953 Ops St Compt 380.

A town officer, other than a justice of the peace, may be removed from office by the Appellate Division of the Supreme Court on grounds of misconduct, maladministration, etc., and inability to perform the duties of office by reason of long illness might constitute maladministration. 1961 Ops St Compt #922.

A town superintendent of highways may be removed from office if he fails to perform his duties. The mere holding of a second position of employment or the failure to spend a definite number of hours performing the duties of his office are not sufficient reason for his removal. 1964 Ops St Compt File #880.

9. — —Assessment favoritism

Removal of 3 town officers (chair of tax assessors and 2 town board members) was appropriate where, inter alia, (1) they all improperly influenced town board of assessment review to alter certain decisions it had made as to properties in petitioner's development, (2) chair of tax assessors made at least some "red ink" changes to tentative assessment roll without following procedure under CLS RPTL § 552, (3) town board members improperly removed town attorney from office prior to expiration of his term,and they participated in several board meetings that were held in private, without notice, and for which no minutes were kept, and (4) board members, acting wholly on basis of suspicion and surmise, without making attempt to verify matters asserted, drafted and sent letter, containing allegations of conspiracy and wrongdoing on part of town supervisor, petitioner, and postal inspector who had been involved in pending investigation of officers' activities, to United States Attorney and United States Postal Service. DeFalco v Doetsch, 208 A.D.2d 1047, 617 N.Y.S.2d 415, 1994 N.Y. App. Div. LEXIS 9842 (N.Y. App. Div. 3d Dep't 1994).

Town assessor may be removed from office for showing favoritism in assessing property. 1947 Ops St Compt 270.

10. — —Refusal to furnish reports

Where a town supervisor willfully refuses to furnish a monthly report pursuant to Town Law § 119 he may be removed from office and/or prosecuted for the violation of §§ 1841 and/or 1857 of the Penal Law. 1957 Ops St Compt 250.

11. — —Receipt of funds

Trustees of village should not be removed from office, under this section upon ground that they have received compensation from village for labor performed and for merchandise furnished, in violation of Vill. Law, §§ 332 and 333, where it appears that said trustees acted in good faith, without knowledge of illegality of transactions, and to best interests of village. Application of Slack, 234 A.D. 7, 254 N.Y.S. 669, 1931 N.Y. App. Div. LEXIS 8279 (N.Y. App. Div. 1931).

On proceeding under this section for removal of village trustee for alleged misconduct in office, acceptance by trustee of twenty-five dollars from village for his services and expenses, in connection with organization of certain territory into water district is not in violation of Penal Law, § 1868 or Vill. Law, § 332. Wolfe v Trask, 249 A.D. 11, 290 N.Y.S. 970, 1936 N.Y. App. Div. LEXIS 5021 (N.Y. App. Div. 1936).

Removal of a constable under this section was unjustified where he violated the form of the law in presentation of his bill for services but there was no question but that the services were actually rendered. In re Reidulski, 257 A.D. 962, 12 N.Y.S.2d 624, 1939 N.Y. App. Div. LEXIS 8699 (N.Y. App. Div. 1939).

Where a town superintendent of highways appropriated money for his own personal use, such conduct constituted malfeasance in office justifying his removal. Application of Wilcox, 278 A.D. 1002, 105 N.Y.S.2d 634, 1951 N.Y. App. Div. LEXIS 5482 (N.Y. App. Div. 1951).

Public officer's larceny of public funds constitutes grounds for his removal as does corrupt bargaining for appointment and bribery. Application of Baker, 87 Misc. 2d 592, 386 N.Y.S.2d 313, 1976 N.Y. Misc. LEXIS 2261 (N.Y. Sup. Ct. 1976).

12. — —Failure to attend meetings

Defendant who while member of Congress and town supervisor was absent from town and county board meetings and left checks signed in blank for his clerk to use to pay town bills was not guilty of "misconduct, maladministration, malfeasance or malversation in office." Luce v Beiter, 239 A.D. 23, 265 N.Y.S. 61, 1933 N.Y. App. Div. LEXIS 7940 (N.Y. App. Div. 1933).

Proceeding under CLS Pub O § 36 to remove certain village officials from public office was moot as to those individuals who no longer occupied public office. Gumo v Canzoneri, 263 A.D.2d 456, 693 N.Y.S.2d 618, 1999 N.Y. App. Div. LEXIS 7805 (N.Y. App. Div. 2d Dep't 1999).

13. Service of notice of petition and charges

Proceeding to remove respondent from his elected position as town supervisor would be dismissed since personal jurisdiction was not obtained where undated petition was served on respondent personally on or about June 28, 1990 and notice of petition was served by itself, by mail, on July 12, 1990; CLS Pub O § 36 requires that notice of petition and charges be served together. Campisi v Scelba, 166 A.D.2d 442, 560 N.Y.S.2d 495, 1990 N.Y. App. Div. LEXIS 11748 (N.Y. App. Div. 2d Dep't 1990).

14. Standard of proof

Special proceeding under CLS Pub O § 36 seeking removal of respondent as mayor of village would be dismissed where verified petition alleged 12 causes of action, each of which was based on hearsay, and respondent's verified answer was based on personal knowledge and was supported by affidavit of person with personal knowledge. Young v Costantino, 281 A.D.2d 988, 722 N.Y.S.2d 678, 2001 N.Y. App. Div. LEXIS 2850 (N.Y. App. Div. 4th Dep't 2001).

Although a proceeding for removal of town officer because of misconduct, malfeasance, maladministration or malversation in office is quasi criminal in nature and requires a finding of wrongdoing and misconduct, petitioners are not required to prove the facts of the proceeding beyond a reasonable doubt. Application of Baker, 87 Misc. 2d 592, 386 N.Y.S.2d 313, 1976 N.Y. Misc. LEXIS 2261 (N.Y. Sup. Ct. 1976).

15. Judicial review

In proceeding under CPLR § 7804(g) to review removal of member of village library and planning boards there was not substantial evidence to support removal of petitioner under charges of unauthorized tampering with materials in police custody and of improper criticism of officials. Gersh v Tuckahoe, 23 A.D.2d 258, 260 N.Y.S.2d 75, 1965 N.Y. App. Div. LEXIS 4064 (N.Y. App. Div. 2d Dep't 1965).

Trial court properly annulled a town's determination to remove petitioner as the assessor of the town, concluding that he was entitled to complete the term, because petitioner's term of office did not end when the town withdrew from the coordinated assessment program, thus, he held a right to continued employment until the expiration of his term. Matter of Rubeor v Town of Wright, 134 A.D.3d 1211, 20 N.Y.S.3d 730, 2015 N.Y. App. Div. LEXIS 8987 (N.Y. App. Div. 3d Dep't 2015), app. denied, 27 N.Y.3d 902, 51 N.E.3d 564, 32 N.Y.S.3d 53, 2016 N.Y. LEXIS 441 (N.Y. 2016).

A village treasurer may not be removed from office by the village board of trustees before his term of office has expired, except for misconduct. Should such an officer be removed he could challenge the removal by instituting a proceeding against the village board under Article 78 of the Civil Practice Law and Rules. 1966 Ops St Compt File #603.

16. Effect of removal on reelection

Removal of public officer under CLS Pub O § 36 is for entire term of that office; however, officer may subsequently be elected to new term of same office. 1994 Op St Compt No. I 94-33.

Agency Opinions

Analysis

1. In general
2. Authority of town or village board
3. Who may make application for removal
4. Who may be removed
5. Grounds for removal
6. —Particular conduct
7. — —Assessment favoritism
8. — —Holding more than one position
9. — —Refusal to furnish reports
10. — —Failure to attend meetings
11. Effect of removal on reelection

1. In general

Either procedure for removal is available, but the Court might require initial action by the Village Board of Trustees; if the Village Board of Trustees is the complainant the village attorney would prosecute, otherwise the complainant must provide his own attorney; the board member is responsible to provide his own defense. 1967 NY Ops Atty Gen July 18.

Different procedures govern the removal from office of an appointed town assessor and an elected town assessor. 1979 Op St Compt File #623.

2. Authority of town or village board

Village board of trustees may enact local law establishing procedure for removal for cause of appointive village offices. 1992 NY Ops Atty Gen I 92-45.

A town board is not authorized to conduct an investigation into allegations of misconduct raised against the town highway superintendent for the purpose of determining whether a proceeding under Public Officers Law, § 36, for the removal of the superintendent should be commenced. N.Y. Op. Att'y Gen. No. 83-42.

A town may not reimburse the town supervisor for legal expenses incurred in defending himself in removal and criminal proceedings. 1978 Op St Compt File #992.

A town board does not have the authority to remove the town clerk from office for failure to perform his duties. The board may withhold his salary for failure to submit monthly reports and revenues to the supervisor but may not withhold his salary for any other reason. 1980 Op St Compt File #555.

3. Who may make application for removal

A board of trustees may remove or suspend a village clerk in accordance with the procedure set out in this section. 1955 NY Ops Atty Gen March 22 (informal).

A town board may not commence a proceeding for the removal of a town board member under Public Officers Law, § 36, or pay for the legal expense of such a proceeding but may commence an action at town expense for a declaratory judgment to determine whether a town board member has moved his residence and that as a result a vacancy exists on the board. 1978 NY Ops Atty Gen June 22.

A town officer may be removed from office only upon an application to the Supreme Court by the district attorney of the town's county or by a citizen resident in the town. A town itself may not initiate removal proceedings. 1979 NY Ops Atty Gen Oct 17 (informal).

Village trustee who believes that village clerk is failing to perform clerk's duties may, in his or her capacity as resident of village, apply to Appellate Division for removal of clerk under CLS Pub O § 36; alternatively, board of trustees may commence Article 78 proceeding against clerk to compel performance of statutory duties. 2005 NY Ops Atty Gen I 05-1.

Neither the town board nor any State agency is the proper party to initiate removal proceedings. 1978 Op St Compt File #239.

4. Who may be removed

A fire commissioner may be removed from office only in accordance with the provisions of Public Officers Law § 36. 1971 NY Ops Atty Gen Jan. 5.

The highway superintendent serves a fixed term of office and may only be removed from office during his term pursuant to section 36 of the Public Officers Law or section 160 of the Highway Law. 1977 NY Ops Atty Gen May 6.

The terms "special district" and "improvement district" are synonymous and are used interchangeably in the statutes. The provisions of Public Officers Law § 36 for removal of town, village, improvement district or fire district officers are applicable to officers of what the Nassau County Civil Divisions Act refers to as "special districts" including removal of a commissioner of the Port Washington Police District. 1980 NY Ops Atty Gen April 14 (Informal), 1980 N.Y. AG LEXIS 134.

New York State law does not provide for "recall" of a fire district commissioner, but does authorize removal for cause under specified circumstances and procedures. 1978 Op St Compt File #747.

A town board member who consistently neglects to attend board meetings might be removed from office under Public Officers Law, § 36. 1978 Op St Compt File #1057.

5. Grounds for removal

6. —Particular conduct

7. — —Assessment favoritism

A proceeding to remove an elected assessor from office must be brought pursuant to the provisions of section 36 of the Public Officers Law. If proven, a charge of favoritism in assessing property constitutes grounds for removal from office. 6 Op Counsel SBEA #113 (1980 May 1).

8. — —Holding more than one position

Assuming that the performance of the official duties of either office would not interfere with the other, the same person may at the same time hold the two public offices of Village Fire Chief and Town Superintendent of Highways. 1971 NY Ops Atty Gen Dec. 28.

The same person simultaneously may hold the office of town supervisor or town councilman in a town in Westchester County and the county office of deputy sheriff. This conclusion necessarily is subject to any provision of a local code of ethics or opinion of a local board of ethics having jurisdiction. 1981 NY Ops Atty Gen May 28 (informal).

9. — —Refusal to furnish reports

Where a supervisor intentionally or willfully fails to submit his monthly and annual financial reports to the town board or fails to keep his books of account in proper order, (1) any citizen resident of the town may present to the Appellate Division of the Supreme Court an application for removal of such officer from office, or (2) the town board may bring an Article 78 proceeding in the nature of mandamus seeking a court order requiring the supervisor to properly perform his official duties, or (3) the town board may create the position of town comptroller and designate him as the accounting officer of the town with responsibility for keeping detailed accounting records, filing the annual financial reports with the town clerk, and filing the monthly financial reports with the town board. 1982 Op St Compt File #82-252.

10. — —Failure to attend meetings

A town board does not have authority to pass a local law requiring town board members to attend regular board meetings and work sessions and, in default of such attendance, empowering the town board to declare the office vacant. 1978 NY Ops Atty Gen June 22 (Informal), 1978 N.Y. AG LEXIS 106.

A city recreation commission may not include in its rules of procedure a provision for removal of a member upon his failure to attend a specified number of meetings. The legislative body of the city may establish attendance requirements for appointive city offices. 1985 N.Y. Op. Att'y Gen. No. 85-31.

A town board member who consistently neglects to attend board meetings might be removed from office under Public Officers Law, § 36. 1978 Op St Compt File #1057.

11. Effect of removal on reelection

A town supervisor removed from office for misconduct may be nominated and elected to a new term as town supervisor. 1979 Op St Compt File #588.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Grand jury; grand jury reports, CLS CPL § 190.85.

Jurisprudences:

18A NY Jur 2d Civil Servants and Other Public Officers and Employees §§ 109, 117, 118, 127, 128, 130 .

26 NY Jur 2d Counties, Towns, and Municipal Corporations § 525 .

63C Am Jur 2d, Public Officers and Employees §§ 115, 161, 214, 630.

15A Am Jur Legal Forms 2d, Public Officers, Forms 213:51 et seq.

Annotations:

Assertion of immunity as ground for removing or discharging public officer or employee. 44 ALR2d 789.

Solicitation or receipt of funds by public officer or employee for political campaign expenses or similar purposes as bribery. 55 ALR2d 1137.

Removal of public officer for misconduct during previous term. 42 ALR3d 691.

Refusal to submit to polygraph examination as ground for discharge or suspension of public employees or officers. 15 ALR4th 1207.

ARTICLE 6 Freedom of Information Law

Section

86. Definitions
87. Access to agency records.
89. General provisions relating to access to records; certain cases.

HISTORY:

Add, L 1977, ch 933, § 1, eff Jan 1, 1978.

§ 86. Definitions

As used in this article, unless the context requires otherwise:

1. "Judiciary" means the courts of the state, including any municipal or district court, whether or not of record.

2. "State legislature" means the legislature of the state of New York, including any committee, subcommittee, joint committee, select committee, or commission thereof.

3. "Agency" means any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature.

4. "Record" means any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes.

5. "Critical infrastructure" means systems, assets, places or things, whether physical or virtual, so vital to the state that the disruption, incapacitation or destruction of such systems, assets, places or things could jeopardize the health, safety, welfare or security of the state, its residents or its economy.

6. "Law enforcement disciplinary records" means any record created in furtherance of a law enforcement disciplinary proceeding, including, but not limited to:

(a) the complaints, allegations, and charges against an employee;

(b) the name of the employee complained of or charged;

(c) the transcript of any disciplinary trial or hearing, including any exhibits introduced at such trial or hearing;

(d) the disposition of any disciplinary proceeding; and

(e) the final written opinion or memorandum supporting the disposition and discipline imposed including the agency's complete factual findings and its analysis of the conduct and appropriate discipline of the covered employee.

7. "Law enforcement disciplinary proceeding" means the commencement of any investigation and any subsequent hearing or disciplinary action conducted by a law enforcement agency.

8. "Law enforcement agency" means a police agency or department of the state or any political subdivision thereof, including authorities or agencies maintaining police forces of individuals defined as police officers in section 1.20 of the criminal procedure law, a sheriff's department, the department of corrections and community supervision, a local department of correction, a local probation department, a fire department, or force of individuals employed as firefighters or firefighter/paramedics.

9. "Technical infraction" means a minor rule violation by a person employed by a law enforcement agency as defined in this section as a police officer, peace officer, or firefighter or firefighter/paramedic, solely related to the enforcement of administrative departmental rules that (a) do not involve interactions with members of the public, (b) are not of public concern, and (c) are not otherwise connected to such person's investigative, enforcement, training, supervision, or reporting responsibilities.

HISTORY:

Add, L 1977, ch 933, § 1, eff Jan 1, 1978, with substance derived from former § 87; amd, L 2003, ch 403, § 2, eff Aug 26, 2003; L 2020, ch 96, § 2, effective June 12, 2020.

Prior Law: Former § 86, add, L 1974, ch 578, § 2; repealed, L 1977, ch 933, § 1, eff Jan 1, 1978.

Amendment Notes The 2020 amendment by ch 96, § 2, added 6 through 9.

Notes to Decisions

Analysis

I. "Judiciary"

1. Board of Law Examiners
2. Commissioner of Jurors
3. Court-appointed receivers
4. District Attorney's subpoenas
5. New York City public administrators

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B. Specific Records

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IV. Under Former § 87

60. In general

I. "Judiciary"

1. Board of Law Examiners

State Board of Law Examiners exercises a judicial function and is therefore part of the "judiciary"; it is excluded from the definition of "agency" for purposes of the FOIL. Pasik v State Bd. of Law Examiners, 102 A.D.2d 395, 478 N.Y.S.2d 270, 1984 N.Y. App. Div. LEXIS 18797 (N.Y. App. Div. 1st Dep't 1984).

2. Commissioner of Jurors

Newspaper publisher could not compel Commissioner of Jurors to release names and addresses of jurors in murder trial, even if CLS Jud § 509 did not apply, since commissioner, as court officer, is considered part of judiciary and therefore is not subject to CLS Pub O § 86. Newsday, Inc. v Sise, 120 A.D.2d 8, 507 N.Y.S.2d 182, 1986 N.Y. App. Div. LEXIS 58997 (N.Y. App. Div. 2d Dep't 1986), aff'd, 71 N.Y.2d 146, 524 N.Y.S.2d 35, 518 N.E.2d 930, 1987 N.Y. LEXIS 20000 (N.Y. 1987)).

3. Court-appointed receivers

Superintendent of Insurance, as liquidator, and Liquidation Bureau, as with any other court-appointed receiver, enjoy judicial privilege under CLS Pub O § 86(3) and thus are specifically exempted from disclosure requirements of Freedom of Information Law. Consolidated Edison Co. v Insurance Dep't of State, 140 Misc. 2d 969, 532 N.Y.S.2d 186, 1988 N.Y. Misc. LEXIS 511 (N.Y. Sup. Ct. 1988).

4. District Attorney's subpoenas

Respondent state agency was not required by Freedom of Information Law (FOIL) to release copies of subpoenas served by district attorney's office, as subpoenas are judicial records even if they are in possession of agencies other than district attorney's office, and judiciary is exempt from reach of FOIL. Newsday, Inc. v Empire State Dev. Corp., 283 A.D.2d 182, 724 N.Y.S.2d 62, 2001 N.Y. App. Div. LEXIS 4296 (N.Y. App. Div. 1st Dep't 2001), rev'd, 98 N.Y.2d 359, 746 N.Y.S.2d 855, 774 N.E.2d 1187, 2002 N.Y. LEXIS 1625 (N.Y. 2002).

5. New York City public administrators

Public administrators in New York City fall within the scope of the definition of "judiciary" in Pub O § 86(1) in view of their capacity to issue subpoenas as authorized by SCPA § 1114. Comm Pub Acc Rec FOIL—Ad Op 1772.

II. "Agency"

6. In general

Private company which rehabilitates homes with government funds is not agency subject to Freedom of Information Law and individual member of public is not entitled to access to company records relating to survey of low income people. Comm Pub Acc Rec FOIL-Ad Op 2639.

7. Authorities, commissions and the like, generally

The New York State Association of Counties, while created to enhance the workings of government, is not a governmental entity since it does not perform a governmental or proprietary function for the state or any municipality, and the employees of the Association are not public employees for, while they have a relationship with government, they are not employed by government but rather by a corporate board of directors. Comm Pub Acc Rec FOIL—Ad Op 1919.

8. —Environmental entities, generally

9. — —Water-related, including New York/New Jersey Port Authority

Suffolk County Water Authority is an "agency" under Public Officers Law § 86(3) and subject to the Freedom of Information Law in all respects. Comm Pub Acc Rec FOIL-Ad Op 2412.

Port Authority, as bi-state entity whose jurisdiction and functions extend to New Jersey as well as New York, is not "agency" within meaning of Freedom of Information Law, since New York cannot generally impose its legislative enactments beyond its borders, Freedom of Information Law does not apply to Port Authority. Comm Pub Acc Rec FOIL-Ad Op 2728.

10. —Homeowner's association

The Steuben Rural Electric Co-operative, Incorporated, is neither an "agency" as defined in § 86(3) of the Public Officers Law nor a "public body" as defined in § 97(2) of the Public Officers Law. Comm Pub Acc Rec FOIL-Ad Op 2371.

11. —Municipal development corporations, generally

Buffalo Enterprise Development Corporation (BEDC) is "agency" within meaning of Freedom of Information Law since it is not-for-profit local development corporation which channels public funds into community, it enjoys many attributes of public entities, its purpose is governmental, it was created exclusively by and for city of Buffalo to attract investment and stimulate growth in city, it describes itself as "agent" of city, and it is required to publicly disclose its annual budget, which is subject to

public hearing and is submitted to city for review. Buffalo News v Buffalo Enter. Dev. Corp., 84 N.Y.2d 488, 619 N.Y.S.2d 695, 644 N.E.2d 277, 1994 N.Y. LEXIS 4113 (N.Y. 1994).

12. — —Municipal housing authorities (MHAs)

New York City Department of Housing Preservation and Development is covered by N.Y. Pub. Off. Law § 86(2) as a "municipal department." Matter of Thomas v City of N.Y. Dept. of Hous. Preserv. & Dev., 817 N.Y.S.2d 864, 12 Misc. 3d 547, 235 N.Y.L.J. 81, 2006 N.Y. Misc. LEXIS 783 (N.Y. Sup. Ct. 2006).

13. —Other and miscellaneous

Boards of assessment review, although they have been described as quasi-judicial bodies, are not part of judiciary and thus are not excluded from definition of "agency" under CLS Pub O § 86(3). 11 Op. Counsel SBRPS No. 36 (2002).

14. Banks and other financial entities

Although the banking industry may be regulated in part by the state, banks are part of the private sector and do not constitute governmental entities; therefore, banks fall outside the scope of the Freedom of Information Law. Comm Pub Acc Rec FOIL-Ad Op 2335.

15. Civic and community organizations, generally

Civic organization board, which drew two-thirds of its membership from the private sector and which never held itself out as an agent of the city, was not a public agency subject to information disclosure requirements even though, in fostering the city's economic development by overseeing the finances of a public arena, it was performing a governmental function. Matter of Ervin v Southern Tier Economic Dev., Inc., 26 A.D.3d 633, 809 N.Y.S.2d 268, 2006 N.Y. App. Div. LEXIS 1708 (N.Y. App. Div. 3d Dep't 2006).

Community board is municipal entity that performs governmental function for municipality and is thus "agency" subject to Freedom of Information Law. Comm Pub Acc Rec FOIL-Ad Op 2564.

16. —Political committees

While political committee may be related to government, it cannot be considered governmental entity performing governmental function; therefore, political committee does not fall within definition of "agency" or scope of Freedom of Information Law. Comm Pub Acc Rec FOIL-Ad Op 2593.

17. Corporations, generally

18. —Not-for-profit corporations

Freedom of Information Law did not apply to respondent not-for-profit corporation formed by private business leaders to improve quality of life of county residents by, inter alia, promoting employment opportunities, attracting new business and otherwise increasing economic growth in county, and thus court properly dismissed Article 78 petition to compel disclosure of records kept by respondent in connection with proposed landfill projects; respondent was not "agency" within meaning of CLS Pub O § 84. Farms First v Saratoga Economic Dev. Corp., 222 A.D.2d 861, 635 N.Y.S.2d 720, 1995 N.Y. App. Div. LEXIS 12902 (N.Y. App. Div. 3d Dep't 1995).

Not-for-profit corporations which worked closely with Department of Environmental Conservation and Office of Parks, Recreation and Historical Preservation, and whose objectives coincided partly with those 2 agencies, were not themselves "agencies" subject to Freedom of Information Law where they were formed by private individuals, they were governed by self-selected board of directors, they were primarily privately funded, and their operating budgets were not subject to approval by any governmental body. Lugo v Scenic Hudson, Inc., 258 A.D.2d 626, 685 N.Y.S.2d 761, 1999 N.Y. App. Div. LEXIS 1471 (N.Y. App. Div. 2d Dep't 1999).

A newspaper may not obtain the financial record of a non-profit corporation which defaulted on bonds issued to cover the cost of leasing a large tract of land from a county agency, since the non-profit corporation is not an agency within the meaning of Public Officers Law § 86(3) and therefore falls outside the scope of the Freedom of Information Law; however, it is possible for the newspaper to obtain any records or reports submitted to the county governmental agency. Comm Pub Acc Rec FOIL—Ad Op 1812.

North East Area Development, as not-for-profit corporation, is not governmental entity performing governmental function and is not "agency", and its records do no fall within scope of Freedom of Information Law. Comm Pub Acc Rec FOIL-Ad Op 2738.

19. Courts, generally

Court is not subject to Freedom of Information Law. Comm Pub Acc Rec FOIL-Ad Op 2657.

20. —Federal agencies

By its plain terms, the statutory definition of "agency" in Public Officers Law § 86(3) does not include federal agencies; rather, the definition of "agency" is limited to state and municipal entities. The argument that the definition of "agency" should not be applied to the distinct phrases "inter-agency" and "intra-agency" is meritless, as there is there is nothing particular to either the context or usage of those phrases that would indicate a legislative intent to treat the term "agency," as used in that section, separately from the rest of the Freedom of Information Law. Matter of Town of Waterford v New York State Dept. of Envtl. Conservation, 18 N.Y.3d 652, 944 N.Y.S.2d 429, 967 N.E.2d 652, 2012 N.Y. LEXIS 510 (N.Y. 2012).

Definition of "agency" in Public Officers Law § 86(3) did not include federal agencies. Thus, the Department of Environmental Conservation's communications with the Environmental Protection Agency were not protected by the intra-agency exemption of Public Officers Law § 87(2)(g). Matter of Town of Waterford v New York State Dept. of Envtl. Conservation, 18 N.Y.3d 652, 944 N.Y.S.2d 429, 967 N.E.2d 652, 2012 N.Y. LEXIS 510 (N.Y. 2012).

Documents shared with a federal agency were not exempt from disclosure because "agency" for freedom of information purposes does not include a federal agency, there was an express acknowledgment that the deliberative process exemption did not protect documents shared with a federal agency, and the common interest doctrine did not apply to non-confidential communications between agencies with separate counsel. Matter of Riverkeeper Inc. v Port Auth. of N.Y. & N.J., 66 Misc. 3d 250, 111 N.Y.S.3d 523, 2019 N.Y. Misc. LEXIS 5619 (N.Y. Sup. Ct. 2019), aff'd, 187 A.D.3d 557, 130 N.Y.S.3d 659, 2020 N.Y. App. Div. LEXIS 5965 (N.Y. App. Div. 1st Dep't 2020).

21. —Judicial personnel

Petitioner is not entitled to access to the records of the Mayor's Committee on the Judiciary concerning the committee's withdrawal of approval of him as a prospective judicial appointee since the committee, whose determinations have no legal effect, performs a purely advisory function merely making recommendations to the Mayor concerning judicial appointments, and entities which perform only advisory functions are not required to make their records available under the Freedom of Information Law. Baumgarten v Koch, 97 Misc. 2d 449, 411 N.Y.S.2d 487, 1978 N.Y. Misc. LEXIS 2819 (N.Y. Sup. Ct. 1978).

Third Department Judicial Screening Committee was not an agency under the New York Freedom of Information Law, specifically N.Y. Pub. Off. Law § 86(3), and was not a "public body" under the New York Open Meetings Law, specifically N.Y. Pub. Off. Law § 102(2), as the Governor could reject the advice of the Committee and leave a judicial position vacant until the next election; thus, the Committee's function was purely advisory. Hurley v Johnson, 779 N.Y.S.2d 771, 4 Misc. 3d 616, 2004 N.Y. Misc. LEXIS 867 (N.Y. Sup. Ct. 2004).

22. —Office of Court Administration (OCA)

The Freedom of Information Law (Public Officers Law, art 6), which applies to "agencies" and specifically excludes "the judiciary" from the definition of agency (Public Officers Law, § 86), is applicable to the Office of Court Administration, since the "judiciary" is defined as "the courts of the state" (Public Officers Law, § 86, subd 1), and the Office of Court Administration is not a court. Babigian v Evans, 104 Misc. 2d 140, 427 N.Y.S.2d 688, 1980 N.Y. Misc. LEXIS 2290 (N.Y. Sup. Ct. 1980).

Office of Court Administration, as administrative arm of court system, is subject to Freedom of Information Law. Comm Pub Acc Rec FOIL-Ad Op 2600.

Office of Court Administration is not court but "agency" that is required to comply with Freedom of Information Law. Comm Pub Acc Rec FOIL-Ad Op 2742.

23. —Office of Inspector General of New York City

Office of Inspector General of City of New York is municipal office and governmental entity performing governmental function for municipality and falls within scope of Freedom of Information Law. Comm Pub Acc Rec FOIL-Ad Op 2704.

24. Criminal law, generally

25. —District Attorney's Office

District attorneys' offices and records are subject to Freedom of Information Law. Comm Pub Acc Rec FOIL-Ad Op 2530.

Office of district attorney is governmental entity performing governmental function and is agency within meaning of Freedom of Information Law in all respects. Comm Pub Acc Rec FOIL-Ad Op 2644.

26. —Police departments, generally

Police departments are subject to Freedom of Information Law. Comm Pub Acc Rec FOIL-Ad Op 2530.

Municipal police department is subject to Freedom of Information Law. Comm Pub Acc Rec FOIL-Ad Op 2657.

Police Department is required to respond to requests for accident reports and it is inappropriate for police department to routinely refer request to Department of Motor Vehicles. Comm Pub Acc Rec FOIL-Ad Op 2691.

27. Education-related entities, generally

Book lists compiled by individual professors in the state university system were records held for an agency within the meaning of the statute, and therefore subject to a request by a private bookstore owner who was operating in competition with the contractor that ran the agency's main bookstore. Mohawk Book Co. v State Univ. of N.Y., 288 A.D.2d 574, 732 N.Y.S.2d 272, 2001 N.Y. App. Div. LEXIS 10355 (N.Y. App. Div. 3d Dep't 2001).

Briefs submitted by parties to Education Department in conjunction with proceedings conducted under § 3020-a of Education Law constitute "records" as defined by law and are subject to whatever rights of access might exist. Comm Pub Acc Rec FOIL-Ad Op 2534.

Letters of complaint submitted by or on behalf of dental school patients do not constitute records created by "agency" within meaning of Freedom of Information Law § 86(3). Comm Pub Acc Rec FOIL-Ad Op 2678.

28. —Board of Cooperative Educational Services (BOCES)

BOCES is clearly a governmental entity performing a governmental function and, therefore, is an "agency" subject to the Freedom of Information Law. Comm Pub Acc Rec FOIL—Ad Op 1923.

29. —Community colleges

Public community college constituted "agency" for purposes of inquiry under Freedom of Information Law in which certain course materials were sought. Russo v Nassau County Community College, 81 N.Y.2d 690, 603 N.Y.S.2d 294, 623 N.E.2d 15, 1993 N.Y. LEXIS 3264 (N.Y. 1993).

30. —Cornell's statutory colleges

Colleges created by CLS Educ §§ 5711, 5712, 5714 and 5715 and operated by Cornell University on behalf of State University of New York (i.e., New York State College of Veterinary Medicine, New York State College of Agriculture and Life Sciences, New York State College of Human Ecology, and New York State School of Industrial and Labor Relations) may not categorically be deemed state agencies under Freedom of Information Law (FOIL) given their hybrid character and significant indicia denoting private entity and function, notwithstanding general policy of liberal disclosure under FOIL and facts that colleges in question are funded by state money, are subject to some state oversight, are state agencies under CLS St Fin § 53-a(5) and are technically part of state university system. Stoll v New York State College of Veterinary Med. at Cornell Univ., 94 N.Y.2d 162, 701 N.Y.S.2d 316, 723 N.E.2d 65, 1999 N.Y. LEXIS 3738 (N.Y. 1999).

31. —State University of New York (SUNY), generally

State University of New York constitutes "agency" within meaning of CLS Pub O § 86(3). Encore College Bookstores v Auxiliary Serv. Corp., 87 N.Y.2d 410, 639 N.Y.S.2d 990, 663 N.E.2d 302, 1995 N.Y. LEXIS 4751 (N.Y. 1995).

State University of New York (SUNY) Health Science Center at Brooklyn (HSC-B) is "agency" under CLS Pub O § 86(3) when it maintains records for purpose of federal inspection to comply with Federal Animal Welfare Act (7 USCS §§ 2131 to 2159) in that such records are kept in connection with biomedical research conducted by HSC-B, which is fulfilling SUNY's statutory mission to provide educational services to people of New York state under CLS Educ § 351(c). Citizens for Alternatives to Animal Labs, Inc. v Board of Trustees of the State Univ. of N.Y., 92 N.Y.2d 357, 681 N.Y.S.2d 205, 703 N.E.2d 1218, 1998 N.Y. LEXIS 3220 (N.Y. 1998).

Court should have dismissed Article 78 proceeding to review denial of petitioners' request for unredacted records of Laboratory Animal Users' Committee (LAUC) of State University of New York, since Freedom of Information Act applies only to entities performing governmental or proprietary function for state, and LAUC was not such entity. American Soc. for Prevention of Cruelty to Animals v Board of Trustees of State University of New York, 184 A.D.2d 508, 584 N.Y.S.2d 198, 1992 N.Y. App. Div. LEXIS 7615 (N.Y. App. Div. 2d Dep't), app. denied, 80 N.Y.2d 757, 589 N.Y.S.2d 308, 602 N.E.2d 1124, 1992 N.Y. LEXIS 3226 (N.Y. 1992).

32. —Other and miscellaneous

The State Board of Law Examiners is not an "agency" for purposes of the FOIL. Pasik v State Bd. of Law Examiners, 102 A.D.2d 395, 478 N.Y.S.2d 270, 1984 N.Y. App. Div. LEXIS 18797 (N.Y. App. Div. 1st Dep't 1984).

Baldwin Educational Assembly is "agency" under § 86(3) of Public Officers Law, and thus records generated by or in possession of BEA are subject to Freedom of Information Law. Comm Pub Acc Rec FOIL-Ad Op 2503.

33. Fire departments and the like

If a fire department is operated by a municipality itself, the records of the department are subject to the Freedom of Information Law since the municipality is a public corporation that falls within the definition of "agency" in Public Officers Law § 86(3); furthermore, recent case law indicates that fire department records are subject to access under Public Officers Law § 87, even if the records are maintained by a volunteer fire company. Comm Pub Acc Rec FOIL—Ad Op 1780.

A volunteer fire company, even though a not-for-profit corporation, is an agency subject to the Freedom of Information Law if that corporation maintains a contractual relationship with the municipality. Comm Pub Acc Rec FOIL—Ad Op 1907.

Since § 174(6) of Town Law provides in part that "fire district is political subdivision of state and district corporation which is "public corporation", fire district falls within definition of "agency". Comm Pub Acc Rec FOIL-Ad Op 2587.

34. Hospitals and other health-related entities

Volunteer ambulance company was "agency" within meaning of Freedom of Information Law where it performed government function solely for municipal entity and municipal subdivision of town, and it submitted budget to and received all of its funding from town. Ryan v Mastic Volunteer Ambulance Co., 212 A.D.2d 716, 622 N.Y.S.2d 795, 1995 N.Y. App. Div. LEXIS 1671 (N.Y. App. Div. 1st Dep't 1995), app. denied, 88 N.Y.2d 804, 645 N.Y.S.2d 446, 668 N.E.2d 417, 1996 N.Y. LEXIS 1493 (N.Y. 1996).

Non-profit, private hospitals receiving substantial amounts of government funds are not government agencies within the definition of Public Officers Law § 86(3) and therefore not subject to the disclosure requirements of Public Officers Law § 87. Comm Pub Acc Rec FOIL—Ad Op 1795 568.

Neither a county dental society, its peer or review committee nor the New York State Dental Society can be characterized as "agencies" subject to the Freedom of Information Law, and therefore records of these groups fall outside the scope of rights of access granted by the Law. Com Pub Acc Rec FOIL-Ad Op 1873.

State board for professional medical conduct is "agency" under § 86(3) of Public Officers Law, and as such is subject to Freedom of Information Law. Comm Pub Acc Rec FOIL-Ad Op 2499.

"Agency" as defined in Freedom of Information Law does not include Niagra Falls Memorial Medical Center, a private not-for-profit hospital. Comm Pub Acc Rec FOIL-Ad Op 2511.

Records of county hospital which is operated by municipality fall within scope of Freedom of Information Law. Comm Pub Acc Rec FOIL-Ad Op 2648.

Hospital owned and operated by state or unit of local government is considered governmental entity and its records are subject to whatever rights of access might exist under Freedom of Information Law. Comm Pub Acc Rec FOIL-Ad Op 2683.

Order compelling an ambulance company to produce certain records pursuant to the Freedom of Information Law (FOIL) was reversed because respondent was a private not-for-profit corporation and not a governmental entity performing a governmental function subject to the mandates of FOIL. Matter of Outhouse v Cortlandt Community Volunteer Ambulance Corps, Inc., 171 A.D.3d 1071, 97 N.Y.S.3d 669, 2019 N.Y. App. Div. LEXIS 2890 (N.Y. App. Div. 2d Dep't 2019).

35. Insurance companies

Municipal cooperative health benefit plan established by several education entities under CLS Gen Mun § 119-o(1) and CLS Ins § 4702(e), which provided health insurance benefits to employees and retirees of participating entities pursuant to municipal cooperation agreement, was "agency" subject to Freedom of Information Law, not private entity akin to private insurance company. Passino v Jefferson-Lewis, 277 A.D.2d 1028, 716 N.Y.S.2d 229, 2000 N.Y. App. Div. LEXIS 11436 (N.Y. App. Div. 4th Dep't 2000), app. denied, 96 N.Y.2d 709, 725 N.Y.S.2d 639, 749 N.E.2d 208, 2001 N.Y. LEXIS 1513 (N.Y. 2001).

Neither Superintendent of Insurance, as liquidator, nor Liquidation Bureau is "agency" of state for purposes of Freedom of Information Law. Consolidated Edison Co. v Insurance Dep't of State, 140 Misc. 2d 969, 532 N.Y.S.2d 186, 1988 N.Y. Misc. LEXIS 511 (N.Y. Sup. Ct. 1988).

Blue Cross/Blue Shield of Rochester's refusal to release school district loss ratios and specific claim information to a central school district is not violative of the Freedom of Information Law since Blue Cross/Blue Shield of Rochester is not a "agency" within the meaning of Public Officers Law § 86(3) and therefore not subject to the disclosure requirements of Public Officers Law § 87. Comm Pub Acc Rec FOIL—Ad Op 1804.

Rockland County is not entitled to access to records of the Department of Civil Service consisting of "insurance experience data" since insurance carriers no longer submit such data to the Department and therefore the department has no such information; furthermore, since an insurance carrier is not a governmental agency under Public Officers Law § 86, it is not required to provide access to its records. Comm Pub Acc Rec FOIL-Ad Op 1911.

36. Legal assistance organizations

Legal Aid Society, which is not entity of government, is not subject to Freedom of Information Law. Comm Pub Acc Rec FOIL-Ad Op 2089.

The Prisoners' Legal Services of New York is not an "agency" and, therefore, is not in any way subject to the Freedom of Information Law. Comm Pub Acc Rec FOIL-Ad Op 2407.

Prisoners' legal services association is not "agency" under § 86(3) of Public Officers Law, and thus it is not subject to Freedom of Information Law. Comm Pub Acc Rec FOIL-Ad Op 2509.

37. Utility companies

Telephone company is not subject to Freedom of Information Law. Comm Pub Acc Rec FOIL-Ad Op 2657.

III. "Record"

A. Generally

38. In general

Personal or unofficial documents which are intermingled with official government files and are being "kept" or "held" by governmental entity are "records" maintained by "agency" under CLS Pub O § 86 and are thus subject to disclosure under Freedom of Information Law (CLS Pub O Art 6) absent specific statutory exemption. Capital Newspapers, Div. of Hearst Corp. v Whalen, 69 N.Y.2d 246, 513 N.Y.S.2d 367, 505 N.E.2d 932, 1987 N.Y. LEXIS 15362 (N.Y. 1987).

Information kept or held for government agency is within embrace of "records" under Freedom of Information Law (CLS Pub O §§ 84 et seq.); to implement narrow definition of "records" adopted by federal courts would undermine legislative objective to provide maximum disclosure by enabling government agency to insulate its records from public access by delegating responsibility for creating or maintaining particular information to nongovernmental entity. Encore College Bookstores v Auxiliary Serv. Corp., 87 N.Y.2d 410, 639 N.Y.S.2d 990, 663 N.E.2d 302, 1995 N.Y. LEXIS 4751 (N.Y. 1995).

Because an agency's software enabled it to manipulate data and was more than just a delivery system or data warehouse, it was a "record," as defined by N.Y. Pub. Off. Law § 86(4); therefore, because the agency failed to articulate a legitimate concern covered by the exemption in N.Y. Pub. Off. Law § 87(2)(i), the software was subject to disclosure. Matter of TJS of N.Y., Inc. v New York State Dept. of Taxation & Fin., 89 A.D.3d 239, 932 N.Y.S.2d 243, 2011 N.Y. App. Div. LEXIS 7602 (N.Y. App. Div. 3d Dep't 2011).

Trial court erred in granting the motions of a town's planning board, town clerk, and a developer to dismiss a petition for certain architectural renderings because the renderings became "records" within the meaning of the Freedom of Information Law when a developer's owner left them in the possession of the town planner for a number of days and the planner displayed them at a planning board meeting, and it was unclear whether the renderings were still in the possession of the town planner when the petitioner made her request. Matter of Fanizzi v Planning Bd. of Patterson, 146 A.D.3d 98, 44 N.Y.S.3d 74, 2016 N.Y. App. Div. LEXIS 8226 (N.Y. App. Div. 2d Dep't 2016).

39. Blueprints

In view of the definition of "record" in Public Officers Law § 86(4) it would appear to be clear that a blueprint for a proposed office building that would replace a historic building constitutes a "record" subject to the Freedom of Information Law. Comm Pub Acc Rec FOIL—Ad Op 1842.

40. Computer tapes or disks

In proceeding under Freedom of Information Law, court properly ordered disclosure of records in computer tape format instead of on hard copy where agency maintained requested files in computer format, files could be reproduced on computer tapes at minimal cost in few hours, and petitioner agreed to pay cost, while information provided on hard copy would use more than one million sheets of paper, cost more than $10,000, take 5-6 weeks to complete, and cost hundreds of thousands of dollars to reconvert to computer-usable format. Brownstone Publishers, Inc. v New York City Dep't of Bldgs., 166 A.D.2d 294, 560 N.Y.S.2d 642, 1990 N.Y. App. Div. LEXIS 12056 (N.Y. App. Div. 1st Dep't 1990).

Freedom of Information Law is applicable to information found within computer tapes or discs as well as paper files. Comm Pub Ac Rec FOIL-Ad Op 2569.

41. Minutes of meetings; transcripts

Minutes of insurance company meetings that are given by the companies to the NYS Insurance Department for its examination constitute "records" within the meaning of the FOIL. Washington Post Co. v New York State Ins. Dep't, 61 N.Y.2d 557, 475 N.Y.S.2d 263, 463 N.E.2d 604, 1984 N.Y. LEXIS 4180 (N.Y. 1984).

42. Official correspondence, communication and the like

If a town or county supervisor receives communications from a county supervisors' association that relate to the performance of his or her official duties, such communications would constitute "records" under Public Law Officers Law § 86 and would be subject to rights of access granted by the Freedom of Information Law. Com Pub Acc Rec FOIL—Ad Op 1878.

43. Photographs, film and the like

Sexually-explicit film and filmstrips from college-level course taught in public college and provided by college constituted agency "record" under Freedom of Information Law. Russo v

Nassau County Community College, 81 N.Y.2d 690, 603 N.Y.S.2d 294, 623 N.E.2d 15, 1993 N.Y. LEXIS 3264 (N.Y. 1993).

Trial court should have ordered disclosure the metadata associated with those photos that the agency had already disclosed to petitioner, as well as those photos deemed subject to disclosure under the Freedom of Information Law, N.Y. Pub. Off. Law art. 6. Matter of Irwin v Onondaga County Resource Recovery Agency, 72 A.D.3d 314, 895 N.Y.S.2d 262, 2010 N.Y. App. Div. LEXIS 1317 (N.Y. App. Div. 4th Dep't 2010).

44. "Preliminary" notes and the like

A request for documents to be discussed at an open meeting of the Permanent Commission on Public Employee Pension and Retirement System may not be denied on the ground that the report was a working paper only and not in final form, since Public Officers Law § 86(4) makes it clear that whether records are kept as "working papers" or whether records may not be "final" does not remove them from the scope of the definition of "record" accessible under the Freedom of Information Law. Comm Pub Acc Rec FOIL—Ad Op 1832.

Preliminary economic report and executive summary pertaining to Hawkinsville Dam Project, if maintained by Hudson River-Black River Regulating District, constitutes "records" within meaning of Freedom of Information Law § 86(4) and is subject to public access unless it falls within one or more of exceptions contained in Law. Comm Pub Acc Rec FOIL-Ad Op 2743.

45. Tape recordings, generally

A tape recording of a hearing held before the Department of Motor Vehicles is a "record" under Public Officers Law § 86, regardless of whether the tape recording has been forwarded to a private reporting firm or not. Comm Pub Acc Rec FOIL—Ad Op 1904.

Tape recording produced by a town clerk in the performance of her official duty is a "record" subject to rights of access granted by the Freedom of Information Law. Comm Pub Acc Rec FOIL—Ad Op 1918.

Tape recording may be destroyed or erased shortly after creation and when it has no further utility, however, it would be inappropriate to destroy or erase tape recording while request for tape recording is pending under Freedom of Information Law. Comm Pub Acc Rec FOIL-Ad Op 2170.

Tape recording in possession of clerk used to aid her in performance of her duties is "record" that falls within scope of Freedom of Information Law. Comm Pub Acc Rec FOIL-Ad Op 2698.

Once tape recording exist, it constitutes "record" subject to rights of access granted by Freedom of Information Law, and tape recording of open meeting is "record" that is available. Comm Pub Acc Rec FOIL-Ad Op 2724.

46. —Duplicate recordings

Decision of Superintendent of District Board of Education to permit duplication of tape recording of previous night's Board meeting is in compliance with Freedom of Information Law where citizen asks to tape previous night's meeting from official tape, superintendent grants request, and duplicate tape is made prior to time unapproved minutes are made available to public, since tape recording is clearly "record" that is subject to right of access as soon as it exists. Comm Pub Acc Rec FOIL-Ad Op 2673.

47. —Videotapes

Video tape of a news broadcast is not a "record," within the meaning of N.Y. Pub. Off. Law § 86(4), and thus, does not have to be disclosed under the Freedom of Information Law. Pennington v Clark, 194 Misc. 2d 381, 755 N.Y.S.2d 195, 2002 N.Y. Misc. LEXIS 1737 (N.Y. Sup. Ct. 2002).

B. Specific Records

48. Court records, generally

The Freedom of Information Law is not applicable to court records since Public Officers Law § 86(3) excludes the courts from the definition of "agency". Com Pub Acc Rec FOIL-Ad Op 1885.

Court records in which person may be interested are not subject to right of access granted by Freedom of Information Law. Comm Pub Acc Rec FOIL-Ad Op 2629.

49. —Administrative records

Criminal Records Information Management System (CRIMS) data base, maintained by Office of Court Administration, is exempt from Freedom of Information Law disclosure under CLS Pub O § 86(3) Daily News Publ'g Co. v Office of Court Admin., 186 Misc. 2d 424, 718 N.Y.S.2d 800, 2000 N.Y. Misc. LEXIS 494 (N.Y. Sup. Ct. 2000).

50. —Jury matters

Newspaper publisher could not compel Commissioner of Jurors to release names and addresses of jurors in murder trial, even if CLS Jud § 509 did not apply, since commissioner, as court officer, is considered part of judiciary and therefore is not subject to CLS Pub O § 86. Newsday, Inc. v Sise, 120 A.D.2d 8, 507 N.Y.S.2d 182, 1986 N.Y. App. Div. LEXIS 58997 (N.Y. App. Div. 2d Dep't 1986), aff'd, 71 N.Y.2d 146, 524 N.Y.S.2d 35, 518 N.E.2d 930, 1987 N.Y. LEXIS 20000 (N.Y. 1987)).

51. — —Grand jury

Grand jury minutes are court records, rather than agency records, and thus are exempt from ambit of Freedom of Information Law, CLS Pub O §§ 86(1) and (3). Mullgrav v Santucci, 195 A.D.2d 786, 600 N.Y.S.2d 382, 1993 N.Y. App. Div. LEXIS 7280 (N.Y. App. Div. 3d Dep't 1993).

Grand Jury minutes were court records, not agency records, N.Y. Pub. Off. Law § 86(1), (3); they were confidential, N.Y. Crim. Proc. Law § 190.25(4)(a), and accordingly, were exempt from the ambit of the Freedom of Information Law, N.Y. Pub. Off. Law § 84 et seq. N.Y. Pub. Off. Law § 87(2)(a). Hall v Bongiorno, 305 A.D.2d 508, 761 N.Y.S.2d 63, 2003 N.Y. App. Div. LEXIS 5402 (N.Y. App. Div. 2d Dep't 2003).

Grand jury minutes are court records which are exempt from ambit of Freedom of Information Law. Harvey v Hynes, 174 Misc. 2d 174, 665 N.Y.S.2d 1000, 1997 N.Y. Misc. LEXIS 533 (N.Y. Sup. Ct. 1997).

52. Criminal matters, generally

Inventory of evidence used against petitioner in connection with criminal investigation resulting in his murder conviction was not exempt from disclosure under Freedom of Information Law, since evidence inventory list is record within meaning of CLS Pub O § 86(4). Dobranski v Houper, 154 A.D.2d 736, 546 N.Y.S.2d 180, 1989 N.Y. App. Div. LEXIS 12412 (N.Y. App. Div. 3d Dep't 1989).

53. —Police records, generally

53. —Police records, generally.

Police officers and firefighters were not entitled to declarative and injunctive relief barring respondents from releasing certain information contained in their disciplinary files because they advanced no persuasive arguments as to why controlling statutes, including this one, violated any other provision of the Federal and State Constitutions, and thus had not demonstrated a likelihood of success on the merits. Buffalo Police Benevolent Assn., Inc. v Brown, 69 Misc. 3d 998, 134 N.Y.S.3d 150, 2020 N.Y. Misc. LEXIS 7199 (N.Y. Sup. Ct. 2020).

54. — —Physical evidence

Court properly dismissed proceeding to compel agency to disclose, under Freedom of Information Law, records and physical evidence compiled during criminal investigation culminating in petitioner's conviction, since physical evidence requested, such as tools and items of clothing, did not fall within definition of "record" under CLS Pub O § 86, and requests involving names, addresses, and statements of confidential witnesses, grand jury testimony, and reports which would reveal non-routine criminal investigative techniques for processing homicide scene were all exempt from disclosure under CLS Pub O § 87. Allen v Strojnowski, 129 A.D.2d 700, 514 N.Y.S.2d 463, 1987 N.Y. App. Div. LEXIS 45390 (N.Y. App. Div. 2d Dep't), app. dismissed, app. denied, 70 N.Y.2d 871, 523 N.Y.S.2d 493, 518 N.E.2d 5, 1987 N.Y. LEXIS 19075 (N.Y. 1987).

Items presented in evidence in criminal trial requested by petitioner, consisting of "articles of clothing and alleged weapons," did not fall within definition of "record" subject to disclosure under Freedom of Information Law; such physical evidence is not part of "the documents and statistics leading (governmental

determination" (CLS Pub O § 84 (2) (e) (i)). Sideri v Office of the DA, 243 A.D.2d 423, 663 N.Y.S.2d 206, 1997 N.Y. App. Div. LEXIS 10842 (N.Y. App. Div. 1st Dep't 1997), app. denied, 91 N.Y.2d 808, 669 N.Y.S.2d 261, 692 N.E.2d 130, 1998 N.Y. LEXIS 252 (N.Y. 1998).

55. Financial records, including banks

Bank records pertaining to issuance of industrial revenue bonds by city industrial development corporation (CIDC) were not records of agency within meaning of CLS Pub O § 86(4), for when bonds were issued, CIDC assigned all of its rights in bonds to bank, and bank acted as trustee for bondholders and not for CIDC. United Food & Commercial Workers, Dist. Union, Local One v City of Schenectady Indus. Dev. Agency, 204 A.D.2d 887, 612 N.Y.S.2d 477, 1994 N.Y. App. Div. LEXIS 5431 (N.Y. App. Div. 3d Dep't 1994).

56. Insurance records

Minutes of insurance company meetings that are given by the companies to the NYS Insurance Department for its examination constitute "records" within the meaning of the FOIL. Washington Post Co. v New York State Ins. Dep't, 61 N.Y.2d 557, 475 N.Y.S.2d 263, 463 N.E.2d 604, 1984 N.Y. LEXIS 4180 (N.Y. 1984).

57. Real property assessment data

Court properly determined that inventory data for all parcels contained on assessment roll of town constituted record within meaning of Freedom of Information Law. Comps, Inc. v Town of Huntington, 269 A.D.2d 446, 703 N.Y.S.2d 225, 2000 N.Y. App. Div. LEXIS 1367 (N.Y. App. Div. 2d Dep't), app. denied, 95 N.Y.2d 758, 713 N.Y.S.2d 522, 735 N.E.2d 1287, 2000 N.Y. LEXIS 1832 (N.Y. 2000).

Real property assessment revaluation data being compiled by independent appraisal company for eventual use in county-wide reassessment program are not "records" subject to public rights to access within Freedom of Information Law. 7 Op Counsel, SBEA #68, 1980 December 22.

Access to records of a private corporation currently engaged in a contractual relationship with the Saratoga County Board of Supervisors and the County Equalization and Assessment Committee performing a 100 percent assessment revaluation project for the county may not be denied on the basis that Freedom of Information Law is inapplicable to records of a private corporation, since Public Officers Law § 86(4) defines "record" as including "any information produced for an agency in any fiscal form whatsoever" and the private corporation involved was clearly producing information for a public corporation. Comm Pub Acc Rec FOIL—Ad Op 1783.

A request for real property assessment revaluation data being compiled by a private company for Saratoga County may not be denied on the ground that such data does not constitute "records" under Public Officers Law § 86 since if there are materials made available to public officials of Saratoga County it appears that they must be of necessity "records" subject to the Freedom of Information Law and, furthermore, the definition of "record" includes information "in any physical form whatsoever" and thereby covers preliminary drafts, other information that is nonfinal, or even information that is "in production". Comm Pub Acc Rec FOIL—Ad Op 1857.

58. School records, generally

Sexually-explicit film and filmstrips from college-level course taught in public college and provided by college constituted agency "record" under Freedom of Information Law. Russo v Nassau County Community College, 81 N.Y.2d 690, 603 N.Y.S.2d 294, 623 N.E.2d 15, 1993 N.Y. LEXIS 3264 (N.Y. 1993).

59. —Student books and related documents

Booklist to be used by students at State University of New York (SUNY), compiled by bookseller under subcontract with corporation that provided auxiliary services for particular SUNY campus, and received by corporation and kept on university's behalf, constituted "record" within meaning of CLS Pub O § 86(4). Encore College Bookstores v Auxiliary Serv. Corp., 87 N.Y.2d 410, 639 N.Y.S.2d 990, 663 N.E.2d 302, 1995 N.Y. LEXIS 4751 (N.Y. 1995).

Invoices for textbooks purchased from publishing companies for sale at community college bookstore operated by faculty-student association were "records" under CLS Pub O § 86(4) and were kept or maintained by faculty-student association for "agency" under Freedom of Information Law. Gray v Faculty-Student Ass'n of Hudson Valley Community College, Inc., 186 Misc. 2d 404, 717 N.Y.S.2d 507, 2000 N.Y. Misc. LEXIS 490 (N.Y. Sup. Ct. 2000).

IV. Under Former § 87

60. In general

As a public benefit corporation the State University Construction Fund is an "agency" which must comply with the Freedom of Information Law. Cavalier v McCue, 58 A.D.2d 729, 396 N.Y.S.2d 299, 1977 N.Y. App. Div. LEXIS 12845 (N.Y. App. Div. 3d Dep't 1977).

Under the definition of "agency," the Division of the Budget came within application of the Freedom of Information Law. Dunlea v Goldmark, 85 Misc. 2d 198, 380 N.Y.S.2d 496, 1976 N.Y. Misc. LEXIS 1982 (N.Y. Sup. Ct.), modified, 54 A.D.2d 446, 389 N.Y.S.2d 423, 1976 N.Y. App. Div. LEXIS 14061 (N.Y. App. Div. 3d Dep't 1976).

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62. Minutes of meetings; transcripts
63. Official correspondence, communication and the like
64. Photographs, film and the like
65. "Preliminary" notes and the like
66. —Unofficial documents; unsigned or undated
67. Records mandated but not necessarily originated
68. Tape recordings, generally
69. —Audiotapes
70. —Duplicate recordings
71. —Tape recordings of other transmissions
72. —Videotapes
73. Wallets, including contents thereof

B. Specific Records

74. Appraisals
75. Building inspector reports
76. Court records, generally
77. —Administrative records
78. —County clerk's records
79. —Judgment docket books
80. —Licensing officer's records
81. Criminal matters, generally
82. —Correctional Department records
83. —Police records, generally
84. — —Physical evidence
85. —Prisoner's request for court records
86. —Sentencing records
87. Employment records
88. Financial records, including banks
89. Insurance records
90. Marriage records
91. Medical records, generally
92. —Hospital records
93. Notary records
94. Real property assessment data
95. School records, generally
96. —Student books and related documents
97. Voting records
98. Zoning records
99. Other and miscellaneous

I. "Judiciary"

1. In general

If request involves records related to sentencing, record sought would be maintained by court rather than "agency"; if this is so, Freedom of Information Law would not be applicable. Comm On Open Gov't FOIL-AO-4598.

Courts are not subject to either freedom of information law or personal privacy protection law; as such, request for minutes or transcripts of proceedings that took place in county court would properly be directed to clerk of court in which proceeding was conducted. Comm on Open Gov't FOIL-AO-4760.

Courts and court records are outside scope of Freedom of Information Law; since other provisions of law grant significant rights of access to court records, request for trial transcript should be directed to clerk of appropriate court. Comm on Open Gov't FOIL-AO-4769.

Freedom of Information Law pertains to records maintained by local and state government, except judiciary and state legislature; as such, Law does not apply to courts or to federal agencies, such as drug enforcement agency. Comm on Open Gov't FOIL-AO-4778.

Freedom of Information Law does not apply to courts and court records. Comm on Open Gov't FOIL-AO-4790.

Freedom of Information Law does not apply to courts or court records and requests for court records should be directed to clerk of courts that maintain records. Comm on Open Gov't FOIL-AO-4823.

Freedom of Information Law is not applicable to court or court records; consequently, Committee on Open Government has neither jurisdiction nor expertise to provide guidance concerning court records. Comm on Open Gov't FOIL-AO-4825.

Freedom of Information Law is not applicable to courts and court records; further, since Freedom of Information Law does not apply, inquiry concerning courts and court records falls outside scope of Committee's jurisdiction. Comm on Open Gov't FOIL-AO-4832.

Committee on Open Government is authorized to render advice on issues concerning Freedom of Information Law; since rights of access to records are governed by Judiciary Law, Committee cannot advise as to legal remedies available with respect to failure of court to respond to request for records. Comm on Open Gov't FOIL-AO-4846.

Although courts and court records are excluded from scope of Freedom of Information Law, other statutes often grant broad rights of access to court records; request for such records should be directed to court reporter, clerk of court or attorney. Comm on Open Gov't FOIL-AO-4919.

Freedom of Information Law is not applicable to courts or court records; nevertheless, court records are often available pursuant to other provisions of law and requests should generally be directed to clerk of appropriate court. Comm on Open Gov't FOIL-AO-4922.

Records held by court or court clerk fell outside scope of Freedom of Information Law; however, office of court administration is "agency" subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-4931.

Freedom of Information Law does not apply to courts or court records; further, federal Freedom of Information and Privacy Acts apply only to records maintained by federal agencies; consequently they are also inapplicable to records maintained by Supreme Court in New York. Comm on Open Gov't FOIL-AO-4935.

Freedom of Information Law does not apply to courts or court records; however, there are other statutes that may grant rights of access to court records and requests for those records should be directed to clerks of appropriate courts. Comm on Open Gov't FOIL-AO-4940.

While the Freedom of Information Law is inapplicable to the courts or court records, other provisions of the law (e.g., Judiciary Law § 255) grant substantial rights of access to court records. Comm on Open Gov't FOIL-AO-6293 (1990).

2. Bronx Housing Court

Since the Bronx Housing Court is part of the civil court of New York City, which is a "court of record", records maintained by a clerk for the Housing Court were outside the scope of the Freedom of Information Law. Comm on Open Gov't FOIL-AO-6296 (1990).

3. Dismissal-related matters

Freedom of Information Law does not apply to courts or court records; however, many court records are available pursuant to other provisions of law; because criminal procedure law provides that when criminal action or proceeding is dismissed in favor of accused and records relating to event are sealed, records of dismissal of action cannot be provided based upon the exemption of Criminal Procedure Law. Comm on Open Gov't FOIL-AO-4947.

4. District Attorney's subpoenas

Subpoenas issued by district attorney's office are agency records covered by Freedom of Information Law, rather than court records that fall beyond scope of that statute, as office of district attorney is "governmental entity" that performs a "governmental function"; as such, extent to which such records may be withheld is limited to grounds under CLS Pub O § 87(2). Comm on Open Gov't FOIL-AO-12027.

5. Judicial appointment matters

Access to records involving the appointment of temporary acting supreme court judges were properly denied pursuant to the provisions of the Freedom of Information Law. Comm on Open Gov't FOIL-AO-6296 (1990).

6. Special matrimonial referees

Special matrimonial referee is court official not subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-12183.

County office of public defender is required to comply with Freedom of Information Law. Comm on Open Gov't FOIL-AO-12535.

II. "Agency"

7. In general

Term "agency" does not include federal agency. Committee on Open Government FOIL-AO-3336.

While governmental entities are required to comply with FOIL, law does not apply to records of private firms or persons, such as private sector employers, insurance companies, and repair shop. Comm on Open Gov't FOIL-AO-4105.

Freedom of Information Law pertains to records of both state agencies and local governments and all records of agency are available, except to extent that records or portions thereof fall within one or more grounds for denial appearing in law. Comm On Open Gov't FOIL-AO-4602.

Freedom of Information Law is applicable to records of "agency", and term "agency" is defined in CLS Pub O § 86(3). Comm on Open Gov't FOIL-AO-4749.

Since definition of "agency" includes municipal entities, all municipalities are required to maintain records setting forth name, public office address, title and salary of every officer or public employee of agency. Comm on Open Gov't FOIL-AO-4788.

Police department is "agency" required to comply with Freedom of Information Law; however, owner or operator of apartment building would not be "agency" if it is not governmental entity; if it is private entity, Freedom of Information Law would not apply and entity would not be required to disclose its records. Comm on Open Gov't FOIL-AO-4912.

Freedom of Information Law pertains to records of governmental entity; it does not apply to records or information maintained by private individual and in situation where private citizen contacts other private citizens using personal resources, rather than those of agency, Freedom of Information Law would not be applicable or irrelevant. Comm on Open Gov't FOIL-AO-4949.

Even though consultants or consulting firms may be private entities rather than governmental entities, records maintained for agencies by consultants should be treated as if they were maintained by agency. Comm on Open Gov't FOIL-AO-8899.

Freedom of Information Law applies to entities of state and local government, while Personal Privacy Protection Law applies only to state agencies. Comm on Open Gov't FOIL-AO-12592.

Local government may opt to disclose personal information, even when disclosure would result in unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-12594.

If relationship between agency and private developer is essentially that of agency and consultant, CLS Pub O § 87(2)(g) would be applicable in analyzing rights of access to documents involving both entities; if, however, relationship of that nature does not exist, that provision would not be pertinent in determining rights of access. Comm on Open Gov't FOIL-AO-12727.

If committee is not public body subject to Open Meetings Law, it is also not "agency" for purposes of Freedom of Information Law. If Open Meetings Law does not apply to committee's meetings because it does not perform governmental function, to be consistent, it cannot be argued that same committee does perform governmental function and is agency when analyzing rights of access to records it prepares for agency. Comm on Open Gov't OML-AO-2300.

If jury charged with selecting plan for memorial at World Trade Center site would not exist but for its relationship with public authority, and if it carries out its duties solely for or on behalf of agency, it, too, would constitute "agency" required to comply with Freedom of Information Law. Comm on Open Gov't OML-AO-4200.

8. Authorities, commissions and the like, generally

9. —Environmental entities, generally

10. — —Water-related, including New York/New Jersey Port Authority

Port Authority of New York and New Jersey is not "agency" subject to Freedom of Information Law. Comm on Open Govt FOIL-AO-3586.

Since Port Authority is bi-state entity operating in New York and New Jersey, it is not subject to New York, New Jersey or federal freedom of information statutes. Comm on Open Gov't FOIL-AO-7563.

Waterfront Commission of New York Harbor is bi-state agency and, therefore, is not subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-7869.

Any documentation maintained by Hudson River-Black River Regulating District constitutes agency record subject to rights of access, and District is required to disclose its records to extent required by Freedom of Information Law. Comm on Open Gov't FOIL-AO-7917.

Since environmental task force is part of Department of Environmental Conservation and since environmental task force performs many governmental functions, it is considered "agency" subject to Freedom of Information Law; generally, not-for-profit corporations, which are not governmental entities, fall outside scope of Freedom of Information Law; nevertheless, some not-for-profit corporations, and certain corporations or foundations closely affiliated with specific state agencies and whose purposes are essentially to support, supplement or extend functions and programs of such agencies are agencies subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-4913.

11. —Homeowner's association

Homeowners association organized as not for profit, type corporation as defined in CLS N-PCL § 102(a) is not required to conform to requirements of Freedom of Information Law. Comm on Open Gov't FOIL-AO-7924.

12. —Municipal development corporations, generally

13. — —Local development corporations (LDCs)

Because 5 city officials serve as permanent members of Auburn Local Development Corporation (LDC), it is clear that City of Auburn exercises substantial control over LDC, and LDC constitutes "agency" required to comply with Freedom of Information Law; further, its board constitutes "public body" under Open Meetings Law. Comm on Open Gov't FOIL-AO-10198.

Many of local development corporation's records would remain subject to Freedom of Information Law, even if corporation were not itself subject to that statute as not-for-profit corporation, where corporation performed government function and several members of its board served due to their status as city officials. Comm on Open Gov't FOIL-AO-12386.

Local development corporation (LDC) would be required to comply with Freedom of Information Law, notwithstanding its status as not-for-profit corporation, if there is significant government control, i.e., if majority of LDC's board of directors consists of or is designated by government. Comm on Open Gov't FOIL-AO-12401.

Documentation prepared or received by city officials in conjunction with performance of their duties as members of board of directors of local recreation development corporation was produced only by or for city, and therefore, whether or not corporation itself was subject to Freedom of Information Law (FOIL), many, if not all of its records were subject to FOIL. Comm on Open Gov't OML-AO-3234.

14. — —Municipal housing authorities (MHAs)

Municipal housing authorities in New York are subject to Freedom of Information Law since CLS Pub Hous § 3(2) states that municipal housing authorities are public corporations. Comm on Open Gov't FOIL-AO-12634.

Since industrial development agencies are public corporations, Montgomery County Industrial Development Agency is subject to Freedom of Information Law. Urban Development Corporation is subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-8551.

Canandaigua Recreation Development Corporation, established by City of Canandaigua, is "agency" required to comply with Freedom of Information Law. Comm on Open Gov't FOIL-AO-12272.

Kingston Local Development Corporation (KLDC) was subject to Freedom of Information Law since mayor of Kingston served as president of KLDC and had authority to choose members of its board and, therefore, city of Kingston exercised substantial control over KLDC. Comm on Open Gov't OML-AO-2590.

Records involving activities of Fort Totten Redevelopment Authority generally fall within coverage of Freedom of Information Law. Comm on Open Gov't OML-AO-2603.

15. —Transit-related authorities

Transit authority is required to disclose records to extent that records sought are accessible pursuant to Freedom of Information Law, and that it would be authorized to disclose as "routine use" of Personal Privacy Protection Law. Comm on Open Gov't FOIL-AO-4964.

16. —Other and miscellaneous

While a bank may maintain records concerning transactions in which the Warren-Washington Industrial Development Agency was involved, such records were subject to the Freedom of Information Law even though they were not in the agency's physical possession. Comm on Open Gov't FOIL-AO-6318 (1990).

Woodstock Public Access Committee is public body required to comply with Open Meetings Law and its records are subject to Freedom of Information Law since 5 members of committee are appointed by town board, and chair of committee and station manager are also appointed by town board. Comm on Open Gov't FOIL-AO-9236.

Special Funds Conservation Committee, which is affiliated with New York Compensation Rating Board and is headed by individual appointed by Chairman of Workers' Compensation Board, is not governmental entity and thus is not "agency" subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-9825.

Oneida County Cooperative Extension is "agency" required to comply with Freedom of Information Law, for it performs governmental function for state and Oneida County. Comm on Open Gov't FOIL-AO-9940.

Laboratory Corporation of America in Burlington, North Carolina, is not subject to federal Freedom of Information Act or New York Freedom of Information Law. Comm on Open Gov't FOIL-AO-12108.

New York State Technology Enterprise Corporation (NYSTEC) is not "agency" and is not required to comply with Freedom of Information Law, since NYSTEC is independent of government; no government agency or official has any control over corporation or authority to designate any person to NYSTEC's Board of Directors. Comm on Open Gov't FOIL-AO-12603.

Fact that commission may not be public body subject to Open Meetings Law or agency as defined by Freedom of Information Law is not determinative of whether records prepared by commission are subject to Freedom of Information Law; issue is whether documentation prepared by commission consists of agency records. When entity or person prepares documents for agency, those documents are agency records subject to rights conferred by Freedom of Information Law, irrespective of their origin or authorship. Comm on Open Gov't FOIL-AO-8300.

If advisory commissions were created by town resolution, it would be likely that they were not agencies; on other hand, if commission were created by local law, for example, and performs necessary function in decision-making process, it would be subject to Open Meetings Law as "public body" and would constitute "agency" subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-12641.

17. Banks and other financial entities

Financial Information Services Agency is subject to Freedom of Information Law because it is municipal entity that performs governmental function for city; further, directors of agency are required to designate one or more persons as records access officers. Comm on Open Gov't FOIL-AO-4969.

Although meetings of Syracuse Financial Plan Commission are not subject to Open Meetings Law and although commission itself is not agency, it clearly carries out its duties for City of Syracuse and, therefore, records that it prepares are subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-8300.

18. Civic and community organizations, generally

19. —Citizen advisory panels

Citizens Advisory Panel in the Town of Liberty is likely "agency" subject to Freedom of Information Law, where such panels were created by Power Authority, public benefit corporation, they function as governmental entities and perform governmental function for municipalities. Comm on Open Gov't FOIL-AO-4425.

20. —Festival development corporations (FDCs)

Records of Festival Development Corporation (FDC), formed by town board and festival producers to handle town's portion of proceeds from music festival held in town, are subject to Freedom of Information Law, and meetings of FDC must be conducted in accordance with Open Meetings Law. Comm on Open Gov't FOIL-AO-10020.

CLS Pub O § 87(2)(g), which permits withholding of interagency or intra-agency materials depending on contents of those materials, could not be cited to withhold communications between county and federal agency; CLS Pub O § 86 defines "agency" as entity of state or local government in New York. Comm on Open Gov't FOIL-AO-10050.

Festival Development Corporation (FDC), formed by town board and festival producers to handle town's portion of proceeds from music festival held in town, was "agency" subject to Freedom of Information Law and "public body" subject to Open Meetings Law, where town supervisor was its chairman, and its board of trustees consisted of same persons as town board; although "agency" usually is entity of state or local government, FDC was entity for which quorum was required under Not-for-Profit Corporation Law, it had more than 2 members, and town exercised substantial control over it. Comm on Open Gov't OML-AO-2739.

21. —Libraries and museums

Board of trustees of Suffolk County Vanderbilt Museum is "agency" required to comply with Freedom of Information Law; Board is also "public body" subject to Open Meetings Law. Committee on Open Government FOIL-AO-3676; OML-AO-1153.

"Special district library" is "agency" subject to Freedom of Information Law where legislation creating library provides for central school district to raise money by tax, to equip and maintain library, and to provide building or rooms for library use. Committee on Open Government FOIL-AO-3370.

Fact that museum board of trustees is not employed by town, or that board of trustees paid for museum expansion plans would not be relevant to rights of access; once plans for relevant documentation are in possession of town, they fall within scope of Freedom of Information Law; even though plans may be "preliminary" communications, those factors do not necessarily indicate that records can be withheld; however, if museum board of trustees is not governmental entity performing governmental or proprietary function for town, but rather is independent, nongovernmental, not-for-profit corporation, it would not be "agency". Comm On Open Gov't FOIL-AO-4596.

Where members of library board of trustees were appointed by town board and library functioned as unit within town government, town board was required to promulgate appropriate rules and regulations applicable to town government, including Library, consistent with those adopted by Committee on Open Government and with Freedom of Information Law. Comm on Open Gov't FOIL-AO-8330.

Based on CLS Educ § 253 and judicial interpretations concerning that and related provisions, distinction may be made between public library and association or free association library; former would be subject to Freedom of Information Law, while latter would not. Comm on Open Gov't FOIL-AO-13277.

Whether public library was part of town government or otherwise, it was still governmental entity and was subject to Freedom of Information Law where library's employees were public employees subject to Civil Service Law, they participated in town's medical insurance plan, library's budget was approved by town board, it used town's tax identification number, and town supervisor signed every library check. Comm on Open Gov't OML-AO-2370.

Unlike public library which is established by government and belongs to "the public," free association library, as private nongovernmental entity, is not subject to Freedom of Information Law. Comm on Open Gov't OML-AO-3579.

22. —Tourist promotion agencies

Cattaraugus County Tourist Promotion Agency, Inc. (TPA) is not subject to either Freedom of Information (FOIL) or Open Meetings Laws; however, since those on its board of directors named by county participate by virtue of their positions in county government, any records that they produce or receive in connection with their functions for TPA constitute county records under FOIL. Comm on Open Gov't FOIL-AO-12,364.

Community board is municipal entity that performs governmental function for municipality and is thus "agency" subject to FOIL. Comm on Open Gov't FOIL-AO-4161.

Community board is municipal entity that performs governmental function for municipality, therefore, it is "agency" subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-4748.

Fulton Community Revitalization Corporation (FCRC) is not "agency" under Freedom of Information Law (FOIL), but when records involving FCRC come into possession of city officials, they constitute agency records subject to FOIL. Comm on Open Gov't OML-AO-3642.

23. Corporations, generally

24. —Not-for-profit corporations

Homeowners association organized as not for profit, type corporation as defined in CLS N-PCL § 102(a) is not required to conform to requirements of Freedom of Information Law. Comm on Open Gov't FOIL-AO-7924.

Not-for-profit corporation which, among other functions, operated tennis concessions at city parks was subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-9625.

If Southern Tier Economic Development Corporation (STED) is creation of government or if government has substantial control over its operations, it would fall within coverage of Freedom of Information Law. Comm on Open Gov't FOIL-AO-13181.

When records involving Southern Tier Economic Development Corporation (STED) come into possession of member of its board who serves due to his or her government position, they would constitute agency records that fall within coverage of Freedom of Information Law. Comm on Open Gov't FOIL-AO-13181.

Friends of the North Country, Inc., as not-for-profit corporation, cannot be characterized as "agency" and it does not have responsibility to comply with Freedom of Information Law (FOIL); however, in consideration of its contractual relationships with governmental entities, some of its records may fall within scope of FOIL. Comm on Open Gov't FOIL-AO-13361.

Not-for-profit corporation (Clarence Senior Citizens, Inc.) would be subject to both Freedom of Information and Open Meetings Laws where town board essentially has complete control over membership of board of directors of corporation. Comm on Open Gov't FOIL-AO-13422.

Local humane society could not be characterized as "agency" and thus does not have responsibility to comply with Freedom of Information Law except with regard to government records society may hold. Comm on Open Gov't FOIL-AO-13466.

Not-for-profit corporation (Health Research Inc. (HRI)) is subject to Freedom of Information Law where its essential purpose is to enhance functioning of state agency (Department of Health), it would not exist but for its relationship with that agency, and it is treated as state agency by CLS St Fin § 53-a. Comm on Open Gov't FOIL-AO-13496.

If not-for-profit corporation (Health Research Inc. (HRI)) is determined to be "agency" under Freedom of Information Law, it would constitute agency subject to Personal Privacy Protection Law. Comm on Open Gov't FOIL-AO-13496.

Where fire company is corporate parent of ambulance corporation, and if offices of 2 corporations are in same premises, their leadership and members are same or overlap, and their records are overseen, used and administered by same persons, such records are kept by or for fire company and thus fall within coverage of Freedom of Information Law. Comm on Open Gov't FOIL-AO-13576.

Private not-for-profit agency that received majority of its funds from state Office of Alcoholism and Substance Abuse Services was local "drug abuse prevention council" under CLS Gen Mun § 239-u and, as such, constituted agency whose records fell within coverage of Freedom of Information Law. Comm on Open Gov't FOIL-AO-16573.

Although community action agencies are not-for-profit corporations and appear to perform governmental function, it is questionable whether they constitute "governmental entities" or, therefore, are agencies subject to Freedom of Information Law. Although it is unclear whether Freedom of Information Law and Open Meetings Law apply to records and meetings of community action agency, language of federal enabling legislation indicates intent that community action agency be accountable by offering reasonable public access to proceedings and records. Comm on Open Gov't OML-AO-2613.

Not-for-profit corporation known as Clarence Senior Citizens, Inc. is subject to Freedom of Information and Open Meetings Laws; its directors are appointed by majority of Clarence Town Board, number of directors can be increased or decreased by Clarence Town Board, its directors can be removed for cause by majority of members of its board and majority of Clarence Town Board, and its directors can be removed without cause only by Clarence Town Board. Comm on Open Gov't OML-AO-3483.

Carthage Industrial Development Corporation (local development corporation) would constitute "agency" required to comply with Freedom of Information Law, since at least 7 of 9 members of corporation, who also serve as its board of directors, are appointed by or are government officials, and thus government agencies exercise substantial control over corporation. Comm on Open Gov't OML-AO-4267.

25. —Off-Tracking Betting corporation (OTB)

Suffolk Regional Off-Track Betting Corporation is "agency" and all of its records are subject to rights of access granted by Freedom of Information Law, irrespective of their original source or function to which they relate. Comm On Open Gov't FOIL-AO-4506.

Records of Catskill Regional Off-Track Betting Corporation were accessible in that such public corporation was an agency subject to FOIL. Comm on Open Gov't FOIL-AO-6156 (1990).

Corporation is not governmental entity even though it has relationship with government; as such, its records are not subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-4613.

New York City Housing Development Corporation (HDC), as public benefit corporation, is agency required to comply with Freedom of Information Law. Comm on Open Gov't FOIL-AO-12822.

Although it consists largely of government employees, Police Benevolent Association of City of New York, Inc., is private organization not subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-16577.

If entity is district corporation or public benefit corporation, it constitutes "public corporation" that falls within coverage of Freedom of Information Law and Open Meetings Law. Comm on Open Gov't OML-AO-2598.

26. Courts, generally

27. —Appearance schedules; dockets

"Appearance schedule" of defendants can be inspected prior to commencement of court (assuming such schedule is similar to or

same as "docket") under CLS Jud § 255-b and CLS UJCA § 2019-a (for justice courts); Freedom of Information Law would not apply. Comm on Open Gov't FOIL-AO-12719.

28. —Court libraries

Supreme Court libraries would likely be considered as part of "judiciary" and as such, Freedom of Information Law would not apply. Comm on Open Gov't FOIL-AO-4663.

29. —Federal agencies

Freedom of Information Law generally pertains to records maintained by entities of state and local government in New York; it does not apply to records maintained by federal agencies and any request made for such records should be directed to federal agency that maintains record. Comm on Open Gov't FOIL-AO-4934.

Freedom of Information Law does not apply to courts or court records; further, federal Freedom of Information and Privacy Acts apply only to records maintained by federal agencies; consequently they are also inapplicable to records maintained by Supreme Court in New York. Comm on Open Gov't FOIL-AO-4935.

30. —Office of Court Administration (OCA)

Administrative Board of New York State Courts is "agency" subject to requirements of Freedom of Information Law; Board performs administrative function and does not exercise judicial function within definition of "judiciary" in CLS Pub O § 86(1). Committee on Open Government FOIL-AO-3503.

Since state office of court administration is "agency" required to comply with Freedom of Information Law, if functions of city office of court administration are similar to those carried out by its state counterpart, it would be "agency" for purposes of Freedom of Information Law. Comm on Open Gov't FOIL-AO-4746.

Records held by court or court clerk fell outside scope of Freedom of Information Law; however, office of court administration is "agency" subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-4931.

Office of Court Administration is not court, but rather is "agency" and, therefore, is subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-9208.

31. —Office of Public Administrator

Office of Public Administrator constitutes agency required to comply with Freedom of Information Law. Comm on Open Gov't FOIL-AO-9358.

Records maintained by county commissioner of finance while acting in his capacity as public administrator fall within coverage of Freedom of Information Law. Comm on Open Gov't FOIL-AO-9650.

32. —Surrogate's Court

Records of Surrogate's Court proceeding which were not available under Freedom of Information Law (which does not pertain to courts or court records) were available from clerk of Surrogate's Court (CLS SCPA § 2501). Comm on Open Gov't FOIL-AO-9895.

33. —Town Justice Court

Town Justice Court is not "agency" and therefore it is not required by Freedom of Information Law to disclose records, particularly those indicating disposition of cases; Freedom of Information Law does not apply to courts and court records. Comm on Open Gov't FOIL-AO-4614.

"Appearance schedule" of defendants can be inspected prior to commencement of court (assuming such schedule is similar to or same as "docket") under CLS Jud § 255-b and CLS UJCA § 2019-a (for justice courts); Freedom of Information Law would not apply. Comm on Open Gov't FOIL-AO-12719.

Request for records of Justice Court should be made to clerk of court, citing CLS UJCA § 2019-a as basis for request. Comm on Open Gov't FOIL-AO-13353.

Freedom of information law does not apply to records kept by court. Committee on Open Government FOIL-AO-3793.

Although Freedom of Information Law does not apply to courts or court records, other provisions of law often grant the right of access to court records. Comm on Open Gov't FOIL-AO-4667.

If records sought are court records, Freedom of Information Law would not govern rights of access; however, court records may be available under other statutes which often confer broad rights of access to court records. Comm on Open Gov't FOIL-AO-4679.

Freedom of Information Law does not apply to courts or courts records, but this does not infer that court records are confidential, because other provisions of law often grant significant rights of access to court records. Comm on Open Gov't FOIL-AO-4681.

Freedom of Information Law is not applicable to courts or court records; further, federal Freedom of Information Act pertains only to records in possession of federal agencies; moreover, courts and court records fall outside of requirements of federal Freedom of Information Act. Comm on Open Gov't FOIL-AO-4692.

Freedom of Information Law does not apply to courts and court records, and such records are often available under other provisions of law, however, request for records should be submitted to clerk of appropriate court. Comm on Open Gov't FOIL-AO-4802.

Freedom of Information Law does not apply to courts or court records and as such request should be submitted to clerk of appropriate court. Comm on Open Gov't FOIL-AO-4804.

Freedom of Information Law is not applicable to courts and court records; further, since Freedom of Information Law does not apply, inquiry concerning courts and court records falls outside scope of Committee's jurisdiction. Comm on Open Gov't FOIL-AO-4832.

Courts and court records are not subject to Freedom of Information Law; however, other provisions of law may grant broad rights of access to court records. Comm on Open Gov't FOIL-AO-4862.

Although Freedom of Information Law does not apply to courts and court records, other provisions of law often grant broad rights of access to court records; therefore, it is suggested that requests should be made to clerk of appropriate court. Comm on Open Gov't FOIL-AO-4873.

Freedom of Information Law does not apply to courts or court records; however, other provisions of law grant broad rights of access to court records. Comm on Open Gov't FOIL-AO-4880.

Freedom of Information Law does not apply to court or court records and though Freedom of Information Law is inapplicable, other provisions of law often grant significant rights of access to court records; where county court clerk has failed to respond to requests for records pursuant to Freedom of Information Law, requester should discuss matter with attorney or representative of prisoners' legal services. Comm on Open Gov't FOIL-AO-4887.

If request involves court records, Freedom of Information Law is not applicable; however, other provisions of law often grant rights of access to court records and if court records are sought, request should be made to clerk of appropriate court. Comm on Open Gov't FOIL-AO-4892.

Although courts and court records are excluded from scope of Freedom of Information Law, other statutes often grant broad rights of access to court records; request for such records should be directed to court reporter, clerk of court or attorney. Comm on Open Gov't FOIL-AO-4919.

Freedom of Information Law is not applicable to courts or court records; nevertheless, court records are often available pursuant to other provisions of law and requests should generally be directed to clerk of appropriate court. Comm on Open Gov't FOIL-AO-4922.

Freedom of Information Law does not apply to courts or court records; however, there are other statutes that may grant rights of access to court records and requests for those records should be directed to clerks of appropriate courts. Comm on Open Gov't FOIL-AO-4940.

Freedom of Information Law does not apply to court records, and as such, records of County Supreme Court are not accessible under Freedom of Information Law. Comm on Open Gov't FOIL-AO-4972.

FOIL does not apply to the courts or court records. Comm on Open Gov't FOIL-AO-6118 (1990).

Courts and court records are not subject to Freedom of Information Law; however, court records are generally available under other provisions of law (e.g., CLS Jud § 255). Comm on Open Gov't FOIL-AO-12579.

34. Criminal law, generally

35. —Corrections Department

"Agency" is defined to include entities of state and local

government, such as department of correctional services. Comm on Open Gov't FOIL-AO-4841.

Department of Correctional Services is "agency" subject to requirements of both Freedom of Information Law and Personal Privacy Protection Law; former includes within its scope any governmental entity performing governmental function; latter defines "agency" to mean state agencies performing governmental function for state. Comm on Open Gov't FOIL-AO-4983.

36. —District Attorney's Office

Office of City Prosecuter is "agency" required to comply with Freedom of Information Law; thus, records pertaining to city code violation complaint directed to City Prosecuter must be made available under FOIL. Comm on Open Govt FOIL-AO-3727.

Since office of district attorney is "governmental entity" that performs "governmental function" for state and public corporation, it is agency required to comply with Freedom of Information Law. Comm on Open Gov't FOIL-AO-4652.

Since office of district attorney is "governmental entity" that performs "governmental function" for state in public corporation or county, it is agency required to comply with Freedom of Information Law; therefore, to extent that office of district attorney maintains requested records, they are subject to rights of access, even though records may be kept by other entities such as court or police department. Comm on Open Gov't FOIL-AO-4684.

Since office of district attorney is governmental entity that performs governmental functions for state and federal corporation, such as county, it is agency required to comply with Freedom of Information Law. Comm on Open Gov't FOIL-AO-4701.

Since office of special prosecutor, department of correction and office of district attorney are "agencies", presumably any requested records would be equally available or exempt from disclosure, irrespective of which agency maintains records. Comm on Open Gov't FOIL-AO-4704.

Since district attorney's office is "governmental entity" that performs "governmental function" for state and public corporation, such as county, it is agency required to comply with Freedom of Information Law. Comm on Open Gov't FOIL-AO-4716.

Since office of district attorney is "governmental entity" that performs "governmental function" for state and public corporation, it is agency required to comply with Freedom of Information Law. Comm on Open Gov't FOIL-AO-4746.

Copies of felony complaints and indictments may be maintained by office of District Attorney who prosecuted case and since district attorney's office is agency subject to Freedom of Information Law, request may be submitted under Freedom of Information Law to relevant district attorney's office for such records. Comm on Open Gov't FOIL-AO-4799.

Since office of district attorney is "governmental entity" that performs "governmental function" for state and public corporation, county, it is agency required to comply with Freedom of Information Law. Comm on Open Gov't FOIL-AO-4802.

Since office of district attorney is "governmental entity" that performs "governmental function" for state and public corporation, it is agency required to comply with Freedom of Information Law. Comm on Open Gov't FOIL-AO-4865.

Office of district attorney is "agency" and, therefore, records maintained by office of district attorney are subject to rights of access granted by Freedom of Information Law. Comm on Open Gov't FOIL-AO-4902.

District Attorney's office is "agency" subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-4972.

Since office of District Attorney is governmental entity that performs governmental function for state and public corporation, it is agency required to comply with Freedom of Information Law. Comm on Open Gov't FOIL-AO-4976.

Police departments or offices of district attorneys constitute agencies required to comply with Freedom of Information Law; however, courts and court records are outside coverage of Freedom of Information Law. Comm on Open Gov't FOIL-AO-7538.

37. —Drug Enforcement Administration (DEA)

Drug Enforcement Administration is a federal agency that is not subject to the New York Freedom of Information Law which is applicable to records maintained by entities of state and local government in New York. The agency, in question, however, is subject to the federal Freedom of Information Act. Comm on Open Gov't FOIL-AO-6300 (1990).

38. —Police departments, generally

39. — —Sheriff's departments

Freedom of Information Law is applicable to all records of agency, including sheriff's department, and is based upon presumption of access. Comm on Open Gov't FOIL-AO-4872.

Police activity log is "record" that falls within scope of Freedom of Information Law except to extent that its contents may be withheld in accordance with CLS Pub O § 87(2); agency must respond to request for information within 5 business days from receipt of request and this response can take 3 forms: it can grant access, deny access, and if so, denial should be in writing stating reasons therefor, or receipt of request may be acknowledged in writing if more than 5 business days are necessary to review or locate records; however, Committee on Open Government has no authority to enforce Freedom of Information Law, nor is it empowered to compel agency to grant or deny access to records. Comm on Open Gov't FOIL-AO-4574.

Police Department is agency in accordance with definition in CLS Pub Off § 86(3) and as such is subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-4728.

Police department is "agency" required to comply with Freedom of Information Law. Comm on Open Gov't FOIL-AO-4912.

Both police department and child protective unit of Department of Social Services are governmental entities performing governmental functions and as such are agencies required to comply with Freedom of Information Law. Comm on Open Gov't FOIL-AO-4927.

"Precinct Community Council of the New York City Police Department," which consists of groups of concerned individuals dedicated to improvement of relations between police and community, is not subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-12098.

Freedom of Information Law does not apply to courts or court records, or to records maintained by attorney; nevertheless, court records are often available pursuant to other provisions of law, and such requests should be directed to clerk of appropriate court; pre-sentence reports are confidential with respect to public and may be made available to defendant only by court. Comm on Open Gov't FOIL-AO-4881.

40. Education-related entities, generally

41. —Board of Cooperative Educational Services (BOCES)

Board of cooperative educational services is subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-7587.

42. —City University of New York (CUNY)

Reports sent by the admission office of the City University of New York Law School at Queens College to the ABA accreditation committee were not exempt from the Freedom of Information Law in that the FOIL was applicable to inter-agency materials and the ABA was not a state or municipal entity nor was it a governmental entity. Comm on Open Gov't FOIL-AO-6292.

Personnel and budget committees created under City University of New York bylaws must comply with both Freedom of Information and Open Meetings Laws, although much of their deliberative process may be conducted in executive session under CLS Pub O § 105(1)(f) and their recommendations can likely be withheld in great measure under CLS Pub O § 87(2)(g). Comm on Open Gov't FOIL-AO-12284.

43. —Community colleges

Student government association of community college is "agency" subject to Freedom of Information Law; thus, all records maintained by association, including budget of campus clubs which had funds, would be available to public. Committee on Open Government FOIL-AO-3500.

Freedom of Information Law pertains to records of agencies of state and local government; community colleges throughout state are "agencies" subject to requirements of Freedom of Information Law. Comm On Open Gov't FOIL-AO-4593.

Community college is "agency" under Freedom of Information Law and community college's records are subject to rights of

access under Freedom of Information Law. Comm on Open Gov't FOIL-AO-4629.

Since community colleges are governmental entities performing governmental function, report concerning allegation of plagiarism is subject to rights of access granted by Freedom of Information Law; Federal Family Educational Rights and Privacy Act generally prohibits educational agency from disclosing "education records" identifiable to student without student's consent; therefore, to extent that Federal Act prohibits disclosure, records concerning allegation of plagiarism would be specifically exempted from disclosure by federal statute. Comm on Open Gov't FOIL-AO-4904-A.

Suffolk Community College Association, Inc., was subject to Freedom of Information Law since association would not have existed but for its relationship with college. Comm on Open Gov't FOIL-AO-8386.

Faculty Student Association of Hudson Valley Community College is "agency" required to comply with Freedom of Information Law because it would not exist but for its relationship with State University of New York. Comm on Open Gov't FOIL-AO-12072.

44. —State University of New York (SUNY), generally

45. — —SUNY funds, foundations and the like

State University Construction Fund is "agency" required to comply with Freedom of Information Law. Comm on Open Govt FOIL-AO-3589.

College foundation and its board of trustees is agency subject to freedom of information law since relationship between state university of New York and foundation is similar to that between volunteer fire company and municipality. Committee on Open Government FOIL-AO-3810.

Research Foundation of State University of New York (SUNY), which would not exist but for its relationship with SUNY and carries out its functions, powers and duties for SUNY, is "agency" with responsibility to comply with Freedom of Information Law. Comm on Open Gov't FOIL-AO-12228.

State university foundation was "agency" subject to Freedom of Information Law where foundation's purpose was "to serve the University," foundation could not carry out its duties without approval of university officials, and it was "integral part" of university; moreover, offices of foundation were located at university, and utilized university space. Comm on Open Gov't FOIL-AO-12685.

46. — —SUNY libraries

New York State library is part of state education department and state university libraries are within state university; in both instances, those libraries are parts of agency and consequently, are subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-4663.

Since state university is integral part of government of New York State and is engaged in carrying out governmental functions, it is "agency" required to comply with Freedom of Information Law. Comm on Open Gov't FOIL-AO-4619.

Clinical management practice program at state university is operated by and on behalf of state university and certain of its components and is "agency" because state university and components fall under this definition; further, records of or pertaining to clinical management practice plan are maintained by officers and employees of state university and therefore such records are subject to rights granted by Freedom of Information Law. Comm on Open Gov't FOIL-AO-4763.

State University of New York is "agency" required to comply with Freedom of Information Law. Not-for-profit corporation created to carry out its duties for or on behalf of college of State University of New York could be found to be subject to Freedom of Information Law. If corporation existed due to its relationship with college of State University of New York and if college would have performed functions of corporation if corporation had not been created, it might be concluded that corporation conducted public business and performs governmental function for college and, therefore, that college was subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-7871.

Open Meetings Law applies to meetings of public bodies, not only to governing bodies, but also to committees and subcommittees designated by governing body; Freedom of Information Law is applicable to agency records; state university, as well as its component colleges, are agencies whose records are subject to rights of access. Comm on Open Govt's OML-AO-1402.

Brockport Student Government at SUNY College at Brockport is agency subject to Freedom of Information Law since student government is involved in performing governmental function for, on behalf of or in conjunction with State University. Comm on Open Gov't OML-AO-2599.

47. —Other and miscellaneous

Freedom of Information Law was inapplicable to National Center for Fluoridation Policy and Research because, although it was headed by member of faculty at School of Dental Medicine at University of Buffalo, it essentially was private advocacy group in no way connected with University of Buffalo, it was web-based and not physically located anywhere, it was not affiliated with School of Dental Medicine, and it received no money or support from university. Comm on Open Gov't FOIL-AO-12,359.

School district as well as entities operating under aegis of district can be characterized as "agency" subject to requirements of Freedom of Information Law. Comm on Open Govt FOIL-AO-3456.

Although Freedom of Information Law provides broad rights of access, it pertains to existing records; education department does not maintain any list that contains names and current addresses of college alumni, and though education department would provide information containing current addresses of alumni if they maintained information, department cannot make available what it does not have. Comm On Open Gov't FOIL-AO-4599.

Teachers' retirement system is governmental entity performing governmental or proprietary function for state and school districts, which are municipal entities; as such, it is agency required to comply with Freedom of Information Law. Comm on Open Gov't FOIL-AO-4699.

Freedom of Information Law pertains generally to records of agency which includes entities of state and local governments such as school districts; while law provides statutory guidance concerning access to records of agencies, it makes no specific reference to records of school district; if record is final and does not identify particular students, it appears it would be accessible; to extent that such report might identify particular student or students, those aspects of report would be required to be kept confidential pursuant to federal law; in addition, if state education department maintains report, presumably it would be equally available from department and district. Comm on Open Gov't FOIL-AO-4714.

While county school board association exists due to its relationship with governmental entities, it is private, not-for-profit entity that is not governmental and, therefore, its records are not subject to Freedom of Information Law because it is not "agency". Comm on Open Gov't FOIL-AO-4767.

Teacher resource and computer training center is "agency" because it is governmental entity performing governmental function for state, for one or more school districts and for one or more boards of cooperative educational services; its records should therefore be made available in accordance with Freedom of Information Law. Comm on Open Gov't FOIL-AO-4855.

Not-for-profit "Research Foundation" and its "Institute for Long Island Archaeology," which operate and maintains laboratory within Anthropology Department of SUNY/Stony Brook (SUNY), are subject to Freedom of Information Law, as they would not exist but for their relationship with SUNY; even if Foundation and Institute are not "agencies," their records fall within coverage of Freedom of Information Law, because there is "considerable crossover" between their activities and SUNY, and their documents are physically maintained by SUNY and its staff. Comm on Open Gov't FOIL-AO-10401.

While city Board of Education is subject to Freedom of Information Law, state Education Department is subject to that statute, as well as Personal Privacy Protection Law. Comm on Open Gov't FOIL-AO-12594.

Not-for-profit corporation that contracts with SUNY/Albany to carry out variety of functions, including operation of food service, campus bookstore and beverage vending, is required to comply with both Freedom of Information Law and Open Meetings Law. Comm on Open Gov't FOIL-AO-13068.

Research Foundation of City University of New York is subject to Freedom of Information Law and Open Meetings Law, even though foundation regards itself as private corporation under contract to university. Comm on Open Gov't FOIL-AO-13140.

Freedom of Information Law does not apply to private entities, such as private colleges, notwithstanding their receipt of government funding. Comm on Open Gov't FOIL-AO-12100.

Board of College of Staten Island Association, Inc., which oversees allocation and expenditure of student activity fees, is subject to Open Meetings Law and Freedom of Information Law when electing directors; however, neither statute requires voting by roll call or specifies that results must be announced exactly when votes are cast, and both statutes are satisfied so long as record is prepared indicating each member's vote. Comm on Open Gov't OML-AO-3502.

48. Election-related entities

Since board of elections is component of county, Freedom of Information Law applies to all records of agency and all county records, including information kept on computer tapes or discs, which are subject to rights and access granted by Freedom of Information Law; data processing center serves as modern record storage, generating and retrieval center and these functions should not serve to impair capacity of agencies or public officers from carrying out statutory responsibilities under Freedom of Information Law. Comm On Open Gov't FOIL-AO-4600.

Because of "open vote" provision and Freedom of Information Law, and since committee of public body is considered to be "agency", when final vote is taken by committee, record must be prepared to indicate manner in which each member casts his or her vote. Comm on Open Gov't OML-AO-1396, Comm on Open Gov't FOIL-AO-4638.

49. Fire departments and the like

Franklin Square & Munson Fire District is public corporation (CLS Gen Const § 66, CLS Town § 174) required to comply with Freedom of Information Law. Comm on Open Gov't FOIL-AO-12,345.

The board of fire commissioners of a fire district is an "agency" under the Freedom of Information Law. Comm on Open Gov't FOIL-AO-2994.

Since fire district is public corporation as provided in CLS Town § 174(7) and defined in CLS Pub Off 86(3), it is "agency" subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-4496.

If ambulance department is private, profit making entity, that is independent of government, its records would not be subject to Freedom of Information Law; however, fire departments that are not-for-profit corporation which contract with one or more municipalities and exist by virtue of contractual relationship with government may have its records subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-4644.

Volunteer fire company is "agency" that falls within provisions of Freedom of Information Law because volunteer fire company performs governmental function and, as such, its records are subject to rights of access granted by Freedom of Information Law; under Freedom of Information Law, all records of volunteer fire company are available except to extent that they fall within one or more grounds for denial of access. Comm on Open Gov't FOIL-AO-4917.

Since fire district is public corporation, it is "agency" subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-8538.

Volunteer fire companies created as private corporations are subject to Freedom of Information Law, and their financial records, as well as records reflective of response times, generally consist of factual data that must be disclosed. Comm on Open Gov't FOIL-AO-9947.

While New York City Fire Department and New York State Department of Labor are "agencies" required to comply with Freedom of Information Law, Personal Privacy Protection Law, which applies to state agencies such as Department of Labor, does not apply to local entities such as New York City Fire Department. Comm on Open Gov't FOIL-AO-12188.

Volunteer fire companies are subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-12548.

Fire district is public corporation and, therefore, is "agency" required to comply with Freedom of Information Law. Comm on Open Gov't OML-AO-2598.

Board of volunteer fire company is "public body" subject to Open Meetings Law; volunteer fire companies, which generally are not-for-profit corporations that perform their duties by means of contractual relationships with municipalities, perform governmental function and their records are subject to rights of access granted by Freedom of Information Law. Comm on Open Gov't OML-AO-3311.

Access to records of Slaterville Ambulance, Inc., which was formed by Slaterville Volunteer Fire Company, was governed by Freedom of Information Law, since members of ambulance corporation were also members of volunteer fire company, ambulance corporation was analogous to subsidiary of fire company, and same persons oversaw, used and administered their records. Comm on Open Gov't OML-AO-3508.

50. Hospitals and other health-related entities

Report prepared by ad hoc committee of SUNY Upstate Medical Center, in response to allegations of improprieties against Center and Department of Microbiology, would be "record" subject to rights of access granted by Freedom of Information Law, despite contention that report is "property" of SUNY Research Foundation. Comm on Open Govt FOIL-AO-3463.

Hospital which is part of New York City Health and Hospitals Corporation is "agency" required to comply with Freedom of Information Law. Comm on Open Govt FOIL-AO-3593.

Request made to obtain medical records from department of correctional services should be brought not under Freedom of Information Law but under CLS Pub Health § 18; § 18 provides rights that exceed those granted by Freedom of Information Law. Comm On Open Gov't FOIL-AO-4608.

Private medical center is not "agency" under Freedom of Information Law, and therefore, is not subject to law; however, CLS Pub Health § 18 generally provides patients rights of access to their own medical records, with certain exceptions. Comm on Open Gov't FOIL-AO-4622.

Hospital is "agency" or part of agency and its records are subject to rights of access granted by Freedom of Information Law. Comm on Open Gov't FOIL-AO-4758.

New York City Health and Hospitals Corporation is agency required to comply with Freedom of Information Law. Comm on Open Gov't FOIL-AO-9189.

Board of managers of city hospital constitutes "public body" for purposes of Open Meetings Law and "agency" for purposes of Freedom of Information Law and is required to comply with both statutes. Comm on Open Gov't FOIL-AO-9478.

Roswell Park Cancer Institute is required to comply with Freedom of Information Law since it is under management and control of Department of Health. Roswell Park Alliance Foundation is not required to comply with Freedom of Information Law since it is non-profit corporation, its employees are paid by Foundation and not by Roswell Park Cancer Institute or Department of Health, it employs its own attorneys and, like all not-for-profit corporations in New York, it is subject to oversight and filing requirements imposed by Office of Attorney General, and not Department of Health. Comm on Open Gov't FOIL-AO-9667.

Albany Medical Center is not governmental entity and does not carry out its functions on behalf of government; fact that it uses or receives government funds is not determinative of its status and does not alter its character as a private organization that falls beyond coverage of Freedom of Information Law. Comm on Open Gov't FOIL-AO-12091.

Volunteer ambulance company performing its duties for ambulance district, which is itself public corporation, is subject to the Freedom of Information Law. Comm on Open Gov't FOIL-AO-12548.

Health research not-for-profit corporation was "agency" subject to Freedom of Information law where corporation's essential purpose was to enhance functioning of state Health Department, and it would not exist but for its relationship with that agency. Even if entities in question (not-for-profit health research institute and university research foundation) were not "agencies," their records would fall within scope of Freedom of Information Law due to their relationships with state Department of Health and state university, respectively, both of which clearly were agencies. Comm on Open Gov't FOIL-AO-12685.

51. Insurance companies

Private insurance company is not "agency", and records that it produces are not subject to Freedom of Information Law; however, when its records are submitted to agency, records are subject to rights granted by Freedom of Information Law; definition of "agency" excludes state legislature, as well as "judiciary", but Office of Court Administration is "agency" and its records are subject to Freedom of Information Law; similarly, records of division of budget are "agency records". Comm on Open Gov't FOIL-AO-4617.

While State Insurance Fund is not typical of commercial enterprises, it carries out many of its duties as entity in competition with private firms in insurance industry, and thus it can be characterized as commercial entity, and portions of its annual budget that fall within scope of CLS Pub O § 87(2)(d) may be withheld under Freedom of Information Law. Comm on Open Gov't FOIL-AO-12190.

52. Legal assistance organizations

Freedom of information law does not apply to records kept by attorney employed by legal aid society. Committee on Open Government FOIL-AO-3793.

While legal aid societies which are agencies of local government may be subject to Freedom of Information Law, it appears that most are not "agencies" as defined in Freedom of Information Law and, as such, are not subject to law. Comm on Open Gov't FOIL-AO-4691.

If legal aid society is not "governmental agency", but rather, not-for-profit corporation, it would not be subject to Freedom of Information Law; however, various governmental entities, such as counties, might maintain records pertaining to legal aid society; in those instances, request made under Freedom of Information Law may be directed to agency or agencies that maintain records sought. Comm on Open Gov't FOIL-AO-4741.

If legal aid society is not-for-profit corporation, although it has relationship with government, it is not "governmental entity" subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-4746.

Freedom of Information Law is applicable to agencies, governmental entities that perform governmental function; since Prisoners' Legal Services is not governmental entity, it is not agency required to comply with Freedom of Information Law. Comm on Open Gov't FOIL-AO-4940.

Ordinarily, attorney or attorney's office does not constitute agency, and records maintained by attorney or his or her office will fall beyond coverage of Freedom of Information Law. Comm on Open Gov't FOIL-AO-7573.

While legal aid societies which are agencies of local government may be subject to Freedom of Information Law, most are not "agencies" as that term is defined in Freedom of Information Law and, as such, are not subject to that statute. Comm on Open Gov't FOIL-AO-8384.

While records of governmental entity required to adopt plan under CLS County Art 18-B are subject to Freedom of Information Law, records of individual attorney or private organization performing services under Article 18-B may or may not be subject to Freedom of Information Law, depending on nature of plan. Comm on Open Gov't OML-AO-4016.

If plan under CLS County Art 18-B involves services of public defender, records maintained by office of public defender would fall within scope of Freedom of Information Law, for that office would constitute "agency" as defined in CLS Pub O § 86(3). Comm on Open Gov't OML-AO-4016.

If plan under CLS County Art 18-B involves services rendered by private attorneys or associations, those persons or entities would not constitute agencies subject to Freedom of Information Law. Comm on Open Gov't OML-AO-4016.

If bar association, for example, or other organization maintains records for county, such records would constitute county records, even if they are maintained apart from agency's premises. Comm on Open Gov't OML-AO-4016.

53. Social services agencies

Government offices, such as Human Resources Administration or Department of Social Services, are "agencies" subject to Freedom of Information Law; however, private facility would not likely be required to comply with Freedom of Information Law. Comm on Open Gov't FOIL-AO-4924.

Both police department and child protective unit of Department of Social Services are governmental entities performing governmental functions and as such are agencies required to comply with Freedom of Information Law. Comm on Open Gov't FOIL-AO-4927.

Freedom of Information Law pertains to agency records, and Division for Youth, including its facilities, is "agency" subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-4981.

County Head Start organization is required to disclose its records, with exceptions, even though it is not connected with county government, where it is designated by federal government as Head Start agency, and federal legislation exists that indicates intent to ensure accountability to public by providing "...reasonable public access to information,...and reasonable public access to books and records of the agency..." Comm on Open Gov't OML-AO-4183.

54. Utility companies

While public utility might be regulated by government, it is not be governmental entity performing governmental function and, therefore, is not subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-7882.

If telephone records are prepared by phone company and sent to school district, they can not be characterized as intra-agency materials within meaning of CLS Pub O § 87(2)(g) as telephone company is not agency. Comm on Open Gov't FOIL-AO-7926.

III. "Record"

A. Generally

55. In general

Freedom of Information Law is applicable only to existing records; and thus request to be provided, "on continuing basis," with all reports of particular state agency cannot be construed as request made under FOIL. Comm on Open Govt FOIL-AO-3538.

Freedom of Information Law is not vehicle under which agency is required to answer questions; on contrary, it represents means by which person may seek existing records. Comm on Open Gov't FOIL-AO-4058.

Agency is not required to answer questions or create record in response to request for information, and agency would not be required to create list in response to request if record does not exist in form of list. Comm on Open Gov't FOIL-AO-4425.

In light of decision in Capital Newspapers, Div. of Hearst Corp. v Whalen (1987) 69 NY2d 246, 513 NYS2d 367, 505 NE2d 932, 13 Media L R 2245, under which personal or unofficial documents which are intermingled with official government files and are being "kept" or "held" by governmental entity are "records of an agency" and thus subject to rights granted by Freedom of Information Law, if college foundation records may be intermingled with other records and are "kept" and "held" within offices of a public college or university, such records would fall within scope of such Law. Comm On Open Gov't FOIL-AO-4519.

Freedom of Information Law pertains to existing records and agency need not create or prepare record in response to request. Comm on Open Gov't FOIL-AO-4860.

If documents in question are kept, held or filed by agency, they are "records" that fall within scope of Freedom of Information Law. Comm on Open Gov't FOIL-AO-4882.

Agency may not deny request for records solely on basis that another agency possesses copies of same record. Comm on Open Gov't FOIL-AO-7566.

Whether agency records are characterized as "working documents," "politically sensitive" or otherwise, they fall within scope of Freedom of Information Law. Comm on Open Gov't FOIL-AO-7933.

Contents of files kept, held, filed, produced or reproduced by, with or for agency constitute records subject to rights conferred by Freedom of Information Law, irrespective of where they are located, whether they are characterized as official or unofficial, or whether they are found in files denominated as "public" or otherwise. Comm on Open Gov't FOIL-AO-8323.

While town records might be generated or maintained as result of federal law, they are nonetheless town records subject to other laws, such as Freedom of Information Law. Comm on Open Gov't FOIL-AO-9184.

Whether records are characterized as "working documents," "politically sensitive," or otherwise, they fall within scope of Freedom of Information Law. Comm on Open Gov't OML-AO-2274.

56. Abstract of claims

Town abstracts of claim are "records" subject to Freedom of Information Law as soon as they exist. Comm on Open Gov't FOIL-AO-12196.

57. Agendas

Insofar as agendas pertaining to executive sessions exist, they constitute records subject to rights conferred by Freedom of Information Law. Comm on Open Gov't FOIL-AO-8512.

As soon as agenda of public meeting is prepared, it constitutes "record" within scope of the Freedom of Information Law. Comm on Open Gov't FOIL-AO-12095.

Public body, such as Rockland Community College Board of Trustees, may choose to prepare or follow agenda, but there is no obligation to do so; however, once agenda is prepared, it constitutes "record" subject to rights of access conferred by Freedom of Information Law. Comm on Open Gov't OML-AO-3618.

58. Computer tapes or disks

E-mail communication between village officials constitutes "record" under Freedom of Information Law. Comm on Open Gov't FOIL-AO-12,348.

Since board of elections is component of county, Freedom of Information Law applies to all records of agency and all county records, including information kept on computer tapes or discs, which are subject to rights and access granted by Freedom of Information Law; data processing center serves as modern record storage, generating and retrieval center and these functions should not serve to impair capacity of agencies or public officers from carrying out statutory responsibilities under Freedom of Information Law. Comm On Open Gov't FOIL-AO-4600.

Freedom of Information Law is applicable not only to traditional paper records, but also to information in computers by means of tapes or discs. Comm on Open Gov't FOIL-AO-4658.

Freedom of Information Law includes within its scope traditional paper records, as well as computer tapes, discs and similar information storage devices. Comm on Open Gov't FOIL-AO-4739.

If data is maintained on computers, agency would not be required to develop new programs or reprogram to extract data that might otherwise be available; if agency does not maintain records in format requested, Law would not require agency to prepare or produce records in such format. Comm on Open Gov't FOIL-AO-4747.

If village has no compilation of information sought and cannot print out information based upon existing computer programs, it would not be obliged to create new records or reprogram in order to produce information sought; on other hand, if existing computer programs enable village to produce printout containing information sought, it would be obliged to do so in response to request made by any person. Comm on Open Gov't FOIL-AO-4828.

Where Department of Correctional Services can retrieve information sought on computer, computer disks and similar media constitute "records" subject to rights of access; therefore, information kept by Department, in any physical form whatsoever would constitute "record". Comm on Open Gov't FOIL-AO-4901.

Inventory records, such as computer tapes or property record cards, that are "kept" or "filed" by town constitute "records" subject to rights granted by the Freedom of Information Law. Comm on Open Gov't FOIL-AO-6276 (1990).

If information is maintained in some physical form, it would constitute "record" subject to rights of access conferred by Freedom of Information Law; further, definition of "record" contained in CLS Pub O § 86(4) includes specific reference to computer tapes and discs. When information is maintained electronically —e.g., in computer—if information sought is available under Freedom of Information Law and may be retrieved by means of existing computer programs, agency is required to disclose information. If information sought can be retrieved from computer or other storage medium only by means of new programming or alteration of existing programs, those steps would be equivalent of creating new record, which is not required by CLS Pub O § 89(3); thus, agency is not required by Freedom of Information Law to reprogram or develop new programs to retrieve information that would otherwise be available. Comm on Open Gov't FOIL-AO-7595.

Since Statewide Planning and Research Cooperative System (SPARCS) consists of data that is maintained in some physical form by Department of Health, SPARCS database (or databases) constitutes "record" subject to rights conferred by Freedom of Information Law. Comm on Open Gov't FOIL-AO-7947.

Irrespective of whether document is characterized as police blotter or "General Incident Report" or whether it is maintained on paper or electronically, it would constitute "record" subject to rights of access conferred by Freedom of Information Law. Comm on Open Gov't FOIL-AO-8546.

Latest block assignment list, or boundary files, in digital format that are used to create computer representations of State Senate and Assembly legislative districts, along with attribute information for each of these districts constituted agency records subject to broad disclosure requirements imposed by Freedom of Information Law, irrespective of origin of files. Comm on Open Gov't FOIL-AO-8561.

Computerized listing of all licensed passenger-car drivers residing in 3 counties would be available under Freedom of Information Law if Department of Motor Vehicles could generate requested data based on its existing computer programs; CLS Veh & Tr § 202 does not prohibit applicant from seeking database or portion of database consisting of driver license information. Comm on Open Gov't FOIL-AO-10106.

If New York City Department of Environmental Protection (DEP) is required by NYC Admin Code § 24-707 to print entire contents of its Citywide Facility Inventory Database (CFID), equivalent information must also be made available in electronic format; whether information is stored on paper or on computer tape or in computer disk, it constitutes "record." Comm on Open Gov't FOIL-AO-12559.

Email maintained on county's computers constitute county records subject to rights of access conferred by Freedom of Information Law. Comm on Open Gov't FOIL-AO-13444.

59. "Confidential" matters; sealed records

Freedom of Information Law may not be used to obtain copies of all records pertaining to criminal charges that have been dismissed and sealed by court; Criminal Procedure Law contains correct procedure for obtaining such records. Comm On Open Gov't FOIL-AO-4604.

Freedom of Information Law does not apply to courts or court records, or to records maintained by private attorney; nevertheless, court records are often available pursuant to other provisions of law, and requests for such records should be directed to clerk of appropriate court; pre-sentence reports are confidential with respect to public and may be made available to defendant only by court. Comm on Open Gov't FOIL-AO-4865.

Freedom of Information Law does not apply to courts or court records; however, many court records are available pursuant to other provisions of law; because criminal procedure law provides that when criminal action or proceeding is dismissed in favor of accused and records relating to event are sealed, records of dismissal of action cannot be provided based upon the exemption of Criminal Procedure Law. Comm on Open Gov't FOIL-AO-4947.

Whether documents are characterized as "official" or "confidential", or whether they pertain to current or former employees, they constitute "records" that fall within requirements of Freedom of Information Law. Comm on Open Gov't FOIL-AO-8930.

60. Contracts

Any contract between agency and one or more public employees must be disclosed. Comm on Open Gov't FOIL-AO-8511.

61. Copies

Once document is kept, held, filed, produced or reproduced by, with or for agency, it constitutes "record" subject to rights granted by Freedom of Information Law. Comm on Open Gov't FOIL-AO-4742.

62. Minutes of meetings; transcripts

Freedom of Information Law is applicable to all records of agency, such as town, and, as such, requests for minutes of town board are properly made pursuant to Freedom of Information Law; minutes of meetings of public bodies are available under Freedom of Information Law and Open Meetings Law; further, both laws require that record of votes indicating how each member of public body voted must be maintained and made available. Comm on Open Gov't FOIL-AO-4773.

Even if minutes have not been approved by committee, they are nonetheless public records and therefore subject to rights of access granted by Freedom of Information Law. Comm on Open Gov't FOIL-AO-4794.

Since hearing transcript consists of information produced for agency, city, it is "record" subject to rights of access. Comm on Open Gov't FOIL-AO-4971.

Minutes of meeting, which consist merely of factual rendition of what transpired at meeting, are available under Freedom of Information Law. Comm on Open Gov't FOIL-AO-8895.

Any notes or minutes prepared regarding executive session of public body constitute "records" subject to rights conferred by Freedom of Information Law. Comm on Open Gov't FOIL-AO-9178.

If town board prepares transcript of meeting, it is available under Freedom of Information Law. Comm on Open Gov't OML-AO-2535.

While tape recording of meeting will likely contain elements of meeting minutes, minutes should be reduced to writing so that they constitute permanent written record that can be viewed by public; furthermore, municipalities often need readily accessible permanent written records for officials to refer to or rely on in performance of their duties. Comm on Open Gov't OML-AO-3646.

63. Official correspondence, communication and the like

"Corning Papers", consisting of personal as well as official correspondence written or received by Mayor Corning, in either his capacity as Mayor or as Chairman of Albany County Democratic Committee, are records subject to rights of access granted by Freedom of Information Law; further, although some of records might be characterized as "personal" or "inter-agency or intra-agency materials", those records might not be exempted from disclosure in toto; on contrary, records must be reviewed individually to determine rights of access. Comm on Open Govt FOIL-AO-3514.

As to complaint letters submitted by students' parents to board of education, 2 of which letters were submitted in sealed envelopes, complaints were "records" under CLS Pub O § 86(4), whether or not they were submitted in sealed envelopes, under §§ 87(2)(b) and 89(2)(b) of such Law, substance of such complaint may be disclosed, though identifying details pertaining to a complainant might not be relevant to board's work and thus their disclosure may constitute unwarranted invasion of personal privacy, and under 20 USCS § 1232g, complaint identifying student's parents would be "personally identifiable" to student and therefore justify deletion of identifying details. Comm On Open Gov't FOIL-AO-4512.

Rights granted by Freedom of Information Law apply to all agency records, irrespective of whether agency prepared or received records; with exception of summonses and affidavits of service, inter-departmental referral reports, and handwritten notes of inspector or other public officer are all records which could be characterized as inter-agency or intra-agency materials and thus portions of inter-agency materials may be withheld to extent that they consist of advice, opinion, recommendation and the like. Comm on Open Gov't FOIL-AO-4635.

Letters submitted by landowners to zoning board of appeals constitute "records" subject to rights of access and none of grounds of denial could justifiably be asserted; if record is denied, denial must be made in writing, stating reasons and informing applicant of name and address of person or body to whom appeal may be made. Comm on Open Gov't FOIL-AO-4717.

All letters or other correspondence addressed to or prepared by a Mayor in capacity as Mayor constituted "records" that fall within the scope of the Freedom of Information Law. Comm on Open Gov't FOIL-AO-6295 (1990).

Irrespective of where records, such as "official letters" from state agencies, from firms and others, may be kept by town supervisor, they are kept due to and in performance of supervisor's official duties and in his capacity as supervisor, and, therefore, such records fall within scope of Freedom of Information Law. Comm on Open Gov't FOIL-AO-8289.

Correspondence between state agency and member of village board of trustees, using his title of Village Trustee, was subject to Freedom of Information Law and provisions of CLS Art & Cult Affrs article 57-A dealing with management, retention, and disposition of government records. Comm on Open Gov't FOIL-AO-12182.

64. Photographs, film and the like

Written request for records should be directed to records access officer of agency or agencies that maintain records; further, Freedom of Information Law requires that applicant reasonably describe records sought so request should contain sufficient detail to enable agency officials to locate records; request for records kept at correctional facility may be directed to facility superintendent or his designee; photographs indicating extent of injuries to requester are clearly records subject to rights of access; ordinarily, medical information or records involving personal details may be withheld on ground that disclosure would result in unwarranted invasion of personal privacy; however, disclosure shall not be construed to constitute unwarranted invasion of personal privacy when, upon presenting reasonable proof of identity, person seeks access to records pertaining to him. Comm on Open Gov't FOIL-AO-4824.

65. "Preliminary" notes and the like

66. —Unofficial documents; unsigned or undated

Solid waste management authority is required to respond to request for all records that it does maintain and disclose those records in accordance with Freedom of Information Law; therefore, if materials sought are maintained by solid waste management authority, irrespective of their function, use or origination, they constitute "records" subject to rights granted by Freedom of Information Law. Comm on Open Gov't FOIL-AO-4921.

Whether document in possession of agency is signed or unsigned, undated or characterized as unofficial, it nonetheless falls within coverage of Freedom of Information Law. Comm on Open Gov't FOIL-AO-8378.

Once plans for relevant documentation are in possession of town, they fall within scope of Freedom of Information Law, and even though plans may be "preliminary" communications, those factors do not necessarily indicate that records can be withheld. Comm On Open Gov't FOIL-AO-4596.

Even if minutes have not been approved by committee, they are nonetheless public records and therefore subject to rights of access granted by Freedom of Information Law. Comm on Open Gov't FOIL-AO-4794.

If sub-committee compiles unofficial report and discloses such report to school board, sub-committee should have prepared minutes indicating nature of its action, even though that action does not represent final action of school board as whole; further, even though report is unofficial or draft, since it consists of information produced for agency, report clearly constitutes "record" subjects to rights granted under Freedom of Information Law. Comm on Open Gov't FOIL-AO-4907.

Once document exists, it constitutes "record" subject to rights of access, even if record is characterized as "draft" or is unapproved. Comm on Open Gov't FOIL-AO-8543.

Regardless of whether document is characterized as draft or internal, it still falls within coverage of Freedom of Information Law. Comm on Open Gov't FOIL-AO-8942.

Any notes or minutes, including handwritten notes used to prepare typewritten minutes, that are prepared during executive session of public body constitute records subject to rights conferred by Freedom of Information Law. Comm on Open Gov't FOIL-AO-9503.

Irrespective of its characterization as "draft," HUD audit of county's "Revolving Loan Fund" fell within coverage of Freedom of Information Law as soon as it came into county's possession. Comm on Open Gov't FOIL-AO-10050.

Fact that document is characterized as "draft" is not determinative of rights of access, since Freedom of Information Law is applicable to all agency records. Comm on Open Gov't FOIL-AO-12607.

Notes pertaining to meetings of various town boards were "records" that fell within coverage of Freedom of Information Law. Comm on Open Gov't FOIL-AO-12681.

Files "kept" by agency employees that fall within scope of request would, based on definition of "record" appearing in CLS Pub O § 86(4), constitute agency records subject to rights of access, irrespective of their characterization as personal, unofficial, draft or otherwise. Comm on Open Gov't FOIL-AO-12849.

Although notes of meeting do not constitute minutes of meeting but rather serve as basis for preparing minutes, they constitute "records" as defined by Freedom of Information Law. Comm on Open Gov't OML-AO-2512.

Notes taken by clerk are "records" covered by Freedom of Information Law. Comm on Open Gov't OML-AO-3153.

67. Records mandated but not necessarily originated

If documents are kept for town by its attorney in conjunction with representation of town official, they are records subject to rights granted by Freedom of Information Law. Comm on Open Gov't FOIL-AO-4753.

Documents concerning sewer projects and other legal business performed for village would be "records" of village subject to Freedom of Information Law; fact that records are kept in location other than municipal building should not affect village's legal custody of records. Comm on Open Gov't FOIL-AO-4783.

Any documentation, irrespective of its function or origin, maintained by agency constitutes "record" subject to rights of access under Freedom of Information Law. Comm on Open Gov't FOIL-AO-7914.

Definition of "record" includes not only documents that are physically maintained by agency; it also refers to documents are that are "kept, held, filed, produced or reproduced by, with or for agency"; thus, where county does not have physical possession of records, but engages third party to receive certain records, records are nevertheless subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-8899.

If document is produced for agency, it constitutes agency record, even if it is not in physical possession of agency. If committee is not public body for purposes of Open Meetings Law because it does not perform governmental function, then for same reason, it is not agency for purposes of Freedom of Information Law; however, report prepared by agency for public body would still constitute agency record based on fact that it was prepared for public body. Comm on Open Gov't FOIL-AO-9297.

Although Department of Agriculture and Markets prepares various documents in conjunction with its statutory duties, when those documents come into physical custody of municipality, such as town, they become "records" of town. Comm on Open Gov't FOIL-AO-9375.

Records maintained by village, irrespective of who or what agency might have prepared them, are village records under Freedom of Information Law; thus, village was required to respond to request for records relating to state Comptroller's recent audit of village, even though same records might be maintained by Comptroller. Comm on Open Gov't FOIL-AO-10108.

Records maintained by Slate Valley Museum Foundation for Village of Granville, whether or not in physical possession of foundation and irrespective of whether foundation was "agency," were subject to Freedom of Information Law. Comm on Open Gov't OML-AO-3433.

68. Tape recordings, generally

69. —Audiotapes

As to whether audio tape recording of meeting of board of elections may be erased when typed or written minutes become official, under CLS Pub Off § 86(4), such recording is "record" subject to rights of access as soon as it exists; under CLS Arts & Cult Aff § 57.11, records maintained by local government cannot be destroyed without consent of Commissioner of Education, and Education Department has developed schedules indicating minimum retention periods for certain records. Comm on Open Gov't FOIL-AO-4435.

If audiotapes are produced by and for town, they constitute "records" subject to rights of access; while stenographer might have physical custody of audiotapes of meetings, those tapes are in legal custody of town, and town clerk is required to respond to request for tapes as required by Freedom of Information Law. Comm on Open Gov't FOIL-AO-4826.

Audiotape of judicial seminar/discussion conducted by Office of Court Administration was agency record subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-9403.

70. —Duplicate recordings

Tape recording of meeting or public hearing is "record" subject to rights of access under Freedom of Information Law; with respect to means by which tape recording may be made available, equivalent of "inspection" of tape recording would involve listening to tapes; while agency need not relinquish physical custody of tape to enable member of public to listen to it, person could listen to tape in presence of agency official, who could maintain custody and control over tape; as alternative, agency could, upon payment of requisite fee, reproduce tape. Comm on Open Govt FOIL-AO-3615.

A tape recording of an open meeting is accessible for listening and/or copying under the Freedom of Information Law. Comm on Open Gov't FOIL-AO-6268 (1990).

With regard to meetings of Town Board which are videotaped and aired on public access television, town was not required to purchase new equipment to acquire capacity to copy videotapes and, when copy of videotape was requested, local commercial service or perhaps school or library could reproduce tape and Town could charge for actual cost of reproduction. Comm on Open Gov't FOIL-AO-8306.

If city has ability to prepare duplicate of tape recording of hearing, it must do so upon payment of actual cost of reproduction. Comm on Open Gov't FOIL-AO-12149.

71. —Tape recordings of other transmissions

Tape recordings of dictaphone, dispatch and radio transmissions maintained by (or produced for) agencies constitute "records" and, while there may be no obligation to transcribe tape recordings, public has right to listen to or have copy of them unless there is basis for denial under CLS Pub O § 87(2). Comm on Open Gov't FOIL-AO-9935.

72. —Videotapes

Videotape recordings of village trustees meetings constitute "records" under CLS Pub O L § 86(4). Comm on Open Govt FOIL-AO-3425.

Video tape constitutes "record" subject to rights granted by Freedom of Information Law. Comm on Open Gov't FOIL-AO-4697.

Member of public may tape record open meetings of public bodies, so long as tape recording is carried out unobtrusively, in manner that does not detract from deliberative process; these same principles apply to video equipment; if advances in technology permit video equipment to be used without special lighting, in stationary location and in unobtrusive manner, it is questionable whether prohibition under those circumstances would be reasonable; tape recording of open meeting kept by town is clearly record subject to rights of access under Freedom of Information Law. Comm on Open Gov't FOIL-AO-4960.

With regard to meetings of Town Board which are videotaped and aired on public access television, town was not required to

purchase new equipment to acquire capacity to copy videotapes and, when copy of videotape was requested, local commercial service or perhaps school or library could reproduce tape and Town could charge for actual cost of reproduction. Comm on Open Gov't FOIL-AO-8306.

Videotape maintained by agency constitutes "record" subject to rights of access conferred by Freedom of Information Law. Comm on Open Gov't FOIL-AO-9365.

Tape or video recordings produced by village official in performance of his or her official duties constitute "records" subject to rights of access under Freedom of Information Law; however, if open meeting is taped or video recorded by member of public, tape would be private property of that person and would not be subject to Freedom of Information Law. Comm on Open Gov't OML-AO-2219.

Notwithstanding a contention that a tape recording of a meeting of village board of trustees was not a public record because it was used merely as a tool for minutes of meeting, portion of tape reflective of open meeting and possibly portions reflective of discussion in executive session are accessible under Freedom of Information Law. Comm on Open Govt FOIL-AO 3109.

Tape recording of meeting prepared by or in possession of village clerk constitutes "record", even if tape recorder is personal property of clerk; if tape recording exists, it is available to public for either listening or reproduction. Committee on Open Government FOIL-AO-3384.

Tape recording of open meeting held at town hall is "record" subject to rights of access granted by Freedom of Information Law. 1986 Committee on Open Government FOIL-AO-4191.

If city maintains tape recording of public hearings or meetings, tape recording is "record" subject to rights of access granted by Freedom of Information Law, and whether or not tape recording is considered "official" or otherwise is irrelevant. 1986 Committee on Open Government FOIL-AO-4216.

Tape recordings constitute "records" subject to rights conferred by Freedom of Information Law. Comm on Open Gov't FOIL-AO-4716.

Tape recordings maintained by city constitute "records" subject to rights of access granted by Freedom of Information Law. Comm on Open Gov't FOIL-AO-4743.

While tape recording would likely contain elements of minutes, minutes should be reduced to writing in order that they constitute permanent, written record that can be viewed by public and so that town has permanent written record readily accessible to town officials who must refer to or rely upon minutes in performance of their duties. Comm on Open Gov't FOIL-AO-4826.

Assuming that tape recordings of disciplinary hearing existed, they would constitute "records" subject to Freedom of Information Law, even if they were "sealed" and despite claim that they were "deemed not to exist." Applicant's rights of access to tape recordings of his disciplinary hearing did not change after determination arising out hearing was reversed. Comm on Open Gov't FOIL-AO-8380.

Although applicant cannot "inspect" tape recording, equivalent of inspecting such record involves listening to it; thus, applicant has right under Freedom of Information Law to listen to such tape recording. Comm on Open Gov't FOIL-AO-8565.

Tape recording of board of education executive session, prepared by member of board, fell within coverage of Freedom of Information Law, and thus could be destroyed or erased only in conjunction with provision of Arts and Cultural Affairs Law dealing with retention and disposal of records. Comm on Open Gov't FOIL-AO-10368.

Tape recording of meeting of town planning board clearly fell within coverage of Freedom of Information Law. When town maintains tape recording of meeting, tape would constitute "record" that falls within coverage of Freedom of Information Law, irrespective of reason for which recording was prepared. Comm on Open Gov't FOIL-AO-12696.

Those portions of audio tapes that consisted of recordings of town board meetings constituted "records" that fell within scope of Freedom of Information Law where tapes were prepared in conjunction with performance of preparer's duties as board member, even though he used his own tape recorder and purchased tapes. Comm on Open Gov't FOIL-AO-12923.

When tape recording captures commentary made in public meeting, there is no basis to deny access under Freedom of Information Law; however, tape recordings of executive sessions reflecting deliberative process may constitute "intra-agency material" under CLS Pub O § 87(2)(g) and, if there has been no final determination by town board indicating misconduct or imposing penalty in connection with ethics complaint, disclosure of tape recordings of deliberations of town ethics board would constitute unwarranted invasion of personal privacy. Comm on Open Gov't OML-AO-3712.

73. Wallets, including contents thereof

Freedom of Information Law pertains to rights of access to existing records maintained by governmental agencies and while definition of records is extremely broad, it does not include such items as wallets, contents of individual's wallet or money. Comm on Open Gov't FOIL-AO-4932.

B. Specific Records

74. Appraisals

Appraisals maintained by or produced for County, as well as any other informational materials related to them, constitute "records" subject to rights conferred by Freedom of Information Law. Comm on Open Gov't FOIL-AO-7936.

75. Building inspector reports

Since information kept, held, filed, produced or reproduced for or by town would constitute "records" subject to rights of access granted by Freedom of Information Law, contract between town and private corporation would be available because none of grounds for denial would apply; similarly, town records reflective of building inspections are generally available. Comm On Open Gov't FOIL-AO-4601.

76. Court records, generally

77. —Administrative records

Fact that "criminal records database" was maintained by Office of Court Administration (OCA) did not transform it into court record; however, OCA was not required by Freedom of Information Law to honor request for "updates on a monthly basis" to extent that such request was prospective in nature. Comm on Open Gov't FOIL-AO-12,343.

Records held by court or court clerk fell outside scope of Freedom of Information Law; however, Office of Court Administration is "agency" subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-4931.

78. —County clerk's records

When county clerk is acting in his or her capacity as court clerk, records fall beyond coverage of Freedom of Information Law. Comm on Open Gov't FOIL-AO-8519.

79. —Judgment docket books

Where information sought exists in 2 forms, both forms are "records" that are equally available under law; accordingly, where judgment docket books are kept in print and microfiche, both forms should be made available to public for copying. Comm on Open Gov't FOIL-AO-4063.

Felony conviction docket books maintained by county clerk and Supreme Court clerk are court records excluded from coverage of Freedom of Information Law; however, they are subject to disclosure under CLS Jud § 255-b, which states that "A docket-book, kept by a clerk of a court, must be kept open, during the business hours fixed by law, for search and examination by any person." Comm on Open Gov't FOIL-AO-9771.

80. —Licensing officer's records

Whether records maintained by "licensing officer" should be characterized as court records or agency records is conjectural; while functions of licensing officers are carried out by judges in most locations in state, in other locations, same functions are carried out by commissioners of police or county sheriff and, therefore, functions of licensing officers do not appear to be inherently judicial in nature. Comm on Open Gov't FOIL-AO-7918.

Copies of court orders pertaining to New York City Department of Sanitation's "confiscation of topsoil and living vegetation in Rockaway" were accessible under Freedom of Information Law

insofar as they existed and were maintained by Department of Sanitation. Comm on Open Gov't FOIL-AO-12,352.

Although Freedom of Information Law does not apply to courts or court records, request can be made to court clerk of county in which case was heard for relevant court records. Comm on Open Gov't FOIL-AO-4691.

While Freedom of Information Law does not apply to court records, many court records are available under other provisions of law and, as such, it is possible to make request to courts that maintains records sought. Comm on Open Gov't FOIL-AO-4765.

Freedom of Information Law does not pertain to courts or court records; however, court records are generally available in accordance with relevant provisions of judiciary law and other statutes. Comm on Open Gov't FOIL-AO-4799.

Freedom of Information Law does not apply to courts or court records and requests for court records should be directed to clerk of courts that maintain records. Comm on Open Gov't FOIL-AO-4823.

Freedom of Information Law is not applicable to courts and court records; further, since Freedom of Information Law does not apply, inquiry concerning courts and court records falls outside scope of Committee's jurisdiction. Comm on Open Gov't FOIL-AO-4832.

Courts and court records are not subject to Freedom of Information Law; however, other provisions of law may grant broad rights of access to court records. Comm on Open Gov't FOIL-AO-4862.

Although Freedom of Information Law does not apply to courts and court records, other provisions of law often grant broad rights of access to court records; therefore, it is suggested that requests should be made to clerk of appropriate court. Comm on Open Gov't FOIL-AO-4873.

Freedom of Information Law does not apply to courts or court records; however, other provisions of law grant broad rights of access to court records. Comm on Open Gov't FOIL-AO-4880.

If request involves court records, Freedom of Information Law is not applicable; however, other provisions of law often grant rights of access to court records and if court records are sought, request should be made to clerk of appropriate court. Comm on Open Gov't FOIL-AO-4892.

Although courts and court records are excluded from scope of Freedom of Information Law, other statutes often grant broad rights of access to court records; request for such records should be directed to court reporter, clerk of court or attorney. Comm on Open Gov't FOIL-AO-4919.

Freedom of Information Law is not applicable to courts or court records; nevertheless, court records are often available pursuant to other provisions of law and requests should generally be directed to clerk of appropriate court. Comm on Open Gov't FOIL-AO-4922.

Freedom of Information Law does not apply to courts or court records; further, federal Freedom of Information and Privacy Acts apply only to records maintained by federal agencies; consequently they are also inapplicable to records maintained by Supreme Court in New York. Comm on Open Gov't FOIL-AO-4935.

Freedom of Information Law does not apply to courts or court records; however, there are other statutes that may grant rights of access to court records and requests for those records should be directed to clerks of appropriate courts. Comm on Open Gov't FOIL-AO-4940.

Document produced by state Supreme Court and maintained by school district, which indicated that former school board member had pleaded guilty to crime of grand larceny, was accessible under Freedom of Information Law. Comm on Open Gov't FOIL-AO-16547.

81. Criminal matters, generally

82. —Correctional Department records

If request involves records related to sentencing, record sought would be maintained by court rather than "agency"; if this is so, Freedom of Information Law would not be applicable. Comm On Open Gov't FOIL-AO-4598.

Freedom of Information Law pertains to records maintained by units of state and local government except state legislature and judiciary; law generally pertains to records of department of correctional services, including its correctional facilities; however, law pertains to access to existing records and does not require agency to answer questions or to provide "information". Comm on Open Gov't FOIL-AO-4695.

Since office of special prosecutor, department of correction and office of district attorney are "agencies", presumably any requested records would be equally available or exempt from disclosure, irrespective of which agency maintains records. Comm on Open Gov't FOIL-AO-4704.

Freedom of Information Law pertains to agency records, including those maintained by Department of Correctional Services and its facilities. Comm on Open Gov't FOIL-AO-4953.

83. —Police records, generally

84. — —Physical evidence

Physical evidence, such as clothing, does not constitute "record" subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-4707.

Items of physical evidence (i.e., tools and clothing) do not constitute records and are beyond coverage of Freedom of Information Law. Envelope which contained birthday card mailed by inmate to individual who was discovered to be incarcerated in another state was record subject to disclosure under Freedom of Information Law, rather than physical evidence to which Freedom of Information Law did not apply. Comm on Open Gov't FOIL-AO-8510.

Arrest records in possession of Police Department constitute "records" subject to rights of access; arrest records are exempt to extent that they are sealed under CLS CPL § 160.50. Committee on Open Government FOIL-AO-3359.

If records of the a Town Constable were not agency records, but rather court records, Freedom of Information Law justifies denial of access. On the other hand, CLS Uniform Justice Court Act § 2019-a confers rights of access to records and dockets of the court. Comm on Open Gov't FOIL-AO-6203 (1990).

Except in unusual circumstances, accident reports prepared by police agencies are available under both Freedom of Information Law and CLS Pub O § 66-a. Comm on Open Gov't FOIL-AO-12206.

Police training videos held by New York Police Academy Library would constitute New York City Police Department "records" subject to rights of access, assuming that such videotapes are maintained by or for department. Comm on Open Gov't FOIL-AO-12748.

85. —Prisoner's request for court records

Freedom of Information Law does not apply to court or court records and though Freedom of Information Law is inapplicable, other provisions of law often grant significant rights of access to court records; where county court clerk has failed to respond to requests for records pursuant to Freedom of Information Law, requester should discuss matter with attorney or representative of prisoners' legal services. Comm on Open Gov't FOIL-AO-4887.

86. —Sentencing records

If request involves records related to sentencing, record sought would be maintained by court rather than "agency"; if this is so, Freedom of Information Law would not be applicable. Comm On Open Gov't FOIL-AO-4598.

Freedom of Information Law does not apply to courts or court records, or to records maintained by private attorney; nevertheless, court records are often available pursuant to other provisions of law, and requests for such records should be directed to clerk of appropriate court; pre-sentence reports are confidential with respect to public and may be made available to defendant only by court. Comm on Open Gov't FOIL-AO-4865.

Freedom of Information Law does not apply to courts or court records, or to records maintained by attorney; nevertheless, court records are often available pursuant to other provisions of law, and such requests should be directed to clerk of appropriate court; pre-sentence reports are confidential with respect to public and may be made available to defendant only by court. Comm on Open Gov't FOIL-AO-4881.

Freedom of Information Law may not be used to obtain copies of all records pertaining to criminal charges that have been

dismissed and sealed by court; Criminal Procedure Law contains correct procedure for obtaining such records. Comm On Open Gov't FOIL-AO-4604.

Since office of district attorney is "governmental entity" that performs "governmental function" for state in public corporation or county, it is agency required to comply with Freedom of Information Law; therefore, to extent that office of district attorney maintains requested records, they are subject to rights of access, even though records may be kept by other entities such as court or police department. Comm on Open Gov't FOIL-AO-4684.

Freedom of Information Law does not apply to courts or court records; however, many court records are available pursuant to other provisions of law; because criminal procedure law provides that when criminal action or proceeding is dismissed in favor of accused and records relating to event are sealed, records of dismissal of action cannot be provided based upon the exemption of Criminal Procedure Law. Comm on Open Gov't FOIL-AO-4947.

Irrespective of whether document is characterized as police blotter or "General Incident Report" or whether it is maintained on paper or electronically, it would constitute "record" subject to rights of access conferred by Freedom of Information Law. Comm on Open Gov't FOIL-AO-8546.

87. Employment records

Records identifying public employees who work during given period, rates of pay and number of hours worked are available because those records are "relevant" to performance of duties; Freedom of Information Law deals specifically with payroll information. Comm on Open Gov't FOIL-AO-4657.

Whether documents are characterized as "official" or "confidential", or whether they pertain to current or former employees, they constitute "records" that fall within requirements of Freedom of Information Law. Comm on Open Gov't FOIL-AO-8930.

Entirety of administrative file pertaining to former public employee containing "union and job related complaints," memorandum concerning employee prepared by his supervisor relating to particular incident, another memorandum concerning alleged misperceptions made by employee, and correspondence between employer and outside employee assistance program to which employer referred employee, all were records subject to rights conferred by Freedom of Information Law. Comm on Open Gov't FOIL-AO-9647.

Term "personnel" appears in neither Open Meetings Law nor Freedom of Information law, and characterization of issue as "personnel matter" does not necessarily to lead to conclusion that matter is confidential. Comm on Open Gov't OML-AO-4168.

88. Financial records, including banks

Financial disclosure statements and related documents are "records" within scope of Freedom of Information Law. Comm on Open Gov't FOIL-AO-9826.

89. Insurance records

Private insurance company is not "agency" and records that it produces are not subject to Freedom of Information Law; however, when its records are submitted to agency, records are subject to rights granted by Freedom of Information Law; definition of "agency" excludes state legislature, as well as "judiciary", but Office of Court Administration is "agency" and its records are subject to Freedom of Information Law; similarly, records of division of budget are "agency records". Comm on Open Gov't FOIL-AO-4617.

List of insurance companies appearing on state insurance department's early warning or watch list would constitute "record" if it falls within scope of Freedom of Information Law. Comm on Open Gov't FOIL-AO-4639.

90. Marriage records

Irrespective of where records pertaining to performance of marriages by mayor may be kept, they are kept due to and in performance of mayor's official duties and in his capacity as mayor or marriage officer; thus, such records fall within scope of Freedom of Information Law. Comm on Open Gov't FOIL-AO-7883.

91. Medical records, generally

92. —Hospital records

Hospital is "agency" or part of agency and its records are subject to rights of access granted by Freedom of Information Law. Comm on Open Gov't FOIL-AO-4758.

Private medical center is not "agency" under Freedom of Information Law, and therefore, is not subject to law; however, CLS Pub Health § 18 generally provides patients rights of access to their own medical records, with certain exceptions. Comm on Open Gov't FOIL-AO-4622.

Clinical management practice program at state university is operated by and on behalf of state university and certain of its components and is "agency" because state university and components fall under this definition; further, records of or pertaining to clinical management practice plan are maintained by officers and employees of state university and therefore such records are subject to rights granted by Freedom of Information Law. Comm on Open Gov't FOIL-AO-4763.

Written request for records should be directed to records access officer of agency or agencies that maintain records; further, Freedom of Information Law requires that applicant reasonably describe records sought so request should contain sufficient detail to enable agency officials to locate records; request for records kept at correctional facility may be directed to facility superintendent or his designee; photographs indicating extent of injuries to requester are clearly records subject to rights of access; ordinarily, medical information or records involving personal details may be withheld on ground that disclosure would result in unwarranted invasion of personal privacy; however, disclosure shall not be construed to constitute unwarranted invasion of personal privacy when, upon presenting reasonable proof of identity, person seeks access to records pertaining to him. Comm on Open Gov't FOIL-AO-4824.

93. Notary records

Notary records maintained by Department of Correctional Services, including records of notaries employed by Department of Correctional Services, are department records, rather than property of notary. Comm on Open Gov't FOIL-AO-9870.

94. Real property assessment data

Online web application, whereby staff of Office of Real Property Services (ORPS) proposed to copy assessment data received in electronic form from municipalities into data warehouse to be accessed over internet, was "delivery system" rather than "record" subject to Freedom of Information Law, and thus online access could be restricted to assessors, who would only be able to sign on if agency provided valid usercode and password; original source of data would still be accessible to public from municipalities and ORPS on request. Comm on Open Gov't FOIL-AO-12,366.

95. School records, generally

96. —Student books and related documents

Assuming that school district or high school maintains copy of yearbook, yearbook constitutes "record" that falls within scope of rights conferred by Freedom of Information Law. Comm on Open Gov't FOIL-AO-9618.

Freedom of Information Law applies to notes taken at meeting between school administrator and student or group of students, with other professional staff present; however, references to students' names or other aspects of records that would make student's identity easily traceable must be withheld in order to comply with federal law (except to extent that parent of student requests records pertaining to his or her own child). Comm on Open Gov't FOIL-AO-10289.

Records maintained by School of Agriculture and Life Sciences at Cornell University, pertaining to its research into biotechnology under supervision of State University of New York (SUNY), were agency records within coverage of Freedom of Information Law. Comm on Open Gov't FOIL-AO-12315.

Student grades in class taught by professor at State University of New York were accessible under Freedom of Information Law, provided that any identifying details pertaining to students' identities were withheld; for example, if student grades appeared alphabetically, then university would be required to scramble content of records so that no student could be identified. Comm on Open Gov't FOIL-AO-16598.

"Datebook" of superintendent of school district was record subject to Freedom of Information Law, despite contention of superintendent that datebook was his "personal" datebook. Comm on Open Gov't OML-AO-2347.

State Review Panel created by L 1995, ch 145 is "public body" subject to Open Meetings Law, and any documentation maintained by it constitutes "record" within coverage of Freedom of Information Law, as such records would have been acquired or produced by or for State Education Department or local school district. Comm on Open Gov't OML-AO-2690.

Insofar as board's instructions to staff affect may public or final district policy, or involve records communicated between or among school district officials or prepared for district by consultant, those portions consisting of statistical or factual information must be disclosed. Comm on Open Gov't OML-AO-3473.

97. Voting records

Since board of elections is component of county, Freedom of Information Law applies to all records of agency and all county records, including information kept on computer tapes or discs, which are subject to rights and access granted by Freedom of Information Law; data processing center serves as modern record storage, generating and retrieval center and these functions should not serve to impair capacity of agencies or public officers from carrying out statutory responsibilities under Freedom of Information Law. Comm On Open Gov't FOIL-AO-4600.

Freedom of Information Law is applicable to all records of agency, such as town, and, as such, requests for minutes of town board are properly made pursuant to Freedom of Information Law; minutes of meetings of public bodies are available under Freedom of Information Law and Open Meetings Law; further, both laws require that record of votes indicating how each member of public body voted must be maintained and made available. Comm on Open Gov't FOIL-AO-4773.

Pursuant to CLS Pub O § 89(6) and CLS Elec § 5-602, there was no basis to withhold list of persons who voted in Mattituck Park District from disclosure under Freedom of Information Law, regardless of requester's intended use of list. Comm on Open Gov't FOIL-AO-16532.

98. Zoning records

Letters submitted by landowners to zoning board of appeals constitute "records" subject to rights of access and none of grounds of denial could justifiably be asserted; if record is denied, denial must be made in writing, stating reasons and informing applicant of name and address of person or body to whom appeal may be made. Comm on Open Gov't FOIL-AO-4717.

99. Other and miscellaneous

Records prepared for agency by private consulting firm constitute intra-agency material subject to Freedom of Information Law and would be accessible or deniable depending upon their contents; further, although records may not be in physical possession of agency, since they were produced for county, they are records within county's legal custody; assuming documents in question are "records" subject to Freedom of Information Law, their status as preliminary would not alone remove them from scope of rights of access. Comm on Open Gov't FOIL-AO-4798.

Fact that attorneys for village were given authority to hire consulting firm did not remove records prepared by consulting firm from coverage of Freedom of Information Law and, because records were not prepared solely for litigation, they were subject to same standards as records prepared by agency staff. Comm on Open Gov't FOIL-AO-12124.

Many of local development corporation's records would remain subject to Freedom of Information Law, even if corporation were not itself subject to that statute as not-for-profit corporation, where corporation performed government function and several members of its board served due to their status as city officials. Comm on Open Gov't FOIL-AO-12386.

If town official acting in his or her capacity as town official serves on local development corporation (LDC) board, records that he or she produces or receives in that capacity would be town records subject to rights conferred by Freedom of Information Law. Comm on Open Gov't FOIL-AO-12401.

Even if entities in question (not-for-profit health research institute and university research foundation) were not "agencies," their records would fall within scope of Freedom of Information Law due to their relationships with state Department of Health and state university, respectively, both of which clearly were agencies. Comm on Open Gov't FOIL-AO-12685.

Written materials comprising accident report, as well as other documentation, including photographs taken at scene by town employees, would constitute "records" subject to rights conferred by Freedom of Information Law. Comm on Open Gov't FOIL-AO-12917.

Computer software, because it is reflective of information in physical form, constitutes "record" that falls within coverage of Freedom of Information Law. Comm on Open Gov't FOIL-AO-12920.

Any "document" transferred or delivered to Rudolph W. Giuliani Center for Urban Affairs, Inc. by any New York City agency would constitute "record" that falls within coverage of Freedom of Information Law. Comm on Open Gov't FOIL-AO-13194.

Bid documents that were accessible through county's website, but were maintained by private contractor and were available to public only by registering and agreeing to terms developed by private contractor, constituted "agency records" within meaning of Freedom of Information Law. Comm on Open Gov't FOIL-AO-16508.

Record prepared by consultant for agency is accessible or deniable, in whole or in part, depending on its contents. Comm on Open Gov't OML-AO-3165.

While volunteer ambulance corporation could deny access to portions of records identifying those to whom medical services were rendered, their ages and descriptions of their medical problems or conditions, because disclosure of name coupled with those details would reveal personal and somewhat intimate aspect of individual's life, other information (such as locations of calls) had to be disclosed; emergency call, particularly when sirens or flashing lights are used, is public event, and destination of fire truck or ambulance is or can be known to those in vicinity of event. Comm on Open Gov't OML-AO-3508.

Since town ethics board did not have authority to decide or make binding or final determinations, opinion of board or its members could be withheld under Freedom of Information Law unless and until opinion was adopted by town board, or if local law required disclosure; further, to extent that misconduct charges were dismissed or allegations found to be without merit, they could be withheld. Comm on Open Gov't OML-AO-3712.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS Tax § 697.

Federal Aspects:

Public information; agency rules, opinions, orders, records, and proceedings, 5 UCSC § 552.

Jurisprudences:

1 NY Jur 2d Abstracts and Land Titles § 3 .

18A NY Jur 2d Civil Servants and Other Public Officers and Employees § 170 .

49 NY Jur 2d Elections § 60.

50 NY Jur 2d Elections § 701 .

92 NY Jur 2d Records and Recording §§ 17, 18, 20, 24 .

94 NY Jur 2d Schools, Universities and Colleges § 329 .

Law Reviews:

Tesler, Gould debunked: the prohibition against using New York's Freedom of Information Law as a criminal discovery tool. 44 N.Y.L. Sch. L. Rev. 71.

Annotations:

What are "records" of an agency which must be made available under state freedom of information act. 27 ALR4th 680.

What are "records" of agency which must be made available under the Freedom of Information Act (5 USCS § 552(a)(3)). 50 ALR Fed 336.

Meaning of term "agency" for purposes of Freedom of Information Act (5 USCS § 552). 57 ALR Fed 295.

Texts: Bjorklund, Fishman & Kurtz, New York Nonprofit Law and Practice with Tax Analysis §§ 3-12(b), 10-4(a).

Dienes, Levine & Lind, Newsgathering and the Law (1999, Matthew Bender) §§ 11-2, 11-3(c), 11-3(d).

1 Frumer & Biskind, Bender's New York Evidence—CPLR § 1.09; 4 Frumer & Biskind, Bender's New York Evidence—CPLR § 12.11; 5 Frumer & Biskind, Bender's New York Evidence—CPLR § 23.25.

Schwartz & Reidenberg, Data Privacy Law (1996, LLP) § 6-5.

§ 87. Access to agency records.

1. (a) Within sixty days after the effective date of this article, the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article.

(b) Each agency shall promulgate rules and regulations, in conformity with this article and applicable rules and regulations promulgated pursuant to the provisions of paragraph (a) of this subdivision, and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to:

i. the times and places such records are available;

ii. the persons from whom such records may be obtained, and

iii. the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record in accordance with the provisions of paragraph (c) of this subdivision, except when a different fee is otherwise prescribed by statute.

(c) In determining the actual cost of reproducing a record, an agency may include only:

i. an amount equal to the hourly salary attributed to the lowest paid agency employee who has the necessary skill required to prepare a copy of the requested record;

ii. the actual cost of the storage devices or media provided to the person making the request in complying with such request;

iii. the actual cost to the agency of engaging an outside professional service to prepare a copy of a record, but only when an agency's information technology equipment is inadequate to prepare a copy, if such service is used to prepare the copy; and

iv. preparing a copy shall not include search time or administrative costs, and no fee shall be charged unless at least two hours of agency employee time is needed to prepare a copy of the record requested. A person requesting a record shall be informed of the estimated cost of preparing a copy of the record if more than two hours of an agency employee's time is needed, or if an outside professional service would be retained to prepare a copy of the record.

2. Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that:

(a) are specifically exempted from disclosure by state or federal statute;

(b) if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article;

(c) if disclosed would impair present or imminent contract awards or collective bargaining negotiations;

(d) are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise;

(e) are compiled for law enforcement purposes and which, if disclosed, would:

i. interfere with law enforcement investigations or judicial proceedings;

ii. deprive a person of a right to a fair trial or impartial adjudication;

iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or

iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures;

(f) if disclosed could endanger the life or safety of any person;

(g) are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations;

iv. external audits, including but not limited to audits performed by the comptroller and the federal government; or

(h) are examination questions or answers which are requested prior to the final administration of such questions.

(i) if disclosed, would jeopardize the capacity of an agency or an entity that has shared information with an agency to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures; or

(j) [Expires and repealed Dec 1, 2024] are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-a of the vehicle and traffic law.

(k) [Expires and repealed Dec 1, 2024] are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-b of the vehicle and traffic law.

(*l*) [Expires and repealed Sept 20, 2025] are photographs, microphotographs, videotape or other re-

corded images produced by a bus lane photo device prepared under authority of section eleven hundred eleven-c of the vehicle and traffic law.

(m) [Expires and repealed July 1, 2022] are photographs, microphotographs, videotape or other recorded images prepared under the authority of section eleven hundred eighty-b of the vehicle and traffic law.

(n) [Expires and repealed Dec 1, 2024] are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-d of the vehicle and traffic law.

(o) [Expires and repealed Sept 12, 2020] are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-e of the vehicle and traffic law.

(p) are data or images produced by an electronic toll collection system under authority of article forty-four-C of the vehicle and traffic law and in title three of article three of the public authorities law.

(p) [Expires September 6, 2024] are photographs, microphotographs, videotape or other recorded images prepared under the authority of section eleven hundred eighty-d of the vehicle and traffic law.

(q) [Expires December 1, 2024] are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred seventy-four-a of the vehicle and traffic law.

3. Each agency shall maintain:

(a) a record of the final vote of each member in every agency proceeding in which the member votes;

(b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency; and

(c) a reasonably detailed current list by subject matterof all records in the possession of the agency, whether or not available under this article. Each agency shall update its subject matter list annually, and the date of the most recent update shall be conspicuously indicated on the list. Each state agency as defined in subdivision four of this section that maintains a website shall post its current list on its website and such posting shall be linked to the website of the committee on open government. Any such agency that does not maintain a website shall arrange to have its list posted on the website of the committee on open government.

4. (a) Each state agency which maintains records containing trade secrets, to which access may be denied pursuant to paragraph (d) of subdivision two of this section, shall promulgate regulations in conformity with the provisions of subdivision five of section eighty-nine of this article pertaining to such records, including, but not limited to the following:

(1) the manner of identifying the records or parts;

(2) the manner of identifying persons within the agency to whose custody the records or parts will be charged and for whose inspection and study the records will be made available;

(3) the manner of safeguarding against any unauthorized access to the records.

(b) As used in this subdivision the term "agency" or "state agency" means only a state department, board, bureau, division, council or office and any public corporation the majority of whose members are appointed by the governor.

(c) Each state agency that maintains a website shall post information related to this article and article six-A of this chapter on its website. Such information shall include, at a minimum, contact information for the persons from whom records of the agency may be obtained, the times and places such records are available for inspection and copying, and information on how to request records in person, by mail, and, if the agency accepts requests for records electronically, by e-mail. This posting shall be linked to the website of the committee on open government.

4-a. A law enforcement agency responding to a request for law enforcement disciplinary records as defined in section eighty-six of this article shall redact any portion of such record containing the information specified in subdivision two-b of section eighty-nine of this article prior to disclosing such record under this article.

4-b. A law enforcement agency responding to a request for law enforcement disciplinary records, as defined in section eighty-six of this article, may redact any portion of such record containing the information specified in subdivision two-c of section eighty-nine of this article prior to disclosing such record under this article.

5. (a) An agency shall provide records on the medium requested by a person, if the agency can reasonably make such copy or have such copy made by engaging an outside professional service. Records provided in a computer format shall not be encrypted.

(b) No agency shall enter into or renew a contract for the creation or maintenance of records if such contract impairs the right of the public to inspect or copy the agency's records.

HISTORY:

Add, L 1977, ch 933, § 1, eff Jan 1, 1978, with substance derived from former § 88; amd, L 1981, ch 890, § 1, eff July 31, 1981; L 1982, ch 73, § 1, eff Oct 15, 1982; L 1983, ch 80, § 1, eff May 10, 1983; L 1984, ch 283, § 1; L 1987, ch 814, § 12, eff Aug 7, 1987; L 1988, ch 746, § 15, eff Jan 25, 1989; L 1990, ch 289, § 1, eff June 25, 1990; L 1999, ch 510, § 12, eff Sept 28, 1999, deemed eff Jan 1, 1999; L 2001, ch 368, § 1, eff Oct 16, 2001; L 2003, ch 403, § 3, eff Aug 26, 2003; L 2007, ch 102, § 1, eff Oct 31, 2007; L 2008, ch 223, §§ 1–3, eff Aug 6, 2008; L 2008, ch 499, § 1, eff Jan 2, 2009; L 2009, ch 19, § 8, eff May 28, 2009; L 2009, ch 20, § 22, eff May 28, 2009; L 2009, ch 21, § 20, eff May 28, 2009; L 2009, ch 22, § 20, eff May 28, 2009; L 2009, ch 23, § 7, eff May 28, 2009; L 2009, ch 383, § 22, eff Sept 25, 2009; L 2010, ch 59, § 12 (Part II), eff Sept 20, 2010; L 2010, ch 154, § 1, eff July 7, 2010; L 2013, ch 189, § 13, eff Aug 30, 2013; L 2014, ch 43, § 5, effective July 25, 2014; L 2014, ch 99, § 13, effective August 21, 2014; L 2014, ch 101, § 13, effective August 21, 2014; L 2014, ch 123, § 13, effective August 21, 2014; L 2015, ch 222, § 13, effective September 12, 2015; L 2019, ch 59, § 7 (Part ZZZ, Subpart A), effective April 12, 2019; L 2019, ch 145, § 15, effective September

5, 2019; L 2019, ch 148, § 12, effective September 6, 2019; L 2020, ch 96, § 3, effective June 12, 2020.

Prior Law: Former § 87, add, L 1974, ch 578, § 2; repealed, L 1977, ch 933, eff Jan 1, 1978.

Editor's Notes Laws 1987, ch 814, §§ 1, 2 and 14, provide as follows:

Section 1. Short title. This act shall be known and may be cited as the "New York state governmental accountability, audit and internal control act of 1987".

§ 2. Legislative findings. The legislature hereby finds that the scope, size and complexity of state government make it necessary to assure that the state's systems of internal control provide reasonable control over all state operations, and provide the public, the governor, the state legislature, the judiciary and the heads of state agencies and authorities with assurance that state assets and resources, including but not limited to, cash, investments, facilities inventories, supplies, equipment, personal and contractual services are being utilized consistent with the requirements of law and duly established managerial policies and in an effective, economical and efficient manner.

The legislature further finds that the public has a right to know the extent to which state agencies and authorities, the legislature and the judiciary are achieving the objectives of internal control described herein and consequently to be fully informed of weaknesses identified through the conduct of external audits of internal controls.

The legislature further finds that prudent management of state government requires controls in all aspects of state government designed to assure that assets are properly safeguarded, that accounting entries and data are accurate and reliable, and that prescribed managerial policies are adhered to, including assurances that such assets and resources are used only for proper purposes. Therefore, this act requires systems of internal control throughout state government as well as the external audit thereof.

The legislature finds that the adequacy and effectiveness of existing state government internal controls and internal audit functions can be improved by the implementation of a more comprehensive system of internal control and internal audit that encompasses all of state government and will foster the effective and efficient use of government resources and ensure the integrity of accounting systems.

The legislature further finds that it is responsible for the generation of revenue and the appropriation of funds; and, in keeping with the constitutional principle of the separation of powers and the fact that it is directly chosen by the people, the legislature is itself directly responsible to the public for the proper use and application of the resources necessary for its operation; and the operational requirements of the legislature, which is a lateral, collegial institution rather than a hierarchical organization and is constitutionally charged with determining the rules of its own proceedings, differ in many respects from those agencies charged with the delivery of goods and services to the people of the state.

The legislature, therefore, finds that existing systems of internal control can be improved and made more comprehensive, and that it is desirable to build on and coordinate existing internal control efforts and provide a firm statutory foundation for an effective and continuing comprehensive system that will foster the effective and efficient use of government resources and ensure the integrity of accounting systems.

§ 14. This act shall take effect immediately and shall remain in full force and effect until January 1, 1999 at which time this act shall be deemed repealed, provided that sections seven, nine, ten, and eleven of this act shall take effect April 1, 1989, and section eight of this act shall take effect January 1, 1990, except that commencing on and after the date on which this act shall have become a law, the state comptroller, state agencies, covered authorities, the state legislature and the judiciary are authorized to take all actions necessary to implement their respective internal control and audit responsibilities under such sections of this act, and provided that paragraph a of subdivision 2-b of section 8 of the state finance law, as added by section five of this act, and subdivision 1 of section 953 and subdivision 1 of section 954 of the executive law, as added by section seven of this act, and subdivision 1 of section 249-c of the judiciary law, as added by section ten of this act, shall take effect April 1, 1989, and subdivision 1 of section 92 of the legislative law, as added by section eight of this act, shall take effect January 1, 1990. (Amd, L 1993, ch 597, § 1, eff Aug 4, 1993.).

Laws 1988, ch 746, § 17, eff Jan 25, 1989, provides as follows:

§ 17. This act shall take effect on the thirtieth day after it shall have become a law and shall remain in full force and effect until December 1, 2024 when upon such date the amendments and provisions made by this act shall be deemed repealed; provided, however, any such local laws as may be enacted pursuant to this act shall remain in full force and effect only until the expiration on December 1, 2024 (Amd, L 1991, ch 212, § 2, L 1993, ch 582, § 1, L 1995, ch 651, § 2, L 1999, ch 503, § 2, L 2004, ch 667, § 2, eff Oct 26, 2004, L 2009, ch 18, § 3, eff April 28, 2009; L 2014, ch 134, § 1, eff July 22, 2014; L 2019, ch 58, § 5 (Part TT), eff April 12, 2019).

Laws 2007, ch 102, § 2, eff Oct 31, 2007, provides as follows:

§ 2. This act shall take effect on the one hundred twentieth day after it shall have become a law; provided, however, that the committee on open government shall be immediately authorized and directed to promulgate any rules and regulations and take any other actions necessary for implementation of this act on such effective date.

Laws 2008, ch 499, § 2, eff Jan 2, 2009, provides as follows:

§ 2. This act shall take effect on the one hundred twentieth day after it shall have become a law; provided, however, that the committee on open government shall be immediately authorized and directed to promulgate any rules and regulations and take any other actions necessary for implementation of this act on such date.

Laws 2009, ch 19, § 10, eff May 28, 2009, provides as follows:

§ 10. This act shall take effect on the thirtieth day after it shall have become a law and shall expire December 1, 2024 when upon such date the provisions of this act shall be deemed repealed; provided that the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section one of this act shall be subject to the expiration and reversion of such paragraph pursuant to section 17 of chapter 746 of the laws of 1988, as amended, when upon such date the provisions of section two of this act shall take effect; provided that the amendments to the opening paragraph and paragraph (c) of subdivision 1 of section 1809 of the vehicle and traffic law made by section four of this act shall be subject to the expiration and reversion of such subdivision pursuant to chapter 166 of the laws of 1991, as amended, when upon such date the provisions of section five of this act shall take effect; provided, however, that the amendments to the opening paragraph of subdivision 1 of section 1809 of the vehicle and traffic law made by section five of this act shall not affect the expiration of such subdivision and shall expire therewith; provided, however, that the amendments to subdivision 2 of section 371 of the general municipal law made by section seven of this act shall not affect the expiration of such section and shall be deemed to expire therewith; and provided, further, that any such local laws as may be enacted pursuant to this act shall remain in full force and effect only until December 1, 2024 (Amd, L 2014, ch 133, § 1, eff July 22, 2014; L 2019, ch 58, § 3 (Part TT), eff April 12 2019).

Laws 2009, ch 20, § 24 intro and sub (k), eff May 28, 2009, provides as follows:

§ 24. This act shall take effect on the thirtieth day after it shall have become a law and shall expire December 1, 2024 when upon such date the provisions of this act shall be

deemed repealed; provided that (Amd, L. 2014, ch 128, § 1, eff July 22, 2014; L 2019, ch 58, § 9 (Part TT), eff April 12, 2019):

(k) any such local laws as may be enacted pursuant to this act shall remain in full force and effect only until December 1, 2024 (Amd, L 2014, ch 128, § 1, eff July 22, 2014; L 2019, ch 58, § 9 (Part TT), eff April 12, 2019).

Laws 2009, ch 21, § 22 intro and sub (j), eff May 28, 2009, expires and repealed Dec 1, 2014, provides as follows:

§ 22. This act shall take effect on the thirtieth day after it shall have become a law and shall expire December 1, 2014 when upon such date the provisions of this act shall be deemed repealed; provided that:

(j) any such local laws as may be enacted pursuant to this act shall remain in full force and effect only until December 1, 2014.

Laws 2009, ch 22, § 22 intro and sub (j), eff May 28, 2009, provides as follows:

§ 22. This act shall take effect on the thirtieth day after it shall have become a law and shall expire December 1, 2019 when upon such date the provisions of this act shall be deemed repealed; provided that (Amd, L 2014, ch 122, § 1, eff July 22, 2014.):

(j) any such local laws as may be enacted pursuant to this act shall remain in full force and effect only until December 1, 2019 (Amd, L 2014, ch 122, § 1, eff July 22, 2014.).

Laws 2009, ch 23, § 9, eff May 28, 2009, provides as follows:

§ 9. This act shall take effect on the thirtieth day after it shall have become a law and shall expire December 1, 2024 when upon such date the provisions of this act shall be deemed repealed; provided that the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section one of this act shall be subject to the expiration and reversion of such paragraph pursuant to section 17 of chapter 746 of the laws of 1988, as amended, when upon such date the provisions of section two of this act shall take effect; provided that the amendments to the opening paragraph and paragraph (c) of subdivision 1 of section 1809 of the vehicle and traffic law made by section four of this act shall be subject to the expiration and reversion of such subdivision pursuant to chapter 166 of the laws of 1991, as amended, when upon such date the provisions of section five of this act shall take effect; provided, however, that the amendments to the opening paragraph of subdivision 1 of section 1809 of the vehicle and traffic law made by section five of this act shall not affect the expiration of such subdivision and shall expire therewith; and provided, further, that any such local laws as may be enacted pursuant to this act shall remain in full force and effect only until December 1, 2024 (Amd, L 2014, ch 127, § 1, eff July 22, 2014; L 2019, ch 58, § 7 (Part TT), eff April 12, 2019).

Laws 2009, ch 383, § 24 intro and sub (k), eff Sept 25, 2009, expires and repealed Dec 1, 2014, provides as follows:

§ 24. This act shall take effect on the thirtieth day after it shall have become a law and shall expire December 1, 2014 when upon such date the provisions of this act shall be deemed repealed; provided that:

(k) any such local laws as may be enacted pursuant to this act shall remain in full force and effect only until December 1, 2014.

Laws 2010, ch 59, § 14 (Part II), intro, eff Sept 20, 2010, provides as follows:

§ 14. This act shall take effect on the ninetieth day after it shall have become a law and shall expire 15 years after such effective date when upon such date the provisions of this act shall be deemed repealed; and provided that any rules and regulations related to this act shall be promulgated on or before such effective date, provided that (Amd, L 2015, ch 239, § 6, eff Sept 18, 2015; L 2019, ch 39, § 2 (Part D), eff June 24, 2019).

Laws 2013, ch 189, § 15, intro, eff Aug 30, 2013, provides as follows:

§ 15. This act shall take effect on the thirtieth day after it shall have become a law and shall expire and be deemed repealed July 1, 2022; and provided further that any rules necessary for the implementation of this act on its effective date shall be promulgated on or before such effective date, provided that (Amd, L 2019, ch 30, § 6, eff July 11, 2019).

Laws 2014, ch 43, § 12, intro, eff July 25, 2015, provides:

§ 12. This act shall take effect on the thirtieth day after it shall have become a law; provided that sections on through ten of this act shall expire 4 years after such effective date when upon such date the provisions of such sections of this act shall be deemed repealed; and provided further that any rules necessary for the implementation of this act on its effective date shall be promulgated on or before such effective date, provided that (Amd, L 2019, ch 30, § 5, eff July 11, 2019).

Laws 2014, ch 99, § 15, intro par, eff Aug 21, 2014, provides:

§ 15. This act shall take effect on the thirtieth day after it shall have become a law and shall and be deemed repealed December 1, 2024; and provided further that any rules necessary for the implementation of this act on its effective date shall be promulgated on or before such effective date, provided that (Amd, L 2019, ch 58, § 4 (Part TT), eff April 12, 2019).

Laws 2014, ch 101, § 15, intro par, eff Aug 21, 2014, provides:

§ 15. This act shall take effect on the thirtieth day after it shall have become a law and shall expire and be deemed repealed December 1, 2024; and provided further that any rules necessary for the implementation of this act on its effective date shall be promulgated on or before such effective date, provided that (Amd, L 2019, ch 58, § 2 (Part TT), eff April 12, 2019).

Laws 2014, ch 123, § 15, intro par, eff Aug 21, 2014, provides:

§ 15. This act shall take effect on the thirtieth day after it shall have become a law and shall expire and be deemed repealed December 1, 2024; and provided further that any rules necessary for the implementation of this act on its effective date shall be promulgated on or before such effective date, provided that (Amd, L 2019, ch 58, § 1 (Part TT), eff April 12, 2019).

Laws 2015, ch 222, § 15, intro par, eff Sept 12, 2015, provides:

§ 15. This act shall take effect on the thirtieth day after it shall have become a law and shall expire and be deemed repealed December 1, 2024; and provided further that any rules necessary for the implementation of this act on its effective date shall be promulgated on or before such effective date, provided that (Amd, L 2019, ch 58, § 8 (Part TT), eff April 12, 2019).

Laws 2019, ch 59, § 1 (Part ZZZ), eff April 12, 2019, provides:

§ 1. This act shall be known and may be cited as the "MTA reform and traffic mobility act".

Laws 2019, ch 143, § 25, eff September 5, 2019, provides:

§ 25. This act shall take effect on the thirtieth day after it shall have become a law and shall expire December 1, 2024 when upon such date the provisions of this act shall be deemed repealed; provided that any such local law as may be enacted pursuant to this act shall remain in full force and effect only until December 1, 2024 and provided, further, that:

(a) the amendments to subdivision 1 of section 235 of the vehicle and traffic law made by section one of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section one-a of this act shall take effect;

(b) the amendments to section 235 of the vehicle and traffic law made by section one-a of this act shall not affect the expiration of such section and shall be deemed to expire therewith, when upon such date the provisions of section one-b of this act shall take effect;

(c) the amendments to section 235 of the vehicle and traffic law made by section one-b of this act shall not affect the expiration of such section and shall be deemed to expire

therewith, when upon such date the provisions of section one-c of this act shall take effect;

(d) the amendments to section 235 of the vehicle and traffic law made by section one-c of this act shall not affect the expiration of such section and shall be deemed to expire therewith, when upon such date the provisions of section one-d of this act shall take effect;

(e) the amendments to section 235 of the vehicle and traffic law made by section one-d of this act shall not affect the expiration of such section and shall be deemed to expire therewith, when upon such date the provisions of section one-e of this act shall take effect;

(f) the amendments to section 235 of the vehicle and traffic law made by section one-e of this act shall not affect the expiration of such section and shall be deemed to expire therewith, when upon such date the provisions of section one-f of this act shall take effect;

(g) the amendments to section 235 of the vehicle and traffic law made by section one-f of this act shall not affect the expiration of such section and shall be deemed to expire therewith, when upon such date the provisions of section one-g of this act shall take effect;

(h) the amendments to subdivision 1 of section 236 of the vehicle and traffic law made by section two of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section two-a of this act shall take effect;

(i) the amendments to subdivision 1 of section 236 of the vehicle and traffic law made by section two-a of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section two-b of this act shall take effect;

(j) the amendments to subdivision 1 of section 236 of the vehicle and traffic law made by section two-b of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section two-c of this act shall take effect;

(k) the amendments to subdivision 1 of section 236 of the vehicle and traffic law made by section two-c of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section two-d of this act shall take effect;

(l) the amendments to subdivision 1 of section 236 of the vehicle and traffic law made by section two-d of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section two-e of this act shall take effect;

(m) the amendments to subdivision 1 of section 236 of the vehicle and traffic law made by section two-e of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section two-f of this act shall take effect;

(n) the amendments to paragraph f of subdivision 1 of section 239 of the vehicle and traffic law made by section four of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section four-a of this act shall take effect;

(o) the amendments to paragraph f of subdivision 1 of section 239 of the vehicle and traffic law made by section four-a of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section four-b of this act shall take effect;

(p) the amendments to paragraph f of subdivision 1 of section 239 of the vehicle and traffic law made by section four-b of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section four-c of this act shall take effect;

(q) the amendments to paragraph f of subdivision 1 of section 239 of the vehicle and traffic law made by section four-c of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section four-d of this act shall take effect;

(r) the amendments to paragraph f of subdivision 1 of section 239 of the vehicle and traffic law made by section four-d of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section four-e of this act shall take effect;

(s) the amendments to paragraph f of subdivision 1 of section 239 of the vehicle and traffic law made by section four-e of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section four-f of this act shall take effect;

(t) the amendments to subdivisions 1 and 1-a of section 240 of the vehicle and traffic law made by section five of this act shall not affect the expiration of such subdivisions and shall be deemed to expire therewith, when upon such date the provisions of section five-a of this act shall take effect;

(u) the amendments to subdivisions 1 and 1-a of section 240 of the vehicle and traffic law made by section five-a of this act shall not affect the expiration of such subdivisions and shall be deemed to expire therewith, when upon such date the provisions of section five-b of this act shall take effect;

(v) the amendments to subdivisions 1 and 1-a of section 240 of the vehicle and traffic law made by section five-b of this act shall not affect the expiration of such subdivisions and shall be deemed to expire therewith, when upon such date the provisions of section five-c of this act shall take effect;

(w) the amendments to subdivisions 1 and 1-a of section 240 of the vehicle and traffic law made by section five-c of this act shall not affect the expiration of such subdivisions and shall be deemed to expire therewith, when upon such date the provisions of section five-d of this act shall take effect;

(x) the amendments to subdivisions 1 and 1-a of section 240 of the vehicle and traffic law made by section five-d of this act shall not affect the expiration of such subdivisions and shall be deemed to expire therewith, when upon such date the provisions of section five-e of this act shall take effect;

(y) the amendments to subdivisions 1 and 1-a of section 240 of the vehicle and traffic law made by section five-e of this act shall not affect the expiration of such subdivisions and shall be deemed to expire therewith, when upon such date the provisions of section five-f of this act shall take effect;

(z) the amendments to paragraphs a and g of subdivision 2 of section 240 of the vehicle and traffic law made by section six of this act shall not affect the expiration of such paragraphs and shall be deemed to expire therewith, when upon such date the provisions of section six-a of this act shall take effect;

(aa) the amendments to paragraphs a and g of subdivision 2 of section 240 of the vehicle and traffic law made by section six-a of this act shall not affect the expiration of such paragraphs and shall be deemed to expire therewith, when upon such date the provisions of section six-b of this act shall take effect;

(bb) the amendments to paragraphs a and g of subdivision 2 of section 240 of the vehicle and traffic law made by section six-b of this act shall not affect the expiration of such paragraphs and shall be deemed to expire therewith, when upon such date the provisions of section six-c of this act shall take effect;

(cc) the amendments to paragraphs a and g of subdivision 2 of section 240 of the vehicle and traffic law made by section six-c of this act shall not affect the expiration of such paragraphs and shall be deemed to expire therewith, when upon such date the provisions of section six-d of this act shall take effect;

(dd) the amendments to paragraphs a and g of subdivision 2 of section 240 of the vehicle and traffic law made by section six-d of this act shall not affect the expiration of such paragraphs and shall be deemed to expire therewith, when upon such date the provisions of section six-e of this act shall take effect;

(ee) the amendments to paragraphs a and g of subdivision 2 of section 240 of the vehicle and traffic law made by section six-e of this act shall not affect the expiration of such paragraphs and shall be deemed to expire therewith, when upon such date the provisions of section six-f of this act shall take effect;

(ff) the amendments to subdivisions 1 and 2 of section 241 of the vehicle and traffic law made by section seven of this act shall not affect the expiration of such subdivisions and shall be deemed to expire therewith, when upon such date the provisions of section seven-a of this act shall take effect;

(gg) the amendments to subdivisions 1 and 2 of section 241 of the vehicle and traffic law made by section seven-a of this act shall not affect the expiration of such subdivisions and shall be deemed to expire therewith, when upon such date the provisions of section seven-b of this act shall take effect;

(hh) the amendments to subdivisions 1 and 2 of section 241 of the vehicle and traffic law made by section seven-b of this act shall not affect the expiration of such subdivisions and shall be deemed to expire therewith, when upon such date the provisions of section seven-c of this act shall take effect;

(ii) the amendments to subdivisions 1 and 2 of section 241 of the vehicle and traffic law made by section seven-c of this act shall not affect the expiration of such subdivisions and shall be deemed to expire therewith, when upon such date the provisions of section seven-d of this act shall take effect;

(jj) the amendments to subdivisions 1 and 2 of section 241 of the vehicle and traffic law made by section seven-d of this act shall not affect the expiration of such subdivisions and shall be deemed to expire therewith, when upon such date the provisions of section seven-e of this act shall take effect;

(kk) the amendments to subdivisions 1 and 2 of section 241 of the vehicle and traffic law made by section seven-e of this act shall not affect the expiration of such subdivisions and shall be deemed to expire therewith, when upon such date the provisions of section seven-f of this act shall take effect;

(ll) the amendments to subparagraph (i) of paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section eight of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eight-a of this act shall take effect;

(mm) the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section eight-a of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eight-b of this act shall take effect;

(nn) the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section eight-b of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eight-c of this act shall take effect;

(oo) the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section eight-c of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eight-d of this act shall take effect;

(pp) the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section eight-d of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eight-e of this act shall take effect;

(qq) the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section eight-e of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eight-f of this act shall take effect;

(rr) the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section eight-f of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eight-g of this act shall take effect;

(ss) the amendments to subdivision 1 of section 1809 of the vehicle and traffic law made by section ten of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section ten-a of this act shall take effect;

(tt) the amendments to subdivision 1 of section 1809 of the vehicle and traffic law made by section ten-a of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section ten-b of this act shall take effect;

(uu) the amendments to subdivision 1 of section 1809 of the vehicle and traffic law made by section ten-b of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section ten-c of this act shall take effect;

(vv) the amendments to subdivision 1 of section 1809 of the vehicle and traffic law made by section ten-c of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section ten-d of this act shall take effect;

(ww) the amendments to subdivision 1 of section 1809 of the vehicle and traffic law made by section ten-d of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section ten-e of this act shall take effect;

(xx) the amendments to subdivision 1 of section 1809 of the vehicle and traffic law made by section ten-e of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section ten-f of this act shall take effect;

(yy) the amendments to subdivision 1 of section 1809 of the vehicle and traffic law made by section ten-f of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section ten-g of this act shall take effect;

(zz) the amendments to paragraph a of subdivision 1 of section 1809-e of the vehicle and traffic law made by section eleven of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eleven-a of this act shall take effect;

(aaa) the amendments to paragraph a of subdivision 1 of section 1809-e of the vehicle and traffic law made by section eleven-a of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eleven-b of this act shall take effect;

(bbb) the amendments to paragraph a of subdivision 1 of section 1809-e of the vehicle and traffic law made by section eleven-b of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eleven-c of this act shall take effect;

(ccc) the amendments to paragraph a of subdivision 1 of section 1809-e of the vehicle and traffic law made by section eleven-c of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eleven-d of this act shall take effect;

(ddd) the amendments to paragraph a of subdivision 1 of section 1809-e of the vehicle and traffic law made by section eleven-d of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eleven-e of this act shall take effect;

(eee) the amendments to paragraph a of subdivision 1 of section 1809-e of the vehicle and traffic law made by section eleven-e of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eleven-f of this act shall take effect;

(fff) the amendments made to subdivision 1 of section 371 of the general municipal law made by section thirteen of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section thirteen-a of this act shall take effect;

(ggg) the amendments made to section 371 of the general municipal law made by section thirteen-a of this act shall not affect the expiration of such section and shall be deemed to expire therewith, when upon such date the provisions of section thirteen-b of this act shall take effect;

(hhh) the amendments made to section 371 of the general municipal law made by section thirteen-b of this act shall not affect the expiration of such section and shall be deemed to expire therewith, when upon such date the provisions of section thirteen-c of this act shall take effect;

(iii) the amendments made to section 371 of the general municipal law made by section thirteen-c of this act shall not affect the expiration of such section and shall be deemed to expire therewith, when upon such date the provisions of section thirteen-d of this act shall take effect;

(jjj) the amendments made to section 371 of the general municipal law made by section fourteen of this act shall not affect the expiration of such section and shall be deemed to expire therewith, when upon such date the provisions of section fourteen-a of this act shall take effect; and

(kkk) the amendments made to section 2590-h of the education law made by section twenty-one of this act shall not affect the expiration and reversion of such section and shall expire therewith.

Laws 2019, ch 148, § 14, eff September 6, 2019, provides:

§ 14.This act shall take effect on the thirtieth day after it shall have become a law and shall expire 5 years after such effective date when upon such date the provisions of this act shall be deemed repealed; and provided further that any rules necessary for the implementation of this act on its effective date shall be promulgated on or before such effective date, provided that:

(a) the amendments to subdivision 1 of section 235 of the vehicle and traffic law made by section one of this act shall not affect the expiration of such section and shall be deemed to expire therewith, when upon such date the provisions of section one-a of this act shall take effect;

(a-1) the amendments to section 235 of the vehicle and traffic law made by section one-a of this act shall not affect the expiration of such section and shall be deemed to expire therewith, when upon such date the provisions of section one-b of this act shall take effect;

(a-2) the amendments to section 235 of the vehicle and traffic law made by section one-b of this act shall not affect the expiration of such section and shall be deemed to expire therewith, when upon such date the provisions of section one-c of this act shall take effect;

(a-3) the amendments to section 235 of the vehicle and traffic law made by section one-c of this act shall not affect the expiration of such section and shall be deemed to expire therewith, when upon such date the provisions of section one-d of this act shall take effect;

(a-4) the amendments to section 235 of the vehicle and traffic law made by section one-d of this act shall not affect the expiration of such section and shall be deemed to expire therewith, when upon such date the provisions of section one-e of this act shall take effect;

(a-5) the amendments to section 235 of the vehicle and traffic law made by section one-e of this act shall not affect the expiration of such section and shall be deemed to expire therewith, when upon such date the provisions of section one-f of this act shall take effect;

(a-6) the amendments to section 235 of the vehicle and traffic law made by section one-f of this act shall not affect the expiration of such section and shall be deemed to expire therewith, when upon such date the provisions of section one-g of this act shall take effect;

(b) the amendments to subdivision 1 of section 236 of the vehicle and traffic law made by section two of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section two-a of this act shall take effect;

(b-1) the amendments to subdivision 1 of section 236 of the vehicle and traffic law made by section two-a of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section two-b of this act shall take effect;

(b-2) the amendments to subdivision 1 of section 236 of the vehicle and traffic law made by section two-b of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section two-c of this act shall take effect;

(b-3) the amendments to subdivision 1 of section 236 of the vehicle and traffic law made by section two-c of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section two-d of this act shall take effect;

(b-4) the amendments to subdivision 1 of section 236 of the vehicle and traffic law made by section two-d of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section two-e of this act shall take effect;

(b-5) the amendments to subdivision 1 of section 236 of the vehicle and traffic law made by section two-e of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section two-f of this act shall take effect;

(c) the amendments to paragraph f of subdivision 1 of section 239 of the vehicle and traffic law made by section four of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section four-a of this act shall take effect;

(c-1) the amendments to paragraph f of subdivision 1 of section 239 of the vehicle and traffic law made by section four-a of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section four-b of this act shall take effect;

(c-2) the amendments to paragraph f of subdivision 1 of section 239 of the vehicle and traffic law made by section four-b of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section four-c of this act shall take effect;

(c-3) the amendments to paragraph f of subdivision 1 of section 239 of the vehicle and traffic law made by section four-c of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section four-d of this act shall take effect;

(c-4) the amendments to paragraph f of subdivision 1 of section 239 of the vehicle and traffic law made by section four-d of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section four-e of this act shall take effect;

(c-5) the amendments to paragraph f of subdivision 1 of section 239 of the vehicle and traffic law made by section four-e of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section four-f of this act shall take effect;

(d) the amendments to subdivisions 1 and 1-a of section 240 of the vehicle and traffic law made by section five of this act shall not affect the expiration of such subdivisions and shall be deemed to expire therewith, when upon such date the provisions of section five-a of this act shall take effect;

(d-1) the amendments to subdivisions 1 and 1-a of section 240 of the vehicle and traffic law made by section five-a of this act shall not affect the expiration of such subdivisions and shall be deemed to expire therewith, when upon such date the provisions of section five-b of this act shall take effect;

(d-2) the amendments to subdivisions 1 and 1-a of section 240 of the vehicle and traffic law made by section five-b of this act shall not affect the expiration of such subdivisions and shall be deemed to expire therewith, when upon such date the provisions of section five-c of this act shall take effect;

(d-3) the amendments to subdivisions 1 and 1-a of section 240 of the vehicle and traffic law made by section five-c of this act shall not affect the expiration of such subdivisions and shall be deemed to expire therewith, when upon such date the provisions of section five-d of this act shall take effect;

(d-4) the amendments to subdivisions 1 and 1-a of section 240 of the vehicle and traffic law made by section five-d of this act shall not affect the expiration of such subdivisions and shall be deemed to expire therewith, when upon such date the provisions of section five-e of this act shall take effect;

(d-5) the amendments to subdivisions 1 and 1-a of section 240 of the vehicle and traffic law made by section five-e of this act shall not affect the expiration of such subdivisions and shall be deemed to expire therewith, when upon such date the provisions of section five-f of this act shall take effect;

(e) the amendments to paragraphs a and g of subdivision 2 of section 240 of the vehicle and traffic law made by section six of this act shall not affect the expiration of such paragraphs and shall be deemed to expire therewith, when upon such date the provisions of section six-a of this act shall take effect;

(e-1) the amendments to paragraphs a and g of subdivision 2 of section 240 of the vehicle and traffic law made by section six-a of this act shall not affect the expiration of such paragraphs and shall be deemed to expire therewith, when upon such date the provisions of section six-b of this act shall take effect;

(e-2) the amendments to paragraphs a and g of subdivision 2 of section 240 of the vehicle and traffic law made by section six-b of this act shall not affect the expiration of such paragraphs and shall be deemed to expire therewith, when upon such date the provisions of section six-c of this act shall take effect;

(e-3) the amendments to paragraphs a and g of subdivision 2 of section 240 of the vehicle and traffic law made by section six-c of this act shall not affect the expiration of such paragraphs and shall be deemed to expire therewith, when upon such date the provisions of section six-d of this act shall take effect;

(e-4) the amendments to paragraphs a and g of subdivision 2 of section 240 of the vehicle and traffic law made by section six-d of this act shall not affect the expiration of such paragraphs and shall be deemed to expire therewith, when upon such date the provisions of section six-e of this act shall take effect;

(e-5) the amendments to paragraphs a and g of subdivision 2 of section 240 of the vehicle and traffic law made by section six-e of this act shall not affect the expiration of such paragraphs and shall be deemed to expire therewith, when upon such date the provisions of section six-f of this act shall take effect;

(f) the amendments to subdivisions 1 and 2 of section 241 of the vehicle and traffic law made by section seven of this act shall not affect the expiration of such subdivisions and shall be deemed to expire therewith, when upon such date the provisions of section seven-a of this act shall take effect;

(f-1) the amendments to subdivisions 1 and 2 of section 241 of the vehicle and traffic law made by section seven-a of this act shall not affect the expiration of such subdivisions and shall be deemed to expire therewith, when upon such date the provisions of section seven-b of this act shall take effect;

(f-2) the amendments to subdivisions 1 and 2 of section 241 of the vehicle and traffic law made by section seven-b of this act shall not affect the expiration of such subdivisions and shall be deemed to expire therewith, when upon such date the provisions of section seven-c of this act shall take effect;

(f-3) the amendments to subdivisions 1 and 2 of section 241 of the vehicle and traffic law made by section seven-c of this act shall not affect the expiration of such subdivisions and shall be deemed to expire therewith, when upon such date the provisions of section seven-d of this act shall take effect;

(f-4) the amendments to subdivisions 1 and 2 of section 241 of the vehicle and traffic law made by section seven-d of this act shall not affect the expiration of such subdivisions and shall be deemed to expire therewith, when upon such date the provisions of section seven-e of this act shall take effect;

(f-5) the amendments to subdivisions 1 and 2 of section 241 of the vehicle and traffic law made by section seven-e of this act shall not affect the expiration of such subdivisions and shall be deemed to expire therewith, when upon such date the provisions of section seven-f of this act shall take effect;

(g) the amendments to subdivision 1 of section 1809 of the vehicle and traffic law made by section nine of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section nine-a of this act shall take effect;

(g-1) the amendments to subdivision 1 of section 1809 of the vehicle and traffic law made by section nine-a of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section nine-b of this act shall take effect;

(g-2) the amendments to subdivision 1 of section 1809 of the vehicle and traffic law made by section nine-b of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section nine-c of this act shall take effect;

(g-3) the amendments to subdivision 1 of section 1809 of the vehicle and traffic law made by section nine-c of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section nine-d of this act shall take effect;

(g-4) the amendments to subdivision 1 of section 1809 of the vehicle and traffic law made by section nine-d of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section nine-e of this act shall take effect;

(g-5) the amendments to subdivision 1 of section 1809 of the vehicle and traffic law made by section nine-e of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section nine-f of this act shall take effect;

(g-6) the amendments to subdivision 1 of section 1809 of the vehicle and traffic law made by section nine-f of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section nine-g of this act shall take effect;

(h) the amendments to paragraph a of subdivision 1 of section 1809-e of the vehicle and traffic law made by section ten of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section ten-a of this act shall take effect;

(h-1) the amendments to paragraph a of subdivision 1 of section 1809-e of the vehicle and traffic law made by section ten-a of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section ten-b of this act shall take effect;

(h-2) the amendments to paragraph a of subdivision 1 of section 1809-e of the vehicle and traffic law made by section ten-b of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section ten-c of this act shall take effect;

(h-3) the amendments to paragraph a of subdivision 1 of section 1809-e of the vehicle and traffic law made by section ten-c of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section ten-d of this act shall take effect;

(h-4) the amendments to paragraph a of subdivision 1 of section 1809-e of the vehicle and traffic law made by section ten-d of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when

upon such date the provisions of section ten-e of this act shall take effect;

(h-5) the amendments to paragraph a of subdivision 1 of section 1809-e of the vehicle and traffic law made by section ten-e of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section ten-f of this act shall take effect;

(i) the amendments to subparagraph (i) of paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section eleven of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eleven-a of this act shall take effect;

(i-1) the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section eleven-a of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eleven-b of this act shall take effect;

(i-2) the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section eleven-b of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eleven-c of this act shall take effect;

(i-3) the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section eleven-c of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eleven-d of this act shall take effect;

(i-4) the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section eleven-d of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eleven-e of this act shall take effect;

(i-5) the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section eleven-e of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eleven-f of this act shall take effect; and

(i-6) the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section eleven-f of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eleven-g of this act shall take effect.

Amendment Notes The 2014 amendment by ch 43, § 5 added 2(n) [first setout].

The 2014 amendment by ch 99, § 13, ch 101, § 13, ch 123, § 13 added 2(n) [second setout].

2013. Chapter 189, § 13 amended:

By adding sub 2, par (m).

2010. Chapter 59, § 12 (Part II) amended:

By adding sub 2, par (l).

2010. Chapter 154, § 1 amended:

Sub 2, par (i) by deleting at fig 1 "an agency's" and adding the matter in italics.

2009. Chapter 383, § 22 amended:

By adding sub 2, par (k).

2008. Chapter 223, § 1 amended:

Sub 1, par (b), subpar (iii) by adding the matter in italics.

2008. Chapter 223, § 2 amended:

By adding sub 1, par (c).

2008. Chapter 223, § 3 amended:

By adding sub 5.

2008. Chapter 499, § 1 amended:

Sub 3, par (c) by deleting at fig 1 a comma and adding the matter in italics.

2007. Chapter 102, § 1 amended:

By adding sub 4, par (c).

1988. Chapter 746, § 15 amended:

By adding sub 2, par (j).

The 2015 amendment by ch 222, § 13, added 2(o).

The 2019 amendment by ch 59, § 7 (Part ZZZ, Subpart A), added 2(p).

The 2019 amendment by ch 145, § 15, added 2(q).

The 2019 amendment by ch 148, § 12, added 2(p) [second setout].

The 2020 amendment by ch 96, § 3, added 4-a and 4-b.

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I. In General

A. Generally

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Freedom of Information Law is permissive; thus, while agency may withhold records under certain circumstances, agency may disclose even if records are deniable. Comm Pub Acc Rec FOIL-Ad Op 2524.

Freedom of Information Law is not vehicle by which member of public may cross-examine public officials but is vehicle by which member of public may gain access to records. Comm Pub Acc Rec FOIL-Ad Op 2531.

Freedom of Information Law does not preclude official of agency from seeking views relative to request from others in agency or from those outside of agency, and such communication should be fostered where it enhances compliance with Law and capacity to render reasoned response. Comm Pub Acc Rec FOIL-Ad Op 2704.

2. Construction, generally

Information kept or held for government agency is within embrace of "records" under Freedom of Information Law (CLS Pub O §§ 84 et seq.); to implement narrow definition of "records" adopted by federal courts would undermine legislative objective to provide maximum disclosure by enabling government agency to insulate its records from public access by delegating responsibility for creating or maintaining particular information to non-governmental entity. Encore College Bookstores v Auxiliary Serv. Corp., 87 N.Y.2d 410, 639 N.Y.S.2d 990, 663 N.E.2d 302, 1995 N.Y. LEXIS 4751 (N.Y. 1995).

3. —Presumptions

All government records are presumptively open for public inspection and copying unless they fall within enumerated exemptions of CLS Pub O § 87(2). Gould v New York City Police Dep't, 89 N.Y.2d 267, 653 N.Y.S.2d 54, 675 N.E.2d 808, 1996 N.Y. LEXIS 3575 (N.Y. 1996).

4. Consulting matters

Opinions and recommendations that would, if prepared by agency employees, be exempt from disclosure under the Freedom of Information Law (FOIL) as "intra-agency materials" (Pub O § 87[2][g]), do not lose their exempt status simply because they are prepared for the agency, at its request, by an outside consultant. Respondents' final determination being to take no action with respect to property revaluation, the consultant's opinion could not be considered a final agency determination subject to disclosure under Pub O § 87(2)(g)(iii), and the fact that respondents ultimately took no action did not divest the reports of their quality as "intra-agency materials," since FOIL protects against disclosure of pre-decisional memoranda or other non-final recommendations, whether or not action is taken. However, to the extent that real estate appraisal reports prepared for respondents by a private consulting firm in connection with possible revaluation of appellant's property after new construction contained "statistical or factual tabulations or data" (Pub O § 87[2][g][i]), or other material subject to production, they would be ordered redacted and made available to appellant. Xerox Corp. v Webster, 65 N.Y.2d 131, 490 N.Y.S.2d 488, 480 N.E.2d 74, 1985 N.Y. LEXIS 15741 (N.Y. 1985).

Finding in an N.Y. C.P.L.R. art. 78 proceeding that the Freedom of Information Law (FOIL), N.Y. Pub. Off. Law § 84 et seq., agency exception to disclosure, N.Y. Pub. Off. Law § 87(2), did not apply to certain communications between an agency and its consultant was proper because the consultant's representation of a university regarding the same construction project created an inseparable conflict for purposes of FOIL and the agency exemption; these circumstances elevated the FOIL appeal beyond the average agency-consultant relationship that the FOIL exemptions were designed to foster and protect. Matter of Tuck-It-Away Assoc., L.P. v Empire State Dev. Corp., 54 A.D.3d 154, 861 N.Y.S.2d 51, 240 N.Y.L.J. 14, 2008 N.Y. App. Div. LEXIS 6117 (N.Y. App. Div. 1st Dep't 2008).

Petitioner, which challenged town's assessment of its real property, was not entitled under Freedom of Information Law to obtain information concerning retainer agreement between town and outside consultant, or to portion of consultant's appraisal containing information about comparable properties used in determining fair market value of petitioner's property. GMC, GM Powertrain Div. v Town of Massena, 180 Misc. 2d 682, 693 N.Y.S.2d 870, 1999 N.Y. Misc. LEXIS 210 (N.Y. Sup. Ct. 1999).

Access to records of a private corporation currently engaged in a consulting contractual relationship with the Saratoga County Board of Supervisors and the County Equalization and Assessment Committee performing a 100 percent assessment revaluation project for the county may not be denied on the basis that Freedom of Information Law is inapplicable to records of a private corporation since Public Officers Law § 86(4) defines "record" as including "any information produced for an agency in any fiscal form whatsoever" and the private corporation involved was clearly producing information for a public corporation; furthermore, the private corporation could not assert that such records were intra-agency or inter-agency records exempt from disclosure under Public Officers Law § 87(2)(g) since the corporation does not fall within the definition of "agency" as defined by the Freedom of Information law and therefore could not assert § 87(2)(g) as a basis for denying access to records. Comm Pub Acc Rec FOIL—Ad Op 1783.

Committee on Open Government is authorized to provide advice, but cannot "rule" or compel an agency to comply with Freedom of Information Law or other statutes within its advisory jurisdiction. Comm on Open Gov't F7967.

5. Custody and maintenance of records, generally

Court properly determined that village's Freedom of Information Law rules and regulations, regarding number of persons who could view public documents at given time and use of personal copiers, constituted valid and rational exercise of village's authority under CLS Pub O § 87(1)(b). Village regulation violated Freedom of Information Law (CLS Pub O § 87 et seq.) and regulations promulgated thereunder where it permitted village clerk to limit hours during which public documents could be inspected to period of time less than business hours of clerk's office. Murtha v Leonard, 210 A.D.2d 411, 620 N.Y.S.2d 101, 1994 N.Y. App. Div. LEXIS 12851 (N.Y. App. Div. 2d Dep't 1994).

Archival tax maps must be permanently retained as public records along with tax rolls to which they relate. 10 Op. Counsel SBRPS No. 40.

6. —Stored records, generally

7. — —Home-stored records

There is no requirement that town records be kept in public building and town supervisor may not be prohibited by town board from allowing bookkeeper to keep town's financial records in bookkeeper's home so long as books are accessible to public. Northumberland v Eastman, 129 Misc. 2d 447, 493 N.Y.S.2d 93, 1985 N.Y. Misc. LEXIS 2637 (N.Y. Sup. Ct. 1985).

8. — —Temporarily stored records

The fact that the records were not in the possession of either the village or its volunteer fire department does not warrant dismissal of the proceeding where the records were to be returned to the village, since temporary possession in another does not necessarily oust a permanent possessor of the control which would make it subject to the responsibilities imposed by the Freedom of Information Law and Special Term was fully justified in granting a right of inspection upon their retransfer to the village's custody. Westchester Rockland Newspapers, Inc. v Kimball, 50 N.Y.2d 575, 430 N.Y.S.2d 574, 408 N.E.2d 904, 1980 N.Y. LEXIS 2453 (N.Y. 1980).

9. Effect of other legal proceedings, generally

10. —Advisory opinions

The advisory opinion of the Committee on Public Access to

Records is entitled to great weight and, if not irrational or unreasonable, should be upheld. Gannett Co. v James, 108 Misc. 2d 862, 438 N.Y.S.2d 901, 1981 N.Y. Misc. LEXIS 2304 (N.Y. Sup. Ct. 1981), aff'd, 86 A.D.2d 744, 447 N.Y.S.2d 781, 1982 N.Y. App. Div. LEXIS 15305 (N.Y. App. Div. 4th Dep't 1982).

11. —Article 78 proceedings

Where applicable, relief under Freedom of Information Law (FOIL) may be had regardless of availability of discovery through some other means; thus, petitioner in Article 78 proceeding was not precluded from seeking to compel State Insurance Department to comply with request under FOIL, even though petitioner could obtain similar discovery in plenary action. Consolidated Edison Co. v Insurance Dep't of State, 140 Misc. 2d 969, 532 N.Y.S.2d 186, 1988 N.Y. Misc. LEXIS 511 (N.Y. Sup. Ct. 1988).

In a N.Y. C.P.L.R. art. 78 proceeding brought by a publisher and a journalist challenging the denial of its Freedom of Information Law, N.Y. Pub. Off. Law § 84 et seq., records request for New York State employees' payroll records, the denial on the part of the State Comptroller, the Office of State Comptroller, and the State of New York was vacated and the State was ordered to disclose certain tables that did not use social security numbers as their primary key since they were not a trade secret as well as tables that used social security numbers as their primary key as such tables were retrievable through a simple computer manipulation. However, the State properly invoked the personal privacy exemption in refusing to disclose the State employees' birth dates as the court believed that a reasonable person would find the disclosure of their precise birth dates, taken together with their full name and other details of their State employment, to be offensive and objectionable. Matter of Hearst Corp. v State, 882 N.Y.S.2d 862, 24 Misc. 3d 611, 2009 N.Y. Misc. LEXIS 868 (N.Y. Sup. Ct. 2009).

In an action to obtain disclosure of correspondence between the county district attorney's (DA's) office and the county comptroller, judgment could not be entered in favor of the minority leader of the county legislature, despite a conclusory invocation by respondents, the DA and the county, of the exemption for inter-agency materials under N.Y. Pub. Off. Law § 87(2)(g), as N.Y. C.P.L.R. § 7804(f) required that respondents be permitted to answer. Benedict v Albany County, 867 N.Y.S.2d 906, 22 Misc. 3d 597, 2008 N.Y. Misc. LEXIS 6866 (N.Y. Sup. Ct. 2008).

12. —Criminal proceedings

Availability of disclosure of documents by virtue of CLS CPL Art 240 does not preclude defendants from seeking documents under Freedom of Information Law. Gould v New York City Police Dep't, 89 N.Y.2d 267, 653 N.Y.S.2d 54, 675 N.E.2d 808, 1996 N.Y. LEXIS 3575 (N.Y. 1996).

13. —Department of Motor Vehicles (DMV)

Although disclosure of hazardous intersections and locations might diminish the protection offered by 23 U.S.C.S. § 409, it would not be eliminated; consequently, § 409 did not render the documents sought by the media exempt from disclosure under N.Y. Pub. Off. Law § 87(2) of the Freedom of Information Law. Newsday, Inc. v State DOT, 5 N.Y.3d 84, 800 N.Y.S.2d 67, 833 N.E.2d 210, 2005 N.Y. LEXIS 1215 (N.Y.), cert. dismissed, 546 U.S. 930, 126 S. Ct. 410, 163 L. Ed. 2d 313, 2005 U.S. LEXIS 7651 (U.S. 2005).

14. —Federal laws, generally

Bank (petitioner), which was target of hostile takeover by second bank, was not deprived of due process by State Banking Board's determination not to release certain confidential information regarding "hostile" bank's takeover application, since (1) petitioner had no "property" rights in proceeding because banking board's sole function was to decide whether to allow proposed offer and it did not play active part in transaction nor approve it as sound course of action for either bank, (2) CLS Bank § 142 did not require bank superintendent even to notify petitioner or to offer petitioner opportunity to take part in proceeding, (3) petitioner had received great bulk of material requested through use of Freedom of Information Law, (4) petitioner had been given notice of issues and had submitted extensive documentation in opposition to takeover application, and (5) even if application were approved, parallel federal application had to be considered and approved by Federal Reserve Board, wherein petitioner would have time to oppose it. Irving Bank Corp. v Considine, 138 Misc. 2d 849, 525 N.Y.S.2d 770, 1988 N.Y. Misc. LEXIS 105 (N.Y. Sup. Ct. 1988).

15. Format of records

In proceeding under Freedom of Information Law, court properly ordered disclosure of records in computer tape format instead of on hard copy where agency maintained requested files in computer format, files could be reproduced on computer tapes at minimal cost in few hours, and petitioner agreed to pay cost, while information provided on hard copy would use more than one million sheets of paper, cost more than $10,000, take 5-6 weeks to complete, and cost hundreds of thousands of dollars to reconvert to computer-usable format. Brownstone Publishers, Inc. v New York City Dep't of Bldgs., 166 A.D.2d 294, 560 N.Y.S.2d 642, 1990 N.Y. App. Div. LEXIS 12056 (N.Y. App. Div. 1st Dep't 1990).

Format of the records provided in response to a FOIL records request was within the boundaries of proper procedure, as providing them in an original electronic format would have resulted in providing portions of the records that were exempt from disclosure. Prall v New York City Dept. of Corr., 971 N.Y.S.2d 821, 40 Misc. 3d 940, 2013 N.Y. Misc. LEXIS 2405 (N.Y. Sup. Ct. 2013), aff'd, 129 A.D.3d 734, 10 N.Y.S.3d 332, 2015 N.Y. App. Div. LEXIS 4584 (N.Y. App. Div. 2d Dep't 2015).

16. Jurisdictional matters

The legislature has vested sole jurisdiction over claims under the Freedom of Information Law in the Supreme Court of the State of New York. Application of Strober (1990) Op Comr Educ No 12352.

Supreme Court is appropriate forum for addressing violation of Freedom of Information Law; thus, Commissioner of Education had no jurisdiction over such claims. 1996 Op Comm Ed No. 13596.

17. Physical evidence

Items presented in evidence in criminal trial requested by petitioner, consisting of "articles of clothing and alleged weapons," did not fall within definition of "record" subject to disclosure under Freedom of Information Law; such physical evidence is not part of "the documents and statistics leading (governmental determination" (CLS Pub O § 84 (2) (e) (i)). Sideri v Office of the DA, 243 A.D.2d 423, 663 N.Y.S.2d 206, 1997 N.Y. App. Div. LEXIS 10842 (N.Y. App. Div. 1st Dep't 1997), app. denied, 91 N.Y.2d 808, 669 N.Y.S.2d 261, 692 N.E.2d 130, 1998 N.Y. LEXIS 252 (N.Y. 1998).

18. Required records, generally

While Commissioner of Jurors cannot be compelled to disclose information regarding prospective jurors under CLS Pub O § 87, newspaper publisher could nevertheless apply for disclosure directly to Appellate Division pursuant to CLS Jud § 509. Newsday, Inc. v Sise, 120 A.D.2d 8, 507 N.Y.S.2d 182, 1986 N.Y. App. Div. LEXIS 58997 (N.Y. App. Div. 2d Dep't 1986), aff'd, 71 N.Y.2d 146, 524 N.Y.S.2d 35, 518 N.E.2d 930, 1987 N.Y. LEXIS 20000 (N.Y. 1987).

19. —Salary matters ($87(3)(b))

Public Officers Law § 87(3)(b) requires that a school district maintain on an ongoing basis a record that indicates the names, public office addresses, titles and salaries of all its officers and employees in order to ensure this type of information will be compiled and made available to the public upon request; moreover, such information is relevant to the performance of public employees' official duty and therefore may not be denied on the basis of the privacy rights of public employees. Com Pub Acc Rec FOIL—Ad Op 1866.

20. —Answers to questions not required

21. — —In Individual document listing not required

Subject matter list required under § 87(3)(c) of Freedom of Information Law need not identify with particularity each and every record of agency, but need only refer to categories of records of agency in reasonable detail in order that applicant may identify category of records that may include records sought. Comm Pub Acc Rec FOIL-Ad Op 2508.

22. — —Lists about employment matters

State employees' retirement system was not required to create a detailed listing by subject matter of its final opinions referring to, reflecting, or relating to a retirement applicant's deadline for changing a retirement option, where, under Pub O § 87, the system was required only to maintain a reasonably detailed current list by subject matter of all records in the possession of the agency. Wattenmaker v New York State Employees' Retirement System, 95 A.D.2d 910, 464 N.Y.S.2d 52, 1983 N.Y. App. Div. LEXIS 18882 (N.Y. App. Div. 3d Dep't), app. denied, 60 N.Y.2d 555, 1983 N.Y. LEXIS 5625 (N.Y. 1983).

23. — —Lists about prisons and prisoners

Freedom of Information Law does not require Department of Correctional Services to create master index with respect to each inmate. Comm Pub Acc Rec FOIL-A Op 2578.

Under Freedom of Information Law § 87(3)(c), Department of Correctional Services subject matter list need not make reference to every record of agency, subject matter list need only make reference in reasonable detail to categories of records maintained by agency. Comm Pub Acc Rec FOIL-Ad Op 2660.

24. — —Lists required regardless of document availability

Although a cable company did not support its claim of competitive injury in order to prohibit disclosure of documents under N.Y. Pub. Off. Law § 87(2)(d), because the town was negotiating with the company and a competitor, premature disclosure of the documents would enable a competitor to obtain an unfair advantage in violation of § 87(2)(c). Verizon NY, Inc. v Bradbury, 803 N.Y.S.2d 409, 10 Misc. 3d 785, 234 N.Y.L.J. 102, 2005 N.Y. Misc. LEXIS 2439 (N.Y. Sup. Ct. 2005), rev'd, in part, 40 A.D.3d 1113, 837 N.Y.S.2d 291, 2007 N.Y. App. Div. LEXIS 6637 (N.Y. App. Div. 2d Dep't 2007).

25. —Voting matters

Because the requisite record of the final vote of each member of a college's senate committee would be impossible were the final vote of each member anonymous or secret, under the Freedom of Information Law, voting by the senate and its executive committee could not be conducted by secret ballot. Perez v City Univ. of N.Y., 5 N.Y.3d 522, 806 N.Y.S.2d 460, 840 N.E.2d 572, 2005 N.Y. LEXIS 3211 (N.Y. 2005).

Request by animal rights advocates under Freedom of Information Law for documents pertaining to final votes of university review committee responsible for approving use of animals in experiments would be granted to extent of requiring disclosure of all prospective votes, inasmuch as CLS Pub O § 87(3)(a), although not mandating that vote be taken in any particular instance, requires that record be kept of each member's vote if vote is taken. American Soc. for Prevention of Cruelty to Animals v Board of Trustees of State University, 147 Misc. 2d 847, 556 N.Y.S.2d 447, 1990 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. 1990).

Freedom of Information Law precludes public bodies from taking action by means of secret ballot; voting record identifying each member who voted and manner in which he or she voted must be prepared whenever final vote is taken. Com Pub Acc Rec FOIL-A Op 2539.

While vote for election of school board president may constitute "board issue" it also constitutes "public issue" for which record of votes should be prepared pursuant to § 87(3) (a) of Freedom of Information Law since vote will clearly be taken by members of School Board in performance of their official duties. Comm Pub Acc Rec FOIL-Ad Op 2549.

Records required to be prepared pursuant to § 87(3) of Freedom of Information Law involve records of votes, payroll listing and subject matter list of records in possession of any agency. Comm Pub Acc Rec FOIL-Ad Op 2586.

Copies of electronic ballot images and cast vote records were ordered disclosed under the Freedom of Information Law because it could not be concluded that the records were included in the statutory term "voted ballots," which were exempt from disclosure, so there was no clear legislative intent to preserve the records' confidentiality. Matter of Kosmider v Whitney, 56 Misc. 3d 354, 46 N.Y.S.3d 403, 2017 N.Y. Misc. LEXIS 327 (N.Y. Sup. Ct. 2017), aff'd, 160 A.D.3d 1151, 75 N.Y.S.3d 305, 2018 N.Y. App. Div. LEXIS 2519 (N.Y. App. Div. 3d Dep't 2018).

26. Requester's identity and purpose, generally

Status or need of person seeking access is generally of no consequence in construing FOIL and its exemptions. Capital Newspapers Div. of Hearst Corp. v Burns, 67 N.Y.2d 562, 505 N.Y.S.2d 576, 496 N.E.2d 665, 1986 N.Y. LEXIS 19312 (N.Y. 1986).

Access to government records does not depend on purpose for which records are sought. Gould v New York City Police Dep't, 89 N.Y.2d 267, 653 N.Y.S.2d 54, 675 N.E.2d 808, 1996 N.Y. LEXIS 3575 (N.Y. 1996).

Where the department of education (DOE) decided to comply with a New York Freedom of Information Law (FOIL) request for teacher data reports (TDRs) that included the teachers' names, a teachers union had standing to challenge the DOE's decision, even though it was not the entity which had requested the records, as it established that the administrative action would cause it harm and that it was within the zone of interest encompassed by FOIL. Mulgrew v Board of Educ. of the City School Dist. of the City of N.Y., 919 N.Y.S.2d 786, 31 Misc. 3d 296, 2011 N.Y. Misc. LEXIS 128 (N.Y. Sup. Ct.), aff'd, 87 A.D.3d 506, 928 N.Y.S.2d 701, 2011 N.Y. App. Div. LEXIS 6218 (N.Y. App. Div. 1st Dep't 2011).

Status of applicant for records or reason for which request is made under Freedom of Information Law is irrelevant. Comm Pub Acc Rec FOIL-Ad Op 2518.

Record accessible under Freedom of Information Law is equally available to any person without regard to status or interest and individual seeking access to information need not indicate reason for requesting records. Comm Pub Acc Rec FOIL-Ad Op 2645.

"Interest, connection and/or need" of applicant for records is largely irrelevant to right of access granted by Freedom of Information Law; police blotter, if available, should be made available for access to any person and demonstration of interest in, need for, or connection with records is unnecessary. Comm Pub Acc Rec FOIL-Ad Op 2722.

Chief of police could not properly condition release of accessible records on requester's stating reason for desiring copies of records. Comm Pub Acc Rec FOIL-Ad Op 2799.

New York Freedom of Information Law was not applicable because defendants, an employer and an alleged supervisor, had not stated grounds that the documents were not discoverable under the Federal Rules of Civil Procedure. Adams v Buffalo Pub. Schs, 2014 U.S. Dist. LEXIS 109642 (W.D.N.Y. July 10, 2014).

27. —Litigant as requester

Access to records of a government agency under the FOIL is not affected by the fact that there is pending or potential litigation between the person making the request and the agency; the court below erroneously concluded that the FOIL is unavailable to a litigant and that CPLR art. 31 is a blanket exemption from FOIL. Access to records of a government agency under the Freedom of Information Law, Pub O, Art 6, is not affected by the fact that there is pending or potential litigation between the person making the request and the agency involved, since the statutory mandate of open disclosure requires that an agency's public records remain as available to its litigation adversary as to any other person and the requirements of CPLR § 3120 that documents be "specifically designated" is inapplicable under the Freedom of Information Law, the latter statute requiring merely that the records be "reasonably described," as specified in Pub O § 89(3). M. Farbman & Sons, Inc. v New York City Health & Hospitals Corp., 62 N.Y.2d 75, 476 N.Y.S.2d 69, 464 N.E.2d 437, 1984 N.Y. LEXIS 4244 (N.Y. 1984).

Petitioners who sought Freedom of Information Law disclosure of police department records pertaining to sex crimes for which they had been convicted, for use in collateral review of their convictions, did not fit within exception to statutory privilege of CLS Civ R § 50-b for persons "charged with commission of an offense" (CLS Civ R § 50-b(2)(a)) and thus they would be treated in same manner as any other person seeking access to those records. Fappiano v N.Y. City Police Dep't, 95 N.Y.2d 738, 724 N.Y.S.2d 685, 747 N.E.2d 1286, 2001 N.Y. LEXIS 573 (N.Y. 2001).

The Freedom of Information Law cannot be utilized as a device for disclosure after a statement of readiness has been filed. John

T. Brady & Co. v New York, 84 A.D.2d 113, 445 N.Y.S.2d 724, 1982 N.Y. App. Div. LEXIS 14911 (N.Y. App. Div. 1st Dep't), app. dismissed, 56 N.Y.2d 504, 1982 N.Y. LEXIS 5315 (N.Y. 1982), app. dismissed, 56 N.Y.2d 711, 451 N.Y.S.2d 735, 436 N.E.2d 1337, 1982 N.Y. LEXIS 3372 (N.Y. 1982).

Fact that person requesting material pursuant to Freedom of Information Law (CLS Pub Off §§ 84 et seq.) is in litigation with village from which materials have been requested does not affect propriety of request; furthermore, claim that request constitutes harassment cannot be sustained where there is no showing that records requested have been previously produced. Lucas v Pastor, 117 A.D.2d 736, 498 N.Y.S.2d 461, 1986 N.Y. App. Div. LEXIS 53011 (N.Y. App. Div. 2d Dep't 1986).

In civil action against owners of premises on which sex crime against minor allegedly took place, where plaintiffs sought disclosure from New York City Police Department of its file concerning incident, Special Term followed appropriate procedure under Freedom of Information Law (CLS Pub O § 87) by reviewing police records in camera, and correctly applied standards of law by making police records available to plaintiffs only after redacting names and statements of confidential police witnesses and name of suspect identified by victim from police photograph. In re Radio City Music Hall Productions, Inc., 121 A.D.2d 230, 503 N.Y.S.2d 722, 1986 N.Y. App. Div. LEXIS 58224 (N.Y. App. Div. 1st Dep't 1986).

A civil litigant is unquestionably entitled, as against a claim of privilege, to obtain by way of discovery in a pending action at least the same documents that any member of the public could obtain by simply filing a Freedom of Information Law request; however, the FOIL does not entitle a member of the public to obtain a criminal investigation file. Wunsch v Rochester, 108 Misc. 2d 854, 438 N.Y.S.2d 896, 1981 N.Y. Misc. LEXIS 2303 (N.Y. Sup. Ct. 1981).

Limitations upon disclosure found in CPLR § 4503 and § 3101 do not apply to disclosure under the Freedom of Information Law. In an Article 78 proceeding to deny disclosure of certain documents prepared by confidential technical consultants to four utility companies which were engaged in an adjudicatory administrative proceeding pending before an administrative law judge regarding permits issued pursuant to the National Pollutant Discharge Elimination System, the disclosure would not be denied where defendants failed to claim a specific exemption, privilege or immunity and to demonstrate that the material sought was within such exemption, privilege or immunity and also failed to demonstrate that the documents in question were exempt from disclosure under any of the eight categories of exemption specified in Pub O § 87. Lawler, Matusky & Skelly Engineers v Abrams, 111 Misc. 2d 356, 443 N.Y.S.2d 973, 1981 N.Y. Misc. LEXIS 3276 (N.Y. Sup. Ct. 1981).

In a civil action seeking to hold defendant landlord liable for plaintiff's rape by an intruder on the ground that defendant failed to comply with the nighttime lighting requirement of the administrative code of the city of New York, plaintiff could not employ Pub O § 87, which permitted access to certain agency records, as a discovery tool since the statute was not available to private litigants in matters not affected by a public interest or as a means of circumventing ordinary discovery procedures. Niederberg v Raleigh Realty Co., 118 Misc. 2d 1086, 462 N.Y.S.2d 149, 1983 N.Y. Misc. LEXIS 3446 (N.Y. Sup. Ct. 1983).

In action against city by pedestrian who fell on city sidewalk, CLS Code of Prof Respons DR 7-104 did not prohibit pedestrian's attorney from contacting city employees to examine records respecting condition of sidewalk under Freedom of Information Law (FOIL) without first clearing request with counsel for city, because FOIL authorizes such direct contact. Fusco v Albany, 134 Misc. 2d 98, 509 N.Y.S.2d 763, 1986 N.Y. Misc. LEXIS 3064 (N.Y. Sup. Ct. 1986).

Request for "evaluation property card" regarding the applicant's property is improperly denied on the basis that the municipality need not provide copies since it is involved in the litigation, since Public Officers Law § 87 provides access to copies of the record. Comm Pub Acc Rec FOIL—Ad Op 1774.

28. —Prison inmate or convict as requester

Regulation prohibiting inmates from providing unauthorized legal assistance (7 NYCRR § 270.2(B)(26)(vii)) affords sufficient notice of prohibited conduct and, in light of legitimate security interest in preventing inmates from gaining access to legal records of other inmates, does not unconstitutionally infringe on inmate's right to submit Freedom of Information Law request. Siao-Pao v Selsky, 274 A.D.2d 698, 711 N.Y.S.2d 189, 2000 N.Y. App. Div. LEXIS 7775 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 767, 717 N.Y.S.2d 547, 740 N.E.2d 653, 2000 N.Y. LEXIS 3481 (N.Y. 2000).

29. —Representative capacity of requester, generally

30. — —Family member

The divorced father having joint custody of the children of the marriage is entitled to the same information regarding his children as the children's mother, since Public Officers Law § 87(2)(a) provides for disclosure of records unless such disclosure is exempted by state or federal statute, and the federal statute involved (20 USCS § 1232g) specifically authorizes a parent, custodial or otherwise, to have access to education records of children unless a legally binding instrument, such as a divorce decree, specifically provides to the contrary. Comm Pub Acc Rec FOIL—Ad Op 1860.

A divorced parent who does not have custody of his daughter is nonetheless entitled to access to her school records under 20 USCS § 1232g since a parent, custodial or otherwise, enjoys rights under the Family Educational Rights and Privacy Act, unless a legally binding instrument, such as a divorce decree, specifically provides to the contrary. Com Pub Acc Rec FOIL—Ad Op 1875.

Fact that divorced parent might not have custody of his or her children is not determinative of right of access to student records. Comm Pub Acc Rec FOIL-Ad Op 2677.

31. — —Public officers

Members of a county legislature are not required to comply with the Freedom of Information Law in order to gain access to certain public record where such public officers seek the information while acting in their capacity as a public officers and are requesting the information as representatives of government who have a need to know in order to carry out their official duties. Comm Pub Acc Rec FOIL—Ad Op 1781.

When a public officer seeks information while acting in his or her capacity as a public officer, that person should not be required to follow the procedures generally applicable to the public under the Freedom of Information Law; however, it would not be appropriate to provide public officers "carte blanche" or unrestricted access to records. Comm Pub Acc Rec FOIL-Ad Op 2383.

Member of county legislature has right to use Freedom of Information Law. Comm Pub Acc Rec FOIL-Ad Op 2491.

B. Agencies Subject To Disclosure

32. Courts and court-related entities. generally

33. —Administration of courts, including Office of Court Administration (OCA)

Petitioner is not entitled to access to the records of the Mayor's Committee on the Judiciary concerning the committee's withdrawal of approval of him as a prospective judicial appointee since the committee, whose determinations have no legal effect, performs a purely advisory function merely making recommendations to the Mayor concerning judicial appointments, and entities which perform only advisory functions are not required to make their records available under the Freedom of Information Law. Baumgarten v Koch, 97 Misc. 2d 449, 411 N.Y.S.2d 487, 1978 N.Y. Misc. LEXIS 2819 (N.Y. Sup. Ct. 1978).

34. Fire departments, generally

If a fire department is operated by a municipality itself, the records of the department are subject to the Freedom of Information Law since the municipality is a public corporation that falls within the definition of "agency" in Public Officers Law § 86(3); furthermore, recent case law indicates that fire department records are subject to access under Public Officers Law § 87, even if the records are maintained by a volunteer fire company. Comm Pub Acc Rec FOIL—Ad Op 1780.

35. —Volunteers

Even though a volunteer fire company may be a not-for-profit corporation which exists separately from a municipality with

which it maintains a contractual relationship, the fire company is subject to the Freedom of Information Law and therefore its books and records are subject to access in the same manner and to the same extent as the records in possession of any unit of government in New York State. Com Pub Acc Rec FOIL—Ad Op 1896.

36. Health care entities, generally

37. —Health care insurers

Blue Cross/Blue Shield of Rochester's refusal to release a school district's loss ratios and specific claim information to a central school district is not violative of the Freedom of Information Law since Blue Cross/Blue Shield of Rochester is not a "agency" within the meaning of Public Officers Law § 86(3) and therefore not subject to the disclosure requirements of Public Officers Law § 87. Comm Pub Acc Rec FOIL—Ad Op 1804.

38. —Hospitals and medical centers, generally

State University of New York Health Science Center at Brooklyn was not "performing a governmental or proprietary function for the state," and thus was not acting as "agency" subject to Freedom of Information Law (CLS Pub O §§ 84 et seq.), in maintaining records under federal mandate and for federal review. Citizens for Alternatives to Animal Labs v Board of Trustees of the State Univ., 240 A.D.2d 490, 658 N.Y.S.2d 653, 1997 N.Y. App. Div. LEXIS 6098 (N.Y. App. Div. 2d Dep't 1997), rev'd, 92 N.Y.2d 357, 681 N.Y.S.2d 205, 703 N.E.2d 1218, 1998 N.Y. LEXIS 3220 (N.Y. 1998).

Non-profit, private hospitals receiving substantial amounts of government funds are not government agencies within the definition of Public Officers Law § 86(3) and therefore are not subject to the disclosure requirements of Public Officers Law § 87. Comm Pub Acc Rec FOIL—Ad Op 1795.

Request by prisoner for medical record kept at a private medical center of treatment for back injury he suffered in 1978 is properly denied despite his allegation that he needed the records to assist him in his defense against a charge of burglary in which it is alleged that he removed colored television sets since the private medical center is not subject to the Freedom of Information Law; however, upon request of a physician or hospital of the prisoner's designation under Public Health Law § 17, the private medical center must provide copies of medical records to the physician or hospital designated. Comm Pub Acc Rec FOIL—Ad Op 1802.

Freedom of Information Law does not apply to medical records maintained by private hospitals or physicians. Comm Pub Acc Rec FOIL-Ad Op 2685.

Trial court properly dismissed an application by a patient's spouse, seeking review of a determination of a Records Access Appeals Officer that partially denied her request under the Freedom of Information Law for documents prepared in the course of the Department of Health investigation into the hospital's treatment of the patient, as the exception applied. Matter of Pasek v New York State Dept. of Health, 151 A.D.3d 1250, 56 N.Y.S.3d 627, 2017 N.Y. App. Div. LEXIS 4443 (N.Y. App. Div. 3d Dep't 2017).

Summary of the complaint and facts referring to hospital records involving a patient with no obvious connection to quality assurance goals, as well as a factual statement in the independent consultant's report, was purely factual information that was not within an intra-agency exemption for purposes of the Freedom of Information Law, such that disclosure thereof was required. Matter of Pasek v New York State Dept. of Health, 151 A.D.3d 1250, 56 N.Y.S.3d 627, 2017 N.Y. App. Div. LEXIS 4443 (N.Y. App. Div. 3d Dep't 2017).

39. Industrial developments and the like, generally

Buffalo Enterprise Development Corporation (BEDC) is "agency" within meaning of Freedom of Information Law since it is not-for-profit local development corporation which channels public funds into community, it enjoys many attributes of public entities, its purpose is governmental, it was created exclusively by and for city of Buffalo to attract investment and stimulate growth in city, it describes itself as "agent" of city, and it is required to publicly disclose its annual budget, which is subject to public hearing and is submitted to city for review. Buffalo News v Buffalo Enter. Dev. Corp., 84 N.Y.2d 488, 619 N.Y.S.2d 695, 644 N.E.2d 277, 1994 N.Y. LEXIS 4113 (N.Y. 1994).

In an Article 78 proceeding brought by representatives of various unions representing court officers and court clerks to obtain a declaration that the Office of Court Administration (OCA) was subject to the Freedom of Information Law (FOIL), the court determined that, pursuant to Pub O Law § 87, the functions of the OCA were largely concerned with staffing and physical operation as opposed to adjudicatory functions of the courts of New York State and, therefore, OCA could not be deemed to be one of the "courts of the state" so as to be exempt from FOIL; however, although subject to FOIL, OCA would be entitled to withhold records protected from disclosure by State or Federal statute as well as documents provided by those performing adjudicatory functions which are exempt regardless of where they repose. Quirk v Evans, 116 Misc. 2d 554, 455 N.Y.S.2d 918, 1982 N.Y. Misc. LEXIS 3916 (N.Y. Sup. Ct. 1982).

Although the trial court held that it had the power to issue a subpoena requiring the New York State Unified Court System (UCS) to release records showing the amount of overtime it paid to court officers because the legislature invoked the powers of New York's Civil Practice Law and Rules when it gave the New York State Public Employees Relations Board power to issue subpoenas, the court refused to issue the subpoena because an association which requested the records for use prosecuting its claim that the UCS engaged in unfair labor practices did not show adequate justification of its need for the records or that the records could not be obtained under New York's Freedom of Information Law. State Supreme Court Officers Ass'n v State Unified Court Sys., 774 N.Y.S.2d 909, 2 Misc. 3d 960, 2004 N.Y. Misc. LEXIS 54 (N.Y. Sup. Ct. 2004).

Office of Court Administration is an "agency" subject to the Freedom of Information Law in all respects, rather than a "court" that falls outside the requirements of the Freedom of Information Law. Comm Pub Acc Rec FOIL-Ad Op 2810.

40. Insurance entities

Although some information required to be included in reports created pursuant to N.Y. Ins. Law § 3429 were exempt from disclosure under the Freedom of Information Law, the insurers did not show that zip code data, without more, would put them at a competitive disadvantage, as required by N.Y. Pub. Off. Law §§ 87(2)(d), 89(4)(b), (5)(e); therefore, the borough president, who was seeking the information, was entitled to N.Y. C.P.L.R. art. 78 relief. Matter of Markowitz v Serio, 11 N.Y.3d 43, 862 N.Y.S.2d 833, 893 N.E.2d 110, 2008 N.Y. LEXIS 1827 (N.Y. 2008).

Neither Superintendent of Insurance, as liquidator, nor Liquidation Bureau is "agency" of state for purposes of Freedom of Information Law. Consolidated Edison Co. v Insurance Dep't of State, 140 Misc. 2d 969, 532 N.Y.S.2d 186, 1988 N.Y. Misc. LEXIS 511 (N.Y. Sup. Ct. 1988).

Insurance Department's Bureau of Taxes and Accounts maintains certain financial records relating to Property/Casualty Insurance Security Fund, and those records are available under Freedom of Information Law (FOIL); when company is declared insolvent, all books and records relating to company are transferred to Liquidation Bureau, which is not subject to FOIL, but one may inquire directly to Liquidation Bureau to ascertain whether they maintain records relating to insolvent insurers that contain information not maintained by Insurance Department. Insurance Department, Opinions of General Counsel, Opinion Number 00-12-01.

Insurer's filed rates are records of Insurance Department and are subject to public disclosure provisions contained in CLS Public Officers Law Art 6 ("Freedom of Information Law"). Insurance Department, Opinions of General Counsel, Opinion Number 01-02-08.

41. Law and lawyers, generally

The State Board of Bar Examiners is not an "agency" for purposes of the FOIL. Pasik v State Bd. of Law Examiners, 102 A.D.2d 395, 478 N.Y.S.2d 270, 1984 N.Y. App. Div. LEXIS 18797 (N.Y. App. Div. 1st Dep't 1984).

42. —District Attorney's office

Documents sought from district attorney by petitioner in Article 78 proceeding were no longer available to petitioner, and

thus he was entitled to them under Freedom of Information Law, except to extent that they were exempt from disclosure, where petitioner previously had provided those documents to his former attorney during his criminal prosecution, but former attorney, who had been disbarred and was no longer practicing law, no longer possessed them. Scarola v Morgenthau, 246 A.D.2d 417, 668 N.Y.S.2d 174, 1998 N.Y. App. Div. LEXIS 357 (N.Y. App. Div. 1st Dep't 1998).

District attorneys were not required to make photographic reprints of photographs that an attorney had requested, pursuant to N.Y. Pub. Off. Law §§ 86(4) and 87(1)(b), because photographs were considered records and the only requirement was to provide copies or reproductions of records. Pennington v Clark, 307 A.D.2d 756, 763 N.Y.S.2d 191, 2003 N.Y. App. Div. LEXIS 7844 (N.Y. App. Div. 4th Dep't 2003).

Kings County District Attorney's Office is agency within meaning of Freedom of Information Law and is required to prepare payroll listing envisioned by § 87(3)(b) of Freedom of Information Law. Comm Pub Acc Rec FOIL-Ad Op 2555.

43. Police departments

Where a law enforcement agency was asked to disclose records relating to a police investigation and surveillance activities involving two specific individuals and associated organizations-information protected under the law enforcement and public safety exemptions of Public Officers Law § 87, an agency's response to neither confirm nor deny the existence of responsive documents was compatible with the FOIL statute and the precedent of the New York Court of Appeals interpreting it. Matter of Abdur-Rashid v New York City Police Dept., 31 N.Y.3d 217, 100 N.E.3d 799, 76 N.Y.S.3d 460, 2018 N.Y. LEXIS 723 (N.Y.), reh'g denied, 31 N.Y.3d 1125, 106 N.E.3d 732, 81 N.Y.S.3d 349, 2018 N.Y. LEXIS 1510 (N.Y. 2018).

Rare case where, due to the surrounding circumstances and the manner in which a Freedom of Information Law (FOIL) request is structured, acknowledging that any responsive records exist would reveal information tethered to a narrow exemption; but when a FOIL request seeks to ascertain if a specific person or organization is under investigation by the New York City Police Department Intelligence Bureau, such a response is entirely consistent with the purpose and structure of the statute. Matter of Abdur-Rashid v New York City Police Dept., 31 N.Y.3d 217, 100 N.E.3d 799, 76 N.Y.S.3d 460, 2018 N.Y. LEXIS 723 (N.Y.), reh'g denied, 31 N.Y.3d 1125, 106 N.E.3d 732, 81 N.Y.S.3d 349, 2018 N.Y. LEXIS 1510 (N.Y. 2018).

In civil action against owners of premises on which sex crime against minor allegedly took place, where plaintiffs sought disclosure from New York City Police Department of its file concerning incident, Special Term followed appropriate procedure under Freedom of Information Law (CLS Pub O § 87) by reviewing police records in camera, and correctly applied standards of law by making police records available to plaintiffs only after redacting names and statements of confidential police witnesses and name of suspect identified by victim from police photograph. In re Radio City Music Hall Productions, Inc., 121 A.D.2d 230, 503 N.Y.S.2d 722, 1986 N.Y. App. Div. LEXIS 58224 (N.Y. App. Div. 1st Dep't 1986).

Orders compelling a city police department to disclose certain disciplinary records were reversed because disciplinary decisions fell within N.Y. Civ. Rights Law § 50-a, which makes police personnel records used to evaluate performance toward continued employment or promotion confidential, and the fact that the city police department's disciplinary trials were open to the public did not remove the resulting decisions from the protective cloak of § 50-a. Matter of New York Civ. Liberties Union v New York City Police Dept., 148 A.D.3d 642, 50 N.Y.S.3d 365, 2017 N.Y. App. Div. LEXIS 2448 (N.Y. App. Div. 1st Dep't 2017), aff'd, 32 N.Y.3d 556, 118 N.E.3d 847, 94 N.Y.S.3d 185, 2018 N.Y. LEXIS 3479 (N.Y. 2018).

44. Private corporations, generally

45. —Not-for-profit corporations

A newspaper may not obtain the financial record of a non-profit corporation which defaulted on bonds issued to cover the cost of leasing a large tract of land from a county agency since the non-profit corporation is not an agency within the meaning of Public Officers Law § 86(3) and therefore falls outside the scope of the Freedom of Information Law; however, it is possible for the newspaper to obtain any records or reports submitted to the county governmental agency. Comm Pub Acc Rec FOIL—Ad Op 1812.

46. Schools and related activities, generally

Where there was no indication that a teachers group intended to use charter school teachers' names to, for example, expose governmental abuses or evaluate governmental activities, rather, it appeared that it sought the teachers' names as a convenient mechanism for contacting prospective members, although the group had a right to seek dues-paying members, it could not rely on the Freedom of Information Law to achieve that end. Matter of New York State United Teachers v Brighter Choice Charter School, 15 N.Y.3d 560, 915 N.Y.S.2d 194, 940 N.E.2d 899, 2010 N.Y. LEXIS 3287 (N.Y. 2010).

Because N.Y. Educ. Law § 2854(1)(e) and N.Y. Pub. Off. Law § 87(3)(b) required the charter schools to maintain, inter alia, records of the names of their employees, the trial court properly granted a union's N.Y. C.P.L.R. art. 78 application to review the schools' denial of its request under the Freedom of Information Law, N.Y. Pub. Off. Law art. 6. Matter of New York State United Teachers v Brighter Choice Charter School, 64 A.D.3d 1130, 883 N.Y.S.2d 383, 2009 N.Y. App. Div. LEXIS 5906 (N.Y. App. Div. 3d Dep't 2009), rev'd, 15 N.Y.3d 560, 915 N.Y.S.2d 194, 940 N.E.2d 899, 2010 N.Y. LEXIS 3287 (N.Y. 2010).

The legislature has vested sole jurisdiction over claims under the Freedom of Information Law in the Supreme Court of the State of New York. Application of Strober (1990) Op Comr Educ No 12352.

A request for access to records directed to the director of Interscholastic Athletics in Westchester County which is associated with the New York State Public High School Athletic Association, a not-for-profit corporation which is independent and not a government entity, specifically requesting copies of criteria regarding ice hockey officials, especially as applied to the applicant, and rating sheets pertaining to the applicant, should be honored provided such records are "agency" records; the determination of whether the records involved are "agency" records subject to the Freedom of Information Law is problematical since the person serving as the director of Interscholastic Athletics serves in a dual capacity as director and as an employee of BOCES, a governmental entity performing governmental functions. Comm Pub Acc Rec FOIL—Ad Op 1923.

Copies of video recordings did not have to be provided even if they constituted educational records because although it was well-known within the school community that the approximately 40 third grade students participated in an event, the video recordings could contain statements made by individual students or other information that were not known to the school community generally. Matter of Jacobson v Ithaca City Sch. Dist., 53 Misc. 3d 1091, 39 N.Y.S.3d 904, 2016 N.Y. Misc. LEXIS 3469 (N.Y. Sup. Ct. 2016).

47. —Community colleges

Public community college constituted "agency" for purposes of inquiry under Freedom of Information Law in which certain course materials were sought. Russo v Nassau County Community College, 81 N.Y.2d 690, 603 N.Y.S.2d 294, 623 N.E.2d 15, 1993 N.Y. LEXIS 3264 (N.Y. 1993).

48. —State University of New York (SUNY), generally

State University of New York constitutes "agency" within meaning of CLS Pub O § 86(3). Encore College Bookstores v Auxiliary Serv. Corp., 87 N.Y.2d 410, 639 N.Y.S.2d 990, 663 N.E.2d 302, 1995 N.Y. LEXIS 4751 (N.Y. 1995).

Court should have dismissed Article 78 proceeding to review denial of petitioners' request for unredacted records of Laboratory Animal Users' Committee (LAUC) of State University of New York, since Freedom of Information Act applies only to entities performing governmental or proprietary function for state, and LAUC was not such entity. American Soc. for Prevention of Cruelty to Animals v Board of Trustees of State University of New York, 184 A.D.2d 508, 584 N.Y.S.2d 198, 1992 N.Y. App. Div.

LEXIS 7615 (N.Y. App. Div. 2d Dep't), app. denied, 80 N.Y.2d 757, 589 N.Y.S.2d 308, 602 N.E.2d 1124, 1992 N.Y. LEXIS 3226 (N.Y. 1992).

49. — —Cornell's statutory colleges

Colleges created by CLS Educ §§ 5711, 5712, 5714 and 5715 and operated by Cornell University on behalf of State University of New York (i.e., New York State College of Veterinary Medicine, New York State College of Agriculture and Life Sciences, New York State College of Human Ecology, and New York State School of Industrial and Labor Relations) may not categorically be deemed state agencies under Freedom of Information Law (FOIL) given their hybrid character and significant indicia denoting private entity and function, notwithstanding general policy of liberal disclosure under FOIL and facts that colleges in question are funded by state money, are subject to some state oversight, are state agencies under CLS St Fin § 53-a(5) and are technically part of state university system. Stoll v New York State College of Veterinary Med. at Cornell Univ., 94 N.Y.2d 162, 701 N.Y.S.2d 316, 723 N.E.2d 65, 1999 N.Y. LEXIS 3738 (N.Y. 1999).

Because Cornell University, as an independent institution, was statutorily authorized to manage research and related activities at the New York College of Agriculture and Life Sciences and the New York State Agricultural Experiment Station, even though those institutions within the university were funded by the state, a radio talk show host concerned about genetic engineering and related topics was not entitled to obtain documents relating to that research pursuant to the Freedom of Information Law, N.Y. Pub. Off. Law art. 6, but would be able to obtain release of those documents produced by the university in compliance with its obligation to account for its expenditures of state funds. Alderson v N.Y. State College of Agric. & Life Scis., 4 N.Y.3d 225, 792 N.Y.S.2d 370, 825 N.E.2d 585, 2005 N.Y. LEXIS 178 (N.Y. 2005).

50. Other and miscellaneous agencies

Refusal by the Troy Citizen's Forum to file information requested by the Mayor's Advisory Task Force on Community Development with the city's office of public information is improper since the Forum is subject to the Freedom of Information Law and has an affirmative duty to make its records available to any person at the location for public inspection designated by the public body; the Forum's allegation that the Task Force requesting the information was not a "legally created body" is a factor irrelevant to the rights to access. Comm Pub Acc Rec FOIL—Ad Op 1917.

C. Disclosure Requests

i. Generally

51. In general

Individual's rights of access to records sought are in no way relevant to a request for a certification regarding maintenance of the records; however, if the response involves a denial it may be inferred that the records indeed exist. Comm Pub Acc Rec FOIL-Ad Op 2803.

52. Form of request, generally

53. —Faxed requests

Invasion of privacy of former county employees and resultant economic or personal hardships were sufficient basis for county to refuse to provide copies of names, job titles and salary levels of county employees who had been laid off as result of budget cuts; and claim that disclosure of county records would result in economic or personal hardship to former employees was a conclusory assertion unsupported by any factual basis and thus insufficient to bring material within exemption in the former Freedom of Information Law. Gannett Co. v County of Monroe, 59 A.D.2d 309, 399 N.Y.S.2d 534, 1977 N.Y. App. Div. LEXIS 13567 (N.Y. App. Div. 4th Dep't 1977), aff'd, 45 N.Y.2d 954, 411 N.Y.S.2d 557, 383 N.E.2d 1151, 1978 N.Y. LEXIS 2339 (N.Y. 1978)

54. —Use of subpoena

Petitioner did not fail to comply with Freedom of Information Law (FOIL) on ground that she did not serve subpoena under CLS CPLR § 2307; provisions of CPLR relating to discovery in civil actions do not apply to FOIL requests. DeCorse v City of Buffalo, 239 A.D.2d 949, 659 N.Y.S.2d 604, 1997 N.Y. App. Div. LEXIS 6376 (N.Y. App. Div. 4th Dep't 1997).

55. Requests for mailed records

If an applicant seeking public records from a particular school district is willing to pay the costs of photocopying and mailing, he should not be required to visit school district offices in order to obtain required material, but a request that records be mailed must be honored. Comm Pub Acc Rec FOIL-Ad Op 2349.

56. Requests for photocopied records

Town improperly denied petitioner's request to photocopy financial disclosures of members of the town board of ethics, as N.Y. Pub. Off. Law § 87 of the New York Freedom of Information Law (FOIL), N.Y. Pub. Off. Law § 84 et seq., required such government records to be available for both inspection and copying and there was no rational basis to deny copying of documents that FOIL authorized petitioner to inspect. Matter of Archdeacon v Town of Oyster Bay, 813 N.Y.S.2d 289, 12 Misc. 3d 438, 235 N.Y.L.J. 51, 2006 N.Y. Misc. LEXIS 597 (N.Y. Sup. Ct. 2006).

57. Right to be present and to have counsel at disclosure

In connection with request for records under Freedom of Information Law, petitioner did not have right to be present at hearing ordered by court, at which both employee who conducted search for records and supervisor appeared, and at which court inquired into diligence of search for records; moreover, petitioner did not have right to assignment of counsel. Thomas v Records Access Officer, 205 A.D.2d 786, 613 N.Y.S.2d 929, 1994 N.Y. App. Div. LEXIS 6569 (N.Y. App. Div. 2d Dep't), app. denied, 84 N.Y.2d 807, 621 N.Y.S.2d 516, 645 N.E.2d 1216, 1994 N.Y. LEXIS 3439 (N.Y. 1994).

58. Specificity of request for disclosure, generally

Trial court should have ordered disclosure the metadata associated with those photos that the agency had already disclosed to petitioner, as well as those photos deemed subject to disclosure under the Freedom of Information Law N.Y. Pub. Off. Law art. 6. Matter of Irwin v Onondaga County Resource Recovery Agency, 72 A.D.3d 314, 895 N.Y.S.2d 262, 2010 N.Y. App. Div. LEXIS 1317 (N.Y. App. Div. 4th Dep't 2010).

Freedom of information law does not require that applicant for records identify records with particularity. Comm Pub Acc Rec FOIL-Ad Op 2516.

59. —Not sufficiently specific request

Freedom of Information Law did not entitle petitioners to access to "[a]ll notes, records, correspondence, meeting minutes and other documents related to the adoption and/or revision of the Village Zoning Code's prohibition of commercial activity (presently Code § 170-5)" where CLS Pub O § 89(3) places burden on petitioners to "reasonably describe" documents requested so that search can be made by agency, and village showed that, in order to fully comply with petitioners' requests, one full-time employee of village clerk's office would have to manually search through every document filed with village going back over 45 years. Bader v Bove, 273 A.D.2d 466, 710 N.Y.S.2d 379, 2000 N.Y. App. Div. LEXIS 7416 (N.Y. App. Div. 2d Dep't), app. denied, 95 N.Y.2d 764, 716 N.Y.S.2d 38, 739 N.E.2d 294, 2000 N.Y. LEXIS 2871 (N.Y. 2000).

Request for "all correspondence from any municipality, state or local government agency, private person or business enterprise of any nature concerning pesticiding" is so open-ended as to not reasonably describe any records. Comm Pub Acc Rec FOIL-Ad Op 1819.

60. —Sufficiently specific request

Plaintiff's request for access to records for a certain period was proper where it was sufficiently detailed to enable the respondent governmental agency to locate the records in question and thus met FOIL specificity requirements, despite the fact that the request required production of thousands of records. Capital Newspapers, Div. of Hearst Corp. v Whalen, 126 Misc. 2d 710, 483 N.Y.S.2d 635, 1984 N.Y. Misc. LEXIS 3691 (N.Y. Sup. Ct. 1984), modified, 113 A.D.2d 217, 495 N.Y.S.2d 979, 1985 N.Y. App. Div. LEXIS 52356 (N.Y. App. Div. 3d Dep't 1985).

61. Time element of request

A town may not, under rules implementing Freedom of Information Law refuse to accept requests for access on a day of the

week when it is open for business. Comm Pub Acc Rec FOIL-Ad Op 2809.

ii. Disclosure Fees

62. In general

Where CLS Elec §§ 5-602 and 5-604 were constitutional to extent that they required county boards of election to compile voter registration and enrollment lists to aid ballot access by petition, but were unconstitutional to extent that they provided such records free of charge to some political entities but not others, court would adopt procedural device of severance, retaining information-compiling subsections, discarding payment subsections, and substituting relevant provisions of CLS Pub O § 87 for discarded payment provisions, as information compiling subsections were not inextricably intertwined with payment sections. Schulz v New York State Bd. of Elections, 167 Misc. 2d 404, 633 N.Y.S.2d 915, 1995 N.Y. Misc. LEXIS 468 (N.Y. Sup. Ct. 1995).

Fees for responding to request for access to information should be assessed equally and without regard to status, identity or interest of applicant for records; records are not equally available to any person as required by Freedom of Information Law where accessible records are made available at no cost to one group of applicants but fee for copies of same records is assessed with respect to others. Comm Pub Acc Rec FOIL-Ad Op 2763.

If an agency provides copies of records accessible under Freedom of Information Law to news media for free, it should also provide records to others seeking them for free. Comm Pub Acc Rec FOIL-Ad Op 2807.

63. Indigence of document requester

Indigent state prison inmate seeking to corroborate claims made in habeas corpus petitions was not entitled to obtain free copies of court documents under Freedom of Information Law (FOIL), and district attorney's refusal to waive copying fee on ground of absence of provision permitting such waiver in FOIL was reasonable; inmate's remedy was to proceed as poor person in habeas corpus proceedings and seek leave of court for disclosure. Whitehead v Morgenthau, 146 Misc. 2d 806, 552 N.Y.S.2d 518, 1990 N.Y. Misc. LEXIS 73 (N.Y. Sup. Ct. 1990).

64. Maximum charge not to exceed 25 cents per photocopy, generally

A fee of $572.16 sought to be charged by a town for services to a village which requested a copy of the tentative assessment list prepared by the town with respect to property that was within both the town and the village is both excessive and inappropriate since the town assessed the fee based on the "going fair market rate for 1 hour on IBM 3031 and the operator's time and paper costs" and, assuming that the initial computer printout had been made by the town prior to the village's request, the fee should be based upon the cost of photocopying existing records and thereby regulated by Public Officers Law § 87(1)(b)(iii). Comm Pub Acc Rec FOIL—Ad Op 1786.

A town may not charge 50 cents per photocopy for records up to 9 × 14 inches since Public Officers Law § 87(1)(b)(iii) restricts such charges to 25 cents per photocopy. Com Pub Acc Rec FOIL-Ad Op 1870.

65. —Effect of local enactment or policy, generally

While that part of Cheektowaga, N.Y., Code § 192-2, which charged a sum in excess of the amount authorized by N.Y. Pub. Off. Law § 87(1)(b)(iii) for computer generated police and accident reports was invalid because the fees set forth in the town law were not "precribed by statute," a trial court improperly declared the entire law invalid because plaintiff only challenged the charges for police and accident reports and did not challenge the fees for local record checks and background investigations also included in the town law. N.Y. Cent. Mut. Fire Ins. Co. v Town of Cheektowaga, 13 A.D.3d 1189, 787 N.Y.S.2d 582, 2004 N.Y. App. Div. LEXIS 16314 (N.Y. App. Div. 4th Dep't 2004).

66. — —Ordinance cannot create exception

Fee of $7 charged for certified copies of accident reports under City of Syracuse Revised General Ordinances § 19-4 violates Freedom of Information Law (CLS Pub O § 87), which provides that fees for copies of records shall not exceed 25 cents per photocopy, or actual cost of reproducing any other record, except when different fee is otherwise prescribed by "statute"; § 19-4 of Syracuse Revised General Ordinances is "ordinance," not statute, and therefore fee greater than that stated in Public Officers Law cannot be charged. Sheehan v Syracuse, 137 Misc. 2d 438, 521 N.Y.S.2d 207, 1987 N.Y. Misc. LEXIS 2647 (N.Y. Sup. Ct. 1987).

Agency may charge fee in excess of twenty-five cents per photocopy only where statute, act passed by State Legislature and signed by governor, specifically so provides; fees in excess of twenty-five cents per photo copy charged by town pursuant to ordinance are invalid because local law or ordinance is not considered "statute" with meaning of Freedom of Information Law. Comm Pub Acc Rec FOIL-Ad Op 2552.

Enactment of local ordinance establishing fee in excess of $2 per photocopy cannot permit Village to legally charge more than 25 cents per photocopy in view of change in Freedom of Information Law which permits assessment of fee higher than 25 cents per photocopy only by act of state legislature. Comm Pub Acc Rec FOIL-Ad Op 2668.

67. — —Regulations of New York City

Under amendments of Chapter 73 of the Laws of 1982, only an act of the state legislature (a statute) permits assessment of a fee higher than 25 cents per photocopy; the intent behind the amendment was to establish a uniform maximum charge with respect to fees generally and not with respect to accident reports specifically, although $10 fee charged by New York City Police Department for accident reports may, under means by which New York City Charter provisions have been legislated, have the effect of a statute enacted by the legislature. Comm Pub Acc Rec FOIL-Ad Op 2791.

68. —Effect of specific state statutes, generally

69. — —Vehicle and Traffic Law

Provision in § 202 of the Vehicle and Traffic Law authorizing copying fee of $3.50 for accident reports obtained from the Department of Motor Vehicles does not provide a basis for agencies such as municipal police departments charging more than 25 cents for copies of accident reports requested under Freedom of Information Law. Comm Pub Acc Rec FOIL-Ad Op 2825.

70. Photocopying fee; scanning charges, generally

Inmate could be charged a photocopying fee under N.Y. Pub. Off. Law § 87(1)(b)(iii) for materials requested pursuant to the Freedom of Information Law, N.Y. Pub. Off. Law art. 6, as the records were properly redacted under N.Y. Pub. Off. Law § 89(2) to prevent an unwarranted invasion of privacy, and, thus, copies had to be provided, because identity of the recipients of other inmates' correspondence constituted "identifying details." Matter of Brown v Goord, 45 A.D.3d 930, 845 N.Y.S.2d 495, 2007 N.Y. App. Div. LEXIS 10962 (N.Y. App. Div. 3d Dep't 2007), app. dismissed, 10 N.Y.3d 796, 857 N.Y.S.2d 25, 886 N.E.2d 789, 2008 N.Y. LEXIS 659 (N.Y. 2008).

Fees paid by insurance companies to a village police department to receive copies of accident reports may not be turned over to the PBA. 1980 Ops St Compt File #172.

In absence of a designated fee under CPLR § 8021(a)(11), the proper fee for photocopying deeds that are not certified is the fee provided for in Public Officers Law § 87(1)(b)(iii) rather than the fee established by the provisions of CPLR § 8021(a)(7) since that provision fixes a fee per page for preparing and certifying a copy of any paper or instrument filed or recorded and the documents in question were not certified. Comm Pub Acc Rec FOIL—Ad Op 1854.

Seven dollar labor cost for photocopying in connection with Freedom of Information Law request may not legally be assessed by town board before complying with request because fees characterized as labor costs may not assessed in connection with Freedom of Information Law request. Comm Pub Acc Rec FOIL-Ad Op 2581.

Freedom of Information Law does not permit a police department to charge $5 for copies of accident and incident reports. Comm Pub Acc Rec FOIL-Ad Op 2818.

71. —Advance payment requirement

In cases where a great number of records have been requested, and agency may request that fees for photocopying be paid in advance. Com Pub Acc Rec FOIL—Ad Op 1900.

72. —Map copying

Because no specific provision governs copies of tax maps filed in the county office of the director of real property tax services, the Freedom of Information Law applies, and since there is no fee "otherwise prescribed by law," the county may charge only the actual cost of reproduction for copies of tax maps, excluding operator salaries. Moreover, the county under Real P Tax § 1534 has no authority to include in its charge for copying tax maps a levy for map maintenance expense. Szikszay v Buelow, 107 Misc. 2d 886, 436 N.Y.S.2d 558, 1981 N.Y. Misc. LEXIS 2108 (N.Y. Sup. Ct. 1981).

73. Reproduction fee

The fee for reproducing a tape recording must be based upon the direction give in § 87(1)(b)(iii). Comm Pub Acc Rec FOIL—Ad Op 1904.

74. Search fee

A town may not justify the imposition of a search fee in addition to the photocopying fee based upon fact that some town employee must travel to a separate building where records older than 2 years are kept. Comm Pub Acc Rec FOIL-Ad Op 2813.

D. Sufficiency Of Response, Generally

75. In general

Petitioner was properly provided with photocopy of original line-up photograph rather than reprint as requested, even though CLS Pub O § 86(4) provides that a photograph is a record within meaning of statute, since CLS Pub O § 87(1)(b) merely requires agency to provide copies or reproductions of records. Adams v Hirsch, 182 A.D.2d 583, 582 N.Y.S.2d 724, 1992 N.Y. App. Div. LEXIS 6335 (N.Y. App. Div. 1st Dep't 1992).

Police chief should have provided copy of original memorandum transmitted by chief to the mayor and village board in which numbers of traffic tickets issued were tabulated, rather than a separate letter advising requester of number issued, where request was for memorandum. Comm Pub Acc Rec FOIL-Ad Op 2799.

There is no requirement that provider of computer generated printout also furnish requester with interpretation of codes entered thereon. Comm Pub Acc Rec FOIL-Ad Op 2814.

Trial court properly directed disclosure of the records at issue without redactions, awarded attorney's fee and costs, and denied a sheriff's department's motion for leave to renew because, while the department provided the requested records, it failed to proffer more than conclusory assertions supporting its claims for redaction of the signatures of the captains who approved overtime requests and failed to show that the information was exempt. Matter of Jaronczyk v Mangano, 121 A.D.3d 995, 996 N.Y.S.2d 291, 2014 N.Y. App. Div. LEXIS 7122 (N.Y. App. Div. 2d Dep't 2014).

76. Appealability information

Any possible conclusion that school district had issued final and binding determination of Freedom of Information Law (FOIL) request was negated by letter from district superintendent that advised petitioner of allegedly proper procedure to obtain material under FOIL, and superintendent's letter at later date that responded in part to FOIL request. School district's response to Freedom of Information Law (FOIL) request became final and binding, and statute of limitations began to run against petitioner's Article 78 proceeding, on date when district's superintendent wrote letter to petitioner that responded in part to FOIL request. Petitioner seeking records from school district under Freedom of Information Law did not fail to exhaust its administrative remedies where school district did not advise it of availability of administrative appeal, and did not demonstrate in Article 78 proceeding that procedures for such appeal had even been established. Fact that petitioner, requesting records from school district under Freedom of Information Law, was aware, in theory, of availability of administrative review of denial of its request, did not relieve school district of its responsibility to advise petitioner that such review was available, and of procedures for securing it. Orange County Publ'ns v Kiryas Joel Union Free Sch. Dist., 282 A.D.2d 604, 724 N.Y.S.2d 167, 2001 N.Y. App. Div. LEXIS 3819 (N.Y. App. Div. 2d Dep't 2001).

77. Five-day response requirement

As the New York State Department of Transportation (DOT) acknowledged a request for documents within five days as required by under N.Y. Pub. Off. Law § 89(3)(a), and the request resulted in about 11,000 documents, many of which were still being used, three months was not an excessive time for DOT to allow inspection of some of them and to claim that others were exempt from disclosure under N.Y. Pub. Off. Law § 87(2)(g). Miller v New York State DOT, 58 A.D.3d 981, 871 N.Y.S.2d 489, 2009 N.Y. App. Div. LEXIS 160 (N.Y. App. Div. 3d Dep't), app. denied, 12 N.Y.3d 712, 882 N.Y.S.2d 397, 909 N.E.2d 1235, 2009 N.Y. LEXIS 1786 (N.Y. 2009).

78. Inability to locate

Police lieutenant's mere statement that "(b)ased on the information you provided and after searching for the following requested document(s), this unit was unable to locate" certain documents was insufficient to establish that police department made diligent search for requested records where it was unclear what role, if any, lieutenant played in searching for documents and whether in fact diligent search had been conducted. Bellamy v New York City Police Dep't, 272 A.D.2d 120, 708 N.Y.S.2d 5, 2000 N.Y. App. Div. LEXIS 5440 (N.Y. App. Div. 1st Dep't 2000), overruled in part, Rattley v N.Y. City Police Dep't, 96 N.Y.2d 873, 730 N.Y.S.2d 768, 756 N.E.2d 56, 2001 N.Y. LEXIS 1868 (N.Y. 2001).

79. Periodic or on-going disclosure

A shortage of staff does not constitute a sufficient basis for withholding agency records under Public Law Officers Law § 87; however, in cases in which great numbers of records have been requested, it has been suggested that the agency and the applicant might be able to agree to a schedule spreading disclosure over a period of weeks or even months. Com Pub Acc Rec FOIL—Ad Op 1900.

80. Presumption of availability

Broad allegation that files contain exempt material is insufficient to overcome the presumption that records are open for inspection and categorically to deny petitioner all access to the requested material. Konigsberg v Coughlin, 68 N.Y.2d 245, 508 N.Y.S.2d 393, 501 N.E.2d 1, 1986 N.Y. LEXIS 20497 (N.Y. 1986).

In Article 78 proceeding to compel district attorney to disclose, pursuant to Freedom of Information Law, records in his possession that were compiled during criminal investigation which culminated in conviction of petitioner for murder in second degree, court erred in denying petition on ground that there was no statutory basis for requested relief since, unless they fall within one of 8 categories of exemptions provided for in CLS Pub O § 87(2), all agency records are presumptively available for public inspection and copying without regard to status, need, good faith or purpose of applicant requesting access. Moore v Santucci, 151 A.D.2d 677, 543 N.Y.S.2d 103, 1989 N.Y. App. Div. LEXIS 8185 (N.Y. App. Div. 2d Dep't 1989).

E. Denying Disclosure

i. Generally

81. Administrative or manpower burden as justifying denial

Although a city did not establish that its denial of a Freedom of Information Law request was supported by a specific statutory exemption, as required by N.Y. Pub. Off. Law §§ 87, 89, the petitioner was entitled to N.Y. C.P.L.R. art. 78 relief to the extent that a hearing was necessary to determine precisely what would be entailed were the city to attempt to retrieve the requested documents from electronic databases and whether an undue burden would be created by requiring the city to respond to the request. Matter of New York Comm. for Occupational Safety & Health v Bloomberg, 72 A.D.3d 153, 892 N.Y.S.2d 377, 2010 N.Y. App. Div. LEXIS 75 (N.Y. App. Div. 1st Dep't 2010).

82. Confidentiality, generally

State agency's long-standing promise of confidentiality to insurance companies which generated the requested documents is irrelevant to whether such documents fit within the definition of "records" under FOIL; the definition does not exclude or make any reference to information labeled "confidential" by the agency;

confidentiality is relevant only when determining whether the record or a portion of it is exempt. Washington Post Co. v New York State Ins. Dep't, 61 N.Y.2d 557, 475 N.Y.S.2d 263, 463 N.E.2d 604, 1984 N.Y. LEXIS 4180 (N.Y. 1984).

Trial court properly denied a billing consultant's request for an award of counsel fees under Public Officers Law § 89(4)(c) because, while the response by the public service commission (PSC) to the consultant's administrative appeal—from the denial of its request under the Freedom of Information Law—was untimely and the consultant prevailed when the requested records were turned over to it, the PSC reasonably believed the case file to be exempt from disclosure when they denied the consultant access to it. Matter of Utility Rate Analysis Consultants (URAC) Corp. v Public Serv. Commn. of The State of N.Y., 171 A.D.3d 1279, 97 N.Y.S.3d 757, 2019 N.Y. App. Div. LEXIS 2600 (N.Y. App. Div. 3d Dep't 2019).

As categories of value or amount were to be redacted from the annual statement of financial disclosure for all members of a town's board of ethics, disclosure and copying would not constitute an unwarranted invasion of privacy under the New York Freedom of Information Law, N.Y. Pub. Off. Law § 84 et seq. Matter of Archdeacon v Town of Oyster Bay, 813 N.Y.S.2d 289, 12 Misc. 3d 438, 235 N.Y.L.J. 51, 2006 N.Y. Misc. LEXIS 597 (N.Y. Sup. Ct. 2006).

Neither request for nor promise of confidentiality can validly be asserted to withhold records that would otherwise be available. Comm Pub Acc Rec FOIL-Ad Op 2711.

83. —Attorney-client privilege

While most of the documents that the New York State Department of Environmental Conservation refused to disclose pursuant to a request under the New York Freedom of Information Law, N.Y. Pub. Off. Law Art. 6, were privileged as they were either attorney work product or attorney-client communications, the privilege was lost as to two documents that the Department did not disclose because they were not confidential as they were revealed to or obtained from third parties. Morgan v N.Y. State Dep't of Envtl. Conservation, 9 A.D.3d 586, 779 N.Y.S.2d 643, 2004 N.Y. App. Div. LEXIS 9106 (N.Y. App. Div. 3d Dep't 2004).

Police association was not entitled to reports it sought from a city under N.Y. Pub. Off. Law § 87(2)(a) of the New York Freedom of Information Law, N.Y. Pub. Off. Law art. 6, because an in camera review of the reports showed that they were privileged attorney-client information under N.Y. C.P.L.R. 4503; they were primarily and predominantly legal in nature and, in their full content and context, were made to render legal advice or services. Matter of Rye Police Assn. v City of Rye, 34 A.D.3d 591, 824 N.Y.S.2d 163, 2006 N.Y. App. Div. LEXIS 13482 (N.Y. App. Div. 2d Dep't 2006).

Trial court erred in ordering disclosure of certain emails because they were protected by the attorney-client privilege as each of the emails at issue were communications between counsel in the Governor's Office and New York Department of Transportation employees that contained or referenced factual information relevant to counsel providing legal advice regarding the proposed termination of the sublease. Matter of Gilbert v Office of the Governor of the State of N.Y., 170 A.D.3d 1404, 96 N.Y.S.3d 724, 2019 N.Y. App. Div. LEXIS 2200 (N.Y. App. Div. 3d Dep't 2019).

Letters requested were drafts of the final termination notice that incorporated counsel's recommendations that were circulated in furtherance of the decision-making process prior to a final determination; accordingly, they were exempt from disclosure as inter-agency or intra-agency materials and as attorney work product. Matter of Gilbert v Office of the Governor of the State of N.Y., 170 A.D.3d 1404, 96 N.Y.S.3d 724, 2019 N.Y. App. Div. LEXIS 2200 (N.Y. App. Div. 3d Dep't 2019).

84. —Employment matters

Town defendants were properly granted summary judgment in action alleging that town supervisor breached confidentiality clause of parties' settlement agreement when, in response to question at town board meeting, he revealed amount of plaintiff's severance payment, as confidentiality clause included exception for disclosure "required by law or legal process," settlement agreement was agency record presumptively accessible to public under Freedom of Information Law (FOIL), and disclosure of amount of severance payment did not fall within any exception under FOIL. Hansen v Town of Wallkill, 270 A.D.2d 390, 705 N.Y.S.2d 246, 2000 N.Y. App. Div. LEXIS 2948 (N.Y. App. Div. 2d Dep't 2000).

Department of education's alleged assurances that teacher data reports would remain confidential could not shield them from disclosure, as the department had no right to bargain away the public's right to access to public records. Mulgrew v Board of Educ. of the City School Dist. of the City of N.Y., 919 N.Y.S.2d 786, 31 Misc. 3d 296, 2011 N.Y. Misc. LEXIS 128 (N.Y. Sup. Ct.), aff'd, 87 A.D.3d 506, 928 N.Y.S.2d 701, 2011 N.Y. App. Div. LEXIS 6218 (N.Y. App. Div. 1st Dep't 2011).

85. —School records

Agency such as school district cannot characterize records as confidential unless there is some statutory basis for doing so. Comm Pub Acc Rec FOIL-Ad Op 2702.

Educational institution need not obtain signed waiver from parents or students in order to disclose whether student has graduated or has been awarded degree. Comm Pub Acc Rec FOIL-Ad Op 2779.

School district may not except from disclosure a financial statement submitted in connection with a bid despite fact it is designated "private and confidential", and any promise of confidentiality would be all but meaningless; there is no procedure for an individual to request that records submitted to a school district be excepted from disclosure because disclosure would be an invasion of personal privacy. There is no procedure for an individual to request that records submitted to a school district be excepted from disclosure because disclosure would be an invasion of personal privacy. Com Pub Acc Rec OML-Ad Op 2787.

86. Effect of potential commercial use of requested information, including fund-raising

City erred in refusing to release unredacted copies of General Offense Reports to petitioner on ground that names and addresses of victims and witnesses were sought for commercial or fund-raising purpose since petitioner wanted those reports as evidence of landowner's knowledge of prior criminal activity before commencing action against owner following assault on petitioner in basement of apartment building where she was living; such use of information in maintenance of civil action to redress alleged tortuous wrong was not "commercial" activity. DeCorse v City of Buffalo, 239 A.D.2d 949, 659 N.Y.S.2d 604, 1997 N.Y. App. Div. LEXIS 6376 (N.Y. App. Div. 4th Dep't 1997).

New York City Department of Buildings would be required to provide publishing company (Article 78 petitioner) with computer tapes of information sought under Freedom of Information Law (FOIL) instead of providing hard copy computer printouts since petitioner made strong showing that hard copy would not provide reasonable access to information, and department made no showing that employing one worker for few hours on overtime basis to copy information to computer tape at petitioner's expense posed hardship; fact that petitioner intended to sell information in computerized format to its subscribers did not alter its right to receive information under FOIL, which applies no differently to requests motivated by commercial interests than in other circumstances. Brownstone Publishers, Inc. v New York City Dep't of Bldgs., 146 Misc. 2d 376, 550 N.Y.S.2d 564, 1990 N.Y. Misc. LEXIS 20 (N.Y. Sup. Ct.), aff'd, 166 A.D.2d 294, 560 N.Y.S.2d 642, 1990 N.Y. App. Div. LEXIS 12056 (N.Y. App. Div. 1st Dep't 1990).

87. Non-existent documents, generally

Court properly dismissed Article 78 proceeding brought under Freedom of Information Law to compel State University of New York to produce booklist for upcoming semester's course materials as prepared by its faculty where petitioner failed to show that such information was either created or obtained by university, or was in its possession and control at time request was made. Encore College Bookstores v Auxiliary Serv. Corp., 212 A.D.2d 418, 622 N.Y.S.2d 684, 1995 N.Y. App. Div. LEXIS 1636 (N.Y. App. Div. 1st Dep't), modified, aff'd, 87 N.Y.2d 410, 639 N.Y.S.2d 990, 663 N.E.2d 302, 1995 N.Y. LEXIS 4751 (N.Y. 1995).

88. —Burden of proof as to existence

In Article 78 proceeding challenging police department's denial of disclosure under Freedom of Information Law, Supreme Court

did not abuse its discretion in concluding that police department adequately established nonexistence of additional records requested by petitioner where police department's records access officer certified to Supreme Court that police department had provided petitioner with all responsive documents in its possession; petitioner was required to articulate demonstrable factual basis to support his contention that requested documents existed and were within police department's control, and his conjecture that documents existed some 10 years earlier was insufficient to warrant hearing on issue. Gould v New York City Police Dep't, 89 N.Y.2d 267, 653 N.Y.S.2d 54, 675 N.E.2d 808, 1996 N.Y. LEXIS 3575 (N.Y. 1996).

It was proper to deny petitioner's Freedom of Information request where his belief in existence of "confessions or statements" of certain individuals bearing on crimes for which he was convicted was based on book about prosecution that was closely related to his own prosecution, but Assistant District Attorney who headed related prosecution affirmed that he conducted diligent search of District Attorney's file and did not find requested documents, and there was nothing to indicate that author of book had knowledge of contents of District Attorney's file. Lugo v Galperin, 269 A.D.2d 338, 703 N.Y.S.2d 182, 2000 N.Y. App. Div. LEXIS 2245 (N.Y. App. Div. 1st Dep't), app. denied, 95 N.Y.2d 755, 711 N.Y.S.2d 833, 733 N.E.2d 1102, 2000 N.Y. LEXIS 1401 (N.Y. 2000).

Court improperly granted Freedom of Information Law petition directing Office of Emergency Management (OEM) to determine whether certain requested records existed as to spraying of Malathion and other pesticides and, if they did, provide them to petitioner or indicate why they could not be made available, where OEM explained that diligent search of its records had been conducted and that, after interviews with various OEM staff members, OEM determined that it had no other documents responsive to petitioner's request. N.Y. Envtl. Law & Justice Project v City of New York, 286 A.D.2d 307, 730 N.Y.S.2d 285, 2001 N.Y. App. Div. LEXIS 8318 (N.Y. App. Div. 1st Dep't 2001).

89. —Computerized records

Agency lacked rational basis to deny Freedom of Information Law request for redacted electronic records concerning mandated childhood blood lead level screening, on ground that redacting confidential information from computerized data involved preparation of records not "possessed or maintained" under CLS Pub O § 89(3), because to redact computerized data would take only hours, whereas to perform redaction manually would take weeks or months and probably would not be as accurate at computer-generated redactions. N.Y. Pub. Interest Research Group v Cohen, 188 Misc. 2d 658, 729 N.Y.S.2d 379, 2001 N.Y. Misc. LEXIS 235 (N.Y. Sup. Ct. 2001).

90. —No duty to create or prepare, generally

Agency need not create new record on behalf of applicant who requests information where information requested does not exist in form of record. Comm Pub Acc Rec FOIL-Ad Op 2666.

91. — —Employment-related records

The Office of Court Administration need not, pursuant to a request under the Freedom of Information Law (Public Officers Law, art 6), supply petitioner, a court employee, with a variety of information regarding a 1966 reclassification of court employees, since although the Freedom of Information Law is applicable to the Office of Court Administration, the information sought has never been compiled; the Freedom of Information Law does not impose a duty upon an office of government to research files to compile statistics in response to an information request, and to impose such a duty would expose an agency to vast expense in response to a single request of information. Babigian v Evans, 104 Misc. 2d 140, 427 N.Y.S.2d 688, 1980 N.Y. Misc. LEXIS 2290 (N.Y. Sup. Ct. 1980).

92. — —Municipal records

Pursuant to a N.Y. C.P.L.R. art. 78 proceeding, although a county clerk was required to make available all documents which did not come under an exception to N.Y. Pub. Off. Law § 89 or N.Y. Pub. Off. Laws § 87(2), the court found that the clerk was not required to create a record under § 89(3) where none existed, particularly when it would be at considerable expense to taxpayers. Data Tree LLC v Romaine, 233 N.Y.L.J. 108, 2005 N.Y. Misc. LEXIS 3373 (N.Y. Sup. Ct. 2005).

93. — —Sentencing records

Supreme Court properly dismissed petition seeking judgment under Freedom of Information Law requiring Department of Correctional Services to provide "the Statewide Alphabetical Listing of all inmates currently in DOCS custody, showing facility of incarceration and DIN Numbers" on ground that requested record did not exist and that CLS Pub O § 89(3) does not require agency to create record; although Department of Correctional Services might maintain "Alpha Cell Book" for each correctional facility, listing every inmate incarcerated therein, it was under no obligation to compile requested data from such records. Di Rose v New York State Dep't of Correctional Servs., 216 A.D.2d 691, 627 N.Y.S.2d 850, 1995 N.Y. App. Div. LEXIS 6386 (N.Y. App. Div. 3d Dep't 1995).

94. Permissive, not mandatory, denials

Freedom of Information Law is permissive; thus, while agency may withhold records under certain circumstances, agency may disclose even if records are deniable. Comm Pub Acc Rec FOIL-Ad Op 2524.

95. Previously provided documents, generally

In Article 78 proceeding to compel district attorney to disclose, pursuant to Freedom of Information Law (FOIL), records in his possession that were compiled during criminal investigation which culminated in conviction of petitioner for murder in second degree, if district attorney could show that specific records had previously been provided, request for those records could be denied as moot in absence of allegation by petitioner or his attorney that such records were no longer in their possession. Moore v Santucci, 151 A.D.2d 677, 543 N.Y.S.2d 103, 1989 N.Y. App. Div. LEXIS 8185 (N.Y. App. Div. 2d Dep't 1989).

District attorney's office's submissions were insufficient to sustain its burden of demonstrating that the records the inmate requested were exempt from disclosure where the office failed to provide any competent proof that the documents responsive to these requests were previously provided to the inmate during discovery in his criminal action. Matter of Rose v Albany County Dist. Attorney's Off., 111 A.D.3d 1123, 975 N.Y.S.2d 258, 2013 N.Y. App. Div. LEXIS 7751 (N.Y. App. Div. 3d Dep't 2013).

96. —Publicly available documents

Special prosecutor was not justified in refusing to produce requested record on basis that it constituted public record on file in county clerk's office, since Freedom of Information Law does not require showing of need for requested record. Muniz v Roth, 163 Misc. 2d 293, 620 N.Y.S.2d 700, 1994 N.Y. Misc. LEXIS 559 (N.Y. Sup. Ct. 1994).

97. Specificity of reasons for denial

State agencies, in attempting to meet their burden of establishing that certain requested documents were exempt from disclosure under N.Y. Pub. Off. Law § 87(2)(g), adequately described the records withheld, sufficiently set forth the reasons for withholding them, and properly submitted them to the trial court for in camera inspection. Miller v New York State DOT, 58 A.D.3d 981, 871 N.Y.S.2d 489, 2009 N.Y. App. Div. LEXIS 160 (N.Y. App. Div. 3d Dep't), app. denied, 12 N.Y.3d 712, 882 N.Y.S.2d 397, 909 N.E.2d 1235, 2009 N.Y. LEXIS 1786 (N.Y. 2009).

County district attorney was not entitled to the dismissal of a proceeding filed by the minority leader of the county legislature to obtain correspondence from the DA's office to the county comptroller as N.Y. Pub. Off. Law § 89(4)(b) provided the proper remedy and the leader did not have to establish a clear legal right to the relief sought; however, the DA and the county only made a conclusory invocation of the exemption under N.Y. Pub. Off. Law § 87(2)(g) for inter-agency materials. Benedict v Albany County, 867 N.Y.S.2d 906, 22 Misc. 3d 597, 2008 N.Y. Misc. LEXIS 6866 (N.Y. Sup. Ct. 2008).

Explanation that "other specific information requested is not available to candidates" is insufficient rendition of reason for denial of access to records. Comm Pub Acc Rec FOIL-Ad Op 2518.

98. Waiver of denial

New York State Department of Transportation's statement indicating an intent to disclose documents to a citizen did not

constitute a waiver of its right to later claim that some of those records were exempt from disclosure under N.Y. Pub. Off. Law § 87(2) as interagency and intraagency documents. Miller v New York State DOT, 58 A.D.3d 981, 871 N.Y.S.2d 489, 2009 N.Y. App. Div. LEXIS 160 (N.Y. App. Div. 3d Dep't), app. denied, 12 N.Y.3d 712, 882 N.Y.S.2d 397, 909 N.E.2d 1235, 2009 N.Y. LEXIS 1786 (N.Y. 2009).

ii. Specific Statutory Exemptions Justifying Denial

99. In general

Nothing in the Freedom of Information Law restricts the right of the agency if it so chooses to grant access to records within any of the statutory exceptions, with or without deletion of identifying details. Short v Board of Managers of Nassau County Medical Center, 57 N.Y.2d 399, 456 N.Y.S.2d 724, 442 N.E.2d 1235, 1982 N.Y. LEXIS 3787 (N.Y. 1982).

Exemptions are to be narrowly construed to provide maximum access, and agency seeking to prevent disclosure carries burden of demonstrating that requested material falls squarely within FOIL exemption by articulating particularized and specific justification for denying access; moreover, it is within agency's discretion to disclose records falling within statutory exemptions, with or without identifying details, if it so chooses. Capital Newspapers Div. of Hearst Corp. v Burns, 67 N.Y.2d 562, 505 N.Y.S.2d 576, 496 N.E.2d 665, 1986 N.Y. LEXIS 19312 (N.Y. 1986).

Respondents' request to Freedom of Information Law request bear independent burden of establishing that material requested falls squarely within ambit of statutory exemptions by articulating particularized and specific justification for denying access, and broad allegation that requested files contained exempt material was insufficient to overcome presumption that records were open for inspection, and could not justify categorical denial of all access to requested material. Konigsberg v Coughlin, 68 N.Y.2d 245, 508 N.Y.S.2d 393, 501 N.E.2d 1, 1986 N.Y. LEXIS 20497 (N.Y. 1986).

Blanket exemptions for particular types of documents are inimical to Freedom of Information Law's policy of open government; instead, to invoke one of exemptions of CLS Pub O § 87(2), agency must articulate "particularized and specific justification" for not disclosing requested documents. If court is unable to determine whether withheld documents fall entirely within scope of asserted exemption, it should conduct in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material. Gould v New York City Police Dep't, 89 N.Y.2d 267, 653 N.Y.S.2d 54, 675 N.E.2d 808, 1996 N.Y. LEXIS 3575 (N.Y. 1996).

In Article 78 proceeding to compel disclosure, failure of superintendent of correctional facility and Supreme Court to disclose underlying facts contained in agency records, so as to establish that they did in fact fall within ambit of statutory exemptions of CLS Pub O § 87, did not constitute error since such disclosure would effectively subvert purpose of statutory exemptions to preserve confidentiality of information. Nalo v Sullivan, 125 A.D.2d 311, 509 N.Y.S.2d 53, 1986 N.Y. App. Div. LEXIS 62573 (N.Y. App. Div. 2d Dep't 1986), app. denied, 69 N.Y.2d 612, 517 N.Y.S.2d 1027, 511 N.E.2d 86, 1987 N.Y. LEXIS 16883 (N.Y. 1987).

Unauthorized disclosure made by subordinate officer of State Police concerning intra-agency disciplinary matter did not operate as waiver of exemptions under CLS Pub O § 87. Scaccia v New York State Div. of State Police, 138 A.D.2d 50, 530 N.Y.S.2d 309, 1988 N.Y. App. Div. LEXIS 6870 (N.Y. App. Div. 3d Dep't 1988).

Report was not rendered exempt from disclosure by assertion that it could not be found after diligent search, since (1) respondent made only conclusory assertion that report could not be found, and (2) reliability of assertion had to be examined in light of prior assertion that petitioner's entire file could not be found, and concession that file was later found. Key v Hynes, 205 A.D.2d 779, 613 N.Y.S.2d 926, 1994 N.Y. App. Div. LEXIS 6562 (N.Y. App. Div. 2d Dep't 1994), overruled in part, Rattley v N.Y. City Police Dep't, 96 N.Y.2d 873, 730 N.Y.S.2d 768, 756 N.E.2d 56, 2001 N.Y. LEXIS 1868 (N.Y. 2001).

Town could not successfully defend against Freedom of Information Law (FOIL) requests by newspaper and radio station, asking for town records pertaining to constables suspected of sleeping on duty, by claiming that such information was rendered exempt by CLS Civ R § 50-a, since (1) § 50-a applies only to police officers and correction officers, whereas constables are not defined as police officers by CLS CPL § 1.20, and are considered to be peace officers as defined by CLS CPL § 2.10, and (2) when non-litigating member of media seeks personnel records through FOIL requests, CLS Civ R § 50-a does not create blanket exemption from disclosure. Woodstock v Goodson-Todman Enterprises, Ltd., 133 Misc. 2d 12, 505 N.Y.S.2d 540, 1986 N.Y. Misc. LEXIS 2959 (N.Y. Sup. Ct. 1986).

N.Y. Comp. Codes R. & Regs. tit. 9, § 9978, the rules and regulations enacted to guide the temporary state commission on local government ethics, does not constitute a "statute" sufficient to provide an exemption to the right of inspection and copying of pulbic records under the New York Freedom of Information Law, N.Y. Pub. Off. Law § 84 et seq. Matter of Archdeacon v Town of Oyster Bay, 813 N.Y.S.2d 289, 12 Misc. 3d 438, 235 N.Y.L.J. 51, 2006 N.Y. Misc. LEXIS 597 (N.Y. Sup. Ct. 2006).

Because a resident only sought non-confidential materials in a Freedom of Information Law, Public Officers Law art. 6, application, because a yacht club was not a necessary party under N.Y. C.P.L.R. 1001(a) with a right to intervene, and, aside from certain very limited exceptions, because a village did not prove that the materials sought were exempt under Public Officers Law § 87(2), the resident prevailed within the meaning of Public Officers Law § 89(4)(c). Matter of McCrory v Village of Mamaroneck, 932 N.Y.S.2d 850, 34 Misc. 3d 603, 2011 N.Y. Misc. LEXIS 5106 (N.Y. Sup. Ct. 2011).

Certain memoranda and accompanying e-mail were not records that were germane to the department's decision-making process or reflected opinions or evaluations related to the construction of this project; as such, these particular documents were not exempt from disclosure and had to be disclosed. Matter of Mazzone v New York State Dept. of Transp., 95 A.D.3d 1423, 943 N.Y.S.2d 648, 2012 N.Y. App. Div. LEXIS 3515 (N.Y. App. Div. 3d Dep't 2012).

Trial court erred in partially granting the petitioners' application to annul the respondents' partial denial of the petitioners' request for certain e-mail documents because the documents were inter-agency materials and privileged attorney-client communications inasmuch as they were clearly drafted for discussion purposes, did not constitute final policy decisions. and there was no factual basis in the record demonstrating that the communications were in furtherance of fraud or wrongful conduct. Matter of Shooters Comm. On Political Educ., Inc. v Cuomo, 147 A.D.3d 1244, 47 N.Y.S.3d 512, 2017 N.Y. App. Div. LEXIS 1400 (N.Y. App. Div. 3d Dep't 2017).

Language of § 87(2) of Freedom of Information Law requires that agency review records sought in their entirety to determine which portions fall within one or more of grounds for denial. Comm Pub Acc Rec FOIL-Ad Op 2538.

Freedom of Information Law is permissive and while agency may withhold records falling within one or more of 8 grounds for denial appearing in Freedom of Information Law § 87(2) there is no requirement that such records must be withheld. Comm Pub Acc Rec FOIL-Ad Op 2759.

City telecommunications agency was not required to disclose the geographic location of conduits based on the exception of information technology from disclosure, since the conduits were electronic information systems and infrastructures and disclosure of maps would pose a substantial physical threat to the conduits and jeopardize the agency's ability to guarantee the security of its information technology assets. Matter of Crawford v New York City Dept. of Info. Tech. & Telecom., 982 N.Y.S.2d 725, 43 Misc. 3d 735, 2014 N.Y. Misc. LEXIS 1224 (N.Y. Sup. Ct. 2014), app. dismissed, in part, 136 A.D.3d 591, 25 N.Y.S.3d 595, 2016 N.Y. App. Div. LEXIS 1382 (N.Y. App. Div. 1st Dep't 2016).

100. Exempted by state or federal statute (§ 87(2)(a)), generally

Trial court properly denied a criminal law firm's petition—to compel production of documents relating to a retired police

detective pursuant to the Freedom of Information Law—and dismissed the proceeding because the firm's own submissions showed that the detective had been called to testify numerous times since his retirement, and the Civilian Complaint Review Board met its burden of showing a substantial and realistic potential for the abusive use of the requested material against the detective. Matter of Hughes Hubbard & Reed, LLP v Civilian Complaint Review Bd., 171 A.D.3d 1064, 97 N.Y.S.3d 671, 2019 N.Y. App. Div. LEXIS 2873 (N.Y. App. Div. 2d Dep't 2019).

State Comptroller, the Director of Services for the Office of Unclaimed Funds, and the Records Appeals Officer, New York Office of the State Comptroller, met their burden of establishing that disclosure of records an asset finder requested was properly withheld because the requested records, a list of persons that had claims falling within a specified range of dollar values, were specifically exempted from disclosure under Public Officers Law § 87(2)(a), and the asset finder identified no principled basis for allowing access to the targeted ranges that it sought; the State Comptroller's construction of Abandoned Property Law § 1401 as prohibiting the disclosure of abandoned property claims that fall within targeted ranges of amounts is rational and reasonable method of giving effect to the legislature's expressed intent of withholding from third parties information concerning the value of abandoned property claims. Matter of U.S. Claims Servs. Inc. v New York State Dept. of Audit & Control, 873 N.Y.S.2d 897, 23 Misc. 3d 923, 2009 N.Y. Misc. LEXIS 363 (N.Y. Sup. Ct. 2009).

Denial of a Freedom of Information Law request was proper because the documents requested were exempt from disclosure pursuant to N.Y. Pub. Off. Law § 87(2)(a), (g), and, as a prior disclosure was inadvertent, there was no waiver of the department's right to claim that these documents were exempt from disclosure. Matter of Mazzone v New York State Dept. of Transp., 95 A.D.3d 1423, 943 N.Y.S.2d 648, 2012 N.Y. App. Div. LEXIS 3515 (N.Y. App. Div. 3d Dep't 2012).

In a N.Y. C.P.L.R. art. 78 matter, a legal defense fund and a Muslim advocacy group were not entitled to records under the Freedom of Information Law (FOIL), N.Y. Pub. Off. Law § 87(2)(a), regarding any joint New York City Police Department (NYPD)-Central Intelligence Agency (CIA)unit engaged in counterterrorism surveillance or information gathering, and the NYPD's sharing of information about informants with the CIA because the requested records fell squarely within both FOIL's inter and intra-agency exemption and the federal Freedom of Information Act, 5 U.S.C.S. § 552(b)(5). Asian Am. Legal Defense & Educ. Fund v New York City Police Dept., 964 N.Y.S.2d 888, 41 Misc. 3d 471, 2013 N.Y. Misc. LEXIS 1912 (N.Y. Sup. Ct. 2013), aff'd, 125 A.D.3d 531, 5 N.Y.S.3d 13, 2015 N.Y. App. Div. LEXIS 1550 (N.Y. App. Div. 1st Dep't 2015).

School district erred in determining that video recordings were exempt from disclosure because the video recordings were not educational records for purposes of the Family Educational Rights and Privacy Act; the school district did not alleging that the video recordings were related in any way to the educational performance of the students depicted, and its production of a redacted transcript of the video evinced an understanding that it was not an "educational record." Matter of Jacobson v Ithaca City Sch. Dist., 53 Misc. 3d 1091, 39 N.Y.S.3d 904, 2016 N.Y. Misc. LEXIS 3469 (N.Y. Sup. Ct. 2016).

Department of Corrections and Community Supervision erred in denying an inmate's Freedom of Information Law request for video footage of an event and incident that occurred at a correctional facility because the video was not a "personnel record" or confidential and personal inasmuch as it could be used for several purposes, and just depicted the actual acts and conduct of individuals, not unsubstantiated allegations or complaints. Matter of Green v Annucci, 59 Misc. 3d 452, 70 N.Y.S.3d 746, 2017 N.Y. Misc. LEXIS 5345 (N.Y. Sup. Ct. 2017).

101. —Civil Practice Law and Rules (CPLR)

Exemption from disclosure for attorney work product did not apply to documents voluntarily disclosed to the Attorney General's Office by counsel for a non-government client; however, notes created within the Attorney General's Office and apparently never shared with anyone outside that office were exempt as work product. Matter of Gartner v New York State Attorney General's Off., 160 A.D.3d 1087, 75 N.Y.S.3d 102, 2018 N.Y. App. Div. LEXIS 2383 (N.Y. App. Div. 3d Dep't 2018).

In Article 78 proceeding by newspaper reporter who sought description of legal services provided to county by outside law firm in connection with environmental lawsuit, court would conduct in camera inspection of billing records to determine extent to which descriptive material enclosed therein was protected from disclosure under CLS Pub O § 87(2)(a) and CLS CPLR § 4503; assuming that work product privilege applied to FOIL request, references to conversations or correspondence with particular individuals or similar material might constitute protected work product; attorney-client privilege does not attach to fee statements, except for detailed accounts of legal services provided by counsel. Orange County Publs. v County of Orange, 168 Misc. 2d 346, 637 N.Y.S.2d 596, 1995 N.Y. Misc. LEXIS 617 (N.Y. Sup. Ct. 1995).

Petitioner was not entitled to pre-litigation disclosure under Freedom of Information Law of names of certain of its employees, whom it suspected of misappropriating computer resources through accessing electronic information service operated by respondent Southern Adirondack Library System (SALS), where SALS contended that requested information was confidential under CLS CPLR § 4509 and, although petitioner had internal security problem involving unauthorized use of its computers, no criminal complaint was before court, or had been made. Quad/Graphics, Inc. v Southern Adirondack Library Sys., 174 Misc. 2d 291, 664 N.Y.S.2d 225, 1997 N.Y. Misc. LEXIS 493 (N.Y. Sup. Ct. 1997).

Attorney-client relationship may exist between town attorney and his clients, town board and those other town officials to whom legal counsel is given; thus, confidential communications between town attorney and his clients are exempted from disclosure pursuant to Freedom of Information Law § 87(2)(a) which incorporates privilege envisioned by Civil Practice Law and Rules § 4503. Comm Pub Acc Rec FOIL-Ad Op 2756.

102. —Civil Rights Law, generally

Court properly dismissed petition by legal services agency to review determination of Department of Correctional Services which denied request under Freedom of Information Law for access to documents pertaining to inmate grievances and official disciplinary actions taken against certain correction officer, since such documents were exempt from disclosure under CLS Civ R § 50-a(1) because they were part of officer's personnel record relied on in evaluating his performance, whether or not they had been physically placed in his file; legislative purpose to protect correction officers from use of personnel records in litigation was controlling, although no litigation had yet been commenced, since disclosure of such information to legal services agency could not reasonably be said to be unrelated to potential litigation. Prisoners' Legal Services v New York State Dep't of Correctional Services, 138 A.D.2d 712, 526 N.Y.S.2d 526, 1988 N.Y. App. Div. LEXIS 3236 (N.Y. App. Div. 2d Dep't), aff'd, 73 N.Y.2d 26, 538 N.Y.S.2d 190, 535 N.E.2d 243, 1988 N.Y. LEXIS 3359 (N.Y. 1988).

Records of a corrections department investigation into a prisoner's (and the prisoner's parent's) allegation of imposition of discipline on account of a private grudge, in which investigation the corrections officer in question was completely exonerated, were the very sort of personnel files intended to fall under the protection of N.Y. Civ. Rights Law § 50-a(1), since any such proceeding could affect a corrections officer's professional future. Matter of Argentieri v Goord, 25 A.D.3d 830, 807 N.Y.S.2d 445, 2006 N.Y. App. Div. LEXIS 81 (N.Y. App. Div. 3d Dep't 2006).

As correction officers' accident reports had not been shown to have any relevancy to their continued employment or promotion, the reports were not exempt from disclosure under N.Y. Civ. Rights Law § 50-a or N.Y. Pub. Off. Law § 87(2)(a). Matter of Canty v Office of Counsel, N.Y. State Dept. of Correctional Servs., 913 N.Y.S.2d 528, 30 Misc. 3d 705, 2010 N.Y. Misc. LEXIS 6095 (N.Y. Sup. Ct. 2010).

103. — —Police matters

Derogatory and potentially injurious information contained in police officers' personnel records did not lose its statutory shield of confidentiality under CLS Civ R § 50-a and unqualifiedly become

public knowledge merely because entity seeking Freedom of Information Law access was news-gathering organization which did not intend to use records in any legal proceeding. Daily Gazette Co. v City of Schenectady, 93 N.Y.2d 145, 688 N.Y.S.2d 472, 710 N.E.2d 1072, 1999 N.Y. LEXIS 224 (N.Y. 1999).

Respondent police departments failed to meet their burden of showing that statutory privilege of CLS Civ R § 50-b applied to Freedom of Information Law request for records pertaining to sex crimes for which petitioners were convicted, where no attempt was made to show that each requested document contained information that tended to identify victim of sex crime. Fappiano v N.Y. City Police Dep't, 95 N.Y.2d 738, 724 N.Y.S.2d 685, 747 N.E.2d 1286, 2001 N.Y. LEXIS 573 (N.Y. 2001).

Documents constituting final determination of disciplinary action against State Police investigator were not exempt from disclosure on basis of CLS Civ R § 50-a, which provides for confidentiality of police personnel records, since statute is only intended to prevent access to such records by adversarial counsel for purposes of harassment on cross-examination or otherwise in context of litigation, and did not exempt such records from disclosure in nonlitigation context where petitioner was seeking access under Freedom of Information Law (CLS Pub O Art 6) and was not involved in litigation with State Police. Scaccia v New York State Div. of State Police, 138 A.D.2d 50, 530 N.Y.S.2d 309, 1988 N.Y. App. Div. LEXIS 6870 (N.Y. App. Div. 3d Dep't 1988).

City police department lacked "reasonable basis in law" under CLS Pub O § 89(4)(c)(ii) to deny petitioner's request for investigatory and disciplinary records concerning incident in which on-duty officer left his assigned post without authorization to perform termite inspection for realtor at petitioner's house, and second officer refused to take statement from petitioner when she lodged complaint in regard thereto, notwithstanding that police department's refusal was based on CLS Civ R § 50-a, which provides that personnel records used to evaluate performance of police officers, inter alia, are not subject to inspection except by consent of officer, since (1) § 50-a does not create blanket exemption and was enacted to prevent vexatious investigations into irrelevant matters in context of civil or criminal litigation, and (2) petitioner had no cause of action as to second officer's failure to take her complaint, and any cause of action against other officer was time barred when petitioner made her Freedom of Information Law (FOIL) request; thus, since records were otherwise of significant public interest and petitioner had substantially prevailed in her Article 78 proceeding challenging denial of her request to release records under FOIL, it was proper to award her reasonable counsel fees. Powhida v Albany, 147 A.D.2d 236, 542 N.Y.S.2d 865, 1989 N.Y. App. Div. LEXIS 8132 (N.Y. App. Div. 3d Dep't 1989).

Defendant was not entitled, under Freedom of Information Law, to obtain copies of complaints against, reprimands of, and incidents of misconduct by 3 state police officers involved in criminal investigation of homicides with which defendant was charged where such records were used to evaluate officers' performances for purposes of continued employment, and thus were exempt from disclosure by CLS Pub O § 87(2)(a) and CLS Civ R § 50-a. Lyon v Dunne, 180 A.D.2d 922, 580 N.Y.S.2d 803, 1992 N.Y. App. Div. LEXIS 2694 (N.Y. App. Div. 3d Dep't), app. denied, 79 N.Y.2d 758, 584 N.Y.S.2d 446, 594 N.E.2d 940, 1992 N.Y. LEXIS 1270 (N.Y. 1992).

Records of disciplinary action taken against members of state police as result of internal investigation were specifically exempted from disclosure under Freedom of Information Law by CLS Civ R § 50-a. Ferrara v Superintendent, N.Y. State Police, 235 A.D.2d 874, 652 N.Y.S.2d 432, 1997 N.Y. App. Div. LEXIS 525 (N.Y. App. Div. 3d Dep't), app. dismissed, app. denied, 90 N.Y.2d 829, 660 N.Y.S.2d 551, 683 N.E.2d 16, 1997 N.Y. LEXIS 1557 (N.Y. 1997).

Police department's denial of Freedom of Information Law request for disclosure of documents relating to petitioner's prior arrests, based on prohibition found in CLS Civ R § 50-b, was improper where petitioner was arrested for rape, sodomy and assault, but rape and sodomy charges were dismissed and he was convicted only of assault charges. Brown v New York City Police Dep't, 264 A.D.2d 558, 694 N.Y.S.2d 385, 1999 N.Y. App. Div. LEXIS 8936 (N.Y. App. Div. 1st Dep't 1999).

Documents pertaining to use of force by police officers were properly denied under N.Y. Pub. Off. Law § 87(2)(a) to the New York Civil Liberties Union under a Freedom of information request because the documents came within the exemption purview of N.Y. Civ. Rights Law § 50-a(1) and a substantial potential that the documents would be used in an abusive manner against city police officers was established that could not be cured by simple redaction of identifying details. N.Y. Civ. Liberties Union v City of Schenectady, 306 A.D.2d 784, 761 N.Y.S.2d 704, 2003 N.Y. App. Div. LEXIS 7424 (N.Y. App. Div. 3d Dep't 2003), rev'd, 2 N.Y.3d 657, 781 N.Y.S.2d 267, 814 N.E.2d 437, 2004 N.Y. LEXIS 1602 (N.Y. 2004).

Supreme court erred in dismissing a journalist's action seeking an order directing the New York State Police to turn over records he requested because the State Police failed to demonstrate that the requested records fell within the exemption set forth in N.Y. Civ. Rights Law § 50-a; as the State Police moved to dismiss the petition prior to answering, the record was devoid of any affidavit or other evidence specifying the types of responsive records that existed and establishing that any such documents were used to evaluate performance toward continued employment or promotion. Matter of Hearst Corp. v New York State Police, 109 A.D.3d 32, 966 N.Y.S.2d 557, 2013 N.Y. App. Div. LEXIS 3838 (N.Y. App. Div. 3d Dep't 2013).

Trial court properly determined that the only portion of an internal affairs investigation report that should be disclosed under the Freedom of Information Law was a redacted citizen complaint summary because the report was a personnel record and the withheld portion of the report could not be disclosed in redacted form in a manner that would alleviate the potential that the information could be used in litigation to embarrass or humiliate the police officer who was the subject of the report. Matter of Cook v Nassau County Police Dept., 110 A.D.3d 718, 972 N.Y.S.2d 638, 2013 N.Y. App. Div. LEXIS 6317 (N.Y. App. Div. 2d Dep't 2013).

Civilian Complaint Review Board (CCRB) was not required under the Freedom of Information Law to disclose records relating to misconduct investigations involving a certain police officer because records of the CCRB relating to complaints and proceedings against police officers were exempt from disclosure as personnel records used to evaluate performance toward continued employment or promotion. Matter of Luongo v Records Access Officer, 161 A.D.3d 1079, 78 N.Y.S.3d 183, 2018 N.Y. App. Div. LEXIS 3658 (N.Y. App. Div. 2d Dep't 2018).

104. —Criminal Procedure Law (CPL)

Grand Jury minutes were court records, not agency records, N.Y. Pub. Off. Law § 86(1), (3); they were confidential, N.Y. Crim. Proc. Law § 190.25(4)(a), and accordingly, were exempt from the ambit of the Freedom of Information Law, N.Y. Pub. Off. Law § 84 et seq. N.Y. Pub. Off. Law § 87(2)(a). Hall v Bongiorno, 305 A.D.2d 508, 761 N.Y.S.2d 63, 2003 N.Y. App. Div. LEXIS 5402 (N.Y. App. Div. 2d Dep't 2003).

Particularized reasons were provided for the proper withholding of a FOIL records request for sealed records of inmates, including the inmates' birth, home addresses, and photographs, as such records were within the specific statutory exemption from disclosure. Prall v New York City Dept. of Corr., 971 N.Y.S.2d 821, 40 Misc. 3d 940, 2013 N.Y. Misc. LEXIS 2405 (N.Y. Sup. Ct. 2013), aff'd, 129 A.D.3d 734, 10 N.Y.S.3d 332, 2015 N.Y. App. Div. LEXIS 4584 (N.Y. App. Div. 2d Dep't 2015).

105. —Education Law

CLS Pub O Art 6 does not require Office of Professional Discipline of Education Department to disclose name, address and telephone number of complainant who did not testify at prior disciplinary hearing since CLS Educ § 6510(8) made requested information confidential. Murphy v New York State Education Dep't, Office of Professional Discipline, 148 A.D.2d 160, 543 N.Y.S.2d 70, 1989 N.Y. App. Div. LEXIS 8166 (N.Y. App. Div. 1st Dep't 1989).

106. —Executive Law

Inmate was entitled to receive the lab reports, raw data, logbook entries, chain of custody forms and other documentation

related to the taking of the blood sample and transporting of the sample and results he requested under the New York Freedom of Information Act, except for the actual DNA results from the New York State Division of Criminal Justice Services that he had already received from another source, since the documents were not kept in the State's DNA identification index and were not exempt from disclosure as DNA records; the New York State Police Assistant Deputy Superintendent failed to prove the only ground he invoked for the denial of the inmate's request. Matter of Karimzada v O'Mara, 111 A.D.3d 1088, 975 N.Y.S.2d 248, 2013 N.Y. App. Div. LEXIS 7741 (N.Y. App. Div. 3d Dep't 2013).

In proceeding under Freedom of Information Law to compel production of certain statements made in special prosecutor's investigation of alleged fabrication of fingerprint evidence, statements that had been made during confidential hearings conducted pursuant to CLS Exec Art 6 were exempt from disclosure under CLS Pub O § 87(2)(a). Muniz v Roth, 163 Misc. 2d 293, 620 N.Y.S.2d 700, 1994 N.Y. Misc. LEXIS 559 (N.Y. Sup. Ct. 1994).

107. —Federal laws, generally

108. — —Anti-trust laws

Electronics store owner who had commenced federal antitrust action against electronic products manufacturer alleging wrongful termination as distributor for failure to adhere to manufacturer's resale price maintenance scheme was entitled, under Freedom of Information Law (FOIL), CLS Pub O Art 6, to documents and records in possession of Attorney General which were generated in state's settled federal price-fixing action against same manufacturer; requested materials were not exempt from FOIL disclosure by CLS Gen Bus § 343, which imposes confidentiality in antitrust matters on members of Attorney General's staff in order to protect ongoing investigation, since statute expressly authorizes Attorney General to reveal such information at any time during investigation. Ragusa v New York State Dep't of Law, 152 Misc. 2d 602, 578 N.Y.S.2d 959, 1991 N.Y. Misc. LEXIS 698 (N.Y. Sup. Ct. 1991).

109. — —Highway Hazard Education Act

Where a newspaper requested information from the New York Department of Transportation for a purpose other than litigation, the exemption provisions of the federal highway Hazard Elimination Program, 23 U.S.C. S. § 409 were not applicable; therefore the federal statute did not prohibit disclosure of the requested priority intersection and highway location data to the newspaper pursuant to N.Y. Pub. Off. Law § 87(2)(a). Newsday, Inc. v State DOT, 10 A.D.3d 201, 780 N.Y.S.2d 402, 2004 N.Y. App. Div. LEXIS 9272 (N.Y. App. Div. 3d Dep't 2004), aff'd, 5 N.Y.3d 84, 800 N.Y.S.2d 67, 833 N.E.2d 210, 2005 N.Y. LEXIS 1215 (N.Y. 2005).

Where the news corporation, in a N.Y. C.P.L.R. art. 78 petition, sought disclosure from the State of New York Department of Transportation pursuant to the New York Freedom of Information Law, N.Y. Pub. Off. Law art. 6, of information from priority investigation location lists and priority investigation intersection lists that was not discoverable in lawsuits pursuant to 23 U.S.C.S. § 409, the petition was granted; construing the New York Freedom of Information Law broadly and the exemption under N.Y. Pub. Off. Law § 87(2) narrowly as required by N.Y. Pub. Off. Law § 89(4)(b), 23 U.S.C.S. § 409 did not preempt the New York Freedom of Information Law, and 23 U.S.C.S. § 409 did not apply to N.Y. Pub. Off. Law art. 6 requests. Newsday, Inc. v N.Y. State DOT, 765 N.Y.S.2d 758, 1 Misc. 3d 321, 2003 N.Y. Misc. LEXIS 1263 (N.Y. Sup. Ct. 2003), aff'd, 10 A.D.3d 201, 780 N.Y.S.2d 402, 2004 N.Y. App. Div. LEXIS 9272 (N.Y. App. Div. 3d Dep't 2004).

110. — —Indian Gaming Regulatory Act

Nothing in the Indian Gaming Regulatory Act, 25 U.S.C.S. § 2701 et seq., or in the state-tribe compact, prevented the release under New York's Freedom of Information Law, N.Y. Pub. Off. Law §§ 84-90, of the tribe's submissions of daily inspection reports and patron complaints by New York's State Racing and Wagering Board; the tribe was not a necessary party to the action where it had voluntarily declined to participate. Herald Co. v Feurstein, 779 N.Y.S.2d 333, 3 Misc. 3d 885, 2004 N.Y. Misc. LEXIS 191 (N.Y. Sup. Ct. 2004).

111. —Judiciary Law

Court did not err in refusing to order Commissioner of Jurors to disclose to publisher of newspaper names and addresses of jurors in murder trial, since CLS Jud § 509 renders confidential all records used in juror selection process, including names and addresses of prospective jurors, and CLS Pub O § 87 prohibits disclosure of records which are specifically exempted by statute. Newsday, Inc. v Sise, 120 A.D.2d 8, 507 N.Y.S.2d 182, 1986 N.Y. App. Div. LEXIS 58997 (N.Y. App. Div. 2d Dep't 1986), aff'd, 71 N.Y.2d 146, 524 N.Y.S.2d 35, 518 N.E.2d 930, 1987 N.Y. LEXIS 20000 (N.Y. 1987).

112. —New York City laws, generally

Information services and publishing company was entitled, under Freedom of Information Law, to access to statistical and factual information regarding transfers of cooperative apartments in New York City, including apartment numbers of transferred units since (1) city was not entitled to exemption from disclosure on basis of secrecy provision of NYC Admin Code § 11-2115 since secrecy provision was not state or federal statute as required by CLS Pub O § 87(2)(a), and (2) data sought was readily available to public. Brownstone Publishers, Inc. v New York City Dep't of Finance, 150 A.D.2d 185, 540 N.Y.S.2d 796, 1989 N.Y. App. Div. LEXIS 5880 (N.Y. App. Div. 1st Dep't 1989), app. denied, 1989 N.Y. App. Div. LEXIS 11453 (N.Y. App. Div. 1st Dep't Sept. 7, 1989).

113. —Penal Law (PL)

Special State Prosecutor was not required to disclose, to newspaper, depositions of Attorney General staff members given in connection with investigation into unlawful "leak" of grand jury information since depositions were exempt because (1) they had been compiled for law enforcement purposes and their disclosure could interfere with investigations, and (2) they were exempted by state statute—CLS Penal § 215.70. New York News, Inc. v Office of Special State Prosecutor, 153 A.D.2d 512, 544 N.Y.S.2d 151, 1989 N.Y. App. Div. LEXIS 10657 (N.Y. App. Div. 1st Dep't 1989).

Court denied Freedom of Information Law request for documents relating to "proper cause" accepted by county licensing officer as justification for issuance of pistol license, as CLS Penal § 400.00(5) limits disclosure to name and address of any person to whom any license has been granted. Sportsmen's Ass'n for Firearms Educ., Inc. v Kane, 178 Misc. 2d 185, 680 N.Y.S.2d 411, 1998 N.Y. Misc. LEXIS 446 (N.Y. Sup. Ct. 1998).

114. —Public Authorities Law

Records in possession of New York City Transit Adjudication Bureau, which were compiled in connection with charges and disposition involving 2 separate and unrelated bureau hearings, were exempt from disclosure under Freedom of Information Law by virtue of CLS Pub Authorities § 1209-a(4)(f). Reape v State Metro. Transp. Auth., 185 A.D.2d 275, 586 N.Y.S.2d 23, 1992 N.Y. App. Div. LEXIS 8905 (N.Y. App. Div. 2d Dep't 1992), app. denied, 81 N.Y.2d 710, 599 N.Y.S.2d 804, 616 N.E.2d 159, 1993 N.Y. LEXIS 1700 (N.Y. 1993).

115. —Public Health Law

CLS Pub Health § 18(3) and (4) did not exempt petitioner's medical records in possession of Department of Health from disclosure under Freedom of Information Law, where there was no indication that records sought by petitioner contained harmful information or privileged doctors' notes. Mantica v New York State Dep't of Health, 94 N.Y.2d 58, 699 N.Y.S.2d 1, 721 N.E.2d 17, 1999 N.Y. LEXIS 3442 (N.Y. 1999).

Under Freedom of Information Law, law firm representing company which was being sued by neighboring residents for discharing chemicals and polluting water supply was not entitled to compel Department of Health (DOH) to disclose memorandum which summarized reports received from physicians regarding their examinations of residents, since DOH established that memorandum summarized results of study performed under CLS Pub Health § 206(1)(j), and thus was immune from public scrutiny under CLS Pub O § 87(2)(a), by affidavit of DOH physician who had prepared memorandum, stating that medical information summarized by him was obtained pursuant to § 206(1)(j) study to reduce morbidity and mortality, and that he had assured

physicians that information would be kept confidential. Williams & Connolly v Axelrod, 139 A.D.2d 806, 527 N.Y.S.2d 113, 1988 N.Y. App. Div. LEXIS 3638 (N.Y. App. Div. 3d Dep't 1988).

Given that agencies were permitted under N.Y. Pub. Off. Law § 87(2)(a) to deny access to records if the records were specifically exempt from disclosure by a state or federal statute, respondent health department was justified in denying a request for cancer records under New York's Freedom of Information Law, N.Y. Pub. Off. Law Art. 6, where the requested records either revealed, or could have led to the disclosure of, the identity of particular cancer patients, and, thus, were exempt from disclosure pursuant to N.Y. Pub. Health Law § 2402. Hassig v N.Y. State Dep't of Health, 294 A.D.2d 781, 742 N.Y.S.2d 442, 2002 N.Y. App. Div. LEXIS 5376 (N.Y. App. Div. 3d Dep't), app. denied, 99 N.Y.2d 502, 752 N.Y.S.2d 589, 782 N.E.2d 567, 2002 N.Y. LEXIS 3497 (N.Y. 2002).

CLS Pub Health § 2804-b does not justify denial of Freedom of Information law request for physician identifier information in Statewide Planning and Research Cooperative System. New York Times Co. v New York State Dep't of Health, 173 Misc. 2d 310, 660 N.Y.S.2d 810, 1997 N.Y. Misc. LEXIS 248 (N.Y. Sup. Ct. 1997), aff'd, 243 A.D.2d 157, 674 N.Y.S.2d 826, 1998 N.Y. App. Div. LEXIS 7774 (N.Y. App. Div. 3d Dep't 1998).

Exercise of rights of personal privacy under Freedom of Information Law is limited to living persons; however, Public Health Law and statutes otherwise conferring confidentiality pertaining to medical or hospital records may continue in effect after subject of those records dies. Comm on Open Gov't F7974.

116. —Public Officers Law

Statute provides the exclusive means for disclosure of confidential personnel records, and the parties cannot sidestep its mandate through the expedient of redacted Freedom of Information Law disclosure; as the requested records were exempt from disclosure under Pub. Off. Law § 87(2)(a), which contained no statutory authorization for redaction, redacted disclosure could not be compelled. Matter of New York Civ. Liberties Union v New York City Police Dept., 32 N.Y.3d 556, 118 N.E.3d 847, 94 N.Y.S.3d 185, 2018 N.Y. LEXIS 3479 (N.Y. 2018).

Court properly dismissed proceeding to compel agency to disclose, under Freedom of Information Law, records and physical evidence compiled during criminal investigation culminating in petitioner's conviction, since physical evidence requested, such as tools and items of clothing, did not fall within definition of "record" under CLS Pub O § 86, and requests involving names, addresses, and statements of confidential witnesses, grand jury testimony, and reports which would reveal nonroutine criminal investigative techniques for processing homicide scene were all exempt from disclosure under CLS Pub O § 87. Allen v Strojnowski, 129 A.D.2d 700, 514 N.Y.S.2d 463, 1987 N.Y. App. Div. LEXIS 45390 (N.Y. App. Div. 2d Dep't), app. dismissed, app. denied, 70 N.Y.2d 871, 523 N.Y.S.2d 493, 518 N.E.2d 5, 1987 N.Y. LEXIS 19075 (N.Y. 1987).

Memorialized discussions at duly convened executive sessions of county board of supervisors which do not result in formal vote, whether consisting of privileged attorney-client communications or otherwise, are not type of governmental records to which public has to be given access, as confidentiality has been specifically sanctioned by CLS Pub O §§ 105 and 106, and thus such records fall within exemption of CLS Pub O § 87(2)(a). Wm. J. Kline & Sons v County of Hamilton, 235 A.D.2d 44, 663 N.Y.S.2d 339, 1997 N.Y. App. Div. LEXIS 10151 (N.Y. App. Div. 3d Dep't 1997).

Superintendent of Insurance, as liquidator, and Liquidation Bureau, as with any other court-appointed receiver, enjoy judicial privilege under CLS Pub O § 86(3) and thus are specifically exempted from disclosure requirements of Freedom of Information Law. Consolidated Edison Co. v Insurance Dep't of State, 140 Misc. 2d 969, 532 N.Y.S.2d 186, 1988 N.Y. Misc. LEXIS 511 (N.Y. Sup. Ct. 1988).

117. —Social Services Law

Court properly denied Article 78 petition to review denial of father's request under CLS Pub O § 87 for social service records concerning his daughter on basis that such information was protected under CLS Soc Serv § 372 where father could not demonstrate that disclosure to him would be "proper" under § 372(3), in that he had executed judicial surrender agreement terminating his parental rights and surrendering child for adoption. Wise v Battistoni, 208 A.D.2d 755, 617 N.Y.S.2d 506, 1994 N.Y. App. Div. LEXIS 9884 (N.Y. App. Div. 2d Dep't 1994).

Petitioner, academic researcher, was not entitled to disclosure, in redacted form, of intake referral forms maintained by Visiting Psychiatric Service, unit of respondent's Office of Health and Mental Health Services; such records were exempt from disclosure under CLS Soc Serv § 136(2) and Pub Health § 18(6). Rabinowitz v Hammons, 228 A.D.2d 369, 644 N.Y.S.2d 726, 1996 N.Y. App. Div. LEXIS 7484 (N.Y. App. Div. 1st Dep't), app. denied, 89 N.Y.2d 802, 653 N.Y.S.2d 279, 675 N.E.2d 1232, 1996 N.Y. LEXIS 4248 (N.Y. 1996).

Investigative newspaper reporter was not entitled to disclosure of records and information held by social services agencies pertaining to agency actions in case involving child abuse victim, notwithstanding that CLS Soc Serv § 422(4)(A)(h) allows disclosure of such confidential material to "any person engaged in a bona fide research purpose," since it was not possible to release material sought and keep requisite confidentiality, even with redaction of names; it was irrelevant for purposes of disclosure that victim was deceased, that some material surrounding matter had been disclosed to press by various means, or that information sought would allegedly correct misinformation already revealed to public. New York News, Inc. v Grinker, 142 Misc. 2d 325, 537 N.Y.S.2d 770, 1989 N.Y. Misc. LEXIS 47 (N.Y. Sup. Ct. 1989).

Law firm was entitled to written decisions of fair hearings into reports of child abuse conducted under Social Services Law § 422(8)(b), pursuant to the Freedom of Information Law, Public Officers Law § 84 et seq.; although § 422(4) barred the disclosure of investigative materials, release of the hearing decisions was required by State Administrative Procedure Act § 307[3][a]. Lansner & Kubitschek v New York State Off. of Children & Family Servs., 64 Misc. 3d 438, 103 N.Y.S.3d 743, 2019 N.Y. Misc. LEXIS 2449 (N.Y. Sup. Ct. 2019).

118. —Tax Law

Tax records and exhibits or transcripts of tax hearings conducted by respondent Department of Taxation and Finance against petitioner's adversary in civil litigation were protected from disclosure under CLS Tax § 1146(a); thus, court denied Article 78 proceeding to review respondent's denial of Freedom of Information Law request under CLS Pub O § 87(2)(a). Tartan Oil Corp. v State Dep't of Taxation & Fin., 172 Misc. 2d 322, 659 N.Y.S.2d 410, 1997 N.Y. Misc. LEXIS 164 (N.Y. Sup. Ct. 1997), aff'd, 239 A.D.2d 36, 668 N.Y.S.2d 76, 1998 N.Y. App. Div. LEXIS 326 (N.Y. App. Div. 3d Dep't 1998).

119. Unwarranted invasion of personal privacy (§ 87(2)(b)), generally

Because questions of fact existed as to whether a provider's Freedom of Information Law request for public land records would require the county clerk to disclose private information, and whether the clerk could comply with the request in the format sought by the provider, the matter was remitted to the trial court to determine whether the clerk could provide the records pursuant to N.Y. Pub. Off. Law §§ 87(2)(b), 89(2)(c)(1), (3)(b). Matter of Data Tree, LLC v Romaine, 9 N.Y.3d 454, 849 N.Y.S.2d 489, 880 N.E.2d 10, 2007 N.Y. LEXIS 3712 (N.Y. 2007).

Historian was entitled to disclosure of the names and identifying details of people, other than the people interviewed, mentioned in certain interview transcripts in her Freedom of Information Law request because such disclosure would not have been an unwarranted invasion of personal privacy under N.Y. Pub. Off. Law § 87(2)(b); the diminished claims of privacy were weighed against the claims of history. However, the request for the names of interviewees who were promised that no one would find out they were being interviewed was denied because it would have been unacceptable for the government to break that promise, even after all these years. Matter of Harbatkin v New York City Dept. of Records & Info. Servs., 19 N.Y.3d 373, 948 N.Y.S.2d 220, 971 N.E.2d 350, 2012 N.Y. LEXIS 1278 (N.Y. 2012), cert. denied, 568 U.S. 1157, 133 S. Ct. 1239, 185 L. Ed. 2d 177, 2013 U.S. LEXIS 1101 (U.S. 2013).

Because a county clerk determined that compliance with a petitioner's request for certain electronic documents was not possible without extraordinary efforts on its part to protect the privacy interests of its citizens, the trial court properly denied the petitioner's N.Y. C.P.L.R. art. 78 request under N.Y. Pub. Off. Law § 87(2)(b). Matter of Data Tree, LLC v Romaine, 36 A.D.3d 804, 828 N.Y.S.2d 512, 2007 N.Y. App. Div. LEXIS 713 (N.Y. App. Div. 2d Dep't), rev'd, 9 N.Y.3d 454, 849 N.Y.S.2d 489, 880 N.E.2d 10, 2007 N.Y. LEXIS 3712 (N.Y. 2007).

Freedom of Information Law, N.Y. Pub. Off. Law § 84 et seq., did not require disclosure of the home addresses of hate crime victims, even redacted as the trial court instructed, N.Y. Pub. Off. Law § 87(2)(b), as even the partial disclosure of an address could have revealed the identity of a victim; moreover, expert testimony regarding the sensitivity of hate crime victims and their frequent desire to remain private about the incidents was not controverted. Matter of New York Times Co. v City of N.Y. Police Dept., 103 A.D.3d 405, 959 N.Y.S.2d 171, 2013 N.Y. App. Div. LEXIS 689 (N.Y. App. Div. 1st Dep't), app. denied, 22 N.Y.3d 854, 977 N.Y.S.2d 183, 999 N.E.2d 548, 2013 N.Y. LEXIS 2941 (N.Y. 2013).

Portion of an inmate's Freedom of Information Law request for crime scene photographs of his female murder victim was denied under N.Y. Pub. Off. Law § 87(2)(b) as the inmate's personal interest in the photographs was irrelevant; the public had no interest in accessing the photographs, and the victim's family had a substantial privacy interest in not releasing the photographs of the victim's bloodied, partially clothed body. Matter of Edwards v New York State Police, 44 A.D.3d 1216, 843 N.Y.S.2d 729, 238 N.Y.L.J. 85, 2007 N.Y. App. Div. LEXIS 10867 (N.Y. App. Div. 3d Dep't 2007).

Trial court properly denied disclosure of unpublished photos of individuals other than petitioner and those relating to law enforcement because the agency established that those photos were exempt under N.Y. Pub. Off. Law § 87(2)(b); the individuals photographed by the agency consented to its use of their photos only for public education purposes. The record did not support the theory that there was a public interest in disclosure of either the unpublished photos of individuals other than petitioner or the unpublished photos relating to law enforcement investigations. Matter of Irwin v Onondaga County Resource Recovery Agency, 72 A.D.3d 314, 895 N.Y.S.2d 262, 2010 N.Y. App. Div. LEXIS 1317 (N.Y. App. Div. 4th Dep't 2010).

Applying an erroneous standard to the denial of an individual's Freedom of Information Law request was reversible error because the error substantially prejudiced the individual, as (1) officials showed no unwarranted invasion of privacy under N.Y. Pub. Off. Law § 89(2), (2) there was a significant public interest in the requested materials, and (3) no privacy interests outweighed this public interest, as personally identifying information could be redacted. Matter of Thomas v Condon, 128 A.D.3d 528, 9 N.Y.S.3d 257, 2015 N.Y. App. Div. LEXIS 4163 (N.Y. App. Div. 1st Dep't 2015).

Decision denying a company's request for photographs of all arrested or booked individuals to allow it to charge a fee to persons to obtain the photographs over its website was upheld because the records were exempt from disclosure as an unwarranted invasion of personal privacy under N.Y. Pub. Off. Law § 87(2)(b). Matter of Prall v New York City Dept. of Corrections, 129 A.D.3d 734, 10 N.Y.S.3d 332, 2015 N.Y. App. Div. LEXIS 4584 (N.Y. App. Div. 2d Dep't 2015).

Record request under the Freedom of Information Law for numerous documents relating to a village's deer management activities was improperly redacted, as a claim that disclosure would constitute an unwarranted invasion of personal privacy lacked merit because there was no showing that the redacted information fell into any statutory category that qualified for exemption or that there were privacy interests at stake that outweighed the public interest in disclosure of the information. Matter of Laveck v Village Bd. of Trustees of the Vil. of Lansing, 145 A.D.3d 1168, 42 N.Y.S.3d 460, 2016 N.Y. App. Div. LEXIS 7991 (N.Y. App. Div. 3d Dep't 2016).

Executive Chamber offered no proof that the requested records fell into any enumerated categories and failed to specify the implicated privacy interests, if any, against which the public interest in disclosing the records were to be balanced. The Chamber's claim that innocent non-specified people may have their reputations besmirched in an unspecified manner failed to sustain its burden to provide a particularized and specific justification for not disclosing requested documents. Matter of New York Times Co. v New York State Exec. Chamber, 57 Misc. 3d 405, 56 N.Y.S.3d 821, 2017 N.Y. Misc. LEXIS 2711 (N.Y. Sup. Ct. 2017).

120. —Deceased persons

Unofficial papers of deceased city mayor in custody of city would be subject to disclosure under Freedom of Information Law (CLS Pub O Art 6) without prescreening by city, even though they pertained to mayor's personal affairs and to his activities as county Democratic Committee Chairman, where those papers were intermingled with official papers. Capital Newspapers, Div. of Hearst Corp. v Whalen, 69 N.Y.2d 246, 513 N.Y.S.2d 367, 505 N.E.2d 932, 1987 N.Y. LEXIS 15362 (N.Y. 1987).

Public interest group was entitled to unedited body-worn camera footage of a police shooting of a person having a mental health crisis because redactions of police interactions with decedent after he was subdued were of significant public interest, and privacy objections were resolved by the family's support of public disclosure. New York Lawyers for the Pub. Interest v New York City Police Dept., 64 Misc. 3d 671, 103 N.Y.S.3d 275, 2019 N.Y. Misc. LEXIS 3240 (N.Y. Sup. Ct. 2019).

121. —Employees and employments, generally

122. — —Application for employment

Public employment history of City University of New York's employees, insofar as revealed on their job applications, is not shielded from disclosure as unwarranted invasion of employees' privacy under CLS Pub O § 89(2)(b)(i). Dates of attendance at academic institutions is subject to disclosure, at least where employees did not meet licensing requirements for employment when hired and thus had to have worked minimum number of years in field in order to have qualified for job; in such circumstances, agency's need for information would be great and personal hardship of disclosure small. Kwasnik v City of New York, 262 A.D.2d 171, 691 N.Y.S.2d 525, 1999 N.Y. App. Div. LEXIS 6756 (N.Y. App. Div. 1st Dep't 1999).

123. — —Evaluation of job performance

Department of education did not act arbitrarily and capriciously in releasing teacher data reports (TDRs) listing the teachers' names, as it could have reasonably determined that releasing the unredacted TDRs would not be an unwarranted invasion of privacy under N.Y. Pub. Off. Law § 89(2), because the data did not relate to the teachers' personal lives and the public's interest in disclosure outweighed the teachers' privacy interest. Mulgrew v Board of Educ. of the City School Dist. of the City of N.Y., 919 N.Y.S.2d 786, 31 Misc. 3d 296, 2011 N.Y. Misc. LEXIS 128 (N.Y. Sup. Ct.), aff'd, 87 A.D.3d 506, 928 N.Y.S.2d 701, 2011 N.Y. App. Div. LEXIS 6218 (N.Y. App. Div. 1st Dep't 2011).

Department of education did not act arbitrarily and capriciously in releasing teacher data reports (TDRs) listing the teachers' names, as it could have rationally determined that, while the unredacted TDRs were intra-agency records, they were statistical tabulations of data that had to be released under N.Y. Pub. Off. Law § 87(2)(g)(i), regardless of any flaws or unreliability. Mulgrew v Board of Educ. of the City School Dist. of the City of N.Y., 919 N.Y.S.2d 786, 31 Misc. 3d 296, 2011 N.Y. Misc. LEXIS 128 (N.Y. Sup. Ct.), aff'd, 87 A.D.3d 506, 928 N.Y.S.2d 701, 2011 N.Y. App. Div. LEXIS 6218 (N.Y. App. Div. 1st Dep't 2011).

124. — —Salaries

Union employee's request for the names and addresses of non-union employees so that the union employee could verify that non-union contractors were paying employees the prevailing wage implicated significant personal privacy interests that prevailed over the public interest in disclosure of the information, particularly in light of the fact that information on employee titles and their corresponding wages had been provided to the union employee. Matter of Massaro v New York State Thruway Auth., 111 A.D.3d 1001, 974 N.Y.S.2d 636, 2013 N.Y. App. Div. LEXIS 7216 (N.Y. App. Div. 3d Dep't 2013).

125. — —Telephone records and the like

Because the people with unlisted telephone numbers were likely suggesting that disclosure of their numbers would be unnecessarily intrusive or result in an unwarranted invasion of personal privacy, the petitioner was not entitled to disclosure of the unlisted telephone numbers under N.Y. Pub. Off. Law § 87(2)(b) of the Freedom of Information Law, N.Y. Pub. Off. Law § 84 et seq. Matter of Hawley v Village of Penn Yan, 35 A.D.3d 1270, 827 N.Y.S.2d 390, 2006 N.Y. App. Div. LEXIS 15663 (N.Y. App. Div. 4th Dep't 2006).

126. —Housing, homesteading and the like

Petitioner's request under Freedom of Information Law, CLS Pub O Art 6, for specified Homestead Program applications submitted to town should not have been denied in its entirety, although disclosure of some material in applications would constitute unwarranted invasion of privacy, since petitioner had limited request to, and town would be required to disclose, applications involving past or present town employees redacted to reflect only employment history. Wilson v Islip, 179 A.D.2d 763, 578 N.Y.S.2d 642, 1992 N.Y. App. Div. LEXIS 679 (N.Y. App. Div. 2d Dep't 1992).

127. —Licensing; licensees

Response given by applicant for driver's license to question on application as to whether he or she had received treatment for any disability, was not subject to disclosure under Freedom of Information Law. Hanig v State Dep't of Motor Vehicles, 168 A.D.2d 884, 564 N.Y.S.2d 805, 1990 N.Y. App. Div. LEXIS 15767 (N.Y. App. Div. 3d Dep't 1990), aff'd, 79 N.Y.2d 106, 580 N.Y.S.2d 715, 588 N.E.2d 750, 1992 N.Y. LEXIS 209 (N.Y. 1992).

Citizen's request, pursuant to N.Y. Pub. Off. Law § 85, for information about persons issued deer management permits was denied because disclosure would constitute an unwarranted invasion of personal privacy; the system containing the information included a broad range of personal information including the license holder's first and last name, middle initial, gender, height, eye color, date of birth, driver's license number, customer identification number, state of residency, residential address, telephone number, and other personal information. In addition, the court noted that, unlike professional/work-related licenses, disclosure of the personal information in relation to hunting licenses would not serve the public interest. Matter of Goyer v New York State Dept. of Envtl. Conservation, 813 N.Y.S.2d 628, 12 Misc. 3d 261, 2005 N.Y. Misc. LEXIS 3114 (N.Y. Sup. Ct. 2005).

Personal privacy exception of CLS Pub O § 89(2)(b)(iii) does not apply to names and business addresses of newly licensed New York insurance agents. Insurance Department, Opinions of General Counsel, Opinion Number 00-08-01.

128. —Lists of names, addresses and the like, generally

Petition pursuant to Article 78 of CPLR to compel disclosure under Freedom of Information Act of certain documents and records is unanimously modified since deletion of such identified information as names, addresses and social security numbers will not impede petitioner's search, yet will protect individuals involved from unwarranted invasion of their personal privacy. Harris v City University of New York, Baruch College, 114 A.D.2d 805, 495 N.Y.S.2d 175, 1985 N.Y. App. Div. LEXIS 53810 (N.Y. App. Div. 1st Dep't 1985).

Records that exist that indicate amounts paid by town to engineering firm must be made available, because none of grounds of denial could appropriately be asserted, and if social security numbers or home addresses are included in records, these details may be withheld on ground that disclosure would constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL AO-4690.

Personal privacy exception of CLS Pub O § 89(2)(b)(iii) does not apply to names and business addresses of newly licensed New York insurance agents. Insurance Department, Opinions of General Counsel, Opinion Number 00-08-01.

129. — —Commercial or fund-raising purposes

Nonprofit "pro-gun activist" organization was not entitled to obtain names and addresses of persons holding rifle or shotgun permits under Freedom of Information Law (FOIL) in order to solicit membership dues to help support its informational, lobbying and other activities, since such solicitation is "fund-raising" and is thus exempted from FOIL's disclosure requirements as invasion of privacy. Federation of New York State Rifle & Pistol Clubs, Inc. v New York City Police Dep't, 73 N.Y.2d 92, 538 N.Y.S.2d 226, 535 N.E.2d 279, 1989 N.Y. LEXIS 192 (N.Y. 1989).

Privacy exemption was properly applied to Freedom of Information Law request for inventory data for all parcels contained on assessment roll of town since petitioner intended to use information for commercial purposes; redaction of names and addresses from inventory data would not protect privacy interests since tax map numbers contained in that data would, nonetheless, enable petitioner to identify names and addresses of property owners through comparison of tax map numbers to assessment roll. Comps, Inc. v Town of Huntington, 269 A.D.2d 446, 703 N.Y.S.2d 225, 2000 N.Y. App. Div. LEXIS 1367 (N.Y. App. Div. 2d Dep't), app. denied, 95 N.Y.2d 758, 713 N.Y.S.2d 522, 735 N.E.2d 1287, 2000 N.Y. LEXIS 1832 (N.Y. 2000).

Police commissioner was exempt under N.Y. Pub. Off. Law §§ 87(2)(b) and 89(2)(b)(iii) from having to comply with a rifle and pistol association's request under the New York Freedom of Information Law, N.Y. Pub. Off. Law § 84 et seq., for a list, in digital format, of the names and addresses of all pistol licensees in a city because the commissioner provided specific proof of the association's intent to use the requested material for the impermissible purposes of fund-raising and/or commercial gain. Matter of New York State Rifle & Pistol Assn., Inc. v Kelly, 55 A.D.3d 222, 863 N.Y.S.2d 439, 240 N.Y.L.J. 60, 2008 N.Y. App. Div. LEXIS 6784 (N.Y. App. Div. 1st Dep't 2008).

130. —Police, generally

Police officer did not meet burden of proving that his "Lost Time Report," showing dates of his absences from employment, requested by newspaper and reporter to verify information that some police officers were abusing sick leave privileges, was exempt from disclosure as unwarranted invasion of personal privacy under CLS Pub O Law §§ 87 and 89, since report sought was neither employment history nor medical history, nor did it come within other listed categories of exemptions, and officer's assertion that release of report would cause him to suffer "economic or personal hardship" was conclusory and not supported by facts. Capital Newspapers Div. of Hearst Corp. v Burns, 67 N.Y.2d 562, 505 N.Y.S.2d 576, 496 N.E.2d 665, 1986 N.Y. LEXIS 19312 (N.Y. 1986).

In a N.Y. C.P.L.R. art. 78 matter, a legal defense fund and a Muslim advocacy group were not entitled to records under the Freedom of Information Law, N.Y. Pub. Off. Law §§ 87(2)(b) and 89(2), regarding the New York City Police Department's (NYPD's) surveillance of Muslim individuals, businesses, and organizations because disclosure that an individual or entity might have been named during the course of an investigation of possible terrorist activity or otherwise involved in the investigation could be quickly disseminated, causing harm to the reputation of such individual or entity, even though their connection to the investigation might later be determined to be purely coincidental. Asian Am. Legal Defense & Educ. Fund v New York City Police Dept., 964 N.Y.S.2d 888, 41 Misc. 3d 471, 2013 N.Y. Misc. LEXIS 1912 (N.Y. Sup. Ct. 2013), aff'd, 125 A.D.3d 531, 5 N.Y.S.3d 13, 2015 N.Y. App. Div. LEXIS 1550 (N.Y. App. Div. 1st Dep't 2015).

131. — —Confidential informants

Statements made by individuals alleged by petitioner in Article 78 proceeding to be "known informants" were exempt from disclosure under CLS Pub O § 87(2)(b), (e)(iii), and (f) where disclosure of such documents, if they existed, would be unwarranted invasion of personal privacy, might endanger safety of informants, and necessarily would reveal documents compiled for law enforcement purposes that would identify confidential source. Scarola v Morgenthau, 246 A.D.2d 417, 668 N.Y.S.2d 174, 1998 N.Y. App. Div. LEXIS 357 (N.Y. App. Div. 1st Dep't 1998).

132. — —Discipline, misconduct and the like

Documents constituting final determination of disciplinary action finding that State Police investigator abused his official authority in obtaining information for petitioner's personal use were not immune from disclosure under privacy exemption of Freedom of Information Law since determination was not disclo-

sure of employment history under CLS Pub O § 89(2)(b)(i) nor information of personal nature under CLS Pub O § 89(2)(b)(iv). Scaccia v New York State Div. of State Police, 138 A.D.2d 50, 530 N.Y.S.2d 309, 1988 N.Y. App. Div. LEXIS 6870 (N.Y. App. Div. 3d Dep't 1988).

133. — —Work-related records, including attendance

Police officer's memo book was exempted from disclosure by CLS Pub O § 87(2)(b) since it remained officer's private property, notwithstanding its evidentiary value at trial. Scott v Chief Medical Examiner, 179 A.D.2d 443, 577 N.Y.S.2d 861, 1992 N.Y. App. Div. LEXIS 141 (N.Y. App. Div. 1st Dep't), app. denied, 79 N.Y.2d 758, 584 N.Y.S.2d 446, 594 N.E.2d 940, 1992 N.Y. LEXIS 1277 (N.Y. 1992), app. denied, 79 N.Y.2d 758, 584 N.Y.S.2d 446, 594 N.E.2d 940 (N.Y. 1992), cert. denied, 506 U.S. 891, 113 S. Ct. 259, 121 L. Ed. 2d 190, 1992 U.S. LEXIS 6116 (U.S. 1992).

In proceeding under Freedom of Information Law seeking disclosure of complaint follow-up reports ("DD-5s") produced by police department in connection with homicide investigation, fact that petitioner knew identity of witnesses interviewed by police did not preclude application of privacy exemption because he did not necessarily know what witnesses told police, which could have been information imparted in confidence, and police were not required to show that particular witness was specifically promised confidentiality if circumstances gave rise to clear inference that promise was assumed. Johnson v New York City Police Dep't, 257 A.D.2d 343, 694 N.Y.S.2d 14, 1999 N.Y. App. Div. LEXIS 7785 (N.Y. App. Div. 1st Dep't), app. dismissed, 94 N.Y.2d 791, 700 N.Y.S.2d 422, 722 N.E.2d 502, 1999 N.Y. LEXIS 3646 (N.Y. 1999).

"Lead sheets," made in connection with inmate's arrest and conviction, regarding communications with victim's relatives, as well as information pertaining to contacts with individuals who did not provide information, were properly deemed exempt based on privacy exemption under CLS Pub O § 87(2)(b). De Oliveira v Wagner, 274 A.D.2d 904, 711 N.Y.S.2d 592, 2000 N.Y. App. Div. LEXIS 8284 (N.Y. App. Div. 3d Dep't 2000).

134. —Prisons and prisoners, generally

Personal reference cards of other inmates who were in lineup with petitioner, who was convicted of murder, were not exempt from disclosure under Freedom of Information Law, CLS Pub O § 87(2)(b), on ground that their disclosure would constitute unwarranted invasion of personal privacy, since much of information in cards was already publicly accessible via arrest and conviction records; however, disclosure would be denied to data within cards not so publicly accessible, including inmates' prison identification numbers, dietary requirements, and name and address of next of kin. Handwritten notations identifying other inmates in petitioner's cell block were not exempt from disclosure under Freedom of Information Law, CLS Pub O § 87(2)(b), on ground that their disclosure would constitute unwarranted invasion of personal privacy. Dobranski v Houper, 154 A.D.2d 736, 546 N.Y.S.2d 180, 1989 N.Y. App. Div. LEXIS 12412 (N.Y. App. Div. 3d Dep't 1989).

Inmate was entitled to unredacted copies of inmate grievance log entries, log supplement forms, and inmate grievance monthly reports only concerning himself; however, inmate was entitled to same documents as to other inmates with name, number, and DIN of grievance redacted. Di Rose v New York State Dep't of Correctional Servs., 226 A.D.2d 846, 640 N.Y.S.2d 353, 1996 N.Y. App. Div. LEXIS 3718 (N.Y. App. Div. 3d Dep't 1996).

Deputy Commissioner of Correctional Services properly denied inmate's Freedom of Information Law request for access to particular letter authored by his former paramour since inmate had twice been denied parole based, in part, on fact that while incarcerated he "communicated threats to kill the husband of (his) former paramour"; under circumstances, disclosure would constitute unwarranted invasion of privacy and could endanger life or safety of author (CLS Pub O § 87(2)(b)(f). Deane v Annucci, 248 A.D.2d 760, 669 N.Y.S.2d 696, 1998 N.Y. App. Div. LEXIS 2217 (N.Y. App. Div. 3d Dep't), app. denied, 92 N.Y.2d 804, 677 N.Y.S.2d 779, 700 N.E.2d 318, 1998 N.Y. LEXIS 1881 (N.Y. 1998).

Prison inmate's request for various documents, including investigator's reports and statement of witness who did not testify at trial, was properly denied since those documents were exempt from disclosure because they either were compiled for law-enforcement purposes or would constitute unwarranted invasion of privacy. Mulhall v Fitzgerald, 249 A.D.2d 852, 672 N.Y.S.2d 480, 1998 N.Y. App. Div. LEXIS 4833 (N.Y. App. Div. 3d Dep't 1998).

Police department should have granted petitioner's Freedom of Information Law request for records pertaining to his arrest and conviction, despite department's claim that records identified victim of sex offense, and that petitioner stood convicted of sex offense on which he was charged and thus did not qualify as person "charged" with sex offense entitled to such records under CLS Civ R § 50-b(2)(a), since petitioner claimed to need records for purposes of planned proceedings in federal court to overturn his conviction, and he already knew victim's name. Fappiano v New York City Police Dep't, 267 A.D.2d 156, 700 N.Y.S.2d 20, 1999 N.Y. App. Div. LEXIS 13203 (N.Y. App. Div. 1st Dep't 1999), rev'd, 95 N.Y.2d 738, 724 N.Y.S.2d 685, 747 N.E.2d 1286, 2001 N.Y. LEXIS 573 (N.Y. 2001).

Request for access to names of prison guards accused of inappropriate behavior was improperly denied by State Commission of Correction on ground that release thereof would constitute unwarranted invasion of guards' personal privacy under CLS Pub O § 89(2), since such allegations did not fit within any of 5 statutory definitions of personal privacy exemption. Faulkner v Del Giacco, 139 Misc. 2d 790, 529 N.Y.S.2d 255, 1988 N.Y. Misc. LEXIS 276 (N.Y. Sup. Ct. 1988).

Court would grant order permitting access by legal aid society to referrals by correctional institutions of prison inmates to specialist medical care where legal aid society asked that information be redacted to delete all identifying details such as names and institutional numbers; such disclosure would not be unwarranted invasion of personal privacy within CLS Pub O § 87(2)(b) since CLS Pub O § 89(2)(c)(i) states that disclosure is not invasion if identifying details are deleted. Rold v Coughlin, 142 Misc. 2d 877, 538 N.Y.S.2d 896, 1989 N.Y. Misc. LEXIS 461 (N.Y. Sup. Ct. 1989).

Respondents demonstrated a particularized and specific justification for withholding the dates of birth and addresses of inmates from a FOIL records request, as such disclosure would result in an unwarranted invasion of personal privacy to the inmates, as well as potential harms such as identity theft. Prall v New York City Dept. of Corr., 971 N.Y.S.2d 821, 40 Misc. 3d 940, 2013 N.Y. Misc. LEXIS 2405 (N.Y. Sup. Ct. 2013), aff'd, 129 A.D.3d 734, 10 N.Y.S.3d 332, 2015 N.Y. App. Div. LEXIS 4584 (N.Y. App. Div. 2d Dep't 2015).

Particularized reasons were provided for the proper withholding of a FOIL records request for photographs of inmates, as the disclosure would constitute an unwarranted invasion of privacy resulting in personal and/or economic hardship to inmates, and disclosure could endanger the lives and safety of inmates and their family members. Prall v New York City Dept. of Corr., 971 N.Y.S.2d 821, 40 Misc. 3d 940, 2013 N.Y. Misc. LEXIS 2405 (N.Y. Sup. Ct. 2013), aff'd, 129 A.D.3d 734, 10 N.Y.S.3d 332, 2015 N.Y. App. Div. LEXIS 4584 (N.Y. App. Div. 2d Dep't 2015).

Disciplinary records relating to a physical altercation between a prisoner and a cellmate were exempt from disclosure to the prisoner under N.Y. Pub. Off. Law § 87(2)(f) because the disclosure of the information provided by the cellmate regarding the incident might have exposed the cellmate to an increased risk of retribution. Matter of Argentieri v Goord, 25 A.D.3d 830, 807 N.Y.S.2d 445, 2006 N.Y. App. Div. LEXIS 81 (N.Y. App. Div. 3d Dep't 2006).

135. —Location of specific prisoners

List of inmates housed in particular area of correctional facility, and who therefore may have been witnesses to assault, was not exempt from disclosure under CLS Pub O §§ 87 and 89 pertaining to unwarranted invasion of personal privacy, nor under CLS Pub O § 95 pertaining information which could endanger life or safety of any person. Bensing v Le Fevre, 133 Misc. 2d 198, 506 N.Y.S.2d 822, 1986 N.Y. Misc. LEXIS 2848 (N.Y. Sup. Ct. 1986).

136. —Videotapes

Videotapes taken by Department of Correctional Services at prison over multiyear period were not entirely exempt from

disclosure as unwarranted invasion of inmate privacy since inmates at state correctional facilities, being well aware that their movements are monitored, have no legitimate expectation of privacy from any and all public portrayal of their persons; however, department could redact those portions of tapes disclosure of which would invade inmate's expectation of privacy, with department preparing and submitting description of redacted portions sufficient to allow court to determine applicability of exemption. Buffalo Broadcasting Co. v New York State Dep't of Correctional Services, 155 A.D.2d 106, 552 N.Y.S.2d 712, 1990 N.Y. App. Div. LEXIS 2940 (N.Y. App. Div. 3d Dep't 1990).

In proceeding by television station seeking to compel Department of Corrections to release videotapes of inmate uprising at state correctional facility, redactions were properly ordered to prevent invasions of personal privacy to extent that tapes involved strip frisks or other display of inmate nudity. Buffalo Broadcasting Co. v New York Dep't of Correctional Services, 174 A.D.2d 212, 578 N.Y.S.2d 928, 1992 N.Y. App. Div. LEXIS 552 (N.Y. App. Div. 3d Dep't), app. denied, 79 N.Y.2d 759, 584 N.Y.S.2d 447, 594 N.E.2d 941, 1992 N.Y. LEXIS 1315 (N.Y. 1992).

137. Impairment of contract awards or collective bargaining negotiations (§ 87(2)(c)), generally

In a proceeding seeking access to certain records of an urban renewal agency consisting of reports by an independent appraiser on the potential use and value of certain buildings which the agency owned and planned to offer for sale to the public, the Appellate Division correctly determined that the appraiser's reports fell within the provision of the Freedom of Information Law excepting from disclosure to the public those materials which "if disclosed would impair present or imminent contract awards." Murray v Troy Urban Renewal Agency, Inc., 56 N.Y.2d 888, 453 N.Y.S.2d 400, 438 N.E.2d 1115, 1982 N.Y. LEXIS 3500 (N.Y. 1982).

When a provider submitted documents to a village in connection with negotiations for a cable television franchise, those documents were not exempt from disclosure to the provider's competitor, under N.Y. Pub. Off. Law § 87(2)(c), because the provider and the competitor were not competitors for a single cable television franchise, so disclosure of the documents would not impair the provider's negotiations with the village. Matter Verizon N.Y., Inc. v Bradbury, 40 A.D.3d 1113, 837 N.Y.S.2d 291, 2007 N.Y. App. Div. LEXIS 6637 (N.Y. App. Div. 2d Dep't 2007).

Exemption from disclosure of documents set forth in N.Y. Pub. Off. Law § 87(2)(c) primarily protects the interests of an agency in achieving the optimum result in awarding a contract to a supplier of goods or services or in reaching a collective bargaining agreement. Matter Verizon N.Y., Inc. v Bradbury, 40 A.D.3d 1113, 837 N.Y.S.2d 291, 2007 N.Y. App. Div. LEXIS 6637 (N.Y. App. Div. 2d Dep't 2007).

Privacy exception contained in N.Y. Pub. Off. Law § 87(2)(b) was inapplicable because any privacy interest victims had in the information contained in the documents petitioner requested was extinguished; a computer disc containing electronic communications between an inmate and his victims was admitted into evidence at the inmate's criminal trial, and the victims testified about sexual conversations they had with the inmate through a social networking site, and substantial additional testimony was adduced regarding the sexually explicit conversations between the inmate and victims. Matter of MacKenzie v Seiden, 106 A.D.3d 1140, 964 N.Y.S.2d 702, 2013 N.Y. App. Div. LEXIS 3060 (N.Y. App. Div. 3d Dep't 2013).

Supreme court erred in dismissing petitioner's application to review a determination of respondent county district attorney's office denying his Freedom of Information Law (FOIL) request because the district attorney's office made no showing that each requested document contained identifying information; to the extent that the requested records were determined to contain identifying information and were exempt under N.Y. Civ. Rights Law § 50-b(1), they would fall under the FOIL exemption from disclosure by state statute, N.Y. Pub. Off. Law §§ 87(2))(a). Matter of MacKenzie v Seiden, 106 A.D.3d 1140, 964 N.Y.S.2d 702, 2013 N.Y. App. Div. LEXIS 3060 (N.Y. App. Div. 3d Dep't 2013).

Entities subject to the requirements of the Freedom of Information Law should not be permitted to evade them on a bare assertion that withholding documents is in the public interest; in the context of the awarding of public contracts, even short delays in disclosure may have deleterious effects, because the timelines for challenges to the awarding of public contracts are so short. Matter of Acme Bus Corp. v County of Suffolk, 136 A.D.3d 896, 26 N.Y.S.3d 159, 2016 N.Y. App. Div. LEXIS 1169 (N.Y. App. Div. 2d Dep't 2016).

Respondents had no reasonable basis for denying appellant access to documents relating to an agency's request for proposals on the ground that disclosure would impair imminent contract awards because all of the proposals had been submitted and acted upon. Matter of Acme Bus Corp. v County of Suffolk, 136 A.D.3d 896, 26 N.Y.S.3d 159, 2016 N.Y. App. Div. LEXIS 1169 (N.Y. App. Div. 2d Dep't 2016).

138. —Bids and bidding

Court would order Department of Health (DOH) to supply unsuccessful bidder with copies of documents related to bidding process and award of public contract where there was no showing that successful bidder had any reasonable expectation that its bid would not be open to public, and DOH's request for proposals stated that DOH could use submitted materials for its own purposes without limitation. Professional Standards Review Council of Am. v New York State Dep't of Health, 193 A.D.2d 937, 597 N.Y.S.2d 829, 1993 N.Y. App. Div. LEXIS 4836 (N.Y. App. Div. 3d Dep't 1993).

139. —Collective bargaining negotiations

A copy of a report paid for by a Board of Cooperative Educational Services and designed to assist participating school districts in their collective bargaining negotiations with public employee unions will not be furnished to the executive director of a union representing school administrators and supervisors since the report comes within the exceptions to the Freedom of Information Law for, if disclosed, the report "would impair . . . collective bargaining negotiations"; such disclosure would only serve an inequitable one-sided ploy rather than the furnishing of information intended by the statute. Trauernicht v Board of Cooperative Educational Services, 95 Misc. 2d 394, 407 N.Y.S.2d 398, 1978 N.Y. Misc. LEXIS 2436 (N.Y. Sup. Ct. 1978).

140. Trade secrets (§ 87(2)(d)), generally

Power company's failure to comply with CLS Pub O § 89(5) did not preclude it from relying on exemption contained in CLS Pub O § 87(2)(d); § 89(5) was not intended to apply where confidentiality was agreed to by public entity in settlement of legal dispute. Glens Falls Newspaper, Inc. v Counties of Warren & Washington Indus. Dev. Agency, 257 A.D.2d 948, 684 N.Y.S.2d 321, 1999 N.Y. App. Div. LEXIS 779 (N.Y. App. Div. 3d Dep't 1999).

In responding to Freedom of Information Law request for copies of test reports prepared by Department of Transportation (DOT) Materials Bureau during preceding 2 years relating to approval or disapproval of course aggregate, DOT met its burden of establishing likelihood of competitive harm sufficient to justify partial redaction of documents on ground that test results, which were produced as result of scientific examination of aggregate samples provided by commercial suppliers, were derived from information obtained from commercial enterprise with purview of CLS Pub O § 87(2)(d). Troy Sand & Gravel Co. v New York State DOT, 277 A.D.2d 782, 716 N.Y.S.2d 772, 2000 N.Y. App. Div. LEXIS 12205 (N.Y. App. Div. 3d Dep't 2000), app. denied, 96 N.Y.2d 708, 725 N.Y.S.2d 638, 749 N.E.2d 207, 2001 N.Y. LEXIS 1862 (N.Y. 2001).

Municipal cooperative health benefit plan established under CLS Gen Mun § 119-o(1) and CLS Ins § 4702(e), which provided health insurance benefits to employees and retirees of participating entities pursuant to municipal cooperation agreement, was commercial enterprise by legislative design and, as such, records sought by petitioners were exempt from Freedom of Information Law disclosure under CLS Pub O § 87(2)(d). Passino v Jefferson-Lewis, 277 A.D.2d 1028, 716 N.Y.S.2d 229, 2000 N.Y. App. Div. LEXIS 11436 (N.Y. App. Div. 4th Dep't 2000), app. denied, 96

N.Y.2d 709, 725 N.Y.S.2d 639, 749 N.E.2d 208, 2001 N.Y. LEXIS 1513 (N.Y. 2001).

Court upheld determination of Department of Environmental Conservation (DEC) which denied request for trade secret exemption under Freedom of Information Law for "Nearby Source Verification Worksheets" submitted by petitioner pursuant to DEC's requirements for issuance of permit under CLS Pub Ser art 10, as information compiled in such worksheets reflected publicly available data, fact that petitioner had to verify and analyze such data did not make compiled information exempt where petitioner did not apply unique or proprietary methods but rather used DEC's standard methodology, and petitioner's expenditure of resources to screen out and specify emission source points to be included in its nearby source inventory did not produce information for worksheets that was not readily reproducible by third parties. Sunset Energy Fleet L.L.C. v State Dep't of Envtl. Conservation, 285 A.D.2d 865, 728 N.Y.S.2d 279, 2001 N.Y. App. Div. LEXIS 7534 (N.Y. App. Div. 3d Dep't 2001).

Although the case had to be remanded because of the inadequate record without a judicial determination being made as to the applicability of the exclusions under N.Y Pub. Off. Law § 87(2); documents produced by the city's accounting firm to the city in connection with an arbitration proceeding involving the city would have been exempt from disclosure under N.Y. Pub. Off. Law § 87(2)(d) to the extent such documents contained trade secrets of the accounting firm or other proprietary information whose disclosure would cause substantial injury to the accounting firm's competitive position. Similarly, to the extent interagency or intra-agency materials exempt from disclosure under N.Y. Pub. Off. Law § 87(2)(g) were produced or filed by the city in the arbitration, the exemption of such materials would not have been lost by virtue of such production or filing. City of Newark v Law Dep't of N.Y., 305 A.D.2d 28, 760 N.Y.S.2d 431, 2003 N.Y. App. Div. LEXIS 5568 (N.Y. App. Div. 1st Dep't 2003).

When a provider submitted documents to a village in connection with negotiations for a cable television franchise, the provider did not show that those documents were exempt from disclosure to the provider's competitor, under N.Y. Pub. Off. Law § 87(2)(d), because the provider did not show the specific harm the provider would suffer if the documents were disclosed. Matter Verizon N.Y., Inc. v Bradbury, 40 A.D.3d 1113, 837 N.Y.S.2d 291, 2007 N.Y. App. Div. LEXIS 6637 (N.Y. App. Div. 2d Dep't 2007).

Exemption from disclosure of documents set forth in N.Y. Pub. Off. Law § 87(2)(d) protects the interests of a commercial enterprise in avoiding a significant competitive injury as a result of disclosure of information it provided to an agency, thereby fostering the state's economic development efforts to attract business to New York. Matter Verizon N.Y., Inc. v Bradbury, 40 A.D.3d 1113, 837 N.Y.S.2d 291, 2007 N.Y. App. Div. LEXIS 6637 (N.Y. App. Div. 2d Dep't 2007).

After the agency prepared a special franchise full value assessment which was given to a city to calculate the tax to be paid by a utility for the use of rights-of-way under N.Y. Real Prop. Tax Law art. 6, the agency properly refused to produce the cost and inventory data used in the assessment to the city as a trade secret under N.Y Pub. Off. Law § 87(2)(d); the data at issue would be of value to potential competitors as it included a detailed inventory of the age, cost, and extent of the property employed by the utility along the rights-of-way and tracked the construction, installation, and retirement of the property. Matter of Schenectady v O'Keeffe, 50 A.D.3d 1384, 856 N.Y.S.2d 281, 2008 N.Y. App. Div. LEXIS 3294 (N.Y. App. Div. 3d Dep't), app. denied, 11 N.Y.3d 702, 864 N.Y.S.2d 389, 894 N.E.2d 653, 2008 N.Y. LEXIS 2482 (N.Y. 2008).

Village board of trustees' determination to grant a Freedom of Information Law request to release respondent corporation's franchise report to appellant corporation was arbitrary and capricious under N.Y. C.P.L.R. § 7803(3) as respondent corporation demonstrated that the disclosure would cause substantial injury to its competitive position, and, thus, the exemption in N.Y. Pub. Off. Law § 87(2)(d) applied, and the board did not consider the facts underlying the request but only stated that it did not intend to become an arbiter of pending disputes between the corporations. Matter of Verizon N.Y., Inc. v Mills, 60 A.D.3d 958, 875 N.Y.S.2d 572, 2009 N.Y. App. Div. LEXIS 2287 (N.Y. App. Div. 2d Dep't 2009).

Documents submitted by a telecommunications company in connection with a proposal to replace existing networks with a fully wireless network were exempt from disclosure under the Freedom of Information Law because the documents contained bona fide trade secrets, and, as such, the company did not have to show a likelihood of substantial competitive injury from disclosure. Matter of Verizon N.Y., Inc. v New York State Pub. Serv. Commn., 137 A.D.3d 66, 23 N.Y.S.3d 446, 2016 N.Y. App. Div. LEXIS 240 (N.Y. App. Div. 3d Dep't 2016).

Electronics store owner who had commenced federal antitrust action against electronic products manufacturer alleging wrongful termination as distributor for failure to adhere to manufacturer's resale price maintenance scheme was entitled, under Freedom of Information Law (FOIL), CLS Pub O Art 6, to documents and records in possession of Attorney General which were generated in state's settled federal price-fixing action against same manufacturer, since (1) Attorney General's mere general statement that materials sought contained "economically sensitive information" was insufficient to deny FOIL disclosure under CLS Pub O § 87(2)(d), (2) Attorney General did not allege that there was agreement to treat information supplied by witnesses and target itself as confidential, and (3) there was no reason to maintain confidentiality of investigatory file to protect reputation of "innocent investigated entity." Ragusa v New York State Dep't of Law, 152 Misc. 2d 602, 578 N.Y.S.2d 959, 1991 N.Y. Misc. LEXIS 698 (N.Y. Sup. Ct. 1991).

State insurance department superintendent did not show that the trade secret exemption applied to bar disclosure of certain reports that the borough president sought to determine whether insurance companies were engaged in an illegal practice called "redlining;" application of that exemption would thwart regulatory law aimed at stopping of that illegal practice. Matter of Markowitz v Serio, 812 N.Y.S.2d 841, 11 Misc. 3d 439, 235 N.Y.L.J. 12, 2006 N.Y. Misc. LEXIS 81 (N.Y. Sup. Ct. 2006), rev'd, 39 A.D.3d 247, 833 N.Y.S.2d 444, 2007 N.Y. App. Div. LEXIS 4287 (N.Y. App. Div. 1st Dep't 2007), reinstated, 11 N.Y.3d 43, 862 N.Y.S.2d 833, 893 N.E.2d 110, 2008 N.Y. LEXIS 1827 (N.Y. 2008).

Disclosure of a racing association's proposed changes to an above-$250,000 competitive bidding policy was exempted under N.Y. Pub. Off. Law § 87(2)(d) because even in a summarized state, the information could allow a competitor to potentially gain a competitive advantage which could significantly impinge the association's ability to effectively continue its operations; it was of no import that the information was being sought by a newspaper reporter. Matter of New York Racing Assn. Inc. v State of NY Racing & Wagering Bd., 863 N.Y.S.2d 540, 21 Misc. 3d 379, 240 N.Y.L.J. 51, 2008 N.Y. Misc. LEXIS 5160 (N.Y. Sup. Ct. 2008).

A request by a corporation to the Social Services Department for access to proposals submitted by another corporation to administer the Medicaid program in New York City and upstate New York together with the contract entered into with the state by that corporation may be denied under Public Officers Law § 87(2)(d) if such disclosure would cause substantial injury to the competitive position of the contracting corporation. Comm Pub Acc Rec FOIL—Ad Op 1763.

Income and expense statements submitted to assessor by owner of income-producing property for assessor's use in assessing such property may be withheld from public inspection and copying. 10 Op. Counsel SBRPS No. 17.

In a corporation's appeal of a decision of the Records Access Officer (RAO) that determined certain documents submitted by the corporation to an agency during the course of a regulatory proceeding were not exempt from disclosure as trade, the court held that the RAO and the agency erred as a matter of law by subjecting determined trade secrets to further review and that certain information, such as the corporation's cost information, were trade secrets under N.Y. Pub. Off. Law § 87(2)(d). Matter of Verizon N.Y. Inc. v New York State Pub. Serv. Commn., 991 N.Y.S.2d 841, 46 Misc. 3d 858, 2014 N.Y. Misc. LEXIS 3886 (N.Y. Sup. Ct. 2014), aff'd, 137 A.D.3d 66, 23 N.Y.S.3d 446, 2016 N.Y. App. Div. LEXIS 240 (N.Y. App. Div. 3d Dep't 2016).

141. —Booklists

Appropriate test for determining whether "substantial injury to the competitive position of the subject enterprise" would ensue from disclosure of commercial information so as to exempt information from disclosure under CLS Pub O § 87(2)(d) is federal standard whereby courts must consider how valuable information will be to competing business, as well as resultant damage to submitting enterprise. Booklist to be used by students at State University of New York (SUNY), compiled by bookseller under subcontract with corporation that provided auxiliary services—including bookstore—for particular SUNY campus, received by corporation and kept on university's behalf, was shielded from disclosure to subcontractor's competitor by exemption in CLS Pub O § 87(2)(d) where (1) booklist would enable competitor to offer precise inventory that its target clientele—SUNY students—was required to purchase and that was currently offered by subcontractor, (2) subcontractor faced potential loss of student customers as result of disclosure, (3) likelihood of harm was enhanced by economic windfall conferred on competitor were it to receive booklist at mere cost of Freedom of Information Law fees, and (4) informa tion in booklist, accumulated by subcontractor's effort and expense, was also directly available to competitor. Encore College Bookstores v Auxiliary Serv. Corp., 87 N.Y.2d 410, 639 N.Y.S.2d 990, 663 N.E.2d 302, 1995 N.Y. LEXIS 4751 (N.Y. 1995).

Central booklist maintained on forms generated by a large bookstore and compiled from lists submitted by individual state university faculty members was not a trade secret of the large bookstore and was therefore subject to disclosure upon request of small bookstore owner who was attempting to compete with the large bookstore. Mohawk Book Co. v State Univ. of N.Y., 288 A.D.2d 574, 732 N.Y.S.2d 272, 2001 N.Y. App. Div. LEXIS 10355 (N.Y. App. Div. 3d Dep't 2001).

142. —Computer programs

A description of a computer program and details of mathematical models, procedures and statistical assumptions, submitted by an insurance company to the Insurance Department, at the latter's request and in confidence, in connection with an application by the company to use a certain method of computing dividends, not at variance with prescribed methods of accounting, are trade secrets and, if disclosed, would result in an unfair advantage to the company's competitors, and, accordingly, are exempt from disclosure under that provision of the Freedom of Information Law (Public Officers Law, art 6, § 87) which exempts documents which constitute "trade secrets or are maintained for the regulation of commercial enterprise which if disclosed would cause substantial injury to the competitive position of the subject enterprise". Belth v Insurance Dep't of New York, 95 Misc. 2d 18, 406 N.Y.S.2d 649, 1977 N.Y. Misc. LEXIS 2688 (N.Y. Sup. Ct. 1977).

143. —Responses to "Requests for Proposals" (RFPs)

Petitioner, which responded to "Request for Proposal" (RFP) issued by New York State Department of Family Assistance, waived its right to exemption from disclosure under CLS Pub O § 87(2)(d) where RFP specifically advised petitioner, as to public information requirements, that "except for trade secrets and certain personnel information (both of which Department has reserved the right to disclose), all parts of proposals must be disclosed to those members of the general public making inquiry under the New York State Freedom of Information Law," and that "[s]hould an offeror wish to request exemption from public access to information contained in its proposal, the offeror must at the time (of) submission of its offer, specifically, identify in their submission the information and explain in detail why public access to the information would be harmful to the offeror," and petitioner did not request exemption at time of submitting its proposal. Lockheed Martin IMS Corp. v New York State Dep't of Family Assistance, 256 A.D.2d 847, 681 N.Y.S.2d 656, 1998 N.Y. App. Div. LEXIS 13574 (N.Y. App. Div. 3d Dep't 1998).

144. Law enforcement (§ 87(2)(e)), generally

New York Civil Liberties Union was entitled to certain police records as the freedom of information law request had been improperly denied based on misrepresentations by the city that the police used a "use of force" form. N.Y. Civ. Liberties Union v City of Schenectady, 2 N.Y.3d 657, 781 N.Y.S.2d 267, 814 N.E.2d 437, 2004 N.Y. LEXIS 1602 (N.Y. 2004).

Information sought by the requester under the Freedom of Information Law (FOIL), as redacted, were exempt from disclosure because, considering the municipalities' submissions of audit plans in the context of the statutory and regulatory amendments aiming to uncover and curtail fraudulent and criminal reporting, the existence of reasonably anticipated investigations at the time of the FOIL request was clear. The redactions fit squarely within the exemption permitting an agency to deny access to records compiled for law enforcement purposes where their disclosure would interfere with an investigation. Matter of Madeiros v New York State Educ. Dept., 30 N.Y.3d 67, 86 N.E.3d 527, 64 N.Y.S.3d 635, 2017 N.Y. LEXIS 3073 (N.Y. 2017).

Government agency was held permitted to rely on the confidential exemption only if the agency establishes (1) that an express promise of confidentiality was made to the source, or (2) that the circumstances of the particular case are such that the confidentiality of the source or information can be reasonably inferred. Matter of Friedman v Rice, 30 N.Y.3d 461, 90 N.E.3d 800, 68 N.Y.S.3d 1, 2017 N.Y. LEXIS 3285 (N.Y. 2017).

Court of Appeals of New York notes that this provision also applies to confidential information without regard to source. In accordance with the statute's plain text, the rule the Court elaborates applies to sources and information alike. Matter of Friedman v Rice, 30 N.Y.3d 461, 90 N.E.3d 800, 68 N.Y.S.3d 1, 2017 N.Y. LEXIS 3285 (N.Y. 2017).

Defendant was entitled, under Freedom of Information Law, to obtain copy of inventory list of evidence retrieved from scene of homicides with which defendant was charged where, in opposition to demand, state police merely made conclusory assertions that disclosure of such list would reveal non-routine criminal investigative procedures and techniques, and thus failed to satisfy burden under CLS Pub Off § 87(2). Lyon v Dunne, 180 A.D.2d 922, 580 N.Y.S.2d 803, 1992 N.Y. App. Div. LEXIS 2694 (N.Y. App. Div. 3d Dep't), app. denied, 79 N.Y.2d 758, 584 N.Y.S.2d 446, 594 N.E.2d 940, 1992 N.Y. LEXIS 1270 (N.Y. 1992).

Newspapers were entitled to obtain names of police officers involved in off-duty incident and their respective punishments since it was not shown that information would be used in existing or potential litigation. Daily Gazette Co. v City of Schenectady, 242 A.D.2d 164, 673 N.Y.S.2d 783, 1998 N.Y. App. Div. LEXIS 6454 (N.Y. App. Div. 3d Dep't 1998), rev'd, 93 N.Y.2d 145, 688 N.Y.S.2d 472, 710 N.E.2d 1072, 1999 N.Y. LEXIS 224 (N.Y. 1999).

In a Freedom of Information Law proceeding in which petitioner inmate sought information from a city police department, while the age of the information sought could be relevant to the inquiry as to whether the exemptions under N.Y. Pub. Off. Law § 87(2)(b), (e)(iv), and (f) were applicable, age alone was insufficient to hold the exemptions inapplicable. Matter of Bellamy v New York City Police Dep't, 59 A.D.3d 353, 874 N.Y.S.2d 60, 2009 N.Y. App. Div. LEXIS 1413 (N.Y. App. Div. 1st Dep't 2009).

State Education Department properly denied petitioner's Freedom of Information Law request for audit guidelines and related documents related to special education preschool programs because they were exempt because they were compiled with law enforcement investigative purposes in mind. Matter of Madeiros v New York State Educ. Dept., 133 A.D.3d 962, 18 N.Y.S.3d 782, 2015 N.Y. App. Div. LEXIS 8132 (N.Y. App. Div. 3d Dep't 2015), aff'd in part, modified, 30 N.Y.3d 67, 86 N.E.3d 527, 64 N.Y.S.3d 635, 2017 N.Y. LEXIS 3073 (N.Y. 2017).

State Education Department properly redacted a petitioner's Freedom of Information Law request for audit guidelines and related documents related to special education preschool programs because the redactions were necessary in order to avoid revealing auditing techniques that would enable the providers of preschool special education programs to conceal their financial misdeeds more effectively. Matter of Madeiros v New York State Educ. Dept., 133 A.D.3d 962, 18 N.Y.S.3d 782, 2015 N.Y. App. Div. LEXIS 8132 (N.Y. App. Div. 3d Dep't 2015), aff'd in part, modified, 30 N.Y.3d 67, 86 N.E.3d 527, 64 N.Y.S.3d 635, 2017 N.Y. LEXIS 3073 (N.Y. 2017).

Proposed questions were not exempt from disclosure under the law enforcement exemption because an employer sought to ques-

tion employees in accordance with the provisions of their union contract for the purpose of gathering information that could result in administrative disciplinary proceedings; the record made no reference to a criminal investigation implicating the employee and did not suggest that law enforcement officials would be involved in the proposed interrogation of them. Matter of Aurigemma v New York State Dept. of Taxation & Fin., 128 A.D.3d 1235, 9 N.Y.S.3d 711, 2015 N.Y. App. Div. LEXIS 4300 (N.Y. App. Div. 3d Dep't 2015).

Supreme court properly ordered the release of proposed questions because the pages at issue were not exempt from disclosure under the law enforcement exemption; even assuming the exemption applied, the questions at issue were routine in nature, the disclosure of which would not reveal detailed or specialized investigative techniques or procedures. Matter of Aurigemma v New York State Dept. of Taxation & Fin., 128 A.D.3d 1235, 9 N.Y.S.3d 711, 2015 N.Y. App. Div. LEXIS 4300 (N.Y. App. Div. 3d Dep't 2015).

Trial court properly dismissed an inmate's application to review a determination of the Office of Victim Services (OVS) denying his Freedom of Information Law request because the documentation and information requested by the inmate—services that the victims might have received as a result of his "alleged assault" upon them—were not subject to disclosure, the inmate did not establish that any of the information that he requested fell within one of the statutory exceptions, the statutory provisions were wholly unrelated to OVS's provision of services to crime victims, and redacted disclosure could not be compelled where OVS met its burden of demonstrating that the records were exempt from disclosure. Jamison v Watson, 176 A.D.3d 1405, 111 N.Y.S.3d 436, 2019 N.Y. App. Div. LEXIS 7681 (N.Y. App. Div. 3d Dep't 2019).

Petitioner would be granted disclosure under Freedom of Information Law of all statements of witnesses which had been made to law enforcement personnel in connection with his murder conviction and had not been previously delivered to him, except grand jury statements and hearing or trial transcripts of witness testimony that were court records, as well as all investigative reports not previously delivered to him; district attorney could provide petitioner with detailed listing of any documents believed to be exempt from disclosure along with affidavit specifying in nonconclusory terms basis for any claimed exemption. Brownell v Grady, 147 Misc. 2d 105, 554 N.Y.S.2d 382, 1990 N.Y. Misc. LEXIS 153 (N.Y. Sup. Ct. 1990).

Although an inmate's Freedom of Information Law request relating to records created in response to his allegation that he was sexually assaulted by a correction officer was denied on other grounds, the exemptions in N.Y. Pub. Off. Law § 87(2)(e)(iii) and (iv) did not apply because there was no indication that the participating witnesses qualified as "confidential sources" or that the records would reveal any source or disclose any information which would be deemed confidential or reveal any nonroutine criminal investigative techniques or procedures. Matter of John H. v Goord, 27 A.D.3d 798, 809 N.Y.S.2d 682, 2006 N.Y. App. Div. LEXIS 2313 (N.Y. App. Div. 3d Dep't 2006).

Police are not required to withhold name and address of victim of crime on request of victim; capacity to withhold may be beyond scope of authority of police department due to necessity of disclosure in subsequent judicial proceedings. Comm Pub Acc Rec FOIL-Ad Op 2471.

145. —Confidential source or disclosure (§ 87(2)(e)(iii))

Records concerning State Police investigator's disciplinary proceeding, consisting of written report of accusation under 9 NYCRR § 479.1 and written notification of proposed imposition of penalty under 9 NYCRR § 479.3, were not subject to disclosure under Freedom of Information Law since former document was report of internal investigation of complaint against investigator, which constituted data for law enforcement purposes exempt under CLS Pub O § 87(2)(e)(i) and (iii) or as pre-decisional, intra-agency materials under CLS Pub O § 87(2)(g), and latter document was intermediate step leading to decision to proceed to formal disciplinary hearing exempt under CLS Pub O § 87(2)(g). Documents constituting final determination of disciplinary action against State Police investigator were not immune from disclosure as intra-agency material since that exemption does not apply to "final agency policy or determination" under CLS Pub O § 87(2)(g)(iii), and State Police had not met their burden of showing that disclosure of final decision sustaining charges of misconduct would interfere in law enforcement investigation or reveal confidential sources in order to qualify for exemption under CLS Pub O § 87(2)(e). Scaccia v New York State Div. of State Police, 138 A.D.2d 50, 530 N.Y.S.2d 309, 1988 N.Y. App. Div. LEXIS 6870 (N.Y. App. Div. 3d Dep't 1988).

Statements made by individuals alleged by petitioner in Article 78 proceeding to be "known informants" were exempt from disclosure under CLS Pub O § 87(2)(b), (e)(iii), and (f) where disclosure of such documents, if they existed, would be unwarranted invasion of personal privacy, might endanger safety of informants, and necessarily would reveal documents compiled for law enforcement purposes that would identify confidential source. Scarola v Morgenthau, 246 A.D.2d 417, 668 N.Y.S.2d 174, 1998 N.Y. App. Div. LEXIS 357 (N.Y. App. Div. 1st Dep't 1998).

Statements of witnesses who did not testify at petitioner's criminal trial were confidential, and would not be disclosed under CLS Pub O § 87(2)(e)(iii). Johnson v Hynes, 264 A.D.2d 777, 695 N.Y.S.2d 380, 1999 N.Y. App. Div. LEXIS 9142 (N.Y. App. Div. 2d Dep't 1999).

Trial court erred in ordering that the district attorney produce certain documents because the district attorney met her burden of demonstrating that the witness statements and other documents provided to law enforcement officials during a criminal investigation by witnesses who did not testify at trial were exempt from disclosure, and the fact that petitioner had pled guilty did not remove the cloak of confidentiality from statements. Matter of Friedman v Rice, 134 A.D.3d 826, 20 N.Y.S.3d 600, 2015 N.Y. App. Div. LEXIS 9126 (N.Y. App. Div. 2d Dep't 2015), rev'd, 30 N.Y.3d 461, 90 N.E.3d 800, 68 N.Y.S.3d 1, 2017 N.Y. LEXIS 3285 (N.Y. 2017).

In a N.Y. C.P.L.R. art. 78 matter, a legal defense fund and a Muslim advocacy group were not entitled to records under the Freedom of Information Law, N.Y. Pub. Off. Law § 87(2)(e)(iii), regarding the New York City Police Department's (NYPD's) surveillance of Muslim individuals, businesses, and organizations because disclosure could potentially undermine the effectiveness of the NYPD's undercover programs and reveal the identity of undercover officers and informants. Asian Am. Legal Defense & Educ. Fund v New York City Police Dept., 964 N.Y.S.2d 888, 41 Misc. 3d 471, 2013 N.Y. Misc. LEXIS 1912 (N.Y. Sup. Ct. 2013), aff'd, 125 A.D.3d 531, 5 N.Y.S.3d 13, 2015 N.Y. App. Div. LEXIS 1550 (N.Y. App. Div. 1st Dep't 2015).

In response to a request for documents regarding a homicide investigation, the police department failed to establish the pages pertaining to an unnamed informant fell under the Freedom of Information Law's confidentiality exemption because there was no evidence the person received an express or implied promise of confidentiality. Matter of Exoneration Initiative v New York City Police Dept., 114 A.D.3d 436, 980 N.Y.S.2d 73, 2014 N.Y. App. Div. LEXIS 719 (N.Y. App. Div. 1st Dep't 2014).

146. —Investigations or judicial proceedings (§ 87(2)(e)(i)), generally

Records concerning State Police investigator's disciplinary proceeding, consisting of written report of accusation under 9 NYCRR § 479.1 and written notification of proposed imposition of penalty under 9 NYCRR § 479.3, were not subject to disclosure under Freedom of Information Law since former document was report of internal investigation of complaint against investigator, which constituted data for law enforcement purposes exempt under CLS Pub O § 87(2)(e)(i) and (iii) or as pre-decisional, intra-agency materials under CLS Pub O § 87(2)(g), and latter document was intermediate step leading to decision to proceed to formal disciplinary hearing exempt under CLS Pub O § 87(2)(g). Documents constituting final determination of disciplinary action against State Police investigator were not immune from disclosure as intra-agency material since that exemption does not apply to "final agency policy or determination" under CLS Pub O § 87(2)(g)(iii), and State Police had not met their burden of showing that disclosure of final decision sustaining charges of misconduct would interfere in law enforcement investigation or reveal confidential sources in order to qualify for exemption

under CLS Pub O § 87(2)(e). Scaccia v New York State Div. of State Police, 138 A.D.2d 50, 530 N.Y.S.2d 309, 1988 N.Y. App. Div. LEXIS 6870 (N.Y. App. Div. 3d Dep't 1988).

Information maintained by police department, relating to incident in which off-duty police officer was shot in head while drinking and gambling with other off-duty officers, was exempt from disclosure under CLS Pub O § 87(2)(e)(i) where department asserted that disclosure might interfere with its open investigation of incident because injured officer might be interrogated at some future time and might provide information leading to further investigation along new lines of inquiry; accordingly, Freedom of Information Law request by injured officer's family and their attorney was dismissed, without prejudice to renew after police department either interviewed injured officer or received sufficient medical evidence to establish his incapacity to be interviewed. DeLuca v New York City Police Dep't, 261 A.D.2d 140, 689 N.Y.S.2d 487, 1999 N.Y. App. Div. LEXIS 4581 (N.Y. App. Div. 1st Dep't 1999).

Electronics store owner who had commenced federal antitrust action against electronic products manufacturer alleging wrongful termination as distributor for failure to adhere to manufacturer's resale price maintenance scheme was entitled, under Freedom of Information Law (FOIL), CLS Pub O Art 6, to documents and records in possession of Attorney General which were generated in state's settled federal price-fixing action against same manufacturer, since Attorney General failed to demonstrate that there was any judicial proceeding or law enforcement investigation in progress involving manufacturer to warrant FOIL exemption under CLS Pub O § 87(2)(e)(i). Ragusa v New York State Dep't of Law, 152 Misc. 2d 602, 578 N.Y.S.2d 959, 1991 N.Y. Misc. LEXIS 698 (N.Y. Sup. Ct. 1991).

New York City's fire department failed to carry its burden of establishing that law enforcement, specifically, the prosecution of a notorious terrorist, would be prejudiced if it provided a newspaper with access to oral histories and other records it had preserved of firefighters' activities and memories of the events of September 11, 2001; private feelings and deliberative opinions expressed by firefighters were, however, exempt. N.Y. Times Co. v City of New York Fire Dep't, 195 Misc. 2d 119, 754 N.Y.S.2d 517, 2003 N.Y. Misc. LEXIS 94 (N.Y. Sup. Ct. 2003), aff'd in part, modified, 3 A.D.3d 340, 770 N.Y.S.2d 324, 2004 N.Y. App. Div. LEXIS 143 (N.Y. App. Div. 1st Dep't 2004).

In a N.Y. C.P.L.R. art. 78 matter, a legal defense fund and a Muslim advocacy group were not entitled to records under the Freedom of Information Law, N.Y. Pub. Off. Law § 87(2)(e)(i), regarding the New York City Police Department's (NYPD's) surveillance of Muslim individuals, businesses, and organizations because the high level of detail in the records made it relatively easy to connect strands of information, which in turn, provided a factual basis from which the identity of sources, the size and capabilities of the NYPD undercover program, and methods used by the NYPD could be determined; the exemption also applied to completed investigations because the records could provide the NYPD with a basis for further investigation. Asian Am. Legal Defense & Educ. Fund v New York City Police Dept., 964 N.Y.S.2d 888, 41 Misc. 3d 471, 2013 N.Y. Misc. LEXIS 1912 (N.Y. Sup. Ct. 2013), aff'd, 125 A.D.3d 531, 5 N.Y.S.3d 13, 2015 N.Y. App. Div. LEXIS 1550 (N.Y. App. Div. 1st Dep't 2015).

Executive Chamber established that the requested records were compiled for law enforcement purposes when the reply to the requests under the Freedom of Information Law, Public Officers Law § 84 et seq., had to be performed. Matter of New York Times Co. v New York State Exec. Chamber, 57 Misc. 3d 405, 56 N.Y.S.3d 821, 2017 N.Y. Misc. LEXIS 2711 (N.Y. Sup. Ct. 2017).

147. — —Grand jury matters

Special State Prosecutor was not required to disclose, to newspaper, depositions of Attorney General staff members given in connection with investigation into unlawful "leak" of grand jury information since depositions were exempt because (1) they had been compiled for law enforcement purposes and their disclosure could interfere with investigations, and (2) they were exempted by state statute—CLS Penal § 215.70. New York News, Inc. v Office of Special State Prosecutor, 153 A.D.2d 512, 544 N.Y.S.2d 151, 1989 N.Y. App. Div. LEXIS 10657 (N.Y. App. Div. 1st Dep't 1989).

Fact that records of county sheriff's department were in temporary possession of U.S. Attorney for presentation to federal grand jury did not warrant dismissal of action to compel production of records pursuant to Freedom of Information Law, CLS Pub O § 84 et seq. Buffalo Broadcasting Co. v County of Erie, 190 A.D.2d 1086, 593 N.Y.S.2d 706, 1993 N.Y. App. Div. LEXIS 1335 (N.Y. App. Div. 4th Dep't 1993).

Grand jury minutes are court rather than agency records and are accordingly exempt from ambit of Freedom of Information Law. Gibson v Grady, 192 A.D.2d 657, 597 N.Y.S.2d 84, 1993 N.Y. App. Div. LEXIS 3871 (N.Y. App. Div. 2d Dep't 1993).

148. —Investigative techniques or procedures (§ 87(2)(e)(iv)), generally

Identikit papers and notations in connection with criminal investigation resulting in petitioner's murder conviction were exempt from disclosure under Freedom of Information Law, CLS Pub O § 87(2)(e)(iv), as records compiled for law enforcement purposes which, if disclosed, would reveal non-routine criminal investigative techniques, since their disclosure might alert prospective criminals to characteristics important in composite artistry and thus encourage them to tailor their appearance in order to evade detection. Inventory of evidence used against petitioner in connection with criminal investigation resulting in his murder conviction was not exempt from disclosure under Freedom of Information Law, since evidence inventory list is record within meaning of CLS Pub O § 86(4). Dobranski v Houper, 154 A.D.2d 736, 546 N.Y.S.2d 180, 1989 N.Y. App. Div. LEXIS 12412 (N.Y. App. Div. 3d Dep't 1989).

In responding to petitioner's Freedom of Information Law request for certain records relating to trained police dog formerly assigned to transit police department's canine unit, respondents properly redacted documents provided to petitioner so as to delete canine training categories, as those would reveal non-routine criminal investigative techniques and procedures. O'Donnell v Donadio, 259 A.D.2d 251, 688 N.Y.S.2d 117, 1999 N.Y. App. Div. LEXIS 2316 (N.Y. App. Div. 1st Dep't 1999), app. denied, 1999 N.Y. App. Div. LEXIS 5569 (N.Y. App. Div. 1st Dep't May 6, 1999), app. dismissed, 93 N.Y.2d 1032, 697 N.Y.S.2d 554, 719 N.E.2d 914, 1999 N.Y. LEXIS 2839 (N.Y. 1999).

Police lieutenant's denial of release of requested DD-5 (Complaint Follow-up Report) on ground that its release "would reveal non-routine investigatory techniques" was insufficient where police department did not even articulate what type of information was contained in DD-5. Bellamy v New York City Police Dep't, 272 A.D.2d 120, 708 N.Y.S.2d 5, 2000 N.Y. App. Div. LEXIS 5440 (N.Y. App. Div. 1st Dep't 2000), overruled in part, Rattley v N.Y. City Police Dep't, 96 N.Y.2d 873, 730 N.Y.S.2d 768, 756 N.E.2d 56, 2001 N.Y. LEXIS 1868 (N.Y. 2001).

Documents requested by petitioner under Freedom of Information Law relating to his murder conviction, consisting of statements made to law enforcement personnel and investigative reports, including notebook records, would not be ordered turned over to court for in camera inspection to determine whether any were subject to exemption from disclosure in absence of specific allegations by district attorney as to which documents contained privileged, confidential or investigative technique information. Brownell v Grady, 147 Misc. 2d 105, 554 N.Y.S.2d 382, 1990 N.Y. Misc. LEXIS 153 (N.Y. Sup. Ct. 1990).

In a N.Y. C.P.L.R. art. 78 matter, a legal defense fund and a Muslim advocacy group were not entitled to records under the Freedom of Information Law, N.Y. Pub. Off. Law § 87(2)(e)(iv), regarding the New York City Police Department's (NYPD's) surveillance of Muslim individuals, businesses, and organizations because the NYPD's intelligence gathering and counterterrorism activities constituted detailed, specialized methods of conducting an investigation into potential future terrorist attacks and disclosure of the requested documents would provide a roadmap of investigation decisions, techniques and information that could be prepared to undermine future investigations, and avoid detection, arrest, and prosecution. Asian Am. Legal Defense & Educ. Fund v New York City Police Dept., 964 N.Y.S.2d 888, 41 Misc. 3d 471, 2013 N.Y. Misc. LEXIS 1912 (N.Y. Sup. Ct. 2013), aff'd, 125

A.D.3d 531, 5 N.Y.S.3d 13, 2015 N.Y. App. Div. LEXIS 1550 (N.Y. App. Div. 1st Dep't 2015).

Police department properly denied a journalist's request for when and in what situations certain vans could not be used because the information clearly came within the ambit of investigative techniques or procedures. Matter of Grabell v New York City Police Dept., 996 N.Y.S.2d 893, 47 Misc. 3d 203, 2014 N.Y. Misc. LEXIS 5353 (N.Y. Sup. Ct. 2014), aff'd in part, modified, vacated, in part, 139 A.D.3d 477, 32 N.Y.S.3d 81, 2016 N.Y. App. Div. LEXIS 3540 (N.Y. App. Div. 1st Dep't 2016).

149. — —Autopsies

Defendant was not entitled, under Freedom of Information Law, to obtain copies of autopsy reports and laboratory analyses of evidence relating to police officers' criminal investigation of homicides for which defendant was charged, where (1) CLS County § 677 governed disclosure of autopsy reports and no county officers were made parties to proceeding, and (2) other reports and evidence were compiled for law enforcement purposes and, if disclosed, would reveal non-routine criminal investigative techniques or procedures. Lyon v Dunne, 180 A.D.2d 922, 580 N.Y.S.2d 803, 1992 N.Y. App. Div. LEXIS 2694 (N.Y. App. Div. 3d Dep't), app. denied, 79 N.Y.2d 758, 584 N.Y.S.2d 446, 594 N.E.2d 940, 1992 N.Y. LEXIS 1270 (N.Y. 1992).

Petitioner was not entitled to disclosure of certain documents, worksheets and audiotape allegedly created by New York City Department of Health in connection with autopsy of certain person whom petitioner was convicted of murdering, since exemption exists for records relating to deaths due to criminal behavior under New York City Charter § 557(g). Mitchell v Borakove, 225 A.D.2d 435, 639 N.Y.S.2d 791, 1996 N.Y. App. Div. LEXIS 2789 (N.Y. App. Div. 1st Dep't), app. dismissed, 88 N.Y.2d 919, 646 N.Y.S.2d 987, 670 N.E.2d 228, 1996 N.Y. LEXIS 1749 (N.Y. 1996).

150. —Prisons; prisoners

Petitioner, inmate serving prison sentence for killing man, was not entitled to disclosure of records as to his victim's criminal history since such records, which were in possession of Division of Criminal Justice Services, were exempt from disclosure provisions of Freedom of Information Law. Bennett v Girgenti, 226 A.D.2d 792, 640 N.Y.S.2d 307, 1996 N.Y. App. Div. LEXIS 3449 (N.Y. App. Div. 3d Dep't), app. denied, 88 N.Y.2d 805, 646 N.Y.S.2d 985, 670 N.E.2d 226, 1996 N.Y. LEXIS 1687 (N.Y. 1996).

Prison inmate's request for various documents, including investigator's reports and statement of witness who did not testify at trial, was properly denied since those documents were exempt from disclosure because they either were compiled for law-enforcement purposes or would constitute unwarranted invasion of privacy. Mulhall v Fitzgerald, 249 A.D.2d 852, 672 N.Y.S.2d 480, 1998 N.Y. App. Div. LEXIS 4833 (N.Y. App. Div. 3d Dep't 1998).

It was proper to deny inmate's request for disclosure of another individual's parole records; requested parole documents were confidential and thus exempt from disclosure. Zarvela v New York State Div. of Parole, 252 A.D.2d 696, 675 N.Y.S.2d 917, 1998 N.Y. App. Div. LEXIS 8150 (N.Y. App. Div. 3d Dep't 1998).

151. Endangerment of life or safety (§ 87(2)(f)), generally

Petitioner, who sought Freedom of Information Law (FOIL) disclosure of complaint follow-up reports ("DD-5s") produced by police department in connection with homicide investigation, was not required to demonstrate compelling and particularized need for such information that outweighed potential harm to public good asserted by respondent, as public safety provisions of FOIL are quite explicit, and it is by these provisions that FOIL request is to be judged. Johnson v New York City Police Dep't, 257 A.D.2d 343, 694 N.Y.S.2d 14, 1999 N.Y. App. Div. LEXIS 7785 (N.Y. App. Div. 1st Dep't), app. dismissed, 94 N.Y.2d 791, 700 N.Y.S.2d 422, 722 N.E.2d 502, 1999 N.Y. LEXIS 3646 (N.Y. 1999).

Trial court erred in ordering a city to release the home addresses of handgun licensees in electronic form because the fact that N.Y. Penal Law § 400.00(5) made the name and address of a handgun license holder "a public record" was not dispositive of whether the city could have asserted the privacy and safety exemptions to Freedom of Information Law disclosure, especially when the newspaper sought the names and addresses in electronic form; in addition, disclosing a person's home address implicated a heightened privacy concern. Furthermore, the city submitted a deputy inspector's affidavit, which the newspaper failed to controvert, detailing its privacy and safety concerns implicated by disclosure of the addresses in electronic form, and, at a minimum, the affidavit demonstrated a possibility of endangerment sufficient to invoke the exemption set forth in N.Y. Pub. Off. Law § 87(2)(f). Matter of New York Times Co. v City of N.Y. Police Dept., 103 A.D.3d 405, 959 N.Y.S.2d 171, 2013 N.Y. App. Div. LEXIS 689 (N.Y. App. Div. 1st Dep't), app. denied, 22 N.Y.3d 854, 977 N.Y.S.2d 183, 999 N.E.2d 548, 2013 N.Y. LEXIS 2941 (N.Y. 2013).

Record request under the Freedom of Information Law for numerous documents relating to a village's deer management activities was improperly redacted based, in part, on a statutory exemption because there was no evidence to support the determination that the safety of the property owners who participated in the deer management program could be endangered by the release of their identities. Matter of Laveck v Village Bd. of Trustees of the Vil. of Lansing, 145 A.D.3d 1168, 42 N.Y.S.3d 460, 2016 N.Y. App. Div. LEXIS 7991 (N.Y. App. Div. 3d Dep't 2016).

Supreme court erred in directing the Records Access Officer, Civilian Complaint Review Board (CCRB) to produce records pursuant to the Freedom of Information Law because the documents constituted "personnel records" and fell squarely within a statutory exemption of the statute; the CCRB's findings and recommendations were of significance to superiors in evaluating police officers' performance, and all complaints filed with the CCRB remained in an officer's CCRB history. Matter of Luongo v Records Access Officer, Civilian Complaint Review Bd., 150 A.D.3d 13, 51 N.Y.S.3d 46, 2017 N.Y. App. Div. LEXIS 2463 (N.Y. App. Div. 1st Dep't), app. denied, 30 N.Y.3d 908, 93 N.E.3d 1213, 70 N.Y.S.3d 448, 2017 N.Y. LEXIS 3771 (N.Y. 2017).

Because of the widespread notoriety of an arrestee's death and the officer's role therein, and the fact that hostility and threats against the officer had been significant enough to cause an order of around-the-clock police protection for him and his family, the gravity of the threats to the officer's safety demonstrated that disclosure of the records sought carries a substantial and realistic potential for harm; thus, nondisclosure of the requested records was warranted. Matter of Luongo v Records Access Officer, Civilian Complaint Review Bd., 150 A.D.3d 13, 51 N.Y.S.3d 46, 2017 N.Y. App. Div. LEXIS 2463 (N.Y. App. Div. 1st Dep't), app. denied, 30 N.Y.3d 908, 93 N.E.3d 1213, 70 N.Y.S.3d 448, 2017 N.Y. LEXIS 3771 (N.Y. 2017).

In granting request by animal rights advocates under Freedom of Information Law for access to applications submitted to university review committee responsible for approving use of animals in experiments, court would allow redaction of name, department, location, telephone number and grant or application number of funding source pursuant to CLS Pub O § 87(2)(f), but would not order redaction of those sections of applications relating to procedures to be performed on animals, including their treatment and disposal, since such information could not be considered trade secret. American Soc. for Prevention of Cruelty to Animals v Board of Trustees of State University, 147 Misc. 2d 847, 556 N.Y.S.2d 447, 1990 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. 1990).

In a N.Y. C.P.L.R. art. 78 matter, a legal defense fund and a Muslim advocacy group were not entitled to records under the Freedom of Information Law, N.Y. Pub. Off. Law § 87(2)(f), regarding the New York City Police Department's (NYPD's) surveillance of Muslim individuals, businesses, and organizations because release of the requested documents could impair the lives and safety of the law enforcement community, undercover officers, confidential informants, and members of the public who cooperated with the NYPD's investigations and anti-terrorism efforts. Asian Am. Legal Defense & Educ. Fund v New York City Police Dept., 964 N.Y.S.2d 888, 41 Misc. 3d 471, 2013 N.Y. Misc. LEXIS 1912 (N.Y. Sup. Ct. 2013), aff'd, 125 A.D.3d 531, 5 N.Y.S.3d 13, 2015 N.Y. App. Div. LEXIS 1550 (N.Y. App. Div. 1st Dep't 2015).

Police department properly redacted identifying information from statements given by a testifying witness and a nontestifying

witness pertaining to a homicide investigation before disclosing some of the requested documents under the Freedom of Information Law because disclosure of such information could potentially endanger the witnesses' safety or result in an unwarranted invasion of their personal privacy. Matter of Exoneration Initiative v New York City Police Dept., 114 A.D.3d 436, 980 N.Y.S.2d 73, 2014 N.Y. App. Div. LEXIS 719 (N.Y. App. Div. 1st Dep't 2014).

Although building plans and similar records maintained by New York City Department of Buildings generally must be made available under Freedom of Information Law, exemption under CLS Pub O § 87(2)(f), which authorizes an agency to withhold records to extent that disclosure "would endanger the life or safety of any person," may apply where such records include reference to alarms or security systems. Comm on Open Gov't F7966.

152. —Confidential sources of information, generally

Statements made by individuals alleged by petitioner in Article 78 proceeding to be "known informants" were exempt from disclosure under CLS Pub O § 87(2)(b), (e)(iii), and (f) where disclosure of such documents, if they existed, would be unwarranted invasion of personal privacy, might endanger safety of informants, and necessarily would reveal documents compiled for law enforcement purposes that would identify confidential source. Scarola v Morgenthau, 246 A.D.2d 417, 668 N.Y.S.2d 174, 1998 N.Y. App. Div. LEXIS 357 (N.Y. App. Div. 1st Dep't 1998).

Organization was entitled to N.Y. C.P.L.R. art. 78 relief because there was no basis under N.Y. Pub. Off. Law §§ 87(2)(e)(iii), (2)(f), or 89(1)(b) to withhold the information sought where the witnesses at issue might have exculpatory information that would help an inmate, and nothing in the record indicated that an explicit assurance of confidentiality was given or that the witnesses would be in danger. Matter of Exoneration Initiative v New York City Police Dept., 966 N.Y.S.2d 825, 39 Misc. 3d 962, 2013 N.Y. Misc. LEXIS 1342 (N.Y. Sup. Ct. 2013), aff'd in part, modified, 114 A.D.3d 436, 980 N.Y.S.2d 73, 2014 N.Y. App. Div. LEXIS 719 (N.Y. App. Div. 1st Dep't 2014).

153. — —Complainant; victim

Supporting deposition and criminal information underlying unpursued criminal complaint for trespass filed against petitioner were exempt from disclosure under Freedom of Information Law, CLS Pub O § 87(2), since (1) names and addresses of complainants need not be disclosed where such disclosure would endanger their lives and safety, and (2) information would identify source promised confidentiality. Dobranski v Houper, 154 A.D.2d 736, 546 N.Y.S.2d 180, 1989 N.Y. App. Div. LEXIS 12412 (N.Y. App. Div. 3d Dep't 1989).

154. —Prisoners; prisons, generally

Confidential records of Department of Correctional Services referring to inmate as member of organized crime and dealing with escape risk were properly exempted from disclosure under CLS Pub O § 87, since all records were either interagency or intra-agency materials, or were materials disclosure of which could endanger lives or safety of certain individuals. Nalo v Sullivan, 125 A.D.2d 311, 509 N.Y.S.2d 53, 1986 N.Y. App. Div. LEXIS 62573 (N.Y. App. Div. 2d Dep't 1986), app. denied, 69 N.Y.2d 612, 517 N.Y.S.2d 1027, 511 N.E.2d 86, 1987 N.Y. LEXIS 16883 (N.Y. 1987).

Respondents did not improperly deny disclosure of unredacted copies of program and security assessment summaries compiled at time of inmate's transfer to different correctional facility, since proof that disclosure of information to public would create danger to person's life or safety is not required in order to invoke exemption from disclosure of CLS Pub O § 87(2)(f); rather, there need only be possibility that such information would endanger lives or safety of individual. Stronza v Hoke, 148 A.D.2d 900, 539 N.Y.S.2d 528, 1989 N.Y. App. Div. LEXIS 4102 (N.Y. App. Div. 3d Dep't), app. denied, 74 N.Y.2d 611, 546 N.Y.S.2d 555, 545 N.E.2d 869, 1989 N.Y. LEXIS 2871 (N.Y. 1989).

Inmates were not entitled, under Freedom of Information Law, to disclosure of specifications and other data relating to electrical and security transmission systems of prison since information fell within exemption for records which could endanger life or safety of any person; disclosure, especially to inmates, could impair effectiveness of systems and compromise safe and successful operation of prison. Flowers v Sullivan, 149 A.D.2d 287, 545 N.Y.S.2d 289, 1989 N.Y. App. Div. LEXIS 11068 (N.Y. App. Div. 2d Dep't 1989), app. dismissed, in part, 75 N.Y.2d 850, 552 N.Y.S.2d 924, 552 N.E.2d 172, 1990 N.Y. LEXIS 207 (N.Y. 1990), app. dismissed, 75 N.Y.2d 1004, 557 N.Y.S.2d 311, 556 N.E.2d 1118, 1990 N.Y. LEXIS 1078 (N.Y. 1990).

It was proper to deny inmate's request to obtain name of individual(s) who had transmitted or forwarded certain reports as to interviews with 2 prosecution witnesses to law enforcement officials, date reports were sent, and name or names of those persons to whom reports were sent since information sought pertained to criminal investigation surrounding inmate's conviction for murdering fellow inmate, disclosure of which could subject certain individuals to retribution. Howard v Malone, 247 A.D.2d 665, 668 N.Y.S.2d 418, 247 A.2d 665, 1998 N.Y. App. Div. LEXIS 969 (N.Y. App. Div. 3d Dep't 1998).

Where many of a prosecutor's interview notes had been provided to an inmate's trial counsel and there was no showing that a witness would be endangered by disclosure pursuant to N.Y. Pub. Off. Law § 87(2)(f), the notes would be reviewed in camera before disclosure to the inmate under N.Y. C.P.L.R. art. 78. Chebere v Johnson, 3 A.D.3d 365, 770 N.Y.S.2d 357, 2004 N.Y. App. Div. LEXIS 337 (N.Y. App. Div. 1st Dep't), app. dismissed, 2 N.Y.3d 778, 780 N.Y.S.2d 304, 812 N.E.2d 1252, 2004 N.Y. LEXIS 1002 (N.Y. 2004).

Inmate's Freedom of Information Law request for documents created in response to his allegation that he was sexually assaulted by a correction officer was denied because disclosure of those records could endanger the life or safety of a person and, thus, the exemption in N.Y. Pub. Off. Law § 87(2)(f) applied. Matter of John H. v Goord, 27 A.D.3d 798, 809 N.Y.S.2d 682, 2006 N.Y. App. Div. LEXIS 2313 (N.Y. App. Div. 3d Dep't 2006).

Portions of corrections officers' accident reports in which they described the accident and/or injury had to be provided to an inmate, but only after making redactions under N.Y. Pub. Off. Law § 87(2)(f) to protect the confidentiality of the officers' personal information, including home addresses, dates of birth, telephone numbers and social security numbers, which could endanger their life or safety. Matter of Canty v Office of Counsel, N.Y. State Dept. of Correctional Servs., 913 N.Y.S.2d 528, 30 Misc. 3d 705, 2010 N.Y. Misc. LEXIS 6095 (N.Y. Sup. Ct. 2010).

155. — —Parole documents

Parole documents relating to 2 former inmates who testified against petitioner in his criminal trial were not subject to Freedom of Information Law disclosure, given that parole records have been held to be confidential under CLS Exec § 259-k and, even if redacted, their release could endanger life and safety. Carty v New York State Div. of Parole, 277 A.D.2d 633, 716 N.Y.S.2d 125, 2000 N.Y. App. Div. LEXIS 12045 (N.Y. App. Div. 3d Dep't 2000).

156. — —Videotapes

Inmate was not entitled, under Freedom of Information Law, to obtain copy of videotape depicting his transfer to special housing unit since disclosure would endanger life or safety of prison employees and inmates as videotape revealed geographical layout of special housing unit and disclosed identities of inmates and officers who occupied that portion of prison. Lonski on behalf of Collins v Kelly, 149 A.D.2d 977, 540 N.Y.S.2d 114, 1989 N.Y. App. Div. LEXIS 6022 (N.Y. App. Div. 4th Dep't 1989).

Videotapes taken by Department of Correctional Services at prison over multiyear period were not entirely exempt from disclosure on grounds that disclosure to public of videotapes of inmates and correction officers in facility, and of physical layout of facility's special housing unit, would endanger safety and security, since there was no showing that tapes would reveal anything more to inmates than would be personally observed during their actual confinement; however, department could redact those portions of tapes disclosure of which would create serious safety consideration, with department preparing and submitting description of redacted portions sufficient to allow court to determine applicability of exemption. Buffalo Broadcasting Co. v New York State Dep't of Correctional Services, 155 A.D.2d 106, 552

N.Y.S.2d 712, 1990 N.Y. App. Div. LEXIS 2940 (N.Y. App. Div. 3d Dep't 1990).

In proceeding by television station seeking to compel Department of Corrections to release videotapes of inmate uprising at state correctional facility, court properly rejected department's claim that certain tapes should be redacted or withheld because disclosure would create concerns for personal safety of inmates or correctional personnel, since depictions which department sought to suppress were of scenes witnessed by general prison population, and techniques and equipment used by correctional officers were observable by inmates and were completely conventional in nature. Court properly rejected attempt by Department of Corrections to shield, in their entirety, tapes of facility's special housing unit, on ground that extreme dangerousness of inmate population of that unit required that operations of unit and its physical configuration be shrouded in total secrecy; however, redaction was justified with respect to techniques for storming cells and administration of tear gas, as well as for tape showing security system switchboard at facility. Buffalo Broadcasting Co. v New York Dep't of Correctional Services, 174 A.D.2d 212, 578 N.Y.S.2d 928, 1992 N.Y. App. Div. LEXIS 552 (N.Y. App. Div. 3d Dep't), app. denied, 79 N.Y.2d 759, 584 N.Y.S.2d 447, 594 N.E.2d 941, 1992 N.Y. LEXIS 1315 (N.Y. 1992).

157. Inter-agency and intra-agency materials (§ 87(2)(g)), generally

Definition of "agency" in Public Officers Law § 86(3) did not include federal agencies. Thus, the Department of Environmental Conservation's communications with the Environmental Protection Agency were not protected by the intra-agency exemption of Public Officers Law § 87(2)(g). Matter of Town of Waterford v New York State Dept. of Envtl. Conservation, 18 N.Y.3d 652, 944 N.Y.S.2d 429, 967 N.E.2d 652, 2012 N.Y. LEXIS 510 (N.Y. 2012).

Certain portions of one document requested under the Freedom of Information Law, N.Y. Pub. Off. Law art. 6 consisted of inter- and intra-agency discussions, recommendations, and opinions that were exempt from disclosure, pursuant to N.Y. Pub. Off. Law § 87(2)(g), and the trial court properly ordered that it be redacted before release. Matter of Humane Socy. of United States v Brennan, 53 A.D.3d 909, 861 N.Y.S.2d 234, 2008 N.Y. App. Div. LEXIS 6156 (N.Y. App. Div. 3d Dep't), app. denied, 11 N.Y.3d 711, 872 N.Y.S.2d 73, 900 N.E.2d 556, 2008 N.Y. LEXIS 3449 (N.Y. 2008).

State agencies' records of communications with people outside the agency, press releases, and a New York Department of State entity information form were not exempt from disclosure under N.Y. Pub. Off. Law § 87(2)(g), but those portions of the records containing material exempt from disclosure had to be redacted before disclosure. Miller v New York State DOT, 58 A.D.3d 981, 871 N.Y.S.2d 489, 2009 N.Y. App. Div. LEXIS 160 (N.Y. App. Div. 3d Dep't), app. denied, 12 N.Y.3d 712, 882 N.Y.S.2d 397, 909 N.E.2d 1235, 2009 N.Y. LEXIS 1786 (N.Y. 2009).

Because the Department of Taxation and Finance complied with N.Y. Pub. Off. Law § 89(4)(a) by providing a sufficient description of the withheld documents and by articulating a basis for its denial, and because the withheld documents fell squarely within the inter-agency and intra-agency exemption as predecisional, nonfinal discussions and recommendations by employees within the agency used to assist the decision makers in formulating a determination, the taxpayers were not entitled to N.Y. C.P.L.R. art. 78 relief. Matter of Bass Pro, Inc. v Megna, 69 A.D.3d 1040, 892 N.Y.S.2d 642, 2010 N.Y. App. Div. LEXIS 189 (N.Y. App. Div. 3d Dep't 2010).

Access to records of a private corporation performing an assessment revaluation project for the county cannot be denied on the ground that such records are intra-agency or inter-agency records exempt from disclosure under Pub O § 87(2)(g), since the corporation is not an "agency" for FOIL purposes. Comm Pub Acc Rec FOIL—Ad Op 1783.

Intra-agency exception to a Freedom of Information Law request by a patient's spouse for documents prepared in the course of the Department of Health investigation into the hospital's treatment of the patient applied because the information was collected by the hospital for quality assurance purposes. Matter of Pasek v New York State Dept. of Health, 151 A.D.3d 1250, 56 N.Y.S.3d 627, 2017 N.Y. App. Div. LEXIS 4443 (N.Y. App. Div. 3d Dep't 2017).

Patients' bill of rights directs the hospital to afford certain rights to a patient and has no applicability to a request under the Freedom of Information Law directed toward the Department of Health. Matter of Pasek v New York State Dept. of Health, 151 A.D.3d 1250, 56 N.Y.S.3d 627, 2017 N.Y. App. Div. LEXIS 4443 (N.Y. App. Div. 3d Dep't 2017).

In an estate administrator's (EA) wrongful death action against a county, denial of disclosure of certain documents that were created after the decedent's death was error, as the EA was entitled to disclosure, they were not made solely in anticipation of litigation, and the deliberative process privilege was inapplicable to discovery requests. Mosey v County of Erie, 148 A.D.3d 1572, 50 N.Y.S.3d 641, 2017 N.Y. App. Div. LEXIS 2202 (N.Y. App. Div. 4th Dep't 2017).

Trial court properly found that communications between a mayor and/or his office and a private consultant were exempt from the statutory exemption for inter-/intra-agency materials because the consultant was not retained by the mayor's office, the documents at issue included examples of the mayor and the consultant discussing issues important to the consultant's private clients, which were the types of communications that the Freedom of Information Law meant to make available to the public, and the attempts to withhold them ran counter to the public interest in transparency and ability to participate on important issues of municipal governance. Matter of Rauh v de Blasio, 161 A.D.3d 120, 75 N.Y.S.3d 15, 2018 N.Y. App. Div. LEXIS 3064 (N.Y. App. Div. 1st Dep't 2018).

Trial court erred in denying petitioner's Freedom of Information Law petition insofar as it sought to compel the production of records and materials related to a residential valuation model used by a town in generating real property assessments because, while the town established that certain information in the model might be exempt from disclosure as a nonfinal intra-agency record, it could not be determined from the record whether the model material fell wholly or only partially within that exemption, and any material subject to production under any subsection in that exemption should be redacted. Matter of Gedan v Town of Mamaroneck, 170 A.D.3d 833, 94 N.Y.S.3d 178, 2019 N.Y. App. Div. LEXIS 1765 (N.Y. App. Div. 2d Dep't 2019).

Where the Joint Commission on Public Ethics (JCOPE) investigated respondent to determine if it had violated the Lobby Act by failing to register as a lobbyist, respondent was ordered to respond to JCOPE's subpoena and disclose communications and records of meetings between respondent and the mayor, because assuming without deciding that the mayor's office properly invoked the deliberative process privilege, respondent failed to demonstrate that the documents sought had to protected, as it claimed that disclosure would chill deliberations but did not explain how. New York State Joint Commn. on Pub. Ethics v Campaign for One N.Y., Inc., 53 Misc. 3d 983, 37 N.Y.S.3d 851, 2016 N.Y. Misc. LEXIS 3277 (N.Y. Sup. Ct. 2016).

Documents shared with a federal agency were not exempt from disclosure because "agency" for freedom of information purposes does not include a federal agency, there was an express acknowledgment that the deliberative process exemption did not protect documents shared with a federal agency, and the common interest doctrine did not apply to non-confidential communications between agencies with separate counsel. Matter of Riverkeeper Inc. v Port Auth. of N.Y. & N.J., 66 Misc. 3d 250, 111 N.Y.S.3d 523, 2019 N.Y. Misc. LEXIS 5619 (N.Y. Sup. Ct. 2019), aff'd, 187 A.D.3d 557, 130 N.Y.S.3d 659, 2020 N.Y. App. Div. LEXIS 5965 (N.Y. App. Div. 1st Dep't 2020).

158. —Environmental matters

In Article 78 mandamus proceeding, petitioner was not entitled to access to preliminary draft of study by State Department of Environmental Conservation (ENCON) of chemical waste dump site where draft had been inadvertently produced by ENCON in response to initial request under Freedom of Information Law (CLS Pub O Law Art 6) and where ENCON subsequently took position that portions of draft were exempt from disclosure as inter-agency document within meaning of CLS Pub O § 87; inadvertent production of draft did not operate as waiver of any

privilege that may have attached to document, and privilege was properly asserted since portions of draft fell within exemption from disclosure for pre-decisional intra-agency communications which contain no final determinations and do not affect public welfare. McGraw-Edison Co. v Williams, 133 Misc. 2d 1053, 509 N.Y.S.2d 285, 1986 N.Y. Misc. LEXIS 3027 (N.Y. Sup. Ct. 1986).

159. —Family matters

Exemption for inter-agency documents was enacted to foster open and candid discussion among public officials and to protect uninhibited recommendations made within the family from being scrutinized by those affected and by the public. Shaw v Lerer, 112 Misc. 2d 260, 446 N.Y.S.2d 855, 1981 N.Y. Misc. LEXIS 3420 (N.Y. Sup. Ct. 1981).

160. —Legal matters, generally

161. — —Court-related

Court properly granted petitioners' application for disclosure under Freedom of Information Law of portion of administrative law judge's memorandum that addressed their request for oral argument before respondent Public Service Commission (PSC), which was expressly adopted by PSC in denying oral argument; that portion of memorandum was not pre-decisional intra-agency document exempt from disclosure under CLS Pub O § 87(2)(g). Century House Historical Soc'y v State PSC, 237 A.D.2d 844, 655 N.Y.S.2d 182, 1997 N.Y. App. Div. LEXIS 2764 (N.Y. App. Div. 3d Dep't 1997).

162. —Medical and health matters

Rating given by each member of Department of Health committee to each bid on public contract was subject to disclosure, but subjective comments, opinions and recommendations written in by committee members were exempt from disclosure pursuant to CLS Pub O § 87(2)(g). Professional Standards Review Council of Am. v New York State Dep't of Health, 193 A.D.2d 937, 597 N.Y.S.2d 829, 1993 N.Y. App. Div. LEXIS 4836 (N.Y. App. Div. 3d Dep't 1993).

163. —Municipal affairs, generally

Town documents consisting of evaluations, deliberations, proposals, policy formulations, conclusions, recommendations, opinions and advice were exempt from public access under Freedom of Information Law, since government agency deliberative functions would be hindered by disclosure of such subjective matter. Oyster Bay v Williams, 134 A.D.2d 267, 520 N.Y.S.2d 599, 1987 N.Y. App. Div. LEXIS 50450 (N.Y. App. Div. 2d Dep't 1987).

President of Borough of Staten Island could not withhold disclosure of investigator's memorandum outlining investigation and determination of guilt regarding employee of President's office since memorandum became final agency policy record when President adopted it as basis for his decision, and memorandum was purely factual. New York 1 News v Office of the President, 231 A.D.2d 524, 647 N.Y.S.2d 270, 1996 N.Y. App. Div. LEXIS 8820 (N.Y. App. Div. 2d Dep't 1996).

164. —Police and related law enforcement activities, generally

Petitioner's request for all records relating to his disqualified application for position of state trooper was properly denied, since such records were exempt from disclosure pursuant to Freedom of Information Law, CLS Pub O § 87(2)(g), in that, aside from documents provided by petitioner himself, records consisted of opinions, advice, evaluations, deliberations, conclusions or recommendations. O'Shaughnessy v New York State Div. of State Police, 202 A.D.2d 508, 609 N.Y.S.2d 18, 1994 N.Y. App. Div. LEXIS 2584 (N.Y. App. Div. 2d Dep't), app. denied, 84 N.Y.2d 807, 621 N.Y.S.2d 516, 645 N.E.2d 1216, 1994 N.Y. LEXIS 3485 (N.Y. 1994).

Exemption to FOIL under CLS Pub O § 87(2)(g) for pre-decisional intra-agency materials would not protect information given to police department internal affairs unit and interviews of police officers conducted in connection with investigation where interviews appeared to comprise factual accounts of incident in which 16-year-old student was shot while making sale of crack cocaine to undercover officer. Svaigsen v City of New York, 203 A.D.2d 32, 609 N.Y.S.2d 894, 1994 N.Y. App. Div. LEXIS 3296 (N.Y. App. Div. 1st Dep't 1994).

While a county executive argued that the posting of the arrest of petitioner arrestee for drunk driving was public information such as that provided in requests under the Freedom of Information Law, the court could not consider such an argument or whether the posting of the information on an Internet website was, inter alia, an unwarranted invasion of privacy under Public Officers Law § 87(2)(g) as the information was provided voluntarily by the posting on an Internet website. Bursac v Suozzi, 868 N.Y.S.2d 470, 22 Misc. 3d 328, 240 N.Y.L.J. 94, 2008 N.Y. Misc. LEXIS 6576 (N.Y. Sup. Ct. 2008).

In a N.Y. C.P.L.R. art. 78 matter, a legal defense fund and a Muslim advocacy group were not entitled to records under the Freedom of Information Law, N.Y. Pub. Off. Law § 87(2)(g), regarding the New York City Police Department's (NYPD's) surveillance of Muslim individuals, businesses, and organizations because the NYPD had undertaken intelligence and counterterrorism efforts in conjunction with the New York City Taxi and Limousine Commission (TLC), and documents provided by the TLC to the NYPD in connection with counterterrorism investigations or information gathering activities, and records reflecting the NYPD's request for such records from the TLC were withheld pursuant to the inter and intra-agency exemption. Asian Am. Legal Defense & Educ. Fund v New York City Police Dept., 964 N.Y.S.2d 888, 41 Misc. 3d 471, 2013 N.Y. Misc. LEXIS 1912 (N.Y. Sup. Ct. 2013), aff'd, 125 A.D.3d 531, 5 N.Y.S.3d 13, 2015 N.Y. App. Div. LEXIS 1550 (N.Y. App. Div. 1st Dep't 2015).

165. —Prisons and prisoners, generally

Confidential records of Department of Correctional Services referring to inmate as member of organized crime and dealing with escape risk were properly exempted from disclosure under CLS Pub O § 87, since all records were either inter-agency or intra-agency materials, or were materials disclosure of which could endanger lives or safety of certain individuals. Nalo v Sullivan, 125 A.D.2d 311, 509 N.Y.S.2d 53, 1986 N.Y. App. Div. LEXIS 62573 (N.Y. App. Div. 2d Dep't 1986), app. denied, 69 N.Y.2d 612, 517 N.Y.S.2d 1027, 511 N.E.2d 86, 1987 N.Y. LEXIS 16883 (N.Y. 1987).

Inmate was not entitled to disclosure of unredacted portions of program security and assessment summary forms, prepared semiannually or on transfer of inmate from one facility to another, which contained information to assist prison officials in determining placement of inmate in most appropriate facility, since those documents are exempted from disclosure under intra-agency memorandum exemption in CLS Pub O § 87(2)(g); further, inmate was not entitled to disclosure of such documents under 7 NYCRR § 5.50 to challenge accuracy of material contained therein since that regulation permits challenge to accuracy only as to records relating to inmate's "correctional supervision history" or his "personal history." Rowland D. v Scully, 152 A.D.2d 570, 543 N.Y.S.2d 497, 1989 N.Y. App. Div. LEXIS 9629 (N.Y. App. Div. 2d Dep't 1989), aff'd, 76 N.Y.2d 725, 557 N.Y.S.2d 876, 557 N.E.2d 112, 1990 N.Y. LEXIS 1268 (N.Y. 1990).

166. — —Parole matters

Division of Parole properly denied application to disclose 2 letters of recommendation contained in file of former inmate, who was prosecution witness in petitioner's murder trial; letters were exempt from disclosure as inter-agency materials under CLS Pub O § 87(2)(g)(iii). Mingo v New York State Div. of Parole, 244 A.D.2d 781, 666 N.Y.S.2d 244, 1997 N.Y. App. Div. LEXIS 12614 (N.Y. App. Div. 3d Dep't 1997).

Trial court erroneously ordered disclosure of a District Attorney's letter to the parole division, which outlined background information on an inmate who was requesting parole release and factors to be considered as part of their recommendations on whether to release the inmate, to said inmate, as such information did not constitute a statement of the crime victim or the victim's representative, as such was exempt from disclosure under the Freedom of Information Law contained in N.Y. Pub. Off. Law § 87(2)(g)(iii), thus, no basis existed to order that it be expunged from the inmate's institutional file. Grigger v N.Y. State Div. of Parole, 11 A.D.3d 850, 783 N.Y.S.2d 689, 2004 N.Y. App. Div. LEXIS 12724 (N.Y. App. Div. 3d Dep't 2004), app. denied, 4 N.Y.3d 704, 792 N.Y.S.2d 1, 825 N.E.2d 133, 2005 N.Y. LEXIS 95 (N.Y. 2005).

167. —Real estate matters

Certain "significant/insignificant" notations, denominating whether particular real estate transfer should be deemed "significant" or "insignificant" by assessor, contained in real estate transfer data provided to State Board of Equalization and Assessment by New York City, did not fall within purview of statistical or factual tabulations or data, but rather were opinions exempt from disclosure under CLS Pub O § 87(2)(g) since words "significant" and "insignificant" do not denote facts but simply report tentative opinions of city assessors resulting from their review of real estate transfer tax returns, and opinions were not transformed into statistical data when communicated to state board; moreover, notations were not instructions to staff of state board that affect public inasmuch as they were simply convenience for state board and their use was within discretion of each appraiser. David v Lewisohn, 142 A.D.2d 305, 535 N.Y.S.2d 793, 1988 N.Y. App. Div. LEXIS 13234 (N.Y. App. Div. 3d Dep't 1988), app. denied, 74 N.Y.2d 610, 546 N.Y.S.2d 554, 545 N.E.2d 868, 1989 N.Y. LEXIS 2804 (N.Y. 1989).

Respondent was not required to disclose draft appraisal report of real estate parcels respondent acquired under Eminent Domain Procedure Law, which respondent used to determine amount at which it would settle claims regarding parcels, since report was never adopted by agency as final agency policy or determination; however, given sparse description of document, in camera inspection would be held to determine whether any part of it was nonexempt. Greco v Supp, 171 Misc. 2d 425, 654 N.Y.S.2d 560, 1997 N.Y. Misc. LEXIS 20 (N.Y. Sup. Ct. 1997).

168. —Schools, teachers and the like

Sexually-explicit film and filmstrips from college-level course taught in public college and provided by college did not constitute "deliberative material" (communications exchanged for discussion purposes not constituting final policy decisions) that would be exempt from disclosure under Freedom of Information Law as "inter-agency materials," despite college's characterization of classroom environment as one of "deliberation," where materials had been used in course for years. Russo v Nassau County Community College, 81 N.Y.2d 690, 603 N.Y.S.2d 294, 623 N.E.2d 15, 1993 N.Y. LEXIS 3264 (N.Y. 1993).

Court properly concluded that documents sought by petitioner in connection with his failure to achieve rank of professor at Queens College, consisting of recommendations of various committees concerning promotional candidates, were exempt from disclosure under Freedom of Information Law, CLS Pub O § 87(2)(g)(i), since such recommendations were purely advisory in nature and rendered only to aid actual decision-maker, Board of Trustees, in reaching determination on particular candidate. Under Freedom of Information Law, CLS Pub O § 87, school records consisting of opinions, advice, valuations, deliberations, proposals, policy formulations, conclusions, or recommendations are exempt from disclosure so as to protect deliberative process of government by ensuring that persons in advisory role are able to express their opinions freely to agency decision-makers. Rothenberg v City Univ. of N.Y., 191 A.D.2d 195, 594 N.Y.S.2d 219, 1993 N.Y. App. Div. LEXIS 2065 (N.Y. App. Div. 1st Dep't), app. denied, 81 N.Y.2d 710, 600 N.Y.S.2d 197, 616 N.E.2d 854, 1993 N.Y. LEXIS 1773 (N.Y. 1993).

In proceeding by teacher who sought disclosure pursuant to Freedom of Information Law of various documents related to his termination, court properly found that CLS Pub O § 87(2)(g) precluded disclosure of chancellor's committee reports, CLS Educ § 3020-a reports, and "unsatisfactory" lesson observation reports in possession of school district, since all such material was inter-agency materials which were not statistical or factual tabulations or data, instructions to staff that affected public, or final agency policy or determinations. Elentuck v Green, 202 A.D.2d 425, 608 N.Y.S.2d 701, 1994 N.Y. App. Div. LEXIS 1956 (N.Y. App. Div. 2d Dep't), app. denied, 84 N.Y.2d 809, 621 N.Y.S.2d 519, 645 N.E.2d 1219, 1994 N.Y. LEXIS 4222 (N.Y. 1994).

Request by animal rights advocates under Freedom of Information Law seeking access to applications submitted to but not approved by university review committee responsible for authorizing use of animals in experiments would not be denied on ground that disapproved applications do not fall within category of agency records under CLS Pub O § 87(2)(g); disclosure of such documents would be no more injurious to consultative functions of government than disclosure of approved applications. American Soc. for Prevention of Cruelty to Animals v Board of Trustees of State University, 147 Misc. 2d 847, 556 N.Y.S.2d 447, 1990 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. 1990).

169. Statistical or factual tabulations or data (§ 87(2)(g)(i)), generally

Intra-agency documents that contain "statistical or factual tabulations or data" are subject to Freedom of Information Law disclosure, whether or not embodied in final agency policy or determination. "Factual data," as used in CLS Pub O § 87(2)(g)(i), means objective information in contrast to opinions, ideas, or advice exchanged as part of consultative or deliberative process of government decision making. Gould v New York City Police Dep't, 89 N.Y.2d 267, 653 N.Y.S.2d 54, 675 N.E.2d 808, 1996 N.Y. LEXIS 3575 (N.Y. 1996).

The Freedom of Information Law exempts as "intra-agency materials" only opinions and recommendations not "statistical or factual tabulations or data" and the mere fact that some of the data might be an estimate or recommendation does not convert it into a expression of opinion. Ingram v Axelrod, 90 A.D.2d 568, 456 N.Y.S.2d 146, 1982 N.Y. App. Div. LEXIS 18634 (N.Y. App. Div. 3d Dep't 1982).

Agency was not required by Freedom of Information Law (FOIL) to comply with applicant's request for statistical information where data necessary to compile statistical information was included in data in agency's computer, and agency did not ordinarily compile or maintain particular statistical information requested; agency would not be required to compile statistical information from written documents or records, and FOIL does not differentiate between records maintained in written form and records maintained in form of computerized tapes or discs. Guerrier v Hernandez-Cuebas, 165 A.D.2d 218, 566 N.Y.S.2d 406, 1991 N.Y. App. Div. LEXIS 1564 (N.Y. App. Div. 3d Dep't), app. denied, 78 N.Y.2d 853, 573 N.Y.S.2d 466, 577 N.E.2d 1058, 1991 N.Y. LEXIS 896 (N.Y. 1991).

Records of state agencies containing statistical or factual tabulations had to be disclosed under N.Y. Pub. Off. Law § 87(2)(g)(i), but before disclosure, the portions of those documents containing material exempt from disclosure had to be redacted. Miller v New York State DOT, 58 A.D.3d 981, 871 N.Y.S.2d 489, 2009 N.Y. App. Div. LEXIS 160 (N.Y. App. Div. 3d Dep't), app. denied, 12 N.Y.3d 712, 882 N.Y.S.2d 397, 909 N.E.2d 1235, 2009 N.Y. LEXIS 1786 (N.Y. 2009).

Correspondence among or between agencies may be characterized as intra-agency materials and such materials may be withheld where they consist of advice, recommendation or suggestion; however, portions of such materials consisting of statistical or factual information, instructions to staff that affect public or final agency policy or determinations must be made available. Comm Pub Acc Rec FOIL-Ad Op 2649.

170. —Financial data, generally

Records reflective of the manner in which a renovation project is funded, as well as the wage and hours labor standards applicable to the project, would constitute statistical or factual information available under the Freedom of information Law. Comm Pub Acc Rec FOIL—Ad Op 1791.

Records that exist that indicate amounts paid by town to engineering firm must be made available, because none of grounds of denial could appropriately be asserted. Comm on Open Gov't FOIL AO-4690.

171. —Telephone numbers

Disclosure of certain agency records pursuant to the Freedom of Information Law, N.Y. Pub. Off. Law art. 6-c, was proper because the information contained in the records constituted factual data not exempt from disclosure; however, disclosure of two telephone numbers contained therein would have constituted an unwarranted invasion of personal privacy and were redacted. Matter of Humane Socy. of United States v Brennan, 53 A.D.3d 909, 861 N.Y.S.2d 234, 2008 N.Y. App. Div. LEXIS 6156 (N.Y. App. Div. 3d Dep't), app. denied, 11 N.Y.3d 711, 872 N.Y.S.2d 73, 900 N.E.2d 556, 2008 N.Y. LEXIS 3449 (N.Y. 2008).

172. Instructions to staff (§ 87(2)(g)(ii)), generally

State agencies' records of instructions to staff that affected the public had to be disclosed under N.Y. Pub. Off. Law § 87(2)(g)(ii), but the portions of those documents containing material exempt from disclosure had to be redacted before disclosure. Miller v New York State DOT, 58 A.D.3d 981, 871 N.Y.S.2d 489, 2009 N.Y. App. Div. LEXIS 160 (N.Y. App. Div. 3d Dep't), app. denied, 12 N.Y.3d 712, 882 N.Y.S.2d 397, 909 N.E.2d 1235, 2009 N.Y. LEXIS 1786 (N.Y. 2009).

173. —Police

Although New York State Police manual can be characterized as "intra-agency" materials, its contents may be reflective of instructions to staff that affect the public and are therefore available under Freedom of Information Law § 87(2)(g)(ii). Comm Pub Acc Rec FOIL-Ad Op 2749.

174. Final agency policy or determination (§ 87(2)(g)(iii)), generally

A memorandum prepared by a public agency for internal use addressing a position it might take in pending or prospective collective bargaining negotiations to which it is a party is not a "final agency policy or determination" by the agency, access to which is obtainable under the Freedom of Information Law, Pub O § 87(2)(g), as an exception to the provision exempting intra-agency materials. Kheel v Ravitch, 62 N.Y.2d 1, 475 N.Y.S.2d 814, 464 N.E.2d 118, 1984 N.Y. LEXIS 4212 (N.Y. 1984).

Agency's properly withheld documents fell within the N.Y. Pub. Off. Law § 87(2)(g)(iii) exemption for predecisional, nonfinal discussion and recommendations by employees within and among agencies to assist decision makers in formulating a policy or determination. Matter of Stein v New York State Dept. of Transp., 25 A.D.3d 846, 807 N.Y.S.2d 208, 2006 N.Y. App. Div. LEXIS 52 (N.Y. App. Div. 3d Dep't 2006).

175. —Finances, generally

A decision to approve a loan, loan guaranty or grant would be reflective of a "final determination" available under § 87(2)(g)(iii). Comm Pub Acc Rec FOIL—Ad Op 1791.

176. —Police matters

New York State Police Manual can be characterized as "intra-agency" materials; however, its contents may be reflective of policy of Division of State Police and therefore available under Freedom of Information Law § 87(2)(g)(iii). Comm Pub Acc Rec FOIL-Ad Op 2749.

177. Examination questions and answers (§ 87(2)(h)), generally

Public Officers Law § 87(2)(h) permits agencies to withhold questions and answers regarding examination administered by Department of Civil Service if questions are to be administered at some time in future. Comm Pub Acc Rec FOIL-Ad Op 2548.

178. Computer access codes (§ 87(2)(i))

Because an agency's software enabled it to manipulate data and was more than just a delivery system or data warehouse, it was a "record," as defined by N.Y. Pub. Off. Law § 86(4); therefore, because the agency failed to articulate a legitimate concern covered by the exemption in N.Y. Pub. Off. Law § 87(2)(i), the software was subject to disclosure. Matter of TJS of N.Y., Inc. v New York State Dept. of Taxation & Fin., 89 A.D.3d 239, 932 N.Y.S.2d 243, 2011 N.Y. App. Div. LEXIS 7602 (N.Y. App. Div. 3d Dep't 2011).

F. Judicial Review

179. In general

The fact that the records were not in the possession of either the village or its volunteer fire department does not warrant dismissal of the proceeding where the records were to be returned to the village, since temporary possession in another does not necessarily oust a permanent possessor of the control which would make it subject to the responsibilities imposed by the Freedom of Information Law, and Special Term was fully justified in granting a right of inspection upon their retransfer to the village's custody. Westchester Rockland Newspapers, Inc. v Kimball, 50 N.Y.2d 575, 430 N.Y.S.2d 574, 408 N.E.2d 904, 1980 N.Y. LEXIS 2453 (N.Y. 1980).

In a proceeding to review a refusal by the state police to permit a newspaper reporter to have access to records reflecting the identity of persons arrested for speeding in a certain county, the Deputy Superintendent of State Police, as appellant, would be permitted to raise for the first time on appeal contentions, under CPL § 160.50, that such records should be sealed, where the rights of third parties are implicated, and an order granting the petition to the extent of permitting inspection of copies of traffic tickets issued and lists of violation of the Vehicle and Traffic Law compiled by the state police from a specified date would be modified to exempt from the records permitted to be examined any records sealed pursuant to CPL § 160.50. Johnson Newspaper Corp. v Stainkamp, 61 N.Y.2d 958, 475 N.Y.S.2d 272, 463 N.E.2d 613, 1984 N.Y. LEXIS 4187 (N.Y. 1984).

A motion by certain landlords, who were the subjects of an Attorney General's investigation concerning alleged fraudulent or illegal activity in violation of applicable rent stabilization laws, for an order directing the Attorney General to surrender certain information pursuant to the Freedom of Information Law (Pub O, Art 6) would be denied, since the Attorney General had complied in part with the landlords' request for disclosure and had denied others of their requests, so that if the landlords were dissatisfied the proper course would be to pursue the administrative remedies provided by Pub O §§ 89(4)(a), 89(4)(b). Wiener v Abrams, 119 Misc. 2d 970, 464 N.Y.S.2d 919, 1983 N.Y. Misc. LEXIS 3629 (N.Y. Sup. Ct. 1983).

Bank (petitioner), which was target of hostile takeover by second bank, failed to exhaust its administrative remedies and thus could not maintain proceeding seeking access to all confidential information submitted to State Banking Board by "hostile" bank in its takeover offer, since banking board had previously denied petitioner's request for information and petitioner failed to appeal that determination to Superintendent of Banks within 7 days as required by CLS Pub O § 89; in view of fact that any extension of time for petitioner to appeal denial of its request would be act directly prejudicing or weakening position of takeover bank, superintendent could not unilaterally extend time set forth in statute. Irving Bank Corp. v Considine, 138 Misc. 2d 849, 525 N.Y.S.2d 770, 1988 N.Y. Misc. LEXIS 105 (N.Y. Sup. Ct. 1988).

180. Article 78 proceedings, generally

In Article 78 proceeding to compel district attorney to produce certain documents under Freedom of Information Law, district attorney could not be heard to complain that petitioner had failed to exhaust his administrative remedies where district attorney had failed to advise petitioner of availability of administrative appeal within district attorney's office, and failed to demonstrate in Article 78 proceeding that procedures for such appeal had, in fact, been established. Barrett v Morgenthau, 74 N.Y.2d 907, 549 N.Y.S.2d 649, 548 N.E.2d 1300, 1989 N.Y. LEXIS 3180 (N.Y. 1989).

In Article 78 proceeding to compel Nassau County District Attorney to disclose all documents in his possession relating to petitioner's arrest in Ulster County, which culminated in judgment of conviction in Ulster County Court, Nassau County Supreme Court properly dismissed proceeding without hearing where assistant district attorney of Nassau County submitted affirmation demonstrating that his office had searched for and was not in possession of any such information, and petitioner failed to articulate any factual basis for his claim to contrary. Ahlers v Dillon, 143 A.D.2d 225, 532 N.Y.S.2d 22, 1988 N.Y. App. Div. LEXIS 8737 (N.Y. App. Div. 2d Dep't 1988).

Court properly dismissed Article 78 proceeding to compel police department to produce certain information pertaining to petitioner's arrest, where department had answered petitioner's Freedom of Information Law request with its own request for additional pedigree information needed to process request, petitioner claimed that he sent pedigree information in letter which department claimed it never received, and petitioner failed to exhaust his administrative remedies by appealing pursuant to CLS Pub O § 89(4)(a). Sanders v Bratton, 258 A.D.2d 422, 685 N.Y.S.2d 722, 1999 N.Y. App. Div. LEXIS 1847 (N.Y. App. Div. 1st Dep't 1999).

Article 78 proceeding to review denial of Freedom of Information Law request was properly dismissed as time-barred where

request duplicated earlier request, and thus constituted belated attempt to seek judicial review of denial of first request. Mendez v New York City Police Dep't, 260 A.D.2d 262, 688 N.Y.S.2d 538, 1999 N.Y. App. Div. LEXIS 4184 (N.Y. App. Div. 1st Dep't 1999).

Article 78 petition to compel production of documents under Freedom of Information Law request was properly dismissed for failure to exhaust administrative remedies where petitioner's administrative appeal respecting requested records alleged to have been improperly withheld had not yet been determined. Tellier v New York City Police Dep't, 267 A.D.2d 9, 698 N.Y.S.2d 490, 1999 N.Y. App. Div. LEXIS 12392 (N.Y. App. Div. 1st Dep't 1999).

Convict's failure to take timely administrative appeal from police department's failure to turn over ballistics reports in response to his Freedom of Information Law request would not justify dismissal of his Article 78 proceeding for failure to exhaust administrative remedies where he had already waited longer than time department had set, and he commenced proceeding before he had received department's belated and incomplete response. Coleman v N.Y. City Police Dep't, 282 A.D.2d 390, 723 N.Y.S.2d 494, 2001 N.Y. App. Div. LEXIS 4146 (N.Y. App. Div. 1st Dep't 2001).

In personal injury action, plaintiff who was wrongfully denied access to defendant city's records under Freedom of Information Law (FOIL) was not entitled to order directing disclosure under CLS CPLR § 3124, since there was no outstanding Article 31 discovery demand against city, but court would convert plaintiff's motion to Article 78 proceeding (pursuant to CLS CPLR § 103), which was plaintiff's proper remedy inasmuch as city regulations did not provide administrative remedy for citizen denied FOIL request. Fusco v Albany, 134 Misc. 2d 98, 509 N.Y.S.2d 763, 1986 N.Y. Misc. LEXIS 3064 (N.Y. Sup. Ct. 1986).

Community Board of Borough of Manhattan had standing to maintain Article 78 proceeding to obtain disclosure from New York City Department of City Planning pursuant to Freedom of Information Law, notwithstanding contention that boards only existed pursuant to New York City Charter provision which enumerated activities which could be pursued by boards but which conferred no powers on them, since (1) if members of board had brought petition in their individual capacities, they would have had standing, and (2) board only sought limited relief and did not seek to overturn decision or recommendation of Department of City Planning. Community Bd. 7 v Schaffer, 150 Misc. 2d 770, 570 N.Y.S.2d 769, 1991 N.Y. Misc. LEXIS 265 (N.Y. Sup. Ct. 1991), aff'd, 183 A.D.2d 422, 585 N.Y.S.2d 1010, 1992 N.Y. App. Div. LEXIS 6621 (N.Y. App. Div. 1st Dep't 1992).

In Article 78 proceeding to review denial of petitioner's Freedom of Information law requests for physician identifier information contained in Statewide Planning and Research Cooperative System, issues related to privacy interests of physicians could not be used by court to justify agency's determination, where Department of Health had denied petitioner's requests solely on basis of privacy interests of patients, without comment on need to protect privacy of physicians. New York Times Co. v New York State Dep't of Health, 173 Misc. 2d 310, 660 N.Y.S.2d 810, 1997 N.Y. Misc. LEXIS 248 (N.Y. Sup. Ct. 1997), aff'd, 243 A.D.2d 157, 674 N.Y.S.2d 826, 1998 N.Y. App. Div. LEXIS 7774 (N.Y. App. Div. 3d Dep't 1998).

Respondent was not precluded from raising, for first time in Article 78 proceeding, additional ground for denying petitioner's request under Freedom of Information Law (FOIL); rationale behind rule limiting court's review to ground invoked by agency does not apply to FOIL review, which has its own substantive law and does not fit into traditional writs. Harvey v Hynes, 174 Misc. 2d 174, 665 N.Y.S.2d 1000, 1997 N.Y. Misc. LEXIS 533 (N.Y. Sup. Ct. 1997).

Petitioner's N.Y. C.P.L.R. art. 78 suit under the New York Freedom of Information Law, N.Y. Pub. Off. Law § 84 et seq., was timely filed under N.Y. C.P.L.R. § 217(1) because, in view of ambiguous and contradictory letters from a town, at times granting him the right to photocopy the records, and thereafter precluding any photocopying, the town did not provide him with a final and binding determination until less than four months before he filed suit. Matter of Archdeacon v Town of Oyster Bay, 813 N.Y.S.2d 289, 12 Misc. 3d 438, 235 N.Y.L.J. 51, 2006 N.Y. Misc. LEXIS 597 (N.Y. Sup. Ct. 2006).

181. Attorney fees

Court properly denied petitioners' request for counsel fees under CLS Pub O § 89(4)(c), even though petitioners substantially prevailed in their Freedom of Information Law request for survey maps of their respective parcels and county respondent lacked reasonable basis in law for withholding surveys, since surveys, which were obtained in connection with proposed flood control project, were not of clearly significant interest to general public, despite fact that 6 other individuals and national environmental organization sought access to same surveys. Grace v Chenango County, 256 A.D.2d 890, 681 N.Y.S.2d 695, 1998 N.Y. App. Div. LEXIS 13583 (N.Y. App. Div. 3d Dep't 1998).

In Article 78 proceeding by landowners against town board members, even if members lacked reasonable basis to withhold worksheets used in completing tax assessment roll, court did not abuse its discretion in denying landowners' request for counsel fees under CLS Pub O § 89(4)(c) where worksheets were small part of landowners' total Freedom of Information Law requests, with which members otherwise fully complied. Todd v Craig, 266 A.D.2d 626, 697 N.Y.S.2d 722, 1999 N.Y. App. Div. LEXIS 11242 (N.Y. App. Div. 3d Dep't 1999), app. denied, 94 N.Y.2d 760, 706 N.Y.S.2d 80, 727 N.E.2d 577, 2000 N.Y. LEXIS 121 (N.Y. 2000).

Some records that state agencies withheld from a citizen were not interagency and intraagency documents that were exempt from disclosure under N.Y. Pub. Off. Law § 87(2). But as the agencies had a rational basis for believing the exemption applied, the citizen's request for counsel fees under N.Y. Pub. Off. Law § 89(4)(c)(i) was properly denied. Miller v New York State DOT, 58 A.D.3d 981, 871 N.Y.S.2d 489, 2009 N.Y. App. Div. LEXIS 160 (N.Y. App. Div. 3d Dep't), app. denied, 12 N.Y.3d 712, 882 N.Y.S.2d 397, 909 N.E.2d 1235, 2009 N.Y. LEXIS 1786 (N.Y. 2009).

Attorney's fees would not be granted in the courts discretion for litigation under the Freedom of Information Law where, after the commencement of the proceeding but before the affected agency answered, the desired records were disclosed by the agency at the request of a third party who was the subject of the records, in that it was evident that the agency acted in an apparent good-faith effort to protect the confidences of the third party, and there did not appear to be the type of vigorous defense or the specter of ultimate loss on the merits after intermediate appeal, which had been present in cases cited by the petitioner. William J. Kline & Sons, Inc. v Fallows, 124 Misc. 2d 701, 478 N.Y.S.2d 524, 1984 N.Y. Misc. LEXIS 3316 (N.Y. Sup. Ct. 1984).

In Article 78 proceeding wherein court found that Department of Health lacked reasonable basis to deny Freedom of Information law requests for physician identifier information contained in Statewide Planning and Research Cooperative System (SPARCS), award of attorney's fees was not warranted although petitioner substantially prevailed and SPARCS records appear to be matters of significant interest to general public, as department's argument related to scope of "identifying details" subject to personal privacy protection, while overly broad, was not wholly lacking in merit. New York Times Co. v New York State Dep't of Health, 173 Misc. 2d 310, 660 N.Y.S.2d 810, 1997 N.Y. Misc. LEXIS 248 (N.Y. Sup. Ct. 1997), aff'd, 243 A.D.2d 157, 674 N.Y.S.2d 826, 1998 N.Y. App. Div. LEXIS 7774 (N.Y. App. Div. 3d Dep't 1998).

182. Burden of proof

Agency or other party opposing Freedom of Information Law disclosure of personnel records, on ground that disclosure is specifically exempted under CLS Pub O § 87(2)(a) by reason of CLS Civ R § 50-a, must demonstrate "substantial and realistic potential of the requested material for the abusive use against the officer or firefighter." Daily Gazette Co. v City of Schenectady, 93 N.Y.2d 145, 688 N.Y.S.2d 472, 710 N.E.2d 1072, 1999 N.Y. LEXIS 224 (N.Y. 1999).

Special Term properly granted petitioner access to certain materials requested under the Freedom of Information Law, where respondent municipality failed to meet its burden of proof that the materials were exempt under Pub O § 87(2)(a) in that the sole proof submitted concerning the purported exemption

from discovery consisted of conclusory allegations of counsel for the municipality and there was no indication in the record that any of the parties requested the trial court to conduct an in-camera inspection. Niagara Environmental Action v Niagara Falls, 100 A.D.2d 742, 473 N.Y.S.2d 653, 1984 N.Y. App. Div. LEXIS 17749 (N.Y. App. Div. 4th Dep't), aff'd, 63 N.Y.2d 651, 479 N.Y.S.2d 512, 468 N.E.2d 694, 1984 N.Y. LEXIS 4515 (N.Y. 1984).

Individual did not have to show the denial of the individual's Freedom of Information Law request was "arbitrary and capricious," "an abuse of discretion," "irrational," or "unlawful" because (1) the standard was whether an error of law affected the denial, and (2) officials had to show an exemption under N.Y. Pub. Off. Law § 87[2]. Matter of Thomas v Condon, 128 A.D.3d 528, 9 N.Y.S.3d 257, 2015 N.Y. App. Div. LEXIS 4163 (N.Y. App. Div. 1st Dep't 2015).

Appellate court would not consider employees' alternative grounds for denying disclosure of proposed interrogation questions because merely attaching the privilege log to the records appeal officer's affidavit, without any corresponding reference to the cited exemptions or any explanation as to the manner in which exemptions applied to the documents at issue, did not satisfy the employees' burden to articulate "a particularized and specific justification for denying access. Matter of Aurigemma v New York State Dept. of Taxation & Fin., 128 A.D.3d 1235, 9 N.Y.S.3d 711, 2015 N.Y. App. Div. LEXIS 4300 (N.Y. App. Div. 3d Dep't 2015).

The Freedom of Information Law (Public Officers Law, art 6) requires every public agency to provide access to all records, with certain exceptions; the burden is placed upon an agency resisting disclosure to prove that the material sought comes within the statutory exemptions. Herald Co. v School Dist., 104 Misc. 2d 1041, 430 N.Y.S.2d 460, 1980 N.Y. Misc. LEXIS 2446 (N.Y. Sup. Ct. 1980).

183. Default judgment

In proceeding to review New York City Law Department's lack of response to petitioner's Freedom of Information Law requests, court should have granted Department's motion to vacate default judgment entered against it after its request for further adjournment was denied since there was existing departmental backlog of unprocessed information requests, and Department's position that it had absolute defense as to much of material sought was correct when its application for adjournment was made. Murray v Matusiak, 247 A.D.2d 303, 669 N.Y.S.2d 278, 1998 N.Y. App. Div. LEXIS 1587 (N.Y. App. Div. 1st Dep't 1998).

State college must release copy of its proposal to offer master's degree program that was submitted to board of regents since proposal is reflective of final determination made by agency and, therefore, available under § 87(2)(g)(iii) of Freedom of Information Law. Comm Pub Acc Rec FOIL-Ad Op 2510.

184. In camera inspection

It was well within the discretion of the Appellate Division to order Special Term to conduct an *in camera* hearing to excise privacy impinging references to needy individuals in village records inasmuch as though the Freedom of Information Law specifies no procedures for implementing its guarantees, decisional law has repeatedly acknowledged the efficacy of this technique in appropriate circumstances, and there is no abuse of discretion as a matter of law in withholding the prerogative of deletion from the village where it had its opportunity to do so before the commencement of the litigation, but refused. Westchester Rockland Newspapers, Inc. v Kimball, 50 N.Y.2d 575, 430 N.Y.S.2d 574, 408 N.E.2d 904, 1980 N.Y. LEXIS 2453 (N.Y. 1980).

In a CPLR Art 78 proceeding to compel a public hospital corporation to comply with a request under the Freedom of Information Law, Pub O, Art 6, in which it was claimed that certain items of the request were exempt from production under Pub O § 87(2), which protects inter-agency or intra-agency materials, where the public hospital corporation did not demonstrate as a matter of law that all of the records requested were in fact inter-agency or intra-agency materials or, even if so, that they were not statistical or factual tabulations, or instructions to staff that affect the public, or final agency policy or determination, an in camera inspection was required. M. Farbman & Sons, Inc. v New York City Health & Hospitals Corp., 62 N.Y.2d 75, 476 N.Y.S.2d 69, 464 N.E.2d 437, 1984 N.Y. LEXIS 4244 (N.Y. 1984).

In an action by the developer of a proposed suburban shopping center wherein it is alleged that various actions by the respondent municipality constituted a deliberate effort to ruin the project, an *in camera* inspection of documents maintained as records by the municipality relating to the proposed center which the municipality claimed were exempt from disclosure (Public Officers Law, § 87, subd 2, par [g]) was proper since the parties had unequal knowledge of the documents sought and the municipality failed to give sufficiently detailed information with respect to the material allegedly exempt to permit the trial court to decide the issue. Miracle Mile Associates v Yudelson, 68 A.D.2d 176, 417 N.Y.S.2d 142, 1979 N.Y. App. Div. LEXIS 10536 (N.Y. App. Div. 4th Dep't), app. denied, 48 N.Y.2d 606 (N.Y. 1979).

In article 78 proceeding to compel disclosure, failure of superintendent of correctional facility and Supreme Court to disclose underlying facts contained in agency records, so as to establish that they did in fact fall within ambit of statutory exemptions of CLS Pub O § 87, did not constitute error since such disclosure would effectively subvert purpose of statutory exemptions to preserve confidentiality of information. Nalo v Sullivan, 125 A.D.2d 311, 509 N.Y.S.2d 53, 1986 N.Y. App. Div. LEXIS 62573 (N.Y. App. Div. 2d Dep't 1986), app. denied, 69 N.Y.2d 612, 517 N.Y.S.2d 1027, 511 N.E.2d 86, 1987 N.Y. LEXIS 16883 (N.Y. 1987).

In Article 78 proceeding, court should not have directed Department of Motor Vehicles to grant petitioner's request under Freedom of Information Law for disclosure of investigative report prepared by Inspector-General in response to petitioner's allegations that department employees had engaged in corrupt conduct in awarding contract to supply department with automobile emission analyzers, although department's opposition (which consisted of general denials and conclusory allegation that materials sought were exempt from disclosure) failed to particularize that report fell within any statutory exemption; court should have granted in camera inspection. Allen Group, Inc. v New York State Dep't of Motor Vehicles, 147 A.D.2d 856, 538 N.Y.S.2d 78, 1989 N.Y. App. Div. LEXIS 1968 (N.Y. App. Div. 3d Dep't 1989).

In Article 78 proceeding for release of documents under Freedom of Information Law, inmate was entitled to have court conduct in camera inspection of records pertaining to his transfers from one correctional facility to another, notwithstanding contention that records were exempt predecisional evaluations and recommendations, where there were no detailed affidavits or other exhibits to show type of information generally contained in allegedly exempt material. Grune v New York State Dep't of Correctional Services, 166 A.D.2d 834, 562 N.Y.S.2d 826, 1990 N.Y. App. Div. LEXIS 12774 (N.Y. App. Div. 3d Dep't 1990).

On review of a respondent's denial of petitioners' Freedom of Information Law (FOIL) requests, the lower court erred in conducting an in camera inspection of the withheld documents and determining in the first instance that the documents were statutorily protected from disclosure; because the record demonstrated that additional documents responsive to petitioners' FOIL requests existed and were not yet produced or examined by respondent's FOIL Appeals Officer, the case was remitted to the lower court to direct respondent to respond to petitioners' FOIL requests by reviewing the additional subject documents and to determine in the first instance whether they were statutorily exempted from disclosure Matter of Union Carbide Corp. v New York State Dept. of Envtl. Conservation, 2020 N.Y. App. Div. LEXIS 7648 (December 10, 2020).

In Article 78 proceeding by newspaper reporter who sought description of legal services provided to county by outside law firm in connection with environmental lawsuit, court would conduct in camera review to determine whether descriptive material contained in billing records was protected under Freedom of Information Law, where county failed to articulate particularized and specific justification for refusing requested disclosure. Orange County Publs. v County of Orange, 168 Misc. 2d 346, 637 N.Y.S.2d 596, 1995 N.Y. Misc. LEXIS 617 (N.Y. Sup. Ct. 1995).

185. Jurisdiction

Supreme Court had jurisdiction to consider newspaper's application for order compelling social service agency to disclose certain records regarding agency actions in child abuse case, notwithstanding newspaper's failure either to make formal application to agency itself for ruling pursuant to CLS Pub O § 89(3) and (4)(a) or to appeal agency's first decision to deny disclosure, since, based on agency's public statements that disclosure would not be granted, such administrative procedure would be futile. New York News, Inc. v Grinker, 142 Misc. 2d 325, 537 N.Y.S.2d 770, 1989 N.Y. Misc. LEXIS 47 (N.Y. Sup. Ct. 1989).

Federal court lacked subject matter jurisdiction to decide whether officer violated Freedom of Information Law. Schuloff v Fields, 950 F. Supp. 66, 1997 U.S. Dist. LEXIS 339 (E.D.N.Y. 1997), aff'd, 159 F.3d 1348, 1998 U.S. App. LEXIS 20187 (2d Cir. N.Y. 1998).

An appeal to the Commissioner of Education is not the proper jurisdictional forum for addressing claims relating to violations of the Freedom of Information Law. The appropriate jurisdictional forum for challenging alleged violations of the Freedom of Information Law is the Supreme Court of the State of New York, and not in an appeal before the Commissioner of Education. Appeal Alexandreena D, 1990 Op Comr Educ No 12433.

Appropriate jurisdictional forum for addressing alleged Freedom of Information Law violations is Supreme Court of State of New York, not appeal to Commissioner of Education under CLS Educ § 310. 1996 Op Comm Ed No. 13719.

186. Mootness

Article 78 proceeding seeking to compel police department to comply with Freedom of Information Law (FOIL) request for "serial numbers" or "lot numbers" of photographs introduced into evidence at petitioner's criminal trial was dismissed as academic, where petitioner conceded that he received "most" requested documents by means of another contemporaneous FOIL request to district attorney's office. Fappiano v N.Y. City Police Dep't, 95 N.Y.2d 738, 724 N.Y.S.2d 685, 747 N.E.2d 1286, 2001 N.Y. LEXIS 573 (N.Y. 2001).

Article 78 petition to compel police department to respond to inmate's Freedom of Information Law (FOIL) request for documents relating to his conviction was properly dismissed as moot, where counsel to police department submitted affirmation averring that department conducted diligent search for documents it could not locate, and that all responsive documents had been disclosed, thereby satisfying FOIL certification requirement. Rattley v N.Y. City Police Dep't, 96 N.Y.2d 873, 730 N.Y.S.2d 768, 756 N.E.2d 56, 2001 N.Y. LEXIS 1868 (N.Y. 2001).

The issues raised by a prisoner seeking review of the deletion on security grounds of information relating to the location in the correctional facility of the documents sought under the Freedom of Information Law were moot where the prisoner was granted permission to examine and copy the lists under staff supervision; the deleted material was properly excluded on the ground that its revelation would jeopardize prison security. Fournier v Fish, 83 A.D.2d 979, 442 N.Y.S.2d 823, 1981 N.Y. App. Div. LEXIS 15443 (N.Y. App. Div. 3d Dep't 1981).

Appeal from judgment denying petition to compel respondent to disclose certain documents under Freedom of Information Law (CLS Pub O § 84 et seq.) was academic where respondent turned over documents demanded, and sufficiency of that production was determined in subsequent proceeding by judgment from which no appeal was taken. Majid v Brown, 218 A.D.2d 802, 631 N.Y.S.2d 253, 1995 N.Y. App. Div. LEXIS 8957 (N.Y. App. Div. 2d Dep't 1995).

In Article 78 proceeding to compel Division of Parole to comply with petitioner's request under Freedom of Information Law for copy of his parole file, appeal was moot where petitioner was subsequently provided with copy of his file with certain items redacted; challenge to propriety of redactions was separate issue which must be pursued before respondent and, if not satisfactorily resolved, made subject of separate Article 78 proceeding. Di Rose v New York State Div. of Parole, 222 A.D.2d 900, 635 N.Y.S.2d 747, 1995 N.Y. App. Div. LEXIS 13314 (N.Y. App. Div. 3d Dep't 1995).

Proceeding to compel compliance with petitioner's Freedom of Information Law request was moot where respondent had complied with request by providing petitioner with certain documents. Almodovar v Altschuller, 232 A.D.2d 700, 647 N.Y.S.2d 1010, 1996 N.Y. App. Div. LEXIS 10023 (N.Y. App. Div. 3d Dep't 1996).

Petitioner's request to compel town to produce certain records which supported tentative real property assessment was moot where there was no evidence that assessor's initial response lacked any documents to which petitioner was entitled, and petitioner's subsequent requests related to tentative assessment that was admittedly based on clerical error, which error had been corrected. Corvetti v Town of Lake Pleasant, 239 A.D.2d 841, 657 N.Y.S.2d 536, 1997 N.Y. App. Div. LEXIS 5564 (N.Y. App. Div. 3d Dep't 1997).

Although labor union's proceeding to compel Department of Transportation (DOT) to disclose copy of lease it had negotiated was rendered moot by DOT's production of lease at commencement of proceeding, exception to mootness doctrine applied where DOT conceded that it had "longstanding practice" of delaying disclosure in similar circumstances, DOT was in position to almost invariably render such proceedings moot, and issue presented was novel. Laborers' Int'l Union of N. Amer., Local Union No. 17 v New York State DOT, 280 A.D.2d 66, 719 N.Y.S.2d 354, 2001 N.Y. App. Div. LEXIS 480 (N.Y. App. Div. 3d Dep't 2001).

A petition seeking disclosure pursuant to the Freedom of Information Law (Pub O § 84 et seq.) of certain records of a local industrial development agency would be dismissed as moot where, after the proceeding was commenced but before the agency filed its answer, the desired records were made available to petitioners by the agency at the request of the corporation which was the subject of the records, in that there was no liklihood of repetition between the instant parties or among other members of the public as once petitioners had access to the records there would be no further request for them, and the initial denial to produce the records was based on specific grounds which would not necessarily exist every time a freedom of information request was made. William J. Kline & Sons, Inc. v Fallows, 124 Misc. 2d 701, 478 N.Y.S.2d 524, 1984 N.Y. Misc. LEXIS 3316 (N.Y. Sup. Ct. 1984).

Application under Freedom of Information Law was moot insofar as petitioner sought disclosure of photographs taken by police of 78 members of antiabortion organization who were arrested at demonstration where (1) judge had sealed records of those 78 members and ordered return of photographs to them, and (2) photographs were not marked into evidence and were not made part of public trial record. Planned Parenthood of Westchester, Inc. v Town Bd. of Greenburgh, 154 Misc. 2d 971, 587 N.Y.S.2d 461, 1992 N.Y. Misc. LEXIS 346 (N.Y. Sup. Ct. 1992).

187. Necessary parties

Supreme court erred in dismissing a journalist's action seeking an order directing the New York State Police to turn over records he requested regarding an alleged hit-and-run committed by an off-duty State trooper because the State trooper was a necessary party to the proceeding as he could be adversely or inequitably affected by a judgment, N.Y. C.P.L.R. 1001(a); the State trooper was a defendant in a pending wrongful death civil lawsuit arising from the alleged hit-and-run incident. Matter of Hearst Corp. v New York State Police, 109 A.D.3d 32, 966 N.Y.S.2d 557, 2013 N.Y. App. Div. LEXIS 3838 (N.Y. App. Div. 3d Dep't 2013).

A tenured teacher who is the respondent in a disciplinary hearing must be made a party to a CPLR article 78 proceeding commenced by a newspaper to annul the school district's determination denying disclosure of the teacher's name and the charges against her, since the teacher "might be inequitably affected by a judgment in the action" (CPLR 1001, subd [a]) and is therefore a necessary party to the proceeding, since she is entitled to protect herself from an "unwarranted invasion of personal privacy" pursuant to section 87 (subd 2, par [b]) of the Public Officers Law, and since the school district may not present the teacher's interests with the same adversary vigor as might the teacher herself; however, the teacher may not be included by name as a party respondent since this would reveal her identity.

Herald Co. v School Dist., 102 Misc. 2d 637, 424 N.Y.S.2d 98, 1980 N.Y. Misc. LEXIS 1996 (N.Y. Sup. Ct. 1980).

188. Res judicata

Where a doctor under investigation by the State Board of Professional Medical Conduct sought, in an Article 78 proceeding, access to certain medical records, patient interviews, and interviews with other doctors obtained by the board commissioner during the investigation, the doctor's request for the information made under the 1977 version of the Freedom of Information Law (Pub O §§ 84–90) was separate and independent from his earlier request made when the 1974 version of the statute was in effect, in that §§ 87(2) and 89(4) of the 1977 Act materially changed the parties' rights by giving the board discretion to provide access to sensitive information rather than excluding it entirely and by placing on the board the burden of proving the propriety of denying access to information. Consequently, under the transactional analysis approach to res judicata, the parties were not bound by the determination made on the doctor's first request. John P. v Whalen, 54 N.Y.2d 89, 444 N.Y.S.2d 598, 429 N.E.2d 117, 1981 N.Y. LEXIS 3071 (N.Y. 1981).

Although records in question were held not exempt from disclosure in prior litigation, city is not precluded from asserting in instant case that certain notations contained in such records are exempt as interagency expressions of opinion within the deliberative process of fixing assessments, where city did not become a party to prior litigation until case was on appeal, and issue of exemption of notations had not been raised before trial court. New York v New York State Bd. of Equalization & Assessment, 65 N.Y.2d 656, 491 N.Y.S.2d 610, 481 N.E.2d 242, 1985 N.Y. LEXIS 14769 (N.Y. 1985).

Doctrine of res judicata barred Article 78 proceeding to review determination denying petitioner access to records requested under Freedom of Information Law (FOIL) where same records were subject of petitioner's prior FOIL requests, and Supreme Court's first disposition denying such requests involved same parties and was not appealed by petitioner. Ferrara v Superintendent, N.Y. State Police, 235 A.D.2d 874, 652 N.Y.S.2d 432, 1997 N.Y. App. Div. LEXIS 525 (N.Y. App. Div. 3d Dep't), app. dismissed, app. denied, 90 N.Y.2d 829, 660 N.Y.S.2d 551, 683 N.E.2d 16, 1997 N.Y. LEXIS 1557 (N.Y. 1997).

189. Standing

NYC Finance Department, as governmental agency, cannot act on behalf of taxpayers to raise and assert freedom of information law, and therefore lacks standing for such an action. Michael v Communications Workers of America, 130 Misc. 2d 424, 495 N.Y.S.2d 569, 1985 N.Y. Misc. LEXIS 3213 (N.Y. Sup. Ct. 1985).

II. Application To Particular Documents

190. Accidents, generally

In personal injury action, plaintiff was entitled to resort to Freedom of Information Law (FOIL) to obtain city records regarding any written notice of defective sidewalk received prior to her fall while walking on it, even though note of issue and statement of readiness were already filed, since FOIL's mandate of open disclosure requires that government agency's public records be as available to litigation adversary as to any other member of public. Fusco v Albany, 134 Misc. 2d 98, 509 N.Y.S.2d 763, 1986 N.Y. Misc. LEXIS 3064 (N.Y. Sup. Ct. 1986).

In action against nursing home owner and its construction contractor on behalf of resident who died in fall through construction hole, plaintiff was entitled to use plan of correction that defendants allegedly submitted in response to statement of deficiencies issued by Department of Health (DOH) where (1) plaintiff obtained such information through Freedom of Information Law demand made to DOH, (2) plan, although discussed at meeting between members of home's quality assurance committee and contractor's representatives, was not exempt from disclosure under CLS Educ § 6527(3), and (3) neither CLS Pub Health § 2805-l nor CLS Pub Health § 2805-m(2) applies to nursing facilities. Hale v Odd Fellow & Rebekah Health Care Facility, 188 Misc. 2d 498, 728 N.Y.S.2d 649, 2001 N.Y. Misc. LEXIS 220 (N.Y. Sup. Ct. 2001).

191. —Motor vehicle accidents

In a proceeding brought by a law firm to gain access to all accident reports in the possession of a city police department, the trial court properly granted such access where, while the law firm had not demonstrated that it had the requisite interest to warrant inspection under Pub O § 66-a, it was entitled to access under the Freedom Of Information Law; however, the police department would be directed to delete the names and addresses of the victims from the accident reports it made available to the law firm so as to protect the privacy of the accident victims. Scott, Sardano & Pomeranz v Records Access Officer, 104 A.D.2d 733, 480 N.Y.S.2d 643, 1984 N.Y. App. Div. LEXIS 20168 (N.Y. App. Div. 4th Dep't 1984), aff'd, 65 N.Y.2d 294, 491 N.Y.S.2d 289, 480 N.E.2d 1071, 1985 N.Y. LEXIS 15078 (N.Y. 1985).

The victim of a collision with a bus will be allowed access to records of an investigation and findings relating to the accident, and held in the custody of the Commissioner of Transportation; petitioner is entitled to inspect the records under the Freedom of Information Law as the records are public and as the provision which bars notice of bus involvement in an accident from being used in an action growing out of the accident (Transportation Law, § 142, sub 8) does not specifically bar the records with respect to such an accident from being disclosed. McAuley v Commissioner of Dep't of Transp., 99 Misc. 2d 83, 415 N.Y.S.2d 389, 1979 N.Y. Misc. LEXIS 2211 (N.Y. Sup. Ct. 1979).

While the language of section 117 of the Transportation Law exempts accident reports prepared by carriers from disclosure under the Freedom of Information Law (Public Officers Law, § 87, subd 2, par [a]), no such protection is provided for accident reports prepared by the Department of Transportation; however, because the agency's report may contain material from the carrier's report, the court will inspect both the agency's and carrier's reports *in camera*. Bloomberg v Hennessy, 99 Misc. 2d 958, 417 N.Y.S.2d 593, 1979 N.Y. Misc. LEXIS 2368 (N.Y. Sup. Ct. 1979).

192. Animals; animal control, generally

Records pertaining to sources through which animals were acquired for laboratory experiments, maintained by State University of New York Health Science Center at Brooklyn pursuant to Federal Animal Welfare Act, fell within definition of records that were presumptively discoverable under Freedom of Information Law. Citizens for Alternatives to Animal Labs v Board of Trustees of the State Univ. of N.Y., 169 Misc. 2d 210, 643 N.Y.S.2d 323, 1996 N.Y. Misc. LEXIS 172 (N.Y. Sup. Ct. 1996), rev'd, 240 A.D.2d 490, 658 N.Y.S.2d 653, 1997 N.Y. App. Div. LEXIS 6098 (N.Y. App. Div. 2d Dep't 1997).

While an applicant requesting a copy of a complaint resulting in a visit from an animal warden may not be denied access under Public Officers Law § 87(2)(e), since a complaint submitted by a member of the public cannot be characterized as a record "compiled for law enforcement purposes", and since such record was not held by a criminal law enforcement agency, access to the information could be properly denied under Public Officers Law § 87(2)(b) as "an unwarranted invasion of personal privacy". Comm Pub Acc Rec FOIL—Ad Op 1819.

Although the names of persons who adopt dogs after they have been held in city dog pounds for the statutory waiting period are not protected under any confidentiality standard, they may be withheld because disclosure could result in unnecessary or unwarranted intrusions, harassment or personal hardship. Comm Pub Acc Rec FOIL-Ad Op 2796.

In most instances, names, addresses and phone numbers of people complaining about dogs may be withheld from disclosure by Dog Control Officer under Freedom of Information Law, on ground that disclosure would result in unwarranted invasion of personal privacy; what is relevant to work of agency is substance of complaint, and inasmuch as identity of complainant is irrelevant, such identifying details may be deleted. Comm on Open Gov't F7976.

193. —Animal research

In Article 78 proceeding, respondent research facility of State University of New York, which conducted biomedical research using dogs and cats, was properly directed to disclose under Freedom of Information Law (CLS Pub O Art 6) records kept pursuant to Federal Animal Welfare Act (7 USCS §§ 2131 to 2159) absent any claim of specific statutory exemption. Citizens

for Alternatives to Animal Labs, Inc. v Board of Trustees of the State Univ. of N.Y., 92 N.Y.2d 357, 681 N.Y.S.2d 205, 703 N.E.2d 1218, 1998 N.Y. LEXIS 3220 (N.Y. 1998).

Request by animal rights advocates under Freedom of Information Law for list of all records kept by university review committee responsible for approving use of animals in experiments would be denied where such list was maintained not by committee but, as permitted under CLS Pub O § 87(3)(c), by university proper. However, request would not be denied on ground that disclosure would have chilling effect on university research, where information sought did not require detailed descriptions of projects for which approval was requested. American Soc. for Prevention of Cruelty to Animals v Board of Trustees of State University, 147 Misc. 2d 847, 556 N.Y.S.2d 447, 1990 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. 1990).

194. Athletics, games and the like

A petition by an ice hockey official to inspect individual rating sheets prepared by high school coaches and used by a hockey officials' association and by an office of interscholastic athletics to assign officials to high school ice hockey games would be denied where the rating sheets were interagency documents made to assist in a selective process, not in a statistical one, and were thus exempt from disclosure under Pub O § 87 (Freedom of Information Law), since a revelation of the ratings would disrupt the deliberative process of the agencies involved and be injurious to their consultative functions. The exemption was enacted to foster open and candid discussion among public officials and to protect uninhibited recommendations made within the family from being scrutinized by those affected and by the public; the rating process provides useful advisory opinions which would become meaningless or nonexistent if the cloak of confidentiality were removed with the result being a detrimental impact upon the public's interest and participation in high school functions. Shaw v Lerer, 112 Misc. 2d 260, 446 N.Y.S.2d 855, 1981 N.Y. Misc. LEXIS 3420 (N.Y. Sup. Ct. 1981).

It is questionable whether agency's disclosure of boxing promotion contract will result in unwarranted invasion of privacy since boxing is regulated by state and persons involved in boxing are likely required to submit substantial amount of information to state athletic commission for their protection as well as protection of public. Comm Pub Acc Rec FOIL-Ad Op 2524.

195. Consumer affairs

The substance of a complaint filed with the county against a vendor is available to an inquiring consumer provided that any identifying details regarding a complaint which may constitute an unwarranted invasion of personal privacy be withheld pursuant to Public Officers Law § 87(2)(b); and third parties may have access to stenographic transcripts of hearings concerning the revocation by the county of a license of a person or firm engaged in commercial activity but identifying detail constituting an unwarranted invasion of personal privacy must be deleted pursuant to Public Officers Law § 87(2)(b). Third parties may have access to stenographic transcripts of hearings concerning the revocation by the county of a license of a person or firm engaged in commercial activity but inter-agency or intra-agency material that are not statistical or factual tabulations or data must be deleted as required by § 87(2)(g). Comm Pub Acc Rec FOIL—Ad Op 1828.

196. Financial matters, generally

Monthly financial statement requested by a town board member from the town supervisor must be made available since, although the records may be characterized as "intra-agency", such records consist solely of factual information available under Public Officers Law § 87(2)(g)(i). Com Pub Acc Rec FOIL—Ad Op 1870.

197. —Audits and budgets, generally

The major portions of forms used by field auditors in an audit of a town were "factual tabulations or data" referred to in Pub O § 87(2)(g)(i) and as such were not exempt from disclosure under the Freedom of Information Act. However, spaces for "remarks" and "explanations" indicated some non-final intra-agency matters exempt from disclosure might have been present. Thus, in an action requesting access to all field auditors' work papers relating to the examination, the court should have directed that any specific material identified as exempt be submitted for an in camera inspection. Pursuant to the Freedom of Information Law, petitioners, residents of the Town of Oyster Bay, are entitled to access and inspection of field auditor's reports and work papers which are not specifically exempted under § 87, subd. 2, produced in connection with a State audit of the town. Polansky v Regan, 81 A.D.2d 102, 440 N.Y.S.2d 356, 1981 N.Y. App. Div. LEXIS 10495 (N.Y. App. Div. 3d Dep't 1981).

A memorandum by the Budget Director of Oneida County to the Interim County Executive regarding the projected condition of the county general fund at the end of the year, which is not a statistical or factual tabulation within the meaning of the Freedom of Information Law (Public Officers Law, art 6), the Oneida County Freedom of Information Regulations, article 12 of the County Law, or 9 NYCRR 145.1 (a) (2), but rather contains opinions, policy options or recommendations, is not subject to public inspection. Bartlett v Nassar, 100 Misc. 2d 904, 420 N.Y.S.2d 265, 1979 N.Y. Misc. LEXIS 2574 (N.Y. Sup. Ct. 1979).

Access may be had to budget documents prepared for discussion at an annual session of a county legislature unless such documents are intra-agency or inter-agency materials which are not available under Public Officers Law § 87(2)(g); in any event, while intra-agency and inter-agency materials may be withheld, portions of such materials consisting of statistical or factual data, instructions to staff that affect the public, or final agency policy or determination must be made available. Comm Pub Acc Rec FOIL—Ad Op 1765.

Access to records of account and audits of town reflecting annual financial report may be had not only under § 87(2)(g)(i), but also under § 30 of General Municipal Law and § 29 of Town Law. Comm Pub Acc Rec FOIL-Ad Op 2450.

Bills, ledgers, books of account and similar records regarding finances of local government are available under Freedom of Information Law; thus, bills submitted to unit of local government are available for inspection and copying by any person. Comm Pub Acc Rec FOIL-Ad Op 2550.

Audits of municipalities are available from either municipality or State Department of Audit and Control; thus, any person may request and obtain copy of town audit upon payment of appropriate fees. Comm Pub Acc Rec FOIL-Ad Op 2690.

198. — —Computerized records

Computer printout regarding budget appropriations, expenditures and unencumbered balances prepared by or for board or education or district treasurer consisting solely of "statistical or factual tabulations or data" are accessible under § 87(2)(g)(i) of Freedom of Information Law. Comm Pub Acc Rec FOIL-Ad Op 2567.

199. —Bank records

Bank records pertaining to issuance of industrial revenue bonds by city industrial development corporation (CIDC) were not records of agency within meaning of CLS Pub O § 86(4), for when bonds were issued, CIDC assigned all of its rights in bonds to bank, and bank acted as trustee for bondholders and not for CIDC. United Food & Commercial Workers, Dist. Union, Local One v City of Schenectady Indus. Dev. Agency, 204 A.D.2d 887, 612 N.Y.S.2d 477, 1994 N.Y. App. Div. LEXIS 5431 (N.Y. App. Div. 3d Dep't 1994).

200. —Bids for public contracts

Court properly directed Department of Transportation (DOT) to release, under Freedom of Information Law, documents submitted by successful bidder in response to request for proposals (RFP) inviting contract bids for development and operation of high-speed ferry service, where requested documents did not include any intra-agency confidential information that would assist in DOT's contract negotiations, and petitioner specifically stated that it was not seeking any evaluative material or internal analyses that could reveal DOT's "thinking"; even if release of actual proposals prior to DOT's selecting successful bidder would have undermined negotiating process, successful bidder's RFP response was not competitively sensitive once contract was awarded. Cross-Sound Ferry Servs. v Department of Transp., 219

A.D.2d 346, 634 N.Y.S.2d 575, 1995 N.Y. App. Div. LEXIS 12680 (N.Y. App. Div. 3d Dep't 1995).

Ruling that successful bidder has no reasonable expectation of not having its bid opened to the public applies equally to records of unsuccessful bidders in situations in which bids are publicly opened. Comm Pub Acc Rec FOIL-Ad Op 2787.

201. Grant programs

In an action under the Freedom of Information Law to compel disclosure of certain records of the New York State Council on the Arts relative to grants made by the Council, disclosure would not be ordered as to records which were not final opinions, which did not set forth the reasons for the Council's decisions, and the disclosure of which would impinge on the Council's predecisional processes. Other records, however, which represented final agency determinations would, with the deletion of certain comments, be required to be furnished. Bray v Mar, 106 A.D.2d 311, 482 N.Y.S.2d 759, 1984 N.Y. App. Div. LEXIS 21373 (N.Y. App. Div. 1st Dep't 1984).

Empire State Development Corporation (ESDC) approved a farm's application for a grant to construct manure treatment plants. Under N.Y. Pub. Off. Law § 87 of the New York Freedom of Information Law, ESDC had to disclose to a humane society portions of a finance memorandum and a cost-benefit analysis that contained purely factual data regarding the farm's financial and operating history, but ESDC's opinions and projections as to economic issues, which were exempt intra-agency materials, could be redacted from those documents. Matter of Humane Socy. of U.S. v Empire State Dev. Corp., 53 A.D.3d 1013, 863 N.Y.S.2d 107, 240 N.Y.L.J. 28, 2008 N.Y. App. Div. LEXIS 6332 (N.Y. App. Div. 3d Dep't 2008), app. denied, 12 N.Y.3d 701, 876 N.Y.S.2d 348, 904 N.E.2d 503, 2009 N.Y. LEXIS 116 (N.Y. 2009).

Access to city records as to whether owners of a particular parcel of real property have applied for assistance from the city in their renovation project, and if so, whether assistance had been approved and granted in the form of a loan, loan guaranty or grant, whether the project was funded in any way by the state or federal government and whether "wage and hour labor standards" were applicable to the project may not be denied as "an unwarranted invasion of personal privacy" under the Public Officers Law § 87(2)(b) since the property involved was owned by a commercial enterprise. Comm Pub Acc Rec FOIL—Ad Op 1791.

202. —New York City financial matters

Taxicab medallion owners were not entitled to preliminary injunction barring enforcement of financial disclosure requirements set forth in regulation promulgated by New York City Taxi and Limousine Commission where commission stipulated that it would not release private financial information (including addresses and telephone numbers of filers) contained in forms at issue and would notify filers of any request under Freedom of Information Law for information in such forms. Statharos v New York City Taxi & Limousine Comm'n, 198 F.3d 317, 1999 U.S. App. LEXIS 32213 (2d Cir. N.Y. 1999).

Although public administrators in New York City fall within the scope of the definition of "judiciary" in Public Officers Law § 86(1) in view of their capacity to issue subpoenas as authorized by SCPA § 1114 and are therefore outside of the scope of the Freedom of Information Law, many of the records of public administrators are likely to be available under Public Officers Law § 87(2)(b)(i) since SCPA § 1109 requires each public administrator to file a monthly statement of accounts with the mayor and comptroller of the New York City and since the mayor and comptroller represent agencies that fall within the scope of the Freedom of Information Law. Comm Pub Acc Rec FOIL—Ad Op 1772.

203. —School finances

Reimbursable people participation sheets kept by the New York City Board of Education are accessible under Public Officers Law § 87(2)(g)(i) since, although the sheets are inter-agency or intra-agency materials, they consist of factual information. Com Pub Acc Rec FOIL—Ad Op 1872.

Records consisting of contracts entered into by a school district with a private corporation are available since no legitimate grounds for denial could be cited, and related records of moneys paid by the school district to the private corporation are also available since such records constitute factual data that cannot be exempted under § 87(2)(g)(i) as intra-agency materials. Com Pub Acc Rec FOIL—Ad Op 1874.

Freedom of Information Law grants access to books of account, ledgers and similar documentation regarding finances of school district. Comm Pub Acc Rec FOIL-Ad Op 2520.

Proposed budget of school district must be made available for public access prior to and after its approval since there is no ground for denial in Freedom of Information Law § 87(2); taxpayer is entitled to see budget figures for each building and system covered by proposed school board budget. Comm Pub Acc Rec FOIL-Ad Op 2643.

Records of New York City Board of Education consisting of correspondence and other papers transmitted between Board and Superintendent and Community School Board District 3 which involve fiscal records are available for public access under Freedom of Information Law § 87(2)(g)(i) to extent that such records are reflective of statistical or factual tabulations or data. Comm Pub Acc Rec FOIL-Ad Op 2739.

Agency may not deny access to student government financial ledgers unless they identify particular students. Comm Pub Acc Rec OML-Ad Op 2785.

204. —Specific financial expenditures, generally

Petitioner, who was investigating student complaints of alleged price gouging at community college bookstore, was entitled to Freedom of Information Law (FOIL) disclosure of copies of invoices for textbooks purchased from publishing companies for sale as new texts, redacted so as to disclose only date of invoice and identity and unit price of books purchased, where he intended to publish information in college newspaper and respondents demonstrated that invoices contained information which, if disclosed, would cause substantial competitive injury. Gray v Faculty-Student Ass'n of Hudson Valley Community College, Inc., 186 Misc. 2d 404, 717 N.Y.S.2d 507, 2000 N.Y. Misc. LEXIS 490 (N.Y. Sup. Ct. 2000).

Records concerning purchase offers, vouchers and similar fiscal information of a city are accessible under Public Officers Law § 87(2)(g)(i) where, while all the records are inter-agency or intra-agency material, they must be made available since the information sought consists of factual information; moreover, General Municipal Law § 51 requires disclosure of city financial records. Com Pub Acc Rec FOIL—Ad Op 1861.

Records of moneys paid by school district to attorney or law firm for services rendered to district are not privileged except where portions of bills contain information that is confidential under attorney-client relationship in such case portions can be deleted under Freedom of Information Law § 87(2)(a). Comm Pub Acc Rec FOIL-Ad Op 2723.

Where request is made under Freedom of Information Law for records of industrial development agency regarding expenditures for economic development in 1982, including vouchers, checks, and minutes of meetings at which the expenditures were discussed, the materials are not exempt from disclosure under provisions pertaining to (1) unwarranted invasions of privacy, or (2) trade secrets. Comm on Open Govt Foil-AO 3059.

205. — —Telephone records

Town sufficiently complied with petitioner's request under Freedom of Information Law, CLS Pub O Art 6, for copies of town's cellular telephone bills for certain years by producing summary pages of bills showing costs incurred on each cellular phone for subject periods, which indicated that amounts were not excessive. Wilson v Islip, 179 A.D.2d 763, 578 N.Y.S.2d 642, 1992 N.Y. App. Div. LEXIS 679 (N.Y. App. Div. 2d Dep't 1992).

206. — —Travel expenses

Information contained in travel vouchers and similar records consisting of "statistical or factual tabulations or data" must be made available under Freedom of Information Law. Comm Pub Acc Rec FOIL-Ad Op 2584.

Records reflective of expenditures of public moneys by employee in performance of his or her official duties, such as travel vouchers, results in permissible invasion of personal privacy if disclosed. Comm Pub Acc Rec FOIL-Ad Op 2748.

207. Fires, firefighters, fire districts and the like

Firefighter association was entitled to access to information on response times contained in city planning document, even though document was pre-decisional draft that generally was protected from disclosure under Freedom of Information Law, since response times were "statistical or factual tabulations or data" to which access is provided by CLS Pub O § 87. MacRae v Dolce, 130 A.D.2d 577, 515 N.Y.S.2d 295, 1987 N.Y. App. Div. LEXIS 46577 (N.Y. App. Div. 2d Dep't 1987).

Firearms education association's Article 78 proceeding to compel county police commissioner to disclose certain documents under Freedom of Information Law was properly dismissed where information sought was protected by CLS Penal § 400.00(5). Sportsmen's Ass'n for Firearms Educ., Inc. v Kane, 266 A.D.2d 396, 698 N.Y.S.2d 170, 1999 N.Y. App. Div. LEXIS 11516 (N.Y. App. Div. 2d Dep't 1999).

208. Guns; gun permits

Trial court properly granted a newspaper owner's petition to compel the production of the names and addresses of all pistol permit holders in a county pursuant to the Freedom of Information Law and the Secure Ammunition and Firearms Enforcement Act because, while the court did not consider whether any of the statutory exemptions applied, the county did not demonstrate the applicability of the asserted exemptions or that disclosure would be offensive and objectionable to a reasonable person of ordinary sensibilities, and the owner had standing to challenge the county's refusal to disclose where the request was made by a reporter in his professional capacity as an employee of the owner's newspaper. Matter of Gannett Satellite Info. Network v County of Putnam, 142 A.D.3d 1012, 37 N.Y.S.3d 299, 2016 N.Y. App. Div. LEXIS 5890 (N.Y. App. Div. 2d Dep't 2016).

Since Public Officers Law § 89(5) preserves rights of access to records granted by other provisions of the law or judicial determination and Penal Law § 400.00(5) specifically makes application for licenses to carry handguns and firearms a public record, denial of a request for approved licenses for handguns is improper; such records may not be withheld on the basis of Public Officers Law § 87(2)(e)(i) since it is questionable whether an approved application could be characterized as a record compiled for law enforcement purposes and since the application was for only approved licenses such disclosure would not interfere with any law enforcement investigation; furthermore, the records could not be denied under § 87(2)(g) as the request was for statistical or factual information. Comm Pub Acc Rec FOIL—Ad Op 1831.

209. Insurance

Minutes of insurance company meetings that are given by the companies to the NYS Insurance Department for its examination constitute "records within the meaning of the FOIL. Consequently, they are subject to public review under FOIL unless it is established that the documents are, in whole or in part, subject to statutory exemption. Washington Post Co. v New York State Ins. Dep't, 61 N.Y.2d 557, 475 N.Y.S.2d 263, 463 N.E.2d 604, 1984 N.Y. LEXIS 4180 (N.Y. 1984).

Freedom of Information Law did not require State Insurance Department to comply with petitioner's request for computer report detailing form number, type of form, kind of insurance and disposition of all health and life insurance policy forms filed with department during particular period, although information sought existed within department's database, where department did not have automated or "batch" program to routinely compile and print out records in single report, and to accommodate petitioner's request, it would be necessary for computer operator to create new records through search of online database by entering petitioner's search criteria; department was not required to create new records nor to develop program to accomplish such task for purpose of complying with petitioner's request. Gabriels v Curiale, 216 A.D.2d 850, 628 N.Y.S.2d 882, 1995 N.Y. App. Div. LEXIS 7466 (N.Y. App. Div. 3d Dep't 1995).

New York Insurance Department's power to deny access under N.Y. Pub. Off. Law § 87(2)(d) to records that were submitted to the Department by a commercial enterprise or derived from information obtained from a commercial enterprise and which, if disclosed, would cause substantial injury to the competitive position of the subject enterprise was properly exercised in denying a borough president's New York Freedom of Information Law, N.Y. Pub. Off. Law § 84 et seq., request for annual reports submitted to the Department by insurers under N.Y. Comp. Codes R. & Regs. tit. 11, § 218.7 as an insurer's market share and growth trend in each ZIP code could be determined from the information in the reports, and another company could use the reports to target its competitive efforts in areas where the reporting insurer was most vulnerable while avoiding areas where that insurer was strongest. Matter of Markowitz v Serio, 39 A.D.3d 247, 833 N.Y.S.2d 444, 2007 N.Y. App. Div. LEXIS 4287 (N.Y. App. Div. 1st Dep't 2007), app. denied, 2007 N.Y. App. Div. LEXIS 8521 (N.Y. App. Div. 1st Dep't July 12, 2007), rev'd, 11 N.Y.3d 43, 862 N.Y.S.2d 833, 893 N.E.2d 110, 2008 N.Y. LEXIS 1827 (N.Y. 2008).

A description of a computer program and details of mathematical models, procedures and statistical assumptions, submitted by an insurance company to the Insurance Department, at the latter's request and in confidence, in connection with an application by the company to use a certain method of computing dividends, not at variance with prescribed methods of accounting, are trade secrets and, if disclosed, would result in an unfair advantage to the company's competitors, and, accordingly, are exempt from disclosure under that provision of the Freedom of Information Law (Public Officers Law, art 6, § 87) which exempts documents which constitute "trade secrets or are maintained for the regulation of commercial enterprise which if disclosed would cause substantial injury to the competitive position of the subject enterprise". Belth v Insurance Dep't of New York, 95 Misc. 2d 18, 406 N.Y.S.2d 649, 1977 N.Y. Misc. LEXIS 2688 (N.Y. Sup. Ct. 1977).

Even though Liquidation Bureau of State Insurance Department and Superintendent of Insurance, as liquidator of insolvent insurance company, were not subject to Freedom of Information Law (FOIL), documents filed by insolvent insurance company with State Insurance Department were subject to disclosure under FOIL since superintendent would have received those documents in normal course of his duties as regulator of insurance industry; claim that documents were confidential under CLS Ins § 1504 was irrelevant in view of defunct status of company. License applications filed by various entities with State Insurance Department were "records" kept by Superintendent of Insurance in his regulatory capacity subject to disclosure under Freedom of Information Law. Consolidated Edison Co. v Insurance Dep't of State, 140 Misc. 2d 969, 532 N.Y.S.2d 186, 1988 N.Y. Misc. LEXIS 511 (N.Y. Sup. Ct. 1988).

CLS Pub O § 89(2)(b) did not bar Freedom of Information Law disclosure of names of insurance company employees earning over $600,000, as insurance industry is highly regulated, employees' salaries have been filed with Department of Insurance since early 1900's, and fact that employees were nongovernmental employees did not ipso facto shield their salary from public view. Belth v N.Y. State Dep't of Ins., 189 Misc. 2d 508, 733 N.Y.S.2d 833, 2001 N.Y. Misc. LEXIS 490 (N.Y. Sup. Ct. 2001).

Filings of insurers are open to public inspection, including insurer's annual statement as well as its rate and form filings. Insurance Department, Opinions of General Counsel, Opinion Number 00-05-13.

Property-casualty insurance policy forms filed with Superintendent of Insurance by insurers authorized to do business in New York are generally public record and, as such, are available for inspection under Freedom of Information Law. Insurance Department, Opinions of General Counsel, Opinion Number 02-02-16.

Opinions of General Counsel are available to public for inspection and copying under Freedom of Information Law (FOIL) unless of confidential nature as defined by FOIL, and then only to extent so required. Insurance Department, Opinions of General Counsel, Opinion Number 07-02-14.

Where person requests that documents be withheld from public disclosure, Insurance Department will inform submitting party that such blanket request is not acceptable; submitting party must make separate request for each document submitted to

department, specifying why documents should be treated as exempt under CLS Pub O § 87(2)(d) (i.e., Freedom of Information Law (FOIL)) and also 11 NYCRR § 241.6(a) (Regulation 71). Insurance Department, Opinions of General Counsel, Opinion Number 07-02-14.

210. Labor matters; employees, generally

In an Article 78 proceeding, the trial court properly denied an application to compel a state employees' retirement system to produce all documents referring, reflecting or relating to a retirement applicant's deadline for changing a retirement option, where the system's method of record keeping was a reasonable one, and where the system was not required to prepare records not then in existence for the convenience of an applicant. Wattenmaker v New York State Employees' Retirement System, 95 A.D.2d 910, 464 N.Y.S.2d 52, 1983 N.Y. App. Div. LEXIS 18882 (N.Y. App. Div. 3d Dep't), app. denied, 60 N.Y.2d 555, 1983 N.Y. LEXIS 5625 (N.Y. 1983).

In Article 78 proceeding, petitioner's request for statement of specific reasons for his disqualification as candidate for position of state trooper was properly denied since (1) he had already been provided with document stating that he failed to meet requirements for position, and (2) in-camera inspection disclosed no record in file which contained specific statement of reasons for his disqualification, and respondent Division of State Police was under no obligation to create such record. O'Shaughnessy v New York State Div. of State Police, 202 A.D.2d 508, 609 N.Y.S.2d 18, 1994 N.Y. App. Div. LEXIS 2584 (N.Y. App. Div. 2d Dep't), app. denied, 84 N.Y.2d 807, 621 N.Y.S.2d 516, 645 N.E.2d 1216, 1994 N.Y. LEXIS 3485 (N.Y. 1994).

Petitioner, a court employee, is entitled to receive from respondent, the Office of Court Administration, pursuant to a request under the Freedom of Information Law (Public Officers Law, art 6), a list of those court employees who have been paid $15,000 to $20,000 in back pay as a result of reclassification; respondent's contention that imminent collective bargaining negotiations would be impaired by release of the information (see Public Officers Law, § 87, subd 2, par [c]) is conclusory in nature and not adequately supported, and moreover, although the data is not available in printed form and "[n]othing in [the Freedom of Information Law] shall be construed to require any entity to prepare any record not possessed or maintained by such entity" (Public Officers Law, § 89, subd 3), the section should not restrict access to information readily obtained from a computer, and the information sought is on computer and readily available. Babigian v Evans, 104 Misc. 2d 140, 427 N.Y.S.2d 688, 1980 N.Y. Misc. LEXIS 2290 (N.Y. Sup. Ct. 1980).

Medical records of employee who has worked for private sector company fall outside scope of rights of access granted by Freedom of Information Law. Comm Pub Acc Rec FOIL-Ad Op 2680.

Timetable for personnel layoffs at Western Publishing Company as part of company's plans to close its Poughkeepsie plant should be made available by Employment Service of the Department of Labor for public inspection pursuant to Freedom of Information Law. Comm Pub Acc Rec FOIL-Ad Op 2764.

211. —Attendance and leave records

A person claiming an exception to disclosure under the Freedom of Information Law has the burden of proving entitlement to the exception (Pub O § 89(5)(e)); hence, in an Article 78 proceeding to review the denial of access to certain records of a county police department pertaining to the absences of a certain detective, the usual standard of review in Article 78 proceeding that the agency's determination will not be set aside unless arbitrary, capricious or without rational basis was not applicable, and detective bore the burden of proving entitlement to any exception. Disclosure to petitioners, a newspaper and a reporter, of the dates the detective was absent from scheduled employment would not constitute an unwarranted invasion of privacy in that the public had a right to know facts concerning public employees on whom its tax dollars are spent. Further, although the information sought did not constitute a personnel record within the meaning of Civ Rights Law § 50-a, which exempts such records from disclosure as to police officers, the legislative intent in enacting that statute was for the narrow purpose of preventing time-consuming and vexatious investigation into irrelevant collateral matters in a civil or criminal action, not to create a blanket exemption from disclosure of personnel records of police officers, and thus the exemption was inapplicable. Disclosure to petitioners, a newspaper and a reporter, of the dates a county police detective was absent from scheduled employment would not constitute an unwarranted invasion of privacy in that the public has a right to know facts concerning public employees on whom its tax dollars are spent. Capital Newspapers Div. of Hearst Corp. v Burns, 109 A.D.2d 92, 490 N.Y.S.2d 651, 1985 N.Y. App. Div. LEXIS 56643 (N.Y. App. Div. 3d Dep't 1985), aff'd, 67 N.Y.2d 562, 505 N.Y.S.2d 576, 496 N.E.2d 665, 1986 N.Y. LEXIS 19312 (N.Y. 1986).

Payroll records of municipal housing authority were not exempted from disclosure under Freedom of Information Law by CLS Pub O § 87(2)(b) since (1) records regarding days worked, leave taken with or without pay and leave accrued were relevant to day-to-day operations of authority, and (2) authority failed to show how release of records would result in economic or personal hardship, as possibility that records could be used to discover other financial information was insufficient and claim that newspaper might use information to create embarrassing article was also insufficient. Buffalo News v Buffalo Municipal Housing Authority, 163 A.D.2d 830, 558 N.Y.S.2d 364 (N.Y. App. Div. 4th Dep't 1990).

Access to an absence report used by a central school district may not be denied on the basis that disclosure would constitute "an unwarranted invasion of personal privacy" under Public Officers Law § 87(2)(b) since the absence report form indicates that it is relevant to the performance of a public employee's official duties in that it bears upon the manner in which a public employee performs those duties in view of the fact that a public employee can be absent with pay for only a certain number of days for illness or for vacation. Comm Pub Acc Rec FOIL—Ad Op 1766.

In a citizen investigation as to whether a municipal employee illegally applied for and was granted unauthorized days off in order to serve with his military reserve unit, records reflective of the days taken off by the employee are accessible under Public Officers Law since records that are relevant to the performance of the official duties of a public employee are accessible and absence records are clearly relevant to the performance of the official's official duties. Comm Pub Acc Rec FOIL—Ad Op 1778.

Records of sick time used by city employees including names of employees, department for which they work, and number of sick time hours accumulated by employees are available for public inspection except to extent that Civil Rights Law § 50-a may be applicable to limited class of employees and records pertaining to them. Comm Pub Acc Rec FOIL-Ad Op 2712.

Records regarding employment of individual by Middle Island Central School District to extent they involve individual's record of attendance and use of sick or personal leave time are available for public access; however, such records are unavailable for public access to extent that they are reflective of opinions or recommendations. Comm Pub Acc Rec FOIL-Ad Op 2735.

212. —Civil service matters

In a proceeding in which petitioner sought access to validity studies and job analyses prepared in connection with certain specified examinations, judgment would be affirmed where respondents acted properly under Pub O § 87 in refusing to disclose the requested material. Public Education Asso. v Board of Examiners of Bd. of Education, 93 A.D.2d 838, 461 N.Y.S.2d 60, 1983 N.Y. App. Div. LEXIS 17689 (N.Y. App. Div. 2d Dep't), app. dismissed, 60 N.Y.2d 612, 1983 N.Y. LEXIS 6005 (N.Y. 1983).

Documents prepared by county civil service department regarding petitioner's request for job reclassification were not exempt from disclosure under Freedom of Information Act even though they fell within exception to disclosure for "inter-agency or intra-agency materials" where, after redactions made by court, they consisted of factual data to which access should be provided pursuant to CLS Pub O § 87(2)(g)(i). Akras v Suffolk County Dep't of Civil Service, 137 A.D.2d 523, 524 N.Y.S.2d 266, 1988 N.Y. App. Div. LEXIS 803 (N.Y. App. Div. 2d Dep't 1988).

In an Article 78 proceeding brought under the Freedom of Information Law to permit inspection and copying of examination questions in the Civil Service Examination, the "test release" policy adopted by the Department of Personnel pursuant to Freedom of Information Law § 87(2)(h) was not arbitrary or capricious in denying access to questions which the department intended to reuse and which therefore had not been "finally administered" and were exempt from disclosure under § 87(2)(h) and Educ Law § 340. Social Serv. Emples. Union v Cunningham, 109 Misc. 2d 331, 437 N.Y.S.2d 1005, 1981 N.Y. Misc. LEXIS 2397 (N.Y. Sup. Ct. 1981), aff'd, 90 A.D.2d 696, 1982 N.Y. App. Div. LEXIS 23098 (N.Y. App. Div. 1st Dep't 1982).

Police officer was entitled, under Freedom of Information Law (FOIL), to examination grades of all persons on supplementary lists for black and Hispanic members regarding civil service examination for police sergeant where New York City Personnel Director failed to meet burden of showing that such information fell within FOIL exemption for material the release of which would constitute "unwarranted invasion of personal privacy," in that names of officers on supplemental lists had already been disclosed, no meaningful distinction existed between names of those on list (who, by definition, had not passed exam) and their test scores, and there was no reasonable expectation of privacy with respect to exam scores of those who were promoted. Rainey v Levitt, 138 Misc. 2d 962, 525 N.Y.S.2d 551, 1988 N.Y. Misc. LEXIS 196 (N.Y. Sup. Ct. 1988).

Public Officers Law § 87(2)(h) permits agencies to withhold questions and answers regarding examination administered by Department of Civil Service if questions are to be administered at some time in future. Comm Pub Acc Rec FOIL-Ad Op 2548.

Test key answers regarding examinations held for positions of court officer and senior court officer may be withheld by agency since answers relate to questions that will be given on examinations in future. Comm Pub Acc Rec FOIL-Ad Op 2674.

213. —Collective bargaining

An application for access to a memorandum prepared by the Metropolitan Transit Authority documenting recent decisions with respect to the designated impartial arbitrator in disputes between various transit authorities and unions in the city that were unfavorable to management was properly denied, since a memorandum prepared by a public agency for internal use addressing a position it might take in pending or prospective collective bargaining negotiations to which it is a party is not a "final agency policy or determination" by the agency, access to which is obtainable under the Freedom of Information Law, Pub O § 87(2)(g), as an exception to the provision exempting intra-agency materials. Kheel v Ravitch, 62 N.Y.2d 1, 475 N.Y.S.2d 814, 464 N.E.2d 118, 1984 N.Y. LEXIS 4212 (N.Y. 1984).

Refusal of Department of Transportation to disclose lease it had negotiated could not be justified on basis that, pending approval by Attorney General and Comptroller, disclosure would impair contract awards or collective bargaining negotiations (CLS Pub O § 87(2)(c)), since terms of contract were not competitively sensitive, Comptroller's role was not to prevent competition, contractor's competitors were already aware of project, and petitioner had consented to redaction of contract price. Laborers' Int'l Union of N. Amer., Local Union No. 17 v New York State DOT, 280 A.D.2d 66, 719 N.Y.S.2d 354, 2001 N.Y. App. Div. LEXIS 480 (N.Y. App. Div. 3d Dep't 2001).

A copy of a report paid for by a Board of Cooperative Educational Services and designed to assist participating school districts in their collective bargaining negotiations with public employee unions will not be furnished to the executive director of a union representing school administrators and supervisors since the report comes within the exceptions to the Freedom of Information Law for, if disclosed, the report "would impair . . . collective bargaining negotiations"; such disclosure would only serve an inequitable one-sided ploy rather than the furnishing of information intended by the statute. Trauernicht v Board of Cooperative Educational Services, 95 Misc. 2d 394, 407 N.Y.S.2d 398, 1978 N.Y. Misc. LEXIS 2436 (N.Y. Sup. Ct. 1978).

Records detailing qualifications for position or promotion represent policy of agency and is accessible. Comm Pub Acc Rec FOIL-A Op 2560.

214. —Disciplinary actions, misconduct and the like, generally

New York State's Freedom of Information Law (CLS Public Officers Law §§ 84 et seq.) entitles press to ascertain results of disciplinary action against public employee even though matter was concluded by settlement which municipality agreed would remain confidential. Geneva Printing Co. v Lyons (N.Y. Sup. Ct. Mar. 25, 1981).

215. — —Education employees

A newspaper publisher is not entitled to compel a school district to produce the name of and charges against a teacher charged with misconduct in a private disciplinary proceeding since subdivision 2 of section 3020-a of the Education Law, which provides that a disciplinary hearing may be instituted against a teacher only after the board of education makes a finding of probable cause in executive session, which is closed to the public (Public Officers Law, § 97, subd 3), and section 3020-a (subd 3, par c) of the Education Law, which provides a teacher with the option of a private or public hearing, together with 8 NYCRR 82.9, which provides that a disciplinary hearing shall be private except on the request of the accused teacher, indicate a clear intent to assure the privacy of the entire hearing procedure; disclosure of the teacher's name would completely subvert the statutory intent by creating a likelihood that the teacher's effectiveness and reputation would be severely damaged in advance of any finding of fault; such disclosure is exempted by section 3020-a of the Education Law by mandating privacy for the entire proceeding tantamount to an executive session, and therefore, the school district properly denied disclosure of the name and the charges against the teacher; and, an exemption from disclosure may be expressed in a rule or regulation and still be within the ambit of a specific exemption by statute (Public Officers Law, § 87, subd 2, par [a]); therefore, an advisory opinion of the Committee on Public Access to Records which states otherwise lacks the rational basis necessary to support disclosure. An agency may deny access to records that "are specifically exempted from disclosure by state or federal statute" (Public Officers Law, § 87, subd 2, par [a]); the exemption must be clearly delineated and the statute narrowly construed, but clear intent to mandate confidentiality of the proceedings or material is a sufficiently specific denial of disclosure. A newspaper publisher is not entitled to compel a school district to disclose the name of and charges against a teacher charged with misconduct in a disciplinary proceeding since that information is inter-agency or intra-agency material which is exempted from the operation of the Freedom of Information Law pursuant to section 87 (subd 2, par [g]) of the Public Officers Law since those records are not statistical or factual data, instructions to staff or final agency policy or determinations; the nature of the name and charges, which are part and parcel of an unproved allegation of misconduct, is nonfinal and further, any findings or recommendations of the hearing panel are not binding on the board of education or the commissioner; the name of and charges against the teacher constitute part of unproven predetermination materials exempt from disclosure. Herald Co. v School Dist., 104 Misc. 2d 1041, 430 N.Y.S.2d 460, 1980 N.Y. Misc. LEXIS 2446 (N.Y. Sup. Ct. 1980).

Negotiated settlement of teacher disciplinary proceeding brought under CLS Educ § 3020-a, in which some charges were sustained by teacher's express admission of guilt, was not exempt from disclosure under Freedom of Information Law since CLS Educ § 3020-a did not provide for privacy of hearing, and negotiated settlement was not protected as employment record. Anonymous v Board of Educ., 162 Misc. 2d 300, 616 N.Y.S.2d 867, 1994 N.Y. Misc. LEXIS 402 (N.Y. Sup. Ct. 1994).

Results of disciplinary proceeding under CLS Educ § 3020-a were matter of public record and did not fall within "employment history" exception of CLS Pub O § 89, and thus dissemination of such information to media did not implicate teacher's liberty interest. DeMichele v Greenburgh Cent. Sch. Dist. No. 7, 167 F.3d 784, 1999 U.S. App. LEXIS 2344 (2d Cir. N.Y. 1999).

216. — —Housing employees

Where newspaper sought disciplinary records of municipal housing authority including each employee's name, address, job title, specific charges brought, disposition of charges, penalty

imposed and level at which case was adjudicated, authority could not deny access under Freedom of Information Law on basis of CLS Pub O § 87(2)(b) since records were clearly relevant to work of authority, and therefore access was required. Buffalo News v Buffalo Municipal Housing Authority, 163 A.D.2d 830, 558 N.Y.S.2d 364 (N.Y. App. Div. 4th Dep't 1990).

217. — —Police and related law enforcement employees

Local newspapers were not entitled, under Freedom of Information Law, to comprehensive access to all records of disciplinary action taken against 18 polices officers (including their identities and individual punishments) arising from off-duty incident in which they pelted 2 civilians with raw eggs, given risk of use of such information to embarrass or humiliate officers involved. Daily Gazette Co. v City of Schenectady, 93 N.Y.2d 145, 688 N.Y.S.2d 472, 710 N.E.2d 1072, 1999 N.Y. LEXIS 224 (N.Y. 1999).

Petitioner, a member of the New York State Police who was removed as an investigator in the Bureau of Criminal Investigation and reassigned as a trooper in the uniform service because of violations of departmental regulations, is not entitled to inspect and copy records, reports and statements concerning the investigation of his conduct by the State Police, since disclosure of the records could result in an unwarranted invasion of the privacy of certain informants and would be prejudicial to law enforcement and governmental administration, and, accordingly, his petition to compel disclosure under the Freedom of Information Law (Public Officers Law, art 6) is denied. Petix v Connelie, 99 Misc. 2d 343, 416 N.Y.S.2d 167, 1979 N.Y. Misc. LEXIS 2257 (N.Y. Sup. Ct. 1979).

Applicant may be properly denied access to record in possession of the Internal Affairs Section of the New York City Police Department of an investigation made with respect to the possibility of bribery of officers and the disciplinary action which may be brought, where Civil Rights Law § 50-a specifically exempts police officers' personnel record used to evaluate performance for continued employment or promotion from disclosure. Comm Pub Acc Rec FOIL-Ad Op 1768.

City and its police department (city) failed to show that employment records requested by a retired police officer were exempt under the Freedom of Information Law because city did not establish that there was any criminal investigation, that criminal non-routine investigative techniques and procedures were employed, or that disclosure of the materials would "provide a step-by-step guide" to evade criminal detection; the retiree requested records that involved allegations of corruption. Matter of Gallogly v City of New York, 51 Misc. 3d 296, 21 N.Y.S.3d 867, 2016 N.Y. Misc. LEXIS 18 (N.Y. Sup. Ct. 2016).

City and its police department failed to show that employment records requested by a retired police officer were exempt under the Freedom of Information Law or the Civil Rights Law because the retiree only requested records related to himself and did not seek information related to any other police officer. Matter of Gallogly v City of New York, 51 Misc. 3d 296, 21 N.Y.S.3d 867, 2016 N.Y. Misc. LEXIS 18 (N.Y. Sup. Ct. 2016).

218. —Employment applications

Access to the contents of a personnel file pertaining to an applicant which included letters of recommendation in possession of a county community college may be denied under Public Officers Law § 87(2)(g) since letters of recommendation may constitute inter-agency or intra-agency materials not required to be disclosed. Comm Pub Acc Rec FOIL—Ad Op 1764.

No grounds for denial of access exist and individual is entitled to inspect portions of 2 employment applications he completed where individual lost his position with New York City Transit Authority based upon Authority's contention that individual answered question differently on separate employment applications. Comm Pub Acc Rec FOIL-Ad Op 2701.

219. —Lists of employees' names, addresses, payroll information and the like, generally

A county is not obligated to disclose the home address of an employee when an attorney's office requests such address to serve legal papers since the home address had no relevance to the performance of the official duties of a public employee and therefore may be withheld on the ground that disclosure would constitute an "unwarranted invasion of personal privacy"; however, the county must furnish full personnel information when ordered to do so by a court. Comm Pub Acc Rec FOIL—Ad Op 1928.

Records of public employees consisting of social security numbers, number of dependents claimed, garnishees and union information can be withheld with justification for they are irrelevant to performance of employees' duties and, therefore, disclosure of such would constitute unwarranted invasion of personal privacy. Comm Pub Acc Rec FOIL-Ad Op 2486.

Salary of public employee is accessible by way of Freedom of Information Law even if particular public employee objects to disclosure of his or her salary. Comm Pub Acc Rec FOIL-Ad Op 2531.

220. — —Education employees

A school district is not required to release information regarding its employees' identification, social security and retirement numbers since such information has no bearing upon the manner in which the public employees perform their official duties and constitutes an "unwarranted invasion of personal privacy" under Public Officers Law § 87(2)(b) but information as to the name, position, gross pay, fiscal year gross pay and other information relevant to the manner in which employee and the school district perform their respective duty is accessible to the public since public employees have a lesser right of privacy than any other identifiable group since such employees are required to be more accountable for their activities. Comm Pub Acc Rec FOIL—Ad OP 1803.

Public Officers Law § 87(3)(b) requires that a school district maintain on an ongoing basis a record that indicates the names, public office addresses, titles and salaries of all its officers and employees in order to ensure this type of information will be compiled and made available to the public upon request; moreover, such information is relevant to the performance of public employees' official duty and therefore may not be denied on the basis of the privacy rights of public employees. Com Pub Acc Rec FOIL—Ad Op 1866.

Records reflective of the current salary of the president of a community college, the salary of a professional negotiator under contract with the college and the final and official report of the Middle States Accreditation Team are available under Public Officers Law § 87 since the legislature has made specific reference to payroll information pertaining to public employees in § 87(3)(b) based upon the tacit finding that disclosure of such information would result in permissible rather than an unwarranted invasion of personal privacy and since the accreditation report does not fall within any of the grounds for denial listed in § 87(2). Comm Pub Acc Rec FOIL—Ad Op 1926.

Contract salary figures that appear on pay stubs for particular School District employees for designated pay periods may properly be withheld from disclosure under § 87(2)(b) of the Public Officers Law on the ground that disclosure would constitute an "unwarranted invasion of personal privacy". Comm Pub Acc Rec FOIL-Ad Op 2328.

221. —Performance evaluations

Special Term properly decided that information requested by a newspaper publisher and some reporters concerning harassment and the use of force by police officers need not be disclosed, since the information constituted personnel records used to evaluate performance toward continued employment or promotion and fell within the exemption contained in Pub O § 87. Gannett Co. v James, 86 A.D.2d 744, 447 N.Y.S.2d 781, 1982 N.Y. App. Div. LEXIS 15305 (N.Y. App. Div. 4th Dep't), app. denied, 56 N.Y.2d 502, 435 N.E.2d 1099, 1982 N.Y. LEXIS 5255 (N.Y. 1982).

A defendant charged with a speeding traffic violation is entitled to disclosure of certain personnel records of the arresting police officer relating to the officer's ability to use radar equipment and to visually estimate the speed of moving vehicles as an aid in cross-examination on the issue of credibility. The information sought by defendant in the officer's personnel records is properly discoverable under section 50-a of the Civil Rights Law, which provides a means to obtain all "personnel records, used to evaluate performance toward continued employment or promo-

tion, under the control of any police agency or department", and is not exempted from public disclosure under any provisions of the Freedom of Information Law (Public Officers Law, art 6). To protect against the unbridled disclosure of police personnel records, each determination of applications for disclosure must be made on an *ad hoc* basis with the court being the final arbiter as to whether the defendant has demonstrated the relevancy and materiality of the information in the personnel records to warrant disclosure. People v Gutterson, 93 Misc. 2d 1105, 403 N.Y.S.2d 998, 1978 N.Y. Misc. LEXIS 2182 (N.Y. J. Ct. 1978).

Any document which the Freedom of Information Law, now Pub O §§ 84 et seq., requires to be disclosed on the request of any member of the public is no longer protected by the common-law public interest privilege; however, police personnel records subject to Civ R § 50-a, which are used to evaluate performance toward continued employment or promotion, are exempt from Pub O § 89 and the common-law privilege remains applicable except as to certain material such as the employee's own statements. Wunsch v Rochester, 108 Misc. 2d 854, 438 N.Y.S.2d 896, 1981 N.Y. Misc. LEXIS 2303 (N.Y. Sup. Ct. 1981).

Subject to disclosure under CLS Pub O § 89 is "memorandum of understanding" between public school superintendent and high school principal, which set forth superintendent's evaluation of principal's job performance and his expectations for future job performance, and which served as basis for superintendent's decision to recommend principal for tenure. Geneva Printing Co. v South Seneca Cent. School Dist. (N.Y. Sup. Ct. July 12, 1982).

222. —Personnel records, generally

Disclosure of the identity and ages of employees of the Office for the Aging constitutes an unwarranted invasion of personal privacy and therefore deniable under Public Officers Law § 87(2)(b) since, although courts have held that records that are relevant to the performance of public employee's official duties are accessible for disclosure, courts would probably find that the portion of a record identifying a public employee and indicating his or her age may be deleted as having minimal relevance to the performance of that person's official duties. Comm Pub Acc Rec FOIL—Ad Op 1848.

Contents of a personnel file must be made available to the subject of such file unless the contents of the records are intra-agency materials that do not consist of factual or statistical information or the records identify other persons in such a way as to constitute an invasion of that person's privacy. Comm Pub Acc Rec FOIL—Ad Op 1927.

Denial of access to records indicating employee's employment status may be appropriate on ground that disclosure will result in unwarranted invasion of personal privacy where public employee's status as temporary, provisional, or permanent is irrelevant to manner in which employee performs his or her official duties. Comm Pub Acc FOIL-Ad Op 2613.

Rights of access to contents of personnel files are not determined by their physical placement in such files but by specific contents of records. Comm Pub Acc Rec FOIL-Ad Op 2637.

While records may be kept within personnel files, they are nonetheless subject to rights of access granted by Freedom of Information Law. Comm Pub Acc Rec FOIL-Ad Op 2767.

223. — —Parole officers' personnel records

In actions against the State for false arrest and false imprisonment, based upon the alleged acts of a parole officer who was responsible for the arrests, his personnel records, except as to any matters specifically relating to ongoing criminal investigation, are subject to examination by the claimants, pursuant to the Freedom of Information Law which became effective January 1, 1978 (Public Officers Law, art 6, as added by L 1977, ch 933), and which permits access to all governmental records other than those specifically exempted. Also, those portions of his personnel records that concern complaints and incidents which may have occurred during his employment are not exempt from disclosure under the provision of the Freedom of Information Law (Public Officers Law, art 6) which exempts, as an unwarranted invasion of personal privacy, disclosure of employment, medical or credit histories or personal references of applicants for employment. Montes v State, 94 Misc. 2d 972, 406 N.Y.S.2d 664, 1978 N.Y. Misc. LEXIS 2329 (N.Y. Ct. Cl. 1978).

Documents in employment history folders of 3 members of Board of Parole must be made available for public inspection unless disclosure of such information will result in unwarranted invasion of personal privacy. Comm Pub Acc Rec FOIL-Ad Op 2741.

224. — —Prisoners' personnel records

Inmate grievances against state correction officers and administrative decisions relating thereto constitute "personnel records" under CLS Civ R § 50-a, and are thus exempt from disclosure under Freedom of Information Law, since they are relied on in evaluating officers' performance. Prisoners' Legal Services v New York State Dep't of Correctional Services, 73 N.Y.2d 26, 538 N.Y.S.2d 190, 535 N.E.2d 243, 1988 N.Y. LEXIS 3359 (N.Y. 1988).

225. — —School personnel records

A teacher has a right to review the content of a separate file maintained by a principal unless it falls within one of the exemptions under § 87(2) of the Public Officers Law; even if exempted under Freedom of Information Law, file may be accessible under collective bargaining agreement. Comm Pub Acc Rec FOIL-Ad Op 2817.

226. —Retirees and other former employees

Not-for-profit corporation, whose primary purpose is to provide its members with services and information concerning pensions and other matters, is not entitled to access to names and addresses of all retirees of the New York City Police Department currently receiving pensions and annuities, in view of 1983 amendment to § 89 to the effect that disclosure of such information is not required. New York Veteran Police Ass'n v New York City Police Dep't Article I Pension Fund, 61 N.Y.2d 659, 472 N.Y.S.2d 85, 460 N.E.2d 226, 1983 N.Y. LEXIS 3613 (N.Y. 1983).

The Teachers' Retirement System of the City of New York was required [under former law] to disclose the names and addresses of retired New York City school teachers to a not-for-profit corporation which investigated legislation and other government action affecting the pension funds of the retirement system, since the Freedom of Information Law (Public Officers Law, art 6), pursuant to which the request for the names and addresses was made, was enacted in recognition of the principle that government is the public's business and the public should have access to the records of government, and the most significant portion of the public affected by, and interested in, the workings of retirement system were the retirees; the names and addresses were not exempt from disclosure under section 87 (subd 2, par [b]) or section 89 (subd 2, par [b], cl iii) of the Public Officers Law, which deny access to information which would invade personal privacy and to information to be used for commercial or funding-raising purposes, inasmuch as a nonprofit organization cannot have as its purpose a design to reap a pecuniary profit or financial gain, and dues solicitation by the corporation is not a form of fund-raising within the meaning of the Freedom of Information Law because it is merely a device to achieve the primary and acceptable purpose of information distribution. Moreover, the retirement system failed to meet its burden of showing that the material sought was protected (Public Officers Law, § 89, subd 4, par [b]), since the argument that the corporation might sell the list of retirees' names and addresses to other organizations, not-for-profit or otherwise, was speculative and did not suffice to overcome the corporation's interest in obtaining the information. New York Teachers Pension Asso. v Teachers' Retirement System, 71 A.D.2d 250, 422 N.Y.S.2d 389, 1979 N.Y. App. Div. LEXIS 13466 (N.Y. App. Div. 1st Dep't 1979), app. denied, 49 N.Y.2d 701, 426 N.Y.S.2d 1025, 403 N.E.2d 187, 1980 N.Y. LEXIS 4955 (N.Y. 1980).

Right of access to list of deceased members of New York City Retirement System relative to applications originally submitted by deceased members in order to determine identities of possible beneficiaries who might have ability to claim moneys due them from deceased members does not exist since identities of those who are subject of request may be alive and request will involve names as well as last known addresses. Comm Pub Acc Rec FOIL-Ad Op 2718.

227. —Unemployment benefits and proceedings

Records showing the amount of a recipient's unemployment insurance benefits and the period of time during which those benefits were received were not prohibited from disclosure pursuant to Labor Law § 537, but were exempted from public access under Pub O § 87 subd. 2, par. [b] as an unwarranted invasion of personal privacy, unless the person to whom it pertained had given his written consent pursuant to Pub O § 89, subd. 2, par [c], proof of which was lacking. Messina v Lufthansa German Airlines, 83 A.D.2d 831, 441 N.Y.S.2d 557, 1981 N.Y. App. Div. LEXIS 15203 (N.Y. App. Div. 2d Dep't 1981).

In a defamation action by claimant employee against her former employer for an alleged libel in a letter the employer sent to the New York State Labor Department regarding claimant's unemployment compensation application, claimant's subpoena duces tecum seeking to obtain such letter as well as other records and documents from the department pursuant to the Freedom of Information Law, Pub O § 87, would be quashed, where to furnish this information would be violative of the express provisions of Labor Law § 537, which were designed to ensure the confidentiality of the unemployment insurance system. Clegg v Bon Temps, Ltd., 114 Misc. 2d 805, 452 N.Y.S.2d 825, 1982 N.Y. Misc. LEXIS 3569 (N.Y. Civ. Ct. 1982).

Under Freedom of Information Law, CLS Pub O Art 6 (FOIL), petitioner was entitled to daily work reports of tax auditors and tax compliance agents generated within Unemployment Insurance Division of Department of Labor, despite provision of CLS Labor § 537 which prohibits FOIL disclosure of information acquired from employers and employees in course of administration of Unemployment Insurance Law, where reports contained names and addresses of employers, their registration numbers, type of audit or investigation conducted, amount of any collections, and other payment information, and such information was generated either by department employees or was available from other records which department did not claim were exempt from disclosure. Banigan v Roberts, 135 Misc. 2d 614, 515 N.Y.S.2d 944, 1986 N.Y. Misc. LEXIS 3146 (N.Y. Sup. Ct. 1986).

228. Land use and development; zoning, generally

In an action by the developer of a proposed suburban shopping center wherein it is alleged that various actions by the respondent municipality constituted a deliberate effort to ruin the project, documents maintained as records by the municipality relating to the proposed shopping center, including petitions for declaratory rulings by the Department of Environmental Conservation and responses to the petitions, correspondence among city officials and other persons, handwritten notes of city officials or employees for their own files, miscellaneous newspaper clippings and other media articles relating to the proposed mall and various State, Federal and local laws, rules and regulations, which do not contain advice or opinion which is a part of the deliberative process, which refer to a proposed statutory environmental hearing and contain instructions to staff involving the public, and which state an agency's final determination or reflect prior final policy determination by an agency, are not exempt from disclosure under the Freedom of Information Law. Miracle Mile Associates v Yudelson, 68 A.D.2d 176, 417 N.Y.S.2d 142, 1979 N.Y. App. Div. LEXIS 10536 (N.Y. App. Div. 4th Dep't), app. denied, 48 N.Y.2d 606 (N.Y. 1979).

In a proceeding to compel the disclosure of correspondence between a town, its architects and its engineers in connection with the town's public improvement project, the trial court erred in finding that such correspondence was not intra-agency correspondence and in ordering disclosure, since, under the New York Freedom of Information Law, such correspondence was an intra-agency communication and was not subject to disclosure unless the correspondence was a statistical or factual tabulation of data, instructions to staff that might affect the public, or a final agency policy or determination. Sea Crest Constr. Corp. v Stubing, 82 A.D.2d 546, 442 N.Y.S.2d 130, 1981 N.Y. App. Div. LEXIS 11388 (N.Y. App. Div. 2d Dep't 1981).

Petitioner's request, under Freedom of Information Law, for inventory of all privately owned real property in certain area was properly denied, even though deletion from inventory of names and addresses of property owners ordinarily would be sufficient remedy, where release of inventory's map numbers would still allow petitioner to identify names and addresses of listed property owners, and it was reasonable to infer that petitioner was seeking inventory for commercial purposes. Siegel, Fenchel & Peddy, P.C. v Central Pine Barrens Joint Planning & Policy Comm'n, 251 A.D.2d 670, 676 N.Y.S.2d 191, 1998 N.Y. App. Div. LEXIS 7977 (N.Y. App. Div. 2d Dep't 1998), app. denied, 93 N.Y.2d 804, 689 N.Y.S.2d 429, 711 N.E.2d 643, 1999 N.Y. LEXIS 691 (N.Y. 1999).

Case would be remanded for particularized findings after in camera inspection of documents sought where record was unclear as to whether city buildings department's records regarding enforcement of new zoning restrictions warranted application of Freedom of Information Law exemption in CLS Pub O § 87(2). DJL Restaurant Corp. v Department of Bldgs., 273 A.D.2d 167, 710 N.Y.S.2d 564, 2000 N.Y. App. Div. LEXIS 7511 (N.Y. App. Div. 1st Dep't 2000).

Access to city records as to whether owners of a particular parcel of real property have applied for assistance from the city in their renovation project, and if so, whether assistance had been approved and granted in the form of a loan, loan guaranty or grant, whether the project was funded in any way by the state or federal government and whether "wage and hour labor standards" were applicable to the project may not be denied as inter-agency or intra-agency materials exempt from disclosure under Public Officers Law § 87(2)(g) since a decision to approve a loan, loan guaranty or grant would be reflective of a "final determination" available under § 87(2)(g)(iii) and records reflective of the manner in which the project is funded, as well as the wage and hour labor standards applicable to the project, would constitute statistical or factual information which would also be available. Comm Pub Acc Rec FOIL—Ad Op 1791.

229. —Appraisals; appraisers

In a proceeding seeking access to certain records of an urban renewal agency consisting of reports by an independent appraiser on the potential use and value of certain buildings which the agency owned and planned to offer for sale to the public, the Appellate Division correctly determined that the appraiser's reports fell within the provision of the Freedom of Information Law excepting from disclosure to the public those materials which "if disclosed would impair present or imminent contract awards." Murray v Troy Urban Renewal Agency, Inc., 56 N.Y.2d 888, 453 N.Y.S.2d 400, 438 N.E.2d 1115, 1982 N.Y. LEXIS 3500 (N.Y. 1982).

Where the Department of Transportation acquired property for a highway project but later abandoned the project and offered the former owner the opportunity to repurchase the property, the date the State abandoned the project was the decisive date for determining whether the State was required to offer the property at the amount of its fair market value (EDPL § 406(A)) or on terms beneficial to the State (High Law § 30(18)); if the project had been abandoned after July 1, 1978, which was the effective date of EDPL § 406(A), the former owner was entitled to repurchase the property at its fair market value. The former owner was not entitled to disclosure of the appraisal reports and related data relied on by the State, since these constituted intra-agency materials rendered for the State's use and access thereto was properly denied under Pub O § 87(2)(g).124 Ferry Street Realty Corp. v Hennessy, 82 A.D.2d 981, 440 N.Y.S.2d 419, 1981 N.Y. App. Div. LEXIS 14715 (N.Y. App. Div. 3d Dep't 1981).

Appraisal manuals and similar records may properly be withheld by agency since such records may likely consist of inter-agency or intra-agency materials. Comm Pub Acc Rec FOIL-Ad Op 2698.

230. —Building inspections, building plans, surveys and the like

Public Officers Law § 87(2)(a) may not be used to deny access to a report compiled by the state Department of Labor concerning the inspection of certain town library buildings where the applicable provisions of the Labor Law relied on to deny disclosure (Labor Law § 2(12)) does not in any way pertain to the access of the public to records. Comm Pub Acc Rec FOIL—Ad Op 1821.

231. —Eminent domain

Respondent had to disclose amount of settlements reached for real estate parcels acquired under Eminent Domain Procedure Law, even though some owners had not reached settlement; negotiations to settle ongoing litigation do not fall within exemption for matters which would impair present or imminent contract awards (CLS Pub O § 87(2)(c)). Greco v Supp, 171 Misc. 2d 425, 654 N.Y.S.2d 560, 1997 N.Y. Misc. LEXIS 20 (N.Y. Sup. Ct. 1997).

232. —Housing

Housing authority board of commissioners' use of secret ballot for voting purposes in executive session violated Freedom of Information Law and Open Meetings Law, but did not warrant annulment of board's decision to discharge employee, and thus employee's Article 78 proceeding was properly dismissed; claim that board would have voted differently had they done so in open session was of no consequence since board clearly had authority to determine employment issue at executive session, under CLS Pub O § 105. Smithson v Ilion Housing Authority, 130 A.D.2d 965, 516 N.Y.S.2d 564, 1987 N.Y. App. Div. LEXIS 46949 (N.Y. App. Div. 4th Dep't 1987), aff'd, 72 N.Y.2d 1034, 534 N.Y.S.2d 930, 531 N.E.2d 651, 1988 N.Y. LEXIS 2707 (N.Y. 1988).

Resident of middle-income housing developed under N.Y. Priv. Hous. Fin. Law art. 2 was entitled to disclosure of apartment waiting lists under N.Y. Pub. Off. Law §§ 87 and 89 by a city housing department. Under N.Y. Pub. Hous. Law § 3(14), the exemptions of N.Y. Pub. Hous. Law § 159 applied only to public housing projects; disclosure would not constitute an unwarranted invasion of privacy because income information was not included in the lists and was not the type of personal information expressly excluded under N.Y. Pub. Off. Law § 89(2)(b); and New York City, N.Y., R. tit. 28, § 3-02(h)(10) expressly required that such lists be made available. Matter of Thomas v City of N.Y. Dept. of Hous. Preserv. & Dev., 817 N.Y.S.2d 864, 12 Misc. 3d 547, 235 N.Y.L.J. 81, 2006 N.Y. Misc. LEXIS 783 (N.Y. Sup. Ct. 2006).

Provision of 42 USCS § 3610(a) prohibiting disclosure of aspects of conciliation process in resolving discriminatory housing practices do not preclude access to site plan developed as result of conciliation. Comm Pub Acc Rec FOIL-Ad Op 2464.

233. —New York City land use

Community Board 7 of Borough of Manhattan had standing under Freedom of Information Law to compel New York City Planning Board to produce certain documents requested to enable community board to review and make recommendations as to proposed land use, since assessment of proposed project founded on incomplete information would prevent community board from effectively representing those who lived or worked in project area; since there was no clear legislative intent to negate review of planning board's denial of access, motion to dismiss community board's Article 78 petition was properly denied. Community Bd. 7 v Schaffer, 183 A.D.2d 422, 585 N.Y.S.2d 1010, 1992 N.Y. App. Div. LEXIS 6621 (N.Y. App. Div. 1st Dep't), app. dismissed, 80 N.Y.2d 972, 591 N.Y.S.2d 140, 605 N.E.2d 876, 1992 N.Y. LEXIS 3792 (N.Y. 1992), rev'd, 84 N.Y.2d 148, 615 N.Y.S.2d 644, 639 N.E.2d 1, 1994 N.Y. LEXIS 1293 (N.Y. 1994).

Records maintained by New York City Department of Buildings indicating owner of real property and "zoning code and classification of the building" must be made available under Freedom of Information Law, since no grounds for denial of access apply. Comm on Open Gov't F7966.

234. Law and law enforcement, generally

Even if Internal Affairs Bureau file can be said to constitute personnel record under CLS Civ R § 50-a, it is still subject to court's in camera review for purpose of ascertaining whether it contains discoverable information. Showing was sufficient to warrant court's in camera review of Internal Affairs Bureau file in wrongful death action asserting failure of defendants to properly enforce order of protection against husband who allegedly killed his wife where wife's administrator presented 911 tapes, interviews with Internal Affairs officer and depositions demonstrating materiality and relevancy of materials sought. Mastroianni v County of Suffolk, 181 Misc. 2d 1003, 696 N.Y.S.2d 395, 1999 N.Y. Misc. LEXIS 413 (N.Y. Sup. Ct. 1999).

Requested Freedom of Information Law disclosure of Criminal Records Information Management System (CRIMS) data base maintained by Office of Court Administration (OCA) to commercial venture selling electronic records, which planned to resell CRIMS data base for profit over Internet at per transaction prices substantially below those charged by OCA, would contravene clear legislative intent of CLS St Fin § 94-b that OCA will sell electronically kept court data and collect proceeds to defray costs of data processing function. Daily News Publ'g Co. v Office of Court Admin., 186 Misc. 2d 424, 718 N.Y.S.2d 800, 2000 N.Y. Misc. LEXIS 494 (N.Y. Sup. Ct. 2000).

Withholding of information relating to "911 tape" which apparently led to applicant's arrest cannot be justified under Freedom of Information Law § 87(2)(e) since effects of tape recording pertaining to applicant's arrest will not result in harmful effects of disclosure envisioned by language of § 87(2)(e) where trial has already been held and judicial proceedings have been completed. Comm Pub Acc Rec FOIL-Ad Op 2744.

Freedom of Information Law, when applied in conjunction with Personal Privacy Protection Law, may preclude Crime Victims Board from disclosing statements made by crime victim, records obtained by board and used in determining compensation given to victim, and record of amount awarded to victim. Statement of crime victim, record indicating amount of award to victim, and medical or similar records used in determining compensation given to victim were properly withheld by Crime Victims Board, as unwarranted invasion of privacy under CLS Pub O § 89(2)(b). Comm on Open Gov't F7979.

235. —Attorney matters, generally

Material demanded, relative to grading of New York State Bar Examination and administration of appeals by applicants who fail examination, fall within ambit of exempt material. Pasik v State Bd. of Law Examiners, 102 A.D.2d 395, 478 N.Y.S.2d 270, 1984 N.Y. App. Div. LEXIS 18797 (N.Y. App. Div. 1st Dep't 1984).

In Article 78 proceeding by newspaper reporter who sought description of legal services provided to county by outside law firm in connection with environmental lawsuit, court would conduct in camera inspection to determine extent to which descriptive material contained in billing records was protected from disclosure under CLS Pub O § 87(2)(g); documents that would, if prepared by public agency's employees, be exempt from disclosure as intra-agency materials, were similarly exempt when prepared by outside consultants. Orange County Publs. v County of Orange, 168 Misc. 2d 346, 637 N.Y.S.2d 596, 1995 N.Y. Misc. LEXIS 617 (N.Y. Sup. Ct. 1995).

236. — —Attorney work product

In action against nursing home owner and its construction contractor on behalf of resident who died in fall through construction hole, defendants failed to prove that copies of consultant's memoranda, which defendants identified as plan of correction, were privileged where (1) it was unclear whether those materials were copies of documents that plaintiff obtained from Department of Health (DOH) through Freedom of Information Law (FOIL), (2) there was no explanation as to why DOH would release information specifically exempted from FOIL disclosure by CLS Pub O § 87(2)(a), and (3) although defendants claimed that plan was prepared by consultant retained by their attorney to assist in defense of anticipated enforcement proceedings, it was unclear whether defendants had waived right to claim litigation privilege by discussing plan with representatives of defendant contractor. Hale v Odd Fellow & Rebekah Health Care Facility, 188 Misc. 2d 498, 728 N.Y.S.2d 649, 2001 N.Y. Misc. LEXIS 220 (N.Y. Sup. Ct. 2001).

237. — —District Attorney's office

Portions of the office manual of the Deputy Attorney-General and Special Prosecutor for Nursing Homes that reveal confidential methods used for investigating nursing home fraud are exempt from disclosure pursuant to section 87 (subd 2, par [e], cl iv) of the Public Officers Law, which provides that an agency may deny access to records that reveal criminal investigative techniques or procedures, except routine techniques and procedures, one of the criteria for determining whether investigative techniques are non-routine being whether disclosure of those proce-

dures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel; to permit disclosure of these confidential methods which have led to numerous successful prosecutions would have a dramatic impact on law enforcement investigations by alerting prospective defendants to the course those inquiries would be likely to take. Fink v Lefkowitz, 47 N.Y.2d 567, 419 N.Y.S.2d 467, 393 N.E.2d 463, 1979 N.Y. LEXIS 2168 (N.Y. 1979).

Records of a district attorney's office would not be exempt from discovery by the State Commission on Judicial Conduct under Pub O § 87(2), since Jud § 42(3) provides that the Commission may request and receive from any agency of the state or political subdivision thereof or any public authority such assistance, information and data as will enable it properly to carry out its function. In re Hendley, 116 Misc. 2d 1044, 457 N.Y.S.2d 165, 1982 N.Y. Misc. LEXIS 3997 (N.Y. Sup. Ct. 1982).

Disclosure by district attorney of names of persons involved in previously disposed of criminal case will not result in unwarranted invasion of personal privacy since such individuals have already been identified by any number of means including judicial proceedings and records and through statements which police officers may have provided in performance of their official duties; thus, disclosure of such information cannot be justifiably withheld. Comm Pub Acc Rec FOIL-Ad Op 2644.

238. —Criminal investigations, generally

A criminal prosecution is a particular kind of enforcement proceeding where disclosure of particular kinds of investigatory records while a case is pending would generally "interfere with enforcement proceedings." This does not mean that every document in a law enforcement agency's criminal case file is automatically exempt from disclosure simply because kept there; the agency must identify the generic kinds of documents for which the exemption is claimed, and the generic risks posed by disclosure of these categories of documents. Lesher v Hynes, 19 N.Y.3d 57, 945 N.Y.S.2d 214, 968 N.E.2d 451, 2012 N.Y. LEXIS 621 (N.Y. 2012).

N.Y. Pub. Off. Law § 87(2)(e)(i) ceases to apply after enforcement investigations and any ensuing judicial proceedings have run their course. Thus, the exemption does not bar disclosure of records compiled for law enforcement purposes in a criminal matter where the prosecution has been completed, absent some unusual circumstance such as the prospect that disclosure might compromise a related case. Lesher v Hynes, 19 N.Y.3d 57, 945 N.Y.S.2d 214, 968 N.E.2d 451, 2012 N.Y. LEXIS 621 (N.Y. 2012).

Petitioner, whose proposal to construct and operate an amusement park has not been acted upon, allegedly as the result of a character investigation of petitioner conducted by the New York City Department of Investigation, is entitled to inspect a document in the department's possession containing his own testimony; however, the report of the Organized Crime Control Bureau in connection with the character investigation of petitioner, although not requested in a criminal investigation, is nonetheless exempt from disclosure as an investigatory report compiled for law enforcement purposes (Public Officers Law, § 87, subd 2, par [e]) since the report contains numerous criminal activities of alleged organized crime figures useful in the work of the police and would, if disclosed, reveal "confidential information relating to a criminal investigation", critically impede police investigation of organized crime and possibly result in harm to innocent individuals. Glantz v Lupkin, 100 Misc. 2d 453, 419 N.Y.S.2d 34, 1979 N.Y. Misc. LEXIS 2483 (N.Y. Sup. Ct. 1979).

A motion by certain landlords, who were the subjects of an Attorney General's investigation concerning alleged fraudulent or illegal activity by the landlords in violation of applicable rent stabilization laws, for an order directing the Attorney General to surrender certain information pursuant to the Freedom of Information Law (Pub O, Art 6) would be denied, since the Attorney General had complied in part with the landlords' request for disclosure and had denied others of their requests, so that if the landlords were dissatisfied the proper course would be to pursue the administrative remedies provided by Pub O §§ 89(4)(a), 89(4)(b). Wiener v Abrams, 119 Misc. 2d 970, 464 N.Y.S.2d 919, 1983 N.Y. Misc. LEXIS 3629 (N.Y. Sup. Ct. 1983).

Pub O § 87(2)(e)(i), (iii) does not automatically prevent disclosure of records pertaining to investigation of decedent's death to decedent's parents in connection with efforts to prevent decedent's husband from obtaining letters of administration since FOIL exemptions do not create evidentiary privilege of their own force and petitioner should not, therefore, be deprived of opportunity to demonstrate that their interest outweighs common law "public interest" privilege in confidentiality; decedent's parents are not entitled to disclosure of records pertaining to investigation of decedent's death at this time since government's interest in preserving confidentiality of investigation into possible homicide in which decedent's husband has not been excluded as suspect far outweighs petitioners' interest in securing information in support of their application for letters of administration relative to the estate of their deceased daughter. In re Estate of Schwartz, 130 Misc. 2d 786, 497 N.Y.S.2d 834, 1986 N.Y. Misc. LEXIS 2423 (N.Y. Sur. Ct. 1986).

Appellants' contentions that settlement must be rejected because its provisions limiting access to New York City police department's intelligence files violate New York's FOIL, is without merit, since District Court correctly noted that New York statute deals with access to, rather than preservation of, public documents, and such limitation of public access as District Court approved is temporary, maximum of one year, and seems essence of reasonable compromise of parties' wishes. Handschu v Special Services Div., 787 F.2d 828, 1986 U.S. App. LEXIS 23873 (2d Cir. N.Y. 1986).

347 affidavits compiled during the Westchester District Attorney's investigation of the Ossining Fire Department 50/50 Lottery are accessible under Public Officers Law § 87 since, although the affidavits were obtained in connection with a criminal investigation, such investigation is closed and no criminal charges resulted from it and therefore the harmful effects of disclosure envisioned by § 87(2)(e) would not arise and since CPL § 240.20 does not mandate denial of access since that section concerns information that may be disclosed by a prosecutor to a defendant in the context of an ongoing criminal proceeding and does not apply to a request unrelated to a criminal trial where the person requesting the information is not the defendant. Com Pub Acc Rec FOIL—Ad Op 1881.

239. — —Accomplices; co-defendants

Criminal defendant was not entitled to Freedom of Information Law (FOIL) disclosure of arrest records and documents relating to investigation of his case and documents of related cases involving his accomplices, as requested materials were compiled for law enforcement purposes, FOIL disclosure would interfere with orderly process of disclosure under CLS CPL art 240, and FOIL disclosure would create substantial likelihood of delay in adjudication of criminal proceeding. Pittari v Pirro, 258 A.D.2d 202, 696 N.Y.S.2d 167, 1999 N.Y. App. Div. LEXIS 8700 (N.Y. App. Div. 2d Dep't), app. denied, 94 N.Y.2d 755, 701 N.Y.S.2d 712, 723 N.E.2d 567, 1999 N.Y. LEXIS 3909 (N.Y. 1999).

240. — —Breathalyzer matters

Information relating to manufacturer's name, address, and model number of breathalyzer machine and also copy of rules and regulation establishing procedures for administration of breath tests should be made available for public inspection since information is not compiled for law enforcement purposes and there exists no other ground for denial. Comm Pub Acc Rec FOIL-Ad Op 2770.

241. — —Criminal histories

Witness' criminal convictions and any pending criminal action against him were not protected from disclosure under invasion of privacy exception to Freedom of Information Law, since they were matters of public record, and all governmental agency records are presumptively available for public inspection without consideration of status, need, good faith or purpose. Thompson v Weinstein, 150 A.D.2d 782, 542 N.Y.S.2d 33, 1989 N.Y. App. Div. LEXIS 7232 (N.Y. App. Div. 2d Dep't 1989).

Although criminal history records or "rap sheets" compiled by Division of Criminal Justice Services are exempt from disclosure under Freedom of Information Law (FOIL), CLS CPL § 240.45(1) requires disclosure to defendant of statements, criminal convic-

tions, and pending criminal charges pertaining to witnesses whom prosecutor intends to call at trial; FOIL exempts such material from disclosure if witness does not testify, but once such material is handed over by prosecutor and witness testifies, it is no longer exempt. In convicted murderer's Article 78 proceeding under Freedom of Information Law (FOIL) to compel district attorney to disclose criminal history records of prosecution witnesses who testified at his trial, those records were not exempt from disclosure by reason of invasion of privacy exceptions to FOIL where request was narrowed on appeal by agreement that records be redacted of personal information. Petitioner could not obtain such information under FOIL if he or his attorney obtained it from prosecutor in prior proceeding, unless he and his attorney no longer possessed that information. District Attorney had burden of proving that copies of requested records were previously furnished to petitioner or his attorney. If copies of requested records were previously furnished to petitioner or his attorney in prior proceeding, but petitioner and his attorney no longer possessed them, other copies had to be furnished unless district attorney no longer possessed them and thus could not comply. Williams v Erie County DA, 255 A.D.2d 863, 682 N.Y.S.2d 316, 1998 N.Y. App. Div. LEXIS 12053 (N.Y. App. Div. 4th Dep't 1998).

In proceeding under Freedom of Information Law (FOIL) to compel records access officer of district attorney's office to produce certain records related to indictment underlying petitioner's conviction of certain crimes, there was no merit in officer's claim that anti-contact rule in CLS Code of Prof Respons DR 7-104 prohibited her from directly communicating with petitioner and thus from responding to his FOIL request, because petitioner was represented by attorney in pending appeal from his conviction, his request concerned subject of that representation, and his attorney had refused to waive anticontact rule, where (1) standing of one who seeks access to records under FOIL is as member of the public and is neither enhanced nor restricted because he is also litigant or potential litigant, (2) thus, petitioner's status as criminal defendant under prosecution by officer's office was not legitimate concern for officer, and (3) although criminal prosecution and FOIL request may involve same "subjects," they are clearly different "matters" under anti-contact rule. Mims v Chichester, 281 A.D.2d 256, 722 N.Y.S.2d 30, 2001 N.Y. App. Div. LEXIS 2466 (N.Y. App. Div. 1st Dep't 2001).

Criminal history records under control of Division of Criminal Justice Services are exempted from disclosure by CLS Exec § 837(8), and thus are exempt from disclosure under Freedom of Information Law. Comm on Open Gov't F7974.

242. — —Fingerprints

In proceeding under Freedom of Information Law to compel production of fingerprint tests related to fabrication of fingerprint evidence in petitioner's criminal case, special prosecutor failed to establish that requested information was exempt from disclosure because it related to continuing criminal investigation of allegations against state police officers, and would reveal non-routine criminal investigative techniques, since (1) process of locating and identifying fabricated fingerprints apparently constitutes routine methodology, and (2) mere assertion that special prosecutor's investigation was continuing, without particularity, did not justify exemption. Muniz v Roth, 163 Misc. 2d 293, 620 N.Y.S.2d 700, 1994 N.Y. Misc. LEXIS 559 (N.Y. Sup. Ct. 1994).

243. — —Pending cases; ongoing investigations

Agency's assertion that disclosure of police records to defendant in pending criminal prosecution would interfere with that proceeding is sufficiently particularized justification for denial of access to records under Freedom of Information Law. Legal Aid Soc'y v New York City Police Dep't, 274 A.D.2d 207, 713 N.Y.S.2d 3, 2000 N.Y. App. Div. LEXIS 8722 (N.Y. App. Div. 1st Dep't), app. denied, 95 N.Y.2d 956, 722 N.Y.S.2d 469, 745 N.E.2d 389, 2000 N.Y. LEXIS 3925 (N.Y. 2000).

Police department failed to show that the documents requested under the Freedom of Information Law were exempt or should be sealed under N.Y. Pub. Off. Law §§ 87(2)(e)(i), 89(2)(a) because it failed to provide any information on the generic types of documents or categories of documents that were allegedly exempt from disclosure, or to suggest a reason why the records could not be redacted so as to delete details tending to identify the victim's identity. Matter of Loevy & Loevy v New York City Police Dept., 957 N.Y.S.2d 628, 38 Misc. 3d 950, 2013 N.Y. Misc. LEXIS 46 (N.Y. Sup. Ct. 2013).

A city councilman making a report to police of a threat received by him from an individual because he cast a no vote on a certain matter before the city council is entitled to access to a copy of such report since the disclosure would not constitute an unwarranted invasion of personal privacy under Public Officers Law § 87(2)(b) where the councilman already knew the identity of the person who made the threat, since the disclosure, while of intra-agency materials as provided for in § 87(2)(g), appeared to be of essentially factual information, and since the disclosure would not interfere with ongoing law enforcement investigations as provided for in § 87(2)(e). Comm Pub Acc Rec FOIL—Ad Op 1775.

Criminal records which relate to ongoing investigation may be withheld where disclosure will interfere with investigation. Comm Pub Acc Rec FOIL-Ad Op 2681.

244. — —Physical evidence; photographs

Court properly dismissed proceeding to compel agency to disclose, under Freedom of Information Law, records and physical evidence compiled during criminal investigation culminating in petitioner's conviction, since physical evidence requested, such as tools and items of clothing, did not fall within definition of "record" under CLS Pub O § 86, and requests involving names, addresses, and statements of confidential witnesses, grand jury testimony, and reports which would reveal non-routine criminal investigative techniques for processing homicide scene were all exempt from disclosure under CLS Pub O § 87. Allen v Strojnowski, 129 A.D.2d 700, 514 N.Y.S.2d 463, 1987 N.Y. App. Div. LEXIS 45390 (N.Y. App. Div. 2d Dep't), app. dismissed, app. denied, 70 N.Y.2d 871, 523 N.Y.S.2d 493, 518 N.E.2d 5, 1987 N.Y. LEXIS 19075 (N.Y. 1987).

Convicted murderer who sought disclosure under Freedom of Information Law of investigatory file compiled by state police, which led to his arrest and conviction, was not entitled to disclosure of portions of file which related to laboratory examinations of items of evidence seized from crime scene and elsewhere, since scientific evidence (excluding ballistics and fingerprint tests) may be exempted from disclosure; further, murderer was not entitled to disclosure of portions of file which related to method by which state police gathered information against him and his accomplices from private businesses, since disclosure of such information would enable future violators of law to tailor their conduct to avoid detection. Spencer v New York State Police, 187 A.D.2d 919, 591 N.Y.S.2d 207, 1992 N.Y. App. Div. LEXIS 13458 (N.Y. App. Div. 3d Dep't 1992).

Convict's request under Freedom of Information Law should have been remanded to police department for response to request for ballistics reports where department's incomplete and belated response to request had neither turned over reports nor explained why they were exempt. Coleman v N.Y. City Police Dep't, 282 A.D.2d 390, 723 N.Y.S.2d 494, 2001 N.Y. App. Div. LEXIS 4146 (N.Y. App. Div. 1st Dep't 2001).

In proceeding under Freedom of Information Law, petitioner was entitled to disclosure of photographs taken by police of 43 members of antiabortion organization who were arrested at demonstration, notwithstanding that photographs were compiled for law enforcement purposes, since there was no indication as to how disclosure would interfere with law enforcement investigations or judicial proceedings, or deprive persons of right to fair trial; further, photographs would not be held exempt from disclosure as unwarranted invasion of privacy on basis of mere conclusory assertions. Planned Parenthood of Westchester, Inc. v Town Bd. of Greenburgh, 154 Misc. 2d 971, 587 N.Y.S.2d 461, 1992 N.Y. Misc. LEXIS 346 (N.Y. Sup. Ct. 1992).

An arrestee has the right to obtain copies of mug shots pertaining to him upon presenting reasonable proof of identity. Comm Pub Acc Rec FOIL-Ad Op 2811.

245. — —Sealed records; expunged materials

Final reports of the Kings County District Attorney's Conviction Review Unit are exempt from disclosure under the Freedom of Information Law unless the individual subject of the report consents to its release; the section vests the right to unseal official

records of a prosecution with the individual whose conviction was vacated, and it is for that individual to weigh and decide whether the disclosure for public purposes is worth the potential stigma associated with the public's access. Matter of New York Times Co. v District Attorney of Kings County, 179 A.D.3d 115, 111 N.Y.S.3d 691, 2019 N.Y. App. Div. LEXIS 8425 (N.Y. App. Div. 2d Dep't 2019).

Supreme court did not err in denying a newspaper's petition to review redactions to a final report of the Kings County District Attorney's Conviction Review Unit (CRU) relating to the exoneration of individuals because absent a CPL 160.50 waiver, the CRU's final reports were not subject to disclosure under the Freedom of Information Law. Matter of New York Times Co. v District Attorney of Kings County, 179 A.D.3d 115, 111 N.Y.S.3d 691, 2019 N.Y. App. Div. LEXIS 8425 (N.Y. App. Div. 2d Dep't 2019).

With respect to a Kings County District Attorney's Conviction Review Unit report where the exonerated individual consented to the report's release, challenges to certain redactions cannot be resolved without an in camera review of the redacted material. Matter of New York Times Co. v District Attorney of Kings County, 179 A.D.3d 115, 111 N.Y.S.3d 691, 2019 N.Y. App. Div. LEXIS 8425 (N.Y. App. Div. 2d Dep't 2019).

Order denying a newspaper's petition to review redactions to a final report of the Kings County District Attorney's Conviction Review Unit (CRU) relating to the exoneration of an arrestee was modified by directing the District Attorney to produce the unredacted report for an in camera inspection because without an in camera review of the arrestee's report, it was impossible to determine whether the redacted material falls within those exemptions. Matter of New York Times Co. v District Attorney of Kings County, 179 A.D.3d 115, 111 N.Y.S.3d 691, 2019 N.Y. App. Div. LEXIS 8425 (N.Y. App. Div. 2d Dep't 2019).

Tape recordings made in course of criminal investigation, but not used at trial, sought by newspaper in defending libel action, are not exempt from disclosure under CLS Pub Off § 87(2)(b), where tapes were not sealed pursuant to § 87(2)(a), plaintiff in libel suit is former public official who has narrower expectation of privacy, tapes could be relevant to newspaper's defense of libel action, and newspaper has no other source to obtain information, despite fact that much of tapes' content was revealed through testimony at criminal trial. Tape recordings made in course of criminal investigation and sealed after acquittal of defendants in ensuing criminal action pursuant to CLS CPL 160.50(1)(c), sought by newspaper in defending libel action, are exempt from disclosure under CLS Pub Off § 87(2)(a). Journal Pub. Co. v Office of Special Prosecutor, 131 Misc. 2d 417, 500 N.Y.S.2d 919, 1986 N.Y. Misc. LEXIS 2512 (N.Y. Sup. Ct. 1986).

246. — —Telephone calls, including 911 recordings

On FOIL application to compel police department's disclosure of records pertaining to investigation of harassing telephone calls made to applicant at her home and at her office at United Nations, interviews of persons recorded who had no connection with applicant's harassment complaint implicated personal privacy concerns and were not subject to disclosure. FOIL applicant was entitled to disclosure of videotape of alleged perpetrator making telephone calls and written records of investigation conducted by United Nations but turned over to New York law enforcement authorities in connection with latter's investigation where such information was not exempt under federal law in present circumstances involving neither search of United Nations premises nor interference with United Nations property or assets. Letters and reports describing investigation should be provided in redacted form, with deletion of any information regarding placement of telephone "traps" and surveillance cameras, because deleted information did not describe "routine" criminal investigation techniques or procedures under CLS Pub O § 87(2)(e)(iv), and any information that was "internal government exchange" would be protected by inter/intra agency exemption in CLS Pub O § 87(2)(g). Burtis v New York Police Dep't, 240 A.D.2d 259, 659 N.Y.S.2d 875, 1997 N.Y. App. Div. LEXIS 6568 (N.Y. App. Div. 1st Dep't 1997).

Police were ordered to produce 911 call recordings and other materials related to a woman's death in estates' civil case against a doctor because the records were material and necessary and the police failed to show disclosure would affect personal safety, or any expectation of confidentiality, under the statutory exemptions. Estate of Gilbert v Hackett, 62 Misc. 3d 691, 88 N.Y.S.3d 775, 2018 N.Y. Misc. LEXIS 5040 (N.Y. Sup. Ct. 2018).

247. — —Warrants; "use of force" records

Police department's "Use of Force" forms, while not personnel records, were nonetheless exempt from disclosure as intra-agency materials which were not statistical or factual tabulations or data, instructions to staff that affect the public or final agency policy or determinations. Gannett Co. v James, 86 A.D.2d 744, 447 N.Y.S.2d 781, 1982 N.Y. App. Div. LEXIS 15305 (N.Y. App. Div. 4th Dep't), app. denied, 56 N.Y.2d 502, 435 N.E.2d 1099, 1982 N.Y. LEXIS 5255 (N.Y. 1982).

Newspaper was properly denied disclosure, under Freedom of Information Law, of police reports regarding firearms discharge. Newsday, Inc. v New York City Police Dep't, 133 A.D.2d 4, 518 N.Y.S.2d 966, 1987 N.Y. App. Div. LEXIS 49560 (N.Y. App. Div. 1st Dep't 1987).

In tort action against city arising from shooting of plaintiff by city police officer, court should not have directed city to produce for in camera inspection Police Department Internal Affairs Division records relating to previous incidents involving officer, since such records constituted predecisional intra-agency materials subject to CLS Civ R § 50-a(2) and CLS Pub O § 87(2)(g), and plaintiff failed to set forth any facts from which court could conclude that intrusion into their confidentiality was warranted where shooting was not alleged to be unprovoked and plaintiff offered only conclusory allegations of negligent training and supervision. Court properly directed city to turn over Civilian Complaint Review Board (CCRB) records concerning 3 prior incidents involving officer, and properly permitted plaintiff to conduct deposition on certain events that occurred earlier than incident in which plaintiff was shot, since prior incidents were relevant to issue of notice regarding officer's need for training in appropriate use of force. Flores v City of New York, 207 A.D.2d 302, 615 N.Y.S.2d 400, 1994 N.Y. App. Div. LEXIS 8370 (N.Y. App. Div. 1st Dep't 1994).

Records concerning a conviction of a prisoner are available to the prisoner where the records apparently pertain to a closed case; information pertaining to the search warrant involved and any surveillance activity by police, although not available under the Freedom of Information Law since such information would be in possession of a court, is available under Judiciary Law § 255 upon the prisoner's request to the clerk of the appropriate court. Com Pub Acc Rec FOIL—Ad Op 1867.

While denial of access to files of a district attorney giving the names of members of surveillance team employed in New York and in Pontiac, Michigan on basis of Public Officer Law § 87(2)(e) is improper, since it appeared the criminal investigation to which the requested records relate had been completed, access to the records in question may properly be denied under Public Officers Law § 87(2)(f) since the disclosure of such information would "endanger the life or safety of a particular person". Comm Pub Acc Rec FOIL—Ad Op 1903.

Information concerning use of deadly force by police departments, including various areas of statistical information regarding shootings, and rules and regulations and other procedural mechanisms employed by police departments concerning monitoring and investigation of incidents in which deadly force may have been involved is subject to public access to extent that such records exist in terms of statistics from departments and in cases where determinations have been rendered, from departments involved and/or from courts in which proceedings were determined. Comm Pub Acc Rec FOIL-Ad Op 2736.

248. — —Witness matters

Complaint follow-up reports (commonly referred to as DD5's) are not categorically exempt from disclosure as intra-agency material under CLS Pub O § 87(2)(g), since they contain such factual data as names, addresses, and physical descriptions of crime victims, witnesses and perpetrators, certain checklists, police officers' notes of "details," and factual accounts of witnesses' observations (regardless of whether such observations are reli-

able or not); however, any impressions, recommendations, or opinions recorded in complaint follow-up report would not constitute factual data and would be exempt from disclosure. Gould v New York City Police Dep't, 89 N.Y.2d 267, 653 N.Y.S.2d 54, 675 N.E.2d 808, 1996 N.Y. LEXIS 3575 (N.Y. 1996).

Substance of District Attorney's investigators' interviews with 36 witnesses, under a promise of confidentiality, is not subject to disclosure, notwithstanding that no criminal charges were filed as a result of the investigation, and notwithstanding that the names and addresses of the witnesses have been provided. Hawkins v Kurlander, 98 A.D.2d 14, 469 N.Y.S.2d 820, 1983 N.Y. App. Div. LEXIS 20372 (N.Y. App. Div. 4th Dep't 1983).

Court properly dismissed proceeding to compel agency to disclose, under Freedom of Information Law, records and physical evidence compiled during criminal investigation culminating in petitioner's conviction, since physical evidence requested, such as tools and items of clothing, did not fall within definition of "record" under CLS Pub O § 86, and requests involving names, addresses, and statements of confidential witnesses, grand jury testimony, and reports which would reveal non-routine criminal investigative techniques for processing homicide scene were all exempt from disclosure under CLS Pub O § 87. Allen v Strojnowski, 129 A.D.2d 700, 514 N.Y.S.2d 463, 1987 N.Y. App. Div. LEXIS 45390 (N.Y. App. Div. 2d Dep't), app. dismissed, app. denied, 70 N.Y.2d 871, 523 N.Y.S.2d 493, 518 N.E.2d 5, 1987 N.Y. LEXIS 19075 (N.Y. 1987).

New York City Police Department (NYPD) would be ordered to fully disclose documents it had compiled in criminal investigation of sexual assault where such documents were requested by university (employer of assailant) in connection with its defense of civil suit brought by victim, and where (1) NYPD did not allege that anyone had been promised anonymity in exchange for cooperation in investigation, (2) names and addresses of witnesses would have been discoverable in criminal trial, and (3) victim's commencement of civil suit had put assault in issue and had opened topic to inquiry. Cornell University v New York Police Dep't, 153 A.D.2d 515, 544 N.Y.S.2d 356, 1989 N.Y. App. Div. LEXIS 10665 (N.Y. App. Div. 1st Dep't 1989), app. denied, 75 N.Y.2d 707, 554 N.Y.S.2d 476, 553 N.E.2d 1024, 1990 N.Y. LEXIS 554 (N.Y. 1990).

It was abuse of discretion for police commissioner to deny inmate's request under Freedom of Information Law based on possibility that information sought was exempt from disclosure on personal privacy grounds, on confidential information grounds, and on intra-agency grounds, where inmate sought copy of statements given to police officers involving certain arrestees because he believed that arrangement had been made between one or more of them which resulted in testimony against him; thus, inmate's Article 78 petition would be granted to extent of directing police commissioner to review requested records and either release them to inmate or specify, with particularity, reasons for refusing to do so. Burton v Slade, 166 A.D.2d 352, 561 N.Y.S.2d 637, 1990 N.Y. App. Div. LEXIS 12839 (N.Y. App. Div. 1st Dep't 1990).

City erred in refusing to release unredacted copies of General Offense Reports to petitioner on ground that names and addresses of victims and witnesses were sought for commercial or fund-raising purpose since petitioner wanted those reports as evidence of landowner's knowledge of prior criminal activity before commencing action against owner following assault on petitioner in basement of apartment building where she was living; such use of information in maintenance of civil action to redress alleged tortious wrong was not "commercial" activity. DeCorse v City of Buffalo, 239 A.D.2d 949, 659 N.Y.S.2d 604, 1997 N.Y. App. Div. LEXIS 6376 (N.Y. App. Div. 4th Dep't 1997).

Court properly denied Freedom of Information Law application to compel district attorney to disclose statements of witnesses who testified at petitioner's criminal trial, because such statements were protected by public interest privilege, and "compelling and particularized need" for disclosure was not shown. Kassebaum v Morgenthau, 270 A.D.2d 71, 704 N.Y.S.2d 61, 2000 N.Y. App. Div. LEXIS 2587 (N.Y. App. Div. 1st Dep't), app. denied, 95 N.Y.2d 756, 712 N.Y.S.2d 448, 734 N.E.2d 760, 2000 N.Y. LEXIS 1659 (N.Y. 2000).

Priest who was interviewed by police after someone alleged that he sexually abused several boys in his parish did not have an expectation of privacy in statements police collected when they conducted an investigation, and the trial court ordered a local government to provide a copy of documents that remained in a police department's files after the investigation was closed, redacted to mask the identities of the alleged victims and individuals other than the priest who were interviewed. Inscho v Tioga County Legislature, 766 N.Y.S.2d 754, 2 Misc. 3d 230, 2003 N.Y. Misc. LEXIS 1386 (N.Y. Sup. Ct. 2003).

Because a city did not demonstrate the applicability of any exemption under N.Y. Pub. Off. Law § 87(2)(b)(iv), (e)(iii), (f), two witness statements, as well as the names and addresses of the witnesses, were not exempt from disclosure. Matter of Carnevale v City of Albany, 68 A.D.3d 1290, 891 N.Y.S.2d 495, 2009 N.Y. App. Div. LEXIS 8944 (N.Y. App. Div. 3d Dep't 2009).

249. —Litigation, generally

A report written by independent counsel evaluating the possibility of a county's recovery in a particular civil lawsuit did not fall within any of the three exceptions set forth in Pub O § 87(2)(g), which establishes exceptions from disclosure of specific intra-agency material. Austin v Purcell, 103 A.D.2d 827, 478 N.Y.S.2d 64, 1984 N.Y. App. Div. LEXIS 19465 (N.Y. App. Div. 2d Dep't 1984).

Details of agreement by which power companies settled lawsuit involving purchase and sale of electricity were exempt from disclosure under CLS Pub O § 87(2)(d) where one party to agreement was involved in negotiations and litigation with other companies from which it purchased electricity, and disclosure would jeopardize its ability to negotiate effectively to obtain lowest rates for its customers. Glens Falls Newspaper, Inc. v Counties of Warren & Washington Indus. Dev. Agency, 257 A.D.2d 948, 684 N.Y.S.2d 321, 1999 N.Y. App. Div. LEXIS 779 (N.Y. App. Div. 3d Dep't 1999).

Supreme court did not err in withholding documents because they fell within the scope of the intra-agency exemption for pre-decisional, nonfinal discussions and recommendations by employees within the agency used to assist the decision makers in formulating a determination; the documents consisted of internal discussions on the entirely separate decision regarding what information to disclose to the public about pending litigation and how best to do so. Matter of Smith v New York State Off. of the Attorney Gen., 116 A.D.3d 1209, 984 N.Y.S.2d 190, 2014 N.Y. App. Div. LEXIS 2444 (N.Y. App. Div. 3d Dep't), app. denied, 24 N.Y.3d 912, 26 N.E.3d 782, 2 N.Y.S.3d 843, 2014 N.Y. LEXIS 3448 (N.Y. 2014).

Trustees of union free school district violated publication provisions of CLS Pub O § 106 when they failed to publish minutes of executive session which had been held ostensibly to discuss status of certain litigation, despite trustees' claim that discussions were exempt from disclosure under Freedom of Information Law, since, even if meeting involved such discussions, no basis existed for trustees to avoid publication of minutes pertaining to "final determination" of action and "date and vote thereon" as required by § 106; moreover, fact that trustees characterized vote as taken by "consensus" did not exclude recording of vote as "formal vote," and fact that vote taken was not "final determination" of litigation did not exclude recording of determination as determination of matter voted on. Previdi v Hirsch, 138 Misc. 2d 436, 524 N.Y.S.2d 643, 1988 N.Y. Misc. LEXIS 340 (N.Y. Sup. Ct. 1988).

250. — —Courts and court records, generally

Even assuming the applicability of the Freedom of Information Law (Public Officers Law, § 84 *et seq.*), the public interest functions of the Mayor's Committee on the Judiciary, which makes recommendations to the Mayor concerning judicial appointments, and the necessity for confidentiality bar petitioner from access to the records of the committee regarding the committee's withdrawal of approval of him as a prospective judicial appointee; the interest of an individual in gaining access to confidential information must give way to the overriding public interest in assuring that only the most qualified candidates are appointed to judicial office. Baumgarten v Koch, 97 Misc. 2d 449,

411 N.Y.S.2d 487, 1978 N.Y. Misc. LEXIS 2819 (N.Y. Sup. Ct. 1978).

"Agency" as defined in freedom of information law excludes "judiciary"; freedom of information law does not apply to courts and court records. Comm Pub Acc Rec FOIL-Ad Op 2516.

251. — —Grand jury matters

Grand jury testimony is non-disclosable under Freedom of Information Law since such testimony is "specifically exempted from disclosure by state...statute." Newton v District Attorney of Bronx County, 186 A.D.2d 57, 588 N.Y.S.2d 269, 1992 N.Y. App. Div. LEXIS 10741 (N.Y. App. Div. 1st Dep't 1992).

Grand jury minutes are court records, rather than agency records, and thus are exempt from ambit of Freedom of Information Law, CLS Pub O §§ 86(1) and (3). Mullgrav v Santucci, 195 A.D.2d 786, 600 N.Y.S.2d 382, 1993 N.Y. App. Div. LEXIS 7280 (N.Y. App. Div. 3d Dep't 1993).

252. —Police matters, generally

Petitioner was entitled to vacatur of police commissioner's denial of his request for records under Freedom of Information Law (FOIL) where (1) records sought were reasonably described so that search could be made, but commissioner's denial implied that records could not be located, (2) records were not directly addressed by commissioner, and (3) applicable FOIL exemptions were not identified by commissioner; commissioner failed to establish that requested material fell within ambit of statutory exemptions. Cromwell v Ward, 183 A.D.2d 459, 584 N.Y.S.2d 295, 1992 N.Y. App. Div. LEXIS 6812 (N.Y. App. Div. 1st Dep't 1992).

City police department was entitled to dismissal of Freedom of Information Law application challenging denial of petitioner's request for documents pertaining to results of investigations of her complaints to department's Internal Affairs Bureau (IAB) where (1) petitioner failed to articulate demonstrable factual basis for believing that requested documents existed, after records access officer had certified that petitioner's complaints did not generate investigation and that diligent and thorough search had located no such documents, and (2) although petitioner's complaints were logged in by IAB and then forwarded to proper precinct, one complaint was against civilian and was deemed civil rather than criminal, and the other claimed only police officer's refusal to take complaint against civilian. Dos-Santos v New York City Police Dep't, 255 A.D.2d 205, 679 N.Y.S.2d 819, 1998 N.Y. App. Div. LEXIS 12415 (N.Y. App. Div. 1st Dep't 1998).

Applicant may be properly denied access to record in possession of the Internal Affairs Section of the New York City Police Department of an investigation made with respect to the possibility of bribery of officers and the disciplinary action which may be brought, where Civil Rights Law § 50-a specifically exempts police officers' personnel record used to evaluate performance for continued employment or promotion from disclosure. Applicant may be properly denied access to record in possession of the Internal Affairs Section of the New York City Police Department of an investigation made with respect to the possibility of bribery of officers and the disciplinary action which may be brought, where the record was essentially intra-agency in nature. Comm Pub Acc Rec FOIL—Ad Op 1768.

Statements by police officers, although compiled for law enforcement purposes, may be considered "intra-agency materials" and not subject to disclosure where materials are reflective of advice, opinion, suggestion, impression and the like. Comm Pub Acc Rec FOIL-Ad Op 2644.

New York City Police Department may not engage in blanket denials of access to "DD-5's" generally, since "factual context," specific contents of records, and effects of disclosure are factors that must be considered in determining extent to which DD-5's may be withheld or, conversely, must be disclosed. Comm on Open Gov't F7968.

253. — —Arrest records

Petition in Article 78 proceeding to compel production, under New York State Freedom of Information Law (FOIL), of police records concerning release of persons arrested in riot was properly dismissed where (1) police chief's failure to perform ministerial act of filing certificate of disposition under CLS CPL § 160.50(3)(j) did not negate legislative intent, in enacting CLS CPL § 160.50, that records of persons arrested and never prosecuted be sealed, (2) thus, records sought were exempt from FOIL disclosure under CLS Pub O § 87(2)(a), and (3) requested information might also be exempt from public disclosure as "unwarranted invasion of personal liberty" under CLS Pub O § 89(2)(a). Leibowitz v Safir, 251 A.D.2d 581, 674 N.Y.S.2d 736, 1998 N.Y. App. Div. LEXIS 7500 (N.Y. App. Div. 2d Dep't), app. denied, 92 N.Y.2d 813, 680 N.Y.S.2d 906, 703 N.E.2d 764, 1998 N.Y. LEXIS 3687 (N.Y. 1998).

Fact that "lead sheets" made in connection with inmate's arrest and conviction were provided to defense counsel at inmate's criminal trial did not mandate wholesale disclosure of information contained therein under Freedom of Information Law (FOIL); inmate was entitled to production of documents only to extent they were not specifically exempt under FOIL. De Oliveira v Wagner, 274 A.D.2d 904, 711 N.Y.S.2d 592, 2000 N.Y. App. Div. LEXIS 8284 (N.Y. App. Div. 3d Dep't 2000).

State Police records pertaining to petitioner's arrest and conviction for certain sex offenses were not exempt from disclosure under CLS Civ R § 50-b, although petitioner was not merely "charged," but had been convicted, and thus disclosure was properly directed under Freedom of Information Law. Karlin v McMahon, 279 A.D.2d 717, 719 N.Y.S.2d 613, 2001 N.Y. App. Div. LEXIS 276 (N.Y. App. Div. 3d Dep't), rev'd, 96 N.Y.2d 842, 729 N.Y.S.2d 435, 754 N.E.2d 194, 2001 N.Y. LEXIS 1448 (N.Y. 2001).

Defendants' request for disclosure and inspection of statistical data relating to the arrest and prosecution of persons for prostitution-related offenses, for the purpose of establishing their claim that the law under which they are charged (Penal Law, art 230) is unconstitutionally enforced by the District Attorney and city police, who allegedly routinely enforce section 230.00 of the Penal Law against female prostitutes while they do not enforce section 230.03 against their male patrons, is denied since it does not fit under the categories of discoverable material described in CPL 240.20 and 240.40, is not discoverable on the authority of *Brady v Maryland* (373 US 83), as it does not address the guilt or innocence of the defendants, and, moreover, the claim of discriminatory enforcement should not be treated as a defense to the criminal charge, but as an application to the court for a dismissal or quashing of the prosecution upon constitutional grounds; however, if defendants should seek and obtain the data under the Freedom of Information Law (Public Officers Law, art 6, §§ 85-90), the court will allow them to renew their motions for an evidentiary hearing and for dismissal of the accusatory instruments, if they should then decide that such motions would be appropriate. People v Nelson, 103 Misc. 2d 847, 427 N.Y.S.2d 194, 1980 N.Y. Misc. LEXIS 2205 (N.Y. City Ct. 1980).

General arrest procedures found in a town's rules and regulations manual are available under Public Officers Law § 87 where such records may not be denied under § 87(2)(g) as "intra-agency materials" because they constitute "instructions to staff that affect the public" accessible under § 87(2)(g)(ii), and where they may not be denied on the basis of § 87(2)(e) since they were not compiled for law enforcement purposes but rather in the ordinary course of business. Com Pub Acc Rec FOIL—AD Op 1884.

254. — —Broadcasts

City failed to meet burden of demonstrating that certain police radio broadcasts relating to robbery investigation were exempt from disclosure under CLS Pub O § 87, thus entitling broadcasting company access to tape recordings of them, where city, in answer to company's petition, referred only to statutory provisions regarding exceptions to disclosure, did not allege any facts showing whether material sought came within exceptions, did not request Special Term to make in camera inspection, failed to show that material did not contain "instructions to staff that affect the public," and abandoned contention on appeal that access to recordings would "interfere with law enforcement investigations." Buffalo Broadcasting Co. v Buffalo, 126 A.D.2d 983, 511 N.Y.S.2d 759, 1987 N.Y. App. Div. LEXIS 42105 (N.Y. App. Div. 4th Dep't 1987).

255. — —Complaint follow-up reports (DD5s)

Police officer memo books and DD5 reports are exempt from disclosure under Freedom of Information Law. DeFelice ex rel.

Barbera v New York City Police Dep't, 226 A.D.2d 176, 640 N.Y.S.2d 536, 1996 N.Y. App. Div. LEXIS 3750 (N.Y. App. Div. 1st Dep't), rev'd, 89 N.Y.2d 267, 653 N.Y.S.2d 54, 675 N.E.2d 808, 1996 N.Y. LEXIS 3575 (N.Y. 1996).

Petitioner was not entitled to Freedom of Information Law disclosure of unredacted complaint follow-up reports ("DD-5s") produced by police department in connection with homicide investigation that resulted in petitioner's first degree manslaughter conviction, in light of necessity of protecting safety and privacy rights of witnesses; however, blanket exemption was not warranted, either on public safety grounds or basis that witnesses had been promised confidentiality. Johnson v New York City Police Dep't, 257 A.D.2d 343, 694 N.Y.S.2d 14, 1999 N.Y. App. Div. LEXIS 7785 (N.Y. App. Div. 1st Dep't), app. dismissed, 94 N.Y.2d 791, 700 N.Y.S.2d 422, 722 N.E.2d 502, 1999 N.Y. LEXIS 3646 (N.Y. 1999).

256. — —Logs, memo books, notes, manuals and the like

Police activity logs (commonly referred to as memo books) are agency records available under provisions of Freedom of Information Law, subject to any applicable exemption and on payment of appropriate fee, since police officers are required to maintain activity logs in course of their regular duties, to store completed logs in their lockers, and to surrender logs to superiors for inspection on request, and contents of logs are meticulously prescribed by departmental regulation; although officers generally maintain physical possession of logs, they are nevertheless "kept" or "held" by officers for police department, which places them within statutory definition of "records." Gould v New York City Police Dep't, 89 N.Y.2d 267, 653 N.Y.S.2d 54, 675 N.E.2d 808, 1996 N.Y. LEXIS 3575 (N.Y. 1996).

Article 13G of the Administrative Manual of the New York State Police, which deals with the procedures followed when employing electronic surveillance and monitoring devices during criminal investigations, is exempt from disclosure under Pub O Law § 82(2)(e)(iv) since the procedures contained in the Article are not routine and revealing the information could allow miscreants to tailor their activities to evade detection. De Zimm v Connelie, 102 A.D.2d 668, 479 N.Y.S.2d 871, 1984 N.Y. App. Div. LEXIS 18837 (N.Y. App. Div. 3d Dep't 1984), aff'd, 64 N.Y.2d 860, 487 N.Y.S.2d 320, 476 N.E.2d 646, 1985 N.Y. LEXIS 14143 (N.Y. 1985).

Police officer memo books and DD5 reports are exempt from disclosure under Freedom of Information Law. DeFelice ex rel. Barbera v New York City Police Dep't, 226 A.D.2d 176, 640 N.Y.S.2d 536, 1996 N.Y. App. Div. LEXIS 3750 (N.Y. App. Div. 1st Dep't), rev'd, 89 N.Y.2d 267, 653 N.Y.S.2d 54, 675 N.E.2d 808, 1996 N.Y. LEXIS 3575 (N.Y. 1996).

While prosecuting pending homicide indictment, district attorney could assert blanket exemption under CLS Pub O § 87(2)(e)(i) in response to request for production of complaint reports and records, interviews, police activity logs and other material compiled in connection with prosecution of indictment and investigation of earlier attempted robberies and weapon possession involving same victim. Pittari ex rel. Cajigas v Pirro, 179 Misc. 2d 241, 683 N.Y.S.2d 700, 1998 N.Y. Misc. LEXIS 632 (N.Y. Sup. Ct. 1998), aff'd, Pittari v Pirro, 258 A.D.2d 202, 696 N.Y.S.2d 167, 1999 N.Y. App. Div. LEXIS 8700 (N.Y. App. Div. 2d Dep't 1999).

257. — —New York City police

Employee who was discharged from position as railroad policeman, but reinstated following determination that he had been wrongfully discharged was entitled to discovery of information and documents in possession of superintendent of state police upon which superintendent determined not to reinstate employee's certificate of appointment and designation, which was necessary for employee's complete reinstatement, since there has been no showing of any factual basis on which to determine whether objectives of protecting confidentiality of investigative sources and encouraging perspective witnesses to come forward in future would be impeded by disclosure of items requested. Mooney v Superintendent of New York State Police, 117 A.D.2d 445, 502 N.Y.S.2d 828, 1986 N.Y. App. Div. LEXIS 53709 (N.Y. App. Div. 3d Dep't 1986).

Since a police department may, under the Freedom of Information Law, promulgate rules denying access to intra-agency records which are not final agency policy or determinations (Public Officers Law, § 87) and since the Civilian Complaint Review Board only hears and recommends action upon civilian complaints against members of the police department to the Police Commissioner and does not make final determinations in the matters which come before it (New York City Charter, § 440), the New York City Police Department has the power to exempt records of proceedings before the board from disclosure. People v Morales, 97 Misc. 2d 733, 412 N.Y.S.2d 310, 1979 N.Y. Misc. LEXIS 1995 (N.Y. City Crim. Ct. 1979).

Freedom of Information Law § 87(2)(e) may not be justifiably cited to withhold transcript of police calls made on particular dates to 32nd precinct in Manhattan since records were likely compiled in ordinary course of business rather than for law enforcement purposes. Comm Pub Acc Rec FOIL-Ad Op 2769.

258. — —New York State police

State Police Appeals Officer satisfied his obligation under Freedom of Information Law by providing photographs to petitioner, who had been convicted of murder, that had been developed in accordance with usual procedures employed by State Police; there was no obligation to enhance or reprocess photographs to improve their quality. Russo v Fitzgerald, 260 A.D.2d 738, 687 N.Y.S.2d 816, 1999 N.Y. App. Div. LEXIS 3657 (N.Y. App. Div. 3d Dep't), app. denied, 93 N.Y.2d 813, 695 N.Y.S.2d 541, 717 N.E.2d 700, 1999 N.Y. LEXIS 1912 (N.Y. 1999).

New York State Police Manual can be characterized as "intra-agency" materials; however, its contents may be reflective of instructions to staff that affect public and available under Freedom of Information Law § 87(2)(g)(ii), or as policy of Division of State Police and therefore available under Freedom of Information Law § 87(2)(g)(iii). Comm Pub Acc Rec FOIL-Ad Op 2749.

259. — —Police procedures and policies

Court erred in ordering disclosure of records relating to past deployments, policies, procedures, training materials, aggregate cost and total number of mobile X-ray unit vans that the New York Police Department "NYPD" used to combat terrorism because the materials were exempt from disclosure under the law enforcement and public safety exemptions, as terrorists could have exploited this information. The court properly directed the NYPD to disclose tests or reports regarding the radiation dose or other health and safety effects of the vans. Matter of Grabell v New York City Police Dept., 139 A.D.3d 477, 32 N.Y.S.3d 81, 2016 N.Y. App. Div. LEXIS 3540 (N.Y. App. Div. 1st Dep't), app. denied, 28 N.Y.3d 910, 69 N.E.3d 1022, 47 N.Y.S.3d 226, 2016 N.Y. LEXIS 3827 (N.Y. 2016).

Court denied Freedom of Information Law (FOIL) request by defendant who intended to offer "battered women's syndrome" defense, where defendant requested all material in district attorney's possession relating to her present case and her prior arrests or bad acts, but she failed to make written request or exhaust administrative remedies by appealing within 30 days of denial of her request; furthermore, documents turned over to defense counsel as part of voluntary disclosure could not be obtained under FOIL, and criminal records were unavailable under FOIL. People v Seeley, 179 Misc. 2d 42, 683 N.Y.S.2d 795, 1998 N.Y. Misc. LEXIS 590 (N.Y. Sup. Ct. 1998).

Because a city appropriately refused to provide statements that its police officers gave to its office of professional standards, they qualified as personnel records of a law enforcement agency that were exempt from disclosure by N.Y. Pub. Off. Law § 87(2)(a), N.Y. Civ. Rights Law § 50-a. Matter of Carnevale v City of Albany, 68 A.D.3d 1290, 891 N.Y.S.2d 495, 2009 N.Y. App. Div. LEXIS 8944 (N.Y. App. Div. 3d Dep't 2009).

A newspaper editor may have access to police blotters and complaint reports reporting names of persons from prominent families involved in burglaries since Public Officers Law § 89(5) makes it clear that nothing in the Freedom of Information Law may be cited to limit or abridge rights of access granted either by other privileges of law or by means of judicial determination and *Scheehan* v *City of Binghamton* specifically holds that police blotters are accessible. Comm Pub Acc Rec FOIL—Ad Op 1793.

Although tapes or transcripts of radio communications made by officers of a police department concerning the charges for which a prisoner was booked at the time of his arrest may properly be withheld from the prisoner under Public Officers Law § 87(2)(e) as records compiled for law enforcement purposes, the actual booking record of the prisoner's arrest is available to him since the Freedom of Information Law is more expansive in terms of right of access than the former law and the former law specifically granted access to police blotters and booking records. Comm Pub Acc Rec FOIL—Ad Op 1837.

Fact that Freedom of Information Law no longer specifically directs that police blotters and booking records be made available does not constitute basis for withholding those records. Comm Pub Acc Rec FOIL-Ad Op 2541.

260. —Prisons and prisoners, generally

Where inmate was transferred to different correctional facility after sending letter to daughter of facility employee, soliciting personal relationship, Commissioner of Correctional Services properly denied his Freedom of Information Law request for copies of all institutional records relating to his transfer on ground that requested records were exempt as containing information that might endanger individual's life or safety. Partee v Bartlett, 241 A.D.2d 605, 660 N.Y.S.2d 1011, 1997 N.Y. App. Div. LEXIS 7226 (N.Y. App. Div. 3d Dep't), app. denied, 90 N.Y.2d 811, 666 N.Y.S.2d 99, 688 N.E.2d 1381, 1997 N.Y. LEXIS 3611 (N.Y. 1997).

Trial court properly denied an inmate's requests for records concerning the denial of his request to participate in a family reunion program and the resulting investigation, as the department of corrections and community supervision made a sufficient showing that disclosure of such materials could pose a risk of harm to others. Matter of Williamson v Fischer, 116 A.D.3d 1169, 984 N.Y.S.2d 194, 2014 N.Y. App. Div. LEXIS 2409 (N.Y. App. Div. 3d Dep't), app. denied, 24 N.Y.3d 904, 995 N.Y.S.2d 713, 20 N.E.3d 659, 2014 N.Y. LEXIS 2451 (N.Y. 2014).

Petitioner, an inmate at a State correctional facility, is not entitled to receive copies of State Police records relating to his attempted escape which was aborted by the State Police, inasmuch as the records are exempt from disclosure under section 87 (subd 2, par [g]) of the Public Officers Law, as they are intra-agency records of the investigation of the incident. Hall v Brandon, 96 Misc. 2d 318, 408 N.Y.S.2d 1006, 1978 N.Y. Misc. LEXIS 2600 (N.Y. Sup. Ct. 1978).

State Commission of Correction properly denied request for access to documents categorized as staff handwritten notes, comments and observations, and interoffice memorandum, and report concerning commission's investigation of prison melee, since documents contained subjective comments and observations prepared to assist commission in making final determination, thus exempting them from disclosure under CLS Pub O § 87(2)(g). However, State Commission of Correction improperly denied access to statements of 4 inmates made during commission's investigation of prison melee since statements merely recited factual claims made by alleged assault victims and did not constitute investigator's notes exempt from disclosure as intra-agency material under CLS Pub O § 87(2)(g); moreover, there was no proof that such statements were gathered specifically for law enforcement purposes, and there was no indication that any criminal proceedings had been initiated nor that confidentiality was promised or expected so as to exempt statements from disclosure under § 87(2)(e). Faulkner v Del Giacco, 139 Misc. 2d 790, 529 N.Y.S.2d 255, 1988 N.Y. Misc. LEXIS 276 (N.Y. Sup. Ct. 1988).

Petitioners, 2 members of legal services corporation and inmate, were not entitled under Freedom of Information Law to names of Muslim inmates at certain correctional facility who had filed grievances based on being pat-frisked by female correction officers since facility's grievance program and procedures provided that its papers and information were to be confidential; thus, it was proper for facility to refuse request for identifying information after having supplied name-redacted grievance documents. Faulkner v Lefevre, 140 Misc. 2d 699, 532 N.Y.S.2d 337, 1988 N.Y. Misc. LEXIS 576 (N.Y. Sup. Ct. 1988).

This section did not preclude the disclosure in a civil suit to a claimant who was injured by his cellmate of the name of an inmate who was housed with the cellmate immediately prior to his placement with the claimant as there was no showing as to why releasing the information would result in a risk to the safety and security of the prison, and any privacy interest of the inmate in keeping his identity confidential was outweighed given the seriousness of the claimant's injuries and his burden of proof. Robinson v State of New York, 972 N.Y.S.2d 834, 40 Misc. 3d 1034, 2013 N.Y. Misc. LEXIS 2851 (N.Y. Ct. Cl. 2013).

261. — —Directives to correctional staff; manuals

Prison inmate was not entitled, under Freedom of Information Law, to disclosure of certain provisions of State Department of Correctional Services Employee Manual where in-camera review of those provisions revealed that they pertained to supervision and security of inmates and thus fell within exemption, in CLS Pub O § 87(2)(f), for materials that "if disclosed would endanger the life or safety of any person." Boddie v Goord, 251 A.D.2d 799, 674 N.Y.S.2d 466, 1998 N.Y. App. Div. LEXIS 6766 (N.Y. App. Div. 3d Dep't), app. denied, 92 N.Y.2d 810, 680 N.Y.S.2d 54, 702 N.E.2d 839, 1998 N.Y. LEXIS 3062 (N.Y. 1998).

Only personal information which appeared in employee accident reports, employee training reports, records of interviews that were conducted with employees, and other documents which the New York Department of Correctional Services (DOCS) created after an inmate was alleged injured by a corrections officer was exempt from disclosure under N.Y. Pub. Off. Law §§ 87 and 89, and the appellate court ordered the DOCS to disclose redacted versions of the reports and records that did not contain personal information. Beyah v Goord, 309 A.D.2d 1049, 766 N.Y.S.2d 222, 2003 N.Y. App. Div. LEXIS 10931 (N.Y. App. Div. 3d Dep't 2003).

Directive on limited privilege made by superintendent of correctional facility which is essentially statement of policy regarding limited privilege is available under Freedom of Information Law. Comm Pub Acc Rec FOIL-Ad Op 2626.

262. —Tape recordings; videotapes

Court properly ordered Department of Correctional Services to furnish television station with videotapes taken by department in course of prisoners' uprising in special housing unit of prison, but only after department reviewed and edited tapes to redact specific portions which would interfere with criminal prosecutions, invade inmate's expectation of privacy, or create serious safety considerations, and only after department furnished description of excised material sufficient to allow court to determine applicability of any statutory exemption without in camera viewing of tapes; department's conclusory allegations, made without even reviewing tapes, were insufficient to confer blanket exemption of all tapes from disclosure under Freedom of Information Law. Buffalo Broadcasting Co. v New York State Dep't of Correctional Services, 155 A.D.2d 106, 552 N.Y.S.2d 712, 1990 N.Y. App. Div. LEXIS 2940 (N.Y. App. Div. 3d Dep't 1990).

Trial court properly found that the evidence submitted by the department of correction (DOC) was insufficient to establish that disclosure of the electronic video surveillance record from one camera angle from one particular day showing a former detainee's slip and fall accident could endanger the life or safety of any person by exposing limits in the surveillance system for purposes of the N.Y. Pub. Off. Law §§ 87(2)(f) Freedom of Information Law exemption; the trial court also properly found, however, that the DOC established, through a sergeant's affidavit, that disclosure of the remaining electronic video surveillance records requested could expose such limitations and thus endanger the life or safety of any person. Matter of Dilworth v Westchester County Dept. of Correction, 93 A.D.3d 722, 940 N.Y.S.2d 146, 2012 N.Y. App. Div. LEXIS 1792 (N.Y. App. Div. 2d Dep't), app. denied, 19 N.Y.3d 810, 951 N.Y.S.2d 720, 976 N.E.2d 249, 2012 N.Y. LEXIS 2051 (N.Y. 2012).

263. —Sentencing, generally

In an Article 78 proceeding to compel the director of the Temporary Release Program, Department of Correctional Services to comply with petitioner's request for certain specified information following the denial of petitioner's request for a furlough from a correctional facility, Special Term erred in order-

ing the disclosure of the copies of records on which the final determination was made, since these were intra-agency materials which were exempt from the disclosure provisions of the Freedom of Information Law. Schumate v Wilson, 90 A.D.2d 832, 456 N.Y.S.2d 11, 1982 N.Y. App. Div. LEXIS 19081 (N.Y. App. Div. 2d Dep't 1982).

264. — —Parole

Parole board would not be required to submit for in camera inspection letters sought by petitioner, who had been denied parole, from persons opposed to his release, since the letters, which were received from private citizens, were exempt from disclosure and would remain confidential and protected in order to permit private citizens to express freely their opinions for or against an individual's parole. Jordan v Hammock, 86 A.D.2d 725, 447 N.Y.S.2d 44, 1982 N.Y. App. Div. LEXIS 15282 (N.Y. App. Div. 3d Dep't), app. dismissed, 57 N.Y.2d 674, 1982 N.Y. LEXIS 7345 (N.Y. 1982).

While not specifically establishing exemption from Freedom of Information Law, CLS Exec § 259-k provides clear legislative intent to establish and maintain confidentiality of parole records. Prison inmate was not entitled to disclosure of another individual's parole records under Freedom of Information Law, even if certain information were redacted; CLS Exec § 259-k directs that parole case record information be confidential, and parole board promulgated rules prohibiting release of information sought. Collins v New York State Div. of Parole, 251 A.D.2d 738, 674 N.Y.S.2d 145, 1998 N.Y. App. Div. LEXIS 6491 (N.Y. App. Div. 3d Dep't), app. denied, 92 N.Y.2d 811, 680 N.Y.S.2d 457, 703 N.E.2d 269, 1998 N.Y. LEXIS 3107 (N.Y. 1998).

Prison inmate who was denied parole was not entitled to disclosure, under Freedom of Information Law, of county district attorney's letter to Division of Parole furnishing background information and setting forth factors recommended for consideration in deciding whether to release inmate on parole where letter fit squarely within interagency communications exemption in CLS Pub O § 87(2)(g)(iii). Ramahlo v Bruno, 273 A.D.2d 521, 708 N.Y.S.2d 206, 2000 N.Y. App. Div. LEXIS 6441 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 767, 719 N.Y.S.2d 647, 742 N.E.2d 123, 2000 N.Y. LEXIS 3511 (N.Y. 2000).

Prison inmate's Article 78 proceeding, seeking copies of parole release interview transcripts of 2 former inmates who testified at his criminal trial and any parole recommendations made by district attorney and judge, would be dismissed for failure to state cause of action where (1) CLS Exec § 259-k and Board of Parole's implementing rules clearly direct that parole records remain confidential, (2) records sought by inmate were thus exempt from disclosure under Freedom of Information Law (FOIL) because releasing them would be unwarranted invasion of privacy, and (3) contrary result was not required by fact that respondents might have previously released parole records of another inmate in response to FOIL request. Robles v Tracy, 275 A.D.2d 837, 713 N.Y.S.2d 776, 2000 N.Y. App. Div. LEXIS 9343 (N.Y. App. Div. 3d Dep't 2000), app. denied, 96 N.Y.2d 702, 722 N.Y.S.2d 794, 745 N.E.2d 1016, 2001 N.Y. LEXIS 57 (N.Y. 2001).

265. — —Pre-sentencing reports

State prisoner is not entitled to copy of pre-sentence report under § 87(2)(a), since such records are exempt from disclosure by § 390.50 of the Criminal Procedure Law. Comm Pub Acc Rec FOIL-Ad Op 2448.

Pre-sentence report may be made available only by court and only according to procedures outlined in § 390.50 of Criminal Procedure Law. Comm Pub Acc Rec FOIL-Ad Op 2599.

Pre-sentence report in criminal proceeding is outside scope of Freedom of Information Law and agency may withhold such information pursuant to § 87(2)(a) of Law. Comm Pub Acc Rec FOIL-Ad Op 2754.

Pre-sentence report may not be obtained under Freedom of Information Law but may only be obtained through judge of the trial court. Comm Pub Acc Rec FOIL-Ad Op 2788.

Pre-sentence report was not subject to disclosure under Freedom of Information Law since such report may be made available only on court order, under circumstances described in CLS CPL § 390.50. Comm on Open Gov't F7981.

266. — —Probation

Prisoner may be denied access to his probation report by a county Police Department and by the judge of the sentencing court on the ground that the Freedom of Information Law does not apply to courts and court records. Comm Pub Acc Rec FOIL—Ad Op 1776.

267. —Traffic violations

The disclosure of records of a public lottery sponsored by a volunteer fire department is proper where it is not demonstrated that the material requested falls within one of the eight categories of exemptions contained in subdivision 2 of section 87 of the Public Officers Law, there being no provision which specifically exempts volunteer fire departments from the Freedom of Information Law (Public Officers Law, art 6), since the policies motivating the enactment of the Freedom of Information Law center or goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom, regardless of the purpose for which a document was produced or the function to which it relates; the fact that the records were not in the possession of either the village or its volunteer fire department does not warrant dismissal of the proceeding where the records were to be returned to the village since temporary possession in another does not necessarily oust a permanent possessor of the control which would make it subject to the responsibilities imposed by the Freedom of Information Law and Special Term was fully justified in granting a right of inspection upon their retransfer to the village's custody; furthermore, it was well within the discretion of the Appellate Division to order Special Term to conduct an *in camera* hearing to excise privacy impinging references to needy recipients of the lottery funds inasmuch as though the Freedom of Information Law specifies no procedures for implementing its guarantees, decisional law has repeatedly acknowledged the efficacy of this technique in appropriate circumstances and there is no abuse of discretion as a matter of law in withholding the prerogative of deletion from the village where it had its opportunity to do so before the commencement of the litigation, but refused. Westchester Rockland Newspapers, Inc. v Kimball, 50 N.Y.2d 575, 430 N.Y.S.2d 574, 408 N.E.2d 904, 1980 N.Y. LEXIS 2453 (N.Y. 1980).

In a proceeding to review a refusal by the state police to permit a newspaper reporter to have access to records reflecting the identity of persons arrested for speeding in a certain county, an order granting the petition to the extent of permitting the reporter to examine copies of traffic tickets issued and lists of violation of the Vehicle and Traffic Law compiled by the state police from a specified date in and for the particular county would be modified to exempt from the permitted inspection any records sealed pursuant to the provisions of CPL § 160.50, since, subject to the modification, the reporter was entitled to the relief granted in view of the fact that the information sought was sufficiently identified to comply with the requirements of the Freedom of Information Law (Pub O §§ 85 et seq.) and that the "intra-agency" exemption to the Freedom of Information Law was inapplicable, since it applies only to materials involving subjective matter integral to the agency's deliberative process in formulating policy. Johnson Newspaper Corp. v Stainkamp, 61 N.Y.2d 958, 475 N.Y.S.2d 272, 463 N.E.2d 613, 1984 N.Y. LEXIS 4187 (N.Y. 1984).

It was improper for Division of Lottery to deny request for copies of news releases previously issued by Division from its "creation to the present relating to lottery winners," especially since Division's own regulation characterized requested information as "public" (21 NYCRR § 2803.12). Corwin Solomon & Tanebaum v New York State Div. of the Lottery, 239 A.D.2d 763, 657 N.Y.S.2d 803, 1997 N.Y. App. Div. LEXIS 5222 (N.Y. App. Div. 3d Dep't 1997).

347 affidavits compiled during the Westchester District Attorney's investigation of the Ossining Fire Department 50/50 Lottery are accessible under Public Officers Law § 87 since, although the affidavits were obtained in connection with a criminal investigation, such investigation is closed and no criminal charges resulted from it and therefore the harmful effects of disclosure envisioned by § 87(2)(e) would not arise and since CPL § 240.20 does not mandate denial of access since that section concerns

information that may be disclosed by a prosecutor to a defendant in the context of an ongoing criminal proceeding and does not apply to a request unrelated to a criminal trial where the person requesting the information is not the defendant. Com Pub Acc Rec FOIL—Ad Op 1881.

Assuming that localities have retained copies of traffic tickets issued by local police officers, those copies must be available for inspection and/or photocopying under the Freedom of Information Law since such disclosure would not likely result in the harmful effects listed in § 87(2)(e)(i–iv) of the Public Officers Law. Comm Pub Acc Rec FOIL-Ad Op 2344.

Chief of police erred in not providing copies of uniform traffic tickets under the Freedom of Information Law. Comm Pub Acc Rec FOIL-Ad Op 2799.

Traffic summonses are subject to disclosure under Freedom of Information Law, since issuance of citations or summonses indicates that violation has been found, and such finding constitutes "factual" information accessible under CLS Pub O § 87(2)(g)(i), as well as final agency determination accessible under § 87(2)(g)(iii). Comm on Open Gov't F7975.

268. Lottery, bingo and other games of chance

In an Article 78 proceeding to compel the county to supply the administrator and director of a methadone maintenance program with copies of a check made out to the program director and the computer printout for the check listing the names of medical assistance recipients who paid for the director's services with Medicaid cards and the dates they were treated, the requested documents would be made available where they had not been listed as exceptions under Pub O § 87(2) of the Freedom of Information Law. Vent v Bates, 89 A.D.2d 567, 452 N.Y.S.2d 98, 1982 N.Y. App. Div. LEXIS 17622 (N.Y. App. Div. 2d Dep't 1982).

Upon cross-appeals from a judgment of Special Term which in an Article 78 proceeding partially granted petitioner's application for access to a report prepared by a New York State Department of Health employee, despite repondent's assertion that the report was exempt from disclosure as "intra-agency material" pursuant to Pub O § 87, petitioner would be granted access to most of the report on the ground that the Freedom of Information Act exempts as "intra-agency materials" only opinions and recommendations not "statistical or factual tabulations or data" and the mere fact that some of the data might be an estimate or recommendation does not convert it into an expression of opinion; moreover, certain of the pages would be accessible since they were neither prepared by nor for the Department of Health so that they could not be defined as inter or intra agency materials as the mere fact of being collected by a governmental agency and appended to its report is insufficient to transform a paper into "intra-agency material." However pages of the report which contained opinions and recommendations would be exempt from disclosure. Ingram v Axelrod, 90 A.D.2d 568, 456 N.Y.S.2d 146, 1982 N.Y. App. Div. LEXIS 18634 (N.Y. App. Div. 3d Dep't 1982).

Respondent improperly denied access to names and cities of residence (as opposed to names and actual addresses) of state lottery prize winners on ground that request was unwarranted invasion of personal privacy under CLS Pub O § 87(2)(b)(iii), although it was uncontested that lists were to be used for commercial purposes, where such information was regularly released when winners were announced and was defined as "public information" in respondent's own regulations (21 NYCRR § 2803.12). Empire Realty Corp. v New York State Div. of the Lottery, 230 A.D.2d 270, 657 N.Y.S.2d 504, 1997 N.Y. App. Div. LEXIS 5207 (N.Y. App. Div. 3d Dep't 1997).

A contract between the State Department of Social Services and defendant data corporation, a supplier of drug price information to retail pharmacies, executed without public announcement or bidding, under which defendant was granted both the right to supply the State with monthly estimated cost prices and formulae for Medicaid reimbursement for at least 3,500 of the most frequently purchased drugs, and the right to obtain statutory copyright for the price lists thereby giving defendant the sole right to distribute the maximum allowable reimbursement price lists to retail pharmacists, is invalid, as a perversion of the Freedom of Information Law (Public Officers Law, §§ 85–90) which gives the public the right to "unimpaired access" to "documents and statistics leading to" State agency determinations and requires that such information as the price lists upon which the formula for Medicaid reimbursement for prescriptions is based be made accessible to the public and subject to its inspection. S-P Drug Co. v Smith, 96 Misc. 2d 305, 409 N.Y.S.2d 161, 1978 N.Y. Misc. LEXIS 2598 (N.Y. Sup. Ct. 1978).

A news service is entitled to obtain the results of a State-wide student drug abuse survey since disclosure of the documents will not violate a person's privacy (Public Officers Law, § 89, subd 2, pars [a], [b]; § 87, subd 2, par [b]) and since the common-law privilege shielding confidential communications between public officers will not be applied because disclosure of the document does not jeopardize the public interest. Gannett News Service, Inc. v New York Office of Alcoholism etc., 99 Misc. 2d 235, 415 N.Y.S.2d 780, 1979 N.Y. Misc. LEXIS 2238 (N.Y. Sup. Ct. 1979).

As to their professional services, cardiac surgeons do not possess personal privacy interest in information collected and maintained by Department of Health in Statewide Planning and Research Cooperative System. To extent that Department of Health regulations (10 NYCRR § 400.18) purport to create personal privacy exemption to disclosure of physician identifier information in Statewide Planning and Research Cooperative System which does not exist under Public Officers Law, such exemptions are not enforceable. New York Times Co. v New York State Dep't of Health, 173 Misc. 2d 310, 660 N.Y.S.2d 810, 1997 N.Y. Misc. LEXIS 248 (N.Y. Sup. Ct. 1997), aff'd, 243 A.D.2d 157, 674 N.Y.S.2d 826, 1998 N.Y. App. Div. LEXIS 7774 (N.Y. App. Div. 3d Dep't 1998).

In a proceeding pursuant to N.Y. C.P.L.R. art. 78, the trial court properly denied a health care associations' Freedom of Information Law requests; the requests sought the results of an audit by an agency to determine which residents of nursing homes were underpaying, and the agency did not possess the records in question, N.Y. Pub. Off. Law § 89(3), and the association failed to support its contention that the agency failed to properly certify that the documents did not exist or that it had performed a diligent search as required by N.Y. Pub. Off. Law § 87(3). N.Y. Ass'n of Homes & Servs. for the Aging, Inc. v Novello, 13 A.D.3d 958, 786 N.Y.S.2d 827, 2004 N.Y. App. Div. LEXIS 15864 (N.Y. App. Div. 3d Dep't 2004).

A request for records from the Freedom of Information Officer of a psychiatric center as to whether the inquirer attended an "investigative meeting" held with the psychiatric center's Youth Hope Program is improperly denied since, while the record constitutes a "intra-agency or inter-agency record", the portion of the record indicating whether a person attended a particular meeting is factual data which is not exempt from disclosure under Public Officers Law § 87(2)(g). Comm Pub Acc Rec FOIL—Ad Op 1751.

Testimony, reports and patient records of any committee may remain confidential unless specific direction is given to do otherwise. Comm Pub Acc Rec FOIL-Ad Op 2547.

Letters of complaint submitted by or on behalf of dental school patients do not constitute records created by "agency" within meaning of Freedom of Information Law § 86(3). Comm Pub Acc Rec FOIL-Ad Op 2678.

269. Medicine and health, generally

It was error to dismiss law firm's Article 78 petition for review of Department of Health (DOH) determination denying firm's request under Freedom of Information Law for disclosure of internal DOH memorandum (requested by firm in connection with lawsuit against firm's client brought by neighboring residents and alleging that client discharged chemicals and polluted water supply), since portions of memorandum dealt with public health matters and could be found to be instructions to staff which affected public, where memorandum contained legal opinions on state's right to obtain physicians' reports of their examinations of residents, legal interpretations of CLS Pub Health § 206, directions to be provided to DOH employee responsible for reviewing physicians' reports, and opinions on use by DOH of examination information and its compliance with Public Health Law; matter would be remitted to court for in camera inspection and determination as to which portions of memorandum should be redacted and which parts released. Williams & Connolly v

Axelrod, 139 A.D.2d 806, 527 N.Y.S.2d 113, 1988 N.Y. App. Div. LEXIS 3638 (N.Y. App. Div. 3d Dep't 1988).

Fact that petitioner expended 2,200 hours and $225,000 over 10-month period in researching, screening, analyzing and compiling air emissions data prior to submitting its "Nearby Source Verification Worksheets" to Department of Environmental Conservation, as condition of obtaining permit under CLS Pub Ser art 10, did not entitle it to "trade secret" exemption under Freedom of Information Law on ground that disclosure of worksheets to other prospective developers of electric generation facilities in area would result in substantial competitive injury, as every facility has regulatory costs attached to its operation, and petitioner failed to show that cost of compiling data in question was considerable relative to entire cost of project, or that disclosure would decrease its ability to secure proper permits. Sunset Energy Fleet L.L.C. v State Dep't of Envtl. Conservation, 285 A.D.2d 865, 728 N.Y.S.2d 279, 2001 N.Y. App. Div. LEXIS 7534 (N.Y. App. Div. 3d Dep't 2001).

Department of Environmental Conservation properly denied a request, under the Freedom of Information Law, for the amount and type of each application of termiticide in the State of New York for certain years, as the release of the information to the public was only authorized in summary form; the information contained in the Department's data base was accessible by interested parties only to the extent permitted pursuant to N.Y. Envtl. Conserv. Law §§ 33-1201(2) and 33-1203(1)(a). Terminix Int'l Co. L.P. v Assistant Comm'r for Hearings & Mediation Servs., 301 A.D.2d 810, 753 N.Y.S.2d 591, 2003 N.Y. App. Div. LEXIS 290 (N.Y. App. Div. 3d Dep't 2003).

The attorney for an association of property owners would be entitled, pursuant to Pub O §§ 84 et seq., to the production of certain public documents in the possession of the Department of Health, including handwritten weekly field reports for specified periods, draft reports on air monitoring for the installation of landfill overburden monitoring wells in connection with a landfill maintained by a chemical and plastics company, and an internal departmental memorandum, since such production was not precluded by the fact that the factual information contained in some of the documents may have been supplied to the attorney in other records, and the material contained in the memorandum was not integral to the agency's deliberative process and contained no opinions or other subjective material; however, the attorney would not be entitled to production of a copy of a memorandum from an agency attorney to the agency's general counsel concerning communications with the agency's staff in connection with health problems suffered by an area resident and attributed to drilling activity at the landfill, since the contents of the memorandum were protected by the attorney-client privilege, and the memorandum was prepared for ongoing litigation; petitioner attorney would additionally be entitled to recover his reasonable attorney's fees, since the agency lacked a reasonable basis in law for withholding those records that were subject to production. Steele v New York State Dep't of Health, 119 Misc. 2d 963, 464 N.Y.S.2d 925, 1983 N.Y. Misc. LEXIS 3627 (N.Y. Sup. Ct. 1983).

Records concerning the identities of persons present at meetings of the Panel to Review Scientific Studies and Development of Public Policy on Problems Resulting from Hazardous Waste, information regarding identities of those consulted or interviewed during meetings of the Panel, studies or reports reviewed at each meeting for the purpose of compiling the Panel's final report and the Panel's final report itself are available under Public Officers Law § 87 with the possible exclusion of identities of certain persons present at meetings disclosure of which would result in an "unwarranted invasion of personal privacy" under Public Officers Law § 87(2)(b) if, for instances, persons having medical problems relating to hazardous wastes were interviewed during a meeting. Comm Pub Acc Rec FOIL—Ad Op 1856.

Department of Transportation's investigation of oil spill is not within exemption of records "compiled for law enforcement purposes". Comm Pub Acc Rec FOIL-Ad Op 2456.

270. —Environmental records

In an Article 78 proceeding, Special Term's granting of a petition seeking disclosure of 29 medical records pursuant to the Freedom of Information Law after deletion of all personal identifying details was held improper, where the principle of selective deletion could have no application to the 29 medical records as they were exempted from disclosure pursuant to Pub O §§ 87 and 89 exception for medical records. Medical records, except for statistical data, are not records "otherwise available", so that the furnishing of such records is an unwarranted invasion of personal privacy. Short v Board of Managers of Nassau County Medical Center, 57 N.Y.2d 399, 456 N.Y.S.2d 724, 442 N.E.2d 1235, 1982 N.Y. LEXIS 3787 (N.Y. 1982).

Patients may obtain their own medical records from state agency pursuant to Freedom of Information law despite prohibition of CLS Pub Health § 18(6) against redisclosure of patient information by third parties; intent of § 18(6) was not to prevent disclosure to patients of their own medical records, but to prevent disclosure of confidential medical records to third parties. Fact that petitioner could obtain his medical records from hospital pursuant to CLS Pub Health § 18 did not diminish his right to obtain them from Department of Health under Freedom of Information Law. Mantica v New York State Dep't of Health, 94 N.Y.2d 58, 699 N.Y.S.2d 1, 721 N.E.2d 17, 1999 N.Y. LEXIS 3442 (N.Y. 1999).

Hospital records of witnesses who testified against petitioner at grand jury proceeding were not disclosable under Freedom of Information Law since access to such records would constitute "an unwarranted invasion of personal privacy." Newton v District Attorney of Bronx County, 186 A.D.2d 57, 588 N.Y.S.2d 269, 1992 N.Y. App. Div. LEXIS 10741 (N.Y. App. Div. 1st Dep't 1992).

State Department of Health failed to show that unwarranted invasion of patients' personal privacy would result from Supreme Court's order directing it to disclose to news companies, under Freedom of Information Law, identity of physicians involved in medical records maintained by Statewide Planning and Research Cooperative System (SPARCS) where wealth of information about patients, except for their names and their physicians' names, was already being disclosed by SPARCS, and department conceded that "even without the physician identifier, it is conceivable that one could attempt to connect the disclosable SPARCS data outlined above to invade a patient's medical privacy." State Department of Health could not invoke CLS Pub Health §§ 2804-b and 2807-n as justification for denying news companies access, under Freedom of Information Law, to identity of physicians involved in medical records maintained by Statewide Planning and Research Cooperative System; Appellate Division's review in Article 78 proceeding is limited to specific grounds invoked by administrative agency, and post-determination legislative enactment could not serve as basis for department's actions and would not be considered. New York Times Co. v New York State Dep't of Health, 243 A.D.2d 157, 674 N.Y.S.2d 826, 1998 N.Y. App. Div. LEXIS 7774 (N.Y. App. Div. 3d Dep't 1998).

Members of the uniformed forces, including New York City Police, Housing, Transit, Fire, Collection, and Sanitation officers, may have access to those materials in medical records containing statistical or factual information, such as laboratory test results, but may be denied access to records prepared by departmental doctors since such records could properly be characterized as "intra-agency materials" exempted by Public Officers Law § 87(2)(g) from disclosure; however, Public Health Law § 17 requires the release of medical records, including records prepared by departmental doctors, upon request by a private doctor or hospital designated by the subject of such tests or records. Comm Pub Acc Rec FOIL—Ad Op 1846.

Medical records reflective of opinion may validly be withheld against request for disclosure under Freedom of Information Law. Comm Pub Acc Rec FOIL-Ad Op 2625.

Medical records, to extent they contain factual information, are available for public inspection; however, medical records reflective of advice, diagnostic opinion and similar information can likely be withheld. Comm Pub Acc Rec FOIL-Ad Op 2679.

Medical records found within personnel file of employee who has worked for private sector company fall outside scope of rights of access granted by Freedom of Information Law. Comm Pub Acc Rec FOIL-Ad Op 2680.

271. —Medical records, generally

272. — —Autopsy

Newspaper and its reporter were not entitled, under Freedom

of Information Law, to compel county to disclose autopsy reports which contained identities and blood-alcohol content of victims involved in alcohol-related traffic fatalities since CLS County § 677 restricts inspection of autopsy reports, and newspaper and reporter failed to show that they had "substantial interest" in reports, despite desire to publish articles on dangers of drinking and driving. Disclosure of MV-105 forms, which county medical examiner submits to Commissioner of Motor Vehicles under CLS County § 677(5), is governed by CLS County § 677(3)(b), and thus is not permitted under Freedom of Information Law absent showing of "substantial interest" by party requesting disclosure. Herald Co. v Murray, 136 A.D.2d 954, 524 N.Y.S.2d 949, 1988 N.Y. App. Div. LEXIS 1292 (N.Y. App. Div. 4th Dep't 1988).

Petitioner was not entitled to disclosure of certain documents, worksheets and audiotape allegedly created by New York City Department of Health in connection with autopsy of certain person whom petitioner was convicted of murdering, since exemption exists for records relating to deaths due to criminal behavior under New York City Charter § 557(g). Mitchell v Borakove, 225 A.D.2d 435, 639 N.Y.S.2d 791, 1996 N.Y. App. Div. LEXIS 2789 (N.Y. App. Div. 1st Dep't), app. dismissed, 88 N.Y.2d 919, 646 N.Y.S.2d 987, 670 N.E.2d 228, 1996 N.Y. LEXIS 1749 (N.Y. 1996).

NYC Charter § 557(g) precluded sister of convicted murderer from obtaining, under Freedom of Information Law, autopsy serology report concerning murdered individual, who was her husband, even if she had substantial interest in obtaining report. Katz v Scott, 236 A.D.2d 259, 653 N.Y.S.2d 346, 1997 N.Y. App. Div. LEXIS 1279 (N.Y. App. Div. 1st Dep't), app. denied, 90 N.Y.2d 801, 660 N.Y.S.2d 554, 683 N.E.2d 19, 1997 N.Y. LEXIS 1566 (N.Y. 1997).

Court properly dismissed Article 78 proceeding to compel Freedom of Information Law (FOIL) disclosure of autopsy report, felony complaint and ballistics report pertaining to petitioner's criminal prosecution, as those documents previously had been provided to his attorney and, in any event, autopsy reports are exempt from disclosure under New York City Charter § 557(g), statements made by witness to district attorney's office are protected by public interest privilege, and FOIL specifically exempts medical records as unwarranted invasion of privacy. Huston v Turkel, 236 A.D.2d 283, 653 N.Y.S.2d 584, 1997 N.Y. App. Div. LEXIS 1399 (N.Y. App. Div. 1st Dep't), app. denied, 90 N.Y.2d 809, 664 N.Y.S.2d 270, 686 N.E.2d 1365, 1997 N.Y. LEXIS 3170 (N.Y. 1997).

Petitioner, who was convicted of second degree murder, was not entitled to disclosure under Freedom of Information Law of records of city medical examiner from investigation into death of murder victim since city charter stated that such records were not open to public inspection. Nor was he entitled to such records on basis of provision of CLS County § 677(3)(b) that person with substantial interest in records of medical examiner was entitled to inspect records since statute did not apply to New York County in light of CLS County § 2(a). Mullady v Bogard, 153 Misc. 2d 1018, 583 N.Y.S.2d 744, 1992 N.Y. Misc. LEXIS 149 (N.Y. Sup. Ct. 1992).

Autopsy reports, which are available as of right only to district attorney and next of kin under CLS County § 677, are exempt from disclosure under Freedom of Information Law even if they are maintained by law enforcement agency, such as State Commission of Correction, rather than coroner or medical examiner. Comm on Open Gov't F7974.

273. — —Mental health

Clinical records regarding patient in mental hygiene facility are not normally open to inspection under Public Officers Law § 87 since Mental Hygiene Law § 33.13 generally requires their confidentiality; where such clinical mental health records are transferred from a public to a private hospital the confidentiality provisions required of the public hospital would essentially be transferred to the hospital presently retaining the patient records under Mental Hygiene Law § 33.13(d). Comm Pub Acc Rec FOIL—Ad Op 1843.

274. — —Prisoners' medical records

Prison inmate's grievance regarding his Freedom of Information Law request for copies of his medical records was properly denied where (1) he was not denied copies of his medical records because of his inability to pay for them but, rather, his refusal to sign form that would encumber his inmate account for cost of copies of his records, and (2) that condition was consistent with CLS Pub Health § 18(2)(e). Dawes v Selsky, 286 A.D.2d 806, 730 N.Y.S.2d 563, 2001 N.Y. App. Div. LEXIS 8624 (N.Y. App. Div. 3d Dep't 2001).

Position of representatives of the Department of Correctional Services, to the effect that factual information on medical reports of prisoners, such as laboratories results, are available under the Freedom of Information Act, but advisory materials, such as opinions rendered by physicians, are withheld is a stance consistent with Public Officers Law § 87(2)(g). Comm Pub Acc Rec FOIL—Ad Op 1797.

Department of Correctional Services' practice of providing access to medical information of factual nature such as laboratory tests, x-rays, and similar materials and withholding medical records reflective of advice, such as diagnostic opinion is reflective of compliance with Freedom of Information Law. Comm Pub Acc Rec FOIL-Ad Op 2646.

Autopsy reports, which are available as of right only to district attorney and next of kin under CLS County § 677, are exempt from disclosure under Freedom of Information Law even if they are maintained by law enforcement agency, such as State Commission of Correction, rather than coroner or medical examiner. Comm on Open Gov't F7974.

275. —Professional standards

Records of a doctor's disciplinary proceeding conducted by the State Board of Professional Medical Conduct pursuant to Pub Health Law § 230, consisting of patients' records and interviews with patients and with other doctors obtained during investigation of professional misconduct, are confidential under the provisions of that statute and are therefore exempt from public access under Pub O Law § 87(2) (Freedom of Information Law). John P. v Whalen, 54 N.Y.2d 89, 444 N.Y.S.2d 598, 429 N.E.2d 117, 1981 N.Y. LEXIS 3071 (N.Y. 1981).

A request for records or portions thereof pertaining to the names and organizational affiliations of the individuals who examine candidates for the Associate Medical Care Administrator promotional exam administered during the March 1980 period is improperly denied on the ground that the Department of Civil Service does not maintain a record of the names of those persons in view of a statement by the Department's Administrative Director that Department records "do contain the names . . . of persons constituting a pool or panel . . ." since such information constitutes a record under Public Officers Law § 86 and is accessible under Public Officers Law § 87; a denial of access to such record on the basis that it is an inter-agency or intra-agency document is also improper since records reflective of the names of examiners in question clearly constitute "factual data" which must be made available. Comm Pub Acc Rec FOIL—Ad Op 1787.

276. Schools and education, generally

Under the liberality to be accorded to the Freedom of Information Law, which mandates the disclosure of all records of public agencies subject only to claimed exemption (Public Officers Law, § 87, subd 2) with the agency carrying the burden of establishing such exemption, the notes made by the secretary to the New York State Board of Regents during the course of open and public meetings are official public records, taken by the secretary in his official, not private capacity, subject to compulsory disclosure and do not constitute personal memoranda of the secretary or exempt intra-agency materials which are not statistical or factual tabulations or data or instructions to staff that affect the public or final agency policy or determinations. (Public Officers Law, § 87, subd 2, par [g].) The notes, although fragmentary and nonverbatim, are clearly intended as factual; do not consist of instructions to staff that affect the public, and are not final agency policy or determinations. Warder v Board of Regents, 97 Misc. 2d 86, 410 N.Y.S.2d 742, 1978 N.Y. Misc. LEXIS 2752 (N.Y. Sup. Ct. 1978).

An appeal to the Commissioner of Education is not the proper forum for addressing claims relating to violations of the Freedom of Information Law. The appropriate form for challenging alleged

violations of the Freedom of Information Law is the Supreme Court of the State of New York, and not in an appeal before the Commissioner of Education. Appeal Alexandreena D, 1990 Op Comr Educ No 12433.

Access to report by teaching personnel within a school district which reflects the teachers' perceptions of the strong and weak points of the district as related to its educational delivery of services may be denied under Public Officers Law § 87(2)(g) as intra-agency or inter-agency material that are essentially advisory in nature. Comm Pub Acc Rec FOIL—Ad Op 1814.

Policy memorandum bulletins sent to principals by the superintendent of a school district are available under the Freedom of Information Law, since it is clear that such bulletins are records subject to rights of access and since, while the bulletins might be characterized as intra-agency materials, they are still accessible to the public in that they reflect instructions to staff that affect the public as well as statements of general policy. Comm Pub Acc Rec FOIL—Op 1910. Official report of the Middle States Accreditation Team are available under Public Officers Law § 87, since the accreditation report does not fall within any of the grounds for denial listed in § 87(2). Comm Pub Acc Rec FOIL—Ad Op 1926.

State college must release copy of its proposal to offer master's degree program that was submitted to board of regents since proposal is reflective of final determination made by agency and, therefore, available under § 87(2)(g)(iii) of Freedom of Information Law. Comm Pub Acc Rec FOIL-Ad Op 2510.

Denial of access to annual report of Curriculum Development Committee by Ballston Spa Central School District is inappropriate in view of terms of collective bargaining agreement between superintendent and Ballston Spa Education Association. Comm Pub Acc Rec FOIL-Ad Op 2750.

277. —Books, visual aids and other teaching tools

Sexually-explicit film and filmstrips from college-level course taught in public college and provided by college constituted agency "record" under Freedom of Information Law. Russo v Nassau County Community College, 81 N.Y.2d 690, 603 N.Y.S.2d 294, 623 N.E.2d 15, 1993 N.Y. LEXIS 3264 (N.Y. 1993).

Booklist to be used by students at State University of New York (SUNY), compiled by bookseller under subcontract with corporation that provided auxiliary services for particular SUNY campus, and received by corporation and kept on university's behalf, constituted "record" within meaning of CLS Pub O § 86(4). Encore College Bookstores v Auxiliary Serv. Corp., 87 N.Y.2d 410, 639 N.Y.S.2d 990, 663 N.E.2d 302, 1995 N.Y. LEXIS 4751 (N.Y. 1995).

278. —Discipline, misconduct, termination and the like

Disciplinary records maintained by Cornell University, regarding professor who was disciplined for having sexually harassed several female students, were not subject to Freedom of Information Law (FOIL) and thus Article 78 petition to compel FOIL disclosure of such records made to or about any personnel or students of "statutory" colleges operated by Cornell University (CLS Educ §§ 5711, 5712, 5714 and 5715) was properly denied. Stoll v New York State College of Veterinary Med. at Cornell Univ., 94 N.Y.2d 162, 701 N.Y.S.2d 316, 723 N.E.2d 65, 1999 N.Y. LEXIS 3738 (N.Y. 1999).

In proceeding by teacher who sought disclosure pursuant to Freedom of Information Law of various documents related to his termination, court properly found that CLS Pub O § 87(2)(g) precluded disclosure of chancellor's committee reports, CLS Educ § 3020-a reports, and "unsatisfactory" lesson observation reports in possession of school district, since all such material was inter-agency materials which were not statistical or factual tabulations or data, instructions to staff that affected public, or final agency policy or determinations. Elentuck v Green, 202 A.D.2d 425, 608 N.Y.S.2d 701, 1994 N.Y. App. Div. LEXIS 1956 (N.Y. App. Div. 2d Dep't), app. denied, 84 N.Y.2d 809, 621 N.Y.S.2d 519, 645 N.E.2d 1219, 1994 N.Y. LEXIS 4222 (N.Y. 1994).

279. —Family Educational Rights and Privacy Act (FERPA)

A former student is entitled to all her school records, including information concerning her IQ achievement test scores and similar information, since 20 USCS § 1232g states that "education records" identifiable to a particular student are confidential to all but the parents of this student, and the student acquires the rights of his or her parent when he or she reaches the age of 18. Comm Pub Acc Rec FOIL—Ad Op 1789.

280. —Financial matters, generally

School district's internal audit reports regarding particular high school were subject to public disclosure under Freedom of Information Law. Gannett Co. v Rochester City Sch. Dist., 179 Misc. 2d 502, 684 N.Y.S.2d 757, 1998 N.Y. Misc. LEXIS 649 (N.Y. Sup. Ct. 1998), aff'd, 267 A.D.2d 964, 701 N.Y.S.2d 679, 1999 N.Y. App. Div. LEXIS 13673 (N.Y. App. Div. 4th Dep't 1999).

Reimbursable people participation sheets kept by the New York City Board of Education are accessible under Public Officers Law § 87(2)(g)(i) since, although the sheets are inter-agency or intra-agency materials, they consist of factual information. Com Pub Acc Rec FOIL—Ad Op 1872.

Records consisting of contracts entered into by a school district with a private corporation are available since no legitimate grounds for denial could be cited, and related records of moneys paid by the school district to the private corporation are also available since such records constitute factual data that cannot be exempted under § 87(2)(g)(i) as intra-agency materials. Com Pub Acc Rec FOIL—Ad Op 1874.

Freedom of Information Law grants access to books of account, ledgers and similar documentation regarding finances of school district. Comm Pub Acc Rec FOIL-Ad Op 2520.

Proposed budget of school district must be made available for public access prior to and after its approval since there is no ground for denial in Freedom of Information Law § 87(2); taxpayer is entitled to see budget figures for each building and system covered by proposed school board budget. Comm Pub Acc Rec FOIL-Ad Op 2643.

Records of New York City Board of Education consisting of correspondence and other papers transmitted between Board and Superintendent and Community School Board District 3 which involve fiscal records are available for public access under Freedom of Information Law § 87(2)(g)(i) to extent that such records are reflective of statistical or factual tabulations or data. Comm Pub Acc Rec FOIL-Ad Op 2739.

Agency may not deny access to student government financial ledgers unless they identify particular students. Comm Pub Acc Rec OML-Ad Op 2785.

281. —Personnel records

A school district is not required to release information regarding its employees' identification, social security and retirement numbers since such information has no bearing upon the manner in which the public employees perform their official duties and constitutes an "unwarranted invasion of personal privacy" under Public Officers Law § 87(2)(b) but information as to the name, position, gross pay, fiscal year gross pay and other information relevant to the manner in which employee and the school district perform their respective duty is accessible to the public since public employees have a lesser right of privacy than any other identifiable group since such employees are required to be more accountable for their activities. Comm Pub Acc Rec FOIL—Ad OP 1803.

Public Officers Law § 87(3)(b) requires that a school district maintain on an ongoing basis a record that indicates the names, public office addresses, titles and salaries of all its officers and employees in order to ensure this type of information will be compiled and made available to the public upon request; moreover, such information is relevant to the performance of public employees' official duty and therefore may not be denied on the basis of the privacy rights of public employees. Com Pub Acc Rec FOIL—Ad Op 1866.

Records reflective of the current salary of the president of a community college, the salary of a professional negotiator under contract with the college and the final and official report of the Middle States Accreditation Team are available under Public Officers Law § 87 since the legislature has made specific reference to payroll information pertaining to public employees in § 87(3)(b) based upon the tacit finding that disclosure of such information would result in permissible rather than an unwar-

ranted invasion of personal privacy and since the accreditation report does not fall within any of the grounds for denial listed in § 87(2). Comm Pub Acc Rec FOIL—Ad Op 1926.

Contract salary figures that appear on pay stubs for particular School District employees for designated pay periods may properly be withheld from disclosure under § 87(2)(b) of the Public Officers Law on the ground that disclosure would constitute an "unwarranted invasion of personal privacy". Comm Pub Acc Rec FOIL-Ad Op 2328.

A teacher has a right to review the content of a separate file maintained by a principal unless it falls within one of the exemptions under § 87(2) of the Public Officers Law; even if exempted under Freedom of Information Law, file may be accessible under collective bargaining agreement. Comm Pub Acc Rec FOIL-Ad Op 2817.

282. —School board matters, generally

Procedures of 8 NYCRR part 84 did not apply to decision by board of education to provide member of board with list of names, home addresses, job titles and salaries of all employees of board, since board member was not seeking to review personnel records of employees, and records were already accessible by general public. Buffalo Teachers Federation, Inc. v Buffalo Bd. of Educ., 156 A.D.2d 1027, 549 N.Y.S.2d 541, 1989 N.Y. App. Div. LEXIS 16244 (N.Y. App. Div. 4th Dep't 1989), app. denied, 75 N.Y.2d 708, 555 N.Y.S.2d 691, 554 N.E.2d 1279, 1990 N.Y. LEXIS 673 (N.Y. 1990).

It was error to dismiss Article 78 petition, challenging determination of New York City Board of Education which denied petitioner's Freedom of Information Law request to obtain copies of OP No. 30 forms filed for city school district on ground that they constituted intra-agency pre-decisional materials, as OP No. 30 forms are more in nature of factual presentation to show only that appropriate procedures have been followed, and there is nothing about them to suggest that they should be considered pre-decisional material or deliberative material. OP No. 30 forms filed for city school district are not exempt from Freedom of Information Law disclosure, on ground that disclosure might result in unwarranted invasion of privacy, as information disclosed on such forms does not encompass sort of detail that would ordinarily and reasonably be regarded as intimate, private information. Mothers on the Move v Messer, 236 A.D.2d 408, 652 N.Y.S.2d 773, 1997 N.Y. App. Div. LEXIS 1030 (N.Y. App. Div. 2d Dep't 1997).

School district's internal audit reports regarding particular high school were subject to public disclosure under Freedom of Information Law. Gannett Co. v Rochester City Sch. Dist., 179 Misc. 2d 502, 684 N.Y.S.2d 757, 1998 N.Y. Misc. LEXIS 649 (N.Y. Sup. Ct. 1998), aff'd, 267 A.D.2d 964, 701 N.Y.S.2d 679, 1999 N.Y. App. Div. LEXIS 13673 (N.Y. App. Div. 4th Dep't 1999).

Since the tape recording of meetings of a local school board concern an open meeting, there are no grounds for denial of access under Public Officers Law § 87(2) which may be appropriately asserted against any request for access to them. Comm Pub Acc Rec FOIL—Ad Op 1769.

School board agendas should be made available to persons requesting such materials since, although they are intra-agency material, the agenda generally represents a factual recitation of the subjects to be considered at a meeting accessible under § 87(2)(g)(i). Comm Pub Acc Rec FOIL—Ad Op 1914.

A written report on a specific subject requested by the board of education from the school administration which is prepared by one of the school's administrators and used by the board in a discussion at one of its open sessions is an inter-agency document. Comm Pub Acc Rec FOIL-Ad Op 2815.

Nominating petitions filed by candidates seeking election to the board of education pursuant to Article 53 of the Education Law are accessible in their entirety and their disclosure does not constitute an unwarranted invasion of personal privacy. Comm Pub Acc Rec FOIL-Ad Op 2828.

283. —Student lists; directories

An individual's request that a community college furnish him with the names and addresses of all students enrolled at the college was properly refused, pursuant to 20 USCS § 1232g and Pub O § 87(2), where the individual did not designate such information "directory information," which would make it available to the public and, further, because the person requesting the information did not demonstrate a need for the requested disclosure, he would not be entitled to court-ordered access pursuant to the federal statute and, since a privacy right is thus established, access could also be withheld pursuant to Pub O § 87(2), particularly since the individual requesting the information failed to show that the names and addresses were not sought for" commercial or fund-raising purposes," under Pub O Law § 89(2). Krauss v Nassau Community College, 122 Misc. 2d 218, 469 N.Y.S.2d 553, 1983 N.Y. Misc. LEXIS 4100 (N.Y. Sup. Ct. 1983).

284. —Tests; test scores

Interim report by State Education Department, detailing petitioner's allegations that teachers at certain school had inflated student test results, summarizing departmental investigation which followed, and concluding by noting that meeting to discuss any further action or investigation would be desirable, was not subject to disclosure under Freedom of Information Act, since it was non-final agency determination falling within exemption contemplated by CLS Pub O § 87(2)(g). Mitzner v Sobol, 173 A.D.2d 1064, 570 N.Y.S.2d 402, 1991 N.Y. App. Div. LEXIS 7208 (N.Y. App. Div. 3d Dep't 1991).

A former student is entitled to all her school records, including information concerning her IQ achievement test scores and similar information, since 20 USCS § 1232g states that "education records" identifiable to a particular student are confidential to all but the parents of this student, and the student acquires the rights of his or her parent when he or she reaches the age of 18. Comm Pub Acc Rec FOIL—Ad Op 1789.

285. —Transcripts and the like

286. — —Student attendance records

School attendance registers from 1870 to 1925 are considered statistical or factual tabulations or data and are accessible under the Freedom of Information Law, although through retroactive application of Federal statute (20 USCS § 1232g) such records might not be available unless individuals upon whom requested are deceased. Comm Pub Acc Rec FOIL-Ad Op 2821.

287. Social services

Under Soc Serv § 372, the petitioner bears the burden of convincing the court that disclosure of the information sought would be proper. Thus, in a proceeding by an incarcerated 17-year old with violent tendencies who had spent almost his entire life under foster care seeking disclosure of his confidential records and certain information relating to his younger sisters pursuant to Pub O § 84 and Soc Serv § 372, the court did not abuse its discretion in limiting disclosure by excluding all material regarding the infant sisters where, in requesting the information, the petitioner never informed the agency that he wished to use the information to reinstitute contact with his sisters, and thus failed to show that disclosure of the information would be proper. Moreover, insofar as the petitioner's application would affect the welfare of his sisters, the court should have appointed a guardian to determine and represent their interest, rather than have the agency assume an adversary role on the theory that nondisclosure would always be in the best interests of the children. Sam v Sanders, 80 A.D.2d 758, 436 N.Y.S.2d 301, 1981 N.Y. App. Div. LEXIS 10536 (N.Y. App. Div. 1st Dep't 1981), aff'd, 55 N.Y.2d 1008, 449 N.Y.S.2d 474, 434 N.E.2d 710, 1982 N.Y. LEXIS 3177 (N.Y. 1982).

In an Article 78 proceeding to compel the county to supply the administrator and director of a methadone maintenance program with copies of a check made out to the program director and the computer printout for the check listing the names of medical assistance recipients who paid for the director's services with Medicaid cards and the dates they were treated, the requested documents would be made available where they had not been listed as exceptions under Pub O § 87(2) of the Freedom of Information Law. Vent v Bates, 89 A.D.2d 567, 452 N.Y.S.2d 98, 1982 N.Y. App. Div. LEXIS 17622 (N.Y. App. Div. 2d Dep't 1982).

In Article 78 proceeding to review denial of petitioner's request to be sent free copies of draft model "form" fair hearing decisions and final fair hearing decisions addressing use of Emergency Assistance to Families funds to replace lost or stolen cash, court

properly determined that fair hearing decisions requested were not exempt from disclosure under Freedom of Information Law, CLS Pub O § 84 et seq., and that Commissioner of Department of Social Services fulfilled its obligation under statute by granting petitioner access to fair hearing decisions maintained by agency for inspection and photocopying, but that draft model "form" fair hearing decisions were exempt from disclosure as intra-agency materials, pursuant to CLS Pub O § 87(2)(g). Bosshart v Perales, 202 A.D.2d 498, 609 N.Y.S.2d 30, 1994 N.Y. App. Div. LEXIS 2381 (N.Y. App. Div. 2d Dep't 1994), app. denied, 85 N.Y.2d 801, 624 N.Y.S.2d 371, 648 N.E.2d 791, 1995 N.Y. LEXIS 189 (N.Y. 1995).

Court would grant newspaper and its reporter disclosure of letter from Commissioner of New York City Human Resources Administration (HRA) to Commissioner of State Department of Social Services outlining HRA activities regarding individuals and family involved in particular child abuse case, and outlining HRA Commissioner's views as to agency matters; however, those parts of letter relating to specific child, either living or deceased, or pertaining to any specific agency action, would be redacted to protect privacy of all individuals involved and to assure compliance with confidentiality requirements of CLS Soc Serv § 422. New York News, Inc. v Grinker, 142 Misc. 2d 325, 537 N.Y.S.2d 770, 1989 N.Y. Misc. LEXIS 47 (N.Y. Sup. Ct. 1989).

In Article 78 proceeding, court would grant news organization's Freedom of Information Law request for access to all records maintained by department of social services concerning 3 children who were killed by their father unless department requested in camera inspection of purported confidential information within 7 days, where commissioner had determined that disclosure was in public interest, no specific reasons were cited for not disclosing requested documents, much information had already been released through criminal proceedings against father, and there were no surviving children whose best interests must be considered. Gannett Co. v County of Ontario, 173 Misc. 2d 304, 661 N.Y.S.2d 920, 1997 N.Y. Misc. LEXIS 333 (N.Y. Sup. Ct. 1997).

A request by a corporation to the Social Services Department for access to proposals submitted by another corporation to administer the Medicaid program in New York City and upstate New York together with the contract entered into with the state by that corporation may be denied under Public Officers Law § 87(2)(d) if such disclosure would cause substantial injury to the competitive position of the contracting corporation. Comm Pub Acc Rec FOIL—Ad Op 1763.

A request for "information, records and other materials" relating to a particular individual maintained by the Suffolk County Department of Social Services generated in 1959 may be properly denied since Social Services Law § 136 provides that records identifiable to an applicant for or recipient of public assistance are confidential and the exemption from disclosure carries over to the Freedom of Information Law since Public Officers Law § 87(2)(a) states that an agency may withhold records or portions thereof that are "specifically exempted from disclosure by state or federal statute". Comm Pub Acc Rec FOIL—Ad Op 1767.

288. Taxation, generally

Service station's financial records, which were in possession of Department of Taxation and Finance as result of department's audits of station, were exempt from disclosure under CLS Tax § 1146(a); although statute specifically prohibits disclosure only of "return or report" filed with department, statutory purpose of encouraging taxpayers to make full and truthful declarations would be thwarted if materials and records compiled by taxpayers in support of their returns and reports were subject to disclosure. Tartan Oil Corp. v State Dep't of Taxation & Fin., 239 A.D.2d 36, 668 N.Y.S.2d 76, 1998 N.Y. App. Div. LEXIS 326 (N.Y. App. Div. 3d Dep't 1998).

Hotel owner which sought records from New York City Department of Taxation and Finance, relating to department's policies and proceedings respecting collection of hotel room occupancy taxes, was not entitled to such records under literal language of broad disclosure provisions contained in NYC Charter §§ 1058 and 1059 if they were otherwise exempt from disclosure under Freedom of Information Law. Turner v Department of Fin., 242 A.D.2d 146, 673 N.Y.S.2d 428, 1998 N.Y. App. Div. LEXIS 5959 (N.Y. App. Div. 1st Dep't 1998).

Access to county records pertaining to unpaid taxes is available under both Freedom of Information Law and § 51 of the General Municipal Law. Comm Pub Acc Rec FOIL-Ad Op 2807.

Freedom of Information Law is not absolute restriction on scope of subpoena issued under CLS Tax § 2006(10), and thus it is not sufficient for Division of Taxation to merely assert that document is privileged or exempt from disclosure; disputed document(s) must be presented to Administrative Law Judge for in camera inspection and determination made as to whether document(s) must be provided to taxpayer or is privileged and exempt from disclosure. NY Tax Appeals Tribunal TSB-D-97(39)I, 1996 N.Y. Tax LEXIS 354.

289. —Real property assessments, generally

In Article 78 proceeding by landowners against town board members, landowners were not entitled to counsel fees under CLS Pub O § 89(4)(c), even though worksheets used in completing tax assessment roll had been wrongfully withheld from landowners, where there was statutory and decisional authority providing reasonable basis for view that worksheets were properly withheld as pre-decisional matter. Todd v Craig, 266 A.D.2d 626, 697 N.Y.S.2d 722, 1999 N.Y. App. Div. LEXIS 11242 (N.Y. App. Div. 3d Dep't 1999), app. denied, 94 N.Y.2d 760, 706 N.Y.S.2d 80, 727 N.E.2d 577, 2000 N.Y. LEXIS 121 (N.Y. 2000).

Court properly determined that inventory data for all parcels contained on assessment roll of town constituted record within meaning of Freedom of Information Law. Comps, Inc. v Town of Huntington, 269 A.D.2d 446, 703 N.Y.S.2d 225, 2000 N.Y. App. Div. LEXIS 1367 (N.Y. App. Div. 2d Dep't), app. denied, 95 N.Y.2d 758, 713 N.Y.S.2d 522, 735 N.E.2d 1287, 2000 N.Y. LEXIS 1832 (N.Y. 2000).

Forms sent to an assessor providing for notification of the sale or transfer of ownership of real property are not available for the public inspection under Public Officers Law § 87 since such forms are specifically exempt from disclosure under Real Property Tax Law § 574(5). Comm Pub Acc Rec FOIL—Ad Op 1827.

Verified list of changes in assessments which board of assessment review gives to assessor is public record available for inspection and copying under state's Freedom of Information Law. 10 Op. Counsel SBRPS No. 118.

Income tax returns filed with applications for real property tax exemptions (such as senior citizens exemption) are not subject to public inspection and copying under Freedom of Information Law. 11 Op. Counsel SBRPS No. 30.

Records submitted to board of assessment review, either as part of originally filed complaint or in response to board's demand, are available for public inspection and copying under Freedom of Information Law (FOIL) unless one or more FOIL exceptions applies. 11 Op. Counsel SBRPS No. 36 (2002).

290. — —Computerized records

In Article 78 proceeding challenging real property assessments, court improperly ordered town assessor to either furnish copy of computer tape file or permit petitioner to inspect or copy it where computer tape file contained information derived partly from Real Property Transfer Reports, which are exempt from public disclosure under CLS RPTL § 574(5); computer data management system derived from exempt information is protected under CLS Pub O § 87(2)(a). Corporation which purported to represent property owners before board of assessment review pursuant to CLS RPTL § 524(3), but lacked authority to do so, nevertheless had standing to institute Article 78 proceeding to compel disclosure under Freedom of Information Law (FOIL) based on rights held by it independent of its status as property owners' representative, since requested information did not fall within any FOIL exemption, there was no authority for restricting access to such information solely to property owners, and it was not precluded by doctrine of "unclean hands" on ground that it engaged in unauthorized legal practice by seeking to represent property owners in judicial proceedings. Property Valuation Analysts, Inc. v Williams, 164 A.D.2d 131, 563 N.Y.S.2d 545, 1990 N.Y. App. Div. LEXIS 13069 (N.Y. App. Div. 3d Dep't 1990).

Assessment records are public information and the form of the records or the petitioner's purpose in seeking them does not alter their public character or petitioner's concomitant right to inspect

and copy them. Therefore, it was improper for the county to deny petitioner's request for copies of the county's assessment rolls and computer tape format. Szikszay v Buelow, 107 Misc. 2d 886, 436 N.Y.S.2d 558, 1981 N.Y. Misc. LEXIS 2108 (N.Y. Sup. Ct. 1981).

Computerized sales file containing sales prices of real property arranged by tax lot and tax block and information whether parcel is one or 2-family home and statement of assessed value, street address and name of buyer and seller which is maintained by New York City Department of Finance is subject to public inspection under Freedom of Information Law. Comm Pub Acc Rec FOIL-Ad Op 2720.

Objective real property inventory data, though subject to change, is always public record; however, property owner name and address portion of computer tape used to generate property inventory data mailers may be withheld if it is sought for commercial or fund-raising purpose. Preliminary assessments included on assessment inventory notices are available for public inspection and copying. 10 Op. Counsel SBRPS No. 4.

291. — —Consultant reports

Opinions and recommendations that would, if prepared by agency employees, be exempt from disclosure under the Freedom of Information Law (FOIL) as "intra-agency materials" (Pub O § 87[2][g]), do not lose their exempt status simply because they are prepared for the agency, at its request, by an outside consultant. Respondents' final determination being to take no action with respect to property revaluation, the consultant's opinion could not be considered a final agency determination subject to disclosure under Pub O § 87(2)(g)(iii), and the fact that respondents ultimately took no action did not divest the reports of their quality as "intra-agency materials," since FOIL protects against disclosure of pre-decisional memoranda or other non-final recommendations, whether or not action is taken. However, to the extent that real estate appraisal reports prepared for respondents by a private consulting firm in connection with possible revaluation of appellant's property after new construction contained "statistical or factual tabulations or data" (Pub O § 87[2][g][i]), or other material subject to production, they would be ordered redacted and made available to appellant. Xerox Corp. v Webster, 65 N.Y.2d 131, 490 N.Y.S.2d 488, 480 N.E.2d 74, 1985 N.Y. LEXIS 15741 (N.Y. 1985).

Petitioner, which challenged town's assessment of its real property, was not entitled under Freedom of Information Law to obtain information concerning retainer agreement between town and outside consultant, or to portion of consultant's appraisal containing information about comparable properties used in determining fair market value of petitioner's property. GMC, GM Powertrain Div. v Town of Massena, 180 Misc. 2d 682, 693 N.Y.S.2d 870, 1999 N.Y. Misc. LEXIS 210 (N.Y. Sup. Ct. 1999).

Access to records of a private corporation currently engaged in a consulting contractual relationship with the Saratoga County Board of Supervisors and the County Equalization and Assessment Committee performing a 100 percent assessment revaluation project for the county may not be denied on the basis that Freedom of Information Law is inapplicable to records of a private corporation since Public Officers Law § 86(4) defines "record" as including "any information produced for an agency in any fiscal form whatsoever" and the private corporation involved was clearly producing information for a public corporation; furthermore, the private corporation could not assert that such records were intra-agency or inter-agency records exempt from disclosure under Public Officers Law § 87(2)(g) since the corporation does not fall within the definition of "agency" as defined by the Freedom of Information law and therefore could not assert § 87(2)(g) as a basis for denying access to records. Comm Pub Acc Rec FOIL—Ad Op 1783.

292. — —New York City real property assessments

In a proceeding to enjoin the release under the Freedom of Information Law of entire sales data lists concerning real estate transactions in New York City on the grounds that a portion of the lists containing notations of significance or insignificance ("S/I" notations) made by assessors was exempt from disclosure, the trial court erred in determining that such lists were not exempt where the potential exemption of the S/I notation was never fully litigated below. New York v New York State Bd. of Equalization & Assessment, 65 N.Y.2d 656, 491 N.Y.S.2d 610, 481 N.E.2d 242, 1985 N.Y. LEXIS 14769 (N.Y. 1985).

293. Utilities, including water

Internal review report of city water department was exempt from disclosure by virtue of CLS Pub O § 87(2)(g) where in-camera review of report revealed that it consisted solely of opinions, advice, evaluations, recommendations, and other subjective material and did not contain statistical or factual tabulations or data, instructions to staff that affected the public, or final agency policies or determinations. Rome Sentinel Co. v Rome, 174 A.D.2d 1005, 572 N.Y.S.2d 165, 1991 N.Y. App. Div. LEXIS 8929 (N.Y. App. Div. 4th Dep't 1991).

Utility company that entered into mandated power purchase agreement with respondent alternative power producer, whereby it was obligated to purchase all electricity generated by respondent at rate based on respondent's status as qualifying facility under Public Utility Regulatory Policies Act (Pub L 95-617), was not entitled to disclosure under Freedom of Information Law of "efficiency data" which respondent was required to file with State Energy Board; board had rational basis to conclude that requested operational data should be accorded confidential treatment under 9 NYCRR § 7843.2 and CLS Pub O § 87(2)(d) considering interests of respondent's steam host, and to determine that respondent would be unable to fairly compete for steam customers in future if such customers could not be fully assured that their confidentiality agreements were inviolate. New York State Elec. & Gas Corp. v New York State Energy Planning Bd., 221 A.D.2d 121, 645 N.Y.S.2d 145, 1996 N.Y. App. Div. LEXIS 7731 (N.Y. App. Div. 3d Dep't 1996).

294. Vital statistics; Birth records

295. —Death certificates

Disclosure of death certificate of person who allegedly died of AIDS would not constitute invasion of personal privacy, and thus would not be exempt from mandates of disclosure under Freedom of Information Law. City's determination that newspaper's request for death certificate of person who allegedly died of AIDS was for other than "proper purpose" (within meaning of CLS Pub Health § 4174) would not be sustained, and thus newspaper was entitled to disclosure under Freedom of Information Law, since newspaper's investigative reporting of possible AIDS case in locality which it served was legitimate reportage, given great public concern about disease. Tri-State Pub. Co., Div. of Ottaway Newspapers, Inc. v Port Jervis, 138 Misc. 2d 147, 523 N.Y.S.2d 954, 1988 N.Y. Misc. LEXIS 4 (N.Y. Sup. Ct. 1988).

Request by spouse for death certificate, amended or otherwise, meets "proper purpose" standard of New York City Administrative Code, and provision requiring confidentiality of medical examiner's records generally prepared in conjunction with criminal investigation cannot appropriately be cited as basis for withholding such certificate when death which has occurred is not subject of criminal investigation by law enforcement agency. Comm Pub Acc Rec FOIL-Ad Op 2084.

Public Health Law requiring applicant for death certificate to demonstrate proper purpose for making request may preclude access by way of request under § 87, since disclosure would result in unwarranted invasion of personal privacy of applicant for death certificate. Comm Pub Acc Rec FOIL-Ad Op 2467.

296. —Marriage records

Journalistic organization was entitled under Freedom of Information Law to unrestricted access to names of couples to whom marriage licenses had been issued since (1) disclosure was not barred by provision of CLS Dom Rel § 19 which restricts access to affidavits documenting marriage license information and permits disclosure only for "proper purpose," and (2) disclosure would not constitute unwarranted invasion of personal privacy within meaning of CLS Pub O § 87(2)(b). Gannett Co. v City Clerk's Office, 157 Misc. 2d 349, 596 N.Y.S.2d 968, 1993 N.Y. Misc. LEXIS 123 (N.Y. Sup. Ct.), aff'd, 197 A.D.2d 919, 604 N.Y.S.2d 848, 1993 N.Y. App. Div. LEXIS 9390 (N.Y. App. Div. 4th Dep't 1993).

A publication by Bureau of Vital Records indicating that names of marriage license applicants should not be provided to the news media is erroneous since such information is required to be made

available under both Freedom of Information Law and under § 19 of the Domestic Relations Law. Comm Pub Acc Rec FOIL-Ad Op 2812.

297. Other and miscellaneous, generally

Because the material sought by an insurer—pictures and/or video from a traffic camera gathered through a county's red light camera program—was specifically exempt from disclosure by N.Y. Pub. Off. Law § 87(2)(k), the insurer could only obtain information directly through the vendor. Matter of Travelers Prop. Cas. Co. of Am. v Nassau County Traffic & Parking Violations Agency, 937 N.Y.S.2d 536, 34 Misc. 3d 844, 2011 N.Y. Misc. LEXIS 6506 (N.Y. Sup. Ct. 2011).

Trial court should have ordered disclosure of the metadata associated with those photos that the agency had already disclosed to petitioner, as well as those photos deemed subject to disclosure under the Freedom of Information Law, N.Y. Pub. Off. Law art. 6. Matter of Irwin v Onondaga County Resource Recovery Agency, 72 A.D.3d 314, 895 N.Y.S.2d 262, 2010 N.Y. App. Div. LEXIS 1317 (N.Y. App. Div. 4th Dep't 2010).

Tape recordings of New York City mayor's interview with Playboy magazine are "records" subject to the Freedom of Information Law while in mayor's possession if recordings were produced for office of mayor; even though subsequently released to Playboy editors, recordings continue to fall within definition of "record" and subject to Freedom of Information Law; extent to which unpublished portions of tape recordings are accessible is dependent upon application of exceptions under § 87(2)(b) and (d). Comm Pub Acc Rec FOIL-Ad Op 2474.

Contract and other records pertaining to contract in possession of government agency is subject to rights of access granted by Freedom of Information Law where contract is entered into by unit of government with private corporation. Comm Pub Acc Rec FOIL-Ad Op 2665.

Records of Town, as well as other units of government subject to Freedom of Information Law, are presumptively open to public for inspection and copying. Comm Pub Acc Rec FOIL-Ad Op 2744.

298. —Lists of names, addresses and the like

In an Article 78 proceeding, it would be held that the sheriff properly denied a petitioner's request under the Freedom of Information Law for access to the income executions on file, where petitioner's stated purpose in seeking access was to send correspondence to the judgment debtors, in that the sheriff met his burden of proving that release of that information would constitute an unwarranted invasion of personal privacy by, demonstrating that petitioner would likely use the records for commercial purposes and the sheriff could not delete identifying details of a personal nature contained in the records which could conceivably result in economic or personal hardship to the debtors. In re Nicholas, 117 Misc. 2d 630, 458 N.Y.S.2d 858, 1983 N.Y. Misc. LEXIS 3196 (N.Y. Sup. Ct. 1983).

Records relative to the names and addresses of fire departments located in New York State are available under the Freedom of Information Law provided the Department of State maintains such records. Comm Pub Acc Rec FOIL—Ad Op 1915.

299. — —Businesses requiring license

In an Article 78 proceeding, a television network news division had a right under the Freedom of Information Law of access to the names and business addresses of principals of applicants for license to operate a check cashing business and other names by which they were known. However, disclosure of their home or residence addresses could, as a result of the nature of the business they conduct, expose applicants and their families to danger to life or safety and would be withheld. American Broadcasting Cos. v Siebert, 110 Misc. 2d 744, 442 N.Y.S.2d 855, 1981 N.Y. Misc. LEXIS 3153 (N.Y. Sup. Ct. 1981).

300. — —Jurors; potential jurors

Records containing names and addresses of jurors obtained from juror qualification questionnaires are exempt from disclosure under CLS Jud § 509, and thus are necessarily exempt under Freedom of Information Law, even though CLS Jud § 509 exempts only questionnaires themselves, since it is information from questionnaires which, if made public, would invade jurors' privacy. Newsday, Inc. v Sise, 71 N.Y.2d 146, 524 N.Y.S.2d 35, 518 N.E.2d 930, 1987 N.Y. LEXIS 20000 (N.Y. 1987), cert. denied, 486 U.S. 1056, 108 S. Ct. 2823, 100 L. Ed. 2d 924, 1988 U.S. LEXIS 2686 (U.S. 1988).

301. — —Lottery winners

Respondent improperly denied access to names and cities of residence (as opposed to names and actual addresses) of state lottery prize winners on ground that request was unwarranted invasion of personal privacy under CLS Pub O § 87(2)(b)(iii), although it was uncontested that lists were to be used for commercial purposes, where such information was regularly released when winners were announced and was defined as "public information" in respondent's own regulations (21 NYCRR § 2803.12). Empire Realty Corp. v New York State Div. of the Lottery, 230 A.D.2d 270, 657 N.Y.S.2d 504, 1997 N.Y. App. Div. LEXIS 5207 (N.Y. App. Div. 3d Dep't 1997).

III. Under Former § 88

A. Generally

302. In general

Disclosure requirements of former Freedom of Information Law are mandatory, and as to those items required to be disclosed the agency must comply; if from experience it is determined that the statute needs revision it should be directed to the attention of the legislature. Dunlea v Goldmark, 54 A.D.2d 446, 389 N.Y.S.2d 423, 1976 N.Y. App. Div. LEXIS 14061 (N.Y. App. Div. 3d Dep't 1976), aff'd, 43 N.Y.2d 754, 401 N.Y.S.2d 1010, 372 N.E.2d 798, 1977 N.Y. LEXIS 2546 (N.Y. 1977).

Contrary to contention of respondents, executive director of State Consumer Protection Board, who petitioned to have Supreme Court overrule State Education Department's refusal to provide certain information to Board on ground that such refusal contravened the former Freedom of Information Law, had power to conduct investigations, research, studies and analysis of matters affecting the interest of consumers; and was "relevant or essential to the ordinary work" of Board, and, thus, was not exempt from disclosure under certain provisions of the former Freedom of Information Law; and, Goal of the former Freedom of Information Law is to give the public free access to the documents involved in government decision making, not to ease the research burden of private litigants, although this may well have been the intention of the separate federal sanction, under the federal Freedom of Information Act, for the failure to index final opinions; and it would be an unwarranted enlargement of the purpose of the the former Freedom of Information Law to require every agency to break down every final order into component topics and index it topically; accordingly, the Unemployment Insurance Appeal Board conformed to the spirit and letter of the law by labeling and separately listing by each label the broad variety of records it maintains, and by making them available for public inspection. D'Alessandro v Unemployment Ins. Appeal Board, 56 A.D.2d 762, 392 N.Y.S.2d 433, 1977 N.Y. App. Div. LEXIS 11024 (N.Y. App. Div. 1st Dep't 1977).

If county had never compiled a list of names of terminated employees sought, Freedom of Information Law did not require that one be prepared, but applicant was required to be granted access to those lists and documents which specifically identify the employees to be terminated and which effectuate their removal. Gannett Co. v County of Monroe, 59 A.D.2d 309, 399 N.Y.S.2d 534, 1977 N.Y. App. Div. LEXIS 13567 (N.Y. App. Div. 4th Dep't 1977), aff'd, 45 N.Y.2d 954, 411 N.Y.S.2d 557, 383 N.E.2d 1151, 1978 N.Y. LEXIS 2339 (N.Y. 1978).

Since all documents are not presumptively available for public inspection and copying under the Freedom of Information Law, in order for public access to be mandatory the requested document must be included in one of the nine enumerated categories in the Law. Freedom of Information Law does not make all records of government generally available but, rather, provides that only certain enumerated categories are available. Sheehan v Binghamton, 59 A.D.2d 808, 398 N.Y.S.2d 905, 1977 N.Y. App. Div. LEXIS 13885 (N.Y. App. Div. 3d Dep't 1977).

Matters relating to specific documents, data and information should be settled through discovery process as much as possible rather than resorting to the Freedom of Information Law. Burke v Yudelson, 81 Misc. 2d 870, 368 N.Y.S.2d 779, 1975 N.Y. Misc.

LEXIS 2477 (N.Y. Sup. Ct. 1975), aff'd, 51 A.D.2d 673, 378 N.Y.S.2d 165, 1976 N.Y. App. Div. LEXIS 11034 (N.Y. App. Div. 4th Dep't 1976).

Mere fact that agency which seeks disclosure of information pursuant to the former Freedom of Information Law, would conclude, after receiving such information, that the information should not be acted on does not make the information "irrelevant to the work of the agency" so as to render the information exempt from disclosure to the agency. Pooler v Nyquist, 89 Misc. 2d 705, 392 N.Y.S.2d 948, 1976 N.Y. Misc. LEXIS 2861 (N.Y. Sup. Ct. 1976).

School district regulations, as submitted by school district, did not comply with the former Freedom of Information Law and school district was therefore ordered to comply which such law by revising its regulations within 30 days. Duncan v Savino, 90 Misc. 2d 282, 394 N.Y.S.2d 362, 1977 N.Y. Misc. LEXIS 2040 (N.Y. Sup. Ct. 1977).

Where malfeasance of a public officer is in issue, and the necessary confidentiality of criminal investigation will not be impaired thereby or national security threatened, maximum freedom of information must be provided whether the proceeding is criminal or civil. Montes v State, 94 Misc. 2d 972, 406 N.Y.S.2d 664, 1978 N.Y. Misc. LEXIS 2329 (N.Y. Ct. Cl. 1978).

303. Requests for information

Description of material sought to be discovered under former Freedom of Information Law as "budget examiner's file" was not too vague since readily identifiable material was sought; although there were allegations that the files contained some material which should be exempt, there was no such a showing as to establish that the public was to be denied access to the whole file. Dunlea v Goldmark, 54 A.D.2d 446, 389 N.Y.S.2d 423, 1976 N.Y. App. Div. LEXIS 14061 (N.Y. App. Div. 3d Dep't 1976), aff'd, 43 N.Y.2d 754, 401 N.Y.S.2d 1010, 372 N.E.2d 798, 1977 N.Y. LEXIS 2546 (N.Y. 1977).

304. Standing

Since Freedom of Information Law directs that certain records be made available to "any persons" on request, petitioning attorney had standing to maintain Article 78 proceeding seeking disclosure of certain documents, regardless of whether he might represent interests other than the corporation directly requesting the records. Cavalier v McCue, 58 A.D.2d 729, 396 N.Y.S.2d 299, 1977 N.Y. App. Div. LEXIS 12845 (N.Y. App. Div. 3d Dep't 1977).

Attorney representing client being sued by city was entitled to and could have access to municipal records sought under the Freedom of Information Law and to make appropriate arrangements for obtaining copies thereof at his expense, notwithstanding that discovery proceedings had been held in connection with pending lawsuit. Burke v Yudelson, 81 Misc. 2d 870, 368 N.Y.S.2d 779, 1975 N.Y. Misc. LEXIS 2477 (N.Y. Sup. Ct. 1975), aff'd, 51 A.D.2d 673, 378 N.Y.S.2d 165, 1976 N.Y. App. Div. LEXIS 11034 (N.Y. App. Div. 4th Dep't 1976).

Teacher, who had brought proceeding alleging that school district had failed to comply with the former Freedom of Information Law, and her attorney, as well as other persons whether or not voters or in any associated with the school district, were intended to be benefited by the former Freedom of Information Law. Duncan v Savino, 90 Misc. 2d 282, 394 N.Y.S.2d 362, 1977 N.Y. Misc. LEXIS 2040 (N.Y. Sup. Ct. 1977).

305. Sufficiency of response

Statement by director of the Division of the Budget that there was a valid need for protection of communication between high government officials and those who advise and assist them was insufficient to show how disclosure of certain worksheets and files prepared by budget examiner on the Cable Television Commission would be harmful to the public interest. In order to preclude disclosure under the Freedom of Information Law there must be specific support for the claim of privilege; this requires the governmental agency to come forward and show that public interest would indeed be jeopardized by disclosure. Dunlea v Goldmark, 85 Misc. 2d 198, 380 N.Y.S.2d 496, 1976 N.Y. Misc. LEXIS 1982 (N.Y. Sup. Ct.), modified, 54 A.D.2d 446, 389 N.Y.S.2d 423, 1976 N.Y. App. Div. LEXIS 14061 (N.Y. App. Div. 3d Dep't 1976).

306. Confidentiality

Under Freedom of Information Act, court, on proper application, is forum to determine validity of public official's classification of materials as confidential. Dillon v Cahn, 79 Misc. 2d 300, 359 N.Y.S.2d 981, 1974 N.Y. Misc. LEXIS 1651 (N.Y. Sup. Ct. 1974).

Information "specifically exempted by statute" from disclosure under the Freedom of Information Act does not contemplate exemptions of article governing disclosure, but rather refers to such information as income tax and juvenile and youthful offender proceedings. Burke v Yudelson, 81 Misc. 2d 870, 368 N.Y.S.2d 779, 1975 N.Y. Misc. LEXIS 2477 (N.Y. Sup. Ct. 1975), aff'd, 51 A.D.2d 673, 378 N.Y.S.2d 165, 1976 N.Y. App. Div. LEXIS 11034 (N.Y. App. Div. 4th Dep't 1976).

Under the former Freedom of Information Act, all Joint Commission on Accreditation of Hospitals survey reports delivered in confidence to the State Department of Health, whether submitted in lieu of a Public Health Law survey or in connection with such survey, shall not be available for public disclosure; however, all Joint Commission on Accreditation of Hospitals survey reports delivered to the State Department of Health without such agreement of confidentiality may be available for public disclosure. Nassau-Suffolk Hospital Council, Inc. v Whalen, 89 Misc. 2d 304, 390 N.Y.S.2d 995, 1977 N.Y. Misc. LEXIS 1842 (N.Y. Sup. Ct. 1977).

307. Enforcement

Landowner's right to compel certain pretrial disclosures from the condemnor under the Freedom of Information Law was a matter to be pursued in an Article 78 proceeding rather than by way of motion in the condemnation proceeding. In re Oyster Bay, 54 A.D.2d 762, 387 N.Y.S.2d 881, 1976 N.Y. App. Div. LEXIS 14428 (N.Y. App. Div. 2d Dep't 1976).

Where more than four months elapsed from time of denial of appeals of applications for information pursuant to the former Freedom of Information Law to time of commencement of special proceedings to compel disclosure, judicial review of denials was barred by statute of limitations; and where it was possible that, if applicant for information pursuant to the former Freedom of Information Law had initially applied to records access officer of town, his application might have been granted, thereby obviating need for any request to courts, judicial review of denial of applications was barred by doctrine of exhaustion of administrative remedies, particularly in view of fact that denial of previous requests for information did not establish that new application for different information would have been fruitless. Cosgrove v Klingler, 58 A.D.2d 910, 396 N.Y.S.2d 498, 1977 N.Y. App. Div. LEXIS 13102 (N.Y. App. Div. 3d Dep't 1977).

County officials had burden of demonstrating applicability of exemption under Gannett Co. v County of Monroe, 59 A.D.2d 309, 399 N.Y.S.2d 534, 1977 N.Y. App. Div. LEXIS 13567 (N.Y. App. Div. 4th Dep't 1977), aff'd, 45 N.Y.2d 954, 411 N.Y.S.2d 557, 383 N.E.2d 1151, 1978 N.Y. LEXIS 2339 (N.Y. 1978).

Under Freedom of Information Act, court, on proper application, is forum to determine validity of public official's classification of materials as confidential. Dillon v Cahn, 79 Misc. 2d 300, 359 N.Y.S.2d 981, 1974 N.Y. Misc. LEXIS 1651 (N.Y. Sup. Ct. 1974).

In Article 78 proceeding in which executive director of State Consumer Protection Board sought overruling of State Education Department's refusal to provide certain information to Board on ground that such refusal contravened the former Freedom of Information Law, respondents had burden of demonstrating the applicability of an exemption from disclosure.; and respondents' mere conclusory recitations that information was confidentially received, that its release might result in unfair advantage to competitors and would unwarrantably invade personal privacy were not sufficient to sustain respondents' burden of proof that certain exemptions from disclosure were applicable; and where respondent only summarily asserts the exemption issue, court is not required to conduct an "in camera" review of every challenged document for purpose of determining whether the exemption is applicable. Pooler v Nyquist, 89 Misc. 2d 705, 392 N.Y.S.2d 948, 1976 N.Y. Misc. LEXIS 2861 (N.Y. Sup. Ct. 1976).

Commissioner of Education will not entertain appeals alleging that school contracts with photographers violated Gen Bus L §§ 340, 349 relating to monopolies and unfair business practices, and that request to inspect contracts was improperly refused under the former Freedom of Information Law, as these laws provide other methods of review. Re Jones, Op Comr Ed #9456.

B. Particular Matters

308. In general

Public Officers Law entitled petitioner and other bona fide members of news media to inspect and copy village payroll records. Miller v Freeport, 51 A.D.2d 765, 379 N.Y.S.2d 517, 1976 N.Y. App. Div. LEXIS 11328 (N.Y. App. Div. 2d Dep't 1976).

On motion of newspaper editor for release of the record of disciplinary proceeding against judge, those materials to be released consisted of briefs in the Appellate Division, the referee's report insofar as it related to charges which he sustained and the charges themselves to that extent, and testimony and exhibits bearing on such charges. In re Mertens, 58 A.D.2d 527, 395 N.Y.S.2d 195, 1977 N.Y. App. Div. LEXIS 12487 (N.Y. App. Div. 1st Dep't 1977).

Certified representative of bargaining unit of state employees was not entitled to examine "showing of interest" submitted on behalf of employee organization challenging representation status of certified representative, where Public Employee Relation Board's director had power to pass upon sufficiency of the "showing of interest" and revealing names of employees who signed challenger's petitions might subject signators to harassment and reprisal and would violate policy of secrecy of employee's choice in such matters. Police Benevolent Ass'n of New York State Police, Inc. v Helsby, 84 Misc. 2d 17, 374 N.Y.S.2d 262, 1975 N.Y. Misc. LEXIS 3078 (N.Y. Sup. Ct. 1975).

Petitioner, which ran review course preparatory to the state certified public accountants examination, could not compel education commissioner to continue his long-established practice of supplying petitioner with lists of exam applicants for use in its business, as the Freedom of Information Law provides that an agency may delete identifying details to prevent an unwarranted invasion of personal privacy, and the legislature has defined "an unwarranted invasion of personal privacy" to include the sale or release of lists of names and addresses if such a list would be used for private, commercial or fund-raising purposes. Person-Wolinsky Associates, Inc. v Nyquist, 84 Misc. 2d 930, 377 N.Y.S.2d 897, 1975 N.Y. Misc. LEXIS 3219 (N.Y. Sup. Ct. 1975).

Assessors' workbooks or field books constitute public records which may be inspected or copied. 4 Op Counsel, SBEA #25.

309. Accident and investigation reports

Investigatory files exemption from the former Freedom of Information Law should be narrowly construed. Zuckerman v New York State Bd. of Parole, 53 A.D.2d 405, 385 N.Y.S.2d 811, 1976 N.Y. App. Div. LEXIS 13069 (N.Y. App. Div. 3d Dep't 1976).

Where police report on events surrounding prisoner's death in city's detention center had multiple purposes which included enabling district attorney to determine whether any crime or offense had been committed, and enabling police department to determine whether any of its personnel were guilty of breach of duty and whether proceedings were adequate to prevent any recurrence, and investigation resulting in such report was conducted in regular course of official police business, newspaper was entitled to disclosure of only so much of such report as represented purely factual matter, with names of police officers and jail personnel deleted. Westchester Rockland Newspapers, Inc. v Mosczydlowski, 58 A.D.2d 234, 396 N.Y.S.2d 857, 1977 N.Y. App. Div. LEXIS 11862 (N.Y. App. Div. 2d Dep't 1977).

"Chief's Report" about fire was within purview of Freedom of Information Law and was discoverable, and city did not have right to refuse to disclose unless applicant would sign affirmation that notice of claim was not filed and would not be filed and that cause of action was not and would not be brought against city. Application of Dwyer, 85 Misc. 2d 104, 378 N.Y.S.2d 894, 1975 N.Y. Misc. LEXIS 3279 (N.Y. Sup. Ct. 1975).

Under Multiple Residence Law, apartment tenant was entitled to building code enforcement bureau's reports concerning her apartment and common areas of apartment building, in that disclosure would not violate right of privacy of other individuals, nor would it in any manner hamper future code enforcement efforts by bureau. Martinez v Libous, 85 Misc. 2d 186, 378 N.Y.S.2d 917, 1975 N.Y. Misc. LEXIS 3286 (N.Y. Sup. Ct. 1975).

The former Freedom of Information Law's broad policy in favor of disclosure mandated rejection of argument that town building department records compiled during investigation of complaint that construction work at certain town facilities was performed improperly and in violation of town code were not public records under the law. Sole beneficiaries of exemption provided by Freedom of Information Law, which was intended to provide unimpaired access to governmental information, for information that is part of investigatory files compiled for law enforcement purposes are criminal law enforcement authorities, and thus building department could not rely on such exemption for its refusal to permit examination of records compiled during investigation of complaint that construction work at certain town facilities was performed improperly and in violation of town code. Where town building department's investigation of complaint that construction work at certain town facilities was performed improperly and in violation of town code was alleged to be ongoing but no facts were alleged demonstrating how public interest would be jeopardized if inspection of records compiled during investigation took place, and assertion of privilege was wholly based upon conclusory use of terms "executive privilege" and "attorneys' work product," records were not privilege under common-law public interest privilege. Young v Huntington, 88 Misc. 2d 632, 388 N.Y.S.2d 978, 1976 N.Y. Misc. LEXIS 2715 (N.Y. Sup. Ct. 1976).

310. Audits and budgets

Fact that city was in litigation with one of its contractors did not bar contractor from availing himself of right granted by Freedom of Information Law to inspect and copy audits with respect to the contracts at issue, contractor was not required to resort to discovery rules to attain such material; absent any proof that documents were not exempt from disclosure by the Freedom of Information Law petition for access to such record was properly granted. Burke v Yudelson, 51 A.D.2d 673, 378 N.Y.S.2d 165, 1976 N.Y. App. Div. LEXIS 11034 (N.Y. App. Div. 4th Dep't 1976).

Budget examiner's files and work sheets for Cable Television Commission were subject to discovery under former Freedom of Information Law; however, the agency was entitled to an opportunity to establish specific exemptions, preferably by a sufficiently detailed affidavit to enable special term to determine the validity of the exemption claimed. Even assuming that in spite of Freedom of Information Law public agencies retain a common-law privilege to deny access on a showing that disclosure would be highly detrimental to the overall public interest, refusal to disclose budget examiner's files and work sheets for Commission on Cable Television could not be justified on common-law grounds absent any showing of the requisite detriment to the public interest. Dunlea v Goldmark, 54 A.D.2d 446, 389 N.Y.S.2d 423, 1976 N.Y. App. Div. LEXIS 14061 (N.Y. App. Div. 3d Dep't 1976), aff'd, 43 N.Y.2d 754, 401 N.Y.S.2d 1010, 372 N.E.2d 798, 1977 N.Y. LEXIS 2546 (N.Y. 1977).

One agency may not discover the budgetary estimates prepared by a separate agency, both functioning under the auspices of a County Executive and a Budget Director, prior to the adoption of a formal budget proposal by the County Executive for consideration by the county's Board of Legislators, since neither a public official's right to know, nor the former Freedom of Information Law, authorizes access to the information sought within the context of the provisions of article XIV of the Westchester County Charter (L 1937, ch 617) dealing with the procedure for the preparation and adoption of the county budget. Delaney v Del Bello, 62 A.D.2d 281, 405 N.Y.S.2d 276, 1978 N.Y. App. Div. LEXIS 10452 (N.Y. App. Div. 2d Dep't 1978).

A budget document transmitted by a county executive to the clerk of the county legislature containing recommendations for salaries regarding various managerial positions in the county government is accessible under Public Officers Law § 87 since the document in question is a necessary incident to the budget review process and represents an addendum to the tentative budget. Com Pub Acc Rec FOIL—Ad Op 1879.

311. Criminal justice system records

Claimant, who had brought action against state for conscious pain and suffering and wrongful death alleging negligent parole of person, who while on parole from state hospital allegedly murdered claimant's father, was entitled to discover only final determinations and dissenting opinions of members of governing body of parole board since all other records of board were confidential. Dowling v State, 49 A.D.2d 982, 374 N.Y.S.2d 148, 1975 N.Y. App. Div. LEXIS 11300 (N.Y. App. Div. 3d Dep't 1975).

Minutes of business meeting of Parole Board were not per se exempt from disclosure either under Correction Law, as unwarranted invasion of personal privacy, under investigatory files compiled for law enforcement purposes exemption to Freedom of Information Law, or under common-law privilege for official information; Supreme Court would be required to inspect minutes in camera to determine to what extent, if any, minutes were exempt from disclosure for those reasons. Zuckerman v New York State Bd. of Parole, 53 A.D.2d 405, 385 N.Y.S.2d 811, 1976 N.Y. App. Div. LEXIS 13069 (N.Y. App. Div. 3d Dep't 1976).

Federal penitentiary inmate's petition to compel state police to furnish inmate with copies of all its files relating to inmate would be denied, in view of indication that such information constituted part of investigatory files compiled for law enforcement purposes, and, thus, was exempt from availability for public inspection. Marshall v New York State Police, 89 Misc. 2d 529, 391 N.Y.S.2d 953, 1977 N.Y. Misc. LEXIS 1889 (N.Y. Sup. Ct. 1977).

312. Law enforcement agencies

Report of investigation made by state police as to cause of certain fire and results of certain polygraph tests constituted part of investigatory files compiled for law enforcement purposes and were therefore exempt from availability for public inspection and copying. V. F. V. Constr. Co. v Kirwan, 51 A.D.2d 753, 379 N.Y.S.2d 166, 1976 N.Y. App. Div. LEXIS 11301 (N.Y. App. Div. 2d Dep't 1976).

County district attorney's trial sheet and witnesses' statements obtained by his office in course of preparing criminal case for trial were exempt from disclosure under the former Freedom of Information Law, as information which was part of investigatory files compiled for law enforcement purposes, and were exempt from disclosure under common-law privilege. Knight v Gold, 53 A.D.2d 694, 385 N.Y.S.2d 123, 1976 N.Y. App. Div. LEXIS 13446 (N.Y. App. Div. 2d Dep't 1976), app. dismissed, 43 N.Y.2d 841, 402 N.Y.S.2d 811, 373 N.E.2d 991, 1978 N.Y. LEXIS 1756 (N.Y. 1978).

Requested document or "complaint" of CB radio theft was a field officer's report and, as such, might well include hearsay, reports and names of confidential informants, suspicions or rumors; since no reasonable definition of "police blotter," as enumerated in the Freedom of Information Law, would call for the inclusion of such information thereon, the requested document was not subject to disclosure under the Law, and its availability should have been denied. Sheehan v Binghamton, 59 A.D.2d 808, 398 N.Y.S.2d 905, 1977 N.Y. App. Div. LEXIS 13885 (N.Y. App. Div. 3d Dep't 1977).

Sole beneficiaries of exemption provided by the former Freedom of Information Law, which was intended to provide unimpaired access to governmental information, for information that is part of investigatory files compiled for law enforcement purposes are criminal law enforcement authorities, and thus building department could not predicate its refusal to permit examination of records compiled during investigation of complaint that construction work at certain town facilities was performed improperly and in violation of town code on such exemption. Young v Huntington, 88 Misc. 2d 632, 388 N.Y.S.2d 978, 1976 N.Y. Misc. LEXIS 2715 (N.Y. Sup. Ct. 1976).

Federal penitentiary inmate's petition to compel state police to furnish inmate with copies of all its files relating to inmate would be denied, in view of indication that such information constituted part of investigatory files compiled for law enforcement purposes and, thus, was exempt from availability for public inspection. Marshall v New York State Police, 89 Misc. 2d 529, 391 N.Y.S.2d 953, 1977 N.Y. Misc. LEXIS 1889 (N.Y. Sup. Ct. 1977).

313. Educational institution records

The Freedom of Information Law (Public Officers Law, art 6) does not except from its disclosure requirement salary and fringe benefit data compiled as part of a subscription service by respondent Board of Cooperative Educational Services for member school districts; nothing in section 84 or 87 of the Public Officers Law requires that the agency from which the information is sought be the agency making the decision to which the information relates, there is no evidence that disclosure of the data requested would impair present or imminent collective bargaining within the meaning of section 87, and although the Education Law makes the information sought available only to school districts that pay for it, petitioner, president-elect of a school administrators association, is not such a district and any conflict between the Education Law and the Public Officers Law will be resolved when a school district seeks to use the latter law to avoid the restriction of the former; moreover, disclosure would not be contrary to public policy concerning governmental disclosure, which is fixed by the Freedom of Information Law, since the common-law interest privilege cannot protect from disclosure materials which that law requires to be disclosed, and disclosure would not constitute an unlawful contribution of public funds contrary to section 1 of article VIII of the New York Constitution, since meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds. Doolan v Board of Cooperative Educational Services, Second Supervisory Dist., 48 N.Y.2d 341, 422 N.Y.S.2d 927, 398 N.E.2d 533, 1979 N.Y. LEXIS 2404 (N.Y. 1979).

Tenured teachers whose positions as department heads had been abolished were entitled to inspect, pursuant to the state freedom of information law, official minutes of school board's meetings pertaining to its decision to eliminate the teachers' positions and pertaining to the teachers' competency, but board was not obliged to disclose minutes of its executive sessions. Gabriel v Turner, 50 A.D.2d 889, 377 N.Y.S.2d 527, 1975 N.Y. App. Div. LEXIS 11790 (N.Y. App. Div. 2d Dep't 1975).

Provision of Education Law defining words "public records" does not fall within scope of provision of the former Freedom of Information Law mandating disclosure of any files, records, papers or documents "required by any other provision of law to be made available" for public inspection and copying since it does not mandate that the defined records be made available for public inspection and copying. Cavalier v McCue, 58 A.D.2d 729, 396 N.Y.S.2d 299, 1977 N.Y. App. Div. LEXIS 12845 (N.Y. App. Div. 3d Dep't 1977).

Disclosure of drop-out and placement rates of private schools and private business schools would not permit an unfair advantage to competitors so as to exempt such information from disclosure under the former Freedom of Information Law. Information, with respect to disposition of each complaint received by Commissioner of Education after effective date of law concerning private schools and private business schools and with respect to drop-out rates and placement rates of certain private schools and information consisting of copies of field inspection reports and field supervisors' factual reports was discoverable pursuant to the former Freedom of Information Law provisions pertaining to final opinions made in adjudication of cases and pertaining to audits and statistical or factual tabulations, unless such information was exempted by succeeding provisions of the statute. Pooler v Nyquist, 89 Misc. 2d 705, 392 N.Y.S.2d 948, 1976 N.Y. Misc. LEXIS 2861 (N.Y. Sup. Ct. 1976).

The former Freedom of Information Law broadens category of those to whom records are required to be made available, by school district beyond disclosure required by the Education Law. Duncan v Savino, 90 Misc. 2d 282, 394 N.Y.S.2d 362, 1977 N.Y. Misc. LEXIS 2040 (N.Y. Sup. Ct. 1977).

314. Election records

Ballots in referendum on extension of dairy promotion order and cooperative milk producer lists related thereto were subject to disclosure. Gates v Dyson, 55 A.D.2d 705, 389 N.Y.S.2d 154, 1976 N.Y. App. Div. LEXIS 15478 (N.Y. App. Div. 3d Dep't 1976).

315. Litigation

Material which is exempt from disclosure pursuant to statute governing scope of disclosure because prepared solely for purposes of litigation is similarly exempt from disclosure under the

Freedom of Information Law. Westchester Rockland Newspapers, Inc. v Mosczydlowski, 58 A.D.2d 234, 396 N.Y.S.2d 857, 1977 N.Y. App. Div. LEXIS 11862 (N.Y. App. Div. 2d Dep't 1977).

The former Freedom of Information Law did not entitle claimant, which brought wrongful death action arising from prisoner take-over of portion of Attica Correctional Facility, to access to records of state commission which investigated incident and whose records were protected from disclosure by public interest privilege. Jones v State, 58 A.D.2d 736, 395 N.Y.S.2d 862, 1977 N.Y. App. Div. LEXIS 12855 (N.Y. App. Div. 4th Dep't 1977).

Engineer's report, which contained opinion of a potential expert witness who might be called on behalf of county upon a trial to resist contract's claim for additional compensation to repair a break in sewer line, and which had been obtained by county for such express purpose, was not subject to disclosure under former Freedom of Information Law; and where there is a dispute arising out of a public contract from which a claim for a large sum of money may be made against the county, any information and material obtained by the county at the suggestion of the county attorney in order to resist such claim will not be made the subject matter of disclosure under the former Freedom of Information Law. Fitzpatrick v County of Nassau, Dep't of Public Works, 83 Misc. 2d 884, 372 N.Y.S.2d 939, 1975 N.Y. Misc. LEXIS 3007 (N.Y. Sup. Ct. 1975).

Fact that material is prepared by a lawyer prior to commencement of an action does not render privilege against disclosure of material prepared for litigation under the former Freedom of Information Law inapplicable to such material if it is prepared in contemplation of litigation. Cavalier v McCue, 86 Misc. 2d 1074, 386 N.Y.S.2d 281, 1976 N.Y. Misc. LEXIS 2583 (N.Y. Sup. Ct. 1976).

Material, consisting of expert appraisal opinions prepared by state and Metropolitan Transportation Authority for negotiation or litigation of condemnation claims, did not fit into any one of categories of information available for inspection and copying under the Public Officers Law and specifically did not consist of statistical or factual data or internal or external audits and, thus, petitioners, who were litigants in condemnation proceedings, would not be entitled to obtain such appraisal opinions. Novack v Schuler, 88 Misc. 2d 796, 389 N.Y.S.2d 223, 1976 N.Y. Misc. LEXIS 2746 (N.Y. Sup. Ct. 1976).

Information, with respect to disposition of each complaint received by Commissioner of Education after effective date of law concerning private schools and private business schools and information consisting of copies of field inspection reports and field supervisors' factual reports would be exempt from disclosure under the former Freedom of Information Law to extent that it was part of any investigatory file which Commissioner established for purpose of considering whether or not enforcement proceedings should be instituted or for purpose of instituting such proceedings. Pooler v Nyquist, 89 Misc. 2d 705, 392 N.Y.S.2d 948, 1976 N.Y. Misc. LEXIS 2861 (N.Y. Sup. Ct. 1976).

316. Personnel records

Disclosure of names, job titles and salary levels of county employees who were terminated due to substantial budget reductions was not exempt under the former Freedom of Information Law on ground that information sought was of a personal nature, or that type of records sought were not relevant and essential to ordinary work of agency and in absence of documentation of economic or personal hardship. Records regarding the termination of employees and their removal from the payroll are, by their very nature, relevant and essential to the ordinary work of county, and thus exception in the former Freedom of Information Law applicable where records are not relevant or essential to the ordinary work of the agency or instrumentality is not in such case applicable. Gannett Co. v County of Monroe, 59 A.D.2d 309, 399 N.Y.S.2d 534, 1977 N.Y. App. Div. LEXIS 13567 (N.Y. App. Div. 4th Dep't 1977), aff'd, 45 N.Y.2d 954, 411 N.Y.S.2d 557, 383 N.E.2d 1151, 1978 N.Y. LEXIS 2339 (N.Y. 1978).

Plaintiffs in proceedings before Civilian Complaint Review Board were entitled to obtain records of complaints and investigations of civilian complaints against police officer, so long as confidential sources and ongoing investigations are endangered. Walker v New York, 64 A.D.2d 980, 408 N.Y.S.2d 811, 1978 N.Y. App. Div. LEXIS 12955 (N.Y. App. Div. 2d Dep't 1978).

Although freedom of information law did not provide for the copying of payrolls of officers and employees of village, legislature intended that bona fide members of the news media should be afforded the opportunity to make copies of the payrolls which they were authorized by statute to inspect. Miller v Freeport, 81 Misc. 2d 81, 365 N.Y.S.2d 444, 1975 N.Y. Misc. LEXIS 2334 (N.Y. Sup. Ct. 1975), aff'd, 51 A.D.2d 765, 379 N.Y.S.2d 517, 1976 N.Y. App. Div. LEXIS 11328 (N.Y. App. Div. 2d Dep't 1976).

Disclosure of written reprimands for police officers, contained in report concerning investigation into alleged wrongdoing involving on-duty employment of city police officers, would not result in an unwarranted invasion of personal privacy and would not harm overall public interest, and thus such reprimands should be made available for public inspection and copying under former Freedom of Information Law. Farrell v Village Bd. of Trustees, 83 Misc. 2d 125, 372 N.Y.S.2d 905, 1975 N.Y. Misc. LEXIS 2815 (N.Y. Sup. Ct. 1975).

City council resolution ordering commissioner of public safety to provide all reports and files of professional standards unit of city police department to standing committee on public safety of city council for review in confidential manner was not unlawful. Kilgallon v City Council of Troy, 86 Misc. 2d 106, 382 N.Y.S.2d 271, 1976 N.Y. Misc. LEXIS 2405 (N.Y. Sup. Ct.), modified, 53 A.D.2d 976, 385 N.Y.S.2d 841, 1976 N.Y. App. Div. LEXIS 15775 (N.Y. App. Div. 3d Dep't 1976).

317. Invasion of privacy

Disclosure of written reprimands of police officers, contained in report concerning investigation into alleged wrongdoing involving on-duty employment of city police officers, would not result in an unwarranted invasion of personal privacy and would not harm overall public interest, and thus such reprimands should be made available for public inspection and copying under former Freedom of Information Law. Farrell v Village Bd. of Trustees, 83 Misc. 2d 125, 372 N.Y.S.2d 905, 1975 N.Y. Misc. LEXIS 2815 (N.Y. Sup. Ct. 1975).

318. Statistical and factual tabulations

Mere fact that a statistical or factual tabulation forms the basis for a subsequent opinion does not mean that the tabulation is not subject to discovery under the former Freedom of Information Law; fact that the document is part of the "deliberative" process is irrelevant since the law makes the back up factual or statistical information to a final decision available to the public and there is no statutory requirement that such data be limited to "objective" information. Phrase "statistical or factual" tabulation, within meaning of disclosure requirements of former Freedom of Information Law, means something other than an expression of opinion or naked argument for or against a certain position. Even though director of the Division of the Budget might claim that data contained in worksheet prepared by budget examiner with reference to Cable Television Commission were recommendations rather than statistical or factual material, the data came within the definition of "statistical and factual tabulations" and material was thus available under the Freedom of Information Law. Dunlea v Goldmark, 85 Misc. 2d 198, 380 N.Y.S.2d 496, 1976 N.Y. Misc. LEXIS 1982 (N.Y. Sup. Ct.), modified, 54 A.D.2d 446, 389 N.Y.S.2d 423, 1976 N.Y. App. Div. LEXIS 14061 (N.Y. App. Div. 3d Dep't 1976).

IV. Under Former § 66

319. In general

This section and § 144 of the Education Law, §§ 255 and 255-b of the Judiciary Law, § 925 of the County Law, and § 51 of the General Municipal Law manifest the general policy of New York to make available to public inspection and access all records or other papers kept in a public office, at least where secrecy is not enjoined by statute or rule. Werfel v Fitzgerald, 23 A.D.2d 306, 260 N.Y.S.2d 791, 1965 N.Y. App. Div. LEXIS 3932 (N.Y. App. Div. 2d Dep't 1965).

Where a court grants a taxpayer's application to inspect the village records, such as those concerning an urban renewal project, the officials having custody of the records may impose reasonable rules and regulations as to when and how the inspec-

tion may be made in order to avoid undue interference with official functions. Sorley v Lister, 33 Misc. 2d 471, 218 N.Y.S.2d 215, 1961 N.Y. Misc. LEXIS 2694 (N.Y. Sup. Ct. 1961).

This section expresses a strong legislative policy to make available to public inspection all records or other papers kept in the public office, save where secrecy is enjoined by statute or rule or overriding considerations. Bernkrant v City Rent & Rehabilitation Administration, 40 Misc. 2d 157, 242 N.Y.S.2d 753, 1963 N.Y. Misc. LEXIS 1886 (N.Y. Sup. Ct. 1963), aff'd, 20 A.D.2d 682, 246 N.Y.S.2d 170, 1964 N.Y. App. Div. LEXIS 4671 (N.Y. App. Div. 1st Dep't 1964).

The policy of this section in making available to public inspection documents kept in any public office is further evidenced by the broad definition of "public records" in § 144 of the Education Law and § 51 of the General Municipal Law. This section expresses a strong legislative policy to make available to public inspection and access all records or other papers kept in a public office, if secrecy is not enjoined by statute or rule. Scott v County of Nassau, 43 Misc. 2d 648, 252 N.Y.S.2d 135, 1964 N.Y. Misc. LEXIS 1534 (N.Y. Sup. Ct. 1964).

Effectuation of the policy in favor of full publicity of public records accordingly demands the broadest possible interpretation of the scope and content of this section, so far as some overriding consideration of policy does not forbid. C. Van Deusen, Inc. v New York State Liquor Authority, 47 Misc. 2d 1094, 263 N.Y.S.2d 984, 1965 N.Y. Misc. LEXIS 1414 (N.Y. Sup. Ct. 1965).

The right of the public to know of governmental operations and to inspect public records is fundamental to the workings of a democratic society. All documents classified as public records are open for public inspection and absent a contrary statute or rule the public policy of New York favors making all records and papers kept in a public office available for inspection. Winston v Mangan, 72 Misc. 2d 280, 338 N.Y.S.2d 654, 1972 N.Y. Misc. LEXIS 1297 (N.Y. Sup. Ct. 1972).

Education Law § 144, Public Officers Law § 66, Judiciary Law §§ 266 and 255-b, and General Municipal Law § 51 express a strong and forthright legislative policy to make available to public inspection and access all records or other papers where there is no compelling reason for secrecy or where secrecy is not enjoined by statute or rule. Cline v Board of Trustees, 76 Misc. 2d 536, 351 N.Y.S.2d 81, 1973 N.Y. Misc. LEXIS 1528 (N.Y. Sup. Ct. 1973), aff'd, 45 A.D.2d 823, 357 N.Y.S.2d 1022, 1974 N.Y. App. Div. LEXIS 7188 (N.Y. App. Div. 3d Dep't 1974).

320. Fees

Town clerk is entitled to collect five cents for each year searched for each name, and ten cents for each instrument set up, where he makes a search of judgment dockets filed in his office. 1946 Ops St Compt 226.

A town clerk furnishing copies of records and papers on file in his office for which no fee is expressly allowed by law, should charge fees at the rate payable to the county clerk for a similar service. 1952 Ops St Compt 376.

The fee to be charged for a village tax search is five cents for each name searched against for each year and ten cents for each instrument necessarily set up. 1954 Ops St Compt 224.

Where a town uses an I.B.M. punch card file for chattel mortgages and conditional sales contracts instead of the ordinary indices, the fees for preparing and furnishing lists of chattel mortgages and conditional sales filed during a particular period should be the fees for preparing certified copies of records. 1956 Ops St Compt 118.

A public officer having custody of public records and papers must furnish copies of those records and papers on file in his office. If no fee is expressly allowed by law, fees at the rate payable to county clerk for a similar service may be charged. 1958 Ops St Compt File #155.

A town police department may charge a fee for supplying certified copies of police reports of accidents. 1960 Ops St Compt File #555.

Fees for furnishing marriage license transcripts, certifications and searches, being payable to the town clerk, are the property of the town, and neither these functions nor fees are within the province of a registrar of vital statistics. 1965 Ops St Compt File #186.

A county treasurer must, upon request and tender of fees, prepare and certify a search of the tax records in his office. 1969 Ops St Compt File #472.

A town clerk must furnish as many certified copies of town planning board meeting minutes as are requested. A fee of one dollar per page, or portion thereof, may be charged for such copies. 1969 Ops St Compt File #528.

321. Applicability to particular officers or agencies

An official court-appointed stenographer is a "public officer" and his office is a "public office" within the meaning of this section, thus any of the stenographer's original notes may reasonably be regarded as "records" or other "papers" of which he has custody in his office. New York Post Corp. v Leibowitz, 2 N.Y.2d 677, 163 N.Y.S.2d 409, 143 N.E.2d 256, 1957 N.Y. LEXIS 1009 (N.Y. 1957).

This section will not sustain an application by a citizen and taxpayer for leave to inspect the books, records and files of the Triborough Bridge and Tunnel Authority, since that agency is a public benefit corporation within the definition of that term in subd 4 of § 3 of the General Corporation Law, created by special act, and no provision of such legislation or of the Public Authorities Law authorizes a citizen or taxpayer to demand inspection of its records. New York Post Corp. v Moses, 10 N.Y.2d 199, 219 N.Y.S.2d 7, 176 N.E.2d 709, 1961 N.Y. LEXIS 1088 (N.Y. 1961).

Motor vehicle bureau is public office within this state, within meaning of this section. People ex rel. Stenstrom v Harnett, 224 A.D. 127, 230 N.Y.S. 28, 1928 N.Y. App. Div. LEXIS 9947 (N.Y. App. Div.), aff'd, 249 N.Y. 606, 164 N.E. 602, 249 N.Y. (N.Y.S.) 606, 1928 N.Y. LEXIS 965 (N.Y. 1928).

The Municipal Civil Service Commission of the City of New York is a "city department" and its records are "public records" so that the provisions of this section are applicable. Walker v Watson, 115 N.Y.S.2d 93, 201 Misc. 556, 1952 N.Y. Misc. LEXIS 1616 (N.Y. Sup. Ct.), modified, 280 A.D. 760, 113 N.Y.S.2d 676, 1952 N.Y. App. Div. LEXIS 3609 (N.Y. App. Div. 1952).

322. Availability of particular documents, generally

City treasurer's records of court funds on deposit are not public records in the sense that, under § 66, transcripts thereof must be furnished to all who apply and tender the fee allowed by law. Natelson v Portfolio, 291 N.Y. 290, 52 N.E.2d 440, 291 N.Y. (N.Y.S.) 290, 1943 N.Y. LEXIS 1019 (N.Y. 1943).

Not all records kept by public officers are "public records," and, in the absence of statute expressly stating that items sought to be examined are public records, nature and purpose of the record and possibly custom and usage must be the guide in determining whether a particular record is public in nature. Sorley v Lister, 33 Misc. 2d 471, 218 N.Y.S.2d 215, 1961 N.Y. Misc. LEXIS 2694 (N.Y. Sup. Ct. 1961).

The policy of full publicity demands the broadest possible interpretation of this section, including making available to newspapers upon request pursuant to § 4174 of the Public Health Law certified copies of records of deaths under circumstances which make them newsworthy. Rome Sentinel Co. v Boustedt, 43 Misc. 2d 598, 252 N.Y.S.2d 10, 1964 N.Y. Misc. LEXIS 1566 (N.Y. Sup. Ct. 1964).

Above statute is inapplicable to request to permit taxpayer to inspect records, vouchers, cash receipts, disbursements and other written records evidencing expenditures of public funds by Board of Higher Education of City of New York or any unit thereof. Dabrowski v Rosenberg, 44 Misc. 2d 877, 255 N.Y.S.2d 305, 1964 N.Y. Misc. LEXIS 1178 (N.Y. Sup. Ct. 1964).

In an action to direct the Secretary of State of the state of New York to allow the petitioner access to the corporate card index files in the Corporation Bureau of the Secretary of State, the petition must show that the Secretary of State is specifically enjoined by law to permit the petitioner to inspect the corporate card index files. The corporate card index file maintained in the office of the Secretary of State is not a public record. Such file is not kept pursuant to any statutory mandate but rather is an office procedure simplifying and expediting performance of the duties of the

office by its employees. Looby v Lomenzo, 60 Misc. 2d 16, 301 N.Y.S.2d 163, 1969 N.Y. Misc. LEXIS 1494 (N.Y. Sup. Ct. 1969).

Town clerk has duty to furnish, upon request and upon payment of lawful fees, copy of list of dog owners filed in his office by dog enumerator. List must be certified and fees therefor are property of the town. Fees for preparing and certifying list are $.20 per folio plus $.25 for certificate. 1955 Ops St Compt 372.

Confidential claims for investigative expenses submitted by the Nassau County District Attorney to the County Comptroller are not available for inspection by the public until the investigation is complete. 1968 Ops St Compt File #748.

323. —Minutes of meetings of boards or authorities

By virtue of Education Law § 6306, board of trustees of community college was a "board" within the meaning of General Municipal Law § 51, and records thereof were matters of public record discoverable by county taxpayers where said board failed to establish any compelling reason why minutes of board were not matters of public record, or cite any statute or rule enjoining secrecy of records. Resident and taxpayer of county in which community college was located had legal standing to bring Article 78 petition to compel college board of trustees to permit examination of minutes of board meetings; it was immaterial that petitioner was also an employee of college and a member of its faculty association. Cline v Board of Trustees, 76 Misc. 2d 536, 351 N.Y.S.2d 81, 1973 N.Y. Misc. LEXIS 1528 (N.Y. Sup. Ct. 1973), aff'd, 45 A.D.2d 823, 357 N.Y.S.2d 1022, 1974 N.Y. App. Div. LEXIS 7188 (N.Y. App. Div. 3d Dep't 1974).

The minutes of a municipal housing authority are open to inspection only by parties showing a special interest to be served. 1967 Ops St Compt File #331.

Tape recordings used as an aid in compiling official minutes of village board meetings are not public records. 1968 Ops St Compt File #525.

324. —Motor vehicle records

Such records of police commissioner of city of Buffalo as are public records must be produced pursuant to Pub. Off. Law, § 66, and petitioner, who was involved in motor vehicle accident, is entitled to inspect and to copy such records and any other statement signed by a person involved in the motor vehicle accident as are on file with the commissioner pursuant to Veh. and Tr. Law, § 70, subd. 5-a. Blandford v McClellan, 16 N.Y.S.2d 919, 173 Misc. 15, 1940 N.Y. Misc. LEXIS 1373 (N.Y. Sup. Ct. 1940).

Inspection of a medical officer's report on an autopsy performed on a deceased motorist might be obtained under this section, at the office of the Commissioner of Motor Vehicles where filing of the report was required by § 603 of the Vehicle and Traffic Law. Walsh v Beckman, 29 Misc. 2d 591, 215 N.Y.S.2d 398, 1961 N.Y. Misc. LEXIS 2963 (N.Y. Sup. Ct. 1961).

325. —Police records

Notwithstanding statutory provisions for unrestricted searches, examinations and the procurement of transcripts of public records, disclosure of certain records of police department would be denied where such records were the object of an investigation of serious crime by an Assistant Attorney General. Nunziata v Police Dep't of New York, 73 Misc. 2d 29, 341 N.Y.S.2d 22, 1973 N.Y. Misc. LEXIS 2244 (N.Y. Sup. Ct. 1973).

Photographs taken by a village police department and kept in its files are part of the reports of the occurrences at which they were taken. While they are not open to the inspection of the general public, accident reports, including any photographs must be available to interested parties. A fee of one dollar per copy may be charged, or where necessary, a different fee may be established by local law. 1967 Ops St Compt File #639.

326. —Prison records

Pre-parole records of inmates of state institution are confidential and are not "public records" within the meaning of this section. The board of parole does not have a mandatory duty to make them available for inspection and copy. Jordan v Loos, 125 N.Y.S.2d 447, 204 Misc. 814, 1953 N.Y. Misc. LEXIS 2334 (N.Y. Sup. Ct. 1953), aff'd, 283 A.D. 983, 130 N.Y.S.2d 904, 1954 N.Y. App. Div. LEXIS 5998 (N.Y. App. Div. 1954).

327. —Tax records

Property appraisal information data accumulated in connection with an urban renewal project are not public records which taxpayers and property owners have a right to inspect, being mere opinions for guidance on whether to acquire the property by purchase or condemnation, the disclosure of which to property owners would tend to hinder rather than to promote the program without serving any useful or beneficial public purpose. Sorley v Lister, 33 Misc. 2d 471, 218 N.Y.S.2d 215, 1961 N.Y. Misc. LEXIS 2694 (N.Y. Sup. Ct. 1961).

This section does not cover records, reports and audits prepared by employees of a State Tax Commission in connection with checking records of the New York Racing Association in determining the proper franchise tax to be paid by that association, and such records are not "public records" within the intendment of this section. Thaler v Murphy, 42 Misc. 2d 1, 247 N.Y.S.2d 816, 1964 N.Y. Misc. LEXIS 1973 (N.Y. Sup. Ct. 1964).

The county treasurer issues copies of town and county tax receipts: the town clerk provides copies of school tax receipts. 1954 Ops St Compt 64.

A card file kept by a town receiver of taxes listing names of property owners and addresses to which tax bills are to be sent is not open to public inspection. 1969 Ops St Compt File #587.

A town clerk is required, on demand and on payment of fee, to furnish a properly certified copy of assessment roll. 1967 Ops St Compt File #672.

328. —Other and miscellaneous

The state traffic commission has legal authority to promulgate rules regarding the speed at which one may travel on the New York State highways and the director of the commission can issue under seal a certificate stating that there is no rule or regulation permitting a speed greater than 50 miles per hour along any highway within the state. People v Thomas, 105 N.Y.S.2d 611, 199 Misc. 163, 1950 N.Y. Misc. LEXIS 2522 (N.Y. County Ct. 1950).

A certificate signed by the State Traffic Commission which certified that the Commission had not fixed a maximum speed greater than 50 miles per hour along any highway within the State of New York could properly be received in evidence in a prosecution for violation of Vehicle and Traffic Law § 56(4). People v Martin, 136 N.Y.S.2d 777, 207 Misc. 127, 1955 N.Y. Misc. LEXIS 3382 (N.Y. County Ct. 1955).

A town clerk may not provide periodic lists of documents filed in his office to a private credit bureau. 1967 Ops St Compt File #651.

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1. Requests for photocopied records

Unpublished decision: While N.Y. Pub. Off. Law § 87 did have provisions for photocopying records sought under the Freedom of Information Law, N.Y. Pub. Off. Law § 84 et seq., it also allowed the agency from which records were sought to make its own rules as to the manner of access. Humane Soc'y of the United States v Fanslau, 237 N.Y.L.J. 25, 2007 N.Y. Misc. LEXIS 322 (N.Y. Sup. Ct. Jan. 26, 2007).

2. Miscellaneous

Unpublished decision: Bankruptcy court acted within its equitable authority when it stayed a state court action that sought disclosure of records related to the closure of a hospital owned by a bankruptcy debtor; the bankruptcy court reasonably found that the purpose of the state court action was to investigate causes of action within the bankruptcy court's exclusive purview, as documents filed in the state court action alleged fraud, waste, and improper transfers. Kagan v Saint Vincents Catholic Med. Ctrs.

(In re Saint Vincents Catholic Med. Ctrs.), 581 Fed. Appx. 41, 2014 U.S. App. LEXIS 19710 (2d Cir. N.Y. 2014).

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I. In General

A. Generally

1. In general

Freedom of Information Law does not require agency to provide information or answer questions, but only to make existing records available upon request where such records do not fall under one or more of grounds for denial. 1986 Committee on Open Government FOIL-AO-4187.

Freedom of Information Law pertains to rights of access to records, and does not deal with accuracy of contents of records such that it does not provide applicant with right to challenge any and all errors contained in records requested. 1986 Committee on Open Government FOIL-AO-4309.

To extent that news media obtains police blotters or complaint reports pursuant to Freedom of Information Law, individual, as member of public, would enjoy same rights; when records are accessible under Freedom of Information Law, they should be made available to any person, without regard to status or interests. Comm on Open Gov't FOIL-AO-4585.

Freedom of Information Law requires that each agency make available for public inspection and copying all records, except those records or portions thereof that fall within grounds for denial, as such, applicant may use his or her photocopy machine to prepare copies of town records. Comm on Open Gov't FOIL-AO-4759.

Since agency is generally obliged to maintain custody and control of its records, applicant may be required to review records in presence of official of agency; since agency must grant or deny access to records within prescribed periods of time, as long as records are made available for inspection or copying within those time periods, agency could wait until official of agency could be present; however, if agency official cannot be present during course of time period, access cannot be delayed or denied until that person becomes available. Comm on Open Gov't FOIL-AO-4869.

Freedom of Information Law requires that each agency shall make available for public inspection and copying all records, except those records or portions thereof that fall within one or more grounds for denial; as such, applicant for records may use his or her photocopy machine to prepare copies of town records. Comm on Open Gov't FOIL-AO-4936.

Freedom of Information Law pertains to records of governmental entity; it does not apply to records or information maintained by private individual and in situation where private citizen contacts other private citizens using personal resources, rather than those of agency, Freedom of Information Law would not be applicable or irrelevant. Comm on Open Gov't FOIL-AO-4949.

Freedom of Information Law does not require that agency transfer records from location where record is available for inspection and copying to another location. Comm on Open Gov't FOIL-AO-4984.

Although Freedom of Information Law (FOIL) requires agencies to respond to requests for existing records and disclose those records in accordance with its provisions, FOIL is not vehicle that requires agencies to provide information by responding to questions. Comm on Open Gov't FOIL-AO-7549.

Whether document in possession of agency is signed or unsigned, undated or characterized as unofficial, it nonetheless falls within coverage of Freedom of Information Law. Comm on Open Gov't FOIL-AO-8378.

Insofar as record is disclosed at open meeting, agency waives any right to withhold it that might otherwise have existed; even though there may have been basis for withholding prior to public disclosure of record, that activity precludes agency from withholding any portion of document that was disclosed. Comm on Open Gov't FOIL-AO-9178.

Introductory language of CLS Pub O § 87(2), which refers to ability of agency to withhold "records or portions thereof" that fall within scope of grounds for denial that follow, indicates recognition on part of drafters of statute that there may be situations in which single record or report includes both information that must be disclosed and information that may be withheld; that phrase also imposes obligation upon agency to review records sought in their entirety to determine which portions, if any, may properly be withheld. Comm on Open Gov't FOIL-AO-9214.

Freedom of Information Law governs records of local boards of ethics. Comm on Open Gov't FOIL-AO-12169.

Claim or promise of confidentiality is irrelevant to analysis of rights of access to records. Comm on Open Gov't FOIL-AO-12605.

Regulations of Committee on Open Government and local laws enacted under CLS Pub O § 87(1) can deal only with procedural implementation of Freedom of Information Law; neither may govern extent to which records may be withheld. Comm on Open Gov't FOIL-AO-12829.

Former mayor has no "right" to determine which documents are accessible to public, despite agreement between city and mayor's private entity to which documents were transferred, where such documents are city records, and all such records are subject to rights of access conferred on public by Freedom of Information Law. Comm on Open Gov't FOIL-AO-13194.

2. Access officers, generally

3. —Duties of access officers, generally

4. — —Staff duties

Pursuant to regulations and to implement CLS Pub O § 89(3) concerning agency's duty to provide certification, records access officer has duty of ensuring that town personnel certify that copies of records are true copies. Comm on Open Gov't FOIL-AO-8378.

Records access officer has duty of coordinating responses to requests for records under Freedom of Information Law; as such, records access officer may designate staff to carry out functions associated with implementation of Freedom of Information Law. Comm on Open Gov't FOIL-AO-9248.

Not every official or staff person within agency must be expert with respect to Freedom of Information Law; it is duty of records

access officer to coordinate agency's response to requests, and each official or staff person in possession of records should not have authority to determine whether or when those records should be disclosed. Comm on Open Gov't FOIL-AO-12681.

One duty of designated records access officer is to assist requestor, upon request, to identify records sought. Comm on Open Gov't FOIL-AO-4086.

Records access officer has duty of coordinating an agency's response to requests; requests should generally be directed to records access officer. Comm on Open Gov't FOIL-AO-4630.

Freedom of Information Law requires each agency to have "records access officer" to whom requests may be directed and who has duty of coordinating agency's response to request for records; therefore, requests should be sent to "records access officer" in relevant agency; request should be made in writing and should reasonably describe record so that there is sufficient detail to enable agency officials to locate records. Comm on Open Gov't FOIL-AO-4693.

Agency's regulations must include reference to designation of one or more "record access officers", person or persons to whom request may be directed and who have duty of coordinating agency's response to request. Comm on Open Gov't FOIL-AO-4698.

Agency must appoint records access officer who has duty of coordinating agency's response to request for records sought under Freedom of Information Law; request should be directed to records access officer of agency that maintains records. Comm on Open Gov't FOIL-AO-4704.

Agency must appoint records access officers who has duty of coordinating agency's response for requests for records made under Freedom of Information Law; as such, requests for records should generally be directed to records access officer of agency that maintains records requested. Comm on Open Gov't FOIL-AO-4721.

Request for records should be directed to records access officer at agency or agencies that maintain records sought; records access officer has duty of co-ordinating agency's response to request for records. Comm on Open Gov't FOIL-AO-4754.

Requests for records should generally be directed to records access officer of agency whose duty is to coordinate agency's response to request for records. Comm on Open Gov't FOIL-AO-4766.

Freedom of Information Law requires that each agency designate one or more records access officers whose duty is to coordinate agency's response to request; requests for records should be directed to that person. Comm on Open Gov't FOIL-AO-4770.

Request or requests should be directed to records access officer at agency or agencies which maintain records sought because each agency has designated representative as officer who has duty of coordinating agency's response to requests for records made under Freedom of Information Law. Comm on Open Gov't FOIL-AO-4774.

Records access officer has duty of coordinating agency's response to request for records; board of each community school district has designated records access officer who is required to respond to request for records maintained by district. Comm on Open Gov't FOIL-AO-4780.

Requests made under Freedom of Information Law should be directed to records access officers of agencies where records are sought; each agency should have designated records access officer having duty of coordinating agency's response to requests made under Freedom of Information Law. Comm on Open Gov't FOIL-AO-4790.

Requests for records should be directed to agency's designated records access officer who has duty of coordinating agency's response to requests; records access officer has duty to respond within 5 business days of receipt of request and if request is denied, reasons must be stated in writing, and applicant must be informed of right to appeal. Comm on Open Gov't FOIL-AO-4952.

Agency is required to designate one or more records access officers who have duty of coordinating agency's response to requests because often employees of agency are unfamiliar with law and might not even recognize that request has been made; single records access officer generally has opportunity to develop degree of expertise and requests or inquiries involving access to records should generally be funneled to that person. Comm on Open Gov't FOIL-AO-4955.

Each agency must designate one or more records access officers who is person having duty for coordinating agency's response to requests; therefore, requests should be directed to records access officer of agency that maintains records sought. Comm on Open Gov't FOIL-AO-4957.

Designated records access officer of each agency is required to assist request in identifying records if necessary. Comm on Open Gov't FOIL-AO-4975.

Agency's records access officer has duty individually, or in that person's role of coordinating response to request under Freedom of Information Law, to inform person denied access of right to appeal as well as name and address of person or body to whom appeal may be directed. Comm on Open Gov't FOIL-AO-9722.

5. —Effect of failure to designate access officer

Failure to designate particular person as records access officer constitutes deficiency in city's regulations under Freedom of Information Law. Comm on Open Govt FOIL-AO 2972.

Absence of freedom of information officer does not constitute valid basis for delaying access beyond time required for response; shortage of staff does not constitute valid basis for delaying or denying access to records. Committee on Open Government FOIL-AO-3400.

6. —Specific access officers; For appeals

7. — —For correctional facility

Regulations of department of correctional services pursuant to Freedom of Information Law require that superintendent of correctional facility acts as records access officer. Comm On Open Gov't FOIL-AO-4606.

Even though department of correctional services, pursuant to Freedom of Information Law, permits custodian of department records to waive copy and fee, there is no requirement that fee must be waived; superintendent of correctional facility is "custodian of records". Comm on Open Gov't FOIL-AO-4621.

Requests for records should be directed to records access officer of agency that maintains records; requests for records kept at correctional facility may be directed to facility superintendent or his designee. Comm on Open Gov't FOIL-AO-4823.

Written request for records should be directed to records access officer of agency or agencies that maintain records; request for records kept at correctional facility may be directed to facility superintendent or his designee. Comm on Open Gov't FOIL-AO-4824.

Under Freedom of Information Law, requests for records kept at correctional facility may be directed to facility superintendent; Freedom of Information Law requires that applicant reasonably describe records sought and include sufficient detail to enable agency officials to locate records. Comm on Open Gov't FOIL-AO-4845.

Freedom of Information Law request for records of correctional facility's purchase orders and related records, and Inspector General's report, should have been submitted to Department of Correctional Services' records access officer rather than facility's inmate records coordinator. Comm on Open Gov't FOIL-AO-10100.

8. — —For District Attorney's office

Agency is required to appoint records access officer who has duty of coordinating agency's response to requests for records under Freedom of Information Law; request for records should be directed to records access officer in office of district attorney that maintains record. Comm on Open Gov't FOIL-AO-4701.

9. — —For health care facility

Request by patient to inspect or copy his or her medical records should be made to director of medical records of health care facility that maintains records or to health care provider who treated patient. Comm on Open Gov't FOIL-AO-4633.

10. — —For library

It was inappropriate for library board of trustees to serve as records access officer since duties to be performed in that role could then be carried out by unspecified board member. Comm on Open Gov't FOIL-AO-8330.

11. — —For municipality

The rules and regulations of a town with regard to its public records may designate the town clerk as the individual to issue copies of town records, including town ordinances. 1979 Op St Compt File #546.

Where records access officer is also town clerk, and information requested is in physical custody of town library, person requesting information does not have to go to library to review information, since town clerk, as records access officer, has authority to obtain records from library director in order to carry out responsibilities under FOIL. Comm on Open Gov't FOIL-AO-4084.

In most towns, records access officer is town clerk, for CLS Town § 30 specifies that clerk is legal custodian of all town records, even though town clerk might not have physical custody or possession of all town records, clerk nonetheless maintains legal custody of such records and, assuming that town clerk is records access officer, she has duty to respond to request and make records available to extent required by Freedom of Information Law, regardless of which town official physically maintains records sought. Comm on Open Gov't FOIL-AO-4492.

Since it is responsibility of county attorney to act as legal counsel to county departments, it is proper for county attorney to respond to request for records on behalf of officials of county department; as such, fact that county legislature (governing body of county, public corporation) was advised of request for records and asked that county attorney respond, while not common practice, did not appear to be inconsistent with Freedom of Information Law. Comm on Open Gov't FOIL-AO-4951.

If an agency has designated a series of records access officers, a request should be initially made to the records access officer for the department maintaining the record sought. On the other hand, if there is one records access officer for the entire municipality, that person would have the responsibility of coordinating responses to requests for records physically kept or maintained in any office or by any department within the municipality. Comm on Open Gov't FOIL-AO-6231 (1990).

Failure of town supervisor to share records or to inform clerk of their existence may effectively preclude clerk from carrying out her duties as records management officer, or if she or someone else is so designated as records access officer for purposes of responding to requests under Freedom of Information Law; if records access officer does not know existence or location of town records, that person may not have ability to grant or deny access to records in manner consistent with requirements of Freedom of Information Law. Comm on Open Gov't FOIL-AO-8289.

When county clerk is acting in his or her capacity as court clerk, records fall beyond coverage of Freedom of Information Law. Comm on Open Gov't FOIL-AO-8519.

Failure of town supervisor to share records or to inform clerk of their existence might effectively preclude clerk from carrying out her duties as records management officer or, if she or someone else is so designated, as records access officer for purposes of responding to requests under Freedom of Information Law; if records access officer does not know existence or location of town records, that person may not have ability to grant or deny access to records in manner consistent with requirements of Freedom of Information Law. Comm on Open Gov't FOIL-AO-9422.

County government records may be requested from county officials generally, as well as from records access officer who has duty of coordinating responses to requests. Comm on Open Gov't FOIL-AO-10004.

Payroll records were in possession of town supervisor only in his capacity as government official acting in performance of his duties, and thus were subject to rights conferred by Freedom of Information Law; town clerk, not supervisor, was records access officer with legal custody of payroll records. Comm on Open Gov't FOIL-AO-10025.

Records access officer's response to request for records maintained by Albany County Department of Public Works, that "all Freedom of Information requests must be filed through the Albany County Clerk's Office," was inconsistent with Freedom of Information Law and unnecessarily delayed issuance of determination to grant or deny applicant's request. Comm on Open Gov't FOIL-AO-10222.

Because town clerks are both legal custodians of town records under CLS Town § 30 and records management officer, they are in most circumstances also designated as records access officer. Comm on Open Gov't FOIL-AO-12910.

Governing body must appoint records access officer and appeals officer or body, who must be identified by name, title, business address and business telephone number; records access officer shall not be appeals officer. Comm on Open Gov't FOIL-AO-4725.

Records access officer should not be appeals officer and if appeals officer is not known, appeal should be directed to head or governing body of agency maintaining records sought. Comm on Open Gov't FOIL-AO-4730.

Agency is required to designate records access officer who has duty of responding to requests for records and appeals person or body responsible for making determinations on appeals; Freedom of Information Law provides that the appeals officer should be head, chief executive or governing body of agency or person designated by head, chief executive or governing body; however, records access officer cannot be appeals officer. Comm on Open Gov't FOIL-AO-4810.

Initial request for records should be directed to records access officer of agency and appeals will be directed to appeals officer of that agency. Comm on Open Gov't FOIL-AO-4847.

Although there may be more than one records access officer, each such records access officer is generally responsible for records maintained by separate units within agency; furthermore, person cannot serve as both records access officer and appeals officer. Comm on Open Gov't FOIL-AO-4916.

Where records request is received by office of agency other than records access office, office receiving request should forward it to records access officer. Comm on Open Gov't FOIL-AO-4162.

Under Freedom of Information Law, written request for records should be directed to records access officer of agency maintaining records. Comm on Open Gov't FOIL-AO-4578.

Head of agency must designate appeals officer or body, who must be identified by name, title, business address and business telephone number; further, records access officer shall not be appeals officer. Comm on Open Gov't FOIL-AO-4723.

Requests for record should be directed to records access officer at agency or agencies that maintain records which are sought; further, when making request, sufficient detail should be included so to enable officials to locate records, such as names, dates, descriptions of events and similar details. Comm on Open Gov't FOIL-AO-4737.

Requests for records should be directed to records access officer at agency or agencies that maintain records sought. Comm on Open Gov't FOIL-AO-4749.

Any request for records under Freedom of Information Law should be directed to records access officer of agency maintaining records sought. Comm on Open Gov't FOIL-AO-4750.

Request for records should be directed to records access officer of agency that maintains records sought, and request should reasonably describe records sought so that there is sufficient detail to enable agency officials to locate records sought. Comm on Open Gov't FOIL-AO-4762.

Request for records should be directed to records access officer and agency that maintains record sought and applicant must reasonably describe records sought and include sufficient detail to enable officials to locate records. Comm on Open Gov't FOIL-AO-4865.

Request for records should be directed to records access officer at agency that maintains record sought. Comm on Open Gov't FOIL-AO-4881.

Request for records should be directed to agency that maintains records and such request should be addressed to agency's records access officer; Freedom of Information Law requires that applicant reasonably describe records sought and include sufficient detail to enable agency officials to locate records. Comm on Open Gov't FOIL-AO-4974.

Agency's records access officer is not required to be present or participate personally with respect to every facet of dealing with request made under Freedom of Information Law. Comm on Open Gov't FOIL-AO-9248.

There is nothing in Freedom of Information Law or regulations of Committee on Open Government that focuses on qualifications

of records access officer or those who may assist records access officer in carrying out his or her duties; records access officer has authority, and perhaps obligation in some instances, to consult with others in effort to ensure compliance with law. Comm on Open Gov't FOIL-AO-12699.

If Mohawk & Hudson River Humane Society maintains records for any municipality, Freedom of Information Law request should be made to that municipality's records access officer, who will then either direct society to disclose municipality's records in its possession or acquire records from society to review them for purpose of determining requester's rights of access. Comm on Open Gov't OML-AO-3490.

Town clerk, not Secretary to Ethics Board or member of Board, has authority to determine rights of access in response to request made under Freedom of Information Law where town clerk has been designated records access officer. Comm on Open Gov't OML-AO-3712.

12. Accuracy of requested records

Mere characterization of record as "intra-agency material" would not serve to enable agency to withhold record in its entirety because portions containing statistical or factual information, instructions to staff that affect public, or final agency policy or determination must be made available; even though record or portions of record may be withheld under Freedom of Information Law, there is no requirement that record must be withheld, even if basis for denial can be asserted; certification made under Freedom of Information Law would not pertain to validity of contents of record, but rather would involve assertion that copy provided is true copy. Comm on Open Gov't FOIL-AO-4666.

Although Freedom of Information Law pertains to records of agency, that statute deals with the rights of access to records; nothing in Freedom of Information Law deals specifically with right to amend or correct records. Comm on Open Gov't FOIL-AO-4880.

13. Construction, generally

14. —Presumptions

Freedom of Information Law is applicable to all records of agency, including sheriff's department, and is based upon presumption of access. Comm on Open Gov't FOIL-AO-4872.

15. Consulting matters

Preliminary materials compiled by private firm acting as consultant for agency are subject to Freedom of Information Law when materials are not submitted to agency, but are used in preparing final report. 1986 Committee on Open Government FOIL-AO-4297.

Report made by consultant, that was hired by county, is likely to be accessible in part and deniable on part based upon its contents; report should be viewed in its entirety for purpose of disclosing those portions that are accessible in conjunction with CLS Pub O § 87(2)(g). Comm on Open Gov't FOIL-AO-4624.

There is nothing in Freedom of Information Law that precludes representative of one agency from conferring with or seeking advice of representative of another agency; consequently, if city appeals officer rendered determination after seeking advice of district attorney, there would not be any impropriety. Comm on Open Gov't FOIL-AO-4800.

Representatives of agency may consult or confer with representatives of other agencies prior to granting or denying access to records; nevertheless, it is responsibility of agency to grant or deny access to its records and it would be inappropriate to transfer request for its records to another agency. Comm on Open Gov't FOIL-AO-7917.

Records prepared by town advisory commissions should not be viewed as consultant's report and would not fall within scope of CLS Pub O § 87(2)(g), unless commission were "agency" because it performed necessary function in decision-making process. Comm on Open Gov't FOIL-AO-12641.

16. Custody and maintenance of records, generally

17. —Attorney-maintained records

Blanket denial of interim clerk's request for contents downloaded from former village clerk's computer, which had been removed and were in possession of village trustee and village attorney, was inconsistent with Freedom of Information law because, while some aspects of records in question might properly be withheld based on their specific contents, records themselves would not have come into possession of village trustee or attorney but for their roles in village government. Comm on Open Gov't FOIL-AO-12,354.

Agency's records in possession of outside counsel should be available to individual to same extent that they would be available when they are in possession of agency. Comm on Open Govt FOIL-AO-3705.

Records maintained away from village premises by its attorney fall within coverage of Freedom of Information Law; whether such records are available to public depends on their specific nature and content. Comm on Open Gov't FOIL-AO-10016.

18. —Stored records, generally

19. — —Computerized records

Blanket denial of interim clerk's request for contents downloaded from former village clerk's computer, which had been removed and were in possession of village trustee and village attorney, was inconsistent with Freedom of Information law because, while some aspects of records in question might properly be withheld based on their specific contents, records themselves would not have come into possession of village trustee or attorney but for their roles in village government. Comm on Open Gov't FOIL-AO-12,354.

Since board of elections is component of county, Freedom of Information Law applies to all records of agency and all county records, including information kept on computer tapes or discs, which are subject to rights and access granted by Freedom of Information Law; data processing center serves as modern record storage, generating and retrieval center and these functions should not serve to impair capacity of agencies or public officers from carrying out statutory responsibilities under Freedom of Information Law. Comm On Open Gov't FOIL-AO-4600.

20. — —Home-stored records

There is no provision that requires that town records be kept in town offices at all times, and clerk may maintain temporary possession of records at her home, so long as that person complies with Freedom of Information Law. Comm on Open Gov't FOIL-AO-8489.

Town planning board could not restrict ability to view or copy its records to times when board met since, even if records were in physical possession of planning board, they were in legal custody of town clerk who, as records access officer pursuant to CLS Town § 30, had duty to coordinate response to Freedom of Information Law requests. Comm on Open Gov't OML-AO-2227.

There is no provision that requires that town records be kept in town offices at all times, and clerk may maintain temporary possession of records at his or her home, so long as that person complies with Freedom of Information Law. Comm on Open Gov't OML-AO-2407.

21. — —Temporarily stored records

A municipal (or fire district) governing board may retain private consultants and computer service companies for the purpose of assisting the chief fiscal officer in maintaining the financial records of the municipality. The financial records cannot be permanently removed from municipal custody, although they may be temporarily removed for the purpose of working on them consistent with the right of inspection accorded the general public under the Freedom of Information Law. Op St Comp, 1969, No. 69-509 is superseded to the extent that it is inconsistent with this opinion. 1980 Op St Compt File #540.

There is no provision that requires that town records be kept in town offices at all times, and clerk may maintain temporary possession of records at her home, so long as that person complies with Freedom of Information Law. Comm on Open Gov't FOIL-AO-8489.

There is no provision that requires that town records be kept in town offices at all times, and clerk may maintain temporary possession of records at his or her home, so long as that person complies with Freedom of Information Law. Comm on Open Gov't OML-AO-2407.

22. — —Unavailable records

Payroll record, which is required to be compiled, identifies faculty as part-time at community college; furthermore, it is implicit that payroll record required to be compiled pursuant to CLS Pub O § 87(3)(b) be current; if payroll record has not been prepared, proceeding could likely be commenced pursuant to CLS CPLR Article 78 to compel agency to perform duty that is required to be performed by law. Comm on Open Gov't FOIL-AO-4656.

All agencies, including police departments, must maintain reasonably detailed current list by subject matter, of all records in possession of agency and these subject matter lists will be available for disclosure; however, if police department does not maintain one or more of lists sought, Freedom of Information Law would not require that it create or prepare such lists in response to request; to extent that police department does maintain lists sought, they are likely to be available. Comm on Open Gov't FOIL-AO-4660.

County police department's disposal of original record after it was microfilmed was consistent with CLS Art & Cult Affrs § 57.29 and rendered record unavailable from department under Freedom of Information Law; microfilmed record could be obtained from State Archives and Records Administration. Comm on Open Gov't FOIL-AO-9970.

Freedom of Information Law requires that agency search for records in its possession, whether or not they are on premises and even if they are kept in storage. Comm on Open Gov't FOIL-AO-4481.

City was not prohibited from maintaining counseling memos and related personnel information in off-site location other than central personnel files. Comm on Open Gov't FOIL-AO-12078.

It is duty of New York City Housing Development Corporation (HDC) to ensure that records be maintained in manner that gives effect to requirements of Local Government Records Law (CLS Art & Cult Affrs Art 57-A); law requires that such records must be kept, preserved and protected for minimum of 6 years. Comm on Open Gov't FOIL-AO-12822.

Records cannot be destroyed without consent of Commissioner of Education, and local officials cannot destroy or dispose of records until minimum period for retention of records has been reached. Comm on Open Gov't FOIL-AO-12849.

Minutes of meetings of village board of trustees, which are in possession of village District Attorney, are subject to access under Freedom of Information Law, since minutes had been available from village clerk to any person since their creation. Comm on Open Govt FOIL-AO-3534.

Freedom of Information Law requires that each agency make available for public inspection and copying all records, except those records or portions thereof that fall within grounds for denial, as such, applicant may use his or her photocopy machine to prepare copies of town records. Comm on Open Gov't FOIL-AO-4759.

Documents concerning sewer projects and other legal business performed for village would be "records" of village subject to Freedom of Information Law; fact that records are kept in location other than municipal building should not affect village's legal custody of records. Comm on Open Gov't FOIL-AO-4783.

Clerk is required to prepare minutes and make them available within 2 weeks of meetings to which they relate and if minutes cannot be provided within 2 weeks, clerk, in order to comply with Open Meetings Law, should prepare minutes within legal time limits and mark them as "unimproved", "draft" or "nonfinal". Town records need not necessarily be kept at town hall, nevertheless, if records are kept elsewhere they must be accessible to public in accordance with Freedom of Information Law at reasonable times; therefore, while a stenographer might have physical custody of audiotapes of meetings, those tapes are in legal custody of town, and town clerk is required to respond to request for tapes as required by Freedom of Information Law. Comm on Open Gov't FOIL-AO-4826.

Since agency is generally obliged to maintain custody and control of its records, applicant may be required to review records in presence of official of agency; since agency must grant or deny access to records within prescribed periods of time, as long as records are made available for inspection or copying within those time periods, agency could wait until official of agency could be present; however, if agency official cannot be present during course of time period, access cannot be delayed or denied until that person becomes available. Comm on Open Gov't FOIL-AO-4869.

Freedom of Information Law deals with access to, rather than preservation of, public documents; therefore, although files in question have been preserved during period in which settlement guidelines are in effect, it is possible that, following expiration of effective date of settlement, some files might be destroyed; if documents in question are kept, held or filed by agency, they are "records" that fall within scope of Freedom of Information Law. Comm on Open Gov't FOIL-AO-4882.

If requested records pertaining to contract that had been awarded by State University of New York College at Farmingdale were not maintained by college, but were instead maintained by corporation to which contract was awarded, it was questionable whether Freedom of Information Law would apply to that entity. Comm on Open Gov't FOIL-AO-7871.

Irrespective of where records, such as "official letters" from state agencies, from firms and others, may be kept by town supervisor, they are kept due to and in performance of supervisor's official duties and in his capacity as supervisor, and, therefore, such records fall within scope of Freedom of Information Law. Comm on Open Gov't FOIL-AO-8289.

Where members of library board of trustees were appointed by town board and library functioned as unit within town government, town board was required to promulgate appropriate rules and regulations applicable to town government, including Library, consistent with those adopted by Committee on Open Government and with Freedom of Information Law. Comm on Open Gov't FOIL-AO-8330.

While agency is not required to do so, it may have staff person observe applicant for records while records are being inspected since agencies have responsibility to ensure that custody and integrity of their records is maintained. Comm on Open Gov't FOIL-AO-9209.

Even when different agency maintains same records as village, village records are be subject to Freedom of Information Law and village will be required to respond to request for such records. Comm on Open Gov't FOIL-AO-9309.

Records maintained by village, irrespective of who or what agency might have prepared them, are village records under Freedom of Information Law; thus, village was required to respond to request for records relating to state Comptroller's recent audit of village, even though same records might be maintained by Comptroller. Comm on Open Gov't FOIL-AO-10108.

Freedom of Information Law is silent with respect to ability to amend or correct records that may contain inaccurate information. Comm on Open Gov't FOIL-AO-12503.

Agencies of local government are not required to maintain most records permanently. Comm on Open Gov't FOIL-AO-12589.

Insofar as records sought were maintained by or for university auxiliary services corporation they were, in essence, university's records, and university would be required to direct custodian of records to disclose them in accordance with Freedom of Information Law, or obtain them in order to disclose them to applicant to extent required by law. Comm on Open Gov't FOIL-AO-12656.

Town board has overall responsibility of ensuring compliance with Freedom of Information Law and records access officer has duty of coordinating responses to requests. Comm on Open Gov't FOIL-AO-12681.

Memorandum marked "confidential" would be in legal custody of town clerk, regardless of its physical location (i.e., whether in clerk's "official file" or elsewhere). Comm on Open Gov't OML-AO-3889.

Records prepared by chair of town board are not property of that person; on contrary, they would be in legal custody of Town Clerk and would constitute records subject to rights conferred by Freedom of Information Law. Comm on Open Gov't OML-AO-3889.

Town Supervisor would have no greater right of access or control over records prepared by chair of town board than any other member of board. Comm on Open Gov't OML-AO-3889.

23. Effect of other legal proceedings, generally

24. —Advisory opinions

Pursuant to policy adopted by committee, advisory opinion will not be prepared when it is known that litigation pertaining to FOIL has been commenced. Comm on Open Gov't FOIL-AO-4140.

Committee on Open Government is authorized to render advisory opinions on issues arising under Freedom of Information Law; committee does not have authority to enforce compliance with law or to obtain records from other agencies in response to request; request for records should be directed to records access officer of agency maintaining record sought; however, Freedom of Information Law does not require agency to create or prepare record in response to request. Comm On Open Gov't FOIL-AO-4591.

25. —Committee on Open Government

Neither Committee on Open Government nor its staff has authority to compel agency to grant or deny access to records; further, committee is not empowered to obtain records on behalf of applicant. Comm on Open Gov't FOIL-AO-4611.

Committee on Open Government is authorized to render advice on issues concerning New York Freedom of Information Law; Committee is not authorized to render advice with respect to other state or federal statutes; Freedom of Information Law pertains to rights of access to records maintained by units of state and local government; on other hand, federal statute, Freedom of Information Law pertains generally to records maintained by federal agencies such as Social Security Administration. Comm on Open Gov't FOIL-AO-4864.

Committee on Open Government is authorized to render advice on issues concerning Freedom of Information Law; it is not generally responsibility of Committee to direct individuals to agencies that maintain records they seek. Comm on Open Gov't FOIL-AO-4878.

Town boards are required to promulgate appropriate rules and regulations consistent with those adopted by Committee on Open Government and with Freedom of Information Law. Comm on Open Gov't FOIL-AO-7578.

Committee on Open Government (COOG) has neither jurisdiction nor resources to "investigate" practices of agencies; similarly, COOG is not empowered to compel agency to comply with law or grant or deny access to records. Comm on Open Gov't FOIL-AO-12483.

Committee on Open Government does not have resources to publish opinions or distribute complete sets of opinions to interested persons; however, to attempt to enable people to view such opinions, they are sent to various law libraries across state. Comm on Open Gov't OML-AO-4133.

26. —Criminal proceedings

Although Freedom of Information Law deals with records generally, Criminal Procedure Law deals specifically with records involving situation in which criminal charges are dismissed in favor of accused. Comm on Open Gov't FOIL-AO-4830.

27. —Department of Motor Vehicles (DMV)

Records concerning convictions, suspensions or revocations of driver's license, or accidents, other than those pertaining to alcohol related offenses are kept by motor vehicles department and are purged after 4 years; as such, records concerning violations, convictions or accidents would no longer exist after 4 years; records containing alcohol related offenses are kept for 10 years; with respect to other records, marriage records are kept by town or city clerks, depending where marriage took place; records pertaining to divorce, such as certificate of disposition, can be obtained from county clerk in county in which divorce was granted. Comm on Open Gov't FOIL-AO-4852.

28. —Division of Housing and Community Renewal

Right of access to rent registration records are governed not by Freedom of Information Law, but rather by Emergency Tenant Protection Act, the New York City Administrative Code and Division of Housing and Community Renewal; information furnished to Division of Housing and Community Renewal is considered confidential only when request for confidentiality is expressly made by person furnishing information, and that if such information is requested by third party, agency has burden of demonstrating that person who furnished information requested confidentiality; once agency indicates that it will disclose records but fails to make records available, such action is equivalent of denial. Comm on Open Gov't FOIL-AO-4738.

29. —Federal laws, generally

Audits of municipalities are generally available under Freedom of Information Law which requires disclosure of external audits, including, but not limited to, audits performed by comptroller and federal government. Comm on Open Gov't FOIL-AO-4721.

Freedom of Information Law is generally applicable to records maintained by entities of state and local government in New York, including state agencies, police departments, office of governor and offices of mayors; different statute, federal Freedom of Information Act, applies to records maintained by federal agencies; further, each state has enacted its own version of access law; private entities, such as private corporations or law firms, are not agencies subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-4809.

Freedom of Information Law generally pertains to records maintained by entities of state and local government in New York; it does not apply to records maintained by federal agencies and, therefore, request for federal records should be directed to federal agency that maintains record sought. Comm on Open Gov't FOIL-AO-4941.

Federal Freedom of Information Act applies only to records maintained by federal agencies and does not apply to requests for records maintained by state agencies; relevant law is state Freedom of Information Law. Comm on Open Gov't FOIL-AO-7633.

Disclosure of records identifiable to victim of sex offense is governed by CLS Civ R § 50-b, rather than Freedom of Information Law. Comm on Open Gov't FOIL-AO-12173.

30. —Judicial matters

Information contained in record of grievance submitted to Office of Grievance Committee against former attorney are subject to CLS Jud § 90(10); further, records may be disclosed only in conjunction with that statute, rather than Freedom of Information Law. Comm on Open Gov't FOIL-AO-4979.

31. —Mental health matters

Rights of access to mental health records are governed by Mental Hygiene Law rather than Freedom of Information Law. Comm on Open Gov't FOIL-AO-4821.

32. —New York Code of Rules and Regulations (NYCRR)

Initial responsibility to deal with requests under Freedom of Information Law is borne by agency's records access officer, whose designation and duties are prescribed under 21 NYCRR § 1401.2. Comm on Open Gov't FOIL-AO-7578.

Regulations promulgated by Committee on Open Government (21 NYCRR Part 1401) indicate intent to enable public to contact records access officer for agency directly and to ensure that records access officer's name and phone number should be readily available. Comm on Open Gov't FOIL-AO-8876.

Insofar as 8 NYCRR Part 84, as promulgated by Commissioner of Education, is more restrictive than Freedom of Information Law, it is out of date and void. Comm on Open Gov't FOIL-AO-9443.

Under 21 NYCRR Part 1401, records access officer has duty of coordinating agency's response to requests under Freedom of Information Law, and request should ordinarily be directed to that person. Comm on Open Gov't FOIL-AO-12438.

33. —Open Meetings Law

Grounds for withholding records appearing in Freedom of Information Law and grounds for entry into executive session appearing in CLS Pub O § 105(1) (Open Meetings Law) are not necessarily consistent; thus, even though records might be withheld in accordance with FOIL, it does not necessarily follow that meeting pertaining to those records may properly be closed or that it is reasonable to withhold them. Comm on Open Gov't FOIL-AO-12405.

Reference materials pertaining to budgets, reserves and fund balances distributed to members of board of education at state-

sponsored conference, which were reviewed in closed meeting of board, should have been made accessible for review in their entirety; board improperly discussed budget matters in executive session, and Freedom of Information Law exception pertaining to communications between or among state or local government officials did not apply. Comm on Open Gov't OML-AO-3271.

34. —Personal Privacy Protection Act, generally

35. — —Birth, death and marriage records

Committee on Open Government is authorized to render advice on issues concerning New York Freedom of Information Law; Committee is not authorized to render advice with respect to other state or federal statutes; Freedom of Information Law pertains to rights of access to records maintained by units of state and local government; on other hand, federal statute, Freedom of Information Law pertains generally to records maintained by federal agencies such as Social Security Administration. Comm on Open Gov't FOIL-AO-4864.

Although Freedom of Information Law generally governs rights of access to records, other statutes pertain specifically to birth, death, and marriage records; problem relative to those statutes is that rights of access are generally conditioned upon showing that request is made for judicial or other "proper purposes". Comm on Open Gov't FOIL-AO-4929.

Personal Privacy Protection Law applies to state agencies and does not apply to units of local government such as county; however, under Freedom of Information Law, agency may deny access to record that falls within one or more of grounds of denial, but is not generally required to do so; while agency's regulations or ordinances may be less restrictive than Freedom of Information Law with respect to right of access, they may not be more restrictive. Comm on Open Gov't FOIL-AO-4678.

Personal Privacy Protection Law requires that state agencies make records available for inspection and copying to data subject, person to whom records pertain; however rights granted by Law do not apply to public safety agency records; accessible records are available for inspection and copying; therefore, if record is accessible, it may be inspected and if, after inspection copies are needed, applicant may be required to pay fee for copying. Comm on Open Gov't FOIL-AO-4961.

When final vote is taken by agency, such as local conditional release commission, record must be prepared that indicates manner in which each member who voted cast his or her vote; ordinarily, records of votes will appear in minutes. Comm on Open Gov't OML-AO-3784.

Thrust of CLS Pub O § 87(3)(a) ("open voting" requirement of Freedom of Information Law) is consistent with Legislative Declaration that appears at beginning of Open Meetings Law. Comm on Open Gov't OML-AO-3784.

When record is known to be available from another source, it is not likely that agency can properly deny that record under any of the grounds for denial set forth in Freedom of Information Law. 1986 Committee on Open Government FOIL-AO-4310.

Under CLS Pub Off § 87(1)(a), if urban renewal agency is considered part of city's government, it should not have its own regulations but could implement Freedom of Information Law according to "uniform" regulations adopted by city, "governing body" of "public corporation". Comm on Open Gov't FOIL-AO-4450.

Freedom of Information Law is "general" law because it pertains generally to rights of access to records of entities of state and local government in New York; however, since Social Services Law deals with particular category of records and is "special" or specific statute, special statute prevails over general statute. Comm On Open Gov't FOIL-AO-4594.

If records sought are court records, Freedom of Information Law would not govern rights of access; however, court records may be available under other statutes which often confer broad rights of access to court records. Comm on Open Gov't FOIL-AO-4679.

Advisory opinion, issued by Committee on Open Government, may be requested prior to commencement of litigation; however, there is no requirement that applicant for records seek advisory opinion. Comm on Open Gov't FOIL-AO-4705.

Although Freedom of Information Law provides substantial rights of access, it deals generally with access to government records; when other statutes deal with specific records, those statutes prevail over general statute, such as Freedom of Information Law. Comm on Open Gov't FOIL-AO-4968.

If records are available as of right under different provision of law or by means of judicial determination, nothing in Freedom of Information Law can serve to diminish rights of access. Comm on Open Gov't FOIL-AO-12421.

36. Format of records

If data is maintained on computers, agency would not be required to develop new programs or reprogram to extract data that might otherwise be available; if agency does not maintain records in format requested, Law would not require agency to prepare or produce records in such format. Comm on Open Gov't FOIL-AO-4747.

Freedom of Information Law provides right to inspect and copy records, which means that person may inspect records and may, with pen and paper, copy contents of records; however, if applicant requests agency to provide photocopies of accessible records, Freedom of Information Law requires that agency prepare photocopies upon payment of, or offer to pay, requisite fees for photocopying; further, agency may require that request be made in writing; while agency is required to make photocopies, it is not required to provide records to applicants so that applicant may make photocopies. Comm on Open Gov't FOIL-AO-4982.

Agency would be required to produce electronic information assuming that data sought is available under Freedom of Information Law, that it can be made available in format in which applicant requests it, and that applicant is willing to pay requisite fee. Comm on Open Gov't FOIL-AO-12741.

If agency is able to scan records in order to transmit them via email, and doing so will not involve any effort additional to alternative methods of responding, it is required to do so. Comm on Open Gov't FOIL-AO-16572.

If New York City Department of Finance was able to make information about all mortgages and deeds filed in city during immediate past year available in electronic file format, as requested, and requester was willing to pay requisite fees, then it was required to do so; department's posting of information in question on its website did not constitute reasonable compliance with its obligation under Freedom of Information Law, where requester indicated that website was of no use to it because it needed access to entire file electronically so that it could make lists of various sorts and make comparisons of sets of data. Comm on Open Gov't FOIL-AO-16619.

Agency was required to provide photocopies of records if photocopies were requested, even though records were maintained in bound volumes; agency could suggest that requester inspect bound records, rather than obtain photocopies, but if requester was willing to pay for copies, agency was required to do so. Comm on Open Gov't FOIL-AO-16638.

37. Required records, generally

38. —Salary matters ($87(3)(b))

Records identifying public employees who work during given period, rates of pay and number of hours worked are available because those records are "relevant" to performance of duties; Freedom of Information Law deals specifically with payroll information. Comm on Open Gov't FOIL-AO-4657.

One of few instances in which agency is required to create record involves list that identifies every employee by name, public office address, title and salary; every agency, including school districts, are required to prepare and maintain these lists. Comm on Open Gov't FOIL-AO-4752.

Since definition of "agency" includes municipal entities, all municipalities are required to maintain records setting forth name, public office address, title and salary of every officer or public employee of agency. Comm on Open Gov't FOIL-AO-4788.

Payroll record is required to be prepared and must include names, titles and salaries, except in rare circumstance in which disclosure of name would endanger person's life or safety. Comm on Open Gov't FOIL-AO-4858.

All agencies, including school district, must maintain and make available on ongoing basis payroll record containing name, public office address, title and salary of the officer or employee of agency. Comm on Open Gov't FOIL-AO-4905.

School district is required to maintain and make available list that includes current salaries and work locations of district employees, and current payroll record could be compared with previous payroll record to ascertain increases in administrators' salaries; therefore, district is required to disclose records reflective of salary increases, current salaries and identities in work locations of its employees. Comm on Open Gov't FOIL-AO-4942.

School district is required to maintain record that includes name, title, salary and public office address (i.e., school) of all employees, including teachers. Comm on Open Gov't FOIL-AO-7634.

Payroll record that identifies all agency officers or employees by name, public office address, title, and salary must be prepared to comply with Freedom of Information Law and must be disclosed upon request. Comm on Open Gov't FOIL-AO-12305.

39. —Subject matter lists ($87(3)(c)), generally

Pursuant to Pub O § 87, an agency does not have discretion to determine whether or not it should prepare a subject matter list, notwithstanding an alleged lack of necessary personnel and financial resources, for the statute requires that such a list must be maintained. Comm on Open Govt FOIL-AO 3055.

When requesting records, specific nature and contents of each record must be provided or grounds for denial may apply. Comm on Open Gov't FOIL-AO-4659.

Subject matter list or master index is different from records to which it refers, since it is categorization of kinds of records maintained by agency; such records themselves may be accessible or deniable, in whole or in part, under other provisions of Freedom of Information Law. Comm on Open Gov't FOIL-AO-12492.

40. —Answers to questions not required

41. — —In Individual document listing not required

Subject matter list is not intended to refer to each and every record kept by agency, but should refer to categories of agency's records, rather than individual records. 1986 Committee on Open Government FOIL-AO-4190.

As to request for index to files of New York City Police Department, under CLS Pub Off § 87(3)(c), agency's "subject matter list" must describe, by category, kinds of records maintained by an agency, list is not required to refer to each and every record of agency, and the agency is not required to prepare index describing particular records regarding particular case. Comm on Open Gov't FOIL-AO-4458.

Under Freedom of Information Law, subject matter list is list of categories of records that agency maintains, not list or index that identifies each and every record of agency. Comm on Open Gov't FOIL-AO-4797.

Subject matter list should be maintained by agencies on ongoing basis; further its contents must be made available; such list need not identify each and every record of agency, rather, subject matter list must indicate categories of records maintained by agency. Comm on Open Gov't FOIL-AO-4858.

Each agency is required to maintain current "subject matter list", list of all categories of records that it maintains, and subject matter lists refer to categories of information and categories of records, respectively because they are not required to identify each and every record of agency or refer to records pertaining to particular individuals; although Committee on Open Government does not maintain copies of agencies' subject matter lists, lists are available from each agency. Comm on Open Gov't FOIL-AO-4896.

Subject matter list is intended to indicate categories of records maintained by agency and there is no requirement in Freedom of Information Law that agency prepare index identifying records that it maintains concerning specific person. Comm on Open Gov't FOIL-AO-4950.

"Subject matter list" required to be maintained under CLS Pub O § 87(3)(c) is not required to identify each and every record of agency; rather, it must refer, by category and in reasonable detail, to kinds of records maintained by agency. Comm on Open Gov't FOIL-AO-8288.

Although there is nothing in Freedom of Information Law that requires that agency prepare list identifying each document in file, if request for file is granted and there is no indication that any aspect of file has been withheld, it may be assumed that entirety of file, at time of disclosure, was made available. Comm on Open Gov't FOIL-AO-8378.

Subject matter list required by CLS Pub O § 87(3)(c) is not required to identify each and every record of agency; rather, it is required to identify by category and in reasonable detail, kinds of records maintained by agency. Although subject matter list is not prepared with respect to records pertaining to single individual, such list should be sufficiently detailed to enable individual to identify file category of record or records in which that person may be interested. Comm on Open Gov't FOIL-AO-12483.

42. — —Law citations not required

When requesting records, applicant need not cite specific provision of law; rather, citing Freedom of Information Law and reasonably describing records sought should be adequate. It is not necessary to cite specific provision of law when requesting records; rather, citing Freedom of Information Law and reasonably describing records sought should be adequate. Comm on Open Gov't FOIL-AO-4940.

43. — —Lists about education matters

City University of New York is neither required nor able to include notations concerning rights of access corresponding to categories of records included in subject matter lists, where it is often impossible to characterize category as available or deniable without exception. Comm On Open Gov't FOIL-AO-4555.

44. — —Lists about employment matters

There is no basis for denying access to computer tape or disc which contains New York State telephone directory for Albany, New York City, Long Island and Westchester since records sought contain names, public office addresses and public office telephone numbers of the New York State employees, and none of grounds for denial could appropriately be asserted. Comm on Open Gov't FOIL-AO-4653.

45. — —Lists about law enforcement matters

All agencies, including police departments, must maintain reasonably detailed current list by subject matter, of all records in possession of agency and these subject matter lists will be available for disclosure; however, if police department does not maintain one or more of lists sought, Freedom of Information Law would not require that it create or prepare such lists in response to request; to extent that police department does maintain lists sought, they are likely to be available. Comm on Open Gov't FOIL-AO-4660.

Records maintained by police department, to extent that they continue to exist, will be subject to rights conferred by Freedom of Information Law; that is not to suggest that all records will be accessible, but that they will be subject to rights of access granted by Law; as general matter, administrative manuals are accessible pursuant to CLS Pub O § 87(2)(g); however, those manuals prepared or used by law enforcement agencies may be accessible or deniable depending upon effects of disclosure. Comm on Open Gov't FOIL-AO-4661.

While Freedom of Information Law does not apply to court records, many court records are available under other provisions of law and, as such, it is possible to make request to court that maintains records sought; further, autopsy report is likely to be maintained by office of medical examiner; request for records must reasonably describe records sought and must be sufficiently detailed so to enable agency officials to locate requested records. Comm on Open Gov't FOIL-AO-4765.

Alternative to police department directory may be subject matter list which each agency is required to maintain under Freedom of Information Law; subject matter list prepared by agency is not required to consist of index of each and every record maintained by its agency, but rather it is intended to refer to categories or kinds of records maintained by agency. Comm on Open Gov't FOIL-AO-4796.

Subject matter lists may not identify with specificity each record maintained by agency, but rather they are intended to describe kinds or categories of records maintained by agency; in addition to keeping case files at office of district attorney, records are also likely to be kept in relation to personnel matters, policies and procedures, correspondence, financial matters involving agency expenditures, as well as other records that do not deal specifically with cases of records found within case files. Comm on Open Gov't FOIL-AO-4819.

Subject matter lists refer to general categories of records that agency maintains; subject matter list is not required to identify each and every record of agency or refer to records pertaining to particular individual; all agencies, including district attorney's office, are required to maintain subject matter lists and these lists must be made available to public. Comm on Open Gov't FOIL-AO-4890.

46. — —Lists about prisons and prisoners

If records fall within the scope of both Personal Privacy Protection Law and Freedom of Information Law, requester should direct written requests to both records access officer and privacy compliance officer of department of correctional services and indicate that request is made under both laws. Comm on Open Gov't FOIL-AO-4841.

Under Freedom of Information Law, requests for records kept at correctional facility may be directed to facility superintendent; Freedom of Information Law requires that applicant reasonably describe records sought and include sufficient detail to enable agency officials to locate records. Comm on Open Gov't FOIL-AO-4845.

Requests should be directed to agency that maintains records sought; agency is not required to prepare or create record in response to request; therefore, if no statistics concerning stabbings at correctional facilities have been prepared, agency, when receiving such request, would not be obliged to create records containing such statistics. Comm on Open Gov't FOIL-AO-4874.

Freedom of Information Law requires that applicant reasonably describe records sought, so, when making request, sufficient detail should be provided so to enable agency officials to locate records; further, regulations promulgated by Department of Correctional Services pursuant to Freedom of Information Law indicate that, for records kept at facility, request may be directed to facility superintendent. Comm on Open Gov't FOIL-AO-4956.

Master list of all records in possession of Department of Correctional Services must be maintained and made available for inspection at each correctional facility. Comm on Open Gov't FOIL-AO-10055.

Under CLS Pub o § 87(3)(c) and regulations of Department of Correctional Services, master index must be maintained and made available for inspection at each facility. Comm on Open Gov't FOIL-AO-12492.

47. — —Lists required regardless of document availability

Freedom of Information Law does not require that subject matter list indicate those records that must be made available and those that may be withheld. Comm on Open Govt FOIL-AO-3649.

"Subject matter list" is not intended to refer to every record maintained by agency; rather, it is intended to refer to types of records, by category, and in reasonable detail, kept by agency. Comm On Open Gov't FOIL-AO-3857.

Freedom of Information Law requires that every agency maintain reasonably detailed current list of records by subject matter, and subject matter list must refer by category to all agency records, and not only those considered to be accessible to public. 1986 Committee on Open Government FOIL-AO-4182.

One of few instances in which Freedom of Information Law requires agency to prepare record concerns "subject matter lists" which lists all records in possession of agency, whether or not available under Law. Comm on Open Gov't FOIL-AO-4750.

If list of employees is maintained only on paper and agency lacks capacity to generate list electronically, it is not obliged to develop electronic database containing contents of list in order to accommodate applicant's request that list be provided in electronic form and e-mailed to him. Comm on Open Gov't FOIL-AO-12105.

CLS Pub O § 87(3)(c) does not require that agency ascertain which among its records must be made available or may be withheld; law states that subject matter list must refer, in reasonable detail, to kinds of records maintained by agency, whether or not they are available. Comm on Open Gov't OML-AO-2349.

48. — —Specificity of lists

When making request, sufficient detail should be included so to enable officials to locate records, such as names, dates, descriptions of events and similar details. Comm on Open Gov't FOIL-AO-4737.

Freedom of Information Law requires that applicant reasonably describe record sought, so when making requests, sufficient detail should be included to enable agency officials to locate records. Comm on Open Gov't FOIL-AO-4749.

Request must reasonably describe record sought and be sufficiently detailed to enable agency officials to determine records requested and to locate them. Comm on Open Gov't FOIL-AO-4755.

Request for records should be directed to records access officer of agency that maintains records sought, and request should reasonably describe records sought so that there is sufficient detail to enable agency officials to locate records sought. Comm on Open Gov't FOIL-AO-4762.

Request for records must reasonably be describe records sought and requests sent to agency involving records pertaining to requester, without more, would likely not meet requirements of Freedom of Information Law; when making request, sufficient detail should be included so to enable agency officials to locate records, such as names, dates, descriptions of events, docket numbers and similar identifying data. Comm on Open Gov't FOIL-AO-4774.

Freedom of Information Law requires that applicant reasonably describe records sought so request should contain sufficient detail to enable agency officials to locate records. Comm on Open Gov't FOIL-AO-4824.

Freedom of Information Law requires that applicant reasonably describe records sought so request should contain sufficient detail to enable agency offices to locate records. Comm on Open Gov't FOIL-AO-4831.

When making requests for records, request should include sufficient detail to enable agency officials to locate records; requests should be directed to agency or agencies that maintain the record sought. Comm on Open Gov't FOIL-AO-4833.

Request for records should be directed to records access officer and agency that maintains record sought and applicant must reasonably describe records sought and include sufficient detail to enable officials to locate records. Comm on Open Gov't FOIL-AO-4865.

Applicant must reasonably describe record sought, so, when making requests, as much detail as possible should be provided to enable agency officials to locate records. Comm on Open Gov't FOIL-AO-4877.

Applicant must reasonably describe record sought and include sufficient detail to enable officials to locate records. Comm on Open Gov't FOIL-AO-4881.

Applicants for records should reasonably describe records sought and must provide sufficient information to enable agency officials to locate records. Comm on Open Gov't FOIL-AO-4882.

Freedom of Information Law requires that request reasonably describe records sought so that when request is made to agency or court, sufficient detail should be included so to enable officials to locate records. Comm on Open Gov't FOIL-AO-4922.

When making request for records, Freedom of Information Law requires that applicant reasonably describe records sought and should include sufficient detail to enable agency officials to locate records. Comm on Open Gov't FOIL-AO-4924.

Freedom of Information Law requires that applicant reasonably describe records sought so when making request, sufficient detail should be included to enable agency officials to locate records sought. Comm on Open Gov't FOIL-AO-4958.

Freedom of Information Law requires that applicant reasonably describe records sought and if agency can locate requested records based on terms of request, applicant has reasonably

described such records; however, if agency cannot determine which records have been requested, standard of "reasonably describing" records is not met and in some instances, while records sought might exist, they may not be retrievable due to nature of agency's filing system; also, agency need not create or prepare record in response to request. Comm on Open Gov't FOIL-AO-4970.

Request for records should be directed to agency that maintains records and such request should be addressed to agency's records access officer; Freedom of Information Law requires that applicant reasonably describe records sought and include sufficient detail to enable agency officials to locate records. Comm on Open Gov't FOIL-AO-4974.

When making request, Freedom of Information Law does not require applicant identify records sought with specificity; rather, Law merely requires that request reasonably describe records sought and request meets the standard of reasonably describing when agency officials can locate records based on terms of request. Comm on Open Gov't FOIL-AO-4975.

49. — —Writing requirement for lists

Requests for records should be made in writing and reasonably describe record sought; therefore, requests should include sufficient detail to enable agency officials to locate records. Comm on Open Gov't FOIL-AO-4823.

Request for records should be made in writing and should reasonably describe records sought; therefore, when making request, sufficient detail should be included to enable agency officials to locate records. Comm on Open Gov't FOIL-AO-4938.

Agency may always require that applicant request records in writing; when request is made applicant must reasonably describe record sought and if agency officials cannot determine which records have been requested, request likely did not meet "reasonably describe" standard and response to that effect should be given to applicant. Comm on Open Gov't FOIL-AO-4955.

Freedom of Information Law is not vehicle that requires governmental entity or public officer to answer questions; it is a vehicle that enables public to seek existing records. Comm on Open Gov't FOIL-AO-4069.

Freedom of Information Law merely requires agencies to respond to requests for records; it does not oblige public officials to provide information by answering questions. Comm on Open Gov't FOIL-AO-4582.

Freedom of Information Law is vehicle under which person may request records from agency; further agency is obliged to respond to such request, but Freedom of Information Law is not vehicle that requires agency officials to respond or prepare answers to questions. Comm on Open Gov't FOIL-AO-4775.

To extent that requestor is requesting information, answers to questions or explanations rather than existing records, agency is not required to produce information in order to respond to request; records should be reasonably described so that agency officials are able to locate records sought by means of description and vague requests that are merely descriptions of events will not fulfill this requirement. Comm on Open Gov't FOIL-AO-4857.

Three-member board of assessment review, as "public body" and "agency," was required to prepare minutes in accordance with CLS Pub O §§ 87(3)(a) and 106, including record of each member's vote. Comm on Open Gov't OML-AO-3499.

50. —Voting matters

Each agency is required to maintain record of final vote of each member in every agency proceeding in which member votes. Committee on Open Government FOIL-AO-3387.

Freedom of Information Law requires that every agency maintain record of final vote of each member and every agency proceeding in which members vote, such that preliminary votes that do not result in majority may not be recorded; however, vote resulting in affirmative total of majority of membership of agency would be required to be recorded and indicated how each member voted, such that secret balloting by members of agency would be improper where voting resulting in majority could not be recorded indicating how each member voted. 1986 Committee on Open Government FOIL-AO-4281.

Freedom of Information Law has so-called "open vote" requirement which requires record to identify by name those who vote it in favor or against measure. Comm on Open Gov't OML-AO-1394; Comm on Open Gov't FOIL-AO-4610.

Because of "open vote" provision and Freedom of Information Law, and since committee of public body is considered to be "agency", when final vote is taken by committee, record must be prepared to indicate manner in which each member casts his or her vote. Comm on Open Gov't OML-AO-1396, Comm on Open Gov't FOIL-AO-4638.

When action is taken by formal vote at open or executive sessions, the Freedom of Information Law and the Open Meetings Law both require open voting and a record of the manner in which each member voted. Comm on Open Gov't FOIL-AO-6226 (1990).

When a final vote is taken by a public body, a record, presumably minutes, must be prepared which indicate the manner in which each member cast his or her vote, and such record is subject to access under the Freedom of Information Law. Comm on Open Gov't FOIL-AO-6244 (1990).

While CLS Pub O § 87(3)(a) requires that agency maintain voting records indicating how each member cast his or her vote, because committees created by New York/New Jersey Harbor Estuary Program (HEP) are not agencies, New York Freedom of Information Law and its requirement concerning record of votes would not be applicable. Comm on Open Gov't FOIL-AO-8324.

Vote of city's common council resulting in affirmative total of majority of membership must be recorded, indicating how each member voted; state legislature, in precluding secret ballot voting, sought to ensure that public has right to know how its representatives voted individually with respect to particular issues. Comm on Open Gov't FOIL-AO-10002.

Freedom of Information Law does not require agency to keep separate list of voting records of each individual so long as minutes indicate how each member cast his or her vote. Comm on Open Gov't FOIL-AO-12040.

Board of elections is not required to include optional field to fill in voter's home phone number in addition to required voter registration information, but if phone numbers are included in computerized records maintained by board, they are accessible under Freedom of Information law. Comm on Open Gov't FOIL-AO-12067.

Board of College of Staten Island Association, Inc., which oversees allocation and expenditure of student activity fees, is subject to Open Meetings Law and Freedom of Information Law when electing directors; however, neither statute requires voting by roll call or specifies that results must be announced exactly when votes are cast, and both statutes are satisfied so long as record is prepared indicating each member's vote. Comm on Open Gov't OML-AO-3502.

There is nothing in either Freedom of Information or Open Meetings Laws that specifies that vote must be accomplished by means of roll call or that vote be "announced exactly as the same time it is cast." Comm on Open Gov't OML-AO-4264.

Freedom of Information Law finds that agency may deny access to record or portion thereof which if disclosed would endanger life or safety of any person; names of all agency employees are likely to be available except to extent that CLS Pub Off § 87(2)(f) applies. Comm on Open Gov't FOIL-AO-4735.

All agencies, including Department of Correctional Services, are required to maintain payroll list in accordance with Freedom of Information Law; however, agency may withhold records or portions of records when disclosure would endanger life or safety of any person. Comm on Open Gov't FOIL-AO-4894.

When requesting records from agency, applicant should request copies of records rather than information generally. Comm on Open Gov't FOIL-AO-4977.

Any contract between agency and one or more public employees must be disclosed. Comm on Open Gov't FOIL-AO-8511.

If record sought under Freedom of Information Law is payroll list required to be maintained pursuant to CLS Pub O § 87(3)(b), it must be disclosed, irrespective of its intended use for commercial or fundraising purposes. Comm on Open Gov't FOIL-AO-9523.

Report required by law to be submitted to state legislature by state agency would be available from legislature pursuant to CLS Pub O § 88(2)(g) or would be available from agency pursuant to CLS Pub O § 87(2). Comm on Open Gov't FOIL-AO-12158.

Payroll record that identifies all officers or employees by name, public office address, title and salary must be prepared to comply with Freedom of Information Law. Comm on Open Gov't FOIL-AO-12776.

51. Requester's identity and purpose, generally

52. —Commercial purpose of request

Neither purpose for which record was requested nor status of requester as representative of union would be relevant to rights of access because if record is available under Freedom of Information Law, it should be made equally available to any person, notwithstanding one's status or interest. Comm on Open Gov't FOIL-AO-4758.

Purpose for which request is made is generally irrelevant and ordinarily has no bearing upon rights of access because accessible records should be made equally available to any person, without regard to status or interest; however, agency may inquire with respect to purpose of request when request involves list of names and addresses to determine whether records would be used for commercial purpose and, therefore, whether disclosure would result in unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4818.

Status of applicant or the purpose for which requests for records is made are irrelevant to rights of access, and agency cannot inquire as to intended use of records; however, rights of access to list of names and addresses, or equivalent records, may be contingent upon possible commercial purpose for which request is made. Comm on Open Gov't FOIL-AO-4879.

Restriction imposed by county, that recipient must certify that he/she will not use list of names and addresses for commercial or fund-raising purposes, was consistent with Freedom of Information Law, but restriction that recipient "will not sell, give or otherwise transmit" list of names and addresses was overbroad. Comm on Open Gov't FOIL-AO-16609.

53. —Litigant as requester

Pendency or possibility of litigation has no effect upon use of Freedom of Information Law or rights of access, even though requests are made by potential or actual litigant. Committee on Open Government FOIL-AO-3394.

Even though applicant may be litigant in court proceedings, he may nonetheless seek records under Freedom of Information Law as member of public. 1986 Committee on Open Government FOIL-AO-4184.

Litigant has same rights of access to records under Freedom of Information Law as any member of public, notwithstanding interest in records or status as inmate. Comm on Open Gov't FOIL-AO-4586.

If record is available to public under Freedom of Information Law, it cannot be withheld solely because applicant is litigant or because records relate to litigation; however, file might nonetheless contain records consisting of attorney work product or material prepared for litigation, as well as records subject to attorney client privilege; these records would be specifically exempted from disclosure. Comm On Open Gov't FOIL-AO-4605.

Although litigant might be able to seek records by means of discovery or other disclosure devices, as member of public, records may be sought pursuant to Freedom of Information Law, notwithstanding status as litigant. Comm on Open Gov't FOIL-AO-4725.

Requester's status as litigant does not affect rights when records are requested under Freedom of Information Law. Comm on Open Gov't FOIL-AO-4801.

Freedom of Information Law requires no showing of materiality, relevance, necessity or any other purpose as condition for asserting rights of access to records; moreover, while records may not be available to litigant by means of discovery because those records might not be material or relevant to litigation, those same records might be available to any member of the public who seeks records under Freedom of Information Law. Comm on Open Gov't FOIL-AO-4889.

Pendency of litigation does not affect either rights of public or litigant under Freedom of Information Law. Comm on Open Gov't FOIL-AO-7549.

Fact that requester's client may have been subject of investigation or complaint does not, in and of itself, constitute basis for denial of access to records or affect her right to seek records under Freedom of Information Law. Comm on Open Gov't FOIL-AO-12924.

54. —Prison inmate or convict as requester

Neither Freedom of Information Law nor regulations require that records be transferred from their usual locations to accommodate applicant at site convenient to applicant. While inmates may be indigent or unable to travel, agency is not required to make records available at other than its designated or customary locations. Comm on Open Gov't FOIL-AO-8519.

CLS Civil R §§ 79 or 79-a, which deal with forfeiture of one's civil rights, do not provide basis for county district attorney's office to deny access to existing records concerning requestor's arrest and conviction; when person seeks records under Freedom of Information Law (FOIL), he or she is as member of public, and records accessible under FOIL must be made equally available to any person, without regard to status or interest. Comm on Open Gov't FOIL-AO-10079.

Freedom of Information Law does not require that accessible records be transferred from their usual locations to accommodate applicant at site convenient to applicant; thus, while inmates may be indigent or unable to travel, agency is not required to make records available at other than its designated or customary locations. Comm on Open Gov't FOIL-AO-10220.

Freedom of Information Law process does not differ for incarcerated person and person who is not incarcerated. Comm on Open Gov't FOIL-AO-12156.

55. —Representative capacity of requester, generally

56. — —Companion or friend

Records were improperly withheld from requester where agency's reasons for denial were because of requester's reasons for wanting to review records and because companions of requester were also interested in reviewing records. Comm on Open Govt FOIL-AO-3637.

Where recluse makes request for records under Freedom of Information Law, he may view records at offices of agency, request photocopies by mail, in which case up to 25 cents per photocopy plus cost of postage could be charged, or may have friend or "volunteer" pick up or make copies. Comm on Open Gov't FOIL-AO-8306.

57. — —Employee organization

With respect to status of recognized employee organization, FOIL does not distinguish among applicants for records, and employee organization does not enjoy any special or greater rights than public generally under FOIL. Comm on Open Gov't FOIL-AO-4076.

58. — —Family member

Under Freedom of Information Law, agency may charge up to 25 cents per photocopy; however, agency may not assess fee for making request for search or labor unless statute other than Freedom of Information Law permits such fees to be assessed; in addition, CLS Pub Health § 18 generally grants access to medical records to subjects of those records, but subject can be charged for reasonable fee for labor; however, records cannot be withheld solely due to inability to pay. Comm On Open Gov't FOIL-AO-4609.

Government offices, such as Human Resources Administration or Department of Social Services, are "agencies" subject to Freedom of Information Law; however, private facility would not likely be required to comply with Freedom of Information Law; records concerning foster care are generally confidential, however, if requester is parent of child, it is likely that parent has rights of access to records pertaining to child; consequently, request for records should be given to agency or agencies that maintain records in which requester is interested. Comm on Open Gov't FOIL-AO-4924.

Freedom of Information Law was inapplicable to request for "any paragraph of any law that verifies" special referee's ruling that requestor's wife could not represent her friend in matrimonial hearing even though friend had given her power of attorney,

as such request essentially sought interpretation of law requiring judgment as to which of several provisions might be applicable. Comm on Open Gov't FOIL-AO-12128.

59. — —Lobbyists

Lists of lobbyists registered with Temporary State Commission on Lobbying must be disclosed, irrespective of status or interest of applicant, or intended use of such lists. Comm on Open Gov't FOIL-AO-4895.

60. — —News media

News media enjoy no special rights of access under Freedom of Information Law; if record is available, it must be made equally available to any person without regard to status or interest; if record may be withheld from public, it is equally deniable if it is requested by news media. Committee on Open Government FOIL-AO-3396.

Freedom of Information Law generally does not distinguish among applicants for records, and members of news media and their representatives enjoy no special rights. Comm on Open Gov't FOIL-AO-12206.

61. — —Public officers

A member of a board of education need not observe the procedures required of the general public for obtaining access to tapes of school board meeting for official purposes unless expressly so provided in a board regulation. 1980 Op St Compt File #163.

If it is clear that records are requested in performance of one's official duties, request might not be viewed as having been made under Freedom of Information Law; in such situation, if request is reasonable, and in absence of board rule or policy to contrary, member of public body should not generally be required to resort to Freedom of Information Law in order to seek or obtain records. Comm on Open Gov't FOIL-AO-7634.

If request is reasonable, and in absence of village board rule or policy to contrary, mayor or member of village board should not generally be required to resort to Freedom of Information Law in order to seek or obtain records. Comm on Open Gov't FOIL-AO-8387.

In most instances, board member seeking records without consent or approval of majority of total board membership has same rights as member of public, unless there is some right conferred on board member by law or rule. Comm on Open Gov't FOIL-AO-12288.

Member of town board acting unilaterally, without consent or approval of majority of total membership of board, has same rights as public generally (unless some right is conferred on board member by law or rule) to obtain information relating to incident involving death of town resident while in police custody. Comm on Open Gov't OML-AO-3158.

62. — —Town board meeting attendees

Town board member, acting unilaterally without consent or approval of majority of total membership of board, has same rights as those accorded to member of public under Freedom of Information Law, unless there is some right conferred on board member by means of law or rule; in absence of any such rule, member seeking records could presumably be treated in same manner as public generally. Comm on Open Gov't FOIL-AO-12692.

Town board's practice of distributing copies of minutes at no cost to persons in attendance at meetings, while charging for minutes to those who requested them on following day, did not violate Freedom of Information Law so long as no individual was being singled out and all who requested copies after meetings received same treatment. Comm on Open Gov't OML-AO-2705.

Accessible records must be made equally available to any person without regard to status or interest; there is no requirement that reason for request be stated or that applicant identify person that he or she might be representing. Committee on Open Government FOIL-AO-3392.

Private organization has right to make request, under Freedom of Information Law, to receive town property assessment information stored on computer tape. 1986 Committee on Open Government FOIL-AO-4261.

When records are accessible under Freedom of Information Law, they should be made equally available to any person regardless of status or interest; moreover, assuming that it is available under Freedom of Information Law, condition of agreeing not to sue in order to receive records pertaining to study of contaminated wells could not be imposed; only if report was prepared solely for litigation would denial on that basis be justified. Comm on Open Gov't FOIL-AO-4628.

Reports of inspections constitute inter-agency or intra-agency materials that would be accessible or deniable depending upon their contents; rights of access to such reports should not differ or be distinguishable on basis of who may have requested report. Comm on Open Gov't FOIL-AO-4641.

All applicants for information should be treated consistently and rules should be equally implemented, irrespective of identity or status of applicant or purpose for which request is made. Comm on Open Gov't FOIL-AO-4686.

Town board member, "acting on his own", does not necessarily have right to obtain all town records "at any time for any reason." Comm on Open Gov't FOIL-AO-12910.

Agency may not condition request upon identification by requestor of name, telephone number, address, and motives of person who prompted inquiries. Committee on Open Government FOIL-AO-3392.

If record is accessible, it must be made available irrespective of purpose or reason for which request is made. Comm on Open Gov't FOIL-AO-4471.

Purpose for which request is made, intended use of information, or status as litigants would not be relevant in determining rights of access because accessible records must be made equally available to any person, without regard to status or interests. Comm on Open Gov't FOIL-AO-4751.

Purpose for which record is requested is generally irrelevant to its access; one instance when purpose for request may be relevant is when record involving listed names and addresses is used for commercial or fund-raising purposes. Comm on Open Gov't FOIL-AO-4752.

Accessible records shall be made available to any person without regard to status or interest, so purpose for which records are requested is irrelevant to rights of access. Comm on Open Gov't FOIL-AO-4794.

Upon receipt of request that reasonably describes records sought, agency is required to make requested records available except to extent that one or more grounds for denial applies; agency may not generally require individuals to supply additional information, such as social security number, before responding to request. Comm on Open Gov't FOIL-AO-4822.

In situations in which agency has required that applicant state one reason for request, purpose for which record is sought is generally irrelevant to rights of access and agency may not require applicant to state reason or purpose for request. Comm on Open Gov't FOIL-AO-4822.

Status of applicant or purposes for which records are requested is made are irrelevant to rights of access, and agency cannot inquire as to intended use of records. Comm on Open Gov't FOIL-AO-4866.

Subject matter lists do not have to refer to each and every record maintained by agency; rather, it is intended to indicate categories of records maintained by agency; since subject matter list does not contain any personally identifiable information, and since its contents are clearly available, disclosure of subject matter lists cannot be conditioned upon demonstration of proof of date of birth or identification number; therefore, subject matter lists must be made available to any person, irrespective of applicant's status or interest. Comm on Open Gov't FOIL-AO-4868.

Status or interest of applicant for records, or purpose for which request is made are irrelevant to rights of access; therefore, fact that applicant seeks to use records for commercial purpose has no effect on rights of access and request for license must be granted, even if request is made for commercial purpose; however, if request is made for list of names and addresses or its equivalent, purpose for which request is made may become relevant to rights of access based on unwarranted invasion of personal privacy,

especially when that list may be used for commercial or fund raising purposes. Comm on Open Gov't FOIL-AO-4926.

When records are available under Freedom of Information Law, they must be made equally available to any person, without regard to status or interest. Freedom of Information Law does not generally distinguish among applicants, and reason for which request is made is largely irrelevant to rights of access. Comm on Open Gov't FOIL-AO-7637.

There is no provision of constitution or law that would authorize agency or representative to require that member of public "barter" in order to obtain information. Comm on Open Gov't FOIL-AO-7936.

Email request that reasonably describes record sought should suffice under Freedom of Information Law; however, if applicant requests records that are accessible only to subject of those records, agency can require applicant to provide proof of identity and, until digital signatures are prevalent, email may be inadequate. Comm on Open Gov't FOIL-AO-11977.

When seeking records via email, requester is not obligated to include his or her name. Comm on Open Gov't FOIL-AO-16528.

B. Agencies Subject To Disclosure

63. In general

FOIL, as general matter, is applicable to records of state and local government in New York; it does not apply to records of private corporation. Comm on Open Gov't FOIL-AO-3998.

All records of agency are available, except to extent that records or portions thereof fall within one or more of grounds for denial in CLS Pub O § 87(2)(a) through (i); agency may withhold records to extent that disclosure would constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4572.

Freedom of Information Law applies to entities of state and local government, while Personal Privacy Protection Law applies only to state agencies. Comm on Open Gov't FOIL-AO-12592.

64. Building inspectors

Since information kept, held, filed, produced or reproduced for or by town would constitute "records" subject to rights of access granted by Freedom of Information Law, contract between town and private corporation would be available because none of grounds for denial would apply; similarly, town records reflective of building inspections are generally available. Comm On Open Gov't FOIL-AO-4601.

65. Courts and court-related entities. generally

66. —Administration of courts, including Office of Court Administration (OCA)

Administrative Board of New York State Courts is "agency" subject to requirements of Freedom of Information Law; Board performs administrative function and does not exercise judicial function within definition of "judiciary" in CLS Pub O § 86(1). Committee on Open Government FOIL-AO-3503.

Office of Court Administration, which is administrative arm of court system and not court itself, is "agency" required to comply with Freedom of Information Law. 1986 Committee on Open Government FOIL-AO-4212.

Freedom of Information Law pertains to records maintained units of state and local government, except state legislature and judiciary; court records are not subject to rights of access under Freedom of Information Law, but are governed by Judiciary Law. Comm On Open Gov't FOIL-AO-4590.

If request involves records related to sentencing, records sought would be maintained by court rather than "agency"; if this is so, Freedom of Information Law would not be applicable. Comm on Open Gov't FOIL-AO-4598.

Although Freedom of Information Law does not apply to courts or court records, other provisions of law often grant the right of access to court records. Comm on Open Gov't FOIL-AO-4667.

Freedom of Information Law is not applicable to courts or court records; further, federal Freedom of Information Act pertains only to records in possession of federal agencies; moreover, courts and court records fall outside of requirements of federal Freedom of Information Act. Comm on Open Gov't FOIL-AO-4692.

Freedom of Information Law pertains to records maintained by local and state government, except judiciary and state legislature; as such, Law does not apply to courts or to federal agencies, such as drug enforcement agency; records of federal agencies are generally subject to rights of access in accordance with Freedom of Information Act, federal statute; records of court proceedings are likely maintained by court where proceeding took place and request should be directed to clerk of court. Comm on Open Gov't FOIL-AO-4778.

Freedom of Information Law does not pertain to courts or court records; however, court records are generally available in accordance with relevant provisions of judiciary law and other statutes; copies of felony complaints and indictments may be maintained by office of District Attorney who prosecuted case and since district attorney's office is agency subject to Freedom of Information Law, request may be submitted under Freedom of Information Law to relevant district attorney's office for such records. Comm on Open Gov't FOIL-AO-4799.

Since office of district attorney is "governmental entity" that performs "governmental function" for state and public corporation, county, it is agency required to comply with Freedom of Information Law; Freedom of Information Law does not apply to courts and court records, and such records are often available under other provisions of law, however, request for records should be submitted to clerk of appropriate court. Comm on Open Gov't FOIL-AO-4802.

Courts and court records are not subject to Freedom of Information Law; however, other provisions of law may grant broad rights of access to court records. Comm on Open Gov't FOIL-AO-4862.

Freedom of Information Law does not apply to courts or court records, or to records maintained by private attorney; nevertheless, court records are often available pursuant to other provisions of law, and requests for such records should be directed to clerk of appropriate court; pre-sentence reports are confidential with respect to public and may be made available to defendant only by court. Comm on Open Gov't FOIL-AO-4865.

Although Freedom of Information Law does not apply to courts and court records, other provisions of law often grant broad rights of access to court records; therefore, it is suggested that requests should be made to clerk of appropriate court. Comm on Open Gov't FOIL-AO-4873.

Freedom of Information Law does not apply to courts or court records, or to records maintained by attorney; nevertheless, court records are often available pursuant to other provisions of law, and such requests should be directed to clerk of appropriate court; pre-sentence reports are confidential with respect to public and may be made available to defendant only by court. Comm on Open Gov't FOIL-AO-4881.

Freedom of Information Law does not apply to court or court records and though Freedom of Information Law is inapplicable, other provisions of law often grant significant rights of access to court records; where county court clerk has failed to respond to requests for records pursuant to Freedom of Information Law, requester should discuss matter with attorney or representative of prisoners' legal services. Comm on Open Gov't FOIL-AO-4887.

67. Fire departments, generally

68. —Volunteers

Volunteer fire company is agency subject to provisions of FOIL. Comm On Open Gov't FOIL-AO-3934.

If "financial statement" is prepared by officials of volunteer fire company, it is assumed that statement would be available under Freedom of Information Law, and while certain aspects of interagency materials may be denied, those portions consisting of statistical or factual tabulations or data would be available. 1986 Committee on Open Government FOIL-AO-4175.

Volunteer fire company is "agency" that falls within provisions of Freedom of Information Law because volunteer fire company performs governmental function and, as such, its records are subject to rights of access granted by Freedom of Information Law; under Freedom of Information Law, all records of volunteer fire company are available except to extent that they fall within one or more grounds for denial of access. Comm on Open Gov't FOIL-AO-4917.

Volunteer fire companies are subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-7640.

Volunteer fire companies created as private corporations are subject to Freedom of Information Law, and their financial records, as well as records reflective of response times, generally consist of factual data that must be disclosed. Comm on Open Gov't FOIL-AO-9947.

Volunteer fire companies are subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-12548.

Volunteer fire companies are subject to Freedom of Information Law. Comm on Open Gov't OML-AO-3904.

Franklin Square & Munson Fire District is public corporation (CLS Gen Const § 66, CLS Town § 174) required to comply with Freedom of Information Law. Comm on Open Gov't FOIL-AO-12,345.

Board of Fire Commissioners of a fire district is an "agency" subject to the requirements of the Freedom of Information Law. Comm on Open Govt FOIL-AO 2994.

If associated fire department does not contract with municipality or perform fire fighting services, but rather serves merely as independent benevolent association with voluntary membership, it might be found that it performs no governmental function and therefore falls outside scope of Freedom of Information Law. Comm on Open Govt FOIL-AO 3082.

While requests for recommendations contained within fire inspection reports may be deniable as intra-agency materials, names of fire inspectors and locations of inspections might be considered factual information available under Freedom of Information Law, and further, if inspectors maintain log or similar document which indicates locations of inspections, such document, which factually describes where inspector's day is spent, would likely be available, unless different ground for denial applies. 1986 Committee on Open Government FOIL-AO-4385.

If ambulance department is private, profit-making entity that is independent of government, its records would not be subject to Freedom of Information Law; however, when fire departments that are not-for-profit corporation contract with one or more municipalities where they exist by virtue of contractual relationship with government may have its records be subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-4644.

Medical information contained in ambulance run record of fire department could be withheld on ground that disclosure can constitute unwarranted invasion of personal privacy, except to extent that record refers to agency name and other information that has already been disclosed by means of motor vehicle accident report. Comm on Open Gov't FOIL-AO-4786.

Since fire district is public corporation, it is "agency" subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-8538.

Fire district is public corporation and, therefore, is "agency" required to comply with Freedom of Information Law. Comm on Open Gov't OML-AO-2598.

69. Health care entities, generally

70. —Ambulances

If ambulance department is private, profit-making entity that is independent of government, its records would not be subject to Freedom of Information Law; however, when fire departments that are not-for-profit corporation contract with one or more municipalities where they exist by virtue of contractual relationship with government may have its records be subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-4644.

Medical information contained in ambulance run record of fire department could be withheld on ground that disclosure can constitute unwarranted invasion of personal privacy, except to extent that record refers to agency name and other information that has already been disclosed by means of motor vehicle accident report. Comm on Open Gov't FOIL-AO-4786.

Volunteer ambulance company performing its duties for ambulance district, which is itself public corporation, is subject to the Freedom of Information Law. Comm on Open Gov't FOIL-AO-12548.

Access to records of Slaterville Ambulance, Inc., which was formed by Slaterville Volunteer Fire Company, was governed by Freedom of Information Law, since members of ambulance corporation were also members of volunteer fire company, ambulance corporation was analogous to subsidiary of fire company, and same persons oversaw, used and administered their records. Comm on Open Gov't OML-AO-3508.

71. —Hospitals and medical centers, generally

72. — —New York City Health and Hospitals Corporation

Hospital which is part of New York City Health and Hospitals Corporation is "agency" required to comply with Freedom of Information Law. Comm on Open Govt FOIL-AO-3593.

New York City Health and Hospitals Corporation is agency required to comply with Freedom of Information Law. Comm on Open Gov't FOIL-AO-9189.

Hospital incident reports can be characterized as records that are specifically exempted from disclosure by state or federal statute. Comm on Open Gov't FOIL-AO-4587.

Request made to obtain medical records from department of correctional services should be brought not under Freedom of Information Law but under CLS Pub Health § 18; § 18 provides rights that exceed those granted by Freedom of Information Law. Comm On Open Gov't FOIL-AO-4608.

Hospital is "agency" or part of agency and its records are subject to rights of access granted by Freedom of Information Law. Comm on Open Gov't FOIL-AO-4758.

Reports prepared by health network that are forwarded to town advisory committee are town records that fall within coverage of Freedom of Information Law. Comm on Open Gov't FOIL-AO-9247.

Board of managers of city hospital constitutes "public body" for purposes of Open Meetings Law and "agency" for purposes of Freedom of Information Law and is required to comply with both statutes. Comm on Open Gov't FOIL-AO-9478.

Roswell Park Cancer Institute is required to comply with Freedom of Information Law since it is under management and control of Department of Health. Roswell Park Alliance Foundation is not required to comply with Freedom of Information Law since it is non-profit corporation, its employees are paid by Foundation and not by Roswell Park Cancer Institute or Department of Health, it employs its own attorneys and, like all not-for-profit corporations in New York, it is subject to oversight and filing requirements imposed by Office of Attorney General, and not Department of Health. Comm on Open Gov't FOIL-AO-9667.

Health research not-for-profit corporation was "agency" subject to Freedom of Information law where corporation's essential purpose was to enhance functioning of state Health Department, and it would not exist but for its relationship with that agency. Even if entities in question (not-for-profit health research institute and university research foundation) were not "agencies," their records would fall within scope of Freedom of Information Law due to their relationships with state Department of Health and state university, respectively, both of which clearly were agencies. Comm on Open Gov't FOIL-AO-12685.

Office of Medical Examiner is "agency" subject to FOIL. Comm On Open Gov't FOIL-AO-4171.

73. Housing authorities

Municipal housing authorities in New York are subject to Freedom of Information Law since CLS Pub Hous § 3(2) states that municipal housing authorities are public corporations. Comm on Open Gov't FOIL-AO-12634.

74. Industrial developments and the like, generally

75. —Hudson River-Black River Regulatory District

Any documentation maintained by Hudson River-Black River Regulating District constitutes agency record subject to rights of access, and District is required to disclose its records to extent required by Freedom of Information Law. Comm on Open Gov't FOIL-AO-7917.

76. —Festival Development Corporations (FDCs)

Festival Development Corporation (FDC) which was created by town board initially to deal with Woodstock Festival, and FDC's board of directors which consisted of 5 members of town board, were subject to same requirements of Open Meetings and Freedom of Information Laws as town board itself, as FDC was essentially alter ego of town board when it voted to use proceeds

from festival to build new town hall. Comm on Open Gov't OML-AO-3193.

77. —Local development corporations (LDCs)

Many of records of local development (LDC) would remain subject to Freedom of Information Law, even if corporation were not itself subject to that statute as not-for-profit corporation, where corporation performed government function and several members of its board served due to their status as city officials. Comm on Open Gov't FOIL-AO-12386.

Local development corporation (LDC) would be required to comply with Freedom of Information Law, notwithstanding its status as not-for-profit corporation, if there is significant government control, i.e., if majority of LDC's board of directors consists of or is designated by government. If town official acting in his or her capacity as town official serves on local development corporation (LDC) board, records that he or she produces or receives in that capacity would be town records subject to rights conferred by Freedom of Information Law. Comm on Open Gov't FOIL-AO-12401.

Carthage Industrial Development Corporation (local development corporation) would constitute "agency" required to comply with Freedom of Information Law, since at least 7 of 9 members of corporation, who also serve as its board of directors, are appointed by or are government officials, and thus government agencies exercise substantial control over corporation. Comm on Open Gov't OML-AO-4267.

78. —New York State Technology Enterprise Corporation

New York State Technology Enterprise Corporation (NYSTEC) is not "agency" and is not required to comply with Freedom of Information Law, since NYSTEC is independent of government; no government agency or official has any control over corporation or authority to designate any person to NYSTEC's Board of Directors. Comm on Open Gov't FOIL-AO-12603.

79. —Off-Tack Betting corporation (OTB)

In Committee's view, New York City OTB Corporation is agency subject to provisions of FOIL. Comm on Open Gov't FOIL-AO-3997.

80. —Port Authority of New York and New Jersey

As a bi-state entity, the Port Authority of New York and New Jersey is probably not subject to the Freedom of Information Law. Comm on Open Govt FOIL-AO 3061.

Port Authority of New York and New Jersey is not "agency" subject to Freedom of Information Law. Comm on Open Govt FOIL-AO-3586.

Since Port Authority is bi-state entity operating in New York and New Jersey, it is not subject to New York, New Jersey or federal freedom of information statutes. Comm on Open Gov't FOIL-AO-7563.

81. —Urban development Corporation (UDC)

Urban Development Corporation is subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-8551.

82. —Woodstock Public Access Committee

Woodstock Public Access Committee is public body required to comply with Open Meetings Law and its records are subject to Freedom of Information Law since 5 members of committee are appointed by town board, and chair of committee and station manager are also appointed by town board. Comm on Open Gov't FOIL-AO-9236.

An industrial development agency is an "agency" subject to the Freedom of Information Law. Comm on Open Govt FOIL-AO 3059.

Industrial development agencies incorporated under CLS N-PCL § 1411 constitute agencies subject to Freedom of Information Law to extent that agencies operate as extensions of government that carry out their duties in conjunction with government. Committee on Open Government FOIL-AO-3340.

Since state office of court administration is "agency" required to comply with Freedom of Information Law, if functions of city office of court administration are similar to those carried out by its state counterpart, it would be "agency" for purposes of Freedom of Information Law. Comm on Open Gov't FOIL-AO-4746.

Records held by court or court clerk fell outside scope of Freedom of Information Law; however, office of court administration is "agency" subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-4931.

Industrial development agency is subject to the requirements of the Freedom of Information Law. Comm on Open Gov't FOIL-AO-6318 (1990).

Since industrial development agencies are public corporations, Montgomery County Industrial Development Agency is subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-8551.

Office of Court Administration is not court, but rather is "agency" and, therefore, is subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-9208.

Audiotape of judicial seminar/discussion conducted by Office of Court Administration was agency record subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-9403.

Records involving activities of Fort Totten Redevelopment Authority generally fall within coverage of Freedom of Information Law. Comm on Open Gov't OML-AO-2603.

Not-for-profit "Local Development Corporation" performed governmental function and was subject to Open Meetings Law and Freedom of Information Law, where 5 of its 9 permanent members were city officials (mayor, city manager, corporation counsel, comptroller, and chairman of Industrial Development Agency). Comm on Open Gov't OML-AO-2774.

83. Insurance entities

Neither New York Automobile Insurance Plan (Assigned Risk Plan, CLS Insurance § 5301) nor committee designated to administrator plan (CLS Insurance § 5302) is subject to Freedom of Information Law or Open Meeting Law. 1986 Committee on Open Government FOIL-AO-4306.

Private insurance company is not "agency" and records that it produces are not subject to Freedom of Information Law; however, when its records are submitted to agency, records are subject to rights granted by Freedom of Information Law; definition of "agency" excludes state legislature, as well as "judiciary", but Office of Court Administration is "agency" and its records are subject to Freedom of Information Law; similarly, records of division of budget are "agency records". Comm on Open Gov't FOIL-AO-4617.

84. Law and lawyers, generally

85. —District Attorney's office

District attorney's office records are subject to FOIL. Comm On Open Gov't FOIL-AO-4035.

Office of District Attorney is "agency" subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-4127.

Since office of district attorney is "governmental entity" that performs "governmental function" for state and public corporation, it is agency required to comply with Freedom of Information Law. Comm on Open Gov't FOIL-AO-4652.

Since office of district attorney is governmental entity that performs governmental functions for state and federal corporation, such as county, it is agency required to comply with Freedom of Information Law. Comm on Open Gov't FOIL-AO-4701.

Since district attorney's office is "governmental entity" that performs "governmental function" for state and public corporation, such as county, it is agency required to comply with Freedom of Information Law. Comm on Open Gov't FOIL-AO-4716.

Since office of district attorney is "governmental entity" that performs "governmental function" for state and public corporation, it is agency required to comply with Freedom of Information Law. Comm on Open Gov't FOIL-AO-4746.

Freedom of Information Law does not pertain to courts or court records; however, court records are generally available in accordance with relevant provisions of judiciary law and other statutes; copies of felony complaints and indictments may be maintained by office of District Attorney who prosecuted case and since district attorney's office is agency subject to Freedom of Information Law, request may be submitted under Freedom of Information Law to relevant district attorney's office for such records. Comm on Open Gov't FOIL-AO-4799.

Since office of district attorney is "governmental entity" that performs "governmental function" for state and public corporation, county, it is agency required to comply with Freedom of Information Law; Freedom of Information Law does not apply to courts and court records, and such records are often available under other provisions of law, however, request for records should be submitted to clerk of appropriate court. Comm on Open Gov't FOIL-AO-4802.

Since office of district attorney is "governmental entity" that performs "governmental function" for state and public corporation, it is agency required to comply with Freedom of Information Law. Comm on Open Gov't FOIL-AO-4865.

Subject matter lists refer to general categories of records that agency maintains; subject matter list is not required to identify each and every record of agency or refer to records pertaining to particular individual; all agencies, including district attorney's office, are required to maintain subject matter lists and these lists must be made available to public. Comm on Open Gov't FOIL-AO-4890.

Office of district attorney is "agency" and, therefore, records maintained by office of district attorney are subject to rights of access granted by Freedom of Information Law. Comm on Open Gov't FOIL-AO-4902.

District Attorney's office is "agency" subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-4972.

Since office of District Attorney is governmental entity that performs governmental function for state and public corporation, it is agency required to comply with Freedom of Information Law. Comm on Open Gov't FOIL-AO-4976.

Records of an office of a district attorney are subject to rights granted by the Freedom of Information Law; however, records compiled for law enforcement purposes can be withheld to the extent that disclosure would result in harmful effects described in CLS Public Officers Law § 87(2)(e)(i-iv). Comm on Open Gov't FOIL-AO-6220 (1990).

Police departments or offices of district attorneys constitute agencies required to comply with Freedom of Information Law; however, courts and court records are outside coverage of Freedom of Information Law. Comm on Open Gov't FOIL-AO-7538.

If District Attorney, as head of District Attorney's Office, is appeals person for purpose of Freedom of Information Law, only means of seeking review of his determination is through Article 78 proceeding. Comm on Open Gov't FOIL-AO-9501.

86. —Legal aid societies

While legal aid societies which are agencies of local government may be subject to Freedom of Information Law, it appears that most are not "agencies" as defined in Freedom of Information Law and, as such, are not subject to law; although Freedom of Information Law does not apply to courts or court records, request can be made to court clerk of county in which case was heard for relevant court records. Comm on Open Gov't FOIL-AO-4691.

If legal aid society is not "governmental agency", but rather, not-for-profit corporation, it would not be subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-4741.

While legal aid societies which are agencies of local government may be subject to Freedom of Information Law, most are not "agencies" as that term is defined in Freedom of Information Law and, as such, are not subject to that statute. Comm on Open Gov't FOIL-AO-8384.

87. —Prosecutors

Office of City Prosecutor is "agency" required to comply with Freedom of Information Law; and thus records pertaining to city code violation complaint directed to City Prosecutor must be made available under FOIL. Comm on Open Govt FOIL-AO-3727.

Since office of special prosecutor, department of correction and office of district attorney are "agencies", presumably any requested records would be equally available or exempt from disclosure, irrespective of which agency maintains records. Comm on Open Gov't FOIL-AO-4704.

88. —Public Defenders

County office of public defender is required to comply with Freedom of Information Law. Comm on Open Gov't FOIL-AO-12535.

If plan under CLS County Art 18-B involves services of public defender, records maintained by office of public defender would fall within scope of Freedom of Information Law, for that office would constitute "agency" as defined in CLS Pub O § 86(3). Comm on Open Gov't OML-AO-4016.

Ordinarily, attorney or attorney's office does not constitute agency, and records maintained by attorney or his or her office will fall beyond coverage of Freedom of Information Law. Comm on Open Gov't FOIL-AO-7573.

The Erie County Bar Association and its Assigned Counsel Program are not "agencies" subject to Freedom of Information Law; however, if bar association, for example, or other organization maintains records for county, those records would constitute county records. Comm on Open Gov't OML-AO-4016.

While records of governmental entity required to adopt plan under CLS County Art 18-B are subject to Freedom of Information Law, records of individual attorney or private organization performing services under Article 18-B may or may not be subject to Freedom of Information Law, depending on nature of plan. Comm on Open Gov't OML-AO-4016.

If plan under CLS County Art 18-B involves services rendered by private attorneys or associations, those persons or entities would not constitute agencies subject to Freedom of Information Law. Comm on Open Gov't OML-AO-4016.

89. Legislature of New York State

Members of state legislature are not required by FOIL to respond individually to requests. Comm on Open Gov't FOIL-AO-4087.

Freedom of Information Law pertains to records maintained units of state and local government, except state legislature and judiciary; court records are not subject to rights of access under Freedom of Information Law, but are governed by Judiciary Law. Comm On Open Gov't FOIL-AO-4590.

Freedom of Information Law pertains to records maintained by local and state government, except judiciary and state legislature; as such, Law does not apply to courts or to federal agencies, such as drug enforcement agency; records of federal agencies are generally subject to rights of access in accordance with Freedom of Information Act, federal statute; records of court proceedings are likely maintained by court where proceeding took place and request should be directed to clerk of court. Comm on Open Gov't FOIL-AO-4778.

90. Museums

Board of trustees of Suffolk County Vanderbilt Museum is "agency" required to comply with Freedom of Information Law; Board is also "public body" subject to Open Meetings Law. Committee on Open Government FOIL-AO-3676; OML-AO-1153.

If museum board of trustees is not governmental entity performing governmental or proprietary function for town, but rather is independent, nongovernmental, not-for-profit corporation, it would not be "agency". Comm On Open Gov't FOIL-AO-4596.

Not-for-profit Slate Valley Museum Foundation was "public body" whose records were subject to Freedom of Information Law, considering its nexus with Village of Granville, where it had more than 2 members, and it appeared to conduct public business and perform governmental function for Village of Granville, for which quorum was required. Comm on Open Gov't OML-AO-3433.

91. Police departments

If record is accessible under Freedom of Information Law, it is available for both inspection and copying; further, when there has been intentional public disclosure of record, it is unlikely that there would be any basis for denial of subsequent requests for inspection or copying of that record; since police department's patrol guide is available for review at certain public location, copies of that record should be available from agency that maintains it. Comm on Open Gov't FOIL-AO-4817.

Records of a Board of Police Commissions are subject to rights conferred by the Freedom of Information Law to the extent that records or portions thereof fall within one or ore grounds for denial under the provisions of CLS Public Officers Law § 87(2)(a-i). Comm on Open Gov't FOIL-AO-6315 (1990).

Police departments or offices of district attorneys constitute agencies required to comply with Freedom of Information Law; however, courts and court records are outside coverage of Freedom of Information Law. Comm on Open Gov't FOIL-AO-7538.

92. Private corporations, generally

93. —Not-for-profit corporations

Not-for-profit corporation which, among other functions, operated tennis concessions at city parks was subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-9625.

Not-for-profit corporation that contracts with SUNY/Albany to carry out variety of functions, including operation of food service, campus bookstore and beverage vending, is required to comply with both Freedom of Information Law and Open Meetings Law. Comm on Open Gov't FOIL-AO-13068.

Research Foundation of City University of New York is subject to Freedom of Information Law and Open Meetings Law, even though foundation regards itself as private corporation under contract to university. Comm on Open Gov't FOIL-AO-13140.

If Southern Tier Economic Development Corporation (STED) is creation of government or if government has substantial control over its operations, it would fall within coverage of Freedom of Information Law. Comm on Open Gov't FOIL-AO-13181.

When records involving Southern Tier Economic Development Corporation (STED) come into possession of member of its board who serves due to his or her government position, they would constitute agency records that fall within coverage of Freedom of Information Law. Comm on Open Gov't FOIL-AO-13181.

Private not-for-profit agency that received majority of its funds from state Office of Alcoholism and Substance Abuse Services was local "drug abuse prevention council" under CLS Gen Mun § 239-u and, as such, constituted agency whose records fell within coverage of Freedom of Information Law. Comm on Open Gov't FOIL-AO-16573.

Despite amendment to certificate of local recreation development corporation, which was intended to reduce number of city officials and designees on its board of directors so that they no longer comprised majority of board, many of corporation's records remained subject to Freedom of Information Law, and its meetings arguably remained subject to Open Meetings Law. Comm on Open Gov't OML-AO-3234.

Chautauqua Institution Architectural Review Board, formed as not-for-profit corporation governed by special acts of state legislature, was not subject to Open Meetings or Freedom of Information Laws, since it was separate and distinct from government, it operated without financial assistance from government, and its land regulations were based on deed restrictions rather than assertion of any governmental authority. Comm on Open Gov't OML-AO-3307.

Not-for-profit corporation known as Clarence Senior Citizens, Inc. is subject to Freedom of Information and Open Meetings Laws; its directors are appointed by majority of Clarence Town Board, number of directors can be increased or decreased by Clarence Town Board, its directors can be removed for cause by majority of members of its board and majority of Clarence Town Board, and its directors can be removed without cause only by Clarence Town Board. Comm on Open Gov't OML-AO-3483.

New York Public Library, founded in 1895 by Astor, Lenox and Tilden foundations to provide "private philanthropy for the public good," is private not-for-profit institution not subject to Freedom of Information Law. Comm on Open Gov't OML-AO-3579.

Corporation is not governmental entity even though it has relationship with government; as such, its records are not subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-4613.

Since Freedom of Information Law generally applies to governmental entities, private corporation is not subject to Law; furthermore, there is no state statute that generally requires private corporations to respond to requests for records. Comm on Open Gov't FOIL-AO-4615.

Private insurance company is not "agency" and records that it produces are not subject to Freedom of Information Law; however, when its records are submitted to agency, records are subject to rights granted by Freedom of Information Law; definition of "agency" excludes state legislature, as well as "judiciary", but Office of Court Administration is "agency" and its records are subject to Freedom of Information Law; similarly, records of division of budget are "agency records". Comm on Open Gov't FOIL-AO-4617.

Although it consists largely of government employees, Police Benevolent Association of City of New York, Inc., is private organization not subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-16577.

94. Schools and related activities, generally

95. —Board of Cooperative Educational Services (BOCES)

Agency need not create or prepare record in response to request; therefore, if board of co-operative educational services does not maintain statistical data involving race, ethnicity or sex, it is not required to prepare data on behalf of request. Comm on Open Gov't FOIL-AO-4914.

Board of cooperative educational services is subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-7587.

96. —City University of New York (CUNY)

Personnel and budget committees created under City University of New York bylaws must comply with both Freedom of Information and Open Meetings Laws, although much of their deliberative process may be conducted in executive session under CLS Pub O § 105(1)(f) and their recommendations can likely be withheld in great measure under CLS Pub O § 87(2)(g). Comm on Open Gov't FOIL-AO-12284.

Even if Research Foundation of City University of New York (CUNY) had no independent responsibility to comply with Freedom of Information (FOIL), its records fell within coverage of FOIL; foundation administered all grants and contracts awarded to CUNY faculty and staff for research, training, education and services pursuant to state-approved agreement with CUNY and, while foundation was legally and financially separate from CUNY, it performed governmental function based on its nexus with CUNY and degree of control exercised by CUNY over its 17-member board. Comm on Open Gov't OML-AO-3398.

97. —Community colleges

Student government association of community college is "agency" subject to Freedom of Information Law. Committee on Open Government FOIL-AO-3500.

Community college is "agency" under Freedom of Information Law and community college's records are subject to rights of access under Freedom of Information Law. Comm on Open Gov't FOIL-AO-4629.

Payroll record, which is required to be compiled, identifies faculty as part-time at community college; furthermore, it is implicit that payroll record required to be compiled pursuant to CLS Pub O § 87(3)(b) be current; if payroll record has not been prepared, proceeding could likely be commenced pursuant to CLS CPLR Article 78 to compel agency to perform duty that is required to be performed by law. Comm on Open Gov't FOIL-AO-4656.

Since community colleges are governmental entities performing governmental function, report concerning allegation of plagiarism is subject to rights of access granted by Freedom of Information Law; Federal Family Educational Rights and Privacy Act generally prohibits educational agency from disclosing "education records" identifiable to student without student's consent; therefore, to extent that Federal Act prohibits disclosure, records concerning allegation of plagiarism would be specifically exempted from disclosure by federal statute. Comm on Open Gov't FOIL-AO-4904-A.

Suffolk Community College Association, Inc., was subject to Freedom of Information Law since association would not have existed but for its relationship with college. Comm on Open Gov't FOIL-AO-8386.

98. —State University of New York (SUNY), generally

State University Construction Fund is "agency" required to comply with Freedom of Information Law. Comm on Open Govt FOIL-AO-3589.

New York State library is part of state education department and state university libraries are within state university; in both instances, those libraries are parts of agency and consequently,

are subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-4663.

Clinical management practice program at state university is operated by and on behalf of state university and certain of its components and is "agency" because state university and components fall under this definition; further, records of or pertaining to clinical management practice plan are maintained by officers and employees of state university and therefore such records are subject to rights granted by Freedom of Information Law. Comm on Open Gov't FOIL-AO-4763.

State University of New York is "agency" required to comply with Freedom of Information Law. Comm on Open Gov't FOIL-AO-7871.

State university foundation was "agency" subject to Freedom of Information Law where foundation's purpose was "to serve the University," foundation could not carry out its duties without approval of university officials, and it was "integral part" of university; moreover, offices of foundation were located at university, and utilized university space. Comm on Open Gov't FOIL-AO-12685.

Brockport Student Government at SUNY College at Brockport is agency subject to Freedom of Information Law since student government is involved in performing governmental function for, on behalf of or in conjunction with State University. Comm on Open Gov't OML-AO-2599.

99. —Teachers' retirement system

Teachers' retirement system is governmental entity performing governmental or proprietary function for state and school districts, which are municipal entities; as such, it is agency required to comply with Freedom of Information Law. Comm on Open Gov't FOIL-AO-4699.

School district as well as entities operating under aegis of district can be characterized as "agency" subject to requirements of Freedom of Information Law. Comm on Open Govt FOIL-AO-3456.

While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect public or final agency policy determinations must be made available; however, if teacher who may have reached "conclusions" had no authority to make final agency determination, conclusions might not be considered "final", and even if these "conclusions" were used in making final determination, they could be denied. Comm on Open Gov't FOIL-AO-4571.

Ratings of school teachers could be characterized as "intra-agency materials", and extent to which they may be accessible or deniable is largely dependent upon specific content of individual records since extent to which individual forms contain opinions and facts differs from one form to next. Comm On Open Gov't FOIL-AO-4592.

Freedom of Information Law pertains to records of agencies of state and local government; community colleges throughout state are "agencies" subject to requirements of Freedom of Information Law. Comm On Open Gov't FOIL-AO-4593.

Unsatisfactory lesson observation reports, pertaining to named teachers, would constitute intra-agency material that would be available or deniable, in whole or in part, based upon specific contents; however, individual rating reports, which also pertain to named teachers, could be accessible since social security numbers, file numbers, and possibly those reasons which were merely opinions, could be masked out and would therefore not be an unwarranted invasion of personal privacy; individual rating reports are accessible under Freedom of Information Law as long as they are final agency determinations. Comm on Open Gov't FOIL-AO-4642.

Freedom of Information Law pertains generally to records of agency which includes entities of state and local governments such as school districts; while law provides statutory guidance concerning access to records of agencies, it makes no specific reference to records of school district; if record is final and does not identify particular students, it appears it would be accessible; to extent that such report might identify particular student or students, those aspects of report would be required to be kept confidential pursuant to federal law; in addition, if state education department maintains report, presumably it would be equally available from department and district. Comm on Open Gov't FOIL-AO-4714.

Head of agency must designate appeals officer or body, who must be identified by name, title, business address and business telephone number; further, records access officer shall not be appeals officer. Comm on Open Gov't FOIL-AO-4723.

Every agency, including school districts, are required to prepare and maintain certain lists; school district contains records of name classroom teachers, as those separate and distinct from payroll record, such record is available, however, if school district does not maintain such lists, Law would not require school district to create or prepare such lists based on request. Comm on Open Gov't FOIL-AO-4752.

Terms of settlement and contract between school district and teacher would result in permissible rather than unwarranted invasion of personal privacy; such records are relevant to performance of official duties of school board and teacher, and, furthermore, it is clear that contracts between public employers and their employees are accessible because they represent terms and conditions under which public moneys are expended and public duties are performed. Comm on Open Gov't FOIL-AO-4861.

Assuming that school district or high school maintains copy of yearbook, yearbook constitutes "record" that falls within scope of rights conferred by Freedom of Information Law. Comm on Open Gov't FOIL-AO-9618.

100. Transit authorities

Transit authority is required to disclose records to extent that records sought are accessible pursuant to Freedom of Information Law, and that it would be authorized to disclose as "routine use" of Personal Privacy Protection Law. Comm on Open Gov't FOIL-AO-4964.

101. Utilities

While a public utility might be regulated by government, it is not a governmental entity performing a government function and consequently is not subject to rights of access granted by the Freedom of Information Law. Comm on Open Govt FOIL-AO 3019.

102. Other and miscellaneous agencies

Pursuant to § 60 of Town Law, town board meets requirements as "governing body" and is thus, pursuant to § 87 of FOIL, required to promulgate appropriate regulations applicable to all agencies in town government consistent with regulations of Committee on Open Government. Comm on Open Gov't FOIL-AO-4085.

If documents are kept for town by its attorney in conjunction with representation of town official, they are records subject to rights granted by Freedom of Information Law. Comm on Open Gov't FOIL-AO-4753.

Information contained in state child abuse central registrar is confidential pursuant to Social Services Law and any rights applicant may have to information in register would be conferred by Social Services Law, rather than Freedom of Information Law or Personal Privacy Protection Law. Comm on Open Gov't FOIL-AO-4980.

Crime Stoppers of Jefferson County, Inc., a not-for-profit corporation, was not subject to FOIL in that it was not a governmental agency. Comm on Open Gov't FOIL-AO-6113 (1990).

Office of Public Administrator constitutes agency required to comply with Freedom of Information Law. Comm on Open Gov't FOIL-AO-9358.

Special Funds Conservation Committee, which is affiliated with New York Compensation Rating Board and is headed by individual appointed by Chairman of Workers' Compensation Board, is not governmental entity and thus is not "agency" subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-9825.

If advisory commissions were created by town resolution, it would be likely that they were not agencies; on other hand, if commission were created by local law, for example, and performs necessary function in decision-making process, it would be subject to Open Meetings Law as "public body" and would constitute

"agency" subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-12641.

Mohawk & Hudson River Humane Society is not agency responsible for complying with Freedom of Information Law (FOIL); while some of its records may fall within scope of FOIL if they are "kept, held, filed, produced or reproduced...for an agency," responsibility to comply with FOIL does not involve society itself, but rather government agency whose records are maintained by society on its behalf. Comm on Open Gov't OML-AO-3490.

Freedom of Information Law does not apply to New York State Ethics Commission. Comm on Open Gov't OML-AO-3664.

C. Disclosure Requests

1. Generally

103. In general

For records kept by correctional facility, regulations of Department of Correctional Services indicate that request may be directed to facility superintendent; for records kept at Department's central offices in Albany, request may be sent to Deputy Superintendent for Administration. Comm on Open Gov't FOIL-AO-4005 and 4006.

There is nothing in Freedom of Information Law that requires that hearing must be held when appeal of decision denying disclosure of records is made, and applicant, as general matter, merely indicates that denial of records was made by records access officer or by means of failure to respond to request on timely basis; moreover, there is nothing in law or regulations providing that appeals officer is bound to provide reasons for denial initially offered by records access officer, nor is there anything that binds court to reasons for denial stated by agency when it reviews matter in judicial proceeding. 1986 Committee on Open Government FOIL-AO-4302.

All records of agency are available, except to extent that records or portions thereof fall within one or more of grounds for denial appearing in CLS Pub O § 87(2)(a) through (i); failure of agency to respond within designated time of 5 days results in denial of access that may be appealed to head of agency or whomever is designated to determine appeals, and that person or body has 10 business days from receipt of appeal to render determination; contention that agency has insufficient manpower to comply with request for information is not valid defense. Comm on Open Gov't FOIL-AO-4570.

Request for records should be directed to records access officer of agency or agencies that would maintain records which are requested; records sought should be reasonably described in sufficient detail so agency officials can locate them; all records of agency are available, except to extent that records or portions thereof fall within CLS Pub O § 87(2)(a) through (i). Comm on Open Gov't FOIL-AO-4579.

Once plans for relevant documentation are in possession of town they fall within scope of Freedom of Information Law and even though plans may be "preliminary" communications, those factors do not necessarily indicate that records can be withheld. Comm On Open Gov't FOIL-AO-4596.

Where person seeking records requests cases pertaining to particular geographical area and to certain criminal charges, education department may deny access to records if department keeps records by means of names and subject matter and could not locate records based on requester's qualifiers. Comm on Open Gov't FOIL-AO-4631.

Request for records should reasonably describe records sought so to enable agency officials to locate records; request for records in question should be directed to facility superintendent. Comm on Open Gov't FOIL-AO-4695.

Freedom of Information Law does not generally distinguish among applicants, and rights conferred by that statute are conferred on applicants for records as members of public. Comm on Open Gov't FOIL-AO-7554.

While agency cannot require that appointment be made with respect to every request under Freedom of Information Law, applicant for accessible records should be able to make appointment to inspect those records during regular business hours when agency has regular business hours. Comm on Open Gov't FOIL-AO-8347.

While board may choose to furnish information or records during meeting, it may require that request be made in accordance with its rules and regulations adopted under Freedom of Information Law. Comm on Open Gov't FOIL-AO-8449.

When agency determines that it maintains requested records and has retrieved records sought, it is reasonable for agency to indicate that applicant must respond in some manner as to his or her preference, schedule, or desire to pay fee for copies within reasonable time. Comm on Open Gov't FOIL-AO-9491.

Member of public may not designate date or dates on which he or she seeks to review records, and thus if requested records will be in use by staff on particular date or during particular period of time, agency is not required to alter its schedule or work plan. Comm on Open Gov't FOIL-AO-12206.

If electronic information can be extracted or generated with reasonable effort, and if that effort involves less time and cost to agency than engaging in manual deletions, agency should follow more reasonable and less costly and labor intensive course of action. Comm on Open Gov't FOIL-AO-12565.

Office of District Attorney cannot limit requester's ability to inspect records to period less than its regular business hours. Comm on Open Gov't FOIL-AO-12737.

If request involves variety of items, while applicant may ask that certain records be made available sooner than others, applicant may not require agency to make records available in certain order. Comm on Open Gov't FOIL-AO-12737.

Requests made under Freedom of Information Law should themselves generally be disclosed, except where request includes intimate personal information, in which case identifying details may be withheld. Comm on Open Gov't FOIL-AO-13471.

104. "Continuous basis" requests

Freedom of Information Law is applicable only to existing records; and thus request to be provided, "on continuing basis," with all reports of particular state agency cannot be construed as request made under FOIL. Comm on Open Govt FOIL-AO-3538.

105. Form of request, generally

106. —Faxed requests

Absent judicial determination to contrary and assuming that such request is directed to appropriate person, i.e., records access officer, there is no basis to refuse to accept request for records under Freedom of Information Law made by means of fax transmission. Claim that agency can refuse to accept request for records under Freedom of Information Law made by fax transmission based on CLS CPLR § 2103 would be misplaced, since that provision deals with service of papers in legal proceeding and does not pertain or refer to request made to governmental entity under Freedom of Information Law. Comm on Open Gov't FOIL-AO-9232.

County police department could validly require that requests be made under Freedom of Information Law by submitting them either in person or by mail, rather than by fax transmission, where department's 5 fax machines served specific law enforcement functions and department received approximately 100,000 requests annually since receipt of requests by fax could have severe negative impact on ability of department to engage in authorized interdepartmental fax communications. Comm on Open Gov't FOIL-AO-9312.

Public body may not determine to accept requests for records under Freedom of Information Law only if they are faxed to public body. Comm on Open Gov't FOIL-AO-9547.

Agency must accept document requests made via fax machine, unless use of machine adversely impacts on agency's capacity to carry out its duties. Comm on Open Gov't FOIL-AO-10193.

Agency must accept requests made via fax machine, unless use of such machine adversely impacts on agency's capacity to carry out its duties. Comm on Open Gov't FOIL-AO-13094.

107. —Law cites not required

No provision of Freedom of Information Law requires that applicant cite particular provision within Public Officers Law in order to justify request for records. Comm on Open Gov't FOIL-AO-9267.

108. —Writing requirement

Any written request for records that reasonably describes records sought should be sufficient, but failure to complete form prescribed by agency cannot serve to delay response to request or deny request. Comm on Open Gov't FOIL-AO-4686.

Agency may require that request be made in writing and that request must contain sufficient detail to enable agency officials to locate and identify records sought. Comm on Open Gov't FOIL-AO-7566.

Agencies may require that requests for records be made in writing, although they may choose to accept oral requests for records and act in informal manner in their responses to requests for records. Comm on Open Gov't OML-AO-2791.

Although an agency may require that a request be made in writing, an applicant is not required to complete a form prescribed by the agency. Comm on Open Govt FOIL-AO 3023.

There is nothing in Freedom of Information Law that refers to any particular form that must be used in making request, and failure to complete form prescribed by agency cannot be considered valid basis for delaying or denying request. Committee on Open Government FOIL-AO-3353.

Failure to complete form prescribed by agency cannot constitute valid basis for delay or denying request for records under Freedom of Information Law. Comm on Open Govt FOIL-AO-3607.

Although agency may require that request for record be in writing, Freedom of Information Law does not require that particular form be used when requesting records; however, if requirement that request be made on agency prevents requested records from being made available within 5 business days of initial written request, requirement is unnecessarily restrictive, and if agency fails or refuses to respond to individual's request merely because agency request form is not completed, agency violates Freedom of Information Law. 1986 Committee on Open Government FOIL-AO-4344.

Failure to use "actual form" as opposed to photocopy when requesting records from agency cannot constitute valid basis for delaying response to request or denying request. Comm on Open Gov't FOIL-AO-4655.

Any written request for records that reasonably describes records sought should be sufficient, but failure to complete form prescribed by agency cannot serve to delay response to request or deny request. Comm on Open Gov't FOIL-AO-4686.

While agency may require that requests be in writing and that request reasonably describe records sought, there is no provision in Freedom of Information Law requiring or allowing agency to require particular language or wording in request for records; also, Freedom of Information Law is to facilitate public to gain access to records without regard to whether requester accurately cites relevant provisions of Law. Comm on Open Gov't FOIL-AO-4782.

Any written request for records that reasonably describes records sought should suffice and failure to complete form prescribed by agency cannot serve to delay response or deny request for records; standard form may be utilized except to extent that it unnecessarily serves to delay response or deny request for records. Comm on Open Gov't FOIL-AO-4875.

Although agency may require that request be made in writing or may make records available upon oral request, Freedom of Information Law is silent concerning use of standard forms; accordingly, any written request that reasonably describes records sought should suffice. Comm on Open Gov't FOIL-AO-4920.

Town Clerk's requirement that a preprinted form be used to request documents and that a signature appear on such form was improper in that any request made in writing that reasonably describes the records sought would be adequate. Comm on Open Gov't FOIL-AO-6219 (1990).

While agency may not require that applicant complete request form prescribed by agency, it may require that request be made in writing in accordance with CLS Pub O § 89(3). Comm on Open Gov't FOIL-AO-8448.

Use of standard forms for Freedom of Information Law requests is inappropriate to extent it unnecessarily delays response to request for records, or results in denial of request. Comm on Open Gov't FOIL-AO-10004.

Parties may validly agree not to speak about settlement or agreement; however, Freedom of Information Law pertains to records, not to speech. Comm on Open Gov't FOIL-AO-13371.

City of Yonkers could not require those seeking records via email to use city's Freedom of Information request form, although use of prescribed form would likely be of benefit to people seeking city records. Comm on Open Gov't FOIL-AO-16607.

Agency may not require that request under Freedom on Information Law be made on prescribed form since use of standard forms is inappropriate to extent that it unnecessarily serves to delay response to or deny request for records; any written request that reasonably describes records sought should suffice. Comm on Open Gov't OML-AO-2222.

109. Limit on number of records being requested

There is no statutory limitation on number of records that may be requested in single application for records, and there is no requirement that each record sought must be requested separately. Comm on Open Gov't FOIL-AO-12,348.

Copies of land records in electronic form were available under Freedom of Information Law to land records company, or to any person, although almost 5 million images of deeds and mortgages, plus indices to such records, were involved; requested records already existed in electronic form, and "extensive programming" was not required. Comm on Open Gov't FOIL-AO-16560.

110. Requests for mailed records

Nothing in Freedom of Information Law or regulations promulgated by Committee on Open Government specifically deals with requests made and responses given by mail; however, due to size of state, inability of some people to physically travel to locations where records are kept, reality that many people work and cannot travel to those locations, and in view of intent of law, it is implicit that agencies must respond to requests by mail. Comm on Open Gov't FOIL-AO-8536.

To give reasonable effect to Freedom of Information Law and its intent, agencies are required to mail records to applicants. Comm on Open Gov't FOIL-AO-13548.

111. Requests for photocopied records

Agency may not require applicant to make appointment to view or obtain records at its offices; further, assuming that applicant remits appropriate fee for copies, plus postage if it chooses to include such charge, agency would be required to send records accessible under Freedom of Information Law to applicant. Comm on Open Gov't FOIL-AO-8536.

Ability of an agency to prohibit use of requestor's own copying or scanning equipment is dependent on reasonableness of prohibition considering physical arrangements of agency's premises and its staffing requirements or needs. Comm on Open Gov't FOIL-AO-10072.

It was unreasonable for inmate records coordinator or Department of Correctional Services to require, as matter of policy, that authorization to disclose inmate records bear original signature, where authorization was notarized; if photocopy is admissible in judicial proceeding for evidentiary purposes, it should be equally acceptable for purpose of authorizing disclosure under Freedom of Information or Personal Privacy Protection Laws. Comm on Open Gov't FOIL-AO-10345.

112. Specificity of request for disclosure, generally

113. —Not sufficiently specific request

Request for copies of all "records" in possession or control of city or any "agency" thereof in which there is not any mention, reference of illusion to particular theater, does not reasonably describe records sought. Comm on Open Govt FOIL-AO-3526.

Request for letters sent to town, or to particular office, officer or department of town government, within specific week or month, would "reasonably describe" records sought in accordance with Freedom of Information Law. Comm on Open Govt FOIL-AO-3598.

Whether request reasonably describes records sought may be dependent upon terms of request, as well as nature of agency's filing or record-keeping system. Division of Human Rights was not required to review 14-volume set of materials containing variety of information, which process would take weeks, in order

to reply to request for all policy statements of Division that were currently in effect pertaining to employment discrimination under Human Rights Law. Comm on Open Gov't FOIL-AO-7584.

If request under Freedom of Information Law involves minutes of agency insofar as they deal with particular subject, and if minutes are not topically indexed, agency staff would not be required to review all of minutes in effort to locate particular items within them. Comm on Open Gov't FOIL-AO-8288.

Even assuming that request for vouchers of persons paid in specific judicial district through Family Court including experts, investigators, law guardians, attorneys and like involved records of Office of Court Administration, rather than courts records (which are not available under Freedom of Information Law), it appeared that request did not reasonably describe records sought as thousands of vouchers were filed each year but were not filed by judicial district. Comm on Open Gov't FOIL-AO-9208.

Request for "all information kept regarding [my] property" did not reasonably describe records sought if town maintained records falling within scope of such request in number of locations or departments and by means of different filing systems within those departments; moreover, if records were kept chronologically, it might not be possible to locate them by means of name or address. Comm on Open Gov't FOIL-AO-10280.

114. —Sufficiently specific request

Request for record concerning street repairs and risks of pending lawsuit identified location of repairs as well as time period during which repairs were made "reasonably described" records. Comm on Open Gov't FOIL-AO-4675.

It appeared that minutes of meetings held by industrial development agency could be readily retrieved and that request for minutes covering period of 3 years would reasonably describe records sought by applicant. Comm on Open Gov't FOIL-AO-8288.

If case records identify police officer or officers who prepared complaint follow-up report ("DD5), then police department has ability to locate that officer and acquire activity log for purpose of determining rights of access to portions pertaining to case; if so, then request reasonably describes records, as required by Freedom of Information Law. Comm on Open Gov't FOIL-AO-10038.

If speeding tickets issued within particular time frame can be retrieved by means of name of trooper who issued them, request for all such tickets issued within that period, for purpose of ascertaining whether officer issues citations "all at 75 mph," would meet standard imposed by law because, on receipt of tickets, applicant could review and analyze them himself. Comm on Open Gov't FOIL-AO-10343.

Applicants request for city police Field Interview Forms (FIFs), despite volume of material, met requirement of "reasonably describing" records and could not be rejected due to its breadth. Comm on Open Gov't FOIL-AO-12565.

Freedom of Information Law requires that person requesting records must "reasonably describe" records sought so agency officials can locate records; however, certain records may justifiably be withheld if information sought includes other people in addition to requester because that would cause unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4574.

Request for records should be directed to records access officer of agency or agencies that would maintain records which are requested; records sought should be reasonably described in sufficient detail so agency officials can locate them; all records of agency are available, except to extent that records or portions thereof fall within CLS Pub O § 87(2)(a) through (i). Comm on Open Gov't FOIL-AO-4579.

When requesting transcript of hearing before parole board, request should be directed to agency which maintains such records—division of parole; however, while making such requests, sufficient detail should be provided as to enable agency officials to locate records. Comm on Open Gov't FOIL-AO-4634.

Freedom of Information Law states that agency may require that request for records be in writing, and that request reasonably describe records sought; any written request that reasonably describes records sought should suffice; moreover, failure to complete form prescribed by agency cannot constitute valid basis for delaying response to request or denying access to records. Comm on Open Gov't FOIL-AO-4646.

When requesting records, specific nature and contents of each record must be provided or grounds for denial may apply. Comm on Open Gov't FOIL-AO-4659.

Freedom of Information Law requires each agency to have "records access officer" to whom requests may be directed and who has duty of coordinating agency's response to request for records; therefore, requests should be sent to "records access officer" in relevant agency; request should be made in writing and should reasonably describe record so that there is sufficient detail to enable agency officials to locate records. Comm on Open Gov't FOIL-AO-4693.

When making requests under Freedom of Information Law, requests should be for existing records rather than information and should be as specific as possible in describing records so that agency officials can identify and locate records sought. Comm on Open Gov't FOIL-AO-4884.

When making request, Freedom of Information Law does not require applicant to identify records sought with specificity; rather, law merely requires that request reasonably describe records sought and that request meets the standard of reasonably describing when agency officials can locate records based on terms of request. Comm on Open Gov't FOIL-AO-4975.

Whether request under Freedom of Information Law reasonably describes records sought may be dependent on terms of request, as well as nature of agency's filing system. Comm on Open Gov't FOIL-AO-7509.

Journalist or member of public cannot require a portion of police report by referring to specific incident; rather, applicant could request report or reports as they pertain to particular days or dates. Comm on Open Gov't FOIL-AO-8546.

Applicant is not required to identify with particularity exactly which record, or perhaps which portion of record, he or she may be interested in reviewing; thus, journalist or member of public cannot require a portion of a report by referring to a specific incident, but can, instead, request report or reports as they pertain to particular days or dates. Comm on Open Gov't FOIL-AO-9455.

Requests for oaths of office, which may be filed with respect to some individuals, are filed chronologically; thus, requestor must include year in which oath was filed in order to locate and obtain copies of those records. Comm on Open Gov't FOIL-AO-9991.

To extent that records sought from village could be located with reasonable effort, request reasonably described them; however, to extent that records were not maintained in manner that permitted their retrieval except by reviewing perhaps thousands of records individually in effort to locate those falling within scope of request, request was too broad. Comm on Open Gov't FOIL-AO-10108.

Request for "911 police radio dispatch tapes" generated over 10 years earlier, and citing certain date, likely would meet standard of reasonably describing records if directed to small police department; on other hand, if 911 calls are received in different locations, due, for example, to size or population of county, request of that nature might not meet standard of reasonably describing records. Comm on Open Gov't FOIL-AO-12589.

Identifying records that indicate "criticism" might, in some circumstances, be problematic, and such request may not, at least in part, reasonably describe records sought under Freedom of Information Law. Requests for "any and all memorandum, resolutions, draft resolutions, correspondence or press releases calling for the holding of legislative hearings into any of the controversies surrounding" named county executive and district attorney would meet requirement of reasonably describing records; on other hand, if such records were not maintained in manner that permitted their retrieval except by reviewing perhaps hundreds or even thousands of records individually in effort to locate those falling within scope of request, to that extent, requests would not meet standard reasonably describing records. Comm on Open Gov't FOIL-AO-12631.

With regard to request under Freedom of Information Law for minutes of meetings, it appeared that minutes of meetings could be readily retrieved and that request for minutes covering period of 3 years would reasonably describe records; however, with

regard to request for minutes insofar as they dealt with particular subject, and if minutes were not topically indexed, agency staff would not be required to review all of minutes in effort to locate particular items within them. Comm on Open Gov't OML-AO-2349.

115. Time element of request

School district regulation providing that public records could only be seen between 3 and 4 p.m. on day school offices were open is unduly restrictive and invalid under Freedom of Information Law; if agency maintains regular business hours, it is required to accept requests and produce records during those hours. Comm on Open Govt FOIL-AO-3664.

Although Freedom of Information Law provides direction concerning time and manner in which agency must respond to requests, it does not include any provision that specifies period within which records must be disclosed. While agency must grant access to records, deny access or acknowledge receipt of request within 5 business days, when such acknowledgement is given, there is no precise time period within which agency must grant or deny access to records. When agency acknowledges receipt of request because more than 5 business days may be needed to grant or deny request, so long as it provides approximate date indicating when request will be granted or denied and that date is reasonable in view of attendant circumstances, agency acts in compliance with law. Comm on Open Gov't FOIL-AO-7509.

When agency has regular business hours, it must accept requests during those hours; however, for variety of reasons, agency may reasonably limit time in which applicant may inspect or copy records. Comm on Open Gov't FOIL-AO-8347.

Insofar as town offices operate during regular business hours, public should have opportunity to request and review records during those hours; if there are no regular business hours, appointment procedure must be devised. Comm on Open Gov't FOIL-AO-8489.

Member of public may not designate date or dates on which he or she seeks to review records. Comm on Open Gov't FOIL-AO-12737.

When records are being used by agency staff, agency may delay disclosure; however, when they are no longer in use, there would be no valid reason for continuing such delay. Comm on Open Gov't FOIL-AO-12754.

2. Disclosure Fees

116. In general

Assuming that information sought would not involve the creation of a record, fees for producing records should be based upon the actual cost of reproduction. Comm on Open Govt FOIL-AO 3113.

Committee on Open Government is not authorized to advise as to propriety of fees set by governmental entities that are not subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-4103.

If fees are prescribed by statute, they are valid even though they are in excess of fees prescribed by Freedom of Information Law. Comm on Open Gov't FOIL-AO-4641.

Freedom of Information Law limits fees that agencies may charge when records are requested, except when different fee is otherwise prescribed by statute; since city administrative code is not statute enacted by state legislature, fee imposed by code is not valid under Freedom of Information Law. Comm on Open Gov't FOIL-AO-4911.

City's department of law acted reasonably when it informed applicant that she should either arrange appointment to view requested materials or arrange payment of fee required to make copies of materials within 10 days by contacting particular individual who was identified by name and phone number and, further, that failure to do so would be deemed withdrawal of request. Comm on Open Gov't FOIL-AO-9491.

There is nothing in Freedom of Information Law that requires agencies to make records available online via Internet; when they choose to do so, they would be acting above and beyond responsibilities imposed on them by law, and in such cases, provisions in Freedom of Information Law pertaining to fees do not apply. Comm on Open Gov't FOIL-AO-12975.

If record is available in its entirety, requester would have right to inspect it free of charge; however, if some aspects of record may properly be withheld, requester must pay established fee and agency would be obliged to disclose those portions of records after having made appropriate deletions from copy of record. Comm on Open Gov't FOIL-AO-13366.

Prohibition of use of one's own digital camera to copy records accessible under Freedom of Information Law (FOIL) would be unreasonable and inconsistent with FOIL, and no fee may be charged when one's own camera is used; unlike bringing one's own photocopier, there would be no use of agency's space or electricity, and there would be no distinction in terms of agency's efforts in retrieving records between more traditional inspection of records and use of camera. Comm on Open Gov't FOIL-AO-16504.

117. Certification fees

City clerk may not impose fee for making request under Freedom of Information Law, for search or for certification, unless statute other than Freedom of Information Law permits such fees to be assessed. 1986 Committee on Open Government FOIL-AO-4333.

Freedom of Information Law, and regulations promulgated thereunder, direct that agency may not charge more than 25 cents per page for photocopies, except when different fee is otherwise prescribed by statute, and no fee may be charged for certification of requested records or certified statements that requested records cannot be located, except as otherwise prescribed by statute. 1986 Committee on Open Government FOIL-AO-4344.

118. Computer costs

The fee for producing computer documents should be based solely on the actual cost of reproduction. FOIL-AO-3012.

Agency cannot include in computation of "actual costs" of reproducing records that cannot be photocopied such considerations as insurance, maintenance or personnel costs, but may include computer time if agency is billed on that basis, cost of paper used to prepare printout, cost of compute tape if tape itself is reproduced, and similar costs that are not "fixed" costs of agency. 1986 Committee on Open Government FOIL-AO-4241.

If agency chooses to engage in development of new or altered computer programs in order to retrieve requested information that could not otherwise be compiled, it would be acting beyond requirements of Freedom of Information Law and, therefore, could charge for such service based upon considerations separate from provisions concerning assessment of fees described in CLS Pub O § 87(1)(b)(iii). Comm on Open Gov't FOIL-AO-7595.

Absent contrary statutory authority, agency may charge maximum of 25 cents per photocopy up to 9 by 14 inches; in case of electronic information, agency may charge fee based on actual cost of reproduction, which would involve cost of computer time, plus cost of information storage medium (i.e., computer tape) to which data is transferred, or cost of paper when printout is prepared. Comm on Open Gov't FOIL-AO-7624.

It is likely that fee for reproducing computer tape, assuming that its contents are wholly available under law, would involve cost of computer time, plus cost of information storage medium (i.e., computer tape) to which data is transferred. Comm on Open Gov't FOIL-AO-7630.

Where applicant requests inspection of records, agency may not prepare computer printouts of information and then seek to collect fee for printouts; agency should either make records available for inspection at no charge or, if computer printout has to be generated, agency should inform applicant in advance what fee will be. Comm on Open Gov't FOIL-AO-8343.

Fee of $250 sought to be charged by county appeared to be excessive and inconsistent with Freedom of Information Law and its judicial interpretation where county intended to charge that amount for making its budget available on computer disk based on costs for workers' time in getting data, computer time and overhead costs. Comm on Open Gov't FOIL-AO-8525.

Fee of $750 sought to be charged by county for computer digitized map, which could fit on single diskette, appeared to be excessive and inconsistent with Freedom of Information Law and its judicial interpretation. Comm on Open Gov't FOIL-AO-8528.

$250 fee charged by City of Ithaca for copy of its municipal codes and regulations on computer disk appeared to be excessive and inconsistent with Freedom of Information Law; fee for reproducing electronic information involves cost of computer time, plus cost of information storage medium (i.e., computer tape or disk) to which data is transferred. Comm on Open Gov't FOIL-AO-9830.

If applicant requests computer printout of records from which appropriate deletions must be made, applicant can be charged up to 25 cents per photocopy for duplication of printouts up to 9 by 14 inches in size. Comm on Open Gov't FOIL-AO-10213.

Fee for "machine-readable" copy of portion of registered voter roster of $11 ($1 for disk media plus $10 "setup" fee), plus $.005 per voter, was inappropriate and inconsistent with law; there was no basis to charge "setup" fee or fee determined by number of names produced. Comm on Open Gov't FOIL-AO-12092.

Where county generated paper document from information stored in computer, rather than merely photocopying existing record, it could assess its fee based on actual cost of producing that document. Comm on Open Gov't FOIL-AO-12127.

If New York City Department of Environmental Protection (DEP) is required by NYC Admin Code § 24-707 to print entire contents of its Citywide Facility Inventory Database (CFID), equivalent information must also be made available in electronic format, assuming that conversion of format can be accomplished, that data sought is available under FOIL, that data can be transferred from format in which it is maintained to format in which it is requested, and if applicant is willing to pay actual cost of reproduction. Comm on Open Gov't FOIL-AO-12559.

City would be obliged to provide information regarding race and ethnicity contained on police Field Interview Forms (FIFs) if city had ability to computer generate such data, if it had capacity to segregate that data from items that need not be disclosed, and if applicant were willing to pay actual cost of reproduction as envisioned by CLS Pub O § 87(1)(b)(iii). Comm on Open Gov't FOIL-AO-12565.

119. Indigence of document requester

Despite fact that party who requests record is an indigent person, agency may charge up to 25 cents per photocopy when making records available under the Freedom of Information Law. Comm on Open Govt FOIL-AO 3022.

There is nothing in Freedom of Information Law that pertains to waiver of fees for photocopies, as such, and despite applicant's status as inmate and indigent person, Freedom of Information Law does not require that fees be waived. 1986 Committee on Open Government FOIL-AO-4318.

Agency may charge a fee for copies of medical records made available under FOIL notwithstanding the requester's indigency. Comm on Open Gov't FOIL-AO-6107 (1990).

Agency may assess fees for copies of records sought under Freedom of Information Law even when applicant for records demonstrates that he or she is unable to pay; when records are accessible, requestor may inspect them at no charge. Comm on Open Gov't FOIL-AO-12047.

There is nothing in Freedom of Information Law that requires that agency waive fees, irrespective of status of applicant for records; further, agency may charge its established photocopying fees even though applicant is indigent inmate. Comm on Open Gov't FOIL-AO-12702.

120. Maximum charge not to exceed 25 cents per photocopy, generally

121. —Effect of local enactment or policy, generally

122. — —Ordinance cannot create exception

Only act of state legislature would permit assessment of photocopy fee higher then 25 cents per copy; therefore, local ordinance could not validly raise fee for copies beyond 25 cents per photocopy. Comm on Open Gov't FOIL-AO-4668.

123. — —Regulations of New York City

Fee of $5 for photocopy, levied by New York City Department of Buildings pursuant to provision of City Administrative Code, is invalid under Freedom of Information Law, since City Administrative Code cannot be considered "statute" that could be cited to exempt records from disclosure. Comm on Open Govt FOIL-AO-3445.

Freedom of Information Law allows agency to charge up to $.25 cents per photocopy or actual cost of reproducing records that cannot be photocopied, unless another statute permits higher fee to be assessed; Freedom of Information Law makes no reference to capacity to charge for personnel costs, search time, or time needed to evaluate contents of records in terms of rights of access; however, after October 15, 1982, only act of state legislature or statute permit assessment of search fee, fee higher than $.25 cents per photocopy or fee that exceeds actual cost of reproduction; New York City Administrative Code is not viewed as statute that exempts records from Freedom of Information Law. Comm on Open Gov't FOIL-AO-4588.

Insofar as regulations, local enactment or policy authorize assessment of fee other than maximum fee of 25 cents per photocopy, such would be invalid. Comm on Open Gov't FOIL-AO-7637.

Only act of state Legislature (i.e, statute) would permit assessment of fee higher than 25 cents per photocopy, fee that exceeds actual cost of reproducing records that cannot be photocopied, (i.e., electronic information), or any other fee, such as fee for "administration," search or overhead costs. Comm on Open Gov't OML-AO-3799.

124. —Effect of specific state statutes, generally

125. — —Public Officers Law

CLS Pub O § 66-a (statute separate from Freedom of Information Law) authorizes Division of State Police to charge $15 for search and copy of accident reports. Comm on Open Gov't FOIL-AO-12409.

CLS Pub O § 66-a permits State Police to charge $15 for report rather than 25 cents per page authorized under CLS Pub O § 87(1)(b)(iii). Comm on Open Gov't FOIL-AO-12844.

126. — —Vehicle and Traffic Law

Only act of state legislature, statute, would permit assessment of fee higher than 25 cents for photocopy; however, since Vehicle and Traffic Law authorizing copying fee of $3.50 for accident reports applies to particular record in possession of department of motor vehicles only, other agencies, such as municipal police departments, cannot unilaterally adopt the policy or regulations authorizing fees in excess of 25 cents for photocopy without specific statutory authority to do so. Comm on Open Gov't FOIL-AO-4768.

Department of Motor Vehicles is authorized to charge more than twenty-five cents ($.25) per photocopy of records in that CLS Vehicle and Traffic Law § 202(2)(3) specifies the fees to be charged by the Department. Comm on Open Gov't FOIL-AO-6265 (1990).

Fee of $10.00 charged by county sheriff's department for copy of accident report, even if authorized by county board of supervisors, was invalid. CLS Veh & Tr § 202 which authorizes copying fee of $15.00 for accident reports obtained from Department of Motor Vehicles (DMV) and one dollar per page for copies of other records, and authorizes DMV to collect fees for searching for records, does not authorize other agencies (such as municipal police or sheriff's departments) to charge more than 25 cents per copy when accident reports are requested under Freedom of Information Law. Comm on Open Gov't FOIL-AO-12263.

Under amendment to FOIL (L 1982 ch 73), only act of state Legislature—statute—would permit assessment of fee higher than 25 cents per photocopy, fee that exceeds actual cost of reproducing records that cannot be photocopied, or any other fee, such as fee for search. Since CLS Veh & Tr § 202 pertains to particular records in possession of Department of Motor Vehicles only, other agencies, such as municipal police or sheriff's departments, cannot unilaterally adopt policy or regulations authorizing fees in excess of 25 cents per photocopy or other fees without specific statutory authority to do so. Comm on Open Gov't FOIL-AO-12409.

Agency may not charge file search fee nor may agency, by other means, charge additional fees or raise costs of obtaining copies beyond amounts indicated in Freedom of Information Law unless

so authorized by state or federal statute to do so. Comm on Open Gov't FOIL-AO-4838.

Fees assessed by county clerks pursuant to CLS CPLR §§ 8018-8021 may exceed those permitted under Freedom of Information Law. Comm on Open Gov't FOIL-AO-10376.

Prior to October 15, 1982, local law, ordinance, or regulation establishing fee in excess of 25 cents per photocopy or higher than actual cost of reproduction was valid; however, currently under Freedom of Information Act, only act of state legislature, statute, would permit assessment of fee higher than 25 cents for photocopy, or fee that exceeds actual cost of reproduction. Comm On Open Gov't FOIL-AO-4597.

When there is no state statute which prescribes fee, proper fee is not more than 25 cents per page and no charge of additional fee for deletion of portions of records. Comm on Open Gov't FOIL-AO-4618.

Under Freedom of Information Law, agency may charge up to 25 cents per photocopy; however, there is exception when different fee is otherwise prescribed by statute. Comm on Open Gov't FOIL-AO-4625.

Agency may charge up to $.25 per page for photocopies of records except when different fee is prescribed by statute other than Freedom of Information Law. Comm on Open Gov't FOIL-AO-4750.

Freedom of Information Law permits agency to charge up to 25 cents for photocopy, unless different fee is prescribed by statute; statute is act of state legislature and does not include rule, regulation or policy adopted by agency. Comm on Open Gov't FOIL-AO-4782.

Both town and village are limited to charging no more than 25 cents for photocopy for records, except in instances in which statute, act of state legislature, permits them to charge higher fee; even if minutes have not been approved by committee, they are nonetheless public records and therefore subject to rights of access granted by Freedom of Information Law. Comm on Open Gov't FOIL-AO-4794.

Only act of state legislature would permit assessment of fee higher than 25 cents per photocopy, or fee that exceeds actual cost of reproducing records that cannot be photocopied. Comm on Open Gov't FOIL-AO-4944.

Freedom of Information Law states that accessible records are available for inspection and copying, and upon payment of appropriate fee, agency must make copies of records; only act of state legislature would permit assessment of fee higher than 25 cents per photocopy, or fee that exceeds actual cost of reproducing records that cannot be photocopied. Comm on Open Gov't FOIL-AO-4954.

Village may not charge $20.00 for copy of police accident report since FOIL specifies a maximum charge of $.25 per photocopy in absence of a statute allowing higher charges. Comm on Open Gov't FOIL-AO-6157 (1990).

Charge of one dollar per copy of records made available by the Dutchess County Office of Real Property Tax Services was excessive. Such charges should be limited to twenty-five cents per copy if dimension of such photocopy did not exceed nine inches by fourteen inches. Comm on Open Gov't FOIL-AO-6208 (1990).

Provision in CLS Public Officers Law § 87(1)(b)(iii) that an agency could charge "the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute" allowed Town to charge a fee of ten dollars ($10.000) for the cost of reproducing copies of Polaroid pictures provided that the Town could show that the fee was their actual cost. If the actual cost of the reproduction was less than ten dollars ($10.000), then the established fee would be inconsistent with the Freedom of Information Law. Comm on Open Gov't FOIL-AO-6258 (1990).

Fee of $5.00 per photocopy is inconsistent with Freedom of Information Law; unless act of state legislature authorizes agency to charge different fee, agency can charge no more than 25 cents per photocopy up to 9 by 14 inches. Comm on Open Gov't FOIL-AO-7542.

County library did not act improperly when it refused to permit person to make photocopies of requested documents on public machine at cost of 10 cents each and, instead, required that library personnel make copies of documents at cost of 25 cents each where requested records were not library materials but were records involving administration of library that were kept at location separate and apart from library materials, many of records sought were original documents, and staff was required to insure that custody of those documents was maintained; thus, rather than permitting individual to take records to copy machine in different section and floor of library, they were properly copied by staff at photocopy machine in offices used for administrative purposes to ensure continual custody of records. Comm on Open Gov't FOIL-AO-7641.

Village could not charge more than 25 cents per photocopy for copy of transcript of meeting of zoning board of appeals because transcript, once prepared, constituted village record. Comm on Open Gov't FOIL-AO-10013.

No statute authorizes volunteer ambulance service (if it is subject to Freedom of Information Law) to charge fee for personnel time, searching for records or charging more than 25 cents per photocopy for records up to 9 by 14 inches. Comm on Open Gov't FOIL-AO-12548.

127. Personnel costs, generally

128. —Inspection fees

Fee can not be charged for inspection of financial disclosure form filed with the New York City Conflicts of Interest Board. Comm on Open Gov't FOIL-AO-6111 (1990).

Accessible records pertaining to payroll records of a city must be made available for inspection at no charge. Comm on Open Gov't FOIL-AO-6261 (1990).

If copies are requested and agency makes them, applicant can be required to pay appropriate fee; however, if applicant seeks to inspect accessible records no fee can be charged. Comm on Open Gov't FOIL-AO-7606.

No fee can be charged to inspect record which must be maintained pursuant to CLS Pub O § '87(3)(b); however, if copy is requested, agency may charge up to 25 cents per photocopy for paper copies. Comm on Open Gov't FOIL-AO-7643.

Because agency cannot charge for inspection of records available under Freedom of Information Law, applicant cannot be charged fee for listening to such tape. Comm on Open Gov't FOIL-AO-8565.

When record is available in its entirely under Freedom of Information Law, any person has right to inspect record at no charge; however, there are often situations in which some aspects of record, but not entire record, may properly be withheld in accordance with grounds for denial appearing in CLS Pub O § 87(2) and, in those events, applicant does not have right to inspect record and agency may prepare redacted copy and charge established fee. Comm on Open Gov't FOIL-AO-9643.

Agency may assess fees for copies of records sought under Freedom of Information Law even when applicant for records demonstrates that he or she is unable to pay; when records are accessible, requestor may inspect them at no charge. Comm on Open Gov't FOIL-AO-12047.

Town officials may not impose up-front fee for time spent retrieving public records for review; no fee may be charged for personnel time, or for inspection of or search for records, except as prescribed by statute. Comm on Open Gov't FOIL-AO-12207.

129. —Preparation of redacted records

When accessible and deniable information must, of necessity, appear on same page, practice of preparing redacted copy and charging established fee is fully justifiable; however, if records are designed to ensure that some portion of content of each page may be withheld, and if design is intended to ensure that records cannot be inspected at no charge, such practice would represent abuse of Freedom of Information Law and conflict with its clear intent. Comm on Open Gov't FOIL-AO-8391.

When record is available in its entirely under Freedom of Information Law, any person has right to inspect record at no charge; however, there are often situations in which some aspects of record, but not entire record, may properly be withheld in accordance with grounds for denial appearing in CLS Pub O § 87(2) and, in those events, applicant does not have right to inspect record and agency may prepare redacted copy and charge established fee. Comm on Open Gov't FOIL-AO-9643.

130. —"Salary infringes" fee

Photocopying fee may be imposed but "salary infringes" fee cannot validly be charged unless such fee is prescribed by different statute. Comm on Open Gov't FOIL-AO-4158.

131. —Transcript preparation fee

Fee of[1]0.00 for first 3 pages of transcript of hearing would be excessive if city was making photocopy of existing paper record; however, if city was preparing new record in response to request for paper transcript, city could charge reasonable fee. Comm on Open Gov't FOIL-AO-12082.

Generally, agency may not charge for time spent by employee in evaluating record or for making deletions; only fee that could be charged when there is no state statute which prescribes fee, is not more than 25 cents per page and no charge of additional fee for deletion of portions of records. Comm on Open Gov't FOIL-AO-4618.

Unless another statute permits assessment of different fee, records accessible under Freedom of Information Law may be inspected free of charge, and agency cannot impose fee involving personnel costs. Comm on Open Gov't FOIL-AO-4703.

Accessible records may be inspected free of charge and if copies of records are requested, agency may generally charge up to 25 cents per photocopy or actual cost of reproducing records that cannot be photocopied; no fee may be assessed under Freedom of Information Law for search time or personnel costs involved in viewing or evaluating contents of records; regulations promulgated by Department of Correctional Services under Freedom of Information Law provides in part that custodian of records, such as facility superintendent, may, in his discretion, waive all or any portion of fees authorized by regulations for any department record; as such, when requesting records of Department of Correctional Services, waiver of fee may be sought. Comm on Open Gov't FOIL-AO-4856.

With respect to fees, unless another statute permits assessment of different fee, records accessible under Freedom of Information Law may be inspected free of charge and agency cannot impose fee involving personnel costs; when copies are requested, agency may charge up to 25 cents per photocopy for actual cost of reproducing records that cannot be photocopied, unless otherwise provided by statute other than Freedom of Information Law. Comm on Open Gov't FOIL-AO-4953.

Agency may not impose charge for cost of supervising those who inspect or copy records. Comm on Open Gov't FOIL-AO-8347.

While Freedom of Information Law (FOIL) may require agency to incur expense of producing documents for public disclosure, and compliance with FOIL involves use of public employees' time, such costs fulfill governmental obligation and do not constitute gift or waste of public funds; however, if agency offers to engage in effort beyond FOIL requirements, it may charge for expenses that ordinarily could not be assessed under FOIL. Comm on Open Gov't FOIL-AO-12316.

132. Photocopying fee; scanning charges, generally

133. —Advance payment requirement

Once agency has determined number of copies requested, it may require that fee be paid prior to reproduction of records. Comm on Open Gov't FOIL-AO-4076.

Agency may require payment of fees for copying in advance of preparing copies. Comm on Open Gov't FOIL-AO-8306.

When person requests copies of records and agency produces records as required by law, but applicant has not paid or refuses to pay fee, based on principles of fairness, agencies need not accede to ensuing requests until applicant has paid requisite fee regarding earlier request for copies. Comm on Open Gov't FOIL-AO-8343.

Agency may require advance payment of fee for copying records, particularly when request is voluminous. Comm on Open Gov't FOIL-AO-9643.

When agency produces copies of records in response to request under Freedom of Information Law, but applicant for records has not paid requisite fee, agency can refuse to honor further requests until fee is paid. Comm on Open Gov't FOIL-AO-9659.

When agency produces copies of records in response to request, but applicant for records has not paid requisite fee, agency can refuse to honor further requests until fee is paid. Comm on Open Gov't FOIL-AO-10008.

134. —Cash payment requirement

City was required to accept United States currency as legal tender for payment for photocopies prepared in response to request under Freedom of Information Law and could not require payment by means of money order. Comm on Open Gov't FOIL-AO-9652.

Police department is required to accept cash, as legal tender, in payment of fees for photocopies; there is nothing in Freedom of Information Law that pertains specifically to means by which fees for copies should be paid. Comm on Open Gov't FOIL-AO-10038.

135. —Map copying

As to fees for photocopying village sewer area maps whose dimensions exceed 9 inches by 14 inches, if village is unable to prepare copies, it could have maps duplicated by copying service and fee would be same as that charged to village, as its actual cost of reproduction. Comm on Open Gov't FOIL-AO-4448.

Agency which has custody of records which in their present form contain material which is not subject to inspection, can properly charge for copies of requested material at statutory rate where this is only reasonable method of making records available for inspection. Comm on Open Govt FOIL-AO-3558.

When records are being made available under limited disclosure provisions of Mental Hygiene Law § 33.13, but also constitute "records" as defined in § 86[4] of FOIL, then in absence of any specific authority to charge photocopying fee in Mental Hygiene Law, fee provisions of FOIL are applicable. Comm on Open Gov't FOIL-AO-4052.

Though fee may not be charged for inspection of records, there may be situations where copying fee may be charged even though inspection has been requested, as, for example, when record sought is both accessible in part and deniable in part, it may be necessary for agency to copy record in order to make permissible or required deletions and make remainder available for inspection. Comm on Open Gov't FOIL-AO-4466.

Unless different statute prescribes higher fee, agency may charge up to 25 cents for photocopy for records. Comm on Open Gov't FOIL-AO-4646.

If record is accessible, it may be inspected and if, after inspection copies are needed, applicant may be required to pay fee for copying. Comm on Open Gov't FOIL-AO-4961.

If applicant requests agency to provide photocopies of accessible records, Freedom of Information Law requires that agency prepare photocopies upon payment of, or offer to pay, requisite fees for photocopying; further, agency may require that request be made in writing. Comm on Open Gov't FOIL-AO-4982.

Maximum fee for copying records under the Freedom of Information Law is twenty-five cents ($.25), unless a different fee is prescribed by a statute other than the Freedom of Information Law. Comm on Open Gov't FOIL-AO-6256 (1990); FOIL-AO-6257 (1990).

Fee of $5.00 per map was not justified if applicant used its own equipment to scan agencies' property tax maps. Comm on Open Gov't FOIL-AO-10072.

Under Freedom of Information Law, New York City Board of Elections may charge "actual cost" of reproducing computer tapes of voter registration lists (namely, computer time plus cost of tape or disk); because time and effort involved in transferring data from one storage medium to another is minimal, alleged fee of $400 to $1,000 was inconsistent with Freedom of Information Law. Comm on Open Gov't FOIL-AO-12067.

If record includes print on 2 sides, duplication of record involves 2 photocopies, and agency may charge on that basis. Comm on Open Gov't FOIL-AO-12271.

If agency has prepared copies of records in good faith and applicant fails or refuses to pay fee, agency is not required to make available those copies that have been prepared; agency should not be required to honor ensuing requests until applicant has fulfilled his or her responsibility by tendering fee for copies previously made. Comm on Open Gov't FOIL-AO-13143.

Agency could charge photocopying fee for documents that would be transmitted to requester by email, where portions of documents were exempted from disclosure, and only method of

transmitting portions that were accessible to public involved preparation of photocopies from which appropriate redactions would be made, then scanning redacted information for email purposes. Comm on Open Gov't FOIL-AO-16571.

If person requests photocopied records and then refuses to pay for and pick up copies produced, agency may inform that person that it will not honor any additional or ensuing Freedom of Information Law requests until he/she pays requisite fees. Comm on Open Gov't FOIL-AO-16638.

136. Reproduction fee

If department of correctional services can reproduce cassette tape of hearing on disciplinary charges in-house, then actual fee for providing copy would be average unit cost of blank cassette excluding fixed costs, otherwise fee would be cost to department for having tape reproduced. Comm on Open Gov't FOIL-AO-4053.

With regard to meetings of Town Board which are videotaped and aired on public access television, town was not required to purchase new equipment to acquire capacity to copy videotapes and, when copy of videotape was requested, local commercial service or perhaps school or library could reproduce tape and Town could charge for actual cost of reproduction. Comm on Open Gov't FOIL-AO-8306.

If photocopy of photograph serves as adequate reproduction of such record, photocopy will likely suffice to comply with Freedom of Information Law; however, if photocopy does not serve to provide accurate method of reproducing what appears on photograph, agency is obliged to "copy" record-i.e., prepare reprint of photograph, upon payment of actual cost of reproduction. Comm on Open Gov't FOIL-AO-9370.

Town must disclose its payroll records, assuming that items of interest can be generated based on town's existing computer programs and copied onto disk; fee would be based on actual cost of reproduction. Comm on Open Gov't FOIL-AO-12776.

137. Search fee

Section 1401.8[a][2] of regulations promulgated by committee states that no fee may be charged for search for records. Comm on Open Gov't FOIL-AO-4139.

City clerk may not impose fee for making request under Freedom of Information Law, for search or for certification, unless statute other than Freedom of Information Law permits such fees to be assessed. 1986 Committee on Open Government FOIL-AO-4333.

Freedom of Information Law allows agency to charge up to $.25 cents per photo copy or actual cost of reproducing records that cannot be photocopied, unless another statute permits higher fee to be assessed; Freedom of Information Law makes no reference to capacity to charge for personnel costs, search time, or time needed to evaluate contents of records in terms of rights of access; however, after October 15, 1982, only act of state legislature or statute can permit assessment of search fee, fee higher than $.25 cents per photo copy or fee that exceeds actual cost of reproduction; New York City Administrative Code is not viewed as statute that exempts records from Freedom of Information Law. Comm on Open Gov't FOIL-AO-4588.

Agency may not charge file search fee nor may agency, by other means, charge additional fees or raise costs of obtaining copies beyond amounts indicated in Freedom of Information Law unless so authorized by state or federal statute to do so. Comm on Open Gov't FOIL-AO-4838.

Accessible records may be inspected free of charge and if copies of records are requested, agency may generally charge up to 25 cents per photocopy or actual cost of reproducing records that cannot be photocopied; no fee may be assessed under Freedom of Information Law for search time or personnel costs involved in viewing or evaluating contents of records; regulations promulgated by Department of Correctional Services under Freedom of Information Law provides in part that custodian of records, such as facility superintendent, may, in his discretion, waive all or any portion of fees authorized by regulations for any department record; as such, when requesting records of Department of Correctional Services, waiver of fee may be sought. Comm on Open Gov't FOIL-AO-4856.

Agency may not charge more than 25 cents per page for photocopies, except when different fee is otherwise prescribed by statute; moreover, regulations specifically indicate that no fee may be charged for search for records except as otherwise prescribed by statute; since there is no statute that specifically prescribes search fees that may be charged by New York City Fire Department, Department cannot charge a fee for search of information; consequently, if search fee was established by rule or policy rather than by means of enactment of state legislature, it would be invalid. Comm on Open Gov't FOIL-AO-4870.

Town officials may not impose up-front fee for time spent retrieving public records for review; no fee may be charged for personnel time, or for inspection of or search for records, except as prescribed by statute. Comm on Open Gov't FOIL-AO-12207.

138. Shipping and handling

A "nominal charge" of over $2.00 for postage and handling of a single copy of a document under the Freedom of Information Law is excessive. FOIL-AO-2976.

Agency may not charge personnel costs or "handling" charges for processing Freedom of Information requests; however, agency is not precluded from passing on to applicant cost of postage for mailing requested records. 1986 Committee on Open Government FOIL-AO-4275.

So long as applicant for records is prepared to pay requisite fees for photocopying and postage, agency must mail records to applicant; since number of records, size of report or amount of postage often cannot be known in advance, agency could not require that envelope accompany request. Comm on Open Gov't FOIL-AO-4654.

There is no statute that would preclude village from charging its postage cost when mailing records requested under Freedom of Information Law. Comm on Open Gov't FOIL-AO-8306.

Neither Freedom of Information Law nor regulations promulgated by Committee on Open Government (21 NYCRR Part 1401) deals with cost of or assessment of charges for postage when copies are mailed to applicant, and neither prohibits agency from charging for postage. Mailing copies of records to applicant represents additional service provided by agency that is separate from duties imposed by Freedom of Information Law; agency must mail copies of records to applicant upon payment of appropriate fees for copying and postage; alternatively, if it informs applicant of cost of postage, agency can require that applicant provide stamped self-addressed envelope. Comm on Open Gov't FOIL-AO-8450.

Town could charge reasonable fee for paper that faxed Freedom on Information Law request was on, inasmuch as it used its paper to receive communication by fax. Comm on Open Gov't FOIL-AO-12029.

Freedom of Information Law (FOIL) is silent with respect to ability of agency to charge for postage when records made available under that statute are mailed to applicant; thus, entity subject to FOIL may charge for postage. Comm on Open Gov't FOIL-AO-12548.

Charge of $3.00 to transport records from storage facility to town hall 6 miles away where records can be mailed in response to requests made under Freedom of Information Law would be inappropriate. Comm on Open Gov't FOIL-AO-13548.

139. Waiver of fee

Even though department of correctional services, pursuant to Freedom of Information Law, permits custodian of department records to waive copying fee, there is no requirement that fee must be waived; superintendent of correctional facility is "custodian of records". Comm on Open Gov't FOIL-AO-4621.

Accessible records may be inspected free of charge and if copies of records are requested, agency may generally charge up to 25 cents per photocopy or actual cost of reproducing records that cannot be photocopied; no fee may be assessed under Freedom of Information Law for search time or personnel costs involved in viewing or evaluating contents of records; regulations promulgated by Department of Correctional Services under Freedom of Information Law provides in part that custodian of records, such as facility superintendent, may, in his discretion, waive all or any portion of fees authorized by regulations for any department record; as such, when requesting records of Department of Correctional Services, waiver of fee may be sought. Comm on Open Gov't FOIL-AO-4856.

FOIL contains no express provisions for the waiver of fees for copying records. Comm on Open Gov't FOIL-AO-6137 (1990).

Nothing in the Freedom of Information Law requires an agency to waive fees for copying records. Comm on Open Gov't FOIL-AO-6257 (1990).

There is nothing in the Freedom of Information Law that pertains to the waiver of fees for copying documents even though person requesting copies is indigent. Comm on Open Gov't FOIL-AO-6305 (1990).

There is nothing in Freedom of Information Law pertaining to waiver of fees for copies, and agency is not required to waive fees even when applicant is indigent inmate. Comm on Open Gov't FOIL-AO-7542.

There is nothing in Freedom of Information Law that requires that agency waive fees, irrespective of status of applicant for records; further, agency may charge its established photocopying fees even though applicant is indigent inmate. Comm on Open Gov't FOIL-AO-12702.

There is nothing in Freedom of Information Law that requires agency to waive fees, irrespective of status of applicant for records. Comm on Open Gov't FOIL-AO-12802.

D. Sufficiency Of Response, Generally

140. In general

If existing records are incomplete or misleading, notation could be added to records, or cover letter, which might describe why information may not be completely accurate. Comm on Open Gov't FOIL-AO-4056.

When record sought is only available under FOIL, agency is required to make record available for inspection only at location or locations designated in regulations; accordingly, state agency can require person to travel to distant office rather than local office to obtain information sought. Comm on Open Gov't FOIL-AO-4101.

With respect to "direct access", agency officials may search for and make available particular records, rather than enabling members of public to conduct their own searches. Comm on Open Gov't FOIL-AO-4139.

Since it is responsibility of county attorney to act as legal counsel to county departments, it is proper for county attorney to respond to request for records on behalf of officials of county department; as such, fact that county legislature (governing body of county, public corporation) was advised of request for records and asked that county attorney respond, while not common practice, did not appear to be inconsistent with Freedom of Information Law. Comm on Open Gov't FOIL-AO-4951.

Applicant for accessible records should be able to make appointment to inspect those records during regular business hours when agency has regular business hours; alternatively, if applicant cannot know precisely when he or she may have opportunity to inspect records, agencies should indicate that records will be available for inspection during business hours for certain period after request has been granted; if records are not inspected within such specified reasonable period, request may be considered to have been withdrawn. Comm on Open Gov't FOIL-AO-7592.

If applicant cannot know precisely when he or she may have opportunity to inspect records, agency should indicate that records will be available during business hours for certain period, 2 weeks, for example, after request has been granted; if records are not inspected or copied within such specified reasonable period, applicant should be informed that request will be considered to have been withdrawn. Comm on Open Gov't FOIL-AO-8347.

When applicant requests copies of records, records may be reproduced in presence of applicant, applicant can physically present himself or herself at agency's offices to obtain copies, or copies can be mailed to applicant. Comm on Open Gov't FOIL-AO-8450.

If, as matter of practice or policy, town acknowledges receipt of requests by stating that requests will be granted or denied within 30 days, irrespective of nature, volume or search needed to respond, such practice would be inconsistent with both language and intent of Freedom of Information Law. Comm on Open Gov't FOIL-AO-8540.

Request seeking records relating to town's purported testing and environmental assessments of dump on specified person's property, which was filed after applicant read newspaper article which indicated that town conducted its own tests which showed no hazardous materials on site and which included statement by town supervisor that there was clear, compelling evidence that site contained neither hazardous nor toxic materials, met standard for reasonably describing records sought by applicant. Comm on Open Gov't FOIL-AO-8956.

Neither police department nor district attorney's office can withhold existing records pertaining to requestor's arrest and conviction in their entirety, on ground that they constitute intra-agency materials; records compiled for law enforcement purposes can only be withheld if disclosure would result in harmful effects described CLS Pub O § 87(2)(e)(i)- (iv). Comm on Open Gov't FOIL-AO-10079.

If in every instance, as matter of practice or policy, agency acknowledged receipt of requests and indicated that it would determine whether to grant or deny access to records within particular period following date of acknowledgement, such practice or policy would be contrary to thrust of Freedom of Information Law. Comm on Open Gov't FOIL-AO-10083.

Agency may choose to make records available via e-mail or fax, but there is no obligation to do so on request. Comm on Open Gov't FOIL-AO-12305.

New York Freedom of Information Law (FOIL) does not require preparation of so-called "Vaughn Index" (providing analysis of documents withheld by agency as means of justifying denial and insuring that burden of proof remains on agency), which is required under federal Freedom of Information Act (FOIA). Comm on Open Gov't FOIL-AO-12579.

There is no requirement that agency make records available on weekends or during times other than regular business hours. Comm on Open Gov't FOIL-AO-12727.

CLS Penal § 240.65 does not apply when agency denies access to record, even though basis for denial may be inappropriate or erroneous, or when agency cannot locate record that must be maintained. Comm on Open Gov't FOIL-AO-12822.

Freedom of Information Law does not require that agency provide degree of detail in response to request or administrative appeal which would require that denial at agency level identify every record withheld or include description of reason for withholding each document; state Freedom of Information Law, unlike equivalent federal law, does not require preparation of so-called Vaughn index. Comm on Open Gov't FOIL-AO-12924.

There is nothing in Freedom of Information Law that requires that records be transmitted via fax or e-mail; agency may choose to make records available via those methods of transmission, but there is no obligation to do so. Comm on Open Gov't FOIL-AO-13175.

If records maintained by Rudolph W. Giuliani Center for Urban Affairs, Inc. (Center) can be located with reasonable effort, i.e., if they have been "reasonably described," Center and Department of Records and Information Services (DORIS) would be required to retrieve records for purpose of making them available to extent required by law, even if "processing" has not been completed. Comm on Open Gov't FOIL-AO-13226.

There may be instances in which there may be no need or obligation to examine or become familiar with specific contents of records prior to deciding to grant or deny access, such as records that are beyond scope of access. Comm on Open Gov't FOIL-AO-13229.

Delay for as much as 90 days for city police department to "locate" and "review" videotape of flag-raising at Ground Zero in order to determine rights of access is neither reasonable nor indicative of compliance with Freedom of Information Law, since such record, being well known not only to Americans, but to people throughout world, should not be difficult to locate or identify. Comm on Open Gov't FOIL-AO-13487.

141. Appealability information

If portion of requested record was deliberately deleted from copy made available, request was partially granted and partially denied, and agency should have informed in writing of reason for denial and right to appeal denial. Comm on Open Gov't FOIL-AO-4806.

Records access officer has duty to respond within 5 business days of receipt of request and if request is denied, reasons must be stated in writing, and applicant must be informed of right to appeal. Comm on Open Gov't FOIL-AO-4952.

When request under Freedom of Information Law is denied, person issuing denial is required to inform person denied access of right to appeal as well as name and address of person or body to whom appeal may be directed. Comm on Open Gov't FOIL-AO-7554.

Agency's records access officer has duty individually, or in that person's role of coordinating response to request under Freedom of Information Law, to inform person denied access of right to appeal as well as name and address of person or body to whom appeal may be directed. Comm on Open Gov't FOIL-AO-9722.

142. Certification

Particularly when certification is requested with respect to voluminous number of records, single certification given by means of written assertion, statement or affidavit describing or identifying records that were copied is sufficient under CLS Pub O § 89(3); it is not necessary for each copy of records made available under Freedom of Information Law to be stamped or "certified" separately. Comm on Open Gov't FOIL-AO-9338.

Nothing in Freedom of Information Law specifies form of certification that agency does not maintain or cannot locate record. Verification by agency's records access officer that he made diligent search for referenced record and found no record or entry of it at offices of agency was sufficient certification that agency did not maintain or could not locate record. Comm on Open Gov't FOIL-AO-9628.

143. Five-day response requirement

Records access officer has duty to respond within 5 business days of receipt of request and if request is denied, reasons must be stated in writing, and applicant must be informed of right to appeal. Comm on Open Gov't FOIL-AO-4952.

Agency need not respond instantly to request and has 5 business days to respond from receipt of request for records reasonably described. Comm on Open Gov't FOIL-AO-4982.

In case of routine requests, agency should ordinarily have ability to grant or deny access to records within 5 business days; if more than that period is needed, due to possibility that other requests have been received, that other duties preclude quick response or because of volume of request, need for consultation, search techniques needed to locate records or need to review records to determine which portions should be disclosed or denied, estimated date for granting or denying request must be given in acknowledgement to reflect those factors. Comm on Open Gov't FOIL-AO-9444.

Acknowledgement of receipt of request for documents under Freedom of Information Law which indicates that "a response will be forthcoming within appropriate time" is inconsistent with 5-day requirement imposed by law. Comm on Open Gov't FOIL-AO-9549.

Agency's acknowledgement of request for records, which indicated that request would be processed "as soon as possible," was too ambiguous and open-ended; if more than 5 business days are needed to determine rights of access, agency must state approximate date when action will be taken. Comm on Open Gov't FOIL-AO-12030.

Village's response to request for records, that village clerk was on vacation and would respond to request upon her return, was inadequate. Comm on Open Gov't FOIL-AO-12084.

When agency acknowledges request because more than 5 business days may be needed to grant or deny request, it acts in compliance with law if it provides approximate date when request will be granted or denied, and that date is reasonable in view of attendant circumstances. Comm on Open Gov't FOIL-AO-12094.

When agency acknowledges receipt of Freedom of Information Law request because more than 5 business days may be needed to grant or deny it, there is no precise time period within which it must grant or deny access to records; reasonable time depends on attendant circumstances such as volume of request, possibility that other requests have been made, necessity to conduct legal research, search and retrieval techniques used to locate records. Comm on Open Gov't FOIL-AO-12219.

If neither response to request under Freedom of Information Law nor acknowledgement of receipt of request is given within 5 business days, or if agency delays responding for unreasonable time after it acknowledges that request has been received, request may be considered to have been constructively denied. Comm on Open Gov't FOIL-AO-12438.

While Freedom of Information Law (FOIL) does not preclude agencies from developing standard forms to be used by those requesting records, failure to use standard form does not justify late response to written FOIL requests if requested records are reasonably described. Comm on Open Gov't OML-AO-3397.

144. Inability to locate

Where applicable, agency should certify that it does not have possession of records requested or that such records cannot be found after diligent search; however, agency is not required to provide any additional proof as to whether record exists or whether record can be located, nor is agency required to obtain record from another source if it does not maintain record requested, as such, upon certifying that it cannot locate record, agency is not required to furnish additional proof that it has conducted diligent search for record, other than certification itself. 1986 Committee on Open Government FOIL-AO-4283.

Agency has satisfactorily responded to request for information when it appears that all requested records maintained by agency have been made available and when agency provided letter certifying that, after diligent search, it had not been able to locate certain records. Comm on Open Gov't FOIL-AO-4688.

If an appeal from denial of records has not been answered within statutory time period, administrative remedies have been exhausted and challenge could be initiated to denial under CLS Civil Practice Rules Article 78; assuming that record involving individual's previous employment with city exists and can be located, record would be available; on other hand, if city officials cannot locate such record, response should nonetheless be given, indicating that record of employment could not be located. Comm on Open Gov't FOIL-AO-4840.

Statement that agency does not maintain record sought is not denial, for agency cannot withhold records that it does not maintain; therefore, such response to initial request does not provide basis on which to appeal and such response to appeal does not provide basis to commence CLS CPLR Article 78 proceeding; in response to request for records agency shall provide copy of such record and certify correctness of such copy if so requested, or if case may be, shall certify that it does not have possession of such record or that such record cannot be found after diligent search. Comm on Open Gov't FOIL-AO-4891.

If so requested, agency shall certify that it does not have possession of such record or that record cannot be found after diligent search. Comm on Open Gov't FOIL-AO-4897.

Certification by a records access officer that agency does not have possession of a requested record need not take any specific form. Comm on Open Gov't FOIL-AO-6271 (1990).

Nothing in Freedom of Information Law specifies form of certification that agency does not maintain or cannot locate record. Verification by agency's records access officer that he made diligent search for referenced record and found no record or entry of it at offices of agency was sufficient certification that agency did not maintain or could not locate record. Comm on Open Gov't FOIL-AO-9628.

145. Partial availability

Since agency has capacity to deny records or portions thereof that fall within grounds for denial, agency is required to review records sought in their entirety to determine which portions, if any, may justifiably be withheld, and blanket denials are generally inappropriate. Committee on Open Government FOIL-AO-3381.

Phrase "records or portions thereof" in CLS Pub O § 87(2) requires that agency review records sought in their entirety to determine which portions, if any, may justifiably be withheld. Comm on Open Govt FOIL-AO-3451.

If portion of requested record was deliberately deleted from copy made available, request was partially granted and partially denied, and agency should have informed in writing of reason for

denial and right to appeal denial. Comm on Open Gov't FOIL-AO-4806.

Agency has obligation to review records sought in their entirety to determine which portions, if any, may justifiably be withheld. Comm on Open Gov't FOIL-AO-7603.

When portions of file are withheld, response to request must indicate that request was denied in part, and applicant must be informed of right to appeal denial in accordance with CLS Pub O § 89(3) and regulations. Comm on Open Gov't FOIL-AO-8378.

Applicant would not have right to inspect record where some aspects of record, but not entire record, could properly be withheld in accordance with ground for denial appearing in CLS Pub O § 87(2). Comm on Open Gov't OML-AO-3850.

146. Periodic or on-going disclosure

Freedom of Information Law does not require that agency disclose records on an ongoing basis in response to single request, and agency may deny request for records which are sought prospectively; however, applicant may seek records on periodic basis, and agency is obliged to respond to each request. Comm on Open Gov't FOIL-AO-10181.

147. Tape recording of response

Assuming that contents of a cassette recording of an agency hearing are available under the Freedom of Information Law, persons can listen to it or request a copy for a fee based upon the actual cost of reproduction. If no transcript exists, the agency is not required to create one in response to a request by a non-party. Comm on Open Govt FOIL-AO 3033.

Tape recording of meeting or public hearing is "record" subject to rights of access under Freedom of Information Law; with respect to means by which tape recording may be made available, equivalent of "inspection" of tape recording would involve listening to tapes; while agency need not relinquish physical custody of tape to enable member of public to listen to it, person could listen to tape in presence of agency official, who could maintain custody and control over tape; as alternative, agency could, upon payment of requisite fee, reproduce tape. Comm on Open Govt FOIL-AO-3615.

148. Who must respond

There is nothing in Freedom of Information Law that specifies which public officer or employee must respond to request. Nothing in Freedom of Information Law or regulations would require that chief of police respond personally or preclude village attorney from responding on behalf or at direction of village official. Comm on Open Gov't FOIL-AO-8533.

There is no requirement that denial of request for records under Freedom of Information Law at agency level identify every record withheld or that description of reason for withholding each document be given. Comm on Open Gov't FOIL-AO-9249.

Village clerk failed to comply with Freedom of Information Law when she forwarded requests for information concerning implementation of village's assessment practice to village attorney and suggested that requestor contact village attorney for further information; clerk, as designated records access officer, had duty to coordinate village's response to requests for records, and her response to contact village attorney, without more, was inadequate. Comm on Open Gov't FOIL-AO-10186.

Village's response to request for records, that village clerk was on vacation and would respond to request upon her return, was inadequate. Comm on Open Gov't FOIL-AO-12084.

E. Denying Disclosure

1. Generally

149. In general

While § 87[2] indicates that records or portions thereof may be withheld in accordance with grounds for denial that follow; there is nothing in FOIL that prohibits disclosure of record. Comm on Open Gov't FOIL-AO-4082.

Under decision in Doolan v Board of Cooperative Educational Services, Second Supervisory Dist. (1979) 48 NY2d 341, 422 NYS2d 927, 398 NE2d 533, public interest privilege formerly existing at common law no longer constitutes valid basis for denial of access to records. Comm On Open Gov't FOIL-AO-4514.

Request for records should be directed to records access officer of agency or agencies that would maintain records which are requested; records sought should be reasonably described in sufficient detail so agency officials can locate them; all records of agency are available, except to extent that records or portions thereof fall within CLS Pub O § 87(2)(a) through (i). Comm on Open Gov't FOIL-AO-4579.

All records of agency are available under FOIL, except to extent that records or portions thereof fall within one or more grounds for denial under CLS Pub O § 87(2)(a) to (i). Comm On Open Gov't FOIL-AO-4593.

Since information kept, held, filed, produced or reproduced for or by town would constitute "records" subject to rights of access granted by Freedom of Information Law, contract between town and private corporation would be available because none of grounds for denial would apply; similarly, town records reflective of building inspections are generally available. Comm On Open Gov't FOIL-AO-4601.

All records of agency are available, except to extent that records or portions thereof fall within one or more grounds for denial appearing in Freedom of Information Law. Comm on Open Gov't FOIL-AO-4645.

All records of agency are available, except to extent that records or portions thereof fall within one or more grounds for denial appearing in CLS Pub O § 87(2)(a) through (i). Comm on Open Gov't FOIL-AO-4652.

Contention that records should be made available, absent statutory prohibition, is incorrect because CLS Pub O § 87(2) enables agency to withhold records under certain circumstances. Comm on Open Gov't FOIL-AO-4670.

Contracts, which presumably identify contractors, are matters of public record, and no grounds for denial under Freedom of Information Law could be asserted to withhold those records. Comm on Open Gov't FOIL-AO-4675.

All records of agency are available, except to extent that records or portions thereof fall within one or more grounds for denialin CLS Public Officer § 87(2). Comm on Open Gov't FOIL-AO-4802.

Agency has obligation to review records sought in entirety to determine which portions, if any, may be justifiably withheld. Comm on Open Gov't FOIL-AO-4836.

Although Freedom of Information Law requires that agencies comply with certain procedural requirements in that they must disclose many kinds of records, rights of access to various records may be questionable and dependent upon their contents. Comm on Open Gov't FOIL-AO-4872.

Agency must review records which are requested to determine which portions if any may be justifiably withheld. Comm on Open Gov't FOIL-AO-4908.

All records of agency are available, except to extent that records or portions thereof fall within one or more grounds for denial appearing in Freedom of Information Law. Comm on Open Gov't FOIL-AO-4938.

Documents which indicate allocation made by school board for travel expenses would be available because none of grounds for denial could appropriately be asserted and, similarly, travel vouchers and similar records indicating travel expenses incurred by school district employees are accessible. Comm on Open Gov't FOIL-AO-4942.

Agency may not deny request for records solely on basis that another agency possesses copies of same record. Comm on Open Gov't FOIL-AO-7566.

Where draft report is distributed to persons who attend public meeting, report must thereafter be made available under Freedom of Information Law, regardless of fact that it was originally subject to being withheld prior to its distribution at meeting. Comm on Open Gov't FOIL-AO-8942.

Reasons for denial cited in determination of appeal need not be consistent with those offered by records access officer in initial denial. Comm on Open Gov't FOIL-AO-9374.

Survey prepared by independent professional surveyor in conjunction with county watershed project, at cost of several hundred dollars, was not intrinsically valuable document which, if released to public without full consideration for its cost, would constitute gift of public funds in violation of CLS NY Const Art VIII § 1; meeting public's right of access to information concern-

ing government is fulfillment of governmental obligation, not gift or waste of public funds. Comm on Open Gov't FOIL-AO-9844.

In response to request for planning commission records showing each instance during past several years in which it did not exercise its discretion to waive certain zoning requirement, it was not improper for secretary of planning commission to "refuse to do [requestor's] research" and invite requestor to look through planning commission's files, which might be contained in "1 or 2 file cabinets"; alternative means of gaining requested information might involve request to review minutes of commission meetings because, while there may be numerous minutes, review of their contents would involve less effort than search of file cabinets. Comm on Open Gov't FOIL-AO-12181.

Disclosure made to another governmental entity that has sought records to carry out governmental function cannot be equated with disclosure made to member of public under Freedom of Information Law. Comm on Open Gov't FOIL-AO-13091.

School superintendent may not condition responding to request or determining to grant or deny access on indication by requester of whether there is "alternative source" of requested information. Comm on Open Gov't FOIL-AO-13303.

150. Administrative or manpower burden as justifying denial

Aside from photocopying fee, Freedom of Information Law does not authorize the assessment of any fee for time spent in investigating or researching records. Comm on Open Govt FOIL-AO 3044.

Administrative burden imposed upon officials does not constitute valid basis for rejecting request or withholding records. Committee on Open Government FOIL-AO-3371.

Administrative burden of searching for records, whether due to volume of records requested or their age, does not constitute basis for denial; denial of records based upon shortage of staff to search "dead" files, is improper. Committee on Open Government FOIL-AO-3802.

Hardship does not constitute valid basis for withholding records which are accessible under FOIL, since law imposes obligation upon agency to search for and make them available. Comm on Open Gov't FOIL-AO-4123.

If information sought exists, but apparently cannot be proved due to nature of agencies filing or record-keeping systems, although agency might not have disclosed information sought, its actions would not be considered as denials that can be appealed. Comm on Open Gov't FOIL-AO-4764.

A Shortage of manpower to comply with a request for copies of records did not constitute a valid basis for denial of access to records. Comm on Open Gov't FOIL-AO-6140 (1990).

Shortage of manpower to comply with request for records under Freedom of Information Law does not constitute valid basis for denial of access to records. Comm on Open Gov't FOIL-AO-9455.

151. Burden of proof, generally

Even though portion or portions of records may be justifiably withheld from disclosure, that does not give agency authority to withhold entire record; single record may be both available or deniable in part requiring agency officials to review records sought in their entirety to determine which portions may justifiably be withheld; when records are denied under law, burden of proof in such proceeding is on agency. Comm on Open Gov't FOIL-AO-4706.

Record or report might be both available or deniable in part and thus imposes burden of proof obligation on agency officials to review requested records in their entirety to determine which portions, if any, may be justifiably withheld; agency may withhold records to extent that disclosure would result in unwarranted invasion of personal privacy and to extent that records pertain to allegations or charges against employees that have not yet been proven, which did not result in any disciplinary action, and names or other identifying details that would, if disclosed, constitute unwarranted invasion of personal privacy; however, if investigations of misconduct resulted in disciplinary action, charges that were sustained as well as any final determination indicating action taken would be available for disclosure. Comm on Open Gov't FOIL-AO-4709.

Agency's regulations cannot render records deniable or confidential, unless there is basis for so doing pursuant to one or more of grounds for denial appearing in Freedom of Information Law. Comm on Open Gov't FOIL-AO-7947.

152. Certification of denial

Statement that agency does not maintain record sought is not denial, for agency cannot withhold records that it does not maintain; therefore, such response to initial request does not provide basis on which to appeal and such response to appeal does not provide basis to commence CLS CPLR Article 78 proceeding; in response to request for records agency shall provide copy of such record and certify correctness of such copy if so requested, or if case may be, shall certify that it does not have possession of such record or that such record cannot be found after diligent search. Comm on Open Gov't FOIL-AO-4891.

Where agency has made substantial effort to locate records requested, agency may, upon request, certify that it does not have possession of such record or that such record does not exist after diligent search. Comm on Open Gov't FOIL-AO-4910.

When agency indicates that it does not maintain or cannot locate record, applicant for record may seek certification to that effect. Comm on Open Gov't FOIL-AO-9157.

153. Confidentiality, generally

154. —Attorney-client privilege

With regard to pleadings and related materials, records subject to attorney-client privilege or attorney's work product would be confidential and specifically exempted from disclosure by statute; however, once such records are made available to adversary or introduced into evidence confidentiality provisions would no longer apply. Comm on Open Gov't FOIL-AO-4787.

Bills submitted by consultants and others, and bills payable by agency are accessible in entirety, for none of grounds of denial will apply; however, in case of bills involving compensation of agency's attorney, it is possible that portions consisting of identifying details or descriptions of services rendered by attorney for client may be justifiably withheld as confidential under attorney-client privilege; however, numbers indicating amounts expended are accessible under Freedom of Information Law. Comm on Open Gov't FOIL-AO-4921.

Portions of bills involving compensation of agency's attorney consisting of identifying details or descriptions of services rendered by attorney for client may be justifiably withheld as confidential under attorney-client privilege; however, numbers indicating amounts expended are accessible under Freedom of Information Law. Comm on Open Gov't FOIL-AO-4921.

When municipal official or body seeks legal advice from its attorney and attorney renders legal advice, communications of that nature would fall within coverage of attorney-client privilege and would, therefore, be exempt from disclosure under CLS Pub O § 87(2)(a). Retainer agreement (contract) would not be subject to attorney-client privilege and would ordinarily be accessible under Freedom of Information Law. Comm on Open Gov't FOIL-AO-12641.

155. —Employment matters

With regard to records that identify public employees, records that are relevant to performance of public employee's official duties are available, because disclosure in such instances would result in permissible rather than unwarranted invasion of personal privacy; with respect to statements made by persons other than public employees, their names or other identifying details pertaining to them might be deleted to protect privacy while remainder of statements would be available; if documents are not part of criminal investigation, and if criminal investigation has been completed, it is unlikely that records would be withheld. Comm on Open Gov't FOIL-AO-4722.

If private records are relevant to performance of certain public employees' official duties, they are available for disclosure as permissible invasion of confidentiality. Comm on Open Gov't FOIL-AO-4776.

Various activities are licensed due to some public interest in insuring that individuals or entities are qualified to engage in certain activities or in order that certain activities may be regulated and, therefore, licenses should be available because

they are intended to enable public to know that individual has met appropriate requirements to engage in activity that is regulated by state or in which state has significant interest; while disclosure of licenses identifies licensees, disclosure would not necessarily constitute an unwarranted invasion of confidentiality; however, in some instances, personal information such as licensee's home address, phone number or other personal information that may appear on license might justifiably be withheld. Comm on Open Gov't FOIL-AO-4871.

Clause in board of trustees' agreement to buy out employment contract of college president, which would have prohibited president from discussing college matters with news media or others, could not limit public rights of access to records under Freedom of Information Law, and if board had approved buyout contract, it would clearly have been accessible notwithstanding agreement not to discuss its contents. Comm on Open Gov't FOIL-AO-10151.

Request for disclosure of reports prepared by county Department of Civil Service, which investigated senior typist civil service positions to confirm that these individuals' job responsibilities matched Civil Service titles, could not be denied as "confidential" in blanket fashion. Comm on Open Gov't FOIL-AO-16530.

156. —Housing records

Agency would not be required to prepare list of names and addresses of landlords who leased space to town if no such list exists; however, individual records identifying landlords or leases would be available thereby enabling request to prepare own list. Comm on Open Gov't FOIL-AO-4698.

Information furnished to Division of Housing and Community Renewal is considered confidential only when request for confidentiality is expressly made by person furnishing information, and that if such information is requested by third party, agency has burden of demonstrating that person who furnished information requested confidentiality; once agency indicates that it will disclose records but fails to make records available, such action is equivalent of denial. Comm on Open Gov't FOIL-AO-4738.

Reports prepared by New York State Housing Finance Agency following its investigation of complaint made by named individual were generally available to "data subject" of complaint under Personal Privacy Protection Law except to extent that disclosure would constitute unwarranted invasion of privacy of someone other than himself, as complainant's identity was known, and agency's claim that it promised confidentiality to her was generally meaningless; however, agency could redact any information identifiable to complainant to extent that disclosure would constitute unwarranted invasion of her privacy. Comm on Open Gov't FOIL-AO-9921.

157. —School records

Freedom of Information Law pertains generally to records of agency which includes entities of state and local governments such as school districts; while law provides statutory guidance concerning access to records of agencies, it makes no specific reference to records of school district; if record is final and does not identify particular students, it appears it would be accessible; to extent that such report might identify particular student or students, those aspects of report would be required to be kept confidential pursuant to federal law; in addition, if state education department maintains report, presumably it would be equally available from department and district. Comm on Open Gov't FOIL-AO-4714.

An assertion of "confidential disclosure" without any statutory citation cannot be justified as a basis for withholding under Freedom of Information Law. Comm on Open Govt FOIL-AO 3032.

Local law cannot require confidentiality or otherwise restrict access to records in manner inconsistent with statute enacted by state legislature, such as FOIL; accordingly, that portion of "grouper" law enacted by board of trustees of Ocean Beach village, which removed leases from requirements of FOIL, is not valid. Comm On Open Gov't FOIL-AO-3875.

Whether subject of record prefers to authorize or preclude disclosure is irrelevant in terms of analysis of rights conferred by Freedom of Information Law. Comm on Open Gov't FOIL-AO-7921.

Freedom of Information Law did not require that city identify anonymous donor of funds used by City to clean up property that was ravaged by fire since donor did not wish to be identified and disclosure would have constituted unwarranted invasion of privacy. Comm on Open Gov't FOIL-AO-8583.

Promise or assertion of confidentiality will not suffice to justify denial of request for records under Freedom of Information Law unless statute specifically confers confidentiality. Comm on Open Gov't FOIL-AO-9484.

There is no basis to deny disclosure request based on assertion of executive or governmental privilege if requested records, or portions of them, do not fall within grounds for denial under CLS Pub O § 87(2). Comm on Open Gov't FOIL-AO-9976.

Architect's plans and related documents prepared for agency submitted under seal of professionals, bearing legend that they are protected by copyright and may not be reproduced without permission of professional, nevertheless are subject to rights conferred by Freedom of Information Law; assertion of confidentiality does not remove rights of access to records that would otherwise be available, and consent of professional who prepared document (or owner of real property described in document) is irrelevant. Comm on Open Gov't FOIL-AO-12179.

Assertion or claim of confidentiality, unless it is based on statute, is "likely meaningless"; assertion of confidentiality, without more, would not serve to enable agency to withhold record. Comm on Open Gov't FOIL-AO-12405.

Confidentiality agreement required by board of education as condition of permitting board members to view board's legal bills would be valid insofar as bills included information that was confidential based on proper assertion of attorney-client privilege or another statute that forbids disclosure, but such agreements could not validly restrict or diminish rights of access conferred by Freedom of Information Law upon members of public who happened to be board members. Comm on Open Gov't FOIL-AO-16511.

"Official Statement of Executive Policy" issued by mayor, which prohibited members of city's senior staff or department heads from disclosing certain information discussed at meetings with mayor and other city officials, and city ordinance that prohibited city officers and employees from disclosing certain information "discussed or deliberated during a properly convened executive session," were inconsistent with law and would likely be found to be unconstitutional since (1) violations could result in imposition of fine and/or imprisonment, and (2) while prohibitions under both enactments appeared to be based on combination of exceptions to rights of access in Freedom of Information Law and Open Meeting Law's grounds for entry into executive session, some disclosures mandated by FOIL and Open Meetings Law might be punished. Comm on Open Gov't OML-AO-3282.

Stamping, marking or asserting that record is "confidential" is all but meaningless; rights of access and ability to deny access to records is fixed by Freedom of Information Law. Comm on Open Gov't OML-AO-3889.

158. Constructive denial

A response to a request for records which denies access because the request is "too broad" is not a denial of access but may be considered a constructive denial of access for purposes of appeal. Comm on Apen Gov't FOIL-AO-2974.

Agency's failure to mail accessible records to applicant who pays or offers to pay appropriate fees for copying and postage would constitute constructive denial of access to records; documents explaining why certain room was sealed due to presence of asbestos before removing records would likely be available because it is decision that affects public or final agency policy or determination. Comm on Open Gov't FOIL-AO-4789.

Conditions imposed by private contractor ("Bidnet") on retrieval of county bid information maintained by Bidnet on county website, including registration requirements and prohibition of resale of information to third parties, were inconsistent with Freedom of Information Law and unenforceable. Comm on Open Gov't FOIL-AO-16508.

159. Copyright considerations

Department of Transportation could not assert copyright protection to deny Freedom of Information Law (FOIL) request for

street names, political boundaries, fire and ambulance boundaries and locations of public facilities on ground that applicant was commercial business and department had paid private firm to compile information sought, as department had statutory obligation to maintain such records and, despite increased revenue that it might derive via agreements based on copyright, absence of copyright might result in greater overall economic benefit to state, state residents, and commercial enterprises. Comm on Open Gov't FOIL-AO-11992.

Requestor's intended use of copyrighted materials may have bearing on agency's obligation to prepare copies under Freedom of Information Law. Comm on Open Gov't FOIL-AO-12179.

Agency could preclude reproduction of copyrighted architectural plans and similar records only if reproduction would cause substantial injury to copyright holder. Comm on Open Gov't FOIL-AO-12179.

Records, like county tax maps, that government agency is required to produce, are not subject to copyright protection. Comm on Open Gov't FOIL-AO-12385.

Regarding access to plans, drawings and surveys that are marked with seal of architect, land surveyor or engineer, seal does not serve as copyright, nor does it restrict right to inspect and copy under Freedom of Information Law; it merely indicates that person is qualified as licensee. Comm on Open Gov't FOIL-AO-12830.

If reproduction of copyrighted architectural plans and similar records would "cause substantial injury to the competitive position of the subject enterprise," i.e., holder of copyright, in conjunction with CLS Pub O § 87(2)(d), agency could preclude reproduction of work; however, if reproduction of work would not result in substantial injury to competitive position of copyright holder, such exception would not apply. Comm on Open Gov't FOIL-AO-12830.

Government agency that is required to disclose copyrighted record should bear no liability or responsibility relating to use of work; rather, if holder of copyright believes that recipient of copy of work has in some manner violated Copyright Act, that person or entity may initiate proceedings against recipient for copyright infringement. Comm on Open Gov't FOIL-AO-12830.

Copyright protection should not be claimed when agency is obligated by law to prepare records, as in case of maps prepared by department of transportation, or when records involve accountability of government and promote public's understanding of government functions and actions, such as videotapes of meeting held by public board. Comm on Open Gov't FOIL-AO-16494.

160. Effect of potential commercial use of requested information, including fund-raising

Rights of access to political party membership lists of names and addresses, or equivalent records, may be contingent upon purpose for which request is made; agency may withhold records in conjunction with grounds for denial listed in Freedom of Information Law, nevertheless, agency is not obliged to withhold records, even when records may be withheld; therefore, even if political party membership lists could be withheld, Freedom of Information Law would not prohibit disclosure. Comm on Open Gov't FOIL-AO-4866.

Real property inventory is available to any person for any reason during time specified in notice under CLS RPTL § 501, but inventory may be withheld at other times if it would be used for commercial or fund raising purpose. Comm on Open Gov't FOIL-AO-12421.

161. Non-existent documents, generally

162. —Burden of proof as to existence

Freedom of Information Law requires that applicant reasonably describe records sought and if agency can locate requested records based on terms of request, applicant has reasonably described such records; however, if agency cannot determine which records have been requested, standard of "reasonably describing" records is not met and in some instances, while records sought might exist, they may not be retrievable due to nature of agency's filing system. Comm on Open Gov't FOIL-AO-4970.

163. —Computerized records

If accessible information that is sought can be retrieved from computer or other storage medium only by means of reprogramming or altering existing programs, steps would be equivalent of creating new record. Comm on Open Gov't FOIL-AO-4739.

Department of taxation and finance is required to maintain list setting forth name, public office address, title and salary of every officer or employee of agency and must make this tape available; however, if department does not keep this list on computer tape or disk, it cannot provide what it does maintain; further, Freedom of Information Law does not require information be placed on computer tape or disk. Comm on Open Gov't FOIL-AO-4781.

If village has no compilation of information sought and cannot print out information based upon existing computer programs, it would not be obliged to create new records or reprogram in order to produce information sought; on other hand, if existing computer programs enable village to produce printout containing information sought, it would be obliged to do so in response to request made by any person. Comm on Open Gov't FOIL-AO-4828.

Freedom of Information Law provides that agency is not required to create or prepare record in response to request, so if county does not have capacity to provide data in computer mode in which it was requested, Freedom of Information Law would not require county to create or prepare record in such mode or format. Comm on Open Gov't FOIL-AO-4897.

If information sought can be printed out based upon existing programs, retrieval could not be equated with creation of new record; if, however, printout can be produced only by creating new programs or software, preparation of new programs would likely be equivalent of creating new record, an act that Department of Correctional Services would not be required to perform. Comm on Open Gov't FOIL-AO-4901.

Where retrieval of electronically stored information would require extensive reprogramming, and such reprogramming would represent the creation of a new record, agency was not obligated to produce such records. Comm on Open Gov't FOIL-AO-6167 (1990).

164. —No duty to create or prepare, generally

165. — —Court-related records

If notice concerning pending lawsuits had not been prepared by agency, agency would not be required to create such a list; however, individual records that identify pending lawsuits would be available for disclosure. Comm on Open Gov't FOIL-AO-4675.

Since it is questionable whether court or court clerk would maintain record containing total or tabulation of number of cases that were transferred from one court to another, if no such record exists containing figures sought, there would be no obligation to create such record or total on requester's behalf. Comm on Open Gov't FOIL-AO-4862.

166. — —Education-related records

City officials would not be required by Freedom of Information Law to prepare record that identifies firms which are interested in buying certain school when there is no list or record that identifies firms since communications had been oral in nature. Comm on Open Gov't FOIL-AO-4582.

Agency need not create or prepare record in response to request; therefore, if board of co-operative educational services does not maintain statistical data involving race, ethnicity or sex, it is not required to prepare data on behalf of request. Comm on Open Gov't FOIL-AO-4914.

Freedom of Information Law generally pertains to existing records and agency need not create or prepare record in response to request, unless specific direction to contrary is provided; therefore, if record indicating total of amount of legal fees paid by school district regarding employment dispute was not available, school district would not be required to review records and prepare tabulation or total in response to request. Comm on Open Gov't FOIL-AO-4942.

167. — —Health-related records

Freedom of Information Law pertains to existing records and agency need not create or prepare record in response to request; therefore, if information sought does not exist in form of record or

records, health department would not be obliged to create or prepare new records on requestor's behalf. Comm on Open Gov't FOIL-AO-4860.

168. — —Lists

Freedom of Information Law pertains to existing records and agency is not required to create or prepare record in response to request; therefore, if there is no list of district offices of specific senators, senate would not be obliged to prepare list based upon request. Comm on Open Gov't FOIL-AO-4820.

If city does not maintain list of contributors and amounts of contributions made to project, it could not provide copy of such record; but, assuming that city has possession of list of contributors, it would appear that some aspects of list would be available, while others could be withheld. Comm on Open Gov't FOIL-AO-4899.

169. — —Municipal records

Town is required to disclose existing records in accordance with Freedom of Information Law, but it is not obliged to create new records or review its records for purpose of preparing totals or tabulations. Comm on Open Gov't FOIL-AO-4725.

If town board has not prepared record containing explanation of its decision, it would not be required to do so pursuant to request made under Freedom of Information Law. Comm on Open Gov't FOIL-AO-4727.

Freedom of Information Law pertains to existing records and agency is generally not required to create or prepare records in response to requests; therefore, if office of mayor maintains no record containing proof of qualification for appointment, there would be no obligation to create such records based on requests. Comm on Open Gov't FOIL-AO-4886.

170. — —Sentencing records

Pre-sentence report may be made available only upon order of court, and only under circumstances described in CLS CPL § 390.50; as such, Freedom of Information Law does not entitle person requesting pre-sentence report to receive a copy of it. Comm on Open Gov't FOIL-AO-4612.

Requests should be directed to agency that maintains records sought; agency is not required to prepare or create record in response to request; therefore, if no statistics concerning stabbings at correctional facilities have been prepared, agency, when receiving such request, would not be obliged to create records containing such statistics. Comm on Open Gov't FOIL-AO-4874.

Freedom of Information Law pertains to existing records and if there is no record that lists all inmates and correction officers who were transported to correctional facility, Department of Correctional Services would not be required to create such records based on request. Comm on Open Gov't FOIL-AO-4877.

Freedom of Information Law does not require agency to create or prepare record in response to request. Comm On Open Gov't FOIL-AO-4591.

If totals or breakdown of information requested have not been statistically prepared and do not appear in existing records, agency would not be required to create new records in response to such requests. Comm on Open Gov't FOIL-AO-4630.

Freedom of Information Law pertains to existing records, and agency generally is not required to create new record in response to request. Comm on Open Gov't FOIL-AO-4643.

Freedom of Information Law is vehicle under which public may seek and generally obtain existing records; it is not vehicle that requires agency officials to answer questions or prepare new records in response to request for information; further, as general rule, agency may not create or prepare record and response to request. Comm on Open Gov't FOIL-AO-4720.

Freedom of Information Law pertains to existing records, and agency is not required to create or prepare records in response to request; to extent that information sought does not exist in form of records, agency would not be obligated to prepare new records. Comm on Open Gov't FOIL-AO-4757.

Agency is not required to create or prepare record in response to request; therefore, if information sought does not exist in form of record or records, agency officials would not be required by Freedom of Information Law to create new record in order to respond to request. Comm on Open Gov't FOIL-AO-4775.

Freedom of Information Law enables applicant to request existing records; it does not require agency officials to respond to questions or create new record in response to request. Comm on Open Gov't FOIL-AO-4831.

Freedom of Information Law pertains to existing records and agency is not required to create or prepare record in response to request. Comm on Open Gov't FOIL-AO-4876.

Freedom of Information Law pertains to access of existing records and, as such, Law does not require that agencies prepare or create record in response to request. Comm on Open Gov't FOIL-AO-4884.

Freedom of Information Law generally pertains to existing records and agency need not create or prepare record in response to request. Comm on Open Gov't FOIL-AO-4912.

Freedom of Information Law pertains to existing records and agency need not create or prepare record in response to request; as such, Freedom of Information Law does not require agency officials to answer questions when their answers would involve preparation of new records; further, although agency officials may and often do answer questions, there is no law that requires them to do so. Comm on Open Gov't FOIL-AO-4930.

Freedom of Information Law pertains to existing records and agency is generally not required to create record in response to request. Comm on Open Gov't FOIL-AO-4943.

Freedom of Information Law pertains to existing records and agency is not required to create record in response to request. Comm on Open Gov't FOIL-AO-4949.

Freedom of Information Law pertains to existing records and an agency need not create a record in response to a request; hence, records pertaining to events that occurred in 1975 may not be available due to the substantial passage of time. Comm on Open Gov't FOIL-AO-6302 (1990).

Freedom of Information Law does not require agency to create record in response to request; therefore, if authority does not maintain record containing payment breakdown in relation to contract, Freedom of Information Law would not require that such record be prepared in response to request. Comm on Open Gov't OML-AO-4733.

171. —Tape recordings

Assuming that contents of a cassette recording of an agency hearing are available under the Freedom of Information Law, persons can listen to it or request a copy for a fee based upon the actual cost of reproduction. If no transcript exists, the agency is not required to create one in response to a request by a non-party. Comm on Open Govt FOIL-AO 3033.

Records officer need not extract requested information from variety of records for requester. Comm on Open Govt FOIL-AO-3665.

Although Freedom of Information Law provides broad rights of access, it pertains to existing records; education department does not maintain any list that contains names and current addresses of college alumni, and though education department would provide information containing current addresses of alumni if they maintained information, department cannot make available what it does not have. Comm On Open Gov't FOIL-AO-4599.

Records maintained by police department, to extent that they continue to exist, will be subject to rights conferred by Freedom of Information Law. Comm on Open Gov't FOIL-AO-4661.

Issuance of duplicate tax bill does not pertain to creation of new document, but rather duplication of existing record; therefore, Freedom of Information Law pertains to existing records because agency is not required to prepare new record in response to request. Comm on Open Gov't FOIL-AO-4668.

Freedom of Information Law pertains to access to existing records and does not require agency to answer questions or to provide "information". Comm on Open Gov't FOIL-AO-4695.

Statement that agency does not maintain memoranda or related records which are requested, and that agency was unable to locate regulations sought, was not denial, and therefore agency's response cannot be subject to appeal. Comm on Open Gov't FOIL-AO-4715.

Freedom of Information Law pertains to existing records maintained by agencies and does not generally require agencies to answer questions; when requesting information, requester should

specify that certain records are sought instead of simply asking questions. Comm on Open Gov't FOIL-AO-4843.

Freedom of Information Law pertains to rights of access to existing records only. Comm on Open Gov't FOIL-AO-4853.

Freedom of Information Law is vehicle that requires agency officials to respond to requests for records; it does not require that agency officials answer questions or to request "information". Comm on Open Gov't FOIL-AO-4883.

Freedom of Information Law does not require agency officials to answer questions or provide information that does not exist in form of record or records; rather, it is vehicle under which any person may seek existing records, irrespective of applicant's status or interest. Comm on Open Gov't FOIL-AO-4889.

Freedom of Information Law pertains to rights of access to existing records maintained by agencies; Law does not require that agencies answer questions or prepare response to request for "information". Comm on Open Gov't FOIL-AO-4906.

Freedom of Information Law pertains to rights of access to existing records maintained by agencies, thus, agency, such as New York City Police Department, is not required to answer questions or supply information generally in response to request; further, agency is not required to obtain records from other agencies in order to respond to request. Comm on Open Gov't FOIL-AO-4915.

If Racing and Wagering Board maintains copy of New York Racing Association Charter, it should be made available upon payment of appropriate fee for photocopying because none of grounds for denial would be applicable; however, if board does not maintain possession of Charter, it would not be required to obtain copy on requester's behalf. Comm on Open Gov't FOIL-AO-4952.

Freedom of Information Law pertains to rights of access to existing records maintained by entities of state and local government and, as such, Law does not require agencies to answer questions, or prepare response to request. Comm On Open Gov't FOIL-AO-4977.

If a complaint was made verbally to town's zoning code enforcement officer and the town maintained no recording pertaining to the complaint, FOIL was inapplicable in that no record existed. Comm on Open Gov't FOIL-AO-6142 (1990).

If no report exists in format described or containing each of elements indicated in request for disclosure, agency officials are not obliged to compile or create new record containing information or prepare new record in desired format. Comm on Open Gov't FOIL-AO-7606.

Physical possession by county of records, or absence thereof, is not necessarily determinative of rights of access. Comm on Open Gov't FOIL-AO-8899.

Where agency cannot find records requested under Freedom of Information Law, it cannot and need not prepare itemized listing of records it was unable to find. Comm on Open Gov't FOIL-AO-9411.

172. Permissive, not mandatory, denials

Grounds for denial under Freedom of Information Law are permissive rather than mandatory, such that agency may deny access to records or portions thereof that fall within one or more of grounds for denial, however agency is not prohibited from granting request for such records. 1986 Committee on Open Government FOIL-AO-4326.

Grounds for denial of access to records are generally permissive, not mandatory; agency may deny access to records or portions of records that fall within one or more grounds for denial, but it is not required to do so. Comm on Open Gov't FOIL-AO-4792.

Language of Freedom of Information Law indicates that agency may withhold records, but that it is generally not required to do so; thus, although agency may in appropriate circumstances withhold records, it is not obliged to do so. Comm on Open Gov't FOIL-AO-7528.

173. Previously provided documents, generally

174. —Publicly available documents

If request involves tape recordings made during specific period of time, and all conversations occurring within that period were publicly disclosed to be at airwaves, tapes would be available in their entirety to requestor or to any member of public; if tapes were not disclosed over airwaves, to extent that they pertained to requestor's arrest and events leading to arrest, it appears that they would be available in great measure if not in their entirety. Comm on Open Gov't FOIL-AO-4743.

Although inadvertent disclosure of records that ordinarily could have been withheld does not create right of access, where disclosure to news media is not inadvertent but purposeful, any member of public then has rights of access to records. Comm on Open Gov't FOIL-AO-9245.

When information contained in record has already been disclosed, or is available from another source, grounds for denial in Freedom of Information Law would not likely provide basis for denial of records sought; Freedom of Information Law pertains to rights of access to existing records and does not require agency to create or prepare record in response to request. Comm on Open Gov't FOIL-AO-4747.

Nothing in Freedom of Information Law pertains specifically to repeated requests made by applicant for records that have already been disclosed; it was advised that agency inform applicant that records sought have been made available and that ensuing requests for same items will be considered moot and will not be answered. Comm on Open Gov't FOIL-AO-8549.

If record was previously made available to requester or his attorney (i.e., in conjunction with criminal proceeding), there must be demonstration that neither requester nor attorney possesses record in order to successfully obtain second copy. Comm on Open Gov't FOIL-AO-12438.

175. Redaction of part of publicly available document as denial

Single record or report may be subject to Freedom of Information application in part or deniable in part, and agency has obligation to review record sought in its entirety to determine which portions, if any, may justifiably be withheld. 1986 Committee on Open Government FOIL-AO-4236.

When record is requested and portion is deleted when record is made available, deletion represents denial of request and Freedom of Information Law requires that denial of access be in writing, stating reasons therefore and advising applicant of right to appeal denial. 1986 Committee on Open Government FOIL-AO-4380.

Report made by consultant, that was hired by county, is likely to be accessible in part and deniable on part based upon its contents; report should be viewed in its entirety for purpose of disclosing those portions that are accessible in conjunction with CLS Pub O § 87(2)(g). Comm on Open Gov't FOIL-AO-4624.

Agency has obligation to review records sought in their entirety to ascertain extent, if any, to which records or portions thereof may justifiably be withheld. Comm on Open Gov't FOIL-AO-4791.

There may be situations in which single record might be both available or deniable in part. Comm on Open Gov't FOIL-AO-7603.

176. Specificity of reasons for denial

No provision of Freedom of Information Law or judicial decision requires that denial at agency level identify every record withheld or give description of reason for withholding each document be given. Comm on Open Gov't FOIL-AO-8527.

177. Waiver of denial

Once department of correctional services enables inmates' attorneys to view video tapes, department has waived its capacity to deny request by either inmate, who is subject of tape, or attorney of inmate who is acting in representative capacity on behalf of inmate. Comm on Open Gov't FOIL-AO-4697.

Fact that any person could have heard content of requested record constitutes waiver of capacity to withhold what has become part of public domain. Comm on Open Gov't FOIL-AO-12186.

2. Specific Statutory Exemptions Justifying Denial

178. In general

Grounds for entry into executive session in the Open Meetings Law are not necessarily consistent with the grounds for denial of

access to records appearing in the Freedom of Information Law. Comm on Open Govt FOIL-AO 3074.

When record is requested under Freedom of Information Law, only question that may be raised by agency involves extent, if any, to which record might properly be withheld in accordance with grounds for denial appearing in CLS Pub O § 87(2); thus, agency cannot delay disclosing records, unless such constructive denial is based upon one or more of grounds for denial appearing in § 87(2). Comm on Open Govt FOIL-AO-3549.

Although public body may take final action during executive session, information that would be deniable under Freedom of Information Law need not be made available as part of minutes of executive session, and if no action is taken during executive session, minutes need not be prepared, as a consequence, there may be situations in which some aspects of minutes of executive session might justifiably be deleted, if those deletions represent information that falls within one or more of the grounds for denial. 1986 Committee on Open Government FOIL-AO-4314.

If records are available pursuant to provision of law other than Freedom of Information Law, nothing in Freedom of Information Law can be asserted to withhold those records. Comm on Open Gov't FOIL-AO-9363.

Insofar as witness statements are part of motor vehicle accident reports, they must be disclosed in their entirety in most instances since, under CLS Pub O § 89(6), if records are available under some other provision of law or by means of judicial interpretation, grounds for denial appearing in CLS Pub O § 87(2) cannot be asserted. Comm on Open Gov't FOIL-AO-12611.

179. Exempted by state or federal statute (§ 87(2)(a)), generally

180. —Civil Practice Law and Rules (CPLR)

Copies of school district attorney's notes taken during arbitration hearing were not subject to disclosure under Freedom of Information Law pursuant to CLS Pub O § 87(2)(a) and CLS CPLR § 3101. Comm on Open Gov't FOIL-AO-8467.

Records that might become involved in litigation, which were obtained by Public Service Commission (PSC) from Niagara Mohawk Power Corporation (NMPC) pursuant to PSC order, would be exempted from disclosure under Freedom of Information Law based on NMPC's attempt to preserve attorney-client privilege, insofar as NMPC could properly claim privileges under CPLR concerning its records. Comm on Open Gov't FOIL-AO-9911.

Materials that are served on or shared with adversary could not be characterized as confidential or exempt from disclosure under CLS CPLR § 3101. Insofar as certain correspondence between town and private attorney have been communicated between town and its adversary or have been filed with court, any claim of privilege or its equivalent would be effectively waived; once records in nature of attorney work product or material prepared for litigation were transmitted to adversary, i.e., from town to its adversary and vice versa, capacity to claim exemptions from disclosure under CLS CPLR § 3101(c) or (d) or, therefore, CLS Pub O § 87(2)(a) ends, while, conversely, if records had not been disclosed to person other than client or clients, assertion of privilege would be proper. If records are prepared for multiple purposes, one of which includes eventual use in litigation, CLS CPLR § 3101(d) does not serve as basis for withholding records; only when records are prepared solely for litigation can § 3101(d) be properly asserted to deny access to records. Comm on Open Gov't FOIL-AO-12638.

Because records reflective of correction officers' vacation accruals do not evaluate performance, and because those records are "neutral," CLS Civ R § 50-a would not serve to authorize denial of access to applicant. Attendance records, including those involving overtime work, are clearly available under Freedom of Information Law, for they are relevant to performance of public employees' official duties; similarly, records reflective of leave used or accrued must be disclosed, for public has economic interest in obtaining those records and because records are relevant to performance of public employees' official duties. Comm on Open Gov't FOIL-AO-12699.

Proper assertion of attorney-client privilege involves need to ensure that advantage is not given to adversary; thus, if disclosure of certain items that were deleted in record of litigation would have no such adverse effect, attorney-client privilege could not be properly asserted under Freedom of Information Law. Comm on Open Gov't FOIL-AO-13383.

Records regarding "dates, times and duration" of legal services rendered by school district attorney in civil rights case must be disclosed; "descriptive" material reflective of "general nature of services rendered," as well as dates, times and duration of services rendered, ordinarily would be beyond coverage of attorney-client or work product privilege. Comm on Open Gov't FOIL-AO-13526.

Materials that are served on or shared with adversary in litigation cannot be characterized as confidential or exempt from disclosure under CLS CPLR § 3101(c) and (d). Comm on Open Gov't FOIL-AO-13590.

Correspondence between village attorney and applicant's attorney, if it exists, although in possession of village's attorney, does not constitute privileged communications; village is client of village attorney, but applicant's attorney is not. Comm on Open Gov't FOIL-AO-16526.

181. —Civil Rights Law, generally

182. — —Police matters

Assuming that request for final determination relating to complaint of misconduct by police officer was not been made in context of current or future litigation, CLS Civ R § 50-a would not justify denial of request pursuant to CLS Pub O § 87(2)(a). Comm on Open Gov't FOIL-AO-7602.

Agency's blanket denial of Freedom of Information Law request for records pertaining to "disruption" that occurred at fireworks festival, on basis of CLS Civ R § 50-a, was not proper because, while some records might justifiably have been withheld as pertaining to police personnel, records focusing on event itself would not be subject to § 50-a (although other grounds to deny access might apply). Comm on Open Gov't FOIL-AO-12016.

In context of city business, matters would be "confidential" only on rare occasions; those situations might involve information that is derived from personnel records used to evaluate continuing employment or promotion of police officers or professional firefighters under CLS Civ R § 50-a, or they might involve attorney work product or records subject to attorney-client privilege. Comm on Open Gov't FOIL-AO-12558.

Names or other identifying details pertaining to police officers who were subjects of complaints or investigations could be deleted from records sought under CLS Civ R § 50-a; remainder, however, would be subject to Freedom of Information Law and would be available unless other elements of records might be justifiably withheld. Comm on Open Gov't FOIL-AO-12655.

CLS Civ R § 50-b exempts records identifiable to victim of sex offense from disclosure, and thus Freedom of Information Law provides no rights of access to such records. Comm on Open Gov't FOIL-AO-13088.

Committee on Open Government would suggest that police department prepare inventory of all records falling within scope of Freedom of Information Law request involving certain sex crime case; inventory should briefly describe each and every record sought, and when it is clearly so, assertion or certification that record would, if disclosed, identify or tend to identify victim in violation of CLS Civ R § 50-b. Comm on Open Gov't FOIL-AO-13088.

Board of Public Safety was justified in deleting, from minutes of its executive sessions, references to how each board member voted in deciding to place Chief of Police on administrative leave; matter involved police officer within scope of CLS Civ R § 50-a, which prohibits disclosure of personnel records used to evaluate police officer's performance, and could be withheld under Freedom of Information Law. Comm on Open Gov't OML-AO-3427.

CLS Civ R § 50-a is inapplicable to request for records under Freedom of Information Act and cannot be asserted as basis for denial of request. 1986 Committee on Open Government FOIL-AO-4284.

Where veteran directs that his or her certificate of honorable discharge filed with county clerk be sealed pursuant to CLS Civ R

§ 79-g, record is specifically exempted from disclosure pursuant to CLS Pub O § 87(2)(a). Comm on Open Gov't FOIL-AO-8954.

With regard to records identifiable to victim of sex offense, Freedom of Information Law provides no rights of access to those records and any authority to disclose or obtain records in question would be based on direction provided by CLS Civ R § 50-b. Comm on Open Gov't FOIL-AO-9645.

CLS Civ R § 50-a does not exempt records from disclosure when request is made under Freedom of Information Law in context unrelated to litigation; § 50-a was designed to limit access to personnel records by criminal defense counsel who would use contents of records, including unsubstantiated and irrelevant complaints against officers, to embarrass officers during cross-examination. Comm on Open Gov't FOIL-AO-10149.

Rationale for confidentiality accorded by CLS Civ R § 50-a was no longer present, and that statute was no longer applicable or pertinent, as applied to police chief who had retired, since there was no issue involving continued employment or promotion; thus, records regarding chief could be disclosed under Freedom of Information Law. Records indicating payments for "accrued sick, vacation and/or personal leave time as well as any payment or payments for accrued overtime or compensatory time" and "any other...benefits" would be accessible to public under Freedom of Information Law, even if employee in question remained police officer and CLS Civ R § 50-a remained consideration, since records reflective of payments or benefits are not used to evaluate performance, and such records are "neutral." Comm on Open Gov't FOIL-AO-12423.

Records subject to CLS Civ R § 50-b are exempt from disclosure under Freedom of Information Law, and any disclosure of records falling within its coverage can be made only pursuant to that statute. Comm on Open Gov't FOIL-AO-12535.

General policy of withholding names of complainants or victims would be inconsistent with Freedom of Information Law, although denial of access to name of complainant or victim may be appropriate; under CLS Civ R § 50-b, police and other public officers are prohibited from disclosing identity of victim of sex offense, person's identity could likely be withheld under CLS Pub O § 87(2)(f) which permits agency to withhold records to extent that disclosure would "endanger the life or safety of any person," (which would include situation where complainant is in some way associated with organized crime or is confidential source), and same provision might apply when victim is senior citizen who lives alone. Comm on Open Gov't FOIL-AO-12605.

If direction to seal certificate of honorable discharge were given by veteran under CLS Civ R § 79-g, county clerk would be prohibited from disclosing, notwithstanding provisions of Freedom of Information Law; conversely, when there is no direction by veteran to seal certificate, that record, like all others, would be subject to rights conferred by Freedom of Information Law. Comm on Open Gov't FOIL-AO-12688.

CLS Civ R § 50-b would not apply to writing prepared by school principal regarding allegations that school employee was pedophile where writing was authored long before any arrest, and it did not identify any victim of sex offense. Comm on Open Gov't FOIL-AO-13590.

CLS Civ R § 50-a would not serve to authorize town to deny access to record containing schedule for staffing for desk in police station on certain dates, since such records do not evaluate performance, and are "neutral," even if they might be found within personnel files. Comm on Open Gov't FOIL-AO-13610.

183. —County Law

Records of investigations of deaths, requested after investigations were closed, would be subject to CLS County § 677 to extent that files contained autopsy reports and "writings" of coroner or medical examiner, and to that extent they were available only to district attorney and deceased's next of kin; however, records prepared by police departments that came into possession of coroner or medical examiner were subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-10030.

Under CLS County § 308(4), "records...of calls" means either recording or transcript of communication between person making 911 emergency call, and employee who receives call; statute cannot validly be construed to mean records regarding or relating to 911 call. Comm on Open Gov't FOIL-AO-12544.

CLS County § 308(4) cannot validly be construed to mean records regarding or relating to 911 call; if that were so, innumerable police and fire reports, including arrest reports and police blotter entries, would be exempt from disclosure in their entirety under Freedom of Information Law. Comm on Open Gov't FOIL-AO-12741.

184. —Criminal Procedure Law (CPL)

Presentence report cannot be obtained from correctional facility under Freedom of Information Law; presentence report may be made available only upon order of court, and only under circumstances described in CLS Crim Pro § 390.50. Comm on Open Gov't FOIL-AO-4637.

Pre-sentence reports are specifically exempted from disclosure by state statute and may generally be withheld on basis of Freedom of Information Law in conjunction with CLS CPL § 390.50. Comm on Open Gov't FOIL-AO-4669.

Freedom of Information Law does not apply to courts or court records; however, many court records are available pursuant to other provisions of law; because criminal procedure law provides that when criminal action or proceeding is dismissed in favor of accused and records relating to event are sealed, records of dismissal of action cannot be provided based upon the exemption of Criminal Procedure Law. Comm on Open Gov't FOIL-AO-4947.

Records regarding grand jury testimony, evidence, decision, result or other matter are specifically exempted from disclosure by Criminal Procedure Law and therefore cannot be acquired under Freedom of Information Law. Comm on Open Gov't FOIL-AO-4972.

Where records were sealed pursuant to CLS Criminal Procedure Law § 160.50, such records were exempt from disclosure by statute, and thus outside the scope of rights conferred by the Freedom of Information Law. Comm on Open Gov't FOIL-AO-6289 (1990).

Grand jury records are exempt from disclosure pursuant to CLS Pub O § 87(2)(a) since CLS CPL § 190.25(4) provides that grand jury proceedings are secret. Comm on Open Gov't FOIL-AO-7573.

If person who committed shooting was not fingerprinted, arraigned or arrested, records could not have been sealed because CLS CPL § 160.50 would not have applied and, therefore, records pertaining to incident would not be exempt from disclosure under CLS Pub O § 87(2)(a). Comm on Open Gov't FOIL-AO-8322.

CLS CPL § 390.50 represents exclusive procedure concerning access to pre-sentence reports. Comm on Open Gov't FOIL-AO-12429.

Unless arrest or booking record has been sealed under CLS CPL § 160.50, it must be disclosed; under that statute, when criminal charges have been dismissed in favor of accused, records relating to arrest ordinarily are sealed and, in those instances, records would be exempted from disclosure by statute under CLS Pub O § 87(2)(a). Comm on Open Gov't FOIL-AO-12605.

Access to records relating to investigation of county property and employees could be denied under CLS CPL § 190.25(4) where matter went before grand jury. Comm on Open Gov't FOIL-AO-12722.

Grand jury minutes and "other matters attending a grand jury proceeding" would be outside scope of rights conferred by Freedom of Information Law; any disclosure of those records would be based on court order or perhaps vehicle authorizing or requiring disclosure that is separate and distinct from Freedom of Information Law. Comm on Open Gov't FOIL-AO-12802.

"Official records" and capacity to seal under CLS CPL § 160.50 involve those records "relating to the arrest or prosecution," and do not necessarily include investigative materials; thus, investigative materials may fall under Freedom of Information Law. Comm on Open Gov't FOIL-AO-13469.

185. —Election Law

Unsuccessful candidate in village election was not entitled to Freedom of Information Law access to paper roll to check on votes he received, as such records are exempted from disclosure by CLS Elec § 9-124. Comm on Open Gov't FOIL-AO-12126.

186. —Emergency Tenant Protection Act

Right of access to rent registration records are governed not by Freedom of Information Law, but rather by Emergency Tenant Protection Act, the New York City Administrative Code and Division of Housing and Community Renewal. Comm on Open Gov't FOIL-AO-4738.

"Rent rolls" (lists of rent stabilized buildings located within city, maintained by state Division of Housing and Community Renewal) are specifically exempted from disclosure by CLS Unconsol Ch 249-B § 12-a(b) and are beyond rights of access conferred by Freedom of Information Law. Comm on Open Gov't FOIL-AO-13091.

Government agency would not be required to disclose name of person currently residing in certain rent-controlled apartment, except to tenant or tenant's representative. Comm on Open Gov't FOIL-AO-13463.

187. —Executive Law

State Ethics Commission and its records are excluded from coverage of Freedom of Information Law pursuant to CLS Pub O § 87(2)(a) and CLS Exec § 94(17)(a). Comm on Open Gov't FOIL-AO-7917.

CLS Exec § 259-k(2) and 9 NYCRR § 8000.5, which describe circumstances under with division is permitted to release information from its case records, do not justify withholding names of inmates being released from state facilities to parole supervision. Comm on Open Gov't FOIL-AO-10181.

Sole records required to be disclosed by State Ethics Commission are those identified in CLS Exec § 94(a)(1)-(4). Comm on Open Gov't FOIL-AO-13614.

Based on confidentiality provision of CLS Exec § 501-c, medical records and other records pertaining to requester's son, who had been placed in residential treatment facility following issuance of PINS petition, could only be disclosed pursuant to court order. Comm on Open Gov't FOIL-AO-16554.

188. —Federal laws, generally

189. — —Driver's Privacy Protection Act

Federal Driver's Privacy Protection Act does not exempt data maintained by state Department of Motor Vehicles, relating to moving violations and accidents, from Freedom of Information Law disclosure. Comm on Open Gov't FOIL-AO-11978.

190. — —Family Educational Rights and Privacy Act (FERPA)

Federal Family Educational Rights and Privacy Act generally prohibits educational agency from disclosing "education records" identifiable to student without student's consent; therefore, to extent that Federal Act prohibits disclosure, records concerning allegation of plagiarism would be specifically exempted from disclosure by federal statute. Comm on Open Gov't FOIL-AO-4904-A.

If portions of time sheets, bills or related records contain information that is confidential under attorney-client privilege, disclosure of those portions may be withheld under CLS Pub O § 87(2)(a), which permits agency to withhold records or portions thereof that are "specifically exempted from disclosure by state or federal statute." Portions of "confidential monthly summary" prepared by law firm for school district which identified or could identify students facing disciplinary charges were not subject to disclosure under Freedom of Information Law, due to privacy requirements of Family Education Rights and Privacy Act (20 USCS § 1232g) and CLS Pub O § 87(2)(a). Comm on Open Gov't FOIL-AO-7508.

Request to inspect and copy all first-year student answers to particular midterm examination administered by law school could be denied pursuant to provisions of Family Education Rights and Privacy Act (20 USCS § 1232g) and CLS Pub O § 87(2)(a), even though names did not appear on test papers, if test answers were handwritten, since it was possible that review of test papers could enable individual to identify students' papers by means of their handwriting, which presumably was unique in every instance. Comm on Open Gov't FOIL-AO-7510.

If person employed by school district routinely and as part of his or her official duties contacts parents of students by telephone, those portions of phone bill that could identify parents and, therefore, students, are exempt from disclosure under CLS Pub O § 87(2)(a) and Family Educational Rights and Privacy Act, 20 USCS § 1232g. In order to comply with Family Educational Rights and Privacy Act, 20 USCS § 1232g, for those records reflective of calls made by school district staff who routinely and as part of their duties contacted parents of students, last four digits appearing in local phone number could be deleted from school district telephone bills prior to disclosure of those bills, unless it was known that certain phone numbers did not involve contact with parents; in case of long distance calls, as well as 800 and 900 numbers, reference to those calls were required to be disclosed in their entirety, unless it could clearly be asserted that particular long distance call or calls involved contact with parent of student; similarly, those records of calls made by staff who did not telephone parents of students routinely and as part of their official duties were required to be disclosed. Comm on Open Gov't FOIL-AO-7926.

Family Educational Rights and Privacy Act (20 USCS § 1232g) generally forbids school district from disclosing personally identifiable information concerning students, unless parents of students consent to disclosure. Comm on Open Gov't FOIL-AO-12405.

Family Educational Rights and Privacy Act (FERPA; 20 USCS § 1232g) would apply to writing prepared by school principal regarding allegations that school employee was pedophile if writing included personally identifiable information pertaining to person or persons who provided information to school district. Comm on Open Gov't FOIL-AO-13590.

191. — —Internal Revenue Code

W-2 forms are not exempted from disclosure under CLS Pub O § 87(2)(a) on basis of 26 USCS § 6103 since latter statute pertains to records received and maintained by Internal Revenue Service but does not pertain to records kept by individual taxpayer or records maintained by employer, such as school district. Comm on Open Gov't FOIL-AO-7639.

W-2 forms and similar records, such as "NYS-45-ATT," are not specifically exempted from disclosure by statute on basis of 26 USCS § 6103 (Internal Revenue Code) and CLS Tax § 697(e) since such confidentiality statutes pertain only to records received and maintained by Internal Revenue Service; statutes do not pertain to records kept by either individual taxpayer or employer. Comm on Open Gov't FOIL-AO-13090.

Portions of W-2 forms, as well as NYS-Att-45 form, may be withheld from disclosure, such as social security numbers and total tax withheld, since such items are largely irrelevant to performance of employee's duties; however, those portions indicating public officers' or employees' names and gross wages must be disclosed. Comm on Open Gov't FOIL-AO-13090.

192. — —Omnibus Transportation Employee Testing Act

Omnibus Transportation Employee Testing Act of 1991 (OTETA) (PL 102-143, Title V; codified at 49 USCS ch 313) appears to be intended to ensure that alcohol and drug test results of school bus drivers are exempted from public disclosure, as evidenced by statute, implementing regulations, and agency interpretation of Act, including News Alert (publication of U.S. Department of Transportation, dated March 27, 1998). Comm on Open Gov't FOIL-AO-12554.

State agency in possession of records prepared by federal agency which could be withheld by federal agency under federal Freedom of Information Law (FOIL) may not deny disclosure under state FOIL on ground that such records are "specifically exempted from disclosure by...statute" under CLS Pub O § 87(2)(a); only federal agencies subject to federal act may assert exemption appearing in federal act. Comm on Open Gov't FOIL-AO-11985.

Finding that records are confidential and cannot be disclosed must be consistent with specific and unequivocal language of statute. For purposes of Freedom of Information Law, statute would be enactment of state Legislature or Congress; therefore, federal regulation cannot confer, require or promise confidentiality. Comm on Open Gov't FOIL-AO-12554.

193. —Hospital incident reports

Hospital incident reports can be characterized as records that are specifically exempted from disclosure by state or federal statute. Comm on Open Gov't FOIL-AO-4587.

194. —Judiciary Law

Information contained in record of grievance submitted to office of grievance committee against former attorney are subject to CLS Jud § 90(10); further, records may be disclosed only in conjunction with that statute, rather than Freedom of Information Law; moreover, even if Freedom of Information Law is considered to be applicable, Law provides that agency may deny access to records that are specifically exempted from disclosure by state or federal statute. Comm on Open Gov't FOIL-AO-4979.

195. —Mental Hygiene Law

Requestor of information consisting of mental health records which are both relevant and material to defense litigation cannot be obtained pursuant to Freedom of Information Law; these records may be disclosed through CLS Mental Hygiene § 33.13. Comm on Open Gov't FOIL-AO-4744.

To extent that CLS Men Hyg § 33.13 is applicable to clinical records as class, statute exempts records from disclosure in their entirety, despite accessibility provisions of Freedom of Information Law. Comm on Open Gov't FOIL-AO-13376.

Records regarding incident in which developmental center chaplain left center with resident for long period of time without authorization, and in which police were called to find them, resulting in charge of endangering welfare of incompetent person, would not be clinical record under CLS Men Hyg § 33.13 and would be subject to Freedom of Information law. Comm on Open Gov't FOIL-AO-13376.

196. —New York City laws, generally

197. — —New York City Charter

§ 557(g) of New York City Charter has effect of statute and it exempts records from Freedom of Information Law. Comm on Open Gov't FOIL-AO-9195.

Whether payroll records required to be maintained by New York City Conflicts of Interest Board were exempt from disclosure on basis of NYC Charter § 2603(k) depended on whether charter provision in question was purely local enactment, or whether it was approved and enacted by state legislature, in which case it would constitute statute exempting requested records from disclosure. Comm on Open Gov't FOIL-AO-12205.

New York City local laws which are result of action by state legislature could be considered "statute" that could exempt records from disclosure; however, local law which may have been enacted without any direction by state legislature could not be characterized as "statute". Comm on Open Govt FOIL-AO-3659.

Freedom of Information Law allows agency to charge up to $.25 cents per photocopy or actual cost of reproducing records that cannot be photocopied, unless another statute permits higher fee to be assessed; Freedom of Information Law makes no reference to capacity to charge for personnel costs, search time, or time needed to evaluate contents of records in terms of rights of access; however, after October 15, 1982, only act of state legislature or statute permit assessment of search fee, fee higher than $.25 cents per photocopy or fee that exceeds actual cost of reproduction; New York City Administrative Code is not viewed as statute that exempts records from Freedom of Information Law. Comm on Open Gov't FOIL-AO-4588.

Right of access to rent registration records are governed not by Freedom of Information Law, but rather by Emergency Tenant Protection Act, the New York City Administrative Code and Division of Housing and Community Renewal. Comm on Open Gov't FOIL-AO-4738.

New York City Health Code (specifically NYC Health Code § 11.07), unless enacted by State Legislature, does not constitute statute that exempts records from disclosure under CLS Pub O § 87(2)(a). Comm on Open Gov't FOIL-AO-7609.

CLS Exec § 259-k(2) and 9 NYCRR § 8000.5, which describe circumstances under with division is permitted to release information from its case records, do not justify withholding names of inmates being released from state facilities to parole supervision. Comm on Open Gov't FOIL-AO-10181.

198. —Open Meetings Law

Grounds for withholding records under Freedom of Information Law and grounds for entry into executive session under Open Meetings Law are separate and distinct, and they are not necessarily consistent. Comm on Open Gov't FOIL-AO-8323.

Since public body may choose to conduct executive session or discuss particular issue in public, information expressed during executive session is not "exempted from disclosure by...statute" under CLS Pub O § 87(2)(a), which requires that statute must prohibit disclosure and leave no discretion to agency or official regarding ability to disclose. Comm on Open Gov't OML-AO-3282.

199. —Penal Law (PL)

Assuming instructions to grand jury are part of grand jury proceedings, Freedom of Information Law is not applicable, because it is exempted by CLS Penal § 215.70. Comm on Open Gov't FOIL-AO-4784.

200. —Public Health Law

While Freedom of Information Law pertains generally to rights of access to records maintained by units of state and local government, Public Health Law governs patients' rights of access to medical records pertaining to himself or herself; as such, when requesting copies of medical records pertaining to ones self, request should be made pursuant to Public Health Law, rather than Freedom of Information Law. Comm on Open Gov't FOIL-AO-4918.

201. —Public Housing Law

Public housing authority or municipality in possession of records pertaining to application for housing, together with amount of rent paid and identity of person paying rent, could withhold such information pursuant to CLS Pub O § 87(2)(a) and CLS Pub Hous § 159. Comm on Open Gov't FOIL-AO-8938.

Under CLS Pub Hous § 159, public housing authority or municipality cannot disclose information identifiable to tenants. Comm on Open Gov't FOIL-AO-12399.

202. —Public Officers Law

Confidential communications between an attorney and his client are exempted from disclosure pursuant to CLS Public Officers Law § 87(2)(a). Comm on Open Gov't FOIL-AO-6237 (1990).

If state agency cannot disclose records pursuant to CLS Pub O § 96, it is precluded from disclosing them under Freedom of Information Law; alternatively, if disclosure of record would not constitute unwarranted invasion of personal privacy and if record is available under Freedom of Information Law, it may be disclosed under CLS Pub O § 96(1). Since disclosure by Lottery of information regarding lottery winners does not include actual home addresses of winners, home addresses of lottery winners can be withheld as unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-9143.

CLS Pub O § 87(4) pertains only to state agencies, and was enacted in conjunction with CLS Pub O § 89(5) to clearly limit application of that provision to state agencies. Comm on Open Gov't FOIL-AO-9995.

203. —Social Services Law

Information contained in state child abuse central registrar is confidential pursuant to Social Services Law and any rights applicant may have to information in register would be conferred by Social Services Law, rather than Freedom of Information Law or Personal Privacy Protection Law. Comm on Open Gov't FOIL-AO-4980.

Records dealing with juvenile offenders are exempted from disclosure by state statute, CLS Soc Serv Law § 372; therefore, records which identify juvenile offenders or others committed to facility of Division for Youth are confidential and cannot be disclosed except under conditions described in Soc Serv Law § 372. Comm on Open Gov't FOIL-AO-4981.

Records indicating name, last known address, home telephone number, employment address, email address, and civil case numbers of each child support obligor known to county were exempt from disclosure under Freedom of Information Law based on CLS Soc Serv § 111-v and CLS Dom Rel § 235(1). Comm on Open Gov't FOIL-AO-16643.

204. —Tax Law

Commercial entity claiming that disclosure would cause substantial injury to its competitive position may choose to initiate

proceeding to defend against disclosure, in which case it would have burden of proof; in that event, commercial enterprise, rather than person seeking records, would bear expense and burden of attempting to block disclosure and litigating matter. Comm on Open Gov't FOIL-AO-12656.

W-2 forms and similar records, such as "NYS-45-ATT," are not specifically exempted from disclosure by statute on basis of 26 USCS § 6103 (Internal Revenue Code) and CLS Tax § 697(e) since such confidentiality statutes pertain only to records received and maintained by Internal Revenue Service; statutes do not pertain to records kept by either individual taxpayer or employer. Comm on Open Gov't FOIL-AO-13090.

Portions of W-2 forms, as well as NYS-Att-45 form, may be withheld from disclosure, such as social security numbers and total tax withheld, since such items are largely irrelevant to performance of employee's duties; however, those portions indicating public officers' or employees' names and gross wages must be disclosed. Comm on Open Gov't FOIL-AO-13090.

205. —Town Code of Ethics

Assertion of confidentiality in town code of ethics, without more, does not guarantee or require confidentiality under CLS Pub O § 87(2)(a). Comm on Open Gov't OML-AO-2805.

Advisory opinion prepared by town Ethics Board could be withheld, except in 2 circumstances: (1) if opinion were rejected or modified, it would be deniable under both CLS Pub O § 87(2)(b) as unwarranted invasion of personal privacy and under CLS Pub O § 87(2)(g), for it consists of recommendation to Town Board that is not final or binding, or (2) opinion involves situation in which local law requires disclosure. Comm on Open Gov't OML-AO-3712.

There would be no basis for withholding those portions of ethics complaint made to town ethics board that indicate complainant's identity where name of complainant has been disclosed by himself and others. Comm on Open Gov't OML-AO-3712.

When allegations or charges of misconduct against public official have not yet been determined or did not result in disciplinary action, records relating to such allegations may be withheld, for disclosure would result in unwarranted invasion of personal privacy; further, to extent that such charges are dismissed or allegations are found to be without merit, they may be withheld. Comm on Open Gov't OML-AO-3712.

In typical situation in which Freedom of Information Law determines rights of access, opinions offered by town Ethics Board or its members may be withheld, unless and until opinion is adopted by the Town Board or local enactment requires disclosure; similarly, if Open Meetings Law were followed, discussions following complaint concerning conduct of Town Board member could have occurred during executive sessions. Comm on Open Gov't OML-AO-3712.

Contents of tape recordings of executive sessions reflecting deliberative process of either Town Board or town Ethics Board would consist of "intra-agency material" falling within scope of CLS Pub O § 87(2)(g); moreover, since there was no final determination by Town Board indicating misconduct or imposing penalty regarding subject of ethics complaint, any such tapes could be withheld on ground that disclosure would constitute unwarranted invasion of personal privacy. Comm on Open Gov't OML-AO-3712.

Local legislative body has statutory authority to prohibit legislator from disclosing matters discussed in executive session. 2000 NY Ops Atty Gen I 2000-2.

Records subject to attorney-client privilege, attorney work product, and material prepared for litigation are deniable under Freedom of Information Law due to statutory exemptions from disclosure. Committee on Open Government FOIL-AO-3379.

Provision of municipal code cannot serve as basis for exempting records from disclosure under Freedom of Information Law, and although records may in some instances be characterized as "confidential", they may be considered confidential only when statute, act of state legislature or congress, so prescribes, and city code is not statute. 1986 Committee on Open Government FOIL-AO-4211.

Initial ground for denial of records under Freedom of Information Law pertains to records that are specifically exempted from disclosure by state or federal statute; therefore, if statute other than Freedom of Information Law permits or requires confidentiality, rights that might otherwise be granted by Freedom of Information Law do not apply. Comm on Open Gov't FOIL-AO-4620.

Although Freedom of Information Law provides broad rights of access to records, agency may withhold records or portions thereof that are specifically exempted from disclosure by state or federal statute. Comm on Open Gov't FOIL-AO-4664.

If no ground for denial under Freedom of Information Law can justifiably be asserted, no claim of privilege could be asserted to enable government to withhold information; when record is subject to attorney/client privilege or consists of attorney work product, it is specifically exempted from disclosure by statute and therefore may be withheld under Freedom of Information Law. Comm on Open Gov't FOIL-AO-4685.

When statute other than Freedom of Information Law provides specific direction with respect to disclosure of particular type of records, that statute supersedes more general provisions of Freedom of Information Law; there are many state and federal statutes that specifically exempt particular records from disclosure or give specific direction with respect to disclosure of particular records. Comm on Open Gov't FOIL-AO-4835.

Request for records may be denied if records are specifically exempted from disclosure by state or federal statute; statute would be enactment of state legislature or Congress and would not include local law, ordinance, or regulations; therefore, if confidentiality is conferred by local law, records would not be exempted from disclosure by "statute", rather they would be available to extent required by Freedom of Information Law. Comm on Open Gov't FOIL-AO-4839.

Absent clear indication of legislative intent to require continued confidentiality, Freedom of Information Law, as matter of public policy, supercedes statute that appears to exempt records from disclosure; nevertheless, this issue can be resolved only by court. Comm on Open Gov't FOIL-AO-4844.

While school district may engage in attorney-client relationship with its attorney, records of moneys paid and received by attorney or law firm for services rendered to client are not privileged; but, if portions of bills or related records contain information that is confidential under attorney-client privilege, those portions could be deleted under Freedom of Information Law, which permits agency to withhold records or portions thereof that are specifically exempted from disclosure by state or federal statute. Comm on Open Gov't FOIL-AO-4942.

CLS Pub O § 87(2)(a) will not apply to records prepared or acquired in ordinary course of business, rather than for any purpose relating to litigation, notwithstanding their subsequent use in course of litigation. Comm on Open Gov't FOIL-AO-7549.

Administrative regulations cannot be considered as statute that would exempt records from disclosure; agency cannot rely on regulations as basis for withholding record. Comm on Open Gov't FOIL-AO-7611.

Assertion or claim of confidentiality, unless it is based upon statute, is likely meaningless; if there is no statute upon which agency can rely to characterize records as "confidential" or "exempted from disclosure", records are subject to whatever rights of access exist under Freedom of Information Law. Local enactment cannot confer, require or promise confidentiality. Comm on Open Gov't FOIL-AO-7914.

Under Freedom of Information Law, central database containing conviction information is beyond public's rights of access as statute pertaining to agency that maintains database exempts database from public access. Comm on Open Gov't FOIL-AO-9287.

If county record identifies who in county attorney's office handled legal matter, that portion of such record is accessible under Freedom of Information Law. Comm on Open Gov't FOIL-AO-10151.

Since copyrighted materials are available for inspection, records bearing copyright cannot be characterized as being "specifically exempted from disclosure...by...statute." Comm on Open Gov't FOIL-AO-12179.

To be "exempted from disclosure by statute", both state and federal courts have determined that statute must leave no

discretion to agency: it must withhold such records; in contrast, when records are not exempted from disclosure by separate statute, both Freedom of Information Law and its federal counterpart are permissive. Since public body may choose to conduct executive session or discuss issue in public, information expressed during executive session is not "confidential"; to be confidential, statute must prohibit disclosure and leave no discretion to agency or official regarding ability to disclose. City ordinance stating that certain city employees could not discuss or divulge "any sensitive matter or information that if disclosed would disrupt the efficient and effective operation of the City government or would impair the public officer's close working relationship with the Mayor" stifles free speech in manner that has been found to be unconstitutional. Comm on Open Gov't FOIL-AO-12558.

Records presented to grand jury would ordinarily be outside scope of rights conferred by Freedom of Information Law, and thus any disclosure of those records would be based on court order or vehicle authorizing or requiring disclosure that is separate and distinct from Freedom of Information Law; however, if that record were presented or submitted into evidence during public proceeding, exemption from disclosure would no longer apply. Comm on Open Gov't FOIL-AO-12694.

Information contained in sex offender registry is to be disclosed only pursuant to Sex Offender Registration Act, "only in the furtherance of the provisions of" CLS Correc Art 6-C, and Freedom of Information Law does not apply. Comm on Open Gov't FOIL-AO-13586.

Even if information sought under Freedom of Information Law was obtained during executive session properly held, or from records marked "confidential," claim of confidentiality must be based on statute that specifically confers or requires confidentiality. Comm on Open Gov't OML-AO-0149.

206. Unwarranted invasion of personal privacy (§ 87(2)(b)), generally

207. —Complaints to agencies; complainants

Substance of written complaint is available, but those portions of complaint that identify complainant may be deleted on ground that disclosure would constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4142.

Record pertaining to respondent, person against whom complaint is made, would generally have rights of access to records pertaining to him or her, except those portions which if disclosed would result in unwarranted invasion of personal privacy with respect to other persons; when complaint is made against public employee allegations have not yet been or are not substantiated, complaint and records related to it that identified person against whom complaint is made may generally be withheld on ground that disclosure would result in unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4729.

Substance of complaints made to an agency by a member of the public is generally available to the public under FOIL, but those portions of the complaint identifying complainants may be deleted on the ground that disclosure would result in an unwarranted invasion of person privacy. Comm on Open Gov't FOIL-AO-6143 (1990).

Substance of a complaint made to an agency by a member of the public is available, but those portions of the complaint which identify complainants may be deleted on the ground that disclosure would result in an unwarranted invasion of a person's privacy. Comm on Open Gov't FOIL-AO-6272 (1990).

Substance of a complaint made to an agency by a member of the public is available, but those portions of the complaint which identify complainants may be deleted on the ground that disclosure would result in an unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-6285 (1990).

There may be privacy considerations concerning persons other than employees who may be subjects of agency's inquiries; for instance, name of complainant or witness can be withheld in appropriate circumstances as unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-7914.

Provisions in Freedom of Information Law pertaining to privacy are intended to deal with natural persons, rather than entities, such as corporations, hospitals, other health care facilities or insurers. Comm on Open Gov't FOIL-AO-7947.

If identity of complainants is not known to applicant, often portions of records identifying them may be withheld under CLS Pub O § 87(2)(b); however, where identity of complainant is clearly known privacy provisions are inapplicable. Comm on Open Gov't FOIL-AO-8413.

Substance of complaint made to public agency is generally available, although those portions of complaint which identify complainants may be deleted on ground that disclosure would result in "an unwarranted invasion of personal privacy" pursuant to CLS Pub O § 87(2)(b). Comm on Open Gov't FOIL-AO-9214.

Reference to caller as "an 86 year old woman" might constitute unwarranted invasion of personal privacy; it was conjectural whether caller's age was relevant to spill report prepared by Department of Environmental Conservation (DEC) following call by person outside DEC. Comm on Open Gov't FOIL-AO-9918.

Substance of complaints transmitted to village, pertaining to requestor's property, was accessible under Freedom of Information Law; however portions of complaints that identified complainants could be deleted to prevent unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-10172.

Logbook maintained by town board's "Anti-Bias Task Force," which recorded complaints of bias-related incidents by date, facts, names, etc., was available to public under Freedom of Information Law, except for individual complainants' names and personally identifying details. Comm on Open Gov't FOIL-AO-12201.

If state agency cannot disclose records pursuant to CLS Pub O § 96 (Personal Privacy Protection Law), it is precluded from disclosing under Freedom of Information Law; alternatively, if disclosure of record would not constitute unwarranted invasion of personal privacy and if record is available under Freedom of Information Law, it may be disclosed under CLS Pub O § 96(1)(c). "Results of the deposition" relating to applicant's complaint to Division of Human Rights, and case file concerning matter, could be withheld to extent that they identified persons other than applicant and disclosure would result in unwarranted invasion of their privacy; in addition, they could be withheld in accordance with CLS CPLR § 3101, while remaining aspects of records pertaining to applicant would appear to be accessible to applicant. Comm on Open Gov't FOIL-AO-12592.

If complaint of misconduct included identity of complainant, identifying details pertaining to that person may be withheld on ground that disclosure would constitute "an unwarranted invasion of personal privacy"; provision might also be cited insofar as records identify witnesses, family members related to complainant, and perhaps others. Comm on Open Gov't FOIL-AO-12655.

County Sewer District could withhold or delete portions of records involving citizens' complaints which identified complainants, on ground that disclosure would result in unwarranted invasion of personal privacy; what is relevant is substance of complaint—i.e., whether or not complaint has merit. Comm on Open Gov't OML-AO-2234.

Portion of ethics complaint that identifies complainant may be redacted by town ethics board on ground that disclosure would result in unwarranted invasion of personal privacy unless name of complainant has already been disclosed by himself and others. Comm on Open Gov't OML-AO-3712.

208. —Deceased persons

Access may not be denied to an accident report on the basis that it would be an unwarranted invasion of the privacy of a deceased person. Comm on Open Gov't FOIL-AO-2984.

If it can be assumed that person can demonstrate that he or she is next of kin of deceased, he or she would acquire rights that deceased had when he or she was living. Comm on Open Gov't FOIL-AO-13174.

Next of kin has rights of access, under Freedom of Information Law and Personal Privacy Protection Law, to deceased employee's personal history file, except situations in which such records identify others and disclosure would constitute unwarranted invasion of those other persons' privacy. Comm on Open Gov't FOIL-AO-13174.

Blanket denial of request for state police reports related to homicide-suicide of husband and wife in their home was incon-

sistent with Freedom of Information Law; in view of details that had already been published and made publicly known, it was unlikely that records pertaining directly to either deceased person would, if disclosed, result in unwarranted invasion of personal privacy, although portions of records identifying other persons might properly be redacted, depending on their contents. Comm on Open Gov't FOIL-AO-16552.

209. —Employees and employments, generally

210. — —Certification, qualifications and the like

Records pertaining to public employees that are relevant to performance of their duties are available, because disclosure in those circumstances would result in permissible rather than unwarranted invasion of personal privacy; therefore, licenses or records indicating certification status as well as area of certification are accessible under Freedom of Information Law and similarly, records involving dates of assignment and work hours are relevant to performance of duties of public employees to whom information relates. Comm on Open Gov't FOIL-AO-4905.

Records containing information directly relevant to public employee's performance of his or her duties, such as license or degree requirements for position, are generally available, but other aspects of public employee's education, employment history or other personal information are likely to be denied based on unwarranted invasion of personal privacy; if residency requirement is needed for position, then disclosure of such information would not constitute unwarranted invasion of personal privacy; however, rest of records may be denied on basis of privacy considerations. Comm on Open Gov't FOIL-AO-4915.

While record that individual has met requirements to gain teaching certification is clearly public, score on certification exam would, if disclosed, constitute unwarranted invasion of personal privacy. State Education Department would not have authority to disclose certain teacher test scores to city Board of Education in effort to assess connection between those scores and student performance, even though such data would be used "in aid of" board's efforts in hiring most qualified candidates; while data would be helpful to board, it was apparently not "necessary," for board had functioned to date without data. Comm on Open Gov't FOIL-AO-12594.

211. — —Discipline, misconduct and the like

Record or report might be both available or deniable in part and thus imposes obligation on agency officials to review requested records in their entirety to determine which portions, if any, may be justifiably withheld; agency may withhold records to extent that disclosure would result in unwarranted invasion of personal privacy and to extent that records pertain to allegations or charges against employees that have not yet been proven, which did not result in any disciplinary action, and names or other identifying details that would, if disclosed, constitute unwarranted invasion of personal privacy; however, if investigations of misconduct resulted in disciplinary action, charges that were sustained as well as any final determination indicating action taken would be available for disclosure. Comm on Open Gov't FOIL-AO-4709.

In context of investigation or possible disciplinary action, where public employees have been charged or where allegations have been made, but where no filing of determination in nature of disciplinary action has been taken, records identifiable to individuals relating to charges or allegations may generally be withheld for disclosure because this would result in unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4787.

Portions of records identifying those who file complaints can generally be withheld as unwarranted invasion of personal privacy; further, if complaint is unsubstantiated and does not result in disciplinary action, it could be withheld as unwarranted invasion of personal privacy regarding officer who is subject of complaint; on other hand, if public employee is subject of disciplinary action, those records are available. Comm on Open Gov't FOIL-AO-4923.

Records pertaining to public employees that are relevant to performance of their duties are available because disclosure would result in permissible rather than unwarranted invasion of personal privacy; therefore, if disciplinary action has been taken regarding particular police officers, records reflective of that action are available. Comm on Open Gov't FOIL-AO-4925.

To the extent that charges or allegations against public employee have not been proven or have been dismissed, records pertaining to charges or allegations could be withheld as unwarranted invasion of personal privacy; however, if complaint or allegation has resulted in disciplinary action taken against public employee, records indicating charges that were sustained in nature of action would be available; identities of complainants may generally be withheld on ground that disclosure would result in unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4967.

Records that are relevant to performance of public employee's official duties are available because disclosure would result in permissible rather than unwarranted invasion of personal privacy; further, record reflective of final disciplinary action taken against public employee would be available because such record would deal with matter of public concern, that being public employee's accountability for misconduct; with respect to complaints directed to agency by member of public, portions of complaints that identify complainants may be deleted on ground that disclosure would constitute unwarranted invasion of personal privacy and often what is relevant to agency is substance of complaint and whether it has merit, not identity of person who made complaint; however if employees of agency were acting in performance of their official duties when making complaint, references to them would be relevant to their duties and duties of agency and, as such, denial of those aspects of hearing transcript cannot be justified. Comm on Open Gov't FOIL-AO-4971.

Records that are relevant to performance of public employee's official duties are available because disclosure in such instances would result in permissible rather than unwarranted invasion of personal privacy; however, if allegations of misconduct have not yet or did not result in disciplinary action, records relating to such allegations may be withheld because disclosure would result in unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4973.

Finding of misconduct, or the imposition of disciplinary action regarding college professors, is accessible under FOIL. On the other hand, when allegations, or charges of misconduct, have not yet been determined, or did not result in disciplinary action, the records relating to such allegations may be withheld on the basis that disclosure would be an unwarranted invasion of person privacy. Comm on Open Gov't FOIL-AO-6155 (1990).

Portions of "confidential monthly summary" prepared by law firm for school district which identified or could identify employees facing disciplinary charges were not subject to disclosure under Freedom of Information Law. Comm on Open Gov't FOIL-AO-7508.

Memorandum prepared concerning possibility that county official might have exhibited symptoms of drinking intoxicating substance while performing his or her duties, and recommendation to conduct professional evaluation to determine whether dependency problem existed, were sufficiently personal and intimate that they could be withheld if requested by public under CLS Pub O § 87(2)(b) on ground that disclosure would constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-7528.

When allegations or charges of misconduct by public official have not yet been determined or did not result in disciplinary action, records relating to such allegations may be withheld since disclosure would result in unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-7549.

Disclosure of litigation file cabinet "tags" used by individual attorneys at board of education might properly be denied where tags identified employees who were subjects of disciplinary proceedings or other matters disclosure of which would constitute unwarranted invasion of personal privacy within meaning of CLS Pub O § 87(2)(b). Comm on Open Gov't FOIL-AO-9251.

Counseling memo issued to employee of Department of Transportation after allegation of misconduct could likely be withheld from disclosure to prevent unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-9383.

Records reflective of salaries of public employees must be prepared and made available and, similarly, records reflective of other payments, whether they pertain to overtime, or participation in work-related activities, for example, would be available, for those records would be relevant to performance of one's official duties. When allegations or charges of misconduct of public employee have not yet been determined or did not result in disciplinary action or finding of misconduct, records relating to such allegations may be withheld, for disclosure would result in unwarranted invasion of personal privacy; similarly, to extent that charges are dismissed or allegations are found to be without merit, they may be withheld. Comm on Open Gov't FOIL-AO-12423.

If there were no determination to effect that public employee engaged in misconduct, denial of access to records regarding investigation of county property and employees that ended several years earlier, based on considerations of privacy, would be consistent with Freedom of Information Law. Comm on Open Gov't FOIL-AO-12722.

If there were no determination to effect that public employee engaged in misconduct, denial of access to records based on considerations of privacy would be consistent with law. Comm on Open Gov't FOIL-AO-12802.

Exception pertaining to protection of personal privacy could be invoked, in public employee misconduct proceeding, to shield identities of alleged victims and perhaps others, such as witnesses. Comm on Open Gov't FOIL-AO-12802.

If there were final determination indicating misconduct on part of public employee, based on judicial determinations, such determination would be accessible; in that event, other aspects of records consisting of factual information would be available, except to extent that disclosure would constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-12802.

Disclosure of information indicating public employee's criminal conviction would not, if disclosed, constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-13240.

School board, in teacher disciplinary matter, would not have been required to name subject of discussion before entering into executive session under Open Meetings law, or that charges, which were not proven, would have to have been disclosed under Freedom of Information Law. Comm on Open Gov't FOIL-AO-13355.

Board of education would not be required to identify, by name, certain employee charged with misconduct at time when board came out of executive session and brought charges against employee. Comm on Open Gov't FOIL-AO-13378.

Record indicating determination to impose discipline or sanction on public officer would be accessible to public; disclosure would constitute permissible invasion of privacy, and it would reflect final agency determination accessible under CLS Pub O § 87(2)(g)(iii). Comm on Open Gov't OML-AO-3902.

212. — —Evaluation of job performance

Individual rating reports, which pertain to named teachers, could be accessible since social security numbers, file numbers, and possibly those reasons which were merely opinions, could be masked out and would therefore not be an unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4642.

Records relevant to performance of public employee's duties would, if disclosed, result in permissible rather than unwarranted invasion of personal privacy; while disclosure of fact that public employee has received promotion would not constitute unwarranted invasion of personal privacy, disclosure of record indicating that public employee applied for and was not granted promotion would likely constitute unwarranted invasion of personal privacy and, as such, request for copy of application may be denied in its entirety prior to final determination concerning application for promotion; since each portion of completed application involves privacy considerations, in situation where promotion has been granted, to extent that application is not relevant to performance of employee's duties, it could be withheld as unwarranted invasion of personal privacy and, as such, while name of institution that awarded degree and names of courses taken could generally be withheld as unwarranted invasion of personal privacy, if particular degree or major field of study is requirement for position held by applicant, portion of application indicating that such criteria have been met would likely be available, for they are relevant to performance of one's official duties. Comm on Open Gov't FOIL-AO-4908.

Final rating of public employee would be available under Freedom of Information Law, assuming that any appeals had been exhausted, for it would constitute final agency determination available under CLS Pub O § 87(2)(g)(iii), particularly if monetary award was based upon rating; moreover, final rating concerning public employee's performance is relevant to that person's official duties, as well as those of supervisor who issues rating and, therefore, name of employee, final rating and name of supervisor who made rating would be available under Freedom of Information Law since disclosure would not result in unwarranted invasion of personal privacy of either employee or supervisor. Comm on Open Gov't FOIL-AO-7633.

Disclosure, in employee performance evaluation, of description of duties to be performed by any person holding particular position, or series of criteria reflective of duties or goals to be achieved by any person holding that position, would result in permissible rather than unwarranted invasion of personal privacy for purpose of FOIL. Component of employee performance evaluation involving reviewer's subjective analysis or opinion of how well or poorly standards or duties have been carried out or goals have been achieved could be withheld under FOIL, both as unwarranted invasion of personal privacy and under CLS Pub O § 87(2)(g), on ground that it constitutes opinion concerning performance. Component of employee performance evaluation consisting of final rating, i.e., "good", "excellent", "average", etc. would be available for disclosure under FOIL, assuming that any appeals have been exhausted, for it would constitute final agency determination available under CLS Pub O § 87(2)(g)(iii), particularly if monetary award were based on rating; moreover, final rating concerning public employee's performance is relevant to that person's official duties and therefore would not result in unwarranted invasion of personal privacy if disclosed. Comm on Open Gov't FOIL-AO-12396.

Based on CLS Civ R § 50-a, city cannot disclose personnel evaluation records to reporter or public generally absent written consent of Chief of Police; however, since chief—as subject of records—has right to waive confidentiality conferred by such statute, he has right to gain access to records exempt from disclosure to public, because they pertain to him. Comm on Open Gov't FOIL-AO-13288.

213. — —Insurance matters

Nature of insurance coverage of particular employees and amounts of their claims or billings would be largely irrelevant to manner in which town employees perform their official duties; as such, records that identify employees by means of kind of insurance coverage they have chosen, and amounts of claims made by employees and their dependents would result in unwarranted invasion of personal privacy; however, if town maintains statistics regarding insurance coverage or billings, those statistics would be available, so long as they did not identify employees. Comm on Open Gov't FOIL-AO-4962.

Whether public employee has chosen medical insurance plan involving family coverage as opposed to individual coverage is irrelevant to performance of that person's official duties; thus, records, insofar as they indicate nature of coverage, could be withheld as unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-7623.

Portions of payroll records indicating payments of unemployment insurance benefits may be withheld on ground that disclosure would constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-13090.

214. — —Salaries

While salary information pertaining to public employees is accessible, information concerning deductions or amounts withheld from salaries due to judgment could be withheld as unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4565.

Since Freedom of Information Law has long granted access to name, public office address, title and salary and all employees of

agency, those portions of resume indicating previous public employment would be available; also, agency may delete identifying details when it makes records available as to preclude any unwarranted invasions of personal privacy. Comm on Open Gov't FOIL-AO-4650.

Records identifying public employees who work during given period, rates of pay and number of hours worked are available because those records are "relevant" to performance of their duties. Comm on Open Gov't FOIL-AO-4657.

Records pertaining to public employees that are relevant to performance of their duties are available because disclosure in those instances would result in permissible rather than unwarranted invasion of personal privacy; however, records pertaining to deductions from one's paycheck are irrelevant to performance of that public employee's official duties and consequently, they could be withheld on ground that disclosure would result in unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4885.

Disclosure that permits public to determine general income level of participant in grant program would constitute unwarranted invasion of personal privacy because such disclosure would indicate that particular individual has income or economic means below certain level; therefore, if by means of their names or addresses, grants are made to low income persons, it is likely that disclosure of portions of records indicating their identities might justifiably be withheld; on other hand, if grant is not conditioned on income qualification, but rather upon location of property, disclosure of identities of those recipients of grants would likely be proper. Comm on Open Gov't FOIL-AO-4904.

Portions of W-2 forms can be withheld to protect against unwarranted invasions of personal privacy, such as social security numbers, home addresses and net pay, for those items are largely irrelevant to performance of an employee's duties. Comm on Open Gov't FOIL-AO-7639.

Records reflective of salaries of public employees must be prepared and made available and, similarly, records reflective of other payments, whether they pertain to overtime, or participation in work-related activities, for example, would be available, for those records would be relevant to performance of one's official duties. When allegations or charges of misconduct of public employee have not yet been determined or did not result in disciplinary action or finding of misconduct, records relating to such allegations may be withheld, for disclosure would result in unwarranted invasion of personal privacy; similarly, to extent that charges are dismissed or allegations are found to be without merit, they may be withheld. Comm on Open Gov't FOIL-AO-12423.

Insofar as payroll records sought by applicant included public works contractor's employees' names, addresses, social security numbers and their wages, portions of those records could properly be withheld under CLS Pub O § 87(2)(b) since what was relevant to agency was whether employees were being paid in accordance with prevailing wage standards; however, portions of records reflective of titles, duties, wages, hours worked and similar data should be disclosed. Comm on Open Gov't FOIL-AO-12640.

Portions of city contractors' records reflective of titles, duties, wages, hours worked, deductions, and similar data must be disclosed, but personally identifiable details pertaining to contractor's employees may be deleted or redacted from records prior to disclosure. Comm on Open Gov't FOIL-AO-13343.

215. — —Telephone records and the like

When public officer or employee uses fax machine in course of his or her official duties, bills involving use of machine would be relevant to performance of that person's official duties; thus, disclosure of fax numbers to which transmissions were made would not result in unwarranted invasion of personal privacy with respect to officer or employee serving as government official. If government employee contacts certain classes of persons as part of employee's ongoing and routine duties, there may be grounds for withholding numbers listed on telephone bill; numbers could likely be deleted in those circumstances to protect against unwarranted invasion of personal privacy due to status of those contacted. Comm on Open Gov't FOIL-AO-7607.

When public officer or employee uses telephone in course of his or her official duties, bills involving use of telephone are relevant to performance of that person's official duties; thus, disclosure of such bills will not result in unwarranted invasion of personal privacy with respect to officer or employee of agency who uses agency's telephone. When telephone numbers appear on agency telephone bill, those numbers do not necessarily indicate who in fact was called or who picked up receiver in response to call; thus, disclosure of numbers called will not result in unwarranted invasion of personal privacy, even with respect to recipient of call. Disclosure of telephone numbers called by caseworker who telephones applicants for or recipients of public assistance might identify those who were contacted and, therefore, numbers could likely be withheld from disclosure in that circumstance to protect against unwarranted invasion of personal privacy due to status of those contacted. Comm on Open Gov't FOIL-AO-7926.

Disclosure of details of long distance telephone bills made from county executive's office, as well as bills for cellular phone calls made by county executive, would not necessarily result in unwarranted invasion of privacy of individuals to whom calls were made (although exceptions to general rule of disclosure might arise) as indication of phone numbers discloses nothing regarding nature of conversations, and individuals would not be required to indicate nature of conversations. Comm on Open Gov't FOIL-AO-10270.

While employees' home telephone numbers are personal and irrelevant to their duties and thus may be withheld, business telephone numbers must be disclosed because there is nothing personal about phone number used or assigned to employee at his or her place of employment, which is used and relates to performance of his or her official duties. Comm on Open Gov't FOIL-AO-12105.

Public officer's or employee's home telephone number is irrelevant to performance of his or her official duties and may be withheld on ground that disclosure would result in unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-13397.

Records concerning mayor's use of his personal cell phone were not accessible under Freedom of Information Law (FOIL), although city provided small salary increase of $45.00 per month to defray some costs of phone, where mayor used his cell phone for both personal and city business as he saw fit, and he was billed for phone directly at his residence; however, insofar as cell phone documentation was maintained by or for city, it would constitute agency record within coverage of FOIL. Comm on Open Gov't FOIL-AO-16629.

216. — —Union matters

School district's disclosure of list of teachers who were not members of certain union would result in permissible rather than unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-9764.

General listing of all gubernatorial appointees, without reference to data pertaining to ethnicity or race, would be accessible under Freedom of Information Law; however, if appointee's race or ethnicity is irrelevant to performance of his or her official duties, such record could likely be withheld under FOIL; consequently, to extent that list of all appointees contains racial or ethnic data identifiable to appointees, such data could be deleted on grounds that disclosure would constitute unwarranted invasion of personal privacy. Comm on Open Govt FOIL-AO-3604.

If records are relevant to performance of public employee's official duties, disclosure constitutes permissible rather than unwarranted invasion of personal privacy. Committee on Open Government FOIL-AO-3831.

Personal information such as home address, home telephone number, or name of person for an employer to contact in case of an emergency, may be withheld from disclosure, but where remainder of record is available, such as faculty members' programs for semester, it will be proper to delete personal information while disclosing remainder; also, if record is available under Freedom of Information Law it is available for both inspection and copy. Comm on Open Gov't FOIL-AO-4629.

If records are relevant to performance of public employee's official duties, disclosure would constitute permissible rather

than unwarranted invasion of personal privacy; conversely, if records are not relevant to performance of one's official duties, disclosure has been found to result in unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4658.

Records that are relevant to performance of official duties of public employee are available on ground that disclosure would result in permissible rather than unwarranted invasion of personal privacy; however, records concerning public employees that are not relevant to performance of official duties may be denied on ground that disclosure would indeed result in unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4680.

With regard to records that identify public employees, records that are relevant to performance of public employee's official duties are available, because disclosure in such instances would result in permissible rather than unwarranted invasion of personal privacy; with respect to statements made by persons other than public employees, their names or other identifying details pertaining to them might be deleted to protect privacy while remainder of statements would be available. Comm on Open Gov't FOIL-AO-4722.

Record pertaining to respondent, person against whom complaint is made, would generally have rights of access to records pertaining to him or her, except those portions which if disclosed would result in unwarranted invasion of personal privacy with respect to other persons; when complaint is made against public employee allegations have not yet been or are not substantiated, complaint and records related to it that identified person against whom complaint is made may generally be withheld on ground that disclosure would result in unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4729.

Records pertaining to public employees that are relevant to performance of their official duties are generally available, however, where names do not pertain to public employees acting in performance of their official duties, it might be appropriately contended that interest in protecting privacy outweighs general duty to disclose, and that disclosure would constitute unwarranted invasion of personal privacy; disclosure of identifying details concerning inmates within reports would result in unwarranted invasion of personal privacy and such identifying details could be withheld on that basis. Comm on Open Gov't FOIL-AO-4736.

Bills, vouchers, contracts and similar records involving payments to or expenditures by public employees are relevant to performance of their official duties and as such those types of records would be available on the ground that disclosure would constitute permissible rather than unwarranted invasion of personal privacy; however, some aspects of these records could be deleted as unwarranted invasion of personal privacy, such as public employees' home addresses or social security numbers which have no relevance to performance of one's official duties. Comm on Open Gov't FOIL-AO-4763.

If private records are relevant to performance of certain public employees' official duties, they are available for disclosure as permissible invasion of personal privacy. Comm on Open Gov't FOIL-AO-4776.

Records pertaining to public employees that are relevant to performance of duties are available, because disclosure in these instances would result in permissible rather than unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4828.

With regard to records pertaining to public employees, records that are relevant to performance of public employee' s official duties are generally available, for disclosure in such instances would result in permissible rather than unwarranted invasion of personal privacy. To extent that records are irrelevant to performance of an employee's official duties, disclosure would constitute unwarranted invasion of personal privacy and, therefore, is not required. In regard to complaint filed with State Division of Human Rights against officials of school district, findings of probable cause and settlement of complaint, disclosure of terms of settlement would result in permissible, rather than unwarranted invasion of personal privacy, except to extent that disclosure would involve intimate personal details in nature, for example, of unsubstantiated allegations, particularly since identities of those involved were already known; contrary result was not required by fact that school district was ordered by State Division of Human Rights Hearing Officer to keep terms of settlement secret. Comm on Open Gov't FOIL-AO-7544.

Opinions expressed by non-party employees in context of administrative investigation could be withheld from disclosure under CLS Pub O § 87(2)(g), and perhaps under CLS Pub O § 87(2)(b) as well. Comm on Open Gov't FOIL-AO-7858.

Payroll record and other related records identifying employees and their salaries must be disclosed; items that have no relevance to performance of one's official duties, such as social security numbers, deductions and like may be withheld on ground that disclosure would constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-12776.

There is nothing intimate or personal about photograph of public employee that is used for purposes of identification, such as in medical facilities; thus, photograph of associate medical examiner should be disclosed under Freedom of Information Law. Comm on Open Gov't FOIL-AO-12829.

"Employer ID Number", firm's federal taxpayer and workers' compensation identification numbers, and state unemployment insurance registration number, as provided on Empire Zone application forms, should be exempt from disclosure since they could be used to obtain information of personal nature or other information to which there is no right of public access. Comm on Open Gov't FOIL-AO-12890.

Agreement between school district and individual who agreed to resign, and which stated that agreement "shall remain confidential and shall not be revealed to any third party for a period of ten (10) years from the date hereof, unless production of this agreement or of the terms of this agreement is required by law," would require disclosure, including name of individual; however, associated letters of recommendation could be withheld. Comm on Open Gov't FOIL-AO-13371.

Mere indication that public employee is or has been on disability is no more intimate or personal than disclosure of days and dates of sick leave, which are accessible; insofar as those kinds of records indicate nature of illness or disability, such entries, which are akin to medical details, may be deleted. Comm on Open Gov't FOIL-AO-13610.

Schedules indicating appointments, meetings and like in which public employee has engaged are relevant to performance of that person's official duties; thus, to extent that such record pertains to performance of employee's official duties, disclosure will result in permissible rather than unwarranted invasion of personal privacy. Comm on Open Gov't OML-AO-2347.

Neither characterization of documents as "personnel records" nor their placement in personnel files would necessarily render those documents "confidential" or deniable under Freedom of Information Law; on contrary, contents of those documents serve as relevant factors in determining extent to which they are available or deniable under Freedom of Information Law. Comm on Open Gov't OML-AO-3902.

Term "personnel" appears in neither Open Meetings Law nor Freedom of Information law, and characterization of issue as "personnel matter" does not necessarily to lead to conclusion that matter is confidential. Comm on Open Gov't OML-AO-4168.

217. —Ethical matters

Advisory opinion prepared by town ethics board can generally be withheld under Freedom of Information Law; if opinion is rejected or modified, it is deniable under both CLS Pub O § 87(2)(b) as unwarranted invasion of personal privacy and under CLS Pub O § 87(2)(g) as recommendation to town board that is not final. Names or other identifying details pertaining to witnesses or others interviewed by town ethics board can generally be withheld from disclosure on ground that disclosure would constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-8922.

Advisory opinion prepared by town Ethics Board could be withheld, except in 2 circumstances: (1) if opinion were rejected or modified, it would be deniable under both CLS Pub O § 87(2)(b) as unwarranted invasion of personal privacy and under CLS Pub O § 87(2)(g), for it consists of recommendation to Town Board that is not final or binding, or (2) opinion involves situation in

which local law requires disclosure. Comm on Open Gov't OML-AO-3712.

There would be no basis for withholding those portions of ethics complaint made to town ethics board that indicate complainant's identity where name of complainant has been disclosed by himself and others. Comm on Open Gov't OML-AO-3712.

When allegations or charges of misconduct against public official have not yet been determined or did not result in disciplinary action, records relating to such allegations may be withheld, for disclosure would result in unwarranted invasion of personal privacy; further, to extent that such charges are dismissed or allegations are found to be without merit, they may be withheld. Comm on Open Gov't OML-AO-3712.

In typical situation in which Freedom of Information Law determines rights of access, opinions offered by town Ethics Board or its members may be withheld, unless and until opinion is adopted by the Town Board or local enactment requires disclosure; similarly, if Open Meetings Law were followed, discussions following complaint concerning conduct of Town Board member could have occurred during executive sessions. Comm on Open Gov't OML-AO-3712.

Contents of tape recordings of executive sessions reflecting deliberative process of either Town Board or town Ethics Board would consist of "intra-agency material" falling within scope of CLS Pub O § 87(2)(g); moreover, since there was no final determination by Town Board indicating misconduct or imposing penalty regarding subject of ethics complaint, any such tapes could be withheld on ground that disclosure would constitute unwarranted invasion of personal privacy. Comm on Open Gov't OML-AO-3712.

218. —Housing, homesteading and the like

In view of absence of any intent on part of applicant to ascertain names of Section 8 tenants and in view of small size of Village of Fort Plain, Village could withhold records to extent that disclosure would identify Section 8 tenants, including addresses, irrespective of whether multiple dwelling unit was occupied by Section 8 tenants as well as others; in municipality of less than 3,000 with few if any large housing units, disclosure of tenant's address would render that person's identity readily traceable. Comm on Open Gov't FOIL-AO-9466.

Because tenants in section 8 housing must meet income qualification, insofar as disclosure of records would identify tenants, they may be withheld on ground that disclosure would constitute "an unwarranted invasion of personal privacy" under CLS Pub O § 87(2)(b), even if dwellings are not public housing units or under jurisdiction of housing authority; conversely, following deletion of identifying details pertaining to tenants, remainder of records, i.e., those portions indicating identities of landlords, contractors and amounts that are paid, must be disclosed. City housing authority could deny reporter's request for disclosure of names of section 8 tenants in particular housing development; however, identity of landlord must be disclosed, for payments are made by governmental entities to landlord, irrespective of landlord's income and financial standing, while other details could be withheld, if disclosure would make tenant's identity ascertainable. Comm on Open Gov't FOIL-AO-12399.

If participation in housing grant or loan program is based on applicant's income, personally identifying details relating to that person may be withheld; conversely, if participation is not based on income, but perhaps other factors, such as location or age of property, there would likely be no basis for denial of access. Comm on Open Gov't FOIL-AO-13214.

219. —Licensing; licensees

Various activities are licensed due to some public interest in insuring that individuals or entities are qualified to engage in certain activities or in order that certain activities may be regulated and, therefore, licenses should be available because they are intended to enable public to know that individual has met appropriate requirements to engage in activity that is regulated by state or in which state has significant interest; while disclosure of licenses identifies licensees, disclosure would not necessarily constitute an unwarranted invasion of personal privacy; however, in some instances, personal information such as licensee's home address, home phone number or other personal information that may appear on license might justifiably be withheld. Comm on Open Gov't FOIL-AO-4871.

Record relating to single "Furbearer Possession Tag" maintained by Department of Environmental Conservation under 6 NYCRR § 6.3(c) must be disclosed, apart from applicant's date of birth. Comm on Open Gov't FOIL-AO-12949.

Disclosure of names of applicants for marriage licenses or those who have been granted marriage licenses would not rise to level of unwarranted invasion of personal privacy; however, certain information might justifiably be deleted, such as special consent information, medical or health information, social security numbers, ages, occupations, names of fathers and countries of birth, maiden names of mothers and their countries of birth, and whether former spouses are living or deceased. Comm on Open Gov't FOIL-AO-13120.

Copy of reference letter provided to Banking Department in connection with individual's application to obtain license to operate as mortgage broker may be withheld, even though applicant has knowledge of identity of author of letter. Comm on Open Gov't FOIL-AO-13345.

220. —Lists of names, addresses and the like, generally

221. — —Commercial or fund-raising purposes

If list of those licensed to carry pistols was sought for commercial or fund-raising purposes, denial of access is appropriate because it is unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4732.

Agency may inquire with respect to purpose of request when request involves list of names and addresses to determine whether records would be used for commercial purpose and, therefore, whether disclosure would result in unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4818.

Unwarranted invasion of personal privacy pertains to records identifiable to natural persons, rather than hospitals or corporate entities, for example; lists including names and addresses of natural persons would be accessible or deniable depending upon its use; those portions of lists pertaining to entities are accessible, irrespective of intended use; those portions pertaining to natural persons would be accessible or deniable, depending upon whether list would be used for fund-raising purposes. Comm on Open Gov't FOIL-AO-4879.

If request is made for list of names and addresses or its equivalent, purpose for which request is made may become relevant to rights of access based on unwarranted invasion of personal privacy, especially when that list may be used for commercial or fund-raising purposes. Comm on Open Gov't FOIL-AO-4926.

City inventory lists and assessment data regarding real property would be available to any person for any reason during time specified in notice required by CLS RPTL § 501, but it could be withheld at other times if it would be used for commercial or fund-raising purpose. Comm on Open Gov't FOIL-AO-12689.

County cannot condition disclosure of its vendor lists on requester's assertion that he would not use list for commercial purposes or fund-raising. Comm on Open Gov't FOIL-AO-12816.

Real property inventory prepared by assessors under CLS RPTL § 501 is available to any person for any reason during time specified in notice, but may be withheld at other times under Freedom of Information Law if it would be used for commercial or fund raising purpose. Comm on Open Gov't FOIL-AO-12987.

Home addresses of principals or officers of corporate licensee are not subject to disclosure, as disclosure would likely constitute unwarranted invasion of personal privacy. 1986 Committee on Open Government FOIL-AO-4293.

Although Freedom of Information Law provides broad rights of access, it permits agency to withhold records when disclosure would constitute unwarranted invasion of personal privacy; request for names and addresses of all persons arrested and or convicted of DWI charge in past 3 years will be denied. Comm on Open Gov't FOIL-AO-4581.

Personal information such as home address, home telephone number, or name of person for an employer to contact in case of an emergency, may be withheld from disclosure, but where remainder of record is available, such as faculty members' programs for semester, it will be proper to delete personal information while

disclosing remainder; also, if record is available under Freedom of Information Law it is available for both inspection and copy. Comm on Open Gov't FOIL-AO-4629.

If intra-agency directory containing home addresses and home telephone numbers of public employees is requested, it would likely be proper to delete home addresses and home telephone numbers and make remainder available. Comm on Open Gov't FOIL-AO-4636.

Single record or report may be both accessible and deniable in part under Freedom of Information Law; therefore, agency has obligation to review records sought, in their entirety, to determine which portions, if any, may be justifiably withheld; in context of general investigation, names or other identifying details may be deleted to protect against unwarranted invasion of personal privacy so that all other aspects of documents might be made available. Comm on Open Gov't FOIL-AO-4640.

Provisions in Freedom of Information Law pertaining to privacy are intended to deal with details of lives of natural persons, rather than entities, such as corporations; business addresses of corporate owners of building pertain to their activities as corporate owners; home addresses, however, are likely of little relevance to agency and can be withheld as unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4739.

To extent that information pertains to entities as opposed to persons, provisions concerning personal privacy would not be applicable; even if information does pertain to natural persons, while names and addresses may or not constitute unwarranted invasion of personal privacy, records indicating locations of fires would be accessible. Comm on Open Gov't FOIL-AO-4751.

Bills, vouchers, contracts and similar records involving payments to or expenditures by public employees are relevant to performance of their official duties and as such those types of records would be available on the ground that disclosure would constitute permissible rather than unwarranted invasion of personal privacy; however, some aspects of these records could be deleted as unwarranted invasion of personal privacy, such as public employees' home addresses or social security numbers which have no relevance to performance of one's official duties. Comm on Open Gov't FOIL-AO-4763.

To extent that list identifies contributions made to project by entities, such as corporations or organizations, it would be available because those portions would not identify natural persons; on other hand, to extent that list identifies natural persons and amounts of their contributions, disclosure of identities of those persons would constitute unwarranted invasion of personal privacy and, therefore, could be withheld on that basis. Comm on Open Gov't FOIL-AO-4899.

Names of county employees on list of vendors doing business with county would clearly be accessible where such list indicates payments to public employees who are being paid or reimbursed in relation to performance of their official duties; inclusion of names of public employees also pertains to those persons in relation to their governmental activities, and disclosure of their identities would constitute permissible rather than unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-12816.

Insofar as county vendor list identifies public employees and includes their home addresses, such addresses, under CLS Pub O § 89(7), may be withheld; if list does not contain public employees' home addresses, but rather their work addresses, list would be available in its entirety. Comm on Open Gov't FOIL-AO-12816.

Registration records maintained by county board of elections are accessible to public under CLS Elec § 3-220; nothing in Freedom of Information Law may be asserted to withhold such records, even though certain items in each record might justifiably be denied as unwarranted invasion of personal privacy if contained in other kinds of records. Comm on Open Gov't FOIL-AO-12823.

City is not required to disclose records identifiable to individuals based on age-related characteristic. Comm on Open Gov't FOIL-AO-13342.

Names and addresses of toddlers participating in city program, or those of their parents, may clearly be withheld to protect their privacy; however, through permissible disclosure of zip codes, requester could likely determine extent of participation by nonresidents without obtaining or needing their names and addresses. Comm on Open Gov't FOIL-AO-13342.

While portions of payment requisitions and certified payroll of private company with which school district has contracted are accessible under Freedom of Information Law insofar as they are reflective of titles, duties, wages, hours worked and similar data, disclosure of personally identifiable details pertaining to employees of private company may be deleted or redacted from those records prior to disclosure. Comm on Open Gov't FOIL-AO-16649.

222. —Medical information

Medical information contained in ambulance run record of fire department could be withheld on ground that disclosure can constitute unwarranted invasion of personal privacy, except to extent that record refers to agency name and other information that has already been disclosed by means of motor vehicle accident report. Comm on Open Gov't FOIL-AO-4786.

Freedom of Information Law enables agency to withhold records or portions thereof the disclosure of which would constitute unwarranted invasion of personal privacy; records where requester was falsely accused of serious crimes against some patients in agency where requester worked for years as psychologist would probably identify persons other than requester, such as patients or clients, complainants or informants and, therefore, even if Freedom of Information Law were to apply, significant aspects of records would likely be withheld. Comm on Open Gov't FOIL-AO-4816.

Freedom of Information Law permits agency to withhold records when disclosure would result in unwarranted invasion of personal privacy which includes medical information. Comm on Open Gov't FOIL-AO-4877.

Portions of reports prepared by fire departments and emergency squads identifying those to whom medical services were rendered, their ages and descriptions of their medical problems or conditions could be withheld under CLS Pub O § 87(2)(b) on ground that disclosure would constitute unwarranted invasion of personal privacy, for disclosure of name coupled with those details would represent personal and somewhat intimate event in individual's life. Comm on Open Gov't FOIL-AO-7532.

Records involving incidence of animal bites is available under Freedom of Information Law, except to extent disclosure would constitute unwarranted invasion of personal privacy in accordance with CLS Pub O §§ 87(2)(b) and 89(2)(b); names of person bitten and other identifying details pertaining to those persons could justifiably be withheld or deleted from records on ground that disclosure would result in unwarranted invasion of personal privacy. Although name, address, telephone number or other personally identifiable details concerning dog bite victim could properly be withheld under CLS Pub O § 87(2)(b), location of dog bite incident, description of how bite occurred and name of health professional who provided treatment would be available; if identifying details are deleted, those other items would be available, for they would not identify victim of dog bite. Comm on Open Gov't FOIL-AO-7609.

Records of claims based upon medical treatment of public employee or members of employee's family could be withheld due to considerations of privacy. Comm on Open Gov't FOIL-AO-7623.

New York State Cancer Registry records of cancer site specific diagnoses and deaths from period 1976-1997 for particular county should be disclosed under Freedom of Information Law since such data would not, under terms of CLS Pub Health § 2402, "disclose the identity of any person" and would not be unwarranted invasion of personal privacy; anyone anywhere could interview persons residing in particular locale and question them about incidence of certain diseases and any such disclosures, which would not be required by law, would be irrelevant to authority to withhold records. Comm on Open Gov't FOIL-AO-12402.

Record of medical emergency call consists in great measure of what might be characterized as medical record or history relating to person needing care or service; thus, portions of records identifying those to whom medical services were rendered, their ages, and descriptions of their medical problems or conditions could be withheld, while other aspects of records, such as locations of calls or addresses, should be disclosed. Emergency call, particularly when sirens or flashing lights are used, is event of

public nature, and thus when fire truck or ambulance travels to its destination, that destination is or can be known to those in vicinity of event, and disclosure of address or brief description of event would not likely constitute unwarranted invasion of personal privacy; also, presence of emergency vehicle does not necessarily indicate that there is medical problem since those vehicles are dispatched for any number of reasons, many of which do not relate to medical event. Comm on Open Gov't FOIL-AO-12608.

Names of municipal employees or family members coupled with amounts of reimbursements appearing on vouchers would, if disclosed, constitute unwarranted invasion of personal privacy, even though they do not indicate particular medical condition or problem, since items of that nature are largely irrelevant to performance of one's official duties, and vouchers indicating treatment, or particularly frequency of treatment, and amounts reimbursed, represent intimate details of peoples' lives. Comm on Open Gov't FOIL-AO-12692.

Death of person while in police custody is event of public nature and thus disclosure does not constitute unwarranted invasion of personal privacy; however, medical records (and perhaps other aspects of records relating to deceased, family members, or witnesses) might be withheld on ground that disclosure would constitute unwarranted invasion of privacy. Comm on Open Gov't OML-AO-3158.

223. —Personal Privacy Protection Act

Personal Privacy Protection Law applies to state agencies and does not apply to units of local government such as county; however, under Freedom of Information Law, agency may deny access to record that falls within one or more of grounds of denial, but is not generally required to do so. Comm on Open Gov't FOIL-AO-4678.

If disclosure of records maintained by state agency would result in unwarranted invasion of personal privacy, Personal Privacy Protection Law and Freedom of Information Law would prohibit disclosure; written reprimands pertaining to employees that were issued for failure to report suspected child abuse are accessible under Freedom of Information Law; however, to extent that those records identify patients, those details should be deleted to protect against unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4683.

While Personal Privacy Protection Law, when read in conjunction with Freedom of Information Law, precludes agency from publicly releasing records, which, if disclosed, would constitute unwarranted invasion of personal privacy, Personal Privacy Protection Law preserves rights granted by Freedom of Information Law. Comm on Open Gov't FOIL-AO-4708.

To extent that lists of lobbyists registered with Temporary State Commission on Lobbying identify entities, rather than natural persons, provisions concerning protection of personal privacy appearing in both Freedom of Information Law and Personal Privacy Protection Law are inapplicable; also, since report required to be prepared by Commission must include listing of lobbyists, and is available to public, Freedom of Information Law could not be asserted to withhold list from any member of public, irrespective of possible use of lists. Comm on Open Gov't FOIL-AO-4895.

Clemency application, and perhaps related documentation, would likely constitute unwarranted invasion of personal privacy if disclosed, particularly if materials contain information regarding applicant's medical condition. When Freedom of Information Law and Personal Privacy Protection Law are read in conjunction with one another, state agency cannot release records when disclosure would result in unwarranted invasion of personal privacy, unless disclosure is otherwise permitted by § 96; therefore, where disclosure would constitute unwarranted invasion of personal privacy, in order to acquire records, consent to disclose as described in § 96(1)(a) would be needed to obtain them. Comm on Open Gov't FOIL-AO-7586.

Records introduced into evidence or disclosed during public judicial proceeding must be disclosed; also, if certain crime scene photos have been disclosed, as evidence or otherwise, it is questionable or perhaps unlikely that others involving same locations or persons would reveal more, in terms of invasion of personal privacy, than those previously disclosed. It would be difficult to justify denial of access to significant portions of criminal investigation records based on claim that disclosure would result in unwarranted invasion of privacy, even though there had not been trial, where substantial disclosures about defendant, his family, victims and community were made and disseminated over lengthy period of time both locally and nationally. Psychological records held by District Attorney and relating to criminal defendant might be withheld under CLS Pub O §§ 87(2)(b) and 89(2)(b); however, it might be in public interest, as well as positive law enforcement function, to disclose details concerning defendant's life since consideration of patterns of behavior and development of data about behavior may enable school and law enforcement officials to recognize inclination or proclivity to commit violent or antisocial acts, and preventive measures might be taken to prevent those acts from occurring. Comm on Open Gov't FOIL-AO-12579.

224. —Police, generally

225. — —Confidential informants

Office of State Inspector General, which investigates allegations of fraud, corruption, waste and abuse within covered agencies, may redact from reports names and other identifying details concerning sources and witnesses under Freedom of Information Law on grounds that records were compiled for law enforcement purposes which, if disclosed, would identify confidential source, constitute unwarranted invasion of personal privacy, constitute information of personal nature that is not relevant to work of agency, constitute interagency or intra-agency materials which are not statistical or factual tabulations or data, instructions to staff or final agency policy, and finally disclosure of names of informants and witnesses could endanger life or safety of such informant or witness. 1986 Committee on Open Government FOIL-AO-4251.

To extent that codefendants' statements held deleted materials which identified codefendants, it does not appear that withholding of their names was justifiable because disclosure of codefendants' names and addresses during trial would indicate that they are not "confidential" informants; further, due to those disclosures, release of their names would not constitute unwarranted invasion of personal privacy; however, if names withheld pertain to persons other than codefendants identified during trial, it is possible that those persons are confidential informants or that disclosure of their identities would result in unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4851.

226. — —Discipline, misconduct and the like

To extent that charges of misconduct against police officer are dismissed or allegations are found to be without merit, records related to and including such charges or allegations may be withheld to prevent unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-7602.

Statements regarding Chief of Police's conduct made by city police officers and state troopers would be accessible to Chief or his attorney, including portions of records indicating officers' and troopers' identities. Comm on Open Gov't FOIL-AO-13288.

227. — —Work-related records, including attendance

Police roll call or attendance record will not likely be characterized as record compiled for law enforcement purposes, rather, it appears to be record prepared in ordinary course of business; with exception of police officers' home addresses, roll call reports are available, because disclosure would result in permissible rather than unwarranted invasion of personal privacy; blanket denial of records may be inappropriate when only portions of records may be deniable, with remainder excessible. Comm on Open Gov't FOIL-AO-4694.

If home addresses have not previously been disclosed, they may be withheld on ground that disclosure would constitute unwarranted invasion of personal privacy; also, sign in log for auxiliary police officers containing names of officers and times and dates they performed their duties or training should be made available under Freedom of Information Law. Comm on Open Gov't FOIL-AO-4728.

Where names of employees were whited out in detective's report which requester received, justification for such deletion is

that disclosure would constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4900.

With respect to records indicating arrests that did not result in convictions, disclosure would constitute unwarranted invasion of personal privacy; however, with respect to records of arrests for which underlying charges are still pending, those records generally would be accessible pursuant to Freedom of Information Law because records maintained by law enforcement agencies, as well as courts, indicating arrests and charges are in most instances accessible to public. Comm on Open Gov't FOIL-AO-4983.

Disclosure of minimal details about homicide victims can not be characterized as unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-10122.

Information contained in boxes indicating race and ethnicity on city police Field Interview Forms (FIFs) would be accessible, absent personally identifying details or other data collected and included in FIFs. Comm on Open Gov't FOIL-AO-12565.

As nature and amount of information disclosed to public relating to criminal investigation or proceeding increases, extent to which Freedom of Information Law exception concerning privacy decreases. Comm on Open Gov't FOIL-AO-12579.

228. —Prisons and prisoners, generally

Where requester requests commitment papers, which include person's sentence, probation officer's report, fingerprints, medical, psychiatric and other records, of co-defendants, this request would likely be withheld on ground that disclosure would constitute an unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4682.

Records pertaining to public employees that are relevant to performance of their official duties are generally available, however, where names do not pertain to public employees acting in performance of their official duties, it might be appropriately contended that interest in protecting privacy outweighs general duty to disclose, and that disclosure would constitute unwarranted invasion of personal privacy; disclosure of identifying details concerning inmates within reports would result in unwarranted invasion of personal privacy and such identifying details could be withheld on that basis. Comm on Open Gov't FOIL-AO-4736.

"Clemency request" made to Governor by member of news media on behalf of inmate was subject to rights conferred by Freedom of Information Law; however, there could be privacy implications relating to author of application, inmate and perhaps others which would justify denial of disclosure under CLS Pub O § 87(2)(b). Comm on Open Gov't FOIL-AO-7568.

Disclosure that inmate requested notary services, without more, does not represent significant invasion of privacy, but any notation in records regarding inmate's reason for seeking notary services should be withheld. Comm on Open Gov't FOIL-AO-9870.

Personally identifying details pertaining to members of public who transmitted communications to county local conditional release commission regarding its decision to vote to release certain inmate may be deleted on ground that disclosure would constitute unwarranted invasion of those persons' privacy. Comm on Open Gov't OML-AO-3784.

229. —Location of specific prisoners

Request for names, Department of Correctional Services numbers and locations of all inmates housed in certain sections of correctional facility should be made readily accessible for inspection because it does not result in unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4901.

230. —Videotapes

If local law enforcement authorities maintain videotapes of camera surveillance of persons confined in local jails, such videotapes constitute "records" subject to rights of access granted by Freedom of Information Law, however, as such videotapes may show intimate details of peoples' lives, disclosure may constitute unwarranted invasion of personal privacy of persons on such tapes. 1986 Committee on Open Government FOIL-AO-4335.

Once department of correctional services enables inmates' attorneys to view video tapes, department has waived its capacity to deny request by either inmate, who is subject of tape, or attorney of inmate who is acting in representative capacity on behalf of inmate; similarly, if viewing tape did not constitute unwarranted invasion of personal privacy of employees involved, disclosure of duplicate of tape would not constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4697.

231. —Religious matters

Record reflective of demonstration of personal religious beliefs or activities can be withheld from disclosure under Freedom of Information Law on ground that disclosure would constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-9365.

232. —Representatives requesting information on behalf of others

Purpose for obtaining consent of third person when requesting records is to make records available to that third party when record sought might otherwise be withheld on basis that disclosure would constitute unwarranted invasion of personal privacy of person to whom records pertain. Comm on Open Gov't FOIL-AO-4659.

"Clemency request" made to Governor by member of news media on behalf of inmate was subject to rights conferred by Freedom of Information Law; however, there could be privacy implications relating to author of application, inmate and perhaps others which would justify denial of disclosure under CLS Pub O § 87(2)(b). Comm on Open Gov't FOIL-AO-7568.

Privacy was not at issue with respect to attendance and payroll records requested by employee's wife on his behalf, as records essentially pertained to employee himself, and person cannot engage in unwarranted invasion of his or her own privacy. Comm on Open Gov't FOIL-AO-10144.

Assuming that no other ground for denial is applicable, request made by subject of request for records pertaining to him, or by his representative who has obtained written release authorizing disclosure to representative, cannot be denied based on CLS Pub O § 87(2)(b); however, to extent that persons other than applicant are identified in records, privacy considerations may arise relative to those individuals warranting deletion of identifying details or certain portions of records. Comm on Open Gov't FOIL-AO-10166.

233. —Veterans' affairs

Sole item that could be withheld from record of certificate of honorable discharge given to veteran would be social security number (assuming record is not sealed under CLS Civ R § 79-g), since local government agencies may withhold social security numbers on ground that disclosure would constitute "an unwarranted invasion of personal privacy," but they are not required to do so. Comm on Open Gov't FOIL-AO-12688.

234. —Waiver

Municipal agency may withhold records when disclosure would constitute unwarranted invasion of personal privacy; however, there is no obligation to do so; if only basis for withholding records concerns unwarranted invasion of personal privacy, and if subject of records consents to disclosure, thereby waiving protection of privacy, records would become available under Freedom of Information Law. 1986 Committee on Open Government FOIL-AO-4211.

State police could not require notarized waiver executed by administrator of decedent's estate prior to releasing its investigation of suicide death of requestor's sister, as records about decedents are generally public except for any portions which if disclosed would "disgrace the memory" of decedent. Comm on Open Gov't FOIL-AO-10372.

Disclosure of evidence or information collected during investigation, before final determination regarding validity of allegations, may represent unwarranted invasion of personal privacy. Comm on Open Govt FOIL-AO-3682.

Privacy provisions are intended to enable agency to withhold records under appropriate circumstances, when records pertain to natural persons; therefore, grounds for denial concerning protection of personal privacy would not apply where entries in receipt book refer to firms, rather than natural persons. Comm On Open Gov't FOIL-AO-3922.

Exceptions to disclosure requirements based on unwarranted invasion of personal privacy pertains to natural persons and is not applicable to entities, and public agencies have no common-law public interest privilege that would allow agency to withhold information which it would otherwise be required to disclose under Freedom of Information Law. 1986 Committee on Open Government FOIL-AO-4202.

Unwarranted invasion of personal privacy under Freedom of Information Law pertains only to privacy of individuals, so to extent that list of names and addresses pertains to businesses or corporations, it would not constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4584.

Interdepartmental referral reports and handwritten notes of public officers may contain personally identifiable details which might, if disclosed, result in unwarranted invasion of personal privacy; however, with respect to summonses and accompanying affidavits of service issued by agencies, as general matter, they are available under Freedom of Information Law. Comm on Open Gov't FOIL-AO-4635.

Agency may withhold records or portions thereof disclosure of which would constitute unwarranted invasion of personal privacy; further, agency may delete identifying details when it makes records available to protect against unwarranted invasions of personal privacy; these same principles and procedures can be applied with respect to CLS Civ R § 50-b, which is intended to guarantee that identity of victim of sex offense, who was under age of 18 at time of alleged commission of offense, remain confidential. Comm on Open Gov't FOIL-AO-4647.

Questionnaires, sent to firms interested in selling electronic voting machines to city by commissioner of New York City Department of General Services, would, if disclosed, enable one firm to gain advantage over competitor or impair city's ability to reach optimal agreement; as such, requester for questionnaire may justifiably be denied access; agency may withhold records or portions thereof disclosure of which would constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4665.

Unwarranted invasion of privacy is intended to apply to records that identify individuals rather than corporations, partnerships or other such entities; to extent that purchasers or sellers are not natural persons, names and addresses are likely to be available. Comm on Open Gov't FOIL-AO-4792.

When complaint is made, there may be considerations of privacy that properly result in denial of access to records or perhaps deletion of identifying details to protect against unwarranted invasion of personal privacy; however, if complaint was sent by person who made it to members of news media, disclosure would not result in unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4946.

Not every record maintained by government that identifies particular individuals would, if disclosed, result in unwarranted invasion of personal privacy; rather, either by means of judicial decisions or pursuant to statutes, many records containing personally identifiable details are accessible to public because disclosure would result in permissible invasion of privacy; although records such as voter registration lists and assessment rolls, identify individuals and their addresses, state legislature and courts have determined they are available, despite possibility of invasion of one's privacy and those records may be used by any person for similar or unrelated purposes; therefore, if Freedom of Information Law applied, use of information would not constitute unwarranted invasion of personal privacy, because information is available to public. Comm on Open Gov't FOIL-AO-4949.

Where record pertains to particular individual and, therefore, is available only to that person because disclosure might constitute unwarranted invasion of personal property under CLS Pub O § 87(2)(b) if disclosed to others, subject of record may authorize another person to seek and obtain record on his or her behalf. Comm on Open Gov't FOIL-AO-7566.

CLS Pub O § 87(2)(b) is intended to pertain to natural persons, but not to entities or persons acting in business capacities. Comm on Open Gov't FOIL-AO-9454.

Privacy provisions of Freedom of Information Law do not apply when records identify commercial entities or persons acting in their business capacities. Comm on Open Gov't FOIL-AO-9888.

To extent that records sought by Public Service Commission from Niagara Mohawk Power Corporation related to employees and other individuals in their professional or business capacities, Freedom of Information Law privacy provisions did not apply; however, names or other details pertaining to natural persons could be deleted insofar as requested records involved other aspects. Comm on Open Gov't FOIL-AO-9911.

Freedom of Information Law exception concerning protection of personal privacy pertains to natural persons, not corporate entities. Comm on Open Gov't FOIL-AO-10050.

Provisions in Freedom of Information Law pertaining to protection of personal privacy may not be asserted to withhold records pertaining to entities other than natural persons. Commercial use exception would not apply to disclosure of Citywide Facility Inventory Database (CFID) maintained and made available by New York City Department of Environmental Protection (DEP), since provisions pertaining to protection of personal privacy involve items relating to natural persons, and database related only to business entities. Comm on Open Gov't FOIL-AO-12559.

Local government may opt to disclose personal information, even when disclosure would result in unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-12594.

School district would be required to disclose record or records identifying applicants for vacancy on board of education; fact that person has applied to fill vacancy in what ordinarily is elective office would not represent disclosure of intimate personal detail or would, therefore, constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-12918.

In determining rights of access to "application letters" and resumes of applicants for school board vacancy, applicant's employment history (other than public employment) may be withheld; medical information may be withheld, as well as other details, such as social security number; however, some details within records would not rise to level of unwarranted invasion of personal privacy if disclosed, such as applicant's general educational background. Comm on Open Gov't FOIL-AO-12918.

Records identifiable to users of library could be withheld on ground either that (1) disclosure would constitute "an unwarranted invasion of personal privacy" under CLS Pub O § 87(2)(b), or (2) CLS CPLR § 4509, if such statute applies. Comm on Open Gov't FOIL-AO-13308.

Person's name, coupled with reason for his or her absence on day of election, would constitute unwarranted invasion of privacy. Comm on Open Gov't FOIL-AO-13443.

Income tax forms or other personal financial information submitted by senior citizens seeking STAR exemptions may be withheld from public. Comm on Open Gov't FOIL-AO-13630.

Disclosure of names of board members and district employees to whom laptop computers were issued, and list of inappropriate personal purposes for which computer issued to each person was used, would not constitute unwarranted invasion of person privacy, since identities of those to whom computers were issued related to performance of those persons' functions and duties as officers or employees of government agency, and information regarding personal use of computers pertained to use of school district computers, not to their use by any particular individual. Comm on Open Gov't FOIL-AO-16407.

Recipients' responses to survey conducted by public agency would be accessible under Freedom of Information Law if recipients were informed that their responses would be made available, or if their responses were anonymous, but if they were given no indication that their names and/or addresses would be disclosed, and those items were included in their responses, then disclosure of those or other personally identifying details would result in unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-16618.

City could honor request of donor to remain anonymous with regard to donation received by city to clean up property that was ravaged by fire since disclosure would have constituted unwarranted invasion of privacy. Comm on Open Gov't OML-AO-2440.

235. Impairment of contract awards or collective bargaining negotiations (§ 87(2)(c)), generally

236. —Bids and bidding

If agency seeks bid regarding purchase of particular goods or services, and request is made for bid prior to date for final

submission of bids, bids might justifiably be withheld on ground that disclosure would impair present or imminent contract award; however, any bid that results in contract between agency and firm that supplies goods or services is available to public under Freedom of Information Law. Comm on Open Govt FOIL-AO-3432.

Section 87[2][c] of FOIL may generally be invoked when disclosure would place agency in unfair or disadvantageous position in negotiation process, or when premature disclosure of bids would give one or more bidders an advantage over other possible bidders prior to deadline for submission of bids to agency. Comm on Open Gov't FOIL-AO-4080.

Questionnaires, sent to firms interested in bidding to sell electronic voting machines to city by commissioner of New York City Department of General Services, would, if disclosed, enable one firm to gain advantage over competitor or impair city's ability to reach optimal agreement; as such, requester for questionnaire may justifiably be denied access; agency may withhold records or portions thereof disclosure of which would constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4665.

If a proposed expenditure by a city refers to services that must be negotiated with contractors or that are subject to bidding requirements, disclosure of those figures might enable contractors to tailor their bids accordingly, to the potential detriment of the District and its taxpayers. To the extent that disclosure would "impair" the process of awarding contracts or collective bargaining negotiations, then those portions of the work papers could be withheld. Comm on Open Gov't FOIL-AO-6242 (1990).

Prior to deadline for submission of bids, disclosure of bids to another possible submitter might provide that person or firm with unfair advantage vis a vis those who have already submitted bids; further, disclosure of identities of bidders or number of bidders might enable another potential bidder to tailor his bid in manner that provides him with unfair advantage in bidding process; thus, in such situation, harm or "impairment" would likely be result, and disclosure of records could justifiably be denied. Comm on Open Gov't FOIL-AO-7563.

Denial of access to records regarding soon-to-expire contract because school board is involved in new RFP process is unjustifiable; if anything, disclosure of existing contract and successful proposal that served as basis for award of that contract would likely enhance bidding process recently begun by board. Comm on Open Gov't FOIL-AO-13400.

237. —Collective bargaining negotiations

Contract between school district and superintendent does not fall within exemption for records which, if disclosed, would impair collective bargaining negotiations since, as general matter, contract into which unit of government enters must be made available to public once it has been approved. Committee on Open Government FOIL-AO-3333.

School district did not have justifiable basis under CLS Pub O § 87(2)(c) to deny request for disclosure of tentative contract agreement between teachers' union and district, where tentative agreement had been distributed to news media and to hundreds of union members for review. Comm on Open Gov't FOIL-AO-10005.

Information concerning school superintendent's salary could not be withheld based on perceived effect on collective negotiations, where there was insufficient relationship between superintendent's contract with school board and school district's negotiations with employees' union, as salary information is clearly public, and collective negotiations' exception under Freedom of Information Law does not apply to salary of someone outside bargaining unit; if valid offer was made and validly accepted, record in question would represent final agency determination available under CLS Pub O 87(2)(g)(iii). Comm on Open Gov't FOIL-AO-10209.

To extent that disclosure would reveal city's collective bargaining strategy in relation to present or imminent collective bargaining negotiations or hamper ability of city to engage in negotiations optimal to its taxpayers, it is likely that CLS Pub O § 87(2)(c) could be asserted to prevent disclosure of documents and memoranda relating to negotiations and discussions of future contract between city and police officers. Comm on Open Gov't FOIL-AO-12655.

When deadline for submission of bids has been reached, all of submitters are on equal footing and agency is generally obliged to accept lowest appropriate bid; thus, in such situation, disclosure of bids would be available under Freedom of Information Law. Even though deadline for submission of responses to request for proposals might have passed, agency may engage in negotiations or evaluations with bid submitters resulting in alterations in proposals or costs; thus, whether disclosure at that juncture would impair process of awarding contract is question of fact. Comm on Open Gov't FOIL-AO-7563.

If there is no inequality of knowledge between or among parties to negotiations, and if records have been shared or exchanged by parties, it is questionable and difficult to envision how disclosure would impair present or imminent contract awards; further, if lease or contract has been signed, negotiations have presumably ended and any impairment that might have existed prior to consummation of agreement would essentially have disappeared. Comm on Open Gov't FOIL-AO-7593.

Assuming that request for proposal related to contract that had already been awarded by State University of New York College at Farmingdale and was in possession of College, it appeared to be available under Freedom of Information Law. Comm on Open Gov't FOIL-AO-7871.

When there is no inequality of knowledge between or among parties to negotiations, or if records have been shared or exchanged by parties, it is questionable and difficult to envision how disclosure would "impair present or imminent contract awards" within meaning of CLS Pub O § 87(2)(c). Comm on Open Gov't FOIL-AO-7936.

If contracts under immigration initiatives request for proposals had been awarded and executed by city borough and were merely pending registration by comptroller, there would be no basis for denial of access under Freedom of Information Law since disclosure could not impair present or imminent contract awards or collective bargaining negotiations within meaning of CLS Pub O § 87(2)(c). Comm on Open Gov't FOIL-AO-9439.

Where there are no other parties involved or potentially involved in lease negotiations, it is questionable whether disclosure of information pertaining to negotiations could "impair" contracting process and, thus, justify withholding of information. Fair market value of rental property may be withheld under CLS Pub O § 87(2)(c) where such value is determined by appraisal prior to consummation of transaction. Comm on Open Gov't FOIL-AO-9500.

CLS Pub O § 87(2)(c) permits withholding of requested records, even where disclosure would not impair contracting process with respect to those involved in process, if disclosure would impair different concurrent and related contract negotiations. Comm on Open Gov't FOIL-AO-9512.

With regard to request for detailed work plan offered by one of parties involved in litigation with village, if village and other parties to litigation were aware of content of records at issue, CLS Pub O § 87(2)(c) could not justifiably be asserted to withhold records in question. Comm on Open Gov't FOIL-AO-9641.

Survey prepared by independent professional surveyor in conjunction with county watershed project did not contain kind of information found to be deniable under CLS Pub O § 87(2)(c). Comm on Open Gov't FOIL-AO-9844.

If county is currently involved in award of contracts or collective bargaining negotiations, some aspects of petitions regarding requests for county occupancy tax allocations (but probably not all aspects) could be withheld under CLS Pub O § 87(2)(c). Comm on Open Gov't FOIL-AO-10402.

Contract awards exception would not apply to disclosure of Citywide Facility Inventory Database (CFID) maintained and made available by New York City Department of Environmental Protection (DEP). Comm on Open Gov't FOIL-AO-12559.

Disclosure of Letter of Intent between New York City Economic Development Corporation (EDC) and New York Stock Exchange (NYSE) regarding development of new NYSE location would "impair present or imminent contract awards" and thus denial of disclosure request was consistent with law; while contents of Letter of Intent were known by and in possession of NYSE and

EDC, its contents were not known to other parties involved or potentially involved in negotiations regarding project. Comm on Open Gov't FOIL-AO-12604.

Disclosure of letter of intent would "impair" present or imminent contract awards, and thus denial of request for access was consistent with Freedom of Information Law, where contents of letter were known by and in possession of parties (New York Stock Exchange and NYC Economic Development Corporation (EDC)), and letter's contents were not known to other parties involved or potentially involved in negotiations regarding project (construction of new stock exchange). Comm on Open Gov't FOIL-AO-12727.

CLS Pub O § 87(2)(c) did not justify blanket denial by Empire State Development Corporation (ESDC) of request for "any and all memoranda of agreement ... [between ESDC and realty trust] regarding the development of the Farley Post Office, and any subsequent correspondence among the parties or their representatives" pertaining to that agreement, since agreement and award already been made and since revoked and it did not appear that any contract award was "present or imminent." Comm on Open Gov't FOIL-AO-16473.

County could not refuse to disclose tentative labor agreement based on exemption under CLS Pub O § 87(2)(c), since tentative agreement had already been disseminated to school officials, union leaders and 630 teachers, and disclosure would not result in any inequality of knowledge. Comm on Open Gov't FOIL-AO-16610.

Village may be entitled to invoke CLS Pub O § 87(2)(c) to prevent disclosure of contract negotiations regarding park land where premature disclosure of appraised value of real property would have placed village at disadvantage in negotiating process. Comm on Open Gov't OML-AO-3764.

If there is no possibility that other consulting firms may be involved in negotiations with pension fund boards, it is difficult to envision how disclosure of names of such 2 firms would "impair" ability of fund to reach optimal agreement within meaning of CLS Pub O § 87(2)(c); thus, disclosure is required under Freedom of Information Law. Comm on Open Gov't OML-AO-3931.

238. Trade secrets (§ 87(2)(d)), generally

239. —Computer programs

Since data are not secret, but rather are reflective of law, and since State Legislature is not commercial enterprise, CLS Pub O § 87(2)(d) could not validly be asserted as basis for denial of request for latest block assignment list, or boundary files, in digital format that are used to create computer representations of State Senate and Assembly legislative districts, along with attribute information for each of these districts. Comm on Open Gov't FOIL-AO-8561.

Neither CLS Pub O § 87(2)(d) or any other ground may be asserted for denial of access for software developed "with the intent that it be freely shared with other counties." Comm on Open Gov't FOIL-AO-12920.

If it can be concluded that software developed by county is being used as commercial product in competitive market, it might justifiably be withheld under CLS Pub O § 87(2)(d). Comm on Open Gov't FOIL-AO-13002.

240. —Responses to "Requests for Proposals" (RFPs)

Where party requests disclosure of responses to request for proposals (RFP), question under CLS Pub O § 87(2)(d) involves extent, if any, to which disclosure would cause substantial injury to competitive position of firms responding to RFP's; if, for example, data could be used to ascertain value of entity's property or involves significant financial information, it might be contended that certain of data might, if disclosed, cause substantial injury to its competitive position. Nature of records and area of commerce in which profit-making entity is involved would be factors used to determine extent to which disclosure of records would cause substantial injury to competitive position of enterprise; thus, proper assertion of CLS Pub O § 87(2)(d) would be dependent on facts and effect of disclosure on competitive position of entity to which records relate. Comm on Open Gov't FOIL-AO-7563.

Commercial entities, upon submission of records to state agencies, may seek to prevent disclosure by seeking protection offered to trade secrets; however, Freedom of Information Law is not applied to records prepared by agency concerning commercial entities; if information sought may generally be known or could be known within insurance industry, disclosure would not cause substantial injury to competitive position of subject enterprise or enterprises. Comm on Open Gov't FOIL-AO-4639.

Freedom of Information Law pertains to existing records maintained by agencies and does not generally require agencies to answer questions or prepare or create records in response to request; when requesting information, requester should specify that certain records are sought instead of simply asking questions. Comm on Open Gov't FOIL-AO-4843.

Financial data, such as compilation of information pertaining to firm, might be characterized as trade secret, depending upon nature of competition within industry or endeavor, and effects of disclosure. Comm on Open Gov't FOIL-AO-4959.

Survey prepared by independent professional surveyor in conjunction with county watershed project did not contain kind of information found to be deniable under CLS Pub O § 87(2)(d) as (1) information sought was not available solely from government in that any surveyor presumably could prepare similar record, and (2) request was not made by competitor or in context in which competition from person or firm in business of surveying was pertinent. Comm on Open Gov't FOIL-AO-9844.

Lease agreement between state Department of Transportation (DOT) and British corporation, providing for tenant's private management of public airport (Stewart International Airport in Orange County), was not exempt from disclosure under CLS Pub O § 87(2)(d) on ground that tenant had invested great deal of time to learn how to properly lease and operate airport in United States in that (1) other agreements involving private management of public airports are customarily disclosed, (2) tenant's relative lack of knowledge and experience concerning operation of airports in United States had no bearing on public's rights of access, (3) many aspects of lease agreement were standard and would not give advantage to competitors if disclosed, (4) any unusual or unique elements were particular to Stewart airport and would not be applicable in negotiations involving other airports, and (5) fact that agreement required tenant's Capital Improvement Plan (CIP) to be filed with FAA, and CIP would be made public, diminished justification for denial of access. Comm on Open Gov't FOIL-AO-12208.

Nature of record, area of commerce in which commercial entity is involved, and presence of certain conditions (i.e., extent to which information is known outside business; extent to which it is known by business' employees and others involved in business; extent of measures taken by business to guard secrecy of information; value of information to business and to its competitors; amount of effort or money expended by business in developing information; and ease or difficulty with which information could be properly acquired or duplicated by others) that must be found to characterize records as trade secrets would be factors used to determine extent to which disclosure would "cause substantial injury to the competitive position" of commercial enterprise. Foreign bank's records in connection with litigation, submitted to state Banking Department, would be exempt from FOIL disclosure where records would be unavailable elsewhere, and disclosure would cause substantial injury to its competitive position. Comm on Open Gov't FOIL-AO-12376.

When commercial entity is required to submit records to state agency under CLS Pub O § 89(5), it may request, at time of submission, that records or portions thereof be kept confidential in accordance with CLS Pub O § 87(2)(d). CLS Pub O §§ 87(2)(d) and 89(5) would not be applicable and would not serve as basis for denial of access under Freedom of Information Law where materials redacted by state university involved terms of negotiated agreements developed by parties to those agreements, and they were not records that were submitted to university by commercial enterprise. Redacted portions of state university vendor contracts (i.e., numeric figures) were not "trade secrets" and likely would not cause substantial injury to competitive position of subject enterprises where they were not analogous to process, formula, or financial information which showed strengths or weaknesses of

entity; rather, they indicated amounts to be paid and received as result of negotiation between 2 parties, and thus that kind of information should be disclosed. Comm on Open Gov't FOIL-AO-12656.

Disclosure of employers' policy expiration dates, even without name of insurance carrier, would cause competitive harm to New York State Insurance Fund (NYSIF) since expiration date is most significant aspect of database in context of marketing, and disclosure would not enable the NYSIF "to compete on an equal basis" with other carriers; also, disclosure would likely have additional effect of raising premiums of employers who could least afford higher cost of doing business. Comm on Open Gov't FOIL-AO-12657.

If reproduction of copyrighted architectural plans and similar records would "cause substantial injury to the competitive position of the subject enterprise," i.e., holder of copyright, in conjunction with CLS Pub O § 87(2)(d), agency could preclude reproduction of work; however, if reproduction of work would not result in substantial injury to competitive position of copyright holder, such exception would not apply. Comm on Open Gov't FOIL-AO-12830.

Portions of forms regarding private entities' applications under Empire Zones program may be withheld as trade secrets where they relate to "projected" purchases of real property. Comm on Open Gov't FOIL-AO-12890.

Assertion of trade secret exception is dependent on passage of time; value of information to competitors, and, therefore, potentially harmful effects of disclosure, continually diminish with passage of time. Comm on Open Gov't FOIL-AO-12890.

Information on application form under Empire Zones program such as "Total Annual Sales Projected for Zone Facility," if projected or current, could likely be withheld as trade secret; however, if such figure appears in applications prepared previously, it may be accessible. Comm on Open Gov't FOIL-AO-12890.

Disclosure could apparently "cause substantial injury to the competitive position" of group of self-insured trusts under Workers' Compensation Law, and thus CLS Pub O § 87(2)(d) would serve as valid basis for denial of access, where such disclosure would include certain current financial statements prepared as such groups attempted to reach levels of compliance required by new regulations, and disclosure could result in perception that such groups might be weak and, therefore, vulnerable vis a vis their competition. Comm on Open Gov't FOIL-AO-12980.

CLS Pub O § 87(2)(d) potentially serves as ground for denial of access with respect to records prepared by Long Island Power Authority (LIPA), as well as those received from private contractor, given fact that LIPA is engaged in competition with private firms engaged in same area of commercial activity (i.e., power generation). Comm on Open Gov't FOIL-AO-13086.

If deadline for submission of bids on public contract has been reached, and particularly if contract has been awarded, records of bidder's "letter of engagement" would be accessible, irrespective of which version of letter of engagement might be of interest. Comm on Open Gov't FOIL-AO-13327.

"Trade secret" exception to Freedom of Information Law did not exempt Freedom of Information Law disclosure by village of statement filed by cable television provider to substantiate its quarterly franchise fee paid to village, although requester was competing cable television provider, in absence of persuasive evidence that disclosure would result in substantial competitive harm to provider in question or any one particular provider. Comm on Open Gov't FOIL-AO-16555.

241. Law enforcement (§ 87(2)(e)), generally

242. —Confidential source or disclosure (§ 87(2)(e)(iii))

If detective's report can be characterized as record complied for law enforcement purposes, it might be contended that disclosure of names would identify confidential source; however, capacity to withhold on this basis is dependent upon nature of report, its function and whether employees are considered to be confidential sources. Comm on Open Gov't FOIL-AO-4900.

Statement given to police on arrest of codefendant in murder prosection, review of which was sought by defendant's wife after conclusion of prosecution of defendant and codefendant, might be exempt from disclosure under CLS Pub O § 87(2)(e)(iii) if portions of statement might identify confidential source or disclose confidential information relating to criminal investigation. Comm on Open Gov't FOIL-AO-7538.

It was likely that records pertaining to how law enforcement agencies create informants out of various individuals, if they existed, would be exempt from disclosure under CLS Pub O § 87(2)(e)(iii). Comm on Open Gov't FOIL-AO-7582.

Denial of access to state police records relating to much-publicized bombing incident and investigation of suspect, who later committed suicide, was appropriate only to extent that such records described investigative techniques which, if disclosed, would enable potential lawbreakers to evade detection or endanger life or safety of law enforcement personnel. Comm on Open Gov't FOIL-AO-10229.

New York City Department of Transportation should not have denied request for records indicating locations of cameras used in city's Red Light Camera Program since such disclosures are routinely made through distribution of Notices of Liability, and disclosure may be beneficial and proper despite law enforcement exception under FOIL, given possibility that knowledge of camera's location may encourage drivers to obey and comply with law. Comm on Open Gov't FOIL-AO-12412.

CLS Pub O § 87(2)(e)(iii) might properly be asserted to withhold records regarding investigation of county property and employees that ended several years earlier, insofar as they included names or other identifying details pertaining to informants, witnesses and perhaps others. Comm on Open Gov't FOIL-AO-12722.

243. —Investigations or judicial proceedings (§ 87(2)(e)(i)), generally

244. — —Criminal complaint follow-up reports (DD-5s)

It is inappropriate to engage in blanket denials of access to criminal complaint follow-up reports (DD-5's) in every instance in which they are requested; rather, factual context, specific contents of records and effects of their disclosure are factors that must be considered in determining extent to which those records may be withheld or, conversely, must be disclosed. Comm on Open Gov't FOIL-AO-7539.

Determination by police department to engage in blanket denials of requests for disclosure of DD-5's is overly simplistic and is inappropriate as matter of law. Comm on Open Gov't FOIL-AO-7559.

245. — —Grand jury matters

Time and attendance records presented by district attorney to grand jury, which had been prepared in ordinary course of business and not for any law enforcement or grand jury related purpose, were not compiled for law enforcement purposes and thus were not exempt from disclosure under Freedom of Information Law. Comm on Open Gov't FOIL-AO-12036.

Under CLS Pub O § 87(2)(e)(i), status of police investigation as well as contents of any police or investigative reports are determinative in terms of right of access as well as capacity to withhold. Comm on Open Govt FOIL-AO-3422.

Although records compiled for law enforcement purposes which, if disclosed, would interfere with law enforcement investigations or judicial proceedings need not be disclosed, portions of such records which contain information which would not interfere with investigation or proceedings are subject to disclosure. Committee on Open Government FOIL-AO-3808.

Under CLS Pub O § 87(2)(e), lists of property with serial numbers, claimed missing as result of certain burglaries, and lists of property recovered and returned, requested from village of Vincent department of public works and board of education in circumstances where person committing the crimes has been convicted, would be available even if compiled for law enforcement purposes, since harm set forth in those provisions would not occur if related investigations were terminated, and compilation for insurance purposes would not be regarded as compilation for law enforcement purposes. Comm On Open Gov't FOIL-AO-4550.

Records maintained by police department, to extent that they continue to exist, will be subject to rights conferred by Freedom of Information Law; that is not to suggest that all records will be accessible, but that they will be subject to rights of access granted

by Law; as general matter, administrative manuals are accessible pursuant to CLS Pub O § 87(2)(g); however, those manuals prepared or used by law enforcement agencies may be accessible or deniable depending upon effects of disclosure. Comm on Open Gov't FOIL-AO-4661.

To extent that police activity log contains investigative information compiled for law enforcement purposes, only those portions could be withheld that would if disclosed result in harm; the remainder, however, falls outside of that provision; police memo books would constitute interagency materials; nevertheless, they constitute, in part, factual data; even though accessible information may be intertwined with deniable information, agency must extract from record those portions that are available. Comm on Open Gov't FOIL-AO-4756.

Freedom of Information Law cannot justify denial of records consisting of correspondence between county and city homeowners concerning orders to abate lead paint problems based upon fact that records were compiled for law enforcement purposes because investigations were completed, violations were found, and orders were issued to abate problems; also, notice of violation or order to correct hazardous condition would be reflected of final agency determination. Comm on Open Gov't FOIL-AO-4772.

Often records created in ordinary course of business become relevant to investigation; contacts, vouchers, audits and other records that are generally available to public may be used or even become focus of investigations and despite their use or relevance to investigation, those kinds of records, which are not prepared in conjunction with law enforcement investigations, remain available for disclosure. Comm on Open Gov't FOIL-AO-4976.

Even if schedule of fines prepared by adjudication division of city department of consumer affairs could be characterized as record "compiled for law enforcement purposes" within meaning of CLS Pub O § 87(2)(e), it was difficult to envision how disclosure would interfere with law enforcement investigation since any such investigation would have ended when matter reached adjudication division and since it appeared that division conducted quasi-judicial proceedings, rather than judicial proceedings. Comm on Open Gov't FOIL-AO-7533.

CLS Pub O § 87(2)(e)(i) does not allow nondisclosure of information that might, at some point, interfere with investigation; it refers only to disclosure that "would" interfere. Records prepared in ordinary course of business which later become relevant to or used in law enforcement investigation and not thereby transformed into records compiled for law enforcement purposes; if they would have been available prior to their use in law enforcement context, they remain available, notwithstanding their potential use in law enforcement activity. Comm on Open Gov't FOIL-AO-8314.

Although Division of Criminal Justice Services (DCJS) and local law enforcement agencies engage in dissemination agreement under which local agency agrees that data acquired from DCJS will remain confidential; insofar as local government maintains conviction records independent of those acquired from DCJS, such records must be disclosed. Comm on Open Gov't FOIL-AO-8952.

Agency cannot, by means of practice or policy, generally withhold information based upon contention that disclosure would adversely affect future investigations; ability to withhold records under Freedom of Information Law can only be based on effects of disclosure in conjunction with attendant facts. If city department of investigation employee is currently involved in investigation and disclosure of identifying details pertaining to that employee in relation to that investigation would interfere with investigation, records can be withheld under CLS Pub O § 87(2)(e)(i); however, after closing memorandum has been prepared and investigation has been completed, disclosure of identity of employee cannot interfere with investigation. Comm on Open Gov't FOIL-AO-9399.

While Public Service Commission is not criminal law enforcement agency, it can assert CLS Pub O § 87(2)(e)(i) as basis to deny access to investigative records in appropriate circumstances when it is empowered to engage in law enforcement functions; however, if records sought were prepared in ordinary course of business, § 87(2)(e) would likely not justify denial. Comm on Open Gov't FOIL-AO-9911.

Records that established "on call, as needed" classification for county employees constituted civil service classifications created in ordinary course of business, not records compiled for law enforcement purposes, even if they were later used in law enforcement investigation; such records were available inasmuch as they would have been available prior to their use in law enforcement context. Comm on Open Gov't FOIL-AO-10270.

Materials and communications between New York State Department of Law (NYDOL) and United State Environmental Protection Agency (EPA) regarding PCBs in Hudson River were not exempt from disclosure on ground that they were compiled for law enforcement purposes in furtherance of ongoing investigation, where EPA indicated that it did not have law enforcement investigation ongoing, including any type of joint investigation with NYDOL. Comm on Open Gov't FOIL-AO-12034.

CLS Pub O § 87(2)(e) would not likely serve as basis for denial of access to much of information sought regarding murder investigation that ended with suicide by alleged perpetrator. Comm on Open Gov't FOIL-AO-12544.

Police Academy Library would be justified in denying full access to certain police training videos to extent that records in question include descriptions of investigative techniques which if disclosed would either (1) enable potential lawbreakers to evade detection, or (2) endanger lives or safety of law enforcement personnel or others. Comm on Open Gov't FOIL-AO-12748.

Blanket denial of request for "written documentation of the procedure for the issuance of summonses for unleashed dogs in the park by Parks Enforcement Patrol officers" would not be appropriate since enforcement of matters relating to unleashed dogs rarely results in detailed investigations or judicial proceedings that involve incidents resulting in penalties more serious than violations. Comm on Open Gov't FOIL-AO-13107.

246. —Investigative techniques or procedures (§ 87(2)(e)(iv)), generally

Widely used records involving investigative techniques, such as fingerprint and ballistics test, and procedures such as interviewing potential witnesses and viewing crime scenes would not likely fall within scope of denial; authority to deny access under Freedom of Information Law pertains only to those criminal investigative techniques and procedures that are not "routine". Comm on Open Gov't FOIL-AO-4805.

Agreement by chief of police to withhold names of 18 police officers who admitted to off-duty misconduct did not preclude disclosure under Freedom of Information Law; citizens' right to know that public servants are held accountable when they abuse public trust outweighs any advantage that would accrue to municipalities if they could negotiate disciplinary matters with employees with power to suppress terms of settlement. Comm on Open Gov't FOIL-AO-10149.

Law enforcement exception would not apply to disclosure of Citywide Facility Inventory Database (CFID) maintained and made available by New York City Department of Environmental Protection (DEP). Comm on Open Gov't FOIL-AO-12559.

247. —Prisons; prisoners

Records relating to incident that occurred at correctional facility in which inmate sustained personal injuries—including overall directive on search procedures, specially designed program for infirmary command, directions governing persons designated "assaultive" prisoners, and institutional orders devised to govern movements of particular inmates—constituted intra-agency materials that fell within scope of CLS Pub O § 87(2)(g); however, instructions to staff that affect public or agency's policy would be available, while denial of access would be appropriate to extent that records included descriptions of investigative techniques which if disclosed would enable potential lawbreakers to evade detection or endanger lives or safety of law enforcement personnel or others. Comm on Open Gov't FOIL-AO-12561.

Fact that records may relate to litigation, pending or threatened, does not necessarily remove them from the scope of rights of access under the Freedom of Information Law. Comm on Open Govt FOIL-AO 3071.

Agency is obligated to review record or records sought in their entirety to determine which portions if any, may justifiably be denied; extent to which exemption for records compiled for law

enforcement purposes may be asserted is dependent upon whether documents were compiled or received in ordinary course of business, rather than for law enforcement purposes, and upon potentially harmful effects of disclosure. Committee on Open Government FOIL-AO-3840.

Agency report which is prepared solely for litigation is exempt from disclosure under Freedom of Information Law; however, if report is prepared for multiple purposes, one of which involves litigation, Freedom of Information Law would govern rights of access. 1986 Committee on Open Government FOIL-AO-4205.

Policy of withholding information unless crime is solved clearly conflicts with Freedom of Information Law, and that, unless different statute provides contrary direction, individual who may have been victim of crime generally has no right to insist upon confidentiality; concurrently, agency, including police department, is required to review records when request is made to determine extent, if any, to which one or more of grounds for denial might apply. Comm on Open Gov't FOIL-AO-4689.

Records prepared by special prosecutor concerning investigation of district attorney could be characterized as records compiled for law enforcement purpose; however, such records can be withheld only to extent that disclosure would result in harmful effects described in CLS Pub O § 87(2)(e)(i)-(iv). Comm on Open Gov't FOIL-AO-4696.

Disclosure of certain records compiled for law enforcement purposes might, depending upon facts and effects of disclosure, be withheld for while or perhaps forever; however, those same records might in future become available, for harmful effects of disclosure might disappear due to intervening facts. Comm on Open Gov't FOIL-AO-4736.

Records pertaining to suspension of pistol permit might be exempt from disclosure pursuant to CLS Pub O § 87(2)(e) as records compiled for law enforcement purposes. Comm on Open Gov't FOIL-AO-7516.

It was questionable whether schedule of fines prepared by adjudication division of city department of consumer affairs could be characterized as record "compiled for law enforcement purposes" within meaning of CLS Pub O § 87(2)(e) since such schedule would not have been prepared with respect to any specific or individual case, but rather to cases generally that come before adjudication division and, therefore, it likely would constitute record prepared in ordinary course of business rather than for law enforcement purpose. Comm on Open Gov't FOIL-AO-7533.

Categorical denial of request for police records concerning cases that resulted in convictions (including police reports, "memobook entries" and related records) was inconsistent with Freedom of Information Law and its judicial construction; police department must conduct review to identify portions of records that may fall within scope of one or more grounds for denial of access. Comm on Open Gov't FOIL-AO-10038.

Records compiled for law enforcement purposes can only be withheld to extent that disclosure would result in harmful effects described in CLS Pub O § 87(2)(e)(i) through (iv). Comm on Open Gov't FOIL-AO-12438.

Those portions of records of Department of Correctional Services which, if disclosed, would enable potential lawbreakers to evade detection could likely be withheld under Freedom of Information Law; nevertheless, other portions of records might be "routine" and might not, if disclosed, preclude employees from carrying out their duties effectively. Comm on Open Gov't FOIL-AO-12492.

In context of criminal proceedings, variety of information is routinely disclosed: information equivalent to that disclosed during arraignment must be disclosed by police department or prosecutor; once information has been disclosed during public judicial proceeding, grounds for denying access under Freedom of Information Law no longer apply; and, when person is arrested, taken into custody and is committed to county jail, record must be maintained at jail that includes numerous details, all of which must be disclosed. Comm on Open Gov't FOIL-AO-12605.

City records resulting from complaints and calls for investigations concerning activities occurring at property contiguous to applicant's residence might be deniable, while others would require disclosure, where portions, if disclosed, would enable potential lawbreakers to evade detection, or would endanger life of safety of officers or others. Comm on Open Gov't FOIL-AO-12690.

"Factual context", specific contents of records, and effects of their disclosure are factors that must be considered in determining extent to which police department records may be withheld or, conversely, must be disclosed. Comm on Open Gov't FOIL-AO-12702.

CLS Pub O § 87(2)(e)(i) and (ii) and (f) could not be invoked to deny access to electronic copies of 911 incident reports which functioned as traditional police blotter. Comm on Open Gov't FOIL-AO-12741.

Records prepared by manufacturer of radar device could not be characterized as having been "compiled for law enforcement purposes"; thus, CLS Pub O § 87(2)(e) would not be applicable as means of withholding such records. Comm on Open Gov't FOIL-AO-12859.

If there has been plea agreement in criminal matter and there is no possibility of further prosecution, disclosure of records of matter would neither interfere with investigation or judicial proceeding, nor would it deprive defendant of fair trial, for there will be no trial. Comm on Open Gov't FOIL-AO-12909.

Business records would not be transformed into records compiled for law enforcement purposes where such records were prepared in ordinary course of business and then become relevant to or used in law enforcement investigation or perhaps in litigation. Comm on Open Gov't FOIL-AO-12909.

Exception concerning records compiled for law enforcement purposes would be inapplicable to Freedom of Information request for permits, certificates of occupancy and outstanding violations or citations with respect to various properties, even if records sought might be used in or pertinent to criminal investigation. Comm on Open Gov't FOIL-AO-16459.

248. Endangerment of life or safety (§ 87(2)(f)), generally

249. —Confidential sources of information, generally

250. — —Complainant; victim

General policy of withholding names of complainants or victims would be inconsistent with Freedom of Information Law, although denial of access to name of complainant or victim may be appropriate; under CLS Civ R § 50-b, police and other public officers are prohibited from disclosing identity of victim of sex offense, person's identity could likely be withheld under CLS Pub O § 87(2)(f) which permits agency to withhold records to extent that disclosure would "endanger the life or safety of any person," (which would include situation where complainant is in some way associated with organized crime or is confidential source), and same provision might apply when victim is senior citizen who lives alone. Comm on Open Gov't FOIL-AO-12605.

Denial of file related to criminal investigations for reasons that records would endanger life or safety of some person is improper where identities of confidential sources are withheld. Committee on Open Government FOIL-AO-3802.

Agency may withhold records compiled for law enforcement purposes when they identify confidential source relating to criminal investigation, when disclosure would endanger life or safety of any person, or when disclosure would constitute unwarranted invasion of personal privacy; Freedom of Information Law does not require agency to create or prepare record or response to request. Comm on Open Gov't FOIL-AO-4573.

If law enforcement official telephones informants or is engaged in investigation, disclosure of telephone numbers listed on official's telephone bill might endanger individual's life or safety and, therefore, numbers might justifiably be deleted pursuant to CLS Pub O § 87(2)(f). Comm on Open Gov't FOIL-AO-7607.

If law enforcement official telephones informants, disclosure of numbers called might endanger individual's life or safety and, therefore, numbers might justifiably be withheld from disclosure pursuant to CLS Pub O § 87(2)(f). Comm on Open Gov't FOIL-AO-7926.

If record indicates that named individual is assigned to undercover unit, his or her name or other identifying details could be withheld pursuant to CLS Pub O § 87(2)(f); however, if record, such as oath of office, indicates public employee's title (i.e., deputy

sheriff) and does not specify that person's assignment to undercover or similar unit, there would appear to be no basis for denial of access. Comm on Open Gov't FOIL-AO-8398.

Photo of public employee who testified at public proceeding during which any person could have been present and seen his face should be accessible, except in extraordinary circumstances, such as situation in which threat has been made or where person works undercover or in manner in which his or identity could, if disclosed, jeopardize that person's safety. Comm on Open Gov't FOIL-AO-13005.

251. —Prisoners; prisons, generally

All agencies, including Department of Correctional Services, are required to maintain payroll lists in accordance with freedom of information law; however, agency may withhold records or portions of records when disclosure would endanger life or safety of any person; disclosure of identities of state employees including employees of Department of Correctional Services would not in most circumstances endanger life or safety; however, in those circumstances in which law enforcement agency has engaged employees in undercover positions, names of these employees may be deleted from portions of payroll record which identified them with justification based on endangerment of life or safety. Comm on Open Gov't FOIL-AO-4894.

Certain "directives" of Department of Correctional Services are generally available under the Freedom of Information Law. On the other hand, if "directives" involve security at a facility access could justifiably be denied under CLS Public Officers Law § 87(2)(f) on the basis that such disclosure would "endanger the life or safety of any person". Comm on Open Gov't FOIL-AO-6274 (1990).

Freedom of Information Law finds that agency may deny access to record or portion thereof which if disclosed would endanger life or safety of any person; names of all agency employees are likely to be available except to extent that CLS Pub Off § 87(2)(f) applies. Comm on Open Gov't FOIL-AO-4735.

In situation where subjects of investigation are deceased, presumably due to natural causes, it is difficult to envision how disclosure of public employees' names could "endanger" lives or safety. Comm on Open Gov't FOIL-AO-4736.

Records pertaining to suspension of pistol permit might be exempt from disclosure pursuant to CLS Pub O § 87(2)(f), which permits withholding to extent that disclosure would endanger life or safety of any person. Comm on Open Gov't FOIL-AO-7516.

Where building plans include reference to alarms or security systems, it is possible that CLS Pub O § 87(2)(f) might be asserted on basis that disclosure would endanger life or safety of person. Comm on Open Gov't FOIL-AO-7921.

CLS Pub O § 87(2)(f) would not bar disclosure of identity of commercial entities which experience excessive false alarms since many such entities post notices to announce existence of alarm system and since, when law enforcement agency responds to alarm, whether alarm is based on real emergency or otherwise, its response is public event. Comm on Open Gov't FOIL-AO-8953.

Information regarding location of emergency housing facility within county could not be withheld under CLS Pub O § 87(2)(f) since fear that county residents would act violently if they know that facility was used for emergency housing was not warranted or provable. Mere speculation cannot serve as justifiable basis for withholding records under CLS Pub O § 87(2)(f). Emotional hostility cannot be equated with endangerment so as to justify withholding of records under CLS Pub O § 87(2)(f). Comm on Open Gov't FOIL-AO-9204.

County's denial of request for names of all police department employees assigned to district attorney's office, on ground that disclosure would endanger their safety, was unnecessarily broad; aside from undercover situation, law enforcement officers in performance of their duties typically identify themselves by nameplates and badge or shield numbers, and undercover officers are not likely to use their real names in performance of their duties and thus disclosure of their real names will not jeopardize their safety. Comm on Open Gov't FOIL-AO-10099.

Denial of access to state police records relating to much-publicized bombing incident and investigation of suspect, who later committed suicide, was not justified on ground that disclosure would endanger life or safety of those concerned, where media accounts of incident apparently established that suspect was perpetrator, and suspect was dead. Comm on Open Gov't FOIL-AO-10229.

CLS Pub O § 87(2)(b) does not justify denial of request for "complete listing" of voice and fax numbers of town employees, if such list exists; however, portions of list might properly be withheld if, for instance, telephone and fax lines were dedicated to certain uses and, if those lines were to become tied up by outsider and could not be used as intended, agency would be precluded from carrying out its duties in manner whereby public would be adequately protected or served. CLS Pub O § 87(2)(f) and (i) might justifiably be asserted to withhold wholesale disclosure of e-mail addresses of agency employees in that (1) virus attached to single e-mail address could be transmitted to every other e-mail address contacted, which could result in inability to carry out critical governmental functions, and (2) while e-mail address might not have been created to be used as computer access code, it could be used to gain unauthorized access to computer, or to transmit virus (or other program) to other computers. Comm on Open Gov't FOIL-AO-12305.

Police Academy Library would be justified in denying full access to certain police training videos to extent that records in question include descriptions of investigative techniques which if disclosed would either (1) enable potential lawbreakers to evade detection, or (2) endanger lives or safety of law enforcement personnel or others. Comm on Open Gov't FOIL-AO-12748.

CLS Pub O § 87(2)(f), which permits agency to withhold records insofar as disclosure could "endanger the life or safety of any person," might properly be invoked to deny access to architectural building plans, insofar as such records include information concerning alarms, security systems and like. Comm on Open Gov't FOIL-AO-12830.

Records prepared by manufacturer of radar device could not be withheld on ground that such records include descriptions of investigative techniques which if disclosed would enable potential lawbreakers to evade detection or endanger lives or safety of law enforcement personnel or others. Comm on Open Gov't FOIL-AO-12859.

CLS Pub O § 87(2)(f) would serve as basis for denial of request for fax and e-mail addresses of New York City Housing Authority employees. Comm on Open Gov't FOIL-AO-13356.

Insofar as disclosure would enable terrorists to evade detection or effective law enforcement or potentially enable them to jeopardize lives and safety, records regarding "chemical hazard and inventory data" and "site specific emergency response plan" relating to particular pump station may be withheld under CLS Pub O § 87(2)(f). Comm on Open Gov't FOIL-AO-13386.

If records have been previously disclosed to public, it would be difficult for agency to prove that disclosure of such records could now or in future endanger life or safety, especially if records have been made available via internet. Comm on Open Gov't FOIL-AO-13550.

252. Inter-agency and intra-agency materials (§ 87(2)(g)), generally

253. —Accounting matters, generally

254. — —Audits

While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect public, final agency policy or determinations or external audits must be made available; concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and like, could be withheld, and, as such, specific contents of inter-agency or intra-agency materials determine extent to which materials may be withheld. Comm on Open Gov't FOIL-AO-4948.

While inter-agency or intra-agency materials may be withheld from disclosure, portions of such materials consisting of statistical or factual information, instructions to staff that affect public, final agency policy or determinations or external audits must be made available; concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice,

recommendation and like could be withheld from disclosure. Comm on Open Gov't FOIL-AO-4978.

While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, or instructions to staff that affect public, or final agency policy determinations must be made available; "income fund reimbursable account" would consist solely of statistical or factual tabulations or data and would be accessible pursuant to Freedom of Information Law. Comm on Open Gov't FOIL-AO-4619.

While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect public, or final agency policy for determinations must be made available such as books of account, ledgers and similar records, bills, vouchers, contracts and records involving expenditure of public moneys. Comm on Open Gov't FOIL-AO-4643.

255. —Consulting; consultants, generally

256. — —Advisory opinions and the like

While inter-agency or intra-agency material may be withheld from disclosure, portions of such materials consisting of statistical factual information, instructions to staff that affect public, or final agency policy or determinations must be made available; concurrently, to extent that such materials consist of advice, opinion or recommendation, they may be withheld; denial of records may be appealed pursuant to CLS Pub O § 89(4)(a). Comm On Open Gov't FOIL-AO-4595.

Denial of access to records on ground that records sought are inter-agency, without more explanation, is insufficient; further, if agency maintains requested records, fact that records were received from another agency does not exempt it from responding to request; agency is permitted to withhold intra-agency or inter-agency materials insofar as they consist of evaluative material, such as opinion or recommendation, as opposed to factual material, but where request of records may be partially factual in nature, records may not be withheld. Comm on Open Gov't FOIL-AO-4616.

Portions of inter-agency or intra-agency materials that are reflective of opinion, advice and recommendation could be withheld; memorandum from staff consisting of advice or recommendation would properly be withheld. Comm on Open Gov't FOIL-AO-4726.

Although records reflective of pre-decisional commentary or advice may be withheld under CLS Pub O § 87(2)(g), where such records are produced by entity that is not agency under Freedom of Information Law and such records are transmitted to entity that is agency under Freedom of Information Law, records do not consist of either inter-agency or intra-agency material and CLS Pub O § 87(2)(g) cannot be asserted as basis for denial. Comm on Open Gov't FOIL-AO-8300.

Advisory opinion prepared by town ethics board can generally be withheld under Freedom of Information Law; if opinion is rejected or modified, it is deniable under both CLS Pub O § 87(2)(b) as unwarranted invasion of personal privacy and under CLS Pub O § 87(2)(g) as recommendation to town board that is not final. Comm on Open Gov't FOIL-AO-8922.

Draft report usually consists of intra-agency material that can be withheld except to extent that it contains any of 4 categories of available information delineated in CLS Pub O § 87(2)(g)(i)-(iv); this, insofar as draft consists of statistical or factual information, it is available; however, opinions contained in draft can be withheld. Comm on Open Gov't FOIL-AO-8942.

If author of document asserted to be inter-agency or intra-agency material cannot be identified, and there is no proof that statement represents advice or opinion rather than fact or policy, disclosure under Freedom of Information Law is likely to be required. Comm on Open Gov't FOIL-AO-10047.

While inter-agency or intra-agency materials may be withheld under FOIL, portions of such materials consisting of statistical or factual information, instructions to staff that affect public, final agency policy or determinations or external audits must be made available, unless different ground for denial could appropriately be asserted; concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and like could be withheld. Comm on Open Gov't FOIL-AO-12395.

Characterization of private party as "consultant" is not determinative of issue whether communications between private party and agency are intra-agency materials; it is actual function served by outside party which must be considered in deciding whether communications are encompassed by intra-agency exemption. Committee on Open Government FOIL-AO-3381.

Reports prepared by outside consultants for purposes of aiding deliberative process of agency which requested opinions and recommendations from consultant may be considered "intra-agency material"; collections of statements of objective information logically arranged and reflecting objective reality are factual tabulations or data, which may not be properly withheld from disclosure. Committee on Open Government FOIL-AO-3843.

To extent that inter-agency or intra-agency materials are reflective of advice, opinion or recommendation, they can be withheld. Comm on Open Gov't FOIL-AO-4061.

Records prepared for agency by private consulting firm constitute intra-agency material subject to Freedom of Information Law and would be accessible or deniable depending upon their contents. Comm on Open Gov't FOIL-AO-4798.

Appraisal report, whether it be prepared by employees of city or by private consulting firm, constitutes intra-agency materials subject to Freedom of Information Law and can be accessible or deniable depending upon contents. Comm on Open Gov't FOIL-AO-4837.

Where records sought were prepared by consultants and were inter-agency materials, they would be accessible or deniable, in whole or in part, depending upon their contents and, to extent that they consist of statistical or factual information, they would be available. Comm on Open Gov't FOIL-AO-4889.

Consultant reports prepared for agency should be treated as if they were prepared by staff of agency and they therefore constitute intra-agency materials subject to Freedom of Information Law; however, inter-agency or intra-agency materials consisting of external audits, including but not limited to audits performed by comptroller and Federal Government must be made available. Comm on Open Gov't FOIL-AO-4916.

Intra-agency materials or records prepared by consultant for agency would be accessible or deniable, in whole or in part, depending on their contents; insofar as records in question consist of advice, recommendations or opinions, they could be withheld; however, to extent that they consist of statistical or factual data, they would be available unless different ground for denial could be asserted. Comm on Open Gov't FOIL-AO-7642.

To extent that architectural consultant presented his recommendations for proposed new school buildings (including floor plans and cost analysis) at open meeting, such documentation was constructively disclosed and district thereby waived its ability to withhold records containing such information on ground that they consisted of intra-agency documents in draft form as to which no final determination had yet been made. Comm on Open Gov't FOIL-AO-10365.

"Draft unapproved minutes" of meetings of city council should be disclosed, on request, as soon as they exist; minutes of meeting open to public do not involve "internal government consultations or deliberations" since information contained in those records has effectively been disclosed to public already. Comm on Open Gov't FOIL-AO-12607.

Records prepared by consultant for agency may be withheld or must be disclosed based on same standards as in cases in which records are prepared by staff of agency. Records prepared by town advisory commissions should not be viewed as consultant's report and would not fall within scope of CLS Pub O § 87(2)(g), unless commission were "agency" because it performed necessary function in decision-making process. Comm on Open Gov't FOIL-AO-12641.

If relationship between agency and private developer is essentially that of agency and consultant, CLS Pub O § 87(2)(g) would be applicable in analyzing rights of access to documents involving both entities; if, however, relationship of that nature does not exist, that provision would not be pertinent in determining rights of access. Comm on Open Gov't FOIL-AO-12727.

If preliminary FEIS were prepared by applicant or applicant's consultant, exception regarding inter-agency or intra-agency materials would not serve as basis for denial of access. Comm on Open Gov't FOIL-AO-13441.

257. —Employment

Records which indicate reason for job reclassification from maximum security to medium security and then back to maximum security would likely be characterized as intra-agency material and, therefore, those portions containing opinions or recommendations concerning job reclassification could be denied. Comm on Open Gov't FOIL-AO-4676.

If disclosure of records maintained by state agency would result in unwarranted invasion of personal privacy, Personal Privacy Protection Law and Freedom of Information Law would prohibit disclosure; written reprimands pertaining to employees that were issued for failure to report suspected child abuse are accessible under Freedom of Information Law; however, to extent that those records identify patients, deletions of those details should be made to protect against unwarranted invasion of personal privacy; determination to effect that employee engaged in misconduct or violated procedures will be available as final determination of interagency matter. Comm on Open Gov't FOIL-AO-4683.

Records may be characterized as inter-agency or intra-agency materials, in order to manufacture signs and work orders and regulations would constitute either instructions to staff that affect public final agency policies determinations that would be accessible. Comm on Open Gov't FOIL-AO-4757.

If letter of resignation could be considered to be "intra-agency", those portions consisting of advice or opinion can be withheld; those portions that contain factual information will be available. Comm on Open Gov't FOIL-AO-4771.

Attendance records can be characterized as intra-agency materials, however, those portions reflective of dates or numbers of absences would constitute statistical or factual information which is accessible. Comm on Open Gov't FOIL-AO-4808.

If complaint was made by staff or employees of agency and transmitted to another agency, it could be characterized as inter-agency material; on other hand, if complaint was made by person or persons not employed by agency CLS Pub O § 87(2)(g) would not be applicable. Comm on Open Gov't FOIL-AO-4829.

Communications among staff members of agency or agencies could be characterized as "inter-agency or intra-agency materials" and to extent that such materials consist of advice, opinion and recommendation, they can be withheld pursuant to Freedom of Information Law. Comm on Open Gov't FOIL-AO-4853.

Testimony given by city employees would constitute intra-agency materials that would be accessible or deniable depending upon contents; on other hand, testimony given by members of public would not constitute inter-agency or intra-agency materials and, therefore, would be available, except to extent that different ground for denial may be asserted. Comm on Open Gov't FOIL-AO-4971.

Although employee misconduct records can be characterized as intra-agency materials, if record indicates disciplinary action taken with respect to employee of school district, it would be available on ground that it consists of final agency determination. Comm on Open Gov't FOIL-AO-4973.

Records prepared by employees of agency and communicated within that agency or to another agency fall within scope of CLS Pub O § 87(2)(g). Comm on Open Gov't FOIL-AO-7516.

Memorandum prepared concerning possibility that county official might have exhibited symptoms of drinking intoxicating substance while performing his or her duties, and recommendation to conduct professional evaluation to determine whether dependency problem existed, were sufficiently personal and intimate that they could be withheld if requested by public under CLS Pub O § 87(2)(g) to extent that documents were reflective of opinion, advice, recommendation and like. Comm on Open Gov't FOIL-AO-7528.

Opinions expressed by non-party employees in context of administrative investigation could be withheld from disclosure under CLS Pub O § 87(2)(g), and perhaps under CLS Pub O § 87(2)(b) as well. Comm on Open Gov't FOIL-AO-7858.

Responses to surveys distributed to county employees asking for their opinions on various matters relating to their jobs were exempt from disclosure pursuant to CLS Pub O § 87(2)(g). Comm on Open Gov't FOIL-AO-8899.

Proposed "arbitrator appraisal" forms completed by parties to voluntary grievance arbitration constitute inter-agency materials when transmitted to Public Employment Relations Board (PERB) and "ratings" circled on such forms constitute opinions; thus, substance of such forms, when prepared by PERB employees, can be withheld under CLS Pub O § 87(2)(g). Comm on Open Gov't FOIL-AO-9972.

Disclosure of correspondence between water district and Employees Retirement System pertaining to requestor's husband was not precluded on ground that it consisted of inter-agency materials reflective of opinion, advice and recommendation, as requestor's husband was "data subject" under CLS Pub O § 92(3) and thus had rights of access to records about himself. Comm on Open Gov't FOIL-AO-10144.

258. —Engineering reports

Inter-agency material consisting of engineering report made up of statistical or factual information would be available under Freedom of Information Law; contrarily, those portions of report consisting of advice, opinion or recommendation would be withheld. Comm on Open Gov't FOIL-AO-4795.

259. —Environmental matters

While inter-agency or intra-agency materials may be withheld from disclosure, portions of such materials consisting of statistical or factual information, instructions to staff that affect public, final agency policy or determinations or external audits may be available; concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and like could be withheld; list of names of companies that did not respond to department of environmental conservation survey is factual information, and therefore available. Comm on Open Gov't FOIL-AO-4814.

260. —Federal law involvement

Term "agency" does not include federal agency, and consequently exemption for inter-agency materials does not apply to communications between city and federal agency. Committee on Open Government FOIL-AO-3336.

Freedom of Information Law pertains to records of state and local government; since definition of agency does not include federal agency, grounds for withholding communications listed in Freedom of Information Law cannot be cited to withhold communications between county agency and federal agency. Comm on Open Gov't FOIL-AO-4966.

CLS Pub O § 87(2)(g) cannot be properly cited to withhold communications between state agency and federal agency since federal agency is not "agency" for purposes of that statute. Comm on Open Gov't FOIL-AO-9637.

CLS Pub O § 87(2)(g), which permits withholding of inter-agency or intra-agency materials depending on contents of those materials, could not be cited to withhold communications between county and federal agency; CLS Pub O § 86 defines "agency" as entity of state or local government in New York. Comm on Open Gov't FOIL-AO-10050.

261. —Insurance matters

If record was prepared for New York Property Insurance and Underwriting Association and not for state insurance department, record could not be characterized as "inter-agency or intra-agency materials" and, therefore, Freedom of Information Law could not be applicable as the basis for denial; consequently, records should be made available, except to extent the different basis for denial would apply to records or portions thereof. Comm on Open Gov't FOIL-AO-4848.

Denial of request for letter sent by insurance company to fire district, on ground that it was intra-agency material, was unjustified because insurance company is not "agency" as that term is defined in Freedom of Information Law. Comm on Open Gov't FOIL-AO-12270.

262. —Legal matters, generally

263. — —Court-related

Rights granted by Freedom of Information Law apply to all agency records, irrespective of whether agency prepared or re-

ceived records; with exception of summonses and affidavits of service, inter-departmental referral reports, and handwritten notes of inspector or other public officer are all records which could be characterized as inter-agency or intra-agency materials and thus portions of inter-agency materials may be withheld to extent that they consist of advice, opinion, recommendation and the like. Comm on Open Gov't FOIL-AO-4635.

Disclosure of litigation file cabinet "tags" used by individual attorneys at board of education might properly be denied where tags reflected values or opinions—i.e., by characterizing contents of files as "important" or "unimportant," "winnable" or "unwinnable"; those kinds of notations could be withheld as intra-agency material under CLS Pub O § 87(2)(g). Comm on Open Gov't FOIL-AO-9251.

Insofar as audiotape of judicial seminar/discussion conducted by Office of Court Administration consisted of recommendations, suggestions or expressions of opinion, whether offered by expert consultants or by judges or employees, it could justifiably be withheld under CLS Pub O § 87(2)(g). Comm on Open Gov't FOIL-AO-9403.

Memo books of New York law department would constitute "intra-agency materials"; nevertheless, they appear to consist largely of factual data and even though accessible information may be "intertwined" with deniable information, such as advice or opinion, agency must extract from record those portions that are available for disclosure; however, attorney's work product and materials prepared solely for litigation are exempt from disclosure. Comm on Open Gov't FOIL-AO-4648.

Even though materials may be inter-agency or intra-agency materials, if they also consist of attorney work product or material prepared for litigation, they fall within scope of attorney/client privilege. Comm on Open Gov't FOIL-AO-4685.

Records prepared by office of special prosecutor are inter-agency materials that would be accessible or deniable, in whole or in part, depending upon their contents. Comm on Open Gov't FOIL-AO-4696.

CLS Pub O § 87(2)(g) applied to report prepared by town attorney in response to anonymous complaint that dentist was operating his practice in violation of town codes; thus, to extent that attorney-client privilege did not apply, aspects of report consisting of advice or opinion could be withheld, but portions consisting of statistical or factual information should be disclosed. Comm on Open Gov't FOIL-AO-9854.

Insofar as attorney billing records are maintained by or for town, town would be required to direct custodian of records to disclose them in accordance with Freedom of Information Law, or obtain them in order to disclose them to requester to extent required by law; town has ability to redact portions of bills that might include, for example, descriptions of litigation strategy or privileged communications between attorney and his or client, which could be harmful to interests of town. Comm on Open Gov't FOIL-AO-12750.

Supreme court did not err in withholding documents because they fell within the scope of the intra agency exemption for pre-decisional, nonfinal discussions and recommendations by employees within the agency used to assist the decision makers in formulating a determination; the documents consisted of internal discussions on the entirely separate decision regarding what information to disclose to the public about pending litigation and how best to do so. Matter of Smith v New York State Off. of the Attorney Gen., 116 A.D.3d 1209, 984 N.Y.S.2d 190, 2014 N.Y. App. Div. LEXIS 2444 (N.Y. App. Div. 3d Dep't), app. denied, 24 N.Y.3d 912, 26 N.E.3d 782, 2 N.Y.S.3d 843, 2014 N.Y. LEXIS 3448 (N.Y. 2014).

264. —Lists of names, addresses and the like

If intra-agency directory containing home addresses and home telephone numbers of public employees is requested, it would likely be proper to delete home addresses and home telephone numbers and make remainder available. Comm on Open Gov't FOIL-AO-4636.

While inter-agency or intra-agency materials may be withheld from disclosure, portions of such materials consisting of statistical or factual information, instructions to staff that affect public, final agency policy or determinations or external audits may be available; concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and like could be withheld; list of names of companies that did not respond to department of environmental conservation survey is factual information, and therefore available. Comm on Open Gov't FOIL-AO-4814.

265. —Medical and health matters

Record transmitted from officer employed by agency to mental health unit could be characterized as inter-agency material; therefore, it would be accessible or deniable in whole or in part, depending upon its specific contents; to extent that record contains advice, recommendation or opinion, those portions would likely be denied. Comm on Open Gov't FOIL-AO-4812.

While "data" prepared by health department could be properly characterized as "intra-agency material", to extent that it exists, it appears that it consists solely of statistical or factual tabulations or data that must be made available. Comm on Open Gov't FOIL-AO-4860.

Medical records prepared by jail personnel could be characterized as "intra-agency materials" that fall within scope of Freedom of Information Law and to extent that such materials consist of advice, opinion, recommendation, and like, Freedom of Information Law would permit denial. Comm on Open Gov't FOIL-AO-4933.

With respect to medical records, Freedom of Information Law permits that some records may be withheld in whole or in part, depending upon their contents because medical records prepared by agency personnel could be characterized as intra-agency materials; to extent that such materials consist of advice, opinion, recommendation and like, Freedom of Information Law would permit denial. Comm on Open Gov't FOIL-AO-4943.

With respect to medical records, Freedom of Information Law permits that some records may be withheld in whole or in part, depending upon their contents; medical records prepared by department personnel could be characterized as intra-agency materials that fall within scope of Freedom of Information Law and to extent that such materials consist of advice, opinion, recommendation and like, Freedom of Information Law would permit denial. Comm on Open Gov't FOIL-AO-4953.

Portions of Uniform Complaint Tracking System (database established under CLS Pub Health § 2803-d) must be disclosed, following redaction of any name, except name of person found to have committed act of physical abuse, neglect or mistreatment, or name of any other person who has authorized disclosure. Comm on Open Gov't FOIL-AO-13072.

266. —Municipal affairs, generally

267. — —Fire department matters

Although memorandum prepared by city fire chief, in his capacity as chief and in performance of his official duties, would be "internal" and could be characterized as "intra agency material", if memorandum was prepared after fire chief's retirement, fire chief would no longer have been employed by city and, therefore, memorandum would not be "intra agency material". 1986 Committee on Open Government FOIL-AO-4372.

Under CLS Pub Off § 87(2)(g), weekly packet of proposed legislation to be reviewed by city council could be characterized as "intra-agency" materials that consist of recommendations, and therefore may be withheld from public access. Comm on Open Gov't FOIL-AO-4418.

By-laws adopted by community board or its constitution may be characterized as "intra-agency materials; nonetheless, they represent final agency policy and, are available for disclosure. Comm on Open Gov't FOIL-AO-4807.

Records prepared by county officials could be characterized as inter-agency materials and if such records consist of statistical or factual information or final agency determinations, records would be available, unless different basis for denial could be asserted. Comm on Open Gov't FOIL-AO-4976.

CLS Pub O § 87(2)(g) applied to report prepared by town attorney in response to anonymous complaint that dentist was operating his practice in violation of town codes; thus, to extent that attorney-client privilege did not apply, aspects of report consisting of advice or opinion could be withheld, but portions

consisting of statistical or factual information should be disclosed. Comm on Open Gov't FOIL-AO-9854.

"Draft unapproved minutes" of meetings of city council should be disclosed, on request, as soon as they exist; minutes of meeting open to public do not involve "internal government consultations or deliberations" since information contained in those records has effectively been disclosed to public already. Comm on Open Gov't FOIL-AO-12607.

If member of county legislature in item of correspondence offered opinion regarding controversy, that portion of correspondence could be withheld. Comm on Open Gov't FOIL-AO-12631.

Records prepared by consultant for agency may be withheld or must be disclosed based on same standards as in cases in which records are prepared by staff of agency. Records prepared by town advisory commissions should not be viewed as consultant's report and would not fall within scope of CLS Pub O § 87(2)(g), unless commission were "agency" because it performed necessary function in decision-making process. Comm on Open Gov't FOIL-AO-12641.

268. —Police and related law enforcement activities, generally

269. — —Investigations

Reports of inspections constitute inter-agency or intra-agency materials that would be accessible or deniable depending upon their contents. Comm on Open Gov't FOIL-AO-4641.

Communication between department of investigation and department of state could be characterized as interagency material that would be accessible or deniable in whole or in part, depending upon its contents. Comm on Open Gov't FOIL-AO-4766.

Records prepared in conjunction with investigation constitute intra-agency materials within meaning of CLS Pub O § 87(2)(g); insofar as they consist of opinions, advice, conjecture, recommendations and like, they can be withheld; however, factual information is available, except to extent that it falls within different ground for denial and findings and conclusions may be available when they constitute final agency determinations. Comm on Open Gov't FOIL-AO-7549.

While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect public or final agency policy or determinations must be made available; concurrently, inter-agency or intra-agency materials which consist of advice, opinion, or recommendation may be withheld; correspondence from homicide detective to district attorney's office would likely be withheld insofar as it consists of suggestions, recommendations or advice. Comm on Open Gov't FOIL-AO-4674.

Police memo books would constitute interagency materials, nevertheless, they constitute, in part, factual data; even though accessible information may be intertwined with deniable information, agency must extract from record those portions that are available. Comm on Open Gov't FOIL-AO-4756.

When police blotters or other records are prepared by employees of police department, they could be characterized as "intra-agency materials"; however, insofar as they consist of factual information, for example, they would be available under Freedom of Information Law, unless different ground for denial applies. Comm on Open Gov't FOIL-AO-7603.

Police department could not claim that records sought regarding murder investigation of incident that ended in suicide of alleged perpetrator could be withheld in their entirety on ground that they constituted intra-agency materials. Comm on Open Gov't FOIL-AO-12544.

With regard to records of police use of physical force, police department's standard operating procedures would reflect final agency policies and must be disclosed, as must records reflective of organizational structure of department and other policies and procedures, except to extent that disclosure would reveal other than routine criminal investigative techniques or procedures or would if disclosed endanger life or safety of police officers or others. Comm on Open Gov't FOIL-AO-12655.

270. —Prisons and prisoners, generally

271. — —Parole matters

Insofar as records pertaining to application for clemency and parole were furnished to Governor or his representatives by applicant, her attorney or other persons outside of government, CLS Pub O § 87(2)(g) would not serve as basis for denial of request for disclosure of such records. Communications transmitted to agency by person outside of government who was not officer or employee of agency could not be characterized as inter-agency or intra-agency materials within meaning of CLS Pub O § 87(2)(g). If superintendent of correctional facility provides opinion to Governor or his representatives concerning application for clemency, that kind of record would fall within CLS Pub O § 87(2)(g). Comm on Open Gov't FOIL-AO-7586.

Even though intraagency material, such as employee rule book of department of correctional services which is reflective of routine criminal investigative techniques and procedures, may not be withheld from disclosure, other aspects of rule book might indicate non-routine criminal investigative techniques or procedures, and, to that extent, rule book could be denied access. Comm on Open Gov't FOIL-AO-4803.

Program and security assessment summary report, prepared by correctional counselor, is intra-agency record consisting of both factual and evaluative materials pertaining to particular inmate; copy of report can be made available as long as evaluative portions are deleted. Comm on Open Gov't FOIL-AO-4842.

Records of Department of Correctional Services consisting of instructions to staff that affect public or agency's policy would be available under Freedom of Information Law, and would not be subject to inter- or intra-agency exception, unless different basis for denial could be asserted. Comm on Open Gov't FOIL-AO-12492.

Records relating to incident that occurred at correctional facility in which inmate sustained personal injuries—including overall directive on search procedures, specially designed program for infirmary command, directions governing persons designated "assaultive" prisoners, and institutional orders devised to govern movements of particular inmates—constituted intra-agency materials that fell within scope of CLS Pub O § 87(2)(g); however, instructions to staff that affect public or agency's policy would be available, while denial of access would be appropriate to extent that records included descriptions of investigative techniques which if disclosed would enable potential lawbreakers to evade detection or endanger lives or safety of law enforcement personnel or others. Comm on Open Gov't FOIL-AO-12561.

County local conditional release commission may withhold opinions regarding release of particular inmate when commission members transmit opinions or recommendations among one another, or when other government officers or employees offer opinions concerning inmate's release. Comm on Open Gov't OML-AO-3784.

272. —Schools, teachers and the like

Under CLS Pub Off § 87(2)(g), letter by school superintendent to board of education, containing advice on board's recommendation as affecting student transfers, could be appropriately withheld as inter-agency materials. Comm on Open Gov't FOIL-AO-4476.

Ratings of school teachers could be characterized as "intra-agency materials", and extent to which they may be accessible or deniable is largely dependent upon specific content of individual records since extent to which individual forms contain opinions and facts differs from one form to next. Comm On Open Gov't FOIL-AO-4592.

Unsatisfactory lesson observation reports, pertaining to named teachers, would constitute intra-agency materials that would be available or deniable, in whole or in part, based upon specific contents. Comm on Open Gov't FOIL-AO-4642.

Records of performance appraisals of teachers under new program under which new or different kinds of appraisals of teachers were prepared could be characterized as "intra-agency materials" within meaning of CLS Pub O § 87(2)(g); however, approved proposal and criteria used in evaluating performance would be reflective of final agency determination or indication of school district's policy that was applied to teacher or teachers in evaluating performance and, if that was so, those aspects of records would be available under CLS Pub O § 87(2)(g)(iii). Comm on Open Gov't FOIL-AO-7633.

If telephone records are prepared by phone company and sent to school district, they can not be characterized as intra-agency materials within meaning of CLS Pub O § 87(2)(g) as telephone company is not agency. Comm on Open Gov't FOIL-AO-7926.

If parent offered information regarding allegations that school employee was pedophile, and that information was recorded in writing by district official, CLS Pub O § 87(2)(g) would not serve as basis for denial of access. Comm on Open Gov't FOIL-AO-13590.

Bus stop reviews provided by school district in response to Freedom of Information Law (FOIL) request could not delete names of reviewers and their comments if portions withheld were reflective of decisions on which district relied; however, to extent that portions withheld reflected opinions of district personnel, redaction would be consistent with FOIL except to extent that those opinions consisted of statistical or factual information. Comm on Open Gov't FOIL-AO-16486.

273. —Other and miscellaneous

Office of State Inspector General, which investigates allegations of fraud, corruption, waste and abuse within covered agencies, may redact from reports names and other identifying details concerning sources and witnesses under Freedom of Information Law on grounds that records were compiled for law enforcement purposes which, if disclosed, would identify confidential source, constitute unwarranted invasion of personal privacy, constitute information of personal nature that is not relevant to work of agency, constitute interagency or intra-agency materials which are not statistical or factual tabulations or data, instructions to staff or final agency policy, and finally disclosure of names of informants and witnesses could endanger life or safety of such informant or witness. 1986 Committee on Open Government FOIL-AO-4251.

Under CLS Pub O § 87(2)(g), requested copy of Suffolk Regional Off-Track Betting Corporation operating manual, spelling out company policies and procedures for employees, may likely be disclosed in whole or in part, where manual prepared by agency is "intra-agency material", but manual's contents likely consist of factual information, instructions to staff that affect the public and policy adopted by Corporation. There is two tier test that must be met for record to fall within scope of CLS Pub O Law § 87(2)(g)-first, record must be inter-agency or intra-agency material which contains information relating to deliberative process of making agency decision; second, portions of inter-agency or intra-agency materials may be disclosed if they consist of statistical or factual information, instructions to staff that affect public or final agency policies for determinations which must be made public. Comm on Open Gov't FOIL-AO-4584.

Investigative notes and records prepared by Public Service Commission (PSC) or department staff may fall within scope of CLS Pub O § 87(2)(g), and thus portions of records obtained by PSC from Niagara Mohawk Power Corporation which were reflective of opinion, advice and recommendations could be withheld. Comm on Open Gov't FOIL-AO-9911.

Fact that village planning board authorized "circulation" of draft proposal regarding special use permits to those present at public meeting resulted in waiver of capacity of village to deny access to proposal as intra-agency material. Comm on Open Gov't FOIL-AO-13495.

Statistical or factual information found within inter-agency or intra-agency materials is independently accessible even though it might not have been used or is not relevant to agency's determination. Comm On Open Gov't FOIL-AO-3859.

To extent that inter-agency or intra-agency materials contain "evaluative" information, those portions of records could be withheld by means of deletions. Comm on Open Gov't FOIL-AO-4004.

Mere characterization of record as "intra-agency material" would not serve to enable agency to withhold record in its entirety because portions containing statistical or factual information, instructions to staff that affect public, or final agency policy or determination must be made available. Comm on Open Gov't FOIL-AO-4666.

While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect public, or final agency policy or determinations must be made available. Comm on Open Gov't FOIL-AO-4680.

If intra-agency materials contain statistical or factual tabulations or data, records would be available, unless different ground for denial could be asserted; on other hand, if court found records to be reflective of opinion, access could be denied. Comm on Open Gov't FOIL-AO-4710.

Even though draft report can be properly characterized as inter-agency materials, those portions consisting of statistical or factual information are available for disclosure; however, where drafts are required to be made available, agency should mark records as "draft", "preliminary" or "non-final" because by doing so recipient of records is actively notified that contents of records are subject to change. Comm on Open Gov't FOIL-AO-4811.

Even though factual information may be intertwined with opinions in inter-agency or intra-agency materials, factual portions should be available unless there is another basis for denial; similarly, to extent that records contain instructions to staff that affect public or final agency policy or determinations, they must generally be made available, unless different ground for denial applies. Comm on Open Gov't FOIL-AO-4898.

Where inter-agency or intra-agency materials contain accessible information that may be "intertwined" with deniable information, agency must extract from record those portions that are available. Comm on Open Gov't FOIL-AO-4907.

Characterization of records as "interdepartmental" and using that characterization as basis for withholding records under Freedom of Information Law is inappropriate; contents of interdepartmental records serve as factors for determining whether or extent to which they must be disclosed. Comm on Open Gov't FOIL-AO-8370.

When member of public, acting in that capacity, or person acting as representative of non-governmental entity, communicates with government, communication could not be characterized as "inter-agency or intra-agency materials," for that person neither is nor represents agency. Comm on Open Gov't FOIL-AO-8552.

Insofar as draft has been distributed to public or perhaps disclosed at meetings open to public, there is no basis for denial of access under CLS Pub O § 87(2)(g). Comm on Open Gov't FOIL-AO-9378.

Blanket denial of access to records based on their characterization as "intra-agency materials" is inappropriate. Comm on Open Gov't FOIL-AO-10170.

Intra-agency materials may be accessible or deniable in whole or in part, depending on their specific contents. Comm on Open Gov't FOIL-AO-12405.

274. Statistical or factual tabulations or data (§ 87(2)(g)(i)), generally

275. —Appraisals

Even though statistical or factual information may be intertwined with opinions, statistical or factual portions, if any, should be available; therefore, appraisal reports prepared for agency by private consulting firm constitutes interagency material subject to Freedom of Information Law and would be accessible or deniable in part depending upon their contents. Comm on Open Gov't FOIL-AO-4836.

Even though statistical or factual information may be intertwined with opinions, statistical or factual portions should be available; appraiser's reports may be made available after parcels of land that are subjects of appraisals have been sold so that disclosure would not impair agencys position. Comm on Open Gov't FOIL-AO-4837.

276. —Attendance records

Attendance records can be characterized as intra-agency materials, however, those portions reflective of dates or numbers of absences would constitute statistical or factual information which is accessible. Comm on Open Gov't FOIL-AO-4808.

277. —Financial data, generally

Under CLS Pub Off § 87(2)(g)(i), books of account, ledgers, and similar documentation would likely comprise accessible "statistical or factual tabulations or data". Comm on Open Gov't FOIL-AO-4557.

While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect public, or final agency policy for determinations must be made available such as books of account, ledgers and similar records, bills, vouchers, contracts and records involving expenditure of public moneys. Comm on Open Gov't FOIL-AO-4643.

Records requested, which pertain to cost of waste treatment, consists of factual and statistical information, and are accessible under Freedom of Information Law. Comm on Open Gov't FOIL-AO-4687.

To extent that records sought consist of statistical or factual tabulations of or relating to other public records, such as budget bill or administrative staff manual, they are accessible under Freedom of Information Law. Comm on Open Gov't FOIL-AO-4893.

CLS Pub O § 87(2)(g) would not justify disclosure of bills involving use of fax machine by officers and employees of city with redaction of those portions indicating fax numbers to which transmissions were made, notwithstanding that records in question could be characterized as intra-agency materials, since they consisted only of statistical or factual information. Comm on Open Gov't FOIL-AO-7607.

Reports of income and expenditure of annual fund raising conducted by volunteer firefighters and of 1.8 percent funds from foreign insurance companies that go to exempt firemen's benevolent associations were required to be disclosed pursuant to CLS Pub O § 87(2)(g)(i) if reports were prepared by fire company; further, if they were prepared for company by others, none of grounds for denial would be applicable and reports would likely be available in their entirety. Comm on Open Gov't FOIL-AO-7640.

In connection with request for breakdown of cost of mayor's police protection from its inception to present, which request did not seek records indicating times that police coverage occurred at mayor's home, CLS Pub O § 87(2)(g) could not justify withholding of information since records requested consisted in great measure, if not in their entirety, of statistical or factual information. Comm on Open Gov't FOIL-AO-7930.

When former customer of licensed moving company sought Department of Transportation (DOT) computer access codes to enable him to collect money judgment against company, DOT was justified in withholding name and number of moving company's bank account only insofar as disclosure would enable former customer to make unauthorized electronic transfers; if disclosure would not reveal unauthorized access information, then CLS Pub O § 87(2)(i) would not apply. Comm on Open Gov't FOIL-AO-9888.

School district improperly denied request to disclose list of proposed budget reductions on ground that list was "inherently opinion, not factual information"; courts have consistently held that series of opinions, recommendations or estimates which appear in tabular, graphic or numerical format are "statistical tabulations" that must be disclosed even if they do not reflect facts or objective reality. Comm on Open Gov't FOIL-AO-10064.

278. —Telephone numbers

If telephone records are generated by school district, records could be characterized as intra-agency materials; however, in view of their content, they would apparently consist of statistical or factual information accessible under CLS Pub O § 87(2)(g)(i) unless another basis for denial applied. Comm on Open Gov't FOIL-AO-7926.

Records pertaining to communications between New York City Department of Parks and Recreation and comptroller's office in relation to review of application for franchise, to extent such records consisted of statistical or factual information, agency policy or final agency determinations, were subject to disclosure. Comm on Open Gov't FOIL-AO-12,337.

If records consist of factual data, they cannot be withheld pursuant to CLS Public Officers § 87(2)(g). Comm on Open Gov't FOIL-AO-4751.

Records indicating membership on board committees would constitute as factual information which is available for disclosure under Freedom of Information Law. Comm on Open Gov't FOIL-AO-4807.

While inter-agency or intra-agency materials may be withheld from disclosure, portions of such materials consisting of statistical or factual information, instructions to staff that affect public, final agency policy or determinations or external audits may be available; concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and like could be withheld; list of names of companies that did not respond to department of environmental conservation survey is factual information, and therefore available. Comm on Open Gov't FOIL-AO-4814.

To extent that data requested exists, despite its characterization as "draft" or "incomplete", data would nonetheless be subject to rights granted by Freedom of Information Law; while "data" prepared by health department could be properly characterized as "intra-agency material", to extent that it exists, it appears that it consists solely of statistical or factual tabulations or data that must be made available. Comm on Open Gov't FOIL-AO-4860.

Where records sought were prepared by consultants and were inter-agency materials, they would be accessible or deniable, in whole or in part, depending upon their contents and, to extent that they consist of statistical or factual information, they would be available. Comm on Open Gov't FOIL-AO-4889.

Even though factual information may be intertwined with opinions in inter-agency or intra-agency materials, factual portions should be available unless there is another basis for denial; similarly, to extent that records contain instructions to staff that affect public or final agency policy or determinations, they must generally be made available, unless different ground for denial applies. Comm on Open Gov't FOIL-AO-4898.

With regard to CLS Pub O § 87(2)(g), even though statistical or factual information may be intertwined with opinions, statistical or factual portions, if any, as well as any policy or determinations, must be disclosed unless different ground for denial can properly be asserted. Comm on Open Gov't FOIL-AO-7566.

Factual information appearing in narrative form, as well as those portions appearing in numerical or tabular form, is available under CLS Pub O § 87(2)(g)(i). Comm on Open Gov't FOIL-AO-7593.

Assuming existence (in physical or electronic form) of statistics of persons initially found guilty of criminal actions but later found to be not guilty, such records would be available under CLS Pub O § 87(2)(g)(i). Comm on Open Gov't FOIL-AO-9760.

By their nature, water readings and spatial data contained in Geographic Information System (GIS) consist of factual information which must be disclosed under CLS Pub O § 87(2)(g)(i). Comm on Open Gov't FOIL-AO-9874.

Written analyses, compilations and summaries prepared by Public Employment Relations Board (PERB) in relation to proposed "arbitrator appraisal" forms (which are completed by parties to voluntary grievance arbitration) constitute intra-agency materials to extent that they are prepared by PERB for internal purposes, but portions of those materials will likely contain "statistical or factual tabulations or data" available under CLS Pub O § 87(2)(g)(i). Comm on Open Gov't FOIL-AO-9972.

Portions of consulting report consisting of statistical or factual information must be disclosed. Comm on Open Gov't FOIL-AO-12150.

Even though factual information could not be withheld under CLS Pub O § 87(2)(g), Court of Appeals in Gould v New York City Police Department, 89 NY2d 267 (1996), was careful to point out that other exceptions might justifiably be asserted regarding witness statements; court did not focus on distinction between witnesses who testified at trial and those who did not but rather on content of records and effects of disclosure. Comm on Open Gov't FOIL-AO-12496.

Even though statistical or factual information may be "intertwined" with opinions, statistical or factual portions, if any, as well as any policy or determinations, would be available under Freedom of Information Law, unless different ground for denial (i.e., CLS Pub O § 87(2)(b) or (e)) could properly be asserted. Comm on Open Gov't FOIL-AO-12611.

If some elements of consultants' report consisted of statistical or factual information, such material must be disclosed, irrespec-

tive of report's status as draft or non-final. Comm on Open Gov't FOIL-AO-13401.

If preliminary FEIS were prepared by village or its consultant, it would constitute intra-agency material, but those portions consisting of statistical or factual information must be disclosed, despite status of document as "preliminary." Comm on Open Gov't FOIL-AO-13441.

School district could disclose under Freedom of Information Law (FOIL) names of board members and district employees to whom laptop computers were issued, and list of personal purposes for which computer issued to each person was used, including names of persons to whom computers were issued on which pornography was found; information sought was purely factual in nature and did not identify or allege that any particular individual engaged in appropriate use of computers. Comm on Open Gov't FOIL-AO-16407.

279. Instructions to staff (§ 87(2)(g)(ii)), generally

280. —Schools

If school district had prepared policy concerning responses to inquiries by residents, such record would be available under Freedom of Information Law since CLS Pub O § 87(2)(g)(iii) requires that agency policy be disclosed; however, if no such records existed, district would not be obliged to create or prepare new record on behalf of applicant. Comm on Open Gov't FOIL-AO-8556.

School district would be required to disclose "performance improvement plan" devised by district to address parents' concerns about behavior of certain teacher, although parents' complaints were found not to be meritorious; content in performance improvement plan represented mandate that instructed teacher in question in relation to duties that he performed concerning students, and thus was accessible under CLS Pub O § 87(2)(g)(ii). Comm on Open Gov't FOIL-AO-16429.

Insofar as board's instructions to staff affect may public or final district policy, or involve records communicated between or among school district officials or prepared for district by consultant, those portions consisting of statistical or factual information must be disclosed. Comm on Open Gov't OML-AO-3473.

Even though factual information may be intertwined with opinions in inter-agency or intra-agency materials, factual portions should be available unless there is another basis for denial; similarly, to extent that records contain instructions to staff that affect public or final agency policy or determinations, they must generally be made available, unless different ground for denial applies. Comm on Open Gov't FOIL-AO-4898.

Guidelines, criteria or policies adopted by agency must be disclosed pursuant to CLS Pub O § 87(2)(g). Comm on Open Gov't FOIL-AO-8415.

281. Final agency policy or determination (§ 87(2)(g)(iii)), generally

282. —Employment matters

Center for Animal Care and Control improperly denied request under Freedom of Information Law for disclosure of employee separation agreements, as requested records represented final agency determinations, and disclosure would result in permissible rather than unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-12,347.

Employment evaluation, as inter-agency document, may be accessible or deniable, perhaps in part, depending upon stage of evaluation process and nature of evaluation itself; to extent that evaluation is reflective of final rating, it might be viewed as final agency determination accessible pursuant to freedom of information law; however, to extent that evaluation consists of opinion, suggestion or recommendation, and thus, is not final, but rather is used to assist final decision maker, it would likely be deniable. Comm on Open Gov't FOIL-AO-4648.

When complaint is made against public employee allegations have not yet been or are not substantiated, complaint and records related to it that identified person against whom complaint is made may generally be withheld on ground that disclosure would result in unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4729.

Following hearing, if disciplinary action is taken and public employees were found to have engaged in misconduct, record indicating charges that were sustained or containing reprimand would be accessible as final agency determination. Comm on Open Gov't FOIL-AO-4787.

If record sought is reflective of final agency disciplinary action taken against public employee, it is available, because such record would deal with matter of public concern, that being public employee's accountability for misconduct; although employee misconduct records can be characterized as intra-agency materials, if record indicates disciplinary action taken with respect to employee of school district, it would be available on ground that it consists of final agency determination. Comm on Open Gov't FOIL-AO-4973.

Final rating of public employee would be available under Freedom of Information Law, assuming that any appeals had been exhausted, for it would constitute final agency determination available under CLS Pub O § 87(2)(g)(iii), particularly if monetary award was based upon rating; moreover, final rating concerning public employee's performance is relevant to that person's official duties, as well as those of supervisor who issues rating and, therefore, name of employee, final rating and name of supervisor who made rating would be available under Freedom of Information Law since disclosure would not result in unwarranted invasion of personal privacy of either employee or supervisor. Comm on Open Gov't FOIL-AO-7633.

Counseling memo issued to employee of Department of Transportation after allegation of misconduct could likely be withheld from disclosure under CLS Pub O § 87(2)(g) since counseling memo is essentially warning rather than conclusion reflective of finding of misconduct and, therefore, does not constitute final agency determination. Comm on Open Gov't FOIL-AO-9383.

Component of employee performance evaluation consisting of final rating, i.e., "good", "excellent", "average", etc. would be available for disclosure under FOIL, assuming that any appeals have been exhausted, for it would constitute final agency determination available under CLS Pub O § 87(2)(g)(iii), particularly if monetary award were based on rating; moreover, final rating concerning public employee's performance is relevant to that person's official duties and therefore would not result in unwarranted invasion of personal privacy if disclosed. Comm on Open Gov't FOIL-AO-12396.

Record indicating determination to impose discipline or sanction on public officer would be accessible to public; disclosure would constitute permissible invasion of privacy, and it would reflect final agency determination accessible under CLS Pub O § 87(2)(g)(iii). Comm on Open Gov't OML-AO-3902.

283. —Environmental matters

Freedom of Information Law cannot justify denial of records consisting of correspondence between county and city homeowners concerning orders to abate lead paint problems based upon fact that records were compiled for law enforcement purposes because investigations were completed, violations were found, and orders were issued to abate problems; also, notice of violation or order to correct hazardous condition would be reflected of final agency determination. Comm on Open Gov't FOIL-AO-4772.

Agency's failure to mail accessible records to applicant who pays or offers to pay appropriate fees for copying and postage would constitute constructive denial of access to records; documents explaining why certain room was sealed due to presence of asbestos before removing records would likely be available because it is decision that affects public or final agency policy or determination. Comm on Open Gov't FOIL-AO-4789.

284. —Finances, generally

285. — —Audits; auditors

An internal audit of a radio station operated by the state university is probably available as statistical or factual data or as a final determination under Pub O § 87(2)(g). Comm on Open Govt FOIL-AO 3064.

Where auditor's findings result in agency action and agency determination, whether violations were improperly found by inspector or omitted by inspector, this is final agency determination that affects property owner; if disciplinary action is later

taken as result of audits, record indicating disciplinary action would be available because it would constitute final agency determination. Comm on Open Gov't FOIL-AO-4776.

286. —Police matters

Police officers' admission of their role in off-duty incident which led to misconduct charges, and their acceptance of discipline, was essentially reflective of settlement with their employer, and thus record indicating terms of settlement constituted "final agency determination" under Freedom of Information Law; there is no distinction in substance between finding of guilt after hearing and admission of guilt as means to avoid such proceeding. Comm on Open Gov't FOIL-AO-10149.

287. —Prisons; prisoners

Rules and directives issued by Department of Correctional Services applicable to inmates concerning religious mail, overseas correspondence mailing privileges and receipt of religious newspapers from foreign countries, are subject to access pursuant to CLS Public Officers Law § 87(2)(g)(iii). Comm on Open Govt FOIL-AO-3536.

While local conditional release commission might in some instances have authority to take action during executive session, record indicating nature of its action, i.e., to grant or deny conditional release, could not justifiably be withheld under Freedom of Information Law. Comm on Open Gov't OML-AO-3784.

288. —Schools, teachers and the like

Records of performance appraisals of teachers under new program under which new or different kinds of appraisals of teachers were prepared could be characterized as "intra-agency materials" within meaning of CLS Pub O § 87(2)(g); however, approved proposal and criteria used in evaluating performance would be reflective of final agency determination or indication of school district's policy that was applied to teacher or teachers in evaluating performance and, if that was so, those aspects of records would be available under CLS Pub O § 87(2)(g)(iii). Comm on Open Gov't FOIL-AO-7633.

289. —Taxes

Imposition of penalty for failure to pay real property taxes would indicate that final agency determination has been made, and thus record so indicating would be available under CLS Pub O § 87(2)(g)(iii). Comm on Open Gov't FOIL-AO-12549.

Single record or report may be both accessible and deniable in part under Freedom of Information Law; therefore, agency has obligation to review records sought, in their entirety, to determine which portions, if any, may be justifiably withheld; similarly, to extent that records contain instructions to staff that affect public or final agency policy or determinations, they must generally be made available. Comm on Open Gov't FOIL-AO-4640.

Explanation of town board's decision would likely be reflective of final agency determination and be accessful under Freedom of Information Law. Comm on Open Gov't FOIL-AO-4727.

By-laws adopted by community board or its constitution may be characterized as "intra-agency materials; nonetheless, they represent final agency policy and, are available for disclosure. Comm on Open Gov't FOIL-AO-4807.

Settlement and contract could likely be characterized as "intra-agency" materials; however, those records are reflective of final agency determination and would be accessible on that basis. Comm on Open Gov't FOIL-AO-4861.

Even though factual information may be intertwined with opinions in inter-agency or intra-agency materials, factual portions should be available unless there is another basis for denial; similarly, to extent that records contain instructions to staff that affect public or final agency policy or determinations, they must generally be made available, unless different ground for denial applies. Comm on Open Gov't FOIL-AO-4898.

Only situation in which opinion of town ethics board is accessible under Freedom of Information Law involves case in which town board clearly adopts opinion as its own, thereby making opinion final determination, and finds that officer or employee engaged in misconduct. Comm on Open Gov't FOIL-AO-8922.

CLS Pub O § 87(2)(g) is intended to insure that any so-called "secret law," such as policy on which agency relies in carrying out its duties, be made available to public. Comm on Open Gov't FOIL-AO-12243.

Insofar as documents exist, they would fall within scope of Freedom of Information Law, irrespective of stage of project; thus, contention that record is "predecisional," "non-final" or that it may relate to matter that is in "the pre-planning stage" would not represent end of analysis of rights of access or agency's obligation to review contents of record. Comm on Open Gov't FOIL-AO-12707.

Assuming that data in question exists, its characterization by agency as "uncertified," "draft" or "preliminary" is not determinative of rights of access under Freedom of Information Law. Comm on Open Gov't FOIL-AO-12711.

290. Examination questions and answers (§ 87(2)(h)), generally

291. —School matters

Freedom of Information Law does not govern rights of access to standardized tests in possession of State Education Department; however, copies of standardized tests which are filed with Commissioner of Education following release of test results are subject to rights of access under FOIL. Comm on Open Govt FOIL-AO-3489.

Request to inspect and copy all first-year student answers to particular midterm examination administered by law school could be denied pursuant to CLS Pub O § 87(2)(h) if there was intent or possibility that questions used in examination would be used in future, since disclosure of questions or answers in that circumstance would diminish or perhaps nullify utility or efficacy of examination. Comm on Open Gov't FOIL-AO-7510.

If examination question is to be given in future, question and answer may be denied; if examination question has been finally administered and will no longer be used, question and answer are accessible. Committee on Open Government FOIL-AO-3820.

292. Computer access codes (§ 87(2)(i))

Distinction between computer codes and computer access codes is that former may merely serve as non-verbal indication of items of information, while latter are used to gain access to information stored in computer; intent of CLS Pub O § 87(2)(i) is to enable agency to withhold computer access codes that would enable individuals to gain unauthorized access to data stored within computer. Comm on Open Gov't FOIL-AO-9249.

Exception involving computer access codes in CLS Pub O § 87(2)(i) is intended to preclude disclosure of codes that would permit unauthorized access to information stored electronically. Comm on Open Gov't FOIL-AO-12559.

"Employer ID Number", firm's federal taxpayer and workers' compensation identification numbers, and state unemployment insurance registration number, as provided on Empire Zone application forms, should be exempt from disclosure under CLS Pub O § 87(2)(i) as "computer access codes," even though such numbers might not have been created for purpose of being access codes. Comm on Open Gov't FOIL-AO-12890.

Bank account or ID number could justifiably be withheld under CLS Pub O § 87(2)(i) if disclosure of bank account number could enable person to gain access to or in any way alter or adversely affect agency's electronic information or electronic information systems. Comm on Open Gov't FOIL-AO-13143.

CLS Pub O § 87(2)(i) would serve as basis for denial of request for e-mail addresses of New York City Housing Authority employees. Comm on Open Gov't FOIL-AO-13356.

F. Judicial Review

293. In general

When determination is made following appeal made pursuant to Freedom of Information Law, that determination must be considered as final and binding. Comm on Open Gov't FOIL-AO-4836.

Absent clear indication of legislative intent to require continued confidentiality, Freedom of Information Law, as matter of public policy, supersedes statute that appears to exempt records from disclosure; nevertheless, this issue can be resolved only by court. Comm on Open Gov't FOIL-AO-4844.

Inmate of correctional facility having submitted checks to cover cost of copies of tape recordings of hearings at the correctional facility, and who never received such information was entitled to appeal the denial in accordance with CLS Public Officers Law § 89(4)(a). Comm on Open Gov't FOIL-AO-6160 (1990).

Failure to inform person denied access to records of right to appeal enables that person to seek judicial review of denial. Comm on Open Gov't FOIL-AO-7554.

294. Article 78 proceedings, generally

If appeal from denial of access to records is denied, in whole or in part, next procedural step would involve commencement of Article 78 proceeding in New York State Supreme Court against agency which denied request; request for advisory opinion from Committee on Open Government should be made prior to commencement of Article 78 proceeding, for it is policy of Committee not to comment on issues arising under Freedom of Information Law which are subject of ongoing litigation. Comm on Open Gov't FOIL-AO-4651.

Under Freedom of Information Law, person seeking records is required to exhaust his or her administrative remedies prior to commencing Article 78 proceeding in State Supreme Court. Comm on Open Gov't FOIL-AO-4724.

When records are denied or constructively denied appeal, CLS Civil Practice Rule Article 78 proceeding may be commenced but only when administrative remedies are properly exhausted. Comm on Open Gov't FOIL-AO-4797.

If an appeal from denial of records has not been answered within statutory time period, administrative remedies have been exhausted and challenge could be initiated to denial under CLS Civil Practice Rules Article 78. Comm on Open Gov't FOIL-AO-4840.

When appeal of denial of records is denied, next step is to seek judicial review of denial by means of commencement of proceeding under CLS CPLR Article 78; in the alternative, rather than initiating lawsuit, it might be preferable to direct requests to other sources which may be able to provide records sought. Comm on Open Gov't FOIL-AO-4902.

If individual chooses not to initiate Article 78 proceeding within 4 months after agency's denial of his or her appeal, choice not to do so should not forever preclude that person from seeking records since there may be changes in circumstances, judicial precedents that could put issue in different light, acquisition of records from other sources that might diminish agency's capacity to justify denial or change in one's financial ability to initiate lawsuit and, therefore, agency cannot in every instance deny second request on basis of mootness. Comm on Open Gov't FOIL-AO-9438.

295. Attorney fees

Absent any formula or decision specifically describing how one might demonstrate that he "substantially prevailed" and that records at issue are "beneficial to the public", for purposes of obtaining attorneys' fees, nature of records sought, rights of access to them and rationale for agency's denial would represent key factors in determining whether such fees may be awarded to petitioner. Comm on Open Gov't FOIL-AO-4443.

There is no penalty per se for failure to comply with Freedom of Information Law; however, law enables court to award reasonable attorney's fees under certain circumstances to person denied access who "substantially prevails" in court. Comm on Open Gov't FOIL-AO-4723.

In order for a petitioner to recover attorney's fees upon the filing of an appeal following the rejection of his request for copies, court must find that the record involved was of clearly significant interest to the general public and that the agency lacked a reasonable basis in law for withholding the record. Comm on Open Gov't FOIL-AO-6281 (1990).

296. Burden of proof

Unlike most Article 78 proceedings in which burden of proof is on public, burden of proof in Article 78 proceeding brought under FOIL is on agency that denied access. Comm On Open Gov't FOIL-AO-3981.

If Article 78 proceeding is commenced, agency has burden of proof that records sought fall within scope of grounds for denial listed in Freedom of Information Law. Comm on Open Gov't FOIL-AO-4723.

Agency must meet burden of proof imposed by Freedom of Information Law by demonstrating harmful effects that would arise from disclosure of records; since some aspects in policies or regulations of police department relating to political activities, demonstrations and police surveillance may reveal criminal investigative techniques or procedures, nondisclosure to public would be justified because such information would enable potential law breakers to evade detection. Comm on Open Gov't FOIL-AO-4903.

When denial of request under Freedom of Information Law is challenged in court, agency denying access has burden of proving that records withheld in fact fall within one or more of grounds for denial. Comm on Open Gov't FOIL-AO-7538.

Under CLS Pub O § 89(5), when commercial enterprise seeks guarantee that agency to which its records are submitted will not disclose records, and agency confers confidentiality and upholds guarantee of confidentiality following appeal by person whose request for record has been denied, agency has burden of proof in its defense of denial in any ensuing proceeding commenced for review of denial. Comm on Open Gov't FOIL-AO-12656.

To continue protection accorded by CLS Pub O § 89(5), agency must believe that it can prove to court that disclosure would, in fact, cause substantial injury to competitive position of commercial enterprise that submitted record; if agency does not believe that it can meet that burden of proof or does not have sufficient knowledge or information to ascertain merits of commercial entity's contentions, it must indicate that request to person seeking record will be granted, in which case, following exhaustion of administrative remedies, commercial entity that submitted record has 15 days to commence proceeding for purpose of demonstrating to court that disclosure would cause substantial injury to its competitive position. Comm on Open Gov't FOIL-AO-12656.

II. Application To Particular Documents

297. Accidents, generally

298. —Motor vehicle accidents

Disclosure of copy of blood alcohol test administered following motor vehicle accident would result in unwarranted invasion of personal privacy if charges against individual had not yet been determined or if charges were dismissed in his or her favor, but disclosure would not result in unwarranted invasion of personal privacy if individual pleaded guilty on basis of test in question and was sentenced. Comm on Open Govt FOIL-AO 3098.

As to request for copies of photographs of motor vehicle accident scene taken by investigating police officers, where no charges were filed against driver or pedestrians involved, if such records are part of motor vehicle accident report, they are available pursuant to CLS Pub O § 66-a, but if they are not considered part of such report, provisions of Freedom of Information Law apply, no grounds for denial under § 87(2) of such Law apply to photographs since investigation has been terminated and requester is pedestrians' attorney and, depending upon its contents, investigative report may also be partially or entirely disclosed. Comm On Open Gov't FOIL-AO-4545.

If village or village manager maintained copy of police report pertaining to automobile accident involving village manager, that report was subject to disclosure by village to extent required by law; if village and/or village manager did not maintain copy of accident report, report could be sought either from police department that prepared it or from Department of Motor Vehicles. Comm on Open Gov't FOIL-AO-7864.

Unless disclosure would interfere with criminal investigation, accident reports prepared by police agencies are available under both Freedom of Information Law and CLS Pub O § 66-a. Assuming that village maintained record indicating odometer reading of damaged vehicle at time of accident involving village manager, as well as bill of sale or similar or related records reflective of nature of new vehicle and expenditure of public moneys, those records would be available under Freedom of Information Law. Comm on Open Gov't FOIL-AO-7864.

With respect to request for Department of Motor Vehicle (DMV) records for school bus drivers relating to moving violations and accidents, portions of records identifiable to individual drivers which included their ages could be withheld as unwarranted invasion of personal privacy under CLS Pub O §§ 87(2)(b), 89(2)(b) and 89(2-a), but if driver's age appeared on accident report available from DMV under Freedom of Information Law and CLS Pub O § 66-a, driver's age would be available from other records maintained by DMV containing equivalent information; furthermore, if ages of bus drivers could be withheld, but age was of primary interest, drivers' names could be withheld from records prior to disclosure. Comm on Open Gov't FOIL-AO-11978.

County police department improperly denied request for motor vehicle accident reports on ground that requestor was not "interested party" under CLS Pub O § 66-a; based on direction give by Court of Appeals, requestor's status as member of public provides him or her with rights of access to records under both CLS Pub O § 66-a and Freedom of Information Law. Comm on Open Gov't FOIL-AO-12302.

Records maintained by or for Department of Transportation would be subject to rights conferred by Freedom of Information Law, even though they might not be subject to discovery or use in litigation due to 23 USCS § 409, since they may be available for other purposes so long as applicants do not seek records for any use precluded by § 409. Comm on Open Gov't FOIL-AO-12395.

Rights of access to certain state Department of Transportation (NYSDOT) records involving listings of safety deficient locations (SDLs) and priority investigation locations (PILs) for roadways in Capital District would be determined by Freedom of Information Law, and particularly CLS Pub O § 87(2)(g), where applicant could demonstrate that records at issue would not be used for purpose prohibited by federal law. Comm on Open Gov't FOIL-AO-12395.

Unless disclosure would interfere with criminal investigation, accident report would be available to any person, including one who had no involvement in accident. Comm on Open Gov't FOIL-AO-12917.

There is nothing in CLS Pub O § 66-a that would authorize agency, such as town, to withhold details identifying those involved in accident, irrespective of their ages. Comm on Open Gov't FOIL-AO-12917.

If there were no arrest or charge in motor vehicle accident, and CLS Family Ct Act § 784 did not apply, but teenage parties appeared in Family Court nonetheless, CLS Family Ct Act § 166 might be pertinent; adult requester who was involved in such accident should suggest that his request to inspect Family Court records would not be "indiscriminate" but rather would reflect his legal interest in matter. Comm on Open Gov't FOIL-AO-12917.

There was no basis under Freedom of Information Law or CLS Pub O § 66-a for county police department to withhold, from accident report, details of police officer's notes and statement of driver of other car (who was arrested, but subsequently "unarrested," on DWI). Comm on Open Gov't FOIL-AO-16466.

Requests for city pothole maps by attorneys or law firms involve activities that those persons or entities carry out in their capacities as professionals, not as private citizens, and thus city department of transportation had no basis for denying access to such records on grounds of personal privacy exception. Comm on Open Gov't FOIL-AO-12866.

299. Ambulance service

Nondisclosure of taped transmissions was not justified on basis of CLS County § 308(4) in that such transmissions, which consisted of dispatcher's instructions to volunteer ambulance personnel to take certain route in transporting particular person on particular date, were not 911 calls made by persons seeking emergency assistance; thus, rights of access were determined by Freedom of Information Law. Comm on Open Gov't FOIL-AO-10270.

Records of ambulance service relating to accidents and vehicle maintenance would be available for disclosure, assuming that service were deemed "agency" for purposes of Freedom of Information Law. Comm on Open Gov't FOIL-AO-12463.

Emergency call, particularly when sirens or flashing lights are used, is event of public nature, and thus when ambulance travels to its destination, that destination is or can be known to those in vicinity of event, and disclosure of address or brief description of event would not likely constitute unwarranted invasion of personal privacy; also, presence of emergency vehicle does not necessarily indicate that there is medical problem since those vehicles are dispatched for any number of reasons, many of which do not relate to medical event. Comm on Open Gov't FOIL-AO-12608.

While volunteer ambulance corporation could deny access to portions of records identifying those to whom medical services were rendered, their ages and descriptions of their medical problems or conditions, because disclosure of name coupled with those details would reveal personal and somewhat intimate aspect of individual's life, other information (such as locations of calls) had to be disclosed; emergency call, particularly when sirens or flashing lights are used, is public event, and destination of fire truck or ambulance is or can be known to those in vicinity of event. Comm on Open Gov't OML-AO-3508.

300. Animals; animal control, generally

Disclosure of dog license records maintained by department of health, concerning dogs at certain address, would result in permissible rather than unwarranted invasion of personal privacy unless such lists would be used for commercial or fundraising purposes. Comm on Open Gov't FOIL-AO-10244.

Society for Prevention of Cruelty to Animals is private corporation not subject to the Freedom of Information Law; nevertheless, insofar as it served as dog warden under contract with town, records prepared for purpose of doing so (including records relating to its investigation of barking dog incident) fell within coverage of Freedom of Information Law and town was required to either direct it to disclose such records or obtain records in order to review and disclose them to extent required by law. Comm on Open Gov't FOIL-AO-12066.

301. Appointment books

To the extent that requested appointment book entries contain reference to communications between a town official and the town attorney, who was present for the purpose of providing legal advice and acting in his or her capacity as an attorney, such information may be withheld under § 87(2)(a) of the Freedom of Information Law, but if an attorney was present, but not acting in his or her capacity as legal counsel to the town official, or if a third party was present who did not maintain a privileged relationship with the official, entries are subject to disclosure. While an appointment record or similar document might be characterized as "intra-agency materials," its contents would constitute "factual" data required to be made available under § 87(2)(g)(i) of Freedom of Information Law. Comm on Open Govt FOIL-AO 3032.

Appointment calendars of government officials are "agency records" subject to rights of access under Freedom of Information Law, as they are kept, held and produced by staff of governmental official, presumably in performance of their official duties, and Freedom of Information Law does not condition determination of whether or not document is "record" upon particular use of records by government official. Comm on Open Govt FOIL-AO-4382.

That entry in mayor's appointment calendar does not relate to transaction of official business or expenditure of public money does not necessarily remove it from scope of public rights of access or into protected "zone of privacy"; it is nature of entry that must be considered in ascertaining whether disclosure would constitute permissible or unwarranted invasion of personal privacy. References in mayor's appointment calendar to purely personal activities, such as child's birthday, family gathering or medical matter, can be withheld from disclosure under Freedom of Information Law as unwarranted invasion of personal privacy; however, in those instances in which mayor may influence or be influenced in that person's capacity as mayor, notwithstanding absence of expenditure of public moneys, contention that disclosure would constitute unwarranted invasion of personal privacy would appear to be unsubstantial in many cases. Comm on Open Gov't FOIL-AO-9191.

302. Consumer affairs

Regarding request for list of heating oil dealers used in Department of Consumer Affairs' monthly heating oil price survey,

privacy provisions of FOIL cannot justifiably be asserted to deny such request, because information sought does not pertain to "natural persons", nor does it involve personal information. Comm on Open Gov't FOIL-AO-4079.

Disclosure of schedule of fines prepared by adjudication division of city department of consumer affairs could not be withheld under CLS Pub O § 87(2)(e); contrary conclusion would, by analogy, permit withholding of disclosure of both sentencing guidelines and public court records reflective of penalties, fines or sentences imposed on lawbreakers. Comm on Open Gov't FOIL-AO-7533.

County water authority had no basis to deny town's request for water readings pertaining to water authority's customers residing in town. Comm on Open Gov't FOIL-AO-9874.

Freedom of Information Law did not apply to request made in 1995 for records concerning particular realtor in 1983, where Division of Licensing Services had destroyed real estate records dated prior to 1987 according to its scheduled rate of destruction; under circumstances, destruction of records sought was not illegal. Comm on Open Gov't FOIL-AO-9920.

303. Financial matters, generally

304. —Audits and budgets, generally

305. — —Computerized records

A computer printout of the trial balance of a city is accessible providing it can be produced under existing computer programs. Comm on Open Gov't FOIL-AO-2999.

List of estimated revenues and expenditures submitted by highway department pursuant to county charter is accessible under Freedom of Information Law to extent that it consists of statistical or factual tabulations or data. Comm on Open Govt FOIL-AO 3021.

An internal audit of a radio station operated by the state university is probably available as statistical or factual data or as a final determination under Pub O § 87(2)(g). Comm on Open Govt FOIL-AO 3064.

Even though figures prepared in budget process may be considered as estimates or subject to change, they constitute "statistical or factual tabulations" accessible under FOIL, whether or not action has been taken with respect to those figures. Comm On Open Gov't FOIL-AO-4027.

While inter-agency or intra-agency materials may be withheld, pursuant to § 87[2][g] of FOIL, to extent that first draft budget documents consist of "statistical or factual tabulations or data", they should be made available. Comm on Open Gov't FOIL-AO-4060.

There is no ground for denial appearing in CLS Pub Off § 87(2) that could be asserted to deny access to village budget. Comm on Open Gov't FOIL-AO-4436.

Books of account, vouchers and other records relating to expenditures by agencies are generally available under FOIL. Comm on Open Gov't FOIL-AO-6137 (1990).

List of proposed budget reductions, consisting mainly of job eliminations and savings that would result, was accessible under Freedom of Information Law to extent that they contained statistical or factual tabulations or data; however, insofar as records consisted of narrative expressions of opinions or recommendations, they could be withheld. Comm on Open Gov't FOIL-AO-10011.

Irrespective of its characterization as "draft," HUD audit of county's "Revolving Loan Fund" fell within coverage of Freedom of Information Law as soon as it came into county's possession. Portions of HUD audit of county's "Revolving Loan Fund," which were identifiable to individuals and included recommendations or opinions regarding their ethical conduct, could be withheld to extent that no final determination concerning their conduct had been reached, to prevent unwarranted invasion of personal privacy; likewise, to extent that allegations or charges were found to be without merit, such records could be withheld. Comm on Open Gov't FOIL-AO-10050.

Town was required to disclose budget and budget-related records even though they constituted "inter-agency or intra-agency" materials, to extent that they contained "statistical or factual tabulations or data" available under CLS Pub O § 87(2)(g)(i) or represented "external audit" available under § 87(2)(g)(iv); furthermore, portion of requested material was same in substance as that required to be maintained by town supervisor and made available under CLS Town §§ 29(4) and 119(1). Comm on Open Gov't FOIL-AO-10101.

Village was obliged to disclose inter-agency records relating to audit by state Comptroller insofar as materials sought constituted statistical or factual information. Comm on Open Gov't FOIL-AO-10108.

While State Insurance Fund is not typical of commercial enterprises, it carries out many of its duties as entity in competition with private firms in insurance industry, and thus it can be characterized as commercial entity, and portions of its annual budget that fall within scope of CLS Pub O § 87(2)(d) may be withheld under Freedom of Information Law. Comm on Open Gov't FOIL-AO-12190.

306. —Bank records

Bank statements and reconciliation records from the bail account of a town justice were subject to rights of access under the Freedom of Information Law. Comm on Open Gov't FOIL-AO-6247 (1990).

Bank account numbers for town might be properly withheld from disclosure under CLS Pub O § 87(2)(i) since disclosure might enable person to gain access to information without authority to do so, or to shift, add, delete or alter information—i.e., to make "electronic transfers." Comm on Open Gov't FOIL-AO-9321.

Town was required to permit applicant to look at back of check paid by town to company for repairs to town's fire trucks where applicant for record sought to apply lien against company and wanted name of company's bank; CLS Pub O § 87(2)(b) did not apply as company was not natural person. Comm on Open Gov't FOIL-AO-9454.

With respect to Freedom of Information Law (FOIL) request for village police department's monthly checking account statements and checks, which were missing and therefore not in physical custody of village, if duplicates or equivalent records were maintained on behalf of village at bank used by village, they would be village records subject to FOIL disclosure, and even if records maintained by bank were not "agency records" it was incumbent on village to acquire such records from bank to extent necessary to comply with requirements of Local Government Records Law (CLS Art & Cult Affrs Art 57-A). Comm on Open Gov't FOIL-AO-12001.

307. —Bids for public contracts

If agency seeks bids regarding purchase of particular goods or services, and request is made for bid prior to date for final submission of bids, bids might justifiably be withheld on ground that disclosure would impair present or imminent contract award; however, any bid that results in contract between agency and firm that supplies goods or services is available to public under Freedom of Information Law. Comm on Open Govt FOIL-AO-3432.

Section 87[2][g] of FOIL cannot be asserted to withhold proposals, bids and related documentation submitted by firm which is not "agency" since such records cannot be characterized as "inter-agency or intra-agency materials". Comm on Open Gov't FOIL-AO-4088.

Where public bid opening has taken place, records reflecting outcome of bid should be available. Comm On Open Gov't FOIL-AO-4533.

Information on previous contracts concerning printing of Queens College Graduate Bulletin should be made available under FOIL where bids were being solicited for a current edition. Comm on Open Gov't FOIL-AO-6150 (1990).

Bids or proposals are available for disclosure after contract has been awarded, and, in view of requirements of Freedom of Information Law, successful bidder has no reasonable expectation of not having its bid open to public. Comm on Open Gov't FOIL-AO-7593.

While there may be valid basis for withholding various information contained in or related to proposals submitted to city pursuant to request for proposals, policy of withholding names of submitters of proposals, or bids, until contract is awarded is

inconsistent with Freedom of Information Law. Comm on Open Gov't FOIL-AO-8937.

Names of persons or firms who respond to agency's solicitation of bids, requests for proposals or requests for information must be disclosed, so long as deadline for submission of bids, proposals or responses has been reached. Comm on Open Gov't FOIL-AO-9299.

It was doubtful that county could deny request for disclosure of several proposals received by county after it issued request for proposals for contractors to manage several county golf courses after county selected single firm to manage golf courses, notwithstanding that contract with that firm was still under negotiation and was subject to approval by county legislature. Comm on Open Gov't FOIL-AO-9751.

Disclosure of letter of intent would "impair" present or imminent contract awards, and thus denial of request for access was consistent with Freedom of Information Law, where contents of letter were known by and in possession of parties (New York Stock Exchange and NYC Economic Development Corporation (EDC)), and letter's contents were not known to other parties involved or potentially involved in negotiations regarding project (construction of new stock exchange). Comm on Open Gov't FOIL-AO-12727.

Financial disclosure statements filed by certain county officials, although not specifically exempted from disclosure by state or federal statute, may be withheld from disclosure when disclosure would constitute an unwarranted invasion of personal privacy; public employees enjoy lesser degree of privacy than others, since public employees are generally required to be more accountable than others; public inspection may be had of information regarding sources of income, assets and liabilities of public officials required by local law to provide financial disclosure statements. Committee on Open Government FOIL-AO-3842.

Records reflecting federal money provided to town and amount of money expended therefrom are available under FOIL, and identity of recipient programs of sharing account is likewise available. Comm On Open Gov't FOIL-AO-3864.

Bills, contracts, vouchers and similar records reflective of expenditure of public monies by town of South Hampton are accessible under Freedom of Information Law, for none of grounds for denial contained in CLS Pub O § 87(2) could justifiably be asserted. Comm On Open Gov't FOIL-AO-4520.

Records of expenditures, or budget allocations by agencies, as well as books of account, ledgers and similar documents, are available under FOIL. Comm on Open Gov't FOIL-AO-6151 (1990).

Request for disclosure of salary of a particular employee of the Gowanda Psychiatric Center can not be denied under FOIL. Comm on Open Gov't FOIL-AO-6170 (1990).

Bills, vouchers, contracts, receipts and similar records reflective of payments made or expenses incurred by agency or payments made to agency's staff or agents are generally available for disclosure under Freedom of Information Law, for none of grounds for denial would be applicable in most instances. Comm on Open Gov't FOIL-AO-7508.

Although meetings of Syracuse Financial Plan Commission are not subject to Open Meetings Law and although commission itself is not agency, it clearly carries out its duties for City of Syracuse and, therefore, records that it prepares are subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-8300.

Records maintained by county commissioner of finance while acting in his capacity as public administrator fall within coverage of Freedom of Information Law. Comm on Open Gov't FOIL-AO-9650.

Specific information concerning value of assets of former county legislator could be withheld on ground that disclosure would result in unwarranted invasion of personal privacy; typically, financial disclosure statements must be disclosed insofar as they indicate sources of one's assets, but may be withheld insofar as they indicate value of assets. Comm on Open Gov't FOIL-AO-9826.

Application of Freedom of Information Law to copies of checks written by owner of company that leased space at town facility, to determine how much rent was paid to town, depended on relationship or agreement between owner and his company and town. Profit/loss statements of town facilities are available under Freedom of Information Law, unless grounds for denial exist under CLS Pub O § 87(2). Comm on Open Gov't FOIL-AO-12000.

If village, having received state grant to help pay for improvement projects, maintains records (e.g., books of account, ledgers and similar documentation) as to where and how grant money was used, such records are accessible under Freedom of Information Law unless they involve personal information which, if disclosed, would constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-12038.

Municipality must provide photocopies of financial disclosure statements upon request and payment of appropriate fee, notwithstanding local enactment purporting to allow inspection only. Comm on Open Gov't FOIL-AO-12169.

In context of Freedom of Information Law, particularly considering fact that bank account numbers may serve as codes used to make deposits, withdrawals or engage in other financial transactions, disclosure of both sides of check made out to town by property tax payer would result in unwarranted invasion of personal privacy since it would reveal payer's personal bank account number. Comm on Open Gov't FOIL-AO-16604.

308. Grant programs

309. —New York City financial matters

Section 2603(k) of the New York City Charter could not be cited as authority to deny access to financial disclosure reports of the New York City Conflicts of Interest Board in that such section was not an exemption granted by Section 87(2)(a). Comm on Open Gov't FOIL-AO-6106 (1990).

Ruling issued by New York City Department of Finance was subject to disclosure under the Freedom of Information Law. Comm on Open Gov't FOIL-AO-6238 (1990).

310. —School finances

Virtually all statistical or factual information concerning school finances or expenditures, including the salaries of every employee of the school district, are accessible under the Freedom of Information Law. Comm on Open Govt FOIL-AO 3023.

Contract between school district and superintendent does not fall within exemption for records which, if disclosed, would impair collective bargaining negotiations since, as general matter, contract into which unit of government enters must be made available to public once it has been approved. Committee on Open Government FOIL-AO-3333.

Budget item line draft worksheet prepared by school district could be characterized as "inter-agency" material; nonetheless to extent that it contains statistical or financial tabulations or data, it should be made available. Comm on Open Govt FOIL-AO-3689.

Bills, receipts, contracts, cancelled checks and other documents concerning the expenditure of public money maintained by a school district constitute "records" subject to rights of access conferred by the Freedom of Information Law. Comm on Open Gov't FOIL-AO-6245 (1990).

Cost of tuition contract for high school students from neighboring areas could not be withheld on basis that disclosure would compromise negotiations for future since contract represented culmination of negotiations and did not relate to "present or imminent contract awards." Comm on Open Gov't FOIL-AO-8582.

Records relating to school district audit, insofar as they consist of statistical or factual information, must be disclosed. Comm on Open Gov't FOIL-AO-12185.

As soon as bills are received by school district, they constitute "records" subject to rights of access conferred by Freedom of Information Law, irrespective of whether board has paid or otherwise acted on them. Comm on Open Gov't OML-AO-2195.

311. —Specific financial expenditures, generally

312. — —Telephone records

Records related to non-business long-distance calls made on town telephone is available for inspection to extent that disclosure would not result in unwarranted invasion of personal privacy; thus, portion of record which identifies party called may be deleted as unwarranted invasion of personal privacy whereas portion of record indicating town employee who placed call can be

disclosed since it is warranted invasion of privacy. Comm On Open Gov't FOIL-AO-4028.

When public officer or employee uses the telephone in course of his or her official duties, bills involving use of telephone are relevant to performance of that person's official duties; thus, disclosure of such bills will not result in unwarranted invasion of personal privacy with respect to public officer or employee. Comm on Open Gov't FOIL-AO-9443.

Records which reflected reimbursement to county by county executive for personal calls made on county telephones, if such records existed, were accessible under Freedom of Information Law. Comm on Open Gov't FOIL-AO-10270.

313. — —Travel expenses

Travel vouchers and other similar claims for reimbursement are available under Public Officers Law § 87(2)(g)(i). Comm on Open Gov't FOIL-AO-2837.

Time and mileage expenses claimed by named individual for commission of town-directed duty is available since, as general matter, records indicating expenditure of public funds are accessible, including travel vouchers or claims for reimbursement; records of attendance, including hours or days claimed for sick leave, are accessible. Committee on Open Government FOIL-AO-3838.

Contracts, bills, travel vouchers, receipts and similar records reflective of expenses incurred by agency or payments made to agency's staff must generally be disclosed since none of grounds for denial could appropriately be asserted to withhold those kinds of records. Comm on Open Gov't FOIL-AO-8511.

Attorneys' bills submitted to agency in connection with a lawsuit are subject to disclosure under the Freedom of Information Law, except for portions of the bills containing information that is confidential under the attorney-client relationship. Amount of the fees paid by a board of fire commissioners in defending a lawsuit may be obtained under Freedom of Information Law. Comm on Open Gov't FOIL-AO-2994.

Copies of canceled checks paid to town by city department of water supply are subject to access under Freedom of Information Law. Comm on Open Govt FOIL-AO-3481.

Records of moneys paid and received by attorney or law firm for services rendered to client are not privileged and consequently although identifying details in bills might be withheld, numbers indicated amounts expended are accessible despite assertion of attorney client privilege (CLS SPLR § 4503). Committee on Open Government FOIL-AO-3816.

Disclosure of statistics indicating average salary and other payments and fringe benefits of city police officer was not responsive to request for breakdown of cost of mayor's police protection from its inception to present. Comm on Open Gov't FOIL-AO-7930.

Power authority is required to disclose names of consultants that it has retained, as well as records indicating payments to consultants. Comm on Open Gov't FOIL-AO-9299.

Invoices for textbooks purchased from publishing companies for sale in college bookstore operated by community college's Faculty Student Association (FSA) would be accessible under Freedom of Information Law, even if FSA were not deemed "agency," as (1) such invoices were college records, and (2) since there was no commercial bookseller involved in collecting information or running bookstore, no commercial enterprise was involved and thus there was no possibility that disclosure would cause substantial injury to competitive position of any entity. Comm on Open Gov't FOIL-AO-12072.

Where request is made for the identities and addresses of persons receiving grants under a federal housing rehabilitation program, as well as the amounts of such grants, such material may be deemed exempt from disclosure if disclosure would permit the public to determine the general income level of grant recipients, and disclosure of similar information regarding grants awarded in prior years does not require that current year information be made available. Comm on Open Govt FOIL-AO 3067.

Disclosure that permits public to determine general income level of participant in grant program would likely constitute unwarranted invasion of personal privacy, for such disclosure would indicate that particular individual has income or economic means below certain level. Comm on Open Govt FOIL-AO-3427.

314. Fires, firefighters, fire districts and the like

If fire district had copies of "fuel inventory forms" and records of mileage on vehicles, such items had to be disclosed on request under Freedom of Information Law, because no grounds for denial applied. Comm on Open Gov't FOIL-AO-12,345.

Record indicating whether or not fire was reported by landlord on particular date at specific location is available from New York City Housing Authority under FOIL. Comm On Open Gov't FOIL-AO-4018.

Portions of reports prepared by fire departments and emergency squads which gave names of volunteer firemen present at scene and locations of calls or addresses could be disclosed under Freedom of Information Law since emergency call, particularly when sirens or flashing lights are used, is event of public nature and when fire truck or ambulance travels to its destination, that destination is or can be known to those in vicinity of event. Comm on Open Gov't FOIL-AO-7532.

Records indicating 911 "dispatch times" for fires do not fall within CLS County § 308 former (5), which pertains to recording or transcript of 911 calls, and must be disclosed as "factual data" under CLS Pub O § 87(2)(g)(i). Comm on Open Gov't FOIL-AO-9984.

In context of city business, matters would be "confidential" only on rare occasions; those situations might involve information that is derived from personnel records used to evaluate continuing employment or promotion of police officers or professional firefighters under CLS Civ R § 50-a, or they might involve attorney work product or records subject to attorney-client privilege. City ordinance stating that certain city employees could not discuss or divulge "any sensitive matter or information that if disclosed would disrupt the efficient and effective operation of the City government or would impair the public officer's close working relationship with the Mayor" stifles free speech in manner that has been found to be unconstitutional. Comm on Open Gov't FOIL-AO-12558.

315. Guns; gun permits

An approved pistol license application is a public record accessible to any person. Comm on Open Govt FOIL-AO 3046.

While it is clear that approved application for pistol license is public record, CLS Penal § 400.00 does not state that other records relating to licensing, suspension or revocation process must be kept confidential or may be obtained only by means of court order, with exception of fingerprint records. Records pertaining to suspension of pistol permit might be exempt from disclosure pursuant to CLS Pub O § 87(2)(b) if records identified confidential source, such as neighbor or employer; might be exempt from disclosure pursuant to CLS Pub O § 87(2)(e) as records compiled for law enforcement purposes; and, might be exempt from disclosure pursuant to CLS Pub O § 87(2)(f), which permits withholding to extent that disclosure would endanger life or safety of any person. Comm on Open Gov't FOIL-AO-7516.

There was no law that required preparation of policies or procedures concerning restricted pistol licenses; thus, if no such records had been prepared, neither Freedom of Information Law nor any other statute would require they be created and, therefore, Freedom of Information Law and similar or related statutes would be inapplicable. Comm on Open Gov't FOIL-AO-7918.

In regard to request to "physically see approved gun license applications" for persons living in several specifically stated zip codes, where police department did not maintain records sought by means of address or zip code, it would not be required by Freedom of Information Law to review all of approved applications individually in order to locate those pertaining to licensees within those zip codes. Police department could not deny request to see all approved gun licenses on basis that records were too voluminous, and could not require that applicant request records by names of licensees, where applicant's prior request to see approved applications for persons within certain zip codes was denied because department did not organize its records by address or zip code; applicant could not know names without seeing records, and conditions set forth by department effectively pre-

clude applicant from making appropriate request. Comm on Open Gov't FOIL-AO-8315.

With regard to pistol license applications, numerous aspects of approved application could be withheld pursuant to CLS Pub O § 87(2)(b), such as personal physical characteristics, social security number, character references, information regarding health and mental condition, alcoholism and drug use, and similar intimate personal information. Also, various information must be disclosed under Freedom of Information Law such as date and county of issue, expiration date, name and title of licensing officer and applicable restrictions since such information does not constitute intimate or personal details regarding licensee. Further, portion of pistol license application describing pistol or revolver might be withheld under CLS Pub O § 87(2)(f) based on contention that disclosure would endanger life or safety of licensees and potentially others as well. Comm on Open Gov't FOIL-AO-8902.

While numerous aspects of approved application for gun permit can be withheld under CLS Pub O §§ 87(2)(b) and 89(2)(b) (such as fingerprints, social security number, character references, information regarding health and mental condition, alcoholism and drug use), other information must be disclosed (such as date and county of issue, expiration date, name and title of licensing officer, and applicable license restrictions). Notations regarding particular firearms contained in application for pistol license could likely be withheld due to considerations of safety and security. Comm on Open Gov't FOIL-AO-9771.

CLS Penal § 400.00(5), which requires disclosure of address, is not satisfied by production of licensee's town and zip code only; natural and obvious meaning of "address" means street address and not only zip code, and nothing in Freedom of Information Law may be cited to withhold that information. Comm on Open Gov't FOIL-AO-10150.

316. Insurance

Information reported pursuant to CLS Ins § 336 by insurers to agencies concerning investigations of fires would be considered as exempted from disclosure by statute. Comm on Open Govt FOIL-AO-3571.

Policyholder of State Insurance Fund could be entitled to obtain from Fund list of other policyholders and their addresses, since (1) prohibition against disclosure found within CLS Workers Compensation Law § 98 would not be applicable to list of names and addresses of policyholders, (2) list would not be used for commercial or fund-raising purposes, and (3) provisions concerning privacy in Freedom of Information Law would not be applicable to list of firms or corporations. Comm on Open Govt FOIL-AO-3707.

Insurance policies maintained by school district on district employees should be made available under Freedom of Information Law, since policies are equivalent of contracts, which have always been accessible to public. Comm on Open Govt FOIL-AO-3735.

Insurance policies and contractual agreements between municipal fire district and insurers are available under Freedom of Information Law. 1986 Committee on Open Government FOIL-AO-4210.

Any agreement or contract between city and its insurance carrier would be available under Freedom of Information Law, for none of grounds for denial would apply. Aggregate or statistical data concerning claims under health insurance policies issued to city employees would be available under Freedom of Information Law, so long as it did not include personally identifiable information. Comm on Open Gov't FOIL-AO-7623.

Life insurance policy kept for former elected official is not subject to Freedom of Information Law, and village is not required to obtain copy of such policy if it did not have (and never had) policy or copy of it. Comm on Open Gov't FOIL-AO-10042.

While State Insurance Fund is not typical of commercial enterprises, in many respects it carries out duties as entity in competition with private firms in insurance industry, and thus CLS Pub O § 87(2)(d) would serve as potential bases to deny access to marketing plan developed by State Insurance Fund. Comm on Open Gov't FOIL-AO-10225.

Disclosure of employers' policy expiration dates, even without name of insurance carrier, would cause competitive harm to New York State Insurance Fund (NYSIF) since expiration date is most significant aspect of database in context of marketing, and disclosure would not enable the NYSIF "to compete on an equal basis" with other carriers; also, disclosure would likely have additional effect of raising premiums of employers who could least afford higher cost of doing business. Comm on Open Gov't FOIL-AO-12657.

317. Labor matters; employees, generally

318. —Attendance and leave records

Information relative to sick time taken by city police officers during particular period should be made available, unless such records are confidential pursuant to CLS Civ R § 50-a, since materials in question consist solely of "statistical or factual tabulations or data" accessible under CLS Public Officers Law § 87(2)(g)(i), and since disclosure of records would not result in unwarranted invasion of personal privacy. Comm on Open Govt FOIL-AO-3717.

Attendance records can be characterized as intra-agency materials, however, those portions reflective of dates or numbers of absences would constitute statistical or factual information which is accessible; disclosure of attendance records would result in permissible rather than unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4808.

Copies of attendance records of public employees may be obtained under the provisions of the Freedom of Information Law. Comm on Open Gov't FOIL-AO-6284 (1990).

Work schedules or attendance records for public employees, including those concerning use or accrual of leave time, must be disclosed under Freedom of Information Law. Comm on Open Gov't FOIL-AO-9478.

Time sheets maintained by water district, indicating earnings, use of personal and sick leave, and accrual of overtime, must be disclosed. Comm on Open Gov't FOIL-AO-10144.

Requested records concerning compensation time accrued by all employees of village police department are not exempt from disclosure under Civil Rights Law, and must be disclosed under Freedom of Information Law. Comm on Open Gov't FOIL-AO-12199.

Rights of access to records regarding leaves of absences granted to certain town employees, including reason for leave and date leaves was granted, depended on nature of reason leave was sought; if reason for seeking leave was intimate or personal, such as medical need, disclosure would constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-12224.

Because records reflective of correction officers' vacation accruals do not evaluate performance, and because those records are "neutral," CLS Civ R § 50-a would not serve to authorize denial of access to applicant. Attendance records, including those involving overtime work, are clearly available under Freedom of Information Law, for they are relevant to performance of public employees' official duties; similarly, records reflective of leave used or accrued must be disclosed, for public has economic interest in obtaining those records and because records are relevant to performance of public employees' official duties. Comm on Open Gov't FOIL-AO-12699.

Under CLS Pub O § 87(2)(b), any description of illness or medical problem found in personnel records can be withheld or deleted, for disclosure of such personal details would likely constitute an unwarranted invasion of personal privacy and not relevant to performance of employee's duties; however, number that merely indicates amount of sick time or vacation time accumulated or used, or dates and times of attendance or absence, does not represent personal detail of one's life and is relevant to performance of one's official duties. Comm on Open Gov't OML-AO-2744.

319. —Arrest records of employees or prospective employees

Request for information on disposition of alcohol-related arrests, breakdown of tickets by individual officer, qualifications required for police officer position, and name and qualification of each officer presently employed by village are subject to Freedom of Information Law request. 1986 Committee on Open Government FOIL-AO-4269.

320. —Civil service matters

Notice of state examination and examination schedule are subject to access under Freedom of Information Law. Comm on Open Govt FOIL-AO-3566.

If examination question is to be given in future, question and answer may be denied; if examination question has been finally administered and will no longer be used, question and answer is accessible. Committee on Open Government FOIL-AO-3820.

Applicant was entitled under Freedom of Information Law to disclosure of "Goals and Timetables Status Reports" prepared by Department of Civil Service, which reports consisted of summary statistical information and did not identify agency employees by name or social security number, but rather by job title and sex and race or ethnicity of incumbents of positions. Comm on Open Gov't FOIL-AO-7935.

321. —Collective bargaining

Grade awarded on civil service examination taken by person not meeting minimum age requirement is subject to access under Freedom of Information Law; neither CLS Civ S § 50(4) nor Civil Service Department's regulations operate to restrict access to such records. Comm on Open Govt FOIL-AO-3573.

Payroll information described in § 87(3)(b) of Freedom of Information Law is available, irrespective of pendency of collective bargaining negotiations. Comm On Open Gov't FOIL-AO-4502.

Collective bargaining agreement might confer rights of access to personnel records which exceed rights granted by Freedom of Information Law. Comm on Open Gov't FOIL-AO-4567.

Information concerning Yonkers Police Department as to number of days and hours to be worked by patrolmen and commanding officers, their shifts and their benefits package was probably available in that such information would normally be included within collective bargaining agreements or other contracts between the city and public employee union. Comm on Open Gov't FOIL-AO-6218 (1990).

Portions of records indicating membership in union can be withheld from disclosure under Freedom of Information Law as unwarranted invasion of personal privacy. Disclosure indicating that public officer or employee is covered by health insurance plan at public expense will not represent or reveal intimate detail of one's life. Comm on Open Gov't FOIL-AO-8908.

Proposed "arbitrator appraisal" form completed and returned to Public Employment Relations Board by party to voluntary grievance arbitration is analogous to employment reference under CLS Pub O § 89(2)(b)(i); thus, while form is generally available, identifying details of representative or employee of union who completes form may be withheld as unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-9972.

322. —Compliance with conditions of employment

Where police department receives request for copies of all training certificates held by certain officers, any such records which are considered confidential under § 50-A of the Civil Rights law are not subject to disclosure under the Freedom of Information Law, except to the extent that public notices such as news articles have appeared with respect to those certificates. Comm on Open Govt FOIL-AO 3043.

If a teacher is required to earn a masters degree as a condition of employment, a record indicating the receipt of such degree would be available under the Freedom of Information Law, for it would be relevant to the performance of the official duties of both the employee and the employing board of education. Although a record indicating that a teacher has received a master's degree would be available under the Freedom of Information Law where receipt of such degree is a condition of employment, details surrounding the award of the degree, such as the institution that granted the degree, class standing, and similar personal details, may justifiably be withheld on the ground that disclosure constitutes an unwarranted invasion of personal privacy. Comm on Open Govt FOIL-AO 3069.

Permanent teaching certificates are available under Freedom of Information Law. Comm on Open Govt FOIL-AO-3440.

School district records indicating certification status of all teaching personnel in district as well as area of certification are subject to access under Freedom of Information Law. Comm on Open Govt FOIL-AO-3517.

With respect of accessibility under Freedom of Information Law to materials in teacher's personnel file, teacher's certification could be available under FOIL; in addition, information relevant to requirements which must be met as condition of employment would be available; however, source of degree, teaching experience, grades, class ranking and similar personal details might justifiably be withheld. Committee on Open Government OML-AO-3494.

323. —Disciplinary actions, misconduct and the like, generally

324. — —Education employees

Records of final disciplinary determinations against professionals licensed by the Education Department are public information under the Freedom of Information Law. NY Ops Atty Gen 84-F14.

With regard to findings and recommendations issued pursuant to CLS Educ § 3020-a in connection with charges brought against teacher for misconduct and conduct unbecoming teacher, references to offensive statements about victim's sexuality which were not credited as truthful by panel, could be withheld from disclosure to prevent unwarranted invasion of privacy. Comm on Open Gov't FOIL-AO-7939.

Letter of reprimand accepted by tenured teacher pursuant to agreement that resolved disciplinary charge against him, dispensing with need for further litigation or hearings, was accessible under Freedom of Information Law even though it provided that "No statements to anyone or press releases concerning any aspect of this stipulation . . . shall be made by any party," as letter of reprimand was part of school district's final determination and it bore on performance of teacher's official duties. Comm on Open Gov't FOIL-AO-10180.

Unless different ground for denial applied, transcript of disciplinary hearing which resulted in termination of school custodian, who had been convicted of arson set at school, was accessible to extent it contained factual information, although transcript is not "final" document. Comm on Open Gov't FOIL-AO-10260.

325. — —Housing employees

As to rights of access to names of 2 employees of Schenectady Municipal Housing Authority who were suspended for misuse of company equipment, record reflective of final disciplinary action taken against public employee is available, but if allegations or charges of misconduct have not yet been determined or did not result in disciplinary action, records relating to such allegations may be withheld because disclosure would result in unwarranted invasion of personal privacy, and to extent that certain charges may have been dismissed, they may be withheld. Comm On Open Gov't FOIL-AO-4511.

326. — —Police and related law enforcement employees

With respect to Freedom of Information Law, record pertaining to public employees that are relevant to performance of their duties are available, for disclosure in those instances would result in permissible rather than unwarranted invasion of personal privacy, such that records of reprimands of police officers are available under Freedom of Information Law. 1986 Committee on Open Government FOIL-AO-4284.

Assuming that request for final determination relating to complaint of misconduct by police officer was not been made in context of current or future litigation, CLS Civ R § 50-a would not justify denial of request pursuant to CLS Pub O § 87(2)(a). To extent that charges of misconduct against police officer are dismissed or allegations are found to be without merit, records related to and including such charges or allegations may be withheld to prevent unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-7602.

Names of 18 police officers who admittedly were involved in off-duty egg-throwing incident, and nature of penalties imposed on them, were accessible under Freedom of Information Law where requestor did not intend to use information in litigation context, records did not deal with unsubstantiated allegations or complaints and could not be characterized as "sensitive" or

intimate, and incident had been widely publicized. Comm on Open Gov't FOIL-AO-10149.

Letters of reprimand regarding public employees are generally accessible, since they constitute final agency determinations available under § 87(2)(g)(iii) of the Freedom of Information Law. With regard to letters of complaint, the substance of a complaint may be deemed available while identifying details pertaining to the complainant may be withheld or deleted on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Comm on Open Govt FOIL-AO 3048.

Reprimand of county dog warden is subject to access under Freedom of Information Law. Comm on Open Govt FOIL-AO-3475.

Hearing Officer's Report in Civil Service employee disciplinary action is subject to access under Freedom of Information Law, since report was adopted in its entirety by Board of Education and, therefore, is final determination of Board. Comm on Open Govt FOIL-AO-3519.

With regard to public employees, disclosure of written reprimands would result in permissible as opposed to unwarranted invasion of personal privacy, for reprimand is relevant to manner in which named public employee performs his official duties. Comm On Open Gov't FOIL-AO-3935.

Records of issuance of reprimand of public employee or determination to take disciplinary action against public employee are subject to Freedom of Information application as they are relevant to performance of one's official duties. 1986 Committee on Open Government FOIL-AO-4236.

Assuming that tape recordings of disciplinary hearing existed, they would constitute "records" subject to Freedom of Information Law, even if they were "sealed" and despite claim that they were "deemed not to exist." Applicant's rights of access to tape recordings of his disciplinary hearing did not change after determination arising out hearing was reversed. Comm on Open Gov't FOIL-AO-8380.

If final determination of public body identifies person who is subject of charge or allegation and determination is that charge or allegation has no merit, applicant for records under Freedom of Information Law has right to obtain substance of determination, following deletion of personally identifiable details. Comm on Open Gov't FOIL-AO-9399.

If there were written reasons for suspensions of city employees that had been made known to those suspended, those records constituted final agency determinations which had to be disclosed under Freedom of Information Law. Disclosure of identities of suspended city employees does not constitute unwarranted invasion of personal privacy within meaning of CLS Pub O § 87(2)(b). Comm on Open Gov't FOIL-AO-9463.

CLS Civ R § 50-a governed inmate's request to disclose complaints and similar records pertaining to correction officer, and required judicial review of records sought to be disclosed. Comm on Open Gov't FOIL-AO-9838.

Identities of city employees, who were suspended as result of negotiated settlement of disciplinary charges, were accessible even though city had agreed not to release their names as part of settlement. Comm on Open Gov't FOIL-AO-10192.

If counseling memo is essentially "warning" rather than a conclusion reflective of finding of misconduct, it does not constitute final agency determination and therefore may be withheld under CLS Pub O § 87(2)(g). Comm on Open Gov't FOIL-AO-12078.

When allegations or charges of misconduct have not yet been determined or did not result in disciplinary action or finding of misconduct, records relating to such allegations may be withheld, for disclosure would result in unwarranted invasion of personal privacy; similarly, to extent that charges are dismissed or allegations are found to be without merit, they may be withheld. Comm on Open Gov't FOIL-AO-12423.

327. —Employment applications

While various aspects of employment application could be withheld from public under Freedom of Information Law on ground that disclosure would constitute unwarranted invasion of personal privacy, disclosure may be made to governmental official when it is clear that disclosure is made to assist in performance of governmental function. Comm on Open Gov't FOIL-AO-8585.

328. —Lists of employees' names, addresses, payroll information and the like, generally

329. — —Education employees

Resolution of Board of Education that staff records shall not be released constitutes violation of Freedom of Information Law since agency is required to maintain record setting forth name, public office address, title and salary of every officer or employee of agency, and such payroll information may be made available to any person; resolution of school board which conflicts with Freedom of Information Law is void to extent of conflict. Committee on Open Government FOIL-AO-3383.

School district is required to maintain record that includes name, title, salary and public office address (i.e., school) of all employees, including teachers. Comm on Open Gov't FOIL-AO-7634.

W-2 forms are not exempted from disclosure under CLS Pub O § 87(2)(a) on basis of 26 USCS § 6103 since latter statute pertains to records received and maintained by Internal Revenue Service but does not pertain to records kept by individual taxpayer or records maintained by employer, such as school district. Comm on Open Gov't FOIL-AO-7639.

As payroll records of school system were found to be available prior to enactment of Freedom of Information Law, such records must be disclosed regardless of intended use of records; thus, payroll records required to be maintained should be disclosed to any person, irrespective of their intended use and without request for why such records have been requested. Comm on Open Gov't FOIL-AO-7643.

330. — —Library employees

Payroll information of library personnel must be disclosed; items of personal information, such as social security number or home address, which is irrelevant to performance of employee's official duties may be withheld or deleted from record on ground that disclosure would result in unwarranted invasion of personal privacy. Committee on Open Government FOIL-AO-3370.

331. — —Police and related law enforcement employees

Front sides of paychecks relative to employees of office of District Attorney, as well as various other County employees, are subject to access under Freedom of Information Law, upon condition that details other than name of employee and net pay appearing on paychecks could be deleted on ground that disclosure would constitute unwarranted invasion of personal privacy. Comm on Open Govt FOIL-AO-3507.

Copies of timesheets reflecting hours worked by village constable should be made available for public inspection under Freedom of Information Law. Comm on Open Govt FOIL-AO-3570.

Disclosure of identities of municipal employees, including law enforcement officers, would not in most instances endanger their lives or safety; however, in event that payroll record specifies that employees are in undercover positions, CLS Pub O § 87(2)(f) might be cited with justification as basis for deleting those portions of payroll record that identify such individuals. Comm on Open Gov't FOIL-AO-8398.

Freedom of Information Law does not specify whether office of sheriff must maintain separate payroll record that identifies only employees of that agency, or whether county government, as umbrella organization for number of smaller agencies, must maintain payroll record pertaining to all county employees; records must be as complete and current as possible, and so long as some agency within county government maintains record or records reflective of information required to be maintained pursuant to CLS Pub O § 87(3)(b), such action would serve to comply with Freedom of Information Law. Inmates who are paid by correctional facility for tasks that they perform cannot be characterized as employees for purposes of CLS Pub O § 87(3)(b). Comm on Open Gov't FOIL-AO-8581.

332. — —Public works employees

Statistical and factual payroll information pertaining to water district employee was accessible under Freedom of Information Law. Comm on Open Gov't FOIL-AO-10144.

In releasing payroll records kept by agency to determine whether employees on public works projects are being paid in accordance with prevailing wage standards, agency may delete contractors' names, addresses and social security numbers to prevent unwarranted invasion of personal privacy, as such information is largely irrelevant to reason for keeping records; however, portions of records reflective of titles, duties, wages, hours worked and similar data must be disclosed. Comm on Open Gov't FOIL-AO-10325.

Insofar as payroll records sought by applicant included public works contractor's employees' names, addresses, social security numbers and their wages, portions of those records could properly be withheld under CLS Pub O § 87(2)(b) since what was relevant to agency was whether employees were being paid in accordance with prevailing wage standards; however, portions of records reflective of titles, duties, wages, hours worked and similar data should be disclosed. Comm on Open Gov't FOIL-AO-12640.

Payroll record envisioned by Public Officers Law § 87(3)(b) should pertain to the current fiscal year, rather than a previous year, and should be current on an on-going basis. Comm on Open Gov't FOIL-AO-2923.

Assuming their existence, records indicating the names and occupational titles of persons who wrote certain publications of the New York State Department of Labor are subject to disclosure under the Freedom of Information Law. Comm on Open Govt FOIL-AO 3031.

While a payroll record that identifies public employees is clearly available to any person, the level of accountability required of government employees may differ from that required of employees of private concerns whose identities appear in government records. Comm on Open Govt FOIL-AO 3060.

"Staff roster" which includes home addresses and home telephone numbers may be withheld since, under CLS Pub O § 89, disclosure of home address of officer or employee is not required. Committee on Open Government FOIL-AO-3399.

Copy of public employee's federal W-2 form is public record within meaning of Freedom of Information Law; names and figures indicating gross income paid by agency to its officers and employees found on W-2 form must be made available; however, remaining information which refers to amounts withheld for Social Security, home address, or Social Security number could be deleted on ground that disclosure would constitute unwarranted invasion of personal privacy. Comm on Open Govt FOIL-AO-3669.

Any individual who requests record identifying district employee and his or her salary is entitled to record under FOIL; moreover, record should be made available within 5 business days of receipt of request. Comm on Open Gov't FOIL-AO-4054.

Although Freedom of Information Law does not require agency to create records, payroll list of employees is included among records required to be kept pursuant to CLS Pub O § 87(3) and, therefore, payroll record that identifies all officers or employees by name, public office address, title and salary must be prepared to comply with, and must be disclosed pursuant to, Freedom of Information Law. Comm on Open Gov't FOIL-AO-7609.

With certain qualifications, W-2 forms or records containing equivalent information pertaining to public employees must be disclosed under Freedom of Information Law. Record identifying agency employees by name, public office address, title and salary must be maintained and made available under Freedom of Information Law. Portions of W-2 forms can be withheld to protect against unwarranted invasions of personal privacy, such as social security numbers, home addresses and net pay, for those items are largely irrelevant to performance of one's duties. Comm on Open Gov't FOIL-AO-7639.

Insofar as vouchers or related records include public employees' social security numbers or home addresses, those items can be deleted from records based upon considerations of personal privacy since they are largely irrelevant to performance of one's duties. Comm on Open Gov't FOIL-AO-7930.

When public employee's paycheck indicates amount after deductions have been made, it is likely that amount appearing on check could be withheld; that figure would not represent employee's salary or gross pay, both of with would be public and would instead reflect, without specification, what would remain after what might be series of personal decisions (i.e., claiming exemptions, choice of health insurance, payment of life insurance premiums, direct deposit into bank account, purchase of savings bonds, etc.) that had no relationship to performance of employee's governmental duties. Comm on Open Gov't FOIL-AO-8387.

Home telephone number of public officer or employee is largely irrelevant to performance of one's official duties and, therefore, request under Freedom of Information Law for such information can be denied as disclosure would constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-9197.

Applicant was entitled to list of names and addresses of county employees who opted for payment in place of county's health insurance coverage since such payment constituted record of payment to public employee. Comm on Open Gov't FOIL-AO-9390.

Insofar as W-2 forms of public employees indicate gross wages, they must be disclosed under Freedom of Information Law; however, other portions of W-2 forms could be withheld, such as social security numbers, home addresses and net pay since those items are largely irrelevant to performance of one's duties. Comm on Open Gov't FOIL-AO-9742.

Disclosure of information contained in records identifying state employees who might be eligible for early retirement incentive but had not been given notice of eligibility, if they had not made public any interest in taking advantage of early retirement incentives, would constitute unwarranted invasion of personal privacy because their names (and associated personal information in form of birth dates and ages as of particular date) were entirely unrelated to performance of their duties. Comm on Open Gov't FOIL-AO-9816.

Home addresses of public officers and employees need not be disclosed because they are largely irrelevant to performance of their duties. Comm on Open Gov't FOIL-AO-9820.

E-mail addresses may be withheld under CLS Pub O § 87(2)(f) and (i) to extent that disclosure of list of e-mail addresses could effectively preclude agency from carrying out its functions if list was used inappropriately. Comm on Open Gov't FOIL-AO-12105.

Payroll record and other related records identifying employees and their salaries must be disclosed; items that have no relevance to performance of one's official duties, such as social security numbers, deductions and like may be withheld on ground that disclosure would constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-12776.

Home address of present or former public officer or employee need not be disclosed under Freedom of Information Law. Comm on Open Gov't FOIL-AO-13397.

Portions of W-2 forms for public employees can be withheld, such as social security numbers, home addresses and net pay, since those items are largely irrelevant to performance of one's duties; however, those portions indicating public officers' or employees' names and gross wages must be disclosed. Comm on Open Gov't OML-AO-2460.

333. —Performance evaluations

Whether or not evaluation of employee work performance is placed in employee's personnel folder is irrelevant to question of whether evaluation is available under Freedom of Information requests, since any information kept, held or produced by agency constitutes "record". 1986 Committee on Open Government FOIL-AO-1478.

Although some portions of performance evaluations and rating forms of agency employees may be justifiably withheld, including statements of opinion, recommendation, or advice, the final rating is likely subject to disclosure, assuming that it is reflective of a final determination, and particularly if monetary awards are based upon ratings. Comm on Open Govt FOIL-AO 3031.

While standards, goals, objectives and similar criteria might apply to particular public employee, those records would clearly be relevant to performance of that person's official duties and, therefore, disclosure would result in permissible rather than unwarranted invasion of personal privacy; however, insofar as documents include supervisor's subjective comments or analysis of how well or poorly individual has carried out goals or met criteria, those portions of records could be withheld; similarly, self-appraisals or peer appraisals would apparently consist of

opinions that could also be withheld. Comm on Open Gov't FOIL-AO-7633.

Final rating of public employee would be available under Freedom of Information Law, assuming that any appeals had been exhausted, for it would constitute final agency determination available under CLS Pub O § 87(2)(g)(iii), particularly if monetary award was based upon rating; moreover, final rating concerning public employee's performance is relevant to that person's official duties, as well as those of supervisor who issues rating and, therefore, name of employee, final rating and name of supervisor who made rating would be available under Freedom of Information Law since disclosure would not result in unwarranted invasion of personal privacy of either employee or supervisor. Comm on Open Gov't FOIL-AO-7633.

Disclosure, in employee performance evaluation, of description of duties to be performed by any person holding particular position, or series of criteria reflective of duties or goals to be achieved by any person holding that position, would result in permissible rather than unwarranted invasion of personal privacy for purpose of FOIL. Comm on Open Gov't FOIL-AO-12396.

Component of employee performance evaluation involving reviewer's subjective analysis or opinion of how well or poorly standards or duties have been carried out or goals have been achieved could be withheld under FOIL, both as unwarranted invasion of personal privacy and under CLS Pub O § 87(2)(g), on ground that it constitutes opinion concerning performance. Comm on Open Gov't FOIL-AO-12396.

Component of employee performance evaluation consisting of final rating, i.e., "good", "excellent", "average", etc. would be available for disclosure under FOIL, assuming that any appeals have been exhausted, for it would constitute final agency determination available under CLS Pub O § 87(2)(g)(iii), particularly if monetary award were based on rating; moreover, final rating concerning public employee's performance is relevant to that person's official duties and therefore would not result in unwarranted invasion of personal privacy if disclosed. Comm on Open Gov't FOIL-AO-12396.

334. —Personnel records, generally

335. — —School personnel records

School district contract with superintendent is not exempt from disclosure on grounds of unwarranted invasion of personal privacy since public employees enjoy lesser degree of privacy than that of public generally and records relevant to performance of public employee's official duties are generally obtainable. Committee on Open Government FOIL-AO-3333.

Work schedule of community college faculty member is accessible under Freedom on Information Law, since schedule is relevant to performance of his or her official duties. Comm on Open Govt FOIL-AO-3594.

"File numbers" that are assigned to each employee of school district are not subject to access under Freedom of Information Law, since file number is merely identification number and since it is not relevant to manner in which public employee performs his or her duties. Comm on Open Govt FOIL-AO-3638.

Contract between school district and individual, like collective bargaining agreement between public employer and public employee union, must be disclosed, for it is clearly relevant to duties, terms and conditions reflective of responsibilities of parties. Comm on Open Gov't FOIL-AO-13296.

Under CLS Pub Off § 87(2)(g)(iii), minutes of board of education meeting convened to review and ultimately approve report by non-teaching salary committee were subject to disclosure under Open Meetings Law, despite contentions that information should not be released until personnel concerned were notified, since board voted to accept and approve report and thereby made final agency determination. Comm on Open Gov't OML-AO-1380.

336. — —Social Security numbers

Whether city human rights commission or employing agency maintains employee's social security number is irrelevant in terms of Freedom of Information Law; either can withhold that item as unwarranted invasion of personal privacy since infringement upon privacy and effect of disclosure would be same regardless of which agency maintains or perhaps discloses that kind of personal information. Comm on Open Gov't FOIL-AO-7858.

Applicant was entitled under Freedom of Information Law to disclosure of "Goals and Timetables Status Reports" prepared by Department of Civil Service, which reports consisted of summary statistical information and did not identify agency employees by name or social security number, but rather by job title and sex and race or ethnicity of incumbents of positions. Comm on Open Gov't FOIL-AO-7935.

Public disclosure of social security number of employee of state agency, absent consent of data subject, constitutes unwarranted invasion of personal privacy under both Freedom of Information Law and Personal Privacy Protection Act. Comm on Open Gov't FOIL-AO-9237.

337. — —Racial information

Race of public employee or incumbent could properly be withheld under CLS Pub O § 87(2)(b), as race has nothing to do with performance of public employee's duties. Comm on Open Gov't FOIL-AO-9790.

Records of state hospital regarding requesting party's past standing as employee may be exempt from disclosure under § 87(2)(g) of the Freedom of Information Law. Comm on Open Govt FOIL-AO 3030.

Request for town employee's records, to extent that they relate to employee's position and job responsibilities, should not be denied on ground that disclosure would result in unwarranted invasion of personal privacy. Comm on Open Govt FOIL-AO-3524.

Portions of employee's personnel file which contained advice, recommendations, suggestions or impressions may be withheld; portions of employee's personnel file which contained factual information church as test scores, attendance records, determinations, and similar information must be disclosed; recommendations or letters of reference need not be disclosed where such documentation would result in unwarranted invasion of personal privacy. Committee on Open Government FOIL-AO-3816.

As to disclosure of references in requester's personnel file, such reference could be withheld under CLS Pub Off § 89(2)(b), unless deletion of identifying details would effectively preclude identification of reference's author and, under § 87(2)(g) of such Law, if reference involves appraisal of performance, it could be withheld as "intra-agency materials", unless it was previously disclosed to requester. Comm on Open Gov't FOIL-AO-4567.

Freedom of Information Law requires that person requesting records must "reasonably describe" records sought so agency officials can locate records; however, certain records may justifiably be withheld if information sought includes other people in addition to requester because that would cause unwarranted invasion of personal privacy; while eligible lists, which identify those persons who pass civil service examinations and their scores, are available, records identifying those persons who failed exams or their scores could be withheld as unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4574.

Assuming that record involving individual's previous employment with city exists and can be located, record would be available; on other hand, if city officials cannot locate such record, response should nonetheless be given, indicating that record of employment could not be located. Comm on Open Gov't FOIL-AO-4840.

There is nothing in Freedom of Information Law that deals specifically with personnel records or personnel files; neither characterization of documents as personnel records nor their placement in personnel files would necessarily render those documents confidential or deniable under Freedom of Information Law. Comm on Open Gov't FOIL-AO-7633.

Whether public officer or employee is covered or chooses to be covered by public employer paid health insurance plan or whether that person opts for family or individual coverage has no relevance to performance of that person's official duties. Disclosure indicating that public officer or employee is covered by health insurance plan at public expense would not represent or reveal intimate detail of one's life. If disclosure of cost of health care coverage for particular public employee indicates which plan that person has chosen or whether his or her plan involves individual or dependent coverage, such disclosure might poten-

tially result in revelation of number of details of person's life and unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-7868.

While identity of public employee's prior private employers may be withheld, prior public employment is matter of public record and must be disclosed under Freedom of Information Law. Comm on Open Gov't FOIL-AO-8914.

Under Freedom of Information Law, former employee enjoys rights of access to records about himself or herself and cannot be denied access to their own official personnel file. Comm on Open Gov't FOIL-AO-8930.

Entirety of administrative file pertaining to former public employee containing "union and job related complaints," memorandum concerning employee prepared by his supervisor relating to particular incident, another memorandum concerning alleged misperceptions made by employee, and correspondence between employer and outside employee assistance program to which employer referred employee, all were records subject to rights conferred by Freedom of Information Law. Comm on Open Gov't FOIL-AO-9647.

County had no basis to withhold certificates establishing public employee's associate, bachelor and master degrees. Comm on Open Gov't FOIL-AO-9964.

Agency was not required to disclose written report of alleged incident of harassment submitted by employee to Sexual Harassment Committee, irrespective of final determination of matter because, at time report was prepared, there would have been no indication or finding that it involved more than unsubstantiated allegations; further, identity of person making complaint to Sexual Harassment Committee could be withheld to prevent unwarranted invasion of his or her privacy, given nature of allegation. Comm on Open Gov't FOIL-AO-10399.

Records indicating payments for "accrued sick, vacation and/or personal leave time as well as any payment or payments for accrued overtime or compensatory time" and "any other...benefits" would be accessible to public under Freedom of Information Law, even if employee in question remained police officer and CLS Civ R § 50-a remained consideration, since records reflective of payments or benefits are not used to evaluate performance, and such records are "neutral." Records reflective of salaries of public employees must be prepared and made available and, similarly, records reflective of other payments, whether they pertain to overtime, or participation in work-related activities, for example, would be available, for those records would be relevant to performance of one's official duties. Comm on Open Gov't FOIL-AO-12423.

Neither characterization of documents as "personnel records" nor their placement in personnel files would necessarily render those documents "confidential" or deniable under Freedom of Information Law. Names of municipal employees or family members coupled with amounts of reimbursements appearing on vouchers would, if disclosed, constitute unwarranted invasion of personal privacy, even though they do not indicate particular medical condition or problem, since items of that nature are largely irrelevant to performance of one's official duties, and vouchers indicating treatment, or particularly frequency of treatment, and amounts reimbursed, represent intimate details of peoples' lives. Comm on Open Gov't FOIL-AO-12692.

To extent that letters of resignation include intimate or personal information, i.e., that person has resigned due to poor health, they could be withheld; if they do not contain information of such nature, they would likely be available. Comm on Open Gov't FOIL-AO-13148.

Freedom of Information Law, not General Municipal Law or local enactment, is governing statute for acccess to financial disclosure statements filed by city officers and employees. Comm on Open Gov't FOIL-AO-13559.

338. —Retirees and other former employees

List of only names of retirees of public employees' retirement system should be made available under Freedom of Information Law. Comm on Open Govt FOIL-AO-3642.

Disclosure of pension numbers of agency's present and former employees may be permitted, since such number appears to be only identifier for obtaining public records concerning public employees participating in State Retirement System, such as years of service, salary information and payments made under such system, though identifying number alone may be otherwise irrelevant to performance of public employee's duties, for purposes of determining whether unwarranted invasion of personal privacy has occurred. Comm on Open Gov't FOIL-AO-4490.

Since deaths are often widely known or publicized, disclosure of date of death of former employee would not constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4808.

Disclosure of names of persons employed or once employed by particular agency who had applied under CLS Retire & S S § 803 would result in unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-8328.

Applicant was generally entitled to disclosure of city records concerning all retired pensioned employees, including exempt employees, receiving bona fide legal pensions plus compensatory dollars from December, 1990 to July, 1996 since such disclosure would not involve unwarranted invasion of personal privacy; however, social security numbers, home addresses, member and retirement numbers were unique identifiers and could be withheld based on considerations of privacy. Comm on Open Gov't FOIL-AO-9742.

Correspondence between county and State Retirement System, bi-weekly payroll certifications, and related records pertaining to employment and retirement of public employee who was subject of controversy and investigation involving payments that might have been made to him when he was absent from the workplace, were accessible to extent they were prepared in ordinary course of business, not as result of inquiry regarding employee's conduct. Comm on Open Gov't FOIL-AO-10270.

Rationale for confidentiality accorded by CLS Civ R § 50-a was no longer present, and that statute was no longer applicable or pertinent, as applied to police chief who had retired, since there was no issue involving continued employment or promotion; thus, records regarding chief could be disclosed under Freedom of Information Law. Comm on Open Gov't FOIL-AO-12423.

339. —Unemployment benefits and proceedings

A cassette recording of a hearing before the Unemployment Insurance Appeal Board constitutes a record subject to rights of access granted by the Freedom of Information Law and is presumptively available to the public to the extent that the hearing was open to the public. Comm on Open Govt FOIL-AO 3033.

Records maintained by town relating to former employee's unemployment insurance claim did not fall within scope of CLS Labor § 537 with respect to former employee's Freedom of Information Law request for such records. Comm on Open Gov't FOIL-AO-12286.

Records reflecting public employee's official duties and responsibilities are available under FOIL; thus, since public employee's title, job description, salary and length of service are relevant to official duties, disclosure would not constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-3996.

As to request for information from Utica City School District regarding employee health insurance accounts, to extent that such information consists of agency records, none of grounds for denial under CLS Pub Off § 87(2) could likely be asserted, though if such records identify claimants, identifying details could likely be deleted as constituting unwarranted invasion of personal privacy under §§ 87(2)(b), 89(2)(b) of such law. Comm on Open Gov't FOIL-AO-4495.

While salary information pertaining to public employees is accessible, information concerning deductions or amounts withheld from salaries due to judgment could be withheld as unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4565.

Village must maintain and make available a payroll record that includes the names and salaries of all village employees, and such records are available under the provisions of the Freedom of Information Law. Comm on Open Gov't FOIL-AO-6277 (1990).

Records reflective of participation in work-related activities, such as attendance at conferences, as well as payments or reimbursements for expenses to public employees, are available

under Freedom of Information Law since such records are relevant to performance of one's official duties. Comm on Open Gov't FOIL-AO-7930.

Names and legal addresses of persons who applied to fill vacancy on town ethics committee were probably not accessible under Freedom of Information Law; while applicant for position on ethics committee is not seeking public employment, he or she (as private citizen) should be accorded privacy protection analogous to applicant for public employment. Comm on Open Gov't FOIL-AO-9820.

Identifying details of Public Employment Relations Board (PERB) employees who complete proposed "arbitrator appraisal" forms, in connection with voluntary grievance arbitration, may be withheld to prevent unwarranted invasion of personal privacy; completion of such forms is ancillary to routine duties of PERB employees. Comm on Open Gov't FOIL-AO-9972.

Rights of access granted by Personal Privacy Protection Law do not extend to records of agencies or units within agencies whose primary functions involve investigation, law enforcement, or confinement of persons in correctional facilities; thus, Personal Privacy Law did not serve as vehicle under which job applicant could gain access to state police records documenting results of polygraph exam which was used with other investigative records to determine whether to employ him. Evaluative material and subjective comments or opinions contained in file which included results of polygraph exam and other investigative records used by Division of State Police to determine whether to employ job applicant, which was maintained separately from job applicant's personal history file, could be withheld under CLS Pub O § 87(2)(g), but statistical or factual information contained in such file was available to applicant unless different ground for denial applied. Comm on Open Gov't FOIL-AO-10117.

There is no basis for withholding records or portions of records specifying that public employees are members of public employee union; exception concerning privacy does not apply to record identifying entities or individuals in relation to their business or professional capacities. Comm on Open Gov't FOIL-AO-16451.

Minutes reflective of action taken in executive session, discussing whether to increase salary of justice court clerk or accept his resignation, should have been prepared pursuant to CLS Pub O § 106, and record of action would be accessible under Freedom of Information Law. Comm on Open Gov't OML-AO-2216.

340. Land use and development; zoning, generally

341. —Appraisals; appraisers

To great extent, grounds for denial describe some harm that would arise as result of disclosure; accordingly, where district obtained appraisal of real property for sale, did not disclose such appraisal, solicited bids, and accepted offer subject to district voters' approval of sale, appraisal is accessible even though voters have not yet approved sale, since disclosure would not result in any harm. Comm on Open Gov't FOIL-AO-3999.

As to access to appraiser's working papers contributing to appraisals of land acquired by Albany County for its civic center project, neither records' status as working papers nor their physical possession by party other than county prevents their disclosure, under CLS Pub O § 87(2)(g), papers are likely "intra-agency materials" that would be accessible or deniable depending upon their contents, and submission of request after transaction's completion precludes denial based on impairment of present or imminent contract awards under § 87(2)(c) of such Law. Comm On Open Gov't FOIL-AO-4527.

Appraisals maintained by or produced for County, as well as any other informational materials related to them, constitute "records" subject to rights conferred by Freedom of Information Law. Comm on Open Gov't FOIL-AO-7936.

342. —Building inspections, building plans, surveys and the like

Building plans per se contain no personal information concerning individual and, therefore, those kinds of records cannot be withheld on ground that disclosure would constitute unwarranted invasion of personal privacy under CLS Pub O § 87(2)(b). Comm on Open Gov't FOIL-AO-7921.

It is clear that certificates of occupancy must be disclosed under Freedom of Information Law since none of grounds for denial could properly be asserted to withhold those records. Comm on Open Gov't FOIL-AO-8366.

Whether owner of property consents to permit access to building plan is irrelevant; if record is available under Freedom of Information Law, subject of record does not have ability to control disclosure. Comm on Open Gov't FOIL-AO-12830.

Regarding access to plans, drawings and surveys that are marked with seal of architect, land surveyor or engineer, seal does not serve as copyright, nor does it restrict right to inspect and copy under Freedom of Information Law; it merely indicates that person is qualified as licensee. Comm on Open Gov't FOIL-AO-12830.

If reproduction of copyrighted architectural plans and similar records would "cause substantial injury to the competitive position of the subject enterprise," i.e., holder of copyright, in conjunction with CLS Pub O § 87(2)(d), agency could preclude reproduction of work; however, if reproduction of work would not result in substantial injury to competitive position of copyright holder, such exception would not apply. Comm on Open Gov't FOIL-AO-12830.

CLS Pub O § 87(2)(f), which permits agency to withhold records insofar as disclosure could "endanger the life or safety of any person," might properly be invoked to deny access to architectural building plans, insofar as such records include information concerning alarms, security systems and like. Comm on Open Gov't FOIL-AO-12830.

343. —Geography; geographical data systems

With respect to geographical data systems in general, such things as maps, images and like constitute "factual data" within meaning of CLS Pub O § 87(2)(g) that must be disclosed. Estimates and projections, even though they may not be reflective of "objective reality," nonetheless constitute "statistical" tabulations within meaning of CLS Pub O § 87(2)(g) that must be disclosed. Comm on Open Gov't FOIL-AO-7507.

344. —Housing

County Rent Guidelines Board cannot assert § 12(6) of Emergency Tenant Protection Act as basis for denying request for certain documentation submitted by landlords to County Board pursuant to § 12(6). Comm on Open Govt FOIL-AO-3697.

CLS Real Property Actions and Proceedings Law § 779 does not operate to exempt from disclosure records that come into possession of city Department of Housing Preservation and Development. Comm on Open Govt FOIL-AO-3702.

Record indicating whether or not fire was reported by landlord on particular date at specific location is available from New York City Housing Authority under FOIL. Comm On Open Gov't FOIL-AO-4018.

345. —New York City land use

Disclosure of Letter of Intent between New York City Economic Development Corporation (EDC) and New York Stock Exchange (NYSE) regarding development of new NYSE location would "impair present or imminent contract awards" and thus denial of disclosure request was consistent with law; while contents of Letter of Intent were known by and in possession of NYSE and EDC, its contents were not known to other parties involved or potentially involved in negotiations regarding project. Comm on Open Gov't FOIL-AO-12604.

346. —Waste management

Copies of court orders pertaining to New York City Department of Sanitation's "confiscation of topsoil and living vegetation in Rockaway" were accessible under Freedom of Information Law insofar as they existed and were maintained by Department of Sanitation. Comm on Open Gov't FOIL-AO-12,352.

Any records generated by or in possession of Stadium Committee designated by Mayor of Buffalo are subject to provisions of Freedom of Information Law, where purpose of Committee is to discuss and plan possible domed baseball stadium in downtown Buffalo. Comm on Open Govt FOIL-AO 3091.

Exemption for materials compiled for law enforcement purposes extends only to information relating to criminal investigations, and does not extend to material concerning investigations

of violations of zoning ordinances enforceable by building inspector, since such are "offenses" and not crimes. Committee on Open Government FOIL-AO-3346.

Plans and surveys of building department are clearly available for inspection under FOIL, and are also available for copying unless copyright has been registered with U. S. Copyright Office. Comm On Open Gov't FOIL-AO-4169.

City maps fall within scope of Freedom of Information Law. 1986 Committee on Open Government FOIL-AO-4254.

Detailed engineering plans, submitted to town planning board for site plan or subdivision approval are documents available to public under Freedom of Information Act. 1986 Committee on Open Government FOIL-AO-4364.

A draft land use plan concerning Town of Palermo, even though preliminary in nature, constitute "records" subject to rights of access conferred by the Freedom of Information Law. Comm on Open Gov't FOIL-AO-6246 (1990).

Pendency of litigation does not affect rights of the public to obtain access to building permits under the Freedom of Information Law. Comm on Open Gov't FOIL-AO-6331 (1990).

Where chairman of town planning board, in his official capacity, acquired DEIS material submitted by private developer as part of SEQR process for its proposed shopping mall, such materials constituted "records" subject to rights conferred by Freedom of Information Law. DEIS material submitted by private developer as part of SEQR process for its proposed shopping mall to chairman of town planning board was available under Freedom of Information Law since none of grounds for denial appeared to be applicable. Comm on Open Gov't FOIL-AO-8569.

Correspondence to agency from residents of town opposing proposed subdivision were not subject to disclosure under CLS Pub O § 87(2)(b). Comm on Open Gov't FOIL-AO-8912.

Survey prepared by independent professional surveyor in conjunction with county watershed project constituted intra-agency material but, if it was typical of land surveys generally, it would likely consist entirely of factual information accessible under CLS Pub O § 87(2)(g)(i) unless different ground for denial applied. Comm on Open Gov't FOIL-AO-9844.

CLS Pub O § 87(2)(b) pertains to natural persons, not entities or persons acting in business capacities, and thus commercial building permit files (including copies of permit applications, commercial building project addresses, type of jobs, names, addresses, and phone numbers of contractors doing work) are available insofar as they are maintained in agency's records and can be retrieved by agency's filing or record-keeping systems. Comm on Open Gov't FOIL-AO-9890.

Statements prepared by town planning board, including recommendations concerning proposed amendment to town's zoning and land use ordinance, may be withheld to extent that they constitute pre-decisional or "non-final" records; however, factual data contained therein must be disclosed. Comm on Open Gov't FOIL-AO-10259.

Regarding Freedom of Information Law request for all building permit applications denied by village in past 15 years, if village maintained separate file containing building permit applications that had been denied, or even if building permits were maintained chronologically, locating such records might be relatively easy task; however, if records were kept by parcel and there was no way of locating records sought without reviewing files relating to each and every parcel, request would not meet standard of reasonably describing records sought. Comm on Open Gov't FOIL-AO-12236.

Correspondence between developer and city is accessible to public even if it has been forwarded to city's special counsel and/or law department; such records, although in possession of special counsel, are not protected by attorney-client privilege because city, not developer, is client of special counsel. Comm on Open Gov't FOIL-AO-12238.

Town code enforcement officer could, under federal Drivers Privacy Protection Act (18 USCS § 2721), obtain information from Department of Motor Vehicles concerning ownership of vehicle, registration, inspection and insurance status related to parking and storage of vehicles; however, if licensee has asked that his or her license record be shielded from disclosure, subpoena may be needed to obtain record. Comm on Open Gov't FOIL-AO-12620.

Records subject to SEQRA process are generally accessible, and may not be withheld on ground that they should be available only at certain times or in particular sequence. Comm on Open Gov't FOIL-AO-13441.

Any documentation maintained by or for town regarding "location of the Tower," irrespective of its origin or physical location, would constitute "record" subject to rights conferred by Freedom of Information law. Comm on Open Gov't OML-AO-3821.

347. Law and law enforcement, generally

348. —Attorney matters, generally

349. — —Attorney-client privilege

While attorney and Village board of trustees or mayor may have attorney-client relationship, case law establishes that records of monies paid and received by attorney or law firm for services rendered to client are not privileged. Comm on Open Gov't FOIL-AO-4056.

Attorney bills or vouchers, or portions thereof, indicating payments to attorney are not subject to attorney-client privilege, and in case of municipal attorney, are subject to FOIL. Comm on Open Gov't FOIL-AO-4123.

Report prepared by town attorney in response to anonymous complaint that dentist was operating his practice in violation of town code was within attorney-client privilege under CLS CPLR § 4503 insofar as it consisted of legal advice provided to client (town); however, to extent that report had been disclosed to dentist, privilege was waived and report was not exempted from disclosure by CLS Pub O § 87(2)(a). Comm on Open Gov't FOIL-AO-9854.

School board (client) effectively waived ability to claim that board member's comments regarding attorney's advice to board were made in contravention of attorney-client privilege where several board members made reference to attorney's advice and that his opinion was part of discussion in open meeting. Comm on Open Gov't FOIL-AO-12405.

Pendency of litigation would not affect either rights of public or litigant under Freedom of Information Law. Materials that are served on or shared with adversary could not be characterized as confidential or exempt from disclosure under CLS CPLR § 3101. Pendency of litigation would not affect either rights of public or litigant under Freedom of Information Law. Materials that are served on or shared with adversary could not be characterized as confidential or exempt from disclosure under CLS CPLR § 3101. Insofar as certain correspondence between town and private attorney have been communicated between town and its adversary or have been filed with court, any claim of privilege or its equivalent would be effectively waived; once records in nature of attorney work product or material prepared for litigation were transmitted to adversary, i.e., from town to its adversary and vice versa, capacity to claim exemptions from disclosure under CLS CPLR § 3101(c) or (d) or, therefore, CLS Pub O § 87(2)(a) ends, while, conversely, if records had not been disclosed to person other than client or clients, assertion of privilege would be proper. If records are prepared for multiple purposes, one of which includes eventual use in litigation, CLS CPLR § 3101(d) does not serve as basis for withholding records; only when records are prepared solely for litigation can § 3101(d) be properly asserted to deny access to records. Comm on Open Gov't FOIL-AO-12638.

When municipal official or body seeks legal advice from its attorney and attorney renders legal advice, communications of that nature would fall within coverage of attorney-client privilege and would, therefore, be exempt from disclosure under CLS Pub O § 87(2)(a). Retainer agreement (contract) would not be subject to attorney-client privilege and would ordinarily be accessible under Freedom of Information Law. Comm on Open Gov't FOIL-AO-12641.

350. — —Attorney work product

Survey prepared by independent professional surveyor in conjunction with county watershed project did not constitute work product of county attorney, and was not exempt from disclosure under CLS Pub O § 87(2)(a) and CLS CPLR § 3101(d) on ground that it was material prepared solely for litigation, even if records

prepared by surveyor at direction of county attorney could be characterized as attorney work product. Comm on Open Gov't FOIL-AO-9844.

Pendency of litigation would not affect either rights of public or litigant under Freedom of Information Law. Materials that are served on or shared with adversary could not be characterized as confidential or exempt from disclosure under CLS CPLR § 3101. Pendency of litigation would not affect either rights of public or litigant under Freedom of Information Law. Materials that are served on or shared with adversary could not be characterized as confidential or exempt from disclosure under CLS CPLR § 3101. Insofar as certain correspondence between town and private attorney have been communicated between town and its adversary or have been filed with court, any claim of privilege or its equivalent would be effectively waived; once records in nature of attorney work product or material prepared for litigation were transmitted to adversary, i.e., from town to its adversary and vice versa, capacity to claim exemptions from disclosure under CLS CPLR § 3101(c) or (d) or, therefore, CLS Pub O § 87(2)(a) ends, while, conversely, if records had not been disclosed to person other than client or clients, assertion of privilege would be proper. If records are prepared for multiple purposes, one of which includes eventual use in litigation, CLS CPLR § 3101(d) does not serve as basis for withholding records; only when records are prepared solely for litigation can § 3101(d) be properly asserted to deny access to records. Comm on Open Gov't FOIL-AO-12638.

City's characterization of certain property records as attorney's "work product" was irrelevant since materials characterized as "work product" prepared by or for city would constitute "records" that fall within scope of Freedom of Information Law; moreover, there is no exception dealing specifically with "work product." Comm on Open Gov't FOIL-AO-12689.

Document prepared by village attorney apparently addressed to board of trustees pertaining to alleged conflicts of interest could be withheld from disclosure under CLS Pub O § 87(2)(g) since such document appeared to consist of expression of opinion. Comm on Open Gov't FOIL-AO-9665.

Freedom of Information Law does not apply to information indicating whether attorneys have been censured or disciplined; records that are subject to CLS Jud § 90(10) may be disclosed only in conjunction with that statute. Comm on Open Gov't FOIL-AO-12014.

While records of governmental entity required to adopt plan of providing representation under CLS County article 18-B are subject to Freedom of Information Law, records of individual attorney performing services under Art 18-B may or may not be subject to FOIL, depending on nature of plan. Comm on Open Gov't FOIL-AO-12161.

Vouchers, time sheets and similar materials would be available "in great measure" from county office of public defender, to extent that such records existed. Comm on Open Gov't FOIL-AO-12535.

351. —Criminal investigations, generally

352. — —Accomplices; co-defendants

To extent that codefendants' statements held deleted materials which identified codefendants, it does not appear that withholding of their names was justifiable because disclosure of codefendants' names and addresses during trial would indicate that they are not "confidential" informants; further, due to those disclosures, release of their names would not constitute unwarranted invasion of personal privacy; however, if names withheld pertain to persons other than codefendants identified during trial, it is possible that those persons are confidential informants or that disclosure of their identities would result in unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4851.

Statement given to police on arrest of codefendant in murder prosecution, review of which was sought by defendant's wife after conclusion of prosecution of defendant and codefendant, was subject to disclosure under Freedom of Information Law to extent that statement was introduced into evidence or disclosed during public judicial proceeding since statement lost its cloak of confidentiality on such introduction into evidence or disclosure. Comm on Open Gov't FOIL-AO-7538.

353. — —Breathalyzer matters

Police department's procedure for arrest and the use of a breathalyzer are accessible under Freedom of Information Law. Comm on Open Gov't FOIL-AO-2975.

As to request by prison inmate for records prepared by manufacturer of drug testing machine which indicate that when certain medication is taken, results of drug test may indicate "false positives", such materials would likely be available for disclosure, for it does not appear that any grounds for denial would apply. Comm On Open Gov't FOIL-AO-4529.

354. — —Confidential informants

Police blotter or booking record is probably subject to disclosure under Freedom of Information Law, since it is unlikely that such disclosure would interfere with an investigation or deprive a person of a right to a fair trial, but if a record contains reference to a confidential informant, that portion of the record can be deleted. Comm on Open Govt FOIL-AO 3024.

355. — —Criminal histories

Under the Freedom of Information Law all records are available to the public except that a municipality *may* deny access to records within certain categories. In the case of criminal history records obtained from the New York State Department of Criminal Justice Services, a municipality must determine whether access is restricted by a Use and Dissemination Agreement between the municipality and the Department. 1980 NY Ops Atty Gen Dec. 24 (informal).

Non-confidential criminal history data is subject to rights of access granted by Freedom of Information Law to companies that perform "pre-employment screening services" pursuant to state and federal Fair Credit Reporting Acts. Comm on Open Govt FOIL-AO-3455.

Criminal history records including arrest and conviction data is generally available to the subjects of the records under the Freedom of Information Law. Comm on Open Gov't FOIL-AO-6212 (1990).

While conviction records may be obtained directly from the courts where the convictions occurred, criminal history records maintained by or obtained from Division of Criminal Justice Services (DCJS) are exempted from disclosure under CLS Public Officers Law § 87(2)(a) of the Freedom of Information Law. Comm on Open Gov't FOIL-AO-6312 (1990).

While subject of criminal history record may obtain such record from Division of Criminal Justice Services, criminal history records maintained by that agency are exempted from public disclosure pursuant to CLS Pub O § 87(2)(a). Comm on Open Gov't FOIL-AO-8383.

While subject of conviction may obtain such records from Division of Criminal Justice Services, criminal history records maintained by that agency are exempt from public disclosure pursuant to CLS Pub O § 87(2)(a); if individual is aware of court in which person was convicted, record of conviction is available from court, but there is no agency that provides public access to conviction records generally. Comm on Open Gov't FOIL-AO-8896.

Prosecution witness' rap sheet was available from county district attorney's office to extent of criminal convictions and pending criminal actions. Comm on Open Gov't FOIL-AO-9859.

Regulation promulgated by Division of Criminal Justice Services (9 NYCRR § 6150.4) was inconsistent with Freedom of Information Law (FOIL) insofar as it exempted all criminal history records from FOIL disclosure; only criminal records exempt from FOIL disclosure are records related to arrest of juveniles (CLS Family Ct Act § 784), records sealed under CLS CPL §§ 160.50 or 160.55, and Youthful Offender records sealed under CLS CPL §§ 720.15 or 720.35. Comm on Open Gov't FOIL-AO-16623.

356. — —Fingerprints

Criminal defendant is entitled to access under Freedom of Information Law to copy of his fingerprints taken at scene of crime. Comm on Open Govt FOIL-AO-3464.

357. — —Pending cases; ongoing investigations

City's policy of not releasing any information on criminal case until crime is solved and investigation is closed clearly conflicts with Freedom of Information Law. Comm on Open Govt FOIL-AO-3695.

Unless law enforcement investigation is currently ongoing or pending which relates to requested records, there is no basis for denial on ground that disclosure would interfere with law enforcement investigations, and even if such law enforcement investigation is ongoing or pending, law allows for denial of access only where disclosure "would interfere" with investigation, such that possibility that disclosure "might interfere" is insufficient. 1986 Committee on Open Government FOIL-AO-4310.

If crime is being investigated, and journalist or member of public requests records identifying suspects or witnesses or perhaps indicating course of investigation, it is likely that disclosure would interfere with investigation and that records could be withheld; however, after arrests are made, it is likely that same records would become accessible, at least in part, because disclosure would no longer interfere with investigation since investigation would have ended. Comm on Open Gov't FOIL-AO-9214.

Preparation of closing memorandum does not necessarily signify end of investigation by city department of investigation since department might refer matter to different agency for further investigation and/or prosecution; thus, although closing memoranda are presumptively accessible to public, department could in appropriate circumstances withhold memoranda or portions thereof on ground that disclosure would interfere with investigation that is continuing and is being carried out by another agency or in rare circumstance in which disclosure would interfere with judicial proceeding. Comm on Open Gov't FOIL-AO-9399.

Newspaper was entitled to records of city department of investigation and department of buildings relating to suspension of 42 elevator inspectors employed by department of buildings to extent of disclosure of names of those suspended and reasons for suspensions, notwithstanding assertion that disclosure would interfere directly with ongoing criminal investigation and with ongoing disciplinary proceedings, since it was clear that city departments had already contacted individuals involved and had informed them of action taken against them, as well perhaps as reasons for that action, and, therefore, disclosure would not enable possible lawbreakers to evade detection or flee. Comm on Open Gov't FOIL-AO-9463.

If investigations to which police department records relate are over, disclosure could not interfere with those investigations. If police investigation result in convictions, disclosure of investigative records would not interfere with judicial proceeding even if cases to which they relate are appealed as (1) appeals deal only with matters of law and fact contained in trial court record, which is available to parties and public generally, and (2) while courts and court records are not subject to Freedom of Information Law, they are available under other provisions of law (e.g., CLS Jud § 255). Comm on Open Gov't FOIL-AO-10038.

358. — —Physical evidence; photographs

Police department documentary materials relating to the investigation and conviction of petitioner, as well as photographs maintained by the police department, were subject to rights of access conferred by the Freedom of Information Law. Comm on Open Gov't FOIL-AO-6240 (1991).

Crime victim was not entitled to access under Freedom of Information Law to photographs of himself taken by law enforcement officers, showing his injuries after being beaten, if photographs were maintained in criminal file sealed under CLS CPL § 160.50; if file was not sealed, photographs could be withheld from public on ground that disclosure would result in unwarranted invasion of personal privacy, but could not be withheld from crime victim, as person cannot invade his own privacy. Comm on Open Gov't FOIL-AO-12318.

Records introduced into evidence or disclosed during public judicial proceeding must be disclosed; also, if certain crime scene photos have been disclosed, as evidence or otherwise, it is questionable or perhaps unlikely that others involving same locations or persons would reveal more, in terms of invasion of personal privacy, than those previously disclosed. Comm on Open Gov't FOIL-AO-12579.

359. — —Sealed records; expunged materials

Written reports concerning criminal activity committed on school property submitted by a school district to a village police department and filed by the department are public records and may not be returned to the district nor expunged from the department's records, except in accordance with statutory procedures. 1983 NY Ops Atty Gen Mar 22 (informal).

360. — —Suicide investigations

Blanket denial of request for state police records relating to suicide investigation was inappropriate, as records about deceased persons are generally public; however, those portions which if disclosed would "disgrace the memory" of decedent may be withheld and, in context of suicide, privacy of others might also be considered. Comm on Open Gov't FOIL-AO-9771.

Police department could not claim that records sought regarding murder investigation of incident that ended in suicide of alleged perpetrator could be withheld in their entirety on ground that they constituted intra-agency materials. CLS Pub O § 87(2)(e) would not likely serve as basis for denial of access to much of information sought regarding murder investigation that ended with suicide by alleged perpetrator. Comm on Open Gov't FOIL-AO-12544.

State police reports related to homicide-suicide of husband and wife in their home did not fall within disclosure exception for law enforcement records under CLS Pub O § 87(2)(e)(iv); police had quickly determined that case involved homicide and suicide and, while event might not be characterized as routine, investigation ended quickly and it was unlikely that records compiled by police involved "non-routine" investigative techniques or procedures. Comm on Open Gov't FOIL-AO-16552.

361. — —Telephone calls, including 911 recordings

Records of "911" calls maintained by the New York City Police Department could be obtained under the Freedom of Information Law provided that the transmissions in question could have been or were heard by members of the public while listening to the police scanners. Comm on Open Gov't FOIL-AO-6278 (1990).

Details of long distance telephone bills made from county executive's office, as well as bills for cellular phone calls made by county executive, could not be withheld on ground that individuals to whom were made had absolute right to privacy; agency officials had duty to review records sought in their entirety, to determine if any portions might justifiably be withheld on other grounds. Comm on Open Gov't FOIL-AO-10270.

Fact that police department located 15 domestic incidents pertaining to particular family or address did not justify withholding Freedom of Information Law request for all police reports involving police calls to that family or address, on basis that confirmation of so many domestic incidents, even after deletion of identifying details, might constitute unwarranted invasion of privacy; presence of police vehicle at particular time and location is not secret, and record that refers to such event is public. Comm on Open Gov't FOIL-AO-12299.

Under CLS County § 308(4), "records...of calls" means either recording or transcript of communication between person making 911 emergency call, and employee who receives call; statute cannot validly be construed to mean records regarding or relating to 911 call. Comm on Open Gov't FOIL-AO-12544.

When 911 report relates to dwelling in which there are many tenants, description of complaint as sex offense or "domestic trbl" likely would not identify victim of such offense or those involved in domestic dispute; thus, absent personally identifiable details, city could not justify denial of access on basis of either CLS Civ R § 50-b or CLS Pub O § 87(2)(b) or § 89(2)(b). Comm on Open Gov't FOIL-AO-12741.

Presence of police vehicle at particular time and location due to call from complainant, family member or neighbor is not secret, and record that makes reference to such event would be public. Comm on Open Gov't FOIL-AO-12741.

Printouts of electronic copies of 911 incident reports that indicate merely that certain event occurred would be analogous to disclosure of contents of traditional police blotter and, therefore, should be disclosed. Comm on Open Gov't FOIL-AO-12741.

Existing records reflecting telephone use of public officer or employee in course of official duties would be relevant to performance of that person's official duties, and disclosure would not result in unwarranted invasion of personal privacy with respect to public employee who initiated call; however, exception to general rule of disclosure might arise with respect to recipient of

call if, for example, telephone was used to contact recipients of public assistance, informants in context of law enforcement, or persons seeking certain health services, and thus there might be grounds for withholding phone numbers (or portions of them) due to status of those contacted. Comm on Open Gov't OML-AO-2744.

362. — —Warrants; "use of force" records

Freedom of Information Law applied to any copies of search warrant (whose execution allegedly resulted in damage to home searched) maintained by police department, district attorney's office or another city agency and, if records in question were not sealed under CLS CPL § 160.15, there was unlikely to be any ground for denial inasmuch as warrant was already executed, and search made. Comm on Open Gov't FOIL-AO-11991.

363. — —Witness matters

Although witness statement recorded by police agency might be withheld if requested by a third party, it would likely be available to the person who made the statement. Comm on Open Govt FOIL-AO 3026.

Office of State Inspector General, which investigates allegations of fraud, corruption, waste and abuse within covered agencies, may redact from reports names and other identifying details concerning sources and witnesses under Freedom of Information Law on grounds that records were compiled for law enforcement purposes which, if disclosed, would identify confidential source, constitute unwarranted invasion of personal privacy, constitute information of personal nature that is not relevant to work of agency, constitute interagency or intra-agency materials which are not statistical or factual tabulations or data, instructions to staff or final agency policy, and finally disclosure of names of informants and witnesses could endanger life or safety of such informant or witness. 1986 Committee on Open Government FOIL-AO-4251.

Insofar as witness statements are part of motor vehicle accident reports, they must be disclosed in their entirety in most instances since, under CLS Pub O § 89(6), if records are available under some other provision of law or by means of judicial interpretation, grounds for denial appearing in CLS Pub O § 87(2) cannot be asserted. Comm on Open Gov't FOIL-AO-12611.

CLS Pub O § 87(2)(e)(iii) might properly be asserted to withhold records regarding investigation of county property and employees that ended several years earlier, insofar as they included names or other identifying details pertaining to informants, witnesses and perhaps others. If there were no determination to effect that public employee engaged in misconduct, denial of access to records regarding investigation of county property and employees that ended several years earlier, based on considerations of privacy, would be consistent with Freedom of Information Law. Access to records relating to investigation of county property and employees could be denied under CLS CPL § 190.25(4) where matter went before grand jury. Comm on Open Gov't FOIL-AO-12722.

364. — —Youths; juveniles

Arrest or booking records of youths prior to their adjudication as youthful offenders are subject to access under Freedom of Information Law until they are sealed under CLS CPL § 720.15. Comm on Open Govt FOIL-AO-3668.

Request for youthful offender investigation report from New York State Police is properly deniable under § 87[2][a] of FOIL, on ground that report is "specifically exempted from disclosure by state statute, (CPL, § 720.35[2]). Comm on Open Gov't FOIL-AO-4163.

As to whether police records containing information on juvenile and youthful offenders can be made available for public inspection, under CLS CPL § 720.15, rights of access to records pertaining to youthful offenders might depend upon timing of request and nature of charge, and records might often remain accessible until person is adjudicated youthful offender and, under CLS FCA § 784, records concerning juveniles would be withheld from public inspection unless certain exceptions applied. Comm on Open Gov't FOIL-AO-4441.

"Juvenile Fire Intervention, Response and Education Committee" was not precluded from maintaining records concerning juveniles suspected of fire-setting activity in one community and, when suspects moved to another community, from sharing those records with appropriate authorities in new community; however, names of juvenile suspects could be withheld from public (1) to prevent unwarranted invasion of personal privacy, (2) to prevent interference with law enforcement investigations, and (3) because, even when there is finding of guilt, records pertaining to juveniles are confidential under CLS Family Ct Act § 784. Comm on Open Gov't FOIL-AO-10111.

Police department was not required to disclose names of youth suspected of committing acts of vandalism where they were not charged; further, even if youthful suspects were charged, records pertaining to them would be confidential due to their ages. Locations of acts vandalism were accessible because results of vandalism were visible to any passerby and nothing private was disclosed, and names of victims were also likely available because they were connected to addresses where vandalism occurred, and nothing intimate or personal would be disclosed; vandalism constitutes property crime, rather than contact with persons. Comm on Open Gov't FOIL-AO-10397.

As to request by criminal investigation subject for copies of complaints and statements received by district attorney's office, fact that records sought involve criminal investigation is not of itself basis for denying records, disclosure of records relating to completed investigation would not likely "interfere with" such investigation, complaint made by member of public cannot be denied under characterization as record "compiled for law enforcement purposes" and, though portions of complaint which identify the complainant typically may be deleted as unwarranted invasion of personal privacy, grounds for deletion may no longer exist where such identification has been previously disclosed. Comm On Open Gov't FOIL-AO-4528.

Request for "lineup worksheet" maintained by District Attorney and submitted as exhibit at requester's criminal trial would likely be available from trial court and, as such, would not be subject of any grounds for denial of access, grounds for denial would not apply to voucher listing property confiscated from requester, but as to police report resulting in lineup, portions might be withheld as constituting "unwarranted invasion of personal privacy, record compiled for law enforcement purposes whose disclosure would identify confidential source or reveal confidential information relating to criminal investigation, or record whose disclosure would endanger person's life or safety. Comm on Open Gov't FOIL-AO-4561.

Agency may withhold records compiled for law enforcement purposes when they identify confidential source relating to criminal investigation, when disclosure would endanger life or safety of any person, or when disclosure would constitute unwarranted invasion of personal privacy; Freedom of Information Law does not require agency to create or prepare record or response to request. Comm on Open Gov't FOIL-AO-4573.

If documents are not part of criminal investigation, and if criminal investigation has been completed, it is unlikely that records would be withheld. Comm on Open Gov't FOIL-AO-4722.

Widely used records involving investigative techniques, such as fingerprint and ballistics test, and procedures such as interviewing potential witnesses and viewing crime scenes would not likely fall within scope of denial; authority to deny access under Freedom of Information Law pertains only to those criminal investigative techniques and procedures that are not "routine". Comm on Open Gov't FOIL-AO-4805.

Subpoenas issued by district attorney's office are agency records covered by Freedom of Information Law, rather than court records that fall beyond scope of that statute, as office of district attorney is "governmental entity" that performs a "governmental function"; as such, extent to which such records may be withheld is limited to grounds under CLS Pub O § 87(2). Comm on Open Gov't FOIL-AO-12027.

As nature and amount of information disclosed to public relating to criminal investigation or proceeding increases, extent to which Freedom of Information Law exception concerning privacy decreases. It would be difficult to justify denial of access to significant portions of criminal investigation records based on claim that disclosure would result in unwarranted invasion of privacy, even though there had not been trial, where substantial

disclosures about defendant, his family, victims and community were made and disseminated over lengthy period of time both locally and nationally. Psychological records held by District Attorney and relating to criminal defendant might be withheld under CLS Pub O §§ 87(2)(b) and 89(2)(b); however, it might be in public interest, as well as positive law enforcement function, to disclose details concerning defendant's life since consideration of patterns of behavior and development of data about behavior may enable school and law enforcement officials to recognize inclination or proclivity to commit violent or antisocial acts, and preventive measures might be taken to prevent those acts from occurring. Comm on Open Gov't FOIL-AO-12579.

General policy of withholding names of complainants or victims would be inconsistent with Freedom of Information Law, although denial of access to name of complainant or victim may be appropriate; under CLS Civ R § 50-b, police and other public officers are prohibited from disclosing identity of victim of sex offense, person's identity could likely be withheld under CLS Pub O § 87(2)(f) which permits agency to withhold records to extent that disclosure would "endanger the life or safety of any person," (which would include situation where complainant is in some way associated with organized crime or is confidential source), and same provision might apply when victim is senior citizen who lives alone. In context of criminal proceedings, variety of information is routinely disclosed: information equivalent to that disclosed during arraignment must be disclosed by police department or prosecutor; once information has been disclosed during public judicial proceeding, grounds for denying access under Freedom of Information Law no longer apply; and, when person is arrested, taken into custody and is committed to county jail, record must be maintained at jail that includes numerous details, all of which must be disclosed. Comm on Open Gov't FOIL-AO-12605.

City records resulting from complaints and calls for investigations concerning activities occurring at property contiguous to applicant's residence might be deniable, while others would require disclosure, where portions, if disclosed, would enable potential lawbreakers to evade detection, or would endanger life of safety of officers or others. Comm on Open Gov't FOIL-AO-12690.

Records presented to grand jury would ordinarily be outside scope of rights conferred by Freedom of Information Law, and thus any disclosure of those records would be based on court order or vehicle authorizing or requiring disclosure that is separate and distinct from Freedom of Information Law; however, if that record were presented or submitted into evidence during public proceeding, exemption from disclosure would no longer apply. Comm on Open Gov't FOIL-AO-12694.

Ability of Crime Victims Board to gain access to records maintained by units of local government would be governed by CLS Exec § 623(4); grounds for denial appearing in CLS Pub O § 87(2) would not apply. Comm on Open Gov't FOIL-AO-12934.

365. —Litigation, generally

366. — —Civil rights litigation

Prior to finding of probable cause, names of defendants and/or respondents in cases filed with Division of Human Rights may be withheld to protect their privacy in connection with filing of possible frivolous or scurrilous charges. Prior to finding of probable cause, names of complainants in cases filed with Division of Human Rights may be withheld to prevent unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-8901.

"Results of the deposition" relating to applicant's complaint to Division of Human Rights, and case file concerning matter, could be withheld to extent that they identified persons other than applicant and disclosure would result in unwarranted invasion of their privacy; in addition, they could be withheld in accordance with CLS CPLR § 3101, while remaining aspects of records pertaining to applicant would appear to be accessible to applicant. Comm on Open Gov't FOIL-AO-12592.

367. — —Courts and court records, generally

Freedom of Information Law does not apply to courts or court records; however, many court records are available pursuant to other provisions of law; because criminal procedure law provides that when criminal action or proceeding is dismissed in favor of accused and records relating to event are sealed, records of dismissal of action cannot be provided based upon the exemption of Criminal Procedure Law. Comm on Open Gov't FOIL-AO-4947.

To extent that records kept by public administrator include information reflective of or equivalent to records available from surrogate's court, public administrator would be required to disclose those records under Freedom of Information Law. Comm on Open Gov't FOIL-AO-9650.

Records subject to CLS Jud § 90(10) may be disclosed only in conjunction with that statute, and Freedom of Information Law is inapplicable. Comm on Open Gov't FOIL-AO-12140.

Courts and court records are not subject to Freedom of Information Law; however, court records are generally available under other provisions of law (e.g., CLS Jud § 255). Comm on Open Gov't FOIL-AO-12579.

368. — —Criminal cases, generally

If requester of records is currently party in ongoing criminal proceeding, and record sought may be relevant to that proceeding, records may not be available under Freedom of Information Law but other vehicles may be available to obtain those records. Comm on Open Gov't FOIL-AO-4724.

Pendency of litigation does not affect either rights of public or civil or criminal litigant under Freedom of Information Law or ability of agency to withhold records sought under Freedom of Information Law in accordance with grounds for denial appearing in CLS Pub O § 87(2). Comm on Open Gov't FOIL-AO-8877.

369. — —Grand jury matters

Assuming instructions to grand jury are part of grand jury proceedings, Freedom of Information Law is not applicable, because it is exempted by CLS Penal § 215.70. Comm on Open Gov't FOIL-AO-4784.

Although police department records are used during grand jury proceedings, such use does not remove them from coverage of Freedom of Information Law. Comm on Open Gov't FOIL-AO-8322.

Applicant was entitled to disclosure of 1968 indictment against him since that indictment would have already been made available at time of indictment. Comm on Open Gov't FOIL-AO-9172.

Police chief could not legitimately deny mayor's request for copy of charges filed against village employee who was arraigned and charged in open court because (1) court's record of proceeding was public, (2) although courts are not subject to Freedom of Information Law, CLS UJCA § 2019-a conferred right of access, (3) while police chief may have had physical custody of record in question, he had no legal custody or control over it, and (4) as person arraigned was village employee, mayor was seeking record in performance of his official duties as chief executive officer. Comm on Open Gov't FOIL-AO-11982.

Where request is made for access to records regarding lawsuits filed against village, legal memoranda or other legal papers which have been prepared for the village by an attorney and which have been disclosed to no one other than the client may be deemed confidential under CPLR §§ 4503 or 3101(d), but when such papers are filed with a court or served upon an adversary, any confidentiality that might have existed would be removed. Comm on Open Govt FOIL-AO 3051.

If record is available to public under Freedom of Information Law, it cannot be withheld solely because applicant is litigant or because records relate to litigation; however, file might nonetheless contain records consisting of attorney work product or material prepared for litigation, as well as records subject to attorney client privilege; these records would be specifically exempted from disclosure. Comm On Open Gov't FOIL-AO-4605.

If record is available under Freedom of Information Law, condition of agreeing not to sue in order to receive records pertaining to study of contaminated wells could not be imposed; only if record was prepared solely for litigation would denial on that basis be justified. Comm on Open Gov't FOIL-AO-4628.

While communications between attorney and client are often privileged, records of monies paid and received by attorney or law firm for services rendered to client are not privileged and, therefore, are subject to disclosure under Freedom of Information Law. Comm on Open Gov't FOIL-AO-7508.

CLS Pub O § 87(2)(a) will not apply to records prepared or acquired in ordinary course of business, rather than for any purpose relating to litigation, notwithstanding their subsequent use in course of litigation. Records that are prepared for multiple purposes, one of which includes eventual use in litigation, may not be withheld from disclosure; only records that are prepared solely for litigation can be withheld from disclosure. Comm on Open Gov't FOIL-AO-7549.

Although CLS CPLR § 3101(c) and (d) authorize confidentiality regarding work product of attorney and material prepared for litigation, those kinds of records remain confidential only so long as they are not disclosed to adversary or are filed with court; materials that are served upon or shared with adversary cannot be characterized as confidential or exempt from disclosure. Comm on Open Gov't FOIL-AO-9152.

Disclosure of litigation file cabinet "tags" used by individual attorneys at board of education might properly be denied where tags identified students. Comm on Open Gov't FOIL-AO-9251.

Portions of complaint that identify complainants may be withheld from disclosure pursuant to CLS Pub O § 87(2)(b) on ground that disclosure would result in unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-9673.

Certifications and educational backgrounds of experts who testified at trial of individual requesting records must be disclosed, as issuance of certification is clearly relevant to performance of expert's duties, and disclosure of public employee's educational background does not constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-9967.

Insofar as bank could properly claim privileges under CPLR concerning its records, such records would continue to be privileged and, therefore, exempted from disclosure under Freedom of Information Law due to bank's attempt to preserve privilege as litigation materials despite fact that disclosure was required to another agency in separate matter. Comm on Open Gov't FOIL-AO-12376.

Pendency of litigation would not affect either rights of public or litigant under Freedom of Information Law where applicant sought, inter alia, copies of particular contractor invoices relating to city department of public works, which were prepared in ordinary course of business. Comm on Open Gov't FOIL-AO-12640.

370. —Police matters, generally

371. — —Arrest records

Police department's procedure for arrest and the use of a breathalyzer are accessible under Freedom of Information Law. Comm on Open Gov't FOIL-AO-2975.

Information concerning arrest is maintained by Division of Criminal Justice Services in form of criminal history information and subject of that information, may, pursuant to Division's regulations, seek to amend or correct records pertaining to him. Comm on Open Gov't FOIL-AO-4880.

With respect to records indicating arrests that did not result in convictions, disclosure would constitute unwarranted invasion of personal privacy; however, with respect to records of arrests for which underlying charges are still pending, those records generally would be accessible pursuant to Freedom of Information Law because records maintained by law enforcement agencies, as well as courts, indicating arrests and charges are in most instances accessible to public. Comm on Open Gov't FOIL-AO-4983.

Although arrest records are not specifically mentioned in current Freedom of Information Law, original Law granted access to "police blotters and booking records," and, even though reference to those records is not made in current statute, such records continue to be available since present law was clearly intended to broaden rather than restrict rights of access. Comm on Open Gov't FOIL-AO-8395.

If mug shot pertains to person against whom criminal charges are still pending, it should be disclosed under Freedom of Information Law; on other hand, if mug shot pertains to person against whom criminal charges were dismissed, mug shot or other records relating to matter would be sealed pursuant to CLS CPL § 160.50 and would not be available under Freedom of Information Law. Comm on Open Gov't FOIL-AO-8902.

If person is arrested and matter has not yet been finally determined, arrest or booking record must generally be made available; however, if person is charged and charge is dismissed, arrest and other records pertaining to incident typically are sealed pursuant to CLS CPL § 160.50 and are not available under Freedom of Information Law. Comm on Open Gov't FOIL-AO-8952.

Documents indicating names of persons arrested by city police, whether characterized as arrest record, incident report or otherwise, and whether is maintained on paper or electronically, constitutes "record" under Freedom of Information Law and, unless sealed under CLS CPL § 160.50, must be disclosed. Public's right of access to names of complainants or victims is dependent on attendant facts, and denial of access may be appropriate in some situations, but whether victim or complainant prefers to authorize or preclude disclosure is irrelevant. Comm on Open Gov't FOIL-AO-9809.

Although arrest records are not specifically mentioned in current Freedom of Information Law, original law granted access to "police blotters and booking records" (CLS Pub O former § 88(1)(f)), and thus such records continue to be available, for present law was clearly intended to broaden rather than restrict rights of access. Comm on Open Gov't FOIL-AO-12605.

Blanket denial of request for arrest records would be inconsistent with law and agency must review such records to ascertain extent to which they may properly be withheld. Comm on Open Gov't FOIL-AO-13395.

Language of law, judicial precedent and commonly accepted principles indicate that, in most cases, police records indicating blood alcohol levels of people charged with drunken driving (as well as their occupations, employers, eye color, weight and height) must be disclosed. Comm on Open Gov't FOIL-AO-16436.

372. — —Broadcasts

There might be basis to withhold records, dictaphone, dispatch or radio transmissions relating to traffic stop of particular individual if they were compiled for law enforcement purposes, if disclosure would result in unwarranted invasion of personal privacy with respect to identified individual, or as internal communications under CLS Pub O § 87(2)(g); however, tape recordings of certain communications broadcast over police radio might nevertheless be available. Comm on Open Gov't FOIL-AO-9935.

Request for "911 police radio dispatch tapes" generated over 10 years earlier, and citing certain date, likely would meet standard of reasonably describing records if directed to small police department; on other hand, if 911 calls are received in different locations, due, for example, to size or population of county, request of that nature might not meet standard of reasonably describing records. There is distinction in application of Freedom of Information Law (FOIL) between "enhanced" 911 records and other 911 records; former are subject to CLS County § 308(4) and cannot be disclosed,, while latter—those that are not "enhanced" —are not subject to that statute, and rights of access to those records would be subject to FOIL. Comm on Open Gov't FOIL-AO-12589.

373. — —Complaint follow-up reports (DD5s)

Neither police department nor district attorney's office can claim that DD5's can be withheld in their entirety on ground that they constitute intra-agency materials; once statements have been introduced in evidence or disclosed in judicial proceeding, they have lost their cloak of confidentiality and are generally available for public inspection. Comm on Open Gov't FOIL-AO-9840.

In view of brevity and general contents of police department complaint follow-up reports, also known as "DD5s," exception for non-routine investigative techniques under CLS Pub O § 87(2)(e)(iii) would rarely serve as basis for withholding. Comm on Open Gov't FOIL-AO-10038.

374. — —Logs, memo books, notes, manuals and the like

Police activity log is "record" that falls within scope of Freedom of Information Law except to extent that its contents may be withheld in accordance with CLS Pub O § 87(2); agency must respond to request for information within 5 business days from

receipt of request and this response can take 3 forms: it can grant access, deny access, and if so, denial should be in writing stating reasons therefor, or receipt of request may be acknowledged in writing if more than 5 business days are necessary to review or locate records; however, Committee on Open Government has no authority to enforce Freedom of Information Law, nor is it empowered to compel agency to grant or deny access to records. Comm on Open Gov't FOIL-AO-4574.

Since contents of police blotters may vary, depending upon practice and policy of individual police departments, if, based upon custom and usage, police blotter is log or diary in which events reported by or to police department are recorded and merely contain summaries of events, other than investigative information, it is available. Comm on Open Gov't FOIL-AO-4627.

Failure to use "actual form" as opposed to photocopy when requesting records from agency cannot constitute valid basis for delaying response to request or denying request; when request reasonably describes records sought and constitutes valid request for record under Freedom of Information Law, response is required in accordance with Law; because information contained in "pretrial identification manual" described techniques which were performed on routine basis by police departments generally, and because methods used in performing these techniques were not unique or confidential, manual must be disclosed. Comm on Open Gov't FOIL-AO-4655.

To extent that training materials or manuals used by police department are reflective of routine criminal investigative techniques and procedures, manual cannot be withheld; however, aspects of manual that may indicate non-routine criminal investigative techniques or procedures or techniques or procedures, that may permit individuals to evade law enforcement can be denied access. Comm on Open Gov't FOIL-AO-4906.

New York City Police Department improperly denied access to "homicide ledger," consisting of compilation of names, ages, and addresses and places of death of homicide victims in New York City, on ground that such record constituted intra-agency material, because information sought clearly consisted of factual data, and it was irrelevant that some of it related to investigations that were not yet closed. Comm on Open Gov't FOIL-AO-10122.

375. — —New York State police

Manuals relative to radar devices used by State Police are subject to access under Freedom of Information Law, since such manuals could not be characterized as records compiled for "law enforcement purposes," and since even if they could be characterized as such, contents of manuals would nonetheless be reflective of "routine techniques and procedures". Comm on Open Govt FOIL-AO-3498.

376. — —Police procedures and policies

Police department cannot require "special court order" in order to obtain photocopies of police blotter. Comm on Open Govt FOIL-AO-3424.

To extent that news media obtains police blotters or complaint reports pursuant to Freedom of Information Law, individual, as member of public, would enjoy same rights; when records are accessible under Freedom of Information Law, they should be made available to any person, without regard to status or interests. Comm on Open Gov't FOIL-AO-4585.

Since contents of police blotters may vary, depending upon practice and policy of individual police departments, if, based upon custom and usage, police blotter is log or diary in which events reported by or to police department are recorded and merely contain summaries of events, other than investigative information, it is available. Comm on Open Gov't FOIL-AO-4627.

Agency, including police department, is required to review records when request is made to determine extent, if any, to which one or more of grounds for denial might apply. Comm on Open Gov't FOIL-AO-4689.

To extent that police activity log contains investigative information compiled for law enforcement purposes, only those portions could be withheld that would if disclosed result in harm; the remainder, however, falls outside of that provision. Comm on Open Gov't FOIL-AO-4756.

Agency must meet burden of proof imposed by Freedom of Information Law by demonstrating harmful effects that would arise from disclosure of records; since some aspects in policies or regulations of police department relating to political activities, demonstrations and police surveillance may reveal criminal investigative techniques or procedures, nondisclosure to public would be justified because such information would enable potential law breakers to evade detection. Comm on Open Gov't FOIL-AO-4903.

To extent that training materials or manuals used by police department are reflective of routine criminal investigative techniques and procedures, manual cannot be withheld; however, aspects of manual that may indicate non-routine criminal investigative techniques or procedures, or techniques or procedures that may permit individuals to evade law enforcement can be denied access. Comm on Open Gov't FOIL-AO-4906.

If medical personnel seek information pursuant to statement of policy, policy would be available; exception to rights of access might exist if examination is conducted for law enforcement purpose, and if disclosure would reveal non-routine criminal investigative techniques or procedures that would enable recipient to evade detection or enforcement of law. Comm on Open Gov't FOIL-AO-4943.

Where police blotter contains no investigative information, but instead contains merely summary of events or occurrences, public has right to review or "browse through" it. Police blotter which contains no investigative information, but instead contains merely summary of events or occurrences, is likely to be characterized as record compiled in ordinary course of business, rather than record "compiled for law enforcement purposes" within meaning of CLS Pub O § 87(2)(e). When police blotters or other records are prepared by employees of police department, they could be characterized as "intra-agency materials"; however, insofar as they consist of factual information, for example, they would be available under Freedom of Information Law, unless different ground for denial applies. Comm on Open Gov't FOIL-AO-7603.

Records indicating expenditure of public monies for mayor's police protection were available, unless, in conjunction with CLS Pub O § 87(2)(f), it could be demonstrated that portions of those records described equipment, procedure, or means of providing security so unique that disclosure would enable potential lawbreakers to evade detection, engage in unlawful acts and, therefore, endanger person's life or safety. Comm on Open Gov't FOIL-AO-7930.

Police department policy or guideline that restricts disclosure of crime victims' names in all cases is inconsistent with Freedom of Information Law. Comm on Open Gov't FOIL-AO-7931.

When police blotters, logs or other records are prepared by agency employees, they could be characterized as "intra-agency materials," within meaning of CLS Pub O § 87(2)(g); however, insofar as they consist of factual information, for example, they are available, unless different ground for denial applies. Comm on Open Gov't FOIL-AO-8352.

Irrespective of whether document is characterized as police blotter or "General Incident Report" or whether it is maintained on paper or electronically, it would constitute "record" subject to rights of access conferred by Freedom of Information Law. Comm on Open Gov't FOIL-AO-8546.

It appeared that those portions of policies or procedure manuals pertaining to stolen vehicles which, if disclosed, would enable potential lawbreakers to evade detection could likely be withheld under CLS Pub O § 87(2)(e)(iv). Comm on Open Gov't FOIL-AO-9223.

Freedom of Information Law (FOIL) request for access to police blotter relating to incident in which person in police custody, who was not charged with any crime, was allegedly "slammed" against wall by police officer, was improperly denied on ground that it included "investigative material" as (1) there is no general FOIL exception for investigative material, (2) police records indicating that event (e.g., crime or accident) occurred at particular location are accessible, and (3) only to extent that disclosure would result in harmful effects described in CLS Pub O[8]7(2)(e)(i)-(iv) would police department have authority to withhold information under that provision. Comm on Open Gov't FOIL-AO-11988.

Basis for denial of applicant's appeal was incomplete and inadequate, and blanket denial of request was inconsistent with

law, where applicant sought records related to particular assault arrest entry in village police blotter, including defendant's name, date of birth, address, charges, any victim names and any reports on circumstances surrounding request; records must be reviewed for purpose of identifying those portions of records that might fall within scope of one or more of grounds for denial of access. Unless arrest or booking record has been sealed under CLS CPL § 160.50, it must be disclosed; under that statute, when criminal charges have been dismissed in favor of accused, records relating to arrest ordinarily are sealed and, in those instances, records would be exempted from disclosure by statute under CLS Pub O § 87(2)(a). Comm on Open Gov't FOIL-AO-12605.

Police department guidelines addressed to precinct supervisory staff giving uniformed police officers authority or direction to "strip search" individuals who had been arrested for non-felony offenses should disclosed insofar as they are "routine" or they would not endanger life or safety of any person. Comm on Open Gov't FOIL-AO-13330.

Record of police officers and detectives on duty during specific days cannot be withheld on basis of CLS Pub O § 87(2)(g) since duty roster contains factual information rather than opinions or recommendations. Comm on Open Govt FOIL-AO-3722.

Under CLS Pub Off § 87(2)(e) and (g), request for Nassau County police department's policy and procedure for administering urinalysis to any applicant seeking employment as police officer should not be denied, where law enforcement purpose of records in question was tangential to main purpose of establishing qualification of applicants for public employment; whether procedures used in employment screening process could be equated with those used in criminal investigation was questionable, records sought would not identify "confidential source" or relate to "criminal investigation" and policies and procedures in question would qualify either as "intra-agency" materials or "instructions to staff that affect the public". Comm on Open Gov't FOIL-AO-4396.

As to request for accident reports involving Ticonderoga town police vehicles operated by named police officer, under CLS Pub O §§ 66-a and 87(2)(e)(i), fact that litigation may be pending with respect to certain accidents would have no bearing upon rights of access and only situation in which a denial would be proper would involve disclosure that would "interfere" with investigation or prosecution of crime related to accident. Comm On Open Gov't FOIL-AO-4524.

Records maintained by police department, to extent that they continue to exist, will be subject to rights conferred by Freedom of Information Law; that is not to suggest that all records will be accessible, but that they will be subject to rights of access granted by Law; as general matter, administrative manuals are accessible pursuant to CLS Pub O § 87(2)(g); however, those manuals prepared or used by law enforcement agencies may be accessible or deniable depending upon effects of disclosure. Comm on Open Gov't FOIL-AO-4661.

Police roll call or attendance record will not likely be characterized as record compiled for law enforcement purposes, rather, it appears to be record prepared in ordinary course of business; with exception of police officers' home addresses, roll call reports are available, because disclosure would result in permissible rather than unwarranted invasion of personal privacy; blanket denial of records may be inappropriate when only portions of records may be deniable, with remainder excessible. Comm on Open Gov't FOIL-AO-4694.

Police Department is agency in accordance with definition in CLS Pub Off § 86(3) and as such is subject to Freedom of Information Law; sign in log for auxiliary police officers containing names of officers and times and dates they performed their duties or training should be made available under Law. Comm on Open Gov't FOIL-AO-4728.

In connection with request for breakdown of cost of mayor's police protection from its inception to present, CLS Pub O § 87(2)(b) could not justify withholding of information since request did not seek names of police officers or bodyguards assigned to mayor or his home or who engaged in training, travel or purchases associated with protection of mayor. Comm on Open Gov't FOIL-AO-7930.

Where applicant prepared report of complaint and later sought copy of complaint from police department, there would likely be no valid basis upon which department could rely to justify withholding copy from applicant under Freedom of Information Law. Comm on Open Gov't FOIL-AO-8317.

Fact that some aspects of police reports might properly be withheld does not enable police department to withhold them in their entirety; rather, police department must disclose records, to extent required by Freedom of Information Law, perhaps after having made deletions in accordance with grounds for denial appearing in Law. Comm on Open Gov't FOIL-AO-8546.

DD5's and police officers' memo books may be accessible or deniable under Freedom of Information Law, in whole or in part, depending on their contents. Portions of DD5's and police officers' memo books may be withheld from disclosure if disclosure would endanger life or safety of any person within meaning of CLS Pub O § 87(2)(f). Comm on Open Gov't FOIL-AO-8958.

Freedom of Information Law does not apply to police department records concerning sex offense, and CLS Civ R § 50-b (which exempts records identifiable to victim of sex offense from disclosure) does not confer rights of access to such records even though requestor is person charged. Comm on Open Gov't FOIL-AO-10204.

Information contained in boxes indicating race and ethnicity on city police Field Interview Forms (FIFs) would be accessible, absent personally identifying details or other data collected and included in FIFs. Applicants request for city police Field Interview Forms (FIFs), despite volume of material, met requirement of "reasonably describing" records and could not be rejected due to its breadth. City would be obliged to provide information regarding race and ethnicity contained on police Field Interview Forms (FIFs) if city had ability to generate such data, if it had capacity to segregate that data from items that need not be disclosed, and if applicant were willing to pay actual cost of reproduction as envisioned by CLS Pub O § 87(1)(b)(iii). Comm on Open Gov't FOIL-AO-12565.

Names or other identifying details pertaining to police officers who were subjects of complaints or investigations could be deleted from records sought under CLS Civ R § 50-a; remainder, however, would be subject to Freedom of Information Law and would be available unless other elements of records might be justifiably withheld. If complaint of police misconduct included identity of complainant, identifying details pertaining to that person may be withheld on ground that disclosure would constitute "an unwarranted invasion of personal privacy"; provision might also be cited insofar as records identify witnesses, family members related to complainant, and perhaps others. With regard to records of police use of physical force, police department's standard operating procedures would reflect final agency policies and must be disclosed, as must records reflective of organizational structure of department and other policies and procedures, except to extent that disclosure would reveal other than routine criminal investigative techniques or procedures or would if disclosed endanger life or safety of police officers or others. Comm on Open Gov't FOIL-AO-12655.

To extent that disclosure would reveal city's collective bargaining strategy in relation to present or imminent collective bargaining negotiations or hamper ability of city to engage in negotiations optimal to its taxpayers, it is likely that CLS Pub O § 87(2)(c) could be asserted to prevent disclosure of documents and memoranda relating to negotiations and discussions of future contract between city and police officers. Comm on Open Gov't FOIL-AO-12655.

"Factual context", specific contents of records, and effects of their disclosure are factors that must be considered in determining extent to which police department records may be withheld or, conversely, must be disclosed. Comm on Open Gov't FOIL-AO-12702.

377. —Prisons and prisoners, generally

378. — —Directives to correctional staff; manuals

Rules and directives issued by Department of Correctional Services applicable to inmates concerning religious mail, overseas correspondence mailing privileges and receipt of religious newspapers from foreign countries, are subject to access pursuant

to CLS Public Officers Law § 87(2)(g)(iii). Comm on Open Govt FOIL-AO-3536.

Regulations of department of correctional services pursuant to Freedom of Information Law require that superintendent of correctional facility acts as records access officer. Comm On Open Gov't FOIL-AO-4606.

To extent that department of correction services employee rule book is reflective of routine criminal investigative techniques and procedures, it cannot be withheld from disclosure; nevertheless, other aspects of rule book might indicate non-routine criminal investigative techniques or procedures, and, to that extent, rule-book could be denied. Comm on Open Gov't FOIL-AO-4785.

Even though intra-agency material, such as employee rule book of department of correctional services which is reflective of routine criminal investigative techniques and procedures, may not be withheld from disclosure, other aspects of rule book might indicate non-routine criminal investigative techniques or procedures, and, to that extent, rule book could be denied access. Comm on Open Gov't FOIL-AO-4803.

Even though intraagency material, such as employee rule book of department of correctional services which is reflective of routine criminal investigative techniques and procedures, may not be withheld from disclosure, other aspects of rule book might indicate non-routine criminal investigative techniques or procedures, and, to that extent, rule book could be denied access. Comm on Open Gov't FOIL-AO-4803.

Program and security assessment summary report, prepared by correctional counselor, is intra-agency record consisting of both factual and evaluative materials pertaining to particular inmate; copy of report can be made available as long as evaluative portions are deleted. Comm on Open Gov't FOIL-AO-4842.

Freedom of Information Law pertains to existing records and if there is no record that lists all inmates and correction officers who were transported to correctional facility, Department of Correctional Services would not be required to create such records based on request. Comm on Open Gov't FOIL-AO-4877.

Disclosure of identities of state employees including employees of Department of Correctional Services would not in most circumstances endanger life or safety; however, in those circumstances in which law enforcement agency has engaged employees in undercover positions, names of these employees may be deleted from portions of payroll record which identify them with justification based on endangerment of life or safety. Comm on Open Gov't FOIL-AO-4894.

Freedom of Information Law pertains to agency records, including those maintained by Department of Correctional Services and its facilities. Comm on Open Gov't FOIL-AO-4953.

Freedom of Information Law requires that applicant reasonably describe records sought, so, when making request, sufficient detail should be provided so to enable agency officials to locate records; further, regulations promulgated by Department of Correctional Services pursuant to Freedom of Information Law indicate that, for records kept at facility, request may be directed to facility superintendent. Comm on Open Gov't FOIL-AO-4956.

Regulations of Department of Correctional Services pursuant to Freedom of Information Law indicate that a request for records kept at a correctional facility should be directed to the facility superintendent or his designee. Comm on Open Gov't FOIL-AO-6313 (1990).

Envelope which contained birthday card mailed by inmate to individual who was discovered to be incarcerated in another state was record subject to disclosure under Freedom of Information Law, rather than physical evidence to which Freedom of Information Law did not apply. Comm on Open Gov't FOIL-AO-8510.

With regard to access to county jail's procedure on strip searches and strip frisks, it was likely that those portions which, if disclosed, would endanger life or safety of law enforcement officers or others could be withheld under CLS Pub O § 87(2)(f). Comm on Open Gov't FOIL-AO-9701.

No grounds for denial contained in CLS Pub O § 87(2)(a) could be justifiably asserted to deny request for records identifying inmates who were transported to court with applicant on particular date. Comm on Open Gov't FOIL-AO-9722.

Disclosure of inmates' names and cell locations would not result in unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-9870.

"Program history data" concerning inmates, if maintained by Department of Correctional Services, is available under Freedom of Information Law at least to extent that it is available under department regulations. Comm on Open Gov't FOIL-AO-9929.

Correctional facility's purchase orders and similar records are typically available under Freedom of Information Law. Comm on Open Gov't FOIL-AO-10100.

Under Freedom of Information Law and Personal Privacy Protection Law, inmate's dental records may not be released to Attorney General in pending civil suit without inmate's consent, as such disclosure would constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-12049.

Under CLS Pub O § 87(2)(e)(iv) and (2)(f), respectively, correctional facility could withhold any portions of its Medical Policy and Procedures Manual which, if disclosed, would enable potential lawbreakers to evade detection or endanger life or safety of any person; however, portions of manual that are "routine" and would not preclude employees from carrying out their duties effectively must be disclosed. Comm on Open Gov't FOIL-AO-12050.

Records relating to incident that occurred at correctional facility in which inmate sustained personal injuries—including overall directive on search procedures, specially designed program for infirmary command, directions governing persons designated "assaultive" prisoners, and institutional orders devised to govern movements of particular inmates—constituted intra-agency materials that fell within scope of CLS Pub O § 87(2)(g); however, instructions to staff that affect public or agency's policy would be available, while denial of access would be appropriate to extent that records included descriptions of investigative techniques which if disclosed would enable potential lawbreakers to evade detection or endanger lives or safety of law enforcement personnel or others. Comm on Open Gov't FOIL-AO-12561.

Division of Parole's regulations prohibiting release of inmate records received and/or prepared by another agency cannot diminish rights of access conferred by statute, such as Freedom of Information Law. Comm on Open Gov't FOIL-AO-12728.

If inmate seeks access to his own rap sheet, he should submit request to Division of Criminal Justice Services rather than to Division of Parole. Comm on Open Gov't FOIL-AO-12728.

Availability of records related to DNA sample requester was required to provide as inmate would be governed by CLS Exec § 995-c, which authorizes Division of Criminal Justice Services to establish state DNA identification index and permits disclosure to inmate only for "criminal defense purposes." Comm on Open Gov't FOIL-AO-13038.

Records related to DNA testing of applicant's blood sample—specifically test results and testing and storage procedures—may be disclosed only to extent authorized in CLS Exec § 995-d(2). Comm on Open Gov't FOIL-AO-13152.

Blanket or categorical denial of access to inmate's records is inconsistent with Freedom of Information Law, and ability to protect inmate's privacy is "far from absolute." Comm on Open Gov't OML-AO-3784.

Variety of information concerning any person confined in county jail is clearly public, including fact of person's commitment. Comm on Open Gov't OML-AO-3784.

379. —Tape recordings; videotapes

380. — —Visitor logs

If county correctional center maintained and could locate records indicating units in which inmate in question was housed, such records would be available under Freedom of Information Law. If visitors' log or similar documentation was kept in plain sight and could be viewed by any person, and if staff at county correctional center had ability to locate portions of log pertaining to particular individuals based upon information provided by applicant, those portions of log would be available under Freedom of Information Law; however, if visitors' log or similar documents were not kept in plain sight and could not ordinarily be viewed, visitors log could be withheld on ground that disclosure would constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-8321.

If inmate's name or other identifier can be used to locate records or portions of records that would identify inmate's visi-

tors, it would likely be easy to retrieve that information, and request would reasonably describe records; on other hand, if there are chronological logs of visitors and each page would have to be reviewed in effort to identify visitors of particular inmate, agency staff would not be required to engage in such extensive search. Insofar as prison visitor logs or similar records identified other inmates and their visitors, those portions of records could be withheld on ground that disclosure would constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-8439.

Assuming that visitor's log is maintained by jail as required by state regulations, it is subject to rights of access conferred by Freedom of Information Law. If visitor's log or similar documentation at jail is kept in plain sight and can be viewed by any person, and if staff at facility has ability to locate portions of log of interest to applicant, those portions of log would be available under Freedom of Information Law; however, if visitors log or similar documents are not kept in plain sight and cannot ordinarily be viewed, those portions of log pertaining to persons other than applicant could be withheld on ground that disclosure would constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-9228.

Jail visitation logs which are kept in plain sight, and can be viewed by any person, are accessible under Freedom of Information Law if staff is able to locate requested portions of log; however, if log is not kept in plain sight and cannot ordinarily be viewed, it can be withheld on basis that disclosure would constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-9771.

If local law enforcement authorities maintain videotapes of camera surveillance of persons confined in local jails, such videotapes constitute "records" subject to rights of access granted by Freedom of Information Law, however, as such videotapes may show intimate details of peoples' lives, disclosure may constitute unwarranted invasion of personal privacy of persons on such tapes. 1986 Committee on Open Government FOIL-AO-4335.

Once department of correctional services enables inmates' attorneys to view video tapes, it appears that department has waived its capacity to deny request by either inmate, who is subject of tape, or attorney of inmate who is acting in representative capacity on behalf of inmate; similarly, if viewing tape did not constitute unwarranted invasion of personal privacy of employees involved, disclosure of duplicate of tape would not constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4697.

While inmate of correctional facility was entitled to obtain copies of tape recordings of hearings at a correctional facility, such recordings could not be kept by the inmate in his cell; rather, recordings must be kept by facility officials who will permit inmate to listen to the tapes as many times as the inmate wishes. Comm on Open Gov't FOIL-AO-6160 (1990).

Although record reflective of demonstration of personal religious beliefs or activities can be withheld from disclosure under Freedom of Information Law on ground that disclosure would constitute unwarranted invasion of personal privacy, inmate was entitled to disclosure of videotape of Jehovah Witness Assembly during which he was baptized, which was maintained by Ministerial Services Division of Department of Correctional Services, at least to extent of aspects of videotape that depicted activities witnessed by him. Comm on Open Gov't FOIL-AO-9365.

Inmate who requested tape recording of hearing conducted at prison facility would have right to listen to or obtain copy of tape recording, upon payment of appropriate fee, if he was present at hearing; if he was not present, one or more grounds for denial might apply under CLS Pub O § 87(2). Comm on Open Gov't FOIL-AO-12231.

Department of Correctional Services is required to review videotapes falling within scope of Freedom of Information Law request to attempt to ascertain extent to which their contents fall within grounds for denial appearing in statute. Comm on Open Gov't FOIL-AO-13528.

381. —Sentencing, generally

382. — —Parole

When requesting transcript of hearing before parole board, request should be directed to agency which maintains such records—division of parole; however, while making such requests, sufficient detail should be provided as to enable agency officials to locate records. Comm on Open Gov't FOIL-AO-4634.

Results of parole revocation hearing are available only to person to whom they pertain under Freedom of Information Law. Comm on Open Gov't FOIL-AO-4847.

File concerning individual who had been paroled and died of drug overdose one month after his release was generally public, but Division of Parole could withhold portions of file which would "disgrace the memory of the deceased"; in addition, there might be privacy concerns relating to deceased's family, or crime victims identified in file. Comm on Open Gov't FOIL-AO-9926.

Exceptions to disclosure of records under 9 NYCRR § 8000.5(c)(2)(i) appeared consistent with grounds for withholding records under CLS Pub O § 87(2) and thus, in response to inmate's request for case record prior to his parole hearing, Division of Parole could withhold diagnostic opinions, records identifying sources of information obtained on promise of confidentiality, information which if disclosed would endanger life or safety of person, and pre-sentence reports and memoranda; however, division was required to disclose case summary and all other records to be considered at hearing that were not deniable under regulations or Freedom of Information Law. Comm on Open Gov't FOIL-AO-9979.

Monthly calendars of parole board appearances at certain correctional facilities were accessible under Freedom of Information Law because, while calendars might not be final and might be revised, they would not contain kind of information (i.e., opinion or advice) that could be withheld under CLS Pub O § 87(2)(g). List of inmates interviewed by parole board was accessible under Freedom of Information Law because it was analogous to "commitment" information required to be disclosed under other provisions of law, and it was not so intimate or personal that disclosure would result in unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-10181.

Stated policy of Division of Parole, to honor requests made under Freedom of Information Law (FOIL) only in accordance with certain criteria, was invalid insofar as it was inconsistent with FOIL and judicial construction of FOIL. Comm on Open Gov't FOIL-AO-12248.

383. — —Pre-sentencing reports

Pre-sentence reports, which are sometimes called probation reports, are generally considered confidential under criminal procedure law § 390.50. Comm on Open Gov't FOIL-AO-4761.

Pre-sentence reports are confidential with respect to public and may be made available to defendant only by court. Comm on Open Gov't FOIL-AO-4881.

Pre-sentence reports are confidential under CLS Criminal Procedure Law § 390.50 with respect to the public, and may be made available to a defendant only by the sentencing court. Comm on Open Gov't FOIL-AO-6309 (1990).

CLS CPL § 390.50 represents exclusive procedure concerning access to pre-sentence reports. Comm on Open Gov't FOIL-AO-12429.

384. — —Probation

Probation report which is equivalent of pre-sentence report is exempt from disclosure under CLS CPL § 390.50; psychological evaluation prepared by staff of Department of Correction Services which reflects opinion is exempt. Committee on Open Government FOIL-AO-3332.

Where requester requests commitment papers, which include person's sentence, probation officer's report, fingerprints, medical, psychiatric and other records, of co-defendants, this request would likely be withheld on ground that disclosure would constitute an unwarranted invasion of personal privacy; likewise, letter sent from district attorney to officials of Department of Correctional Services offering advice or recommendations, would be considered inter-agency materials and would be withheld. Comm on Open Gov't FOIL-AO-4682.

Record identifying person on probation and his or her probation officer is not subject to disclosure under Freedom of Information Law. Comm on Open Gov't FOIL-AO-8896.

Records identifiable to persons on probation are beyond scope of public rights of access under Freedom of Information Law. Comm on Open Gov't FOIL-AO-12483.

If request involves records related to sentencing, records sought would be maintained by court rather than "agency"; if this is so, Freedom of Information Law would not be applicable. Comm on Open Gov't FOIL-AO-4598.

"Victim notice", which may be filed by victim or family member of victim pursuant to CLS Correc § 149-a, need not be disclosed under Freedom of Information Law since disclosure would constitute unwarranted invasion of personal privacy. "Victim notice" might be protected from disclosure under Freedom of Information Law under CLS Pub O § 82(2)(f) if disclosure would endanger life or safety of any person. Comm on Open Gov't FOIL-AO-7909.

Records of Department of Correctional Services consisting of instructions to staff that affect public or agency's policy would be available under Freedom of Information Law, and would not be subject to inter- or intra-agency exception, unless different basis for denial could be asserted. Those portions of records of Department of Correctional Services which, if disclosed, would enable potential lawbreakers to evade detection could likely be withheld under Freedom of Information Law; nevertheless, other portions of records might be "routine" and might not, if disclosed, preclude employees from carrying out their duties effectively. Comm on Open Gov't FOIL-AO-12492.

Information described in CLS Correc § 168-b(1)(a) through (d) comprises content of and is registry of sex offenders, and information contained in registry may be made available only in accordance with provisions of Sex Offenders Registration Act. Comm on Open Gov't FOIL-AO-13029.

Copies of records pertaining to requester "from the South Carolina Department of Probation, Parole and Pardon Services that are in the possession of the NYS Division of Parole" cannot be characterized as being exempted from disclosure by CLS Exec § 259-k; also, regulations (such as 9 NYCRR § 8000.5) do not serve to enable agency to withhold records that would otherwise be available under Freedom of Information Law. Comm on Open Gov't FOIL-AO-13125.

385. —Traffic violations

List of all authorized or licensed bingo halls in state is subject to access under Freedom of Information Law, provided such records exist and are maintained by state Racing and Wagering Board. Comm on Open Govt FOIL-AO-3539.

Information regarding sales and prize disbursements by lottery agents should be available to public access under Freedom of Information Law where, under CLS Pub Off § 87(2)(d), such information could not be characterized as "trade secrets" or as "information maintained for the regulation of commercial enterprise" and, where there is nothing unique to particular agent in terms of sales of lottery tickets, disclosure of information sought would not cause "substantial injury" to competitive position" of an agent individually, and under §§ 87(2)(b) and 89(2)(b), whether or not information sought clearly pertained to natural person, denial of access based upon privacy provisions is inappropriate. Comm on Open Gov't FOIL-AO-4446.

As to request for records indicating sales of lottery tickets and amounts of winnings distributed by lottery agents in Onondaga County, contentions that Lottery provides sales information to IRS, which does not disclose personal tax returns or extracts therefrom, that lottery agents might be endangered if information sought is made available, that agents object to being bombarded by vendors who wish to sell them products, and that providing information is expenditure of taxpayer dollars unwarranted for purpose requested are insufficient to support denial of such request. Comm on Open Gov't FOIL-AO-4469.

Traffic Safety Law Enforcement and Disposition (TSLED) database compiled by Department of Motor Vehicles was subject to disclosure irrespective of department's policy not to release personally identifiable data contained therein as (1) disclosure of data with respect to judges and justices constitutes permissible invasion of privacy because it relates to performance of their official duties, (2) insofar as disclosure pertained to motorists, Vehicle and Traffic Law violations lists compiled by state police must be disclosed unless charges were dismissed and records sealed under Criminal Procedure Law, and (3) information sought would be available from courts under CLS Jud § 255 and CLS UJCA § 2019-a, and from department under CLS Veh & Tr § 508(3). Comm on Open Gov't FOIL-AO-10044.

Requestor, having been charged with speeding by town police officer, was entitled to disclosure (to extent request involved existing records) of calibration and maintenance records for radar unit used by officer, calibration certificate, tuning fork used to calibrate radar unit, town's FCC license, and list of models, makes and serial numbers of all radar units used by town; however, disclosure of police officer's radar training certificate was personnel record whose disclosure was prohibited by CLS Civ R § 50-a. Comm on Open Gov't FOIL-AO-12198.

Division of State Police improperly denied request for records relating to speeding ticket on ground that case was still pending and requested records were compiled for law enforcement purposes, where case had been dismissed at trial; police should have ascertained actual status of case, avoiding inappropriate denial of access. Comm on Open Gov't FOIL-AO-12223.

New York City Department of Transportation should not have denied request for records indicating locations of cameras used in city's Red Light Camera Program since such disclosures are routinely made through distribution of Notices of Liability, and disclosure may be beneficial and proper despite law enforcement exception under FOIL, given possibility that knowledge of camera's location may encourage drivers to obey and comply with law. Comm on Open Gov't FOIL-AO-12412.

Fact that "criminal records database" was maintained by Office of Court Administration (OCA) did not transform it into court record; however, OCA was not required by Freedom of Information Law to honor request for "updates on a monthly basis" to extent that such request was prospective in nature. Comm on Open Gov't FOIL-AO-12,343.

Office of City Prosecutor is "agency" required to comply with Freedom of Information Law; thus, records pertaining to city code violation complaint directed to City Prosecutor must be made available under FOIL. Comm on Open Govt FOIL-AO-3727.

Records of complaints made against applicant and his business directed to town building department are subject to Freedom of Information application after deletion of information identifying complainant, and such complaints cannot be characterized as record compiled for law enforcement purposes. 1986 Committee on Open Government FOIL-AO-4235.

Freedom of Information Law may not be used to obtain copies of all records pertaining to criminal charges that have been dismissed and sealed by court; Criminal Procedure Law contains correct procedure for obtaining such records. Comm On Open Gov't FOIL-AO-4604.

Officials of Division of Criminal Justice Services and other agencies may withhold "rap sheets" which are disseminated by Division. Comm on Open Gov't FOIL-AO-4888.

If medical personnel seek information pursuant to statement of policy, policy would be available; exception to rights of access might exist if examination is conducted for law enforcement purpose, and if disclosure would reveal non-routine criminal investigative techniques or procedures that would enable recipient to evade detection or enforcement of law. Comm on Open Gov't FOIL-AO-4943.

When complaint is made, there may be considerations of privacy that properly result in denial of access to records or perhaps deletion of identifying details to protect against unwarranted invasion of personal privacy; however, if complaint was sent by person who made it to members of news media, disclosure would not result in unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4946.

Freedom of Information Law pertains to agency records, including those maintained by Department of Correctional Services and its facilities. Comm on Open Gov't FOIL-AO-4953.

Since conviction occurs during public judicial proceeding, and since records pertaining to convictions are generally available from court where proceeding was conducted, conviction records held by municipality or any agency should be available pursuant to Freedom of Information Law; further, if records are public from one source, such as court, disclosure would not result in unwarranted invasion of personal privacy if record is available from another source. Comm on Open Gov't FOIL-AO-4963.

Power of attorney signed by person in favor of his mother was sufficient for mother to obtain copies of records pertaining to her son, and Saratoga County District Attorney was in error in stating that person's mother would need a court order to obtain copies of the records. Comm on Open Gov't FOIL-AO-6287 (1990).

Whether records maintained by "licensing officer" should be characterized as court records or agency records is conjectural; while functions of licensing officers are carried out by judges in most locations in state, in other locations, same functions are carried out by commissioners of police or county sheriff and, therefore, functions of licensing officers do not appear to be inherently judicial in nature. Comm on Open Gov't FOIL-AO-7918.

Law enforcement exception would not apply to disclosure of Citywide Facility Inventory Database (CFID) maintained and made available by New York City Department of Environmental Protection (DEP). Comm on Open Gov't FOIL-AO-12559.

386. Lottery, bingo and other games of chance

Data contained in Statewide Planning and Research Cooperative System (SPARCS), insofar as it includes personally identifiable information concerning patients, need not be disclosed under Freedom of Information Law since disclosure would constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-7947.

In those instances in which Lottery has taken action on its own initiative to disclose identity of lottery winner by means of press release, information contained in release must be disclosed in response to later request made under Freedom of Information Law; disclosure of that information some time after its initial issuance could not result in unwarranted invasion of privacy. Comm on Open Gov't FOIL-AO-9143.

Although status of applicant and purposes for which request is made are irrelevant to rights of access, and agency cannot ordinarily inquire as to intended use of records, rights of access to list of names and addresses, or equivalent records, may be contingent on purpose for which request is made due to language of CLS Pub O § 89(2)(b)(iii); thus, if request for full name of winners of lottery since its inception, current address of each winner, amount of initial award to each winner and date of award to each winner was sought in order to develop mailing list or its equivalent to be used for commercial or fund-raising purposes, statute could apply to deny access to requested information. Comm on Open Gov't FOIL-AO-9143.

Department of Health and its commissioner have primary responsibility in relation to vital records and genealogical searches. Comm on Open Gov't FOIL-AO-12010.

County Department of Health improperly denied Freedom of Information Law request for copy of "re-inspection" report pertaining to requestor's apartment building on ground that it was only written on memo form and not on official document, and that it was not relevant to litigation in which requestor was involved. Comm on Open Gov't FOIL-AO-12217.

Record of medical emergency call consists in great measure of what might be characterized as medical record or history relating to person needing care or service; thus, portions of records identifying those to whom medical services were rendered, their ages, and descriptions of their medical problems or conditions could be withheld, while other aspects of records, such as locations of calls or addresses, should be disclosed. Comm on Open Gov't FOIL-AO-12608.

387. Medicine and health, generally

388. —Environmental records

The disclosure of medical histories of paid firemen of a fire district without permission, generally, would constitute an unwarranted invasion of the personal privacy of such firemen. 1982 Op St Compt File #82-204.

Incident reports required to be submitted by hospitals to health department pursuant to § 405.37 of regulations promulgated by commissioner of health are accessible to public except to extent that they identify patients, in which case patients names or other identifying details could be deleted. Comm On Open Gov't FOIL-AO-3964.

Regarding medical records, it has generally been suggested that statistical or factual information contained within such records are available but that portions of medical records consisting of advice, recommendation, opinion, and like may justifiably be withheld. Comm on Open Gov't FOIL-AO-4059.

Medical information contained in ambulance run record of fire department could be withheld on ground that disclosure can constitute unwarranted invasion of personal privacy, except to extent that record refers to agency name and other information that has already been disclosed by means of motor vehicle accident report. Comm on Open Gov't FOIL-AO-4786.

With respect to medical records, Freedom of Information Law permits that some records may be withheld in whole or in part, depending upon their contents because medical records prepared by agency personnel could be characterized as intra-agency materials and to extent that such materials consist of advice, opinion, recommendation and like, Freedom of Information Law would permit denial. Comm on Open Gov't FOIL-AO-4943.

With respect to medical records, Freedom of Information Law permits that some records may be withheld in whole or in part, depending upon their contents; medical records prepared by department personnel could be characterized as intra-agency materials that fall within scope of Freedom of Information Law and to extent that such materials consist of advice, opinion, recommendation and like, Freedom of Information Law would permit denial. Comm on Open Gov't FOIL-AO-4953.

Disclosure of data contained in Statewide Planning and Research Cooperative System (SPARCS) which includes names of patients, their addresses, social security numbers, Medicaid numbers or similar identifiers would result in unwarranted invasion of personal privacy; however, if those unique personal identifiers were deleted or removed, it was difficult to envision how disclosure of several items characterized in relevant Department of Health regulations as deniable could possibly identify patient or, therefore, result in unwarranted invasion of personal privacy. Insofar as information contained in Statewide Planning and Research Cooperative System (SPARCS) would identify entities, such as hospitals or insurance companies rather than natural persons, information could not be withheld based upon considerations of privacy. Department of Health could not restrict disclosure of information contained in Statewide Planning and Research Cooperative System (SPARCS) on basis that information would identify physicians who treated various patients. Comm on Open Gov't FOIL-AO-7947.

CLS Pub Health § 18 deals specifically with patient's rights of access to medical records and, therefore, Freedom of Information Law does not apply to patient's request for such records. Comm on Open Gov't FOIL-AO-8312.

With regard to request for records directed to Department of Health relating to incidents that occurred at specific hospital, CLS Pub O § 87(2)(b) would apply to permit denial of access to protect personal privacy. Comm on Open Gov't FOIL-AO-9651.

New York State Cancer Registry records of cancer site specific diagnoses and deaths from period 1976-1997 for particular county should be disclosed under Freedom of Information Law since such data would not, under terms of CLS Pub Health § 2402, "disclose the identity of any person" and would not be unwarranted invasion of personal privacy; anyone anywhere could interview persons residing in particular locale and question them about incidence of certain diseases and any such disclosures, which would not be required by law, would be irrelevant to authority to withhold records. Comm on Open Gov't FOIL-AO-12402.

If New York City Department of Environmental Protection (DEP) is required by NYC Admin Code § 24-707 to print entire contents of its Citywide Facility Inventory Database (CFID), equivalent information must also be made available in electronic format; whether information is stored on paper or on computer tape or in computer disk, it constitutes "record." Comm on Open Gov't FOIL-AO-12559.

389. —Medical records, generally

390. — —Autopsy

In connection with request to city department of investigation for copies of all memoranda, reports and/or other written documents relating to investigation of handling of autopsy of person

who died 5 years ago, it is difficult to envision how disclosure would result in unwarranted invasion of personal privacy with respect to deceased. Comm on Open Govt FOIL-AO-3656.

Inmate's ability to gain access to autopsy reports related to his case was dependent on his capacity to demonstrate his substantial interest in records in accordance with NYC Charter § 557(g). Comm on Open Gov't FOIL-AO-9880.

Freedom of Information Law is inapplicable as basis for seeking or obtaining autopsy report or other records described in CLS County § 677(3)(b); however, while only district attorney and next of kin of deceased have right of access to records subject to § 677 and any others would be required to obtain court order based on showing of substantial interest in records sought to gain right of access, § 677 does not specify that disclosures are prohibited. Comm on Open Gov't FOIL-AO-12019.

Requester's ability to gain access to autopsy reports and related records would be dependent on requester's capacity to demonstrate that he or she has substantial interest in records in accordance with NYC Charter § 557(g). Comm on Open Gov't FOIL-AO-13019.

Freedom of Information Law is inapplicable as basis for seeking or obtaining autopsy report or other records described in CLS County § 677. Comm on Open Gov't FOIL-AO-13080.

Autopsy photographs taken, not by Associate Medical Examiner, but rather by State Police Investigator, might not fall under restrictions imposed by CLS County § 677; if § 677 applies, court order would ordinarily be required to gain access to such records, but if § 677 does not apply, Freedom of Information Law would govern rights of access. Comm on Open Gov't FOIL-AO-13080.

By disclosing autopsy photographs in open court, public disclosure would have already been made; once that occurs, unless record is later sealed, nothing in Freedom of Information Law would serve to enable agency to deny access to such record. Comm on Open Gov't FOIL-AO-13080.

Freedom of Information Law is inapplicable as basis for seeking or obtaining autopsy report or other records described in CLS County § 677. Comm on Open Gov't OML-AO-3158.

391. — —Mental health

Although CLS Mental Hygiene Law § 33.13 provides that clinical records pertaining to patients at mental health facilities are generally confidential, Mental Hygiene Law § 33.16 describes the procedures for a patient, or person authorized to act on behalf of a patient, to request inspection or copies of mental health records from the mental health facility that maintains the records. Comm on Open Gov't FOIL-AO-6286 (1990).

Pursuant to CLS Pub O § 87(2)(a) and CLS Men Hyg § 33.13, Freedom of Information Law does not confer rights of access to clinical records of mental health facility pertaining to patient or client. Comm on Open Gov't FOIL-AO-9654.

Disclosure of transcripts containing information about inmate's medical or mental condition may result in unwarranted invasion of personal privacy to extent transcripts include intimate details about inmate. Comm on Open Gov't FOIL-AO-9999.

If Washington Correctional Facility maintains mental health records as facility, it would be required to disclose such records to inmate (subject of records) to extent required by CLS Men Hyg Law § 33.16. Comm on Open Gov't FOIL-AO-12728.

Requests by inmates for records of mental health "satellite units" within correctional facilities, pertaining to themselves, may be directed to Director of Sentenced Services, Bureau of Forensic Services, Office of Mental Health. Comm on Open Gov't FOIL-AO-12728.

392. — —Prisoners' medical records

CLS Public Health Law § 18 grants access to medical records of an inmate at a correctional facility rather than FOIL. Comm on Open Gov't FOIL-AO-6107 (1990).

Inmate's ability to gain access to autopsy reports related to his case was dependent on his capacity to demonstrate his substantial interest in records in accordance with NYC Charter § 557(g). Comm on Open Gov't FOIL-AO-9880.

Disclosure of transcripts containing information about inmate's medical or mental condition may result in unwarranted invasion of personal privacy to extent transcripts include intimate details about inmate. Comm on Open Gov't FOIL-AO-9999.

Factual information contained in draft "medical services evaluation" of county jail, prepared by State Commission of Correction, must be disclosed by county and state commission irrespective of status of report as draft or non-final; report must be reviewed by relevant agency to identify those portions that might fall within scope of any grounds for denial of access. Comm on Open Gov't FOIL-AO-10245.

393. — —X-rays

X-rays appear to consist of factual information for puposes of § 87(2)(g) of the Freedom of Information Law. Comm on Open Govt FOIL-AO 3094.

Request for record of number of abortions performed at county medical center is type of record that is subject to Freedom of Information disclosure, if such record exists, so long as records are purely statistical and contain no identifying details. 1986 Committee on Open Government FOIL-AO-4203.

If requester is not "qualified person" under CLS Pub Health § 18(1)(g), medical records would be exempt from disclosure. Comm on Open Gov't FOIL-AO-13019.

Request to Department of Environmental Conservation, seeking laws and regulations that might "impact" on particular parcel of land, was not request for records envisioned by Freedom of Information Law. Comm on Open Gov't FOIL-AO-12,351.

Records or portions thereof regarding the identities of contractors and subcontractors who performed construction work at specified schools within district for a particular time period, letters of intent filed by contractors involved in the removal of asbestos from those schools, documents indictating that workmen were properly instructed in the removal of asbestos, the names of haulers and copies of permits to haul asbestos from the schools, the names of disposal sites and the method of disposal of asbestos, the dates asbestos was removed from the schools, Environmental Protection Agency survey reports, records indicating screening for asbestos, air monitoring reports, and contracts and subcontracts regarding asbestos removal are available under the Freedom of Information Law. Comm on Open Govt FOIL-AO 3073.

Final Environmental Impact Statements filed by firms could not be characterized as "inter-agency or intra-agency materials", for firms are not "agencies". Comm on Open Gov't FOIL-AO-4081.

If record is available under Freedom of Information Law, condition of agreeing not to sue in order to receive records pertaining to study of contaminated wells could not be imposed; only if report was prepared solely for litigation would denial on that basis be justified. Comm on Open Gov't FOIL-AO-4628.

Autopsy report is likely to be maintained by office of medical examiner. Comm on Open Gov't FOIL-AO-4765.

With regard to tests or similar records concerning toxicity or hazardous nature of site, such records could be characterized as "intra-agency" materials whether they were prepared by town officials or perhaps by consultants retained by town; thus, insofar as they consisted of statistical or factual information, disclosure under Freedom of Information Law was required unless different ground for denial applied. Comm on Open Gov't FOIL-AO-8956.

Reports of Department of Environmental Conservation which consisted of computer printout of any item that appeared to be inconsistent with terms and conditions of State Pollution Discharge Elimination System (SPDES) Permits were likely available under Freedom of Information Law, notwithstanding assertion that some information entered into computer could be inaccurate and that, therefore, contents of reports were not factual and required verification prior to disclosure. Comm on Open Gov't FOIL-AO-9159.

"Resource Recovery Facility Operations Monitoring Report," prepared for town by professional engineer, constituted agency record even if it was not in town's physical possession, and it was accessible or deniable (in whole or part) based on same standards as if it were prepared by town staff; thus, aspects of report consisting of opinions and advice could be withheld, while aspects consisting of "statistical or factual tabulations or data" were available under CLS Pub O § 87(2)(g)(i). Comm on Open Gov't FOIL-AO-9797.

Although spill reports, which are prepared by Department of Environmental Conservation (DEC) following call by person outside DEC, are not final and relate to incidents for which no

final determination has been made, page of "NYSDEC Spill Report Form" consisting of "caller remarks" was available in its entirety, as virtually all of it consisted of factual information. Comm on Open Gov't FOIL-AO-9918.

It was unlikely that CLS Pub O § 87(2)(e) would serve as basis for withholding page of "NYSDEC Spill Report Form" containing "DEC Remarks" which generally consisted of brief notation or single paragraph; spill reports and responses to them are essentially public events known to owners of property or those responsible for spill. Comm on Open Gov't FOIL-AO-9918.

Information compiled pursuant to L 1996, ch 279 ("Pesticide Reporting Law") qualifies as material that is specifically exempted from disclosure under Freedom of Information Law. Comm on Open Gov't FOIL-AO-10393.

Materials and communications between New York State Department of Law (NYDOL) and United State Environmental Protection Agency (EPA) regarding PCBs in Hudson River could not be characterized as exempted from disclosure by statute because, even if NYDOL or EPA had authority to withhold requested records, neither was required to withhold them and had discretionary authority to disclose. Nor were such materials and communications immune from Freedom of Information Law disclosure on ground that they were privileged, pre-decisional draft documents. Comm on Open Gov't FOIL-AO-12034.

394. Schools and education, generally

395. —Alumni matters

Although Freedom of Information Law provides broad rights of access, it pertains to existing records; education department does not maintain any list that contains names and current addresses of college alumni, and though education department would provide information containing current addresses of alumni if they maintained information, department cannot make available what it does not have. Comm On Open Gov't FOIL-AO-4599.

Family Educational Rights and Privacy Act (20 USCS § 1232g) ("FERPA") prohibits city school district from disclosing high school "graduation rosters" without prior consent of persons to whom records pertain, unless it is shown that subject of record is deceased; however, any list or similar document concerning alumni and their activities is not subject to FERPA and there would be no prohibition concerning disclosure. Comm on Open Gov't FOIL-AO-10009.

396. —Books, visual aids and other teaching tools

Results of Climate Survey Questionnaire, which was completed by teachers in school district, could justifiably be withheld as "intra-agency" materials, since questionnaires were completed by district employees and forwarded to district officials; further, responses could justifiably be withheld since responses consist of "suggestions", recommendations and opinions of individual employees. Comm on Open Govt FOIL-AO-3634.

New York State library is part of state education department and state university libraries are within state university; in both instances, those libraries are parts of agency and consequently, are subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-4663.

397. —Certification matters

Information concerning teacher certification is accessible under Freedom of Information Law, as certification may be most appropriate source of determining teacher's qualifications and is relevant to performance of teacher's duties. 1986 Committee on Open Government FOIL-AO-4255.

Copies of permanent certificates in administration issued by New York State Education Department to each administrator in Newburgh school district are available for inspection under Freedom of Information Law, since, under CLS Pub O § 87(2)(b), disclosure would constitute permissible rather than unwarranted invasion of personal privacy, certification being clearly relevant to performance of teacher's official duties, and school improvement plan would be available pursuant to § 87(2)(g)(iii) of such Law since, under 8 NYCRR 100.2(m)(3), such plan must be approved by board of education of school district and therefore constitutes final agency policy or determination. Comm On Open Gov't FOIL-AO-4513.

License, permit, or certification indicating that individual is qualified to teach in certain areas, must be disclosed; in each instance, disclosure indicates that individual is qualified to engage in certain activity over which state has oversight and, while release of those records identifies individuals, disclosure would constitute permissible rather than unwarranted invasion of personal privacy. While record that individual has met requirements to gain teaching certification is clearly public, score on certification exam would, if disclosed, constitute unwarranted invasion of personal privacy. State Education Department would not have authority to disclose certain teacher test scores to city Board of Education in effort to assess connection between those scores and student performance, even though such data would be used "in aid of" board's efforts in hiring most qualified candidates; while data would be helpful to board, it was apparently not "necessary," for board had functioned to date without data. Comm on Open Gov't FOIL-AO-12594.

398. —Criminal matters

Request for school district records of assaults and sex offenses which have occurred in the public school system during particular time, along with names of schools where incidents occurred, dates of occurrences, and total number of incidents in each category, cannot be denied on grounds that disclosure would endanger life or safety of any person, as long as there was deleted from such reports portions that identify victims, witnesses or perpetrators. Comm on Open Govt FOIL-AO-3701.

School district's blanket denial of access to letters by teachers' union and attorney, asking school district to drop CLS Educ § 3020-a proceeding arising from alleged assault on student following teacher's acquittal of criminal charge arising from same incident, was inappropriate in view of public disclosures that already had been made and publicity generated by incident; district was required to review records in their entirety to determine which portions (if any) could justifiably be withheld. Comm on Open Gov't FOIL-AO-10143.

Document produced by state Supreme Court and maintained by school district, which indicated that former school board member had pleaded guilty to crime of grand larceny, was accessible under Freedom of Information Law. Comm on Open Gov't FOIL-AO-16547.

399. —Discipline, misconduct, termination and the like

Terms of settlement and contract between school district and teacher would result in permissible rather than unwarranted invasion of personal privacy; such records are relevant to performance of official duties of school board and teacher, and, furthermore, it is clear that contracts between public employers and their employees are accessible because they represent terms and conditions under which public moneys are expended and public duties are performed. Comm on Open Gov't FOIL-AO-4861.

Report by school district reflective of a reprimand or a finding of misconduct on the part of a teacher was accessible under provision of FOIL. Comm on Open Gov't FOIL-AO-6108 (1990).

With regard to teacher's request that school district release content of certain letters that were sent by parents to school district allegedly complaining about teacher's conduct, such letters were subject to disclosure if deletions were made to protect children's identity as well as parent's identity, unless it was possible that identities of students or parents could be easily traced even if names and other personal details were deleted. Comm on Open Gov't FOIL-AO-9733.

While witnesses and teachers named or identified in investigative report would ordinarily be withheld under CLS Pub O § 87(2)(b), where disclosures had already occurred concerning alleged misconduct of school administrators, board of education could choose to disclose report in its entirety (except for personally identifiable information pertaining to students). Comm on Open Gov't FOIL-AO-9762.

With respect to substance of complaint and related documents concerning student's alleged mistreatment by school district employee, references to student's name or other aspects of records that would make her identity easily traceable had to be withheld from public to comply with federal law; furthermore, if there was no determination that employee engaged in misconduct, denial of

access based upon privacy considerations would be consistent with law. Comm on Open Gov't FOIL-AO-12104.

Agreement between school district and district employee which had been reviewed and approved by board of education in executive session was subject to disclosure under Freedom of Information Law, unless disclosure would involve unwarranted invasion of personal privacy, for example if part of agreement required that employee engage in drug or alcohol treatment; however, remainder of agreement would ordinarily be accessible. Comm on Open Gov't OML-AO-3472.

400. —Effect of copyright law

DARE Program teaching materials used by school district, which are copyrighted and thus available for inspection, cannot be characterized as "specifically exempted from disclosure-...by...statute," but reproduction of such materials may be precluded if it would "cause substantial injury to the competitive position of the [holder of the copyright]." Comm on Open Gov't FOIL-AO-12102.

401. —Evaluation matters

"Visitation reports" consisting of letters describing conditions found in inspection of school and "lesson observation report" which concerns surprise visit by district administrator to classroom of particular teacher is subject to disclosure to extent reports contain factual information and do not reflect opinion or recommendation rather than determination. Committee on Open Government FOIL-AO-3831.

Ratings of school teachers could be characterized as "intra-agency materials", and extent to which they may be accessible or deniable is largely dependent upon specific content of individual records since extent to which individual forms contain opinions and facts differs from one form to next. Comm On Open Gov't FOIL-AO-4592.

Unsatisfactory lesson observation reports, pertaining to named teachers, would constitute intra-agency materials that would be available or deniable, in whole or in part, based upon specific contents; however, individual rating reports, which also pertain to named teachers, could be accessible since social security numbers, file numbers, and possibly those reasons which were merely opinions, could be masked out and would therefore not be an unwarranted invasion of personal privacy; individual rating reports are accessible under Freedom of Information Law as long as they are final agency determinations. Comm on Open Gov't FOIL-AO-4642.

Records indicating criteria used to determine merit pay increases for administrators employed by school district were accessible under FOIL. Portions of the evaluations, which were reflective of subjective opinions of how well or poorly an administrator met the criteria, could be withheld on the basis that disclosure would be an invasion of personal privacy. Comm on Open Gov't FOIL-AO-6159 (1990).

Superintendent of school's response to request for a copy of a performance evaluation pertaining to the superintendent of schools that "it is not the practice" in the district "to make public the evaluations of the Superintendent or any other member of the Staff" was insufficient in that it failed to refer to any particular provision of the Freedom of Information Law as basis for denial of the request. Comm on Open Gov't FOIL-AO-6255 (1990).

402. —Family Educational Rights and Privacy Act (FERPA)

Buckley Amendment (20 USCS § 1232g) operates to prohibit disclosure of mailing lists of names and addresses of parents of students in grades 7 through 12 within school district. Comm on Open Govt FOIL-AO-3537.

Under CLS Pub Off § 87(2) and 20 USCS § 1232g, records could not be disclosed with respect to parental requests for exclusion of their children from instruction on human sexuality based on their religious beliefs. Comm on Open Gov't FOIL-AO-4397.

As to complaint letters submitted by students' parents to board of education, 2 of which letters were submitted in sealed envelopes, complaints were "records" under CLS Pub O § 86(4), whether or not they were submitted in sealed envelopes, under §§ 87(2)(b) and 89(2)(b) of such Law, substance of such complaint may be disclosed, though identifying details pertaining to complainant might not be relevant to board's work and thus their disclosure may constitute unwarranted invasion of personal privacy, and under 20 USCS § 1232g, complaint identifying student's parents would be "personally identifiable" to student and therefore justify deletion of identifying details. Comm On Open Gov't FOIL-AO-4512.

Since community colleges are governmental entities performing governmental function, report concerning allegation of plagiarism is subject to rights of access granted by Freedom of Information Law; Federal Family Educational Rights and Privacy Act generally prohibits educational agency from disclosing "education records" identifiable to student without student's consent; therefore, to extent that Federal Act prohibits disclosure, records concerning allegation of plagiarism would be specifically exempted from disclosure by federal statute. Comm on Open Gov't FOIL-AO-4904-A.

School district's investigation of a parent's complaint concerning the activities of a school psychologist in relation to daughter of parent constituted an "education record" within the provisions of the Family Educational Rights and Privacy Act (FERPA) (20 USCS § 1232g), and parent was entitled to obtain copy of investigation. Comm on Open Gov't FOIL-AO-6279 (1990).

With regard to request directed to CUNY School of Law at Queens College for release of transcripts of its graduates, school could withhold any aspect of transcript which if disclosed would be personally identifiable to student based upon provisions of both Family Educational Rights and Privacy Act (20 USCS § 1232g) and CLS Pub O § 87(2)(b). Comm on Open Gov't FOIL-AO-9492.

There was no basis for school district to deny request to look at high school yearbooks, notwithstanding federal Family Educational Rights and Privacy Act (USCS § 1232g), since those depicted in yearbook have consented to disclosure and, moreover, any purchaser of yearbook has already acquired personally identifying details concerning students that appear throughout yearbook. Comm on Open Gov't FOIL-AO-9618.

Report by attorney hired by school district to investigate allegations that administrators had asked teachers to erase incorrect answers on district's third grade "PEP" test was not made and maintained in ordinary course of business, and thus was within scope of "education records" required to be kept confidential under Family Educational Rights and Privacy Act (20 USCS § 1232g) insofar as information was identifiable to students. Comm on Open Gov't FOIL-AO-9762.

Family Educational Rights and Privacy Act (20 USCS § 1232g) ("FERPA") prohibits city school district from disclosing high school "graduation rosters" without prior consent of persons to whom records pertain, unless it is shown that subject of record is deceased; however, any list or similar document concerning alumni and their activities is not subject to FERPA and there would be no prohibition concerning disclosure. Comm on Open Gov't FOIL-AO-10009.

Under Family Education Rights and Privacy Act, 20 USCS § 1232g, which applies to all educational institutions that participate in grant programs administered by United States Department of Education, records pertaining to "Performance Assessment in Mathematics" test and "California Achievement Test" scores should be withheld to extent that disclosure could or would identify student or students; thus, test scores should be disclosed, but identifying details must be withheld. Comm on Open Gov't FOIL-AO-10041.

Student grade information in list form, including teachers' names, must be disclosed if it exists; however, identifying details pertaining to students must be withheld in order to comply with federal law. Comm on Open Gov't FOIL-AO-10301.

Family Educational Rights and Privacy Act (20 USCS § 1232g) generally forbids school district from disclosing personally identifiable information concerning students, unless parents of students consent to disclosure. Comm on Open Gov't FOIL-AO-12405.

If school administrator or teacher prepares notes of meeting and does not share or disclose such notes to any other person, Family Education Rights and Privacy Act (FERPA; 20 USCS § 1232g) would not apply; however, due to breadth of definition of

"record" in Freedom of Information Law (FOIL), such notes would fall within scope of FOIL. Comm on Open Gov't FOIL-AO-13022.

With respect to request for list of Freedom of Information Law requests made to school district, references to students' or parents' names or other aspects of records that would make any student's identity "easily traceable" had to be redacted in order to comply with federal law. Comm on Open Gov't FOIL-AO-16558.

Even though matter relates to law enforcement, where matter involves student discipline, records pertaining to matter are exempt from disclosure under Freedom of Information Law insofar as they are personally identifiable to student or students; federal Family Educational Rights and Privacy Act (FERPA, 20 USCS § 1232g) and regulations promulgated thereunder, protect privacy of students. Comm on Open Gov't OML-AO-2522.

403. —Financial matters, generally

404. — —School budgets

Disclosure of budget allocation report or its equivalent is available under Freedom of Information Law, notwithstanding its characterization as "working document" or "politically sensitive." Comm on Open Gov't FOIL-AO-7933.

Applicant was entitled to disclosure of materials used to arrive at proposed budget figures for school district; in response to request for detailed school district budget, applicant received records which referred to variety of expenses, many of which included number of allocations within single category. With regard to school budget, CLS Pub O § '87(2)(c) would permit withholding of records to extent that disclosure would impair present or imminent contract awards or collective bargaining negotiations; if proposed expenditure referred to services that had not yet been negotiated with contractors or that were subject to bidding requirements, disclosure of those figures might enable contractors to tailor their bids accordingly, to potential detriment of school district and its taxpayers. Comm on Open Gov't FOIL-AO-8367.

Virtually all statistical or factual information concerning school finances or expenditures, including the salaries of every employee of the school district, are accessible under the Freedom of Information Law. Comm on Open Govt FOIL-AO 3023.

Contract between school district and superintendent does not fall within exemption for records which, if disclosed, would impair collective bargaining negotiations since, as general matter, contract into which unit of government enters must be made available to public once it has been approved. Committee on Open Government FOIL-AO-3333.

Budget item line draft worksheet prepared by school district could be characterized as "inter-agency" material; nonetheless to extent that it contains statistical or financial tabulations or data, it should be made available. Comm on Open Govt FOIL-AO-3689.

Bills, receipts, contracts, cancelled checks and other documents concerning the expenditure of public money maintained by a school district constitute "records" subject to rights of access conferred by the Freedom of Information Law. Comm on Open Gov't FOIL-AO-6245 (1990).

Cost of tuition contract for high school students from neighboring areas could not be withheld on basis that disclosure would compromise negotiations for future since contract represented culmination of negotiations and did not relate to "present or imminent contract awards." Comm on Open Gov't FOIL-AO-8582.

Management letter prepared in conjunction with annual school district audit report is public document which must be made available to public, not confidential document separate from audit report. Comm on Open Gov't FOIL-AO-9881.

Records relating to school district audit, insofar as they consist of statistical or factual information, must be disclosed. Comm on Open Gov't FOIL-AO-12185.

As soon as bills are received by school district, they constitute "records" subject to rights of access conferred by Freedom of Information Law, irrespective of whether board has paid or otherwise acted on them. Comm on Open Gov't OML-AO-2195.

405. —Personnel records

School district contract with superintendent is not exempt from disclosure on grounds of unwarranted invasion of personal privacy since public employees enjoy lesser degree of privacy than that of public generally and records relevant to performance of public employee's official duties are generally obtainable. Committee on Open Government FOIL-AO-3333.

Resolution of Board of Education that staff records shall not be released constitutes violation of Freedom of Information Law since agency is required to maintain record setting forth name, public office address, title and salary of every officer or employee of agency, and such payroll information may be made available to any person; resolution of school board which conflicts with Freedom of Information Law is void to extent of conflict. Committee on Open Government FOIL-AO-3383.

Work schedule of community college faculty member is accessible under Freedom on Information Law, since schedule is relevant to performance of his or her official duties. Comm on Open Govt FOIL-AO-3594.

"File numbers" that are assigned to each employee of school district are not subject to access under Freedom of Information Law, since file number is merely identification number and since it is not relevant to manner in which public employee performs his or her duties. Comm on Open Govt FOIL-AO-3638.

School district is required to maintain record that includes name, title, salary and public office address (i.e., school) of all employees, including teachers. Comm on Open Gov't FOIL-AO-7634.

W-2 forms are not exempted from disclosure under CLS Pub O § 87(2)(a) on basis of 26 USCS § 6103 since latter statute pertains to records received and maintained by Internal Revenue Service but does not pertain to records kept by individual taxpayer or records maintained by employer, such as school district. Comm on Open Gov't FOIL-AO-7639.

As payroll records of school system were found to be available prior to enactment of Freedom of Information Law, such records must be disclosed regardless of intended use of records; thus, payroll records required to be maintained should be disclosed to any person, irrespective of their intended use and without request for why such records have been requested. Comm on Open Gov't FOIL-AO-7643.

Requirements for eligibility in school district's Salary Elective Program involve information that is otherwise available under Freedom of Information Law, such as date of one's initial employment (or date of one's initial payment) and other items indicating duration of one's public employment, and thus must be disclosed. Comm on Open Gov't FOIL-AO-13108.

Under CLS Pub Off § 87(2)(g)(iii), minutes of board of education meeting convened to review and ultimately approve report by non-teaching salary committee were subject to disclosure under Open Meetings Law, despite contentions that information should not be released until personnel concerned were notified, since board voted to accept and approve report and thereby made final agency determination. Comm on Open Gov't OML-AO-1380.

406. —School board matters, generally

407. — —Minutes

Approved minutes of school board meetings must be made available under the Freedom of Information law. Comm on Open Govt FOIL-AO 3003.

When board of registration has been designated under CLS Educ § 2014, record identifying members must be disclosed and minutes of meeting of board of education must refer to board action making such designation and include names of persons selected. Comm on Open Gov't FOIL-AO-8473.

No law would have required school district officials, on their own initiative, to inform public of loss of funds due to possible embezzlement by district financial officer when problem was discovered; any person, however, may seek school district records at any time under Freedom of Information Law. Comm on Open Gov't OML-AO-3798.

408. — —Voting

School district as well as entities operating under aegis of district can be characterized as "agency" subject to requirements of Freedom of Information Law; thus, teacher who was ill for lengthy period is entitled to information regarding manner in which her rejection to "sick bank" for teachers was determined

and how 4 school district members voted. Comm on Open Govt FOIL-AO-3456.

When final vote is taken by members of agency, record must be prepared that indicates manner in which each member who voted cast his or her vote. Election of replacement for board of cooperative educational services district superintendent requires creation of record of votes cast. Comm on Open Gov't FOIL-AO-7587.

To prevent person from obtaining separate portions of school district absentee ballot application, thereby enabling recipient to compare handwriting, request for names of those to whom absentee ballots were issued could be granted under Freedom of Information Law by disclosing list required to be maintained under CLS Educ § 2018-b while portions of applications that include names and addresses could be deleted in every instance. Comm on Open Gov't FOIL-AO-13443.

Draft curriculum prepared by community advisory board may be deemed not subject to disclosure under Freedom of Information Law if it constitutes advice or a recommendation to the Board of Education, although, assuming that board is subject to the Open Meetings Law, contents of draft would effectively be disclosed at open meetings. Comm on Open Govt FOIL-AO 3027.

Names of persons who have applied for appointment to school board after vacancy due to resignation of member prior to expiration of his term are accessible under Freedom of Information Law. Comm on Open Govt FOIL-AO-3471.

All items presented at school board meeting, including information provided to school board by superintendent and informational packet separate from formal board agenda is subject to Freedom of Information Law. 1986 Committee on Open Government FOIL-AO-4183.

As to complaint letters submitted by students' parents to board of education, 2 of which letters were submitted in sealed envelopes, complaints were "records" under CLS Pub O § 86(4), whether or not they were submitted in sealed envelopes, under §§ 87(2)(b) and 89(2)(b) of such Law, substance of such complaint may be disclosed, though identifying details pertaining to complainant might not be relevant to board's work and thus their disclosure may constitute unwarranted invasion of personal privacy, and under 20 USCS § 1232g, complaint identifying student's parents would be "personally identifiable" to student and therefore justify deletion of identifying details. Comm On Open Gov't FOIL-AO-4512.

City officials would not be required by Freedom of Information Law to prepare record that identifies firms which are interested in buying certain school when there is no list or record that identifies firms since communications had been oral in nature. Comm on Open Gov't FOIL-AO-4582.

Terms of settlement and contract between school district and teacher would result in permissible rather than unwarranted invasion of personal privacy; such records are relevant to performance of official duties of school board and teacher, and, furthermore, it is clear that contracts between public employers and, their employees are accessible because they represent terms and conditions under which public moneys are expended and public duties are performed. Comm on Open Gov't FOIL-AO-4861.

Contract between school superintendent and school district was accessible under provisions of FOIL. Comm on Open Gov't FOIL-AO-6122 (1990).

While blanket denial of agenda packet handed out to school board members before meetings might be inconsistent with Freedom of Information Law, there would likely be one or more grounds for denial that could appropriately be cited withhold portions of those records. Comm on Open Gov't FOIL-AO-8514.

With to request for variety of records communicated among or between school district officials relating to budget requests, to extent that they consisted of "statistical or factual tabulations or data," records were accessible. Comm on Open Gov't FOIL-AO-9359.

While witnesses and teachers named or identified in investigative report would ordinarily be withheld under CLS Pub O § 87(2)(b), where disclosures had already occurred concerning alleged misconduct of school administrators, board of education could choose to disclose report in its entirety (except for personally identifiable information pertaining to students). Comm on Open Gov't FOIL-AO-9762.

School board member could choose to disclose material received by board members in weekly packets, and class sizes and fund balances, unless statute specifically forbade such disclosure. School board member could transmit e-mail communication to number of people relating to certain programs that were carried out in district. Comm on Open Gov't FOIL-AO-12405.

Member of board of education was not prohibited from providing copies of handwritten notes from open school board meetings, and school district's attorney had no right to review such information prior to its release to requestor under Freedom of Information Law. Comm on Open Gov't OML-AO-0149.

Neither Freedom of Information Law, Open Meetings Law, or any other statute would have prohibited Board of Education or one of its members from disclosing participant's prepared statement or divulging what transpired during executive session, even if such disclosures would be unfair, unethical or inappropriate. Comm on Open Gov't OML-AO-3830.

If school board reached "consensus" in executive session that is reflective of its final determination of issue, minutes must be prepared that indicate its action, as well as manner in which each member voted. Comm on Open Gov't OML-AO-4026.

409. —Student lists; directories

Buckley Amendment (20 USCS § 1232g) operates to prohibit disclosure of mailing lists of names and addresses of parents of students in grades 7 through 12 within school district. Comm on Open Govt FOIL-AO-3537.

Under CLS Pub Off § 87(2) and 20 USCS § 1232g, records could not be disclosed with respect to parental requests for exclusion of their children from instruction on human sexuality based on their religious beliefs. Comm on Open Gov't FOIL-AO-4397.

Disclosure of litigation file cabinet "tags" used by individual attorneys at board of education might properly be denied where tags identified students. Comm on Open Gov't FOIL-AO-9251.

With regard to request directed to CUNY School of Law at Queens College for release of transcripts of its graduates, school could withhold any aspect of transcript which if disclosed would be personally identifiable to student based upon provisions of both Family Educational Rights and Privacy Act (20 USCS § 1232g) and CLS Pub O § 87(2)(b). Comm on Open Gov't FOIL-AO-9492.

With regard to teacher's request that school district release content of certain letters that were sent by parents to school district allegedly complaining about teacher's conduct, such letters were subject to disclosure if deletions were made to protect children's identity as well as parent's identity, unless it was possible that identities of students or parents could be easily traced even if names and other personal details were deleted. Comm on Open Gov't FOIL-AO-9733.

Family Educational Rights and Privacy Act (20 USCS § 1232g) ("FERPA") prohibits city school district from disclosing high school "graduation rosters" without prior consent of persons to whom records pertain, unless it is shown that subject of record is deceased; however, any list or similar document concerning alumni and their activities is not subject to FERPA and there would be no prohibition concerning disclosure. Comm on Open Gov't FOIL-AO-10009.

City could withhold any portion of list of participants in softball clinic run by city youth commission that would identify children, including personally identifying details based on age; disclosure would result in unwarranted invasion of personal privacy, particularly as requested information focused on activities of children. Comm on Open Gov't FOIL-AO-10066.

Student grade information in list form, including teachers' names, must be disclosed if it exists; however, identifying details pertaining to students must be withheld in order to comply with federal law. Comm on Open Gov't FOIL-AO-10301.

With respect to substance of complaint and related documents concerning student's alleged mistreatment by school district employee, references to student's name or other aspects of records that would make her identity easily traceable had to be withheld from public to comply with federal law; furthermore, if there was no determination that employee engaged in misconduct, denial of

access based upon privacy considerations would be consistent with law. Comm on Open Gov't FOIL-AO-12104.

School district may not disclose former student's attendance records to prospective employer without former student's consent. Comm on Open Gov't FOIL-AO-12204.

Family Educational Rights and Privacy Act (20 USCS § 1232g) generally forbids school district from disclosing personally identifiable information concerning students, unless parents of students consent to disclosure. Comm on Open Gov't FOIL-AO-12405.

Even though matter relates to law enforcement, where matter involves student discipline, records pertaining to matter are exempt from disclosure under Freedom of Information Law insofar as they are personally identifiable to student or students; federal Family Educational Rights and Privacy Act (FERPA, 20 USCS § 1232g) and regulations promulgated thereunder, protect privacy of students. Comm on Open Gov't OML-AO-2522.

410. —Tests; test scores

Freedom of Information Law does not govern rights of access to standardized tests in possession of State Education Department; however, copies of standardized tests which are filed with Commissioner of Education following release of test results are subject to rights of access under FOIL. Comm on Open Govt FOIL-AO-3489.

School district is required to release, under Freedom of Information Law, printed statistical information revealing average scores of all in senior class in district who took Scholastic Aptitude Test. Comm on Open Govt FOIL-AO-3576.

Where school test questions will be reused or administered in future, both questions and answers could be withheld under CLS Pub Off § 87(2)(h), but if questions and answers appear on paper or papers personally identifiable to student, the Family Educational Rights and Privacy Act (20 USCS § 1232(g)) would govern and supersede state law, thereby allowing access to such records to students or parents in certain circumstances. Comm on Open Gov't FOIL-AO-4406.

While eligible lists, which identify those who pass civil service examinations and their scores, are available, records identifying those persons who failed exams or their scores could be withheld as unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4574.

If "notes" taken by Assistant Superintendent for Instruction and Elementary Education during meeting with parent were reflective of opinion, advice, or recommendation as to children's school records, then access could be denied to parent under Public Officer's Law § 87(2)(g). On the other hand, notes consisting of factual rendition of what transpired at meeting would be available to parent under § 87(2)(g)(i). Comm on Open Gov't FOIL-AO-5539.

Under Family Education Rights and Privacy Act, 20 USCS § 1232g, which applies to all educational institutions that participate in grant programs administered by United States Department of Education, records pertaining to "Performance Assessment in Mathematics" test and "California Achievement Test" scores should be withheld to extent that disclosure could or would identify student or students; thus, test scores should be disclosed, but identifying details must be withheld. Comm on Open Gov't FOIL-AO-10041.

Surveys in possession of school districts constitute records subject to Freedom of Information Law; however, school district is not obliged to disclose survey on its own initiative, and without request, before survey is administered to students. Comm on Open Gov't FOIL-AO-12103.

Student grades in class taught by professor at State University of New York were accessible under Freedom of Information Law, provided that any identifying details pertaining to students' identities were withheld; for example, if student grades appeared alphabetically, then university would be required to scramble content of records so that no student could be identified. Comm on Open Gov't FOIL-AO-16598.

411. —Transcripts and the like

412. — —Student attendance records

Under § 87 of FOIL, student attendance registers cannot be transferred to local historical society where they might be available to public for purpose of engaging in historical research without consent of parents of students or students themselves. Comm on Open Gov't FOIL-AO-4055.

With regard to request directed to CUNY School of Law at Queens College for release of transcripts of its graduates, school could withhold any aspect of transcript which if disclosed would be personally identifiable to student based upon provisions of both Family Educational Rights and Privacy Act (20 USCS § 1232g) and CLS Pub O § 87(2)(b). Comm on Open Gov't FOIL-AO-9492.

School district may not disclose former student's attendance records to prospective employer without former student's consent. Comm on Open Gov't FOIL-AO-12204.

Transcript maintained by school district is "record" subject to rights of access granted by FOIL and should be made available to person to whom it pertains. Comm On Open Gov't FOIL-AO-3884.

Records pertaining to applicant's foreign degree and transcripts from University of Ivory Coast, which were submitted with his application to State University at Albany (SUNY), were available to him from SUNY under Freedom of Information Law and Personal Privacy Protection Law. Comm on Open Gov't FOIL-AO-10125.

If school district maintained records of names of persons who purchased bricks to be placed in walkway at local high school, whose bricks had been removed without permission possibly due to their religious or political content, such records had to be disclosed under Freedom of Information Law; if requested records included personal information such as religious or political beliefs, those portions could be withheld. Comm on Open Gov't FOIL-AO-12,342.

Memorandum sent to superintendents by education department assistant commissioner that describes Job Network Information Service and listing of administrative job openings that includes details regarding specific openings constitute "records" subject to Freedom of Information Law. 1986 Committee on Open Government FOIL-AO-4246.

Terms of contract between employee and school district, as well as contract between public employee and public employer, are permissible rather than unwarranted invasion of personal privacy, since such records are relevant to performance of official duties of school board and employee, and contracts between public employers and their employees represent terms and conditions under which public moneys are expended and public duties are performed. Comm on Open Gov't FOIL-AO-4439.

While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect public or final agency policy determinations must be made available; however, if teacher who may have reached "conclusions" had no authority to make final agency determination, conclusions might not be considered "final", and even if these "conclusions" were used in making final determination, they could be denied. Comm on Open Gov't FOIL-AO-4571.

Since state university is integral part of government of New York State and is engaged in carrying out governmental functions, it is "agency" required to comply with Freedom of Information Law. Comm on Open Gov't FOIL-AO-4619.

Every agency, including school districts, are required to prepare and maintain these lists; a school district contains records of name classroom teachers, as those separate and distinct from payroll record, such record is available, however, if school district does not maintain such lists, Law would not require school district to create or prepare such lists based on request. Comm on Open Gov't FOIL-AO-4752.

Records indicating approvals for courses, names of courses, number of credits granted and verification of satisfactory completion of courses are available; therefore, if school district maintains same or similar records concerning teacher, those records should be disclosed. Comm on Open Gov't FOIL-AO-4885.

Agency need not create or prepare record in response to request; therefore, if board of co-operative educational services does not maintain statistical data involving race, ethnicity or sex, it is not required to prepare data on behalf of request. Comm on Open Gov't FOIL-AO-4914.

Where documents were physically maintained by and in control and custody of community college and its staff, they constituted agency (i.e., college) records, even though records were prepared by another entity. Comm on Open Gov't FOIL-AO-8386.

Teacher was entitled to printout of names of all teachers in school district and their current salaries including salary step and approved graduate hours since such disclosure would not involve unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-9736.

CLS Pub O §§ 87(2)(d) and 89(5) would not be applicable and would not serve as basis for denial of access under Freedom of Information Law where materials redacted by state university involved terms of negotiated agreements developed by parties to those agreements, and they were not records that were submitted to university by commercial enterprise. Redacted portions of state university vendor contracts (i.e., numeric figures) were not "trade secrets" and likely would not cause substantial injury to competitive position of subject enterprises where they were not analogous to process, formula, or financial information which showed strengths or weaknesses of entity; rather, they indicated amounts to be paid and received as result of negotiation between 2 parties, and thus that kind of information should be disclosed. Insofar as records sought were maintained by or for university auxiliary services corporation they were, in essence, university's records, and university would be required to direct custodian of records to disclose them in accordance with Freedom of Information Law, or obtain them in order to disclose them to applicant to extent required by law. Comm on Open Gov't FOIL-AO-12656.

Report prepared by committee of community members appointed to review New York City HIV/AIDS curriculum was subject to Freedom of Information Law, even though committee was not subject to Open Meetings Law, once report was submitted to school district. Comm on Open Gov't OML-AO-2254.

When records or portions of records fall with exceptions to rights of access appearing in Freedom of Information Law, they may be withheld, notwithstanding breadth of CLS Educ § 2116. Comm on Open Gov't OML-AO-2299.

"Datebook" of superintendent of school district was record subject to Freedom of Information Law, despite contention of superintendent that datebook was his "personal" datebook. Comm on Open Gov't OML-AO-2347.

Matters properly discussed by board of education in executive session, although not public knowledge, were not "confidential" under CLS Gen Mun § 805-a(1)(b), and board member could not be prohibited from disclosing information acquired in executive sessions, since information is "confidential" only when government has no discretion and must withhold records or discuss matter in private, and matters appropriate for executive sessions could be discussed in open meetings at option of board; school district matters are "confidential" only rarely, e.g., when information involves student records or records subject to attorney-client privilege. Comm on Open Gov't OML-AO-3449.

413. Social services

List of hotels and motels and amount of money county spent on each during particular periods of time in relation to housing county's needy is accessible under FOIL, for neither confidentiality restriction imposed by Social Services Law § 136 nor FOIL § 87[2][a] would be applicable bases for denial. Comm On Open Gov't FOIL-AO-4040.

As to ex-husband's request to State Department of Social Services for information concerning whereabouts of his ex-wife and children, information sought likely could be withheld as specifically exempted by CLS Soc Serv § 136, generally prohibiting records identifying applicant for or recipient of public assistance. Comm on Open Gov't FOIL-AO-4565.

Under CLS Pub Hous § 159, public housing authority or municipality cannot disclose information identifiable to tenants. Because tenants in section 8 housing must meet income qualification, insofar as disclosure of records would identify tenants, they may be withheld on ground that disclosure would constitute "an unwarranted invasion of personal privacy" under CLS Pub O § 87(2)(b), even if dwellings are not public housing units or under jurisdiction of housing authority; conversely, following deletion of identifying details pertaining to tenants, remainder of records, i.e., those portions indicating identities of landlords, contractors and amounts that are paid, must be disclosed. City housing authority could deny reporter's request for disclosure of names of section 8 tenants in particular housing development; however, identity of landlord must be disclosed, for payments are made by governmental entities to landlord, irrespective of landlord's income and financial standing, while other details could be withheld, if disclosure would make tenant's identity ascertainable. Comm on Open Gov't FOIL-AO-12399.

Access under Freedom of Information Law to results of survey conducted by local drug abuse prevention council would depend in large part on contents of survey and format in which results were presented; CLS Pub O § 87(2)(b) would likely apply if release of survey results identified persons participating in drug treatment program, but if results contained nothing more than aggregate numbers of persons attending programs or requesting services, then disclosure would not result in unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-16573.

414. Taxation, generally

415. —Real property assessments, generally

416. — —Computerized records

Online web application, whereby staff of Office of Real Property Services (ORPS) proposed to copy assessment data received in electronic form from municipalities into data warehouse to be accessed over internet, was "delivery system" rather than "record" subject to Freedom of Information Law, and thus online access could be restricted to assessors, who would only be able to sign on if agency provided valid usercode and password; original source of data would still be accessible to public from municipalities and ORPS on request. Comm on Open Gov't FOIL-AO-12,366.

Assessment records identify property owners, their addresses, and other details concerning property are subject to disclosure; where contents of assessment rolls have been transferred to computer tapes, computer tapes are available for disclosure even though there is intent to use information for commercial purposes. Committee on Open Government FOIL-AO-3799.

Town was required to make full RPS assessment file (including building inventory and sales data) available in electronic format, assuming that it had ability to do so, in that requested records were available as of right under different provisions of law (CLS RPTL §§ 501, 516 and 574). Comm on Open Gov't FOIL-AO-10251.

417. — —New York City real property assessments

New York City transfer tax data, which is submitted to state board for use in determination of residential assessment ratios, is not subject to public disclosure pursuant to Freedom of Information Law. 9 Op Counsel SBEA No. 82 (1991).

Access to a tax assessor's field notes made when inspecting property of a citizen of the town may not be denied on the grounds that the notes are his "personal notes." Comm on Open Gov't FOIL-AO-2987.

Town is required to disclose existing records in accordance with Freedom of Information Law, but it is not obliged to create new records or review its records for purpose of preparing totals or tabulations; records pertaining to assessments and assessment process are generally found to be available for disclosure. Comm on Open Gov't FOIL-AO-4725.

Records pertaining to the assessment of real property re accessible under the Freedom of Information Law. Comm on Open Gov't FOIL-AO-6213.

Records identifying owners of parcels of real property against whom real estate property tax penalties have been imposed, including their addresses, must be disclosed under Freedom of Information Law; however, telephone numbers of such persons may be withheld as unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-9324.

Under CLS RPTL § 501, which requires publication of notice stating assessment inventory and valuation data is "available for review" and that "appointment may be made to review this information during certain times as specified in the notice," disclosure is required to any person irrespective of intended use of data, if term "review" is construed to include inspection and

copying, but different conclusion might be reached if "review" is construed to mean only right to inspect. Comm on Open Gov't FOIL-AO-10062.

Records concerning implementation of village's assessment practices, insofar as they existed, were accessible under Freedom of Information Law. Comm on Open Gov't FOIL-AO-10186.

Records, like county tax maps, that government agency is required to produce, are not subject to copyright protection. Comm on Open Gov't FOIL-AO-12385.

Real property inventory is available to any person for any reason during time specified in notice under CLS RPTL § 501, but inventory may be withheld at other times if it would be used for commercial or fund raising purpose. Comm on Open Gov't FOIL-AO-12421.

City inventory and assessment data regarding real property would be available to any person for any reason during time specified in notice required by CLS RPTL § 501, but it could be withheld at other times if it would be used for commercial or fund raising purpose. Comm on Open Gov't FOIL-AO-12689.

Tax assessment roll or its equivalent must be disclosed. Comm on Open Gov't FOIL-AO-12754.

Because assessment board of review is "public body" and "agency," it is required to prepare minutes in accordance with CLS Pub O § 106, including record of votes of each member in conjunction with CLS Pub O § 87(3)(a). Comm on Open Gov't OML-AO-4043.

Contents of "Application for Alternative Veterans Exemption from Real Property Taxation", prepared by State Board of Equalization and Assessment, as well as other materials that may be submitted with that application, are subject to access under Freedom of Information Law. Comm on Open Govt FOIL-AO-3623.

Tax rolls maintained by agency constitute "records" subject to Freedom of Information Law, regardless of age of records. In regard to request for town tax rolls that were prepared in 19th century, which request was denied on ground that records were sealed and too fragile for viewing, there was conflict between Freedom of Information Law and CLS Art & Cult Affrs § 57.25, which provides that local government officials have responsibility to protect and ensure preservation of records of enduring value. Comm on Open Gov't FOIL-AO-7515.

Records relating to county occupancy tax allocations, to extent that they consist of "statistical or factual tabulations or data," are accessible unless provision other than CLS Pub O § 87(2)(g) applies, even if statistical or factual information contained therein is "intertwined" with opinions which may be withheld. Comm on Open Gov't FOIL-AO-10402.

Notwithstanding claim of confidentiality asserted by city's common council on advice of corporation counsel, stipulation of settlement which resolved pending tax assessment proceedings initiated by corporate taxpayer, was accessible to public absent proper assertion of ground for denial under CLS Pub O § 87(2). Comm on Open Gov't FOIL-AO-12298.

Records identifying owners of those parcels of real property against whom penalties have been imposed, including their addresses, must ordinarily be disclosed. Imposition of penalty for failure to pay real property taxes would indicate that final agency determination has been made, and thus record so indicating would be available under CLS Pub O § 87(2)(g)(iii). If names and addresses of property owners who failed to pay taxes, or on whom penalties were imposed, would be used for commercial or fund-raising purpose, agency could justifiably deny access. Comm on Open Gov't FOIL-AO-12549.

With respect to EA-5217 forms that indicate transfer price of real property, under CLS RPTL former § 574(5) such transfer price had been confidential unless it had been requested in conjunction with administrative or judicial review of assessment; however, those forms, due to amendment of § 574(5), have been available since July 1, 1994. Comm on Open Gov't FOIL-AO-12754.

418. Utilities, including water

Statistical information concerning energy consumption at public facility must be made available. Committee on Open Government FOIL-AO-3358.

419. Vital statistics; Birth records

420. —Death certificates

Access to genealogical records is not governed by Freedom of Information Law; such records are accessible through registrar or town or city clerk, but since birth and death records are generally confidential under CLS Public Health §§ 4173 and 4174, requestor probably does not have right to personally search through genealogical records. Comm on Open Gov't FOIL-AO-12,340.

Death certificates are available, unless request is not made for proper purpose, under Public Health Law which may impose significant search fees. Comm on Open Gov't FOIL-AO-4945.

421. —Marriage records

Rights of access to birth and marriage records are not governed by the Freedom of Information Law, but rather by § 4173 of the Public Health Law and § 20-a of the Domestic Relations Law, respectively. Comm on Open Govt FOIL-AO 3036.

Irrespective of where records pertaining to performance of marriages by mayor may be kept, they are kept due to and in performance of mayor's official duties and in his capacity as mayor or marriage officer; thus, such records fall within scope of Freedom of Information Law. Comm on Open Gov't FOIL-AO-7883.

Contents of marriage records must generally be disclosed; however, if special consent is noted on marriage record, or if such record includes medical or health information, those items might justifiably be deleted. Comm on Open Gov't FOIL-AO-10339.

Although CLS Jud § 255 generally provides that records maintained by clerk of court must be made available, access to records relating to matrimonial proceedings is governed by CLS Dom Rel § 235(1). Comm on Open Gov't FOIL-AO-12999.

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Although date of birth might justifiably be denied as unwarranted invasion of personal privacy, since Election Law requires disclosure of registration records, which includes date of birth, nothing in Freedom of Information Law (CLS Pub Off Law §§ 85-89) may be asserted to withhold those records. Comm on Open Gov't FOIL-AO-4116.

422. Other and miscellaneous, generally

423. —Lists of names, addresses and the like

424. — —Businesses requiring license

Burial permits are accessible under FOIL since, although it might identify deceased, it is questionable whether privacy of deceased may be invaded, especially since no intimate personal details are included; furthermore, licenses or permits are generally always accessible since they enable public to know that certain conditions have been met. Comm On Open Gov't FOIL-AO-4022.

425. — —Department of Motor Vehicle (DMV) lists; parking permit lists

Town cannot properly deny access to list of names and addresses of nonresident parking permit holders, since disclosure of names and addresses of nonresident parking permit holders would not constitute unwarranted invasion of personal privacy in that purpose of disclosure is to inform nonresidents of new town parking policy and of action which might be taken collectively to oppose and reverse policy. Comm on Open Govt FOIL-AO-3741.

Motor vehicle licenses, which include addresses, are accessible pursuant to Vehicle and Traffic Law from Department of Motor Vehicles. Comm on Open Gov't FOIL-AO-4945.

Computerized listing of all licensed passenger-car drivers residing in 3 counties would be available under Freedom of Information Law if Department of Motor Vehicles could generate requested data based on its existing computer programs; CLS Veh

& Tr § 202 does not prohibit applicant from seeking database or portion of database consisting of driver license information. Comm on Open Gov't FOIL-AO-10106.

426. — —Government officials, licensees, contractors and the like

A town may publish and distribute a pamphlet to registered voters in the town containing the names, addresses, and telephone numbers of town officials as well as the names of federal, state and county government officials. 1983 Op St Compt File #83-204.

State Liquor Authorities' list of licensees is discoverable under Freedom of Information Law, as to extent list identifies licensees as entities rather than natural persons, privacy provisions of Freedom of Information Law do not apply, and to extent that it does identify natural persons, notice, posting and publication requirements imposed by Alcohol and Beverage Control Law effectively negate application of provisions that might otherwise permit denial of disclosure. 1986 Committee on Open Government FOIL-AO-4222.

Under CLS Pub Off § 87(2), records indicating identities of contractors or concessionaires under contract with Long Island State Park Commission, expenditures of Commission and similar records, and records identifying past and present members of commission would be available for public review but, under § 89(7) of such law, home addresses of commission members or names of prospective members need not be made available. Comm on Open Gov't FOIL-AO-4486.

Contracts, leases and similar documents reflective of agreements between agencies and those who supply goods or services to agencies pursuant to such agreements are generally available under the Freedom of Information Law. Comm on Open Gov't FOIL-AO-6281 (1990).

Disclosure of list containing names, home addresses and home telephone numbers of attorneys employed in Buffalo office of Department of Law was improper where disclosure was sought in connection with fundraising efforts for election campaign of one of Attorney General's best friends. Comm on Open Gov't FOIL-AO-9210.

Licenses and similar records are available under Freedom of Information Law, notwithstanding assertion that disclosure would constitute unwarranted invasion of personal privacy, since they are intended to enable public to know that individual has met appropriate requirements to be engaged in activity that is regulated by state or in which state has significant interest. Comm on Open Gov't FOIL-AO-9375.

Provisions in Freedom of Information Law pertaining to protection of personal privacy do not justify withholding list of names of executive directors of senior centers maintained by city "Department for the Aging," as such list involves names and addresses of persons in their business capacities, and there is nothing intimate or personal about it. Comm on Open Gov't FOIL-AO-10314.

427. — —Library users

Records identifiable to users of libraries, such as those who hold library cards, are confidential pursuant to CLS CPLR § 4509 and CLS Pub O § 87(2)(a). Comm on Open Gov't FOIL-AO-8904.

428. — —Lottery winners

Although status of applicant and purposes for which request is made are irrelevant to rights of access, and agency cannot ordinarily inquire as to intended use of records, rights of access to list of names and addresses, or equivalent records, may be contingent on purpose for which request is made due to language of CLS Pub O § 89(2)(b)(iii); thus, if request for full name of winners of lottery since its inception, current address of each winner, amount of initial award to each winner and date of award to each winner was sought in order to develop mailing list or its equivalent to be used for commercial or fund-raising purposes, statute could apply to deny access to requested information. Comm on Open Gov't FOIL-AO-9143.

429. — —Real property owners; Section 8 housing lists

Because tenants in Section 8 housing must meet income qualification, insofar as disclosure of records would identify tenants, they may be withheld on ground that disclosure would constitute unwarranted invasion of personal privacy; conversely, following deletion of identifying details pertaining to tenants, remainder of records—i.e., those portions indicating identities of landlords, contractors and amounts that are paid—must be disclosed. Comm on Open Gov't FOIL-AO-9466.

Prior to disclosing computer generated lists of real property inventory data, agency may require applicant to submit certification stating requested information will not be used for commercial or fund-raising purposes. Comm on Open Gov't FOIL-AO-10062.

If town can locate property records sought with reasonable effort, on basis of names of owners, street address or section, lot and block of parcel, town would be obliged to do so even if search involves review of hundreds of records. Comm on Open Gov't FOIL-AO-12940.

430. — —Veterans; military lists

Names and addresses of veterans who have been honorably discharged must generally be disclosed, unless records are sealed under CLS Civ R § 79-g or request involves list of veterans' names and addresses; in latter situation, agency may ascertain whether list is intended to be used for commercial or fund-raising purpose and, if so, list can justifiably be withheld. Comm on Open Gov't FOIL-AO-8954.

If direction to seal certificate of honorable discharge were given by veteran under CLS Civ R § 79-g, county clerk would be prohibited from disclosing, notwithstanding provisions of Freedom of Information Law; conversely, when there is no direction by veteran to seal certificate, that record, like all others, would be subject to rights conferred by Freedom of Information Law. Sole item that could be withheld from record of certificate of honorable discharge given to veteran would be social security number (assuming record is not sealed under CLS Civ R § 79-g), since local government agencies may withhold social security numbers on ground that disclosure would constitute "an unwarranted invasion of personal privacy," but they are not required to do so. Comm on Open Gov't FOIL-AO-12688.

List of property owners with veterans' tax exemptions and alternate veterans' exemptions in particular town should be disclosed, since assessment rolls, which are clearly accessible to public, includes reference to veterans' exemptions, and fact that person has served in armed forces and is veteran is not secret. Comm on Open Gov't FOIL-AO-13146.

431. — —Voter registrations

Computer tapes containing voter registration and information indicating ability to use them should be made available. Comm On Open Gov't FOIL-AO-4032.

Voter registration records are available pursuant to Election Law and are kept by Board of Elections in each county. Comm on Open Gov't FOIL-AO-4945.

While town may have authority to deny access to voter registration list that it acquired from county department of data processing if person requesting list intends to use it as mailing list for commercial activity, denial may merely delay inevitable disclosure by county board of elections, as CLS Elec § 5-602 confers unrestricted public rights of access to voter registration lists prepared and maintained by county board of elections, irrespective of intended use. Comm on Open Gov't FOIL-AO-9814.

Voter registration cards pertaining to named individual, if maintained by county board of elections, were available under CLS Elec § 3-220 and could not be withheld under Freedom of Information Law; subject of voter registration record has no right to restrict disclosure or provide conditions concerning disclosure. Comm on Open Gov't FOIL-AO-10263.

Voter registration records, including information pertaining to residence addresses, dates of birth, party designations and similar information, must be disclosed although some of those items could otherwise be redacted under Freedom of Information Law to prevent unwarranted invasion of personal privacy, because CLS Elec § 3-220 requires disclosure of voter registration records in their entirety. Comm on Open Gov't FOIL-AO-10352.

Although certain items contained in required voter registration records might justifiably be denied as unwarranted invasion of personal privacy if contained in other kinds of records, specific

direction provided in Election Law requires disclosure of such items. Comm on Open Gov't FOIL-AO-12067.

Commissioners of boards of elections are not required to provide monthly updates of voter lists; agency does not have ability and is not required to grant or deny access to records that do not yet exist. Comm on Open Gov't FOIL-AO-13290.

Since CLS Elec § 5-602 confers unrestricted public rights of access to voter registration lists, nothing in Freedom of Information Law could be cited to restrict those rights. Comm on Open Gov't OML-AO-2505.

All records of agency are available, except to extent that records or portions thereof fall within one or more of grounds for denial in CLS Pub O § 87(2)(a) through (i); agency may withhold records to extent that disclosure would constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4572.

Rights of access to political party membership lists of names and addresses, or equivalent records, may be contingent upon purpose for which request is made; agency may withhold records in conjunction with grounds for denial listed in Freedom of Information Law, nevertheless, agency is not obliged to withhold records, even when records may be withheld; therefore, even if political party membership lists could be withheld, Freedom of Information Law would not prohibit disclosure. Comm on Open Gov't FOIL-AO-4866.

Lists including names and addresses of natural persons would be accessible or deniable depending upon its use; those portions of lists pertaining to entities are accessible, irrespective of intended use; those portions pertaining to natural persons would be accessible or deniable, depending upon whether list would be used for fund-raising purposes. Comm on Open Gov't FOIL-AO-4879.

Records identifying all part-time and full-time police officers who had been certified by the County Department of Civil Service for employment in village were accessible under FOIL. Comm on Open Gov't FOIL-AO-6149 (1990).

Mailing lists of the State Office for the Aging constitute records subject to the rights of access provided such lists are not used for fund raising purposes. Comm on Open Gov't FOIL-AO-6319 (1990).

Freedom of Information Law required disclosure of copy of mailing list used to disseminate Legislative Insider, which is published by Monroe County Legislature Majority Office, where applicant provided assurance that she would not use requested information for fund raising purposes. Comm on Open Gov't FOIL-AO-8326.

When list involves persons licensed to engage in certain kind of business and includes address indicating where licensed activity occurs, personal privacy implications are minimal, if they exist at all. Comm on Open Gov't FOIL-AO-8573.

Example contained in CLS Pub O § 89(2)(b) which permits withholding of information to preclude unwarranted invasions of personal privacy where request for information involves sale or release of lists of names and addresses to be used for commercial or fund-raising purposes does not apply to release of information pertaining to commercial entities or persons acting in business capacities. Comm on Open Gov't FOIL-AO-8953.

Even where request under Freedom of Information Law does not involve list per se, request for records that would be used to develop list of names and addresses to be used for commercial purpose may be denied. Comm on Open Gov't FOIL-AO-9143.

With regard to request for vendors names on State Comptroller's outstanding and uncashed check listing, although check number is not "computer access code" per se, it is used in much same manner as computer access code and, therefore, based upon intent of CLS Pub O § 87(2)(i), it appeared that account number, particularly when coupled with additional unique information, might be justifiably withheld. If disclosure would nullify or reduce value of efforts undertaken by bank to ensure security, bank could be placed at disadvantage in relation to its competitors, and disclosure in that event could cause "substantial injury to its competitive position." Comm on Open Gov't FOIL-AO-9325.

With regard to request for rejected applications for admission to law school, items such as names, social security numbers, resident addresses and phone numbers, dates of birth, alien registration numbers, LSDAS/LSAT registration numbers and similar personal details could be withheld to prevent unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-9544.

It is likely that disclosure of names of or other identifying details pertaining to persons ancillary to distribution of assets of estate, such as heirs of those persons, other family members, or neighbors, friends, or acquaintances could justifiably be withheld by public administrator as unwarranted invasion of privacy, except to extent that such information was otherwise available through court clerk. Comm on Open Gov't FOIL-AO-9650.

If list of inmates housed in particular unit at certain time exists, such list should be available under Freedom of Information Law, but any aspect of such list or similar record that includes individual's race may be withheld on ground that disclosure would constitute unwarranted invasion of personal privacy pursuant to CLS Pub O § 87(2)(b). Comm on Open Gov't FOIL-AO-12131.

Where request sought names, addresses and phone numbers of "any and all" county resident golfers utilizing county public golf courses without being county public park pass holders, it would be advisable for requestor to certify (if accurate) that names and addresses would not be used for any commercial or fund-raising purposes. Comm on Open Gov't FOIL-AO-12191.

If Long Island Power Authority maintained or was able to generate list identifying all Suffolk County businesses with energy demand of 200kw or more per month, it was obliged to do so upon request if requestor was willing to pay actual cost of reproduction. Comm on Open Gov't FOIL-AO-12304.

New York City Department of Education could not justifiably deny Freedom of Information Law request for disclosure of employees' work-related cell phone numbers and email addresses, considering advances in information technology, use of security systems and general proliferation of use and disclosure of email addresses, and fact that information sought related to employees' performance of their duties. Comm on Open Gov't FOIL-AO-16602.

"Corning Papers", consisting of personal as well as official correspondence written or received by Mayor Corning, in either his capacity as Mayor or as Chairman of Albany County Democratic Committee, are records subject to rights of access granted by Freedom of Information Law; further, although some of records might be characterized as "personal" or "inter-agency or intra-agency materials", those records might not be exempted from disclosure in toto; on contrary, records must be reviewed individually to determine rights of access. Comm on Open Govt FOIL-AO-3514.

Freedom of Information Law generally does not enable agency to restrict access to information because applicant seeks records for commercial purposes, and exception to disclosure pertains only to those lists that identify natural persons, rather than entities. 1986 Committee on Open Government FOIL-AO-4222.

Freedom of Information Law is applicable to all records of agency, such as town, and, as such, requests for minutes of town board are properly made pursuant to Freedom of Information Law; minutes of meetings of public bodies are available under Freedom of Information Law and Open Meetings Law; further, both laws require that record of votes indicating how each member of public body voted must be maintained and made available. Comm on Open Gov't FOIL-AO-4773.

CLS Freedom of Information Law § 87(3)(a) requires open voting and a record of the manner in which each member voted, thus "secret ballot" for election of officers by Community Board No. 1 in New York City could not be used. Comm on Open Gov't FOIL-AO-6280 (1990).

Tape recording of an open meeting produced for a municipality constitutes "records" subject to rights of access under the Freedom of Information Law. Comm on Open Gov't FOIL-AO-6311 (1990).

Freedom of Information Law does not deal directly right of mayor to gain access to village records, make copies or take them home; however, village records are property of village rather than mayor, even though mayor may be chief executive officer. Village records are not property of mayor, and mayor, when not acting in performance of his or her official duties, does not have right to

obtain and make copies of all village records. Comm on Open Gov't FOIL-AO-8387.

Insofar as agendas pertaining to executive sessions exist, they constitute records subject to rights conferred by Freedom of Information Law. Comm on Open Gov't FOIL-AO-8512.

Latest block assignment list, or boundary files, in digital format that are used to create computer representations of State Senate and Assembly legislative districts, along with attribute information for each of these districts constituted agency records subject to broad disclosure requirements imposed by Freedom of Information Law, irrespective of origin of files. Comm on Open Gov't FOIL-AO-8561.

Freedom of Information Law disclosure of factual information in written report prepared by certain investigator for state Board of Elections, in case of alleged fraud or misconduct in filing of local designating petitions, would not interfere with any investigation or judicial proceeding or deprive any person of fair trial or impartial adjudication, where investigation was complete and case was closed; only basis for denying access under CLS Pub O § 87(e) would be if disclosure identified confidential source or involved "confidential information relating to a criminal investigation." Comm on Open Gov't FOIL-AO-10067.

Letter from city chamber of commerce, concerning renovation project being undertaken by school district, was accessible under Freedom of Information Law if it was maintained by district or was forwarded to records access officer due to his position with district; district's claim of confidentiality was not based on statute, and it was unlikely that disclosure would result in unwarranted invasion of personal privacy because chamber of commerce is business entity, not natural person, and any person writing on its behalf would be doing so in business capacity. Comm on Open Gov't FOIL-AO-10256.

"Draft unapproved minutes" of meetings of city council should be disclosed, on request, as soon as they exist; minutes of meeting open to public do not involve "internal government consultations or deliberations" since information contained in those records has effectively been disclosed to public already. Comm on Open Gov't FOIL-AO-12607.

Requests for "any and all memorandum, resolutions, draft resolutions, correspondence or press releases calling for the holding of legislative hearings into any of the controversies surrounding" named county executive and district attorney would meet requirement of reasonably describing records; on other hand, if such records were not maintained in manner that permitted their retrieval except by reviewing perhaps hundreds or even thousands of records individually in effort to locate those falling within scope of request, to that extent, requests would not meet standard reasonably describing records. If member of county legislature in item of correspondence offered opinion regarding controversy, that portion of correspondence could be withheld. Comm on Open Gov't FOIL-AO-12631.

Notes pertaining to meetings of various town boards were "records" that fell within coverage of Freedom of Information Law. Insofar as notes pertaining to meetings of various town boards consisted of factual rendition of events occurring or comments offered during meeting, they would be accessible under CLS Pub O § 87(2)(g)(i). Fact that notes pertaining to meetings of various town boards might not have been reviewed by those officials who created them would be largely irrelevant to rights of access under Freedom of Information Law; even if records were never reviewed by those officials, they would be subject to rights of access. Comm on Open Gov't FOIL-AO-12681.

Tape recording of open meeting is accessible under Freedom of Information Law, for any person could have been present, and none of grounds for denial would apply. Comm on Open Gov't FOIL-AO-12696.

Any member of public should have ability to listen to audiotape at no charge where tapes were prepared by town board member, using his own equipment and tapes, in conjunction with performance of his duties as board member. Comm on Open Gov't FOIL-AO-12923.

There is nothing in either Freedom of Information or Open Meetings Laws that specifies that vote must be accomplished by means of roll call or that vote be "announced exactly as the same time it is cast"; so long as record is prepared that indicates manner in which each member cast his or vote, entity would be acting in compliance with open vote requirements imposed by those statutes. Comm on Open Gov't FOIL-AO-13547.

III. Under Former § 88

A. Particular Matters

432. In general

A tape recorder may be obtained by the town board to be used by the town clerk to record the proceedings at town board meetings so that minutes may be prepared therefrom but if a recorder is obtained the town clerk would be responsible for maintaining the tapes. The tapes may not be maintained by any official other than the town clerk or his deputy. It would be improper for the tapes to be sealed and to be opened only at town board meetings. The town board may authorize other town officers to use the tape recorder and may direct who will have custody of the instrument. 1977 NY Ops Atty Gen Nov 17.

Whether or not a record derived by means of a match that identifies certain persons on the state payroll is characterized as a "worksheet" or is used temporarily, such a list constitutes a "record" that falls within the scope of the Freedom of Information Law. Comm on Open Govt FOIL-AO 3093.

433. Law enforcement agencies

A councilman of the City of Binghamton is not entitled to access to reports contained in police files which are part of an active police investigation, and active criminal investigation files would be available to legislative inspection and review only when mandated by court order. 1976 NY Ops Atty Gen August 10.

IV. Under Former § 66

434. In general

In absence of statute or order making certain reports confidential inspection should be permitted to person establishing proper interest therein. 1935 N.Y. Op. Att'y Gen. No. 348.

435. Fees

The fees for copies of records in the custody of the temporary state housing rent commission in the City of New York are the same as that allowed to the county clerks in that city, namely, 50 cents a page with a minimum of $2. 1953 N.Y. Op. Att'y Gen. No. 209.

A municipal housing authority is exempt from the payment of the statutory fee for a county clerk's abstract of title where the same is made and certified to; but a county clerk is not required to make abstracts of title. 1955 NY Ops Atty Gen 7 (informal).

A county treasurer should charge fees fixed for a county clerk in County Law § 531 for preparation of tax search certificates. It would appear that there is no need for legislation to fix the fees which the county treasurer should charge for preparing tax search certificates. This section provides that in the absence of a statute fixing a fee to be charged by a public officer "fees at the rate allowed to a county clerk for similar services are to be charged". 1959 NY Ops Atty Gen July 23 (informal).

The appropriate fee for the issuance of a certificate of disposition by the clerk of the Criminal Court of the City of New York is $5. 1974 NY Ops Atty Gen March 27.

436. Availability of particular documents, generally

437. —Minutes of meetings of boards or authorities

There is no specific legal mandate requiring that meetings of the Schenectady Municipal Housing Authority be open to the public or the minutes of such meetings be open to public inspection, but since the Schenectady Municipal Housing Authority handles public funds and its members are public officers, where secrecy is not enjoined by statute or matters discussed at the meetings are not of a confidential nature, attendance at such meetings as well as inspection of minutes of such meetings may be afforded to the public, including the news media. 1969 NY Ops Atty Gen Sept 30.

438. —Motor vehicle records

Reports of hearings for revocation and suspension of motorists' licenses are public records and should be supplied to one making proper application. 1929 N.Y. Op. Att'y Gen. No. 315.

Reports of automobile accidents are public records and party in charge thereof is obliged to furnish transcripts but reports of investigations, arrest records, records of complaints and information supplied by individuals contained in files of division of state police are confidential. 1933 N.Y. Op. Att'y Gen. No. 130.

439. —Prison records

Records of department of correction and wardens of various prisons relating to computation of compensation allowed to prisoners are public records and transcripts thereof, properly certified, should be furnished to applicants. 1933 N.Y. Op. Att'y Gen. No. 495.

440. —Other and miscellaneous

A certified copy of a paper filed in the town clerk's office may be used as evidence to the same extent as the original. 1954 NY Ops Atty Gen 34 (informal).

Town board members are entitled to receive carbon copies of town board meeting minutes prepared by the town clerk. Members of the general public may examine the minutes and copy them or may obtain copies from the town clerk by paying for the same. 1972 NY Ops Atty Gen April 28 (informal).

Publication in public press of contents of will which has been duly probated cannot be enjoined. 1921 N.Y. Op. Att'y Gen. No. 400.

Pistol permits are public records when filed, and are open to inspection by taxpayer. 1931 N.Y. Op. Att'y Gen. No. 131.

Records of retirement system are to be kept open for public inspection, and transcripts must be furnished upon payment of fees. 1933 N.Y. Op. Att'y Gen. No. 222.

License applications for permission to conduct parimutuel harness racing are subject to public inspection for a legitimate purpose under reasonable conditions. Questions dealing with security and policing arrangements of the prospective licensee may be kept confidential. 1955 N.Y. Op. Att'y Gen. No. 228.

Whether a paper or record filed with the State Harness Racing Commission is open for public inspection depends upon its nature and purpose, applicable statute, etc. 1958 NY Ops Atty Gen Nov 28.

A town clerk must make searches for conditional sales and chattel mortgages on file in his office and furnish transcripts thereof on payment of legal fees therefor. 1963 NY Ops Atty Gen March 6.

Salaries paid to the personnel of a community college are public records subject to inspection and must, therefore, be made available to a county executive as well as to the public at large. 1972 NY Ops Atty Gen Oct 31.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 89; CLS ECL § 27-1311; CLS Econ Dev § 224; CLS Ins § 7310; CLS Pub A § 3102-a.

Clinical records; confidentiality, CLS Men Hyg § 33.13.

Release of medical records, CLS Pub Health § 17.

Codes, Rules and Regulations:

Public access to records of the department of agriculture and markets of the State of New York. 1 NYCRR §§ 360.1 et seq.

Public inspection of records of the department of audit and control. 2 NYCRR §§ 110.1 et seq.

Public access to banking department records; trade secret exemption. 3 NYCRR Supervisory Policy G 106.

Public access to records of the department of civil service. 4 NYCRR §§ 80.1 et seq.

Access to record of the public employment relations board. 4 NYCRR §§ 208.1 et seq.

Public access to records of department of economic development. 5 NYCRR §§ 1.1 et seq.

Public access to records and access to personal information of division of minority and women's business development. 5 NYCRR §§ 145.1 et seq.

Department of environmental conservation: access to records. 6 NYCRR §§ 616.1 et seq.

Records of department of correctional services. 7 NYCRR §§ 5.1 et seq.

Inspection and copying of education department records. 8 NYCRR §§ 187.1 et seq.

Public access to records of state university of New York. 8 NYCRR §§ 311.1 et seq.

Access to personal information maintained by state university of New York. 8 NYCRR §§ 315.1 et seq.

Freedom of information. 9 NYCRR §§ 95.1 et seq.

Availability of records for public inspection and copying. 9 NYCRR §§ 145-1.0 et seq.

Public access to records of division for youth. 9 NYCRR §§ 166-2.1 et seq.

Public access to records and personal records. 9 NYCRR §§ 185.1-1 et seq.

Public access to records of the office of general services. 9 NYCRR §§ 330-1.1 et seq.

Public access to records of division of probation and correctional alternatives. 9 NYCRR §§ 368.1 et seq.

Public access to records of New York state police. 9 NYCRR §§ 483.1 et seq.

Access to agency records; open meetings; conflicts of interest. 9 NYCRR §§ 587.1 et seq.

Public access to records and access to personal information. 9 NYCRR §§ 2650.1 et seq.

Public information. 9 NYCRR §§ 5400.1, 5400.2.

Division of criminal justice services: availability of records for public inspection and copying. 9 NYCRR §§ 6150.1 et seq., 6151.1 et seq.

Availability of records for public inspection and copying. 9 NYCRR §§ 6400.0 et seq.

Public access to records. 9 NYCRR §§ 6650.1 et seq.

Permanent commission on public employee pension and retirement systems: public access to records. 9 NYCRR §§ 6700.1 et seq.

Public access to records. 9 NYCRR §§ 7200.1 et seq.

State energy office: public access to records. 9 NYCRR §§ 7801.1 et seq.

Division of parole: public access to records. 9 NYCRR §§ 8008.1 et seq.

Public access to records. 9 NYCRR §§ 8201.1 et seq.

Public access to records. 9 NYCRR §§ 8300.1 et seq.

Public access to records. 9 NYCRR §§ 8450.1 et seq.

Public access to records. 9 NYCRR §§ 8501.1 et seq.

Access to records. 9 NYCRR §§ 9950.1 et seq.

Access to or correction/amendment of records of the elderly pharmaceutical insurance coverage panel subject to the personal privacy protection law. 9 NYCRR §§ 9951.1 et seq.

Access to records by the public for inspection and copying. 9 NYCRR Part 550.

Office of homeland security: public access to records. 9 NYCRR Part 10025.

Department of health: access to records. 10 NYCRR §§ 50-1.1 et seq.

Public access to industrial board of appeals records. 12 NYCRR §§ 73.1 et seq.

Public access to records of the department of labor. 12 NYCRR §§ 700.1 et seq.

Public access to department of law records. 13 NYCRR §§ 120.1 et seq.

Public access to records of state division of alcoholism and alcohol abuse. 14 NYCRR §§ 303.1 et seq.

Office of mental retardation and developmental disabilities: public access to records. 14 NYCRR §§ 603.1 et seq.

Public access to records. 14 NYCRR §§ 1060.1 et seq.

Public access to records. 14 NYCRR Part 510.

Department of alcoholism and substance abuse services: access to information and public access to records. 14 NYCRR Parts 803, 804.

Freedom of information. 15 NYCRR §§ 160.1 et seq.

Public access to department of public service records. 16 NYCRR §§ 6-1.1 et seq.

Availability of records of department of transportation. 17 NYCRR §§ 1.0 et seq.

Examination and copying of records. 19 NYCRR §§ 80.1 et seq.

Public access to records. 19 NYCRR §§ 216.1 et seq.

Public access to the records of the department of taxation and finance and the state tax commission. 20 NYCRR §§ 2370.1 et seq.

Public records-economic development power allocation board. 21 NYCRR §§ 371.1 et seq.

Public access to records. 21 NYCRR §§ 501.1 et seq.

Public access to records. 21 NYCRR §§ 700.1 et seq.

Public access to records. 21 NYCRR §§ 901.1 et seq.

Rules governing public access to records of the Niagara frontier transportation authority and Niagara frontier transit metro system, inc. 21 NYCRR §§ 1156.1 et seq.

Capital district transportation authority: access to records. 21 NYCRR §§ 1500.1 et seq.

Freedom of information. 21 NYCRR §§ 1550.1 et seq.

Public access to records. 21 NYCRR §§ 2050.1 et seq.

New York state housing finance agency: public access to records. 21 NYCRR §§ 2150.1 et seq.

Public access to records. 21 NYCRR §§ 2250.1 et seq.

Public access to records. 21 NYCRR §§ 2300.1 et seq.

Public access to records of emergency financial control board. 21 NYCRR §§ 2430.1 et seq.

Public access to records. 21 NYCRR §§ 2700.1 et seq.

State commission on uniform state laws: public access to records. 21 NYCRR §§ 4100.1 et seq.

Public access to records. 21 NYCRR §§ 4201.1 et seq.

Public access to records. 21 NYCRR §§ 4501.1 et seq.

Public access to records. 21 NYCRR §§ 4600.1 et seq.

Public access to records. 21 NYCRR §§ 4700.1 et seq.

Public access to records. 21 NYCRR §§ 4900.1 et seq.

Access to public and personal records. 21 NYCRR §§ 5019.1 et seq.

Public access to records. 21 NYCRR §§ 5100.1 et seq.

Municipal assistance corporation for the city of New York: public access to records. 21 NYCRR §§ 5400.1 et seq.

Public access to records. 21 NYCRR §§ 5600.1 et seq.

Public access to records. 21 NYCRR §§ 5800.1 et seq.

Public access to records. 21 NYCRR §§ 5900.1 et seq.

Regulations for public access to records of the New York city housing development corporation. 21 NYCRR §§ 8000.1 et seq.

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Low-level radioactive waste disposal facility siting commission: public access to records. 21 NYCRR §§ 9700.1 et seq.

Public access to records. 21 NYCRR §§ 9760.1 et seq.

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25 NY Jur 2d Counties, Towns, and Municipal Corporations § 135.

44 NY Jur 2d Disclosure §§ 72, 106.

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68 NY Jur 2d Insurance § 41.

82 NY Jur 2d Parties § 110 .

92 NY Jur 2d Records and Recording §§ 13, 16, 19, 36, 38, 40, 42–50, 52, 57, 60, 62, 65.

94 NY Jur 2d Schools, Universities and Colleges §§ 329, 416.

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Payroll records of individual government employees as subject to disclosure to public. 100 ALR3d 699.

What are "records" of agency which must be made available under state freedom of information act. 27 ALR4th 680.

What constitutes an agency subject to application of state freedom of information act. 27 ALR4th 742.

What constitutes "trade secrets" exempt from disclosure under state freedom of information act. 27 ALR4th 773.

What constitutes legitimate research justifying inspection of state or local public records not open to inspection by general public. 40 ALR4th 333.

What is computer "trade secret" under state law. 53 ALR4th 1046.

Disclosure of Electronic Data Under State Public Records and Freedom of Information Acts. 54 ALR6th 653.

What statutes specifically exempt agency records from disclosure, under 5 USCS § 552(b)(3). 47 ALR Fed 439.

What are reports prepared or used by "agency responsible for the regulation or supervision of financial institutions," within Freedom of Information Act (5 USCS § 552(b)(8)). 48 ALR Fed 814.

When is federal agency justified, under Freedom of Information Act, in refusing to furnish documents without charge or at reduced charge for search and duplication, pursuant to 5 USCS § 552(a)(4)(A). 50 ALR Fed 552.

What are "trade secrets" within § 6(f) of the Federal Trade Commission Act (15 USCS § 46(f)) not subject to publication by the Commission. 50 ALR Fed 590.

Freedom of Information Act exemption (5 USCS § 552(b)(5)) for inter-agency and intra-agency memorandums or letters as applicable to communications to or from attorneys for the government. 54 ALR Fed 280.

What are "enforcement proceedings" within Freedom of Information Act exemption from disclosure of investigatory records that would interfere with enforcement proceedings (5 USCS § 552(b)(7)(A)). 55 ALR Fed 583.

What constitutes "confidential source" within Freedom of Information Act exemption permitting nondisclosure of identity of confidential source and, in specified instances, of confidential information furnished only by confidential source (5 USCS § 552(b)(7)(D)). 59 ALR Fed 550.

Power of court under 5 USCS § 552(a)(4)(B) to examine agency records in camera to determine propriety of withholding records. 60 ALR Fed 416.

Construction and application of § 3(e)(5) of Privacy Act (5 USCS § 552(e)(5)), providing for proper maintenance of agency records used in determinations. 79 ALR Fed 585.

Who has standing to seek access to agency information under Freedom of Information Act. 82 ALR Fed 248.

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1 Frumer & Biskind, Bender's New York Evidence—CPLR §§ 1.09, 1.14; 4 Frumer & Biskind, Bender's New York Evidence—CPLR §§ 12.11, 12.12; 5 Frumer & Biskind, Bender's New York Evidence—CPLR § 23.25.

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§ 89. General provisions relating to access to records; certain cases.

The provisions of this section apply to access to all records, except as hereinafter specified:

1. (a) The committee on open government is continued and shall consist of the lieutenant governor or the delegate of such officer, the secretary of state or the delegate of such officer, whose office shall act as secretariat for the committee, the commissioner of the office of general services or the delegate of such officer, the director of the budget or the delegate of such officer, and seven other persons, none of whom shall hold any other state or local public office except the representative of local governments as set forth herein, to be appointed as follows: five by the governor, at least two of whom are or have been representatives of the news media, one of whom shall be a representative of local government who, at the time of appointment, is serving as a duly elected officer of a local government, one by the temporary president of the senate, and one by the speaker of the assembly. The persons appointed by the temporary president of the senate and the speaker of the assembly shall be appointed to serve, respectively, until the expiration of the terms of office of the temporary president and the speaker to which the temporary president and speaker were elected. The four persons presently serving by appointment of the governor for fixed terms shall continue to serve until the expiration of their respective terms. Thereafter, their respective successors shall be appointed for terms of four years. The member representing local government shall be appointed for a term of four years, so long as such member shall remain a duly elected officer of a local government. The committee shall hold no less than two meetings annually, but may meet at any time. The members of the committee shall be entitled to reimbursement for actual expenses incurred in the discharge of their duties.

(b) The committee shall:

i. furnish to any agency advisory guidelines, opinions or other appropriate information regarding this article;

ii. furnish to any person advisory opinions or other appropriate information regarding this article;

iii. promulgate rules and regulations with respect to the implementation of subdivision one and paragraph (c) of subdivision three of section eighty-seven of this article;

iv. request from any agency such assistance, services and information as will enable the committee to effectively carry out its powers and duties;

v. develop a form, which shall be made available on the internet, that may be used by the public to request a record; and

vi. report on its activities and findings regarding this article and article seven of this chapter, including recommendations for changes in the law, to the governor and the legislature annually, on or before December fifteenth.

2. (a) The committee on public access to records may promulgate guidelines regarding deletion of identifying details or withholding of records otherwise available under this article to prevent unwarranted invasions of personal privacy. In the absence of such guidelines, an agency may delete identifying details when it makes records available.

(b) An unwarranted invasion of personal privacy includes, but shall not be limited to:

i. disclosure of employment, medical or credit histories or personal references of applicants for employment;

ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility;

iii. sale or release of lists of names and addresses if such lists would be used for solicitation or fundraising purposes;

iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it;

v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency;

vi. information of a personal nature contained in a workers' compensation record, except as provided by section one hundred ten-a of the workers' compensation law;

vii. disclosure of electronic contact information, such as an e-mail address or a social network username, that has been collected from a taxpayer under section one hundred four of the real property tax law; or

viii. disclosure of law enforcement arrest or booking photographs of an individual, unless public release of such photographs will serve a specific law enforcement purpose and disclosure is not precluded by any state or federal laws.

(c) Unless otherwise provided by this article, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy pursuant to paragraphs (a) and (b) of this subdivision:

i. when identifying details are deleted;

ii. when the person to whom a record pertains consents in writing to disclosure;

iii. when upon presenting reasonable proof of identity, a person seeks access to records pertaining to him or her; or

iv. when a record or group of records relates to the right, title or interest in real property, or relates to the inventory, status or characteristics of real property, in which case disclosure and providing copies of such record or group of records shall not be deemed an unwarranted invasion of personal privacy, provided that nothing herein shall be construed to authorize the disclosure of electronic contact information, such as an e-mail address or a social network username, that has been collected from a taxpayer under section one hundred four of the real property tax law.

2-a. Nothing in this article shall permit disclosure which constitutes an unwarranted invasion of personal privacy as defined in subdivision two of this section if such disclosure is prohibited under section ninety-six of this chapter.

2-b. For records that constitute law enforcement disciplinary records as defined in subdivision six of section eighty-six of this article, a law enforcement agency shall redact the following information from such records prior to disclosing such records under this article:

(a) items involving the medical history of a person employed by a law enforcement agency as defined in section eighty-six of this article as a police officer, peace officer, or firefighter or firefighter/paramedic, not including records obtained during the course of an agency's investigation of such person's misconduct that are relevant to the disposition of such investigation;

(b) the home addresses, personal telephone numbers, personal cell phone numbers, personal e-mail addresses of a person employed by a law enforcement agency as defined in section eighty-six of this article as a police officer, peace officer, or firefighter or firefighter/paramedic, or a family member of such a person, a complainant or any other person named in a law enforcement disciplinary record, except where required pursuant to article fourteen of the civil service law, or in accordance with subdivision four of section two hundred eight of the civil service law, or as otherwise required by law. This paragraph shall not prohibit other provisions of law regarding work-related, publicly available information such as title, salary, and dates of employment;

(c) any social security numbers; or

(d) disclosure of the use of an employee assistance program, mental health service, or substance abuse assistance service by a person employed by a law enforcement agency as defined in section eighty-six of this article as a police officer, peace officer, or firefighter or firefighter/paramedic, unless such use is mandated by a law enforcement disciplinary proceeding that may otherwise be disclosed pursuant to this article.

2-c. For records that constitute "law enforcement disciplinary records" as defined in subdivision six of section eighty-six of this article, a law enforcement agency may redact records pertaining to technical infractions as defined in subdivision nine of section eighty-six of this article prior to disclosing such records under this article.

3. (a) Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied, including, where appropriate, a statement that access to the record will be determined in accordance with subdivision five of this section. An agency shall not deny a request on the basis that the request is voluminous or that locating or reviewing the requested records or providing the requested copies is burdensome because the agency lacks sufficient staffing or on any other basis if the agency may engage an outside professional service to provide copying, programming or other services required to provide the copy, the costs of which the agency may recover pursuant to paragraph (c) of subdivision one of section eighty-seven of this article. An agency may require a person requesting lists of names and addresses to provide a written certification that such person will not use such lists of names and addresses for solicitation or fund-raising purposes and will not sell, give or otherwise make available such lists of names and addresses to any other person for the purpose of allowing that person to use such lists of names and addresses for solicitation or fund-raising purposes. If an agency determines to grant a request in whole or in part, and if circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part. Upon payment of, or offer to pay, the fee prescribed therefor, the entity shall provide a copy of such record and certify to the correctness of such copy if so requested, or as the case may be, shall certify that it does not have possession of such record or that such record cannot be found after diligent search. Nothing in this article shall be construed to require any entity to prepare any record not possessed or maintained by such entity except the records specified in subdivision three of section eighty-seven and subdivision three of section eighty-eight of this article. When an agency has the ability to retrieve or extract a record or data maintained in a computer storage system with reasonable effort, it shall be required to do so. When doing so requires less employee time than engaging in manual retrieval or redactions from non-electronic records, the agency shall be required to retrieve or extract such record or data electronically. Any programming necessary to retrieve a record maintained in a computer storage system and to transfer that record to the medium requested by a person or to allow the transferred record to be read or printed shall not be deemed to be the preparation or creation of a new record.

(b) All entities shall, provided such entity has reasonable means available, accept requests for records submitted in the form of electronic mail and shall respond to such requests by electronic mail, using forms, to the extent practicable, consistent with the form or forms developed by the committee

on open government pursuant to subdivision one of this section and provided that the written requests do not seek a response in some other form.

(c) Each state agency, as defined in subdivision five of this section, that maintains a website shall ensure its website provides for the online submission of a request for records pursuant to this article.

4. (a) Except as provided in subdivision five of this section, any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal when received by the agency and the ensuing determination thereon. Failure by an agency to conform to the provisions of subdivision three of this section shall constitute a denial.

(b) Except as provided in subdivision five of this section, a person denied access to a record in an appeal determination under the provisions of paragraph (a) of this subdivision may bring a proceeding for review of such denial pursuant to article seventy-eight of the civil practice law and rules. In the event that access to any record is denied pursuant to the provisions of subdivision two of section eighty-seven of this article, the agency involved shall have the burden of proving that such record falls within the provisions of such subdivision two. Failure by an agency to conform to the provisions of paragraph (a) of this subdivision shall constitute a denial.

(c) The court in such a proceeding: (i) may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, and when the agency failed to respond to a request or appeal within the statutory time; and (ii) shall assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed and the court finds that the agency had no reasonable basis for denying access.

(d)

(i) Appeal to the appellate division of the supreme court must be made in accordance with subdivision (a) of section fifty-five hundred thirteen of the civil practice law and rules.

(ii) An appeal from an agency taken from an order of the court requiring disclosure of any or all records sought:

(A) shall be given preference;

(B) shall be brought on for argument on such terms and conditions as the presiding justice may direct, upon application of any party to the proceeding; and

(C) shall be deemed abandoned if the agency fails to serve and file a record and brief within sixty days after the date of service upon the petitioner of the notice of appeal, unless consent to further extension is given by all parties, or unless further extension is granted by the court upon such terms as may be just and upon good cause shown.

5. (a)(1) A person acting pursuant to law or regulation who, subsequent to the effective date of this subdivision, submits any information to any state agency may, at the time of submission, request that the agency except such information from disclosure under paragraph (d) of subdivision two of section eighty-seven of this article. Where the request itself contains information which if disclosed would defeat the purpose for which the exception is sought, such information shall also be excepted from disclosure.

(1-a) A person or entity who submits or otherwise makes available any records to any agency, may, at any time, identify those records or portions thereof that may contain critical infrastructure information, and request that the agency that maintains such records except such information from disclosure under subdivision two of section eighty-seven of this article. Where the request itself contains information which if disclosed would defeat the purpose for which the exception is sought, such information shall also be excepted from disclosure.

(2) The request for an exception shall be in writing and state the reasons why the information should be excepted from disclosure.

(3) Information submitted as provided in subparagraphs one and one-a of this paragraph shall be excepted from disclosure and be maintained apart by the agency from all other records until fifteen days after the entitlement to such exception has been finally determined or such further time as ordered by a court of competent jurisdiction.

(b) On the initiative of the agency at any time, or upon the request of any person for a record excepted from disclosure pursuant to this subdivision, the agency shall:

(1) inform the person who requested the exception of the agency's intention to determine whether such exception should be granted or continued;

(2) permit the person who requested the exception, within ten business days of receipt of notification from the agency, to submit a written statement of the necessity for the granting or continuation of such exception;

(3) within seven business days of receipt of such written statement, or within seven business days of the expiration of the period prescribed for submission of such statement, issue a written determination granting, continuing or terminating such exception and stating the reasons therefor; copies of such determination shall be served upon the person, if any, requesting the record, the person who requested the exception, and the committee on public access to records.

(c) A denial of an exception from disclosure under paragraph (b) of this subdivision may be appealed by the person submitting the information and a denial of access to the record may be appealed by the person requesting the record in accordance with this subdivision:

(1) Within seven business days of receipt of written notice denying the request, the person may file a written appeal from the determination of the agency with the head of the agency, the chief executive officer or governing body or their designated representatives.

(2) The appeal shall be determined within ten business days of the receipt of the appeal. Written notice of the determination shall be served upon the person, if any, requesting the record, the person who requested the exception and the committee on public access to records. The notice shall contain a statement of the reasons for the determination.

(d)

(i) A proceeding to review an adverse determination pursuant to paragraph (c) of this subdivision may be commenced pursuant to article seventy-eight of the civil practice law and rules. Such proceeding, when brought by a person seeking an exception from disclosure pursuant to this subdivision, must be commenced within fifteen days of the service of the written notice containing the adverse determination provided for in subparagraph two of paragraph (c) of this subdivision. The proceeding shall be given preference and shall be brought on for argument on such terms and conditions as the presiding justice may direct, not to exceed forty-five days.

(ii) Appeal to the appellate division of the supreme court must be made in accordance with subdivision (a) of section fifty-five hundred thirteen of the civil practice law and rules.

(iii) An appeal taken from an order of the court requiring disclosure:

(A) shall be given preference; and

(B) shall be brought on for argument on such terms and conditions as the presiding justice may direct, upon application by any party to the proceeding; and

(C) shall be deemed abandoned when the party requesting an exclusion from disclosure fails to serve and file a record and brief within sixty days after the date of the notice of appeal, unless consent of further extension is given by all parties, or unless further extension is granted by the court upon such terms as may be just and upon good cause shown.

(e) The person requesting an exception from disclosure pursuant to this subdivision shall in all proceedings have the burden of proving entitlement to the exception.

(f) Where the agency denies access to a record pursuant to paragraph (d) of subdivision two of section eighty-seven of this article, the agency shall have the burden of proving that the record falls within the provisions of such exception.

(g) Nothing in this subdivision shall be construed to deny any person access, pursuant to the remaining provisions of this article, to any record or part excepted from disclosure upon the express written consent of the person who had requested the exception.

(h) As used in this subdivision the term "agency" or "state agency" means only a state department, board, bureau, division, council or office and any public corporation the majority of whose members are appointed by the governor.

6. Nothing in this article shall be construed to limit or abridge any otherwise available right of access at law or in equity of any party to records.

7. Nothing in this article shall require the disclosure of the home address of an officer or employee, former officer or employee, or of a retiree of a public employees' retirement system; nor shall anything in this article require the disclosure of the name or home address of a beneficiary of a public employees' retirement system or of an applicant for appointment to public employment; provided however, that nothing in this subdivision shall limit or abridge the right of an employee organization, certified or recognized for any collective negotiating unit of an employer pursuant to article fourteen of the civil service law, to obtain the name or home address of any officer, employee or retiree of such employer, if such name or home address is otherwise available under this article.

8. Any person who, with intent to prevent the public inspection of a record pursuant to this article, willfully conceals or destroys any such record shall be guilty of a violation.

9. When records maintained electronically include items of information that would be available under this article, as well as items of information that may be withheld, an agency in designing its information retrieval methods, whenever practicable and reasonable, shall do so in a manner that permits the segregation and retrieval of available items in order to provide maximum public access.

HISTORY:

Add, L 1977, ch 933, § 1, eff Jan 1, 1978; amd, L 1981, ch 890, §§ 2, 3; L 1981, ch 975, § 1; L 1982, ch 73, § 2, eff Oct 15, 1982, applicable only to actions commenced on or after Oct 15, 1982; L 1983, ch 80, § 2; L 1983, ch 652, § 3, eff Sept 1, 1984; L 1983, ch 783, § 1, eff July 30, 1983; L 1984, ch 33, § 1, eff March 27, 1984; L 1984, ch 227, § 1; L 1989, ch 705, § 2, eff Nov 1, 1989; L 1998, ch 545, §§ 2, 3, eff Jan 1, 1999; L 2003, ch 403, § 4, eff Aug 26, 2003; L 2004, ch 339, § 1, eff Aug 10, 2004; L 2005, ch 22, § 1, eff May 3, 2005; L 2006, ch 182, § 1, eff Oct 24, 2006; L 2006, ch 492, § 1, eff Aug 16, 2006; L 2008, ch 223, §§ 4–6, eff Aug 6, 2008; L 2008, ch 351, § 1, eff July 21, 2008; L 2011, ch 61, § 11 (Part U), eff March 31, 2011; L 2016, ch 487, § 1, effective May 27, 2017; L 2017, ch 453, § 1, effective December 13, 2017; L 2018, ch 47, § 1, effective January 1, 2019; L 2019, ch 55, § 2 (Part II, Subpart K), effective April 12, 2019; L 2019, ch 59, § 2 (Part GGG), effective April 12, 2019; L 2019, ch 707, § 1, effective June 17, 2020; L 2020, ch 96, § 4, effective June 12, 2020.

Prior Law: Former § 89, add, L 1974, ch 578; repealed, L 1977, ch 933, eff Jan 1, 1978.

Editor's Notes Laws 1981, ch 890, § 4, eff Jan 1, 1982, provides as follows:

§ 4. This act shall take effect January first, nineteen hundred eighty-two, and shall apply only to records submitted on or after such date, except that the provisions of section one of this act shall take effect immediately.

Laws 1983, ch 783, § 2, eff July 30, 1983, provides as follows:

§ 2. This act shall take effect immediately and shall apply to any request pursuant to the public officers law for which there is no final determination, including judicial review.

Laws 1998, ch 544, § 4, eff Jan 1, 1999, provides as follows:

§ 4. This act shall take effect on the first day of January next succeeding the date upon which it shall have become a law; provided, however, the chair of the workers' compensation board is authorized to immediately adopt rules and regulations so that the provisions of this act may be fully implemented on such date.

Laws 2004, ch 339, § 2, eff Aug 10, 2004, provides as follows:

§ 2. This act shall take effect immediately and shall apply to proceedings commenced on or after such date.

Laws 2018, ch 47, § 2, eff January 1, 2019, provides:

§ 2. This act shall take effect on the first of January next succeeding the date on which it shall have become a law.

Laws 2019, ch 55, § 1 (Part II, Subpart K), eff April 12, 2019, provides:

Section 1. Legislative findings. The legislature finds that law enforcement photographs, otherwise known as "mugshots," are published on the internet and other public platforms with impunity. An individual's mugshot is displayed publicly even if the arrest does not lead to a conviction, or the conviction is later expunged, sealed, or pardoned. This practice presents an unacceptable invasion of the individual's personal privacy. While there is a well-established Constitutional right for the press and the public to publish government records which are in the public domain or that have been lawfully accessed, arrest and booking information have not been found by courts to have the same public right of access as criminal court proceedings or court filings. Therefore, each state can set access to this information through its Freedom of Information laws. The federal government has already limited access to booking photographs through privacy formulations in its Freedom of Information Act, and the legislature hereby declares that New York will follow the same principle to protect its residents from this unwarranted invasion of personal privacy, absent a specific law enforcement purpose, such as disclosure of a photograph to alert victims or witnesses to come forward to aid in a criminal investigation (Amd, L 2019, ch 59, § 1 (Part GGG), eff April 12, 2019).

Laws 2019, ch 59, § 3 (Part GGG), eff April 12, 2019, provides:

§ 3. This act shall take effect on the same date and in the same manner as subpart K of part II of a chapter of the laws of 2019 amending the public officers law relating to prohibiting disclosure of law enforcement booking information and photographs, as proposed in legislative bill numbers S.1505-C and A.2005-C, takes effect.

Laws 2019, ch 707, § 3, eff June 17, 2020, provides:

§ 3. This act shall take effect on the one hundred eightieth day after it shall have become a law and shall apply to appeals for which notice of appeal was filed on or after such date.

Amendment Notes 2011. Chapter 61, § 11 (Part U) amended:

Sub 2, par (b), subpar iv by deleting at fig 1 "or".

Sub 2, par (b), subpar v by deleting at fig 1 "or".

Sub 2, par (b), subpar vi by deleting at fig 1 a period and adding the matter in italics.

By adding sub 2, par (b), subpar vii.

Sub 2, par (c), subpar iv by adding the matter in italics.

2008. Chapter 223, § 6 amended:

Sub 3, par (a) by adding the matter in italics.

2008. Chapter 351, § 1 amended:

By adding sub 9.

2006. Chapter 182 § 1 amended:

Sub 1, par (b), subpar iv by deleting at fig 1 "and" and adding the matter in italics.

By adding sub 1, par (b), subpar v.

By redesignating former sub 1, par (b), subpar v as sub 1, par (b), subpar vi.

Sub 1, par (b), subpar vi by deleting at fig 1 "articles six" and adding the matter in italics.

By adding sub 3, par (b).

2006. Chapter 492, § 1 amended:

Sub 4, par (c), opening par by deleting at fig 1 "provided, that such attorney's fees and litigation costs may be recovered only where the court finds that" and adding the matter in italics.

By adding sub 4, par (c), subpar i,.

By deleting former sub 4, par (c), subpar i.

Sub 4, par (c), subpar ii by deleting at fig 1 "lacked a reasonable basis in law for withholding the record" and adding the matter in italics.

The 2016 amendment by ch 487, § 1, added 4(d).

The 2017 amendment by ch 453, § 1, rewrote 4(c), which formerly read: "The court in such a proceeding may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, when: i. the agency had no reasonable basis for denying access; or ii. the agency failed to respond to a request or appeal within the statutory time."

The 2018 amendment by ch 47, § 1, added 3(c).

The 2019 amendment by ch 55, § 2 (Part II, Subpart K), added 2(b)viii; and made a related change.

The 2019 amendment by ch 59, § 2 (Part GGG), substituted "arrest or booking photographs of an individual, unless public release of such photographs" for "booking information about an individual, including booking photographs, unless public release of such information" in 2(b)viii.

The 2019 amendment by ch 707 § 1, added the 5(d)(i) designation; added the last sentence of 5(d)(i); and added 5(d)(ii) and 5(d)(iii).

The 2020 amendment by ch 96, § 4, added 2-b and 2-c.

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I. Generally

A. In General

i. Generally

1. In general

If court is unable to determine whether withheld documents fall entirely within scope of asserted exemption, it should conduct in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material. Gould v New York City Police Dep't, 89 N.Y.2d 267, 653 N.Y.S.2d 54, 675 N.E.2d 808, 1996 N.Y. LEXIS 3575 (N.Y. 1996).

Freedom of Information Law (FOIL) does not expressly or impliedly authorize private claim for money damages; rather, civil remedy exists by way of Article 78 proceeding with counsel fees and court costs available, as well as criminal sanction. Warburton v State, 173 Misc. 2d 879, 662 N.Y.S.2d 706, 1997 N.Y. Misc. LEXIS 390 (N.Y. Ct. Cl. 1997).

Because a resident only sought non-confidential materials in a Freedom of Information Law, Public Officers Law art. 6, application, because a yacht club was not a necessary party under N.Y. C.P.L.R. 1001(a) with a right to intervene, and, aside from certain very limited exceptions, because a village did not prove that the materials sought were exempt under Public Officers Law § 87(2), the resident prevailed within the meaning of Public Officers Law § 89(4)(c). Matter of McCrory v Village of Mamaroneck, 932 N.Y.S.2d 850, 34 Misc. 3d 603, 2011 N.Y. Misc. LEXIS 5106 (N.Y. Sup. Ct. 2011).

2. Advisory opinions; consultants, generally

3. —Committee on Open Government/Public Access to Records

The Freedom of Information Law requires the Committee on Public Access to Records to furnish an advisory opinion regarding the law to any agency or any person (Pub O § 89(1)). However, it does not give the committee any part in the review process established by Pub O § 89(4) except to require that a copy of any appeal to the records access appeals officer and the determination thereon be furnished by the agency to the committee. Thus, while an individual who has unsuccessfully sought agency disclosure under the Freedom of Information Law may properly resort to the committee for an advisory opinion, such opinion is neither binding upon the agency nor entitled to greater deference in an Article 78 proceeding than is the construction of the agency. John P. v Whalen, 54 N.Y.2d 89, 444 N.Y.S.2d 598, 429 N.E.2d 117, 1981 N.Y. LEXIS 3071 (N.Y. 1981).

Advisory opinions of Committee on Open Government are neither binding on agency nor entitled to greater deference in Article 78 proceeding than is construction of agency. Buffalo News v Buffalo Enter. Dev. Corp., 84 N.Y.2d 488, 619 N.Y.S.2d 695, 644 N.E.2d 277, 1994 N.Y. LEXIS 4113 (N.Y. 1994).

The advisory opinion of the Committee on Public Access to Records is entitled to great weight and, if not irrational or unreasonable, should be upheld. Gannett Co. v James, 108 Misc. 2d 862, 438 N.Y.S.2d 901, 1981 N.Y. Misc. LEXIS 2304 (N.Y. Sup. Ct. 1981), aff'd, 86 A.D.2d 744, 447 N.Y.S.2d 781, 1982 N.Y. App. Div. LEXIS 15305 (N.Y. App. Div. 4th Dep't 1982).

The State Insurance Fund is not exempt from the notices required to be given to the Committee on Public Access to Records under Acts 1980, Chapter 677 § 3, since, although the systems of records kept by the State Insurance Funds are confidential, the focal point of the legislation is not whether the records are available to public access, but whether the records exist that may be used to identify individuals. Com Pub Acc Rec FOIL—Ad Op 1893.

State agencies are required to adopt their own regulations consistent with those of Committee on Public Access to Records which are required under § 89(1)(b)(iii) of Freedom of Information Law. Comm Pub Acc Rec FOIL-Ad Op 2517.

Committee on Public Access to Records has no authority to compel agency to comply with Freedom of Information Law. Comm Pub Acc Rec FOIL-Ad Op 2579.

4. Attorney matters, generally

In connection with request for records under Freedom of Information Law, petitioner did not have right to be present at hearing ordered by court, at which both employee who conducted search for records and supervisor appeared, and at which court inquired into diligence of search for records; moreover, petitioner did not have right to assignment of counsel. Thomas v Records Access Officer, 205 A.D.2d 786, 613 N.Y.S.2d 929, 1994 N.Y. App. Div. LEXIS 6569 (N.Y. App. Div. 2d Dep't), app. denied, 84 N.Y.2d 807, 621 N.Y.S.2d 516, 645 N.E.2d 1216, 1994 N.Y. LEXIS 3439 (N.Y. 1994).

Where appellant sued respondents under the Freedom of Information Law, that they complied with its records request before filing an answer did not justify the trial court in denying appellant's request for attorneys' fees, as it "substantially prevailed" in case, having eventually received the documents it sought, and respondents had no reasonable basis for denying it access to those documents. Matter of Acme Bus Corp. v County of Suffolk, 136 A.D.3d 896, 26 N.Y.S.3d 159, 2016 N.Y. App. Div. LEXIS 1169 (N.Y. App. Div. 2d Dep't 2016).

Trial court erred in denying a petitioner's request for an award of an attorney's fee and litigation costs because all of the statutory prerequisites for such an award had been satisfied and the award would promote the purpose of and policy behind the Freedom of Information Law. Matter of South Shore Press, Inc. v Havemeyer, 136 A.D.3d 929, 25 N.Y.S.3d 303, 2016 N.Y. App. Div. LEXIS 1192 (N.Y. App. Div. 2d Dep't 2016).

5. —Attorney fees

Since the public's interest in closure of a nursing facility did not by itself establish that any records relating to the New York State Department of Health's actions were also of interest to society, as the records included general agency documents as well as closure-related records, the facility was not entitled to attorney fees under N.Y. Pub. Off. Law § 89(4)(c)(i). Beechwood Restorative Care Ctr. v Signor, 5 N.Y.3d 435, 808 N.Y.S.2d 568, 842 N.E.2d 466, 2005 N.Y. LEXIS 2697 (N.Y. 2005).

Firefighter association was not entitled to counsel fees under CLS Pub O § 89, even though it successfully challenged city's adverse determination and obtained release of response time information under Freedom of Information Law, since information was not "of clearly significant interest to the general public." MacRae v Dolce, 130 A.D.2d 577, 515 N.Y.S.2d 295, 1987 N.Y. App. Div. LEXIS 46577 (N.Y. App. Div. 2d Dep't 1987).

In Article 78 proceeding challenging denial of request for certain documents under Freedom of Information Law, petitioner "substantially prevailed" for purposes of recovering counsel fees under CLS Pub O § 89(4)(c), even though documents were released before any defense was asserted, since it was initiation of proceeding which brought about release of documents, and it would be irrational to allow respondent to moot proceeding and prevent award of counsel fees by releasing documents before asserting defense. Records of police officers who had been investigated, rules, regulations and orders found to have been violated, and discipline imposed were of "clearly significant interest to the general public" under CLS Pub O § 89(4)(c)(i) for purposes of awarding attorney's fees in Article 78 proceeding challenging denial of request for release of those records since incident involved on-duty police officer who left his assigned post without authorization to perform termite inspection for realtor at petitioner's home, and second police officer's refusal to take statement from petitioner when she lodged complaint of such conduct; police department's response to incident would significantly contribute to public's evaluation of important public agency. City police department lacked "reasonable basis in law" under CLS Pub O § 89(4)(c)(ii) to deny petitioner's request for investigatory and disciplinary records concerning incident in which on-duty officer left his assigned post without authorization to perform termite inspection for realtor at petitioner's house, and second officer refused to take statement from petitioner when she lodged complaint in regard thereto, notwithstanding that police department's refusal was based on CLS Civ R § 50-a, which provides that personnel records used to evaluate performance of police officers, inter alia, are not subject to inspection except by consent of officer, since (1) § 50-a does not create blanket exemption and was enacted to prevent vexatious investigations into irrelevant matters in context of civil or criminal litigation, and (2) petitioner had no cause of action as to second officer's failure to take her complaint, and any cause of action against other officer was time barred when petitioner made her Freedom of Information Law (FOIL) request; thus, since records were otherwise of significant public interest and petitioner had substantially prevailed in her Article 78 proceeding challenging denial of her request to release records under FOIL, it was proper to award her reasonable counsel fees. Powhida v Albany, 147 A.D.2d 236, 542 N.Y.S.2d 865, 1989 N.Y. App. Div. LEXIS 8132 (N.Y. App. Div. 3d Dep't 1989).

Petitioner, who was not lawyer and did not retain lawyer to represent him in proceeding under Freedom of Information Law, was not entitled to award of attorney's fees. Leeds v Burns, 205 A.D.2d 540, 613 N.Y.S.2d 46, 1994 N.Y. App. Div. LEXIS 6002 (N.Y. App. Div. 2d Dep't), app. denied, 84 N.Y.2d 811, 622 N.Y.S.2d 914, 647 N.E.2d 120, 1994 N.Y. LEXIS 4572 (N.Y. 1994).

In Article 78 proceeding to compel Department of Transportation (DOT) to release certain documents pursuant to Freedom of Information Law (FOIL), court did not err in awarding counsel fees to petitioner under CLS CPLR Art 86 on basis that DOT's position in denying access to requested documents was not "substantially justified," where DOT acknowledged receipt of petitioner's FOIL request but simply did not respond, either to petitioner's application or to its appeal, and no explanation was ever proffered by DOT as to why information was withheld. In Article 78 proceeding to compel Department of Transportation (DOT) to release, pursuant to Freedom of Information Law (FOIL), copies of proposals and related documents submitted in response to request for proposals (RFP) inviting contract bids for development and operation of high-speed ferry service, petitioner was not entitled to award of counsel fees under CLS CPLR Art 86 where DOT alleged that disclosure of actual proposals before contract was awarded would undermine negotiating process. Cross-Sound Ferry Servs. v Department of Transp., 219 A.D.2d 346, 634 N.Y.S.2d 575, 1995 N.Y. App. Div. LEXIS 12680 (N.Y. App. Div. 3d Dep't 1995).

In Article 78 proceeding under Freedom of Information Law wherein respondent eventually supplied requested information and court dismissed petition as moot, court did not abuse its discretion in denying petitioner's request for counsel fees, in light of evidence of confusion and possible misunderstanding involved in respondent's efforts to respond to petitioner's request for information. URAC Corp. v PSC, 223 A.D.2d 906, 636 N.Y.S.2d 480, 1996 N.Y. App. Div. LEXIS 399 (N.Y. App. Div. 3d Dep't 1996).

Court properly denied petitioners' request for counsel fees under CLS Pub O § 89(4)(c), even though petitioners substantially prevailed in their Freedom of Information Law request for survey maps of their respective parcels and county respondent lacked reasonable basis in law for withholding surveys, since surveys, which were obtained in connection with proposed flood control project, were not of clearly significant interest to general public, despite fact that 6 other individuals and national environmental organization sought access to same surveys. Grace v Chenango County, 256 A.D.2d 890, 681 N.Y.S.2d 695, 1998 N.Y. App. Div. LEXIS 13583 (N.Y. App. Div. 3d Dep't 1998).

In Article 78 proceeding by landowners against town board members, landowners were not entitled to counsel fees under CLS Pub O § 89(4)(c), even though worksheets used in completing tax assessment roll had been wrongfully withheld from landowners, where there was statutory and decisional authority providing reasonable basis for view that worksheets were properly withheld as pre-decisional matter. Even if members lacked reasonable basis to withhold worksheets used in completing tax assessment roll, court did not abuse its discretion in denying landowners' request for counsel fees under CLS Pub O § 89(4)(c) where worksheets were small part of landowners' total Freedom of Information Law requests, with which members otherwise fully complied. Todd v Craig, 266 A.D.2d 626, 697 N.Y.S.2d 722, 1999 N.Y. App. Div. LEXIS 11242 (N.Y. App. Div. 3d Dep't 1999), app. denied, 94 N.Y.2d 760, 706 N.Y.S.2d 80, 727 N.E.2d 577, 2000 N.Y. LEXIS 121 (N.Y. 2000).

Although the appellate court found that records which the New York Department of Correctional Services (DOCS) created after an inmate was alleged injured by a corrections officer were not exempt from disclosure under New York's Freedom of Information Law, N.Y. Pub. Off. Law art. 6, and it ordered the DOCS to disclose redacted versions of the records that did not contain personal information, the court found that the information requested was not of clearly significant interest to the general public, and it upheld the trial court's judgment denying the inmate's request under N.Y. Pub. Off. Law § 89(4)(c) for attorney's fees. Beyah v Goord, 309 A.D.2d 1049, 766 N.Y.S.2d 222, 2003 N.Y. App. Div. LEXIS 10931 (N.Y. App. Div. 3d Dep't 2003).

Some records that state agencies withheld from a citizen were not interagency and intraagency documents that were exempt from disclosure under N.Y. Pub. Off. Law § 87(2). But as the agencies had a rational basis for believing the exemption applied, the citizen's request for counsel fees under N.Y. Pub. Off. Law § 89(4)(c)(i) was properly denied. Miller v New York State DOT, 58 A.D.3d 981, 871 N.Y.S.2d 489, 2009 N.Y. App. Div. LEXIS 160 (N.Y. App. Div. 3d Dep't), app. denied, 12 N.Y.3d 712, 882 N.Y.S.2d 397, 909 N.E.2d 1235, 2009 N.Y. LEXIS 1786 (N.Y. 2009).

In light of the appellate courts' significant modification of a supreme court's order pertaining to the disclosure of requested information, the petitioner did not substantially prevail, and thus there was no basis for an award of attorney's fees and other litigation costs. Matter of Grabell v New York City Police Dept., 139 A.D.3d 477, 32 N.Y.S.3d 81, 2016 N.Y. App. Div. LEXIS 3540 (N.Y. App. Div. 1st Dep't), app. denied, 28 N.Y.3d 910, 69 N.E.3d 1022, 47 N.Y.S.3d 226, 2016 N.Y. LEXIS 3827 (N.Y. 2016).

Requestor was entitled to attorney's fees under the Freedom of Information Law (FOIL) because the requestor received a complete response and the actual document only after commencing the proceeding, and, as such, the requestor substantially prevailed, even if the document was available in the public domain, and the agency did not establish a reasonable basis for denying the FOIL request. Matter of Competitive Enter. Inst. v Attorney

Gen. of N.Y., 161 A.D.3d 1283, 76 N.Y.S.3d 640, 2018 N.Y. App. Div. LEXIS 3152 (N.Y. App. Div. 3d Dep't 2018).

Reporters were entitled to attorney fees under the Public Officers Law because they substantially prevailed and the mayor's office lacked a reasonable basis for withholding its communications. Matter of Rauh v de Blasio, 161 A.D.3d 120, 75 N.Y.S.3d 15, 2018 N.Y. App. Div. LEXIS 3064 (N.Y. App. Div. 1st Dep't 2018).

Although a requester substantially prevailed, the Department of Corrections and Community Supervision had a reasonable basis for denying access to unredacted records, and therefore, the requester was not entitled to an award of counsel fees and costs. Matter of Prisoners' Legal Servs. of N.Y. v New York State Dept. of Corr. & Community Supervision, 173 A.D.3d 8, 98 N.Y.S.3d 677, 2019 N.Y. App. Div. LEXIS 3434 (N.Y. App. Div. 3d Dep't 2019).

Petitioners were properly denied counsel fees because they had not substantially prevailed within the meaning of the Public Officers Law, as they had not received all the information that they requested and to which they were entitled in response to the underlying Freedom of Information Law litigation Matter of Union Carbide Corp. v New York State Dept. of Envtl. Conservation, 2020 N.Y. App. Div. LEXIS 7648 (December 10, 2020).

Court would decline request for award of attorney fees and costs under CLS Pub O § 89 by successful petitioner in proceeding to require disclosure of names of all inmates housed in particular area of correctional facility since request was apparently one of first impression, respondents demonstrated concern for release of information, and there was no showing that agency lacked any reasonable basis in law for withholding information. Bensing v Le Fevre, 133 Misc. 2d 198, 506 N.Y.S.2d 822, 1986 N.Y. Misc. LEXIS 2848 (N.Y. Sup. Ct. 1986).

Petitioners had not "substantially prevailed" in proceeding challenging denial of their request for certain documents under Freedom of Information Law, where court merely granted access to one of 3 categories of documents requested; thus, petitioners were not entitled to award of attorney's fees and costs under CLS Pub O § 89(4)(c). Faulkner v Del Giacco, 139 Misc. 2d 790, 529 N.Y.S.2d 255, 1988 N.Y. Misc. LEXIS 276 (N.Y. Sup. Ct. 1988).

In Article 78 proceeding by legal aid society to obtain access to redacted referrals by correctional institutions of prison inmates to specialist medical care in which court granted request for access, court would also allow award of attorney's fees pursuant to CLS Pub O § 89(4)(c) in amount of $7,500. Rold v Coughlin, 142 Misc. 2d 877, 538 N.Y.S.2d 896, 1989 N.Y. Misc. LEXIS 461 (N.Y. Sup. Ct. 1989).

In proceeding under Freedom of Information Law involving request by animal rights advocates for documents maintained by university review committee, court would deny petitioners' request for sanctions since committee had reasonable basis in law for redacting certain materials and withholding others. American Soc. for Prevention of Cruelty to Animals v Board of Trustees of State University, 147 Misc. 2d 847, 556 N.Y.S.2d 447, 1990 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. 1990).

Prevailing party in Freedom of Information Law proceeding was not entitled to attorney fees as costs where Appellate Division precedent, although held by court to be inapposite on its facts, provided at least arguable basis for denial of request, and thus agency had not lacked reasonable basis in law for withholding of requested record. Citizens for Alternatives to Animal Labs v Board of Trustees of the State Univ. of N.Y., 169 Misc. 2d 210, 643 N.Y.S.2d 323, 1996 N.Y. Misc. LEXIS 172 (N.Y. Sup. Ct. 1996), rev'd, 240 A.D.2d 490, 658 N.Y.S.2d 653, 1997 N.Y. App. Div. LEXIS 6098 (N.Y. App. Div. 2d Dep't 1997).

In Article 78 proceeding wherein court found that Department of Health lacked reasonable basis to deny Freedom of Information law requests for physician identifier information contained in Statewide Planning and Research Cooperative System (SPARCS), award of attorney's fees was not warranted although petitioner substantially prevailed and SPARCS records appear to be matters of significant interest to general public, as department's argument related to scope of "identifying details" subject to personal privacy protection, while overly broad, was not wholly lacking in merit. New York Times Co. v New York State Dep't of Health, 173 Misc. 2d 310, 660 N.Y.S.2d 810, 1997 N.Y. Misc. LEXIS 248 (N.Y. Sup. Ct. 1997), aff'd, 243 A.D.2d 157, 674 N.Y.S.2d 826, 1998 N.Y. App. Div. LEXIS 7774 (N.Y. App. Div. 3d Dep't 1998).

Since New York City's fire department had good reason to try to resist releasing certain materials relating to the events of September 11, 2001, an award of attorney's fees to a reporter, and the newspaper he worked for, after a partially successful attempt to obtain their release was not appropriate. N.Y. Times Co. v City of New York Fire Dep't, 195 Misc. 2d 119, 754 N.Y.S.2d 517, 2003 N.Y. Misc. LEXIS 94 (N.Y. Sup. Ct. 2003), aff'd in part, modified, 3 A.D.3d 340, 770 N.Y.S.2d 324, 2004 N.Y. App. Div. LEXIS 143 (N.Y. App. Div. 1st Dep't 2004).

Where the news corporation sought judicial review of the decision of the State of New York Department of Transportation to deny the corporation's New York Freedom of Information Law, N.Y. Pub. Off. Law art. 6, seeking information from priority investigation location lists and priority investigation intersection lists that was not discoverable in lawsuits pursuant to 23 U.S.C.S. § 409 and relief was granted, the corporation was not entitled to counsel fees under N.Y. Pub. Off. Law § 89(4)(c)(i), (ii); it could not be found that the department, under 23 U.S.C.S. § 409, did not have a reasonable basis to withhold the documents. Newsday, Inc. v N.Y. State DOT, 765 N.Y.S.2d 758, 1 Misc. 3d 321, 2003 N.Y. Misc. LEXIS 1263 (N.Y. Sup. Ct. 2003), aff'd, 10 A.D.3d 201, 780 N.Y.S.2d 402, 2004 N.Y. App. Div. LEXIS 9272 (N.Y. App. Div. 3d Dep't 2004).

Petitioner's request for access to documents a police department compiled and maintained in conjunction with its investigation into allegations that a priest sexually molested several boys in his parish raised novel issues, and although the trial court ordered a county government to release redacted copies of the documents, it denied petitioner's request for an award of attorney's fees. Inscho v Tioga County Legislature, 766 N.Y.S.2d 754, 2 Misc. 3d 230, 2003 N.Y. Misc. LEXIS 1386 (N.Y. Sup. Ct. 2003).

Resident of middle-income housing who sought to have a city housing department allow her to copy apartment waiting lists was entitled to attorney fees and costs under N.Y. Pub. Off. Law § 89(4)(c). The resident had clearly prevailed, and her reason for wishing to see the lists, to determine whether there was misconduct in the way the department was administering the lists, was of significant public interest. Matter of Thomas v City of N.Y. Dept. of Hous. Preserv. & Dev., 817 N.Y.S.2d 864, 12 Misc. 3d 547, 235 N.Y.L.J. 81, 2006 N.Y. Misc. LEXIS 783 (N.Y. Sup. Ct. 2006).

Because an agency had a reasonable basis for denying a petitioner's request for access under N.Y. Pub. Off. Law § 89(4)(c)(i), the trial court properly refused to award the petitioner legal fees. Matter of Hawley v Village of Penn Yan, 35 A.D.3d 1270, 827 N.Y.S.2d 390, 2006 N.Y. App. Div. LEXIS 15663 (N.Y. App. Div. 4th Dep't 2006).

Because correspondence between the parties indicated that the police department engaged in tactics to delay disclosure, and because complete disclosure was made only after court intervention, the matter was not resolved "voluntarily"; therefore, the trial court's denial of the a civil liberties union's request for an award of counsel fees and costs under N.Y. Pub. Off. Law § 89(4)(c) was an abuse of discretion. Matter of New York Civ. Liberties Union v City of Saratoga Springs, 87 A.D.3d 336, 926 N.Y.S.2d 732, 2011 N.Y. App. Div. LEXIS 5690 (N.Y. App. Div. 3d Dep't 2011).

Denial of an association's request for counsel fees in its Freedom of Information Law proceeding under N.Y. C.P.L.R. art. 78 was error because, as the records requested were attached to the answer filed by police, the association substantially prevailed under N.Y. Pub. Off. Law § 89(4)(c), and the police had no reasonable basis for withholding the entirety of the records sought; the argument that there was a reasonable basis to believe that the records were exempt from disclosure was belied by the virtually immediate release of the requested information upon commencement of the proceeding. Further, at most, the police could have reasonably believed that a small portion of the records were exempt, and the police failed to articulate any persuasive reason why the records could not have been redacted and the portions that were not exempt from disclosure turned over.

Matter of New York State Defenders Assn. v New York State Police, 87 A.D.3d 193, 927 N.Y.S.2d 423, 2011 N.Y. App. Div. LEXIS 5683 (N.Y. App. Div. 3d Dep't 2011).

As petitioner did not substantially prevail in his efforts to obtain disclosure of the documents and, given their content, the department did not arbitrarily arrive at its decision not to disclose them, and the trial court's decision denying him counsel fees did not constitute an abuse of its discretion Matter of Mazzone v New York State Dept. of Transp., 95 A.D.3d 1423, 943 N.Y.S.2d 648, 2012 N.Y. App. Div. LEXIS 3515 (N.Y. App. Div. 3d Dep't 2012).

Award of counsel fees and costs under N.Y. Pub. Off. Law § 89(4)(c)(i) was warranted because a legal aid society doggedly pursued its request for information from the Division of Parole for more than a year without a responsive reply to that request or its appeals prior to the commencement of a N.Y. C.P.L.R. art. 78 proceeding. Matter of Legal Aid Socy. v New York State Dept. of Corr. & Community Supervision, 105 A.D.3d 1120, 962 N.Y.S.2d 773, 2013 N.Y. App. Div. LEXIS 2244 (N.Y. App. Div. 3d Dep't 2013).

Journalist was entitled to administrative relief and attorney's fees because, with two exceptions, the police department's response consisted largely of repeated, conclusory statements that the disclosure of records pertaining to certain vans would allow would-be criminals to circumvent the vans' potential effectiveness and the information could be provided in redacted form. Matter of Grabell v New York City Police Dept., 996 N.Y.S.2d 893, 47 Misc. 3d 203, 2014 N.Y. Misc. LEXIS 5353 (N.Y. Sup. Ct. 2014), aff'd in part, modified, vacated, in part, 139 A.D.3d 477, 32 N.Y.S.3d 81, 2016 N.Y. App. Div. LEXIS 3540 (N.Y. App. Div. 1st Dep't 2016).

Citizen whose request for electronic voting records was wrongly denied was not entitled to attorneys' fees because the denial was based on a good faith interpretation of the applicable statute. Matter of Kosmider v Whitney, 56 Misc. 3d 354, 46 N.Y.S.3d 403, 2017 N.Y. Misc. LEXIS 327 (N.Y. Sup. Ct. 2017), aff'd, 160 A.D.3d 1151, 75 N.Y.S.3d 305, 2018 N.Y. App. Div. LEXIS 2519 (N.Y. App. Div. 3d Dep't 2018).

6. Burden of proof

In convicted murderer's Article 78 proceeding under Freedom of Information Law (FOIL) to compel district attorney to disclose criminal history records of prosecution witnesses who testified at his trial, district attorney had burden of proving that copies of requested records were previously furnished to petitioner or his attorney. Williams v Erie County DA, 255 A.D.2d 863, 682 N.Y.S.2d 316, 1998 N.Y. App. Div. LEXIS 12053 (N.Y. App. Div. 4th Dep't 1998).

Record request under the Freedom of Information Law for numerous documents relating to a village's deer management activities was improperly redacted based, in part, on a statutory exemption because there was no evidence to support the determination that the safety of the property owners who participated in the deer management program could be endangered by the release of their identities. Matter of Laveck v Village Bd. of Trustees of the Vil. of Lansing, 145 A.D.3d 1168, 42 N.Y.S.3d 460, 2016 N.Y. App. Div. LEXIS 7991 (N.Y. App. Div. 3d Dep't 2016).

Record request under the Freedom of Information Law for numerous documents relating to a village's deer management activities was improperly redacted, as a claim that disclosure would constitute an unwarranted invasion of personal privacy lacked merit because there was no showing that the redacted information fell into any statutory category that qualified for exemption or that there were privacy interests at stake that outweighed the public interest in disclosure of the information. Matter of Laveck v Village Bd. of Trustees of the Vil. of Lansing, 145 A.D.3d 1168, 42 N.Y.S.3d 460, 2016 N.Y. App. Div. LEXIS 7991 (N.Y. App. Div. 3d Dep't 2016).

State insurance department superintendent did not meet his burden of proof that he had in revisiting disclosure of certain reports that the trade secret exemption applied; the application of that exemption would thwart the enactment of regulatory law aimed at preventing insurance companies from engaging in the illegal insurance practice known as "redlining." Matter of Markowitz v Serio, 812 N.Y.S.2d 841, 11 Misc. 3d 439, 235 N.Y.L.J. 12, 2006 N.Y. Misc. LEXIS 81 (N.Y. Sup. Ct. 2006), rev'd, 39 A.D.3d 247, 833 N.Y.S.2d 444, 2007 N.Y. App. Div. LEXIS 4287 (N.Y. App. Div. 1st Dep't 2007), reinstated, 11 N.Y.3d 43, 862 N.Y.S.2d 833, 893 N.E.2d 110, 2008 N.Y. LEXIS 1827 (N.Y. 2008).

Because the Department of Taxation and Finance complied with N.Y. Pub. Off. Law § 89(4)(a) by providing a sufficient description of the withheld documents and by articulating a basis for its denial, and because the withheld documents fell squarely within the inter-agency and intra-agency exemption as predecisional, nonfinal discussions and recommendations by employees within the agency used to assist the decision makers in formulating a determination, the taxpayers were not entitled to N.Y. C.P.L.R. art. 78 relief. Matter of Bass Pro, Inc. v Megna, 69 A.D.3d 1040, 892 N.Y.S.2d 642, 2010 N.Y. App. Div. LEXIS 189 (N.Y. App. Div. 3d Dep't 2010).

7. Effect of federal laws

Bank (petitioner), which was target of hostile takeover by second bank, was not deprived of due process by State Banking Board's determination not to release certain confidential information regarding "hostile" bank's takeover application, since (1) petitioner had no "property" rights in proceeding because banking board's sole function was to decide whether to allow proposed offer and it did not play active part in transaction nor approve it as sound course of action for either bank, (2) CLS Bank § 142 did not require bank superintendent even to notify petitioner or to offer petitioner opportunity to take part in proceeding, (3) petitioner had received great bulk of material requested through use of Freedom of Information Law, (4) petitioner had been given notice of issues and had submitted extensive documentation in opposition to takeover application, and (5) even if application were approved, parallel federal application had to be considered and approved by Federal Reserve Board, wherein petitioner would have time to oppose it. Irving Bank Corp. v Considine, 138 Misc. 2d 849, 525 N.Y.S.2d 770, 1988 N.Y. Misc. LEXIS 105 (N.Y. Sup. Ct. 1988).

Federal district court cannot exercise supplementary jurisdiction over inmate's New York Freedom of Information Law (FOIL) claim, where FOIL claim arises from alleged failure of sheriff and police department to turn over exculpatory material which they say does not exist, while federal civil rights claim arises from alleged threats to inmate's personal safety while incarcerated, because constitutional right to personal safety in prison and request for documents pursuant to CLS Pub Officers Law § 89 are distinct factually and legally so that federal and state claims do not derive from common nucleus of operative fact. Benyi v Broome County, 887 F. Supp. 395, 1995 U.S. Dist. LEXIS 6621 (N.D.N.Y. 1995).

Federal Freedom of Information and Privacy Acts apply only to records of federal agencies and New York State Freedom of Information Law applies to records of units of government in New York. Comm Pub Acc Rec FOIL-Ad Op 2671.

8. Jurisdiction matters, generally

Supreme Court is appropriate forum for addressing violation of Freedom of Information Law; thus, Commissioner of Education had no jurisdiction over such claims. 1996 Op Comm Ed No. 13596.

9. —Subpoenas

In action by injured construction worker under CLS Labor § 240(1), worker's employer was entitled to subpoena duces tecum requiring State Department of Motor Vehicles to produce certified copy of worker's 1997 application for renewal of his driver's license where (1) document sought was relevant to damages and could not have been obtained through disclosure, and (2) document was not exempt from subpoena merely because information contained therein might have been exempt from disclosure under CLS Pub O § 89(2)(b)(i), because Freedom of Information Law does not limit litigant's resort to compulsory legal process. Edbauer v Bd. of Educ., 286 A.D.2d 999, 731 N.Y.S.2d 309, 2001 N.Y. App. Div. LEXIS 9083 (N.Y. App. Div. 4th Dep't 2001).

ii. Applicability

10. In general

Municipal development corporation, which disclosed its annual budget publicly, filed its audited financial reports with munici-

pality, and which was established to invest public funds in economic development activities, was agency subject to requirements of Freedom of Information Law. Buffalo News v Buffalo Enter. Dev. Corp., 173 A.D.2d 43, 578 N.Y.S.2d 945, 1991 N.Y. App. Div. LEXIS 17870 (N.Y. App. Div. 4th Dep't 1991), app. dismissed, 79 N.Y.2d 977, 583 N.Y.S.2d 195, 592 N.E.2d 803, 1992 N.Y. LEXIS 1036 (N.Y. 1992).

In a N.Y. C.P.L.R. art. 78 proceeding brought by a publisher and a journalist challenging the denial of its Freedom of Information Law, N.Y. Pub. Off. Law § 84 et seq., records request seeking an electronic copy of certain New York State employee payroll information, it was determined that the 2008 amendments to N.Y. Pub. Off. Law § 89(3) regarding requests for electronic information did not apply to the case since the amendments were not retroactive. Matter of Hearst Corp. v State, 882 N.Y.S.2d 862, 24 Misc. 3d 611, 2009 N.Y. Misc. LEXIS 868 (N.Y. Sup. Ct. 2009).

Acts 1980, ch 677, relative to the submission of notices of systems of records maintained by agencies, is not applicable to entities of local government but only to state agencies. Comm Pub Acc Rec FOIL—Ad Op 1905.

Individual agencies maintaining records under emergency preparedness plan are required to respond in accordance with the Freedom of Information Law, notwithstanding that intent of the plan is to funnel information into and disclose information from a single source. Comm Pub Acc Rec FOIL-Ad Op 2786.

11. Courts; litigation, generally

12. —Office of Court Administration (OCA)

Office of Court Administration is an "agency" subject to the Freedom of Information Law in all respects, rather than a "court" that falls outside the requirements of the Freedom of Information Law. Comm Pub Acc Rec FOIL-Ad Op 2810.

13. —Physical evidence

Items presented in evidence in criminal trial requested by petitioner, consisting of "articles of clothing and alleged weapons," did not fall within definition of "record" subject to disclosure under Freedom of Information Law; such physical evidence is not part of "the documents and statistics leading (governmental determination" (CLS Pub O § 84 (2) (e) (i)). Sideri v Office of the DA, 243 A.D.2d 423, 663 N.Y.S.2d 206, 1997 N.Y. App. Div. LEXIS 10842 (N.Y. App. Div. 1st Dep't 1997), app. denied, 91 N.Y.2d 808, 669 N.Y.S.2d 261, 692 N.E.2d 130, 1998 N.Y. LEXIS 252 (N.Y. 1998).

14. Criminal law, generally

15. —District Attorney's office

In convicted murderer's Article 78 proceeding under Freedom of Information Law (FOIL) to compel district attorney to disclose criminal history records of prosecution witnesses who testified at his trial, petitioner could not obtain such information under FOIL if he or his attorney obtained it from prosecutor in prior proceeding, unless he and his attorney no longer possessed that information. If copies of requested records were previously furnished to petitioner or his attorney in prior proceeding, but petitioner and his attorney no longer possessed them, other copies had to be furnished unless district attorney no longer possessed them and thus could not comply. Williams v Erie County DA, 255 A.D.2d 863, 682 N.Y.S.2d 316, 1998 N.Y. App. Div. LEXIS 12053 (N.Y. App. Div. 4th Dep't 1998).

16. —Grand jury

Grand jury minutes are court rather than agency records and are accordingly exempt from ambit of Freedom of Information Law. Gibson v Grady, 192 A.D.2d 657, 597 N.Y.S.2d 84, 1993 N.Y. App. Div. LEXIS 3871 (N.Y. App. Div. 2d Dep't 1993).

Grand jury minutes are court records, rather than agency records, and thus are exempt from ambit of Freedom of Information Law, CLS Pub O §§ 86(1) and (3). Mullgrav v Santucci, 195 A.D.2d 786, 600 N.Y.S.2d 382, 1993 N.Y. App. Div. LEXIS 7280 (N.Y. App. Div. 3d Dep't 1993).

17. —Police and other law enforcement agencies

It was error to deny a motion to dismiss a petition filed by police officers and the officers' union alleging a city was barred from holding public police disciplinary hearings because (1) the officers had no private right of action for claimed violations of Civil Rights Law § 50-a, (2) Civil Rights Law § 50-a did not mandate closed disciplinary hearings, as the statute did not mention disciplinary hearings or require that such hearings be held in private, and this exclusion was intentional, (3) Public Officers Law §§ 89(2) and 96, barring a disclosure of records that was an unwarranted invasion of privacy, did not bar public disciplinary hearings, (4) Second Class Cities Law § 137 gave a city the right to hold public police disciplinary hearings, and (5) the Public Employment Relations Board had exclusive jurisdiction over whether police disciplinary matters were a prohibited subject of negotiations, under Civil Service Law §§ 205(5)(d) and 209-a(1) and (2), as alleged by the officers and the union. Matter of Doe v City of Schenectady, 84 A.D.3d 1455, 923 N.Y.S.2d 241, 2011 N.Y. App. Div. LEXIS 3607 (N.Y. App. Div. 3d Dep't 2011).

Police department failed to show that the documents requested under the Freedom of Information Law were exempt or should be sealed under N.Y. Pub. Off. Law §§ 87(2)(e)(i), 89(2)(a) because it failed to provide any information on the generic types of documents or categories of documents that were allegedly exempt from disclosure, or to suggest a reason why the records could not be redacted so as to delete details tending to identify the victim's identity. Matter of Loevy & Loevy v New York City Police Dept., 957 N.Y.S.2d 628, 38 Misc. 3d 950, 2013 N.Y. Misc. LEXIS 46 (N.Y. Sup. Ct. 2013).

18. —Prisons; prisoners

Absent a showing that an inmate's fiancee was a confidential informant or requested or was promised anonymity, or that the fiancee's life or safety would be endangered by disclosure, the inmate's N.Y. Pub. Off. Law art. 6 request for any statements made by the fiancee during an interview with investigators was improperly denied; accordingly, the inmate was entitled to N.Y. C.P.L.R. art. 78 relief. Matter of Gomez v Fischer, 74 A.D.3d 1399, 902 N.Y.S.2d 212, 2010 N.Y. App. Div. LEXIS 4589 (N.Y. App. Div. 3d Dep't 2010).

19. Employment; labor

N.Y. Lab. Law § 220(3) did not include contracts for the sale of goods used in public works projects, and where a steel company acted solely as materials supplier, supplying shop-painted structural steel for a public works project, its workers were not subject to prevailing wage laws; a trial court's order dismissing a proceeding brought by a union representative pursuant to Art. 78 against a transportation department, seeking review of the transportation department's denial of the union representative's request under the Freedom of Information Law, N.Y. Pub. Off. Law art. 6, for the steel company's payroll records, was affirmed. Ramaglia v N.Y. State DOT, 5 A.D.3d 909, 773 N.Y.S.2d 167, 2004 N.Y. App. Div. LEXIS 2560 (N.Y. App. Div. 3d Dep't), app. denied, 3 N.Y.3d 601, 782 N.Y.S.2d 405, 816 N.E.2d 195, 2004 N.Y. LEXIS 1595 (N.Y. 2004).

Trial court erred in finding that materials resulting from the state police's investigation after a state trooper had resigned were confidential under the Freedom of Information Law (FOIL) because police departments who investigated persons who were no longer their employees were not conducting investigations of "personnel" within the meaning of FOIL. 2015 N.Y. App. Div. LEXIS 7824.

20. Fires; firefighters

Because a volunteer fire company was an "agency" subject to the requirements of Freedom of Information Law (FOIL), N.Y. Pub. Off. Law art. 6, and because it did not claim any FOIL exemption, it was required to disclose the requested records without regard to whether they related to governmental or nongovernmental functions. Matter of Matter of Hayes v Chestertown Volunteer Fire Co., Inc., 93 A.D.3d 1117, 941 N.Y.S.2d 734, 2012 N.Y. App. Div. LEXIS 2340 (N.Y. App. Div. 3d Dep't 2012).

21. Insurance matters

Neither Superintendent of Insurance, as liquidator, nor Liquidation Bureau is "agency" of state for purposes of Freedom of Information Law. Consolidated Edison Co. v Insurance Dep't of State, 140 Misc. 2d 969, 532 N.Y.S.2d 186, 1988 N.Y. Misc. LEXIS 511 (N.Y. Sup. Ct. 1988).

Where applicable, relief under Freedom of Information Law (FOIL) may be had regardless of availability of discovery through some other means; thus, petitioner in Article 78 proceeding was not precluded from seeking to compel State Insurance Department to comply with request under FOIL, even though petitioner could obtain similar discovery in plenary action. Consolidated Edison Co. v Insurance Dep't of State, 140 Misc. 2d 969, 532 N.Y.S.2d 186, 1988 N.Y. Misc. LEXIS 511 (N.Y. Sup. Ct. 1988).

Filings of insurers are open to public inspection, including insurer's annual statement as well as its rate and form filings. Insurance Department, Opinions of General Counsel, Opinion Number 00-05-13.

Insurance Department's Bureau of Taxes and Accounts maintains certain financial records relating to Property/Casualty Insurance Security Fund, and those records are available under Freedom of Information Law (FOIL); when company is declared insolvent, all books and records relating to company are transferred to Liquidation Bureau, which is not subject to FOIL, but one may inquire directly to Liquidation Bureau to ascertain whether they maintain records relating to insolvent insurers that contain information not maintained by Insurance Department. Insurance Department, Opinions of General Counsel, Opinion Number 00-12-01.

Insurer's filed rates are records of Insurance Department and are subject to public disclosure provisions contained in CLS Public Officers Law Art 6 ("Freedom of Information Law"). Insurance Department, Opinions of General Counsel, Opinion Number 01-02-08.

22. Schools, education and the like, generally

Where there was no indication that the teachers group intended to use the names to, for example, expose governmental abuses or evaluate governmental activities, rather, it appeared that it sought the teachers' names as a convenient mechanism for contacting prospective members, although the group had a right to seek dues-paying members, it could not rely on the Freedom of Information Law to achieve that end. Matter of New York State United Teachers v Brighter Choice Charter School, 15 N.Y.3d 560, 915 N.Y.S.2d 194, 940 N.E.2d 899, 2010 N.Y. LEXIS 3287 (N.Y. 2010).

Negotiated settlement of teacher disciplinary proceeding brought under CLS Educ § 3020-a, in which some charges were sustained by teacher's express admission of guilt, was not exempt from disclosure under Freedom of Information Law since CLS Educ § 3020-a did not provide for privacy of hearing, and negotiated settlement was not protected as employment record. Anonymous v Board of Educ., 162 Misc. 2d 300, 616 N.Y.S.2d 867, 1994 N.Y. Misc. LEXIS 402 (N.Y. Sup. Ct. 1994).

23. —Community colleges

Community college did not enjoy immunity under Freedom of Information Law (FOIL) as nongovernmental agency since college was well within FOIL (CLS Pub O § 86(3)) definition of "agency" as governmental entity performing governmental or proprietary function for state or any one or more municipalities. Russo v Nassau Community College, 147 Misc. 2d 179, 554 N.Y.S.2d 774, 1990 N.Y. Misc. LEXIS 154 (N.Y. Sup. Ct. 1990), rev'd, 185 A.D.2d 982, 587 N.Y.S.2d 419, 1992 N.Y. App. Div. LEXIS 10329 (N.Y. App. Div. 2d Dep't 1992).

24. —State University of New York (SUNY)

State University of New York constitutes "agency" within meaning of CLS Pub O § 86(3). Booklist to be used by students at State University of New York (SUNY), compiled by bookseller under subcontract with corporation that provided auxiliary services for particular SUNY campus, and received by corporation and kept on university's behalf, constituted "record" within meaning of CLS Pub O § 86(4). Information kept or held for government agency is within embrace of "records" under Freedom of Information Law (CLS Pub O §§ 84 et seq.); to implement narrow definition of "records" adopted by federal courts would undermine legislative objective to provide maximum disclosure by enabling government agency to insulate its records from public access by delegating responsibility for creating or maintaining particular information to nongovernmental entity. Encore College Bookstores v Auxiliary Serv. Corp., 87 N.Y.2d 410, 639 N.Y.S.2d 990, 663 N.E.2d 302, 1995 N.Y. LEXIS 4751 (N.Y. 1995).

Colleges created by CLS Educ §§ 5711, 5712, 5714 and 5715 and operated by Cornell University on behalf of State University of New York (i.e., New York State College of Veterinary Medicine, New York State College of Agriculture and Life Sciences, New York State College of Human Ecology, and New York State School of Industrial and Labor Relations) may not categorically be deemed state agencies under Freedom of Information Law (FOIL) given their hybrid character and significant indicia denoting private entity and function, notwithstanding general policy of liberal disclosure under FOIL and facts that colleges in question are funded by state money, are subject to some state oversight, are state agencies under CLS St Fin § 53-a(5) and are technically part of state university system. Disciplinary records maintained by Cornell University, regarding professor who was disciplined for having sexually harassed several female students, were not subject to Freedom of Information Law (FOIL) and thus Article 78 petition to compel FOIL disclosure of such records made to or about any personnel or students of "statutory" colleges operated by Cornell University (CLS Educ §§ 5711, 5712, 5714 and 5715) was properly denied. Stoll v New York State College of Veterinary Med. at Cornell Univ., 94 N.Y.2d 162, 701 N.Y.S.2d 316, 723 N.E.2d 65, 1999 N.Y. LEXIS 3738 (N.Y. 1999).

iii. Requests; Requestors

a. Generally

25. In general

Petitioner did not fail to comply with Freedom of Information Law (FOIL) on ground that she did not serve subpoena under CLS CPLR § 2307; provisions of CPLR relating to discovery in civil actions do not apply to FOIL requests. DeCorse v City of Buffalo, 239 A.D.2d 949, 659 N.Y.S.2d 604, 1997 N.Y. App. Div. LEXIS 6376 (N.Y. App. Div. 4th Dep't 1997).

In Article 78 proceeding seeking order that respondents furnish documents under Freedom of Information Law, petitioner's motion to renew was properly denied where he failed to prove that documents requested had not been provided to attorney who had represented him at his criminal trial or that documents were no longer available. Brightley v Lai, 266 A.D.2d 131, 698 N.Y.S.2d 487, 1999 N.Y. App. Div. LEXIS 12348 (N.Y. App. Div. 1st Dep't 1999).

Corporation was entitled to disclosure of licensees' addresses in a request under the Freedom of Information Law (FOIL), N.Y. Pub. Off. Law art. 6 because, although the commissioner claimed that such disclosure would have been an unwarranted invasion of privacy, the commissioner failed to establish that any of the N.Y. Pub. Off. Law § 89(2)(b) categories applied or that the disclosure of addresses would have been an unwarranted invasion of privacy under N.Y. Pub. Off. Law §§ 87(2)(b), 89(2)(b); although courts have discretion to order notice of a proceeding to any person, the commissioner was not entitled to notify licensees and permit them to provide alternative addresses would have contravened the purposes of FOIL by creating a new record of addresses in response to a FOIL request to avoid disclosing the original records. Matter of Schenectady County Socy. for The Prevention of Cruelty To Animals, Inc. v Mills, 74 A.D.3d 1417, 904 N.Y.S.2d 512, 243 N.Y.L.J. 115, 2010 N.Y. App. Div. LEXIS 4592 (N.Y. App. Div. 3d Dep't 2010), aff'd, 18 N.Y.3d 42, 935 N.Y.S.2d 279, 958 N.E.2d 1194, 2011 N.Y. LEXIS 3178 (N.Y. 2011).

26. Form of request, generally

Failure of applicant for access to records to complete form prescribed by agency does not constitute valid basis for withholding records. Applicant need not present two forms of identification when request is made under Freedom of Information Law. Comm Pub Acc Rec FOIL-Ad Op 2527.

Purpose of Freedom of Information Law is to facilitate process by which records are made available by government and whether multiple requests for records are submitted separately or on one request form is irrelevant. Comm Pub Acc Rec FOIL-Ad Op 2653.

27. Information requests or questions

In response to petitioner's Freedom of Information Law requests, agencies complied with this statute because they submitted attestations regarding their searches and stating that the

requested record did not exist due to the fact that the report of the study requested had not been drafted. Matter of Empire Ctr. for Pub. Policy v New York State Energy & Research Dev. Auth., 188 A.D.3d 1556, 2020 N.Y. App. Div. LEXIS 7321 (N.Y. App. Div. 3d Dep't 2020).

Complaint did not allege that the city wrongly refused to provide the arrestee with information that he requested in 2006 and 2007 because that allegation did not state a 42 U.S.C.S. § 1983 claim, as it was not rooted in a claimed constitutional or federal statutory right. Rather, the allegation was governed by New York's Freedom of Information Law (FOIL), N.Y. Pub. Off. Law §§ 84-90, and under FOIL, challenges of information denials had to be brought in a proceeding under N.Y. C.P.L.R. art. 78, N.Y. Pub. Off. Law § 89(4), within four months after the determination to be reviewed became final, N.Y. C.P.L.R. § 217(1); however, because the arrestee did not file the claim until March 2009, and because he did not appear to have ever brought a proceeding under N.Y. C.P.L.R. art. 78, the claim was dismissed. Hayes v Perotta, 751 F. Supp. 2d 597, 2010 U.S. Dist. LEXIS 124187 (S.D.N.Y. 2010).

28. "Reasonably describe" requirement, generally

Inmate "reasonably described" documents sought under CLS Pub O § 89 from Department of Correctional Services and his correctional facility by his request "to inspect and review any and all files of records kept on me and my number of identification," where affidavit of inmate records coordinator demonstrated that correctional authorities had been able to identify inmate's institutional records, including his "central file, service unit folder, education folder, hospital records, grievance file, correspondence office file, and package room and visiting room documents," and that authorities amassed some 2,300 pages of records which inmate records coordinator estimated to represent approximately 95 percent of inmate's institutional records; such admissions contradicted authorities' assertions that they were not able to locate and identify requested files, and they accordingly failed to establish that documents were not "reasonably described." Konigsberg v Coughlin, 68 N.Y.2d 245, 508 N.Y.S.2d 393, 501 N.E.2d 1, 1986 N.Y. LEXIS 20497 (N.Y. 1986).

Trial court should have ordered disclosure the metadata associated with those photos that the agency had already disclosed to petitioner, as well as those photos deemed subject to disclosure under the Freedom of Information Law N.Y. Pub. Off. Law art. 6. Matter of Irwin v Onondaga County Resource Recovery Agency, 72 A.D.3d 314, 895 N.Y.S.2d 262, 2010 N.Y. App. Div. LEXIS 1317 (N.Y. App. Div. 4th Dep't 2010).

In a N.Y. C.P.L.R. art. 78 matter, requests by a legal defense fund and a Muslim advocacy group for information pertaining to the New York City Police Department's (NYPD's) investigation of Muslim, Arab, and South Asian communities within and outside of New York City were not reasonably described under the Freedom of Information Law, N.Y. Pub. Off. Law § 89(3), because the vast majority of the NYPD's records were not organized along racial, religious, or ethnic classifications and there was no combination of search terms that would have yielded the universe of responsive documents. Asian Am. Legal Defense & Educ. Fund v New York City Police Dept., 964 N.Y.S.2d 888, 41 Misc. 3d 471, 2013 N.Y. Misc. LEXIS 1912 (N.Y. Sup. Ct. 2013), aff'd, 125 A.D.3d 531, 5 N.Y.S.3d 13, 2015 N.Y. App. Div. LEXIS 1550 (N.Y. App. Div. 1st Dep't 2015).

b. Requestors

29. In general

Derogatory and potentially injurious information contained in police officers' personnel records did not lose its statutory shield of confidentiality under CLS Civ R § 50-a and unqualifiedly become public knowledge merely because entity seeking Freedom of Information Law access was news-gathering organization which did not intend to use records in any legal proceeding. Daily Gazette Co. v City of Schenectady, 93 N.Y.2d 145, 688 N.Y.S.2d 472, 710 N.E.2d 1072, 1999 N.Y. LEXIS 224 (N.Y. 1999).

County legislature procedures requiring member of legislature seeking records in performance of official duties to pay for copies of information sought and employing greater number of steps than outlined under § 89 is unreasonable; public officer seeking information in official capacity is not required to file forms prescribed or follow formalized procedures under § 89. Comm Pub Acc Rec FOIL-Ad Op 2449.

30. Litigants; litigation

Access to records of a government agency under the Freedom of Information Law, Pub O, Art 6, is not affected by the fact that there is pending or potential litigation between the person making the request and the agency involved since the statutory mandate of open disclosure requires that an agency's public records remain as available to its litigation adversary as to any other person and the requirements of CPLR § 3120 that documents be "specifically designated" is inapplicable under the Freedom of Information Law, the latter statute requiring merely that the records be "reasonably described," as specified in Pub O § 89(3). M. Farbman & Sons, Inc. v New York City Health & Hospitals Corp., 62 N.Y.2d 75, 476 N.Y.S.2d 69, 464 N.E.2d 437, 1984 N.Y. LEXIS 4244 (N.Y. 1984).

Petitioners who sought Freedom of Information Law disclosure of police department records pertaining to sex crimes for which they had been convicted, for use in collateral review of their convictions, did not fit within exception to statutory privilege of CLS Civ R § 50-b for persons "charged with commission of an offense" (CLS Civ R § 50-b(2)(a)) and thus they would be treated in same manner as any other person seeking access to those records. Fappiano v N.Y. City Police Dep't, 95 N.Y.2d 738, 724 N.Y.S.2d 685, 747 N.E.2d 1286, 2001 N.Y. LEXIS 573 (N.Y. 2001).

A civil litigant is unquestionably entitled, as against a claim of privilege, to obtain by way of discovery in a pending action at least the same documents that any member of the public could obtain by simply filing a Freedom of Information Law request; however, the FOIL does not entitle a member of the public to obtain a criminal investigation file. Wunsch v Rochester, 108 Misc. 2d 854, 438 N.Y.S.2d 896, 1981 N.Y. Misc. LEXIS 2303 (N.Y. Sup. Ct. 1981).

31. Prisoners; prisons

Regulation prohibiting inmates from providing unauthorized legal assistance (7 NYCRR § 270.2(B)(26)(vii)) affords sufficient notice of prohibited conduct and, in light of legitimate security interest in preventing inmates from gaining access to legal records of other inmates, does not unconstitutionally infringe on inmate's right to submit Freedom of Information Law request. Siao-Pao v Selsky, 274 A.D.2d 698, 711 N.Y.S.2d 189, 2000 N.Y. App. Div. LEXIS 7775 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 767, 717 N.Y.S.2d 547, 740 N.E.2d 653, 2000 N.Y. LEXIS 3481 (N.Y. 2000).

32. Representative capacity of requestor

Court did not abuse its discretion in denying petitioner's application seeking permission for his associate to view various records pursuant to Freedom of Information Act where (1) order, incorporating prior agreement between parties, did not authorize additional individuals to have access to documents respondents had already agreed to supply to petitioner, (2) order clearly complied with CLS Pub O § 89(3) requirement that public entity in receipt of written request for record reasonably described make it available to "person requesting it," and (3) petitioner was not aggrieved by order since respondents were willing to provide him with ample opportunity to view large number of documents during several visits to their office. Alexanian v New York, 184 A.D.2d 452, 587 N.Y.S.2d 149, 1992 N.Y. App. Div. LEXIS 8608 (N.Y. App. Div. 1st Dep't), app. denied, 80 N.Y.2d 759, 591 N.Y.S.2d 137, 605 N.E.2d 873, 1992 N.Y. LEXIS 3435 (N.Y. 1992).

In Article 78 proceeding seeking Freedom of Information Law disclosure of copies of invoices for textbooks purchased by respondent from publishing companies for sale as new texts in community college bookstore, it was of no significance that petitioner, who was investigating complaints of alleged price gouging at bookstore and intended to publish information from invoices in student newspaper, was no longer editor of college newspaper. Gray v Faculty-Student Ass'n of Hudson Valley Community College, Inc., 186 Misc. 2d 404, 717 N.Y.S.2d 507, 2000 N.Y. Misc. LEXIS 490 (N.Y. Sup. Ct. 2000).

A court may order the release of a record to any person who is or may be, affected in a civil or criminal action by the contents of

the record of any investigation of an autopsy; the spouse of an incarcerated inmate was entitled to access to autopsy records which may have been the basis for a criminal appeal. Pennington v Clark, 194 Misc. 2d 381, 755 N.Y.S.2d 195, 2002 N.Y. Misc. LEXIS 1737 (N.Y. Sup. Ct. 2002).

c. Specificity Of Requests

33. Specificity sufficient, generally

Any request made in writing which reasonably describes records will suffice as reasonable request for records under Freedom of Information Law § 89(3). Comm Pub Acc Rec FOIL-Ad Op 2653.

Applicant for access to public information meets burden of reasonably describing records where agency in receipt of request can determine nature of records sought. Comm Pub Acc Rec FOIL-Ad Op 2696.

34. —Employment; employees

Request by newspaper for access to all records received or maintained by deceased city official during specified 3-year period while official was city mayor is sufficient to meet requirements of CLS Public Officers Law § 89. Capital Newspapers, Div. of Hearst Corp. v Whalen, 113 A.D.2d 217, 495 N.Y.S.2d 979, 1985 N.Y. App. Div. LEXIS 52356 (N.Y. App. Div. 3d Dep't 1985), rev'd, 69 N.Y.2d 246, 513 N.Y.S.2d 367, 505 N.E.2d 932, 1987 N.Y. LEXIS 15362 (N.Y. 1987).

A request to the state Labor Department for portions of Title 29 of the Code of Federal Regulations after having redacted sections that might not be incorporated by reference in state regulations is proper since the point of the request in question appears to involve information regarding which federal regulation must be followed under the state Occupational Safety and Health Act (SOSHA), and the applicant reasonably described the information sought as required by Public Officers Law § 89(3). Comm Pub Acc Rec FOIL—Ad Op 1906.

35. —Police records

Freedom of Information Law requests were sufficiently specific to satisfy requirement of CLS Pub O § 89 where newspaper's request to Town Board specified name of one constable and sought town records pertaining to other constables who were suspected of sleeping while on duty, and similar request by radio station (although broader in scope because it sought information as to constables or others who were sleeping or otherwise avoiding duty) was reasonably perceived to request records in town's possession regarding town employees suspected of sleeping or consciously avoiding their duties in other ways; requests were restricted to employees, primarily constables, who were suspected of sleeping on duty or otherwise not fulfilling their employment duties, and thus subject matter was described so that town could locate records sought. Woodstock v Goodson-Todman Enterprises, Ltd., 133 Misc. 2d 12, 505 N.Y.S.2d 540, 1986 N.Y. Misc. LEXIS 2959 (N.Y. Sup. Ct. 1986).

36. —Prisons; prisoners

Documents were reasonably described, for purposes of Pub O § 89(3), where prison inmate sought "to inspect and review any and all files or records kept on me and my number of identification of the New York State Department of Correctional Services". Because FOIL request was framed sufficiently, respondents lacked authority to require greater specificity. Konigsberg v Coughlin, 68 N.Y.2d 245, 508 N.Y.S.2d 393, 501 N.E.2d 1, 1986 N.Y. LEXIS 20497 (N.Y. 1986).

37. Specificity insufficient, generally

Freedom of Information Law did not entitle petitioners to access to "[a]ll notes, records, correspondence, meeting minutes and other documents related to the adoption and/or revision of the Village Zoning Code's prohibition of commercial activity (presently Code § 170-5)" where CLS Pub O § 89(3) places burden on petitioners to "reasonably describe" documents requested so that search can be made by agency, and village showed that, in order to fully comply with petitioners' requests, one full-time employee of village clerk's office would have to manually search through every document filed with village going back over 45 years. Bader v Bove, 273 A.D.2d 466, 710 N.Y.S.2d 379, 2000 N.Y. App. Div. LEXIS 7416 (N.Y. App. Div. 2d Dep't), app. denied, 95 N.Y.2d 764, 716 N.Y.S.2d 38, 739 N.E.2d 294, 2000 N.Y. LEXIS 2871 (N.Y. 2000).

Since an agency gave a plausible explanation of its difficulty in interpreting the wording of a petitioner's FOIL requests and the petitioner's flat refusal to provide any clarification, the appeals court was satisfied that the descriptions were insufficient and the limited disclosure made in response to these requests was justified under N.Y. Pub. Off. Law § 89(3). Matter of Stein v New York State Dept. of Transp., 25 A.D.3d 846, 807 N.Y.S.2d 208, 2006 N.Y. App. Div. LEXIS 52 (N.Y. App. Div. 3d Dep't 2006).

New York State Department of Health satisfied its burden to demonstrate that an organization's request under the Freedom of Information Law did not provide a reasonable description of the records sought that was adequate to permit it to identify and locate the requested documents; it established that its indexing system did not permit searching its paper or electronic records by the name of an entity and that it had no method of searching its correspondence records for the terms provided. Matter of Reclaim the Records v New York State Dept. of Health, 185 A.D.3d 1268, 128 N.Y.S.3d 303, 2020 N.Y. App. Div. LEXIS 4104 (N.Y. App. Div. 3d Dep't 2020).

Administrative appeal did not specify that it was intended to be treated as a new request or an amendment or clarification of the original request, which could, in turn, have resulted in a new determination by the New York State Department of Health and, if necessary, a new administrative appeal because the administrative appeal merely argued that the Department had erred in denying the request; little new information was included within the administrative appeal. Matter of Reclaim the Records v New York State Dept. of Health, 185 A.D.3d 1268, 128 N.Y.S.3d 303, 2020 N.Y. App. Div. LEXIS 4104 (N.Y. App. Div. 3d Dep't 2020).

38. —Medical records

Freedom of Information Law § 89(3) requires that request for information reasonably describe records sought; request for medical records without greater specificity does not reasonably describe records, particularly where individual seeking records has lengthy medical problems. Comm Pub Acc Rec FOIL-Ad Op 2684.

39. —Real property matters, generally

40. — —Environmental; pesticides

Request for "all correspondence from any municipality, state or local government agency, private person or business enterprise of any nature concerning pesticiding" is so open ended as to not reasonably describe any records. Comm Pub Acc Rec FOIL-Ad Op 1819.

iv. Responses

a. Generally

41. In general

Blanket exemptions for particular types of documents are inimical to Freedom of Information Law's policy of open government; instead, to invoke one of exemptions of CLS Pub O § 87(2), agency must articulate "particularized and specific justification" for not disclosing requested documents. Gould v New York City Police Dep't, 89 N.Y.2d 267, 653 N.Y.S.2d 54, 675 N.E.2d 808, 1996 N.Y. LEXIS 3575 (N.Y. 1996).

Agency or other party opposing Freedom of Information Law disclosure of personnel records, on ground that disclosure is specifically exempted under CLS Pub O § 87(2)(a) by reason of CLS Civ R § 50-a, must demonstrate "substantial and realistic potential of the requested material for the abusive use against the officer or firefighter." Daily Gazette Co. v City of Schenectady, 93 N.Y.2d 145, 688 N.Y.S.2d 472, 710 N.E.2d 1072, 1999 N.Y. LEXIS 224 (N.Y. 1999).

While CLS Civ R § 50-c mandates caution by imposing civil liability on governmental entities that disclose identity of sex crime victim in violation of CLS Civ R § 50-b, that fact did not justify respondent police departments' blanket denial of Freedom of Information Law requests for documents pertaining to sex crimes for which petitioners were convicted. Fappiano v N.Y. City Police Dep't, 95 N.Y.2d 738, 724 N.Y.S.2d 685, 747 N.E.2d 1286, 2001 N.Y. LEXIS 573 (N.Y. 2001).

Department's failure to respond to owners' request for certain documents, and its failure to respond to the owners' letter

considered as an appeal of the apparent denial of the owners' initial request, were in direct violation of N.Y. Pub. Off. Law § 89(3), and summary judgment for the department in the owners' N.Y. C.P.L.R. art. 78 freedom of information case was error. Matter of Rhino Assets, LLC v New York City Dept. for the Aging, SCRIE Programs, 31 A.D.3d 292, 819 N.Y.S.2d 247, 2006 N.Y. App. Div. LEXIS 9237 (N.Y. App. Div. 1st Dep't 2006).

Although an agency initially overlooked some responsive documents, its affidavit stating that it had conducted more than one diligent search provided a sufficient certification when it disclosed more documents; there was no need to order it to search further. Matter of Gartner v New York State Attorney General's Off., 160 A.D.3d 1087, 75 N.Y.S.3d 102, 2018 N.Y. App. Div. LEXIS 2383 (N.Y. App. Div. 3d Dep't 2018).

Union's demand for the metadata of the disclosed documents was denied because the respondents e-mailed the records maintained in electronic form, as required by the Public Officers Law. Matter of Barry v O'Neill, 185 A.D.3d 503, 128 N.Y.S.3d 183, 2020 N.Y. App. Div. LEXIS 4061 (N.Y. App. Div. 1st Dep't 2020).

Because the plain language of N.Y. Pub. Off. Law § 89(3)(a), (4)(a) contemplated one final agency determination in the event responsive records were withheld, the State Department of Transportation could not subdivide a petitioner's request into sub-requests based upon the geographic region in which the responsive records were located; therefore, the petitioner was entitled to N.Y. C.P.L.R. art. 78 relief. Matter of Mazzone v New York State Dept. of Transp., 914 N.Y.S.2d 623, 30 Misc. 3d 981, 2011 N.Y. Misc. LEXIS 77 (N.Y. Sup. Ct. 2011).

An agency cannot merely assert ground for denial of access to records and prevail; on contrary, it must demonstrate that disclosure would result in harmful effect envisioned by grounds for denial. Comm Pub Acc Rec FOIL-Ad Op 2166.

There is no requirement that an agency transfer or forward its records from a central to a regional office to accommodate an applicant. Comm Pub Acc Rec FOIL-Ad Op 2792.

42. Inability to locate

Records access appeals officer responded properly under N.Y. Pub. Off. Law § 89(3) to a request for documents under the Freedom of Information Law where he provided some documents to petitioner and he certified that other requested documents could not be found despite a diligent search; petitioner did not assert any basis to find that the diligent search was not made. Matter of Daum v Tessler, 24 A.D.3d 214, 804 N.Y.S.2d 920, 2005 N.Y. App. Div. LEXIS 13988 (N.Y. App. Div. 1st Dep't 2005).

Trial court erred in ordering the New York Police Department (NYPD) to submit an affidavit describing its search for certain records requested by petitioner because the NYPD certified that it had conducted a diligent search, and except for a few properly exempt records, it could not locate documents responsive to the request. This certification satisfied the statutory requirements. Matter of Grabell v New York City Police Dept., 139 A.D.3d 477, 32 N.Y.S.3d 81, 2016 N.Y. App. Div. LEXIS 3540 (N.Y. App. Div. 1st Dep't), app. denied, 28 N.Y.3d 910, 69 N.E.3d 1022, 47 N.Y.S.3d 226, 2016 N.Y. LEXIS 3827 (N.Y. 2016).

b. Particular Cases

43. District Attorney's office; Special Prosecutor

It was proper to deny petitioner's Freedom of Information request where his belief in existence of "confessions or statements" of certain individuals bearing on crimes for which he was convicted was based on book about prosecution that was closely related to his own prosecution, but Assistant District Attorney who headed related prosecution affirmed that he conducted diligent search of District Attorney's file and did not find requested documents, and there was nothing to indicate that author of book had knowledge of contents of District Attorney's file. Lugo v Galperin, 269 A.D.2d 338, 703 N.Y.S.2d 182, 2000 N.Y. App. Div. LEXIS 2245 (N.Y. App. Div. 1st Dep't), app. denied, 95 N.Y.2d 755, 711 N.Y.S.2d 833, 733 N.E.2d 1102, 2000 N.Y. LEXIS 1401 (N.Y. 2000).

Special prosecutor was not justified in refusing to produce requested record on basis that it constituted public record on file in county clerk's office, since Freedom of Information Law does not require showing of need for requested record. Muniz v Roth, 163 Misc. 2d 293, 620 N.Y.S.2d 700, 1994 N.Y. Misc. LEXIS 559 (N.Y. Sup. Ct. 1994).

44. Employment; employees, generally

Where, in response to the applicants' request for information regarding employees of the New York City Board of Education, the City of New York Office of Payroll Administration answered that the information sought was exempt from disclosure because the ages and zip codes of Board employees was personal information, it was reported in confidence to the Board, and it was not relevant to the work of the Board, the Board failed to satisfy its burden of demonstrating that the requested material qualified for an exemption under the New York Freedom of Information Law, N.Y. Pub. Off. Law § 84 et seq.; the Office's response was parroted from the N.Y. Pub. Off. Law § 89(2)(b)(v) and was utterly devoid of any factual basis for the Office's conclusions, and the Office was a distinct agency from the nonparty Board and any sworn statements made by the Office on behalf of the Board were incompetent to support the Office's claim that the requested information was exempt from disclosure under the New York Freedom of Information Law. Daily News, L.P. v City of New York Office of Payroll Admin., 9 A.D.3d 308, 781 N.Y.S.2d 3, 2004 N.Y. App. Div. LEXIS 9791 (N.Y. App. Div. 1st Dep't), app. denied, 3 N.Y.3d 609, 786 N.Y.S.2d 812, 820 N.E.2d 291, 2004 N.Y. LEXIS 2500 (N.Y. 2004).

In a N.Y. C.P.L.R. art. 78 proceeding brought by a publisher and a journalist challenging the denial of its Freedom of Information Law, N.Y. Pub. Off. Law § 84 et seq., records request for New York State employees' payroll records, the denial on the part of the State Comptroller, the Office of State Comptroller, and the State of New York was vacated and the State was ordered to disclose certain tables that did not use social security numbers as their primary key since they were not a trade secret as well as tables that used social security numbers as their primary key as such tables were retrievable through a simple computer manipulation. However, the State properly invoked the personal privacy exemption in refusing to disclose the State employees' birth dates as the court believed that a reasonable person would find the disclosure of their precise birth dates, taken together with their full name and other details of their State employment, to be offensive and objectionable. Matter of Hearst Corp. v State, 882 N.Y.S.2d 862, 24 Misc. 3d 611, 2009 N.Y. Misc. LEXIS 868 (N.Y. Sup. Ct. 2009).

45. —Union matters

A city improperly denied a request by a union for access to city records showing the names and social security numbers of individuals employed by nonunion contractors on public works contracts under Pub O § 89 where the city offered only conclusory allegations that the list of names would be used for commercial or fund-raising purposes or that disclosure would result in economic or personal hardship. Hopkins v Buffalo, 107 A.D.2d 1028, 486 N.Y.S.2d 514, 1985 N.Y. App. Div. LEXIS 42843 (N.Y. App. Div. 4th Dep't 1985).

46. Police and other law enforcement agencies, generally

Article 78 petition to compel police department to respond to inmate's Freedom of Information Law (FOIL) request for documents relating to his conviction was properly dismissed as moot, where counsel to police department submitted affirmation averring that department conducted diligent search for documents it could not locate, and that all responsive documents had been disclosed, thereby satisfying FOIL certification requirement. Rattley v N.Y. City Police Dep't, 96 N.Y.2d 873, 730 N.Y.S.2d 768, 756 N.E.2d 56, 2001 N.Y. LEXIS 1868 (N.Y. 2001).

It was abuse of discretion for police commissioner to deny inmate's request under Freedom of Information Law based on possibility that information sought was exempt from disclosure on personal privacy grounds, on confidential information grounds, and on intra-agency grounds, where inmate sought copy of statements given to police officers involving certain arrestees because he believed that arrangement had been made between one or more of them which resulted in testimony against him; thus, inmate's Article 78 petition would be granted to extent of directing police commissioner to review requested records and either release them to inmate or specify, with particularity,

reasons for refusing to do so. Burton v Slade, 166 A.D.2d 352, 561 N.Y.S.2d 637, 1990 N.Y. App. Div. LEXIS 12839 (N.Y. App. Div. 1st Dep't 1990).

Petitioner was entitled to vacatur of police commissioner's denial of his request for records under Freedom of Information Law (FOIL) where (1) records sought were reasonably described so that search could be made, but commissioner's denial implied that records could not be located, (2) records were not directly addressed by commissioner, and (3) applicable FOIL exemptions were not identified by commissioner; commissioner failed to establish that requested material fell within ambit of statutory exemptions. Cromwell v Ward, 183 A.D.2d 459, 584 N.Y.S.2d 295, 1992 N.Y. App. Div. LEXIS 6812 (N.Y. App. Div. 1st Dep't 1992).

Fact that "lead sheets" made in connection with inmate's arrest and conviction were provided to defense counsel at inmate's criminal trial did not mandate wholesale disclosure of information contained therein under Freedom of Information Law (FOIL); inmate was entitled to production of documents only to extent they were not specifically exempt under FOIL. De Oliveira v Wagner, 274 A.D.2d 904, 711 N.Y.S.2d 592, 2000 N.Y. App. Div. LEXIS 8284 (N.Y. App. Div. 3d Dep't 2000).

Because the trial court relied on the police department's submissions tendered after the expiration of the 10-day administrative appeal in N.Y. Pub. Off. Law § 89(4)(a) response period and after the commencement of a police officer's N.Y. C.P.L.R. art. 78 proceeding, the trial court improperly considered evidence outside the administrative record in denying the officer's Freedom of Information Law request. Matter of Molloy v New York City Police Dept., 50 A.D.3d 98, 851 N.Y.S.2d 480, 2008 N.Y. App. Div. LEXIS 1029 (N.Y. App. Div. 1st Dep't 2008).

A response from the Division of Criminal Justice Services informing an applicant that the Division's files did not reveal the existence of a criminal history record pertaining to him may indeed be accurate even if the applicant had previously been arrested since CPL § 160.50 provides that if a criminal charge or proceeding against an individual is dismissed in his or her favor, records pertaining to the charge may be sealed or purged. Com Pub Acc Rec FOIL—Ad Op 1887.

47. —Police photographs

State Police Appeals Officer satisfied his obligation under Freedom of Information Law by providing photographs to petitioner, who had been convicted of murder, that had been developed in accordance with usual procedures employed by State Police; there was no obligation to enhance or reprocess photographs to improve their quality. Russo v Fitzgerald, 260 A.D.2d 738, 687 N.Y.S.2d 816, 1999 N.Y. App. Div. LEXIS 3657 (N.Y. App. Div. 3d Dep't), app. denied, 93 N.Y.2d 813, 695 N.Y.S.2d 541, 717 N.E.2d 700, 1999 N.Y. LEXIS 1912 (N.Y. 1999).

In proceeding under Freedom of Information Law, petitioner was entitled to disclosure of photographs taken by police of 43 members of antiabortion organization who were arrested at demonstration, notwithstanding that photographs were compiled for law enforcement purposes, since there was no indication as to how disclosure would interfere with law enforcement investigations or judicial proceedings, or deprive persons of right to fair trial; further, photographs would not be held exempt from disclosure as unwarranted invasion of privacy on basis of mere conclusory assertions. Planned Parenthood of Westchester, Inc. v Town Bd. of Greenburgh, 154 Misc. 2d 971, 587 N.Y.S.2d 461, 1992 N.Y. Misc. LEXIS 346 (N.Y. Sup. Ct. 1992).

48. Public works; utilities

Agency properly gave an adequate explanation under N.Y. Pub. Off. Law § 89(5)(c)(2) for its decision to deny a city's Freedom of Information Law request for a utility's cost and inventory data used to prepare a special franchise full value assessment as the agency enclosed summary level data for the city property covered by the assessment in a letter and explained that the data requested was often submitted with a claim of confidentiality and that as a result of utility deregulation and municipal takeovers of utility service, utility companies had claimed that disclosure would cause substantial injury to their competitive position. Matter of Schenectady v O'Keeffe, 50 A.D.3d 1384, 856 N.Y.S.2d 281, 2008 N.Y. App. Div. LEXIS 3294 (N.Y. App. Div. 3d Dep't), app. denied, 11 N.Y.3d 702, 864 N.Y.S.2d 389, 894 N.E.2d 653, 2008 N.Y. LEXIS 2482 (N.Y. 2008).

49. Real property, generally

Denial of a request for a "evaluation property card" regarding the applicant's property is improperly denied on the basis that the municipality need not make copies for anyone seeking record or, in the alternative, that the municipality need not provide copies since it is involved in the litigation, since Public Officers Law § 87 provides access to copies of the record, and since Public Officers Law § 89(3) requires that, upon payment of or offer to pay requisite fees, an agency must provide copies of accessible records upon request. Comm Pub Acc Rec FOIL—Ad Op 1774.

50. —Environmental matters; pesticides

Court improperly granted Freedom of Information Law petition directing Office of Emergency Management (OEM) to determine whether certain requested records existed as to spraying of Malathion and other pesticides and, if they did, provide them to petitioner or indicate why they could not be made available, where OEM explained that diligent search of its records had been conducted and that, after interviews with various OEM staff members, OEM determined that it had no other documents responsive to petitioner's request. N.Y. Envtl. Law & Justice Project v City of New York, 286 A.D.2d 307, 730 N.Y.S.2d 285, 2001 N.Y. App. Div. LEXIS 8318 (N.Y. App. Div. 1st Dep't 2001).

51. School; education matters

Any possible conclusion that school district had issued final and binding determination of Freedom of Information Law (FOIL) request was negated by letter from district superintendent that advised petitioner of allegedly proper procedure to obtain material under FOIL, and superintendent's letter at later date that responded in part to FOIL request. School district's response to Freedom of Information Law (FOIL) request became final and binding, and statute of limitations began to run against petitioner's Article 78 proceeding, on date when district's superintendent wrote letter to petitioner that responded in part to FOIL request. Orange County Publ'ns v Kiryas Joel Union Free Sch. Dist., 282 A.D.2d 604, 724 N.Y.S.2d 167, 2001 N.Y. App. Div. LEXIS 3819 (N.Y. App. Div. 2d Dep't 2001).

52. Social services

The Commissioner of Social Services rationally and reasonably complied with Pub O § 89(3) when, in response to a demand for records, stated that the department had issued 64,797 decisions, that the cost of photocopying one page thereof is 25 cents, that the records were available for inspection on business days between 8:30 a.m. and 5:00 p.m. upon receipt of the request and the time and date desired for inspection, in that Commissioner offered to make the records sought available to petitioner in that manner and at those times. Schanbarger v New York State Comm'r of Social Services, 99 A.D.2d 621, 472 N.Y.S.2d 175, 1984 N.Y. App. Div. LEXIS 16856 (N.Y. App. Div. 3d Dep't), app. dismissed, 62 N.Y.2d 604, 478 N.Y.S.2d 1023, 1984 N.Y. LEXIS 7718 (N.Y. 1984), app. denied, 62 N.Y.2d 942, 478 N.Y.S.2d 1023 (N.Y. 1984).

53. Telephone records

Town sufficiently complied with petitioner's request under Freedom of Information Law, CLS Pub O Art 6, for copies of town's cellular telephone bills for certain years by producing summary pages of bills showing costs incurred on each cellular phone for subject periods, which indicated that amounts were not excessive. Wilson v Islip, 179 A.D.2d 763, 578 N.Y.S.2d 642, 1992 N.Y. App. Div. LEXIS 679 (N.Y. App. Div. 2d Dep't 1992).

B. Timeliness

i. Generally

54. In general

Contrary to the trial court's interpretation, N.Y. Pub. Off. Law § 89(3) did not require either a grant or a denial of a Freedom of Information Law (FOIL) request within 20 days of the 5-day "acknowledgment" notice, as the 20-day period was triggered only when the agency determined to grant a request in whole or in part, and when circumstances prevent disclosure within 20 business days from the date of the acknowledgment of the receipt of the request; indeed, § 89(3) mandated no time period for denying or granting a FOIL request, and rules and regulations

purporting to establish an absolute time period had been held invalid on the ground that they were inconsistent with the statute. Matter of New York Times Co. v City of N.Y. Police Dept., 103 A.D.3d 405, 959 N.Y.S.2d 171, 2013 N.Y. App. Div. LEXIS 689 (N.Y. App. Div. 1st Dep't), app. denied, 22 N.Y.3d 854, 977 N.Y.S.2d 183, 999 N.E.2d 548, 2013 N.Y. LEXIS 2941 (N.Y. 2013).

55. Time requirement of notice prior to request

The requirement, prescribed by a fire district, that request form be completed, mailed or presented to the secretary-treasurer of the district 2 weeks prior to the request violates the time limits required for response under Public Officers Law § 89 since that law required an agency to respond to a request within 5 business days of the receipt of a request by either granting access, denying access, or acknowledging receipt of the request advising that it is necessary to review or locate the records requested. Comm Pub Acc Rec FOIL—Ad Op 1907.

56. Timeliness of production of documents

Court's imposition of 15-day time period for New York City Police Department to comply with Freedom of Information Law requests was improper; CLS Pub O § 89(3) mandates no time period for disclosing records. Legal Aid Soc'y v New York City Police Dep't, 274 A.D.2d 207, 713 N.Y.S.2d 3, 2000 N.Y. App. Div. LEXIS 8722 (N.Y. App. Div. 1st Dep't), app. denied, 95 N.Y.2d 956, 722 N.Y.S.2d 469, 745 N.E.2d 389, 2000 N.Y. LEXIS 3925 (N.Y. 2000).

As the New York State Department of Transportation (DOT) acknowledged a request for documents within five days as required by under N.Y. Pub. Off. Law § 89(3)(a), and the request resulted in about 11,000 documents, many of which were still being used, three months was not an excessive time for DOT to allow inspection of some of them and to claim that others were exempt from disclosure under N.Y. Pub. Off. Law § 87(2)(g). Miller v New York State DOT, 58 A.D.3d 981, 871 N.Y.S.2d 489, 2009 N.Y. App. Div. LEXIS 160 (N.Y. App. Div. 3d Dep't), app. denied, 12 N.Y.3d 712, 882 N.Y.S.2d 397, 909 N.E.2d 1235, 2009 N.Y. LEXIS 1786 (N.Y. 2009).

A 6-month delay by the Civil Service Department in releasing an "electronic data file" to an applicant that had requested it and had in fact paid the requisite fees for the information contained in it constitutes a "constructive" denial of access under Public Officers Law § 89(3); although an agency may acknowledge receipt of a request within 5 business days of the receipt of a request in order to locate records or evaluate their contents with respect to rights of access, regulations require that records be denied or made available within 10 business days of the acknowledgement. Comm Pub Acc Rec FOIL—Ad Op 1806.

Response to request for records indicating they would be provided within 90 days was constructive denial. Comm Pub Acc Rec FOIL-Ad Op 2805.

ii. Response to Request

57. Requirement of 5 business days for response

Committee on Open Government regulation (21 NYCRR 1401.5(d)), requiring that grant or denial of access to records must be made within 10 days after acknowledgement of request for records, is invalid as inconsistent with CLS Pub O § 89(3), which contains no such time limitation but merely requires that person requesting record be furnished with statement of approximate date when request will be granted or denied. Lecker v New York City Bd. of Educ., 157 A.D.2d 486, 549 N.Y.S.2d 673, 1990 N.Y. App. Div. LEXIS 142 (N.Y. App. Div. 1st Dep't), app. dismissed, 75 N.Y.2d 946, 555 N.Y.S.2d 692, 554 N.E.2d 1280, 1990 N.Y. LEXIS 698 (N.Y. 1990).

The failure of the Freedom of Information Officer of a psychiatric center to reply to a request for records indicating whether a applicant had attended an "investigative meeting" dealing with the psychiatric center's Youth Hope Program is improper under Public Officers Law § 89 since such law and the Committee on Public Access Regulation § 1401.5 require agency to comply to a request within 5 business days after its receipt. Comm Pub Acc Rec FOIL—Ad Op 1751.

A request for information consisting of certain HUD reports and FHA forms with addenda may be deemed to be denied upon failure of the agency to respond within 5 business days of the receipt of such requests thereby giving the applicant the right to appeal to the head of the agency or a person designated to determine appeals. Comm Pub Acc Rec FOIL—Ad Op 1825.

Agency's failure to reply to request within 5 business days, as required by Public Officers Law § 89(3) and Committee on Public Access to Record Regulation § 1401.5, constitutes a denial of access authorizing the requestor to appeal to the head of the agency involved under Public Officers Law § 89(4). Comm Pub Acc Rec FOIL—Ad Op 1846.

Trial court properly found that the publisher failed to meet the statutory prerequisites for an award of counsel fees because on the same day that the publisher's amended Freedom of Information Law request was received, the Thruway Authority provided a written acknowledgment that it had received the request and a statement of the approximate date when a response would be forthcoming, and, thus, the Authority's initial response complied with the timing requirements. Matter of Gannett Satellite Info. Network, LLC v New York State Thruway Auth., 181 A.D.3d 1072, 120 N.Y.S.3d 224, 2020 N.Y. App. Div. LEXIS 1748 (N.Y. App. Div. 3d Dep't 2020).

iii. Response And Appeal

58. In general

Proceeding was not barred by the statute of limitations, N.Y. Pub. Off. Law § 89(5)(b) because there iwas no proof in the record of the date that a determination denying petitioner's Freedom of Information Law was mailed to petitioner or when he received it. Matter of MacKenzie v Seiden, 106 A.D.3d 1140, 964 N.Y.S.2d 702, 2013 N.Y. App. Div. LEXIS 3060 (N.Y. App. Div. 3d Dep't 2013).

59. Requirement of 10 business days for appeal

Failure of agency to respond to disclosure request within designated time limits results in denial of access that may be appealed to head of agency or whomever is designated to determine appeals and such person or body has 7 [now 10] business days from receipt of appeal to render determination. Comm Pub Acc Rec FOIL-Ad Op 2651.

C. Restrictions On Access

i. Generally

60. In general

City erred in refusing to release unredacted copies of General Offense Reports to petitioner on ground that names and addresses of victims and witnesses were sought for commercial or fund-raising purpose since petitioner wanted those reports as evidence of landowner's knowledge of prior criminal activity before commencing action against owner following assault on petitioner in basement of apartment building where she was living; such use of information in maintenance of civil action to redress alleged tortious wrong was not "commercial" activity. DeCorse v City of Buffalo, 239 A.D.2d 949, 659 N.Y.S.2d 604, 1997 N.Y. App. Div. LEXIS 6376 (N.Y. App. Div. 4th Dep't 1997).

State Department of Health could not invoke CLS Pub Health §§ 2804-b and 2807-n as justification for denying news companies access, under Freedom of Information Law, to identity of physicians involved in medical records maintained by Statewide Planning and Research Cooperative System; Appellate Division's review in Article 78 proceeding is limited to specific grounds invoked by administrative agency, and post-determination legislative enactment could not serve as basis for department's actions and would not be considered. New York Times Co. v New York State Dep't of Health, 243 A.D.2d 157, 674 N.Y.S.2d 826, 1998 N.Y. App. Div. LEXIS 7774 (N.Y. App. Div. 3d Dep't 1998).

Where the news corporation, in Article 78 petition, sought disclosure from the State of New York Department of Transportation pursuant to the New York Freedom of Information Law, N.Y. Pub. Off. Law art. 6, of information from priority investigation location lists and priority investigation intersection lists that was not discoverable in lawsuits pursuant to 23 U.S.C.S. § 409, the petition was granted; construing the New York Freedom of Information Law broadly and the exemption under N.Y. Pub. Off. Law § 87(2) narrowly as required by N.Y. Pub. Off. Law § 89(4)(b), 23 U.S.C.S. § 409 did not preempt the New York Freedom of Information Law, and 23 U.S.C.S. § 409 did not apply

to N.Y. Pub. Off. Law art. 6 requests. Newsday, Inc. v N.Y. State DOT, 765 N.Y.S.2d 758, 1 Misc. 3d 321, 2003 N.Y. Misc. LEXIS 1263 (N.Y. Sup. Ct. 2003), aff'd, 10 A.D.3d 201, 780 N.Y.S.2d 402, 2004 N.Y. App. Div. LEXIS 9272 (N.Y. App. Div. 3d Dep't 2004).

61. Time restriction on access

Request for access to records pursuant to Freedom of Information Law is constructively denied where agency makes records available for review only one hour per week or per review. Comm Pub Acc Rec FOIL-Ad Op 2771.

A town may not under rules implementing Freedom of Information Law refuse to accept requests for access on a day of the week when it is open for business. Comm Pub Acc Rec FOIL-Ad Op 2809.

ii. Fees

62. In general

Because the information requester substantially prevailed within the meaning of the statute, the Appellate Division erred in determining that she failed to meet the statutory prerequisites for an award of attorneys' fees. Although the Department of Education's redactions in the eventually-released records had been upheld, the requester's legal action ultimately succeeded in obtaining substantial unredacted post-commencement disclosure responsive to her Freedom of Information Law request, including both disclosure that was volunteered by the agency and disclosure that was compelled by the trial court's order. Matter of Madeiros v New York State Educ. Dept., 30 N.Y.3d 67, 86 N.E.3d 527, 64 N.Y.S.3d 635, 2017 N.Y. LEXIS 3073 (N.Y. 2017).

Trial court erred in summarily denying appellant's petition alleging a county violated the New York Freedom of Information Law, N.Y. Pub. Off. Law § 84 et seq., as the county did not meet its burden of demonstrating that each and every cost it sought to impose for providing the records was authorized by N.Y. Pub. Off. Law § 87(1)(c). Matter of Weslowski v Vanderhoef, 98 A.D.3d 1123, 951 N.Y.S.2d 538, 2012 N.Y. App. Div. LEXIS 6249 (N.Y. App. Div. 2d Dep't 2012).

Though a petitioner successfully persuaded a trial court to release some documents withheld by the Department of Taxation and Finance from the petitioner's request under the Freedom of Information Law, N.Y. Pub. Off. Law art. 6, the trial court did not err by refusing the petitioner an award of attorney fees because the documents related to the petitioner's audit, they were case-specific and not of public interest, and the petitioner had not shown that the Department lacked a reasonable basis for withholding them pursuant to N.Y. Pub. Off. Law § 89(4)(c). Matter of Henry Schein, Inc. v Eristoff, 35 A.D.3d 1124, 827 N.Y.S.2d 718, 2006 N.Y. App. Div. LEXIS 15821 (N.Y. App. Div. 3d Dep't 2006).

As most of the redactions were appropriate with respect to a Freedom of Information Law records request, such that petitioner did not substantially prevail, she was not entitled to an award of counsel fees. Matter of Madeiros v New York State Educ. Dept., 133 A.D.3d 962, 18 N.Y.S.3d 782, 2015 N.Y. App. Div. LEXIS 8132 (N.Y. App. Div. 3d Dep't 2015), aff'd in part, modified, 30 N.Y.3d 67, 86 N.E.3d 527, 64 N.Y.S.3d 635, 2017 N.Y. LEXIS 3073 (N.Y. 2017).

63. Copying fee, generally

64. —Maximum of 25 cents per photocopied page

Practice of City of Niagara Falls of charging $4 for copies of police accident reports is improper since there is no statute under which City can charge more than 25 cents for photocopying in response to request for copies of police accident reports. Comm Pub Acc Rec FOIL-Ad Op 2713.

65. Postage costs; mailing fees

Municipality cannot charge for stationery, search or clerical time in connection with complying with requests for access to public information; however it is not unreasonable for municipality to assess fee for postage based upon actual cost of whatever postage might be. Comm Pub Acc Rec FOIL-Ad Op 2675.

66. Waiver of fees

Indigent state prison inmate seeking to corroborate claims made in habeas corpus petitions was not entitled to obtain free copies of court documents under Freedom of Information Law (FOIL), and district attorney's refusal to waive copying fee on ground of absence of provision permitting such waiver in FOIL was reasonable; inmate's remedy was to proceed as poor person in habeas corpus proceedings and seek leave of court for disclosure. Whitehead v Morgenthau, 146 Misc. 2d 806, 552 N.Y.S.2d 518, 1990 N.Y. Misc. LEXIS 73 (N.Y. Sup. Ct. 1990).

iii. Records Not Possessed Or Maintained

a. Generally

67. In general

With certain exceptions, a public entity is not required to prepare any record not possessed or maintained by it. N.Y. Pub. Off. Law § 89(3). Hall v Bongiorno, 305 A.D.2d 508, 761 N.Y.S.2d 63, 2003 N.Y. App. Div. LEXIS 5402 (N.Y. App. Div. 2d Dep't 2003).

68. "Aggregate" or statistical data

Since Freedom of Information Act, CLS Pub O § 89(3), does not require any entity to prepare records not possessed or maintained by it, respondent was not required to comply with request for "aggregate" data which it would have been required to compile from documents or records in its possession. Reubens v Murray, 194 A.D.2d 492, 599 N.Y.S.2d 580, 1993 N.Y. App. Div. LEXIS 6778 (N.Y. App. Div. 1st Dep't 1993).

69. Certification matters

There is nothing in the Freedom of Information Law that would require a district attorney to certify with respect to its view of an officer's role in the arrest of an individual. Comm Pub Acc Rec FOIL-Ad Op 2790.

70. Computerized records; tape or disks

Agency was not required by Freedom of Information Law (FOIL) to comply with applicant's request for statistical information where data necessary to compile statistical information was included in data in agency's computer, and agency did not ordinarily compile or maintain particular statistical information requested; agency would not be required to compile statistical information from written documents or records, and FOIL does not differentiate between records maintained in written form and records maintained in form of computerized tapes or discs. Guerrier v Hernandez-Cuebas, 165 A.D.2d 218, 566 N.Y.S.2d 406, 1991 N.Y. App. Div. LEXIS 1564 (N.Y. App. Div. 3d Dep't), app. denied, 78 N.Y.2d 853, 573 N.Y.S.2d 466, 577 N.E.2d 1058, 1991 N.Y. LEXIS 896 (N.Y. 1991).

Petitioner, a court employee, is entitled to receive from respondent, the Office of Court Administration, pursuant to a request under the Freedom of Information Law (Public Officers Law, art 6), a list of those court employees who have been paid $15,000 to $20,000 in back pay as a result of reclassification; although the data is not available in printed form and "[n]othing in [the Freedom of Information Law] shall be construed to require any entity to prepare any record not possessed or maintained by such entity" (Public Officers Law, § 89, subd 3), the section should not restrict access to information readily obtained from a computer, and the information sought is on computer and readily available. Babigian v Evans, 104 Misc. 2d 140, 427 N.Y.S.2d 688, 1980 N.Y. Misc. LEXIS 2290 (N.Y. Sup. Ct. 1980).

Agency lacked rational basis to deny Freedom of Information Law request for redacted electronic records concerning mandated childhood blood lead level screening, on ground that redacting confidential information from computerized data involved preparation of records not "possessed or maintained" under CLS Pub O § 89(3), because to redact computerized data would take only hours, whereas to perform redaction manually would take weeks or months and probably would not be as accurate at computer-generated redactions. N.Y. Pub. Interest Research Group v Cohen, 188 Misc. 2d 658, 729 N.Y.S.2d 379, 2001 N.Y. Misc. LEXIS 235 (N.Y. Sup. Ct. 2001).

Pursuant to a N.Y. C.P.L.R. art. 78 proceeding, although a county clerk was required to make available all documents which did not come under an exception to N.Y. Pub. Off. Law § 89 or N.Y. Pub. Off. Laws § 87(2), the court found that the clerk was not required to create a record under § 89(3) where none existed in the specified format, particularly when it would be at considerable expense to taxpayers. Data Tree LLC v Romaine, 233 N.Y.L.J. 108, 2005 N.Y. Misc. LEXIS 3373 (N.Y. Sup. Ct. 2005).

71. Effect of federal law

There is no requirement under Freedom of Information Law that a "Vaughn" index, such as is required in some circumstances under the federal Freedom of Information Act be furnished upon request. Comm Pub Acc Rec FOIL-Ad Op 2797.

72. Records for public distribution

Under Freedom of Information Law, it was not intended that government agencies be burdened with the expense and effort of preparing records for distribution to the public. Gannett Co. v County of Monroe, 59 A.D.2d 309, 399 N.Y.S.2d 534, 1977 N.Y. App. Div. LEXIS 13567 (N.Y. App. Div. 4th Dep't 1977), aff'd, 45 N.Y.2d 954, 411 N.Y.S.2d 557, 383 N.E.2d 1151, 1978 N.Y. LEXIS 2339 (N.Y. 1978).

73. Records not in retrievable format

Although a city did not establish that its denial of a Freedom of Information Law request was supported by a specific statutory exemption, as required by N.Y. Pub. Off. Law §§ 87, 89, the petitioner was entitled to N.Y. C.P.L.R. art. 78 relief to the extent that a hearing was necessary to determine precisely what would be entailed were the city to attempt to retrieve the requested documents from electronic databases and whether an undue burden would be created by requiring the city to respond to the request. Matter of New York Comm. for Occupational Safety & Health v Bloomberg, 72 A.D.3d 153, 892 N.Y.S.2d 377, 2010 N.Y. App. Div. LEXIS 75 (N.Y. App. Div. 1st Dep't 2010).

b. Particular Types Of Records

74. Employment; labor, generally

75. —Union records

Requirements of Freedom of Information Law cannot serve to compel agency to prepare records in conjunction with terms of collective bargaining agreement. Comm Pub Acc Rec FOIL-Ad Op 2672.

76. Insurance matters

Rockland County is not entitled to access to records of the Department of Civil Service consisting of "insurance experience data" since insurance carriers no longer submit such data to the Department and therefore the department has no such information. Comm Pub Acc Rec FOIL—Ad Op 1911.

77. Medical and health records

In a proceeding pursuant to N.Y. C.P.L.R. art. 78, the trial court properly denied a health care associations' Freedom of Information Law requests; the requests sought the results of an audit by an agency to determine which residents of nursing homes were underpaying, and the agency did not possess the records in question, N.Y. Pub. Off. Law § 89(3), and the association failed to support its contention that the agency failed to properly certify that the documents did not exist or that it had performed a diligent search as required by N.Y. Pub. Off. Law § 87(3). N.Y. Ass'n of Homes & Servs. for the Aging, Inc. v Novello, 13 A.D.3d 958, 786 N.Y.S.2d 827, 2004 N.Y. App. Div. LEXIS 15864 (N.Y. App. Div. 3d Dep't 2004).

A request for records pertaining to the organizational affiliations of individuals who examine candidates for the Associate Medical Care Administrator promotional exam administered during the March 1980 period may be properly denied where such records are not maintained by the Department of Social Services, since Public Officers Law § 89(3) states that an agency need not create a record in response to a request. Comm Pub Acc Rec FOIL—Ad Op 1787.

78. Police records, generally

Supreme Court properly denied petitioner's application to compel New York City Police Department to provide ballistics report and reprint of his line-up photograph, pursuant to petitioner's requests under Freedom of Information Law, since ballistics report had been destroyed and line-up photograph could not be located, and under CLS Pub O § 89(3), entity is not required to prepare any record not possessed or maintained by it. Adams v Hirsch, 182 A.D.2d 583, 582 N.Y.S.2d 724, 1992 N.Y. App. Div. LEXIS 6335 (N.Y. App. Div. 1st Dep't 1992).

Fact that records of county sheriff's department were in temporary possession of U.S. Attorney for presentation to federal grand jury did not warrant dismissal of action to compel production of records pursuant to Freedom of Information Law, CLS Pub O § 84 et seq. Buffalo Broadcasting Co. v County of Erie, 190 A.D.2d 1086, 593 N.Y.S.2d 706, 1993 N.Y. App. Div. LEXIS 1335 (N.Y. App. Div. 4th Dep't 1993).

In Article 78 proceeding, petitioner's request for statement of specific reasons for his disqualification as candidate for position of state trooper was properly denied since (1) he had already been provided with document stating that he failed to meet requirements for position, and (2) in-camera inspection disclosed no record in file which contained specific statement of reasons for his disqualification, and respondent Division of State Police was under no obligation to create such record. O'Shaughnessy v New York State Div. of State Police, 202 A.D.2d 508, 609 N.Y.S.2d 18, 1994 N.Y. App. Div. LEXIS 2584 (N.Y. App. Div. 2d Dep't), app. denied, 84 N.Y.2d 807, 621 N.Y.S.2d 516, 645 N.E.2d 1216, 1994 N.Y. LEXIS 3485 (N.Y. 1994).

District attorney was not required to prepare and produce documents not possessed or maintained by it, with certain exceptions, not applicable in the instant case to the request to obtain a fingerprint card for a certain witness, and to search for criminal records using the fingerprint card, and to search for criminal records under certain names allegedly used by the witness as an alias. . Hall v Bongiorno, 305 A.D.2d 508, 761 N.Y.S.2d 63, 2003 N.Y. App. Div. LEXIS 5402 (N.Y. App. Div. 2d Dep't 2003).

While the records sought by a journalist did not come within the sealing provisions of N.Y. Crim. Proc. Law § 160.50, because the privacy interests of parking ticket recipients was far outweighed by the public's interest in the circumstances surrounding a city's administrative dismissal of tens of thousands of tickets, pursuant to N.Y. Pub. Off. Law § 89(4)(b) and N.Y. C.P.L.R. art. 78, the journalist was entitled to disclosure as well as an award of counsel fees and costs. Matter of Hearst Corp. v City of Albany, 88 A.D.3d 1130, 931 N.Y.S.2d 713, 2011 N.Y. App. Div. LEXIS 7230 (N.Y. App. Div. 3d Dep't 2011).

Requestor's N,Y. C.P.L.R. art. 78 petition should not have been dismissed because an appeals officer's determination, under N.Y. Pub. Off. Law § 89(3)(a), that responsive documents could not be located was not based on evidence in the record, and the requestor's allegations, if proven, would provide a factual basis to support the requestor's contention that additional documents relating to the investigation of the requestor's criminal case existed and were within the police department's control. Matter of Oddone v Suffolk County Police Dept., 96 A.D.3d 758, 946 N.Y.S.2d 580, 2012 N.Y. App. Div. LEXIS 4272 (N.Y. App. Div. 2d Dep't 2012).

79. —Fingerprints

Since Public Officers Law § 89(3) specifically states that an agency generally need not create a record in response to a request, denial of various records, directives, and memoranda which authorize members of the Westchester County Department of Public Safety to fingerprint pre-trial detainees after arraignment on an indictment is proper where the Department maintains that there are no records reflective of the information sought. Comm Pub Acc Rec FOIL—Ad Op 1771.

80. Prisoners; prison records

Supreme Court properly dismissed petition seeking judgment under Freedom of Information Law requiring Department of Correctional Services to provide "the Statewide Alphabetical Listing of all inmates currently in DOCS custody, showing facility of incarceration and DIN Numbers" on ground that requested record did not exist and that CLS Pub O § 89(3) does not require agency to create record; although Department of Correctional Services might maintain "Alpha Cell Book" for each correctional facility, listing every inmate incarcerated therein, it was under no obligation to compile requested data from such records. Di Rose v New York State Dep't of Correctional Servs., 216 A.D.2d 691, 627 N.Y.S.2d 850, 1995 N.Y. App. Div. LEXIS 6386 (N.Y. App. Div. 3d Dep't 1995).

II. Unwarranted Invasion Of Personal Privacy

A. Generally

81. In general

Historian was entitled to disclosure of the names and identifying details of people, other than the people interviewed, men-

tioned in certain interview transcripts in her Freedom of Information Law request because such disclosure would not have been an unwarranted invasion of personal privacy under N.Y. Pub. Off. Law § 87(2)(b); the diminished claims of privacy were weighed against the claims of history. However, the request for the names of interviewees who were promised that no one would find out they were being interviewed was denied because it would have been unacceptable for the government to break that promise, even after all these years. Matter of Harbatkin v New York City Dept. of Records & Info. Servs., 19 N.Y.3d 373, 948 N.Y.S.2d 220, 971 N.E.2d 350, 2012 N.Y. LEXIS 1278 (N.Y. 2012), cert. denied, 568 U.S. 1157, 133 S. Ct. 1239, 185 L. Ed. 2d 177, 2013 U.S. LEXIS 1101 (U.S. 2013).

Privacy exception contained in N.Y. Pub. Off. Law § 87(2)(b) was inapplicable because any privacy interest victims had in the information contained in the documents petitioner requested was extinguished; a computer disc containing electronic communications between an inmate and his victims was admitted into evidence at the inmate's criminal trial, and the victims testified about sexual conversations they had with the inmate through a social networking site, and substantial additional testimony was adduced regarding the sexually explicit conversations between the inmate and victims. Matter of MacKenzie v Seiden, 106 A.D.3d 1140, 964 N.Y.S.2d 702, 2013 N.Y. App. Div. LEXIS 3060 (N.Y. App. Div. 3d Dep't 2013).

82. Deletion of identifying details

Statutory authority to delete identifying details as a means to remove records from what would otherwise be an exception to disclosure mandated by FOIL extends only to records whose disclosure without deletion would constitute an unwarranted invasion of personal privacy, and does not extend to records excepted in consequence of specific exemption from disclosure by State or Federal statute. Short v Board of Managers of Nassau County Medical Center, 57 N.Y.2d 399, 456 N.Y.S.2d 724, 442 N.E.2d 1235, 1982 N.Y. LEXIS 3787 (N.Y. 1982).

Petition pursuant to Article 78 of CPLR to compel disclosure under Freedom of Information Act of certain documents and records is unanimously modified since deletion of such identified information as names, addresses and social security numbers will not impede petitioner's search, yet will protect individuals involved from unwarranted invasion of their personal privacy. Harris v City University of New York, Baruch College, 114 A.D.2d 805, 495 N.Y.S.2d 175, 1985 N.Y. App. Div. LEXIS 53810 (N.Y. App. Div. 1st Dep't 1985).

As the gun tags at issue were the type of documents that could be used to impose discipline or affect continued employment or promotions, they constituted personnel records under N.Y. Civ. Rights Law § 50-a(1); therefore, the city had to redact the personal information from the tags before disclosing them to the newspapers pursuant to N.Y. Pub. Off. Law art. 6. Matter of Capital Newspapers Div. of Hearst Corp. v City of Albany, 63 A.D.3d 1336, 881 N.Y.S.2d 214, 2009 N.Y. App. Div. LEXIS 4609 (N.Y. App. Div. 3d Dep't 2009), aff'd in part, modified, 15 N.Y.3d 759, 906 N.Y.S.2d 808, 933 N.E.2d 207, 2010 N.Y. LEXIS 1351 (N.Y. 2010).

Inmate could be charged a photocopying fee under N.Y. Pub. Off. Law § 87(1)(b)(iii) for materials requested pursuant to the Freedom of Information Law, N.Y. Pub. Off. Law art. 6, as the records were properly redacted under N.Y. Pub. Off. Law § 89(2) to prevent an unwarranted invasion of privacy, and, thus, copies had to be provided, because identity of the recipients of other inmates' correspondence constituted "identifying details." Matter of Brown v Goord, 45 A.D.3d 930, 845 N.Y.S.2d 495, 2007 N.Y. App. Div. LEXIS 10962 (N.Y. App. Div. 3d Dep't 2007), app. dismissed, 10 N.Y.3d 796, 857 N.Y.S.2d 25, 886 N.E.2d 789, 2008 N.Y. LEXIS 659 (N.Y. 2008).

Trial court erred in dismissing a union's applications to review the state universities' denial of its Freedom of Information Law requests regarding the hiring of certain individuals for high-ranking positions within the universities' police departments to assess the universities' compliance with the Retirement and Social Security Law because, while the union conceded that the names and the home addresses of the unsuccessful applicants were not subject to disclosure, the universities failed to demonstrate a factual basis for their assertion that the requested documents could not be redacted in such a manner as to protect the identity of the individual applicants, and the documents in question were not submitted for an in camera review. Matter of Police Benevolent Assn. of N.Y. State, Inc. v State of New York, 145 A.D.3d 1391, 44 N.Y.S.3d 578, 2016 N.Y. App. Div. LEXIS 8769 (N.Y. App. Div. 3d Dep't 2016).

Although the records requested by petitioner contained information that was specifically exempt, such as the applicants for high-ranking offices in respondents' police departments' names and addresses, and the redaction of some of those identifying details might not prevent a reasonable member of the community from identifying certain applicants such that certain applications, or components thereof, might need to be redacted in their entirety, that circumstance did not justify a blanket denial of the release of 1,344 pages of application information from numerous applicants; not all substantive information was identifying. Matter of Police Benevolent Assn. of N.Y. State, Inc. v State of New York, 165 A.D.3d 1434, 86 N.Y.S.3d 246, 2018 N.Y. App. Div. LEXIS 6946 (N.Y. App. Div. 3d Dep't 2018).

83. Disclosure of names and addresses

Procedures of 8 NYCRR part 84 did not apply to decision by board of education to provide member of board with list of names, home addresses, job titles and salaries of all employees of board, since board member was not seeking to review personnel records of employees, and records were already accessible by general public. Buffalo Teachers Federation, Inc. v Buffalo Bd. of Educ., 156 A.D.2d 1027, 549 N.Y.S.2d 541, 1989 N.Y. App. Div. LEXIS 16244 (N.Y. App. Div. 4th Dep't 1989), app. denied, 75 N.Y.2d 708, 555 N.Y.S.2d 691, 554 N.E.2d 1279, 1990 N.Y. LEXIS 673 (N.Y. 1990).

Corporation was entitled to disclosure of licensees' addresses in a request under the Freedom of Information Law (FOIL), N.Y. Pub. Off. Law art. 6 because, although the commissioner claimed that such disclosure would have been an unwarranted invasion of privacy, the commissioner failed to establish that any of the N.Y. Pub. Off. Law § 89(2)(b) categories applied or that the disclosure of addresses would have been an unwarranted invasion of privacy under N.Y. Pub. Off. Law §§ 87(2)(b), 89(2)(b); the record failed to establish that home addresses, as opposed to business addresses, would have been disclosed, and disclosure of all addresses could not have been prevented based on speculation that there was a risk of inadvertent disclosure of private information. With no exemption established, FOIL's broad standard of open disclosure and presumption of availability required disclosure. Matter of Schenectady County Socy. for The Prevention of Cruelty To Animals, Inc. v Mills, 74 A.D.3d 1417, 904 N.Y.S.2d 512, 243 N.Y.L.J. 115, 2010 N.Y. App. Div. LEXIS 4592 (N.Y. App. Div. 3d Dep't 2010), aff'd, 18 N.Y.3d 42, 935 N.Y.S.2d 279, 958 N.E.2d 1194, 2011 N.Y. LEXIS 3178 (N.Y. 2011).

Trial court erred in ordering a city to release the home addresses of handgun licensees in electronic form because the fact that N.Y. Penal Law § 400.00(5) made the name and address of a handgun license holder "a public record" was not dispositive of whether the city could have asserted the privacy and safety exemptions to Freedom of Information Law disclosure, especially when the newspaper sought the names and addresses in electronic form; in addition, disclosing a person's home address implicated a heightened privacy concern. Matter of New York Times Co. v City of N.Y. Police Dept., 103 A.D.3d 405, 959 N.Y.S.2d 171, 2013 N.Y. App. Div. LEXIS 689 (N.Y. App. Div. 1st Dep't), app. denied, 22 N.Y.3d 854, 977 N.Y.S.2d 183, 999 N.E.2d 548, 2013 N.Y. LEXIS 2941 (N.Y. 2013).

Union employee's request for the names and addresses of non-union employees so that the union employee could verify that non-union contractors were paying employees the prevailing wage implicated significant personal privacy interests that prevailed over the public interest in disclosure of the information, particularly in light of the fact that information on employee titles and their corresponding wages had been provided to the union employee. Matter of Massaro v New York State Thruway Auth., 111 A.D.3d 1001, 974 N.Y.S.2d 636, 2013 N.Y. App. Div. LEXIS 7216 (N.Y. App. Div. 3d Dep't 2013).

Request for access to names of prison guards accused of inappropriate behavior was improperly denied by State Commission of Correction on ground that release thereof would constitute unwarranted invasion of guards' personal privacy under CLS Pub O § 89(2), since such allegations did not fit within any of 5 statutory definitions of personal privacy exemption. Faulkner v Del Giacco, 139 Misc. 2d 790, 529 N.Y.S.2d 255, 1988 N.Y. Misc. LEXIS 276 (N.Y. Sup. Ct. 1988).

Respondents demonstrated a particularized and specific justification for withholding the dates of birth and addresses of inmates from a FOIL records request, as such disclosure would result in an unwarranted invasion of personal privacy to the inmates, as well as potential harms such as identity theft. Prall v New York City Dept. of Corr., 971 N.Y.S.2d 821, 40 Misc. 3d 940, 2013 N.Y. Misc. LEXIS 2405 (N.Y. Sup. Ct. 2013), aff'd, 129 A.D.3d 734, 10 N.Y.S.3d 332, 2015 N.Y. App. Div. LEXIS 4584 (N.Y. App. Div. 2d Dep't 2015).

In dismissing an appeal, brought on behalf of employees of the school district, which sought an order prohibiting the board of education from allowing one of its board members to take home an employee list which included names, addresses, job titles and job descriptions of all employees of the district, it was pointed out that Part 84 of the Regulations which restricts the right of access by school board members relates to the examination of school employees' "personnel records." Because the board member in question was not seeking to review personnel records, the procedures set forth in Part 84 did not apply. As to violations of Freedom of Information Law, § 310, the appropriate forum for challenging alleged violations of the Freedom of Information Law is the Supreme Court of the State of New York, not an appeal to the Commissioner of Education. Appeal of Krasinski (1990) Op Comr Educ No 12323.

84. Disclosure of Social Security numbers

Court would direct county social services department to produce "any and all" records related to petitioner and his mother, after deletion of confidential identifying details, since (1) CLS Soc Serv § 373-a applied to allow petitioner access to county records pertaining to himself and his natural mother even though statute did not become effective until several years after petitioner, who had been foster child, was discharged into his own care, and (2) under Freedom of Information Law, all records of governmental agencies are presumptively available for public inspection and copying without regard to status, need, good faith, or purpose of applicant requesting access. Malowsky v D'Elia, 160 A.D.2d 798, 553 N.Y.S.2d 836, 1990 N.Y. App. Div. LEXIS 4201 (N.Y. App. Div. 2d Dep't 1990).

Records that exist that indicate amounts paid by town to engineering firm, they must, be made available, because none of grounds of denial could appropriately be asserted, and if social security numbers or home addresses are included in records, these details may be withheld on ground that disclosure would constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL AO-4690.

85. Lists sought for commercial or fund-raising purposes, generally

Police commissioner was exempt under N.Y. Pub. Off. Law §§ 87(2)(b) and 89(2)(b)(iii) from having to comply with a rifle and pistol association's request under the New York Freedom of Information Law, N.Y. Pub. Off. Law § 84 et seq., for a list, in digital format, of the names and addresses of all pistol licensees in a city because the commissioner provided specific proof of the association's intent to use the requested material for the impermissible purposes of fund-raising and/or commercial gain. Matter of New York State Rifle & Pistol Assn., Inc. v Kelly, 55 A.D.3d 222, 863 N.Y.S.2d 439, 240 N.Y.L.J. 60, 2008 N.Y. App. Div. LEXIS 6784 (N.Y. App. Div. 1st Dep't 2008).

A request directed to a state agency for a list of names and addresses which would be used for commercial or fund-raising purposes constitutes an unwarranted invasion of personal privacy and would justify the denial of access to such records under Public Officers Law § 89(2)(b)(iii). Com Pub Acc Rec FOIL—Ad Op 1865.

Agency may question purpose for which request for access to record is made only where request is for list of names and addresses in effort to ascertain whether or not list is being sought for commercial or fund-raising purposes. Comm Pub Acc Rec FOIL-Ad Op 2527.

86. Maintenance of "otherwise available right of access"

Fact that petitioner could obtain his medical records from hospital pursuant to CLS Pub Health § 18 did not diminish his right to obtain them from Department of Health under Freedom of Information Law. Mantica v New York State Dep't of Health, 94 N.Y.2d 58, 699 N.Y.S.2d 1, 721 N.E.2d 17, 1999 N.Y. LEXIS 3442 (N.Y. 1999).

Hotel owner which sought records from New York City Department of Taxation and Finance, relating to department's policies and proceedings respecting collection of hotel room occupancy taxes, was not entitled to such records under literal language of broad disclosure provisions contained in NYC Charter §§ 1058 and 1059 if they were otherwise exempt from disclosure under Freedom of Information Law. Turner v Department of Fin., 242 A.D.2d 146, 673 N.Y.S.2d 428, 1998 N.Y. App. Div. LEXIS 5959 (N.Y. App. Div. 1st Dep't 1998).

Under mandatory access provisions of Public Employee Safety and Health (PESH) Act, petitioners were entitled to review entire logs and summaries of all recordable occupational injuries and illnesses in all 17 offices of Department of Labor and, absent showing that unwarranted invasion of personal privacy would result if identity of employees were disclosed, respondents' decision to redact certain identifying information from Occupational Injury Logs constituted erroneous interpretation of law, lacked reasonable basis, and would be annulled. Goldstein v State, 188 Misc. 2d 524, 728 N.Y.S.2d 891, 2001 N.Y. Misc. LEXIS 203 (N.Y. Sup. Ct. 2001).

A newspaper editor may have access to police blotters and complaint reports reporting names of persons from prominent families involved in burglaries since Public Officers Law § 89(5) [now § 89(6)] makes it clear that nothing in the Freedom of Information Law may be cited to limit or abridge rights of access granted either by other privileges of law or by means of judicial determination and Scheehan v City of Binghamton specifically holds that police blotters are accessible. Comm Pub Acc Rec FOIL—Ad Op 1793.

Since Public Officers Law § 89(5) [now § 89(6)] preserves rights of access to records granted by other provisions of the law or judicial determination and Penal Law § 400.00(5) specifically makes applications for licenses to carry handguns and firearms a public record, denial of a request for approved licenses for handguns is improper. Com Pub Acc Rec FOIL—Ad Op 1831.

Request of a parent for copies of psychological tests or protocols of a child made by an agency is improperly denied since access to such psychological tests or protocols is available under the Federal Family Educational Rights and Privacy Act and under the Education of the Handicapped Act and while the specific provisions of the federal law do not grant a right to copy the records, Public Officers Law § 89 does allow accessible records to be photocopied and such direction remains effective for records accessible under federal law as well. Comm Pub Acc Rec FOIL—Ad Op 1851.

Nothing in Freedom of Information Law may be successfully asserted to diminish rights of access existing under other provisions of law. Comm Pub Acc Rec FOIL-Ad Op 2737.

87. Request to except certain information from disclosure

Petitioner, which responded to "Request for Proposal" (RFP) issued by New York State Department of Family Assistance, waived its right to exemption from disclosure under CLS Pub O § 87(2)(d) where RFP specifically advised petitioner, as to public information requirements, that "except for trade secrets and certain personnel information (both of which Department has reserved the right to disclose), all parts of proposals must be disclosed to those members of the general public making inquiry under the New York State Freedom of Information Law," and that "(s)hould an offeror wish to request exemption from public access to information contained in its proposal, the offeror must at the time (of) submission of its offer, specifically, identify in their

submission the information and explain in detail why public access to the information would be harmful to the offeror," and petitioner did not request exemption at time of submitting its proposal. Lockheed Martin IMS Corp. v New York State Dep't of Family Assistance, 256 A.D.2d 847, 681 N.Y.S.2d 656, 1998 N.Y. App. Div. LEXIS 13574 (N.Y. App. Div. 3d Dep't 1998).

Power company's failure to comply with CLS Pub O § 89(5) did not preclude it from relying on exemption contained in CLS Pub O § 87(2)(d); § 89(5) was not intended to apply where confidentiality was agreed to by public entity in settlement of legal dispute. Glens Falls Newspaper, Inc. v Counties of Warren & Washington Indus. Dev. Agency, 257 A.D.2d 948, 684 N.Y.S.2d 321, 1999 N.Y. App. Div. LEXIS 779 (N.Y. App. Div. 3d Dep't 1999).

Fact that petitioner expended 2,200 hours and $225,000 over 10-month period in researching, screening, analyzing and compiling air emissions data prior to submitting its "Nearby Source Verification Worksheets" to Department of Environmental Conservation, as condition of obtaining permit under CLS Pub Ser art 10, did not entitle it to "trade secret" exemption under Freedom of Information Law on ground that disclosure of worksheets to other prospective developers of electric generation facilities in area would result in substantial competitive injury, as every facility has regulatory costs attached to its operation, and petitioner failed to show that cost of compiling data in question was considerable relative to entire cost of project, or that disclosure would decrease its ability to secure proper permits. Sunset Energy Fleet L.L.C. v State Dep't of Envtl. Conservation, 285 A.D.2d 865, 728 N.Y.S.2d 279, 2001 N.Y. App. Div. LEXIS 7534 (N.Y. App. Div. 3d Dep't 2001).

Redacting confidential information from computerized records pertaining to mandated childhood blood lead level screening did not involve preparation of records not "possessed or maintained" which, under CLS Pub O § 89(3), Department of Health, was not required to create. N.Y. Pub. Interest Research Group v Cohen, 188 Misc. 2d 658, 729 N.Y.S.2d 379, 2001 N.Y. Misc. LEXIS 235 (N.Y. Sup. Ct. 2001).

There is no procedure for an individual to request that records submitted to a school district be excepted from disclosure because disclosure would be an invasion of personal privacy. Comm Pub Acc Rec OML-Ad Op 2787.

Freedom of Information Law is not absolute restriction on scope of subpoena issued under CLS Tax § 2006(10), and thus it is not sufficient for Division of Taxation to merely assert that document is privileged or exempt from disclosure; disputed document(s) must be presented to Administrative Law Judge for in camera inspection and determination made as to whether document(s) must be provided to taxpayer or is privileged and exempt from disclosure. NY Tax Appeals Tribunal TSB-D-97(39)I, 1996 N.Y. Tax LEXIS 354.

Documents shared with a federal agency were not exempt from disclosure because "agency" for freedom of information purposes does not include a federal agency, there was an express acknowledgment that the deliberative process exemption did not protect documents shared with a federal agency, and the common interest doctrine did not apply to non-confidential communications between agencies with separate counsel. Attorney's fees were proper absent reasonable basis for withholding the communications. Matter of Riverkeeper Inc. v Port Auth. of N.Y. & N.J., 66 Misc. 3d 250, 111 N.Y.S.3d 523, 2019 N.Y. Misc. LEXIS 5619 (N.Y. Sup. Ct. 2019), aff'd, 187 A.D.3d 557, 130 N.Y.S.3d 659, 2020 N.Y. App. Div. LEXIS 5965 (N.Y. App. Div. 1st Dep't 2020).

B. Particular Types Of Records

88. Animals

Results of action taken and outcome of matter presented to dog control officer relating to enforcement of local leash law is accessible under Freedom of Information Law and disclosure will not constitute unwarranted invasion of personal privacy where violation is found and record reflects violation. Comm Pub Acc Rec FOIL-Ad Op 2561.

Although the names of persons who adopt dogs after they have been held in city dog pounds for the statutory waiting period are not protected under any confidentiality standard, they may be withheld because disclosure could result in unnecessary or unwarranted intrusions, harassment or personal hardship. Comm Pub Acc Rec FOIL-Ad Op 2796.

In most instances, names, addresses and phone numbers of people complaining about dogs may be withheld from disclosure by Dog Control Officer under Freedom of Information Law, on ground that disclosure would result in unwarranted invasion of personal privacy; what is relevant to work of agency is substance of complaint, and inasmuch as identity of complainant is irrelevant, such identifying details may be deleted. Comm on Open Gov't F7976.

89. Civil rights

A request by an attorney in private practice for access to all complaints filed with the New York State Division of Human Rights between September 1, 1981 and July 1, 1982, would be granted except that the first names and addresses of the complainants would be withheld, where Pub O § 89 furnished an exception for the disclosure of lists of names and addresses if such lists would be used for commercial or fund-raising purposes to the extent that such lists might constitute an unwarranted invasion of personal privacy, and where the attorney sought the names and addresses for the benefit of his law practice, which clearly fit within the definition of commercial purposes. Goodstein v Shaw, 119 Misc. 2d 400, 463 N.Y.S.2d 162, 1983 N.Y. Misc. LEXIS 3523 (N.Y. Sup. Ct. 1983).

90. Department of Motor Vehicle (DMV) records, generally

91. —Disabilities information

Responses to question regarding current treatment for disabilities, made on application for state driver's license, are exempt from disclosure as "medical . . . histories" under Freedom of Information Law. Hanig v State Dep't of Motor Vehicles, 79 N.Y.2d 106, 580 N.Y.S.2d 715, 588 N.E.2d 750, 1992 N.Y. LEXIS 209 (N.Y. 1992).

Response given by applicant for driver's license to question on application as to whether he or she had received treatment for any disability, was not subject to disclosure under Freedom of Information Law. Hanig v State Dep't of Motor Vehicles, 168 A.D.2d 884, 564 N.Y.S.2d 805, 1990 N.Y. App. Div. LEXIS 15767 (N.Y. App. Div. 3d Dep't 1990), aff'd, 79 N.Y.2d 106, 580 N.Y.S.2d 715, 588 N.E.2d 750, 1992 N.Y. LEXIS 209 (N.Y. 1992).

92. Employment; employees, generally

92. Employment; employees, generally

Trial court erred in denying a religious publisher's petition to compel a board of education to provide copies of forms used by department of education's employees to request absences for religious observances, in cases where the request was denied, for a given period because the board conceded that it could locate the requested records, the request was not open-ended, and did not require the board to manually search every document filed with it over a broad time period. Matter of Jewish Press, Inc. v New York City Dept. of Educ., 183 A.D.3d 731, 122 N.Y.S.3d 679, 2020 N.Y. App. Div. LEXIS 2868 (N.Y. App. Div. 2d Dep't 2020).

93. —Job applications

Public employment history of City University of New York's employees, insofar as revealed on their job applications, is not shielded from disclosure as unwarranted invasion of employees' privacy under CLS Pub O § 89(2)(b)(i). Dates of attendance at academic institutions is subject to disclosure, at least where employees did not meet licensing requirements for employment when hired and thus had to have worked minimum number of years in field in order to have qualified for job; in such circumstances, agency's need for information would be great and personal hardship of disclosure small. Kwasnik v City of New York, 262 A.D.2d 171, 691 N.Y.S.2d 525, 1999 N.Y. App. Div. LEXIS 6756 (N.Y. App. Div. 1st Dep't 1999).

94. —Qualifications; certifications, ratings and the like

Department of education did not act arbitrarily and capriciously in releasing teacher data reports (TDRs) listing the teachers' names, as it could have reasonably determined that releasing the unredacted TDRs would not be an unwarranted invasion of privacy under N.Y. Pub. Off. Law § 89(2), because the data did not relate to the teachers' personal lives and the public's

interest in disclosure outweighed the teachers' privacy interest. Mulgrew v Board of Educ. of the City School Dist. of the City of N.Y., 919 N.Y.S.2d 786, 31 Misc. 3d 296, 2011 N.Y. Misc. LEXIS 128 (N.Y. Sup. Ct.), aff'd, 87 A.D.3d 506, 928 N.Y.S.2d 701, 2011 N.Y. App. Div. LEXIS 6218 (N.Y. App. Div. 1st Dep't 2011).

Department of education did not act arbitrarily and capriciously in releasing teacher data reports (TDRs) listing the teachers' names, as it could have rationally determined that, while the unredacted TDRs were intra-agency records, they were statistical tabulations of data that had to be released under N.Y. Pub. Off. Law § 87(2)(g)(i), regardless of any flaws or unreliability. Mulgrew v Board of Educ. of the City School Dist. of the City of N.Y., 919 N.Y.S.2d 786, 31 Misc. 3d 296, 2011 N.Y. Misc. LEXIS 128 (N.Y. Sup. Ct.), aff'd, 87 A.D.3d 506, 928 N.Y.S.2d 701, 2011 N.Y. App. Div. LEXIS 6218 (N.Y. App. Div. 1st Dep't 2011).

95. —Unemployment benefits

Records showing the amount of a recipient's unemployment insurance benefits and the period of time during which those benefits were received were not prohibited from disclosure pursuant to Labor § 537, but were exempted from public access under Pub C § 87 subd. 2, par. [b] as an unwarranted invasion of personal privacy, unless the person to whom it pertained had given his written consent pursuant to Pub O § 89, subd. 2, par [c], proof of which was lacking. Messina v Lufthansa German Airlines, 83 A.D.2d 831, 441 N.Y.S.2d 557, 1981 N.Y. App. Div. LEXIS 15203 (N.Y. App. Div. 2d Dep't 1981).

96. Financial matters, generally

97. —Judgment debtors; executions and attachments

Sheriff properly denied a petitioner's request under the Freedom of Information Law for access to the income executions on file, where petitioner's stated purpose in seeking access was to send correspondence to the judgment debtors, in that the sheriff met his burden of proving that release of that information would constitute an unwarranted invasion of personal privacy by demonstrating that petitioner would likely use the records for commercial purposes and the sheriff could not delete identifying details of a personal nature contained in the records which could conceivably result in economic or personal hardship to the debtors. In re Nicholas, 117 Misc. 2d 630, 458 N.Y.S.2d 858, 1983 N.Y. Misc. LEXIS 3196 (N.Y. Sup. Ct. 1983).

98. Government contractors, licensees and the like, generally

In an Article 78 proceeding, a television network news division had a right under the Freedom of Information Law of access to the names and business addresses of principals of applicants for license to operate a check cashing business and other names by which they were known. However, disclosure of their home or residence addresses could, as a result of the nature of the business they conduct, expose applicants and their families to danger to life or safety and would be withheld. American Broadcasting Cos. v Siebert, 110 Misc. 2d 744, 442 N.Y.S.2d 855, 1981 N.Y. Misc. LEXIS 3153 (N.Y. Sup. Ct. 1981).

Citizen's request, pursuant to N.Y. Pub. Off. Law § 85, for information about persons issued deer management permits was denied because disclosure would constitute an unwarranted invasion of personal privacy; the system containing the information included a broad range of personal information including the license holder's first and last name, middle initial, gender, height, eye color, date of birth, driver's license number, customer identification number, state of residency, residential address, telephone number, and other personal information. Matter of Goyer v New York State Dept. of Envtl. Conservation, 813 N.Y.S.2d 628, 12 Misc. 3d 261, 2005 N.Y. Misc. LEXIS 3114 (N.Y. Sup. Ct. 2005).

Records that exist that indicate amounts paid by town to engineering firm, they must, be made available, because none of grounds of denial could appropriately be asserted, and if social security numbers or home addresses are included in records, these details may be withheld on ground that disclosure would constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL AO-4690.

99. Guns; gun permits

Nonprofit "pro-gun activist" organization was not entitled to obtain names and addresses of persons holding rifle or shotgun permits under Freedom of Information Law (FOIL) in order to solicit membership dues to help support its informational, lobbying and other activities, since such solicitation is "fund-raising" and is thus exempted from FOIL's disclosure requirements as invasion of privacy. Federation of New York State Rifle & Pistol Clubs, Inc. v New York City Police Dep't, 73 N.Y.2d 92, 538 N.Y.S.2d 226, 535 N.E.2d 279, 1989 N.Y. LEXIS 192 (N.Y. 1989).

100. Insurance; insurance agents

Although some information required to be included in reports created pursuant to N.Y. Ins. Law § 3429 were exempt from disclosure under the Freedom of Information Law, the insurers did not show that zip code data, without more, would put them at a competitive disadvantage, as required by N.Y. Pub. Off. Law §§ 87(2)(d), 89(4)(b), (5)(e); therefore, the borough president, who was seeking the information, was entitled to N.Y. C.P.L.R. art. 78 relief. Matter of Markowitz v Serio, 11 N.Y.3d 43, 862 N.Y.S.2d 833, 893 N.E.2d 110, 2008 N.Y. LEXIS 1827 (N.Y. 2008).

CLS Pub O § 89(2)(b) did not bar Freedom of Information Law disclosure of names of insurance company employees earning over $600,000, as insurance industry is highly regulated, employees' salaries have been filed with Department of Insurance since early 1900's, and fact that employees were nongovernmental employees did not ipso facto shield their salary from public view. Disclosure of insurance industry executive's salary information under N.Y. Pub. Off. Law § 89(2)(b) was not an unwarranted invasion of privacy. Belth v N.Y. State Dep't of Ins., 189 Misc. 2d 508, 733 N.Y.S.2d 833, 2001 N.Y. Misc. LEXIS 490 (N.Y. Sup. Ct. 2001).

Personal privacy exception of CLS Pub O § 89(2)(b)(iii) does not apply to names and business addresses of newly licensed New York insurance agents. Insurance Department, Opinions of General Counsel, Opinion Number 00-08-01.

101. Lottery and other games of chance

Respondent improperly denied access to names and cities of residence (as opposed to names and actual addresses) of state lottery prize winners on ground that request was unwarranted invasion of personal privacy under CLS Pub O § 87(2)(b)(iii), although it was uncontested that lists were to be used for commercial purposes, where such information was regularly released when winners were announced and was defined as "public information" in respondent's own regulations (21 NYCRR § 2803.12). Empire Realty Corp. v New York State Div. of the Lottery, 230 A.D.2d 270, 657 N.Y.S.2d 504, 1997 N.Y. App. Div. LEXIS 5207 (N.Y. App. Div. 3d Dep't 1997).

It was improper for Division of Lottery to deny request for copies of news releases previously issued by Division from its "creation to the present relating to lottery winners," especially since Division's own regulation characterized requested information as "public" (21 NYCRR § 2803.12). Corwin Solomon & Tanebaum v New York State Div. of the Lottery, 239 A.D.2d 763, 657 N.Y.S.2d 803, 1997 N.Y. App. Div. LEXIS 5222 (N.Y. App. Div. 3d Dep't 1997).

102. Medical and health-related information, generally

State Department of Health failed to show that unwarranted invasion of patients' personal privacy would result from Supreme Court's order directing it to disclose to news companies, under Freedom of Information Law, identity of physicians involved in medical records maintained by Statewide Planning and Research Cooperative System (SPARCS) where wealth of information about patients, except for their names and their physicians' names, was already being disclosed by SPARCS, and department conceded that "even without the physician identifier, it is conceivable that one could attempt to connect the disclosable SPARCS data outlined above to invade a patient's medical privacy." New York Times Co. v New York State Dep't of Health, 243 A.D.2d 157, 674 N.Y.S.2d 826, 1998 N.Y. App. Div. LEXIS 7774 (N.Y. App. Div. 3d Dep't 1998).

Court would grant order permitting access by legal aid society to referrals by correctional institutions of prison inmates to specialist medical care where legal aid society asked that information be redacted to delete all identifying details such as names and institutional numbers; such disclosure would not be unwarranted invasion of personal privacy within CLS Pub O § 87(2)(b)

since CLS Pub O § 89(2)(c)(i) states that disclosure is not invasion if identifying details are deleted. Rold v Coughlin, 142 Misc. 2d 877, 538 N.Y.S.2d 896, 1989 N.Y. Misc. LEXIS 461 (N.Y. Sup. Ct. 1989).

As to their professional services, cardiac surgeons do not possess personal privacy interest in information collected and maintained by Department of Health in Statewide Planning and Research Cooperative System. New York Times Co. v New York State Dep't of Health, 173 Misc. 2d 310, 660 N.Y.S.2d 810, 1997 N.Y. Misc. LEXIS 248 (N.Y. Sup. Ct. 1997), aff'd, 243 A.D.2d 157, 674 N.Y.S.2d 826, 1998 N.Y. App. Div. LEXIS 7774 (N.Y. App. Div. 3d Dep't 1998).

Portions of corrections officers' accident reports that were filled out by medical personnel were privileged as medical records under N.Y. Pub. Off. Law § 89(2)(b)(ii), the Health Insurance Portability and Accountability Act, 42 U.S.C.S. § 1320d et seq., and N.Y. Pub. Health Law § 18. Matter of Canty v Office of Counsel, N.Y. State Dept. of Correctional Servs., 913 N.Y.S.2d 528, 30 Misc. 3d 705, 2010 N.Y. Misc. LEXIS 6095 (N.Y. Sup. Ct. 2010).

103. —Autopsy

Court properly dismissed Article 78 proceeding to compel Freedom of Information Law (FOIL) disclosure of autopsy report, felony complaint and ballistics report pertaining to petitioner's criminal prosecution, as those documents previously had been provided to his attorney and, in any event, autopsy reports are exempt from disclosure under New York City Charter § 557(g), statements made by witness to district attorney's office are protected by public interest privilege, and FOIL specifically exempts medical records as unwarranted invasion of privacy. Huston v Turkel, 236 A.D.2d 283, 653 N.Y.S.2d 584, 1997 N.Y. App. Div. LEXIS 1399 (N.Y. App. Div. 1st Dep't), app. denied, 90 N.Y.2d 809, 664 N.Y.S.2d 270, 686 N.E.2d 1365, 1997 N.Y. LEXIS 3170 (N.Y. 1997).

104. —Hospital records

Hospital records of witnesses who testified against petitioner at grand jury proceeding were not disclosable under Freedom of Information Law since access to such records would constitute "an unwarranted invasion of personal privacy." Newton v District Attorney of Bronx County, 186 A.D.2d 57, 588 N.Y.S.2d 269, 1992 N.Y. App. Div. LEXIS 10741 (N.Y. App. Div. 1st Dep't 1992).

Exercise of rights of personal privacy under Freedom of Information Law is limited to living persons; however, Public Health Law and statutes otherwise conferring confidentiality pertaining to medical or hospital records may continue in effect after subject of those records dies. Comm on Open Gov't F7974.

105. Police and other law enforcement agencies, generally

Police officer did not meet burden of proving that his "Lost Time Report," showing dates of his absences from employment, requested by newspaper and reporter to verify information that some police officers were abusing sick leave privileges, was exempt from disclosure as unwarranted invasion of personal privacy under CLS Pub O Law §§ 87 and 89, since report sought was neither employment history nor medical history, nor did it come within other listed categories of exemptions, and officer's assertion that release of report would cause him to suffer "economic or personal hardship" was conclusory and not supported by facts. Capital Newspapers Div. of Hearst Corp. v Burns, 67 N.Y.2d 562, 505 N.Y.S.2d 576, 496 N.E.2d 665, 1986 N.Y. LEXIS 19312 (N.Y. 1986).

Where a law enforcement agency was asked to disclose records relating to a police investigation and surveillance activities involving two specific individuals and associated organizations-information protected under the law enforcement and public safety exemptions of Public Officers Law § 87, an agency's response to neither confirm nor deny the existence of responsive documents was compatible with the FOIL statute and the precedent of the New York Court of Appeals interpreting it. Matter of Abdur-Rashid v New York City Police Dept., 31 N.Y.3d 217, 100 N.E.3d 799, 76 N.Y.S.3d 460, 2018 N.Y. LEXIS 723 (N.Y.), reh'g denied, 31 N.Y.3d 1125, 106 N.E.3d 732, 81 N.Y.S.3d 349, 2018 N.Y. LEXIS 1510 (N.Y. 2018).

Rare case where, due to the surrounding circumstances and the manner in which a Freedom of Information Law (FOIL) request is structured, acknowledging that any responsive records exist would reveal information tethered to a narrow exemption; but when a FOIL request seeks to ascertain if a specific person or organization is under investigation by the New York City Police Department Intelligence Bureau, such a response is entirely consistent with the purpose and structure of the statute. Matter of Abdur-Rashid v New York City Police Dept., 31 N.Y.3d 217, 100 N.E.3d 799, 76 N.Y.S.3d 460, 2018 N.Y. LEXIS 723 (N.Y.), reh'g denied, 31 N.Y.3d 1125, 106 N.E.3d 732, 81 N.Y.S.3d 349, 2018 N.Y. LEXIS 1510 (N.Y. 2018).

Police officer was entitled, under Freedom of Information Law (FOIL), to examination grades of all persons on supplementary lists for black and Hispanic members regarding civil service examination for police sergeant where New York City Personnel Director failed to meet burden of showing that such information fell within FOIL exemption for material the release of which would constitute "unwarranted invasion of personal privacy," in that names of officers on supplemental lists had already been disclosed, no meaningful distinction existed between names of those on list (who, by definition, had not passed exam) and their test scores, and there was no reasonable expectation of privacy with respect to exam scores of those who were promoted. Rainey v Levitt, 138 Misc. 2d 962, 525 N.Y.S.2d 551, 1988 N.Y. Misc. LEXIS 196 (N.Y. Sup. Ct. 1988).

In a N.Y. C.P.L.R. art. 78 matter, a legal defense fund and a Muslim advocacy group were not entitled to records under the Freedom of Information Law, N.Y. Pub. Off. Law §§ 87(2)(b) and 89(2), regarding the New York City Police Department's (NYPD's) surveillance of Muslim individuals, businesses, and organizations because disclosure that an individual or entity might have been named during the course of an investigation of possible terrorist activity or otherwise involved in the investigation could be quickly disseminated, causing harm to the reputation of such individual or entity, even though their connection to the investigation might later be determined to be purely coincidental. Asian Am. Legal Defense & Educ. Fund v New York City Police Dept., 964 N.Y.S.2d 888, 41 Misc. 3d 471, 2013 N.Y. Misc. LEXIS 1912 (N.Y. Sup. Ct. 2013), aff'd, 125 A.D.3d 531, 5 N.Y.S.3d 13, 2015 N.Y. App. Div. LEXIS 1550 (N.Y. App. Div. 1st Dep't 2015).

106. —Arrests

Petition in Article 78 proceeding to compel production, under New York State Freedom of Information Law (FOIL), of police records concerning release of persons arrested in riot was properly dismissed where (1) police chief's failure to perform ministerial act of filing certificate of disposition under CLS CPL § 160.50(3)(j) did not negate legislative intent, in enacting CLS CPL § 160.50, that records of persons arrested and never prosecuted be sealed, (2) thus, records sought were exempt from FOIL disclosure under CLS Pub O § 87(2)(a), and (3) requested information might also be exempt from public disclosure as "unwarranted invasion of personal liberty" under CLS Pub O § 89(2)(a). Leibowitz v Safir, 251 A.D.2d 581, 674 N.Y.S.2d 736, 1998 N.Y. App. Div. LEXIS 7500 (N.Y. App. Div. 2d Dep't), app. denied, 92 N.Y.2d 813, 680 N.Y.S.2d 906, 703 N.E.2d 764, 1998 N.Y. LEXIS 3687 (N.Y. 1998).

Police department should have granted petitioner's Freedom of Information Law request for records pertaining to his arrest and conviction, despite department's claim that records identified victim of sex offense, and that petitioner stood convicted of sex offense on which he was charged and thus did not qualify as person "charged" with sex offense entitled to such records under CLS Civ R § 50-b(2)(a), since petitioner claimed to need records for purposes of planned proceedings in federal court to overturn his conviction, and he already knew victim's name. Fappiano v New York City Police Dep't, 267 A.D.2d 156, 700 N.Y.S.2d 20, 1999 N.Y. App. Div. LEXIS 13203 (N.Y. App. Div. 1st Dep't 1999), rev'd, 95 N.Y.2d 738, 724 N.Y.S.2d 685, 747 N.E.2d 1286, 2001 N.Y. LEXIS 573 (N.Y. 2001).

In proceeding challenging denial of petitioner's request for various documents pertaining to his arrest, court improperly found that it lacked subject matter jurisdiction on ground that petitioner, who had been convicted of sex offense, was required to

avail himself of procedures outlined in CLS Civ R § 50-b(2)(b), namely, application to court having jurisdiction over sex offense; under CLS Civ R § 50-b(2)(a), "(a)ny person charged with the commission of a sex offense ... against the same victim" is not prohibited from inspecting such material, and statutory provision is not limited to individual preparing trial defense to sex offense charge. Doyen v McMahon, 271 A.D.2d 852, 706 N.Y.S.2d 252, 2000 N.Y. App. Div. LEXIS 4437 (N.Y. App. Div. 3d Dep't 2000), rev'd sub. nom., Fappiano v N.Y. City Police Dep't, 95 N.Y.2d 738, 724 N.Y.S.2d 685, 747 N.E.2d 1286, 2001 N.Y. LEXIS 573 (N.Y. 2001) sub. nom.Fappiano v New York City Police Dep't, 2001 N.Y. LEXIS 11 (N.Y. Jan. 9, 2001).

107. —Discipline, misconduct, termination and the like

Documents constituting final determination of disciplinary action finding that State Police investigator abused his official authority in obtaining information for petitioner's personal use were not immune from disclosure under privacy exemption of Freedom of Information Law since determination was not disclosure of employment history under CLS Pub O § 89(2)(b)(i) nor information of personal nature under CLS Pub O § 89(2)(b)(iv). Scaccia v New York State Div. of State Police, 138 A.D.2d 50, 530 N.Y.S.2d 309, 1988 N.Y. App. Div. LEXIS 6870 (N.Y. App. Div. 3d Dep't 1988).

Retired police officer was entitled to reasonable attorneys' fees and costs because the city police department failed to respond to his appeal of the denial of his Freedom of Information Law request within the statutory time, did not respond to the appeal until after the enforcement proceeding was commenced, and neither the denial nor the untimely appeal determination contained a reasonable basis for denying access to the retiree's requested employment records. Matter of Gallogly v City of New York, 51 Misc. 3d 296, 21 N.Y.S.3d 867, 2016 N.Y. Misc. LEXIS 18 (N.Y. Sup. Ct. 2016).

108. —Victims of crime

Statement of crime victim, record indicating amount of award to victim, and medical or similar records used in determining compensation given to victim were properly withheld by Crime Victims Board, as unwarranted invasion of privacy under CLS Pub O § 89(2)(b). Comm on Open Gov't F7979.

109. —Witnesses, including grand jury witnesses

Hospital records of witnesses who testified against petitioner at grand jury proceeding were not disclosable under Freedom of Information Law since access to such records would constitute "an unwarranted invasion of personal privacy." Newton v District Attorney of Bronx County, 186 A.D.2d 57, 588 N.Y.S.2d 269, 1992 N.Y. App. Div. LEXIS 10741 (N.Y. App. Div. 1st Dep't 1992).

In proceeding under Freedom of Information Law seeking disclosure of complaint follow-up reports ("DD-5s") produced by police department in connection with homicide investigation, fact that petitioner knew identity of witnesses interviewed by police did not preclude application of privacy exemption because he did not necessarily know what witnesses told police, which could have been information imparted in confidence, and police were not required to show that particular witness was specifically promised confidentiality if circumstances gave rise to clear inference that promise was assumed. Johnson v New York City Police Dep't, 257 A.D.2d 343, 694 N.Y.S.2d 14, 1999 N.Y. App. Div. LEXIS 7785 (N.Y. App. Div. 1st Dep't), app. dismissed, 94 N.Y.2d 791, 700 N.Y.S.2d 422, 722 N.E.2d 502, 1999 N.Y. LEXIS 3646 (N.Y. 1999).

Organization was entitled to N.Y. C.P.L.R. art. 78 relief because there was no basis under N.Y. Pub. Off. Law §§ 87(2)(e)(iii), (2)(f), or 89(1)(b) to withhold the information sought where the witnesses at issue might have exculpatory information that would help an inmate, and nothing in the record indicated that an explicit assurance of confidentiality was given or that the witnesses would be in danger. Matter of Exoneration Initiative v New York City Police Dept., 966 N.Y.S.2d 825, 39 Misc. 3d 962, 2013 N.Y. Misc. LEXIS 1342 (N.Y. Sup. Ct. 2013), aff'd in part, modified, 114 A.D.3d 436, 980 N.Y.S.2d 73, 2014 N.Y. App. Div. LEXIS 719 (N.Y. App. Div. 1st Dep't 2014).

110. Prisons and prisoners, generally

Inmate was entitled to unredacted copies of inmate grievance log entries, log supplement forms, and inmate grievance monthly reports only concerning himself; however, inmate was entitled to same documents as to other inmates with name, number, and DIN of grievance redacted. Di Rose v New York State Dep't of Correctional Servs., 226 A.D.2d 846, 640 N.Y.S.2d 353, 1996 N.Y. App. Div. LEXIS 3718 (N.Y. App. Div. 3d Dep't 1996).

Deputy Commissioner of Correctional Services properly denied inmate's Freedom of Information Law request for access to particular letter authored by his former paramour since inmate had twice been denied parole based, in part, on fact that while incarcerated he "communicated threats to kill the husband of (his) former paramour"; under circumstances, disclosure would constitute unwarranted invasion of privacy and could endanger life or safety of author (CLS Pub O § 87(2)(b)(f). Deane v Annucci, 248 A.D.2d 760, 669 N.Y.S.2d 696, 1998 N.Y. App. Div. LEXIS 2217 (N.Y. App. Div. 3d Dep't), app. denied, 92 N.Y.2d 804, 677 N.Y.S.2d 779, 700 N.E.2d 318, 1998 N.Y. LEXIS 1881 (N.Y. 1998).

Prison inmate's request for various documents, including investigator's reports and statement of witness who did not testify at trial, was properly denied since those documents were exempt from disclosure because they either were compiled for law-enforcement purposes or would constitute unwarranted invasion of privacy. Mulhall v Fitzgerald, 249 A.D.2d 852, 672 N.Y.S.2d 480, 1998 N.Y. App. Div. LEXIS 4833 (N.Y. App. Div. 3d Dep't 1998).

In convicted murderer's Article 78 proceeding under Freedom of Information Law (FOIL) to compel district attorney to disclose criminal history records of prosecution witnesses who testified at his trial, those records were not exempt from disclosure by reason of invasion of privacy exceptions to FOIL where request was narrowed on appeal by agreement that records be redacted of personal information. Williams v Erie County DA, 255 A.D.2d 863, 682 N.Y.S.2d 316, 1998 N.Y. App. Div. LEXIS 12053 (N.Y. App. Div. 4th Dep't 1998).

"Lead sheets," made in connection with inmate's arrest and conviction, regarding communications with victim's relatives, as well as information pertaining to contacts with individuals who did not provide information, were properly deemed exempt based on privacy exemption under CLS Pub O § 87(2)(b). De Oliveira v Wagner, 274 A.D.2d 904, 711 N.Y.S.2d 592, 2000 N.Y. App. Div. LEXIS 8284 (N.Y. App. Div. 3d Dep't 2000).

Court would grant order permitting access by legal aid society to referrals by correctional institutions of prison inmates to specialist medical care where legal aid society asked that information be redacted to delete all identifying details such as names and institutional numbers; such disclosure would not be unwarranted invasion of personal privacy within CLS Pub O § 87(2)(b) since CLS Pub O § 89(2)(c)(i) states that disclosure is not invasion if identifying details are deleted. Rold v Coughlin, 142 Misc. 2d 877, 538 N.Y.S.2d 896, 1989 N.Y. Misc. LEXIS 461 (N.Y. Sup. Ct. 1989).

Particularized reasons were provided for the proper withholding of a FOIL records request for photographs of inmates, as the disclosure would constitute an unwarranted invasion of privacy resulting in personal and/or economic hardship to inmates, and disclosure could endanger the lives and safety of inmates and their family members. Prall v New York City Dept. of Corr., 971 N.Y.S.2d 821, 40 Misc. 3d 940, 2013 N.Y. Misc. LEXIS 2405 (N.Y. Sup. Ct. 2013), aff'd, 129 A.D.3d 734, 10 N.Y.S.3d 332, 2015 N.Y. App. Div. LEXIS 4584 (N.Y. App. Div. 2d Dep't 2015).

Portions of corrections officers' accident reports in which they described the accident and/or injury had to be provided to an inmate, but only after making redactions under N.Y. Pub. Off. Law § 87(2)(f) to protect the confidentiality of the officers' personal information, including home addresses, dates of birth, telephone numbers and social security numbers, which could endanger their life or safety. Matter of Canty v Office of Counsel, N.Y. State Dept. of Correctional Servs., 913 N.Y.S.2d 528, 30 Misc. 3d 705, 2010 N.Y. Misc. LEXIS 6095 (N.Y. Sup. Ct. 2010).

As correction officers' accident reports had not been shown to have any relevancy to their continued employment or promotion, the reports were not exempt from disclosure under N.Y. Civ. Rights Law § 50-a or N.Y. Pub. Off. Law § 87(2)(a). Matter of Canty v Office of Counsel, N.Y. State Dept. of Correctional Servs.,

913 N.Y.S.2d 528, 30 Misc. 3d 705, 2010 N.Y. Misc. LEXIS 6095 (N.Y. Sup. Ct. 2010).

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111. —Assaults, grievances and related incidents

Only personal information which appeared in employee accident reports, employee training reports, records of interviews that were conducted with employees, and other documents which the New York Department of Correctional Services (DOCS) created after an inmate was alleged injured by a corrections officer was exempt from disclosure under N.Y. Pub. Off. Law §§ 87 and 89, and the appellate court ordered the DOCS to disclose redacted versions of the reports and records that did not contain personal information. Beyah v Goord, 309 A.D.2d 1049, 766 N.Y.S.2d 222, 2003 N.Y. App. Div. LEXIS 10931 (N.Y. App. Div. 3d Dep't 2003).

List of inmates housed in particular area of correctional facility, and who therefore may have been witnesses to assault, was not exempt from disclosure under CLS Pub O §§ 87 and 89 pertaining to unwarranted invasion of personal privacy, nor under CLS Pub O § 95 pertaining information which could endanger life or safety of any person. Bensing v Le Fevre, 133 Misc. 2d 198, 506 N.Y.S.2d 822, 1986 N.Y. Misc. LEXIS 2848 (N.Y. Sup. Ct. 1986).

Petitioners, 2 members of legal services corporation and inmate, were not entitled under Freedom of Information Law to names of Muslim inmates at certain correctional facility who had filed grievances based on being pat-frisked by female correction officers since facility's grievance program and procedures provided that its papers and information were to be confidential; thus, it was proper for facility to refuse request for identifying information after having supplied name-redacted grievance documents. Faulkner v Lefevre, 140 Misc. 2d 699, 532 N.Y.S.2d 337, 1988 N.Y. Misc. LEXIS 576 (N.Y. Sup. Ct. 1988).

112. —Videotapes

Videotapes taken by Department of Correctional Services at prison over multiyear period were not entirely exempt from disclosure as unwarranted invasion of inmate privacy since inmates at state correctional facilities, being well aware that their movements are monitored, have no legitimate expectation of privacy from any and all public portrayal of their persons; however, department could redact those portions of tapes disclosure of which would invade inmate's expectation of privacy, with department preparing and submitting description of redacted portions sufficient to allow court to determine applicability of exemption. Buffalo Broadcasting Co. v New York State Dep't of Correctional Services, 155 A.D.2d 106, 552 N.Y.S.2d 712, 1990 N.Y. App. Div. LEXIS 2940 (N.Y. App. Div. 3d Dep't 1990).

113. Real property, generally

Because questions of fact existed as to whether a provider's Freedom of Information Law request for public land records would require the county clerk to disclose private information, and whether the clerk could comply with the request in the format sought by the provider, the matter was remitted to the trial court to determine whether the clerk could provide the records pursuant to N.Y. Pub. Off. Law §§ 87(2)(b), 89(2)(c)(1), (3)(b). Matter of Data Tree, LLC v Romaine, 9 N.Y.3d 454, 849 N.Y.S.2d 489, 880 N.E.2d 10, 2007 N.Y. LEXIS 3712 (N.Y. 2007).

Petitioner's request under Freedom of Information Law, CLS Pub O Art 6, for specified Homestead Program applications submitted to town should not have been denied in its entirety, although disclosure of some material in applications would constitute unwarranted invasion of privacy, since petitioner had limited request to, and town would be required to disclose, applications involving past or present town employees redacted to reflect only employment history. Wilson v Islip, 179 A.D.2d 763, 578 N.Y.S.2d 642, 1992 N.Y. App. Div. LEXIS 679 (N.Y. App. Div. 2d Dep't 1992).

Petitioner's request, under Freedom of Information Law, for inventory of all privately owned real property in certain area was properly denied, even though deletion from inventory of names and addresses of property owners ordinarily would be sufficient remedy, where release of inventory's map numbers would still allow petitioner to identify names and addresses of listed property owners, and it was reasonable to infer that petitioner was seeking inventory for commercial purposes. Siegel, Fenchel & Peddy, P.C. v Central Pine Barrens Joint Planning & Policy Comm'n, 251 A.D.2d 670, 676 N.Y.S.2d 191, 1998 N.Y. App. Div. LEXIS 7977 (N.Y. App. Div. 2d Dep't 1998), app. denied, 93 N.Y.2d 804, 689 N.Y.S.2d 429, 711 N.E.2d 643, 1999 N.Y. LEXIS 691 (N.Y. 1999).

Objective real property inventory data, though subject to change, is always public record; however, property owner name and address portion of computer tape used to generate property inventory data mailers may be withheld if it is sought for commercial or fund-raising purpose. 10 Op. Counsel SBRPS No. 4.

There were no identifiable violations of the Freedom of Information Law (FOIL) because there was no evidence that any documents were wrongfully withheld; petitioners failed to establish that a town released any documents due to the commencement of litigation and to produce any evidence that the town did not act in good faith, and thus, any technical violations in the mode or manner of the town's responses to the FOIL requests would not warrant the imposition of costs or counsel fees. Matter of Fichera v New York State Dep't of Envtl. Conservation, 159 A.D.3d 1493, 74 N.Y.S.3d 422, 2018 N.Y. App. Div. LEXIS 2199 (N.Y. App. Div. 4th Dep't 2018).

114. —Assessment records; property taxes

Privacy exemption was properly applied to Freedom of Information Law request for inventory data for all parcels contained on assessment roll of town since petitioner intended to use information for commercial purposes; redaction of names and addresses from inventory data would not protect privacy interests since tax map numbers contained in that data would, nonetheless, enable petitioner to identify names and addresses of property owners through comparison of tax map numbers to assessment roll. Comps, Inc. v Town of Huntington, 269 A.D.2d 446, 703 N.Y.S.2d 225, 2000 N.Y. App. Div. LEXIS 1367 (N.Y. App. Div. 2d Dep't), app. denied, 95 N.Y.2d 758, 713 N.Y.S.2d 522, 735 N.E.2d 1287, 2000 N.Y. LEXIS 1832 (N.Y. 2000).

115. —Housing, including Section 8 housing matters

Payroll records of municipal housing authority were not exempted from disclosure under Freedom of Information Law by CLS Pub O § 87(2)(b) since (1) records regarding days worked, leave taken with or without pay and leave accrued were relevant to day-to-day operations of authority, and (2) authority failed to show how release of records would result in economic or personal hardship, as possibility that records could be used to discover other financial information was insufficient and claim that newspaper might use information to create embarrassing article was also insufficient. Where newspaper sought disciplinary records of municipal housing authority including each employee's name, address, job title, specific charges brought, disposition of charges, penalty imposed and level at which case was adjudicated, authority could not deny access under Freedom of Information Law on basis of CLS Pub O § 87(2)(b) since records were clearly relevant to work of authority, and therefore access was required. Buffalo News v Buffalo Municipal Housing Authority, 163 A.D.2d 830, 558 N.Y.S.2d 364 (N.Y. App. Div. 4th Dep't 1990).

Resident of middle-income housing developed under N.Y. Priv. Hous. Fin. Law art. 2 was entitled to disclosure of apartment waiting lists under N.Y. Pub. Off. Law §§ 87 and 89 by a city housing department. Under N.Y. Pub. Hous. Law § 3(14), the

exemptions of N.Y. Pub. Hous. Law § 159 applied only to public housing projects; disclosure would not constitute an unwarranted invasion of privacy because income information was not included in the lists and was not the type of personal information expressly excluded under N.Y. Pub. Off. Law § 89(2)(b); and New York City, N.Y., R. tit. 28, § 3-02(h)(10) expressly required that such lists be made available. Matter of Thomas v City of N.Y. Dept. of Hous. Preserv. & Dev., 817 N.Y.S.2d 864, 12 Misc. 3d 547, 235 N.Y.L.J. 81, 2006 N.Y. Misc. LEXIS 783 (N.Y. Sup. Ct. 2006).

116. —Land use, including building permits and environmental facilities

Requests for individual building permits sought for purpose of obtaining commercial leads should be complied with since such requests are not for lists of names and addresses as envisioned by § 89(2)(b)(iii) of Freedom of Information Law. Comm Pub Acc Rec FOIL-Ad Op 2496.

117. Schools, generally

OP No. 30 forms filed for city school district are not exempt from Freedom of Information Law disclosure, on ground that disclosure might result in unwarranted invasion of privacy, as information disclosed on such forms does not encompass sort of detail that would ordinarily and reasonably be regarded as intimate, private information. Mothers on the Move v Messer, 236 A.D.2d 408, 652 N.Y.S.2d 773, 1997 N.Y. App. Div. LEXIS 1030 (N.Y. App. Div. 2d Dep't 1997).

School district may not except from disclosure a financial statement submitted in connection with a bid despite fact they are designated "private and confidential", and any promise of confidentiality would be all but meaningless. Comm Pub Acc Rec FOIL-Ad Op 2787.

School district failed to meet its burden with respect to the assertion that disclosure of the names of the authors who submitted written comments constituted an unwarranted invasion of personal privacy because the majority of the comments disclosed were not in the nature of complaints regarding the performance of school district employees; the comments were on a matter of public interest for which the school district failed to demonstrate the authors had any expectation of privacy. Matter of Jacobson v Ithaca City Sch. Dist., 53 Misc. 3d 1091, 39 N.Y.S.3d 904, 2016 N.Y. Misc. LEXIS 3469 (N.Y. Sup. Ct. 2016).

118. —Students

A news service is entitled to obtain the results of a State-wide student drug abuse survey since disclosure of the documents will not violate a person's privacy (Public Officers Law, § 89, subd 2, pars [a], [b]; § 87, subd 2, par [b]) and since the common-law privilege shielding confidential communications between public officers will not be applied because disclosure of the document does not jeopardize the public interest. Gannett News Service, Inc. v New York Office of Alcoholism etc., 99 Misc. 2d 235, 415 N.Y.S.2d 780, 1979 N.Y. Misc. LEXIS 2238 (N.Y. Sup. Ct. 1979).

An individual's request that a community college furnish him with the names and addresses of all students enrolled at the college was properly refused, pursuant to 20 USCS § 1232g and Pub O § 87(2), where the individual did not designate such information "directory information," which would make it available to the public and, further, because the person requesting the information did not demonstrate a need for the requested disclosure, he would not be entitled to court-ordered access pursuant to the federal statute and, since a privacy right is thus established, access could also be withheld pursuant to Pub O § 87(2), particularly since the individual requesting the information failed to show that the names and addresses were not sought for" commercial or fund-raising purposes," under Pub O § 89(2). Krauss v Nassau Community College, 122 Misc. 2d 218, 469 N.Y.S.2d 553, 1983 N.Y. Misc. LEXIS 4100 (N.Y. Sup. Ct. 1983).

119. —Teachers and other school staff

Public employment history of City University of New York's employees, insofar as revealed on their job applications, is not shielded from disclosure as unwarranted invasion of employees' privacy under CLS Pub O § 89(2)(b)(i). Dates of attendance at academic institutions is subject to disclosure, at least where employees did not meet licensing requirements for employment when hired and thus had to have worked minimum number of years in field in order to have qualified for job; in such circumstances, agency's need for information would be great and personal hardship of disclosure small. Kwasnik v City of New York, 262 A.D.2d 171, 691 N.Y.S.2d 525, 1999 N.Y. App. Div. LEXIS 6756 (N.Y. App. Div. 1st Dep't 1999).

Results of disciplinary proceeding under CLS Educ § 3020-a were matter of public record and did not fall within "employment history" exception of CLS Pub O § 89, and thus dissemination of such information to media did not implicate teacher's liberty interest. DeMichele v Greenburgh Cent. Sch. Dist. No. 7, 167 F.3d 784, 1999 U.S. App. LEXIS 2344 (2d Cir. N.Y. 1999).

Access to the contents of a personnel file pertaining to an applicant which included letters of recommendation in possession of a community college may be denied under Public Officers Law § 87(2)(g) since letters of recommendation may constitute interagency or intra-agency materials not required to be disclosed and may be denied under Public Officers Law § 89(2)(b) which specifically exempts "disclosure of employment, medical or credit histories of personal references of applicants for employment". Comm Pub Acc Rec FOIL—Ad Op 1764.

120. — —Retirees, pension information and the like

The Teachers' Retirement System of the City of New York is required to disclose the names and addresses of retired New York City school teachers to a not-for-profit corporation which investigates legislation and other government action affecting the pension funds of the retirement system; the names and addresses are not exempt from disclosure under section 87 (subd 2, par [b]) or section 89 (subd 2, par [b], cl iii) of the Public Officers Law, which deny access to information which would invade personal privacy and to information to be used for commercial or funding-raising purposes, inasmuch as a nonprofit organization cannot have as its purpose a design to reap a pecuniary profit or financial gain, and dues solicitation by the corporation is not a form of fund-raising within the meaning of the Freedom of Information Law because it is merely a device to achieve the primary and acceptable purpose of information distribution. Moreover, the retirement system failed to meet its burden of showing that the material sought is protected (Public Officers Law, § 89, subd 4, par [b]), since the argument that the corporation might sell the list of retirees' names and addresses to other organizations, not-for-profit or otherwise, is speculative and does not suffice to overcome the corporation's interest in obtaining the information. New York Teachers Pension Asso. v Teachers' Retirement System, 71 A.D.2d 250, 422 N.Y.S.2d 389, 1979 N.Y. App. Div. LEXIS 13466 (N.Y. App. Div. 1st Dep't 1979), app. denied, 49 N.Y.2d 701, 426 N.Y.S.2d 1025, 403 N.E.2d 187, 1980 N.Y. LEXIS 4955 (N.Y. 1980).

121. Social services

Court would direct county social services department to produce "any and all" records related to petitioner and his mother, after deletion of confidential identifying details, since (1) CLS Soc Serv § 373-a applied to allow petitioner access to county records pertaining to himself and his natural mother even though statute did not become effective until several years after petitioner, who had been foster child, was discharged into his own care, and (2) under Freedom of Information Law, all records of governmental agencies are presumptively available for public inspection and copying without regard to status, need, good faith, or purpose of applicant requesting access. Malowsky v D'Elia, 160 A.D.2d 798, 553 N.Y.S.2d 836, 1990 N.Y. App. Div. LEXIS 4201 (N.Y. App. Div. 2d Dep't 1990).

122. Telephone records, including 911 calls

Tapes and transcripts of 911 calls made by victims and survivors on September 11, 2001, were protected as private utterances from disclosure to a newspaper reporter who sought their release under the New York Freedom of Information Law, N.Y. Pub. Off. Law art. 6; calls made by those whose families sought release could be released, as could everything said by 911 personnel unless release of material could threaten security. N.Y. Times Co. v City of New York Fire Dep't, 195 Misc. 2d 119, 754 N.Y.S.2d 517, 2003 N.Y. Misc. LEXIS 94 (N.Y. Sup. Ct. 2003), aff'd in part, modified, 3 A.D.3d 340, 770 N.Y.S.2d 324, 2004 N.Y. App. Div. LEXIS 143 (N.Y. App. Div. 1st Dep't 2004).

III. Appeals

A. Administrative Appeals

i. Generally

123. In general

Regulation promulgated by Village of Scarsdale providing that applicant for access to record must file appeal within 30 days of date of denial complies with Freedom of Information Law. Comm Pub Acc Rec FOIL-Ad Op 2554.

An additional step for appealing denials of documents established under a county Freedom of Information Law does not supersede provisions of the New York Freedom of Information Law. Comm Pub Acc Rec FOIL-Ad Op 2816.

124. Article 78 proceedings, generally

Trial court properly declined to declare that a city's responses to a newspaper's Freedom of Information Law (FOIL) requests and rulings on administrative appeals were untimely and to order the city to cease this practice because, under N.Y. Pub. Off. Law § 89(4)(a), the remedy for an untimely response or ruling was to deem the response a denial and file an N.Y. C.P.L.R. art. 78 proceeding; review of a FOIL determination did not provide for mandamus relief. The newspaper's reliance on N.Y. C.P.L.R. 3001 was unavailing. Matter of New York Times Co. v City of N.Y. Police Dept., 103 A.D.3d 405, 959 N.Y.S.2d 171, 2013 N.Y. App. Div. LEXIS 689 (N.Y. App. Div. 1st Dep't), app. denied, 22 N.Y.3d 854, 977 N.Y.S.2d 183, 999 N.E.2d 548, 2013 N.Y. LEXIS 2941 (N.Y. 2013).

125. —District Attorney's office

In Article 78 proceeding to compel district attorney to produce certain documents under Freedom of Information Law, district attorney could not be heard to complain that petitioner had failed to exhaust his administrative remedies where district attorney had failed to advise petitioner of availability of administrative appeal within district attorney's office, and failed to demonstrate in Article 78 proceeding that procedures for such appeal had, in fact, been established. Barrett v Morgenthau, 74 N.Y.2d 907, 549 N.Y.S.2d 649, 548 N.E.2d 1300, 1989 N.Y. LEXIS 3180 (N.Y. 1989).

Where district attorneys failed to timely respond to an attorney's request, by way of a letter which clarified his prior request for photographic reprints, within the five-day period required by N.Y. Pub. Off. Law § 89(3), or within the 10-day period prescribed for administrative appeals pursuant to N.Y. Pub. Off. Law § 89(4)(a), and where they failed to inform the attorney of his right to appeal after they eventually denied his request, the attorney was deemed to have exhausted his administrative remedies. Pennington v Clark, 307 A.D.2d 756, 763 N.Y.S.2d 191, 2003 N.Y. App. Div. LEXIS 7844 (N.Y. App. Div. 4th Dep't 2003).

County district attorney was not entitled to the dismissal of a proceeding filed by the minority leader of the county legislature to obtain correspondence from the DA's office to the county comptroller as N.Y. Pub. Off. Law § 89(4)(b) provided the proper remedy and the leader did not have to establish a clear legal right to the relief sought; however, the DA and the county only made a conclusory invocation of the exemption under N.Y. Pub. Off. Law § 87(2)(g) for inter-agency materials. Benedict v Albany County, 867 N.Y.S.2d 906, 22 Misc. 3d 597, 2008 N.Y. Misc. LEXIS 6866 (N.Y. Sup. Ct. 2008).

126. —Landlord and tenant

A motion by certain landlords, who were the subjects of an Attorney General's investigation concerning alleged fraudulent or illegal activity by the landlords in violation of applicable rent stabilization laws, for an order directing the Attorney General to surrender certain information pursuant to the Freedom of Information Law (Pub O, Art 6) would be denied, since the Attorney General had complied in part with the landlords' request for disclosure and had denied others of their requests, so that if the landlords were dissatisfied the proper course would be to pursue the administrative remedies provided by Pub O §§ 89(4)(a), 89(4)(b). Wiener v Abrams, 119 Misc. 2d 970, 464 N.Y.S.2d 919, 1983 N.Y. Misc. LEXIS 3629 (N.Y. Sup. Ct. 1983).

127. —Police and other law enforcement agencies

Where an applicant was invalidly denied access to information of a town's police department, a two-step appeal procedure required by local law, whereby applicant must appeal to the police chief and to the town board, is invalid as a violation of proper appeal procedure of § 89(4)(a) of the Public Officers Law. Comm Pub Acc Rec FOIL-Ad Op 2329.

128. —Prisons; prisoners

In Article 78 proceeding, petitioner was properly denied counsel fees in connection with request under Freedom of Information Law (FOIL) for names of inmates confined in correctional facility's special housing unit where petitioner, as paralegal for prisoners' legal services organization, stated only that request was made "with an eye to possible litigation," since petitioner failed to meet requirement of CLS Pub O § 89(4)(c) that counsel fees are recoverable in FOIL proceeding only if information sought is of "clearly significant interest to the general public." Wurster v Le Fevre, 152 A.D.2d 810, 543 N.Y.S.2d 591, 1989 N.Y. App. Div. LEXIS 9329 (N.Y. App. Div. 3d Dep't 1989).

Although failure to administratively appeal police department's adverse ruling under Freedom of Information Law (FOIL) within 30-day period provided for in CLS Pub O § 89(4)(a) normally precludes judicial review, inmate would be permitted to commence administrative appeal in light of fact that police department failed to address inmate's FOIL request until inmate commenced Article 78 proceeding regarding request. Newton v Police Dep't of New York, 183 A.D.2d 621, 585 N.Y.S.2d 5, 1992 N.Y. App. Div. LEXIS 7562 (N.Y. App. Div. 1st Dep't 1992).

Although the failure of the Division of Parole to respond within five days to a letter from petitioner requesting access to certain information contained in his parole records for use at a final parole revocation hearing would be properly construed as a denial of his request, petitioner would not be entitled, in an Article 78 proceeding, to an order granting access to the requested information, since he failed to make a timely written appeal pursuant to Public Officers Law § 89 and thus failed to exhaust his administrative remedies. Robertson v Chairman of New York State Bd. of Parole, 122 Misc. 2d 829, 471 N.Y.S.2d 1015, 1984 N.Y. Misc. LEXIS 2903 (N.Y. Sup. Ct. 1984).

129. —Schools

Petitioner seeking records from school district under Freedom of Information Law did not fail to exhaust its administrative remedies where school district did not advise it of availability of administrative appeal, and did not demonstrate in Article 78 proceeding that procedures for such appeal had even been established. Orange County Publ'ns v Kiryas Joel Union Free Sch. Dist., 282 A.D.2d 604, 724 N.Y.S.2d 167, 2001 N.Y. App. Div. LEXIS 3819 (N.Y. App. Div. 2d Dep't 2001).

Fact that petitioner, requesting records from school district under Freedom of Information Law, was aware, in theory, of availability of administrative review of denial of its request, did not relieve school district of its responsibility to advise petitioner that such review was available, and of procedures for securing it. Orange County Publ'ns v Kiryas Joel Union Free Sch. Dist., 282 A.D.2d 604, 724 N.Y.S.2d 167, 2001 N.Y. App. Div. LEXIS 3819 (N.Y. App. Div. 2d Dep't 2001).

In dismissing an appeal, brought on behalf of employees of the school district, which sought an order prohibiting the board of education from allowing one of its board members to take home an employee list which included names, addresses, job titles and job descriptions of all employees of the district, it was pointed out that Part 84 of the Regulations which restricts the right of access by school board members relates to the examination of school employees' "personnel records." Because the board member in question was not seeking to review personnel records, the procedures set forth in Part 84 did not apply. As to violations of Freedom of Information Law, § 310, appropriate forum for challenging alleged violations of the Freedom of Information Law is the Supreme Court of the State of New York, not an appeal to the Commissioner of Education. Appeal of Krasinski (1990) Op Comr Educ No 12323.

An appeal to the Commissioner of Education is not the proper forum for addressing claims relating to violations of the Freedom of Information Law. The appropriate form for challenging alleged violations of the Freedom of Information Law is the Supreme Court of the State of New York, and not in an appeal before the

Commissioner of Education. Appeal Alexandreena D, 1990 Op Comr Educ No 12433.

130. Public hearing requirement

Appropriate forum for addressing alleged Freedom of Information Law violations is Supreme Court of State of New York, not appeal to Commissioner of Education under CLS Educ § 310. 1996 Op Comm Ed No. 13719.

131. Timely determination requirement

The seven [now 10] day limitations set forth in Pub O § 89, which provides that on an interagency appeal under the Freedom of Information Law the designated appeal authorities shall within seven business days of the receipt of an appeal from a denial of access to a record explain in writing the reasons for further denial or provide access to the records sought, should be read as directory, not mandatory, and the consequence of failure to comply with that limitation is that the applicant would be deemed to have exhausted his administrative remedies and would be entitled to seek a judicial remedy. Accordingly, where Special Term in an Article 78 proceeding commenced by petitioner 19 days after taking his appeal and after having received no response, interpreted the statute as mandatory and directed the furnishing of the material requested without regard to its exemption from disclosure under the Freedom of Information Law, the matter would be remanded to Special Term to determine whether the material fell within one of the exemptions. Floyd v McGuire, 87 A.D.2d 388, 452 N.Y.S.2d 416, 1982 N.Y. App. Div. LEXIS 16563 (N.Y. App. Div. 1st Dep't), app. dismissed, 57 N.Y.2d 774, 1982 N.Y. LEXIS 4344 (N.Y. 1982).

ii. Appeals Officer

132. In general

When determination on appeal is made, appeals person or body must either forward written determination fully explaining reason for further denial to applicant or provide access to records that were initially denied. Comm Pub Acc Rec FOIL-Ad Op 2601.

133. Appeals office for education matters

An appeal to the Commissioner of Education is not the proper forum for addressing claims relating to violations of the Freedom of Information Law. The appropriate form for challenging alleged violations of the Freedom of Information Law is the Supreme Court of the State of New York, and not in an appeal before the Commissioner of Education. Appeal Alexandreena D, 1990 Op Comr Educ No 12433.

School district must have person or body designated to render determinations on appeal following denial of access to records under Freedom of Information Law. Comm Pub Acc Rec FOIL-Ad Op 2724.

Designation of individual as both records access officer and appeals officer of Board of Education of Lyndenhurst School District is improper since single individual cannot serve as both records access officer and appeals officer. Comm Pub Acc Rec FOIL-Ad Op 2752.

134. Appeals officer for municipalities

Town board as governing body of municipality and as appeals body for purposes of Freedom of Information Law is required to transmit to committee on Public Access to Records copies of appeals relating to denial of access to records and determinations that follow. Comm Pub Acc Rec FOIL-Ad Op 2597.

135. Appeals officer for prisoners

The Deputy Commissioner of Legal Matters would be presumed to be the person designated, within the meaning of Pub O § 89, to receive a state prisoner's appeal of the New York City Police Department's denial of his Freedom of Information Law request, although the department had made no formal designation, where the letter transmitting the department's denial to the prisoner had stated that any appeal of the decision should be made to the deputy commissioner. Floyd v McGuire, 108 Misc. 2d 536, 437 N.Y.S.2d 886, 1981 N.Y. Misc. LEXIS 2235 (N.Y. Sup. Ct. 1981), rev'd, 87 A.D.2d 388, 452 N.Y.S.2d 416, 1982 N.Y. App. Div. LEXIS 16563 (N.Y. App. Div. 1st Dep't 1982).

136. Requirement that records access officer and appeals officer cannot be same person

Designation of individual as both records access officer and appeals officer of Board of Education of Lyndenhurst School District is improper since single individual cannot serve as both records access officer and appeals officer. Comm Pub Acc Rec FOIL-Ad Op 2752.

B. Judicial Review

137. In general

Respondent was not precluded from raising, for first time in Article 78 proceeding, additional ground for denying petitioner's request under Freedom of Information Law (FOIL); rationale behind rule limiting court's review to ground invoked by agency does not apply to FOIL review, which has its own substantive law and does not fit into traditional writs. Harvey v Hynes, 174 Misc. 2d 174, 665 N.Y.S.2d 1000, 1997 N.Y. Misc. LEXIS 533 (N.Y. Sup. Ct. 1997).

Because bidder's request for a competitor's "pricing information" under the Freedom of Information Law, N.Y. Pub. Off. Law art. 6, was not raised before the trial court, and as its argument regarding the search of a procurement entity's records was not raised in the bidder's administrative appeal, the bidder was not entitled to N.Y. C.P.L.R. art. 78 relief. Matter of Matter of Solutions Economics, LLC v Long Is. Power Auth., 97 A.D.3d 593, 948 N.Y.S.2d 100, 2012 N.Y. App. Div. LEXIS 5290 (N.Y. App. Div. 2d Dep't), app. denied, 20 N.Y.3d 851, 956 N.Y.S.2d 484, 980 N.E.2d 534, 2012 N.Y. LEXIS 3466 (N.Y. 2012).

138. Attorney fees as reviewable on appeal

In Article 78 proceeding, award of attorneys' fees under CLS Pub O § 89(4)(c) is within sound discretion of trial court and determination should not be disturbed on appeal unless abuse of discretion is shown. In Article 78 proceeding to obtain various documents from Department of Correctional Services which was dismissed as moot after all documents were released, court did not abuse its discretion in denying award of attorneys' fees to petitioner under CLS Pub O § 89(4)(c) where evidence demonstrated that department commenced work on petitioner's complex request for documents on day it was received and was unable to sooner complete task because of difficulty in locating and assembling extensive and complex records. Friedland v Maloney, 148 A.D.2d 814, 538 N.Y.S.2d 650, 1989 N.Y. App. Div. LEXIS 2376 (N.Y. App. Div. 3d Dep't 1989).

Although a Freedom of Information Law records requester substantially prevailed in a proceeding to obtain unredacted records of a village's deer management program, he was not entitled to an award of counsel fees and costs because the redactions were made in good faith. Matter of Laveck v Village Bd. of Trustees of the Vil. of Lansing, 145 A.D.3d 1168, 42 N.Y.S.3d 460, 2016 N.Y. App. Div. LEXIS 7991 (N.Y. App. Div. 3d Dep't 2016).

Trial court erred in denying the landowners' request for counsel fees and costs because the Department of Environmental Conservation failed to respond to their appeal until after the commencement of the action/proceeding, which constituted a constructive denial that went against the purpose of the Freedom of Information Law. Matter of 101CO, LLC v New York State Dept. of Envtl. Conservation, 169 A.D.3d 1307, 95 N.Y.S.3d 404, 2019 N.Y. App. Div. LEXIS 1471 (N.Y. App. Div. 3d Dep't 2019).

Trial court properly denied a billing consultant's request for an award of counsel fees under Public Officers Law § 89(4)(c) because, while the response by the public service commission (PSC) to the consultant's administrative appeal—from the denial of its request under the Freedom of Information Law—was untimely and the consultant prevailed when the requested records were turned over to it, the PSC reasonably believed the case file to be exempt from disclosure when they denied the consultant access to it. Matter of Utility Rate Analysis Consultants (URAC) Corp. v Public Serv. Commn. of The State of N.Y., 171 A.D.3d 1279, 97 N.Y.S.3d 757, 2019 N.Y. App. Div. LEXIS 2600 (N.Y. App. Div. 3d Dep't 2019).

Trial court properly granted the petitioners' request for attorney's fees and litigation costs because a city failed to respond to their requests for certain records pursuant to the Freedom of Information Law (FOIL), the petitioners "substantially prevailed" in the proceeding since the city failed to respond to the FOIL request within five business days of receiving it, failed to respond to the FOIL appeal within 10 business days of receiving it, and

despite the city's assertion that it delegated its responsibility to respond to the request to a development agency, the petitioners also sent a FOIL request to the agency, and there was no indication in its responses that it was responding on behalf of the city. Matter of LTTR Home Care, LLC v City of Mount Vernon, 179 A.D.3d 798, 116 N.Y.S.3d 679, 2020 N.Y. App. Div. LEXIS 278 (N.Y. App. Div. 2d Dep't 2020).

Trial court abused its discretion in declining to include the counsel fees and costs arising from the prior appeal because the portion of the prior appeal relating to petitioners' Freedom of Information Law claim stemmed from the very kinds of unreasonable delays and denials of access which the counsel fee provision sought to deter. Matter of 101CO, LLC v New York State Dept. of Envtl. Conservation, 2020 N.Y. App. Div. LEXIS 8147 (N.Y. App. Div. 3d Dep't 2020).

Reasonable attorney's fees and litigation costs were not warranted to a FOIL records requester because the requester was not the prevailing party in the proceeding; the undisclosed records were within various statutory exemptions. Prall v New York City Dept. of Corr., 971 N.Y.S.2d 821, 40 Misc. 3d 940, 2013 N.Y. Misc. LEXIS 2405 (N.Y. Sup. Ct. 2013), aff'd, 129 A.D.3d 734, 10 N.Y.S.3d 332, 2015 N.Y. App. Div. LEXIS 4584 (N.Y. App. Div. 2d Dep't 2015).

Freedom of Information Law permits court to award reasonable attorney fees to member of public in certain circumstances where such person successfully challenges denial of access to records. Comm Pub Acc Rec FOIL-Ad Op 2540.

Inmate was not entitled to attorneys' fees in his Freedom of Information action because the Department of Corrections and Community Supervision had a reasonable basis for denying access given the novelty of the video recording issue. Matter of Green v Annucci, 59 Misc. 3d 452, 70 N.Y.S.3d 746, 2017 N.Y. Misc. LEXIS 5345 (N.Y. Sup. Ct. 2017).

139. Burden of proof, generally

A person claiming an exception to disclosure under the Freedom of Information Law has the burden of proving entitlement to the exception (Pub O § 89(5)(e)); hence, in an Article 78 proceeding to review the denial of access to certain records of a county police department pertaining to the absences of a certain detective, the usual standard of review in Article 78 proceeding that the agency's determination will not be set aside unless arbitrary, capricious or without rational basis was not applicable, and detective bore the burden of proving entitlement to any exception. Although the information sought did not constitute a personnel record within the meaning of Civ R § 50-a, which exempts such records from disclosure as to police officers, the legislative intent in enacting that statute was for the narrow purpose of preventing time-consuming and vexatious investigation into irrelevant collateral matters in a civil or criminal action, not to create a blanket exemption from disclosure of personnel records of police officers, and thus the exemption was inapplicable. Capital Newspapers Div. of Hearst Corp. v Burns, 109 A.D.2d 92, 490 N.Y.S.2d 651, 1985 N.Y. App. Div. LEXIS 56643 (N.Y. App. Div. 3d Dep't 1985), aff'd, 67 N.Y.2d 562, 505 N.Y.S.2d 576, 496 N.E.2d 665, 1986 N.Y. LEXIS 19312 (N.Y. 1986).

Petitioner's Article 78 petition, challenging denial of his request under Freedom of Information Law (CLS Pub O Art 6; FOIL) for copies of memo book entries made by officers who investigated armed robberies for which he was convicted, was improperly dismissed based on ground that hearing agency's determination was neither arbitrary nor capricious, since this standard was not applicable to issue of whether particular document was exempt from disclosure under FOIL, and respondent did not prove entitlement to exception by merely asserting that entries fell within exemption for records which, if disclosed, would identify confidential source or disclose confidential information. Laureano v Grimes, 179 A.D.2d 602, 579 N.Y.S.2d 357, 1992 N.Y. App. Div. LEXIS 911 (N.Y. App. Div. 1st Dep't 1992).

In Article 78 proceeding to review denial of petitioner's Freedom of Information law requests for physician identifier information contained in Statewide Planning and Research Cooperative System, issues related to privacy interests of physicians could not be used by court to justify agency's determination, where Department of Health had denied petitioner's requests solely on basis of privacy interests of patients, without comment on need to protect privacy of physicians. New York Times Co. v New York State Dep't of Health, 173 Misc. 2d 310, 660 N.Y.S.2d 810, 1997 N.Y. Misc. LEXIS 248 (N.Y. Sup. Ct. 1997), aff'd, 243 A.D.2d 157, 674 N.Y.S.2d 826, 1998 N.Y. App. Div. LEXIS 7774 (N.Y. App. Div. 3d Dep't 1998).

Court denied Article 78 petition to require respondent district attorney's office to turn over records relating to petitioner's arrest and indictment 10 years earlier pursuant to Freedom of Information Law, where respondent provided sufficiently detailed basis to show that it conducted diligent search for requested records and was unable to find them, and petitioner did not offer factual basis for his claim otherwise. Anzalone v Bonanno, 176 Misc. 2d 159, 670 N.Y.S.2d 1013, 1998 N.Y. Misc. LEXIS 95 (N.Y. Sup. Ct. 1998).

When a resident of middle-income housing sought disclosure of apartment waiting lists by a city housing department, the department had the burden under N.Y. Pub. Off. Law § 89(4)(b) of proving that the records were statutorily exempt from disclosure. Accordingly, the more restrictive standards of review under an ordinary N.Y. C.P.L.R. art. 78 proceeding, under which the discretion of an administrative body was to be deferred to, did not apply. Matter of Thomas v City of N.Y. Dept. of Hous. Preserv. & Dev., 817 N.Y.S.2d 864, 12 Misc. 3d 547, 235 N.Y.L.J. 81, 2006 N.Y. Misc. LEXIS 783 (N.Y. Sup. Ct. 2006).

140. —In camera inspection of documents

In camera inspection of records alleged to be exempt from disclosure should be employed only in rare case where agency resisting disclosure, after providing detailed description of nature of material sought, purpose for which it was produced or used, and similar relevant factors, fails to sustain burden of showing that specific statutory exemption applies or that specific document is not record of agency. Capital Newspapers, Div. of Hearst Corp. v Whalen, 113 A.D.2d 217, 495 N.Y.S.2d 979, 12, 1985 N.Y. App. Div. LEXIS 52356 (N.Y. App. Div. 3d Dep't 1985), rev'd, 69 N.Y.2d 246, 513 N.Y.S.2d 367, 505 N.E.2d 932, 1987 N.Y. LEXIS 15362 (N.Y. 1987),.

On review of a respondent's denial of petitioners' Freedom of Information Law (FOIL) requests, the lower court erred in conducting an in camera inspection of the withheld documents and determining in the first instance that the documents were statutorily protected from disclosure; because the record demonstrated that additional documents responsive to petitioners' FOIL requests existed and were not yet produced or examined by respondent's FOIL Appeals Officer, the case was remitted to the lower court to direct respondent to respond to petitioners' FOIL requests by reviewing the additional subject documents and to determine in the first instance whether they were statutorily exempted from disclosure Matter of Union Carbide Corp. v New York State Dept. of Envtl. Conservation, 2020 N.Y. App. Div. LEXIS 7648 (December 10, 2020).

A portion of defendant police officer's personnel file, specifically those records used to evaluate performance toward continued employment or promotion, may be made available to the District Attorney upon a clear showing of facts sufficient to warrant an *in camera* inspection by the Judge; after such inspection, only the relevant and material portion shall be made available to the requesting party. People v Zanders, 95 Misc. 2d 82, 407 N.Y.S.2d 410, 1978 N.Y. Misc. LEXIS 2385 (N.Y. Sup. Ct. 1978).

In Article 78 proceeding, court would grant news organization's Freedom of Information Law request for access to all records maintained by department of social services concerning 3 children who were killed by their father unless department requested in camera inspection of purported confidential information within 7 days, where commissioner had determined that disclosure was in public interest, no specific reasons were cited for not disclosing requested documents, much information had already been released through criminal proceedings against father, and there were no surviving children whose best interests must be considered. Gannett Co. v County of Ontario, 173 Misc. 2d 304, 661 N.Y.S.2d 920, 1997 N.Y. Misc. LEXIS 333 (N.Y. Sup. Ct. 1997).

141. Dismissal of appeal without hearing

In Article 78 proceeding to compel Nassau County District Attorney to disclose all documents in his possession relating to

petitioner's arrest in Ulster County, which culminated in judgment of conviction in Ulster County Court, Nassau County Supreme Court properly dismissed proceeding without hearing where assistant district attorney of Nassau County submitted affirmation demonstrating that his office had searched for and was not in possession of any such information, and petitioner failed to articulate any factual basis for his claim to contrary. Ahlers v Dillon, 143 A.D.2d 225, 532 N.Y.S.2d 22, 1988 N.Y. App. Div. LEXIS 8737 (N.Y. App. Div. 2d Dep't 1988).

142. Exhaustion of administrative remedies, generally

Court properly dismissed Article 78 proceeding to compel police department to produce certain information pertaining to petitioner's arrest, where department had answered petitioner's Freedom of Information Law request with its own request for additional pedigree information needed to process request, petitioner claimed that he sent pedigree information in letter which department claimed it never received, and petitioner failed to exhaust his administrative remedies by appealing pursuant to CLS Pub O § 89(4)(a). Sanders v Bratton, 258 A.D.2d 422, 685 N.Y.S.2d 722, 1999 N.Y. App. Div. LEXIS 1847 (N.Y. App. Div. 1st Dep't 1999).

Petition to compel production of documents under Freedom of Information Law request was properly dismissed for failure to exhaust administrative remedies where petitioner's administrative appeal respecting requested records alleged to have been improperly withheld had not yet been determined. Tellier v New York City Police Dep't, 267 A.D.2d 9, 698 N.Y.S.2d 490, 1999 N.Y. App. Div. LEXIS 12392 (N.Y. App. Div. 1st Dep't 1999).

Respondents' failure to advise inmate of need to appeal under 9 NYCRR § 8008.8 did not preclude dismissal of inmate's Article 78 petition to review respondents' alleged denial of disclosure request under Freedom of Information Law, for failure to exhaust administrative remedies. Dickman v Trietley, 268 A.D.2d 914, 702 N.Y.S.2d 449, 2000 N.Y. App. Div. LEXIS 836 (N.Y. App. Div. 3d Dep't 2000).

Trial court erred in denying an owner's petition to compel a village to disclose certain records pursuant to the Freedom of Information Law and in dismissing the proceeding because, while the vast majority of the material was responsive to the owner's request, the court's requirement of exhaustion was excused since the village's denial letter did not inform the owner that further administrative review of the determination was available. Matter of Lepper v Village of Babylon, 2021 N.Y. App. Div. LEXIS 196 (N.Y. App. Div. 2d Dep't 2021).

Bank (petitioner), which was target of hostile takeover by second bank, failed to exhaust its administrative remedies and thus could not maintain proceeding seeking access to all confidential information submitted to State Banking Board by "hostile" bank in its takeover offer, since banking board had previously denied petitioner's request for information and petitioner failed to appeal that determination to Superintendent of Banks within 7 days as required by CLS Pub O § 89; in view of fact that any extension of time for petitioner to appeal denial of its request would be act directly prejudicing or weakening position of takeover bank, superintendent could not unilaterally extend time set forth in statute. Irving Bank Corp. v Considine, 138 Misc. 2d 849, 525 N.Y.S.2d 770, 1988 N.Y. Misc. LEXIS 105 (N.Y. Sup. Ct. 1988).

Court denied Freedom of Information Law (FOIL) request by defendant who intended to offer "battered women's syndrome" defense, where defendant requested all material in district attorney's possession relating to her present case and her prior arrests or bad acts, but she failed to make written request or exhaust administrative remedies by appealing within 30 days of denial of her request; furthermore, documents turned over to defense counsel as part of voluntary disclosure could not be obtained under FOIL, and criminal records were unavailable under FOIL. People v Seeley, 179 Misc. 2d 42, 683 N.Y.S.2d 795, 1998 N.Y. Misc. LEXIS 590 (N.Y. Sup. Ct. 1998).

Inmate was not permitted under Fed. R. Civ. P. 15(d) to add a supplemental claim against a records coordinator for failing to provide records requested by the inmate because there was no basis for the inmate's contention that the records coordinator's act of writing the incorrect year of the log book that the inmate sought was done in retaliation against the inmate for filing a civil rights action against other prison officials. Although the inmate did not alleged that he attempted to appeal the denial of his document request under N.Y. Pub. Off. Law § 89(4), the inmate's failure to comply with the exhaustion requirement of 42 U.S.C.S. § 1997e(a) of the Prison Litigation Reform Act was not the basis for the denial of the inmate's motion to supplement because exhaustion was an affirmative defense and there were some exceptions to the exhaustion requirement. Harnett v Barr, 538 F. Supp. 2d 511, 2008 U.S. Dist. LEXIS 19236 (N.D.N.Y. 2008).

143. —Exhaustion requirement satisfied

Newspaper's administrative remedies were exhausted when the city constructively denied its timely internal appeal of the denial of their Freedom of Information request for the crime incident database by failing to respond to the appeal within the statutorily mandated 10-day period of N.Y. Pub. Off. Law § 89(4)(a); the newspaper then exercised its statutory remedy by bringing a proceeding for review of the denial under N.Y. C.P.L.R. art. 78, and, after learning of its existence, narrowed their request to a database, which contained 12 of the 16 data fields the newspaper had originally requested. Even if the request for the database was deemed a new request, certain exceptions existed by which a petitioner could have bypassed the available administrative remedies, such as where the administrative remedies would either have been futile or caused irreparable injury. Matter of New York Times Co. v City of N.Y. Police Dept., 103 A.D.3d 405, 959 N.Y.S.2d 171, 2013 N.Y. App. Div. LEXIS 689 (N.Y. App. Div. 1st Dep't), app. denied, 22 N.Y.3d 854, 977 N.Y.S.2d 183, 999 N.E.2d 548, 2013 N.Y. LEXIS 2941 (N.Y. 2013).

Trial court incorrectly held that the futility exception to the exhaustion of administrative remedies doctrine does not apply because the Freedom of Information Law (FOIL) established an exclusive remedy; FOIL did not contain an express provision that judicial review of a final administrative determination was a party's "exclusive remedy" for an allegedly erroneous administrative rejection of a request for information under the statute, and, accordingly, in the context of FOIL, a futility exception existed to the judicially-created rule that administrative remedies had to be exhausted. Since the newspaper established that exhaustion of administrative remedies concerning their request for the database would have been futile, the failure to exhaust administrative remedies did not bar the petition to require production of the database pursuant to FOIL. Matter of New York Times Co. v City of N.Y. Police Dept., 103 A.D.3d 405, 959 N.Y.S.2d 171, 2013 N.Y. App. Div. LEXIS 689 (N.Y. App. Div. 1st Dep't), app. denied, 22 N.Y.3d 854, 977 N.Y.S.2d 183, 999 N.E.2d 548, 2013 N.Y. LEXIS 2941 (N.Y. 2013).

Newspaper properly exhausted its administrative remedies prior to commencing Article 78 proceeding against city, city registrar, state, and Commissioner of Health seeking disclosure of death certificate under Freedom of Information Law, even though newspaper did not pursue administrative review within Department of Health (which has supervisory powers over city registrars), where certificate was in possession and control of city and registrar, newspaper appealed registrar's adverse determination to city common council, and newspaper then commenced proceeding against "governing body of the entity" (city and registrar) as authorized by CLS Pub O § 89. Tri-State Pub. Co., Div. of Ottaway Newspapers, Inc. v Port Jervis, 138 Misc. 2d 147, 523 N.Y.S.2d 954, 1988 N.Y. Misc. LEXIS 4 (N.Y. Sup. Ct. 1988).

144. Jurisdictional matters

Request for disclosure of information by Office of Professional Discipline of Education Department was not properly before court where there was no evidence that petitioner either applied, in accordance with department's regulations, to department's records access officer for requested information or appealed to commissioner of department from denial of information by administrative officer of department. Murphy v New York State Education Dep't, Office of Professional Discipline, 148 A.D.2d 160, 543 N.Y.S.2d 70, 1989 N.Y. App. Div. LEXIS 8166 (N.Y. App. Div. 1st Dep't 1989).

Supreme Court had jurisdiction to consider newspaper's application for order compelling social service agency to disclose certain records regarding agency actions in child abuse case, notwithstanding newspaper's failure either to make formal application to agency itself for ruling pursuant to CLS Pub O

§ 89(3) and (4)(a) or to appeal agency's first decision to deny disclosure, since, based on agency's public statements that disclosure would not be granted, such administrative procedure would be futile. New York News, Inc. v Grinker, 142 Misc. 2d 325, 537 N.Y.S.2d 770, 1989 N.Y. Misc. LEXIS 47 (N.Y. Sup. Ct. 1989).

Federal court lacked subject matter jurisdiction to decide whether officer violated Freedom of Information Law. Schuloff v Fields, 950 F. Supp. 66, 1997 U.S. Dist. LEXIS 339 (E.D.N.Y. 1997), aff'd, 159 F.3d 1348, 1998 U.S. App. LEXIS 20187 (2d Cir. N.Y. 1998).

In dismissing an appeal, brought on behalf of employees of the school district, which sought an order prohibiting the board of education from allowing one of its board members to take home an employee list which included names, addresses, job titles and job descriptions of all employees of the district, it was pointed out that Part 84 of the Regulations which restricts the right of access by school board members relates to the examination of school employees "personnel records." Because the board member in question was not seeking to review personnel records, the procedures set forth in Part 84 did not apply. As to violations of Freedom of Information Law, § 310, the appropriate forum for challenging alleged violations of the Freedom of Information Law is the Supreme Court of the State of New York, not an appeal to the Commissioner of Education. Appeal of Krasinski (1990) Op Comr Educ No 12323.

An appeal to the Commissioner of Education is not the proper forum for addressing claims relating to violations of the Freedom of Information Law. The appropriate forum for challenging alleged violations of the Freedom of Information Law is the Supreme Court of the State of New York, and not in an appeal before the Commissioner of Education. Appeal Alexandreena D, 1990 Op Comr Educ No 12433.

145. Mootness; "academic" nature of appeal

Article 78 proceeding seeking to compel police department to comply with Freedom of Information Law (FOIL) request for "serial numbers" or "lot numbers" of photographs introduced into evidence at petitioner's criminal trial was dismissed as academic, where petitioner conceded that he received "most" requested documents by means of another contemporaneous FOIL request to district attorney's office. Fappiano v N.Y. City Police Dep't, 95 N.Y.2d 738, 724 N.Y.S.2d 685, 747 N.E.2d 1286, 2001 N.Y. LEXIS 573 (N.Y. 2001).

Law graduate's Article 78 proceeding to review state board of law examiners' refusal to release bar exam test scores under Freedom of Information Law would be dismissed as moot since examiners had destroyed his exam by time he requested scores (11 months after results were announced), and case did not fall within traditional exception permitting review of important and recurring issues which might otherwise might be unreviewable; bar exam affected very narrow segment of population, issue was not of burning importance to law candidates, and in any event bar exam results are confidential under CLS Jud § 90(10). Duban v State Bd. of Law Examiners, 157 A.D.2d 946, 550 N.Y.S.2d 207, 1990 N.Y. App. Div. LEXIS 429 (N.Y. App. Div. 3d Dep't), app. dismissed, 75 N.Y.2d 945, 555 N.Y.S.2d 689, 554 N.E.2d 1277, 1990 N.Y. LEXIS 738 (N.Y. 1990).

Police department's provision of documents regarding indictment pursuant to Freedom of Information Law request by inmate shortly after inmate filed Article 78 petition rendered moot that portion of petition which sought documents provided. Newton v Police Dep't of New York, 183 A.D.2d 621, 585 N.Y.S.2d 5, 1992 N.Y. App. Div. LEXIS 7562 (N.Y. App. Div. 1st Dep't 1992).

Appeal from Supreme Court's dismissal of petition seeking to compel district attorney to grant access to certain document was not rendered academic by letter to petitioner from representative of district attorney, stating that his file had been found and offering access to 48 documents in file conditioned on payment of appropriate fee, since documents offered did not include report sought by petitioner. Key v Hynes, 205 A.D.2d 779, 613 N.Y.S.2d 926, 1994 N.Y. App. Div. LEXIS 6562 (N.Y. App. Div. 2d Dep't 1994), overruled in part, Rattley v N.Y. City Police Dep't, 96 N.Y.2d 873, 730 N.Y.S.2d 768, 756 N.E.2d 56, 2001 N.Y. LEXIS 1868 (N.Y. 2001).

Article 78 proceeding, commenced after district attorney failed to respond to petitioner's mishandled Freedom of Information Law request, was rendered moot when, prior to determination of proceeding, district attorney denied document request and acknowledged petitioner's right to take administrative appeal. Johnson v Morgenthau, 214 A.D.2d 348, 625 N.Y.S.2d 21, 1995 N.Y. App. Div. LEXIS 3716 (N.Y. App. Div. 1st Dep't 1995).

Appeal from judgment denying petition to compel respondent to disclose certain documents under Freedom of Information Law (CLS Pub O § 84 et seq.) was academic where respondent turned over documents demanded, and sufficiency of that production was determined in subsequent proceeding by judgment from which no appeal was taken. Majid v Brown, 218 A.D.2d 802, 631 N.Y.S.2d 253, 1995 N.Y. App. Div. LEXIS 8957 (N.Y. App. Div. 2d Dep't 1995).

Proceeding to compel compliance with petitioner's Freedom of Information Law request was moot where respondent had complied with request by providing petitioner with certain documents. Almodovar v Altschuller, 232 A.D.2d 700, 647 N.Y.S.2d 1010, 1996 N.Y. App. Div. LEXIS 10023 (N.Y. App. Div. 3d Dep't 1996).

Petitioner's request to compel town to produce certain records which supported tentative real property assessment was moot where there was no evidence that assessor's initial response lacked any documents to which petitioner was entitled, and petitioner's subsequent requests related to tentative assessment that was admittedly based on clerical error, which error had been corrected. Corvetti v Town of Lake Pleasant, 239 A.D.2d 841, 657 N.Y.S.2d 536, 1997 N.Y. App. Div. LEXIS 5564 (N.Y. App. Div. 3d Dep't 1997).

Trial court correctly determined that a publisher's petition, claiming constructive denial of requests by the Thruway Authority under the Freedom of Information Law, was moot because the Authority ultimately disclosed 1,320 pages of documents during the pendency of the special proceeding. Matter of Gannett Satellite Info. Network, LLC v New York State Thruway Auth., 181 A.D.3d 1072, 120 N.Y.S.3d 224, 2020 N.Y. App. Div. LEXIS 1748 (N.Y. App. Div. 3d Dep't 2020).

146. Remand

When an inmate appealed the state police denial of his freedom of information request for information related to his convictions, and said the state police had not provided the trial court reviewing the denial with all information responsive to his request, the failure of the state police to certify, under N.Y. Pub. Off. Law § 89(3), that it did not have a requested record or that a record could not be located after a diligent search, precluded the appellate court from finding that all responsive information had been provided and mandated a remand to the trial court to determine if there were any responsive documents which had not been provided to the trial court. De Fabritis v McMahon, 301 A.D.2d 892, 754 N.Y.S.2d 117, 2003 N.Y. App. Div. LEXIS 348 (N.Y. App. Div. 3d Dep't 2003).

147. Res judicata

Doctrine of res judicata barred Article 78 proceeding to review determination denying petitioner access to records requested under Freedom of Information Law (FOIL) where same records were subject of petitioner's prior FOIL requests, and Supreme Court's first disposition denying such requests involved same parties and was not appealed by petitioner. Ferrara v Superintendent, N.Y. State Police, 235 A.D.2d 874, 652 N.Y.S.2d 432, 1997 N.Y. App. Div. LEXIS 525 (N.Y. App. Div. 3d Dep't), app. dismissed, app. denied, 90 N.Y.2d 829, 660 N.Y.S.2d 551, 683 N.E.2d 16, 1997 N.Y. LEXIS 1557 (N.Y. 1997).

148. Standing; parties

In an Article 78 proceeding brought by the Adirondack Park Local Government Review Board to compel the production of papers from the Adirondack Park Agency, the action would be dismissed where the Board lacked the capacity to sue absent express authority to sue, absent any necessity to sue in order to carry out the Board's powers. In re Adirondack Park Local Government Review Bd., 89 A.D.2d 642, 453 N.Y.S.2d 78, 1982 N.Y. App. Div. LEXIS 17754 (N.Y. App. Div. 3d Dep't 1982).

Petitioner lacked standing to contest local rule (43 RCNY 1-05) which appeared to conflict with CLS Pub O § 89(3) by providing that approximate date of agency's Freedom of Information Law

determination should not exceed 10 business days, where respondent did not rely on local rule when it acknowledged petitioner's request with advice that determination would be reached in approximately 120 days, and it was unclear why petitioner believed himself injured by local rule and sought its nullification. O'Donnell v Donadio, 259 A.D.2d 251, 688 N.Y.S.2d 117, 1999 N.Y. App. Div. LEXIS 2316 (N.Y. App. Div. 1st Dep't 1999), app. denied, 1999 N.Y. App. Div. LEXIS 5569 (N.Y. App. Div. 1st Dep't May 6, 1999), app. dismissed, 93 N.Y.2d 1032, 697 N.Y.S.2d 554, 719 N.E.2d 914, 1999 N.Y. LEXIS 2839 (N.Y. 1999).

While the city of Newark, New Jersey had standing to challenge the denial of a request for documents under the New York Freedom of Information Law (FOIL), N.Y. Pub. Off. Law § 84 et seq., the city's mayor and the members of the city's municipal council, in their individual and official capacities, lacked standing to maintain the proceeding because the underlying FOIL requests were not made on their behalf. City of Newark v Law Dep't of N.Y., 305 A.D.2d 28, 760 N.Y.S.2d 431, 2003 N.Y. App. Div. LEXIS 5568 (N.Y. App. Div. 1st Dep't 2003).

Former New York Attorney General (former AG) was a necessary party to an appeal of an order compelling the New York State Attorney General's Office (AG's Office) to gain access to the former AG's private email account to determine whether the documents contained therein should be disclosed under the New York State Freedom of Information Law (FOIL); resolution of the FOIL demand directly impacted the personal property of the former AG, now a private citizen who was not before the court, whose significant private rights and property could not be protected by the AG's Office, which did not represent his private interests. Matter of Smith v New York State Off. of the Attorney Gen., 110 A.D.3d 1201, 973 N.Y.S.2d 404, 2013 N.Y. App. Div. LEXIS 6725 (N.Y. App. Div. 3d Dep't 2013).

Nothing in the Indian Gaming Regulatory Act, 25 U.S.C.S. § 2701 et seq., or in the state-tribe compact, prevented the release under New York's Freedom of Information Law, N.Y. Pub. Off. Law §§ 84-90, of the tribe's submissions of daily inspection reports and patron complaints by New York's State Racing and Wagering Board; the tribe was not a necessary party to the action where it had voluntarily declined to participate. Herald Co. v Feurstein, 779 N.Y.S.2d 333, 3 Misc. 3d 885, 2004 N.Y. Misc. LEXIS 191 (N.Y. Sup. Ct. 2004).

149. Statute of limitations

Article 78 proceeding was properly dismissed as time-barred where, on respondents' failure to address within 10 days petitioner's administrative appeal from denial of his request for information under Freedom of Information Law, petitioner was deemed, in accordance with CLS Pub O § 89(4)(a), to have exhausted his administrative remedies, thereby enabling him to seek judicial review of that denial and commencing 4-month limitation period in CLS CPLR § 217 for Article 78 proceeding. Van Steenburg v Thomas, 242 A.D.2d 802, 661 N.Y.S.2d 317, 1997 N.Y. App. Div. LEXIS 8673 (N.Y. App. Div. 3d Dep't), app. denied, 91 N.Y.2d 803, 667 N.Y.S.2d 682, 690 N.E.2d 491, 1997 N.Y. LEXIS 4072 (N.Y. 1997).

150. Vacating default judgment

In proceeding to review New York City Law Department's lack of response to petitioner's Freedom of Information Law requests, court should have granted Department's motion to vacate default judgment entered against it after its request for further adjournment was denied since there was existing departmental backlog of unprocessed information requests, and Department's position that it had absolute defense as to much of material sought was correct when its application for adjournment was made. Murray v Matusiak, 247 A.D.2d 303, 669 N.Y.S.2d 278, 1998 N.Y. App. Div. LEXIS 1587 (N.Y. App. Div. 1st Dep't 1998).

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I. Generally

A. In General

i. Generally

1. In general

Freedom of Information Law is not statute that requires agency officials to answer questions or that permits member of public to cross-examine agency officials. Committee on Open Government FOIL-AO-3344.

Records access officer is responsible for assuring that agency personnel assist requestor in identifying records. Committee on Open Government FOIL-AO-3353.

Freedom of Information Law does not require that records falling within exemptions from disclosure must be withheld, and only instances in which agency would be prohibited from disclosing records would involve situations in which statutes specifically provide such direction. Committee on Open Government FOIL-AO-3354.

Freedom of Information Law does not require agency to provide information or answer questions, but only to make existing records available upon request where such records do not fall under one or more of grounds for denial. 1986 Committee on Open Government FOIL-AO-4187.

Records containing selection procedures should be available under Freedom of Information Law, for they represent policy of agency; denial occurring under Freedom of Information Law pertains to situation in which existing records are withheld, such that although applicant may not obtain information, there is no denial, if information sought does not exist in form of record. 1986 Committee on Open Government FOIL-AO-4200.

Shortage of manpower necessary to comply with request under Freedom of Information Law is indefensible, for denial on that basis would thwart very purpose of law. 1986 Committee on Open Government FOIL-AO-4255.

Request for records should be directed to records access officer of agency or agencies that would maintain records which are requested; records sought should be reasonably described in sufficient detail so agency officials can locate them; all records of agency are available, except to extent that records or portions thereof fall within CLS Pub O § 87(2)(a) through (i). Comm on Open Gov't FOIL-AO-4579.

When records are accessible under Freedom of Information Law, they should be made available to any person, without regard to status or interests. Comm on Open Gov't FOIL-AO-4585.

Although agency must permit applicant to request records during regular business hours, it is not required to permit inspection during entire course of agency's regular business hours. Comm on Open Gov't FOIL-AO-4777.

Documents concerning business performed for village would be "records" of village subject to Freedom of Information Law; fact that records are kept in location other than municipal building should not affect village's legal custody of records. Comm on Open Gov't FOIL-AO-4783.

To extent that records sought consist of statistical or factual tabulations of or relating to other public records, such as budget bill or administrative staff manual, they are accessible under Freedom of Information Law. Comm on Open Gov't FOIL-AO-4893.

Although Freedom of Information Law generally governs rights of access to records, other statutes pertain specifically to birth, death, and marriage records; problem relative to those statutes is that rights of access are generally conditioned upon showing that request is made for judicial or other "proper purposes". Comm on Open Gov't FOIL-AO-4929.

Although Freedom of Information Law provides substantial rights of access, it deals generally with access to government records; when other statutes deal with specific records, those statutes prevail over general statute, such as Freedom of Information Law. Comm on Open Gov't FOIL-AO-4968.

Whether document in possession of agency is signed or unsigned, undated or characterized as unofficial, it nonetheless falls within coverage of Freedom of Information Law. Comm on Open Gov't FOIL-AO-8378.

If records are available pursuant to provision of law other than Freedom of Information Law, nothing in Freedom of Information Law can be asserted to withhold those records. Comm on Open Gov't FOIL-AO-9363.

Claim or promise of confidentiality is irrelevant to analysis of rights of access to records. Comm on Open Gov't FOIL-AO-12605.

2. Advisory opinions; consultants, generally

3. —Committee on Open Government/Public Access to Records

Committee on Open Government is authorized to render advisory opinions on issues arising under Freedom of Information

Law; committee does not have authority to enforce compliance with law or to obtain records from other agencies in response to request; request for records should be directed to records access officer of agency maintaining record sought; however, Freedom of Information Law does not require agency to create or prepare record in response to request. Comm On Open Gov't FOIL-AO-4591.

Committee on Open Government is authorized to render advice on issues concerning Freedom of Information Law; it is not generally responsibility of Committee to direct individuals to agencies that maintain records they seek. Comm on Open Gov't FOIL-AO-4878.

Neither Committee on Open Government nor any other state agency has general authority to compel compliance with Freedom of Information Law; usual vehicle for challenging agency's denial of access to records or perhaps validity of its regulations is proceeding brought under Article 78 of Civil Practice Law and Rules. Comm on Open Gov't FOIL-AO-7637.

Function of Committee on Open Government in providing opinions is purely advisory, and Committee has no authority to review records in camera or otherwise. Comm on Open Gov't FOIL-AO-7917.

While government agencies are not required to heed opinions rendered by Committee on Public Access to Records, they cannot justifiably ignore direction given by Court of Appeals. Comm on Open Gov't FOIL-AO-12302.

Committee on Open Government will not render advice on issues arising under Freedom of Information Law that are currently in litigation; under Freedom of Information Law, written request for records should be directed to records access officer of agency maintaining records. Comm on Open Gov't FOIL-AO-4578.

Advisory opinion, issued by Committee on Open Government, may be requested prior to commencement of litigation; however, there is no requirement that applicant for records seek advisory opinion. Comm on Open Gov't FOIL-AO-4705.

There is nothing in Freedom of Information Law that precludes representative of one agency from conferring with or seeking advice of representative of another agency; consequently, if city appeals officer rendered determination after seeking advice of district attorney, there would not be any impropriety. Comm on Open Gov't FOIL-AO-4800.

Committee on Open Government is authorized to render advice on issues concerning New York Freedom of Information Law; Committee is not authorized to render advice with respect to other state or federal statutes; Freedom of Information Law pertains to rights of access to records maintained by units of state and local government; on other hand, federal statute, Freedom of Information Law pertains generally to records maintained by federal agencies such as Social Security Administration. Comm on Open Gov't FOIL-AO-4864.

Management study report prepared by consultant for town may be withheld or must be disclosed, pursuant to Freedom of Information Law, based on same standard as if report were prepared by agency staff. Comm on Open Gov't OML-AO-2211.

4. Attorney matters, generally

5. —Attorney fees

Reimbursement under CLS Pub O § 89(4)(c) is limited to court costs and attorney's fees, and any such award may be conferred only when each of 3 conditions is met: (1) that person denied access has substantially prevailed, (2) that agency had no reasonable basis for denying access, and (3) that records are of clearly significant interest to general public; there is no mention of damages in Freedom of Information Law. Comm on Open Gov't FOIL-AO-12690.

6. Burden of proof

Even though portion or portions of records may be justifiably withheld from disclosure, that does not give agency authority to withhold entire record; single record may be both available or deniable in part requiring agency officials to review records sought in their entirety to determine which portions may justifiably be withheld; when records are denied under law, burden of proof in such proceeding is on agency. Comm on Open Gov't FOIL-AO-4706.

7. Copying records, generally

8. —Certification of copies

Certification made under FOIL merely involves assertion that copy made is true copy; it is not equivalent of legal certification in which assertion is made that contents of copy are correct and accurate. Comm On Open Gov't FOIL-AO-3882.

When certification is requested with respect to voluminous number of records, single certification, asserted by means of cover letter, for example, would be appropriate and each copy of such records need not be stamped or certified separately. Comm On Open Gov't FOIL-AO-4534.

Mere characterization of record as "intra-agency material" would not serve to enable agency to withhold record in its entirety because portions containing statistical or factual information, instructions to staff that affect public, or final agency policy or determination must be made available; even though record or portions of record may be withheld under Freedom of Information Law, there is no requirement that record must be withheld, even if basis for denial can be asserted; certification made under Freedom of Information Law would not pertain to validity of contents of record, but rather would involve assertion that copy provided is true copy. Comm on Open Gov't FOIL-AO-4666.

When records cannot be found, applicant may request that agency certify that it does not have possession of such record or that such records cannot be found after diligent search. Comm on Open Gov't FOIL-AO-4753.

Freedom of Information Law requires that each agency make available for public inspection and copying all records, except those records or portions thereof that fall within grounds for denial, as such, applicant may use his or her photocopy machine to prepare copies of town records. Comm on Open Gov't FOIL-AO-4759.

If record is accessible under Freedom of Information Law, it is available for both inspection and copying; further, when there has been intentional public disclosure of record, it is unlikely that there would be any basis for denial of subsequent requests for inspection or copying of that record; since police department's patrol guide is available for review at certain public location, copies of that record should be available from agency that maintains it. Comm on Open Gov't FOIL-AO-4817.

Since agency is generally obliged to maintain custody and control of its records, applicant may be required to review records in presence of official of agency; since agency must grant or deny access to records within prescribed periods of time, as long as records are made available for inspection or copying within those time periods, agency could wait until official of agency could be present; however, if agency official cannot be present during course of time period, access cannot be delayed or denied until that person becomes available. Comm on Open Gov't FOIL-AO-4869.

Freedom of Information Law requires that each agency shall make available for public inspection and copying all records, except those records or portions thereof that fall within one or more grounds for denial; as such, applicant for records may use his or her photocopy machine to prepare copies of town records. Comm on Open Gov't FOIL-AO-4936.

Personal Privacy Protection Law requires that state agencies make records available for inspection and copying to data subject, person to whom records pertain; however rights granted by Law do not apply to public safety agency records; accessible records are available for inspection and copying; therefore, if record is accessible, it may be inspected and if, after inspection copies are needed, applicant may be reported to pay fee for copying. Comm on Open Gov't FOIL-AO-4961.

Freedom of Information Law does not require that agency transfer records from location where record is available for inspection and copying to another location. Comm on Open Gov't FOIL-AO-4984.

Prohibition of use of one's own digital camera to copy records accessible under Freedom of Information Law (FOIL) would be unreasonable and inconsistent with FOIL, and no fee may be charged when one's own camera is used; unlike bringing one's

own photocopier, there would be no use of agency's space or electricity, and there would be no distinction in terms of agency's efforts in retrieving records between more traditional inspection of records and use of camera. Comm on Open Gov't FOIL-AO-16504.

9. Correction of records

Although Freedom of Information Law pertains to records of agency, that statute deals with the rights of access to records; nothing in Freedom of Information Law deals specifically with right to amend or correct records. Comm on Open Gov't FOIL-AO-4880.

Freedom of Information Law did not provides basis for attempting to remove allegedly false information from record in possession of New York City agency. Comm on Open Gov't FOIL-AO-12065.

10. Effect of federal laws

Audits of municipalities are generally available under Freedom of Information Law which requires disclosure of external audits, including, but not limited to, audits performed by comptroller and federal government; agency must appoint records access officers who has duty of coordinating agency's response for requests for records made under Freedom of Information Law; as such, requests for records should generally be directed to records access officer of agency that maintains records requested. Comm on Open Gov't FOIL-AO-4721.

Freedom of Information Law pertains to records maintained by local and state government, except judiciary and state legislature; as such, Law does not apply to courts or to federal agencies, such as drug enforcement agency; records of federal agencies are generally subject to rights of access in accordance with Freedom of Information Act, federal statute; records of court proceedings are likely maintained by court where proceeding took place and request should be directed to clerk of court. Comm on Open Gov't FOIL-AO-4778.

Freedom of Information Law is generally applicable to records maintained by entities of state and local government in New York, including state agencies, police departments, office of governor and offices of mayors; different statute, federal Freedom of Information Act, applies to records maintained by federal agencies; further, each state has enacted its own version of access law; private entities, such as private corporations or law firms, are not agencies subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-4809.

Committee on Open Government is authorized to render advice on issues concerning New York Freedom of Information Law; Committee is not authorized to render advice with respect to other state or federal statutes; Freedom of Information Law pertains to rights of access to records maintained by units of state and local government; on other hand, federal statute, Freedom of Information Law pertains generally to records maintained by federal agencies such as Social Security Administration. Comm on Open Gov't FOIL-AO-4864.

Freedom of Information Law generally pertains to records maintained by entities of state and local government in New York; it does not apply to records maintained by federal agencies and, therefore, request for federal records should be directed to federal agency that maintains record sought. Comm on Open Gov't FOIL-AO-4941.

11. Effect of New York Code of Rules and Regulations (NYCRR)

Right of access to rent registration records are governed not by Freedom of Information Law, but rather by Emergency Tenant Protection Act, the New York City Administrative Code and Division of Housing and Community Renewal. Comm on Open Gov't FOIL-AO-4738.

Insofar as 8 NYCRR Part 84, as promulgated by Commissioner of Education, is more restrictive than Freedom of Information Law, it is out of date and void. Comm on Open Gov't FOIL-AO-9443.

Under 21 NYCRR Part 1401, records access officer has duty of coordinating agency's response to requests under Freedom of Information Law, and request should ordinarily be directed to that person. Comm on Open Gov't FOIL-AO-12438.

12. Jurisdiction matters, generally

13. —Subpoenas

Single record or report may be both accessible and deniable in part under Freedom of Information Law; therefore, agency has obligation to review records sought, in their entirety, to determine which portions, if any, may be justifiably withheld; in context of general investigation, names or other identifying details may be deleted to protect against unwarranted invasion of personal privacy so that all other aspects of documents might be made available. Comm on Open Gov't FOIL-AO-4640.

Committee on Open Government (COOG) has neither jurisdiction nor resources to "investigate" practices of agencies; similarly, COOG is not empowered to compel agency to comply with law or grant or deny access to records. Comm on Open Gov't FOIL-AO-12483.

14. Mailing of records

So long as applicant for records is prepared to pay requisite fees for photocopying and postage, agency must mail records to applicant; since number of records, size of report or amount of postage often cannot be known in advance, agency could not require that envelope accompany request. Comm on Open Gov't FOIL-AO-4654.

ii. Applicability

15. In general

Records of complaints made against applicant and his business directed to town building department are subject to Freedom of Information application after deletion of information identifying complainant, and such complaints cannot be characterized as record compiled for law enforcement purposes. 1986 Committee on Open Government FOIL-AO-4235.

All records of agency are available, except to extent that records or portions thereof fall within one or more of grounds for denial appearing in CLS Pub O § 87(2)(a) through (i); failure of agency to respond within designated time of 5 days results in denial of access that may be appealed to head of agency or whomever is designated to determine appeals, and that person or body has 10 business days from receipt of appeal to render determination; contention that agency has insufficient manpower to comply with request for information is not valid defense. Comm on Open Gov't FOIL-AO-4570.

Neither Committee on Open Government nor its staff has authority to compel agency to grant or deny access to records; further, committee is not empowered to obtain records on behalf of applicant. Comm on Open Gov't FOIL-AO-4611.

Since Freedom of Information Law generally applies to governmental entities, private corporation is not subject to Law; furthermore, there is no state statute that generally requires private corporations to respond to requests for records. Comm on Open Gov't FOIL-AO-4615.

Records concerning convictions, suspensions or revocations of driver's license, or accidents, other than those pertaining to alcohol related offenses are kept by motor vehicles department and are purged after 4 years; as such, records concerning violations, convictions or accidents would no longer exist after 4 years; records containing alcohol related offenses are kept for 10 years; with respect to other records, marriage records are kept by town or city clerks, depending where marriage took place; records pertaining to divorce, such as certificate of disposition, can be obtained from county clerk in county in which divorce was granted. Comm on Open Gov't FOIL-AO-4852.

Motor vehicle licenses, which include addresses, are accessible pursuant to Vehicle and Traffic Law from Department of Motor Vehicles; death certificates are available, unless request is not made for proper purpose, under Public Health Law which may impose significant search fees; voter registration records are available pursuant to Election Law and are kept by Board of Elections in each county. Comm on Open Gov't FOIL-AO-4945.

Freedom of Information Law pertains to records of governmental entity; it does not apply to records or information maintained by private individual and in situation where private citizen contacts other private citizens using personal resources, rather than those of agency, Freedom of Information Law would not be applicable or irrelevant. Comm on Open Gov't FOIL-AO-4949.

Any documentation maintained by Hudson River-Black River Regulating District constitutes agency record subject to rights of access, and District is required to disclose its records to extent required by Freedom of Information Law. Comm on Open Gov't FOIL-AO-7917.

Since industrial development agencies are public corporations, Montgomery County Industrial Development Agency is subject to Freedom of Information Law. Urban Development Corporation is subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-8551.

All records are subject to Freedom of Information Law, whether they are characterized as "official" or otherwise. Comm on Open Gov't OML-AO-3889.

Records prepared by chair of town board are not property of that person; on contrary, they would be in legal custody of Town Clerk and would constitute records subject to rights conferred by Freedom of Information Law. Comm on Open Gov't OML-AO-3889.

Town Supervisor would have no greater right of access or control over records prepared by chair of town board than any other member of board. Comm on Open Gov't OML-AO-3889.

16. Automobile accident reports

Insofar as witness statements are part of motor vehicle accident reports, they must be disclosed in their entirety in most instances since, under CLS Pub O § 89(6), if records are available under some other provision of law or by means of judicial interpretation, grounds for denial appearing in CLS Pub O § 87(2) cannot be asserted. Comm on Open Gov't FOIL-AO-12611.

17. Courts; litigation, generally

18. —Office of Court Administration (OCA)

Definition of "agency" exclude state legislature, as well as "judiciary", but Office of Court Administration is "agency" and its records are subject to Freedom of Information Law; similarly, records of division of budget are "agency records". Comm on Open Gov't FOIL-AO-4617.

Committee on Open Government will not render advice on issues arising under Freedom of Information Law that are currently in litigation; under Freedom of Information Law, written request for records should be directed to records access officer of agency maintaining records. Comm on Open Gov't FOIL-AO-4578.

Litigant has same rights of access to records under Freedom of Information Law as any member of public, notwithstanding interest in records or status as inmate. Comm on Open Gov't FOIL-AO-4586.

Freedom of Information Law pertains to records maintained units of state and local government, except state legislature and judiciary; court records are not subject to rights of access under Freedom of Information Law, but are governed by Judiciary Law. Comm On Open Gov't FOIL-AO-4590.

Town Justice Court is not "agency" and therefore it is not required by Freedom of Information Law to disclose records, particularly those indicating disposition of cases; Freedom of Information Law does not apply to courts and court records. Comm on Open Gov't FOIL-AO-4614.

Although Freedom of Information Law does not apply to courts or court records, other provisions of law often grant the right of access to court records. Comm on Open Gov't FOIL-AO-4667.

If records sought are court records, Freedom of Information Law would not govern rights of access; however, court records may be available under other statutes which often confer broad rights of access to court records. Comm on Open Gov't FOIL-AO-4679.

Freedom of Information Law is not applicable to courts or court records; further, federal Freedom of Information Act pertains only to records in possession of federal agencies; moreover, courts and court records fall outside of requirements of federal Freedom of Information Act. Comm on Open Gov't FOIL-AO-4692.

While Freedom of Information Law does not apply to court records, many court records are available under other provisions of law and, as such, it is possible to make request to courts that maintains records sought. Comm on Open Gov't FOIL-AO-4765.

Freedom of Information Law pertains to records maintained by local and state government, except judiciary and state legislature; as such, Law does not apply to courts or to federal agencies, such as drug enforcement agency; records of federal agencies are generally subject to rights of access in accordance with Freedom of Information Act, federal statute; records of court proceedings are likely maintained by court where proceeding took place and request should be directed to clerk of court. Comm on Open Gov't FOIL-AO-4778.

Freedom of Information Law does not pertain to courts or court records; however, court records are generally available in accordance with relevant provisions of judiciary law and other statutes. Comm on Open Gov't FOIL-AO-4799.

Freedom of Information Law does not pertain to courts or court records; however, court records are generally available in accordance with relevant provisions of judiciary law and other statutes; copies of felony complaints and indictments may be maintained by office of District Attorney who prosecuted case and since district attorney's office is agency subject to Freedom of Information Law, request may be submitted under Freedom of Information Law to relevant district attorney's office for such records. Comm on Open Gov't FOIL-AO-4799.

Courts and court records are not subject to Freedom of Information Law; however, other provisions of law may grant broad rights of access to court records. Comm on Open Gov't FOIL-AO-4862.

Freedom of Information Law does not apply to courts or court records, or to records maintained by private attorney; nevertheless, court records are often available pursuant to other provisions of law, and requests for such records should be directed to clerk of appropriate court; pre-sentence reports are confidential with respect to public and may be made available to defendant only by court; since office of district attorney is "governmental entity" that performs "governmental function" for state and public corporation, it is agency required to comply with Freedom of Information Law. Comm on Open Gov't FOIL-AO-4865.

Although Freedom of Information Law does not apply to courts and court records, other provisions of law often grant broad rights of access to court records; therefore, it is suggested that requests should be made to clerk of appropriate court. Comm on Open Gov't FOIL-AO-4873.

Freedom of Information Law does not apply to courts or court records, or to records maintained by attorney; nevertheless, court records are often available pursuant to other provisions of law, and such requests should be directed to clerk of appropriate court; pre-sentence reports are confidential with respect to public and may be made available to defendant only by court. Comm on Open Gov't FOIL-AO-4881.

Freedom of Information Law does not apply to court or court records and though Freedom of Information Law is inapplicable, other provisions of law often grant significant rights of access to court records; where county court clerk has failed to respond to requests for records pursuant to Freedom of Information Law, requester should discuss matter with attorney or representative of prisoners' legal services. Comm on Open Gov't FOIL-AO-4887.

Freedom of Information Law requires no showing of materiality, relevance, necessity or any other purpose as condition for asserting rights of access to records; moreover, while records may not be available to litigant by means of discovery because those records might not be material or relevant to litigation, those same records might be available to any member of the public who seeks records under Freedom of Information Law. Comm on Open Gov't FOIL-AO-4889.

19. Criminal law, generally

20. —District Attorney's office

Since office of special prosecutor, department of correction and office of district attorney are "agencies", presumably any requested records would be equally available or exempt from disclosure, irrespective of which agency maintains records. Comm on Open Gov't FOIL-AO-4704.

Since office of district attorney is "governmental entity" that performs "governmental function" for state and public corporation, it is agency required to comply with Freedom of Information Law; since state office of court administration is "agency" re-

quired to comply with Freedom of Information Law, if functions of city office of court administration are similar to those carried out by its state counterpart, it would be "agency" for purposes of Freedom of Information Law; if legal aid society is not-for-profit corporation, although it has relationship with government, it is no "governmental entity" subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-4746.

Office of district attorney is "agency" and, therefore, records maintained by office of district attorney are subject to rights of access granted by Freedom of Information Law. Comm on Open Gov't FOIL-AO-4902.

21. —Legal aid

While legal aid societies which are agencies of local government may be subject to Freedom of Information Law, it appears that most are not "agencies" as defined in Freedom of Information Law and, as such, are not subject to law; although Freedom of Information Law does not apply to courts or court records, request can be made to court clerk of county in which case was heard for relevant court records. Comm on Open Gov't FOIL-AO-4691.

If legal aid society is not "governmental agency", but rather, not-for-profit corporation, it would not be subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-4741.

While legal aid societies which are agencies of local government may be subject to Freedom of Information Law, most are not "agencies" as that term is defined in Freedom of Information Law and, as such, are not subject to that statute. Comm on Open Gov't FOIL-AO-8384.

22. —Police and other law enforcement agencies

To extent that news media obtains police blotters or complaint reports pursuant to Freedom of Information Law, individual, as member of public, would enjoy same rights; when records are accessible under Freedom of Information Law, they should be made available to any person, without regard to status or interests. Comm on Open Gov't FOIL-AO-4585.

23. —Prisons; prisoners

To learn whether information is deleted from record and if it is proper to do so, requester of record should request that department of correctional services provide explanation of deletions made because this is generally procedure when response to appeal is given. Comm on Open Gov't FOIL-AO-4576.

Since family visiting program was established by department of correctional services, records concerning program would be maintained by that department, rather than department of state; therefore, department of state cannot supply information sought because it does not maintain records on subject. Comm On Open Gov't FOIL-AO-4607.

Since office of special prosecutor, department of correction and office of district attorney are "agencies", presumably any requested records would be equally available or exempt from disclosure, irrespective of which agency maintains records. Comm on Open Gov't FOIL-AO-4704.

Policy of withholding information unless crime is solved clearly conflicts with Freedom of Information Law, and that, unless different statute provides contrary direction, individual who may have been victim of crime generally has no right to insist upon confidentiality; concurrently, agency, including police department, is required to review records when request is made to determine extent, if any, to which one or more of grounds for denial might apply. Comm on Open Gov't FOIL-AO-4689.

Although Freedom of Information Law deals with records generally, Criminal Procedure Law deals specifically with records involving situation in which criminal charges are dismissed in favor of accused. Comm on Open Gov't FOIL-AO-4830.

24. Fires; firefighters

Since fire district is public corporation, it is "agency" subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-8538.

25. Insurance matters

Private insurance company is not "agency" and records that it produces are not subject to Freedom of Information Law; however, when its records are submitted to agency, records are subject to rights granted by Freedom of Information Law; definition of "agency" excludes state legislature, as well as "judiciary", but Office of Court Administration is "agency" and its records are subject to Freedom of Information Law; similarly, records of division of budget are "agency records". Comm on Open Gov't FOIL-AO-4617.

26. Medical, health, hospitals and the like, generally

27. —Mental health

Rights of access to mental health records are governed by Mental Hygiene Law rather than Freedom of Information Law. Comm on Open Gov't FOIL-AO-4821.

If records sought are neither medical nor mental health records, rights of access would be determined by Freedom of Information Law. Comm on Open Gov't FOIL-AO-4853.

Freedom of Information Law pertain generally to rights of access to records maintained by units of state and local government; however, Men Hyg Law specifically pertains to patient's or client's rights of access to mental health records pertaining to patient or client and it also provides procedures for requesting records and for appealing denials; Committee on Open Government is not authorized to advise with respect to other statutes such as Men Hyg Law. Comm on Open Gov't FOIL-AO-4854.

Hospital is "agency" or part of agency and its records are subject to rights of access granted by Freedom of Information Law. Comm on Open Gov't FOIL-AO-4758.

28. Schools, education and the like, generally

29. —Community colleges

Freedom of Information Law pertains to records of agencies of state and local government and community colleges throughout state are "agencies" subject to requirements of Freedom of Information Law; all records of agency are available, except to extent that records or portions thereof fall within one or more grounds for denial under CLS Pub O § 87(2)(a) to (i). Comm On Open Gov't FOIL-AO-4593.

Suffolk Community College Association, Inc., was subject to Freedom of Information Law since association would not have existed but for its relationship with college. Comm on Open Gov't FOIL-AO-8386.

30. —State University of New York (SUNY)

Since state university is integral part of government of New York State and is engaged in carrying out governmental functions, it is "agency" required to comply with Freedom of Information Law. Comm on Open Gov't FOIL-AO-4619.

New York State library is part of state education department and state university libraries are within state university; in both instances, those libraries are parts of agency and consequently, are subject to Freedom of Information Law; Supreme Court libraries would likely be considered as part of "judiciary" and as such, Freedom of Information Law would not apply. Comm on Open Gov't FOIL-AO-4663.

State University of New York is "agency" required to comply with Freedom of Information Law. Comm on Open Gov't FOIL-AO-7871.

School district meets broad definition of "agency" under CLS Pub Off § 86(3), but as "unit of local government," is excepted from coverage of Personal Privacy Protection Law, § 92(1) of such law, and thus neither Personal Privacy Protection Law nor § 89(2-a) of Freedom of Information Law would apply to records held by school district. Comm on Open Gov't FOIL-AO-4439.

Freedom of Information Law pertains generally to records of agency which includes entities of state and local governments such as school districts; while law provides statutory guidance concerning access to records of agencies, it makes no specific reference to records of school district; if record is final and does not identify particular students, it appears it would be accessible; to extent that such report might identify particular student or students, those aspects of report would be required to be kept confidential pursuant to federal law; in addition, if state education department maintains report, presumably it would be equally available from department and district. Comm on Open Gov't FOIL-AO-4714.

Terms of settlement and contract between school district and teacher would result in permissible rather than unwarranted invasion of personal privacy; such records are relevant to performance of official duties of school board and teacher, and, furthermore, it is clear that contracts between public employers and their employees are accessible because they represent terms and conditions under which public moneys are expended and public duties are performed. Comm on Open Gov't FOIL-AO-4861.

Agency need not create or prepare record in response to request; therefore, if board of co-operative educational services does not maintain statistical data involving race, ethnicity or sex, it is not required to prepare data on behalf of request. Comm on Open Gov't FOIL-AO-4914.

31. Social services

Freedom of Information Law is "general" law because it pertains generally to rights of access to records of entities of state and local government in New York; however, since Social Services Law deals with particular category of records and is "special" or specific statute, special statute prevails over general statute. Comm On Open Gov't FOIL-AO-4594.

iii. Requests; Requestors

a. Generally

32. In general

Police department cannot require "special court order" in order to obtain photocopies of police blotter. Comm on Open Govt FOIL-AO-3424.

Failure to complete form prescribed by agency cannot validly be cited as basis for withholding or delaying access to records; any request made in writing that reasonably described records should suffice. Comm on Open Gov't FOIL-AO-4141.

Upon receipt of request for records sought, agency is required to make requested records available except to extent that one or more grounds for denial applies; agency may not generally require individuals to supply additional information, such as social security number, before responding to request. Comm on Open Gov't FOIL-AO-4822.

When requesting records from agency, applicant should request copies of records rather than information generally. Comm on Open Gov't FOIL-AO-4977.

New York City Transit Authority was not required to furnish "copies of each and every disclosure" of records pertaining to requester which were allegedly send to units of state and local government and to private corporations on basis that (1) request did not include details concerning nature of such records, and (2) no information was included to indicate whether person requesting information was a former employee. Comm on Open Gov't FOIL-AO-6214 (1990).

Police department could not deny request to see all approved gun licenses on basis that records were too voluminous, and could not require that applicant request records by names of licensees, where applicant's prior request to see approved applications for persons within certain zip codes was denied because department did not organize its records by address or zip code; applicant could not know names without seeing records, and conditions set forth by department effectively preclude applicant from making appropriate request. Comm on Open Gov't FOIL-AO-8315.

Nothing in Freedom of Information Law or regulations promulgated by Committee on Open Government specifically deals with requests made and responses given by mail; however, due to size of state, inability of some people to physically travel to locations where records are kept, reality that many people work and cannot travel to those locations, and in view of intent of law, it is implicit that agencies must respond to requests by mail. Comm on Open Gov't FOIL-AO-8536.

When agency determines that it maintains requested records and has retrieved records sought, it is reasonable for agency to indicate that applicant must respond in some manner as to his or her preference, schedule, or desire to pay fee for copies within reasonable time. Comm on Open Gov't FOIL-AO-9491.

33. Form of request, generally

34. —Faxes

Absent judicial determination to contrary and assuming that such request is directed to appropriate person, i.e., records access officer, there is no basis to refuse to accept request for records under Freedom of Information Law made by means of fax transmission. Claim that agency can refuse to accept request for records under Freedom of Information Law made by fax transmission based on CLS CPLR § 2103 would be misplaced, since that provision deals with service of papers in legal proceeding and does not pertain or refer to request made to governmental entity under Freedom of Information Law. Comm on Open Gov't FOIL-AO-9232.

County police department could validly require that requests be made under Freedom of Information Law by submitting them either in person or by mail, rather than by fax transmission, where department's 5 fax machines served specific law enforcement functions and department received approximately 100,000 requests annually since receipt of requests by fax could have severe negative impact on ability of department to engage in authorized interdepartmental fax communications. Comm on Open Gov't FOIL-AO-9312.

Public body may not determine to accept requests for records under Freedom of Information Law only if they are faxed to public body. Comm on Open Gov't FOIL-AO-9547.

Agency may choose to make records available via e-mail or fax, but there is no obligation to do so on request. Comm on Open Gov't FOIL-AO-12305.

The name of an applicant has no bearing upon rights of access to records under the Freedom of Information Law, and failure to sign a request does not constitute a basis for delaying or denying rights of access. Comm on Open Govt FOIL-AO 3078.

Agency requirement that request for record be made on standard form is inappropriate to extent that it unnecessarily serves to delay response or deny request for records. 1986 Committee on Open Government FOIL-AO-4280.

Failure to complete form prescribed by agency cannot constitute valid basis for delaying response to request or denying access to records. Comm on Open Gov't FOIL-AO-4646.

Failure to use "actual form" as opposed to photocopy when requesting records from agency cannot constitute valid basis for delaying response to request or denying request; when request reasonably describes records sought and constitutes valid request for record under Freedom of Information Law, response is required in accordance with Law. Comm on Open Gov't FOIL-AO-4655.

Any written request for records that reasonably describes records sought should be sufficient, but failure to complete form prescribed by agency cannot serve to delay response to request or deny request. Comm on Open Gov't FOIL-AO-4686.

While agency may require that requests be in writing, there is no provision in Freedom of Information Law requiring or allowing agency to require particular language or wording in request for records; also, Freedom of Information Law is to facilitate public to gain access to records without regard to whether requester accurately cites relevant provisions of Law. Comm on Open Gov't FOIL-AO-4782.

Any written request for records should suffice and failure to complete form prescribed by agency cannot serve to delay response or deny request for records; standard form may be utilized except to extent that it unnecessarily serves to delay response or deny request for records. Comm on Open Gov't FOIL-AO-4875.

Although agency may require that request be made in writing or may make records available upon oral request, Freedom of Information Law is silent concerning use of standard forms; accordingly, any written request that reasonably describes records sought should suffice. Comm on Open Gov't FOIL-AO-4920.

While agency may not require that applicant complete request form prescribed by agency, it may require that request be made in writing in accordance with CLS Pub O § 89(3). Comm on Open Gov't FOIL-AO-8448.

It was unreasonable for inmate records coordinator or Department of Correctional Services to require, as matter of policy, that authorization to disclose inmate records bear original signature, where authorization was notarized; if photocopy is admissible in judicial proceeding for evidentiary purposes, it should be equally acceptable for purpose of authorizing disclosure under Freedom of Information or Personal Privacy Protection Laws. Comm on Open Gov't FOIL-AO-10345.

City of Yonkers could not require those seeking records via email to use city's Freedom of Information request form, although use of prescribed form would likely be of benefit to people seeking city records. Comm on Open Gov't FOIL-AO-16607.

Agency may not require that request under Freedom on Information Law be made on prescribed form since use of standard forms is inappropriate to extent that it unnecessarily serves to delay response to or deny request for records; any written request that reasonably describes records sought should suffice. Comm on Open Gov't OML-AO-2222.

35. Information requests or questions

Freedom of Information Law merely requires that agencies respond to request for records, and does not oblige public officials to provide "information" by answering questions; town officials would not be required to create or prepare new records in response to questions; should lawsuit be initiated, court may award petitioner reasonable attorney's fees if petitioner has "substantially prevailed". Comm on Open Gov't FOIL-AO-4577.

Freedom of Information Law merely requires agencies to respond to requests for records; it does not oblige public officials to provide information by answering questions. Comm on Open Gov't FOIL-AO-4582.

Freedom of Information Law pertains to existing records and, as general matter, agency need not create or prepare record in response to request for information; when requesting records, requestor should make sure to make request, rather than ask questions. Comm on Open Gov't FOIL-AO-4712.

Freedom of Information Law is vehicle under which person may request records from agency; further agency is obliged to respond to such request, but Freedom of Information Law is not vehicle that requires agency officials to respond or prepare answers to questions. Comm on Open Gov't FOIL-AO-4775.

Freedom of Information Law pertains to existing records maintained by agencies and does not generally require agencies to answer questions or prepare or create records in response to request; when requesting information, requester should specify that certain records are sought instead of simply asking questions. Comm on Open Gov't FOIL-AO-4843.

To extent that requestor is requesting information, answers to questions or explanations rather than existing records, agency is not required to produce information in order to respond to request; records should be described so that agency officials are able to locate records sought by means of description and vague requests that are merely descriptions of events will not fulfill this requirement. Comm on Open Gov't FOIL-AO-4857.

Freedom of Information Law does not deal with information per se; rather, it pertains to requests for and rights of access to existing records maintained by government agency, and it does not require that agency provide information or answers in response to questions. Comm on Open Gov't OML-AO-3866.

36. Law citations

It is not necessary to cite specific provision of law when requesting records; rather, citing Freedom of Information Law and reasonably describing records sought should be adequate. Comm on Open Gov't FOIL-AO-4940.

No provision of Freedom of Information Law requires that applicant cite particular provision within Public Officers Law in order to justify request for records. Comm on Open Gov't FOIL-AO-9267.

37. "Reasonably describe" requirement, generally

38. —Sufficient to locate object of request

When making requests for information under FOIL § 89[3], it is suggested that requester include sufficient detail to enable agency officials to locate records, such as identification, index and docket numbers, dates, descriptions of events and similar information. Comm on Open Gov't FOIL-AO-4002, 4003, 4005, 4006, and 4008.

Request for records should be directed to records access officer of agency or agencies that would maintain records which are requested; records sought should be described in sufficient detail so agency officials can locate them; all records of agency are available, except to extent that records or portions thereof fall within CLS Pub O § 87(2)(a) through (i). Comm on Open Gov't FOIL-AO-4579.

To enable department officials to locate records pertaining to family visiting program request should contain sufficient detail. Comm On Open Gov't FOIL-AO-4607.

When requesting transcript of hearing before parole board, request should be directed to agency which maintains such records—division of parole; however, while making such requests, sufficient detail should be provided as to enable agency officials to locate records. Comm on Open Gov't FOIL-AO-4634.

When making its request for records, written request should include sufficient detail to enable agency officials to locate records. Comm on Open Gov't FOIL-AO-4676.

Freedom of Information Law requires each agency to have "records access officer" to whom requests may be directed and who has duty of coordinating agency's response to request for records; therefore, requests should be sent to "records access officer" in relevant agency; request should be made in writing and should be in sufficient detail to enable agency officials to locate records. Comm on Open Gov't FOIL-AO-4693.

When making request, sufficient detail should be included so to enable officials to locate records, such as names, dates, descriptions of events and similar details. Comm on Open Gov't FOIL-AO-4737.

Request must be sufficiently detailed to enable agency officials to determine records requested and to locate them. Comm on Open Gov't FOIL-AO-4755.

Request for records should be directed to records access officer of agency that maintains records sought, and request should be in sufficient detail to enable agency officials to locate records sought. Comm on Open Gov't FOIL-AO-4762.

When making requests for records, request should include sufficient detail to enable agency officials to locate records; requests should be directed to agency or agencies that maintain the record sought. Comm on Open Gov't FOIL-AO-4833.

If agency can locate records based upon terms of request, agency is obliged to grant or deny access to records based on Freedom of Information Law. Comm on Open Gov't FOIL-AO-4834.

Under Freedom of Information Law, requests for records kept at correctional facility may be directed to facility superintendent; Freedom of Information Law requires that applicant include sufficient detail to enable agency officials to locate records. Comm on Open Gov't FOIL-AO-4845.

To extent that requestor is requesting information, answers to questions or explanations rather than existing records, agency is not required to produce information in order to respond to request; records should be described so that agency officials are able to locate records sought by means of description and vague requests that are merely descriptions of events will not fulfill this requirement. Comm on Open Gov't FOIL-AO-4857.

Request for records should be directed to records access officer and agency that maintains record sought and applicant must include sufficient detail to enable officials to locate records. Comm on Open Gov't FOIL-AO-4865.

Freedom of Information Law requires that applicant to provide sufficient detail should be provided so to enable agency officials to locate records; further, regulations promulgated by Department of Correctional Services pursuant to Freedom of Information Law indicate that, for records kept at facility, request may be directed to facility superintendent. Comm on Open Gov't FOIL-AO-4956.

Freedom of Information Law requires that applicant to provide sufficient detail to enable agency officials to locate records sought. Comm on Open Gov't FOIL-AO-4958.

Request for records should be directed to agency that maintains records and such request should be addressed to agency's records access officer; Freedom of Information Law requires that applicant include sufficient detail to enable agency officials to locate records. Comm on Open Gov't FOIL-AO-4974.

Agency may require that request be made in writing and that request must contain sufficient detail to enable agency officials to locate and identify records sought. Comm on Open Gov't FOIL-AO-7566.

Although agency may require that request for information be made in writing, agency may make records available pursuant to

oral request; although applicant must "reasonably describe" records sought, request need not identify particular record, for if agency can locate records based upon terms of request, applicant has met requirement that records be "reasonably described". 1986 Committee on Open Government FOIL-AO-4175.

Freedom of Information Law requires that person requesting records must "reasonably describe" records sought so agency officials can locate records; however, certain records may justifiably be withheld if information sought includes other people in addition to requester because that would cause unwarranted invasion of personal privacy; while eligible lists, which identify those persons who pass civil service examinations and their scores, are available, records identifying those persons who failed exams or their scores could be withheld as unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4574.

Freedom of Information Law states that agency may require that request for records be in writing, and that request "reasonably describe" records sought; any written request that "reasonably describes" records sought should suffice. Comm on Open Gov't FOIL-AO-4646.

Freedom of Information Law requires that applicant "reasonably describe" record sought, so when making requests, sufficient detail should be included to enable agency officials to locate records. Comm on Open Gov't FOIL-AO-4749.

Request for records must "reasonably describe" records sought and must be sufficiently detailed so to enable agency officials to locate requested records. Comm on Open Gov't FOIL-AO-4765.

Request for records must "reasonably describe" records sought and requests sent to agency involving records pertaining to requester, without more, would likely not meet requirements of Freedom of Information Law; when making request, sufficient detail should be included so to enable agency officials to locate records, such as names, dates, descriptions of events, docket numbers and similar identifying data. Comm on Open Gov't FOIL-AO-4774.

Request for records must "reasonably describe" record sought so that agency can locate records based upon terms of request. Comm on Open Gov't FOIL-AO-4777.

Requests for records should be made in writing and "reasonably describe" record sought; therefore, requests should include sufficient detail to enable agency officials to locate records. Comm on Open Gov't FOIL-AO-4823.

Freedom of Information Law requires that applicant "reasonably describe" records sought so request should contain sufficient detail to enable agency officials to locate records. Comm on Open Gov't FOIL-AO-4824.

Freedom of Information Law requires that applicant "reasonably describe" records sought so request should contain sufficient detail to enable agency offices to locate records. Comm on Open Gov't FOIL-AO-4831.

Applicant must "reasonably describe" record sought, so, when making requests, as much detail as possible should be provided to enable agency officials to locate records. Comm on Open Gov't FOIL-AO-4877.

Applicant must "reasonably describe" record sought and include sufficient detail to enable officials to locate records. Comm on Open Gov't FOIL-AO-4881.

Applicants for records should "reasonably describe" records sought and must provide sufficient information to enable agency officials to locate records. Comm on Open Gov't FOIL-AO-4882.

Freedom of Information Law requires that request "reasonably describe" records sought so that when request is made to agency or court, sufficient detail should be included so to enable officials to locate records. Comm on Open Gov't FOIL-AO-4922.

When making request for records, Freedom of Information Law requires that applicant "reasonably describe" records sought and should include sufficient detail to enable agency officials to locate records. Comm on Open Gov't FOIL-AO-4924.

Request for records should be made in writing and should "reasonably describe" records sought; therefore, when making request, sufficient detail should be included to enable agency officials to locate records. Comm on Open Gov't FOIL-AO-4938.

Agency may always require that applicant request records in writing; when request is made applicant must reasonably describe record sought and if agency officials cannot determine which records have been requested, request likely did not meet "reasonably describe" standard and response to that effect should be given to applicant. Comm on Open Gov't FOIL-AO-4955.

Freedom of Information Law requires that applicant reasonably describe records sought and if agency can locate requested records based on terms of request, applicant has reasonably described such records; however, if agency cannot determine which records have been requested, standard of "reasonably describing" records is not met and in some instances, while records sought might exist, they may not be retrievable due to nature of agency's filing system; also, agency need not create or prepare record in response to request. Comm on Open Gov't FOIL-AO-4970.

b. Requestors

39. In general

To extent that news media obtains police blotters or complaint reports pursuant to Freedom of Information Law, individual, as member of public, would enjoy same rights; when records are accessible under Freedom of Information Law, they should be made available to any person, without regard to status or interests. Comm on Open Gov't FOIL-AO-4585.

Freedom of Information Law does not deal directly right of mayor to gain access to village records, make copies or take them home; however, village records are property of village rather than mayor, even though mayor may be chief executive officer. If request is reasonable, and in absence of village board rule or policy to contrary, mayor or member of village board should not generally be required to resort to Freedom of Information Law in order to seek or obtain records. Comm on Open Gov't FOIL-AO-8387.

Town board member, acting unilaterally without consent or approval of majority of total membership of board, has same rights as those accorded to member of public under Freedom of Information Law, unless there is some right conferred on board member by means of law or rule; in absence of any such rule, member seeking records could presumably be treated in same manner as public generally. Comm on Open Gov't FOIL-AO-12692.

Member of town board acting unilaterally, without consent or approval of majority of total membership of board, has same rights as public generally (unless some right is conferred on board member by law or rule) to obtain information relating to incident involving death of town resident while in police custody. Comm on Open Gov't OML-AO-3158.

When former state officer or employee, within 2 years of termination of state service, submits Freedom of Information Law (FOIL) request to his or her former agency or pursues appeal of denial of such request, agency should give copy of this advisory opinion (interpreting Advisory Opinion No. 98-7 as it relates to FOIL requests); if such individual then pursues request or appeal, agency may assume that he or she is proceeding on his or her own behalf, which is permitted, but if it is later discovered that he or she was proceeding in violation of CLS Pub O § 73(8), then Ethics Commission may impose civil remedy of up to $10,000 for each violation. State Ethics Comm Adv Op No. 97-12.

40. Litigants; litigation

If record is available to public under Freedom of Information Law, it cannot be withheld solely because applicant is litigant or because records relate to litigation; however, file might nonetheless contain records consisting of attorney work product or material prepared for litigation, as well as records subject to attorney client privilege; these records would be specifically exempted from disclosure. Comm On Open Gov't FOIL-AO-4605.

Pendency of litigation does not affect person's rights as a member of the public under the Freedom of Information Law. Comm on Open Gov't FOIL-AO-6209 (1990).

41. Prisoners; prisons

Request made to obtain medical records from department of correctional services should be brought not under Freedom of Information Law but under CLS Pub Health § 18; § 18 provides rights that exceed those granted by Freedom of Information Law. Comm On Open Gov't FOIL-AO-4608.

42. Representative capacity of requestor

Government offices, such as Human Resources Administration or Department of Social Services, are "agencies" subject to Freedom of Information Law; however, private facility would not likely be required to comply with Freedom of Information Law; records concerning foster care are generally confidential, however, if requester is parent of child, it is likely that parent has rights of access to records pertaining to child; consequently, request for records should be given to agency or agencies that maintain records in which interested. Comm on Open Gov't FOIL-AO-4924.

c. Specificity Of Requests

43. In general

Request for records should be directed to records access officer of agency or agencies that would maintain records which are requested; records sought should be reasonably described in sufficient detail so agency officials can locate them; all records of agency are available, except to extent that records or portions thereof fall within CLS Pub O § 87(2)(a) through (i). Comm on Open Gov't FOIL-AO-4579.

When making requests under Freedom of Information Law, requests should be for existing records rather than information and should be as specific as possible in describing records so that agency officials can identify and locate records sought. Comm on Open Gov't FOIL-AO-4884.

When making request, Freedom of Information Law does not require applicant identify records sought with specificity; rather, Law merely requires that request reasonably describe records sought and request meets the standard of reasonably describing when agency officials can locate records based on terms of request. Comm on Open Gov't FOIL-AO-4975.

Whether request reasonably describes records sought may be dependent upon terms of request, as well as nature of agency's filing or record-keeping system. Comm on Open Gov't FOIL-AO-7584.

It appeared that minutes of meetings held by industrial development agency could be readily retrieved and that request for minutes covering period of 3 years would reasonably describe records sought by applicant. If request under Freedom of Information Law involves minutes of agency insofar as they deal with particular subject, and if minutes are not topically indexed, agency staff would not be required to review all of minutes in effort to locate particular items within them. Comm on Open Gov't FOIL-AO-8288.

Journalist or member of public cannot be required to seek portion of police report by referring to specific incident; rather, applicant could request report or reports as they pertain to particular days or dates. Comm on Open Gov't FOIL-AO-8546.

Applicant is not required to identify with particularity exactly which record, or perhaps which portion of record he or she may be interested in reviewing; thus, journalist or member of public cannot be required to seek portion of report by referring to specific incident and can, instead, request report or reports as they pertain to particular days or dates. Comm on Open Gov't FOIL-AO-9455.

Requests for oaths of office, which may be filed with respect to some individuals, are filed chronologically; thus, requestor must include year in which oath was filed in order to locate and obtain copies of those records. Comm on Open Gov't FOIL-AO-9991.

To extent that records sought from village could be located with reasonable effort, request reasonably described them; however, to extent that records were not maintained in manner that permitted their retrieval except by reviewing perhaps thousands of records individually in effort to locate those falling within scope of request, request was too broad. Comm on Open Gov't FOIL-AO-10108.

Identifying records that indicate "criticism" might, in some circumstances, be problematic, and such request may not, at least in part, reasonably describe records sought under Freedom of Information Law. Requests for "any and all memorandum, resolutions, draft resolutions, correspondence or press releases calling for the holding of legislative hearings into any of the controversies surrounding" named county executive and district attorney would meet requirement of reasonably describing records; on other hand, if such records were not maintained in manner that permitted their retrieval except by reviewing perhaps hundreds or even thousands of records individually in effort to locate those falling within scope of request, to that extent, requests would not meet standard reasonably describing records. Comm on Open Gov't FOIL-AO-12631.

With regard to request under Freedom of Information Law for minutes of meetings, it appeared that minutes of meetings could be readily retrieved and that request for minutes covering period of 3 years would reasonably describe records; however, with regard to request for minutes insofar as they dealt with particular subject, and if minutes were not topically indexed, agency staff would not be required to review all of minutes in effort to locate particular items within them. Comm on Open Gov't OML-AO-2349.

44. Specificity sufficient, generally

45. —Medical records

Person seeking medical records need not specify precisely period of time for which records are being sought, in order to "reasonably describe" requested records. Comm on Open Govt FOIL-AO-3611.

46. —Police records

Request to review police blotter in terms of period of time, such as day or week, would "reasonably describe" record sought and conform with requirements of CLS Pub O L § 89(3). Comm on Open Govt FOIL-AO-3424.

Request for records "pertaining to the investigation of Donald Lee McNabb", found dead in his apartment following his promise to testify in relation to drug case, reasonably describes records sought where, in view of nature of event and intended publicity as indicated in variety of news articles, city of Auburn can locate records pertaining to that death. Comm on Open Gov't FOIL-AO-4562.

If case records identify police officer or officers who prepared complaint follow-up report ("DD5), then police department has ability to locate that officer and acquire activity log for purpose of determining rights of access to portions pertaining to case; if so, then request reasonably describes records, as required by Freedom of Information Law. Comm on Open Gov't FOIL-AO-10038.

If speeding tickets issued within particular time frame can be retrieved by means of name of trooper who issued them, request for all such tickets issued within that period, for purpose of ascertaining whether officer issues citations "all at 75 mph," would meet standard imposed by law because, on receipt of tickets, applicant could review and analyze them himself. Comm on Open Gov't FOIL-AO-10343.

Applicants request for city police Field Interview Forms (FIFs), despite volume of material, met requirement of "reasonably describing" records and could not be rejected due to its breadth. Comm on Open Gov't FOIL-AO-12565.

Request for "911 police radio dispatch tapes" generated over 10 years earlier, and citing certain date, likely would meet standard of reasonably describing records if directed to small police department; on other hand, if 911 calls are received in different locations, due, for example, to size or population of county, request of that nature might not meet standard of reasonably describing records. Comm on Open Gov't FOIL-AO-12589.

47. —Public works; streets

Request for record concerning street repairs and risks of pending lawsuit identified location of repairs as well as time period during which repairs were made "reasonably described" records. Comm on Open Gov't FOIL-AO-4675.

48. —Wagering, including Off-Track Betting (OTB)

Request that Suffolk Regional Off-Track Betting Corporation furnish "copy of SROTB operating manual, spelling out company policies and procedures for employees" reasonably describes records sought and need not be more specific. Comm On Open Gov't FOIL-AO-4548.

Request involving "the correspondence file for the [Staten Island] Borough President and Deputy Borough President from January 1, 1980 through June 30, 1983" is not a request for records "reasonably described" for purposes of § 89(3) of the

Freedom of Information Law. Comm on Open Govt FOIL-AO 3025.

49. Specificity insufficient, generally

50. —Employment; employees, generally

51. — —Security work

Request for description of any and all security measures in place for city officials, either in past or present, was too broad and did not satisfy requirement of CLS Pub O § 89(3) that applicant "reasonably describe" records sought. Comm on Open Gov't FOIL-AO-7930.

52. — —Worker's compensation

Requests for cases of complaints filed by workers sustaining respiratory or bodily damage due to long-term occupational exposure to certain chemicals or solvents does not "reasonably describe" records requested, where workers' compensation board does not file records in way that enables it to locate those involving occupational diseases. Comm On Open Gov't FOIL-AO-4517.

Division of Human Rights was not required to review 14-volume set of materials containing variety of information, which process would take weeks, in order to reply to request for all policy statements of Division that were currently in effect pertaining to employment discrimination under Human Rights Law. Comm on Open Gov't FOIL-AO-7584.

53. —Family Court records

Even assuming that request for vouchers of persons paid in specific judicial district through Family Court including experts, investigators, law guardians, attorneys and like involved records of Office of Court Administration, rather than courts records (which are not available under Freedom of Information Law), it appeared that request did not reasonably describe records sought as thousands of vouchers were filed each year but were not filed by judicial district. Comm on Open Gov't FOIL-AO-9208.

54. —Public works; water

While "all records" standard might be appropriate for requesting records in some circumstances, it would not be appropriate in every circumstance, and requests for "all records" concerning certain water district from 1977 to present is that kind of request which likely does not "reasonably describe" information sought. Comm on Open Gov't FOIL-AO-4449.

55. —Real property matters, generally

Request for "all information kept regarding [my] property" did not reasonably describe records sought if town maintained records falling within scope of such request in number of locations or departments and by means of different filing systems within those departments; moreover, if records were kept chronologically, it might not be possible to locate them by means of name or address. Comm on Open Gov't FOIL-AO-10280.

Request for copies of any and all records concerning petitioner made to specific records officer does not contain sufficient detail to permit agency to respond. Comm on Open Govt FOIL-AO-3605.

iv. Responses

a. Generally

56. In general

As general matter, if record is made available for inspection, agency is required under § 89[3] to prepare copy of such record upon payment of or offer to pay requisite fees for photocopying. Comm on Open Gov't FOIL-AO-4066.

Although agency may require request for information made in writing, and agency may create request forms, failure to complete form prescribed by agency cannot serve to delay response to request or deny access to records, and any request made in writing that reasonably describes records is sufficient. 1986 Committee on Open Government FOIL-AO-4181.

Denial of request for records rendered following appeal must include more detailed indication of basis for denial than initial denial. Comm On Open Gov't FOIL-AO-4528.

Freedom of Information Law merely requires that agencies respond to request for records, and does not oblige public officials to provide "information" by answering questions; town officials would not be required to create or prepare new records in response to questions; should lawsuit be initiated, court may award petitioner reasonable attorney's fees if petitioner has "substantially prevailed". Comm on Open Gov't FOIL-AO-4577.

No provision of Freedom of Information Law or judicial decision requires that denial at agency level identify every record withheld or give description of reason for withholding each document be given. Comm on Open Gov't FOIL-AO-8527.

There is nothing in Freedom of Information Law that specifies which public officer or employee must respond to request. Comm on Open Gov't FOIL-AO-8533.

Freedom of Information Law requires agencies to produce accessible information in format of applicant's choice, so long as agency is able to do so and applicant pays requisite fee. Comm on Open Gov't FOIL-AO-8888.

There is no requirement that denial of request for records under Freedom of Information Law at agency level identify every record withheld or that description of reason for withholding each document be given. Comm on Open Gov't FOIL-AO-9249.

Village clerk failed to comply with Freedom of Information Law when she forwarded requests for information concerning implementation of village's assessment practice to village attorney and suggested that requestor contact village attorney for further information; clerk, as designated records access officer, had duty to coordinate village's response to requests for records, and her response to contact village attorney, without more, was inadequate. Comm on Open Gov't FOIL-AO-10186.

When agency acknowledges request because more than 5 business days may be needed to grant or deny request, it acts in compliance with law if it provides approximate date when request will be granted or denied, and that date is reasonable in view of attendant circumstances. Comm on Open Gov't FOIL-AO-12094.

When agency acknowledges receipt of Freedom of Information Law request because more than 5 business days may be needed to grant or deny it, there is no precise time period within which it must grant or deny access to records; reasonable time depends on attendant circumstances such as volume of request, possibility that other requests have been made, necessity to conduct legal research, search and retrieval techniques used to locate records. Comm on Open Gov't FOIL-AO-12219.

While agencies are required by CLS Pub O § 89(4)(a) to send copies of appeals and their determinations thereon to Committee on Open Government, there is nothing in law that requires that they provide information pertaining to Committee to person seeking records. Comm on Open Gov't FOIL-AO-12690.

There is no requirement that agency make records available on weekends or during times other than regular business hours. Comm on Open Gov't FOIL-AO-12727.

CLS Penal § 240.65 does not apply when agency denies access to record, even though basis for denial may be inappropriate or erroneous, or when agency cannot locate record that must be maintained. Comm on Open Gov't FOIL-AO-12822.

57. Concealment or destruction

If administrative assistant for Long Island regional office of the Office of Parks, Recreation and Historic Preservation willfully concealed existence of records pertaining to a "rating and ranking list of employees", such concealment was in violation of CLS Public Officers Law § 89(8). Comm on Open Gov't FOIL-AO-6228 (1990).

CLS Pub O § 89(8) does not deal with situations in which records are requested and agency determines to withhold them in accordance with one or more of grounds for denial appearing in CLS Pub O § 87(2); rather, it pertains to situations in which agency officials knowingly conceal existence of records or destroy records in order to prevent disclosure. In case of alleged violation of CLS Pub O § 89(8), matter could be brought to district attorney in conjunction with CLS Penal § 240.65. Comm on Open Gov't FOIL-AO-7637.

Penalty for violating CLS Pub O § 89(8) (i.e., when agency employee receives request for record and indicates that agency does not maintain record even though he or she knows that agency does maintain it, or when agency employee destroys record following request for that record in order to prevent its

public disclosure) is up to 15 days in jail and/or fine up to $250. Comm on Open Gov't FOIL-AO-12254.

When agency indicates that it does not maintain or cannot locate record, applicant for record may seek certification to that effect. Comm on Open Gov't FOIL-AO-12589.

Neither chairman of town planning board nor any other person would have had right or authority to destroy tape recording of open meeting of board. CLS Penal § 240.65 and CLS Pub O § 89(8) may be applicable in 2 circumstances: (1) when agency officer or employee receives request for record and indicates that agency does not maintain record even though he or she knows that agency does maintain record, or (2) when agency officer or employee destroys record following request for that record in order to prevent disclosure of record. Comm on Open Gov't FOIL-AO-12696.

58. Delay as constructive denial

Denial of request for minutes and tape recordings of board of education meeting which states that the request will be granted "within a reasonable time" after a subsequent board meeting is deficient. Comm on Open Gov't FOIL-AO-2860.

Acknowledgment of receipt of request for records, together with statement that records sought will be made available, is likely insufficient to comply with Freedom of Information Law when records sought are not actually made available. Comm On Open Gov't FOIL-AO-4556.

Once agency indicates that it will disclose records but fails to make records available, such action is equivalent of denial. Comm on Open Gov't FOIL-AO-4738.

59. Failure to respond as constructive denial

Failure of agency to respond to request for materials under Freedom of Information Law constitutes a constructive denial of access. Comm on Open Govt FOIL-AO 3037.

60. Inability to locate

Freedom of Information Law does not obligate city official to create additional record in effort to respond to request for record; denial of records must be in writing with stated reasons; if agency indicates that it does not have requested record, upon request, records access officer shall certify that it does not have possession of such record where such record cannot be found after diligent search. Comm On Open Gov't FOIL-AO-4589.

Agency has satisfactorily responded to request for information when it appears that all requested records maintained by agency have been made available and when agency provided letter certifying that, after diligent search, it had not been able to locate certain records. Comm on Open Gov't FOIL-AO-4688.

Denial of record must be made in writing, stating reasons and informing applicant of name and address of person or body to whom appeal may be made; when requested records cannot be located, agency shall certify that it does not have possession of such record or that such record cannot be found after diligent search. Comm on Open Gov't FOIL-AO-4717.

Statement that agency does not maintain record sought is not denial, for agency cannot withhold records that it does not maintain; therefore, such response to initial request does not provide basis on which to appeal and such response to appeal does not provide basis to commence CLS CPLR Article 78 proceeding; in response to request for records agency shall provide copy of such record and certify correctness of such copy if so requested, or if case may be, shall certify that it does not have possession of such record or that such record cannot be found after diligent search. Comm on Open Gov't FOIL-AO-4891.

If so requested, agency shall certify that it does not have possession of such record or that record cannot be found after diligent search. Comm on Open Gov't FOIL-AO-4897.

Nothing in Freedom of Information Law specifies form of certification that agency does not maintain or cannot locate record. Comm on Open Gov't FOIL-AO-9628.

Where county district attorney's office indicated that requested records apparently were lost, applicant was entitled to seek certification to that effect. Comm on Open Gov't FOIL-AO-9863.

61. Notice as to appeal rights and procedure

If record is denied, denial must be made in writing, stating reasons and informing applicant of name and address of person or body to whom appeal may be made. Comm on Open Gov't FOIL-AO-4717.

If portion of requested record was deliberately deleted from copy made available, request was partially granted and partially denied, and agency should have informed in writing of reason for denial and right to appeal denial. Comm on Open Gov't FOIL-AO-4806.

Records access officer has duty to respond within 5 business days of receipt of request and if request is denied, reasons must be stated in writing, and applicant must be informed of right to appeal. Comm on Open Gov't FOIL-AO-4952.

Agency's records access officer has duty individually, or in that person's role of coordinating response to request under Freedom of Information Law, to inform person denied access of right to appeal as well as name and address of person or body to whom appeal may be directed. Comm on Open Gov't FOIL-AO-9722.

Records access officer has duty, individually or in his or her role of coordinating response to request, to inform persons denied access of their right to appeal, and name and address of person or body to whom appeal may be directed. Comm on Open Gov't FOIL-AO-10016.

62. Single certification for multiple copies

When certification is requested with respect to voluminous number of records, then single certification asserted by means of "cover letter" would be appropriate; while it might be good practice to describe records that have been certified in cover letter or similar document, there is no requirement that such action be taken. Comm On Open Gov't FOIL-AO-3912.

Particularly when certification is requested with respect to voluminous number of records, single certification given by means of written assertion, statement or affidavit describing or identifying records that were copied is sufficient under CLS Pub O § 89(3); it is not necessary for each copy of records made available under Freedom of Information Law to be stamped or "certified" separately. Comm on Open Gov't FOIL-AO-9338.

b. Particular Cases

63. In general

Agency need not respond instantly to request and has 5 business days to respond from receipt of request for records reasonably described. Comm on Open Gov't FOIL-AO-4982.

If applicant cannot know precisely when he or she may have opportunity to inspect records, agency should indicate that records will be available during business hours for certain period, 2 weeks, for example, after request has been granted; if records are not inspected or copied within such specified reasonable period, applicant should be informed that request will be considered to have been withdrawn. Comm on Open Gov't FOIL-AO-8347.

When portions of file are withheld, response to request must indicate that request was denied in part, and applicant must be informed of right to appeal denial in accordance with CLS Pub O § 89(3) and regulations. Comm on Open Gov't FOIL-AO-8378.

Nothing in Freedom of Information Law or regulations would require that chief of police respond personally or preclude village attorney from responding on behalf or at direction of village official. Comm on Open Gov't FOIL-AO-8533.

If, as matter of practice or policy, town acknowledges receipt of requests by stating that requests will be granted or denied within 30 days, irrespective of nature, volume or search needed to respond, such practice would be inconsistent with both language and intent of Freedom of Information Law. Comm on Open Gov't FOIL-AO-8540.

Nothing in Freedom of Information Law pertains specifically to repeated requests made by applicant for records that have already been disclosed; it was advised that agency inform applicant that records sought have been made available and that ensuing requests for same items will be considered moot and will not be answered. Comm on Open Gov't FOIL-AO-8549.

Certification made under Freedom of Information Law does not pertain to accuracy of contents of record, but rather would involve assertion that copy is true copy; in other words, certification prepared pursuant to CLS Pub O § 89(3) would not indicate that contents of record are complete, accurate or "legal," but would

merely indicate that copy of record is true copy. Comm on Open Gov't FOIL-AO-9338.

Shortage of manpower to comply with request for records under Freedom of Information Law does not constitute valid basis for denial of access to records. Comm on Open Gov't FOIL-AO-9455.

Acknowledgement of receipt of request for documents under Freedom of Information Law which indicates that "a response will be forthcoming within appropriate time" is inconsistent with requirements imposed by law. Comm on Open Gov't FOIL-AO-9549.

If in every instance, as matter of practice or policy, agency acknowledged receipt of requests and indicated that it would determine whether to grant or deny access to records within particular period following date of acknowledgement, such practice or policy would be contrary to thrust of Freedom of Information Law. Comm on Open Gov't FOIL-AO-10083.

Agency's acknowledgement of request for records, which indicated that request would be processed "as soon as possible," was too ambiguous and open-ended; if more than 5 business days are needed to determine rights of access, agency must state approximate date when action will be taken. Comm on Open Gov't FOIL-AO-12030.

Village's response to request for records, that village clerk was on vacation and would respond to request upon her return, was inadequate. Comm on Open Gov't FOIL-AO-12084.

Village is not obliged by Freedom of Information Law to provide information sought by answering questions raised during meeting, preparing tabulations in effort to be responsive, or offering explanation of its action. Comm on Open Gov't OML-AO-2383.

64. Employment; employees, generally

If an appeal from denial of records has not been answered within statutory time period, administrative remedies have been exhausted and challenge could be initiated to denial under CLS Civil Practice Rules Article 78; assuming that record involving individual's previous employment with city exists and can be located, record would be available; on other hand, if city officials cannot locate such record, response should nonetheless be given, indicating that record of employment could not be located. Comm on Open Gov't FOIL-AO-4840.

If agency has central telephone number, and calls are forwarded to employees through use of switchboard or other transfer mechanism, disclosure of central telephone number is adequate to comply with request for "complete listing" of voice and fax numbers of agency employees. Comm on Open Gov't FOIL-AO-12305.

65. Legislative record

Since it is responsibility of county attorney to act as legal counsel to county departments, it is proper for county attorney to respond to request for records on behalf of officials of county department; as such, fact that county legislature (governing body of county, public corporation) was advised of request for records and asked that county attorney respond, while not common practice, did not appear to be inconsistent with Freedom of Information Law. Comm on Open Gov't FOIL-AO-4951.

66. Police and other law enforcement agencies, generally

Disclosure of statistics indicating average salary and other payments and fringe benefits of city police officer was not responsive to request for breakdown of cost of mayor's police protection from its inception to present. Comm on Open Gov't FOIL-AO-7930.

Basis for denial of applicant's appeal was incomplete and inadequate, and blanket denial of request was inconsistent with law, where applicant sought records related to particular assault arrest entry in village police blotter, including defendant's name, date of birth, address, charges, any victim names and any reports on circumstances surrounding request; records must be reviewed for purpose of identifying those portions of records that might fall within scope of one or more of grounds for denial of access. Comm on Open Gov't FOIL-AO-12605.

67. Public works; utilities

Records access officer's response to request for records maintained by Albany County Department of Public Works, that "all Freedom of Information requests must be filed through the Albany County Clerk's Office," was inconsistent with Freedom of Information Law and unnecessarily delayed issuance of determination to grant or deny applicant's request. Comm on Open Gov't FOIL-AO-10222.

68. Real property, generally

69. —Environmental matters; pesticides

Request seeking records relating to town's purported testing and environmental assessments of dump on specified person's property, which was filed after applicant read newspaper article which indicated that town conducted its own tests which showed no hazardous materials on site and which included statement by town supervisor that there was clear, compelling evidence that site contained neither hazardous nor toxic materials, met standard for reasonably describing records sought by applicant. Comm on Open Gov't FOIL-AO-8956.

70. —Zoning

In response to request for planning commission records showing each instance during past several years in which it did not exercise its discretion to waive certain zoning requirement, it was not improper for secretary of planning commission to "refuse to do [requestor's] research" and invite requestor to look through planning commission's files, which might be contained in "1 or 2 file cabinets"; alternative means of gaining requested information might involve request to review minutes of commission meetings because, while there may be numerous minutes, review of their contents would involve less effort than search of file cabinets. Comm on Open Gov't FOIL-AO-12181.

71. School; education matters

Initial response by agency did not constitute denial, and instead was acknowledgment of receipt of request that was consistent with CLS Pub O § 89(3), where (1) request involved bills, canceled checks, receipts and similar records reflective of expenses incurred or payments made concerning athletic fields, travel by school district officials, catering for board meetings, legal services, records pertaining to improvements made in board room and superintendent's office and "writings that set forth terms and conditions of employment for certain administrators," and (2) receipt of request was acknowledged on April 19 and applicant was informed that school district "should be able to provide you with further response no later than May 27." Comm on Open Gov't FOIL-AO-8879.

State university did not violate citizen's statutory right to review records under Freedom of Information Law where such citizen was declared "persona non grata" and prohibited from entering campus without specific authorization because he had violated campus rules promulgated under CLS Educ § 6450(1) but, in response to his request for records, he was granted permission to visit particular site on campus for reviewing records during specific time. Comm on Open Gov't OML-AO-2226.

72. Telephone records

If agency has central telephone number, and calls are forwarded to employees through use of switchboard or other transfer mechanism, disclosure of central telephone number is adequate to comply with request for "complete listing" of voice and fax numbers of agency employees. Comm on Open Gov't FOIL-AO-12305.

B. Timeliness

i. Generally

73. In general

Freedom of Information Law has force of law and prescribes time limits for response to quest for records. Comm On Open Gov't FOIL-AO-4593.

Failure of agency to respond for records to disclosure within designated time limits results in denial of access and may be appealed to head of agency or whomever is designated to determine appeals. Comm on Open Gov't FOIL-AO-4627.

Failure of agency to respond to request for record within designated time limits results in denial of access and may be appealed to head of agency or whomever is designated to determine appeal; if determination is not rendered within proper time limit, appellant has exhausted his or her administrative remedies

and may initiate challenge to constructive denial of access. Comm on Open Gov't FOIL-AO-4628.

Financial Information Services Agency is subject to timeliness rules of Freedom of Information Law because it is municipal entity that performs governmental function for city; further, directors of agency are required to designate one or more persons as records access officers. Comm on Open Gov't FOIL-AO-4969.

74. Timeliness of production of documents

Since agency is generally obliged to maintain custody and control of its records, applicant may be required to review records in presence of official of agency; since agency must grant or deny access to records within prescribed periods of time, as long as records are made available for inspection or copying within those time periods, agency could wait until official of agency could be present; however, if agency official cannot be present during course of time period, access cannot be delayed or denied until that person becomes available. Comm on Open Gov't FOIL-AO-4869.

Statement by Record Access Officer for New York City Police Department that final determination would be made in "30 to 60 days" on petitioner's request to inspect records, rather than copy records, constituted denial of access to records. Comm on Open Gov't FOIL-AO-5538.

Request for minutes of various committees of Seneca County Legislature which was answered by County Administrator to the effect that the person who would ordinarily disclose the minutes was on vacation, and no further attempt was made by County Administrator to furnish requested information, the request was constructively denied and an appeal could be made. Comm on Open Gov't FOIL-AO-6328 (1990).

Agency is not required to respond instantly to request under Freedom of Information Law; although Freedom of Information Law provides direction concerning time and manner in which agency must respond to requests, it does not include any provision that specifies period within which records must be disclosed. Comm on Open Gov't FOIL-AO-8347.

To suggest that response to request for copies of certificates of occupancy can take nearly 2 months serves to negate clear intent of Freedom of Information Law as expressed in its statement of legislative intent and by courts in their interpretations of Law; in municipality size of Village of Old Westbury and in situation in which request involves small number of records that are clearly accessible under Freedom of Information Law, there is no justifiable reason for delaying disclosure of records. Comm on Open Gov't FOIL-AO-8366.

Insofar as records sought can be readily retrieved and copied, to comply with intent of Freedom of Information Law, it is "incumbent" on town to make records available as soon as possible; if certain of records sought cannot be readily retrieved, delay may be warranted with respect to disclosure of those records; however, with regard to others that can be quickly located, there would appear to be no valid basis for delaying their disclosure. Comm on Open Gov't FOIL-AO-8407.

Particularly in case of voluminous request, it is proper for agency to disclose quickly or on ongoing basis those records that are readily retrievable. Comm on Open Gov't FOIL-AO-8879.

Notwithstanding legislative declaration appearing at beginning of Freedom of Information Law which provides that "it is incumbent upon state and its localities to extend public accountability wherever and whenever feasible," agency cannot be expected to respond instantly to request in every case or to produce records instantly, absent appointment or indication in advance of inspection that records will continually be available for review. Comm on Open Gov't FOIL-AO-9209.

When agency acknowledges receipt of request because more than 5 business days may be needed to grant or deny such request, agency complies with Freedom of Information Law if it provides approximate date indicating when request will be granted or denied, and such date is reasonable in view of attendant circumstances; however, if records are clearly available or readily retrievable, there may be no basis for lengthy delay. Comm on Open Gov't FOIL-AO-10083.

If request under Freedom of Information Law is voluminous and significant amount of time is needed to locate records and review them to determine rights of access, delay in disclosure might be reasonable; on other hand, if record or report is clearly public and can be found easily, there would be no rational basis for delay. Comm on Open Gov't FOIL-AO-12607.

There is no precise time period within which agency must grant or deny access to records; time needed to do so may be dependent on, inter alia, volume of request, possibility that other requests have been made, necessity to conduct legal research, and search and retrieval techniques used to locate records. When agency acknowledges receipt of request because more than 5 business days may be needed to grant or deny request, Freedom of Information Law is satisfied so long as agency provides approximate date indicating when request will be granted or denied, and such date is reasonable in view of attendant circumstances. Comm on Open Gov't FOIL-AO-12655.

Agency constructively denied request for certain police records where roughly one year had elapsed since request was first made. Comm on Open Gov't FOIL-AO-12655.

ii. Response to Request

75. In general

For purposes of Freedom of Information Law phrase "business day" means any day other than Saturday, Sunday or legal holiday, and even though municipal office in small community has "business hours" only 2 days per week, it is unreasonable to contend that response required to be made within 10 business days could be delayed for period of 5 weeks. 1986 Committee on Open Government FOIL-AO-4230.

Agency's failure to respond within designated time limits results in denial of access to records that may be appealed to head of agency or whomever is designated to determine appeals. Comm on Open Gov't FOIL-AO-4425.

Agency is not required to respond instantly to request under Freedom of Information Law; although Freedom of Information Law provides direction concerning time and manner in which agency must respond to requests, it does not include any provision that specifies period within which records must be disclosed. Comm on Open Gov't FOIL-AO-8347.

Authority of agency to take up to 5 business days to respond to request under Freedom of Information Law or, if warranted, to take additional time by acknowledging receipt of request in accordance with CLS Pub O § 89(3) is not intended to enable agencies to delay disclosure unnecessarily. Comm on Open Gov't FOIL-AO-8366.

Notwithstanding legislative declaration appearing at beginning of Freedom of Information Law which provides that "it is incumbent upon state and its localities to extend public accountability wherever and whenever feasible," agency cannot be expected to respond instantly to request in every case or to produce records instantly, absent appointment or indication in advance of inspection that records will continually be available for review. Comm on Open Gov't FOIL-AO-9209.

In case of routine requests, agency should ordinarily have ability to grant or deny access to records within 5 business days; if more than that period is needed, due to possibility that other requests have been received, that other duties preclude quick response or because of volume of request, need for consultation, search techniques needed to locate records or need to review records to determine which portions should be disclosed or denied, estimated date for granting or denying request must be given in acknowledgement to reflect those factors. Comm on Open Gov't FOIL-AO-9444.

When agency acknowledges receipt of request because more than 5 business days may be needed to grant or deny such request, agency complies with Freedom of Information Law if it provides approximate date indicating when request will be granted or denied, and such date is reasonable in view of attendant circumstances; however, if records are clearly available or readily retrievable, there may be no basis for lengthy delay. Comm on Open Gov't FOIL-AO-10083.

If neither response to request under Freedom of Information Law nor acknowledgement of receipt of request is given within 5 business days, or if agency delays responding for unreasonable time after it acknowledges that request has been received,

request may be considered to have been constructively denied. Comm on Open Gov't FOIL-AO-12438.

76. Requirement of 5 business days for response

To extent that agency's response granting, denying or acknowledging receipt of request for records is given more than 5 business days following initial receipt of written request, agency's requirement of completion of standard application form would fail to comply with provisions of Freedom of Information Law. Comm on Open Gov't FOIL-AO-4427.

While there is nothing in Freedom of Information Law prohibiting New York City Police Department from rendering determination in 1987 regarding appeal filed in 1984 and not answered, incident to denial of request for records, it is not required to do so under CLS Pub Off § 89(4)(a) and CPLR Art 78, and, in order to ensure Department's responding appropriately to request for records in such circumstances, requesting party should renew process and resubmit initial request to Department's records access officer. Comm on Open Gov't FOIL-AO-4493.

Agency must respond to request for information within 5 business days from receipt of request and this response can take 3 forms: it can grant access, deny access, and if so demand should be in writing stating reasons, or receipt of request may be acknowledged in writing if more than 5 business days is necessary to review or locate records; however, Committee on Open Government has no authority to enforce Freedom of Information Law, nor is it empowered to compel agency to grant or deny access to records. Comm on Open Gov't FOIL-AO-4574.

Freedom of Information Law requires that agency respond to request for record within 5 business days of its receipt of request. Comm on Open Gov't FOIL-AO-4662.

Freedom of Information Law requires that agency respond in writing within 5 business days of receipt of request whether or not agency maintains record sought and whether or not record is available; agency's failure to respond may be considered constructive denial which may be appealed. Comm on Open Gov't FOIL-AO-4672.

Where request for record is not granted, denied or acknowledged within 5 days of its receipt, appeal is appropriate. Comm on Open Gov't FOIL-AO-4675.

Agency must respond to request for records within 5 business days of receipt of request; this time period is intended to enable agency to respond without immediate disruption of its functions; however, it is not intended to serve as means of delaying access to records that are routinely used and readily accessible. Comm on Open Gov't FOIL-AO-4954.

Agency need not respond instantly to request for records and has 5 business days to respond from receipt of request for records reasonably described. Comm On Open Gov't FOIL-AO-4982.

While agency must grant access to records, deny access or acknowledge receipt of request within 5 business days, when such acknowledgement is given, there is no precise time period within which agency must grant or deny access to records; time needed to do so may be dependent upon volume of request, possibility that other requests have been made, necessity to conduct legal research, search and retrieval techniques used to locate records and like; in short, when agency acknowledges receipt of request because more than 5 business days may be needed to grant or deny request, so long as it provides approximate date indicating when request will be granted or denied and that date is reasonable in view of attendant circumstances, agency acts in compliance with law. Comm on Open Gov't FOIL-AO-7606.

If it can be proven that mail was delivered to and agency received request on certain date, agency has 5 business days from that date to grant request for disclosure, deny access in writing, or acknowledge receipt of request in writing that includes approximate date when it can be anticipated that request be granted or denied. Comm on Open Gov't FOIL-AO-12429.

iii. Response And Appeal

77. In general

Failure of agency to respond to appeal of denial of records within designated time limits results in denial of access that may be appealed to head of agency or whomever is designated to determine appeals. Comm on Open Gov't FOIL-AO-4652.

Failure of agency to respond to request for records within designated time limits results in denial of access and may be appealed to head of agency or whomever is designated to determine appeals; that person or body has designated amount of time from receipt of appeal to render determination and if determination is not rendered within that period of time, appellant has exhausted his or her administrative remedies and may initiate challenge to constructive denial of access under CLS CPLR Article 78. Comm on Open Gov't FOIL-AO-4713.

78. Requirement of 5 and 10 business days for response and appeal, respectively

Freedom of Information Law provides that agency must respond to request for records within 5 business days of receipt of request, and if request is denied, denial should be in writing stating reasons therefor; failure to respond within designated time limits results in denial of access that may be appealed to head of agency or whomever is designated to determine appeals; that person or body has 10 business days from receipt of appeal to render determination. Comm On Open Gov't FOIL-AO-4603.

Agency must respond to request for records within 5 business days of receipt of request, and failure to respond within designated time limits results in denial of access that may be appealed; if determination regarding appeal is not rendered within 10 business days, appellant has exhausted his or her administrative remedies, and may initiate challenge to constructive denial of access under CLS CPLR Article 78. Comm on Open Gov't FOIL-AO-4690, 4745, 4750.

Agency must respond to request for records within 5 business days of receipt of request and when request is denied, applicant may appeal to head of agency or whomever is designated to determine appeals; that person or body has 10 business days from receipt of appeal to render determination. Comm on Open Gov't FOIL-AO-4872.

Agency is required to respond to request for records within 5 business days of receipt of request and failure to respond within designated time limits results in denial of access that may be appealed; when appeal is made but determination is not rendered within 10 business days of receipt of appeal, appellant has exhausted his or her administrative remedies and may initiate challenge to constructive denial of access under CLS CPLR Art 78; in addition to 5 business days that agency has to respond to request, in determining whether agency has failed to comply with time frame, mailing time for response should be taken into account. Comm on Open Gov't FOIL-AO-4957.

79. Requirement of 10 business days for appeal

Failure of agency to respond within designated time limit for requested records results in denial of access which may be appealed to head of agency or whomever is designated to determine appeals who has 10 business days from receipt of appeal to render determination; when determination is not rendered within 10 business days of receipt of appeal, appellant has exhausted his or her administrative remedies and may initiate challenge to constructive denial of access under CLS Civ Practice Rules Article 7. Comm on Open Gov't FOIL-AO-4620.

Failure of agency to respond to request for record within designated time limits results in denial of access that may be appealed to head of agency or whomever is designated to determine appeals; person or body has 10 business days from receipt of appeal to render determination; when appeal is made but determination is not rendered within 10 business days of receipt of appeal, appellant has exhausted his or her administrative remedies and may initiate challenge to constructive denial of access under CLS CPLR Article 78; before Article 78 proceeding may be commenced, exhaustion of administrative remedies must take place. Comm on Open Gov't FOIL-AO-4671.

Failure of agency to respond to request for record within designated time limits results in denial of access that may be appealed to head of agency or whomever is designated to determine appeal; that person or body has 10 business days from receipt of appeal to render determination. Comm on Open Gov't FOIL-AO-4673.

Failure of agency to respond to request for records within designated time limits results in denial of access that may be appealed, and when determination is not rendered within 10

business days of receipt of appeal, appellant has exhausted his or her administrative remedies and may initiate challenge to constructive denial of access under CLS Civ Practice Rules Article 78. Comm on Open Gov't FOIL-AO-4680.

Failure of agency to respond to request to records within designated time limits results in denial of access that may be appealed to head of agency or whomever is designated to determine appeals; that person already has 10 business days from receipt of appeal to render its determination. Comm on Open Gov't FOIL-AO-4684.

If records received were not records requested, and agency's response was silent regarding its failure to make requested record available, response could be considered "constructive denial" which may be appealed; when appeal is made but determination is not rendered within 10 business days of receipt of appeal, appellant has exhausted his or her administrative remedies and may initiate challenge to constructive denial of access under CLS CPLR Article 78. Comm on Open Gov't FOIL-AO-4687.

Failure of agency to respond to request for information within designated time limits results in denial of access and may be appealed to head of agency or whomever is designated to determine appeal; that person or body has 10 business days from receipt of appeal to render determination; however, when determination is not rendered within 10 business days, appellant has exhausted his or her administrative remedies and may initiate challenge to constructive denial of access under CLS CPLR Article 78. Comm on Open Gov't FOIL-AO-4700.

Failure of agency to respond to request for information within designated time limits results in denial of access that may be appealed, and determination must be rendered within 10 days or else appellant exhausts his or her administrative remedies and may initiate challenge to constructive denial of access under CLS CPLR Article 78. Comm on Open Gov't FOIL-AO-4716.

When appeal is made, but determination is not rendered within 10 business days of receipt of appeal, appellant has exhausted his or her administrative remedies and may initiate challenge to constructive denial of access under CLS CPLR Article 78. Comm on Open Gov't FOIL-AO-4718.

Agency has 5 business days to respond to request for record and if they fail to respond within designated time limit denial of access may be appealed; appeal must be determined within 10 business days from receipt of appeal. Comm on Open Gov't FOIL-AO-4753.

If agency officials respond to request for information by acknowledging receipt of request, response should indicate approximate date when determination of access will be made and cannot exceed 10 business days from date of acknowledgment. Comm on Open Gov't FOIL-AO-4810.

When a request for copies of records has been denied and an appeal is made but a determination is not rendered within 10 business days of the receipt of the appeal as required by CLS Public Officers Law § 89(4)(a) of the Freedom of Information Law, the appellant has exhausted administrative remedies and may initiate a challenge to a constructive denial of access under CLS Civil Practice Rules, Article 78. Comm on Open Gov't FOIL-AO-6259 (1990).

C. Restrictions On Access

i. Generally

80. In general

Agency may use request forms so long as their use does not impair rights granted under FOIL; if requirement that form be completed prevents requested records from being made available within 5 business days of initial written request, then requirement is unnecessarily restrictive. Comm On Open Gov't FOIL-AO-3941.

Freedom of Information Law generally does not enable agency to restrict access to information because applicant seeks records for commercial purposes, and exception to disclosure pertains only to those lists that identify natural persons, rather than entities. 1986 Committee on Open Government FOIL-AO-4222.

If video tape is made available for viewing, agency must make copy available as well. Comm on Open Gov't FOIL-AO-4697.

Status of applicant or purposes for which request is made are irrelevant to rights of access, and agency cannot inquire as to intended use of records; however, rights of access to political party membership lists of names and addresses, or equivalent records, may be contingent upon purpose for which request is made; agency may withhold records in conjunction with grounds for denial listed in Freedom of Information Law, nevertheless, agency is not obliged to withhold records, even when records may be withheld; therefore, even if political party membership lists could be withheld, Freedom of Information Law would not prohibit disclosure. Comm on Open Gov't FOIL-AO-4866.

There is no provision of constitution or law that would authorize agency or representative to require that member of public "barter" in order to obtain information. Comm on Open Gov't FOIL-AO-7936.

Town could not require applicant for records under Freedom of Information Law to abide by certain conditions prior to disclosure of records, such as requirement that applicant add disclaimer at top of each page that he received indicating that record was draft or unapproved. Comm on Open Gov't FOIL-AO-9378.

Town clerk acted reasonably when she offered to allow applicant to listen to tape recordings of certain meetings of town board or to tape them by setting his own tape recorder in front of hers since clerk did not have equipment needed to copy tapes and could not relinquish custody of tapes as they were property of town. Comm on Open Gov't FOIL-AO-9409.

Agency is not required to keep on hand requested records interminably and may inform applicant that he or she may inspect records or pay for copies of records within reasonable time, and that failing to receive response from applicant, request will be deemed withdrawn by date certain. Comm on Open Gov't FOIL-AO-9491.

If records are in use by town employees at time of Freedom of Information Law request, 2 options are available: disclosure could be delayed until town employees are no longer actively using them, at which time they could be inspected at no charge, or second set could be copied and made available following payment of appropriate fee for photocopies. Comm on Open Gov't FOIL-AO-12157.

Stated policy of Division of Parole, to honor requests made under Freedom of Information Law (FOIL) only in accordance with certain criteria, was invalid insofar as it was inconsistent with FOIL and judicial construction of FOIL. Comm on Open Gov't FOIL-AO-12248.

Conditions imposed by private contractor ("Bidnet") on retrieval of county bid information maintained by Bidnet on county website, including registration requirements and prohibition of resale of information to third parties, were inconsistent with Freedom of Information Law and unenforceable. Comm on Open Gov't FOIL-AO-16508.

81. Mailing option required

Agency cannot require requester of documents to inspect them in person since under CLS Public Officers § 89, particular records may be made available by mail upon payment of requisite fees for photocopying and postage. Committee on Open Government FOIL-AO-3844.

So long as applicant for records is prepared to pay requisite fees for photocopying and postage, agency must mail records to applicant; since number of records, size of report or amount of postage often cannot be known in advance, agency could not require that envelope accompany request. Comm on Open Gov't FOIL-AO-4654.

Agency's failure to mail accessible records to applicant who pays or offers to pay appropriate fees for copying and postage would constitute constructive denial of access to records; documents explaining why certain room was sealed due to presence of asbestos before removing records would likely be available because it is decision that affects public or final agency policy or determination. Comm on Open Gov't FOIL-AO-4789.

Agency may not require applicant to make appointment to view or obtain records at its offices; further, assuming that applicant remits appropriate fee for copies, plus postage if it chooses to include such charge, agency would be required to send records

accessible under Freedom of Information Law to applicant. Comm on Open Gov't FOIL-AO-8536.

Agency or its records access officer cannot require requestor to travel to town hall or officer's home as condition precedent to gaining access to records; assuming that records can be located with reasonable effort and requestor is willing to pay appropriate fees for copying and postage, records access officer must make copies of records sought and mail them to requestor. Comm on Open Gov't FOIL-AO-12288.

If agency is able to scan records in order to transmit them via email, and doing so will not involve any effort additional to alternative methods of responding, it is required to do so. Comm on Open Gov't FOIL-AO-16572.

82. Supervision of access

Agency may ensure that person inspecting or copying records be supervised. Comm on Open Gov't FOIL-AO-8347.

Tacit agreement pursuant to which applicant was allowed to inspect school district records in conjunction with procedure under which appointment was made in advance of inspection was reasonable, so long as school district offered time or times to review records promptly and in manner consistent with intent of Freedom of Information Law. While agency is not required to do so, it may have staff person observe applicant for records while records are being inspected since agencies have responsibility to ensure that custody and integrity of their records is maintained. Comm on Open Gov't FOIL-AO-9209.

Requestor, having been informed that school district records are available for review on given day, may review requested records during regular business hours with or without presence of district employee; extent to which district opts to have employee present while records are reviewed is matter of its discretion. Comm on Open Gov't FOIL-AO-10227.

83. Time restriction on access

When agency has regular business hours, it must accept requests during those hours; however, for variety of reasons, agency may reasonably limit time in which applicant may inspect or copy records. Comm on Open Gov't FOIL-AO-8347.

Insofar as town offices operate during regular business hours, public should have opportunity to request and review records during those hours; if there are no regular business hours, appointment procedure must be devised. Comm on Open Gov't FOIL-AO-8489.

Ability of agency to limit inspection of records to one person at time involves balancing public's rights and agency's need to carry out its responsibilities effectively; relevant factors include size of agency's staff and space available to agency. Comm on Open Gov't FOIL-AO-8904.

Assuming that appointment is made, agency is required to permit applicant to inspect records during period of agency's regular business hours; agency cannot validly promulgate rules which limit time of inspection during business day. Comm on Open Gov't FOIL-AO-9209.

With regard to appropriate frequency and duration of times during which one may inspect records, appropriate frequency of ability to inspect is based upon attendant facts and circumstances; if, for example, records are constantly in use by agency, it would be unreasonable to suggest that agency is required to provide inspection on ongoing basis over period of days or weeks. Comm on Open Gov't FOIL-AO-9374.

Requestor, having been informed that school district records are available for review on given day, may review requested records during regular business hours with or without presence of district employee; extent to which district opts to have employee present while records are reviewed is matter of its discretion. Comm on Open Gov't FOIL-AO-10227.

Village cannot limit person's ability to inspect records to period less than its regular business hours. Comm on Open Gov't FOIL-AO-12130.

Town planning board could not restrict ability to view or copy its records to times when board met since, even if records were in physical possession of planning board, they were in legal custody of town clerk who, as records access officer pursuant to CLS Town § 30, had duty to coordinate response to Freedom of Information Law requests. Comm on Open Gov't OML-AO-2227.

Principle of reasonableness should govern number of times record may be inspected or how long request is considered to be active; thus, if request involves great number of records, agency cannot restrict inspection to single day, but it need not make same records available over and over if it would unnecessarily interfere with its capacity to carry out its duties. Comm on Open Gov't OML-AO-2683.

ii. Fees

84. In general

If fees are prescribed by statute, they are valid even though they are in excess of fees prescribed by Freedom of Information Law. Comm on Open Gov't FOIL-AO-4641.

Unless another statute permits assessment of different fee, records accessible under Freedom of Information Law may be inspected free of charge, and agency cannot impose fee involving personnel costs. Comm on Open Gov't FOIL-AO-4703.

Freedom of Information Law limits fees that agencies may charge when records are requested, except when different fee is otherwise prescribed by statute; since city administrative code is not statute enacted by state legislature, fee imposed by code is not valid under Freedom of Information Law. Comm on Open Gov't FOIL-AO-4911.

Where applicant requests inspection of records, agency may not prepare computer printouts of information and then seek to collect fee for printouts; agency should either make records available for inspection at no charge or, if computer printout has to be generated, agency should inform applicant in advance what fee will be. Comm on Open Gov't FOIL-AO-8343.

Agency may not impose charge for cost of supervising those who inspect or copy records. Comm on Open Gov't FOIL-AO-8347.

Because agency cannot charge for inspection of records available under Freedom of Information Law, applicant cannot be charged fee for listening to such tape. Comm on Open Gov't FOIL-AO-8565.

When record is available in its entirely under Freedom of Information Law, any person has right to inspect record at no charge; however, there are often situations in which some aspects of record, but not entire record, may properly be withheld in accordance with grounds for denial appearing in CLS Pub O § 87(2) and, in those events, applicant does not have right to inspect record and agency may prepare redacted copy and charge established fee. Comm on Open Gov't FOIL-AO-9643.

City would be obliged to provide information regarding race and ethnicity contained on police Field Interview Forms (FIFs) if city had ability to generate such data, if it had capacity to segregate that data from items that need not be disclosed, and if applicant were willing to pay actual cost of reproduction as envisioned by CLS Pub O § 87(1)(b)(iii). Comm on Open Gov't FOIL-AO-12565.

85. Computer-related fees, generally

86. —Computer digitized maps

Fee of $750 sought to be charged by county for computer digitized map, which could fit on single diskette, appeared to be excessive and inconsistent with Freedom of Information Law and its judicial interpretation. Comm on Open Gov't FOIL-AO-8528.

Fee of $250 sought to be charged by county appeared to be excessive and inconsistent with Freedom of Information Law and its judicial interpretation where county intended to charge that amount for making its budget available on computer disk based on costs for workers' time in getting data, computer time and overhead costs. Comm on Open Gov't FOIL-AO-8525.

$250 fee charged by City of Ithaca for copy of its municipal codes and regulations on computer disk appeared to be excessive and inconsistent with Freedom of Information Law; fee for reproducing electronic information involves cost of computer time, plus cost of information storage medium (i.e., computer tape or disk) to which data is transferred. Comm on Open Gov't FOIL-AO-9830.

If applicant requests computer printout of records from which appropriate deletions must be made, applicant can be charged up to 25 cents per photocopy for duplication of printouts up to 9 by 14 inches in size. Comm on Open Gov't FOIL-AO-10213.

If New York City Department of Environmental Protection (DEP) is required by NYC Admin Code § 24-707 to print entire contents of its Citywide Facility Inventory Database (CFID), equivalent information must also be made available in electronic format, assuming that conversion of format can be accomplished, that data sought is available under FOIL, that data can be transferred from format in which it is maintained to format in which it is requested, and if applicant is willing to pay actual cost of reproduction. Comm on Open Gov't FOIL-AO-12559.

87. Copying fee, generally

88. —Accident reports

Only act of state legislature, statute, would permit assessment of fee higher than 25 cents for photocopy; however, since statute authorizing copying fee of $3.50 for accident reports applies to particular record in possession of department of motor vehicles only, other agencies, such as municipal police departments, cannot unilaterally adopt the policy or regulations authorizing fees in excess of 25 cents for photocopy without specific statutory authority to do so. Comm on Open Gov't FOIL-AO-4768.

Fee of $10.00 charged by county sheriff's department for copy of accident report, even if authorized by county board of supervisors, was invalid. Comm on Open Gov't FOIL-AO-12263.

89. —Advance payment requirement

Agency may require advance payment of fee for copying records, particularly when request is voluminous. Comm on Open Gov't FOIL-AO-9643.

When agency produces copies of records in response to request under Freedom of Information Law, but applicant for records has not paid requisite fee, agency can refuse to honor further requests until fee is paid. Comm on Open Gov't FOIL-AO-9659.

When agency produces copies of records in response to request, but applicant for records has not paid requisite fee, agency can refuse to honor further requests until fee is paid. Comm on Open Gov't FOIL-AO-10008.

90. —Maximum of 25 cents per photocopied page

Freedom of Information Law allows agency to charge up to $.25 cents per photocopy or actual cost of reproducing records that cannot be photocopied, unless another statute permits higher fee to be assessed; Freedom of Information Law makes no reference to capacity to charge for personnel costs, search time, or time needed to evaluate contents of records in terms of rights of access; however, after October 15, 1982, only act of state legislature or statute permit assessment of search fee, fee higher than $.25 cents per photocopy or fee that exceeds actual cost of reproduction; New York City Administrative Code is not viewed as statute that exempts records from Freedom of Information Law. Comm on Open Gov't FOIL-AO-4588.

Prior to October 15, 1982, local law, ordinance, or regulation establishing fee in excess of 25 cents per photocopy or higher than actual cost of reproduction was valid; however, currently under Freedom of Information Act, only act of state legislature, statute, would permit assessment of fee higher than 25 cents for photocopy, or fee that exceeds actual cost of reproduction. Comm On Open Gov't FOIL-AO-4597.

Under Freedom of Information Law, agency may charge up to 25 cents per photocopy; however, agency may not assess fee for making request for search or labor unless statute other than Freedom of Information Law permits such fees to be assessed; in addition, CLS Pub Health § 18 generally grants access to medical records to subjects of those records, but subject can be charged for reasonable fee for labor; however, records cannot be withheld solely due to inability to pay. Comm On Open Gov't FOIL-AO-4609.

Generally, agency may not charge for time spent by employee in evaluating record or for making deletions; only fee that could be charged when there is no state statute which prescribes fee, is not more than 25 cents per page and no charge of additional fee for deletion of portions of records. Comm on Open Gov't FOIL-AO-4618.

Under Freedom of Information Law, agency may charge up to 25 cents per photocopy; however, there is exception when different fee is otherwise prescribed by statute. Comm on Open Gov't FOIL-AO-4625.

Unless different statute prescribes higher fee, agency may charge up to 25 cents for photocopy for records. Comm on Open Gov't FOIL-AO-4646.

Only act of state legislature would permit assessment of photocopy fee higher then 25 cents per copy; therefore, local law could not validly raise fee for copies beyond 25 cents per photocopy. Comm on Open Gov't FOIL-AO-4668.

Agency may charge up to $.25 per page for photocopies of records except when different fee is prescribed by statute other than Freedom of Information Law. Comm on Open Gov't FOIL-AO-4750.

Freedom of Information Law permits agency to charge up to 25 cents for photocopy, unless different fee is prescribed by statute; statute is act of state legislature and does not include rule, regulation or policy adopted by agency. Comm on Open Gov't FOIL-AO-4782.

Both town and village are limited to charging no more than 25 cents for photocopy for records, except in instances in which statute, act of state legislature, permits them to charge higher fee; even if minutes have not been approved by committee, they are nonetheless public records and therefore subject to rights of access granted by Freedom of Information Law. Comm on Open Gov't FOIL-AO-4794.

Agency may not charge more than 25 cents per page for photocopies, except when different fee is otherwise prescribed by statute; moreover, regulations specifically indicate that no fee may be charged for search for records except as otherwise prescribed by statute; since there is no statute that specifically prescribes search fees that may be charged by New York City Fire Department, Department cannot charge a fee for search of information; consequently, if search fee was established by rule or policy rather than by means of enactment of state legislature, it would be invalid. Comm on Open Gov't FOIL-AO-4870.

Only act of state legislature would permit assessment of fee higher than 25 cents per photocopy, or fee that exceeds actual cost of reproducing records that cannot be photocopied. Comm on Open Gov't FOIL-AO-4944.

With respect to fees, unless another statute permits assessment of different fee, records accessible under Freedom of Information Law may be inspected free of charge and agency cannot impose fee involving personnel costs; when copies are requested, agency may charge up to 25 cents per photocopy for actual cost of reproducing records that cannot be photocopied, unless otherwise provided by statute other than Freedom of Information Law. Comm on Open Gov't FOIL-AO-4953.

Freedom of Information Law states that accessible records are available for inspection and copying, and upon payment of appropriate fee, agency must make copies of records; only act of state legislature would permit assessment of fee higher than 25 cents per photocopy, or fee that exceeds actual cost of reproducing records that cannot be photocopied. Comm on Open Gov't FOIL-AO-4954.

91. —Photographs; video reproductions

With regard to meetings of Town Board which are videotaped and aired on public access television, town was not required to purchase new equipment to acquire capacity to copy videotapes and, when copy of videotape was requested, local commercial service or perhaps school or library could reproduce tape and Town could charge for actual cost of reproduction. Comm on Open Gov't FOIL-AO-8306.

If photocopy of photograph serves as adequate reproduction of such record, photocopy will likely suffice to comply with Freedom of Information Law; however, if photocopy does not serve to provide accurate method of reproducing what appears on photograph, agency is obliged to "copy" record-i.e., prepare reprint of photograph, upon payment of actual cost of reproduction. Comm on Open Gov't FOIL-AO-9370.

Agency may not charge file search fee nor may agency, by other means, charge additional fees or raise costs of obtaining copies beyond amounts indicated in Freedom of Information Law unless so authorized by state or federal statute to do so. Comm on Open Gov't FOIL-AO-4838.

Accessible records are available for inspection and copying; therefore, if record is accessible, it may be inspected and if, after

inspection copies are needed, applicant may be required to pay fee for copying. Comm on Open Gov't FOIL-AO-4961.

Freedom of Information Law provides right to inspect and copy records, which means that person may inspect records and may, with pen and paper, copy contents of records; however, if applicant requests agency to provide photocopies of accessible records, Freedom of Information Law requires that agency prepare photocopies upon payment of, or offer to pay, requisite fees for photocopying; further, agency may require that request be made in writing; while agency is required to make photocopies, it is not required to provide records to applicants so that applicant may make photocopies. If applicant requests agency to provide photocopies of accessible records, Freedom of Information Law requires that agency prepare photocopies upon payment of, or offer to pay, requisite fees for photocopying; further, agency may require that request be made in writing. Comm on Open Gov't FOIL-AO-4982.

If copies are requested and agency makes them, applicant can be required to pay appropriate fee; however, if applicant seeks to inspect accessible records no fee can be charged. Comm on Open Gov't FOIL-AO-7606.

Agency may require payment of fees for copying in advance of preparing copies. Comm on Open Gov't FOIL-AO-8306.

When person requests copies of records and agency produces records as required by law, but applicant has not paid or refuses to pay fee, based on principles of fairness, agencies need not accede to ensuing requests until applicant has paid requisite fee regarding earlier request for copies. Comm on Open Gov't FOIL-AO-8343.

When accessible and deniable information must, of necessity, appear on same page, practice of preparing redacted copy and charging established fee is fully justifiable; however, if records are designed to ensure that some portion of content of each page may be withheld, and if design is intended to ensure that records cannot be inspected at no charge, such practice would represent abuse of Freedom of Information Law and conflict with its clear intent. Comm on Open Gov't FOIL-AO-8391.

City's department of law acted reasonably when it informed applicant that she should either arrange appointment to view requested materials or arrange payment of fee required to make copies of materials within 10 days by contacting particular individual who was identified by name and phone number and, further, that failure to do so would be deemed withdrawal of request. Comm on Open Gov't FOIL-AO-9491.

City was required to accept United States currency as legal tender for payment for photocopies prepared in response to request under Freedom of Information Law and could not require payment by means of money order. Comm on Open Gov't FOIL-AO-9652.

Agency could charge photocopying fee for documents that would be transmitted to requester by email, where portions of documents were exempted from disclosure, and only method of transmitting portions that were accessible to public involved preparation of photocopies from which appropriate redactions would be made, then scanning redacted information for email purposes. Comm on Open Gov't FOIL-AO-16571.

92. Postage costs; mailing fees

There is no statute that would preclude village from charging its postage cost when mailing records requested under Freedom of Information Law. Comm on Open Gov't FOIL-AO-8306.

Neither Freedom of Information Law nor regulations promulgated by Committee on Open Government (21 NYCRR Part 1401) deals with cost of or assessment of charges for postage when copies are mailed to applicant, and neither prohibits agency from charging for postage. Mailing copies of records to applicant represents additional service provided by agency that is separate from duties imposed by Freedom of Information Law; agency must mail copies of records to applicant upon payment of appropriate fees for copying and postage; alternatively, if it informs applicant of cost of postage, agency can require that applicant provide stamped self-addressed envelope. Comm on Open Gov't FOIL-AO-8450.

93. Waiver of fees

Even though department of correctional services, pursuant to Freedom of Information Law, permits custodian of department records to waive copying fee, there is no requirement that fee must be waived; superintendent of correctional facility is "custodian of records". Comm on Open Gov't FOIL-AO-4621.

Accessible records may be inspected free of charge and if copies of records are requested, agency may generally charge up to 25 cents per photocopy or actual cost of reproducing records that cannot be photocopied; no fee may be assessed under Freedom of Information Law for search time or personnel costs involved in viewing or evaluating contents of records; regulations promulgated by Department of Correctional Services under Freedom of Information Law provides in part that custodian of records, such as facility superintendent, may, in his discretion, waive all or any portion of fees authorized by regulations for any department record; as such, when requesting records of Department of Correctional Services, waiver of fee may be sought. Comm on Open Gov't FOIL-AO-4856.

Agency may assess fees for copies of records sought under Freedom of Information Law even when applicant for records demonstrates that he or she is unable to pay; when records are accessible, requestor may inspect them at no charge. Comm on Open Gov't FOIL-AO-12047.

There is nothing in Freedom of Information Law that requires that agency waive fees, irrespective of status of applicant for records; further, agency may charge its established fees even though applicant is indigent inmate. Comm on Open Gov't FOIL-AO-12702.

iii. Records Not Possessed Or Maintained

a. Generally

94. In general

Freedom of Information Law does not require agency to create or prepare record in response to request. Comm On Open Gov't FOIL-AO-4591.

Freedom of information law pertains to existing records, and agency generally is not required to create new record in response to request. Comm on Open Gov't FOIL-AO-4643.

Unless specific direction is otherwise provided, agency need not create nor prepare record in response to request, and while officials and employees may answer the inquiries, Freedom of Information Law does not require them to do so; however, law does require that agency officials respond to request for records. Comm on Open Gov't FOIL-AO-4699.

Freedom of Information Law pertains to existing records and, as general matter, agency need not create or prepare record in response to request for information; when requesting records, requestor should make sure to do so, rather than asking questions. Comm on Open Gov't FOIL-AO-4712.

Freedom of Information Law pertains to existing records, and agency is not required to create or prepare records in response to request; to extent that information sought does not exist in form of records, agency would not be obligated to prepare new records. Comm on Open Gov't FOIL-AO-4757.

Agency is not required to create or prepare record in response to request; therefore, if information sought does not exist in form of record or records, agency officials would not be required by Freedom of Information Law to create new record in order to respond to request. Comm on Open Gov't FOIL-AO-4775.

Freedom of Information Law enables applicant to request existing records; it does not require agency officials to respond to questions or create new record in response to request. Comm on Open Gov't FOIL-AO-4831.

Freedom of Information Law pertains to existing records maintained by agencies and does not generally require agencies to answer questions or prepare or create records in response to request; when requesting information, requester should specify that certain records are sought instead of simply asking questions. Freedom of Information Law pertains to rights of access to existing records only. Comm on Open Gov't FOIL-AO-4853.

Freedom of Information Law pertains to existing records and agency is not required to create or prepare record in response to request. Comm on Open Gov't FOIL-AO-4876.

Freedom of Information Law is vehicle that requires agency officials to respond to requests for records; it does not require that agency officials answer questions or create new records in re-

sponse to question or request for "information". Comm on Open Gov't FOIL-AO-4883.

Freedom of Information Law pertains to access of existing records and, as such, Law does not require that agencies prepare or create record in response to request. Comm on Open Gov't FOIL-AO-4884.

Freedom of Information Law does not require agency officials to answer questions or provide information that does not exist in form of record or records; rather, it is vehicle under which any person may seek existing records, irrespective of applicant's status or interest. Comm on Open Gov't FOIL-AO-4889.

Freedom of Information Law pertains to rights of access to existing records maintained by agencies; Law does not require that agencies answer questions or prepare record in response to request for "information". Comm on Open Gov't FOIL-AO-4906.

Freedom of Information Law generally pertains to existing records and agency need not create or prepare record in response to request. Comm on Open Gov't FOIL-AO-4912.

Freedom of Information Law pertains to existing records and agency need not create or prepare record in response to request; as such, Freedom of Information Law does not require agency officials to answer questions when their answers would involve preparation of new records; further, although agency officials may and often do answer questions, there is no law that requires them to do so. Comm on Open Gov't FOIL-AO-4930.

Freedom of Information Law generally pertains to existing records and agency need not create or prepare record in response to request, unless specific direction to contrary is provided. Comm on Open Gov't FOIL-AO-4942.

Freedom of Information Law pertains to existing records and agency is generally not required to create record in response to request. Comm on Open Gov't FOIL-AO-4943.

Freedom of Information Law pertains to existing records and agency is not required to create record in response to request. Comm on Open Gov't FOIL-AO-4949.

Freedom of Information Law pertains to rights of access to existing records maintained by entities of state and local government and, as such, Law does not require agencies to answer questions, or prepare record in response to request. Comm On Open Gov't FOIL-AO-4977.

95. "Aggregate" or statistical data

If totals or breakdown of information requested have not been statistically prepared and do not appear in existing records, agency would not be required to create new records in response to such requests. Comm on Open Gov't FOIL-AO-4630.

Requests should be directed to agency that maintains records sought; agency is not required to prepare or create record in response to request; therefore, if no statistics concerning stabbings at correctional facilities have been prepared, agency, when receiving such request, would not be obliged to create records containing such statistics. Comm on Open Gov't FOIL-AO-4874.

96. Appealability

Statement that agency does not maintain memoranda or related records which are requested, and that agency was unable to locate regulations sought, was not denial, and therefore agency's response cannot be subject to appeal. Comm on Open Gov't FOIL-AO-4715.

Statement that agency does not maintain record sought is not denial, for agency cannot withhold records that it does not maintain; therefore, such response to initial request does not provide basis on which to appeal and such response to appeal does not provide basis to commence CLS CPLR Article 78 proceeding; in response to request for records agency shall provide copy of such record and certify correctness of such copy if so requested, or if case may be, shall certify that it does not have possession of such record or that such record cannot be found after diligent search. Comm on Open Gov't FOIL-AO-4891.

97. Certification matters

Freedom of Information Law does not obligate city official to create additional record in effort to respond to request for record; denial of records must be in writing with stated reasons; if agency indicates that it does not have requested record, upon request, records access officer shall certify that it does not have possession of such record where such record cannot be found after diligent search. Comm On Open Gov't FOIL-AO-4589.

Denial of record must be made in writing, stating reasons and informing applicant of name and address of person or body to whom appeal may be made; when requested records cannot be located, agency shall certify that it does not have possession of such record or that such record cannot be found after diligent search. Comm on Open Gov't FOIL-AO-4717.

Where agency has made substantial effort to locate records requested, agency may, upon request, certify that it does not have possession of such record or that such record does not exist after diligent search. Comm on Open Gov't FOIL-AO-4910.

When agency indicates that it does not maintain or cannot locate record, applicant for record may seek certification to that effect. Comm on Open Gov't FOIL-AO-9157.

Where agency cannot find records requested under Freedom of Information Law, it cannot and need not prepare certified itemized listing of records it was unable to find. Comm on Open Gov't FOIL-AO-9411.

98. Computerized records; tape or disks

The necessity of altering existing computer programs to obtain information sought by a requesting individual under the Freedom of Information Law would represent the equivalent of creating a new record. Comm on Open Gov't FOIL-AO-2999.

Although computer tapes and disks constitute records subject to rights of access under the Freedom of Information Law, the Law does not require the agency to conduct reprogramming for the purpose of gaining access to a particular item of information. Comm on Open Govt FOIL-AO 3038.

Freedom of Information Law does not require agency to provide requester with transcript of tape recording if agency does not already have such transcript; however, copy of tape recording should be made available, upon offer to pay cost of its reproduction. Comm on Open Govt FOIL-AO-3726.

There is no basis for denying access to computer tape or disc which contains New York State telephone directory for Albany, New York City, Long Island and Westchester since records sought contain names, public office addresses and public office telephone numbers of the New York State employees, and none of grounds for denial could appropriately be asserted; if record is available, it is available for both inspection and copying. Comm on Open Gov't FOIL-AO-4653.

If extraction of information stored in computer would require reprogramming, agency is not required to reprogram because this is equivalent of creating record. Comm on Open Gov't FOIL-AO-4658.

Freedom of Information Law pertains to rights of access to existing records and does not require agency to create or prepare record in response to request; similarly, assuming that some of data is maintained on computers, agency would not be required to develop new programs or reprogram to extract data that might otherwise be available; if agency does not maintain records in format requested, Law would not require agency to prepare or produce records in such format. Comm on Open Gov't FOIL-AO-4747.

Freedom of Information Law provides that agency is not required to create or prepare record in response to request, so if county does not have capacity to provide data in computer mode in which it was requested, Freedom of Information Law would not require county to create or prepare record in such mode or format. Comm on Open Gov't FOIL-AO-4897.

Where Department of Correctional Services can retrieve information sought on computer, computer disks and similar media constitute "records" subject to rights of access; therefore, information kept by Department, in any physical form whatsoever would constitute "record"; if information sought can be printed out based upon existing programs, retrieval could not be equated with creation of new record; if, however, printout can be produced only by creating new programs or software, preparation of new programs would likely be equivalent of creating new record, an act that Department would not be required to perform. Comm on Open Gov't FOIL-AO-4901.

When information is maintained electronically—e.g., in computer—if information sought is available under Freedom of

Information Law and may be retrieved by means of existing computer programs, agency is required to disclose information. If information sought can be retrieved from computer or other storage medium only by means of new programming or alteration of existing programs, those steps would be equivalent of creating new record, which is not required by CLS Pub O § 89(3); thus, agency is not required by Freedom of Information Law to reprogram or develop new programs to retrieve information that would otherwise be available. If agency chooses to engage in development of new or altered programs in order to retrieve requested information that could not otherwise be compiled, it would be acting beyond requirements of Freedom of Information Law and, therefore, could charge for such service based upon considerations separate from provisions concerning assessment of fees described in CLS Pub O § 87(1)(b)(iii). Comm on Open Gov't FOIL-AO-7595.

Computerized listing of all licensed passenger-car drivers residing in 3 counties would be available under Freedom of Information Law if Department of Motor Vehicles could generate requested data based on its existing computer programs; CLS Veh & Tr § 202 does not prohibit applicant from seeking database or portion of database consisting of driver license information. Comm on Open Gov't FOIL-AO-10106.

Under Freedom of Information Law, New York City Board of Elections may charge "actual cost" of reproducing computer tapes of voter registration lists (namely, computer time plus cost of tape or disk); because time and effort involved in transferring data from one storage medium to another is minimal, alleged fee of $400 to $1,000 was inconsistent with Freedom of Information Law. Comm on Open Gov't FOIL-AO-12067.

County was not obligated to develop capacity to transfer requested data onto compact discs if it did not have ability to do so, but if it was able to make data available in different form (such as printout, tape or floppy disc) it was required to do so to extent that data was not exempt from disclosure and requestor was willing to pay appropriate fee. Comm on Open Gov't FOIL-AO-12191.

99. Records for public distribution

Unless information sought is maintained in some physical form, agency is not required to respond orally or in writing to inquiries from public; agency need not create records which do not already exist. Committee on Open Government FOIL-AO-3836.

Freedom of Information Law is vehicle under which public may seek and generally obtain existing records; it is not vehicle that requires agency officials to answer questions or prepare new records in response to request for information; further, as general rule, agency may not create or prepare record and response to request. Comm on Open Gov't FOIL-AO-4720.

100. Records not in retrievable format

If information sought does not exist in form of record requested, agency is not obliged to create new form of record on basis of request; further, agency is not required by Freedom of Information Law to answer questions. Comm on Open Gov't FOIL-AO-4707.

Freedom of Information Law requires that agency grant or deny access to existing records and that agency generally need not create record in response to request; to extent that information sought does exist in form of record or records, general records sought should be made available. Comm on Open Gov't FOIL-AO-4719.

If accessible information that is sought can be retrieved from computer or other storage medium only by means of reprogramming or altering existing programs, the steps would be equivalent of creating new record. Comm on Open Gov't FOIL-AO-4739.

Freedom of Information Law requires that applicant reasonably describe records sought and if agency can locate requested records based on terms of request, applicant has reasonably described such records; however, if agency cannot determine which records have been requested, standard of "reasonably describing" records is not met and in some instances, while records sought might exist, they may not be retrievable due to nature of agency's filing system; also, agency need not create or prepare record in response to request. Comm on Open Gov't FOIL-AO-4970.

If no report exists in format described or containing each of elements indicated in request for disclosure, agency officials are not obliged to compile or create new record containing information or prepare new record in desired format. Comm on Open Gov't FOIL-AO-7606.

Freedom of Information Law does not require agency to create record in response to request; therefore, if authority does not maintain record containing payment breakdown in relation to contract, Freedom of Information Law would not require that such record be prepared in response to request. Comm on Open Gov't OML-AO-4733.

101. Records required by law

Agency is not required to create or prepare record in response to request, except record as specified in CLS Pub O § 87(3). Comm on Open Gov't FOIL-AO-4711.

b. Particular Types Of Records

102. Court records

If notice concerning pending lawsuits had been prepared by agency, agency would not be required to create such a list; however, individual records that identify pending lawsuits would be available for disclosure. Comm on Open Gov't FOIL-AO-4675.

Since it is questionable whether court or court clerk would maintain record containing total or tabulation of number of cases that were transferred from one court to another, if no record exists containing figures sought, there would be no obligation to create such record or total on requester's behalf. Comm on Open Gov't FOIL-AO-4862.

Even though other statutes may deal with access to court records, procedural provisions associated with Freedom of Information Law (i.e., those involving designation of records access officer or right to appeal denial) would not ordinarily be applicable. Comm on Open Gov't FOIL-AO-12802.

If request involves records maintained by County Clerk in his capacity as court clerk, Freedom of Information Law would not apply. Comm on Open Gov't FOIL-AO-12802.

Grand jury minutes and "other matters attending a grand jury proceeding" would be outside scope of rights conferred by Freedom of Information Law; any disclosure of those records would be based on court order or perhaps vehicle authorizing or requiring disclosure that is separate and distinct from Freedom of Information Law. Comm on Open Gov't FOIL-AO-12802.

103. Employment; labor, generally

If no records exist that provide total of compensation paid to Village attorney for given period, agency would not be required to review individual records for purpose of preparing new record containing total; however, individual records, or portions thereof, might be made available in order that person requesting information can independently prepare their own total. Comm on Open Gov't FOIL-AO-4056.

Department of taxation and finance is required to maintain list setting forth name, public office address, title and salary of every officer or employee of agency and must make this tape available; however, if department does not keep this list on computer tape or disk, it cannot provide what it does maintain; further, Freedom of Information Law does not require information be placed on computer tape or disk. Comm on Open Gov't FOIL-AO-4781.

If list of employees is maintained only on paper and agency lacks capacity to generate list electronically, it is not obliged to develop electronic database containing contents of list in order to accommodate applicant's request that list be provided in electronic form and e-mailed to him. Comm on Open Gov't FOIL-AO-12105.

104. Financial records, generally

105. —Political contributions

If city does not maintain list of contributors and amounts of contributions made to project, it could not provide copy of such record; but, assuming that city has possession of list of contributors, it would appear that some aspects of list would be available, while others could be withheld. Comm on Open Gov't FOIL-AO-4899.

Issuance of duplicate tax bill does not pertain to creation of new document, but rather duplication of existing record; therefore,

Freedom of Information Law pertains to existing records because agency is not required to prepare new record in response to request. Comm on Open Gov't FOIL-AO-4668.

Freedom of Information Law does not require agency to create record in response to request; therefore, if authority does not maintain record containing payment breakdown in relation to contract, Freedom of Information Law would not require that such record be prepared in response to request. Comm on Open Gov't OML-AO-4733.

106. Guns; gun permits

There was no law that required preparation of policies or procedures concerning restricted pistol licenses; thus, if no such records had been prepared, neither Freedom of Information Law nor any other statute would require they be created and, therefore, Freedom of Information Law and similar or related statutes would be inapplicable. Comm on Open Gov't FOIL-AO-7918.

In regard to request to "physically see approved gun license applications" for persons living in several specifically stated zip codes, where police department did not maintain records sought by means of address or zip code, it would not be required by Freedom of Information Law to review all of approved applications individually in order to locate those pertaining to licensees within those zip codes. Comm on Open Gov't FOIL-AO-8315.

107. Landlord and tenant records

Agency would not be required to prepare list of names and addresses of landlords who leased space to town if no such list exists; however, individual records identifying landlords or leases would be available thereby enabling request to prepare own list. Comm on Open Gov't FOIL-AO-4698.

108. Medical and health records

Freedom of Information Law pertains to existing records and agency need not create or prepare record in response to request; therefore, if information sought does not exist in form of record or records, health department would not be obliged to create or prepare new records on requestor's behalf. Comm on Open Gov't FOIL-AO-4860.

109. Municipal records

Town is required to disclose existing records in accordance with Freedom of Information Law, but it is not obliged to create new records or review its records for purpose of preparing totals or tabulations. Comm on Open Gov't FOIL-AO-4725.

If town board has not prepared record containing explanation of its decision, it would not be required to do so pursuant to request made under Freedom of Information Law. Comm on Open Gov't FOIL-AO-4727.

Freedom of Information Law pertains to existing records and an entity is not required to create or prepare record in response to request; therefore, if there is no list of district offices of specific senators, senate would not be obliged to prepare list based upon request. Comm on Open Gov't FOIL-AO-4820.

Freedom of Information Law pertains to existing records and agency is generally not required to create or prepare records in response to requests; therefore, if office of mayor maintains no record containing proof of qualification for appointment, there would be no obligation to create such records based on requests. Comm on Open Gov't FOIL-AO-4886.

Insofar as town records are in physical possession of town's consultant, in response to request for any such records, records access officer, in carrying out his or her duty to "coordinate" town's response to requests, must either direct consultant to make records available in manner consistent with law, or acquire records in order that they may be disclosed in accordance with law. Comm on Open Gov't FOIL-AO-13045.

110. Police records, generally

Agency may withhold records compiled for law enforcement purposes when they identify confidential source relating to criminal investigation, when disclosure would endanger life or safety of any person, or when disclosure would constitute unwarranted invasion of personal privacy; Freedom of Information Law does not require agency to create or prepare record or response to request. Comm on Open Gov't FOIL-AO-4573.

All agencies, including police departments, must maintain reasonably detailed current list by subject matter, of all records in possession of agency and these subject matter lists will be available for disclosure. Comm on Open Gov't FOIL-AO-4660.

Agency is not required to create or prepare record in response to request; if no record is kept by police department that indicates length of time taken to reassemble pistol as evidence, or which indicates exact procedures that were used to reassemble pistol, police department officials would not be required to prepare such records in response to request. Comm on Open Gov't FOIL-AO-4702.

Freedom of Information Law pertains to rights of access to existing records maintained by agencies, thus, agency, such as New York City Police Department, is not required to answer questions or supply information generally in response to request; further, agency is not required to obtain records from other agencies in order to respond to request. Comm on Open Gov't FOIL-AO-4915.

Police officer's certification on behalf of Division of State Police, stating that diligent search was made and requested records either were not maintained or could not be found, was inadequate unless certifying officer herself had personally made search. Comm on Open Gov't FOIL-AO-12223.

111. Prisoners; prison records

Requests should be directed to agency that maintains records sought; agency is not required to prepare or create record in response to request; therefore, if no statistics concerning stabbings at correctional facilities have been prepared, agency, when receiving such request, would not be obliged to create records containing such statistics. Comm on Open Gov't FOIL-AO-4874.

Freedom of Information Law pertains to existing records and if there is no record that lists all inmates and correction officers who were transported to correctional facility, Department of Correctional Services would not be required to create such records based on request. Comm on Open Gov't FOIL-AO-4877.

Since CLS Arts & Cultural Affairs Law § 57.05 permits destruction records older than two years, Commissioner of Correction was justified in purging records older than two years, and request for copy of "incident report" filed more than two years after the incident was not timely. Comm on Open Gov't FOIL-AO-6320 (1990).

If inmate's name or other identifier can be used to locate records or portions of records that would identify inmate's visitors, it would likely be easy to retrieve that information, and request would reasonably describe records; on other hand, if there are chronological logs of visitors and each page would have to be reviewed in effort to identify visitors of particular inmate, agency staff would not be required to engage in such extensive search. Comm on Open Gov't FOIL-AO-8439.

112. Public Defender's office

If county office of public defender does not maintain records sought, there would be no obligation on its part to prepare records on applicant's behalf. Comm on Open Gov't FOIL-AO-12535.

113. Schools; students, teachers and other staff

City officials would not be required by Freedom of Information Law to prepare record that identifies firms which are interested in buying certain school when there is no list or record that identifies firms since communications had been oral in nature. Comm on Open Gov't FOIL-AO-4582.

Although Freedom of Information Law provides broad rights of access, it pertains to existing records; education department does not maintain any list that contains names and current addresses of college alumni, and though education department would provide information containing current addresses of alumni if they maintained information, department cannot make available what it does not have. Comm On Open Gov't FOIL-AO-4599.

If school district does not maintain payroll lists, Freedom of Information Law would not require school district to create or prepare such lists based on request. Comm on Open Gov't FOIL-AO-4752.

If no record or records falling within the scope of a request had been prepared by a school district, the Freedom of Information

Law does not require the district to create new records to satisfy the request. Comm on Open Gov't FOIL-AO-6330 (1990).

If school district had prepared policy concerning responses to inquiries by residents, such record would be available under Freedom of Information Law since CLS Pub O § 87(2)(g)(iii) requires that agency policy be disclosed; however, if no such records existed, district would not be obliged to create or prepare new record on behalf of applicant. Comm on Open Gov't FOIL-AO-8556.

II. Unwarranted Invasion Of Personal Privacy

A. Generally

114. In general

Unwarranted invasion of personal privacy under Freedom of Information Law pertains only to privacy of individuals, so to extent that list of names and addresses pertains to businesses or corporations, it would not constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4584.

Purpose for obtaining consent of third person when requesting records is to make records available to that third party when record sought might otherwise be withheld on basis that disclosure would constitute unwarranted invasion of personal privacy of person to whom records pertain. Comm on Open Gov't FOIL-AO-4659.

While Personal Privacy Protection Law, when read in conjunction with Freedom of Information Law, precludes agency from publicly releasing records, which, if disclosed, would constitute unwarranted invasion of personal privacy, Personal Privacy Protection Law preserves rights granted by Freedom of Information Law. Comm on Open Gov't FOIL-AO-4708.

Provisions in Freedom of Information Law pertaining to privacy are intended to deal with details of lives of natural persons, rather than entities, such as corporations; business addresses of corporate owners of building pertain to their activities as corporate owners; home addresses, however, are likely of little relevance to agency and can be withheld as unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4739.

Agency may inquire with respect to purpose of request when request involves list of names and addresses to determine whether records would be used for commercial purpose and, therefore, whether disclosure would result in unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4818.

Unwarranted invasion of personal privacy pertains to records identifiable to natural persons, rather than hospitals or corporate entities, for example; lists including names and addresses of natural persons would be accessible or deniable depending upon its use; those portions of lists pertaining to entities are accessible, irrespective of intended use; those portions pertaining to natural persons would be accessible or deniable, depending upon whether list would be used for fund-raising purposes. Comm on Open Gov't FOIL-AO-4879.

If request is made for list of names and addresses or its equivalent, purpose for which request is made may become relevant to rights of access based on unwarranted invasion of personal privacy, especially when that list may be used for commercial or fund raising purposes. Comm on Open Gov't FOIL-AO-4926.

When complaint is made, there may be considerations of privacy that properly result in denial of access to records or perhaps deletion of identifying details to protect against unwarranted invasion of personal privacy; however, if complaint was sent by person who made it to members of news media, disclosure would not result in unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4946.

With regard to CLS Pub O § 87(2)(b), which permits agency to withhold records to extent that disclosure would constitute unwarranted invasion of personal privacy, nature and content of personally identifiable information, rather than identity of agency that maintains it, are factors to consider in analysis of rights of access or authority to withhold. Comm on Open Gov't FOIL-AO-7858.

Examples contained in CLS Pub O § 89(2)(b) are not determinative of all issues that arise relating to application of privacy standard. Comm on Open Gov't FOIL-AO-7868.

Building plans per se contain no personal information concerning individual and, therefore, those kinds of records cannot be withheld on ground that disclosure would constitute unwarranted invasion of personal privacy under CLS Pub O § 87(2)(b). Comm on Open Gov't FOIL-AO-7921.

Provisions in Freedom of Information Law pertaining to privacy are intended to deal with natural persons, rather than entities, such as corporations, hospitals, other health care facilities or insurers. Comm on Open Gov't FOIL-AO-7947.

If identity of complainants is not known to applicant, often portions of records identifying them may be withheld under CLS Pub O § 87(2)(b); however, where identity of complainant is clearly known privacy provisions are inapplicable. Comm on Open Gov't FOIL-AO-8413.

Portions of complaint that identify complainants may be withheld from disclosure pursuant to CLS Pub O § 87(2)(b) on ground that disclosure would result in unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-9673.

Privacy provisions of Freedom of Information Law do not apply when records identify commercial entities or persons acting in their business capacities. Comm on Open Gov't FOIL-AO-9888.

Freedom of Information Law exception concerning protection of personal privacy pertains to natural persons, not corporate entities. Comm on Open Gov't FOIL-AO-10050.

Assuming that no other ground for denial is applicable, request made by subject of request for records pertaining to him, or by his representative who has obtained written release authorizing disclosure to representative, cannot be denied based on CLS Pub O § 87(2)(b); however, to extent that persons other than applicant are identified in records, privacy considerations may arise relative to those individuals warranting deletion of identifying details or certain portions of records. Comm on Open Gov't FOIL-AO-10166.

Provisions in Freedom of Information Law pertaining to protection of personal privacy may not be asserted to withhold records pertaining to entities other than natural persons. Comm on Open Gov't FOIL-AO-12559.

Local government may opt to disclose personal information, even when disclosure would result in unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-12594.

Recipients' responses to survey conducted by public agency would be accessible under Freedom of Information Law if recipients were informed that their responses would be made available, or if their responses were anonymous, but if they were given no indication that their names and/or addresses would be disclosed, and those items were included in their responses, then disclosure of those or other personally identifying details would result in unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-16618.

115. Deletion of identifying details

General listing of all gubernatorial appointees, without reference to data pertaining to ethnicity or race, would be accessible under Freedom of Information Law; however, if appointee's race or ethnicity is irrelevant to performance of his or her official duties, such record could likely be withheld under FOIL; consequently, to extent that list of all appointees contains racial or ethnic data identifiable to appointees, such data could be deleted on grounds that disclosure would constitute unwarranted invasion of personal privacy. Comm on Open Govt FOIL-AO-3604.

Substance of complaint made to public agency is generally available, although those portions of complaint which identify complainants may be deleted on ground that disclosure would result in "an unwarranted invasion of personal privacy" pursuant to CLS Pub O § 87(2)(b). Comm on Open Gov't FOIL-AO-9214.

If final determination of public body identifies person who is subject of charge or allegation and determination is that charge or allegation has no merit, applicant for records under Freedom of Information Law has right to obtain substance of determination, following deletion of personally identifiable details. Comm on Open Gov't FOIL-AO-9399.

Student grades in class taught by professor at State University of New York were accessible under Freedom of Information Law, provided that any identifying details pertaining to students' identities were withheld; for example, if student grades appeared

alphabetically, then university would be required to scramble content of records so that no student could be identified. Comm on Open Gov't FOIL-AO-16598.

While volunteer ambulance corporation could deny access to portions of records identifying those to whom medical services were rendered, their ages and descriptions of their medical problems or conditions, because disclosure of name coupled with those details would reveal personal and somewhat intimate aspect of individual's life, other information (such as locations of calls) had to be disclosed; emergency call, particularly when sirens or flashing lights are used, is public event, and destination of fire truck or ambulance is or can be known to those in vicinity of event. Comm on Open Gov't OML-AO-3508.

Portion of ethics complaint that identifies complainant may be redacted by town ethics board on ground that disclosure would result in unwarranted invasion of personal privacy unless name of complainant has already been disclosed by himself and others. Comm on Open Gov't OML-AO-3712.

116. Disclosure of names and addresses

"Staff roster" which includes home addresses and home telephone numbers may be withheld since, under CLS Pub O § 89, disclosure of home address of officer or employee is not required. Committee on Open Government FOIL-AO-3399.

List of only names of retirees of public employees' retirement system should be made available under Freedom of Information Law. Comm on Open Govt FOIL-AO-3642.

New York City Community Development Agency could be required to disclose names and addresses of member of publicly elected community "Area Policy Board", despite fact that, under CLS Pub O § 89(7) agency would not be required to disclose home addresses of its officers or employees, since governing provisions of federal law, as well as procedures adopted by Community Development Agency, require that names and home addresses be disclosed. Comm on Open Govt FOIL-AO-3718.

Agency may ask purpose of request when request involves list of names and addresses, since pursuant to § 89, agency may deny access to records which, if disclosed, would constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4141.

While status of applicant and purpose for which request is made are generally irrelevant in determining right of access, purpose is relevant when list of names and addresses is requested, consequently, agency's practice of ascertaining purpose of request that involves list of names and addresses or its equivalent is proper. 1986 Committee on Open Government FOIL-AO-4186.

Under CLS Pub Off § 87(2), records indicating identities of contractors or concessionaires under contract with Long Island State Park Commission, expenditures of Commission and similar records, and records identifying past and present members of Commission would be available for public review but, under § 89(7) of such Law, home addresses of Commission members or names of prospective members need not be made available. Comm on Open Gov't FOIL-AO-4486.

All records of agency are available, except to extent that records or portions thereof fall within one or more of grounds for denial in CLS Pub O § 87(2)(a) through (i); agency may withhold records to extent that disclosure would constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4572.

Although Freedom of Information Law provides broad rights of access, it permits agency to withhold records when disclosure would constitute unwarranted invasion of personal privacy; request for names and addresses of all persons arrested and or convicted of DWI charge in past 3 years will be denied. Comm on Open Gov't FOIL-AO-4581.

Although Freedom of Information Law provides broad rights of access, it pertains to existing records; education department does not maintain any list that contains names and current addresses of college alumni, and though education department would provide information containing current addresses of alumni if they maintained information, department cannot make available what it does not have. Comm On Open Gov't FOIL-AO-4599.

Rights of access to political party membership lists of names and addresses, or equivalent records, may be contingent upon purpose for which request is made; agency may withhold records in conjunction with grounds for denial listed in Freedom of Information Law, nevertheless, agency is not obliged to withhold records, even when records may be withheld; therefore, even if political party membership lists could be withheld, Freedom of Information Law would not prohibit disclosure. Comm on Open Gov't FOIL-AO-4866.

Lists including names and addresses of natural persons would be accessible or deniable depending upon its use; those portions of lists pertaining to entities are accessible, irrespective of intended use; those portions pertaining to natural persons would be accessible or deniable, depending upon whether list would be used for fund-raising purposes. Comm on Open Gov't FOIL-AO-4879.

List of names and addresses of licensed dog owners for certain counties could be withheld since it was apparent that list was to be used for commercial purposes involving "canine fencing". Comm on Open Gov't FOIL-AO-6215 (1990).

117. Disclosure of Social Security numbers

Aspects of resume of public employee indicating, inter alia, individual's home address, and social security number might, if disclosed, constitute unwarranted invasion of personal privacy as irrelevant to performance of official duties; contrarily, since FOIL has long granted access to name, public office address, title, and salary of all agency employees, those portions of resume indicating previous public employment in New York are available. Comm On Open Gov't FOIL-AO-4010.

Bills, vouchers, contracts and similar records involving payments to or expenditures by public employees are relevant to performance of their official duties and as such those types of records would be available on the ground that disclosure would constitute permissible rather than unwarranted invasion of personal privacy; however, some aspects of these records could be deleted as unwarranted invasion of personal privacy, such as public employees' home addresses or social security numbers which have no relevance to performance of one's official duties. Comm on Open Gov't FOIL-AO-4763.

Whether city human rights commission or employing agency maintains employee's social security number is irrelevant in terms of Freedom of Information Law; either can withhold that item as unwarranted invasion of personal privacy since infringement upon privacy and effect of disclosure would be same regardless of which agency maintains or perhaps discloses that kind of personal information. Comm on Open Gov't FOIL-AO-7858.

Insofar as vouchers or related records include public employees' social security numbers or home addresses, those items can be deleted from records based upon considerations of personal privacy since they are largely irrelevant to performance of one's duties. Comm on Open Gov't FOIL-AO-7930.

Disclosure of data contained in Statewide Planning and Research Cooperative System (SPARCS) which includes names of patients, their addresses, social security numbers, Medicaid numbers or similar identifiers would result in unwarranted invasion of personal privacy; however, if those unique personal identifiers were deleted or removed, it was difficult to envision how disclosure of several items characterized in relevant Department of Health regulations as deniable could possibly identify patient or, therefore, result in unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-7947.

Public disclosure of social security number of employee of state agency, absent consent of data subject, constitutes unwarranted invasion of personal privacy under both Freedom of Information Law and Personal Privacy Protection Act. Comm on Open Gov't FOIL-AO-9237.

Applicant was generally entitled to disclosure of city records concerning all retired pensioned employees, including exempt employees, receiving bona fide legal pensions plus compensatory dollars from December, 1990 to July, 1996 since such disclosure would not involve unwarranted invasion of personal privacy; however, social security numbers, home addresses, member and retirement numbers were unique identifiers and could be withheld based on considerations of privacy. Comm on Open Gov't FOIL-AO-9742.

Sole item that could be withheld from record of certificate of honorable discharge given to veteran would be social security number (assuming record is not sealed under CLS Civ R § 79-g), since local government agencies may withhold social security numbers on ground that disclosure would constitute "an unwarranted invasion of personal privacy," but they are not required to do so. Comm on Open Gov't FOIL-AO-12688.

State agency such as university cannot validly disseminate social security numbers of its employees (or others, such as students) to public, without consent of subjects of those items; Personal Privacy Protection Law forbids such disclosure. Comm on Open Gov't FOIL-AO-12743.

In order to disclose social security numbers to staff or employees at state college, 2 conditions must be met: (1) that those items are "necessary to the performance of [the] official duties" of staff or employees who seek or acquire social security numbers; and (2) that disclosure of those items is accomplished in order to comply with law or necessary to "operate a program specifically authorized by law." Comm on Open Gov't FOIL-AO-12743.

118. Ethics advisory opinions

Advisory opinion prepared by town ethics board can generally be withheld under Freedom of Information Law; if opinion is rejected or modified, it is deniable under both CLS Pub O § 87(2)(b) as unwarranted invasion of personal privacy and under CLS Pub O § 87(2)(g) as recommendation to town board that is not final. Comm on Open Gov't FOIL-AO-8922.

Names or other identifying details pertaining to witnesses or others interviewed by town ethics board can generally be withheld from disclosure on ground that disclosure would constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-8922.

Portions of HUD audit of county's "Revolving Loan Fund," which were identifiable to individuals and included recommendations or opinions regarding their ethical conduct, could be withheld to extent that no final determination concerning their conduct had been reached, to prevent unwarranted invasion of personal privacy; likewise, to extent that allegations or charges were found to be without merit, such records could be withheld. Comm on Open Gov't FOIL-AO-10050.

119. Lists sought for commercial or fund-raising purposes, generally

While it has been held that accessible records should be made equally available to any person, regardless of status or interest, Pub O § 89(2)(b)(iii) represents what might be characterized as an internal conflict in the Freedom of Information Law, for it renders the purpose for which a request is made for a list of names and addresses relevant to the accessibility of the material. Comm on Open Govt FOIL-AO 3060.

Purpose for which record is requested is generally irrelevant to its access; one instance when purpose for request may be relevant is when record involving listed names and addresses is used for commercial or fund raising purposes. Comm on Open Gov't FOIL-AO-4752.

Agency may inquire with respect to purpose of request when request involves list of names and addresses to determine whether records would be used for commercial purpose and, therefore, whether disclosure would result in unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4818.

Although reasons for which request is made under Freedom of Information Law or applicant's potential use of records are generally irrelevant, CLS Pub O § 89(2)(iii) permits agency to withhold lists of names and addresses if such lists would be used for commercial or fund-raising purposes on ground that disclosure would constitute unwarranted invasion of personal privacy; thus, intended use of list of names and addresses is relevant, and agency can ask why list of names and addresses has been requested. Comm on Open Gov't FOIL-AO-7643.

Freedom of Information Law required disclosure of copy of mailing list used to disseminate Legislative Insider, which is published by Monroe County Legislature Majority Office, where applicant provided assurance that she would not use requested information for fund raising purposes. Comm on Open Gov't FOIL-AO-8326.

Example contained in CLS Pub O § 89(2)(b) which permits withholding of information to preclude unwarranted invasions of personal privacy where request for information involves sale or release of lists of names and addresses to be used for commercial or fund-raising purposes does not apply to release of information pertaining to commercial entities or persons acting in business capacities. Comm on Open Gov't FOIL-AO-8953.

Agency may inquire as to purpose of request for information when request involves list of names and addresses; otherwise, purpose for which request is made is irrelevant. Comm on Open Gov't FOIL-AO-10290.

If requester is seeking certain records (regarding purchased and installed ground source heat pumps by residential community) in order to develop mailing list or its equivalent to be used for commercial or fund-raising purposes, CLS Pub O § 89(2)(b)(iii) may be pertinent. Comm on Open Gov't FOIL-AO-12874.

120. Maintenance of "otherwise available right of access"

Payroll record, which is required to be compiled, identifies faculty as part-time at community college; furthermore, it is implicit that payroll record required to be compiled pursuant to CLS Pub O § 87(3)(b) be current; if payroll record has not been prepared, proceeding could likely be commenced pursuant to CLS CPLR Article 78 to compel agency to perform duty that is required to be performed by law. Comm on Open Gov't FOIL-AO-4656.

While numerous aspects of approved application for gun permit can be withheld under CLS Pub O §§ 87(2)(b) and 89(2)(b) (such as fingerprints, social security number, character references, information regarding health and mental condition, alcoholism and drug use), other information must be disclosed (such as date and county of issue, expiration date, name and title of licensing officer, and applicable license restrictions). Comm on Open Gov't FOIL-AO-9771.

While town may have authority to deny access to voter registration list that it acquired from county department of data processing if person requesting list intends to use it as mailing list for commercial activity, denial may merely delay inevitable disclosure by county board of elections, as CLS Elec § 5-602 confers unrestricted public rights of access to voter registration lists prepared and maintained by county board of elections, irrespective of intended use. Comm on Open Gov't FOIL-AO-9814.

"Program history data" concerning inmates, if maintained by Department of Correctional Services, is available under Freedom of Information Law at least to extent that it is available under department regulations. Comm on Open Gov't FOIL-AO-9929.

Traffic Safety Law Enforcement and Disposition (TSLED) database compiled by Department of Motor Vehicles was subject to disclosure irrespective of department's policy not to release personally identifiable data contained therein as (1) disclosure of data with respect to judges and justices constitutes permissible invasion of privacy because it relates to performance of their official duties, (2) insofar as disclosure pertained to motorists, Vehicle and Traffic Law violations lists compiled by state police must be disclosed unless charges were dismissed and records sealed under Criminal Procedure Law, and (3) information sought would be available from courts under CLS Jud § 255 and CLS UJCA § 2019-a, and from department under CLS Veh & Tr § 508(3). Comm on Open Gov't FOIL-AO-10044.

Voter registration cards pertaining to named individual, if maintained by county board of elections, were available under CLS Elec § 3-220 and could not be withheld under Freedom of Information Law; subject of voter registration record has no right to restrict disclosure or provide conditions concerning disclosure. Comm on Open Gov't FOIL-AO-10263.

Voter registration records, including information pertaining to residence addresses, dates of birth, party designations and similar information, must be disclosed although some of those items could otherwise be redacted under Freedom of Information Law to prevent unwarranted invasion of personal privacy, because CLS Elec § 3-220 requires disclosure of voter registration records in their entirety. Comm on Open Gov't FOIL-AO-10352.

121. Request to except certain information from disclosure

Commercial entities, upon submission of records to state agencies, may seek to prevent disclosure by seeking protection offered to trade secrets; however, Freedom of Information Law is not applied to records prepared by agency concerning commercial entities; if information sought may generally be known or could be known within insurance industry, disclosure would not cause substantial injury to competitive position of subject enterprise or enterprises. Comm on Open Gov't FOIL-AO-4639.

Information furnished to Division of Housing and Community Renewal is considered confidential only when request for confidentiality is expressly made by person furnishing information, and that if such information is requested by third party, agency has burden of demonstrating that person who furnished information requested confidentiality; once agency indicates that it will disclose records but fails to make records available, such action is equivalent of denial. Comm on Open Gov't FOIL-AO-4738.

Reports prepared by New York State Housing Finance Agency following its investigation of complaint made by named individual were generally available to "data subject" of complaint under Personal Privacy Protection Law except to extent that disclosure would constitute unwarranted invasion of privacy of someone other than himself, as complainant's identity was known, and agency's claim that it promised confidentiality to her was generally meaningless; however, agency could redact any information identifiable to complainant to extent that disclosure would constitute unwarranted invasion of her privacy. Comm on Open Gov't FOIL-AO-9921.

CLS Pub O § 87(4) pertains only to state agencies, and was enacted in conjunction with CLS Pub O § 89(5) to clearly limit application of that provision to state agencies. Comm on Open Gov't FOIL-AO-9995.

Agreement by chief of police to withhold names of 18 police officers who admitted to off-duty misconduct did not preclude disclosure under Freedom of Information Law; citizens' right to know that public servants are held accountable when they abuse public trust outweighs any advantage that would accrue to municipalities if they could negotiate disciplinary matters with employees with power to suppress terms of settlement. Comm on Open Gov't FOIL-AO-10149.

Clause in board of trustees' agreement to buy out employment contract of college president, which would have prohibited president from discussing college matters with news media or others, could not limit public rights of access to records under Freedom of Information Law, and if board had approved buyout contract, it would clearly have been accessible notwithstanding agreement not to discuss its contents. Comm on Open Gov't FOIL-AO-10151.

Architect's plans and related documents prepared for agency submitted under seal of professionals, bearing legend that they are protected by copyright and may not be reproduced without permission of professional, nevertheless are subject to rights conferred by Freedom of Information Law; assertion of confidentiality does not remove rights of access to records that would otherwise be available, and consent of professional who prepared document (or owner of real property described in document) is irrelevant. Comm on Open Gov't FOIL-AO-12179.

When commercial entity is required to submit records to state agency under CLS Pub O § 89(5), it may request, at time of submission, that records or portions thereof be kept confidential in accordance with CLS Pub O § 87(2)(d). CLS Pub O §§ 87(2)(d) and 89(5) would not be applicable and would not serve as basis for denial of access under Freedom of Information Law where materials redacted by state university involved terms of negotiated agreements developed by parties to those agreements, and they were not records that were submitted to university by commercial enterprise. Redacted portions of state university vendor contracts (i.e., numeric figures) were not "trade secrets" and likely would not cause substantial injury to competitive position of subject enterprises where they were not analogous to process, formula, or financial information which showed strengths or weaknesses of entity; rather, they indicated amounts to be paid and received as result of negotiation between 2 parties, and thus that kind of information should be disclosed. Under CLS Pub O § 89(5), when commercial enterprise seeks guarantee that agency to which its records are submitted will not disclose records, and agency confers confidentiality and upholds guarantee of confidentiality following appeal by person whose request for record has been denied, agency has burden of proof in its defense of denial in any ensuing proceeding commenced for review of denial. To continue protection accorded by CLS Pub O § 89(5), agency must believe that it can prove to court that disclosure would, in fact, cause substantial injury to competitive position of commercial enterprise that submitted record; if agency does not believe that it can meet that burden of proof or does not have sufficient knowledge or information to ascertain merits of commercial entity's contentions, it must indicate that request to person seeking record will be granted, in which case, following exhaustion of administrative remedies, commercial entity that submitted record has 15 days to commence proceeding for purpose of demonstrating to court that disclosure would cause substantial injury to its competitive position. Commercial entity claiming that disclosure would cause substantial injury to its competitive position may choose to initiate proceeding to defend against disclosure, in which case it would have burden of proof; in that event, commercial enterprise, rather than person seeking records, would bear expense and burden of attempting to block disclosure and litigating matter. Comm on Open Gov't FOIL-AO-12656.

B. Particular Types Of Records

122. Animals

Center for Animal Care and Control improperly denied request under Freedom of Information Law for disclosure of employee separation agreements, as requested records represented final agency determinations, and disclosure would result in permissible rather than unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-12,347.

Records involving incidence of animal bites is available under Freedom of Information Law, except to extent disclosure would constitute unwarranted invasion of personal privacy in accordance with CLS Pub O §§ 87(2)(b) and 89(2)(b); names of person bitten and other identifying details pertaining to those persons could justifiably be withheld or deleted from records on ground that disclosure would result in unwarranted invasion of personal privacy. Although name, address, telephone number or other personally identifiable details concerning dog bite victim could properly be withheld under CLS Pub O § 87(2)(b), location of dog bite incident, description of how bite occurred and name of health professional who provided treatment would be available; if identifying details are deleted, those other items would be available, for they would not identify victim of dog bite. Comm on Open Gov't FOIL-AO-7609.

123. Civil rights

Prior to finding of probable cause, names of defendants and/or respondents in cases filed with Division of Human Rights may be withheld to protect their personal privacy in connection with filing of possible frivolous or scurrilous charges. Comm on Open Gov't FOIL-AO-8901.

Logbook maintained by town board's "Anti-Bias Task Force," which recorded complaints of bias-related incidents by date, facts, names, etc., was available to public under Freedom of Information Law, except for individual complainants' names and personally identifying details. Comm on Open Gov't FOIL-AO-12201.

If state agency cannot disclose records pursuant to CLS Pub O § 96 (Personal Privacy Protection Law), it is precluded from disclosing under Freedom of Information Law; alternatively, if disclosure of record would not constitute unwarranted invasion of personal privacy and if record is available under Freedom of Information Law, it may be disclosed under CLS Pub O § 96(1)(c). "Results of the deposition" relating to applicant's complaint to Division of Human Rights, and case file concerning matter, could be withheld to extent that they identified persons other than applicant and disclosure would result in unwarranted invasion of their privacy; in addition, they could be withheld in accordance with CLS CPLR § 3101, while remaining aspects of records pertaining to applicant would appear to be accessible to applicant. Comm on Open Gov't FOIL-AO-12592.

124. Department of Motor Vehicle (DMV) records, generally

Town cannot properly deny access to list of names and addresses of nonresident parking permit holders, since disclosure of

names and addresses of nonresident parking permit holders would not constitute unwarranted invasion of personal privacy in that purpose of disclosure is to inform nonresidents of new town parking policy and of action which might be taken collectively to oppose and reverse policy. Comm on Open Govt FOIL-AO-3741.

With respect to request for Department of Motor Vehicle (DMV) records for school bus drivers relating to moving violations and accidents, portions of records identifiable to individual drivers which included their ages could be withheld as unwarranted invasion of personal privacy under CLS Pub O §§ 87(2)(b), 89(2)(b) and 89(2-a), but if driver's age appeared on accident report available from DMV under Freedom of Information Law and CLS Pub O § 66-a, driver's age would be available from other records maintained by DMV containing equivalent information; furthermore, if ages of bus drivers could be withheld, but age was of primary interest, drivers' names could be withheld from records prior to disclosure. Comm on Open Gov't FOIL-AO-11978.

125. Employment; employees, generally

126. —Death of employee

Attendance records can be characterized as intra-agency materials, however, those portions reflective of dates or numbers of absences would constitute statistical or factual information which is accessible; disclosure of attendance records would result in permissible rather than unwarranted invasion of personal privacy; since deaths are often widely known or publicized, disclosure of date of death of former employee would not constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4808.

127. —Health care insurance records

As to request for information from Utica City School District regarding employee health insurance accounts, to extent that such information consists of agency records, none of grounds for denial under Pub Off § 87(2) could likely be asserted, though if such records identify claimants, identifying details could likely be deleted as constituting unwarranted invasion of personal privacy under §§ 87(2)(b), 89(2)(b) of such law. Comm on Open Gov't FOIL-AO-4495.

Nature of insurance coverage of particular employees and amounts of their claims or billings would be largely irrelevant to manner in which town employees perform their official duties; as such, records that identify employees by means of kind of insurance coverage they have chosen, and amounts of claims made by employees and their dependents would result in unwarranted invasion of personal privacy; however, if town maintains statistics regarding insurance coverage or billings, those statistics would be available, so long as they did not identify employees. Comm on Open Gov't FOIL-AO-4962.

Whether public officer or employee is covered or chooses to be covered by public employer paid health insurance plan or whether that person opts for family or individual coverage has no relevance to performance of that person's official duties. Disclosure indicating that public officer or employee is covered by health insurance plan at public expense would not represent or reveal intimate detail of one's life. If disclosure of cost of health care coverage for particular public employee indicates which plan that person has chosen or whether his or her plan involves individual or dependent coverage, such disclosure might potentially result in revelation of number of details of person's life and unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-7868.

Disclosure indicating that public officer or employee is covered by health insurance plan at public expense will not represent or reveal intimate detail of one's life. Comm on Open Gov't FOIL-AO-8908.

128. —Job applications

Freedom of Information Law requires that person requesting records must "reasonably describe" records sought so agency officials can locate records; however, certain records may justifiably be withheld if information sought includes other people in addition to requester because that would cause unwarranted invasion of personal privacy; while eligible lists, which identify those persons who pass civil service examinations and their scores, are available, records identifying those persons who failed exams or their scores could be withheld as unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4574.

Records pertaining to public employees that are relevant to performance of their duties are available, because disclosure in those circumstances would result in permissible rather than unwarranted invasion of personal privacy; therefore, licenses or records indicating certification status as well as area of certification are accessible under Freedom of Information Law and similarly, records involving dates of assignment and work hours are relevant to performance of duties of public employees to whom information relates. Comm on Open Gov't FOIL-AO-4905.

While various aspects of employment application could be withheld from public under Freedom of Information Law on ground that disclosure would constitute unwarranted invasion of personal privacy, disclosure may be made to governmental official when it is clear that disclosure is made to assist in performance of governmental function. Comm on Open Gov't FOIL-AO-8585.

Names and addresses of applicants for public employment need not be disclosed, due to possibility of embarrassment if applicant is not selected and because that person would not yet have been hired. Comm on Open Gov't FOIL-AO-9820.

129. —Misconduct, discipline, termination and the like

If disclosure of records maintained by state agency would result in unwarranted invasion of personal privacy, Personal Privacy Protection Law and Freedom of Information Law would prohibit disclosure; written reprimands pertaining to employees that were issued for failure to report suspected child abuse are accessible under Freedom of Information Law; however, to extent that those records identify patients, deletions of those details should be made to protect against unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4683.

Record or report might be both available or deniable in part and thus imposes obligation on agency officials to review requested records in their entirety to determine which portions, if any, may be justifiably withheld; agency may withhold records to extent that disclosure would result in unwarranted invasion of personal privacy and to extent that records pertain to allegations or charges against employees that have not yet been proven, which did not result in any disciplinary action, and names or other identifying details that would, if disclosed, constitute unwarranted invasion of personal privacy; however, if investigations of misconduct resulted in disciplinary action, charges that were sustained as well as any final determination indicating action taken would be available for disclosure. Comm on Open Gov't FOIL-AO-4709.

With regard to records that identify public employees, records that are relevant to performance of public employee's official duties are available, because disclosure in such instances would result in permissible rather than unwarranted invasion of personal privacy; with respect to statements made by persons other than public employees, their names or other identifying details pertaining to them might be deleted to protect privacy while remainder of statements would be available. Comm on Open Gov't FOIL-AO-4722.

Record pertaining to respondent, person against whom complaint is made, would generally have rights of access to records pertaining to him or her, except those portions which if disclosed would result in unwarranted invasion of personal privacy with respect to other persons; when complaint is made against public employee allegations have not yet been or are not substantiated, complaint and records related to it that identified person against whom complaint is made may generally be withheld on ground that disclosure would result in unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4729.

In context of investigation or possible disciplinary action, where public employees have been charged or where allegations have been made, but where no filing of determination in nature of disciplinary action has been taken, records identifiable to individuals relating to charges or allegations may generally be withheld for disclosure because this would result in unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4787.

Freedom of Information Law enables agency to withhold records or portions thereof the disclosure of which would constitute

unwarranted invasion of personal privacy; records where requester was falsely accused of serious crimes against some patients in agency where requester worked for years as psychologist would probably identify persons other than requester, such as patients or clients, complainants or informants and, therefore, even if Freedom of Information Law were to apply, significant aspects of records would likely be withheld. Comm on Open Gov't FOIL-AO-4816.

Portions of records identifying those who file complaints can generally be withheld as unwarranted invasion of personal privacy; further, if complaint is unsubstantiated and does not result in disciplinary action, it could be withheld as unwarranted invasion of personal privacy regarding employee who is subject of complaint; on other hand, if public employee is subject of disciplinary action, those records are available. Comm on Open Gov't FOIL-AO-4923.

Records pertaining to public employees that are relevant to performance of their duties are available because disclosure would result in permissible rather than unwarranted invasion of personal privacy; therefore, if disciplinary action has been taken regarding particular police officers, records reflective of that action are available. Comm on Open Gov't FOIL-AO-4925.

To the extent that charges or allegations against public employee have not been proven or have been dismissed, records pertaining to charges or allegations could be withheld as unwarranted invasion of personal privacy; however, if complaint or allegation has resulted in disciplinary action taken against public employee, records indicating charges that were sustained in nature of action would be available; identities of complainants may generally be withheld on ground that disclosure would result in unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4967.

Records that are relevant to performance of public employee's official duties are available because disclosure would result in permissible rather than unwarranted invasion of personal privacy; further, record reflective of final disciplinary action taken against public employee would be available because such record would deal with matter of public concern, that being public employee's accountability for misconduct; with respect to complaints directed to agency by member of public, portions of complaints that identify complainants may be deleted on ground that disclosure would constitute unwarranted invasion of personal privacy and often what is relevant to agency is substance of complaint and whether it has merit, not identity of person who made complaint; however if employees of agency were acting in performance of their official duties when making complaint, references to them would be relevant to their duties and duties of agency and, as such, denial of those aspects of hearing transcript cannot be justified. Comm on Open Gov't FOIL-AO-4971.

Records that are relevant to performance of public employee's official duties are available because disclosure in such instances would result in permissible rather than unwarranted invasion of personal privacy; however, if allegations of misconduct have not yet or did not result in disciplinary action records relating to such allegations may be withheld for disclosure would result in unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4973.

There may be privacy considerations concerning persons other than employees who may be subjects of board's inquiries; for instance, name of complainant or witness can be withheld in appropriate circumstances as unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-7914.

Disclosure of litigation file cabinet "tags" used by individual attorneys at board of education might properly be denied where tags identified employees who were subjects of disciplinary proceedings or other matters disclosure of which would constitute unwarranted invasion of personal privacy within meaning of CLS Pub O § 87(2)(b). Comm on Open Gov't FOIL-AO-9251.

Counseling memo issued to employee of Department of Transportation after allegation of misconduct could likely be withheld from disclosure to prevent unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-9383.

Disclosure of identities of suspended city employees does not constitute unwarranted invasion of personal privacy within meaning of CLS Pub O § 87(2)(b). Comm on Open Gov't FOIL-AO-9463.

When allegations or charges of misconduct of employee have not yet been determined or did not result in disciplinary action or finding of misconduct, records relating to such allegations may be withheld, for disclosure would result in unwarranted invasion of personal privacy; similarly, to extent that charges are dismissed or allegations are found to be without merit, they may be withheld. Comm on Open Gov't FOIL-AO-12423.

If there were no determination to effect that public employee engaged in misconduct, denial of access to records regarding investigation of county property and employees that ended several years earlier, based on considerations of privacy, would be consistent with Freedom of Information Law. Comm on Open Gov't FOIL-AO-12722.

130. —Pensions

Disclosure of pension numbers of agency's present and former employees may be permitted, since such number appears to be only identifier for obtaining public records concerning public employees participating in State Retirement System, such as years of service, salary information and payments made under such system, though identifying number alone may be otherwise irrelevant to performance of public employee's duties, for purposes of determining whether unwarranted invasion of personal privacy has occurred. Comm on Open Gov't FOIL-AO-4490.

131. —Qualifications; certifications, ratings and the like

Records pertaining to public employees that are relevant to performance of their duties are available, because disclosure in those circumstances would result in permissible rather than unwarranted invasion of personal privacy; therefore, licenses or records indicating certification status as well as area of certification are accessible under Freedom of Information Law and similarly, records involving dates of assignment and work hours are relevant to performance of duties of public employees to whom information relates. Comm on Open Gov't FOIL-AO-4905.

Records relevant to performance of public employee's duties would, if disclosed, result in permissible rather than unwarranted invasion of personal privacy; while disclosure of fact that public employee has received promotion would not constitute unwarranted invasion of personal privacy, disclosure of record indicating that public employee applied for and was not granted promotion would likely constitute unwarranted invasion of personal privacy and, as such, request for copy of application may be denied in its entirety prior to final determination concerning application for promotion; since each portion of completed application involves privacy considerations, in situation where promotion has been granted, to extent that application is not relevant to performance of employee's duties, it could be withheld as unwarranted invasion of personal privacy and, as such, while name of institution that awarded degree and names of courses taken could generally be withheld as unwarranted invasion of personal privacy, if particular degree or major field of study is requirement for position held by applicant, portion of application indicating that such criteria have been met would likely be available, for they are relevant to performance of one's official duties. Comm on Open Gov't FOIL-AO-4908.

Records containing information directly relevant to public employee's performance of his or her duties, such as license or degree requirements for position, are generally available, but other aspects of public employee's education, employment history or other personal information are likely to be denied based on unwarranted invasion of personal privacy; if residency requirement is needed for position, then disclosure of such information would not constitute unwarranted invasion of personal privacy; however, rest of records may be denied on basis of privacy considerations. Comm on Open Gov't FOIL-AO-4915.

Disclosure, in employee performance evaluation, of description of duties to be performed by any person holding particular position, or series of criteria reflective of duties or goals to be achieved by any person holding that position, would result in permissible rather than unwarranted invasion of personal privacy for purpose of FOIL. Component of employee performance evaluation involving reviewer's subjective analysis or opinion of how well or poorly standards or duties have been carried out or

goals have been achieved could be withheld under FOIL, both as unwarranted invasion of personal privacy and under CLS Pub O § 87(2)(g), on ground that it constitutes opinion concerning performance. Component of employee performance evaluation consisting of final rating, i.e., "good", "excellent", "average", etc. would be available for disclosure under FOIL, assuming that any appeals have been exhausted, for it would constitute final agency determination available under CLS Pub O § 87(2)(g)(iii), particularly if monetary award were based on rating; moreover, final rating concerning public employee's performance is relevant to that person's official duties and therefore would not result in unwarranted invasion of personal privacy if disclosed. Comm on Open Gov't FOIL-AO-12396.

Copy of reference letter provided to Banking Department in connection with individual's application to obtain license to operate as mortgage broker may be withheld, even though applicant has knowledge of identity of author of letter. Comm on Open Gov't FOIL-AO-13345.

132. —Salaries

Records pertaining to public employees that are relevant to performance of their duties are available because disclosure in those instances would result in permissible rather than unwarranted invasion of personal privacy; however, records pertaining to deductions from one's paycheck are irrelevant to performance of that public employee's official duties and consequently, they could be withheld on ground that disclosure would result in unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4885.

When public employee's paycheck indicates amount after deductions have been made, it is likely that amount appearing on check could be withheld; that figure would not represent employee's salary or gross pay, both of with would be public and would instead reflect, without specification, what would remain after what might be series of personal decisions (i.e., claiming exemptions, choice of health insurance, payment of life insurance premiums, direct deposit into bank account, purchase of savings bonds, etc.) that had no relationship to performance of employee's governmental duties. Comm on Open Gov't FOIL-AO-8387.

If record sought under Freedom of Information Law is payroll list required to be maintained pursuant to CLS Pub O § 87(3)(b), it must be disclosed, irrespective of its intended use for commercial or fundraising purposes. Comm on Open Gov't FOIL-AO-9523.

Privacy was not at issue with respect to attendance and payroll records requested by employee's wife on his behalf, as records essentially pertained to employee himself, and person cannot engage in unwarranted invasion of his or her own privacy. Comm on Open Gov't FOIL-AO-10144.

In releasing payroll records kept by agency to determine whether employees on public works projects are being paid in accordance with prevailing wage standards, agency may delete contractors' names, addresses and social security numbers to prevent unwarranted invasion of personal privacy, as such information is largely irrelevant to reason for keeping records; however, portions of records reflective of titles, duties, wages, hours worked and similar data must be disclosed. Comm on Open Gov't FOIL-AO-10325.

133. —Unions; collective bargaining

Portions of records indicating membership in union can be withheld from disclosure under Freedom of Information Law as unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-8908.

School district's disclosure of list of teachers who were not members of certain union would result in permissible rather than unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-9764.

Proposed "arbitrator appraisal" form completed and returned to Public Employment Relations Board by party to voluntary grievance arbitration is analogous to employment reference under CLS Pub O § 89(2)(b)(i); thus, while form is generally available, identifying details of representative or employee of union who completes form may be withheld as unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-9972.

There is no basis for withholding records or portions of records specifying that public employees are members of public employee union; exception concerning privacy does not apply to record identifying entities or individuals in relation to their business or professional capacities. Comm on Open Gov't FOIL-AO-16451.

If intra-agency directory containing home addresses and home telephone numbers of public employees is requested, it would likely be proper to delete home addresses and home telephone numbers and make remainder available. Comm on Open Gov't FOIL-AO-4636.

Since Freedom of Information Law has long granted access to name, public office address, title and salary and all employees of agency, those portions of resume indicating previous public employment would be available; also, agency may delete identifying details when it makes records available as to preclude any unwarranted invasions of personal privacy. Comm on Open Gov't FOIL-AO-4650.

Records identifying public employees who work during given period, rates of pay and number of hours worked are available because those records are "relevant" to performance of their duties. Comm on Open Gov't FOIL-AO-4657.

If records are relevant to performance of public employee's official duties, disclosure would constitute permissible rather than unwarranted invasion of personal privacy; conversely, if records are not relevant to performance of one's official duties, disclosure has been found to result in unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4658.

Records that are relevant to performance of official duties of public employee are available on ground that disclosure would result in permissible rather than unwarranted invasion of personal privacy; however, records concerning public employees that are not relevant to performance of official duties may be denied on ground that disclosure would indeed result in unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4680.

With regard to records that identify public employees, records that are relevant to performance of public employee's official duties are available, because disclosure in such instances would result in permissible rather than unwarranted invasion of personal privacy; with respect to statements made by persons other than public employees, their names or other identifying details pertaining to them might be deleted to protect privacy while remainder of statements would be available. Comm on Open Gov't FOIL-AO-4722.

Records pertaining to public employees that are relevant to performance of their official duties are generally available, however, where names do not pertain to public employees acting in performance of their official duties, it might be appropriately contended that interest in protecting privacy outweighs general duty to disclose, and that disclosure would constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4736.

Records pertaining to public employees that are relevant to performance of duties are available, for disclosure in these instances would result in permissible rather than unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4828.

Disclosure of names of persons employed or once employed by particular agency who had applied under CLS Retire & S S § 803 would result in unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-8328.

Home telephone number of public officer or employee is largely irrelevant to performance of one's official duties and, therefore, request under Freedom of Information Law for such information can be denied as disclosure would constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-9197.

Disclosure of list containing names, home addresses and home telephone numbers of attorneys employed in Buffalo office of Department of Law was improper where disclosure was sought in connection with fundraising efforts for election campaign of one of Attorney General's best friends. Comm on Open Gov't FOIL-AO-9210.

Identifying details of Public Employment Relations Board (PERB) employees who complete proposed "arbitrator appraisal" forms, in connection with voluntary grievance arbitration, may be

withheld to prevent unwarranted invasion of personal privacy; completion of such forms is ancillary to routine duties of PERB employees. Comm on Open Gov't FOIL-AO-9972.

Provisions in Freedom of Information Law pertaining to protection of personal privacy do not justify withholding list of names of executive directors of senior centers maintained by city "Department for the Aging," as such list involves names and addresses of persons in their business capacities, and there is nothing intimate or personal about it. Comm on Open Gov't FOIL-AO-10314.

Names of county employees on list of vendors doing business with county would clearly be accessible where such list indicates payments to public employees who are being paid or reimbursed in relation to performance of their official duties; inclusion of names of public employees also pertains to those persons in relation to their governmental activities, and disclosure of their identities would constitute permissible rather than unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-12816.

Insofar as county vendor list identifies public employees and includes their home addresses, such addresses, under CLS Pub O § 89(7), may be withheld; if list does not contain public employees' home addresses, but rather their work addresses, list would be available in its entirety. Comm on Open Gov't FOIL-AO-12816.

Next of kin has rights of access, under Freedom of Information Law and Personal Privacy Protection Law, to deceased employee's personal history file, except situations in which such records identify others and disclosure would constitute unwarranted invasion of those other persons' privacy. Comm on Open Gov't FOIL-AO-13174.

134. Financial matters, generally

135. —Estates; estate administration

It is likely that disclosure of names of or other identifying details pertaining to persons ancillary to distribution of assets of estate, such as heirs of those persons, other family members, or neighbors, friends, or acquaintances could justifiably be withheld by public administrator as unwarranted invasion of privacy, except to extent that such information was otherwise available through court clerk. Comm on Open Gov't FOIL-AO-9650.

136. —Grant programs

Disclosure that permits public to determine general income level of participant in grant program would constitute unwarranted invasion of personal privacy because such disclosure would indicate that particular individual has income or economic means below certain level; therefore, if by means of their names or addresses, grants are made to low income persons, it is likely that disclosure of portions of records indicating their identities might justifiably be withheld; on other hand, if grant is not conditioned on income qualification, but rather upon location of property, disclosure of identities of those recipients of grants would likely be proper. Comm on Open Gov't FOIL-AO-4904.

137. —Judgment debtors; executions and attachments

Although purpose for which information is requested is generally irrelevant to rights of access, exception to rule arises as to sale or release of lists of names and addresses if such lists would be used for commercial or fundraising purposes; request for records of executions and levies against personal property may be denied if purpose is direct mail solicitation of debtors. Committee on Open Government FOIL-AO-3817.

Specific information concerning value of assets of former county legislator could be withheld on ground that disclosure would result in unwarranted invasion of personal privacy; typically, financial disclosure statements must be disclosed insofar as they indicate sources of one's assets, but may be withheld insofar as they indicate value of assets. Comm on Open Gov't FOIL-AO-9826.

138. Fires, firefighters, firefighting and the like

The disclosure of medical histories of paid firemen of a fire district without permission, generally, would constitute an unwarranted invasion of the personal privacy of such firemen. 1982 Op St Compt File #82-204.

To extent that information pertains to entities as opposed to persons, provisions concerning personal privacy would not be applicable; even if information does pertain to natural persons, while names and addresses may or not constitute unwarranted invasion of personal privacy, records indicating locations of fires would be accessible. Comm on Open Gov't FOIL-AO-4751.

Medical information contained in ambulance run record of fire department could be withheld on ground that disclosure can constitute unwarranted invasion of personal privacy, except to extent that record refers to agency name and other information that has already been disclosed by means of motor vehicle accident report. Comm on Open Gov't FOIL-AO-4786.

Emergency call, particularly when sirens or flashing lights are used, is event of public nature, and thus when fire truck travels to its destination, that destination is or can be known to those in vicinity of event, and disclosure of address or brief description of event would not likely constitute unwarranted invasion of personal privacy; also, presence of emergency vehicle does not necessarily indicate that there is medical problem since those vehicles are dispatched for any number of reasons, many of which do not relate to medical event. Comm on Open Gov't FOIL-AO-12608.

139. Government contractors, licensees and the like, generally

140. —Lobbyists

To extent that lists of lobbyists registered with temporary state commission on lobbying identify entities, rather than natural persons, provisions concerning protection of personal privacy appearing in both Freedom of Information Law and Personal Privacy Protection Law are inapplicable; also, since report required to be prepared by Commission must include listing of lobbyists, and is available to public, provision of Freedom of Information Law could not be asserted to withhold list from any member of public, irrespective of possible use of lists. Comm on Open Gov't FOIL-AO-4895.

141. —Political contributors

To extent that list identifies contributions made to project by entities, such as corporations or organizations, it would be available because those portions would not identify natural persons; on other hand, to extent that list identifies natural persons and amounts of their contributions, disclosure of identities of those persons would constitute unwarranted invasion of personal privacy and, therefore, could be withheld on that basis. Comm on Open Gov't FOIL-AO-4899.

Freedom of Information Law did not require that city identify anonymous donor of funds used by City to clean up property that was ravaged by fire since donor did not wish to be identified and disclosure would have constituted unwarranted invasion of privacy. Comm on Open Gov't FOIL-AO-8583.

City could honor request of donor to remain anonymous with regard to donation received by city to clean up property that was ravaged by fire since disclosure would have constituted unwarranted invasion of privacy. Comm on Open Gov't OML-AO-2440.

Questionnaires, sent to firms interested in selling electronic voting machines to city by commissioner of New York City Department of General Services, would, if disclosed, enable one firm to gain advantage over competitor or impair city's ability to reach optimal agreement; as such, requester for questionnaire may justifiably be denied access; agency may withhold records or portions thereof disclosure of which would constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4665.

Unwarranted invasion of privacy is intended to apply to records that identify individuals rather than corporations, partnerships or other such entities; to extent that purchasers or sellers are not natural persons, names and addresses are likely to be available. Comm on Open Gov't FOIL-AO-4792.

Status or interest of applicant for records, or purpose for which request is made are irrelevant to rights of access; therefore, fact that applicant seeks to use records for commercial purpose has no effect on rights of access and request for license must be granted, even if request is made for commercial purpose; however, if request is made for list of names and addresses or its equivalent,

purpose for which request is made may become relevant to rights of access based on unwarranted invasion of personal privacy, especially when that list may be used for commercial or fund raising purposes. Comm on Open Gov't FOIL-AO-4926.

When list involves persons licensed to engage in certain kind of business and includes address indicating where licensed activity occurs, personal privacy implications are minimal, if they exist at all. Comm on Open Gov't FOIL-AO-8573.

Licenses and similar records are available under Freedom of Information Law, notwithstanding assertion that disclosure would constitute unwarranted invasion of personal privacy, since they are intended to enable public to know that individual has met appropriate requirements to be engaged in activity that is regulated by state or in which state has significant interest. Comm on Open Gov't FOIL-AO-9375.

Exception concerning privacy, including CLS Pub O § 89(2)(b)(iii), does not apply to list of vendors doing business with county. Comm on Open Gov't FOIL-AO-12816.

County cannot condition disclosure of its vendor lists on requester's assertion that he would not use list for commercial purposes or fund-raising. Comm on Open Gov't FOIL-AO-12816.

While portions of payment requisitions and certified payroll of private company with which school district has contracted are accessible under Freedom of Information Law insofar as they are reflective of titles, duties, wages, hours worked and similar data, disclosure of personally identifiable details pertaining to employees of private company may be deleted or redacted from those records prior to disclosure. Comm on Open Gov't FOIL-AO-16649.

142. Guns; gun permits

If list of those licensed to carry pistols was sought for commercial or fund-raising purposes, denial of access is appropriate because it is unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4732.

With regard to pistol license applications, various information must be disclosed under Freedom of Information Law such as date and county of issue, expiration date, name and title of licensing officer and applicable restrictions since such information does not constitute intimate or personal details regarding licensee. Comm on Open Gov't FOIL-AO-8902.

With regard to pistol license applications, numerous aspects of approved application could be withheld pursuant to CLS Pub O § 87(2)(b), such as personal physical characteristics, social security number, character references, information regarding health and mental condition, alcoholism and drug use, and similar intimate personal information. Comm on Open Gov't FOIL-AO-8902.

Name and address of person to whom pistol license is granted are accessible to public; licensee's preference regarding disclosure should not be determinative. Comm on Open Gov't FOIL-AO-13544.

143. Insurance; insurance agents

If town maintains statistics regarding insurance coverage or billings, those statistics would be available, so long as they did not identify employees; it might also be possible to delete identifying details contained in billing records to protect privacy, while providing access to remainder for records, which would indicate town's medical insurance billing experience without identifying particular employees. Comm on Open Gov't FOIL-AO-4962.

Data contained in Statewide Planning and Research Cooperative System (SPARCS), insofar as it includes personally identifiable information concerning patients, need not be disclosed under Freedom of Information Law since disclosure would constitute unwarranted invasion of personal privacy. Insofar as information contained in Statewide Planning and Research Cooperative System (SPARCS) would identify entities, such as hospitals or insurance companies rather than natural persons, information could not be withheld based upon considerations of privacy. Department of Health could not restrict disclosure of information contained in Statewide Planning and Research Cooperative System (SPARCS) on basis that information would identify physicians who treated various patients. Comm on Open Gov't FOIL-AO-7947.

144. Lottery and other games of chance

Information regarding sales and prize disbursements by lottery agents should be available to public access under Freedom of Information Law where, under CLS Pub Off § 87(2)(d), such information could not be characterized as "trade secrets" or as "information maintained for the regulation of commercial enterprise" and, where there is nothing unique to particular agent in terms of sales of lottery tickets, disclosure of information sought would not cause "substantial injury to the competitive position" of an agent individually, and under §§ 87(2)(b) and 89(2)(b), whether or not information sought clearly pertained to natural person, denial of access based upon privacy provisions is inappropriate. Comm on Open Gov't FOIL-AO-4446.

If state agency cannot disclose records pursuant to CLS Pub O § 96, it is precluded from disclosing them under Freedom of Information Law; alternatively, if disclosure of record would not constitute unwarranted invasion of personal privacy and if record is available under Freedom of Information Law, it may be disclosed under CLS Pub O § 96(1)(c). In those instances in which Lottery has taken action on its own initiative to disclose identity of lottery winner by means of press release, information contained in release must be disclosed in response to later request made under Freedom of Information Law; disclosure of that information some time after its initial issuance could not result in unwarranted invasion of privacy. Since disclosure by Lottery of information regarding lottery winners does not include actual home addresses of winners, home addresses of lottery winners can be withheld as unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-9143.

Although status of applicant and purposes for which request is made are irrelevant to rights of access, and agency cannot ordinarily inquire as to intended use of records, rights of access to list of names and addresses, or equivalent records, may be contingent on purpose for which request is made due to language of CLS Pub O § 89(2)(b)(iii); thus, if request for full name of winners of lottery since its inception, current address of each winner, amount of initial award to each winner and date of award to each winner was sought in order to develop mailing list or its equivalent to be used for commercial or fund-raising purposes, statute could apply to deny access to requested information. Even where request under Freedom of Information Law does not involve list per se, request for records that would be used to develop list of names and addresses to be used for commercial purpose may be denied. Comm on Open Gov't FOIL-AO-9143.

145. Medical and health-related information, generally

146. —Dental records

Under Freedom of Information Law and Personal Privacy Protection Law, inmate's dental records may not be released to Attorney General in pending civil suit without inmate's consent, as such disclosure would constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-12049.

147. —Hospital records

Data contained in Statewide Planning and Research Cooperative System (SPARCS), insofar as it includes personally identifiable information concerning patients, need not be disclosed under Freedom of Information Law since disclosure would constitute unwarranted invasion of personal privacy. Insofar as information contained in Statewide Planning and Research Cooperative System (SPARCS) would identify entities, such as hospitals or insurance companies rather than natural persons, information could not be withheld based upon considerations of privacy. Department of Health could not restrict disclosure of information contained in Statewide Planning and Research Cooperative System (SPARCS) on basis that information would identify physicians who treated various patients. Comm on Open Gov't FOIL-AO-7947.

With regard to request for records directed to Department of Health relating to incidents that occurred at specific hospital, CLS Pub O § 87(2)(b) would apply to permit denial of access to protect personal privacy. Comm on Open Gov't FOIL-AO-9651.

148. —Medical histories

With respect to medical records, Freedom of Information Law permits that some records may be withheld in whole or in part, depending upon their contents because medical records prepared by agency personnel could be characterized as intra-agency materials and to extent that such materials consist of advice,

opinion, recommendation and like, Freedom of Information Law would permit denial. Comm on Open Gov't FOIL-AO-4943.

With respect to medical records, Freedom of Information Law permits that some of those records may be withheld in whole or in part, depending upon their contents; medical records prepared by department personnel could be characterized as intra-agency materials that fall within scope of Freedom of Information Law and to extent that such materials consist of advice, opinion, recommendation and like, Freedom of Information Law would permit denial. Comm on Open Gov't FOIL-AO-4953.

Neither characterization of documents as "personnel records" nor their placement in personnel files would necessarily render those documents "confidential" or deniable under Freedom of Information Law. Names of municipal employees or family members coupled with amounts of reimbursements appearing on vouchers would, if disclosed, constitute unwarranted invasion of personal privacy, even though they do not indicate particular medical condition or problem, since items of that nature are largely irrelevant to performance of one's official duties, and vouchers indicating treatment, or particularly frequency of treatment, and amounts reimbursed, represent intimate details of peoples' lives. Comm on Open Gov't FOIL-AO-12692.

149. —Mental health

Where requester requests commitment papers, which include person's sentence, probation officer's report, fingerprints, medical, psychiatric and other records, of co-defendants, this request would likely be withheld on ground that disclosure would constitute an unwarranted invasion of personal privacy; likewise, letter sent from district attorney to officials of Department of Correctional Services offering advice or recommendations, would be considered inter-agency materials and would be withheld. Comm on Open Gov't FOIL-AO-4682.

The disclosure of medical histories of paid firemen of a fire district without permission, generally, would constitute an unwarranted invasion of the personal privacy of such firemen. 1982 Op St Compt File #82-204.

Medical information contained in ambulance run record of fire department could be withheld on ground that disclosure can constitute unwarranted invasion of personal privacy, except to extent that record refers to agency name and other information that has already been disclosed by means of motor vehicle accident report. Comm on Open Gov't FOIL-AO-4786.

Freedom of Information Law permits agency to withhold records when disclosure would result in unwarranted invasion of personal privacy, which includes medical information. Comm on Open Gov't FOIL-AO-4877.

New York State Cancer Registry records of cancer site specific diagnoses and deaths from period 1976-1997 for particular county should be disclosed under Freedom of Information Law since such data would not, under terms of CLS Pub Health § 2402, "disclose the identity of any person" and would not be unwarranted invasion of personal privacy; anyone anywhere could interview persons residing in particular locale and question them about incidence of certain diseases and any such disclosures, which would not be required by law, would be irrelevant to authority to withhold records. Comm on Open Gov't FOIL-AO-12402.

Record of medical emergency call consists in great measure of what might be characterized as medical record or history relating to person needing care or service; thus, portions of records identifying those to whom medical services were rendered, their ages, and descriptions of their medical problems or conditions could be withheld, while other aspects of records, such as locations of calls or addresses, should be disclosed. Comm on Open Gov't FOIL-AO-12608.

Death of person while in police custody is event of public nature and thus disclosure does not constitute unwarranted invasion of personal privacy; however, medical records (and perhaps other aspects of records relating to deceased, family members, or witnesses) might be withheld on ground that disclosure would constitute unwarranted invasion of privacy. Comm on Open Gov't OML-AO-3158.

150. Police and other law enforcement agencies, generally

151. —Arrests

Although Freedom of Information Law provides broad rights of access, it permits agency to withhold records when disclosure would constitute unwarranted invasion of personal privacy; request for names and addresses of all persons arrested and or convicted of DWI charge in past 3 years will be denied. Comm on Open Gov't FOIL-AO-4581.

With respect to records indicating arrests that did not result in convictions, disclosure would constitute unwarranted invasion of personal privacy; however, with respect to records of arrests for which underlying charges are still pending, those records generally would be accessible pursuant to Freedom of Information Law because records maintained by law enforcement agencies, as well as courts, indicating arrests and charges are in most instances accessible to public. Comm on Open Gov't FOIL-AO-4983.

152. —Discipline, misconduct, termination and the like

Names of 18 police officers who admittedly were involved in off-duty egg-throwing incident, and nature of penalties imposed on them, were accessible under Freedom of Information Law where requestor did not intend to use information in litigation context, records did not deal with unsubstantiated allegations or complaints and could not be characterized as "sensitive" or intimate, and incident had been widely publicized. Comm on Open Gov't FOIL-AO-10149.

If complaint of police misconduct included identity of complainant, identifying details pertaining to that person may be withheld on ground that disclosure would constitute "an unwarranted invasion of personal privacy"; provision might also be cited insofar as records identify witnesses, family members related to complainant, and perhaps others. Comm on Open Gov't FOIL-AO-12655.

Death of person while in police custody is event of public nature and thus disclosure does not constitute unwarranted invasion of personal privacy; however, medical records (and perhaps other aspects of records relating to deceased, family members, or witnesses) might be withheld on ground that disclosure would constitute unwarranted invasion of privacy. Comm on Open Gov't OML-AO-3158.

153. —Fingerprints

Disclosure does not constitute unwarranted invasion of personal privacy where person seeking disclosure seeks access to records pertaining to him; records relating to criminal history and fingerprints are disclosable to person to whom records pertain. Committee on Open Government FOIL-AO-3362.

Where requester requests commitment papers, which include person's sentence, probation officer's report, fingerprints, medical, psychiatric and other records, of co-defendants, this request would likely be withheld on ground that disclosure would constitute an unwarranted invasion of personal privacy; likewise, letter sent from district attorney to officials of Department of Correctional Services offering advice or recommendations, would be considered inter-agency materials and would be withheld. Comm on Open Gov't FOIL-AO-4682.

154. —Police photographs

Records introduced into evidence or disclosed during public judicial proceeding must be disclosed; also, if certain crime scene photos have been disclosed, as evidence or otherwise, it is questionable or perhaps unlikely that others involving same locations or persons would reveal more, in terms of invasion of personal privacy, than those previously disclosed. Comm on Open Gov't FOIL-AO-12579.

155. —Victims of crime

Agency may withhold records or portions thereof disclosure of which would constitute unwarranted invasion of personal privacy; further, agency may delete identifying details when it makes records available to protect against unwarranted invasions of personal privacy; these same principles and procedures can be applied with respect to CLS Civ R § 50-b, which is intended to guarantee that identity of victim of sex offense, who was under age of 18 at time of alleged commission of offense, remain confidential. Comm on Open Gov't FOIL-AO-4647.

"Victim notice," which may be filed by victim or family member of victim pursuant to CLS Correc § 149-a, need not be disclosed under Freedom of Information Law since disclosure would constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-7909.

Disclosure of minimal details about homicide victims can not be characterized as unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-10122.

Locations of acts vandalism were accessible because results of vandalism were visible to any passerby and nothing private was disclosed, and names of victims were also likely available because they were connected to addresses where vandalism occurred, and nothing intimate or personal would be disclosed; vandalism constitutes property crime, rather than contact with persons. Comm on Open Gov't FOIL-AO-10397.

Fact that police department located 15 domestic incidents pertaining to particular family or address did not justify withholding Freedom of Information Law request for all police reports involving police calls to that family or address, on basis that confirmation of so many domestic incidents, even after deletion of identifying details, might constitute unwarranted invasion of privacy; presence of police vehicle at particular time and location is not secret, and record that refers to such event is public. Comm on Open Gov't FOIL-AO-12299.

Crime victim was not entitled to access under Freedom of Information Law to photographs of himself taken by law enforcement officers, showing his injuries after being beaten, if photographs were maintained in criminal file sealed under CLS CPL § 160.50; if file was not sealed, photographs could be withheld from public on ground that disclosure would result in unwarranted invasion of personal privacy, but could not be withheld from crime victim, as person cannot invade his own privacy. Comm on Open Gov't FOIL-AO-12318.

Blanket denial of request for state police reports related to homicide-suicide of husband and wife in their home was inconsistent with Freedom of Information Law; in view of details that had already been published and made publicly known, it was unlikely that records pertaining directly to either deceased person would, if disclosed, result in unwarranted invasion of personal privacy, although portions of records identifying other persons might properly be redacted, depending on their contents. Comm on Open Gov't FOIL-AO-16552.

With enactment of personal privacy protection law, state agency is precluded from disclosing personal information when such disclosure would constitute unwarranted invasion of personal privacy, unless disclosure is made pursuant to one of conditions set forth in CLS Public Officers § 96(1); with respect to records of municipal agency which is not subject to personal privacy protection law, freedom of information law applies; sheriff may withhold records when disclosure would constitute unwarranted invasion of personal privacy, even though there is no obligation to do so. Committee on Open Government FOIL-AO-3817.

If home addresses have not previously been disclosed, they may be withheld on ground that disclosure would constitute unwarranted invasion of personal privacy; also, sign in log for auxiliary police officers containing names of officers and times and dates they performed their duties or training should be made available under Freedom of Information Law. Comm on Open Gov't FOIL-AO-4728.

To extent that codefendants' statements held deleted materials which identified codefendants, it does not appear that withholding of their names was justifiable because disclosure of codefendants' names and addresses during trial would indicate that they are not "confidential" informants; further, due to those disclosures, release of their names would not constitute unwarranted invasion of personal privacy; however, if names withheld pertain to persons other than codefendants identified during trial, it is possible that those persons are confidential informants or that disclosure of their identities would result in unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4851.

Where names of employees were whited out in detective's report which requester received, justification for such deletion is that disclosure would constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4900.

Where names of employees were whited out in detective's report which requester received, justification for such deletion is that disclosure would constitute unwarranted invasion of personal privacy; if detective's report can be characterized as record complied for law enforcement purposes, it might be contended that disclosure of names would identify confidential source; however, capacity to withhold on this basis is dependent upon nature of report, its function and whether employees are considered to be confidential sources. Comm on Open Gov't FOIL-AO-4900.

In connection with request for breakdown of cost of mayor's police protection from its inception to present, CLS Pub O § 87(2)(b) could not justify withholding of information since request did not seek names of police officers or bodyguards assigned to mayor or his home or who engaged in training, travel or purchases associated with protection of mayor. Comm on Open Gov't FOIL-AO-7930.

Blanket denial of request for state police records relating to suicide investigation was inappropriate, as records about deceased persons are generally public; however, those portions which if disclosed would "disgrace the memory" of decedent may be withheld and, in context of suicide, privacy of others might also be considered. Comm on Open Gov't FOIL-AO-9771.

State police could not require notarized waiver executed by administrator of decedent's estate prior to releasing its investigation of suicide death of requestor's sister, as records about decedents are generally public except for any portions which if disclosed would "disgrace the memory" of decedent. Comm on Open Gov't FOIL-AO-10372.

As nature and amount of information disclosed to public relating to criminal investigation or proceeding increases, extent to which Freedom of Information Law exception concerning privacy decreases. It would be difficult to justify denial of access to significant portions of criminal investigation records based on claim that disclosure would result in unwarranted invasion of privacy, even though there had not been trial, where substantial disclosures about defendant, his family, victims and community were made and disseminated over lengthy period of time both locally and nationally. Comm on Open Gov't FOIL-AO-12579.

Psychological records held by District Attorney and relating to criminal defendant might be withheld under CLS Pub O §§ 87(2)(b) and 89(2)(b); however, it might be in public interest, as well as positive law enforcement function, to disclose details concerning defendant's life since consideration of patterns of behavior and development of data about behavior may enable school and law enforcement officials to recognize inclination or proclivity to commit violent or antisocial acts, and preventive measures might be taken to prevent those acts from occurring. Comm on Open Gov't FOIL-AO-12579.

156. Prisons and prisoners, generally

157. —Videotapes

Once department of correctional services enables inmates' attorneys to view video tapes, department has waived its capacity to deny request by either inmate, who is subject of tape, or attorney of inmate who is acting in representative capacity on behalf of inmate; similarly, if viewing tape did not constitute unwarranted invasion of personal privacy of employees involved, disclosure of duplicate of tape would not constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4697.

158. —Visitor logs

If visitors' log or similar documentation was kept in plain sight and could be viewed by any person, and if staff at county correctional center had ability to locate portions of log pertaining to particular individuals based upon information provided by applicant, those portions of log would be available under Freedom of Information Law; however, if visitors' log or similar documents were not kept in plain sight and could not ordinarily be viewed, visitors log could be withheld on ground that disclosure would constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-8321.

Insofar as prison visitor logs or similar records identified other inmates and their visitors, those portions of records could be withheld on ground that disclosure would constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-8439.

If visitor's log or similar documentation at jail is kept in plain sight and can be viewed by any person, and if staff at facility has

ability to locate portions of log of interest to applicant, those portions of log would be available under Freedom of Information Law; however, if visitors log or similar documents are not kept in plain sight and cannot ordinarily be viewed, those portions of log pertaining to persons other than applicant could be withheld on ground that disclosure would constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-9228.

Where requester requests commitment papers, which include person's sentence, probation officer's report, fingerprints, medical, psychiatric and other records, of co-defendants, this request would likely be withheld on ground that disclosure would constitute an unwarranted invasion of personal privacy; likewise, letter sent from district attorney to officials of Department of Correctional Services offering advice or recommendations, would be considered inter-agency materials and would be withheld. Comm on Open Gov't FOIL-AO-4682.

Records pertaining to public employees that are relevant to performance of their official duties are generally available, however, where names do not pertain to public employees acting in performance of their official duties, it might be appropriately contended that interest in protecting privacy outweighs general duty to disclose, and that disclosure would constitute unwarranted invasion of personal privacy; disclosure of identifying details concerning inmates within reports would result in unwarranted invasion of personal privacy and such identifying details could be withheld on that basis. Comm on Open Gov't FOIL-AO-4736.

Disclosure of identifying details concerning inmates within reports would result in unwarranted invasion of personal privacy and such identifying details could be withheld on that basis. Comm on Open Gov't FOIL-AO-4736.

Request for names, Department of Correctional Services numbers and locations of all inmates housed in certain sections of correctional facility should be made readily accessible for inspection because it does not result in unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-4901.

Record reflective of demonstration of personal religious beliefs or activities can be withheld from disclosure under Freedom of Information Law on ground that disclosure would constitute unwarranted invasion of personal privacy. Although record reflective of demonstration of personal religious beliefs or activities can be withheld from disclosure under Freedom of Information Law on ground that disclosure would constitute unwarranted invasion of personal privacy, inmate was entitled to disclosure of videotape of Jehovah Witness Assembly during which he was baptized, which was maintained by Ministerial Services Division of Department of Correctional Services, at least to extent of aspects of videotape that depicted activities witnessed by him. Comm on Open Gov't FOIL-AO-9365.

Disclosure of inmates' names and cell locations would not result in unwarranted invasion of personal privacy. Disclosure that inmate requested notary services, without more, does not represent significant invasion of privacy, but any notation in records regarding inmate's reason for seeking notary services should be withheld. Comm on Open Gov't FOIL-AO-9870.

159. Public office holders, officials and the like

Mailing lists of the State Office for the Aging constitute records subject to the rights of access provided such lists are not used for fund raising purposes. Comm on Open Gov't FOIL-AO-6319 (1990).

References in mayor's appointment calendar to purely personal activities, such as child's birthday, family gathering or medical matter, can be withheld from disclosure under Freedom of Information Law as unwarranted invasion of personal privacy; however, in those instances in which mayor may influence or be influenced in that person's capacity as mayor, notwithstanding absence of expenditure of public moneys, contention that disclosure would constitute unwarranted invasion of personal privacy would appear to be unsubstantial in many cases. Comm on Open Gov't FOIL-AO-9191.

School district would be required to disclose record or records identifying applicants for vacancy on board of education; fact that person has applied to fill vacancy in what ordinarily is elective office would not represent disclosure of intimate personal detail or would, therefore, constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-12918.

In determining rights of access to "application letters" and resumes of applicants for school board vacancy, applicant's employment history (other than public employment) may be withheld; medical information may be withheld, as well as other details, such as social security number; however, some details within records would not rise to level of unwarranted invasion of personal privacy if disclosed, such as applicant's general educational background. Comm on Open Gov't FOIL-AO-12918.

Disclosure of information indicating public employee's criminal conviction would not, if disclosed, constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-13240.

Schedules indicating appointments, meetings and like in which public employee has engaged are relevant to performance of that person's official duties; thus, to extent that such record pertains to performance of employee's official duties, disclosure will result in permissible rather than unwarranted invasion of personal privacy. Comm on Open Gov't OML-AO-2347.

160. Recreation and sports

City could withhold any portion of list of participants in softball clinic run by city youth commission that would identify children, including personally identifying details based on age; disclosure would result in unwarranted invasion of personal privacy, particularly as requested information focused on activities of children. Comm on Open Gov't FOIL-AO-10066.

Where request sought names, addresses and phone numbers of "any and all" county resident golfers utilizing county public golf courses without being county public park pass holders, it would be advisable for requestor to certify (if accurate) that names and addresses would not be used for any commercial or fund-raising purposes. Comm on Open Gov't FOIL-AO-12191.

161. Real property, generally

162. —Assessment records; property taxes

Assessment records identify property owners, their addresses, and other details concerning property are subject to disclosure; where contents of assessment rolls have been transferred to computer tapes, computer tapes are available for disclosure even though there is intent to use information for commercial purposes. Committee on Open Government FOIL-AO-3799.

If names and addresses of property owners who failed to pay taxes, or on whom penalties were imposed, would be used for commercial or fund-raising purpose, agency could justifiably deny access. Comm on Open Gov't FOIL-AO-12549.

City inventory and assessment data regarding real property would be available to any person for any reason during time specified in notice required by CLS RPTL § 501, but it could be withheld at other times if it would be used for commercial or fund raising purpose. Comm on Open Gov't FOIL-AO-12689.

In context of Freedom of Information Law, particularly considering fact that bank account numbers may serve as codes used to make deposits, withdrawals or engage in other financial transactions, disclosure of both sides of check made out to town by property tax payer would result in unwarranted invasion of personal privacy since it would reveal payer's personal bank account number. Comm on Open Gov't FOIL-AO-16604.

163. —Housing, including Section 8 housing matters

In view of absence of any intent on part of applicant to ascertain names of Section 8 tenants and in view of small size of Village of Fort Plain, Village could withhold records to extent that disclosure would identify Section 8 tenants, including addresses, irrespective of whether multiple dwelling unit was occupied by Section 8 tenants as well as others; in municipality of less than 3,000 with few if any large housing units, disclosure of tenant's address would render that person's identity readily traceable. Comm on Open Gov't FOIL-AO-9466.

Because tenants in Section 8 housing must meet income qualification, insofar as disclosure of records would identify tenants, they may be withheld on ground that disclosure would constitute unwarranted invasion of personal privacy; conversely, following deletion of identifying details pertaining to tenants, remainder of records—i.e., those portions indicating identities of

landlords, contractors and amounts that are paid—must be disclosed. Comm on Open Gov't FOIL-AO-9466.

Portions of HUD audit of county's "Revolving Loan Fund," which were identifiable to individuals and included recommendations or opinions regarding their ethical conduct, could be withheld to extent that no final determination concerning their conduct had been reached, to prevent unwarranted invasion of personal privacy; likewise, to extent that allegations or charges were found to be without merit, such records could be withheld. Comm on Open Gov't FOIL-AO-10050.

Because tenants in section 8 housing must meet income qualification, insofar as disclosure of records would identify tenants, they may be withheld on ground that disclosure would constitute "an unwarranted invasion of personal privacy" under CLS Pub O § 87(2)(b), even if dwellings are not public housing units or under jurisdiction of housing authority; conversely, following deletion of identifying details pertaining to tenants, remainder of records, i.e., those portions indicating identities of landlords, contractors and amounts that are paid, must be disclosed. City housing authority could deny reporter's request for disclosure of names of section 8 tenants in particular housing development; however, identity of landlord must be disclosed, for payments are made by governmental entities to landlord, irrespective of landlord's income and financial standing, while other details could be withheld, if disclosure would make tenant's identity ascertainable. Comm on Open Gov't FOIL-AO-12399.

164. —Land use, including building permits and environmental facilities

Correspondence to agency from residents of town opposing proposed subdivision were not subject to disclosure under CLS Pub O § 87(2)(b). Comm on Open Gov't FOIL-AO-8912.

Commercial use exception would not apply to disclosure of Citywide Facility Inventory Database (CFID) maintained and made available by New York City Department of Environmental Protection (DEP), since provisions pertaining to protection of personal privacy involve items relating to natural persons, and database related only to business entities. Comm on Open Gov't FOIL-AO-12559.

Exception concerning records compiled for law enforcement purposes would be inapplicable to Freedom of Information request for permits, certificates of occupancy and outstanding violations or citations with respect to various properties, even if records sought might be used in or pertinent to criminal investigation. Comm on Open Gov't FOIL-AO-16459.

Records identifying owners of parcels of real property against whom real estate property tax penalties have been imposed, including their addresses, must be disclosed under Freedom of Information Law; however, telephone numbers of such persons may be withheld as unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-9324.

Prior to disclosing computer generated lists of real property inventory data, agency may require applicant to submit certification stating requested information will not be used for commercial or fund-raising purposes. Comm on Open Gov't FOIL-AO-10062.

Substance of complaints transmitted to village, pertaining to requestor's property, was accessible under Freedom of Information Law; however portions of complaints that identified complainants could be deleted to prevent unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-10172.

Real property inventory is available to any person for any reason during time specified in notice under CLS RPTL § 501, but inventory may be withheld at other times if it would be used for commercial or fund raising purpose. Comm on Open Gov't FOIL-AO-12421.

165. Schools, generally

166. —Students

With regard to request directed to CUNY School of Law at Queens College for release of transcripts of its graduates, school could withhold any aspect of transcript which if disclosed would be personally identifiable to student based upon provisions of both Family Educational Rights and Privacy Act (20 USCS § 1232g) and CLS Pub O § 87(2)(b). Comm on Open Gov't FOIL-AO-9492.

With regard to request for rejected applications for admission to law school, items such as names, social security numbers, resident addresses and phone numbers, dates of birth, alien registration numbers, LSDAS/LSAT registration numbers and similar personal details could be withheld to prevent unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-9544.

"Juvenile Fire Intervention, Response and Education Committee" was not precluded from maintaining records concerning juveniles suspected of fire-setting activity in one community and, when suspects moved to another community, from sharing those records with appropriate authorities in new community; however, names of juvenile suspects could be withheld from public (1) to prevent unwarranted invasion of personal privacy, (2) to prevent interference with law enforcement investigations, and (3) because, even when there is finding of guilt, records pertaining to juveniles are confidential under CLS Family Ct Act § 784. Comm on Open Gov't FOIL-AO-10111.

167. —Teachers and other school staff

168. — —Retirees, pension information and the like

Terms of settlement and contract between school district and teacher would result in permissible rather than unwarranted invasion of personal privacy; such records are relevant to performance of official duties of school board and teacher, and, furthermore, it is clear that contracts between public employers and their employees are accessible because they represent terms and conditions under which public moneys are expended and public duties are performed. Comm on Open Gov't FOIL-AO-4861.

Public employees enjoy lesser right to privacy then any other identifiable group, because they are more accountable to public; therefore, records that are relevant to performance of official duties of public employee are available since disclosure results in permissible rather than unwarranted invasion of personal privacy. Certifications pertaining to duties of school employees are available under FOIL, since such disclosure constitutes permissible rather than unwarranted invasion of personal privacy. Comm On Open Gov't FOIL-AO-4010.

Terms of contract between employee and school district, as well as contract between public employee and public employer, are permissible rather than unwarranted invasion of personal privacy, since such records are relevant to performance of official duties of school board and employee, and contracts between public employers and their employees represent terms and conditions under which public moneys are expended and public duties are performed. Comm on Open Gov't FOIL-AO-4439.

As to request for information from Utica City School District regarding employee health insurance accounts, to extent that such information consists of agency records, none of grounds for denial under Pub Off § 87(2) could likely be asserted, though if such records identify claimants, identifying details could likely be deleted as constituting unwarranted invasion of personal privacy under §§ 87(2)(b), 89(2)(b) of such law. Comm on Open Gov't FOIL-AO-4495.

As to complaint letters submitted by students' parents to board of education, 2 of which letters were submitted in sealed envelopes, complaints were "records" under CLS Pub O § 86(4), whether or not they were submitted in sealed envelopes, under §§ 87(2)(b) and 89(2)(b) of such Law, substance of such complaint may be disclosed, though identifying details pertaining to complainant might not be relevant to board's work and thus their disclosure may constitute unwarranted invasion of personal privacy, and under 20 USCS § 1232g, complaint identifying student's parents would be "personally identifiable" to student and therefore justify deletion of identifying details. Comm On Open Gov't FOIL-AO-4512.

Ratings of school teachers could be characterized as "intra-agency materials", and extent to which they may be accessible or deniable is largely dependent upon specific content of individual records since extent to which individual forms contain opinions and facts differs from one form to next. Comm On Open Gov't FOIL-AO-4592.

Personal information such as home address, home telephone number, or name of person for an employer to contact in case of an emergency, may be withheld from disclosure, but where remainder of record is available, such as faculty members' programs for semester, it will be proper to delete personal information while disclosing remainder; also, if record is available under freedom of information law it is available for both inspection and copy. Comm on Open Gov't FOIL-AO-4629.

With regard to findings and recommendations issued pursuant to CLS Educ § 3020-a in connection with charges brought against teacher for misconduct and conduct unbecoming teacher, references to offensive statements about victim's sexuality which were not credited as truthful by panel, could be withheld from disclosure to prevent unwarranted invasion of privacy. Comm on Open Gov't FOIL-AO-7939.

With regard to teacher's request that school district release content of certain letters that were sent by parents to school district allegedly complaining about teacher's conduct, such letters were subject to disclosure if deletions were made to protect children's identity as well as parent's identity, unless it was possible that identities of students or parents could be easily traced even if names and other personal details were deleted. Comm on Open Gov't FOIL-AO-9733.

Teacher was entitled to printout of names of all teachers in school district and their current salaries including salary step and approved graduate hours since such disclosure would not involve unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-9736.

School district's disclosure of list of teachers who were not members of certain union would result in permissible rather than unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-9764.

Certifications and educational backgrounds of experts who testified at trial of individual requesting records must be disclosed, as issuance of certification is clearly relevant to performance of expert's duties, and disclosure of public employee's educational background does not constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-9967.

While record that individual has met requirements to gain teaching certification is clearly public, score on certification exam would, if disclosed, constitute unwarranted invasion of personal privacy. State Education Department would not have authority to disclose certain teacher test scores to city Board of Education in effort to assess connection between those scores and student performance, even though such data would be used "in aid of" board's efforts in hiring most qualified candidates; while data would be helpful to board, it was apparently not "necessary," for board had functioned to date without data. Comm on Open Gov't FOIL-AO-12594.

Disclosure of names of board members and district employees to whom laptop computers were issued, and list of inappropriate personal purposes for which computer issued to each person was used, would not constitute unwarranted invasion of person privacy, since identities of those to whom computers were issued related to performance of those persons' functions and duties as officers or employees of government agency, and information regarding personal use of computers pertained to use of school district computers, not to their use by any particular individual. Comm on Open Gov't FOIL-AO-16407.

Bus stop reviews provided by school district in response to Freedom of Information Law (FOIL) request could not delete names of reviewers and their comments if portions withheld were reflective of decisions on which district relied; however, to extent that portions withheld reflected opinions of district personnel, redaction would be consistent with FOIL except to extent that those opinions consisted of statistical or factual information. Comm on Open Gov't FOIL-AO-16486.

169. Social services

Access under Freedom of Information Law to results of survey conducted by local drug abuse prevention council would depend in large part on contents of survey and format in which results were presented; CLS Pub O § 87(2)(b) would likely apply if release of survey results identified persons participating in drug treatment program, but if results contained nothing more than aggregate numbers of persons attending programs or requesting services, then disclosure would not result in unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-16573.

170. Telephone records, including 911 calls

Telephone numbers called by public employees during business hours are likely available under FOIL, for they would not necessarily indicate who in fact was called, and indication of number would not disclose nature of conversation. Comm On Open Gov't FOIL-AO-3894.

When public officer or employee uses telephone in course of his or her official duties, bills involving use of telephone are relevant to performance of that person's official duties; thus, disclosure of such bills will not result in unwarranted invasion of personal privacy with respect to officer or employee of agency who uses agency's telephone. When telephone numbers appear on agency telephone bill, those numbers do not necessarily indicate who in fact was called or who picked up receiver in response to call; thus, disclosure of numbers called will not result in unwarranted invasion of personal privacy, even with respect to recipient of call. Disclosure of telephone numbers called by caseworker who telephones applicants for or recipients of public assistance might identify those who were contacted and, therefore, numbers could likely be withheld from disclosure in that circumstance to protect against unwarranted invasion of personal privacy due to status of those contacted. Comm on Open Gov't FOIL-AO-7926.

Reference to caller as "an 86 year old woman" might constitute unwarranted invasion of personal privacy; it was conjectural whether caller's age was relevant to spill report prepared by Department of Environmental Conservation (DEC) following call by person outside DEC. Comm on Open Gov't FOIL-AO-9918.

Record of medical emergency call consists in great measure of what might be characterized as medical record or history relating to person needing care or service; thus, portions of records identifying those to whom medical services were rendered, their ages, and descriptions of their medical problems or conditions could be withheld, while other aspects of records, such as locations of calls or addresses, should be disclosed. Comm on Open Gov't FOIL-AO-12608.

When 911 report relates to dwelling in which there are many tenants, description of complaint as sex offense or "domestic trbl" likely would not identify victim of such offense or those involved in domestic dispute; thus, absent personally identifiable details, city could not justify denial of access on basis of either CLS Civ R § 50-b or CLS Pub O § 87(2)(b) or § 89(2)(b). Comm on Open Gov't FOIL-AO-12741.

Presence of police vehicle at particular time and location due to call from complainant, family member or neighbor is not secret, and record that makes reference to such event would be public. Comm on Open Gov't FOIL-AO-12741.

Printouts of electronic copies of 911 incident reports that indicate merely that certain event occurred would be analogous to disclosure of contents of traditional police blotter and, therefore, should be disclosed. Comm on Open Gov't FOIL-AO-12741.

171. Utilities and the like

To extent that records sought by Public Service Commission from Niagara Mohawk Power Corporation related to employees and other individuals in their professional or business capacities, Freedom of Information Law privacy provisions did not apply; however, names or other details pertaining to natural persons could be deleted insofar as requested records involved other aspects. Comm on Open Gov't FOIL-AO-9911.

In releasing payroll records kept by agency to determine whether employees on public works projects are being paid in accordance with prevailing wage standards, agency may delete contractors' names, addresses and social security numbers to prevent unwarranted invasion of personal privacy, as such information is largely irrelevant to reason for keeping records; however, portions of records reflective of titles, duties, wages, hours worked and similar data must be disclosed. Comm on Open Gov't FOIL-AO-10325.

Insofar as payroll records sought by applicant included public works contractor's employees' names, addresses, social security numbers and their wages, portions of those records could properly be withheld under CLS Pub O § 87(2)(b) since what was relevant

to agency was whether employees were being paid in accordance with prevailing wage standards; however, portions of records reflective of titles, duties, wages, hours worked and similar data should be disclosed. Comm on Open Gov't FOIL-AO-12640.

County Sewer District could withhold or delete portions of records involving citizens' complaints which identified complainants, on ground that disclosure would result in unwarranted invasion of personal privacy; what is relevant is substance of complaint—i.e., whether or not complaint has merit. Comm on Open Gov't OML-AO-2234.

172. Veterans

173. —Voting; elections

Although date of birth might justifiably be denied as unwarranted invasion of personal privacy, since Election Law requires disclosure of registration records, which includes date of birth, nothing in Freedom of Informatoin Law (CLS Pub Off Law §§ 85-89) may be asserted to withhold those records. Comm on Open Gov't FOIL-AO-4116.

Although certain items contained in required voter registration records might justifiably be denied as unwarranted invasion of personal privacy if contained in other kinds of records, specific direction provided in Election Law requires disclosure of such items. Comm on Open Gov't FOIL-AO-12067.

Pursuant to CLS Pub O § 89(6) and CLS Elec § 5-602, there was no basis to withhold list of persons who voted in Mattituck Park District from disclosure under Freedom of Information Law, regardless of requester's intended use of list. Comm on Open Gov't FOIL-AO-16532.

Names and addresses of veterans who have been honorably discharged must generally be disclosed, unless records are sealed under CLS Civ R § 79-g or request involves list of veterans' names and addresses; in latter situation, agency may ascertain whether list is intended to be used for commercial or fund-raising purpose and, if so, list can justifiably be withheld. Comm on Open Gov't FOIL-AO-8954.

Sole item that could be withheld from record of certificate of honorable discharge given to veteran would be social security number (assuming record is not sealed under CLS Civ R § 79-g), since local government agencies may withhold social security numbers on ground that disclosure would constitute "an unwarranted invasion of personal privacy," but they are not required to do so. Comm on Open Gov't FOIL-AO-12688.

III. Appeals

A. Administrative Appeals

i. Generally

174. In general

Requirement imposed by § 89[4][a], that denial on appeal must "fully explain" reasons for such denial, involves more than mere recitation of language of one or more grounds for denial appearing in § 87[2]. Comm on Open Gov't FOIL-AO-4075.

Failure to respond to request for information within designated time limits results in denial of access that may be appealed to head of agency or person designated to determine appeals, and when appeal is made but determination is not rendered within 10 business days of receipt of appeal, applicant has exhausted his or her administrative remedies and may initiate challenge to constructive denial of access under CLS Civil Practice Law and Rules, Article 78. 1986 Committee on Open Government FOIL-AO-4181.

While inter-agency or intra-agency material may be withheld, portions of such materials consisting of statistical factual information, instructions to staff that affect public, or final agency policy or determinations must be made available; concurrently, to extent that such materials consist of advice, opinion or recommendation, they may be withheld; denial of records may be appealed pursuant to CLS Pub O § 89(4)(a). Comm On Open Gov't FOIL-AO-4595.

In event of denial of request or failure to respond within appropriate time limit, appeal may be brought in accordance with CLS Pub O § 89(4)(a). Comm On Open Gov't FOIL-AO-4607.

If request for record has been denied by agency, either in writing or due to failure to respond, denial may be appealed. Comm on Open Gov't FOIL-AO-4645.

Where request for record is not granted, denied or acknowledged, appeal is appropriate. Comm on Open Gov't FOIL-AO-4675.

Agency has 5 business days to respond to request for record and if they fail to respond within designated time limit denial of access may be appealed; appeal must be determined within 10 business days from receipt of appeal. Comm on Open Gov't FOIL-AO-4753.

If information sought exists, but apparently cannot be proved due to nature of agencies filing or record-keeping systems, although agency might not have disclosed information sought, its actions would not be considered as denials that can be appealed. Comm on Open Gov't FOIL-AO-4764.

Agency must respond to request for records within 5 business days of receipt of request and when request is denied, applicant may appeal to head of agency or whomever is designated to determine appeals; that person or body has 10 business days from receipt of appeal to render determination. Comm on Open Gov't FOIL-AO-4872.

Committee on Open Government does not have authority to respond to appeal; Committee may advise with respect to Freedom of Information Law; however, it is not empowered to grant or deny access to records, or to compel agency to comply with Freedom of Information Law; in short, Committee cannot determine appeals from denial of access. Comm on Open Gov't FOIL-AO-4909.

If request for records has been denied, denial may be appealed in accordance with Freedom of Information Law. Comm on Open Gov't FOIL-AO-4912.

When agency denies request for records, denial may be appealed according to specifications set out in Freedom of Information Law. Comm on Open Gov't FOIL-AO-4928.

If agency does not respond to request for records within 5 business days of receipt of request, or if request is denied, applicant has right to appeal denial under Freedom of Information Law; under these provisions, applicant must appeal within 30 days of denial to head, chief executive or governing body of entity, or person designated as appeals officer; such person must determine appeal within 10 business days of receipt of appeal. Comm on Open Gov't FOIL-AO-4937.

When records access officer denies request, applicant has right to appeal pursuant to Freedom of Information Law. Comm on Open Gov't FOIL-AO-4948.

Committee on Open Government indicates that appeal from denial of access to records should include date and location of initial request, description of records that were denied and name and address of applicant; further, Freedom of Information Law requires that applicant appeal within 30 days of receipt of written denial. Comm on Open Gov't FOIL-AO-4965.

Reasons for denial cited in determination of appeal need not be consistent with those offered by records access officer in initial denial. Comm on Open Gov't FOIL-AO-9374.

Constructive denial of Freedom of Information Law request (by non-response from agency) may be appealed in accordance with CLS Pub O § 89(4)(a). Comm on Open Gov't FOIL-AO-12438.

175. Article 78 proceedings, generally

176. —District Attorney's office

Since district attorneys office is "governmental entity" that performs "governmental function" for state and public corporation, such as county, it is agency required to comply with Freedom of Information Law; based on this, tape recording constitutes "record" subject to rights conferred by Freedom of Information Law; failure of agency to respond to request for information within designated time limits results in denial of access that may be appealed, and determination must be rendered within 10 days or else appellant has exhausted his or her administrative remedies and may initiate challenge to constructive denial of access under CLS CPLR Article 78. Comm on Open Gov't FOIL-AO-4716.

177. —Medical, health and the like

Jail visitation logs which are kept in plain sight, and can be viewed by any person, are accessible under Freedom of Information Law if staff is able to locate requested portions of log;

however, if log is not kept in plain sight and cannot ordinarily be viewed, it can be withheld on basis that disclosure would constitute unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-9771.

When applicant's request for records of State Commission of Investigation is denied, applicant may appeal denial not to State Health Department, but to State Commission of Investigation. Comm on Open Gov't OML-AO-4849.

178. —Prisons; prisoners

To learn whether information is deleted from record and if it is proper to do so, requester of record should request that department of correctional services provide explanation of deletions made because this is generally procedure when response to appeal is given. Comm on Open Gov't FOIL-AO-4576.

If appeal from denial of access to records is denied, in whole or in part, next procedural step would involve commencement of Article 78 proceeding in New York State Supreme Court against agency which denied request; request for advisory opinion from Committee on Open Government should be made prior to commencement of Article 78 proceeding, for it is policy of Committee not to comment on issues arising under Freedom of Information Law which are subject of ongoing litigation. Comm on Open Gov't FOIL-AO-4651, 4659, 4687, 4695, 4698-4700.

179. Public hearing requirement

No public hearing is required when denial of access to records is appealed in accordance with CLS Public Officers § 89. Committee on Open Government FOIL-AO-3806.

180. Requirement that reason(s) for denial of request be specified

Freedom of Information Law provides that agency must respond to request for records within 5 business days of receipt of request, and if request is denied, denial should be in writing stating reasons therefor; failure to respond within designated time limits results in denial of access that may be appealed to head of agency or whomever is designated to determine appeals; that person or body has 10 business days from receipt of appeal to render determination. Comm On Open Gov't FOIL-AO-4603.

Upon receipt of appeal, person or body determining appeal has 10 business days to either fully explain in writing to person requesting record reasons for further denial, or provide access to records sought; when determination is not rendered within 10 business days from receipt of appeal as required under Freedom of Information Law, appellant has exhausted his or her administrative remedies and may initiate challenge to constructive denial of access. Comm on Open Gov't FOIL-AO-4632.

181. Timely determination requirement

When appeal is made but determination is not rendered within 10 business days of receipt of appeal as required under § 89[4][a] of FOIL, appellant has exhausted his or her administrative remedies and may initiate challenge to constructive denial of access under Article 78 of CPLR. Comm on Open Gov't FOIL-AO-4056.

Appeals person or body has 10 business days from receipt of appeal to render determination; when appeal is made but determination is not rendered within 10 business days of receipt of appeal, appellant has exhausted his or her administrative remedies and may initiate challenge to constructive denial of access under CLS CPLR Article 78; before Article 78 proceeding may be commenced, exhaustion of administrative remedies must take place. Comm on Open Gov't FOIL-AO-4671, 4673, 4680, 4687, 4690.

Request for advisory opinion does not relieve agency of its responsibility to comply with time limitation imposed by CLS Pub O § 89(4)(a) concerning issuance of determination following appeal, unless appellant has waived adherence to that limitation. Comm on Open Gov't FOIL-AO-7917.

ii. Appeals Officer

182. In general

It is improper for agency to refer correspondence concerning request for documents to attorneys from private law firm since appeals officer or body must be clearly designated; although agency officials may consult with attorney, determination on appeal should be made by designated appeals officer or body. Committee on Open Government FOIL-AO-3388.

Freedom of Information Law provides that agency must respond to request for records within 5 business days of receipt of request, and if request is denied, denial should be in writing stating reasons therefor; failure to respond within designated time limits results in denial of access that may be appealed to head of agency or whomever is designated to determine appeals; that person or body has 10 business days from receipt of appeal to render determination. Comm On Open Gov't FOIL-AO-4603.

Failure of agency to respond within designated time limit for requested records results in denial of access which may be appealed to head of agency or whomever is designated to determine appeals who has 10 business days from receipt of appeal to render determination; when an appeal is made but determination is not rendered within 10 business days of receipt of appeal, appellant has exhausted his or her administrative remedies and may initiate challenge to constructive denial of access under CLS Civ Practice Rules Article 7. Comm on Open Gov't FOIL-AO-4620.

Failure of agency to respond for records to disclosure within designated time limits results in denial of access and may be appealed to head of agency or whomever is designated to determine appeals. Comm on Open Gov't FOIL-AO-4627.

Failure of agency to respond to request for record within designated time limits results in denial of access and may be appealed to head of agency or whomever is designated to determine appeal; if determination is not rendered within proper time limit, appellant has exhausted his or her administrative remedies and may initiate challenge to constructive denial of access. Comm on Open Gov't FOIL-AO-4628.

Any person denied access to record may appeal, and appeal should be in writing, describing records denied, and should be directed to appeals officer of agency that maintains records. Comm on Open Gov't FOIL-AO-4629.

Upon receipt of appeal, person or body determining appeal has 10 business days to either fully explain in writing to person requesting record reasons for further denial, or provide access to records sought; when determination is not rendered within 10 business days from receipt of appeal as required under Freedom of Information Law, appellant has exhausted his or her administrative remedies and may initiate challenge to constructive denial of access. Comm on Open Gov't FOIL-AO-4632.

Failure of agency to respond to request for record within designated time limits results in denial of access that may be appealed to head of agency or whomever is designated to determine appeals; person or body has 10 business days from receipt of appeal to render determination; when appeal is made but determination is not rendered within 10 business days of receipt of appeal, appellant has exhausted his or her administrative remedies and may initiate challenge to constructive denial of access under CLS CPLR Article 78; before Article 78 proceeding may be commenced, exhaustion of administrative remedies must take place. Comm on Open Gov't FOIL-AO-4671.

Freedom of Information Law requires that agency respond in writing within 5 business days of receipt of request whether or not agency maintains record sought and whether or not record is available; agency's failure to respond may be considered constructive denial which may be appealed. Comm on Open Gov't FOIL-AO-4672.

Failure of agency to respond to request for record within designated time limits results in denial of access that may be appealed to head of agency or whomever is designated to determine appeal; that person or body has 10 business days from receipt of appeal to render determination. Comm on Open Gov't FOIL-AO-4673.

Failure of agency to respond to request for records within designated time limits results in denial of access that may be appealed and if determination is not rendered within 10 business days of receipt of appeal, appellant has exhausted his or her administrative remedies and may initiate challenge to constructive denial of access under CLS Civ Practice Rules Article 78. Comm on Open Gov't FOIL-AO-4680.

Freedom of Information Law requires that agency must appoint person or body to whom appeal may be directed following denial of access to records. Comm on Open Gov't FOIL-AO-4681.

Failure of agency to respond to request to records within designated time limits results in denial of access that may be appealed to head of agency or whomever is designated to determine appeals; that person already has 10 business days from receipt of appeal to render its determination. Comm on Open Gov't FOIL-AO-4684.

When seeking appeal for denial of records, appeal may be made to community board itself or person or body designated by board to render determinations on appeal. Comm on Open Gov't FOIL-AO-4748.

Agency must respond to request for records within 5 business days of receipt of request and when request is denied, applicant may appeal to head of agency or whomever is designated to determine appeals; that person or body has 10 business days from receipt of appeal to render determination. Comm on Open Gov't FOIL-AO-4872.

If agency does not respond to request for records within 5 business days of receipt of request, or if request is denied, applicant has right to appeal denial under Freedom of Information Law; under these provisions, applicant must appeal within 30 days of denial to head, chief executive or governing body of entity, or person designated as appeals officer; such person must determine appeal within 10 business days of receipt of appeal. Comm on Open Gov't FOIL-AO-4937.

If District Attorney, as head of District Attorney's Office, is appeals person for purpose of Freedom of Information Law, only means of seeking review of his determination is through Article 78 proceeding. Comm on Open Gov't FOIL-AO-9501.

Appeals officer is not bound by reasons offered in initial denial of access or absence thereof. Comm on Open Gov't FOIL-AO-12987.

Due to scheduling concerns, governing body should designate person (i.e., Supervisor, Town Attorney, etc.) to determine appeals under Freedom of Information Law (FOIL), although it is permissible under FOIL to appeal directly to governing body itself. Comm on Open Gov't FOIL-AO-13350.

183. Appeals office for education matters

Committee on Open Government cannot investigate allegation that conflict of interest exists where person performs dual function of secretary to Board of Education and appeals officer for purposes of FOIL, since FOIL does not place limitations concerning persons that may be designated as appeals officer and, as general matter, Committee on Open Government has neither authority nor resources to "investigate" possible conflicts of interest. Comm on Open Gov't FOIL-AO-3993.

184. Appeals officer for municipalities

If fire department is subject to Freedom of Information Law, appeal from denial of records should be directed to governing body of department. Comm on Open Gov't FOIL-AO-4644.

185. Appeals officer for prisoners

Person designated to render determinations on appeal under Freedom of Information Law for Department of Correctional Services is counsel to Department; as such, appeal may be directed to counsel at Department's Albany Office. Comm on Open Gov't FOIL-AO-4007.

186. Requirement that records access officer and appeals officer cannot be same person

Regulations promulgated by Committee [21 NYCRR 1401], which have force of law, state that records access officer and appeals person cannot be same individual [21 NYCRR 1401.7[b]]. Comm on Open Gov't FOIL-AO-4056.

Under Freedom of Information Law, direct appeal should be made to appeals officer of agency maintaining records sought; records access officer shall not be appeals officer. Comm on Open Gov't FOIL-AO-4580.

Head of agency must designate appeals officer or body, who must be identified by name, title, business address and business telephone number; further, records access officer shall not be appeals officer. Comm on Open Gov't FOIL-AO-4723.

Governing body must appoint records access officer and appeals officer or body, who must be identified by name, title, business address and business telephone number; records access officer shall not be appeals officer. Comm on Open Gov't FOIL-AO-4725.

Records access officer should not be appeals officer and if appeals officer is not known, appeal should be directed to head or governing body of agency maintaining records sought. Comm on Open Gov't FOIL-AO-4730.

Agency is required to designate records access officer who has duty of responding to requests for records and appeals person or body responsible for making determinations on appeals; Freedom of Information Law provides that the appeals officer should be head, chief executive or governing body of agency or person designated by head, chief executive or governing body; however, records access officer cannot be appeals officer. Comm on Open Gov't FOIL-AO-4810.

Initial request for records should be directed to records access officer of agency and appeals will be directed to appeals officer of that agency; these cannot be same person. Comm on Open Gov't FOIL-AO-4847.

Agency would be acting in compliance with law regarding designation of person to determine appeals so long as such person does not engage in direct role in dealing initially with request under Freedom of Information Law. Comm on Open Gov't FOIL-AO-12699.

B. Judicial Review

187. In general

If appeal from denial of access to records is denied, in whole or in part, next procedural step would involve commencement of Article 78 proceeding in New York State Supreme Court against agency which denied request; request for advisory opinion from Committee on Open Government should be made prior to commencement of Article 78 proceeding, for it is policy of Committee not to comment on issues arising under Freedom of Information Law which are subject of ongoing litigation. Comm on Open Gov't FOIL-AO-4651, 4695, 4698, 4718, 4724-4725.

Absent clear indication of legislative intent to require continued confidentiality, Freedom of Information Law, as matter of public policy, supersedes statute that appears to exempt records from disclosure; nevertheless, this issue can be resolved only by court. Comm on Open Gov't FOIL-AO-4844.

188. Burden of proof, generally

When appeal is made but determination is not rendered within 10 business days of receipt of appeal, appellant has exhausted his or her administrative remedies and may initiate challenge to constructive denial of access under CLS CPLR Article 78. If Article 78 proceeding is commenced, agency has burden of proof that records sought fall within scope of grounds for denial listed in Freedom of Information Law. Comm on Open Gov't FOIL-AO-4723.

189. Exhaustion of administrative remedies, generally

Neither initial denial made in writing nor failure to respond to request for information results in exhaustion of administrative remedies that would enable applicant to seek judicial review of denial, as when request is denied, or when agency fails to respond to request within requisite time limits, applicant must appeal to agency head before initiating proceeding under Article 78. 1986 Committee on Open Government FOIL-AO-4179.

190. Finality of appeal

When determination is made following appeal made pursuant to Freedom of Information Law, that determination must be considered as final and binding. Comm on Open Gov't FOIL-AO-4836.

191. Mootness; "academic" nature of appeal

192. —Second or subsequent appeal

If individual chooses not to initiate Article 78 proceeding within 4 months after agency's denial of his or her appeal, choice not to do so should not forever preclude that person from seeking records since there may be changes in circumstances, judicial precedents that could put issue in different light, acquisition of records from other sources that might diminish agency's capacity to justify denial or change in one's financial ability to initiate lawsuit and, therefore, agency cannot in every instance deny second request on basis of mootness. Comm on Open Gov't FOIL-AO-9438.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 87, 92, 96.

Public employees' fair employment act, CLS Civ S §§ 200 et seq.

Proceeding against body or officer, CLS CPLR §§ 7801 et seq.

Codes, Rules and Regulations:

Public access to records of department of economic development. 5 NYCRR §§ 1.1 et seq.

Insurance department: certified capital companies. 11 NYCRR Part 400 (Regulation 156).

Federal Aspects:

Public information; agency rules, opinions, orders, records, and proceedings, 5 USCS § 552.

Law Reviews:

Tesler, Gould debunked: the prohibition against using New York's Freedom of Information Law as a criminal discovery tool. 44 N.Y.L. Sch. L. Rev. 71.

Annotations:

Disclosure of Electronic Data Under State Public Records and Freedom of Information Acts. 54 ALR6th 653.

Matthew Bender's New York Practice Guides: 3 New York Practice Guide: Real Estate § 20.02.

Texts: Bjorklund, Fishman & Kurtz, New York Nonprofit Law and Practice with Tax Analysis § 10-4(a).

Dienes, Levine & Lind, Newsgathering and the Law (1999, Matthew Bender) §§ 11-2, 11-4, 11-7(a), 11-7(e), 11-7(i), 11-8, 11-9.

1 Frumer & Biskind, Bender's New York Evidence—CPLR § 1.09; 4 Frumer & Biskind, Bender's New York Evidence—CPLR § 12.11; 5 Frumer & Biskind, Bender's New York Evidence—CPLR § 23.25.

New York Insurance Law (Matthew Bender's New York Practice Series) §§ 2.02[3][c], 36.03[2][b][ii].

Schwartz & Reidenberg, Data Privacy Law (1996, LLP) § 6-5.

ARTICLE 6-A Personal Privacy Protection Law

Section

92. Definitions

HISTORY:

Add, L 1983, ch 652, § 1, eff Sept 1, 1984 (see 1983 note below).

§ 92. Definitions

(1) Agency. The term "agency" means any state board, bureau, committee, commission, council, department, public authority, public benefit corporation, division, office or any other governmental entity performing a governmental or proprietary function for the state of New York, except the judiciary or the state legislature or any unit of local government and shall not include offices of district attorneys.

(2) Committee. The term "committee" means the committee on open government as constituted pursuant to subdivision one of section eighty-nine of this chapter.

(3) Data subject. The term "data subject" means any natural person about whom personal information has been collected by an agency.

(4) Disclose. The term "disclose" means to reveal, release, transfer, disseminate or otherwise communicate personal information or records orally, in writing or by electronic or any other means other than to the data subject.

(5) Governmental unit. The term "governmental unit" means any governmental entity performing a governmental or proprietary function for the federal government or for any state or any municipality thereof.

(6) Law. The term "law" means state or federal statute, rule or regulation.

(7) Personal information. The term "personal information" means any information concerning a data subject which, because of name, number, symbol, mark or other identifier, can be used to identify that data subject.

(8) Public safety agency record. The term "public safety agency record" means a record of the state commission of correction, the temporary state commission of investigation, the department of corrections and community supervision, the office of children and family services, the office of victim services, the office of probation and correctional alternatives or the division of state police or of any agency or component thereof whose primary function is the enforcement of civil or criminal statutes if such record pertains to investigation, law enforcement, confinement of persons in correctional facilities or supervision of persons pursuant to criminal conviction or court order, and any records maintained by the division of criminal justice services pursuant to sections eight hundred thirty-seven, eight hundred thirty-seven-a, eight hundred thirty-seven-b, eight hundred thirty-seven-c, eight hundred thirty-eight, eight hundred thirty-nine, and eight hundred forty-five of the executive law and by the department of state pursuant to section ninety-nine of the executive law.

(9) Record. The term "record" means any item, collection or grouping of personal information about a data subject which is maintained and is retrievable by use of the name or other identifier of the data subject irrespective of the physical form or technology used to maintain such personal information. The term "record" shall not include personal information which is not used to make any determination about the data subject if it is:

(a) a telephone book or directory which is used exclusively for telephone and directory information;

(b) any card catalog, book or other resource material in any library;

(c) any compilation of information containing names and addresses only which is used exclusively for the purpose of mailing agency information;

(d) personal information required by law to be maintained, and required by law to be used, only for statistical research or reporting purposes;

(e) information requested by the agency which is necessary for the agency to answer unsolicited requests by the data subject for information; or

(f) correspondence files.

(10) Routine use. The term "routine use" means, with respect to the disclosure of a record or personal

information, any use of such record or personal information relevant to the purpose for which it was collected, and which use is necessary to the statutory duties of the agency that collected or obtained the record or personal information, or necessary for that agency to operate a program specifically authorized by law.

(11) System of records. The term "system of records" means any group of records under the actual or constructive control of any agency pertaining to one or more data subjects from which personal information is retrievable by use of the name or other identifier of a data subject.

HISTORY:

Add, L 1983, ch 652, § 1, eff Sept 1, 1984 (see 1983 note under Article 6–A); amd, L 1985, ch 134, § 29; L 1991, ch 313, § 1, eff July 15, 1991; L 1992, ch 336, § 11, eff July 12, 1993 (see 1992 note below); L 2010, ch 56, § 40 (Part A), eff June 22, 2010; L 2010, ch 56, § 2 (Part A–1), eff June 22, 2010; L 2010, ch 491, § 5, eff Jan 1, 2011; L 2011, ch 62, § 135 (Part C, Subpart B), eff March 31, 2011.

Prior Law: Former § 92, add, L 1976, ch 511; renumbered § 97, L 1977, ch 933, § 2; renumbered § 102, L 1983, ch 652, § 1, eff Sept 1, 1984.

Prior § 92, add, L 1909, ch 51; renumbered § 107, L 1976, ch 511; renumbered § 117, L 1977, ch 933, § 2, eff Jan 1, 1978.

Editor's Notes: Laws 1992, ch 336, § 12, par 3, eff Jan 1, 1993, provides as follows:

§ 12. This act shall take effect January 1, 1993, except that sections one through eleven of this act shall take effect 360 days after the date on which this act shall have become a law; provided however that:

3. effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of the foregoing sections of this act on their effective date are authorized and directed to be made and completed within 360 days after the date on which this act becomes a law.

Amendment Notes: 2011. Chapter 62, § 135 (Part C, Subpart B) amended:

Sub (8) by deleting at fig 1 "correctional services", at fig 2 "the division of parole," and adding the matter in italics.

2010. Chapter 491, § 5 amended:

Sub (8) by adding the matter between figs 1 and 2 and 6 and 7 and deleting at fig 8 ", and eight hundred forty-five-a".

Notes to Decisions

Analysis

1. In general
2. "Public service agency" generally

1. In general

Building a Better New York Committee (BBNYC) could not claim protections afforded by Personal Privacy Protection Law, CLS Pub O Art 6-A (PPPL) since CLS Pub O § 97(1) provides that only "data subject" may commence proceeding to seek judicial relief of purported violation of PPPL, and "data subject" is defined under CLS Pub O § 92 as any natural person; thus, BBNYC lacked standing to bring proceeding to restrain State Commission on Government Integrity and State Board of Elections from publicly revealing contents of files prepared by board in its investigation of town election campaign. Building a Better New York Committee v New York State Com. on Government Integrity, 138 Misc. 2d 829, 525 N.Y.S.2d 488, 1988 N.Y. Misc. LEXIS 203 (N.Y. Sup. Ct. 1988).

Police narcotics officer has no viable claim under New York's Personal Privacy Protection Law (Pub O §§ 91 et seq.), even though citizen taped conversations picked up on scanner in which officer used racially derogatory language, because neither district attorney's office nor police department are "agencies," and tape recording is not "record," as defined by § 92. Spetalieri v Kavanaugh, 36 F. Supp. 2d 92, 1998 U.S. Dist. LEXIS 20061 (N.D.N.Y. 1998).

Personal Privacy Protection Law is applicable only to records in possession of state agencies and is not applicable to records of units of local government; although state agencies may be prohibited from releasing records when disclosure would constitute unwarranted invasion of personal privacy, provision is not applicable to units of local government; although state agency required to comply with Personal Privacy Protection Law is obligated to withhold records when disclosure would constitute unwarranted invasion of personal privacy, units of local government continue to operate under permissive provisions of Freedom of Information Law which enable but do not require agency to withhold records when disclosure would constitute unwarranted invasion of personal privacy. Committee on Open Government PPPL-AL-3.

CLS Pub O § 92(9)(e) does not exempt Lottery Division's records, in their entirety, from coverage under Personal Privacy Protection Law. Comm on Open Govt PPPL-AO-5.

2. "Public service agency" generally

Even if material sought by petitioner (namely, all records relating to his disqualified application for position of state trooper) fell within ambit of Personal Privacy Protection Law (PPPL), CLS Pub O Art 6-A, it was not subject to disclosure because it consisted of "public safety agency records," to which PPPL is rendered inapplicable by reason of CLS Pub O § 95(7), in that public agency record is defined in CLS Pub O § 92(8) to include record of division of state police pertaining to investigation, and material sought by petitioner consisted entirely of evaluative documents gathered by state police pursuant to extensive investigation into his background and qualifications for position of state trooper. O'Shaughnessy v New York State Div. of State Police, 202 A.D.2d 508, 609 N.Y.S.2d 18, 1994 N.Y. App. Div. LEXIS 2584 (N.Y. App. Div. 2d Dep't), app. denied, 84 N.Y.2d 807, 621 N.Y.S.2d 516, 645 N.E.2d 1216, 1994 N.Y. LEXIS 3485 (N.Y. 1994).

It was error to deny a motion to dismiss a petition filed by police officers and the officers' union alleging a city was barred from holding public police disciplinary hearings because (1) the officers had no private right of action for claimed violations of Civil Rights Law § 50-a, (2) Civil Rights Law § 50-a did not mandate closed disciplinary hearings, as the statute did not mention disciplinary hearings or require that such hearings be held in private, and this exclusion was intentional, (3) Public Officers Law §§ 89(2) and 96, barring a disclosure of records that was an unwarranted invasion of privacy, did not bar public disciplinary hearings, (4) Second Class Cities Law § 137 gave a city the right to hold public police disciplinary hearings, and (5) the Public Employment Relations Board had exclusive jurisdiction over whether police disciplinary matters were a prohibited subject of negotiations, under Civil Service Law §§ 205(5)(d) and 209-a(1) and (2), as alleged by the officers and the union. Matter of Doe v City of Schenectady, 84 A.D.3d 1455, 923 N.Y.S.2d 241, 2011 N.Y. App. Div. LEXIS 3607 (N.Y. App. Div. 3d Dep't 2011).

Agency Opinions

Analysis

1. In general
2. Courts
3. Educational institutions, schools and the like
4. "Public service agency". generally
5. —Correctional facilities
6. Transportation, transit, travel and the like

1. In general

Personal Privacy Protection law is applicable to records identifiable to individuals that are maintained by state agencies; with certain exceptions, subject of records may inspect and copy records pertaining to him or her; in addition, subject of record may seek to amend personal information that is inaccurate or misleading. Comm On Open Gov't FOIL-AO-4602.

If Personal Privacy Protection Law was found to apply, records would still be available, because records accessible under Freedom of Information Law remain accessible, notwithstanding provisions of Personal Privacy Protection Law. Comm on Open Gov't FOIL-AO-4657.

In situation where no findings were issued because complaint could not be substantiated, it is likely that protection of privacy conferred by Freedom of Information Law and Personal Privacy Protection Law would be accorded to person or persons against whom complaint was made. Comm on Open Gov't FOIL-AO-4729.

Personal Privacy Protection Law pertains to records containing personal information about individuals maintained by state agencies; in some instances, individual may have greater rights of access to records pertaining to himself or herself under Personal Privacy Protection Law than under Freedom of Information Law and as such when requesting records pertaining to oneself from state agency, it should be explicit that request is made in accordance with both laws. Comm on Open Gov't FOIL-AO-4762.

Department of Correctional Services is "agency" subject to requirements of both Freedom of Information Law and Personal Privacy Protection Law; former includes within its scope any governmental entity performing governmental function; latter defines "agency" to mean state agencies performing governmental function for state. Comm on Open Gov't FOIL-AO-4983.

While New York City Fire Department and New York State Department of Labor are "agencies" required to comply with Freedom of Information Law, Personal Privacy Protection Law, which applies to state agencies such as Department of Labor, does not apply to local entities such as New York City Fire Department. Comm on Open Gov't FOIL-AO-12188.

Freedom of Information Law applies to entities of state and local government, while Personal Privacy Protection Law applies only to state agencies. Comm on Open Gov't FOIL-AO-12592.

Local government may opt to disclose personal information, even when disclosure would result in unwarranted invasion of personal privacy. Comm on Open Gov't FOIL-AO-12594.

If not-for-profit corporation (Health Research Inc. (HRI)) is determined to be "agency" under Freedom of Information Law, it would constitute agency subject to Personal Privacy Protection Law. Comm on Open Gov't FOIL-AO-13496.

2. Courts

Courts are not subject to either freedom of information law or personal privacy protection law; as such, request for minutes or transcripts of proceedings that took place in county court would properly be directed to clerk of court in which proceeding was conducted. Comm on Open Gov't FOIL-AO-4760.

3. Educational institutions, schools and the like

Personal Privacy Protection Law does not apply to school district or other municipal entity. Committee on Open Government FOIL-AO-3398.

While city Board of Education is subject to Freedom of Information Law, state Education Department is subject to that statute, as well as Personal Privacy Protection Law. Comm on Open Gov't FOIL-AO-12594.

4. "Public service agency". generally

5. —Correctional facilities

If records fall within the scope of both Personal Privacy Protection Law and Freedom of Information Law, requester should direct written requests to both records access officer and privacy compliance officer of department of correctional services and indicate that request is made under both laws. Comm on Open Gov't FOIL-AO-4841.

Rights of access granted by Personal Privacy Protection Law do not extend to records of agencies or units within agencies whose primary functions involve investigation, law enforcement or confinement or persons in correctional facilities. Comm on Open Gov't FOIL-AO-9673.

Rights of access granted by Personal Privacy Protection Law do not extend to records of agencies or units within agencies whose primary functions involve investigation, law enforcement, or confinement of persons in correctional facilities; thus, Personal Privacy Law did not serve as vehicle under which job applicant could gain access to state police records documenting results of polygraph exam which was used with other investigative records to determine whether to employ him. Comm on Open Gov't FOIL-AO-10117.

Rights of access granted by Personal Privacy Protection Law do not extend to records of agencies or units within agencies whose primary functions involve investigation, law enforcement or confinement or persons in correctional facilities. Comm on Open Gov't FOIL-AO-12429.

Personal Privacy Protection Law generally grants rights of access to records held by state agencies to subject of records, but rights of access do not apply to public safety agency records. Comm on Open Gov't FOIL-AO-4804.

Complaint is excluded from Personal Privacy Protection Law from rights of access on ground that it is "public safety agency record". Comm on Open Gov't FOIL-AO-4829.

Division of criminal justice services is state agency and "personal criminal records" are records pertaining to personal information; however, rights of access granted by Personal Privacy Protection Law do not apply to "public safety agency records". Comm on Open Gov't FOIL-AO-4896.

Personal Privacy Protection Law requires that state agencies make records available for inspection and copying to data subject, person to whom records pertain; however rights granted by Law do not apply to public safety agency records. Comm on Open Gov't FOIL-AO-4961.

6. Transportation, transit, travel and the like

The New York State Public Transportation Safety Board has a statutory entitlement to receive and the New York City Transit Authority a statutory duty to furnish employment records including drug and alcohol test results in the context of a Board investigation of a transportation accident; such disclosure to the Board does not violate any provisions of the Personal Privacy Protection Law (Public Officers Law §§ 91 et seq.). 1990 N.Y. Op. Att'y Gen. No. F90-7.

Transit authority is required to disclose records to extent that records sought are accessible pursuant to Freedom of Information Law, and that it would be authorized to disclose as "routine use" of Personal Privacy Protection Law. Comm on Open Gov't FOIL-AO-4964.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 96.

Additional functions, powers and duties of the division, CLS Exec § 837-a.

Duties of courts and peace officers, CLS Exec § 837-b.

Processing requests submitted by police departments, CLS Exec § 837-c.

Functions, powers and duties of division, CLS Exec § 837.

Identification of unknown dead and missing persons, CLS Exec § 838.

Municipal police training council, CLS Exec § 839.

Central state registry of peace officers, CLS Exec § 845-a.

Central state registry of police officers, CLS Exec § 845.

Codes, Rules and Regulations:

Access to records of department of agriculture and markets pursuant to the Personal Privacy Protection Law. 1 NYCRR §§ 365.1 et seq.

Federal Aspects:

Records maintained on individuals, 5 USCS § 552a.

Jurisprudences:

88 NY Jur 2d Public Welfare and Old Age Assistance § 370 .

92 NY Jur 2d Records and Recording §§ 16, 66, 68, 73, 74, 76.

102 NY Jur 2d Taxation and Assessment § 2820 .

Annotations:

What are "records" of an agency which must be made available under state freedom of information act. 27 ALR4th 680.

What are "records" of agency which must be made available under the Freedom of Information Act (5 USCS § 552(a)(3)). 50 ALR Fed 336.

Meaning of term "agency" for purposes of Freedom of Information Act (5 USCS § 552). 57 ALR Fed 295.

Texts: Schwartz & Reidenberg, Data Privacy Law (1996, LLP) § 6-5.

ARTICLE 7 Open Meetings Law

Section

102. Definitions
103. Open meetings and executive sessions
104. Public notice
105. Conduct of executive sessions
106. Minutes
107. Enforcement

HISTORY:
Add, L 1976, ch 511, § 1, eff Jan 1, 1977.

§ 102. Definitions

As used in this article:

1. "Meeting" means the official convening of a public body for the purpose of conducting public business, including the use of videoconferencing for attendance and participation by the members of the public body.

2. "Public body" means any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body.

3. "Executive session" means that portion of a meeting not open to the general public.

HISTORY:
Formerly § 92, add, L 1976, ch 511, § 1; renumbered § 97, L 1977, ch 933, § 2; renumbered § 102, L 1983, ch 652, § 1, eff Sept 1, 1984; L 1979, ch 704, § 1, eff Oct 1, 1979; L 2000, ch 289, § 2, eff Aug 23, 2000.

Notes to Decisions

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I. Generally
1. "Conducting public business" defined
2. "Convening" defined

II. "Meeting" Defined
3. In general
4. Collective bargaining sessions
5. Informal or social meetings, generally
6. —Agenda sessions
7. —Briefing, debriefing, planning sessions and the like
8. —Gatherings where food is served
9. —Workshops, seminars and the like
10. Political caucuses
11. Quorum requirements, generally
12. —Participation by telephone or other mechanical devices
13. Tours, inspections, visits and the like
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III. "Public Body" Defined
15. In general
16. Advisory entities
17. Community planning and development, generally
18. —Industrial development agencies
19. —Local development corporations (LDCs)
20. Courts; court employees
21. Education, generally
22. —Community colleges
23. —Local school districts; boards of education
24. —State University of New York (SUNY)
25. Ethics boards
26. Fire prevention and control
27. Health and medicine
28. Insurance
29. Law enforcement and corrections
30. Libraries and museums
31. Real property; Housing
32. —Zoning
33. Taxation
34. Utilities
35. Waste
36. Other and miscellaneous

IV. "Executive Session" Defined
37. In general

I. Generally

1. "Conducting public business" defined

The Legislature intended to include discussions of public business within the operation of the Open Meetings Law (Public Officers Law, art 7) by its amendment of the law, which changed the phrase "transacting public business" to "conducting public business", and added to the definition of "public body" the phrase "committee or subcommittee" thereof, following a decision of the Appellate Division holding that meetings of standing committees of a board of education were not subject to the requirements of said law because they were not empowered to "transact" business. Sciolino v Ryan, 103 Misc. 2d 1021, 431 N.Y.S.2d 664, 1980 N.Y. Misc. LEXIS 2245 (N.Y. Sup. Ct. 1980), aff'd, 81 A.D.2d 475, 440 N.Y.S.2d 795, 1981 N.Y. App. Div. LEXIS 10933 (N.Y. App. Div. 4th Dep't 1981), aff'd, 83 A.D.2d 755, 444 N.Y.S.2d 878, 1981 N.Y. App. Div. LEXIS 15072 (N.Y. App. Div. 4th Dep't 1981).

2. "Convening" defined

The guidelines as to whether a meeting is a "formal convening" (under former law) so as to entitle a stranger to attend are the rules of the governing body itself, the board of county supervisors. Kessel v Board of Supervisors, 90 Misc. 2d 574, 394 N.Y.S.2d 762, 1977 N.Y. Misc. LEXIS 2114 (N.Y. Sup. Ct. 1977).

II. "Meeting" Defined

3. In general

In order for gathering of members of public body to constitute "meeting" for purposes of Open Meetings Law, quorum must be present; where there was never quorum present at any of private meetings of board of education prior to regular meeting, none such events constituted "meeting" which was required to be conducted in public pursuant to Open Meetings Law. Tri-Village Publishers, Inc. v St. Johnsville Bd. of Education, 110 A.D.2d 932, 487 N.Y.S.2d 181, 1985 N.Y. App. Div. LEXIS 48835 (N.Y. App. Div. 3d Dep't 1985).

The annual session of a county legislature held to create a budget is subject to the Open Meetings Law since such session clearly falls within the scope of the definition of "meeting" in [former] Public Officers Law § 97(1) in that the session requires a quorum and meets for the purpose of discussing public business. Comm Pub Acc Rec OML—Ad Op 557.

Definition of "meeting" appearing in § [former] 97(1) of Open Meetings Law is applicable to any convening of quorum of public body for purpose of discussing public business, whether or not there is intent to take action and regardless of manner in which gathering may be characterized; therefore, agenda meetings are subject to Open Meetings Law and must be convened open to public. Comm Pub Acc Rec OML-Ad Op 648.

4. Collective bargaining sessions

The Open Meetings Law (Pub O Article 7) would not be applicable to collective bargaining sessions between public employers and public employee organizations under the Taylor Law

(Civ S, Article 14) since "sunshine" bargaining would not be imposed upon public sector labor relations in the absence of any such specific legislation in the Taylor Law and in the absence of any specific provision to that effect in the Open Meetings Law. County of Saratoga v Newman, 124 Misc. 2d 626, 476 N.Y.S.2d 1020, 1984 N.Y. Misc. LEXIS 3253 (N.Y. Sup. Ct. 1984).

5. Informal or social meetings, generally

In proceeding under CLS EDPL § 207 challenging respondent Industrial Development Agency's decision to condemn property for development of retail shopping plaza, respondent's 5-member board did not violate Open Meetings Law (CLS Pub O §§ 100 et seq.) by holding informal staff meeting (at which quorum was not present) in which engineering consultant presented status report regarding preparation of preliminary draft of proposed Supplemental Final Environmental Impact Statement, where no discussions of substance, voting, or other action took place. Mobil Oil Corp. v City of Syracuse Indus. Dev. Agency, 224 A.D.2d 15, 646 N.Y.S.2d 741, 1996 N.Y. App. Div. LEXIS 8991 (N.Y. App. Div. 4th Dep't), app. dismissed, 89 N.Y.2d 860, 653 N.Y.S.2d 281, 675 N.E.2d 1234, 1996 N.Y. LEXIS 4287 (N.Y. 1996), app. denied, 89 N.Y.2d 811, 657 N.Y.S.2d 403, 679 N.E.2d 642, 1997 N.Y. LEXIS 359 (N.Y. 1997).

6. —Agenda sessions

Informal conference or "agenda session" constitutes "meeting" for purposes of Open Meetings Law, for it permits the crystallization of secret decisions to a point just short of ceremonial acceptance. Orange County Publications, Div. of Ottaway Newspapers, Inc. v Council of Newburgh, 60 A.D.2d 409, 401 N.Y.S.2d 84, 1978 N.Y. App. Div. LEXIS 9687 (N.Y. App. Div. 2d Dep't), aff'd, 45 N.Y.2d 947, 411 N.Y.S.2d 564, 383 N.E.2d 1157, 1978 N.Y. LEXIS 2337 (N.Y. 1978).

Public bodies may not escape public view under Open Meetings Law by claiming that they did not formally convene when, in fact, meeting took place at which business of public interest was discussed; although not every assembling of members of public body is intended to fall within scope of law, informal conferences, agenda sessions and work sessions do invoke provisions of statute when quorum is present and when topics for discussion and decision are such as would otherwise arise at regular meeting. Goodson Todman Enterprises, Ltd. v Kingston Common Council, 153 A.D.2d 103, 550 N.Y.S.2d 157, 1990 N.Y. App. Div. LEXIS 29 (N.Y. App. Div. 3d Dep't 1990).

While a social dinner gathering attended by members of the Nassau County Board of Supervisors at which there was some discussion of the proposed budget submitted by the County Executive and an early morning gathering of the board at the town hall to enable them to pick up budget work sheets required for the upcoming board meeting do not constitute "meetings" held by the board concerning the budget in violation of the Open Meetings Law (Public Officers Law, §§ 95–106), an informal and impromptu luncheon gathering of the board at which staff reports concerning the budget were given does, however, represent an assemblage of a legislative body for a particular business purpose and thus subject to the requirements of the Open Meetings Law which governs an informal "conference" or "agenda session" or planning session wherein oral reports are received; however, in the absence of a showing of sufficient "prejudice" or "good cause", the isolated technical violation does not warrant the extreme remedy of invalidating the entire Nassau County budget adopted by the board. Kessel v D'Amato, 97 Misc. 2d 675, 412 N.Y.S.2d 303, 1979 N.Y. Misc. LEXIS 1992 (N.Y. Sup. Ct.), modified, 72 A.D.2d 790, 421 N.Y.S.2d 614, 1979 N.Y. App. Div. LEXIS 14036 (N.Y. App. Div. 2d Dep't 1979).

7. —Briefing, debriefing, planning sessions and the like

Meeting of several members of standing committee of municipal legislative body was covered by Open Meetings Law where quorum of committee was present, meeting was not casual encounter, but rather planned informal conference, and topic to be discussed had already arisen at earlier meeting which was required to be open to public. "Briefing session" at which municipal corporation counsel met with members of municipal legislature and other public officials was subject to Open Meetings Law where no authorization for closed "executive session" was given at an open meeting, one topic at briefing session was of interest to public, meeting was planned, and quorum was eventually present. Goodson Todman Enterprises, Ltd. v Kingston Common Council, 153 A.D.2d 103, 550 N.Y.S.2d 157, 1990 N.Y. App. Div. LEXIS 29 (N.Y. App. Div. 3d Dep't 1990).

Evidence that a clerk not a member of the board of education prepared, maintained and presented minutes of purported "planning sessions" which were offered and accepted at subsequent "regular meetings" of the board, that certain subjects raised at the purported "planning sessions" would, under the "Open Meetings Law", be raised at regular public meetings whereas other subjects would fall within general areas properly considered in "executive sessions" and that oral reports were received during the "planning sessions" from employees of the school system as well as from prospective contractors established that the "planning sessions" were "meetings" subject to the provisions of the "Open Meetings Law". Kamlet v Board of Education, 91 Misc. 2d 1105, 399 N.Y.S.2d 366, 1977 N.Y. Misc. LEXIS 2489 (N.Y. Sup. Ct. 1977).

Where certain committees of the school district board of education were advisory in nature and did not perform governmental functions, they were not public bodies subject to the open meetings provisions of N.Y. Pub. Off. Law §§ 102(2) and 103, even though the committees contained at least one member of the board. Matter of Jae v Bd. of Educ. of Pelham Union Free Sch. Dist., 22 A.D.3d 581, 802 N.Y.S.2d 228, 2005 N.Y. App. Div. LEXIS 10872 (N.Y. App. Div. 2d Dep't 2005), app. denied, 6 N.Y.3d 714, 816 N.Y.S.2d 749, 849 N.E.2d 972, 2006 N.Y. LEXIS 1311 (N.Y. 2006).

Meeting of quorum of school board to discuss "what went right and wrong at meeting" or to consider members' behavior or performance at meeting falls within scope of definition of "meeting" even though it is characterized as "debriefing session", and closed debriefing session constitutes violation of Open Meetings Law. Comm Pub Acc Rec OML-Ad Op 823.

8. —Gatherings where food is served

While a social dinner gathering attended by members of the Nassau County Board of Supervisors at which there was some discussion of the proposed budget submitted by the County Executive and an early morning gathering of the board at the town hall to enable them to pick up budget work sheets required for the upcoming board meeting do not constitute "meetings" held by the board concerning the budget in violation of the Open Meetings Law (Public Officers Law, §§ 95–106), an informal and impromptu luncheon gathering of the board at which staff reports concerning the budget were given does, however, represent an assemblage of a legislative body for a particular business purpose and thus subject to the requirements of the Open Meetings Law which governs an informal "conference" or "agenda session" or planning session wherein oral reports are received; however, in the absence of a showing of sufficient "prejudice" or "good cause", the isolated technical violation does not warrant the extreme remedy of invalidating the entire Nassau County budget adopted by the board. Kessel v D'Amato, 97 Misc. 2d 675, 412 N.Y.S.2d 303, 1979 N.Y. Misc. LEXIS 1992 (N.Y. Sup. Ct.), modified, 72 A.D.2d 790, 421 N.Y.S.2d 614, 1979 N.Y. App. Div. LEXIS 14036 (N.Y. App. Div. 2d Dep't 1979).

9. —Workshops, seminars and the like

Public bodies may not escape public view under Open Meetings Law by claiming that they did not formally convene when, in fact, meeting took place at which business of public interest was discussed; although not every assembling of members of public body is intended to fall within scope of law, informal conferences, agenda sessions and work sessions do invoke provisions of statute when quorum is present and when topics for discussion and decision are such as would otherwise arise at regular meeting. Goodson Todman Enterprises, Ltd. v Kingston Common Council, 153 A.D.2d 103, 550 N.Y.S.2d 157, 1990 N.Y. App. Div. LEXIS 29 (N.Y. App. Div. 3d Dep't 1990).

"A close door workshop" conducted by an out-of-town law firm for a school board is a meeting subject to the Open Meetings Law in all respects provided that a quorum of the school board was present at the closed door workship. Comm Pub Acc Rec OML—Ad Op 597.

Open meetings law includes "workshops" and "work sessions" held by quorum of public body for purpose of discussing its business. Comm Pub Acc Rec OML-Ad Op 786.

10. Political caucuses

In a proceeding challenging the closing of meetings of the members of the majority political party on a city council at which the members discussed matters that were to come before the council at public meetings, the party meetings constituted meetings within the scope of [former] Pub O § 97(1) and, since it was undisputed that a quorum was present at the meetings, the meetings violated the Open Meetings Law; additionally, the meetings did not come under the "political caucus" exception contained in [former] Pub O § 103(2) since that exception was meant merely to prevent the statue from extending to the private matters of a political party, as opposed to matters that are public business. Sciolino v Ryan, 81 A.D.2d 475, 440 N.Y.S.2d 795, 1981 N.Y. App. Div. LEXIS 10933 (N.Y. App. Div. 4th Dep't 1981).

Political caucuses are not subject to open meetings law even where attendance at caucus is by sufficient number of members of board as to constitute quorum of board. Oneonta Star, Div. of Ottaway Newspapers, Inc. v County of Schoharie, 112 A.D.2d 622, 492 N.Y.S.2d 145, 1985 N.Y. App. Div. LEXIS 55880 (N.Y. App. Div. 3d Dep't 1985).

11. Quorum requirements, generally

City council's discussions or meetings at which there was not a quorum of council members present were not violations of the Open Meetings Law. DeSantis v City of Jamestown, 193 Misc. 2d 197, 747 N.Y.S.2d 906, 2002 N.Y. Misc. LEXIS 1266 (N.Y. Sup. Ct. 2002).

Due to scope of definition of "quorum" in § 41 of General Construction Law, no specific reference to quorum requirement is necessary to bring entity within scope of Open Meetings Law. Comm Pub Acc Rec OML-Ad Op 770.

12. —Participation by telephone or other mechanical devices

The participation of a member of a public body by means of "conference equipment or other mechanical devices" does not constitute the presence of that member for the purposes of convening quorum under Public Officers Law § 97. Com Pub Acc Rec OML-Ad Op 588.

13. Tours, inspections, visits and the like

Open Meeting Law was not violated when Public Service Commissioners toured proposed routes for transition station where tour was intended to provide commissioners with greater understanding of evidence regarding site selection, and summary report of tour was properly provided to parties. New Rochelle v Public Service Com., 150 A.D.2d 441, 541 N.Y.S.2d 49, 1989 N.Y. App. Div. LEXIS 6524 (N.Y. App. Div. 2d Dep't), app. denied, 74 N.Y.2d 610, 546 N.Y.S.2d 554, 545 N.E.2d 868, 1989 N.Y. LEXIS 2819 (N.Y. 1989).

14. Other and miscellaneous

Although various meetings were held that were not open to the public, they did not all violate the Open Meetings Law, N.Y. Pub. Off. Law art. 7, as a meeting between a judge and others in his chambers was a judicial proceeding under N.Y. Pub. Off Law § 108(1) that was not covered by the Law, and a meeting between county and state legislators for advice was not subject to the Law pursuant to N.Y. Pub. Off. Law § 102(1); meetings held by members of the county legislature regarding issues that involved the budget and an increase in taxes, and meetings held by various legislators and officials without the judge's presence constituted violations of the Law, but sanctions such as a permanent injunction against future violations were not required under N.Y. Pub. Off. Law § 107. Warren v Giambra, 813 N.Y.S.2d 892, 12 Misc. 3d 650, 235 N.Y.L.J. 86, 2006 N.Y. Misc. LEXIS 829 (N.Y. Sup. Ct. 2006).

A meeting of a town board for the purpose of filling a vacancy on the board must be conducted as a public meeting subject to the Open Meetings Law. Com Pub Acc Rec OML-Ad Op 582.

Any convening of a quorum of a community school board with the president's council for the purpose of conducting public business constitutes a "meeting" subject to the Open Meetings Law regardless of whether such meetings are called closed meetings, personnel meetings or consultative meetings. Com Pub Acc Rec OML-Ad Op 583.

Formal gatherings of county supervisors' associations are not public meetings open to the public under [former] Public Officers Law § 97 where the members attending such meetings exchange points of view, discuss trends, and discuss issues of common interest; however, if a town or county supervisor receives communications from an association that relate to the performance of his or her official duties, such communications would constitute "records" under Public Law Officers Law § 86 and would be subject to rights of access granted by the Freedom of Information Law. Com Pub Acc Rec OML-Ad Op 586.

Gatherings of staff of correctional facility are not within scope of Open Meetings Law. Comm Pub Acc Rec OML-Ad Op 760.

School board superintendent acting as a receiver for a high school and junior high school violated N.Y. Educ. Law §§ 414(1)(c) and 211-f(1)(b)(iv) by excluding reporters' cameras from a public meeting held at a school because she opened that non-public forum to the public to discuss a matter of public interest, and although the schools were the subject of the meeting, the property was not being used for school purposes. News 12 Co. v Hempstead Pub. Schs. Bd. of Educ., 52 Misc. 3d 479, 31 N.Y.S.3d 788, 2016 N.Y. Misc. LEXIS 1411 (N.Y. Sup. Ct. 2016).

Where a school board superintendent acting as a receiver for a high school and junior high school violated the law by excluding reporters' cameras from a public meeting held at a school, petitioner newspapers were not entitled to relief with respect to the board because the superintendent, as receiver, had the authority to call the meeting without the board's consent. News 12 Co. v Hempstead Pub. Schs. Bd. of Educ., 52 Misc. 3d 479, 31 N.Y.S.3d 788, 2016 N.Y. Misc. LEXIS 1411 (N.Y. Sup. Ct. 2016).

III. "Public Body" Defined

15. In general

Formally chartered entity with officially delegated duties and organizational attributes of substantive nature should be deemed public body that is performing governmental function. Smith v City Univ. of New York, 92 N.Y.2d 707, 685 N.Y.S.2d 910, 708 N.E.2d 983, 1999 N.Y. LEXIS 1 (N.Y. 1999).

Essential factor in determining applicability of CLS Pub O Art 7 is whether or not entity is performing governmental function rather than simply conducting public business. Poughkeepsie Newspaper Div. of Gannett Satellite Information Network v Mayor's Intergovernmental Task Force on New York City Water Supply Needs, 145 A.D.2d 65, 537 N.Y.S.2d 582, 1989 N.Y. App. Div. LEXIS 1492 (N.Y. App. Div. 2d Dep't 1989).

Committee or subcommittee designated by public body is itself a public body subject to Open Meetings Law in all respects. Comm Pub Acc Rec OML-Ad Op 794.

Any entity designated or created to serve as body by any other public body falls within requirements of Open Meetings Law. Comm Pub Acc Rec OML-Ad Op 809.

Definition of "public body" appearing in [former] § 97(2) of Open Meetings Law is not as restrictive as definition of "agency" in Freedom of Information Law. Comm Pub Acc Rec OML-Ad Op 813.

16. Advisory entities

Advisory Commission to make findings and recommendations about problems relating to liability insurance, established by Governor with "responsibility" for studying nature and impact of liability insurance problem, is not public body subject to Open Meetings Law (CLS Pub O § 100 et seq.) since (1) commission was created by executive order as advisory body composed of members who do not hold fixed terms, (2) commission lacks power to transact public business, make law, adopt regulations, or direct changes in state law and policy, and (3) no requirement exists that Governor wait for commission's recommendations before taking any action. N.Y. Pub. Interest Research Group, Inc. v Governor's Advisory Comm'n, 133 Misc. 2d 613, 507 N.Y.S.2d 798, 1986 N.Y. Misc. LEXIS 2916 (N.Y. Sup. Ct. 1986), aff'd, 135 A.D.2d 1149, 523 N.Y.S.2d 21, 1987 N.Y. App. Div. LEXIS 48440 (N.Y. App. Div. 1st Dep't 1987).

Committee consisting of two or more persons designated to perform duty collectively as body is subject to Open Meetings Law in all respects, even if it has only capacity to recommend or advise. Comm Pub Acc Rec OML-Ad Op 600.

Various citizens advisory committees created by Town Board, such as a handicapped advisory committee, an airport committee and a conservation council are all public bodies and as such are subject to the Open Meetings Law in all respects even though such committees are without any authority to make final decisions. Comm Pub Acc Rec OML-Ad Op 753.

Subcommittee of school board, empowered to conduct such business that it can be deemed advisory to full Board is public body and required to comply with provisions of Open Meetings Law. Comm Pub Acc Rec OML-Ad Op 795.

"Public body" within meaning of Open Meetings Law includes advisory bodies as well as governing bodies. Comm Pub Acc Rec OML-Ad Op 836.

17. Community planning and development, generally

A mayor's community development task force is a public body within the meaning of [former] Public Officers Law § 97(2) since the task force is an entity consisting of more than 2 members, is required to conduct business only by means of a quorum under General Construction Law § 41 and clearly performs governmental functions for the city in reviewing citizen input into community development program, therefore, the task force violated [former] Public Officers Law § 99 by failing to give advanced notice of its meeting to at least 2 members of the news media and to the public by means of posting in a conspicuous public location. Com Pub Acc Rec OML—Ad Op 590.

Village planning board is public body and is subject to Open Meetings Law in all respects since planning board is entity consisting of more than 2 members, conducts public business, performs governmental function for public corporation and is created by governing body. Comm Pub Acc Rec OML-Ad Op 827.

18. —Industrial development agencies

Since an industrial development agency is a corporate government agency, constituting a public benefit corporation under General Municipal Law, § 856(2), its board is also a public body subject to the Open Meetings Law. Comm Pub Acc Rec OML-Ad Op 857.

An industrial development agency is a "public body" for purposes of § 102 of the Open Meetings Law. Comm on Open Govt OMIL-AO 937.

19. —Local development corporations (LDCs)

Non-profit local development corporation is "public body" under [former] § 97(2) of Public Officers Law, and therefore, meetings of such corporation are subject to Open Meetings Law. Comm Pub Acc Rec OML-Ad Op 780.

Meetings of board of local development corporation are subject to Open Meetings Law; definition of "public body" appearing in [former] § 97(2) of Open Meetings Law is not as restrictive as definition of "agency" in Freedom of Information Law. Comm Pub Acc Rec OML-Ad Op 813.

20. Courts; court employees

Third Department Judicial Screening Committee was not an agency under the New York Freedom of Information Law, specifically N.Y. Pub. Off. Law § 86(3), and was not a "public body" under the New York Open Meetings Law, specifically N.Y. Pub. Off. Law § 102(2), as the Governor could reject the advice of the Committee and leave a judicial position vacant until the next election; thus, the Committee's function was purely advisory. Hurley v Johnson, 779 N.Y.S.2d 771, 4 Misc. 3d 616, 2004 N.Y. Misc. LEXIS 867 (N.Y. Sup. Ct. 2004).

21. Education, generally

While the application of the Open Meetings Law to meetings of a faculty-student association is unclear, if such Association exists due to its relationship with a particular college, and if the college would perform the functions of the association if the association had not been created, the faculty-student association is likely to be construed a "public body" under [former] Public Officers Law § 97(2). Comm Pub Acc Rec OML—Ad Op 578.

Budget advisory committee appointed by superintendent of education and consisting of parents, community leaders and district employees who are charged by superintendent with responsibility for developing budget proposals is public body. Comm Pub Acc Rec OML-Ad Op 764.

Baldwin educational assembly is "public body" under [former] § 97(2) of Public Officers Law, and thus meetings of BEA are subject to Open Meetings Law. Comm Pub Acc Rec OML-Ad Op 781.

"Public body" within meaning of Open Meetings Law includes advisory bodies as well as governing bodies; thus, university task force Committee constitute public body subject to provisions of Open Meetings Law because it performs advisory role for university in performance or its governmental function. Comm Pub Acc Rec OML-Ad Op 836.

22. —Community colleges

Fiorello H. LaGuardia Community College Association, Inc., qualifies as public body subject to Open Meetings Law (CLS Pub O Art 7) because it is not merely advisory but possesses and exercises real and effective decision-making power, given its delegated authority to administer student activity fees and its purported power to suspend, regulate and reinstate student publications. Mandatory student activity fees allocated and disbursed by Fiorello H. LaGuardia Community College Association, Inc., pursuant to articles 125 and 126 of Education Law were state funds for purpose of determining whether association qualified as public body subject to Open Meetings Law. Smith v City Univ. of New York, 92 N.Y.2d 707, 685 N.Y.S.2d 910, 708 N.E.2d 983, 1999 N.Y. LEXIS 1 (N.Y. 1999).

La Guardia Community College Association was not public body governed by Open Meetings Law, and thus its meeting was properly closed notwithstanding fact that funds for certain student activities were allocated at meeting, since association's primary purpose was to serve student body rather than state, it did not possess final decision-making authority but performed advisory role with respect to expenditures, and it did not exercise power of sovereign because student activity funds it oversaw were segregated from university's general revenues and did not constitute state funds. Smith v City Univ. of New York, 241 A.D.2d 410, 661 N.Y.S.2d 599, 1997 N.Y. App. Div. LEXIS 7824 (N.Y. App. Div. 1st Dep't 1997), app. dismissed, 91 N.Y.2d 921, 669 N.Y.S.2d 262, 692 N.E.2d 131, 1998 N.Y. LEXIS 243 (N.Y. 1998), rev'd, 92 N.Y.2d 707, 685 N.Y.S.2d 910, 708 N.E.2d 983, 1999 N.Y. LEXIS 1 (N.Y. 1999).

23. —Local school districts; boards of education

School district board of education was a "public body" within the meaning of and subject to the provisions of the "Open Meetings Law." Kamlet v Board of Education, 91 Misc. 2d 1105, 399 N.Y.S.2d 366, 1977 N.Y. Misc. LEXIS 2489 (N.Y. Sup. Ct. 1977).

In Article 78 proceeding challenging termination of school district's director of operations from his noncompetitive position without duly noticed public meeting of community school board trustees, respondents' claim that district administrator had informally "conferred" with certain members of board of trustees before terminating petitioner, or that board members "proposed" that his services be terminated, did not satisfy CLS Educ § 2566(6), whose purpose is to protect persons from being discharged by unilateral action of superintendent without ratification of such action by board of education. Okebiyi v Cortines, 167 Misc. 2d 1008, 641 N.Y.S.2d 791, 1996 N.Y. Misc. LEXIS 112 (N.Y. Sup. Ct. 1996), app. dismissed, 239 A.D.2d 421, 658 N.Y.S.2d 894, 1997 N.Y. App. Div. LEXIS 5084 (N.Y. App. Div. 2d Dep't 1997).

Written notice not to renew contract provided to the superintendent of schools, which notice was within the time limit provided by the contract of employment but was not preceded by official action, that is, by a regular meeting as compared to an informal meeting or executive session of the board of education, cannot be ratified by official action after the contractual deadline for the written notice. The subsequent adoption of a resolution by the community school board which occurred after the contractual deadline for written notice, therefore, was not accomplished in time to prevent automatic renewal of the superintendent's con-

tract. Appeal of Hernandez, 1991 Op Comr Educ No 12367; Appeal of Lilly, 1991 Op Comr Educ No 12396.

Citizens Committee established by public school board for generating recommendations regarding "K-8 Configuration and Building Utilization" is a public body subject to the Open Meetings Law in all respects. Comm Pub Acc Rec OML-Ad Op 752.

Subcommittee of school board, empowered to conduct such business that it can be deemed advisory to full Board is public body and required to comply with provisions of Open Meetings Law. Comm Pub Acc Rec OML-Ad Op 795.

Administrative Cabinet composed of superintendent and various principals which discusses matters dealing with curriculum and policy is not entity that performs particular duties collectively as body, but group consisting of executive staff of school district that does not function as body and would not be required to conduct its business by means of quorum; thus, Administrative Cabinet is not subject to Open Meetings Law. Comm Pub Acc Rec OML-Ad Op 819.

24. —State University of New York (SUNY)

Laboratory Animals Use Committee (LAUC) of State University of New York at Stony Brook is body deriving its powers solely from federal law, and thus LAUC is not "public body" as defined in CLS Pub O § 102. American Society for Prevention of Cruelty to Animals v Board of Trustees of State University, 79 N.Y.2d 927, 582 N.Y.S.2d 983, 591 N.E.2d 1169, 1992 N.Y. LEXIS 818 (N.Y. 1992).

In a proceeding by a Cornell student seeking a declaration requiring the Cornell Board of Trustees to open its meetings concerning the statutory colleges, the trial court correctly held that the Board was required to hold such open meetings since the close relationship between Cornell and the State and Cornell's dual role as both a private and public institution indicated that the Board is a public body as defined by the Open Meetings Law, since Cornell conducts public business and performs a governmental function for the State or for an agency or department of the State, and since the Board, in administering the colleges, spends State monies appropriated for the four colleges. Holden v Board of Trustees, 80 A.D.2d 378, 440 N.Y.S.2d 58, 1981 N.Y. App. Div. LEXIS 10103 (N.Y. App. Div. 3d Dep't 1981).

25. Ethics boards

The Board of Ethics of City of Lockport is a "public body" within the meaning of [former] Public Officers Law § 97(2) subject to the Open Meetings Law and such Board, due to the nature of its discussions which would involve the employment history of particular people and matters leading to the discipline, suspension or dismissal of particular people, often may have the capacity to conduct its business during executive session under [former] Public Officers Law § 100(1)(f). Comm Pub Acc Rec OML—Ad Op 573.

26. Fire prevention and control

While a volunteer fire company was an "agency" under the Freedom of Information Law, Public Officers Law art. 6, it was not a "public body" subject to the Open Meetings Law, Public Officers Law art. 7. Matter of Matter of Hayes v Chestertown Volunteer Fire Co., Inc., 93 A.D.3d 1117, 941 N.Y.S.2d 734, 2012 N.Y. App. Div. LEXIS 2340 (N.Y. App. Div. 3d Dep't 2012).

A volunteer fire company is a "public body" as defined in [former] § 97(2) of the Public Officers Law. Comm Pub Acc Rec OML-Ad Op 744.

Board of Volunteer Fire Department is "public body" subject to Open Meetings Law. Comm Pub Acc Rec OML-Ad Op 802.

Board of Commissioners of fire district is "public body" and is subject to Open Meetings Law. Comm Pub Acc Rec OML-Ad Op 815.

Board of fire commissioners is subject to Open Meetings Law since it is entity consisting of more than 2 members, is required to conduct its business by means of quorum pursuant to General Construction Law § 41 and conducts public business and performs governmental function; public must have access to its meetings which encompass any gathering of quorum of public body for purpose of discussing public business, whether or not there is intent to take action, and regardless of manner in which gathering may be characterized. Comm Pub Acc Rec OML-Ad Op 838.

27. Health and medicine

Mayor's Intergovernmental Task Force on New York City Water Supply Needs was not public body within meaning of CLS Pub O § 102(2) since (1) its sole purpose was to make recommendations to mayor of New York City and thus it did not perform governmental function, and (2) it did not require quorum to conduct its business. Poughkeepsie Newspaper Div. of Gannett Satellite Information Network v Mayor's Intergovernmental Task Force on New York City Water Supply Needs, 145 A.D.2d 65, 537 N.Y.S.2d 582, 1989 N.Y. App. Div. LEXIS 1492 (N.Y. App. Div. 2d Dep't 1989).

The Medical Advisory Committee consisting of 20 members appointed by the Governor to advise the State Commissioner of Social Services with respect to health and medical care services for needy persons (Social Services Law, § 365-c) in compliance with Federal directives which mandate its existence in order to enable the State to obtain Federal funding, is a public body whose meetings are subject to the "Open Meetings Law" (Public Officers Law, § 97). The giving of advice by the committee either on their own volition or at the request of the commissioner is a necessary governmental function for the proper actions of the Social Services Department. Until the Legislature acts otherwise, advisory bodies will be subject to the "Open Meetings Law". MFY Legal Services, Inc. v Toia, 93 Misc. 2d 147, 402 N.Y.S.2d 510, 1977 N.Y. Misc. LEXIS 2648 (N.Y. Sup. Ct. 1977).

Non-profit, private hospitals receiving substantial amounts of government funds are not government agencies within the definition of Public Officers Law § 86(3) and therefore not subject to the disclosure requirements of Public Officers Law § 87 nor do they constitute a "public body" as defined in [former] Public Officers Law § 97(2) and therefore are not subject to the requirements of the Open Meetings Law (Pub O Law § 98). Comm Pub Acc Rec OML—Ad Op 568.

State board of medicine established under § 6523 of Education Law is "public body", and thus subject to Open Meetings Law. Comm Pub Acc Rec OML-Ad Op 776.

28. Insurance

Advisory Commission to make findings and recommendations about problems relating to liability insurance, established by Governor with "responsibility" for studying nature and impact of liability insurance problem, is not public body subject to Open Meetings Law (CLS Pub O § 100 et seq.) since (1) commission was created by executive order as advisory body composed of members who do not hold fixed terms, (2) commission lacks power to transact public business, make law, adopt regulations, or direct changes in state law and policy, and (3) no requirement exists that Governor wait for commission's recommendations before taking any action. N.Y. Pub. Interest Research Group, Inc. v Governor's Advisory Comm'n, 133 Misc. 2d 613, 507 N.Y.S.2d 798, 1986 N.Y. Misc. LEXIS 2916 (N.Y. Sup. Ct. 1986), aff'd, 135 A.D.2d 1149, 523 N.Y.S.2d 21, 1987 N.Y. App. Div. LEXIS 48440 (N.Y. App. Div. 1st Dep't 1987).

29. Law enforcement and corrections

A Correctional Facility Overcrowding Policy Committee created by Suffolk County is a "public body" subject to the Open Meetings Law; however, a Community Action Southold Town, a not-for-profit corporation created to study racial tension and perform a nongovernmental activity, probably are not "public bodies" within the meaning of [former] Public Officers Law § 97(2) and therefore not subject to the Open Meetings Law. Comm Pub Acc Rec OML—Ad Op 571.

30. Libraries and museums

Board of trustees of public library constitutes a "public body" therefore bringing meetings of such board within scope of Open Meetings Law; however, staff of public library is not a "public body" and, therefore meetings of library staff are not subject to Open Meetings Law. Comm Pub Acc Rec OML-Ad Op 714.

31. Real property; Housing

A "Homestead Committee" and a "Mayor's Task Force on Abandoned Housing," created to review and recommend policies regarding the disposition or use of vacant and abandoned prop-

erty, composed of members of the common council and representatives of several city departments, were public bodies within the meaning of the Open Meetings Law and subject to its requirements. In addition, documents generated by the committees relating to the city's homestead program were subject to disclosure under the Freedom of Information law, notwithstanding the contention that such committees had no governmental capacity and were advisory only. Syracuse United Neighbors v Syracuse, 80 A.D.2d 984, 437 N.Y.S.2d 466, 1981 N.Y. App. Div. LEXIS 10897 (N.Y. App. Div. 4th Dep't 1981), app. dismissed, 55 N.Y.2d 995, 449 N.Y.S.2d 201, 434 N.E.2d 270, 1982 N.Y. LEXIS 3165 (N.Y. 1982).

32. —Zoning

Zoning revision committee created by town board was not public body subject to open meeting requirements of CLS Pub O Art 7 since (1) committee had limited function of advising town board with respect to contemplated change in town's zoning ordinance, (2) committee had no power to implement its recommendations, and (3) committee members had no fixed terms and town board was not required to wait for committee's recommendations in order to act. Goodson Todman Enterprises, Ltd. v Town Bd. of Milan, 151 A.D.2d 642, 542 N.Y.S.2d 373, 1989 N.Y. App. Div. LEXIS 8255 (N.Y. App. Div. 2d Dep't), app. denied, 74 N.Y.2d 614, 547 N.Y.S.2d 848, 547 N.E.2d 103, 1989 N.Y. LEXIS 3153 (N.Y. 1989).

City's board of zoning appeals was a "public body," and, thus, all portions of meeting of board had to be open to public, except for judicial or quasi-judicial proceedings. Orange County Publications Div. of Ottaway Newspapers, Inc. v Council of Newburgh, 89 Misc. 2d 847, 393 N.Y.S.2d 298, 1977 N.Y. Misc. LEXIS 1955 (N.Y. Sup. Ct. 1977), modified, 60 A.D.2d 409, 401 N.Y.S.2d 84, 1978 N.Y. App. Div. LEXIS 9687 (N.Y. App. Div. 2d Dep't 1978).

Zoning board of appeals (ZBA) did not violate the Open Meetings Law where, between the close of the public hearing and the public meeting the following month at which a determination was made, the ZBA's counsel communicated individually with the ZBA's members and prepared a draft written determination, and, at the public meeting, the ZBA reviewed the proposed draft, made changes and ultimately made a determination; there was no evidence that a quorum of the ZBA's members met or consulted with its counsel outside a public meeting. Matter of Braunstein v Board of Zoning Appeals of the Town of Copake, 100 A.D.3d 1091, 952 N.Y.S.2d 857, 2012 N.Y. App. Div. LEXIS 7185 (N.Y. App. Div. 3d Dep't 2012).

33. Taxation

Meetings of a selection committee formed by the city manager of the city involved in order to provide advice and interview candidates for the position of Chief of Police and make recommendations to the mayor and city council relative to their decision regarding the choice of a candidate for the position of Chief are subject to the Open Meetings Law since the committee in question is a "public body" within the meaning of [former] Public Officers Law § 97(2) in that the committee consists of at least two members, performs its duties by means of a quorum, and clearly performs a governmental function. Comm Pub Acc Rec OML—Ad Op 563.

Montgomery County Assessors' Association while composed of public officials, does not conduct public business nor perform governmental function, is not public body subjet to Open Meetings Law, and is not required to open its meetings to public. Comm Pub Acc Rec OML-Ad Op 848.

34. Utilities

The Steuben Rural Electric Co-operative, Incorporated, is neither an "agency" as defined in § 86(3) of the Public Officers Law nor a "public body" as defined in [former] § 97(2) of the Public Officers Law. Comm Pub Acc Rec OML-Ad Op 729.

Board of Commissioners of Water District is "public body" subject to Open Meetings Law. Comm Pub Acc Rec OML-Ad Op 800.

35. Waste

Since the Panel to Review Scientific Studies and the Development of Public Policy on Problem Resulting from Hazardous Waste was created by an executive order of the governor, convenes only by means of a quorum pursuant to General Construction Law § 41, and clearly conducts public business, the Panel is a "public body" within the meaning of [former] Public Officers Law § 97(2) subject to the minimum requirements concerning minutes of open meetings under Public Officers Law § 101. Comm Pub Acc Rec OML—Ad Op 580.

36. Other and miscellaneous

In an action brought by and on behalf of former residents of an institution for the poor seeking to remove the trustees of the institution, set aside the conveyance of the institution's property, reopen and renovate it, the trustees did not compose a public body for the purpose of the Open Meetings Law, although they were appointed by town supervisors, where their sole function and basis of existence was to carry out the testamentary trust of an individual; the action was barred under the principles of res judicata and collateral estoppel since a court of competent jurisdiction had already rendered a judgment concerning the propriety of the sale. Burgher v Purcell, 109 Misc. 2d 531, 440 N.Y.S.2d 480, 1981 N.Y. Misc. LEXIS 2424 (N.Y. Sup. Ct. 1981), aff'd, 87 A.D.2d 888, 449 N.Y.S.2d 527, 1982 N.Y. App. Div. LEXIS 16396 (N.Y. App. Div. 2d Dep't 1982).

County chapter of state association for retarded children is not subject to Open Meetings Law since association is private and does not conduct public business or perform governmental function. Comm Pub Acc Rec OML-Ad Op 771.

IV. "Executive Session" Defined

37. In general

Meeting of government body could not be considered closed "executive session" absent authorization given at an open meeting. Goodson Todman Enterprises, Ltd. v Kingston Common Council, 153 A.D.2d 103, 550 N.Y.S.2d 157, 1990 N.Y. App. Div. LEXIS 29 (N.Y. App. Div. 3d Dep't 1990).

School district's board of education engaged in persistent pattern of deliberate violation of letter and spirit of CLS Pub O Art 7 by, inter alia, improperly convening executive sessions and conducting business in manner inaudible to public audience. Goetschius v Board of Educ., 281 A.D.2d 416, 721 N.Y.S.2d 386, 2001 N.Y. App. Div. LEXIS 2074 (N.Y. App. Div. 2d Dep't 2001).

"Executive session" as described in [former] § 97(3) of Open Meetings Law refers to portion of open meeting during which public may be excluded. Comm Pub Acc Rec OML-A Op 793.

Executive session is not separate and distinct from meeting, but rather is portion of open meeting and public body cannot enter into executive session to discuss subject of its choice. Comm Pub Acc Rec OML-Ad Op 846.

Executive session is not separate and distinct from open meeting, but rather is portion of open meeting; motion to enter into executive session must include reference to "general area or areas of subject or subjects to be considered" during executive session; every time quorum of public body, majority of total membership, is present for purpose of conducting or discussing public business, that gathering is meeting subject to Open Meetings Law. Comm on Open Gov't OML-AD-1441.

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IV. "Executive Session" Defined

51. In general

I. Generally

1. In general

Where sub-committee conducts public business and performs governmental function for public corporation, sub-committee meets definition of "public body" and is subject to provisions of Open Meetings Law; every meeting of public body, including sub-committee, must be convened open to public, and executive session may be conducted only after open meeting has been convened. Comm on Open Gov't FOIL-AO-4907.

Public body, such as town board or public library board of trustees, cannot carry out its powers or duties except by means of affirmative vote of majority of its total membership taken at meeting duly held on reasonable notice to all of members. Comm on Open Gov't FOIL-AO-8330.

OML does not pertain to safety or sanitary standards of meeting sites, rather matters related to physical building standards are generally governed by local ordinances. Comm on Open Gov't OML-AO-1291.

As general matter, Open Meetings Law is based on presumption of openness and all meetings of public bodies must be conducted open to public, except to extent that executive session may be convened. Comm on Open Gov't OML-AO-1463.

Even where meeting of committee of public body is held at request of non-member, it nevertheless falls within coverage of Open Meetings Law, assuming that quorum of committee is present to discuss public business. Comm on Open Gov't OML-AO-2472.

Agency cannot validly take action outside of meeting held in accordance with Open Meetings Law, during which quorum is present and by means of affirmative vote of majority of its total membership; thus, agency cannot adopt new administrative fee schedule by unanimous written consent. Comm on Open Gov't OML-AO-2569.

Mere presence of majority of total membership of public body at particular facility or site does not necessarily lead to conclusion that members are conducting meeting that falls within coverage of Open Meetings Law; only when majority of total membership of public body convenes for purpose of conducting public business, as body, does that statute become applicable. Comm on Open Gov't OML-AO-2614.

2. "Conducting public business" defined

Mayor and 2 trustees failed to comply with Open Meetings Law when they wrote letters to governor and chairman of park board discussing village business, where they represented themselves as village board of trustees, without informing other 2 trustees on board. Comm on Open Gov't OML-AO-3322.

Town Board violated Open Meetings Law when it authorized publication of political advertisements in local newspaper without having done so at meeting by means of vote by members of board. Comm on Open Gov't OML-AO-3680.

Action of 4 of 7 members of town planning board in sending letter to private attorney, stating that they disagreed with town attorney's legal position in connection with certain lawsuits, was not validly taken, where issue had never been discussed at board meetings and discussion occurred by means of series of phone calls. Comm on Open Gov't OML-AO-3732.

3. "Convening" defined

Meeting is "official convening" of public body for purpose of conducting public business and as such when quorum of public body, such as school board, meets for purpose of conducting public business, such gathering constitutes meeting subject to Open Meetings Law. Comm on Open Gov't OML-AO-1422-1423, and 1427.

Meeting is official convening of public body for purpose of conducting public business and as such when quorum of public body, such as school board, meets for purpose of conducting public business, such gathering constitutes meeting subject to Open Meetings Law. Board of education is public body under Open Meetings Law; further, meeting is official convening of public body for purpose of conducting public business and as such when quorum of public body, such as school board, meets for purpose of conducting public business, such gathering constitutes meeting subject to Open Meetings Law. Comm on Open Gov't OML-AO-1422-1423, and 1427.

Public body cannot carry out its powers or duties except by means of affirmative vote of majority of its total membership taken at meeting duly held upon reasonable notice to all of members; as such, public body has capacity to act only during duly convened meetings; Open Meeting Law defines meeting to mean official convening of public body for purpose of conducting public business and term convening means physical coming together; there is nothing in Open Meetings Law that would preclude members of public body from conferring by telephone; however, series of telephone calls among members which results in decision, without benefit of meeting, would violate law. Comm on Open Gov't OML-AO-1426.

"Convening" of quorum requires assembly of group in order to constitute quorum of public body. Comm on Open Gov't OML-AO-2256.

Circulation of materials, without any "convening"of members of public body, does not constitute meeting subject to Open Meetings Law. Comm on Open Gov't OML-AO-3174.

Public body, such as planning board, may validly conduct meeting or carry out its authority only at meeting during which majority of its members has physically convened or during which majority has convened by means of videoconferencing, and even then, only when reasonable notice is given to all members. Comm on Open Gov't OML-AO-3732.

There is nothing in the Open Meetings Law that would preclude members of public body from conferring individually, by telephone, via mail or e-mail; however, series of communications

between individual members or telephone calls among members which results in collective decision, meeting held by means of telephone conference or series of telephone calls, or vote taken by mail or e-mail would be inconsistent with law. Comm on Open Gov't OML-AO-3732.

Meeting, i.e., "convening" of public body, involves physical coming together of at least majority of total membership of such body, i.e., Planning Board, or convening that occurs through videoconferencing. Comm on Open Gov't OML-AO-3732.

Amendments to Open Meetings Law clearly indicate that there are only 2 ways in which public body may validly conduct meeting; any other means of conducting meeting, i.e., by telephone, by mail, or by e-mail, would be inconsistent with law. Comm on Open Gov't OML-AO-3732.

Meeting, i.e., "convening" of public body, involves physical coming together of at least majority of total membership of such body, i.e., Board of Education, or convening that occurs through videoconferencing. Comm on Open Gov't OML-AO-4113.

It would not be unreasonable for isolated, seasonal coastal village to conduct meetings outside village boundaries where access to village is limited during parts of year, it is primarily seasonal community, and there is 25-year history of holding budget hearings at alternative location in nearby county in order to facilitate and maximize attendance and participation of as many residents as possible. Comm on Open Gov't OML-AO-4180.

II. "Meeting" Defined

4. In general

Any gathering of quorum of public body for purpose of conducting public business is "meeting" that must be convened open to public, whether or not there is intent to take action and regardless of manner in which gathering may be characterized. Comm on Open Gov't OML-AO-1394; Comm on Open Gov't FOIL-AO-4610.

If quorum of board convenes to discuss public business during gatherings, those gatherings would constitute "meetings" subject to Open Meetings Law. Comm on Open Gov't FOIL-AO-4686.

Any gathering of quorum of public body for purpose of conducting public business constitutes "meeting" subject to Open Meetings Law, whether or not there is intent to take action and irrespective of manner in which gathering may be characterized. Comm on Open Gov't FOIL-AO-4815.

"Meeting" involves situation where quorum of public body seeks to conduct business or deliberate as body and, conversely, hearing generally refers to situations in which members of public are given opportunity to express views, as in case of public hearing, or to situation in which person or entity seeks testimony from witness or interested parties or investigates in quasi-judicial manner. Comm on Open Gov't FOIL-AO-4916.

Meetings of boards of assessors are "meetings" subject to Open Meetings Law. Committee on Open Government OML-AO-1170. Meeting of budget director with committee of county legislature is subject to open meeting requirements so long as quorum of committee, in advance of gathering, intends to meet with budget director to discuss budget. Committee on Open Government OML-AO-1188.

If majority of board met after adjournment by design, to discuss public business, it would appear that such gathering constituted new "meeting" held in violation of OML; however if there was no intent to discuss public business as body, but merely brief conversation held while people were in process of leaving, it is doubtful that such gathering would constitute "meeting". Comm On Open Gov't OML-AO-1280.

Any gathering of quorum of public body for purpose of conducting business constitutes "meeting" subject to Open Meetings Law, even if there is no intent to take action and irrespective of manner in which gathering may be characterized; therefore, when quorum of budget commission meets to conduct public business, those gatherings are meetings, even though voting might not occur. Comm on Open Gov't OML-AO-1447.

"Meeting" means gathering of at least quorum of public body for purpose of discussing public business, regardless of whether any action is intended to be taken; all meetings must be preceded by notice and conducted open to public, unless and until executive session may be held to discuss one or more topics of discussion described in Open Meetings Law. Comm on Open Gov't OML-AO-1450.

Gathering of majority of public body in their capacities as board members, to discuss public business, constitutes "meeting" subject to Open Meetings Law. Comm on Open Gov't OML-AO-2191.

When quorum of board gathers to discuss public business, in their capacities as board members, any such gathering constitutes "meeting" subject to Open Meetings Law. Comm on Open Gov't OML-AO-2256.

Even though gathering might have been called by person or persons other than member of public body, it constitutes "meeting", assuming that quorum of public body is present for purpose of conducting public business. Comm on Open Gov't OML-AO-2280.

Open Meetings Law does not necessarily apply to hearing, and there is distinction between meeting and hearing. Comm on Open Gov't OML-AO-2307.

Nothing in Open Meetings Law refers to capacity of member of public body to participate in meeting through delegate or vote by "proxy"; member of public body cannot cast vote unless member is physically present at meeting of body. Comm on Open Gov't OML-AO-2488.

If majority of public body gathers to discuss public business, any such gathering ordinarily constitutes "meeting" subject to Open Meetings Law; however, in order to constitute valid meeting, all of members of public body must be given reasonable notice of meeting. Comm on Open Gov't OML-AO-2601.

"Extra meeting," during which quorum of town board is present for purpose of discussing or conducting public business, is meeting subject to Open Meetings Law in all respects. Comm on Open Gov't OML-AO-2726.

When public body or board gathers solely to consider matters exempt from Open Meetings Law, meeting need not be preceded by notice and there is no obligation to follow procedures applicable for entry into executive session. Comm on Open Gov't OML-AO-3506.

When majority of public body gathers to discuss public business, in their capacities as members of body, any such gathering would constitute "meeting" subject to Open Meetings Law. Comm on Open Gov't OML-AO-3709.

"Meeting" is different from "hearing," in that meeting is generally gathering of quorum of public body for purpose of discussion, deliberation, and potentially taking action within scope of its powers and duties, while hearing is generally held to provide members of public with opportunity to express their views concerning particular subject, such as proposed budget, local law or matter involving land use. Comm on Open Gov't OML-AO-3834.

"Hearings" are often required to be preceded by publication of legal notice while, in contrast, CLS Pub O § 104(3) of Open Meetings Law specifies that notice of "meeting" must merely be "given" to news media and posted; further, there is no requirement that newspaper, for example, publish notice given regarding meeting to be held under Open Meetings Law. Comm on Open Gov't OML-AO-3834.

"Meeting" of public body held in accordance with Open Meetings Law can only occur with presence of quorum; "hearing," on other hand, can be conducted without quorum present. Comm on Open Gov't OML-AO-3834.

5. "Civic" meetings; advisory ad hoc entities

Meetings of ad hoc citizens' advisory committee, held on school property for purpose of addressing concerns regarding proposed zoning variance, were meetings for "civic" purpose or purpose pertaining to "welfare" of community, and thus were required to be open to public under CLS Educ § 414 even though they did not involve public body or Open Meetings Law. Comm on Open Gov't OML-AO-2180.

Advisory ad hoc entities, other than committees consisting solely of members of public bodies, having no power to take final action fall outside scope of Open Meetings Law. Comm on Open Gov't OML-AO-2254.

Although town board is clearly "public body" required to comply with Open Meetings Law, citizens advisory body designated by board or supervisor does not fall within requirements of that statute; similarly, "round table meetings" between supervisor and

town employees is not subject to Open Meetings Law as no quorum of public body would be present. Comm on Open Gov't OML-AO-2583.

Gathering of 3 members of town board at meeting of senior citizen organization, which was also attended by group of developers who were interested in establishing landfill in town, did not constitute meeting subject to Open Meetings Law, where board member who was president of senior citizen organization had no role in arranging to have developers speak at meeting, and board members did not sit together or talk together. Comm on Open Gov't OML-AO-2740.

Gathering of 32 concerned residents, law enforcement personnel and clergy, along with members of town board and board of education, to discuss alcohol free event to be held for township students after upcoming prom, and to consider what community could do in response to alcohol-related deaths of 2 high school students, was not subject to Open Meetings Law since public and members of various boards did not meet for purposes of conducting public business as public body. Comm on Open Gov't OML-AO-3461.

6. Collective bargaining sessions

Yearly meetings between central school district and teachers association, pursuant to their collective bargaining agreement, are subject to Open Meetings Law and may not exclude public and school administration; provisions of collective bargaining agreement that restrict public access to meetings have no legal effect. Comm on Open Gov't OML-AO-2772.

7. Environmental "scoping" meetings

"Scoping meetings," held with town officials at request of Department of Environmental Conservation, were subject to provisions of Open Meetings Law inasmuch as quorum of town board was present for purpose of conducting public business. Comm on Open Gov't OML-AO-2177.

Even where gathering of town board is held at request of official of Department of Environmental Conservation, it would be meeting subject to Open Meetings Law, assuming that quorum of board was present for purpose of conducting public business. Comm on Open Gov't OML-AO-2374.

8. Informal or social meetings, generally

9. —Briefing, debriefing, planning sessions and the like

Meetings held, prior to time of actual scheduled meeting, to discuss public business in private is subject to Open Meeting Law. 1986 Committee on Open Government OML-AO-1334.

"Pre-meetings" held by county industrial development authority before every monthly board meeting, at which substantive discussions occurred and decisions were made, were "meetings" under Open Meetings Law, whether or not there was intent to have action, and therefore "pre-meeting" must be preceded by notice of time and place given to news media and posting under CLS Pub O § 104. Comm on Open Gov't OML-AO-2683.

Private meeting at country club, in which majority of board of education met to "go over" details of district business that was to be discussed at executive session on following day, constituted "meeting" under Open Meetings Law; however, if members of public body meet by chance or at social gathering, Open Meetings Law would not apply because there would be no intent to conduct public business, collectively, as body. Comm on Open Gov't OML-AO-2695.

"Goal-setting meeting" held by school board falls within coverage of Open Meetings Law, although it may be informal and there may be no votes or action taken, in that subject matter involves consideration of public business and development of public policy. Comm on Open Gov't OML-AO-2791.

Briefing, whose purpose was to provide news media with opportunity to raise questions and acquire background information prior to noticed meeting of library board of trustees concerning adoption of resolution involving capital proposition, was not "meeting" subject to Open Meetings Law where there was no intent that majority of board be present at briefings, and function of briefings did not involve board conducting public business collectively. Comm on Open Gov't OML-AO-3161.

If school board members attended "parent meeting" as parents and did not function or situate themselves as body, such gathering would not have constituted "meeting"; however, "briefing sessions" conducted with majority of public body present have been found to be "meetings" falling within coverage of Open Meetings Law. Comm on Open Gov't OML-AO-4121.

10. —Gatherings where food is served

If public body intends to gather for social event, such meeting would not be subject to Open Meetings Law even though public business may inadvertently be discussed; however, meeting of school board at restaurant for purpose of discussing renewal of school superintendent's contract was "meeting" subject to Law. Committee on Open Government OML-AO-1138.

Gathering of board members of private industry counsel at catering hall where luncheon is served constitutes "meeting" subject to Open Meetings Law, if quorum of board is present. 1986 Committee on Open Government OML-AO-1303.

Gathering of 4 members of town board at restaurant by invitation of developer constituted "meeting" falling within coverage of Open Meetings Law. Comm on Open Gov't OML-AO-4228.

11. —Press conferences

Press conference held by town supervisor, at which majority of town board was present, did not constitute meeting subject to Open Meetings Law since there was no intent on part of those present to conduct public business, collectively, as body. Comm on Open Gov't OML-AO-2279.

12. —Recess

If board holds recess for purpose of formulating wording of resolution concerning subject then on floor, then recess is itself meeting subject to OML. Comm On Open Gov't OML-AO-1227.

13. —Retreats

Retreat held by board of education constituted "meeting" that should have been open to public and preceded by notice, where agenda stated that focus of retreat was "roles and responsibilities of the President and Vice President (transition) and board committees"; any decisions made at such retreat were made in manner inconsistent with law. Comm on Open Gov't FOIL-AO-12213.

"Facilitated retreat" which is not intended to deal in any way with agency business, but rather is intended to build on team building and communication skills, is not subject to Open Meetings Law. Comm on Open Gov't OML-AO-2733.

Retreat conducted by board of education at site outside of school district boundaries was not meeting subject to Open Meetings Law, where purpose of retreat was to discuss inner workings of board and interpersonal relationships among board members, and no school business was conducted. Comm on Open Gov't OML-AO-2764.

"Retreat" conducted by school superintendent for board of education to set goals constituted meeting subject to Open Meetings. Comm on Open Gov't OML-AO-3152.

Board of education's privately conducted "retreat" was "meeting" that should have been held open to public where discussion at retreat involved "District goals" and consideration of district policies and procedures. Comm on Open Gov't OML-AO-3709.

"Retreat" conducted in private by board of education was a "meeting" that should have been open to public even if no action was taken, if it involved discussion of district goals and consideration of policies and procedures followed by board members before, during and after meetings. Comm on Open Gov't OML-AO-3709.

Two-day retreat conducted by Board of Education constituted meeting that fell within coverage of Open Meetings Law where topics considered at retreat included financial status of school district, district's capacity and demographics and variety of other matters. Comm on Open Gov't OML-AO-3787.

14. —Training sessions

State nursing board's annual "Education Day" was not subject to Open Meetings Law where it was held solely for purpose of educating and training board members, it was not intended to be official board meeting, board members did not conduct board business collectively as public body, no votes or other official or

public business were conducted, attendance was optional, and no quorum was required. Comm on Open Gov't OML-AO-2213.

If session is to be held solely for purpose of educating and training members of public body, and if members do not conduct business collectively as body, session does not constitute meeting of public body subject to Open Meetings Law. If "self-assessment" sessions are held to discuss interpersonal relations and similar matters, and if business of public body is not intended to arise and does not arise, those kinds of gatherings are not subject to Open Meetings Law. Comm on Open Gov't OML-AO-2294.

15. —Workshops, seminars and the like

"Seminar" conducted by school board to discuss informally in seminar-type situation policy and goals of city school district, which seminar would include board of education members and administrative staff only, would be "meeting" subject to requirements of Open Meetings Law, since discussion of "policy and goals" of school district could be equated with conducting a public business; further, such meeting should be held in location that would reasonably permit interest of members of public to attend. Committee on Open Government OML-AO-1096.

"Self-evaluation session" conducted by board of education, in which members talk about their relationship with each other as board members, who shall act as spokesperson, and need for confidentiality of matters taken in executive sessions, constitutes "meeting" which is subject to requirements of Open Meetings Law. Committee on Open Government OML-AO-1120.

Any gathering of quorum of public body held for purpose of conducting public business constitutes "meeting" subject to Open Meeting Law, whether or not there is intent to take action, and regardless of manner in which gathering may be characterized; work sessions and similar informal gatherings of public bodies in which there is intent to discuss, but no intent to take action falls within requirements of Open Meetings Law, assuming that quorum is present. 1986 Committee on Open Government OML-AO-1296.

So-called "work sessions" held by city council are "meetings", and must be preceded by notice given in accordance with Open Meetings Law. Comm on Open Gov't OML-AO-1357.

All meetings of public bodies must be conducted open to public, except to extent that executive sessions may be convened; meeting includes any gathering of forum of public body for purpose of conducting public business, whether or not there is intent to take action and regardless of manner in which gathering may be characterized; since "workshop" or "work session" is meeting subject to Open Meetings Law, public body is required to comply with requirements of Law, irrespective of its characterization of meeting. Comm on Open Gov't OML-AO-1462.

Town board's scheduled "workshop" meeting was subject to Open Meetings Law in all respects; however, in absence of motions, proposals, resolutions, or other matters on which votes were taken, minutes did not have to be prepared. Comm on Open Gov't OML-AO-2237.

School district's "workshop on the budget" constituted meeting subject to requirements of Open Meetings Law where board president called 2 other board members into back room for "private" meeting, soon thereafter 2 other board members joined them, board president then returned alone to announce that board was going into executive session and, after executive session, board indicated that it had reduced budget but offered no explanation; assuming that board consisted of 5 members, if gathering of 3 members (and later other 2 members) was held to discuss public business, so-called "private meeting" was itself "meeting" and, assuming that private session involved consideration of budget, it should have been conducted in public. Comm on Open Gov't OML-AO-2754.

There is no legal distinction between "meeting" and "workshop"; workshop held by majority of public body has same responsibilities as formal meeting in relation to notice and taking of minutes, as well as same ability to enter into executive sessions. Comm on Open Gov't OML-AO-3154.

Open Meetings Law clearly applies to twice-monthly town board "workshops," in which various issues and proposals are discussed. Comm on Open Gov't OML-AO-3749.

There is no legal distinction between "workshop" and "meeting" under Open Meetings Law; when majority of board convenes to discuss village business, any such gathering would constitute "meeting" subject to Open Meetings Law, even if it is characterized as "workshop." Comm on Open Gov't OML-AO-3812.

"Informal meeting" held by town board falls within requirements of Open Meetings Law, even though there is no intent to take action. Comm on Open Gov't FOIL-AO-1257.

Open Meetings Law did not apply to annual small social gathering hosted at applicant's house between City Council members and County Legislators who represented City districts if sole intent of gathering was to socialize. Comm on Open Gov't FOIL-AO-8583.

Meeting between school administrator and student or group of students, with other professional staff present, is not subject to Open Meetings Law, as such gathering does not consist of members of any particular public body. Comm on Open Gov't FOIL-AO-10289.

Gathering of members of public body characterized as "informal" meeting is nonetheless subject to Open Meetings Law where quorum is gathered for purpose of conducting public business. Committee on Open Government OML-AO-1036.

If there is no intent that majority of public body convene for purpose of conducting public business, even though majority may be present in single room, such gathering does not constitute meeting subject to requirements of Open Meetings Law; thus, if members of public body exchange pleasantries or engage in various tasks individually, rather than as body, their presence in room does not trigger application of Open Meetings Law or necessarily indicate that meeting is being held. Comm on Open Gov't OML-AO-2286.

Chance gathering or social function does not constitute meeting within meaning of Open Meetings Law since there would be no intent on part of those present to conduct public business, collectively, as body. Comm on Open Gov't OML-AO-2288.

When staff people gather, either among themselves, or perhaps with head of State agency and his or her staff, no public body is present, and Open Meetings Law is inapplicable. Comm on Open Gov't OML-AO-2400.

Open Meetings Law did not require that annual small social gathering hosted by city mayor at his house between city council members and county legislators who represented city districts be held open to public so long as sole intent of gathering was to socialize. Comm on Open Gov't OML-AO-2440.

Open Meetings Law does not pertain to question of whether officials and general public may be videotaped or recorded as they come into building prior to town board meeting because expectation that peoples' comments are fully public is not generally present when people are talking informally prior to start of meeting; however, town board may be authorized under CLS Town §§ 63 and 64 to restrict use of recording devices in meeting room before or after meetings, unless persons being recorded consent to being recorded. Comm on Open Gov't OML-AO-2689.

Informal gathering, at which 3 members of 5-member town board met to discuss choice of individual to fill vacant board position following death of one member, constituted meeting that should have been held in accordance with Open Meetings Law. Comm on Open Gov't OML-AO-2773.

If there is no intent that majority of public body will gather for purpose of conducting public business, but rather for purpose of gaining education, training, to develop or improve team building or communication skills, or to consider interpersonal relations, Open Meetings Law would not be applicable; in that event, if gathering is to be held solely for those purposes, and not to conduct or discuss matters of public business, and if members in fact do not conduct or intend to conduct public business collectively as body, activities occurring during that event would not in my view constitute meeting of public body subject to Open Meetings Law. Comm on Open Gov't OML-AO-3709.

If majority of public body is present at social gathering, and intent is indeed to socialize, their presence would not constitute "meeting" of public body. Comm on Open Gov't OML-AO-3787.

If majority of members of public body meet one another by chance, in "casual encounter," absent intent to conduct public

business, it is unlikely that Open Meetings Law would apply. Comm on Open Gov't OML-AO-3787.

Court would likely determine that series of exchanges among members of public body via "buddy list" using chat room or instant messaging would be "virtual meeting" and would constitute secret meeting held in contravention of Open Meetings Law. Comm on Open Gov't OML-AO-3787.

Even if copies of communications between 2 board members were sent via "listserv" to other members, there would be no instantaneous communication, and no virtual meeting; such communications would be equivalent to carbon copies, "cc's" of correspondence, distributed to members. Comm on Open Gov't OML-AO-3787.

Gathering held "behind closed doors" one hour prior to Board of Education's meeting was itself meeting that should have been preceded by notice and conducted open to public as required by Open Meetings Law, where subject of both meetings—contingency budget—was same. Comm on Open Gov't OML-AO-3860.

Gathering at home of Town Board member or any other similar gathering in which majority of Board discusses Town business would constitute "meeting" required to be conducted in accordance with Open Meetings Law. Comm on Open Gov't OML-AO-4035.

If sole purpose of gathering is social in nature, Open Meetings Law would not apply; however, if during social gathering, majority of members of public body begin to discuss business of that body, collectively as group, they should recognize that they are conducting public business without notice to public and immediately cease their discussion of public business. Comm on Open Gov't OML-AO-4261.

16. Political caucuses

To extent that majority of total membership of county committee on ways and means was present for purpose of conducting public business, such gathering could not have been characterized as political caucus exempt from provisions of Open Meetings Law, but rather as "meeting" that should have been open to public. Committee on Open Government OML-AO-1061.

Conferences or caucuses conducted by majority of members of either house of State Legislature for purpose of conducting public business would constitute "meetings" subject to Open Meetings Law; however, to extent that political party business is discussed during conferences or caucuses, such gatherings would fall outside scope of Law. Committee on Open Government OML-AO-1158.

Exemption contained in CLS Pub O § 108(2) concerning political caucuses applies to "the legislative body" of county, i.e., county legislature; it does not refer to committee of legislative body. Comm on Open Gov't OML-AO-2287.

Four Republican members of 5-member town board could meet and/or discuss matters of public business in private on ground that their gatherings or discussions constituted political caucuses, but action could be taken by board only at meeting held in accordance with Open Meetings Law, preceded by reasonable notice given to all board members, including lone Democrat. Comm on Open Gov't OML-AO-2749.

Either majority or minority party members of legislative body may conduct closed political caucuses during or separate from meetings of public body when discussing political party business, such as fund raising, party leadership, etc.; however, city council may not validly conduct closed political caucus to discuss matters of public business. Comm on Open Gov't OML-AO-3254.

Gathering of Democrat member, Republican member and Independent member of 5-member town board was "meeting" that should have been held in accordance with Open Meetings Law; because they belonged to more than one political party, gathering could not be characterized as political caucus. Comm on Open Gov't OML-AO-3328.

Political caucus by definition is restricted to members or adherents of single political party. Comm on Open Gov't OML-AO-4107.

Meeting of Republican and Democrat members of public board, in which majority of board would be present, would be "meeting" and would not be exempt from Open Meetings Law as political caucus, since caucus is restricted to members or adherents of single political party. Comm on Open Gov't OML-AO-4107.

In general, either majority or minority party members of legislative body may conduct closed political caucuses, either during or separate from meetings of public body. Comm on Open Gov't OML-AO-4149.

If there were gathering of Democrat members who served on city Common Council, Republican legislator could not be characterized as "guest" so as to bring meeting within political caucus exemption from Open Meetings Law. Comm on Open Gov't OML-AO-4149.

Where all members of town board are from single political party, majority of members of board may not validly conduct closed political caucus to discuss matters of public business; however, when members are discussing political party business (i.e., fund raising, party leadership, etc.), closed political caucus may be appropriately held. Comm on Open Gov't OML-AO-4177.

17. Quorum requirements, generally

18. —Participation by telephone or other mechanical devices

There is nothing in Open Meetings Law that would preclude members of public body from conferring by telephone, but series of telephone calls among members which resulted in decision, without benefit of meeting, would violate Law. Comm on Open Gov't OML-AO-1386.

Based upon terms of Open Meetings Law, board of municipal housing authority is public body subject to requirements of Law; there is nothing in Open Meetings Law that would preclude members of public body from conferring by telephone; however, series of telephone calls among members which results in decision, without benefit of meeting, would violate Law; public body cannot carry out its powers or duties except by means of affirmative vote of majority of its total membership taken at meeting duly held upon reasonable notice to all members, and, as such, public body has capacity to act, to vote, only during duly convened meetings; definition of "convene" requires assembly of group in order to constitute quorum of public body. Comm on Open Gov't OML-AO-1446.

There is nothing in Open Meetings Law that would preclude members of public body from conferring individually or by telephone; however, series of communications between individual members or telephone calls among members which results in decision or meeting held by means of telephone conference would be inconsistent with law. Comm on Open Gov't OML-AO-2256.

Open Meetings Law did not permit new concept called "Interactive Town Board Meetings" in which residents of town were encouraged to call in while watching town board live and in which they could speak at public hearings and express their views on town issues before town board vote; similarly, Open Meetings Law did not permit absent members of town's public bodies to use same system and to vote by telephone if they were unable to attend meeting because of health reasons or other emergencies. Comm on Open Gov't OML-AO-2430.

Open Meetings Law did not allow decisional meeting of Public Service Commission in Albany under circumstances in which 4 commission members were present in Albany, but one member of commission desires to participate in discussion and vote on matters considered at meeting by means of 2-way telephone link from New York City, despite fact that site from which commission sought to participate was open to public and that any discussion or vote could be heard by means of speakerphone hook-up by all persons present at both locations; Commissioner who sought to participate by phone could not validly vote or be counted for purposes of quorum. Comm on Open Gov't OML-AO-2480.

Vote conducted by board of education by e-mail, for purpose of giving certain employees day off at full pay without charging leave time, was inconsistent with Open Meetings Law; newly enacted provisions concerning videoconferencing clearly indicate that public bodies may validly conduct meetings only at meetings during which quorum has physically convened, or during meeting held by videoconference. Comm on Open Gov't OML-AO-3257.

Open Meetings Law was violated when town supervisor directed his secretary to poll town board by phone for authorization to pay $4700 billed for services rendered on dredging of boat

launch; members of public body cannot lawfully vote by phone, mail or e-mail. Comm on Open Gov't OML-AO-3479.

Public body may not take action or vote by means of telephone calls or e-mail, since such action or vote would violate quorum requirements of CLS Gen Const § 41. Comm on Open Gov't OML-AO-3732.

Public body may not take action or vote by means of e-mail, telephone conference, or series of telephone conversations. Comm on Open Gov't OML-AO-3787.

Holding "eMeeting" in chat room, even with public notice, would be inconsistent with Open Meetings Law. Comm on Open Gov't OML-AO-3928.

Public body may not take action or vote by means of series of telephone calls or, for example, by e-mail. Comm on Open Gov't OML-AO-4113.

School board's collective determination—based on telephone calls from school superintendent in which he apparently solicited responses from school board members concerning salary range offered for new position—as to what salary range should be, should have occurred during open meeting held in accordance with provisions of Open Meetings Law; because decision to offer certain salary range was made, such action should be memorialized in minutes. Comm on Open Gov't OML-AO-4113.

Town board may not take action by means of series of phone contacts or through voting by phone. Comm on Open Gov't OML-AO-4177.

Although resident who wishes to observe village proceedings via telephone would not be prohibited from doing so, village board member's participation by telephone would not be sufficient for attendance and/or voting purposes. Comm on Open Gov't OML-AO-4180.

"Quorum" consists of majority of total membership of body for purpose of Open Meetings Law; thus, if, for example, school board consists of 7, its quorum would be 4, and in case of committee consisting of 3, quorum would be 2. Comm on Open Gov't FOIL-AO-12405.

Meetings held by an association of government representatives, such as mayors of each village located in particular town, is not subject to Open Meeting Law, as, although conference represents forum during which common issues or problems may be discussed or shared, there is no quorum of any particular public body present and activities of conference are in no way binding upon participant villages and conference does not in any way conduct public business collectively, but is merely vehicle for exchanging ideas. 1986 Committee on Open Government OML-AO-1353.

Public body cannot carry out its powers or duties except by means of affirmative vote of majority of its total membership taken at meeting duly held upon reasonable notice to all of members; as such, public body has capacity to act only during duly convened meetings. Comm on Open Gov't OML-AO-1426.

Public body is permitted to perform and exercise its duties only at meeting conducted by quorum of body, majority of its total membership, and only by means of affirmative vote of majority of its total membership. Comm on Open Gov't OML-AO-1433.

"Meeting" subject to Open Meetings Law does not occur unless quorum of public body has convened for purpose of conducting public business. Comm on Open Gov't OML-AO-2343.

Open Meetings Law applies only if quorum is present; even when meeting is scheduled and reasonable notice is given to all members, but less than majority attends, gathering does not constitute "meeting" and public has no right to attend. Comm on Open Gov't OML-AO-2489.

Member of town board, in his capacity as citizen, had right to attend public gathering despite concerns that his presence created quorum of town board; even if quorum happened to be present, Open Meetings Law would not apply because there was no intent to conduct public business collectively Comm on Open Gov't OML-AO-3162.

Open Meetings Law applied when 4 members of 7-member committee created by 20-member Fulton County Board of Supervisors met to discuss committee business, although total weighted vote for entire board was 551, quorum of board would presumably involve gathering of members representing 276 weighted votes, and group of 7 supervisors in question had weighted vote of only 168, since committee consisting solely of members of board was "public body," and 4 members constituted quorum of committee. Comm on Open Gov't OML-AO-3434.

Gathering of 6 of 13 members of county legislature for joint press announcement of their intent to have county financially support EMS (emergency medical services) did not violate Open Meetings Law, since no quorum was present, and no action could have been taken; group merely offered its proposal and expressed its intention. Comm on Open Gov't OML-AO-3675.

When there is intent to evade application of Open Meetings Law by ensuring that less than quorum is present, and, by design, series of gatherings each consisting of less than quorum occurs to discuss public business, such action would represent failure to comply with statute. Comm on Open Gov't OML-AO-3787.

Conversation or exchange of questions or information between or among less than majority of public body does not implicate Open Meetings Law. Comm on Open Gov't OML-AO-3787.

"Meeting" of public body held in accordance with Open Meetings Law can only occur with presence of quorum; "hearing," on other hand, can be conducted without quorum present. Comm on Open Gov't OML-AO-3834.

County legislature's quorum rule is inconsistent with CLS Gen Const § 41 where rule states that "all voting shall be decided by a majority of those present and voting," while § 41 states that "not less than a majority of the whole number may perform and exercise such power, authority or duty." Comm on Open Gov't OML-AO-3989.

Even when meeting is scheduled and reasonable notice is given to all members of public body in manner consistent with requirements of CLS Gen Const § 41, but less than majority attends, gathering would not constitute "meeting" and public would have no right to attend. Comm on Open Gov't OML-AO-4067.

When there is intent to evade Open Meetings Law by ensuring that less than quorum is present, such intent would violate Open Meetings Law. Comm on Open Gov't OML-AO-4067.

19. Tours, inspections, visits and the like

Inspection of school buildings by quorum of school board for purpose of considering building committee report constitutes gathering held to conduct public business and, therefore, would be "meeting" subject to Open Meetings Law. Committee on Open Government OML-AO-1154.

Site visit or tour by public body, particularly on private property, does not constitute meeting subject to Open Meetings Law; however, site visits or tours by public bodies should be conducted solely for purpose of observation and acquiring information, and any discussions or deliberations regarding such observations should occur in public during meetings conducted in accordance with Open Meetings Law. Comm on Open Gov't OML-AO-2578.

Open Meetings Law did not apply to gathering of 4 members of town board at home of person whose property was subject of pending zoning change, where board members met to view site of proposed zoning amendment, news media was invited, and no discussion of town business occurred. Comm on Open Gov't OML-AO-3144.

Site visit or tour by public body, particularly on private property, would apparently not constitute "meeting"; however, site visits or tours should be conducted solely to observe and acquire information, and any ensuing discussions or deliberations should occur in public at meeting conducted in accordance with Open Meetings Law. Comm on Open Gov't OML-AO-3179.

Town planning board's site visits, whose purpose was to "get a better understanding" of sites at issue, would likely fall outside coverage of Open Meetings Law insofar as such visits were educational in nature, no planning board business was conducted, and any discussion concerning board members' observations only occurred in open meetings. Comm on Open Gov't OML-AO-3560.

20. Volunteer boards

Pursuant to CLS Educ § 260-a, meetings of boards of trustees of various libraries, including public libraries, must be conducted in accordance with Open Meetings Law. Comm on Open Gov't OML-AO-2196.

"Candidates forum" traditionally sponsored by community organizations, during which candidates for board of education and library board of trustees expressed their views in response to

questions by members of community, did not constitute meetings of public body, and thus Open Meetings Law did not apply. Comm on Open Gov't OML-AO-2241.

If quorum of either village board of trustees or board of volunteer fire company convenes to conduct public business, gathering is subject to Open Meetings Law; further, if quorum of both entities convened jointly, conclusion is same. Comm on Open Gov't OML-AO-2308.

21. Other and miscellaneous

Gathering during which zoning board of appeals acts with regard to application for variance was meeting subject to Open Meetings Law. Comm on Open Gov't FOIL-AO-4717.

Industrial development authority's amendment to its by-laws, permitting meetings to be held and decisions to be made by telephone or teleconference, was inconsistent with Open Meetings Law; common definition of "meeting" involves physical coming together of majority (or more) of total membership of public body, and public's right to observe performance of public officials in their deliberations (CLS Pub O § 100) cannot be realized if members of public body conduct business or vote by phone. Comm on Open Gov't FOIL-AO-9778.

Negotiation meetings taking place between 2 public bodies to reach agreement concerning newly-formed water district constitute "meetings" subject to Open Meetings Law requirement of notice. Committee on Open Government OML-AO-1044.

Meeting of county board of health to discuss proposal for review of county's clean indoor air act is "meeting" under Open Meetings Law that should have been opened to public and proceeded by notice. Committee on Open Government OML-AO-1057.

Meeting of quorum of school board to view film for purpose of later determining whether or not film should be shown to students, constitutes "meeting" within requirements of Open Meetings Law. Committee on Open Government OML-AO-1155.

Meeting generally involves gathering of public body for purpose of discussing public business; hearing usually pertains to situation in which members of public may express their views concerning particular subject, such as proposed ordinance. Comm on Open Gov't OML-AO-1415.

If quorum of village board of trustees met to engage in negotiations, in their capacities as board members, the gathering would constitute "meeting" subject to Open Meetings Law, regardless of who "asked for meeting;" every meeting of public body must be preceded by notice of time and place of meeting. Comm on Open Gov't OML-AO-1445.

Committee meetings held pursuant to regulation promulgated by Commissioner of Education, which requires boards of education to develop "shared decision making" plans "in collaboration with a committee" consisting of various persons, fall within scope of Open Meetings Law, although such committees do not have ability to make determinations, since they conduct public business and perform necessary and integral governmental function in development of shared decision-making plans. Comm on Open Gov't OML-AO-2204.

Where president of board of education asked 2 members of board to review several recommended financial policies and bring back their suggestions to full board and where those 2 members had no authority and were asked to study issue in order to facilitate process more quickly, members chosen to carry out study were not required do so in accordance with Open Meetings Law. Comm on Open Gov't OML-AO-2431.

Open Meetings Law is not triggered until quorum of public body convenes for purpose of conducting public business collectively as body; thus, Open Meetings Law would not apply to mediation session between 4 of 9 members of school board and several members of public since meeting would not involve quorum of school board; further, contrary result would not be required if other board members attended in their capacity as private citizens since they would not be participating in mediation. Comm on Open Gov't OML-AO-2614.

Meeting between 2 current school board members and 2 candidates who had just won election but were not yet sworn into office did not violate Open meetings Law assuming that board consisted of more than 3 members, because persons who have been elected but who have not been sworn into office are not yet members of board and, absent majority of current board, Open Meetings Law did not apply. Comm on Open Gov't OML-AO-2699.

Open Meetings Law did not apply to meeting called by town supervisor to discuss possibility of road widening, where 4 of 7 members of town board were present in audience among other members of public who attended, but they did not function collectively as public body or board. Comm on Open Gov't OML-AO-3298.

If attorney, as representative of board of education, meets with officials of another school district to discuss tuition negotiations, and quorum of board is not present, Open Meetings Law does not apply. Comm on Open Gov't OML-AO-3324.

Even when there is no basis to conduct executive session under CLS Pub O § 105, private discussion between board of education and its attorney may be valid based on proper assertion of attorney-client privilege when legal advice is requested, even if litigation is not involved; however, authority to assert attorney-client privilege under CLS Pub O § 108 is narrow. Comm on Open Gov't OML-AO-3324.

Workshop or work session held by majority of public body is "meeting," with same responsibilities in relation to openness, notice and taking of minutes as in case of formal meeting, as well as same ability to enter into executive sessions. Comm on Open Gov't OML-AO-3403.

If city planning commission made e-mail communications via listserve or other means through which members of commission and members of public, received them at different times, and there was no instantaneous or simultaneous communication, that circumstance would be equivalent to transmission of inter-office memoranda, and Open Meetings Law would not be implicated. Comm on Open Gov't OML-AO-3447.

Board of education could continue its practice whereby all 9 board members, but no more than 3 members at one time, would meet privately over course of several days with superintendent of schools, business officials, and/or administrative staff to discuss tentative budget prior to its presentation at public meeting, unless board's practice was designed to circumvent Open Meetings Law. Comm on Open Gov't OML-AO-3452.

If notice requirement of CLS Gen Const § 41 does not occur, even if majority is present, valid meeting could not be held or action could not validly be taken. Comm on Open Gov't OML-AO-3732.

If member of board having particular interest or expertise offers information in writing to other members, by means of intra-agency memorandum or perhaps via e-mail, it could not be concluded that such action, by itself, would constitute "meeting," even if it leads to responses by other members. Comm on Open Gov't OML-AO-3787.

Presence of 3 members of Town Board at meeting of board's cell tower committee would not subject meeting to Open Meetings Law if board members did not function as board but were merely part of audience as attendees at meeting. Comm on Open Gov't OML-AO-3887.

Public body may not take action or vote by means of members signing letter at different times. Comm on Open Gov't OML-AO-3899.

If majority of school board committee met to conduct meeting of committee, and 2 other board members attended meeting by sitting in audience as observers, such gathering would have constituted meeting of committee, but not meeting of board; on other hand, if 2 or more members joined committee "at the same table" to discuss school district business, such gathering of that nature would have been meeting of board. Comm on Open Gov't OML-AO-4057.

School board members who attended "parent meetings" and may have discussed board business with superintendent would not be deemed to be attending "meeting" where, for most part, members just listened to parent concerns and superintendent's responses to those concerns, and did not function as body. Comm on Open Gov't OML-AO-4113.

Absence of verbal deliberation would not necessarily remove gathering from coverage of Open Meetings Law. Comm on Open Gov't OML-AO-4113.

"Community forum meeting" held by board of education is different from meeting of public body, and both are different from

public hearing; "community forum meeting" is similar to public hearing, due to its purpose, but unlike public hearing, is not prescribed by law. Comm on Open Gov't OML-AO-4141.

When majority of city's Common Council is present to discuss city business, such gathering would ordinarily constitute "meeting" subject to Open Meetings Law, unless meeting or portion thereof is exempt from law. Comm on Open Gov't OML-AO-4149.

Gathering of town board members constituted "meeting" where it involved matter of public business, i.e., authority of board to fill vacancy in public office. Comm on Open Gov't OML-AO-4177.

Six school board members may have taken action in manner that contravened requirements of Open Meetings Law, where they determined to prepare and approve letter—signed at different times—criticizing seventh member for disclosing allegedly confidential matters; majority's actions represented more serious lapse than that which was subject of their underlying disapproval of seventh member. Comm on Open Gov't OML-AO-4192.

When jury charged with selecting plan for memorial at World Trade Center site met, on particular date, with city mayor, state governor, and former city mayor, such meeting should have been open to public. Comm on Open Gov't OML-AO-4200.

III. "Public Body" Defined

22. In general

If hearing is conducted by hearing officer, no public body would be involved and Open Meetings Law would not be applicable. Comm on Open Gov't FOIL-AO-4787.

"Public body" refer not only to governing body, but also to committees, subcommittees or smaller bodies of such body. "Public body" refers not only to governing body, such as town board, but also to committees, subcommittees or similar bodies of such body; therefore, requirements of Open Meetings Law apply to town board, as well as any committees or subcommittees that it may designate. Comm on Open Gov't FOIL-AO-4815.

Any entity consisting of 2 or more members of public body, such as committee or subcommittee consisting of members of ethics board, falls within requirements of Open Meetings Law, assuming that committee discusses or conducts public business collectively as body. Comm on Open Gov't FOIL-AO-9522.

When committee is subject to Open Meetings Law, it has same obligations regarding notice and openness, for example, as well as same authority to conduct executive sessions, as governing body. Comm on Open Gov't FOIL-AO-12405.

A committee of the Senate or the Assembly is a "public body". Comm on Open Gov't OML-AO-887.

City Common Council is public body, and commissions to which liaisons have been appointed are also public bodies; however, City Common Council and commissions are separate and distinct, and liaisons are not members of commissions; only members of commission, which would be public body conducting meeting, have right to attend executive sessions held by commission. Comm on Open Gov't OML-AO-1455.

When committee consists solely of members of public body, such as county board of supervisors, Open Meetings Law is applicable. Any entity consisting of 2 or more members of public body, such committee of county board of supervisors, would fall within requirements of Open Meetings Law, assuming that committee discusses or conducts public business collectively as body. Comm on Open Gov't OML-AO-2267.

When committee is subject to Open Meetings Law, it has same obligations regarding notice and openness, for example, as well as same authority to conduct executive sessions, as governing body. Comm on Open Gov't OML-AO-2287.

If committee is not public body subject to Open Meetings Law, it is also not "agency" for purposes of Freedom of Information Law. Comm on Open Gov't OML-AO-2300.

Staff of agency does not constitute public body and, therefore, meeting of staff of agency is not subject to Open Meetings Law. Comm on Open Gov't OML-AO-2399.

Where agency falls within scope of Freedom of Information Law, its board constitutes "public body" for purposes of Open Meetings Law. Comm on Open Gov't OML-AO-2590.

Open Meetings Law would not apply to gathering of persons newly elected to board of education who had not yet become members of board. Comm on Open Gov't OML-AO-4261.

Open Meetings Law applies not only to governing body, such as county legislature, but also to committee or subcommittee of such public body. Comm on Open Gov't OML-AO-1396,4638.

Open Meetings Law applies to meetings of public bodies, not only to governing bodies, but also to committees and subcommittees designated by governing body. Comm on Open Gov't OML-AO-1402,4677.

23. Advisory entities

Advisory body designated by mayor or by governing body, is "public body" that falls within scope of Open Meetings Law. Comm on Open Gov't FOIL-AO-1258.

If advisory commissions were created by town resolution, it would be likely that they were not agencies; on other hand, if commission were created by local law, for example, and performs necessary function in decision-making process, it would be subject to Open Meetings Law as "public body" and would constitute "agency" subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-12641.

An advisory committee created by a county legislature which is composed largely of members of the public constitutes a "public body" subject to the Open Meetings Law. Comm on Open Gov't OML-AO-865.

Steering committee established by town to handle issues related to a planned power plant is a public body for purposes of the Open Meetings Law, notwithstanding that it serves in an advisory capacity. Comm on Open Govt OML-AO 943.

School superintendent's "parents advisory committee" is "public body" subject to provisions of Open Meetings Law, despite fact that group has no policymaking capacity and is only advisory in nature. Committee on Open Government OML-AO-1114.

Committees, subcommittees and other advisory bodies are subject to requirements of Open Meetings Law and, as such, even though entity may have solely advisory authority or merely capacity to recommend, it would fall within requirements of Open Meetings Law; therefore, budget commission is public body and each of conditions found within definition of public body are met; because commission conducts public business and performs governmental function for public corporation it is "public body" and is subject to provisions of Open Meetings Law. Comm on Open Gov't OML-AO-1447.

"Charter Drafting Committee," appointed by Charter Commission and designated by County Board of Supervisors, constituted public body subject to Open Meetings Law, although its authority was advisory only, since it was authorized by CLS Mun H R § 33(5); when an advisory body is created by statute, such a body falls within requirements of Open Meetings Law. Comm on Open Gov't OML-AO-2181.

Education Subcommittee of Citizens Advisory Committee of New York/New Jersey Harbor Estuary Program (HEP) was not subject to Open Meetings Law since HEP was public/private partnership with representatives of federal agencies, New York and New Jersey state and municipal agencies, and interested persons who were not government employees. Comm on Open Gov't OML-AO-2361.

City charter commission created by city constitutes public body subject to Open Meetings Law, even though its authority may be advisory. Comm on Open Gov't OML-AO-2415.

Advisory body to board of education, such as citizens' advisory committee, is not subject to Open Meetings Law, even if member of board of education or administration participates. Comm on Open Gov't OML-AO-2588.

Court would likely hold that Long Island Railroad Commuter's Council, Metro-North Rail Commuter Council and New York City Transit Authority Advisory Council, albeit advisory in nature, are "public bodies" subject to Open Meetings Law, as they are created by statutes (CLS Pub A §§ 1204-a, 1266-d and 1266-e), they have statutory powers and duties, and they continue to exist until legislation that created them is repealed or amended. Comm on Open Gov't OML-AO-2752.

Health and safety committees created under commissioner's regulations perform governmental function, and thus are public bodies subject to Open Meetings Law, in that they carry out necessary functions in implementation of legislation and regulations, and schools in some contexts cannot act without first

having consulted with them. Volunteer "building level committees" formed within schools are not subject to Open Meetings Law insofar as they have no legal duty to carry out any function as part of decision making process. Comm on Open Gov't OML-AO-3167.

"Partners in Tourism," created by Tourism Subcommittee of Columbia County Board of Supervisors to foster discussion with local business community to discuss use and expenditure of county and state funds in tourism marketing, was not subject to Open Meetings Law to extent its functions were purely advisory and it had no decisionmaking authority. Comm on Open Gov't OML-AO-3396.

Advisory committee designated by Town Board to prepare proposed revisions to Town's zoning law does not constitute public body, and thus is not required to comply with Open Meetings Law, assuming that committee has no authority to take any final and binding action for or on behalf of Town. Comm on Open Gov't OML-AO-3858.

Advisory committee designated by Town Board to prepare proposed revisions to Town's zoning law may choose to conduct meetings in public, and similar entities have done so, even though Open Meetings Law does not require that they do so. Comm on Open Gov't OML-AO-3858.

Since Town Board has power to create advisory committee, it is implicit under CLS Town § 64(23) that Board has power to require that committee function in certain way, such as in accordance with Open Meetings Law. Comm on Open Gov't OML-AO-3858.

Town Board could by local law or rule require advisory committee to grant public access to its meetings in manner consistent with Open Meetings Law. Comm on Open Gov't OML-AO-3858.

24. Community planning and development, generally

25. —Industrial development agencies

The board of an industrial development agency is a "public body" for purposes of the Open Meetings Law. Comm on Open Govt OML-AO 910.

Saratoga County Industrial Development Agency constitutes "public body" subject to Open Meetings Law since it performs governmental function for public corporation; moreover, CLS Gen Mun § 890-h states that it is "a body corporate and politic," that its members "shall be appointed by the governing body of the county of Saratoga," and that it is governed by CLS Gen Mun Art 18-A. Comm on Open Gov't OML-AO-2233.

City of Glen Falls Industrial Development Agency is subject to Open Meetings Law. Comm on Open Gov't OML-AO-2569.

26. —Festival development corporations (FDCs)

Cattaraugus County Tourist Promotion Agency, Inc. (TPA) is not subject to either Freedom of Information (FOIL) or Open Meetings Laws; however, since those on its board of directors named by county participate by virtue of their positions in county government, any records that they produce or receive in connection with their functions for TPA constitute county records under FOIL. Comm on Open Gov't FOIL-AO-12,364.

Records of Festival Development Corporation (FDC), formed by town board and festival producers to handle town's portion of proceeds from music festival held in town, are subject to Freedom of Information Law, and meetings of FDC must be conducted in accordance with Open Meetings Law. Comm on Open Gov't FOIL-AO-10020.

Festival Development Corporation (FDC), formed by town board and festival producers to handle town's portion of proceeds from music festival held in town, was "agency" subject to Freedom of Information Law and "public body" subject to Open Meetings Law, where town supervisor was its chairman, and its board of trustees consisted of same persons as town board; although "agency" usually is entity of state or local government, FDC was entity for which quorum was required under Not-for-Profit Corporation Law, it had more than 2 members, and town exercised substantial control over it. Comm on Open Gov't OML-AO-2739.

Festival Development Corporation (FDC) which was created by town board initially to deal with Woodstock Festival, and FDC's board of directors which consisted of 5 members of town board, were subject to same requirements of Open Meetings and Freedom of Information Laws as town board itself, as FDC was essentially alter ego of town board when it voted to use proceeds from festival to build new town hall. Comm on Open Gov't OML-AO-3193.

27. —Local development corporations (LDCs)

Because 5 city officials serve as permanent members of Auburn Local Development Corporation (LDC), it is clear that City of Auburn exercises substantial control over LDC, and LDC constitutes "agency" required to comply with Freedom of Information Law; further, its board constitutes "public body" under Open Meetings Law. Comm on Open Gov't FOIL-AO-10198.

Board of local development corporation would be deemed "public body" for purposes of Open Meetings Law where (1) it was entity for which quorum was required pursuant to provisions of Not-for-Profit Corporation Law, (2) it consisted of more than 2 members, and (3) based on language of CLS N-PCL § 1411(a), it conducted public business and performed governmental function for public corporation (city). Comm on Open Gov't FOIL-AO-12386.

Local development corporation is "public body" subject to requirements of open meetings law since quorum is required, board consists of more than 2 members, and board conducts public business and performs governmental function for more than one corporation. Committee on Open Government OML-AO-1028.

County community development corporation, which is local development corporation, is "public body" within meaning of CLS Pub O § 102(2). Committee on Open Government OML-AO-1134.

Not-for-profit "Local Development Corporation" performed governmental function and was subject to Open Meetings Law and Freedom of Information Law, where 5 of its 9 permanent members were city officials (mayor, city manager, corporation counsel, comptroller, and chairman of Industrial Development Agency). Comm on Open Gov't OML-AO-2774.

Despite amendment to certificate of local recreation development corporation, which was intended to reduce number of city officials and designees on its board of directors so that they no longer comprised majority of board, many of corporation's records remained subject to Freedom of Information Law, and its meetings arguably remained subject to Open Meetings Law. Comm on Open Gov't OML-AO-3234.

Carthage Industrial Development Corporation (local development corporation) would constitute "public body" required to comply with Open Meetings Law since it is entity for which quorum is required under Not-for-Profit Corporation Law, it consists of more than 2 members, and it conducts public business and performs governmental function for several public corporations, including 2 villages, town, county, public authority and industrial development agency. Comm on Open Gov't OML-AO-4267.

Community board is "public body" subject to Open Meetings Law in all respects; also, if youth committee is committee of community board, and since definition of "public body" includes committees of public body, youth committee is required to prepare and disclose minutes of its meetings and its records are subject to rights granted by Freedom of Information Law. Comm on Open Gov't FOIL-AO-4748.

Woodstock Public Access Committee is public body required to comply with Open Meetings Law and its records are subject to Freedom of Information Law since 5 members of committee are appointed by town board, and chair of committee and station manager are also appointed by town board. Comm on Open Gov't FOIL-AO-9236.

A community development corporation is a "public body", even though it may be a not-for-profit corporation. Comm on Open Gov't OML-AO-883.

Not-for-profit corporations are subject to Open Meetings Law where relationship between corporation and government includes conduct of public business and designation of corporation to perform governmental function. Committee on Open Government OML-AO-1046.

Designated community action agency may be considered "public body" subject to Open Meetings Law notwithstanding fact that agency may be not-for-profit corporation; not-for-profit corporations are subject to Open Meetings Law where relationship

between corporation and government includes conduct of public business and designation of corporation to perform governmental function. Committee on Open Government OML-AO-1046.

City board of architectural review is public body required to comply with Open Meetings Law; board is not entitled to conduct executive sessions to discuss each application for building permit. Committee on Open Government OML-AO-1108.

Subcommittee to which town board delegated authority of town planning board is "public body" subject to requirements of Open Meetings Law in all respects, and fact that subcommittee merely makes recommendations does not necessarily remove subcommittee from requirements of law. 1986 Committee on Open Government OML-AO-1348.

City Urban Renewal Agency, Common Council, and Planning Board are clearly public bodies required to comply with Open Meetings Law. Comm on Open Gov't OML-AO-1356.

Board of directors of private, not-for-profit entity is not "public body", for purposes of Open Meetings Law. Comm on Open Gov't OML-AO-1359.

Regional committee of community board is "public body" required to comply with Open Meetings Law and based upon subject matter which committee reviews, those deliberations should be conducted open to public. Comm on Open Gov't OML-AO-1439.

Historical society, which was operated as private tax-exempt not-for-profit corporation, was not "public body" subject to Open Meetings Law since it did not conduct "public business" or perform "governmental function"; furthermore, historical societies are "type B" not-for-profit corporations under CLS N-PCL § 1408, and visitation and inspection of premises and records of such corporations are conferred only on Supreme Court Justice under CLS N-PCL § 114. Comm on Open Gov't OML-AO-2217.

Local planning board constitutes public body required to comply with Open Meetings Law. Comm on Open Gov't OML-AO-2266.

Woodstock Public Access Committee is public body required to comply with Open Meetings Law and its records are subject to Freedom of Information Law since 5 members of committee are appointed by town board and chair of committee and station manager are also appointed by Town Board and, moreover, committee is obligated by plan for operation of Woodstock Public Access Station to conduct its meetings under requirements of Open Meetings Law. Comm on Open Gov't OML-AO-2552.

If entity is district corporation or public benefit corporation, it constitutes "public corporation" that falls within coverage of Freedom of Information Law and Open Meetings Law. Comm on Open Gov't OML-AO-2598.

Fort Totten Redevelopment Authority was not subject to Open Meetings Law. Comm on Open Gov't OML-AO-2603.

Community action agencies created by means of authority conferred by Economic Opportunity Act of 1964 are public bodies subject to Open Meetings Law since they perform their duties for state or at least one public corporation. Although it is unclear whether Freedom of Information Law and Open Meetings Law apply to records and meetings of community action agency, language of federal enabling legislation indicates intent that community action agency be accountable by offering reasonable public access to proceedings and records. Comm on Open Gov't OML-AO-2613.

"Unofficial Steering Committee" consisting of leaders of county legislature who meet with county manager, county attorney and other "high ranking bureaucrats" on weekly basis, insofar as it is not created by any action of county legislature, does not constitute "public body" subject to Open Meetings Law. Comm on Open Gov't OML-AO-3128.

Special District Operations and Development Committee for City of Syracuse, whose members are designated solely by mayor, is "alter ego" of not-for-profit corporation known as "Downtown Committee of Syracuse, Inc." which represents all property owners and tenants in city's central business district; thus, Downtown Committee is required to conduct its meetings in accordance with Open Meetings Law and must disclose records maintained by it as custodian for city in accordance with the Freedom of Information Law. Comm on Open Gov't OML-AO-3145.

District service cabinets created by New York City Charter § 2705 are not subject to Open Meetings Law insofar as their membership is flexible and depends on nature of issues that arise, no motions are made in meetings and no actions are taken and, while various reports and comments relating to local community may be made during meetings, persons attending do not function collectively as "a body." Comm on Open Gov't OML-AO-3440.

"Special board" created under CLS Vill § 7-722 constitutes "public body" required to comply with Open Meetings Law in same manner as Village Board of Trustees. Comm on Open Gov't OML-AO-3841.

Board of Roosevelt Island Operating Corporation (RIOC) is public body required to comply with Open Meetings Law, since according to CLS Unconsol Ch 196 § 3, RIOC "shall be a body corporate and politic constituting a public benefit corporation and a political subdivision of the state of New York," and public benefit corporation is type of public corporation. Comm on Open Gov't OML-AO-4190.

Assuming that at least 5 members of Roosevelt Island Operating Corporation (RIOC) Board gather with Residents Association or any other person or group for purpose of discussing matters within jurisdiction of RIOC, collectively, as body, such gathering would constitute meeting that must be conducted in accordance with Open Meetings Law. Comm on Open Gov't OML-AO-4190.

28. Courts; court employees

Meetings of Board of Directors of Rochester Area School Health Plan (RASHP) Consortium fall within coverage of Open Meetings Law, since board carries out its duties in accordance with authority conferred by CLS Gen Mun Art 5-G and CLS Ins Art 47. Comm on Open Gov't OML-AO-4183.

29. Education, generally

30. —City University of New York (CUNY)

Board of Visitors of City University of New York Law School at Queens College is advisory committee not subject to Open Meetings Law. Comm on Open Gov't OML-AO-2292.

Personnel and budget committees created under bylaws of City University of New York must comply with both Freedom of Information and Open Meetings Laws, although much of their deliberative process may be conducted in executive session under CLS Pub O § 105(1)(f) and their recommendations could likely be withheld in great measure under CLS Pub O § 87(2)(g). Comm on Open Gov't OML-AO-3195.

Research Foundation of City University of New York is "public body" subject to Open Meetings Law; foundation, which administers all grants and contracts awarded to CUNY faculty and staff for research, training, education and services pursuant to state-approved agreement with CUNY, is entity for which quorum is required, it would not exist but for its relationship with CUNY, it carries out various functions that CUNY would otherwise perform, and majority of 17 members on its board of directors are CUNY officials or organizations. Comm on Open Gov't OML-AO-3398.

31. —Community colleges

Student government association of community college is "public body" subject to Open Meetings Law. Committee on Open Government OML-AO-1097.

Onondaga Student Services Association, Inc., formed as not-for-profit corporation to administer funding from student fees for student activities at Onandaga Community College, was public body whose board of directors, which consisted of faculty, students and administrators, was required to conduct meetings in accordance with Open Meetings Law. Comm on Open Gov't OML-AO-3557.

32. —Local school districts; boards of education

Board of education is public body under Open Meetings Law; further, meeting is official convening of public body for purpose of conducting public business and as such when quorum of public body, such as school board, meets for purpose of conducting public business, such gathering constitutes meeting subject to Open Meetings Law; open meetings law provides that public may attend meetings of public bodies, except to extent that executive session may be convened. Board of education is public body under

Open Meetings Law; further, meeting is official convening of public body for purpose of conducting public business and as such when quorum of public body, such as school board, meets for purpose of conducting public business, such gathering constitutes meeting subject to Open Meetings Law. Comm on Open Gov't OML-AO-1422-1423, and 1427.

Definition of "public body" includes any entity that conducts public business, including entity designated or created to serve as body by a school board or any other public body; committees designated by school board are public bodies subject to open meetings law. Committee on Open Government FOIL-AO-1202.

Although county school board association and its board might discuss matters relating to public business, it does not conduct public business or perform governmental function and therefore, is not "public body" subject to Open Meetings Law. Comm on Open Gov't FOIL-AO-4767.

If majority of board of education gathers to discuss school district business, in their capacities as board members, any such gathering would constitute "meeting" subject to Open Meetings Law; in related vein, if issue involves or requires action taken by board of education, such action may be taken only at meeting of board. Comm on Open Gov't FOIL-AO-8541.

Open Meetings Law is applicable to meetings of subcommittees of school board, when committee or subcommittee consists solely of members of public body, such as board, and consists of 2 or more members. Comm on Open Gov't FOIL-AO-12405.

Committees which operate within community school district, which have one member of school board as chair and which advise board constitute "public bodies" and are subject to Open Meetings Law. Committee on Open Government OML-AO-1031.

If survey task force that was designated and created by board of education conducts public business and performs governmental function for school district, it complies with definition of "public body" and is subject to provisions of Open Meetings Law. Comm on Open Gov't OML-AO-1438.

Any committee of board of education or designated by board of education is "public body" subject to Open Meetings Law; these committees conduct public business and perform governmental function for public corporation, school district; therefore, standing committee of board of education meets definition of "public body and is thus subject to provisions of Open Meetings Law; committee designated by teachers' association would not constitute public body because such association is public employee union outside requirements of Open Meetings Law. Comm on Open Gov't OML-AO-1444.

Standing committee consisting solely of members of board of education constitutes public body subject to Open Meetings Law since current definition of "public body" in CLS Pub O § 102(2) makes reference to entities that "conduct" public business and specifically refers to "committee, subcommittees and similar bodies" of public body. Citizens' advisory committee established by board of education was not subject to Open Meetings Law where it did not involve exercise of sovereign powers; however, where board adopted rule or policy less restrictive with respect to public access than Open Meetings Law, such rule or policy was effective notwithstanding provisions of Open Meetings Law. Comm on Open Gov't OML-AO-2175.

Standing committee of members of board of education constitutes public body subject to Open Meetings Law that is separate and distinct from board of education. Comm on Open Gov't OML-AO-2417.

Advisory body to board of education, such as citizens' advisory committee, is not subject to Open Meetings Law, even if member of board of education or administration participates. Comm on Open Gov't OML-AO-2588.

District Review Panel created by Board of Regents as result of special legislation based on Regents' determination that deficiencies existed in Roosevelt Union Free School District that merited "immediate corrective action" was subject to Open Meetings Law since Panel, depending upon its role at particular time, could function either as advisory body or as governing body and, in either case, it performed necessary and integral function in implementation of special legislation. Comm on Open Gov't OML-AO-2607.

Central School District or building level shared decisionmaking teams perform governmental function and are subject to Open Meetings Law, where district's shared decisionmaking plan cannot be adopted without their "collaboration" and participation. Comm on Open Gov't OML-AO-3329.

33. —State University of New York (SUNY)

Executive Committee of Faculty Senate of State University at Buffalo bears each of characteristics necessary to conclude that it is "public body" subject to Open Meetings Law. Comm on Open Gov't OML-AO-1372.

If student association performs function for State University of New York, that would, but for existence of association, be performed by State University of New York, that student association is public body which conducts public business and performs governmental function for State University of New York. Comm on Open Gov't OML-AO-1442.

Brockport Student Government at SUNY College at Brockport is public body subject to Open Meetings Law. Comm on Open Gov't OML-AO-2599.

Teacher resource and computer training center has characteristics necessary to determine that it is "public body" because it is entity consisting of at least two members, it conducts business and performs governmental functions and those functions are carried out for one or more public corporations; as such, it is "public body" required to comply with Open Meetings Law. Comm on Open Gov't FOIL-AO-4855.

Not-for-profit corporation that contracts with SUNY/Albany to carry out variety of functions, including operation of food service, campus bookstore and beverage vending, is required to comply with both Freedom of Information Law and Open Meetings Law. Comm on Open Gov't FOIL-AO-13068.

Research Foundation of City University of New York is subject to Freedom of Information Law and Open Meetings Law, even though foundation regards itself as private corporation under contract to university. Comm on Open Gov't FOIL-AO-13140.

Community advisory board on sex education curriculum is "public body" required to comply with the Open Meetings Law. Comm on Open Govt OML-AO 924.

School superintendent's "parents advisory committee" is "public body" subject to provisions of Open Meetings Law, despite fact that group has no policymaking capacity and is only advisory in nature. Committee on Open Government OML-AO-1114.

Board of trustees of college foundation is "public body" where it conducts public business for agency of state, such as state university. Committee on Open Government OML-AO-1190.

Committee of community members appointed to review New York City HIV/AIDS curriculum was not subject to Open Meetings Law. Comm on Open Gov't OML-AO-2254.

Task force charged to examine disposition of closed school building and to make recommendations was not subject to Open Meetings Law. Comm on Open Gov't OML-AO-2260.

Compact for Learning Central Committees created pursuant to state regulations are subject to Open Meetings Law, notwithstanding that they act as advisory committees, since required plans for participation by teachers and parents with administrators and school board members in school-based planning and shared decision making cannot be adopted absent collaboration and participation by such committees. Comm on Open Gov't OML-AO-2305.

Open Meetings Law applied to meetings of school-based management/shared decision making committees in New York City public schools under Open Meetings Law, notwithstanding that committees did not have ability to make determinations, since they performed required, necessary and integral function in development of shared decision making plans. Comm on Open Gov't OML-AO-2456.

Shared decision-making committees created pursuant to regulations promulgated by Commissioner of Education were required to comply with Open Meetings Law, even though committees might or might not have ability to make determinations, since they performed necessary and integral function in development of shared decision making plans. Comm on Open Gov't OML-AO-2547.

Baruch College Committee on Academic Standing of School of Business was required to comply with Open Meetings Law since entity did not appear to be advisory as it appeared to have ability to render determinations. Comm on Open Gov't OML-AO-2556.

Organization called Citizens for Quality Education was not required to hold open meetings that anyone had right to attend since organization was private. Comm on Open Gov't OML-AO-2575.

State Review Panel created by L 1995, ch 145 is "public body" subject to Open Meetings Law, and any documentation maintained by it constitutes "record" within coverage of Freedom of Information Law, as such records would have been acquired or produced by or for State Education Department. Comm on Open Gov't OML-AO-2690.

Board of Trustees of School Employees Healthcare Plan, which provides health insurance to more than 9,000 persons and conducts public business pursuant to CLS Gen Mun Art 5-G and CLS Ins Art 47, is public body required to comply with Open Meetings Law because it performs governmental function for group of public corporations, in that participants of plan are public educational organizations and board is responsible for management and administration of plan. Comm on Open Gov't OML-AO-2766.

Health and safety committees created under commissioner's regulations perform governmental function, and thus are public bodies subject to Open Meetings Law, in that they carry out necessary functions in implementation of legislation and regulations, and schools in some contexts cannot act without first having consulted with them. Volunteer "building level committees" formed within schools are not subject to Open Meetings Law insofar as they have no legal duty to carry out any function as part of decision making process. Comm on Open Gov't OML-AO-3167.

School-based building planning committee, created by board of education to provide forum for input on internal curricular and educational issues at each school building, would perform governmental function and therefore would be "public body" subject to Open Meetings Law, unless board of education was not required to seek its input or otherwise consult with it prior to asserting board authority. Comm on Open Gov't OML-AO-3265.

Governing bodies of private educational institutions are not obliged to give effect to Open Meetings Law, despite fact that they are chartered by Board of Regents and are, to some extent, overseen by Board and state Education Department, for they do not conduct public business, nor do they perform governmental function. Comm on Open Gov't OML-AO-3838.

Central Committee of New York State Public High School Athletic Association conducts public business and performs governmental function for hundreds of public corporations (school districts), and thus committee constitutes public body that falls within requirements of Open Meetings Law, in view of obligation of trustees and boards of education to comply with law, regulations of Commissioner of Education, and their inability to do so unless they comply with Association's constitution and bylaws regarding interscholastic athletics. Comm on Open Gov't OML-AO-4029.

Budget committee of school board is essentially committee of board and, therefore, constitutes public body required to comply with Open Meetings Law when majority of core members of committee gather for purpose of discussing matters within area of its activity. Comm on Open Gov't OML-AO-4158.

34. Elections

Committee of 2 individuals delegated authority by town board to alter election districts is "public body" whose meetings are subject to Open Meetings Law. Committee on Open Government OML-AO-1123.

County board of elections constitutes public body subject to Open Meetings Law. Comm on Open Gov't OML-AO-2646.

Task force created by state board of elections which was charged with duty to offer advice and recommendations designed to enhance public participation in electoral process, pursuant to federal Help America Vote Act, was not subject to Open Meetings Law. Comm on Open Gov't OML-AO-3614.

35. Ethics boards

Village board of ethics is public body subject to Open Meetings Law since it is created by village board, it consists of at least 2 members, it may conduct its business only by means of quorum, and it conducts public business and performs governmental function for public corporation, i.e., village. Comm on Open Gov't OML-AO-2387.

Meetings of New York State Ethics Commission are not subject to Open Meetings Law. Comm on Open Gov't OML-AO-3664.

If issue before board of ethics involves particular person in conjunction with one or more of subjects listed in CLS Pub O § 105(1)(f), executive session could appropriately be held. Comm on Open Gov't OML-AO-3712.

Ethics board or committee has same obligations as governing body, such as town board, regarding openness and provision of notice of meetings. Comm on Open Gov't OML-AO-3712.

36. Finances, generally

The meeting at which a town board is required on or before January 20 each year to audit the accounts of its officers and employees must be made open to the public. 1979 Op St Compt File #57.

Budget director and head of county department or agency are not "public body" subject to Open Meetings Law. Committee on Open Government OML-AO-1188.

Syracuse Financial Plan Commission is not agency and its meetings are not subject to Open Meetings Law; however, as it carries out its duties for City of Syracuse, records that it prepares are subject to Freedom of Information Law. Comm on Open Gov't OML-AO-2353.

Disciplinary hearing held by village board of trustees in its capacity as board of police commissioners was quasi-judicial proceeding exempt from Open Meetings Law, and thus board would not have been justified in allowing it to be broadcast and televised over police chief's CLS Civ R § 52 objection. Comm on Open Gov't OML-AO-3684.

37. Fire prevention and control

Since volunteer fire company conducts public business at its meetings, performs governmental function and such function is carried out for public corporation, volunteer fire company is "public body" subject to Open Meetings Law. Comm on Open Gov't FOIL-AO-4917.

Board of fire commissioners is "public body" required to comply with Open Meetings Law. Comm on Open Gov't FOIL-AO-8538.

Board of trustees of volunteer fire company is a public body subject to the Open Meetings Law. Comm on Open Govt OML-AO 947.

Open Meetings Law does not require board of fire commissioners or public bodies generally to read aloud entire text of resolutions that they consider at meetings; resolutions that have been put before voters in summary form do not violate Open Meetings Law. Comm on Open Gov't OML-AO-1411.

Board of commissioners of fire district is public body subject to Open Meetings Law. If board of fire commissioners designates itself as committee or designates committee consisting of at least 2 of its members, those committees also constitute public bodies required to comply with Open Meetings Law. Comm on Open Gov't OML-AO-2282.

Board of volunteer fire company is subject to Open Meetings Law. Comm on Open Gov't OML-AO-2308.

Since district corporation is also public corporation, board of commissioners of fire district is public body subject to Open Meetings Law. Comm on Open Gov't OML-AO-2598.

Board of volunteer fire company is "public body" subject to Open Meetings Law; volunteer fire companies, which generally are not-for-profit corporations that perform their duties by means of contractual relationships with municipalities, perform governmental function and their records are subject to rights of access granted by Freedom of Information Law. Comm on Open Gov't OML-AO-3311.

Board of volunteer fire company is "public body" subject to Open Meetings Law despite its status as not-for-profit corporation. Comm on Open Gov't OML-AO-3904.

38. Health and medicine

Committee formed by town board to review emergency medical services in town constitutes public body for purposes of Open Meetings Law where entity conducts public business, and is

required to act by means of quorum under CLS Gen Const § 41. Committee on Open Government OML-AO-1043.

Local Alcohol Beverage Control Board is "public body" subject to Open Meetings Law. 1986 Committee on Open Government OML-AO-1314.

Subcommittee of community services board is subject to requirements of Open Meetings Law in view of specific statutory reference to such subcommittee under CLS Men Hyg §§ 41.05(b) and 44.11. Comm on Open Gov't OML-AO-2190.

Assuming that entities have no authority to take final and binding action on behalf of City of New York or its board of education, neither Oversight Committee nor Asbestos Task Force constitutes "public body" required to comply with Open Meetings Law. Comm on Open Gov't OML-AO-2265.

Multi-county school employee health plan committee was subject to Open Meetings Law since its functions included authority to take final action on behalf of member school districts, it consisted of at least 2 members, it carried out its duties pursuant to quorum requirements, and it conducted public business and performed governmental function, in that it carried out various responsibilities and acted for or on behalf of several boards of education, which were governing bodies of public corporations, i.e., school districts. Comm on Open Gov't OML-AO-2275.

Only circumstance in which town health advisory committee can be found to be public body involves situation in which majority of members of town board serve on committee; since advisory committee is designated to advise town board, if majority of town board serves on advisory committee, town board would essentially be providing advice to itself. Comm on Open Gov't OML-AO-2568.

Assuming that it is volunteer organization, board of directors of ambulance corporation is subject to Open Meetings Law. Comm on Open Gov't OML-AO-2604.

Pharmacy & Therapeutics Committee is not subject to Open Meetings Law since it has no authority to take final and binding action for or on behalf of any government agency, it was created by State Department of Health "as a completely internal mechanism, requiring no additional statutory or regulatory authority," and it only makes recommendations to Commissioner of Health, who has authority to make determinations based on its recommendations. Comm on Open Gov't OML-AO-3492.

39. Horse racing

Board of Directors of Thoroughbred Racing Capital Investment Fund is "public body" subject to Open Meetings Law in all respects. Committee on Open Government OML-AO-1066.

Since New York Racing Association is referred to as private corporation that does not perform "governmental functions", it appears that New York Racing Association's board of Directors would not constitute "public body" as defined by Open Mediums Law; if this is so, despite its significant relationship with government, its meetings would not be subject to Open Meetings Law. Comm on Open Gov't OML-AO-1416.

New York State Thoroughbred Breeding and Development Fund Corporation is public benefit corporation and, therefore, its governing body is public body required to comply with Open Meetings Law. Comm on Open Gov't OML-AO-2471.

Board of directors of New York State Thoroughbred Breeding and Development Fund Corporation is entity consisting of more than 2 members that conducts public business and performs governmental function for public corporation and, therefore, it constitutes "public body" required to comply with Open Meetings Law. Comm on Open Gov't OML-AO-2488.

40. Insurance

Neither New York Automobile Insurance Plan (Assigned Risk Plan, CLS Insurance § 5301) nor committee designated to administrator plan (CLS Insurance § 5302) is subject to Freedom of Information Law or Open Meeting Law. 1986 Committee on Open Government FOIL-AO-4306.

Board of Trustees of School Employees Healthcare Plan, which provides health insurance to more than 9,000 persons and conducts public business pursuant to CLS Gen Mun Art 5-G and CLS Ins Art 47, is public body required to comply with Open Meetings Law because it performs governmental function for group of public corporations, in that participants of plan are public educational organizations and board is responsible for management and administration of plan. Comm on Open Gov't OML-AO-2766.

Commissioners of State Insurance Fund constitute public body that falls within requirements of Open Meetings Law. Comm on Open Gov't OML-AO-3881.

41. Law enforcement and corrections

Monthly meetings of the Board of Parole are subject to the Open Meetings Law, but may also be subject to the exemptions and exceptions contained therein. 1978 NY Ops Atty Gen Nov. 2.

A meeting of a "not-for-profit community service organization" not conducted by public officials and at which no public policy is made is not a meeting of a "public body", notwithstanding that the association receives public anti-crime funding. Comm on Open Gov OML-AO-893.

Board of Visitors of the School at Industry constitutes a "public body". Comm on Open Gov't OML-AO-904.

STOP-DWI Committees are subject to Open Meetings Law as "public body". Committee on Open Government OML-AO-1081.

Board of Commissioners of Port Washington Police District, which consisted of 3 members and performed governmental function for public corporation, constituted "public body" required to comply with Open Meetings Law. Comm on Open Gov't OML-AO-2186.

Town of Pine Plains Police Advisory Council created by enactment of local law, although advisory in nature, was "public body" subject to Open Meetings Law; however, member of town board did not have right to attend council's executive sessions unless he or she was member of council, or there was some independent authority to do so based on rule, policy or other privilege conferred by town board. Comm on Open Gov't OML-AO-3143.

Open Meetings Law applies to local conditional release commissions, based on provisions of CLS Correc §§ 271 and 272; while it is likely that some of commission's discussions and deliberations may validly occur in private, other aspects of its duties must be performed in public and result in creation of records accessible to public. Comm on Open Gov't OML-AO-3784.

42. Libraries and museums

Board of trustees of Suffolk County Vanderbilt Museum is "public body" subject to Open Meetings Law. Committee on Open Government FOIL-AO-3676; OML-AO-1153.

Public body, such as town board or public library board of trustees, cannot carry out its powers or duties except by means of affirmative vote of majority of its total membership taken at meeting duly held on reasonable notice to all of members. Comm on Open Gov't FOIL-AO-8330.

Book committee designated to review certain library books and make recommendations concerning their suitability is a "public body", subject to Open Meetings Law in all respects. Comm on Open Gov't OML-AO-1362.

Not only would elected board of trustees of public library constitute "public body", but also board of co-operative library system is public body and, as such, each of entities responsible for appointments to ad hoc committee is "public body" subject to Open Meetings Law. Comm on Open Gov't OML-AO-1450.

Queens Borough Public Library is public corporation and is subject to Freedom of Information Law. Comm on Open Gov't OML-AO-2258.

Library board of trustees is required by CLS Educ § 260-a to comply with Open Meetings Law. Comm on Open Gov't OML-AO-2298.

Board of trustees of public library system, such as Nassau Library System, is required to comply with Open Meetings Law. Comm on Open Gov't OML-AO-2389.

Board of Trustees of Clinton Essex Franklin Library System can validly take action only at meeting in which quorum is present, and vote cannot validly be taken by secret ballot. Comm on Open Gov't OML-AO-2796.

As private not-for-profit institution, New York Public Library, which was founded in 1895 by Astor, Lenox and Tilden foundations to provide "private philanthropy for the public good," is not subject to Freedom of Information Law; however, pursuant to CLS Educ § 260-a, Open Meetings Law applies to gatherings of its board of trustees. Comm on Open Gov't OML-AO-3579.

Governing body of special district library—its Board of Trustees—constitutes public body required to comply with Open Meetings Law, since library functions as district corporation, which, according to CLS Gen Const § 66, is kind of public corporation. Comm on Open Gov't OML-AO-3740.

Any entity consisting of 2 or more members of public body, such as committee or subcommittee consisting of members of library board of trustees, would fall within requirements of Open Meetings Law, assuming that committee discusses or conducts public business collectively as body. Comm on Open Gov't OML-AO-3740.

Boards of trustees of both governmental and non-governmental (i.e., not-for-profit corporation) public libraries are required to comply with Open Meetings Law under CLS Educ § 260-a. Comm on Open Gov't OML-AO-3903.

While board of trustees of public library that is not governmental entity (i.e., not-for-profit corporation) is required to conduct its meetings in accordance with Open Meetings Law, CLS Educ § 260-a provides, by implication, that committees and subcommittees of such boards of trustees, except those in New York City, are not required to give effect to Open Meetings Law. Comm on Open Gov't OML-AO-3903.

Based on characterizations of Buffalo and Erie County Public Library by courts and terms of statutes dealing with its establishment, its Board of Trustees constitutes public body, and it would be subject to Open Meetings Law, even in absence of enactment of CLS Educ § 260-a. Comm on Open Gov't OML-AO-3903.

43. Public buildings

Stadium Committee designated by Mayor of Buffalo for purpose of discussing and planning possible domed baseball stadium in downtown Buffalo is "public body" subject to Open Meeting Law in all respects. Comm on Open Govt OML-AO 946.

Not-for-profit corporation created to own and operate proposed civic center is "public body" subject to Open Meetings Law. Committee on Open Government OML-AO-1165.

Panel of experts created to advise and offer recommendations concerning clean up and reopening of state office building is subject to open meeting law since members are charged with public duty to be performed or exercised by them jointly, and since panel performs governmental function for a state. Committee on Open Government OML-AO-1194.

44. Real property; Housing

45. —Zoning

Unless one or more of exceptions in CLS Pub O § 105(1)(a) through (h) arise, public body, including zoning board of appeals, must deliberate in public; vote by zoning board of appeals must be taken in public; if open meetings law is violated possible recourse is provided in CLS Pub O § 107(1). Comm on Open Gov't FOIL-AO-44717; Comm on Open Gov't OML-AO-1412.

Planning board and zoning board of appeals are "public bodies" subject to the Open Meetings Law. Comm on Open Gov't OML-AO-867.

Comprehensive planning committee established by town planning board with town board's approval, for purpose of revising town's comprehensive zoning plan, was subject to Open Meetings Law where 6 of 7 planning board members served on committee, and committee appeared to be "special board" under CLS Town § 272-a. Comm on Open Gov't OML-AO-3633.

If town's "Comprehensive Plan/Zoning Code Committee" is "special board" as that phrase is defined in CLS Town § 272-a(2)(c), it would exist by means of statutory authorization and would constitute "public body" required to comply with Open Meetings Law. Comm on Open Gov't OML-AO-3785.

Town's "Comprehensive Plan/Zoning Code Committee" was not "special board" under CLS Town § 272-a(2)(c), but rather "advisory committee" not subject to Open Meetings Law, where Committee consists of persons appointed by Supervisor and perhaps co-chairs, and Committee does not appear to have been created nor have its members been appointed by Town Board. Comm on Open Gov't OML-AO-3785.

Meetings of both homeowners association organized as not for profit, type corporation as defined in CLS N-PCL § 102(a) and of its board are not governed by Open Meetings Law. Comm on Open Gov't FOIL-AO-7924.

Assuming that condominium complex was not part of any government, its meetings would not be subject to Open Meetings Law. Comm on Open Gov't OML-AO-2441.

Non-profit homeowners association is private rather than governmental entity, and thus its meetings are not subject to Open Meetings Law. Comm on Open Gov't OML-AO-3120.

Home owners associations established pursuant to Declaration of Condominium to manage affairs of Condominium are not subject to Open Meetings Law. Comm on Open Gov't OML-AO-3868.

46. Taxation

A committee consisting of 2 councilmen and the town assessors appointed to study a change in veterans exemptions on the assessment roll is a "public body". Comm on Open Gov't OML-AO-877.

Assessment board of review constitutes "public body" required to comply with Open Meetings Law. Comm on Open Gov't OML-AO-2617.

Three-member board of assessment review is "public body" subject to comply with Open Meetings Law and, while it may deliberate in private (e.g., when its deliberations are "quasi-judicial"), voting or taking action must occur in open meeting. Comm on Open Gov't OML-AO-3499.

Town of Altamont Board of Assessment Review is public body subject to Open Meetings Law and thus, while it may deliberate in private, actual voting must occur in open meeting, and meeting minutes must indicate how each member voted. Comm on Open Gov't OML-AO-3668.

Board of assessment review is clearly "public body" required to comply with Open Meetings Law. Comm on Open Gov't OML-AO-4043.

Public has the right to be present at meeting of board of assessment review under CLS RPTL § 525(2)(a), insofar as assessor is present for purpose of offering information or point of view. Comm on Open Gov't OML-AO-4043.

47. Transportation; transit

Governing body of public authority, public corporation, is "public body" required to comply with Open Meetings Law and, as such, Board of Niagara Frontier Transportation Authority is public body subject to Open Meetings Law. Comm on Open Gov't OML-AO-1460.

IRT/BMT board, which functions as part of or adjunct to New York City Transit Authority, constitutes "public body" subject to Open Meetings Law. Comm on Open Gov't OML-AO-2178.

48. Utilities

Steering committee established by town to handle issues related to a planned power plant is a public body for purposes of the Open Meetings Law, notwithstanding that it serves in an advisory capacity. Comm on Open Govt OML-AO 943.

49. Waste

Town "landfill discussion committee," consisting of 7 appointed persons who formulate suggestions in review policy on town landfill, is "public body" subject to Open Meetings Law. Committee on Open Government OML-AO-1084.

Bi-county citizens advisory committee intended to assist 2 counties in development of joint solution to solid waste disposal problems, though not yet formally established, is "public body" for purposes of Open Meetings Law, where 12 members have agreed to serve and are serving, members have been engaged in discussion and formulation of public policy, and committee appears to conduct public business and perform governmental function for 2 public corporations. Comm on Open Gov't OML-AO-1377.

Citizen advisory committee designated to provide advice concerning regional landfill, whose members were designated by several agencies, was not subject to Open Meetings Law; however, committee was not precluded or prohibited from conducting open meetings. Comm on Open Gov't OML-AO-2185.

Task force created to develop plan to close landfill was not subject to Open Meetings Law since task force would not operate pursuant to any quorum requirement, had only capacity to offer

recommendations to Governor and Mayor, and would not function as body. Comm on Open Gov't OML-AO-2644.

Inter-municipal group, consisting of representatives of several local governmental entities, was not obliged to comply with Open Meetings Law when it met with Department of Environmental Conservation officials to discuss regional sewer project, where it did not include majority of any particular public body, and it had no authority to take any final binding action for or on behalf of municipality. Comm on Open Gov't OML-AO-3190.

50. Other and miscellaneous

Committees created by New York/New Jersey Harbor Estuary Program (HEP) did not constitute public bodies subject to Open Meetings Law. Comm on Open Gov't FOIL-AO-8324.

Village board of trustees is "public body" subject to requirements of Open Meetings Law. Comm on Open Gov't FOIL-AO-8570.

Not-for-profit corporation (Clarence Senior Citizens, Inc.) would be subject to both Freedom of Information and Open Meetings Laws where town board essentially has complete control over membership of board of directors of corporation. Comm on Open Gov't FOIL-AO-13422.

Board of directors of local humane society would not constitute "public body" under Open Meetings Law where there is little if any government control. Comm on Open Gov't FOIL-AO-13466.

If ambulance company performs its functions exclusively for municipality, it conducts public business and performs governmental function for municipality and thus meetings of its governing body would be subject to Open Meetings Law. Comm on Open Gov't FOIL-AO-13576.

Committee formed upon request of county executive to study delivery of legal services to indigent persons in county constitutes "public body" subject to Open Meetings Law. Committee on Open Government OML-AO-1138.

Based upon provisions of Article 12-D of General Municipal Law, municipal commission on human rights is "public body" subject to OML. Comm On Open Gov't OML-AO-1203.

Private Industry Counsel is public body required to comply with Open Meetings Law, as quorum is required for entity to take action, its board consists of more than 2 members, is created and authorized by state and federal law and conducts public business and performs governmental function for 1 or more public corporations. 1986 Committee on Open Government OML-AO-1304.

District service cabinets, which exist pursuant to New York City Charter, do not have specific membership and do not function as body and, therefore, do not constitute public bodies subject to Open Meetings Law. Comm on Open Gov't OML-AO-2548.

Sampson Air Force Veterans Association, Inc., is not public body subject to requirements of Open Meetings Law, as it is private corporation, not governmental entity. Comm on Open Gov't OML-AO-2779.

Incorporated village's 3-person Harbor Commission, as entity created by law with special powers and authority to act and make decisions, is "public body" required to comply with Open Meetings Law. Comm on Open Gov't OML-AO-3130.

New York City police department's "Precinct Community Councils" which consist of all community members at least 18 years of age who wish to join, and sponsor programs for purpose of maintaining public interest in quality police services, are not subject to requirements of Open Meetings Law. Comm on Open Gov't OML-AO-3157.

Ad hoc committee designated by town board as "Adult Uses Study Committee," which consisted of citizens and some town employees, and had no authority to take any final and binding action for or on behalf of town, was not "public body" subject to Open Meetings Law. Comm on Open Gov't OML-AO-3261.

Chautauqua Institution Architectural Review Board, formed as not-for-profit corporation governed by special acts of state legislature, was not subject to Open Meetings or Freedom of Information Laws, since it was separate and distinct from government, it operated without financial assistance from government, and its land regulations were based on deed restrictions rather than assertion of any governmental authority. Comm on Open Gov't OML-AO-3307.

Local workforce investment boards (LWIBs) are public bodies subject to Open Meetings Law; LWIBs derive in part from powers, functions and duties of state and local government officials, they conduct public business, and they performed "a governmental function." Comm on Open Gov't OML-AO-3480.

Not-for-profit corporation known as Clarence Senior Citizens, Inc. is subject to Freedom of Information and Open Meetings Laws; its directors are appointed by majority of Clarence Town Board, number of directors can be increased or decreased by Clarence Town Board, its directors can be removed for cause by majority of members of its board and majority of Clarence Town Board, and its directors can be removed without cause only by Clarence Town Board. Comm on Open Gov't OML-AO-3483.

Board of Directors of Mohawk & Hudson River Humane Society is not subject to Open Meetings Law since, pursuant to its bylaws, there is little (if any) government control. Comm on Open Gov't OML-AO-3490.

Governing body of Slaterville Ambulance, Inc. was subject to Open Meetings Law if, like Slaterville Volunteer Fire Company, ambulance corporation performed its functions exclusively for municipality. Comm on Open Gov't OML-AO-3508.

Conservation Fund Advisory Board (CFAB) established under CLS ECL § 11-0327, which reviews allocations and expenditures of department for fish and wildlife, is subject to Open Meetings Law; CFAB reports to Department of Environmental Conservation, which is mandated to report annually on CFAB's findings, and thus at least one governmental function is contingent on CFAB's report. Comm on Open Gov't OML-AO-3570.

Fulton Community Revitalization Corporation is subject to Open Meetings Law since its purposes are not exclusively governmental in nature, its bylaws do not require its membership to include any city officials, and city government has no official role in designating or selecting members of its board. Comm on Open Gov't OML-AO-3639.

When committee is subject to Open Meetings Law, it has same obligations regarding notice, openness, and taking of minutes, for example, as well as same authority to conduct executive sessions, as governing body. Comm on Open Gov't OML-AO-3740.

Open Meetings Law does not apply to meetings of members of county committee of particular political party; political party organization may seek to influence course of government, but is not itself governmental entity. Comm on Open Gov't OML-AO-3788.

Receipt of government funding does not render entity public body. Comm on Open Gov't OML-AO-3838.

Oversight by government would not necessarily bring entity within coverage of Open Meetings Law. Comm on Open Gov't OML-AO-3838.

Board of directors of Snug Harbor Cultural Center, Inc. (SHCC), of Staten Island, does not constitute public body and, therefore, is not required to comply with Open Meetings Law, although SHCC receives funding from New York City and City serves as landlord, and Mayor of New York City and Commissioner of Cultural Affairs are ex officio members of SHCC board. Comm on Open Gov't OML-AO-3838.

Meetings of governing body of ambulance company formed as not-for-profit corporation may be subject to Open Meetings Law if corporation is similar to volunteer fire company, and it performs its duties solely for ambulance district and town. Comm on Open Gov't OML-AO-3885.

Cell tower committee appointed by town board is not required to comply with Open Meetings Law or provide notice of its meetings where committee has no authority to take any final and binding action for or on behalf of town. Comm on Open Gov't OML-AO-3887.

"Friends" of New York City community board would not constitute public body, and thus its meetings would not be subject to Open Meetings Law, since, typically, "friends" groups are organized as not-for-profit corporations, and while they often seek to assist governmental entities, they are not ordinarily part of government. Comm on Open Gov't OML-AO-3894.

Public corporations and public benefit corporations in New York are all governmental entities. Comm on Open Gov't OML-AO-3903.

Entity created by Chair of community board, consisting of 5 members of board, falls within coverage of Open Meetings Law. Comm on Open Gov't OML-AO-3926.

County bar association does not fall within coverage of Open Meetings Law. Comm on Open Gov't OML-AO-4016.

Board of Directors of county bar association's Article 18-B program for providing counsel to indigents constitutes "public body" subject to Open Meetings Law where sole function of program involves carrying out duties in accordance with Article 18-B pursuant to contract with county. Comm on Open Gov't OML-AO-4016.

If entity meets on school property for social or civic purpose, or for purpose pertaining to welfare of community, its meetings would be open to public under CLS Educ § 414(1)(c), even if Open Meetings Law does not apply. Comm on Open Gov't OML-AO-4025.

Soccer association meeting in high school auditorium must be held open to public under CLS Educ § 414(1)(c) as social or civic purpose, even though such association clearly falls beyond coverage of Open Meetings Law. Comm on Open Gov't OML-AO-4025.

Policy Council or Board of Directors of county Head Start program would not constitute "public body" subject to Open Meetings Law, where program was not connected with county government, although 42 USCS § 9839(a) indicates intent to ensure "...reasonable public access to information, including public hearings at the request of appropriate community groups..." Comm on Open Gov't OML-AO-4183.

If jury charged with selecting plan for memorial at World Trade Center site carries out its duties solely for or on behalf of agency, it is entity that conducts public business and performs governmental function for public corporation, i.e., public authority, and thus jury is public body that falls within coverage of Open Meetings Law. Comm on Open Gov't OML-AO-4200.

IV. "Executive Session" Defined

51. In general

Motion for entry into executive session by board should contain two components, inclusion of term "particular" and reference to one or more of topics appearing in that provision. Comm on Open Gov't FOIL-AO-4686.

While Open Meetings Law authorizes public bodies to conduct executive sessions in circumstances described in CLS Pub O § 105(1)(a) through (h), there is no requirement that executive session be held even though public body has right to do so. Introductory language of CLS Pub O § 105(1), which prescribes procedure that must be accomplished before executive session may be held, clearly indicates that public body "may" conduct executive session only after having completed that procedure. Comm on Open Gov't FOIL-AO-12405.

In technical sense, executive session cannot be scheduled prior to meeting, as executive session is not separate and distinct from open meeting, but rather as part of open meeting. 1986 Committee on Open Government OML-AO-1310.

Public body may exclude public from its deliberations during executive session. Comm on Open Gov't OML-AO-1413.

With respect to motion for entry into executive session, it is insufficient to merely regurgitate the statutory language of ground for entry into executive session because such boiler plate recitation does not comply with intent of statute; reference should be made only to those topics which will be discussed in executive session; when listing agenda to enter into executive session, agenda need not include reference to name or other identifying details concerning individual who will be subject of discussion. Comm on Open Gov't OML-AO-1420.

Exception from open meeting based on discussion of litigation is intended to permit public body to discuss its litigation strategy behind closed doors, rather than issues that might eventually result in litigation; further, since possible or potential litigation can be result of nearly any topic discussed by public body, executive session cannot be held to discuss issue merely because there is potential for litigation; motion to enter into executive session must include, in general terms, reference to subject to be considered behind closed doors. Comm on Open Gov't OML-AO-1429.

Member of town board has authority to attend executive sessions called by town board unless and until member is legally barred from attending; motion to enter into executive session to discuss personnel or personnel matters without additional description is inadequate; motion for entry into executive session should contain two components, inclusion of term "particular", and reference to one or more of topics appearing in Open Meetings Law. Comm on Open Gov't OML-AO-1440.

Executive session is not separate and distinct from open meeting, but rather it is portion of open meeting during which public may be excluded; public body cannot enter into executive session to discuss subject of its choice, but must only discuss subjects listed in Open Meetings Law as appropriate for discussion behind closed doors. Comm on Open Gov't OML-AO-1445.

If action is taken during executive session, minutes indicating nature of action and vote, by member, must be prepared within one week of executive session; further, minutes are accessible to public to extent required by Freedom of Information Law; executive session is not separate from open meeting, but rather is portion of open meeting during which public may be excluded; further, public body cannot enter into executive session to discuss subject of its choice but is specifically limited to topics listed in Open Meetings Law; action taken in executive session remains valid unless and until court renders determination to contrary. Comm on Open Gov't OML-AO-1448.

"Executive session" is portion of open meeting during which public may be excluded and, as such, executive session is not separate and distinct from meeting, but rather it is portion of open meeting; public body cannot schedule executive session in advance of meeting, because vote to enter into executive session must be taken at meeting during which executive session is held; public body cannot enter into executive session to discuss subject of its choice and is limited to subjects listed in Open Meetings Law; further, motion to enter into executive session must identify in general terms the area or areas of subject or subjects to be considered. Comm on Open Gov't OML-AO-1451.

City Common Council is public body, and commissions to which liaisons have been appointed are also public bodies; however, City Common Council and commissions are separate and distinct, and liaisons are not members of commissions; only members of commission, which would be public body conducting meeting, have right to attend executive sessions held by commission; moreover, liaison, person who is not a member of commission, would not have right to attend executive session of such commission; nevertheless, commission may permit attendance of others to executive session. Comm on Open Gov't OML-AO-1455.

Even though deliberations of zoning board of appeals may be characterized as quasi-judicial, they are not exempt from Open Meetings Law; moreover, deliberations of zoning board must be conducted in public, except to extent that one or more of grounds for entry into executive session may properly be asserted. Comm on Open Gov't OML-AO-1456.

Executive session is not separate and distinct from meeting, but rather portion of open meeting and motion to enter into executive session must include reference to general area or areas of subject or subjects to be considered during executive session. Comm on Open Gov't OML-AO-1460.

Executive session is defined in Open Meetings Law to mean portion of open meeting during which public may be excluded and, as such, executive session is not separate and distinct from meeting, but rather is portion of open meeting. Comm on Open Gov't OML-AO-1463.

Presence or absence of "mission statement" is not determinative of public body's capacity to conduct executive session. Comm on Open Gov't OML-AO-2422.

Executive session is not separate from open meeting, but rather is portion of open meeting. Comm on Open Gov't OML-AO-3860.

Public body cannot schedule executive session in advance of meeting, since, because vote to enter into executive session must be made and carried by majority vote of total membership during open meeting, it cannot be known in advance of that vote that such motion will indeed be approved. Comm on Open Gov't OML-AO-4067.

Rather than scheduling executive session in advance of meeting, which would violate Open Meetings Law, public body on its

agenda or notice of meeting could refer to or schedule motion to enter into executive session to discuss certain subjects; reference to motion to conduct executive session would not represent assurance that executive session would ensue, but rather indicate that there is intent to enter into executive session by means of vote to be taken during meeting. Comm on Open Gov't OML-AO-4067.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:
Definitions, CLS Gen Const § 66.

Federal Aspects:
Open meetings, 5 USCS § 552b.

Jurisprudences:
2 NY Jur 2d Administrative Law §§ 82, 83, 85, 94, .
26 NY Jur 2d Counties, Towns, and Municipal Corporations § 412 .
75 NY Jur 2d Libraries § 15 .
94 NY Jur 2d Schools, Universities, and Colleges §§ 127, 152 .
96 NY Jur 2d State of New York § 162 .

Law Reviews:
Sluzar, New York abandons a commitment to open meetings. 50 Alb. L. Rev. 613.
Whelan, New York's Open Meetings Law: revision of the political caucus exemption and its implications for local government. 60 Brook. L. Rev. 1483.

Matthew Bender's New York Practice Guides: 3 New York Practice Guide: Real Estate § 20.03.

Texts: Dienes, Levine & Lind, Newsgathering and the Law (1999, Matthew Bender) § 9-6.
Gerrard, Ruzow, Weinberg, Environmental Impact Review in New York (Matthew Bender) § 8.14.

§ 103. Open meetings and executive sessions

(a) Every meeting of a public body shall be open to the general public, except that an executive session of such body may be called and business transacted thereat in accordance with section ninety-five* of this article.

(b) Public bodies shall make or cause to be made all reasonable efforts to ensure that meetings are held in facilities that permit barrier-free physical access to the physically handicapped, as defined in subdivision five of section fifty of the public buildings law.

(c) A public body that uses videoconferencing to conduct its meetings shall provide an opportunity for the public to attend, listen and observe at any site at which a member participates.

(d) [There are two subs (d)] Public bodies shall make or cause to be made all reasonable efforts to ensure that meetings are held in an appropriate facility which can adequately accommodate members of the public who wish to attend such meetings.

(d) [There are two subs (d)] 1. Any meeting of a public body that is open to the public shall be open to being photographed, broadcast, webcast, or otherwise recorded and/or transmitted by audio or video means. As used herein the term "broadcast" shall also include the transmission of signals by cable.

2. A public body may adopt rules, consistent with recommendations from the committee on open government, reasonably governing the location of equipment and personnel used to photograph, broadcast, webcast, or otherwise record a meeting so as to conduct its proceedings in an orderly manner. Such rules shall be conspicuously posted during meetings and written copies shall be provided upon request to those in attendance.

(e) Agency records available to the public pursuant to article six of this chapter, as well as any proposed resolution, law, rule, regulation, policy or any amendment thereto, that is scheduled to be the subject of discussion by a public body during an open meeting shall be made available, upon request therefor, to the extent practicable as determined by the agency or the department, prior to or at the meeting during which the records will be discussed. Copies of such records may be made available for a reasonable fee, determined in the same manner as provided therefor in article six of this chapter. If the agency in which a public body functions maintains a regularly and routinely updated website and utilizes a high speed internet connection, such records shall be posted on the website to the extent practicable as determined by the agency or the department, prior to the meeting. An agency may, but shall not be required to, expend additional moneys to implement the provisions of this subdivision.

(f) Open meetings of an agency or authority shall be, to the extent practicable and within available funds, broadcast to the public and maintained as records of the agency or authority. If the agency or authority maintains a website and utilizes a high speed internet connection, such open meeting shall be, to the extent practicable and within available funds, streamed on such website in real-time, and posted on such website within and for a reasonable time after the meeting. For the purposes of this subdivision, the term "agency" shall mean only a state department, board, bureau, division, council or office and any public corporation the majority of whose members are appointed by the governor. For purposes of this subdivision, the term "authority" shall mean a public authority or public benefit corporation created by or existing under any state law, at least one of whose members is appointed by the governor (including any subsidiaries of such public authority or public benefit corporation), other than an interstate or international authority or public benefit corporation.

HISTORY:

Formerly § 93, add, L 1976, ch 511, § 1; renumbered § 98, L 1977, ch 933, § 2; renumbered § 103, L 1983, ch 652, § 1, eff Sept 1, 1984; amd, L 1977, ch 368, § 1; L 2000, ch 289, § 3, eff Aug 23, 2000; L 2010, ch 40, § 1, eff April 14, 2010; L 2010, ch 43, § 2, eff April 1, 2011; L 2011, ch 603, § 1, eff Feb 2, 2012; L 2015, ch 519, § 1, effective January 10, 2016; L 2016, ch 319, § 1, effective March 8, 2017.

Editor's Notes: Laws 2010, ch 43, § 1, eff April 1, 2011, provides as follows:

Section 1. Legislative findings. It is the policy of this state that all public business "be performed in an open and public manner and that the citizens of this state be fully aware and able to observe the performance of public officials and attend

*So in original. Probably should read "section one hundred five".

and listen to the deliberations and decisions that go into the making of public policy". (public officers law, § 100) However, because most citizens are unable to attend first-hand the meetings of public bodies, they rely upon the printed press and broadcast media to act as their agent in seeking out and communicating these events. Advances in technology now allow meetings to be photographed, broadcast and recorded in a non-disruptive manner, and these advances should be utilized to give effect to the policy of open and public governmental proceedings.

Amendment Notes: 2011. Chapter 603, § 1 amended by adding sub (e).

2010. Chapter 40, § 1 amended by adding sub (d) [first setout].

2010. Chapter 43, § 2 amended by adding sub (d) [second setout].

The 2015 amendment by ch 519, § 1, added (f).

The 2016 amendment by ch 319, § 1, in (f), added "or authority" wherever it appears in the first two sentences and added the last sentence.

Notes to Decisions

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21. Other matters

1. In general

The Open Meetings Law (Public Officers Law, art 7), which provides that every meeting of a public body, except for an executive session, shall be open to the general public, and which defines the word "meeting" as "the formal convening of a public body for the purpose of officially transacting public business", is not limited in application to regular or formal meetings only, but applies to the gathering or meeting of a public body for the purpose of transacting public business, whenever a quorum is present, whether or not a vote of the members is taken. Orange County Publications, Div. of Ottaway Newspapers, Inc. v Council of Newburgh, 60 A.D.2d 409, 401 N.Y.S.2d 84, 1978 N.Y. App. Div. LEXIS 9687 (N.Y. App. Div. 2d Dep't), aff'd, 45 N.Y.2d 947, 411 N.Y.S.2d 564, 383 N.E.2d 1157, 1978 N.Y. LEXIS 2337 (N.Y. 1978).

Statute does not apply only to formal or regular meanings, but to any gathering or meeting of quorum of public body for purpose of transacting business. Tri-Village Publishers, Inc. v St. Johnsville Bd. of Education, 110 A.D.2d 932, 487 N.Y.S.2d 181, 1985 N.Y. App. Div. LEXIS 48835 (N.Y. App. Div. 3d Dep't 1985).

Essential factor in determining applicability of CLS Pub O Art 7 is whether or not entity is performing governmental function rather than simply conducting public business. Poughkeepsie Newspaper Div. of Gannett Satellite Information Network v Mayor's Intergovernmental Task Force on New York City Water Supply Needs, 145 A.D.2d 65, 537 N.Y.S.2d 582, 1989 N.Y. App. Div. LEXIS 1492 (N.Y. App. Div. 2d Dep't 1989).

Confidential communications between village zoning board of appeals and its counsel, during which counsel allegedly advised board of legal issues involved in determination of variance application, were exempt from provisions of Open Meetings Law, CLS Pub O §§ 103 and 108(3). Young v Board of Appeals, 194 A.D.2d 796, 599 N.Y.S.2d 632, 1993 N.Y. App. Div. LEXIS 6672 (N.Y. App. Div. 2d Dep't 1993).

Allegation on appeal of Article 78 proceeding regarding city planning board's violation of Open Meetings Law (CLS Pub O § 103(a)) was rendered academic where it pertained to meetings leading to determination that was superseded by later approval of revised application. Alberti v City of New Rochelle, 257 A.D.2d 572, 682 N.Y.S.2d 892, 1999 N.Y. App. Div. LEXIS 136 (N.Y. App. Div. 2d Dep't 1999).

Trial court's annulment of the determinations of a county and a comptroller reducing a retiree's salary for purposes of his retirement severance was proper because a board of trustees had been authorized by N.Y. Educ. Law § 6306(2) and N.Y. Comp. Codes R. & Regs. tit. 8, § 604.2(a) to vote to raise the retiree's salary pursuant to his employment contract, and contradictory local laws did not supersede state law or regulations; there was no support for the claim that the meeting was not properly noticed as to time and place and there was no statutory requirement that notice of the agenda of the meeting be given. The contention that the vote was unauthorized because verbatim minutes of the meeting were not taken was unavailing as N.Y. Pub. Off. Law § 106 merely required that a record or summary of the action at a meeting be taken, and the record disclosed that a summary of the action was taken. Matter of LaLima v County of Suffolk, 45 A.D.3d 845, 847 N.Y.S.2d 208, 2007 N.Y. App. Div. LEXIS 12137 (N.Y. App. Div. 2d Dep't 2007).

Trial court properly rejected appellants' challenges under the Open Meetings Law; appellants were not aggrieved by any insufficiency in the notice of the meeting of the planning board held on November 12, 2008, or inaccessibility of the meeting to those with disabilities. In any event, the notice conformed to statutory requirements. Matter of Thorne v Village of Millbrook Planning Bd., 83 A.D.3d 723, 920 N.Y.S.2d 369, 2011 N.Y. App. Div. LEXIS 2836 (N.Y. App. Div. 2d Dep't), app. denied, 17 N.Y.3d 711, 930 N.Y.S.2d 556, 954 N.E.2d 1182, 2011 N.Y. LEXIS 2949 (N.Y. 2011).

Trial court properly denied a petition by nearby business owners to review a town board's issuance of special use permits for a convenience store and a "minor" restaurant as a violation of the General Municipal Law because, while the owners alleged sufficient harm to establish standing, the town complied with SEQRA's requirements before making a negative declaration, the owners failed to establish that the rezoning of the property constituted illegal spot zoning, was inconsistent with the town's comprehensive plan, or incompatible with the surrounding uses, and the record did not support the owners' contention that the Open Meetings Law was violated. Matter of Star Prop. Holding, LLC v Town of Islip, 164 A.D.3d 799, 83 N.Y.S.3d 146, 2018 N.Y. App. Div. LEXIS 5815 (N.Y. App. Div. 2d Dep't 2018).

2. Closed meetings, generally

CLS CPLR § 217 barred petitioners' claim that respondent public body violated their First Amendment rights by conducting public business in closed session, where Article 78 proceeding was commenced more than 4 months after petitioners were barred from attending meeting; petitioners' claim arose solely from respondent's conduct in holding closed meeting, not from actions taken at closed meeting. Smith v City Univ. of New York, 92 N.Y.2d 707, 685 N.Y.S.2d 910, 708 N.E.2d 983, 1999 N.Y. LEXIS 1 (N.Y. 1999).

A cause of action under the Open Meetings Law (Public Officers Law, art 7) was stated by a petition alleging the occurrence of a closed session meeting of the Mayor, a committee from the city council, and members of the school board at which there was a discussion concerning the possible sale of the junior high school and the contemplated applications for funds under the Public Works Act by both the city and the board, and which further alleged, *inter alia,* that a quorum of the board was present, that the meeting was private and that the subjects of the meeting were such that they would ordinarily arise at a public meeting.

Oneonta Star Div. of Ottaway Newspapers, Inc. v Board of Trustees, 66 A.D.2d 51, 412 N.Y.S.2d 927, 1979 N.Y. App. Div. LEXIS 9988 (N.Y. App. Div. 3d Dep't 1979).

In a proceeding challenging the reapportionment of a county legislature, meetings at which members of the majority political party discussed a reapportionment plan did not violate [former] Pub O § 98(a) where, although they were closed sessions, no legislative quorum was present at any of the meetings; although a technical violation occurred at one of the meetings because no public notice was "conspicuously" posted as required by [former] Pub O § 99, the trial court was not justified in voiding all the actions resulting from the meeting where the press was in fact notified of the meeting and attended it and where the resolution of the meeting merely called for a public hearing. Britt v County of Niagara, 82 A.D.2d 65, 440 N.Y.S.2d 790, 1981 N.Y. App. Div. LEXIS 10944 (N.Y. App. Div. 4th Dep't 1981).

Closed meetings of the Rent Stabilization Guidelines Board of the City of New York for the consideration of data which resulted in the issuance of a rent guideline order for rent stabilized apartments violated the "Open Meetings Law" (Public Officers Law, art 7) since such meetings were neither announced to the news media nor open to the public; although the Rent Stabilization Law, by requiring that the board consider "such other data as may be made available to it" (Administrative Code, § YY51-5.0, subd b, par [3]) does not mandate public hearings, the board's obligation to consider other data, when read together with the "Open Meetings Law", obligates the board to provide an opportunity for interested persons to present such data and, accordingly, the board's failure to open meetings to the public, thereby excluding public oversight and public participation, requires that implementation of the rent guideline order be enjoined and that the matter be remanded to the board for further public hearings. Rent Stabilization Ass'n v Rent Guidelines Board, 98 Misc. 2d 312, 413 N.Y.S.2d 950, 1978 N.Y. Misc. LEXIS 2884 (N.Y. Sup. Ct. 1978).

A cause of action in a petition brought by the president of a parent-teacher club seeking to declare void a school board's vote closing an elementary school on the ground that the action was taken in violation of the Open Meetings Law would be dismissed, where the property committee of the board had 12 to 15 closed meetings before recommending to the school board that the school be closed, but the board held an open public meeting on the committee's report and the vote was taken at a subsequent open meeting, and where the property committee had no warrant to take definitive action, but could only make nonbinding recommendations to the board. Dombroske v Board of Education, 118 Misc. 2d 800, 462 N.Y.S.2d 146, 1983 N.Y. Misc. LEXIS 3402 (N.Y. Sup. Ct. 1983).

City counsel violates Public Officers Law by exclusion of public from meeting held to discuss preliminary redevelopment plan for blighted area in city; in light of this and other violations of Open Meetings Law, court will impose upon counsel payment to petitioners of cost and reasonable attorney fees, in amount of $500. Orange County Publications, Div. of Ottaway Newspapers, Inc. v Council of Newburgh (N.Y. Sup. Ct. Mar. 4, 1983).

3. —Application to particular circumstances, generally

Where certain committees of the school district board of education were advisory in nature and did not perform governmental functions, they were not public bodies subject to the open meetings provisions of N.Y. Pub. Off. Law §§ 102(2) and 103, even though the committees contained at least one member of the board. Matter of Jae v Bd. of Educ. of Pelham Union Free Sch. Dist., 22 A.D.3d 581, 802 N.Y.S.2d 228, 2005 N.Y. App. Div. LEXIS 10872 (N.Y. App. Div. 2d Dep't 2005), app. denied, 6 N.Y.3d 714, 816 N.Y.S.2d 749, 849 N.E.2d 972, 2006 N.Y. LEXIS 1311 (N.Y. 2006).

Meetings of a selection committee formed by the city manager in order to provide advice and interview candidates for the position of Chief of Police and make recommendations to the mayor and city council relative to their decision regarding the choice of a candidate for the position of Chief are subject to the Open Meetings Law since the committee in question is a "public body" within the meaning of Public Officers Law § 97(2) [now § 102(2)] in that the committee consists of at least two members, performs its duties by means of a quorum, and clearly performs a governmental function. Comm Pub Acc Rec OML—Ad Op 563.

Compulsory interest arbitration panel hearing is exempt from provisions of Open Meetings Law due to quasi-judicial nature and due to distinctions in legislation between such panel and direction provided in Civil Service Law § 209(3)(e)(iii). Comm Pub Acc Rec OML-Ad Op 630.

4. — —Education

Board of Education did not have right to deny teachers permission to attend board meetings; CLS Educ §§ 2801 and 3020-a, which allow Board to adopt rules and regulations for maintenance of public order on school property, are overridden by CLS Educ § 1708(3), which specifically provides that "(t)he meetings of all such boards (of education) shall be open to the public," to CLS Educ §§ 2801 and 3020-a do not supersede Open Meetings Law (CLS Pub O Art 7), and finding that Board's right to exclude teachers overrides teachers' right to attend meetings would run afoul of CLS Pub O § 110. Goetschius v Board of Educ., 244 A.D.2d 552, 664 N.Y.S.2d 811, 1997 N.Y. App. Div. LEXIS 11925 (N.Y. App. Div. 2d Dep't 1997).

School district's board of education engaged in persistent pattern of deliberate violation of letter and spirit of CLS Pub O Art 7 by, inter alia, improperly convening executive sessions and conducting business in manner inaudible to public audience. Goetschius v Board of Educ., 281 A.D.2d 416, 721 N.Y.S.2d 386, 2001 N.Y. App. Div. LEXIS 2074 (N.Y. App. Div. 2d Dep't 2001).

Under the "Open Meetings Law," all meetings of school district board of education convened to transact public business were required to be open to the public, with the exception of "executive sessions" properly convened pursuant to the relevant provisions of the Public Officers Law. Kamlet v Board of Education, 91 Misc. 2d 1105, 399 N.Y.S.2d 366, 1977 N.Y. Misc. LEXIS 2489 (N.Y. Sup. Ct. 1977).

Written notice not to renew contract provided to the superintendent of schools, which notice was within the time limit provided by the contract of employment but was not preceded by official action, that is, by a regular meeting as compared to an informal meeting or executive session of the board of education, cannot be ratified by official action after the contractual deadline for the written notice. The subsequent adoption of a resolution by the community school board which occurred after the contractual deadline for written notice, therefore, was not accomplished in time to prevent automatic renewal of the superintendent's contract. Appeal of Hernandez, 1991 Op Comr Educ No 12367; Appeal of Lilly, 1991 Op Comr Educ No 12396.

A school board has the authority to enter into an executive session to discuss the appointment of a particular individual to the board in order to fill a vacancy since a discussion of the appointment of a particular individual to the school board would likely and of necessity involve a review of the employment history of the particular person and the discussion would likely constitute a manner "leading to the appointment of a particular individual" to the board. Comm Pub Acc Rec OML—Ad Op 566.

Activities of a Board of Education in discussing a reduction of size of its Committee on the Handicapped and the appointment of specific individuals to serve on that Committee during an executive session, conducted prior to rather than during an open meeting, violates the Open Meetings Law since, in view of the definition of "executive session" in Public Officers Law § 97 [now § 102], it is clear that a public body may conduct an executive session only after having convened an open meeting, open meetings may only be conducted upon notice to the public and to the news media, which was not given in this case, and a public body may enter into an executive session for only those matters deemed appropriate for an executive session as described in Public Officers Law § 100 [now § 105] and where reducing the size of the Committee on the Handicapped was a policy matter which did not concern any "particular" person, a discussion of the reduction of the Committee should have been held during open meeting. Comm Pub Acc Rec OML—Ad Op 570.

While the application of the Open Meetings Law to meetings of a faculty-student association is unclear, if such Association exists due to its relationship with a particular college, and if the college

would perform the functions of the association if the association had not been created, a faculty-student association is likely to be construed a "public body" under Public Officers Law § 97(2) [now § 102(2)] and therefore subject to the requirements of Public Officers Law § 98 [now § 103]. Comm Pub Acc Rec OML—Ad Op 578.

5. — —Finance

A taxpayer's Article 78 petition charging a violation of the Open Meetings Law (Pub Off Law § 103) in connection with the adoption of a village budget failed to state a cause of action, since the subject budget had been adopted after a public hearing in which all who attended were afforded the opportunity to comment, and the changes and revisions that were then made to the tentative budget were the result of considerable deliberation by numerous village officials, since there was no statutory requirement that any further hearing or discussion be formally scheduled prior to such revisions being made in the tentative budget, since affidavits submitted by petitioner taxpayer were insufficient to warrant relief in that they did not establish what had been said at an alleged "backroom" meeting of the board of village trustees prior to formal public adoption of the revised budget or how long such meeting lasted, and since it was not the intent of the Open Meetings Law to inhibit such brief and innocuous gatherings of bodies subject to its terms prior to public meetings as that which was alleged to have occurred. Puka v Greco, 119 Misc. 2d 696, 464 N.Y.S.2d 349, 1983 N.Y. Misc. LEXIS 3580 (N.Y. Sup. Ct. 1983), aff'd, 104 A.D.2d 362, 479 N.Y.S.2d 150, 1984 N.Y. App. Div. LEXIS 19832 (N.Y. App. Div. 2d Dep't 1984).

6. — —Health

Non-profit, private hospitals receiving substantial amounts of government funds do not constitute a "public body" as defined in Public Officers Law § 97(2) [now § 102(2)] and therefore not subject to the requirements of the Open Meetings Law. Comm Pub Acc Rec OML—Ad Op 568.

7. — —Law enforcement

Open Meetings Law did not require a city council to hold a public debate on its proposal to reorganize the fire and police departments. DeSantis v City of Jamestown, 193 Misc. 2d 197, 747 N.Y.S.2d 906, 2002 N.Y. Misc. LEXIS 1266 (N.Y. Sup. Ct. 2002).

8. — —Zoning

Town board did not violate Open Meetings Law (CLS Pub O §§ 100 et seq.) by allegedly drafting new legislation at executive session held after public hearing as to 3 proposed amendments to zoning ordinance where, following executive session, board enacted 2 of amendments proposed which were not new or different from proposed amendments, it tabled remaining proposed amendment, and there was nothing to controvert town's sworn allegation that executive session was conducted only for permissible purpose. Gernatt Asphalt Prods. v Town of Sardinia, 87 N.Y.2d 668, 642 N.Y.S.2d 164, 664 N.E.2d 1226, 1996 N.Y. LEXIS 313 (N.Y. 1996).

Zoning amendments would be annulled due to violation of Open Meetings Law by town board where (1) town board and certain town officials went into executive session at close of public hearing on proposed special use permit amendment that would have generally banned mining in town but for permissible uses in certain districts subject to special use permit requirements, ostensibly to discuss likely effect of amendments on existing litigation, and (2) board emerged after 30 minutes and formally resolved, without any further public involvement, to adopt amendment that completely banned mining in town. Gernatt Asphalt Prods. v Town of Sardinia, 208 A.D.2d 139, 622 N.Y.S.2d 395, 1995 N.Y. App. Div. LEXIS 1929 (N.Y. App. Div. 1st Dep't 1995), rev'd, 87 N.Y.2d 668, 642 N.Y.S.2d 164, 664 N.E.2d 1226, 1996 N.Y. LEXIS 313 (N.Y. 1996).

Plaintiffs' request that a rezoning determination be voided based on alleged violations of the Open Meetings Law was moot; plaintiffs did not allege that any of their claims fell within an exception to the mootness doctrine. Citizens for St. Patrick's v City of Watervliet City Council, 126 A.D.3d 1159, 5 N.Y.S.3d 582, 2015 N.Y. App. Div. LEXIS 1978 (N.Y. App. Div. 3d Dep't 2015).

9. —Executive sessions, generally

Although a town zoning board of appeals violated the Open Meetings Law when it discussed at an executive session a property owner's application for a certificate of nonconformity or for a use variance in order to operate a junkyard on his premises, pursuant to N.Y. Pub. Off. Law §§ 103 and 105, where the owner failed to show good cause why the court should exercise its discretion to void the board's determination as a sanction for that violation, the court declined to impose such a sanction. Carrier v Town of Palmyra Zoning Bd. of Appeals, 30 A.D.3d 1036, 816 N.Y.S.2d 647, 2006 N.Y. App. Div. LEXIS 7599 (N.Y. App. Div. 4th Dep't 2006), app. denied, 8 N.Y.3d 807, 834 N.Y.S.2d 88, 865 N.E.2d 1255, 2007 N.Y. LEXIS 530 (N.Y. 2007).

Statements made by a particular member of a Town Board to a representative of the news media in opposition to a bid on property received by the Board despite the Board's holding of an executive session do not represent a violation of Public Officers Law § 98 [now § 103] but may be a violation of General Municipal Law § 805-a in that one may argue that the information under discussion in the executive session was "confidential" and the Town Board member's disclosure might have jeopardized the Town's position in the bidding process. Comm Pub Acc Rec OML—Ad Op 561.

It is an open question whether or not a public body may rectify any mistake made in holding an executive session by ratifying its action through a public vote. Comm Pub Acc Rec OML-Ad Op 857.

In a suit brought by neighboring landowners against a motorcycle company and a town, the trial court reasonably exercised its discretion in awarding counsel fees and costs to the landowners because the town violated the open meetings law by holding executive sessions without explanation or notice, denied the landowners any meaningful participation in the process leading to the final adoption of the controversial 2013 agreement, and minutes were not taken of certain meetings. Matter of Ballard v New York Safety Track LLC, 126 A.D.3d 1073, 5 N.Y.S.3d 542, 2015 N.Y. App. Div. LEXIS 1852 (N.Y. App. Div. 3d Dep't 2015).

10. —Judicial or quasi-judicial proceedings

That portion of a meeting of a board of zoning appeals during which the board conducts its deliberations on requests for zoning variances is judicial in nature and, accordingly, is not subject to the Open Meetings Law (Public Officers Law, art 7), which requires that every meeting of a public body be open to the general public but which exempts from its mandates judicial or quasi-judicial proceedings, while that portion of the meeting at which the board's decision is announced, the votes of its members taken, and its other regular business conducted, is non-judicial and must be open to the public. Orange County Publications, Div. of Ottaway Newspapers, Inc. v Council of Newburgh, 60 A.D.2d 409, 401 N.Y.S.2d 84, 1978 N.Y. App. Div. LEXIS 9687 (N.Y. App. Div. 2d Dep't), aff'd, 45 N.Y.2d 947, 411 N.Y.S.2d 564, 383 N.E.2d 1157, 1978 N.Y. LEXIS 2337 (N.Y. 1978).

In an Article 78 proceeding by a group of concerned citizens to annul the issuance of a special use permit by the town zoning board to a company for the construction of a shopping mall, the permit was properly issued where the zoning board, which conducted ten public hearings and three special meetings on the company's application, properly held an executive session that was closed to the public inasmuch as the closed session, which was for the purpose of the board's weighing the evidence and applying the law, was judicial, rather than legislative in nature. Concerned Citizens against Concerned Citizens against Crossgates v Guilderland Zoning Bd. of Appeals, 91 A.D.2d 763, 458 N.Y.S.2d 13, 1982 N.Y. App. Div. LEXIS 19655 (N.Y. App. Div. 3d Dep't 1982).

Town planning board properly decided at certain meeting to deny developer's application for site approval plan for proposed shopping center, despite absence of developer, where proper notice was given at previous meeting and other members of public attended; even if developer were purposely excluded, that fact of itself did not contravene Open Meetings Law since board acted on proposal in judicial nature. Grossman v Planning Bd. of Colonie, 126 A.D.2d 887, 510 N.Y.S.2d 929, 1987 N.Y. App. Div. LEXIS 42003 (N.Y. App. Div. 3d Dep't 1987).

11. —Political caucuses

In a proceeding challenging the closing of meetings of the members of the majority political party on a city council at which the members discussed matters that were to come before the council at public meetings, the party meetings constituted meetings within the scope of [former] Pub O § 97(1) and, since it was undisputed that a quorum was present at the meetings, the meetings violated the Open Meetings Law; additionally, the meetings did not come under the "political caucus" exception contained in [former] Pub O § 103(2) since that exception was meant merely to prevent the statute from extending to the private matters of a political party, as opposed to matters that are public business. Sciolino v Ryan, 81 A.D.2d 475, 440 N.Y.S.2d 795, 1981 N.Y. App. Div. LEXIS 10933 (N.Y. App. Div. 4th Dep't 1981).

Meeting between respondents and members of village police benevolent association violated Open Meetings Law (CLS Pub O §§ 100-111) where respondents were trustees who together constituted majority of village board and were also members of Independent Party of village; meeting was not exempt from open meetings statute on basis that it was political caucus of Independent Party since it was undisputed that quorum of village board was present at meeting. Humphrey v Posluszny, 175 A.D.2d 587, 573 N.Y.S.2d 790, 1991 N.Y. App. Div. LEXIS 10096 (N.Y. App. Div. 4th Dep't), app. dismissed, 78 N.Y.2d 1072, 576 N.Y.S.2d 222, 582 N.E.2d 605, 1991 N.Y. LEXIS 4742 (N.Y. 1991).

Closed meeting of quorum of city council, which had purpose of adopting proposed plan for addressing budget crisis before going "public" to debate such plan, was not exempt from open meeting requirement of CLS Pub O Art 7 on ground that meeting was political caucus within meaning of CLS Pub O § 108(2), even though meeting was of members of only one political party, since entire council was composed of members of only one political party, and stated purpose of meeting was to adopt plan to address budget crisis. Buffalo News, Div. of Berkshire Hathaway, Inc. v Buffalo Common Council, 154 Misc. 2d 400, 585 N.Y.S.2d 275, 1992 N.Y. Misc. LEXIS 264 (N.Y. Sup. Ct. 1992).

Alleged "closed party caucuses" of the majority of the members of the Oneida County Board of Legislature to discuss pending resolutions and other legislative business is are meetings subject to the requirements of Open Meetings Law and not exempt from the Law's provision on the basis of [former] Public Officers Law § 103(2) exempting "deliberations of political committees, conferences, and caucuses" since it is clear that during the meetings involved public as well as political business was conducted. Comm Pub Acc Rec OML—Ad Op 576.

12. —Private or secret meetings

If any private or secret meetings or assemblages of a public entity are held when a quorum of its members is present and when the topics for discussion and eventual decision are such as would otherwise arise at a regular meeting, a violation of the Open Meetings Law (Public Officers Law, art 7) occurs. Oneonta Star Div. of Ottaway Newspapers, Inc. v Board of Trustees, 66 A.D.2d 51, 412 N.Y.S.2d 927, 1979 N.Y. App. Div. LEXIS 9988 (N.Y. App. Div. 3d Dep't 1979).

13. —Work sessions

A meeting of a city council, characterized by it as a "work session" and concededly not an executive session, the purpose of which was to consider problems of urban renewal in an area of the city, but at which the council did not plan to take a vote, was a meeting of a public body, required to be open to the public under the Open Meetings Law (Public Officers Law, art 7), which provides that every meeting of a public body, except for an executive session, shall be open to the general public, and defines the word "meeting" as "the formal convening of a public body for the purpose of officially transacting public business". Orange County Publications, Div. of Ottaway Newspapers, Inc. v Council of Newburgh, 60 A.D.2d 409, 401 N.Y.S.2d 84, 1978 N.Y. App. Div. LEXIS 9687 (N.Y. App. Div. 2d Dep't), aff'd, 45 N.Y.2d 947, 411 N.Y.S.2d 564, 383 N.E.2d 1157, 1978 N.Y. LEXIS 2337 (N.Y. 1978).

Respondent town board, which approved a 3,900 unit planned integrated development shortly after it lawfully substituted itself as the "lead agency" for matters involving the State Environmental Quality Review Act in place of the planning board (ECL 8-0111, subd 6), violated provisions of article 7 of the Public Officers Law by conducting several private "work sessions" concerning technical aspects of the project without public notice both before and after it assumed jurisdiction over the pending proceedings for an environmental impact statement. Tuxedo Conservation & Taxpayers Ass'n v Town Bd. of Tuxedo, 96 Misc. 2d 1, 408 N.Y.S.2d 668, 1978 N.Y. Misc. LEXIS 2613 (N.Y. Sup. Ct. 1978), aff'd, 69 A.D.2d 320, 418 N.Y.S.2d 638, 1979 N.Y. App. Div. LEXIS 11357 (N.Y. App. Div. 2d Dep't 1979).

Pre-meeting work session of city housing authority attended by only 3 of 7 commission members, at which agenda for regularly scheduled meeting was discussed, was not subject to Open Meetings Law (CLS Pub O § 100 et seq.) since quorum was lacking; however, if quorum had been planned or actually obtained, statute would automatically apply, and commission members would then have been required immediately to abandon session, and cease and desist from further consideration of any items until meeting had been properly noticed and could proceed in compliance with Open Meetings Law. Buffalo Evening News, Inc. v Buffalo Municipal Housing Authority, 134 Misc. 2d 155, 510 N.Y.S.2d 422, 1986 N.Y. Misc. LEXIS 3075 (N.Y. Sup. Ct. 1986).

14. Location of meetings, generally

School board superintendent acting as a receiver for a high school and junior high school violated N.Y. Educ. Law §§ 414(1)(c) and 211-f(1)(b)(iv) by excluding reporters' cameras from a public meeting held at a school because she opened that non-public forum to the public to discuss a matter of public interest, and although the schools were the subject of the meeting, the property was not being used for school purposes. News 12 Co. v Hempstead Pub. Schs. Bd. of Educ., 52 Misc. 3d 479, 31 N.Y.S.3d 788, 2016 N.Y. Misc. LEXIS 1411 (N.Y. Sup. Ct. 2016).

Where a school board superintendent acting as a receiver for a high school and junior high school violated the law by excluding reporters' cameras from a public meeting held at a school, petitioner newspapers were not entitled to relief with respect to the board because the superintendent, as receiver, had the authority to call the meeting without the board's consent. News 12 Co. v Hempstead Pub. Schs. Bd. of Educ., 52 Misc. 3d 479, 31 N.Y.S.3d 788, 2016 N.Y. Misc. LEXIS 1411 (N.Y. Sup. Ct. 2016).

15. —Access for physically handicapped

Petitioner was entitled to mandamus directing town to comply with CLS Pub O §§ 74-a and 103 by conducting future public meetings at location other than present town hall, and requiring that such location provide barrier-free facilities for physically handicapped persons, where evidence established that town hall was not accessible to physically handicapped persons, that attempt to remedy defect by installation of ramp had been inadequate, and that no further efforts to remedy defect had been made. Smith v Warwick, 169 A.D.2d 976, 564 N.Y.S.2d 874, 1991 N.Y. App. Div. LEXIS 519 (N.Y. App. Div. 3d Dep't 1991).

In light of the strong public policy considerations underlying the statutory requirement in the Open Meetings Law that public bodies make "reasonable efforts to ensure that meetings are held in facilities that permit barrier-free physical access to the physically handicapped", respondent Town Board of the Town of Brookhaven, which has been conducting its meetings on the second floor in the town hall in a meeting room which is accessible only by ascending a winding staircase, is directed to conduct all of its public meetings at barrier-free facilities commencing January 1, 1978. "Reasonable efforts" can take the form of altering existing owned meeting facilities which contain barriers, moving to other available facilities or combining these options when necessary. Although the town board's efforts to alter the town hall by the construction of an elevator have been expeditious, the failure to move town board meetings to other available barrier-free facilities since September 1, 1977, the effective date of the statutes involved, requires judicial intervention particularly because there has been no showing that such movement would disrupt governmental operations in any fashion. In fact, over the years numerous meetings of the town board have been held in public school facilities. Fenton v Randolph, 92 Misc. 2d 514, 400 N.Y.S.2d 987, 1977 N.Y. Misc. LEXIS 2577 (N.Y. Sup. Ct. 1977).

16. Metal detectors at meeting entrances

Use of metal detector at entrance to public meeting of school district's board of education was not per se violation of either Fourth Amendment guarantee against unreasonable searches and seizures or CLS Pub O Art 7. Goetschius v Board of Educ., 281 A.D.2d 416, 721 N.Y.S.2d 386, 2001 N.Y. App. Div. LEXIS 2074 (N.Y. App. Div. 2d Dep't 2001).

17. Recording devices, generally

Although Education Law § 1709(1) grants a local Board of Education the legal authority to adopt by-laws and rules to regulate the use of recording devices at board meetings, implicit in that statutory authorization is the general principle that such rule must be reasonable and a general prohibition of the use of tape recorders at meetings of the board is unreasonable and void on the ground that such prohibition would be contrary to public policy. Comm Pub Acc Rec OML—Ad Op 554.

A general prohibition of the use of recorders during open meetings of a town board is unreasonable and, therefore, void on the ground that such prohibition is contrary to public policy; in view of the advance in technology and the enactment of the Open Meeting Law a public body may only prohibit the use of mechanical devices, such as tape recorders or cameras, when the use of such devices would in fact detract from the deliberative process. Comm Pub Acc Rec OML—Ad Op 556.

18. —Tape recordings, generally

19. — —Battery-operated

Use of a handheld, battery operated cassette tape recorder does not detract from the deliberative process of a public meeting and therefore, a rule prohibiting the use of such devices per se woud be unreasonable and invalid. Com Pub Acc Rec OML-Ad Op 591.

Public body may prohibit use of mechanical devices, such as tape recorders, when use of such devices would in fact detract from deliberative process; however, since handheld, battery operated cassette tape recorder could not detract from deliberative process, it is not believed that rule prohibiting use of such devices would be reasonable or valid. Comm Pub Acc Rec OML-Ad Op 659.

Public body cannot restrict use of portable, battery-operated tape recorders at open meetings of such bodies. Comm Pub Acc Rec OML-Ad Op 790.

Town board may not prohibit its clerk or member of the public from using a handheld tape recorder in an inconspicuous manner at meetings of the board. Comm Pub Acc Rec OML-Ad Op 861.

20. —Video recordings, generally

Board of education's resolution prohibiting people who attended the board's public meetings from using video cameras to record the meetings was inconsistent with the purpose of New York's Open Meetings Law, N.Y. Pub. Off. Law § 100 et seq., and was overturned by the appellate court. Csorny v Shoreham-Wading River Cent. Sch. Dist., 305 A.D.2d 83, 759 N.Y.S.2d 513, 2003 N.Y. App. Div. LEXIS 5494 (N.Y. App. Div. 2d Dep't 2003).

Village policy banning video recording at public meetings of village board was unreasonable and would be declared void where sole justification for policy was claim of village board members and some members of public that they did not wish to appear on television and would be distracted from business at hand by presence of cameras. Peloquin v Arsenault, 162 Misc. 2d 306, 616 N.Y.S.2d 716, 1994 N.Y. Misc. LEXIS 392 (N.Y. Sup. Ct. 1994).

21. Other matters

Zoning board of appeals (ZBA) did not violate the Open Meetings Law where, between the close of the public hearing and the public meeting the following month at which a determination was made, the ZBA's counsel communicated individually with the ZBA's members and prepared a draft written determination, and, at the public meeting, the ZBA reviewed the proposed draft, made changes and ultimately made a determination; there was no evidence that a quorum of the ZBA's members met or consulted with its counsel outside a public meeting. Matter of Braunstein v Board of Zoning Appeals of the Town of Copake, 100 A.D.3d 1091, 952 N.Y.S.2d 857, 2012 N.Y. App. Div. LEXIS 7185 (N.Y. App. Div. 3d Dep't 2012).

If members of town board met to discuss public business or continued original meeting after their official adjournment at 8:45 p.m., they failed to comply with Open Meetings Law. Comm on Open Gov't F7978.

Agency Opinions

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22. Other matters

1. In general

The Town Law is not superseded by the provisions of Article 7 of the Public Officers Law with respect to the meetings of a zoning board of appeals. Under Town Law, § 267, all meetings of a town's zoning board of appeals must be open to the public. 1977 NY Ops Atty Gen Oct 18.

Governmental subdivision may not, consistent with "gift or loan" prohibition under CLS NY Const Art VIII § 1, reimburse individual member of legislative body for litigation expenses incurred in unsuccessful lawsuit initiated by that member under Open Meetings Law, when commencement of such suit is not part of member's official duties. 2002 NY Ops Atty Gen I 2002-4.

Open Meetings Law does not require board of fire commissioners or public bodies generally to read aloud entire text of resolutions that they consider at meetings; resolutions that have been put before voters in summary form do not violate open meetings law. Comm on Open Gov't OML-AO-1411.

Since New York Racing Association is referred to as private corporation that does not perform "governmental functions", it appears that New York Racing Association's board of Directors would not constitute "public body" as defined by Open Mediums Law; if this is so, despite its significant relationship with government, its meetings would not be subject to Open Meetings Law. Comm on Open Gov't OML-AO-1416.

Although assessment board of review may deliberate in private, act of voting or taking action must occur during open meeting and be referenced in minutes. Comm on Open Gov't OML-AO-2229.

Public bodies must conduct meetings in manner that guarantees public ability to "be fully aware of" and "listen to" deliberative process; thus, public body must situate itself and conduct its meetings in manner in which those in attendance can observe and hear proceedings, and to do otherwise would be unreasonable and fail to comply with basic requirement of Open Meetings Law. Comm on Open Gov't OML-AO-2273.

Unless statute, act of State Legislature, authorizes public body to close meeting that would ordinarily be subject to Open Meetings Law, public body cannot restrict public access to meetings in manner inconsistent with Open Meetings Law. Comm on Open Gov't OML-AO-2393.

Open Meetings Law was violated where approximately 55 people attended meeting of village planning board in order to hear board's consideration of urban renewal plan, members of planning board huddled around conference table talking almost

inaudibly among themselves, and board was informed that persons in audience could not hear their discussion but no action was taken to remedy problem. Comm on Open Gov't OML-AO-3218.

Vote conducted by board of education by e-mail, for purpose of giving certain employees day off at full pay without charging leave time, was inconsistent with Open Meetings Law; newly enacted provisions concerning videoconferencing clearly indicate that public bodies may validly conduct meetings only at meetings during which quorum has physically convened, or during meeting held by videoconference. Comm on Open Gov't OML-AO-3257.

Entity has authority to adopt rules or procedures to govern its own proceedings; however, those rules or procedures must be reasonable. Comm on Open Gov't OML-AO-3834.

2. Closed meetings, generally

3. —Application to particular circumstances, generally

4. — —Education

In some instances, although record might be withheld under Freedom of Information Law, discussion of that record might be required to be conducted in public under Open Meetings Law, and vice versa; for example, if superintendent of schools sends memorandum to board of education recommending charge in curriculum, insofar as memorandum consists of his or her advice, opinion or recommendation, it may be withheld under CLS Pub O § 87(2)(g), but when board discusses matter at meeting, there would be no basis for entry into executive session. Comm on Open Gov't FOIL-AO-8323.

If board of education discussed applicant's proposal that public records distributed to board members prior to meetings be posted on bulletin board for public review in advance of meetings and/or its policy on matter, any such discussions should have occurred during open meeting since none of grounds for entry into executive session would have been applicable. Comm on Open Gov't FOIL-AO-8541.

Where teacher is subject of final determination indicating that he or she engaged in misconduct, determination would be matter of public record and, therefore, it would be unreasonable to prohibit reading of that record at public meeting, including name of subject of determination. Comm on Open Gov't FOIL-AO-9251.

If issue before board of education involves extent to certain records are public or should not have been disclosed, there is no basis for entry into executive session; however, if board wishes to discuss actions taken by employee is disclosing records and perhaps removal of employee, CLS Pub O § 105(1)(f) might permit entry into executive session. Comm on Open Gov't FOIL-AO-9443.

Insofar as discussion at executive session at meeting of board of education involved matter leading to dismissal or removal of school district resident who helped to prepare and then prematurely disclosed draft survey to be distributed to voters on day of board elections and budget vote, there was proper basis for conducting executive session. Comm on Open Gov't FOIL-AO-9499.

Board of education is public body under Open Meetings Law; further, meeting is official convening of public body for purpose of conducting public business and as such when quorum of public body, such as school board, meets for purpose of conducting public business, such gathering constitutes meeting subject to Open Meetings Law; Open Meetings Law provides that public may attend meetings of public bodies, except to extent that executive session may be convened. Comm on Open Gov't OML-AO-1422; Comm on Open Gov't OML-AO-1423; Comm on Open Gov't OML-AO-1427.

Any action taken by board of education to expand controversial pilot "heterogenous" program, which determined grouping of high school students for instructional purposes, should have occurred during open meeting, with minutes prepared to indicate nature of action taken and vote of board members. Comm on Open Gov't OML-AO-2238.

No law requires that school board permit residents to question candidates at meeting. Comm on Open Gov't OML-AO-2367.

If school board reaches consensus at executive session that is its final determination of matter, minutes must be prepared and school board must take action in public; in contrast, if board reaches "meeting of minds" or engages in so-called "straw vote" regarding interim step in process that is incomplete, it would not be taking final action that would require public vote or preparation of minutes. Comm on Open Gov't OML-AO-2378.

School staff members who are prohibited from being on campus due to disciplinary reasons could not be prohibited from attending public meetings which were held on campus; while superintendent may have had authority to take certain action against disciplined staff members in his or her capacity as employee, she had no authority to prohibit any member of public, including disciplined staff member, from attending public meeting of public body. Comm on Open Gov't OML-AO-2436.

Board of education could legally discuss name, address, description, and criminal history of paroled sex offender in open session; Sex Offender Registration Act (CLS Correc Art 6-C) includes public notification provisions, and court order prohibiting disclosure by law enforcement agencies did not apply to school district, assuming that it acquired information appropriately from public sources. Comm on Open Gov't OML-AO-2681.

Subject of "tuition negotiations" likely would not fall within any grounds for board of education to hold executive session even if board's attorney was present, unless attorney-client privilege applied. Comm on Open Gov't OML-AO-3324.

School board cannot take action during executive session except in situations in which action during closed session is permitted or required by statute, such as when board initiates charges against tenured person under CLS Educ § 3020-a or where action in public could identify particular student. Comm on Open Gov't OML-AO-4026.

5. — —Finance

The meeting at which a town board is required on or before January 20 each year to audit the accounts of its officers and employees must be made open to the public. 1979 Op St Compt File #57.

A vote to approve payment of vouchers must take place at a regular or special meeting of a town board. 1981 Op St Compt File #81-169.

List of all expenditures made from petty cash fund by county public library must be prepared, presented, and acted upon at open meeting of library board of trustees. Comm on Open Gov't OML-AO-2196.

Discussions relating to budgetary matters, such as funding or elimination of positions or programs, cannot appropriately be discussed during executive session. Comm on Open Gov't OML-AO-2393.

While discussion of employee's financial history can be considered in executive session, that issue must be distinguished from consideration of possible award of "cash out" package; latter pertains to matter of policy that could or would affect non-union employees in future and, therefore, executive session cannot properly be held to discuss award of cash out package. Comm on Open Gov't OML-AO-2402.

Governing board of Brooklyn College Association improperly discussed budget for student government of College of Arts and Sciences in executive session. Comm on Open Gov't OML-AO-3474.

6. — —Health

Meeting of county board of health to discuss proposal for review of county's clean indoor air act is "meeting" under Open Meetings Law, that should have been opened to public and preceded by notice. Committee on Open Government OML-AO-1057.

Town board's discussion of locations for residential spraying of chemicals to control black flies should have occurred during open meeting since no grounds for entry into executive session applied. Comm on Open Gov't OML-AO-2249.

County board of health violated Open Meetings Law when it considered implementation of new smoking regulations during executive session. Comm on Open Gov't OML-AO-2612.

7. — —Law enforcement

Village board of trustees could enter into executive session to discuss 3-year police contract only if collective bargaining negotiations involving police union were involved; if there was no

union, there likely would be no basis for conducting executive session. Comm on Open Gov't FOIL-AO-12324.

While discussions of police agency consolidations or mergers might involve "personnel" and/or "contract negotiations," it is doubtful that those issues can properly be discussed in executive sessions. Comm on Open Gov't OML-AO-2608.

Committee created by county legislature to consider whether vacancies should be filled, and to offer recommendations to full legislature, did not properly hold executive session to discuss District Attorney's statement that inability to fill vacant assistant district attorney position might result in more cases being plea bargained or dismissed; while discussion pertained to persons arrested and/or in law enforcement custody, it was unlikely that issues involved, if discussed in public, would imperil public safety. Comm on Open Gov't OML-AO-3623.

Committee created by county legislature to consider whether vacancies should be filled, and to offer recommendations to full legislature, could enter into executive session to discuss whether Sheriff's Department had sufficient personnel on duty at specific times of day; public discussion of law enforcement coverage would allow potential lawbreakers to know when Sheriff's Department might be understaffed and might enable them to tailor their illegal activities to circumvent effective law enforcement. Comm on Open Gov't OML-AO-3623.

8. — —Zoning

Gathering during which zoning board of appeals deliberates or makes decisions is meeting subject to Open Meetings Law; further, Law requires that all meetings be convened open to public and proceeded by notice given to news media and to public by means of posting; zoning board of appeals must deliberate in public, except to extent that topic may justifiably be considered during executive session; unless one or more of these topics arises, public body, including zoning board of appeals, must deliberate in public and vote by zoning board of appeals must be taken in public. Comm on Open Gov't OML-AO-1418.

Proposed amendment to city charter—requiring city council to grant every individual who wished to speak at one of its meetings at least 5 minutes to do so prior to consideration of council's legislative agenda—would not conflict with Open Meetings Law, though it would go beyond what law requires. 2004 NY Ops Atty Gen I 04-9.

If public body intends to keep individuals from attending meeting by locking doors or by meeting in small room, such meeting would not be open to public and would thus violate OML; but if doors are unknowingly and unintentionally locked, or meeting room cannot accommodate unexpected number of attendees, such meeting would not be found to violate law so as to require invalidation of any action taken. Comm On Open Gov't OML-AO-1251.

There is nothing in OML that requires newspaper to print notice of meeting that it receives; thus, there is no guaranty that notice given to newspaper will be printed; as long as agency complies with notice requirements, failure on part of news media to publish notice does not constitute violation of OML. Comm on Open Gov't OML-AO-1291.

Members of public bodies may consult with one another individually or by phone, but may not validly conduct meetings by means of telephone conferences or make collective determinations by means of series of one-on-one conversations or telephonic communications; intent of Open Meetings Law, to provide public with right to "observe" performance of public officials in their deliberations, cannot be realized if members conduct public business or vote by phone. Comm on Open Gov't OML-AO-2683.

Where public discussion relative to particular parcel of land could affect negotiations and, therefore, prices paid for other parcels where no final price has yet been established, insofar as publicity would "substantially" affect value of those parcels, executive session may properly be held. Comm on Open Gov't OML-AO-4165.

9. —Executive sessions, generally

Grounds for withholding records under Freedom of Information Law and grounds for entry into executive session under Open Meetings Law are separate and distinct, and they are not necessarily consistent. Comm on Open Gov't FOIL-AO-8323.

All meetings of public bodies must be held open to public, except that executive session may convene to discuss topic or topics that fall within grounds for calling executive session; threat or mere possibility of litigation does not, without more, constitute valid basis for entry into executive session because litigation exception is to enable public body to discuss pending litigation privately, without bearing strategy to its adversary through mandatory public meeting; mere presence of attorney with municipal board did not automatically result in privileged relationship and exemption from Open Meetings Law; subject matter of discussion and nature of communication determine applicability of attorney-client relationship and existence of exemption from Open Meetings Law. Comm on Open Gov't OML-AO-1421.

Open Meetings Law provides that public may attend meetings of public bodies, except to extent that executive session may be convened. Comm on Open Gov't OML-AO-1422-1423.

Executive session is not separate and distinct from open meeting; on contrary, executive session is part of open meeting that must be convened open to public and preceded by notice given to news media and by means of posting in accordance with CLS Pub O § 104. Comm on Open Gov't OML-AO-2257.

Public body cannot schedule or conduct executive session in advance of meeting because vote to enter into executive session must be taken at open meeting during which executive session is held. Comm on Open Gov't OML-AO-2257.

Even when subject to be discussed can properly be considered during executive session, public body must first convene open meeting, preceded by notice of time and place given in accordance with CLS Pub O § 104; following initiation of meeting in public, when subject arises that may be discussed in executive session, procedure described in CLS Pub O § 105(1) should be carried out. Comm on Open Gov't OML-AO-2262.

If building in which meeting is held includes room or space other than room in which executive session is being conducted, it would be inappropriate to remove public from building and lock doors; by so doing, public has no capacity to know when executive session has ended and open portion of meeting has been continued. Comm on Open Gov't OML-AO-2268.

While Open Meetings Law authorizes public bodies to conduct executive sessions in circumstances described in CLS Pub O § 105(1)(a) through (h), there is no requirement that executive session be held even though public body has right to do so. Comm on Open Gov't OML-AO-2278.

CLS Pub O § 105(1)(d) does not permit public body to conduct executive session due to possibility or fear of litigation. Comm on Open Gov't OML-AO-2566.

Based on language of Open Meetings Law, public body cannot conduct executive session merely because issue may be sensitive. Discussions relating to budgetary matters, such as funding or reduction of positions, cannot appropriately be discussed during executive session. Comm on Open Gov't OML-AO-2570.

To give effect to both Open Meetings Law and CLS Town § 30, which imposes certain responsibilities on town clerk, there are 3 options: first, town board can permit clerk to attend executive session in its entirety; second, town board can deliberate during executive session without clerk's presence, but, prior to any vote, call clerk into executive session for purpose of taking minutes in conjunction with duties imposed by town law; and third, town board can deliberate toward decision during executive session, but return to open meeting for purpose of taking action. Comm on Open Gov't OML-AO-2583.

Permitting news media to attend executive session is equivalent of permitting public to attend, and public body cannot validly justify authorizing news media to be present at executive session while excluding all other members of public; stated differently, if public body authorizes news media to attend executive session, it effectively loses its basis for holding executive session since members of news media serve as representatives of public. Comm on Open Gov't OML-AO-2597.

Members of new media do not have any special privilege above that of any resident in attendance to attend executive session of public body pertaining to personnel matter. Comm on Open Gov't OML-AO-2597.

While board of education could convene executive session to interview candidates for district clerk position pursuant to "personnel" exception of Open Meetings Law, state-sponsored budget workshop attended by board members was improperly discussed later at that executive session, even if budget issues often have impact on personnel. Comm on Open Gov't OML-AO-3271.

If board's discussion of "pay raises for elected officials including themselves" involved across-the-board increase, executive session would not be proper, but if discussion focused on individual employee or board member and whether pay increase was merited, matter related to "a particular person" and executive session could validly be held. Comm on Open Gov't OML-AO-3537.

10. —Judicial or quasi-judicial proceedings

Certain aspects of proceedings of a zoning board of appeals may be properly characterized as "quasi-judicial". Comm on Open Gov't OML-AO-867.

Probable cause determination under Education Law § 3020-a does not fall within the exemption for quasi-judicial proceedings under [former] Public Officers Law § 103(1). Comm on Open Gv't OML-AO-881.

Gathering during which zoning board of appeals deliberates or makes decisions is meeting subject to Open Meetings Law; zoning board of appeals must deliberate in public, except to extent that topic may justifiably be considered during executive session; unless one or more of these topics arises, public body, including zoning board of appeals, must deliberate in public and vote by zoning board of appeals must be taken in public. Comm on Open Gov't OML-AO-1418.

Even though deliberations of zoning board of appeals might be characterized as "quasi-judicial", they are no longer exempt from Open Meetings Law; moreover, deliberations of board must be conducted in public, except to extent that one or more grounds for entering in executive session might properly be asserted. Comm on Open Gov't OML-AO-1430.

Even though deliberations of zoning board of appeals may be characterized as quasi-judicial, they are not exempt from Open Meetings Law; moreover, deliberations of zoning board must be conducted in public, except to extent that one or more of grounds for entry into executive session may properly be asserted; assuming that there is no basis for entry into executive session, zoning board of appeals must vote in public. Comm on Open Gov't OML-AO-1456.

Open Meetings Law does not necessarily apply to hearing, and there is distinction between meeting and hearing. Comm on Open Gov't OML-AO-2307.

New York State Board of Regents could properly weigh evidence taken during public hearing, apply law and reach determination regarding termination of members of board of education since proceeding was quasi-judicial in nature and, therefore, outside coverage of Open Meetings Law. Comm on Open Gov't OML-AO-2551.

Discussions of town ethics board, regarding complaint of alleged misconduct of member of town board, could occur in executive session. Comm on Open Gov't OML-AO-3712.

Portion of meeting of board of assessment review during which those challenging their property tax assessments are heard, as well as act of voting or taking action, must be conducted open to public, although board may deliberate in private. Comm on Open Gov't OML-AO-4043.

Public has the right to be present at meeting of board of assessment review under CLS RPTL § 525(2)(a), insofar as assessor is present for purpose of offering information or point of view. Comm on Open Gov't OML-AO-4043.

11. —Political caucuses

Meetings of a political party's district committee are not subject to the Open Meetings Law. Comm on Open Gov't OML-AO-888.

To extent that majority of total membership of county committee on ways and means was present for purpose of conducting public business, such gathering could not have been characterized as political caucus exempt from provisions of Open Meetings Law, but rather as "meeting" that should have been open to public. Committee on Open Government OML-AO-1061.

Either majority or minority party members of legislative body may conduct closed political caucuses, either during or separate from meetings of public body, without violating Open Meetings Law. Comm on Open Gov't OML-AO-2310.

In general, either majority or minority party members of legislative body may conduct closed political caucuses, either during or separate from meetings of public body. Comm on Open Gov't OML-AO-2369.

If majority of town board members meet to discuss public business and members include at least one member from each party, gathering cannot be characterized as political caucus exempt from Open Meetings Law; on contrary, due to presence of members of more than one political party, it would constitute "meeting" subject to requirements of Open Meetings Law. Comm on Open Gov't OML-AO-2457.

Exemption concerning political caucuses applies to only to legislative body of county, i.e., county legislature; exemption does not apply to public bodies other than legislative bodies. Comm on Open Gov't OML-AO-2461.

Due to 1985 amendment of CLS Pub O § 108(2), if used to extreme, majority members of legislative bodies may conduct closed political caucuses to discuss subjects of their choice, including matters of public business. Comm on Open Gov't OML-AO-2600.

Four Republican members of 5-member town board could meet and/or discuss matters of public business in private on ground that their gatherings or discussions constituted political caucuses, but action could be taken by board only at meeting held in accordance with Open Meetings Law, preceded by reasonable notice given to all board members, including lone Democrat. Comm on Open Gov't OML-AO-2749.

While political caucuses held by members of particular party were exempt from Open Meetings Law, private discussion of village business by members of party who served on village board of trustees was improper. Comm on Open Gov't OML-AO-3217.

Either majority or minority party members of legislative body may conduct closed political caucuses during or separate from meetings of public body when discussing political party business, such as fund raising, party leadership, etc.; however, city council may not validly conduct closed political caucus to discuss matters of public business. Comm on Open Gov't OML-AO-3254.

Gathering of Democrat member, Republican member and Independent member of 5-member town board was "meeting" that should have been held in accordance with Open Meetings Law; because they belonged to more than one political party, gathering could not be characterized as political caucus. Comm on Open Gov't OML-AO-3328.

Democratic legislator whose re-registration as member of Republican party had not yet become effective could not be characterized as "guest" at gathering of Republican majority of county legislature, and if he attended, such gathering would not qualify as "political caucus" exempt from Open Meetings Law. Comm on Open Gov't OML-AO-3597.

12. —Work sessions

Workshop or work session held by majority of public body is "meeting," with same responsibilities in relation to openness, notice and taking of minutes as in case of formal meeting, as well as same ability to enter into executive sessions. Comm on Open Gov't OML-AO-3403.

Contention by bureau president that publicity could arouse unnecessary community concern and may have adverse affect on board's credibility is irrelevant to duties of public body subject to Open Meetings Law since deliberative process must be conducted openly, notwithstanding possibility of adverse effect upon body's credibility. Committee on Open Government OML-AO-1036.

If it can be assumed that only board of trustees of library system is authorized to engage law firm for library system, its action to do so can validly occur only during meeting of board held in accordance with Open Meetings Law; further, any such action must be memorialized in minutes of meeting. Comm on Open Gov't OML-AO-2389.

President of county legislature could validly rule that members could not ask questions about, or discuss in open session, matters relating to proposed settlements referred for approval in 3 matters in litigation, if discussion would result in inappropriate or unethical disclosure of privileged information; unilateral disclo-

sure by member of public body, made contrary to or in absence of consent by majority, could result in revelation of litigation strategy, unwarranted invasion of personal privacy, impairment of collective bargaining negotiations or interference with criminal or other investigations. Comm on Open Gov't OML-AO-2718.

Member of town zoning board of appeals, as member of general public, could not be precluded from attending open meeting of zoning board of appeals on basis that he was precluded from participating as board member due to possibility of conflict of interest; furthermore, if matter involving board member's interest were to be considered in executive session, interested board member nevertheless would have right to attend that session. Comm on Open Gov't OML-AO-3276.

Open Meetings Law would be implicated if board of education took action in private, either by means of actual convening or by phone or via e-mail, when it presented final redistricting plan that denoted "E-3" designation which differed materially from "E-3" designation presented to public at prior meeting. Comm on Open Gov't OML-AO-3473.

Town of Southold Ethics Board was authorized to conduct executive sessions under Open Meetings Law, although town code did not mention its ability to do so. Comm on Open Gov't OML-AO-3712.

Although it may be difficult and perhaps cumbersome during course of meeting to enter into executive session, return to open meeting and later enter into executive session again, should need arise, such actions may be fully appropriate and necessary to comply with Open Meetings Law. Comm on Open Gov't OML-AO-4165.

13. Interpreter

There is nothing in Open Meetings Law that would require public body to ensure that interpreter is present at meeting. Comm on Open Gov't OML-AO-2535.

14. Location of meetings, generally

15. —Access for physically handicapped

Meeting of 2 city boards at the city waste water treatment plant does not satisfy Public Officers Law § 98(b) [now § 103(b)]. Comm on Open Gov't OML-AO-905.

CLS Public Officers Law § 103(b) does not impose obligation on public body to construct new facility or reconstruct or renovate existing facility to permit barrier-free access to physically handicapped persons; however, if public body has capacity to hold its meetings in number of locations, meetings should be held in facility that is most likely to accommodate needs of persons with handicapping conditions. Committee on Open Government OML-AO-1185.

Section 103[b] of OML imposes no obligation upon public body to construct new facility or reconstruct or renovate existing facility to permit barrier free access to physically handicapped persons. Comm on Open Gov't OML-AO-1291.

Open Meetings Law imposes no obligation on public body to construct new facility, or to renovate existing facility, to permit barrier-free access to physically handicapped persons; however, public body has responsibility to make "all reasonable efforts" to ensure that meetings are held in facilities that permit barrier-free access to physically handicapped persons. Comm on Open Gov't OML-AO-2252.

If board has capacity to hold its meetings in facility that is accessible to handicapped persons, meetings should be held in location that is most likely to accommodate needs of those persons. Comm on Open Gov't OML-AO-2447.

There is no obligation on public body to construct new facility or to renovate existing facility to permit barrier-free access to physically handicapped persons; however, public body has responsibility to make all reasonable efforts to ensure that meetings and hearings are held in facilities that permit barrier-free access to physically handicapped persons and, therefore, if public body has capacity to hold its meetings in facility that is accessible to handicapped persons, meetings should be held in location that is most likely to accommodate needs of those persons. Comm on Open Gov't OML-AO-2575.

Public body is not obligated to construct new facility or renovate existing facility to permit barrier-free access to physically handicapped persons; however, wherever possible, meetings of public bodies should be held in rooms most likely to accommodate needs of handicapped persons. Comm on Open Gov't OML-AO-3227.

To comply with Open Meetings Law, village board of trustees should hold its meetings in barrier-free handicapped accessible facility, not in upstairs room at village hall; suggested solution of requiring handicapped persons unable to attend meeting on second floor to call in advance, to make appropriate arrangements for special transport, would be unreasonable and would result in impediment for handicapped persons that does not exist for others. Comm on Open Gov't OML-AO-3639.

If courtroom located on ground floor of Town Hall was available for board of assessment review proceedings, it would be unreasonable to conduct proceedings in room on second floor, which was accessible only by stairs. Comm on Open Gov't OML-AO-3668.

Fire district bylaw which required board of fire commissioners to hold its meetings in designated room above fire house was invalid because it was more restrictive with respect to public access than Open Meetings Law, where room in question was not handicap accessible, and meetings could be held at nearby location that would permit access to those interested in attending. Comm on Open Gov't OML-AO-3692.

Since there is nothing in the Open Meetings Law that deals specifically with the location of a meeting of a public body, the question should be dealt with from the perspective of reasonableness. If, for example, a school board sought to conduct a meeting 100 miles from the school district, the site would be unreasonable, since under those circumstances an interested member of the public likely would not have the capacity to attend, but if there is a special reason for holding a meeting close to, but outside the bounds of, the school district, such a gathering might not be unreasonable. Comm on Open Govt OML-AO 936.

While Open Meetings Law does not prohibit meetings from being held in restaurant, such meeting site might represent impediment to access to many who might otherwise want to attend. 1986 Committee on Open Government OML-AO-1304.

If it is can be anticipated in advance of meeting that larger crowd is likely to attend than usual meeting location will accommodate, and if larger facility is available, it would be reasonable and consistent with intent of Open Meetings Law to hold meeting in larger facility; conversely, assuming same facts, it would be unreasonable to hold meeting in facility that would not accommodate those interested in attending. Comm on Open Gov't OML-AO-2359.

It would be inappropriate and inconsistent with Open Meetings Law for public body to hold meeting in restaurant where those who attend would be expected to make purchase. Board of education violated Open Meetings Law when it held building planning workshop, without notice to public, in restaurant in nearby location in Pennsylvania. Comm on Open Gov't OML-AO-2560.

If it is known in advance of meeting that larger crowd is likely to attend than usual meeting location will accommodate, and if larger facility is available, it is reasonable and consistent with intent of Open Meetings Law to hold meeting in larger facility; conversely, assuming same facts, it is unreasonable to hold meeting in facility that will not accommodate those interested in attending. Comm on Open Gov't OML-AO-2604.

It was inconsistent with Open Meetings Law to hold meeting at country club, because meeting held in location where those who attend must be members or are expected to purchase something represents impediment to free public access. Comm on Open Gov't OML-AO-2695.

If it is known in advance of town board meeting that likely attendance will be larger than usual meeting location will accommodate, and if larger facility is available, board should hold meeting in larger facility. Comm on Open Gov't OML-AO-2767.

Nothing in Open Meetings Law specifies that meetings of village board of trustees must be conducted within village boundaries; nevertheless, meeting of board of trustees, or any municipal body, must be held at location where members of public who might want to attend could reasonably do so. Comm on Open Gov't OML-AO-3279.

If City of North Tonawanda Common Council conducted meetings in either of 2 locations and knew in advance that larger crowd than usual was likely to attend particular meeting, it would be consistent with Open Meetings Law to hold that meeting in larger facility. Comm on Open Gov't OML-AO-3403.

Board of the Greenburgh Eleven Union Free School District could hold its meetings at BOCES facility that required all visitors to sign in, where sign-in requirement was prompted by security concerns, it was BOCES policy and not created or drafted by school board, and sign-in policy (which appeared in BOCES handbook) applied to all visitors regardless of their reasons for being there. Comm on Open Gov't OML-AO-3527.

Board of education's alleged practice of adjourning for executive session, and then returning to public session in room other than where meeting originally convened, required board to provide notice, presumably by posting, as to location where meeting would continue after executive session or recess, especially if (by coincidence or otherwise) most members of public had left before open meeting resumed. Comm on Open Gov't OML-AO-3589.

Court probably would not determine that time and place of meetings of Franklin County Legislature are unreasonable or constitute violation of Open Meetings Law, despite fact that county seat (Malone) is located at northern end of what is large county, roughly 47 percent of county's population lives in southern end of county, and meetings are scheduled during business hours from 10 a.m. to 2 p.m., since greater percentage apparently resides closer to Malone and thus would experience less hardship. Comm on Open Gov't OML-AO-3912.

Holding public meeting at home of Town Board member would be unreasonable and inconsistent with intent of Open Meetings Law since, aside from issue of barrier-free access to physically handicapped persons, home is not public facility, and entry into home to attend meeting involves sense of intrusion or intimidation. Comm on Open Gov't OML-AO-4035.

16. Public's right to speak

If public body does not want to permit members of public to speak or otherwise participate at open meetings, it is not required to do so; on other hand, there is nothing in Open Meetings Law that limits authority of public body to permit public participation at meetings; consequently, public body may permit some public participation, presumably in accordance with reasonable rules that treat members of public equally. Comm on Open Gov't FOIL-AO-4930.

A public body is not required to permit members of the public to speak or participate at hearings. However, if a public body chooses to permit public participation, it should do so based upon reasonable rules that treat all members of the public equally. Comm on Open Govt OML-AO 923.

OML does not confer right on public to speak or otherwise participate at meetings; however, public body may permit public to participate if it so chooses. Comm On Open Gov't OML-AO-1281.

When Open Meetings Law is applicable, public has right to attend and listen to deliberations of public bodies, and although public body may permit public to speak or to participate at meetings, public has no right to speak or otherwise participate at open meetings. 1986 Committee on Open Government OML-AO-1295.

Procedures of village board which authorized public participation at meetings were reasonable under Open Meetings Law where members of public were given equal opportunity to speak; public body is not obligated to answer questions or permit public to speak, or otherwise participate at its meetings, but when it permits public participation, it should do so based upon reasonable rules that treat members of public equally. Comm on Open Gov't OML-AO-2173.

If it is clear that commentary is or would be repetitive of comments made at prior meetings, public body may reasonably preclude individuals from reiterating comments previously made; however, if individuals who have spoken previously wish to provide new or different information or commentary, and if public body permits others to do so, those individuals should be permitted to do so. Possibility that commentary may relate to eventual litigation, without more, may not serve as valid basis for prohibiting member of public from speaking, since possible litigation could be subject or result of nearly any topic discussed by public body. Comm on Open Gov't OML-AO-2231.

Open Meetings Law is silent with respect to issue of public participation; thus, if public body does not want to answer questions or permit public to speak or otherwise participate at its meetings, it is not obliged to do so. Comm on Open Gov't OML-AO-2309.

Although public body is not obliged to permit public to speak at its meetings, when public body chooses to authorize public participation, it should do so in accordance with reasonable rules that treat members of public equally; thus, rule that allows certain members of public to speak while prohibiting others from speaking at all is unreasonable and subject to invalidation. Comm on Open Gov't OML-AO-2585.

When public body permits public to speak at meetings pursuant to local laws, it should do so reasonably and in manner that treats members of public equally. Comm on Open Gov't OML-AO-2600.

If public is generally permitted to speak at meetings, public body cannot validly prohibit person from speaking because of possibility that he or she might at some point initiate litigation, as that person's comments would divulge nothing about public body's strategy in potential or eventual litigation. Comm on Open Gov't OML-AO-2696.

Member of public who attended town board meeting was improperly prevented from asking questions about condition of road on which automobile accident involving his son had occurred, where public was given opportunity to speak and ask questions during meeting, there was no rule or policy restricting public from discussing or raising questions involving certain subject areas, and questioner was not boisterous or unruly. Comm on Open Gov't OML-AO-3183.

Public body is not required to permit public to speak at meetings, but if it chooses to do so, it must do so in reasonable manner based on reasonable rules that treat members of public equally. Comm on Open Gov't OML-AO-3292.

Village board of trustees may establish rules concerning conduct of persons who attend its meetings, including limiting privilege of public to speak or participate to certain times, topics and duration. Comm on Open Gov't OML-AO-3295.

Board of Education could justifiably restrict speaker at open meeting from discussing incident in which his son was allegedly assaulted by another student (who he referred to as "Child A"), although neither board not any district officer or employee would have been involved in disclosing identity of "Child A," and FERPA, therefore, would not have been directly implicated, considering "compelling state interest" in protecting students' privacy and ensuring that speaker's comments would not render student's identity easily traceable; member of public and board of education could discuss Child A in private, not necessarily based on any ground for executive session, but rather based on CLS Pub O § 108(3), which exempts matters made confidential by law from Open Meetings Law. Comm on Open Gov't OML-AO-3405.

Members of public who chose to speak at meetings of village board of trustees could not be compelled to identify themselves by name and address as condition of speaking in same manner as others. Comm on Open Gov't OML-AO-3518.

Board of education could limit members of public, at its meetings, to "one turn at the microphone," so long as its practice was implemented equally and reasonably. Comm on Open Gov't OML-AO-3589.

It would be unreasonable to authorize those with one point of view to speak at meeting or hearing for 10 minutes or perhaps without limitation, while permitting those with different view to speak for 3 minutes or not at all. Comm on Open Gov't OML-AO-3834.

Public body is not required to permit public to speak during meetings. Comm on Open Gov't OML-AO-4024.

Rule of public body authorizing any person in attendance to speak for maximum prescribed time on agenda items, and those items only, would be reasonable and valid, so long as it is carried out reasonably and consistently. Comm on Open Gov't OML-AO-4024.

Court would determine that public body may limit amount of time allotted to person who wishes to speak at meeting, so long as limitation is reasonable. Comm on Open Gov't OML-AO-4044.

City Council may limit public comments to matters involving City business or operation of City government and require brief written summary of subject intended to be discussed by person wishing to address Council. Comm on Open Gov't OML-AO-4044.

City Council, rather than President of Council reaching determination alone, should determine whether particular subject may be raised by member of public. Comm on Open Gov't OML-AO-4044.

It is "unlikely" that public body could validly prohibit nonresident from speaking at public forum based on residency. Comm on Open Gov't OML-AO-4141.

Any member of public has equal opportunity to partake in public hearing, and effort to distinguish among attendees by residence or any other qualifier would be inconsistent with law and, therefore, unreasonable. Comm on Open Gov't OML-AO-4141.

17. Recording devices, generally

18. —Tape recordings, generally

Member of public may tape record open meetings of public bodies. Comm on Open Gov't FOIL-AO-1461.

Board of Education, pursuant to CLS Educ § 1709, could adopt rule prohibiting members from using tape recorders at executive sessions without consent of majority of board, as tape recording executive session could potentially defeat purpose of holding executive session. Comm on Open Gov't FOIL-AO-10368.

Possibility that video recording of open meeting might be pertinent to or used in litigation is largely irrelevant. Comm on Open Gov't FOIL-AO-12186.

Executive of housing authority did not need permission to tape record meetings, although housing authority resolution indicated that authority "members, agents, and/or employees...present at the meeting and acting within the scope of their employment" needed consent to tape record meetings, where resolution permitted public to use tape recorders so long as they were "neither disruptive nor obtrusive"; agency rule giving members, agents or employees lesser rights than public is unreasonable and unsustainable. Comm on Open Gov't FOIL-AO-12187.

Under Open Meetings Law, no consent is required in order to tape record any aspect of open meetings; further, public body cannot compel member of public or news media to provide copies of tape recording on request; if tape recording of open meeting has been made, owner of tape recording may do with it as he or she sees fit. Committee on Open Government OML-AO-1058.

Any person may use tape recorder at open meeting, so long as tape recording is carried out unobtrusively and in manner that does not detract from deliberative process. Comm on Open Gov't OML-AO-2267.

Any person may use tape recorder at open meeting and member of news media may report with respect to what he or she hears or observes; although there is no requirement that permission to use tape recorder must be obtained, as matter of courtesy it would be appropriate to inform public body that meeting will be tape recorded. Comm on Open Gov't OML-AO-2471.

There is nothing in Open Meetings Law that requires public bodies to tape record their meetings; thus, public body is not precluded from choosing to tape record some portions of meeting but not others. While public body has discretion to use or turn off its own tape recorder, it does not have authority to prohibit member of public from continuing to use his or her own tape recorder, notwithstanding person's statement that he or she has information on subject being discussed but that he or she does not want to discuss it "with the recording on." Comm on Open Gov't OML-AO-2542.

Member of public may tape record open meetings of public bodies, including comments of general public, so long as tape recording is carried out unobtrusively and in manner that does not detract from deliberative process. Comm on Open Gov't OML-AO-2547.

19. —Video recordings, generally

20. — —Tripod-supported

Regulation for use of video cameras at town board meetings conflicted with Open Meetings Law where it stated that camera must be situated on stationary tripod, that it must be turned on before beginning of meeting, and that camera operator must "then be seated with audience until meeting is adjourned or a recess is called," in absence of any reason why camera operator could not be permitted to sit next to or near camera equipment. Regulation for use of video cameras at town board meetings also conflicted with Open Meetings Law where it provided that "camera cannot be hand-operated or moved at any time during a meeting," since small movement of camera situated on stationary tripod (for example to focus on person at one end of table who is speaking and then to person speaking at other end of table) might be non-disruptive and no more distracting than flipping over sheet of paper on notepad by person taking notes, or changing cassette on audio tape recorder. Comm on Open Gov't OML-AO-2197.

Proposed board of education policy enabling any person present at open meeting to ask that use of video equipment be discontinued, and authorizing board president to grant such request unless overruled by majority of board, would not pass legal muster where basis for denying use of video recording devices was that videotapes might be intended to be used as "political mechanism" which would cause divisiveness in school district, and that videotaping was "inherently more obtrusive" and "inherently more likely to detract from the deliberative process" than audio recording. Comm on Open Gov't FOIL-AO-12,353.

Rule prohibiting use of cameras and video tape equipment during public meetings would be reasonable if use of cameras, special lighting, and related equipment would clearly be disruptive to deliberative process; also, if person is or may be compelled to testify before court or during hearing conducted by agency, video taping would be prohibited by CLS Civ R L § 52. Committee on Open Government OML-AO-1062.

Resolution of town board, concerning audio-visual coverage of board meetings, conflicted with Open Meetings Law where it prohibited "zoom" or "tight recording" of persons in attendance at open meetings, and prohibited "light or signal visible or audible to participants...to indicate whether [video equipment] was operating," without regard to whether such recording could be accomplished in non-disruptive manner. Comm on Open Gov't OML-AO-2193.

Regulation for use of video cameras at town board meetings, permitting only one camera in meeting room, conflicted with Open Meetings Law if it was possible to permit use of more than one camera in non-disruptive manner. Regulation giving preference to news media for video taping town board meetings conflicted with Open Meetings Law, although CLS Jud § 218 concerning use of cameras in courts authorizes their use only by members of news media, since members of news have no special right or rights in excess of those conferred upon public under Open Meetings Law. And, regulation requiring that persons using video cameras at town board meetings be present and record meeting in its entirety (only exception being executive sessions) was unreasonable under Open Meetings Law; people who attend meetings with pen and paper are not required to take notes throughout entire meeting, but may take notes based on what they consider important or interesting to them, and people using video cameras should have same discretion. Further, regulation for use of video cameras at town board meetings conflicted with Open Meetings Law where it stated that "if individuals wishes [sic] to address Board without video being used, his/her wishes will be honored"; if a person opts to speak at open meeting, there is no valid basis for prohibiting public from audio or video taping that person's remarks. Comm on Open Gov't OML-AO-2197.

Unless use of video camera is disruptive, planning board (or any public body) may not prohibit its use at open meeting; if it is known in advance that use of recording equipment will be prohibited, person seeking to use such equipment may seek injunction. Comm on Open Gov't OML-AO-3192.

It might be reasonable in village or other space-restricted setting to restrict number of camcorders to one, while such requirement might be viewed as unreasonable in large county legislative chamber or where local board of education is conducting meeting in school auditorium. Comm on Open Gov't OML-AO-4044.

Court's analysis, that those portions of video recording which reflect inter-agency communications between Empire State Development Corporation, New York City Mayor and Governor which are not statistical or factual information or data, would be inconsistent with finding that jury's meetings (regarding selection of plan for memorial at World Trade Center site) are subject to Open Meetings Law; if press and public should have been permitted to attend meeting of jury (assuming quorum was present), there would be no ground for denying access to videotape recording in its entirety. Comm on Open Gov't OML-AO-4200.

Exchange between jury charged with selecting plan for memorial at World Trade Center site and former New York City Mayor could not properly be characterized as "inter-agency" in nature so as to deny access to video recording of exchange, since former mayor was not public officer or employee during such exchange and therefore would not have been officer or employee of agency. Comm on Open Gov't OML-AO-4200.

Any person may tape or video record open meeting of public body, so long as use of recording device is not disruptive or obtrusive. Comm on Open Gov't FOIL-AO-12405.

Member of public may tape record open meetings of public bodies, so long as tape recording is carried out unobtrusively in manner that does not detract from deliberative process, and same principles would apply to video equipment, such that if video equipment can be used without special lighting, in stationary location in an unobtrusive manner, prohibition against video recording of meetings of public bodies would be unreasonable. 1986 Committee on Open Government OML-AO-1317.

Member of public may make audio or visual tape recording of open meetings of public bodies so long as recording is carried out unobtrusively and in manner that does not detract from deliberative process; furthermore, members of public, as well as public officials, may be recorded. Resolution of town board, concerning audio-visual coverage of board meetings, conflicted with Open Meetings Law where it provided that violations "shall result in the forfeiture of the right for any future audio-visual coverage"; regulation may not validly preclude person, who has once attempted to use equipment that is disruptive, from using altered or different equipment that is non-disruptive in future. Resolution of town board also conflicted with Open Meetings Law where it precluded audio or video "pickup" of "conferences" between or among board members or other elected or appointed officials at open meetings; if there is no basis for conducting executive session, or if no exemption is claimed, public has right to listen, hear and observe all that is said during open meeting. Comm on Open Gov't OML-AO-2193.

Comments of members of public, as well as public officials, may be recorded at open meeting. Comm on Open Gov't OML-AO-2267.

Open Meetings Law does not address use of recording, broadcasting and video equipment in non-disruptive manner at open meetings. Rule prohibiting use of unobtrusive recording devices would not be reasonable if presence of such devices would not detract from deliberative process. Comm on Open Gov't OML-AO-2283.

Requirement that any person wishing to record public meeting of village board of trustees, or any other village board, or any portion of such meeting, must inform village clerk prior to commencement of meeting, so as to enable village clerk to inform those in attendance of fact that meeting is to be recorded did not violate Open Meetings Law since it did not diminish privilege of using recording device at meeting. Requirement that any recording device, once activated, should remain activated at least until such time as all discussion concerning particular agenda item was complete, so as to capture full discussion thereof, violated Open Meetings Law. Public body may not restrict number of recording devices used by members of public during meetings. If member of public records meeting, recording is property of that individual; public body cannot require that individual who records meeting provide copy to any other person. Comm on Open Gov't OML-AO-2521.

City council which has televised its meetings on public access channel may subsequently decide to cease doing so; however, any person may audio tape record or video record open meetings of public bodies, so long as use of recording devices is not disruptive or obtrusive. Comm on Open Gov't OML-AO-3122.

Member of public may tape record open meetings of public bodies, so long as tape recording is carried out unobtrusively and in manner that does not detract from deliberative process; such rule would also apply to video recording. Comm on Open Gov't OML-AO-3749.

Blanket prohibition of audio recording is not permissible, and it is likely that appellate courts would find that also to be case with blanket prohibitions of video recording. Comm on Open Gov't OML-AO-4044.

21. Time of meetings

If planning board purposely waits until past midnight to conduct its business or take action, when most persons interested in attending cannot reasonably do so, it is acting in manner inconsistent with Open Meetings Law. Comm on Open Gov't OML-AO-3173.

Procedure apparently used by Mohawk Central School District Board of Education whereby notice given prior to meeting indicated that meeting would begin at 7:45 p.m., but board met at non-publicly advertised time of 7 p.m. and immediately entered into executive session, was inconsistent with Open Meetings Law; alternative method of achieving desired result of notifying public that it was not necessary to arrive at scheduled meeting time in order to be present when public business actually began would be to indicate, on agenda or notice of meeting, that meeting would commence at 7 p.m. (for example) and first item would be voting on motion to enter into executive session to discuss certain subjects. Comm on Open Gov't OML-AO-3510.

Court probably would not determine that time and place of meetings of Franklin County Legislature are unreasonable or constitute violation of Open Meetings Law, despite fact that county seat (Malone) is located at northern end of what is large county, roughly 47 percent of county's population lives in southern end of county, and meetings are scheduled during business hours from 10 a.m. to 2 p.m., since greater percentage apparently resides closer to Malone and thus would experience less hardship. Comm on Open Gov't OML-AO-3912.

22. Other matters

Majority members of board may convene privately without notifying minority members of their gathering, but vote may not be taken during any gathering held without reasonable notice to all members. Comm on Open Gov't OML-AO-1394; Comm on Open Gov't FOIL-AO-4610.

If one person defends or praises board member or employee during open meeting, there cannot be valid restriction on comments (whether neutral, positive or negative) regarding same or other board members or employees. Comm on Open Gov't FOIL-AO-12085.

Members of public bodies may consult with one another individually or by phone, but may not validly conduct meetings by means of telephone conferences, or make collective determinations by means of series of "one on one" conversations or by means of telephonic communications. Comm on Open Gov't OML-AO-2240.

Board must situate itself and conduct its meetings in manner in which those in attendance can observe and hear proceedings; to do otherwise would be unreasonable and fail to comply with basic requirement of Open Meetings Law; however, if meeting room is large, members of public body should situate themselves in locations close enough to proceedings to hear what is said. Comm on Open Gov't OML-AO-2352.

If sound system has been installed in room in which meeting is to be held and if its use would guarantee that those present could indeed hear what is said at meetings, it should be used in order to comply with Open Meetings Law. Comm on Open Gov't OML-AO-2379.

Open Meetings Law did not allow decisional meeting of Public Service Commission in Albany under circumstances in which 4 commission members were present in Albany, but one member of commission desires to participate in discussion and vote on matters considered at meeting by means of 2-way telephone link from New York City, despite fact that site from which commission sought to participate was open to public and that any discussion

or vote could be heard by means of speakerphone hook-up by all persons present at both locations; Commissioner who sought to participate by phone could not validly vote or be counted for purposes of quorum. Comm on Open Gov't OML-AO-2480.

While members of public have right to attend meetings of public bodies, public bodies do not have right to require that those in attendance remain at meeting for entirety of discussion of agenda item or meeting. Comm on Open Gov't OML-AO-2521.

With respect to ability to hear what is said at meetings, public bodies must conduct meetings in manner that guarantees public ability to "be fully aware of" and "listen to" deliberative process. Comm on Open Gov't OML-AO-2575.

Public body cannot validly require that those who seek to attend meetings identify themselves by name, residence or interest because any member of public has equal opportunity to partake in open meeting, and effort to distinguish among attendees by residence or other qualifier is inconsistent with Open Meetings Law and, therefore, unreasonable. Comm on Open Gov't OML-AO-2717.

Under CLS Vill § 4-412(2), village board of trustees may determine rules of its procedure, and there is no obligation to follow Robert's Rules, which are unnecessarily complex and confusing and may, in some instances, be contrary to law. Comm on Open Gov't OML-AO-3205.

Reference materials pertaining to budgets, reserves and fund balances distributed to members of board of education at state-sponsored conference, which were reviewed in closed meeting of board, should have been made accessible for review in their entirety; board improperly discussed budget matters in executive session, and Freedom of Information Law exception pertaining to communications between or among state or local government officials did not apply. Comm on Open Gov't OML-AO-3271.

Since public body may choose to conduct executive session or discuss particular issue in public, information expressed during executive session is not "exempted from disclosure by...statute" under CLS Pub O § 87(2)(a), which requires that statute must prohibit disclosure and leave no discretion to agency or official regarding ability to disclose. Comm on Open Gov't OML-AO-3282.

While nothing in Open Meetings Law prohibits legal counsel from advising member of board of education not to speak at open meetings, to refrain from speaking would appear to conflict with board member's basic duties to express points of view, to exchange ideas, and to engage in deliberative process. Comm on Open Gov't OML-AO-3292.

While board of education is not specifically obligated to provide public address system, it must conduct meetings in manner that guarantees public ability to be "fully aware of" and "listen to" deliberative process. Comm on Open Gov't OML-AO-3292.

If city planning commission made e-mail communications via listserve or other means through which members of commission and members of public, received them at different times, and there was no instantaneous or simultaneous communication, that circumstance would be equivalent to transmission of inter-office memoranda, and Open Meetings Law would not be implicated. Comm on Open Gov't OML-AO-3447.

Under CLS RPTL § 525(2)(a), assessor's remarks concerning complaints made to town board of assessment review could be made only in open sessions; thus, insofar as assessor was present for purpose of offering information or point of view, public was entitled to be present. Comm on Open Gov't OML-AO-3668.

Public body, such as planning board, may validly conduct meeting or carry out its authority only at meeting during which majority of its members has physically convened or during which majority has convened by means of videoconferencing, and even then, only when reasonable notice is given to all members. Comm on Open Gov't OML-AO-3732.

There is nothing in the Open Meetings Law that would preclude members of public body from conferring individually, by telephone, via mail or e-mail; however, series of communications between individual members or telephone calls among members which results in collective decision, meeting held by means of telephone conference or series of telephone calls, or vote taken by mail or e-mail would be inconsistent with law. Comm on Open Gov't OML-AO-3732.

Meeting, i.e., "convening" of public body, involves physical coming together of at least majority of total membership of such body, i.e., Planning Board, or convening that occurs through videoconferencing. Comm on Open Gov't OML-AO-3732.

Amendments to Open Meetings Law clearly indicate that there are only 2 ways in which public body may validly conduct meeting; any other means of conducting meeting, i.e., by telephone, by mail, or by e-mail, would be inconsistent with law. Comm on Open Gov't OML-AO-3732.

Public body may not take action or vote by means of members signing letter at different times. Comm on Open Gov't OML-AO-3899.

Holding "eMeeting" in chat room, even with public notice, would be inconsistent with Open Meetings Law. Comm on Open Gov't OML-AO-3928.

Person cannot be required to provide his or her identity or address as condition precedent to attending or participating in same manner as other members of public, since any person may attend meeting of public body, irrespective of his or her status, interest, or residence. Comm on Open Gov't OML-AO-4002.

There may be valid, justifiable reasons for speakers not identifying themselves or having their names and/or addresses included in minutes of meetings, since it may be inappropriate or even dangerous for speaker to identify himself or herself. Comm on Open Gov't OML-AO-4002.

Public body may not take action or vote by means of series of telephone calls or, for example, by e-mail. Comm on Open Gov't OML-AO-4113.

School board's collective determination—based on telephone calls from school superintendent in which he apparently solicited responses from school board members concerning salary range offered for new position—as to what salary range should be, should have occurred during open meeting held in accordance with provisions of Open Meetings Law; because decision to offer certain salary range was made, such action should be memorialized in minutes. Comm on Open Gov't OML-AO-4113.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:
Definitions, CLS Pub B § 50.

Codes, Rules and Regulations:
Niagara frontier transportation authority. 21 NYCRR §§ 1158.1 et seq.

Federal Aspects:
Open meetings, 5 USCS § 552b.

Jurisprudences:
56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 136 et seq.

126 Am Jur Proof of Facts 3d 343, Proof of Violation of State Open Meeting or Sunshine Law.

Law Reviews:
Sluzar, New York abandons a commitment to open meetings. 50 Alb. L. Rev. 613.

Whelan, New York's Open Meetings Law: revision of the political caucus exemption and its implications for local government. 60 Brook. L. Rev. 1483.

Annotations:
Emergency exception under state law making proceedings by public bodies open to the public. 33 ALR5th 731.

Attorney-client exception under state law making proceedings by public bodies open to the public. 34 ALR5th 591.

Matthew Bender's New York Practice Guides: 3 New York Practice Guide: Real Estate § 20.03.

Texts: Dienes, Levine & Lind, Newsgathering and the Law (1999, Matthew Bender) § 9-6(e).

§ 104. Public notice

1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given or electronically transmitted to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before such meeting.

2. Public notice of the time and place of every other meeting shall be given or electronically transmitted, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.

3. The public notice provided for by this section shall not be construed to require publication as a legal notice.

4. If videoconferencing is used to conduct a meeting, the public notice for the meeting shall inform the public that videoconferencing will be used, identify the locations for the meeting, and state that the public has the right to attend the meeting at any of the locations.

5. If a meeting will be streamed live over the internet, the public notice for the meeting shall inform the public of the internet address of the website streaming such meeting.

6. When a public body has the ability to do so, notice of the time and place of a meeting given in accordance with subdivision one or two of this section, shall also be conspicuously posted on the public body's internet website.

HISTORY:

Formerly § 94, add, L 1976, ch 511, § 1; renumbered § 99, L 1977, ch 933, § 2; renumbered § 104, L 1983, ch 652, § 1, eff Sept 1, 1984; L 1979, ch 704, § 2, eff Oct 1, 1979; L 2000, ch 289, § 4, eff Aug 23, 2000; L 2009, ch 26, § 1, eff May 12, 2009; L 2016, ch 302, § 1, eff Sept 9, 2016.

Amendment Notes The 2016 amendment by ch 302, § 1, added "or electronically transmitted" in 1 and 2; added 5; and renumbered existing 5 as 6.

Notes to Decisions

Analysis

1. In general
2. Adequacy of notice in particular cases, generally
3. —Meetings not scheduled 1 week in advance
4. Adjournment, continuance or the like, generally
5. —Cancellation of meeting
6. Content of notice, generally
7. —Agenda not required
8. Effect of inadequate notice
9. Posting in public location

1. In general

Court would dismiss Article 78 proceeding brought by police officer to invalidate his removal from payroll on ground that such action occurred at meeting of town police commission for which appropriate notice was not given as required by CLS Pub O § 104, since officer's disability retirement had been approved by State Comptroller, and town's subsequent action in removing officer from payroll was merely ministerial, non-discretionary function that did not require notice to or involvement of retired officer. Rockland County Patrolmen's Benevolent Ass'n v Collins, 175 Misc. 2d 246, 667 N.Y.S.2d 1003, 1997 N.Y. Misc. LEXIS 636 (N.Y. Sup. Ct. 1997).

2. Adequacy of notice in particular cases, generally

Actions of state agencies in approving settlement agreement between governor, agencies and private utility regarding executing and approving agreement to transfer nuclear power plant from utility to state were not invalid on grounds that public notice requirements of Open Meetings Law were not satisfied where respective agencies properly posted public notices and made timely press releases to appropriate newspapers. Citizens for an Orderly Energy Policy, Inc. v Cuomo, 159 A.D.2d 141, 559 N.Y.S.2d 381, 1990 N.Y. App. Div. LEXIS 8392 (N.Y. App. Div. 3d Dep't 1990), aff'd, 78 N.Y.2d 398, 576 N.Y.S.2d 185, 582 N.E.2d 568, 1991 N.Y. LEXIS 4795 (N.Y. 1991).

Requirement that notice of meeting of town board be given to media was satisfied where date of such meeting was decided at previous town board meeting, and newspaper reporter attended meeting at which such decision was made; CLS Pub O § 104 does not specify type of media notice required. Actions taken at town board meeting would not be invalidated on basis of improper public notice as required by CLS Pub O § 104 requiring posting of public notice in designated public location at least 72 hours before meeting, where evidence indicated that notice of meeting was posted on town bulletin board but failed to indicate how long before meeting such notice was posted, since court found that any impropriety in notice was unintentional, and parties relying on impropriety of notice failed to demonstrate any prejudice therefrom. Woodstock v Goodson-Todman Enterprises, Ltd., 133 Misc. 2d 12, 505 N.Y.S.2d 540, 1986 N.Y. Misc. LEXIS 2959 (N.Y. Sup. Ct. 1986).

There was no violation under N.Y. Pub. Off. Law § 107(1) of the Open Meeting Law, N.Y. Pub. Off. Law § 100 et seq., where notice pursuant to N.Y. Pub. Off Law § 104(1) and (2) was published as to the time, place, and subject of a meeting to discuss a developer's proposal for an area of the city, everyone who wanted to speak at the meeting had a chance to do so, and there was no indication that the city commission that held the meeting intentionally or knowingly discouraged anyone from attending. Matter of Windsor Owners Corp. v City Council of City of N.Y., 878 N.Y.S.2d 545, 23 Misc. 3d 490, 241 N.Y.L.J. 14, 2009 N.Y. Misc. LEXIS 88 (N.Y. Sup. Ct. 2009).

Trial court properly rejected appellants' challenges under the Open Meetings Law; appellants were not aggrieved by any insufficiency in the notice of the meeting of the planning board held on November 12, 2008, or inaccessibility of the meeting to those with disabilities. In any event, the notice conformed to statutory requirements. Matter of Thorne v Village of Millbrook Planning Bd., 83 A.D.3d 723, 920 N.Y.S.2d 369, 2011 N.Y. App. Div. LEXIS 2836 (N.Y. App. Div. 2d Dep't), app. denied, 17 N.Y.3d 711, 930 N.Y.S.2d 556, 954 N.E.2d 1182, 2011 N.Y. LEXIS 2949 (N.Y. 2011).

A procedure for a town meeting which involved giving of notice of a public hearing on a budget proposal which included notice of a hearing on contract between the town and two fire companies, at which no public comment was sought concerning the fire district contract, and upon the closing of which the Town Supervisor called a meeting of the Town Board at which the budget was adopted and an unnoticed resolution passed, is improper since, under the circumstances, it appears that the notice for gathering for the public hearing did not indicate that a meeting would be held for the purpose of conducting regular town business and therefore is inadequate under Public Officers Law § 99 [now § 104]. Comm Pub Acc Rec OML–Ad Op 567.

Activities of a Board of Education in discussing a reduction of size of its Committee on the Handicapped and the appointment of specific individuals to serve on that Committee during an executive session, conducted prior to rather than during an open meeting, violated the Open Meetings Law since, inter alia, open meetings may only be conducted upon notice to the public and to the news media. Comm Pub Acc Rec OML–Ad Op 570.

A mayor's community development task force is a public body within the meaning of Public Officers Law § 97(2) [now § 102(2)], and therefore the task force violated Public Officers Law § 99 [now § 104] by failing to give advanced notice of its meeting to at least 2 members of the news media and to the public by means of posting in a conspicuous public location. Comm Pub Acc Rec OML–Ad Op 590.

3. —Meetings not scheduled 1 week in advance

Special Term's annulment of a decision by the State Commission of Corrections, on the ground that the failure of the Commission to give at least one week's public notice of the meeting at which the decision was taken violated the notice requirements of the Open Meetings Law, Pub O § 104(1), would be reversed where the uncontested proof was that the September 30 meeting was not scheduled until September 27, and that the requisite

public notice was given almost immediately thereafter, and hence met the alternative statutory notice requirement of Pub O § 104(2). Bowen v State Com. of Correction, 104 A.D.2d 238, 484 N.Y.S.2d 210, 1984 N.Y. App. Div. LEXIS 20623 (N.Y. App. Div. 3d Dep't 1984).

Trustees of union free school district violated notice provisions of CLS Pub O § 104 when, despite lack of urgency, they scheduled executive session on same day as meeting itself, they provided no notice to news media, and the only notice was posted on district office's bulletin board. Previdi v Hirsch, 138 Misc. 2d 436, 524 N.Y.S.2d 643, 1988 N.Y. Misc. LEXIS 340 (N.Y. Sup. Ct. 1988).

4. Adjournment, continuance or the like, generally

If members of town board met to discuss public business or continued original meeting after their official adjournment at 8:45 p.m., they failed to comply with Open Meetings Law. Comm on Open Gov't F7978.

5. —Cancellation of meeting

The trial court did not abuse its discretion in invalidating all action taken at a meeting of the board of education of a school district where the school district failed to present a satisfactory explanation for their last-minute call of the meeting and for the patent inadequacy of the notice which consisted only of a typewritten announcement posted on a bulletin board. White v Battaglia, 79 A.D.2d 880, 434 N.Y.S.2d 537, 1980 N.Y. App. Div. LEXIS 14302 (N.Y. App. Div. 4th Dep't 1980).

Although notice provisions of Open Meetings Law contain no requirements respecting cancellation of meetings it is reasonable to give 72 hours notice of cancellation. Comm Pub Acc Rec OML-Ad Op 765.

6. Content of notice, generally

Open Meetings Law requires only that notice of time and place of meeting be given to public. Comm Pub Acc Rec OML-Ad Op 830.

Notice given with respect to meetings of town board need not include indication of topics to be discussed. Comm Pub Acc Rec OML-Ad Op 832.

7. —Agenda not required

Trial court's annulment of the determinations of a county and a comptroller reducing a retiree's salary for purposes of his retirement severance was proper because a board of trustees had been authorized by N.Y. Educ. Law § 6306(2) and N.Y. Comp. Codes R. & Regs. tit. 8, § 604.2(a) to vote to raise the retiree's salary pursuant to his employment contract, and contradictory local laws did not supersede state law or regulations; there was no support for the claim that the meeting was not properly noticed as to time and place and there was no statutory requirement that notice of the agenda of the meeting be given. The contention that the vote was unauthorized because verbatim minutes of the meeting were not taken was unavailing as N.Y. Pub. Off. Law § 106 merely required that a record or summary of the action at a meeting be taken, and the record disclosed that a summary of the action was taken. Matter of LaLima v County of Suffolk, 45 A.D.3d 845, 847 N.Y.S.2d 208, 2007 N.Y. App. Div. LEXIS 12137 (N.Y. App. Div. 2d Dep't 2007).

8. Effect of inadequate notice

In a proceeding challenging the reapportionment of a county legislature, meetings at which members of the majority political party discussed a reapportionment plan did not violate Pub O Law § 98(a) [now § 103(a)] where, although they were closed sessions, no legislative quorum was present at any of the meetings; although a technical violation occurred at one of the meetings because no public notice was "conspicuously" posted as required by Pub O Law § 99 [now § 104], the trial court was not justified in voiding all the actions resulting from the meeting where the press was in fact notified of the meeting and attended it and where the resolution of the meeting merely called for a public hearing. Britt v County of Niagara, 82 A.D.2d 65, 440 N.Y.S.2d 790, 1981 N.Y. App. Div. LEXIS 10944 (N.Y. App. Div. 4th Dep't 1981).

Board of education violated Open Meetings Law by failing to provide public notice of special meeting at reasonable time prior thereto, and its resolution authorizing payment of retirement incentive to reimburse employee for unused accrued sick leave, which was adopted in executive session held at that meeting, was therefore void. Rampello v East Irondequoit Cent. Sch. Dist., 236 A.D.2d 797, 653 N.Y.S.2d 469, 1997 N.Y. App. Div. LEXIS 1719 (N.Y. App. Div. 4th Dep't 1997).

Despite violation of notice requirements of Open Meetings Law, action taken by Town Board remains effective unless a court renders a determination to the contrary in resolving a suit brought by an aggrieved person under Pub O § 102 [now § 107]. Comm Pub Acc Rec OML–Ad Op 567.

Record supported a finding that a zoning board of appeals violated the Open Meetings Law with regard to a workshop by failing to give proper notice, but plaintiffs failed to establish good cause to annul the determination on that ground, as the improperly noticed meeting was open to the public and the determination at issue was adopted at a publicized, public meeting after a series of public meetings with regard thereto had previously been held. Thus, the trial court should not have annulled the determination on that ground and should not have awarded plaintiffs costs and attorneys' fees based on that violation. Chestnut Ridge Assoc., LLC v 30 Sephar Lane, Inc., 169 A.D.3d 995, 94 N.Y.S.3d 596, 2019 N.Y. App. Div. LEXIS 1414 (N.Y. App. Div. 2d Dep't 2019).

9. Posting in public location

Because a town complied with N.Y. Pub. Off. Law § 104 by posting notice of a meeting and followed the appropriate procedure in the State Environmental Quality Review Act and N.Y. Town Law § 261-b(3)(d), and because its mitigation measures had a rational basis in the record, a preservation association was not entitled to N.Y. C.P.L.R. art. 78 relief. Finger Lakes Preserv. Assn. v Town Bd. of Italy, 887 N.Y.S.2d 499, 25 Misc. 3d 1115, 2009 N.Y. Misc. LEXIS 2760 (N.Y. Sup. Ct. 2009).

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1. In general

A village board may, in its discretion, sell real property at public auction or through negotiated sale and invoke whatever notice requirements it deems appropriate. 1981 NY Ops Atty Gen March 10 (informal).

It is unreasonable for a school board not to give notice of its meetings to a newspaper of general circulation which receives and regularly publishes publicity from the school and attends school board meetings after the newspaper has asked for such notification. Comm on Open Gov't OML-AO-906.

Every meeting of public body must be preceded by notice of time and place of meeting, regardless of whether meetings are considered formal or otherwise. Committee on Open Government OML-AO-1036.

If public body seeks to hold meeting as well as public hearing, in addition to legal notice of public hearing, public body should give notice as required by Open Meetings Law. Committee on Open Government OML-AO-1106.

City housing authority must post notice prior to all of its meetings; thus, amendment to by-laws of board providing that regular meetings of authority shall be held at particular time and at particular place unless otherwise provided by authority, is

inconsistent with CLS Pub O § 104. Committee on Open Government OML-AO-1128.

Public body may invite persons with relevant special knowledge or expertise into executive sessions without violating Open Meetings Law; however, arbitrary invitation to attend executive session to those without expertise or whose presence may be irrelevant to discussion would be unreasonable and inconsistent with law. 1986 Committee on Open Government OML-AO-1320.

So-called "work sessions" held by city council are "meetings", and must be preceded by notice given in accordance with Open Meetings Law. Comm on Open Gov't OML-AO-1357.

Public body may carry out its powers and duties only at meeting held upon reasonable notice to all members. Comm on Open Gov't OML-AO-1433.

All meetings must be preceded by notice given in accordance with Open Meetings Law and conducted open to public, unless and until executive session may be held to discuss one or more topics described in Law. Comm on Open Gov't OML-AO-1438,1444,1450.

Notice must be given prior to meeting of public body even if entire substance of meeting may be conducted in executive session. Comm on Open Gov't OML-AO-2211.

Public body has capacity to carry out its duties only during duly convened meetings that are preceded by reasonable notice given to all members. Comm on Open Gov't OML-AO-2256.

If 2 public bodies intend to meet jointly, both are required to comply with Open Meetings Law and provide required notice. Comm on Open Gov't OML-AO-2280.

Choosing not to provide notice as required by Open Meetings Law due to possibility that executive session might be held is inappropriate. Comm on Open Gov't OML-AO-2427.

If majority of public body is invited to conduct public business, and gathering is not political caucus exempt from Open Meetings Law, it is not reasonable, in view of overall intent of Open Meetings Law, not to provide notice to public and news media or to all of members. Comm on Open Gov't OML-AO-2489.

Board of education violated Open Meetings Law when it held building planning workshop, without notice to public, in restaurant in nearby location in Pennsylvania. Comm on Open Gov't OML-AO-2560.

If majority of public body gathers to discuss public business, any such gathering ordinarily constitutes meeting subject to Open Meetings Law; however, in order to constitute valid meeting, all of members of public body must be given reasonable notice of meeting. Comm on Open Gov't OML-AO-2601.

If town board intends to convene to discuss agenda or other matters of public business before its regularly scheduled meeting, notice must be given indicating time and place of that gathering. Comm on Open Gov't OML-AO-3132.

When public body or board gathers solely to consider matters exempt from Open Meetings Law, meeting need not be preceded by notice and there is no obligation to follow procedures applicable for entry into executive session. Comm on Open Gov't OML-AO-3506.

Inasmuch as use of e-mail to transmit information has become commonplace and is widely accepted, notice of meetings of public bodies may validly be accomplished by e-mail. Comm on Open Gov't OML-AO-3670.

If issue before board of ethics involves particular person in conjunction with one or more of subjects listed in CLS Pub O § 105(1)(f), executive session could appropriately be held. Comm on Open Gov't OML-AO-3712.

Ethics board or committee has same obligations as governing body, such as town board, regarding openness and provision of notice of meetings. Comm on Open Gov't OML-AO-3712.

Public body, such as planning board, may validly conduct meeting or carry out its authority only at meeting during which majority of its members has physically convened or during which majority has convened by means of videoconferencing, and even then, only when reasonable notice is given to all members. Comm on Open Gov't OML-AO-3732.

If notice requirement of CLS Gen Const § 41 does not occur, even if majority is present, valid meeting could not be held or action could not validly be taken. Comm on Open Gov't OML-AO-3732.

When committee is subject to Open Meetings Law, it has same obligations regarding notice, openness, and taking of minutes, for example, as well as same authority to conduct executive sessions, as governing body. Comm on Open Gov't OML-AO-3740.

"Hearings" are often required to be preceded by publication of legal notice while, in contrast, CLS Pub O § 104(3) of Open Meetings Law specifies that notice of "meeting" must merely be "given" to news media and posted; further, there is no requirement that newspaper, for example, publish notice given regarding meeting to be held under Open Meetings Law. Comm on Open Gov't OML-AO-3834.

There is nothing in Open Meetings Law that specifies who must provide notice of meetings or prepare minutes. Comm on Open Gov't OML-AO-3841.

Notice requirements set forth in CLS Pub O § 104 would apply to both "locations" of village meeting: urban county in which many residents live, and isolated village in which such residents maintain seasonal homes. Comm on Open Gov't OML-AO-4180.

Notice must be provided prior to all meetings, regardless of whether meetings are considered formal or otherwise. Comm on Open Gov't OML-AO-1394,4610.

2. Adequacy of notice in particular cases, generally

3. —Meetings not scheduled 1 week in advance

A resolution passed at a special town board meeting held without two days' written notice is not invalid if all of the town board members have actual notice of the meeting, attend it and participate therein. 1980 NY Ops Atty Gen April 14 (informal).

If meeting of body is scheduled at least week in advance, notice of name and place must be given to news media and to public by means of posting in one or more designated public locations, not less than 72 hours prior to meeting; however, if there is a need to convene board quickly due to "emergency", notice requirements can be met by telephoning local news media and by posting in one or more designated locations. Comm on Open Gov't FOIL-AO-4815.

Every meeting of public body must be preceded by notice of time and place of meeting; meetings must be scheduled at least one week in advance and notice must be given to news media and the public by means of posting in one or more designated, conspicuous public locations; however, when meetings are scheduled less than one week in advance notice must be given to news media and public by means of posting to the extent practicable at reasonable time prior to such meetings. Comm on Open Gov't OML-AO-1445.

Where meetings are scheduled less than a week in advance, requirement notice must be given to news media and to public to extent practicable at reasonable time prior to such meetings; as such, if meeting must be convened quickly, public body should inform news media of time and place of meeting by phone, and post notice. Comm on Open Gov't OML-AO-1460.

Propriety of scheduling meeting less than one week in advance is dependent upon actual need to do so. Comm on Open Gov't OML-AO-2186.

Absent emergency or urgency, it may be unreasonable to conduct meetings on short notice, unless there is some necessity to do so. Comm on Open Gov't OML-AO-2389.

If single notice of meeting was posted in isolated area of school building on Friday concerning meeting to be held on Monday, and if building was closed to public during weekend, board of education failed to comply with Open Meetings Law. Comm on Open Gov't OML-AO-2496.

Agenda was sufficiently specific in listing subjects to be considered by town board in executive session where such subjects were identified as "real estate," "contracts," "litigation" and "negotiations." Comm on Open Gov't FOIL-AO-12,339.

If meeting is scheduled at least week in advance, notice of time and place must be given to news media and to public by means of posting in one or more designated public locations, not less than 72 hours prior to meeting; if meeting is scheduled less than week advance, notice of time and place must be given to news media and posted in same manner as described above, "to extent practicable," at reasonable time prior to meeting; therefore, if there is need to convene quickly, notice requirements can generally be met by telephoning local news media and by posting notice

in one or more designated locations. Comm on Open Gov't OML-AO-2256.

If series of meetings have been scheduled in advance to be held at particular times, posting of notice of schedule of those meetings and transmittal of that notice to news media satisfies CLS Pub O § 104 regarding those meetings; only instance in which additional notice would be required would involve unscheduled meetings that are not referenced in notice. Comm on Open Gov't OML-AO-2278.

Where no notice was given indicating change in location of meeting, board failed to comply with CLS Pub O § 104; moreover, even if notice was given on day of meeting, but there was no basis for changing location, it is questionable whether changing site was reasonable or, therefore, reflective of compliance with Open Meetings Law. Comm on Open Gov't OML-AO-2289.

Merely posting single notice would fail to comply with Open Meetings Law since law specifies that notice be posted and given to news media. Comm on Open Gov't OML-AO-2381.

Although Open Meetings Law does not specify which news media outlet or outlets should receive notice, that law, like any other, should be implemented in manner that gives reasonable effect to its intent; thus, notice given to weekly newspaper might not, due to time of publication, serve to enable that newspaper to inform public of meeting. Comm on Open Gov't OML-AO-2449.

Open Meetings Law does not specify which news media must receive notice; public body may comply with Open Meetings Law by providing notice to local radio station in accordance with CLS Pub O § 104. Comm on Open Gov't OML-AO-2458.

If school superintendent "sent" notice to news media, by fax machine or by delivery reasonable time prior to meeting, notice to news media might satisfactorily have been accomplished; however, if notice were "sent" in some other way that did not provide time and place of meeting to news media at reasonable time prior to meeting, that aspect of Open Meetings Law might not have been adequately carried out. Comm on Open Gov't OML-AO-2474.

So long as notice of meeting is given to at least one news media organization prior to meeting, public body acts in compliance with requirement that notice be given to news media. If notice of village board meeting is posted and given to newspaper that has significant circulation in village or to radio station situated in or near village, board is in compliance with Open Meetings Law. If newspaper has significant circulation in municipality, it might be considered to be unreasonable to avoid providing notice to that newspaper. Providing notice to single weekly newspaper, which would not again publish until meeting at issue, and failing to post notice at all, was inconsistent with requirements of Open Meetings Law. Comm on Open Gov't OML-AO-2513.

Absent emergency or urgency, it is unreasonable to conduct meetings on short notice—i.e., less than one week—unless there is some necessity to do so. Comm on Open Gov't OML-AO-2567.

So long as notice of meeting is given to at least one news media organization prior to meeting, public body acts in compliance with requirement that notice be given to news media. Open Meetings Law does not require that notice of meetings be given to particular newspaper; if newspaper has significant circulation in municipality, it is reasonable to provide notice to that newspaper. Comm on Open Gov't OML-AO-2585.

Merely posting one notice would not comply with Open Meetings Law, which requires that notice be given to news media and posted prior to meetings; it would be unreasonable to conduct meeting on short notice absent showing of necessity to do so. Comm on Open Gov't OML-AO-3248.

Procedure apparently used by Mohawk Central School District Board of Education whereby notice given prior to meeting indicated that meeting would begin at 7:45 p.m., but board met at non-publicly advertised time of 7 p.m. and immediately entered into executive session, was inconsistent with Open Meetings Law; alternative method of achieving desired result of notifying public that it was not necessary to arrive at scheduled meeting time in order to be present when public business actually began would be to indicate, on agenda or notice of meeting, that meeting would commence at 7 p.m. (for example) and first item would be voting on motion to enter into executive session to discuss certain subjects. Comm on Open Gov't OML-AO-3510.

If entity subject to Open Meetings Law conducts meeting at office of former board member and office is located in large building with many other offices, notice must provide sufficient detail for those interested in attending to locate area of building where meeting will be held (for example, floor or room number, or company name), and it might also be reasonable to conspicuously post notice and details of meeting location in lobby of building in question. Comm on Open Gov't OML-AO-3593.

If series of meetings have been scheduled in advance to be held at particular times, posting of notice of schedule of those meetings in conspicuous public location and transmittal of that notice once to news media would satisfy CLS Pub O § 104 regarding those meetings; sole instances in which additional notice would be required would involve unscheduled meetings that are not referenced in notice. Comm on Open Gov't OML-AO-3812.

4. Adjournment, continuance or the like, generally

5. —Cancellation of meeting

When notice of meeting has been posted in one or more locations as required by CLS Pub O § 104, it would be appropriate to post notice of cancellation at same locations. When notice of upcoming meeting is given to members of news media, they should also be informed of its cancellation; in some instances, it may be appropriate to contact additional news media; for instance, even though notice might have been given prior to meeting to newspaper, radio station may be able to inform public more quickly that meeting has been canceled. Comm on Open Gov't OML-AO-2420.

Where meeting held on May 30 was "recessed" to June 20, second gathering constituted new meeting which should have been preceded by notice under CLS Pub O § 104, and minutes of May 30 meeting were required to be prepared and disclosed on request within 2 weeks of May 30. Comm on Open Gov't FOIL-AO-12288.

No subsequent public notice is required when a village board of trustees continues a meeting from one day to the next because of inability to resolve all issues regarding its budget. Comm on Open Gov't OML-AO-884.

If a meeting is adjourned on one date and other meetings are scheduled to continue discussions of issues considered at an earlier meeting, each successive meeting is subject to notice requirements of the Open Meetings Law. Comm on Open Govt OML-AO 932.

If regular board meeting is adjourned to next day, requirements of posting meeting notices and notifying public must again be met, since adjournment signifies end of meeting. Comm on Open Gov't OML-AO-2219.

Town planning board violated Open Meetings Law when it conducted adjourned regularly scheduled and properly noticed meeting, went to another location to inspect site at issue, and conducted vote on site without prior written notification of time and place of vote; board should have voted at meeting held in accordance with Open Meetings Law after its site visit. Comm on Open Gov't OML-AO-3184.

Board of education's alleged practice of adjourning for executive session, and then returning to public session in room other than where meeting originally convened, required board to provide notice, presumably by posting, as to location where meeting would continue after executive session or recess, especially if (by coincidence or otherwise) most members of public had left before open meeting resumed. Comm on Open Gov't OML-AO-3589.

6. Content of notice, generally

7. —Agenda not required

Although many public bodies by policy, rule, or tradition, prepare agendas prior to their meetings, the Open Meetings Law does not require or refer to the preparation of an agenda. Thus, no violation of the Open Meetings Law occurs when a public body discusses a matter and votes on it without having first placed the matter on its agenda. Comm on Open Govt OML-AO 921.

Hospital advisory board was not required by Open Meetings Law to disseminate agendas and similar information prior to meetings to enable members of public to be aware of subjects to be considered at its meetings, since CLS Pub O § 104 requires that public body provide notice of time and place of its meetings, but

does not require that notice include reference to subjects to be considered, or that notices be mailed to individuals on request. Comm on Open Gov't OML-AO-2246.

There is nothing in Open Meetings Law that requires that notice of meeting include reference to subjects to be discussed; similarly, there is nothing in that statute that pertains to or requires preparation of agenda. Comm on Open Gov't OML-AO-3806.

There is no provision in law that limits or restricts scope of special meeting of town board or that requires that notice of special meeting specify subjects to be considered. Comm on Open Gov't OML-AO-3859.

While notice of time and place must be given prior to all meetings of public body, there is no requirement that agenda or notification of issues to be discussed be given unless public body has established rules or procedures requiring additional information in its notices of meetings. Comm on Open Gov't FOIL-AO-9178.

There is nothing in the Open Meetings Law that requires that the subject matter to be discussed at a meeting be included in a notice. Comm on Open Gov't OML-AO-866.

Although notice must be given concerning time and place of meetings, statute does not require that notice include purpose of meeting, or statement whether meeting is characterized as regular or special. Committee on Open Government OML-AO-1047.

Although every meeting must be preceded by notice given in accordance with CLS Public Officers § 104, notice need not include agenda or indication of specific subjects to be discussed by public body; accordingly, notice of meeting of human rights commission need not include lists of alleged violators. Committee on Open Government OML-AO-1203.

While notice of time and place must be given prior to all meetings, there is no requirement that agenda or notification of issues to be discussed be given, unless public body has established rules or procedures requiring additional information in its notices of meetings. Comm on Open Gov't OML-AO-2256.

Although CLS Pub O § 104 requires that notice be given prior to every meeting indicating time and place of meeting, there is nothing in that statute that requires that notice include reference to subjects to be considered; further, although many public bodies prepare agendas prior to their meetings, there are no requirements that they do so or that they must follow their agendas. Comm on Open Gov't OML-AO-2283.

While Open Meetings Law requires that meeting be preceded by notice of time and place, there is no requirement that reason for holding special meeting must be included in notice or in minutes. Comm on Open Gov't OML-AO-2344.

When news media chooses to publicize meeting, it is not obligated to print verbatim account of notice provided by public body. Comm on Open Gov't OML-AO-2446.

Requirement that notice of meeting be given to public and news media does not require notice to state subjects to be considered at meeting, and thus chairman of county legislature did not violate Open Meeting Law by discussing issue not referred to on printed, published agenda included in notice of meeting. Comm on Open Gov't OML-AO-2722.

8. Effect of inadequate notice

As long as town board complies with notice requirements of CLS Pub O § 104, failure on part of newspaper to print notice would not have any adverse effect upon legality of action taken by board. Committee on Open Government OML-AO-1143.

In order to constitute valid meeting, all of members of public body must be given reasonable notice of meeting. Comm on Open Gov't OML-AO-2358.

Finding of failure to comply with notice requirements imposed by Open Meetings Law, intentional or otherwise, is dependent upon attendant facts; further, action taken by public body generally remains valid unless and until court determines to contrary. Comm on Open Gov't OML-AO-2371.

If majority of members of public body meet without informing other members, majority cannot vote or act as or on behalf of body as whole; unless all of members of body are given reasonable notice of meeting, body is incapable of performing or exercising its power, authority or duty. Comm on Open Gov't OML-AO-2395.

When legal challenge is initiated relating to failure to provide notice, key issue is whether failure to comply with notice requirements imposed by Open Meetings Law was "unintentional." Comm on Open Gov't OML-AO-2567.

Action purportedly taken by majority of public body that met without giving reasonable notice to all of members is nullity. Comm on Open Gov't OML-AO-2601.

9. Emergency, urgent or "hurried" meetings

Absent actual emergency or urgency, it was unreasonable for village to conduct meeting characterized as "emergency meeting" without publication of notice in official newspaper. Comm on Open Gov't FOIL-AO-12124.

Open Meetings Law requires that reasonable effort be made to give notice of meeting, even if such meeting is called "hurriedly"; requirements of Law relative to notice could be met by contacting local news media by phone and by posting notice and locations designated for posting. Committee on Open Government OML-AO-1074.

Absent emergency or urgency, it is unreasonable to conduct meetings on short notice, unless there is some necessity to do so. Comm on Open Gov't OML-AO-3403.

Vote on policy issue taken by board of education prior to published meeting time of 7:30 p.m. violated Open Meetings Law, and court would be authorized to invalidate vote under CLS Pub O § 107; meeting should not have convened until 7:30 p.m. and, if board needed to start meeting earlier, it had to provide additional notice to news media and at location where original notice was posted, to reflect new time meeting would begin. Comm on Open Gov't OML-AO-3601.

There is no requirement that notice of "special" or "emergency" meeting be given to "the full complement of local media"; so long as members of news media were given notice prior to meeting, county legislature's obligation with respect to that element of Open Meetings Law was satisfied. Comm on Open Gov't OML-AO-3913.

Although Open Meetings Law does not make reference to "special" or "emergency" meetings, if, for example, there is need to convene quickly, notice requirements can generally be met by telephoning or faxing notice of time and place of meeting to local news media and by posting notice in one or more designated locations. Comm on Open Gov't OML-AO-3913.

If there is need to convene meeting quickly, notice requirements can generally be met by telephoning local news media and by posting notice in one or more designated locations. Comm on Open Gov't OML-AO-4042.

10. Mailing of notice not required

There is no requirement that a mailing list be developed for the purpose of sending notices of meetings to members of the public. Comm on Open Gov't OML-AO-866.

Hospital advisory board was not required by Open Meetings Law to disseminate agendas and similar information prior to meetings to enable members of public to be aware of subjects to be considered at its meetings, since CLS Pub O § 104 requires that public body provide notice of time and place of its meetings, but does not require that notice include reference to subjects to be considered, or that notices be mailed to individuals on request. Comm on Open Gov't OML-AO-2246.

11. Paying for notice

A town may not establish a separate fund, nor may it use its publicity fund to pay the expense of publishing a summary and condensed notices of forthcoming town board meetings. However, public notice of such meetings must be given. 1978 Op St Compt File #417.

Public bodies need not pay to publish legal notice of their meetings, or to require newspapers or other media to publish notice at no cost; rather, notice must merely be "given" to news media, which will choose to print it or not as matter of discretion. Comm on Open Gov't OML-AO-3568.

12. Posting in public location

If meeting is scheduled at least one week in advance, notice of time and place must be given to news media and to public by means of posting in one or more designated public locations, not less than 72 hours prior to meeting; however, if there is need to

convene quickly, due to emergency, notice requirements can be met by telephoning local news media and then posting in one or more designated locations. Comm on Open Gov't FOIL-AO-4815.

21 NYCRR § 1401.9 does not require notice to be posted in all sub-divisions of county government where public does business with said sub-divisions; posting in more than one location is not required. Comm on Open Gov't FOIL-AO-10004.

Establishment of a notice board would likely serve to enhance compliance with public notice requirements of the Open Meetings Law. Comm on Open Govt OML-AO 907.

A bulletin board in city hall is a reasonable location for posting notices of meetings by the city council. Comm on Open Gov't OML-AO-912.

Notice posted in public building in area that is not generally seen or passed by most members of public is not posting that can be characterized as "conspicuous"; public body is required to designate, by means of resolution or some other method designed to inform public, location or locations where notice of all meetings of particular public body will always be posted. Committee on Open Government OML-AO-1187.

Every meeting of public body must be preceded by notice of time and place of meeting; meetings must be scheduled at least one week in advance and notice must be given to news media and the public by means of posting in one or more designated, conspicuous public locations; however, when meetings are scheduled less than one week in advance notice must be given to news media and public by means of posting to the extent practicable at reasonable time prior to such meetings. Comm on Open Gov't OML-AO-1445.

Notice of time and place must be give prior to all meetings, whether or not they're regularly scheduled or otherwise and specifically, meeting scheduled at least one week in advance requires that notice be given to news media and to public by means of posting not less than 72 hours prior to such meetings. Comm on Open Gov't OML-AO-1460.

Public body must designate, presumably by resolution, location or locations where it will routinely post notice of meetings; single posting on door to meeting room does not satisfy requirement that notice be "conspicuously posted," since notice must be placed at location that is visible to public. Comm on Open Gov't OML-AO-2186.

Public body must designate, presumably by resolution, location or locations where it will routinely post notice of meetings. Comm on Open Gov't OML-AO-2513.

To meet requirement that notice be "conspicuously posted," notice must be placed at location that is visible to public. Comm on Open Gov't OML-AO-2513.

Public body must designate, presumably by resolution, location or locations where it will routinely post notice of meetings. Comm on Open Gov't OML-AO-2585.

Public body must designate, presumably by resolution, location or locations where it will routinely post notice of meetings; to be "conspicuously posted," notice must be placed at location visible to public. Comm on Open Gov't OML-AO-3568.

Term "designated" in CLS Pub O § 104(1) involves requirement that public body, by resolution or through adoption of policy or directive, must select one or more specific locations where notice of meetings will consistently and regularly be posted. Comm on Open Gov't OML-AO-3740.

Term "designated" in CLS Pub O § 104 involves requirement that public body, by resolution or through adoption of policy or directive, must select one or more specific locations where notice of meetings will consistently and regularly be posted. Comm on Open Gov't OML-AO-3806.

For notice of meeting to be "conspicuously" posted, it must be posted at location or locations where those who may be interested in attending meetings have reasonable opportunity to see notice. Comm on Open Gov't OML-AO-3806.

While posting notice of public meeting on website is fully appropriate and positive, based on language of law "posting" would involve placement of notice of time and place of meetings at particular location or locations. Comm on Open Gov't OML-AO-3958.

Term "designated" in posting requirement of Open Meetings Law involves requirement that public body, by resolution or through adoption of policy or directive, must select one or more specific locations where notice of meetings will consistently and regularly be posted. Comm on Open Gov't OML-AO-4127.

For notice of meeting to be "conspicuously" posted, it must be posted at location or locations where those who may be interested in attending meetings have reasonable opportunity to see notice. Comm on Open Gov't OML-AO-4127.

While posting notice of public meeting on website is fully appropriate and positive, based on language of Open Meetings Law, "posting" would involve placement of notice of time and place of meetings at particular location or locations. Comm on Open Gov't OML-AO-4127.

13. Requirement of notice to news media

Open Meetings Law requires that all meetings be convened open to public and proceeded by notice given to news media and to public by means of posting. Comm on Open Gov't FOIL-AO-4717.

Notice of meetings need not be preceded by publication of legal notice; however, notice of time and place of every meeting must be given to news media, and to public by means of posting in one or more designated, conspicuous public locations. Comm on Open Gov't FOIL-AO-4916.

Open Meetings Law requires that notice of time and place of meetings be given to news media and to public by means of posting; in case of a hearing, however, there is usually requirement that notice of hearing be published. Comm on Open Gov't OML-AO-1415.

Open Meetings Law requires that all meetings be convened open to public and proceeded by notice given to news media and to public by means of posting. Comm on Open Gov't OML-AO-1418.

If public body routinely gives notice to news media and posts notice as required by CLS Pub O § 104 but fails to notify media prior to special meeting due to oversight, such failure could be characterized as unintentional. Given that notice requirements of Open Meetings Law have remained unchanged since law went into effect in 1977, it would appear that "practice" of not notifying news media of meetings could not be construed as unintentional. Comm on Open Gov't OML-AO-2381.

If notice is given indicating that meeting will begin at certain time, public body must wait until that time to begin conducting its business; alternatively, if there is need to convene earlier than time specified in original notice, public body must make additional notices to news media and at location where notice is posted to reflect actual time when meeting will begin. Comm on Open Gov't OML-AO-2487.

If regular schedule is established, sending notice of scheduled meetings once to news media and posting notice continuously will satisfy notice requirements for period in which schedule is in effect, and only situation in which additional notice will be required would involve unscheduled meetings. Comm on Open Gov't OML-AO-3124.

Public body is not required to pay to place legal notice prior to meeting; it must merely "give" notice of time and place of meeting to news media, and moreover, when in receipt of notice of meeting, there is no obligation imposed on news media to publish notice. Comm on Open Gov't OML-AO-3740.

Notice of meetings should be given to news media organizations that would be most likely to make contact with those who may be interested in attending. Comm on Open Gov't OML-AO-3806.

14. Waiver of notice

Public body may not waive notice requirements imposed by Open Meetings Law. Comm on Open Gov't OML-AO-2176.

Notice requirements imposed by Open Meetings Law can never be waived. Comm on Open Gov't OML-AO-3954.

Waiver of notice in CLS Educ § 1606(3) deals with notice to members; separate and distinct are notice requirements imposed by Open Meetings Law. Comm on Open Gov't OML-AO-3954.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

Access to agency records; open meetings; conflicts of interest. 9 NYCRR §§ 587.1 et seq.

Federal Aspects:

Open meetings, 5 USCS § 552b.

Jurisprudences:
56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 136 et seq.
126 Am Jur Proof of Facts 3d 343, Proof of Violation of State Open Meeting or Sunshine Law.

Law Reviews:
Whelan, New York's Open Meetings Law: revision of the political caucus exemption and its implications for local government. 60 Brook. L. Rev. 1483.

Annotations:
Emergency exception under state law making proceedings by public bodies open to the public. 33 ALR5th 731.

Matthew Bender's New York Practice Guides: 3 New York Practice Guide: Real Estate § 20.03.

Texts: Dienes, Levine & Lind, Newsgathering and the Law (1999, Matthew Bender) § 9-6(d).

§ 105. Conduct of executive sessions

1. Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys:

a. matters which will imperil the public safety if disclosed;

b. any matter which may disclose the identity of a law enforcement agent or informer;

c. information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed;

d. discussions regarding proposed, pending or current litigation;

e. collective negotiations pursuant to article fourteen of the civil service law;

f. the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation;

g. the preparation, grading or administration of examinations; and

h. the proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by such public body, but only when publicity would substantially affect the value thereof.

2. Attendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body.

HISTORY:
Formerly § 95, add, L 1976, ch 511, § 1; renumbered § 100, L 1977, ch 933, § 2; renumbered § 105, L 1983, ch 652, § 1, eff Sept 1, 1984; L 1979, ch 704, § 3, eff Oct 1, 1979.

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I. In General

1. In general

Town board did not violate Open Meetings Law (CLS Pub O §§ 100 et seq.) by allegedly drafting new legislation at executive session held after public hearing as to 3 proposed amendments to zoning ordinance where, following executive session, board enacted 2 of amendments proposed which were not new or different from proposed amendments, it tabled remaining proposed amendment, and there was nothing to controvert town's sworn allegation that executive session was conducted only for permissible purpose. Gernatt Asphalt Prods. v Town of Sardinia, 87 N.Y.2d 668, 642 N.Y.S.2d 164, 664 N.E.2d 1226, 1996 N.Y. LEXIS 313 (N.Y. 1996).

Public body must identify subject matter to be discussed at closed meeting with some degree of particularity; merely reciting language of Open Meetings Law is insufficient. Gordon v Village of Monticello, 207 A.D.2d 55, 620 N.Y.S.2d 573, 1994 N.Y. App. Div. LEXIS 13248 (N.Y. App. Div. 3d Dep't 1994), rev'd, in part, 87 N.Y.2d 124, 637 N.Y.S.2d 961, 661 N.E.2d 691, 1995 N.Y. LEXIS 4447 (N.Y. 1995).

La Guardia Community College Association was not public body governed by Open Meetings Law, and thus its meeting was properly closed notwithstanding fact that funds for certain student activities were allocated at meeting, since association's primary purpose was to serve student body rather than state, it did not possess final decision-making authority but performed advisory role with respect to expenditures, and it did not exercise power of sovereign because student activity funds it oversaw were segregated from university's general revenues and did not constitute state funds. Smith v City Univ. of New York, 241 A.D.2d 410, 661 N.Y.S.2d 599, 1997 N.Y. App. Div. LEXIS 7824 (N.Y. App. Div. 1st Dep't 1997), app. dismissed, 91 N.Y.2d 921, 669 N.Y.S.2d 262, 692 N.E.2d 131, 1998 N.Y. LEXIS 243 (N.Y. 1998), rev'd, 92 N.Y.2d 707, 685 N.Y.S.2d 910, 708 N.E.2d 983, 1999 N.Y. LEXIS 1 (N.Y. 1999).

School district's board of education engaged in persistent pattern of deliberate violation of letter and spirit of CLS Pub O Art 7 by, inter alia, improperly convening executive sessions and conducting business in manner inaudible to public audience. Goetschius v Board of Educ., 281 A.D.2d 416, 721 N.Y.S.2d 386, 2001 N.Y. App. Div. LEXIS 2074 (N.Y. App. Div. 2d Dep't 2001).

Trial court's annulment of the determinations of a county and a comptroller reducing a retiree's salary for purposes of his retirement severance was proper because a board of trustees had been

authorized by N.Y. Educ. Law § 6306(2) and N.Y. Comp. Codes R. & Regs. tit. 8, § 604.2(a) to vote to raise the retiree's salary pursuant to his employment contract, and contradictory local laws did not supersede state law or regulations; there was no support for the claim that the meeting was not properly noticed as to time and place and there was no statutory requirement that notice of the agenda of the meeting be given. The contention that the vote was unauthorized because verbatim minutes of the meeting were not taken was unavailing as N.Y. Pub. Off. Law § 106 merely required that a record or summary of the action at a meeting be taken, and the record disclosed that a summary of the action was taken. Matter of LaLima v County of Suffolk, 45 A.D.3d 845, 847 N.Y.S.2d 208, 2007 N.Y. App. Div. LEXIS 12137 (N.Y. App. Div. 2d Dep't 2007).

Executive session may not be scheduled to be convened at future meetings on regular basis. Comm Pub Acc Rec OML-Ad Op 604.

Open Meetings Law applies to every convening of quorum of public body, even if there is no intent to take action, and regardless of manner in which gathering may be characterized. Comm Pub Acc Rec OML-Ad Op 811.

It is an open question whether or not a public body may rectify any mistake made in holding an executive session by ratifying its action through a public vote. Comm Pub Acc Rec OML-Ad Op 857.

2. Attendance at executive session, generally

Given the absence of any requirement in either N.Y. Pub. Off. Law § 105(2) or N.Y. Educ. Law § 1708(3) that a school district board of education must identify any non-members it authorized to attend its executive sessions, there was an "irrefutable inference" that it was "intended to be omitted or excluded"; accordingly, petitioners' request to find that such individuals had to be identified lacked merit. Matter of Jae v Bd. of Educ. of Pelham Union Free Sch. Dist., 22 A.D.3d 581, 802 N.Y.S.2d 228, 2005 N.Y. App. Div. LEXIS 10872 (N.Y. App. Div. 2d Dep't 2005), app. denied, 6 N.Y.3d 714, 816 N.Y.S.2d 749, 849 N.E.2d 972, 2006 N.Y. LEXIS 1311 (N.Y. 2006).

Only members of public body are entitled to be present at executive session of such public body; thus, Laws Committee of Cattaraugus County Legislature may exclude from executive sessions all persons, including county legislators, who are not members of Laws Committee. Comm Pub Acc Rec OML-Ad Op 812.

A public body may exclude from an executive session all but its own members, including a person who may have initiated a discussion or who may be the subject of a discussion. Comm Pub Acc Rec OML-Ad Op 858.

3. —Legal adversaries

While public body may permit persons other than members to attend executive session, attendance of non-members should generally be restricted to those who may be involved in particular legal controversy or who have specific knowledge or expertise that would aid members of public body in deliberating; § 100(2) [now § 105(2)] of Public Officers Law should not be used as means of discriminating or enabling public body to select particular persons for purposes of including or excluding them from executive session. Comm Pub Acc Rec OML-Ad Op 633.

4. —Members of media

Town planning board properly required newspaper editor to leave meeting which was in executive session to discuss pending litigation, and his refusal to leave gave probable cause for arrest as trespasser where executive session to discuss pending litigation was authorized exception to Open Meetings Law. Matthes v East Fishkill, 785 F.2d 43, 1986 U.S. App. LEXIS 23253 (2d Cir. N.Y. 1986).

5. —Unsuccessful candidates for public office

Board improperly allowed unsuccessful candidate for board position, who had no legal responsibility for decision making, to attend executive sessions pending his appeal of results of election at which his opponent was elected, as his presence at board executive sessions afforded him access to information about school district personnel, which breached confidentiality and jeopardized ongoing teacher negotiations. 1995 Op Comm Ed No. 13310.

6. Confidentiality, generally

Memorialized discussions at duly convened executive sessions of county board of supervisors which do not result in formal vote, whether consisting of privileged attorney-client communications or otherwise, are not type of governmental records to which public has to be given access, as confidentiality has been specifically sanctioned by CLS Pub O §§ 105 and 106, and thus such records fall within exemption of CLS Pub O § 87(2)(a). Wm. J. Kline & Sons v County of Hamilton, 235 A.D.2d 44, 663 N.Y.S.2d 339, 1997 N.Y. App. Div. LEXIS 10151 (N.Y. App. Div. 3d Dep't 1997).

While board members cannot disclose confidential information properly discussed at executive session, boards may not shield all matters from public disclosure simply by entering into executive session and executive session may be properly entered into for only those purposes set forth in CLS Pub Officers § 105; moreover, there may be instances in which information learned during course of properly convened executive session warrants referral to District Attorney, Attorney General or other appropriate law enforcement authority for investigation and possible action. 2005 Op Comm Ed No. 15,315.

7. —Effect of violations

In a proceeding by a dismissed teacher to direct implementation of a teacher tenure hearing panel report and to dismiss an appeal to the Commissioner of Education, the teacher's claim that the board of education did not meet certain conditions precedent to its right to appeal was without merit where, although the board failed to implement the hearing panel's recommendation within 30 days of the board's receipt of the panel's report as required by Educ Law § 3020-a, there was nothing in that statute conditioning the board's right to appeal on its compliance with that requirement, and where, although the board should have authorized the appeal to the Commissioner at a public meeting rather than at an executive session, the teacher failed to sustain her burden of showing that she was prejudiced by such action. Kloepfer v Commissioner of Education, 82 A.D.2d 974, 440 N.Y.S.2d 785, 1981 N.Y. App. Div. LEXIS 14710 (N.Y. App. Div. 3d Dep't 1981), aff'd, 56 N.Y.2d 687, 451 N.Y.S.2d 732, 436 N.E.2d 1334, 1982 N.Y. LEXIS 3352 (N.Y. 1982).

In a proceeding brought by a probationary teacher who had been dismissed based upon Pub O § 100 [now § 105] and Educ Law § 1708 to vitiate the board of education's determination to dismiss her, which had been made in an executive session without first moving and voting to conduct such a closed session, it was inappropriate to annul the board's determination; petitioner could not convert a statutory cause of action designed to remedy an injury to the public committed by officials who violate the Open Meetings Law to her personal grievance against board's substantive determination to dismiss her. Sanna v Lindenhurst Bd. of Education, 85 A.D.2d 157, 447 N.Y.S.2d 733, 1982 N.Y. App. Div. LEXIS 17083 (N.Y. App. Div. 2d Dep't), aff'd, 58 N.Y.2d 626, 458 N.Y.S.2d 511, 444 N.E.2d 975, 1982 N.Y. LEXIS 3881 (N.Y. 1982).

Members of public body who are persistently derelict with regard to mandate of § 105 after being directed to comply by court order will be found in contempt of court, fined, and required to pay attorney's fees. Orange County Publications, Div. of Ottaway Newspapers, Inc. v County of Orange, 120 A.D.2d 596, 502 N.Y.S.2d 71, 1986 N.Y. App. Div. LEXIS 56679 (N.Y. App. Div. 2d Dep't), app. dismissed, 68 N.Y.2d 807, 506 N.Y.S.2d 1037, 498 N.E.2d 437, 1986 N.Y. LEXIS 20142 (N.Y. 1986).

Housing authority board of commissioners' use of secret ballot for voting purposes in executive session violated Freedom of Information Law and Open Meetings Law, but did not warrant annulment of board's decision to discharge employee, and thus employee's Article 78 proceeding was properly dismissed; claim that board would have voted differently had they done so in open session was of no consequence since board clearly had authority to determine employment issue at executive session, under CLS Pub O § 105. Smithson v Ilion Housing Authority, 130 A.D.2d 965, 516 N.Y.S.2d 564, 1987 N.Y. App. Div. LEXIS 46949 (N.Y. App. Div. 4th Dep't 1987), aff'd, 72 N.Y.2d 1034, 534 N.Y.S.2d 930, 531 N.E.2d 651, 1988 N.Y. LEXIS 2707 (N.Y. 1988).

Court providently exercised its discretion in annulling certain determinations of school district's board of education and award-

ing attorney fee to petitioners in Article 78 proceeding where board engaged in persistent pattern of deliberate violation of letter and spirit of CLS Pub O Art 7 by, inter alia, improperly convening executive sessions and conducting business in manner inaudible to public audience. Goetschius v Board of Educ., 281 A.D.2d 416, 721 N.Y.S.2d 386, 2001 N.Y. App. Div. LEXIS 2074 (N.Y. App. Div. 2d Dep't 2001).

Town's Board's decision in its N.Y. Pub. Off. Law § 105(1)(f) executive session to terminate an employee for poor performance was proper as, given the nature of the employee's probationary employment interest and the purposes of the Open Meetings Law, the Board's not recording its proven actions in its executive session minutes was a non-prejudicial open meetings law violation of N.Y. Pub. Off. Law § 106(2); therefore, the lower court's reversing the Board's determination was not for the "good cause" required by N.Y. Pub. Off. Law § 107(1) for the lower court to exercise its discretion to reverse the determination. The violation was capable of being corrected by the Board simply recording the vote in the minutes of its executive session. Specht v Town of Cornwall, 13 A.D.3d 380, 786 N.Y.S.2d 546, 2004 N.Y. App. Div. LEXIS 14843 (N.Y. App. Div. 2d Dep't 2004).

Board member's surreptitious taping and disclosure of executive sessions, and her unilateral disclosure of executive session material. violated her fiduciary duties as board member, her oath of office and General Municipal Law, despite her claim that she acted in interest of justice; while individual board members are free to express their opinions and to vote separately, only majority of board can relinquish protection afforded once executive session is convened. 2005 Op Comm Ed No. 15,315.

City counsel violates Public Officers Law by exclusion of public from meeting held to discuss preliminary redevelopment plan for blighted area in city; in light of this and other violations of Open Meetings Law, court will impose upon counsel payment to petitioners of cost and reasonable attorney fees, in amount of $500. Orange County Publications, Div. of Ottaway Newspapers, Inc. v Council of Newburgh (N.Y. Sup. Ct. Mar. 4, 1983).

8. Motions for executive sessions, generally

9. —Contents or components of motions

A procedure in which a town board held an executive session on December 9, during which it resolved to hold another executive session on December 17, is not permissible under Public Law Officers Law § 100 [now § 105] since, before a public body may enter into an executive session, a member of that body must introduce a motion to do so during an open meeting in which the proposed subject matter for the executive session is identified in general terms. Com Pub Acc Rec OML-Ad Op 581.

A public body can never schedule an executive session in advance since, in order to conduct an executive session, a motion to enter into such session must be made during an open meeting, must identify in general terms the subject to be considered, and must be carried by a majority vote of the total membership of the public body. Comm Pub Acc Rec OML—Ad Op 597.

Before public body can enter into executive session, motion must be made by member of public body, general description of subject to be considered during executive session must be made and majority of total membership of public body must pass motion to enter into executive session. Comm Pub Acc OML-Ad Op 791.

10. —Requirement that motions be made at open meetings

A school board in a public work session may vote to go to an executive session without convening a "regular" meeting since the Open Meetings Law makes no distinction between a "work session" and a "meeting". Comm Pub Acc Rec OML—Ad Op 558.

Activities of a Board of Education during an executive session conducted prior to rather than during an open meeting violated the Open Meetings Law since, in view of the definition of "executive session" in Public Officers Law § 97 [now § 102], it is clear that a public body may conduct an executive session only after having convened an open meeting. Comm Pub Acc Rec OML—Ad Op 570.

Public body cannot schedule "executive session" in advance of meeting since such session is portion of open meeting during which the public may be excluded. Comm Pub Acc Rec OML—Ad Op 596.

11. Presumption of openness

Open Meeting Law is based upon presumption of openness and all meetings of public bodies are presumed to be open except to extent that executive session may appropriately be convened, and while public body may enter into executive session in certain circumstances, there is no requirement that executive session must be convened even if one or more of grounds for executive session may be present. Comm Pub Acc Rec OML-Ad Op 835.

12. Voting for executive session, generally

Meeting of government body could not be considered closed "executive session" absent voted authorization given at an open meeting. Goodson Todman Enterprises, Ltd. v Kingston Common Council, 153 A.D.2d 103, 550 N.Y.S.2d 157, 1990 N.Y. App. Div. LEXIS 29 (N.Y. App. Div. 3d Dep't 1990).

A school board in a public work session may vote to go to an executive session without convening a "regular" meeting since the Open Meetings Law makes no distinction between a "work session" and a "meeting". Comm Pub Acc Rec OML—Ad Op 558.

13. —Majority requirement

A public body can never schedule an executive session in advance since, in order to conduct an executive session, a motion to enter into such session must be made during an open meeting, must identify in general terms the subject to be considered, and must be carried by a majority vote of the total membership of the public body. Comm Pub Acc Rec OML—Ad Op 597.

Before public body can enter into executive session, motion must be made by member of public body, general description of subject to be considered during executive session must be made and majority of total membership of public body must pass motion to enter into executive session. Comm Pub Acc OML-Ad Op 791.

14. —Minutes of voting required

Executive session called during town board meeting was proper where minutes of meeting clearly demonstrated that board members properly voted to go into executive session to discuss personnel matters. Woodstock v Goodson-Todman Enterprises, Ltd., 133 Misc. 2d 12, 505 N.Y.S.2d 540, 1986 N.Y. Misc. LEXIS 2959 (N.Y. Sup. Ct. 1986).

II. Grounds For Holding Executive Session

15. In general

Although parents must be afforded opportunity to be present at each meeting at which their child's individualized educational program is developed, school district's committee on special education is not precluded from discussing student's case in absence of parents. Re Application of a Child with Handicapping Condition, 1987 Op Comm Ed No. 11862.

Section 100(1) [now § 105(1)] of Open Meetings Law specifies and limits areas of discussion that may appropriately be considered during executive session. Comm Pub Acc Rec OML-Ad Op 788.

Committee subject to Open Meetings Law may under § 100(1) [now § 105(1)] of Law enter into "executive session" to consider one or more among 8 categories of discussion deemed appropriate for executive session. Comm Pub Acc Rec OML-Ad Op 817.

16. Employment matters, generally

CLS Pub O § 105(1)(f) applies not only to those situations where personnel action (i.e., promotion, dismissal, etc.) is warranted solely because of employee's job performance or employment history, but also applies to those situations where personnel action is warranted as result of fiscal restraints. Plattsburgh Pub. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 A.D.2d 518, 586 N.Y.S.2d 346, 1992 N.Y. App. Div. LEXIS 8984 (N.Y. App. Div. 3d Dep't 1992).

Trial court properly dismissed a former employee's application to review a determination of a town terminating his employment because there was no indication of any personal or political animosities suggesting some deceitful purpose of ousting and replacing the former employee, his conclusory and unsupported assertions failed to refute the town's showing that its actions were part of a good faith effort to reorganize a municipal depart-

ment for the purposes of reducing costs and increasing efficiency, and while the town board violated the Open Meetings Law, the former employee did not show the requisite "good cause" for declaring the board's action to be void, and the board's failure to comply with the Law was merely negligent. Matter of Cutler v Town of Mamakating, 137 A.D.3d 1373, 26 N.Y.S.3d 409, 2016 N.Y. App. Div. LEXIS 1539 (N.Y. App. Div. 3d Dep't 2016).

Petition for judgment granting petitioner admission to any meeting of county board of supervisors held prior to any formal meeting of the board and to attend any meetings where salary increases were denied would be dismissed since petitioner sought to intrude into informal discussions that the supervisors might have when they were not officially transacting business, or at best, as they informally exchanged their views on matters later to be openly and formally discussed with a view to final determination. Kessel v Board of Supervisors, 90 Misc. 2d 574, 394 N.Y.S.2d 762, 1977 N.Y. Misc. LEXIS 2114 (N.Y. Sup. Ct. 1977).

Although a meeting of a town board concerning the filling of a vacancy on the board is a public meeting under Public Officers Law § 97 [now § 102] and subject to the Open Meetings Law, where the subjects of the meetings in question concern interviews of candidates for the position on the Board, such interviews may be conducted during executive session under Public Officers Law § 100(1)(f) [now § 105(1)(f)]. Com Pub Acc Rec OML-Ad Op 582.

Even if there were technical violations of the statute, there were no allegations that such violations were part of a larger conspiracy to circumvent the law, and with respect to each of the employment decisions formal votes were taken in open meetings following the executive sessions, so there was no conduct that warranted nullification of the employment decisions at issue. Matter of School Transparency Org. for Parents v Harpursville Cent. Sch. Dist. ("HCSD"), 50 Misc. 3d 478, 17 N.Y.S.3d 836, 2015 N.Y. Misc. LEXIS 3469 (N.Y. Sup. Ct. 2015).

17. —Educational employment

In light of recent judicial decisions interpreting § 1708(3) of the Education Law to preclude a public school board from voting during an executive session, a vote to terminate a probationary teacher must be conducted by a public school board during an open meeting. Comm Pub Acc Rec OML-Ad Op 754.

18. —Particular person or corporation as subject, generally

Because a hearing officer was properly appointed by a village board of trustees in executive session to investigate a N.Y. Civ. Serv. Law § 75(2) disciplinary matter against a police chief, because the none of the board's actions taken violated N.Y. Pub. Off. Law art. 7, and because there was substantial evidence supporting the hearing officer's report and recommendations, the chief was not entitled to N.Y. C.P.L.R. art. 78 relief. Matter of Perryman v Saranac Lake, 64 A.D.3d 830, 881 N.Y.S.2d 693, 2009 N.Y. App. Div. LEXIS 5362 (N.Y. App. Div. 3d Dep't 2009).

A school board has the authority to enter into an executive session to discuss the appointment of a particular individual to the board in order to fill a vacancy since a discussion of the appointment of a particular individual to the school board would likely and of necessity involve a review of the employment history of the particular person and the discussion would likely constitute a manner "leading to the appointment of a particular individual" to the board. Comm Pub Acc Rec OML—Ad Op 566.

A public body may not enter into an executive session to discuss matters concerning personnel generally, but only those matters concerning a "particular person" and an executive session may not be held to discuss the relocation of a school district office since such item does not fall within any of the grounds for an executive session delineated in Public Officers Law § 100(1)(a) through (h). Com Pub Acc Rec OML-Ad Op 583.

A discussion of layoffs of city employees due to budgetary constraint is not a proper topic for an executive session under Public Officers Law § 100 [now § 105] since the major consideration involved policy questions and not the manner in which a particular employee has performed his or her duties. Comm Pub Acc Rec OML—Ad Op 596.

Executive sessions are not appropriate if personal matters are discussed generally or in terms of policy, rather than with regard to a particular person. Comm Pub Acc Rec OML-Ad Op 862.

In an action brought against a town by its former comptroller, the town was entitled to summary judgment because even if the town violated the Open Meetings Law when discussion the decision to terminate him from that position, its actions were voidable, rather than void. Phillips v Town of Glenville, 160 A.D.3d 1264, 75 N.Y.S.3d 629, 2018 N.Y. App. Div. LEXIS 2651 (N.Y. App. Div. 3d Dep't 2018).

19. — —Ethical considerations

The Board of Ethics of City of Lockport, due to the nature of its discussion which would involve the employment history of particular people and matters leading to the discipline, suspension or dismissal of particular people, often may have the capacity to conduct its business during executive session under Public Officers Law § 100(1)(f) [now § 105(1)(f)]. Comm Pub Acc Rec OML—Ad Op 573.

20. — —Independent contractor status

Discussion of award of contract to perform services may constitute matter leading to employment of particular corporation, and Open Meetings Law § 100(1)(f) [now § 105(1)(f)] is likely to apply where discussion focuses upon hiring particular individual; similiar discussion relative to particular corporation will also fall within scope of (1)(f); discussion does not involve matter leading to employment where it involves contract for purchase of goods, but might touch upon credit or financial history of corporation and to such extent executive session will be proper. Comm Pub Acc Rec OML-Ad Op 835.

21. Litigation matters, generally

Discussions held during executive session of town board, concerning redesign work of sewage treatment facilities, fell within "litigation" category under CLS Pub O § 105(1)(d) where town had entered consent order with State Department of Environmental Conservation and New York City Department of Environmental Protection requiring certain redesign work to be completed by certain specified dates. Roberts v Town Bd., 207 A.D.2d 404, 615 N.Y.S.2d 725, 1994 N.Y. App. Div. LEXIS 8191 (N.Y. App. Div. 2d Dep't), app. denied, 84 N.Y.2d 811, 622 N.Y.S.2d 913, 647 N.E.2d 119, 1994 N.Y. LEXIS 4622 (N.Y. 1994).

Under § 100 [now § 105] of the Public Officers Law, any decision to conduct an executive session must be made in an open meeting pursuant to motion and the motion must identify the general area or areas of the subject or subjects to be concerned; thus, where a public body identified the subject to be discussed only in general terms as "discussions regarding proposed, pending or current litigation," a petition seeking an order declaring that the public body had conducted a public session in violation of the Pub O Law would be granted. Daily Gazette Co. v Town Bd., Cobleskill, 111 Misc. 2d 303, 444 N.Y.S.2d 44, 1981 N.Y. Misc. LEXIS 3263 (N.Y. Sup. Ct. 1981).

Trustees of union free school district violated notice provisions of CLS Pub O § 105 when, in providing notice of executive session regarding status of certain litigation, they indicated purpose of meeting as only "to discuss personnel matters and negotiations" and failed to identify litigation to be discussed with particularity. Executive session held by trustees of union free school district would be disqualified under CLS Pub O § 105 where, in discussing certain litigation, they included at session counsel for litigant suing them. Previdi v Hirsch, 138 Misc. 2d 436, 524 N.Y.S.2d 643, 1988 N.Y. Misc. LEXIS 340 (N.Y. Sup. Ct. 1988).

22. —Possible, proposed or threatened litigation

Planning board did not violate open meetings requirements when it went into executive session to discuss threatened litigation regarding a site plan for a fast food restaurant because the board took no action during the executive session. Matter of Western Sullivan O.R.E. LLC v Town of Thompson Planning Bd., 53 Misc. 3d 1202(A), 46 N.Y.S.3d 477, 2016 N.Y. Misc. LEXIS 3350 (N.Y. Sup. Ct. 2016).

To be considered "proposed" litigation, there must be imminent or real threat of litigation in order to qualify under § 100(1)(d) [now § 105(1)(d)] of Public Officers Law, consequently, "possible" litigation does not constitute appropriate basis for entry into executive session. Comm Pub Acc Rec OML-Ad Op 635.

23. Sale, lease or acquisition of real property, generally

Every discussion pertaining to sale of real property may not be discussed in executive session, but executive session is proper

under Open Meetings Law § 100(1)(h) [now § 105(1)(h)] only when "publicity will substantially affect value" of property. Comm Pub Acc Rec OML-Ad Op 841.

24. —School property

A board of education of a central school district, which agreed to sell two schools because of a decline in student enrollment without obtaining approval of the voters as authorized by Educ Law § 1804(6)(c), would not violate provisions of Pub O Law § 100(1)(h) [now § 105(1)(h)] by discussing in closed executive sessions proposals for the purchase of the schools and the financial capabilities of those making the proposals since such sessions were designed to protect the integrity of the offers made and to secure the best possible financial return. Botwin v Board of Education, 114 Misc. 2d 291, 451 N.Y.S.2d 577, 1982 N.Y. Misc. LEXIS 3472 (N.Y. Sup. Ct. 1982).

Open Meetings Law § 100(1)(h) [now § 105(1)(h)] cannot justifiably be cited as basis for discussing sale of schoolhouse during executive session since developers are "pre-qualified", offers are final, and nature and location of property to be sold is known and publicity cannot substantially affect value of property. Comm Pub Acc Rec FOIL-Ad Op 2727.

Executive session may not be held to discuss relocation of school district office since such item does not fall within any of the grounds for executive session delineated in subd (1)(a) through (h). Comm Pub Acc Rec OML-Ad Op 583.

25. Sufficiency of motion

Stated purpose of village board of trustees for entering into executive session—discussion of "a personnel issue"—did not satisfy requirements of CLS Pub O § 105, since statute requires that such discussion involve "employment history of a particular person"; although individual need not be identified by name, statute requires that any motion to enter into executive session describe with some detail nature of proposed discussion. Gordon v Village of Monticello, 207 A.D.2d 55, 620 N.Y.S.2d 573, 1994 N.Y. App. Div. LEXIS 13248 (N.Y. App. Div. 3d Dep't 1994), rev'd, in part, 87 N.Y.2d 124, 637 N.Y.S.2d 961, 661 N.E.2d 691, 1995 N.Y. LEXIS 4447 (N.Y. 1995).

Motion to enter into executive session to discuss "personnel" without greater description of topic is insufficient; applicability of Public Officers Law § 100(1)(f) [now § 105(1)(f)] is limited to situations in which discussion involves "particular person" in conjunction with one or more of topics indicated in (1)(f). Comm Pub Acc Rec OML-AD Op 791.

Executive session ostensibly for purpose of reviewing actions of "individual administrators" and "appropriateness of their actions in light of their responsibilities" is proper since discussion will likely involve "employment history of particular person" as well as matters that might lead to demotion, discipline, suspension, dismissal or removal of particular person. Comm Pub Acc Rec OML-Ad Op 803.

Mere recitation of basis for entry into executive session is insufficient and motion to enter into executive session should indicate topic within Open Meetings Law § 100(1)(f) [now § 105(1)(f] as well as fact that discussion will refer to particular person. Comm Pub Acc Rec OML-Ad Op 829.

26. Other particular grounds for executive session, generally

Local BOCES cannot conduct discussions regarding budget preparations at a "workshop session" since such discussions must be open to the public. Comm Pub Acc Rec OML-Ad Op 740.

Issue of school closings is not proper subject for executive session. Comm Pub Acc Rec OML-Ad Op 762.

Town board may not enter into executive session to consider transfer of town funds. Comm Pub Acc Rec OML-Ad Op 828.

Executive session regarding discussion of pay for substitute teachers is not appropriate and district Board of Education may not exclude public and news media from "workshop" sessions held to discuss declining enrollment. Comm Pub Acc Rec OML-Ad Op 831.

27. —Developmentally disabled persons

Where reducing the size of Committee on the Handicapped was a policy matter which did not concern any "particular" person, a discussion of the reduction of the Committee should have been held during open meeting. Comm Pub Acc Rec OML—Ad Op 570.

28. —Industrial development agencies

Discussion of the by-laws of an industrial development agency does not fall within areas that may be appropriately considered during an executive session. Comm Pub Acc Rec OML-Ad Op 857.

29. —Land use matters

Although a town zoning board of appeals violated the Open Meetings Law when it discussed at an executive session a property owner's application for a certificate of nonconformity or for a use variance in order to operate a junkyard on his premises, pursuant to N.Y. Pub. Off. Law §§ 103 and 105, where the owner failed to show good cause why the court should exercise its discretion to void the board's determination as a sanction for that violation, the court declined to impose such a sanction. Carrier v Town of Palmyra Zoning Bd. of Appeals, 30 A.D.3d 1036, 816 N.Y.S.2d 647, 2006 N.Y. App. Div. LEXIS 7599 (N.Y. App. Div. 4th Dep't 2006), app. denied, 8 N.Y.3d 807, 834 N.Y.S.2d 88, 865 N.E.2d 1255, 2007 N.Y. LEXIS 530 (N.Y. 2007).

City council violates Public Officers Law by exclusion of public from meeting held to discuss preliminary redevelopment plan for blighted area in city; in light of this and other violations of Open Meetings Law, court will impose upon council payment to petitioners of cost and reasonable attorney fees, in amount of $500. Orange County Publications, Div. of Ottaway Newspapers, Inc. v Council of Newburgh (N.Y. Sup. Ct. Mar. 4, 1983).

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I. In General

1. In general

A town board may by local law compel the zoning board of appeals and the planning board of such town to tape record their public meetings but may not compel them to tape record their private discussions and deliberations. 1980 NY Ops Atty Gen May 13 (informal).

While Open Meetings Law authorizes public bodies to conduct executive sessions in circumstances described in CLS Pub O § 105(1)(a) through (h), there is no requirement that executive session be held even though public body has right to do so. Introductory language of CLS Pub O § 105(1), which prescribes procedure that must be accomplished before executive session may be held, clearly indicates that public body "may" conduct executive session only after having completed that procedure. Grounds for withholding records appearing in Freedom of Information Law and grounds for entry into executive session appearing in CLS Pub O § 105(1) (Open Meetings Law) are not necessarily consistent; thus, even though records might be withheld in accordance with FOIL, it does not necessarily follow that meeting pertaining to those records may properly be closed or that it is reasonable to withhold them. Comm on Open Gov't FOIL-AO-12405.

School boards can generally act only during open meetings. Comm on Open Gov't OML-AO-864.

A public body cannot schedule an executive session in advance of a meeting. Comm on Open Gov't OML-AO-872.

When a discussion during an executive session ends, presumably an open meeting is continued and members of the public in attendance should be so informed. Comm on Open Govt OML-AO 911.

Although as general rule, public body subject to open meetings law may take action during properly convened executive session (CLS Public Officers § 105), school boards are further restricted from taking action in closed session by operation of CLS Education § 1708. Committee on Open Government OML-AO-1199.

Public body may generally vote during proper executive session; however, any vote to appropriate public moneys must be taken during open meeting; as such, there may be situations in which discussions may be conducted during executive session, but public body may be required to return to open meeting to vote to appropriate public moneys in relation to subject previously considered behind closed doors. 1986 Committee on Open Government, OML-AO-1311.

All meetings must be proceeded by notice given in accordance with Open Meetings Law and conducted open to public, unless and until executive session may be held to discuss one or more topics described in Law. Comm on Open Gov't OML-AO-1438.

If building in which meeting is held includes room or space other than room in which executive session is being conducted, it would be inappropriate to remove public from building and lock doors; by so doing, public has no capacity to know when executive session has ended and open portion of meeting has been continued. Comm on Open Gov't OML-AO-2268.

Open Meetings Law imposes no obligation in advance of executive session to specify whether action will or will not be taken during executive session. Comm on Open Gov't OML-AO-2270.

There is nothing in Open Meetings Law or in Village Law that deals specifically with special meetings or subjects that may be considered at those meetings; thus, at special meeting held to discuss renewal of bond anticipation note, board was not prohibited from acting on resolution concerning clerk's attendance at Training School. Comm on Open Gov't OML-AO-2410.

Town ethics board or committee has same obligations as governing body, such as Town Board, regarding openness and provision of notice of meetings, for example, as Town Board, as well as same authority to conduct executive sessions when it is appropriate to do so. Comm on Open Gov't OML-AO-3712.

When committee is subject to Open Meetings Law, it has same obligations regarding notice, openness, and taking of minutes, for example, as well as same authority to conduct executive sessions, as governing body. Comm on Open Gov't OML-AO-3740.

There are 2 vehicles that may authorize public body, such as board of education, to discuss public business in private: one involves entry into executive session, second involves "exemptions" under CLS Pub O § 108. Comm on Open Gov't OML-AO-3863.

To discuss matter exempted from Open Meetings Law, public body need not follow procedure imposed by CLS Pub O § 105(1) that relates to entry into executive session; when matter is exempt from Open Meetings Law, that law simply does not apply. Comm on Open Gov't OML-AO-3863.

2. Agenda for executive session

It is proper for public body to prepare agenda indicating that executive session will be held only "if needed," since such language does not improperly presuppose that executive session will be held. Comm on Open Gov't OML-AO-2408.

Amendment of school board agendas for days on which executive sessions were anticipated, to note "Executive Session - If Necessary," would satisfy requirements of Open Meetings Law since such notation would not improperly presume that executive session would be held. Comm on Open Gov't OML-AO-2416.

Public body may not conduct executive session to discuss subject of its choice. Comm on Open Gov't OML-AO-3863.

School board cannot take action during executive session except in situations in which action during closed session is permitted or required by statute, such as when board initiates charges against tenured person under CLS Educ § 3020-a or where action in public could identify particular student. Comm on Open Gov't OML-AO-4026.

3. Attendance at executive session, generally

4. —Legal adversaries

Local legislative body has statutory authority to prohibit legislator from disclosing confidential matters discussed in executive session. 2000 NY Ops Atty Gen I 2000-2.

What is said or heard during executive session is not "confidential" unless statute specifically confers or requires confidentiality; thus, if discussion occurring during executive session could have been conducted in public, divulging nature of discussion was not breach of ethics. Comm on Open Gov't FOIL-AO-12,358.

Neither the Freedom of Information nor the Open Meetings Laws prohibit a member of the board of education from disclosing information obtained by that individual during a discussion held during an executive session. Comm on Open Gov't FOIL-AO-2846; Comm on Open Gov't OML-AO-868.

When member of public body has sued that body and is its legal adversary, he or she could validly be excluded from executive session between other members and their attorney in which attorney-client privilege is properly invoked; however, if member of public body is not adversary party in litigation (but perhaps dissenter or person with minority view), that person would have right to attend executive session. Comm on Open Gov't OML-AO-2377.

If member of public body is body's adversary in litigation, that person must excuse himself or herself from executive sessions concerning litigation, since person's presence would defeat purpose of executive session held under CLS Pub O § 105(1)(d). Comm on Open Gov't OML-AO-2386.

5. —Members of media

Members of new media do not have any special privilege above that of any resident in attendance to attend executive session of public body pertaining to personnel matter. Permitting news media to attend executive session is equivalent of permitting public to attend, and public body cannot validly justify authorizing news media to be present at executive session while excluding all other members of public; stated differently, if public body authorizes news media to attend executive session, it effectively loses its basis for holding executive session since members of news media serve as representatives of public. Members of new media do not have any special privilege above that of any resident in attendance to attend executive session of public body pertaining to personnel matter. Comm on Open Gov't OML-AO-2597.

6. —Town clerks

A town clerk may be permitted to attend an executive session of the town board but has no right to attend such sessions under the "Open Meetings Law." 1978 Op St Compt File #462.

To give effect to both Open Meetings Law and CLS Town § 30, which imposes certain responsibilities on town clerk, there are 3 options: first, town board can permit clerk to attend executive session in its entirety; second, town board can deliberate during executive session without clerk's presence, but, prior to any vote, call clerk into executive session for purpose of taking minutes in conjunction with duties imposed by town law; and third, town board can deliberate toward decision during executive session, but return to open meeting for purpose of taking action. Comm on Open Gov't OML-AO-2583.

When town board wants to take action during executive session it can (1) permit town clerk to attend executive session in its entirety, (2) deliberate during executive session without clerk's presence and call clerk into executive session to take minutes prior to vote, or (3) deliberate toward decision during executive session, but return to open meeting to take action. Comm on Open Gov't OML-AO-2726.

7. —Unsuccessful candidates for public office

Sole people who have right to attend executive sessions are members of public body conducting executive session, but public body may authorize others to attend; however, Open Meetings Law should be implemented in manner that gives reasonable effect to its intent and, therefore, public body may not, without rational basis, permit some to attend executive sessions while excluding others. Although board of education can properly permit former member of board, who was defeated in election, to attend board's executive sessions and can properly permit him to receive board's materials packet and otherwise participate without voting, pending determination of his appeal of election results, he should be excluded during communications between board and its attorney since his presence would waive attorney-client privilege. Board of education could properly permit former member of board, who was defeated in election, to attend board's executive sessions and could properly permit him to receive board's materials packet and otherwise participate without voting, pending determination of his appeal of election results, except with regard to executive sessions involving matters relating to particular student or students. Comm on Open Gov't OML-AO-2375.

Only members of public bodies have right to attend executive session, and no other person may have right to attend without approval of public body; quorum of members of public body is required to agree to permit attendance of person other than member of public body. Committee on Open Government OML-AO-1052.

Only members of commission, which would be public body conducting meeting, have right to attend executive sessions held by commission; moreover, liaison, person who is not a member of commission, would not have right to attend executive session of such commission; nevertheless, commission may permit attendance of others to executive session. Comm on Open Gov't OML-AO-1455.

Public bodies must conduct meetings in manner that guarantees public ability to "be fully aware of" and "listen to" deliberative process; thus, public body must situate itself and conduct its meetings in manner in which those in attendance can observe and hear proceedings, and to do otherwise would be unreasonable and fail to comply with basic requirement of Open Meetings Law. Comm on Open Gov't OML-AO-2273.

Assuming that there is reasonable basis for doing so, public body may permit persons other than its members to attend executive session. Comm on Open Gov't OML-AO-2389.

Since political caucus is beyond coverage of Open Meetings Law, there is no "right" to attend such caucus; rather, peoples' presence is essentially by invitation. Comm on Open Gov't OML-AO-2457.

Public body cannot compel individual to remain at executive session. Comm on Open Gov't OML-AO-2504.

Unless authorized to attend by committee, members of county legislature who are not members of that committee do not have right to attend executive session of committee. Comm on Open Gov't OML-AO-2509.

Chair of University Faculty Senate of City University of New York, as ex officio member of board of trustees, would have right to attend executive session called by board's standing committee on Faculty and Staff Affairs only if he or she was member of that committee or privilege of attending executive sessions of committees was granted to members of board who were not members of committees. Comm on Open Gov't OML-AO-3139.

Town of Pine Plains Police Advisory Council created by enactment of local law, although advisory in nature, was "public body" subject to Open Meetings Law; however, member of town board did not have right to attend council's executive sessions unless he or she was member of council, or there was some independent authority to do so based on rule, policy or other privilege conferred by town board. Comm on Open Gov't OML-AO-3143.

Deputy town supervisor could be authorized to attend executive session when town supervisor was present and, if matter was disputed, board could resolve issue by adopting or rejecting motion by member to permit or reject non-member's attendance. Comm on Open Gov't OML-AO-3150.

Board of Education could permit members-elect to attend executive session, but if members-elect were present when board's attorney was offering legal advice, their presence would result in waiver of attorney-client privilege and exemption from Open Meetings Law could not be claimed. Comm on Open Gov't OML-AO-3177.

Member of town zoning board of appeals, as member of general public, could not be precluded from attending open meeting of zoning board of appeals on basis that he was precluded from participating as board member due to possibility of conflict of interest; furthermore, if matter involving board member's interest were to be considered in executive session, interested board member nevertheless would have right to attend that session. Comm on Open Gov't OML-AO-3276.

When member of public body has sued or is likely to sue that body and is its legal adversary, he or she can validly be excluded from gathering between other members and their attorney in which attorney-client privilege is properly invoked; however, if member of public body is not adversarial or potential adversarial party in litigation, but perhaps only dissents with majority or takes minority view, he or she cannot be excluded from executive session. Comm on Open Gov't OML-AO-3436.

Sole people who have right to attend executive sessions are members of public body, i.e., town board conducting executive session; however, public body may authorize others to attend executive session. Comm on Open Gov't OML-AO-3864.

While Open Meetings Law does not describe criteria that should be used to determine which persons other than members of public body might properly attend executive session, Open Meetings Law should be carried out in manner that gives reasonable effect to its intent; thus, typically, those persons other than members of public bodies who are authorized to attend are clerk, public body's attorney, superintendent in case of board of education, or person who has some special knowledge, expertise or performs function that relates to subject of executive session. Comm on Open Gov't OML-AO-3864.

If there is dispute among members concerning attendance of person other than member of Town Board at executive session, Board could resolve matter by adopting or rejecting motion by member to permit or reject attendance by non-member at executive session. Comm on Open Gov't OML-AO-3864.

Only members of public body, such as board of education, have right to attend executive session; while public body may permit others to attend, those who are not members have no right to attend. Comm on Open Gov't OML-AO-4027.

Superintendent of education is not member of board of education (public body), since superintendent—unlike board member—is not elected, and thus superintendent does not have right to attend executive session of board; however, board may choose to authorize attendance of superintendent at its executive sessions. Comm on Open Gov't OML-AO-4027.

8. Confidentiality, generally

9. —Effect of violations

Action taken by public body at open meeting may not be invalidated by court even though subject of such action was discussed at prior closed meeting held in violation of law. Comm On Open Gov't OML-AO-1249.

Since public body may choose to conduct executive session or discuss issue in public, information expressed during executive session is not "confidential"; to be confidential, statute must prohibit disclosure and leave no discretion to agency or official regarding ability to disclose. Comm on Open Gov't FOIL-AO-12558.

Executive session is portion of open meeting and cannot be conducted before open meeting has commenced; exception exists for matters made confidential by federal or state law; board and its attorney may meet privately before board meeting for purpose of seeking legal advice without going through procedures for executive session. Committee on Open Government OML-AO-1189.

While nothing in OML prevents those in attendance at executive session from revealing details of discussion therein, if discussion involves matter made confidential by federal or state law, such law would control and determine whether individual could legally disclose content of discussion. Comm On Open Gov't OML-AO-1193.

Statements made by members of board of education during executive sessions were not generally privileged or confidential, and thus there was no valid basis for sustaining claim of confidentiality with respect to such statements in subsequent improper practice hearing before Public Employment Relations Board, in absence of statute specifically prohibiting disclosure. Comm on Open Gov't OML-AO-2239.

There is no statute which prohibits board member from disclosing information acquired, heard or discussed during executive session; claim of confidentiality can only be based upon statute that specifically confers or requires confidentiality. Comm on Open Gov't OML-AO-2278.

Situations in which information acquired during executive session would be "confidential" in legal sense are rare; further, validity of or capacity to enforce prohibition against disclosure whether such information is "confidential" or not is questionable. Comm on Open Gov't OML-AO-2358.

Person present at executive session may disclose what occurred unless statute forbids disclosure. Comm on Open Gov't OML-AO-3188.

"Official Statement of Executive Policy" issued by mayor, which prohibited members of city's senior staff or department heads from disclosing certain information discussed at meetings with mayor and other city officials, and city ordinance that prohibited city officers and employees from disclosing certain information "discussed or deliberated during a properly convened executive session," were inconsistent with law and would likely be found to be unconstitutional since (1) violations could result in imposition of fine and/or imprisonment, and (2) while prohibitions under both enactments appeared to be based on combination of exceptions to rights of access in Freedom of Information Law and Open Meeting Law's grounds for entry into executive session, some disclosures mandated by FOIL and Open Meetings Law might be punished. Comm on Open Gov't OML-AO-3282.

Matters properly discussed by board of education in executive session, although not public knowledge, were not "confidential" under CLS Gen Mun § 805-a(1)(b), and board member could not be prohibited from disclosing information acquired in executive sessions, since information is "confidential" only when government has no discretion and must withhold records or discuss matter in private, and matters appropriate for executive sessions could be discussed in open meetings at option of board; school district matters are "confidential" only rarely, e.g., when information involves student records or records subject to attorney-client privilege. Comm on Open Gov't OML-AO-3449.

Policy adopted by board of education, stating in part that "Matters discussed in executive sessions must be treated as confidential; that is, never discussed out of executive session," would be inconsistent with Freedom of Information Law and Open Meetings Law; while information might be obtained during executive session properly held or from records marked "confidential," term "confidential" has narrow and precise technical meaning, and claim that records or information is characterized must be based on statute, or act of Congress or state legislature, that specifically confers or requires confidentiality. Comm on Open Gov't OML-AO-3463.

To enable public to know how their elected officials feel about issues of significance, elected officials should not be discouraged from disclosing or discussing matters relating to their duties, but action or decision of majority of public body should be respected by dissenting members, and disclosing information shared in executive session, without consent of majority, could invade personal privacy, impair collective bargaining negotiations or otherwise damage government functions, even if no statute prohibits disclosure. Comm on Open Gov't OML-AO-3562.

While local conditional release commission might in some instances have authority to take action during executive session, record indicating nature of its action, i.e., to grant or deny conditional release, could not justifiably be withheld under Freedom of Information Law. Comm on Open Gov't OML-AO-3784.

Whether meeting is open to public or closed is generally irrelevant with respect to participant's ability to disseminate information that he or she has acquired at meeting, and even when Open Meetings Law applies and public body validly enters into executive session, there is ordinarily nothing privileged or confidential about information expressed or acquired during executive session; to be confidential, particular statute must apply that prohibits disclosure and leaves no discretion to agency or official regarding ability to disclose. Comm on Open Gov't OML-AO-3785.

Neither Freedom of Information Law, Open Meetings Law, or any other statute would have prohibited Board of Education or one of its members from disclosing participant's prepared statement or divulging what transpired during executive session, even if such disclosures would be unfair, unethical or inappropriate. Comm on Open Gov't OML-AO-3830.

Unless Open Meetings Law (OML) authorizes state board to conduct public business in private, request for secrecy by federal officials has no bearing on board's obligation to comply with OML. Comm on Open Gov't OML-AO-4182.

School board member's disclosure of certain information about named personnel did not involve matter that could properly have been considered during executive session, where information consisted only of "innocuous" notes by board president. Comm on Open Gov't OML-AO-4192.

10. Executive session viewed as part of public meeting

Based upon language of Pub O § 105(1), it is clear that an executive session is not separate and distinct from an open meeting, but rather is a portion of an open meeting. Therefore, an open meeting must be convened prior to entry into an executive session. Comm on Open Govt OML-AO 918.

Executive session is portion of open meeting and cannot be conducted before open meeting has commenced; exception exists for matters made confidential by federal or state law; board and its attorney may meet privately before board meeting for purpose of seeking legal advice without going through procedures for executive session. Committee on Open Government OML-AO-1189.

Executive session is not separate and distinct from open meeting, but rather is portion of open meeting; motion to enter into executive session must include reference to "general area or areas of subject or subjects to be considered" during executive session; every time quorum of public body, majority of total membership, is present for purpose of conducting or discussing public business, that gathering is meeting subject to Open Meetings Law; since executive session is defined as portion of meeting, executive session may not be convened after meeting is adjourned; when public body ends its discussion of topic or topics identified in its motion for entry into executive session, it should return to open meeting. Comm on Open Gov't OML-AO-1441.

Executive session is not separate and distinct from open meeting, but rather it is portion of open meeting during which public may be excluded; public body cannot enter into executive session to discuss subject of its choice, but must only discuss subjects listed in Open Meetings Law as appropriate for discussion behind closed doors. Comm on Open Gov't OML-AO-1445.

Executive session is not separate from open meeting, but rather is portion of open meeting during which public may be excluded. Comm on Open Gov't OML-AO-1448.

"Executive session" is portion of open meeting during which public may be excluded and, as such, executive session is not separate and distinct from meeting, but rather it is portion of open meeting; public body cannot schedule executive session in advance of meeting, because vote to enter into executive session must be taken at meeting during which executive session is held. Comm on Open Gov't OML-AO-1451.

Executive session is not separate and distinct from open meeting; on contrary, executive session is part of open meeting that must be convened open to public and preceded by notice given to news media and by means of posting in accordance with CLS Pub O § 104. Comm on Open Gov't OML-AO-2257.

Procedure apparently used by Mohawk Central School District Board of Education whereby notice given prior to meeting indicated that meeting would begin at 7:45 p.m., but board met at non-publicly advertised time of 7 p.m. and immediately entered into executive session, was inconsistent with Open Meetings Law; alternative method of achieving desired result of notifying public that it was not necessary to arrive at scheduled meeting time in order to be present when public business actually began would be to indicate, on agenda or notice of meeting, that meeting would commence at 7 p.m. (for example) and first item would be voting on motion to enter into executive session to discuss certain subjects. Comm on Open Gov't OML-AO-3510.

While there is no requirement that public be informed of whether public body intends to return to open meeting following executive session, it would be considerate and courteous to do so. Comm on Open Gov't OML-AO-3806.

Executive session is not separate from open meeting, but rather is portion of open meeting. Comm on Open Gov't OML-AO-3860.

Public body cannot schedule executive session in advance of meeting, since, because vote to enter into executive session must be made and carried by majority vote of total membership during open meeting, it cannot be known in advance of that vote that such motion will indeed be approved. Comm on Open Gov't OML-AO-4067.

Rather than scheduling executive session in advance of meeting, which would violate Open Meetings Law, public body on its agenda or notice of meeting could refer to or schedule motion to enter into executive session to discuss certain subjects; reference to motion to conduct executive session would not represent assurance that executive session would ensue, but rather indicate that there is intent to enter into executive session by means of vote to be taken during meeting. Comm on Open Gov't OML-AO-4067.

11. Limiting number of executive sessions

There is nothing in OML that limits number of executive sessions that may be conducted during course of meeting of public body. Comm On Open Gov't OML-AO-1281.

12. Motions for executive sessions, generally

13. —Contents or components of motions

Motion for entry into executive session by board should contain two components, inclusion of term "particular" and reference to one or more of topics appearing in that provision. Comm on Open Gov't FOIL-AO-4686.

School board, in teacher disciplinary matter, would not have been required to name subject of discussion before entering into executive session under Open Meetings law, or that charges, which were not proven, would have to have been disclosed under Freedom of Information Law. Comm on Open Gov't FOIL-AO-13355.

Motion to enter into executive session must be made during open meeting, motion must indicate in general terms subject or subjects to be considered, and motion must be carried by majority vote of membership of public body; public body cannot schedule executive session in advance of meeting for it can not be known prior to meeting which members will be present or whether motion to enter into executive session will indeed be carried by majority of public body. Committee on Open Government OML-AO-1033.

In technical sense, executive session cannot be scheduled prior to meeting, as certain procedures must be accomplished during open meeting before executive session may be held, such that it cannot be known that executive session will indeed be held until motion is made and carried by majority vote of total membership of public body during open meeting; motion to enter into executive session to discuss "personnel", without greater description, is inadequate, and motion must contain reference to 2 elements, one being specific person or corporation and other should refer to one or more of topics listed in CLS Pub Off § 105(1)(f). 1986 Committee on Open Government OML-AO-1310.

With respect to motion for entry into executive session, it is insufficient to merely regurgitate the statutory language of ground for entry into executive session because such boiler plate recitation does not comply with intent of statute; so reference should be made only to those topics which will be discussed in executive session. Comm on Open Gov't OML-AO-1420.

Motion to enter into executive session must include, in general terms, reference to subject to be considered behind closed doors. Comm on Open Gov't OML-AO-1429.

Member of town board has authority to attend executive sessions called by town board unless and until member is legally barred from attending; motion to enter into executive session to discuss personnel or personnel matters without additional description is inadequate; motion for entry into executive session should contain two components, inclusion of term "particular", and reference to one or more of topics appearing in Open Meetings Law. Comm on Open Gov't OML-AO-1440.

Motion to enter into executive session must include reference to "general area or areas of subject or subjects to be considered" during executive session. Comm on Open Gov't OML-AO-1441.

Motion for entry into executive session should contain two components, inclusion of term "particular", and reference to one or more topics appearing in that provision. Comm on Open Gov't OML-AO-1460.

Motion to enter into executive session must be sufficiently detailed to enable board members and public to know that board is acting in compliance with requirements of Open Meeting Law. Comm on Open Gov't OML-AO-2224.

Proper wording of motion to conduct executive session to discuss proposed, pending or current litigation involving public body might be: "I move to enter into executive session to discuss the case of the XYZ Corporation versus the [public body]," or something similar to that. Comm on Open Gov't OML-AO-2250.

Motion to enter into executive session must be made during open meeting and include reference to general area or areas of subject or subjects to be considered during executive session. Public body cannot schedule or conduct executive session in advance of meeting because vote to enter into executive session must be taken at open meeting during which executive session is held. Comm on Open Gov't OML-AO-2257.

Chairman of public body cannot simply take meeting into executive session; rather, rationale for proposed executive session must be offered in public, and rationale must be consistent with one or more grounds for entry into executive session authorized by law. Comm on Open Gov't OML-AO-2414.

Motion to conduct executive session must include reference to subject or subjects to be discussed, and motion must be carried by majority vote of public body's membership before such session may validly be held. Comm on Open Gov't OML-AO-2621.

Motion to conduct executive session must be sufficiently detailed to enable public to know that there is proper basis for entry into closed session, but need not identify person or position that is subject of discussion. Comm on Open Gov't OML-AO-2748.

Motion to conduct executive session must include reference to subject or subjects to be discussed, and motion must be carried by majority vote of public body's membership before executive session may validly be held. Comm on Open Gov't OML-AO-3131.

Motion at open meeting of county legislature's Executive Committee, for entry into executive session to discuss contract negotiations relating to potential development, did not adequately describe matter to be considered; absent sufficient detail, public had no way to ascertain whether, or extent to which, executive session could properly be held. Comm on Open Gov't OML-AO-3296.

Motion to enter into executive session to discuss litigation strategy must name litigation, but if litigation strategy relates to person or entity that town board intends to sue, and premature

identification of that person or entity would adversely affect interests of town board and town residents, motion need not identify person or entity in question, as long as it clearly states that litigation strategy is involved. Comm on Open Gov't OML-AO-3646.

14. —Requirement that motions be made at open meetings

Every meeting of public body, including sub-committee, must be convened open to public, and executive session may be conducted only after open meeting has been convened. Comm on Open Gov't FOIL-AO-4907.

Based upon language of Pub O § 105(1), it is clear that an executive session is not separate and distinct from an open meeting, but rather is a portion of an open meeting. Therefore, an open meeting must be convened prior to entry into an executive session. Comm on Open Govt OML-AO 918.

Executive session is portion of open meeting and cannot be conducted before open meeting has commenced; exception exists for matters made confidential by federal or state law; board and its attorney may meet privately before board meeting for purpose of seeking legal advice without going through procedures for executive session. Committee on Open Government OML-AO-1189.

Planning board for town may not hold or schedule executive session in advance of meeting because gathering conducted prior to regularly scheduled meetings of board are themselves "meetings" that should be convened to public and proceeded by notice; moreover, public body cannot enter into executive session to discuss subject of its choice; it is limited to subjects that may appropriately be considered during executive session. Comm on Open Gov't OML-AO-1433.

Even when subject to be discussed can properly be considered during executive session, public body must first convene open meeting, preceded by notice of time and place given in accordance with CLS Pub O § 104; following initiation of meeting in public, when subject arises that may be discussed in executive session, procedure described in CLS Pub O § 105(1) should be carried out. Comm on Open Gov't OML-AO-2262.

Public body cannot schedule executive session in advance of meeting, because vote to enter into executive session must be made and carried by majority vote of total membership during open meeting. Comm on Open Gov't OML-AO-3271.

Public body cannot schedule executive session in advance of meeting because vote to enter into executive session must be made and carried by majority vote of total membership during open meeting and thus it cannot be known in advance of that vote that motion will indeed be approved. Comm on Open Gov't FOIL-AO-12095.

All meetings of public bodies must be held open to public, except that executive session may convene to discuss topic or topics that fall within grounds for calling executive session. Comm on Open Gov't OML-AO-1421.

Chairman of public body cannot simply take meeting into executive session; rather, rationale for proposed executive session must be offered in public, and rationale must be consistent with one or more grounds for entry into executive session authorized by law. Comm on Open Gov't OML-AO-2414.

15. Voting for executive session, generally

16. —Majority requirement

It was improper for board of education to hold executive session prior to board meeting, because vote to enter into executive session must be made and carried by majority vote of total membership during open meeting, and it could not be known in advance of that vote whether motion would be approved. Comm on Open Gov't FOIL-AO-12,342.

Motion to enter into executive session must be made during open meeting, motion must indicate in general terms subject or subjects to be considered, and motion must be carried by majority vote of membership of public body; public body cannot schedule executive session in advance of meeting for it can not be known prior to meeting which members will be present or whether motion to enter into executive session will indeed be carried by majority of public body. Committee on Open Government OML-AO-1033.

In technical sense, executive session cannot be scheduled prior to meeting, as certain procedures must be accomplished during open meeting before executive session may be held, such that it cannot be known that executive session will indeed be held until motion is made and carried by majority vote of total membership of public body during open meeting; motion to enter into executive session to discuss "personnel", without greater description, is inadequate, and motion must contain reference to 2 elements, one being specific person or corporation and other should refer to one or more of topics listed in CLS Pub Off § 105(1)(f). 1986 Committee on Open Government OML-AO-1310.

Open Meetings Law permits public body to enter into executive session, where appropriate, upon majority vote of its total membership; the phrase "total membership", is intended to mean whole number of members, notwithstanding vacancies or absences. Comm on Open Gov't OML-AO-1458.

Motion to conduct executive session must include reference to subject or subjects to be discussed, and motion must be carried by majority vote of public body's membership before such session may validly be held. Comm on Open Gov't OML-AO-2621.

Motion to conduct executive session must include reference to subject or subjects to be discussed, and motion must be carried by majority vote of public body's membership before executive session may validly be held. Comm on Open Gov't OML-AO-3131.

17. —Minutes of voting required

When vote is taken pursuant to motion to enter into executive session, minutes must be prepared which include reference to motion as well as manner in which each member cast his or her vote. Committee on Open Government FOIL-AO-3825.

When vote is taken pursuant to motion to enter into executive session, minutes must be prepared to include reference to motion as well as manner in which each member cast his or her vote. Committee on Open Government OML-AO-1197.

There are 2 vehicles under which public body may exclude public from its deliberations: (1) executive session, which is portion of open meeting during which public may be excluded through procedure that must be accomplished by vote of public body during open meeting; and (2) meeting which involves exemptions where provisions of Open Meetings Law do not apply. Comm on Open Gov't OML-AO-1413.

Since Open Meetings Law permits public bodies to vote in proper circumstances during executive session, roll call voting in public is not required; however, roll call vote and announcement of votes at same time they are cast would be consistent with law. Comm on Open Gov't OML-AO-4264.

While record of votes by members ordinarily is included in minutes, there is no requirement that it be included in minutes; such record may be maintained separate from minutes. Comm on Open Gov't OML-AO-4264.

II. Grounds For Holding Executive Session

18. In general

Mere possibility that ground for entry into executive session might arise does not permit executive session to be held; unless and until it does become suject of discussion, executive session cannot be conducted. Comm on Open Gov't FOIL-AO-1285.

Public body cannot conduct executive session to discuss subject of its choice; on contrary, its meetings must be conducted open to public, unless and until topic arises that may properly be discussed during executive session. Comm on Open Gov't FOIL-AO-1461.

Public body can only enter into executive session after specific procedure spelled out in Open Meetings Law has been followed; to extent that sub-committee considers matters dealing with particular person in conjunction with one or more topics described in Open Meetings Law, executive sessions may be properly convened; however, to extent that discussions pertained to policies, procedures or functions inherent in certain positions, those discussions should be held in public. Comm on Open Gov't FOIL-AO-4907.

As to executive sessions, Open Meetings Law is based upon considerations of common sense and provides public bodies with protection they need to carry out their duties effectively. Comm on Open Gov't OML-AO-1356.

Open Meetings Law permits public body, such as board of education, to conduct executive session for several specified purposes; discussion of terms and conditions of employment between public body employee association is part of collective negotiation and as such, executive session could be conducted; negotiations between public body and public employee union could also be conducted in private. Comm on Open Gov't OML-AO-1417.

Zoning board of appeals must deliberate in public, except to extent that topic may justifiably be considered during executive session; unless one or more of these topics arises, public body, including zoning board of appeals, must deliberate in public. Comm on Open Gov't OML-AO-1418.

Executive session is not separate and distinct from open meeting, but rather it is portion of open meeting during which public may be excluded; public body cannot enter into executive session to discuss subject of its choice, but must only discuss subjects listed in Open Meetings Law as appropriate for discussion behind closed doors. Comm on Open Gov't OML-AO-1445.

Public body cannot enter into executive session to discuss subject of its choice but is specifically limited to topics listed in Open Meetings Law; action taken in executive session remains valid unless and until court renders determination to contrary. Comm on Open Gov't OML-AO-1448.

All meetings must be preceded by notice and conducted open to public, unless and until executive session may be held to discuss one or more topics of discussion described in Open Meetings Law. Comm on Open Gov't OML-AO-1450.

Public body cannot enter into executive session to discuss subject of its choice and is limited to subjects listed in Open Meetings Law; further, motion to enter into executive session must identify in general terms the area or areas of subject or subjects to be considered. Comm on Open Gov't OML-AO-1451.

Motion to enter into executive session must include reference to general area or areas of subject or subjects to be considered during executive session; therefore, motion for entry into executive session should contain two components, inclusion of term "particular", and reference to one or more topics appearing in that provision. Comm on Open Gov't OML-AO-1460.

As general matter, Open Meetings Law is based on presumption of openness and all meetings of public bodies must be conducted open to public, except to extent that executive session may be convened; executive session is defined in Open Meetings Law to mean portion of open meeting during which public may be excluded and, as such, executive session is not separate and distinct from meeting, but rather is portion of open meeting. Comm on Open Gov't OML-AO-1463.

CLS Pub O § 105(1)(f) does not permit public body to discuss every subject that might arise in relation to "particular person," but rather pertains only to certain enumerated subjects that relate to individual; § 105(1)(f) was intended to protect privacy, not to shield policy matters under guise of privacy. Comm on Open Gov't OML-AO-2183.

While Open Meetings Law authorizes public bodies to conduct executive sessions in circumstances described in CLS Pub O § 105(1)(a) through (h), there is no requirement that executive session be held even though public body has right to do so. Comm on Open Gov't OML-AO-2278.

While board of education could convene executive session to interview candidates for district clerk position pursuant to "personnel" exception of Open Meetings Law, state-sponsored budget workshop attended by board members was improperly discussed later at that executive session, even if budget issues often have impact on personnel. Comm on Open Gov't OML-AO-3271.

Under CLS RPTL § 525(2)(a), assessor's remarks concerning complaints made to town board of assessment review could be made only in open sessions; thus, insofar as assessor was present for purpose of offering information or point of view, public was entitled to be present. Comm on Open Gov't OML-AO-3668.

While Town Ethics Board and Town Board clearly have ability to enter into executive session under CLS Pub O § 105(1)(f) to discuss certain matters relating to "particular person," there is no obligation to do so. Comm on Open Gov't OML-AO-3712.

Based on judicial interpretations of Education Law, school board generally cannot vote during executive session, except in those unusual circumstances in which statute permits or requires such vote. Comm on Open Gov't OML-AO-3798.

When discussion at meeting concerns matters of policy, such as manner in which public money will be expended or allocated, functions of department, creation or elimination of positions, or matters relating to budget, CLS Pub O § 105(1)(f) could not be asserted, even though discussion may relate to "personnel." Comm on Open Gov't OML-AO-3831.

CLS Pub O § 105(1)(f) would have validly served as means of entering into executive session, even though consideration of creating certain position (not valid for executive session) may have been separate from performance of particular principal (valid for executive session), where 2 issues could not be segregated or discussed separately. Comm on Open Gov't OML-AO-3831.

19. Collective bargaining negotiations

Provision permitting public body to enter into executive session to discuss negotiations is limited to discussion of collective bargaining negotiations under article 14 of civil service law, and does not apply to discussions concerning site of state prison. Committee on Open Government OML-AO-1186.

Public body may conduct executive session concerning collective bargaining negotiations with public employee union and as such, executive session would be proper to extent that it involves collective bargaining negotiations. Comm on Open Gov't OML-AO-1434.

Where highway department employees are not members of union, CLS Pub O § 105(1)(e) is not applicable and cannot serve as basis for conducting executive session. Comm on Open Gov't OML-AO-2393.

CLS Pub O § 105(1)(e) could not serve as basis for conducting executive session with regard to 5 heavy machine equipment operators who collectively united, sought and received services of attorney to represent them before town board to negotiate their labor contract since group of equipment operators did not qualify as employee organization for purposes of Taylor Law. Comm on Open Gov't OML-AO-2419.

If employees of Town of Sandy Creek were not members of any collective bargaining organization, CLS Civ S §§ 204-a and 209 would not apply and there would be no basis to enter into executive session to discuss health insurance for town employees. Comm on Open Gov't OML-AO-3616.

Consideration of grievance could not properly occur in executive session based on CLS Pub O § 105(1)(e), since grievance does not involve collective negotiations, but rather whether terms of existing agreement are being carried out in accordance with collective bargaining agreement. Comm on Open Gov't OML-AO-3941.

Insofar as contract between school board and teachers' union may require that executive session must be held to resolve grievances, even if Open Meetings Law or some other provision requires that proceeding be open, any such provision is invalid and of no effect. Comm on Open Gov't OML-AO-3994.

If grievance under contract between school board and teachers' union relates, for example, to teacher's health or medical condition, it is likely that executive session could be justified under CLS Pub O § 105(1)(f). Comm on Open Gov't OML-AO-3994.

Proper motion to enter into executive session on grounds of negotiation might be: "I move to enter into executive session to discuss the collective bargaining negotiations involving the police union"; public body should make it clear that negotiations to be discussed in executive session involve CLS Civ S Art 14 (Taylor Law). Comm on Open Gov't OML-AO-4091.

20. Employment matters, generally

21. —Educational employment

If issue before board of education involves extent to certain records are public or should not have been disclosed, there is no basis for entry into executive session; however, if board wishes to discuss actions taken by employee is disclosing records and perhaps removal of employee, CLS Pub O § 105(1)(f) might permit entry into executive session. Comm on Open Gov't FOIL-AO-9443.

Board of Education should have conducted in public discussion pertaining to reinstatement of bus aides who were eliminated under 2000-2001 budget, as focus of discussion was not on any particular person, but rather related to school district's needs and resources. Board of Education should have conducted in public its discussion of interview process for assistant principal position at certain school, because focus was on procedure, not particular person; however, discussion of whether to offer assistant principal position to named individual could have been conducted in executive session. Comm on Open Gov't FOIL-AO-12313.

Neither discussion of ways and means of hiring a school superintendent nor discussion of the purchase of computers are properly conducted in executive session, but discussion of the appointment of a business manager might justifiably be conducted in an executive session pursuant to Pub O § 105(1)(f). Comm on Open Gov't OML-AO-918.

Subject matter of grievances filed by teachers association does not constitute permissible grounds for entering into executive session under CLS Pub O § 105; however, to extent that school board "hears" grievances filed by teachers association and renders final and binding determination, board might have engaged in "quasi judicial proceeding", exempt from Open Meetings Law under § 108; however, if grievances were merely discussed by board, such discussion would have been subject to Law. Committee on Open Government OML-AO-1098.

Budgetary matters, such as funding or elimination of positions or programs, may not be discussed by school board in executive session, since discussion of "personnel" matters in executive session is appropriate only when subject involves particular person or persons, and only when one or more topics listed in CLS Pub O § 105(1)(f) is considered; § 105(1)(f) does not apply to discussion of policy matters, including staff reductions and layoffs, and which positions should be retained or abolished. Comm on Open Gov't OML-AO-2203.

Second clause of CLS Pub O § 105(1)(f) could not be invoked as basis for conducting executive session with regard to election of chancellor for Board of Regents since discussions concerning choice of chancellor would not involve matter concerning employment or promotion as regent could be characterized as employee and since election of chancellor would not constitute appointment. Comm on Open Gov't OML-AO-2450.

Discussion pertaining to school superintendent and his contract can properly be discussed in executive session since such discussion would deal with superintendent's performance, i.e., his employment history. Comm on Open Gov't OML-AO-2459.

Board of education does not have ability to discuss candidates for vacant elective position in executive session. Comm on Open Gov't OML-AO-2462.

CLS Pub O § 105(1)(f) did not permit New York State Board of Regents to conduct executive session to weigh evidence taken during public hearing, apply law and reach determination regarding termination of members of board of education since matter under discussion pertained to failures of board of education as whole, rather than particular member of board of education. Comm on Open Gov't OML-AO-2551.

Board of education's discussion of criteria for search for new superintendent could not properly be considered in executive session, although it involved "personnel matter"; so-called "personnel" exception under CLS Pub O § 105(1)(f) was intended largely to protect privacy, not to shield matters of policy under guise of privacy. Comm on Open Gov't OML-AO-2695.

Discussion of "leadership style" of president of board of education does not fall within coverage of CLS Pub O § 105(1)(f). Comm on Open Gov't OML-AO-2785.

22. —Particular person or corporation as subject, generally

23. — —Ethical considerations

If issue before board of ethics involves particular person in conjunction with one or more of subjects listed in CLS Pub O § 105(1)(f), executive session could appropriately be held. Comm on Open Gov't FOIL-AO-7914.

If issue before board of ethics involves particular person in conjunction with one or more of subjects listed in CLS Pub O § 105(1)(f), executive session may appropriately be held. Comm on Open Gov't FOIL-AO-9522.

If issue before board of ethics involves particular person in conjunction with one or more of subjects listed in CLS Pub O § 105(1)(f), executive session could appropriately be held. Comm on Open Gov't OML-AO-2269.

Discussions of town ethics board, regarding complaint of alleged misconduct of member of town board, could occur in executive session. Comm on Open Gov't OML-AO-3712.

24. — —Independent contractor status

Discussions regarding election of school board officers did not fall within any grounds for entry into executive session, although discussion and election of officers involves consideration of particular individuals, since it was unlikely that any specific subjects included in CLS Pub O § 105(1)(f) would arise in conjunction therewith. Comm on Open Gov't OML-AO-2245.

25. — —Medical or health history

Except in rare instance in which person's medical condition or history may be at issue, election does not involve any of subjects appearing in CLS Pub O § 105(1)(f). Comm on Open Gov't OML-AO-2271.

Initial clause of CLS Pub O § 105(1)(f) could be invoked as basis for conducting executive session with regard to election of chancellor for Board of Regents since physical ability of individual to hold position could be issue, particularly if that person had history of health problems, and since it was also possible that discussion might involve individual's financial or employment history. Comm on Open Gov't OML-AO-2450.

If grievance under contract between school board and teachers' union relates, for example, to teacher's health or medical condition, it is likely that executive session could be justified under CLS Pub O § 105(1)(f). Comm on Open Gov't OML-AO-3994.

26. — —Retaining attorney

Discussion of which attorney or firm should be retained in connection with litigation will likely fall within CLS Pub O § 105(1)(f) and justify conduct of executive session. Comm on Open Gov't FOIL-AO-7933.

Discussion of which attorney or firm should be retained by agency would likely fall within CLS Pub O § 105(1)(f) and would justify executive session. Comm on Open Gov't OML-AO-2274.

Discussion focusing on individual candidates to fill vacancy on board of education might validly be considered in executive session as it would involve matter leading to appointment of particular person. Comm on Open Gov't FOIL-AO-9290.

Insofar as discussion at executive session at meeting of board of education involved matter leading to dismissal or removal of school district resident who helped to prepare and then prematurely disclosed draft survey to be distributed to voters on day of board elections and budget vote, there was proper basis for conducting executive session. Comm on Open Gov't FOIL-AO-9499.

Community college board of trustees could discuss issues pertaining to college president in private. Comm on Open Gov't FOIL-AO-10151.

Although the decision by a town board to form a committee is not a proper subject for executive session discussion, discussion of particular individuals to be appointed to such a committee is a proper subject. Comm on Open Gov't OML-AO-885.

To the extent that a village planning board engages in discussions of the financial history of a particular corporation or the viability of that corporation in relation to its credit history, Pub O § 105(1)(f) provides a basis for entry into executive session. Comm on Open Govt OML-AO 909.

If discussion of administrative assignments is general in nature and involves, for example, the number of administrators or the nature of administrative workloads, no ground exists for convening an executive session. On the other hand, if the discussion involves a review of the performance or employment history of a particular administrator or administrators, an executive session is proper. Comm on Open Govt OML-AO 919.

"Personnel" justification for executive session may appropriately be invoked only when issue deals with particular person or corporation, and board's discussion whether or not to fill vacant

position based upon needs of district or budgetary concerns involves issues of policy that must be discussed in open meeting since those considerations of policy do not pertain to particular person. Committee on Open Government OML-AO-1032.

Executive session is not authorized where discussion simply involves consideration of elimination of positions, since issues do not pertain to particular persons. Committee on Open Government OML-AO-1033.

When listing agenda to enter into executive session, agenda need not include reference to name or other identifying details concerning individual who will be subject of discussion. Comm on Open Gov't OML-AO-1420.

Village board of trustees could not appropriately enter into executive session to discuss change in job description of village attorney from part-time to full-time position "with various new duties" since (1) situation dealt with allocation of public moneys, (2) discussion of job description related to duties or functions inherent in position, not to particular person, and (3) discussion pertaining to creation of full-time attorney's position involved policy matters. Comm on Open Gov't OML-AO-2206.

Discussion involving qualifications for position of school principal, or method of advertising availability and salary of position, could not validly be conducted during executive session since discussion would not pertain to specific individual; however, if and when board reviewed applications submitted by specific candidates for position, CLS Pub O § 105(1)(f) would apply as basis for conducting executive session. Comm on Open Gov't OML-AO-2215.

Town board could properly discuss whether to increase salary of justice court clerk or accept his resignation in executive session. Comm on Open Gov't OML-AO-2216.

Insofar as Board of Regents considers criteria inherent in position of chancellor or attributes or qualifications of any person who might serve in that position, CLS Pub O § 105(1)(f) cannot be asserted to justify executive session with regard to election of chancellor for board since such discussion would not focus on any "particular person" but rather on functions associated with position of chancellor and characteristics that any person who fulfills that role should or perhaps should not possess; however, if and when discussion pertains to particular person, language of statute would become applicable. Comm on Open Gov't OML-AO-2450.

With respect to discussion by board of education concerning salaries and benefits of non-union administrators, to extent that board considered administrators as group, rather than individually, there was no basis for conducting executive session; on other hand, insofar as board focused on particular administrators and their performance (i.e., whether particular administrator merited increase based on performance and, if so, how much), executive session was appropriate. Comm on Open Gov't OML-AO-2459.

Board of education has ability to discuss discipline of specific students in executive session pursuant to CLS Pub O § 105(1)(f). Comm on Open Gov't OML-AO-2522.

It was inappropriate for superintendent of schools to use "specific history of a particular person" as reason to move into executive session to discuss financial problems like double bookings of revenues, or other items that created dollar shortfall in budget, notwithstanding superintendent's concern that public would demand to know who was responsible or speculate that business manager was at fault; financial issues should have been discussed in public without any personnel discussion. Comm on Open Gov't OML-AO-3463.

Resolution approved by board of education in executive session, which authorized board and district superintendent to execute contract with particular employee, should have included name of employee, and minutes of executive session should have indicated, in some manner, nature of agreement and identity of district employee. Comm on Open Gov't OML-AO-3472.

Sole ground for entry into executive session—CLS Pub O § 105(1)(f)—would be pertinent to duties of local conditional release commission; thus, discussion of medical history of inmate or perhaps victim or that person's relations could be held in executive session. Comm on Open Gov't OML-AO-3784.

If action by school board were taken with respect to district's financial officer alleged to have misappropriated funds, i.e., to terminate her or to accept her retirement, any such action could properly have been taken only during open meeting. Comm on Open Gov't OML-AO-3798.

When problem regarding embezzlement of school district funds was discovered and connected to chief financial officer, executive session could have been held to discuss nature of action that might be taken relative to her where some aspects of school board's discussion of situation would have involved matter leading to demotion, discipline or dismissal of particular person. Comm on Open Gov't OML-AO-3798.

Discussion of "a contract to secure the services of a developer" may be considered during executive session under CLS Pub O § 105(1)(f), which governs matter leading to employment of particular corporation, perhaps as well as that entity's financial, credit or employment history. Comm on Open Gov't OML-AO-3806.

Due to presence of term "particular" in CLS Pub O § 105(1)(f), discussion of "personnel" may be considered in executive session only when subject involves particular person or persons, and only when at least one of topics listed in § 105(1)(f) is considered. Comm on Open Gov't OML-AO-3831.

When discussion at public meeting concerns matters of policy, such as manner in which public money will be expended or allocated, functions of department or perhaps creation or elimination of positions, CLS Pub O § 105(1)(f) could not be asserted, even though discussion may relate to "personnel." Comm on Open Gov't OML-AO-3860.

If public body has ability to discipline or impose sanctions against one of its members, including members who are elected officials, discussion concerning possibility of doing so could be conducted during executive session, since such discussion would apparently involve matter leading to discipline of particular person. Comm on Open Gov't OML-AO-3902.

Insofar as pension board discusses "financial history" of particular corporation, CLS Pub O § 105(1)(f) could properly be cited as basis for conducting executive session. Comm on Open Gov't OML-AO-3931.

When public board is discussing grievance under collective bargaining agreement, sole ground for entry into executive session that might be pertinent would be CLS Pub O § 105(1)(f), but only if grievance pertains to particular person in relation to subject described in that provision; if, however, grievance involves policy concerning duties applicable to all employees, there would be no basis for conducting executive session under § 105(1)(f). Comm on Open Gov't OML-AO-3941.

If discussion by town board—centering "around payment for police, fire and related government services"—involves financial history of not-for-profit entity or matters leading to its appointment or employment by town, to that extent executive session could properly be held. Comm on Open Gov't OML-AO-4041.

Executive session under CLS Pub O § 105(1)(f) could be asserted only to extent that Town Board discussed "matters leading to" town justice's "discipline, suspension, dismissal or removal," assuming that board has authority to seek to discipline, suspend, dismiss or remove town justice; however, if no such authority exists, executive session could not properly be held to discuss any such issues. Comm on Open Gov't OML-AO-4059.

Proper motion to enter into executive session on grounds of "personnel" matters might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)"; such motion would not have to identify person or persons who may be subject of discussion. Comm on Open Gov't OML-AO-4091.

Proper motion to enter into executive session on grounds of employment history might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)"; such motion would not have to identify person or persons who may be subject of discussion. Comm on Open Gov't OML-AO-4091.

If one issue at meeting would involve employment history of particular person or perhaps matter leading to discipline or removal of particular person, executive session may properly be held. Comm on Open Gov't OML-AO-4245.

CLS Pub O § 105(1)(f) would validly serve as means of entering into executive session where 2 issues (performance of particular

individual and creation of particular position) cannot be segregated or discussed separately. Comm on Open Gov't OML-AO-4245.

Gordon v Village of Monticello, mod on other grounds 207 AD2d 55 (1994), is "influential precedent" for proposition that executive session may not be entered into by public body in order to discuss filling vacancy in elective office, despite CLS Pub O § 105(1)(f) regarding consideration of employment matters. Comm on Open Gov't FOIL-AO-12918.

An executive session of a town board may not be conducted to discuss "personnel" where discussion regards elected officials, since such discussion could not lead to removal, dismissal or discipline of individuals involved, particularly where the town has not adopted a code of ethics. Comm on Open Gov't OML-AO-878.

Public Officers Law § 100(1)(f) [now § 105(1)(f)] is properly cited as basis for entry into executive session by planning board to engage in discussion of the financial history of a particular corporation, or the "liability" of that corporation in relation to its credit history. Comm on Open Gov't OML-AO-909.

Discussion of "personnel" may be considered in executive session only when subject involves particular person or persons, and only when one or more of topics listed in § 105(1)(f) are considered, and motion containing recitation of statutory language of grounds for executive session, or "personnel", for example, without more, fails to comply with law. 1986 Committee on Open Government OML-AO-1300.

General discussion of moneys allotted for personnel salaries and general personnel related matters does not qualify for discussion during executive session, and exemptions provided for in CLS Pub Off § 105(1)(f) do not include budgetary matters or matters of policy, but only to situations involving particular person. 1986 Committee on Open Government OML-AO-1335.

Executive session cannot be held to discuss salary that should be accorded particular position in municipality, even though there may be but one person in such position, as such matter concerns issue of policy regarding position, irrespective of who might hold that position, unless issue involves how well or poorly particular employer carried out his or her duties. 1986 Committee on Open Government OML-AO-1351.

While issues relative to budget may have impact on personnel, those issues generally relate to personnel generally or manner in which public moneys may be expended, rather than performance of particular employee; if discussion of budget involves considerations of policy relative to expenditures of public moneys, there is no legal basis for entering into executive session. Comm on Open Gov't OML-AO-1434.

Motion to enter into executive session to discuss personnel or personnel matters without additional description is inadequate; motion for entry into executive session should contain two components, inclusion of term "particular", and reference to one or more of topics appearing in Open Meetings Law. Comm on Open Gov't OML-AO-1440.

Insofar as reorganization includes designation of board members to certain committees or involves designation of others to carry out certain functions, i.e., designation of individual as records access officer for purpose of responding to requests made under Freedom of Information Law, those considerations might involve one's employment history or matter leading to appointment of particular person or persons that could properly be discussed in executive session under CLS Pub O § 105(1)(f). Comm on Open Gov't OML-AO-2271.

Due to insertion of term "particular" in CLS Pub O § 105(1)(f), discussion of "personnel" may be considered in executive session only when subject involves particular person or persons and only when one or more of topics listed in CLS Pub O § 105(1)(f) are considered. When discussion concerns matters of policy, such as manner in which public money will be expended or allocated, CLS Pub O § 105(1)(f) cannot be asserted, even though discussion relates to "personnel." Comm on Open Gov't OML-AO-2276.

Discussions relating to budgetary matters, such as funding or reduction of positions, cannot appropriately be discussed during executive session. Comm on Open Gov't OML-AO-2570.

While discussions of police agency consolidations or mergers might involve "personnel" and/or "contract negotiations," it is doubtful that those issues can properly be discussed in executive sessions. Comm on Open Gov't OML-AO-2608.

Discussion about hiring former board member as consultant should have been conducted in public, not in executive session, where discussion did not deal with that person's qualifications, but rather dealt with whether board should delegate task in question (revising board policy) to private citizen, and whether district should pay consultant to travel to Albany to file final policy with state education department. Comm on Open Gov't OML-AO-3198.

Since interviewing candidate for position would involve matter leading to appointment or employment of particular person, as well as consideration of that person's employment history, executive session may properly be held. Comm on Open Gov't OML-AO-3478.

If board's discussion of "pay raises for elected officials including themselves" involved across-the-board increase, executive session would not be proper, but if discussion focused on individual employee or board member and whether pay increase was merited, matter related to "a particular person" and executive session could validly be held. Comm on Open Gov't OML-AO-3537.

"Interrogation" of member of board of education concerning his or her actions would likely not fall within subject areas appearing in CLS Pub O § 105(1)(f). Comm on Open Gov't OML-AO-3562.

If village board's discussion of contract details of appointed, non-union personnel focused on particular person in relation to his or her performance, i.e., his or her employment history, or matter leading to his or her promotion or demotion, executive session could properly have been held; however, if such personnel were considered as group, i.e., for "across the board" consideration of appointees, there would not have been basis for entry into executive session. Comm on Open Gov't OML-AO-4030.

Due to insertion of term "particular" in CLS Pub O § 105(1)(f), discussion of "personnel" may be considered in executive session only when subject involves particular person or persons, and only when at least one topic listed in § 105(1)(f) is considered. Comm on Open Gov't OML-AO-4091.

Term "personnel" appears in neither Open Meetings Law nor Freedom of Information law, and characterization of issue as "personnel matter" does not necessarily to lead to conclusion that matter is confidential. Comm on Open Gov't OML-AO-4168.

When personnel matter involves "the hiring process," rather than "particular person", CLS Pub O § 105(1)(f) may not be asserted to justify holding executive session. Comm on Open Gov't OML-AO-4168.

Even though issue or action taken might relate only to one employee, when that action would affect or serve as precedent in cases arising in future pertaining to other persons in similar situations, there would be no basis for entry into executive session. Comm on Open Gov't OML-AO-4168.

Only to extent that matters considered by city council might have focused on particular person in conjunction with one or more of qualifying topics appearing in CLS Pub O § 105(1)(f) may executive session properly be held. Comm on Open Gov't OML-AO-4168.

When discussion concerns matters of policy, such as manner in which public money will be expended or allocated, functions of department, creation or elimination of positions, or matters relating to budget, CLS Pub O § 105(1)(f) could not be asserted, even though discussion may relate to "personnel." Comm on Open Gov't OML-AO-4245.

27. Litigation matters, generally

28. —Possible, proposed or threatened litigation

"Possible" litigation does not constitute valid basis for entry into executive session, for virtually any subject discussed by a public body could eventually be the topic of litigation. Comm on Open Govt OML-AO 908.

Executive session cannot be conducted solely because there might be possible litigation initiated by group of people who oppose project. Committee on Open Government OML-AO-1074.

"Possible" litigation does not constitute appropriate basis for entry into executive session. Comm On Open Gov't OML-AO-1205.

If common council meets to discuss claims which appear to "propose" litigation, and council intends to discuss its legal strategy, such discussion can be held in executive session; however, if discussion is held strictly to determine exact nature and extent of claims against city, then discussion cannot be held in executive session. Comm On Open Gov't OML-AO-1211.

Threat or fear of litigation does not, without more, constitute valid basis for entry into executive session, and any motion to go into executive session must identify general area to be considered, and it is insufficient to merely regurgitate statutory language. 1986 Committee on Open Government OML-AO-1308.

Provision of Open Meetings Law permitting public body to enter into executive session to discuss proposed, pending, or current litigation (CLS Pub Off § 105(1)(d)) does not permit executive sessions to discuss issues that might eventually result in litigation, nor does statute permit executive session to be held to discuss issue merely because there is "potential" for litigation. 1986 Committee on Open Government OML-AO-1352.

Threat or mere possibility of litigation does not, without more, constitute valid basis for entry into executive session because litigation exception is to enable public body to discuss pending litigation privately, without bearing strategy to its adversary through mandatory public meeting; mere presence of attorney with municipal board did not automatically result in privileged relationship and exemption from Open Meetings Law; subject matter of discussion and nature of communication determine applicability of attorney-client relationship and existence of exemption from Open Meetings Law. Comm on Open Gov't OML-AO-1421.

Unless board discusses its litigation strategy, it does not appear that CLS Pub O § 105(1)(d) could justifiably be cited to conduct executive session; further, possibility that litigation might ensue would not constitute valid basis for entry into executive session. Comm on Open Gov't OML-AO-2274.

CLS Pub O § 105(1)(d) does not permit public body to conduct executive session due to possibility or fear of litigation. Comm on Open Gov't OML-AO-2566.

CLS Pub O § 105(1)(d) did not justify discussion of controversial proposal in executive session due to possibility or fear of litigation, as exception to open meeting requirements for discussion of "proposed, pending or current litigation" applies to litigation strategy, not issues that might eventually result in litigation; if possibility or fear of litigation were valid basis for entry into executive session, little would remain to be discussed in public. Comm on Open Gov't OML-AO-2705.

Litigation exception is intended to permit town board to privately discuss litigation strategy, not issues that might eventually result in litigation. Comm on Open Gov't OML-AO-3646.

29. —Settlement discussions

If discussion of judicial settlement occurs between County Board and its opponent in litigation, no ground for entry into executive session could justifiably be cited. Committee on Open Government OML-AO-1078.

When village board and lawyers for adversary in litigation with village sit down together to work out settlement, Open Meetings Law requires that this be done in open session, and in such case, public body cannot justify executive session to discuss pending litigation with its adversary. 1986 Committee on Open Government, OML-AO-1316.

Unless agency discusses its litigation strategy, CLS Pub O § 105(1)(d) will not justify conduct of executive session; further, possibility that litigation might ensue will not constitute valid basis for entry into executive session. Comm on Open Gov't FOIL-AO-7933.

Public body may not hold executive session to discuss issue merely because there is possibility of litigation, as potential litigation could be subject (or result) of nearly any topic; only to extent that public body discusses its litigation strategy can executive session be properly held under CLS Pub O § 105(1)(d). Comm on Open Gov't FOIL-AO-12124.

Only to extent that public body discusses its litigation strategy and related settlement strategy, executive session can properly be held under CLS Pub O § 105(1)(d); public body may not conduct executive session due to possibility or fear of litigation. Comm on Open Gov't FOIL-AO-16526.

Pub O § 105(1)(d) does not authorize a zoning board of appeals to hold an executive session to discuss an application for a variance notwithstanding that a majority of the board believes it is highly likely that an appeal from its decision will be made to the courts. Comm on Open Govt OML-AO 926.

Motion to enter into executive session to discuss "litigation" without additional specificity is inadequate; motion must identify particular litigation that is being considered. Committee on Open Government OML-AO-1033.

Although motion to enter into executive session must in general terms identify topics to be considered, in discussion of discrimination complaint, motion need not identify either complainant or subject of complaint brought before Human Rights Commission of village. Committee on Open Government OML-AO-1203.

To extent that city council committee intended to seek legal advice of its attorney, such gathering would not be subject to requirements of Open Meetings Law, since it involves attorney/client relationship, matter made confidential by state law, but to extent that committee sought to reach consensus regarding litigation at issue, such gathering would be "meeting" subject to Open Meetings Law, though executive session could be convened where issue involved pending litigation. Comm on Open Gov't OML-AO-1376.

Exception from open meeting based on discussion of litigation is intended to permit public body to discuss its litigation strategy behind closed doors, rather than issues that might eventually result in litigation; further, since possible or potential litigation can be result of nearly any topic discussed by public body, executive session cannot be held to discuss issue merely because there is potential for litigation. Comm on Open Gov't OML-AO-1429.

Although notices of claim might have been filed against town by residents due to flood damages sustained by them, discussion of drainage report that did not include consideration of town's litigation strategy relating to those claims would not qualify for entry of public works committee meeting into executive session under CLS Pub O § 105(1)(d). Comm on Open Gov't OML-AO-2211.

CLS Pub O § 105(1)(a) through (h) did not justify town board's entry into executive session for purpose of deciding whether member of public, who had brought action against town based on its alleged failure to implement zoning law, should be given permission to comment on zoning law issue, since executive session was not called to consider litigation. Comm on Open Gov't OML-AO-2214.

CLS Pub O § 105(1)(d) is intended to permit public body to discuss its litigation strategy behind closed doors, rather than issues that might eventually result in litigation. Comm on Open Gov't OML-AO-2264.

Executive session cannot be held to avoid pending litigation; CLS Pub O § 105(1)(d) allows entry into executive session only to discuss litigation strategy. Comm on Open Gov't OML-AO-2365.

Village board's practice of refusing to identify litigation matter which would be discussed in executive session violated Open Meetings Law. Comm on Open Gov't OML-AO-2451.

Town board could not properly enter into executive session with party against which it had instituted litigation since CLS Pub O § 105(1)(d) only applies to permit executive session to enable public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings. Comm on Open Gov't OML-AO-2464.

Exception regarding litigation would not serve as valid basis for county to conduct executive session if county is not and does not expect to be party to such litigation; since there would be no consideration of "its" litigation strategy, county would have no adversary in any legal proceeding. Comm on Open Gov't OML-AO-3754.

There is no provision in Open Meetings Law that directly authorizes public body to discuss "legal matters" during executive session; provision most analogous to "legal matters" is CLS Pub O § 105(1)(d), which permits public body to enter into executive

session to discuss "proposed, pending or current litigation." Comm on Open Gov't OML-AO-3806.

Litigation exception of CLS Pub O § 105(1)(d) is intended to permit public body to discuss its litigation strategy behind closed doors, rather than issues that might eventually result in litigation. Comm on Open Gov't OML-AO-3806.

When discussion in public meeting relates to litigation that has been initiated, motion to enter into executive session must name such litigation; if Town Board seeks to discuss its litigation strategy in relation to person or entity that it intends to sue, and if premature identification of that person or entity could adversely affect interests of Town and its residents, motion need not identify that person or entity, but it should clearly indicate that discussion will involve litigation strategy. Comm on Open Gov't OML-AO-3806.

Term "litigation" in CLS Pub O § 105(1)(d) involves judicial contest, and discussion of labor grievance under collective bargaining agreement does not involve judicial contest; thus, § 105(1)(d) would not be applicable as basis for entry into executive session. Comm on Open Gov't OML-AO-3941.

Proper motion to enter into executive session on grounds of litigation strategy might be: "I move to enter into executive session to discuss our litigation strategy in the case of the XYZ Company v. the Board of Education." Comm on Open Gov't OML-AO-4091.

Even if litigation exception permitted State Board of Elections to hold executive session to avert lawsuit by federal Department of Justice (DOJ) over implementation of federal Help America Vote Act, ability of board to conduct closed session ended when adversary (DOJ) was permitted to attend. Comm on Open Gov't OML-AO-4182.

If representative of Oneida Indian Nation were invited to attend city Common Council executive session, council would have lost its authority to conduct private session under pending litigation exception of Open Meetings Law. Comm on Open Gov't OML-AO-4214.

If there were court order in effect on date of meeting, requiring negotiations or settlement discussions to be kept confidential, meeting for purpose of conducting settlement negotiations between city Common Council and Oneida Indian Nation would be outside coverage of the Open Meetings Law, and thus procedure for entry into executive session would not apply. Comm on Open Gov't OML-AO-4214.

30. Sale, lease or acquisition of real property, generally

31. —Hospital property

Executive session held by board of legislators to discuss sale of county hospital to not-for-profit corporation was improper where no bidding or actual market value of hospital was involved and thus public discussion would not have any impact on value of property; however, executive session could be held, even when parties and site of parcel were known, insofar as public discussion of financial terms or negotiation process might have substantial effect on value of property. Comm on Open Gov't OML-AO-2691.

32. —School property

Village zoning board of appeals could not enter into executive session to decide legality of private property owner renting out part of his residence to private dance school since village was not party to proposed lease. Comm on Open Gov't OML-AO-2427.

It was unlikely that presentation made by firm regarding offer to purchase school district property could have fallen with scope of CLS Pub O § 105(1)(h) so as to justify executive session of board of education. To extent that board of education engaged in general discussion of benefits or disadvantages of selling school district property in connection with presentation made by firm regarding such purchase, it did not appear that such discussion could properly have occurred in executive session. Insofar as board of education might have discussed possible financial terms or engaged in negotiation process regarding proposal by firm to purchase school district property, it was possible that public discussion at that juncture might have significantly affected value of property and justified executive session. Comm on Open Gov't OML-AO-2558.

Executive session concerning the purchase of property is improper where the particulars surrounding the purchase are generally known. Comm on Open Gov't OML-AO-85.

Town board did not have basis to conduct executive session to discuss issue of whether town should purchase bottled water and supply additional 20 gallons of water for washing daily, or reinstall electricity to operate water pump for landfill attendant, since such matter involved policy issue, and although it might relate to particular employee, it did not appear to involve that person's performance or any subject included in CLS Pub O § 105(1)(f). Comm on Open Gov't OML-AO-2208.

Solid waste authority was not justified in conducting executive session to select 2 possible sites for landfill where top 10 potential sites had previously been disclosed to public in several newspaper articles; public body may conduct executive session to discuss real property transactions only to extent that publicity would "substantially affect the value" of property. Comm on Open Gov't OML-AO-2223.

Proposed acquisition or lease of real property may be discussed in executive session only when publicity would substantially affect value or property. Comm on Open Gov't OML-AO-2345.

While motion to enter into executive session need not necessarily identify parcel or parcels of land under consideration, in view of language of CLS Pub O § 105(1)(h), there must be some indication in motion that publicity would substantially affect value of property. Comm on Open Gov't OML-AO-2373.

There was no basis on which to conduct executive session in connection with purchase of parcel of property by county where location of parcel had already been disclosed publicly. contract of sale had already been signed by owner of parcel and all that remained to complete sale was approval by county board since, on approval by board, seller had no choice but to sell property at agreed price. Comm on Open Gov't OML-AO-2391.

Typically, if location of parcel and likelihood of transaction are known to public, CLS Pub O § 105(1)(h) will not apply; in those circumstances, publicity usually has minimal or insignificant impact on value of real property. Comm on Open Gov't OML-AO-2470.

CLS Pub § 105(1)(h) would not permit town board to conduct executive session to discuss appropriate boundary line between village and town, and potential sale of real property to private landowner, as such issues did not "substantially affect" value of town property. Comm on Open Gov't OML-AO-2747.

Town board was not justified in entering into executive session under CLS Pub O § 105(1)(h) to discuss grant application matters, if focus was not on particular parcel, negotiation strategy, or indication of price. Comm on Open Gov't OML-AO-3142.

Proper basis did not exist for planning board to enter into executive session when reviewing subdivision application, although town was in process of negotiating for acquisition of easement or "development rights" to parcel in question, where all parties that might be affected by town's proposed purchase were aware of property involved and of negotiations in question. Comm on Open Gov't OML-AO-3601.

At joint meeting of town board and public library board of trustees, town board should not have held executive session to discuss site of new library in private, where location of site suggested by board of trustees was already well known to public, and town already owned site chosen by town board. Comm on Open Gov't OML-AO-3646.

Language of CLS Pub O § 105(1)(h) does not refer to negotiations per se or impact of publicity on negotiations relating to parcel of land; rather, its proper assertion is limited to situations in which publicity would have substantial effect on value of property. Comm on Open Gov't OML-AO-3764.

Language of CLS Pub O § 105(1)(h) (real estate exception permitting entry into executive session) does not refer to negotiations per se or impact of publicity on negotiations relating to parcel; rather, its proper assertion is limited to situations in which publicity would have substantial effect on value of property. Comm on Open Gov't OML-AO-3889.

33. Sufficiency of motion

Motion describing subject to be discussed at executive session of public body as "personnel" or "specific personnel matters" is

inadequate; such motion should be based upon specific language of CLS Pub O § 105(1)(f), for example, "I move to enter into executive session to discuss employment history of particular person (or persons)"; such motion need not identify person or persons who may be subject of discussion. Comm on Open Gov't FOIL-AO-9522.

Generalization of matters to be discussed during an executive session such as "contractual matters" or "personal matters" or "pending litigation" are insufficient. A public body entering into executive session to discuss "personal matters" should indicate by motion the topic within Public Officers Law § 100(1)(f) [now § 105(1)(f)] as well as the fact that the discussion will refer to a "particular" person, although the identity of the individual who is the subject of the discussion need not be disclosed. Comm on Open Gov't OML-AO-870.

School board's identification of subject to be discussed in executive session as "specific personnel" is insufficient indication and fails to comply with Open Meetings Law; motion to enter into executive session under CLS Pub O § 105(1)(f) should include reference to "particular person", who need not be named, plus one of topics in that provision. Committee on Open Government OML-AO-1095.

Motion indicating that topic to be discussed involves "various communications" would not, according to case law, comply with OML § 105; similarly, motion to enter into executive session under "category f" would also not comply. Proper motion to go into executive session under § 105[1][f] might be "I move to enter into executive session to discuss matter leading to discipline of particular person"; to protect privacy of person who is subject of discussion, that person need not be identified in motion. Comm On Open Gov't OML-AO-1279.

Motion to enter into executive session to discuss "personnel matters", without additional description, is inadequate; it should contain two components, inclusion of term "particular", and reference to one or more of topics appearing in § 105. Comm on Open Gov't OML-AO-1289.

Proper motion for executive session by school district's board of education considering annual evaluation of superintendent should include reference to one or more of the topics listed in CLS Pub Off § 105(1)(f), as well as reference to fact that discussion focuses upon particular person, and motion containing recitation of ground for executive session as "personnel", for example, without more, fails to comply with Open Meetings Law. Comm on Open Gov't OML-AO-1358.

Motion to enter into executive session to discuss legal matters without more would not meet requirement of Open Meetings Law. Comm on Open Gov't OML-AO-1462.

Motion describing subject to be discussed in executive session as "personnel" is inadequate; motion should be based on specific language of CLS Pub O § 105(1)(f), although such motion need not identify particular person or persons who may be subject of discussion. Comm on Open Gov't OML-AO-2203.

34. Other particular grounds for executive session, generally

35. —Developmentally disabled persons

Discussions of Committee on the Handicapped concerning particular students would in their entirety be outside scope of Open Meetings Law; however, if Committee seeks to discuss matters such as procedural issues, administrative or perhaps budgetary concerns, Law would be applicable. Committee on Open Government OML-AO-1150.

Any member of board of visitors of developmental center has right to attend executive session involving incident reports and other confidential records, board may authorize others, such as representative of Mental Hygiene Legal Service, to attend, but board is not required to permit persons other than members to attend such sessions. Comm on Open Gov't OML-AO-1364.

Subcommittee of community services board improperly conducted executive session to consider how to handle and respond to letter which requested Commissioner of Office of Mental Retardation and Developmental Disabilities to withdraw support for proposed sheltered workshop. Comm on Open Gov't OML-AO-2190.

36. —Health matters

County board of health violated Open Meetings Law when it considered implementation of new smoking regulations during executive session. Comm on Open Gov't OML-AO-2612.

37. —Industrial development agencies

Industrial development agency may enter into executive session to discuss financial or credit history of particular person or corporation pursuant to CLS Pub O § 105(1)(f). Comm on Open Gov't OML-AO-2240.

38. —Land use matters

Unless one or more of exceptions in CLS Pub O § 105(1)(a) through (h) arise, public body, including zoning board of appeals, must deliberate in public; vote by zoning board of appeals must be taken in public; if open meetings law is violated possible recourse is provided in CLS Pub O § 107(1). Comm on Open Gov't FOIL-AO-44717; Comm on Open Gov't OML-AO-1412.

City board of architectural review is public body required to comply with Open Meetings Law; board is not entitled to conduct executive sessions to discuss each application for building permit. Committee on Open Government OML-AO-1108.

Request by general manager of radio station to construct taller transmitting tower did not present any grounds for conducting an executive session. Comm on Open Gov't OML-AO-1387.

Reason offered for conducting executive session of county legislature—"negotiations" regarding casino gaming—would have been inadequate as justification or proper reason for entering into executive session. Comm on Open Gov't OML-AO-3913.

Closed session of county legislature regarding casino gaming could not validly be held based on assertion of attorney-client privilege where representatives of casinos were also present; presence of "strangers" who are not clients essentially resulted in waiver of privilege. Comm on Open Gov't OML-AO-3913.

39. —Law enforcement

At meeting of Executive Committee of Faculty Senate of State University at Buffalo, discussion involving possibility of arming public safety officers did not justify entering into executive session. Comm on Open Gov't OML-AO-1372.

Meetings held at City Hall by Rensselaer City Council and Chief of Police, to discuss problems relating to "fire-police dispatching system," and to discuss resolution to establish opening public session at Common Council meetings," should have been conducted in public since no grounds for entry into executive session applied. Comm on Open Gov't OML-AO-2187.

Board of education should have held open session, rather than executive session, when it met to discuss fact that "class 3 sex offender" lived in city, as public discussion would have enhanced public safety by enabling school officials and public to be alert; insofar as board discussed policies and procedures or whether to inform staff or parents that sex offender resided in city, valid basis for executive session did not exist under § 105(1)(f). Comm on Open Gov't OML-AO-2681.

Committee created by county legislature to consider whether vacancies should be filled, and to offer recommendations to full legislature, did not properly hold executive session to discuss District Attorney's statement that inability to fill vacant assistant district attorney position might result in more cases being plea bargained or dismissed; while discussion pertained to persons arrested and/or in law enforcement custody, it was unlikely that issues involved, if discussed in public, would imperil public safety. Comm on Open Gov't OML-AO-3623.

Committee created by county legislature to consider whether vacancies should be filled, and to offer recommendations to full legislature, could enter into executive session to discuss whether Sheriff's Department had sufficient personnel on duty at specific times of day; public discussion of law enforcement coverage would allow potential lawbreakers to know when Sheriff's Department might be understaffed and might enable them to tailor their illegal activities to circumvent effective law enforcement. Comm on Open Gov't OML-AO-3623.

40. —Use of tape recorder by member of public

Use of tape recorder by member of public could not justify board's entry into executive session. Comm On Open Gov't OML-AO-1191 and 1220.

Discussions regarding election of officers do not fall within any of grounds for entry into executive session. Comm on Open Gov't OML-AO-2257.

41. —Voting; elections

With regard to survey intended to be distributed to voters on day of board of education elections and budget vote, there was no basis for reviewing or revising survey during executive session of board of education. Comm on Open Gov't FOIL-AO-9499.

Neither "policies" or "community relations" may be appropriately discussed during a board of education executive session. Comm on Open Gov't OML-AO-870.

An executive session held to discuss a request under the Freedom of Information Law violates Public Officers Law § 100. Comm on Open Gov't OML-AO-899.

Discussion of purchase of computers is not properly conducted in executive session. Comm on Open Govt OML-AO 918.

Community advisory board's discussion of the curriculum of a school district does not fall within any ground for executive session. Comm on Open Govt OML-AO 924.

Entry by board of education into executive session was not authorized by Pub O § 105, where issues determined by board behind closed doors involved manner in which public monies would be expended and questions of policy, but issues involved no particular person. Comm on Open Govt OML-AO 945.

Issues which focused on particular individuals were properly discussed in executive session of organizational meeting of board of fire commissioners, but "budget review" should have occurred in public, although it might have related to personnel, since consideration of budget most frequently involves policy issues and means or manner in which public moneys may be expended or allocated. Comm on Open Gov't OML-AO-2184.

Discussions by village board relating to budgetary matters, such as funding or elimination of positions or programs, could not appropriately be discussed during executive session. Comm on Open Gov't OML-AO-2189.

Town board did not have basis to go into executive session to discuss proposed inter-municipal agreement outlining how town would swap municipal solid waste with 2 other towns, for their mutual advantage, where representative from one of 2 other towns attended and submitted broad, general draft agreement for discussion. Comm on Open Gov't OML-AO-2200.

Board of education discussion of "strategy for controlling what the public might say at board meetings during those intervals when the public is allowed to speak" should have occurred in public, since discussion involved matter of policy, and thus no grounds for entry into executive session applied. Comm on Open Gov't OML-AO-2221.

Executive session cannot properly be held to discuss distribution of executive session minutes. Comm on Open Gov't OML-AO-2303.

While discussion of employee's financial history can be considered in executive session, that issue must be distinguished from consideration of possible award of "cash out" package; latter pertains to matter of policy that could or would affect non-union employees in future and, therefore, executive session cannot properly be held to discuss award of cash out package. Comm on Open Gov't OML-AO-2402.

Discussions concerning financial or credit history of particular corporation may be conducted in executive session. When public body discusses purchase of securities, or sale or exchange of securities that it holds, and when public discussion would substantially affect value of securities, executive session may justifiably be held. Comm on Open Gov't OML-AO-2404.

Executive session could not be held by board of education to discuss proposal that public records distributed to board members prior to meetings be posted on bulletin board for public review in advance of meetings. Comm on Open Gov't OML-AO-2423.

Based on language of Open Meetings Law, public body cannot conduct executive session merely because issue may be sensitive. Comm on Open Gov't OML-AO-2570.

Matters concerning school board's drafting of bond resolution should have been discussed in public rather than executive session where (1) architect, representatives of construction company and public relations firm, and district's bond counsel were present, and (2) meeting included discussion of scope of proposed work, propriety of board's policy of seeking to expand size of school in order to accept more out-of-district students, various methods available to offer bond proposals to public, whether one or both bond propositions could be sold to public, and pros and cons of various approaches to be used to achieve public support. Comm on Open Gov't OML-AO-3198.

Subject of "tuition negotiations" likely would not fall within any grounds for board of education to hold executive session even if board's attorney was present, unless attorney-client privilege applied. Comm on Open Gov't OML-AO-3324.

If issue before board of ethics involves particular person in conjunction with one or more of subjects listed in CLS Pub O § 105(1)(f), executive session could appropriately be held. Comm on Open Gov't OML-AO-3712.

In typical situation in which Freedom of Information Law determines rights of access, opinions offered by town Ethics Board or its members may be withheld, unless and until opinion is adopted by the Town Board or local enactment requires disclosure; similarly, if Open Meetings Law were followed, discussions following complaint concerning conduct of Town Board member could have occurred during executive sessions. Comm on Open Gov't OML-AO-3712.

Board of education's ability to conduct executive session would be minimal where subjects to be discussed included weighing pros and cons of possible scenarios to house children during renovations. Comm on Open Gov't OML-AO-3787.

There is no requirement that action to recover public moneys must be taken during open meeting. Comm on Open Gov't OML-AO-3798.

There is nothing in Open Meetings Law that refers to "private projects" or that distinguishes private from public projects in context of whether public body may enter into executive session. Comm on Open Gov't OML-AO-3925.

Executive sessions of village board of trustees might properly have been conducted to consider topic of "safe houses" for battered women, since CLS Pub O § 105(a) applies in consideration of need to provide safety and security to battered, abused or threatened women and their children. Comm on Open Gov't OML-AO-3925.

Pension boards could properly hold executive sessions when they focus on particular enterprise and consider whether to purchase or sell securities associated with that enterprise, and if effect of public discussion would result in substantial change in price of securities considered for acquisition or sale. Comm on Open Gov't OML-AO-3931.

CLS Pub O § 105(1)(h) may be invoked in instances in which discussion by pension boards regarding investments focuses on particular purchases or sales yet to be made; on other hand, discussions regarding past purchases or sales would not appear to "substantially affect" value of securities. Comm on Open Gov't OML-AO-3931.

CLS Pub O § 105(1)(h) may not be invoked by pensions boards involving their policy, pertaining to certain sectors, i.e., emerging markets or large cap companies, updates regarding previous transactions, or "post-trade" analyses, since revealing such discussions would appear to have perhaps minimal or perhaps no effect on value of securities. Comm on Open Gov't OML-AO-3931.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Public employees' fair employment act, CLS Civ S §§ 200 et seq.

Federal Aspects:

Open meetings, 5 USCS § 552b.

Jurisprudences:

2 NY Jur 2d Administrative Law §§ 94, 95, 97, 99 .

25 NY Jur 2d Counties, Towns, and Municipal Corporations § 145 .

26 NY Jur 2d Counties, Towns, and Municipal Corporations § 412 .

75 NY Jur 2d Libraries § 15 .

94 NY Jur 2d Schools, Universities, and Colleges §§ 127, 152 .

96 NY Jur 2d State of New York § 162 .

56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 136 et seq.

Law Reviews:

Sluzar, New York abandons a commitment to open meetings. 50 Alb. L. Rev. 613.

Whelan, New York's Open Meetings Law: revision of the political caucus exemption and its implications for local government. 60 Brook. L. Rev. 1483.

Annotations:

Emergency exception under state law making proceedings by public bodies open to the public. 33 ALR5th 731.

Matthew Bender's New York Practice Guides: 3 New York Practice Guide: Real Estate § 20.04.

Texts: Dienes, Levine & Lind, Newsgathering and the Law (1999, Matthew Bender) §§ 9-6(g), 9-6(h)(3), 9-6(h)(5), 9-6(h)(6).

Gerrard, Ruzow, Weinberg, Environmental Impact Review in New York (Matthew Bender) § 8.14.

§ 106. Minutes

1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.

2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.

3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meeting except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session.

HISTORY:

Formerly § 96, add, L 1976, ch 511, § 1; renumbered § 101, L 1977, ch 933, § 2; renumbered § 106, L 1983, ch 652, § 1, eff Sept 1, 1984; L 1979, ch 704, § 4, eff Oct 1, 1979.

Notes to Decisions

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1. In general
2. Applicability to particular entities
3. Availability of minutes to public, generally
4. —Fee for copies
5. —Timely availability, generally
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7. Coverage of particular matters, generally
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9. —School matters
10. Minutes of executive sessions, generally
11. —Town board's executive sessions
12. Role of town clerk
13. Use of tape recorders
14. —Verbatim minutes not required

1. In general

Resolution of Board of Examiners that motions that are not carried not be made part of minutes of stated or special meetings violates Open Meetings Law, since such law requires reference be made to any vote that is taken following introduction of motion, proposal or resolution, whether or not carried, and reference must be made in minutes to any motion or proposal that is made even if no vote is taken. Comm Pub Acc Rec OML-Ad Op 658.

Section 41 of General Construction Law provides that public body may perform its duties only by means of vote carried by majority of whole number of its members; thus, if quorum is no longer present, community board does not have capacity to carry out its duties. Comm Pub Acc Rec OML-Ad Op 799.

2. Applicability to particular entities

Since the Panel to Review Scientific Studies and the Development of Public Policy on Problem Resulting from Hazardous Waste was created by an executive order of the governor, the convenes only by means of a quorum pursuant to General Construction Law § 41 and clearly conducts public business, the Panel is a "public body" within the meaning of Public Officers Law § 97(2) [now § 102(2)] subject to the minimum requirements concerning minutes of open meetings under Public Officers Law § 101 [now § 106]. Comm Pub Acc Rec OML—Ad Op 580.

Public school board is not required to create minutes of its executive sessions since (1) if a public body merely deliberates during an executive session, but takes no action, minutes need not be created, (2) § 1708(3) of the Education Law, which pertains to regular meetings of school boards, states that the meetings of all such boards shall be open to the public but that said boards may hold executive sessions and (3) recent case law has held that executive sessions of a board of education are available only for purposes of discussion and that all formal, official action of the board must be taken in general session open to the public. Comm Pub Acc Rec OML-Ad Op 747.

3. Availability of minutes to public, generally

Memorialized discussions at duly convened executive sessions of county board of supervisors which do not result in formal vote, whether consisting of privileged attorney-client communications or otherwise, are not type of governmental records to which public has to be given access, as confidentiality has been specifically sanctioned by CLS Pub O §§ 105 and 106, and thus such records fall within exemption of CLS Pub O § 87(2)(a). Wm. J. Kline & Sons v County of Hamilton, 235 A.D.2d 44, 663 N.Y.S.2d 339, 1997 N.Y. App. Div. LEXIS 10151 (N.Y. App. Div. 3d Dep't 1997).

4. —Fee for copies

Town is authorized to adopt local law that establishes flat fee for annual subscription to copies of minutes of town board meetings and provides for mailing of copies of minutes to those who have paid fee; amount of fee must be reasonably related to town's reproduction and mailing costs, and provisions of subscription service does not obviate need to respond to individual requests, submitted under Freedom of Information Law, or copies of minutes. 1999 Op St Compt No. 99-8.

5. —Timely availability, generally

The time limits for the preparation of minutes of meetings held by municipal authority are contained in Public Officers Law § 101 [now § 106]; the Committee on Public Access to Records has recognized that in some instances a public body might not meet to approve or make official minutes within the time periods designated in Public Officers Law § 101(3) [now § 106(3)] and has consistently advised that minutes made available within the prescribed time period may be marked as "draft", "unofficial", or "non-final" in order that the public may have the capacity to learn generally what transpired at the meeting and the members of the public body may be given a measure of protection. Comm Pub Acc Rec OML—Ad Op 555.

6. — —Two weeks for minutes of open meeting

Minutes of an open meeting of a local fire district must be compiled and made available within 2 weeks of the meeting; where a public body does not have the capacity to approve minutes within the time period specified by § 101 [now § 106], it has been suggested that unapproved minutes be marked as "unapproved", "draft", "non-final", or "unofficial" in order to allow the public to learn generally that transpired at the meeting and at the same time grant members of the public body a certain measure of protection. Comm Pub Acc Rec OML—Ad Op 594.

Minutes of open meetings must be prepared and made available within 2 weeks of meetings, whether or not minutes have been approved. Comm Pub Acc Rec OML-Ad Op 837.

7. Coverage of particular matters, generally

Housing authority board of commissioners' use of secret ballot for voting purposes in executive session violated Freedom of Information Law and Open Meetings Law, but did not warrant annulment of board's decision to discharge employee, and thus employee's Article 78 proceeding was properly dismissed; claim that board would have voted differently had they done so in open session was of no consequence since board clearly had authority to determine employment issue at executive session, under CLS Pub O § 105. Smithson v Ilion Housing Authority, 130 A.D.2d 965, 516 N.Y.S.2d 564, 1987 N.Y. App. Div. LEXIS 46949 (N.Y. App. Div. 4th Dep't 1987), aff'd, 72 N.Y.2d 1034, 534 N.Y.S.2d 930, 531 N.E.2d 651, 1988 N.Y. LEXIS 2707 (N.Y. 1988).

Open Meeting Law was not violated when Public Service Commissioners toured proposed routes for transition station where tour was intended to provide commissioners with greater understanding of evidence regarding site selection, and summary report of tour was properly provided to parties. New Rochelle v Public Service Com., 150 A.D.2d 441, 541 N.Y.S.2d 49, 1989 N.Y. App. Div. LEXIS 6524 (N.Y. App. Div. 2d Dep't), app. denied, 74 N.Y.2d 610, 546 N.Y.S.2d 554, 545 N.E.2d 868, 1989 N.Y. LEXIS 2819 (N.Y. 1989).

Absence of minutes of certain executive sessions of city council did not violate Open Meetings Law (CLS Pub O Art 7), where no formal vote was taken at such meetings, and binding decision to lay off certain city employees came at open meeting. Plattsburgh Pub. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 A.D.2d 518, 586 N.Y.S.2d 346, 1992 N.Y. App. Div. LEXIS 8984 (N.Y. App. Div. 3d Dep't 1992).

8. —"Consensus" determination

Trustees of union free school district violated publication provisions of CLS Pub O § 106 when they failed to publish minutes of executive session which had been held ostensibly to discuss status of certain litigation, despite trustees' claim that discussions were exempt from disclosure under Freedom of Information Law, since, even if meeting involved such discussions, no basis existed for trustees to avoid publication of minutes pertaining to "final determination" of action and "date and vote thereon" as required by § 106; moreover, fact that trustees characterized vote as taken by "consensus" did not exclude recording of vote as "formal vote," and fact that vote taken was not "final determination" of litigation did not exclude recording of determination as determination of matter voted on. Previdi v Hirsch, 138 Misc. 2d 436, 524 N.Y.S.2d 643, 1988 N.Y. Misc. LEXIS 340 (N.Y. Sup. Ct. 1988).

9. —School matters

Trustees of union free school district violated publication provisions of CLS Pub O § 106 when they failed to publish minutes of executive session which had been held ostensibly to discuss status of certain litigation, despite trustees' claim that discussions were exempt from disclosure under Freedom of Information Law, since, even if meeting involved such discussions, no basis existed for trustees to avoid publication of minutes pertaining to "final determination" of action and "date and vote thereon" as required by § 106; moreover, fact that trustees characterized vote as taken by "consensus" did not exclude recording of vote as "formal vote," and fact that vote taken was not "final determination" of litigation did not exclude recording of determination as determination of matter voted on. Previdi v Hirsch, 138 Misc. 2d 436, 524 N.Y.S.2d 643, 1988 N.Y. Misc. LEXIS 340 (N.Y. Sup. Ct. 1988).

Minutes of an open meeting need not make reference to each comment made by a participant in the meeting and need not include the explanation of a Board of Education member with respect to his or her vote on the reduction in size of an educational committee. Comm Pub Acc Rec OML—Ad Op 570.

10. Minutes of executive sessions, generally

Minutes of executive session are required to be compiled only when action is taken during executive session. Comm Pub Acc Rec OML-Ad Op 761.

Minutes of executive session need not be prepared where public body enters into executive session and merely discusses topic but takes no action. Comm Pub Acc Rec OML-Ad Op 786.

Minutes of executive session must be prepared only when action is taken during such session. Comm Pub Acc Rec OML-Ad Op 822.

Since no action can be taken during an executive session, no record is required to be compiled. Comm Pub Acc Rec OML-Ad Op 860.

If action is taken during executive session, minutes reflective of nature of action taken, date and vote must be prepared; minutes of executive sessions must be prepared and made available within one week of meeting. Committee on Open Government OML-AL-1033.

11. —Town board's executive sessions

Executive sessions of town board were not covered by CLS Pub O § 106(2) where no action as taken by formal vote at such meetings. Roberts v Town Bd., 207 A.D.2d 404, 615 N.Y.S.2d 725, 1994 N.Y. App. Div. LEXIS 8191 (N.Y. App. Div. 2d Dep't), app. denied, 84 N.Y.2d 811, 622 N.Y.S.2d 913, 647 N.E.2d 119, 1994 N.Y. LEXIS 4622 (N.Y. 1994).

Town's Board's decision in its N.Y. Pub. Off. Law § 105(1)(f) executive session to terminate an employee for poor performance was proper as, given the nature of the employee's probationary employment interest and the purposes of the Open Meetings Law, the Board's not recording its proven actions in its executive session minutes was a non-prejudicial open meetings law violation of N.Y. Pub. Off. Law § 106(2); therefore, the lower court's reversing the Board's determination was not for the "good cause" required by N.Y. Pub. Off. Law § 107(1) for the lower court to exercise its discretion to reverse the determination. The violation was capable of being corrected by the Board simply recording the vote in the minutes of its executive session. Specht v Town of Cornwall, 13 A.D.3d 380, 786 N.Y.S.2d 546, 2004 N.Y. App. Div. LEXIS 14843 (N.Y. App. Div. 2d Dep't 2004).

12. Role of town clerk

Although the town clerk is required to record in the minutes of a town board meeting the name of each member of the board who was present, the clerk is under no statutory duty to record the names of other persons attending the meeting. A decision to publish the minutes of a town board meeting must be made by the affirmative vote of a majority of all the members of the town board, and not by the town supervisor acting unilaterally. The town board may also elect to publish at town expense the report of examination prepared by the office of the state comptroller. 1990 Op St Compt No. 90-52.

While § 30(1) of Town Law requires that town clerk be present at each meeting of town board for purpose of taking minutes, § 30(1) does not necessarily require presence of clerk at work session during which there are no motions, proposals, resolutions or votes taken. Minutes of meeting of public body need not reflect nature of discussions where public body merely discusses public business at "work session" but does not engage in making of "motions, proposals, resolutions" or voting. Comm Pub Acc Rec OML-Ad Op 788.

13. Use of tape recorders

Although Open Meetings Law provides that public body shall take minutes at all open meetings and that such minutes shall be made available to public, imposition of such duty cannot fairly be construed as precluding all other methods of recordation; court would affirm annulment of resolution of board of education prohibiting use of tape recorders at its public meetings. Mitchell v Board of Education, 113 A.D.2d 924, 493 N.Y.S.2d 826, 1985 N.Y. App. Div. LEXIS 52551 (N.Y. App. Div. 2d Dep't 1985).

While Open Meetings Law does not require public body to maintain verbatim account of every comment made during meeting, Law does not preclude public body from creating verbatim account by means of tape recorder of what may have transpired at meeting. Comm Pub Acc Rec OML-Ad Op 824.

14. —Verbatim minutes not required

Trial court's annulment of the determinations of a county and a comptroller reducing a retiree's salary for purposes of his retirement severance was proper because a board of trustees had been

authorized by N.Y. Educ. Law § 6306(2) and N.Y. Comp. Codes R. & Regs. tit. 8, § 604.2(a) to vote to raise the retiree's salary pursuant to his employment contract, and contradictory local laws did not supersede state law or regulations; there was no support for the claim that the meeting was not properly noticed as to time and place and there was no statutory requirement that notice of the agenda of the meeting be given. The contention that the vote was unauthorized because verbatim minutes of the meeting were not taken was unavailing as N.Y. Pub. Off. Law § 106 merely required that a record or summary of the action at a meeting be taken, and the record disclosed that a summary of the action was taken. Matter of LaLima v County of Suffolk, 45 A.D.3d 845, 847 N.Y.S.2d 208, 2007 N.Y. App. Div. LEXIS 12137 (N.Y. App. Div. 2d Dep't 2007).

Minutes of open meetings need not consist of verbatim account of meeting or make reference to each comment made during meeting. Comm Pub Acc Rec OML-Ad Op 786.

Minutes of open meetings need not consist of verbatim account of what may have transpired at meeting, but rather that minutes should in essence refer to highlights of meeting. Comm Pub Acc Rec OML-Ad Op 840.

Agency Opinions

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2. Applicability to particular entities
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5. —Fee for copies
6. —Timely availability, generally
7. — —One week for minutes of executive session
8. — —Two weeks for minutes of open meeting
9. Coverage of particular matters, generally
10. —"Consensus" determination
11. —School matters
12. Minutes of executive sessions, generally
13. —School board's executive sessions
14. —Town board's executive sessions
15. Retaining or keeping minutes
16. Role of town clerk
17. Use of tape recorders
18. —Verbatim minutes not required

1. In general

The board members may not cast their votes by telephone on matters which require board approval. 1979 Op St Compt File #242.

With respect to open meetings, minutes must, at minimum, consist of record or summary of all motions, proposals, resolutions and any other matters upon which votes are taken; minutes of open meetings must be made available in their entirety, but with respect to action taken in executive session, record or summary of final determination of action must be prepared and made available to extent required by Freedom of Information Law. Comm on Open Gov't OML-AO-1396, Comm on Open Gov't FOIL-AO-4638.

If sub-committee compiles unofficial report and discloses such report to school board, sub-committee should have prepared minutes indicating nature of its action, even though that action does not represent final action of school board as whole. Comm on Open Gov't FOIL-AO-4907.

Requirement that minutes be prepared is dependent upon activities that occur at meeting and, consequently, if motions are made at work sessions (including motions to enter into executive session), minutes must be prepared. Comm on Open Gov't FOIL-AO-4916.

There is nothing in Open Meetings Law or any other statute that requires that minutes be approved. Notes of meeting do not constitute minutes of meeting, but rather serve as basis for preparing minutes. Although notes of meeting do not constitute minutes of meeting, they constitute "records" as defined by Freedom of Information Law. Minutes of meeting, which consist merely of factual rendition of what transpired at meeting, are available under Freedom of Information Law. Comm on Open Gov't FOIL-AO-8895.

Practice of Senate of changing the official votes within a committee or subcommittee to add members as voting when they were previously recorded as absent is inconsistent with the Open Meetings Law. Comm on Open Gov't OML-AO-887.

Minutes must be prepared at gatherings in which motions, proposals, resolutions, and like are introduced or adopted. Committee on Open Government OML-AO-1196.

Town board's scheduled "workshop" meeting was subject to Open Meetings Law in all respects; however, in absence of motions, proposals, resolutions, or other matters on which votes were taken, minutes did not have to be prepared. Comm on Open Gov't OML-AO-2237.

There is no legal requirement that minutes or similar records be read aloud at meetings. Comm on Open Gov't OML-AO-2352.

Although notes of meeting do not constitute minutes of meeting but rather serve as basis for preparing minutes, they constitute "records" as defined by Freedom of Information Law. Comm on Open Gov't OML-AO-2512.

Open Meetings Law does not require preparation of transcript of meeting conducted by public body. If town board prepares transcript of meeting, it is available under Freedom of Information Law. Comm on Open Gov't OML-AO-2535.

Open Meetings Law presumes good faith and, as it pertains to minutes of meetings, that minutes, above all, be accurate. Comm on Open Gov't OML-AO-2575.

School board generally cannot vote during executive session, except in rare circumstances in which statute permits or requires such vote. Comm on Open Gov't OML-AO-2785.

Inherent in law is requirement that minutes must be accurate and reflect reality of what occurred or was expressed. Comm on Open Gov't OML-AO-3799.

Member of public has no right to insist on amendment or correction of minutes; only public body, by means of majority vote of its total membership, may amend or correct minutes. Comm on Open Gov't OML-AO-3799.

There is nothing in Open Meetings Law that specifies who must provide notice of meetings or prepare minutes. Comm on Open Gov't OML-AO-3841.

Members of Town Board do not have authority to include or exclude language in board minutes as they desire; under CLS Town § 30 Town Clerk has statutory authority and obligation to prepare minutes of Town Board meetings, and so long as minutes are accurate and include items required by CLS Pub O § 106, circumstances under which minutes might justifiably be altered or amended would be rare. Comm on Open Gov't OML-AO-3849.

2. Applicability to particular entities

If youth committee is committee of community board, and since definition of "public body" includes committees of public body, youth committee is required to prepare and disclose minutes of its meetings and its records are subject to rights granted by Freedom of Information Law. Comm on Open Gov't FOIL-AO-4748.

Minutes of meetings of industrial development agency must be prepared and made available to public pursuant to CLS Pub O § 106(3). Comm on Open Gov't FOIL-AO-8288.

Three-member board of assessment review, as "public body" and "agency," was required to prepare minutes in accordance with CLS Pub O §§ 87(3)(a) and 106, including record of each member's vote. Comm on Open Gov't OML-AO-3499.

Town of Altamont Board of Assessment Review is public body subject to Open Meetings Law and thus, while it may deliberate in private, actual voting must occur in open meeting, and meeting minutes must indicate how each member voted. Comm on Open Gov't OML-AO-3668.

Because assessment board of review is "public body" and "agency," it is required to prepare minutes in accordance with CLS Pub O § 106, including record of votes of each member in conjunction with CLS Pub O § 87(3)(a). Comm on Open Gov't OML-AO-4043.

3. Approval of minutes

Minutes of open meetings must be prepared and made available within 2 weeks of meetings to which they pertain. Comm on Open Gov't FOIL-AO-8330.

Although there is nothing in Open Meetings Law or any other statute that requires that minutes be approved, as matter of practice or policy, many public bodies approve minutes of their meetings. Comm on Open Gov't FOIL-AO-8501.

There is nothing in Open Meetings Law or any other statute that requires that minutes be approved. Comm on Open Gov't FOIL-AO-12607.

A majority of the total membership of a public body must cast an affirmative vote as a condition precedent to the adoption of any minutes. While an abstention indicates neither an affirmative nor a negative vote, its effect is the same as a negative vote. Comm on Open Govt OML-AO 931.

In event that meeting minutes have not been approved, to comply with Open Meetings Law minutes should be prepared and made available within prescribed time and marked "unapproved", "draft" or "non-final" to let public know that minutes are subject to change. Comm on Open Gov't OML-AO-1286.

Nothing in Open Meetings Law or any other statute requires that minutes of open meetings be approved; if minutes have not been approved, they should be marked "unapproved," "draft" or "non-final" to effectively notify public that they are subject to change, and they should be made available to public as soon as they exist. Comm on Open Gov't OML-AO-2188.

If information contained in draft or unapproved minutes is inaccurate or misleading, board has authority to make corrections. Comm on Open Gov't OML-AO-3616.

There is nothing in Open Meetings Law or any other statute that requires that minutes be approved; nevertheless, as matter of practice or policy, many public bodies approve minutes of their meetings. Comm on Open Gov't OML-AO-3799.

In event that minutes have not been approved, to comply with Open Meetings Law, it has consistently been advised that minutes be prepared and made available within 2 weeks, and that if minutes have not been approved, they may be marked "unapproved," "draft" or "preliminary," for example. Comm on Open Gov't OML-AO-3799.

If minutes have been prepared within less than 2 weeks, such unapproved minutes would be available as soon as they exist, and they may be marked "unapproved", "draft" or "preliminary." Comm on Open Gov't OML-AO-4146.

4. Availability of minutes to public, generally

5. —Fee for copies

Town board's practice of distributing copies of minutes at no cost to persons in attendance at meetings, while charging for minutes to those who requested them on following day, did not violate Freedom of Information Law so long as no individual was being singled out and all who requested copies after meetings received same treatment. Comm on Open Gov't OML-AO-2705.

6. —Timely availability, generally

7. — —One week for minutes of executive session

If action is taken during executive session, minutes indicating nature of action and vote, by member, must be prepared within one week of executive session; further, minutes are accessible to public to extent required by Freedom of Information Law. Comm on Open Gov't OML-AO-1448.

Public meetings gathered as work sessions are subject to Open Meetings Law and Board of Trustees of village has same obligation to prepare minutes relative to work sessions as it has with respect to regular or official meetings; consequently, if activities occur at meetings in question that would require creation of minutes, minutes must be prepared and made available within 2 weeks of such meetings; if action is taken in executive session that is held during work session, minutes must be prepared and made available within one week of executive session. Comm on Open Gov't OML-AO-1459.

8. — —Two weeks for minutes of open meeting

Minutes of public meeting need not consist of verbatim transcript of entire discussion at meeting, but rather only record or summary of motions, proposals, resolutions and any other matter formally voted upon; therefore, public body merely discusses public business, but does not engage in making of motions, proposals, resolutions or voting, minutes need not reflect nature of discussion; clerk is required to prepare minutes and make them available within 2 weeks of meetings to which they relate and if minutes cannot be provided within 2 weeks, clerk, in order to comply with Open Meetings Law, should prepare minutes within legal time limits and mark them as "unimproved", "draft" or "nonfinal". Comm on Open Gov't FOIL-AO-4826.

There is nothing in Open Meetings Law or any other statute that requires that minutes be approved. Comm on Open Gov't FOIL-AO-7578.

Minutes of open meetings must be prepared and made available within 2 weeks of meetings to which they pertain. In event that minutes have been approved, to comply with Open Meetings Law, minutes should be prepared and made available within 2 weeks; if minutes have not been approved, they may be marked "unapproved," "draft" or "non-final." Comm on Open Gov't FOIL-AO-7578.

Public body has 2 weeks from meeting to prepare minutes and make them available. Comm on Open Gov't FOIL-AO-8895.

Village zoning board's need to have transcript of meeting of zoning board of appeals did not in any way diminish its responsibility under Open Meetings Law to prepare minutes and disclose them within 2 weeks. Comm on Open Gov't FOIL-AO-10013.

In event that minutes have not been approved, to comply with Open Meetings Law, minutes should be prepared and made available within 2 weeks, and they may be marked "unapproved," "draft," or "preliminary." Comm on Open Gov't FOIL-AO-12607.

Public meetings gathered as work sessions are subject to Open Meetings Law and Board of Trustees of village has same obligation to prepare minutes relative to work sessions as it has with respect to regular or official meetings; consequently, if activities occur at meetings in question that would require creation of minutes, minutes must be prepared and made available within 2 weeks of such meetings; if action is taken in executive session that is held during work session, minutes must be prepared and made available within one week of executive session. Comm on Open Gov't OML-AO-1459.

Minutes of open meetings must be prepared and made available within 2 weeks of meetings to which they pertain. Comm on Open Gov't OML-AO-2261.

"Available" means being made accessible to public for inspection and copying within 2 weeks of meeting to which minutes pertain. Comm on Open Gov't OML-AO-3207.

Minutes of public meeting must be prepared and made available to public within 2 weeks of meetings to which they relate, irrespective of whether they are "finalized." Comm on Open Gov't OML-AO-3981.

Public body cannot require that disclosure of minutes be delayed in manner inconsistent with Open Meetings Law. Comm on Open Gov't OML-AO-2466.

Draft "unapproved" minutes of public meeting should be disclosed, on request, as soon as they exist. Comm on Open Gov't OML-AO-3284.

Local legislative body has statutory authority to prohibit legislator from disclosing matters discussed in executive session. 2000 NY Ops Atty Gen I 2000-2.

If youth committee is committee of community board, and since definition of "public body" includes committees of public body, youth committee is required to prepare and disclose minutes of its meetings and its records are subject to rights granted by Freedom of Information Law. Comm on Open Gov't FOIL-AO-4748.

Freedom of Information Law is applicable to all records of agency, such as town, and, as such, requests for minutes of town board are properly made pursuant to Freedom of Information Law; minutes of meetings of public bodies are available under Freedom of Information Law and Open Meetings Law; further, both laws require that record of votes indicating how each member of public body voted must be maintained and made available. Comm on Open Gov't FOIL-AO-4773.

Even if minutes have not been approved by committee, they are nonetheless public records and therefore subject to rights of access granted by Freedom of Information Law. Comm on Open Gov't FOIL-AO-4794.

Any notes or minutes prepared regarding executive session of public body constitute "records" subject to rights conferred by

Freedom of Information Law. Comm on Open Gov't FOIL-AO-9178.

If minutes or notes are prepared concerning executive session even when there is no requirement to do so, any such documents would fall within coverage of Freedom of Information Law. Comm on Open Gov't FOIL-AO-9236.

Any notes or minutes, including handwritten notes used to prepare typewritten minutes, that are prepared during executive session of public body constitute records subject to rights conferred by Freedom of Information Law. Comm on Open Gov't FOIL-AO-9503.

Member of town planning board was entitled to copy of final version of minutes of planning board meetings and, in absence of contrary board rule or policy, was not required to resort to Freedom of Information Law. Comm on Open Gov't FOIL-AO-12122.

"Draft unapproved minutes" of meetings of city council should be disclosed, on request, as soon as they exist; minutes of meeting open to public do not involve "internal government consultations or deliberations" since information contained in those records has effectively been disclosed to public already. Comm on Open Gov't FOIL-AO-12607.

Minutes reflective of action taken in executive session, discussing whether to increase salary of justice court clerk or accept his resignation, should have been prepared pursuant to CLS Pub O § 106, and record of action would be accessible under Freedom of Information Law. Comm on Open Gov't OML-AO-2216.

Town records relating to escrow funds, escrow districts, and certain trust deposits maintained by town were available to public pursuant to CLS Pub O § 106, except to extent that such records or portions thereof fell within one or more grounds for denial under CLS Pub O § 87(2)(a)-(i). Comm on Open Gov't OML-AO-2253.

If minutes or notes are prepared concerning executive session, even when there is no requirement to do so, any such documents would fall within coverage of Freedom of Information Law. Comm on Open Gov't OML-AO-2270,2413.

9. Coverage of particular matters, generally

10. —"Consensus" determination

Roll call voting in public is not required, so long as record is prepared that indicates manner in which each board member cast his or her vote. Comm on Open Gov't FOIL-AO-16656.

A committee must prepare minutes if it reaches a "consensus" to forward a proposal to the governing body. Comm on Open Gov't OML-AO-900.

Where public body votes to engage in or approve contracts, including collective bargaining agreements, which may be lengthy, Open Meetings Law does not require that entirety of such agreement be included as part of minutes, or perhaps even as attachment to minutes; in that kind of circumstance, so long as minutes provide sufficient detail to enable public and agency officials to locate records that are subject of action taken, public body would be substantial compliance with Open Meetings Law. Comm on Open Gov't OML-AO-2296.

In connection with taking of action during executive session and reporting of such action, there may be no distinction between so-called "consensus" and final action taken by public body if consensus is in reality determination reflective of action upon which entity relies. Comm on Open Gov't OML-AO-2558.

Based on CLS Pub O § 106(1), if "consensus" motion includes appointment of number of people, minutes would be required to identify each person appointed and position to which he or she was appointed. In order to comply with Open Meetings Law, minutes must indicate in some manner precise nature of public body's action. Comm on Open Gov't OML-AO-2582.

If town board "agrees on an issue," it may be taking action (even if no motion is made) by means of "consensus," which would require preparation of minutes reflecting each member's vote; in contrast, if board's agreements are analogous to non-binding "straw vote," minutes including votes of members would not be required to be prepared. Comm on Open Gov't OML-AO-2726.

If city council reached "consensus" reflective of its final determination, minutes should have been prepared indicating nature of action taken and manner in which each member voted; in contrast, non-binding "straw poll," if it could not be construed as final, could be taken in executive session as means to ascertain whether additional discussion was warranted or necessary, and minutes indicating members' votes would not have to be prepared. Comm on Open Gov't OML-AO-3126.

If town board relies on "consensus" in carrying out its duties or otherwise reaches agreement on particular matter, minutes should show each board member's vote; in contrast, if "straw vote," or something like it that is not binding and does not represent final action, is taken in executive session, as means of ascertaining whether additional discussion is warranted, votes of members need not be recorded in minutes. Comm on Open Gov't OML-AO-3478.

11. —School matters

Identification of each final determination of School Board by item number does not comply with Open Meetings Law provisions concerning minutes; final determinations of board regarding personnel matters must be summarized and recorded in board's minutes, and must refer, by name, to subjects of Board's determination. Committee on Open Government OML-AO-1090.

Contents of board of education's personnel schedules, setting forth personnel actions (such as probationary appointments, term appointments, changes of status, and resignations), should be included in minutes of meeting at which such actions were approved, or attached to minutes, so that public (as well as governmental entity involved) can ascertain what specific actions have been taken; however, mere reference to materials that are subject of action taken are reasonable and sufficient if minutes provide sufficient detail to enable public and agency officials to locate records that are subject of action taken. Comm on Open Gov't OML-AO-2192.

While Open Meetings Law requires that meeting be preceded by notice of time and place, there is no requirement that reason for holding special meeting must be included in notice or in minutes. Minutes of meeting of board of education were incomplete where one item of minutes referred to motion to enter into executive session, but minutes did not include reasons for entry into executive session. Comm on Open Gov't OML-AO-2344.

Action must be taken in public or minutes must of necessity include information which ordinarily would not be accessible to public; for example, if board of education determines to direct superintendent to offer position to applicant for position, any such action must be taken in public and memorialized in minutes; however, name of person to whom position is offered need not be stated during open meeting or included in minutes of meeting. Comm on Open Gov't OML-AO-2372.

In connection with presentation made by firm to board of education regarding offer to purchase school district property, if there was no official purchase offer to accept or reject and board merely reached meeting of minds to effect that no action would be taken, then there was no requirement that vote be taken and reported. Comm on Open Gov't OML-AO-2558.

When final vote is taken by agency, which is defined to include state or municipal board such as school board, record must be prepared that indicates manner in which each member who voted cast his or her vote, regardless of whether vote occurred at executive session. Comm on Open Gov't OML-AO-2563.

Freedom of Information Law is applicable to all records of agency, such as town, and, as such, requests for minutes of town board are properly made pursuant to Freedom of Information Law; minutes of meetings of public bodies are available under Freedom of Information Law and Open Meetings Law; further, both laws require that record of votes indicating how each member of public body voted must be maintained and made available. Comm on Open Gov't FOIL-AO-4773.

The payroll record envisioned by Public Officers Law § 87(3)(b) need not be incorporated in minutes prepared under § 101 [now § 106]. Comm on Open Gov't OML-AO-879.

No "right" is violated where identities of members of the public in attendance at a meeting are included as part of the minutes of the meeting, although a member of the public is not required to identify himself or herself or sign a register or attendance log as a condition prerequisite to attendance. Comm on Open Gov't OML-AO-896.

A proposal and an agreement by a board to meet on a particular date is required to be recorded in minutes. Comm on Open Gov't OML-AO-906.

Since minutes are required to refer to all motions and proposals, any motion introduced should be cited in minutes even though motion might not be adopted. Committee on Open Government OML-AO-1039.

Reviewing requirement that agency maintain record of final vote of each member in every agency proceeding in which member votes and requirement that minutes include reference to vote, it is concluded that intent of legislature was to require that members of public bodies when casting votes should do so openly and not by means of paper ballot that may later be used in preparation of record of votes; when public body takes action by means of vote, vote of membership must be taken publicly and in such manner that individual members can be identified with affirmative or negative votes. Committee on Open Government OML-AO-1050.

When vote is taken pursuant to motion to enter into executive session, minutes must be prepared to include reference to motion as well as manner in which each member cast his or her vote. Committee on Open Government OML-AO-1197.

There is no requirement under Open Meetings Law that time of meeting or names of persons present be included in minutes. Comm on Open Gov't OML-AO-1290.

Summary of any final determination required to be included in minutes of executive session need not include any matter which is not required to be made public by Freedom of Information Law, such that although public body may take final action during executive session, information that would be deniable under Freedom of Information Law need not be made available as part of minutes of executive session, and further, if no action is taken during executive session, minutes need not be prepared. 1986 Committee on Open Government OML-AO-1336.

When motion to enter into executive session is made, that motion must be included in minutes of meeting; further, if vote is taken during executive session, minutes must be prepared; however, if matter is discussed in executive session, but no action is taken, there is no requirement that minutes of executive session be prepared. Comm on Open Gov't OML-AO-1460.

At minimum, minutes of open meetings must include reference to all motions, proposals, resolutions and any other matters on which votes are taken; however, if those kinds of actions do not occur during working sessions or committee meetings, minutes need not be prepared. Comm on Open Gov't OML-AO-2182.

Vote taken by town board to increase rate of pay for justice court clerk should have been recorded in form of minutes; similarly, any action by board to accept his resignation should be memorialized in minutes. Comm on Open Gov't OML-AO-2216.

If public body reaches "consensus" that is reflective of its final determination of issue, minutes must be prepared that indicate manner in which each member voted. Comm on Open Gov't OML-AO-2257.

If it can be assumed that only board of trustees of library system is authorized to engage law firm for library system, its action to do so can validly occur only during meeting of board held in accordance with Open Meetings Law; further, any such action must be memorialized in minutes of meeting. Comm on Open Gov't OML-AO-2389.

Mere reference to removal of 5 sentences from minutes, without indication of their substance or location, would be inadequate; in order to comply with Open Meetings Law, minutes must indicate in some manner which 5 sentences were removed in order that public can know of precise nature of committee's action. Comm on Open Gov't OML-AO-2477.

To comply with Freedom of Information Law, record must be prepared and maintained indicating how each member cast his or her vote. Comm on Open Gov't OML-AO-2527.

Minutes need not refer to personal opinions expressed during meetings. Comm on Open Gov't OML-AO-3616.

Minutes of town meeting referring to agreement to pay for legal services relative to "annexation [of] territory" do not include sufficient information to ascertain nature of Town Board's action; minutes need not include reference to each element of agreement but, at minimum, minutes should clearly have reflected intent of board to attempt to engage in "annexation [of] territory." Comm on Open Gov't OML-AO-3773.

Minutes need not consist of verbatim of account of all that is stated at meeting. Comm on Open Gov't OML-AO-3799.

Lease agreement involving city would not need to be incorporated into city council minutes with council's resolution regarding lease, unless action taken expressly required that lease agreement must be so incorporated. Comm on Open Gov't OML-AO-3981.

There is no provision of law that requires that names and addresses of those who speak at meetings of town boards or other public bodies be included in minutes of meeting or made "part of the record." Comm on Open Gov't OML-AO-4002.

In consideration of potential uses of personal information placed on website, it is unwise to include individuals' names and addresses in minutes that are to placed on website. Comm on Open Gov't OML-AO-4002.

12. Minutes of executive sessions, generally

13. —School board's executive sessions

School board generally cannot vote in executive session, except in rare circumstances where statute permits or requires such vote; if no vote is taken, there is no requirement that minutes of executive session be prepared. Comm on Open Gov't FOIL-AO-12312.

If school board reaches consensus at executive session that is its final determination of matter, minutes must be prepared and school board must take action in public; in contrast, if board reaches "meeting of minds" or engages in so-called "straw vote" regarding interim step in process that is incomplete, it would not be taking final action that would require public vote or preparation of minutes. Comm on Open Gov't OML-AO-2378.

Resolution approved by board of education in executive session, which authorized board and district superintendent to execute contract with particular employee, should have included name of employee, and minutes of executive session should have indicated, in some manner, nature of agreement and identity of district employee. Comm on Open Gov't OML-AO-3472.

If school board reached "consensus" in executive session that is reflective of its final determination of issue, minutes must be prepared that indicate its action, as well as manner in which each member voted. Comm on Open Gov't OML-AO-4026.

14. —Town board's executive sessions

Public meetings gathered as work sessions are subject to Open Meetings Law and Board of Trustees of town has same obligation to prepare minutes relative to work sessions as it has with respect to regular or official meetings; consequently, if activities occur at meetings in question that would require creation of minutes, minutes must be prepared and made available within 2 weeks of such meetings; if action is taken in executive session that is held during work session, minutes must be prepared and made available within one week of executive session. Comm on Open Gov't OML-AO-1459.

CLS Town § 30, which requires presence of town clerk at each meeting of town board for purposes of taking minutes, does not require continued presence of clerk if it is clear that there will be no need to take minutes to comply with Open Meetings Law, that no action will be taken, and that meeting will be adjourned at conclusion of executive session. Comm on Open Gov't OML-AO-2244.

Minutes of executive sessions are required to be prepared only when action is taken during executive session and if board discusses issue during executive session, but takes no action, there is no requirement that minutes of executive session be prepared. Comm on Open Gov't FOIL-AO-4826.

There is nothing in either Freedom of Information or Open Meetings Laws that specifies that vote must be accomplished by means of roll call or that vote be "announced exactly as the same time it is cast"; so long as record is prepared that indicates manner in which each member cast his or vote, entity would be acting in compliance with open vote requirements imposed by those statutes. Comm on Open Gov't FOIL-AO-13547.

CLS Pub O § 106 does not require public body to record remarks of individual made during executive session merely

because that person so requests. Committee on Open Government OML-AO-1176.

Whether minutes of executive sessions are kept separately or as part of "regular" minutes is discretionary; additionally, if executive session is held and no action is taken, minutes need not be prepared. Comm On Open Gov't OML-AO-1281.

If public body enters into executive session but takes no action, minutes are not required to be prepared, but if action is taken by formal vote, minutes reflecting nature of action, date and vote must be prepared and made available under Freedom of Information Law. Comm on Open Gov't OML-AO-1361.

Preparation of minutes of executive session is not required where neither consensus is reached nor vote taken. Comm on Open Gov't OML-AO-1376.

When motion to enter into executive session is made, that motion must be included in minutes of meeting; further, if vote is taken during executive session, minutes must be prepared; however, if matter is discussed in executive session, but no action is taken, there is no requirement that minutes of executive session be prepared. Comm on Open Gov't OML-AO-1460.

If action is taken during executive session, date and vote must be recorded in minutes pursuant to CLS Pub O § 106(2); however, if no action is taken, minutes of executive session need not be prepared. Comm on Open Gov't OML-AO-2189.

Unless statute specifically prohibits disclosure of certain information or records, statements made during executive session or information derived from executive session cannot be characterized as "confidential" and there is no valid basis for sustaining claim of confidentiality. Comm on Open Gov't OML-AO-2262.

When entity subject to Open Meetings Law takes action during executive session, minutes indicating nature of action taken, date, and vote of each member must be prepared within one week and made available to extent required by Freedom of Information Law; however, if entity merely discusses issue or issues during executive session but takes no action, there is no requirement that minutes of executive session be prepared. Comm on Open Gov't OML-AO-2389.

There is no requirement that persons other than members of public body who are authorized to attend executive session must be identified. Comm on Open Gov't OML-AO-2504.

Any notes or minutes that are prepared at executive session, including handwritten notes used to prepare typewritten minutes, constitute "records" subject to rights conferred by Freedom of Information Law. Comm on Open Gov't OML-AO-2618.

Board of Public Safety was justified in deleting, from minutes of its executive sessions, references to how each board member voted in deciding to place Chief of Police on administrative leave; matter involved police officer within scope of CLS Civ R § 50-a, which prohibits disclosure of personnel records used to evaluate police officer's performance, and could be withheld under Freedom of Information Law. Comm on Open Gov't OML-AO-3427.

While local conditional release commission might in some instances have authority to take action during executive session, record indicating nature of its action, i.e., to grant or deny conditional release, could not justifiably be withheld under Freedom of Information Law. Comm on Open Gov't OML-AO-3784.

In situation in which action is taken to impose some sort sanction or discipline on public officer or employee, such action must be memorialized in minutes prepared in accordance with CLS Pub O § 106. Comm on Open Gov't OML-AO-3902.

If public body reaches consensus in executive session on which it relies, minutes reflective of decisions reached must be prepared and made available. Comm on Open Gov't OML-AO-4028.

Since Open Meetings Law permits public bodies to vote in proper circumstances during executive session, roll call voting in public is not required; however, roll call vote and announcement of votes at same time they are cast would be consistent with law. Comm on Open Gov't OML-AO-4264.

While record of votes by members ordinarily is included in minutes, there is no requirement that it be included in minutes; such record may be maintained separate from minutes. Comm on Open Gov't OML-AO-4264.

15. Retaining or keeping minutes

Tape recordings of meetings and hearings must be retained for minimum of 4 months and written minutes of meetings must be kept permanently. Comm on Open Gov't OML-AO-2291.

Minutes must be retained permanently pursuant to records retention schedule issued by State Archives, but audiotapes or video recordings of meetings need be retained only for period of months, at expiration of which they may be preserved, or erased and reused if they are no longer of value. Comm on Open Gov't OML-AO-3658.

It is not "common practice" for mayor to control access to minutes of meetings, and there is nothing in Open Meetings Law that provides guidance concerning who should have custody of minutes or where they must be kept. Comm on Open Gov't OML-AO-3799.

While there is no requirement that minutes be placed on municipality's website, either in their "official" or summary form, local governments often do so because minutes are unquestionably public. Comm on Open Gov't OML-AO-3799.

16. Role of town clerk

Discussion concerning notification of the town clerk of special meetings of the town board and concerning the clerk's right of attendance at executive sessions. 1978 Op St Compt File #254.

When member of town board requests that his or her statement be entered into minutes, board must determine, under its rules of procedure, whether town clerk should record statement or whether board member should submit statement in writing, which would then be entered as part of minutes; thus, when statement is offered by member of public body for inclusion in minutes, that person has no absolute right to require that statement become part of or referenced in minutes. Comm on Open Gov't OML-AO-2356.

If town clerk prepares essentially verbatim account of statements made by members of particular political party and merely summarizes statements of others, minutes of that nature would be inconsistently and unfairly prepared. Comm on Open Gov't OML-AO-2491.

It is unclear whether town board has authority to compel town clerk to include information in minutes beyond requirements of Open Meetings Law. It is unlikely that town board has authority to require exclusion of information from minutes of open meeting that is accurate. Comm on Open Gov't OML-AO-2605.

Town clerk has responsibility and authority to prepare minutes and ensure their accuracy; thus, vote by full board is needed to alter minutes when board member wants to make alteration and another board member disagrees, provided that alteration must accurately represent what transpired at meeting. Comm on Open Gov't OML-AO-2726.

Town clerk has responsibility and authority to prepare minutes and to ensure their accuracy, and board and/or supervisor may not validly remove or insist on removal of information from minutes so long as information is accurate and presented reasonably, fairly, and in manner consistent with contents of minutes as generally prepared. Comm on Open Gov't OML-AO-3151.

Town clerk, having responsibility and authority to prepare minutes and ensure their accuracy, may not be compelled by board and/or supervisor to remove information from minutes if information is accurate and presented reasonably, fairly and in manner consistent with contents of minutes as generally prepared. Comm on Open Gov't OML-AO-3187.

17. Use of tape recorders

18. —Verbatim minutes not required

Minutes need not consist of verbatim account of statements made during meeting; further, minutes are not required to include reference to each such statements. Comm on Open Gov't FOIL-AO-4930.

Minutes need not consist of verbatim account of all that was said at meeting. While clerk or public body may choose to prepare expansive minutes, they are only required to consist of kinds of information described in § 106. Comm on Open Gov't FOIL-AO-7578.

Section 106 does not require that verbatim transcript of discussion held at meeting be prepared, but simply that certain kinds of information be included in minutes. Comm On Open Gov't OML-AO-1197.

Minutes of meetings need not consist of verbatim transcript of entire discussion at meeting, but rather only record or summary

of motions, proposals, resolutions and any other matter formerly voted upon, such that if public body merely discusses public business at "work session", but does not engage in making of "motions, proposals, resolutions" or voting, presumably minutes need not reflect nature of discussion, and if agency discusses issue during executive session, but takes no action, there is no requirement that minutes of execution session be prepared. 1986 Committee on Open Government OML-AO-1344.

While minutes of open meeting must consist, at minimum, of "record or summary" of motions, proposals, resolutions, action taken and vote of members of public body, there is no requirement that minutes consist of verbatim account of statements made or describe in detail discussions that occurred at meetings. Comm on Open Gov't OML-AO-2255.

If town clerk prepares essentially verbatim account of statements made by members of particular political party and merely summarizes statements of others, minutes of that nature would be inconsistently and unfairly prepared. Comm on Open Gov't OML-AO-2491.

Based on CLS Pub O § 106, minutes of meeting of public body need not consist of verbatim account of everything that was said; on contrary, so long as minutes include kinds of information described in statute, they would be appropriate and meet legal requirements, although clerk may include more information than is required by law. Comm on Open Gov't OML-AO-2605.

Rule requiring town clerk to prepare verbatim account of everything said at every town board meeting was unreasonable, was likely beyond town board's authority under CLS Town §§ 30 and 63, and would likely result in inefficiency; reasonable alternative would be to create audio or video recordings which, if necessary, could be reviewed to ensure accuracy, resolve disputes, or refresh memories. Comm on Open Gov't OML-AO-3658.

A tape recorder may be obtained by the town board to be used by the town clerk to record the proceedings at town board meetings so that minutes may be prepared therefrom but if a recorder is obtained the town clerk would be responsible for maintaining the tapes. 2. The tapes may not be maintained by any official other than the town clerk or his deputy. 3. It would be improper for the tapes to be sealed and to be opened only at town board meetings. 4. The town board may authorize other town officers to use the tape recorder and may direct who will have custody of the instrument. 1977 NY Ops Atty Gen Nov 17.

While tape recording would likely contain elements of minutes, minutes should be reduced to writing in order that they constitute permanent, written record that can be viewed by public and so that town has permanent written record readily accessible to town officials who must refer to or rely upon minutes in performance of their duties; clerk is required to prepare minutes and make them available within 2 weeks of meetings to which they relate and if minutes cannot be provided within 2 weeks, clerk, in order to comply with Open Meetings Law, should prepare minutes within legal time limits and mark them as "unimproved", "draft" or "nonfinal". Comm on Open Gov't FOIL-AO-4826.

Tape recording of board of education executive session, prepared by member of board, fell within coverage of Freedom of Information Law, and thus could be destroyed or erased only in conjunction with provision of Arts and Cultural Affairs Law dealing with retention and disposal of records. Comm on Open Gov't FOIL-AO-10368.

Public may tape record open meetings of public bodies, so long as tape recording is carried out unobtrusively and in manner that does not detract from deliberative process; with regard to video equipment, if equipment is large, if special lighting is needed and if it is obtrusive and distracting, rule prohibiting its use under those circumstances would be reasonable; however, if advances in technology permit video equipment to be used without special lighting, in stationary location and in unobtrusive manner, it is questionable where prohibition under those circumstances would be reasonable. Comm on Open Gov't OML-AO-1437.

While tape recording would likely contain elements of minutes, minutes must exist in writing in order that they constitute permanent, written record that can be viewed by public. Comm on Open Gov't OML-AO-2291.

While tape recording of meeting will likely contain elements of meeting minutes, minutes should be reduced to writing so that they constitute permanent written record that can be viewed by public; furthermore, municipalities often need readily accessible permanent written records for officials to refer to or rely on in performance of their duties. Comm on Open Gov't OML-AO-3646.

Village board of appeals, which chose to audiotape public hearing sessions, was not therefore obligated to tape record its deliberative discussions; only legal obligation concerning preparation of record of meetings pertains to minutes, which need not consist of verbatim account of what was said, or refer to every topic discussed or identify those who may have spoken, so long as they reflect all matters on which votes were taken. Comm on Open Gov't OML-AO-3696.

When tape recording captures commentary made in public meeting, there is no basis to deny access under Freedom of Information Law; however, tape recordings of executive sessions reflecting deliberative process may constitute "intra-agency material" under CLS Pub O § 87(2)(g) and, if there has been no final determination by town board indicating misconduct or imposing penalty in connection with ethics complaint, disclosure of tape recordings of deliberations of town ethics board would constitute unwarranted invasion of personal privacy. Comm on Open Gov't OML-AO-3712.

While audio or video recording would likely contain elements of minutes of meeting, minutes should nonetheless be reduced to writing in order that they constitute permanent, written record that can be viewed by public; because audio and video recordings cannot be preserved permanently, it would be inappropriate to consider them as "official" minutes of City Council meetings. Comm on Open Gov't OML-AO-3981.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Proceeding against body or officer, CLS CPLR §§ 7801 et seq.

Federal Aspects:

Open meetings, 5 USCS § 552b.

Jurisprudences:

2 NY Jur 2d Administrative Law §§ 104–106.

75 NY Jur 2d Libraries § 15 .

94 NY Jur 2d Schools, Universities, and Colleges §§ 127, 152 .

96 NY Jur 2d State of New York § 162 .

56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 156–158.

Law Reviews:

Whelan, New York's Open Meetings Law: revision of the political caucus exemption and its implications for local government. 60 Brook. L. Rev. 1483.

Annotations:

Emergency exception under state law making proceedings by public bodies open to the public. 33 ALR5th 731.

Matthew Bender's New York Practice Guides: 3 New York Practice Guide: Real Estate § 20.03.

Texts: Dienes, Levine & Lind, Newsgathering and the Law (1999, Matthew Bender) § 9-6(f).

§ 107. Enforcement

1. Any aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the civil practice law and rules, or an action for declaratory judgment and injunctive relief. In any such action or proceeding, if a court determines that a public body failed to comply with this article, the court shall have the power, in its discretion, upon good cause shown, to declare that the public body violated this article and/or declare the action taken in relation to such violation void, in whole or in part, without prejudice to reconsideration in compliance with this article. If the court determines that a public body has violated

this article, the court may require the members of the public body to participate in a training session concerning the obligations imposed by this article conducted by the staff of the committee on open government.

An unintentional failure to fully comply with the notice provisions required by this article shall not alone be grounds for invalidating any action taken at a meeting of a public body. The provisions of this article shall not affect the validity of the authorization, acquisition, execution or disposition of a bond issue or notes.

2. In any proceeding brought pursuant to this section, costs and reasonable attorney fees may be awarded by the court, in its discretion, to the successful party. If a court determines that a vote was taken in material violation of this article, or that substantial deliberations relating thereto occurred in private prior to such vote, the court shall award costs and reasonable attorney's fees to the successful petitioner, unless there was a reasonable basis for a public body to believe that a closed session could properly have been held.

3. The statute of limitations in an article seventy-eight proceeding with respect to an action taken at executive session shall commence to run from the date the minutes of such executive session have been made available to the public.

HISTORY:

Formerly § 97, add, L 1976, ch 511, § 1; renumbered § 102, L 1977, ch 933, § 2; renumbered § 107, L 1983, ch 652, § 1, eff Sept 1, 1984; L 2008, ch 397, § 1, eff Aug 5, 2008; L 2010, ch 44, § 1, eff June 13, 2010.

Amendment Notes: 2010. Chapter 44, § 1 amended:

Sub 1, first undesignated par by deleting at fig 1 "and/or", at fig 2 "any action or part thereof taken in violation of this article void in whole or in part" and adding the matter in italics.

2008. Chapter 397, § 1 amended:

Sub 2 by adding the matter in italics.

Notes to Decisions

Analysis

1. In general
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1. In general

Court would affirm dismissal of complaint seeking judgment declaring that resolutions and agreements relating to purchase of land by town solid waste management authority violated Open Meetings Law, CLS Pub O Art 7, where allegations that private meetings "must have" taken place between town board, or authority, and representatives of bank, in connection with proposed action to build solid waste management facility, were merely conclusory, speculative, and unsupported by specific facts, and record indicated instead that "meetings" in question were merely negotiations between respective parties' attorneys concerning details of proposed transactions. Residents for More Beautiful Port Washington, Inc. v North Hempstead, 149 A.D.2d 266, 545 N.Y.S.2d 297, 1989 N.Y. App. Div. LEXIS 11232 (N.Y. App. Div. 2d Dep't), amended, 155 A.D.2d 521, 1989 N.Y. App. Div. LEXIS 14268 (N.Y. App. Div. 2d Dep't 1989), app. denied, 75 N.Y.2d 703, 552 N.Y.S.2d 108, 551 N.E.2d 601, 1990 N.Y. LEXIS 50 (N.Y. 1990).

Where hearing of town zoning board is not conducted in accordance with Open Meetings Law, hearing is voidable rather than void. Ireland v Queensbury Zoning Bd. of Appeals, 169 A.D.2d 73, 571 N.Y.S.2d 834, 1991 N.Y. App. Div. LEXIS 9313 (N.Y. App. Div. 3d Dep't), app. dismissed, 79 N.Y.2d 822, 580 N.Y.S.2d 201, 588 N.E.2d 99, 1991 N.Y. LEXIS 5138 (N.Y. 1991).

Petitioners were not entitled to award of counsel fees in their successful action challenging violation of Open Meetings Law by village board of trustees where board had not repeatedly acted in violation of law and its actions were not undertaken in bad faith. Gordon v Village of Monticello, 207 A.D.2d 55, 620 N.Y.S.2d 573, 1994 N.Y. App. Div. LEXIS 13248 (N.Y. App. Div. 3d Dep't 1994), rev'd, in part, 87 N.Y.2d 124, 637 N.Y.S.2d 961, 661 N.E.2d 691, 1995 N.Y. LEXIS 4447 (N.Y. 1995).

Actions taken at town board meeting would not be invalidated on basis of improper public notice as required by CLS Pub O § 104 requiring posting of public notice in designated public location at least 72 hours before meeting, where evidence indicated that notice of meeting was posted on town bulletin board but failed to indicate how long before meeting such notice was posted, since court found that any impropriety in notice was unintentional, and parties relying on impropriety of notice failed to demonstrate any prejudice therefrom. Woodstock v Goodson-Todman Enterprises, Ltd., 133 Misc. 2d 12, 505 N.Y.S.2d 540, 1986 N.Y. Misc. LEXIS 2959 (N.Y. Sup. Ct. 1986).

Article 78 proceeding to invalidate action taken at executive session of trustees of union free school district on ground of failure to publish minutes was timely commenced, despite running of limitations period for Article 78 proceedings, since CLS Pub O § 107 states that period commences to run from date minutes are made available to public and no minutes were provided prior to proceeding. Previdi v Hirsch, 138 Misc. 2d 436, 524 N.Y.S.2d 643, 1988 N.Y. Misc. LEXIS 340 (N.Y. Sup. Ct. 1988).

Commissioner dismissed petition to remove 6 of 9 members of central school district's board of education for alleged violations of Open Meetings Law, because exclusive jurisdiction was vested in Supreme Court pursuant to CLS Pub O § 107. 1999 Op Comm Ed No. 14,158.

In proceeding to review suspension of petitioners' son under CLS Educ § 3214, Commissioner of Education lacked jurisdiction over petitioners' assertion that board of education should have conducted its review of hearing officer's recommendation in public session; Supreme Court is appropriate forum for addressing alleged Open Meetings Law violations. 1994 Op Comm Ed No. 13265.

Alleged violations of Open Meetings Law may not be basis of appeal to Commissioner of Education. 1996 Op Comm Ed No. 13616.

Despite the violation of the Open Meeting Law, the action taken by the Board remains effective unless a court renders a determination to the contrary in resolving a suit brought by an aggrieved person under Public Officers Law § 102 [now § 107]. Comm Pub Acc Rec OML—Ad Op 567.

Meetings held by public bodies are to be considered legally held unless and until court renders contrary determination. Comm Pub Acc Rec OML-Ad Op 842.

Open Meetings Law does not provide for automatic nullification of action based upon violation of Law; court has discretionary authority to act in response to violation of Law. Comm Pub Acc Rec OML-Ad Op 849.

2. Aggrieved persons

Trial court properly rejected appellants' challenges under the Open Meetings Law; appellants were not aggrieved by any insufficiency in the notice of the meeting of the planning board held on November 12, 2008, or inaccessibility of the meeting to those with disabilities. In any event, the notice conformed to statutory requirements. Further, appellants failed to meet their burden of establishing a violation of the Open Meetings Law in relation to notice of that meeting or that there is good cause to

declare void the planning board's action at that meeting, which was merely to schedule a date for a public hearing. Matter of Thorne v Village of Millbrook Planning Bd., 83 A.D.3d 723, 920 N.Y.S.2d 369, 2011 N.Y. App. Div. LEXIS 2836 (N.Y. App. Div. 2d Dep't), app. denied, 17 N.Y.3d 711, 930 N.Y.S.2d 556, 954 N.E.2d 1182, 2011 N.Y. LEXIS 2949 (N.Y. 2011).

Resident's suit claiming that a city failed to comply with the Open Meetings Law was dismissed because the resident's allegation, that as a member of the general public he was affected by the proposed budget under consideration at a meeting, was insufficient to confer standing in the matter under N.Y. Pub. Off. Law § 107(1). Matter of Rivers v Young, 892 N.Y.S.2d 747, 26 Misc. 3d 946, 243 N.Y.L.J. 2, 2009 N.Y. Misc. LEXIS 3447 (N.Y. Sup. Ct. 2009).

Under Open-Meetings Law any "agrieved" person may initiate suit on basis that he was excluded from public meeting; § 98 [now § 183] of Open Meetings Law provides that any member of general public may attend meeting of public body; thus, any person excluded from meeting would likely be considered "aggrieved". Comm Pub Acc Rec OML-Ad Op 810.

3. Determination of violation

Where plaintiff incorporated village failed to submit contrary evidence or affidavits of probative value in opposition to evidence submitted by a county rent guidelines board and the affidavit submitted by the board's chairman to show that the board properly went into a brief executive session to discuss pending litigation with respect to rent guidelines, defendants board and chairman are entitled to summary judgment on the issue of the board's compliance with the Open Meetings Law. Great Neck Plaza v Nassau County Rent Guidelines Board, 69 A.D.2d 528, 418 N.Y.S.2d 796, 1979 N.Y. App. Div. LEXIS 11833 (N.Y. App. Div. 2d Dep't 1979).

In an Art 78 proceeding to annul resolutions by the board of trustees of a community college that eliminated certain faculty positions, the trial court properly dismissed so much of the petitioner faculty association's claims as fell within the scope of the grievance procedure contained in the collective bargaining agreement between the faculty association and the board of trustees on the ground that the faculty association had failed to exhaust its administrative remedies, since the grievance procedure was applicable to disputes "based upon a claimed violation, misinterpretation, misapplication or inequitable application of any clause" of the collective bargaining agreement, and also contained a provision that set forth the procedures to be followed in the event that retrenchment of personnel became necessary, and the faculty association's claims were merely assertions that the application or misapplication of the contractual policy and procedure by the board of trustees violated other procedural requirements, so that the grievance procedure was applicable to the dispute; however, the trial court erred in dismissing that part of the faculty association's claim which alleged that the board of trustees violated the Open Meetings Law, Pub O, Art 7, since the issues of whether the resolutions were passed at public meetings held in violation of the notice requirements of the Open Meetings Law, and, if so, what the appropriate remedy would be, together with the question of whether the faculty association was an "aggrieved person" within the meaning of the Law, were totally unrelated to the collective bargaining agreement, and were thus outside the scope of its grievance procedures. Brown v Casier, 95 A.D.2d 574, 469 N.Y.S.2d 165, 1983 N.Y. App. Div. LEXIS 19862 (N.Y. App. Div. 3d Dep't 1983).

Evidence was sufficient to permit Supreme Court to conclude that village board of trustees had decided to create full-time village attorney position while in executive session, in violation of Open Meetings Law, where affidavits of board members revealed that board considered whether to create position and resulting fiscal impact, proposed job description was circulated one week later, resolution creating position was introduced and passed at open meeting 2 weeks later, and several members immediately tendered resignations and accepted new appointments so that position could be filled. Gordon v Village of Monticello, 207 A.D.2d 55, 620 N.Y.S.2d 573, 1994 N.Y. App. Div. LEXIS 13248 (N.Y. App. Div. 3d Dep't 1994), rev'd, in part, 87 N.Y.2d 124, 637 N.Y.S.2d 961, 661 N.E.2d 691, 1995 N.Y. LEXIS 4447 (N.Y. 1995).

Board of Education engaged in persistent pattern of deliberate violations of Open Meetings Law (CLS Pub O Art 7) through insufficient notice, unreasonable starting times, improper convening of executive sessions, and improper exclusion of members of public; thus, it was proper for court to annul certain actions of Board and impose attorneys' fees. Goetschius v Board of Educ., 244 A.D.2d 552, 664 N.Y.S.2d 811, 1997 N.Y. App. Div. LEXIS 11925 (N.Y. App. Div. 2d Dep't 1997).

There was no violation under N.Y. Pub. Off. Law § 107(1) of the Open Meeting Law, N.Y. Pub. Off. Law § 100 et seq., where notice pursuant to N.Y. Pub. Off Law § 104(1) and (2) was published as to the time, place, and subject of a meeting to discuss a developer's proposal for an area of the city, everyone who wanted to speak at the meeting had a chance to do so, and there was no indication that the city commission that held the meeting intentionally or knowingly discouraged anyone from attending. Matter of Windsor Owners Corp. v City Council of City of N.Y., 878 N.Y.S.2d 545, 23 Misc. 3d 490, 241 N.Y.L.J. 14, 2009 N.Y. Misc. LEXIS 88 (N.Y. Sup. Ct. 2009).

Violation of CLS Open Meetings Law was corrected by subsequent revote in a public meeting. Re Morris, Op Comr Ed #9509.

Planning board did not violate open meetings requirements when it went into executive session to discuss threatened litigation regarding a site plan for a fast food restaurant because the board took no action during the executive session. Matter of Western Sullivan O.R.E. LLC v Town of Thompson Planning Bd., 53 Misc. 3d 1202(A), 46 N.Y.S.3d 477, 2016 N.Y. Misc. LEXIS 3350 (N.Y. Sup. Ct. 2016).

4. Remedies, generally

Attorneys' fees were properly awarded to plaintiffs under CLS Pub O § 107(2) where village board of trustees intentionally and flagrantly violated Open Meetings Law, and plaintiffs were obviously prejudiced thereby; under circumstances, existence of repeated violations was not prerequisite. Gordon v Village of Monticello, 87 N.Y.2d 124, 637 N.Y.S.2d 961, 661 N.E.2d 691, 1995 N.Y. LEXIS 4447 (N.Y. 1995).

Article 78 proceeding was not appropriate remedy where newspaper company sought injunction against conduct of executive sessions by city council and declaration that certain actions of council violated Open Meetings Law (CLS Pub O Art 7), and court would convert proceeding into declaratory judgment action as there was no issue of jurisdiction and no prejudice was apparent. Plattsburgh Pub. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 A.D.2d 518, 586 N.Y.S.2d 346, 1992 N.Y. App. Div. LEXIS 8984 (N.Y. App. Div. 3d Dep't 1992).

Not every violation of the Open Meetings Law called for a sanction, and the burden was on those raising the issue to establish good cause why a court should exercise its discretion to impose a sanction. DeSantis v City of Jamestown, 193 Misc. 2d 197, 747 N.Y.S.2d 906, 2002 N.Y. Misc. LEXIS 1266 (N.Y. Sup. Ct. 2002).

Petitioner's claim regarding the Open Meetings Law is dismissed for lack of jurisdiction, for the appropriate forum for addressing a violation of the Open Meetings Law is the Supreme Court of the State of New York. Appeal of Strober, 1990 Op Comr Educ No 12371.

Under Open Meetings Law a court has discretionary authority to nullify action taken in violation of Law where member of public prevails in suit brought under Law. Comm Pub Acc Rec OML-Ad Op 825.

5. —Requirement of good cause for invalidating action

An Art 78 proceeding to invalidate a village's budget as having been adopted in violation of the "Open Meetings Law" was properly dismissed where, though such a violation had occurred, petitioner failed to make the required showing of good cause that would entitle him to the discretionary remedy of invalidation under Pub O § 107. Puka v Greco, 104 A.D.2d 362, 479 N.Y.S.2d 150, 1984 N.Y. App. Div. LEXIS 19832 (N.Y. App. Div. 2d Dep't 1984).

Contractor's petition to annul determination awarding street rehabilitation contract to another contractor is properly dismissed upon failure of contractor to show good cause for vacating determination, despite city's lack of compliance with Open Meet-

ings Law (Pub O Law § 103). Callanan Industries, Inc. v Schenectady, 116 A.D.2d 883, 498 N.Y.S.2d 490, 1986 N.Y. App. Div. LEXIS 51689 (N.Y. App. Div. 3d Dep't 1986).

While there were certain violations of the Open Meetings Law, N.Y. Pub. Off. Law § 100 et seq., in relation to a civil service commission's meeting, the appointee failed to establish good cause to invalidate the results of the meeting under N.Y. Pub. Off. Law § 107(1). Matter of Imburgia v Procopio, 98 A.D.3d 617, 949 N.Y.S.2d 727, 2012 N.Y. App. Div. LEXIS 5905 (N.Y. App. Div. 2d Dep't 2012).

In a case where it was alleged that a violation of the open meetings law occurred based on a redistricting plan that related to elections, there was a failure to show good cause why, as a sanction, a court should have exercised its discretion to void the plan since not every violation of the open meetings law triggered its enforcement sanctions. Matter of Max v Ward, 107 A.D.3d 1597, 967 N.Y.S.2d 557, 2013 N.Y. App. Div. LEXIS 4455 (N.Y. App. Div. 4th Dep't 2013).

Trial court properly dismissed a former employee's application to review a determination of a town terminating his employment because there was no indication of any personal or political animosities suggesting some deceitful purpose of ousting and replacing the former employee, his conclusory and unsupported assertions failed to refute the town's showing that its actions were part of a good faith effort to reorganize a municipal department for the purposes of reducing costs and increasing efficiency, and while the town board violated the Open Meetings Law, the former employee did not show the requisite "good cause" for declaring the board's action to be void, and the board's failure to comply with the Law was merely negligent. Matter of Cutler v Town of Mamakating, 137 A.D.3d 1373, 26 N.Y.S.3d 409, 2016 N.Y. App. Div. LEXIS 1539 (N.Y. App. Div. 3d Dep't 2016).

In the absence of a showing of sufficient "prejudice" or "good cause", isolated technical violation does not warrant the extreme remedy of invalidating the entire Nassau County budget adopted by the board. Kessel v D'Amato, 97 Misc. 2d 675, 412 N.Y.S.2d 303, 1979 N.Y. Misc. LEXIS 1992 (N.Y. Sup. Ct.), modified, 72 A.D.2d 790, 421 N.Y.S.2d 614, 1979 N.Y. App. Div. LEXIS 14036 (N.Y. App. Div. 2d Dep't 1979).

Town's Board's decision in its N.Y. Pub. Off. Law § 105(1)(f) executive session to terminate an employee for poor performance was proper as, given the nature of the employee's probationary employment interest and the purposes of the Open Meetings Law, the Board's not recording its proven actions in its executive session minutes was a non-prejudicial open meetings law violation of N.Y. Pub. Off. Law § 106(2); therefore, the lower court's reversing the Board's determination was not for the "good cause" required by N.Y. Pub. Off. Law § 107(1) for the lower court to exercise its discretion to reverse the determination. The violation was capable of being corrected by the Board simply recording the vote in the minutes of its executive session. Specht v Town of Cornwall, 13 A.D.3d 380, 786 N.Y.S.2d 546, 2004 N.Y. App. Div. LEXIS 14843 (N.Y. App. Div. 2d Dep't 2004).

A school board meeting and action taken at such meeting may not be judged "illegal" or "void" if there is a "procedural error in calling the meeting to order, failing to follow Robert's Rules, or through failure to follow the agenda" since such action may only be nullified by a court "upon good cause shown" under Public Officers Law § 102 and it would be very difficult to demonstrate a good cause for invalidating action due merely to procedural defects. Comm Pub Acc Rec OML—Ad Op 558.

6. —Particular cases, generally

In a proceeding by a probationary teacher who alleged that her termination from her position was illegal and a nullity since it resulted from a determination of the school board which was made in executive session in violation of the Open Meetings Law and the Education Law, the teacher was not entitled to reinstatement as a matter of law, where the court had discretion to declare void the action taken at the executive session, and where it did not abuse its discretion in denying the teacher's reinstatement. Sanna v Lindenhurst Bd. of Education, 58 N.Y.2d 626, 458 N.Y.S.2d 511, 444 N.E.2d 975, 1982 N.Y. LEXIS 3881 (N.Y. 1982).

The trial court did not abuse its discretion in invalidating all action taken at a meeting of the board of education of a school district where the school district failed to present a satisfactory explanation for their last-minute call of the meeting and for the patent inadequacy of the notice which consisted only of a typewritten announcement posted on a bulletin board. White v Battaglia, 79 A.D.2d 880, 434 N.Y.S.2d 537, 1980 N.Y. App. Div. LEXIS 14302 (N.Y. App. Div. 4th Dep't 1980).

In a proceeding challenging the reapportionment of a county legislature, meetings at which members of the majority political party discussed a reapportionment plan did not violate Pub O § 98(a) [now § 103(a)] where, although they were closed sessions, no legislative quorum was present at any of the meetings; although a technical violation occurred at one of the meetings because no public notice was "conspicuously" posted as required by Pub O § 99 [now § 104], the trial court was not justified in voiding all the actions resulting from the meeting where the press was in fact notified of the meeting and attended it and where the resolution of the meeting merely called for a public hearing. Britt v County of Niagara, 82 A.D.2d 65, 440 N.Y.S.2d 790, 1981 N.Y. App. Div. LEXIS 10944 (N.Y. App. Div. 4th Dep't 1981).

There was no abuse of discretion by Special Term in not vacating an ordinance which authorized the City of Binghamton to participate in a Federal loan program notwithstanding allegations that the ordinance was passed in violation of the Open Meetings Law. Kradjian v Binghamton, 104 A.D.2d 16, 482 N.Y.S.2d 89, 1984 N.Y. App. Div. LEXIS 20200 (N.Y. App. Div. 3d Dep't 1984), app. dismissed, 64 N.Y.2d 1039, 1985 N.Y. LEXIS 19716 (N.Y. 1985).

Resolution of Board of Education prohibiting use of unobtrusive recording devices was inconsistent with goal of fully informed citizenry and would be annulled. Mitchell v Board of Education, 113 A.D.2d 924, 493 N.Y.S.2d 826, 1985 N.Y. App. Div. LEXIS 52551 (N.Y. App. Div. 2d Dep't 1985).

Party bringing action Under CLS Pub Off § 107 to challenge selection of appointee for position of chancellor is not successful for purposes of award of attorney fees where, during pendency of action, appointment is withdrawn. Jones v Koch, 117 A.D.2d 647, 498 N.Y.S.2d 166, 1986 N.Y. App. Div. LEXIS 52925 (N.Y. App. Div. 2d Dep't), app. denied, 68 N.Y.2d 608, 506 N.Y.S.2d 1033, 498 N.E.2d 435, 1986 N.Y. LEXIS 20088 (N.Y. 1986).

Members of public body who are persistently derelict with regard to mandate of § 105 after being directed to comply by court order will be found in contempt of court, fined, and required to pay attorney's fees. Orange County Publications, Div. of Ottaway Newspapers, Inc. v County of Orange, 120 A.D.2d 596, 502 N.Y.S.2d 71, 1986 N.Y. App. Div. LEXIS 56679 (N.Y. App. Div. 2d Dep't), app. dismissed, 68 N.Y.2d 807, 506 N.Y.S.2d 1037, 498 N.E.2d 437, 1986 N.Y. LEXIS 20142 (N.Y. 1986).

Petitioner was not entitled to injunctive relief or counsel fees assessed against municipal legislature, despite its violation of Open Meetings Law on 2 occasions, where, prior to violation, legislature had duly noticed its meetings and opened them to public, and there was no showing of bad faith on legislature's part; violations of Open Meetings Law need not automatically trigger enforcement sanctions. Goodson Todman Enterprises, Ltd. v Kingston Common Council, 153 A.D.2d 103, 550 N.Y.S.2d 157, 1990 N.Y. App. Div. LEXIS 29 (N.Y. App. Div. 3d Dep't 1990).

Petitioners, nonprofit corporation dedicated to prevention of cruelty to animals, inter alia, were not entitled to writ of mandamus to compel Board of Trustees of State University of New York to allow public attendance at meetings of Laboratory Animals Use Committee (LAUC) of State University of New York at Stony Brook under "Open Meetings Law" (CLS Pub O §§ 100 et seq.) since LAUC is not "public body" within meaning of CLS Pub O § 102(2), and Stony Brook LAUC was not involved in "deliberations and decisions that go into the making of public policy." American Soc'y for Prevention of Cruelty to Animals v Board of Trustees of State Univ., 165 A.D.2d 561, 568 N.Y.S.2d 631, 1991 N.Y. App. Div. LEXIS 4911 (N.Y. App. Div. 2d Dep't 1991), aff'd, 79 N.Y.2d 927, 582 N.Y.S.2d 983, 591 N.E.2d 1169, 1992 N.Y. LEXIS 818 (N.Y. 1992).

Supreme Court did not abuse its discretion in invalidating actions of village board of trustees in creating village attorney position in executive session where creation of position violated CLS Pub O § 105 for failure to sufficiently identify matter under

discussion, and board's action resulted in series of appointments of individuals to occupy otherwise elected positions which, in turn, effectively deprived objectors of opportunity to vote for candidates of their choice. Gordon v Village of Monticello, 207 A.D.2d 55, 620 N.Y.S.2d 573, 1994 N.Y. App. Div. LEXIS 13248 (N.Y. App. Div. 3d Dep't 1994), rev'd, in part, 87 N.Y.2d 124, 637 N.Y.S.2d 961, 661 N.E.2d 691, 1995 N.Y. LEXIS 4447 (N.Y. 1995).

Board of education violated Open Meetings Law by failing to provide public notice of special meeting at reasonable time prior thereto, and its resolution authorizing payment of retirement incentive to reimburse employee for unused accrued sick leave, which was adopted in executive session held at that meeting, was therefore void. Rampello v East Irondequoit Cent. Sch. Dist., 236 A.D.2d 797, 653 N.Y.S.2d 469, 1997 N.Y. App. Div. LEXIS 1719 (N.Y. App. Div. 4th Dep't 1997).

Court properly annulled determination of village zoning board of appeals which granted applications for 2 area variances without any vote or discussion by board members; additionally, while not dispositive, notice of hearing was inaccurate, hearing room was too small to hold number of people who wished to attend, and zoning board provided no basis for refusing to grant reasonable requests for adjournment. Oshry v Zoning Bd. of Appeals, 276 A.D.2d 491, 713 N.Y.S.2d 564, 2000 N.Y. App. Div. LEXIS 9816 (N.Y. App. Div. 2d Dep't 2000).

In an action brought against a town by its former comptroller, the town was entitled to summary judgment because even if the town violated the Open Meetings Law when discussion the decision to terminate him from that position, its actions were voidable, rather than void. Phillips v Town of Glenville, 160 A.D.3d 1264, 75 N.Y.S.3d 629, 2018 N.Y. App. Div. LEXIS 2651 (N.Y. App. Div. 3d Dep't 2018).

Record supported a finding that a zoning board of appeals violated the Open Meetings Law with regard to a workshop by failing to give proper notice, but plaintiffs failed to establish good cause to annul the determination on that ground, as the improperly noticed meeting was open to the public and the determination at issue was adopted at a publicized, public meeting after a series of public meetings with regard thereto had previously been held. Thus, the trial court should not have annulled the determination on that ground and should not have awarded plaintiffs costs and attorneys' fees based on that violation. Chestnut Ridge Assoc., LLC v 30 Sephar Lane, Inc., 169 A.D.3d 995, 94 N.Y.S.3d 596, 2019 N.Y. App. Div. LEXIS 1414 (N.Y. App. Div. 2d Dep't 2019).

Plaintiffs, rent stabilized tenants and various associations of tenants, are not entitled to a preliminary injunction enjoining the enforcement of certain rent guideline orders promulgated by the Rent Guidelines Board for leases entered into during the 12-month period beginning July 1, 1978 since the meetings at which the guidelines were adopted were not procedurally defective (Administrative Code of City of New York, § YY51-5.0, subd b; Public Officers Law, art 7) and the issue of whether or not tenants were given sufficient opportunity to present data relating to the fuel surcharge guidelines order is a matter which is open to question and cannot be a basis for a preliminary injunction; questions relating to defects and shortcomings alleged to exist in the board itself and its staff have no bearing on an application for a preliminary injunction and are matters for the city legislature and executive and not for the courts. Coalition against Coalition against Rent Increase Passalongs v Rent Guidelines Board, 104 Misc. 2d 101, 427 N.Y.S.2d 660, 1979 N.Y. Misc. LEXIS 2960 (N.Y. Sup. Ct. 1979).

An Article 78 proceeding brought by the president of a parent-teacher club was properly before the court to the extent that it sought to declare void the school board's vote closing an elementary school on the ground that the vote was taken in violation of the Open Meetings Law Article 7, and since the Public Officers Law provided that such relief could be sought either in an Article 78 proceeding or in an action for declaratory judgment and injunctive relief, the court was also empowered to enjoin the public body from further proceedings with the action declared void as violative of the Open Meetings Law. However, to the extent that the petition sought other relief, it would have to be dismissed, inasmuch as it could be adequately reviewed by the Commissioner of Education. Dombroske v Board of Education, 118 Misc. 2d 800, 462 N.Y.S.2d 146, 1983 N.Y. Misc. LEXIS 3402 (N.Y. Sup. Ct. 1983).

Actions taken by trustees of union free school district at 2 executive sessions would be voided where trustees violated provisions of Open Meetings Law by failing to properly notify public and publish minutes, and record strongly suggested that violations were not "unintentional" but rather calculated to minimize public awareness of trustees' sensitive political decision to attempt settlement of highly publicized matter in litigation. Previdi v Hirsch, 138 Misc. 2d 436, 524 N.Y.S.2d 643, 1988 N.Y. Misc. LEXIS 340 (N.Y. Sup. Ct. 1988).

Although various meetings were held that were not open to the public, they did not all violate the Open Meetings Law, N.Y. Pub. Off. Law art. 7, as a meeting between a judge and others in his chambers was a judicial proceeding under N.Y. Pub. Off Law § 108(1) that was not covered by the Law, and a meeting between county and state legislators for advice was not subject to the Law pursuant to N.Y. Pub. Off. Law § 102(1); meetings held by members of the county legislature regarding issues that involved the budget and an increase in taxes, and meetings held by various legislators and officials without the judge's presence constituted violations of the Law, but sanctions such as a permanent injunction against future violations were not required under N.Y. Pub. Off. Law § 107. Warren v Giambra, 813 N.Y.S.2d 892, 12 Misc. 3d 650, 235 N.Y.L.J. 86, 2006 N.Y. Misc. LEXIS 829 (N.Y. Sup. Ct. 2006).

7. — —Article 78 proceedings

Article 78 proceeding, alleging that respondent community college association's allocation of student activity funds at closed meeting held on March 30, 1994 wrongfully deprived petitioner of portion of his student activity fees, was timely commenced on August 3, 1994, as petitioner's claim was governed by CLS Pub O § 107(3) and was measured from date minutes of meeting were released, not from date of meeting itself. Smith v City Univ. of New York, 92 N.Y.2d 707, 685 N.Y.S.2d 910, 708 N.E.2d 983, 1999 N.Y. LEXIS 1 (N.Y. 1999).

In Article 78 proceeding in which court enjoined county legislature from holding meetings and hearings at any location without barrier-free access to physically handicapped persons, award of costs and counsel fees was properly denied where court found that legislature had made, and was continuing to make, reasonable efforts to provide access to handicapped persons and that such efforts were commenced and underway prior to prosecution of proceeding. Clark v Lyon, 147 A.D.2d 838, 537 N.Y.S.2d 934, 1989 N.Y. App. Div. LEXIS 1579 (N.Y. App. Div. 3d Dep't 1989).

Court providently exercised its discretion in annulling certain determinations of school district's board of education and awarding attorney fee to petitioners in Article 78 proceeding where board engaged in persistent pattern of deliberate violation of letter and spirit of CLS Pub O Art 7 by, inter alia, improperly convening executive sessions and conducting business in manner inaudible to public audience. Goetschius v Board of Educ., 281 A.D.2d 416, 721 N.Y.S.2d 386, 2001 N.Y. App. Div. LEXIS 2074 (N.Y. App. Div. 2d Dep't 2001).

Because two town boards failed to consider all reasonable options in mitigation of a wind power project, because the lead agency improperly delegated its duties to other agencies, and because the Open Meetings Law in N.Y. Pub. Off. Law § 107(2) was violated, the landowners were entitled to N.Y. C.P.L.R. art. 78 relief. Matter of Brander v Town of Warren Town Bd., 847 N.Y.S.2d 450, 18 Misc. 3d 477, 2007 N.Y. Misc. LEXIS 8258 (N.Y. Sup. Ct. 2007).

Agency Opinions

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1. In general

Open Meetings Law does not preclude board members from describing what occurred during executive session, and any person may ask them whether they discussed only those subjects identified in motions to conduct executive sessions. Comm on Open Gov't FOIL-AO-12200.

Action taken by public body not in compliance with Open Meetings Law remains valid unless and until court determines to contrary. Committee on Open Government OML-AO-1052.

Since there is no agency of government that enforces Open Meetings Law, individual would be required to employ own legal counsel; however, Open Meetings Law provides court with discretionary authority to award costs and reasonable attorney's fees to successful party. Comm on Open Gov't OML-AO-1445.

Action taken by public body remains valid unless and until court renders contrary determination; therefore, if zoning board of appeals votes behind closed doors when vote should have been taken in public, court may, in its discretion, nullify its action. Comm on Open Gov't OML-AO-1456.

When legal challenge is initiated relating to failure to provide notice, key issue is whether failure to comply with notice requirements imposed by Open Meetings Law was "unintentional." Comm on Open Gov't OML-AO-4149.

2. Aggrieved persons

Any aggrieved person under Open Meetings Law may initiate judicial proceeding pursuant to CLS Civil Practice Law and Rules Article 78 or action for declaratory judgment injunctive relief against public body; furthermore, court may, in its discretion, upon good cause shown, invalidate, in whole or in part, any action taken at meeting where violation of Open Meetings Law is determined to have occurred. Comm on Open Gov't OML-AO-1422-1423, and 1427.

Unless one or more of exceptions in CLS Pub O § 105(1)(a) through (h) arise, public body, including zoning board of appeals, must deliberate in public; vote by zoning board of appeals must be taken in public; if open meetings law is violated possible recourse is provided in CLS Pub O § 107(1). Comm on Open Gov't FOIL-AO-44717; Comm on Open Gov't OML-AO-1412.

3. Determination of violation

Where town board members met to discuss public business or continued their original meeting after their official adjournment at 8:45 p.m., they failed to comply with Open Meetings Law. Comm on Open Gov't OML-AO-2285.

While members of public bodies may consult with one another individually or by phone, they may not validly conduct meetings by means of telephone conferences, vote or make collective determinations by means of communications occurring outside of meeting held in accordance with Open Meetings Law. Comm on Open Gov't OML-AO-2290.

Fact that school classes have been canceled due to snowstorm does not precluded board of education from conducting meeting. Comm on Open Gov't OML-AO-2344.

There is no requirement that public body must refer at open meeting to communications received from residents and other interested persons. Comm on Open Gov't OML-AO-2348.

There is nothing in Open Meetings Law that precludes members of public body from conferring individually or by telephone; however, series of communications between individual members or telephone calls among members which results in decision, or meeting held by means of telephone conference, is inconsistent with law. While members of public bodies may consult with one another individually or by phone, they may not validly take action or make collective determinations by means of series of "one on one" meetings or telephonic communications. Comm on Open Gov't OML-AO-2354.

If it is determined that meetings are held by less than quorum for purposes of circumventing Open Meetings Law, court might find such action to violate Open Meetings Law. Comm on Open Gov't OML-AO-2409.

Village board's practice of refusing to identify litigation matter which would be discussed in executive session violated Open Meetings Law. Comm on Open Gov't OML-AO-2451.

When legal challenge is initiated relating to failure to provide notice, key issue is whether failure to comply with notice requirements imposed by Open Meetings Law was "unintentional." Comm on Open Gov't OML-AO-2567.

Town Board violated Open Meetings Law when it authorized publication of political advertisements in local newspaper without having done so at meeting by means of vote by members of board. Comm on Open Gov't OML-AO-3680.

4. Remedies, generally

5. —Requirement of good cause for invalidating action

Finding of failure to comply with notice requirements imposed by Open Meetings Law, intentional or otherwise, is dependent upon attendant facts; further, action taken by public body generally remains valid unless and until court determines to contrary. Comm on Open Gov't OML-AO-2371.

Even though public body might have failed to comply with Open Meetings Law, action that it has taken is not automatically void; rather it would be voidable. Comm on Open Gov't OML-AO-2381.

6. —Particular cases, generally

Failure to prepare appropriate minutes within requisite time does not serve to invalidate decision made at meeting of public body. Comm on Open Gov't FOIL-AO-8895.

If action was taken during open meeting, and if legal notice of hearing was published as required by law, it is questionable whether "good cause" could be demonstrated for purpose of convincing court to employ its discretionary authority to nullify action. Comm on Open Gov't OML-AO-2346.

If public body routinely gives notice to news media and posts notice as required by CLS Pub O § 104 but fails to notify media prior to special meeting due to oversight, such failure could be characterized as unintentional. Comm on Open Gov't OML-AO-2381.

Given that notice requirements of Open Meetings Law have remained unchanged since law went into effect in 1977, it would appear that "practice" of not notifying news media of meetings could not be construed as unintentional. Comm on Open Gov't OML-AO-2381.

County board of health violated Open Meetings Law when it considered implementation of new smoking regulations during executive session. Comm on Open Gov't OML-AO-2612.

Vote on policy issue taken by board of education prior to published meeting time of 7:30 p.m. violated Open Meetings Law, and court would be authorized to invalidate vote under CLS Pub O § 107; meeting should not have convened until 7:30 p.m. and, if board needed to start meeting earlier, it had to provide additional notice to news media and at location where original notice was posted, to reflect new time meeting would begin. Comm on Open Gov't OML-AO-3601.

Actions taken by school board which failed to comply with Freedom of Information Law and Open Meetings Law were voidable, but not automatically void. Comm on Open Gov't OML-AO-2245.

Any decision made by phone poll, if reviewed by court, could be deemed null and void. Comm on Open Gov't OML-AO-2256.

Open Meetings Law does not include any provision involving criminal sanctions. Comm on Open Gov't OML-AO-2385.

District attorney might, depending upon his or her findings, contend that members of public body violated CLS Penal § 195.00, which concerns "official misconduct," when they violated Open Meetings Law. Comm on Open Gov't OML-AO-2385.

Authority to award attorney's fees under CLS Pub O § 107(2) is discretionary rather than mandatory. Comm on Open Gov't OML-AO-2438.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Proceeding against body or officer, CLS CPLR §§ 7801 et seq.

Federal Aspects:

Open meetings, 5 USCS § 552b.

Jurisprudences:

2 NY Jur 2d Administrative Law §§ 90–93.

75 NY Jur 2d Libraries § 15 .

96 NY Jur 2d State of New York § 162 .

94 NY Jur 2d Schools, Universities, and Colleges §§ 127, 152 .

126 Am Jur Proof of Facts 3d 343, Proof of Violation of State Open Meeting or Sunshine Law.

Law Reviews:

Whelan, New York's Open Meetings Law: revision of the political caucus exemption and its implications for local government. 60 Brook. L. Rev. 1483.

Annotations:

Emergency exception under state law making proceedings by public bodies open to the public. 33 ALR5th 731.

Matthew Bender's New York Practice Guides: 3 New York Practice Guide: Real Estate § 20.03.

Texts: Dienes, Levine & Lind, Newsgathering and the Law (1999, Matthew Bender) §§ 9-6(f), 9-6(j), 9-6(b).

Gerrard, Ruzow, Weinberg, Environmental Impact Review in New York (Matthew Bender) § 8.14.

REAL PROPERTY LAW

Article
7. Landlord and Tenant
7-A. Portable Kerosene Heaters

HISTORY:
Add, L 1909, ch 52, eff Feb 17, 1909.

ARTICLE 7 Landlord and Tenant

Section
231-a. Sprinkler system notice in residential leases
235-bb. Certificates of occupancy; required disclosure to tenant.

HISTORY:
Add, L 1909, ch 52.

§ 231-a. Sprinkler system notice in residential leases

1. Every residential lease shall provide conspicuous notice in bold face type as to the existence or non-existence of a maintained and operative sprinkler system in the leased premises.

2. For purposes of this section, "sprinkler system" shall have the same meaning as defined in section one hundred fifty-five-a of the executive law.

3. If there is a maintained and operative sprinkler system in the leased premises, the residential lease agreement shall provide further notice as to the last date of maintenance and inspection.

HISTORY:
L 2014, ch 202, § 1, effective December 3, 2014.

Editor's Notes Laws 2014, ch 202, § 2, eff Dec 3, 2014, provides:

§ 2. This act shall take effect on the one hundred twentieth day after it shall have become a law, and shall apply to leases entered into on or after such date.

§ 235-bb. Certificates of occupancy; required disclosure to tenant.

1. Prior to executing a residential lease or rental agreement with a tenant, the owner of real property consisting of three or fewer rental units shall provide conspicuous notice in bold face type as to whether a certificate of occupancy, if such certificate is required by law, is currently valid for the dwelling unit subject to the lease or rental agreement. Owners who provide the tenant with an actual copy of the valid certificate of occupancy shall be deemed to have complied with the requirements of this subdivision.

2. Any agreement by a lessee or tenant of premises for dwelling purposes waiving or modifying his or her rights as set forth in this section shall be void as contrary to public policy.

HISTORY:
L 2017, ch 446, § 1, effective November 29, 2017.

ARTICLE 7-A Portable Kerosene Heaters

Section
239-a. Definitions
239-b. Only approved portable kerosene heaters permitted in structures
239-c. Approval by the secretary of state
239-d. Sale of unapproved portable kerosene heaters
239-e. Portable kerosene heaters prohibited in multiple dwellings
239-g. Application of article

HISTORY:
Add, L 1965, ch 1031, § 188, eff Sept 1, 1967.

§ 239-a. Definitions

As used in this article the following terms shall mean and include:

1. "Structure." Any building or completed construction of any kind including but not limited to, private dwellings or to any structure used for business, commercial or industrial purposes, but not including multiple dwellings, buildings under construction, or buildings used solely for agricultural purposes.

2. "Multiple dwelling." A multiple dwelling is a dwelling which is either rented, leased, let or hired out to be occupied or is occupied as the residence or home of three or more families living independently of each other and shall include, dwelling portions of hospitals, nursing homes, convents, monasteries, asylums and public institutions.

3. "Owner." The owner of the freehold of any real property (as defined in section two of the real property law), or of a lesser estate therein, a mortgagee or vendee in possession, assignee of rents, receiver, executor, trustee, lessee, agent, or any other person, firm or corporation, directly or indirectly in control of real property.

4. "Person." The term person shall include the owner, mortgagee or vendee in possession, assignee of rents, receiver, executor, trustee, lessee, agent or any other person, firm or corporation, directly or indirectly in control of a structure or part thereof.

5. "Listed." Any portable kerosene heater which has been tested by an independent, nationally recognized testing or inspection agency, acceptable to the secretary of state and which has been determined to meet a generally accepted standard for such heaters. Such determination shall be evidenced by either the inclusion of the heater on a list published by such agency or by the heater bearing the listing mark of such agency.

6. "Portable kerosene heater." Any non-flue connected, self-contained, self-supporting, kerosene-fueled heating appliance equipped with an integral reservoir, designed to be carried from one location to another.

7. "Approved portable kerosene heater." Any listed portable kerosene heater which:

(a) has a fuel capacity of not more than two gallons;

(b) emits no more than .04 percent carbon monoxide in an air free sample of flue gases at maximum heat output and no more than .08 percent at recommended low-fire setting;

(c) has a minimum tipping angle of no more than thirty-three degrees from the vertical with a full fuel reservoir;

(d) has an automatic shutoff safety device or inherent design feature which extinguishes the heating flame upon tipover in not more than ten seconds;

(e) includes as standard equipment a pump or siphon for refueling;

(f) is packaged with instructions advising the purchaser of proper maintenance and operation;

(g) bears labeling, in conspicuous letters, cautioning and informing the purchaser as to:

(i) the need for an adequate source of ventilation when the heater is in operation;

(ii) the use of only suitable fuel for the heater;

(iii) proper manner of refueling;

(iv) proper placement and handling of the heater when in operation; and

(v) proper procedures for lighting, flame regulation and extinguishing the heater;

(h) after April first, nineteen hundred eighty-two, meets such additional standards, if any, as may be contained in reasonable rules and regulations adopted by the secretary of state pursuant to section two hundred thirty-nine-c of this article.

HISTORY:

Add, L 1965, ch 1031, § 188, eff Sept 1, 1967. Derived from Penal Law § 1671; amd, L 1981, ch 967, §§ 2, 3, eff Sept 1, 1981.

Agency Opinions

1. In general

A town may prohibit the use of portable kerosene heaters in condominiums. 1982 N.Y. Op. Att'y Gen. No. 82-11, 1982 N.Y. AG LEXIS 98.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 239-b, 239-c, 291-g.

§ 239-b. Only approved portable kerosene heaters permitted in structures

Portable kerosene heaters which do not meet the requirements of subdivision seven of section two hundred thirty-nine-a of this article are prohibited in structures. It shall be unlawful for any person (1) to use any portable kerosene heater except an approved portable kerosene heater in any portion of a structure, or (2) being the owner of such structure, to provide or place or cause to be provided or placed in any portion of a structure, any portable kerosene heater except an approved portable kerosene heater for use by any occupant of such structure.

HISTORY:

Add, L 1981, ch 967, § 4, eff Sept 1, 1981.

Prior Law: Former § 239-b, add, L 1965, ch 1031, § 188, eff Sept 1, 1967, derived from Penal Law § 1672; repealed, L 1981, ch 967, § 4, eff Sept 1, 1981.

Agency Opinions

1. In general

A town may prohibit the use of portable kerosene heaters in condominiums. 1982 N.Y. Op. Att'y Gen. No. 82-11, 1982 N.Y. AG LEXIS 98.

§ 239-c. Approval by the secretary of state

After April first, nineteen hundred eighty-two, no portable kerosene heater shall be offered for sale in this state for use in a structure unless it has been approved by the secretary of state or his designee. In determining whether to approve a portable kerosene heater for sale, the secretary of state shall consider whether the heater meets (1) the standards set forth in subdivision seven of section two hundred thirty-nine-a of this article, and (2) any additional standards which the secretary of state reasonably believes are required to effectuate the purposes of this article as set forth in section two hundred thirty-nine of this article. The secretary of state may promulgate reasonable rules and regulations setting forth the procedure by which portable kerosene heaters will be reviewed for approval.

HISTORY:

Add, L 1981, ch 967, § 6, eff Sept 1, 1981.

Prior Law: Former § 239–c, add, L 1965, ch 1031, § 188, eff Sept 1, 1967, derived from Penal Law § 1673; renumbered § 239–f, L 1981, ch 967, § 5, eff Sept 1, 1981.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 239-a.

Codes, Rules and Regulations:

Portable kerosene heaters: approval for sale. 19 NYCRR §§ 432.1 et seq.

§ 239-d. Sale of unapproved portable kerosene heaters

All unapproved portable kerosene heaters offered for sale in this state shall have printed thereon or attached thereto and on the package in which such heater is sold the following statement: "This heater is not approved for residential or commercial use." There shall also be printed thereon or attached thereto and on the package in which such heater is sold such other information as may be required by the secretary of state.

HISTORY:

Add, L 1981, ch 967, § 6, eff Sept 1, 1981; amd, L 1984, ch 637, § 1, eff Nov 24, 1984.

Prior Law: Former § 239–d, add, L 1965, ch 1031, § 188, eff Sept 1, 1967, derived from Penal Law § 1674; renumbered § 239–g, L 1981, ch 967, § 7, eff Sept 1, 1981.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

Portable kerosene heaters: approval for sale. 19 NYCRR §§ 432.1 et seq.

§ 239-e. Portable kerosene heaters prohibited in multiple dwellings

It shall be unlawful to use any portable kerosene heater in a multiple dwelling.

HISTORY:

Add, L 1981, ch 967, § 6, eff Sept 1, 1981.

Agency Opinions

1 In general

A town may prohibit the use of portable kerosene heaters in condominiums. 1982 N.Y. Op. Att'y Gen. No. 82-11, 1982 N.Y. AG LEXIS 98.

§ 239-g. Application of article

1. This article shall not be applicable to any city having a population in excess of five hundred thousand.

2. Nothing in this article shall be construed to permit the sale or use of any portable kerosene heater in any municipality in which such use or sale is restricted or prohibited by any general, special or local law or rule or regulation.

HISTORY:

Formerly § 239–d, renumbered and amd, L 1981, ch 967, § 7, eff Sept 1, 1981.

Agency Opinions

1. In general

A town may prohibit the use of portable kerosene heaters in condominiums. 1982 N.Y. Op. Att'y Gen. No. 82-11, 1982 N.Y. AG LEXIS 98.

REAL PROPERTY TAX LAW

Article
4. Exemptions
5. Assessment Procedure

ARTICLE 4 Exemptions

Title 2. Private Property

Section
464. Incorporated associations of volunteer firefighters.
466. Volunteer firefighters and fire companies in villages.
466-a. Volunteer firefighters and volunteer ambulance workers; certain counties
466-b. Volunteer firefighters and volunteer ambulance workers; certain additional counties
466-c. [There are seven sections 466-c; added by L 2002, ch 428] Volunteer firefighters and volunteer ambulance workers; certain county
466-c. [There are seven sections 466-c; added by L 2002, ch 431] Volunteer firefighters and volunteer ambulance workers; certain counties
466-c. [There are seven sections 466-c; added by L 2002, ch 432] Volunteer firefighters and volunteer ambulance workers; certain county
466-c. [There are seven sections 466-c; added by L 2002, ch 435] Volunteer firefighters and volunteer ambulance workers; certain county
466-c. [There are seven sections 466-c; added by L 2002, ch 440] Volunteer firefighters and volunteer ambulance workers; exemption
466-c. [There are seven sections 466-c; added by L 2002, ch 450] Volunteer firefighters and volunteer ambulance workers; certain counties
466-c. [There are seven sections 466-c; added by L 2004, ch 464] Volunteer firefighters and volunteer ambulance workers; certain county
466-d. [There are four sections 466-d; added by L 2003, ch 131] Volunteer firefighters and volunteer ambulance workers; certain county
466-d. [There are four sections 466-d; added by L 2003, ch 133] Volunteer firefighters and volunteer ambulance workers; certain county
466-d. [There are four sections 466-d; added by L 2003, ch 142] Volunteer firefighters and volunteer ambulance workers
466-d. [There are four sections 466-d; added by L 2003, ch 168] Volunteer firefighters and volunteer ambulance workers; certain counties
466-e. [There are four sections 466-e; added by L 2004, ch 341] Volunteer firefighters and volunteer ambulance workers; certain county
466-e. [There are four sections 466-e; added by L 2004, ch 395] Volunteer firefighters and volunteer ambulance workers; certain county
466-e. [There are four sections 466-e; added by L 2004, ch 705] Volunteer firefighters and volunteer ambulance workers; certain county
466-e. [There are four sections 466-e; added by L 2004, ch 708] Volunteer firefighters and volunteer ambulance workers; certain county
466-f. [There are five sections 466-f; added by L 2005, ch 74] Volunteer firefighters and volunteer ambulance workers; certain county
466-f. [There are five sections 466-f; added by L 2005, ch 189] Volunteer firefighters and volunteer ambulance workers; certain county
466-f. [There are five sections 466-f; added by L 2005, ch 208] Volunteer firefighters and volunteer ambulance workers; certain counties
466-f. [There are five sections 466-f; added by L 2005, ch 244] Volunteer firefighters and volunteer ambulance workers; certain county
466-f. [There are five sections 466-f; added by L 2005, ch 324] Un-remarried spouses of volunteer firefighters or volunteer ambulance workers killed in the line of duty
466-g. [There are two sections 466-g; added by L 2005, ch 419] Volunteer firefighters and volunteer ambulance workers; certain county
466-g. [There are two sections 466-g; added by L 2005, ch 712] Volunteer firefighters and volunteer ambulance workers; certain county
466-h. [There are two sections 466-h; added by L 2006, ch 250] Volunteer firefighters and volunteer ambulance workers; certain county
466-h. [There are two sections 466-h; added by L 2006, ch 305] Un-remarried spouses of deceased volunteer firefighters or volunteer ambulance workers
466-i. Volunteer firefighters and volunteer ambulance workers; certain counties
466-j. Volunteer firefighters and volunteer ambulance workers; certain county
468. Fire patrol and salvage corps

HISTORY:
Add, L 1958, ch 959, § 1, eff Oct 1, 1959.

TITLE 2 Private Property

HISTORY:
Add, L 1958, ch 959, eff Oct 1, 1959.

§ 464. Incorporated associations of volunteer firefighters.

1. Except as otherwise provided in subdivision two of this section, real property owned by an incorporated association of present or former volunteer firefighters, other than a business corporation, which is (a) actually and exclusively used and occupied by such incorporated association or (b) leased to the city, town, village or fire district in which the real property is located and is actually and exclusively used and occupied by such city, town, village

or fire district for fire department purposes or for the social and recreational use of the firefighters and residents of the city, town, village or fire district, provided the rent under any such lease does not exceed the amount of carrying, maintenance and depreciation charges or (c) leased to the school district in which the real property is located and is actually and exclusively used and occupied by such school district for school district purposes, provided the rent under any such lease does not exceed the amount of carrying, maintenance and depreciation charges, shall be exempt from taxation, but the total amount of the exemption to any one incorporated association shall not exceed twenty thousand dollars.

2. Notwithstanding the provisions of subdivision one of this section, real property owned by an incorporated volunteer fire company or fire department created for the purpose of furnishing fire protection which is (a) actually and exclusively used and occupied by such fire company or fire department for public purposes or (b) leased to the city, town, village or fire district in which the real property is located and is actually and exclusively used and occupied by such city, town, village or fire district for governmental purposes including but not limited to the social and recreational use of the firefighters and residents of the city, town, village or fire district provided the rent under any such lease does not exceed the amount of carrying, maintenance and depreciation charges or (c) leased to the school district in which the real property is located and is actually and exclusively used and occupied by such school district for school district purposes, provided the rent under any such lease does not exceed the amount of carrying, maintenance and depreciation charges, shall be exempt from taxation and exempt from special ad valorem levies and special assessments to the extent provided in section four hundred ninety of this chapter. In the event that not all of the real property shall be used and occupied for such purposes then exemption of the portion not so used shall be limited to the exemption provided in subdivision one of this section.

3. The term "public purpose", as used in this section, shall mean land and buildings, or portions thereof, used for

(a) housing, storage, repair and testing of fire department vehicles and of equipment, appliances, devices, tools, protective clothing, uniforms and supplies,

(b) receipt and dispatch of alarms,

(c) training, drills and instruction,

(d) generators, lockers, showers, custodial quarters,

(e) offices, company meetings, ready room,

(f) social and recreational use, other than for income producing or business purposes, of both the firefighters and residents of the city, town, village or fire district in which the real property is located.

HISTORY:

Add, L 1958, ch 959, § 1, with substance derived from Tax Law § 4; amd, L 1959, ch 733, § 1; L 1965, ch 807, § 1, eff June 1, 1965; L 2018, ch 476, § 248, effective December 28, 2018.

Editor's Notes: See 1959 notes under Arts 1 and 4.

Subsection History: Sub 1, formerly entire section, so designated sub 1 and amd, L 1965, ch 807, § 1, eff June 1, 1965.

Subs 2 and 3, add, L 1965, ch 807, § 1, eff June 1, 1965.

Amendment Notes The 2018 amendment by ch 476, § 248, substituted "firefighters" for "firemen" in the section heading; substituted "firefighters" for "firemen" wherever it appears in 1, 2, and 3; and made a stylistic change.

Notes to Decisions

Analysis

1. In general
2. Property acquired after taxable status date
3. Property leased to other parties

1. In general

Exemption from taxation of real property of incorporated association of volunteer firemen discussed. 1946 Op St Compt 162.

Real property owned by a fire company or department which is organized for the purpose of furnishing fire protection, is totally exempt from taxation, provided that it is actually and exclusively used and occupied by it for a public purpose (as defined in the statute). 1968 Op St Compt No. 532.

2. Property acquired after taxable status date

Property of an incorporated fire company acquired subsequent to the taxable status date is liable for taxes for the entire year. 1955 Op St Compt 74.

3. Property leased to other parties

When portion of real property owned and used by an incorporated volunteer fire association is rented for purposes other than those of the association and rent is received for such portion, such real property is wholly subject to taxation. 1947 Op St Compt 340.

The board of trustees of a village may enter into a lease with an incorporated fire department covering a portion of a building, owned by such department, for storing village fire apparatus and for village office and library purposes for twenty years. However, it would appear that the exemption afforded by § 464 of the Real Property Tax Law would not be applicable in such a case. 1960 Op St Compt No. 161.

An incorporated fire department may lease a portion of the fire house owned by it to a Central School District and have the property remain tax exempt. 1966 Op St Compt No. 733.

A tax exemption may be applied to the unleased portion of a building owned by a village volunteer fire department where the tenant of the leased portion does not qualify, under the statute, to create a total exemption for the building or premises. 1967 Op St Compt No. 1011.

An incorporated fire company may lease a portion of its real property to the village in which it is located, for use as office and storage space, as provided herein, and retain its tax exemption. 1968 Op St Compt No. 203.

A fire company may, under certain conditions, lease a portion of its real property to a fire district in which the property is located for parking of vehicles of members and residents of the fire district while in attendance at social functions at the district fire house. Where the rent under any such lease does not exceed the amount of carrying, maintenance and depreciation charges, the leased portion may remain or become tax exempt. 1968 Op St Compt No. 252.

Tax exemption of real property of an incorporated fire company is lost where a portion of the property is rented. 1955 Op St Compt 210.

Real property of incorporated volunteer fire department leased to United States Postal Service is not entitled to exemption under CLS RPTL § 464(2). 10 Op. Counsel SBRPS No. 65.

Agency Opinions

Analysis

1. In general

2. Vacant land
3. Property leased to other parties
4. Special assessments and ad valorem levies
5. Miscellaneous

1. In general

The real property tax exemption provided by subdivision 2 of section 464 of the Real Property Tax Law is applicable only to incorporated volunteer fire companies and departments which have satisfied the requirements of the Not-For-Profit Corporation Law (§§ 404(f), 1402). 5 Op Counsel SBEA No. 45 (1976).

Fire protection service supplied by a village fire department is a public purpose within the meaning of section 406 of the Real Property Tax Law, and accordingly, village-owned land leased to the fire department and used by the department for the provision of fire protection services is exempt from taxation pursuant to section 406. 5 Op Counsel SBEA No. 107 (1976).

2. Vacant land

Vacant land owned by a fire department is not exempt by virtue of its being owned by a fire department unless it is used for public purposes or is leased to other municipalities in accordance with the provisions of section 464 of the Real Property Tax Law. 5 Op Counsel SBEA No. 107 (1976).

3. Property leased to other parties

Real property owned by an incorporated volunteer fire company or fire department, otherwise exempt from taxation pursuant to section 464 of the Real Property Tax Law, is taxable when it is leased to a United States Army Reserve unit. Where only a portion of such property is leased to the reserve unit, that portion will be taxable while the remainder will be entitled to the exemption. 5 Op Counsel SBEA No. 78 (1976).

4. Special assessments and ad valorem levies

Real property exempt pursuant to either subdivision 1 or 2 of section 464 of the Real Property Tax Law is liable for special assessments and special ad valorem levies. 6 Op Counsel SBEA No. 16 (1976 as revised 1978).

Real property exempt from taxation pursuant to subdivision 2 of § 464 of Real Property Tax Law is exempt from special ad valorem levies and special assessments to same extent as properties exempt from taxation pursuant to one of sections listed in § 490. 7 Op Counsel SBEA No. 103 (1983).

5. Miscellaneous

Where a fire company or department, created for the purpose of furnishing fire protection, owns a recreation hall, that building is totally exempt from taxation pursuant to section 464(2) of the Real Property Tax Law if it is used solely for fire company or department purposes and none of the revenue derived from the operation of the building inures to the benefit of the members of the company or department. 5 Op Counsel SBEA No. 107 (1976).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 490, 844.

§ 466. Volunteer firefighters and fire companies in villages.

Upon the adoption of a proposition therefor by the qualified voters of a village, the real property owned by a volunteer member of the village fire department and the real property owned by any volunteer fire company in the village shall be exempt from taxation for village purposes to the extent of five hundred dollars in addition to any other exemption authorized by law.

HISTORY:

Add, L 1958, ch 959, § 1, eff Oct 1, 1959, with substance derived from Vill Law § 104; L 2018, ch 476, § 249, effective December 28, 2018.

Amendment Notes The 2018 amendment by ch 476, § 249, substituted "firefighters" for "firemen" in the section heading.

Notes to Decisions

Where taxes are invalid because of subd. 7 of Tax Law § 4 and cloud upon title of property, provable only by evidence dehors the record, action in equity to have such taxes annulled and canceled of record is maintainable. Elmhurst Fire Co. v New York, 213 N.Y. 87, 106 N.E. 920, 213 N.Y. (N.Y.S.) 87, 1914 N.Y. LEXIS 733 (N.Y. 1914).

The exemption from village taxation of firemen under former Village Law § 132 not only includes firemen actively serving as members of any indicated company, but also can include volunteer exempt firemen as defined by the statute. Starr v Mayor & Trustees of Island Park, 130 N.Y.S.2d 235, 1954 N.Y. Misc. LEXIS 2018 (N.Y. Sup. Ct. 1954).

Where a village has adopted a proposition pursuant to former § 132 of the Village Law exempting members of fire companies from taxation to the extnt of $500, "exempt volunteer firemen" who have resigned after five years service are not entitled to the exemption. 1947 Op St Compt 82.

Exemption from village taxes on real property owned by firemen and veterans. 1947 Op St Compt 266.

There is no minimum time which a volunteer fireman must serve in order to be eligible for tax exemption pursuant to this section, and a volunteer fire company may not adopt a bylaw which requires its members to fulfill certain service requirements in order to attain eligibility. 1963 Op St Compt No. 73.

Real property, owned jointly by a volunteer fireman of a village fire department together with another person who is not a volunteer fireman, qualifies for exemption from taxation by the village. 1969 Op St Compt No. 107.

A village volunteer fireman is not entitled to a refund for the additional tax he had to pay after his real property tax exemption was removed from the tax roll when he ceased to be an active volunteer fireman. 1979 Op St Compt No. 160.

Agency Opinions

The owner of "veteran property" or "volunteer fireman property" wholly exempt from village taxation is eligible to vote at a village election. 1955 NY Ops Atty Gen 93 (informal).

Village trustees may not submit a proposition to the electors exempting real property of volunteer firemen with more than 10 years' service and not exempting real property of those with less than 10 years' service. 1955 NY Ops Atty Gen 32 (informal) (former Village Law § 132).

Where a village had adopted a proposition affording the volunteer firemen an exemption from real property taxation, such action was undisturbed by the repeal of the former enabling statute (Village Law § 104) and its reenactment under Real Property Tax Law § 465. 1960 NY Ops Atty Gen Aug 3 (informal).

A village should deduct exemptions for veterans and volunteer firemen from the assessed value of real property and not from the full or equalized value. 1976 NY Ops Atty Gen March 30 (informal).

The exemption provided by section 466 of the Real Property Tax Law to volunteer members of a village fire department and fire companies in villages is in addition to any other exemption to which the real property may be entitled. 2 Op Counsel SBEA No. 23.

If a husband and wife are each eligible in their own right for the village firefighter exemption authorized by section 466 of the Real Property Tax Law, their marital status does not prevent each from enjoying the full benefits of the exemption. 7 Op Counsel SBEA No. 45 (1980).

A person subject to call for firefighting or rescue squad duty, without an option of whether or not to respond, is an active volunteer fireman and eligible to receive an exemption from real property taxes under Real Property Tax Law § 466. 7 Op Counsel SBEA No. 114 (1983).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 452.

§ 466-a. Volunteer firefighters and volunteer ambulance workers; certain counties

1. Real property owned by an enrolled member of an incorporated volunteer fire company, fire depart-

ment or incorporated voluntary ambulance service or such enrolled member and spouse residing in any county having a population of more than two hundred sixty-one thousand inhabitants but less than two hundred seventy thousand inhabitants, determined in accordance with the 1990 federal census, or in any county having a population of more than ninety-eight thousand seven hundred inhabitants butless than ninety-nine thousand inhabitants, as determined by the latestfederal decennial census, shall be exempt from taxation to the extent of ten percent of the assessed value of such property for city, village, town, part town, special district or county purposes, exclusive of special assessments, provided that the governing body of a city, village, town or county, after a public hearing, adopts a local law, ordinance or resolution providing therefor; provided further, however, that such exemption shall in no event exceed three thousand dollars multiplied by the latest state equalization rate for the assessing unit in which such real property is located.

2. Such exemption shall not be granted to an enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service residing in such county unless:

(a) the applicant resides in the city, town or village which is served by such incorporated volunteer fire company or fire department or incorporated voluntary ambulance service;

(b) the property is the primary residence of the applicant;

(c) the property is used exclusively for residential purposes; provided however, that in the event any portion of such property is not used exclusively for the applicant's residence but is used for other purposes, such portion shall be subject to taxation and the remaining portion only shall be entitled to the exemption provided by this section; and

(d) the applicant has been certified by the authority having jurisdiction for the incorporated volunteer fire company or fire department as an enrolled member of such incorporated volunteer fire company or fire department for at least five years or the applicant has been certified by the authority having jurisdiction for the incorporated voluntary ambulance service as an enrolled member of such incorporated voluntary ambulance service for at least five years. It shall be the duty and responsibility of the municipality which adopts a local law, ordinance or resolution pursuant to this section to determine the procedure for certification.

3. Any enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service who accrues more than twenty years of active service and is so certified by the authority having jurisdiction for the incorporated volunteer fire company, fire department or incorporated voluntary ambulance service, shall be granted the ten percent exemption as authorized by this section for the remainder of his or her life as long as his or her primary residence is located within such a county provided that the governing body of a village, town or county, after a public hearing, adopts a local law, ordinance or resolution providing therefor.

4. Application for such exemption shall be filed with the assessor or other agency, department or office designated by the municipality offering such exemption on or before the taxable status date on a form as prescribed by the commissioner.

5. No applicant who is a volunteer firefighter or volunteer ambulance worker who by reason of such status is receiving any benefit under the provisions of this article on the effective date of this section shall suffer any diminution of such benefit because of the provisions of this section.

HISTORY:

Add, L 1999, ch 617, § 1, eff Jan 1, 2000 (see 1999 note below); amd, L 2002, ch 433, § 1, eff Jan 1, 2003 (see 2002 note below); L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Editor's Notes: Laws 1999, ch 617, § 2, eff Jan 1, 2000, provides as follows:

§ 2. This act shall take effect on the first day of January next succeeding the date on which it shall have become a law and shall apply to taxable status dates occurring on or after such date.

Laws 2002, ch 433, § 2, eff Jan 1, 2002, provides as follows:

§ 2. This act shall take effect on the first day of January next succeeding the date on which it shall have become a law and shall apply to taxable status dates occurring on or after such date.

Subsection History: Sub 1, amd, L 2002, ch 433, § 1, eff Jan 1, 2003 (see 2002 note below).

Sub 4, amd, L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Amendment Notes: 2010. Chaper 56, § 1 (Part W) amended:

Sub 4 by substituting at fig 1 "commissioner" for "state board".

2002. Chaper 433, § 1 amended:

Sub 1 by adding the matter in italics.

§ 466-b. Volunteer firefighters and volunteer ambulance workers; certain additional counties

1. Real property owned by an enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service or such enrolled member and spouse residing in any county having a population of more than one hundred twenty thousand inhabitants but less than one hundred forty-one thousand inhabitants, determined in accordance with the latest federal decennial census, shall be exempt from taxation to the extent of ten percent of the assessed value of such property for city, village, town, part town, special district or county purposes, exclusive of special assessments, provided that the governing body of a city, village, town or county, after a public hearing, adopts a local law, ordinance or resolution providing therefor; provided further, however, that such exemption shall in no event exceed three thousand dollars multiplied by the latest state equalization rate for the assessing unit in which such real property is located.

2. Such exemption shall not be granted to an enrolled member of an incorporated volunteer fire

company, fire department or incorporated voluntary ambulance service residing in such county unless:

(a) the applicant resides in the city, town or village which is served by such incorporated volunteer fire company or fire department or incorporated voluntary ambulance service;

(b) the property is the primary residence of the applicant;

(c) the property is used exclusively for residential purposes; provided however, that in the event any portion of such property is not used exclusively for the applicant's residence but is used for other purposes, such portion shall be subject to taxation and the remaining portion only shall be entitled to the exemption provided by this section; and

(d) the applicant has been certified by the authority having jurisdiction for the incorporated volunteer fire company or fire department as an enrolled member of such incorporated volunteer fire company or fire department for at least five years or the applicant has been certified by the authority having jurisdiction for the incorporated voluntary ambulance service as an enrolled member of such incorporated voluntary ambulance service for at least five years. It shall be the duty and responsibility of the municipality which adopts a local law, ordinance or resolution pursuant to this section to determine the procedure for certification.

3. Any enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service who accrues more than twenty years of active service and is so certified by the authority having jurisdiction for the incorporated volunteer fire company, fire department or incorporated voluntary ambulance service, shall be granted the ten percent exemption as authorized by this section for the remainder of his or her life as long as his or her primary residence is located within such a county provided that the governing body of a city, village, town or county, after a public hearing, adopts a local law, ordinance or resolution providing therefor.

4. Application for such exemption shall be filed with the assessor or other agency, department or office designated by the municipality offering such exemption on or before the taxable status date on a form as prescribed by the commissioner.

5. No applicant who is a volunteer firefighter or volunteer ambulance worker who by reason of such status is receiving any benefit under the provisions of this article on the effective date of this section shall suffer any diminution of such benefit because of the provisions of this section.

HISTORY:

Add, L 2000, ch 609, § 1, eff Jan 1, 2002 (see 2000 note below); amd, L 2001, ch 319, § 1, eff Jan 1, 2002 (see 2001 note below); L 2002, ch 459, § 1, eff Aug 20, 2002 (see 2002 note below); L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Editor's Notes: Laws 2000, ch 609, § 2, eff Jan 1, 2002, provides as follows:

§ 2. This act shall take effect on the first day of January next succeeding the date on which it shall have become a law and shall apply to taxable status dates occurring on or after such date.

Laws 2001, ch 319, § 2, eff Jan 1, 2002, provides as follows:

§ 2. This act shall take effect on the same date as chapter 609 of the laws of 2000 takes effect and shall apply to taxable status dates on or after such effective date.

Laws 2002, ch 459, § 2, eff Aug 20, 2002, provides as follows:

§ 2. This act shall take effect immediately and shall apply to assessment rolls prepared on the basis of taxable status dates occurring on or after such date.

Subsection History: Sub 1, amd, L 2001, ch 319, § 1, eff Jan 1, 2002 (see 2001 note below), L 2002, ch 459, § 1, eff Aug 20, 2002 (see 2002 note below).

Sub 3, amd, L 2001, ch 319, § 1, eff Jan 1, 2002 (see 2001 note below).

Sub 4, amd, L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Amendment Notes: 2010. Chaper 56, § 1 (Part W) amended:

Sub 4 by substituting at fig 1 "commissioner" for "state board".

2002. Chaper 459, § 1 amended:

Sub 1 by deleting at fig 1 "thirty-three" and adding the matter in italics.

2001. Chaper 319, § 1 amended:

Sub 3 by adding the matter in italics.

§ 466-c. [There are seven sections 466-c; added by L 2002, ch 428] Volunteer firefighters and volunteer ambulance workers; certain county

1. Real property owned by an enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service or such enrolled member and spouse residing in any county having a population of ninety-five thousand inhabitants but less than ninety-six thousand inhabitants, determined in accordance with the latest decennial federal census, shall be exempt from taxation to the extent of ten percent of the assessed value of such property for city, village, town, part town, special district, county or school district purposes, exclusive of special assessments, provided that the governing body of a city, village, town, county or school district, after a public hearing, adopts a local law, ordinance or resolution providing therefor; provided further, however, that such exemption shall in no event exceed three thousand dollars multiplied by the latest state equalization rate for the assessing unit in which such real property is located.

2. Such exemption shall not be granted to an enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service residing in such county unless:

(a) the applicant resides in the city, town, village or school district which is served by such incorporated volunteer fire company or fire department or incorporated voluntary ambulance service;

(b) the property is the primary residence of the applicant;

(c) the property is used exclusively for residential purposes; provided however, that in the event any portion of such property is not used exclusively for the applicant's residence but is used for other purposes, such portion shall be subject to taxation and

the remaining portion only shall be entitled to the exemption provided by this section; and

(d) the applicant has been certified by the authority having jurisdiction for the incorporated volunteer fire company or fire department as an enrolled member of such incorporated volunteer fire company or fire department for at least five years or the applicant has been certified by the authority having jurisdiction for the incorporated voluntary ambulance service as an enrolled member of such incorporated voluntary ambulance service for at least five years. It shall be the duty and responsibility of the municipality which adopts a local law, ordinance or resolution pursuant to this section to determine the procedure for certification.

3. Any enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service who accrues more than twenty years of active service and is so certified by the authority having jurisdiction for the incorporated volunteer fire company, fire department or incorporated voluntary ambulance service, shall be granted the ten percent exemption as authorized by this section for the remainder of his or her life as long as his or her primary residence is located within such a county provided that the governing body of a city, village, town or county, after a public hearing, adopts a local law, ordinance or resolution providing therefor.

4. Application for such exemption shall be filed with the assessor or other agency, department or office designated by the municipality offering such exemption on or before the taxable status date on a form as prescribed by the commissioner.

5. No applicant who is a volunteer firefighter or volunteer ambulance worker who by reason of such status is receiving any benefit under the provisions of this article on the effective date of this section shall suffer any diminution of such benefit because of the provisions of this section.

HISTORY:

Add, L 2002, ch 428, § 1, eff Jan 1, 2003 (see 2002 note below); amd, L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Editor's Notes: Laws 2002, ch 428, § 2, eff Jan 1, 2003, provides as follows:

§ 2. This act shall take effect on the first day of January next succeeding the date on which it shall have become a law and shall apply to taxable status dates occurring on or after such date.

Subsection History: Sub 4, amd, L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Amendment Notes: 2010. Chapter 56, § 1 (Part W) amended:

Sub 4 by substituting at fig 1 "commissioner" for "state board".

Notes to Decisions

Volunteer firefighter or volunteer ambulance worker who serves in town in Putnam County other than that in which he or she resides cannot receive exemption based on 5 years of service from his or her home town under CLS RPTL § 466-c(2); in contrast, if volunteer's home town chooses to offer lifetime service exemption based on 20 years of service under § 466-c(3), fact that its resident serves, or served, in another town does not bar that exemption. 11 Op. Counsel SBRPS No. 31 (2002).

§ 466-c. [There are seven sections 466-c; added by L 2002, ch 431] Volunteer firefighters and volunteer ambulance workers; certain counties

1. Real property owned by an enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service or such enrolled member and spouse residing in any county having a population of more than nine hundred fifty thousand but less than nine hundred sixty thousand as determined in accordance with the latest decennial census, shall be exempt from taxation to the extent of ten percent of the assessed value of such property for city, village, town, part town, special district, or county purposes, exclusive of special assessments, provided that the governing body of a city, village, town, or county, after a public hearing, adopts a local law, ordinance or resolution providing therefor; provided further, however, that such exemption shall in no event exceed three thousand dollars multiplied by the latest state equalization rate for the assessing unit in which such real property is located.

2. Such exemption shall not be granted to an enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service residing in such county unless:

(a) the applicant resides in the city, town, or village which is served by such incorporated volunteer fire company or fire department or incorporated voluntary ambulance service;

(b) the property is the primary residence of the applicant;

(c) the property is used exclusively for residential purposes; provided however, that in the event any portion of such property is not used exclusively for the applicant's residence but is used for other purposes, such portion shall be subject to taxation and the remaining portion only shall be entitled to the exemption provided by this section; and

(d) the applicant has been certified by the authority having jurisdiction for the incorporated volunteer fire company or fire department as an enrolled member of such incorporated volunteer fire company or fire department for at least five years or the applicant has been certified by the authority having jurisdiction for the incorporated voluntary ambulance service as an enrolled member of such incorporated voluntary ambulance service for at least five years. It shall be the duty and responsibility of the municipality which adopts a local law, ordinance or resolution pursuant to this section to determine the procedure for certification.

3. Any enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service who accrues more than twenty years of active service and is so certified by the authority having jurisdiction for the incorporated volunteer fire company, fire department or incorporated voluntary ambulance service, shall be granted the ten percent exemption as authorized by this section for the remainder of his or her life as

long as his or her primary residence is located within such county provided that the governing body of a city, village, town or county, after a public hearing, adopts a local law, ordinance or resolution providing therefor.

4. Application for such exemption shall be filed with the assessor or other agency, department or office designated by the municipality offering such exemption on or before the taxable status date on a form as prescribed by the commissioner.

5. No applicant who is a volunteer firefighter or volunteer ambulance worker who by reason of such status is receiving any benefit under the provisions of this article on the effective date of this section shall suffer any diminution of such benefit because of the provisions of this section.

HISTORY:

Add, L 2002, ch 431, § 1, eff Jan 1, 2003 (see 2002 note below); amd, L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Editor's Notes: Laws 2002, ch 431, § 2, eff Jan 1, 2003, provides as follows:

§ 2. This act shall take effect on the first day of January next succeeding the date on which it shall have become a law and shall apply to taxable status dates occurring on or after such date.

Subsection History: Sub 4, amd, L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Amendment Notes: 2010. Chaper 56, § 1 (Part W) amended:

Sub 4 by substituting at fig 1 "commissioner" for "state board".

§ 466-c. [There are seven sections 466-c; added by L 2002, ch 432] Volunteer firefighters and volunteer ambulance workers; certain county

1. Real property owned by an enrolled member of an incorporated volunteer fire company, fire department or incorporated volunteer ambulance service or such enrolled member and spouse residing in any county having a population of more than forty-three thousand four hundred inhabitants but less than forty-three thousand six hundred inhabitants, determined in accordance with the latest decennial federal census, shall be exempt from taxation to the extent of ten percent of the assessed value of such property for city, village, town, part town, special district or county purposes, exclusive of special assessments, provided that the governing body of a city, village, town or county, after a public hearing, adopts a local law, ordinance, or resolution providing therefor; provided further, however, that such exemption shall in no event exceed three thousand dollars multiplied by the latest state equalization rate for the assessing unit in which real property is located.

2. Such exemption shall not be granted to an enrolled member of an incorporated volunteer fire company, fire department or incorporated volunteer ambulance service residing in such county unless:

(a) the applicant resides in the city, town or village which is served by such incorporated volunteer fire company or fire department or incorporated voluntary ambulance service;

(b) the property is the primary residence of the applicant;

(c) the property is used exclusively for residential purposes; provided however, that in the event any portion of such property is not used exclusively for the applicant's residence but is used for other purposes, such portion shall be subject to taxation and the remaining portion only shall be entitled to the exemption provided by this section; and

(d) the applicant has been certified by the authority having jurisdiction for the incorporated volunteer fire company or fire department as an enrolled member of such incorporated volunteer fire company or fire department for at least five years or the applicant has been certified by the authority having jurisdiction for the incorporated voluntary ambulance service as an enrolled member of such incorporated voluntary ambulance service for at least five years. It shall be the duty and responsibility of the municipality which adopts a local law, ordinance or resolution pursuant to this section to determine the procedure for certification.

3. Any enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service who accrues more than twenty years of active service and is so certified by the authority having jurisdiction for the incorporated volunteer fire company, fire department or incorporated voluntary ambulance service, shall be granted the ten percent exemption as authorized by this section for the remainder of his or her life as long as his or her primary residence is located within such county provided that the governing body of a city, village, town or county, after a public hearing, adopts a local law, ordinance or resolution providing therefor.

4. Application for such exemption shall be filed with the assessor or other agency, department or office designated by the municipality offering such exemption on or before the taxable status date on a form as prescribed by the commissioner.

5. No applicant who is a volunteer firefighter or volunteer ambulance worker who by reason of such status is receiving any benefit under the provisions of this article on the effective date of this section shall suffer any diminution of such benefit because of the provisions of this section.

HISTORY:

Add, L 2002, ch 432, § 1, eff Jan 1, 2003 (see 2002 note below); amd, L 2010, ch 56, § 1 (Part W), eff June 22, 2011.

Editor's Notes: Laws 2002, ch 432, § 2, eff Jan 1, 2003, provides as follows:

§ 2. This act shall take effect on the first day of January next succeeding the date on which it shall have become a law and shall apply to assessment rolls prepared on the basis of taxable status dates occurring on or after such effective date.

Subsection History: Sub 4, amd, L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Amendment Notes: 2010. Chaper 56, § 1 (Part W) amended:

Sub 4 by substituting at fig 1 "commissioner" for "state board".

§ 466-c. [There are seven sections 466-c; added by L 2002, ch 435] Volunteer firefighters and volunteer ambulance workers; certain county

1. Real property owned by an enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service or such enrolled member and spouse residing in any county having a population of more than two hundred eighty thousand inhabitants but less than two hundred eighty thousand two hundred inhabitants, determined in accordance with the latest decennial federal census, shall be exempt from taxation to the extent of ten percent of the assessed value of such property for city, village, town, part town, special district or county purposes, exclusive of special assessments, provided that the governing body of a city, village, town or county, after a public hearing, adopts a local law, ordinance or resolution providing therefor; provided further, however, that such exemption shall in no event exceed three thousand dollars multiplied by the latest state equalization rate for the assessing unit in which such real property is located.

2. Such exemption shall not be granted to an enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service residing in such county unless:

(a) the applicant resides in the city, town or village which is served by such incorporated volunteer fire company or fire department or incorporated voluntary ambulance service;

(b) the property is the primary residence of the applicant;

(c) the property is used exclusively for residential purposes; provided however, that in the event any portion of such property is not used exclusively for the applicant's residence but is used for other purposes, such portion shall be subject to taxation and the remaining portion only shall be entitled to the exemption provided by this section; and

(d) the applicant has been certified by the authority having jurisdiction for the incorporated volunteer fire company or fire department as an enrolled member of such incorporated volunteer fire company or fire department for at least five years or the applicant has been certified by the authority having jurisdiction for the incorporated voluntary ambulance service as an enrolled member of such incorporated voluntary ambulance service for at least five years. It shall be the duty and responsibility of the municipality which adopts a local law, ordinance or resolution pursuant to this section to determine the procedure for certification.

3. Any enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service who accrues more than twenty years of active service and is so certified by the authority having jurisdiction for the incorporated volunteer fire company, fire department or incorporated voluntary ambulance service, shall be granted the ten percent exemption as authorized by this section for the remainder of his or her life as long as his or her primary residence is located within such county provided that the governing body of a city, village, town or county, after a public hearing, adopts a local law, ordinance or resolution providing therefor.

4. Application for such exemption shall be filed with the assessor or other agency, department or office designated by the municipality offering such exemption on or before the taxable status date on a form as prescribed by the commissioner.

5. No applicant who is a volunteer firefighter or volunteer ambulance worker who by reason of such status is receiving any benefit under the provisions of this article on the effective date of this section shall suffer any diminution of such benefit because of the provisions of this section.

HISTORY:

Add, L 2002, ch 435, § 1, eff Jan 1, 2003 (see 2002 note below); amd, L 2010, ch 56, § 1 (Part 1), eff June 22, 2010.

Editor's Notes: Laws 2002, ch 435, § 2, eff Jan 1, 2003, provides as follows:

§ 2. This act shall take effect on the first day of January next succeeding the date on which it shall have become a law and shall apply to taxable status dates occurring on or after such date.

Subsection History: Sub 4, amd, L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Amendment Notes: 2010. Chaper 56, § 1 (Part W) amended:

Sub 4 by substituting at fig 1 "commissioner" for "state board".

§ 466-c. [There are seven sections 466-c; added by L 2002, ch 440] Volunteer firefighters and volunteer ambulance workers; exemption

1. Real property owned by an enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service or such enrolled member and spouse residing in a county which has a population of more than one million three hundred thousand and less than one million four hundred thousand persons, according to the latest federal decennial census and which is not located within a city with a population of one million or more shall be exempt from taxation to the extent of ten percent of the assessed value of such property for city, village, town, part town, school district, special district or county purposes, exclusive of special assessments, provided that the governing body of a city, village, town, school district or county, after a public hearing, adopts a local law, ordinance or resolution providing therefor.

2. Such exemption shall not be granted to an enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service residing in such county unless:

(a) the applicant resides in the city, town or village which is served by such incorporated volunteer fire company or fire department or incorporated voluntary ambulance service;

(b) the property is the primary residence of the applicant;

(c) the property is used exclusively for residential purposes; provided however, that in the event any portion of such property is not used exclusively for the applicant's residence but is used for other purposes, such portion shall be subject to taxation and the remaining portion only shall be entitled to the exemption provided by this section; and

(d) the applicant has been certified by the authority having jurisdiction for the incorporated volunteer fire company or fire department as an enrolled member of such incorporated volunteer fire company or fire department for at least five years or the applicant has been certified by the authority having jurisdiction for the incorporated voluntary ambulance service as an enrolled member of such incorporated voluntary ambulance service for at least five years. It shall be the duty and responsibility of the municipality which adopts a local law, ordinance or resolution pursuant to this section to determine the procedure for certification.

3. Any enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service who accrues more than twenty years of active service and is so certified by the authority having jurisdiction for the incorporated volunteer fire company, fire department or incorporated voluntary ambulance service, shall be granted the ten percent exemption as authorized by this section for the remainder of his or her life as long as his or her primary residence is located within such county provided that the governing body of a city, village, town, school district or county, after a public hearing, adopts a local law, ordinance or resolution providing therefor.

4. Application for such exemption shall be filed with the assessor or other agency, department or office designated by the municipality offering such exemption on or before the taxable status date on a form as prescribed by the commissioner.

5. No applicant who is a volunteer firefighter or volunteer ambulance worker who by reason of such status is receiving any benefit under the provisions of this article on the effective date of this section shall suffer any diminution of such benefit because of the provisions of this section.

HISTORY:

Add, L 2002, ch 440, § 1, eff Jan 1, 2003 (see 2002 note below); amd, L 2003, ch 177, § 1, eff July 22, 2003; L 2004, ch 719, § 1, eff Jan 1, 2005 (see 2004 note below); L 2005, ch 261, § 1, eff Jan 1, 2006 (see 2005 note below); L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Editor's Notes: Laws 2002, ch 440, § 2, eff Jan 1, 2003, provides as follows:

§ 2. This act shall take effect on the first day of January next succeeding the date on which it shall have become a law and shall apply to taxable status dates occurring on or after such date.

Laws 2004, ch 719, § 2, eff Jan 1, 2005, provides as follows:

§ 2. This act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to taxable status dates occurring on or after such date.

Laws 2005, ch 261, § 2, eff Jan 1, 2006, provides as follows:

§ 2. This act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to taxable status dates occurring on or after such date.

Subsection History: Sub 1, amd, L 2003, ch 177, § 1, eff July 22, 2003, L 2004, ch 719, § 1, eff Jan 1, 2005 (see 2004 note below), L 2005, ch 261, § 1, eff Jan 1, 2006 (see 2005 note below).

Sub 3, amd, L 2005, ch 261, § 1, eff Jan 1, 2006 (see 2005 note below).

Sub 4, amd, L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Amendment Notes: 2010. Chaper 56, § 1 (Part W) amended:

Sub 4 by substituting at fig 1 "commissioner" for "state board".

2005. Chaper 261, § 1 amended:

Sub 1 by adding the matter in italics.

Sub 3 by adding the matter in italics.

§ 466-c. [There are seven sections 466-c; added by L 2002, ch 450] Volunteer firefighters and volunteer ambulance workers; certain counties

1. Real property owned by an enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service or such enrolled member and spouse residing in a county with a population of more than one million four hundred thousand and less than one million five hundred thousand, according to the latest federal decennial census, shall be exempt from taxation to the extent of ten percent of the assessed value of such property for city, village, town, part town, special district, county or school district purposes, exclusive of special assessments, provided that the governing body of a city, village, town, county or school district, after a public hearing, adopts a local law, ordinance or resolution providing therefor.

2. Such exemption shall not be granted to an enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service residing in such county unless:

(a) the applicant resides in the town which is served by such incorporated volunteer fire company or fire department or incorporated voluntary ambulance service;

(b) the property is the primary residence of the applicant;

(c) the property is used exclusively for residential purposes; provided, however, that in the event any portion of such property is not used exclusively for the applicant's residence but is used for other purposes, such portion shall be subject to taxation and the remaining portion only shall be entitled to the exemption provided by this section; and

(d) the applicant has been certified by the authority having jurisdiction for the incorporated volunteer fire company or fire department as an enrolled member of such incorporated volunteer fire company or fire department for at least five years or the applicant has been certified by the authority having jurisdiction for the incorporated voluntary ambulance service as an enrolled member of such incorporated voluntary ambulance service for at least five

years. It shall be the duty and responsibility of the municipality which adopts a local law, ordinance or resolution pursuant to this section to determine the procedure for certification.

3. Any enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service who accrues more than twenty years of active service and is so certified by the authority having jurisdiction for the incorporated volunteer fire company, fire department or incorporated voluntary ambulance service, shall be granted the ten percent exemption as authorized by this section for the remainder of his or her life as long as his or her primary residence is located within such a county provided that the governing body of a city, village, town, county or school district, after a public hearing, adopts a local law, ordinance or resolution providing therefor.

4. Application for such exemption shall be filed with the assessor or other agency, department or office designated by the municipality offering such exemption on or before the taxable status date on a form as prescribed by the commissioner.

5. Incorporated volunteer fire companies, fire departments and incorporated volunteer ambulance services shall file lists of its enrolled members eligible for the exemption provided by this section with the assessor or other agency, department or office designated by the municipality offering such exemption on or before the taxable status date on a form as prescribed by the commissioner.

6. No applicant who is a volunteer firefighter or volunteer ambulance worker who, by reason of such status is receiving any benefit under the provisions of this article on the effective date of this section, shall suffer any diminution of such benefit because of the provisions of this section.

7. (a) For the purposes of this section, title to that portion of real property owned by a cooperative apartment corporation in which a tenant-stockholder of such corporation resides and which is represented by his share or shares of stock in such corporation as determined by its or their proportional relationship to the total outstanding stock of the corporation, including that owned by the corporation, shall be deemed to be vested in such tenant-stockholder.

(b) That proportion of the assessment of such real property owned by a cooperative apartment corporation determined by the relationship of such real property vested in such tenant-stockholder to such entire parcel and the building thereon owned by such cooperative apartment corporation in which such tenant-stockholder resides shall be subject to exemption from taxation pursuant to this section and any exemption so granted shall be credited by the appropriate taxing authority against the assessed valuation of such real property. Upon the completion of the final assessment roll, or as soon thereafter as is practicable, the assessor shall forward to the cooperative apartment corporation a statement setting forth the exemption attributable to each eligible tenant-stockholder. The reduction in real property taxes realized thereby shall be credited by the cooperative apartment corporation against the amount of such taxes otherwise payable by or chargeable to such tenant-stockholder.

(c) Every cooperative apartment corporation, upon receiving an exemption pursuant to this section, shall provide to each eligible tenant-stockholder a written statement detailing how the exemption is being credited to such eligible tenant-stockholder no later than sixty days after such cooperative apartment corporation receives such exemption.

(d) Real property may be exempt from taxation pursuant to this subdivision by a municipality in which such property is located only if the governing board of such municipality, after public hearing, adopts a local law, ordinance or resolution providing therefor.

HISTORY:

Add, L 2002, ch 450, § 1, eff Jan 1, 2003 (see 2002 note below); amd, L 2004, ch 9, § 1, eff Jan 1, 2005 (see 2004 note below); L 2004, ch 648, § 1, eff Jan 1, 2005 (see 2005 note below); L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Editor's Notes: Laws 2002, ch 450, § 2, eff Jan 1, 2003, provides as follows:

§ 2. This act shall take effect on the first day of January next succeeding the date on which it shall have become a law and shall apply to taxable status dates occurring on or after such date.

Laws 2004, ch 9, § 2, eff Jan 1, 2005, provides as follows:

§ 2. This act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to taxable status dates occurring on or after such date.

Laws 2004, ch 648, § 2, eff Jan 1, 2005, provides as follows:

§ 2. This act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to taxable status dates occurring on or after such date.

Subsection History: Sub 1, amd, L 2004, ch 9, § 1, eff Jan 1, 2005 (see 2004 note below).

Sub 2, par (a), amd, L 2004, ch 9, § 1, eff Jan 1, 2005 (see 2004 note below).

Sub 4, amd, L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Sub 5, amd, L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Sub 7, add, L 2004, ch 648, § 1, eff Jan 1, 2005 (see 2005 note below).

Amendment Notes: 2010. Chaper 56, § 1 (Part W) amended:

Sub 4 by substituting at fig 1 "commissioner" for "state board".

Sub 5 by substituting at fig 1 "commissioner" for "state board".

2004. Chaper 9, § 1 amended:

Sub 1 by deleted at fig 1 "; provided further, however, that such exemption shall in no event exceed three thousand dollars multiplied by the latest state equalization rate for the assessing unit in which such real property is located" and adding the matter in italics.

Sub 2, par (a) by deleting at fig 1 "city," and at fig 2 "or village".

2004. Chaper 648, § 1 amended:

By adding sub 7.

Notes to Decisions

To qualify for volunteer firefighters and volunteer ambulance workers exemption in Suffolk County on basis of minimum of 5

years of service, that service must have been performed for single volunteer company. 11 Op. Counsel SBRPS No. 51.

Where 2 (or more) qualified firefighters or ambulance workers own property together, their exemptions under CLS RPTL § 466-c (L 2002, ch 450) may be combined. 11 Op. Counsel SBRPS No. 51.

Where title is in single owner, only one exemption may be allowed under CLS RPTL § 466-c (L 2002, ch 450), even if individual qualifies both as volunteer firefighter and as volunteer ambulance worker. 11 Op. Counsel SBRPS No. 51.

Term "enrolled member" is not defined in CLS RPTL § 466-c (L 2002, ch 45); it is intended to refer to "active volunteer members" as that term is defined in CLS Vol Fire Ben § 3(1) and CLS Vol Ambul Work L § 3(1). 11 Op. Counsel SBRPS No. 51.

§ 466-c. [There are seven sections 466-c; added by L 2004, ch 464] Volunteer firefighters and volunteer ambulance workers; certain county

1. Real property owned by an enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service or such enrolled member and spouse residing in any county having a population of more than eighty-three thousand inhabitants but less than eighty-four thousand five hundred inhabitants, determined in accordance with the latest decennial federal census, shall be exempt from taxation to the extent of ten percent of the assessed value of such property for city, village, town, part town, special district or county purposes, exclusive of special assessments, provided that the governing body of a city, village, town or county, after a public hearing, adopts a local law, ordinance or resolution providing therefor; provided further, however, that such exemption shall in no event exceed three thousand dollars multiplied by the latest state equalization rate for the assessing unit in which such real property is located.

2. Such exemption shall not be granted to an enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service residing in such county unless:

(a) the applicant resides in the city, town or village which is served by such incorporated volunteer fire company or fire department or incorporated voluntary ambulance service;

(b) the property is the primary residence of the applicant;

(c) the property is used exclusively for residential purposes; provided however, that in the event any portion of such property is not used exclusively for the applicant's residence but is used for other purposes, such portion shall be subject to taxation and the remaining portion only shall be entitled to the exemption provided by this section; and

(d) the applicant has been certified by the authority having jurisdiction for the incorporated volunteer fire company or fire department as an enrolled member of such incorporated volunteer fire company or fire department for at least five years or the applicant has been certified by the authority having jurisdiction for the incorporated voluntary ambulance service as an enrolled member of such incorporated voluntary ambulance service for at least five years. It shall be the duty and responsibility of the municipality which adopts a local law, ordinance or resolution pursuant to this section to determine the procedure for certification.

3. Any enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service who accrues more than twenty years of active service and is so certified by the authority having jurisdiction for the incorporated volunteer fire company, fire department or incorporated voluntary ambulance service, shall be granted the ten percent exemption as authorized by this section for the remainder of his or her life as long as his or her primary residence is located within such county provided that the governing body of a city, village, town or county, after a public hearing, adopts a local law, ordinance or resolution providing therefor.

4. Application for such exemption shall be filed with the assessor or other agency, department or office designated by the municipality offering such exemption on or before the taxable status date on a form as prescribed by the commissioner.

5. No applicant who is a volunteer firefighter or volunteer ambulance worker who by reason of such status is receiving any benefit under the provisions of this article on the effective date of this section shall suffer any diminution of such benefit because of the provisions of this section.

HISTORY:

Add, L 2004, ch 464, § 1, eff Jan 1, 2005 (see 2004 note below); amd, L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Editor's Notes: Laws 2004, ch 464, § 2, eff Jan 1, 2005, provides as follows:

§ 2. This act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to taxable status dates occurring on or after such date.

Subsection History: Sub 4, amd, L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Amendment Notes: 2010. Chaper 56, § 1 (Part W) amended:

Sub 4 by substituting at fig 1 "commissioner" for "state board".

§ 466-d. [There are four sections 466-d; added by L 2003, ch 131] Volunteer firefighters and volunteer ambulance workers; certain county

1. Real property owned by an enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service or such enrolled member and spouse residing in any county having a population of sixty-three thousand inhabitants but less than sixty-three thousand one hundred inhabitants, as determined in accordance with the latest decennial federal census, shall be exempt from taxation to the extent of ten percent of the assessed value of such property for city, village, town, part town, special district, county or school district purposes, exclusive of special assessments, provided that the governing body of a city, village, town, county or school district, after a public hearing, adopts a local law, ordinance or resolution providing therefor; provided further, however, that

such exemption shall in no event exceed three thousand dollars multiplied by the latest state equalization rate for the assessing unit in which such real property is located.

2. Such exemption shall not be granted to an enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service residing in such county unless:

(a) the applicant resides in the city, town, village or school district which is served by such incorporated volunteer fire company or fire department or incorporated voluntary ambulance service;

(b) the property is the primary residence of the applicant;

(c) the property is used exclusively for residential purposes; provided however, that in the event any portion of such property is not used exclusively for the applicant's residence but is used for other purposes, such portion shall be subject to taxation and the remaining portion only shall be entitled to the exemption provided by this section; and

(d) the applicant has been certified by the authority having jurisdiction for the incorporated volunteer fire company or fire department as an enrolled member of such incorporated volunteer fire company or fire department for at least five years or the applicant has been certified by the authority having jurisdiction for the incorporated voluntary ambulance service as an enrolled member of such incorporated voluntary ambulance service for at least five years. It shall be the duty and responsibility of the municipality which adopts a local law, ordinance or resolution pursuant to this section to determine the procedure for certification.

3. Any enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service who accrues more than twenty years of active service and is so certified by the authority having jurisdiction for the incorporated volunteer fire company, fire department or incorporated voluntary ambulance service, shall be granted the ten percent exemption as authorized by this section for the remainder of his or her life as long as his or her primary residence is located within such county provided that the governing body of a city, village, town or county, after a public hearing, adopts a local law, ordinance or resolution providing therefor.

4. Application for such exemption shall be filed with the assessor or other agency, department or office designated by the municipality offering such exemption on or before the taxable status date on a form prescribed by the commissioner.

5. No applicant who is a volunteer firefighter or volunteer ambulance worker who by reason of such status is receiving any benefit under the provisions of this article on the effective date of this section shall suffer any diminution of such benefit due to the receipt of a tax exemption provided pursuant to the provisions of this section.

HISTORY:

Add, L 2003, ch 131, § 1, eff Jan 1, 2004; amd, L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Editor's Notes Laws 2003, ch 131, § 2, eff Jan 1, 2004, provides as follows:

§ 2. This act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to taxable status dates occurring on or after such date.

Subsection History: Sub 4, amd, L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Amendment Notes 2010. Chaper 56, § 1 (Part W) amended:

Sub 4 by substituting at fig 1 "commissioner" for "state board".

§ 466-d. [There are four sections 466-d; added by L 2003, ch 133] Volunteer firefighters and volunteer ambulance workers; certain county

1. Real property owned by an enrolled member of an incorporated volunteer fire company, fire department or incorporated volunteer ambulance service or such enrolled member and spouse residing in any county having a population of more than forty-four thousand one hundred inhabitants but less than forty-four thousand six hundred inhabitants, determined in accordance with the latest decennial federal census, shall be exempt from taxation to the extent of ten percent of the assessed value of such property for city, village, town, part town, school district, special district or county purposes, exclusive of special assessments, provided that the governing body of a city, village, town, school district, or county, after a public hearing, adopts a local law, ordinance, or resolution providing therefor; provided further, however, that such exemption shall in no event exceed three thousand dollars multiplied by the latest state equalization rate for the assessing unit in which real property is located.

2. Such exemption shall not be granted to an enrolled member of an incorporated volunteer fire company, fire department or incorporated volunteer ambulance service residing in such county unless:

(a) the applicant resides in the city, town or village which is served by such incorporated volunteer fire company or fire department or incorporated voluntary ambulance service;

(b) the property is the primary residence of the applicant;

(c) the property is used exclusively for residential purposes; provided however, that in the event any portion of such property is not used exclusively for the applicant's residence but is used for other purposes, such portion shall be subject to taxation and the remaining portion only shall be entitled to the exemption provided by this section; and

(d) the applicant has been certified by the authority having jurisdiction for the incorporated volunteer fire company or fire department as an enrolled member of such incorporated volunteer fire company or fire department for at least five years or the applicant has been certified by the authority having jurisdiction for the incorporated voluntary ambu-

lance service as an enrolled member of such incorporated voluntary ambulance service for at least five years. It shall be the duty and responsibility of the municipality which adopts a local law, ordinance or resolution pursuant to this section to determine the procedure for certification.

3. Any enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service who accrues more than twenty years of active service and is so certified by the authority having jurisdiction for the incorporated volunteer fire company, fire department or incorporated voluntary ambulance service, shall be granted the ten percent exemption as authorized by this section for the remainder of his or her life as long as his or her primary residence is located within such county provided that the governing body of a city, village, town, school district, or county, after a public hearing, adopts a local law, ordinance or resolution providing therefor.

4. Application for such exemption shall be filed with the assessor or other agency, department or office designated by the municipality offering such exemption on or before the taxable status date on a form as prescribed by the commissioner.

5. No applicant who is a volunteer firefighter or volunteer ambulance worker who by reason of such status is receiving any benefit under the provisions of this article on the effective date of this section shall suffer any diminution of such benefit because of the provisions of this section.

HISTORY:

Add, L 2003, ch 133, § 1, eff Jan 1, 2004; amd, L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Editor's Notes Laws 2003, ch 133, § 2, eff Jan 1, 2004, provides as follows:

§ 2. This act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to assessment rolls prepared on the basis of taxable status dates occurring on or after such effective date.

Subsection History: Sub 4, amd, L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Amendment Notes 2010. Chaper 56, § 1 (Part W) amended:

Sub 4 by substituting at fig 1 "commissioner" for "state board".

§ 466-d. [There are four sections 466-d; added by L 2003, ch 142] Volunteer firefighters and volunteer ambulance workers

1. Real property owned by an enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service or such enrolled member and spouse residing in a county which has a population of more than nine hundred thousand and less than nine hundred fifty thousand persons, shall be exempt from taxation to the extent of ten percent of the assessed value of such property for city, village, town, part town, school district, special district or county purposes, exclusive of special assessments, provided that the governing body of a city, village, town, school district, or county, after a public hearing, adopts a local law, ordinance or resolution providing therefor.

2. Such exemption shall be granted to an enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service residing in such county only if:

(a) the applicant resides in the city, town or village which is served by such incorporated volunteer fire company or fire department or incorporated voluntary ambulance service;

(b) the property is the primary residence of the applicant;

(c) the property is used exclusively for residential purposes; provided, however, that in the event any portion of such property is not used exclusively for the applicant's residence but is used for other purposes, such portion shall be subject to taxation and the remaining portion only shall be entitled to the exemption provided by this section;

(d) the applicant has been certified by the authority having jurisdiction for the incorporated volunteer fire company or fire department as an enrolled member of such incorporated volunteer fire company or fire department for at least five years or the applicant has been certified by the authority having jurisdiction for the incorporated voluntary ambulance service as an enrolled member of such incorporated voluntary ambulance service for at least five years. It shall be the duty and responsibility of the municipality which adopts a local law, ordinance or resolution pursuant to this section to determine the procedure for certification; and

(e) (i) for volunteer firefighters, the area served by the volunteer fire company does not encompass any area served by a fire company having five or more professional firefighters.

(ii) for volunteer ambulance workers, the area served by the volunteer ambulance company does not encompass any area served by an ambulance company having five or more professional ambulance workers.

3. Any enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service who accrues more than twenty years of active service and is so certified by the authority having jurisdiction for the incorporated volunteer fire company, fire department or incorporated voluntary ambulance service, shall be granted the ten percent exemption as authorized by this section for the remainder of his or her life as long as his or her primary residence is located within such a county provided that the governing body of a city, village, town, school district or county, after a public hearing, adopts a local law, ordinance or resolution providing therefor.

4. Any volunteer firefighter or volunteer ambulance worker of such county who is or becomes permanently disabled due to the exercise of his or her duties as such firefighter or ambulance worker and who is prevented from being certified as an active service member shall be entitled to the an-

nual certification during the period of his or her disability.

5. Application for such exemption shall be filed with the assessor or other agency, department or office designated by the municipality offering such exemption on or before the taxable status date on a form as prescribed by the commissioner.

6. No applicant who is a volunteer firefighter or volunteer ambulance worker who by reason of such status is receiving any benefit under the provisions of this article on the effective date of this section shall suffer any diminution of such benefit because of the provisions of this section.

7. [Repealed]

HISTORY:

Add, L 2003, ch 142, § 1, eff July 22, 2003; amd, L 2004, ch 399, § 1, eff Aug 17, 2004; L 2006, ch 205, § 1, eff Jan 1, 2007; L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Editor's Notes Laws 2003, ch 142, § 2, eff July 22, 2003, provides as follows:

§ 2. This act shall take effect immediately and shall apply to assessment rolls prepared on the basis of taxable status dates occurring on or after such date.

Laws 2006, ch 205, § 2, eff Jan 1, 2007, provides as follows:

§ 2. This act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to taxable status dates occurring on or after such date.

Subsection History: Sub 1, amd, L 2006, ch 205, § 1, eff Jan 1, 2007 (see 2006 note below).

Sub 3, amd, L 2006, ch 205, § 1, eff Jan 1, 2007 (see 2006 note below).

Sub 5, amd, L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Sub 7, repealed, L 2004, ch 399, § 1, eff Aug 17, 2004.

Amendment Notes 2010. Chaper 56, § 1 (Part W) amended:

Sub 5 by substituting at fig 1 "commissioner" for "state board".

2006. Chaper 205, § 1 amended:

Sub 1 by adding the matter in italics.

Sub 3 by adding the matter in italics.

2004. Chaper 399, § 1 amended:

By repealing sub 7.

§ 466-d. [There are four sections 466-d; added by L 2003, ch 168] Volunteer firefighters and volunteer ambulance workers; certain counties

1. Real property owned by an enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service or such enrolled member and spouse residing in any county having a population of more than two hundred eighteen thousand but less than two hundred twenty-three thousand as determined in accordance with the latest decennial census, shall be exempt from taxation to the extent of ten percent of the assessed value of such property for city, village, town, part town, special district, or county purposes, exclusive of special assessments, provided that the governing body of a city, village, town, or county, after a public hearing, adopts a local law, ordinance or resolution providing therefor; provided further, however, that such exemption shall in no event exceed three thousand dollars multiplied by the latest state equalization rate for the assessing unit in which such real property is located.

2. Such exemption shall not be granted to an enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service residing in such county unless:

(a) the applicant resides in the city, town, or village which is served by such incorporated volunteer fire company or fire department or incorporated voluntary ambulance service;

(b) the property is the primary residence of the applicant;

(c) the property is used exclusively for residential purposes; provided however, that in the event any portion of such property is not used exclusively for the applicant's residence but is used for other purposes, such portion shall be subject to taxation and the remaining portion only shall be entitled to the exemption provided by this section; and

(d) the applicant has been certified by the authority having jurisdiction for the incorporated volunteer fire company or fire department as an enrolled member of such incorporated volunteer fire company or fire department for at least five years or the applicant has been certified by the authority having jurisdiction for the incorporated voluntary ambulance service as an enrolled member of such incorporated voluntary ambulance service for at least five years. It shall be the duty and responsibility of the municipality which adopts a local law, ordinance or resolution pursuant to this section to determine the procedure for certification.

3. Any enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service who accrues more than twenty years of active service and is so certified by the authority having jurisdiction for the incorporated volunteer fire company, fire department or incorporated voluntary ambulance service, shall be granted the ten percent exemption as authorized by this section for the remainder of his or her life as long as his or her primary residence is located within such county provided that the governing body of a city, village, town or county, after a public hearing, adopts a local law, ordinance or resolution providing therefor.

4. Application for such exemption shall be filed with the assessor or other agency, department or office designated by the municipality offering such exemption on or before the taxable status date on a form as prescribed by the commissioner.

5. No applicant who is a volunteer firefighter or volunteer ambulance worker who by reason of such status is receiving any benefit under the provisions of this article on the effective date of this section shall suffer any diminution of such benefit because of the provisions of this section.

HISTORY:

Add, L 2003, ch 168, § 1, eff Jan 1, 2004; amd, L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Editor's Notes Laws 2003, ch 168, § 2, eff Jan 1, 2004, provides as follows:

§ 2. This act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to taxable status dates occurring on or after such date.

Subsection History: Sub 4, amd, L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Amendment Notes 2010. Chaper 56, § 1 (Part W) amended:

Sub 4 by substituting at fig 1 "commissioner" for "state board".

Notes to Decisions

For purposes of 2007 income tax payments, volunteer firefighters and ambulance workers, who timely filed in 2006 for their real property tax exemptions, some or all of benefit of which they received on 2007 (or 2007-08) real property taxes, could still qualify for 2007 income tax credit; likewise, if they notified assessors by December 31, 2007 of their intention not to reapply by next taxable status date, they could qualify for 2007 income tax credit. 12 Op. Counsel SBRPS No. 8.

§ 466-e. [There are four sections 466-e; added by L 2004, ch 341] Volunteer firefighters and volunteer ambulance workers; certain county

1. Real property owned by an enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service or such enrolled member and spouse residing in any county having a population of more than two hundred twenty-five thousand inhabitants but less than two hundred fifty thousand inhabitants, determined in accordance with the two thousand federal census, shall be exempt from taxation to the extent of ten percent of the assessed value of such property for city, village, town, part town, special district or county purposes, exclusive of special assessments, provided that the governing body of a city, village, town or county, after a public hearing, adopts a local law, ordinance or resolution providing therefor; provided further, however, that such exemption shall in no event exceed three thousand dollars multiplied by the latest state equalization rate for the assessing unit in which such real property is located.

2. Such exemption shall not be granted to an enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service residing in such county unless:

(a) the applicant resides in the city, town or village which is served by such incorporated volunteer fire company or fire department or incorporated voluntary ambulance service;

(b) the property is the primary residence of the applicant;

(c) the property is used exclusively for residential purposes; provided however, that in the event any portion of such property is not used exclusively for the applicant's residence but is used for other purposes, such portion shall be subject to taxation and the remaining portion only shall be entitled to the exemption provided by this section; and

(d) the applicant has been certified by the authority having jurisdiction for the incorporated volunteer fire company or fire department as an enrolled member of such incorporated volunteer fire company or fire department for at least five years or the applicant has been certified by the authority having jurisdiction for the incorporated voluntary ambulance service as an enrolled member of such incorporated voluntary ambulance service for at least five years. It shall be the duty and responsibility of the municipality which adopts a local law, ordinance or resolution pursuant to this section to determine the procedure for certification.

3. Any enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service who accrues more than twenty years of active service and is so certified by the authority having jurisdiction for the incorporated volunteer fire company, fire department or incorporated voluntary ambulance service, shall be granted the ten percent exemption as authorized by this section for the remainder of his or her life as long as his or her primary residence is located within such county provided that the governing body of a city, village, town or county, after a public hearing, adopts a local law, ordinance or resolution providing therefor.

4. Application for such exemption shall be filed with the assessor or other agency, department or office designated by the municipality offering such exemption on or before the taxable status date on a form as prescribed by the commissioner.

5. No applicant who is a volunteer firefighter or volunteer ambulance worker who by reason of such status is receiving any benefit under the provisions of this article on the effective date of this section shall suffer any diminution of such benefit because of the provisions of this section.

HISTORY:

Add, L 2004, ch 341, § 1, eff Jan 1, 2005; amd, L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Editor's Notes Laws 2004, ch 341, § 2, eff Jan 1, 2005, provides as follows:

§ 2. This act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to taxable status dates occurring on or after such date.

Subsection History: Sub 4, amd, L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Amendment Notes 2010. Chapter 56, § 1 (Part W) amended:

Sub 4 by substituting at fig 1 "commissioner" for "state board".

§ 466-e. [There are four sections 466-e; added by L 2004, ch 395] Volunteer firefighters and volunteer ambulance workers; certain county

1. Real property owned by an enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service or such enrolled member and spouse residing in any county having a population of more than twenty-six thousand inhabitants but less than twenty-seven thousand five hundred inhabitants, determined in accordance with the latest decennial federal census, shall be exempt from taxation to the extent of ten percent of the assessed value of such property for

city, village, town, part town, special district, county or school district purposes, exclusive of special assessments, provided that the governing body of a village, town, city, county or school district, after a public hearing, adopts a local law, ordinance or resolution providing therefor; provided further, however, that such exemption shall in no event exceed three thousand dollars multiplied by the latest state equalization rate for the assessing unit in which such real property is located.

2. Such exemption shall not be granted to an enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service residing in such county unless:

(a) the applicant resides in the city, town, village or school district which is served by such incorporated volunteer fire company or fire department or incorporated voluntary ambulance service;

(b) the property is the primary residence of the applicant;

(c) the property is used exclusively for residential purposes; provided however, that in the event any portion of such property is not used exclusively for the applicant's residence but is used for other purposes, such portion shall be subject to taxation and the remaining portion only shall be entitled to the exemption provided by this section; and

(d) the applicant has been certified by the authority having jurisdiction for the incorporated volunteer fire company or fire department as an enrolled member of such incorporated volunteer fire company or fire department for at least five years or the applicant has been certified by the authority having jurisdiction for the incorporated voluntary ambulance service as an enrolled member of such incorporated voluntary ambulance service for at least five years. It shall be the duty and responsibility of the municipality which adopts a local law, ordinance or resolution pursuant to this section to determine the procedure for certification.

3. Any enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service who accrues more than twenty years of active service and is so certified by the authority having jurisdiction for the incorporated volunteer fire company, fire department or incorporated voluntary ambulance service, shall be granted the ten percent exemption as authorized by this section for the remainder of his or her life as long as his or her primary residence is located within such county provided that the governing body of a village, town, city, county or school district, after a public hearing, adopts a local law, ordinance or resolution providing therefor.

4. Application for such exemption shall be filed with the assessor or other agency, department or office designated by the municipality offering such exemption on or before the taxable status date on a form as prescribed by the commissioner.

5. No applicant who is a volunteer firefighter or volunteer ambulance worker who by reason of such status is receiving any benefit under the provisions of this article on the effective date of this section shall suffer any diminution of such benefit because of the provisions of this section.

HISTORY:

Add, L 2004, ch 395, § 1, eff Jan 1, 2005; amd, L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Editor's Notes Laws 2004, ch 395, § 2, eff Jan 1, 2005, provides as follows:

§ 2. This act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to taxable status dates occurring on or after such date.

Subsection History: Sub 4, amd, L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Amendment Notes 2010. Chapter 56, § 1 (Part W) amended:

Sub 4 by substituting at fig 1 "commissioner" for "state board".

§ 466-e. [There are four sections 466-e; added by L 2004, ch 705] Volunteer firefighters and volunteer ambulance workers; certain county

1. Real property owned by an enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service or such enrolled member and spouse residing in any county having a population of more than one hundred forty-six thousand inhabitants but less than one hundred fifty thousand inhabitants, determined in accordance with the latest federal dicennial [decennial]* census, shall be exempt from taxation to the extent of ten percent of the assessed value of such property for city, village, town, part town, special district, school district, fire district or county purposes, exclusive of special assessments, provided that the governing body of a city, village, town, school district, fire district or county, after a public hearing, adopts a local law, ordinance or resolution providing therefor; provided further, however, that such exemption shall in no event exceed three thousand dollars multiplied by the latest state equalization rate for the assessing unit in which such real property is located.

2. Such exemption shall not be granted to an enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service residing in such county unless:

(a) the applicant resides in the city, town or village which is served by such incorporated volunteer fire company or fire department or incorporated voluntary ambulance service;

(b) the property is the primary residence of the applicant;

(c) the property is used exclusively for residential purposes; provided however, that in the event any portion of such property is not used exclusively for the applicant's residence but is used for other purposes, such portion shall be subject to taxation and

*The bracketed word has been inserted by the Publisher.

the remaining portion only shall be entitled to the exemption provided by this section; and

(d) the applicant has been certified by the authority having jurisdiction for the incorporated volunteer fire company or fire department as an enrolled member of such incorporated volunteer fire company or fire department for at least five years or the applicant has been certified by the authority having jurisdiction for the incorporated voluntary ambulance service as an enrolled member of such incorporated voluntary ambulance service for at least five years. It shall be the duty and responsibility of the municipality, school district and/or fire district which adopts a local law, ordinance or resolution pursuant to this section to determine the procedure for certification.

3. Any enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service who accrues more than twenty years of active service and is so certified by the authority having jurisdiction for the incorporated volunteer fire company, fire department or incorporated voluntary ambulance service, shall be granted the ten percent exemption as authorized by this section for the remainder of his or her life as long as his or her primary residence is located within such county provided that the governing body of a city, village, town, school district, fire district or county, after a public hearing, adopts a local law, ordinance or resolution providing therefor.

4. Application for such exemption shall be filed with the assessor or other agency, department or office designated by the municipality, school district and/or fire district offering such exemption on or before the taxable status date on a form as prescribed by the commissioner.

5. No applicant who is a volunteer firefighter or volunteer ambulance worker who by reason of such status is receiving any benefit under the provisions of this article on the effective date of this section shall suffer any diminution of such benefit because of the provisions of this section.

HISTORY:

Add, L 2004, ch 705, § 1, eff Jan 1, 2005; amd, L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Editor's Notes Laws 2004, ch 705, § 2, eff Jan 1, 2005, provides as follows:

§ 2. This act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to taxable status dates occurring on or after such date.

Subsection History: Sub 4, amd, L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Amendment Notes 2010. Chapter 56, § 1 (Part W) amended:

Sub 4 by substituting at fig 1 "commissioner" for "state board".

§ 466-e. [There are four sections 466-e; added by L 2004, ch 708] Volunteer firefighters and volunteer ambulance workers; certain county

1. Real property owned by an enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service or such enrolled member and spouse residing in any county having a population of thirty-one thousand inhabitants but less than thirty-two thousand five hundred inhabitants, as determined in accordance with the latest decennial federal census, shall be exempt from taxation to the extent of ten percent of the assessed value of such property for city, village, town, part town, special district, county or school district purposes, exclusive of special assessments, provided that the governing body of a city, village, town, county or school district, after a public hearing, adopts a local law, ordinance or resolution providing therefor; provided further, however, that such exemption shall in no event exceed three thousand dollars multiplied by the latest state equalization rate for the assessing unit in which such real property is located.

2. Such exemption shall not be granted to an enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service residing in such county unless:

(a) the applicant resides in the city, town, village or school district which is served by such incorporated volunteer fire company or fire department or incorporated voluntary ambulance service;

(b) the property is the primary residence of the applicant;

(c) the property is used exclusively for residential purposes; provided, however, that in the event any portion of such property is not used exclusively for the applicant's residence but is used for other purposes, such portion shall be subject to taxation and the remaining portion only shall be entitled to the exemption provided by this section; and

(d) the applicant has been certified by the authority having jurisdiction for the incorporated volunteer fire company or fire department as an enrolled member of such incorporated volunteer fire company or fire department for at least five years or the applicant has been certified by the authority having jurisdiction for the incorporated voluntary ambulance service as an enrolled member of such incorporated voluntary ambulance service for at least five years. It shall be the duty and responsibility of the municipality which adopts a local law, ordinance or resolution pursuant to this section to determine the procedure for certification.

3. Any enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service who accrues more than twenty years of active service and is so certified by the authority having jurisdiction for the incorporated volunteer fire company, fire department or incorporated voluntary ambulance service, shall be granted the ten percent exemption as authorized by this section for the remainder of his or her life as long as his or her primary residence is located within such county provided that the governing body of a city, village, town or county, after a public hearing, adopts a local law, ordinance or resolution providing therefor.

4. Application for such exemption shall be filed with the assessor or other agency, department or office designated by the municipality offering such exemption on or before the taxable status date on a form prescribed by the commissioner.

5. No applicant who is a volunteer firefighter or volunteer ambulance worker who by reason of such status is receiving any benefit under the provisions of this article on the effective date of this section shall suffer any diminution of such benefit due to the receipt of a tax exemption provided pursuant to the provisions of this section.

HISTORY:

Add, L 2004, ch 708, § 1, eff Jan 1, 2005; amd, L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Editor's Notes Laws 2004, ch 708, § 2, eff Jan 1, 2005, provides as follows:

§ 2. This act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to taxable status dates occurring on or after such date.

Subsection History: Sub 4, amd, L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Amendment Notes 2010. Chapter 56, § 1 (Part W) amended:

Sub 4 by substituting at fig 1 "commissioner" for "state board".

§ 466-f. [There are five sections 466-f; added by L 2005, ch 74] Volunteer firefighters and volunteer ambulance workers; certain county

1. Real property owned by an enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service or such enrolled member and spouse residing in any county having a population of more than three hundred thousand inhabitants but less than three hundred fifty thousand inhabitants, determined in accordance with the latest decennial federal census, shall be exempt from taxation to the extent of ten percent of the assessed value of such property for village, town, part town, special district, city, county purposes or school districts, exclusive of special assessments, provided that the governing body of a village, town, city, county or school district, after a public hearing, adopts a local law, ordinance or resolution providing therefor; provided further, however, that such exemption shall in no event exceed three thousand dollars multiplied by the latest state equalization rate for the assessing unit in which such real property is located.

2. Such exemption shall not be granted to an enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service residing in such county unless:

(a) the applicant resides in the city, town, village or school district which is served by such incorporated volunteer fire company or fire department or incorporated voluntary ambulance service;

(b) the property is the primary residence of the applicant;

(c) the property is used exclusively for residential purposes; provided however, that in the event any portion of such property is not used exclusively for the applicant's residence but is used for other purposes, such portion shall be subject to taxation and the remaining portion only shall be entitled to the exemption provided by this section; and

(d) the applicant has been certified by the authority having jurisdiction for the incorporated volunteer fire company or fire department as an enrolled member of such incorporated volunteer fire company or fire department for at least five years or the applicant has been certified by the authority having jurisdiction for the incorporated voluntary ambulance service as an enrolled member of such incorporated voluntary ambulance service for at least five years. It shall be the duty and responsibility of the municipality which adopts a local law, ordinance or resolution pursuant to this section to determine the procedure for certification.

3. Any enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service who accrues more than twenty years of active service and is so certified by the authority having jurisdiction for the incorporated volunteer fire company, fire department or incorporated voluntary ambulance service, shall be granted the ten percent exemption as authorized by this section for the remainder of his or her life as long as his or her primary residence is located within such county provided that the governing body of a village, town, city, county or school district, after a public hearing, adopts a local law, ordinance or resolution providing therefor.

4. Application for such exemption shall be filed with the assessor or other agency, department or office designated by the municipality offering such exemption on or before the taxable status date on a form as prescribed by the commissioner.

5. No applicant who is a volunteer firefighter or volunteer ambulance worker who by reason of such status is receiving any benefit under the provisions of this article on the effective date of this section shall suffer any diminution of such benefit because of the provisions of this section.

HISTORY:

Add, L 2005, ch 74, § 1, eff Jan 1, 2006; amd, L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Editor's Notes Laws 2005, ch 74, § 2, eff Jan 1, 2006, provides as follows:

§ 2. This act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to taxable status dates occurring on or after such date.

Subsection History: Sub 4, amd, L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Amendment Notes 2010. Chapter 56, § 1 (Part W) amended:

Sub 4 by substituting at fig 1 "commissioner" for "state board".

§ 466-f. [There are five sections 466-f; added by L 2005, ch 189] Volunteer firefighters and volunteer ambulance workers; certain county

1. Real property owned by an enrolled member of an incorporated volunteer fire company, fire depart-

ment or incorporated voluntary ambulance service or such enrolled member and spouse residing in any county having a population of more than seventy-three thousand inhabitants but less than seventy-four thousand inhabitants, determined in accordance with the latest federal decennial census, shall be exempt from taxation to the extent of ten percent of the assessed value of such property for city, village, town, part town, special district, school district, fire district or county purposes, exclusive of special assessments, provided that the governing body of a city, village, town, school district, fire district or county, after a public hearing, adopts a local law, ordinance or resolution providing therefor; provided further, however, that such exemption shall in no event exceed three thousand dollars multiplied by the latest state equalization rate for the assessing unit in which such real property is located.

2. Such exemption shall not be granted to an enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service residing in such county unless:

(a) the applicant resides in the city, town or village which is served by such incorporated volunteer fire company or fire department or incorporated voluntary ambulance service;

(b) the property is the primary residence of the applicant;

(c) the property is used exclusively for residential purposes; provided however, that in the event any portion of such property is not used exclusively for the applicant's residence but is used for other purposes, such portion shall be subject to taxation and the remaining portion only shall be entitled to the exemption provided by this section; and

(d) the applicant has been certified by the authority having jurisdiction for the incorporated volunteer fire company or fire department as an enrolled member of such incorporated volunteer fire company or fire department for at least five years or the applicant has been certified by the authority having jurisdiction for the incorporated voluntary ambulance service as an enrolled member of such incorporated voluntary ambulance service for at least five years. It shall be the duty and responsibility of the municipality, school district and/or fire district which adopts a local law, ordinance or resolution pursuant to this section to determine the procedure for certification.

3. Any enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service who accrues more than twenty years of active service and is so certified by the authority having jurisdiction for the incorporated volunteer fire company, fire department or incorporated voluntary ambulance service, shall be granted the ten percent exemption as authorized by this section for the remainder of his or her life as long as his or her primary residence is located within such county provided that the governing body of a city, village, town, school district, fire district or county, after a public hearing, adopts a local law, ordinance or resolution providing therefor.

4. Application for such exemption shall be filed with the assessor or other agency, department or office designated by the municipality, school district and/or fire district offering such exemption on or before the taxable status date on a form as prescribed by the commissioner.

5. No applicant who is a volunteer firefighter or volunteer ambulance worker who by reason of such status is receiving any benefit under the provisions of this article on the effective date of this section shall suffer any diminution of such benefit because of the provisions of this section.

HISTORY:

Add, L 2005, ch 189, § 1, eff Jan 1, 2006; amd, L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Editor's Notes Laws 2005, ch 189, § 2, eff Jan 1, 2006, provides as follows:

§ 2. This act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to taxable status dates occurring on or after such date.

Subsection History: Sub 4, amd, L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Amendment Notes 2010. Chapter 56, § 1 (Part W) amended:

Sub 4 by substituting at fig 1 "commissioner" for "state board".

§ 466-f. [There are five sections 466-f; added by L 2005, ch 208] Volunteer firefighters and volunteer ambulance workers; certain counties

1. Real property owned by an enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service or such enrolled member and spouse residing in any county having a population of more than one hundred ten thousand inhabitants but less than one hundred thirteen thousand inhabitants, determined in accordance with the latest federal decennial census shall be exempt from taxation to the extent of ten percent of the assessed value of such property for city, village, town, part town, special district, school, or county purposes, exclusive of special assessments, provided that the governing body of a city, village, town, or county, after a public hearing, adopts a local law, ordinance, or resolution providing therefor; provided further, however, that such exemption shall in no event exceed three thousand dollars multiplied by the latest state equalization rate for the assessing unit in which such real property is located.

2. Such exemption shall not be granted to an enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service unless:

(a) the applicant resides in the city, town, or village which is served by such incorporated volunteer fire company or fire department or incorporated voluntary ambulance service;

(b) the property is the primary residence of the applicant;

(c) the property is used exclusively for residential purposes; provided however, that in the event any portion of such property is not used exclusively for the applicant's residence but is used for other purposes, such portion shall be subject to taxation and the remaining portion only shall be entitled to the exemption provided by this section; and

(d) the applicant has been certified by the authority having jurisdiction for the incorporated volunteer fire company or fire department as an enrolled member of such incorporated volunteer fire company or fire department for at least five years or the applicant has been certified by the authority having jurisdiction for the incorporated voluntary ambulance service as an enrolled member of such incorporated voluntary ambulance service for at least five years. It shall be the duty and responsibility of the municipality, school district, and/or fire district which adopts a local law, ordinance or resolution pursuant to this section to determine the procedure for certification.

3. Any enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service who accrues more than twenty years of active service and is so certified by the authority having jurisdiction for the incorporated volunteer fire company, fire department or incorporated voluntary ambulance service, shall be granted the ten percent exemption as authorized by this section for the remainder of his or her life as long as his or her primary residence is located within this state provided that the governing body of a city, village, town, school district, fire district, or county, after a public hearing, adopts a local law, ordinance or resolution providing therefor.

4. Application for such exemption shall be filed with the assessor or other agency, department or office designated by the municipality, school district, and/or fire district offering such exemption on or before the taxable status date on a form as prescribed by the commissioner.

5. No applicant who is a volunteer firefighter or volunteer ambulance worker who by reason of such status is receiving any benefit under the provisions of this article on the effective date of this section shall suffer any diminution of such benefit because of the provisions of this section.

HISTORY:

Add, L 2005, ch 208, § 1, eff Jan 1, 2006; amd, L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Editor's Notes Laws 2005, ch 208, § 2, eff Jan 1, 2006, provides as follows:

§ 2. This act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to taxable status dates occurring on or after such effective date.

Subsection History: Sub 4, amd, L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Amendment Notes 2010. Chapter 56, § 1 (Part W) amended:

Sub 4 by substituting at fig 1 "commissioner" for "state board".

Notes to Decisions

Member of volunteer firefighting company or volunteer ambulance corps who resides in town which receives services from such company only on mutual aid basis is not eligible for partial exemption based on minimum of 5 years service in volunteer firefighting company or volunteer ambulance corps. 11 Op. Counsel SBRPS No. 79.

§ 466-f. [There are five sections 466-f; added by L 2005, ch 244] Volunteer firefighters and volunteer ambulance workers; certain county

1. Real property owned by an enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service or such enrolled member and spouse residing in any county having a population of more than forty-nine thousand and less than forty-nine thousand nine hundred inhabitants, determined in accordance with the latest federal decennial census, shall be exempt from taxation to the extent of ten percent of the assessed value of such property for city, village, town, part town, special district, school district, fire district or county purposes, exclusive of special assessments, provided that the governing body of a city, village, town, school district, fire district or county, after a public hearing, adopts a local law, ordinance or resolution providing therefor.

2. Such exemption shall not be granted to an enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service residing in such county unless:

(a) the applicant resides in the city, town or village which is served by such incorporated volunteer fire company or fire department or incorporated voluntary ambulance service;

(b) the property is the primary residence of the applicant;

(c) the property is used exclusively for residential purposes; provided however, that in the event any portion of such property is not used exclusively for the applicant's residence but is used for other purposes, such portion shall be subject to taxation and the remaining portion only shall be entitled to the exemption provided by this section; and

(d) the applicant has been certified by the authority having jurisdiction for the incorporated volunteer fire company or fire department as an enrolled member of such incorporated volunteer fire company or fire department for at least five years or the applicant has been certified by the authority having jurisdiction for the incorporated voluntary ambulance service as an enrolled member of such incorporated voluntary ambulance service for at least five years. It shall be the duty and responsibility of the municipality, school district and/or fire district which adopts a local law, ordinance or resolution pursuant to this section to determine the procedure for certification.

3. Any enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service who accrues more than

twenty years of active service and is so certified by the authority having jurisdiction for the incorporated volunteer fire company, fire department or incorporated voluntary ambulance service, shall be granted the ten percent exemption as authorized by this section for the remainder of his or her life as long as his or her primary residence is located within such county provided that the governing body of a city, village, town, school district, fire district or county, after a public hearing, adopts a local law, ordinance or resolution providing therefor.

4. Application for such exemption shall be filed with the assessor or other agency, department or office designated by the municipality, school district and/or fire district offering such exemption on or before the taxable status date on a form as prescribed by the commissioner.

5. No applicant who is a volunteer firefighter or volunteer ambulance worker who by reason of such status is receiving any benefit under the provisions of this article on the effective date of this section shall suffer any diminution of such benefit because of the provisions of this section.

HISTORY:

Add, L 2005, ch 244, § 1, eff Jan 1, 2006; amd, L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Editor's Notes Laws 2005, ch 244, § 2, eff Jan 1, 2006, provides as follows:

§ 2. This act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to taxable status dates occurring on or after such date.

Subsection History: Sub 4, amd, L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Amendment Notes 2010. Chapter 56, § 1 (Part W) amended:

Sub 4 by substituting at fig 1 "commissioner" for "state board".

§ 466-f. [There are five sections 466-f; added by L 2005, ch 324] Un-remarried spouses of volunteer firefighters or volunteer ambulance workers killed in the line of duty

Any local law or ordinance adopted pursuant to sections four hundred sixty-six, four hundred sixty-six-a, four hundred sixty-six-b, four hundred sixty-six-c, four hundred sixty-six-d, or four hundred sixty-six-e of this title may be amended, or a local law, ordinance or resolution may be adopted to continue any exemption claimed under such statutes by an enrolled member of an incorporated volunteer fire company, fire department, or incorporated voluntary ambulance service, to such deceased enrolled member's un-remarried spouse if such member is killed in the line of duty; provided, however, that:

1. such un-remarried spouse is certified by the authority having jurisdiction for the incorporated volunteer fire company, fire department or incorporated voluntary ambulance service as an un-remarried spouse of an enrolled member of such incorporated volunteer fire company, fire department or incorporated voluntary ambulance service who was killed in the line of duty, and

2. such deceased volunteer had been an enrolled member for at least five years, and

3. such deceased volunteer had been receiving the exemption prior to his or her death.

HISTORY:

Add, L 2005, ch 324, § 1, eff Jan 1, 2006.

Editor's Notes Laws 2005, ch 324, § 2, eff Jan 1, 2006, provides as follows:

§ 2. This act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to taxable status dates occurring on or after such date.

Notes to Decisions

Un-remarried surviving spouse of volunteer firefighter or ambulance worker killed in performance of duties on behalf of another company, which accepted his or her service, may benefit from exemption offered by CLS RPTL § 466-f. 11 Op. Counsel SBRPS No. 66.

As it has been enacted, new CLS RPTL § 466-f (L 2005, ch 324) does not apply to municipality in county whose volunteer firefighter and/or ambulance worker exemption is governed by any other section of Real Property Tax Law such as CLS RPTL § 466-f or § 466-g. 11 Op. Counsel SBRPS No. 66.

Real Property Tax Law does not define phrase "killed in the line of duty" as used in CLS RPTL § 466-f, but such standard is similar to that in other provisions of law relating to benefits payable to injured firefighters or representatives of deceased volunteer firefighters, such as CLS Gen Mun § 205. 11 Op. Counsel SBRPS No. 66.

§ 466-g. [There are two sections 466-g; added by L 2005, ch 419] Volunteer firefighters and volunteer ambulance workers; certain county

1. Real property owned by an enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service or such enrolled member and spouse residing in any county having a population of more than four hundred fifty-eight thousand inhabitants but less than four hundred sixty thousand inhabitants, determined in accordance with the latest decennial federal census, shall be exempt from taxation to the extent of ten percent of the assessed value of such property for city, village, town, part town, special district, school district or county purposes, exclusive of special assessments, provided that the governing body of a city, village, town, school district, or county, after a public hearing, adopts a local law, ordinance or resolution providing therefor; provided further, however, that such exemption shall in no event exceed three thousand dollars multiplied by the latest state equalization rate for the assessing unit in which such real property is located.

2. Such exemption shall not be granted to an enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service residing in such county unless:

(a) the applicant resides in the city, town or village which is served by such incorporated volunteer fire company or fire department or incorporated voluntary ambulance service;

(b) the property is the primary residence of the applicant;

(c) the property is used exclusively for residential purposes; provided, however, that in the event any portion of such property is not used exclusively for the applicant's residence but is used for other purposes, such portion shall be subject to taxation and the remaining portion only shall be entitled to the exemption provided by this section; and

(d) the applicant has been certified by the authority having jurisdiction for the incorporated volunteer fire company or fire department as an enrolled member of such incorporated volunteer fire company or fire department for at least five years or the applicant has been certified by the authority having jurisdiction for the incorporated voluntary ambulance service as an enrolled member of such incorporated voluntary ambulance service for at least five years. It shall be the duty and responsibility of the municipality which adopts a local law, ordinance or resolution pursuant to this section to determine the procedure for certification.

3. Any enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service who accrues more than twenty years of active service and is so certified by the authority having jurisdiction for the incorporated volunteer fire company, fire department or incorporated voluntary ambulance service, shall be granted the ten percent exemption as authorized by this section for the remainder of his or her life as long as his or her primary residence is located within such county provided that the governing body of a city, village or town, after a public hearing, adopts a local law, ordinance or resolution providing therefor.

4. Application for such exemption shall be filed with the assessor or other agency, department or office designated by the municipality offering such exemption on or before the taxable status date on a form as prescribed by the commissioner.

5. No applicant who is a volunteer firefighter or volunteer ambulance worker who by reason of such status is receiving any benefit under the provisions of this article on the effective date of this section shall suffer any diminution of such benefit because of the provisions of this section.

HISTORY:

Add, L 2005, ch 419, § 1, eff Jan 1, 2006 (see 2005 note below); amd, L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Editor's Notes: Laws 2005, ch 419, § 2, eff Jan 1, 2006, provides as follows:

§ 2. This act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to assessment rolls prepared on the basis of taxable status dates occurring on or after such date.

Subsection History: Sub 4, amd, L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Amendment Notes: 2010. Chapter 56, § 1 (Part W) amended:

Sub 4 by substituting at fig 1 "commissioner" for "state board".

Notes to Decisions

Municipality may define "enrolled member" for purposes of volunteer firefighters and ambulance workers exemption available to members who have served for 5 years and continue to so serve (CLS RPTL § 466-g(2), added L 2005 ch 419) as one who is eligible under municipality's length of service award program (LOSAP). 11 Op. Counsel SBRPS No. 82.

§ 466-g. [There are two sections 466-g; added by L 2005, ch 712] Volunteer firefighters and volunteer ambulance workers; certain county

1. Real property owned by an enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service or such enrolled member and spouse residing in any county having a population of more than two hundred thousand six hundred inhabitants but less than two hundred five thousand inhabitants, determined in accordance with the latest decennial federal census, shall be exempt from taxation to the extent of ten percent of the assessed value of such property for city, village, town, part town, special district or county purposes, exclusive of special assessments, provided that the governing body of a city, village, town or county, after a public hearing, adopts a local law, ordinance or resolution providing therefor; provided further, however, that such exemption shall in no event exceed three thousand dollars multiplied by the latest state equalization rate for the assessing unit in which such real property is located.

2. Such exemption shall not be granted to an enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service residing in such county unless:

(a) the applicant resides in the city, town or village which is served by such incorporated volunteer fire company or fire department or incorporated voluntary ambulance service;

(b) the property is the primary residence of the applicant;

(c) the property is used exclusively for residential purposes; provided however, that in the event any portion of such property is not used exclusively for the applicant's residence but is used for other purposes, such portion shall be subject to taxation and the remaining portion only shall be entitled to the exemption provided by this section; and

(d) the applicant has been certified by the authority having jurisdiction for the incorporated volunteer fire company or fire department as an enrolled member of such incorporated volunteer fire company or fire department for at least five years or the applicant has been certified by the authority having jurisdiction for the incorporated voluntary ambulance service as an enrolled member of such incorporated voluntary ambulance service for at least five years. It shall be the duty and responsibility of the municipality which adopts a local law, ordinance or resolution pursuant to this section to determine the procedure for certification.

3. Any enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service who accrues more than twenty years of active service and is so certified by

the authority having jurisdiction for the incorporated volunteer fire company, fire department or incorporated voluntary ambulance service, shall be granted the ten percent exemption as authorized by this section for the remainder of his or her life as long as his or her primary residence is located within such county provided that the governing body of a city, village, town or county, after a public hearing, adopts a local law, ordinance or resolution providing therefor.

4. Application for such exemption shall be filed with the assessor or other agency, department or office designated by the municipality offering such exemption on or before the taxable status date on a form as prescribed by the commissioner.

5. No applicant who is a volunteer firefighter or volunteer ambulance worker who by reason of such status is receiving any benefit under the provisions of this article on the effective date of this section shall suffer any diminution of such benefit because of the provisions of this section.

HISTORY:

Add, L 2005, ch 712, § 1, eff Jan 1, 2006 (see 2005 note below); amd, L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Editor's Notes: Laws 2005, ch 712, § 2, eff Jan 1, 2006, provides as follows:

§ 2. This act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to taxable status dates occurring on or after such effective date.

Subsection History: Sub 4, amd, L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Amendment Notes: 2010. Chapter 56, § 1 (Part W) amended:

Sub 4 by substituting at fig 1 "commissioner" for "state board".

§ 466-h. [There are two sections 466-h; added by L 2006, ch 250] Volunteer firefighters and volunteer ambulance workers; certain county

1. Real property owned by an enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service or such enrolled member and spouse residing in any county having a population of more than one hundred seventy-five thousand but not more than one hundred eighty thousand inhabitants, determined in accordance with the latest decennial federal census, shall be exempt from taxation to the extent of ten percent of the assessed value of such property for city, village, town, part town, special district, school district or county purposes, exclusive of special assessments, provided that the governing body of a city, village, town, school district or county, after a public hearing, adopts a local law, ordinance or resolution providing therefor; provided further, however, that such exemption shall in no event exceed three thousand dollars multiplied by the latest state equalization rate for the assessing unit in which such real property is located.

2. Such exemption shall not be granted to an enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service residing in such county unless:

(a) the applicant resides in the city, town, school district or village which is served by such incorporated volunteer fire company or fire department or incorporated voluntary ambulance service;

(b) the property is the primary residence of the applicant;

(c) the property is used exclusively for residential purposes; provided however, that in the event any portion of such property is not used exclusively for the applicant's residence but is used for other purposes, such portion shall be subject to taxation and the remaining portion only shall be entitled to the exemption provided by this section; and

(d) the applicant has been certified by the authority having jurisdiction for the incorporated volunteer fire company or fire department as an enrolled member of such incorporated volunteer fire company or fire department for at least five years or the applicant has been certified by the authority having jurisdiction for the incorporated voluntary ambulance service as an enrolled member of such incorporated voluntary ambulance service for at least five years. It shall be the duty and responsibility of the municipality which adopts a local law, ordinance or resolution pursuant to this section to determine the procedure for certification.

3. Any enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service who accrues more than twenty years of active service and is so certified by the authority having jurisdiction for the incorporated volunteer fire company, fire department or incorporated voluntary ambulance service, shall be granted the ten percent exemption as authorized by this section for the remainder of his or her life as long as his or her primary residence is located within such county provided that the governing body of a city, village, town, school district or county, after a public hearing, adopts a local law, ordinance or resolution providing therefor.

4. Application for such exemption shall be filed with the assessor or other agency, department or office designated by the municipality offering such exemption on or before the taxable status date on a form as prescribed by the commissioner.

5. No applicant who is a volunteer firefighter or volunteer ambulance worker who by reason of such status is receiving any benefit under the provisions of this article on the effective date of this section shall suffer any diminution of such benefit because of the provisions of this section.

HISTORY:

Add, L 2006, ch 250, § 1, eff Jan 1, 2007; amd, L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Editor's Notes Laws 2006, ch 250, § 2, eff Jan 1, 2007, provides as follows:

§ 2. This act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to taxable status dates occurring on or after such effective date.

Subsection History: Sub 4, amd, L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Amendment Notes 2010. Chapter 56, § 1 (Part W) amended:

Sub 4 by substituting at fig 1 "commissioner" for "state board".

§ 466-h. [There are two sections 466-h; added by L 2006, ch 305] Un-remarried spouses of deceased volunteer firefighters or volunteer ambulance workers

Any local law or ordinance adopted pursuant to sections four hundred sixty-six, four hundred sixty-six-a, four hundred sixty-six-b, four hundred sixty-six-c, four hundred sixty-six-d, four hundred sixty-six-e, four hundred sixty-six-f or four hundred sixty-six-g of this title may be separately amended, or a local law, ordinance or resolution may be separately adopted to continue an exemption or reinstate a pre-existing exemption to an un-remarried spouse of a deceased enrolled member of an incorporated volunteer fire company, fire department, or incorporated voluntary ambulance service; provided, however, that:

1. such un-remarried spouse is certified by the authority having jurisdiction for the incorporated volunteer fire company, fire department or incorporated voluntary ambulance service as an un-remarried spouse of a deceased enrolled member of such incorporated volunteer fire company, fire department or incorporated voluntary ambulance service, and

2. such deceased volunteer had been an enrolled member for at least twenty years, and

3. such deceased volunteer and un-remarried spouse had been receiving the exemption for such property prior to the death of such volunteer.

HISTORY:

Add, L 2006, ch 305, § 1, eff Jan 1, 2007.

Editor's Notes Laws 2006, ch 305, § 2, eff Jan 1, 2007, provides as follows:

§ 2. This act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to taxable status dates occurring on or after such date.

§ 466-i. Volunteer firefighters and volunteer ambulance workers; certain counties

1. Real property owned by an enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service or such enrolled member and spouse residing in any county having a population of more than two hundred ninety-two thousand but less than two hundred ninety-seven thousand as determined in accordance with the latest decennial census, shall be exempt from taxation to the extent of ten percent of the assessed value of such property for city, village, town, part town, school district, special district, or county purposes, exclusive of special assessments, provided that the governing body of a city, village, town, school district, or county, after a public hearing, adopts a local law, ordinance or resolution providing therefor, provided further, however, that such exemption shall in no event exceed three thousand dollars multiplied by the latest state equalization rate for the assessing unit in which such real property is located.

2. Such exemption shall not be granted to an enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service residing in such county unless:

(a) the applicant resides in the city, town, or village which is served by such incorporated volunteer fire company or fire department or incorporated voluntary ambulance service;

(b) the property is the primary residence of the applicant;

(c) the property is used exclusively for residential purposes; provided however, that in the event any portion of such property is not used exclusively for the applicant's residence but is used for other purposes, such portion shall be subject to taxation and the remaining portion only shall be entitled to the exemption provided by this section; and

(d) the applicant has been certified by the authority having jurisdiction for the incorporated volunteer fire company or fire department as an enrolled member of such incorporated volunteer fire company or fire department for at least five years or the applicant has been certified by the authority having jurisdiction for the incorporated voluntary ambulance service as an enrolled member of such incorporated voluntary ambulance service for at least five years. It shall be the duty and responsibility of the municipality which adopts a local law, ordinance or resolution pursuant to this section to determine the procedure for certification.

3. Any enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service who accrues more than twenty years of active service and is so certified by the authority having jurisdiction for the incorporated volunteer fire company, fire department or incorporated voluntary ambulance service, shall be granted the ten percent exemption as authorized by this section for the remainder of his or her life as long as his or her primary residence is located within such county provided that the governing body of a city, village, town, school district, or county, after a public hearing, adopts a local law, ordinance or resolution providing therefor.

4. Application for such exemption shall be filed with the assessor or other agency, department or office designated by the municipality offering such exemption on or before the taxable status date on a form as prescribed by the commissioner.

5. No applicant who is a volunteer firefighter or volunteer ambulance worker who by reason of such status is receiving any benefit under the provisions of this article on the effective date of this section shall suffer any diminution of such benefit because of the provisions of this section.

HISTORY:

Add, L 2007, ch 424, § 1, eff Jan 1, 2008 (see 2007 note below); amd, L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Editor's Notes: Laws 2007, ch 424, § 2, eff Jan 1, 2008, provides as follows:

§ 2. This act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply totaxable status dates occurring on or after such date.

Subsection History: Sub 4, amd, L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Amendment Notes: 2010. Chapter 56, § 1 (Part W) amended:

Sub 4 by substituting at fig 1 "commissioner" for "state board".

§ 466-j. Volunteer firefighters and volunteer ambulance workers; certain county

1. Real property owned by an enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service or such enrolled member and spouse residing in any county having a population of more than seventy-nine thousand and less than eighty thousand inhabitants, determined in accordance with the latest federal decennial census, shall be exempt from taxation to the extent of ten percent of the assessed value of such property for city, village, town, part town, special district, school district, fire district or county purposes, exclusive of special assessments, provided that the governing body of a city, village, town, school district, fire district or county, after a public hearing, adopts a local law, ordinance or resolution providing therefor.

2. Such exemption shall not be granted to an enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service residing in such county unless:

(a) the applicant resides in the city, town or village which is served by such incorporated volunteer fire company or fire department or incorporated voluntary ambulance service;

(b) the property is the primary residence of the applicant;

(c) the property is used exclusively for residential purposes; provided however, that in the event any portion of such property is not used exclusively for the applicant's residence but is used for other purposes, such portion shall be subject to taxation and the remaining portion only shall be entitled to the exemption provided by this section; and

(d) the applicant has been certified by the authority having jurisdiction for the incorporated volunteer fire company or fire department as an enrolled member of such incorporated volunteer fire company or fire department for at least five years or the applicant has been certified by the authority having jurisdiction for the incorporated voluntary ambulance service as an enrolled member of such incorporated voluntary ambulance service for at least five years. It shall be the duty and responsibility of the municipality, school district and/or fire district which adopts a local law, ordinance or resolution pursuant to this section to determine the procedure for certification.

3. Any enrolled member of an incorporated volunteer fire company, fire department or incorporated voluntary ambulance service who accrues more than twenty years of active service and is so certified by the authority having jurisdiction for the incorporated volunteer fire company, fire department or incorporated voluntary ambulance service, shall be granted the ten percent exemption as authorized by this section for the remainder of his or her life as long as his or her primary residence is located within such county provided that the governing body of a city, village, town, school district, fire district or county, after a public hearing, adopts a local law, ordinance or resolution providing therefor.

4. Application for such exemption shall be filed with the assessor or other agency, department or office designated by the municipality, school district and/or fire district offering such exemption on or before the taxable status date on a form as prescribed by the commissioner.

5. No applicant who is a volunteer firefighter or volunteer ambulance worker who by reason of such status is receiving any benefit under the provisions of this article on the effective date of this section shall suffer any diminution of such benefit because of the provisions of this section.

HISTORY:

Add, L 2010, ch 392, § 1, eff Jan 1, 2011 (see 2010 note below); amd, L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Editor's Notes: Laws 2010, ch 392, § 2, eff Jan 1, 2011, provides as follows:

§ 2. This act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to taxable status dates occurring on or after such date.

Subsection History: Sub 4, amd, L 2010, ch 56, § 1 (Part W), eff June 22, 2010.

Amendment Notes: 2010. Chapter 56, § 1 (Part W) amended:

Sub 4 by substituting at fig 1 "commissioner" for "state board".

§ 468. Fire patrol and salvage corps

Real property owned by a corporation organized to maintain a fire patrol and salvage corps for the public benefit, which property is used exclusively for housing or storing property used exclusively for the purpose of such fire patrol and salvage corps, shall be exempt from taxation, provided such property is used and such service rendered indiscriminately and without charge for the public benefit; provided, however, that if a portion only of the real property of such a corporation is so used, such portion shall be exempt from taxation and the remaining portion shall be subject to taxation.

HISTORY:

Add, L 1958, ch 959, § 1, eff Oct 1, 1959 with substance derived from Tax Law § 4.

ARTICLE 5 Assessment Procedure

Title 4. Miscellaneous Provisions

Section
578. County assistance under cooperative agreements

HISTORY:
Add, L 1958, ch 959, § 1, eff Oct 1, 1959.

TITLE 4 Miscellaneous Provisions

HISTORY:
Add, L 1959, ch 733, § 9, eff Oct 1, 1959.

§ 578. County assistance under cooperative agreements

1. The legislative bodies of the counties and the governing boards of the cities, towns, villages and school districts or appropriate officers thereof authorized by such legislative body or governing board, as the case may be, shall have power to enter into contracts with each other for data processing and other mechanical assistance in the preparation of assessment rolls, tax rolls, tax bills and other assessment and property tax records and for supplies of field books, assessment rolls and other assessment and property tax forms.

2. (a) The legislative body of a county and the governing body of any city, town, village or school district therein shall have the power to enter into contracts with each other for the collection of taxes by the county treasurer. Such an agreement may either authorize the county treasurer to collect taxes jointly and concurrently with the tax collecting officer of such city, town, village or school district, or may delegate to the county treasurer the sole and exclusive authority to collect taxes for such city, town, village or school district. Such an agreement shall be considered a municipal cooperation agreement for purposes of article five-G of the general municipal law and shall be subject to all provisions thereof. Any such agreement shall be approved by both the city, town, village or school district and the county, by a majority vote of the voting strength of each governing body.

(b) An agreement that authorizes the county treasurer to collect taxes jointly and concurrently with the tax collecting officer of such city, town, village or school district shall have no effect upon the tenure, powers or duties of the incumbent tax collecting officer, except that the county treasurer shall also be considered a tax collecting officer of the city, town, village or school district, with all the powers and duties thereof. In no case shall such an agreement be construed to empower the tax collecting officer of a city, town, village or school district to collect taxes that have been returned to the county treasurer as unpaid.

(c) An agreement that delegates to the county treasurer the sole and exclusive authority to collect taxes for such city, town, village or school district shall have the effect of making the county treasurer the sole tax collecting officer of such city, town, village or school district, and of abolishing the separate office of tax collecting officer in such city, town, village or school district, for as long as the agreement shall be in effect. Provided, however, that if the office to be abolished is elective, the agreement shall be submitted for the approval of the electors of the contracting city, town or village in the manner provided by section twenty-three of the municipal home rule law. Provided further, that such an agreement shall not take effect during the term of an incumbent tax collecting officer, unless the office should become vacant prior to the expiration of such term. Upon the termination of such an agreement, the office of tax collecting officer shall be deemed reestablished as an appointive office of the city, town, village or school district, unless such office has been abolished or its functions transferred to another officer pursuant to law.

HISTORY:
Add, L 1970, ch 636, § 1, eff May 8, 1970; amd, L 2010, ch 56, § 4 (Part EE), eff June 22, 2010.

Amendment Notes: 2010. Chapter 56, § 4 (Part EE) amended:
By designating entire section as sub 1.
By adding sub 2.

Agency Opinions

An agreement between a town, which has an assessing unit, and a county, which does not, whereby the county provides assessment services to the town exceeds statutory authority where the services reached the level of actually assessing property, as distinguished from services under Real Property Tax Law §§ 572, 578 or 1532. While the county legislature may assign additional duties to the county director of real property tax services, it may not assign duties inconsistent with any general or special law, see Real Property Tax Law 1532(4). 9 Op Counsel SBEA No. 30 (1989).

RETIREMENT AND SOCIAL SECURITY LAW

Article
8. New York State and Local Police and Fire Retirement System

HISTORY:
Add, L 1955, ch 687, eff July 1, 1956.

ARTICLE 8 New York State and Local Police and Fire Retirement System

Title 8. Death Benefits and Disability Retirement

Section
363-f. Firefighters; presumption in certain diseases

HISTORY:
Add, L 1966, ch 1000, § 2, eff April 1, 1967; L 2018, ch 476, § 156, effective December 28, 2018.

TITLE 8 Death Benefits and Disability Retirement

HISTORY:
Add, L 1966, ch 1000, § 2, eff April 1, 1967.

§ 363-f. Firefighters; presumption in certain diseases

Notwithstanding any provision of this chapter or of any general, special or local law to the contrary, and for the purposes of this chapter, any condition of impairment of health caused by diseases of the lung, resulting in total or partial disability or death to a uniformed member of a paid fire department, where such member successfully passed a physical examination on entry into such service or subsequent thereto, which examination failed to reveal any evidence of such conditions, shall be presumptive evidence that such disability or death (1) was caused by the natural and proximate result of an accident, not caused by such firefighter's own negligence and (2) was incurred in the performance and discharge of duty, unless the contrary be proven by competent evidence. The provisions of this section shall remain in full force and effect to and including the thirtieth day of June, two thousand eight.

HISTORY:
Add, L 2002, ch 534, § 1, eff Sept 17, 2002, deemed eff on and after Sept 11, 2001; amd, L 2004, ch 132, § 1, eff June 29, 2004; L 2005, ch 89, § 1, eff June 7, 2005 (see 2005 note below); L 2006, ch 103, § 1, eff June 13, 2006.

Editor's Notes: Laws 2005, ch 89, § 3, eff June 7, 2005, provides as follows:

§ 3. This act shall take effect immediately provided that the amendments to section 363-f of the retirement and social security law and section 207-q of the general municipal law made by sections one and two, respectively, of this act shall be repealed on the same date as such sections.

Amendment Notes:

2006. Chapter 103, § 1 amended:
Par by deleting "six".

SOCIAL SERVICES LAW

Article
6. Children

HISTORY:
Add, L 1940, ch 619, eff Mar 1, 1941, amending generally State Charities Law, as amended, and consolidating Public Welfare Law therewith.

ARTICLE 6 Children

Title 6. Child Protective Services

Section
413. Persons and officials required to report cases of suspected child abuse or maltreatment

HISTORY:
Add, L 1940, ch 619, § 3, eff March 1, 1941.

TITLE 6 Child Protective Services

HISTORY:
Add, L 1973, ch 1039, § 1, eff Sept 1, 1973.

§ 413. Persons and officials required to report cases of suspected child abuse or maltreatment

1. (a) The following persons and officials are required to report or cause a report to be made in accordance with this title when they have reasonable cause to suspect that a child coming before them in their professional or official capacity is an abused or maltreated child, or when they have reasonable cause to suspect that a child is an abused or maltreated child where the parent, guardian, custodian or other person legally responsible for such child comes before them in their professional or official capacity and states from personal knowledge facts, conditions or circumstances which, if correct, would render the child an abused or maltreated child: any physician; registered physician assistant; surgeon; medical examiner; coroner; dentist; dental hygienist; osteopath; optometrist; chiropractor; podiatrist; resident; intern; psychologist; registered nurse; social worker; emergency medical technician; licensed creative arts therapist; licensed marriage and family therapist; licensed mental health counselor; licensed psychoanalyst; licensed behavior analyst; certified behavior analyst assistant; hospital personnel engaged in the admission, examination, care or treatment of persons; a Christian Science practitioner; school official, which includes but is not limited to school teacher, school guidance counselor, school psychologist, school social worker, school nurse, school administrator or other school personnel required to hold a teaching or administrative license or certificate; full or part-time compensated school employee required to hold a temporary coaching license or professional coaching certificate; social services worker; employee of a publicly-funded emergency shelter for families with children; director of a children's overnight camp, summer day camp or traveling summer day camp, as such camps are defined in section thirteen hundred ninety-two of the public health law; day care center worker; school-age child care worker; provider of family or group family day care; employee or volunteer in a residential care facility for children that is licensed, certified or operated by the office of children and family services; or any other child care or foster care worker; mental health professional; substance abuse counselor; alcoholism counselor; all persons credentialed by the office of alcoholism and substance abuse services; employees, who are expected to have regular and substantial contact with children, of a health home or health home care management agency contracting with a health home as designated by the department of health and authorized under section three hundred sixty-five-l of this chapter or such employees who provide home and community based services under a demonstration program pursuant to section eleven hundred fifteen of the federal social security act who are expected to have regular and substantial contact with children; peace officer; police officer; district attorney or assistant district attorney; investigator employed in the office of a district attorney; or other law enforcement official.

(b) Whenever such person is required to report under this title in his or her capacity as a member of the staff of a medical or other public or private institution, school, facility or agency, he or she shall make the report as required by this title and immediately notify the person in charge of such institution, school, facility or agency, or his or her designated agent. Such person in charge, or the designated agent of such person, shall be responsible for all subsequent administration necessitated by the report. Any report shall include the name, title and contact information for every staff person of the institution who is believed to have direct knowledge of the allegations in the report. Nothing in this section or title is intended to require more than one report from any such institution, school or agency.

(c) A medical or other public or private institution, school, facility or agency shall not take any retaliatory personnel action, as such term is defined in paragraph (e) of subdivision one of section seven hundred forty of the labor law, against an employee because such employee believes that he or she has reasonable cause to suspect that a child is an abused or maltreated child and that employee therefore makes a report in accordance with this title. No school, school official, child care provider, foster care provider, residential care facility provider, hospital, medical institution provider or mental health facility provider shall impose any conditions, including prior approval or prior notification, upon a member of their staff specifically required to report under this title. At the time of the making of a report, or at

any time thereafter, such person or official may exercise the right to request, pursuant to paragraph (A) of subdivision four of section four hundred twenty-two of this title, the findings of an investigation made pursuant to this title.

(d) Social services workers are required to report or cause a report to be made in accordance with this title when they have reasonable cause to suspect that a child is an abused or maltreated child where a person comes before them in their professional or official capacity and states from personal knowledge facts, conditions or circumstances which, if correct, would render the child an abused or maltreated child.

2. Any person, institution, school, facility, agency, organization, partnership or corporation which employs persons mandated to report suspected incidents of child abuse or maltreatment pursuant to subdivision one of this section shall provide consistent with section four hundred twenty-one of this chapter, all such current and new employees with written information explaining the reporting requirements set out in subdivision one of this section and in sections four hundred fifteen through four hundred twenty of this title. The employers shall be responsible for the costs associated with printing and distributing the written information.

3. Any state or local governmental agency or authorized agency which issues a license, certificate or permit to an individual to operate a family day care home or group family day care home shall provide each person currently holding or seeking such a license, certificate or permit with written information explaining the reporting requirements set out in subdivision one of this section and in sections four hundred fifteen through four hundred twenty of this title.

4. Any person, institution, school, facility, agency, organization, partnership or corporation, which employs persons who are mandated to report suspected incidents of child abuse or maltreatment pursuant to subdivision one of this section and whose employees, in the normal course of their employment, travel to locations where children reside, shall provide, consistent with section four hundred twenty-one of this title, all such current and new employees with information on recognizing the signs of an unlawful methamphetamine laboratory. Pursuant to section 19.27 of the mental hygiene law, the office of alcoholism and substance abuse services shall make available to such employers information on recognizing the signs of unlawful methamphetamine laboratories.

HISTORY:

Add, L 1973, ch 1039, § 1; amd, L 1979, ch 81, § 1; L 1980, ch 843, § 182; L 1984, ch 932, § 1; L 1985, ch 676, § 4; L 1985, ch 677, § 7; L 1986, ch 718, § 1, eff Nov 27, 1986; L 1988, ch 544, § 1; L 1989, ch 194, § 1, eff Jan 1, 1990; L 1994, ch 306, § 2, eff July 20, 1994; L 1995, ch 94, § 1, eff Sept 26, 1995; L 2001, ch 432, § 1, eff Feb 1, 2002; L 2002, ch 420, § 8, eff Sept 1, 2004; L 2002, ch 676, § 11, eff Jan 1, 2005; L 2005, ch 394, § 7, eff Nov 1, 2005; L 2007, ch 193, § 1, eff Oct 1, 2007; L 2007, ch 513, § 1, eff Oct 14, 2007; L 2008, ch 323, § 14, eff Jan 17, 2009; L 2008, ch 366, § 1, eff July 21, 2008; L 2011, ch 91, § 1, eff June 22, 2011; L 2012, ch 501, § 3 (Part D), eff June 30, 2013; L 2013, ch 554, § 12, eff July 1, 2014; L 2014, ch 126, § 6, effective July 22, 2014; L 2014, ch 205, § 1, effective July 1, 2015; L 2017, ch 56, § 2 (Part Q), effective July 19, 2017; L 2018, ch 57, § 7 (Part C), effective April 12, 2018.

Prior Law: Former § 413, add, L 1940, ch 619, § 4; repealed, L 1971, ch 947, § 1, eff July 1, 1971.

Editor's Notes: Laws 1992, ch 32, § 39, eff Oct 1, 1992, amended Laws 1985, ch 676, § 22 (as amd, L 1990, ch 55, § 1, L 1991, ch 250, § 1), so as to delete an expiration date of March 31, 1992 applicable to the 1985 amendment of this section.

Laws 2002, ch 420, § 9, eff Sept 1, 2004, provides as follows:

§ 9. a. Nothing in this act shall prohibit or limit the activities or services on the part of any person in the employ of a program or service operated, regulated, funded, or approved by the department of mental hygiene, the office of children and family services, the office of temporary and disability assistance, the department of corrections and community supervision, the state office for the aging, the department of health, or a local governmental unit as that term is defined in article 41 of the mental hygiene law or a social services district as defined in section 61 of the social services law, provided, however, this section shall not authorize the use of any title authorized pursuant to article 154 of the education law, except that this section shall be deemed repealed one year from the date that the regulations issued in accordance with section six of part Y of the chapter of the laws of 2018 which amended this subdivision appear in the state register, or the date such regulations are adopted, whichever is later; provided however that the state education department shall notify the legislative bill drafting commission upon the occurrence of the date such regulations appear in the state register and the date of their adoption in order that the commission may maintain an accurate and timely effective database of the official text of the laws of the state of New York in furtherance of effectuating the provisions of section 44 of the legislative law and section 70-b of the public officers law (Amd, L 2016, ch 59, § 1 (Part J), eff April 13, 2016; L 2018, ch 57, § 8 (Part Y), eff April 12, 2018).

Laws 2002, ch 420, § 11, eff Sept 1, 2004, provide as follows:

§ 11. This act shall take effect September 1, 2004; and provided, further, however, that the commissioner of education and the board of regents are authorized, prior to such effective date, to promulgate such rules or regulations as may be necessary for the timely implementation of this act.

Laws 2002, ch 676, § 19, sub 2, eff Dec 9, 2002, provides as follows:

§ 19. This act shall take effect immediately; provided that:

2. Sections seven, eight and nine and sections eleven through eighteen of this act shall take effect January 1, 2005; provided that the department of education is authorized to promulgate any and all rules and regulations and take any other measures necessary to implement sections seven, eight and nine and sections eleven through eighteen of this act on or before their effective date, including but not limited to the appointment of the state board for mental health practitioners, the acceptance and processing of applications for licensure, and the issuance of licenses; provided further that the provisions of article 163 of the education law requiring a license or limited permit to practice under such article shall not be enforced until January 1, 2006; provided further, however, that the provisions of such article 163 requiring a license or limited permit to practice under such article shall not be enforced until January 1, 2007 with respect to any individual who applied for a license pursuant to the provisions of subdivision 2 of section 8411 of the education law, unless such individual has otherwise been denied a license thereunder (Amd, L 2004, ch 210, § 8, eff July 27, 2004, L

2006, ch 130, § 1, eff July 5, 2006, deemed eff on and after Jan 1, 2006.).

Laws 2007, ch 513, § 2, eff Oct 14, 2007, provides as follows:

§ 2. This act shall take effect on the sixtieth day after it shall have become a law; provided, however, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized and directed to be made and completed on or before such effective date.

Laws 2008, ch 323, §§ 1, 19, eff July 21, 2008, provide as follows:

Section 1. Legislative findings. It is vital to provide a comprehensive state system to address the issue of residential child abuse and neglect. Children served in residential settings are particularly vulnerable and deserve at least as stringent a system of preventing and responding to abuse and neglect as those who live at home with their families. Accordingly, the government's response to abuse and neglect of children in residential care must provide full accountability and aggressively protect children from harm. It is therefore critical that the law employs appropriate standards to describe acts of abuse and neglect and delineates the processes that will be employed in response to findings made in an investigation of alleged abuse or neglect.

§ 19. This act shall take effect immediately; provided, however, that sections two, three, four, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen and eighteen of this act shall take effect on the one hundred eightieth day after it shall have become a law; provided, further, that effective immediately the office of children and family services, the state education department, the office of mental health, the office of mental retardation and developmental disabilities, the office of alcoholism and substance abuse services and the commission on quality of care and advocacy for persons with disabilities are hereby authorized to promulgate and adopt rules and regulations on an emergency basis as necessary for the purpose of implementing the provisions of this act.

Laws 2010, ch 130, § 16, eff June 18, 2010, deemed eff on and after June 1, 2010, provides as follows:

§ 16. [Formerly § 15, as renumbered § 16, L 2010, ch 132, § 5] This act shall take effect immediately; provided that sections thirteen, fourteen and fifteen of this act shall take effect immediately and shall be deemed to have been in full force and effect on and after June 1, 2010 and such sections shall be deemed repealed one year from the date that the regulations issued in accordance with section six of part Y of the chapter of the laws of 2018 which amended this section appear in the state register, or the date such regulations are adopted, whichever is later; provided however that the state education department shall notify the legislative bill drafting commission upon the occurrence of the date such regulations appear in the state register and the date of their adoption in order that the commission may maintain an accurate and timely effective database of the official text of the laws of the state of New York in furtherance of effectuating the provisions of section 44 of the legislative law and section 70-b of the public officers law; provided further that the amendments to section 9 of chapter 420 of the laws of 2002 amending the education law relating to the profession of social work made by section thirteen of this act shall repeal on the same date as such section repeals; provided further that the amendments to section 17-a of chapter 676 of the laws of 2002 amending the education law relating to the practice of psychology made by section fourteen of this act shall repeal on the same date as such section repeals (Amd, L 2010, ch 132, § 6, eff June 18, 2010, deemed eff on and after June 1, 2010, L 2013, ch 57, § 3 (Part AA), eff March 29, 2013, deemed eff on and after April 1, 2013; L 2016, ch 59, § 3 (Part J), eff April 13, 2016; L 2018, ch 57, § 10 (Part Y), eff April 12, 2018).

Laws 2012, ch 501, § 1, eff Dec 17, 2012, provides as follows:

Section 1. This act shall be known and may be cited as the "protection of people with special needs act".

Laws 2013, ch 554, §§ 15, 16, eff July 1, 2014, provide as follows:

§ 15. The provisions of sections eleven and twelve of this act shall not apply to persons applying for licensure or certification or to persons licensed or certified pursuant to section 8805 of the education law until such licensed or certified person re-registers their license or certification in accordance with the provisions of paragraph g of subdivisions 1 and 2 of section 8804 of the education law as added by section one of this act.

§ 16. This act shall take effect July 1, 2014: provided, however, that if section 3 of part D of chapter 501 of the laws of 2012 is not in effect on such date, then the amendments to paragraph (a) of subdivision 1 of section 413 of the social services law made by section twelve of this act shall take effect on the same date and in the same manner as such chapter of the laws of 2012, takes effect; provided further that sections six, seven, eight, nine and ten of this act and section 8805 of the education law as added by section one of this act shall take effect immediately; and provided further that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized and directed to be made and completed on or before such effective date.

Laws 2014, ch 126, § 13, eff July 22, 2014, provides:

§ 13. This act shall take effect immediately; provided, however, that if section 12 of chapter 554 of the laws of 2013 shall not have taken effect on or before such date then section six of this act shall take effect on the same date and in the same manner as such chapter of the laws of 2013 takes effect.

Laws 2014, ch 205, § 4, eff Aug 6, 2014, provides:

§ 4. This act shall take effect immediately; provided, however, that sections one and two of this act shall take effect on July 1, 2015; provided, further that if chapter 554 of the laws of 2013 shall not have taken effect on or before such date then section one of this act shall take effect on the same date and in the same manner as such chapter of the laws of 2013, takes effect; and provided that if chapter 8 of the laws of 2014 shall not have taken effect on or before such date then section two of this act shall take effect on the same date and in the same manner as such chapter of the laws of 2014, takes effect.

Laws 2017, ch 56, § 6 (Part Q), eff July 19, 2017, provides:

§ 6. This act shall take effect on the ninetieth day after it shall have become a law; provided however that: the commissioner of the office of children and family services, in consultation with the office of temporary and disability assistance, shall promulgate all rules and regulations necessary to implement the provisions of section two of this act; the commissioner of the office of temporary and disability assistance, in consultation with the office of children and family services, shall promulgate all rules and regulations necessary to implement the provisions of sections one and three of this act; and the commissioner of the division of criminal justice services, in consultation with the office of temporary and disability assistance, shall promulgate all rules and regulations necessary to implement the provisions of section four of this act; and provided further, the aforementioned rules or regulations may be promulgated on an emergency basis.

Amendment Notes: 2013. Chapter 554, § 12 amended:

Sub 1, par (a) by adding the matter in italics.

2012. Chapter 501, § 3 (Part D) amended:

Sub 1, par (c) by deleting at fig 1 "or section 45.07 of the mental hygiene law".

The 2014 amendment by ch 126, § 6 added "employee or volunteer in a residential care facility for children that is licensed, certified or operated by the office of children and family service" in 1(a) [first setout].

The 2014 amendment by ch 205, § 1 added "full or part-time compensated school employee required to hold a temporary coaching license or professional coaching certificate" in 1(a) [second setout].

The 2017 amendment by ch 56, § 2 (Part Q), added "employee of a publicly-funded emergency shelter for families with children" in 1(a).

The 2018 amendment by ch 57, § 7 (Part C), added "employees, who are expected to have regular and substantial contact with children, of a health home or health home care management agency contracting with a health home as designated by the department of health and authorized under section three hundred sixty-five-l of this chapter or such employees who provide home and community based services under a demonstration program pursuant to section eleven hundred fifteen of the federal social security act who are expected to have regular and substantial contact with children" in 1(a).

Notes to Decisions

Analysis

1. Constitutionality
2. Reporting requirement
3. Defamation
4. Immunity
5. Privileged communications
6. —Medical records
7. Illustrative cases
8. Under former Penal § 483d

1. Constitutionality

Parents alleged that the principal's report to state's Department of Child and Family Services was exaggerated and misleading, but even in the light most favorable to them, nothing in the report was materially false—the son wrote violent journal entries, misbehaved in school, and expressed suicidal thoughts, albeit in a hypothetical, creative, imagined way—furthermore, the principal's actions were expressly aimed at protecting the son, and the principal had a legal obligation to report suspected neglect. There was no evidence that the principal acted with the type of malice needed to shock the conscience. Cox v Warwick Valley Cent. Sch. Dist., 654 F.3d 267, 2011 U.S. App. LEXIS 17094 (2d Cir. N.Y. 2011).

Statutes requiring child welfare officials to follow guidelines and take affirmative actions to ensure well being and promote welfare of children in foster care (CLS Soc Serv §§ 411, 413, 415, 416, 417, 420, 421, 422, 423, 424-b, 424-c) were sufficiently mandatory to afford children in custody of New York City Child Welfare Administration right to protective services of which they could not be deprived without due process of law. Marisol A. by Forbes v Giuliani, 929 F. Supp. 662, 1996 U.S. Dist. LEXIS 8420 (S.D.N.Y. 1996), aff'd, 126 F.3d 372, 1997 U.S. App. LEXIS 27618 (2d Cir. N.Y. 1997).

Miranda warnings were required in a situation where petitioner made statements to a child youth services caseworker who was investigating charges relating to the sexual abuse of a child for which petitioner was incarcerated pending trial because various sections of the New York Social Services Law, including N.Y. Soc. Serv. Law §§ 413 and 424, required the caseworker to report to law enforcement, and the caseworker in this circumstance knew that law enforcement was listening in on the conversation for purposes of its investigation. Because of this violation, habeas corpus relief was warranted with respect to a conviction involving defendant's minor daughter because the statements to the caseworker had a substantial and injurious effect in determining the jury's verdicts, but that was not the case with respect to convictions involving three other alleged victims. Jackson v Conway, 765 F. Supp. 2d 192, 2011 U.S. Dist. LEXIS 17126 (W.D.N.Y. 2011), aff'd in part and rev'd in part, 763 F.3d 115, 2014 U.S. App. LEXIS 15589 (2d Cir. N.Y. 2014).

2. Reporting requirement

A complaint which alleges, in part, that a county is liable for its department of social services which had actual notice of conduct by foster parents constituting maltreatment of the infant plaintiff prior to the time that she was severely scalded due to their unfitness and carelessness states a cause of action against the county; in addition to the general legislative structure for the care and custody of children, the physical abuse or maltreatment of a child is required to be reported by social services workers and child care or foster care workers, among others (Social Services Law, § 413; 18 NYCRR 432.3) and in the event of a violation of this obligation the "person, official or institution required by this title to report a case of suspected child abuse or maltreatment who knowingly and willingly fails to do so shall be civilly liable for the damages proximately caused by such failure" (Social Services Law, § 420, subd 2); the statutory liability thus created, under a liberal construction of the pleadings, requires that the amended complaint be sustained. Bartels v County of Westchester, 76 A.D.2d 517, 429 N.Y.S.2d 906, 1980 N.Y. App. Div. LEXIS 12165 (N.Y. App. Div. 2d Dep't 1980).

County's and a school's argument that they were not required to report the mother's allegation of abuse to the New York Central Register as required by N.Y. Soc. Serv. Law § 413(1), because the brother was not a person legally responsible for his sister's care, was meritless, as it was not the duty of the mandated reporter to make that assessment; however, the court held that the supreme court abused its discretion by granting leave to serve a late notice of claim on behalf of the second daughter, as the second daughter was never the subject of any of the mother's reports of sexual abuse to the county or school. Catherine G. v County of Essex, 307 A.D.2d 446, 761 N.Y.S.2d 727, 2003 N.Y. App. Div. LEXIS 7702 (N.Y. App. Div. 3d Dep't 2003), aff'd in part, modified, 3 N.Y.3d 175, 785 N.Y.S.2d 369, 818 N.E.2d 1110, 2004 N.Y. LEXIS 2413 (N.Y. 2004).

Evidence including a child's medical records and a social worker's written assessment, together with the statutory presumption of good faith, established that defendant, acting in the scope of his employment as an emergency room physician, had reasonable cause to suspect that the child's skull fracture may have been the result of abuse or maltreatment and that he was acting in good faith when he discharged his statutory duty to report that suspicion. Hunter v Lourdes Hosp., 174 A.D.3d 1269, 107 N.Y.S.3d 482, 2019 N.Y. App. Div. LEXIS 5828 (N.Y. App. Div. 3d Dep't 2019).

While a child was a "child coming before" a school district, principal, and school psychologist, they could not rely on a third party's hearsay statements or the mother's general concerns to support "reasonable cause" to believe the child was being abused; therefore, there was no duty to report suspected child abuse under N.Y. Soc. Serv. Law § 413. Diana G-D v Bedford Cent. School Dist., 932 N.Y.S.2d 316, 33 Misc. 3d 970, 2011 N.Y. Misc. LEXIS 4978 (N.Y. Sup. Ct. 2011).

Trial court in a neglect proceeding improperly relied on the notation in a caseworker's notes that the child's uncle was a known drug dealer and kept drugs, drug records, and weapons in the grandmother's apartment under circumstances in which this information was provided by an emergency room doctor who did not testify at the hearing; the trial court incorrectly attributed this statement to the father, although the source of the doctor's information was unknown and there was no showing of who provided this information to the doctor. Even though the doctor was under a duty to report suspected child abuse and maltreatment, the critical statement was not based on the doctor's own knowledge or observations made in the course of treating the father, and in the absence of any information about the source, there was no way to ascertain whether the information given the doctor came from someone who also had a business duty to report it or would be admissible under another hearsay exception. Matter of Jaden C. (Phillip J.), 90 A.D.3d 485, 936 N.Y.S.2d 8, 2011 N.Y. App. Div. LEXIS 8802 (N.Y. App. Div. 1st Dep't 2011).

Persons serving as mediators in the Community Dispute Resolutions Center Program are not barred by the program's confidentiality provisions from reporting evidence of child abuse if such is neither the subject matter of the resolution process nor contained in the memoranda, work products or case files of a mediator. The reporting requirements of section 413 of the Social Services Law do not apply to the Program's mediators when they

are acting as such. 1983 NY Ops Atty Gen 83-F17, 1983 N.Y. AG LEXIS 4.

Credentialed and noncredentialed substance abuse and addiction counselors are mental health professionals required to report suspected incidents of child abuse and neglect pursuant to Social Services Law § 413. 1991 N.Y. Op. Att'y Gen. No. 91-F5, 1991 N.Y. AG LEXIS 77.

Social worker who failed to follow proper reporting procedure could be held liable under Social Services Law to allegedly abused foster child, even though she lacked authority to remove child from foster home. Doe by Hickey v Jefferson County, 985 F. Supp. 66, 1997 U.S. Dist. LEXIS 21525 (N.D.N.Y. 1997).

Supplemental jurisdiction will be exercised over state-law claims, in action against numerous defendants claiming various constitutional and state-law violations arising from abuse of 7-year-old child in foster care, because state claims, including social worker's alleged violation of CLS Soc Serv Law § 413, arise from same case or controversy as federal claims. Doe by Hickey v Jefferson County, 985 F. Supp. 66, 1997 U.S. Dist. LEXIS 21525 (N.D.N.Y. 1997).

Claims against the medical group for violation of statutory duties as a mandatory reporter failed as liability only attached if a failure to report was willful and knowing; the children did not make any allegations that this standard was met as to the medical group or present any facts supporting such a claim. Page v Monroe, 488 F. Supp. 2d 219, 2007 U.S. Dist. LEXIS 35978 (N.D.N.Y. 2007), aff'd in part and rev'd in part, 300 Fed. Appx. 71, 2008 U.S. App. LEXIS 23407 (2d Cir. N.Y. 2008).

For the claim against the doctor for violating her statutory duties as a mandatory reporter to succeed, a reasonable juror was to be able to conclude that the doctor's failure to report the children's mother was willful and knowing and that that failure caused the childrens' harm; no reasonable juror could so conclude as the children never alleged that the doctor's failure to report was knowing and willful. Instead, they alleged that the doctor had reasonable cause to suspect that the children were abused or neglected children and thus should have suspected, even if she did not; even if the children were able to show that the doctor's actions constituted a breach of the duty of care, they were not able to show that this failure was the proximate cause of injury suffered by the children. Page v Monroe, 488 F. Supp. 2d 219, 2007 U.S. Dist. LEXIS 35978 (N.D.N.Y. 2007), aff'd in part and rev'd in part, 300 Fed. Appx. 71, 2008 U.S. App. LEXIS 23407 (2d Cir. N.Y. 2008).

Credentialed alcoholism counselors are mental health professionals required to report suspected incidents of child abuse and neglect pursuant to CLS Soc Serv Law § 413. 1989 N.Y. Op. Att'y Gen. No. 89-F5, 1989 N.Y. AG LEXIS 33.

In litigation that arose out of sexual relationship between minor high school student and teacher, failure to report child abuse claim against another teacher failed because parent did not file required pre-litigation notice. RF v S. Country Cent. Sch. Dist., 2016 U.S. Dist. LEXIS 130671 (E.D.N.Y. Sept. 23, 2016).

3. Defamation

In a defamation and malicious prosecution case brought by a father against a social worker based on reports made by the social worker alleging that the father had abused his children, summary judgment in favor of the social worker was affirmed where she submitted evidence establishing that the children made statements to her during therapy sessions which provided her with reasonable cause to suspect that they had been abused by the father and that she acted in good faith in reporting her suspicions; since the father failed to submit evidence showing that there was a fact issue as to whether the social worker engaged in misconduct or gross negligence, or as to whether the social worker acted with actual malice, the social worker was entitled to immunity under that N.Y. Soc. Serv. Law § 413. Rine v Chase, 309 A.D.2d 796, 765 N.Y.S.2d 648, 2003 N.Y. App. Div. LEXIS 10635 (N.Y. App. Div. 2d Dep't 2003).

Defamation complaint should not have been dismissed where it alleged that residents, who were not presumptively privileged, made a false report of child abuse, did not have reasonable cause to suspect child abuse, and did not act in good faith. Vaz v Sipsas, 1 A.D.3d 503, 767 N.Y.S.2d 250, 2003 N.Y. App. Div. LEXIS 12111 (N.Y. App. Div. 2d Dep't 2003).

Child was brought to the emergency department of a hospital by his mother for treatment of a laceration to his right ring finger which had occurred the previous day while the child was visiting his father and the triage nurse on duty reported to the New York Child Protective Services (CPS) her suspicion of the father's maltreatment or abuse of the child, but the CPS determined that there was no credible evidence to support the allegations and designated the report as unfounded; however, the trial court properly granted the nurse's motion for summary judgment dismissing the father's suit against him alleging that she willfully made false statements against him with the intent of inflicting harm on him because (1) the nurse submitted her own affidavit and that of her nursing supervisor and the child's hospital medical records establishing that she had reasonable cause to suspect that the child had been maltreated by the father, and that in reporting to the CPS she was discharging her duties under N.Y. Soc. Serv. Law. § 413 and following hospital policy and was immune from a lawsuit under N.Y. Soc. Serv. Law § 419; and (2) the father submitted no medical affidavits or affirmations or other probative proof supporting his speculative claims that the nurse had engaged in any misconduct or gross negligence, that her suspicions had been groundless, or to rebut the presumption of good faith. Lentini v Page, 5 A.D.3d 914, 773 N.Y.S.2d 472, 2004 N.Y. App. Div. LEXIS 2550 (N.Y. App. Div. 3d Dep't 2004).

4. Immunity

Because a social services worker was a mandated reporter under N.Y. Soc. Serv. Law § 413(1), and because there was no evidence that the worker was guilty of willful misconduct or gross negligence, the worker was entitled to immunity under N.Y. Soc. Serv. Law § 419 for reporting the suspected abuse and the removal of the parents' child. Goldberg v Edson, 41 A.D.3d 428, 838 N.Y.S.2d 145, 2007 N.Y. App. Div. LEXIS 6978 (N.Y. App. Div. 2d Dep't 2007).

Where school employees asserted immunity from liability pursuant to N.Y. Soc. Serv. Law §§ 413 and 419, triable issues of fact existed as to whether the school employees had reasonable cause to suspect possible child abuse or maltreatment of a child by the mother, based on the mother's hitting the child's hand, and whether they reported the alleged abuse or maltreatment in good faith. Biondo v Ossining Union Free School Dist., 66 A.D.3d 725, 888 N.Y.S.2d 75, 2009 N.Y. App. Div. LEXIS 7247 (N.Y. App. Div. 2d Dep't 2009).

Teacher, speech therapist, and principal are entitled to qualified immunity, even though they made reports of suspected child abuse that led to temporary removal of child and investigation of plaintiff parents, where they had no reason to doubt accuracy of "facilitated communication" with developmentally disabled child, because it is clear that educators had obligation to report suspected child abuse under CLS Soc Serv Law § 413. Zappala v Albicelli, 980 F. Supp. 635, 1997 U.S. Dist. LEXIS 16133 (N.D.N.Y. 1997), aff'd, 1999 U.S. App. LEXIS 3827 (2d Cir. N.Y. Mar. 11, 1999).

School defendants were entitled to qualified immunity in § 1983 action arising from their investigation of possible sexual abuse by father of developmentally disabled child, where they had relied substantially on evidence derived through facilitated communication in determining that it was necessary to file report with Child Abuse Central Registry; even if facilitated communication yielded false information, defendants' actions were still objectively reasonable because, at relevant time, they had no reason to believe that facilitated communication yielded false results, or even that it was highly suspect. Zappala v Albicelli, 980 F. Supp. 635, 1997 U.S. Dist. LEXIS 16133 (N.D.N.Y. 1997), aff'd, 1999 U.S. App. LEXIS 3827 (2d Cir. N.Y. Mar. 11, 1999).

5. Privileged communications

Exception to the physician-patient privilege applicable in child welfare proceedings did not apply in a murder prosecution in which an important issue was whether the child had been born alive; however, the reporting requirements applicable to professionals overcame the privilege in cases involving death. People v Strawbridge, 299 A.D.2d 584, 751 N.Y.S.2d 606, 2002 N.Y. App.

Div. LEXIS 10572 (N.Y. App. Div. 3d Dep't 2002), app. denied, 99 N.Y.2d 632, 760 N.Y.S.2d 114, 790 N.E.2d 288, 2003 N.Y. LEXIS 1226 (N.Y. 2003), app. denied, 100 N.Y.2d 599, 766 N.Y.S.2d 175, 798 N.E.2d 359, 2003 N.Y. LEXIS 3642 (N.Y. 2003).

Defendant's three-month-old child, who defendant was charged with having beaten, was the client of social workers who had discussed the case with defendant and offered counseling to defendant and his wife so that social workers could disclose to the grand jury all pertinent information regarding the suspected crime regardless of any social worker-client privilege. People v Easter, 90 Misc. 2d 748, 395 N.Y.S.2d 926, 1977 N.Y. Misc. LEXIS 2145 (N.Y. County Ct. 1977).

Duty of health care professionals to report suspected cases of child abuse to social services agency under CLS Soc Serv §§ 413 and 415 suspends application of CLS CPLR § 4504(a) physician-patient privilege in all judicial proceedings involving child abuse or maltreatment, not just child protective proceedings under CLS Family Ct Act § 1046(a)(vii); thus, physician is not precluded by privilege from testifying before grand jury as to incriminating statements made to him by defendant where those statements were impetus for statutorily required report of suspected child abuse or maltreatment. People v Gearhart, 148 Misc. 2d 249, 560 N.Y.S.2d 247, 1990 N.Y. Misc. LEXIS 423 (N.Y. County Ct. 1990).

Neither CPLR 4504(a) nor any other statute specifically includes emergency medical technicians (EMT's) among those to whom communications may be privileged. To the contrary, the legislature has in Social Services Law § 413 specifically included EMT's as well as physicians as mandated reporters of suspected child abuse or maltreatment. People v Sergio, 864 N.Y.S.2d 264, 21 Misc. 3d 451, 240 N.Y.L.J. 54, 2008 N.Y. Misc. LEXIS 5304 (N.Y. Sup. Ct. 2008).

6. —Medical records

A hospital that files a report of suspected child abuse or maltreatment as required by law (Social Services Law §§ 413, 415) is also required to provide the medical records of the alleged victim to the investigating caseworker from Child Protective Services since the legislative mandate to furnish medical information essential to a prompt and thorough investigation removes any barrier to the release of the medical records from which such information is gleaned. Since release of medical records is required by law, the hospital is entitled to immunity (Social Services Law § 419) and need not fear exposure to civil liability. Schuyler County Dep't of Social Services by Balch v Schuyler Hospital, Inc., 144 Misc. 2d 250, 543 N.Y.S.2d 872, 1989 N.Y. Misc. LEXIS 446 (N.Y. Sup. Ct. 1989).

7. Illustrative cases

Because the statute could not be considered to channel official discretion meaningfully, plaintiffs could not plausibly claim that the preventative child abuse services they were allegedly denied were constitutionally protected liberty or property rights subject to due process scrutiny; hence, plaintiffs' procedural due process claim against a public hospital was dismissed. Jones v Nickens, 961 F. Supp. 2d 475, 2013 U.S. Dist. LEXIS 117743 (E.D.N.Y. 2013), dismissed, in part, dismissed without prejudice, 236 F. Supp. 3d 688, 2017 U.S. Dist. LEXIS 24079 (E.D.N.Y. 2017).

Complaint should have been dismissed–plaintiffs seek compensatory and punitive damages arising out of report by defendant medical center of suspected sexual abuse of plaintiffs' infant children; on October 10, 1986, plaintiff mother brought her three-year-old daughter to defendant for examination; child had sore throat and vaginal discharge; when mother stated that her daughter's seven-year-old cousin who lived in same household had similar discharge, she was told to bring both children in for examination next day; during examination of seven year old on October 11 child seemed very frightened and Spanish interpreter was summoned; although child's answers to questions about sexual abuse were negative, interpreter believed that child was not being truthful and that she was "afraid of something"; physical examination of seven year old revealed that she, too, had vaginal discharge; throat and vaginal cultures were taken from both children and sent to laboratory for testing for venereal disease–defendant's employees, pursuant to their obligations under Social Services Law § 413, reported matter to Bureau of Child Welfare, which removed children from their parents' custody–initial test results available to defendant as of 4:30 A.M., on October 11 were ambiguous; it was not until October 13 that final results for both children ruled out possibility of venereal disease; defendant's employees acted reasonably under circumstances; mandated reporters need not await conclusive evidence of abuse or maltreatment but must act on their reasonable suspicions and law allows them degree of latitude to err on side of protecting children who may be suffering from abuse. Isabelle V. v New York, 150 A.D.2d 312, 541 N.Y.S.2d 809, 1989 N.Y. App. Div. LEXIS 7127 (N.Y. App. Div. 1st Dep't 1989).

Plaintiff seeking damages for physical and mental abuse, allegedly suffered as result of defendant foster care agency's negligent supervision of his placement in foster homes, was not entitled to directed verdict based on admission of caseworker that she did not inform Department of Social Services of plaintiff's allegations of physical abuse in foster home, since caseworker also testified that plaintiff admitted to having fabricated allegation, and thus no case of suspected child abuse existed to be reported. Ivan John M. v Catholic Home Bureau, 182 A.D.2d 421, 582 N.Y.S.2d 154, 1992 N.Y. App. Div. LEXIS 5602 (N.Y. App. Div. 1st Dep't 1992).

In action for damages for physical and mental abuse, allegedly suffered as result of defendant foster care agency's negligent supervision of plaintiff's placement in foster homes, court was not required to charge jury with either requirements of CLS Soc Serv § 413 or legal consequences of failure to comply therewith, although court should have charged that failure by foster care agency to report instance of suspected child abuse would constitute negligence as matter of law, where court's charge clearly instructed jury that defendant would be liable under negligence theory if evidence established that it had notice of abuse, failed to take reasonable steps to stop abuse, and that plaintiff was subsequently abused. Ivan John M. v Catholic Home Bureau, 182 A.D.2d 421, 582 N.Y.S.2d 154, 1992 N.Y. App. Div. LEXIS 5602 (N.Y. App. Div. 1st Dep't 1992).

Dismissal of action for defamation and intentional infliction of emotional distress was not warranted where first defendant, allegedly at direction of second defendant, erroneously reported that plaintiffs had committed physical and sexual child abuse, and there were triable issues of fact as to whether first defendant was mandated reporter entitled to presumption of good faith under CLS Soc Serv § 413 and, if so, whether presumption was rebutted. Lieberman v Scully, 273 A.D.2d 279, 709 N.Y.S.2d 583, 2000 N.Y. App. Div. LEXIS 6480 (N.Y. App. Div. 2d Dep't 2000).

8. Under former Penal § 483d

In an action investigating charges of an allegedly "battered child" evidence which established that the child exhibited a pattern of nervous behavior, apprehension and withdrawal, bruised buttocks, a severe scalp wound requiring five sutures, and a broken arm constituted by virtue of the cumulative effect of the injuries an overall pattern which warranted a finding that the parent or persons having lawful custody of the child had committed or omitted performance of those duties owed to the child resulting in substantial injuries, and further compelling a finding that the child was a "neglected child" within the meaning of § 312 of the Family Court Act. In re Young, 50 Misc. 2d 271, 270 N.Y.S.2d 250, 1966 N.Y. Misc. LEXIS 1854 (N.Y. Fam. Ct. 1966).

Increasing community concern with the care and protection of the abused child has manifested itself in criminal legislation requiring a report to an appropriate public agency of a serious injury or injuries to a child which it is believed is the result of abuse or neglect, by the physician, superintendent, or person in charge of the hospital or other institution where such child's injuries are being treated. In re Young, 50 Misc. 2d 271, 270 N.Y.S.2d 250, 1966 N.Y. Misc. LEXIS 1854 (N.Y. Fam. Ct. 1966).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 390, 422, 422-c; CLS Family Ct Act § 1046.

Functions, powers and duties of the commission, CLS Men Hyg § 45.07.

Codes, Rules and Regulations:

Child abuse and maltreatment. 18 NYCRR §§ 432.1 et seq.

Jurisprudences:

42 Am Jur 2d, Infants § 15.

15A Am Jur Pl & Pr Forms (Rev), Juvenile Courts and Delinquent and Dependent Children, Form 92.

2 Am Jur Proof of Facts 2d 365, Child Abuse–The Battered Child Syndrome.

6 Am Jur Proof of Facts 2d 345, Failure to Report Suspected Case of Child Abuse.

22 Am Jur Trials 347, Child Custody Litigation.

14 Am Jur Trials 619, Juvenile Court Proceedings.

Causes of Action:

Cause of Action Against Physician or Other Health Care Provider for Failure to Report Child Abuse. 35 COA2d 225.

Law Reviews:

Agatstein, Child abuse reporting in New York State: the dilemma of the mental health professional. 34 N.Y.L. Sch. L. Rev. 115.

Appleman on Insurance:

1-12 New Appleman New York Insurance Law § 12.06.

Texts: 4 Frumer & Biskind, Bender's New York Evidence —CPLR §§ 12.04, 12.07, 12.08.

STATE FINANCE LAW

Article
4-A. State Assistance to Local Government
VI. Funds of the State
XI. State Purchasing

HISTORY:
Add, L 1940, ch 593, eff April 18, 1940.

ARTICLE 4-A State Assistance to Local Government

Section
54-e. State assistance to reimburse municipalities for firefighting costs

HISTORY:
Add, L 1946, ch 301, § 1, eff April 1, 1946.

§ 54-e. State assistance to reimburse municipalities for firefighting costs

1. As used in this section, unless otherwise expressly stated:

a. "Normal operating expenses" shall mean those costs, losses and expenses which are ordinarily associated with the maintenance, administration and day-to-day operations of the fire department of a municipality. Such expenses shall include, but not be limited to, the ordinary wages of firefighters, administrative and other overhead costs, depreciation, the costs of litigation and the costs of employee's benefits, including insurance, disability, death, or health care whether or not such costs are incurred as the result of firefighting services rendered to property under the jurisdiction of the state of New York.

b. "Firefighting costs" shall mean those expenses and losses which would not have been incurred had not the fire in question taken place. Such costs shall include, but not be limited to, salaries for specially employed personnel, costs of supplies expended, and the lesser of (1) the cost of repairing any destroyed or damaged equipment or (2) the value of such equipment immediately preceding the fire. Firefighting costs shall not include: normal operating expenses as defined herein, any firefighting cost for which the municipality is reimbursed under a policy of insurance or any costs associated with false alarms, regardless of cause.

c. "Claim" shall mean that amount which is equal to those firefighting costs incurred by a municipality to the extent that such costs exceed the sum of two hundred fifty dollars.

d. "Fire" shall mean any instance of destructive and uncontrolled burning on property under the jurisdiction of the state of New York including scorch burns and explosions of combustible dust or solids, flammable liquids and gases.

e. "Municipality" shall mean any county, city, village, town or fire district, having a fire department consisting of personnel, apparatus and equipment which has as its purpose protecting property and maintaining the safety and welfare of the public from the dangers of fire, or, in the case of a fire protection district or that portion of a town outside a village or fire district, a fire company as defined in section three of the volunteer firefighters' benefit law. The personnel of any such fire department may be paid employees or unpaid volunteers or any combination thereof.

f. "Property under the jurisdiction of the state of New York" shall mean real property and improvements thereon and appurtenances thereto in which the state of New York holds legal fee simple title and further, any real property conveyed or made available to the New York state housing finance agency or the dormitory authority of the state of New York under agreements for the financing and construction of facilities for the state university of New York; provided however, with the exception of property occupied by the state university of New York, such property shall not include leasehold interest; provided further, such property shall not include any property for which a municipality receives any payments-in-lieu of taxes or any other payments, including real property taxes, that are or may be used for providing fire protection to such property.

g. [Deleted]

2. Any municipality whose fire department has responded to a fire on property under the jurisdiction of the state of New York:

a. shall, within thirty days after such fire, submit a report, on a form prescribed by the office of fire prevention and control, to the office of fire prevention and control stating the location of such a fire and the firefighting costs incurred while fighting such a fire; and

b. may, within thirty days after such a fire, submit a claim, on a form prescribed by the office of fire prevention and control to the office of fire prevention and control pursuant to the provisions of this section.

3. The office of fire prevention and control shall review each claim to determine if such claim shall be approved, reduced, amended or rejected and shall notify the municipality, within sixty days of receipt of such claim, as to his [its]* determination. The municipality shall notify the office of fire prevention and control within thirty days after receipt of the office of fire prevention and control's notification, as to its acceptance or rejection of such determination. Failure to so notify the office of fire prevention and control shall constitute an acceptance of the determination. If accepted by the municipality, such acceptance shall constitute the final and conclusive

*The bracketed work has been inserted by the Publisher.

determination for such claim. If rejected by the municipality, such municipality shall resubmit its claim, within thirty days after receipt of the office of fire prevention and control's notification, together with its reasons for objection and any additional documentation which may justify its claim. Upon receipt of a resubmitted claim, the office of fire prevention and control shall review such claim and within sixty days of receipt of such resubmitted claim, make a final determination as to the amount to be approved for such claim. If the municipality shall dispute such final determination it may commence an action, within sixty days of such final determination, in the court of claims which shall have jurisdiction to adjudicate the claim and enter judgment, which judgment shall be a final determination for purposes of this section and shall be payable in accordance with the provisions of subdivisions four and five of this section.

4. The office of fire prevention and control shall certify all claims for which a final determination has been made. The office of fire prevention and control shall submit all claims certified during the preceding year to the comptroller of the department of audit and control on or before April first of each year. Any claim that has been received prior to April first of such year, but for which no certification has been made, shall, for purposes of payment, be considered as a claim for the year in which such certification is made.

5. All claims certified by the office of fire prevention and control shall be paid annually and shall be paid upon a warrant from the comptroller from funds appropriated in the local assistance fund. In the event such appropriation is insufficient to permit the aggregate annual payments authorized under this section, each municipality's payment for any claim or claims certified during the preceding year shall be decreased proportionally until the total payments are equal to the amount appropriated.

6. The chief fiscal officer of the municipality shall pay the amounts received under this section into the fund or funds from which moneys were expended to provide the firefighting services for which a reimbursement was made under this section.

7. This section shall not in any way impair, limit or modify the rights and obligations of any insurer under any policy of insurance.

8. The office of fire prevention and control shall annually prepare a report on the effectiveness of this section and shall submit such report to the legislature. Such report shall include the number and location of any fire on property under the jurisdiction of the state of New York, the number of claims and the amount of each such claim filed pursuant to this section and further, the total amount of all claims filed and the total amount of payments made under the provisions of this section. The first such report shall be submitted to the legislature on or before June first, nineteen hundred seventy-nine.

HISTORY:

Add, L 1978, ch 741, § 1, eff April 1, 1979 and entitling any municipality to file a claim, in accordance with the provisions of this act, for a fire occurring on or after such date; amd, L 1979, ch 225, § 20, eff Sept 1, 1979; L 2010, ch 56, § 47 (Part B), eff July 1, 2010.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Definitions, CLS Vol Fire Ben § 3.

Jurisprudences:

26 NY Jur 2d Counties, Towns, and Municipal Corporations § 1043.

96 NY Jur 2d State of New York § 177.

ARTICLE VI Funds of the State

Section

97-pp. New York state emergency services revolving loan account

99-q. Volunteer firefighting and volunteer emergency services recruitment and retention fund

HISTORY:

Add, L 1940, ch 593, eff April 18, 1940.

§ 97-pp. New York state emergency services revolving loan account

1. There is hereby established within the combined expendable trust fund-020 in the custody of the state comptroller a new account to be known as the "New York state emergency services revolving loan account".

2. The account shall consist of all moneys appropriated for its purpose, all moneys transferred to such account pursuant to law, and all moneys required by this section or any other law to be paid into or credited to this account, including all moneys received by the account or donated to it, payments of principal and interest on loans made from the account, and any interest earnings which may accrue from the investment or reinvestment of moneys from the account.

3. Moneys of the account, when allocated, shall be available to the commissioner of the division of homeland security and emergency services to make loans as provided in this section. Up to five percent of the moneys of the account or two hundred fifty thousand dollars, whichever is less, may be used to pay the expenses, including personal service and maintenance and operation, in connection with the administration of such loans.

4. (a) The commissioner of the division of homeland security and emergency services, on recommendation of the state fire administrator, may make, upon application duly made, up to the amounts available by appropriation, loans for:

(i) Purchasing fire fighting apparatus. A loan for purchasing fire fighting apparatus shall not exceed the lesser of three hundred seventy-five thousand dollars or seventy-five percent of the cost of the fire fighting apparatus; provided, however, that loans issued in response to a joint application shall not exceed the lesser of five hundred fifty thousand dollars or seventy-five percent of the cost of the fire fighting apparatus.

(ii) Purchasing ambulances or rescue vehicles. A loan for purchasing an ambulance or a rescue vehicle shall not exceed the lesser of two hundred twenty-five thousand dollars or seventy-five percent of the cost of the ambulance or rescue vehicle; provided, however, that loans issued in response to a joint application shall not exceed the lesser of three hundred fifty thousand dollars or seventy-five percent of the cost of the ambulance or rescue vehicle.

(iii) Purchasing protective equipment or communication equipment. A loan for purchasing protective equipment or communication equipment or both shall not exceed two hundred thousand dollars. Communication equipment purchased with such loan shall, to the maximum extent practicable, be compatible with the communication equipment of adjacent services and jurisdictions; provided, however, that loans issued in response to a joint application shall not exceed two hundred sixty-five thousand dollars.

(iv) Repairing or rehabilitating fire fighting apparatus, ambulances, or rescue vehicles. A loan for repairing or rehabilitating fire fighting apparatus, ambulances, or rescue vehicles shall not exceed the lesser of two hundred thousand dollars or one hundred percent of the cost of the repair or rehabilitation; provided, however, that loans issued in response to a joint application shall not exceed the lesser of four hundred thousand dollars or one hundred percent of the cost of the repair or rehabilitation.

(v) Purchasing accessory equipment. A loan for purchasing accessory equipment shall not exceed one hundred twenty-five thousand dollars; provided, however, that loans issued in response to a joint application shall not exceed one hundred seventy-five thousand dollars.

(vi) Renovating, rehabilitating or repairing facilities that house firefighting equipment, ambulances, rescue vehicles and related equipment. A loan for this purpose shall not exceed the lesser of two hundred fifty thousand dollars or seventy-five percent of the cost of the project; provided, however, that loans issued in response to a joint application shall not exceed the lesser of five hundred thousand dollars or seventy-five percent of the cost of the project.

(vii) Construction costs associated with the establishment of facilities that house firefighting equipment, ambulances, rescue vehicles and related equipment. A loan for this purpose shall not exceed the lesser of five hundred thousand dollars or seventy-five percent of the cost of the construction, or be used for the payment of fees for design, planning, preparation of applications or other costs not directly attributable to land acquisitions or construction; provided, however, that loans issued in response to a joint application shall not exceed the lesser of seven hundred fifty thousand dollars or seventy-five percent of the cost of the construction, or be used for the payment of fees for design, planning, preparation of applications or other costs not directly attributable to land acquisitions or construction.

(viii) Construction costs associated with the establishment of facilities for the purpose of live fire training. A loan for this purpose shall not be granted if another live fire training facility is located within the boundaries of the county or within twenty-five miles. A loan for this purpose shall not exceed the lesser of two hundred fifty thousand dollars or seventy-five percent of the cost of construction, provided, however, joint applications shall not exceed the lesser of four hundred thousand dollars or seventy-five percent of the cost of construction or be used for the payment of fees for design, planning, preparation of applications or other costs not directly attributable to land acquisitions or construction.

(b) No loan authorized by this section shall have an interest rate exceeding two and one-half percent. No applicant shall receive a loan for any purpose under paragraph (a) of this subdivision more than once in any five-year period; provided, however, that joint applicants may receive up to two loans in any five year period. The minimum amount of any loan shall be five thousand dollars. The period of any loan shall not exceed the period of probable usefulness, prescribed by section 11.00 of the local finance law, for the emergency equipment to be purchased with the proceeds of the loan or, if no period be there prescribed, five years. The total amount of any interest earned by the investment or reinvestment of all or part of the principal of any loan made under this section shall be returned to the commissioner of the division of homeland security and emergency services for deposit in the account and shall not be credited as payment of principal or interest on the loan. The commissioner of the division of homeland security and emergency services may require security for any loan and may specify the priority of liens against any emergency equipment wholly or partially purchased with moneys loaned under this section. The commissioner of the division of homeland security and emergency services may make loans under this section subject to such other terms and conditions the commissioner of the division of homeland security and emergency services deems proper.

(c) The commissioner of the division of homeland security and emergency services shall have the power to make such rules and regulations as may be necessary and proper to effectuate the purposes of this section.

(d) The commissioner of the division of homeland security and emergency services shall annually report by March fifteenth to the governor and the legislature describing the activities and operation of the loan program authorized by this section. Such report shall set forth the number of loan applications received and approved; the number of joint applications received and approved; the names of

counties, cities, towns, villages and fire districts receiving loans together with the amount and purpose of the loan, the interest rate charged, and the outstanding balance; and the balance remaining in the New York state emergency services revolving loan account, along with fund revenues and expenditures for the previous fiscal year, and projected revenues and expenditures for the current and following fiscal years.

5. (a) Application for loans may be made by a town, village, city, fire district, fire protection district, independent, not-for-profit fire and ambulance corporation or county, other than a county wholly contained within a city, provided that the application is otherwise consistent with its respective powers. Applications may also be submitted jointly by multiple applicants provided that the application is otherwise consistent with each applicant's respective powers.

(b) Every application shall be in a form acceptable to the commissioner of the division of homeland security and emergency services. Every application shall accurately reflect the conditions which give rise to the proposed expenditure and accurately reflect the ability of the applicant to make such an expenditure without the proceeds of a loan under this section.

(c) (i) The commissioner of the division of homeland security and emergency services shall give preference to those applications which demonstrate the greatest need, joint applications, and to those applications the proceeds of which will be applied toward attaining compliance with federal and state laws and may disapprove any application which contains no adequate demonstration of need or which would result in inequitable or inefficient use of the moneys in the account.

(ii) In making determinations on loan applications, the commissioner of the division of homeland security and emergency services shall assure that loan fund moneys are equitably distributed among all sectors of the emergency services community and all geographical areas of the state. Loans for the purpose of personal protective firefighting equipment shall be given preference for a period of two years from the date the first loan is made. Not less than fifty percent of the loans annually made shall be made to applicants whose fire protection or ambulance service is provided by a fire department or ambulance service whose membership is comprised exclusively of volunteers.

(d) An application or joint application shall not be approved:

(i) if the applicant or applicants are in arrears on any prior loan under this section,

(ii) if it shall be shown that at any time in the prior ten years the applicant or applicants used state funds to repay all or part of any loan made under this section.

(e) The commissioner of the division of homeland security and emergency services shall, to the maximum extent feasible, and consistent with the other provisions of this section, seek to provide that loans authorized by this section reflect an appropriate geographic distribution, are distributed equitably and encourage regional cooperation.

(f) [Redesignated]

6. For purposes of this section, the following terms shall have the accompanying meanings:

(a) "Fire companies" means (i) a fire company, the members of which are firefighters, volunteer, paid or both, of a county, city, town, village, fire district or fire department, or (ii) a fire corporation, the members of which are firefighters, volunteer, paid or both, providing fire protection pursuant to a fire protection contract within a fire protection district of a town.

(b) "Volunteer ambulance service" means an individual, partnership, association, corporation, municipality or any legal or public entity or subdivision thereof engaged in providing emergency medical services and the transportation of sick, disabled or injured persons by motor vehicle, aircraft or other form of transportation to or from facilities providing hospital services which is (i) operating not for pecuniary profit or financial gain, and (ii) no part of the assets or income of which is distributable to, or inures to the benefit of, its members, directors or officers.

(c) "Ambulance" means a motor vehicle designed, appropriately equipped, and used for carrying sick or injured persons.

(d) "Accessory equipment" means equipment necessary to support the ordinary functions of fire fighting, emergency medical services, or rescue activities other than communication equipment, protective equipment, and motor vehicles together with their fixtures and appointments.

(e) "Account" means the New York state emergency services revolving loan account established by this section within the combined expendable trust fund-020.

(f) "Communication equipment" means any voice or original transmission system or telemetry system used to enhance fire fighter safety on the grounds of a fire or other emergency.

(g) "Emergency equipment" means any or all of the following: ambulances, accessory equipment, communication equipment, fire fighting apparatus, protective equipment, and rescue vehicles.

(h) "Fire fighting apparatus" means elevated equipment, pumpers, tankers, ladder trucks, hazardous materials emergency response vehicles, or other such specially equipped motor vehicles used for fire protection, together with the fixtures and appointments necessary to support their functions.

(i) "Joint application" means an application submitted by two or more towns, villages, cities, fire districts, fire protection districts, not-for-profit fire and ambulance corporations or counties, other than a county wholly contained within a city, for any purposes provided in subdivision four of this section.

(j) "Protective equipment" means any clothing and devices that comply with occupational safety and health administration standards (federal occupational safety and health act regulations) used to protect personnel who provide emergency services from injury while performing their functions, including, but not limited to, helmets, coats, boots, eyeshields, gloves and self contained respiratory protection devices.

(k) "Rescue vehicle" means a motor vehicle, other than an ambulance or fire fighting apparatus, appropriately equipped and used to support fire department operations and includes a vehicle specifically for carrying accessory equipment.

HISTORY:

Add, L 1994, ch 599, § 1, eff July 26, 1994; amd, L 1994, ch 631, § 1, eff July 26, 1994; L 1997, ch 430 § 2, eff Aug 20, 1997; L 1999, ch 471, § 2, eff Sept 7, 1999; L 2003, ch 646, §§ 1, 2, eff Oct 7, 2003; L 2004, ch 370, § 1, eff Aug 17, 2004; L 2006, ch 72, § 1, eff April 1, 2007; L 2010, ch 56, § 30 (Part B), eff July 1, 2010; L 2013, ch 393, §§ 1, 2, eff Oct 21, 2013.

Prior Law: Another § 97-pp, renumbered § 97-y, L 1996, ch 309, § 167, eff July 13, 1996.

Editor's Notes: Laws 1999, ch 471, § 1, eff Sept 7, 1999, provides as follows:

Section 1. Legislative intent. The legislature hereby finds and declares that fire protection districts and not-for-profit fire and ambulance companies provide services which are valuable and vital to the health and safety of the citizens of this state. Such services require support to purchase and update equipment, construct and maintain facilities and acquire rescue vehicles and other apparatus necessary to provide adequate fire protection and emergency services. The state emergency services revolving loan account exists to provide low interest loans for such purposes, but under current law access to loans through this fund is limited or denied to these entities. The support of such entities to provide adequate fire and emergency services for the health and safety of our citizens is an important public benefit and purpose.

Amendment Notes: 2013. Chapter 393, § 1 amended:

Sub 4, par (a), subpar (i) by deleting at fig 1 "two hundred twenty-five thousand", at fig 2 "four hundred" and adding the matter in italics.

Sub 4, par (a), subpar (ii) by deleting at fig 1 "one hundred fifty", at fig 2 "two hundred sixty-five" and adding the matter in italics.

Sub 4, par (a), subpar (iii) by deleting at fig 1 "one hundred, at fig 2"one hundred sixty-five" and adding the matter in italics.

Sub 4, par (a), subpar (iv) by deleting at fig 1 "seventy-five", at fig 2 "one hundred thirty-five" and adding the matter in italics.

Sub 4, par (a), subpar (v) by deleting at fig 1 "seventy-five", at fig 2 "one hundred thirty-five" and adding the matter in italics.

Sub 4, par (a), subpar (vi) by deleting at fig 1 "one hundred fifty", at fig 2 "two hundred sixty-five" and adding the matter in italics.

Sub 4, par (a), subpar (vii) by deleting at fig 1 "three hundred", at fig 2 "five hundred twenty-five" and adding the matter in italics.

Sub 4, par (a), subpar (viii) by deleting at fig 1 "one hundred fifty", at fig 2 "two hundred sixty-five" and adding the matter in italics.

2013. Chapter 393, § 2 amended:

Sub 5, par (c), subpar (ii) by deleting at fig 1 "and whose budget for the fiscal year immediately preceding did not exceed one hundred thousand dollars.

Notes to Decisions

Transaction in which municipality would apply for loan from emergency services revolving loan account as "surrogate" for private fire company or ambulance service is not authorized under CLS St Fin § 97-pp. 1999 N.Y. Op. Att'y Gen. No. 99-F3, 1999 N.Y. AG LEXIS 20.

RESEARCH REFERENCES AND PRACTICE AIDS

Federal Aspects:

The Federal Occupational Safety and Health Act, cited in statutory text, appears generally as 29 USCS §§ 651 et seq.

§ 99-q. Volunteer firefighting and volunteer emergency services recruitment and retention fund

1. There is hereby established in the joint custody of the commissioner of taxation and finance and the comptroller, a special fund to be known as the "volunteer firefighting and volunteer emergency services recruitment and retention fund".

2. Such fund shall consist of all revenues received by the department of taxation and finance, pursuant to the provisions of sections two hundred nine-G and six hundred thirty-b of the tax law and all other moneys appropriated, credited, or transferred thereto from any other fund or source pursuant to law. Nothing contained in this section shall prevent the state from receiving grants, gifts or bequests for the purposes of the fund as defined in this section and depositing them into the fund according to law. Any interest received by the comptroller on moneys on deposit in such fund shall be retained in and become part of such fund.

2-a. On or before the first day of February each year, the state fire administrator shall provide a written report to the temporary president of the senate, speaker of the assembly, chair of the senate finance committee, chair of the assembly ways and means committee, chair of the senate committee on local government, chair of the assembly local government committee, the state comptroller and the public. Such report shall include how the monies of the fund were utilized during the preceding calendar year, and shall include:

(i) the amount of money dispersed from the fund and the award process used for such disbursements;

(ii) recipients of awards from the fund;

(iii) the amount awarded to each;

(iv) the purposes for which such awards were granted; and

(v) a summary financial plan for such monies which shall include estimates of all receipts and all disbursements for the current and succeeding fiscal years, along with the actual results from the prior fiscal year.

3. Moneys in such fund shall be expended only to provide grants to volunteer firefighting and volunteer emergency services organizations and to statewide organizations which represent the interests of volunteer firefighters and/or volunteer emergency services providers for the purpose of encouraging the recruitment and retention of volunteer firefighters and volunteer emergency services personnel. Such purposes may include, but need not be limited to: development and implementation of marketing

plans, publicity campaigns, and community awareness initiatives; design, production and distribution of promotional merchandise, brochures and other materials; sponsorship of local community events designed to help recruit volunteers; newspaper publications, promotional mailings and other advertising designed to help recruit volunteers.

4. Monies shall be payable from the fund on the audit and warrant of the comptroller on vouchers approved and certified by the state fire administrator.

5. To the extent practicable, the state fire administrator shall ensure that all monies received during a fiscal year are expended prior to the end of that fiscal year.

HISTORY:

Add, L 2009, ch 490, § 3, eff April 26, 2010 (see 2009 note below); amd, L 2010, ch 56, § 48 (Part B), eff July 1, 2010; L 2015, ch 453, § 10, effective November 20, 2015; L 2016, ch 54, § 27-g (Part UU), effective April 4, 2016.

Editor's Notes: Laws 2009, ch 490, § 4, eff April 26, 2010, provides as follows;.

§ 4. This act shall take effect on the one hundred eightieth day after it shall have become a law. Effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized to be made on or before such effective date.

Laws 2016, ch 54, § 52 (Part UU), eff April 4, 2016, provides:

§ 52. This act shall take effect immediately and shall be deemed to have been in full force and effect on and after April 1, 2016; provided, however: (a) the provisions of sections one through eight, and sections twelve through twenty of this act shall expire March 31, 2017, when upon such date the provisions of such sections shall be deemed repealed; (b) provided, however, that the provisions of section twenty-seven-j of this act shall be deemed to have been in full force and effect on the same date and in the same manner as chapter 453 of the laws of 2015, took effect; and (c) the provisions of section forty-six of this act shall expire upon the last payment made by the comptroller pursuant to section forty-six of this act when upon such date the provisions of such section shall be deemed repealed; provided that the state comptroller shall notify the legislative bill drafting commission upon the occurrence of the last payment provided for in section forty-six of this act in order that the commission may maintain an accurate and timely effective database of the official text of the laws of the state of New York in furtherance of effectuating the provisions of section 44 of the legislative law and section 70-b of the public officers law.

Amendment Notes: The 2015 amendment by ch 453, § 10, added 2-a.

The 2016 amendment by ch 54, § 27-g (Part UU), substituted "local government" for "health" twice in the first sentence of the introductory language of 2-a.

ARTICLE XI State Purchasing

Section

163. [Repealed June 30, 2021] Purchasing services and commodities.

HISTORY:

Add, L 1995, ch 83, § 33, eff July 20, 1995, deemed eff on and after April 1, 1995.

§ 163. [Repealed June 30, 2021] Purchasing services and commodities.

1. Definitions. For the purposes of this section, the following terms shall have the following meanings unless otherwise specified:

a. "Consortium" means like entities which agree to collectively purchase commodities at a lower price than would be otherwise achievable through purchase by such entities pursuant to other provisions of this article.

b. "Emergency" means an urgent and unexpected requirement where health and public safety or the conservation of public resources is at risk.

c. "Responsible" or "responsibility" means the financial ability, legal capacity, integrity, and past performance of a business entity and as such terms have been interpreted relative to public procurements.

d. "Responsive" means a bidder or other offerer meeting the minimum specifications or requirements as prescribed in a solicitation for commodities or services by a state agency.

e. "Specification" or "requirement" means any description of the physical or functional characteristics or the nature of a commodity or construction item, any description of the work to be performed, the service or products to be provided, the necessary qualifications of the offerer, the capacity and capability of the offerer to successfully carry out the proposed contract, or the process for achieving specific results and/or anticipated outcomes or any other requirement necessary to perform the work. It may include a description of any obligatory testing, inspection or preparation for delivery and use, and may include federally required provisions and conditions where the eligibility for federal funds is conditioned upon the inclusion of such federally required provisions and conditions. Specifications shall be designed to enhance competition, ensuring the commodities or services of any offerer are not given preference except where required by this article.

f. "Procurement record" means documentation of the decisions made and the approach taken in the procurement process.

g. "Sole source" means a procurement in which only one offerer is capable of supplying the required commodities or services.

h. "Single source" means a procurement in which although two or more offerers can supply the required commodities or services, the commissioner or state agency, upon written findings setting forth the material and substantial reasons therefor, may award a contract or nontechnical amendment to a contract to one offerer over the other. The commissioner or state agency shall document in the procurement record the circumstances leading to the selection of the vendor, including the alternatives considered, the rationale for selecting the specific vendor and the basis upon which it determined the cost was reasonable.

i. "Lowest price" means the basis for awarding contracts for commodities among responsive and responsible offerers.

j. "Best value" means the basis for awarding contracts for services to the offerer which optimizes quality, cost and efficiency, among responsive and responsible offerers. Such basis shall reflect, wherever possible, objective and quantifiable analysis. Such basis may also identify a quantitative factor for offerers that are small businesses, certified minority- or women-owned business enterprises as defined in subdivisions one, seven, fifteen and twenty of section three hundred ten of the executive law or service-disabled veteran-owned business enterprises as defined in subdivision one of section three hundred sixty-nine-h of the executive law to be used in evaluation of offers for awarding of contracts for services.

k. "Authorized user" or "non-state agency purchaser" means (i) any officer, body or agency of the state or of a political subdivision or a district therein, or fire company or volunteer ambulance service as such are defined in section one hundred of the general municipal law, to make purchases of commodities, services and technology through the office of general services' centralized contracts, pursuant to the provisions of section one hundred four of the general municipal law; (ii) any county extension service association as authorized under subdivision eight of section two hundred twenty-four of the county law; (iii) any association or other entity as specified in and in accordance with section one hundred nine-a of the general municipal law; (iv) any association, consortium or group of privately owned or municipal, federal or state owned or operated hospitals, medical schools, other health related facilities or voluntary ambulance services, which have entered into a contract and made mutual arrangements for the joint purchase of commodities, services and technology pursuant to section twenty-eight hundred three-a of the public health law; (v) any institution for the instruction of the deaf or of the blind listed in section forty-two hundred one of the education law; (vi) any qualified non-profit-making agency for the blind approved by the commissioner of the office of children and family services or the office of temporary and disability assistance; (vii) any qualified charitable non-profit-making agency for the severely disabled approved by the commissioner of education; (viii) any hospital or residential health care facility as defined in section twenty-eight hundred one of the public health law; (ix) any private not-for-profit mental hygiene facility as defined in section 1.03 of the mental hygiene law; (x) any public authority or public benefit corporation of the state, including the port authority of New York and New Jersey and the interstate environmental commission; (xi) any public library, association library, library system, cooperative library system, the New York Library Association, and the New York State Association of Library Boards or any other library except those which are operated by for profit entities; (xii) any other association or entity as specified in state law, to make purchases of commodities, services and technology through the office of general services' centralized contracts. Such qualified non-profit-making agencies for the blind and severely disabled may make purchases from the correctional industries program of the department of corrections and community supervision subject to rules pursuant to the correction law.

2. Operating principles. The objective of state procurement is to facilitate each state agency's mission while protecting the interests of the state and its taxpayers and promoting fairness in contracting with the business community. The state's procurement process shall be guided by the following principles:

a. To promote purchasing from responsive and responsible offerers, including small businesses.

b. To be based on clearly articulated procedures which require a clear statement of product specifications, requirements or work to be performed; a documentable process for soliciting bids, proposals or other offers; a balanced and fair method, established in advance of the receipt of offers, for evaluating offers and awarding contracts; contract terms and conditions that protect the state's interests and promote fairness in contracting with the business community; and a regular monitoring of vendor performance.

c. To encourage the investment of the private and not-for-profit sectors in New York state by making reasonable efforts to ensure that offerers are apprised of procurement opportunities; by specifying the elements of a responsive bid and disclosing the process for awarding contracts including, if applicable, the relative importance and/or weight of cost and the overall technical criterion for evaluating offers; and by ensuring the procurement is conducted accordingly.

d. To ensure that contracts are awarded consistent with the best interests of the state.

e. To ensure that officers and employees of state entities do not benefit financially or otherwise from the award of state contracts.

f. To ensure regular and critical review of the efficiency, integrity and effectiveness of the overall process.

3. General provisions for purchasing commodities.

a. State agency procurement practices for commodities shall incorporate the following:

(i) The purchase of commodities by state agencies including the office of general services shall be conducted in a manner which accords first priority to preferred sources in accordance with the provisions of this article, second priority to centralized contracts, third priority to agency or multi-agency established contracts and fourth priority to other means of contracting.

(ii) Commodities contracts shall be awarded on the basis of lowest price to a responsive and responsible offerer; or, in the case of multiple awards, in accordance with paragraph c of subdivision ten of this section.

(iii) The commissioner shall be responsible for the standardization and centralized purchase of commodities required by state agencies in a manner which maximizes the purchasing value of public funds.

(iv) The commissioner is authorized to permit purchases of commodities and services for authorized users through the office of general services' centralized contracts. Such authorized users so empowered shall accept sole responsibility for any payment due with respect to such purchases.

(v) Consistent with guidelines issued by the state procurement council, state agencies may competitively purchase commodities procured in accordance with this article in lieu of using centralized contracts when the resultant price is less than the centralized contract price.

(vi) When justified by price, state agencies, and hospitals and facilities managed and controlled by state agencies eligible pursuant to section twenty-eight hundred three-a of the public health law, shall be eligible to make purchases pursuant to guidelines issued by the state procurement council from a consortium or comparable entity in lieu of using centralized contracts for commodities.

(vii) The commissioner is authorized to enter into contracts pursuant to the provisions of section twenty-eight hundred three-a of the public health law.

(viii) [Deleted]

b. The commissioner shall:

(i) determine, in cooperation with the state procurement council and state agencies, the identity, form, function and utility of those commodities which shall be made available on or through centralized contracts. Criteria may include, but need not be limited to, the availability of a volume discount, prior use of the commodity among state agencies and the relative cost of establishing the contract, its anticipated use and expected actual savings for the state. The commissioner may also act as a broker for state agencies to procure commodities.

(ii) determine the number and scope of centralized contracts for commodities to be let during any period, including the letting of multiple contracts to ensure the sufficient variety and uninterrupted availability of commodities for state agency use.

(iii) maintain lists of firms which produce or manufacture or offer for sale commodities in the form, function and utility required by state agencies. The commissioner shall ensure such lists are updated regularly. With the assistance of the department of economic development and other state agencies, beginning on July first, two thousand one, ensure the availability to all authorized purchasers of a centralized list which identifies commodities offered by New York state's small businesses and a centralized list which identifies commodities and services offered by businesses certified pursuant to article fifteen-A of the executive law. Such lists shall be updated semiannually and designed to enable effective identification of New York state's small businesses and businesses certified pursuant to article fifteen-A of the executive law.

(iv) ensure the specification of commodities for centralized contracts reflect the form, function and utility required by state agencies and conform, wherever possible, to industry standards. Where necessary, the commissioner may develop specifications for commodities. When not otherwise forthcoming from a particular firm or industry, the commissioner may request information from businesses for the purpose of establishing or improving a specification. The office of general services may assist agencies in developing specifications for agency-procured commodity contracts when industry standards are not available or appropriate. In all cases, specifications shall be consistent with the requirements of state agencies.

(v) With the assistance of the department of economic development and other state agencies, provide a training program once per year, in each economic development region, as established in article eleven of the economic development law, beginning January first, two thousand one, for those businesses certified pursuant to article fifteen-A of the executive law and those interested in becoming certified. Such training program shall provide assistance with respect to participation as a vendor in the procurement process, as established in this article, and including without limitation educating minority and women contractors about surety bonding requirements on state contracts, and identifying resources available to such contractors in obtaining their first bond and in increasing their bonding capacity, including but not limited to the federal small business administration bond guarantee program.

(vi) With the assistance of the department of economic development and other state agencies, provide training once per year for staff of each state agency's minority and women business development office, or if an agency does not have such an office, then an agency's representative. Such training program shall consist of a meeting with such agencies' representatives to inform each agency of how to encourage procurement of commodities and services from businesses certified pursuant to article fifteen-A of the executive law.

(vii) assist the department of agriculture and markets and the department of economic development in providing a training program once per year, in each economic development region, established in article eleven of the economic development law, to encourage and increase participation in the procurement process, pursuant to this article, by small businesses, as defined in section one hundred thirty-one of the economic development law, including farms, selling food or food products grown, produced, harvested, or processed in New York state and assist such businesses in identifying such food or food products which may help to meet state agencies' needs.

(viii) maintain a list of contractors which produce or manufacture or offer for sale environmentally-sensitive cleaning and maintenance products in the form, function and utility generally used by elementary and secondary schools in accordance with specifications or guidelines promulgated pursuant to section four hundred nine-i of the education law.

(ix) review and consider prior to issuance of bid solicitations the term of the proposed contract based on factors, including, but not limited to; (A) the nature of the commodity, (B) the complexity of the procurement, (C) the identity and type of purchasers, (D) the suitability of the contract for adding additional contractors during the term, and (E) the estimated contract value. This determination shall be documented in the procurement record.

(x) reasonably consider aggregate amount of public sales by potential vendors.

(xi) review and consider the feasibility of creating regional contracts for commodities being procured by the state.

(xii) maintain a procurement record for each centralized contract procurement identifying, with supporting documentation, decisions made by the commissioner during the procurement process. The procurement record shall include, but not be limited to, each contract amendment, and the justification for each.

c. When commodities are not available in the form, function and utility required by state agencies through preferred sources or centralized contracts, a state agency may, independently or in conjunction with other state agencies, procure commodities in accordance with the provisions of this section. State agencies may maintain listings of firms, including those certified pursuant to article fifteen-A of the executive law, or may use the office of general services' listing of firms and may request assistance from the office of general services. It shall be the responsibility of state agencies to periodically advise the office of general services of those agency-procured commodities which, due to the frequency of purchase or related factors, should be made available through centralized contracts.

d. The commissioner may make, or cause to be made by a duly authorized representative, any investigation which he or she may deem proper for acquiring the necessary information from a state agency, except state agencies where the head of the agency is not appointed by the governor, including but not limited to the state education department, the department of law, and the department of audit and control, for the exercise of his or her powers and duties under this section. For such purposes the commissioner may subpoena and compel the attendance of witnesses before him or her, or an authorized representative, and may compel the production of books, papers, records or documents. The commissioner or a duly authorized representative may take and hear proofs and testimony and, for that purpose, the commissioner or the duly authorized representative may administer oaths. In addition, the commissioner or the duly authorized representative:

(i) Shall have access at all reasonable times to offices of state agencies;

(ii) May examine all books, papers, records and documents in any such state agency as pertain directly to the purchase, control or distribution of commodities; and

(iii) May require any state agency to furnish such data, information or statement as may be necessary.

4. General provisions for purchasing services. State agency procurement practices for services shall incorporate the following:

a. The purchase of services by state agencies including the office of general services shall be conducted in a manner which accords first priority to preferred sources in accordance with the provisions of this article when the services required are available in the form, function and utility required by state agencies through a preferred source.

b. (i) Centralized contracts for services may be procured by the office of general services at the request of state agencies or as determined by the commissioner. The purchase of services by state agencies, except state agencies where the head of the agency is not appointed by the governor, including but not limited to the state education department, the department of law, and the department of audit and control, shall be conducted in a manner that accords second priority to centralized contracts meeting form, function and utility required by said agency, third priority to agency or multi-agency established contracts and fourth priority to other means of contracting.

(ii) The commissioner shall:

(A) review and consider prior to issuance of bid solicitations the term of the proposed contract based on factors, including, but not limited to, (a) the nature of the service, (b) the complexity of the procurement, (c) the identity and type of purchasers, (d) the suitability of the contract for adding additional contractors during the term, and (e) the estimated contract value. This determination shall be documented in the procurement record.

(B) reasonably consider the aggregate amount of public sales by potential vendors.

(C) review and consider the feasibility of creating regional contracts for services being procured by the state.

(D) maintain a procurement record for each centralized contract procurement identifying with supporting documentation, decisions made by the commissioner during the procurement process. The procurement records shall include, but not be limited to, each contract amendment, and the justification for each.

c. When services are not available from preferred sources consistent with the provisions of this article in the form, function or utility required by state agencies, state agencies may procure services inde-

pendently or in conjunction with other state agencies in accordance with the provisions of this section.

d. Service contracts shall be awarded on the basis of best value to a responsive and responsible offerer; or, in the case of multiple awards, in accordance with paragraph c of subdivision ten of this section.

e. The commissioner is authorized to permit purchases of services for authorized users through the office of general services' centralized contracts. Such authorized users so empowered shall accept sole responsibility for any payment due with respect to such purchases.

f. [Repealed]

g. All state agencies shall require all contractors, including subcontractors, that provide services for state purposes pursuant to a contract, to submit an annual employment report for each contract for services that includes for each employment category within the contract the number of employees employed to provide services under the contract, the number of hours they work and their total compensation under the contract. Employment reports shall be submitted to the agency that awarded the contract, the department of civil service and the department of audit and control and shall be available for public inspection and copying pursuant to section eighty-seven of the public officers law provided that in disclosing such reports pursuant to the public officers law, the agency making the disclosure shall redact the name or social security number of any individual employee that is included in such document.

5. Process for conducting state procurements. The process for conducting state procurements for services and commodities shall be as follows:

Determination of need. State agencies shall be responsible for determining the need for a given service or commodity:

(i) For commodities, upon such determination of need, state agencies shall ascertain whether the commodity is available in the form, function and utility consistent with their needs from preferred sources and if so, shall purchase said commodity from a preferred source in accordance with the provisions of this article. If not so available, state agencies shall determine whether the commodity is available in the form, function and utility consistent with their needs on a centralized contract and if so, except as provided in subparagraph (v) of paragraph a of subdivision three of this section, shall purchase said commodity using the centralized contract. If a commodity is not available in the form, function and utility consistent with the needs of the state agency from a preferred source or a centralized contract or as provided for in subparagraph (v) of paragraph a of subdivision three of this section, the state agency may procure the commodity independently or in conjunction with another state agency in accordance with paragraph c of subdivision three of this section.

(ii) For services, upon such determination of need, state agencies shall ascertain whether the service is available in the form, function and utility consistent with their needs from preferred sources and, if so, shall purchase said service through the preferred source in accordance with the provisions of this article. If not so available, state agencies the heads of which are appointed by the governor:

(A) Shall purchase the service if it is available in the form, function and utility consistent with their needs using an established centralized contract procured by either the office of general services or another state agency;

(B) May request that the office of general services procure such a service, particularly with respect to those services having utility and/or benefit to more than one state agency; or

(C) May procure the service independently or in conjunction with another state agency.

6. Discretionary buying thresholds. Pursuant to guidelines established by the state procurement council: the commissioner may purchase services and commodities in an amount not exceeding eighty-five thousand dollars without a formal competitive process; state agencies may purchase services and commodities in an amount not exceeding fifty thousand dollars without a formal competitive process; and state agencies may purchase commodities or services from small business concerns or those certified pursuant to articles fifteen-A and seventeen-B of the executive law, or commodities or technology that are recycled or remanufactured in an amount not exceeding five hundred thousand dollars without a formal competitive process and for commodities that are food, including milk and milk products, grown, produced or harvested in New York state in an amount not to exceed two hundred thousand dollars, without a formal competitive process.

6-a. Discretionary purchases. Notwithstanding the provisions of subdivision two of section one hundred twelve of this chapter relating to the dollar threshold requiring the state comptroller's approval of contracts, the commissioner of general services may make purchases or enter into contracts for the acquisition of commodities and services having a value not exceeding eighty-five thousand dollars without prior approval by any other state officer or agency in accordance with procedures and requirements set forth in this article.

6-b. Determination of threshold amount. For determination of threshold amount purposes of determining whether a purchase is within the discretionary thresholds established by subdivision six of this section, the commissioner and state agencies shall consider the reasonably expected aggregate amount of all purchases of the same commodities or services to be made within the twelve-month period commencing on the date of purchase. Purchases of services or commodities shall not be artificially divided for the purpose of satisfying the discretionary buying thresholds established by subdivision six of this section. A change to or a renewal of a discretionary purchase shall not be permitted if the change or

renewal would bring the reasonably expected aggregate amount of all purchases of the same commodities or services from the same provider within the twelve-month period commencing on the date of the first purchase to an amount greater than the discretionary buying threshold amount.

6-c. Pursuant to the authority provided in subdivision six of this section, for the purchase of commodities that are food, including milk and milk products, grown, produced or harvested in New York state, where such commodities exceed fifty thousand dollars in value, state agencies must advertise the discretionary purchase on the state agency website for a reasonable period of time and make the discretionary purchase based on the lowest price that meets the state agency's form, function and utility.

6-d. Pursuant to the authority provided in subdivision six of this section, state agencies shall report annually on a fiscal year basis by July first of the ensuing year to the director of the division of minority and women-owned business development the total number and total value of contracts awarded to businesses certified pursuant to article fifteen-A of the executive law, and with respect to contracts awarded to businesses certified pursuant to article seventeen-B of the executive law such information shall be reported to the division of service-disabled veteran-owned business enterprises for inclusion in their respective annual reports.

7. Method of procurement. Consistent with the requirements of subdivisions three and four of this section, state agencies shall select among permissible methods of procurement including, but not limited to, an invitation for bid, request for proposals or other means of solicitation pursuant to guidelines issued by the state procurement council. State agencies may accept bids electronically including submission of the statement of non-collusion required by section one hundred thirty-nine-d of this chapter, and the statement of certification required by section one hundred thirty-nine-l of this chapter, and, starting April first, two thousand twelve, and ending March thirty-first, two thousand fifteen, may, for commodity, service and technology contracts require electronic submission as the sole method for the submission of bids for the solicitation. State agencies shall undertake no more than eighty-five such electronic bid solicitations, none of which shall be reverse auctions, prior to April first, two thousand fifteen. In addition, state agencies may conduct up to twenty reverse auctions through electronic means, prior to April first, two thousand fifteen. Prior to requiring the electronic submission of bids, the agency shall make a determination, which shall be documented in the procurement record, that electronic submission affords a fair and equal opportunity for offerers to submit responsive offers. Within thirty days of the completion of the eighty-fifth electronic bid solicitation, or by April first, two thousand fifteen, whichever is earlier, the commissioner shall prepare a report assessing the use of electronic submissions and make recommendations regarding future use of this procurement method. In addition, within thirty days of the completion of the twentieth reverse auction through electronic means, or by April first, two thousand fifteen, whichever is earlier, the commissioner shall prepare a report assessing the use of reverse auctions through electronic means and make recommendations regarding future use of this procurement method. Such reports shall be published on the website of the office of general services. Except where otherwise provided by law, procurements shall be competitive, and state agencies shall conduct formal competitive procurements to the maximum extent practicable. State agencies shall document the determination of the method of procurement and the basis of award in the procurement record. Where the basis for award is the best value offer, the state agency shall document, in the procurement record and in advance of the initial receipt of offers, the determination of the evaluation criteria, which whenever possible, shall be quantifiable, and the process to be used in the determination of best value and the manner in which the evaluation process and selection shall be conducted.

7-a. On or before February first, two thousand twelve, the commissioner of the office of general services shall submit to the speaker of the assembly and the temporary president of the senate a report describing:

(a) the number of times the office of general services required electronic submission as the sole method by which bids could be submitted for the period from July first, two thousand ten through December thirty-first, two thousand eleven;

(b) the estimated savings to the state as a result of the office of general services requiring electronic submission as the sole method by which bids could be submitted in response to a solicitation and the basis on which the estimate is made;

(c) to the extent practicable, the size, minority- and women-owned business enterprise composition and geographic distribution of those vendors that submitted bids in response to an office of general services solicitation where electronic submission was the sole method by which bids could be submitted for the period from July first, two thousand ten to December thirty-first, two thousand eleven; and

(d) to the extent practicable, the size, minority- and women-owned business enterprise composition and geographic distribution of those vendors that submitted bids in response to an office of general services solicitation for those contracts described in subdivision seven of this section for the period from July first, two thousand eight through June thirtieth, two thousand ten.

8. Public notice. All procurements by state agencies, including, without limitation, the state university of New York and the city university of New York, in excess of fifty thousand dollars shall be advertised in the state's procurement opportunities newsletter

in accordance with article four-C of the economic development law.

9. Soliciting and accepting offers. For purchases from sources other than preferred sources and for purchases in excess of the discretionary buying threshold established in subdivision six of this section:

a. The commissioner or a state agency shall select a formal competitive procurement process in accordance with guidelines established by the state procurement council and document its determination in the procurement record. The process shall include, but is not limited to, a clear statement of need; a description of the required specifications governing performance and related factors; a reasonable process for ensuring a competitive field; a fair and equal opportunity for offerers to submit responsive offers; and a balanced and fair method of award. Where the basis for the award is best value, documentation in the procurement record shall, where practicable, include a quantification of the application of the criteria to the rating of proposals and the evaluation results, or, where not practicable, such other justification which demonstrates that best value will be achieved.

b. The solicitation shall prescribe the minimum specifications or requirements that must be met in order to be considered responsive and shall describe and disclose the general manner in which the evaluation and selection shall be conducted. Where appropriate, the solicitation shall identify the relative importance and/or weight of cost and the overall technical criterion to be considered by a state agency in its determination of best value.

c. Where provided in the solicitation, state agencies may require clarification from offerers for purposes of assuring a full understanding of responsiveness to the solicitation requirements. Where provided for in the solicitation, revisions may be permitted from all offerers determined to be susceptible of being selected for contract award, prior to award. Offerers shall be accorded fair and equal treatment with respect to their opportunity for discussion and revision of offers. A state agency shall, upon request, provide a debriefing to any unsuccessful offerer that responded to a request for proposal or an invitation for bids, regarding the reasons that the proposal or bid submitted by the unsuccessful offerer was not selected for an award. The opportunity for an unsuccessful offerer to seek a debriefing shall be stated in the solicitation.

(i) A debriefing shall be requested by the unsuccessful offerer within fifteen calendar days of release by the state agency of a notice in writing or electronically that the offerer's offer is unsuccessful.

(ii) Such notice shall be provided to all unsuccessful offerers by the state agency for the specific procurement.

(iii) The state agency, upon a request made within fifteen days of release of the written or electronic notice from the unsuccessful offerer for a debriefing, shall schedule the debriefing to occur within a reasonable time of such request. Debriefings shall be conducted by the state agency with the unsuccessful offerer in-person, provided, however, the parties may mutually agree to utilize other means such as, but not limited to, by telephone, video-conferencing or other types of electronic communications. State agency personnel participating in the debriefing discussion shall have been involved with and knowledgeable about the procurement and the evaluation and selection of the successful offerer or offerers.

(iv) Such debriefing shall include, but need not be limited to: (A) the reasons that the proposal, bid or offer submitted by the unsuccessful offerer was not selected for award; (B) the qualitative and quantitative analysis employed by the agency in assessing the relative merits of the proposals, bids or offers; (C) the application of the selection criteria to the unsuccessful offerer's proposal; and (D) when the debriefing is held after the final award, the reasons for the selection of the winning proposal, bid or offer. The debriefing shall also provide, to the extent practicable, general advice and guidance to the unsuccessful offerer concerning potential ways that their future proposals, bids or offers could be more responsive.

d. All offers may be rejected. Where provided in the solicitation, separable portions of offers may be rejected.

e. Every offer shall be firm and not revocable for a period of sixty days from the bid opening, or such other period of time specified in the solicitation to the extent not inconsistent with section 2-205 of the uniform commercial code. Subsequent to such sixty day or other specified period, any offer is subject to withdrawal communicated in a writing signed by the offeror.

f. Prior to making an award of contract, each state agency shall make a determination of responsibility of the proposed contractor which shall supplement, as appropriate, but not supersede the determination of responsibility that may be required pursuant to section one hundred thirty-nine-k of this chapter.

g. A procurement record shall be maintained for each procurement identifying, with supporting documentation, decisions made by the commissioner or state agency during the procurement process. The procurement record shall include, but not be limited to each contract amendment and the justification for each.

10. Letting of contracts. Contracts for commodities shall be awarded on the basis of lowest price to a responsive and responsible offerer. Contracts for services shall be awarded on the basis of best value from a responsive and responsible offerer. Multiple awards for services and commodities shall be conducted in accordance with paragraph c of this subdivision.

a. Selection and award shall be a written determination in the procurement record made by the

commissioner or a state agency in a manner consistent with the provisions of the solicitation. In the event two offers are found to be substantially equivalent, price shall be the basis for determining the award recipient or, when price and other factors are found to be substantially equivalent, the determination of the commissioner or agency head to award a contract to one or more of such bidders shall be final. The basis for determining the award shall be documented in the procurement record.

b.

(i) Single or sole source procurements for services or commodities, or procurements made to meet emergencies arising from unforeseen causes, may be made without a formal competitive process and shall only be made under unusual circumstances and shall include a determination by the commissioner or the state agency that the specifications or requirements for said purchase have been designed in a fair and equitable manner. The purchasing agency shall document in the procurement record, subject to review by the state comptroller, the bases for a determination to purchase from a single source or sole source, or the nature of the emergency giving rise to the procurement.

(ii) State agencies shall minimize the use of single source procurements and shall use single source procurements only when a formal competitive process is not feasible. State agencies shall document in the procurement record the circumstances and the material and substantial reasons why a formal competitive process is not feasible. The term of a single source procurement contract shall be limited to the minimum period of time necessary to ameliorate the circumstances which created the material and substantial reasons for the single source award. Not later than thirty days after the contract award, state agencies shall, for all single source procurement contracts, make available for public inspection on the agency website, a summary of the circumstances and material and substantial reasons why a competitive procurement is not feasible. Any information which the contracting agency is otherwise prohibited by law from disclosing pursuant to sections eighty-seven and eighty-nine of the public officers law, shall be redacted from the documentation published on the agency website.

c. The commissioner or state agency may elect to award a contract to one or more responsive and responsible offerers provided, however, that the basis for the selection among multiple contracts at the time of purchase shall be the most practical and economical alternative and shall be in the best interests of the state, and further provided that the requirements set forth herein shall not preclude the commissioner from establishing multiple award contracts for reasons including increased opportunities for small businesses to participate in state contracts.

d. It shall be in the discretion of the commissioner or state agency to require a bond or other guarantee of performance, and to approve the amount, form and sufficiency thereof.

e. The commissioner may authorize purchases required by state agencies or other authorized purchasers by letting a contract pursuant to a written agreement, or by approving the use of a contract let by any department, agency or instrumentality of the United States government and/or any department, agency, office, political subdivision or instrumentality of any state or states. A state agency purchaser shall document in the procurement record its rationale for the use of a contract let by any department, agency or instrumentality of the United States government or any department, agency, office, political subdivision or instrumentality of any other state or states. Such rationale shall include, but need not be limited to, a determination of need, a consideration of the procurement method by which the contract was awarded, an analysis of alternative procurement sources including an explanation why a competitive procurement or the use of a centralized contract let by the commissioner is not in the best interest of the state, and the reasonableness of cost.

f. The commissioner is authorized to let centralized contracts, in accordance with the procedures of this section, for joint purchasing by New York state and any department, agency or instrumentality of the United States government and/or any state including the political subdivisions thereof; provided however that any entity incurring a liability under such contract shall be responsible for discharging said liability.

11. Reasonableness of results. It shall be the responsibility of the head of each state agency to periodically sample the results of the procurement process to test for reasonableness; to ensure that the results withstand public scrutiny and that the quality and the price of the purchase makes sense; and to ensure that purchasing is conducted in a manner consistent with the best interests of the state.

12. Review by the office of the state comptroller. Review by the office of the state comptroller shall be in accordance with section one hundred twelve of this chapter. If the contracting agency has not complied with one or more provisions of this article, the state comptroller may approve the awarded contract if:

a. the contracting agency determines that the noncompliance was a non-material deviation from one or more provisions of this article. For the purposes of this subdivision "non-material deviation" shall mean that such noncompliance did not prejudice or favor any vendor or potential vendor, such noncompliance did not substantially affect the fairness of the competitive process, and that a new procurement would not be in the best interest of the state. Such determination by the contracting agency and the state comptroller shall be documented in the procurement record; and

b. the state comptroller concurs in such determination.

13. Technological procurement improvements. The state procurement council may request that the

office of general services provide, or recommend to the state comptroller to provide for the utilization of technological advances and efficiencies in the procurement process including, but not limited to, electronic ordering and payment, procurement cards and similar improvements.

14. Reporting by the state comptroller. To support transparency in the state's procurement process and prudent procurement management, oversight and policy-making, the state comptroller shall submit a report to the state procurement council, the governor, the commissioner of the office of general services, the director of the budget, and the legislative fiscal committees containing data related to state agency contracts. Such report shall be made annually, on a fiscal year basis by the first of July of the next succeeding year.

a. For state agency contracts, such report shall include:

(i) a list of all active contracts as of the end of the fiscal year;

(ii) a list of all contracts reviewed by the office of the state comptroller during the fiscal year;

(iii) a list of contract award protests reviewed by the office of the state comptroller and the resolution thereof; and

(iv) for consulting contracts subject to approval of the state comptroller, a report of planned and actual employment under each contract.

b. The lists required pursuant to subparagraphs (i) and (ii) of paragraph a of this subdivision shall include, to the extent reasonably available, the following information related to each contract:

(i) the state agency letting the contract;

(ii) the state agency for which the contract is let, if different;

(iii) whether an agency contract or centralized contract;

(iv) vendor name and address;

(v) a description of the contract. For contracts let under section nine of the public buildings law, the description shall denote the scope of work of the contract and the nature of the emergency for which it was let;

(vi) contract start and end dates;

(vii) the dollar value of the contract;

(viii) for contracts subject to approval by the state comptroller, whether approved or non-approved, the date of such approval/nonapproval, and if non-approved, the reason or reasons therefor;

(ix) life to date and fiscal year expenditures against the contract and by which agencies;

(x) major contract category, including, but not limited to, consultant, construction, equipment, grants, leases, land claim, miscellaneous services, printing, repayment agreements, revenue agreements, intergovernmental agreements, and commodities;

(xi) source selection method, including "lowest price", "best value", sole source, single source, negotiated and/or emergency procurement;

(xii) number of bids/proposals received by the contracting agency; and

(xiii) subtotals as deemed applicable.

c. The report required pursuant to subparagraph (iv) of paragraph a of this subdivision shall include:

(i) information required to be reported by the contractor annually by the employment category within the contract, including the planned number of employees to provide services under the contract, the planned number of hours to be worked under the contract, and the total compensation planned under the contract; and

(ii) information required to be reported by the contractor annually pursuant to paragraph g of subdivision four of this section, specifically, the actual number of employees, by employment category within the contract, employed to provide services under the contract, the number of hours worked and total compensation under the contract.

d. For the purposes of the report required pursuant to subparagraph (iv) of paragraph a of this subdivision, a "contract for consulting services" shall mean any contract entered into by a state agency for analysis, evaluation, research, training, data processing, computer programming, engineering, environmental health and mental health services, accounting, auditing, paralegal, legal, or similar services. Such report shall be available for public inspection and copying pursuant to section eighty-seven of the public officers law provided that in disclosing such reports pursuant to the public officers law, the agency making the disclosure shall redact the name, social security number and other personal information of any individual employee or consultant that is included in such document.

e. The information required by this subdivision shall be provided in electronic format in such form as prescribed by the state comptroller such that the data can be searched and sorted.

f. All reports required under this subdivision shall be available for public inspection and copying pursuant to section eighty-seven of the public officers law provided that in disclosing such reports pursuant to the public officers law, the agency making the disclosure shall redact the name or social security number of any individual employee that is included in such document.

15. Reporting by agencies.

a. State agencies shall report annually, on a fiscal year basis, by July first of the ensuing year to the state procurement council, the governor, the legislative fiscal committees and the state comptroller the total number and total dollar value of single source contracts awarded by the agency during the fiscal year, and the percentage such contracts represent of the agency's total number and total dollar value of contract awards during the reporting period.

b. Each state agency shall include with its report an assessment by the agency head of the agency's efforts to minimize the award of single source contracts.

c. All reports required under this subdivision shall be available for public inspection and copying pursuant to section eighty-seven of the public officers law provided that in disclosing such reports pursuant to the public officers law, the agency making the disclosure shall redact the name or social security number of any individual employee that is included in such document.

HISTORY:

Add, L 1995, ch 83, § 33, eff July 20, 1995 and deemed eff on and after April 1, 1995; amd, L 1997, ch 430, § 7, eff Aug 20, 1997; L 2000, ch 95, §§ 3, 4, 6-a, 9–12, 21, 22, 25, eff July 1, 2000; L 2005, ch 1, § 15, eff Jan 1, 2006; L 2005, ch 584, § 3, eff Sept 1, 2005; L 2006, ch 10, §§ 4, 5 eff June 19, 2006; L 2006, ch 56, §§ 3, 4 (Part D), eff April 10, 2006; L 2008, ch 137, §§ 1–4, 11–17, 20, eff June 30, 2008; L 2009, ch 361, § 6, eff Aug 26, 2009; L 2010, ch 56, § 10 (Part FF), eff June 22, 2010; L 2010, ch 173, § 1, eff Oct 13, 2010; L 2011, ch 62, § 165 (Part C, Subpart B), eff March 31, 2011; L 2012, ch 55, §§ 2–5, 7, 9, 10, 12, 36 (Part L), eff March 30, 2012; L 2013, ch 55, §§ 1, 2 (Part P), eff March 28, 2013; L 2014, ch 173, § 2, effective July 22, 2014; L 2014, ch 317, § 3, effective August 11, 2014; L 2014, ch 381, § 3, effective September 23, 2014; L 2015, ch 569, §§ 1, 2, effective December 21, 2015; L 2016, ch 57, §§ 2-a, 2-b (Part F), effective April 13, 2016; L 2018, ch 57, § 2 (Part KK, Subpart A), effective January 1, 2019; L 2019, ch 96, § 9, effective January 11, 2020.

Prior Law: Former § 163, add, L 1940, ch 593, with substance derived from § 113; amd, L 1941, ch 745, § 3, L 1942, ch 868, § 2, L 1953, ch 861, § 4, L 1961, ch 416, § 5, L 1980, ch 218, § 2, L 1981, ch 1014, § 1, L 1987, ch 849, §§ 2, 3; repealed, L 1995, ch 83, § 33, eff July 20, 1995 and deemed eff on and after April 1, 1995 (see 1995 note below).

Editor's Notes Laws 1995, ch 83, § 362, sub 5, eff June 20, 1995, provides as follows:

§ 362. This act shall take effect immediately provided however:

5. Sections thirty-one through forty-two of this act shall take effect on the thirtieth day after it shall have become a law and shall be deemed to have been in full force and effect on and after April 1, 1995; provided that section 163 of the state finance law, as added by section thirty-three of this act shall remain in full force and effect until June 30, 2021 at which time it shall expire and be deemed repealed. Contracts executed prior to the expiration of such section 163 shall remain in full force and effect until the expiration of any such contract notwithstanding the expiration of certain provisions of this act. (Amd, L 2000, ch 95, § 1, eff July 1, 2000; L 2002, ch 426, § 2, eff Aug 20, 2002; L 2005, ch 56, § 1 (Part K), eff April 12, 2005, deemed eff on and after April 1, 2005; L 2006, ch 56, § 1 (Part D), eff April 10, 2006; L 2007, ch 56, § 1 (Part D), eff April 9, 2007; L 2008, ch 137, § 22, eff June 30, 2008; L 2012, ch 55, § 37 (Part L), eff March 30, 2012; L 2016, ch 57, § 1 (Part F), eff April 13, 2016.).

Laws 1997, ch 430, § 33, sub 3, eff Aug 20, 1997, provides as follows:

§ 33. This act shall take effect immediately provided, that:

3. The amendments to sections 162 and 163 of the state finance law made by sections six and seven of this act shall not affect the repeal of such sections and shall be deemed to be repealed therewith;.

Laws 2000, ch 95, § 27, subs 2 and 3, eff July 1, 2000, provides as follows:

§ 27. This act shall take effect July 1, 2000; provided, however, that:

2. Procurement contracts for which bid solicitations have been issued prior to the effective date of this act shall be awarded pursuant to the provisions of law in effect at the time of issuance.

3. Nothing contained in sections two through twenty-five of this act shall be deemed to affect the application, qualification, expiration, reversion or repeal of any provision of law amended by any section of this act and the provisions of this act shall be applied or qualified or shall expire or revert or be deemed repealed in the same manner, to the same extent and on the same date as the case may be as otherwise provided by law.

Laws 2005, ch 1, § 16, eff Aug 23, 2005, provides as follows:

§ 16. This act shall take effect immediately; provided, however, that sections one, six, eight, nine, ten, eleven and fifteen of this act shall take effect January 1, 2006; and provided, however, the amendments to paragraph f of subdivision 9 of section 163 of the state finance law made by section fifteen of this act shall not affect the repeal of such section and shall be deemed repealed therewith; provided, further, that the amendments to article 1-A of the legislative law, made by this act, shall not affect the repeal of such article pursuant to chapter 2 of the laws of 1999, as amended, and shall be deemed repealed therewith; provided, further, that sections thirteen and fourteen of this act shall take effect January 1, 2006 and shall be deemed repealed July 31, 2021; provided, further, that effective immediately, the advisory council on procurement lobbying created pursuant to section twelve of this act shall be constituted no later than sixty days following the effective date of this act, provided that effective sixty days following the effective date of this act, the advisory council on procurement lobbying shall be authorized to establish model guidelines and to add, amend and/or repeal any rules or regulations necessary for the implementation of its duties under sections twelve and thirteen of this act, and the advisory council authorized to make and complete such model guidelines on or before the effective date of section thirteen of this act; provided, further, that procurement contracts for which bid solicitations have been issued prior to the effective date of this act shall be awarded pursuant to the provisions of law in effect at the time of issuance. (Amd, L 2007, ch 501, § 1, eff Aug 1, 2007; L 2009, ch 169, § 1, eff July 11, 2009; L 2010, ch 4, § 5, eff March 10, 2010; L 2014, ch 62, § 1, eff June 30, 2014; L 2016, ch 57, § 2 (Part F), eff April 13, 2016.).

Laws 2005, ch 584, § 1, eff Sept 1, 2005, provides:

Section 1. Legislative intent. Even more so than adults, children are vulnerable to, and may be severely affected by, exposure to chemicals, hazardous wastes and other environmental hazards. The Federal Environmental Protection Agency estimates that human exposure to air pollutants indoors can be two to five times, and occasionally up to 100 times, higher than outdoor levels. Children, their teachers, and other school staff members spend a significant part of their lives in school buildings, and are exposed to chemicals from cleaners, waxes, deodorizers and other maintenance products. Health threats may be caused by the presence of such chemicals, potentially resulting in increased costs to individual schools, school districts and the state in terms of staff time and effort, cleanup costs, school closings and student absenteeism. Discharges of chemicals from cleaning and maintenance products also burden publicly-owned wastewater treatment works, and also end up in our lakes and streams. Cleaning and maintenance products that are the same in form, function and utility as products currently used in schools, but that have eliminated or lowered concentrations of potentially harmful chemicals, are increasingly being developed and are available in the marketplace. Therefore, the legislature finds that school districts and public and private elementary and secondary schools should be informed of and should purchase environmentally-sensitive cleaning and maintenance products. It is the purpose of this legislation to reduce as much as possible exposure of children and school staff to potentially-harmful chemicals and substances used in the cleaning and maintenance of schools.

Laws 2006, ch 10, § 6, eff June 19, 2006, provides as follows:

§ 6. This act shall take effect on the ninetieth day after it shall have become a law, provided, however, that the amendments to section 163 of the state finance law made by sections

four and five of this act shall not affect the repeal of such section and shall be deemed repealed therewith.

Laws 2006, ch 56, § 5 (Part D), eff April 10, 2006, provides as follows:

§ 5. This act shall take effect immediately; provided that procurement contracts for which bid solicitations have been issued prior to the effective date of this act shall be awarded pursuant to the provisions of law in effect at the time of issuance of the bid solicitation; and provided further that the amendments to section 163 of the state finance law made by sections three and four of this act shall not affect the repeal of such section and shall be deemed repealed therewith.

Laws 2008, ch 137, § 23, eff June 30, 2008, provides as follows:

§ 23. This act shall take effect immediately; provided, however, that the amendments to section 163 of the state finance law made by sections two, three, four, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, and twenty of this act shall not affect the repeal of such section and shall be deemed repealed therewith; and provided further that sections five, six, and seven of this act shall take effect on December 31, 2009. The commissioner of economic development is authorized to develop and issue a process for state agencies on or before December 31, 2008 of how the additional information required by subdivision 3 of section 143 of the economic development law shall be submitted for the procurement opportunities newsletter.

Laws 2009, ch 361, § 7, eff Aug 26, 2009, provides as follows:

§ 7. This act shall take effect immediately; provided, however, that the amendments to subdivision 4 of section 311 of the executive law made by section five of this act shall not affect the expiration of such section and shall be deemed to expire therewith; provided further that the amendment to section 163 of the state finance law made by section six of this act shall not affect the repeal of such section and shall be deemed to be repealed therewith; and provided further that the additional appointments required by subdivision 1 of section 120 and subdivision 1 of section 133 of the economic development law, as amended by sections one and two, respectively, of this act shall be made no later than April 1, 2010.

Laws 2010, ch 56, § 13, intro and sub 3 (Part FF), eff June 22, 2010, provides as follows:

§ 13. This act shall take effect immediately and shall apply to any contract let or awarded on or after such date; provided, however, that:

3. the amendments to subdivision 7 of section 163 of the state finance law made by section ten of this act shall not affect the repeal of such subdivision and shall be deemed repealed therewith; and.

Laws 2010, ch 173, § 3, eff Oct 13, 2010, provides as follows:

§ 3. This act shall take effect on the ninetieth day after it shall have become a law; provided however, that the amendments to subdivision 6 of section 163 of the state finance law made by section one of this act shall not affect the repeal of such section and shall be deemed repealed therewith.

Laws 2011, ch 62, § 174, sub 34 (Part C, Subpart B), eff March 31, 2011, provides as follows:

§ 174. This act shall take effect immediately, provided that:

34. the amendments to section 163 of the state finance law made by section one hundred sixty-five of this act shall not affect the repeal of such section and shall expire and be deemed repealed therewith.

Laws 2012, ch 55, § 39 (Part L), eff March 30, 2012, provides as follows:

§ 39. This act shall take effect immediately, provided, however, that procurement contracts for which bid solicitations have been issued prior to the effective date of this act shall be subject to the provisions of law in effect at the time of issuance; provided, however, that the amendments made to section 163 of the state finance law by sections two, three, four, five, seven, nine, ten, twelve and thirty-six of this act shall not affect the repeal of such section and shall be deemed to be repealed therewith; and provided, however, that the amendments to section 104 of the general municipal law made by section six of this act shall be subject to the expiration and reversion of such section pursuant to section 9 of subpart A of part C of chapter 97 of the laws of 2011, when upon such date the provisions of section twenty-seven of this act shall take effect; and provided, however, that the amendments to paragraph a of subdivision 5 of section 355 of the education law made by section thirty-one of this act shall be subject to the expiration and reversion of such subdivision pursuant to section 4 of subpart B of part D of chapter 58 of the laws of 2011, when upon such date the provisions of section thirty-two of this act shall take effect; and provided that the amendments to subdivision a of section 6218 of the education law made by section thirty-three of this act shall be subject to the expiration and reversion of such subdivision pursuant to section 4 of subpart B of part D of chapter 58 of the laws of 2011, as amended, when upon such date the provisions of section thirty-four of this act shall take effect.

Laws 2013, ch 55, § 3 (Part P), eff March 28, 2013, provides as follows:

§ 3. This act shall take effect immediately; provided however, that the amendments to section 163 of the state finance law made by sections one and two of this act shall not affect the repeal of such section and shall be deemed repealed therewith.

Laws 2014, ch 173, § 3, eff July 22, 2014, provides:

§ 3. This act shall take effect immediately, provided, that the amendment to subdivision 6-a of section 163 of the state finance law made by section two of this act shall not affect the repeal of such section and shall be deemed repealed therewith.

Laws 2014, ch 317, § 4, eff Aug 11, 2014, provides:

§ 4. This act shall take effect immediately; provided, however, that the amendments to subdivision 5 of section 9 of the public buildings law made by section two of this act shall not affect the expiration thereof pursuant to chapter 674 of the laws of 1993, as amended, and shall be deemed to expire therewith; and provided, further, that the amendments to section 163 of the state finance law made by section three of this act shall not affect the repeal of such section and shall be deemed repealed therewith.

Laws 2014, ch 381, § 4, eff Sept 23, 2014, provides:

§ 4. This act shall take effect immediately; provided however that the amendments made to subparagraphs (vii), (viii), (ix), (x) and (xi) of paragraph b of subdivision 3 of section 163 of the state finance law by section three of this act shall not affect the repeal of such section and shall be deemed repealed therewith.

Laws 2015, ch 569, § 3, eff December 21, 2015, provides:

§ 3. This act shall take effect immediately; provided however, that the amendments to section 163 of the state finance law made by sections one and two of this act shall not affect the repeal of such section and shall be deemed repealed therewith.

Laws 2016, ch 57, § 3 (Part F), eff April 13, 2016, provides:

§ 3. This act shall take effect immediately and shall be deemed to have been in full force and effect on and after April 1, 2016; provided, however, that the provisions of sections two-a, two-b, two-c and two-d of this act shall apply to any procurement initiated on or after such date; provided, further however, that the amendments to section 163 of the state finance law made by sections two-a and two-b of this act shall not affect the repeal of such section as provided in subdivision 5 of section 362 of chapter 83 of the laws of 1995, as amended, and shall be deemed repealed therewith; provided, further, however, that the amendments to section 139-j of the state finance law made by section two-d of this act shall not affect the repeal of such section as provided in section 16 of chapter 1 of the laws of 2005, as amended, and shall be deemed repealed therewith.

Laws 2018, ch 57, § 3 (Part KK, Subpart A), eff January 1, 2019, provides:

§ 3. This act shall take effect on the first of January next succeeding the date on which it shall have become a law; provided, however, that the amendments to subdivision 7 of section 163 of the state finance law made by section one of this act shall not affect the repeal of such section and shall be deemed repealed therewith.

Laws 2019, ch 96, § 16, eff January 11, 2020, provides:

§ 16. This act shall take effect on the one hundred eightieth day after it shall have become a law, provided, however, that the provisions of section twelve of this act shall apply to any state contracts executed and entered into on or after January 1, 2020 and shall exclude such contracts that have been previously awarded or have pending bids or pending requests for proposals issued prior to such date, and shall not apply to projects that have commenced project design prior to such date; provided, further, that:

(a) the amendments to article 15-A of the executive law, made by sections one, two, three, four, five, six, seven and eight of this act, shall not affect the expiration of such article and shall expire and be deemed expired therewith;

(b) the amendments to section 163 of the state finance law, made by section nine of this act, shall not affect the expiration and repeal of such section, and shall expire and be deemed repealed therewith;

(c) the amendments to section 139-j of the state finance law, made by section eleven of this act, shall not affect the expiration and repeal of such section, and shall expire and be deemed repealed therewith; and

(d) section fourteen of this act shall expire and be deemed repealed December 31, 2024.

Amendment Notes The 2014 amendment by ch 173, § 2 deleted the second sentence of 6-a, which formerly read: "Notwithstanding the provisions of article four-C of the economic development law, the commissioner of general services may make purchases or enter into contracts for the acquisition of commodities and services having a value not exceeding thirty thousand dollars without prior approval by any other state officer or agency in accordance with procedures and requirements set forth in this article."

The 2014 amendment by ch 317, § 3 deleted former 14; and added 14 and 15.

The 2014 amendment by ch 381, § 3 added 3b(vii) and redesignated former 3b(vii) through 3b(xi) as 3b(viii) through 3b(xii).

2013. Chapter 55, § 1 (Part P) amended:

Sub 6 by adding the matter in italics.

2013. Chapter 55, § 2 (Part P) amended:

By adding sub 6-c.

2012. Chapter 55, § 2 (Part L) amended:

Sub 1, par j by adding the matter in italics.

2012. Chapter 55, § 3 (Part L) amended:

Sub 3, par a, subpar (iv) by deleting at fig 1 "any officer, body or agency of the state or of a political subdivision or a district therein, or fire company or volunteer ambulance service as such are defined in section one hundred of the general municipal law, to make", at fig 2 ", pursuant to the provisions of section one hundred four of the general municipal law. The commissioner is authorized to permit any county extension service association as authorized under subdivision eight of section two hundred twenty-four of the county law, or any association or other entity as specified in and in accordance with section one hundred nine-a of the general municipal law, or any other association or entity as specified in state law, to make purchases of commodities through the office of general services' centralized contracts; provided, however, that such entity so empowered shall accept sole responsibility for any payment due with respect to such purchase" and adding the matter in italics.

By deleting sub 3, par a, subpar (viii).

2012. Chapter 55, § 4 (Part L) amended:

Sub 3, par d, opening par by deleting at fig 1 "subdivision" and adding the matter in italics.

2012. Chapter 55, § 5 (Part L) amended:

Sub 4, par e by deleting at fig 1 "Any officer, body or agency of a political subdivision as defined in section one hundred of the general municipal law or a district therein, may make purchases of services through the office of general services' centralized contracts for services, subject to the provisions of section one hundred four of the general municipal law. The commissioner may permit and prescribe the conditions for the purchase of services through the office of general services' centralized contracts for services by any public authority or public benefit corporation of the state including the port authority of New York and New Jersey. The commissioner is authorized to permit any public library, association library, library system, cooperative library system, the New York Library Association, and the New York State Association of Library Boards or any other library except those which are operated by for profit entities, to make purchases of services through the office of general services' centralized contracts; provided, however, that such entity so empowered shall accept sole responsibility for any payment due with respect to such purchase." and adding the matter in italics.

2012. Chapter 55, § 7 (Part L) amended:

Sub 4, par b, subpar (i) by deleting at fig 1 "and state agencies may when such centralized contracts are in the form, function or utility required by said agency, purchase from established centralized contracts. The state procurement council may, from time to time, require that state agencies procure services from certain centralized contracts" and adding the matter in italics.

2012. Chapter 55, § 9 (Part L) amended:

By redesignating sub 5, par a as sub 5 second undesignated par.

Sub 5, second undesignated par, par (ii), opening par by deleting at fig 1 "may" and adding the matter in italics.

Sub 5, second undesignated par, par (ii), subpar (A) by deleting at fig 1 "Purchase" and adding the matter in italics.

Sub 5, second undesignated par, par (ii), subpar (B) by deleting at fig 1 "Request" and adding the matter in italics.

Sub 5, second undesignated par, par (ii), subpar (C) by deleting at fig 1 "Procure" and adding the matter in italics.

By deleting sub 5, par b.

2012. Chapter 55, § 10 (Part L) amended:

Sub 7 by deleting at fig 1 "and, in addition, for the period from July first, two thousand ten, to July first, two thousand twelve, fuels (home heating, diesel, gasoline, natural gas), road salt, recycled paper, tires, telecommunications equipment, industrial supplies (tools, equipment), bituminous materials, drainage and culvert pipe, and road aggregate (gravel),", at fig 2 ", provided that the", at fig 3 "has made", at fig 4 "such method" and adding the matter in italics.

2012. Chapter 55, § 12 (Part L) amended:

Sub 8 by deleting at fig 1 "fifteen" and adding the matter in italics.

2012. Chapter 55, § 36 (Part L) amended:

By adding sub 1, par k.

The 2015 amendment by ch 569, §§ 1, 2, added "or service-disabled veteran-owned business enterprises as defined in subdivision one of section three hundred sixty-nine-h of the executive law" in the last sentence of 1j; substituted "articles fifteen-A and seventeen-B" for "article fifteen-A" in 6; and made a related change.

The 2016 amendment by ch 57, §§ 2-a, 2-b (Part F), deleted "which shall provide a reasonable time for requesting a debriefing" at the end of the last sentence of the first paragraph of 9c; added 9c(i) through 9c(iv), 12a, and 12b; and added the second sentence of the introductory language of 12.

The 2018 amendment by ch 57, § 2 (Part KK, Subpart A), added "and the statement of certification required by section one hundred thirty-nine-l of this chapter" in the second sentence of 7.

The 2019 amendment by ch 96, § 9, substituted "remanufactured in an amount not exceeding five hundred thousand dollars" for "remanufactured, or commodities that are food, including milk and milk products, grown, produced or harvested in New York state in an amount not exceeding two hundred thousand dollars" and added " without a formal

competitive process and for commodities that are food, including milk and milk products, grown, produced or harvested in New York state in an amount not to exceed two hundred thousand dollars" in 6; and added 6-d.

Notes to Decisions

Analysis

1. Generally
2. Letting of contracts
3. Best Value
4. Method of procurement
5. Soliciting and accepting offers
6. Standing denied
7. Commissioner's authority
8. Illustrative cases
9. Use of funds rule

1. Generally

The Office of General Services may not validly adopt a rule or standard for bidding on public contracts which enlarges or alters the powers expressed in statute governing bidding. American Institute for Imported Steel, Inc. v Office of General Services, 47 A.D.2d 118, 365 N.Y.S.2d 56, 1975 N.Y. App. Div. LEXIS 8724 (N.Y. App. Div. 3d Dep't 1975), aff'd, 38 N.Y.2d 991, 384 N.Y.S.2d 437, 348 N.E.2d 913, 1976 N.Y. LEXIS 2632 (N.Y. 1976).

The Commissioner of General Services has the power under the State Finance Law to adopt a rule requiring that all bids must be on domestic commodities unless otherwise specified. 1973 NY Ops Atty Gen April 25 (Formal), 1973 N.Y. AG LEXIS 141.

2. Letting of contracts

CLS St Fin § 163(10)(c), which authorizes relatively new type of contract that makes bidder eligible to receive purchase orders for duration of contract, allowed postbid price reduction where reduction benefited taxpayers in that state could buy bituminous concrete at lower price; such reduction did not undermine bidding process. Pallette Stone Corp. v State Office of Gen. Servs., 245 A.D.2d 756, 665 N.Y.S.2d 457, 1997 N.Y. App. Div. LEXIS 12945 (N.Y. App. Div. 3d Dep't 1997).

State Office of General Services (OGS) was not required to formally promulgate rule reflecting policy of allowing postbid price reductions under multiple-award contract making qualified bidders eligible to receive purchase orders for bituminous concrete where standards in CLS St Fin § 163(10)(c) governing multiple-award contracts—namely, "the best interests of the state" and "the most practical and economical alternative"—allow considerable discretion, and thus subject OGS policy was not "rule" under CLS St Adm P Act § 102(2)(a)(i) or "rule or regulation" under CLS NY Const Art IV § 8. Pallette Stone Corp. v State Office of Gen. Servs., 245 A.D.2d 756, 665 N.Y.S.2d 457, 1997 N.Y. App. Div. LEXIS 12945 (N.Y. App. Div. 3d Dep't 1997).

3. Best Value

Order staying an arbitration was proper because a collective bargaining agent's allegation that the replacement of a health benefit administrator violated a provision in an underlying collective bargaining agreement (CBA) requiring approval of a joint committee would have violated public policy set forth in N.Y. State Fin. Law § 163(4)(d), (10), under which service contracts were to have been awarded on the basis of best value to a responsive and responsible offeror; the agent's request that the CBA be interpreted and enforced so as to require joint committee approval before selection of a new insurance carrier or administrator would have effectively delegated to that committee control and veto power over the procurement of health benefit services provided pursuant to the CBA and would have impermissibly added another layer to the decision-making process, one not contemplated or provided by the legislatively crafted procurement scheme. Such a result was untenable, and irreconcilable with and would have clearly violated the public policy obligating the state to award contracts for services, after a competitive bidding process, based solely upon which bid represented the best value. Matter of New York State Correctional Officers & Police Benevolent Assn., Inc. v New York State Dept. of Civ. Serv., 70 A.D.3d 240, 892 N.Y.S.2d 614, 2009 N.Y. App. Div. LEXIS 9840 (N.Y. App. Div. 3d Dep't 2009).

4. Method of procurement

In Article 78 proceeding to annul government contract for provision of electronic benefit transfer services for social services recipients, court dismissed claim that respondent violated CLS St Fin § 163(7) because it did not specify that competitive range would be 10 percent until after bidders' first proposals were received but prior to receipt of their final proposals, where competitive range procedure embodied requisite cost-benefit analysis and was in public interest, and there was no evidence of favoritism, fraud or corruption, nor any unfair advantage to low bidder at other bidders' expense. Transactive Corp. v New York State Dep't of Soc. Servs., 236 A.D.2d 48, 665 N.Y.S.2d 701, 1997 N.Y. App. Div. LEXIS 12010 (N.Y. App. Div. 3d Dep't 1997), aff'd, 92 N.Y.2d 579, 684 N.Y.S.2d 156, 706 N.E.2d 1180, 1998 N.Y. LEXIS 4041 (N.Y. 1998).

5. Soliciting and accepting offers

In Article 78 proceeding to annul government contract to provide electronic benefit transfer services for social services recipients, court dismissed claim that respondent's request for proposals (RFP) failed to comply with CLS St Fin § 163(9)(b) because it did not list 109 scoring items used in evaluating bidders' technical proposals, as § 163(9)(b) does not require particularization but only generalization and RFP met that standard where it set forth general evaluation criteria and weight accorded to each, it adequately advised bidders as to weight given to price factor, 109 items not listed were simply more specific factors subsumed within 5 general criteria listed, and record showed that technical proposals were scored in manner specified in RFP. Transactive Corp. v New York State Dep't of Soc. Servs., 236 A.D.2d 48, 665 N.Y.S.2d 701, 1997 N.Y. App. Div. LEXIS 12010 (N.Y. App. Div. 3d Dep't 1997), aff'd, 92 N.Y.2d 579, 684 N.Y.S.2d 156, 706 N.E.2d 1180, 1998 N.Y. LEXIS 4041 (N.Y. 1998).

State agency properly rejected all bids and issued revised request for proposals on ground that it violated CLS St Fin § 163(9)(c) by requesting clarification and additional information from petitioner, lowest bidder under initial request for proposals, in absence of language in original request for proposals permitting it to do so. La Corte Elec. Constr. & Maintenance v New York State Dep't of Soc. Servs., 243 A.D.2d 1029, 663 N.Y.S.2d 446, 1997 N.Y. App. Div. LEXIS 10876 (N.Y. App. Div. 3d Dep't 1997).

6. Standing denied

In Article 78 proceeding challenging Department of Social Services' award of contract to create and implement electronic benefit transfer system (EBTS) which would replace existing system whereby government benefits were distributed (in some areas) by individual attendants at local "check cashing" institutions, trade association of local check cashing institutions was not within zone of interests protected by CLS St Fin § 163 and thus lacked standing to sue, although it stood to lose remuneration for services performed under pre-EBTS arrangement, because its alleged injury arose from decision to have EBTS, not from procurement process to determine who would implement it. Transactive Corp. v New York State Dep't of Soc. Servs., 92 N.Y.2d 579, 684 N.Y.S.2d 156, 706 N.E.2d 1180, 1998 N.Y. LEXIS 4041 (N.Y. 1998).

In Article 78 proceeding challenging Department of Social Services' award of contract to create and implement electronic benefit transfer system (EBTS) for distribution of certain government benefits, lead subcontractor for unsuccessful bidder was not within zone of interests protected by CLS St Fin § 163 although it suffered potential economic injury, because it was not bidder or offerer under CLS St Fin Art 11; allowing any entity to bring suit based on its status as "bidding team member" would confer standing to too many potential litigants. Transactive Corp. v New York State Dep't of Soc. Servs., 92 N.Y.2d 579, 684 N.Y.S.2d 156, 706 N.E.2d 1180, 1998 N.Y. LEXIS 4041 (N.Y. 1998).

In Article 78 proceeding to annul government contract to provide electronic benefit transfer services for social services recipients based on respondent's alleged noncompliance with Procurement Stewardship Act of 1995 (CLS St Fin §§ 160 et

seq.), petitioner that filed intention to bid but did not, as required by request for proposals (RFP), certify that it could meet or exceed qualifications for bidders established by RFP, and did not make evidentiary showing that it could have qualified, did not have standing because its interest was not within zone of interest protected by State Finance Law. Transactive Corp. v New York State Dep't of Soc. Servs., 236 A.D.2d 48, 665 N.Y.S.2d 701, 1997 N.Y. App. Div. LEXIS 12010 (N.Y. App. Div. 3d Dep't 1997), aff'd, 92 N.Y.2d 579, 684 N.Y.S.2d 156, 706 N.E.2d 1180, 1998 N.Y. LEXIS 4041 (N.Y. 1998).

7. Commissioner's authority

Authority of commissioner to make rules is limited to administrative field and, in any event, clause in specifications may not be given effect as rule if it is intended to confer upon commissioner discretion wider than discretion vested in him under statute. Dictaphone Corp. v O'Leary, 287 N.Y. 491, 41 N.E.2d 68, 287 N.Y. (N.Y.S.) 491, 1942 N.Y. LEXIS 1086 (N.Y. 1942).

8. Illustrative cases

In Article 78 proceeding to annul government contract to provide electronic benefit transfer services for social services recipients based on respondent's alleged failure to comply with Procurement Stewardship Act of 1995 (CLS St Fin §§ 160 et seq.), petitioner could be viewed as "unsuccessful bidder" although it did not actually submit any bid, where it was nation's largest processor of systems for electronic distribution of benefits and primary subcontractor for financial institution that submitted unsuccessful bid, and request for proposals welcomed bids from teams with clear distinction of responsibilities so long as one member of team was financial institution, other team members were fully qualified to perform their expected functions and only one team member was designated as primary contractor. Transactive Corp. v New York State Dep't of Soc. Servs., 236 A.D.2d 48, 665 N.Y.S.2d 701, 1997 N.Y. App. Div. LEXIS 12010 (N.Y. App. Div. 3d Dep't 1997), aff'd, 92 N.Y.2d 579, 684 N.Y.S.2d 156, 706 N.E.2d 1180, 1998 N.Y. LEXIS 4041 (N.Y. 1998).

Proceeding to review determination to award contract to bidder other than petitioner was improperly dismissed without hearing where parties had provided only conclusory assertions in support of their respective contentions as to certification requirements. Power Cooling Inc. v State Univ. of New York, 244 A.D.2d 493, 665 N.Y.S.2d 909, 1997 N.Y. App. Div. LEXIS 11642 (N.Y. App. Div. 2d Dep't 1997).

Commissioner's decision to cancel a contract with a floor covering installer to perform government projects after discovering that the installer's bid was below the prevailing wage rate required for state contracts, and not permitting modification of the proposal was rational, and the trial court properly dismissed the installer's N.Y. C.P.L.R. art. 78 petition seeking an injunction to prevent the cancellation. Taub's Carpet & Tile Corp. v Ringler, 1 A.D.3d 730, 766 N.Y.S.2d 646, 2003 N.Y. App. Div. LEXIS 11734 (N.Y. App. Div. 3d Dep't 2003).

Corporation did not depart from the terms of its request for proposals for debt collection services in demanding that a law firm obtain written confirmation from the jurisdictions at issue that it was exempt from their licensing requirements because the law firm was made aware at the outset that it could be required to submit proof of appropriate licensure or registration and that the corporation had the right to request additional information to clarify the proposal; as the corporation unambiguously intended to require any successful bidder to demonstrate its ability to collect debts in all 50 states and Puerto Rico, it did not deviate from the terms of the request for proposals by directing the law firm to produce a letter from a jurisdiction stating that the law firm was exempt from licensing requirements. Nor was it irrational for the corporation to award the contract to another entity if proof of licensure was not forthcoming. Matter of Solomon & Solomon, P.C. v New York State Higher Educ. Servs. Corp., 70 A.D.3d 1280, 895 N.Y.S.2d 588, 243 N.Y.L.J. 43, 2010 N.Y. App. Div. LEXIS 1543 (N.Y. App. Div. 3d Dep't), app. denied, 15 N.Y.3d 709, 909 N.Y.S.2d 23, 935 N.E.2d 815, 2010 N.Y. LEXIS 2635 (N.Y. 2010).

Trial court did not err in dismissing appellant's action challenging a state agency's rejection of its bid for a contract because appellant failed to exhaust its administrative remedies, and it was not excused from exhaustion on the grounds that the agency acted ultra vires, since the agency was permitted to procure work by a preferred source, if appropriate, and had the power to reject all bids under certain circumstances. Matter of Guilderland Print., Inc. v New York State Off. of Temporary & Disability Assistance, 163 A.D.3d 1318, 83 N.Y.S.3d 692, 2018 N.Y. App. Div. LEXIS 5291 (N.Y. App. Div. 3d Dep't 2018).

Office of General Services acted lawfully in allowing contractor selected under one-year multiple-award contract for supplying concrete for road repairs to voluntarily reduce its state contract price because it had subsequently submitted lower bid on another public works contract; competitive bidding process was not thereby undermined, there was no suggestion of favoritism, public interest was advanced by lower prices, and general specifications specifically advised bidders that any contractor offering same product to another buyer at price lower than state contract price had to offer that price reduction to state. Pallette Stone Corp. v State Office of Gen. Servs., 168 Misc. 2d 869, 645 N.Y.S.2d 389, 1996 N.Y. Misc. LEXIS 212 (N.Y. Sup. Ct. 1996), aff'd, 245 A.D.2d 756, 665 N.Y.S.2d 457, 1997 N.Y. App. Div. LEXIS 12945 (N.Y. App. Div. 3d Dep't 1997).

9. Use of funds rule

Governor and the New York State Department of Health (DOH) acted within their authority in promulgating Executive Order (Cuomo) No. 38 (N.Y. Comp. Codes R. & Regs. tit. 9, § 8.38) and the use-of-funds rule, N.Y. Comp. Codes R. & Regs. tit. 10, pt. 1002, and the use-of-funds rule's administrative costs and executive compensation limits were consistent with N.Y. Pub. Health Law §§ 201, 206 and N.Y. State Fin. Law § 163 or their underlying purpose; the Boreali factors did not indicate that DOH usurped the New York State legislature's function. Agencies for Children's Therapy Servs., Inc. v New York State Dept. of Health, 136 A.D.3d 122, 22 N.Y.S.3d 524, 2015 N.Y. App. Div. LEXIS 9650 (N.Y. App. Div. 2d Dep't 2015), app. dismissed, 26 N.Y.3d 1132, 47 N.E.3d 774, 27 N.Y.S.3d 495, 2016 N.Y. LEXIS 215 (N.Y. 2016), app. denied, 27 N.Y.3d 907, 56 N.E.3d 900, 36 N.Y.S.3d 620, 2016 N.Y. LEXIS 1614 (N.Y. 2016).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS Educ §§ 355, 6218.

Codes, Rules and Regulations:

Purchasing procedures and purchases from preferred sources. 9 NYCRR §§ 250.0 et seq.

Jurisprudences:

Matthew Bender's New York Practice Guides: 2 New York Practice Guide: Business and Commercial §§ 13.06, 13.16.

TAX LAW

Article
9. Corporation Tax
9-A. Franchise Tax on Business Corporations
11. Tax on Mortgages
12-A. Tax on Gasoline and Similar Motor Fuel
13. Tax on Unrelated Business Income
20. Tax on Cigarettes and Tobacco Products
22. Personal Income Tax
28. Sales and Compensating Use Taxes

HISTORY:
Add, L 1909, ch 62, eff Feb 17, 1909.

ARTICLE 9 Corporation Tax

Section
186-f. Public safety communications surcharge

HISTORY:
Add, L 1909, ch 62.

§ 186-f. Public safety communications surcharge

1. Definitions. As used in this section, where not otherwise specifically defined and unless a different meaning is clearly required:

(a) "Place of primary use" has the same meaning as that term is defined in paragraph twenty-six of subdivision (b) of section eleven hundred one of this chapter.

(b) "Wireless communications customer" means mobile telecommunications customer as defined in subparagraph (i) of paragraph twenty-seven of subdivision (b) of section eleven hundred one of this chapter, who contracts for or is the end user of wireless communications service.

(c) "Wireless communications device" means any equipment used to access a wireless communications service.

(d) "Wireless communications service" means all commercial mobile services, as that term is defined in section 332(d) of title 47 of the United States Code, as amended from time to time, including, but not limited to, all broadband personal communications services, wireless radio telephone services, geographic area specialized and enhanced specialized mobile radio services, and incumbent-wide area specialized mobile radio licensees, which offer real time, two-way voice or data service that is interconnected with the public switched telephone network or otherwise provides access to emergency communications services.

(e) "Wireless communications service supplier" means a home service provider as defined in subparagraph (ii) of paragraph twenty-seven of subdivision (b) of section eleven hundred one of this chapter, provided that the home service provider provides wireless communications service and has one or more wireless communications customers in New York state.

(f) "Prepaid wireless communications seller" means a person making a retail sale of prepaid wireless communications service.

(g) "Prepaid wireless communications service" means a prepaid mobile calling service as defined in paragraph twenty-two of subdivision (b) of section eleven hundred one of this chapter.

2. Public safety communications surcharge.

(a) (1) A surcharge on wireless communications service provided to a wireless communications customer with a place of primary use in this state is imposed at the rate of one dollar and twenty cents per month on each wireless communications device in service during any part of each month. The surcharge must be reflected and made payable on bills rendered to the wireless communications customer for wireless communication service.

(2) A surcharge is imposed on the retail sale of each prepaid wireless communications service, whether or not any tangible personal property is sold therewith, at the rate of ninety cents per retail sale. A sale of a prepaid wireless communications service occurs in this state if the sale takes place at a seller's business location in the state. If the sale does not take place at the seller's place of business, it shall be conclusively determined to take place at the purchaser's shipping address or, if there is no item shipped, at the purchaser's billing address, or, if the seller does not have that address, at such address as approved by the commissioner that reasonably reflects the customer's location at the time of the sale of the prepaid wireless communications service.

(b) The surcharges must be reported and paid to the commissioner on a quarterly basis on or before the twentieth day of the month following each quarterly period ending on the last day of February, May, August and November, respectively. The payments must be accompanied by a return in the form and containing the information the commissioner may prescribe.

(c) The surcharges must be added as a separate line item to bills furnished by a wireless communications service supplier to its customers, or must be added as a separate line item to a sales slip, invoice, receipt, or other statement of the price, if any, that is furnished by a prepaid wireless communications seller to a purchaser, and must be identified as the "public safety communications surcharge".

(d) Each wireless communications service supplier and prepaid wireless communications seller is entitled to retain, as an administrative fee, an amount equal to three percent of fifty-eight and three-tenths percent of the total collections of the surcharges imposed by this section, provided that the supplier or seller files any required return and remits the surcharge due to the commissioner on or before its due date.

3. Exemption. Lifeline consumers shall be exempt from the surcharges imposed by this section.

4. Applicable provisions.

(a) Except as otherwise provided in this section, the surcharges imposed under this section shall be administered and collected by the commissioner in a like manner as the taxes imposed by article twenty-eight of this chapter. All the provisions of article twenty-eight of this chapter, including the provisions relating to definitions, exemptions, returns, personal liability for the tax, collection of tax from the customer, payment of tax, and the administration of the taxes imposed by such article, shall apply to the surcharges imposed under the authority of this section so far as those provisions can be made applicable to the surcharges imposed by this section, with such modifications as may be necessary in order to adapt the language of those provisions to the surcharges imposed by this section. Those provisions shall apply with the same force and effect as if the language of those provisions had been set forth in full in this section, except to the extent that any of those provisions is either inconsistent with a provision of this section or is not relevant to the surcharge imposed by this section. For purposes of this section, any reference in this chapter to a tax or the taxes imposed by article twenty-eight of this chapter shall be deemed also to refer to the surcharges imposed by this section unless a different meaning is clearly required.

(b) Notwithstanding the provisions of paragraph (a) of this subdivision:

(1) the exemptions provided for in section eleven hundred sixteen of this chapter, other than the exemptions in paragraphs one, two and three of subdivision (a) of that section, shall not apply to the surcharges imposed by this section.

(2) the credit provided in subdivision (f) of section eleven hundred thirty-seven of this chapter shall not apply to this section.

5. Deposits of surcharge monies collected and received. Notwithstanding any provision of law to the contrary, all surcharge monies collected and received by the commissioner under this section must be deposited daily to the credit of the comptroller with those responsible banks, banking houses or trust companies the comptroller may designate. Those deposits must be kept separate and apart from all other monies in the possession of the comptroller. The comptroller must require adequate security from all such depositories. Of the total revenue collected or received under this section, the comptroller must retain in the comptroller's hands an amount determined by the commissioner to be necessary for refunds under this section, out of which the comptroller will pay any refunds to which taxpayers are entitled under the provisions of this section. The comptroller, after reserving the amount to pay refunds, must, on or before the tenth day of each month, pay all surcharge monies collected and received under this section and remaining to the comptroller's credit as follows:

(a) forty-one and seven-tenths of the revenues collected and received under this section into the state general fund; and

(b) after deducting the amount paid under paragraph (a) of this subdivision and the amount retained by wireless communications suppliers pursuant to paragraph (d) of subdivision two of this section, the balance of the revenues collected under this section into the statewide public safety communications account of the miscellaneous special revenue fund, created pursuant to section ninety-seven-qq of the state finance law.

6. Distribution. The monies collected from the surcharge imposed by this section must be distributed to include the following:

(a) The sum of twenty-five million five hundred thousand dollars must be allocated to the state police pursuant to appropriation by the legislature annually;

(b) The sum of one million five hundred thousand dollars must be deposited into the New York state emergency services revolving loan fund annually; provided, however, that such sums shall not be deposited for state fiscal years two thousand eleven —two thousand twelve, two thousand twelve—two thousand thirteen, two thousand fourteen—two thousand fifteen, two thousand fifteen—two thousand sixteen, two thousand sixteen—two thousand seventeen, two thousand seventeen—two thousand eighteen, two thousand eighteen—two thousand nineteen, two thousand nineteen—two thousand twenty, two thousand twenty—two thousand twenty-one and two thousand twenty-one—two thousand twenty-two;

(c) Up to the sum of seventy-five million dollars annually may be used for the provision of grants or reimbursements to counties for the development, consolidation, or operation of public safety communications systems or networks designed to support statewide interoperable communications for first responders, to be distributed pursuant to standards and guidelines issued by the state. Annual grants may consider costs borne by a municipality related to the issuance of local public safety communications bonds pursuant to section twenty-four hundred thirty-two of the public authorities law, when the municipality has qualified as an approved participant in a statewide interoperable communications system under the standards and guidelines issued by the state, and maintains compliance with such standards and guidelines. The grant amount will be prescribed pursuant to an agreement with the municipality, and may not exceed thirty percent of the annual cost borne by the municipality in relation to such bonds;

(d) To provide the costs of debt service for bonds and notes issued to finance expedited deployment funding pursuant to the provisions of section three hundred thirty-three of the county law and section sixteen hundred eighty-nine-h of the public authorities law; and

(e) services and expenses that support the operations and mission of the division of homeland security and emergency services as appropriated by the legislature.

(f) [Repealed]

(g) The sum of ten million dollars annually shall be used for the provision of grants to counties for costs related to the operations of public safety dispatch centers, to be distributed pursuant to a plan developed by the commissioner of homeland security and emergency services and approved by the director of the budget. Such plan may consider such factors as population density and emergency call volume.

HISTORY:

Add, L 2009, ch 56, § 3 (Part B), eff Sept 1, 2009; amd, L 2010, ch 56, §§ 38, 39 (Part B), eff July 1, 2010; L 2011, ch 57, § 1 (Part D), eff April 13, 2011; L 2011, ch 57, § 2 (Part D), eff April 1, 2012; L 2012, ch 55, § 1 (Part X), eff March 30, 2012; L 2014, ch 55, §1 (Part D), eff March 31, 2014; L 2014, ch 55, §§ 1, 2 (Part Q), eff March 31, 2014; L 2016, ch 57, § 1 (Part C), effective April 13, 2016; L 2017, ch 59, § 1 (Part EEE), effective December 1, 2017; L 2018, ch 55, § 1 (Part M), effective April 1, 2018; L 2020, ch 55, § 1 (Part I), effective April 1, 2020.

Editor's Notes: Laws 2009, ch 56, § 4 (Part B), eff Sept 1, 2009, provides as follows:

§ 4. This act shall take effect on the first day of the quarterly period, as described in paragraph (b) of subdivision 2 of section 186-f of the tax law, as added by section three of this act, next commencing at least 120 days after this act becomes a law.

Laws 2011, ch 57, § 4 (Part D), eff March 31, 2011, provides as follows:

§ 4. This act shall take effect immediately; provided however that section two of this act shall take effect April 1, 2012, and shall expire and be deemed repealed March 31, 2014.

Laws 2012, ch 55, § 2 (Part X), eff March 30, 2012, provides as follows:

§ 2. This act shall take effect immediately; provided however that the amendments to paragraph (d) of subdivision 6 of section 186-f of the tax law made by section one of this act shall not affect the expiration of such paragraph and shall expire therewith.

Laws 2017, ch 59, § 4 (Part EEE), eff December 1, 2017, provides:

§ 4. This act shall take effect immediately; provided, however, sections one and two of this act shall take effect December 1, 2017; and section one of this act shall apply to wireless communications service and prepaid wireless communications service provided on and after that date.

Laws 2018, ch 55, § 2 (Part M), eff April 1, 2018, provides:

§ 2. This act shall take effect April 1, 2018.

Laws 2020, ch 55, § 2 (Part I), eff April 1, 2020, provides:

§ 2. This act shall take effect April 1, 2020.

Subsection History: Sub 5, par (b), amd, L 2014, ch 55, § 1 (Part Q), eff March 31, 2014.

Sub 6, par (b), amd, L 2011, ch 57, § 1 (Part D), eff March 31, 2011, L 2014, ch 55, § 1 (Part D), eff March 31, 2014.

Sub 6, par (c), add, L 2010, ch 56, § 38 (Part B), eff July 1, 2010.

Former sub 6, par (c), deleted, L 2010, ch 56, § 38 (Part B), eff July 1, 2010.

Sub 6, par (d), add, L 2011, ch 57, § 2 (Part D), eff April 1, 2012; amd, L 2012, ch 55, § 1 (Part X), eff March 30, 2012 (see 2012 note below).

Former sub 6, par (d), redesignated sub 6, par (e), L 2011, ch 57, § 2 (Part D), eff April 1, 2012.

Sub 6, par (e), formerly sub 6, par (d), amd, L 2010, ch 56, § 39 (Part B), eff July 1, 2010; so designated sub 6, par (e), L 2011, ch 57, § 2 (Part D), eff April 1, 2012.

Former sub 6, par (e), redesignated sub 6, par (f), L 2011, ch 57, § 2 (Part D), eff April 1, 2012.

Sub 6, par (f), formerly sub 6, par (e), add, L 2010, ch 56, § 39 (Part B), eff July 1, 2010; so designated sub 6, par (f) and amd, L 2011, ch 57, § 2 (Part D), eff April 1, 2012.

Sub 6, par (g), add, L 2014, ch 55, § 2 (Part Q), eff March 31, 2014.

Amendment Notes: 2014. Chapter 55, § 1 (Part D) amended:

Sub 6, par (b) by deleting at fig 1 "and" and adding the matter in italics.

2014. Chapter 55, § 1 (Part Q) amended:

Sub 5, par (b) by deleting at fig 1 "New York state wireless telephone emergency service" and adding the matter in italics.

2014. Chapter 55, § 2 (Part Q) amended:

By adding sub 6, par (g).

The 2016 amendment by ch 57, § 1 (Part C), added "two thousand sixteen–two thousand seventeen and two thousand seventeen–two thousand eighteen" in 6(b) and made a related change.

The 2017 amendment by ch 59, § 1 (Part EEE), rewrote 1 through 4.

The 2018 amendment by ch 55, § 1 (Part M), added "two thousand eighteen–two thousand nineteen and two thousand nineteen–two thousand twenty" in 6(b); and made a related change.

The 2020 amendment by ch 55, § 5 (Part I), added "two thousand twenty—two thousand twenty-one and two thousand twenty-one—two thousand twenty-two" at the end of 6(b); and made a related change.

Agency Opinions

Petitioner's 2-way paging services are not subject to Public Safety Communications Surcharge where such service is not interconnected with Public Switched Telephone Network (PSTN) and does not allow users to connect directly to emergency communication services. NY Adv Op Comm T & F TSB-A-09-(16)C.

ARTICLE 9-A Franchise Tax on Business Corporations

Section
209-G. Gift for volunteer firefighter and volunteer emergency services workers recruitment and retention

HISTORY:

Add, L 1944, ch 415.

§ 209-G. Gift for volunteer firefighter and volunteer emergency services workers recruitment and retention

Effective for any tax year commencing on or after the effective date of this section, a taxpayer in any taxable year may elect to contribute to the support of the volunteer firefighter and volunteer emergency services workers recruitment and retention fund. Such contribution shall be in any whole dollar amount and shall not reduce the amount of the state tax owed by such taxpayer. The commissioner shall include space on the corporate income tax return to enable a taxpayer to make such contribution. Notwithstanding any other provision of law, all revenues collected pursuant to this section shall be credited to the volunteer firefighter and volunteer emergency services recruitment and retention fund and shall be used only for those purposes enumerated in section ninety-nine-q of the state finance law.

HISTORY:
Add, L 2009, ch 490, § 1, eff April 26, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 490, § 4, eff April 26, 2010, provides as follows;.

§ 4. This act shall take effect on the one hundred eightieth day after it shall have become a law. Effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized to be made on or before such effective date.

ARTICLE 11 Tax on Mortgages

Section
253. Recording tax

HISTORY:
Add, L 1909, ch 62, eff Feb 17, 1909.

§ 253. Recording tax

1. A tax of fifty cents for each one hundred dollars and each remaining major fraction thereof of principal debt or obligation which is, or under any contingency may be secured at the date of the execution thereof or at any time thereafter by a mortgage on real property situated within the state recorded on or after the first day of July, nineteen hundred and six, is hereby imposed on each such mortgage, and shall be collected and paid as provided in this article. If the principal debt or obligation which is or by any contingency may be secured by such mortgage recorded on or after the first day of July, nineteen hundred and seven, is less than one hundred dollars, a tax of fifty cents is hereby imposed on such mortgage, and shall be collected and paid as provided in this article.

1-a. (a) In addition to the tax imposed by subdivision one of this section, there shall be imposed on each mortgage of real property situated within the state, except mortgages wherein the mortgagee is a natural person or persons, or is a credit union as defined in section two of the banking law, and in either case the mortgaged premises consist of real property improved by a structure containing six residential dwelling units or less, each with separate cooking facilities, a special additional tax of twenty-five cents for each one hundred dollars and each remaining major fraction thereof of principal debt or obligation which is, or under any contingency may be secured at the date of execution thereof or at anytime thereafter by such mortgage. The tax, if any, imposed by this subdivision shall in cases of real property principally improved or to be improved by one or more structures containing in the aggregate not more than six residential dwelling units, each dwelling unit having its own separate cooking facilities, be paid by the mortgagee, and such tax shall not be paid or payable, directly or indirectly, by the mortgagor except as otherwise provided in sections two hundred fifty-eight and two hundred fifty-nine of this article and except such tax shall be paid in such cases by the mortgagor where the mortgagee is an exempt organization described in paragraph (b) of this subdivision. In all other cases, such tax shall be paid by the mortgagor except that the tax shall be paid by the mortgagee where the mortgagor is an exempt organization described in paragraph (b) of this subdivision. All of the provisions of this article shall apply with respect to the special additional tax imposed by this subdivision to the same extent as if it were imposed by said subdivision one of this section, except as otherwise expressly provided in this article.

(b) An organization organized other than for profit which is operated on a nonprofit basis no part of the net earnings of which inures to the benefit of any officer, director or member and which is exempt from federal income taxation pursuant to subsection (a) of section five hundred one of the internal revenue code shall be exempt from the special additional tax imposed by this subdivision.

2. (a) In addition to the taxes imposed by subdivisions one and one-a of this section, there shall be imposed on each mortgage of real property situated within the state recorded on or after the first day of July, nineteen hundred sixty-nine, an additional tax of twenty-five cents for counties outside of the metropolitan commuter transportation district, as defined pursuant to section twelve hundred sixty-two of the public authorities law, and thirty cents for counties within such metropolitan commuter transportation district for each one hundred dollars and each remaining major fraction thereof of principal debt or obligation which is, or under any contingency may be secured at the date of execution thereof or at any time thereafter by such mortgage, saving and excepting the first ten thousand dollars of such principal debt or obligation in any case in which the related mortgage is of real property principally improved or to be improved by a one or two family residence or dwelling. All the provisions of this article shall apply with respect to the additional tax imposed by this subdivision to the same extent as if it were imposed by the said subdivision one of this section, except as otherwise expressly provided in this article. Notwithstanding article eighteen-A of the general municipal law and titles eleven and fifteen of article eight of the public authorities law, no mortgage of real property situated within the state in counties located within the metropolitan commuter transportation district, the Niagara Frontier transportation district, the Rochester-Genesee transportation district, the capital district transportation district, and the central New York regional transportation district executed, given, made, or transferred or assigned by or to an agency created under article eighteen-A of the general municipal law, an authority created under title eleven or fifteen of article eight of the public authorities law, an agent or agent of such agent of such agency or authority, a project operator receiving financial assistance from such agency or authority, a project occupant of such agency or authority, or an owner of a project receiving financial assistance from such

agency or authority shall be exempt from the additional tax imposed by this subdivision. For the purposes of this subdivision the term "financial assistance" shall have the same meaning as defined in section eight hundred fifty-four of the general municipal law. The imposition of this additional tax on mortgages recorded in a county outside the city of New York, other than one of the counties from time to time comprising the metropolitan commuter transportation district, the Niagara Frontier transportation district, the Rochester-Genesee transportation district, the capital district transportation district or the central New York regional transportation district may be suspended for a specified period of time or without limitation as to time by a local law, ordinance or resolution duly adopted by the local legislative body of such county.

(b) Any local law, ordinance or resolution suspending the imposition of this additional tax as provided in paragraph (a) of this subdivision, or amending or repealing such local law, ordinance or resolution, shall take effect only on the first day of the third month succeeding the month in which such local law, ordinance or resolution is duly adopted. Such a local law, ordinance or resolution shall not be effective unless a certified copy thereof is mailed by registered or certified mail to the state tax commission at its office in Albany at least sixty days prior to the date the local law, ordinance or resolution shall take effect. However, the tax commission may waive and reduce such sixty-day notice requirement to a requirement that such certified copy be mailed by registered or certified mail within a period of not less than thirty days prior to such effective date if it deems such action to be consistent with its duties under this article. A certified copy of any local law, ordinance or resolution adopted pursuant to this subdivision shall also be filed with the state comptroller within five days after the date it is duly adopted.

3. Notwithstanding any other provision of law to the contrary, the mortgage recording tax shall not be imposed upon any mortgage executed by a voluntary nonprofit hospital corporation, fire company or voluntary ambulance service as defined in section one hundred of the general municipal law, or upon any mortgage executed by or granted to the dormitory authority.

HISTORY:

Add, L 1909, ch 62; amd, L 1916, ch 323, § 67, eff April 26, 1916; L 1969, ch 349; L 1969, ch 350, § 1, eff July 1, 1969; L 1970, ch 460, § 6; L 1970, ch 714, § 5; L 1971, ch 151, eff April 21, 1971; L 1972, ch 732; L 1976, ch 101, § 1, eff April 2, 1976; L 1978, ch 788, §§ 19, 20, eff Jan 1, 1979; L 1986, ch 638, § 4; L 1986, ch 751, § 1, eff Jan 1, 1987; L 2005, ch 61, § 1 (Part X) (amd, L 2005, ch 63, § 2 (Part A), eff June 1, 2005), eff June 1, 2005; L 2007, ch 527, § 1, eff Aug 15, 2007; L 2008, ch 522, § 2, eff Jan 1, 2010; L 2016, ch 394, § 5, effective July 1, 2017.

Editor's Notes: Laws 1970, ch 714, § 1, provides as follows:

Section 1. Statement of legislative findings and purpose. The legislature hereby finds and declares as follows:

A. The economic growth of the state and the well-being of its people require adequate, safe, and efficient transportation facilities and services at reasonable cost to the people.

B. The strengthening and improvement of transportation and related services for the residents of the central part of the state and more particularly the growing counties of Cayuga, Cortland, Jefferson, Madison, Oneida, Onondaga and Oswego is a matter of vital importance.

C. In order to insure a healthy economy for such an area and to serve the well-being of its people, it is necessary to take the appropriate measures and assume responsibility for the preservation and improvement of non-highway transportation and related services in such an area.

D. The planning and development of such services is coordinated by the department of transportation which is responsible for balanced transportation policy and planning for all modes.

E. The provision of adequate and efficient non-highway transportation and related services in such an area requires coordinated operation of mass transit, omnibus, aviation, and marine transportation service by a public transportation authority.

F. In order that such a public transportation authority may perform its function, the municipalities included in the authority's transportation district must assume financial responsibility for the authority, utilizing whatever grants are offered or assistance made available, since the facilities operated by the authority may not be self-supporting.

Laws 1973, ch 512, § 1, eff June 5, 1973, provides as follows:

§ 2. This act shall take effect on the ninetieth day after it shall have become a law and shall apply to all mortgages recorded after January first, nineteen hundred seventy-two.

Laws 1986, ch 669, § 9, eff July 26, 1986, provides as follows:

§ 9. Notwithstanding paragraph (b) of subdivision two of section two hundred fifty-three of the tax law or any other provision of law, if the county of Dutchess, Orange or Rockland submits a plan to withdraw from the metropolitan commuter transportation district pursuant to section twelve hundred seventy-nine-b of the public authorities law, it is hereby authorized and empowered through action by its local legislative body to suspend, as of the effective date of such county's withdrawal from the district, for a specified period of time or without limitation as to time, the additional mortgage recording tax imposed by paragraph (a) of subdivision two of section two hundred fifty-three of the tax law; provided, however, that such local law, ordinance or resolution shall not be excepted from the provisions of paragraph (b) of subdivision two of such section two hundred fifty-three unless a certified copy thereof is mailed by registered or certified mail to the state tax commission at its office in Albany at least sixty days prior to the effective date of the county's withdrawal. A certified copy of any such local law, ordinance or resolution adopted pursuant to this section shall also be filed with the state comptroller and the recording officer of the county so acting within seven days after the date it is duly adopted. Except as provided herein, the provisions of the tax law shall apply to the suspension by any such county of the additional mortgage tax imposed by paragraph (a) of subdivision two of such section two hundred fifty-three.

Laws 2016, ch 394, § 6, eff July 1, 2017, provides as follows:

This act shall take effect July 1, 2017 (Amd, L 2017, ch 3, § 1, eff Feb 1, 2017.).

Laws 2017, ch 3, § 2, eff Feb 1, 2017, provides as follows:

This act shall take effect immediately and shall be deemed to have been in full force and effect on and after a chapter of the laws of 2016, amending the general municipal law, the public authorities law, and the tax law, relating to certain recording taxes, as proposed in legislative bills numbers A. 9490 and S. 7442, takes effect.

Subsection History: Sub 1, formerly entire section, so designated, sub 1, L 1969, ch 350, § 1, eff July 1, 1969.

Sub 1-a, add, L 1978, ch 788, § 19, eff Jan 1, 1979; amd, L 2008, ch 522, § 2, eff Jan 1, 2010.

Sub 1-a, par (a), amd, L 1986, ch 638, § 4, L 1986, ch 751, § 1, eff Jan 1, 1987, applicable to mortgages recorded on or after Jan 1, 1987.

Sub 2, add, L 1969, ch 350; amd, L 1969, ch 349, L 1970, ch 460, § 6, L 1970, ch 714, L 1971, ch 151, eff April 21, 1971.

Sub 2, par (a), formerly entire sub 2, so designated sub 2, par (a) and amd, L 1971, ch 151, L 1978, ch 788, § 20, eff Jan 1, 1979; amd, L 2005, ch 61, § 1 (Part X) (amd, L 2005, ch 63, § 2 ((Part A)), eff June 1, 2005), eff June 1, 2005; L 2016, ch 394, § 5, eff July 1, 2017.

Sub 2, par (b), add, L 1971, ch 151, eff April 21, 1971, applicable only to local laws, ordinances or resolutions adopted on or after July 1, 1971.

Sub 3, add, L 1972, ch 732 (see 1973 note below); amd, L 1976, ch 101, eff April 2, 1976, L 2007, ch 527, § 1, eff Aug 15, 2007.

Amendment Notes The 2016 amendment by ch 394, § 5, added the next to last sentence of 2(a).

NOTES TO DECISIONS

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1. Generally

Tax imposed by this section on mortgage executed by lessees did not amount to a tax on personal property. S.S. Silberblatt, Inc. v Tax Com. of State, 5 N.Y.2d 635, 186 N.Y.S.2d 646, 159 N.E.2d 195, 1959 N.Y. LEXIS 1401 (N.Y.), cert. denied, 361 U.S. 912, 80 S. Ct. 253, 4 L. Ed. 2d 183, 1959 U.S. LEXIS 44 (U.S. 1959).

It is not necessary that a mortgage be recorded at once upon its delivery, and failure to do so and to pay the tax does not render the instrument void, but it may be recorded and the tax paid at any time before the mortgagee seeks to enforce it. Mutual Life Ins. Co. v Nicholas, 144 A.D. 95, 128 N.Y.S. 902, 1911 N.Y. App. Div. LEXIS 1631 (N.Y. App. Div. 1911).

Assignment of rent given as security does not constitute a mortgage as defined in Tax L § 250 so as to be subject to a tax under Tax L § 253 upon recordation. Albee Fuel Corp. v Gallman, 42 A.D.2d 323, 346 N.Y.S.2d 678, 1973 N.Y. App. Div. LEXIS 3677 (N.Y. App. Div. 3d Dep't 1973), aff'd, 34 N.Y.2d 773, 358 N.Y.S.2d 140, 314 N.E.2d 879, 1974 N.Y. LEXIS 1539 (N.Y. 1974).

In a proceeding by the Attorney General seeking to enjoin mortgagees from collecting from sellers the special additional mortgage recording tax imposed by Tax Law § 253, insofar as it relates to mortgages on real property improved by a structure containing six residential dwelling units or less, and seeking restitution with respect to amounts so collected by the mortgagees from sellers, Special Term erred in denying restitution to two mortgagees on the ground that class actions were pending seeking such relief against them, where such class actions were still in the early stages and where the present proceeding was a superior and more effective device for obtaining restitution. In addition, the amount of restitution would be reduced by the amount of dollar-for-dollar tax credit received by taxpayers pursuant to Tax Law §§ 210, 606, since it would otherwise be giving taxpayers a windfall if mortgagees were required to pay an amount equal to the special tax paid. State by Abrams v Intercounty Mortgagee Corp., 87 A.D.2d 748, 448 N.Y.S.2d 675, 1982 N.Y. App. Div. LEXIS 16168 (N.Y. App. Div. 1st Dep't), app. dismissed, 57 N.Y.2d 954, 457 N.Y.S.2d 1028, 443 N.E.2d 496 (N.Y. 1982), app. denied, 61 N.Y.2d 601, 471 N.Y.S.2d 1029, 459 N.E.2d 1291, 1983 N.Y. LEXIS 6792 (N.Y. 1983).

Defendants executed adjustable-rate promissory note secured by mortgage on certain realty they owned; mortgage and note were later assigned for value to bank; defendants defaulted and action was commenced; thereafter, defendants sold mortgaged property and bank assigned note and mortgage to plaintiff; neither original mortgage nor subsequent assignments was recorded and no mortgage recording tax was paid as required by section 253 of Tax Law, which provides no judgment or final order shall be made for foreclosure or enforcement of any mortgage subject to any tax or of any debt or obligation secured by any such mortgage, unless taxes imposed have been paid–note refers to subject property and states it is secured by mortgage, and payment of required taxes is necessary before judgment on underlying debt can be granted to plaintiffs; since section 258 of Tax Law does not create obligation to record mortgage, failure to record mortgage and pay tax does not render mortgage and note unenforceable; thus, plaintiff may be entitled to obtain judgment on debt by paying required tax prior to judgment or final order–cause of action on behalf of bank was properly dismissed since bank received value for its assignment and, as assignor, no longer has standing to sue on debt. Commonwealth Land Title Ins. Co. v Lituchy, 161 A.D.2d 517, 555 N.Y.S.2d 786, 1990 N.Y. App. Div. LEXIS 6529 (N.Y. App. Div. 1st Dep't 1990).

2. Constitutionality

The tax on mortgages provided for in Art. 11 is a recording tax and as such does not conflict with the U.S. Const., Am. XIV, § 1, or with the N. Y. Const. Art. XVI, § 3. Franklin Soc. for Home Bldg. & Sav. v Bennett, 282 N.Y. 79, 24 N.E.2d 854, 282 N.Y. (N.Y.S.) 79, 1939 N.Y. LEXIS 860 (N.Y. 1939), app. dismissed, 309 U.S. 640, 60 S. Ct. 893, 84 L. Ed. 995, 1940 U.S. LEXIS 695 (U.S. 1940).

Federal savings bank was entitled to summary judgment declaring that provision of CLS Tax § 253(1-a)(1) was unenforceable insofar as it imposed mortgage recording tax which could not be passed on to borrower, since statute was preempted by regulation promulgated by Federal Home Loan Bank Board, which permitted federal savings and loan associations to pass through to their borrowers necessary costs incurred in making loans secured by mortgages on real property (12 CFR 545.32). Dime Sav. Bank, FSB v State, 174 A.D.2d 173, 579 N.Y.S.2d 679, 1992 N.Y. App. Div. LEXIS 339 (N.Y. App. Div. 2d Dep't 1992).

Taxpayer (bank) was not entitled to refund of taxes it paid pursuant to special mortgage recording tax statute (CLS Tax § 253(1-a)(a)) on grounds of unconstitutionality, even though statute's anti-pass-through provision was preempted by federal regulation, since statute, considered apart from such provision, is fully consistent with federal law, tax itself was not preempted, and legislature intended that tax be imposed irrespective of efficacy of provision. Dime Sav. Bank, FSB v State, 225 A.D.2d 581, 639 N.Y.S.2d 102, 1996 N.Y. App. Div. LEXIS 2134 (N.Y. App. Div. 2d Dep't 1996).

Interest at the rate of 3% per annum (General Municipal Law, § 3-a, subd 1) is payable by the County of Erie on a refund of a mortgage recording tax (Tax Law, § 253) which was determined by the State Tax Commission eight years after application for review to be a tax upon a national bank which the State was without power to levy; the fact that the statute was found to have been levied unconstitutionally as opposed to being unconstitutional per se does not make the case one of erroneous collection, where no interest would be payable. Moreover, the facts present a situation so offensive to one's sense of justice that interest on the refund must be awarded to ameliorate the injustice. CC&F Buffalo Development Co. v Tully, 103 Misc. 2d 1060, 427 N.Y.S.2d 392, 1980 N.Y. Misc. LEXIS 2254 (N.Y. Sup. Ct. 1980).

3. "Principal debt or obligation"

The mortgage tax, as provided for in this section, is improperly imposed upon a second mortgage collateral to first and securing same loan, when the tax has already been imposed for the total debt secured by two mortgages. People ex rel. United States Title Guaranty Co. v State Tax Com., 230 N.Y. 102, 129 N.E. 222, 230 N.Y. (N.Y.S.) 102, 1920 N.Y. LEXIS 562 (N.Y. 1920).

Where mortgagor conveyed leasehold to mortgagee, and mortgagee reconveyed leasehold and improvements thereon to mortgagor, the purchase price to be paid in installments together with a certain percentage of net annual rental income, said sale did not constitute a supplemental mortgage under Tax Law § 255, and a recording tax was subsequently due and owing upon the filing of said agreement pursuant to Tax Law § 250; the amount of the principal debt or obligation is to be used as the basis for computation of the recording tax pursuant to Tax Law, § 253, unless that amount "is not determinable from the terms of the mortgage" in which case "the value of the property covered by the mortgage" is to be used pursuant to Tax Law, § 256; here, although the consolidation agreement provided for additional payments, the amount of which would not be ascertainable at the time of recording, such payments are nothing more than additional interest and, therefore, do not make indeterminable or uncertain the amount of the principal indebtedness. 200 East 64th St. Corp. v Manley, 37 N.Y.2d 744, 374 N.Y.S.2d 621, 337 N.E.2d 133, 1975 N.Y. LEXIS 2108 (N.Y. 1975).

A mortgage given to secure a principal sum of $9,0O0,000 provided that mortgagee might install separate refrigeration plant on premises if mortgagor or sublessor failed to do so and that cost thereof was to be charged on property and secured by mortgage. In order to get the mortgage recorded, a clause was added which provided that maximum amount secured in event of any contingency was $10,900,000. Application for a refund of recording tax calculated on sum of $1,600,000 was properly denied. The contingent additional indebtedness for installation above mentioned amounted to possible physical enhancement of mortgage security and constituted principal indebtedness and not indebtedness incidental to principal secured by mortgage. The ultimate indebtedness was indeterminate so as to require the tax on the maximum amount to be secured in the event of any contingency stated in the mortgage. Rockefeller Center, Inc. v Bragalini, 8 A.D.2d 657, 185 N.Y.S.2d 82, 1959 N.Y. App. Div. LEXIS 9029 (N.Y. App. Div. 3d Dep't 1959).

Mortgage recording was due on interest included in consolidation and extension agreement, where interest was further indebtedness other than that secured by prior recorded primary mortgages, even though indebtedness represented unpaid interest on primary mortgages. In re Michael Dubroff Asso., Inc. (File No. 13738) State Tax Com., Dec. 8, 1976.

Mortgage tax is due on amount of indebtedness recited in mortgage instrument offered for recordation, where mortgage secures payment of lesser indebtedness, plus interest thereon, tax is due on total amount of which is set forth in certain note. In re Cosmopolitan Broadcasting Corp., Det State Tax Comm, Sept. 28, 1979.

4. —Incidental indebtedness

A mortgage given to secure a principal sum of $9,000,000 provided that mortgagee might install separate refrigeration plant on premises if mortgagor or sublessor failed to do so and that cost thereof was to be charged on property and secured by mortgage. In order to get the mortgage recorded, a clause was added which provided that maximum amount secured in event of any contingency was $10,900,000. Application for a refund of recording tax calculated on sum of $1,600,0O0.

Mortgage recording tax was due on interest included in consolidation and extension agreement, where interest was further indebtedness other than that secured by prior recorded primary mortgages, even though indebtedness represented unpaid interest on primary mortgages. In re Michael Dubroff Asso., Inc. (file No. 13738) State Tax Comm., Dec. 8, 1976.

5. —Contingencies

A mortgage given to secure a principal sum of $9,000,000 provided that mortgagee might install separate refrigeration plant on premises if mortgagor or sublessor failed to do so and that cost thereof was to be charged on property and secured by mortgage. In order to get the mortgage recorded, a clause was added which provided that maximum amount secured in event of any contingency was $10,900,000. Application for a refund of recording tax calculated on sum of $1,600,000 was properly denied. The contingent additional indebtedness for installation above mentioned amounted to possible physical enhancement of mortgage security and constituted principal indebtedness and not indebtedness incidental to principal secured by mortgage. The ultimate indebtedness was indeterminate so as to require the tax on the maximum amount to be secured in the event of any contingency stated in the mortgage. Rockefeller Center, Inc. v Bragalini, 8 A.D.2d 657, 185 N.Y.S.2d 82, 1959 N.Y. App. Div. LEXIS 9029 (N.Y. App. Div. 3d Dep't 1959).

6. New or further indebtedness—generally

Under § 250 and this section the recording of an indenture is taxable only to the extent that it increased the mortgagor's "principal debt or obligation." Park & 46th Street Corp. v State Tax Com., 295 N.Y. 173, 65 N.E.2d 763, 295 N.Y. (N.Y.S.) 173, 1946 N.Y. LEXIS 838 (N.Y. 1946).

Under § 255, it is immaterial whether or not there is a "further" indebtedness provided it is a "new" indebtedness. Application of New York, N. H. & H. R. Co., 266 A.D. 470, 42 N.Y.S.2d 676, 1943 N.Y. App. Div. LEXIS 3591 (N.Y. App. Div.), app. denied, 266 A.D. 925, 44 N.Y.S.2d 172, 1943 N.Y. App. Div. LEXIS 5247 (N.Y. App. Div. 1943).

Tax on mortgage claimed to be exempt notwithstanding statute providing circumstances under which statutory exemption is not available should not be incurred as long as parties are careful not to extinguish original debt so as not to create new indebtedness, and it matters not that mortgagor has paid tax on indebtedness which never actually came into existence, representing amount it never received, inasmuch as tax is imposed on debt which may be secured where it exceeds amount actually advanced; different rule governs, however, by statute, in case of mortgages given in trust to secure corporate bonds. Woodmere Knolls, Inc. v Procaccino, 52 A.D.2d 979, 383 N.Y.S.2d 105, 1976 N.Y. App. Div. LEXIS 12860 (N.Y. App. Div. 3d Dep't 1976).

7. —Tax due

Where 18 mortgages (some of them blanket mortgages) were given on seven parcels of real property and then were replaced by seven mortgages reallocating the same indebtedness, each covering one of the same seven parcels, the mortgage tax was payable on the seven new mortgages even though, prior to recording, the county clerk had ruled that no tax would be payable and the mortgagors could have accomplished in a different way the same result without tax. Sverdlow v Bates, 283 A.D. 487, 129 N.Y.S.2d 88, 1954 N.Y. App. Div. LEXIS 4714 (N.Y. App. Div. 1954).

Where a mortgage to secure a principal indebtedness of $7,000 was recorded in 1944 and a supplementary agreement was made when the principal debt had been reduced to $3,298.71 whereby the mortgagee advanced an additional $2,701.29 and the parties agreed that the maximum for which the mortgage could stand as security was $7,000 was subject to tax on the difference between the amount of the unpaid balance of the original indebtedness and the stated possible maximum. City Title Ins. Co. v Orgel, 2 A.D.2d 250, 154 N.Y.S.2d 751, 1956 N.Y. App. Div. LEXIS 4570 (N.Y. App. Div. 2d Dep't 1956).

Whether an old indebtedness was canceled and a new one created was a question of the intention of the parties and hence, an exchange of old mortgage notes by the holder thereof for bonds in a new form did not work a cancelation of the indebtedness where the State Tax Commission sought to assess a mortgage tax on a base of $3,750,000 instead of on a base of $1,000,000 and the net result of the transaction was to procure a single mortgage lien in the amount of $3,750,000 by consolidating the liens of an existing mortgage for $2,750,000 with a new lien for $1,000,000 for a new loan. Fifth Ave. & 46th Street Corp. v Bragalini, 4 A.D.2d 387, 165 N.Y.S.2d 312, 1957 N.Y. App. Div. LEXIS 4684 (N.Y. App. Div. 3d Dep't 1957).

Mortgage recording tax was due on interest included in consolidation and extension agreement, where interest was further

indebtedness other than that secured by prior recorded primary mortgages even though indebtedness represented unpaid interest on primary mortgages. In Re Michael Dubroff Asso., Inc. (File No. 13738) State Tax Com., Dec. 8, 1976.

8. —Tax not applicable

Mortgagor was not obligated to pay mortgage recording tax when it recorded fourth mortgage since that mortgage did not represent new debt or further indebtedness but was merely exchange of one mortgage with prior incidental one. Long Island Lighting Co. v Commissioner of Taxation & Fin., 235 A.D.2d 637, 652 N.Y.S.2d 640, 1997 N.Y. App. Div. LEXIS 100 (N.Y. App. Div. 3d Dep't), app. denied, 90 N.Y.2d 801, 660 N.Y.S.2d 554, 683 N.E.2d 19, 1997 N.Y. LEXIS 1569 (N.Y. 1997).

9. —Collateral mortgage

Collateral mortgage created a new indebtedness or obligation separate and distinct from that of the primary mortgage and the lien created thereunder and was therefore not entitled to the exemption provided by § 255 of the Tax Law. Movielab, Inc. v Murphy, 28 A.D.2d 617, 279 N.Y.S.2d 921, 1967 N.Y. App. Div. LEXIS 4132 (N.Y. App. Div. 3d Dep't 1967).

10. —Future advances

In ascertaining the value of real estate in fixing the mortgage tax, under this section and § 256, on a mortgage given to secure unlimited future advances, the prior mortgage should not have been deducted, where the statement provided by § 256 showing limit of advances had not been filed. People ex rel. Park Row Realty Co. v Saxe, 180 A.D. 103, 167 N.Y.S. 509, 1917 N.Y. App. Div. LEXIS 8115 (N.Y. App. Div. 1917), aff'd, 222 N.Y. 659, 119 N.E. 1070, 222 N.Y. (N.Y.S.) 659, 1918 N.Y. LEXIS 1546 (N.Y. 1918).

Where mortgagor and mortgagee entered into agreements which not only acknowledged that only $3,000,000 had been advanced under previous agreement but expressly provided that amount of $1,000,0O0 previously available would not be advanced and could no longer be required to be advanced and thus did not represent "the principal indebtedness which is or under any contingency[could] be secured by[the] recorded primary mortgage," full amount of sum thereafter advanced to mortgagor represented "new or further indebtedness" secured, together with other debts, by mortgage of the later date, and such amount was subject to recording tax. Woodmere Knolls, Inc. v Procaccino, 52 A.D.2d 979, 383 N.Y.S.2d 105, 1976 N.Y. App. Div. LEXIS 12860 (N.Y. App. Div. 3d Dep't 1976).

11. —Bonds

The mortgage recording tax imposed by this section and § 259, applied to bonds secured by a corporate refunding mortgage to a trustee and issued to raise money to pay matured bonds of the same amount and secured by the same mortgage with respect to which the matured bonds tax had been paid. People v Boston & M. R. R., 202 A.D. 54, 195 N.Y.S. 402, 1922 N.Y. App. Div. LEXIS 4851 (N.Y. App. Div.), aff'd, 234 N.Y. 629, 138 N.E. 475, 234 N.Y. (N.Y.S.) 629, 1922 N.Y. LEXIS 829 (N.Y. 1922).

The mortgage tax could not legally be imposed under this section and §§ 255 and 259 upon bonds of corporation issued to replace bonds theretofore issued under the same mortgage, though the new bonds matured at later date and carried a different rate of interest, where the mortgage authorized issuance of refunding or replacing bonds and substituted bonds so issued were not sold but were delivered to original bondholders in exchange for original bonds which were surrendered and canceled. New York State Gas & Electric Corp. v Gilchrist, 209 A.D. 771, 205 N.Y.S. 501, 1924 N.Y. App. Div. LEXIS 8733 (N.Y. App. Div. 1924), aff'd, 240 N.Y. 552, 148 N.E. 701, 240 N.Y. (N.Y.S.) 552, 1925 N.Y. LEXIS 769 (N.Y. 1925).

New bonds which were exchanged for underlying bonds did not constitute a new advance under a trust mortgage and the amount thereof is not taxable, under this section, notwithstanding that part of the outstanding bonds were past due and part were not due when the new bonds were substituted for old. People ex rel. Boston & M. R. R. v Loughman, 227 A.D. 361, 238 N.Y.S. 27, 1929 N.Y. App. Div. LEXIS 6439 (N.Y. App. Div. 1929), aff'd, 254 N.Y. 513, 173 N.E. 844, 254 N.Y. (N.Y.S.) 513, 1930 N.Y. LEXIS 1095 (N.Y. 1930).

A series of railroad bonds, which created a new obligation secured by an underlying mortgage and was for a further amount advanced under such mortgage, was taxable under this section and § 259, where such bonds were sold to a new creditor and the proceeds were paid to the railroad company and the railroad company thereupon paid its former noteholders. Application of Erie R. Co., 260 A.D. 268, 21 N.Y.S.2d 513, 1940 N.Y. App. Div. LEXIS 4576 (N.Y. App. Div.), aff'd, 284 N.Y. 673, 30 N.E.2d 720, 284 N.Y. (N.Y.S.) 673, 1940 N.Y. LEXIS 1299 (N.Y. 1940).

Tax on mortgage claimed to be exempt notwithstanding statute providing circumstances under which statutory exemption is not available should not be incurred as long as parties are careful not to extinguish original debt so as not to create new indebtedness, and it matters not that mortgagor has paid tax on indebtedness which never actually came into existence, representing amount it never received, inasmuch as tax is imposed on debt which may be secured where it exceeds amount actually advanced; different rule governs, however, by statute, in case of mortgages given in trust to secure corporate bonds. Woodmere Knolls, Inc. v Procaccino, 52 A.D.2d 979, 383 N.Y.S.2d 105, 1976 N.Y. App. Div. LEXIS 12860 (N.Y. App. Div. 3d Dep't 1976).

12. —Other renegotiation of mortgage

A builder executed a mortgage to a loan association, which was duly recorded, and the tax provided by § 253 was paid. Thereafter, the mortgage was extended, purchasers of the property assumed the mortgage, and the contractor was released. Held: the extension of agreement was as a matter of law not such a "mortgage" as to be subject to the recording tax imposed by § 253. Sections 250 and 253 were not applicable. Suffolk County Federal Sav. & Loan Asso. v Bragalini, 5 N.Y.2d 579, 186 N.Y.S.2d 602, 159 N.E.2d 164, 1959 N.Y. LEXIS 1397 (N.Y. 1959).

Mere substitution of one mortgage agreement for another, even in combination with change of mortgagors, was insufficient to create new mortgage and was not subject to mortgage recording tax. Bay View Towers Apartments, Inc. v State Tax Com., 40 N.Y.2d 856, 387 N.Y.S.2d 1002, 356 N.E.2d 474, 1976 N.Y. LEXIS 3021 (N.Y. 1976).

Where full mortgage tax had been paid on original indebtedness and such indebtedness was not extinguished on execution of third "wrap-around" mortgage, under which third mortgagee was to receive debt service charge on both the original and new mortgage debt and was to pay debt service on the two prior mortgages on mortgagor's behalf, mortgage recording tax in connection with the third mortgage was payable only on the increase in the mortgage loan, rather than on the entire amount secured by the third mortgage. First Fiscal Fund Corp. v State Tax Com., 49 A.D.2d 408, 375 N.Y.S.2d 433, 1975 N.Y. App. Div. LEXIS 10923 (N.Y. App. Div. 3d Dep't 1975), aff'd, 40 N.Y.2d 940, 390 N.Y.S.2d 412, 358 N.E.2d 1037, 1976 N.Y. LEXIS 3123 (N.Y. 1976).

State Tax Commission properly granted refund of mortgage recording tax paid by holder of "wraparound" mortgage when it refinanced consolidated first mortgage on property by obtaining additional mortgage commitment to raise amount of first mortgage and readjust equity position of mortgagees without changing total indebtedness; once mortgage has been given and recorded, it may be changed by supplemental mortgage and no additional recording tax will be due as long as amount secured remains same. New York v State Tax Com., 130 A.D.2d 890, 516 N.Y.S.2d 132, 1987 N.Y. App. Div. LEXIS 46885 (N.Y. App. Div. 3d Dep't 1987).

13. Computation of tax

Where mortgagor conveyed leasehold to mortgagee, and mortgagee reconveyed leasehold and improvements thereon to mortgagor, the purchase price to be paid in installments together with a certain percentage of net annual rental income, said sale did not constitute a supplemental mortgage under Tax Law § 255, and a recording tax was subsequently due and owing upon the filing of said agreement pursuant to Tax Law § 250; the amount of the principal debt or obligation is to be used as the basis for computation of the recording tax pursuant to Tax Law, § 253, unless that amount "is not determinable from the terms of the mortgage" in which case "the value of the property covered by the

mortgage" is to be used pursuant to Tax Law, § 256; here, although the consolidation agreement provided for additional payments, the amount of which would not be ascertainable at the time of recording, such payments are nothing more than additional interest and, therefore, do not make indeterminable or uncertain the amount of the principal indebtedness. 200 East 64th St. Corp. v Manley, 37 N.Y.2d 744, 374 N.Y.S.2d 621, 337 N.E.2d 133, 1975 N.Y. LEXIS 2108 (N.Y. 1975).

In ascertaining the value of real estate in fixing the mortgage tax, under this section and § 256, on a mortgage given to secure unlimited future advances, the prior mortgage should not have been deducted, where the statement provided by § 256 showing limit of advances had not been filed. People ex rel. Park Row Realty Co. v Saxe, 180 A.D. 103, 167 N.Y.S. 509, 1917 N.Y. App. Div. LEXIS 8115 (N.Y. App. Div. 1917), aff'd, 222 N.Y. 659, 119 N.E. 1070, 222 N.Y. (N.Y.S.) 659, 1918 N.Y. LEXIS 1546 (N.Y. 1918).

Under this section the tax is measured by the amount of the principal debt which is, or under any contingency may be secured by the mortgage. Application of Erie R. Co., 260 A.D. 268, 21 N.Y.S.2d 513, 1940 N.Y. App. Div. LEXIS 4576 (N.Y. App. Div.), aff'd, 284 N.Y. 673, 30 N.E.2d 720, 284 N.Y. (N.Y.S.) 673, 1940 N.Y. LEXIS 1299 (N.Y. 1940).

A mortgage given to secure a principal sum of $9,000,0O0 provided that mortgagee might install separate refrigeration plant on premises if mortgagor or sublessor failed to do so and that cost thereof was to be charged on property and secured by mortgage. In order to get the mortgage recorded, a clause was added which provided that maximum amount secured in event of any contingency was $10,900,000. Application for a refund of recording tax calculated on sum of $1,600,000 was properly denied. The contingent additional indebtedness for installation above mentioned amounted to possible physical enhancement of mortgage security and constituted principal indebtedness and not indebtedness incidental to principal secured by mortgage. The ultimate indebtedness was indeterminate so as to require the tax on the maximum amount to be secured in the event of any contingency stated in the mortgage. Rockefeller Center, Inc. v Bragalini, 8 A.D.2d 657, 185 N.Y.S.2d 82, 1959 N.Y. App. Div. LEXIS 9029 (N.Y. App. Div. 3d Dep't 1959).

Where full mortgage tax had been paid on original indebtedness and such indebtedness was not extinguished on execution of third "wrap-around" mortgage, under which third mortgagee was to receive debt service charge on both the original and new mortgage debt and was to pay debt service on the two prior mortgages on mortgagor's behalf, mortgage recording tax in connection with the third mortgage was payable only on the increase in the mortgage loan, rather than on the entire amount secured by the third mortgage. First Fiscal Fund Corp. v State Tax Com., 49 A.D.2d 408, 375 N.Y.S.2d 433, 1975 N.Y. App. Div. LEXIS 10923 (N.Y. App. Div. 3d Dep't 1975), aff'd, 40 N.Y.2d 940, 390 N.Y.S.2d 412, 358 N.E.2d 1037, 1976 N.Y. LEXIS 3123 (N.Y. 1976).

In action to foreclose mortgage given as security for $87,000 debt, plaintiff was entitled to summary judgment notwithstanding junior lienor's claim that mortgage was unenforceable because plaintiff failed to pay applicable mortgage tax; "future advance clause" contained in mortgage did not render amount of principal indebtedness secured by mortgage indeterminable, which would require that mortgage tax be assessed on greater value of mortgaged property pursuant to CLS Tax § 256, where additional provision of mortgage stated that "maximum amount of debt secured...shall not be greater than" principal debt, which permitted determination of principal debt. National Bank v Recreational Acreage Exch., 223 A.D.2d 153, 644 N.Y.S.2d 600, 1996 N.Y. App. Div. LEXIS 7565 (N.Y. App. Div. 3d Dep't), app. dismissed, 89 N.Y.2d 861, 653 N.Y.S.2d 283, 675 N.E.2d 1236, 1996 N.Y. LEXIS 4190 (N.Y. 1996).

An Art 78 proceeding to annul and reverse a state tax commission determination that the amount of a mortgage recording tax due was to be computed upon the maximum amount of indebtedness expressly secured by two mortgages rather than the value of the property would be dismissed, even though both mortgages contained a clause stating that the mortgage would be in an amount equal to the purchase price of the lands described in the mortgage, since a mortgage that has been filed clearly expresses a specific indebtedness to be secured by the real property described in the instrument, since the mortgage recording tax under Tax Law § 253 is computed on the amount of the indebtedness expressed in the instrument, and since a recording officer may under Tax Law § 256 determine the tax from the value of the property only if the maximum amount secured is not expressed. In re WBVM Associates, 120 Misc. 2d 434, 466 N.Y.S.2d 136, 1983 N.Y. Misc. LEXIS 3735 (N.Y. Sup. Ct. 1983).

14. —Property in different counties

The New York City mortgage recording tax with respect to a mortgage covering real property located both within and without the City of New York is properly determined by the State Tax Commission on the basis of the relative assessments of such property as they appeared on the respective assessment rolls, without adjustment for differences in equalization rates, pursuant to sections 253-a and 260 of the Tax Law. Long Island Lighting Co. v State Tax Com., 45 N.Y.2d 529, 410 N.Y.S.2d 561, 382 N.E.2d 1337, 1978 N.Y. LEXIS 2288 (N.Y. 1978).

15. Exemptions—generally

Federal credit unions (FCUs) were not exempt from the New York State mortgage recording tax (MRT) imposed by N.Y. Tax Law § 253 as: (1) if federal credit union mortgages were intended to be excluded from MRTs, such immunity would have been stated in the Federal Credit Union Act, specifically 12 U.S.C.S. § 1768, and it was not; (2) the term "property" in § 1768 could not be construed broadly to encompass mortgage loans; (3) Congress could not have intended § 1768 to exempt the mortgage loans since when the provision was enacted, credit unions could issue such loans; (4) when Congress granted FCUs the power to offer residential mortgages, it did not amend § 1768 to include mortgages, or articulate an intent to include mortgages in the property exempt from state taxation; and (5) there was little danger that the MRT would drive federal credit unions out of business. Hudson Val. Fed. Credit Union v New York State Dept. of Taxation & Fin., 20 N.Y.3d 1, 956 N.Y.S.2d 425, 980 N.E.2d 473, 2012 N.Y. LEXIS 2719 (N.Y. 2012).

Tax on mortgage claimed to be exempt notwithstanding statute providing circumstances under which statutory exemption is not available should not be incurred as long as parties are careful not to extinguish original debt so as not to create new indebtedness, and it matters not that mortgagor has paid tax on indebtedness which never actually came into existence, representing amount it never received, inasmuch as tax is imposed on debt which may be secured where it exceeds amount actually advanced; different rule governs, however, by statute, in case of mortgages given in trust to secure corporate bonds. Woodmere Knolls, Inc. v Procaccino, 52 A.D.2d 979, 383 N.Y.S.2d 105, 1976 N.Y. App. Div. LEXIS 12860 (N.Y. App. Div. 3d Dep't 1976).

16. —Tax applied

State Tax Commission properly denied mortgagee's application for refund of mortgage recording tax even though New York Employees' Retirement System (system), tax exempt entity, was "end lender" destined to hold mortgage, for at time mortgage was recorded, (1) mortgagor and mortgagee, both private entities, were only parties to mortgage, (2) system had advanced no funds to mortgagor, (3) mortgage did not secure any obligation owed to system, and (4) mortgagor was not acting as agent for system; when parties involved in such transaction are private concerns, recording tax is due at time of recording, notwithstanding eventual ownership of debts by governmental instrumentality under previous agreement. C. E. Towers Co. v State Tax Com., 135 A.D.2d 976, 522 N.Y.S.2d 384, 1987 N.Y. App. Div. LEXIS 52873 (N.Y. App. Div. 3d Dep't 1987), app. denied, 71 N.Y.2d 804, 528 N.Y.S.2d 829, 524 N.E.2d 149, 1988 N.Y. LEXIS 553 (N.Y. 1988).

17. —Hospital corporation

It is not purpose or intention for which separate corporation is organized, but whether for mortgage tax purposes it is a hospital as defined in statute, that determines its exemption. If nonprofit hospital seeking some special advantage separately incorporates for such advantage, separate corporation cannot thereafter be classified as "voluntary nonprofit hospital corporation" for pur-

pose of seeking relief from imposition of mortgage tax. St. St. Joseph's Health Center Properties, Inc. v State Tax Com., 55 A.D.2d 484, 391 N.Y.S.2d 16, 1977 N.Y. App. Div. LEXIS 10006 (N.Y. App. Div. 3d Dep't), app. denied, 41 N.Y.2d 804, 1977 N.Y. LEXIS 3039 (N.Y. 1977).

In an Article 78 proceeding to review the imposition of a mortgage recording tax on a charity foundation with respect to the foundation's execution as mortgagor of a construction mortgage for the purposes of a village's housing development for the elderly, the tax was properly imposed where the housing development, which was not operated only for the benefit of the infirm or disabled, was unrelated to the hospital functions of the foundation, and where the multicorporate purposes that were stated in the foundation's certificate of incorporation did not limit its activities only to the establishment of hospitals, despite the fact that the foundation was primarily a voluntary, nonprofit, hospital corporation. Church Charity Foundation v State Tax Com., 91 A.D.2d 746, 457 N.Y.S.2d 984, 1982 N.Y. App. Div. LEXIS 19632 (N.Y. App. Div. 3d Dep't 1982).

18. —Federal agencies

Federal credit union's (FCU) claim that it was a federal instrumentality entitled to exemption from the New York State mortgage recording tax imposed by N.Y. Tax Law § 253 under the Supremacy Clause, U.S. Const. art. VI, cl. 2, was rejected as FCUs were private associations chartered under federal law, and were wholly owned, funded and managed by their members; FCUs were not so closely connected to the federal government that they could not be viewed as separate entities with respect to mortgage-lending activities. Hudson Val. Fed. Credit Union v New York State Dept. of Taxation & Fin., 20 N.Y.3d 1, 956 N.Y.S.2d 425, 980 N.E.2d 473, 2012 N.Y. LEXIS 2719 (N.Y. 2012).

19. —Miscellaneous public agencies

An industrial development agency is exempt from payment of the mortgage recording tax. 1982 Op St Compt No. 82-188, 1982 N.Y. Comp. LEXIS 559.

20. —Refund

Inasmuch as the New York State Employees' Retirement System, a state agency, enjoys an immunity of taxation independent from the statutory exemptions listed in the Tax Law for property utilized in the public interest, and the fact that retirement system property consisting of funds loaned to a private party and secured by a mortgage does not negate its immunity, the imposition of a mortgage recording tax upon petitioner mortgagor pursuant to Tax Law § 253 was unlawful and the recovery of interest upon the tax refund due from the State Tax Commission would be allowed even in the absence of specific provision for interest in the taxing statute. Hotel Waldorf-Astoria Corp. v State Tax Com., 86 A.D.2d 330, 451 N.Y.S.2d 261, 1982 N.Y. App. Div. LEXIS 15715 (N.Y. App. Div. 3d Dep't), app. denied, 58 N.Y.2d 603, 459 N.Y.S.2d 1026, 445 N.E.2d 218, 1982 N.Y. LEXIS 6544 (N.Y. 1982).

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1. Generally

Neither New York State nor New York City mortgage recording tax was applicable to various transactions at issue, including lease and transfer of title to New York City Industrial Development Agency. NY Adv Op Comm T & F TSB-A-93-(1)R.

Neither New York State nor New York City mortgage recording tax was applicable to various transactions at issue, including lease and transfer of title to New York City Industrial Development Agency. NY Adv Op Comm T & F TSB-A-93-(1.1)R.

Mortgagee was required to pay special additional mortgage tax where there were fewer than 6 residential dwellings with separate cooking facilities located on mortgaged property. NY Adv Op Comm T & F TSB-A-81-(1)M.

Recording of mortgages by City of Syracuse Industrial Development Agency, as well as of any other related documents recording of which would otherwise be subject to tax under CLS Tax Law Art 11, was not subject to taxes imposed under CLS Tax § 253. NY Adv Op Comm T & F TSB-A-82-(1)M.

Creation of lien did in fact lie within contemplation of parties, and thus tax was due under CLS Tax Law Art 11 on recordation of instrument which provided "That this instrument shall not be a lien against said premise in respect to any mortgages that hereafter may be placed against said premises and the recording of said mortgage or mortgages shall have preference and precedence and be superior and prior in lien of this agreement, irrespective of the date of recording and the said (vendee) agrees to execute any such instrument without cost, which may be deemed necessary or desirable to further effect the subordination of this agreement to any such mortgage or mortgages." NY Adv Op Comm T & F TSB-A-84-(2)M.

Assignment of mortgage by City University of New York was not subject to mortgage recording tax since assignment did not constitute mortgage. NY Adv Op Comm T & F TSB-A-86-(1)M.

Mortgage recording tax would not apply where mortgages, assignment of contract to trust, assignment of rents, and declaration of trust would not be recorded; however, tax would apply at time such documents were recorded. NY Adv Op Comm T & F TSB-A-93-(14)R.

Deed did not rise to level of mortgage, and its recording was not subject to mortgage recording taxes, where its sole purpose was transferring title to property and was not intended as mortgage or security interest. NY Adv Op Comm T & F TSB-A-93-(14)R.

Recording of supplemental mortgage, merely for purposes of adding new owner as mortgagor and merely correcting mortgage to also secure note, was not subject to additional mortgage recording tax. NY Adv Op Comm T & F TSB-A-90-(2)R.

No mortgage recording taxes would be imposed at time financing or refinancing was obtained, or when petitioners entered into trust lease, where memoranda of trust leases, assignment of trust leases and mortgages, notes and certificates, assignment of agreement to acquire condominium interests, and assignment of perfected and first priority security interests would not be recorded or indexed in real estate records (there would only be UCC filing against non-real property interests); however, if such instruments were recorded or indexed in real estate records at subsequent time, such recording or indexing of those instruments would be subject to taxes measured by principal debt or obligation which might be secured at date of execution or at any time thereafter. NY Adv Op Comm T & F TSB-A-96-(5)R.

Further assignment by Triborough Bridge and Tunnel Authority (TBTA) to trustee of TBTA's rights and assumption by trustee of TBTA's obligations (if any) under fee mortgage and collateral assignment were not subject to mortgage recording taxes. NY Adv Op Comm T & F TSB-A-97-(4)R.

Funding of loan to (and execution and delivery of loan certificates by) trustee only after assignment were not subject to mortgage recording taxes. NY Adv Op Comm T & F TSB-A-97-(4)R.

Payment and performance by trustee of its obligations under, holding by lenders of, and/or enforcement by lenders of their rights and remedies under or as to any of loan certificates, loan documents, loan agreement, leasehold mortgage, assignment of rents, or fee mortgage were not subject to mortgage recording taxes. NY Adv Op Comm T & F TSB-A-97-(4)R.

2. Constitutionality

The New York Constitution, Art. XVI, § 3, effective January 1, 1939, did not nullify the mortgage tax imposed by this section. 1939 NY Ops Atty Gen Jan. 14.

3. "Principal debt or obligation"

4. —Incidental indebtedness

Mortgages to savings and loan associations securing a principal debt and also premiums, dues, fines, penalties, etc., in addition to interest were taxable only upon principal debt, and the premiums, fines, etc., were not considered as principal. 1919 N.Y. Op. Att'y Gen. No. 104.

Where a mortgage secured repayment of money loaned by an insurance company, in instalments, and also secured the payment of premiums on a policy of life insurance which was not issued exclusively as additional collateral for the loan, those premiums were part of the "principal debt or obligation". 1919 N.Y. Op. Att'y Gen. No. 137.

"Profit Rate" did not constitute part of "principal debt or obligation" secured by mortgage, but rather was incidental amount within meaning and intent of mortgage recording tax regulations § 648.1(b)(1). NY Adv Op Comm T & F TSB-A-02-(4)R.

5. —Contingencies

The liability on the recording of a mortgage relates to the full amount of the mortgage and not to the lesser contingent amount. 1910 N.Y. Op. Att'y Gen. No. 679.

No tax was due upon the recording of an executory contract, where possession was not to be given until the completion of certain payments, when the deed was to be given and mortgaged back for the balance. 1927 N.Y. Op. Att'y Gen. No. 228.

Mortgages to savings and loan associations securing a principal debt and also premiums, dues, fines, penalties, etc., in addition to interest were taxable only upon principal debt, and the premiums, dues, fines, etc., were not considered as principal. 1919 N.Y. Op. Att'y Gen. No. 104.

Where a mortgage secured repayment of money loaned by an insurance company, in instalments, and also secured the payment of premiums on a policy of life insurance which was not issued exclusively as additional collateral to the loan, those premiums were part of the "principal debt or obligation." 1919 N.Y. Op. Att'y Gen. No. 137.

6. New or further indebtedness—generally

7. —Tax not applicable

Mortgage recording taxes were not applicable in connection with refinancing of debt, evidenced by existing note and secured by primary reported mortgage where existing note and mortgage were assigned by trustee under commercial mortgage backed securities trust to new lender in exchange for defeasance note and security agreement; mortgage and its underlying note had not become due and payable and paid in full so as to prevent recording of assignment to new lender under CLS Real P § 275. NY Adv Op Comm T & F TSB-A-00-(1)R, 2000 N.Y. Tax LEXIS 72.

Mortgage can be assigned either for cash or any other bona fide consideration and, provided mortgage continues to secure bona fide indebtedness, mortgage may be assigned in conformity with CLS Real P § 275; further, recording of assignment of mortgage, in and of itself, is not subject to mortgage recording taxes. NY Adv Op Comm T & F TSB-A-00-(1)R, 2000 N.Y. Tax LEXIS 72.

Neither CLS Real P § 275 nor CLS Tax § 258 would prevent recording of assignment of mortgage and underlying note to new lender; further, once assignment was recorded, instrument which was considered supplemental mortgage as to mortgage, as set forth in CLS Tax § 255(1)(a) and as defined in Mortgage Recording Taxes Regulations § 645(1)(a), could be recorded without further payment of mortgage recording taxes unless such instrument created or secured new or further indebtedness other than indebtedness secured by mortgage. NY Adv Op Comm T & F TSB-A-00-(1)R, 2000 N.Y. Tax LEXIS 72.

Recordation of deed conveying condominium unit by limited liability company to trustee would be treated as conveyance by limited liability company to petitioner of fee title to condominium unit, followed by conveyance by petitioner to trustee of fee title to condominium unit as security for petitioner's indebtedness to participants in condominium project; thus, recordation of deed would be considered recordation of mortgage encumbering condominium unit for purposes of mortgage recording tax. NY Adv Op Comm T & F TSB-A-01-(7)R.

Assuming that proper amount of mortgage recording tax had been paid on recording of mortgage(s) granted by limited liability company (LLC) to acquisition/construction lender under acquisition/construction financing, and that consolidation and severance of mortgage did not create or secure any new or further indebtedness in addition to that on which mortgage recording tax had been paid, recording of instrument which by its terms consolidated separate mortgages granted by LLC to secure acquisition/construction financing into single mortgage would not be subject to additional mortgage recording tax. NY Adv Op Comm T & F TSB-A-01-(7)R.

Assuming that proper amount of mortgage recording tax had been paid on recording of mortgage(s) granted by limited liability company (LLC) to acquisition/construction lender under acquisition/construction financing, and that consolidation and severance of mortgage did not create or secure any new or further indebtedness in addition to that on which mortgage recording tax had been paid, recording of agreement severing mortgage into separate mortgages securing condominium project units' respective allocable shares of proceeds advanced under acquisition/construction financing would not be subject to additional mortgage recording tax, and recording of assignment of participants' mortgage by acquisition/financing lender to administrative agent as agent for participants would not be subject to additional mortgage recording tax. NY Adv Op Comm T & F TSB-A-01-(7)R.

Recording of any assignment, supplement, modification, or amendment of mortgages on property that was part of New York State Urban Development Corporation's land use project was not subject to mortgage recording tax to extent that (1) instrument was not mortgage subject to tax under CLS Tax § 253 (as in case of assignment of mortgages), (2) recording tax was exempt under supplemental mortgage provisions of CLS Tax § 255, but only to extent that principal indebtedness or obligation that was secured by prior primary mortgage was not increased or added to, or (3) Corporation was named as mortgagee or co-mortgagee as to such assignment, supplement, modification, or amendment. NY Adv Op Comm T & F TSB-A-97-(5)R.

Mortgage recording taxes would not apply where consolidation of existing mortgages and new mortgage to form single lien would not create or secure new or further indebtedness or obligation other than principal indebtedness or obligation secured by or which under any contingency could be secured by recorded primary mortgage on which proper tax, if any, had been paid. NY Adv Op Comm T & F TSB-A-93-(19)R.

8. —Urban development corporation

Where Urban Development Corporation, as named mortgagee under land use improvement project mortgages, could record mortgages without payment of mortgage recording taxes imposed under CLS Tax § 253, recording of any assignment, supplement, modification, or amendment of any mortgage was exempt from mortgage recording tax to extent that principal amount of secured indebtedness was not increased; where principal amount of secured indebtedness was increased, mortgage recording tax was due only as to amount of increase. NY Adv Op Comm T & F TSB-A-89-(2)R.

Rationale exempting Urban Development Corporation from mortgage recording tax imposed by CLS Tax Law Art 11 would seem applicable to mortgage recording tax imposed by Chapter 26 of Title 11 of New York City Administrative Code; however, definitive opinion on City mortgage recording tax should come from New York City Finance Administration. NY Adv Op Comm T & F TSB-A-89-(2)R.

Mortgage recording tax is not due on recording of any mortgage recorded in connection with Octagon Project (Roosevelt Island development by state Urban Development Corporation), if petitioner is named mortgagee (whether as trustee, agent, nominee or otherwise) and petitioner presents mortgage for recording; to extent that mortgage continues to secure same principal debt or obligation, recording of any assignment, supplement, modification, or amendment of such mortgage is exempt from mortgage recording tax, either because such action does not create new mortgage subject to tax under CLS Tax § 253, or because instrument constitutes supplemental mortgage under CLS Tax § 255. NY Adv Op Comm T & F TSB-A-09-(1)R.

9. —Future advances

Mortgage executed to secure repayment of advances and readvances made to reimburse borrower for expenses incurred in making improvements on real property would not qualify as credit line mortgage since such mortgage would be made under "building loan contract," whether principal amount of mortgage was greater or less than $3 million. NY Adv Op Comm T & F TSB-A-99-(2)R.

Mortgage executed to secure repayment of advances and readvances made to fund making of improvements on real property would not qualify as credit line mortgage since such mortgage would be made under "building loan contract," whether or not principal amount of mortgage was greater or less than $3 million. NY Adv Op Comm T & F TSB-A-99-(2)R.

10. —Bonds

Whether amendment and restatement of first mortgage bonds by New York State Energy Research and Development Authority represented issuance of further or additional indebtedness was irrelevant for purposes of mortgage recording taxes inasmuch as Authority was state agency exempt from taxation. NY Adv Op Comm T & F TSB-A-94-(1)R, 1994 N.Y. Tax LEXIS 795.

11. —Other renegotiation of mortgage

Modification of existing mortgage, in order to secure, as additional interest, interest on accrued and unpaid interest on original mortgage indebtedness, without increasing maximum principal indebtedness secured by original mortgage, was not subject to any additional mortgage recording taxes under CLS Tax § 255 since it did not create or secure new or further indebtedness or obligation other than principal indebtedness or obligation secured by or which under any contingency could be secured by recorded primary mortgages. NY Adv Op Comm T & F TSB-A-91-(5)R.

Provisions of CLS Tax § 258 would prevent release, discharge, or enforcement of prior recorded mortgages were principal advances, including principal advances in form of unpaid interest, were made that exceeded amount on which tax had been paid; thus, if advances attributable to modification of existing mortgages for unpaid interest when aggregated with outstanding principal balances exceeded maximum amounts secured, such mortgages would only be enforceable up to stated maximum amounts. NY Adv Op Comm T & F TSB-A-91-(5)R.

Where mortgagor is exempt organization under CLS Tax § 253(1-a)(b), special additional mortgage recording tax shall be paid by mortgagee and cannot be passed on to mortgagor or any other party in accordance with CLS Tax § 253(1-a)(a). NY Adv Op Comm T & F TSB-A-92-(9)R.

To extent that principal amount of secured indebtedness was not increased, recording of any assignment, supplement, modification, or amendment of any recognized mortgage was exempt from mortgage recording tax either because such action did not create new mortgage subject to tax under CLS Tax § 253, or because such action constituted "supplemental mortgage" under CLS Tax § 255; where principal amount of secured indebtedness of recognized mortgage was increased, recording tax was due only as to amount of increase. NY Adv Op Comm T & F TSB-A-93-(4)R.

Mortgage modification agreement was supplemental instrument or mortgage, recording of which would not be subject to additional mortgage recording taxes, since agreement provided that accrued interest being deferred would be paid in fixed some at maturity, would not bear interest, and would not be added to principal amount of mortgage; agreement did not create or secure new or further indebtedness or obligation other than principal indebtedness or obligation secured by recorded primary mortgage, but merely extended due date for when accrued interest was payable. NY Adv Op Comm T & F TSB-A-93-(12)R.

Leasehold mortgage and personal property security interest constituted supplemental mortgages under CLS Tax § 255, in relation to mortgage given by Port Authority of New York and New Jersey to trustee, assuming that they were recorded subsequent to recording of mortgage given by Authority to trustee, since they were given for purpose of imposing lien on property (i.e., leasehold interest and personal property of petitioner) not originally covered by or not described in recorded primary mortgage for purpose of securing principal indebtedness secured by prior recorded primary mortgage; thus, leasehold mortgage and personal property security interest granted by petitioner to trustee could be recorded without payment of mortgage recording tax. NY Adv Op Comm T & F TSB-A-96-(3)R.

Where mortgage is already of record and proper amount of mortgage recording tax has been paid, mortgage recording tax is imposed on recording of supplemental instrument or mortgage only to extent such instrument serves to increase amount of secured indebtedness beyond that which is secured by primary recorded mortgage. NY Adv Op Comm T & F TSB-A-01-(7)R.

Deed would be considered supplemental instrument or mortgage recorded pursuant to recorded mortgage; thus, recording of conveyance of deed subject to mortgage would be subject to mortgage recording tax only to extent that it created or secured new or further indebtedness or obligation over and above indebtedness or obligation secured by recorded mortgage. NY Adv Op Comm T & F TSB-A-01-(7)R.

Since recording of amended and restated mortgage would be supplemental to recorded mortgage and deed, and would not secure any additional indebtedness, it would not be subject to any additional mortgage recording tax. NY Adv Op Comm T & F TSB-A-01-(7)R.

Subsequent to recording of mortgage on which all taxes, if any, have been paid, supplemental instrument or mortgage is recorded for purposes of modifying prior recorded primary mortgage, such additional instrument or mortgage would not be subject to taxes imposed under CLS Tax § 253 unless it created or secured new or further indebtedness or obligation other than principal indebtedness or obligation secured by or which under any contingency could be secured by recorded primary mortgage; thus, since amended mortgage presented for recording would not create or secure new or further indebtedness or obligation other than principal indebtedness or obligation secured by mortgage, recording of amended mortgage constituted recording of supplemental mortgage or instrument under CLS Tax § 255 and thus would not be subject to mortgage recording taxes. NY Adv Op Comm T & F TSB-A-95-(6)R.

Provided proper procedures were followed for recording of tax exempt supplemental mortgage under CLS Tax § 255, there was no mortgage recording tax due and payable on recording of modification agreement, which constituted supplemental mortgage that did not create or secure new or further indebtedness or obligation other than principal indebtedness or obligation secured or which under any contingency could be secured by mortgage. NY Adv Op Comm T & F TSB-A-95-(13)R.

To extent that split and modification of existing mortgage do not extinguish original debt and do not create new indebtedness, such mortgage is exempt from mortgage recording tax, either because such action will not create new mortgage subject to tax under CLS Tax § 253 or because instrument constitutes supplemental mortgage under CLS Tax § 255 provided that instrument so recorded is not subject to tax under CLS Tax § 255(1)(a)(ii). NY Adv Op Comm T & F TSB-A-07-(4)R.

12. Computation of tax

13. —Property in different counties

The tax upon mortgages covering property in different counties only applies to such mortgages as are recorded on or subsequent to July 1, 1906, even though offered for recording in other counties. 1909 N.Y. Op. Att'y Gen. No. 557.

Where a supplemental indenture mortgaged real property under terms and conditions of an original trust agreement which

was secured by personal property only, the mortgage tax had to be computed on the amount of indebtedness which remained when the supplemental indenture was executed and a lien on real property created, not on the amount of indebtedness secured at the execution of the original trust agreement. 1918 N.Y. Op. Att'y Gen. No. 216.

Although "revolver" characteristic of loan resulted in mortgage for indefinite amount, petitioner properly capped maximum amount secured at $400,000; thus, on recordation of mortgage, mortgage recording taxes would be computed on $400,000, which was amount stated to be secured by such mortgage. NY Adv Op Comm T & F TSB-A-93-(15)R, 1993 N.Y. Tax LEXIS 629.

In "cost-plus sale" form of financing, recording of mortgage resulted in imposition of mortgage recording tax computed solely on "Base Amount" being financed by finance company. NY Adv Op Comm T & F TSB-A-02-(4)R.

14. Exemptions—generally

15. —Tax applied

New York State-chartered credit union, incorporated under CLS Bank Art 11, is not exempt from special additional tax on mortgages imposed under CLS Tax Art 11, since, under CLS Bank § 460(1), State-chartered credit union may pay earnings to its members. NY Adv Op Comm T & F TSB-A-06-(1)R, ADVISORY OPINION - PETITION NO. M051201A N.Y. Dep't of Tax'n & Fin. May 30, 2006, 2006 N.Y. Tax LEXIS 129 (N.Y. Dep't of Tax'n & Fin. May 30, 2006).

16. —Hospital corporation

Ground lease/leaseback constituted mortgage given by petitioner, as mortgagor to trust as mortgagee, and since petitioner was voluntary nonprofit hospital corporation, recording of ground lease/leaseback was exempt from mortgage recording tax. NY Adv Op Comm T&F TSB-A-98(3) R.

Exemption from mortgage recording tax applied to 43.3 percent of leasehold mortgage representing expenditures for diagnostic and treatment center, and portion of common space reasonably apportioned to diagnostic and treatment center; remainder of mortgage proceeds that were not utilized for hospital-related purposes were subject to tax. NY Adv Op Comm T & F TSB-A-02-(3)R, 2002 N.Y. Tax LEXIS 128.

17. —Urban development corporation

Mortgage recording tax was not due on recording of any mortgage recorded in connection with waterfront development use improvement project, if New York State Urban Development Corporation d/b/a Empire State Development Corporation or Queens West Development Corporation was named mortgagee (whether as trustee, agent, nominee, or otherwise) and either of those corporations presented mortgage for recording; further, to extent that mortgage continued to secure same principal debt or obligation, recording of any assignment, supplement, modification, or amendment of mortgage was exempt from mortgage recording tax, either because such action did not create new mortgage subject to Tax under CLS Tax § 253, or because instrument constitute "supplemental mortgage" under CLS Tax § 255. NY Adv Op Comm T & F TSB-A-00-(3)R.

Mortgage recording tax was not due on recording of any mortgage recorded in connection with land use improvement project, if New York State Urban Development Corporation d/b/a Empire State Development Corporation was named mortgagee (whether as trustee, agent, nominee, or otherwise) and Corporation presented mortgage for recording; further, to extent that mortgage continued to secure same principal debt or obligation, recording of any assignment, supplement, modification, or amendment of mortgage was exempt from mortgage recording tax, either because such instrument did not create new mortgage subject to Tax under CLS Tax § 253, or because such instrument constituted "supplemental mortgage" under CLS Tax § 255. NY Adv Op Comm T & F TSB-A-01-(1)R.

Urban Development Corporation, as named mortgagee under land use improvement project mortgages securing loans whose proceeds would be used for project acquisition and development costs, could record mortgages without payment of mortgage recording taxes imposed under CLS Tax § 253. NY Adv Op Comm T & F TSB-A-89-(2)R.

Petitioner, New York State Urban Development Corporation, as mortgagee, could record mortgages without payment of mortgage recording taxes. NY Adv Op Comm T & F TSB-A-93-(4)R.

Inasmuch as CLS Tax § 252 was enacted in 1909, and last amended in 1966, it must yield to exemption provisions contained in law creating New York State Urban Development Corporation (UDC Act), which were enacted in 1968; thus, if provisions of UDC Act exempted from recording tax mortgages created under project in question, such exemption provisions would prevail. NY Adv Op Comm T & F TSB-A-93-(4)R.

Recording of instrument in which petitioner, New York State Urban Development Corporation, was named mortgagee to increase principal amount of indebtedness secured by recognized mortgage was not subject to mortgage recording tax. NY Adv Op Comm T & F TSB-A-93-(4)R.

Mortgage recording taxes were not due on recording of any mortgage of property that was part of New York State Urban Development Corporation's land use project if Corporation was named mortgagee or co-mortgagee (whether as trustee, agent, or otherwise) and recognized mortgages were recorded prior to time that Corporation assigned its interest in mortgages to other lenders or its co-mortgagee. NY Adv Op Comm T & F TSB-A-97-(5)R.

Mortgage recording tax was not due on recording of any mortgage recorded in connection with development project if New York State Urban Development Corporation (UDC) or its subsidiary Queens West Development Corporation (QWDC) was named mortgagee (whether as trustee, agent, nominee, or otherwise), and UDC and QWDC presented mortgage for recording. NY Adv Op Comm T & F TSB-A-95-(15)R.

18. —Not for profit development corporation

Mortgage recording tax is not due on recording of mortgage by housing development fund company where such company is lender/mortgagee; thus, mortgages entered into by Habitat for Humanity Development Fund Company in connection with Habitat for Humanity-New York City program were not subject to mortgage recording tax. NY Adv Op Comm T & F TSB-A-00-(4)R.

Petitioner, not-for-profit corporation which executed mortgage to construct intermediate care facility certified by office of Mental Retardation and Development Disabilities under CLS Men Hyg §§ 31.02(a)(1) and 31.05 and 14 NYCRR § 681.13, was not exempt from mortgage recording tax since it was not voluntary nonprofit hospital corporation as provided in CLS Tax § 253(3). NY Adv Op Comm T & F TSB-A-85-(1)M, 1985 N.Y. Tax LEXIS 406.

Mortgages given to or by petitioner, not-for-profit local development corporation, were exempt from mortgage recording taxes since petitioner was reincorporated under CLS N-PCL § 1411, and CLS N-PCL § 1411(f) provided that income and operations of corporations incorporated or reincorporated under such section shall be exempt from taxation. NY Adv Op Comm T & F TSB-A-93-(13)R.

If petitioner, tax-exempt not-for-profit corporation about to execute mortgage with lending institution, was organization that had established exemption under Internal Revenue Code § 501(a), petitioner would be exempt from portion of mortgage recording tax representing special additional tax, but would be subject to basic tax, additional tax, and tax on mortgages recorded in cities having population of one million or more. NY Adv Op Comm T & F TSB-A-90-(3)R, 1990 N.Y. Tax LEXIS 94.

Mortgage recorded by not-for-profit local development corporation incorporated under CLS N-PCL § 1411 is exempt from mortgage recording taxes imposed by CLS Tax Art 11. NY Adv Op Comm T & F TSB-A-08-(1)R, 2008 N.Y. Tax LEXIS 58.

19. —Port authorities

Mortgage from Port Authority of New York and New Jersey to trustee, which included rental payable to Authority, was mortgage under CLS Tax Law Art 11 and could be recorded without payment of tax is borrower was state agency. NY Adv Op Comm T & F TSB-A-92-(5)R.

Leasehold mortgage granted to trustee by general partnership as supplemental mortgage to assignment of rents granted by Port Authority of New York and New Jersey could be recorded without payment of mortgage recording tax, provided assignment of rents

granted by Authority to trustee was recorded first; unless mortgage to be granted by partnership to trustee was recorded subsequent to recording of assignment of rents there was no supplemental mortgage and no exemption. NY Adv Op Comm T & F TSB-A-92-(5)R.

Recording of mortgage given by Port Authority of New York and New Jersey to trustee in form of assignment of rents was exempt from mortgage recording tax since Authority was agency or instrumentality of New York State. NY Adv Op Comm T & F TSB-A-96-(3)R.

20. —Bridge and tunnel authorities

Recording of leasehold mortgages granted by Triborough Bridge and Tunnel Authority (TBTA) to lenders on its leasehold interest in leased property under lease of property by Metropolitan Transit Authority to TBTA, and assignment of rents in such mortgages, under specific terms and conditions where TBTA was named mortgagor, was exempt from mortgage recording taxes. NY Adv Op Comm T & F TSB-A-97-(4)R.

In accordance with CLS Tax §§ 250 and 253, assignment by Triborough Bridge and Tunnel Authority (TBTA) to trustee of its rights (if any), and assumption by trustee of TBTA's obligations, under leasehold mortgages granted by TBTA to lenders on its leasehold interest in leased property under lease of property by Metropolitan Transit Authority to TBTA, and assignment of rents in such mortgages, were not events which would cause mortgage recording taxes to be imposed. NY Adv Op Comm T & F TSB-A-97-(4)R.

Funding of loan and execution and delivery of loan certificates to trustee only after assignment were not subject to mortgage recording taxes in situation where execution, delivery or recording by Triborough Bridge and Tunnel Authority (TBTA) of 2 mortgages granted by TBTA to lenders on its leasehold interest in leased property under lease of leased property by Metropolitan Transportation Authority (MTA) to TBTA and assignment of rents in said mortgages and in loan agreement under sublease of leased property by TBTA to MTA where (a) TBTA was named mortgagor, (b) loan secured in part by leasehold mortgage and assignment of rents would be provided by one or more persons or entities other than, and unrelated to, MTA, (c) documents for and securing loan were executed by TBTA, but loan was funded only after either (x) assignment of all of TBTA's right, title, and interest in lease, sublease, support assets purchase option, loan documents, leasehold mortgage and assignment of rents, and collateral assignment to trustee under trust agreement with grantor and assumption by trustee of all of TBTA's obligations (and release of TBTA) under lease, sublease, loan documents, leasehold mortgage and assignment of rents, and collateral assignment or (y) on satisfaction of certain conditions and authorizations relating to possibility of funding loan prior to assignment, which conditions and authorizations were not expected to occur, and (d) proceeds of loan were used by trustee (as successor in interest to TBTA) to fund portion of lump sum payment to MTA, which sum constituted prepaid rent under lease and cost for option giving trustee right to extend initial lease term. NY Adv Op Comm T & F TSB-A-97-(4)R.

Payment and performance by trustee of its obligations under, holding by lenders of, and/or enforcement by lenders of their rights and remedies under or as to loan certificates, loan documents, loan agreement, leasehold mortgage and assignment of rents, or fee mortgage were not subject to mortgage recording taxes in situation where execution, delivery or recording by Triborough Bridge and Tunnel Authority (TBTA) of 2 mortgages granted by TBTA to lenders on its leasehold interest in leased property under lease of leased property by Metropolitan Transportation Authority (MTA) to TBTA and assignment of rents in said mortgages and in loan agreement under sublease of leased property by TBTA to MTA where (a) TBTA was named mortgagor, (b) loan secured in part by leasehold mortgage and assignment of rents would be provided by one or more persons or entities other than, and unrelated to, MTA, (c) documents for and securing loan were executed by TBTA, but loan was funded only after either (x) assignment of all of TBTA's right, title, and interest in lease, sublease, support assets purchase option, loan documents, leasehold mortgage and assignment of rents, and collateral assignment to trustee under trust agreement with grantor and assumption by trustee of all of TBTA's obligations (and release of TBTA) under lease, sublease, loan documents, leasehold mortgage and assignment of rents, and collateral assignment or (y) on satisfaction of certain conditions and authorizations relating to possibility of funding loan prior to assignment, which conditions and authorizations were not expected to occur, and (d) proceeds of loan were used by trustee (as successor in interest to TBTA) to fund portion of lump sum payment to MTA, which sum constituted prepaid rent under lease and cost for option giving trustee right to extend initial lease term. NY Adv Op Comm T & F TSB-A-97-(4)R.

Recording of fee mortgage (where Metropolitan Transportation Authority was mortgagor and Triborough Bridge and Tunnel Authority was mortgagee) was exempt from mortgage recording taxes since at least one party to mortgage at time of recording was agency or instrumentality of New York State. NY Adv Op Comm T & F TSB-A-97-(4)R.

21. —Federal agencies

Mortgages entered into between U.S. Army and private housing corporation could be recorded without payment of mortgage recording taxes imposed under CLS Tax Art 11 where proceeds of mortgage would be used for government purpose of rehabilitation and reconstruction of military housing units located at military base. NY Adv Op Comm T & F TSB-A-04-(1)R.

22. —Miscellaneous public agencies

Exemption from payment of mortgage recording tax was applicable where recorded construction loan mortgage given by housing development fund company (HDFC) was severed to cover different portions of originally mortgaged premises and HDFC executed 2 or more substitute mortgages in favor of original mortgagee, and original construction loan mortgage did not expressly contemplate or describe severance of mortgage and execution of replacement mortgages; further, exemption would also apply where original construction loan mortgage expressly contemplated and provided for severance of mortgage and execution of replacement mortgages. NY Adv Op Comm T & F TSB-A-01-(4)R.

Mortgage recording tax would not be due on recording of any mortgage recorded in connection with portion of community development project, if Roosevelt Island Operating Corporation (RIOC) was named mortgagee (whether as trustee, agent, nominee, or otherwise), and RIOC presented mortgage for recording; further, to extent that mortgage continued to secure same principal debt or obligation, recording of any assignment, supplement, modification, or amendment of mortgage was exempt from mortgage recording tax, either because such action did not create new mortgage subject to tax under CLS Tax § 253, or because instrument constituted "supplemental mortgage" under CLS Tax § 255. NY Adv Op Comm T & F TSB-A-01-(5)R.

Mortgage from corporation to Administrator of Federal Railroad Administration was not subject to mortgage recording tax since mortgagee was instrumentality or agency of United States which was immune from taxation by New York State. NY Adv Op Comm T & F TSB-A-90-(9)R.

Mortgages which arise directly from operation of State of New York Mortgage Agency's Forward Commitment Program are exempt from mortgage recording taxes imposed by CLS Tax Law Art 11. NY Adv Op Comm T & F TSB-A-84-(1)M.

Recording of mortgage by City University of New York, as instrumentality of New York State, was exempt from mortgage recording tax. NY Adv Op Comm T & F TSB-A-86-(1)M.

Mortgage recording tax would not be imposed on recording of Supplemental Mortgage Indenture to be entered into in conjunction with issuance by New York State Energy Research and Development Authority of certain refunding revenue bonds and concurrent amendment and restatement of certain first mortgage bonds of Niagara Mohawk Power Corporation. NY Adv Op Comm T & F TSB-A-98-(4)R.

To extent that creation of payments in lieu of real estate taxes (PILOT) mortgage was authorized by CLS Gen Mun § 858, recording of such PILOT mortgage was exempt from imposition of New York State and New York City mortgage recording taxes. NY Adv Op Comm T & F TSB-A-93-(18)R.

Amendment to loan agreement to increase indebtedness back to original amount constituted additional indebtedness subject to mortgage recording taxes; however, since Town of Hempstead Industrial Development Agency was party to such mortgage, recording of amended loan agreement to effectuate such increase in indebtedness was exempt from taxation. NY Adv Op Comm T & F TSB-A-93-(19)R.

Amendment and restatement of first mortgage bonds, and concurrent recordation of supplemental mortgage indenture, being undertaken for benefit of, and to support issuance of refunding bonds by, New York State Energy Research and Development Authority, state agency, were exempt from imposition of mortgage recording taxes. NY Adv Op Comm T & F TSB-A-94-(1)R, 1994 N.Y. Tax LEXIS 795.

Mortgage recording tax would not be due on recording by Battery Park City Authority of one or more mortgages on New York Mercantile Exchange (NYMEX) on leasehold interests in leased property to which Authority would be either named mortgagee or named mortgagor, provided that proceeds of mortgage(s) were used for project development costs, and either Authority was initial named mortgagee under mortgage, or Authority executed mortgage with NYMEX, as co-mortgagor. NY Adv Op Comm T & F TSB-A-95-(1)R.

To extent principal amount of secured indebtedness was not increased, recording by Battery Park City Authority of any assignments, modifications, amendments, spreaders, consolidations, substitution, severance, restatements, and extensions of mortgage were exempt from mortgage recording tax either because such action would not create new mortgage, or because such action constituted "supplemental mortgage" under CLS Tax § 255; where principal amount of secured indebtedness of mortgage was increased, and Authority was not party to recorded instrument evidencing such increase, mortgage recording tax was due as to amount of increase. NY Adv Op Comm T & F TSB-A-95-(1)R.

Construction loan mortgages recorded by Greater Syracuse Business Development Corporation (petitioner) were exempt from mortgage recording tax, even if mortgages were or might be assigned immediately after recording to private lender for duration of construction phase of project, but then reassigned to petitioner after completion of construction phase for remainder of their term, since petitioner was reincorporated under CLS N-PCL § 1411, and CLS N-PCL § 1411(f) provides that income and operations of corporations incorporated or reincorporated under such section shall be exempt from taxation. NY Adv Op Comm T & F TSB-A-95-(16)R, 1995 N.Y. Tax LEXIS 907.

Recording tax is not due on recording of mortgage as part of Hunters Point (Queens West) Waterfront Development Use Improvement Project if either New York State Urban Development Corporation (dba Empire State Development Corporation) or Queens West Development Corporation (QWDC) is named mortgagee (whether as trustee, agent, nominee or otherwise) and presents mortgage for recording, and recording of assignment, supplement, modification or amendment of such mortgage is exempt from mortgage recording tax to extent that mortgage continues to secure same principal debt or obligation; however, mortgage recording tax would be imposed with respect to new or further indebtedness to extent that such tax would otherwise be required to be paid on new or further indebtedness. NY Adv Op Comm T & F TSB-A-02(6)R.

23. —Reverse mortgage

Recording of reverse mortgage loan, including recording of reverse mortgage loan containing provision for compounding of interest, was not subject to mortgage recording taxes. NY Adv Op Comm T & F TSB-A-94-(9)R.

24. —Applicability to previous statutes

Pertinent provisions of CLS Tax § 252 were enacted in 1909, and thus they would yield to exemption provisions contained in CLS Priv Hous Fin § 577, which were enacted in 1966. NY Adv Op Comm T & F TSB-A-00-(4)R.

Inasmuch as CLS Tax § 252 was enacted in 1909, and last amended in 1966, it must yield to exemption provisions contained in law creating Urban Development Corporation (UDC) which were enacted in 1968; thus, if provisions of UDC Act exempt from recording Tax mortgages created under construction project, such exemption provisions would prevail. NY Adv Op Comm T & F TSB-A-89-(2)R.

Recording of initial assignment, supplement, modification, or amendment of leasehold mortgage, and assignment of rents, fee mortgage, or collateral assignment to extent that then principal indebtedness or obligation secured by leasehold mortgage and assignment of rents or obligations under lease and sublease secured by fee mortgage or collateral assignment (as case may be) were not increased, were either exempt from mortgage recording taxes or were not subject to such taxes because such action did not create mortgage as defined in CLS Tax § 250; recording of any subsequent (following in time to initial assignment) assignment, supplement, modification, or amendment of leasehold mortgage, and assignment of rents, fee mortgage, or collateral assignment under conditions as in case of initial assignment, were either exempt from mortgage recording taxes or were not subject to such taxes for same reasons as in case of initial assignment of those instruments. NY Adv Op Comm T & F TSB-A-97-(4)R.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 187., 210., 253-a., 254., 255., 256., 258., 261., 264., 606., 612., 1453., 1456., 1503., 1511.; CLS Pub A Law § 2429-b.; CLS Real P §§ 339-ee., 416.

Recording tax by a city of one million or more, § 253-a.

Payment over and distribution of taxes, § 261.

Recording executory contracts and powers of attorney, CLS Real P § 294.

CODES, RULES AND REGULATIONS:

Mortgage recording taxes. 20 NYCRR §§ 640.1 et seq.

Imposition of taxes. 20 NYCRR §§ 642.1 et seq.

Jurisprudences:

71 Am Jur 2d, State and Local Taxation § 546.

13B Am Jur Legal Forms 2d, Mortgages and Trust Deeds §§ 179:248., 179:372., 179:373., 179:375., 179:377., 179:378.

Law Reviews:

Miller, Hacking a path through the New York state mortgage tax jungle. 43 Alb. L. Rev. 37.

Treatises

Matthew Bender's New York Practice Guides: New York Practice Guide: Real Estate § 2.29., 3.02., 3.06.

Texts: 1 Bergman on New York Mortgage Foreclosures (Matthew Bender) § 7.13.

ARTICLE 12-A Tax on Gasoline and Similar Motor Fuel

Section

282. Definitions
284. Tax imposed
289-c. Refunds

HISTORY:

Add, L 1929, ch 364, § 1.

§ 282. Definitions

As used in this article,

1. a. With respect to motor fuel, "distributor" means any person, firm, association or corporation, who or which imports or causes to be imported into the state, for use, distribution, storage or sale within the state, any motor fuel; and also any person, firm, association or corporation who or which produces, refines, manufactures or compounds motor fuel within the state.

b. With respect to Diesel motor fuel, "distributor" means any person, firm, association or corporation (i) who or which imports or causes to be imported into the state, for use, distribution, storage or sale

within the state, any Diesel motor fuel; (ii) who or which produces, refines, manufactures or compounds Diesel motor fuel within the state; (iii) who or which makes a sale or use of Diesel motor fuel in this state other than: (A) a retail sale not in bulk or (B) the self-use of Diesel motor fuel which has been the subject of a retail sale to such person; (iv) who or which is registered by the department as a distributor of kero-jet fuel pursuant to the provisions of subdivision two of section two hundred eighty-two-a of this article. For the purposes of this article when used with respect to Diesel motor fuel, a "retail sale not in bulk" means the making or offering to make any sale of Diesel motor fuel to a consumer of such fuel which is delivered directly into a motor vehicle for use in the operation of such vehicle. A "retail sale in bulk" means the making or offering to make any sale of Diesel motor fuel to a consumer which is other than a "retail sale not in bulk". Motor fuel or Diesel motor fuel brought into the state in the ordinary fuel tank connecting with the engine of a motor vehicle, aeroplane, motor boat or other conveyance propelled by the use of such motor fuel or Diesel motor fuel, and to be used only in the operation thereof, shall not be deemed imported within the meaning of this article, if not removed from such tank except as used in the propulsion of such engine.

2. "Motor fuel" means gasoline, benzol, reformulated blend stock for oxygenate blending, conventional blend stock for oxygenate blending, E85, fuel grade ethanol that meets the ASTM International active standards specifications D4806 or D4814 or other product which is suitable for use in operation of a motor vehicle engine.

3. "Motor vehicle" means any vehicle propelled by any power other than muscular, except boats, road building machinery, power shovels, tractor cranes, tractors used exclusively for agricultural purposes and such vehicles as are run only on rails or tracks.

4. "Purchaser" shall include, in addition to its usual meaning, the distributor in the case of transfer of motor fuel by a distributor from his, their or its stock, into a motor vehicle, or into a container from which motor fuel is supplied by the distributor to a motor vehicle or vehicles of the distributor or of others.

5. "Sale" shall include, in addition to its meaning under article twenty-eight of this chapter, the transfer of fuel by a distributor into a motor vehicle or into a receptacle from which fuel is supplied by him or it to his or its own or other motor vehicles.

6. "Filling station" shall include any place, location or station where motor fuel, highway Diesel motor fuel or water-white kerosene (exclusively for heating purposes in containers of no more than twenty gallons), is offered for sale at retail.

7. "Owner" shall include any person offering motor fuel for sale at retail.

8. "Person" includes an individual, copartnership, limited liability company, society, association, corporation, joint stock company, and any combination of individuals and also an executor, administrator, receiver, trustee or other fiduciary.

9. "Omnibus carrier" shall mean every person engaged in operating an omnibus line subject to the supervision of the state department of public service under article three-a of the public service law, including every person operating omnibuses used for the transportation of school children under a contract made pursuant to the provisions of the education law.

10. "Taxicab licensee" shall mean every corporation, company, association, partnership and person engaged in operating a taxicab, as defined in section one hundred forty-eight-a of the vehicle and traffic law, and licensed by local authorities as defined in section one hundred twenty-two of such law to operate at a fixed rate of fare.

11. "Nonpublic school operator" shall mean any nonpublic elementary or secondary school which owns or leases and operates any vehicle solely and exclusively for its purposes.

12. "Transporter" means any person who or which has the use or control, or the right to the use or control of any means of transportation used in transporting motor fuel including a barge, truck or pipeline. "Importing transporter" means any transporter who or which transports motor fuel in the state where such motor fuel is being imported into the state for use, distribution, storage or sale in the state. "Exporting transporter" means any transporter who or which transports motor fuel in this state where such motor fuel is being exported from a point in this state to without this state.

13. "Terminal" means a motor fuel or Diesel motor fuel storage facility with a storage capacity of fifty thousand gallons or more excluding such facility at which motor fuel or Diesel motor fuel is stored solely for its retail sale at such facility. "Terminal operator" means any person who or which has the use of or control over, or the right to so use or control, a terminal.

14. "Diesel motor fuel" shall mean No. 1 Diesel fuel, No. 2 Diesel fuel, biodiesel, kerosene, fuel oil or other middle distillate and also motor fuel suitable for use in the operation of an engine of the diesel type, excluding, however, any product specifically designated "No. 4 Diesel fuel" and not suitable as a fuel used in the operation of a motor vehicle engine.

15. [Repealed]

16. "Non-highway Diesel motor fuel" means any Diesel motor fuel that is designated for use other than on a public highway (except for the use of the public highway by farmers to reach adjacent lands), and is dyed Diesel motor fuel as defined in subdivision eighteen-a of this section.

16-a. "Highway Diesel motor fuel" means any Diesel motor fuel which is not non-highway Diesel motor fuel.

17. "Fixed base operator" means any person, firm, association or corporation, who or which engages in the sale of kero-jet fuel or aviation gasoline, or both,

for airplanes from a fixed and permanent place at an airport within the state.

18. "Indian nation or tribe" means one of the following New York state Indian nations or tribes: Cayuga Nation, Oneida Nation of New York, Onondaga Nation, Poospatuck or Unkechauge Nation, Saint Regis Mohawk Tribe, Seneca Nation of Indians, Shinnecock Indian Nation, Tonawanda Band of Seneca and Tuscarora Nation.

18-a. "Dyed Diesel motor fuel" means Diesel motor fuel which has been dyed in accordance with and for the purpose of complying with the provisions of 26 USC § 4082(a) and the regulations thereunder, as may be amended from time to time.

19. "Qualified Indian" means a person duly enrolled on the tribal rolls of one of the Indian nations or tribes. In the case of the Cayuga Indian Nation of New York, such term shall include enrolled members of such nation when such enrolled members purchase motor fuel on any Seneca reservation.

20. "Qualified reservation" means

(a) lands held by an Indian nation or tribe that is located within the reservation of that nation or tribe in the state;

(b) lands within the state over which an Indian nation or tribe exercises governmental power and that are either (i) held by the Indian nation or tribe subject to restrictions by the United States against alienation, or (ii) held in trust by the United States for the benefit of such Indian nation or tribe;

(c) lands held by the Shinnecock Tribe or the Poospatuck (Unkechauge) Nation within their respective reservations; or

(d) any land that falls within paragraph (a) or (b) of this subdivision, and which may be sold and replaced with other land in accordance with an Indian nation's or tribe's land claims settlement agreement with the state of New York, shall nevertheless be deemed to be subject to restriction by the United States against alienation.

21. "Reservation motor fuel seller" means a seller of motor fuel or Diesel motor fuel which is an Indian nation or tribe, one or more members of such tribe, or an entity wholly owned by either or both, which sells motor fuel within the boundaries of a qualified reservation.

22. [Repealed Sept 1, 2021] "E85" means a fuel blend consisting of ethanol and motor fuel, which meets the ASTM International active standard D5798 for fuel ethanol.

23. [Repealed Sept 1, 2021] "B20" means a mixture consisting by volume of twenty percent biodiesel and the remainder of which is diesel motor fuel. "Biodiesel" shall mean either "qualified biodiesel" or "unqualified biodiesel." "Qualified biodiesel" means a diesel motor fuel substitute produced from nonpetroleum renewable resources that meets the registration requirements for fuels and fuel additives established by the Environmental Protection Agency under section 211 of the Clean Air Act (42 U.S.C. 7545) and that meets the ASTM International active standard D6751 for biodiesel fuel. "Unqualified biodiesel" means a diesel motor fuel substitute produced from nonpetroleum renewable resources that does not meet the ASTM International active standard D6751 for biodiesel fuel.

24. [Repealed Sept 1, 2021] "CNG" means fuel comprised primarily of methane, stored in either a gaseous or liquid state, suitable for use and consumption in the engine of a motor vehicle.

25. [Repealed Sept 1, 2021] "Hydrogen" means fuel comprised primarily of molecular hydrogen, stored in either a gaseous or liquid state, suitable for use and consumption in the engine of a motor vehicle.

26. "Public highway" means public highway as defined in subdivision six of section five hundred one of this chapter.

27. "Wholesaler of motor fuel" means any person, firm, association or corporation who or which: (1) is not a distributor of motor fuel; (2) makes a sale of motor fuel in this state other than a retail sale not in bulk; and (3)(A) makes any purchases of motor fuel for resale within the region set forth in subparagraph (i) or (ii) of paragraph one of subdivision (e) of section eleven hundred eleven of this chapter; or (B) makes any sales of motor fuel, other than retail sales not in bulk, within the region set forth in subparagraph (i) or (ii) of paragraph one of subdivision (e) of section eleven hundred eleven of this chapter. For the purposes of this article when used with respect to motor fuel, a "retail sale not in bulk" means the making or offering to make any sale of motor fuel to a consumer of such fuel which is delivered directly into a motor vehicle for use in the operation of such vehicle. A "retail sale in bulk" means the making or offering to make any sale of motor fuel to a consumer which is other than a "retail sale not in bulk".

HISTORY:

Add, L 1929, ch 364, § 1; amd, L 1930, ch 163, § 1; L 1932, ch 330, § 1; L 1935, ch 48, § 1; L 1937, ch 509, § 1; L 1959, ch 641, § 1; L 1959, ch 711, § 1; L 1961, ch 169, § 1; L 1974, ch 756, § 1; L 1985, ch 44, § 2; L 1986, ch 276, § 1; L 1988, ch 261, §§ 68, 69; L 1989, ch 245, §§ 3, 5, 6, eff July 5, 1989; L 1993, ch 560, § 1, eff July 28, 1993; L 1994, ch 576, § 33, eff July 26, 1994; L 1995, ch 2, § 74, eff Sept 1, 1995; L 2005, ch 61, § 3 (Part K), eff March 1, 2006; L 2006, ch 109, § 1 (Part W-1), eff Sept 1, 2006; L 2006, ch 302, § 1, eff Dec 1, 2006; L 2011, ch 61, §§ 1–4 (Part K), eff Sept 1, 2011; L 2011, ch 61, § 1 (Part L), eff March 31, 2011; L 2012, ch 59, § 1 (Part E), eff June 1, 2012; L 2013, ch 59, § 1 (Part W), eff Aug 1, 2013; L 2013, ch 174, § 17, eff July 30, 2013; L 2016, ch 60, § 1 (Part UU), effective April 13, 2016.

Editor's Notes: Laws 1985, ch 44, § 42, eff June 1, 1985, provides in part as follows:

§ 42. This act shall take effect immediately, except that sections one through thirty-six shall take effect June first, nineteen hundred eighty-five . . . and shall apply to all taxable events respecting motor fuel as such events are defined in section eleven hundred two of the tax law, as amended by this act, and automotive fuel occurring on and after such date and an amount equivalent to the sales taxes paid by or passed through to a purchaser upon sales of motor fuel before such date at the regional average retail sales price pursuant to the provisions of articles twenty-eight and twenty-nine of the tax law in effect prior to such date shall be allowed such purchaser as a credit or refund, where a refund

or credit would be allowable after such date under the tax law, as amended by this act, against the tax required to be prepaid pursuant to section eleven hundred two and passed through or required to be collected or paid pursuant to section eleven hundred five or eleven hundred ten of the tax law upon sales or uses of such motor fuel occurring on and after such date and provided further, however, that no refund or credit shall be allowed pursuant to this provision with respect to motor fuel placed into the ordinary fuel tank connected with the engine of such vehicle prior to such date notwithstanding use of such fuel thereafter.

Laws 1986, ch 276, § 37, eff July 14, 1986, provides as follows:

§ 37. This act shall take effect immediately except that sections one through twenty-four of this act shall apply on and after such effective date (and provided that the department of taxation and finance shall immediately undertake all necessary steps and application review to insure that on October 1, 1986 all terminal operators and transporters, required to be licensed by the provisions of this act, are so licensed by such date and further provided that the single regional average retail sales price for motor fuel provided for in section thirty of this act, which shall replace the separate regional average retail sales price for leaded, unleaded and premium motor fuel, shall be prescribed and first become effective on September 1, 1986 and the commissioner of energy shall determine such single average retail sales price for each region before August 16, 1986 and such price shall be compiled from data with respect to the six-month period ending the last day of June, 1986) and except that sections twenty-five through twenty-eight of this act shall take effect December 1, 1986. (Amd, L 1989, ch 245, § 1, L 1990, ch 190, § 243, L 1992, ch 55, § 52, L 1993, ch 57, § 140, eff April 15, 1993.).

Laws 1994, ch 576, § 75(a), eff July 26, 1994, provides as follows:

§ 75. (a) Section nineteen of this act insofar as it adds subdivision 6 to section 2 of the tax law; sections twenty through twenty-five, twenty-seven through thirty, thirty-two through thirty-nine, forty-one, forty-four through forty-six, forty-eight, fifty-two, fifty-six, fifty-seven, fifty-nine through sixty-two and sixty-four of this act; sections forty, fifty-three through fifty-five, sixty-five, sixty-six and sixty-eight through seventy of this act, except insofar as they define the term "limited liability company" by reference to the limited liability company law; and sections forty-three, forty-seven, forty-nine through fifty-one, fifty-eight and sixty-seven of this act, except insofar as they add a reference to a manager of a limited liability company, take effect immediately pursuant to section seventy-six of this act and are amendments of a merely clarifying nature which are not to be construed to change the result that limited liability companies and members thereof were also included within the meaning of the terms "partnership," "person", "association", "partner" or "member", as applicable, prior to the enactment of this act.

Laws 2005, ch 61, § 7 (Part K), eff March 1, 2006, provides as follows:

§ 7. This act shall take effect March 1, 2006, provided that any actions, rules and regulations necessary to implement the provisions of this act on its effective date are authorized and directed to be completed on or before such date. (Amd, L 2005, ch 63, § 4 (Part A), eff March 1, 2006.).

Laws 2006, ch 109, § 19 (Part W-1), eff June 23, 2006, provides as follows:

§ 19. This act shall take effect immediately; provided, however, that sections one through thirteen of this act shall take effect September 1, 2006 and shall be deemed repealed on September 1, 2021 and such repeal shall apply in accordance with the applicable transitional provisions of sections 1106 and 1217 of the tax law, and shall apply to sales made, fuel compounded or manufactured, and uses occurring on or after such date, and with respect to sections seven through eleven of this act, in accordance with applicable transitional provisions of sections 1106 and 1217 of the tax law; provided, however, that the commissioner of taxation and finance shall be authorized on and after the date this act shall have become a law to adopt and amend any rules or regulations and to take any steps necessary to implement the provisions of this act; provided further that sections fourteen through sixteen of this act shall take effect immediately and shall apply to taxable years beginning on or after January 1, 2006. (Amd, L 2011, ch 61, § 2 (Part L), eff March 31, 2011; L 2012, ch 59, § 1 (Part D) eff March 31, 2012; L 2014, ch 59, § 1 (Part V), eff March 31, 2014; L 2016, ch 60 § 1 (Part U), eff April 13, 2016.).

Laws 2006, ch 302, § 12, eff July 26, 2006, provides as follows:

§ 12. This act shall take effect immediately; provided, however, that (a) sections one through three and eight through eleven of this act shall take effect on the first day of the first month next occurring 120 days after this act shall have become a law and shall apply to sales made on or after such date; provided that the commissioner of taxation and finance shall be authorized on and after the date this act shall have become a law to adopt and amend any rules or regulations and issue any procedures, forms or instructions necessary to implement the provisions of such sections of this act on their effective date.

(b) claims for refunds, credits, or reimbursements which expire on or before the date this act shall have become a law and which are revived under sections four through seven of this act, and claims for refunds, credits, or reimbursements which expire after the date this act shall have become a law, but before the ninetieth day after this act shall have become a law, and which are covered under the laws amended by such sections of this act may be filed by the later of the ninetieth day after this act shall have become a law or the date that the time to file a claim expires under the law as amended by such sections of this act.

Laws 2011, ch 61, § 58 intro par, sub (a) (Part K), eff Sept 1, 2011, provides as follows:

§ 58. This act shall take effect September 1, 2011 and shall apply to sales or uses occurring on or after such date in accordance with the applicable transitional provisions in sections 1106 and 1217 of the tax law; provided, however, that:

(a) the amendments to subdivisions 22 and 23 of section 282 of the tax law, made by section one of this act shall not affect the repeal of such subdivisions and shall be deemed repealed therewith;.

Laws 2011, ch 61, § 3 (Part L), eff March 31, 2011, provides as follows:

§ 3. This act shall take effect immediately; provided, however, that the amendments made to subdivision 22 of section 282 of the tax law made by section one of this act shall not affect the repeal of such subdivision and shall be deemed repealed therewith.

Laws 2012, ch 59, § 7 (Part E), eff June 1, 2012, provides as follows:

§ 7. This act shall take effect June 1, 2012; provided, however, that the amendments to paragraph 2 of subdivision (a) of section 1102 of the tax law made by section five of this act shall be subject to the expiration and reversion of such paragraph pursuant to section 19 of part W1 of chapter 109 of the laws of 2006, as amended, when upon such date the provisions of section six of this act shall take effect; provided, further, that sections five and six of this act shall apply to sales made and uses occurring on and after such effective date in accordance with the applicable transitional provisions in sections 1106 and 1217 of the tax law.

Laws 2013, ch 174, § 1, eff as stated in 2013 note below, provides as follows:

Section 1. This act shall be known and may be cited as the "upstate New York gaming economic development act of 2013."

Laws 2016, ch 60, § 7 (Part UU), eff April 13, 2016, provides:

§ 7. This act shall take effect immediately; provided, however, that sections two, three, four, five and six of this act shall take effect December 1, 2016. Effective immediately,

any rules, regulations and agreements necessary to implement the provisions of this act on its effective date are authorized and directed to be completed on or before such date.

Subsection History: Sub 1, amd, L 1985, ch 44, § 2 (see 1985 note below), L 1988, ch 261, § 68, eff Sept 1, 1988.

Sub 1, par a, formerly undesignated first sentence of sub 1, so designated and amd, L 1988, ch 261, § 68, eff Sept 1, 1988.

Sub 1, par b, formerly undesignated second sentence of sub 1, so designated and amd, L 1988, ch 261, § 68, L 1989, ch 245, § 5, eff July 5, 1989; amd, L 2011, ch 61, § 1 (Part K), eff Sept 1, 2011 (see 2011 note below).

Sub 2, amd, L 1937, ch 509, § 1, L 2011, ch 61, § 1 (Part K), eff Sept 1, 2011 (see 2011 note below).

Sub 3, amd, L 1930, ch 163, § 1, eff March 24, 1930.

Sub 5, amd, L 1985, ch 44, § 2, eff June 1, 1985 (see 1985 note below).

Sub 6, amd, L 1932, ch 330, § 1, L 1988, ch 261, § 68, L 2011, ch 61, § 1 (Part K), eff Sept 1, 2011 (see 2011 note below).

Sub 7, amd, L 1932, ch 330, § 1, eff March 21, 1932.

Sub 8, amd, L 1935, ch 48, § 1, L 1994, ch 576, § 33, eff July 26, 1994 (see 1994 note below).

Sub 9, add, L 1959, ch 641, § 1, eff March 1, 1959.

Sub 10, add, L 1959, ch 711, § 1; amd, L 1961, ch 169, § 1, eff March 1, 1961.

Sub 11, add, L 1974, ch 756, § 1, eff June 7, 1974, but applicable with respect to taxes paid on or after March 1, 1974.

Sub 12, add, L 1986, ch 276, § 1, eff July 14, 1986 (see 1986 note below); amd, L 1993, ch 560, § 1, eff July 28, 1993.

Sub 13, add, L 1986, ch 276, § 1, eff July 14, 1986 (see 1986 note below); amd, L 2013, ch 59, § 1 (Part W), eff Aug 1, 2013.

Sub 14, add, L 1988, ch 261, § 69; amd, L 1989, ch 245, § 3, L 2011, ch 61, § 1 (Part K), eff Sept 1, 2011 (see 2011 note below), L 2012, ch 59, § 1 (Part E), eff June 1, 2012 (see 2012 note below).

Sub 15, add, L 1988, ch 261, § 69; repealed, L 2011, ch 61, § 1-a (Part K), eff Sept 1, 2011 (see 2011 note below).

Sub 16, add, L 2011, ch 61, § 2 (Part K), eff Sept 1, 2011 (see 2011 note below).

Sub 16-a, add, L 2011, ch 61, § 2 (Part K), eff Sept 1, 2011 (see 2011 note below).

Former sub 16, add, L 1988, ch 261, § 69; repealed, L 2011, ch 61, § 2 (Part K), eff Sept 1, 2011 (see 2011 note below).

Sub 17, add, L 1989, ch 245, § 6, eff July 5, 1989; amd, L 1995, ch 2, § 74, eff Sept 1, 1995.

Sub 18, add, L 2005, ch 61, § 3 (Part K), eff March 1, 2006 (see 2005 note below); amd, L 2013, ch 174, § 17, eff July 30, 2013.

Another sub 18, redesignated sub 18-a, L 2011, ch 61, § 3 (Part K), eff Sept 1, 2011 (see 2011 note below).

Sub 18-a, formerly sub 18, add, L 2006, ch 302, § 1 (see 2006 note below); so designated sub 18-a, L 2011, ch 61, § 3 (Part K), eff Sept 1, 2011 (see 2011 note below).

Sub 19, add, L 2005, ch 61, § 3 (Part K), eff March 1, 2006 (see 2005 note below).

Sub 20, add, L 2005, ch 61, § 3 (Part K), eff March 1, 2006 (see 2005 note below).

Sub 21, add, L 2005, ch 61, § 3 (Part K), eff March 1, 2006 (see 2005 note below).

Sub 22, add, L 2006, ch 109, § 1 (Part W-1), eff Sept 1, 2006, repealed Sept 1, 2016 (see 2006 note below), L 2011, ch 61, § 1 (Part K), eff Sept 1, 2011 (see 2011 note below).

Sub 23, add, L 2006, ch 109, § 1 (Part W-1), eff Sept 1, 2006, repealed Sept 1, 2016 (see 2006 note below), L 2011, ch 61, § 1 (Part K), eff Sept 1, 2011 (see 2011 note below), L 2011, ch 61, § 1 (Part L), eff March 31, 2011 (see 2011 note below).

Sub 24, add, L 2006, ch 109, § 1 (Part W-1), eff Sept 1, 2006, repealed Sept 1, 2016 (see 2006 note below).

Sub 25, add, L 2006, ch 109, § 1 (Part W-1), eff Sept 1, 2006, repealed Sept 1, 2016 (see 2006 note below).

Sub 26, add, L 2011, ch 61, § 4 (Part K), eff Sept 1, 2011 (see 2011 note below).

Amendment Notes: 2013. Chapter 59, § 1 (Part W) amended:

Sub 13 by adding the matter in italics.

2013. Chapter 174, § 17 amended:

Sub 18 by deleting at figs 1 and 3 "Indian", at fig 2 "of New York", at figs 4 and 8 "of Indians", at fig 5 "St.", at fig 6 "Tribe", at fig 7 "Senecas" and adding the matter in italics.

The 2016 amendment by ch 60, § 1 (Part UU), added 27.

NOTES TO DECISIONS

Analysis

1. In general
2. Distributor

1. In general

Petitioner was engaged in the delivery of aviation fuels to airlines under agreements with oil companies and was required to make good on losses by evaporation and, to the extent that it paid for fuel loss by evaporation, it was a purchaser within the meaning of this section. Allied New York Services, Inc. v Bragalini, 4 A.D.2d 802, 164 N.Y.S.2d 506, 1957 N.Y. App. Div. LEXIS 4725 (N.Y. App. Div. 3d Dep't 1957).

2. Distributor

A bus line is a distributor within the meaning of this section and entitled to deduct the equivalent of 1 per cent for services even though the gasoline it imports is primarily for its own consumption. Central Greyhound Lines, Inc. v Graves, 274 A.D. 679, 87 N.Y.S.2d 441, 1949 N.Y. App. Div. LEXIS 5868 (N.Y. App. Div. 1949).

Petitioner, gasoline and motor fuel retailer in New York and New Jersey, is liable for unpaid New York motor fuel tax on amount of fuel purchased from New Jersey supplier, despite contention that supplier paid New Jersey motor fuel tax on such fuel and passed cost of tax onto petitioner, since petitioner is clearly distributor as defined by statute and regulation, and thus petitioner is primarily liable for filing necessary return and timely paying tax to New York; there is no merit to contention that New Jersey supplier, being registered distributor with State, became petitioner's agent for collection of taxes, thus completely discharging petitioner's tax liability. Mira Oil Co. v Chu, 114 A.D.2d 619, 494 N.Y.S.2d 458, 1985 N.Y. App. Div. LEXIS 53310 (N.Y. App. Div. 3d Dep't 1985), app. denied, 68 N.Y.2d 601, 505 N.Y.S.2d 1026, 496 N.E.2d 239, 1986 N.Y. LEXIS 18991 (N.Y. 1986).

Agency Opinions

Analysis

1. Enhancement
2. Exemptions
3. Omnibus carrier

1. Enhancement

Petroleum blend resulting from combining marine diesel fuel with enhanced diesel motor fuel would not be deemed to be "enhanced diesel motor fuel," and thus blending process would not be "enhancement" under CLS Tax § 282, since marine diesel fuel is not middle distillate but is instead residual petroleum product formed by blending other fuel oils to produce lower volatility fuel commonly used in medium speed marine engines; also, resulting product is not identified for use in automotive market. NY Adv Op Comm T & F TSB-A-96(1)M.

Petroleum blend resulting from combining substandard No. 2 heating oil with enhanced diesel motor fuel would not be deemed to be "enhanced diesel motor fuel," and thus blending process would not be "enhancement" under CLS Tax § 282, as long as enhanced diesel motor fuel does not contain kerosene or any other substance or additive (such as cetane improver) which would improve substandard heating oil's performance in diesel automotive engine. NY Adv Op Comm T & F TSB-A-96(1)M.

2. Exemptions

The consular officers of Norway and its nationals employed in a consulate in this country, other than those engaged in private occupations for gain, are exempt from motor fuel tax. 1938 N.Y. Op. Att'y Gen. No. 336.

3. Omnibus carrier

Petitioner, which operates vehicles with seating capacity of 8 or more passengers in transportation of disabled persons, meets definition of omnibus carrier under CLS Tax § 282(9); however, petitioner is eligible for refund of taxes paid under CLS Tax §§ 289-c(3)(d), 301-c(c) and 1119(b) only with respect to transportation contracts that provide mass transit service and thus qualify as operating "in local transit service," not with respect to contracts providing services only to select group of persons. NY Adv Op Comm T & F TSB-A-97-(79)S.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 289-b, 300, 301-c, 501, 503-a, 1101, 1812-c.

Codes, Rules and Regulations:

Introduction and definitions. 20 NYCRR §§ 410.1, 410.2.

Federal Aspects:

Exemptions for diesel fuel and kerosene. 26 USCS § 4082.

Jurisprudences:

100 NY Jur 2d Taxation and Assessment §§ 1464, 1475, 1482.

71 Am Jur 2d, State and Local Taxation §§ 550–564.

§ 284. Tax imposed

1. There is hereby levied and imposed an excise tax of four cents per gallon upon motor fuel (a) imported into or caused to be imported into the state by a distributor for use, distribution, storage or sale in the state or upon motor fuel which is produced, refined, manufactured or compounded by a distributor in the state (which acts shall hereinafter in this subdivision be encompassed by the phrase "imported or manufactured") or (b) if the tax has not been imposed prior to its sale in this state, which is sold by a distributor (which act, in conjunction with the acts described in paragraph (a) of this subdivision, shall hereinafter in this article be encompassed by the phrase "imported, manufactured or sold"), except when imported, manufactured or sold under circumstances which preclude the collection of such tax by reason of the United States constitution and of laws of the United States enacted pursuant thereto or when imported or manufactured by an organization described in paragraph one or two of subdivision (a) of section eleven hundred sixteen of this chapter or a hospital included in the organizations described in paragraph four of such subdivision for its own use or consumption and except kero-jet fuel when imported or manufactured by an airline for use in its airplanes. Provided, further, no motor fuel shall be included in the measure of the tax unless it shall have previously come to rest within the meaning of federal decisional law interpreting the United States constitution. All tax for the period for which a return is required to be filed shall be due on the date limited for the filing of the return for such period, regardless of whether a return is filed by such distributor as required by this article or whether the return which is filed correctly shows the amount of tax due.

2. If, prior to April first, nineteen hundred forty-seven, a contract of sale of motor fuel shall have been made, and delivery thereof pursuant to such contract is made within the state thereafter, from a stock of motor fuel which, at the time of the taking of such fuel therefrom for such delivery, is subject to the taxing power of the state, the vendor shall be deemed a distributor, for the purposes of this article, and such motor fuel shall be deemed to be sold, and shall be subject to such tax, at the time of such delivery.

HISTORY:

Add, L 1929, ch 364, § 1; amd, L 1932, § 330, § 3, 1933, ch 465, § 1, L 1947, ch 89, § 3; L 1962, ch 499, § 1; L 1969, ch 911, § 1; L 1975, ch 534, §§ 1, 2; L 1978, ch 737, § 1; L 1979, ch 524, § 1; L 1985, ch 44, §§ 4, 5 (see 1985 note below); L 1986, ch 276, §§ 4, 5 eff July 14, 1986 (see 1986 note below).

Editor's Notes: Laws 1985, ch 44, § 42, eff June 1, 1985, provides in part as follows:

§ 42. This act shall take effect immediately, except that sections one through thirty-six shall take effect June first, nineteen hundred eighty-five . . . and shall apply to all taxable events respecting motor fuel as such events are defined in section eleven hundred two of the tax law, as amended by this act, and automotive fuel occurring on and after such date and an amount equivalent to the sales taxes paid by or passed through to a purchaser upon sales of motor fuel before such date at the regional average retail sales price pursuant to the provisions of articls twenty-eight and twenty-nine of the tax law in effect prior to such date shall be allowed such purchaser as a credit or refund, where a refund or credit would be allowable after such date under the tax law, as amended by this act, against the tax required to be prepaid pursuant to section eleven hundred two and passed through or required to be collected or paid pursuant to section eleven hundred five or eleven hundred ten of the tax law upon sales or uses of such motor fuel occurring on and after such date and provided further, however, that no refund or credit shall be allowed pursuant to this provision with respect to motor fuel placed into the ordinary fuel tank connected with the engine of such vehicle prior to such date notwithstanding use of such fuel thereafter.

Laws 1986, ch 276, § 37, eff July 14, 1986, provides as follows:

§ 37. This act shall take effect immediately except that sections one through twenty-four of this act shall apply on and after such effective date (and provided that the department of taxation and finance shall immediately undertake all necessary steps and application review to insure that on October 1, 1986 all terminal operators and transporters, required to be licensed by the provisions of this act, are so licensed by such date and further provided that the single regional average retail sales price for motor fuel provided for in section thirty of this act, which shall replace the separate regional average retail sales price for leaded, unleaded and premium motor fuel, shall be prescribed and first become effective on September 1, 1986 and the commissioner of energy shall determine such single average retail sales price for each region before August 16, 1986 and such price shall be compiled from data with respect to the six-month period ending the last day of June, 1986) and except that sections twenty-five through twenty-eight of this act shall take effect December 1, 1986. (Amd, L 1989, ch 245, § 1, L 1990, ch 190, § 243, L 1992, ch 55, § 52, L 1993, ch 57, § 140, eff April 15, 1993.).

Subsection History: Sub 1, amd, L 1975, ch 534, § 1, L 1985, ch 44, § 4, (see 1985 note below) L 1986, ch 276, § 4, eff July 14, 1986 (see 1986 note below).

Sub 3, add, L 1985, ch 44, § 5 (see 1985 note below); repealed, L 1986, ch 276, § 5, eff July 14, 1986 (see 1986 note under § 282).

Former sub 3, add, L 1962, ch 499, § 1; repealed, L 1985, ch 44, § 5, eff June 1, 1985 (see 1985 note below).

Sub 4, add, L 1969, ch 911; amd, L 1975, ch 534, § 2, L 1978, ch 737, § 1, L 1979, ch 524, § 1; repealed, L 1985, ch 44, § 5, eff June 1, 1985 (see 1985 note below).

Repeal Notes: [1985, ch 44] Subdivisions three and four of section two hundred eighty-four of the tax law, repealed by section five of this act, exempted sales to a registered distributor of another state for immediate exportation from this state and sales to a volunteer fire company or department, or a volunteer rescue squad from the New York tax. Since the motor fuel tax is collected on the first sale, sales of fuel exported under these circumstances have tax included in the price, but the purchaser will be able to obtain a refund upon furnishing proof of the out-of-state consumption. A refund for taxes paid by a volunteer fire company or department or a volunteer rescue squad is provided by this act.

[1986, ch 276] Subdivision three of section two hundred eighty-four of the tax law, repealed by section five of this act, allowed a person twenty-four hours to pay the taxes due on motor fuel in the event that he purchased motor fuel on which the taxes had not been paid or passed through. This provision had been relied on in a number of instances to frustrate the enforcement efforts of the department of taxation and finance in connection with the first import legislation. It is now prohibited to buy motor fuel upon which the taxes imposed under article twelve-A of the tax law have not been paid or passed through.

NOTES TO DECISIONS

Analysis

1. In general
2. Distributors
3. Exemptions, generally
4. Particular applications: use exempt
5. —Use not exempt

1. In general

Petitioners, as competitors of Indian reservation retailers, had standing to maintain Article 78 proceeding to compel Department of Taxation and Finance to "uniformly enforce New York State cigarette and motor fuel tax laws and regulations" as applied to sales made on Indian reservations located in New York, in that petition essentially raised equal protection claim based on differential enforcement of tax laws and, as members of disadvantaged class, petitioners had right to seek judicial resolution of their claim. N.Y. Ass'n of Convenience Stores v Urbach, 92 N.Y.2d 204, 677 N.Y.S.2d 280, 699 N.E.2d 904, 1998 N.Y. LEXIS 1825 (N.Y. 1998).

Equal protection claim, arising from failure of Department of Taxation and Finance to enforce cigarette and motor fuel tax laws and regulations against sales made on Indian reservations located in New York, was not subject to "strict scrutiny" analysis where department's specialized treatment of on-reservation sales was predicated not on race-based discrimination but on department's sensitivity to tribal sovereignty issues and complex restrictions imposed by federal Indian Trader Laws. N.Y. Ass'n of Convenience Stores v Urbach, 92 N.Y.2d 204, 677 N.Y.S.2d 280, 699 N.E.2d 904, 1998 N.Y. LEXIS 1825 (N.Y. 1998).

Defendants' failure to pay taxes on motor fuel imported from New Jersey to New York did not constitute larceny from New York State on theory that New York was owner of unpaid taxes because, while state may be deemed "owner" of collected but unremitted sales taxes, defendants' tax liability did not depend on their collection of taxes from consumers but resulted from their personal obligations under Tax Law, and they did not hold any funds in trust for state. People v Nappo, 94 N.Y.2d 564, 708 N.Y.S.2d 41, 729 N.E.2d 698, 2000 N.Y. LEXIS 523 (N.Y. 2000).

Refusal of State Tax Commission to apply 1% loss allowance, allowed for evaporation and spillage of gasoline from tanks used by registered distributors exclusively for bulk storage, to gasoline stored by bulk distributor in tank which was connected by a line to retail pumps at distributor's retail outlet was justified, in the absence of proof of actual loss from evaporation and spillage. Evans v Gallman, 48 A.D.2d 466, 370 N.Y.S.2d 223, 1975 N.Y. App. Div. LEXIS 9919 (N.Y. App. Div. 3d Dep't), app. denied, 37 N.Y.2d 712, 1975 N.Y. LEXIS 2958 (N.Y. 1975).

Although federal law forbids collection of sales and excise taxes on tobacco and motor fuel sold on Indian reservations to enrolled tribal members, such taxes are collectible when sales thereof are made to non-Indian customers. N.Y. Ass'n of Convenience Stores v Urbach, 275 A.D.2d 520, 712 N.Y.S.2d 220, 2000 N.Y. App. Div. LEXIS 8429 (N.Y. App. Div. 3d Dep't), app. dismissed, 95 N.Y.2d 931, 721 N.Y.S.2d 606, 744 N.E.2d 142, 2000 N.Y. LEXIS 3595 (N.Y. 2000), app. denied, 96 N.Y.2d 717, 730 N.Y.S.2d 790, 756 N.E.2d 78, 2001 N.Y. LEXIS 2039 (N.Y. 2001), cert. denied, 534 U.S. 1056, 122 S. Ct. 647, 151 L. Ed. 2d 564, 2001 U.S. LEXIS 10849 (U.S. 2001).

Department of Taxation and Finance had rational basis to forbear indefinitely from collecting sales and excise taxes on tobacco and motor fuel sold on New York Indian reservations to non-Indian customers where tax statutes could not be effectively enforced against uncooperative Indian retailers because of tribal immunity, and state's attempted interception of tobacco and fuel shipments resulted in civil unrest, personal injuries, and interference with public transportation. N.Y. Ass'n of Convenience Stores v Urbach, 275 A.D.2d 520, 712 N.Y.S.2d 220, 2000 N.Y. App. Div. LEXIS 8429 (N.Y. App. Div. 3d Dep't), app. dismissed, 95 N.Y.2d 931, 721 N.Y.S.2d 606, 744 N.E.2d 142, 2000 N.Y. LEXIS 3595 (N.Y. 2000), app. denied, 96 N.Y.2d 717, 730 N.Y.S.2d 790, 756 N.E.2d 78, 2001 N.Y. LEXIS 2039 (N.Y. 2001), cert. denied, 534 U.S. 1056, 122 S. Ct. 647, 151 L. Ed. 2d 564, 2001 U.S. LEXIS 10849 (U.S. 2001).

Court dismissed Article 78 proceeding in nature of mandamus to compel Department of Taxation and Finance to enforce tax laws pertaining to sale of tobacco products and motor fuel to non-Indians by Indian retailers on Indian reservations in New York state, as department had rational basis to repeal applicable regulations in conjunction with its efforts to obtain legislative solution after determining that there was no practical manner for enforcement, after making sincere efforts to negotiate settlement, and considering tribal sovereignty and unique nature of Indian nations. N.Y. Ass'n of Convenience Stores v Urbach, 181 Misc. 2d 589, 694 N.Y.S.2d 885, 1999 N.Y. Misc. LEXIS 316 (N.Y. Sup. Ct. 1999), aff'd, 275 A.D.2d 520, 712 N.Y.S.2d 220, 2000 N.Y. App. Div. LEXIS 8429 (N.Y. App. Div. 3d Dep't 2000).

In contrast to taxing scheme under CLS Tax Art 28, there are no comparable provisions under CLS Art 12-A to justify credit for bad debt as to prepaid motor fuel tax. NY Tax Appeals Tribunal TSB-D-98-(1)M.

2. Distributors

Wholesale distributor of motor oil was entitled to preliminary injunction restraining state from collecting motor fuel taxes and sales taxes on its sales to Indians on Indian reservation and from otherwise regulating such sales, since such regulation is preempted by federal Indian trader laws, and thus distributor had established clear likelihood of success on merits. Herzog Bros. Trucking, Inc. v State Tax Com., 69 N.Y.2d 536, 516 N.Y.S.2d 179, 508 N.E.2d 914, 1987 N.Y. LEXIS 16349 (N.Y. 1987), vacated, 487 U.S. 1212, 108 S. Ct. 2861, 101 L. Ed. 2d 898, 1988 U.S. LEXIS 2888 (U.S. 1988).

On reargument following remand from United States Supreme Court, Court of Appeals would express no opinion on whether sales tax collection statutes, as regards distribution of motor fuel to Seneca Indian retailers, generally met constitutional standards, despite remand "for further consideration in light of proposed regulations" published by state Commissioner of Taxation and Finance, where decision on regulations' validity would constitute advisory opinion involving hypothetical future transactions of unknown parties, given uncertainty as to whether distributor which instigated initial appeal would continue to sell to such retailers, and existence of attempts by state and retailers to negotiate different solution to tax problem; thus, Court of Appeals' prior decision would be adhered to. Herzog Bros. Trucking, Inc. v State Tax Com., 72 N.Y.2d 720, 536 N.Y.S.2d 416, 533 N.E.2d 255, 1988 N.Y. LEXIS 3535 (N.Y. 1988).

The State Tax Commission properly sustained a motor fuel tax assessment that was imposed against a licensed fuel oil distributor pursuant to Tax Law § 284, based on a discrepancy during a certain period of more than 300,000 gallons of gasoline between the distributor's purchases of fuel from refineries and what it reported as its sales, since distributors of motor fuel are required, pursuant to Tax Law § 286, to "keep a complete and accurate record of all purchases and sales or other dispositions[of motor fuel]," so that the Tax Commission's determination that the distributor had the burden of establishing its compliance with the statutory requirement by showing that its records were accurate was both rational and reasonable, since the distributor failed to present any direct proof of the claimed specific leakage, spillage, evaporation, volume contraction, or other actual loss during the period at issue, proof from a qualified expert that would establish that such losses regularly occur, or evidence that the figures contained in the distributor's records fell within the range of anticipated loss for the particular activity, and since there was also a rational basis for the distinction that had been drawn by the Tax Commission that resulted in its recognition of a loss allowance without actual proof of loss for gasoline stored in bulk, but not for gasoline involved in retail trade. Petroleum Sales & Service, Inc. v Bouchard, 98 A.D.2d 882, 470 N.Y.S.2d 865, 1983 N.Y. App. Div. LEXIS 21198 (N.Y. App. Div. 3d Dep't 1983), aff'd, 64 N.Y.2d 671, 485 N.Y.S.2d 252, 474 N.E.2d 612, 1984 N.Y. LEXIS 4928 (N.Y. 1984).

Petitioner, gasoline and motor fuel retailer in New York and New Jersey, is liable for unpaid New York motor fuel tax on amount of fuel purchased from New Jersey supplier, despite contention that supplier paid New Jersey motor fuel tax on such fuel and passed cost of tax onto petitioner, since petitioner is clearly distributor as defined by statute and regulation, and thus petitioner is primarily liable for filing necessary return and timely paying tax to New York; there is no merit to contention that New Jersey supplier, being registered distributor with State, became petitioner's agent for collection of taxes, thus completely discharging petitioner's tax liability. Mira Oil Co. v Chu, 114 A.D.2d 619, 494 N.Y.S.2d 458, 1985 N.Y. App. Div. LEXIS 53310 (N.Y. App. Div. 3d Dep't 1985), app. denied, 68 N.Y.2d 601, 505 N.Y.S.2d 1026, 496 N.E.2d 239, 1986 N.Y. LEXIS 18991 (N.Y. 1986).

Under Art. 12-A, the distributor, not the purchaser, is the taxpayer, even though the declared intention of § 289-c is to place the ultimate burden of the tax on those persons who use the motor fuel for the operation of motor vehicles on the highways. In re Conklin, 110 F.2d 178, 1940 U.S. App. LEXIS 4502 (2d Cir. N.Y. 1940).

3. Exemptions, generally

Exemptions from taxation are to be strictly construed against the taxpayer. Central Greyhound Lines, Inc. v Graves, 274 A.D. 679, 87 N.Y.S.2d 441, 1949 N.Y. App. Div. LEXIS 5868 (N.Y. App. Div. 1949).

Exemption from gasoline and motor fuel tax for special districts discussed. 1954 Op St Compt No. 54-236.

4. Particular applications: use exempt

Gasoline used by a bus line in idling motors of its buses on its own parking lots to keep the motors from freezing is not subject to tax under this section. Central Greyhound Lines, Inc. v Graves, 274 A.D. 679, 87 N.Y.S.2d 441, 1949 N.Y. App. Div. LEXIS 5868 (N.Y. App. Div. 1949).

Petitioner, registered motor fuel distributor, was entitled to substantial portion of exempt sales claimed on its MT-104s, even though dealer did not obtain prior approval of its exempt sales as directed by regulations in effect during audit period (20 NYCRR former § 411.5), since evidence petitioner submitted established certain exempt sales made by dealer and established also that it was motor fuel from petitioner being sold in those transactions; further, Division of Taxation had prior notice of noncompliance with regulations and did not disclose that information to petitioner's detriment rather than confront parties, command literal compliance, and assure proper documentation of exempt sales. NY Tax Appeals Tribunal TSB-D-98-(1)M.

5. —Use not exempt

Operation of air-conditioning units in buses is part of the operation of such vehicles within this section and gasoline used for such a purpose is subject to tax. Central Greyhound Lines, Inc. v Graves, 274 A.D. 679, 87 N.Y.S.2d 441, 1949 N.Y. App. Div. LEXIS 5868 (N.Y. App. Div. 1949).

Charitable organizations are subject to the motor fuel tax. 1958 NY Ops Atty Gen Aug 19 (Informal), 1958 N.Y. AG LEXIS 205.

Agency Opinions

Analysis

1. Distributors
2. Exemptions, generally
3. Particular applications: use exempt
4. —Use not exempt

1. Distributors

City which sells to private consumers motor fuel which it has purchased free of tax is, in fact, a distributor, and should be treated as such in collection of tax. 1930 N.Y. Op. Att'y Gen. No. 273.

Petitioner, so long as authorized by Ministry of Revenue of Province of Ontario to be collector under Gasoline Tax Act § 6, would be recognized by New York as distributor licensed in Province of Ontario and would be authorized to purchase gasoline tax free for immediate export to identified facility in Ontario for purposes of selling such gasoline. NY Adv Op Comm T & F TSB-A-87-(2)M.

2. Exemptions, generally

Every claimed exemption from the motor fuel tax should be closely scrutinized, with every presumption against exemption indulged and immunity should be allowed only where the use is for a public purpose by an agency which is solely and exclusively public in its character and where payment of the tax must inevitably involve the use of public funds. 1939 N.Y. Op. Att'y Gen. No. 214.

3. Particular applications: use exempt

4. —Use not exempt

While river regulating districts organized under provisions of Conservation Law, Art. 7, are public corporations and agencies of state, their funds are not derived from taxation, and hence they are not exempt from payment of motor fuel tax imposed by Art. 12-A. 1930 N.Y. Op. Att'y Gen. No. 298.

The tax imposed by Art. 12-A applies to sales made on an Indian reservation to either a white man or a tribal Indian residing on a reservation. 1939 N.Y. Op. Att'y Gen. No. 189, 1939 N.Y. AG LEXIS 160.

Contractors with the United States operating on a "cost-plus" basis are required to pay a motor fuel tax on their purchases of taxable gasoline. 1940 NY Ops Atty Gen Nov. 18.

It was not intention of legislature to include state and municipalities within this article and they are not taxable hereunder upon motor fuel used for public purposes. 1929 N.Y. Op. Att'y Gen. No. 197.

Federal land banks are exempt from tax on sale of motor fuel. 1932 N.Y. Op. Att'y Gen. No. 169.

National farm loan associations and joint stock land banks are federal instrumentalities and exempt from tax on motor fuel. 1933 N.Y. Op. Att'y Gen. No. 256.

School districts are exempt from taxation upon motor fuel purchased by them for public use. 1933 N.Y. Op. Att'y Gen. No. 260.

Sales of motor fuel to non-resident purchaser, pursuant to bona fide contract providing for delivery in foreign state, are not taxable. 1933 N.Y. Op. Att'y Gen. No. 267.

Town board operating improvement districts under Town Law, § 198, is exempt from fuel tax. 1934 N.Y. Op. Att'y Gen. No. 209.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 284-a, 284-c, 284-d, 289-e; CLS High § 10-c.

Voluntary ambulance service, definition of, CLS Pub Health § 3001.
Fire company, definition of, CLS Vol Fire Ben § 3.

Codes, Rules and Regulations:
Imposition of tax. 20 NYCRR §§ 412.1 et seq.

Federal Aspects:
Imposition of tax, 26 USCS § 4081.

Jurisprudences:
71 Am Jur 2d, State and Local Taxation §§ 550 et seq.

§ 289-c. Refunds

1. The tax imposed by this article though payable by the distributor, shall be borne by the purchaser and when paid by the distributor shall be deemed to have been so paid for the account of the purchaser. No person shall sell, advertise, or offer for sale motor fuel, separate from the tax herein imposed; and the price paid by the purchaser for motor fuel on which the tax has been paid, if such price be not less than the amount of the tax thereon, shall be presumed for the purposes of this section to have included the tax.

1-a. (a) Any person selling motor fuel to an organization described in paragraph one or two of subdivision (a) of section eleven hundred sixteen of this chapter or a hospital included in the organizations described in paragraph four of such subdivision for its own use or consumption or selling kero-jet fuel to an airline for use in its airplanes may exclude the amount of the tax or taxes imposed by this article from the selling price thereof.

(b) (i) Any person registered as a distributor of motor fuel selling aviation gasoline to a fixed base operator registered under this article as a "retail seller of aviation gasoline" may exclude the amount of the tax or taxes imposed by this article from the selling price thereof where such aviation gasoline is delivered to the fixed base operator's premises and placed in a storage facility used exclusively for the purpose of fueling airplanes. The commissioner may register as a "retail seller of aviation gasoline" a fixed base operator who makes no sales of aviation gasoline other than retail sales not in bulk delivered directly into the fuel tank of an airplane and who makes no sales of motor fuel other than the foregoing described retail sales of aviation gasoline delivered directly into the fuel tank of airplanes (provided, in no event, shall kero-jet fuel be construed to constitute motor fuel). Such registration shall apply only to the wholesale purchase of only aviation gasoline by such "retail seller of aviation gasoline" and the retail sale by such person of aviation gasoline not in bulk for delivery directly into the fuel tank of an airplane for use in the operation thereof. In no event shall the registration as a "retail seller of aviation gasoline" be deemed to be an authorization to import, or cause to be imported, motor fuel including aviation gasoline, into this state. All the provisions of section two hundred eighty-three-a (except subdivision one) of this article shall be applicable to the registration of "retail sellers of aviation gasoline" with the same force and effect as if the language of such section had been incorporated in full herein and had expressly referred to the registration of "retail sellers of aviation gasoline", with such modification as may be necessary in order to adapt the language so as to apply to the registration of applicants for and persons registered as "retail sellers of aviation gasoline". Provided, however, that if the commissioner is satisfied that certain requirements of such foregoing provisions with respect to registration are not necessary in order to protect tax revenues, the commissioner may waive, limit or modify such requirements with respect to the registration of "retail sellers of aviation gasoline". The department, where applicable, shall coordinate the registration process with respect to a fixed base operator applying for registration as a "retail seller of aviation gasoline" and as a distributor of kero-jet fuel only with the purpose of eliminating any duplicative information or procedures required of the applicant. Every person registered as a "retail seller of aviation gasoline" shall keep complete and accurate records of purchases and sales of aviation gasoline (including individual invoices identifying each purchase or sale of aviation gasoline) to and from such "retail seller of aviation gasoline". The commissioner shall, if it is determined to be appropriate, establish a requirement that a certificate be given by a "retail seller of aviation gasoline" prior to the sale of aviation gasoline pursuant to this paragraph.

(ii) Any person registered as a distributor of motor fuel and also registered as a "retail seller of aviation gasoline" may exclude the amount of the tax or taxes imposed by this article from the selling price thereof on such retail sale of aviation gasoline.

(c) (i) Any person making a sale of motor fuel under the circumstances described in paragraph (a), or subparagraph (i) of paragraph (b) of this subdivision or making a sale of Diesel motor fuel under the circumstances described in subdivision four of section two hundred eighty-two-a of this article whereby the tax or taxes imposed by this article have not been passed through to the purchaser, shall be allowed a refund or credit of the tax or taxes imposed by this article in the amount of such tax or taxes paid by such person on such motor fuel or Diesel motor fuel being sold or included in the price paid by such person for such fuel. Claims for refunds or credits shall be presented, and refunds or credits shall be made, only as authorized by the commissioner under such rules and regulations as he may prescribe.

(ii) Any airline registered as a distributor of motor fuel who imports aviation gasoline into this state for use in its airplanes and a distributor described in subparagraph (ii) of paragraph (b) of this subdivision shall be allowed a refund or credit of the tax or taxes imposed by this article in the amount of such tax or taxes paid by such person on such aviation gasoline so imported and used exclusively in the operation of its airplanes. The refund or credit shall accrue at the time the aviation gasoline is delivered

and stored as prescribed in subparagraph (i) of paragraph (b) of this subdivision. Claims for refunds or credits shall be presented and refunds or credits shall be made only as authorized by the commissioner, including documentary proof required to substantiate refund claims.

(d) [Repealed Sept 1, 2021] (i) Any person may exclude the amount of the tax or taxes imposed by this article on E85 from the selling price thereof where E85 is delivered to a filling station and placed in a storage tank of such filling station for such E85 to be dispensed directly into a motor vehicle for use in the operation of such vehicle. Any person making a sale of E85 under the circumstances described herein, whereby the tax or taxes otherwise imposed by this article have not been passed through to the purchaser, shall be allowed a refund or credit of the taxes imposed by this article in the amount of such tax or taxes paid by such person on such E85 being sold or included in the price paid by such person for such fuel. Claims for refunds or credits shall be presented, and refunds or credits shall be made, only as authorized by the commissioner under such rules and regulations as the commissioner may prescribe.

(ii) Any person may exclude twenty percent of the amount of the tax or taxes imposed by this article from the selling price with respect to any sale of B20. Any person making a sale of B20 upon which such person does not pass on more than eighty percent of the taxes otherwise imposed by this article, where such person has purchased such B20 with the entire amount of the taxes imposed by this article included in such person's purchase price, shall be entitled to a refund or credit equal to the amount of the tax or taxes paid under this article on such B20 in excess of eighty percent of the tax or taxes imposed by this article on diesel motor fuel. Claims for refunds or credits shall be presented, and refunds or credits shall be made, only as authorized by the commissioner under such rules and regulations as the commissioner may prescribe.

(iii) Any person may exclude the amount of the tax or taxes imposed by this article on CNG or hydrogen from the selling price thereof. Any person making a sale of CNG or hydrogen, whereby the tax or taxes otherwise imposed by this article have not been passed through to the purchaser, shall be allowed a refund or credit of any taxes imposed by this article in the amount of such tax or taxes paid by such person on such CNG or hydrogen being sold or included in the price paid by such person for such CNG or hydrogen. Claims for refunds or credits shall be presented, and refunds or credits shall be made, only as authorized by the commissioner under such rules and regulations as the commissioner may prescribe.

2. However, the intention of this article is to place the ultimate burden resulting from such tax, so far as possible, on persons who use the public highways of the state for operating motor vehicles thereon, or who use the waterways of the state including any other waterways bordering on the state for operating pleasure or recreational motor boats thereon, and the following refunds are provided to that end, subject to the provisions of subdivision five of this section.

3. (a) Except as otherwise provided in paragraph (b) of this section, any person who shall buy any motor fuel or diesel motor fuel, on which the tax imposed by this article shall have been paid, and shall consume the same in any manner except in the operation of a motor vehicle upon or over the public highways of this state, or in the operation of a pleasure or recreational motor boat upon or over the waterways of the state including waterways bordering on the state, shall be reimbursed the amount of such tax in the manner and subject to the conditions herein provided except that there shall be no reimbursement of tax paid on motor fuel or diesel motor fuel taken out of this state in a fuel tank connected with the engine of a motor vehicle and consumed outside of this state.

(b) Any omnibus carrier which shall buy any motor fuel on which the aggregate tax imposed by section two hundred eighty-four and section two hundred eighty-four-a of this chapter, or any diesel motor fuel on which the aggregate tax imposed by section two hundred eighty-two-a and section two hundred eighty-two-b of this chapter, shall have been paid, shall be reimbursed, in the case of such motor fuel, the amount paid pursuant to such sections two hundred eighty-four and two hundred eighty-four-a in excess of four cents per gallon, and in the case of diesel motor fuel, the amount paid pursuant to such sections two hundred eighty-two-a and two hundred eighty-two-b in excess of six cents per gallon, provided such motor fuel or diesel motor fuel has been consumed by such carrier in the operation of an omnibus in this state. Any taxicab licensee, as defined by subdivision ten of section two hundred eighty-two of this chapter, who or which shall buy any motor fuel on which the aggregate tax imposed by section two hundred eighty-four and section two hundred eighty-four-a of this chapter or any diesel motor fuel on which the aggregate tax imposed by section two hundred eighty-two-a and section two hundred eighty-two-b of this chapter, shall have been paid, shall be reimbursed, in the case of such motor fuel, the amount paid pursuant to such sections two hundred eighty-four and two hundred eighty-four-a in excess of four cents per gallon, and in the case of diesel motor fuel, the amount paid pursuant to such sections two hundred eighty-two-a and two hundred eighty-two-b in excess of six cents per gallon, provided such motor fuel or diesel fuel has been consumed by such licensee in the operation of a taxicab in this state.

(c) All claims for reimbursement shall be in such form and contain such information as the commissioner shall prescribe and shall be filed within three years from (i) the date of the purchase, in the case of

the purchaser; or (ii) the date of the sale, in the case of the seller, of the motor fuel so subject to reimbursement. Every such claim shall include a certificate by or on behalf of the party presenting the same to the effect that it is just, true and correct, that no part thereof has been paid, except as stated therein, and that the balance therein stated is actually due and owing. The claimant shall satisfy the department that the claimant has borne the tax and that the motor fuel has been consumed by the claimant in a manner other than the operation of a motor vehicle upon or over the public highways of this state, the operation of a pleasure or recreational motorboat upon or over the waterways of the state including waterways bordering on the state or, in the case of an omnibus carrier, taxicab licensee, nonpublic school operator or volunteer ambulance service, that the claimant has borne the tax and that the amount claimed is the amount of such tax reimbursable under paragraph (b), (d), (e) or (f) of this subdivision. The department may require such further information or proof as it shall deem necessary for the administration of such claim. Claims for reimbursement approved by the department shall be paid from revenues collected under this article and deposited to the credit of the comptroller as hereinafter provided; but no such claims shall be paid unless the department is satisfied that the amount of the tax for which the reimbursement is claimed has actually been collected by the state. The amount of any erroneous or excessive payment to a claimant for reimbursement may be determined by the department and may be recovered from such claimant in the same manner as a tax imposed by this article, provided, however, that any such determination shall be made within three years after the date of such erroneous or excessive payment.

(d) Any omnibus carrier which shall buy motor fuel on which the aggregate tax imposed by section two hundred eighty-four, section two hundred eighty-four-a and section two hundred eighty-four-c of this chapter or any diesel motor fuel on which the aggregate tax imposed by section two hundred eighty-two-a, section two hundred eighty-two-b and section two hundred eighty-two-c of this chapter shall have been paid, shall be reimbursed the amount paid provided such motor fuel or diesel motor fuel has been consumed by such carrier in the operation of an omnibus in local transit service in this state pursuant to a certificate of convenience and necessity issued by the commissioner of transportation of this state or by the interstate commerce commission of the United States or pursuant to a contract, franchise or consent between such carrier and a city having a population of more than one million inhabitants, or any agency of such city.

(e) Any nonpublic school operator which shall buy motor fuel on which the aggregate tax imposed by section two hundred eighty-four, section two hundred eighty-four-a and section two hundred eighty-four-c of this chapter or any diesel motor fuel on which the aggregate tax imposed by section two hundred eighty-two-a, section two hundred eighty-two-b and section two hundred eighty-two-c of this chapter shall have been paid, shall be reimbursed the amount paid provided such motor fuel or diesel motor fuel has been consumed by such nonpublic school operator exclusively in educational related activities.

(f) Any voluntary ambulance service, as defined in section thirty hundred one of the public health law, which shall buy motor fuel on which the tax or taxes imposed by this article shall have been paid shall be reimbursed the amount of such tax in the manner and subject to the conditions herein set forth, provided such motor fuel has been consumed by such volunteer ambulance service vehicle in the course of operating within the state.

(g) An organization described in paragraph one or two of subdivision (a) of section eleven hundred sixteen of this chapter or a hospital included in the organizations described in paragraph four of such subdivision, or a fire company or fire department, as defined in section three of the volunteer firefighters' benefit law, or a volunteer rescue squad supported in whole or in part by tax money where any such entity is the purchaser, user or consumer of motor fuel or diesel motor fuel in a vehicle owned and operated by it and used exclusively for its purposes, or an airline where it has purchased kero-jet fuel for use in its airplanes shall be reimbursed the amount of the taxes on motor fuel and diesel motor fuel imposed by or pursuant to the authority of this article included in the price paid for such motor fuel or diesel motor fuel.

(h) Notwithstanding any provision of the law to the contrary, tax paid pursuant to this article in respect to motor fuel or diesel motor fuel purchased by a government entity and paid for by such government entity with a credit card shall be reimbursed or credited to the issuer of the credit card used for such purchase or the fuel distributor designated in accordance with and subject to the provisions of sections eleven hundred thirty-eight, eleven hundred thirty-nine, eleven hundred forty-two, and eleven hundred forty-five of this chapter concerning such credit card issuers, fuel distributors and government entities. Such provisions shall apply with respect to the administration of and procedure with respect to the taxes imposed under this article in the same manner and with the same force and effect as if the language of such provisions had been incorporated in full into this article and had expressly referred to the tax under this article, with such modifications as may be necessary in order to adapt the language of such provisions to the taxes imposed by this article, except to the extent that any such provision is not relevant to this article.

4. [Repealed]

5. If the provisions of this section providing for reimbursement of the amount of the tax paid be held unconstitutional by a court of competent jurisdic-

tion, the other constitutional provisions of this article nevertheless shall stand, it being the express intention of the legislature that even though such provision for reimbursement be held unconstitutional the tax provided for by this article shall be imposed, collected and distributed as provided in this article, regardless in that event of the manner in which the motor fuel is consumed.

6. Moneys paid in error under this article may be refunded. Where motor fuel, upon which the tax imposed by this article has been paid, is sold, under such circumstances that, if the tax had not been paid, the sale would not have been taxable under this article, the tax may be refunded. Refunds shall be made only as authorized by the commissioner under such rules and regulations as the commissioner may prescribe provided an application therefor is filed with the commissioner within three years from the time the erroneous payment was made, or tax paid motor fuel was so sold. Refunds authorized by the commissioner shall be paid from revenues collected under this article and deposited to the credit of the comptroller as hereinafter provided.

7. If an agreement under the provisions of section two hundred eighty-eight (extending the period for determination of tax imposed by this article) is made within the three-year period for the filing of an application for refund under subdivision six of this section or, in the case of a claim for reimbursement under subdivision three of this section, if such agreement is made within three years from the date of purchase or sale (as the case may be) of the motor fuel, the period for filing an application for refund or a claim for reimbursement shall not expire prior to six months after the expiration of the period within which determination may be made pursuant to the agreement or any extension thereof.

8. With respect to motor fuel imported, manufactured or sold or purchased in this state, and with respect to the sale or use of Diesel motor fuel, a refund or credit shall be allowed a distributor or a purchaser of the tax required to be paid pursuant to this article upon such motor fuel or Diesel motor fuel in the amount of such tax paid by or included in the price paid by a distributor or such purchaser to the seller thereof if such fuel was exported from this state for sale or use outside this state, such distributor or such purchaser, as the case may be, exporting such fuel is duly registered with or licensed by the taxing authorities of the state to which such fuel is exported as a distributor or a dealer in the fuel being so exported, and in connection with such exportation such fuel was immediately shipped to an identified facility in the state to which such fuel is exported, and the applicant complies with all requirements and rules and regulations of the commissioner, including evidentiary requirements, relating thereto; and provided further that upon receipt of a claim for refund in processible form, interest shall be allowed and paid at the overpayment rate set by the commissioner pursuant to subdivision twenty-sixth of section one hundred seventy-one of this chapter from the due date of the return to the date immediately preceding the date of the refund check except no such interest shall be allowed or paid if the refund check is mailed within thirty days of such receipt and except no interest shall be allowed or paid if the amount thereof would be less than one dollar. For the purpose of this article, "export" from this state shall in no event be construed to include motor fuel or diesel motor fuel taken out of this state in the fuel tank connected with the engine of a motor vehicle or any conveyance and consumed in the operation thereof outside of this state.

9. With respect to any organization described in paragraph four of subdivision (a) of section eleven hundred sixteen of this chapter which is eligible pursuant to this section for reimbursement of the tax required to be paid pursuant to this article, upon receipt of a claim for reimbursement in processible form, interest shall be allowed and paid at the overpayment rate set by the commissioner of taxation and finance pursuant to subdivision twenty-sixth of section one hundred seventy-one of this chapter from the date of the application for reimbursement to the date immediately preceding the date of the reimbursement check except no such interest shall be allowed or paid if the reimbursement check is mailed within forty-five days of such receipt and except no interest shall be allowed or paid if the amount thereof would be less than one dollar. Provided, however, the department shall process applications for reimbursement as expeditiously as possible.

HISTORY:

Add, L 1929, ch 364, § 1; amd, L 1934, ch 411, § 2; L 1936, ch 381, § 1; L 1938, ch 159, § 1; L 1944, ch 90, § 1; L 1951, ch 271, § 1; L 1959, ch 641, § 2; L 1959, ch 711, § 2; L 1960, ch 358, §§ 1–3; L 1961, ch 169, § 2; L 1963, ch 679, § 2; L 1965, ch 558, §§ 13–15; L 1967, ch 817; L 1968, ch 542; L 1971, ch 411, §§ 2, 4; L 1974, ch 756, §§ 2, 3; L 1974, ch 836, §§ 6, 7; L 1975, ch 455, § 4, 1975; L 1978, ch 737, §§ 2, 3; L 1985, ch 44, §§ 14, 14-a; L 1986, ch 276, §§ 11–13, eff July 14, 1986; L 1988, ch 261, §§ 81, 82, eff Sept 1, 1988; L 1989, ch 61, §§ 107, 108, eff Sept 1, 1989; L 1995, ch 2, §§ 2, 77; L 1997, ch 389, § 152 (Part A); L 2006, ch 109, § 2 (Part W-1); L 2006, ch 302, §§ 5–7, eff July 26, 2006; L 2008, ch 102, § 1, eff Sept 1, 2008; L 2011, ch 61, §§ 13, 14 (Part K), eff Sept 1, 2011.

Editor's Notes: Laws 1985, ch 44, § 42 in part, eff June 1, 1985, provides as follows:

§ 42. This act shall take effect immediately, except that sections one through thirty-six shall take effect June first, nineteen hundred eighty-five . . . and shall apply to all taxable events respecting motor fuel as such events are defined in section eleven hundred two of the tax law, as amended by this act, and automotive fuel occurring on and after such date and an amount equivalent to the sales taxes paid by or passed through to a purchaser upon sales of motor fuel before such date at the regional average retail sales price pursuant to the provisions of articles twenty-eight and twenty-nine of the tax law in effect prior to such date shall be allowed such purchaser as a credit or refund, where a refund or credit would be allowable after such date under the tax law, as amended by this act, against the tax required to be prepaid pursuant to section eleven hundred two and passed through or required to be collected or paid pursuant to section eleven hundred five or eleven hundred ten of the tax

law upon sales or uses of such motor fuel occurring on and after such date and provided further, however, that no refund or credit shall be allowed pursuant to this provision with respect to motor fuel placed into the ordinary fuel tank connected with the engine of such vehicle prior to such date notwithstanding use of such fuel thereafter.

Laws 1986, ch 276, § 37, eff July 14, 1986, provides as follows:

§ 37. This act shall take effect immediately except that sections one through twenty-four of this act shall apply on and after such effective date (and provided that the department of taxation and finance shall immediately undertake all necessary steps and application review to insure that on October 1, 1986 all terminal operators and transporters, required to be licensed by the provisions of this act, are so licensed by such date and further provided that the single regional average retail sales price for motor fuel provided for in section thirty of this act, which shall replace the separate regional average retail sales price for leaded, unleaded and premium motor fuel, shall be prescribed and first become effective on September 1, 1986 and the commissioner of energy shall determine such single average retail sales price for each region before August 16, 1986 and such price shall be compiled from data with respect to the six-month period ending the last day of June, 1986) and except that sections twenty-five through twenty-eight of this act shall take effect December 1, 1986. (Amd, L 1989, ch 245, § 1, L 1990, ch 190, § 243, L 1992, ch 55, § 52, L 1993, ch 57, § 140, eff April 15, 1993.).

Laws 1989, ch 61, § 365(e)(1)a and d, eff April 19, 1989, provides as follows:

(e)(1) a. sections ninety-one through one hundred forty-four and section one hundred sixty-five of this act shall take effect September 1, 1989 and shall apply to the interest chargeable or due on taxes or on any other amounts, or any portion thereof, for which interest rates are set under sections ninety-one through one hundred forty-four of this act which remain or become due or overpaid on or after such date; provided, however, that:

d. any rules or regulations necessary to implement the provisions of sections ninety-one through one hundred forty-four and section one hundred sixty-five of this act may be promulgated and any procedures, forms or instructions necessary for such implementation may be issued on or after the date this act shall have become a law.

Laws 1997, ch 389, §§ 151 and 219 (Part A), sub (23), eff Aug 7, 1997, provides as follows:

§ 151. Statement of findings. Sections one hundred fifty-one through one hundred fifty-eight of this act are intended to clarify the operation of the article 13-A tax from its inception and shall be so construed. In no event shall sections one hundred fifty-one through one hundred fifty-eight of this act affect in any manner the computation of receipts for purposes of the sales and use taxes imposed by article 28 of the tax law and pursuant to the authority of article 29 of the tax law, and receipts subject to sales and use taxes shall be determined without regard to the provisions of sections one hundred fifty-one through one hundred fifty-eight of this act. Further, in no event shall this clarification with respect to the pass through of tax create any refund (credit or reimbursement) or determination of rights which are otherwise time barred as of the date sections one hundred fifty-one through one hundred fifty-eight of this act shall have become a law or enlarge or otherwise affect the time for the filing of a refund (credit or reimbursement) claim or the making of a determination. The allowance of a revised export credit/refund (or reimbursement) for products used outside the state under articles 12-A and 13-A taxes is made available; and with respect to vessels, the allowance of an excess purchases credit/refund under the article 13-A tax is made available. Relief with respect to any impermissibility of the consumption tax aspects under article 13-A of the tax law shall be given by means of the granting of such export credit/refund (or reimbursement) or such excess purchases credit/refund, as the case may be, as the sole and exclusive form of relief. However, if a court of competent jurisdiction does finally determine that making such export credit/refund or such excess purchases credit/refund the exclusive remedy to afford relief under the consumption aspects of the article 13-A tax is not constitutionally permissible, then allowance of a credit for petroleum business taxes paid to other states (or in the case of a foreign country, to such country) to the extent of the article 13-A tax owing with respect to the same petroleum product shall be made available. In such event, such credit for such other states' petroleum business taxes shall be allowed as the exclusive remedy with respect to such consumption aspects of the article 13-A tax.

Laws 1997, ch 389, § 219 (Part A), sub (22), eff Aug 7, 1997, provides as follows:

§ 219. This act shall take effect immediately, provided, that:

(23) sections one hundred fifty-two, one hundred fifty-five and one hundred fifty-six of this act shall take effect and shall apply on and after September 1, 1990, and the references in subdivision (b) of section 315 of the tax law, as added by section one hundred fifty-six of this act, to subdivisions 1 of sections 285-a and 289-c of the tax law shall be deemed to apply to article 13-A of the tax law on and after July 1, 1983;.

Laws 2006, ch 109, § 19 (Part W-1), eff June 23, 2006, provides as follows:

§ 19. This act shall take effect immediately; provided, however, that sections one through thirteen of this act shall take effect September 1, 2006 and shall be deemed repealed on September 1, 2021 and such repeal shall apply in accordance with the applicable transitional provisions of sections 1106 and 1217 of the tax law, and shall apply to sales made, fuel compounded or manufactured, and uses occurring on or after such date, and with respect to sections seven through eleven of this act, in accordance with applicable transitional provisions of sections 1106 and 1217 of the tax law; provided, however, that the commissioner of taxation and finance shall be authorized on and after the date this act shall have become a law to adopt and amend any rules or regulations and to take any steps necessary to implement the provisions of this act; provided further that sections fourteen through sixteen of this act shall take effect immediately and shall apply to taxable years beginning on or after January 1, 2006. (Amd, L 2011, ch 61, § 2 (Part L), eff March 31, 2011; L 2012, ch 59, § 1 (Part D) eff March 31, 2012; L 2014, ch 59, § 1 (Part V), eff March 31, 2014; L 2016, ch 60 § 1 (Part U), eff April 13, 2016.).

Laws 2006, ch 302, § 12, eff July 26, 2006, provides as follows:

§ 12. This act shall take effect immediately; provided, however, that (a) sections one through three and eight through eleven of this act shall take effect on the first day of the first month next occurring 120 days after this act shall have become a law and shall apply to sales made on or after such date; provided that the commissioner of taxation and finance shall be authorized on and after the date this act shall have become a law to adopt and amend any rules or regulations and issue any procedures, forms or instructions necessary to implement the provisions of such sections of this act on their effective date.

(b) claims for refunds, credits, or reimbursements which expire on or before the date this act shall have become a law and which are revived under sections four through seven of this act, and claims for refunds, credits, or reimbursements which expire after the date this act shall have become a law, but before the ninetieth day after this act shall have become a law, and which are covered under the laws amended by such sections of this act may be filed by the later of the ninetieth day after this act shall have become a law or the date that the time to file a claim expires under the law as amended by such sections of this act.

Laws 2008, ch 102, § 7, eff Sept 1, 2008, provides as follows:

§ 7. This act shall take effect on the first day of the sales tax quarterly period, as described in subdivision (b) of section 1136 of the tax law, that begins at least ninety days after the

date on which it shall have become a law and shall apply to sales made and uses occurring on or after that date in accordance with the applicable transitional provisions of sections 1106 and 1217 of the tax law.

Laws 2011, ch 61, § 58 intro par (Part K), eff Sept 1, 2011, provides as follows:

§ 58. This act shall take effect September 1, 2011 and shall apply to sales or uses occurring on or after such date in accordance with the applicable transitional provisions in sections 1106 and 1217 of the tax law; provided, however, that:

Subsection History: Sub 1-a, add, L 1986, ch 276, § 11, eff July 14, 1986 (see 1986 note below).

Sub 1-a, par (b), add, L 1995, ch 2, § 77, eff Sept 1, 1995.

Former sub 1-a, par (b), redesignated sub 1-a, par (c), L 1995, ch 2, § 77, eff Sept 1, 1995.

Sub 1-a, par (c), formerly sub 1-a, par (b), amd, L 1988, ch 261, § 81; so designated sub 1, par (c), L 1995, ch 2, § 77, eff Sept 1, 1995.

Sub 1-a, par (c), subpar (i), formerly sub 1-a, entire par (c), so designated and amd, L 1995, ch 2, § 77, eff Sept 1, 1995.

Sub 1-a, par (c), subpar (ii), add, L 1995, ch 2, § 77, eff Sept 1, 1995.

Sub 1-a, par (d), add, L 2006, ch 109, § 2 (Part W-1), eff Sept 1, 2006, repealed Sept 1, 2016 (see 2006 note below).

Sub 2, amd, L 1965, ch 558, § 13, eff Jan 1, 1966.

Sub 3, amd, L 1938, ch 159, § 1, L 1944, ch 90, § 1, L 1959, ch 641, § 2, L 1959, ch 711, § 2, eff March 1, 1959.

Sub 3, par (a), amd, L 1960, ch 358, § 1, L 1965, ch 558, § 14; L 2011, ch 61, § 13 (Part K), eff Sept 1, 2011 (see 2011 note below).

Sub 3, par (b), add, L 1959, ch 641, § 2; amd, L 1960, ch 358, § 2, L 1961, ch 169, § 2, L 1971, ch 411, § 2, eff July 1, 1971.

Sub 3, par (c), amd, L 1963, ch 679, § 1, L 1965, ch 558, § 15, L 1974, ch 756, § 2, L 1978, ch 737, § 2, L 2006, ch 302, § 5, eff July 26, 2006 (see 2006 note below), L 2011, ch 61, § 13, eff Sept 1, 2011 (see 2011 note below).

Sub 3, par (d), add, L 1967, ch 817; amd, L 1968, ch 542, L 1971, ch 411 § 4 (see 1971 note under § 284-b), L 1974, ch 836, § 7, eff June 7, 1974, applicable with respect to sales or uses on or after March 1, 1974.

Sub 3, par (e), add, L 1974, ch 756, § 3, eff June 7, 1974.

Sub 3, par (f), add, L 1978, ch 737, § 3, eff Oct 6, 1978.

Sub 3, par (g), add, L 1985, ch 44, § 14, (see 1985 note below); amd, L 1986, ch 276, § 12, eff July 14, 1986 (see 1986 note below).

Sub 3, par (h), add, L 2008, ch 102, § 1, eff Sept 1, 2008 (see 2008 note below).

Sub 6, amd, L 1951, ch 271, § 1, L 2006, ch 302, § 6, eff July 26, 2006 (see 2006 note below).

Sub 7, add, L 1975, ch 455, § 4, eff July 24, 1975.

Sub 7, amd, L 2006, ch 302, § 7, eff July 26, 2006 (see 2006 note below).

Sub 8, add, L 1985, ch 44, § 14-a (see 1985 note below); amd, L 1986, ch 276, § 13 (see 1986 note under § 282), L 1988, ch 261, § 82, L 1989, ch 61, § 107 (see 1989 note below), L 1995, ch 2, § 2, L 1997, ch 389, § 152 (Part A), eff and applicable on and after Sept 1, 1990 (see 1997 note below).

Sub 9, add, L 1986, ch 276, § 13 (see 1986 note under § 282); amd, L 1989, ch 61, § 108, eff Sept 1, 1989 (see 1989 note below).

Sub 14, repealed, L 2011, ch 61, § 14 (Part K), eff Sept 1, 2011 (see 2011 note below).

Notes to Decisions

Analysis

1. In general
2. Exemptions
3. —Off highway use
4. Exemption denied

1. In general

A failure of a motor fuel distributor, who, under section 287 of article 12-A of the Tax Law, is required to report the number of gallons sold and pay a motor fuel tax on such gallonage monthly, to claim a credit pursuant to a provision in the section that "where a distributor has purchased motor fuel prior to the expiration of the period covered by the return, upon which the taxes imposed by this article have been or are required to be paid by another distributor, a credit shall be allowed for the amount of such taxes", results in a payment of money in error within the meaning of, and, hence, is subject to, the two-year period of limitation contained in section 289-c (subd 6) of article 12-A, which provides that moneys paid in error under that article may be refunded, but that an application for a refund must be made within two years. Mobil Oil Corp. v State Tax Com., 62 A.D.2d 668, 406 N.Y.S.2d 365, 1978 N.Y. App. Div. LEXIS 10892 (N.Y. App. Div. 3d Dep't 1978).

Commission's determination that petitoner is not entitled to a reimbursement or refund for motor fuel consumed by omnibus carrier affiliated to petitioner by virtue of the fact that their stocks are owned by the same individuals is supported by substantial evidence since, although petitioner purchased all diesel motor fuel and paid taxes, it did not consume the fuel utilized in the operation of its affiliate's omnibuses and therefore could not claim credit or reimbursement for such fuel. Liberty Coaches, Inc. v State Tax Com., 79 A.D.2d 775, 435 N.Y.S.2d 69, 1980 N.Y. App. Div. LEXIS 14173 (N.Y. App. Div. 3d Dep't 1980).

Under Art. 12-A, the distributor, not the purchaser, is the taxpayer, even though the declared intention of § 289-c is to place the ultimate burden of the tax on those persons who use the motor fuel for the operation of motor vehicles on the highways. In re Conklin, 110 F.2d 178, 1940 U.S. App. LEXIS 4502 (2d Cir. N.Y. 1940).

Two year statute of limitations period provided by Tax Law § 289-c(6), within which application for refund for monies paid in error must be made, was equally applicable to credit in lieu of refund pursuant to Tax Law § 287; enforcement of such statute of limitations did not impose motor fuel tax twice in violation of § 289-a. In re Mobil Oil Corp., State Tax Comm, August 24, 1976.

Omnibus carrier credits may not be claimed by coach company for diesel motor fuel purchased by it but consumed by another affiliated omnibus corporation which was also engaged in mass transportation; coach corporation which purchased all diesel motor fuel and paid tax, but did not consume fuel utilized in operation of affiliate's omnibuses could not claim credit or reimbursement for such fuel. IN re Liberty Coaches, Inc., Dec State Tax Comm, August 17, 1979.

2. Exemptions

Exemptions from taxation are to be strictly construed against the taxpayer. Central Greyhound Lines, Inc. v Graves, 274 A.D. 679, 87 N.Y.S.2d 441, 1949 N.Y. App. Div. LEXIS 5868 (N.Y. App. Div. 1949).

Petitioner who was engaged in the delivery of aviation fuel to airlines for oil companies which sold fuel to the airlines was required to make good any losses or shortages in fuel due to evaporation and when the petitioner had to make good on such a loss it reimbursed the oil companies for the loss including the tax. Held: petitioner was entitled to a refund under this section since it was a purchaser to the extent of the fuel that was lost while in its possession and loss by evaporation was a consumption for which a refund would apply. Allied New York Services, Inc. v Bragalini, 4 A.D.2d 802, 164 N.Y.S.2d 506, 1957 N.Y. App. Div. LEXIS 4725 (N.Y. App. Div. 3d Dep't 1957).

3. —Off highway use

Since highway is defined as not including private parking lots, gasoline used by a bus line in idling motors of its buses on its own parking lots to keep the motors from freezing was not subject to tax under this section. Central Greyhound Lines, Inc. v Graves, 274 A.D. 679, 87 N.Y.S.2d 441, 1949 N.Y. App. Div. LEXIS 5868 (N.Y. App. Div. 1949).

The use of a stationary truck's engine to operate mounted compressors and pumps, the fuel therefor coming from the same source which supplies the engine for the vehicle's propulsion, does

not amount to the use of motor fuel in the operation of a motor vehicle upon the highways of the state and is not subject to the motor fuel tax. 1952 N.Y. Op. Att'y Gen. No. 183, 1952 N.Y. AG LEXIS 67.

4. Exemption denied

Operation of air-conditioning units in buses is part of the operation of such vehicles within this section and gasoline used for such a purpose is subject to tax. Central Greyhound Lines, Inc. v Graves, 274 A.D. 679, 87 N.Y.S.2d 441, 1949 N.Y. App. Div. LEXIS 5868 (N.Y. App. Div. 1949).

A determination of the State Tax Commission which sustained the denial of refunds for motor fuel tax to petitioner that had contracted to maintain and service scrubbers, sweepers and forklifts owned by a soft drink company was not erroneous, arbitrary, or capricious, where, although petitioner paid the applicable motor fuel taxes and the vehicles were never operated on state highways, it was the soft drink company rather than petitioner that consumed the motor fuel. Soft Drink Leasing Corp. v State Tax Com., 96 A.D.2d 612, 464 N.Y.S.2d 600, 1983 N.Y. App. Div. LEXIS 19156 (N.Y. App. Div. 3d Dep't 1983).

Gasoline consumed in "idling" or "heating" motor preparatory to its running on highway is taxable use, since it is an essential incident to the use of highways, and accordingly there should be no refund of taxes based on such consumption. 1940 N.Y. Op. Att'y Gen. No. 195, 1940 N.Y. AG LEXIS 55.

Taxicab service operating on the basis of different rates for geographic zones does not operate at fixed rate of fare within meaning and intent of Tax Law § 289(c) and is thus not entitled to refund of motor fuel taxes on basis of being taxicab licensee. In re Always Available Private Car Service, Inc., Op State Tax Comm, April 8, 1977.

Agency Opinions

Analysis

1. In general
2. Exemptions
3. —Off highway use
4. Exemption denied

1. In general

In making its determination as to whether vessel with license to fish and sell portion of its catch is entitled to refund of taxes imposed under CLS Tax Art 12-A, Art 13-A, Art 28 and Art 29, Department of Taxation and Finance would consider collectively provisions of such statutes as they apply to commercial fishing vessels, as well as technical services memorandum defining "fishing vessel" and "predominantly"; criteria to be met include, but are not limited to, (1) fact that fisherman falls within definition of commercial fisherman as set forth in CLS Tax § 300 taking into consideration amount of time, capital and effort that are consumed by fisherman, (2) percent of total gross income from all sources such fisherman has derived from harvesting fish for sale, and (3) whether commercial fishing vessel was used directly and predominantly (more than 50 percent) in harvesting of fish for sale. NY Adv Op Comm T & F TSB-A-95(3)M.

Fishing vessels used directly and predominantly in harvesting of fish for sale do not include any vessel used predominantly (more than 50 percent) for sport fishing, and thus, if fisherman and vessel do not fall within provisions of CLS Tax Art 12-A, Art 13-a, Art 28 and Art 29 as they apply to vessels engaged in commercial fishing, such fisherman will not be entitled to reimbursement of taxes paid on fuel used in such vessel. NY Adv Op Comm T & F TSB-A-95(3)M.

2. Exemptions

3. —Off highway use

Purchasers of motor fuel upon which both normal and additional taxes have been paid who have used same for purposes other than operation of vehicle upon public highways of this state are entitled to refund of both normal and emergency tax. 1933 N.Y. Op. Att'y Gen. No. 264.

Where treaty with a foreign nation contains a provision exempting consular officers from state taxation or a provision granting most favored nation treatment, consular officers are exempt from motor fuel tax imposed by this article. 1937 N.Y. Op. Att'y Gen. No. 194.

Tribal Indian who operates unregistered motor vehicle on reservation, is entitled to refund of state motor fuel tax as provided by § 289-c. 1939 N.Y. Op. Att'y Gen. No. 189, 1939 N.Y. AG LEXIS 160.

Petitioner, which operates vehicles with seating capacity of 8 or more passengers in transportation of disabled persons, meets definition of omnibus carrier under CLS Tax § 282(9); however, petitioner is eligible for refund of taxes paid under CLS Tax §§ 289-c(3)(d), 301-c(c) and 1119(b) only with respect to transportation contracts that provide mass transit service and thus qualify as operating "in local transit service," not with respect to contracts providing services only to select group of persons. NY Adv Op Comm T & F TSB-A-97-(79)S.

4. Exemption denied

Corporation was not entitled to refund of diesel motor fuel tax paid on its purchases of fuel used in idling its vehicles to load and unload cargo and to drop off and hook up its trailers between trips; diesel motor fuel consumed by such idling is considered same as fuel used for actual propulsion of vehicle and is consumed for use on highways of New York State. NY Adv Op Comm T & F TSB-A-03-(1)M.

Not-for-profit paramedic service created by county's local town boards did not qualify for reimbursement of motor fuel tax under CLS Tax § 289-c(3), since service was not hospital, governmental entity, volunteer fire company or department or volunteer rescue squad. NY Adv Op Comm T & F TSB-A-06-(27)S.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 183, 284-c, 284-d, 315.

Presumption of taxability–Diesel Motor fuel, CLS Tax § 285-b.

Voluntary ambulance service, definition of, CLS Pub Health § 3001.

Political subdivision, definition of, CLS Vol Fire Ben § 3.

Codes, Rules and Regulations:

Exemptions from tax. 20 NYCRR §§ 414.1 et seq.

Refunds, generally. 20 NYCRR §§ 415.1 et seq.

Federal Aspects:

Refund for gasoline tax paid on gasoline used on farms, for nonhighway purposes or by local transit systems, 26 USCS §§ 6420 et seq.

ARTICLE 13 Tax on Unrelated Business Income

Section
290. Imposition of tax

HISTORY:

Add, L 1970, ch 1005, § 25, eff May 20, 1970, applicable to taxable years beginning after Dec 31, 1969.

§ 290. Imposition of tax

(a) General. For every taxable year or part thereof, every organization described in paragraph two of subsection (a) of section five hundred eleven of the internal revenue code of nineteen hundred fifty-four and every trust described in paragraph two of subsection (b) of section five hundred eleven of such code carrying on an unrelated trade or business in New York shall pay a tax at the rate of nine per centum on its unrelated business taxable income for such year, or on the portion thereof allocated to this state, as provided in section two hundred ninety-three, or two hundred fifty dollars, whichever is greater.

(b) Unrelated trade or business carried on by a receiver. Any receiver, referee, trustee, assignee or fiduciary, or any officer or agent appointed by any court, who carries on the unrelated trade or business of an organization or trust described in either paragraph two of subsection (a) or paragraph two of subsection (b) of section five hundred eleven of the internal revenue code of nineteen hundred fifty-four shall be subject to the tax imposed by this article in the same manner and to the same extent as if the unrelated trade or business were carried on by the agents, officers or trustees of such organization or trust.

(c) Exemptions. (1) Every corporation liable to tax under article nine-a of this chapter shall not be subject to tax under this article.

(2) Every organization whose sole unrelated trade or business carried on in New York consists of activities constituting an unrelated trade or business solely by virtue of section 501(m)(2)(A) of the internal revenue code shall not be subject to tax under this article.

(3) Any income derived from the conduct of games of chance or from rental of premises for the conduct of games of chance pursuant to a license granted under article nine-A of the general municipal law shall not be subject to tax under this article.

HISTORY:

Add, L 1970, ch 1005, § 25, applicable to taxable years beginning after Dec 31, 1969 (see 1970 note below); amd, L 1971, ch 70, § 12; L 1971, ch 71, § 4; L 1975, ch 895, § 7; L 1978, ch 574, § 13; L 1987, ch 547, § 1 (see 1987 note below); L 1987, ch 817, § 57–a, eff Aug 7, 1987 (see 1987 note below and 1987 note under § 208).

Editor's Notes: Laws 1970, ch 1005, § 1, eff May 20, 1970, provides as follows:

Section 1. Legislative findings and declaration of purpose. A state's tax system must attempt to treat all taxpayers with fairness and equity. Strong taxpayer interest in greater equity in the tax system stimulated the federal tax reform studies and the enactment of the tax reform act of nineteen hundred sixty-nine. This taxpayer interest, plus the close conformity of the state tax system with the federal tax statutes, suggested that the state's tax structure should be reviewed to determine if greater equity and fairness could be achieved without losing the significant advantages of federal conformity.

It is recommended that the state continue to closely conform with federal statutes to the extent that the state can do so without harm to its fiscal position. Thus, the state should accept those federal tax changes with which the state has automatic conformity and take action to assure continuance of the benefits of procedural tax conformity. In addition, it is recommended that the state adopt the increased federal standard deductions, the first two steps of the increased federal personal exemption, reduce, on a tapered basis, the nonconformity deduction for life insurance premiums, and conform to the federal unrelated business income tax. Other changes would impose a minimum income tax, increase the statutory credit for single persons, and, as a means of conforming to the intent of the new federal low-income allowance, eliminate any tax liability for low-income taxpayers with New York adjusted gross income of less than two thousand dollars in any taxable year.

In summary, it is the purpose of this act to institute a program of tax reform that will bring a greater measure of equity and fairness to the state's tax system and that will also maintain the advantages of federal conformity.

Laws 1987, ch 547, § 3, eff July 30, 1987, provides as follows:

§ 3. This act shall take effect immediately, and shall apply to taxable years beginning after December thirty-first, nineteen hundred eighty-six.

Laws 1987, ch 817, § 110, eff Aug 7, 1987, provides in part, as follows:

§ 110. This act shall take effect immediately, provided that:

(a) The provisions of sections . . . fifty-five through fifty-seven-d . . . shall apply to taxable years beginning after December thirty-first, nineteen hundred eighty-six; . . . .

Subsection History: Sub (a), amd, L 1971, ch 70, § 12, L 1971, ch 71, § 4, L 1975, ch 895, § 7, L 1987, ch 817, § 57-a, eff Aug 7, 1987 (see 1987 note below and 1987 note under § 208).

Sub (c), par (1), formerly entire sub, so designated sub (c), par (1), L 1987, ch 547, § 1, eff July 30, 1987 (see 1987 note below).

Sub (c), par (2), add, L 1987, ch 547, § 1, eff July 30, 1987 (see 1987 note below).

Sub (c), par (3), formerly sub (d), add, L 1978, ch 574, § 13; so designated sub (c), par (3) and amd, L 1987, ch 547, § 1, eff July 30, 1987 (see 1987 note below).

Sub (d), redesignated sub (c), par (3), L 1987, ch 547, § 1, eff July 30, 1987 (see 1987 note below).

Agency Opinions

Analysis

1. In general
2. Taxable status

1. In general

Petitioner exempt organization under IRC § 501(c)(7) was subject to $250 minimum tax for taxable year 2003 where its federal unrelated business taxable income for taxable year 2003 was zero, and modifications contained in CLS Tax § 292 did not appear to apply, and thus petitioner did not have unrelated business taxable income for purposes of § 292 for taxable year 2003. NY Adv Op Comm T & F TSB-A-04-(14)C.

Assuming petitioner political action committee is organization described in IRC § 527, petitioner is not subject to tax on unrelated business income imposed under CLS Tax Art 13. NY Adv Op Comm T & F TSB-A-05-(15)C.

2. Taxable status

Receipt of demutualization proceeds by voluntary employees' beneficiary association (VEBA) did not constitute carrying on of unrelated trade or business in New York under CLS Tax § 290; thus, such receipt did not create taxable status for VEBA for purposes of CLS Tax Law Art 13. NY Adv Op Comm T & F TSB-A-01-(17)C.

Investment of demutualization proceeds by voluntary employees' beneficiary association (VEBA) and income generated by such investment did not constitute carrying on of unrelated trade or business in New York under CLS Tax § 290; thus, investment of proceeds and income that was generated did not create taxable status for VEBA for purposes of CLS Tax Law Art 13. NY Adv Op Comm T & F TSB-A-01-(17)C.

Receipt of demutualization proceeds by voluntary employees' beneficiary association (VEBA), policyholder in mutual corporation that was now operating as stock corporation, did not constitute carrying on of unrelated trade or business in New York under CLS Tax § 290; thus, such receipt did not create taxable status for VEBA for purposes of CLS Tax Law Art 13. NY Adv Op Comm T & F TSB-A-02-(9)C.

Voluntary employees' beneficiary association (VEBA), policyholder in mutual corporation that was now operating as stock corporation, was not carrying on unrelated trade or business in New York merely because it invested demutualization proceeds and received income generated by such investment activity; thus, investment of proceeds and income that was generated did not create taxable status for VEBA for purposes of CLS Tax Law Art 13. NY Adv Op Comm T & F TSB-A-02-(9)C.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 290-A, 292, 294.

Federal Aspects:

Taxation of business income of certain exempt organizations, 26 USCS §§ 511 et seq.

Unrelated business taxable income, 26 USCS § 512.

Jurisprudences:

71 Am Jur 2d, State and Local Taxation § 418.

Annotations:

When will income received by organization exempt from federal income tax under sec. 501 of Internal Revenue Code of 1954 (26 USCS sec. 501) be deemed income from unrelated trade or business taxable under secs. 511-513 of Code (26 USCS secs. 511-513). 70 ALR Fed 229.

ARTICLE 20 Tax on Cigarettes and Tobacco Products

Section
480-b. Prohibition against the stamping of certain cigarettes
480-c. Prohibition against the sale of certain tobacco products

HISTORY:

Add, L 1939, ch 940, § 3; amd, L 1947, ch 89; L 1959, ch 71, eff in part April 1, 1959 and in part July 1, 1959.

§ 480-b. Prohibition against the stamping of certain cigarettes

1. Every tobacco product manufacturer as defined by section thirteen hundred ninety-nine-oo of the public health law whose cigarettes are sold for consumption in this state shall annually certify under penalty of perjury that, as of the date of such certification, such tobacco product manufacturer: (a) is a participating manufacturer as defined in subdivision one of section thirteen hundred ninety-nine-pp of the public health law; or (b) is in full compliance with subdivision two of section thirteen hundred ninety-nine-pp of the public health law. Such certification shall be executed and delivered to the commissioner, the attorney general and any agent who affixes New York state cigarette tax stamps to cigarettes of such tobacco product manufacturer, no earlier than the sixteenth day of April and no later than the thirtieth day of April of each year, and shall be accompanied by a list setting forth each of the cigarette brands of such tobacco product manufacturer sold for consumption in New York state. Agents shall retain such certifications for a period of five years.

2. An agent may not affix, or cause to be affixed, a New York state cigarette tax stamp to a package of cigarettes if either: (a) the tobacco product manufacturer of such cigarettes has not provided such agent with the certification required by subdivision one of this section; or (b) the commissioner has notified such agent that such tobacco product manufacturer is in violation of section thirteen hundred ninety-nine-pp of the public health law, or has filed a false certification under subdivision one of this section, and such agent has not been notified by the commissioner that such violation has ceased.

2-a. An agent may not affix, or cause to be affixed, a New York state cigarette tax stamp to a package of cigarettes unless: (a) the cigarettes have been certified by the manufacturer if certification is required under subdivision three of section one hundred fifty-six-c of the executive law; and (b) the package has been marked in such manner as may be required by subdivision six of section one hundred fifty-six-c of the executive law.

3. The commissioner shall prescribe the form of the certification required to be filed pursuant to subdivision one of this section, and is authorized to collect and retain any information he or she may require to assure compliance with this section by agents and tobacco product manufacturers.

HISTORY:

Add, L 2001, ch 383, § 1 (Part J) (see 2001 note below); amd, L 2006, ch 583, § 5 (see 2006 note below); L 2008, ch 57, § 2 (Part MM–1), eff July 1, 2008 (see 2008 note below); L 2008, ch 552, § 4, eff Sept 4, 2008.

Editor's Notes: Laws 2001, ch 383, § 5 (Part J), eff Dec 28, 2001, provides as follows:

§ 5. This act shall take effect 60 days after it shall have become a law; provided, however, that if such effective date is after the thirtieth day of April, then the certifications required for the year in which this act becomes a law by subdivision 1 of section 480-b of the tax law, as added by section one of this act, shall be delivered no later than 60 days after the date this act becomes a law.

Laws 2006, ch 583, § 7, eff Dec 14, 2006, provides as follows:

§ 7. This act shall take effect on the one hundred twentieth day after it shall have become a law; provided, however, that the prohibition against the distribution, sale or offering for sale of any package of cigarettes unless the manufacturer has placed the letters "FSC" as required by subdivision 6 of section 156-c of the executive law on such package; and the testing requirements set forth in paragraph a of subdivision 3 of section 156-c of the executive law as amended by section four of this act shall take effect twelve months after this act shall have become a law. Nothing in this act shall prohibit wholesale dealers or retail dealers from selling their inventory of cigarettes existing on the date that is 12 months after this act takes effect; provided that such cigarettes contain a marking in compliance with section 8 of the office of fire prevention and control regulations at Title 19 NYCRR Part 429, as in existence as of the date this act becomes a law; provided, further, that such wholesale dealer or retail dealer can establish that New York state cigarette tax stamps were affixed to such cigarettes prior to the date that is 12 months after this act takes effect, and provided further that such wholesale dealer or retail dealer can establish that such inventory was purchased prior to such date in comparable quantity to the inventory purchased during the same period in the preceding year.

Laws 2008, ch 57, §§ 6 and 7 (Part MM), eff July 1, 2008, provide as follows:

§ 6. Notwithstanding any provision of law to the contrary, any retailer subject to article 20, 20-A, 28, 29, or 37 of the tax law, at the retailer's option, may continue to sell its inventory of tobacco products that, as the result of the amendments made by this act, are first being defined as cigarettes for a period of thirty days after the effective date of this act. Any retailer selling its inventory of these tobacco products without a cigarette tax stamp during this time is not in violation of article 20, 20-A, 28, 29 or 37 of the tax law.

§ 7. This act shall take effect July 1, 2008; provided, however, that any tobacco product manufacturer required to file a certification between April 16 and April 30, 2008, under subdivision 1 of section 480-b of the tax law, with respect to

cigarettes that are first being defined as cigarettes as a result of the amendments made by this act, must file that certification no later than July 1, 2008.

Subsection History: Sub 2-a, add, L 2006, ch 583, § 5 (see 2006 note below); amd, L 2008, ch 57, § 2 (Part MM-1), eff July 1, 2008 (see 2008 note below).

Sub 3, amd, L 2008, ch 552, § 4, eff Sept 4, 2008.

Notes to Decisions

Analysis

1. In general
2. Procedure

1. In general

Noerr-Pennington immunity did not protect statutes enacted as a result of a tobacco settlement agreement from Supremacy analysis based on the Sherman Act because the protection of pre-legislation action could not immunize the end product. Freedom Holdings, Inc. v Spitzer, 357 F.3d 205, 2004 U.S. App. LEXIS 74 (2d Cir.), reh'g denied, 363 F.3d 149, 2004 U.S. App. LEXIS 5600 (2d Cir. 2004).

In a dormant Commerce clause challenge of New York's Contraband Statutes, enacted pursuant to a settlement agreement for lawsuits against major tobacco manufacturers, plaintiff tobacco importers failed to identify any in-state commercial interest that was directly or indirectly favored by the statutes at the expense of out-of-state competitors; the importers conceded that virtually all cigarettes sold at retail were purchased out of state, the statutes applied equally to in-state and out-of-state products, and products sold by and to in-state and out-of-state parties and any incidental burdens on out-of-state products — i.e., the so-called "embargoing" of the cigarettes of non-participating manufacturers the importers purchased, resulted from their failure to comply with the statutes, a burden that was no greater for out-of-state interests than for in-state ones. Thus, the district court's dismissal of the Commerce Clause for failure to state a claim was affirmed. Freedom Holdings, Inc. v Spitzer, 357 F.3d 205, 2004 U.S. App. LEXIS 74 (2d Cir.), reh'g denied, 363 F.3d 149, 2004 U.S. App. LEXIS 5600 (2d Cir. 2004).

2. Procedure

Where the district court denied two cigarette importers' motion for a preliminary injunction against enforcement of N.Y. Pub. Health Law §§ 1399-nn to 1399-pp and N.Y. Tax Law §§ 480-b and 481 subdiv. 1(c), the denial was affirmed because the importers failed to show irreparable harm. If they were successful at trial on their claims, they conceded that they would be entitled to a return of any funds deposited into escrow. Freedom Holdings, Inc. v Spitzer, 408 F.3d 112, 2005 U.S. App. LEXIS 8886 (2d Cir. N.Y. 2005).

Where the district court denied two cigarette importers' motion for a preliminary injunction against enforcement of N.Y. Pub. Health Law §§ 1399-nn to 1399-pp and N.Y. Tax Law §§ 480-b and 481 subdiv. 1(c), the denial was affirmed because the importers failed to show irreparable harm. If they were successful at trial on their claims, they conceded that they would be entitled to a return of any funds deposited into escrow. Freedom Holdings, Inc. v Spitzer, 408 F.3d 112, 2005 U.S. App. LEXIS 8886 (2d Cir. N.Y. 2005).

Cigarette importers did not show that the New York Escrow and Contraband Statutes, N.Y. Pub. Health Law §§ 1399-nn to 1399-pp and N.Y. Tax Law §§ 480-b, 481, and 1846, violated the Sherman Act, 15 U.S.C.S. § 1, as the evidence did not establish that the statutes effectively compelled non-participating tobacco manufacturers to join an allegedly anticompetitive Master Settlement Agreement among tobacco companies and government entities. Also, state-action immunity applied to the challenged statutes. Freedom Holdings, Inc. v Cuomo, 624 F.3d 38, 2010 U.S. App. LEXIS 21392 (2d Cir. N.Y. 2010), cert. denied, 563 U.S. 913, 131 S. Ct. 1810, 179 L. Ed. 2d 670, 2011 U.S. LEXIS 2548 (U.S. 2011).

Cigarette importers failed to prove that the New York Escrow and Contraband Statutes, N.Y. Pub. Health Law §§ 1399-nn to 1399-pp and N.Y. Tax Law §§ 480-b, 481, and 1846, had an extraterritorial effect on commerce, and their challenge to the statutes under the dormant Commerce Clause, U.S. Const. art. I, § 8, cl. 3, was therefore properly rejected. While the enactment of similar escrow and contraband statutes in most states had caused cigarette prices to rise nationwide, the statutes imposed no inconsistent obligations. Freedom Holdings, Inc. v Cuomo, 624 F.3d 38, 2010 U.S. App. LEXIS 21392 (2d Cir. N.Y. 2010), cert. denied, 563 U.S. 913, 131 S. Ct. 1810, 179 L. Ed. 2d 670, 2011 U.S. LEXIS 2548 (U.S. 2011).

Cigarette importers demonstrated neither a likelihood of success on the merits nor irreparable harm with regards to the Master Settlement Agreement (MSA), the Escrow Statute, N.Y. Pub. Health Law § 1399-pp, and provisions of the Contraband Statute found at N.Y. Tax Law §§ 480-b, 481, and 1846. However, they made a showing of likelihood of success and of irreparable harm as regards the repeal of the Allocable Share Release provision, and accordingly, a preliminary injunction was granted enjoining the amended version of N.Y. Pub. Health Law § 1399-pp. Freedom Holdings, Inc. v Spitzer, 447 F. Supp. 2d 230, 2004 U.S. Dist. LEXIS 18296 (S.D.N.Y. 2004), aff'd, 408 F.3d 112, 2005 U.S. App. LEXIS 8886 (2d Cir. N.Y. 2005).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 1846.

§ 480-c. Prohibition against the sale of certain tobacco products

1. Every tobacco product manufacturer, as defined by section thirteen hundred ninety-nine-oo of the public health law, whose roll-your-own tobacco is sold for consumption in this state, must annually certify under penalty of perjury that, as of the date of that certification, the tobacco product manufacturer: (a) is a participating manufacturer as defined in subdivision one of section thirteen hundred ninety-nine-pp of the public health law; or (b) is in full compliance with subdivision two of section thirteen hundred ninety-nine-pp of the public health law. The certification must be executed and delivered to the commissioner, the attorney general, and any distributor of roll-your-own tobacco of such tobacco product manufacturer, no earlier than the sixteenth day of April and no later than the thirtieth day of April of each year, and must be accompanied by a list setting forth each of the brands of roll-your-own tobacco of the tobacco product manufacturer sold for consumption in New York state. Distributors must retain the certifications for a period of five years.

2. A distributor must not offer for sale or cause to be sold in this state roll-your-own tobacco of a tobacco product manufacturer if either: (a) the tobacco product manufacturer of the roll-your-own tobacco has not provided the distributor with the certification required by subdivision one of this section; or (b) the commissioner has notified the distributor that the tobacco product manufacturer is in violation of section thirteen hundred ninety-nine-pp of the public health law, or has filed a false certification under subdivision one of this section, and the distributor has not been notified by the commissioner that the violation has ceased.

3. The commissioner must prescribe the form of the certification required to be filed pursuant to subdivision one of this section, and is authorized to

collect and retain any information he or she may require to assure compliance with this section by distributors and tobacco product manufacturers.

HISTORY:
Add, L 2008, ch 552, § 5, eff Sept 4, 2008, subs 1 and 2, eff April 16, 2009.

ARTICLE 22 Personal Income Tax

Part I. General

Section
606. Credits against tax.

Part II. Residents

612. New York adjusted gross income of a resident individual
630-b. Gift for volunteer firefighting and volunteer emergency services fund

HISTORY:
Add, L 1960, ch 563, § 2, eff April 18, 1960.

PART I General

HISTORY:
Add, L 1960, ch 563, eff April 18, 1960.

§ 606. Credits against tax.

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(e-1) [Expires and repealed Jan 1, 2020] Enhanced real property tax circuit breaker credit.

(1) For purposes of this subsection:

(A) "Qualified taxpayer" means a resident individual of the state, who (i) is a resident of a city with a population over one million, (ii) has occupied the same residence for six months or more of the taxable year, and (iii) is required or chooses to file a return under this article.

(B) "Household" or "members of the household" means a qualified taxpayer and all other persons, not necessarily related, who have the same residence and share its furnishings, facilities and accommodations. Such terms shall not include a tenant, subtenant, roomer or boarder who is not related to the qualified taxpayer in any degree specified in subparagraphs (A) through (G) of paragraph two of subsection (d) of section one hundred fifty-two of the internal revenue code. Provided, however, no person may be a member of more than one household at one time.

(C) "Household gross income" means the aggregate adjusted gross income of all members of the household for the taxable year as reported for federal income tax purposes, or which would be reported as adjusted gross income if a federal income tax return were required to be filed, with the modifications in subsection (b) of section six hundred twelve of this article but without the modifications in subsection (c) of such section, plus any portion of the gain from the sale or exchange of property otherwise excluded from such amount; earned income from sources without the United States excludable from federal gross income by section nine hundred eleven of the internal revenue code; support money not included in adjusted gross income; nontaxable strike benefits; supplemental security income payments; the gross amount of any pension or annuity benefits to the extent not included in such adjusted gross income (including, but not limited to, railroad retirement benefits and all payments received under the federal social security act and veterans' disability pensions); nontaxable interest received from the state of New York, its agencies, instrumentalities, public corporations, or political subdivisions (including a public corporation created pursuant to agreement or compact with another state or Canada); workers' compensation; the gross amount of "loss-of-time" insurance; and the amount of cash public assistance and relief, other than medical assistance for the needy, paid to or for the benefit of the qualified taxpayer or members of his or her household. Household gross income shall not include surplus foods or other relief in kind or payments made to individuals because of their status as victims of Nazi persecution as defined in P.L. 103-286. Provided, further, household gross income shall only include all such income received by all members of the household while members of such household. In computing household gross income, the net amount of loss reported on Federal Schedule C, D, E, or F shall not exceed three thousand dollars per schedule. In addition, the net amount of any other separate category of loss shall not exceed three thousand dollars. The aggregate amount of all losses included in computing household gross income shall not exceed fifteen thousand dollars.

(D) "Residence" means a dwelling in this state, in a city with a population of over one million, owned or rented by the taxpayer, and so much of the land abutting it, not exceeding one acre, as is reasonably necessary for use of the dwelling as a home, and may consist of a part of a multi-dwelling or multi-purpose building including a cooperative or condominium, and rental units within a single dwelling. Residence includes a trailer or mobile home, used exclusively for residential purposes and defined as real property pursuant to paragraph (g) of subdivision twelve of section one hundred two of the real property tax law.

(E) "Qualifying real property taxes" means all real property taxes, special ad valorem levies and special assessments, exclusive of penalties and interest, levied on the residence of a qualified taxpayer and paid during the taxable year. A qualified taxpayer may elect to include any additional amount that would have been levied in the absence of an exemption from real property taxation pursuant to section four hundred sixty-seven of the real property tax law. If tenant-stockholders in a cooperative housing corporation have met the requirements of section two hundred sixteen of the internal revenue code by which they are allowed a deduction for real estate taxes, the amount of taxes so allowable, or which would be allowable if the taxpayer had filed returns on a cash basis, shall be qualifying real

property taxes. If a residence is owned by two or more individuals as joint tenants or tenants in common, and one or more than one individual is not a member of the household, qualifying real property taxes is that part of such taxes on the residence which reflects the ownership percentage of the qualified taxpayer and members of his or her household. If a residence is an integral part of a larger unit, qualifying real property taxes shall be limited to that amount of such taxes paid as may be reasonably apportioned to such residence. If a household owns and occupies two or more residences during different periods in the same taxable year, qualifying real property taxes shall be the sum of the prorated qualifying real property taxes attributable to the household during the periods such household occupies each of such residences. If the household owns and occupies a residence for part of the taxable year and rents a residence for part of the same taxable year, it may include the proration of qualifying real property taxes on the residence owned. Provided, however, for purposes of the credit allowed under this subsection, qualifying real property taxes may be included by a qualified taxpayer only to the extent that such taxpayer or the spouse of such taxpayer, occupying such residence for one hundred eighty-three days or more of the taxable year, owns or has owned the residence and paid such taxes.

(F) "Real property tax equivalent" means fifteen and three-quarters percent of the adjusted rent actually paid in the taxable year by a household solely for the right of occupancy of its New York residence for the taxable year. If (i) a residence is rented to two or more individuals as cotenants, or such individuals share in the payment of a single rent for the right of occupancy of such residence, and (ii) each of such individuals is a member of a different household, one or more of which individuals shares such residence, real property tax equivalent is that portion of fifteen and three-quarters percent of the adjusted rent paid in the taxable year which reflects that portion of the rent attributable to the qualified taxpayer and the members of his or her household.

(G) "Adjusted rent" means rental paid for the right of occupancy of a residence, excluding charges for heat, gas, electricity, furnishings and board. Where charges for heat, gas, electricity, furnishings or board are included in rental but where such charges and the amount thereof are not separately set forth in a written rental agreement, for purposes of determining adjusted rent the qualified taxpayer shall reduce rental paid as follows:

(i) For heat, or heat and gas, deduct six percent of rental paid.

(ii) For heat, gas and electricity, deduct eight percent of rental paid.

(iii) For heat, gas, electricity and furnishings, deduct ten percent of rental paid.

(iv) For heat, gas, electricity, furnishings and board, deduct twenty percent of rental paid.

If the commissioner determines that the adjusted rent shown on the return is excessive, the commissioner may reduce such rent, for purposes of the computation of the credit, to an amount substantially equivalent to rent for a comparable accommodation.

(2) A qualified taxpayer shall be allowed a credit as provided in paragraph three of this subsection against the taxes imposed by this article reduced by the credits permitted by this article. If the credit exceeds the tax as so reduced for such year under this article, the excess shall be treated as an overpayment, to be credited or refunded, without interest. If a qualified taxpayer is not required to file a return pursuant to section six hundred fifty-one of this article, a qualified taxpayer may nevertheless receive the full amount of the credit to be credited or repaid as an overpayment, without interest.

(3) Determination of credit. For taxable years after two thousand thirteen, the amount of the credit allowable under this subsection shall be determined as follows:

If household gross income for the taxable year is:	Excess real property taxes are the excess of real property tax equivalent or the excess of qualifying real property taxes over the following percentage of household gross income:	The credit amount is the following percentage of excess property taxes:
Less than $100,000	4	4.5
$100,000 to less than $150,000	5	3.0
$150,000 to less than $200,000	6	1.5

Notwithstanding the foregoing provisions, the maximum credit determined under this subparagraph may not exceed five hundred dollars.

(4) If a qualified taxpayer occupies a residence for a period of less than twelve months during the taxable year or occupies two or more residences during different periods in such taxable year, the credit allowed pursuant to this subsection shall be computed in such manner as the commissioner may, by regulation, prescribe in order to properly reflect the credit or portion thereof attributable to such residence or residences and such period or periods.

(5) The commissioner may prescribe that the credit under this subsection shall be determined in whole or in part by the use of tables prescribed by such commissioner. Such tables shall set forth the credit to the nearest dollar.

(6) Only one credit per household and per qualified taxpayer shall be allowed per taxable year under this subsection. When two or more members of a household are able to meet the qualifications for a qualified taxpayer, the credit shall be equally divided between or among such individuals unless such individuals file with the commissioner a written agreement among such individuals setting forth a different division.

(A) Provided, however, where a joint income tax return has been filed pursuant to the provisions of

section six hundred fifty-one of this article by a qualified taxpayer and his or her spouse (or where both spouses are qualified taxpayers and have filed such joint return), the credit, or the portion of the credit if divided, to which the spouses are entitled shall be applied against the tax of both spouses and any overpayment shall be made to both spouses.

(B) Where any return required to be filed pursuant to the provisions of section six hundred fifty-one of this article is combined with any return of tax imposed pursuant to the authority of this chapter or any other law if such tax is administered by the commissioner, the credit or the portion of the credit if divided, allowed to the qualified taxpayer may be applied by the commissioner toward any liability for the aforementioned taxes.

(7) No credit shall be granted under this subsection:

(A) If household gross income for the taxable year equals or exceeds two hundred thousand dollars.

(B) To a property owner unless: (i) the property is used for residential purposes, (ii) not more than twenty percent of the rental income, if any, from the property is from rental for nonresidential purposes and (iii) the property is occupied as a residence in whole or in part by one or more of the owners of the property.

(C) To an individual with respect to whom a deduction under subsection (c) of section one hundred fifty-one of the internal revenue code is allowable to another taxpayer for the taxable year.

(D) With respect to a residence that is wholly exempted from real property taxation.

(E) To an individual who is not a resident individual of a city, within the state, with a population over one million, for the entire taxable year.

(8) The right to claim a credit or the portion of a credit, where such credit has been divided under this subsection, shall be personal to the qualified taxpayer and shall not survive his or her death, but such right may be exercised on behalf of a claimant by his or her legal guardian or attorney in fact during his or her lifetime.

(9) Returns. If a qualified taxpayer is not required to file a return pursuant to section six hundred fifty-one of this article, a claim for a credit may be taken on a return filed with the commissioner within three years from the time it would have been required that a return be filed pursuant to such section had the qualified taxpayer had a taxable year ending on December thirty-first. Returns under this paragraph shall be in such form as shall be prescribed by the commissioner, which shall make available such forms and instructions for filing such returns.

(10) Proof of claim. The commissioner may require a qualified taxpayer to furnish the following information in support of his claim for credit under this subsection: household gross income, real property taxes levied or that would have been levied in the absence of an exemption from real property tax pursuant to section four hundred sixty-seven of the real property tax law, the names of members of the household and other qualifying taxpayers occupying the same residence and their identifying numbers including social security numbers, household gross income, size and nature of property claimed as residence and all other information which may be required by the commissioner to determine the credit.

(11) Administration. The provisions of this article, including the provisions of sections six hundred fifty-three, six hundred fifty-eight, and six hundred fifty-nine of this article and the provisions of part six of this article relating to procedure and administration, including the judicial review of the decisions of the commissioner, except so much of section six hundred eighty-seven of this article which permits a claim for credit or refund to be filed after the period provided for in paragraph nine of this subsection and except sections six hundred fifty-seven, six hundred eighty-eight and six hundred ninety-six of this article, shall apply to the provisions of this subsection in the same manner and with the same force and effect as if the language of those provisions had been incorporated in full into this subsection and had expressly referred to the credit allowed or returns filed under this subsection, except to the extent that any such provision is either inconsistent with a provision of this subsection or is not relevant to this subsection. As used in such sections and such part, the term "taxpayer" shall include a qualified taxpayer under this subsection and, notwithstanding the provisions of subsection (e) of section six hundred ninety-seven of this article, where a qualified taxpayer has protested the denial of a claim for credit under this subsection and the time to file a petition for redetermination of a deficiency or for refund has not expired, he shall, subject to such conditions as may be set by the commissioner, receive such information (A) which is contained in any return filed under this article by a member of his or her household for the taxable year for which the credit is claimed, and (B) which the commissioner finds is relevant and material to the issue of whether such claim was properly denied.

(12) Notwithstanding any other provision of this article, the credit allowed under this subsection shall be determined after the determination and application of any other credits permitted under the provisions of this article.

(13) The commissioner shall prepare a written report after December thirty-first of each calendar year, which shall contain statistical information regarding the credits granted on or before such dates under this subsection during such calendar year. Copies of the report shall be submitted by the commissioner to the governor, the temporary president of the senate, the speaker of the assembly, the chairman of the senate finance committee and the chairman of the assembly ways and means committee within forty-five days of December thirty-first.

Such report shall contain, but need not be limited to, the number of credits and the average amount of such credits allowed; and of those, the number of credits and the average amount of such credits allowed to qualified taxpayers in each county; and of those, the number of credits and the average amount of such credits allowed to qualified taxpayers whose household gross income falls within each of the household gross income ranges set forth in paragraph three of this subsection.

(e-1) [Eff Jan 1, 2020] Volunteer firefighters' and ambulance workers' credit.

(1) For taxable years beginning on and after January first, two thousand seven, a resident taxpayer who serves as an active volunteer firefighter as defined in subdivision one of section two hundred fifteen of the general municipal law or as a volunteer ambulance worker as defined in subdivision fourteen of section two hundred nineteen-k of the general municipal law shall be allowed a credit against the tax imposed by this article equal to two hundred dollars. In order to receive this credit a volunteer firefighter or volunteer ambulance worker must have been active for the entire taxable year for which the credit is sought.

(2) If a taxpayer receives a real property tax exemption relating to such service under title two of article four of the real property tax law, such taxpayer shall not be eligible for this credit; provided, however (A) if the taxpayer receives such real property tax exemption in the two thousand seven taxable year as a result of making application therefor in a prior year or (B) if the taxpayer notifies his or her assessor in writing by December thirty-first, two thousand seven of the taxpayer's intent to discontinue such real property tax exemption by not reapplying for such real property tax exemption by the next taxable status date, such taxpayer shall be eligible for this credit for the two thousand seven taxable year.

(3) In the case of a husband and wife who file a joint return and who both individually qualify for the credit under this subsection, the amount of the credit allowed shall be four hundred dollars.

(4) If the amount of the credit allowed under this subsection for any taxable year shall exceed the taxpayer's tax for such year, the excess shall be treated as an overpayment of tax to be credited or refunded in accordance with the provisions of section six hundred eighty-six of this article, provided, however, that no interest shall be paid thereon.

(e-2) [Eff until Jan 1, 2020] Volunteer firefighters' and ambulance workers' credit.

(1) For taxable years beginning on and after January first, two thousand seven, a resident taxpayer who serves as an active volunteer firefighter as defined in subdivision one of section two hundred fifteen of the general municipal law or as a volunteer ambulance worker as defined in subdivision fourteen of section two hundred nineteen-k of the general municipal law shall be allowed a credit against the tax imposed by this article equal to two hundred dollars. In order to receive this credit a volunteer firefighter or volunteer ambulance worker must have been active for the entire taxable year for which the credit is sought.

(2) If a taxpayer receives a real property tax exemption relating to such service under title two of article four of the real property tax law, such taxpayer shall not be eligible for this credit; provided, however (A) if the taxpayer receives such real property tax exemption in the two thousand seven taxable year as a result of making application therefor in a prior year or (B) if the taxpayer notifies his or her assessor in writing by December thirty-first, two thousand seven of the taxpayer's intent to discontinue such real property tax exemption by not reapplying for such real property tax exemption by the next taxable status date, such taxpayer shall be eligible for this credit for the two thousand seven taxable year.

(3) In the case of a husband and wife who file a joint return and who both individually qualify for the credit under this subsection, the amount of the credit allowed shall be four hundred dollars.

(4) If the amount of the credit allowed under this subsection for any taxable year shall exceed the taxpayer's tax for such year, the excess shall be treated as an overpayment of tax to be credited or refunded in accordance with the provisions of section six hundred eighty-six of this article, provided, however, that no interest shall be paid thereon.

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HISTORY:

Add, L 1960, ch 563, § 2, eff April 18, 1960; amd, L 1962, ch 2, § 1; L 1962, ch 1011, § 2; L 1963, ch 272, § 1; L 1969, ch 1072, § 5; L 1970, ch 98, § 1; L 1970, ch 424, §§ 1–3; L 1970, ch 1005, § 3; L 1972, ch 1, §§ 6, 7, eff Jan 4, 1972; L 1973, ch 698, §§ 4–6; L 1974, ch 190, § 2; L 1977, ch 59, § 2; L 1977, ch 70, § 2; L 1977, ch 675, §§ 59, 60, 66; L 1978, ch 69, § 4; L 1978, ch 70, §§ 6, 7; L 1978, ch 71, § 1; L 1978, ch 729, §§ 2–5; L 1978, ch 788, § 25, eff Dec 8, 1978; L 1978, ch 790, § 4; L 1980, ch 888, §§ 4–7; L 1981, ch 103, §§ 15, 16, 19, 20, 22, 25, 68, 70–73, eff May 15, 1981; L 1981, ch 852, § 1; L 1981, ch 853, § 1; L 1981, ch 1043, §§ 8, 10; L 1981, ch 1043, § 9, eff Nov 11, 1981; L 1982, ch 55, §§ 10–15; L 1983, ch 15, §§ 71, 72, eff March 28, 1983; L 1984, ch 606, §§ 6, 7; L 1985, ch 29, §§ 22–25; L 1986, ch 258, § 2; L 1986, ch 410, § 1; L 1986, ch 638, § 7; L 1986, ch 686, §§ 14–16; L 1986, ch 686, § 13; L 1987, ch 13, § 13; L 1987, ch 28, §§ 9–25; L 1987, ch 265, § 3; L 1987, ch 333, §§ 10–16, 18–24.; L 1987, ch 442, §§ 2–5; L 1987, ch 817, §§ 57-c, 57-d, 57-e, 57-f, 57-g, 57-h, 57-l, 57-m; L 1989, ch 61, § 116; L 1990, ch 23, § 3; L 1990, ch 190, § 155; L 1990, ch 624, §§ 21–25; L 1991, ch 423, § 21; L 1992, ch 55, § 10; L 1992, ch 760, §§ 39–43; L 1993, ch 57, §§ 10, 128, 129; L 1993, ch 708, §§ 25–29; L 1994, ch 170, §§ 67, 104, 261–269; L 1994, ch 385, § 63; L 1995, ch 2, §§ 4–6; L 1996, ch 309, §§ 202, 203, 209, 213, 214.; L 1996, ch 713, § 2; L 1997, ch 142, §§ 4, 5; L 1997, ch 389, §§ 41, 56, 102, 104, 105, 129, 130 (Part A), eff Aug 7, 1997; L 1997, ch 399, § 4; L 1998, ch 56, §§ 8, 21, 22, 24, 25, 73 (Part A).; L 1998, ch 315, § 2; L 1998, ch 467, §§ 1, 2; L 1999, ch 115, §§ 5, 6; L 1999, ch 407, §§ 1, 2 (Part I); L 1999, ch 407, § 3 (Part J); L 1999, ch 407, § 2 (Part N); L 1999, ch 407, §§ 3, 4 (Part BB); L 1999, ch 407, § 1 (Part EE); L 2000, ch 63, §§ 3, 4 (Part E); L 2000, ch 63, §§ 4, 5 (Part I); L 2000, ch 63, § 1 (Part M); L 2000, ch 63, §§ 47, 48 (Part Y), expired Jan 1, 2007; L 2000, ch 63, §§ 4, 5 (Part CC); L 2000, ch 63, §§ 4, 5, 15 (Part GG); L 2000, ch 63, §§ 5, 6 (Part II); L 2000, ch 63, § 1 (Part N); L 2000, ch 63, § 1

(Part Q); L 2000, ch 63, § 1 (Part Z); L 2000, ch 63, § 1 (Part DD); L 2002, ch 85, § 5 (Part R); L 2002, ch 85, § 2 (Part V); L 2002, ch 85, §§ 1, 2 (Part C); L 2002, ch 85, §§ 3–6, 15-a, 16 (Part CC); L 2002, ch 85, § 1 (Part N); L 2002, ch 311, § 3; L 2002, ch 597, §§ 12–16; L 2003, ch 1, §§ 4, 5, 15, 16, 22, 24 (Part H); L 2003, ch 527, § 2, eff Sept 17, 2003; L 2004, ch 58, § 19 (Part B), eff Aug 20, 2004; L 2004, ch 60, § 4 (Part D), eff Aug 20, 2004; L 2004, ch 60, §§ 3, 4 (Part P), eff Aug 20, 2004; L 2004, ch 60, § 3 (Part V), eff Aug 20, 2004; L 2004, ch 577, § 7 (Part H), eff Oct 5, 2004; L 2005, ch 58, § 22 (Part C); L 2005, ch 61, §§ 2, 3, 5 (Part U), eff April 12, 2005; L 2005, ch 61, §§ 23–24, 26 (Part W) (add, L 2005, ch 63, § 5 (Part A), eff April 12, 2005), eff April 12, 2005; L 2005, ch 61, §§ 29–32 (Part W) (repealed, L 2005, ch 63, § 5 (Part A), eff April 12, 2005); L 2005, ch 61, § 1 (Part I), eff April 12, 2005; L 2005, ch 61, § 1 (Part P), eff April 12, 2005; L 2005, ch 63, § 1-a (Part A), eff April 12, 2005 (add, L 2005, ch 63, § 24 (Part E), eff April 12, 2005), eff April 12, 2005); L 2005, ch 161, § 26, eff July 3, 2005, deemed eff April 12, 2005; L 2005, ch 378, § 1, eff Aug 2, 2005; L 2005, ch 393, §§ 4–6, eff Aug 2, 2005; L 2005, ch 446, §§ 3, 6, eff Aug 9, 2005; L 2005, ch 537, §§ 4, 8, eff Aug 16, 2005; L 2005, ch 632, § 2, eff Jan 1, 2006; L 2005, ch 728, § 1, eff Oct 11, 2005; L 2005, ch 763, § 2, eff Dec 21, 2005; L 2006, ch 35, § 1 (Part C), eff May 21, 2006; L 2006, ch 35, §§ 2, 3 (Part D), eff May 21, 2006; L 2006, ch 58, § 1 (Part I), eff April 12, 2006; L 2006, ch 61, §§ 1, 4 (Part N), eff April 28, 2006; L 2006, ch 62 as re–passed by the Legislature over the Governor's veto, § 1 (Part A), eff April 28, 2006; L 2006, ch 62 as re–passed by the Legislature over the Governor's veto, §§ 1, 2 (Part F), eff April 28, 2006; L 2006, ch 62 as re–passed by the Legislature over the Governor's veto, §§ 1–3 (Part K), eff April 28, 2006; L 2006, ch 62 as re–passed by the Legislature over the Governor's veto, §§ 4, 5 (Part V), eff April 28, 2006; L 2006, ch 105, §§ 3, 4, eff June 23, 2006; L 2006, ch 109, § 16 (Part W-1), eff June 23, 2006; L 2006, ch 109, § 3 (Part Z-1), eff June 23, 2006; L 2006, ch 109, § 1 (Part F), eff June 23, 2006; L 2006, ch 109, § 1 (Part L-1), eff June 23, 2006; L 2006, ch 251, § 1, eff July 26, 2006, deemed eff on and after Aug 2, 2005; L 2006, ch 522, §§ 2, 3, eff Aug 16, 2006, deemed eff on and after Jan 1, 2006; L 2006, ch 547, §§ 1, 2, eff Aug 16, 2006; L 2007, ch 57, § 5 (Part D-1), eff April 9, 2007; L 2007, ch 128, §§ 1, 2, eff July 3, 2007; L 2007, ch 532, § 1, eff Aug 15, 2007; L 2008, ch 57, § 3 (Part WW-1), eff April 23, 2008; L 2008, ch 57, §§ 2, 3 (Part ZZ-1), eff April 23, 2008; L 2008, ch 57, § 2 (Part AAA-1), eff April 23, 2008; L 2008, ch 637, §§ 5–8, eff Sept 25, 2008; L 2009, ch 57, §§ 12, 16, 18, 20 (Part S-1), eff April 7, 2009; L 2009, ch 57, §§ 3, 7 (Part C-1), eff April 7, 2009; L 2009, ch 239, § 1, eff July 28, 2009; L 2010, ch 56, § 23 (Part W), eff June 22, 2010; L 2010, ch 57, §§ 14, 15 (Part Q), eff Aug 11, 2010; L 2010, ch 57, §§ 9, 11, 15 (Part R), eff Aug 11, 2010; L 2010, ch 57, § 5 (Part Y), eff Aug 11, 2010; L 2010, ch 59, §§ 4, 5 (Part MM), eff July 1, 2012; L 2010, ch 182, § 2, eff Oct 13, 2010; L 2010, ch 297, § 2, eff July 30, 2010; L 2010, ch 472, §§ 1, 2, eff Aug 30, 2010; L 2011, ch 56, §§ 3, 4 (Part D), eff Dec 9, 2011; L 2011, ch 56, §§ 4, 5 (Part E), eff Dec 9, 2011; L 2011, ch 61, §§ 6, 7 (Part V), eff March 31, 2011; L 2011, ch 604, §§ 1, 2, eff Jan 3, 2012, deemed eff on and after Dec 31, 2010; L 2012, ch 59, § 4 (Part I), eff March 30, 2012; L 2012, ch 59, § 4 (Part K), eff March 30, 2012; L 2012, ch 59, § 3 (Part T), eff March 30, 2012; L 2012, ch 109, §§ 3, 4, eff July 18, 2012; L 2012, ch 193, § 1, eff July 18, 2012; L 2012, ch 375, § 1, eff Aug 17, 2012; L 2013, ch 59, § 1 (Part F), eff March 28, 2013; L 2013, ch 59, § 4 (Part G), eff March 28, 2013; L 2013, ch 59, § 1 (Part V), eff March 28, 2013; L 2013, ch 59, § 3 (Part AA), eff March 28, 2013; L 2013, ch 59, § 1 (Part CC), eff March 28, 2013; L 2013, ch 59, §§ 4, 5 (Part EE), eff March 28, 2013; L 2013, ch 68, §§ 8, 9 (Part A), eff June 24, 2013; L 2013, ch 384, § 20, eff Jan 15, 2014; L 2014, ch 59, §§ 67, 68, 69 (Part A), eff Jan 1, 2015; L 2014, ch 59, § 2 (Part J), eff March 31, 2014; L 2014, ch 59, §§ 1, 2 (Part K), eff March 31, 2014; L 2014, ch 59, § 1 (Part M), eff March 31, 2014; L 2014, ch 59, § 4 (Part O), eff March 31, 2014; L, 2014, ch 59, §§ 3, 4 (Part R), eff March 31, 2014; L 2014, ch 59, § 30 (Part S), eff Jan 1, 2015; L 2014, ch 59, §§ 4, 5 (Part T), eff March 31, 2014; L 2014, ch 59, § 2 (Part U), eff March 31, 2014; L 2014, ch 59, § 1 (Part FF), eff March 31, 2014; L 2014, ch 59, §§ 3, 4 (Part HH), eff March 31, 2014; L 2014, ch 59, §§ 3, 4 (Part MM), eff Jan 1, 2015; L 2015, ch 20, § 1 (Part C, Subpart B), effective June 26, 2015; L 2015, ch 56, §§ 3, 4 (Part AA), effective April 13, 2015; L 2015, ch 59, §§ 4, 5, 8, 9 (Part I), effective April 13, 2015; L 2015, ch 59, §§ 3, 4 (Part O), effective April 13, 2015; L 2015, ch 59, § 3 (Part RR), effective April 13, 2015; L 2016, ch 60, §§ 6, 7 (Part A), effective April 13, 2016; L 2016, ch 60, § 1 (Part E), effective April 13, 2016; L 2016, ch 60, § 2 (Part I), effective April 13, 2016; L 2016, ch 60, § 3 (Part J), effective April 13, 2016; L 2016, ch 60, § 2 (Part N), effective April 13, 2016; L 2016, ch 60, §§ 5, 6 (Part V), effective April 13, 2016; L 2016, ch 60, §§ 3, 4 (Part RR), effective April 13, 2016; L 2016, ch 73, §§ 1, 8 (Part A), effective June 23, 2016; L 2016, ch 73, §§ 2, 3 (Part B), effective June 23, 2016; L 2017, ch 59, § 2 (Part C), effective April 10, 2017; L 2017, ch 59, § 1 (Part G), effective April 10, 2017; L 2017, ch 59, §§ 2, 3 (Part H), effective April 10, 2017; L 2017, ch 59, §§ 9, 10 (Part K), effective April 10, 2017; L 2017, ch 59, §§ 3, 4 (Part N, Subpart A), effective April 10, 2017; L 2017, ch 59, §§ 3, 4 (Part N, Subpart B), effective April 10, 2017; L 2017, ch 59, § 3 (Part O), effective April 10, 2017; L 2017, ch 59, § 3 (Part P), effective April 10, 2017; L 2017, ch 59, §§ 1, 2 (Part T), effective April 10, 2017; L 2017, ch 59, §§ 1, 2 (Part TT), effective April 10, 2017; L 2017, ch 59, §§ 1, 2 (Part DDD), effective April 10, 2017; L 2017, ch 315, § 3, effective September 13, 2017; L 2017, ch 485, § 1, effective December 18, 2017; L 2018, ch 14, § 1, effective December 18, 2017; L 2018, ch 59, § 10 (Part B), effective April 12, 2018; L 2018, ch 59, § 1 (Part E), effective April 15, 2020; L 2018, ch 59, §§ 7, 8 (Part E), effective April 12, 2018; L 2018, ch 59, § 1 (Part P), effective April 12, 2018; L 2018, ch 59, § 2 (Part Q), effective April 12, 2018; L 2018, ch 59, § 7 (Part R), effective April 12, 2018; L 2018, ch 59, §§ 8, 9 (Part R), effective January 1, 2019; L 2018, ch 59, § 4 (Part LL), effective April 12, 2018; L 2018, ch 59, § 2 (Part MM), effective April 12, 2018; L 2018, ch 59, §§ 1, 4 (Part RR), effective April 12, 2018; L 2018, ch 518, § 3, effective December 28, 2018; L 2019, ch 39, § 4 (Part G), effective June 24, 2019; L 2019, ch 59, §§ 3, 4 (Part L), effective April 12, 2019; L 2019, ch 59, § 2 (Part R), effective April 12, 2019; L 2019, ch 59, §§ 2, 3-a, (Part U), effective April 12, 2019; L 2019, ch 59, §§ 3, 4 (Part W), effective April 12, 2019; L 2019, ch 59, § 2 (Part LL), effective April 12, 2019; L 2019, ch 59, § 1 (Part NN), effective April 12, 2019; L 2019, ch 59, § 2 (Part OO), effective April 12, 2019; L 2019, ch 59, §§ 3, 4 (Part PP), effective April 12, 2019; L 2019, ch 59, § 2 (Part RR), effective April 12, 2019; L 2019, ch 59, § 4 (Part TT), effective April 12, 2019; L 2019, ch 59, § 1 (Part ZZZ, Subpart F), effective April 12, 2019; L 2019, ch 490, § 72, effective November 12, 2020; L 2019, ch 683, §§ 3, 4, effective December 18, 2019; L 2020, ch 59, § 2 (Part B), effective April 3, 2020; L 2020, ch 59, § 1 (Part E), effective April 3, 2020; L 2020, ch 59, § 1 (Part F), effective April 3, 2020.

Editor's Notes Laws 2019, ch 490, § 82, eff November 12, 2020, provides:

§ 82. This act shall take effect one year after it shall have become a law; provided, however that the amendments to subdivision 7 of section 369-h of the executive law made by section twenty-five of this act shall not affect the repeal of such section and shall be deemed repealed therewith. Effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized to be made and completed on or before such effective date.

Laws 2019, ch 683, §§ 6, 7, eff December 18, 2019, provide:

§ 6. Study of the underutilization of minority and women screenwriters and directors. 1. Study. Subject to an appropriation which shall provide sufficient funding necessary to complete such study, the department of economic development shall select, through the request for proposal process, an entity independent of such department which shall serve as such department's designee for the purpose of conducting a study to investigate the statistical significance of the underutilization of minority and women screenwriters and directors. Such study shall conduct or provide for an examination of, but not be limited to, a comparison of available minority and women screenwriters and directors against the share of screenwriting and directing work such groups receive on projects in New York state to demonstrate the statistically significant underutilization of that population.

2. Report. (a) Upon the completion of the study conducted pursuant to subdivision one of this section, the department of economic development shall deliver a report of the findings of such study to the governor, the temporary president of the senate, and the speaker of the assembly and post the study on the website of the department of economic development. (b) If the department of economic development determines that the study has found statistically significant evidence of the underutilization of minority and women screenwriters and directors against the share of screenwriting and directing work such groups receive on projects in the state, then the department of economic development shall so notify the governor, the temporary president of the senate, the speaker of the assembly, the commissioner of taxation and finance and the legislative bill drafting commission.

3. Powers. All other departments or agencies of the state or subdivisions thereof, and local governments shall, at the request of the department of economic development or its designee chosen pursuant to subdivision one of this section, provide expertise, assistance, and/or data that are relevant or material to the completion of the study directed to be completed by subdivision one of this section and the report directed to be completed by subdivision two of this section. The department of economic development, or its designee, shall also be authorized to obtain relevant information from any recognized entities representing the television industry or segments thereof towards the completion of such study (Amd, L 2020, ch 55, § 2 (Part XX, Subpart X), eff Dec 18, 2020).

§ 7. This act shall take effect immediately, provided, however, that the provisions of sections one, two, three, four, and five of this act shall take effect on the first of January next succeeding the date the department of economic development provides notice to the legislative bill drafting commission of a determination pursuant to paragraph (b) of subdivision two of section six of this act and shall apply to taxable years on and after such date; provided that the department of economic development shall notify the legislative bill drafting commission upon the occurrence of the submission of the report provided for in paragraph (b) of subdivision two of section six of this act in order that the commission may maintain an accurate and timely effective data base of the official text of the laws of the state of New York in furtherance of effectuating the provisions of section 44 of the legislative law and section 70-b of the public officers law. Effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized to be made and completed on or before such effective date (Amd, L 2020, ch 55, § 2 (Part XX, Subpart X), eff Dec 18, 2020).

Laws 2020, ch 59, § 2 (Part E), eff April 3, 2020, provides:

§ 2. This act shall take effect immediately and apply to taxable years beginning on or after January 1, 2020.

Amendment Notes The 2019 amendment by ch 39, § 4 (Part G), in (eee)(5), redesignated and rewrote the former second sentence as the second and third sentences and added the last sentence.

The 2019 amendment by ch 59, §§ 3, 4 (Part L), added (i)(1)(B)(xliv) [first setout]; and added (jjj) [first setout].

The 2019 amendment by ch 59, § 2 (Part R), substituted "two thousand twenty-three" for "two thousand twenty" in the second sentence of (mm)(1).

The 2019 amendment by ch 59, § 2 (Part U), added "Except in the case of a qualified rehabilitation project undertaken within a state park, state historic site, or other land owned by the state, that is under the jurisdiction of the office of parks, recreation and historic preservation" at the beginning of the first sentence of (oo)(5).

The 2019 amendment by ch 59, § 3-a (Part U), in (pp)(5)(A)(iv), added the (1) and (2) designations and added (3); and made a related change.

The 2019 amendments by ch 59, §§ 3, 4 (Part W), added (i)(1)(B)(xliv) [second setout]; and added (jjj) [second setout].

The 2019 amendment by ch 59, § 2 (Part LL), added "for purposes of the credit authorized by this subsection" at the end of (eee)(1)(G).

The 2019 amendment by ch 59, § 1 (Part NN), deleted "and prior to two thousand sixteen" following "thirteen" in the introductory language of (e-1)(3).

The 2019 amendment by ch 59, § 2 (Part OO), in (eee)(6)(B), added the (i) designation and added (ii).

The 2019 amendments by ch 59, §§ 3, 4 (Part PP), in (eee), added "provided that in the event such party was determined to be ineligible on the basis that his or her primary residence received the STAR exemption in the associated fiscal year, the improperly issued credit amount shall be deemed a clerical error and shall be paid upon notice and demand without the issuance of a notice of deficiency and shall be assessed, collected and paid in the same manner as taxes" at the end of (10)(E) and added (13)(E).

The 2019 amendment by ch 59, § 2, (Part RR), added the second sentence of (eee)(3)(A).

The 2019 amendment by ch 59, § 4 (Part TT), in (eee)(5), substituted "were levied" for "where levied" in the first sentence and in the second sentence, deleted "and making any required payments" following "renouncing the exemption" and added "and making any required payments within the time frame prescribed by section four hundred ninety-six of the real property tax law" at the end.

The 2019 amendment by ch 59, § 1 (Part ZZZ, Subpart F), added (jjj).

The 2019 amendment by ch 490, § 72, added "(i)" and "or (ii) has a qualifying condition, as defined in section three hundred fifty of the executive law, and has received a discharge other than bad conduct or dishonorable from such service after September eleventh, two thousand one, or (iii) is a discharged LGBT veteran, as defined in section three hundred fifty of the executive law, and has received a discharge other than bad conduct or dishonorable from such service after September eleventh, two thousand one" in (a-2)(2)(A).

The 2019 amendment by ch 683, §§ 3, 4, added (v); and updated the table of (i)(1)(B)(xlv).

The 2020 amendment by ch 59, § 2 (Part B), substituted "two thousand twenty-two" for "two thousand twenty-one" in the first sentence of (a-2)(1); and substituted "two thousand twenty-one" for "two thousand twenty" in (a-2)(2)(B).

The 2020 amendment by ch 59, § 1 (Part E), in the first sentence of (aa)(1), substituted "There shall be" for "A taxpayer shall be" at the beginning, added "in an amount," and "substituted "the premiums" for "the premium" and added the second sentence in (aa)(1).

The 2020 amendment by ch 59, § 1 (Part F), added "(A)" at the beginning of the first sentence in (d)(6); and added (d)(6)(B).

PART II Residents

HISTORY:

Add, L 1960, ch 563, § 2, eff April 18, 1960.

§ 612. New York adjusted gross income of a resident individual

* * * * *

(c) Modifications reducing federal adjusted gross income. There shall be subtracted from federal adjusted gross income:

* * * * *

(41) The amount of any award paid to a volunteer firefighter or volunteer ambulance worker from a length of service defined contribution plan or defined benefit plan as provided for in articles eleven-A, eleven-AA, eleven-AAA and eleven-AAAA of the general municipal law, to the extent that such award is

includable in gross income for federal income tax purposes; provided, however, that such award is not distributed in the form of a lump sum distribution, as defined in subparagraph (D) of paragraph four of subsection (e) of section four hundred two of the internal revenue code and taxed under section six hundred three of this article; and provided, further, that such award is not distributed to a taxpayer who has not attained the age of fifty-nine and one-half years.

(42) [There are three sub (c), paragraphs (42)] Distributions from an eligible retirement plan, as such term is defined in subparagraph (B) of paragraph (8) of subsection (c) of section four hundred two of the Internal Revenue Code, made on or after April first, two thousand seventeen and before April second, two thousand twenty-two. In order for such distributions to be eligible to be subtracted from federal adjusted gross income under this paragraph, the following conditions must be satisfied: (A) the taxpayer's primary residence was located in the area affected by the disaster declared pursuant to executive order one hundred sixty-five of two thousand seventeen, declaring a state of emergency, dated May third, two thousand seventeen; (B) such primary residence must have incurred damage due to coastal flooding, widespread erosion and water damage caused by such disaster; (C) such damage must qualify for the casualty deduction under section one hundred sixty-five of the internal revenue code (determined without regard to whether the loss exceeds ten percent of adjusted gross income); and (D) the taxpayer during the taxable year must use the entire amount of the distributions to pay for repairs needed as a result of such damage. Provided, however, that the amount of the distributions that otherwise may be subtracted under this paragraph must be reduced by any deduction claimed by the taxpayer for such damage pursuant to section one hundred sixty-five of the internal revenue code. Provided, further, that the taxpayer shall not claim a subtraction modification under paragraph three-a of this subsection for such distribution.

(42) [There are three sub (c), paragraphs (42); eff Jan 1, 2019] Insurance payments received by an eligible volunteer firefighter for the cancer disability benefits in section two hundred five-cc of the general municipal law to the extent includable in gross income for federal income tax purposes.

(42) [There are three sub (c), paragraphs (42)]

(A) The amount of any student loan that is discharged, whether in whole or in part, if such discharge was:

(i) pursuant to subsection (a) or (d) of section 437 of the Higher Education Act of 1965 or the parallel benefit provided pursuant to part D of title IV of such act;

(ii) pursuant to section 464(c)(1)(F) of the Higher Education Act of 1965; or

(iii) otherwise discharged on account of the death or total and permanent disability of the person on whose behalf the indebtedness was incurred.

(B) For the purposes of this paragraph, "student loan" means:

(i) a student loan as defined in section 108(f)(2) of the Internal Revenue Code of 1986; or

(ii) a private education loan, as defined in section 140(7) of the Consumer Credit Protection Act.

* * * * *

[**Editor's Note**: Section 11-1712 of the Administrative Code of the City of New York is amended similarly but said code is not included in the Book.]

HISTORY:

Add, L 1960, ch 563, § 2; amd, L 1961, ch 363, § 1; L 1961, ch 974, § 1; L 1963, ch 446, §§ 10–12; L 1963, ch 921, §§ 1, 2; L 1964, ch 528, § 3; L 1965, ch 178, §§ 4–6; L 1966, ch 902, §§ 30–33; L 1968, ch 873, § 8; L 1969, ch 1072, § 6; L 1970, ch 974, §§ 5, 6; L 1970, ch 1005, §§ 28, 33, 34; L 1971, ch 184, § 2; L 1971, ch 199, § 2; L 1972, ch 1, §§ 9–13; L 1972, ch 414, §§ 4, 5; L 1973, ch 265, § 1; L 1973, ch 718, § 1; L 1975, ch 771, § 1; L 1976, ch 245, § 1; L 1977, ch 675, § 61; L 1977, ch 713, § 2; L 1977, ch 836, § 2; L 1978, ch 33, § 2, applicable to taxable years beginning after Dec 31, 1976; L 1978, ch 70, §§ 9–12; L 1978, ch 480, § 5; L 1978, ch 729, § 6, applicable to taxable years commencing after Dec 31, 1977; L 1978, ch 788, § 26; L 1979, ch 25, §§ 1, 2; L 1979, ch 365, §§ 3–5; L 1981, ch 83, § 1; L 1981, ch 103, §§ 2, 3, applicable to new business investments made on or after July 1, 1981; L 1981, ch 103, §§ 6–8, 27–29, 36, 41–44, 51–53, 60, applicable to taxable years commencing on or after Jan 1, 1981; L 1981, ch 358, § 1; L 1981, ch 1043, §§ 11–14, 16, 18, 20, 21; L 1981, ch 1043, § 15, applicable to taxable years commencing on or after Jan 1, 1981; L 1981, ch 1043, §§ 17, 19, 22, applicable to new business investments made on or after July 1, 1981; L 1982, ch 55, §§ 16, 17; L 1982, ch 547, §§ 3, 4; L 1983, ch 15, §§ 73–76; L 1983, ch 400, § 9; L 1983, ch 648, §§ 5, 6; L 1984, ch 71, §§ 1, 2; L 1984, ch 606, §§ 8–12, applicable to taxable years beginning after Dec 31, 1982; L 1984, ch 805, § 70; L 1984, ch 961, § 1, applicable to disability income received in taxable years commencing after Dec 31, 1983; L 1984, ch 972, § 5; L 1985, ch 43, §§ 4, 5; L 1985, ch 306, §§ 10, 11, applicable to taxable years after Dec 31, 1984; L 1986, ch 535, § 1, applicable to distributions made after April 1, 1987; L 1986, ch 638, § 8; L 1986, ch 639, § 11; L 1987, ch 13, § 14; L 1987, ch 28, §§ 30–63; L 1987, ch 265, § 4; L 1987, ch 267, §§ 13–15; L 1987, ch 817, §§ 57-i—57-k; L 1988, ch 782, § 3; L 1988, ch 783, § 3; L 1989, ch 61, §§ 356, 357, applicable to taxable years beginning on and after Jan 1, 1989; L 1989, ch 114, § 7; L 1989, ch 664, § 1; L 1990, ch 190, §§ 16, 17, 225; L 1990, ch 406, §§ 1, 2; L 1991, ch 166, §§ 2, 3; L 1991, ch 421, § 3; L 1991, ch 428, § 8; L 1992, ch 681, § 7; L 1992, ch 760, §§ 46–49; L 1993, ch 301, § 2; L 1993, ch 374, § 7; L 1993, ch 638, § 4, eff Aug 4, 1993; L 1994, ch 79, § 2; L 1994, ch 170, §§ 42, 43; L 1994, ch 531, § 3; L 1995, ch 81, § 99; L 1996, ch 309, § 215; L 1997, ch 42, § 3, deemed effective for the taxable year beginning January 1, 1996; L 1997, ch 312, § 3; L 1997, ch 389, §§ 57, 59–61 (Part A); L 1997, ch 389, § 3 (Part A); L 1997, ch 546, §§ 6, 7; L 1997, ch 659, § 67; L 1998, ch 56, §§ 89, 98–100 (Part A); L 1999, ch 407, §§ 14, 15 (Part M); L 2000, ch 63, § 5 (Part E); L 2000, ch 535, §§ 7, 8; L 2003, ch 1, § 25 (Part H); L 2003, ch 62, §§ 3, 4 (Part K3); L 2003, ch 62, §§ 4–6 (Part O3); L 2003, ch 62, § 2 (Part U3); L 2003, ch 593, § 3; L 2003, ch 686, §§ 1–3 (Part L); L 2003, ch 686, § 3 (Part M); L 2004, ch 418, § 10, eff Sept 7, 2004; L 2005, ch 58, § 22 (Part C) (repealed, L 2005, ch 63, § 24 (Part E), eff April 12, 2005); L 2006, ch 62, § 1 (Part D), eff April 28, 2006; L 2006, ch 565, § 1; L 2008, ch 57, § 3 (Part HH-1); L 2008, ch 81, § 2; L 2008, ch 603, § 1; L 2009, ch 25, §§ 6, 7 (Part C); L 2011, ch 62, § 104 (Part A), eff Oct 3, 2011; L 2011, ch 525, § 3, eff Sept 23, 2011; L 2013, ch 68, § 10 (Part A), eff June 24, 2013; L 2013, ch 59, § 5 (Part C), eff March 28, 2013; L 2013, ch 59, §§ 4, 5 (Part E), eff March 28, 2013; L 2013, ch 59, § 1 (Part Y), eff March 28, 2013; L 2014, ch 59, § 70 (Part A), eff Jan 1, 2014; L 2014, ch 59, §§ 1, 2 (Part I), eff March 31, 2014; L 2014, ch 59, § 4-a (Part R), eff March 31, 2014; L 2014, ch 59, § 5-a (Part T), eff March 31, 2014; L 2014, ch 59, § 1 (Part KK), eff March 31,

2014; L 2015, ch 59, §§ 1, 3 (Part I), effective April 13, 2015; L 2015, ch 576, §§ 4, 5, effective April 1, 2016; L 2016, ch 120, §§ 4, 5, effective April 1, 2016; L 2017, ch 61, § 3 (Part J), effective July 10, 2017; L 2017, ch 85, § 1 (Part C), effective July 10, 2017; L 2017, ch 334, § 3, effective January 1, 2019; L 2017, ch 456, § 1, effective December 13, 2017; L 2017, ch 472, §§ 2, 3, effective June 16, 2018; L 2018, ch 59, § 2 (Part JJ), effective April 12, 2018; L 2018, ch 379, § 2, effective June 16, 2018.

Editor's Notes Laws 1963, ch 446, §§ 20, 21, provide as follows:

§ 20. The provisions of this act and the deductions and modifications allowed for purposes of the tax law as amended by the preceding sections of this act, shall be given effect for tax purposes only and shall not be taken into consideration or given any effect for the purposes of any state or local law other than the tax law or for the purposes of any regulation promulgated under any other such law.

§ 21. This act shall take effect April first, nineteen hundred sixty-four and shall apply to taxable years commencing on or after April first, nineteen hundred sixty-four.

Laws 1963, ch 921, § 8, eff April 30, 1963, provides as follows:

§ 8. This act shall take effect immediately and shall apply only with respect to taxable years beginning on or after January first, nineteen hundred sixty-three.

Laws 1965, ch 178, § 11, provides:

§ 11. This act shall take effect immediately, but shall apply to taxable years commencing on or after January first, nineteen hundred sixty-five. The net operating loss carryback provisions shall apply to taxable years commencing on or after January first, nineteen hundred sixty-two.

Laws 1970, ch 1005, § 1, eff May 20, 1970, provides as follows:

Section 1. Legislative findings and declaration of purpose. A state's tax system must attempt to treat all taxpayers with fairness and equity. Strong taxpayer interest in greater equity in the tax system stimulated the federal tax reform studies and the enactment of the tax reform act of nineteen hundred sixty-nine. This taxpayer interest, plus the close conformity of the state tax system with the federal tax statutes, suggested that the state's tax structure should be reviewed to determine if greater equity and fairness could be achieved without losing the significant advantages of federal conformity.

It is recommended that the state continue to closely conform with federal statutes to the extent that the state can do so without harm to its fiscal position. Thus, the state should accept those federal tax changes with which the state has automatic conformity and take action to assure continuance of the benefits of procedural tax conformity. In addition, it is recommended that the state adopt the increased federal standard deductions, the first two steps of the increased federal personal exemption, reduce, on a tapered basis, the nonconformity deduction for life insurance premiums, and conform to the federal unrelated business income tax. Other changes would impose a minimum income tax, increase the statutory credit for single persons, and, as a means of conforming to the intent of the new federal low-income allowance, eliminate any tax liability for low-income taxpayers with New York adjusted gross income of less than two thousand dollars in any taxable year.

In summary, it is the purpose of this act to institute a program of tax reform that will bring a greater measure of equity and fairness to the state's tax system and that will also maintain the advantages of federal conformity.

Laws 1972, ch 414, § 6, eff May 22, 1972, provides as follows:

§ 6. Legislative findings. The legislature hereby finds and declares that:

Since September of nineteen hundred sixty-six when nonpublic enrollment reached a zenith of 891,000 pupils, the enrollment of such schools has shown a constant and unmistakable decline. Fewer than 760,000 students were enrolled in September of nineteen hundred seventy-one. The severity of the fiscal crisis confronting nonpublic education threatens to change what has been a gradual transition of pupils into a sudden and precipitous collapse of nonpublic education. Such a collapse would seriously jeopardize the quality of education for all students and worsen an already serious fiscal crisis in the public schools.

Additional financial assistance to public school districts cannot prevent the disruption of the educational process which a massive infusion of new students would precipitate. It can, however, partially alleviate the enormous, and perhaps intolerable, fiscal burden that must be borne by the property taxpayers of school districts. Urban school districts, which contain a majority of the nonpublic school enrollment, are particularly affected, since their ability to raise property tax revenues is curtailed by constitutional tax limits. Therefore, it is declared to be the policy of this State to provide additional financial assistance for those impacted public school districts in accordance with the provision contained herein.

Laws 1973, ch 265, § 2, eff May 1, 1973, provides as follows:

§ 2. This act shall take effect immediately, and any claim for credit or refund of taxes attributable to the provision of paragraph eight-a of subdivision (c) of section six hundred twelve of the tax law, as added by this act, may be filed within two years from the time such member of the armed forces returns to the United States.

Laws 1978, ch 70, § 47, provides as follows:

§ 47. This act shall take effect immediately and, except as otherwise expressly provided by the provisions of the tax law or of the administrative code of the city of New York as herein amended, shall apply to taxable years commencing after December thirty-first, nineteen hundred seventy-seven.

Laws 1983, ch 400, § 22 in part, eff June 30, 1983, provides as follows:

This act shall take effect immediately, except that . . . sections four, five and eight through twelve of this act shall be applicable to taxable years commencing on or after the first day of July, nineteen hundred eighty-three and to that portion of any taxable year commencing prior thereto to the extent of that portion of such year which includes the period which commences with the first day of July, nineteen hundred eighty-three, ...

Laws 1985, ch 43, § 30, eff April 17, 1985, provides as follows:

§ 30. This act shall take effect immediately, provided, however, the provisions of this act with respect to recovery property subject to the provisions of section two hundred eighty-F of the internal revenue code shall apply to taxable years ending after June eighteenth, nineteen hundred eighty-four and, provided further the deletion of the phrase "for which a deduction is allowed under section one hundred sixty-eight of the internal revenue code" in sections three, five, eight, eleven, fourteen, sixteen, nineteen, twenty-one, twenty-five and twenty-eight of this act shall apply to taxable years commencing on or after January first, nineteen hundred eighty-four.

Laws 1987, ch 28, § 1, eff April 20, 1987, provides as follows:

Section 1. Short title. This act shall be known and may be cited as the "Tax Reform and Reduction Act of 1987".

Laws 1987, ch 28, § 107, eff April 20, 1987, provides, in part, as follows:

§ 107. This act shall take effect immediately provided that:

(a) . . . sections thirty-two, thirty-four through thirty-seven, forty, forty-one, forty-five, forty-six, fifty, fifty-two, fifty-four, fifty-eight, sixty-one, . . . shall apply to taxable years beginning after nineteen hundred eighty-six;.

(d) . . . section fifty-five insofar as it applies to paragraph one of subsection (k) of section six hundred twelve of the tax law shall apply to contributions made on or after the effective date of this act; section fifty-five insofar as it applies to paragraph two of subsection (k) of section six hundred twelve of the tax law shall apply to income realized by a qualified higher education fund, and to payments made by such a fund,

in taxable years beginning on or after January first, nineteen hundred eighty-eight; section fifty-five insofar as it applies to paragraph one of subsection (1) of section six hundred twelve of the tax law shall apply to terminations of qualified higher education funds occurring on or after the effective date of this act; section fifty-five insofar as it applies to paragraph two of subsection (1) of section six hundred twelve of the tax law shall apply to taxable years ending on or after the effective date of this act; . . .

(e) . . . sections . . . thirty-eight, thirty-nine, forty-seven and forty-eight shall apply to property to which the amendments made by section two hundred one of Public Law 99-514 apply. . . .;.

(g) The provisions of section thirty-one and forty-three shall apply to taxable years beginning after nineteen hundred eighty-eight; . . . .

(j) . . . sections thirty-three, forty-two, sixty-three, . . . shall apply to taxable years beginning after nineteen hundred eighty-seven. (Amd, L 1987, ch 333, §§ 172, 173, eff April 20, 1987.).

Laws 1987, ch 265, § 12, eff July 20, 1987, provides, in part, as follows:

§ 12. This act shall take effect immediately, provided however, section . . . four . . . of this act, shall apply to taxable years beginning after December thirty-first, nineteen hundred eighty . . . .

Laws 1988, ch 782, § 8, eff Jan 1, 1989, provides as follows:

§ 8. This act shall take effect January first, nineteen hundred eighty-nine, provided however, that in no event shall this act take effect earlier than the beginning of the first full calendar year quarter following forty-five days after the internal revenue service rules that the employee contributions picked up under this act are not includible in the gross income of the employee until distributed or made available to the employee; and this act shall remain in full force and effect only so long as such treatment of employee contributions is authorized pursuant to the provisions of the Internal Revenue Code.

Laws 1989, ch 114, §§ 15, 16, eff May 30, 1989, provide as follows:

§ 15. Nothing contained in this act shall be construed to create any contractual right with respect to members to which it applies. The provisions of this act are intended to afford members the advantages of certain benefits contained in the internal revenue code, and the effectiveness and existence of this act and benefits it confers are completely contingent thereon.

§ 16. This act shall take effect immediately; provided that it shall remain in force and effect only so long as, pursuant to federal law, contributions picked up under this act are not includible as gross income of a member for federal income tax purposes until distributed or made available to the member.

Laws 1989, ch 664, § 3, eff July 21, 1989, provides as follows:

§ 3. This act shall take effect immediately and shall apply to federal pension benefits received in taxable years beginning on or after January 1, 1989; provided, however, that in the event the federal public salary tax act of 1939 or federal law, decisional or legislative, no longer require that federal and state pension benefits be treated equally for purposes for the tax imposed by article 22 of the tax law and the tax authorized pursuant to the authority of article 30 of such law, then the amendments made by sections one and two of this act shall be of no further force and effect except as to federal pension benefits received in taxable years ending prior to the date such change in federal law becomes effective.

Laws 1990, ch 190, § 385(c), (q)(2), eff May 25, 1990, provides as follows:

§ 385. This act shall take effect immediately, provided that:

(c) sections seven through twenty-seven of this act shall apply to taxable years beginning after 1989;.

[(q)] (2) sections two hundred twelve, two hundred twenty-five, two hundred twenty-six, two hundred twenty-seven and two hundred twenty-eight of this act shall apply with respect to the taxes imposed by sections 182, 182-a, 182-b and article 13-A of the tax law, as the case may be, on and after June 1, 1990 and shall not apply with respect to any such taxes accrued prior to such date;.

Laws 1991, ch 166, § 406(a), eff June 12, 1991, provides as follows:

(a) Sections two, four and five of this act shall apply to taxable years beginning after December 31, 1990;.

Laws 1992, ch 681, §§ 15, 16, eff July 31, 1992, provide as follows:

§ 15. Nothing contained in this act shall be construed to create any contractual right with respect to members and employees to which it applies. The provisions of this act are intended to afford members and employees the advantages of certain benefits contained in the internal revenue code, and the effectiveness and existence of this act and benefits it confers are completely contingent thereon.

§ 16. This act shall take effect immediately; provided that it shall remain in force and effect only so long as, pursuant to federal law, contributions picked up under this act are not includible as gross income of a member or employee for federal income tax purposes until distributed or made available to the member or employee.

Laws 1992, ch 760, § 93(j), eff July 31, 1992, provides as follows:

§ 93. This act shall take effect immediately, except that:

(j) sections forty-six and eighty-one of this act shall apply to taxable years of regulated investment companies ending on or after the date of enactment of this act;.

Laws 1993, ch 374, § 15, eff July 21, 1993, provides as follows:

§ 15. This act shall take effect immediately; provided, however, that nothing contained herein shall be deemed to affect the application, qualification, expiration or repeal of any provision of law amended by any section of this act and such provision shall be applied or qualified or shall expire or be deemed repealed in the same manner, to the same extent and on the same date as the case may be as otherwise provided by law.

Laws 1993, ch 638, § 1, eff Aug 4, 1993, provides as follows:

Section 1. Short title. This act may be cited as the "Viatical Settlements Act".

Laws 1994, ch 531, § 12, eff July 26, 1994, provides as follows:

§ 12. This act shall take effect immediately provided, however, that nothing contained herein shall be deemed to affect the application, qualification, expiration or repeal of any provision of law amended by any section of this act and such provision shall be applied or qualified or shall expire or be deemed repealed in the same manner, to the same extent and on the same date as the case may be as otherwise provided by law.

Laws 1995, ch 81, § 246, subs 17 and 17-a, eff June 20, 1995, provides as follows:

§ 246. This act shall take effect immediately, provided that:

17. The commissioners of social services, taxation and finance, health, labor and motor vehicles and any appropriate council shall be authorized to promulgate regulations on an emergency basis to ensure the implementation of this act and may take any steps necessary to implement this act prior to its effective date.

17-a. The provisions of this act shall become effective notwithstanding the failure of the commissioner of health, or the commissioner of social services, or any council to adopt or amend or promulgate regulations implementing this act;.

17-a. The provisions of this act shall become effective notwithstanding the failure of the commissioner of health, or the commissioner of social services, or any council to adopt or amend or promulgate regulations implementing this act;.

Laws 1996, ch 309, §§ 207 and 469, sub 6(e), eff July 13, 1996, provide as follows:

§ 207. Short Title. Sections two hundred seven through two hundred sixteen of this act shall be known and may be cited as "The Farmer's Protection and Farm Preservation Act of 1996."

§ 469. This act shall take effect immediately, provided that:

[6.] (e) sections two hundred seven through two hundred sixteen of this act shall apply to taxable years beginning on or after January 1, 1997;.

Laws 1997, ch 389, § 219 (Part A), subs (2) and (8), eff Aug 7, 1997, provides as follows:

§ 219. This act shall take effect immediately, provided, that:

(2) the provisions of sections three and six of this act, section seven of this act excepting that portion of such section which repeals article 26-A of the tax law, sections nine through fifteen, seventeen through twenty-four, twenty-six, twenty-seven and thirty-one through thirty-four of this act and section thirty-five of this act except to the extent such section is applicable to article 26-A of the tax law as repealed by section seven of this act shall take effect February 1, 2000, and shall apply to estates of decedents dying on or after February 1, 2000;.

(8) sections fifty-six through seventy-eight of this act shall apply to taxable years beginning after December 31, 1996;.

Laws 1997, ch 312, § 11, eff July 29, 1997, provides as follows:

§ 11. This act shall take effect immediately and shall apply to contributions to, and distributions from, the Manhattan and Bronx surface transportation authority pension plan made in taxable years beginning on or after January 1, 1997, provided that the amendments made to any provision of law by this act shall not affect the expiration and repeal of such provision and shall expire therewith as provided by law.

Laws 1997, ch 546, §§ 1 and 2, eff Sept 10, 1997, provide as follows:

Section 1. Short title. This act shall be known and may be cited as the "New York state college choice tuition savings program act".

§ 2. Legislative declaration. It is hereby declared that for the benefit of the people of New York state and for the prosperity and welfare of future generations, the state should establish and maintain a college choice tuition savings program to provide our youth and their families with the fullest opportunity to afford the costs of attending institutions of higher education. It is recognized that promoting savings as one of many tools to help families meet their higher education expenses is in the best interest of the state. It is further recognized that fostering higher education to provide well-educated citizens, while assuring the ability of students to choose which institution of higher education within New York state is best for them to attend, serves the best interests of the state. Furthermore, it is the intent of this act to promote the economic development of the state by creating opportunities for a highly educated workforce.

Laws 1997, ch 659, §§ 1 and 2, eff Sept 24, 1997, provide as follows:

Section 1. Legislative purpose. The purpose of this act is to facilitate the creation of the necessary components for the development of a broader and more integrated continuum of long term care, financed by a range of private, public and public/private options.

§ 2. This act may be cited as the "Long Term Care Integration and Finance Act of 1997".

Laws 1997, ch 659, § 97, eff Sept 24, 1997, provide as follows:

§ 97. This act shall take effect immediately, provided, however, that the amendments to subdivision 4 of section 854 of the general municipal law made by section seventy of this act shall not affect the expiration of such subdivision and shall be deemed to expire there with and provided further that sections sixty seven and sixty-eight of this act shall apply to taxable years beginning on or after January 1, 1998 and provided further that sections eighty one through eighty-seven of this act shall expire and be deemed repealed on December 31, 2024 and provided further, however, that the amendments to section ninety of this act shall take effect January 1, 1998 and shall apply to all policies, contracts, certificates, riders or other evidences of coverage of long term care insurance issued, renewed, altered or modified pursuant to section 3229 of the insurance law on or after such date (Amd, L 2006, ch 57, § 65-b (Part A), eff April 12, 2006, deemed eff on and after April 1, 2006; L 2015, ch 57, § 20 (Part D), eff April 13, 2015; L 2018, ch 57, § 11 (Part Z), eff April 12, 2018).

Laws 1998, ch 56, § 124 (Part A), subs 24 and 29, eff April 28, 1998, provide as follows:

§ 124. This act shall take effect immediately; provided, however, that:

24. The amendments made to section 612 of the tax law by section eighty-nine of this act and the amendments made to section 11-1712 of the administrative code of the city of New York by section ninety of this act shall apply to all taxable years commencing on and after January 1, 1995, provided, further, the amendments made to section 954 of the tax law by section ninety-one of this act shall be deemed to have been in full force and effect on and after April 1, 1963, and shall expire and be deemed repealed February 1, 2000.

29. Sections ninety-eight through one hundred six of this act shall take effect immediately, and shall apply to investments acquired on or after April 1, 1998.

Laws 1999, ch 407, § 20 (Part M), eff Aug 9, 1999, provides as follows:

§ 20. This act shall take effect immediately and shall apply to taxable years beginning on or after January 1, 1997. (Amd, L 2000, ch 63, § 1 (Part H), eff May 15, 2000.).

Laws 2000, ch 535, § 9, eff Oct 4, 2000, provides as follows:

§ 9. This act shall take effect immediately, provided however, that sections seven and eight of this act shall apply to taxable years beginning after December 31, 1999.

Laws 2003, ch 1, § 31 (Part H), provides as follows:

§ 31. The tax credits allowed under section 22 or 23 of the tax law and the corresponding provisions in articles 9, 9-A, 22 and 33 of the tax law, as added by the provisions of sections one through twenty-nine of this act, shall not be applicable to any site accepted into the brownfield cleanup program on and after July 1, 2015 or the date of publication in the state register of proposed regulations defining "underutilized" as provided in subdivision 30 of section 27-1405 of the environmental conservation law, whichever shall be later. The tax credits allowed under section 21 of the tax law and the corresponding provisions in articles 9, 9-A, 22 and 33 of the tax law, as added by the provisions of sections one through twenty-nine of this act, shall not be applicable to any site accepted into the brownfield cleanup program after December 31, 2022, provided, however that any sites accepted on or before December 31, 2022 must have received the certificate of completion required to qualify for any of such credits on or before March 31, 2026.(Amd, L 2012, ch 474, § 1, eff Oct 3, 2012; L 2015, ch 56, § 32 (Part BB), eff July 1, 2015.).

Laws 2003, ch 1, § 33 (Part H), provides as follows:

§ 33. This act shall take effect immediately, except that sections one through twenty-nine of this act shall apply to taxable years beginning on or after April 1, 2005; provided, however, that the IMB credit for energy taxes under subsection (t-1) of section 606 of the tax law contained in sections four, fifteen and twenty-three of this act shall expire on the same date as provided in subdivision (a) of section 49 of part Y of chapter 63 of the laws of 2000. Where any provision of this act provides that a credit shall be allowed for the taxable year in which the effective date of the certificate of completion occurs or a credit shall be allowed for the taxable year in which certain property is placed in service, where the effective date of the certificate of completion or the date the property is placed in service occurs prior to a taxable year beginning on or after April 1, 2005, for purposes of being allowed a credit, such effective date of the certificate of completion and such date the property is placed in service shall be treated as if such date occurred in the first taxable

year occurring on or after April 1, 2005. (Amd, L 2004, ch 577, § 12 (Part H), eff Oct 5, 2004.).

Laws 2003, ch 62, § 5 (Part K3), eff May 15, 2003, provides as follows:

§ 5. This act shall take effect immediately and shall apply to taxable years beginning on and after January 1, 2003.

Laws 2003, ch 62, § 13 (Part O3), eff May 15, 2003, provides as follows:

§ 13. This act shall take effect immediately and shall apply to taxable years on or after January 1, 2003.

Laws 2003, ch 62, § 12 (Part U3), eff May 15, 2003, provides as follows:

§ 12. This act shall take effect immediately and shall apply to taxable years beginning on and after January 1, 2003.

Laws 2003, ch 686, § 28 (Part M), eff Oct 21, 2003, provides as follows:

§ 28. This act shall take effect immediately and shall apply to taxable years beginning on or after January 1, 2003.

Laws 2004, ch 418, § 15, eff Sept 7, 2004, provides as follows:

§ 15. This act shall take effect immediately; provided, that the amendments to subdivision 1 of section 210 of the military law made by section five of this act shall be deemed to have been in full force and effect on and after April 1, 2004; provided, however, that section ten of this act shall apply to taxable years beginning on or after January 1, 2004; provided, further, that section eleven of this act shall take effect June 1, 2004, and shall apply to sales made, uses occurring and services rendered on or after such date, in accordance with applicable transitional provisions in sections 1106 and 1217 of the tax law provided further, however, that section thirteen of this act shall expire and be deemed repealed one year after it shall have become a law.

Laws 2006, ch 62 as re-passed by the Legislature over the Governor's veto, § 2 (Part D), eff April 28, 2006, provides as follows:

§ 2. This act shall take effect immediately and shall apply to taxable years beginning on or after January 1, 2004.

Laws 2006, ch 565, § 2, eff Aug 16, 2006, provides as follows:

§ 2. This act shall take effect immediately and shall apply to taxable years beginning on or after the first of January next succeeding the date on which it shall have become a law.

Laws 2008, ch 57, § 13 (Part HH-1), eff April 23, 2008, provides as follows:

§ 13. This act shall take effect immediately and apply to taxable years beginning on or after January 1, 2008; provided, however, that the amendments to subsection 4 of section 618 of the tax law made by section four of this act shall expire on the same date as such subsection expires, when upon such date the provisions of section five of this act shall take effect; provided, further, that the amendments to subdivision 4 of section 11-1718 of the administrative code of the city of New York made by section eleven of this act shall expire on the same date as such subdivision expires, when upon such date the provisions of section twelve of this act shall take effect.

Laws 2008, ch 603, § 2, eff Sept 25, 2008, provides as follows:

§ 2. This act shall take effect immediately and shall apply to taxable years commencing after December 31, 2007.

Laws 2009, ch 25, § 1, eff May 7, 2009, provides as follows:

Section 1. Legislative findings and declaration of purpose. 1. Mass transportation services in the metropolitan commuter transportation district ("MTA district") are essential to meeting the basic mobility and economic needs of the citizens of the MTA district, the state and the region. The contributions of such mass transportation services are also essential to addressing fundamental environmental policy and social needs of the state's residents.

2. The metropolitan transportation authority must continue to function as the primary provider of reasonably priced, safe and reliable mass transportation services in the MTA district.

3. It is of vital importance to the ability of the metropolitan transportation authority to meet the continued need for mobility and for the economic health of the MTA district that additional dedicated sources of reliable funding be made promptly available.

4. Such funding is needed to ensure the continuation of reasonable fares and provide for the continuation of the capital program of the authority to ensure the ongoing rehabilitation, improvement and expansion of the mass transit system.

5. It is the intent of the governor and legislature to continue to fund the capital program of the metropolitan transportation authority as well as other transportation needs of the state including highways and bridges, non-MTA transit, passenger and freight rail and aviation and port facilities on a multi-year basis.

6. It is the intent of the governor and the legislature to address the capital needs of the department of transportation including highways and bridges, non-MTA transit, passenger and freight rail and aviation and port facilities at the same time and for the same duration as the next MTA capital program. The governor and the legislature request that the department of transportation begin the development of such a program immediately and provide the legislature with an outline of the objectives of the program and the performance measures that will be used to determine investment in transportation in the state for the next multiyear capital program by October 1, 2009.

Laws 2011, ch 525, § 7, eff Sept 23, 2011, provides as follows:

§ 7. This act shall take effect at the beginning of the first payroll period following sixty days after the retirement system covered by this act shall receive an Internal Revenue Service ruling stating that the employee contributions covered by this act are not includible in the gross income of the employee until distributed or made available to the employee and shall remain in full force and effect only as long as such treatment of such employee contributions is authorized pursuant to the provisions of the Internal Revenue Code; provided that the state comptroller shall notify the legislative bill drafting commission upon the occurrence of such ruling and upon any change in the provisions of the Internal Revenue Code affecting the provisions of this act in order that the commission may maintain an accurate and timely effective data base of the official text of the laws of the state of New York in furtherance of effecting the provisions of section 44 of the legislative law and section 70-b of the public officers law; provided further, however, that the amendments to subdivision f of section 517 of the retirement and social security law, paragraph 26 of subsection (b) of section 612, subparagraph (B) of paragraph 2 of subsection (b) of section 671 and subsection (c) of section 1 of subsection (c) of section 1340 of the tax law made by sections two, three, four and five of this act shall not affect the expiration of such provisions and shall be deemed to expire therewith.

Laws 2013, ch 59, § 13 (Part E), eff March 28, 2013, provides as follows:

§ 13. This act shall take effect immediately and shall apply to taxable years beginning on or after January 1, 2013.

Laws 2014, ch 59, § 113 (Part A), eff Jan 1, 2015, provides as follows:

§ 113. This act shall take effect January 1, 2015 and shall apply to taxable years commencing on or after such date; provided that the amendments to section 25 of the tax law made by section forty-three of this act shall not affect the repeal of such section and shall be deemed repealed therewith; provided, further, that the amendments to the opening paragraph of subdivision (a), subparagraph (C) of paragraph 2 of subdivision (e) and subdivision (f) of section 35 of the tax law made by section fifty of this act shall not affect the repeal of such provisions and shall be deemed repealed therewith; provided, further, that the amendments to clause (xxxii) of subparagraph (B) of paragraph 1 of subsection (i) of section 606 of the tax law made by section sixty-eight of this act shall not affect the repeal of such clause and shall be deemed

repealed therewith; provided, further, that the amendments to clause (xxxiii) of subparagraph (B) of paragraph 1 of subsection (i) of section 606 of the tax law made by section sixty-eight of this act shall not affect the repeal of such clause and shall be deemed repealed therewith; and provided, further, that the amendments to clause (ii) of subparagraph (B) of paragraph 2 of subsection (q), paragraph 3 of subsection (s) and the closing paragraph of paragraph 1 of subsection (t) of section 1085 of the tax law made by section eighty-one of this act shall not affect the repeal of such provisions and shall be deemed repealed therewith.

Laws 2014, ch 59, § 9 (Part I), eff March 31, 2014, provides as follows:

§ 9. This act shall take effect immediately and shall apply to taxable years beginning on or after January 1, 2014, provided that sections one and six of this act shall not apply to income of a nonresident trust or an exempt resident trust paid to a beneficiary before June 1, 2014, and sections two and seven of this act shall not apply to income from a trust that is liquidated before June 1, 2014.

Laws 2014, ch 59, § 10 (Part R), eff March 31, 2014, provides as follows:

§ 10. This act shall take effect immediately and shall apply to taxable years beginning on or after January 1, 2014 provided that sections one, two, three, five, six, seven, eight and nine of this act shall expire December 31, 2014 when upon such date such provisions shall be deemed repealed.

Laws 2014, ch 59, § 6 (Part T), eff March 31, 2014, provides as follows:

§ 6. This act shall take effect immediately and shall apply to taxable years beginning on or after January 1, 2014; provided that sections two, two-b, three and five of this act shall expire December 31, 2014, when upon such date such provisions shall be deemed repealed.

Laws 2014, ch 59, § 3 (Part KK), eff March 31, 2014, provides as follows:

§ 3. This act shall take effect immediately and shall apply to taxable years beginning on and after January 1, 2014.

Laws 2015, ch 59, § 11 (Part I), subs (i) and (ii), eff April 13, 2015, provides:

§ 11. This act shall take effect immediately, provided, however that:

(i) sections one and two of this act shall be deemed to have been in full force and effect on and after the effective date of part KK of chapter 59 of the laws of 2014;

(ii) sections four and five of this act shall be deemed to have been in full force and effect on and after the effective date of part K of chapter 59 of the laws of 2014, provided, however, that the amendments to subsection (e-1) of section 606 of the tax law made by sections four and five of this act shall not affect the repeal of such subsection and shall be deemed repealed therewith;

Laws 2015, ch 576, §§ 1, 2 and 8, eff April 1, 2016, provide:

Section 1. This act shall be known and may be cited as the "New York achieving a better life experience (NY ABLE) act".

§ 2. Legislative intent. The legislative intent of this act is to encourage and assist individuals and families in saving private funds for the purpose of supporting individuals with developmental disabilities to maintain health, independence and quality of life; and to provide secure funding for disability related expenses on behalf of designated beneficiaries with intellectual or developmental disabilities that will supplement, but not supplant, benefits provided through existing sources.

§ 8. This act shall take effect April 1, 2016; provided, however, that effective immediately, the addition, amendment and/or repeal of any rules or regulations necessary for the implementation of this act on its effective date are authorized and directed to be made and completed on or before such effective date.

Laws 2017, ch 61, § 4 (Part J), eff July 10, 2017, provides:

§ 4. This act shall take effect on the same date and in the same manner as a chapter of the laws of 2017, relating to creating the Lake Ontario-St. Lawrence Seaway flood recovery and International Joint Commission Plan 2014 mitigation grant program, as proposed in legislative bill numbers S.6783 and A.8013-A, takes effect; provided that:

1. Section two of this act shall take effect on the same date and in the same manner as part A of a chapter of the laws of 2017, relating to creating the Lake Ontario-St. Lawrence Seaway flood recovery and International Joint Commission Plan 2014 mitigation grant program, as proposed in legislative bill numbers S.6783 and A.8013-A, takes effect;

2. Section three of this act shall take effect on the same date and in the same manner as part C of a chapter of the laws of 2017, relating to creating the Lake Ontario-St. Lawrence Seaway flood recovery and International Joint Commission Plan 2014 mitigation grant program, as proposed in legislative bill numbers S.6783 and A.8013-A, takes effect.

Laws 2017, ch 85, § 2 (Part C), eff July 10, 2017, provides:

§ 2. This act shall take effect immediately and shall apply to taxable years beginning on or after January 1, 2017.

Laws 2017, ch 334, §§ 1, 4, eff Jan 1, 2019, provide:

Section 1. Short title. This act shall be known and may be cited as the "New York State Volunteer Firefighter Enhanced Cancer Disability Benefits Act".

§ 4. This act shall take effect January 1, 2019; provided, however, that effective immediately, the addition and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized and directed to be made and completed on or before such effective date; and provided further, however, that the regulations required pursuant to subdivision 7 of section 205-cc of the general municipal law as added by section two of this act shall be finalized no later than June 1, 2018.

Laws 2017, ch 456, § 2, eff December 13, 2017, provides:

§ 2. This act shall take effect immediately and shall apply to the taxable year in which it takes effect and to subsequent taxable years.

Laws 2017, ch 472, § 4, eff June 16, 2018, provides:

§ 4. This act shall take effect on the one hundred eightieth day after it shall have become a law, and shall apply to taxable years commencing on or after the first of January next succeeding the date on which it shall have become law; provided, however, that effective immediately, the commissioner of taxation and finance and the comptroller are authorized and directed to promulgate any rules or regulations necessary to implement the provisions of this act on its effective date on or before such date.

Laws 2018, ch 59, § 7 (Part JJ), eff April 12, 2018, provides:

§ 7. This act shall take effect immediately and shall apply to taxable years beginning on or after January 1, 2018.

Laws 2018, ch 379, § 5, eff December 7, 2018, provides:

§ 5. This act shall take effect immediately; provided, however, that sections one and two of this act shall take effect on the same date and in the same manner as chapter 472 of the laws of 2017 takes effect.

Subsection History: Sub (b), par (1), amd, L 1970, ch 1005, § 28, eff May 20, 1970, applicable to taxable interest income from obligations issued on or after Oct. 9, 1969, which is includible in federal adjusted gross income or federal gross income in taxable years ending on or after Oct 9, 1969.

Sub (b), par (3), paragraph heading, add, L 1991, ch 166, § 2, eff June 12, 1991 (see 1991 note below).

Sub (b), par (3), subpar (A), formerly sub (b), par (3), so designated and amd, L 1991, ch 166, § 2, eff June 12, 1991 (see 1991 note below).

Sub (b), par (3), subpar (B), add, L 1991, ch 166, § 2 (see 1991 note below); amd, L 1997, ch 389, § 57 (Part A), eff Aug 7, 1997 (see 1997 note below)L 2014, ch 59, § 70 (Part A), eff Jan 1, 2014 (see 2014 note below).

Sub (b), par (4), amd, L 1990, ch 406, § 1, eff July 10, 1990.

Sub (b), par (5), add, L 1963, ch 921, § 1, eff April 30, 1963.

Another sub (b), par (5), add, L 1963, ch 446, § 10; renumbered sub (b), par (6), L 1965, ch 178, § 4, eff May 12, 1965.

Sub (b), par (6), formerly sub (b), par (5), add, L 1963, ch 446, § 10; renumbered as par (6) and amd, L 1965, ch 178, § 4, eff May 12, 1965.

Sub (b), par (7), add, L 1970, ch 974, § 6; amd, L 1981, ch 358, § 1, L 1981, ch 1043, § 11, L 1983, ch 648, § 5, L 1987, ch 28, § 30, eff April 20, 1987.

Former sub (b), par (8), add, L 1970, ch 974, § 5; amd, L 1983, ch 648, § 6; repealed, L 1987, ch 28, § 31, eff April 20, 1987 (see 1987 note below).

Sub (b), par (8), add, L 2003, ch 62, § 4 (Part O3) (see 2003 note below); amd, L 2003, ch 686, § 1 (Part L), eff May 15, 2003.

Sub (b), par (9), add, L 1970, ch 974; amd, L 1983, ch 648, § 6; repealed, L 1987, ch 28, § 32, eff April 20, 1987 (see 1987 note below).

Sub (b), par (10), add, L 1972, ch 1, § 9, eff Jan 4, 1972, and applicable to all taxable years beginning on or after Jan 1, 1972.

Sub (b), par (11), add, L 1972, ch 1, § 9; amd, L 1981, ch 103, § 41; repealed, L 1987, ch 28, § 32, eff April 20, 1987 (see 1987 note below).

Sub (b), par (12), add, L 1975, ch 771, § 1; repealed, L 1977, ch 713, § 2, eff Aug 5, 1977.

Sub (b), par (13), add, L 1977, ch 675, § 61; repealed, L 1987, ch 28, § 32, eff April 20, 1987 (see 1987 note below).

Sub (b), par (14), add, L 1978, ch 70, § 9; repealed, L 1987, ch 28, § 33, eff April 20, 1987 (see 1987 note below).

Sub (b), par (15), add, L 1978, ch 788, § 26; amd, L 1986, ch 638, § 8, L 1987, ch 13, § 14, eff March 31, 1987.

Sub (b), par (16), add, L 1978, ch 788, § 26; amd, L 1981, ch 103, § 36, L 1986, ch 638, § 8, L 1987, ch 28, § 34, eff April 20, 1987 (see 1987 note below).

Sub (b), par (17), add, L 1981, ch 103, § 51, eff May 15, 1981.

Sub (b), par (18), add, L 1981, ch 103, § 27, eff May 15, 1981, applicable to taxable years commencing on or after Jan 1, 1981.

Sub (b), par (18), opening par, amd, L 1984, ch 606, § 8, eff July 27, 1984, and applicable to taxable years beginning after December 31, 1982.

Sub (b), par (18), subpar (A), formerly part of par (18), so designated and amd, L 1984, ch 606, § 8; amd, L 1987, ch 28, § 35, eff April 20, 1987 (see 1987 note below).

Sub (b), par (18), subpar (B), add, L 1984, ch 606, § 8 and applicable to taxable years beginning after December 31, 1982; amd, L 1990, ch 190, § 16, eff May 25, 1990 (see 1990 note below).

Sub (b), par (19), add, L 1981, ch 103 § 27, eff May 15, 1981, and applicable to taxable years commencing on or after Jan 1, 1981.

Sub (b), par (19), opening par, amd, L 1984, ch 606, § 8, eff July 27, 1984, and applicable to taxable years beginning after December 31, 1982.

Sub (b), par (19), subpar (A), formerly part of par (19), so designated and amd, L 1984, ch 606, § 8; amd, L 1987, ch 28, § 36, eff April 20, 1987 (see 1987 note below).

Sub (b), par (19), subpar (B), add, L 1984, ch 606, § 8 and applicable to taxable years beginning after December 31, 1982; amd, L 1990, ch 190, § 16, eff May 25, 1990 (see 1990 note below).

Sub (b), par (20), add, L 1981, ch 103, § 27; amd, L 1981, ch 1043, § 12, L 1984, ch 606, § 8, eff July 27, 1984, and applicable to taxable years beginning after December 31, 1982.

Sub (b), par (21), add, L 1981, ch 103, § 27; amd, L 1984, ch 606, § 8, L 1987, ch 28, § 37 (see 1987 note below), L 1997, ch 389, § 59 (Part A), eff Aug 7, 1997 (see 1997 note below) L 2014, ch 59, § 70 (Part A), eff Jan 1, 2014 (see 2014 note below).

Sub (b), par (22), add, L 1981, ch 103, § 7; amd, L 1981, ch 1043, § 13, eff Nov 11, 1981, and applicable to taxable years commencing on or after Jan 1, 1982.

Sub (b), par (23), add, L 1982, ch 55, § 16; amd, L 1983, ch 15, § 73, L 1985, ch 43, § 4, eff April 17, 1985.

Sub (b), par (24), add, L 1982, ch 55, § 16; amd, L 1983, ch 15, § 73, L 1985, ch 43, § 4, eff April 17, 1985.

Sub (b), par (25), add, L 1982, ch 55, § 16; amd, L 1983, ch 15, § 73, L 1985, ch 43, § 4 (see 1985 note below), L 1987, ch 28, § 38 (see 1987 note below), L 1994, ch 170, § 42, eff June 9, 1994.

Sub (b), par (26), add, L 1988, ch 782, § 3 (see 1988 note below); amd, L 1988, ch 783, § 3, L 1989, ch 114, § 7 (see 1989 note below), L 1992, ch 681, § 7 (see 1992 note below), L 2011, ch 525, § 3, eff Sept 23, 2011 (see 2011 note below).

Former sub (b), par (26), add, L 1982, ch 547, § 3; repealed, L 1985, ch 306, § 10, eff Dec 31, 1984, and applicable to taxable years after Dec 31, 1984.

Sub (b), par (26-a), add, L 1997, ch 312, § 3, eff July 29, 1997 (see 1997 note below).

Sub (b), par (27), add, L 1983, ch 15, § 74; amd, L 1987, ch 28, § 39, eff April 20, 1987 (see 1987 note below).

Sub (b), par (28), add, L 1983, ch 400, § 9 (see 1983 note below); repealed, L 1990, ch 190, § 225, eff May 25, 1990 (see 1990 note below).

Sub (b), par (29), add, L 1987, ch 265, § 4, eff July 20, 1987 (see 1987 note below).

Sub (b), par (30), add, L 1989, ch 61, § 356 and applicable to taxable years beginning on and after Jan 1, 1989; repealed, L 1999, ch 407, § 14 (Part M), eff Aug 9, 1999 (see 1999 note below).

Sub (b), par (31), add, L 1991, ch 421, § 3; amd, L 1993, ch 301, § 2, L 1994, ch 79, § 2, eff May 2, 1994, deemed eff July 21, 1993.

Sub (b), par (32), add, L 1993, ch 374, § 7 (see 1993 note below); amd, L 1994, ch 531, § 3, eff July 26, 1994 (see 1994 note below).

Sub (b), par (33), add, L 1996, ch 309, § 215, eff July 13, 1996 (see 1996 note below).

Sub (b), par (34), add, L 1997, ch 546, § 6 (see 1997 note below); redesignated sub (b), par (34), subpars (A) and (B), L 2000, ch 535, § 7, eff Oct 4, 2000 (see 2000 note below).

Sub (b), par (34), subpar (A), formerly part of sub (b), par (34), so designated sub (b), par (34), subpar (A) and amd, L 2000, ch 535, § 7, eff Oct 4, 2000 (see 2000 note below).

Sub (b), par (34), subpar (B), amd, L 2003, ch 593, § 3, eff Sept 22, 2003.

Sub (b), par (34), subpar (B), cl (i), formerly part of sub (b), par (34), so designated sub (b), par (34), subpar (B), cl (i) and amd, L 2000, ch 535, § 7, eff Oct 4, 2000 (see 2000 note below); amd, L 2003, ch 593, § 3, eff Sept 22, 2003.

Sub (b), par (34), subpar (B), cl (i), subcl (I), formerly part of sub (b), par (34), so designated sub (b), par (34), subpar (B), cl (i), subcl (I) and amd, L 2000, ch 535, § 7 (see 2000 note below); amd, L 2003, ch 593, § 3, eff Sept 22, 2003.

Sub (b), par (34), subpar (B), cl (i), subcl (II), add, L 2000, ch 535, § 7 (see 2000 note below); amd, L 2003, ch 593, § 3, eff Sept 22, 2003.

Sub (b), par (34), subpar (B), cl (i), subcl (III), add, L 2003, ch 593, § 3, eff Sept 22, 2003.

Sub (b), par (34), subpar (B), cl (ii), add, L 2000, ch 535, § 7, eff Oct 4, 2000 (see 2000 note below).

Sub (b), par (35), add, L 1998, ch 56, § 99 (Part A), eff April 28, 1998 (see 1998 note below).

Sub (b), par (36), add, L 2003, ch 62, § 3 (Part K3), eff May 15, 2003 (see 2003 note below).

Sub (b), par (37), add, L 2003, ch 1, § 25 (Part H), eff as stated in 2003 note below.

Sub (b), par (38), add, L 2008, ch 57, § 3 (Part HH-1), eff April 23, 2008 (see 2008 note below).

Sub (b), par (39), add, L 2009, ch 25, § 6 (Part C), eff May 7, 2009 (see 2009 note below).

Sub (b), par (39-a), add, L 2014, ch 59, § 5-a (Part T), eff March 31, 2014 (see 2014 note below).

Sub (b), par (40) [first setout], add, L 2014, ch 59, § 1 (Part I), eff March 31, 2014 (see 2014 note below).

Sub (b), par (40) [second setout], add, L 2014, ch 59, § 4-a (Part R), eff March 31, 2014 (see 2014 note below).

Sub (b), par (41), add, L 2014, ch 59, § 1 (Part T), eff March 31, 2014 (see 2014 note below).

Sub (c), par (1), amd, L 1986, ch 535, § 1 and applicable to distributions made after April 1, 1987, L 1992, ch 760, § 46, eff July 31, 1992 (see 1992 note below).

Sub (c), par (3), subpar (i), formerly entire par, so designated, L 1989, ch 664, § 1, eff July 21, 1989 (see 1989 note below).

Sub (c), par (3), subpar (ii), add, L 1989, ch 664, § 1, eff July 21, 1989 (see 1989 note below).

Sub (c), par (3-a), add, L 1981, ch 103, § 60; amd, L 1981, ch 1043, § 14, eff Nov 11, 1981, and applicable to taxable years commencing on or after Jan 1, 1982, L 1992, ch 760, § 47, eff July 31, 1992.

Sub (c), par (3-b), add, L 1984, ch 961, § 1, eff Aug 6, 1984, and applicable to disability income received in taxable years commencing after Dec 31, 1983.

Former sub (c), par (3-b), relettered sub (c), par (3-c), L 1984, ch 961, § 1, eff Aug 6, 1984, and applicable to disability income received in taxable years commencing after Dec 31, 1983.

Sub (c), par (3-b), subpar (i), amd, L 1987, ch 28, § 40, eff April 20, 1987 (see 1987 note below).

Sub (c), par (3-b), subpar (ii), amd, L 1987, ch 28, § 40, eff April 20, 1987 (see 1987 note below).

Sub (c), par (3-c), formerly sub (c), par (3-b), add, L 1984, ch 71, § 1, relettered sub (c), par (3-c), L 1984, ch 961, § 1, eff Aug 6, 1984, and applicable to disability income received in taxable years commencing after Dec 31, 1983.

Sub (c), par (4), amd, L 1972, ch 1, § 10, L 1981, ch 103, § 42, L 1987, ch 28, § 41, (see 1987 note below), L 1987, ch 267, § 13, eff July 20, 1987.

Sub (c), par (5), amd, L 1961, ch 363, § 1, L 1987, ch 267, § 14, eff July 20, 1987.

Sub (c), par (7), amd, L 2009, ch 25, § 7 (Part C), eff May 7, 2009 (see 2009 note below).

Sub (c), par (8), add, L 1961, ch 974, § 1; amd, L 1964, ch 528, § 3, eff April 10, 1964.

Sub (c), par (8-a), add, L 1973, ch 265, § 1, eff May 1, 1973.

Sub (c), par (8-b), add, L 2004, ch 418, § 10 (see 2004 note below); amd, L 2006, ch 62 as re-passed by the Legislature over the Governor's veto, § 1 (Part D), eff April 28, 2006 (see 2006 note below).

Sub (c), par (8-c), add, L 2008, ch 603, § 1, eff Sept 25, 2008 (see 2008 note below).

Sub (c), par (9), add, L 1963, ch 921, § 2; amd, L 1990, ch 406, § 2, eff July 10, 1990.

Another sub (c), par (9), add, L 1962, ch 446, § 11; renumbered sub (c), par (11), L 1965, ch 178, eff May 12, 1965.

Sub (c), par (10), add, L 1963, ch 921, § 2, eff April 30, 1963.

Sub (c), par (11), formerly sub (c), par (9), add, L 1963, ch 446, § 11; renumbered as sub (c), par (11) and amd, L 1965, ch 178, eff May 12, 1965.

Sub (c), par (12), add, L 1970, ch 974, eff May 19, 1970, and applicable to all taxable years ending after Dec 31, 1969.

Sub (c), par (13), add, L 1972, ch 1, § 11, eff Jan 4, 1972, and applicable to all taxable years beginning on or after January 1, 1972.

Sub (c), par (14), add, L 1972, ch 414, § 4, eff May 22, 1972, and applicable to all taxable years beginning after Dec 31, 1971.

Sub (c), par (15), add, L 1978, ch 33, § 2, eff Mar 28, 1978, and applicable to taxable years beginning after Dec 31, 1976.

Another sub (c), par (15), add, L 1978, ch 70, § 9; renumbered sub (c), par (16), L 1978, ch 729, § 6, eff Aug 7, 1978, and applicable to taxable years commencing after Dec 31, 1977.

Former sub (c), par (16), added as sub (c), par (15), L 1978, ch 70, § 9; renumbered sub (c), par (16), L 1978, ch 729, § 6; repealed, L 1987, ch 28, § 42, eff April 20, 1987 (see 1987 note below).

Sub (c), par (16), add, L 2003, ch 62, § 5 (Part O3) (see 2003 note below); amd, L 2003, ch 686, § 2 (Part L), eff May 15, 2003.

Sub (c), par (17), formerly sub (c), par (16), add, L 1978, ch 70, § 9; renumbered sub (c), par (17), L 1978, ch 729, § 6; repealed L 1987, ch 28, § 43, eff April 20, 1987 (see 1987 note below).

Sub (c), par (18), formerly sub (c), par (17), add, L 1978, ch 70, § 9; renumbered sub (c), par (18), L 1978, ch 729, § 6; repealed, L 1987, ch 28, § 44, eff April 20, 1987.

Sub (c), par (19), add, L 1981, ch 103, § 52, eff May 15, 1981; repealed, L 2013, ch 59, § 4 (Part E), eff March 28, 2013 (see 2013 note below).

Sub (c), par (20), add, L 1981, ch 103, § 2, eff May 15, 1981, and applicable to new business investments made on or after July 1, 1981.

Sub (c), par (21), add, L 1981, ch 103, § 28; amd, L 1984, ch 606, § 9, L 1987, ch 28, § 45, eff April 20, 1987 (see 1987 note below), L 1997, ch 389, § 60 (Part A), eff Aug 7, 1997 (see 1997 note below), L 2014, ch 59, § 70 (Part A), eff Jan 1, 2014 (see 2014 note below).

Sub (c), par (22), add, L 1981, ch 103, § 28; amd, L 1981, ch 1043, § 15, eff Nov 11, 1981, and applicable to taxable years commencing on or after Jan 1, 1981.

Sub (c), par (22), opening par, amd, L 1984, ch 606, § 9, eff July 27, 1984, and applicable to taxable years beginning after December 31, 1982.

Sub (c), par (22), subpar (A), formerly part of par (22), so designated and amd, L 1984, ch 606, § 9; amd, L 1987, ch 28, § 46, eff April 20, 1987 (see 1987 note below).

Sub (c), par (22), subpar (B), add, L 1984, ch 606, § 9, eff July 27, 1984, and applicable to taxable years beginning after December 31, 1982; amd, L 1990, ch 190, § 16, eff May 25, 1990 (see 1990 note below).

Sub (c), par (23), add, L 1981, ch 103, § 8, eff May 15, 1981, and applicable to taxable years commencing on or after Jan 1, 1982.

Sub (c), par (24), add, L 1982, ch 55, § 17; amd, L 1983, ch 15, § 75, L 1985, ch 43, § 5, eff April 17, 1985.

Sub (c), par (25), add, L 1982, ch 55, § 17; amd, L 1983, ch 15, § 75, L 1985, ch 43, § 5, eff April 17, 1985.

Sub (c), par (26), add, L 1982, ch 55, § 17; amd, L 1983, ch 15, § 75, L 1985, ch 43, § 5 (see 1985 note below), L 1987, ch 28, § 47, eff April 20, 1987 (see 1987 note below), L 1994, ch 170, § 43, eff June 9, 1994.

Sub (c), par (27), add, L 1982, ch 547, § 4; repealed, L 1985, ch 306, § 11, eff Dec 31, 1984.

Sub (c), par (28), add, L 1983, ch 15, § 76; amd, L 1987, ch 28, § 48, eff April 20, 1987 (see 1987 note below).

Sub (c), par (29), add, L 1987, ch 28, § 49, eff April 20, 1987.

Sub (c), par (30), add, L 1991, ch 428, § 8, eff July 19, 1991; amd, L 1993, ch 638, § 4, eff Aug 4, 1993.

Sub (c), par (31), add, L 1995, ch 81, § 99 (see 1995 note below); amd, L 1997, ch 42, § 3, deemed effective for the taxable year beginning January 1, 1996; repealed, L 2000, ch 63, § 5, eff Jan 1, 2002.

Sub (c), par (32), add, L 1997, ch 546, § 7 (see 1997 note below); amd, L 2000, ch 535, § 8 (see 2000 note below), L 2008, ch 81, § 2, eff May 21, 2008.

Another sub (c), par (32), redesignated sub (c), par (34), L 1998, ch 56, § 89 (Part A), eff April 28, 1998 (see 1998 note below).

Sub (c), par (33), add, L 1997, ch 546, § 7, eff Sept 10, 1997 (see 1997 note below).

Sub (c), par (34) [first setout], formerly sub (c), par (32), add, L 1997, ch 659, § 67 (see 1997 note below); so designated sub (c), par (34), L 1998, ch 56, § 89 (Part A) (see 1998 note below), L 2011, ch 62, § 104 (Part A), eff Oct 3, 2011.

Sub (c), par (34) [second setout], add, L 1998, ch 56, § 100 (Part A), eff April 28, 1998 (see 1998 note below).

Sub (c), par (35), add, L 1998, ch 56, § 89 (Part A), eff April 28, 1998 (see 1998 note below).

Sub (c), par (36), add, L 1998, ch 56, § 89 (Part A), eff April 28, 1998 (see 1998 note below).

Sub (c), par (37), add, L 2003, ch 62, § 4 (Part K3), eff May 15, 2003 (see 2003 note below).

Sub (c), par (38), add, L 2006, ch 565, § 1, eff Aug 16, 2006 (see 2006 note below).

Former sub (c), par (38), add, L 2005, ch 58, § 22 (Part C) (repealed, L 2005, ch 63, § 24 ((Part E)), eff April 12, 2005).

Sub (c), par (39) [first setout], add, L 2013, ch 59, § 5 (Part C), eff March 28, 2013.

Sub (c), par (39) [second setout], add, L 2013, ch 59, § 1 (Part Y), eff March 28, 2013.

Sub (c), par (40), add, L 2013, ch 68, § 10 (Part A), eff June 24, 2013.

Sub (c), par (41), add, L 2014, ch 59, § 1 (Part KK), eff March 31, 2014 (see 2014 note below).

Sub (e), amd, L 1978, ch 480, § 5, L 1984, ch 606, § 10, L 1984, ch 805, § 70, L 1986, ch 639, § 11, eff July 26, 1986 and deemed eff Sept 1, 1984.

Sub (e), subsection heading, amd, L 1991, ch 166, § 3, eff June 12, 1991.

Sub (e), par (1), formerly part of sub (e), so designated and amd, L 1991, ch 166, § 3, eff June 12, 1991.

Sub (e), par (2), add, L 1991, ch 166, § 3, eff June 12, 1991.

Sub (e), par (3), add, L 1992, ch 760, § 48, eff June 31, 1992.

Sub (f), amd, L 1984, ch 71, § 2, L 1987, ch 28, § 50, eff April 20, 1987 (see 1987 note below).

Sub (g), add, L 1963, ch 446, § 12; amd, L 1968, ch 873, § 8, eff June 22, 1968.

Sub (g), opening par, amd, L 1987, ch 28, § 51, L 1987, ch 817, § 57-i, eff Aug 7, 1987 (see 1987 note under § 208).

Sub (g), par (1), amd, L 1970, ch 1005, § 33, eff May 20, 1970, and applicable to taxable years ending after Dec 31, 1968.

Sub (g), par (4), add, L 1968, ch 873, § 8; amd, L 1969, ch 1072, § 6, eff May 26, 1969.

Sub (g), par (5), formerly sub (g), par (4), so numbered, L 1968, ch 873, § 8; amd, L 1987, ch 817, § 57-j, eff Aug 7, 1987 (see 1987 note under § 208).

Sub (g), par (6), formerly sub (g), par (5), so numbered, L 1968, ch 873, § 8; amd, L 1972, ch 1, § 12, L 1981, ch 103, § 43, L 1987, ch 28, § 52, eff April 20, 1987 (see 1987 note below).

Sub (h), add, L 1965, ch 178, eff May 12, 1965.

Sub (h), opening par, amd, L 1966, ch 902, § 30, L 1987, ch 28, § 53, L 1987, ch 817, § 57-k, eff Aug 7, 1987 (see 1987 note under § 208).

Sub (h), par (1), amd, L 1966, ch 902, § 31, eff Aug 1, 1966.

Sub (h), par (1), subpar (A), amd, L 1977, ch 836, § 2, eff Aug 11, 1977.

Sub (h), par (1), subpar (B), add, L 1966, ch 902, § 31; amd, L 1979, ch 365, § 3, L 1984, ch 972, § 5, eff Aug 6, 1984.

Sub (h), par (2), subpar (A), amd, L 1966, ch 902, § 32, L 1971, ch 199, § 2, eff May 4, 1971.

Sub (h), par (2), subpar (B), amd, L 1966, ch 902, § 32, L 1979, ch 365, § 4, eff June 28, 1979.

Sub (h), par (2), subpar (C), amd, L 1970, ch 1005, § 34, eff May 20, 1970, and applicable to taxable years ending after Dec 31, 1968.

Sub (h), par (3), subpar (A), amd, L 1966, ch 902, § 33, eff Aug 1, 1966.

Sub (h), par (3), subpar (B), amd, L 1966, ch 902, § 33, L 1979, ch 365, § 5, eff June 28, 1979.

Sub (h), par (3), subpar (C), add, L 1971, ch 184, § 2; amd, L 1979, ch 365, § 5, eff June 28, 1979.

Sub (i), add, L 1972, ch 1, § 13; amd, L 1973, ch 718, § 1, L 1976, ch 245, § 1, L 1981, ch 103, § 44, L 1987, ch 28, § 54, eff April 20, 1987 (see 1987 note below).

Sub (j), add, L 1972, ch 414, § 5, eff May 22, 1972.

Sub (k), add, L 2003, ch 62, § 6 (Part O3), eff May 15, 2003 (see 2003 note below).

Former sub (k), add, L 1978, ch 70, § 10; L 1979, ch 25, §§ 1, 2, L 1981, ch 83, § 1; repealed, L 1987, ch 28, § 55, eff April 20, 1987 (see 1987 note below).

Sub (l), add, L 2003, ch 62, § 6 (Part O3) (see 2003 note below); amd, L 2003, ch 686, § 3 (Part L), eff May 15, 2003.

Former sub (1), add, L 1978, ch 70, § 11; repealed, L 1987, ch 28, § 55, eff April 20, 1987 (see 1987 note below).

Sub (m), add, L 2003, ch 62, § 6 (Part O3), eff May 15, 2003 (see 2003 note below).

Former sub (m), add, L 1978, ch 70, § 12; repealed, L 1987, ch 28, § 56, eff April 20, 1987.

Sub (n), add, L 1984, ch 606, § 11, eff July 27, 1984, and applicable to taxable years beginning after December 31, 1982; amd, L 1997, ch 389, § 61 (Part A), eff Aug 7, 1997 (see 1997 note below).

Former sub (n), add, L 1981, ch 103, § 29; deleted, L 1984, ch 606, § 11, eff July 27, 1984.

Sub (n), par (1), amd, L 1997, ch 389, § 61 (Part A), eff Aug 7, 1997 (see 1997 note below).

Sub (n), par (2), amd, L 1997, ch 389, § 61 (Part A), eff Aug 7, 1997 (see 1997 note below).

Sub (n), par (2), subpar (A), amd, L 1997, ch 389, § 61 (Part A), eff Aug 7, 1997 (see 1997 note below).

Sub (o), add, L 1981, ch 103, § 3, eff May 15, 1981, and applicable to new business investments made on or after July 1, 1981.

Sub (o), par 1, subpar (A), opening par, amd, L 1987, ch 28, § 57, eff April 20, 1987.

Sub (o), par 1, subpar (A), cl (ii), amd, L 1987, ch 28, § 58, eff April 20, 1987 (see 1987 note below).

Sub (o), par 1, subpar (A), cl (iii), deleted, L 1987, ch 28, § 58, eff April 20, 1987 (see 1987 note below).

Sub (o), par 1, subpar (B), cl (i), amd, L 1987, ch 28, § 59, eff April 20, 1987.

Sub (o), par 1, subpar (B), cl (ii), amd, L 1981, ch 1043, § 16, L 1987, ch 28, § 59, eff April 20, 1987.

Sub (o), par 1, subpar (B), cl (iv), amd, L 1981, ch 1043, § 16, L 1987, ch 267, § 15, eff July 20, 1987.

Sub (o), par 1, subpar (B), cl (v), subcl (2), amd, L 1981, ch 1043, § 17, eff Nov 11, 1981, and applicable to new business investments made on or after July 1, 1981.

Sub (o), par 1, subpar (C), amd, L 1987, ch 28, § 60, eff April 20, 1987.

Sub (o), par 2, amd, L 1981, ch 1043, § 18, L 1987, ch 28, § 61, eff April 20, 1987 (see 1987 note below).

Sub (o), par 3, amd, L 1981, ch 1043, § 19, eff Nov 11, 1981, and applicable to new business investments made on or after July 1, 1981.

Sub (p), add, L 1981, ch 103, § 6; amd, L 1981, ch 1043, § 20, L 1987, ch 28, § 62, eff April 20, 1987.

Sub (q), add, L 1981, ch 103, § 6; amd, L 1981, ch 1043, § 21, L 1987, ch 28, § 63, eff April 20, 1987 (see 1987 note below).

Sub (r), add, L 2003, ch 686, § 3 (Part M), eff Oct 21, 2003 (see 2003 note below).

Former sub (r), add, L 2003, ch 62, § 2 (Part U3) (see 2003 note below); deleted, L 2003, ch 686, § 3 (Part M), eff Oct 21, 2003 (see 2003 note below).

Prior sub (r), add, L 1981, ch 103, § 53; amd, L 1981, ch 1043, § 22, eff Nov 11, 1981; repealed, L 1997, ch 389, § 3 (Part A), eff Feb 1, 2000 (see 1997 note below).

Sub (r), subsect heading, amd, L 2013, ch 59, § 5 (Part E), eff March 28, 2013 (see 2013 note below).

Sub (r), par (1), subpar (A), amd, L 2013, ch 59, § 5 (Part E), eff March 28, 2013 (see 2013 note below).

Sub (r), par (1), subpar (B), add, L 2013, ch 59, § 5 (Part E), eff March 28, 2013 (see 2013 note below).

Former sub (r), par (1), subpar (B), deleted, L 2013, ch 59, § 5 (Part E), eff March 28, 2013 (see 2013 note below).

Sub (r), par (1), subpar (C), amd, L 2013, ch 59, § 5 (Part E), eff March 28, 2013 (see 2013 note below).

Sub (r), par (2), subpar (A), amd, L 2013, ch 59, § 5 (Part E), eff March 28, 2013 (see 2013 note below).

Sub (r), par (2), subpar (B), add, L 2013, ch 59, § 5 (Part E), eff March 28, 2013 (see 2013 note below).

Former sub (r), par (2), subpar (B), deleted, L 2013, ch 59, § 5 (Part E), eff March 28, 2013 (see 2013 note below).

Sub (s), add, L 1984, ch 606, § 12, eff July 27, 1984, and applicable to taxable years beginning after December 31, 1982.

Sub (s), opening par, formerly part of entire sub, so designated and amd, L 1990, ch 190, § 17, eff May 25, 1990 (see 1990 note below).

Sub (s), par (1), amd, L 1990, ch 190, § 17 (see 1990 note below), L 1992, ch 760, § 49, eff July 31, 1992.

Sub (s), par (2), formerly part of sub (s), par (1), so designated sub (s), par (2) and amd, L 1992, ch 760, § 49, eff July 31, 1992.

Former sub (s), par (2), redesignated sub (s), par (3), L 1992, ch 760, § 49, eff July 31, 1992.

Former sub (s), par (2), opening par, add, L 1990, ch 190, § 17 (see 1990 note below); redesignated sub (s), par (3), opening par, L 1992, ch 760, § 49, eff July 31, 1992.

Former sub (s), par (2), subpar (A), add, L 1990, ch 190, § 17 (see 1990 note below); redesignated sub (s), par (3), subpar (A), L 1992, ch 760, § 49, eff July 31, 1992.

Former sub (s), par (2), subpar (B), formerly part of entire sub, so designated and amd, L 1990, ch 190, § 17 (see 1990 note below); redesignated sub (s), par (3), subpar (B), L 1992, ch 760, § 49, eff July 31, 1992.

Sub (s), par (3), formerly sub (s), par (2), so designated sub (s), par (3) and amd, L 1992, ch 760, § 49, eff July 31, 1992.

Sub (s), par (3), opening par, amd, L 1992, ch 760, § 49, eff July 31, 1992.

Sub (t), add, L 1989, ch 61, § 357, and applicable to taxable years beginning on and after Jan 1, 1989; repealed, L 1999, ch 407, § 15 (Part M), eff Aug 9, 1999 (see 1999 note below).

Sub (u), add, L 1998, ch 56, § 98 (Part A), eff April 28, 1998 (see 1998 note below).

Sub (v), add, L 1998, ch 56, § 98 (Part A), eff April 28, 1998 (see 1998 note below).

Amendment Notes The 2015 amendment by ch 59, §§ 1, 3 (Part I), substituted "subparagraph (D)" for "subparagraph (A)" in the third sentence of (c)(3-a) and in (c)(41).

2014. Chapter 59, § 70 (Part A) amended:

Sub (b), par (3), subpar (B) by deleting at fig 1 "articles", at fig 2 "and thirty-two" and adding the matter in italics.

Sub (b), par (21) by deleting at fig 1 "and in the case of a corporation taxable under article thirty-two of this chapter, after December thirty-first, nineteen hundred ninety-six,".

Sub (c), par (21) by deleting at fig 1 "and in the case of a corporation taxable under article thirty-two of this chapter, after December thirty-first, nineteen hundred ninety-six,".

2014. Chapter 59, § 1 (Part I) amended:

By adding sub (b), par (40) [first setout].

2014. Chapter 59, § 2 (Part I) amended:

By adding sub (b), par (41).

2014. Chapter 59, § 4-a (Part R) amended:

By adding sub (b), par (40) [second setout].

2014. Chapter 59, § 5-a (Part T) amended:

By adding sub (b), par (39-a).

2014. Chapter 59, § 1 (Part KK) amended:

By adding sub (c), par (41).

2013. Chapter 59, § 5 (Part C) amended:

By adding sub (c), par (39) [first setout].

2013. Chapter 59, § 4 (Part E) amended:

By repealing sub (c), par (19).

2013. Chapter 59, § 5 (Part E) amended:

Sub (r), subsect heading by deleting at fig 1 "and income exclusion".

Sub (r), par (1), subpar (A), by deleting at fig 1 "or members. For purposes of this subsection, the term related member or members means a person, corporation, or other entity, including an entity that is treated as a partnership or other pass-through vehicle for purposes of federal taxation, whether such person, corporation or entity is a taxpayer or not, where one such person, corporation, or entity, or set of related persons, corporations or entities, directly or indirectly owns or controls a controlling interest in another entity. Such entity or entities may include all taxpayers under article nine, nine-A, thirteen, twenty-two, thirty-two, thirty-three or thirty-three-A of this chapter" and adding the matter in italics.

By deleting former sub (r), par (1), subpar (B).

By adding sub (r), par (1), subpar (B).

Sub (r), par (1), subpar (C) by deleting at fig 1 "includes" and adding the matter in italics.

Sub (r), par (2), subpar (A) by deleting at fig 1 "to a", at fig 2 "member" and adding the matter in italics.

By deleting former sub (r), par (2), subpar (B).

By adding sub (r), par (2), subpar (B).

2013. Chapter 59, § 1 (Part Y) amended:

By adding sub (c), par (39) [second setout].

2013. Chapter 68, § 10 (Part A).

By adding sub (c), par (40).

The 2015 amendment by ch 576, §§ 4, 5, added (b)(42), (c)(42), and (c)(43).

The 2016 amendment by ch 120, §§ 4, 5, repealed (b)(42), which read: "Distributions received during the taxable year by a designated beneficiary of a 'NY ABLE account' established under the New York achieving a better life experience savings account act provided for under article eighty-four of the mental hygiene law, to the extent such distributions are nonqualified withdrawals within the meaning of subdivision six of section 84.03 of such law" and repealed (c)(42) and (c)(43), which read: "(42) Contributions made during the taxable year by an account owner to one or more 'NY ABLE' accounts established under article eighty-four of the mental hygiene law, provided, however that such exclusion shall be available only to the account owner and not to any other person. (43) Distributions for qualified expenses of a designated beneficiary from a 'NY ABLE' account established under article eighty-four of the mental hygiene law, to the extent includible in gross income for federal income tax purposes."

The 2017 amendment by ch 61, § 3 (Part J), rewrote the second sentence of (c)(42), which formerly read: "In order to be subtracted from federal adjusted gross income, the taxpayer's primary residence must have incurred severe damage due to coastal flooding, widespread erosion and water damage and such primary residence was located in the affected disaster area pursuant to executive order one hundred sixty-five of two thousand seventeen, declaring a state of emergency, dated May third, two thousand seventeen."

The 2017 amendment by ch 85, § 1 (Part C), added (c)(42).

The 2017 amendment by ch 334, § 3, added (c)(42).

The 2017 amendment by ch 456, § 1, added (c)(42).

The 2017 amendment by ch 472, §§ 2, 3, added (b)(42), (c)(42) and (c)(43).

The 2018 amendment by ch 59, § 2 (Part JJ), added (w) and (x).

The 2018 amendment by ch 379, § 2, deleted former (b)(42), (c)(42) and (c)(43).

Repeal Notes: [1985, ch 306] Former paragraph twenty-six of subsection (b) of section six hundred twelve of the tax law, repealed by section ten of this act, paragraph twenty-seven of subsection (c) of section six hundred twelve of such law, repealed by section eleven of this act, provided for current taxation for state and city purposes of compensation deferred for purposes of federal taxation.

[1987, ch 28] Paragraph eight of subsection (b) of section six hundred twelve of the tax law, which is repealed by section thirty-one of this act, related to the add-back modification of shareholders of professional service corporations for FICA contributions. Paragraphs nine, eleven and thirteen of subsection (b) of section six hundred twelve of the tax law, which are repealed by section thirty-two of this act, related respectively to insurance add-back modification of shareholders of professional service corporations for insurance, to obsolete capital gains provisions and to the credit for sales tax paid on catalytic chemical agents. Paragraph (c) of section six hundred twelve of the tax law, which is repealed by section forty-four of this act, related to the expired real property circuit breaker deduction. Subsections (k) and (l) of section six hundred twelve of the tax law, which are repealed by section fifty-five of this act, related to the modification for qualified higher education funds. Subsection (m) of section six hundred twelve of the tax law, which is repealed by section fifty-six of this act, related to the expired real property circuit breaker deduction.

[1990, ch 190] Paragraph 28 of subsection (b) of section 612 of the tax law, repealed by section two hundred twenty-five of this act, provided for the addition to federal adjusted gross income under the personal income tax of the tax imposed by article 13-A of the tax law to the extent that it was deductible in determining federal adjusted gross income.

Notes to Decisions

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28. —Income spreading and averaging
29. —Joint or separate returns
30. —Qualified higher education funds
31. —Other items

1. In general

Where taxpayer's New York State income tax return was properly prepared claiming a moving expense deduction, and taxpayer's federal income tax return was incorrectly prepared and where said return did not reflect his proper federal adjusted gross income, audit division erred in disallowing taxpayer's moving expense education. In re Albert, Dec St Tax Comm, TSB-H-85(23)-I.

Definitions governing new business investment deferral differ from those pertaining to exclusion for new business investment gains; to qualify for a new business investment deferral, new business must be business enterprise that meets all of requirements set forth in CLS Tax § 612(p); there is no requirement that corporation which qualifies as new business must be subject to tax and, accordingly, investment in S corporation may qualify for new business investment deferral. Advisory Opinion, Dec St Tax Comm, TSB-A-87-(5)-I.

CLS Tax § 612 does not contain any modification that affects shareholders of corporations that are each party to tax-free reorganization, where for federal income tax purposes transaction constitutes statutory merger and stock of corporation which before merger was in control of merged corporation as used in transaction. Advisory Op Dec St Tax Comm, TSB-A-88-(14)-C.

CLS Tax Law § 612(b)'s professional corporation modification provisions are triggered by legal or equitable ownership of shares in professional corporation; where taxpayer has given up all incidents of ownership, both legal and equitable, in shares of a professional corporation, by means of "Clifford" trust, it cannot be said, as matter of law, that this is an impermissible method of tax avoidance. In Matter of Friedman, NYS Dept. of Tax. & Fin., Tax Appeals Tribunal Decision No. TSB-D-88-(23)I.

Division of Taxation's adjustment to taxpayer's non-resident income tax return by taking into account taxpayer's spouse's non-New York income to compute tax rate was proper. NY Tax Appeals Tribunal TSB-D-99-(19)I.

2. Constitutionality

In an Article 78 proceeding brought by attorneys who were members of a professional corporation seeking review of deficiencies assessed for personal income tax returns, the assessments were proper where the attorneys transferred their shares of stock in their corporation to trustees under revocable trusts, where the trustees had no active duties to perform other than to do as directed by the attorneys who were the grantors and beneficiaries of the trusts, and where the "add back" provisions of Tax Law § 612, pertaining to upward adjustments of gross income, were properly applied in view of the fact that equal protection rights were not violated by treating employees of a conventional corporation different than employees of a professional corporation. Becker v New York State Tax Com., 89 A.D.2d 707, 453 N.Y.S.2d 830, 1982 N.Y. App. Div. LEXIS 17838 (N.Y. App. Div. 3d Dep't 1982).

Because the state decided to pay full refunds to the plaintiffs, who paid income taxes on Federal pensions for the years 1986 through 1988 pursuant to a discriminatory, unconstitutional tax scheme under Tax Law § 612 [c] [3] [ii]; Administrative Code of City of New York § 11-1712 [c] [3], the issues affected by the vacation and remitittur of this court's decision in Duffy v Wetzler (1992, 2d Dept) 174 App Div 2d 253, 579 NYS2d 684 for further consideration in light of Harper v Virginia Dep't of Taxation (1993) 509 US 86, 113 S Ct 2510, 125 L Ed 2d 74, are academic. Duffy v Wetzler, 207 A.D.2d 375, 616 N.Y.S.2d 48, 1994 N.Y. App. Div. LEXIS 8246 (N.Y. App. Div. 2d Dep't 1994).

This statute is not unconstitutional in that it requires taxation of undistributed profits in apparent conflict with New York Constitution Article 16 § 3, in view of provisions of New York Constitution Article 3 § 22 that "income" may be defined by reference to any provision of laws of United States. Garlin v Murphy, 51 Misc. 2d 477, 273 N.Y.S.2d 374, 1966 N.Y. Misc. LEXIS 1598 (N.Y. Sup. Ct. 1966), aff'd, 34 N.Y.2d 921, 359 N.Y.S.2d 552, 316 N.E.2d 869, 1974 N.Y. LEXIS 1426 (N.Y. 1974).

The prohibition against income splitting contained in Tax L § 612, subd f does not violate Article 3, § 22 of the New York State Constitution. Application of Kenning, 72 Misc. 2d 929, 339 N.Y.S.2d 793, 1972 N.Y. Misc. LEXIS 1271 (N.Y. Sup. Ct. 1972), aff'd, 43 A.D.2d 815, 350 N.Y.S.2d 1017, 1973 N.Y. App. Div. LEXIS 7087 (N.Y. App. Div. 3d Dep't 1973).

Tax Law §§ 612(f) and 615(b)(2) declared constitutional despite contention that denial of right to file separate returns by married couple where one spouse earned income while permitting such filing where both spouses earned income was denial of equal protection and for purpose of convenience of Department of Taxation and Finance. Application of Kenning, 72 Misc. 2d 929, 339 N.Y.S.2d 793, 1972 N.Y. Misc. LEXIS 1271 (N.Y. Sup. Ct. 1972), aff'd, 43 A.D.2d 815, 350 N.Y.S.2d 1017, 1973 N.Y. App. Div. LEXIS 7087 (N.Y. App. Div. 3d Dep't 1973).

A state system of providing income tax benefits to parents of nonpublic school children by allowing deductions of specific amounts from adjusted gross income in calculating their state income tax is invalid under the First Amendment's establishment clause as insufficiently restricted to assure that it will not have the impermissible effect of advancing the sectarian activities of religious schools. Committee for Public Education & Religious Liberty v Nyquist, 413 U.S. 756, 93 S. Ct. 2955, 37 L. Ed. 2d 948, 1973 U.S. LEXIS 36 (U.S. 1973).

Since there is no jurisdiction at the administration level to declare Tax Law § 612(b)(7)–(9) unconstitutional, petitioner's argument, that the add back provisions of Tax Law § 612(b)(7)–(9) are unconstitutional in that they deny shareholders of a professional service corporation equal protection of the law because if a professional is engaged in private practice as an employee-shareholder of that professional service corporation, he is then subject to the add back tax provision that the same

professional engaged in the practice of his profession as an employee of a conventional business corporation is not subject to, is to no avail. In re Levy, Dec St Tax Comm, October 3, 1980.

There is no jurisdiction at administrative level to declare Tax Law § 612 unconstitutional. In re Petition of Bartlett, Dec State Tax Comm, Apr. 24, 1981.

Petitioners, who failed to timely file claims for refund of taxes paid on federal pension income, were not entitled to refund under special refund authority of CLS Tax § 697(d) where petitioners paid income tax on federal pension income as was required by law at time when individual income tax returns were filed for years in question, and even though CLS Tax § 612(c)(3)(ii) had been rendered unconstitutional, petitioners' payments at time they were made, were pursuant to law. NY Tax Appeals Tribunal TSB-D-98-(21)I.

3. New York adjusted gross income

New York taxpayers are required to conform their New York adjusted gross income to their federal adjusted gross income. In re Ross, Dec State Tax Comm, TSB-H-83-(339)-I.

New York adjusted gross income of resident individual means his federal adjusted gross income, as defined in laws of United States for taxable year, with modifications specified in Tax Law § 612(b) and (c); since modifications set forth in § 612(b) are modifications increasing federal adjusted gross income and since there is no modification within § 612(c) to reduce federal adjusted gross income by amount of income earned from foreign sources, or by amount of foreign income taxes withheld, all such income is subject to New York state personal income tax; foreign income taxes may not be taken as New York itemized deduction, since Tax Law § 615(c)(1) requires that total amount of deductions from federal adjusted gross income is to be reduced by federal deductions for income taxes imposed by this state or by any other taxing jurisdiction. In re Noaks, Dec State Tax Comm, Sept. 28, 1979.

Rejected was the claim of the petitioner, a fighter, that he assigned his income to his cooperation and, thus, it was not taxable to him as an individual. This position was based on his allegation that the income from the fights was paid to the corporation which, in turn, paid petitioner a salary as well as covering all expenses associated with the fight. The adjusted gross income of a resident individual is his Federal adjusted gross income as defined in the laws of the United States for the taxable year with certain modifications not applicable in the instant case. Federal adjusted gross income is defined as all income from whatever source derived, minus any pertinent deductions. It is a principle of Federal Income Tax Law that income is to be taxed to the person who has earned it. If that person assigns, his income to another, it nevertheless is the income of the assignor and is taxable to him. Thus, petition's argument that the money was not income to him because he assigned it to his corporation, or it was paid directly to the petitioner, who then passed it on to the corporation, ignores this fundamental principle. Tax may not be escaped by the earner through the use of an anticipatory arrangements and contracts however skillfully devised to prevent income when paid from vesting to him. NY Tax Appeals Tribunal TSB-D-90(35) I (1990).

4. Includability in income—Contributions to pension plans, life insurance

Pension of federal employee is includible in gross income for state personal income tax purposes. In re Resnick, Dec State Tax Comm, TSB-H-83-(25)-I.

Taxpayer was required to make modifications provided for in §§ 612(b)(7), (b)(8) and (b)(9) of Tax Law where professional service corporation in 1978, as direct result of taxpayer being one of its shareholder-employees, contributed certain amounts to a pension plan on taxpayer's behalf, paid the federal excise tax for old age, survivors and disability insurance on taxpayer's wages, and purchased life, accident or health or other insurance for taxpayer. In re Helou, Dec St Tax Comm, TSB-H-85(93)-I.

Shareholders in professional service corporation in general are not outside of the ambit of § 612(b)(7) by virtue of their being in situations involving a defined benefit plan as opposed to a defined contribution plan. In re Etengoff, Dec St Tax Comm, TSB-H-85(109)-I.

Restitution received pursuant to Civil Liberties Act of 1988 (PL 100-383), acknowledging and apologizing for fundamental violations of basic civil liberties and constitutional rights of individuals of Japanese ancestry during World War II, is not subject to New York State personal income tax or New York City personal income tax on residents. Matter of Kochiyama, State Tax Com., March 10, 1989, TSB-A-89-(3)I.

Petitioner, an attorney and shareholder of a professional service corporation who transferred his shares of the company's stock to another attorney pursuant to a trust agreement, still remained the owner of the stock, even though the trust acquired possession for all substantial and practical purposes and therefore will be considered a taxpayer who is a shareholder of a corporation organized under BCL Article 15 and is required to make modifications provided for in Tax Law § 612(b)(7)–(9). In re Levy, Dec St Tax Comm, October 3, 1980.

For purposes of CLS Tax § 634(a)(1), items of income, gain, loss, and deduction included in federal distributable net income of estate for taxable year 1995, that were derived from or connected with New York sources, included "pension income" distribution except to extent that "Voluntary Employee Contribution Account" constituted annuity under 20 NYCRR § 132.4(d), and to extent $20,000 subtraction modification under CLS Tax § 612(c)(3-a) was allowed under CLS Tax § 631(a). Adv Op Comm T & F TSB-A-96(9)I.

Petitioners' claims, seeking refunds of state personal income taxes paid based on inclusion of federal retirement benefits in their state taxable income, were properly dismissed as time-barred under CLS Tax § 687(a) where petitioners had opportunity to file timely "protective" claims for refunds for years in question. NY Tax Appeals Tribunal TSB-D-98-(23.1)I.

5. —Corporate distributions, dividends

Transfers from corporation to sole proprietorship owned by corporation's sole stockholder were not constructive dividends, where check stubs for the payments were marked "loan," the sole proprietorship intended to pay back the loans and did so, and there was a business purpose to the loans, notwithstanding that no notes were made and no interest was paid. In re Senor, Op State Tax Comm, August 16, 1977.

Total gross dividend received by petitioners from foreign corporation was includible in New York adjusted gross income under CLS Tax Law § 612, subd a, even though portion of dividend was withheld by corporation and remitted directly to foreign government. In re Nevin, Op State Tax Comm, October 13, 1978.

Constructive distribution made by corporation having no current earnings or profits would be treated as a return of capital to the extent of the stock basis, but any distribution made from current earnings and profits would be treated as dividend income. In re PLA Standard Corp., Op State Tax Comm, September 15, 1980.

Taxpayer's practice of waiting until end of each fiscal year to determine how much salary he would draw from professional corporation by means of promissory notes was invalid, and money withdrawn from corporation constituted dividend, since there was never any intention to repay notes nor was there any reasonable expectation by corporation of receiving payment on notes at any time, and each note was forgiven as soon as it was deemed to be salary for any specific fiscal year. NY Tax Appeals Tribunal TSB-D-92-(4)I.

Division of Taxation properly assessed petitioner for additional personal income tax attributable to excess income of 2 closely-held corporations, where criminal investigation by district attorney's office determined that corporations' net profit figures were constructive or actual dividends (or excess salary) to petitioner and other corporate principals/shareholders, and petitioner did not offer any evidence to dispute district attorney's findings with respect to corporations' tax liability. NY Tax Appeals Tribunal TSB-D-97-(23)I.

6. —Income from or loss of subchapter S corporation

Tax deficiency resulting from failure of wife's attorney to file and elect as subchapter S corporation as to her business did not

fall within provision of separation agreement obligating husband to pay any tax deficiency due to wife's failure or neglect to disclose any income to be included on tax return; if corporation has not properly elected to be treated as S corporation "any item of loss or deduction of the corporation" shall be included in gross income under CLS Tax § 612(b)(19)(A), so that deficiency was due to underreporting of losses rather than income. Jackson v Jackson, 157 A.D.2d 559, 550 N.Y.S.2d 300, 1990 N.Y. App. Div. LEXIS 789 (N.Y. App. Div. 1st Dep't 1990).

If all shareholders fail to file election for Subchapter S status, shareholders must add back to federal adjusted gross income their pro-rata share of net operating loss of corporation to extent such loss was deducted for federal income tax purposes pursuant to CLS Tax § 612(b)(19); since such election was not made by shareholders of corporation, shareholders, in determining their New York adjusted gross incomes, are required to increase their respective federal adjusted gross incomes by their pro-rate share of net operating loss of corporation as reported on their federal returns. In re Spitalny, et al, Dec St Tax Comm, TSB-H-87(58)-I.

Shareholders of S corporation for federal income tax purposes, may elect to take into account S corporation items of income, loss, deduction and reduction for taxes on personal income tax returns filed for New York State. In re Gerbasi, Dec St Tax Comm, TSB-H-87-(163)-I.

In order to calculate New York City resident tax, taxpayer was not entitled to reduce New York State taxable income by his share of income from subchapter S corporation. NY Tax Appeals Tribunal TSB-D-99-(5)I.

7. —Fellowships, grants and the like

Stipend received by doctor while in educational training at hospital was not excludible from gross income as fellowship grant in accordance with Internal Revenue Code § 117 where doctor received withholding slips showing his compensation as wages, deductions were made for social security, federal and state taxes, he received 2 weeks vacation and 2 weeks military leave, he was provided with medical insurance and where he did not sustained burden of proof to show that amounts received did not represent compensation for services or that his services were not primarily for benefit of hospital within meaning of Treasury Regulation § 1.117-4(c); fact that an individual is engaged in work which may result in educational benefits to himself and/or others does not transform payment received for such work into excludible scholarship or fellowship grant in accordance with Revenue Ruling 64-212, 1967 2 CB 40. In re Buscaglia, 1980 Dec State Tax Comm, Jan 2, 1980.

Grant received by doctor from State Department of Mental Hygiene was not paid as compensation for services or for benefit of grantor, and was properly excludible from income, notwithstanding that grant was made by department in settlement of grievance by doctor concerning department's harassment because doctor criticized conditions at institution operated by department. In re Bronston, 1982 Dec State Tax Comm, Apr 30, 1982.

8. —Interest from government obligations

That portion of lump sum retirement distribution which represents earning from interest on United States Government bonds is exempt from state taxation. Johnson v New York State Tax Com., 117 A.D.2d 867, 498 N.Y.S.2d 581, 1986 N.Y. App. Div. LEXIS 53139 (N.Y. App. Div. 3d Dep't 1986).

Dividends paid by regulated investment company, substantially all of which distributions are made out of interest and original issue discount on federal obligations, are not exempt from personal income tax imposed under CLS Tax Law Article 22, as although CLS Tax § 612 exempts from personal income tax interest on obligations of United States and its agencies and instrumentalities, exemption does not extend to dividends attributable to such exempt interest, since tax-exempt character of income earned by corporation is not automatically preserved and passed through corporate entity upon distribution of dividends by it to its shareholders. In re Luschinsky, Dec St Tax Comm, TSB-H-86(118)I.

Although interest expense on loan used to buy tax-exempt federal securities is not deductible on state income tax, income earned from rebate of such prepaid interest may not be excluded from Federal income in determining state income. In re Millard, Op State Tax Comm, June 14, 1977.

Interest income received by taxpayers from United States Treasury Bills and Notes is exempt from New York State personal income tax. In re Power, Dec State Tax Comm, Sept 28, 1979.

Exempt-interest dividends attributable to obligations of Puerto Rico, Virgin Islands and Guam are excluded from federal gross income and thus not subject to personal income tax. In re Driscoll, 1982 Op State Tax Comm, Sep 22, 1982.

To extent that interest which New York limited partnership established as "private banker" incurs or continues to purchase or carry indebtedness in ordinary course of its banking business is allowed as deduction under § 163(a) of Internal Revenue Code and is not disallowed under § 265(2) of Internal Revenue Code, such interest will also be allowed as deduction for New York State personal income tax purposes and will not be disallowed under CLS Tax § 612(b)(4). Advisory Opinion, Dec St Tax Comm, TSB-A-87-(1)-I.

Taxpayer properly reduced amount of his federal adjusted gross income by amount of interest received on Treasury Note; taxpayer properly reduced amount of his federal adjusted gross income by amount of dividends paid by mutual fund which were attributable to interest on federal obligations. In Matter of Petition of Kalina, TSB-H-87-(194)-I.

9. —Partnership income or distribution

In an Article 78 proceeding to annul a determination of the state tax commission requiring a partner to pay state taxes on all of his partnership income for the year in question, the determination was properly annulled where the partner had been a nonresident alien for 11 months of the year. McLaughlin v New York State Tax Com., 87 A.D.2d 712, 448 N.Y.S.2d 891, 1982 N.Y. App. Div. LEXIS 16051 (N.Y. App. Div. 3d Dep't 1982).

New York resident's adjusted gross income includes his or her distributive share of partnership income or gains. Callicutt v New York State Comm'r of Taxation & Fin., 241 A.D.2d 778, 660 N.Y.S.2d 747, 1997 N.Y. App. Div. LEXIS 8106 (N.Y. App. Div. 3d Dep't 1997).

Taxpayer failed to establish existence of valid assignment of his interest in limited partnership, on which he had failed to pay income tax, where he presented only copy of unsigned assignment together with his "extremely vague" testimony that he had signed original document, purported assignment did not comply with requirements of partnership agreement, and taxpayer had accepted following year's partnership distribution, which was inconsistent with his claim of assignment. Callicutt v New York State Comm'r of Taxation & Fin., 241 A.D.2d 778, 660 N.Y.S.2d 747, 1997 N.Y. App. Div. LEXIS 8106 (N.Y. App. Div. 3d Dep't 1997).

Determination of personal income tax deficiency was supported by evidence of taxpayer's receipt of distributive share from limited partnership, despite taxpayer's intervening bankruptcy, where partnership agreement provided that bankruptcy of limited partner would not cause dissolution of partnership and there was no evidence that taxpayer scheduled partnership interest as asset in bankruptcy proceeding. Callicutt v New York State Comm'r of Taxation & Fin., 241 A.D.2d 778, 660 N.Y.S.2d 747, 1997 N.Y. App. Div. LEXIS 8106 (N.Y. App. Div. 3d Dep't 1997).

Nonresident alien petitioner, who for first 11 months of 1968 resided outside New York State, was required to include as taxable income on her part-year New York State resident income tax return her entire distributive share of income from a calendar year foreign partnership which did not derive any income from United States sources. In re McLaughlin, Dec State Tax Comm, October 17,1980.

20 NYCRR § 154.6 provides means to allocate distributive share of partnership income and gain between resident and non-resident period, and such regulation is necessary because partner is required to pay tax on his distributive share of partnership income and gain without regard to amount of partnership distributions actually made to partner in taxable year; after allocation required by regulation is made, and portion of distributive share of partnership income or gain is allocated to resident period, fact that income or gain may have non-New York

source has no relevance to its taxability. NY Tax Appeals Tribunal TSB-D-95-(5)I.

Petitioner's evidence was insufficient to establish that payments made by partnership were made on periodic basis, and thus constituted excludable annuity payments under CLS Tax § 612(c)(3-a), where sole evidence of how payments were calculated and/or paid was testimony of partnership's tax professional that payments were scheduled basically monthly pursuant to fixed formula in partnership agreement, there was no evidence as to exactly how payments were calculated, there was no testimony as to whether petitioner's wife had absolute right to receive payments on periodic basis regardless of partnership's profits or available funds or whether such right was contingent on partnership's earnings. NY Tax Appeals Tribunal TSB-D-95-(17)I.

Petitioner's evidence was insufficient to establish that payments made by partnership arose from employer-employee relationship, and thus constituted excludable annuity payments under CLS Tax § 612(c)(3-a), where petitioner was partner, not employee; annuity exclusion does not apply to former partners. NY Tax Appeals Tribunal TSB-D-95-(17)I.

10. —Payments for services

Lump sum payment received by taxpayer from his employer was not excludable from his New York State gross income on ground that it constituted damages received due to personal injury or sickness under Internal Revenue Code § 104(a)(2) since he did not show that there were any damages suffered and thus had not proven that payment was for settlement of tort like action, and he had not proven that payment was made on account of personal injuries. NY Tax Appeals Tribunal TSB-D-99-(6)I.

11. —Payments by, for or to member or clergy of religious group

Petitioner's salary, derived from his employment as systems analyst, was properly included in his gross income, despite fact that petitioner was member of religious order which required him to take vow of poverty and turn over said salary, earned in his individual capacity, to church. In re Stanley Dubois, Dec State Tax Comm, TSB-H-84-(183)-I.

Rental allowance or "domiciliary allowance" from seminary to theological teacher used to provide taxpayer with rented quarters and to assist him in purchase of home is not includible in gross income in accordance with meaning and intent of Internal Revenue Code § 107 and Tax Law Article 22. In re Ginsberg, 1979 Dec State Tax Comm, Dec 14, 1979.

Rental allowance of $7,500.00 granted to taxpayer as condition of his employment, and prior to his being hired as instructor at Yeshiva University was not includable in gross income, in accordance with meaning and intent of § 107 of Internal Revenue Code and of Article 22 of New York State tax Law where taxpayer was paid salary of $15,537.27 by Yeshiva during 1972, which was apportioned as follows: $7,500.00 for rental allowance, $2,500.00 for services as religious studies teacher, $5,537.27 for services as mathematics teacher where taxpayer spent two-thirds of his teaching time as religious studies teacher and one-third of his teaching time as mathematics teacher. In re Ginsberg, 1980 Dec State Tax Comm, February 20, 1980.

12. —Reimbursed business expenses; personal use of business property

Reimbursements received by petitioner for meals, lodging, and transportation while he worked on construction job away from his residence should have been included in petitioner's income for tax purposes, where petitioner's wife and two youngest children moved to city of "temporary" job, job lasted for almost three years, and there was no anticipated end of the assignment, making job of indefinite, rather than temporary nature. In re Hanna, Op State Tax Comm November 19, 1976.

Use of aircraft owned by state of New York to transport children of governor results in additional New York State taxable income to governor where governor's children were transported without governor or any other state official, apparently for purely personal reasons or where second state aircraft was used to transport children to same destination on same day and at same time as official flights by governor. In re Carey, Dec State Tax Comm, June 8, 1979.

Petitioner is not entitled to exclude from New York income for year in question amount representing moving expense reimbursement received by petitioner during year in question for moving expenses incurred and paid in previous year. In re James R. Cox & Stella B. Cox, Dec State Tax Comm, TSB-H-84-(199)-I.

13. —Stock options; profit sharing plans

A lump sum distribution received by a president of a corporation during the year in question from a profit-sharing plan constitutes ordinary income under IRC § 402 and Article 22 of the Tax Law where petitioner presented no evidence as to the terms and conditions of the profit-sharing plan nor did he give reasons behind the request made by the IRS that such plan be terminated and liquidated. In re Giebel, 1980 Dec St Tax Comm, Jan. 2, 1980.

The excess of the average daily market price over the purchase price of stock purchased by petitioner pursuant to his company's 1971 stock option purchase plan constitutes ordinary income for 1972 for New York State tax purposes under Tax Law § 612(a) since the company notified petitioner on May 5, 1972 that the shares he purchased in 1971 were no longer subject to a substantial risk of forfeiture. In re Newman, 1980 Dec St Tax Comm, Jan. 11, 1980.

When substantial risk of forfeiture of stocks purchased in company's stock purchase plan is removed, ordinary income results to the extent that fair market value exceeds cost. In re Newman, 1980 Dec State Tax Comm, Jan 11, 1980.

14. —Taxes

Unincorporated business tax is not deduction that is properly allocable to or chargeable against personal service income and, so, should be included in personal service net income of partner in law firm. Wolfe v State Tax Com., 120 A.D.2d 871, 502 N.Y.S.2d 304, 1986 N.Y. App. Div. LEXIS 56971 (N.Y. App. Div. 3d Dep't 1986).

Order granting defendant wife's motion affirmed–issue is whether tax deficiency, occurring from failure to file and elect as subchapter S corporation, is failure to report income; in separation agreement, husband is to pay any tax deficiency due to wife's failure or neglect to disclose any income that is to be included in tax return; wife began corporation from joint marital funds; her attorney at time of incorporation filed election of subchapter S corporation with Federal Government but not with State; tax deficiency resulted; if corporation has not properly elected to be treated as S corporation any item of loss or deduction of corporation shall be included in gross income (Tax Law § 612 [b] [19] [A]); thus, deficiency was due to underreporting of losses rather than income; section in issue should be construed literally as long as it can reasonably reflect parties' intent; court cannot broaden meaning of income to include underreporting of losses; if that was intent of parties, separation agreement should have exempted husband from paying any tax deficiency and not just those resulting from failure or neglect of wife to report income. Jackson v Jackson, 157 A.D.2d 559, 550 N.Y.S.2d 300, 1990 N.Y. App. Div. LEXIS 789 (N.Y. App. Div. 1st Dep't 1990).

Modification required pursuant to CLS Tax L § 612(b)(3) (income taxes) cannot be included in New York personal service income under § 603-A(b)(1). In re Edward Wolfe, Dec State Tax Comm, TSB-H-84-(174)-I.

15. —Unexplained income; safe deposit boxes

Existence of cash or property in safe-deposit box does not of itself imply that taxpayer received taxable income in particular year which was not reported on his returns. While taxpayer may have duty to explain such deposits, no explanation was possible where taxpayer was deceased. In re Estate of Zangen, Op State Tax Comm, Jan. 12, 1977.

Funds found in safe deposit box would not be considered unreported income for the current year, where the bills were old, there were no transactions during the current year that would yield this amount, and the reported estate and decedent's previous life style would explain this amount. In re Estate of Weinstein, Op State Tax Comm, August 16, 1977.

Money found in safe deposit box was not unexplained income, as taxpayer had cashed checks and reported income in previous

years sufficient to explain amount in box. In re Estate of Loeb, Op State Tax Comm, August 16, 1977.

Taxpayers' bank deposits of $147,000.00, source of which is unidentified, represent income subject to tax, within meaning and intent of § 61(a) of Internal Income Revenue Code and of §§ 612 and 705 of New York Tax Law. re Tambasco, 1979 Dec. State Tax Comm, December 20, 1979.

Audit Division's assertion of deficiency was arbitrary and capricious where its evidence consisted only of fact that $42,000 was found in deceased's safe deposit boxes, where evidence of administrator of estate showed that decedent lived frugally, did not own automobile, did not spend money for entertainment and did not spend much for clothes or shelter. In re Bogarsky, 1982 Dec State Tax Comm, May 28, 1982.

16. —Undistributed corporate income

Undistributed share of income from subchapter S Corporation was properly included in shareholder's adjusted gross income, and such taxation was neither prohibited under New York Constitution Article 16 § 3, nor denied equal protection of the law. Garlin v Murphy, 42 A.D.2d 30, 344 N.Y.S.2d 402, 1973 N.Y. App. Div. LEXIS 4226 (N.Y. App. Div. 3d Dep't 1973), aff'd, 34 N.Y.2d 921, 359 N.Y.S.2d 552, 316 N.E.2d 869, 1974 N.Y. LEXIS 1426 (N.Y. 1974).

Petitioners are required to include in New York adjusted gross income, their undistributed taxable income from Pennsylvania corporation which was taxed as small business corporation for federal income tax purposes. In re Barton, Dec State Tax Comm, September 1, 1980.

17. —Other items

In an Article 78 proceeding to review a determination of deficiency with respect to a taxpayer's personal income tax liability, the determination by the Commission that a condemnation award to the taxpayer's deceased husband's estate was "income in respect of a decedent" under Internal Revenue Code § 691 was supported by substantial evidence, where at the time of the decedent's death title to the condemned land had already vested in the state, and the deceased had rejected the state's offer and initiated the suit for just compensation which led to the award. Zeamon v Tully, 91 A.D.2d 67, 458 N.Y.S.2d 89, 1983 N.Y. App. Div. LEXIS 16096 (N.Y. App. Div. 3d Dep't 1983).

Restitution received pursuant to Civil Liberties Act of 1988 (PL 100-383), acknowledging and apologizing for fundamental violations of basic civil liberties and constitutional rights of individuals of Japanese ancestry during World War II, is not subject to New York State personal income tax or New York City personal income tax on residents. Matter of Kochiyama, State Tax Com., March 10, 1989, TSB-A-89-(3)I.

Taxpayer who, subject to settlement agreement with Internal Revenue Service did not deduct long-time capital loss for federal purposes may not deduct such loss from state income tax return. In re Shapiro, 1982 Dec State Tax Comm, Jul 13, 1982.

There is no modification in CLS Tax § 612 with respect to income that is distribution to claimant from qualified settlement fund, and thus such income is treated same for New York state personal income tax purposes as it is treated for federal income tax purposes. NY Tax Appeals Tribunal TSB-A-94-(2)I.

18. Adjustments to federal adjusted gross income, generally

Tax L § 612(c) does not permit a taxpayer to adjust his Federal Adjusted Gross Income for state tax purposes by disregarding the addition required by Internal Revenue Code § 337(d)[26 USCS § 337(d)]. In re Kern, Op State Tax Comm, June 24, 1977.

Dependent as used in Tax Law § 612(c) does not include taxpayer's spouse. In re Badeau, Advisory Op State Tax Comm, Feb. 2, 1981.

CLS Tax § 612 provides no modifications which may serve to reduce petitioner's federal adjusted gross income on his New York State return by amounts of deductions or adjustments to income which petitioner inadvertently failed to claim on his federal return, such that where petitioner failed to claim moving expense adjustment on his federal return he is prohibited from making such adjustment for New York State purposes. In Matter of Petition of Herzstock, TSB-H-87-(193)-I.

19. —Federal pensions

In action against state and municipal taxing authorities to invalidate statute and regulations which discriminated against recipients of federal (as opposed to state and municipal) pension benefits for state income tax purposes, court correctly rejected plaintiffs' claims under 42 USCS § 1983; defense of qualified immunity was available to defendants inasmuch as right claimed by plaintiffs under 4 USCS § 111 was not clearly established until relatively recent opinion of United States Supreme Court, thereby shielding individual defendants from liability for civil damages. Duffy v Wetzler, 174 A.D.2d 253, 579 N.Y.S.2d 684, 1992 N.Y. App. Div. LEXIS 739 (N.Y. App. Div. 2d Dep't), aff'd, in part, app. dismissed, 79 N.Y.2d 976, 583 N.Y.S.2d 190, 592 N.E.2d 798, 1992 N.Y. LEXIS 1068 (N.Y. 1992), app. dismissed, app. denied, 80 N.Y.2d 890, 587 N.Y.S.2d 900, 600 N.E.2d 627, 1992 N.Y. LEXIS 1793 (N.Y. 1992), vacated, 509 U.S. 917, 113 S. Ct. 3027, 125 L. Ed. 2d 716, 1993 U.S. LEXIS 4466 (U.S. 1993), disapproved, Harper v Virginia Dep't of Taxation, 509 U.S. 86, 113 S. Ct. 2510, 125 L. Ed. 2d 74, 1993 U.S. LEXIS 4212 (U.S. 1993).

Because the state decided to pay full refunds to the plaintiffs, who paid income taxes on Federal pensions for the years 1986 through 1988 pursuant to a discriminatory, unconstitutional tax scheme under Tax Law § 612 [c] [3] [ii]; Administrative Code of City of New York § 11-1712 [c] [3], the issues affected by the vacation and remitittur of this court's decision in Duffy v Wetzler (1992, 2d Dept) 174 App Div 2d 253, 579 NYS2d 684 for further consideration in light of Harper v Virginia Dep't of Taxation (1993) 509 US 86, 113 S Ct 2510, 125 L Ed 2d 74, are academic. Duffy v Wetzler, 207 A.D.2d 375, 616 N.Y.S.2d 48, 1994 N.Y. App. Div. LEXIS 8246 (N.Y. App. Div. 2d Dep't 1994).

State Department of Taxation and Finance was not obligated to personally notify all potential income tax refund applicants of their rights and obligations following U.S. Supreme Court case that affected state taxation of federal retirement benefits; in any event, Article 78 petitioners had been aware of import of case before limitations period expired. Brault v New York State Tax Appeals Tribunal, 265 A.D.2d 700, 696 N.Y.S.2d 579, 1999 N.Y. App. Div. LEXIS 10678 (N.Y. App. Div. 3d Dep't 1999).

Receipts from federal government pension are includable in income of New York State resident. In re Esposito, Op State Tax Comm, Sept. 10, 1976.

Refund provisions of CLS Tax § 687 satisfy minimum requirements of due process as set forth in McKesson Corp. v. Division of Alcoholic Beverage & Tobacco, 496 US 18; thus, petitioners' claims for refund of tax paid on federal pension income were properly denied as time-barred under CLS Tax § 687(a) even though Davis v. Michigan Dept. of Treasury, 489 US 803, which ultimately invalidated New York's taxation of federal pension income, applies retroactively. NY Tax Appeals Tribunal TSB-D-97-(21)I.

New York's interest in financial stability justifies its enforcement of 3-year state of limitations on refund claims under CLS Tax § 687(a) with respect to retroactive application of CLS Tax § 612(c)(3) regarding exemption for federal pension benefits. NY Tax Appeals Tribunal TSB-D-97-(24)I.

Administrative law judge properly denied petitioners' claim for refund of taxes paid on federal pension benefits, as having been filed beyond statute of limitations under CLS Tax § 687(a), despite petitioners' contention that it would have been impossible for them to file timely claims for refund for 1977 through 1985 because Supreme Court's decision in Davis v. Michigan Dept. of Treasury, 489 US 803, was not issued until 1989; New York's refund procedure provides clear and certain post-payment remedy and meaningful opportunity to obtain relief for any unconstitutionally collect taxes, and meets minimum requirements of due process. NY Tax Appeals Tribunal TSB-D-97-(25)I.

Claim for refund of tax paid on federal pension income was time-barred under CLS Tax § 687(a) despite petitioners' assertion that they did not timely file their claim due to tax division's neglect in notifying many retirees, including themselves, that claim should be filed; division had issued Technical Services Bureau memorandum to public, which informed taxpayers of their rights to file protective refund claims pending Court of

Appeals' determination as to whether state was required to issue refunds for prior years pursuant to amendments to CLS Tax § 612(c)(3) and NYC Admin Code § 11-1712(c)(3). NY Tax Appeals Tribunal TSB-D-97-(26)I.

Petitioner was not entitled to refund of tax paid on federal pension income pursuant to retroactive application of Davis v. Michigan Dept. of Treasury, 489 US 803 because her claim was not timely filed under CLS Tax § 687(a) and record did not contain any evidence to support her assertion that it was against equity and good conscience to deny her claims because other taxpayers who had filed claims for refund at same time as she did received refunds. NY Tax Appeals Tribunal TSB-D-97-(27)I.

Taxpayer was not entitled to relief pursuant to special refund authority of CLS Tax § 697(d) for taxes paid on his federal pension income; such payments were made pursuant to law when his income tax returns were filed, although statute was subsequently rendered unconstitutional. NY Tax Appeals Tribunal TSB-D-97-(56)I.

20. —State and subdivision pensions

Amounts withdrawn by teacher who is not retired and who is under 59 ½ years of age from tax deferred annuity established under Tax Deferred Annuity Program of New York City Teachers' Retirement System are subject to personal income tax imposed under Tax Law. Advisory Opinion, Dec St Tax Comm, TSB-A-87-(9)-I.

Pension received by taxpayer from Manhattan and Bronx Surface Transit Operating Authority does not constitute pension payable by state or municipal retirement system exempt from taxation; statute creating transit authority provided that its officers and employees would not become members of New York City employees retirement system, pension rights of employees were fixed in collective bargaining agreement and pensions were paid from current operating revenues, no trust was set up and payments were continued only for life of collective bargaining agreement. In re Noone, Dec State Tax Comm, File #14008.

Distributions from Individual Retirement Account established by means of tax free rollover of amounts received in form of pension from state of New York or subdivision or agency thereof are not subject to tax under New York personal income tax because receipt of distribution from qualified trust which constitutes such pension is not subject to tax; act of rolling over pension into Individual Retirement Account is not itself taxable event and subsequent distribution from such account would represent nontaxable return of principal to extend that distribution represented return of funds rolled over into account; to extent that distribution represented interest, or any other type of gain, earned an account, such portion would be subject to tax. In re Martiney, Op State Tax Comm, November 24, 1980, Advisory Opinion No. 1800630 B.

Employees of Manhattan and Bronx Surface Transit Operating Authority were employees of state, its subdivisions, and agencies within meaning and intent of CLS Pub A § 1203-a and CLS Tax § 612 prior to enactment of L 1997, ch 312, amending CLS Pub A § 1203-a. NY Tax Appeals Tribunal TSB-D-98-(7)I.

20 NYCRR former § 116.3(c)(1) is invalid to extent that it may be interpreted as precluding exemption of pension income pursuant to CLS Tax § 612(c)(3)(i) unless such benefits are paid from New York state or municipal retirement system, as statute contains no such requirement; thus, Long Island Railroad Company pension benefits received in 1991 by retired employee constituted allowable subtraction from federal adjusted gross income. NY Tax Appeals Tribunal TSB-D-97-(52)I.

Petitioner, as employee of Manhattan and Bronx Surface Transit Operating Authority, was employee of state, or one of its subdivisions or agencies, thereby satisfying requirements of CLS Tax § 612(c)(3)(i) and entitling him to pension exemption. NY Tax Appeals Tribunal TSB-D-98-(5)I.

21. —Pensions and annuities received by certain individuals

Payments received by taxpayer pursuant to Teachers Insurance Annuity Association Retirement Annuity Contract and College Retirement Equities Fund Retirement Annuity Contract did not qualify for exemption provided by CLS Tax § 612(c)(3-a), rather, such payments are entirely attributable to premium payments made by taxpayer from his own funds; additionally, such payments are not distributions from IRA or Keogh plans. Advisory Opinion, Dec St Tax Comm, TSB-A-87-(11)-I.

Individual retirement account distributions are excluded from tax up to $20,000, except for distributions which constitute lump sum distributions within meaning of 26 USCS § 402. In re Kaszubinski, TSB-A-84-(1)-I.

Payments made to petitioner under petitioner's employer's long-term disability income plan during taxable years ending on or after December 16, 1982 constitute "annuities" subject to exclusion provided for in CLS Tax L § 612(c)(3-a); however, only those payments received by petitioner after he had attained age of 59 ½ years will qualify for such exclusion. In re Richard J. Alexanderson TSB-A-85(2)I.

Payments from corporate employer to taxpayer qualified as annuity, not income, where they were made in money only and at regular intervals, annually, for life of taxpayer, rate remained uniform, taxpayer's right to receive them was evidenced by written instrument executed by employer, and taxpayer was never member of employer's qualified retirement plans. NY Tax Appeals Tribunal TSB-D-94-(7)I.

22. —Military pay or pension

Resident's New York adjusted gross income means his federal adjusted gross income for taxable year, plus or minus specific modifications, but Tax Law does not provide for modification to reduce federal adjusted gross income by amounts received as military retirement pension. In re Winters, Dec State Tax Comm, File #16686.

Military pension received by individual currently residing in New York who was not resident of state when he entered military service must be included in adjusted gross income. In re Bellow, 1978 Op State Tax Comm, September 1, 1978.

Pension received for service as officer in branch of United States Armed Forces does not constitute pension subtracted from federal adjusted gross income, within meaning and intent of Tax Law § 612(c)3; military retirement pay is includible in income of New York State resident. In re Johnson, 1978 Op State Tax Comm, September 13, 1978.

23. —Other income taxes

In an Article 78 proceeding brought by partners in the same law firm seeking review of determinations of the State Tax Commission sustaining personal income tax assessments imposed under Tax L §§ 612 and 617, the Commission properly determined that the New York City Unincorporated Business Tax could not be considered a business excise tax, rather than an income tax, for purposes of being used as an allowable deduction in computing net income for state income tax purposes. Bower v New York State Tax Com., 86 A.D.2d 932, 448 N.Y.S.2d 568, 1982 N.Y. App. Div. LEXIS 15616 (N.Y. App. Div. 3d Dep't 1982).

A city unincorporated business tax, paid by a partnership and deducted by the partnership on its federal information returns, is an income tax required to be added by a partner to his federal adjusted gross income to determine his New York adjusted gross income. Scobey v New York State Tax Com., 95 A.D.2d 905, 463 N.Y.S.2d 907, 1983 N.Y. App. Div. LEXIS 18876 (N.Y. App. Div. 3d Dep't 1983).

Excessive social security taxes withheld from compensation is not one of modifications to federal adjusted gross income provided for under CLS Tax § 612. In re Cosentino, Dec State Tax Comm, TSB-H-84-(141)-I.

New York City general corporation tax is not an income tax that is required to be added back to federal adjusted gross income when computing New York adjusted gross income, such that shareholder of New York S corporation is not required to make modification required by CLS Tax § 612(b)(3) for shareholder's distributive share of New York City general corporation tax paid by S corporation. Dec St Tax Comm, TSB-A-86(16)I, TSB-A-86-(17)-I.

Distributive share of New York City unincorporated business income tax paid by a partnership, which petitioner had deducted in computing federal adjusted gross income, was not deductible under Tax Law Art 23 (New York State unincorporated business

income tax) § 706(4) in computing New York State personal income tax; governing statutes were Tax Law §§ 612(b)(3) and 615(c)(1), requiring unincorporated business income tax to be added to federal adjusted gross income in computing New York State personal income tax. Petition of Adelsberg, File Nos. 13054, 13055 State Tax Com. August 25, 1978.

New York City unincorporated business tax is income tax which must be added to federal adjusted gross income in determining New York adjusted gross income. In re Beah, Dec State Tax Comm, October 9, 1979.

Petitioner, a retired partner of a New York stock brokerage firm, is required to add to federal adjusted gross income petitioner's share of the partnership's New York City unincorporated business tax deduction pursuant to Tax Law § 612(b)(3). In re Smith, 1980 Dec St Tax Comm, Jan. 2, 1980.

Income Tax Bureau properly increased amount of nonresident petitioner's New York source income in accordance with meaning and intent of Tax Law §§ 637(c) and 612(b)(3) by including within his distributive share New York State and New York City unincorporated business taxes taken as deductions on partnership return of brokerage firm of which he was general partner. In re Marchi, 1980 Dec St Tax Comm, Feb 29, 1980.

Since the New York Tax Law makes no provision for the allowance of a credit for taxes paid to a foreign country, petitioners are required to reduce their federal itemized deductions for the taxes paid to Great Britain by a trust of which they were the beneficiaries and the amount of tax paid is included in petitioner's taxable income for purposes of the New York personal income tax. In re Whitehead, 1980 Dec St Tax Comm, March 21, 1980.

The New York City Unincorporated Business Tax is not properly deductible in computing New York State personal income tax. In re Nadler, 1980 Dec St Tax Comm, May 16, 1980.

The New York City unincorporated business tax is an "income tax" within the meaning and intent of Ch 46, Title S of the New York City Administrative Code and accordingly must be added to the federal adjusted gross income. In re Taylor, 1980 Dec St Tax Comm, Jun. 20, 1980.

Taxpayer who received distributive share of partnership ordinary income was required to increase his Federal adjusted gross income by sum representing his share of New York City unincorporated business tax deduction taken on return of partnership. In re Shukat, Dec State Tax Comm, TSB-H-83(88)I, June 10, 1983.

Petitioners, S corporation shareholders, were entitled to resident tax credit against personal income tax for taxes paid to New Jersey and Connecticut by the S corporation to the extent it was deducted in arriving at Federal Adjusted Gross Income. Even assuming that state court decisions in New Jersey and Connecticut characterized the taxes paid by the S corporation as franchise taxes, rather than income taxes, the Tax Appeals Tribunal is not bound by the foreign state's characterization of its own taxes. Courts will often construe the same tax differently depending upon the precise issue before those courts, and therefore, the issue before the Tax Appeals Tribunal should be whether these taxes were income taxes as that term is used in Tax Law § 620(a). In looking at the nature and practical effect of the tax in question, it was concluded that to the extent the instant taxes were imposed on an income base, the nature and effect of the taxes were "income" taxes within the meaning of the resident tax credit. NY Tax Appeals Tribunal TSB-D-90 (28) I (1990).

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Additions to federal adjusted gross income for computing New York State adjusted gross income of resident individual under § 612(b)(3) includes New York City unincorporated business tax. In re Kern, Dec State Tax Comm, Oct 3, 1980.

Income taxes imposed by the state or any other taxing jurisdiction, to the extent deductible in determining federal adjusted gross income, shall be added to such income in determining the New York adjusted gross income of a resident individual under Tax Law §§ 617 and 612(b)(3); furthermore Tax Law §§ 632 and 637 make Tax Law §§ 612(b)(3) and 617 applicable to nonresident taxpayers to the extent that income is derived from or connected with New York sources and accordingly New York City unincorporated business tax is not properly deductible by either resident or non-resident in computing New York State Personal Income Tax. In re Koenig, 1981 Dec St Tax Comm, December 3, 1981.

24. —Ordinary and necessary expenses

A taxpayer who spent approximately 30 hours per week reviewing investment publications, making records of his ownership of stocks, and performing other tasks related to his investments, was not engaged in the business of securities trading under Tax Law § 612, where his transactions lacked the degree of frequency, regularity and continuity necessary to identify him as a trader. Klesitz v New York State Tax Com., 107 A.D.2d 880, 484 N.Y.S.2d 316, 1985 N.Y. App. Div. LEXIS 42786 (N.Y. App. Div. 3d Dep't), app. denied, 65 N.Y.2d 603, 492 N.Y.S.2d 1025, 482 N.E.2d 567, 1985 N.Y. LEXIS 16183 (N.Y. 1985).

Taxpayer was not in business or trade of bookmaking, and thus he was not entitled to calculate forfeiture of seized funds as business expense under 26 USCS § 162(a), where he testified that income in question derived from family gifts, business savings and winnings from legal gambling, he did not testify that he was full-time gambler or bookmaker, and he testified that he was employed as manager of carwash, having been previously employed by IBM. Rizzo v Tax Appeals Tribunal, 210 A.D.2d 748, 621 N.Y.S.2d 115, 1994 N.Y. App. Div. LEXIS 13024 (N.Y. App. Div. 3d Dep't 1994).

Question of reasonablenss of salary or compensation is factual, to be determined upon examination of all facts and circumstances presented; factors include employee's qualifications, nature, extent, and scope of employee's work, size and complexities of business, comparison of salaries paid with gross income and net income, prevailing general economic conditions, comparison of salaries with distribution to stockholders, prevailing rates of compensation for comparable positions in comparable concerns, salary policy of taxpayer to all employees, and in case of small corporations with limited number of officers amount of compensation paid to particular employee in previous years; closely-held corporations are subject to closer scrutiny with respect to salaries and other compensation paid to officer-shareholders; burden of proving that salaries and other compensation paid are reasonable falls upon taxpayer. In re Backus, Dec State Tax Comm, TSB-H-83-(5)-I.

Trader in securities, defined as person who buys and sells securities in frequent and continuous operations for his own account, may deduct expenses, exclusive of commissions, from gross income in determining adjusted gross income; investor in securities, defined as person whose activities are limited to occasional transactions and are less than those required in trade or business may deduct expenses, exclusive of commissions, as nonbusiness itemized deductions. In re Klesitz, Dec State Tax Comm, TSB-H-83-(20)-I.

Bona fide salaries paid to family members may be deducted; propriety of deducting salary expense turns upon economic substance of transaction, not upon time sequence or form of transaction; deduction for salary is properly disallowed where total salary amounts as well as proportions thereof to be returned to family farm by each family member are determined solely by farmer and it appears that no provision for interest to be booked or paid to purported "loans" is established. In re Sobiech, Dec State Tax Comm, TSB-H-83-(48)-I.

Stockbroker who used a private airplane to travel to meetings with numerous Canadian clients could deduct airplane expenses as unreimbursed business expense, as use of the private airplane was necessary in order to timely meet commitments. In re Pease, Op State Tax Comm, July 15, 1977.

Modification for a portion of executors' terminal commissions paid to executors of decedent's estate in final year of estate was properly based on ratio that tax-exempt income for New York State income tax purposes bore to total income in last year of estate, rather than ratio that said tax-exempt income bore to total income over life of estate. Petition of Estate of Green, State Tax Com'n. (File No. 13205) July 27, 1978.

Special guardian fee paid during tax year and claimed as deduction for Federal and New York State income tax purposes constituted payment for conservation or maintenance of property held for production of income, and allocation for New York State income tax purposes was properly based on ratio that tax-exempt income for New York State income tax purposes bore to total income in last year of estate. Petition of Green, State Tax Com'n. (File No. 13206) July 27, 1978.

Taxpayer who was employed for indefinite period at particular business location was "at home" at job site for tax purposes, and travel expenses claimed by taxpayer in connection with assignment at job site were not considered "away from home" expenses under Internal Revenue Code § 162(a)(2), but travel expenses from job site in connection with maintenance of apartment houses owned by taxpayer were considered ordinary and necessary expenses incurred for management, conservation or maintenance of rental property held for the production of income in accordance with Code § 62(5). In re Thew, 1979 Dec State Tax Comm, Nov 26, 1979.

Legal fees incurred in connection with a court action to void a trust agreement are not deductible under IRC § 212 since the legal expenses claimed were expended for the purpose of gaining control of the trust's assets and not for the management, conservation, or maintenance of such trust. In re Greene, 1980 Dec St Tax Comm, Feb. 22, 1980.

Permanent nature of job is judged at time job began and not by later events, consequently assignment, by lasting more than one year, does not change assignment from temporary to indefinite in nature; petitioner properly deducted expenses for meals and lodging in accordance with § 162(a)(2) of Internal Revenue Code. In re Kostuck, Dec State Tax Comm, August 20, 1980.

Loss derived from worthless stock is an ordinary loss where such stock was acquired with a business motive and not an investment motive, and said business motive was retained until said stock became worthless. In re Weisser, Dec State Tax Comm, September 19, 1980.

Petitioner's legal expenses incurred in attempting to reverse conviction for driving while intoxicated were personal in nature and not deductible, where petitioner was arrested on way home from church function unrelated either to his position as city mayor or his rubbish removal business, notwithstanding his contention that conviction was contested because it would have resulted in additional automobile insurance costs which would affect net income from rubbish removal business, and also have adverse effect upon his election to any subsequent public office. In re Stummer, Op State Tax Comm (File No. 10839) April 24, 1978.

Property was held for production of income for use in trade or business, and rental loss would be allowed under Internal Revenue Code § 62(5) and Tax Law Article 22, where property was ski house with capacity of 22 people, was rented during winter by weekend and for summers, was registered as rental property, insurance reflected rental status, and taxpayer did not use property as personal residence. In re Vulpi, 1979 Dec State Tax Comm, Nov 26, 1979.

To be deductible, travel expenses (including amount expended in meals and lodging) while taxpayer in carrying on any trade or business must not only be reasonable and necessary, but must be incurred "while away from home," that is, the taxpayer must maintain an actual residence, the expense of which he continues to incur while away from that residence on business and the taxpayer's employment "away from home" must be "temporary" rather than "indefinite" in nature. Rejected was the position of the Division of Taxation which urged a two-year rule, whereby an expected or actual stay of two years or longer would be considered an indefinite stay, and not a stay away from home, regardless of any other facts or circumstances. Instead of utilizing a durational test to determine whether petitioner's employment was either temporary or indefinite, the better test to apply was to weigh all relevant facts. Here, the petitioner expected his job would be temporary; this expectation was consistent with his past work experience, and furthermore, petitioner contained to maintain strong familial, social, and financial bonds to his Mechanicsville home. NY Tax Appeals Tribunal TSB-D-90 (31) I (1990).

25. —Operating losses

In an Article 78 proceeding challenging the disallowance of that portion of the taxpayer's 1973 and 1974 net operating loss carryback, against his 1971 adjusted gross income, which exceeded his positive federal taxable income for 1971, the disallowance was proper since it only prevented an unauthorized double deduction, and since it was consistent with federal provisions that limited carry forward losses to the amount that was not used to reduce federal taxable income to zero in the preceding year. Berg v Tully, 92 A.D.2d 436, 461 N.Y.S.2d 562, 1983 N.Y. App. Div. LEXIS 16638 (N.Y. App. Div. 3d Dep't), app. denied, 60 N.Y.2d 552 (N.Y. 1983).

Because the taxpayers' returns for 1999 and 2000 did not include the income represented by certain bad debts, and they did not aver that such income was included in any prior year, pursuant to N.Y. Tax Law § 612(a), the taxpayers were not entitled to a bad debt deduction under 26 C.F.R. § 1.166-1(e). Matter of Schnell v Commissioner of Taxation & Fin., 27 A.D.3d 977, 812 N.Y.S.2d 664, 2006 N.Y. App. Div. LEXIS 3571 (N.Y. App. Div. 3d Dep't 2006).

Taxpayers may not carryback New York net operating losses sustained in tax years when they were nonresidents of New York to tax years when they were residents of New York, since such losses did not enter into the taxpayers' Federal adjusted gross income for the years that they were New York residents. In re McClure, 1983 Dec State Tax Comm, TSB-H-83(298)I, October 25, 1983.

Individuals may not claim for New York state income tax purposes different net operating loss deductions or carryback or carryover deductions than for federal income tax purposes. In re Gregory, Op State Tax Comm, October 3, 1977.

Loss incurred by renting home to daughter at less than market value is not deductible since under such circumstances property in question was not operated for profit. In re Williams, Dec State Tax Com, December 16, 1980.

In determining New York State Income Tax, taxpayers may not compute a net operating loss and a net operating loss carryback deduction which includes the addition and subtraction modifications required by Tax Law § 612 and 615 since 26 USCS § 172 providing for the computation of a net operating loss and a net operating loss carryback deduction does not provide for such modifications. In re Hawkings, 1981 Dec St Tax Comm, October 29, 1981.

Computation of net operating loss is not controlled by amount of loss shown on New York State income tax return of loss year; in absence of any provisions in Tax Law for computation of net operating loss, provisions of Internal Revenue Code control computation of any net operating loss; 26 USCS § 172 provides for computation of net operating loss and net operating loss carryback deduction and does not provide for modifications required by Tax Law §§ 612 and 615; therefore, petitioners cannot determine net operating loss or claim deduction for such loss in manner different from that provided in 26 USCS § 172. In re Atwell, 1981 Dec State Tax Comm, Oct 29, 1981; re Adrian, 1981 Dec State Tax Comm, Oct 29, 1981.

26. —Capital gains and losses

It may be assumed that Real Prop Tax L § 467 contemplated using the term "income" to embrace what is currently taxable, at least in part, as income, but in so assuming, it is only fair to carry the assumption further and offset capital gains with capital losses. Engle v Talarico, 33 N.Y.2d 237, 351 N.Y.S.2d 677, 306 N.E.2d 796, 1973 N.Y. LEXIS 867 (N.Y. 1973).

Although as result of circuit court's determination that stock inherited by taxpayer should be valued at sum in excess of that originally shown on estate tax return, resulting in additional estate tax, one-half of which was charged to petitioner as beneficiary of his mother's estate, tax imposed on petitioner for gain realized in sale of stock on basis of the difference between the original valuation and the later valuation did not constitute double taxation, inasmuch as both taxpayers and taxes imposed were different. Kuser v Gallman, 48 A.D.2d 970, 371 N.Y.S.2d 163, 1975 N.Y. App. Div. LEXIS 10264 (N.Y. App. Div. 3d Dep't 1975).

Taxpayer who did not inherit stock until July 1960, was not entitled, in computing state adjusted gross income, to subtract from federal adjusted gross income the gain from property having higher adjusted basis for state income tax purposes than for federal and, since he did not amend his 1961 federal return to eliminate gain from 1961 sale of stock, after Surrogate's Court increased value of stock for estate tax purposes to the amount for which it was sold, and his 1961 federal adjusted gross income included the capital gain, taxpayer was also required to include it in his 1961 state return. Kuser v Gallman, 48 A.D.2d 970, 371 N.Y.S.2d 163, 1975 N.Y. App. Div. LEXIS 10264 (N.Y. App. Div. 3d Dep't 1975).

In computing capital gains as an item of tax preference for minimum income tax purposes, taxpayers may not use a higher New York State basis for property giving rise to such gains than that used for Federal purposes. In re Estate of Fried, 1983 Dec State Tax Comm, TSB-H-83(160)I, June 20, 1983.

Spouses who determine federal income tax on joint return but determine New York income taxes separately must determine New York adjusted gross income separately as if federal adjusted gross incomes had been determined separately; one spouse's reporting of realized gains without taking into consideration losses separately reported by other spouse is improper where spouse who reported losses would not have been entitled to deduct capital losses on federal tax return had separate federal tax return being filed. In re Di Giacinto, Dec State Tax Comm, TSB-H-84-(52)-I.

Gain on sale of Florida cattle ranch may be subtracted under Tax Law § 612(c)(5) from federal adjusted gross income, since such gain was reportable under Article 16 of the Tax Law in an earlier year in which petitioner did not elect to use instalment basis for reporting income to New York State. In re Vanderbilt, Op State Tax Comm, Jan. 13, 1977.

Where taxpayer had made a gift of stock after the corporation had sold its only asset pursuant to a plan of liquidation, the taxpayer would be required to pay the capital gain attributable to the shareholders upon liquidation of the corporation. In re Trefner, Op State Tax Comm, June 14, 1977.

Where both condemned and replacement property, consisting of 2 to 6 family houses held by petitioners for rental income, were similar or related in service or use within the meaning of Internal Revenue Code §§ 1031 and 1033, petitioners could elect to defer payment of the tax on part of the gain resulting from the replacement of the condemned property with property of like character in accordance with the meaning and intent of Internal Revenue Code § 1033, could elect to report all capital gain on two properties without consideration of replacement property, and could elect to combine two condemned properties with four replacement properties to defer part of the gain. Petition of Podolsky, File No. 10644 State Tax Com., Sept. 20, 1978.

Where petitioner sole stockholder filed a separate return, long-term capital loss from sale of such stock was reduced from $1,000 to $500 pursuant to Tax Law § 612(f). Application of Kornblith, File No. 10816 State Tax Com., September 20, 1978.

Taxpayer, member of partnership who was credited on schedule of partner's capital with capital gain income must report such capital gain where he cannot substantiate contention that proceeds of sale which resulted in capital gain were used to satisfy partnership liabilities, including portion of liability which he had assumed and that he received no monetary award from sale and did not realize taxable capital gains since his basis was equal to or larger than capital gain distribution. In re Rice, Dec State Tax Comm, Oct. 9, 1979.

Lump-sum distribution from profit-sharing plan did not qualify for capital gains treatment, and constituted ordinary income in accordance with Internal Revenue Code § 402 and Tax Law Article 22, where taxpayer was president of corporation, owned 75 percent of corporate stock, and corporation's profit-sharing plan was terminated and liquidated on request of Internal Revenue Service. In re Giebel, 1980 Dec State Tax Comm, Jan 2, 1980.

Despite the fact that redemption of petitioner's stock by a brokerage firm technically constituted a sale or exchange of a capital asset and as such would be a capital loss, where petitioner purchased the stock to protect his income, after the brokerage firm made it clear that any advancement or even his remaining with the firm was dependent on his purchase of corporate stock, such purchase was clearly not motivated by investment purposes and therefore the loss taken by petitioner upon the redemption of such stock constitutes an ordinary loss. In re Spurr, 1980 Dec St Tax Comm, Feb. 22, 1980.

Taxpayer who, subject to settlement agreement with Internal Revenue Service, did not deduct long-time capital loss for federal purposes may not deduct such loss from state income tax return. In re Shapiro, 1982 Dec State Tax Comm, Jul 13, 1982.

Constructive distribution made by corporation having no current earnings or profits would be treated as a return of capital to the extent of the stock basis, but any distribution made from current earnings and profits would be treated as dividend income. In re PLA Standard Corp., Op State Tax Comm, September 15, 1980.

Taxpayers were not entitled to reduce capital gain reported on their federal income tax return, realized on sale of partnership interest, by amount attributable to amount of mortgage assumed by purchaser of interest. NY Tax Appeals Tribunal TSB-D-91-(8)I.

Division of Taxation was not precluded from assessing additional tax on gain from sale of certain stock in 1988 tax year when stock was sold although it never challenged or denied taxpayer's Internal Revenue Code § 83(b) election, where taxpayer did not file valid § 83(b) election with his federal income tax return in 1985 when he acquired stock in question, but mistakenly filed it with his 1986 federal income tax return. NY Tax Appeals Tribunal TSB-D-97-(46)I.

27. —Alimony

Petitioner was not entitled to claim deduction for alimony in 1979 where such alimony payments were made in taxable year 1977, since he was a cash base taxpayer, and since said deduction was not claimed for federal purposes in 1979. In re Thompson, Dec St Tax Comm., TSB-H-85-(43)-I.

Money received by taxpayer from her former husband, pursuant to judgment of divorce, constitutes alimony and is taxable as income to taxpayer where divorce decree and separation agreements incorporated therein required former husband to pay for various elements of support for children but neither agreements nor decree stated that specific amount was payable only for child support. In re Shool, Dec State Tax Comm, September 5, 1980.

Although the New York Supreme Court incorporated in its divorce decree a provision designating a certain part of the alimony award to be tax free to petitioner, the entire amount received by petitioner is fully taxable alimony income within the meaning of Article 22 of the Tax Law since the Supreme Court is without authority to determine the taxability of alimony payments. In re Coakley, Dec St Tax Comm, September 19, 1980.

Alimony deduction is not proper where payments are being made under agreement dated before enactment of Internal Revenue Code of 1954 and never altered or modified. In re Luxemburger, Dec State Tax Com, December 26, 1980.

Support payments made to petitioner from husband's pension, must be included in petitioner's federal and New York adjusted gross income and do not qualify for pension and annuity exclusion provided by § 612[c][3-a] of Tax Law. Advisory Opinion, Dec St Tax Comm, TSB-A-86[8]-I.

Prepaid alimony which may be deducted from Federal taxable income may also be deducted from New York taxable income. In re McFarlane, Op State Tax Comm, June 30, 1977.

28. —Income spreading and averaging

In Article 78 proceeding to review personal income tax assessments, provisions of Tax L § 612, subdivision a did not require New York to adopt federal tax regulation permitting taxpayer to spread unusually large legal fee over years in which earned; thus, entire fee was taxable in New York in year received. Bonney v State Tax Com., 43 A.D.2d 879, 351 N.Y.S.2d 187, 1974 N.Y. App. Div. LEXIS 5934 (N.Y. App. Div. 3d Dep't), app. denied, 34 N.Y.2d 515, 1974 N.Y. LEXIS 2712 (N.Y. 1974).

Income averaging is not permitted in computation of New York State personal income tax and federal investment tax credit is to be disregarded in computation of New York State personal income tax. In re Passero, Op State Tax Comm, Sept. 28, 1976.

Since there is no provision in New York Tax Law which permits conformity with respect to special tax computations permitted for Federal income tax purposes, while § 612 requires Federal conformity with respect to included gross income, the entire accumulations distribution received by petitioner in 1971 and required to be included in her Federal gross income for that year was properly includable in New York adjusted gross income notwithstanding fact that she was permitted to throw back amount of said accumulation distribution to 1969 and 1970 in reporting Federal taxable income and to separately compute Federal tax thereon. In re Manasse, Op State Tax Comm, (File No. 12706) April 24, 1978.

29. —Joint or separate returns

Since husband and wife taxpayers file separately on one return and bad debt in issue was only claimed by husband taxpayer, Notice of Deficiency is canceled with respect to wife taxpayer. In re Vibbard, Dec St Tax Comm, TSB-H-87-(168)-I.

Where husband and wife filed a joint federal return but separate state tax returns, capital gain on sale of franchise of husband's business was attributable only to husband. In re Costa, Op State Tax Comm, August 16, 1977.

Where petitioner sole stockholder filed a separate return, long-term capital loss from sale of such stock was reduced from $1,000 to $500 pursuant to Tax Law § 612(f). Application of Kornblith, File No. 10816 State Tax Com., September 20, 1978.

Husband who paid alimony to wife pursuant to separation agreement was entitled to deduction on his separate New York personal income tax return, notwithstanding that husband and wife filed a joint federal return, thereby canceling the deduction for federal purposes. In re Smith, Op State Tax Comm, August 16, 1977.

30. —Qualified higher education funds

Transfer of funds directly from one transferee bank to another does not result in qualified higher education funds being paid to creator of past account; in absence of such payment, transfer of funds does not constitute distribution. In re Sawyer, Op State Tax Comm, Mar. 6, 1981.

If taxpayers have used or will use amounts contained in their higher education fund to establish alumni tuition plan, whereby parents prepay child's full tuition before child enters college, for eligible beneficiary, neither taxpayer nor eligible beneficiary will be subject to tax on such amounts unless eligible beneficiary ceased to be student or incident of termination took place before relevant effective dates of repeal; amounts contained in qualified higher education fund may be used to establish college alumni tuition plan, whereby taxpayer prepays child's college tuition, but no tuition deduction is available for amounts contributed to such plan. Advisory Opinion, Dec St Tax Comm, TSB-A-87-(4)-I.

31. —Other items

Loss in form of forfeiture as part of consensual agreement with district attorney was neither "transaction entered into for profit" (26 USCS § 165(c)(2)) nor loss from "wagering transaction" (26 USCS § 165(d)); thus, taxpayer could not claim forfeiture as deduction for "any loss sustained during the taxable year and not compensated for by insurance or otherwise" under 26 USCS § 165(a). Rizzo v Tax Appeals Tribunal, 210 A.D.2d 748, 621 N.Y.S.2d 115, 1994 N.Y. App. Div. LEXIS 13024 (N.Y. App. Div. 3d Dep't 1994).

Taxpayer was not entitled to a subtraction for state and city tax refunds, where no evidence was submitted that these refunds were included in Federal Adjusted Gross Income. In re Weinberg, Op State Tax Comm, June 24, 1977.

Taxpayer is not required to add back the $25,000 exclusion from federal gross income authorized by Internal Revenue Code § 911 to New York personal income. In re Goldstein, 1982 Dec State Tax Comm, Dec. 17, 1982.

Taxpayer who merely contended that he paid rent for his mother's apartment failed to sustain burden of proof required to show that he was entitled to exemption in accordance with Internal Revenue Code § 151(e), § 152 and Tax Law Article 22, where only canceled checks, and no other documentary evidence, were submitted. In re Shpiz, 1980 Dec State Tax Comm, January 2, 1980.

To be deductible, travel expenses (including amount expended in meals and lodging) while taxpayer in carrying on any trade or business must not only be reasonable and necessary, but must be incurred "while away from home," that is, the taxpayer must maintain an actual residence, the expense of which he continues to incur while away from that residence on business and the taxpayer's employment "away from home" must be "temporary" rather than "indefinite" in nature. Rejected was the position of the Division of Taxation which urged a two-year rule, whereby an expected or actual stay of two years or longer would be considered an indefinite stay, and not a stay away from home, regardless of any other facts or circumstances. Instead of utilizing a durational test to determine whether petitioner's employment was either temporary or indefinite, the better test to apply was to weigh all relevant facts. Here, the petitioner expected his job would be temporary; this expectation was consistent with his past work experience, and furthermore, petitioner contained to maintain strong familial, social, and financial bonds to his Mechanicsville home. NY Tax Appeals Tribunal TSB-D-90 (31) I (1990).

Agency Opinions

Analysis

1. Includability in income—Contributions to pension plans, life insurance
2. —Corporate distributions, dividends
3. —Income from or loss of subchapter S corporation
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15. —Capital gains and losses
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17. —Other items

1. Includability in income—Contributions to pension plans, life insurance

2. —Corporate distributions, dividends

Shareholders of regulated investment company may treat tax-exempt dividends attributable to interest on company's "Exempt Obligations" as subtraction item for purposes of CLS Tax § 612(c)(1) if relevant asset and notice requirements are satisfied. NY Adv Op Comm T & F TSB-91-(9)I.

If shareholder of registered investment company receives exempt-interest dividends derived from New York municipal obligations and obligations of United States territories and possessions that are excluded from shareholder's federal adjusted gross income, such exempt-interest dividends are excluded from New York adjusted gross income. NY Adv Op Comm T & F TSB-A-91-(11)I.

Exempt-interest dividends attributable to interest on New York municipal obligations and obligations of United States territories and possessions that are paid by lower-tier funds to upper-tier fund that is similarly qualified to pay exempt-interest dividends,

which are excluded from federal adjusted gross income, are also excluded from New York adjusted gross income when paid by upper-tier fund to shareholders of upper-tier fund who are subject to New York State or City personal income tax. NY Adv Op Comm T & F TSB-A-00-(1)I.

3. —Income from or loss of subchapter S corporation

Advisory opinion concerning treatment under CLS Tax Art 22 of transaction where election under Internal Revenue Code § 338(h)(10) is made by shareholders of corporation that has elected to be taxed under Subchapter S of Internal Revenue Code (S corporation) when (1) corporation is non-electing S corporation for New York tax purposes, and (2) corporation is New York electing S corporation. NY Adv Op Comm T & F TSB-A-97(2)I.

4. —Interest from government obligations

Interest paid on obligations issued by Niagara Falls Bridge Commission is exempt from New York State and New York City Personal Income Taxes. NY Adv Op Comm T & F TSB-A-92-(1)I.

Zero coupon obligations, including Certificate of Accrual Treasuries, Treasury Bond Receipts, Coupon Treasury Receipts, Easy Growth Treasury Receipts, and Separate Trading of Registered Interest and Principal of Securities, are obligations of United States under CLS Tax § 612(c)(1), and thus are exempt from tax thereunder. NY Adv Op Comm T & F TSB-A-90-(9)I.

Since taxpayer did not elect to deduct his New York itemized deductions under CLS Tax § 615 in determining his New York taxable income for tax year in question, no deduction was allowed under CLS Tax § 615(d)(3); further, since premium paid was not attributable to trade or business carried on by taxpayer, no deduction was allowed computing New York adjusted gross income under CLS Tax § 612(c)(10) for amortizable bond premium for municipal bonds of other states. NY Adv Op Comm T & F TSB-A-03-(3)I.

5. —Partnership income or distribution

Exemption provisions of PL 86-272 do not apply to members of LLCs that are New York domestic corporations or who are residents or domiciliaries of New York. NY Adv Op Comm T & F TSB-A-08-(7)C.

6. —Payments for services

Income that taxpayer actually received in 1996 when he was statutory city resident individual, that was attributable to services performed prior to 1996, was included in his federal adjusted gross income for taxable year 1996 under Treasury Regulations § 1.451.-1(a); thus, under CLS Tax § 1303, NYC Admin Code § 11-1711(a), and CLS Tax § 612, taxpayer could not exclude such income from his city taxable income computed for 1996. NY Adv Op Comm T & F TSB-A-01-(3)I.

Lodging furnished by hotel to its employees is not subject to sales tax and hotel is not required to collect or pay tax on value assigned to such lodging if hotel receives no cash or other consideration for lodging from its employees and lodging is provided under circumstances whereby value of lodging is not income for employees under federal or state income tax laws. NY Adv Op Comm T & F TSB-A-06-(11)S.

For purposes of federal and state personal income tax, value of lodging furnished to employee by his or her employer must be excluded from employee's wages if such lodging is furnished on employer's business premises, is furnished for the employer's convenience and employees must accept such lodging as condition of employment. NY Adv Op Comm T & F TSB-A-06-(11)S.

Provision of rooms by hotel to select vendors (such as musicians, photographers and other vendors who provide services to hotel) is part of consideration paid by hotel for vendor's services; such consideration is subject to tax on normal rent of room. NY Adv Op Comm T & F TSB-A-06-(11)S.

7. —Other items

Reorganization of bank, to form holding company and become wholly-owned subsidiary thereof in transaction treated as tax-free transaction under Internal Revenue Code § 351(a), constituted transaction that was not taxable for purposes of CLS Tax Art 32; further, if for federal income tax purposes, no taxable income would be realized by shareholders as result of exchange of bank's stock for holding company stock, no taxable income would be realized by shareholders for New York State income tax purposes. NY Adv Op Comm T & F TSB-A-90-(5)I, 1990 N.Y. Tax LEXIS 203.

New York adjusted gross income for resident individual, who was nonresident alien for federal income tax purposes and who would be present in United States for less than 183 days during taxable year, would include his consulting fees for services performed in United States and dividends from stock in United States corporations, but would not include consulting fees for services performed in other countries, dividends from stock in alien corporations, interest on deposits held in United States bank account, or capital gain on sale of corporate stock. NY Adv Op Comm T & F TSB-A-90-(6)I.

Revamped Manhattan and Bronx Surface Transit Operating Authority (MABSTOA) pension plan is not "New York State or municipal retirement system" within meaning of Personal Income Tax Regulations former § 116.3(c)(now § 112.3(c)) and thus pension payments received through plan are not exempt from personal income tax under CLS Tax § 612(c)(3); however, revamped MABSTOA pension plan still qualifies for exemption provided by CLS Tax § 612(c)(3-a). NY Adv Op Comm T & F TSB-A-92-(8)I.

Pension payments taxpayer received from his Teachers Insurance and Annuity Association defined contribution pension plan (TIAA) when he reached age 59 ½ would qualify for subtraction under CLS Tax § 612(c)(3-a) up to $20,000 maximum exclusion if he selected interest only option that was paid on periodic basis fluctuating only when TIAA changed interest rate. NY Adv Op Comm T & F TSB-A-97(5)I.

Discussion as to whether taxpayer was entitled to exclude from his New York adjusted gross income, under CLS Tax § 612(c)(12), all withdrawals from IRA, received during each taxable year, until such time as sum of such withdrawals exceeded sum of all of CLS Tax § 612(b)(7) add-back modifications taxpayer made as to professional service corporation's contributions to pension plan attributable to taxpayer. NY Adv Op Comm T & F TSB-A-99-(2)I.

When taxpayer reached age 59 ½ , distributions received from his private Individual Retirement Account (IRA), which was established by means of tax-free rollover or direct transfer of amounts received from his New York City Teachers' Retirement Internal Revenue Code (IRC) § 403(b) tax-deferred annuity plan, would be exempt from state personal income tax, but not in excess of $20,000. NY Adv Op Comm T & F TSB-A-03(5)I.

Retirement benefits received from Internal Revenue Code (IRC) § 403(b) tax-deferred annuity plan are exempt from New York personal income tax under CLS Tax § 612(c)(3)(i) and 20 NYCRR § 112.3(c)(1)(i) if amounts are actually contributed to plan (rather than merely deemed to be contributed to plan) and individual (state employee) directs custodian of current New York State-sponsored § 403(b) plan to transfer funds from plan to another § 403(b) plan not sponsored by state. NY Adv Op Comm T & F TSB-A-06-(10)I.

Distributions that are attributable to petitioner's 401K Thrift Plan rollover contribution to her IRA are not included in her New York taxable income pursuant to CLS Tax § 612(c)(3)(ii); however, any gain or income earned by IRA rollover is included in petitioner's New York taxable income to extent it does not qualify for $20,000 income subtraction under CLS Tax § 612(c)(3-a). NY Adv Op Comm T & F TSB-A-09-(7)I.

Distributions that are attributable to rollover contribution to IRA, 457 Plan, or other eligible retirement plan that is not Roth IRA are not included in New York taxable income pursuant to CLS Tax § 612(c)(3)(i); however, for IRA, 457 Plan or eligible retirement plan that is not Roth IRA, any gain or income earned on amount of rollover is included in petitioner's New York taxable income to extent that it does not qualify for $20,000 income subtraction under CLS Tax § 612(c)(3-a) while, for Roth IRAs, amount of rollover will not be included in New York taxable income pursuant to CLS Tax § 612(c)(3)(i) and, pursuant to Internal Revenue Code § 408A(d), distributions will not be included in Federal gross income. NY Adv Op Comm T & F TSB-A-09-(9)I.

Where tax-deferred annuity plan (TDA) was funded with contributions from school district, which is state public employer, distributions that are attributable to rollover contribution to IRA

from TDA are not included in New York taxable income under CLS Tax § 612(c)(3)(i); however, any gain or income earned on amount of rollover is included in petitioner's New York taxable income to extent that it does not qualify for $20,000 income subtraction under CLS Tax § 612(c)(3-a). NY Adv Op Comm T & F TSB-A-09-(10)I.

8. Adjustments to federal adjusted gross income, generally

9. —Federal pensions

Individual's pension payments from Federal Reserve Retirement Plan are pension payments paid to employee of instrumentality of United States, and thus are exempt from tax under CLS Tax § 612(c)(3)(ii). NY Adv Op Comm T & F TSB-A-90-(8)I.

Retirement plan for employees of Federal Reserve System was pension or other retirement plan within meaning of CLS Tax § 612(c)(3)(ii), and distributions from plan were exempt from personal income tax. NY Adv Op Comm T & F TSB-A-01(1)I.

Distributions from thrift plan (other than in-service withdrawals) for employees of Federal Reserve System, which constituted qualified plan under Internal Revenue Code § 401(a) and profit-sharing plan within meaning of Internal Revenue Code § 401(k), were exempt from personal income tax under CLS Tax § 612(c)(3)(ii). NY Adv Op Comm T & F TSB-A-01(1)I.

Retirement plan for employees of Federal Reserve System Benefits Equalization Plan (BEP), which was unfunded nonqualified defined benefit excess-type pension plan designed to be complementary to retirement plan, was pension or other retirement benefit for purposes of CLS Tax § 612(c)(3)(ii); thus, distributions from BEP were exempt from personal income tax. NY Adv Op Comm T & F TSB-A-01(1)I.

Thrift plan for employees of Federal Reserve System Benefits Equalization Plan (Thrift BEP), which was unfunded nonqualified defined contribution excess-type pension plan designed to be complementary to thrift plan, was pension or other retirement benefit for purposes of CLS Tax § 612(c)(3)(ii); thus, distributions from Thrift BEP were exempt from personal income tax. NY Adv Op Comm T & F TSB-A-01(1)I.

10. —State and subdivision pensions

Distributions received by taxpayer under City University of New York Optional Retirement Program constituted pension and other retirement benefits paid to public employee of subdivision of New York State that were exempt from taxation NY Adv Op Comm T & F TSB-A-02-(5)I.

As to distributions of any gain or income earned from rollover IRA account, since earnings were not attributable to taxpayer's retirement plan attributable to his employment with City University of New York, interest or any other type of gain or income earned was not exempt from New York State taxation under CLS NY Const Art XVI § 5 and CLS Tax § 612(c)(3)(i). NY Adv Op Comm T & F TSB-A-02-(5)I.

Where state, its political subdivisions or agencies, or federal government, do not make any contribution to tax deferred annuity (TDA) plan, distributions received by retired New York State public school teacher do not constitute pension or retirement benefit exempt from New York personal income tax, under CLS Tax § 612(c)(3)(i) and 20 NYCRR § 112.3(c)(1)(i). NY Adv Op Comm T & F TSB-A-05-(3)I.

If petitioner's tax deferred annuity (TDA) plan distributions received by retired New York State public school teacher are attributable to amounts actually contributed (rather than merely being deemed to be contributed) by New York State, its political subdivisions or agencies, then such distributions constitute pension or retirement benefit exempt from New York personal income tax, under CLS Tax § 612(c)(3)(i) and 20 NYCRR § 112.3(c)(1)(i). NY Adv Op Comm T & F TSB-A-05-(3)I.

11. —Pensions and annuities received by certain individuals

"Buyout" payments, requiring that taxpayer officially resign from his tenured position and that he would receive 50 percent of his salary for next 3 years, did not qualify for exclusion in CLS Tax § 612(c)(3-a). NY Adv Op Comm T & F TSB-A-97(5)I.

Payments made pursuant to petitioner's employer's long term disability plan were "annuity" within meaning of CLS Tax § 612(c)(3-a). NY Adv Op Comm T & F TSB-A-98-(5)I.

Where taxpayer was more than 59 ½ -years of age, balance of distribution from rollover Individual Retirement Account (IRA) that represented any other amount in rollover IRA could be added to his state pension and annuity income, if any, that met conditions of CLS Tax § 612(c)(3-a) and Personal Income Tax Regulations § 112.3(c)(2) for purposes of computing $20,000 pension and annuity income modification; total, not in excess of $20,000, would be allowed as subtraction from federal adjusted gross income when computing New York adjusted gross income. NY Adv Op Comm T & F TSB-A-03(4)I.

Analysis as to whether CLS Tax § 612(c)(3-a) permitted 2 $20,000 pension income exclusions on married filing joint return where one spouse died during year and both spouses were over 59 ½ years of age. NY Adv Op Comm T & F TSB-A-98-(6)I.

Analysis of whether distributions from individual retirement account established by means of tax-free rollover of amounts received in form of pension from New York Police Department could be subtracted from federal adjusted gross income when computing adjusted gross income for personal income tax purposes under CLS Tax Art 22. NY Adv Op Comm T & F TSB-A-98-(4)I.

Employer's deferred compensation plan, whereby taxpayer was receiving monthly payments equal to 30 percent of his final average compensation for rest of his life, constituted annuity under Personal Income Tax Regulations § 112.3(c)(2)(i), and assuming that annuity income he received was included in his federal adjusted gross income, that annuity income met conditions under CLS Tax § 612(c)(3-a) because he was more than 59 ½ years of age, and annuity was attributable to personal services performed by him prior to his retirement as non-union employee; thus, when computing New York adjusted gross income, he could, under CLS Tax § 612(c)(3-a), subtract from federal adjusted gross income up to $20,000 of payments he received each year from plan. NY Adv Op Comm T & F TSB-A-99-(1)I.

Taxpayer's distributions from New York State deferred compensation plan would be treated as pension and annuity income under CLS Tax § 612(c)(3-a); if taxpayer met all conditions of statute, his distributions from plan, up to $20,000 for taxable year, could be excluded when he computed his New York adjusted gross income under CLS Tax § 612. NY Adv Op Comm T & F TSB-A-02-(2)I.

Where taxpayer's distributions from New York State deferred compensation plan were rolled over into IRA under provisions of Internal Revenue Code § 457(e)(16), such distributions were not subject to tax for taxable year of rollover; for taxable year that taxpayer received distributions from such IRA, distributions would be treated as pension and annuity income under CLS Tax § 612(c)(3-a). NY Adv Op Comm T & F TSB-A-02-(2)I.

If taxpayer rolled over his City University of New York Optional Retirement Program pension accumulation to IRA, when he received distributions form rollover IRA account, only portion of distribution was exempt; assuming distributions taxpayer received from rollover IRA account were included in his federal adjusted gross income, portion of distribution from rollover IRA account that represented amount of pension benefit that was rolled over to IRA (contribution), was return of pension contribution and was exempt from New York State income tax under CLS NY Const Art XVI § 5 and CLS Tax § 612(c)(3)(i). NY Adv Op Comm T & F TSB-A-02-(5)I.

Balance of distributions that represents amount other than return of pension contribution in rollover IRA account, including any other contributions or any interest or other type of gain or income earned, may be allowed to be subtracted in computing New York adjusted gross income, but only up to $20,000. NY Adv Op Comm T & F TSB-A-02-(5)I.

Individual who is one of 2 beneficiaries of decedent's Individual Retirement Account (IRA) is entitled to allocation of $20,000 pension and annuity income exclusion under CLS Tax § 612(c)(3-a) and 20 NYCRR § 112.3(c)(2), in same ratio as distribution is shared, regardless of age of beneficiaries or whether individual's brother, who is nonresident, receives annual distributions or elects to take lump-sum distribution in prior year resulting in no distribution possible in current year. NY Adv Op Comm T & F TSB-A-07-(3)I.

12. —Disability income

Under CLS Tax § 612(a), wages paid in connection with firefighter's reassignment to desk duty that were included in his federal adjusted gross income were included in New York adjusted gross income subject to New York State personal income tax, where he was not permanently and totally disabled and was not yet retired, and thus was not eligible for disability income subtraction under CLS Tax § 612(c)(3-b)(i); in addition, under CLS Tax § 671, such wages were taxable wages paid to petitioner and were subject to state's withholding of tax. NY Adv Op Comm T & F TSB-A-04-(5)I.

13. —Military pay or pension

Compensation received by United States Army Reserve Master Sergeant for performing active service for United States Army does not qualify for subtraction modification under CLS Tax § 612(c)(8-b), since such modification applies only to military pay received by member of New York State organized militia while on active duty. NY Adv Op Comm T & F TSB-A-07-(5)I.

Supplemental pay received by United States Army Reserve Master Sergeant from New York State Police while on military active duty does not qualify for subtraction modification under CLS Tax § 612(c)(8-b). NY Adv Op Comm T & F TSB-A-07-(5)I.

14. —Operating losses

Under CLS Tax § 612 and 20 NYCRR § 154.8(c), where federal net operating loss is carried back to taxable year that individual was resident of New York state, recomputation of federal adjusted gross income for carry-back year will result in recomputation of New York adjusted gross income for carry-back year; net operating loss carry-back may be allowed for New York personal income tax purposes to extent that carry-back is includible in individual's federal adjusted gross income for carry-back year. NY Adv Op Comm T & F TSB-A-96(3)I.

15. —Capital gains and losses

As New York S corporation subject to tax under CLS Tax Art 9-A that conducts its business within and without New York State, petitioner is required to compute its business allocation percentage and its investment allocation percentage using method that applies to petitioner under Article 9-A; petitioner must then report such percentages to its nonresident shareholders along with each shareholder's pro rata share of petitioner's items of income, gain, loss, and deduction included in federal adjusted gross income as well as those items that relate to CLS Tax § 612(b) and (c). NY Adv Op Comm T & F TSB-A-08-(1)I.

Petitioner who is S corporation shareholder and is unable to currently deduct flow-through loss from her S corporation on her federal income tax return, has no relief from CLS Tax § 612(b)(8), which requires her to add back to her federal adjusted gross income bonus depreciation allowed under Internal Revenue Code § 168(k). NY Adv Op Comm T & F TSB-A-09-(12)I.

16. —Qualified higher education funds

For purposes of subtraction modification under CLS Tax § 612(c)(32), term "contribution" includes amounts transferred from another state's 529 Plan and rolled over to New York 529 Plan; this includes earnings portion of distribution from other state's 529 Plan not included in federal gross income under IRC § 529(c)(3)(C)(i) and portion of distribution considered investment in other state's 529 Plan. NY Adv Op Comm T & F TSB-A-05-(7)I.

Amounts accumulated in member account under investment company's consumer loyalty program and contributed to New York 529 Plan are considered contribution by member for purposes of subtraction modification under CLS Tax § 612(c)(32) in determining New York adjusted gross income where members decide whether rebates on their purchases under program will be transferred into New York 529 Plan or received personally or directed to another individual or entity. NY Adv Op Comm T & F TSB-A-05-(7)I.

There is no modification required under CLS Tax § 612 for distribution from family tuition savings plan established under qualified tuition program of state other than New York. NY Adv Op Comm T & F TSB-A-07-(6)I.

Petitioner's federal "529 plan" distribution, including earnings, received from qualified tuition savings plan established in state other than New York is not included in New York adjusted gross income and is not subject to New York personal income tax. NY Adv Op Comm T & F TSB-A-07-(6)I.

17. —Other items

Taxpayer may, when computing state adjusted gross income for year when he received distribution from deferred compensation plan, subtract from his federal adjusted gross income amount of distribution from plan which was portion of distribution that was included in taxpayer's state adjusted gross income in year of contribution. NY Adv Op Comm T & F TSB-A-92-(3)I.

CLS Tax § 612 does not contain any modification that affects shareholders or stockholders of banks or corporations that are each party to transaction that for federal income tax purposes constitutes tax-free transaction under Internal Revenue Code § 351(a). NY Adv Op Comm T & F TSB-A-95(1)I.

No taxable income, for personal income tax purposes, will be realized by New York state resident or nonresident individuals who are eligible account holders and new stockholders of stock bank as result of transaction whereby bank will reorganize as stock savings bank which will be controlled by newly-formed New York mutual holding company where transaction will be tax-free under Internal Revenue Code §§ 351 and 368(a)(1)(F). NY Adv Op Comm T & F TSB-A-95(1)I.

Amounts paid by petitioner to his ex-wife in 1992 and 1993 pursuant to separation agreement constituted assignment of income owed to petitioner as his share of partnership income that accrued during time he was partner of former partnership, and since such amounts were earned by petitioner, they should be included in his federal adjusted gross income for those years for purposes of computing his New York adjusted gross income under CLS Tax § 612. NY Adv Op Comm T & F TSB-A-97-(6)I.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 606, 615, 617, 618–620, 631, 632, 639, 651, 683, 990, 1310; CLS Educ §§ 561, 562; CLS St Fin § 54.

Low incomes not subject to tax, § 601.

Elementary and secondary education opportunity program, CLS Educ §§ 559 et seq.

Tuition reimbursement payments subject to provisions of this section, CLS Educ § 562.

New York state higher education services corporation, CLS Educ §§ 651 et seq.

"Industrial waste", "other wastes", defined, CLS ECL § 17-0105.

Authority of commissioner of environmental conservation to issue certificates of compliance concerning industrial waste treatment facilities, CLS ECL § 17-0707.

Air contaminant and air contamination source, definitions of, CLS ECL § 19-0107.

Certificates of compliance for purposes of the Tax Law, CLS ECL § 19-0309.

Real property, definition of, CLS Real P Tax § 102.

Persons sixty-five years of age or over, CLS Real P Tax § 467.

Deferred compensation, CLS St Fin § 5.

Codes, Rules and Regulations:

New York adjusted gross income of resident individual. 20 NYCRR §§ 112.1 et seq.

Income from partnership included in New York adjusted gross income. 20 NYCRR § 117.2.

Federal Aspects:

Defining of gross income, adjusted gross income, taxable income, etc., 26 USCS §§ 61 et seq.

Adjusted gross income, 26 USCS §§ 62 et seq.

Pensions and profit sharing, stock bonus plans, etc, 26 USCS §§ 401 et seq.

Regulated investment company, 26 USCS §§ 851 et seq.

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71 Am Jur 2d, State and Local Taxation §§ 483 et seq.

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Qualified voluntary real property exchange—a tax deferral device. 33 Alb. L. Rev. 359.

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Treatment of gain from disposition of rental property. 68 Colum. L. Rev. 1174.

Taxation—employer's voluntary payment to employee's widow not includable in gross income. 30 Fordham L. Rev. 549.

Sager, Weinberg, State taxation of employee retirement and death benefits. 31 Fordham L. Rev. 413.

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Taxation—employer's payments to widow of deceased employee held to be gifts, not compensation. 41 Fordham L. Rev. 188.

Guardino, Tax aspects of recoveries in law suits. 38 NYSB J 539.

Fried, External pressures on internal revenue: the effect of state court adjudications in tax litigation. 42 NYU L Rev 647.

Appleman on Insurance:

1-9 Appleman New York Insurance Law § 9.09.

§ 630-b. Gift for volunteer firefighting and volunteer emergency services fund

An individual in any taxable year may elect to contribute to the volunteer firefighting and volunteer emergency services fund for the recruitment and retention of volunteer firefighters and volunteer emergency services personnel. The contribution shall be in any whole dollar amount and shall not reduce the amount of state tax owed by such individual. The commissioner shall include space on the personal income tax return to enable a taxpayer to make such contribution. Notwithstanding any other provision of law all revenues collected pursuant to this section shall be credited to the volunteer firefighting and volunteer emergency services recruitment and retention fund and used only for those purposes enumerated in section ninety-nine-q of the state finance law.

HISTORY:

Add, L 2009, ch 490, § 2, eff April 26, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 490, § 4, eff April 26, 2010, provides as follows;.

§ 4. This act shall take effect on the one hundred eightieth day after it shall have become a law. Effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized to be made on or before such effective date.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Volunteer firefighting and volunteer emergency services recruitment and retention fund, CLS St Fin § 99-q.

ARTICLE 28 Sales and Compensating Use Taxes

Part III. Exemptions

Section

1116. Exempt organizations

1120. Refunds and credits with respect to motor fuel and diesel motor fuel

HISTORY:

Add, L 1965, ch 93, § 1, eff Aug 1, 1965.

PART III Exemptions

HISTORY:

Add, L 1965, ch 93, § 1, eff Aug 1, 1965.

§ 1116. Exempt organizations

(a) Except as otherwise provided in this section, any sale or amusement charge by or to any of the following or any use or occupancy by any of the following shall not be subject to the sales and compensating use taxes imposed under this article:

(1) The state of New York, or any of its agencies, instrumentalities, public corporations (including a public corporation created pursuant to agreement or compact with another state or Canada) or political subdivisions where it is the purchaser, user or consumer, or where it is a vendor of services or property of a kind not ordinarily sold by private persons;

(2) The United States of America, and any of its agencies and instrumentalities, insofar as it is immune from taxation where it is the purchaser, user or consumer, or where it sells services or property of a kind not ordinarily sold by private persons;

(3) The United Nations or any international organization of which the United States of America is a member where it is the purchaser, user or consumer, or where it sells services or property of a kind not ordinarily sold by private persons;

(4) Any corporation, association, trust, or community chest, fund, foundation, or limited liability company, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, (except as otherwise provided in subsection (h) of section five hundred one of the United States internal revenue code of nineteen hundred fifty-four, as amended), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of or in opposition to any candidate for public office. The provisions of this paragraph regarding political campaign activity shall be interpreted in the same manner as section 501(c)(3) of the United States internal revenue code has been interpreted as of the effective date of the chapter of the laws of two thousand nineteen that amended this paragraph;

(5) A post or organization of past or present members of the armed forces of the United States, or an auxiliary unit or society of, or a trust or foundation for, any such post or organization:

(A) organized in this state,

(B) at least seventy-five percent of the members of which are past or present members of the armed forces of the United States as defined in section thirteen-a of the general construction law and substantially all of the other members of which are individuals who are cadets or are spouses, widows, widowers, ancestors, or lineal descendants of past or present members of the armed forces of the United States or of cadets, and

(C) no part of the net earnings of which inures to the benefit of any private shareholder or individual.

(6) The following Indian nations or tribes residing in New York state: Cayuga, Oneida, Onondaga, Poospatuck, Saint Regis Mohawk, Seneca, Shinnecock, Tonawanda and Tuscarora, where it is the purchaser, user or consumer.

(7) A not-for-profit corporation operating as a health maintenance organization subject to the provisions of article forty-four of the public health law.

(8) Cooperative and foreign corporations doing business in this state pursuant to the rural electric cooperative law.

(9) A credit union, as defined in subdivision nine of section twoof the banking law, where it is the purchaser, user, or consumer, or where it is a vendor of services or property of a kind not ordinarily sold by private persons.

(b) Nothing in this section shall exempt:

(1) (i) retail sales of tangible personal property by any shop or store operated by an organization described in paragraph (4), (5) or (6) of subdivision (a) of this section; (ii) sales, other than for resale, of services described in subdivision (b) or paragraph five of subdivision (c) of section eleven hundred five of this article by that organization, whether or not at a shop or store; (iii) retail sales of tangible personal property and sales, other than for resale, of those services by that organization, made with a degree of regularity, frequency, and continuity by remote means, such as by telephone, the internet, mail order or otherwise; or (iv) retail sales of tangible personal property by lease or rental by that organization as lessor, whether or not at a shop or store;

(2) sales of food or drink in or by a restaurant, tavern or other establishment operated by an organization described in paragraph (1), paragraph (4), paragraph (5) or paragraph (6) of subdivision (a) of this section, other than sales exempt under paragraph (ii) of subdivision (d) of section eleven hundred five, from the taxes imposed hereunder, unless the purchaser is an organization exempt under this section;

(3) sales of the service of providing parking, garaging or storing for motor vehicles by an organization described in paragraph (4) or paragraph (5) of subdivision (a) of this section operating a garage (other than a garage which is part of premises occupied solely as a private one or two family dwelling), parking lot or other place of business engaged in providing parking, garaging or storing for motor vehicles;

(4) sales of tangible personal property or services by cooperative and foreign corporations doing business in this state pursuant to the rural electric cooperative law, unless the purchaser is an organization exempt under this section.

(5) purchases of motor fuel or diesel motor fuel from the tax required to be prepaid pursuant to section eleven hundred two of this article and retail sales of motor fuel or diesel motor fuel subject to the tax imposed by sections eleven hundred five and eleven hundred ten of this article, except that purchases of such fuel by an organization described in paragraph one or two of subdivision (a) of this section for its own use or consumption, purchases of motor fuel by a hospital included in the organizations described in paragraph four of such subdivision for its own use and consumption, purchases of motor fuel and diesel motor fuel by a fire company or fire department, as defined in section three of the volunteer firefighters' benefit law or a voluntary ambulance service, as defined in section three thousand one of the public health law, for such department, company or service's own use and consumption for use in firefighting vehicles, apparatus or equipment, or emergency rescue or first aid response vehicles, apparatus or equipment, owned and operated by such department, company or service if such company, department or service qualifies as an exempt organization pursuant to the provisions of paragraph four of subdivision (a) of this section and purchases of diesel motor fuel by an organization described in paragraph four of such subdivision for its own heating use and consumption shall be exempt from such tax required to be prepaid and from retail sales and use taxes on such fuel.

(6) purchases of cigarettes from the tax required to be prepaid pursuant to section eleven hundred three of this article, except that no prepayment of tax shall be required on sales of cigarettes sold under such circumstances that this state is without power to impose such tax or sold to the United States or sold to or by a voluntary unincorporated organization of the armed forces of the United States operating a place for sale of goods pursuant to regulations promulgated by the appropriate executive agency of the United States, to the extent provided in such regulations and written policy statements of such agency applicable to such sales.

(7) rent received by a hotel operated by a college or university, where such hotel offers one hundred or more rooms for occupancy, and where the individual paying said rent is not doing business on behalf of any organization exempted pursuant to subdivision (a) of this section.

(c) (1) Where any organization described in paragraph four of subdivision (a) of this section carries

on its activities in furtherance of the purposes for which it was organized, in premises in which, as part of said activities, it operates a hotel, occupancy of rooms in the premises and rents therefrom received by such corporation or association shall not be subject to tax hereunder.

(2) Nothing in this subdivision shall exempt any hotel operated by a college or university and which offers one hundred or more rooms for occupancy from collecting taxes imposed pursuant to section eleven hundred five of this article from individuals who are not doing business on behalf of an organization exempted pursuant to subdivision (a) of this section.

(d) (1) Except as provided in paragraph (2) of this subdivision, any admissions all of the proceeds of which inure exclusively to the benefit of the following organizations shall not be subject to any of the taxes imposed under subdivision (f) of section eleven hundred five:

(A) an organization described in paragraph (4), (5) or (6) of subdivision (a) of this section;

(B) a society or organization conducted for the sole purpose of maintaining symphony orchestras or operas and receiving substantial support from voluntary contributions; or

(C) national guard organizations; or

(D) a police or fire department of a political subdivision of the state, or a voluntary fire or ambulance company, or exclusively to a retirement, pension or disability fund for the sole benefit of members of a police or fire department or to a fund for the heirs of such members.

(2) The exemption provided under paragraph (1) of this subdivision shall not apply in the case of admissions to:

(A) Any athletic game or exhibition unless the proceeds shall inure exclusively to the benefit of elementary or secondary schools or unless in the case of an athletic game between two elementary or secondary schools, the entire gross proceeds from such game shall inure to the benefit of one or more organizations described in paragraph (4) of subdivision (a) of this section;

(B) Carnivals or rodeos in which any professional performer or operator participates for compensation, unless the entire net profit from such carnival or rodeo shall inure exclusively to the benefit of an organization described in paragraph four of subdivision (a) of this section, and such organization shall have as its charitable or educational purpose the operation of a school and of such a carnival or rodeo; or

(3) Admission charges for admission to the following places or events shall not be subject to any of the taxes imposed under subdivision (f) of section eleven hundred five:

(A) Any admission to agricultural fairs if no part of the net earnings thereof inures to the benefit of any stockholders or members of the association conducting the same; provided the proceeds therefrom are used exclusively for the improvement, maintenance and operation of such agricultural fairs.

(B) Any admission to a home or garden which is temporarily open to the general public as a part of a program conducted by a society or organization to permit the inspection of historical homes and gardens; provided no part of the net earnings thereof inures to the benefit of any private stockholder or individual.

(C) Any admissions to historic sites, houses and shrines, and museums conducted in connection therewith, maintained and operated by a society or organization devoted to the preservation and maintenance of such historic sites, houses, shrines and museums; provided no part of the net earnings thereof inures to the benefit of any private stockholder or individual.

(e) Receipts from the service of trash removal shall be exempt from the tax on such service imposed by this article, where such service is rendered by a municipal corporation of the state, other than a city of one million or more, including such service rendered on its behalf, under an agreement with such corporation.

(f) (1) For purposes of paragraph four of subdivision (a) of this section, in the case of a qualified amateur sports organization (A) the requirement of such paragraph that no part of its activities involve the provision of athletic facilities or equipment shall not apply, and (B) such organization shall not fail to meet the requirement of such paragraph merely because its membership is local or regional in nature.

(2) For purposes of this subdivision, the term "qualified amateur sports organization" means any organization organized and operated exclusively to foster national or international amateur sports competition if such organization is also organized and operated primarily to conduct national or international competition in sports or to support and develop amateur athletes for national or international competition in sports.

(g) For purposes of paragraph five of subdivision (a) of this section, duly authorized representatives of any such post or organization, while acting on behalf of such post or organization, shall not be subject to the tax imposed under subdivision (e) of section eleven hundred five or the unit fee imposed by section eleven hundred four of this article, provided that such representatives provide an exempt organization certificate from such post or organization certifying that such representative is acting on its behalf.

HISTORY:

Add, L 1965, ch 93, § 1, eff Aug 1, 1965; amd, L 1965, ch 571, § 2, eff Aug 1, 1965; L 1965, ch 575, § 9, eff Aug 1, 1965; L 1968, ch 425, § 2; L 1974, ch 319, § 1,3, eff Sept 1, 1974; L 1976, ch 530, §§ 1, 3, eff Sept 1, 1976; L 1980, ch 416, § 1; L 1980, ch 724, § 1, eff June 30, 1980; L 1980, ch 903, § 1, eff Dec 17, 1980; L 1981, ch 781, § 1, eff Sept 1, 1981; L 1983, ch 366, §§ 1, 2, eff June 26, 1983; L 1983, ch 821, § 1; L 1983, ch 888, §§ 2, 3, eff Sept 1, 1983;

L 1985, ch 44, § 24; L 1986, ch 276, § 18; L 1988, ch 261, § 88; L 1989, ch 245, § 4; L 1993, ch 706, § 1; L 1994, ch 170, § 230, eff Sept 1, 1994; L 1995, ch 2, § 53, eff Sept 1, 1995; L 1995, ch 618, § 1; L 1995, ch 619, § 1, eff Dec 1, 1996; L 1996, ch 387, §§ 1, 2, eff July 30, 1996; L 1997, ch 389, § 101 (Part A), eff Dec 1, 1997; L 1998, ch 408, § 1, eff July 22, 1998; L 2001, ch 270, § 1, eff Sept 5, 2001; L 2004, ch 3, § 23, eff Dec 8, 2004; L 2004, ch 418, § 11, eff June 1, 2004; L 2005, ch 591, § 1, eff March 1, 2006; L 2005, ch 591, § 2, eff March 1, 2008; L 2006, ch 296, § 1, eff Dec 1, 2006; L 2008, ch 57, § 1 (Part KK–1), eff Sept 1, 2008; L 2019, ch 407, § 1, effective October 23, 2019.

Editor's Notes: Laws 1980, ch 724, § 2, provides as follows:

§ 2. This act shall take effect immediately except with respect to receipts from the service of trash removal actually rendered by the municipal corporation itself, this act shall be deemed to have been in effect on and after June first, nineteen hundred seventy-seven, and except with respect to receipts from the service of trash removal rendered by the village of Patchogue, this act shall be deemed to have been in effect from June first, nineteen hundred seventy-six. (Amd, L 1983, ch 90).

Laws 1983, ch 821, § 2, eff July 30, 1983, provides as follows:

§ 2. This act shall take effect immediately and shall apply retroactively and be controlling in any action or proceeding to enforce, abate or recover a tax assessment, provided that a refund may be claimed as prescribed in section eleven hundred thirty-nine of the tax law, and further provided that liability for the tax had not been finally adjudicated prior to January first, nineteen hundred eighty-three.

Laws 1985, ch 44, § 42, eff June 1, 1985, provides as follows:

§ 42. This act shall take effect immediately, except that sections one through thirty-six shall take effect June first, nineteen hundred eighty-five and shall apply to all taxable events respecting motor fuel as such events are defined in section eleven hundred two of the tax law, as amended by this act, and automotive fuel occurring on and after such date and an amount equivalent to the sales taxes paid by or passed through to a purchaser upon sales of motor fuel before such date at the regional average retail sales price pursuant to the provisions of articles twenty-eight and twenty-nine of the tax law in effect prior to such date shall be allowed such purchaser as a credit or refund, where a refund or credit would be allowable after such date under the tax law, as amended by this act, against the tax required to be prepaid pursuant to section eleven hundred two and passed through or required to be collected or paid pursuant to section eleven hundred five or eleven hundred ten of the tax law upon sales or uses of such motor fuel occurring on and after such date and provided further, however, that no refund or credit shall be allowed pursuant to this provision with respect to motor fuel placed into the ordinary fuel tank connected with the engine of such vehicle prior to such date notwithstanding use of such fuel thereafter.

Laws 1986, ch 276, § 37, eff July 14, 1986, provides as follows:

§ 37. This act shall take effect immediately except that sections one through twenty-four of this act shall apply on and after such effective date (and provided that the department of taxation and finance shall immediately undertake all necessary steps and application review to insure that on October 1, 1986 all terminal operators and transporters, required to be licensed by the provisions of this act, are so licensed by such date and further provided that the single regional average retail sales price for motor fuel provided for in section thirty of this act, which shall replace the separate regional average retail sales price for leaded, unleaded and premium motor fuel, shall be prescribed and first become effective on September 1, 1986 and the commissioner of energy shall determine such single average retail sales price for each region before August 16, 1986 and such price shall be compiled from data with respect to the six-month period ending the last day of June, 1986) and except that sections twenty-five through twenty-eight of this act shall take effect December 1, 1986. (Amd, L 1989, ch 245, § 1, L 1990, ch 190, § 243, L 1992, ch 55, § 52, L 1993, ch 57, § 140, eff April 15, 1993.).

Laws 1993, ch 706, § 2, eff Dec 1, 1993, provides as follows:

§ 2. This act shall take effect December 1, 1993, and shall apply to sales occurring on or after such date.

Laws 1994, ch 170, § 564, sub 20, eff June 9, 1994, provides as follows:

§ 564. This act shall take effect immediately provided, however, that:

20. Sections two hundred twenty-eight through two hundred thirty-two of this act shall take effect September 1, 1994, and shall apply to any occupancy on or after September 1, 1994, although such occupancy is pursuant to a prior contract, lease or other arrangement. Where any charge for occupancy is paid on a weekly, monthly or other term basis, the charge for occupancy shall not be subject to the tax imposed under section 1104 of the tax law (repealed by section two hundred twenty-eight of this act) to the extent that the charge for occupancy covers any period on and after September 1, 1994, and such charge for occupancy shall be apportioned on the basis of the ratio of the number of days falling within said period to the total number of days covered thereby. Provided, further, that all provisions of law repealed or deleted by sections two hundred twenty-eight, two hundred twenty-nine, two hundred thirty, two hundred thirty-one and two hundred thirty-two of this act and all provisions of any regulations adopted under any such provision of law, in respect to the assessment, payment or payment over, determination, collection and refund of tax imposed by such section 1104, the filing of returns and preservation of records for the purpose of such tax, the civil and criminal penalties that any person may be subject to for violating provisions of such article, the secrecy of returns, and the disposition of revenues shall continue in effect with respect to all such tax, including any penalty or interest related thereto, accrued up to September 1, 1994. Provided, further, the commissioner of taxation and finance may take any action with respect to the adoption, amendment, suspension or repeal of any rule or regulation relating to sections two hundred twenty-eight through two hundred thirty-two of this act, and may establish any procedure necessary for the timely implementation of sections two hundred twenty-eight through two hundred thirty-two of this act, on and after the date such sections shall have become law.

Laws 1994, ch 281, § 32, provides:

§ 32. This act shall take effect immediately and the pari-mutuel tax reductions in section six of this act shall expire and be deemed repealed on July 1, 2021; provided, however, that nothing contained herein shall be deemed to affect the application, qualification, expiration, or repeal of any provision of law amended by any section of this act, and such provisions shall be applied or qualified or shall expire or be deemed repealed in the same manner, to the same extent and on the same date as the case may be as otherwise provided by law; provided further, however, that sections twenty-three and twenty-five of this act shall remain in full force and effect only until May 1, 1997 and at such time shall be deemed to be repealed (Amd, L 1995, ch 2, § 129; L 1995, ch 16, § 4; L 1995, ch 36, § 4; L 1995, ch 70, § 4; L 1998, ch 56, § 12 (Part E); L 2002, ch 113, § 7, eff June 28, 2002; L 2007, ch 60, § 6 (Part A), eff April 9, 2007; L 2008, ch 18, § 107, eff Feb 19, 2008; L 2009, ch 57, § 7 (Part L-1), eff April 7, 2009; L 2010, ch 134, § 7 (Part C), eff June 21, 2010; L 2011, ch 61, § 7, eff March 31, 2011; L 2012, ch 59, § 7 (Part O), eff March 30, 2012; L 2013, ch 59, § 7 (Part U), eff March 28, 2013; L 2014, ch 59, § 7 (Part AA), eff March 31, 2014; L 2015, ch 59, § 7 (Part NN), eff April 13, 2015; L 2016, ch 60, § 7 (Part FF), eff April 13, 2016; L 2017, ch 59, § 7 (Part OO), eff April 10, 2017; L 2018, ch 59, § 7 (Part GG), eff April 12, 2018; L 2019, ch 59, § 7 (Part HH), eff April 12, 2019; L 2020, ch 59, § 7 (Part Z), eff April 3, 2020).

Laws 1995, ch 2, § 152, sub 5(a), (c), eff June 7, 1995, provides as follows:

§ 152. This act shall take effect immediately, provided, however:

5. (a) Sections forty-seven through sixty-eight and section seventy of this act shall take effect September 1, 1995, and shall apply to all taxable events respecting cigarettes as such events are described in section 1103 of the tax law, as added by section forty-nine of this act, occurring on or after such date

(c) The commissioner of taxation and finance may take any action with respect to the adoption, amendment, suspension or repeal of any rule or regulation relating to sections forty-seven through seventy-three of this act, and may establish any procedure necessary for the timely implementation of sections forty-seven through seventy-three of this act, on or after the date it shall have become a law;

Laws 1997, ch 389, § 219 (Part A), sub (17), eff Aug 7, 1997, provides as follows:

§ 219. This act shall take effect immediately, provided, that:

(17) sections one hundred and one hundred one of this act shall take effect December 1, 1997, and shall apply to any admission to a circus occurring on or after such date whether or not the admission charge has been paid prior to such date, provided that if a ticket to a circus occurring on or after such date was sold and delivered (other than for resale) prior to such date, such sections shall not apply to such ticket;.

Laws 1998, ch 408, § 2, eff July 22, 1998, provides as follows:

§ 2. This act shall take effect immediately and shall apply to sales tax quarterly periods commencing on or after such date.

Laws 2004, ch 3, § 26, eff Dec 8, 2004, provides as follows:

§ 26. Construction. This act and all powers granted hereby shall be liberally construed to effectuate its intent and their purposes, without implied limitations thereon. This act shall constitute full and complete authority for all things herein contemplated to be done. All rights and powers herein granted shall be cumulative with those derived from other sources and shall not, except as expressly stated herein, be construed in limitation thereof. Insofar as the provisions of this act are inconsistent with the provisions of any other act, general or special, the provisions of this act shall be controlling.

Laws 2004, ch 418, § 15, eff Sept 7, 2004, provides as follows:

§ 15. This act shall take effect immediately; provided, that the amendments to subdivision 1 of section 210 of the military law made by section five of this act shall be deemed to have been in full force and effect on and after April 1, 2004; provided, however, that section ten of this act shall apply to taxable years beginning on or after January 1, 2004; provided, further, that section eleven of this act shall take effect June 1, 2004, and shall apply to sales made, uses occurring and services rendered on or after such date, in accordance with applicable transitional provisions in sections 1106 and 1217 of the tax law provided further, however, that section thirteen of this act shall expire and be deemed repealed one year after it shall have become a law.

Laws 2005, ch 591, § 3, eff March 1, 2006, provides as follows:

§ 3. This act shall take effect March 1, 2006, and shall apply to sales made, services rendered and uses occurring on or after such date in accordance with the applicable transition provisions of articles 28 and 29 of the tax law; provided, however, that section two of this act shall take effect March 1, 2008, in accordance with the applicable transition provisions of articles 28 and 29 of the tax law; and provided further that the commissioner of taxation and finance is authorized, on or after the date this act becomes law, to adopt and amend any rules or regulations and issue any procedure, forms or instructions necessary to implement the provisions of this act on their respective effective dates.

Laws 2006, ch 296, § 3, eff Dec 1, 2006, provides as follows:

§ 3. This act shall take effect on the first day of the sales tax quarterly period, as described in subdivision (b) of section 1136 of the tax law, next commencing a least 90 days after this act shall have become a law and shall apply in accordance with the applicable transitional provisions of sections 1106 and 1217 of the tax law.

Laws 2008, ch 57, § 2 (Part KK-1), eff Sept 1, 2008, provides as follows:

§ 2. This act shall take effect September 1, 2008, and shall apply to sales made, uses occurring and services rendered on or after such date, in accordance with applicable transitional provisions in sections 1106 and 1217 of the tax law.

Amendment Notes The 2019 amendment by ch 407, § 1, in (a)(4), added "or in opposition to" in the first sentence and added the second sentence.

Repeal Notes: [1965, ch 571] Subparagraph (C) of paragraph (2) of subdivision (d) of section eleven hundred sixteen of the Tax Law, repealed by this act, excluded motion picture exhibitions from the exemption granted certain organizations from the sales and compensating use taxes imposed by article twenty-eight of the Tax Law.

Amendment Notes:

2004. Chapter 418, § 11 amended:
Sub (a), par (5), by deleting "or".
2006. Chapter 296, § 1 amended:
Sub (a), par (5), by deleting "; and".
2008. Chapter 591, § 2 amended:
Sub (a), par (9), by deleting "issued an authorization certificate on or after January first, two thousand six, pursuant to section four hundred eighty-six of the banking law".
2008. Chapter 57, § 1 (part kk-1) amended:
Sub (b), par (1), by deleting "paragraph".

Notes to Decisions

Analysis

1. State, or state agency, authority, instrumentality, or public corporation
2. —Department of Social Services
3. —Industrial development agencies
4. —Long Island Railroad Company
5. —Power authorities
6. —Private organizations associated with state
7. Municipality, or municipal agency, authority or instrumentality or school district
8. United States of America; federal agencies and other entities
9. Exempt organizations; in general
10. —Certificate of incorporation specifying exempt purpose
11. —Organizations predominantly involved in non-exempt activities
12. — —Athletic clubs
13. — —Fraternal organizations and social clubs
14. — —Insurance exchange
15. — —Neighborhood block associations
16. — —Professional improvement organizations; bar associations
17. — —Retired and senior citizens organizations
18. —Organizations predominantly involved in exempt activities
19. —Benefits inuring to specific groups or individuals
20. —Purchases by contractors for exempt organizations
21. —Purchases and sales by or fees of exempt organizations
22. Indian nations, tribes, reservations, and individuals
23. Non-exempt sales
24. Admissions

1. State, or state agency, authority, instrumentality, or public corporation

Sale made directly to and paid for by governmental agency is not subject to sales tax; sale made to planning and development board which furnished vendor with registration for tax free transactions which indicated it was governmental agency is

exempt from sales tax. Auxiliary Services, State University College at Oswego, Inc., Dec State Tax Comm, TSB-H-83(183)S.

Construction contractor on state projects was liable for sales tax on purchases of tools, supplies, repairs, fuel, and similar items. Re A. F. Lehmann Construction Co., Op State Tax Comm, June 7, 1977.

Contractor on state project must pay sales tax on materials incorporated into the project when his contract so provides. Re A. F. Lehmann Construction Co., Op State Tax Comm, June 7, 1977.

No tax is payable by the purchaser of property constituting equipment, facilities, a transportation facility or a transit facility as those terms are defined in Public Authorities Law §§ 1200 and 1261 if in connection with the purchase the purchaser leases the property to any municipality, public authority, or public benefit corporation for its use and the lease contains an option through the lesee to purchase the property upon the scheduled expiration of the lease for a nominal consideration since such purchase constitutes a purchase for resale; nor is any tax payable by lessor upon the purchase of the property by the municipality, public authority or public benefit corporation pursuant to such option or agreement since the lessee in each case is an entity exempt from tax pursuant to Tax Law § 1116(a)(1). Advisory Op St Tax Comm, April 6, 1982.

In order to determine whether particular entity is instrumentality of state or one or more of its political subdivisions for purposes of determining such entity's exemption from state and local sales and use taxes, examination must be made of following factors: (1) whether entity is used for governmental purpose and performs governmental function, (2) whether performance of its function is on behalf of state or one or more of its political subdivisions, (3) whether there are any private interests involved, or whether state or its political subdivisions involved have powers and interests of owner, (4) whether control and supervision of entity is vested in public authority or authorities, (5) whether there is expressed or implied statutory authority necessary for creation and/or use of such entity, and (6) whether financial autonomy and source of operating expenses are provided by political subdivisions. NYAdv Op Comm T & F TSB-A-94(35)S.

2. —Department of Social Services

New York State Department of Social Services which instituted "direct vendor" program with regard to certain public assistance clients has certain transactions which are exempt from sales tax pursuant to exemption provided under Tax Law. Advisory Opinion, Dec St Tax Comm, TSB-A-87-(30. 1)-S.

3. —Industrial development agencies

Purchases of tangible personal property made for the purpose of installing or using such property upon or within projects financed by industrial development bonds are exempt from sales or use tax, since it is clear from the language of Gen Mun Law art 18A, which establishes tax exemptions upon property owned by industrial development agencies as well as upon property controlled or supervised by them and upon their activity, that it was never the intention to exclude personal property, which is as much a part of a project developed by an industrial development agency as real estate or buildings, from the tax exemption. Since industrial development agencies are governmental agencies created for a public purpose, they would not ordinarily be subject to taxes upon any of their property, real or personal, except as otherwise specifically required by law; thus the purpose of itemizing, in art 18-A, the property declared to be exempt from taxation, was to emphasize that such property was to be included within the tax exemption so long as the industrial development agency owned, controlled, or supervised it in connection with its activities, including the equipping and furnishing of a project. Wegmans Food Markets, Inc. v Department of Taxation & Finance, 126 Misc. 2d 144, 481 N.Y.S.2d 298, 1984 N.Y. Misc. LEXIS 3566 (N.Y. Sup. Ct. 1984), aff'd, 115 A.D.2d 962, 497 N.Y.S.2d 790, 1985 N.Y. App. Div. LEXIS 55328 (N.Y. App. Div. 4th Dep't 1985).

4. —Long Island Railroad Company

Long Island Railroad Company is organization exempt from imposition of state sales tax under Tax Law § 1116(a)(1) and services rendered by taxpayer for said organization pursuant to contract for cleanup and removal of debris are not subject to sales tax. Re Klarmann, Det State Tax Comm, Oct. 9, 1979.

5. —Power authorities

The Power Authority is exempt from sales tax, and contractors with the Power Authority need not pay sales tax, even if the authority is not billed separately for materials. Re Germanetti & Ryan, Inc., Op State Tax Comm, August 26, 1977.

6. —Private organizations associated with state

Flying club with membership limited to members of New York Air National Guard and its civilian employees, stated purpose of which is to conduct program of flight safety and instruction for members, is operated primarily for benefit and recreational interests of its members and its activities are only incidentally educational; club is not instrumentality of state of New York within meaning and intent of Tax Law § 1116 although New York Air National Guard provides storage facilities for aircraft, use of its runway, and space for meetings; club is not entitled to exemption from sales or use tax. Re Syrang Aero Club, Inc., Dec State Tax Comm, October 17, 1980.

Not-for-profit corporation created by New York Conference of Mayors and Other Officials (NYCOM) to provide workers' compensation service program for NYCOM's public employer-members was instrumentality of state, and thus would be afforded same exemption from sales and use taxes as granted to NYCOM. NYAdv Op Comm T & F TSB-A-94(35)S.

7. Municipality, or municipal agency, authority or instrumentality or school district

It was neither arbitrary nor unreasonable to impose sales tax on revenues received by municipalities from off-street parking fees since (1) CLS Tax § 1105(c)(6) explicitly allows such tax on receipts obtained from providing "parking, garaging or storing for motor vehicles," (2) municipalities concededly qualified as "persons" subject to statute, (3) municipalities failed to show that provision of parking facilities was not service also ordinarily provided by private vendors, who served same public interest of aiding free flow of traffic but were taxed nonetheless, and (4) operation of municipal parking lots is proprietary, not governmental, function. North Hempstead v Regan, 171 A.D.2d 165, 574 N.Y.S.2d 851, 1991 N.Y. App. Div. LEXIS 13061 (N.Y. App. Div. 3d Dep't 1991), aff'd, 80 N.Y.2d 936, 591 N.Y.S.2d 131, 605 N.E.2d 867, 1992 N.Y. LEXIS 3432 (N.Y. 1992).

It was neither arbitrary nor unreasonable to exclude municipal parking lots and fields from exception from sales tax created for "on-street" metered parking since off-street parking is ordinarily sold by private persons subject to tax, while on-street parking is not. North Hempstead v Regan, 171 A.D.2d 165, 574 N.Y.S.2d 851, 1991 N.Y. App. Div. LEXIS 13061 (N.Y. App. Div. 3d Dep't 1991), aff'd, 80 N.Y.2d 936, 591 N.Y.S.2d 131, 605 N.E.2d 867, 1992 N.Y. LEXIS 3432 (N.Y. 1992).

Public schools located outside New York state are not exempt from sales and use taxes under § 1116(a)(1) of Tax Law, and in order for such schools to be considered exempt from tax, they must file an application for an exempt organization certificate pursuant to § 1116(a)(4) of Tax Law and meet statutory requirements for exemption. Re Tee Bar Corp., Dec St Tax Comm, TSB-H-85(141)S.

Municipal corporation, being instrumentality of State of New York, is not required to collect sales tax on its charges to property owners for sewer rent, even though municipality initially purchases waste treatment services from private company, as while waste treatment services may sometimes be sold by private persons, they are not "ordinarily" sold by private persons within meaning and intent of CLS Tax § 1116(a)(1). Advisory Opinion, Dec State Tax Comm, TSB-A-86(36)S.

School board, which entered into a contract for construction of building prior to effective date of amendment to Tax L § 1115, subd a(15) could not recover sales tax paid and passed on by contractor, where the contract was a lump sum contract which did not provide for separate passage of title of the materials. Re Marion Central School Dist. #1, Op State Tax Comm, August 22, 1977.

Purchase by private contractor of materials used on school building projects for Board of Education of the City of New York,

an exempt organization, was not subject to sales and compensating use taxes under Tax L § 1116. Re City Wire Works, Inc., Op State Tax Comm, October 3, 1977.

City of Rome is not subject to sales tax on sales of restaurant meals provided to city employees while engaged in city business where city makes direct payment for meals, or where meals are paid for by employee who subsequently receives specific reimbursement from city. Re City of Rome, Op State Tax Comm, Oct 9, 1980.

Sales tax is due on one-half of certain purchases of fuel oil purchased by petitioner in his own name for heating a building owned by the New York City Housing Preservation and Development Administration adjacent to one owned by him pursuant to a contract entered into with HPDA since petitioner did not sell fuel to HPDA but rather provided its building with heat and hot water and therefore his purchases were not purchases for resale under the definition contained in Tax Law § 1101(b)(4)(i) and since the purchases of fuel oil made by him could not be construed as being made by an agent of New York City in order to qualify for the sales tax exemption provided in Tax Law § 1116(a)(1) since petitioner did not transfer the fuel oil itself to the city and since there was no demonstrated or explicit designation of petitioner as the city's agent in buying the fuel oil. Op St Tax Comm, February 18, 1981.

Upgrade and renovation of county coliseum scoreboard were exempt from sales tax under CLS Tax §§ 1116(a)(1) and 1115(a)(15) where county owned coliseum, scoreboard was installed on behalf of county, and it became integral part of structure. NY Tax Appeals Tribunal TSB-D-95(15)S.

8. United States of America; federal agencies and other entities

Petitioner, who was engaged in the service of removal or cleanup of oil spills from bodies of water in New York state, was an independent contractor which purchased equipment, materials, and supplies on its own behalf for use in performing service contracts for the Coast Guard and other persons, and did not make such purchases as agent for the Coast Guard, and thus did not qualify for the exemption from sales and use taxes as provided in § 1116(a)(2) of the Tax Law; accordingly, such purchases were subject to the tax imposed under § 1105(a) of the Tax Law. Re Sea-Land Restoration, Inc., Dec St Tax Comm, TSB-H-85(4)S.

Where language of contract between company and U.S. Department of Energy not only fails to name contractor as agent of government, but also specifically prohibits contractor from acting in agency capacity, contractor, rather than Federal Government, is making purchases and since such purchases do not become integral part of structure, building or real property owned by Federal Government, such purchases do not qualify for exemption from tax and are, therefore, subject to sales and use tax. Advisory Opinion, Dec St Tax Comm, TSB-A-88(7)S.

Purchases of materials by general contractor for use in constructing 31 story commercial office tower on top of existing 8 story building, constructing new building columns, footings, girders and supports in subsurface beneath existing building, and renovating portions of existing building are exempt from state and local sales tax when pursuant to lease between petitioner as tenant and United States Postal Service as landlord, where United States Postal Service will acquire immediate title to such materials once incorporated into real property. 1989 New York State Dept. of Taxation & Finance Advisory Opinion, TSB-A-89-(8)S (Sales Tax).

Purchases of tangible personal property and services under management and operating contract between United States Department of Energy (DOE) and petitioner, company formed to compete for management and operating contract for project to carry out high-level nuclear waste management demonstration project, were not exempt from sales and use tax under CLS Tax § 1116(a)(2) since petitioner failed to show that it was acting as agent of DOE in making purchases in question and in performing its duties under contract. NY Tax Appeals Tribunal TSB-D-98(15)S.

9. Exempt organizations; in general

In Article 78 proceeding, evidence supported State Tax Commission's determination that corporation which managed food service operations for educational and health care institutions was not agent for its tax exempt institutional clients, and thus was not entitled to exemption pursuant to CLS Tax § 1116(a)(4) for recurring purchases of plastic spoons and cups, paper supplies, napkins and cleaning agents, where corporation exercised control over details of food management operations including purchase of food and supplies, determination of vendors to use, performance of bookkeeping functions and placement of employees on its payroll. Custom Mgmt. Corp. v N.Y. State Tax Comm'n, 148 A.D.2d 919, 539 N.Y.S.2d 550, 1989 N.Y. App. Div. LEXIS 4097 (N.Y. App. Div. 3d Dep't 1989).

Parking charges levied by a private profit-making corporation in connection with its operation of a parking facility owned by a corporation exempt from sales tax on such charges pursuant to Tax Law § 1116 would not be similarly exempt where the former was an independent corporation with its own investors which distributed its own profits, filed its own tax returns and operated various other parking facilities, and where such circumstances indicated a lack of the totality of control which would make the former merely an operating extension of the latter and, therefore, the former was the true vendor of the facility. Lincoln Center for Performing Arts, Inc. v State Tax Com., 113 Misc. 2d 329, 448 N.Y.S.2d 931, 1982 N.Y. Misc. LEXIS 3298 (N.Y. Sup. Ct. 1982).

Public schools located outside New York state are not exempt from sales and use taxes under § 1116(a)(1) of Tax Law, and in order for such schools to be considered exempt from tax, they must file an application for an exempt organization certificate pursuant to § 1116(a)(4) of Tax Law and meet statutory requirements for exemption. Re Tee Bar Corp., Dec St Tax Comm, TSB-H-85(141)S.

In ascertaining whether an organization is organized exclusively for one or more of the enumerated exempt purposes, the focus is on the provisions of the organizing documents; the documents must limit purposes of organization to one or more exempt purposes and cannot expressly empower organization to participate, other than as an insubstantial part of its activities, in activities which are not in furtherance of one or more exempt purposes; on the other hand, in determining whether organization is operated exclusively for one or more exempt purposes, focus is on organization's activities; an organization will not be regarded as exempt if more than an insubstantial part of its activities is not in furtherance of exempt purposes. Re Long Island Chapter of the Nat. Asso. of Media Women, Inc., Dec St Tax Comm, TSB-H-85(237)S.

In ascertaining whether organization is organized exclusively for one or more of enumerated exempt purposes, focus is on provisions of organizing documents; in determining whether organization is operated exclusively for one or more exempt purposes, focus is on organization's activities. Re Pierpont, Dec Tax Comm, TSB-H-84(75)S.

Employee purchases by use of corporate credit card of exempt organization bearing name of employee and abbreviation of organization's name would not be subject to sales and use taxes where vendors were issued properly completed Exempt Organization Certifications (Form ST-119.1) by employees who were authorized by organization to act on its behalf to make purchases, and organization and employee were identified on any bill or invoice as purchaser of record. NYAdv Op Comm T & F TSB-A-94(30)S.

10. —Certificate of incorporation specifying exempt purpose

In an Article 78 proceeding to challenge the imposition of an additional sales tax against a fraternal organization whose facilities included a recreation area, bar and lounge, and banquet hall, the actual activity of the organization did not qualify it as an exempt corporation despite reference to a charitable purpose in its certificate of incorporation. Surface Line Operators Fraternal Organization, Inc. v Tully, 85 A.D.2d 858, 446 N.Y.S.2d 451, 1981 N.Y. App. Div. LEXIS 16689 (N.Y. App. Div. 3d Dep't 1981).

Where organization was engaged in certain charitable activities, its organizational intent and substantially all of its operational activities were in furtherance of educational purposes, and specifically, where organization was engaged in presentation of information, lectures and demonstrations concerning plants,

flowers, flower arranging and gardening techniques, at meetings advertised and open to general public, organization qualified for exemptions from sales and use taxes under tax law § 1116(a)(14). Re Bridgeview Garden Club, Dec St Tax Comm, TSB-H-85(74)S.

CLS Tax § 1116(a)(4) makes no provision for exemption for real estate holding company, notwithstanding any requirements in company's certificate of incorporation that all income derived from its properties be turned over to organization exempt from § 501 of Internal Revenue Code. Re Homesite Holding Co., Inc., et al, Dec State Tax Comm, TSB-H-87-(74)S.

JA Companies, non-profit corporations affiliated with Junior Achievement, which involve students in operations of their own small businesses, satisfies criteria set forth in CLS Tax L § 1116(a)(4), and thus sales of tangible personal property by petitioner, where on door-to-door basis, would not be subject to tax. Re Junior Achievement of Western New York, Inc., TSB-A-84(13)S.

11. —Organizations predominantly involved in non-exempt activities

Organization's certificate of incorporation does not satisfy organizational test set forth in Tax Law because none of enumerated tax purposes are set forth therein; further, organization's operations are not exclusively educational or charitable, and these purposes were insubstantial part of its activities. Re Rockwood Park Concerned Residents, Inc., Dec St Tax Comm, TSB-H-87(207)S.

Organization is not entitled to exempt status where, despite commendable humanitarian endeavors, it is clear from subject matter of monthly meetings that nonexempt social activities contribute more than insubstantial part of overall activities. Re Pierpont, Dec Tax Comm, TSB-H-84(75)S.

Division of Taxation properly denied taxpayer's application for exempt organization status, even though organization operated to serve community, supported prevention of cruelty to children, assisted persons in community who were ill or in need, attempted to prepare persons for citizenship, and provided periodic courses on volunteer basis, since financial data clearly indicated that substantial portion of organization's revenue and expenditures were committed to non-exempt purposes. NY Tax Appeals Tribunal TSB-D-91-(49)S.

12. — —Athletic clubs

Skating club which shared use of skating arena constructed on campus of private school with private school which charged annual dues and initiation fee is not organized or operated exclusively for educational or any of exempt purposes set forth in § 1116(a)(4), but is rather athletic club within meaning and intent of § 1105(f)(2) and as such, its membership dues and initiation fees are subject to tax. Re Buffalo Skating Club, Inc., 1980 Corrected Det State Tax Com., February 29, 1980.

13. — —Fraternal organizations and social clubs

In an Article 78 proceeding to challenge the imposition of an additional sales tax against a fraternal organization whose facilities included a recreation area, bar and lounge, and banquet hall, the actual activity of the organization did not qualify it as an exempt corporation despite reference to a charitable purpose in its certificate of incorporation. Surface Line Operators Fraternal Organization, Inc. v Tully, 85 A.D.2d 858, 446 N.Y.S.2d 451, 1981 N.Y. App. Div. LEXIS 16689 (N.Y. App. Div. 3d Dep't 1981).

Despite contention by applicant that it qualified as tax-exempt organization because it was § 10 corporation under New York State Membership Corporation Law prior to effective date of Not-for-Profit Corporation Law, applicant was not a corporation organized and operated exclusively for charitable purposes, or a fraternal society, order or association operating under lodge system, but rather was social club, where it was organized to promote fellowship and extend acquaintanceships through activities mainly consisting of dinners, dances and other special events for members and guests. Re Surface Line Operators Fraternal Organization, Inc., 1980 Det State Tax Comm, Jan 11, 1980.

Fraternal organization is not entitled to exempt status despite its religious and charitable aspects where more than insubstantial part of organizational activities are not in furtherance of exempt purpose. Ben Hur Grand Lodge & Grand Encampment of Independent United Order of Mechanics Friendly Soc. in America & West Indies, Inc., Dec Tax Comm, TSB-H-84(73)S.

14. — —Insurance exchange

Insurance exchange established for purpose of underwriting reinsurance, direct insurance on risks located entirely outside United States, and insurance of certain otherwise uninsurable risks, was not governmental agency or corporation organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes, or for prevention of cruelty to children or animals, and therefore subject to payment of sales and use tax. Re New York Insurance Exchange, Inc., Op State Tax Comm, June 16, 1980.

15. — —Neighborhood block associations

Neighborhood block association incorporated under CLS Not-For-Profit Corporation § 201(b) as "type A" not-for-profit corporation with its stated purposes being civic, social and political in nature, not charitable or educational, does not qualify as exempt corporation under CLS Tax § 1116; certificate of incorporation did not satisfy organizational test in that none of enumerated exempt purposes were set forth therein, and further, corporation's operations were not exclusively educational and/or charitable; in addition, corporation's programs were administered for benefit of specific group of persons and enhancement of neighborhood and not general public. Re Woodhaven Residence Block Asso., Inc., Dec St Tax Comm, TSB-H-87(24)S.

16. — —Professional improvement organizations; bar associations

International bar association was not entitled to exemption from sales and use taxes under CLS Tax § 1116(a)(4), even though many of its purposes and objectives were educational in nature, since association's constitution also listed objective of assisting members of legal profession throughout world in developing and improving their legal services to public; further, association sponsored social events and assisted bar associations in developing countries. International Bar Ass'n v Tax Appeals Tribunal, 210 A.D.2d 819, 620 N.Y.S.2d 582, 1994 N.Y. App. Div. LEXIS 13242 (N.Y. App. Div. 3d Dep't 1994), app. denied, 85 N.Y.2d 806, 627 N.Y.S.2d 323, 650 N.E.2d 1325, 1995 N.Y. LEXIS 1220 (N.Y. 1995).

New York City elementary school principals association did not qualify for exemption from sales tax since it was not organized and operated exclusively for one or more of the purposes specified in § 1116(a)(4) of the Tax Law; although many of association's activities ultimately had an impact on education, a substantial portion of them were designed primarily to improve the profession of school principal and were of concern only to a school principal; these activities served to improve the efficiency of the school principal, but they were not educational in nature. Re New York City Elementary School Principals Asso., Dec St Tax Comm, TSB-H-85(241)S.

Bar association which has purposes which are not limited to those enumerated in Tax Law § 1116(a)(4) is not organization exempt from imposition of sales and use taxes despite fact that association engages in many activities which are educational or charitable in nature because substantial part of its activities are directed toward promoting legal profession for benefit of its members and it is expressly authorized to engage in activities which further professional interest of its members. Re Erie County Bar Asso., Det State Tax Comm, August 17, 1979.

Petitioner, International Bar Association, was properly denied exemption under CLS Tax § 1116(a)(4) where objectives of petitioner's organization, while characterized as educational, were also concerned in large part with advancement of professional interests of its members, and it was exempt from federal taxation under Internal Revenue Code § 501(c)(6) and not § 501(c)(3). NY Tax Appeals Tribunal TSB-D-93(42)S.

17. — —Retired and senior citizens organizations

Club of retired and veteran railway employees which meets monthly for lunch and for discussion of rights of members with respect to their retirement benefits is not organized exclusively for exempt purposes and is therefore not entitled to exemption from sales and compensating use tax. Re National Asso. of

Retired & Veteran Railway Employees, Inc., Dec State Tax Comm, TSB-H-84(113)S.

Seniors citizens club organized for purpose of social, recreational, educational, and service activities among men and women of senior years did not qualify for exempt organization status since club was essentially social organization and its educational and charitable activities were incidental to its social and recreational objectives. Re Waverly Senior Citizens Club, Dec St Tax Comm, TSB-H-86(180)S.

Although Hanover Township Senior Citizens Club's activities are educational and charitable in nature, substantial portion of them are in furtherance of social and recreational purposes; moreover, Club's constitution and bylaws lack clauses for nonninurement, restrictive legislation and dissolution provisions; accordingly, Club is neither organized nor operated exclusively for any of purposes specified in CLS Tax § 1116 and its application for exempt organization status was properly denied. Re Hanover Township Senior Citizen Club, Dec St Tax Comm, TSB-H-87(194)S.

Organization for retired public school employees was not exempt for purposes of CLS Tax § 1116(a)(4) since its constitution stated that its purpose was "to maintain and perpetuate among the retirees the personal, educational, and professional associations and contacts originally established during many years of service within" community, and it held various social functions including luncheons, annual barbecue, and sightseeing tours; under circumstances, organization was primarily social in nature. NY Tax Appeals Tribunal TSB-D-90-(57)S.

Senior citizens clubs were not entitled to tax exempt status under CLS Tax § 1116(a)(4) where their bylaws disclosed that purpose for which they were formed was broader than educational purposes specified in statute, and their educational activities appeared secondary to overall social and recreational aspects of monthly meetings, trips, picnics and dinners. NY Tax Appeals Tribunal TSB-D-97-(11)S.

18. —Organizations predominantly involved in exempt activities

Where organization was engaged in certain charitable activities, its organizational intent and substantially all of its operational activities were in furtherance of educational purposes, and specifically, where organization was engaged in presentation of information, lectures and demonstrations concerning plants, flowers, flower arranging and gardening techniques, at meetings advertised and open to general public, organization qualified for exemptions from sales and use taxes under tax law § 1116(a)(14). Re Bridgeview Garden Club, Dec St Tax Comm, TSB-H-85(74)S.

Audit division properly denied sorority's application for an exempt organization certificate notwithstanding that taxpayer met operational requirements of § 1116(a)(4) of Tax Law in that all of its activities, other than its Founder Day luncheon, were confined exclusively to educational and charitable purposes of activities designed to raise funds to achieve these purposes, where sorority's constitution did not limit sorority's activities to one or more exempt purposes; constitution stated one of its purposes to be "to promote sisterliness and friendship toward each soror"; such purposes were more social in nature than exempt purposes provided for in § 1116(a)(4). Re Alpha Kappa Alpha Sorority, Theta Iota Omega Chapter, Dec St Tax Comm, TSB-H-85(75)S.

Applicant which operated school and day care center was not "organized and operated" exclusively for an exempt purpose under Tax Law § 1116(a)(4) for 2-year period prior to formal adoption of articles of incorporation, even though applicant had been recognized prior to such adoption as a nonprofit entity by a certified public accounting firm retained by the New York City agency of child development. Application of Brownstone School, File No. 14540 State Tax Com., August 25, 1978.

Since petitioner's organizing documents did not contain a provision insuring that its assets were dedicated for an exempt purpose in the event of dissolution as required by the Taxpayers Services Division before September 17, 1975, petitioner was not organized exclusively for exempt purposes within Tax Law § 1116(a)(4) and therefore is not entitled to a refund of sales taxes paid before September 17. Re Monroe Woodbury Athletic Booster Club, Dec St Tax Comm, October 29, 1980.

Church's payment of 10 percent of gross donations generated by field staff member as commission to field staff member does not violate requirement that net earnings may not inure to benefit of private shareholders or individuals since commissions represent reasonable payment in return for services of generating funds, increasing church membership, and promoting church precepts. Re Elmira Mission of Church of Scientology, Dec State Tax Comm, TSB-H-84(92)S.

19. —Benefits inuring to specific groups or individuals

Tax Commission properly determined that nonprofit corporation was not entitled to exemption from sales and use taxes because portion of its net earnings inured to benefit of one director, where director was principal contributor to corporation, bylaws gave him almost exclusive control of management of corporate funds, and he was principal beneficiary of corporate distributions in that he received housing compensation from corporation, his electric and phone bills were paid by corporation, and he held title to car used exclusively for corporation's business for which corporation had paid maintenance and repairs in amount of $1,191.03. Jesus Revivals, Inc. v New York State Tax Com., 139 A.D.2d 875, 527 N.Y.S.2d 603, 1988 N.Y. App. Div. LEXIS 4557 (N.Y. App. Div. 3d Dep't 1988).

New York City elementary school principals association did not qualify for exemption from sales tax since it was not organized and operated exclusively for one or more of the purposes specified in § 1116(a)(4) of the Tax Law; although many of association's activities ultimately had an impact on education, a substantial portion of them were designed primarily to improve the profession of school principal and were of concern only to a school principal; these activities served to improve the efficiency of the school principal, but they were not educational in nature. Re New York City Elementary School Principals Asso., Dec St Tax Comm, TSB-H-85(241)S.

Organization entitled "The Jesus Revivals, Inc." was not entitled to exempt organization status under CLS Tax § 1116, notwithstanding that petitioner's certificate of incorporation sufficiently circumscribed its activities so as to satisfy organizational test, since petitioner failed to show that it had not violated prohibition against inurement of net earnings to benefit of individuals. Re The Jesus Revivals, Inc., Dec St Tax Comm, TSB-H-86(179)S.

Neighborhood block association incorporated under CLS Not-For-Profit Corporation § 201(b) as "type A" not-for-profit corporation with its stated purposes being civic, social and political in nature, not charitable or educational, does not qualify as exempt corporation under CLS Tax § 1116; certificate of incorporation did not satisfy organizational test in that none of enumerated exempt purposes were set forth therein, and further, corporation's operations were not exclusively educational and/or charitable; in addition, corporation's programs were administered for benefit of specific group of persons and enhancement of neighborhood and not general public. Re Woodhaven Residence Block Asso., Inc., Dec St Tax Comm, TSB-H-87(24)S.

Although Hanover Township Senior Citizens Club's activities are educational and charitable in nature, substantial portion of them are in furtherance of social and recreational purposes; moreover, Club's constitution and bylaws lack clauses for nonninurement, restrictive legislation and dissolution provisions; accordingly, Club is neither organized nor operated exclusively for any of purposes specified in CLS Tax § 1116 and its application for exempt organization status was properly denied. Re Hanover Township Senior Citizen Club, Dec St Tax Comm, TSB-H-87(194)S.

Bar association which has purposes which are not limited to those enumerated in Tax Law § 1116(a)(4) is not organization exempt from imposition of sales and use taxes despite fact that association engages in many activities which are educational or charitable in nature because substantial part of its activities are directed toward promoting legal profession for benefit of its members and it is expressly authorized to engage in activities which further professional interest of its members. Re Erie County Bar Asso., Det State Tax Comm, August 17, 1979.

20. —Purchases by contractors for exempt organizations

No sales tax is applicable to purchases made on contract with exempt organization where contract separately lists time and materials charges, expresses intent to take advantage of tax exempt status of purchaser, and sales tax is not included in bid or contract price; purchases of materials for lump-sum contracts with tax exempt organizations are taxable, absent other qualifying circumstances, and road construction contract which evidenced no exemption certificate or other indications of intent to take advantage of tax exemption and which failed to indiciate whether sales tax was included in contract price, and which merely stated total materials costs and total labor and other costs, is not exempt from sales tax. Neil R. Nielsen, Inc., Dec State Tax Comm, TSB-H-83(173)S.

Sales by or to exempt organizations such as religious, charitable or educational organizations are not subject to sales and compensating use taxes; individual items at issue were not purchased and resold by food management service to exempt organizations, but, rather items were purchased and used by food management service's personnel as part of and in course of food management services provided to various clients. Re Customs Management Corp., Dec St Tax Comm, TSB-H-87(184)S.

Construction contractor was liable for sales tax on cost of rental equipment, fuel and materials not incorporated into building under a construction contract with a tax-exempt hospital. Re A. F. Lehmann Construction Co., Op State Tax Comm, June 7, 1977.

Construction company was not entitled to refund for sales taxes paid to its suppliers and subcontractors for purchases of tangible personal property which became integral components of building erected for tax exempt organization where bid and contract set forth lump sum price and did not break down costs into separate categories for labor and materials. Re Smith Bros. Constr. Co., Inc., Op State Tax Comm, September 1, 1977.

Subcontractor's purchases of materials are not subject to sales tax where it entered into subcontract for capital improvements for exempt organization, incorporating provisions of general contract which provided that bid price was exempt from sales tax and that purchases were for resale to exempt organization. Re Davis-Eckert-Joint Venture, 1978 Op St Tax Comm, Dec. 13, 1978.

Where contract with exempt organization, by its express terms, states that there is to be no sales tax included in bid price and none is so included, purchases of materials for performance of contract are tax exempt; where evidence indicates that at time of execution of contract, contracting parties were aware of exempt status of organization, parties intended to exclude taxes on purchases for performance of contract and no sales tax was charged exempt institution, no sales tax is applicable to such purchases; but purchases of materials for lump-sum contracts with tax exempt organizations will be taxable, absent any other qualifying circumstances. Re Joseph Davis, Inc., 1978 Op St Tax Comm, Dec. 13, 1978.

Where contracts with exempt organizations separately list time and materials charges, express intent to take advantage of tax exempt status, and do not include sales tax in bid or contract price, no sales tax is applicable to purchases. North Shore Iron Works, Inc., Dec State Tax Comm, TSB-H-83(213)S.

Mere existence of checks to taxpayer from exempt organization did not establish that particular purchases on which use tax was assessed were for specific project or projects on behalf of exempt organization. NY Tax Appeals Tribunal TSB-D-93(36)S.

Licensee's purchases of equipment and supplies for use in maintaining facilities located at county-owned country club, pursuant to its contract to operate concessions at country club, were not exempt from sales and compensating use tax under CLS Tax § 1116(a)(1) where licensing agreements provided, inter alia, that licensee was not county's agent with respect to any purchases of property or services thereunder, and that county was not obligated to any vendors that sold such property or services to licensee. TSB-A-00(34)S.

21. —Purchases and sales by or fees of exempt organizations

Purchases made by exempt organization in name of headmaster of school and paid for by funds of school are sales to and for use of school and are therefore exempt under CLS Tax § 1116(a)(4); refund of sales taxes paid by exempt organization is limited under CLS Tax § 1139 to purchases billed 3 years or less before date of application for refund. Maplewood School, Dec State Tax Comm, TSB-H-83(150)S.

Church is not required to collect sales tax on cookbooks sold at church where books are sold from storage and office safe whenever persons with access to safe are available, as sales are not made from a display with any degree of regularity, frequency or continuity, nor do they take place in an area set aside for selling tangible personal property, such that sales are not considered to be made through a shop or store. Dec St Tax Comm, TSB-A-86(53)S.

Non-profit associations which conducted classes in square dancing for which they charged fees were exempt from sales and use taxes as organizations existing exclusively for educational purposes. Re Shufflin Shoes Square Dance Club, Op State Tax Comm, August 13, 1976.

Where college assigns personal computer to each incoming freshman student, in exchange for $200 maintenance deposit, college's relinquishment of $200 deposit in lieu of returning personal computer for refund of such deposit is exempt from sales tax under CLS Tax L § 1116(a)(4). Re Clarkson College, TSB-A-84(4)S.

JA Companies, non-profit corporations affiliated with Junior Achievement, which involve students in operations of their own small businesses, satisfies criteria set forth in CLS Tax L § 1116(a)(4), and thus sales of tangible personal property by petitioner, where on door-to-door basis, would not be subject to tax. Re Junior Achievement of Western New York, Inc., TSB-A-84(13)S.

Organization that is exempt from Federal income taxes but not exempt from sales tax may establish separate entity exclusively for religious, charitable, scientific, literary, or educational purposes under Tax § 1116[a], and if it meets requirements of Regulation § 529.7, and is approved by TSB, then its sales other than sales by shop, store or restaurant operated by separate entity, will be exempt from sales tax. Advisory Opinion, TSB-A-86(14)S.

Where tax exempt musical society has different location for each of its meetings, temporary table set up at some of these meetings does not constitute "shop or store" since it fails to occur with regularity, frequency and continuity, and society is therefore not required to collect state and local sales taxes on receipts from sales at its temporary sales table as long as temporary sales table is not located on same premises as person who required to collect tax. Matter of Richard Wagner Society of NY, Inc., TSB-A-88(43)S.

Hospital which qualified as nonprofit corporation and exempt corporation under Internal Revenue Code was not required to collect and remit sales tax on its lease of radiology equipment to joint venture (consisting of hospital and group of radiologists) for use in joint venture's for-profit professional radiology practice; however, if hospital entered into equipment leases with more than one customer, it might be required to collect sales tax on its lease transactions. TSB-A-00(46)S.

22. Indian nations, tribes, reservations, and individuals

Department of Taxation and Finance may require plaintiff, enrolled member of Seneca Nation, to collect and remit sales, use and excise taxes on sale of cigarettes and motor fuel to non-Indian consumers at plaintiff's retail business on Cattaraugus Reservation; state tax statutes requiring Indian retailers to collect and remit taxes on sales to non-Indian purchasers, and to keep records necessary to ensure compliance, do not violate Commerce Clause or constitutional proscription against direct taxation of Indians without explicit congressional consent. Snyder v Wetzler, 84 N.Y.2d 941, 620 N.Y.S.2d 813, 644 N.E.2d 1369, 1994 N.Y. LEXIS 4106 (N.Y. 1994).

Company proprietors lacked standing to assert that a local tax law which imposed a tax on the rental proceeds of hotel and motel rooms within a county was void because it did not exempt Indian tribes, in violation of N.Y. Tax Law § 1116; the proprietors did not show any injury that they, as owners and operators of non-tribal

accommodations, suffered. Hunter v Bd. of Supervisors, 21 A.D.3d 622, 800 N.Y.S.2d 231, 2005 N.Y. App. Div. LEXIS 8280 (N.Y. App. Div. 3d Dep't 2005).

An Indian who resides on a reservation in New York is not liable for New York state and local sales taxes on sales of tangible personal property delivered to the reservation, sales of services where services are delivered to reservation, or on items purchased off the reservation but delivered to the Indian on the reservation, but such exemptions are derived not from § 1116(a)(6) of the Tax Law but from principles set forth in United States Supreme Court decisions. Re Seneca Nation, 1982 Op State Tax Comm, Aug 25, 1982.

23. Non-exempt sales

Table setup at monthly meeting from which tangible personal property is offered for sale by organization which is qualified for exemption from sales tax constitutes "shop or store" within meaning and intent of § 1116(b) of Tax Law, and proceeds from such sales are accordingly subject to sales tax. Re Women's Aglow Fellowship, 1981 Op State Tax Comm, Dec. 22, 1981.

Sales tax must be collected on the sale of meals to employees through a non-profit program conducted in a state institution; although Tax Law § 1116 provides for an exemption from sales tax generally applicable to sales made by the State of New York or any of its agencies or instrumentalities that exemption is by the same statutory provision made expressly inapplicable to sales of food or drink in or by a restaurant, tavern or other establishment. Advisory Op St Tax Comm, March 29, 1982.

24. Admissions

Provision in Tax Law providing that admission charges to historic sites operated by nonprofit-making entity are exempted from imposition of sales tax did not constitute denial of equal protection. Ft. William Henry Corp. v State Tax Com., 52 A.D.2d 664, 381 N.Y.S.2d 907, 1976 N.Y. App. Div. LEXIS 12328 (N.Y. App. Div. 3d Dep't 1976).

Evidence in hearing on determination of sales tax sustained finding that museum operated by profit-making domestic corporation constituted "place of amusement," and thus admission charges to such museum were subject to sales tax. Ft. William Henry Corp. v State Tax Com., 52 A.D.2d 664, 381 N.Y.S.2d 907, 1976 N.Y. App. Div. LEXIS 12328 (N.Y. App. Div. 3d Dep't 1976).

Proceeds of agricultural fair's "pay-one-price" charge for admission to county fair, shared by agricultural fair with operator of carnival midway, are not exempt admissions to agricultural fair within meaning of CLS Tax § 1116(d). In Matter of Petition of Erie County Agricultural Society, TSB-H-87(221)S.

Agency Opinions

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17. Admissions

1. In general

Criteria for exemption for state agency—that agency relationship be manifested through exempt organization's consent for particular company to act as agent on its behalf—will be met if contract between exempt organization and company contains substantially same language contained in contract provision conferring agency status (i.e., manifestation that petitioner consented to act on behalf of agency, subject to latter's control, and that agency authorized such fiduciary relationship), and if purchase orders issued by company indicated that it is acting as agent for exempt organization. NY Adv Op Comm T & F TSB-A-95(30)S.

When petitioner sells or leases its air powered mattress system (used to prevent bed sores and other medical conditions) to someone who will use it in performing medical and similar services for compensation, such as doctor or hospital, petitioner must collect sales or use tax due from purchaser; however, if sale is to organization exempt under CLS Tax § 1116(a) or to someone who will resell them, such as wholesaler, then no sales or use tax will be due, provided that petitioner obtains appropriate exemption certificate from purchaser. NY Adv Op Comm T & F TSB-A-96(1)S.

Video taping of town board meeting and subsequent sale of copy of video tape to New York State or local government entity is exempt transaction, provided petitioner receives purchase order or other appropriate documentation within 90 days of date of sale from government entity. NY Adv Op Comm T & F TSB-A-96(88)S.

Petitioner could purchase materials which were incorporated into and became part of temporary steel crossover for expressway interchange without payment of sales and compensating use tax since such materials met conditions under CLS Tax § 1115(a)(15) and (16). NY Adv Op Comm T & F TSB-A-02-(18)S.

Golf association's catalog sales are exempt from sales tax under CLS Tax § 1116(a) where such sales, whether they are of US Open clothing, programs, souvenirs, or other items, are not made from shop or store or temporary shop or store as described in CLS Tax § 1116(b)(1) and 20 NYCRR § 529.7(i)(2). NY Adv Op Comm T & F TSB-A-05-(5)S.

Golf association's sales of publications made by telephone or mail order are not subject to sales tax under CLS Tax § 1116(a) where such sales are not made from shop or store or temporary shop or store as described in CLS Tax § 1116(b)(1) and 20 NYCRR § 529.7(i)(2). NY Adv Op Comm T & F TSB-A-05-(5)S.

Golf association's sales of souvenir merchandise made at information sessions at host course and association's headquarters in New Jersey at which clients are provided with corporate gift catalog from which they may view and select souvenir US Open merchandise for their attendees are not subject to sales or use tax, regardless of whether delivery of ordered merchandise occurs in New York State, since they do not constitute sales from shop or store as contemplated in CLS Tax § 1116(b)(1) and 20 NYCRR § 529.7(i)(2). NY Adv Op Comm T & F TSB-A-05-(5)S.

Sales of US Open uniforms by golf association to volunteers engaged to assist in conduct of US Open do not constitute sales from shop or store as contemplated in CLS Tax § 1116(b)(1) and are not subject to sales or use tax regardless of whether delivery of uniforms occurs in New York State, where uniform sales are processed by association's staff and drop-shipped directly from manufacturer to volunteer. NY Adv Op Comm T & F TSB-A-05-(5)S.

2. State, or state agency, authority, instrumentality, or public corporation

3. —Industrial development agencies

Taxpayer's purchase and installation of wastewater treatment system would be exempt from sales and use tax under CLS § 1116(a)(l) provided that such system was purchased by taxpayer as agent of county industrial development agency (IDA), and provided that title to such equipment was transferred to IDA; however, if such equipment were installed in such manner that did not result in it becoming part of real property, and if title thereto was not transferred to IDA, taxpayer would be liable for sales or use tax on total cost of equipment including any installation charge. NY Adv Op Comm T & F TSB-A-91-(56)S.

Operation and maintenance of cogeneration plants which were built with funds from industrial development agencies were not exempt from state and local sales and use taxes. NY Adv Op Comm T & F TSB-A-93-(7)S.

4. —Port Authority of New York and New Jersey

Installation of baggage conveyor system by airline on property in airport terminal building leased from Port of New York Authority was not subject to sales and use taxes since Port Authority was exempt organization under CLS Tax § 1116(a)(1), and title to baggage conveyor system vested with Port Authority on completion of its installation. NY Adv Op Comm T & F TSB-A-92-(30)S.

Tangible personal property purchased by sublessee's contractors or subcontractors which became integral component of leased premises owned by Port Authority of New York and New Jersey was exempt from sales tax under CLS Tax § 1116(1)(15) where main lease between port authority and sublessor provided that legal title to "building construction, including improvements, appurtenances and fixtures shall vest in the Port Authority immediately on erection or affixation of all or any part on or to the premises." NY Adv Op Comm T & F TSB-A-91-(23)S.

Pro rata charges made to airline for guard services and Boarding Security Program which were part of common area charges imposed by Port Authority of New York and New Jersey Passenger at terminal of John F. Kennedy International Airport were considered to be charges for additional rent and not subject to sales and use tax. NY Adv Op Comm T & F TSB-A-00-(10)S.

Purchases or leases of equipment from Port Authority of New York and New Jersey used to fuel and defuel commercial airplanes were exempt from sales and use tax. NY Adv Op Comm T & F TSB-A-02-(28)S.

Sales and use tax applies to petitioner's rental of cranes to subcontractor working for contractor who, in turn, was employed by entity purported to be agent of exempt governmental entity (Port Authority of New York and New Jersey) where documentation did not support such relationship. NY Adv Op Comm T & F TSB-A-09-(32)S.

5. —Private organizations associated with state

Not-for-profit advisory organization created to assist New York-licensed excess line insurance brokers to comply with complicated features of New York's current excess line regulatory system, inter alia, was not exempt from payment of sales and compensating use taxes under CLS Tax § 1116(a)(1) since organization was not owned by state, it was organization for purpose of operating board of trade rather than some public purpose, and implementing statute did not specify that organization was governmental agency or public corporation. NY Adv Op Comm T & F TSB-A-90-(13)S.

Downtown Utica Development Association, formed to administer Downtown Utica Business Improvement District pursuant to CLS Gen City § 24-o, was not entity exempt from imposition of sales and use tax under CLS Tax § 1116(a)(1) since (1) although authorized by statute, association was not created by statute but was incorporated by members of association as individuals and not as public officers, and (2) association was not funded by appropriated tax monies, but was funded by special funds collected by city on behalf of association for purpose of association fulfilling its contractual obligations with city. NY Adv Op Comm T & F TSB-A-92-(12)S.

Not-for-profit paramedic service created by county's local town boards was not governmental entity, agency, instrumentality, political subdivision, public corporation, or hospital, and thus motor fuel purchased by service was not eligible for exemption from CLS Tax Art 12-A motor fuel taxes at time of purchase. NY Adv Op Comm T & F TSB-A-06-(27)S.

Not-for-profit paramedic service created by county's local town boards did not qualify for reimbursement of motor fuel tax under CLS Tax § 289-c(3), since service was not hospital, governmental entity, volunteer fire company or department or volunteer rescue squad. NY Adv Op Comm T & F TSB-A-06-(27)S.

Not-for-profit paramedic service created by county's local town boards did not qualify for exemption from, or reimbursement of, petroleum business tax, since service was not governmental entity as described in CLS Tax § 1116(a)(1) or (2). NY Adv Op Comm T & F TSB-A-06-(27)S.

Town fire district officers association was instrumentality of State of New York and thus was exempt from sales and use taxes. NY Adv Op Comm T & F TSB-A-93-(1)S.

County fire district officers association was instrumentality of State of New York and thus was exempt from sales and use taxes. NY Adv Op Comm T & F TSB-A-93-(2)S.

Purchase of supplies, equipment and services for use in performing environmental engineering and consulting services would not be subject to sales tax where purchaser was authorized by governmental agency exempt from sales tax under CLS Tax § 1116(a)(1) or § 1116(a)(2) to act as agent on its behalf in connection with such purchases, and delegation was authorized by law. NY Adv Op Comm T & F TSB-A-95(30)S.

State employees' use of credit card embossed with words "tax-exempt" was not sufficient, in and of itself, to relieve hotel operator of its burden of proving nontaxability of transaction or its responsibility for collecting sales tax on transaction where record generated by swiping card through card reader or cash register did not substantiate that hotel occupancy was paid for by state or by state employee in course of his or her official duties. NY Adv Op Comm T & F TSB-A-02-(15)S.

Colleges or universities which are governmental entities, (e.g., SUNY at Albany) and are purchaser, user and consumer of mailing lists, are likewise exempt from tax under CLS Tax § 1116(a)(1); in such instance, governmental purchase order for mailing list is appropriate exemption document for seller to maintain to confirm exemption. NY Adv Op Comm T & F TSB-A-04-(20)S.

6. Municipality, or municipal agency, authority or instrumentality or school district

A developer may not use a town's tax exemption for the purchase of materials to be used in the construction of a sewage treatment plant which will, upon completion, be given to the town on behalf of a sewer district. 1973 Op St Compt File #30.

A private senior citizens' group which uses a city-owned senior citizens' center may not use the city's sales tax exemption for the purchase of various goods to be used by the private group. 1982 Op St Compt File #82-359.

Sales of aerosol sprays, which detected presence of such substances as marijuana and cocaine, to New York State or any of its agencies, instrumentalities, public corporations or political subdivisions, were exempt from sales tax under CLS Tax § 1116(a)(1). NY Adv Op Comm T & F TSB-A-90-(41)S.

State and local sales tax applied to purchases or sales of certain "miscellaneous expense" items used by taxpayer (food management company) in fulfillment of contractual agreement entered into with state school district since (1) school district, either itself or through taxpayer, was not direct purchaser, user or consumer of items, (2) taxpayer and school district had not entered into agreement whereby taxpayer was designated to act as agent for school district, (3) purchases were initiated by taxpayer's personnel, and vendor invoices arising therefrom were sent to school district location for verification of quantity, privacy, etc., and then forwarded to taxpayer's home office for payment to vendors, (4) taxpayer sought monthly reimbursement for such expenses by submitting listing of detailed transactions to school district, and (5) taxpayer used or consumed items in performing its services for school district. NY Adv Op Comm T & F TSB-A-90-(47)S.

Taxpayer was required to pay sales tax on materials and supplies purchased and used by subcontractors to build, and which became component part of, roads which, as required by subdivision approval process, were to be deeded over to New York State, municipality, or other organization exempt from sales tax under CLS Tax § 1116(a) after construction of roads was completed; however, if real property on which roads were to be constructed was deeded by taxpayer to municipality prior to incorporation of materials and supplies into real property, purchase of such materials and supplies would be exempt from sales tax. NY Adv Op Comm T & F TSB-A-90-(53)S.

Exemptions provided in CLS Tax §§ 1115(a)(15) and 1115(a)(16) for tangible personal property incorporated into land, buildings, or structures of exempt governmental entity, and exemption provided in CLS Tax § 1116(a)(1) for purchases by governmental entities, were not applicable to purchases made by petitioner in erecting sewage treatment plant to be constructed to service lands of petitioner's members, who were developers in

surrounding communities. NY Adv Op Comm T & F TSB-A-01-(14)S.

Services by elevator inspectors hired by municipalities to determine whether and to what extent elevators within municipality are in violation of applicable building codes, and to prepare written report to building owner which addresses any violations, are exempt from sales tax under CLS Tax § 1116(a)(1); inspectors should retain governmental purchase order or copy of contract with governmental entity to substantiate exempt nature of transaction. NY Adv Op Comm T & F TSB-A-05-(11)S.

Services of elevator inspectors hired by municipalities to determine whether and to what extent elevators within municipality are in violation of applicable building codes, and to prepare written reports to owners which address violations, are not subject to sales tax regardless of whether inspectors are hired by exempt governmental entity or nonexempt private entity. NY Adv Op Comm T & F TSB-A-05-(11)S.

School yearbook publisher would not be required to collect sales tax on sales of yearbooks to customer (i.e., public school) as sale would be exempt from sales tax under CLS Tax § 1116(a)(1), where contract was signed by person authorized to contract for disbursement of school district's funds, and publisher's invoice named school district as purchaser. NY Adv Op Comm T & F TSB-A-08-(42)S.

Since books are property of kind ordinarily sold by private persons, public school districts are generally required to collect sales tax on their sales of such books. NY Adv Op Comm T & F TSB-A-08-(42)S.

Student organizations (i.e., yearbook committee or "key club") and extraclassroom activity funds of public schools are not included in exemption granted to school districts under CLS Tax § 1116(a)(1); thus, purchases by such organizations and funds are normally subject to sales tax. NY Adv Op Comm T & F TSB-A-08-(42)S.

Extraclassroom activity fund of school district (only one such fund is required for each school district) may register as sales tax vendor with Department of Taxation and Finance; as registered vendor, extraclassroom activity fund may issue properly completed Resale Certificate (Form ST- 120) to yearbook publisher when purchasing yearbooks for student organizations or fund if such yearbooks are purchased by fund for resale, and student organization or extraclassroom activity fund must collect and remit sales tax on their receipts from sales of yearbooks. NY Adv Op Comm T & F TSB-A-08-(42)S.

7. United States of America; federal agencies and other entities

Company that had contract to perform services as general contractor for United States Department of Energy did not qualify for agency exemption under CLS Tax § 1116(a)(2) where contract contained specific language prohibiting company from acting on its behalf (e.g., "[p]rocurement arrangements under this contract shall be made in the name of the Contractor, shall not bind nor purport to bind the Government..."). NY Adv Op Comm T & F TSB-A-90-(7)S.

Sales of aerosol sprays, which detected presence of substances such as marijuana and cocaine, to United States or its agencies or instrumentalities, were exempt from sales tax under CLS Tax § 1116(a)(2). NY Adv Op Comm T & F TSB-A-90-(41)S.

Prime contractor would be required to pay sales tax on subcontractor's charges for removal of waste material where prime contractor's customer was tax-exempt organization described in CLS Tax § 1116(a)(2), project being performed by prime contractor was not capital improvement, and cost of service being billed to prime contractor by subcontractor would be re-billed to tax-exempt organization; prime contractor's subsequent charges to tax-exempt organization would not be subject to sales tax. NY Adv Op Comm T & F TSB-A-95(38)S.

Mission which has been issued valid United States Department of State (USDOS) tax exemption card would be considered direct payer of record where payment was made by check of mission, credit card of mission, or credit card in name of mission's national government; mission's use of its own credit card to make approved exempt purchases is considered to be direct payment by mission so long as USDOS permits such mission to make such purchases with credit cards. NY Adv Op Comm T & F TSB-A-97(31)S.

8. Exempt organizations; in general

9. —Certificate of incorporation specifying exempt purpose

Although not-for-profit corporation qualified as exempt organization under Internal Revenue Code § 501(c)(6), it did not qualify for exemption under CLS Tax § 1116(a)(4) since general purposes stated in corporation's certificate of incorporation and its by-laws indicated that corporation was not organized and operated exclusively for any purpose enumerated in § 1116(a)(4). NY Adv Op Comm T & F TSB-A-92-(22)S.

10. —Organizations predominantly involved in non-exempt activities

11. — —Animal clubs; pet fanciers

Dog club that conducts dog shows is not exempt from collecting sales tax on admission charges or sales or rentals of tangible personal property, notwithstanding that dog club makes contributions to other charities or that it is operated on not-for-profit basis. NY Adv Op Comm T & F TSB-A-90-(18)S.

There is no "sale" of art work by collector to museum where there is no consideration provided by museum to collector for use and display of art work by museum in state; also, even if such transaction were considered to be sale, such sale to museum would be exempt from sales tax under CLS Tax § 1116(a). NY Adv Op Comm T & F TSB-A-08-(7)S.

12. —Organizations predominantly involved in exempt activities

Video taping of religious service for church which qualifies as exempt organization under CLS Tax § 1116(a)(4), and subsequent sale of copy of tape to church, is exempt transaction, provided petitioner receive exempt organization certification from church within 90 days of date of sale of tape. NY Adv Op Comm T & F TSB-A-96(88)S.

Where buyer of mailing lists has established its exempt status as religious, charitable, educational, etc., institution or organization under CLS Tax § 1116(a)(4), and buyer is purchaser of mailing list and payer of record, receipts from such sale are not subject to tax; organization should furnish, and seller should maintain for its records, properly completed Exempt Organization Certificate, Form ST-119. NY Adv Op Comm T & F TSB-A-04-(20)S.

Exemptions provided in CLS Tax § 1116 are only applicable to purchases by exempt organization for its own use and consumption; purchase of mailing lists by buyer, which is not itself qualifying exempt organization, for buyer's use in performing services for exempt organization is not exempt under § 1116. NY Adv Op Comm T & F TSB-A-04-(20)S.

Not-for-profit paramedic service created by county's local town boards was eligible for refund of sales taxes paid on fuel used in its vehicles in course of its operations within state since service had exempt status under CLS Tax § 1116(a)(4). NY Adv Op Comm T & F TSB-A-06-(27)S.

13. —Benefits inuring to specific groups or individuals

Rent received by petitioner, exempt organization under CLS Tax § 1116(a)(4), for occupancy of room in Hotel Saranac, which provided internship program for students for hotel restaurant management, culinary arts, and forestry, was exempt from sales tax under CLS Tax § 1116(c); rent included separately stated charges for use of furnishings and equipment, maid service, towel and linen services, telephone service, and other accommodations. NY Adv Op Comm T & F TSB-A-98-(40)S.

Golf association's sales of daily and "season" spectator admissions to US Open golf tournament, where proceeds inure other than exclusively to benefit of elementary or secondary schools, are subject to sales tax imposed on admissions under CLS Tax §§ 1105(f) and 1116(d)(2). NY Adv Op Comm T & F TSB-A-05-(5)S.

If hospitality package at golf tournament were to include food and beverages or catering services, hospitality package charges in excess of admission charges would be subject to sales tax under CLS Tax §§ 1105(d)(i)(2) and 1116(b)(2); accordingly, in such case,

entire charge for hospitality table package would be subject to sales tax regardless of whether charges for items included in hospitality package were separately stated on bill, invoice or other statement of charges rendered by golf association to its client. NY Adv Op Comm T & F TSB-A-05-(5)S.

Golf association, as exempt organization under CLS Tax § 1116(a)(4), could purchase any catering services it might provide as part of golf tournament's hospitality packages without payment of sales tax; in such instance, association would be required to provide caterer with properly completed "Exempt Organization Exempt Purchase Certificate" (Form ST-119.1) in order to make such purchases on tax exempt basis. NY Adv Op Comm T & F TSB-A-05-(5)S.

14. —Purchases by contractors for exempt organizations

Purchases made by school teachers under Teacher's Choice Program, involving materials for use in their classroom or office assignments, were exempt from sales tax. NY Adv Op Comm T & F TSB-A-98-(31)S.

Custodians, acting in their capacity as employees of board of education, may purchase tangible personal property on behalf of board of education exempt from sales tax if proper procedures and documentation are used. NY Adv Op Comm T & F TSB-A-98-(30)S.

Discussion as to tax implications regarding "synthetic lease" entered into by petitioner, voluntary nonprofit hospital corporation and exempt organization under CLS Tax § 1116(a)(4), for purpose of financing construction of new health services facility. NY Adv Op Comm T&F TSB-A-98(69) S.

Contractor's purchases of tangible personal property may be exempt from sales tax even though exempt governmental entity does not enter into capital improvement contract with contractor where road building materials purchased by contractor are installed in and become part of real property owned by exempt governmental entity and title to road building materials passes to exempt entity on completion of contract with respective utility company. NY Adv Op Comm T & F TSB-A-05-(20)S.

If, at time of purchase, it is impossible for contractor to distinguish between those road building materials that will be used to restore property of exempt entity and of nonexempt entity, contractor may not issue contractor exempt purchase certificate; contractor may apply for refund or credit for tax paid on those materials incorporated into property of exempt entity, provided such application is made within 3 years of date on which sales or compensating use tax was payable by contractor's supplier. NY Adv Op Comm T & F TSB-A-05-(20)S.

Where contractor may be required to make its installations on private property owned by organization exempt from sales tax under CLS Tax § 1116(a)(4), (5), (6), (7) or (8), contractor will be eligible to purchase road building materials for incorporation into gas and phone line installation projects without payment of sales tax in same manner that such exempt purchases may be made with regard to such installations on property owned by exempt governmental entity. NY Adv Op Comm T & F TSB-A-05-(20)S.

Contractor can substantiate that its purchase of road building material is to become integral component part of property owned by entity exempt from sales tax under CLS Tax § 1116(a) by relying on signed document between contractor and its customer which identifies project, location and owner of real property on which work is being performed, assuming contractor's records allow it to tie in particular purchase of road building materials to contract with customer. NY Adv Op Comm T & F TSB-A-05-(20)S.

Purchases by installer of underground high voltage cable of soil, backfill, concrete and asphalt pavement restoration materials and like which become property of owner of underlying realty on installation are purchases at retail subject to sales or use tax unless otherwise exempt; however, such materials, when incorporated into real property of entity exempt under CLS Tax § 1116(a), may be purchased by installer without payment of sales or use tax. NY Adv Op Comm T & F TSB-A-05-(35)S.

If petitioner makes retail sales or leases of its hospital beds to persons other than person who uses bed in performing medical or similar services for compensation, or to otherwise exempt entity, petitioner is not required to collect sales or use tax on such sale. NY Adv Op Comm T & F TSB-A-05-(36)S.

Rental of petitioner's therapeutic beds to persons performing medical or similar services for compensation are taxable, unless purchaser is exempt entity under CLS Tax § 1116(a). NY Adv Op Comm T & F TSB-A-05-(36)S.

If petitioner makes retail sales or leases of its "Vacuum Assisted Closure" (VAC) devices to persons other than person who uses device in performing medical or similar services for compensation, or to otherwise exempt entity, petitioner is not required to collect sales or use tax on such sale. NY Adv Op Comm T & F TSB-A-05-(36)S.

Rental of petitioner's "Vacuum Assisted Closure" (VAC) devices to persons performing medical or similar services for compensation are taxable, unless purchaser is exempt entity under CLS Tax § 1116(a). NY Adv Op Comm T & F TSB-A-05-(36)S.

CLS Tax § 1115(a)(15) and (16) allow telephone cable installer to make purchases of landscaping and road building materials for use exclusively by installer to restore real property of entity exempt from sales tax under CLS Tax § 1116(a) without payment of sales tax. NY Adv Op Comm T & F TSB-A-05-(30)S.

When telephone cable installer purchases materials which are exclusively incorporated into real property owned by entity exempt from tax under CLS Tax § 1116(a), installer may issue to its supplier Contractor Exempt Purchase Certificate (Form ST-120.1) indicating that materials will be so incorporated; installer can substantiate that landscaping and road building materials which it purchases are to become integral component part of property owned by entity exempt from sales tax under § 1116(a) by relying on signed document between installer and its customer which identifies project, location and owner of real property on which work is being performed, and installer's records must be sufficient to allow it to associate its purchases of landscaping and road building materials to its installation of such materials in property owned by entity exempt from sales tax under § 1116(a). NY Adv Op Comm T & F TSB-A-05-(30)S.

If petitioner performs its asbestos removal service for exempt organization described in CLS Tax § 1116(a) and service is not part of capital improvement, petitioner is eligible for refund or credit of sales tax paid on items actually transferred to customer (i.e., disposable materials or encapsulant). NY Adv Op Comm T & F TSB-A-05-(39)S.

Developer's purchases of tangible personal property that are incorporated into exempt organization's building or real property are not subject to sales tax. NY Adv Op Comm T & F TSB-A-08-(25)S.

Developer must pay sales tax under CLS Tax § 1105(a) on equipment, supplies, and any other property purchased for use in complying with its contractual obligations (other than agency contracts) that are not incorporated into realty of exempt organization. NY Adv Op Comm T & F TSB-A-08-(25)S.

Provided that manufacturer can show that baggage-handling system becomes property of New York State, one of its political subdivisions, or another entity exempt from sales tax under CLS Tax § 1116(a) on installation, materials which are actually incorporated into real property may be purchased or used by manufacturer without payment of sales or use tax under CLS Tax § 1115(a)(15) and (16). NY Adv Op Comm T & F TSB-A-08-(35)S.

15. —Purchases and sales by or fees of exempt organizations

Educational organization exempt under CLS Tax § 1116(a)(4) was not required to collect sales tax on charges by it to students for telephone lines, long distance authorization, and usage. NY Adv Op Comm T & F TSB-A-90-(36)S.

Petitioner which is in membership warehouse segment of specialty retailing cannot, in good faith, accept exemption documents presented by individual members of exempt organization, or make exempt sales of merchandise to those members, where such memberships are "stand alone memberships" not directly associated with qualified group or exempt organization. NY Adv Op Comm T & F TSB-A-97-(20)S.

Petitioners in membership warehouse segment of specialty retailing may accept, in good faith, exemption documents presented by business members when business membership is issued to exempt organization for its official use only, exemption documents are timely presented and properly completed pursu-

ant to tax regulations, and petitioners do not have actual knowledge that exemption documents are false or fraudulent. NY Adv Op Comm T & F TSB-A-97-(20)S.

Sales of tangible personal property by exempt organization from card tables and from members' houses were not subject to sales tax where sales were sporadic and infrequent, occurring only few days during summer. NY Adv Op Comm T & F TSB-A-97(36)S.

Contractor's purchases of construction materials which would become permanent part of recreational facility for exempt organization were not subject to sales and use taxes under CLS Tax § 1115(a)(15). NY Adv Op Comm T&F TSB-A-98(67) S.

Petitioner, exempt organization under CLS Tax § 1116(a)(4) that displayed and sold course manuals, handbooks, consumer brochures, and shirts on-site only at its annual convention held in various locations throughout United States and internationally, would not be considered to be making sales by shop or store within meaning of CLS Tax § 1116(a)(1) when making sales at its annual convention, were convention held within New York; further, taking orders for sales at any of its seminars held within New York, with fulfillment therefore from its offices in Syracuse, New York, was similar to making door to store sales, or mail order or telemarketing sales, none of which sales are subject to tax when performed by exempt organization. NY Adv Op Comm T & F TSB-A-03-(14)S.

Petitioner's sales of clothing items (i.e., T-shirts) for less than $110.00 per item were exempt from statewide sales tax but were subject to county sales tax where petitioner was duly registered as exempt organization under CLS Tax § 1116(a)(4) NY Adv Op Comm T & F TSB-A-03-(18)S.

Receipts from auction sales conducted by employees of charitable organization were not subject to sales tax. NY Adv Op Comm T & F TSB-A-03-(34)S.

If professional auctioneer was hired by petitioner, charitable organization, to conduct auction of items donated to petitioner and was paid flat fee for his or her services, and invoices for sale of auctioned items showed petitioner as seller, petitioner would not be required to collect on receipts from such sales; if auctioneer acted as agent for or co-vendor with petitioner, and made sales of property owned by petitioner, such sales would not be subject to tax, but if auctioneer was only name appearing on sales invoice issued to purchaser, sale would be presumed to be taxable. NY Adv Op Comm T & F TSB-A-03-(34)S.

If petitioner, charitable organization, acted as agent for nonexempt seller by accepting tangible personal property on consignment basis for sale and thereby made taxable sales, it would have to collect sales tax on receipts from such sales at auction, regardless of whether those sales constituted sales made by shop or store. NY Adv Op Comm T & F TSB-A-03-(34)S.

Architectural and engineering service firm is required to collect sales tax from its client on sales of "bid set" (printed copies of final working drawings) unless client qualifies as exempt organization or governmental entity under CLS Tax § 1116(a). NY Adv Op Comm T & F TSB-A-05-(42)S.

Provisions of CLS Tax § 1116(b)—that exempt organization is required to collect sales tax on sales specified under CLS Tax § 1116(b)(1), (2), and (3)—do not require organizations exempt under CLS Tax § 1116(a)(4) to collect sales tax on their sales of services subject to tax under CLS Tax §§ 1105(c)(3) and 1105(c)(5). NY Adv Op Comm T & F TSB-A-07-(18)S.

All purchases made by exempt government organization that are related to construction of building, including purchases or leases of construction machinery and equipment, are exempt from sales tax. NY Adv Op Comm T & F TSB-A-08-(25)S.

If yearbook publisher's contract is signed with private or parochial school that is exempt from sales tax under CLS Tax § 1116(a)(4), and such school is purchaser and payer of record, taxpayer may accept properly completed Exempt Organization Exempt Purchase Certificate (Form ST-119.1) in lieu of collecting sales tax on receipts from its sales of yearbooks. NY Adv Op Comm T & F TSB-A-08-(42)S.

Sales of tangible personal property by organization exempt from tax under CLS Tax § 1116(a)(4) are not subject to sales tax unless such sales are made by shop or store operated by such organization; thus, when private or parochial school yearbooks are sold from shop or store as described in 20 NYCRR § 529.7(i)(2), such organizations' sales of yearbooks are subject to sales tax. NY Adv Op Comm T & F TSB-A-08-(42)S.

For private or parochial schools' yearbook sales made on or after September 1, 2008, such sales will be taxable when made with degree of regularity, frequency, and continuity by remote means, such as by telephone, Internet, or mail order. NY Adv Op Comm T & F TSB-A-08-(42)S.

Sales of school yearbooks to students, parents, and other purchasers by (1) public school, (2) extraclassroom activity fund, club, or organization of private or public school, (3) private school that is not exempt from sales tax under CLS Tax § 1116(a)(4), or (4) school which, though qualifying for exemption under § 1116(a)(4), makes sales of yearbooks through shop or store, are subject to sales tax whether such sales are made directly by those entities or through fulfillment service provider acting for such entities. NY Adv Op Comm T & F TSB-A-08-(42)S.

Not-for-profit corporation exempt from sales tax under CLS Tax § 1116(a)(4) was not required to collect sales tax during annual auction of donated items, notwithstanding that auction was held at commercial auction house and was conducted by professional auctioneer. NY Adv Op Comm T & F TSB-A-91-(27)S.

Petitioner's sales of orthopaedic braces to physicians, hospitals, clinics, and other health care providers were subject to sales and use tax; however, such sales to hospitals, clinics, health maintenance organizations, and other entities designated as exempt organizations under CLS Tax § 1116(a), or to New York State or United States government entities, would not be subject to sales tax. NY Adv Op Comm T & F TSB-A-98-(24)S.

Ground lease/leaseback constituted mortgage given by petitioner, as mortgagor to trust as mortgagee, and since petitioner was voluntary nonprofit hospital corporation, recording of ground lease/leaseback was exempt from mortgage recording tax. NY Adv Op Comm T&F TSB-A-98(3) R.

Sale of "Vitoss" (material surgically implanted in bone defect to repair porous inner core of bone) 2, or its use by, hospital or other organization qualifying for exemption under CLS Tax § 1116(a)(4) would be exempt from imposition of sales and compensating use tax, even if such entity were using product in performing medical services for compensation, provided entity furnish taxpayer with properly completed exemption certificate within 90 days of date of sale. NY Adv Op Comm T & F TSB-A-02-(14)S.

Provided that petitioner remained organized and operated exclusively for exempt purposes, in manner qualifying for exemption under CLS Tax § 1116(a), membership dues charged by petitioner, including charges to members for use of petitioner's facilities, were not subject to sales tax. NY Adv Op Comm T & F TSB-A-02-(29)S.

If New York corporation becomes certified under CLS Gen Mun Art 18-B during 2004, and corporation is calendar year taxpayer, its test date would be in 2004, its test year would be 2003, and it would have base period of zero years (since it was incorporated in 2003); however, corporation would be new business under CLS Tax § 14(j) with respect to taxable year 2004, and it would meet employment test if it hired at least one employee, and thus it would be qualified empire zone enterprise (QEZE) under CLS Tax § 14 and it would be entitled to QEZE tax benefits under CLS Tax §§ 14, 15 and 16 as applied under CLS Tax Art 9-A, Art 28 and Art 29. NY Adv Op Comm T & F TSB-A-04-(6)C, 2004 N.Y. Tax LEXIS 95.

If owner of nonresidential condominium unit is organization which qualifies for exemption from sales tax (CLS Tax § 1116(a)(4)) and if it is purchaser and payer of record of metered or submetered electricity or electric service and steam sold by utility company or Board of Managers, owner may provide utility company or Board of Managers with properly completed Exempt Organization Exempt Purchase Certificate (Form ST-119.1) to make its purchases of metered or submetered electricity or electric service and steam without payment of sales tax. NY Adv Op Comm T & F TSB-A-06-(23)S.

16. Non-exempt sales

Petitioner, not-for-profit corporation organized to provide housing and other humanitarian services to elderly persons, was

operating restaurant, tavern, or other establishment within meaning of CLS Tax § 1116(b)(2) where portion of monthly rent involved meal charge, residents had to pay full rent whether or not they accepted meal provided, meals were not provided for staff, and petitioner did not receive government subsidy for providing meals to residents; thus, petitioner was required to collect and remit sales tax on portion of monthly rent paid by residents for cost of meals. NY Adv Op Comm T & F TSB-A-99-(16)S.

Exempt organization was making sales at shop or store under CLS Tax § 1116(b)(1) when making "on-site" sales of its books and materials at program locations in New York and at its conference center; however, organization's mail order sales were not sales by shop or store. NY Adv Op Comm T & F TSB-A-99-(17)S.

Receipts from sale of reproductions of manifests and other items to visitors at American Family Immigration History Center would be subject to sales and use tax; additional charges made to Charter Founders and Sustaining Members for scrapbooks containing their records, or for additional paper copies and CD-ROM versions of such records, would also be subject to sales and use tax as receipts from retail sales of tangible personal property by shop or store. NY Adv Op Comm T & F TSB-A-02-(21)S.

Purchases and rentals of equipment, parts, and consumable materials were subject to New York sales and use tax where petitioner performed forensic screening services of World Trade Center debris as subcontractor hired by contractor holding contract with New York Police Department (NYPD); petitioner was not agent of NYPD and thus did not qualify for exemption from sales tax. NY Adv Op Comm T & F TSB-A-05-(1)S.

Since golf association was operating its temporary retail outlets at golf tournament on same premises as other persons who were required to collect sales tax, sales by association of clothing, programs, and souvenirs would be subject to sales tax to extent such items are subject to tax as provided in CLS Tax Art 28 and Art 29. NY Adv Op Comm T & F TSB-A-05-(5)S.

Purchase by contractor of road building materials which become integral component part of private property is purchase at retail subject to sales tax where contractor purchases road building materials including fill, sand, stone, and asphalt, that it uses to restore private property after installation of mains or pipes for gas company or conduits for phone company,, and property owner takes title to portion of these road building materials used to restore its property on completion of project for contractor's customers. NY Adv Op Comm T & F TSB-A-05-(20)S.

Conduit purchased by contractor, through which copper wire or fiber optic cable is threaded, does not become integral component part of property of governmental entity where title to conduit is acquired by and remains with phone company; contractor's purchases of conduit used in this manner are not exempt from sales tax under CLS Tax § 1115(a)(15) and (16) but, rather, are subject to sales tax same as any building material purchased by contractor, subcontractor or repairman and incorporated into capital improvement project. NY Adv Op Comm T & F TSB-A-05-(20)S.

State university's charges for separate parking fees are subject to sales tax under CLS Tax § 1105(c)(6), even though university is exempt government entity under CLS Tax § 1116(a)(1), where university's parking services are of kind ordinarily sold by private persons. NY Adv Op Comm T & F TSB-A-05-(23)S.

All charges by baggage-handling system manufacturer to tenant for installation of materials that retain their identity as tangible personal property on installation are subject to sales tax under CLS Tax § 1105(c)(3) regardless of whether underlying real property, property, or land is property of entity exempt from sales tax under CLS Tax § 1116(a). NY Adv Op Comm T & F TSB-A-08-(35)S, 2008 N.Y. Tax LEXIS 252.

17. Admissions

Sales tax would not apply to proceeds from admission charges to American Family Immigration History Center operated by petitioner, non-profit corporation founded to serve as primary fundraiser for restoration of Statue of Liberty and Ellis Island, provided proceeds from admission charges to Center would inure exclusively to petitioner; admission charges to Center would also not be subject to tax. NY Adv Op Comm T & F TSB-A-02-(21)S, 2002 N.Y. Tax LEXIS 161.

Petitioner, non-profit corporation founded to serve as primary fundraiser for restoration of Statue of Liberty and Ellis island, was not operating social or athletic club managing American Family Immigration History Center, and thus fees paid to become Charter Founder or Sustaining Member in petitioner would not be subject to sales tax as payment of dues; further, fees paid to become Charter Founder or Sustaining Member in petitioner, which represented charitable contributions under Internal Revenue Code, would not be taxable as payment for admissions to place of amusement, payment for purchase, rental, or use of any tangible personal property, or payment for any taxable service. NY Adv Op Comm T & F TSB-A-02-(21)S, 2002 N.Y. Tax LEXIS 161.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS Tax §§ 186-a, 289-c, 301-b, 301-c, 305, 1101, 1102, 1105, 1115, 1120, 1121, 1132, 1142-A, 1150, 1443.

Armed forces of the United States, CLS Gen Const § 13-a.

Definitions, CLS Pub Health § 3001.

Health maintenance organizations, CLS Pub Health §§ 4400 et seq.

Definitions, CLS Vol Fire Ben § 3.

Codes, Rules and Regulations:

Exempt organizations. 20 NYCRR §§ 529.1 et seq.

Exemptions from the compensating use tax. 20 NYCRR § 531.5.

Jurisprudences:

68 Am Jur 2d, Sales and Use Taxes §§ 45–62, 204–207.

5B Am Jur Pl & Pr Forms (Rev ed), Charities, Forms 11–13.

Annotations:

Immunity from state taxation of independent contractors with United States or federal agencies. 2 L Ed 2d 1789.

State sales or use tax as violating immunity of United States—Supreme Court cases. 44 L Ed 2d 719.

Validity, under Federal Constitution, statutes, and treaties, of state or local tax as affected by its imposition on Indians, their property or activities, or in connection with an Indian reservation—Supreme Court cases. 73 L Ed 2d 1506.

Texts: New York Nonprofit Law and Practice §§ 5.07, 8.04, 11.04 , 14.03.

§ 1120. Refunds and credits with respect to motor fuel and diesel motor fuel

(a) Retail vendor. (1) A vendor of motor fuel or diesel motor fuel who or which is required to collect the taxes imposed by subdivision (a) of section eleven hundred five of this article and any like tax imposed pursuant to the authority of article twenty-nine of this chapter shall be allowed a refund or credit against the amount of tax collected and required to be remitted to the commissioner pursuant to the provisions of section eleven hundred thirty-seven of this article upon the retail sale of motor fuel or diesel motor fuel in the amount of the tax on such fuel prepaid by or passed through to and included in the price paid by such vendor pursuant to the provisions of section eleven hundred two of this article.

(2) A refund or credit shall also be allowed such vendor for the tax prepaid by or passed through to and included in the price paid by such vendor upon any motor fuel or diesel motor fuel pursuant to the provisions of section eleven hundred two of this article if such fuel is sold at retail by such vendor

under circumstances where the taxes imposed by section eleven hundred five of this article and pursuant to the authority of article twenty-nine of this chapter are not required by the provisions of this article to be collected and remitted upon receipts from a retail sale thereof.

(b) Retail user. A purchaser, user or consumer of motor fuel or diesel motor fuel at retail who or which is required to pay the tax imposed by section eleven hundred ten of this article and any like tax imposed pursuant to the authority of article twenty-nine of this chapter with respect to the purchase of or the use or consumption of such fuel shall be allowed a credit against such tax required to be paid to the commissioner pursuant to such section and article in the amount of the tax prepaid by or passed through to and included in the price paid by such purchaser, user or consumer pursuant to the provisions of section eleven hundred two of this article.

(c) Self-use of motor fuel or diesel motor fuel purchased at wholesale. A refund or credit equal to the amount of tax prepaid by or passed through to and included in the price paid by a purchaser, user or consumer pursuant to the provisions of section eleven hundred two of this article with respect to a purchase of motor fuel or diesel motor fuel other than at retail shall be allowed such purchaser, user or consumer upon the use or consumption of such fuel at retail if the acquisition of such fuel by the purchaser, user or consumer would have otherwise been exempt pursuant to section eleven hundred five-A, eleven hundered fifteen or eleven hundred sixteen of this article but for the provisions of the last sentence of subdivision (c) of section eleven hundred two and subdivision (j) of section eleven hundred fifteen or of such last sentence and paragraph five of subdivision (b) of section eleven hundred sixteen of this article. Also, a refund or credit shall be allowed equal to the difference between the amount of tax prepaid by or passed through to and included in the price paid by a purchaser, user or consumer pursuant to the provisions of section eleven hundred two of this article with respect to a purchase of diesel motor fuel other than at retail and the aggregate of the amount of tax that would have been imposed if measured by the applicable rate specified in section eleven hundred five-A of this article and the amount of tax that would have been imposed if measured by the applicable rate specified in section twelve hundred ten of article twenty-nine upon diesel motor fuel which is used for residential heating purposes if the purchase, use or consumption would have otherwise been subject to such lower rate of tax pursuant to such section eleven hundred five-A but for the last sentence of subdivision (a) of such section eleven hundred five-A or pursuant to section twelve hundred ten but for the last sentence of subparagraph (i) of paragraph three of subdivision (a) of such section twelve hundred ten.

(d) Purchase of motor fuel or diesel motor fuel at retail by an exempt organization. A refund or credit equal to the amount of tax imposed pursuant to section eleven hundred five of this article and any like tax imposed pursuant to the authority of article twenty-nine of this chapter upon the sale of motor fuel or diesel motor fuel and paid by a purchaser shall be allowed such purchaser if the purchase, use or consumption of such fuel would have otherwise been exempt pursuant to section eleven hundred fifteen or eleven hundred sixteen of this article but for the provisions of subdivision (j) of section eleven hundred fifteen or paragraph five of subdivision (b) of section eleven hundred sixteen of this article. Also, there shall be allowed a refund or credit equal to the difference between the amount of tax actually imposed pursuant to section eleven hundred five of this article and the amount of tax that would have been imposed as measured by the applicable rate specified in section eleven hundred five-A of this article and a refund or credit equal to the difference between the tax actually imposed pursuant to the authority of article twenty-nine of this chapter and the amount of tax that would have been imposed if measured by the applicable rate specified in section twelve hundred ten of article twenty-nine upon diesel motor fuel which is used for residential heating purposes if the purchase, use or consumption would have otherwise been subject to such lower rate of tax pursuant to such section eleven hundred five-A but for the last sentence of subdivision (a) of such section eleven hundred five-A or pursuant to section twelve hundred ten but for the last sentence of subparagraph (i) of paragraph three of subdivision (a) of such section twelve hundred ten.

(e) Immediate export. With respect to (i) motor fuel imported, manufactured or sold or purchased in this state, and (ii) highway diesel motor fuel, a refund or credit shall be allowed a registered distributor of this state or a purchaser of the tax required to be prepaid pursuant to section eleven hundred two of this article in the amount of such tax paid by or included in the price paid by a distributor or such purchaser if such fuel was exported from this state for sale outside this state, such distributor or such purchaser, as the case may be, exporting such fuel is duly registered with or licensed by the taxing authorities of the state to which such fuel is exported as a distributor or a dealer in the fuel being so exported, and in connection with such exportation such fuel was immediately shipped to an identified facility in the state to which such fuel is exported, and provided the applicant complies with all requirements and rules and regulations of the commissioner, including evidentiary requirements, relating thereto.

(f) Refunds of the tax required to be prepaid pursuant to the provisions of section eleven hundred two of this article shall be allowed only to the extent such tax paid by or passed through to the retail vendor, or the purchaser, consumer or user exceeds the amount of tax required to be collected from such person or required to be remitted by the provisions

of this article and pursuant to the authority of article twenty-nine of this chapter.

(g) Such credit shall be allowed only to the extent that the tax required to be prepaid pursuant to section eleven hundred two of this article is prepaid by such vendor, purchaser, user or consumer (i) upon importation, manufacture, sale or use, as the case may be, and (ii) with respect to the identified motor fuel or diesel motor fuel for which such credit is claimed upon the use or consumption thereof, but only to the extent that the tax imposed by section eleven hundred five of this article and any like tax imposed pursuant to the authority of article twenty-nine of this chapter together with the tax imposed by section eleven hundred ten of this article and any like tax imposed pursuant to the authority of article twenty-nine of this chapter required to be paid, collected and remitted has been paid, collected and remitted.

(h) Such refunds and credits shall be subject to the provisions of sections eleven hundred nineteen and eleven hundred thirty-nine of this article as if such sections were incorporated in full into this section and had expressly referred to the refunds and credits authorized by this section including the periods of limitations on payments and applications to the commissioner; provided, however, that as provided in subdivision (e) of section eleven hundred thirty-nine of this article no interest shall be allowed or paid upon any refund made or credit allowed pursuant to subdivisions (a) and (b) of this section; and provided, further, that, with respect to refunds or credits pursuant to subdivision (d) of this section with respect to organizations described in paragraph four of subdivision (a) of section eleven hundred sixteen of this chapter and subdivision (e) of this section, upon receipt of a claim for refund in processible form, interest shall be allowed or paid at the overpayment rate set by the commissioner pursuant to section eleven hundred forty-two of this article, or if no rate is set, at the rate of six percent per annum, from the due date of the return or the actual filing date of the return, whichever is later, to the date immediately preceding the date of the refund check except no interest shall be allowed or paid if the refund check is mailed within thirty days of such receipt (except in case of organizations described in paragraph four of subdivision (a) of section eleven hundred sixteen of this chapter, the relevant period of time shall be forty-five days from the date the application for refund is received in processible form and interest, if allowable, shall apply from the date such application is received in processible form) and no interest shall be allowed or paid upon a credit pursuant to such subdivision and except no interest shall be allowed or paid if the amount thereof would be less than one dollar. Provided, however, the department shall process applications for refund as expeditiously as possible.

HISTORY:

Add, L 1985, ch 44, § 26 (see 1985 note below); amd, L 1986, ch 276, § 19 (see 1986 note below); L 1988, ch 261, § 89, eff Sept 1, 1988; L 1989, ch 61, § 127, eff Sept 1, 1989 (see 1989 note below); L 2011, ch 61, § 42 (Part K), eff Sept 1, 2011 (see 2011 note below).

Prior Law: Former § 1120, add, L 1969, ch 473, § 5; repealed, L 1971, ch 221, § 4, eff May 4, 1971, and deemed eff Sept 1, 1969. For similar provisions, see § 1119(b).

Editor's Notes: Laws 1985, ch 44, § 42, eff June 1, 1985, provides as follows:

§ 42. This act shall take effect immediately, except that sections one through thirty-six shall take effect June first, nineteen hundred eighty-five and shall apply to all taxable events respecting motor fuel as such events are defined in section eleven hundred two of the tax law, as amended by this act, and automotive fuel occurring on and after such date and an amount equivalent to the sales taxes paid by or passed through to a purchaser upon sales of motor fuel before such date at the regional average retail sales price pursuant to the provisions of articles twenty-eight and twenty-nine of the tax law in effect prior to such date shall be allowed such purchaser as a credit or refund, where a refund or credit would be allowable after such date under the tax law, as amended by this act, against the tax required to be prepaid pursuant to section eleven hundred two and passed through or required to be collected or paid pursuant to section eleven hundred five or eleven hundred ten of the tax law upon sales or uses of such motor fuel occurring on and after such date and provided further, however, that no refund or credit shall be allowed pursuant to this provision with respect to motor fuel placed into the ordinary fuel tank connected with the engine of such vehicle prior to such date notwithstanding use of such fuel thereafter.

Laws 1986, ch 276, § 37, eff July 14, 1986, provides as follows:

§ 37. This act shall take effect immediately except that sections one through twenty-four of this act shall apply on and after such effective date (and provided that the department of taxation and finance shall immediately undertake all necessary steps and application review to insure that on October 1, 1986 all terminal operators and transporters, required to be licensed by the provisions of this act, are so licensed by such date and further provided that the single regional average retail sales price for motor fuel provided for in section thirty of this act, which shall replace the separate regional average retail sales price for leaded, unleaded and premium motor fuel, shall be prescribed and first become effective on September 1, 1986 and the commissioner of energy shall determine such single average retail sales price for each region before August 16, 1986 and such price shall be compiled from data with respect to the six-month period ending the last day of June, 1986) and except that sections twenty-five through twenty-eight of this act shall take effect December 1, 1986 and except that the provisions of subdivisions two and four of section two hundred eighty-three of the tax law contained in section two of this act, subdivisions two and four of sections two hundred eighty-three-a and two hundred eighty-three-b of the tax law contained in section three of this act and section eighteen hundred twelve-b of the tax law contained in section twenty-seven of this act and section twenty-nine of this act shall remain in full force and effect until April 30, 1993 at which time the language of such subdivisions of such section two hundred eighty-three of the tax law shall revert to the language of such subdivisions such as it existed on the date immediately preceding the effective date of this act and on May 1, 1993 the provisions of such subdivisions two and four of both sections two hundred eighty-three-a and two hundred eighty-three-b of the tax law shall be repealed and the provisions of sections thirty-four and thirty-five of this act shall take effect. (Amd, L 1989, ch 245, § 1, L 1990, ch 190, § 243, L 1992, ch 55, § 52, eff April 10, 1992.).

Laws 1989, ch 61, § 365(e)(1)a and d, eff April 19, 1989, provides as follows:

(e) (1) a. sections ninety-one through one hundred forty-four and section one hundred sixty-five of this act shall take effect September 1, 1989 and shall apply to the interest chargeable or due on taxes or on any other amounts, or any portion thereof, for which interest rates are set under sections ninety-one through one hundred forty-four of this act which remain or become due or overpaid on or after such date; provided however, that:

d. any rules or regulations necessary to implement the provisions of sections ninety-one through one hundred forty-four and section one hundred sixty-five of this act may be promulgated and any procedures, forms or instructions necessary for such implementation may be issued on or after the date this act shall have become a law.

Laws 2011, ch 61, § 58 intro par (Part K), eff Sept 1, 2011, provides as follows:

§ 58. This act shall take effect September 1, 2011 and shall apply to sales or uses occurring on or after such date in accordance with the applicable transitional provisions in sections 1106 and 1217 of the tax law; provided, however, that:

Amendment Notes: 2011. Chapter 61, § 42 (Part K) amended:

Sub (e) by deleting at fig 1 "enhanced" and adding the matter in italics.

Repeal Notes: [1971, ch 221] The provisions of § 1120 of the Tax Law which have been repealed provided a contractor, subcontractor or repairman with a right to apply for a credit against his sales or use taxes for sales or use taxes which he had paid on materials he purchased where he also collected a sales or use tax on the sale of such materials as part of a sale of taxable services or on certain other retail sales. However, that section did not mention his refund rights under those circumstances. Section 1119(b) of the Tax Law sets forth both the right to a refund and the alternative right to a credit in those types of transactions. This amendment does not diminish any right of a contractor, subcontractor or repairman provided under existing law to apply for a credit and specifically provides for his refund rights. In addition, it avoids duplication of procedural provisions by substantially incorporating into § 1119(b) the procedures which were in § 1120 so that the controlling procedures are now found in one section.

Notes to Decisions

1. In general

Chapter 44 of Laws of 1985 does not authorize refund of sales tax paid on purchase of motor fuel by service station operator from distributor during period September 1, 1982 through May 30, 1985 to extent that such tax exceeds amount that would be due if tax were calculated based on price at which service station sold motor fuel, as § 42 of Chapter 44, regarding refunds and credits, is not to be applied retroactively. In Matter of Fourth Day Enterprises, Inc., State Tax Com., Oct. 27, 1988, TSB-D-88(31)S.

2. Refund not authorized

Gasoline retailer was not entitled to refund for sales taxes based on difference between amount of tax it paid to its distributor, which was calculated on basis of average retail sales price for gasoline, and amount it would have paid had tax been computed on basis of price that retailer actually charged for its gasoline, which was lower than applicable retail average, since tax law contained no pertinent refund or credit provisions for retailers who chose to sell gasoline below applicable average sales price. Gasit, Inc. v Dugan, 171 A.D.2d 325, 576 N.Y.S.2d 402, 1991 N.Y. App. Div. LEXIS 14837 (N.Y. App. Div. 3d Dep't 1991), app. dismissed, 79 N.Y.2d 1040, 584 N.Y.S.2d 448, 594 N.E.2d 942, 1992 N.Y. LEXIS 1321 (N.Y. 1992).

Chapter 44 of Laws of 1985 does not authorize refund of sales tax paid on purchase of motor fuel by service station operator from distributor during period September 1, 1982 through May 30, 1985 to extent that such tax exceeds amount that would be due if tax were calculated based on price at which service station sold motor fuel, as § 42 of Chapter 44, regarding refunds and credits, is not to be applied retroactively. In Matter of Fourth Day Enterprises, Inc., State Tax Com., Oct. 27, 1988, TSB-D-88(31)S.

Agency Opinions

Marketer of petroleum products, could not claim credit or refund of sales tax when debt attributable to sale of motor fuel had been ascertained to be uncollectible; there are no provisions under CLS Tax § 1120 allowing distributor refund or credit of taxes paid under such circumstances. NY Adv Op Comm T & F TSB-A-90-(55)S.

Fuel purchased by taxpayer, which rented aircraft and agreed to provide fuel for aircraft, was purchased for resale; however, taxpayer was required to pay sales tax on cost of fuel to vendor from whom it purchased fuel, but then taxpayer could claim credit against sales tax it collected on lease for sales tax paid on fuel purchased and pumped into aircraft in connection with lease. NY Adv Op Comm T & F TSB-A-92-(75)S.

Purchases of aviation gasoline by airlines or for commercial aircraft are subject to sales tax at time of purchase, and purchaser may then apply to Department of Taxation and Finance for refund of sales tax paid; commercial aircraft operators other than airlines must also pay sales tax on purchases of kero-jet fuel at time of purchase, and may then apply for refund of tax paid. NY Adv Op Comm T & F TSB-A-05-(15)S.

Sales of fuel to noncommercial aircraft operators are subject to sales tax without any right to refund. NY Adv Op Comm T & F TSB-A-05-(15)S.

Not-for-profit paramedic service created by county's local town boards was eligible for refund of sales taxes paid on fuel used in its vehicles in course of its operations within state since service had exempt status under CLS Tax § 1116(a)(4). NY Adv Op Comm T & F TSB-A-06-(27)S.

Sales tax must be paid at time of purchase on fuel used to operate exempt ferry boat under CLS Tax § 1115(a)(43); however, ferry boat company may apply for refund of sales tax paid on purchases of fuel made on and after September 1, 2008, if fuel is used to operate exempt ferry boat. NY Adv Op Comm T & F TSB-A-08-(50)S.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 1101, 1102, 1136, 1261.

Reduced tax rate on certain energy sources and services, § 1105-A.

Imposition of sales tax, § 1105.

Exemptions from retail and compensating use taxes , § 1115.

Exempt organizations, § 1116.

Payment of tax, § 1137.

Refunds, § 1139.

Taxes authorized for cities, counties and school districts, §§ 1201 et seq.

Jurisprudences:

101 NY Jur 2d Taxation and Assessment §§ 1654, 1840.

TOWN LAW

Article
3. Town Officers, Powers, Duties and Compensation
4. Town Boards
6. Town Elections
7. Permissive Referendum
8. Finances
9. Ordinances and Licenses
11. Fire, Fire Alarm and Fire Protection Districts
11-A. Joint Fire Districts in Towns and Villages
12. District and Special Improvements

HISTORY:
Add, L 1932, ch 634, generally eff Jan 1, 1934; amd, Law, add, L 1909, ch 63; L 1932, ch 634, eff Jan 1, 1934.

ARTICLE 3 Town Officers, Powers, Duties and Compensation

Section
29. Powers and duties of supervisor

HISTORY:
Add, L 1932, ch 634, with substance transferred from former Articles 5, 22–A, 23–A, 24–A.

§ 29. Powers and duties of supervisor

Except where powers or duties specified herein are devolved upon the town comptroller pursuant to section thirty-four of this chapter, the supervisor of each town.

1. Shall act as treasurer thereof and shall demand, collect, receive and have the care and custody of moneys belonging to or due the town from every source, except as otherwise provided by law. Except as otherwise provided in articles eleven and thirteen, he shall also act as treasurer and disbursing officer for every special district therein.

2. Within ten days after their receipt, shall deposit and secure in his name as supervisor, all such moneys in the manner provided by section ten of the general municipal law.

3. Shall disburse such moneys only by checks payable to the person or persons entitled thereto, which checks shall, if the town board requires such countersignature, be countersigned by the town clerk, or by the comptroller in towns where the office of town comptroller has been established. When authorized by resolution of the town board, such checks may be signed with the facsimile signature of the supervisor or other town officer whose signature is required, as reproduced by a machine or device commonly known as a checksigner. By resolution duly adopted, the town board may determine to enter into a contract to provide for the deposit of the periodic payroll of the town in a bank or trust company for disbursal by it in accordance with provisions of section ninety-six-b of the banking law.

4. Shall keep an accurate and complete account of the receipt and disbursement of all moneys which shall come into his hands by virtue of his office, in books of account in the form prescribed by the state department of audit and control for all expenditures under the highway law and in books of account provided by the town for all other expenditures. Such books of account shall be public records, open and available for inspection at all reasonable hours of the day, and, upon the expiration of his term, shall be filed in the office of the town clerk.

5, 6. [Repealed]

7. Shall pay fixed salaries, the principal of or interest on indebtedness, amounts becoming due upon lawful contracts for periods exceeding one year, and compensation for services of officers or employees regularly engaged by the town at agreed wages by the hour, day, week, month or year without prior audit.

8. Shall prosecute, in the name of the town, for all penalties given by law to such town for its use and for all moneys or property due the town.

9. Shall cause a survey to be made of the bounds of his town, whenever required by the state department of transportation, and transmit a map and description thereof to such department within sixty days thereafter. The expense of such survey and map shall be defrayed by the several towns whose bounds either wholly, or in part, shall be described thereby; such expense to be apportioned by the board of supervisors of the county.

10. Shall prepare and file with the town clerk within thirty days after the expiration of each fiscal year, an annual financial report accounting for all moneys received and disbursed by him, together with the certificate, or certificates, of the bank or trust company where town moneys are deposited, showing the amount of such moneys on deposit with said bank or trust company, and cause a certified copy of such report to be published in the official newspaper, and in such other newspapers, if any, as the town board may require. In addition thereto, if and whenever required, such supervisor shall submit to the other members of the town board at the time of filing such report all vouchers, cancelled checks or check images as authorized by section ninety-nine-b of the general municipal law, check stubs, ledgers, cash books, journals, and financial and accounting records of every sort required to substantiate the accuracy and completeness of such report.

10-a. In lieu of preparing the report required by subdivision ten of this section, the town board may determine, by resolution, that the supervisor shall submit to the town clerk, within the time period prescribed in section thirty of the general municipal law, a copy of the report to the state comptroller required by section thirty of the general municipal law, providing, however, that if the time for the filing of the annual report has been extended by the state comptroller as provided in the said statute, then the

time for submitting a copy of the report to the town clerk similarly shall be extended. The town clerk shall cause either a summary of such report to be published within ten days after receipt thereof in a form approved by the state comptroller or a notice that a copy of such report is on file in the town clerk's office and is available for public inspection and copying, in the official newspaper and in such other newspapers as the town board may direct.

11. Shall lease, sell and convey in the name of the town, property owned by it, whenever and in the manner authorized by the provisions of this chapter or any other general or special law and shall execute and deliver, in the name of the town, grants of easements or other rights in lands or other property owned by the town, whenever so directed by the town board.

12. In towns other than those mentioned in section 9-1107 of the environmental conservation law, and other than those included in a forest fire district as defined in subdivision two of section 9-1109 of the environmental conservation law, shall be superintendent of fires of his town and charged with the duty of preventing and extinguishing forest fires. In such capacity, he shall also be charged with the duty of preventing and extinguishing muck fires. He shall have the power to employ persons to act as forest rangers and fire wardens in preventing and fighting forest and muck fires and to employ necessary assistants therefor, and shall possess, for both such purposes, all the power and authority conferred upon the department of environmental conservation, district forest ranger, forest ranger and fire warden under subdivisions one, two, three, four, five and twelve of section 9-1103, subdivision two of section 9-1111 and section 71-0705 of the environmental conservation law with respect to forest fires and forest fire protection. Any person summoned to fight forest or muck fires who is physically able and refuses to assist, shall be liable to a penalty of twenty dollars. The town board of each town shall designate one of its members to act as such superintendent of fires for the ensuing year in case of absence of the supervisor. The town board shall fix the compensation of all forest rangers, fire wardens, and assistants employed under the provisions of this section, and all expenses incurred under the provisions of this section shall be a charge upon and paid by the town.

13. Shall notify the state department of transportation, in writing, regarding the construction, reconstruction or repair by any person or corporation, or political subdivision of the state within his town, of any dam or other structure for impounding water, and of any dock, pier or wharf, or other structure used as a landing place. This notice shall be given within ten days after the commencement of such work. This subdivision shall not apply to a dam where the area draining into the pond formed thereby does not exceed one square mile, unless the dam is more than ten feet in height above the natural bed of the stream at any point or unless the quantity of water which the dam impounds exceeds one million gallons.

14. Shall attend the annual meeting of the board of supervisors of the county, and every regular, adjourned or special meeting thereof of which he shall receive notice.

15. In towns of the first class, may designate a bookkeeper or confidential secretary, or both. In towns of the second class, the town board may by resolution authorize the supervisor of the town to designate a bookkeeper or confidential secretary, or both. A person so designated by the supervisor, shall receive a reasonable compensation for his services, to be fixed by the town board and such compensation shall be a town charge.

16. Shall have and exercise any other power or duty expressly conferred or imposed upon him by law and such powers and duties of administration and supervision of town or special or improvement district functions as shall be provided by resolution of the town board, to be performed on behalf of such board.

HISTORY:

Add, L 1932, ch 634, eff Jan 1, 1934, with substance transferred from former §§ 87–a, 98, 99, 101, 125, 190–192; amd, L 1933, ch 751, § 7, eff Jan 1, 1934; L 1934, ch 675; L 1934, ch 792; L 1937, ch 680; L 1938, ch 275, §§ 3, 4; L 1941, ch 30, eff Feb 26, 1941; L 1944, ch 274, eff March 22, 1944; L 1945, ch 188; L 1945, ch 500; L 1946, ch 61; L 1956, ch 427; L 1958, ch 765, eff April 15, 1958; L 1959, ch 415; L 1960, ch 105, § 1, eff Feb 23, 1960; L 1961, ch 938, § 1; L 1964, ch 946, § 11; L 1965, ch 222, § 1, eff May 17, 1965; L 1968, ch 420, § 301, eff May 31, 1968; L 1972, ch 654, § 8; L 1973, ch 83, § 2, eff March 20, 1973; L 1973, ch 245, § 1, eff May 1, 1973; L 1975, ch 139, § 1, eff June 3, 1975; L 1979, ch 395, § 1; L 1983, ch 738, § 1, eff Jan 1, 1984; L 1992, ch 708, § 30, eff Nov 28, 1992; L 1996, ch 140, § 18, eff June 11, 1996; L 2006, ch 710, § 3, eff Sept 13, 2006.

Editor's Notes: Laws 1996, ch 140, § 24, eff June 11, 1996, provides as follows:

§ 24. This act shall take effect immediately and shall apply to all budgets which are adopted after the date on which it shall have become a law.

Repeal Notes: [1975, ch 139] Subdivision five of section twenty-nine of the town law, repealed by this act, required each town supervisor to make a report to the county board of supervisors on or before November 15 in each year on all town indebtedness.

Amendment Notes:

2006. Chapter 710, § 3 amended:

Sub 10-a, by deleting "sixty days after the close of the fiscal year" and "for a period of sixty days".

Notes to Decisions

Analysis

1. In general
2. Acquisition of property
3. Annual financial report, generally
4. —Report of town indebtedness
5. Books and records
6. Compensation matters
7. Confidential secretary; bookkeeper, generally
8. —Effect of existence of office of comptroller
9. —Residency requirement
10. —Spousal officeholders
11. Constitutionality

12. Custody and protection of town funds
13. Disbursal of town funds
14. Disposal or other use of town property
15. Easements
16. Firefighting
17. Legal signatures; facsimiles
18. Library matters
19. Powers of deputy supervisor
20. Retention of bid bond
21. Miscellaneous

1. In general

The failure of the town board to exercise its authority to appoint constables did not render a town supervisor a police officer and therefore disqualified under the Alcoholic Beverage Control Law from any direct or indirect interest in the sale of alcoholic beverages. Robinson v O'Connell, 280 A.D. 270, 113 N.Y.S.2d 582, 1952 N.Y. App. Div. LEXIS 3451 (N.Y. App. Div. 1952).

Saturday closing of offices of supervisor and town clerk, and office of assessor in town of second class, is a matter for determination by each such officer. 1954 Ops St Compt File #6531.

A town supervisor is a county officer as well as a town officer, being a member of the board of supervisors. He is a county officer when in the performance of duties for the county and a town officer when performing town duties. 1955 Ops St Compt File #7186.

A town supervisor may also serve as chief engineer of the fire district fire department. 1963 Ops St Compt #123.

A conflict of interest does not occur where a town supervisor who is also a practicing attorney occasionally represents a town depository bank for the sole purpose of closing a mortgage loan which in no way involves the town, but disclosure is recommended. 1972 Ops St Compt File #11.

2. Acquisition of property

A town board may not expend town money to build a substation for the use of the state police. 1946 Ops St Compt 284.

The town of Mohawk may not purchase a fire truck for the prevention and extinguishment of forest fires within such town, unless a fire district is formed. 1946 Ops St Compt 288.

A town may not construct or acquire a building for town hall purposes, which is larger than needed in the foreseeable future, for the purpose of renting portions thereof to private individuals or organizations. 1967 Ops St Compt File #867.

A part-time judge may serve as a bookkeeper for the town supervisor, and may also serve as deputy supervisor but should recuse herself in cases involving the town or the supervisor. Advisory Committee on Judicial Ethics, Op 90-37 (1990).

3. Annual financial report, generally

Supervisor's report must be published and the sending of a printed copy to taxpayers is not sufficient. 1945 Ops St Compt 70.

Report of supervisor pursuant to § 29, subd. 10 and § 286 of the Highway Law may not be condensed for publication. Such reports may be combined. The annual report of supervisor pursuant to § 29 subd. 10 of Town Law must be published in official paper. By resolution such report may also be published in a county other than the county in which the town is located. 1945 Ops St Compt 252.

Town supervisor must publish certified copy of his annual report in official newspaper of town and in such other newspapers as town board may direct. Cost of publishing such report is a town charge. 1946 Ops St Compt 27.

The supervisor of a town may not dispense with the publication of the annual report prescribed by subdivision 10 of section 29 of the Town Law, even though he distributes to each taxpayer a printed copy of his report. 1947 Ops St Compt 24.

Certified copy of annual financial report of town must be published in the official newspaper of the town within a reasonable time after filing of the original report with the town clerk. 1955 Ops St Compt File #7074.

4. —Report of town indebtedness

Bond anticipation notes used to finance a sewer district must be included in the annual report of town indebtedness which the supervisor submits to the county board of supervisors. 1969 Ops St Compt File #980.

5. Books and records

An order that directs that certain books, papers and records, belonging and appertaining to the office of supervisor of the town of Annsville, be delivered by the former supervisor to his successor in office was reversed because these are public records which the former supervisor, upon the expiration of his term of office, was required to file in the office of town clerk. Ferguson, 259 A.D. 1068, 21 N.Y.S.2d 320, 21 N.Y.S.2d 366, 1940 N.Y. App. Div. LEXIS 8003 (N.Y. App. Div. 4th Dep't 1940).

There is no requirement that town records be kept in public building and town supervisor may not be prohibited by town board from allowing bookkeeper to keep town's financial records in bookkeeper's home so long as books are accessible to public. Northumberland v Eastman, 129 Misc. 2d 447, 493 N.Y.S.2d 93, 1985 N.Y. Misc. LEXIS 2637 (N.Y. Sup. Ct. 1985).

Supervisor may not remove books, papers and records of his predecessor from town clerk's office. 1945 Ops St Compt 598.

A retiring supervisor may be compelled to file his books and records with the town clerk for the use of his successor. 1946 Ops St Compt 392.

A town supervisor is not required to file his account books and records with the town clerk each year. 1947 Ops St Compt 49.

A former supervisor may be compelled to surrender all books and papers pertaining to his office by appropriate legal action. 1956 Ops St Compt File #8160.

Upon the expiration of his term, a town supervisor is required to surrender his account books to the town clerk and other books and records of his office to his successor in office, and may be compelled to do so by appropriate legal action. 1969 Ops St Compt File #696.

Town supervisor in town of first class may appoint full-time bookkeeper, but town board must fix reasonable compensation. 1987 Op St Compt No 87-82.

6. Compensation matters

A town supervisor, whose occupation is that of a funeral director, may not receive payment for his services as a funeral director from the county in cases where funeral expenses are a proper charge against the county. 1956 Ops St Compt File #8274.

7. Confidential secretary; bookkeeper, generally

Position of supervisor's confidential bookkeeper/clerk in first-class town is authorized under CLS Town Law § 29(15) as exception to general power of appointment which resides with Town Board, where bookkeeper clerk was appointed by and accepted position to serve as town supervisor and whose job description included preparation of confidential documents, preparation of town budget, and other politically sensitive issues, because statute provides that town supervisor of first-class town is empowered to appoint confidential secretary or bookkeeper which means that supervisor may choose to appoint only bookkeeper and empower that person with all functions of confidential secretary. Matthews v Town of Blooming Grove, 882 F. Supp. 1420, 1995 U.S. Dist. LEXIS 5526 (S.D.N.Y. 1995).

Position of town supervisor's bookkeeper or clerk to town supervisor, designated under CLS Town § 29(15), falls within political dismissal exception to First Amendment protection of public employees in that it is job for which political affiliation is valid consideration. Matthews v Town of Blooming Grove, 882 F. Supp. 1420, 1995 U.S. Dist. LEXIS 5526 (S.D.N.Y. 1995).

The offices of town clerk and confidential secretary or bookkeeper to the supervisor are incompatible. 1945 Ops St Compt 389.

Appointment of a bookkeeper or confidential secretary to the supervisor is made by the supervisor himself and not by the Town Board. 1961 Ops St Compt #833.

Where the Town Board of a second class town, after adopting a resolution authorizing the supervisor to designate a bookkeeper, later revokes the resolution, the position is abolished and the designated bookkeeper can no longer be paid out of town funds for services rendered. 1962 Ops St Compt #11.

A town councilman of the town of the second class may be appointed by the town supervisor as secretary to the town supervisor. 1965 Ops St Compt File #361.

The same person may serve simultaneously as a member of a town recreation advisory board and as the town supervisor's secretary. 1973 Ops St Compt File #735.

8. —Effect of existence of office of comptroller

In a town which does not have a town comptroller, it is highly inadvisable and undesirable for the deputy town clerk and confidential secretary-bookkeeper to the supervisor to be the same person. 1968 Ops St Compt File #833.

9. —Residency requirement

Town board may sell town garage which has outlived its usefulness without advertising for bids. 1946 Ops St Compt 296.

10. —Spousal officeholders

There is no conflict of interest where a town supervisor appoints his wife as bookkeeper. 1970 Ops St Compt File #62.

A town supervisor would not have a statutory conflict of interest if the supervisor's spouse were appointed confidential secretary or bookkeeper; the town's code of ethics, however, should address the subject of employment of relatives or dependents of town officers, and the town supervisor should abstain from discussions and votes of the town board on matters relating to the confidential secretary or bookkeeper. 1991 Op St Compt No. 91-18.

11. Constitutionality

County Law § 150, Town Law § 29(14), § 41(7), constituting the law dealing with the election of Supervisors and the makeup of the Board of Supervisors of St. Lawrence County, are together unconstitutional as violating the principle of one person, one vote. Dona v Board of Supervisors, 48 Misc. 2d 876, 266 N.Y.S.2d 229, 1966 N.Y. Misc. LEXIS 2298 (N.Y. Sup. Ct. 1966).

Apportionment of county board of supervisors which gave equal representation on board to towns of unequal population violated equal protection clause of constitution, as the guaranty of "one person, one vote" has equal application to elective legislative bodies below the level of the state legislature and all municipalities, villages, towns, cities and counties must insure that the vote of each citizen is approximately equal in weight to that of every other citizen. Orlando v Board of Supervisors, 53 Misc. 2d 377, 279 N.Y.S.2d 42, 1966 N.Y. Misc. LEXIS 1676 (N.Y. Sup. Ct. 1966).

12. Custody and protection of town funds

Where there is statutory provision for supervisor to obtain surety bond of solvent surety company to secure safety of town funds deposited by him in bank, it is not too far a cry possibly to imply that taking securities duly given him by proper action of authorized officers of bank is therein authorized. In re Bank of Spencerport, 255 N.Y.S. 482, 143 Misc. 196, 1932 N.Y. Misc. LEXIS 1368 (N.Y. Sup. Ct. 1932).

Town supervisor, who was also town treasurer, had no standing to petition for Article 78 review of town's share of sales tax revenues as distributed by county pursuant to CLS Tax § 1262, on supervisor's theory that statute affected his duties as supervisor because it interfered with his power as treasurer to collect and have custody over moneys "belonging to or due the town" as provided by CLS Town § 29, since town had neither say in process of sales tax collection and disbursement nor property right in taxes so collected. Moreau v County of Saratoga, 134 Misc. 2d 380, 510 N.Y.S.2d 990, 1987 N.Y. Misc. LEXIS 2038 (N.Y. Sup. Ct. 1987), aff'd, 142 A.D.2d 864, 531 N.Y.S.2d 61, 1988 N.Y. App. Div. LEXIS 7939 (N.Y. App. Div. 3d Dep't 1988).

Under subds. 2 and 3 of this section, all checks made payable to a town or to any fund of a town should be deposited in a bank account of the town, and all payments made by a town should be made only by checks payable to the person or persons entitled thereto and not endorsed by a Supervisor and passed on as a negotiable instrument for the purpose of paying an obligation of the town. American Surety Co. v St. Lawrence County Nat'l Bank, 201 N.Y.S.2d 965 (N.Y. Sup. Ct. 1960), aff'd, 14 A.D.2d 618, 218 N.Y.S.2d 744, 1961 N.Y. App. Div. LEXIS 9392 (N.Y. App. Div. 3d Dep't 1961).

Moneys raised by tax for the purchase of town highway machinery shall be deposited to the credit of the town highway fund in a separate bank account. The proceeds of the sale of municipal obligations for machinery purchases should also be deposited in a separate bank account unless the town board resolves to commingle such funds. 1956 Ops St Compt File #8133.

A town supervisor may not deposit town funds in a nondesignated depository. The town board may authorize the supervisor to temporarily invest town funds, not needed for immediate expenditure, in certificates of deposit or special time deposit accounts in banks or trust companies. Such banks or trust companies may be banks other than those designated as official depositories. 1967 Ops St Compt File #399.

A town may designate a bank as depository of town funds, where the town supervisor is an assistant cashier of such bank. 1972 Ops St Compt File #9.

Funds appropriated to the trustees for their use should either be in the control of the town supervisor or the trustees but should not be divided between them. 1974 Ops St Compt File #258.

Powers of town supervisor as treasurer under CLS Town Law may be transferred to town comptroller by local law subject to mandatory referendum; whether it is proper to designate town comptroller as chief fiscal officer must be made on case by case basis depending on particular function to be performed. Ops St Compt 89-35.

13. Disbursal of town funds

Under subds. 2 and 3 of this section, all checks made payable to a town or to any fund of a town should be deposited in a bank account of the town, and all payments made by a town should be made only by checks payable to the person or persons entitled thereto and not endorsed by a Supervisor and passed on as a negotiable instrument for the purpose of paying an obligation of the town. A bank is chargeable with knowledge of the provisions of this section requiring that payments made by a town be made only by check payable to the person or persons entitled thereto. Where a town Supervisor had three accounts in a local bank, one for town funds, one in his personal name, and one in the name of a partnership of which he was a member, the bank should have been placed upon notice that he was withdrawing town funds and placing them in the personal or partnership account without legal right where the checks in question were either not drawn to his name personally or were endorsed over and deposited in the partnership account. American Surety Co. v St. Lawrence County Nat'l Bank, 201 N.Y.S.2d 965 (N.Y. Sup. Ct. 1960), aff'd, 14 A.D.2d 618, 218 N.Y.S.2d 744, 1961 N.Y. App. Div. LEXIS 9392 (N.Y. App. Div. 3d Dep't 1961).

A contract may be entered into by a free public library with a village or town to furnish library services and (1) if such contract entered into with a town is for a longer period than one year, verified claims for amount due under same are not necessary but the supervisor must be authorized by resolution adopted prior to payment to pay amount due under contract for library services rendered (2) if contract is for one year or less, verified claim should be submitted and audited prior to payment (3) if a contract is entered into by a village, verified claim that contract services have been rendered must be audited prior to payment by proper village officers. 1945 Ops St Compt 264.

A town supervisor is personally responsible for the amount of a check he issues in payment of an illegal claim against the town. 1965 Ops St Compt File #124.

Warrants presented to the town supervisor for payment are public records subject to inspection by taxpayers at all reasonable times. 1967 Ops St Compt File #748.

Such warrants need not be filed with the town clerk until the expiration of the supervisor's term of office. 1967 Ops St Compt File #748.

14. Disposal or other use of town property

Resolution of town board authorizing sale of town real estate or resolution of town board authorizing leasing of town real estate is subject to permissive referendum. 1946 Ops St Compt 120.

Town may sell or lease town garage to fire district. It may not give use of town garage to fire district. 1946 Ops St Compt 286.

A town may lease a portion of a town building which is not necessary for its use. 1955 Ops St Compt File #7135.

A town may lease real property no longer required for its own use for a term of 99 years. The resolution is subject to permissive referendum. 1955 Ops St Compt File #7423.

Real property owned by a town and no longer necessary for town purposes may be sold at private sale. The town may pay real estate broker's commissions on the sale of town-owned realty. 1960 Ops St Compt File #815.

A town may not permit the gratuitous use of space in the town hall for the maintenance of county offices. 1965 Ops St Compt File #431.

A town may not allow gratuitous use of a town garage by fire district fire equipment, nor lease same for such if space therein is needed for town purposes. 1967 Ops St Compt File #233.

Property owned by the town may be sold at private sale and the consideration may be the transfer of other real property to the town provided the property transferred to the town is an adequate consideration. The sale of the town's real property is subject to a permissive referendum. 1967 Ops St Compt File #667.

A notice of a resolution calling for the sale of town realty must be published in the official paper of the town. 1967 Ops St Compt File #962.

A resolution authorizing the sale of unneeded town land is subject to permissive referendum. 1967 Ops St Compt File #966.

A town may not sell or lease its real property unless it is no longer required for its own purposes and is not held for public use. In those instances where a sale or lease is proper, fair and adequate consideration must be given. 1972 Ops St Compt File #24.

A town may not include space within a proposed town building for the purpose of leasing such space to the U. S. Postal Service upon the completion of the building. Under certain circumstances, it would be legal for the town to lease land for the construction of a post office building. 1972 Ops St Compt File #253.

15. Easements

The conveyance of an easement over town property is subject to a permissive referendum. The acquisition of an easement by a town does not require a referendum. 1954 Ops St Compt File #6958.

Where town lands do not afford sufficient area for a driveway to a town garage and adjoining landowner also lacks sufficient land for a driveway upon his property the town and the adjoining landowner may grant reciprocal easements for the purpose of creating a joint driveway upon the lands of both parties. 1954 Ops St Compt File #6958.

A town may grant an easement for the use of town property if the use of that property is not needed by the town and if fair and adequate compensation is received in exchange for such an easement. The granting of such an easement is subject to a permissive referendum. 1968 Ops St Compt File #881.

16. Firefighting

Towns should not further compensate members of a volunteer fire company for fighting forest fires within an area furnished fire protection by their company pursuant to contract. 1954 Ops St Compt File #6503.

The town board of a town which is neither a "fire town" nor a "fire district", both as defined by the Conservation Law, may fix the salaries of persons employed to fight forest or muck fires. 1960 Ops St Compt File #437.

A town which is neither a "fire town" nor a "fire district", both as defined by the Conservation Law, is responsible for workmen's compensation benefits payable for injuries occasioned to persons employed by the town supervisor to fight forest or muck fires. 1960 Ops St Compt File #437.

17. Legal signatures; facsimiles

Town supervisors and town clerks may sign checks by facsimile signatures only where the town board has authorized the use of a checksigner. They may sign other documents by means of a rubber name stamp. 1956 Ops St Compt File #8119.

The town supervisor is required to sign checks disbursing highway moneys but the town board by resolution, may authorize a facsimile of his signature. 1956 Ops St Comp File #7940.

18. Library matters

A town may not construct a building to be used as a town hall larger than it will need in the foreseeable future for the sole purpose of providing space and facilities for a free library association. 1969 Ops St Compt File #985.

19. Powers of deputy supervisor

Upon the incapacity of the town supervisor, the deputy supervisor is vested with all the powers and duties of the supervisor, with certain express statutory exceptions. 1967 Ops St Compt File #932.

20. Retention of bid bond

After the bids are opened, bid bonds or guarantee bid deposits submitted by the successful bidder should be retained in the custody of the town supervisor. 1968 Ops St Compt File #761.

21. Miscellaneous

It does not require demand to convert rightful possession into wrongful holding, when public officer, in breach of demand which former § 91 put upon him, keeps and retains as his own funds of town. People v Hedges, 184 A.D. 901, 170 N.Y.S. 1102, 1918 N.Y. App. Div. LEXIS 5721 (N.Y. App. Div. 1918).

A town board had no authority to delegate to the town supervisor its duty to hire and fire nonhighway employees to, where no standard of policy had been established by the town board to provide a guide for the town supervisor to follow when hiring and firing town employees. Schimmel v Biscone, 107 A.D.2d 915, 484 N.Y.S.2d 344, 1985 N.Y. App. Div. LEXIS 49839 (N.Y. App. Div. 3d Dep't 1985).

Process of incorporating village does not require town supervisor to "approve" incorporation petition or take "direct action" of promulgating executive order or directive that public meeting be advertised and scheduled, within meaning of 6 NYCRR § 617.2, and thus State Environmental Quality Review Act (SEQRA) does not apply to incorporation process, and petitioners are not required to submit SEQRA environmental assessment form before respondent supervisor must comply with CLS Vill § 2-204, which mandates her to post notice for public hearing to consider legal sufficiency of petition. O'Keeffe v Bonelli, 170 Misc. 2d 218, 654 N.Y.S.2d 1009, 1996 N.Y. Misc. LEXIS 543 (N.Y. Sup. Ct. 1996).

Town supervisor was policymaker for town under Town § 29, and, thus, town could be held liable under § 1983 for supervisor's alleged retaliation against contractor for threatening suit to challenge award of contract to competitor. Glenview Constr. Inc. v Bucci, 165 F. Supp. 2d 545, 2001 U.S. Dist. LEXIS 14977 (S.D.N.Y. 2001).

Collection of town district water rates or water rentals should be made by town or district employees appointed pursuant to Civil Service Law or by duly authorized town officers and such collection should not be let by contract. 1947 Ops St Compt 298.

Rental of fire hydrants is not a general town charge. 1957 Ops St Compt File #274.

A town may impose a schedule of fees upon a developer to recover engineering, land surveying, and legal expenses incurred in connection with subdivision review so long as they are reasonably necessary to accomplish the regulatory program and bear a reasonable relationship to the average costs incurred by the town planning board in reviewing subdivision applications. The town may not, however, require the developer to pay such fees directly to independent contractors performing such services. 1990 Op St Compt 90-14.

Town supervisor in town of first class may appoint full-time bookkeeper; town board must fix reasonable compensation. 1987 Op St Comp No. 87-82.

Agency Opinions

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1. In general

The offices of Supervisor of the Town of Wilson and Clerk of the Niagara County Legislature, when held by the same person at the same time, are not incompatible per se. 1976 NY Ops Atty Gen Jan 2 (informal).

The supervisor of a suburban town is the chief executive officer and head of the administrative branch of town government. Towns other than suburban towns, by local law, may grant administrative powers to the supervisor. 1981 NY Ops Atty Gen March 5 (informal).

Positions of town tax collector and senior account clerk in supervisor's office are incompatible. 1987 NY Ops Atty Gen No. 87-13 (informal).

Positions of town supervisor and director of county veterans agency were compatible, and thus could be held by same person. 1997 NY Ops Atty Gen I 97-46.

Discussion of multiple questions concerning town government. 1978 Op St Compt File #328.

The offices of town supervisor and mayor of a village within the town are not inherently incompatible. However, the existence of inter-governmental relationships between the village and town could result in personal conflict. 1979 Op St Compt File #487.

A town supervisor does not have power to veto town ordinances or local laws unless such power has been conferred on him by local law. 1980 Op St Compt File #532.

2. Annual financial report, generally

The incoming supervisor, rather than the outgoing supervisor, must file the financial report required by section 30. 1980 Op St Compt File #22.

3. Books and records

The proceeding authorized by Public Officers Law § 80 to obtain official papers from an outgoing officer is personal to his successor and no action by the town board is required before a newly elected or appointed town officer may bring such a proceeding. A newly elected town supervisor may not demand from his predecessor the books of account. 1980 NY Ops Atty Gen March 3 (informal).

Town board cannot require supervisor's office to be kept open for use of other town personnel when office must be kept locked for security of supervisor's records. 1978 Op St Compt File #231.

A town clerk is not responsible for the supervisor's financial records until the records are turned over to the clerk at the expiration of the supervisor's term. There is no authority for a bookkeeper to keep the towns financial records in her home, if it is possible for the records to be located in a public building; nor is there any authority which permits town officers to remove public records from the town clerk's office. 1980 Op St Compt File #78.

A municipal (or fire district) governing board may retain private consultants and computer service companies for the purpose of assisting the chief fiscal officer in maintaining the financial records of the municipality. The financial records cannot be permanently removed from municipal custody, although they may be temporarily removed for the purpose of working on them consistent with the right of inspection accorded the general public under the Freedom of Information Law. Opns St Comp, 1969, No. 69-509 is superseded to the extent that it is inconsistent with this opinion. 1980 Op St Compt File #540.

Where a supervisor intentionally or willfully fails to submit his monthly and annual financial reports to the town board or fails to keep his books of account in proper order, (1) any citizen resident of the town may present to the Appellate Division of the Supreme Court an application for removal of such officer from office, or (2) the town board may bring an Article 78 proceeding in the nature of mandamus seeking a court order requiring the supervisor to properly perform his official duties, or (3) the town board may create the position of town comptroller and designate him as the accounting officer of the town with responsibility for keeping detailed accounting records, filing the annual financial reports with the town clerk, and filing the monthly financial reports with the town board. 1982 Op St Compt File #82-252.

4. Budget responsibility

Final responsibility for budget content and accuracy rests by law with the town board of a suburban town and not with the town supervisor, whether or not the town has established the office of town comptroller. 1966 NY Ops Atty Gen Oct 13.

The proper appointing authority for janitorial and maintenance employees for the Town Hall in the Town of Waterford is the Town Supervisor. 1977 NY Ops Atty Gen March 29 (Informal), 1977 N.Y. AG LEXIS 262.

In a town which has established the position of bookkeeper to the supervisor, the supervisor may appoint the bookkeeper to also be the budget officer. 1982 Op St Compt File #82-108.

5. Confidential secretary; bookkeeper, generally

6. —Effect of existence of office of comptroller

The existence of a town comptroller does not affect the power of a town supervisor of a first class town to "designate a bookkeeper or confidential secretary, or both". 1970 NY Ops Atty Gen Jan 16.

7. —Residency requirement

The supervisor's bookkeeper need not be a resident of the town. 1978 Op St Compt File #309.

8. —Spousal officeholders

Under the above sections the Supervisor of the Town of Milan, Dutchess County, a town of the second class, may designate his wife as a bookkeeper provided that the town board by resolution authorizes him to make a designation for the position and fixes the compensation therefor. 1970 NY Ops Atty Gen March 25.

It is inadvisable for the spouse of the deputy town clerk to be appointed as secretary and bookkeeper to the supervisor. 1979 Op St Compt File #377.

It is permissible in a town of the first class for the supervisor's wife to be appointed as confidential secretary or bookkeeper to the supervisor, and town board is obligated to pay a reasonable salary to the supervisor's wife if that person is appointed as confidential secretary or bookkeeper to the supervisor. 1979 Op St Compt File #391.

The position of confidential secretary or bookkeeper to the town supervisor, authorized by section 29(15) of the Town Law, is incompatible with the position of deputy town clerk, but there exists no incompatibility between the position of confidential secretary or bookkeeper and the position of registrar of vital statistics. 1976 NY Ops Atty Gen Apr 29 (informal).

Positions of confidential assistant secretary to town supervisor and member of town planning board are not incompatible, and thus same person may serve simultaneously in both positions. 2002 NY Ops Atty Gen I 02-16.

Positions of deputy supervisor and confidential secretary to town supervisor are incompatible, since, when exercising duties of deputy supervisor, such individual will be in direct supervisory role with respect to confidential secretary. 2006 NY Ops Atty Gen I 06-3.

The positions of town clerk and confidential secretary to the town supervisor are incompatible. NY Ops Atty Gen 89-66 (informal).

The simultaneous holding of the office of town councilman and the position of bookkeeper to the supervisor is precluded by considerations of incompatibility. 1978 Op St Compt File #267.

A town board may, by local law, regulate the business hours of the town supervisor's office and require that the town supervisor's bookkeeper or confidential secretary be present in the supervisor's office during certain prescribed hours. Absent such local law, the supervisor would determine the business hours of

his or her office and prescribe the bookkeeper's or confidential secretary's working hours. 1978 Op St Compt File #997.

A town board may adopt a resolution fixing the salary of the supervisor, which provides that if he acts as his own clerk he will receive one amount and if he does not, he will receive a lesser amount, providing that in either event his salary does not exceed the amount shown in the notice of public hearing on the preliminary budget. 1979 Op St Compt File #140.

Subject to applicable civil service requirements, a town may engage a bookkeeper to the supervisor on a contract basis rather than as an employee. The bonding requirements, if any, in such event are solely a matter of contract. GENERAL MUNICIPAL LAW, § 92-a: Where a town water district is not governed by a separate board of commissioners, the town may pay the cost of health insurance for a district employee in lieu of paying him a salary. 1982 Op St Compt File #82-53.

9. Custody and protection of town funds

Surpluses in the general and highway funds of a town may be temporarily invested pursuant to § 11 of the General Municipal Law. 1962 NY Ops Atty Gen Feb 13.

Unless a local law provides otherwise, care and custody of a tree trust fund would be a duty of the town supervisor. 1981 Op St Compt File #80-768.

10. Disbursal of town funds

A claim against a town must be made on an itemized voucher certified by the claimant which is submitted to the town board for audit. 1979 Op St Compt File #73.

11. Disposal or other use of town property

Real property conveyed to a town by a deed making no reference to the intended use of said real property but presently used for public parking, a public use, may not be alienated without express legislative authority. 1968 NY Ops Atty Gen Nov 27.

A town may not permit use of a portion of its town hall by a group if it is also used for town purposes; if not so used, it may lease the portion to a private group for adequate consideration. 1978 Op St Compt File #777.

12. Easements

Easement or other rights for installation of sewers through park lands belonging to a town for a use unrelated to park purposes may not be granted without specific authorization of the Legislature. 1977 NY Ops Atty Gen Oct 25.

13. Firefighting

Fire wardens in towns, other than fire towns, have no authority to employ men to aid in extinguishing fires. 1922 N.Y. Op. Att'y Gen. No. 192.

Where supervisor of town is ordered by conservation commission to extinguish forest fires he has right to employ men and to order forest rangers and fire wardens in town to act. 1923 N.Y. Op. Att'y Gen. No. 210.

14. Legal signatures; facsimiles

Except as authorized by the provisions of this section, a signature of a supervisor must be handwritten when affixed to official paper. 1955 NY Ops Atty Gen Aug 16 (informal).

As treasurer of a town, the supervisor must sign all checks or other documents effecting the withdrawal of town funds from town bank accounts. In the supervisor's absence a person duly appointed as administrator in lieu of a deputy supervisor, or a deputy supervisor, may sign such documents, as well as obligations issued by the town. A town board cannot require the supervisor to allow his facsimile signature, affixed by a mechanical check-signer, to be used during his absence if the supervisor objects to such use. The administrator appointed in lieu of a deputy supervisor, and the deputy supervisor, are not regarded as the chief executive officer (in a suburban town) or the chief fiscal officer in the absence of the supervisor. 1983 Op St Compt File #83-8.

15. Library matters

A town supervisor may not be appointed as treasurer of the town's public library by the library trustees. 1979 Op St Compt File #25.

16. Office hours; location

A town board may, by local law, regulate the business hours of the town supervisor's office and require that the town supervisor's bookkeeper or confidential secretary be present in the supervisor's office during certain prescribed hours. Absent such local law, the supervisor would determine the business hours of his or her office and prescribe the bookkeeper's or confidential secretary's working hours. 1978 Op St Compt File #997.

A town supervisor has no authority to set office hours for the town clerk but the town board may, by local law, determine the hours when the town clerk's office must be open for business. This does not include authority to require that the town clerk be personally present in the office during these hours. 1980 Op St Compt File #742.

The town board of any town (including a suburban town), rather than the supervisor, has the authority to determine the location of various town offices and departments within town office buildings. 1983 Op St Compt File #83-171.

17. Miscellaneous

The supervisor of a suburban town is the chief executive officer and head of the administrative branch of town government. Towns other than suburban towns, by local law, may grant administrative powers to the supervisor. 1981 NY Ops Atty Gen March 5 (informal).

Offices of town clerk and deputy supervisor are incompatible, as is positions of supervisor's bookkeeper and town clerk. 1986 NY Ops Atty Gen No. 86-30 (Informal).

Person may not hold simultaneously position of town counsel, bookkeeper/secretary to supervisor and Justice Court clerk. 1988 NY Ops Atty Gen No. 88-4 (Informal).

Town supervisor must recuse herself from taking actions as to town police department which affect terms and conditions of employment of her son, sergeant in department. 1996 NY Ops Atty Gen I 96-17.

Recently elected town supervisor may continue to serve as mayor of village in town until commencement of town's budgeting process. 1998 NY Ops Atty Gen I 98-24.

There is no legal impropriety where a husband and wife simultaneously serve as town supervisor and town clerk, respectively. However, from a practical point of view, there is a question of the advisability of such an arrangement. 1979 Op St Compt File #171.

The salary of a town supervisor or a town board member may include additional compensation for assuming extra duties in regard to a town sewer district. However, the salary of such an official may not be higher than the amount specified for the position in the notice of hearing on the preliminary budget unless a local law is adopted. Such a local law may not have effect for longer than one fiscal year. 1980 Op St Compt File #117.

A town supervisor may not arbitrarily refuse to pay duly audited and approved claims for the purchase of highway supplies. 1981 Op St Compt File #81-144.

The offices of elected town assessor and town supervisor's clerk are compatible. 7 Op Counsel SBEA #8 (1980, Jan 10).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 124; High § 229-b.

Payroll payment by banks or trust companies, CLS Bank § 96-b.

Fire protection areas, CLS ECL § 9-1109.

Outside service by local police; civil disturbance control, CLS Gen Mun § 209-m.

Conflicts of interest of municipal officers and employees, CLS Gen Mun §§ 800 et seq.

Succession of powers and duties upon incorporation of village embracing entire territory of town, CLS Vill §§ 17-1704, 17-1706.

Jurisprudences:

9 NY Jur 2d Banks and Financial Institutions § 247 .

25 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 124, 164, 200, 209, 393 .

26 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 560, 561, 588—592, 597, 969.

55 NY Jur 2d Environmental Rights and Remedies § 295 .
87 NY Jur 2d Public Funds §§ 7, 9, 10, 33 .
92 NY Jur 2d Records and Recording §§ 2, 22 .
97 NY Jur 2d Summary Judgment and Pretrial Motions to Dismiss § 175 .
109 NY Jur 2d Wharves § 52.
7A Am Jur Legal Forms 2d, Easements and Licenses in Real Property, Forms 94:3 et seq.

Law Reviews:

General Municipal Law § 209-m(6)(7)
Local contracts and sub-contracts: the roles of city government and private citizen groups. 14 Buff. L. Rev. 140.
Lease-purchase agreements by New York municipalities. 34 NYSBJ 459.

Annotations:

Payroll records of individual government employees as subject to disclosure to public. 100 ALR3d 699.

ARTICLE 4 Town Boards

Section

64. General powers of town boards
64-g. Town of Warwick preservation funds
64-h. Town of Red Hook preservation funds

HISTORY:

Add, L 1932, ch 634, with substance transferred from former Article 6.

§ 64. General powers of town boards

Subject to law and the provisions of this chapter, the town board of every town:

* * * * *

5. Vacancies. Whenever a vacancy shall occur or exist in any town office, the town board or a majority of the members thereof, may appoint a qualified person to fill the vacancy. If the appointment be made to fill a vacancy in an appointive office, the person so appointed shall hold office for the remainder of the unexpired term. If the appointment be made to fill a vacancy in an elective office, the person so appointed shall hold office until the commencement of the calendar year next succeeding the first annual election at which the vacancy may be filled. A person, otherwise qualified, who is a member of the town board at the time the vacancy occurs may be appointed to fill the vacancy provided that he shall have resigned prior to such appointment.

* * * * *

11-c. Central fire alarm system. In any town, all the area of which outside of any village or villages is included in fire districts, fire alarm districts and fire protection districts, the town board may provide for and establish a central fire alarm system in such town, and may purchase or lease, install, construct and maintain necessary equipment for the operation of such central fire alarm system; provided, that no town board shall exercise the power and authority granted by this subdivision, unless prior thereto the governing board of each village within such town shall by appropriate action have signified its consent thereto, and if the governing board in any village does not consent thereto, the central fire alarm system shall exclude said village and the cost thereof will be assessed against the real property of the town outside said village.

* * * * *

13. Appropriations for rooms for patriotic organizations. In any town in which there may, now or hereafter, be one or more posts of the Grand Army of the Republic, the United Spanish War Veterans, the Veterans of Foreign Wars, the Jewish War Veterans of the United States, Inc., Disabled American Veterans, the Catholic War Veterans, Inc., the Italian American War Veterans of the United States, Incorporated, the Polish Legion of American Veterans, Inc., the Marine Corps League, the Military Order of the Purple Heart, Inc., AMVETS, American Veterans of World War II, Masonic War Veterans of the State of New York, Inc., Veterans of World War I of the United States of America Department of New York, Inc., China-Burma-India Veterans Association, Inc., Polish-American Veterans of World War II, Amsterdam, N.Y., Inc., Polish-American Veterans of World War II, Schenectady, N.Y., Inc., World War Veterans Club of Lindenhurst, Inc., the American Legion, the Eastern Paralyzed Veterans Association, the Vietnam Veterans of America, the Army and Navy Union of the United States, the American Gold Star Mothers, Inc., Regular Veterans Association, Inc., the 369th Veterans Association, Inc., the Tri-County Council of Vietnam Veterans, the National Congress of Puerto Rican Veterans, the Fleet Reserve Association, the Navy Seabee Veterans of America, the Korean War Veterans Association, the Women's Army Corps Veterans Association, the 82nd Airborne Division Association, the Empire State Chapter No. 120 of the Retired Enlisted Association, the National Amputation Foundation, or the Navy Club of the U.S.A., the town board may appropriate a sum not exceeding five hundred dollars for each post in any year for the purpose of assisting in defraying the rental or maintenance of rooms for holding meetings of such post or posts, or both. If there be a post in a town adjoining a town in which no post is located, whose membership includes at least five residents of such town having no post, the town board of such town having no post may vote any sum of money, not exceeding one hundred twenty-five dollars in any year, for the purpose of assisting in defraying the rental or maintenance of rooms in such adjoining town as meeting places of each of the posts hereinbefore enumerated. Claims for such rental or rentals shall be made by the organizations interested, and shall be submitted to the town board for audit in the same manner and at the same time as other claims against the town.

* * * * *

15. Appropriation for construction of conning towers. If requested by the conservation department, the town board of any town, not within the forest preserve, may appropriate a sum of money for the construction of a conning tower, to be constructed by the conservation department and to be used as a look-out in aid of the suppression of forest fires, but the whole amount appropriated in any one year shall not exceed five hundred dollars. The

money so appropriated when collected, shall be disbursed by the supervisor on the order of the conservation department.

* * * * *

HISTORY:

Add, L 1932, ch 634, with substance transferred from former §§ 10, 16, 44, 101, 130, 134, 134–a, 135, 136, 136–a, 137, 137–a, 138–b–138–e, 140, 141–a, 141–b, 143–h, 143–k, 143–m, 332–b; amd, L 1933, ch 751; L 1934, ch 675, § 3; L 1935, ch 344, eff April 8, 1935; L 1935, ch 599; L 1935, ch 688; L 1935, ch 741; L 1936, ch 84; L 1936, ch 419; L 1936, ch 431; L 1936, ch 467; L 1936, ch 468; L 1936, ch 469; L 1936, ch 797; L 1937, ch 495; L 1938, ch 275; L 1938, ch 659; L 1939, ch 577; L 1939, ch 582; L 1939, ch 584; L 1940, ch 302; L 1941, ch 263, § 1; L 1941, ch 324, § 3; L 1941, ch 550, eff April 19, 1941; L 1941, ch 554, §§ 1, 3; L 1941, ch 648, §§ 1, 23; L 1942, ch 85, §§ 10, 11; L 1942, ch 123, eff March 17, 1942; L 1942, ch 452; L 1943, ch 19, § 1; L 1943, ch 376; L 1943, ch 710; L 1944, ch 164; L 1944, ch 690; L 1945, ch 197; L 1945, ch 499; L 1945, ch 831; L 1946, ch 812; L 1946, ch 898; L 1947, ch 181; L 1947, ch 216; L 1947, ch 603; L 1948, ch 396, eff March 23, 1948; L 1948, ch 537; L 1948, ch 538; L 1948, ch 809, § 1; L 1948, ch 853, eff April 6, 1948; L 1949, ch 159; L 1949, ch 747; L 1950, ch 68; L 1950, ch 356; L 1950, ch 808; L 1950, ch 809; L 1950, ch 810; L 1951, ch 536; L 1952, ch 74; L 1952, ch 559; L 1952, ch 586; L 1952, ch 741, eff April 15, 1952; L 1953, ch 186, eff March 24, 1953; L 1953, ch 733; L 1954, ch 382; L 1954, ch 437, § 2, eff Jan 1, 1955; L 1954, ch 730, § 1; L 1955, ch 524; L 1955, ch 804, eff April 28, 1955; L 1956, ch 161; L 1956, ch 429, eff April 9, 1956; L 1956, ch 487, §§ 4, 10, 11; L 1957, ch 629, eff April 17, 1957; L 1958, ch 25, § 3; L 1958, ch 952; L 1959 ch 385 § 2, eff Jan 1 1960; L 1959, ch 485, §§ 4, 5; L 1959, ch 540; L 1959, ch 591; L 1960, ch 120, §§ 4, 5; L 1960, ch 569, eff July 1, 1960; L 1960, ch 592, § 5; L 1960, ch 592, § 4; L 1960, ch 610, § 9; L 1960, ch 646; L 1960, ch 947; L 1961, ch 785; L 1961, ch 889, § 1, eff April 24, 1961; L 1961, ch 951; L 1962, ch 23; L 1962, ch 179, § 1; L 1962, ch 374, eff April 9, 1962; L 1962, ch 740, eff Apr 24, 1962; L 1962, ch 906, eff June 1, 1962; L 1963, ch 230, §§ 1, 4; L 1963, ch 358, eff April 16, 1963; L 1963, ch 360; L 1963, ch 420, § 1, eff Jan 1, 1964; L 1964, ch 800; L 1964, ch 932; L 1964, ch 946, § 11; L 1965, ch 426, eff June 21, 1965; L 1965, ch 999; L 1966, ch 892, eff July 1, 1966; L 1967, ch 355; L 1967, ch 414, § 1; L 1967, ch 574, § 2, eff April 24, 1967; L 1968, ch 759; L 1968, ch 817, §§ 1, 2, eff June 16, 1968; L 1969, ch 1049, § 34, eff Jan 1, 1971; L 1970, ch 23, § 1; L 1970, ch 687, eff July 1, 1970; L 1970, ch 803, eff May 12, 1970; L 1970, ch 944, eff May 19, 1970; L 1971, ch 38; L 1971, ch 984, eff July 2, 1971; L 1972, ch 480, § 2, eff May 24, 1972; L 1972, ch 619, § 1; L 1972, ch 711, § 1, eff June 2, 1972; L 1972, ch 750, § 1, eff May 30, 1972; L 1972, ch 857, § 1, eff May 30, 1972; L 1973, ch 136, § 1, eff April 3, 1973; L 1973, ch 195, § 58, eff April 25, 1973; L 1973, ch 427, § 1, eff June 5, 1973; L 1973, ch 565, § 1, eff June 5, 1973; L 1973, ch 972, § 1, eff June 22, 1973; L 1975, ch 725; L 1977, ch 840, § 90; L 1980, ch 365, §§ 1, 2, eff June 23, 1980; L 1981, ch 566, § 1; L 1981, ch 643, § 1, eff July 21, 1981; L 1982, ch 28, § 1; L 1982, ch 844, § 1, eff July 27, 1982; L 1983, ch 153, § 1; L 1984, ch 195, §§ 1, 2; L 1984, ch 482, § 2; L 1984, ch 584, §§ 1, 2, eff July 27, 1984; L 1987, ch 182, § 1, eff June 29, 1987; L 1989, ch 33, § 1, eff April 6, 1989; L 1989, ch 382, § 1, eff July 13, 1989; L 1990, ch 306, § 2; L 1990, ch 600, § 1, eff July 18, 1990; L 1992, ch 440, § 2; L 1992, ch 708, § 34, eff Nov 28, 1992; L 1993, ch 440, § 24; L 1994, ch 316, § 1, eff July 20, 1994; L 1994, ch 590, § 18, eff July 26, 1994; L 1995, ch 551, § 1, eff Aug 8, 1995; L 1995, ch 554, § 1, eff Aug 8, 1995; L 1995, ch 574, § 2; L 1996, ch 378, § 1, eff July 30, 1996; L 1997, ch 170, § 1; L 1999, ch 78, § 1; L 2000, ch 368, § 1, eff Aug 24, 2000; L 2000, ch 400, § 1, eff Aug 30, 2000; L 2003, ch 649, § 1, eff Oct 7, 2003; L 2004, ch 656, §§ 4, 6, eff Oct 26, 2004; L 2004, ch 658, §§ 1, 2, eff Oct 26, 2004; L 2005, ch 328, § 2, eff July 26, 2005.

Repeal Notes: [1957, ch 629] The repeal of subdivision fourteen of section sixty-four of the town law by this act, which subdivision was amended twice in nineteen hundred fifty-two without reference to each other, was for the purpose of resolving inconsistent provisions by insertion of a new subdivision embodying the provisions of both amendments with additional provisions relating to Suffolk county.

Amendment Notes:

2004. Chapter 656, § 4 amended:

Sub 1-a, by deleting "two".

2004. Chapter 658, § 1 amended:

Sub 12, by deleting "an amount not to exceed five thousand dollars".

2005. Chapter 328, § 2 amended:

Sub 13, by deleting "or".

2004. Chapter 656, § 6 amended:

Sub 14, par a, by deleting "three" and "but not more than ten thousand dollars annually or (2) upon the adoption of a resolution, subject to a mandatory referendum, may appropriate an amount in excess of ten thousand dollars".

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103. —Dumping
104. —Public works department
105. Other powers exercised, generally
106. —Proper exercise, generally
107. — —Communications
108. — —Dredging, sewage and the like
109. — —Highways, roads, driveways and the like
110. — —Police matters
111. —Improper exercise, generally
112. — —Dredging, sewage and the like
113. — —Highways, roads, driveways and the like
114. — —Police matters

1. In general

Dismissal of the petition was proper, because the town residents made no claim that the procedural requirements of General Municipal Law § 120-w were violated, or that annulment of the resolution and the landfill operating agreement was otherwise justified; claim that a permissive referendum was required by Town Law § 64(2) was without merit. Matter of Conners v Town of Colonie, 108 A.D.3d 837, 968 N.Y.S.2d 717, 2013 N.Y. App. Div. LEXIS 4944 (N.Y. App. Div. 3d Dep't 2013).

trial court erred in denying a town's motion to dismiss a lender's complaint insofar as asserted against it to recover the unpaid sums due under the loan, breach of contract, and unjust enrichment because the complaint failed to allege that the concession agreement at issue was approved by the town board, and the lender failed to allege facts which, if true, would establish that the town board ratified the concession agreement. Atalaya Asset Income Fund II, LP v HVS Tappan Beach, Inc., 175 A.D.3d 1370, 108 N.Y.S.3d 169, 2019 N.Y. App. Div. LEXIS 6607 (N.Y. App. Div. 2d Dep't 2019).

The words "a majority of the members" of town board, as used in § 64, if limited to acts of members as distinguished from acts of town boards, are not otherwise defined in Town Law, and, accordingly, what constitutes a majority of the members of board is governed by General Construction Law, § 41. Application of Crosby, 36 N.Y.S.2d 301, 178 Misc. 746, 1942 N.Y. Misc. LEXIS 1786 (N.Y. Sup. Ct.), aff'd, 265 A.D. 92, 37 N.Y.S.2d 745, 1942 N.Y. App. Div. LEXIS 5686 (N.Y. App. Div. 1942).

None of the powers of towns in New York State are derived from the common law, and such powers as they have are entirely statutory. Olin v North Hempstead, 34 Misc. 2d 853, 231 N.Y.S.2d 286, 1962 N.Y. Misc. LEXIS 3199 (N.Y. Sup. Ct. 1962), aff'd, 18 A.D.2d 831, 237 N.Y.S.2d 991, 1963 N.Y. App. Div. LEXIS 4651 (N.Y. App. Div. 2d Dep't 1963).

The trustees of the freeholders and commonalty of the Town of Southampton must submit its budget to the town board for its review and approval. 1974 Op St Compt No. 74–258.

Funds appropriated to the trustees for their use should either be in the control of the town supervisor or the trustees but should not be divided between them. 1974 Ops St Compt File #258.

This section no longer governs appropriations for the U.S. Bicentennial celebration. 1974 Ops St Compt File #505.

Although the town clerk is required to record in the minutes of a town board meeting the name of each member of the board who was present, the clerk is under no statutory duty to record the names of other persons attending the meeting. A decision to publish the minutes of a town board meeting must be made by the affirmative vote of a majority of all the members of the town board, and not by the town supervisor acting unilaterally. The town board may also elect to publish at town expense the report of examination prepared by the office of the state comptroller. 1990 Op St Compt No. 90-52.

2. Acquisition of real property, generally

Dedication of land to town by town trustees was not invalidated by fact that town board adopted resolution accepting dedication "a few minutes" prior to trustees' adoption of same resolution, where there was no question of trustees' intent to dedicate property or of town's intent to accept it. Zebrowski v Trustees of Brookhaven, 128 A.D.2d 704, 513 N.Y.S.2d 200, 1987 N.Y. App. Div. LEXIS 44389 (N.Y. App. Div. 2d Dep't 1987), app. denied, in part, app. dismissed, 72 N.Y.2d 829, 530 N.Y.S.2d 548, 526 N.E.2d 39, 1988 N.Y. LEXIS 1061 (N.Y. 1988).

A municipality must acquire a lot by purchase or condemnation when a zoning ordinance bars substandard lot from any practical use. Long Island Land Research Bureau, Inc. v Young, 7 Misc. 2d 469, 159 N.Y.S.2d 414, 1957 N.Y. Misc. LEXIS 3720 (N.Y. Sup. Ct. 1957).

Contrary to contention that attachment of lighting equipment to telephone utility's poles by town and its lighting district constituted an authorized de facto condemnation of an interest in real property because utility's special franchise to erect and maintain poles in public highways was an interest in real property, such franchise was not an interest in real property. New York Tel. Co. v North Hempstead, 86 Misc. 2d 487, 385 N.Y.S.2d 436, 1975 N.Y. Misc. LEXIS 3362 (N.Y. Sup. Ct. 1975), aff'd, 52 A.D.2d 934, 385 N.Y.S.2d 505, 1976 N.Y. App. Div. LEXIS 12804 (N.Y. App. Div. 2d Dep't 1976).

Developer of residential subdivision, who intended to dedicate roads and utilities within development to town on completion of construction, failed to show that special relationship existed between himself and town, and therefore town was entitled to summary judgment dismissing claim for 5-year delay resulting from developer's attempts to have plans and specifications comply with town's minimum specifications for dedication. Press v Lozier, Inc., 178 Misc. 2d 883, 684 N.Y.S.2d 407, 1998 N.Y. Misc. LEXIS 575 (N.Y. Sup. Ct. 1998).

A membership corporation with leave of the Supreme Court may convey its real property to a town without consideration. The acceptance thereof by the town board is not subject to referen-

dum. Town funds may be expended to keep such town property in repair even if it is encumbered with outstanding leases. 1947 Ops St Compt 156.

Town may acquire land for public purpose under a renewable permit, but may not finance it by the issuance of bonds. 1953 Ops St Compt File #6345.

Discussion relating to purchase of land for town office building and garage. 1957 Ops St Compt File #559.

Under subd. 6 of this section, a Town Board may acquire and pay for an option to purchase land. 1964 Ops St Compt #640.

Real property acquired for purposes of District governed by town board is to be acquired by town board in name of district. 1987 Op St Compt No. 87-69.

3. —By condemnation

Town's and lighting district's right of condemnation extends only to interests in real property and contemplates that acquisition of personal property will be accomplished by purchase or contract. New York Tel. Co. v North Hempstead, 41 N.Y.2d 691, 395 N.Y.S.2d 143, 363 N.E.2d 694, 1977 N.Y. LEXIS 2018 (N.Y. 1977), abrogated, Corsello v Verizon N.Y., Inc., 18 N.Y.3d 777, 944 N.Y.S.2d 732, 967 N.E.2d 1177, 2012 N.Y. LEXIS 583 (N.Y. 2012).

Town lacked power to close 200-foot section of active roadway to create site for resource recovery facility in absence of statutory mandate under Highway Law or other clear and express legislative authorization since (1) public highway cannot be appropriated for another public use without specific legislative authorization, (2) general grant of eminent domain extended in CLS Town § 64 does not empower town to acquire rights in property already devoted to another public use where acquisition will interfere with or destroy prior public use, and (3) CLS Town § 274, which empowers town to authorize closing off or abandonment of streets, requires compliance with both Town and Highway Laws. E & J Holding Corp. v Noto, 126 A.D.2d 641, 510 N.Y.S.2d 899, 1987 N.Y. App. Div. LEXIS 41774 (N.Y. App. Div. 2d Dep't 1987).

Court would annul determination by town board to acquire more property than was necessary for street improvements since property was not blighted area and proposal to construct houses to be "sold" to low-income elderly individuals failed to comply with state constitutional requirements (CLS NY Const Art XVIII § 10), which preclude towns from engaging in private business or enterprise other than building and operation of low "rent" dwelling houses for low-income persons. Russin v Union, 133 A.D.2d 1014, 521 N.Y.S.2d 160, 1987 N.Y. App. Div. LEXIS 52032 (N.Y. App. Div. 3d Dep't 1987).

Owners failed to establish that a town's determination to condemn a portion of their real property to provide expanded access to a recreational trail was without foundation and baseless, or that it was violative of any of the applicable statutory criteria because the town, through its town board, was statutorily authorized to acquire by eminent domain any land required for any public purpose, the record confirmed that the strip would continue in its existing, pre-acquisition condition and that its historical use as an access point to the recreational trail would remain unchanged, and, given the above, the town board's determination to render a negative declaration was not inadequate or otherwise in error. Matter of Johnson v Town of Caroga, 162 A.D.3d 1353, 79 N.Y.S.3d 368, 2018 N.Y. App. Div. LEXIS 4543 (N.Y. App. Div. 3d Dep't 2018).

A taking of property to provide access to land which a town planned to fill for safety reasons was a condemnation for a public purpose within the power of the town. De Matteis v Hempstead, 142 N.Y.S.2d 754, 207 Misc. 1026, 1955 N.Y. Misc. LEXIS 3536 (N.Y. Sup. Ct.), aff'd, 286 A.D. 1025, 145 N.Y.S.2d 256, 1955 N.Y. App. Div. LEXIS 5052 (N.Y. App. Div. 1955).

A municipality must acquire a lot by purchase or condemnation when a zoning ordinance bars substandard lot from any practical use. Long Island Land Research Bureau, Inc. v Young, 7 Misc. 2d 469, 159 N.Y.S.2d 414, 1957 N.Y. Misc. LEXIS 3720 (N.Y. Sup. Ct. 1957).

A town may condemn a school district high school building which is no longer needed or used for school district purposes. 1974 Ops St Compt File #415.

Notwithstanding that the cost of flood control measures for the protection of certain property would exceed the value thereof, a town may not condemn such property in order to preclude expenditures for flood protection. 1976 Ops St Compt File #219.

4. —By lease; proper

Sewer district lands, not required for the purposes of the district, may be leased to the town. 1947 Ops St Compt 462.

A town may sell a portion of its property to an incorporated fire company for the construction of a firehouse and subsequently lease space therein for town purposes. 1953 Op St Compt No. 53–6153.

A town board could, subject to a permissive referendum, convey property, acquired for the purpose of erecting a town garage but no longer necessary for that purpose, to a fire district for a fair and reasonable consideration. A town may lease space in a fire house for use as a town clerk's office. 1955 Ops St Compt File #7272.

A town may enter into a long term lease of lands for a public dump. 1957 Ops St Compt File #100.

A town may lease private property as a site for a town dump. While the town has no authority to agree to indemnify the lessor against tort liability, it may undertake to procure insurance to protect itself and the lessor against such contingencies. 1959 Ops St Compt File #74.

A town board is authorized to lease premises for use as a town hall where, the present hall lacks sanitary facilities, heating and lighting. However, a lease between the board and the Grange for the Grange hall was void where two members of the town board were members of the Grange. 1959 Ops St Compt File #517.

There is no prohibition against the lease, by a town, of premises for use as a town hall for a fixed term of ten years. 1965 Ops St Compt File #178.

A town may rent space in the home or other property of a town officer for use as that officer's town office. 1968 Ops St Compt File #442.

Under certain circumstances, it would be legal for the town to lease land for the construction of a post office building. 1972 Ops St Compt File #253.

A transaction whereby a not-for-profit corporation, without competitive bidding, constructs a public facility for use by a municipal corporation in the performance of its governmental functions and the municipal corporation acquires use of the facility under a lease agreement and has an option to purchase: (a) does not constitute indebtedness for purposes of the State Constitution and Local Finance Law if the lease agreement has an executory clause making the municipal corporation's obligation contingent on annual appropriations, although it is doubtful that a clause providing that, if the municipal corporation fails to appropriate money for the lease payments, the municipal corporation agrees not to purchase, lease or rent property to perform the same functions as the facility, would be enforceable; (b) constitutes a prohibited installment purchase contract if the total character of the transaction is that of a purchase rather than a lease; and (c) violates the competitive bidding requirements of General Municipal Law §§ 101, 103, if the total character of the transaction constitutes a contract for public work of the municipal corporation. 1991 Op St Compt No. 91-13.

Town board may enter into agreement for payment of reasonable rental to town officer who utilizes portion of his or her home as office in connection with performance of his or her official town duties. Town is authorized to lease office space from fire company. 1992 Op St Compt No. 92-16.

5. — —Improper

Town cannot pay rental on a building for the use thereof by the local unit of the National Guard, however a town does have authority to acquire property with any building thereon for the purpose of conveying the same to the state, with or without consideration, where the same is required for an armory, camp, range, base or any building, structure or other facility or purpose for the organized militia. 1957 Ops St Compt File #756.

A town may not lease privately-owned real property situated in another state for established of a dump. 1962 Ops St Compt #811.

A transaction whereby a not-for-profit corporation, without competitive bidding, constructs a public facility for use by a municipal corporation in the performance of its governmental functions and the municipal corporation acquires use of the facility under a lease agreement and has an option to purchase: (a) does not constitute indebtedness for purposes of the State Constitution and Local Finance Law if the lease agreement has an executory clause making the municipal corporation's obligation contingent on annual appropriations, although it is doubtful that a clause providing that, if the municipal corporation fails to appropriate money for the lease payments, the municipal corporation agrees not to purchase, lease or rent property to perform the same functions as the facility, would be enforceable; (b) constitutes a prohibited installment purchase contract if the total character of the transaction is that of a purchase rather than a lease; and (c) violates the competitive bidding requirements of General Municipal Law §§ 101, 103, if the total character of the transaction constitutes a contract for public work of the municipal corporation. 1991 Op St Compt No. 91-13.

6. —By purchase; proper

Owners' N.Y. C.P.L.R. art. 78 petition seeking to annul an authorization by a town board to purchase and remodel property to relocate the town hall was properly dismissed because, inter alia, the purchase and the remodeling of the building constituted a town purpose in context of N.Y. Const. art. VIII, § 2; further, an ordinary town purpose may have been planned and executed with reference to future needs. Matter of Potter v Town Bd. of Town of Aurora, 60 A.D.3d 1333, 875 N.Y.S.2d 414, 2009 N.Y. App. Div. LEXIS 2142 (N.Y. App. Div. 4th Dep't), app. dismissed, 12 N.Y.3d 882, 883 N.Y.S.2d 176, 910 N.E.2d 1006, 2009 N.Y. LEXIS 1868 (N.Y. 2009), app. denied, 13 N.Y.3d 707, 887 N.Y.S.2d 4, 915 N.E.2d 1182, 2009 N.Y. LEXIS 3820 (N.Y. 2009).

A town may purchase a gravel bed and cost thereof is general town charge and no referendum necessary. 1945 Ops St Compt 20.

Town board, on behalf of a sewer district, may acquire lands in an adjoining town and construct a disposal plant thereon. 1946 Ops St Compt 301.

A town may purchase a parcel of land for a site for a town hall and accept a quitclaim deed containing a clause providing for reverter in case the lands cease to be used for a town hall. 1953 Ops St Compt #6181.

Town of second class may purchase real property upon which is to be erected polling places. 1953 Ops St Compt File #6406.

The town may acquire land and carry liability insurance thereon, said land to be made available for the use of the general public in the conduct of baseball games, youth projects, Independence Day celebrations and other similar events. 1956 Ops St Compt File #8144.

Town cannot pay rental on a building for the use thereof by the local unit of the National Guard, however a town does have authority to acquire property with any building thereon for the purpose of conveying the same to the state, with or without consideration, where the same is required for an armory, camp, range, base or any building, structure or other facility or purpose for the organized militia. 1957 Ops St Compt File #756.

When a town needs additional space and no other practical alternative exists, it is probable that a town may purchase a vacant school building from a school district, and use only 50% of the space with the rest being leased for private purposes, if the town expects to need approximately 75% of the building within 15 to 20 years. Prior opinions are superseded to the extent they are inconsistent herewith. 1981 Op St compt File #81-155.

7. — —Improper

Town may not acquire building for town hall with restriction in the deed that a portion of the building must be maintained by the town for community hall purposes. Compliance with Art. 13 of General Municipal Law required if neighborhood recreation center is to be established. 1947 Ops St Compt 241.

In the absence of a contract under General Municipal Law, section 99-h, a town may not purchase real property to be used by private non-profit anti-poverty agencies. 1968 Ops St Compt File #693.

A town may not acquire real property for the purpose of establishing an industrial park and attracting industry to the town. A town may sell unneeded real property without attempting to obtain the highest possible price so long as the property is sold to the best advantage of the town. A deed executed by a town may contain a reversionary clause if this clause achieves a town purpose. 1969 Ops St Compt File #523.

The purchase of an option to buy a building by a town and village for the purpose of future assignment of such option to a private corporation would not be in furtherance of a proper town or village purpose and is, therefore, impermissible. 1974 Ops St Compt File #576.

8. —Joint acquisitions

A town and a village may not purchase a parcel of real property as tenants in common, for the establishment of a public dumping ground. 1955 Ops St Compt File #7616.

Village may not use proceeds of sale of bonds to defray part of cost of a project more expensive than that for which the bonds were authorized. Village and town may jointly acquire land. 1966 Ops St Compt File #683.

Town and fire district located therein may, under CLS Gen Mun Art 5-G, enter into municipal cooperation agreement to jointly acquire real property and construct building thereon for use as combined town hall and fire station; both town and fire district must comply with all statutory requirements applicable to individual undertaking and financing of such project. 1996 Op St Compt No. 96-19.

9. —Necessity of referendum

Purchase and maintenance of a public beach could only be done by the town board and then only upon approval of the qualified electors at an election. Knapp v Fasbender, 278 A.D. 970, 105 N.Y.S.2d 780, 1951 N.Y. App. Div. LEXIS 5404 (N.Y. App. Div. 1951).

A cause of action against a town for breach of contract does not accrue for purposes of the statute of limitations until the contractor has a legal right to demand payment. Thus, where a contract for engineering services specified that payment would be deferred until bonds were sold, the promise to pay was a conditional promise to be treated as a condition precedent to the accrual of the cause of action, and summary judgment for the town was inapporpriate where the record was unclear as to whether the defendant town ever sold any bonds. Laberge v Town of Inlet, 79 A.D.2d 1070, 436 N.Y.S.2d 98, 1981 N.Y. App. Div. LEXIS 9996 (N.Y. App. Div. 3d Dep't), app. dismissed, 54 N.Y.2d 602, 443 N.Y.S.2d 1025, 426 N.E.2d 754, 1981 N.Y. LEXIS 4345 (N.Y. 1981).

A town may purchase a gravel bed and cost thereof is general town charge and no referendum necessary. 1945 Ops St Compt 20.

A membership corporation with leave of the Supreme Court may convey its real property to a town without consideration. The acceptance thereof by the town board is not subject to referendum. Town funds may be expended to keep such town property in repair even if it is encumbered with outstanding leases. 1947 Ops St Compt 156.

The purchase by a town of real property to be used as a town hall and recreational park is subject to permissive referendum except in the specific instances discussed below. 1967 Ops St Compt File #1034.

A school district may convey unneeded real property to a town, with or without consideration, subject to the approval of the voters of the district. 1967 Ops St Compt File #1034.

The purchase, out of surplus funds, of land to expand a town cemetery is not subject to permissive or mandatory referendum in the town. 1968 Ops St Compt File #102.

10. Appropriations and expenditures, generally

A refuse and garbage collection system may not be set up under Town Law, § 221, unless it is on a town-wide basis. A town board may appropriate funds from the general fund for a survey of the practicability and cost of a town-wide refuse collection system. 1956 Ops St Compt File #8154.

Expenditures by the Trustees of the Freeholders and Commonalty of the Town of Southampton, New York, did not have to be approved by the Town Board or the Town Comptroller; this section did not transfer control over Freeholders Trust revenue to the Town Board or otherwise render Trust funds "public funds" under N.Y. Gen. Mun. Law § 10. Gessin v Throne-Holst, 134 A.D.3d 31, 20 N.Y.S.3d 367, 2015 N.Y. App. Div. LEXIS 6799 (N.Y. App. Div. 2d Dep't 2015), app. dismissed, 26 N.Y.3d 1094, 45 N.E.3d 613, 24 N.Y.S.3d 575, 2016 N.Y. LEXIS 35 (N.Y. 2016).

Taxpayers properly asserted claims against Town Trustees for misuse and waste of public funds since the Trustees were a public governmental agency and officers of the Town which were not financially independent from the Town and the Town Board, and were in the financial position of an administrative unit of the Town. Gessin v Throne-Holst, 979 N.Y.S.2d 776, 43 Misc. 3d 517, 2014 N.Y. Misc. LEXIS 518 (N.Y. Sup. Ct. 2014), rev'd, in part, dismissed, 134 A.D.3d 31, 20 N.Y.S.3d 367, 2015 N.Y. App. Div. LEXIS 6799 (N.Y. App. Div. 2d Dep't 2015).

11. —Proper, generally

Where by reason of a storm gravel has accumulated in a creek crossing a town highway thereby causing the flooding of private property, general town money may be expended for the removal of such flood menace. 1946 Ops St Compt 493.

A town board in a town of the second class may establish a shade tree fund under this section or Highway Law, § 153, and expend moneys therefrom for the protection of elm trees. 1953 Ops St Compt File #6187.

Town moneys may be used to replace and repair an "Honor Roll", if it acquires title thereto. No referendum is required. 1955 Ops St Compt File #7508.

A town may expend funds for a performance bond when that is made a condition to granting of a permit by the N.Y.S. Department of Transportation for construction upon a State highway. 1969 Ops St Compt File #354.

A town may pay rental for property leased for library purposes from a fund designated "mortgage payments", where such fund was actually created for the payment of rental. 1969 Ops St Compt File #584.

Town may permit elected official full-time use of town vehicle to insure his readily availability where he is subject to being called to perform official duties during other then regular hours, and further, town may enact local law superseding provisions of CLS Town Law § 27(1) to authorize full-time use of town vehicle as part of official's compensation. 1987 Op St Compt No. 87-25.

Town is authorized to adopt local law that establishes flat fee for annual subscription to copies of minutes of town board meetings and provides for mailing of copies of minutes to those who have paid fee; amount of fee must be reasonably related to town's reproduction and mailing costs, and provisions of subscription service does not obviate need to respond to individual requests, submitted under Freedom of Information Law, or copies of minutes. 1999 Op St Compt No. 99-8.

Although town is generally without authority to purchase gasoline for resale to private organizations, town may, as consideration under contract with nonprofit organization to provide bus transportation for town senior citizens, provide gasoline for bus owned by private organization and used to provide transportation services under contract, in lieu of cash consideration, as providing of gasoline would be in furtherance of proper town purpose of operating and maintaining town senior citizens program. Ops St Compt No. 89-30.

12. —Improper, generally

Town may not donate public money to American Legion Post to be expended for celebration in honor of those who served in armed forces; but town may appropriate and expend town money for observance of Armistice or Memorial Day. 1945 Ops St Compt 458.

A town board may not contribute town money to a veterans' organization for the purchase and erection of a building for such organization. 1947 Ops St Compt 124.

Towns and villages may not spend money to defray expenses of meeting of a county historical society. 1947 Ops St Compt 148-149.

The town board may not appropriate moneys to be paid directly to the trustees of a free association library in the absence of a contract. 1956 Ops St Compt File #8024.

There is no authority for a town to contribute funds to the local Civil Air Patrol unit in order to aid in defraying the expenses of such organization. 1960 Ops St Compt File #503.

Although a town may not contribute money to the local chamber of commerce to assist in paying for holiday decorations for the town business area it may, by itself, or pursuant to contract with an organization equipped for the work pay all or part of the cost of holiday decorations to be used on business area streets. 1963 Ops St Compt #800.

A town may not pay for a private fire alarm system to be placed in the central schools in the town. 1967 Ops St Compt File #538.

The interest in contract is not prohibited where a member of a town conservation advisory council is a stockholder and an officer of a corporation which has contracted to perform alterations on a town building. 1970 Ops St Compt File #51.

13. — —Recreational activities

A town board has no authority to expend town funds in maintaining a public park or playground owned by a trust organized under Article 7 of the General Municipal Law. Levert v Fasbender, 119 N.Y.S.2d 41, 1953 N.Y. Misc. LEXIS 1498 (N.Y. Sup. Ct. 1953).

A town may not expend moneys to stock a lake with legal sized fish for the purpose of creating a "fish pond" from which such fish may be taken, if such lake is not acquired by the town as park property. 1955 Ops St Compt File #7482.

Town funds may not be used in aid of a private youth recreation project. 1957 Ops St Compt File #57-330.

A town may not underwrite part of the expenses of a baseball team established in the name of the town where such team is a part of and in furtherance of youth welfare and recreation activities. 1960 Ops St Compt File #424.

A Town Board has no authority to donate town funds for support of a "little league" baseball club. 1961 Ops St Compt #387.

A town may not contribute public monies to support a private symphony orchestra, but it may contract for free band concerts to the extent provided in subd. 20 of this section. 1963 Ops St Compt #37.

A town may not pay for hospitalization and medical bills incurred by children by reason of having been injured while participating in a town recreation program. 1963 Ops St Compt #773.

A town may not lease, to a boat club, town property acquired for and dedicated to park and public recreational purposes. A town may not contribute its money to a recreational program, for both youth and adults, sponsored by the local Rotary Club and operated jointly with the town. 1964 Ops St Compt File #898.

14. Band concerts

A town may not contribute to the cost of band concerts to be held outside the town. 1955 Ops St Compt File #7527.

A town may not contribute public monies to support a private symphony orchestra, but it may contract for free band concerts to the extent provided in subd. 20 of this section. 1963 Ops St Compt #37.

15. Conveyance of real property, generally

Article 78 proceeding, alleging that town's proposed sale of 88-acre parcel located in environmentally-sensitive Long Island Pine Barrens did not conform to requirements of CLS ECL Art 8, was improperly dismissed for lack of standing as (1) individual petitioners established sufficient potential injury on grounds that they were experiencing problem with rust in their drinking water and county water authority had performed tests on subject parcel to determine whether wells thereon might serve as replacement source of water, and (2) individual petitioners were members of petitioner organization and thus their standing was attributable to organization and its executive director. Long Island Pine Barrens Soc'y, Inc. v Town of Islip, 261 A.D.2d 474, 690 N.Y.S.2d 95, 1999 N.Y. App. Div. LEXIS 4726 (N.Y. App. Div. 2d Dep't 1999).

Town of Islip was not required to comply with this section before leasing land under the waters of Great South Bay for planting and cultivating shellfish, since land was proprietory in nature and did not change its character because the patent was granted by the state rather than the king or a colonial governor. Bevelander v Islip, 17 Misc. 2d 819, 185 N.Y.S.2d 508, 1959 N.Y. Misc. LEXIS 4221 (N.Y. Sup. Ct. 1959).

Conveyance by town of property designated as parkland to private developer for development of low income housing did not violate CLS Pub Hous § 150 on basis that approval of housing project was in violation of town's master plan since approval of housing project, which coincided with change in zoning classification from one-acre residential to garden apartment use, was part of well considered plan for development of community. Conveyance by town of property designated as parkland to "turnkey" private developer for development of low income housing did not render CLS Pub Hous § 124 inapplicable since CLS Pub Hous § 220 requires liberal construction to effectuate purposes of chapter. Alienation by town of property designated as parkland for use and development as low-income housing was lawful pursuant to CLS Pub Hous § 124, notwithstanding lack of approval by state legislature, since statute applied to transfer of "any" governmental property so long as requirements of statute were satisfied. Grayson v Huntington, 144 Misc. 2d 1064, 545 N.Y.S.2d 633, 1989 N.Y. Misc. LEXIS 562 (N.Y. Sup. Ct. 1989), aff'd, 160 A.D.2d 835, 554 N.Y.S.2d 269, 1990 N.Y. App. Div. LEXIS 4479 (N.Y. App. Div. 2d Dep't 1990).

Conviction of defrauding the government, N.Y. Penal Law § 195.20, was supported by sufficient evidence and was not against the weight of the evidence under circumstances in which defendant, a town supervisor, improperly acquired a right-of-way over town property, for access to his own property; among other things, even if the conveyance of the right-of-way failed to comply with the applicable procedural requirements of N.Y. Town Law § 64, such failure would, at most, have rendered the conveyance voidable. Inasmuch as there was no record evidence of any action taken to rescind the transaction, there was legally sufficient evidence to establish that defendant obtained the right-of-way. People v Haskell, 68 A.D.3d 1358, 890 N.Y.S.2d 718, 2009 N.Y. App. Div. LEXIS 9129 (N.Y. App. Div. 3d Dep't 2009).

Real property conveyed to a town for the public use is impressed with a public trust and may not be conveyed without specific legislative authorization. 1965 Ops St Compt File #103.

A town, which is the gratuitous grantee of land from a school district, should not, under the circumstances, convey the same land to a fire district for a use not contemplated in the original conveyance. 1967 Ops St Compt File #1005.

A town has no authority to transfer town cemetery property to a corporation organized under the Religious Corporations Law. 1968 Op St Compt No. 68–333.

16. —By deed

A town which owned the waters and bed of a bay could convey filled-in land to an individual for his own private purposes, and the town could also convey to the same grantee, not only that filled-in land, but land actually under water. Riviera Ass'n v North Hempstead, 52 Misc. 2d 575, 276 N.Y.S.2d 249, 1967 N.Y. Misc. LEXIS 1890 (N.Y. Sup. Ct. 1967).

A town may sell a portion of its property to an incorporated fire company for the construction of a firehouse and subsequently lease space therein for town purposes. 1953 Op St Compt No. 53–6153.

A restriction in a deed to a town requiring the land "to be used only for a public park" renders the title inalienable and the town may not deed the land to a village for a similar or other public purpose without express legislative authority. 1964 Ops St Compt File #968.

A reversionary clause in such deed is not wholly necessary to create a condition subsequent upon breach of which the grantor may exercise a right of re-entry. The grantor may not release the public use restriction, but may waive or release the condition subsequent and his right of reentry. A town board resolution authorizing a conveyance of land creates an enforceable contract to convey, notwithstanding the absence of a deed, provided the land is not otherwise inalienable. Inalienability of public park land may be removed only by legislative enactment. 1964 Ops St Compt File #968.

A town may not acquire real property for the purpose of establishing an industrial park and attracting industry to the town. A town may sell unneeded real property without attempting to obtain the highest possible price so long as the property is sold to the best advantage of the town. A deed executed by a town may contain a reversionary clause if this clause achieves a town purpose. 1969 Ops St Compt File #523.

Town board, on its own motion without necessity of petition, may submit resolution for sale of real property to voter approval. 1996 Op St Compt No. 96-11.

17. —By lease; proper

Town board may lease available space in town garage to incorporated fire company. It may not, however, give use of such space to fire company. 1945 Ops St Compt 342.

Discussion re validity of a lease granting membership corporation privilege of occupying certain town-owned land in return for erection of a building thereon at the expense of such corporation. 1955 Ops St Compt File #7227.

A town board, subject to permissive referendum, may convey real property to a fire district for a fair and reasonable consideration. It may lease its land for the erection of a fire hall thereon but it may not permit the gratuitous use of its land for that purpose. 1956 Ops St Compt File #8018.

18. — —Improper

Master license agreement between town and private corporation (essentially homeowner's organization), using public parkland for private summer cottages, was invalid; neither CLS Town § 64 nor CLS Mun H R § 10 permit town to convert dedicated public parkland into revenue-generating enterprise by leasing public parkland to private individuals. Johnson v Town of Brookhaven, 230 A.D.2d 774, 646 N.Y.S.2d 180, 1996 N.Y. App. Div. LEXIS 8370 (N.Y. App. Div. 2d Dep't 1996).

Where a town building is used for town purposes and there is no present intention to dispose of it, it is improper to lease all or part of such building to a select parents' organization for a private purpose. 1960 Ops St Compt File #613.

A town may not acquire by gift a building which is larger than the town needs and lease the unneeded portion back to the grantor unless the town reasonably anticipates that it will require and use all space in the building for town purposes within the forseeable future. 1962 Ops St Compt #94.

A town may not lease park land to a membership corporation whose aim it is to construct a swimming pool and turn back the same, fully paid for, to the town after a period of years. 1964 Ops St Compt #856.

A town may not lease, to a boat club, town property acquired for and dedicated to park and public recreational purposes. A town may not contribute its money to a recreational program, for both youth and adults, sponsored by the local Rotary Club and operated jointly with the town. 1964 Ops St Compt File #898.

A town may not allow gratuitous use of a town garage by fire district fire equipment, nor lease same for such if space therein is needed for town purposes. 1967 Ops St Compt File #233.

A portion of land acquired or developed as an historic site by a town which has received State aid for that purpose pursuant to Conservation Law, Article 1, Title VIII, cannot be leased to the Atmospheric Sciences Research Center of the New York State University of Albany. 1968 Ops St Compt File #436.

19. —Competitive bidding; private sale

Town board was entitled, at its option, to cancel public sale of land before actual delivery of deed when it learned that considerably higher price for property would be paid by another prospective buyer. Orelli v Ambro, 41 N.Y.2d 952, 394 N.Y.S.2d 636, 363 N.E.2d 360, 1977 N.Y. LEXIS 2015 (N.Y. 1977).

Town board may sell town garage which has outlived its usefulness without advertising for bids. 1946 Ops St Compt 296.

A town may sell excess soil excavated from its refuse disposal pits without competitive bidding or adopting a resolution subject to a permissive referendum. 1958 Ops St Compt File #974.

Real property owned by a town and no longer necessary for town purposes may be sold at private sale. The town may pay real estate broker's commissions on the sale of town-owned realty. 1960 Ops St Compt File #815.

A Town Board, in selling real estate no longer needed for town purposes, may hire a qualified realty appraiser to assist in determining its value and may make the sale either by sealed bidding or auction, with any public sale to be conducted by a town officer designated by the Board, and the manner and type of public notice of sale to be given is discretionary with the Board. 1962 Ops St Compt #156.

20. —Consideration, generally

A town board may convey real property to a fire district for a fair and reasonable consideration. The resolution authorizing such conveyance is subject to permissive referendum. 1954 Ops St Compt File #6673.

A town board could, subject to a permissive referendum, convey property, acquired for the purpose of erecting a town garage but no longer necessary for that purpose, to a fire district for a fair and reasonable consideration. A town may lease space in a fire house for use as a town clerk's office. 1955 Ops St Compt File #7272.

A town board, subject to permissive referendum, may convey real property to a fire district for a fair and reasonable consideration. It may lease its land for the erection of a fire hall thereon but it may not permit the gratuitous use of its land for that purpose. 1956 Ops St Compt File #8018.

A town may not convey town-owned real property to a fire district fire department or company for a consideration less than actual value. 1963 Ops St Compt #137.

Property owned by the town may be sold at private sale and the consideration may be the transfer of other real property to the town provided the property transferred to the town is an adequate consideration. The sale of the town's real property is subject to a permissive referendum. 1967 Ops St Compt File #667.

A town may not lease land to a village, for a village sewage facility, for less than a fair and adequate consideration. 1967 Ops St Compt File #755.

A town may not convey property to a private industrial firm without referendum or for less than adequate consideration. 1969 Ops St Compt File #180.

A town may not sell or lease its real property unless it is no longer required for its own purposes and is not held for public use. In those instances where a sale or lease is proper, fair and adequate consideration must be given. 1972 Ops St Compt File #24.

21. — —Nominal consideration

A town may not, for a nominal consideration, sell or lease real property to a fire district. 1960 Ops St Compt File #435.

A town may not lease town land to a private entity for a nominal consideration; where such real property has been acquired for park purposes, it may not, without specific legislative authority, lease the same under any circumstances. 1960 Ops St Compt File #545.

A town may not convey town cemetery property to a cemetery corporation organized under the Membership Corporations Law for a nominal consideration. But where the consideration for such a transfer is to be other than cash, the resolution of the town board to convey the cemetery property to a cemetery corporation is subject to a permissive referendum and should state the actual consideration for the transfer. 1968 Ops St Compt File # 999.

Neither a town nor a fire district may sell real property to the other for a nominal consideration. 1970 Ops St Compt File #47.

22. —Property not devoted to public use

Provided town has absolute fee to property deeded to it for highway with no reversionary clause in event of failure to use same for highway purpose, town may sell that portion in excess of amount necessary for highway purposes to private individual. 1947 Ops St Compt 133.

A town board could, subject to a permissive referendum, convey property, acquired for the purpose of erecting a town garage but no longer necessary for that purpose, to a fire district for a fair and reasonable consideration. A town may lease space in a fire house for use as a town clerk's office. 1955 Ops St Compt File #7272.

A town may lease real property no longer required for its own use for a term of 99 years. The resolution is subject to permissive referendum. 1955 Ops St Compt File #7423.

A town may not lease town land to a private entity for a nominal consideration; where such real property has been acquired for park purposes, it may not, without specific legislative authority, lease the same under any circumstances. 1960 Ops St Compt File #545.

Real property owned by a town and no longer necessary for town purposes may be sold at private sale. The town may pay real estate broker's commissions on the sale of town-owned realty. 1960 Ops St Compt File #815.

A Town Board may convey, for adequate consideration, property acquired for a proposed stadium but no longer suitable for that purpose or needed for any other town purpose. 1962 Ops St Compt #156.

Real property owned by a town and dedicated to public use may not be sold to the state without express authorization from the Legislature. 1963 Ops St Compt #127.

A Town Board lacks authority to lease land to an adjoining landowner, if the town needs use of such land. 1963 Ops St Compt #635.

A town may not sell or lease its real property unless it is no longer required for its own purposes and is not held for public use. In those instances where a sale or lease is proper, fair and adequate consideration must be given. 1972 Ops St Compt File #24.

A town board's general power to convey real property does not extend to the conveyance of property held for public use. 1973 Ops St Compt File #984.

23. —Referendum, generally

Subdivision (2) of this section mandatorily requires submission to the voters of a resolution for conveyance of real property in the name of the town, if a petition therefor is filed, and the Town Board cannot refuse to submit the proposition to referendum because of conduct of certain of its officers in furtherance of the conveyance or transaction. A Town Board lacks power, without ratification by referendum, to convey real property in the name of the town, and, with respect to a causeway constructed over a pond owned by the town by defendants, the Town Board is not estopped from asserting claim against defendants, in the absence of a referendum, by the fact that defendants have acted upon oral permission of certain town officials. Guilderland v Swanson, 41 Misc. 2d 398, 245 N.Y.S.2d 696, 1963 N.Y. Misc. LEXIS 1242 (N.Y. Sup. Ct. 1963).

Permissive referendum provided for in CLS Town §§ 64(2) and 90 was not required before town could convey property designated as parkland to private developer for development of low income housing since CLS Pub Hous § 124 provided that such conveyance was lawful notwithstanding any other provisions of law; latter statute was special statute which took precedence over former general statutes. Grayson v Huntington, 144 Misc. 2d 1064, 545 N.Y.S.2d 633, 1989 N.Y. Misc. LEXIS 562 (N.Y. Sup. Ct. 1989), aff'd, 160 A.D.2d 835, 554 N.Y.S.2d 269, 1990 N.Y. App. Div. LEXIS 4479 (N.Y. App. Div. 2d Dep't 1990).

A town board may convey real property to a fire district for a fair and reasonable consideration. The resolution authorizing such conveyance is subject to permissive referendum. 1954 Ops St Compt File #6673.

Property owned by the town may be sold at private sale and the consideration may be the transfer of other real property to the town provided the property transferred to the town is an adequate consideration. The sale of the town's real property is subject to a permissive referendum. 1967 Ops St Compt File #667.

A town may not convey property to a private industrial firm without referendum or for less than adequate consideration. 1969 Ops St Compt File #180.

Where a town of the second class sells a parcel of land worth less than $100 to a town justice: (1) A permissive referendum is required without regard to the value of the land; (b) The town justice would not have a prohibited interest in the transaction. 1974 Ops St Compt File #477.

Town may sell historic building under procedural requirements of CLS Gen Mun § 119-dd(4), and such sale is not subject to permissive referendum requirements of CLS Town § 64(2). 1998 Op St Compt No. 98-15.

24. — —Lease of public land

Where no referendum was held as required by subd. (2) of § 64 of this law, and there was no public hearing as required by § 198 subd. (12), legality of a lease entered into by a town with a shellfish corporation was subject to attack by a taxpayer under § 51 of the General Municipal Law without regard to time limitations under § 48 subd. (2) of the Civil Practice Act. Bevelander v Islip, 10 A.D.2d 170, 199 N.Y.S.2d 561, 1960 N.Y. App. Div. LEXIS 10917 (N.Y. App. Div. 2d Dep't 1960).

Resolution of town board authorizing sale of town real estate or resolution of town board authorizing leasing town real estate is subject to permissive referendum. 1946 Ops St Compt 120.

A town may lease real property no longer required for its own use for a term of 99 years. The resolution is subject to permissive referendum. 1955 Ops St Compt File #7423.

A town board, subject to permissive referendum, may convey real property to a fire district for a fair and reasonable consideration. Also, it may lease its land for the erection of a fire hall thereon but it may not permit the gratuitous use of its land for that purpose. 1956 Ops St Compt File #8018.

25. — —Sale of town cemetery

A town may not convey town cemetery property to a cemetery corporation organized under the Membership Corporations Law for a nominal consideration. But where the consideration for such a transfer is to be other than cash, the resolution of the town board to convey the cemetery property to a cemetery corporation is subject to a permissive referendum and should state the actual consideration for the transfer. 1968 Ops St Compt File # 999.

26. — —Sale of unneeded land

A town may sell excess soil excavated from its refuse disposal pits without competitive bidding or adopting a resolution subject to a permissive referendum. 1958 Ops St Compt File #974.

A Town Board, in selling real estate no longer needed for town purposes, may hire a qualified realty appraiser to assist in determining its value and may make the sale either by sealed bidding or auction, with any public sale to be conducted by a town officer designated by the Board, and the manner and type of public notice of sale to be given is discretionary with the Board. 1962 Ops St Compt #156.

Sale of abandoned town property is subject to permissive referendum. 1964 Ops St Compt #212.

A town may convey unneeded real property to a Board of Cooperative Educational Services for a valuable consideration upon the adoption of a resolution subject to permissive referendum. 1967 Ops St Compt File #303.

A resolution authorizing the sale of unneeded town land is subject to permissive referendum. 1967 Ops St Compt File #966.

Real property owned by a town and no longer necessary for town purposes may be conveyed to private persons for an adequate consideration, but the resolution authorizing such conveyance is subject to permissive referendum. 1975 Ops St Compt File #641.

A town may convey a parcel of land, which was dedicated to it by a subdivision developer for the purpose of road construction but was never so used, by resolution subject to a permissive referendum if the property is not needed for any other town purpose and if the town receives fair and adequate consideration. 1981 Op St Comp File #81-380.

27. — —Transfer of less than complete ownership

Town board's resolution transferring operation of landfill to town's solid waste management authority was not invalid on ground that it was adopted without permissive referendum or prior public notice and hearing as required under CLS Town §§ 62(2), 81, 90, 91, and 221, since no expenditure in connection with project was being financed by taxes levied for fiscal year in which such expenditure was to be made. Also, town board's resolution transferring operation of landfill to town's solid waste management authority was not invalid on ground, inter alia, that it was adopted without permissive referendum since Authority took nonexclusive possession of land in question as coordinate municipal body, was not obligated to pay rent, and was unable to make capital improvements or expenditures on landfill site without prior written authorization from town. New York Public Interest Research Group, Inc. v North Hempstead, 153 A.D.2d 743, 545 N.Y.S.2d 308, 1989 N.Y. App. Div. LEXIS 11226 (N.Y. App. Div. 2d Dep't 1989).

28. Depositary, generally

A town board must designate the depository for tax money. Neither the tax collector nor the supervisor may do so alone. 1959 Ops St Compt File #35.

The town supervisor determines the amounts of town moneys to be deposited in or with each bank or trust company where more than one such institution has been designated by the town board as official depositories. 1964 Ops St Compt File #606.

A town supervisor may not deposit town funds in a nondesignated depository. The town board may authorize the supervisor to temporarily invest town funds, not needed for immediate expenditure, in certificates of deposit or special time deposit accounts in banks or trust companies. Such banks or trust companies may be banks other than those designated as official depositories. 1967 Ops St Compt File #399.

29. —Interest of town official in depositary

A bank may be designated as depositary for town funds notwithstanding the fact that an officer of a town is also an officer, director or stockholder of such bank. 1947 Ops St Compt 372.

A member of a town board may be a director of a bank that is the official depository for town funds. 1959 Ops St Compt File #40.

Town funds may be deposited in a bank wherein one of the members of the town board or other town officers are interested, but a town may not borrow or engage in any other financial transactions with such bank except as provided in Local Finance Law § 60.10. 1959 Ops St Compt File #764.

A town may designate a bank as depository of town funds, where the town supervisor is an assistant cashier of such bank. 1972 Ops St Compt File #9.

Municipalities and school districts are authorized to accept surety bonds as security for deposits from their designated depositary banks but are not authorized to accept surety bonds as security for investments. 1982 St Compt File #82-222.

30. —Surety bond or other security

Town board may require depository to furnish surety bond or to deposit government bonds as security for town moneys deposited therein; town board is not required to do this. 1946 Ops St Compt 525.

A single segregation of collateral by a bank is sufficient to secure the current demand accounts of both a town receiver of taxes and assessments and the supervisor, although the accounts are in different branches of the same bank, in a case where the town has required collateral in the first instance. 1968 Ops St Compt File #967.

Town may legally invest in bonds and notes of New York State Medical Care Facilities Finance Agency; however it may not accept bonds and notes of the Agency as collateral for its deposits or investments. 1986 Op St Comp No. 86-81.

31. Easements

The conveyance of an easement over town property is subject to a permissive referendum. The acquisition of an easement by a town does not require a referendum. Where town lands do not afford sufficient area for a driveway to a town garage and adjoining landowner also lacks sufficient land for a driveway upon his property the town and the adjoining landowner may grant reciprocal easements for the purpose of creating a joint driveway upon the lands of both parties. 1954 Ops St Compt File #6958.

A town may grant an easement for the use of town property if the use of that property is not needed by the town and if fair and adequate compensation is received in exchange for such an easement. The granting of such an easement is subject to a permissive referendum. 1968 Ops St Compt File #881.

Town's proposed conveyance of a conservation easement to a not-for-profit corporation was not an illegal gift of public property to a private entity under N.Y. Const. art. VII, § 1; the town had the power, subject to referendum, to make the conveyance under N.Y. Town Law § 64(2), and the land's preservation as an undeveloped park and recreational facility was adequate consideration because it provided a clear public benefit in perpetuity. Matter of La Barbera v Town of Woodstock, 29 A.D.3d 1054, 814 N.Y.S.2d 376, 2006 N.Y. App. Div. LEXIS 5881 (N.Y. App. Div. 3d Dep't), app. dismissed, 7 N.Y.3d 844, 823 N.Y.S.2d 773, 857 N.E.2d 68, 2006 N.Y. LEXIS 2583 (N.Y. 2006).

Town's proposed conveyance of a conservation easement to a not-for-profit corporation did not improperly bind successive town boards because the town was statutorily authorized to enter into a perpetual conservation easement with a not-for-profit organization under N.Y. Envtl. Conserv. Law § 49-035(1), (3)(a), and municipal bodies had the power to make permanent conveyances of real property under N.Y. Town Law § 64(2). Matter of La Barbera v Town of Woodstock, 29 A.D.3d 1054, 814 N.Y.S.2d 376, 2006 N.Y. App. Div. LEXIS 5881 (N.Y. App. Div. 3d Dep't), app. dismissed, 7 N.Y.3d 844, 823 N.Y.S.2d 773, 857 N.E.2d 68, 2006 N.Y. LEXIS 2583 (N.Y. 2006).

32. Franchises, generally

Town board's resolution transferring operation of landfill to town's solid waste management authority was not invalid on ground, inter alia, that it was adopted without prior public notice and hearing since landfill agreement resulting from resolution was exempt from notice and hearing requirements of CLS Town § 64(7) by virtue of Laws of 1983, ch. 544, which expressly authorized town board to grant concession of type authorized by agreement. New York Public Interest Research Group, Inc. v North Hempstead, 153 A.D.2d 743, 545 N.Y.S.2d 308, 1989 N.Y. App. Div. LEXIS 11226 (N.Y. App. Div. 2d Dep't 1989).

Contention of public service commission, that town boards were without authority, under this section, to grant privilege to use streets and highways, is untenable. Penn-York Natural Gas Corp. v Maltbie, 299 N.Y.S. 1004, 164 Misc. 569, 1937 N.Y. Misc. LEXIS 1895 (N.Y. Sup. Ct. 1937).

There is no authority for a town to engage in business of selling television antenna service; town board may, however, grant franchise to private organization to engage in such business in the town. 1955 Ops St Compt File #7231.

The town board may not waive, in whole or in part, accrued franchise fees nor reduce such fees "nunc pro tunc" for prior years. 1955 Ops St Compt File #7361.

Granting of a franchise to a transportation corporation to place electric lines across a town road requires a public hearing, but is not an easement and is not subject to permissive referendum. 1962 Ops St Compt #566.

33. —CATV

In municipalities other than New York City, cable franchises are granted by the town board, village board of trustees, or the common council of the city, as required by N.Y. Town Law § 64(7), N.Y. Village Law § 4-412(6), N.Y. Gen. City Law §§ 20(10) and 23(2)(b), and N.Y. Second Class Cities Law § 37, respectively; in New York City, however, the City Charter requires that the New York City Franchise and Concession Review Committee (FCRC) approve franchises and explicitly bars any participation by the Council after the Council passes an authorizing resolution. Thus, the FCRC was the body with authority to approve cable franchise renewals and the New York Public Service Commission's regulation did not require or authorize the additional approval of the Council. Council of N.Y. v PSC, 99 N.Y.2d 64, 751 N.Y.S.2d 822, 781 N.E.2d 886, 2002 N.Y. LEXIS 3371 (N.Y. 2002).

A town or a village may not prescribe the rates to be charged by a television cable service company to which it grants a franchise. 1965 Ops St Compt File #531.

A town may grant a franchise to a CATV closed circuit television installation whereby such town would receive a percentage of the revenues from the operation of said installation. 1967 Ops St Compt File #800.

A town may grant a franchise for the operation of a community antenna television service by the adoption of a resolution where the franchise contains no regulatory provisions the violation of which would result in a penalty being imposed. 1969 Ops St Compt File #282.

Although a town board lacks the authority to grant an exclusive franchise to any person, firm or corporation providing cable television services, it may grant a franchise to a cable television operator for ten years. 1969 Ops St Compt File #445.

34. —Exclusive franchises

Although a town board lacks the authority to grant an exclusive franchise to any person, firm or corporation providing cable television services, it may grant a franchise to a cable television operator for ten years. 1969 Ops St Compt File #445.

A town board may not adopt an ordinance granting an exclusive license to one garbage collector to do business within the township. 1969 Ops St Compt File #791.

35. Funds; investment of

A town supervisor may not deposit town funds in a nondesignated depository. The town board may authorize the supervisor to temporarily invest town funds, not needed for immediate expenditure, in certificates of deposit or special time deposit accounts in banks or trust companies. Such banks or trust companies may be banks other than those designated as official depositories. 1967 Ops St Compt File #399.

Notwithstanding the charitable purpose for which a nonprofit corporation is organized, a town may not invest in securities issued by such corporation because the transaction would constitute an illegal investment of municipal funds and would also violate Article VIII, section 1, of the New York State Constitution. 1967 Ops St Compt File #840.

Town board manages and controls finances of town, but may authorize its chief fiscal officer or officer having custody of town monies to temporarily invest monies not needed for immediate expenditure. Ops St Compt 89-35.

36. —Petty cash fund

A band, hired to play at a dance held as part of a town recreation program, which requires payment at the end of the evening, cannot be paid from the receipts of the dance, but may be paid from a petty cash fund if one is established for the recreation commission. 1967 Ops St Compt File #756.

Fees of jurors serving in justice court cannot be paid prior to audit unless town board establishes a petty cash fund for that purpose. 1967 Ops St Compt File #774.

A town may establish petty cash funds for town officers, and heads of offices and departments. Such funds may be created for the heads of bureaus and divisions within departments. 1976 Ops St Compt File #392.

37. Gifts to town

A water district may be partially financed by gifts of money made to town for that purpose. 1947 Ops St Compt 552.

Gifts of money to a town become town moneys when accepted by the town, although they must be used for the purpose for which they were given. 1953 Ops St Compt File #6310.

Gifts of private funds may be accepted for town youth recreation projects. 1957 Ops St Compt File #57-330.

A legacy bequeathed to a town board in trust, to construct and thereafter maintain a town hall, does not in reality constitute a trust, but rather an absolute gift, and the town board must treat the residue of such building fund in the same manner as other town funds, subject to the testamentary limitation on its use, and may not deposit same in a savings and loan association. 1964 Ops St Compt File #1005.

Gifts devised or bequeathed to a town "in trust" do not constitute a true trust and are in reality, municipal funds. However, they may be used only for the purposes for which they were given. They must be invested as municipal funds pursuant to the statutes applicable thereto. 1967 Op St Compt No. 67–217.

CLS Town L § 64(a), which empowers town to accept gifts of real and personal property for any public use, is sufficiently broad to allow town to accept, on behalf of town sewer district, dedication of privately owned sewerlines within boundaries of district. 1986 Op St Compt No. 86-52.

38. —Conditional gifts

Gifts under subdivision 8 of this section may be made to a town upon terms and conditions but the use thereof must be public. Town board's power to extend park districts could not be abrogated by covenants or conditions contained in a dedication deed by a property association to the town restricting use of donated park property to property owners and residents of the association and park district at the time of the dedication. Atlantic Beach Property Owners' Ass'n v Hempstead, 3 N.Y.2d 434, 165 N.Y.S.2d 737, 144 N.E.2d 409, 1957 N.Y. LEXIS 903 (N.Y.), reh'g denied, 3 N.Y.2d 942, 1957 N.Y. LEXIS 1528 (N.Y. 1957).

A town may not accept a gift of land on the condition that it will waive permit fees required by a town ordinance. 1958 Ops St Compt File #992.

A town board, acting on behalf of a sewer district may not accept a gift of water to facilitate the treatment of sewage upon the condition that the sewer district never be extended (Town L Articles 12, 12-A) or upon the condition that disposal plant operations be limited to sewage originating within the original district (Town L § 64, subd 8). However, the board could accept such a gift where the term thereof was limited to so long as a disposal plant should remain in operation or for so long as such plant did not treat outside sewage (Town L §§ 198, subd 1, 202, subd 5). 1959 Ops St Compt File #18.

A town may not accept as a gift an incinerator plant to be erected on town property upon condition that the town give exclusive garbage pickup and salvage rights to the donor. 1961 Ops St Compt #408.

A town may accept a gift of real property consisting of waterfront beaches and containing restrictive covenants limiting use thereof to residents of the town and their guests. 1962 Ops St Compt #743.

39. Historic places

A town may not, by local law or otherwise, authorize the purchase of buildings and sites of historic value within the town, renovate them, and then either sell or rent them to parties who agree to the designation of such buildings and sites as historic places. 1974 Ops St Compt File #979.

40. Indemnity insurance

The town board of a town may insure against the liability imposed by section 207-a of the General Municipal Law arising from injuries to paid town firemen. 1947 Ops St Compt 358.

Cost of liability insurance for highway defects should be paid from General Fund. 1953 Ops St Compt File #6391.

The town may acquire land and carry liability insurance thereon, said land to be made available for the use of the general public in the conduct of baseball games, youth projects, Independence Day celebrations and other similar events. 1956 Ops St Compt File #8144.

A town may lease private property as a site for a town dump. While the town has no authority to agree to indemnify the lessor against tort liability, it may undertake to procure insurance to protect itself and the lessor against such contingencies. 1959 Ops St Compt File #74.

A town lacks authority to procure and pay for blanket liability and collision insurance covering fire trucks located in fire districts within the town, in behalf of such districts, and to charge the cost back to the fire district. 1961 Ops St Compt #200.

A town may not purchase liability insurance to cover officers or employees from liability for libel, slander, false arrest or false imprisonment. 1968 Ops St Compt File #2.

41. Lighting of highways and bridges

The cost of lights installed upon a highway located in a lighting district by the town board as a general town charge may be paid from general town funds. 1946 Ops St Compt 274.

A town may erect a light on a public road, paying the installation cost, and enter into an agreement with a private religious corporation, benefited thereby, to pay the electricity charges, but there is no authority for the town to place the religious corporation on the lighting district tax roll for cost of the light. 1961 Ops St Compt File #295.

A town may install safety lights in a lighting district at expense of the whole town. 1962 Ops St Compt #557.

Where certain lighting is to be installed by the town to light a portion of highway, an agreement may be entered into by the town and a school district for jointly lighting the highway and the exterior of the school building. 1968 Ops St Compt File #742.

A town may provide lighting for State highway bridges in any part of the town, including villages. 1973 Ops St Compt File #721.

42. Management, custody and control of town property, generally

In town's action to permanently enjoin private riparian owner from dredging public underwater lands, court improperly held that riparian owner had right to dredge for commercial purposes to extent reasonably necessary to maintain same access to navigability as it originally attained by "wharfing out"; issue was not whether riparian owner was entitled to preserve its original level of access, but whether dredging was necessary to assure reasonable access. Town of Oyster Bay v Commander Oil Corp., 96 N.Y.2d 566, 734 N.Y.S.2d 108, 759 N.E.2d 1233, 2001 N.Y. LEXIS 3265 (N.Y. 2001).

Because no property was conveyed or leased, and the neighbor affirmed that she had no ownership interest in the parcel, the owners failed to state a cause of action alleging a violation of N.Y. Town Law § 64(2) based on the neighbor's allegedly improperly use of the town's real estate parcel. Aiardo v Town of E. Greenbush, 64 A.D.3d 849, 881 N.Y.S.2d 698, 2009 N.Y. App. Div. LEXIS 5333 (N.Y. App. Div. 3d Dep't 2009).

Two towns may erect a memorial building. 1945 Ops St Compt 433.

Machinery may be purchased by town for purposes of this subdivision. 1946 Ops St Compt 199.

43. —Abandoned or unclaimed property

Surplus, obsolete town office machinery which remained unsold after the town conducted a public sale and which has no appreciable market value may be discarded, destroyed or donated to not-for-profit organizations. 1982 St Compt File #82-232.

44. —Gifts, generally

A municipality may make a gift of real property to another municipality, in the absence of other legal impediments to the transfer. 1964 Ops St Compt File #968.

A town may make a gift of used, unneeded and obsolete voting machines to a student organization, where they have no market value. 1972 Ops St Compt File #69.

A town may accept a gift of a copyright on a literary work where it is determined that the acceptance of such gift will have some value to the town. 1976 Ops St Compt File #586.

Town may not make gratuitous payment to private individuals who voluntarily assist town in coordinating volunteers from not-for-profit organizations in providing services in connection with town's recycling program; however, town may (in accordance with applicable procurement procedures) contract with individuals for provision of such coordination services in connection with operation of town's recycling center and pay individuals consideration for such services pursuant to contract. 2002 Op St Compt No. 02-9.

45. — —Gratuitous use

Town board may lease available space in town garage to incorporated fire company. It may not, however, give use of such space to fire company. 1945 Ops St Compt 342.

Town may sell or lease town garage to fire district. It may not give use of town garage to fire district. 1946 Ops St Compt 286.

A town board, subject to permissive referendum, may convey real property to a fire district for a fair and reasonable consideration. It may lease its land for the erection of a fire hall thereon but it may not permit the gratuitous use of its land for that purpose. 1956 Ops St Compt File #8018.

A town may permit the gratuitous use of a portion of town property, under circumstances not amounting to a lease, by a

department of the State of New York. 1964 Ops St Compt File #864.

A town may not permit the gratuitous use of space in the town hall for the maintenance of county offices. 1965 Ops St Compt File #431.

A town may not allow gratuitous use of a town garage by fire district fire equipment, nor lease same for such if space therein is needed for town purposes. 1967 Ops St Compt File #233.

While a town or village may not provide its gasoline for use by volunteer firemen in their private cars, such municipality may assist volunteer firemen by providing a place to store the volunteer firemen's emergency allocation of gasoline. 1974 Ops St Compt File #181.

46. —Highway equipment

Town board may accept gift of money to be used for construction of a sewer system. 1953 Ops St Compt File #6038.

Town superintendent of highways may dispose of fill which has no value upon private property with the consent of the owner. However, if the material has market value, it should be disposed of in the manner most advantageous to the town. 1960 Ops St Compt File #11.

A town board may not impose a covenant on certain previously acquired town properties whereby the town board agrees not to utilize such land for highway purposes. 1975 Ops St Compt File #554.

Town board has authority to make inquiry into allegations of misuse of town highway equipment, and following such inquiry, where appropriate, town board may recommend to highway superintendent that disciplinary action be taken against highway department employees and that superintendent reconsider his appointment of deputy superintendent. Ops St Compt No. 89-34.

47. —Licenses and concessions

A town board may grant a license for a definite period for the use of portions of the park property by concessionaires. Concession may be granted only after a public hearing held pursuant to this section. 1954 Ops St Compt File #6853.

A town may grant a license or concession to a corporation to operate skeet, trap and rifle facilities in a town park. 1967 Ops St Compt File #306.

A town may grant a license or concession to a private person to conduct tennis lessons in a town park for which fees will be charged. 1967 Ops St Compt File #478.

A town may not lease a building on park property to a private person for the operation of a restaurant therein, but may grant a revocable license for that purpose. 1967 Ops St Compt File #492.

48. —Town dump

Although a town may contract with a private individual for use of his lands as a town dumping ground for a fixed sum per year, and such land lies without the town and county, the town may not permit non-residents to use such dumping ground. 1963 Ops St Compt #573.

Establishment of a town dump is subject to approval by referendum unless the land has been purchased for such purpose and is financed pursuant to the Local Finance Law. 1964 Ops St Compt #835.

A town board may assign to the town superintendent the duties of supervising the maintenance of the town dump without providing additional compensation therefor. 1971 Ops St Compt File #1011.

49. —Town hall

Town may construct a town hall and may establish a capital reserve fund in connection with the financing thereof. 1965 Ops St Compt File #88.

A town may not construct or acquire a building for town hall purposes, which is larger than needed in the foreseeable future, for the purpose of renting portions thereof to private individuals or organizations. 1967 Ops St Compt File #867.

No State aid or low interest loans are available for the construction of a new town hall. 1968 Ops St Compt File #108.

A town may not construct a building to be used as a town hall larger than it will need in the foreseeable future for the sole purpose of providing space and facilities for a free library association. 1969 Ops St Compt File #985.

50. —Town offices, generally

A receiver of taxes and assessments is without authority to use town building without consent of town board. Such receiver of taxes and assessments may, with authorization of the town board, lease office space. No authority to charge receiver of taxes office rent for use of office space in town buildings. 1946 Ops St Compt 672.

Except as to receivers of and collectors of taxes, no office hours are prescribed for town officers. It would appear that the town board may authorize the closing of town offices on Saturday during the summer months. 1947 Ops St Compt 168.

While a town may lease space in a privately-owned office building for certain town offices, it may not spend town money to remodel or alter the leased space so as to provide separate offices for certain officials. 1962 Ops St Compt #264.

A justice of the peace may not share in the use of the office facilities of another town officer unless authorized by the town board. 1968 Ops St Compt File #15.

Neither the construction of, nor the acquisition of the land for, a building to house the town police department may be considered as a part-town expense, although the village in that town is exempt from taxation for the maintenance and operation of a town police department. 1968 Ops St Compt File #781.

A town may maintain and plow snow from the driveway of the town clerk's home where the clerk's office is in her home and the driveway is necessary for access to the office. 1968 Ops St Compt File #1049.

A town may not include space within a proposed town building for the purpose of leasing such space to the U.S. Postal Service upon the completion of the building. 1972 Ops St Compt File #253.

A town may not erect a building on town park lands where a portion of such building would be used for municipal purposes such as town offices and the town hall. 1975 Ops St Compt File #877.

51. — —Location

A town board may not compel town officer or official to use rooms provided by town board, but may compel town records and other property to be kept in a place designated by town board. 1945 Ops St Compt 470.

The Town Board of a town of the first class may designate location of the office of receiver of taxes and assessments. 1961 Ops St Compt #814.

If the town board so determines, the office of the town clerk may be located in a building where intoxicants are licensed to be sold. 1969 Ops St Compt File #818.

52. —Town park, generally

Town may not make payments in lieu of taxes to village for services rendered to town park located in village. 1954 Ops St Compt File #6771.

The town board on its own motion may submit to referendum a resolution for the issuance of bonds maturing in more than five years. In the referendum, paper ballots may be used. No person shall be entitled to vote unless he is an elector of the town and the owner of property assessed upon the last preceding town assessment roll. An elector of the town need not necessarily be a registered or enrolled voter. A public park so established shall be administered by the town board. Town board may accept gift for park purposes, absolutely or in trust. Town board may establish capital reserve fund to finance cost of park. If the land to be acquired is less than fifty acres, a down payment from current funds will be necessary, since the term of the proposed bonds exceeds five years. 1966 Ops St Compt File #938.

A town may not rent the use of park property, including a pavilion with restaurant facilities, to private persons or groups for bakes and other outdoor recreational purposes. 1968 Ops St Compt File #409.

Decision as to location of town clerk's office and accompanying town public records is for determination by the town board. Proposed receptacle of town public records is subject to inspection

and approval by the Division of Archives and History of the Department of Education. 1968 Ops St Compt File #1000.

However, it may permit such organization to use park property, provided such use is not to the exclusion of the public, but such use may not involve on-premises advertising. 1969 Ops St Compt File #493.

Persons may be prosecuted for entry upon town park lands during hours when they are closed to the public, either by the adoption of an ordinance with an appropriate penalty clause, or pursuant to certain sections of the Penal Law. 1969 Ops St Compt File #539.

Where a town has constructed a park in a village which is situate within the boundaries of the town: (1) Village traffic regulations may not be enforced within the confines of the town park; (2) The village may not restrict hours of use of the town park, except in the exercise of its police powers; (3) The village police department must provide police protection within the confines of the park; (4) Except for necessary police power regulations, the village may not restrict the use of the town park; (5) The village is not responsible for liability insurance coverage on park property; (6) The village may not install parking meters on roadways within the park. 1976 Ops St Compt File #6.

53. — —Playground; recreational facility

Resolution of town board, which barred use of town airport by sport parachuting organization until it obtained liability insurance naming town as additional insured, was not preempted by Federal Aviation Administration (FAA) requirement that airport be made available to all aeronautical users, including parachutists, on nondiscriminatory basis, since FAA also explicitly permitted municipal proprietors of airports to impose reasonable limitations on parachute jumping, including liability insurance. Malone Parachute Club v Town of Malone, 197 A.D.2d 120, 610 N.Y.S.2d 686, 1994 N.Y. App. Div. LEXIS 4134 (N.Y. App. Div. 3d Dep't 1994).

A municipality operating a playground or recreational program is liable for the negligence of its officers, agents and employees. 1957 Ops St Compt File #57-330.

The establishment of skeet, trap and rifle shooting facilities in a town park and recreational area is a proper recreational use. 1967 Ops St Compt File #306.

A town may not establish a special rate for the use of its golf facilities by clergymen and policemen. 1967 Ops St Compt File #902.

Without specific legislative authority, a town may not sell or lease park property to a little-league organization. 1969 Ops St Compt File #493.

54. —Townline road

Failure of towns to maintain townline road which is sole means of access to certain real property does not relieve the owner of such property of his obligation to pay real property taxes thereon, and the property owner can acquire no personal rights in town line road by maintaining the road by himself. 1968 Ops St Compt File #1022.

55. Medical matters; facilities and services

A town may discontinue operation of a town general hospital. 1955 Ops St Compt File #7505.

The cost of providing visiting nurse services pursuant to subd. 19-a is a general town charge. 1955 Ops St Compt File #7619.

A town which does not have a licensed physician practicing therein may establish the office of town physician and secure a qualified incumbent, but prior authorization from the Legislature is necessary before the town can construct a medical building or clinic. 1964 Ops St Compt #181.

Two adjacent towns may agree to join in the operation of a medical center already established in a third adjoining town but such an agreement must provide for actual joint operation and control and not merely a contribution of funds. 1968 Ops St Compt File #57.

56. —Town physician

On application to continue injunction restraining town board from paying salary for services of town physician, it appears that board, pursuant to former § 141-b, established office of town physician, and that physician so appointed established residence within town and has since continued to reside and practice his profession there. Since statute authorizes appointment of town physician only when no resident physician lives within town, appointment of another physician to office was invalid and injunction should be continued. Edwards v Lake Pleasant, 242 N.Y.S. 635, 137 Misc. 78, 1930 N.Y. Misc. LEXIS 1338 (N.Y. Sup. Ct.), aff'd, 231 A.D. 770, 247 N.Y.S. 354 (N.Y. App. Div. 1930).

Subdivision 21 of this section does not authorize the joint employment of a physician by a town and a village. 1960 Ops St Compt File #939.

A town which does not have a licensed physician practicing therein may establish the office of town physician and secure a qualified incumbent, but prior authorization from the Legislature is necessary before the town can construct a medical building or clinic. 1964 Ops St Compt #181.

A town may engage the services of an employment agency to obtain a doctor for its residents. 1974 Ops St Compt File #39.

57. Official newspapers, generally

Subdivision 11 of this section is permissive and not mandatory. Cowan v Burns, 110 N.Y.S.2d 671, 1952 N.Y. Misc. LEXIS 3004 (N.Y. Sup. Ct. 1952).

Only one newspaper may be designated as the official newspaper of a town. Where an official newspaper has been designated in a town, particular sections of the Town Law requiring publication in the official paper can be satisfied only by publication in the paper so designated. However, where a particular section does not specify publication in the official paper, the newspaper designated for such publication need only comply with the requirement specified in such section. 1954 Ops St Compt File #6717.

Where there is no newspaper which can qualify for the publication of official notices of a town, the town board may adopt a local law providing alternative qualifications for designation. 1968 Ops St Compt File #242.

Minor irregularities in the schedule of publication does not disqualify a newspaper from being designated the town official newspaper. Where a newspaper meets the requirements for the official newspaper, it must be utilized over non-eligible newspapers for publication of notices required to be published in the town official newspaper, even though it has not been so designated. 1968 Ops St Compt File #868.

A town board resolution designating an official town paper continues in full force and effect until it is repealed. 1969 Ops St Compt File #268.

Free distribution of a newspaper to boost subscriptions and newsstand sales does not disqualify it from designation as an official town newspaper or from designation as a newspaper for the publication of fire district notices. 1972 Ops St Compt File #340.

Town board is not required to designate official newspaper, but if it elects to do so board must follow order of selection in CLS Town § 64(11). 1992 Op St Compt No. 92-24.

58. —Location outside of town

If a town board elects to designate an official newspaper in a town in which no paper is published, first choice must be given to a newspaper published in the county and having general circulation in the town before looking to a paper published in a county which adjoins the town. 1955 Ops St Compt File #7126.

While a newspaper published in the town need not be designated as its official newspaper, despite the fact that it is the only newspaper published in the town and is eligible for such designation, if the designation is not made to that newspaper it may not be made to another published elsewhere and notices required by law to be published in the "official newspaper" can only be published in the local paper. 1962 Ops St Compt #693.

A town board may designate as the town's official newspaper, a paper published in a city or village in an adjoining county and having a circulation in the town, under certain circumstances. 1973 Ops St Compt File #742.

59. —"Newspaper" defined

A town without a newspaper cannot designate a so-called "throw-away" or "pennysaver", reputedly mailed to every resi-

dent, as the official newspaper for the publication of town notices. 1968 Ops St Compt File #30.

Publication must be "newspaper" as defined in CLS Gen Const § 60 and must satisfy conditions precedent set forth in CLS Pub O § 70-a before it can be designated as "official newspaper" of town pursuant to CLS Town § 64(11); place of publication of newspaper is question of fact. 1988 Op St Compt No 88-28.

Publication which does not satisfy threshold requirements of CLS Gen Const § 60 and CLS Pub O § 70-a, because it is mailed as third class matter and does not have paid subscription, may not be designated as official newspaper. 1992 Op St Compt No. 92-24.

60. —"Published" defined

Newspaper is "published" in a town for purposes of this section where it is entered as second class mail matter in the town, has its address there, and is sold and distributed in the town in the first instance even though it is printed outside the town. 1954 Ops St Compt File #6564.

61. —Use of other than official newspaper

Only one newspaper may be designated as the official newspaper of a town. Where an official newspaper has been designated in a town, particular sections of the Town Law requiring publication in the official paper can be satisfied only by publication in the paper so designated. However, where a particular section does not specify publication in the official paper, the newspaper designated for such publication need only comply with the requirement specified in such section. 1954 Ops St Compt File #6717.

Where a particular section of the Town Law does not specify publication in the official newspaper, publication need only comply with the requirements of such section. Where no official paper has been designated, notices required to be published in the official newspaper must be published in a paper which could be so designated. 1955 Ops St Compt File #7517.

A town is not restricted to the use of its official newspaper in publishing all public notices; however, the town may not pay for such advertisements unless placed in a newspaper published in the town for one year and entered in the post office as second class matter. 1968 Ops St Compt File #306.

Minor irregularities in the schedule of publication does not disqualify a newspaper from being designated the town official newspaper. Where a newspaper meets the requirements for the official newspaper, it must be utilized over noneligible newspapers for publication of notices required to be published in the town official newspaper, even though it has not been so designated. 1968 Ops St Compt File #868.

62. —Miscellaneous

Failure to publish ordinance in newspaper located in county and having circulation in town under the requirement of Town L § 133, before designating a newspaper which does not meet the statutory requirement except as a lower priority under § 64, subd 11 of the Town Law renders an ordinance invalid even though such ordinance was published in a newspaper of an adjoining county having some circulation in the town and which has been designated as the official newspaper. Almond v Penfold, 58 Misc. 2d 780, 296 N.Y.S.2d 619, 1969 N.Y. Misc. LEXIS 1824 (N.Y. Sup. Ct. 1969).

Report of supervisor pursuant to § 29, subd. 10 and § 286 of the Highway Law may not be condensed for publication. Such reports may be combined. The annual report of supervisor pursuant to § 29 subd. 10 of Town Law must be published in official paper. By resolution such report may also be published in a county other than the county in which the town is located. 1945 Ops St Compt 252.

Notice of hearing for the establishment of a lighting district should be republished in the official town newspaper when its initial publication was not so published. 1963 Ops St Compt #113.

Advertising and publishing fees for legal notices may be a town-wide or part-town charge, depending upon the nature of the publication. 1967 Ops St Compt File #838.

A notice of a resolution calling for the sale of town realty must be published in the official paper of the town. 1967 Ops St Compt File #962.

63. Patriotic holidays, generally

Town board may annually appropriate $200 for observance of Memorial or Armistice Day. 1945 Ops St Compt 456.

Town may not donate public money to American Legion Post to be expended for celebration in honor of those who served in armed forces; but town may appropriate and expend town money for observance of Armistice or Memorial Day. 1945 Ops St Compt 458.

In a town of the first class or in a town having 5,000 or more inhabitants, as described in subdivision 12 of section 64 of the Town Law, two separate appropriations of $200 each may not be made by the town board for the observance of Memorial and Armistice Days. 1946 Ops St Compt 62.

Where there are three American Legion Posts in a town, lump sum payments may not be made by a supervisor to each of such posts of the proportion allocated of the sum appropriated for the observance of Memorial Day. 1946 Ops St Compt 93.

The $200 limitation for appropriations for Memorial Day and Armistice Day may be increased, subject to permissive referendum, to an amount not to exceed ¼ of one mill on each dollar of assessed valuation of the town as shown by the latest assessment roll. 1946 Ops St Compt 188.

In a town of the second class the amount appropriated for the proper observance of Memorial Day may be paid by the supervisor for several veterans' organizations within the town on the concurrent resolution of the post commissioners and quartermasters to allocate the proportion of the sum appropriated over which each post is to supervise the expenditures. 1946 Ops St Compt 371.

The item for Memorial Day observance and Armistice Day observance may be increased to the maximum amount set out in section 64, subd. 12, from the contingent fund, from surplus moneys and from unexpended balances. 1947 Ops St Compt 76.

Where town failed to provide in its budget for Memorial Day observance, contingent funds may be used therefor. American Legion post conducting such observance may pay necessary expenses in first instance and be reimbursed by town upon presentation of vouchers. 1953 Ops St Compt File #6099.

The limitation imposed by subdivisions 12 and 13 of this section is on the amount of the appropriation, not the amount actually paid out during a year. Claim incurred in 1954 may be paid in 1955 with moneys in an unexpended balance of an appropriation from which the claim originally could have been paid, where such balance has not been reappropriated or otherwise committed by the town board. 1955 Ops St Compt File #7068.

Where a town appropriates funds to defray expense of observance of certain holidays by veterans' organizations, the funds should be allocated among the various posts by concurrent determination. The board may appropriate not more than $200 for each post located within the town, but funds so appropriated must be used solely for rental and maintenance costs. 1960 Ops St Compt File #476.

A town supervisor may pay a claim submitted by a veterans' post for reimbursement of expenses for patriotic observance, if the Town Board has made an appropriation therefor. 1962 Ops St Compt #317.

Where a veterans' organization located in a town moves to an adjoining town, the town from which it moved may, if no other veterans' organization is located in the town, appropriate funds for the organization, up to $500 annually, for the celebration of certain holidays if at least three residents of the town belong to the organization. The town may also appropriate up to $50 annually for the organization for the cost of rent and maintenance of its meeting hall if at least five town residents are members of the post. 1981 Op St Comp File #81-399.

64. —Lodging for members of patriotic organizations

Where sum of $75 is placed in annual town budget to be expended toward rent of rooms for American Legion Post located in town, town may not pay $150 for such purpose unless additional moneys are legally transferred and appropriated to such item. 1946 Ops St Compt 119.

Rental for rooms of Marine Corps League may be provided from contingent or surplus funds or by budget note, when no item in budget. 1946 Ops St Compt 200.

A town may, in its discretion, appropriate moneys to maintain meeting room for American Legion Post. 1947 Ops St Compt 137.

Town is authorized to appropriate and pay $200 toward cost of rental or maintenance of rooms by American Legion Post when a holding corporation of the legion is owner and to which holding corporation post pays rental for such rooms. 1947 Ops St Compt 334.

The town board, in its discretion, may appropriate funds for the maintenance of American Legion meeting rooms where such rooms are owned by the post through a holding company. 1954 Ops St Compt File #6831.

The limitation imposed by subdivisions 12 and 13 of this section is on the amount of the appropriation, not the amount actually paid out during a year. Claim incurred in 1954 may be paid in 1955 with moneys in an unexpended balance of an appropriation from which the claim originally could have been paid, where such balance has not been reappropriated or otherwise committed by the town board. 1955 Ops St Compt File #7068.

An American Legion post which has had its charter revoked is not eligible to receive the monetary allowance authorized for patriotic organizations. 1969 Ops St Compt File #329.

65. Postings additional to signboards

Statutory requirements of notice by publication and posting for the submission of propositions are mandatory, and actual notice or substantial equivalents will not be acceptable as a substitute unless there has been in fact some posting and publication to satisfy the statute, while statutory requirements to make elections effective, convenient, or more efficient are generally treated as directory only, with respect to which substantive equivalences will be acceptable. Vote approving proposition to change town board from a body elected at large into one of representatives elected by districts was nullified on basis of improper submission where there was no attempt of any kind at posting or publication of proposition as required by Town Law § 82, and Town Law § 64, subd 14-a, despite widespread publicity of the proposition. Fact that special proceeding pursuant to Election Law § 330 could not be used to set aside vote on proposition did not deprive court of jurisdiction to nullify vote on proposition which failed to comply with posting or publication requirements of Town Law § 82, and § 64, subd 14-a, where lower court opinion had recited that action to determine validity of submission was consolidated into an action for declaratory judgment. D'Addario v McNab, 32 N.Y.2d 84, 343 N.Y.S.2d 124, 295 N.E.2d 792, 1973 N.Y. LEXIS 1403 (N.Y. 1973).

66. Publicity, generally

A town board of a town of the second class may by resolution establish a publicity fund and appropriate $500 annually for the purposes thereof subject to permissive referendum. 1947 Ops St Compt 457.

Town board by resolution may establish publicity fund and appropriate up to $3,000 annually therefor, and annual appropriation may be increased to amount of not more than $10,000 by resolution subject to permissive referendum, and to amount in excess of $10,000 by resolution subject to mandatory referendum; towns may expend publicity fund moneys for purpose of contracting with local chamber of commerce for publicity services. 1992 Op St Compt No. 92-33.

67. —Payments for publicity, generally

Under subdivision 14 of this section a town has statutory powers to use a publicity fund for the benefit of the town at large by erecting a sign at a fork in a highway advising travelers that motels and restaurants are to be found on the road leading through the town. Bischoff v East Hampton, 47 Misc. 2d 615, 263 N.Y.S.2d 61, 1965 N.Y. Misc. LEXIS 1526 (N.Y. Sup. Ct. 1965).

A town may not contribute moneys from its publicity fund to a local chamber of commerce. 1955 Ops St Compt File #7614.

A town may disburse from its publicity fund the necessary and legitimate expenses to urge the United States Golf Association to designate the town as a place for holding a National Public Links Tournament. However, Article VIII § 1 of the New York State Constitution would make it an improper and illegal use of a town's publicity fund to pay the expenses of the United States Golf Association while a golf tournament is in progress. 1959 Ops St Compt File #691.

A town may not contribute money from its publicity fund to help pay the publicity expenses of a volunteer fire department's field days. 1960 Ops St Compt File #339.

A town may expend moneys from its publicity fund for the purpose of securing the designation of the town as the place for an association's annual meeting. 1960 Ops St Compt File #680.

A town may not purchase advertising in a volunteer fire company's program for a fire association convention where the town has already been designated as the site of the convention. 1968 Ops St Compt File #927.

Contract for publicity and promotional services involving development and implementation of marketing strategies would fall within professional services exception to competitive bidding; such services, however, must be procured in accordance with municipality's procurement polices and procedures. 1992 Op St Compt No. 92-33.

Town on behalf of park district established by L 1928 h 477, as amended, may expend up to $50,000 annually for park district promotional purposes, and no referendum under CLS Town § 64(14)(a) is required; further, town may not adopt local law increasing maximum amount that may be expended on behalf of park district for purposes of promoting district. 1992 Op St Compt No. 92-33.

68. — —For Christmas decorations

Publicity fund moneys may be used for Christmas decoration of streets in a business area of the town. 1953 Ops St Compt #6474.

A town may appropriate public moneys to defray the cost of Christmas decorations on streets in a business area of the town as a publicity fund purpose. 1954 Ops St Compt File #6952.

A town lacks authority to donate funds to a village for the celebration of its sesquicentennial. However, where a town has established a publicity fund such fund may be expended for town activities commemorative of a village sesquicentennial. 1958 Ops St Compt File #917.

Subdivision (14) of this section prohibits a town from giving away to the county historical observation committee. However, the town may appropriate funds for town activities in a celebration of New York's Year of History. The town board is not prohibited from being guided by the suggestions of the county historical observance committee as to the precise purposes for which such appropriations may be expended. 1959 Ops St Compt File #662.

A town board may pay all or part of the cost of Christmas tree decorations to be used on streets of an incorporated village within the township, pursuant to § 64(14) of the Town Law. 1960 Ops St Compt File #342.

69. — —For historical celebrations

A town and a village within the town may expend funds jointly to celebrate an historical commemoration. Control of municipal funds appropriated for an historical commemoration may not be turned over to private citizens for administering the program. 1969 Ops St Compt File #1023.

70. Street names, numbers and signs

A town may purchase street signs involving an expenditure of $5,500 without advertising for or receiving bids. 1947 Ops St Compt 513.

There is no requirement in law that individual home owners or addressees be notified of a change in the numbering system used on certain streets in the town. The town board may cause a brief notice of any such change to be published in the official newspaper. 1955 Ops St Compt File #7562.

When a street name change is made pursuant to section 64(9) of the Town Law, the town clerk is required to send only a notice of such fact to the county clerk. The county clerk is required to file such notice but may not charge a fee for doing so. 1969 Ops St Compt File #428.

71. Town contracts, generally

Creation of an obligation against a town, by way of contract, cannot be founded upon omission of action by the town officials, but must be the result of an affirmative determination to create

the obligation in the form and manner provided by statute. New York Tel. Co. v North Hempstead, 41 N.Y.2d 691, 395 N.Y.S.2d 143, 363 N.E.2d 694, 1977 N.Y. LEXIS 2018 (N.Y. 1977), abrogated, Corsello v Verizon N.Y., Inc., 18 N.Y.3d 777, 944 N.Y.S.2d 732, 967 N.E.2d 1177, 2012 N.Y. LEXIS 583 (N.Y. 2012).

Where legislature provides that valid contracts may be made only by specified officers or boards and in specified manner, no implied contract to pay for benefits furnished by person under an agreement which is invalid, because it fails to comply with statutory restrictions and inhibitions can create an obligation or liability of the city. New York Tel. Co. v North Hempstead, 41 N.Y.2d 691, 395 N.Y.S.2d 143, 363 N.E.2d 694, 1977 N.Y. LEXIS 2018 (N.Y. 1977), abrogated, Corsello v Verizon N.Y., Inc., 18 N.Y.3d 777, 944 N.Y.S.2d 732, 967 N.E.2d 1177, 2012 N.Y. LEXIS 583 (N.Y. 2012).

Unsuccessful bidder on town contract for provision of garbage and recyclable services could not defeat contract on basis that contract term of 5 years exceeded 2-year term of town board, and violated principle that town board could not bind hands of its successors, since (1) contract provided that it was for no more than 5 years unless otherwise terminated and that town could terminate contract on 30 days' notice if deemed in best interest of town, and (2) parties to contract agreed that provision gave town authority to terminate contract at any time. Ramapo Carting Corp. v Reisman, 192 A.D.2d 922, 596 N.Y.S.2d 602, 1993 N.Y. App. Div. LEXIS 4023 (N.Y. App. Div. 3d Dep't 1993).

Compliance with subdivision 6 of this section is generally a condition precedent to a valid town contract. Soundview Woods, Inc. v Mamaroneck, 14 Misc. 2d 866, 178 N.Y.S.2d 800, 1958 N.Y. Misc. LEXIS 2771 (N.Y. Sup. Ct. 1958), aff'd, 9 A.D.2d 789, 193 N.Y.S.2d 1021, 1959 N.Y. App. Div. LEXIS 5904 (N.Y. App. Div. 2d Dep't 1959).

Defendant's summary judgment motion as to a town's legal malpractice action was denied, because there was a triable issue of fact as to whether defendant committed malpractice by failing to raise a defense in an underlying action that a consent order was invalid because the town board had not approved the order as required by N.Y. Town Law § 64(6). Town of N. Hempstead v Winston & Strawn LLP, 234 N.Y.L.J. 115, 2005 N.Y. Misc. LEXIS 3553 (N.Y. Sup. Ct. Dec. 15, 2005), rev'd, 28 A.D.3d 746, 814 N.Y.S.2d 237, 2006 N.Y. App. Div. LEXIS 4759 (N.Y. App. Div. 2d Dep't 2006).

Plaintiff's amended complaint failed to state a claim on which relief could be granted for breach of contract or equitable relief because it failed to allege plausibly that a subsequent amendment to a concession agreement (SACA), of which plaintiff claimed to be a third-party beneficiary, was approved by the Town Board through a resolution as required by this statute, and hence did not plausibly allege the existence of a valid and enforceable contract. PHL Variable Ins. Co. v Town of Oyster Bay, 929 F.3d 79, 2019 U.S. App. LEXIS 20263 (2d Cir. N.Y. 2019).

Plaintiffs did not have an actionable claim against a town for an alleged breach of contract because plaintiffs could not show the existence of a written contract with the town. Merrick Gables Ass'n v Town of Hempstead, 691 F. Supp. 2d 355, 2010 U.S. Dist. LEXIS 21469 (E.D.N.Y. 2010).

A contract for library services may exceed one year. 1956 Ops St Compt File #8024.

A town may enter into a contract with a local chamber of commerce to furnish publicity services for the town, but the contract must be in writing, detail services to be rendered, provide reasonable compensation therefor, and no part of such consideration may be based on any form of aid or assistance to a commercial or industrial enterprise as an inducement to locate in the area. 1962 Ops St Compt #210.

A town may contract with a local development corporation for preparation and distribution of brochures pertaining to industrial development in the town. 1964 Ops St Compt #289.

A town cannot contract with a cultural group, operating within the town, for publicity services. 1967 Ops St Compt File #659.

The awarding of a contract by a town board is an improper act where the services of a professional engineer or land survey or are not employed in the preparation of plans and specifications for the public work which involves professional engineering and the cost of the work exceeds $5,000,00. 1968 Ops St Compt File #45.

Town may by local law delegate to town supervisor power to renew certain contracts. 1987 Op St Compt No. 87-43.

72. —Competitive bidding; private sales

It was not improper for town to award contract to specific contractor, despite technical noncompliance with bid specifications, where there was no showing that irregularities in bid gave contractor substantial advantage unavailable to other bidders, and it was in town's best interests to waive irregularities because contractor's bid was considerably lower than cost of current contract. Willets Point Contracting Corp. v Town Bd. of Oyster Bay, 141 A.D.2d 735, 529 N.Y.S.2d 592, 1988 N.Y. App. Div. LEXIS 7038 (N.Y. App. Div. 2d Dep't), app. denied, 72 N.Y.2d 810, 534 N.Y.S.2d 938, 531 N.E.2d 658, 1988 N.Y. LEXIS 2932 (N.Y. 1988).

Town board had authority to reject all bids for 5-year contract for collection of residential solid waste and recyclables in 35 bid areas and to re-advertise for new bids, based on finding that it was in town's best interest to have multiple solid waste carters in order to foster competition and that it was essential to restrict number of areas for which one company could bid. Son Mar Carting v Heil, 159 Misc. 2d 200, 603 N.Y.S.2d 379, 1993 N.Y. Misc. LEXIS 435 (N.Y. Sup. Ct. 1993).

A town board may sell personal property at private sale without receiving bids therefor. 1947 Ops St Compt 511.

A town may purchase street signs involving an expenditure of $5,500 without advertising for or receiving bids. 1947 Ops St Compt 513.

In view of the power of a town to establish and equip parks under subd. 4 of § 220 of the Town Law, and to manage and control them under § 64 of that law, including the power to let contracts under subd. 6 of the latter section, a town may hire machinery and operators therefor from a private contractor at a reasonable hourly or daily rate for clearing and grading land in a town park, and may do so without competitive bidding. 1961 Ops St Compt File #278.

73. —Firefighting; fireworks

Fire protection contract between town and fire company may provide for payment at beginning of contract year. 1987 Op St Compt No. 87-50.

Town contract with private organization to conduct town's fire prevention program could provide for use of town-owned equipment by private organization in connection with conduct of program; however, program and town property used in connection therewith must remain under supervision and control of town, such that contract with private organization should, at minimum, describe program and manner in which it is conducted, and set forth private organization's responsibility for loss or damage to town property. Ops St Compt 88-41.

74. —Highways, driveways and the like

A contract between a town and a county for the removal of ice and snow from county roads may include a "hold harmless" provision for the benefit of the county. 1970 Ops St Compt File #9.

Except in towns which have established office of director of purchasing pursuant to CLS Town Law § 41-a, town highway superintendent has authority to award contracts for purchase of materials and supplies for repair and improvement of highways and bridges and for control of snow and ice without prior board approval; award of contracts for purchase of highway equipment is made by superintendant subject to board approval, except where board has authorized superintendent to purchase equipment up to specified dollar amount without its prior approval; where town board has provided that construction or improvement of highway or bridge be done under contract, award of such contract is made by highway superintendent. 1987 Op St Compt No. 87-42.

Town may enter into agreement with owner of parking lot pursuant to which town would lease portion of lot for town parking purposes and, in consideration therefor, would agree to plow snow on portion of property not used for town parking if snow plowing is primarily in furtherance of proper town purpose, and value of services to owner, plus any other consideration

provided by town, is commensurate with value of benefit received by town under lease. 1992 Op St Compt No. 92-42.

75. —Housing

Town had power to execute memorandum of understanding with landlords whereby town agreed not to adopt Emergency Tenant Protection Act of 1974 and landlords agreed to follow stipulated rental guidelines and certain specifically enumerated terms regarding lease renewals, since memorandum was adopted in recognition of scarcity of affordable housing, and sought to promote public welfare; town is authorized to execute contracts under CLS Town § 64 and has broad power to provide for order, conduct, safety, health, and well-being of persons or property therein, under CLS NY Const Art IX § 2(c)(ii)(10). Preemption doctrine did not bar tenants' action to enforce memorandum of understanding whereby town agreed not to adopt Emergency Tenant Protection Act (ETPA) and landlords agreed to follow stipulated rental guidelines and specifically enumerated terms regarding lease renewals since (1) ETPA is voluntary and demonstrates intention to not preempt field, (2) memorandum represented contract rather than legislation, and preemption doctrine pertains to legislation, not contracts, and (3) even if memorandum were deemed to be legislation, mere fact that local law touched on same matter as state legislation would not necessarily render local law invalid on preemption grounds. Massagli v Bastys, 141 Misc. 2d 357, 532 N.Y.S.2d 638, 1988 N.Y. Misc. LEXIS 596 (N.Y. Sup. Ct. 1988).

Where plaintiffs failed to present convincing evidence that federal government was mislead with respect to scope of Town Attorney's authority to commit town to development of low and moderate income housing for federal employees, defendants were not estopped from asserting lack of such authority. Town Attorney's representation that town would provide "whatever programs would be necessary to meet the housing needs for all federal employees which may develop as a result of the award of the [Internal Revenue Service Regional Center] project" to town was unenforceable for lack of specificity. Brookhaven Housing Coalition v Solomon, 583 F.2d 584, 1978 U.S. App. LEXIS 9549 (2d Cir. N.Y. 1978).

76. —Implied or inferred contracts

In absence of any formal prerequisites to execution of valid contract on part of the town to pay rental for right to attach lighting fixtures to telephone poles, town's failure to respond to letter from telephone company asking town to remove fixtures or pay rent did not create contractual obligation on part of town to pay rental. New York Tel. Co. v North Hempstead, 41 N.Y.2d 691, 395 N.Y.S.2d 143, 363 N.E.2d 694, 1977 N.Y. LEXIS 2018 (N.Y. 1977), abrogated, Corsello v Verizon N.Y., Inc., 18 N.Y.3d 777, 944 N.Y.S.2d 732, 967 N.E.2d 1177, 2012 N.Y. LEXIS 583 (N.Y. 2012).

A town is contractually obligated to receive and pay for services offered by petitioner, a consulting and publishing firm which submitted a written proposal at the town's request in the form of a contract offering to codify its ordinances and local laws for a sum specified in the proposal, inasmuch as petitioner later agreed to certain changes suggested by the town attorney and the town board, by resolution, authorized the town attorney to accept the proposal, authorized the supervisor to sign the agreement, and provided payment for the work, following which the supervisor failed to sign the contract, since although generally, where the parties contemplate that a signed writing is required there is no contract until one is delivered, the rule yields when the parties have agreed on all contractual terms and have only to commit them to writing; because all the terms of the contract had been negotiated and agreed upon, and there was no understanding or agreement that the contract would not be binding until both parties had signed it, it is enforceable although it was never memorialized with a mutually signed writing. Moreover, the town board's resolution authorizing the supervisor to sign the agreement on its behalf was an acceptance of petitioner's offer, since subdivision 6 of section 64 of the Town Law reposes exclusive authority in the town board to award contracts and provides that such contracts shall be executed by the supervisor in the name of the town after approval by the board; nothing further was necessary to create an enforceable contract, and the supervisor's refusal to perform the ministerial act of signing the contract was, therefore, unlawful. Municipal Consultants & Publishers, Inc. v Ramapo, 47 N.Y.2d 144, 417 N.Y.S.2d 218, 390 N.E.2d 1143, 1979 N.Y. LEXIS 1997 (N.Y. 1979).

Town was entitled to dismissal of cause of action for breach of contract where (1) plaintiff alleged that he caused certain improvements to be made on his property in reliance on assurances by town that he would thereafter be granted variance, (2) variance was not granted, (3) plaintiff commenced instant action rather than bringing Article 78 proceeding to review determination of zoning board of appeals, (4) no contract was approved by town board and executed by town supervisor as required by CLS Town § 64(6), and (5) it was doubtful that town could validly contract away its authority to make future zoning determination. Goldberg v Penny, 163 A.D.2d 352, 558 N.Y.S.2d 564, 1990 N.Y. App. Div. LEXIS 8892 (N.Y. App. Div. 2d Dep't 1990).

Town employee's action against town, seeking reimbursement of legal expenses incurred in defending federal criminal prosecution, was dismissed where no local laws or resolutions provided for defense or indemnification of employees who were subject of criminal prosecutions; alleged assurances by town officials, that expenses "would be taken care of," did not create contract implied-in-fact because no town official was authorized to bind town by words or conduct to enter into any contract (express or implied) to reimburse employees. Zimmer v Town of Brookhaven, 247 A.D.2d 109, 678 N.Y.S.2d 377, 1998 N.Y. App. Div. LEXIS 10118 (N.Y. App. Div. 2d Dep't 1998).

Letter from Town Attorney to General Services Administration, stating that town would provide whatever programs would be necessary to meet housing needs for federal employees in connection with opening of Internal Revenue Service Regional Center, did not create binding contractual commitment on part of town to develop low and moderate income housing; since attorney never claimed authority to bind town, and Town Board's resolutions did not by their terms so authorize him, he had neither actual nor apparent authority to create such contractual commitment. Brookhaven Housing Coalition v Solomon, 583 F.2d 584, 1978 U.S. App. LEXIS 9549 (2d Cir. N.Y. 1978).

77. —Interest of town official in contract

A partnership, one of whose members is a town officer, cannot do business with the town and recover compensation therefor. 1947 Ops St Compt 372.

A bank of which a town supervisor is an officer may not loan money at interest to town. 1947 Ops St Compt 453.

Town board may not award contract to chairman of town board of assessors. 1953 Ops St Compt File #6313.

A town board is authorized to lease premises for use as a town hall where, the present hall lacks sanitary facilities, heating and lighting. However, a lease between the board and the Grange for the Grange hall was void where two members of the town board were members of the Grange. 1959 Ops St Compt File #517.

A prohibited conflict of interest would occur if a town councilman should be hired as an independent contractor to work for the town; and his appointment to a position of employment by the town board would be contrary to public policy. 1968 Ops St Compt File #53.

A prohibited interest in contract exists where a town board purchases a vehicle from a company which employs a member of the board as a salesman, unless the exception afforded by section 802(1)(b) is applicable. 1968 Ops St Compt File #810.

A town supervisor has a prohibited interest in any insurance contracts between the town and an insurance agency which he acquires, where he receives a material or pecuniary benefit as a result of such contracts, and he has the powers and duties enumerated in General Municipal Law, § 801 with respect thereto. 1973 Ops St Compt File #979.

78. —Ratification

Validity of otherwise valid town contract does not depend on resolution of town board being recorded in minutes of board meeting. Hubbard v Onondaga County Dep't of Health, 219 A.D.2d 832, 632 N.Y.S.2d 370, 1995 N.Y. App. Div. LEXIS 10881 (N.Y. App. Div. 4th Dep't 1995).

Town was bound by arbitration clause in letter agreement with construction firm where letter agreement was referred to in

change order signed by town supervisor and town comptroller on next day after town board passed resolution authorizing change order. Town of Babylon v Tully Constr. Co., 242 A.D.2d 703, 662 N.Y.S.2d 590, 1997 N.Y. App. Div. LEXIS 9231 (N.Y. App. Div. 2d Dep't 1997), app. denied, 91 N.Y.2d 807, 669 N.Y.S.2d 260, 692 N.E.2d 129, 1998 N.Y. LEXIS 166 (N.Y. 1998).

Defendants had not been entitled to summary judgment on a town's claim its contracts with them were void, because there were triable fact issues as to whether the town board ratified the agreements such that they were enforceable under N.Y. Town Law § 64(6). Town of Angelica v Smith, 89 A.D.3d 1547, 933 N.Y.S.2d 480, 2011 N.Y. App. Div. LEXIS 8249 (N.Y. App. Div. 4th Dep't 2011).

Dismissal of insurer's breach of contract case against a town was error as insurer failed to allege that the parties' concession agreement was approved and ratified by the town board in strict compliance with the statute, so their contract was not binding on the town. Phoenix Life Ins. Co. v Town of Oyster Bay, 186 A.D.3d 763, 129 N.Y.S.3d 451, 2020 N.Y. App. Div. LEXIS 4702 (N.Y. App. Div. 2d Dep't 2020).

Town was liable to plaintiff for 2-month rental of woodchipper, whether or not contract between parties was made on behalf of town by authorized agent or was properly authorized by town board pursuant to CLS Town § 64(6), since (1) retention and use of woodchipper constituted ratification of agreement, and (2) principles of equity and fair dealing require municipal body, based on theory of implied or quasi contract, to pay reasonable value of property received or services rendered, provided they would be proper subject of express contract and are within contractual power of governmental body. Centereach Rentals, Inc. v Huntington, 150 Misc. 2d 462, 574 N.Y.S.2d 636, 1991 N.Y. Misc. LEXIS 562 (N.Y. Dist. Ct. 1991).

Failure of a law firm to raise a consent agreement's invalidity under N.Y. Town Law § 64(6) for lack of town board approval as an affirmative defense in a breach of contract action did not show that the firm committed legal malpractice in representing the town and its waste management authority; the town board ratified the agreement by accepting its benefits and by passing a resolution that referred to the agreement. Town of N. Hempstead v Winston & Strawn, LLP, 28 A.D.3d 746, 814 N.Y.S.2d 237, 2006 N.Y. App. Div. LEXIS 4759 (N.Y. App. Div. 2d Dep't), app. denied, 7 N.Y.3d 715, 826 N.Y.S.2d 181, 859 N.E.2d 921, 2006 N.Y. LEXIS 3536 (N.Y. 2006).

Where Town Board passed no resolution which either explicitly approved Town Attorney's assurances with respect to development of low and moderate income housing for federal employees or was implicitly inconsistent with any other supposition than that Town Board intended to implement housing program, Board's approval of reduction in rent for Internal Revenue Service Regional Center did not constitute ratification of Town Attorney's representations with regard to housing. Brookhaven Housing Coalition v Solomon, 583 F.2d 584, 1978 U.S. App. LEXIS 9549 (2d Cir. N.Y. 1978).

A town board may ratify a contract improperly made by a superintendent of highways when the town board could have authorized the contract initially and when there are funds available from which to pay the claim. If there are no funds available then a town board would have to obtain authority to pay the claim through a special act of the legislature. 1958 Ops St Compt File #991.

A town board does not have to audit and approve a voucher submitted by an independent contractor hired by the town superintendent of highways without board approval. The town board may in its discretion, however, ratify agreements or contracts made by the superintendent without board approval. 1967 Ops St Compt File #344.

Except in towns which have established office of director of purchasing pursuant to CLS Town Law § 41-a, town highway superintendent has authority to award contracts for purchase of materials and supplies for repair and improvement of highways and bridges and for control of snow and ice without prior board approval; award of contracts for purchase of highway equipment is made by superintendant subject to board approval, except where board has authorized superintendent to purchase equipment up to specified dollar amount without its prior approval; where town board has provided that construction or improvement of highway or bridge be done under contract, award of such contract is made by highway superintendent. 1987 Op St Compt No. 87-42.

79. Traffic control, signals and standards, generally

Supervision and control of traffic standards permitted by former § 138-d, did not come within general ambit of prescribed duties of town superintendent as defined by Highway Law, § 47. Masucci v Orangetown, 239 A.D. 840, 264 N.Y.S. 291, 1933 N.Y. App. Div. LEXIS 8820 (N.Y. App. Div. 1933).

The authority given to towns to "purchase, lease, install and maintain traffic signals and standards for the control of traffic upon the streets and highways outside limits of any incorporated village or city," is given without further action by the town. Epolito v Epolito, 71 N.Y.S.2d 611, 189 Misc. 424, 1947 N.Y. Misc. LEXIS 2604 (N.Y. Sup. Ct. 1947).

A town may erect school warning signs on town highways at town expense. 1954 Ops St Compt File #7045.

A town may purchase, lease, install and maintain warning and other traffic control signs upon streets and highways outside the limits of incorporated villages or cities. Expense incurred for this purpose is a general town charge. 1957 Ops St Compt File #915.

The town, under its power to pass ordinances, rules or regulations, for the safety of the community, could purchase and install warnings to motorists indicating the presence of children in the area along the highway. Regulation of the speed on the town highway in question must be established under Vehicle and Traffic Law, section 1622, with the speed established by the State Traffic Commission. 1967 Ops St Compt File #485.

A town may purchase traffic controls for town roads outside of villages and these are a town-wide charge. 1967 Ops St Compt File #1000.

80. —On private property

The installation of traffic controls by a town upon the parking area of a privately-owned shopping center is a town charge and the cost of same may not be assessed against the owner thereof. 1972 Ops St Compt File #574.

81. —On state or county roads

Former §§ 138-d and 141-c, subd. 1, did not make towns liable for failure of traffic signal to operate on state and county highways. Cleveland v Lancaster, 239 A.D. 263, 267 N.Y.S. 673, 1933 N.Y. App. Div. LEXIS 8018 (N.Y. App. Div. 1933), aff'd, 264 N.Y. 568, 191 N.E. 568, 264 N.Y. (N.Y.S.) 568, 1934 N.Y. LEXIS 1599 (N.Y. 1934).

In action against town and county by motorist injured in collision at intersection of streets maintained by them and regulated by stop sign, alleging that traffic signal light should have been installed, plaintiffs failed to overcome defendants' prima facie entitlement to qualified immunity where (1) defendants presented expert opinion and 1986 county traffic engineering report concluding that neither traffic signal nor additional sign at intersection was warranted, (2) plaintiffs' civil engineer opined that intersection was not "designed, maintained, and operated in accordance with standard and appropriate acceptable good and safe design practices," and (3) raw statistics indicating 9 other accidents at or near intersection between 1989 and 1993, without any descriptive details, did not show that defendants breached their continuing duty to review traffic plan in light of its actual operation. Schuster v McDonald, 263 A.D.2d 473, 692 N.Y.S.2d 721, 1999 N.Y. App. Div. LEXIS 7893 (N.Y. App. Div. 2d Dep't 1999).

Where a "stop and go" traffic signal light has been installed on a county road directly in front of a firehouse and operated in emergency situations by the fire company, the cost of the installation, erection and maintenance of the traffic signal light is a town charge. 1969 Ops St Compt File #332.

Where town has actual or constructive knowledge of hazardous traffic conditions at intersection of town highway and county road located outside village, town has responsibility to study need for and, if necessary, to install and maintain appropriately designed traffic controlled devices at intersection; once it adopts traffic safety plan for intersection, town also has responsibility to

continually review plan in light of its actual operation; town has no similar duty with respect to intersection of 2 county roads located outside village, unless town constructed, or owns, maintains, or exercises some form of control over intersection, such as by installing traffic control devices itself. Ops St Compt 89-22.

82. Vacancies in town office, generally

New York Constitution, Art. X, § 5, applies to an election to fill a town office, and Town Law, § 64, subd. 5, which conflicts with constitutional provision, is invalid. Mott v Krug, 278 N.Y. 457, 17 N.E.2d 129, 278 N.Y. (N.Y.S.) 457, 1938 N.Y. LEXIS 1325 (N.Y. 1938).

There was conflict of interest when town board member acquired realty in his town at county tax sale and sale was voidable where, although contract of sale in form concerned only county, by implication it also involved town and was within general municipal law precluding municipal officer from having interest in contract with his municipality when he has power or duty to authorize or approve contract or to appoint officer who has such power or duty, inasmuch as town board's action in preparing town budget was part of approval and authorization culminating in county tax sale and town board fixed salary of collecting officer and filled vacancies in that office. Rose v Eichhorst, 42 N.Y.2d 92, 396 N.Y.S.2d 837, 365 N.E.2d 868, 1977 N.Y. LEXIS 2108 (N.Y. 1977).

This section must be read in connection with § 63 and § 60 as to vacancies to be filled by the board as such. Application of Crosby, 36 N.Y.S.2d 301, 178 Misc. 746, 1942 N.Y. Misc. LEXIS 1786 (N.Y. Sup. Ct.), aff'd, 265 A.D. 92, 37 N.Y.S.2d 745, 1942 N.Y. App. Div. LEXIS 5686 (N.Y. App. Div. 1942).

83. —Created by election tie

Where the office of town supervisor becomes vacant by reason of a tie in the election returns, the town board may appoint a qualified person to that office and upon such appointment, the encumbent, will cease to be a holdover in the office. Furk v Board of Supervisors, 1 N.Y.2d 128, 151 N.Y.S.2d 12, 134 N.E.2d 104, 1956 N.Y. LEXIS 913 (N.Y. 1956).

Petitioner is entitled to mandamus in proceeding involving his right to exercise powers of town supervisor, where returns of biennial town meeting resulted in tie vote and no person has been certified as being elected to said office. Petitioner, incumbent of office must hold over under Public Officers Law, § 5, and is entitled to discharge duties of his office until such time as successor has been appointed or declared elected and qualified under former § 130. Williamson v Corscadden, 255 N.Y.S. 597, 143 Misc. 249, 1932 N.Y. Misc. LEXIS 1380 (N.Y. Sup. Ct. 1932). See also In re Baker, 233 A.D. 482, 253 N.Y.S. 584, 1931 N.Y. App. Div. LEXIS 11337 (N.Y. App. Div. 1931).

84. —Discretion of town board as to filling

In a town of the second class where a vacancy occurs in the office of one of three town assessors by reason of failure to elect, it is the duty of the town board to fill such vacancy. 1947 Ops St Compt 257.

It is mandatory that the town board fill a vacancy in office of town assessor. A person elected to fill a vacancy takes office on January 1. 1955 Ops St Compt File #7289.

A town board need not fill the vacancy left by the resignation of a town councilman whose term of office would have expired at the end of this year. 1967 Ops St Compt File #789.

85. —Eligibility of town officers

No rule of law prohibits a former member of the New York City Council from the Borough of The Bronx from being selected to fill the vacancy in the office of Bronx Borough President by vote of a majority of city council members representing Bronx Borough (New York City Charter, § 81) following his resignation as a city councilman; provisions of law governing the ethical behavior of members of the city council in the appointment of a member to another post are intended to deal with abuses such as dual office holding and do not prohibit a council member from being chosen by his fellow members to another office at which time he automatically forfeits his position as a council member; common-law principles under prior case law which may be read as prohibiting a governmental body from appointing one of its own members to office have been codified and where different from applicable statutory law, specifically abrogated by legislative enactment (New York City Charter, §§ 33, 1115, 2604; Town Law, § 64, subd 5; General Municipal Law, art 18) and, in any event, respondent was not a "member" of the city council at the time the vacancy in the office of Borough President occurred nor was he a member of the special body of electors convened by the Mayor to elect an interim Borough President. Valentin v Simon, 98 Misc. 2d 5, 413 N.Y.S.2d 266, 1979 N.Y. Misc. LEXIS 2037 (N.Y. Sup. Ct. 1979).

A town board may not fill a vacancy in the office of town supervisor by the appointment of one of its members. 1946 Ops St Compt 620.

In a town of the second class, town board may not appoint a town councilman to fill a vacancy in the office of justice of the peace. Nor may such councilman or justice be appointed by the board to be superintendent of a water district operated by such board. 1946 Ops St Compt 652.

A town councilman may be appointed to a vacancy in the office of supervisor providing he resigns his position as councilman prior to appointment, but, under § 63, the vote to fill the vacancy must be by majority of the whole number of the membership of the board. 1962 Ops St Compt #832.

A town councilwoman and a justice of the peace may each resign and be appointed to fill the vacancy of the other. 1967 Ops St Compt File #760.

A town councilman may not be appointed to the office of town assessor. 1967 Ops St Compt File #954.

86. —Specific office vacancies, generally

87. — —Assessor

Under subd. 5 of this section, an elected assessor who sells his real property and ceases to be a resident of the town creates a vacancy which may be filled by the Town Board by an appointee who meets the qualifications for the office. 1964 Ops St Compt #282.

88. — —Highway superintendent

One who receives majority vote for office of superintendent of highways of town and who fails to qualify for office in that his official oath is defective in omitting statement that he has not directly or indirectly paid moneys or property to electors as consideration for giving or withholding votes at election, is not entitled to hold office, and hence town board has authority to fill vacancy by reappointing former incumbent. People ex rel. Preston v Keator, 169 A.D. 368, 154 N.Y.S. 1007, 1915 N.Y. App. Div. LEXIS 9112 (N.Y. App. Div. 1915).

89. — —Justice of the peace

A vacancy in office of justice of the peace must be filled at next annual election. 1946 Ops St Compt 178.

Where a town is required to reduce the number of its justices of the peace from four to two, and where it is necessary to fill a vacancy in one of the offices as well as to elect successors to two other justices, the person elected to fill the vacancy must be elected as a justice of the peace. 1955 St Compt File #7168.

An elected justice of the peace must hold property at the time of election to be qualified for office and an appointment of a justice to fill a vacancy must be made of a person who holds property of record as of the time of his appointment. 1967 Ops St Compt File #510.

90. — —Supervisor; deputy supervisor

Where office of town supervisor was declared vacant in view of the fact that supervisor had accepted and qualified for the office of county legislator, a successor could be appointed at once to fill the vacancy. Knauf v County Legislature of County of Monroe, 27 A.D.2d 440, 280 N.Y.S.2d 15, 1967 N.Y. App. Div. LEXIS 4070 (N.Y. App. Div. 4th Dep't 1967).

The appointment of a deputy supervisor has nothing to do with the filling of a vacancy resulting from the death of an incumbent supervisor, and such a vacancy may be filled by the Town Board by appointment. Roth v Loomis, 54 Misc. 2d 39, 281 N.Y.S.2d 158, 1967 N.Y. Misc. LEXIS 1456 (N.Y. Sup. Ct. 1967).

A vacancy occurring between September 1 and September 20, 1947 in the office of town supervisor should be filled by appointment to be made by the town board. A vacancy in a nomination for office of town supervisor occurring between September 1 and

September 20, 1947 may be filled pursuant to section 139 of the Election Law. 1947 Ops St Compt 398.

Terms of persons appointed to fill vacancies in the office of supervisor and councilman occurring between September 20 and the next general election should run until December 31 of the next political year. 1962 Ops St Compt #894.

Where a town supervisor dies in office, the town board should fill the vacancy as soon as reasonably possible. The fact that the office of deputy supervisor exists does not affect the requirement that the vacancy be filled. 1968 Ops St Compt File #1090.

91. — —Town board member

Terms of persons appointed to fill vacancies in the office of supervisor and councilman occurring between September 20 and the next general election should run until December 31 of the next political year. 1962 Ops St Compt #894.

92. — —Town clerk

Where a town clerk ceases to be a resident of the town, a vacancy occurs which may be filled by the town board. 1971 Ops St Compt File #992.

93. — —Town tax collector

Vacancy occurring on August 19, 1954 in office of town tax collector should be filled at November 1954 election; nomination procedure, filling of vacancy by appointment discussed. 1954 Ops St Compt File #6838.

94. —Term of office, generally

Person appointed to fill vacancy in office of tax collector in town of second class must be owner of record of real property in town, and may hold office only until next annual election at which the vacancy must be filled. 1946 Ops St Compt 118.

The limitation of the term of office of a person appointed to fill a vacancy in an elective office, as set forth in § 8 of Art 13 of the Constitution, does not apply in case of appointive officers. 1946 Ops St Compt 703.

If person is appointed on or about December 1, 1947 to fill vacancy existing in elective town office of receiver of taxes and assessments, such appointee holds office until the general election held in November 1948. 1947 Ops St Compt 524.

Where tax collector resigned January 1, 1955, at the general election there must be an election of collector to fill the unexpired term from the date of the general election in November until December 31, 1955 and also in addition an election to fill the term of office of town collector commencing January 1, 1956 and expiring December 31, 1957. 1955 Ops St Compt File #7212.

The term of office of a receiver of taxes and assessments elected to fill a vacancy does not commence on the day after election. 1956 Ops St Compt File #8016.

95. — —Remainder of calendar year

Where person re-elected in November died before January first, person appointed under former by town board to fill vacancy held office until January first. Under Public Officers Law, §§ 5 and 30, vacancy existed again after January first, and new town board had right to fill vacancy on January first and action of old town board in appointing person to hold office until next biennial election was illegal. People ex rel. Green v Black, 229 A.D. 47, 241 N.Y.S. 244, 1930 N.Y. App. Div. LEXIS 10305 (N.Y. App. Div. 1930).

An appointment made in January to fill a vacancy in the elective office of town clerk terminates December 31 next succeeding the first annual election thereafter held and is not for the unexpired term. The person elected to such office in November of 1946 would hold for the unexpired term. 1946 Ops St Compt 206.

Whether the office of town Highway Superintendent is elective or appointive, a person appointed to fill a vacancy in such office occurring November 1, 1962 will hold office until January 1, 1964. 1962 Ops St Compt #688.

Where an appointee holds the office of town justice due to a vacancy and an election is held filling that vacancy, the term of the appointee expires, and the term of the elected town justices commences, on January first succeeding the election. 1974 Ops St Compt File #10.

96. — —Unexpired term

A person appointed by the town board to fill a vacancy in office of assessor in town of the first class, holds such office for the unexpired term thereof. The limitation of the term of office of a person appointed to fill a vacancy in an elective office, as set forth in section 8 of Article XIII of the Constitution, does not apply in case of appointive officers. 1946 Ops St Compt 703.

The office of justice of the peace where a vacancy occurs and an appointment is made to fill this office may be filled at the next annual election for the remainder of the unexpired term. 1954 Ops St Compt File #6865.

Where a vacancy occurs in the office of justice of the peace, the term of which will expire on December 31, 1957, and an appointment is made until Election Day, it will be necessary to elect a justice of the peace to serve from Election Day through December 31, 1957, as well as justice of the peace for a new four year term commencing on January 1, 1958. 1957 Ops St Compt File #250.

97. —Voting by town board

The "appointment" to fill a vacancy in town office provided for in § 64, subd. 5, cannot be accomplished by execution of certificate by members of town board, but requires a vote at meeting duly called and held pursuant to § 63 which provides that every act, motion or resolution shall require for its adoption an affirmative vote. In re Crosby, 265 A.D. 92, 37 N.Y.S.2d 745, 1942 N.Y. App. Div. LEXIS 5686 (N.Y. App. Div. 1942).

98. Weed, fire and other health hazard removal, generally

Town board did not violate due process by failing to notify property owner or to conduct adversarial hearing prior to adopting resolution authorizing town to enter owner's property to remove litter and debris in event it was not removed by owner within 10 days of service of resolution on him, and to charge costs of removal as lien and assessment to be collected as ad valorem charge. It was neither arbitrary nor capricious to adopt resolution authorizing town to enter petitioner's property to remove litter and debris in event it was not removed by petitioner within 10 days of service of resolution on him, and to charge costs of removal as lien and assessment to be collected as ad valorem charge, where there were ongoing outbreaks of fire and smoke from debris on property. 4M 4M Holding Co. v Town Bd. of Town of Islip, 185 A.D.2d 317, 586 N.Y.S.2d 286, 1992 N.Y. App. Div. LEXIS 9036 (N.Y. App. Div. 2d Dep't 1992), aff'd, 81 N.Y.2d 1053, 601 N.Y.S.2d 458, 619 N.E.2d 395, 1993 N.Y. LEXIS 1723 (N.Y. 1993).

In Article 78 proceeding, lessee of property lacked standing to challenge town board's resolution directing owner of property to expeditiously clean up solid waste on premises, although lessee had agreed to remove waste but had failed to do so, since aggrievement warranting judicial review requires threshold showing that person has been adversely affected by activities challenged, and lessee failed to show any such injury. Sabrina Corp. v Jones, 199 A.D.2d 396, 605 N.Y.S.2d 320, 1993 N.Y. App. Div. LEXIS 12074 (N.Y. App. Div. 2d Dep't 1993), app. denied, 83 N.Y.2d 912, 614 N.Y.S.2d 394, 637 N.E.2d 285 (N.Y. 1994).

A town board may not avail itself of the power granted in section 64(5-a) of the Town Law without first enacting an ordinance pursuant to section 130 of the same law, such ordinance to contain, among other things, the requisite assessment and lien provisions. 1968 Ops St Compt File #1084.

A town may expend its funds to remedy a rodent infestation problem existing on town property by clearing the land of tree and grass clippings and ponding water even though the property is subject to the permanent easement of a county drainage district. The town should seek reimbursement for the district if the district was responsible for the conditions creating the problem or was required by the easement to clear the land. 1982 St Compt File #82-219.

N.Y. Real Prop. Tax Law § 936 did not require a county to credit a town for unpaid maintenance charges under N.Y. Town Law §§ 64 and 130 or to guarantee those amounts since: (1) maintenance charges were assessed against individual properties for their benefit and did not fall within the general definition of a tax; (2) they did not constitute special ad valorem levies since they were not used to defray the cost of a special district improvement or service; (3) they were not assessed ad valorem because they were not based on property value; (4) even if they were special assessments, special assessments were not taxes;

and (5) N.Y. Mun. Home Rule Law § 10 did not render maintenance charges taxes. Matter of Town of Irondequoit v County of Monroe, 175 A.D.3d 846, 107 N.Y.S.3d 510, 2019 N.Y. App. Div. LEXIS 6308 (N.Y. App. Div. 4th Dep't 2019).

99. —Central fire alarm system

The consent of the governing bodies of all villages in the town must be obtained before the town may establish a central fire alarm system. The expense of establishing and operating the central fire alarm system is a general town charge. 1954 Ops St Compt File #6676.

A town board may establish a mutual fire aid radio and central alarm system in the town providing they comply with certain provisions. 1956 Ops St Compt File #8197.

Under subd. 11-c of this section, where a town has a central fire alarm system a fire district may install fire alarm boxes and appropriate wiring within the district and connect the same to the town alarm system within the district at fire district expense, but the town may not install extra fire alarm boxes within the district area at request of the district commissioners where the district agrees to pay cost of additional alarm boxes, wire and installation costs. 1964 Ops St Compt #464.

A town's central fire alarm system may be used to service any authorized emergency calls. 1968 Ops Ct Compt File #116.

100. —Drainage facilities, generally

General town moneys may be expended to deepen, alter or otherwise improve drainage ditches and pipes. 1945 Ops St Compt 432.

A drainage district may be established for the purpose of constructing improvements designed to prevent silting of a creek outlet and consequent flooding of riparian real property. 1953 Ops St Compt File #6382.

The town superintendent of highways may tile a ditch within the bounds of a town highway when such ditch creates a hazard to the highway. 1954 Ops St Compt File #6841.

Whether or not drainage work is to be a general town charge or to be accomplished as a special improvement district is a matter within the discretion of the town board. 1954 Ops St Compt File #6982.

Towns and villages in more than one county may enter into a joint contractual arrangement to maintain a flood control project which has been turned over to them by the State Superintendent of Public Works. A resolution of a town board authorizing the town's contribution under such a joint maintenance contract is not subject to a permissive referendum. 1957 Ops St Compt File #488.

A town board may act pursuant to Town Law § 64(11-a) to protect property within the town from overflowing water courses or it may establish a drainage district and improve such water course to protect such district. 1960 Ops St Compt File #432.

A town may perform the necessary work to clean out a drainage ditch which not only drains a public highway but which also drains private property, based upon an agreement with the benefited property owners to share the costs of such work, but it may not contract with a private contractor to clean out such a drainage ditch based upon the agreement of the property owners to pay the cost of such work. 1960 Ops St Compt File #890.

Where a town drainage district has been created and the drainage facilities therein are inadequate, the cost of correcting such defects should be charged against the property owners of the district and not the town at large. 1968 Ops St Compt File #186.

A town may adopt a local law authorizing it to make repairs to a private water or sewer system when the public health, safety, or welfare is threatened, and to charge the expenses as a tax lien against the property. 1982 St Compt File #82-216.

101. — —Acquisition of property

A town may accept the gift of a strip of land for drainage and flood control purposes and may construct improvements thereon for such purposes. 1954 Ops St Compt File #6707.

A town can condemn real property or an interest therein for the purposes of constructing drainage facilities. 1960 Ops St Compt File #818.

A town has authority under this section to acquire an easement in private lands for draining waters from town roads, and may pay for such an easement either from the general fund, the highway fund, or both. 1961 Ops St Compt File #51.

102. — —Financing

A resolution of a town board authorizing the issuance of capital notes to finance a drainage facility under this section is not subject to a referendum. 1952 Ops St Compt File #5667.

Town may finance the cost of drainage facilities by the issuance of bonds having a maximum maturity of not more than thirty years. 1955 Ops St Compt File #7403.

A common drainage system constructed as a joint project by a village and a town may not be financed by the issuance of bonds. Drainage facilities constructed individually may be so financed. 1956 Ops St Compt File #7936.

103. —Dumping

In view of fact that garbage is a deleterious substance and that garbage dumps, no matter how carefully controlled, present some hazard to a community, town was entitled, in the exercise of its police power, to minimize this potential hazard by enacting ordinance which, inter alia, prohibited the dumping, within the town, of garbage, rubbish and waste originating outside the town. Town was entitled to order permanently enjoining corporate garbage collector from violating town ordinance which regulated the disposal of garbage, rubbish and other articles and which prohibited the dumping, within the town, of garbage, rubbish and waste originating outside the town. Where town ordinance which, in pertinent part, prohibited dumping, within the town, of garbage, rubbish and waste originating from outside the town was clearly a health and safety measure and not a retroactive zoning ordinance, corporate garbage collector's use of site would not be immune from operation of ordinance as a "prior non-conforming use" even if it did preexist ordinance. Plattekill v Dutchess Sanitation, Inc., 56 A.D.2d 150, 391 N.Y.S.2d 750, 1977 N.Y. App. Div. LEXIS 10035 (N.Y. App. Div. 3d Dep't), aff'd, 43 N.Y.2d 662, 400 N.Y.S.2d 816, 371 N.E.2d 534, 1977 N.Y. LEXIS 2483 (N.Y. 1977).

Cause of action seeking declaration of invalidity of town board's authorizing resolution and implementing agreement regarding debris landfill was time barred where (1) plaintiffs' challenge was directed not to substance of resolution and agreement but to town's failure to hold permissive referendum on resolution and to town's lack of authority to make agreement, (2) those procedural claims could have been brought in proceeding under CLS CPLR § 7803(2), and (3) thus, 4-month limitations period in CLS CPLR § 217, not 6-year period in CLS CPLR § 213, applied. Complaint seeking to impose personal liability on individual town board members under CLS Gen Mun § 51 for passing allegedly invalid resolution and making allegedly invalid agreement regarding debris landfill was properly dismissed for failure to state cause of action, absent allegation of necessary element of collusion, fraud, or personal gain. Atkins v Town of Rotterdam, 266 A.D.2d 631, 697 N.Y.S.2d 780, 1999 N.Y. App. Div. LEXIS 11231 (N.Y. App. Div. 3d Dep't 1999).

A village and a town may contract for the joint use of public dumping grounds but may not jointly establish and operate one. 1959 Ops St Compt File #974.

A town may enter into a contract with a village to provide for use of the village dump by inhabitants of the town. 1963 Ops St Compt #150.

104. —Public works department

Office of superintendent of highways must be appointive in any town before department of public works may be established; such office not discontinued when a department of public works is established in town. 1953 Ops St Compt File #6157.

The commissioner of public works of a town has the duty to submit a budget estimate of his department to the town clerk. This estimate of revenues and expenditures is subject to the approval of the town board pursuant to sections 112 and 113 of the Town Law. 1966 Ops St Compt File #423.

The town board of any town in Suffolk County may adopt a resolution establishing a department of public works and may

provide that the town superintendent of highways shall be its administrative head. 1968 Ops St Compt File #456.

Appointment of the elective highway superintendent to be head of a newly created town department of public works would not subject the exercise of his statutory powers and duties to town board supervision. 1972 Ops St Compt File #995.

Where the superintendent of highways is not the head of the department of public works, highway department functions, personnel and equipment may not be transferred to the new department if the result thereof would be to impair the statutory responsibilities of the superintendent. 1972 Ops St Compt File #995.

105. Other powers exercised, generally

A town may not ban the use and operation of mini-bikes within the town but may otherwise restrict the same in relation to speed and noise while operated on public highways within the town and in relation to emission of excessive fumes and noise while operated upon private property. 1972 Ops St Compt File #434.

106. —Proper exercise, generally

It was error to invalidate local law removing quarrying and mining from list of permitted uses in town's residential districts where among various findings made in negative declaration was that mining and quarrying would impinge on various goals of town's master plan, which were intended to "protect the Town's natural resources, natural beauty and small-town atmosphere"; possibility that mining would encroach on town's several "environmentally sensitive areas" was also noted in negative declaration. Local laws of town, imposing various regulations on harvesting of timber and restricting various construction-related activities occurring on steep slopes, wetlands, and other environmentally sensitive areas, were local laws of general applicability that, at best, would have incidental burden on mining, and thus laws were facially valid and declaration to that effect should have been made by court. Patterson Materials Corp. v Town of Pawling, 264 A.D.2d 510, 694 N.Y.S.2d 708, 1999 N.Y. App. Div. LEXIS 8896 (N.Y. App. Div. 2d Dep't 1999), app. denied, 95 N.Y.2d 754, 711 N.Y.S.2d 156, 733 N.E.2d 228, 2000 N.Y. LEXIS 983 (N.Y. 2000).

A town board in a town of the second class may establish a shade tree fund under this section, and may expend moneys therefrom for the protection of elm trees. 1953 Ops St Compt File #6187.

Town may adopt sanitary and plumbing regulations not inconsistent with sanitary code of public health council. Town board must constitute local board of health. 1953 Ops St Compt File #6329.

Where a resolution is subject to permissive referendum, petition is duly filed, and it is to be submitted at a special town election, the Town Board may designate a single polling place at the office of the town clerk. 1963 Ops St Compt #300.

Water district may purchase disused town garage. Town board may employ a qualified realty appraiser. After acquiring the building, the district may sell or lease any part thereof not required for district purposes. 1966 Ops St Compt File #736.

A town may enact reasonable legislation requiring the relocation of utility poles in the interests of public health, safety, or convenience. 1973 Ops St Compt File #34.

107. — —Communications

A town may lease and pay for telephone lines for connections between schools in the town and the central office of the town's mutual aid system. 1960 Ops St Compt File #254.

A town may purchase and install a two-way radio in the privately owned car of the town supervisor for the purpose of maintaining contact with the town hall in the performance of the duties of his office. 1967 Ops St Compt File #974.

108. — —Dredging, sewage and the like

Although a town board could not refuse to issue a dredging permit on the ground that it would not benefit the town, the town could refuse to deny a permit on the ground that the dredging would be harmful to the marine resources of the area. Bernhard v Caso, 19 N.Y.2d 192, 278 N.Y.S.2d 818, 225 N.E.2d 521, 1967 N.Y. LEXIS 1707 (N.Y. 1967).

In an Article 78 proceeding, an application by a landowner to tie into the sewer system of a town the sewer system of a warehouse that he wanted to convert into an office building would be granted, where the town's conditioning of approval of the sewer connection on the landowner's limiting the occupancy of the building to 54 employees and parking to 50 spaces was arbitrary, capricious, and an abuse of discretion, even though the landowner did not have an automatic right to the sewer connection without the consent of the town, where the application was rejected because of the potential increase in traffic, where there was no indication in the record that such an increase would adversely impact on the sewer system, where traffic in any case would be substantially lessened by conversion of the building from a warehouse to an office building, and where the town attorney in response to the landowner's application had noted that the sewer line was readily available to the landowner's property. Svenningsen v Passidomo, 95 A.D.2d 833, 463 N.Y.S.2d 874, 1983 N.Y. App. Div. LEXIS 18771 (N.Y. App. Div. 2d Dep't 1983), aff'd, 62 N.Y.2d 967, 479 N.Y.S.2d 335, 468 N.E.2d 290, 1984 N.Y. LEXIS 4477 (N.Y. 1984).

In an action by individual plaintiffs in their capacities as taxpayers and Mayors of plaintiff villages for a declaration that a town resolution which provided for a levy of an ad valorem property tax to raise an additional $20,000,000 for the town's budget for waste disposal was null and void, plaintiffs' argument that the town was not authorized to provide for the disposal of garbage because no such authority was conferred by Town Law § 64 was without merit since Town Law § 220(5), 221 explicitly empowered a town to provide for the collection and disposal of solid waste. Brookville v Colby, 108 A.D.2d 724, 484 N.Y.S.2d 890, 1985 N.Y. App. Div. LEXIS 43063 (N.Y. App. Div. 2d Dep't 1985).

Court has not power to exempt state officers from scope and effect of valid town ordinances which prohibit discharge of sewage into river and which were adopted pursuant to former § 130, subd. 14 for promotion of its public welfare, nor has court power to restrain by injunction enforcement of criminal law. Mere appropriation of funds by legislature for new sewage disposal plant at state hospital, which empties its sewage into river, does not have effect, by implication or otherwise, of superseding during course of construction of plant, power of defendant town to enact ordinances affecting discharge of sewage into rivers within its jurisdiction. Parsons v Smithtown, 288 N.Y.S. 470, 160 Misc. 103, 1936 N.Y. Misc. LEXIS 1180 (N.Y. Sup. Ct. 1936).

Town could properly enact its marine law requiring permit for removing from or depositing any material in bed of any watercourse of wetland in that the legislature granted town the authority to control land fill operations. People v Poveromo, 79 Misc. 2d 42, 359 N.Y.S.2d 848, 1973 N.Y. Misc. LEXIS 1260 (N.Y. App. Term 1973).

109. — —Highways, roads, driveways and the like

Town board's rejection of dedication of road was not arbitrary where road did not meet all requirements of board's resolution concerning acceptance of new roads—particularly as to requisite number of occupied homes per mile. Di Lucia v Town Bd., 245 A.D.2d 692, 664 N.Y.S.2d 898, 1997 N.Y. App. Div. LEXIS 12536 (N.Y. App. Div. 3d Dep't 1997).

A town highway superintendent is under a duty to make a written annual inventory, but the town board may direct a supplemental inventory of town machinery, tools, implements and equipment. 1967 Ops St Compt File #855.

Town board has authority to assign additional duties to town highway superintendent and board has responsibility of seeing that functions of town highway superintendent which are financed with town moneys, are not negligently, arbitrarily or wastefully performed. 1968 Ops St Compt File #835.

Town has discretion to sell unneeded, worn out or obsolete highway equipment, machinery, tools and implements by public auction, competitive bidding or private negotiation; method chosen should be one which will bring best price or most beneficial terms. 1986 Op St Compt No. 86-78.

110. — —Police matters

Part-time town policemen in Westchester County may not operate their privately owned vehicles equipped with flasher

lights and sirens, but a town board may authorize the use of a detachable "police sign" on privately owned vehicles operated by part-time town policemen. 1967 Ops St Compt File #597.

111. —Improper exercise, generally

Town board's resolution delegating, to town supervisor, its authority to hire and fire town employees would be declared invalid where no standard of policy was established by town board to provide guide for town supervisor to follow when hiring and firing such employees. Lumpkin v Halperin, 225 A.D.2d 698, 639 N.Y.S.2d 938, 1996 N.Y. App. Div. LEXIS 2658 (N.Y. App. Div. 2d Dep't), app. dismissed, 88 N.Y.2d 1015, 649 N.Y.S.2d 381, 672 N.E.2d 607, 1996 N.Y. LEXIS 3021 (N.Y. 1996).

Town board may not, by resolution, extend the provisions of the Tax Law in relation to exemptions of real property from taxation. 1946 Ops St Compt 150.

A town may not enact an ordinance to compel property owners to trim or remove trees, hedges or shrubs situated wholly within their property, notwithstanding such trees, hedges or shrubs obstruct visibility of highway traffic. 1960 Ops St Compt #486.

Money appropriated for benefit of free association library by a town should be disbursed pursuant to contract terms or, in absence of contract, by the supervisor on vouchers. Town has no authority to make gift of land or money to free library association, or to issue bonds to finance such association's purchase of land, or construction of a building on the association's land. 1966 Op St Compt No. 66–710.

A town may not enter into an agreement with a professional baseball team whereby the team supplies the town with admission tickets and the town sells such tickets for a "Community Night" for its citizens. Such an arrangement is not a proper "recreation program" in connection with which town efforts may be undertaken. 1975 Ops St Compt File #651.

A town board may not appoint a "fire marshal's unit" for the purpose of investigating fires suspected to be caused by arson. 1975 Ops St Comp File #1163.

112. — —Dredging, sewage and the like

Although a town board could not refuse to issue a dredging permit on the ground that it would not benefit the town, the town could refuse to deny a permit on the ground that the dredging would be harmful to the marine resources of the area. Bernhard v Caso, 19 N.Y.2d 192, 278 N.Y.S.2d 818, 225 N.E.2d 521, 1967 N.Y. LEXIS 1707 (N.Y. 1967).

A refuse and garbage collection system may not be set up under Town Law, § 221, unless it is on a town-wide basis. A town board may appropriate funds from the general fund for a survey of the practicability and cost of a town-wide refuse collection system. 1956 Ops St Compt File #8154.

A town may not undertake to remove rubbish from private property without assessing such property for the cost of the removal. 1967 Ops St Compt File #770.

A town board may not contract with a private landfill operator for collection and disposal of refuse on lands the town has not acquired pursuant to statute, and retains no control over the operation and services to be rendered. 1972 Ops St Compt File #95.

113. — —Highways, roads, driveways and the like

Where a town chief of police garages a town police car in his private garage, the Town Board may not provide for the plowing of his private driveway at town expense. 1963 Ops St Compt #96.

A town may not ban the use and operation of mini-bikes within the town but may otherwise restrict the same in relation to speed and noise while operated on public highways within the town and in relation to emission of excessive fumes and noise while operated upon private property. 1972 Ops St Compt File #434.

114. — —Police matters

No power in town to contract for village police to render emergency service to town. Town executive may request and village may grant use of village police in town emergency. 1953 Ops St Compt File #6354.

Where a town chief of police garages a town police car in his private garage, the Town Board may not provide for the plowing of his private driveway at town expense. 1963 Ops St Compt #96.

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1. In general

There is now no authority for town electors at town meetings to adopt resolutions authorized by this section. 1958 NY Ops Atty Gen Aug 4 (informal).

The proper appointing authority for janitorial and maintenance employees for the Town Hall in the Town of Waterford is the Town Supervisor. 1977 NY Ops Atty Gen March 29 (Informal), 1977 N.Y. AG LEXIS 262.

County Attorney appointed by Board of Supervisors is appointed to a fixed term of two years. The Board has no authority to remove County Attorney, absent a hearing on charges, notwithstanding a change in the political composition of the Board due to filling of vacancies. 1979 NY Ops Atty Gen Jan 3.

In implementing the Environmental Quality Review Act, (1) agencies must use the procedures in 6 NYCRR Part 617 to the greatest extent possible, but may modify them to accommodate the particular requirements of each agency; (2) any procedural changes would be made by the body vested with the authority to do so; and (3) the town board may not designate one agency as permanent lead agency. 1979 NY Ops Atty Gen Apr 26 (Informal).

Because of the town board's powers over the town justice and court, and the possible appearance before the court by a town board member in his capacity as police officer, the position of town board member and chief of police department of a village within the town are incompatible, and therefore a person should not simultaneously hold both offices. 1990 N.Y. Op. Att'y Gen. No. I90-7.

Discussion of multiple questions concerning town government. 1978 Op St Compt File #328.

The town board of the Town of Brookhaven acts ex officio as the trustees of the town and are vested with the duties and powers previously exercised by the Trustees of the Freeholders and Commonalty of the Town of Brookhaven. Since considerable uncertainty exists as to the nature and scope of such duties and powers, consideration might be given to modification by the Legislature or by local law of the special act granting such duties and powers. 1979 Op St Compt File #751.

In general, village property owners must pay taxes for all expenditures in the town budget unless a statute requires or permits an expenditure to be a part-town charge. 1981 Op St Compt File #80-796.

A town council member may not also serve as financial operations manager. 2013 N.Y. Op. Att'y Gen. No. 2013-1, 2013 N.Y. AG LEXIS 1.

A vacancy created by not placing the position of town justice on the ballot cannot be filled by town board appointment. It can be filled before the November 2013 general election only by special election if the Governor chooses to call for one. The term of the justice will commence January 1, 2014 in either case. 2013 N.Y. Op. Att'y Gen. No. 2013-4, 2013 N.Y. AG LEXIS 4.

2. Acquisition of real property, generally

3. —By condemnation

Subdivision 2 of this section gives a Town Board general power to acquire real property by condemnation, but this power does not extend to property already devoted to public use. 1962 NY Ops Atty Gen Oct 11.

The Town of Newburgh is authorized to obtain easements on, and condemn if necessary, land within the City of Newburgh, for the purpose of constructing thereon a sewer trunk line to the City's sewage treatment plant. 1974 NY Ops Atty Gen Nov 8.

A town has the authority to acquire historic edifices by either purchase or condemnation. 1978 Op St Compt File #497.

4. —By lease; proper

5. — —Improper

A town may not lease real property from a private, not-for-profit corporation for the purpose of providing a place to conduct a Red Cross community blood drive. 1980 Op St Compt File #124.

A lease agreement pursuant to which the Town of Altamont pays an annual rental for real property used by the town as a ski area and which further provides that the lessor agrees to make a gift of the property to the town at the expiration of the lease term would appear to constitute an unauthorized installment purchase contract. 1980 Op St Compt File #243.

A town may establish a public dump within the town by leasing the necessary land therefor. 1964 NY Ops Atty Gen Apr 23.

6. —By purchase; proper

7. — —Improper

A town may not acquire a site for the erection of a treatment plant in a sewer district where the consideration for such transfer would be services of the district to the former owner for a number of years without charge. 1967 NY Ops Atty Gen Jan 24.

While a village is not authorized to acquire property without the confines of the village for use as a village garage, a town may acquire such property outside of the town boundaries for such purpose. 1972 NY Ops Atty Gen Mar 2.

Under unique circumstances justifying a purchase of a parcel of land, the purchase would be for a public purpose even though much of the land would be resold immediately subject to easements for public purposes. 1980 NY Ops Atty Gen Nov. 13 (informal).

A town has the authority to acquire historic edifices by either purchase or condemnation. 1978 Op St Compt File #497.

8. —Joint acquisitions

Discussion of possible conflict of authority over a swimming pool and recreational park owned jointly by a town and a village within the town. 1978 Op St Compt File #463-A.

(1) A town may, in the proper exercise of its police powers, permit town gasoline to be used by a fire district fire department in an emergency and charge the district for the cost of the gasoline. (2) A town and a school district may enter into a municipal cooperation agreement pursuant to which they would jointly purchase gasoline or the school district would purchase gasoline to be delivered to and stored by the town. 1981 Op St Compt File #81-10.

9. —Necessity of referendum

Easement or other rights for installation of sewers through park lands belonging to a town for a use unrelated to park purposes may not be granted without specific authorization of the Legislature. 1977 NY Ops Atty Gen Oct 25.

A resolution of a town board agreeing to lease a parcel of land for use as a public parking lot would be subject to permissive referendum, unless rental payments and the costs of repair, maintenance and insurance are to be financed in whole from moneys appropriated from surplus funds. 1979 Op St Compt File #347.

A town's purchase of school land for parks and playground and its donation of the school building for elderly housing both constitute use of property for a public purpose and do not violate the constitutional prohibition against town gifts to private parties. 1991 NY Ops Atty Gen I 91-27.

Under certain circumstances, a town may accept a gift from an American Legion Post of a building to be used as a town hall, subject to the donor retaining the right to occupy the building several evenings per month. A town may purchase a building in exchange for consideration other than cash. 1981 Op St Compt File #81-172.

10. Appropriations and expenditures, generally

11. —Proper, generally

12. — —Attorney services

A town board may authorize the expenditure of town funds to retain private counsel to defend the Town Highway Superintendent against charges of having made defamatory statements at a town board meeting. 1978 NY Ops Atty Gen Sept 1.

A town may expend funds for legal expenses to determine title to a park previously believed to be owned by the town. 1980 Op St Compt File #434.

A village may use village funds to hire special counsel to defend the village in an action involving claims against village property. The village may, in cooperation with other municipalities, agree to hire a single law firm to present a joint defense against such claims where the interests of all the municipalities are identical. But the village may not pay for the legal services rendered to private litigants although the same law firm could represent both the village and private individuals if they are co-defendants. 1981 Op St Compt File #80-789.

13. — —Volunteer appreciation

A town board may hold an annual dinner for unsalaried members of various town boards where only the meals of the members will be paid for by the town as a token of appreciation for the services rendered by such members to the town. 1980 Op St Compt File #282.

A town may hold a recognition luncheon for its volunteer library workers but the town may only pay for the meals of the volunteers and the cost of the meals must be reasonable. 1982 Op St Compt File #82-66.

A town may adopt a local law superseding Town Law, § 64(14)(a) by authorizing appropriations to the town publicity fund in excess of the amounts specified therein. However, such a local law is subject to a permissive referendum. 1979 Op St Compt File #797.

A charge for stenographic services rendered in connection with a grievance matter concerning a highway department employee should be considered an administrative expense chargeable against the town general fund. 1983 Op St Compt File #83-243.

Town may make contribution to non-profit center for arts, provided that town residents will benefit as result thereof. 1994 NY Ops Atty Gen I 94-35.

Town may contribute funds to project to reconstruct privately-owned dam if town credibly finds that protection of public health would be served. 2002 NY Ops Atty Gen I 2002-17.

A town may expend publicity fund moneys to pay for rental of a room, food, non-alcoholic beverages and gratuities in connection with a dinner or luncheon meeting to be attended by area businessmen and town officials for the purpose of discussing potential business expansion and relocation in the town. However, such moneys may not be expended to purchase alcoholic beverages for such meeting. 1977 Op St Compt File #667.

The City of Saratoga Springs may expend moneys from its publicity fund to pay for actual and necessary expenses incurred in connection with a "Legislators' Day" held for the benefit of the members of the New York Legislature if such expenditures serve the purpose of promoting the general commercial and industrial welfare of the City. Whether an expenditure is for such a purpose is a question of fact to be determined in the first instance by local officials. To the extent Opns St Comp, 1965, No. 65-315, unreported, or other opinions of this Department are inconsistent with this opinion, they are superseded. 1979 Op St Compt No. 79-655, 1979, 1979 N.Y. Comp. LEXIS 164.

An assessor who uses his personal vehicle to visit property in the town in the course of preparing the assessment roll should be reimbursed for his travel expenses since these expenses are necessarily incurred in the performance of his duties. Furthermore, the town board may not adopt a policy of reimbursing only travel outside the town because travel within the town by an officer or employee in performing the duties of his office is a legitimate government expense which must be borne by the municipality. 1981 Op St Compt File #81-161.

14. Conveyance of real property, generally

15. —By deed

A town board, in conveying town real property pursuant to this section, may convey only such estate, right, title or interest as the town may have in the real property which is the subject of the conveyance and is not authorized to convey by a full covenant or warranty deed. 1958 NY Ops Atty Gen (informal).

A town-board may sell real property at private sale pursuant to a resolution which is subject to a permissive referendum provided the property is unneeded for town purposes and an adequate consideration is received. 1981 Op St Compt File #5.

A town may convey real property owned by it, including a portion of the town hall, to a village for village public library expansion, and the village may agree to construct an addition to the town hall at its expense as consideration therefor. 1982 Op St Compt File #82-305.

16. —By lease; proper

17. — —Improper

There is no statute which authorizes a town board to lease the town hall to private persons to conduct public dances. 1953 NY Ops Atty Gen Apr 24 (informal).

Absent specific legislative authorization, a municipality may not lease municipal park lands to a private natural gas company for the purposes of drilling a specified and limited number of gas wells. 1977 Op St Compt File #430.

A Town Board may, subject to permissive referendum, lease property owned by it to a city for a dump site. 1962 NY Ops Atty Gen Sept 14.

There is no authority for a town to convey real property which was originally vested in the town for recreational purposes. Where a planning board required subdividers to set aside and convey land for park and playground purposes, pursuant to § 277 of the Town Law, such lands were held in trust for the public use. 1959 Ops St Compt File #531; however a town may construct a building on its property to be used for park and recreational purposes and may lease such property to a nonprofit organization for recreational purposes for a fair and adequate consideration. 1962 NY Ops Atty Gen Oct 22.

A Town Board, upon adoption of a resolution, may lease to an adjoining landowner for a definite or indefinite term a strip of land adjoining the town building which strip is not being actively used, subject to permissive referendum, and improvements made by the lessee will be for joint use of the town and lessee. 1964 NY Ops Atty Gen Jan 31.

The Town of North Harmony may, pursuant to a resolution of the Town Board which is subject to a permissive referendum, enter into an extended lease of a portion of its real property which is to be used for oil drilling purposes, provided that the land is not impressed with a public trust or presently required for a Town purpose. Any such lease must be made for a fair and adequate consideration, and a provision in the lease for royalty payments to the Town in the event that gas or oil is discovered is permissible. 1975 NY Ops Atty Gen Feb 25 (Informal), 1975 N.Y. AG LEXIS 75.

A town may, for fair consideration and subject to permissive referendum, enter into a lease permitting a private utility to drill for methane gas at a town-owned sanitary landfill if the town board determines that the lease will not interfere with any town purpose. To the extent that any prior opinions are inconsistent with the views expressed herein they are superseded. 1980 Op St Compt File #113.

Under certain circumstances, a town may lease real property to a religious organization for fair and adequate consideration. As a general proposition, land which has no present or foreseeable use for town purposes should be sold, not leased, when an adequate price and ready purchaser are available. 1980 Op St Compt File #709.

18. —Competitive bidding; private sale

A town need not require public bidding for sale of excess land but must submit the transaction to a referendum. 1958 NY Ops Atty Gen Oct 10 (informal).

Town funds cannot be utilized to lease and equip medical facilities for use free of charge by a private physician who has neither been appointed to the office of town physician nor has contracted with the town board to provide medical or public health services. 1977 NY Ops Atty Gen Sept 29.

As a general rule, a town may not submit formal bids on a State contract for the purchase of sand. However, a town may convey to the State an interest in the real property in which the sand is located. 1982 Op St Compt File #82-63.

19. —Consideration, generally

20. — —Nominal consideration

A town may not convey its park land without special legislation, nor may it convey land to the YWCA for nominal consideration. 1978 Op St Compt File #595.

A town may not convey its park land without special legislation, nor may it convey land to the YWCA for nominal consideration. 1978 Op St Compt File #595.

A town board may not reduce the consideration of a lease of town real property during the term of such lease. 1953 NY Ops Atty Gen Dec 7 (informal).

The surplus area in a town building may be rented at a fair and reasonable rent. Any rental of the premises will be subject to a permissive referendum. Approval at a referendum of a lease not requiring a fair and reasonable rent would not exempt the town from the requirement to lease at a fair and reasonable rental. 1972 NY Ops Atty Gen Apr 21.

The Town of North Harmony may, pursuant to a resolution of the Town Board, which is subject to a permissive referendum, enter into an extended lease of a portion of its real property which is to be used for oil drilling purposes, provided that the land is not impressed with a public trust or presently required for a Town purpose. Any such lease must be made for a fair and adequate consideration, and a provision in the lease for royalty payments to the Town in the event that gas or oil is discovered is permissible. 1975 NY Ops Atty Gen Feb 25.

Discussion of fair and adequate consideration. 1981 Op St Compt File #81-51.

A town may convey unneeded real property to an historical society for fair and adequate consideration. 1982 Op St Compt File #82-111.

A town may enter into an agreement with a private firm whereby the firm will install and maintain bus stop shelters along town roads in exchange for the right to sell and display advertising on the shelters, so long as the town receives fair and adequate consideration under the agreement. Although not free from doubt, it would seem that such an arrangement is not subject to competitive bidding. Prior inconsistent opinions superseded. 1982 Op St Compt File #82-133.

21. —Property not devoted to public use

There is no authority for a town to convey real property which was originally vested in the town for recreational purposes. Where a planning board required subdividers to set aside and convey land for park and playground purposes, pursuant to § 277 of the Town Law, such lands were held in trust for the public use. 1959 Ops St Compt File #531; however a town may construct a building on its property to be used for park and recreational purposes and may lease such property to a nonprofit organization for recreational purposes for a fair and adequate consideration. 1962 NY Ops Atty Gen Oct 22.

Real property conveyed to a town by a deed making no reference to the intended use of said real property but presently used for public parking, a public use, may not be alienated without express legislative authority. 1968 NY Ops Atty Gen Nov 27 (informal).

The Town of North Harmony may, pursuant to a resolution of the Town Board which is subject to a permissive referendum, enter into an extended lease of a portion of its real property which is to be used for oil drilling purposes, provided that the land is not impressed with a public trust or presently required for a Town purpose. Any such lease must be made for a fair and adequate consideration, and a provision in the lease for royalty payments to the Town in the event that gas or oil is discovered is permissible. 1975 NY Ops Atty Gen Feb 25 (Informal), 1975 N.Y. AG LEXIS 75.

Under certain circumstances, a town may lease real property to a religious organization for fair and adequate consideration. As a general proposition, land which has no present or foreseeable use for town purposes should be sold, not leased, when an adequate price and ready purchaser are available. 1980 Op St Compt File #709.

22. —Referendum, generally

23. — —Lease of public land

A lease of town real property to a private person is subject to permissive referendum. 1955 NY Ops Atty Gen May 23 (informal).

The surplus area in a town building may be rented at a fair and reasonable rent. Any rental of the premises will be subject to a permissive referendum. Approval at a referendum of a lease not requiring a fair and reasonable rent would not exempt the town from the requirement to lease at a fair and reasonable rental. 1972 NY Ops Atty Gen Apr 21.

The Supervisor and Justices of the Peace, as ex-officio trustees of the Town of Babylon, may lease a portion of the real property of such town, without the holding of a permissive referendum thereon. 1960 Op St Compt File #800.

24. — —Sale of unneeded land

A town need not require public bidding for sale of excess land but must submit the transaction to a referendum. 1958 NY Ops Atty Gen Oct 10 (informal).

The Town of Brookhaven may convey unneeded real property owned by the town to a fire district without consideration and without being subject to a permissive referendum. 1979 Op St Compt File #699.

A sale of park property by the Town Board of the Town of Henrietta to Monroe County may not be subjected to permissive referendum when the Special Act of the Legislature authorizing such sale stipulates that the action of the Town Board is to be consummated without a public hearing or referendum. 1970 NY Ops Atty Gen May 12.

A resolution of a town board of a town in Westchester County which directs the supervisor to sell property acquired through tax foreclosure is not subject to a permissive referendum. 1978 Op St Compt No. 78–586.

Town lands may be sold subject to the provisions of sub 2 of this section. 1953 NY Ops Atty Gen Jan 26 (informal).

Discussion of inalienability of sewer district, park district and park lands. 1977 NY Ops Atty Gen Nov 17.

Procedure, terms and conditions for sale of real property by town under CLS Gen Mun § 72-h are determined by town board. 1987 NY Ops Atty Gen No. 87-61 (Informal).

A town's purchase of school land for parks and playground and its donation of the school building for elderly housing both constitute use of property for a public purpose and do not violate the constitutional prohibition against town gifts to private parties. 1991 NY Ops Atty Gen I 91-27.

Under appropriate circumstances municipality has authority to convey property by means other then quitclaim deed, as CLS Real P § 240 defines "conveyance as including every instrument, in writing, except a will, by which any estate or interest in real property is created, transferred, assigned or surrendered"; however, conveyances other then quitclaim imposes additional obligations on vendor and should be made only after municipality has made certain it can meet those obligations. NY Ops Atty Gen 88-68 (Informal).

If a town has purchased land pursuant to a resolution declaring that a specific parcel should be acquired for park purposes, but the town never used the land at all, and if the land is considered unsuitable for park purposes by the town board and if the deed contains no restriction stating that the land shall be used as a park, the rule of inalienability of park land does not apply and the land can be conveyed without a special act of the Legislature. 1978 Op St Compt File #771.

A reverter clause in an instrument conveying real property to a municipality is deemed to be enforceable unless it is illegal or against public policy. 1980 Op St Compt File #483.

Where a strip of land was not acquired for park purposes but for highway purposes, a special act of the legislature is not needed to alienate an interest therein. Whether a parcel of land was acquired for park purposes is a question of fact. 1982 Op St Compt File #82-255.

25. Depositary, generally

The guaranteed portion of SBA loans may be used as collateral for municipal and school district investments and deposits. 1976 Op St Compt No. 76–1155.

Given the transactional nature of N.O.W. accounts, whenever a municipal officer or employee is authorized or required to deposit moneys received by him in his official capacity, said officer may utilize either a checking account or a N.O.W. account. 1983 Op St Compt File #83-123.

26. Easements

Easement for power line through town park conveyed to town for park purposes may not be granted without specific legislative authorization. 1974 NY Ops Atty Gen June 7 (informal).

The Town of Newburgh is authorized to obtain easements on, and condemn if necessary, land within the City of Newburgh, for the purpose of constructing thereon a sewer trunk line to the City's sewage treatment plant. 1974 NY Ops Atty Gen Nov 8.

A town board may release a town easement to the grantor upon adoption of a resolution which is subject to a permissive referendum if such easement is no longer needed for any town purpose and fair and adequate consideration is paid to the town. 1980 Op St Compt File #267.

A town may adopt a resolution, subject to permissive referendum, conveying a license or easement for the purpose of drawing water from a well located on town property provided that the town board determines that the conveyance will not interfere with any town purpose and the town receives fair consideration. Any such agreement may be for a multi-year period extending beyond the term of the governing board which enters into the agreement, but it may not be for an indefinite term. 1981 Op St Compt File #81-209.

27. Franchises, generally

28. —CATV

Since a television cable concern is not regulated by the Public Service Commission, a Town Board may grant it a franchise upon such terms and conditions as are deemed proper. 1961 NY Ops Atty Gen June 6.

29. —Exclusive franchises

In the absence of specific legislative authority, a Town Board may not grant an exclusive franchise for use of its streets, highways and public places. 1964 NY Ops Atty Gen Sept 11.

30. Funds; investment of

Temporary deposits of funds for income by a municipal corporation require security by a local banking institution; the statutes mentioned are not in conflict. 1965 NY Ops Atty Gen Apr 8.

Recent amendments to the Banking Law and other laws at an Extraordinary Session of the State Legislature (L 1980, ch 883) did not change the status of the law so as to authorize municipal funds to be invested in savings banks. 1981 Op St Compt No. 81-11, 1981

A town is not authorized to invest town funds in a savings bank account. 1982 Op St Compt File #82-9.

Given the transactional nature of N.O.W. accounts, whenever a municipal officer or employee is authorized or required to deposit moneys received by him in his official capacity, said officer may utilize either a checking account or a N.O.W. account. A town clerk is required to deposit all moneys received by him not later than three business days after the total thereof exceeds fifty dollars and therefore is authorized to deposit moneys in a N.O.W. account designated by the town board as a depository of town funds. 1983 Op St Compt File #83-123.

31. Gifts to town

32. —Conditional gifts

Land conveyed to a municipality under a condition whereby it will revert to the grantor if it is not used as a golf course is a fixed asset for purposes of the municipality's annual financial report to the Comptroller. 1980 Op St Compt File #483.

A town board may accept gifts of money by private citizens to be used specifically as a defense fund for a suit attacking the constitutionality of the town's zoning ordinance. 1982 Op St Compt File #82-336.

A town board, under Town Law § 64(17-a) does not have a right to obtain a historical landmark by condemnation or otherwise but might be authorized to acquire such by gift if Town Law § 64(8) is complied with. 1967 NY Ops Atty Gen Apr 24 (Informal), 1967 N.Y. AG LEXIS 68.

While the Town of Skaneateles is authorized to take by gift real and personal property for any public use upon such terms or conditions as may be prescribed by the donor and accepted by said town, it is not authorized to accept all of the stock of a business corporation whose only asset is the land it wishes to donate to the town. 1973 NY Ops Atty Gen Oct 26 (informal).

There is no authority for a town or any of its departments or agencies to either solicit funds for use in town programs or participate in fund-raising activities for such purpose. A town may, however, accept gifts of moneys solicited by a private civic group. 1978 Op St Compt File #256.

An unconditional gift of money to a town may not be used to establish a reserve fund to pay tort claims. 1978 Op St Compt File #1063.

A town board may accept a gift for a particular town purpose subject to the condition that town moneys in the same amount be provided for the same purpose, so long as the town board is not relinquishing any of its powers and duties relating to appropriations and expenditures. 1983 Op St Compt File #83-165.

33. Historic places

A town board, under Town Law § 64(17-a) does not have a right to obtain a historical landmark by condemnation or otherwise but might be authorized to acquire such by gift if Town Law § 64(8) is complied with. 1967 NY Ops Atty Gen Apr 24 (Informal), 1967 N.Y. AG LEXIS 68.

Tax money of a municipality may be used to help operate and maintain a museum owned and operated by a corporation incorporated by or with the consent of the Regents and registered by the Regents. 1971 NY Ops Atty Gen Aug 16.

A town has the authority to acquire historic edifices by either purchase or condemnation. 1978 Op St Compt File #497.

A town may make a contribution to a county for the repair of a covered bridge which has been recognized to be of historic significance and value so long as a determination is first made that such a contribution would serve a legitimate town purpose. 1982 Op St Compt File #82-143.

34. Indemnity insurance

A suburban town may adopt a local law superseding the provisions of section 55-b of the Town Law and removing the limitations therein with respect to the maximum amount of the reserve fund authorized thereby. 1978 Op St Compt File #452.

Discussion of workmen's compensation and liability insurance coverage of persons working on a volunteer basis for a town. 1978 Op St Compt File #712.

There is serious doubt as to the enforceability of a general waiver of liability obtained by a municipality from a person working on a volunteer basis for such municipality. 1978 Op St Compt File #789.

Special districts that are not townwide may be self-insured in the town's liability and casualty reserve fund. Payments into the reserve fund on behalf of special districts for both liability and casualty protection are charged against the districts, and should be allocated among the districts on some equitable basis such as exposure to risk. 1979 Op St Compt File #621.

The cost of liability insurance is a general town-wide charge, and may not be apportioned to the general part-town fund or the highway fund. 1980 Op St Compt File #456.

35. Lighting of highways and bridges

A county may terminate the lighting of public highways without advance notice to towns. Towns may provide lighting on public highways as a general town charge. There is no duty for a town or county to provide lighting on public highways. 1981 NY Ops Atty Gen June 1 (Informal).

(1) A town may not use general funds to install or maintain street lights within the boundaries of an incorporated village except on public bridges which are not under the jurisdiction of the village and (2) a town lighting district may only provide street

lighting in a village if the village is within the district. 1980 Op St Compt File #368.

36. Management, custody and control of town property, generally

37. —Abandoned or unclaimed property

A town board may sell abandoned and unclaimed property held by the town police department, not accepted by the Comptroller and the Motor Vehicle Commissioner. 1958 NY Ops Atty Gen Aug 6 (informal).

A town may lease unneeded real property to junkyard businesses and in connection therewith, construct fencing on the leased property. 1979 Op St Compt File #606.

Where a town owns a boarded-up mansion, a member of the town board has the right to enter and inspect it. He may also bring a reasonable number of interested persons with him, subject to certain conditions. However, no single board member can cause the mansion to be opened for a general public inspection without the approval of a majority of the board. 1981 Op St Compt File #718.

38. —Gifts, generally

39. — —Gratuitous use

A town may furnish the state police and/or the county sheriff with free office facilities, including heat, light, water and janitorial services. 1979 Op St Compt File #462.

Abutting landowners who own and use private road may dedicate road to town, whereupon town becomes responsible for maintenance. 1979 Op St Compt File #631.

A town, either alone or jointly with a village, may establish a "tree trust" to accept gifts of money to be used for planting and maintaining trees on public property. 1981 Op St Compt File #80-768.

If an unincorporated cemetery association conveys a cemetery and perpetual trust fund to a town, the money in the fund may be used only for the particular cemetery involved and not for other town cemeteries. 1981 Op St Compt File #80-810.

A town may not make a gift of public funds to a private historical association but it may enter a contract with an historical association for the support or maintenance of any historic edifices located in the town. 1982 Op St Compt File #82-283.

40. —Highway equipment

Discussion of the town board's power to investigate and settle the town's claim for damages when the town highway superintendent uses town equipment for private purposes. 1979 Op St Compt File #134.

A town highway superintendent has the power to authorize highway employees to take highway vehicles home at night regardless of any contrary policy adopted by the town board. 1981 Op St Compt File #80-806.

In the absence of a collective bargaining agreement so authorizing, a town board may not permit highway employees the use of the highway garage and town equipment to repair and work on their own personal vehicles. 1982 Op St Compt File #82-241.

Town highway equipment is under the management and control of the town highway superintendent and the town board may not impose restrictions on its use so long as it is being used for town highway purposes. This rule applies even where the superintendent is traveling outside the limits of the town if such travel is related to his official duties. In using a highway department vehicle to attend a conference or meeting outside of the town, the superintendent only needs the approval of the town board if the conference or meeting is covered by section 77-b of the General Municipal Law or if additional expenses would be incurred. The town board may impose restrictions on any town vehicles which do not belong to the highway department. 1983 Op St Compt File #83-240.

41. —Licenses and concessions

In joint town and village park managed by town, town has discretion to grant one or more concessions to private vendors to sell food. 1979 Op St Compt File #178.

The granting of a revocable license, for adequate consideration, to a church to use a town community center building for religious services would not fall within the constitutional prohibition contained in article XI, § 3 of the State Constitution. 1981 Op St Compt File #645.

A town may grant a license to use town property for the purpose of ingress and egress to the licensee's property. Such a license would not be considered a conveyance of real property and need not be subject to a permissive referendum. The town may require the licensee to improve the property that he travels on but the cost thereof should be treated as part of the consideration paid for the license since the town will be benefited thereby. 1982 Op St Compt File #82-180.

42. —Town hall

The Town of Tusten is not authorized to purchase a building from the Narrowsburg Fire Department which now houses a movie theater under lease to a private person and where only a portion of said building would be used for a town purpose; namely, a town hall. 1973 NY Ops Atty Gen Oct 29 (informal).

A town may not permit use of a portion of its town hall by a group if it is also used for town purposes; if not so used, it may lease the portion to a private group for adequate consideration. 1978 Op St Compt File #777.

A town may lease office space in the town hall which is not needed for town purposes to the local post office for a fair and reasonable rental. 1981 Op St Compt File #81-173.

43. —Town offices, generally

44. — —Location

In view of the duty imposed upon the town board to have custody of town property, it may require a town clerk to maintain his office in quarters provided by the town. 1957 NY Ops Atty Gen Jan 11 (informal).

A town may house in one building its town offices, justice court offices and police headquarters and may locate the building anywhere within the town or within a village wholly or partly within the town. 1981 NY Ops Atty Gen March 4 (informal).

A town board may require that the records of the town clerk's office be kept in space provided therefor in the town office building and, to that extent, the board may dictate the location of the town clerk's office. 1979 Op St Compt File #221.

The town board of any town (including a suburban town), rather than the supervisor, has the authority to determine the location of various town offices and departments within town office buildings. 1983 Op St Compt File #83-171.

Pursuant to state law, town board has authority to determine location of office of town's board of assessors; pursuant to local law, town board may require board of assessors to maintain regular office hours. 9 Op Counsel SBEA No. 91 (1989).

Town board cannot require supervisor's office to be kept open for use of other town personnel when office must be kept locked for security of supervisor's records. 1978 Op St Compt File #231.

The secretary to the highway superintendent may not keep the superintendent's records in her home unless the town board has designated her home to be the superintendent's office. The town supervisor may not order that mail addressed to other town officers be delivered to him unless the town board has authorized him to receive such mail. 1981 Op St Compt File #80-663.

45. —Town park, generally

46. — —Playground; recreational facility

The only occasion upon which an expenditure for the establishment of a public park and playground and acquisition of the land for the same and the equipping of it with suitable structures and apparatus is subject to a referendum, is when such expenditure is to be made solely under the provisions of the Town Law and from taxes levied for the fiscal year in which the expenditure is to be made, in which case the expenditure is subject to a permissive referendum. One other method of expenditure is authorized when action is to be taken solely under the provisions of the Town Law and that is when the expenditure is to be made in whole from moneys appropriated from surplus funds, but when the expenditure is to be made from such surplus funds, it is not subject to a permissive referendum. On the other hand, where financing of the program is to be relied upon, this is provided for by following a combination of the provisions contained in the Town Law and in the Local Finance Law, in which case, if the financing (as

distinguished from the expenditure) is to be accomplished through the sale of bonds with a proposed maturity greater than five years, it is subject to a permissive referendum whereas if the financing is to be accomplished through sale of bonds with a proposed maturity of not more than five years from the date of the bonds or from the date of the first bond anticipation note issued in anticipation of the sale of the bonds, whichever date is earlier, it is not subject to a permissive referendum. In the event of financing under the Local Finance Law, the expenditure itself is not subject to an additional referendum. If this were not the case, and two referenda could be held, the ridiculous result could be produced that the first referendum could be approved, authorizing sale of long-term obligations, and the second could be rejected, thus effectively preventing the expenditure of the funds so raised. 1976 Ops Atty Gen Oct 15.

A town board may grant a concession for a reasonable fee, terminable at will by the town, to a private entity to operate a restaurant in a town-owned building in the town park. 1978 NY Ops Atty Gen Feb 23 (Informal).

A municipality may enter into a gas pooling agreement whereby municipal park lands are used in such pool, and gas underlying such lands may be extracted in exchange for a portion of royalties, so long as any actual drilling is done on non-park lands. 1977 Op St Compt File #430.

Award of concession to private vendor to sell food from mobile unit at joint town and village park is not subject to competitive bidding. 1979 Op St Compt File #178.

Where a town has used property for park purposes and has by ordinance incorporated the property into its park system, the property is restricted to use for park purposes only and it may not be conveyed or used for other purposes without specific authority from the State Legislature. 1982 Op St Compt File #82-361.

47. —Town waterway; dam

Town Law, § 64(11-a), Village Law, § 4-412(3)(1) and General Municipal Law, § 119-o are permissive statutes and impose no duty on the town or village to make repairs on privately owned streams within such municipalities. 1979 NY Ops Atty Gen Sept 14 (Informal).

While a town has no duty to maintain or repair a privately-owned dam, it has authority to do so where there is a danger of flooding. 1979 Op St Compt No.79–372.

A town is not empowered to develop town-owned real property for the purpose of converting it into building lots for sale. 1955 NY Ops Atty Gen Sept 23 (informal).

In the absence of express legislative grant, a municipality may not exercise its jurisdiction beyond its boundaries and may not, therefore, regulate by ordinance or local law the use of real property owned by it but located in another municipality. 1971 NY Ops Atty Gen May 11 (informal).

A town may house in one building its town offices, justice court offices and police headquarters and may locate the building anywhere within the town or within a village wholly or partly within the town. 1981 NY Ops Atty Gen March 4 (informal).

Underground sprinkler systems may be allowed within the boundaries of town property. 1991 NY Ops Atty Gen I 91-22.

Local government is not authorized to permit use of its property for private advertising. 1992 NY Ops Atty Gen I 92-56.

A town may rent to a Federal agency a log chipper which is currently not needed for town purposes for adequate consideration. 1978 Op St Compt File #934.

A town assessor may not be denied travel expenses for the use of his automobile when used to perform his duties of assessing property in the town, and a town board may dictate where the office of assessor shall be located but may not require the assessor to travel to his office before leaving to assess property in the town. 1980 Op St Compt File #285.

48. Medical matters; facilities and services

49. —Town physician

A town can pay a physician, an X-ray technician, a receptionist and a physician's attendant to operate a town-owned primary health care center. 1978 Op St Compt File #770.

There are various means whereby a town having a public general hospital may "guarantee" a physician an annual sum or salary for practicing in the community. 1979 Op St Compt File #670.

50. Official newspapers, generally

51. —Location outside of town

Where the only newspaper published in the county and circulated within a town is not entered in a post office within five miles of the town, the town board has the discretion to designate as the official newspaper of the town a newspaper which is published in a city in an adjoining county if that newspaper has a general circulation within the town and is entered in the post office as second class matter. 1980 Op St Compt File #307.

Where a town has three different newspapers which have a circulation within the town, only one of which is entered as second class matter in a post office located in the town, the town may designate only that publication as the official newspaper. Where a newspaper is entered as second class matter in a post office which is located outside the town but which delivers mail to an area of the town under the post office's geographical lines, such newspaper is not eligible to be designated as the official newspaper. 1982 Op St Compt File #82-307.

52. —"Newspaper" defined

A "throw-away" pamphlet distributed to the public without charge is not a "newspaper" which can be designated as official by a municipality. 1963 NY Ops Atty Gen Feb 20.

A newspaper which has been designated by a town as an official newspaper does not cease to be an official newspaper if it changes its name, changes its format, or if it closes down with no publication for one week in order to retool. 1990 N.Y. Op. Att'y Gen. No. I90-49.

A town may not designate as the official newspaper, a periodical that has not been entered as second class matter. Postal regulations prevent a publication designed primarily for advertising or having free circulation from being entered as second class matter. 1981 Op St Compt No. 81-70, 1981 N.Y. Comp. LEXIS 818.

53. —"Published" defined

A newspaper which has been designated by a town as an official newspaper does not cease to be an official newspaper if it changes its name, changes its format, or if it closes down with no publication for one week in order to retool. 1990 N.Y. Op. Att'y Gen. No. I90-49.

A newspaper which has general circulation in the town by subscription, but is not available at news stands, may be designated as the official newspaper. 1980 Op St Compt No. 80–123.

54. —Use of other than official newspaper

Where a particular section of the Town Law does not otherwise require, notices may be published in a newspaper not designated as the official newspaper. 1956 NY Ops Atty Gen Feb 16 (informal).

55. —Miscellaneous

(1) A Pennysaver-type shopping circular may not be designated the official town newspaper; (2) provided all statutory criteria are met, a newspaper published in Pennsylvania may be designated the town's official newspaper; (3) it is not necessary for the town, in choosing a newspaper published outside the county, to designate the paper having the greatest circulation in the town. 1979 NY Ops Atty Gen June 28. (Informal).

A newspaper which has been designated by a town as an official newspaper does not cease to be an official newspaper if it changes its name, changes its format, or if it closes down with no publication for one week in order to retool. 1990 N.Y. Op. Att'y Gen. No. I90-49.

The circulation rating of a newspaper, in which town legal notices are published, should be based on total paid circulation over a recent period of six months or so. 1978 Op St Compt File #200.

A town board is advised not to designate as the official town newspaper a newspaper in which a town board member is interested as a stockholder of the corporation publishing such newspaper. 1957 NY Ops Atty Gen Jan 22 (informal).

If only one newspaper has been published in a town for at least one year and is entered in a post office as second class mail

matter, that is the only newspaper which can be designated as the official town newspaper. 1980 NY Ops Atty Gen Oct 29 (informal).

CLS Town § 64(11) establishes procedures for selection of official newspaper. 1992 NY Ops Atty Gen I 92-36.

Discussion of the topic of an official town newspaper and the publication of legal notices. 1978 Op St Compt File #657.

Discussion of official newspaper. 1979 Op St Compt File #41.

A town board resolution designating an official town newspaper may be repealed at any time. 1981 Op St Compt File #81-221.

56. Patriotic holidays, generally

A town and a village may agree to expend funds jointly to pay for the cost of publishing a coloring book commemorating the 300th anniversary of the area. 1978 Op St Compt File #264.

A village may authorize the appropriation of funds for the observance of Memorial Day by adoption of a local law or resolution. 1978 Op St Compt No. 78–854.

Section 64(12) of the Town Law, imposing a $1000 ceiling on annual appropriations for Veteran's Day observance by towns within a certain population class is a special law, and its terms may be superseded by a local law properly enacted. 1978 Op St Compt File #961.

57. Postings additional to signboards

Subdivision 14-a is intended for public purposes for benefit of the town generally and is constitutional. 1939 N.Y. Op. Att'y Gen. No. 143.

58. Publicity, generally

59. —Payments for publicity, generally

60. — —For historical celebrations

Town funds may properly be expended for a centennial celebration of the establishment of a town. 1955 NY Ops Atty Gen May 12 (informal).

A town which has agreed to pay $10,000 to a local chamber of commerce pursuant to a contract for publicity services may not pay any additional moneys to the chamber of commerce in the absence of a resolution subject to mandatory referendum. 1979 Op St Compt File #94.

A town may expend publicity fund moneys to defray the cost of printing the cover of a telephone and business directory issued by the chamber of commerce. 1980 Op St Compt File #109.

An agreement between the Town of Pelham and the League of Women Voters to pay publicity fund moneys for the preparation and distribution of a booklet promoting the general, commercial and industrial welfare of the Town is improper because it leaves the final determination as to the contents of the booklet to the League and does not provide for a set-off of costs of publication and distribution to the extent that advertising revenues exceed the value of the League's services. Such revenues may not exceed the Town's costs and become a source of general revenue to the Town. Opn No. 67-787 superseded. 1981 Op St Compt File #80-671.

Because the amendments to sub 14 of this section made at the 1952 session of the legislature can be harmonized, it is believed that a town of the second class may expend the amount of $2000 annually for publicity purposes. 1953 NY Ops Atty Gen Oct 21 (informal).

A town may not establish a separate fund, nor may it use its publicity fund to pay the expense of publishing a summary and condensed notices of forthcoming town board meetings. However, public notice of such meetings must be given. 1978 Op St Compt File #417.

The State Legislature may enact a special law authorizing a town to impose an occupancy tax on hotels and motels within the town. A formal home rule request from the town is not required. The Legislature may also direct that the revenues produced from such tax are to be credited to the publicity fund of the town. 1983 Op St Compt File #83-218.

61. Street names, numbers and signs

A Town Board may authorize a Superintendent of Highways to purchase road signs at a cost not exceeding $1,000 in any one year, the cost to be a general town charge. 1964 NY Ops Atty Gen May 22.

62. Town contracts, generally

63. —Competitive bidding; private sales

A town may contract for the sale and delivery of recyclable newspaper to a private recycling firm. Such a contract would not be subject to competitive bidding procedures. 1979 Op St Compt File #146.

Award of concession to private vendor to sell food from mobile unit at joint town and village park is not subject to competitive bidding. 1979 Op St Compt File #178.

Competitive bidding is not required for the sale of a damaged vehicle by a town, but is required for repair work to a damaged vehicle, if an expenditure in excess of the bidding monetary limit is involved. If no bidding is required for the repair work, the town is still obligated to secure such work at a reasonable cost and would be advised to obtain cost estimates in this regard. 1979 Op St Compt File #560.

64. —Highways, driveways and the like

A town board is not authorized to contract with a private individual on behalf of the town to plow out driveways of all individual persons in the town who request the service, nor is there any authority for the formation of a district encompassing the entire town or part thereof for such purpose. 1968 NY Ops Atty Gen Nov 14 (informal).

A town may purchase gravel for highway purposes in exchange for performing grading and filling work at the gravel site of the vendor-landowner, provided the value of such work does not exceed the value of the gravel purchased. 1978 Op St Compt File #988.

65. —Interest of town official in contract

General rules are that (a) no officer of a county, city, town, school district, fire district or improvement district may be interested directly or indirectly in a claim other than for his compensation against political subdivision of which he is an officer; and (b) a public officer who is an officer or director of a corporation doing business with governmental unit of which he is an officer has such an interest in corporation's claim as to make contract unlawful. 1946 NY Ops Atty Gen Apr 2.

A retired town officer may contract with the town, but, by so doing, may lose his retirement benefits. 1961 NY Ops Atty Gen Dec 21.

A member of a town board may not have an interest in a contract of insurance with such town except where the total consideration payable thereunder, together with all other considerations payable under contracts with such town in which he has an interest during the fiscal year, does not exceed $100.00; or where his interest is only that of a stockholder owning or controlling less than 5% of the stock of the corporation entering into such contract with the town. In any event, disclosure under § 803 must be made. 1969 NY Ops Atty Gen July 16.

Subdivision 6 of this section, in permitting the Town Board to award contracts, does not prohibit the awarding of contracts by other officers or agencies of the town. 1961 NY Ops Atty Gen June 13.

A town may enter into an agreement wherein it provides funds for the preservation and indexing of historical artifacts which residents either give or lend to the town. 1980 NY Ops Atty Gen Dec. 12 (informal).

A town may appropriate the necessary funds (if funds are available) to pay a claim based upon a contract entered into in a prior year where no appropriation had been made in the year of the contract, provided that funds were available from which an appropriation could have been made in the year the contract was entered into and provided the statute of limitations has not run out. If such a claim is for preliminary work in connection with a capital project for which bonds are issued, the proceeds from such bond issue may be used to pay the claim. 1978 Op St Compt File #608.

A town may enter into an agreement pursuant to Town Law, § 64(12) with a private baseball club to provide an Independence Day fireworks display and pay all or part of the expense therefor, if the display is a town activity and, as such, under the sponsorship and control of the town. 1979 Op St Compt File #742.

A choice of law clause within a public contract would be permissible so long as there is authorization to enter into the underlying contract. 1983 Op St Compt File #83-178.

66. Traffic control, signals and standards, generally

67. —On private property

Regulation of parking and traffic in a private condominium complex is an exercise of a town's police powers, and a town is subject to the same constitutional principles as when it regulates parking and traffic on public streets and highways—e.g., regulations should bear reasonable relation to public welfare and operate with substantial equality and uniformity. The installation of signs and traffic controls in a private condominium complex is a town charge and may not be charged back against the property in question. 1978 Op St Compt File #269.

The cost of installing and maintaining traffic control signs in a private apartment complex is a town charge, and may not be charged back against the apartment owners. 1981 Op St Compt File #80-733.

68. —On state or county roads

A town board has no authority to erect "stop" and "go" signal over and upon state or county highway without permit from superintendent of public works. 1927 N.Y. Op. Att'y Gen. No. 308.

Although traffic control signals, as defined by Vehicle and Traffic Law, § 2 (24) may be installed and maintained as provided for by Town Law, § 64 (16), a town board cannot enact ordinances enforcing obedience to a traffic control signal. Violations in connection therewith must be prosecuted under provisions of Vehicle and Traffic Law. 1937 N.Y. Op. Att'y Gen. No. 172.

A town cannot place a gate across a public highway in order to restrict the use thereof to town officials and employees and to owners of property along the highway. 1980 NY Ops Atty Gen July 29 (Informal), 1980 N.Y. AG LEXIS 75.

69. Vacancies in town office, generally

70. —Created by election tie

The provisions of this section, authorizing town board to fill vacancy in any town office by appointment, apply where there is failure to elect by reason of tie vote. 1911 N.Y. Op. Att'y Gen. No. 520.

In the event of a tie vote at an election for a town office there is a failure to elect and the town board fills the vacancy occurring after the expiration of the term of the incumbent who holds over until his successor is appointed. 1955 NY Ops Atty Gen Dec 9 (informal).

Where there is a tie vote for election to a town office there is a failure to elect and the town board may fill the vacancy by appointment. 1957 NY Ops Atty Gen Nov. 14 (informal).

Where there is a tie vote for an elective office a vacancy will exist at the expiration of the current term. The vacancy must be filled by the appointing board. If the appointing board fails to act, the Governor may require a special election. A special proceeding may be brought to compel the board to act, and if the board then fails, the judgment may require a special election. Appointing officer holds office until following December 31, and balance of term is filled at November election. Officer elected at special election holds for balance of unexpired term. 1973 NY Ops Atty Gen Nov 30.

71. —Discretion of town board as to filling

Where a vacancy exists in the membership of a town board, the authority of the town board is mandatory and not discretionary. Failure of the town board to appoint would authorize a proceeding in the nature of mandamus to compel an appointment. 1970 NY Ops Atty Gen March 5.

If a town board member resigns before September 20 in an even-numbered year and the town board does not appoint to fill the vacancy and an election is held to fill the vacancy, the winner will take office immediately upon the certification of the election by the board of canvassers and upon qualifying for the office. 1978 NY Ops Atty Gen Sept 5.

The failure to follow procedure required by law for a permissive referendum invalidates the resolution by the Town Board in reducing the number of justices from 2 to 1. If the second office of town justice is currently vacant, the town board is empowered to fill the vacancy. The fact that a second town justice should have been available, however, did not invalidate actions transferred to and taken by other justices, where sole town justice was unable to act by reason of conflict of interests, etc. 1990 N.Y. Op. Att'y Gen. No. I90-35.

72. —Eligibility of town officers

A town clerk may resign that office and thereafter be appointed by the town board to fill a vacancy in another elective town office. Of course, this vacancy must be filled by election at the next general election. 1959 NY Ops Atty Gen Apr. 9 (informal).

Under Town Law Section 64(5) and Public Officers Law Section 30(2), a member of the Town Board of the Town of Amherst which created the position of Second Deputy Town Attorney may be appointed by said Board to such position, following the resignation from said Board. 1971 NY Ops Atty Gen Feb 5 (informal).

In view of the statutory authority contained in Town Law, § 64(5), when a vacancy occurs in the Office of Supervisor of the Town of Blooming Grove, a member of the Town Council upon his resignation as Councilman may be appointed to said Office of Supervisor. 1975 NY Ops Atty Gen Oct 28 (informal).

A town board member may not be appointed by the town board to a town job unless the member first resigns from the town board. 1981 NY Ops Atty Gen April 7 (informal).

Section 64(5) of CLS Town permits a former town board member to be appointed only to another town office. 1987 NY Ops Atty Gen No. 87-79 (Informal).

Because of the town board's powers over the town justice and court, and the possible appearance before the court by a town board member in his capacity as police officer, the position of town board member and chief of police department of a village within the town are incompatible, and therefore a person should not simultaneously hold both offices. 1990 N.Y. Op. Att'y Gen. No. I90-7.

73. —Specific office vacancies, generally

74. — —Assessor

A town cannot change from sole appointed assessor to three elective assessors. When office of appointive town assessor becomes vacant, town board appoints individual who serves for remainder of unexpired term. 1980 Op St Compt File #12.

Where the office of town assessor becomes vacant before September twentieth of any year the town board may appoint an assessor to hold the office for the remainder of the calendar year. The town should elect a new assessor at the general election in November to fill the vacancy for the remainder of the unexpired term. No special election need be held. 1980 Op St Compt File #269.

The appointment of an individual to fill a vacancy in the position of appointed assessor is subject to pertinent civil service requirements. 1983 Op St Compt File #83-4.

75. — —Justice of the peace

A person elected to fill a vacancy of the office of justice of the peace is entitled to assume the office upon his election thereto and qualification therefor. 1953 NY Ops Atty Gen Oct 9 (informal).

Where a town in the second class becomes a town in the first class and a justice of the peace, whose term of office has two years to run, resigns, there is doubt whether the town board may properly fill the vacancy. The question is whether it is the justice in office or the term of the office itself which is constitutionally protected. 1954 NY Ops Atty Gen Apr 14 (informal).

A vacancy in the office of justice of the peace occurring on August 11, 1957, should be filled at the 1957 general election. 1957 NY Ops Atty Gen July 28 (informal).

The failure to follow procedure required by law for a permissive referendum invalidates the resolution by the Town Board in reducing the number of justices from 2 to 1. If the second office of town justice is currently vacant, the town board is empowered to fill the vacancy. The fact that a second town justice should have been available, however, did not invalidate actions transferred to and taken by other justices, where sole town justice was unable to act by reason of conflict of interests, etc. 1990 N.Y. Op. Att'y Gen. No. I90-35.

76. — —Town board member

Town board has authority to fill vacancy by appointment for

prescribed period or until filled by special election. 1935 N.Y. Op. Att'y Gen. No. 117.

A vacancy on a town board is filled by appointment by the remaining members of the town board and if they are unable to agree, the Governor may, in his discretion, proclaim a special election to fill the vacancy. Any resident of the town may bring a proceeding under Article 78 CPLR to compel the town board to appoint and could ask, as alternate or additional relief, that the court order a special election in the event the town board fails to appoint. 1978 NY Ops Atty Gen Feb 2 (Informal).

77. — —Town clerk

An appointee to fill a vacancy in the office of town clerk and an appointee to fill a vacancy in the office of town justice must run for election to fill the unexpired portions of the terms. The fact that the appointees had previously been elected to and served in those offices has no relevancy to the question of whether an election must be held. An 18 year old who is otherwise qualified may be appointed to the office of deputy town clerk. 1972 NY Ops Atty Gen July 27 (informal), 1972 N.Y. AG LEXIS 118.

Where the elected town clerk and a councilman simultaneously resign in futuro and at same time town board passes a resolution appointing the councilman as town clerk, resolution has no effect: town councilman was still member of town board and vacancy in town clerk's office did not then exist. Elected town clerk's resignation must be filed with Secretary of State. When filed in town clerk's office, it has no effect so town clerk still holds office. Where resignation purported to be for balance of present and all of forthcoming term the resignation, even if properly filed, would be inoperative as to forthcoming term and present town clerk will hold over in office until qualifying for new term. If clerk fails to qualify for new term, town board may appoint. 1975 NY Ops Atty Gen Dec 31 (informal).

Where a town clerk is re-elected and subsequently resigns prior to the expiration of his current term, two vacancies arise—one for the current term and one for the new term. The vacancies may not be filled until they actually occur, however, and an attempt to fill a prospective vacancy is null and void. 1982 Op St Compt File #82-30.

A town Recreation Commission may not appoint one of its members as Assistant to the Recreation Superintendent. The employment of a former commissioner to such position is not void simply because a majority of the commissioners serving at the time of such appointment previously served as commissioners with the individual being employed. However, in the latter case, additional circumstances may work to void the appointment. N.Y. Op. Att'y Gen. No. 83-38.

A town board member must first resign as such in order to be appointed to fill a vacancy in a town office, and this obviously prevents him from voting on his own appointment. 1978 Op St Compt File #607.

78. —Term of office, generally

79. — —Remainder of calendar year

Resignation of a supervisor prior to September 20 creates a vacancy which must be filled at the general election in the same year, and any appointment to fill a vacancy must be by a majority vote of the Town Board and for a term not longer than the end of the current year. 1962 NY Ops Atty Gen Mar 15.

The term of a supervisor appointed to fill a vacancy expires December 31 of the year in which the appointment is made. 1962 NY Ops Atty Gen July 17.

Subdivision 5 of this section conflicts to some extent with the time limit imposed by the Constitution on appointments to fill vacancies in elective town offices, and accordingly when the appointment is made to fill a vacancy occurring after September 20 and before the general election, the appointee may hold office only through December 31 of the same year, and the vacancy then ensuing may be filled by the Town Board by appointment to hold office until December 31 of that year. 1962 NY Ops Atty Gen Dec 18.

One who is appointed to fill a vacancy in the office of justice of the peace holds office until the next annual election at which the vacancy may be filled, and if the vacancy is not then filled the Town Board may make an appointment to fill it to the end of the year. 1963 NY Ops Atty Gen Nov 13.

If an elected town officer resigns before September 20 in an even-numbered year the vacancy is filled by appointment for the balance of the year and a successor is elected at the general election in November who will take office on the next January 1. 1978 NY Ops Atty Gen Sept 5.

Upon the failure to hold the required election to fill a vacancy in an elective office, the person appointed to temporarily fill the vacancy may not hold over beyond December 31 following the date on which the election should have been held. N.Y. Op. Att'y Gen. No. 84-67.

Where the office of town assessor becomes vacant before September twentieth of any year the town board may appoint an assessor to hold the office for the remainder of the calendar year. The town should elect a new assessor at the general election in November to fill the vacancy for the remainder of the unexpired term. No special election need be held. 1980 Op St Compt File #269.

80. — —Unexpired term

A person elected to fill vacancy in office of justice of peace at general or special election called for that purpose, but held at time when no biennial town meeting or special meeting was scheduled to be held, will hold office only for unexpired portion of term of office and not for full term. 1940 NY Ops Atty Gen June 24.

The term of a justice of the peace to fill a vacancy terminates upon the election of a person to fill the unexpired term and a person so elected is entitled to enter upon office immediately after election. 1957 NY Ops Atty Gen July 16 (informal).

Construing § 17 of art. VI of the Constitution with par. 5 of § 64 of the Town Law, where a vacancy occurs in the office of justice of the peace during a term which would expire December 31, and an appointment is made to fill the vacancy, it is necessary to elect a justice to serve from election day through December 31, as well as a justice for a new four-year term commencing January 1. 1961 NY Ops Atty Gen Mar 27.

The terms of a town assessor and councilman elected on November 6, 1962, to fill vacancies commence January 1, 1963 and terminate on the same day as the terms of their predecessors would have terminated. 1962 NY Ops Atty Gen Oct 1.

Discussion of term of office of justice of peace appointed to fill a vacancy in Suffolk County and election of a successor to fill the balance of the term. 1962 NY Ops Atty Gen Dec 27.

A town justice, elected to fill a vacancy, serves for the unexpired portion of the term, not for a full four-year term. 1974 NY Ops Atty Gen June 14 (informal).

When a member of a town zoning board of appeals holds over after the expiration of his term, a new five-year term commences at the expiration date and the town board should appoint a successor to fill the unexpired term. 1978 Op St Compt File #179.

Where there is a vacancy in the office of justice of the peace, the Town Board may fill it by appointment only until the next annual election and the appointment is valid only for such period, but the person so appointed is acting as a de facto justice if appointed for a longer term and continuing to act under such appointment. 1962 NY Ops Atty Gen May 2.

The Town of Ogden is not authorized to adopt a local law mandating that a vacancy in the elective offices of Supervisor or Councilman, arising otherwise than by expiration of term, be filled by a person of the same political affiliation as the person who vacated the office. 1972 NY Ops Atty Gen Apr 25.

If an elected town officer resigns after September 20 in an even-numbered year, the vacancy is filled by appointment and unless the term will expire in the year in which the vacancy occurred the appointee will serve until the end of the following year. If a town board member resigns before September 20 in an even-numbered year and the town board does not appoint to fill the vacancy and an election is held to fill the vacancy, the winner will take office immediately upon the certification of the election by the board of canvassers and upon qualifying for the office. 1978 NY Ops Atty Gen Sept 5.

The failure to follow procedure required by law for a permissive referendum invalidates the resolution by the Town Board in

reducing the number of justices from 2 to 1. If the second office of town justice is currently vacant, the town board is empowered to fill the vacancy. The fact that a second town justice should have been available, however, did not invalidate actions transferred to and taken by other justices, where sole town justice was unable to act by reason of conflict of interests, etc. 1990 N.Y. Op. Att'y Gen. No. I90-35.

81. —Voting by town board

Resignation of a supervisor prior to September 20 creates a vacancy which must be filled at the general election in the same year, and any appointment to fill a vacancy must be by a majority vote of the Town Board and for a term not longer than the end of the current year. 1962 NY Ops Atty Gen Mar 15.

A person named to fill a vacancy in the office of town supervisor or town councilman must receive not less than a majority of the votes of the entire authorized membership of the town board. 1972 NY Ops Atty Gen Nov 13 (Informal), 1972 N.Y. AG LEXIS 157.

Member of town board who has tendered letter of resignation, effective at some future date, may not participate in appointment of his successor, and appointment may not be made until vacancy actually occurs. NY Ops Atty Gen 89-23 (Informal).

An individual must receive three votes to be appointed to fill a vacancy on the town board of a town of the second class. 1978 Op St Compt No. 78–1054.

Section 64, subd. 5, to the extent that it provides that the appointee of a town board to fill a vacancy in a town office shall hold office longer than the commencement of the political year next succeeding the first annual election after the happening of the vacancy violates New York Constitution, Art. X, § 5. 1938 N.Y. Op. Att'y Gen. No. 99.

A vacancy in an elective town office occurring before September 20 in any year should be filled at the ensuing general election. 1957 NY Ops Atty Gen May 28 (informal).

Upon occurrence of a vacancy in an elective office, filled by appointment, failure to elect a successor for the balance of the unexpired term creates a continuing vacancy commencing on the next January first which cannot be filled by appointment and must be filled at a special election proclaimed by the Governor or ordered by a court. A person appointed to the office on or after the next January first is only a de facto officer. His acts as such cannot be attacked collaterally. 1973 NY Ops Atty Gen July 2 (informal).

Where an oath of office is filed a year or more late a vacancy in office is created and the vacancy can be filled by appointment. 1975 NY Ops Atty Gen Aug 29 (informal).

If an elected town officer resigns prior to September 20, the vacancy is filled by appointment for the balance of the year and a successor is elected at the general election in November. If an elected town officer resigns subsequent to September 20, the vacancy is filled by appointment, and unless the term will expire in the year in which the vacancy occurred, the appointee will serve until the end of the following year. 1976 NY Ops Atty Gen Apr 7 (informal).

82. Weed, fire and other health hazard removal, generally

83. —Drainage facilities, generally

84. — —Financing

Discussion of imposition of charges for sewer service by a village against a town park located in the village. 1978 Op St Compt File #902.

An appropriation of funds for a drainage improvement project which is not set up as a capital project or a reserve fund would lapse at the expiration of the year for which the funds were appropriated. 1979 Op St Compt File #243.

A town may correct a drainage or flooding problem affecting a small portion of the town with an expenditure from the general fund. 1980 Op St Compt File #193.

A town may clean and deepen a stream, for flood control purposes, flowing within a village in a town, as well as that portion of the stream located outside the village. 1955 NY Ops Atty Gen Nov 2 (informal).

A town may correct drainage problem affecting small portion of town, pursuant to section 64(11-a). 1979 Op St Compt File #281.

85. —Dumping

In towns which use village dumping grounds, contracts for such use should be made pursuant to subd. 20-a of this section. 1961 NY Ops Atty Gen July 26.

86. —Public works department

The Town Board of the Town of Collins, Erie County, a town of the second class with a population of less than 10,000 people as shown by the latest federal census, is not authorized to discontinue by local law, or otherwise, the position of town superintendent of highways, but is authorized by local law to establish a department of public works. 1968 NY Ops Atty Gen Dec 9.

Town may enact local law requiring removal of brush, grass, rubbish or weeds, and, where there is noncompliance, cause work to be performed and charge expense to property owner at same time and in same manner as other town taxes. 9 Op Counsel SBEA No. 55 (1990).

87. Other powers exercised, generally

88. —Proper exercise, generally

89. — —Highways, roads, driveways and the like

Town may make its elected superintendent of highways the administrative head of department of public works. 1994 NY Ops Atty Gen I 94-43.

The town board may impose on the town highway superintendent the additional duties of keeping detailed records on preventive maintenance and repair for each piece of highway equipment, making a tally of fuel consumption versus mileage driven, and submitting this information monthly to the town board for review. 1979 Op St Compt File #904.

90. — —Police matters

(1) A town may, in the proper exercise of its police powers, permit town gasoline to be used by a fire district fire department in an emergency and charge the district for the cost of the gasoline. (2) A town and a school district may enter into a municipal cooperation agreement pursuant to which they would jointly purchase gasoline or the school district would purchase gasoline to be delivered to and stored by the town. 1981 Op St Compt File #81-10.

Town board could establish official letterhead and policy for its use by town officials. 1996 NY Ops Atty Gen I 96-47.

Town may allow consumption of alcohol on town property, and may implement permit system to regulate such consumption. 2003 N.Y. Op. Att'y Gen. No. 2003-13 (Informal), 2003 N.Y. Op. (Inf.) Att'y Gen. 13, 2003 N.Y. AG LEXIS 17.

A town may grant a license or concession to sell refreshments in a town recreational facility to a local youth hockey organization. Such license or concession must be terminable at will by the town and the granting thereof must be preceded by a public hearing. 1980 Op St Compt File #491.

A town may sell cobble stones from a town owned gravel pit to another municipality or a private individual. 1980 Op St Compt File #626.

Since Town Board has power to create advisory committee, it is implicit under CLS Town § 64(23) that Board has power to require that committee function in certain way, such as in accordance with Open Meetings Law. Comm on Open Gov't OML-AO-3858.

Town Board could by local law or rule require advisory committee to grant public access to its meetings in manner consistent with Open Meetings Law. Comm on Open Gov't OML-AO-3858.

91. —Improper exercise, generally

92. — —Highways, roads, driveways and the like

A town may only permit the use of its highway equipment by a village pursuant to the provisions of the Highway Law. 1955 NY Ops Atty Gen Nov 2 (informal).

Presently, a town board is not authorized to contract with a private individual on behalf of the town to plow out driveways of all individual persons in the town who request the service, nor is there any authority for the formation of a district encompassing the entire town or part thereof for such purpose. 1968 NY Ops Atty Gen Nov 14.

Ordinance of town which purports to regulate and license hunting and trapping, being in conflict with provisions of Conser-

vation Law, is not reasonable or permissible exercise of powers of town board, and is invalid. 1947 NY Ops Atty Gen Mar 18.

A town board may not enact an order prohibiting smoking in bed. 1954 NY Ops Atty Gen Oct 19 (informal).

In the absence of express authorization from the State Legislature, a town may not lease or sell a town-owned ski area, together with all its facilities and improvements, to another municipality or a private individual or concern. 1980 Op St Compt File #732.

A town may not engage a firm to market town computer programs to other municipalities in exchange for a portion of the proceeds from sales. 1983 Op St Compt File #83-145.

Although there is no precise statutory authority therefor it is believed that a town board may by resolution adopt a town seal and alter the same. 1954 NY Ops Atty Gen June 9 (informal).

The term "district" as used in section 64(2) of the Town Law refers to the improvement districts discussed in Article 12 of the Town Law, and, thus, section 64(2) does not infringe upon the condemnation power accorded a fire district board of fire commissioners as provided for in section 176(14) of the Town Law. 1979 NY Ops Atty Gen Apr 6 (informal).

A local law providing where the town clerk's duties will be performed and the hours when the town clerk's office must be open is not subject to a mandatory referendum. 1979 NY Ops Atty Gen Mar 29 (informal).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 54, 57, 206, 209-q, 209-r, 232, 277; CLS Racing & Wagering § 531; Vill §§ 2-204, 2-214, 2-218, 7-730.

Resignation of town officers, § 26.

Special improvements, § 54.

Permissive referendum, §§ 90 et seq.

Provision for excess sewer, drainage or water facilities, § 192-a.

Sewer drainage or water improvements, § 209-q.

Polluting streams prohibited, CLS ECL § 11-0503.

Discontinuance or relocation, or both, of highways, roads and streets, CLS ECL § 15-2113.

State assistance for local solid waste management plans, CLS ECL § 27-0109.

Powers of municipalities, CLS ECL § 27-0507.

State aid for implementation of resource recovery and other improved solid waste management systems, CLS ECL §§ 27-0501 – 27-0511.

Compliance with sewage disposal requirements, CLS ECL § 43-0121.

Solid waste recovery and management, CLS ECL §§ 51-0901 et seq.

Local highway safety programs, CLS Exec § 333.

Municipal assistance to public authorities furnishing transportation services, CLS Gen Mun § 98-b.

Participation in federal programs, CLS Gen Mun § 99-h.

Control of aquatic plant growth, CLS Gen Mun § 99-j.

Provision of mass transportation by certain municipal corporations, CLS Gen Mun § 119-r.

Creation of conservation advisory council, CLS Gen Mun § 239-x.

Conflicts of interest of municipal officers and employees, CLS Gen Mun §§ 800 et seq.

Classification of highways, CLS High § 3.

General powers and duties of the commissioner of transportation relating to highways, CLS High § 10.

Custody of shade trees, CLS High § 153.

Town highway improvement program, CLS High §§ 219 et seq.

Local development corporations, CLS N-PCL § 1411.

Rentals and selection of tenants, CLS Priv Hous Fin § 31.

Reduced rentals for the elderly, CLS Priv Hous Fin § 126.

Adjusting fair rental equalization for the elderly, CLS Priv Hous Fin § 577-a.

Tax abatement for rent-controlled and rent regulated property occupied by senior citizens, CLS Real P Tax § 467-b.

Contracts for purchase of water, CLS Vill §§ 11-1124.

Succession of powers and duties, CLS Vill § 17-1704.

Succession of powers and duties relating to public bridges and highways, CLS Vill § 17-1706.

Grants of powers to local governments, CLS Stat Loc Govt § 10.

Creation of vacancies, CLS Pub Off § 30.

Codes, Rules and Regulations:

Requirements for notice of sale of bonds by municipalities, school districts and district corporation. 2 NYCRR §§ 25.1 et seq.

Requirements for notice of sale of notes by municipalities, school districts and district corporations. 2 NYCRR §§ 26.1 et seq.

Annual and supplemental debt statements for housing and urban renewal purposes to be used by cities, towns, and villages. 2 NYCRR § 29.1.

Debt statement form to be used in connection with public sales of bonds by counties, towns, villages and cities having less than 125,000 inhabitants. 2 NYCRR § 31.1.

Debt statement form to be used in connection with public sales of bonds by fire districts. 2 NYCRR §§ 35.1 et seq.

Jurisprudences:

3 NY Jur 2d Agriculture and Crops § 27 .

12 NY Jur 2d Buildings, Zoning, and Land Controls §§ 198, 203 .

17 NY Jur 2d Carriers § 85 .

25 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 124, 146, 184, 200, 212, 216, 218—221, 246, 360.

26 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 510—512, 609, 790, 973.

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1257, 1308, 1310, 1312, 1316, 1321, 1323, 1462, 1463, 1486—1488, 1497, 1501—1503, 1507, 1525, 1527, 1531, 1532, 1538, 1541, 1544, 1556, 1561.

43 NY Jur 2d Dedication § 9 .

53A NY Jur 2d Energy § 171 .

64 NY Jur 2d Health and Sanitation §§ 25, 114, 115, 149, 174 .

77 NY Jur 2d Military and Civil Defense § 29 .

81 NY Jur 2d Newspapers §§ 12, 20, 21 .

81 NY Jur 2d Parks, Recreation, and Historic Preservation §§ 41, 120, 133, 137, 143 .

87 NY Jur 2d Public Funds §§ 7, 8, 13 .

87 NY Jur 2d Public Securities § 45 .

99 NY Jur 2d Taxation and Assessment § 764 .

107 NY Jur 2d Veterans § 65, 66 .

107 NY Jur 2d Veterans §§ 60, 61.

108 NY Jur 2d Water §§ 301, 571 .

56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 135.

7A Am Jur Legal Forms 2d, Drains and Drainage Districts, Forms 92:15 et seq.

8A Am Jur Pl & Pr Forms (Rev ed), Dedication, Forms 1 et seq.

Law Reviews:

The theory and practice of state and local government relations in New York State. 33 Alb. L. Rev. 474.

The urban renewal condemnation system scandal and other related practical problems of local government. 33 Alb. L. Rev. 474.

Duty of municipal corporation to furnish police protection. 25 Brook. L. Rev. 363.

General Municipal Law § 209-m(6)(7)

Some observations on local government in New York State. 8 Buff. L. Rev. 27.

Metropolitan approach to government in upstate New York. 13 Buff. L. Rev. 575.

Local contracts and sub-contracts: the roles of city government and private citizen groups. 14 Buff. L. Rev. 140.

Home rule: a fresh start. 14 Buff. L. Rev. 484.

Home rule in New York 1941–1965: retrospect and prospect. 15 Buff. L. Rev. 335.

Home rule and the New York constitution. 66 Colum. L. Rev. 1145.

"Fair" compensation and the accommodation power: antidotes for the taking impasse in land use controversies. 75 Colum. L. Rev. 1021.

Municipal conflicts of interest: rights and remedies under an invalid contract. 27 Fordham L. Rev. 31.

Right to adequate municipal services: thoughts and proposals. 44 NYU L Rev 753.

Landlord duties of the local public agency: a source of protection for residents in urban renewal areas. 45 NYU L Rev 1015.

Public service by lawyers in local government. 2 Syracuse L. Rev. 210.

State condemnation of municipally-owned property: the governmental-proprietary distinction. 11 Syracuse L. Rev. 27.

Admissibility of zoning ordinances as evidence of fair market value in eminent domain proceedings. 12 Syracuse L. Rev. 352.

Municipal home rule in New York. 22 Syracuse L. Rev. 736.

Reletting the abandoned or defaulted public works project in New York: to bid or not to bid. 3 Fordham Urb. L.J. 451.

Lease-purchase agreements by New York municipalities. 34 NYSBJ 459.

Annotations:

Liability of municipality or other governmental subdivision in connection with flood-protection measures. 5 ALR2d 57.

Public regulation and prohibition of sound amplifiers or loud-speaker broadcasts in streets and other public places. 10 ALR2d 627.

Granting or taking of lease of property by municipality as within authorization of purchase or acquisition thereof. 11 ALR2d 168.

Right of municipality or public to use of subsurface of street or highway for purposes other than sewers, pipes, conduits for wires, and the like. 11 ALR2d 180.

Validity and construction or regulations as to subdivision maps or plats. 11 ALR2d 524.

Power of city, town, or county or their officials to compromise claim. 15 ALR2d 1359.

Liability of municipality for failure to erect traffic warnings against entering or using street which is partially barred or obstructed by construction or improvement work. 52 ALR2d 689.

Power of municipal corporation to exchange its real property. 60 ALR2d 220.

Authorization, prohibition, or regulation by municipality of the sale of merchandise on streets or highways, or their use for such purpose. 14 ALR3d 896.

Coverage and exclusions under liability policy issued to municipal corporation or similar governmental body. 23 ALR3d 1282.

Texts: New York Insurance Law (Matthew Bender's New York Practice Series) § 52.04[2][i].

§ 64-g. Town of Warwick preservation funds

1. As used in this section, the following words and terms shall have the following meanings:

(a) "Town" means the town of Warwick.

(b) "Community preservation" shall mean and include any of the purposes outlined in subdivision four of this section.

(c) "Board" means the advisory board required pursuant to subdivision five of this section.

(d) "Fund" means the community preservation fund created pursuant to subdivision two of this section.

2. The town board of the town of Warwick is authorized to establish by local law a community preservation fund pursuant to the provisions of this section. Deposits into the fund may include revenues of the local government from whatever source and shall include, at a minimum, all revenues from a tax imposed upon the transfer of real property interests in such town pursuant to article thirty-one-F of the tax law. The fund shall also be authorized to accept gifts of any such interests in land or of funds. Interest accrued by monies deposited into the fund shall be credited to the fund. In no event shall monies deposited in the fund be transferred to any other account. Nothing contained in this section shall be construed to prevent the financing in whole or in part, pursuant to the local finance law, of any acquisition authorized pursuant to this section. Monies from the fund may be utilized to repay any indebtedness or obligations incurred pursuant to the local finance law consistent with effectuating the purposes of this section. The town of Warwick may only adopt the local law authorized by this subdivision if it has incurred or authorized bonded indebtedness since nineteen hundred eighty for open space purposes equal to or greater than two hundred dollars per town resident. The number of residents shall be determined by the 2000 U.S. Census. Said local law shall make a finding that the town has complied with the per resident financial commitment requirement of this subdivision.

3. The purposes of the fund shall be exclusively, (a) to implement a plan for the preservation of community character as required by this section, (b) to acquire interests or rights in real property for the preservation of community character within the town including villages therein in accordance with such plan and in cooperation with willing sellers, (c) to establish a bank pursuant to a transfer of development rights program consistent with section two hundred sixty-one-a of this chapter, and (d) to provide a management and stewardship program for such interests and rights consistent with subdivision nine of this section and in accordance with such plan designed to preserve community character. Not more than ten percent of the fund shall be utilized for the management and stewardship program. If the implementation of the community preservation project plan, adopted by the town board, as provided in subdivision six of this section, has been completed, and funds are no longer needed for the purposes outlined in this subdivision, then any remaining monies in the fund shall be applied to reduce any bonded indebtedness or obligations incurred to effectuate the purposes of this section.

4. Preservation of community character shall involve one or more of the following: (a) establishment of parks, nature preserves, or recreation areas; (b) preservation of open space, including agricultural lands; (c) preservation of lands of exceptional scenic value; (d) preservation of aquifer recharge areas; (e) preservation of undeveloped beachlands or shoreline; (f) establishment of wildlife refuges for the purpose of maintaining native animal species diversity, including the protection of habitat essential to the recovery of rare, threatened or endangered spe-

cies; (g) preservation of unique or threatened ecological areas; (h) preservation of rivers and river areas in a natural, free-flowing condition; (i) preservation of forested land; (j) preservation of public access to lands for public use including stream rights and waterways; (k) preservation of historic places and properties listed on the New York state register of historic places and/or protected under a municipal historic preservation ordinance or law; and (l) undertaking any of the aforementioned in furtherance of the establishment of a greenbelt.

5. The town board which has established a community preservation fund shall create an advisory board to review and make recommendations on proposed acquisitions of interests in real property using monies from the fund. Such board shall consist of five or seven legal residents of the municipality who shall serve without compensation. No member of the local legislative body shall serve on the board. A majority of the members of the board shall have demonstrated experience with conservation or land preservation activities. The board shall act in an advisory capacity to the town board. At least one member of the board shall be an active farmer.

6. The town board which has established a community preservation fund shall, by local law, adopt a community preservation project plan. Such plan shall list every project which the town plans to undertake pursuant to the community preservation fund. It shall include every parcel which is necessary to be acquired in the town in order to protect community character. Such plan shall provide for a detailed evaluation of all available land use alternatives to protect community character, including but not limited to: (a) fee simple acquisition, (b) zoning regulations, including density reductions, cluster development, and site plan and design requirements, (c) transfer of development rights, (d) the purchase of development rights, and (e) scenic and conservation easements. Said evaluation shall be as specific as practicable as to each parcel selected for inclusion in such plan. Such plan shall establish the priorities for preservation, and shall include the preservation of farmland as its highest priority. Funds from the community preservation fund may only be expended for projects which have been included in such plan. Such plan shall be updated not less than once every five years, but in no event until at least three years after the adoption of the original plan. A copy of such plan shall be filed with the commissioner of environmental conservation, the commissioner of agriculture and markets and the commissioner of the office of parks, recreation and historic preservation. Such plan shall be completed at least sixty days before the submission of the mandatory referendum required by section fourteen hundred forty-nine-bbbb of the tax law.

7. The town board which has established a community preservation fund pursuant to this section shall study and consider establishing a transfer of development rights program to protect community character as provided for by section two hundred sixty-one-a of this chapter. All provisions of such section two hundred sixty-one-a shall be complied with. If at any time during the life of the community preservation fund a transfer of development rights program is established, the town may utilize monies from the community preservation fund in order to create and fund a central bank of the transfer of development rights program. If at any time during the life of the community preservation fund, a transfer of development rights program is repealed by the town, all monies from the central bank shall be returned to the community preservation fund.

8. No interests or rights in real property shall be acquired pursuant to this section until a public hearing is held as required by section two hundred forty-seven of the general municipal law; provided, however, that nothing herein shall prevent the town board from entering into a conditional purchase agreement before a public hearing is held. Any resolution of the town board approving an acquisition of land pursuant to this section, shall find that acquisition was the best alternative for the protection of community character of all the reasonable alternatives available to the town.

9. Lands acquired pursuant to this section shall be administered and managed in a manner which (a) allows public use and enjoyment in a manner compatible with the natural, scenic, historic and open space character of such lands; (b) preserves the native biological diversity of such lands; (c) with regard to open spaces, limits improvements to enhancing access for passive use of such lands such as nature trails, boardwalks, bicycle paths, and peripheral parking areas provided that such improvements do not degrade the ecological value of the land or threaten essential wildlife habitat; and (d) preserves cultural property consistent with accepted standards for historic preservation. In furthering the purposes of this section, the town may enter into agreements with corporations organized under the not-for-profit corporation law and engage in land trust activities to manage lands including less than fee interests acquired pursuant to the provisions of this section, provided that any such agreement shall contain a provision that such corporation shall keep the lands accessible to the public unless such corporation shall demonstrate to the satisfaction of the town that public accessibility would be detrimental to the lands or any natural resources associated therewith.

10. Rights or interests in real property acquired with monies from such fund shall not be sold, leased, exchanged, donated, or otherwise disposed of or used for other than the purposes permitted by this section without the express authority of an act of the legislature, which shall provide for the substitution of other lands of equal environmental value and fair market value and reasonably equivalent usefulness and location to those to be discontinued, sold or disposed of, and such other requirements as shall be

approved by the legislature. Nothing in this section shall preclude the town, by local law, from establishing additional restrictions to the alienation of lands acquired pursuant to this section. This subdivision shall not apply to the sale of development rights by the town acquired pursuant to this section, where said sale is made by a central bank created by the town, pursuant to a transfer of development rights program established by the town pursuant to section two hundred sixty-one-a of this chapter, provided, however (a) that the lands from which said development rights were acquired shall remain preserved in perpetuity by a permanent conservation easement or other instrument that similarly preserves the community character referenced in subdivision four of this section, and (b) the proceeds from such sale shall be deposited in the community preservation fund.

HISTORY:
Add, L 2005, ch 262, § 1, eff July 19, 2005.

§ 64-h. Town of Red Hook preservation funds

1. As used in this section, the following words and terms shall have the following meanings:

(a) "Town" means the town of Red Hook.

(b) "Community preservation" shall mean and include any of the purposes outlined in subdivision five of this section.

(c) "Board" means the advisory board required pursuant to subdivision six of this section.

(d) "Fund" means the community preservation fund created pursuant to subdivision two of this section.

(e) "Tax" shall mean the real estate transfer tax imposed pursuant to section fourteen hundred thirty-eight-b of the tax law or, if the context clearly indicates, shall mean the real estate transfer tax imposed pursuant to article thirty-one of the tax law.

2. The town board of the town of Red Hook is authorized to establish by local law a community preservation fund pursuant to the provisions of this section. Deposits into the fund may include revenues of the local government from whatever source and shall include, at a minimum, all revenues from a tax imposed upon the transfer of real property interests in such town pursuant to article thirty-one-A-1 of the tax law. The fund shall also be authorized to accept gifts of any such interests in land or of funds. Interest accrued by monies deposited into the fund shall be credited to the fund. In no event shall monies deposited in the fund be transferred to any other account. Nothing contained in this section shall be construed to prevent the financing in whole or in part, pursuant to the local finance law, of any acquisition authorized pursuant to this section. Monies from the fund may be utilized to repay any indebtedness or obligations incurred pursuant to the local finance law consistent with effectuating the purposes of this section.

3. The purposes of the fund shall be exclusively, (a) to implement a plan for the preservation of community character as required by this section, (b) to acquire interests or rights in real property for the preservation of community character within the town including villages therein in accordance with such plan and in cooperation with willing sellers, (c) to establish a bank pursuant to a transfer of development rights program consistent with section two hundred sixty-one-a of this chapter, and (d) to provide a management and stewardship program for such interests and rights consistent with subdivision ten of this section and in accordance with such plan designed to preserve community character. Not more than ten percent of the fund shall be utilized for the management and stewardship program.

4. If the implementation of the community preservation project plan, adopted by the town board, as provided in subdivision seven of this section, has been completed, and funds are no longer needed for the purposes outlined in this subdivision, then any remaining monies in the fund shall be applied to reduce any bonded indebtedness or obligations incurred to effectuate the purposes of this section.

5. Preservation of community character shall involve one or more of the following:

(a) preservation of open space;

(b) establishment of parks, nature preserves, or recreation areas;

(c) preservation of land which is predominantly viable agricultural land, as defined in subdivision seven of section three hundred one of the agriculture and markets law, or unique and irreplaceable agricultural land, as defined in subdivision six of section three hundred one of the agriculture and markets law;

(d) preservation of lands of exceptional scenic value;

(e) preservation of fresh and saltwater marshes or other wetlands;

(f) preservation of aquifer recharge areas;

(g) preservation of undeveloped beach-lands or shoreline;

(h) establishment of wildlife refuges for the purpose of maintaining native animal species diversity, including the protection of habitat essential to the recovery of rare, threatened or endangered species;

(i) preservation of unique or threatened ecological areas;

(j) preservation of rivers and river areas in a natural, free-flowing condition;

(k) preservation of forested land;

(*l*) preservation of public access to lands for public use including stream rights and waterways;

(m) preservation of historic places and properties listed on the New York state register of historic places and/or protected under a municipal historic preservation ordinance or law; and

(n) undertaking any of the purposes of this subdivision in furtherance of the establishment of a greenbelt.

6. The town board which has established a community preservation fund shall create an advisory

board to review and make recommendations on proposed acquisitions of interests in real property using monies from the fund. Such board shall consist of five or seven legal residents of the municipality who shall serve without compensation. No member of the local legislative body shall serve on the board. A majority of the members of the board shall have demonstrated experience with conservation or land preservation activities. The board shall act in an advisory capacity to the town board. At least one member of the board shall be an active farmer. Board members' terms shall be staggered.

7. The town board which has established a community preservation fund shall, by local law, adopt a community preservation project plan. Such plan shall list every project which the town plans to undertake pursuant to the community preservation fund. It shall include every parcel which is necessary to be acquired in the town in order to protect community character. Such plan shall provide for a detailed evaluation of all available land use alternatives to protect community character, including but not limited to: (a) fee simple acquisition, (b) zoning regulations, including density reductions, cluster development, and site plan and design requirements, (c) transfer of development rights, (d) the purchase of development rights, and (e) scenic and conservation easements. Said evaluation shall be as specific as practicable as to each parcel selected for inclusion in such plan. Such plan shall establish the priorities for preservation, and shall include the preservation of farmland as its highest priority. Funds from the community preservation fund may only be expended for projects which have been included in such plan. Such plan shall be updated not less than once every five years, but in no event until at least three years after the adoption of the original plan. A copy of such plan shall be filed with the town clerk, the commissioner of environmental conservation, the commissioner of agriculture and markets and the commissioner of the office of parks, recreation and historic preservation. Such plan shall be completed at least sixty days before the submission of the mandatory referendum required by section fourteen hundred thirty-eight-b of the tax law. If at the time of referendum, the town shall have in place an adopted open space plan, such plan shall be deemed sufficient to waive the preservation plan requirements of this subdivision. Any monies expended from the community preservation plan shall, however be consistent with the purposes outlined in subdivisions three and five of this section and with the open space plan for a period not to exceed twelve months.

8. The town board which has established a community preservation fund pursuant to this section may study and consider establishing a transfer of development rights program to protect community character as provided for by section two hundred sixty-one-a of this chapter. All provisions of such section two hundred sixty-one-a shall be complied with. If at any time during the life of the community preservation fund a transfer of development rights program is established, the town may utilize monies from the community preservation fund in order to create and fund a central bank of the transfer of development rights program. If at any time during the life of the community preservation fund, a transfer of development rights program is repealed by the town, all monies from the central bank shall be returned to the community preservation fund.

9. No interests or rights in real property shall be acquired pursuant to this section until a public hearing is held as required by section two hundred forty-seven of the general municipal law; provided, however, that nothing herein shall prevent the town board from entering into a conditional purchase agreement before a public hearing is held. Any resolution of the town board approving an acquisition of rights or interest in real property pursuant to this section, shall find that acquisition was the best alternative for the protection of community character of all the reasonable alternatives available to the town.

10. Rights or interest in real property acquired pursuant to this section shall be administered and managed in a manner which (a) allows public use and enjoyment in a manner compatible with the natural, scenic, historic and open space character of such lands; (b) preserves the native biological diversity of such lands; (c) with regard to open spaces, limits improvements to enhancing access for passive use of such lands such as nature trails, boardwalks, bicycle paths, and peripheral parking areas provided that such improvements do not degrade the ecological value of the land or threaten essential wildlife habitat; and (d) preserves cultural property consistent with accepted standards for historic preservation. Notwithstanding any other provision of this subdivision there shall be no right to public use and enjoyment of land used in conjunction with a farm operation as defined by subdivision eleven of section three hundred one of the agriculture and markets law. In furthering the purposes of this section, the town may enter into agreements with corporations organized under the not-for-profit corporation law and engage in land trust activities to manage lands including less than fee interests acquired pursuant to the provisions of this section, provided that any such agreement shall contain a provision that such corporation shall keep the lands accessible to the public unless such corporation shall demonstrate to the satisfaction of the town that public accessibility would be detrimental to the lands or any natural resources associated therewith.

11. Rights or interests in real property acquired with monies from such fund shall not be sold, leased, exchanged, donated, or otherwise disposed of or used for other than the purposes permitted by this section without the express authority of an act of the state legislature, which shall provide for the substitution of other lands of equal environmental value and fair

market value and reasonably equivalent usefulness and location to those to be discontinued, sold or disposed of, and such other requirements as shall be approved by the state legislature. Any conservation easements, created under title three of article forty-nine of the environmental conservation law, which are acquired with monies from such fund may only be modified or extinguished as provided in section 49-0307 of such law. Nothing in this section shall preclude the town, by local law, from establishing additional restrictions to the alienation of lands acquired pursuant to this section. This subdivision shall not apply to the sale of development rights by the town acquired pursuant to this section, where said sale is made by a central bank created by the town, pursuant to a transfer of development rights program established by the town pursuant to section two hundred sixty-one-a of this chapter, provided, however (a) that the lands from which said development rights were acquired shall remain preserved in perpetuity by a permanent conservation easement or other instrument that similarly preserves the community character referenced in subdivision five of this section, and (b) the proceeds from such sale shall be deposited in the community preservation fund.

HISTORY:

Add, L 2006, ch 443, § 1, eff Aug 7, 2006 (see 2006 note below).

Editor's Notes: Laws 2006, ch 443, § 4, eff Nov 5, 2006, expires and repeal Dec 31, 2026, provides as follows:

§ 4. This act shall take effect immediately; provided, however, that section two of this act shall take effect on the ninetieth day after it shall have become a law and shall expire December 31, 2026 when upon such date the provisions of such section shall be deemed repealed.

ARTICLE 6 Town Elections

Section

81. Election upon proposition

HISTORY:

Add, L 1932, ch 634, with substance transferred from Article 4.

§ 81. Election upon proposition

The town board may upon its own motion and shall upon a petition, as hereinafter provided, cause to be submitted at a special or biennial town election, a proposition:

1. In any town:

(a) To erect a monument or monuments within the town in commemoration of any person or event.

(b) To purchase, lease, construct, alter or remodel a town hall, a town lockup or any other necessary building for town purposes, acquire necessary lands therefor, and equip and furnish such buildings for such purposes, or to demolish or remove any town building.

(c) To establish airports, landing fields, public parking places, public parks or playgrounds, acquire the necessary lands therefor, and equip the same with suitable buildings, structures and apparatus.

(d) To vote upon or determine any question, proposition or resolution which may lawfully be submitted, pursuant to this chapter or any general or special law.

(e) To dredge, bulkhead, dock and otherwise improve any navigable, or other waterway, within the town, and to rent, purchase and equip necessary machinery for such dredging, docking, bulkheading or other improvement, and supply the necessary labor and material therefor.

(f) To provide for the collection and disposition of garbage, ashes, rubbish and other waste matter in the town by (1) the award of one or more contracts for the collection and disposition of the same, (2) by the purchase, operation and maintenance of apparatus and equipment for the collection and transportation of the same, (3) by the construction, operation and maintenance of a disposal or incinerator plant or (4) by any combination of (1), (2) and (3).

2. In any town of the first class:

(a) To increase the number of councilmen from four to six.

(b) To establish or abolish the ward system for the election of councilmen in towns having four or six councilmen.

(c) To decrease the number of councilmen from four to two.

(d) To increase the number of councilmen from two to four.

3. In a town of the second class having five thousand or more population according to the latest federal or state census or enumeration or having an assessed valuation of ten million dollars or more, as shown by the latest completed assessment-roll of such town, or adjoining a city having a population of three hundred thousand or more, as shown by the latest federal or state census or enumeration, to change the classification of such town to that of a town of the first class.

4. Such petition shall be subscribed and authenticated, in the manner provided by the election law for the authentication of nominating petitions, by electors of the town qualifed to vote upon a proposition to raise and expend money, in number equal to at least five per centum of the total votes cast for governor in said town at the last general election held for the election of state officers, but such number shall not be less than one hundred in a town of the first class nor less than twenty-five in a town of the second class. If such a petition be filed in the office of the town clerk not less than sixty days, nor more than seventy-five days, prior to a biennial town election, the proposition shall be submitted at such biennial election. If a petition be presented at any other time, a special election shall be called to be held not less than sixty days, nor more than seventy-five days after the filing of such petition.

5. A proposition for the consolidation or dissolution of a town or district shall be noticed, conducted, canvassed and otherwise held pursuant to, and in accordance with, the provisions of article seven-

teen-A of the general municipal law; and a petition to consolidate or dissolve a town or district shall be subscribed, authenticated and otherwise governed pursuant to, and in accordance with, that article.

Any expenditure approved pursuant to this section shall be paid for by taxes levied for the fiscal year in which such expenditure is to be made. However, nothing contained in this section shall be construed to prevent the financing in whole or in part, pursuant to the local finance law, of any expenditure enumerated in this section which is not authorized pursuant to this section.

Any expenditure financed in whole from moneys appropriated from surplus funds shall not be subject to referendum.

HISTORY:

Add, L 1932, ch 634, eff Jan 1, 1934, with substance transferred from former §§ 43, 45, 46, 46–a, 135, 143–h; amd, L 1933, ch 751, eff Jan 1, 1934; L 1935, ch 602, § 1, eff April 29, 1935; L 1935, ch 812, § 2, eff May 9, 1935; L 1939, ch 780, eff June 8, 1939; L 1940, ch 374, § 12, eff April 11, 1940; L 1941, ch 601, § 6; L 1941, ch 601, § 6, eff Jan 1, 1941; L 1942, ch 155, eff March 23, 1942; L 1943, ch 710; L 1945, ch 838; L 1957, ch 614, §§ 1-3, eff April 17, 1957; L 1958, ch 166, eff March 12, 1958; L 1962, ch 909, eff April 29, 1962; L 1965, ch 889; L 1984, ch 140, § 2; L 1984, ch 434, § 15, eff Dec 1, 1984; L 2004, ch 668, § 2, eff Oct 26, 2004; L 2009, ch 74, § 5, eff March 21, 2010.

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

§ 18. Savings clause. Notwithstanding the repeal or amendment of any law by this act, nothing in this act shall be construed to impair the consolidation or dissolution of any local government entity pursuant to any such repealed or amended law if there was commenced in or for such local government entity prior to the effective date of this act a consolidation or dissolution proceeding pursuant to such law, in which event the provisions of such former law shall govern such proceeding as though such former law had not been repealed hereby.

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I. Generally

1. In general

Provision of CLS Town § 81 that town board "shall upon a petition" submit proposition for establishment of public park to town election and "acquire the necessary lands therefor" does not usurp board's power of eminent domain. Placing proposition to establish public park on referendum in town election, as provided by CLS Town § 81, is official act of ministerial nature which does not require preparation of environmental impact statement. Queensbury Ass'n v Town Bd. of Queensbury, 141 A.D.2d 997, 530 N.Y.S.2d 861, 1988 N.Y. App. Div. LEXIS 7220 (N.Y. App. Div. 3d Dep't 1988).

CLS Town § 81 does not unconstitutionally abridge people's right to petition government for redress of grievances. Greene v Town Bd., Warrensburg, 159 A.D.2d 781, 552 N.Y.S.2d 62, 1990 N.Y. App. Div. LEXIS 2201 (N.Y. App. Div. 3d Dep't), app. dismissed, 76 N.Y.2d 771, 559 N.Y.S.2d 984, 559 N.E.2d 678, 1990 N.Y. LEXIS 1336 (N.Y. 1990), cert. denied, 498 U.S. 941, 111 S. Ct. 348, 112 L. Ed. 2d 313, 1990 U.S. LEXIS 5430 (U.S. 1990).

In a town of the second class where the number of assessors has been reduced to one pursuant to § 21 of the Town Law, the electors may petition for submission of a proposition to increase the number of assessors from one to three and to make such assessors elective rather than appointive. If such a proposition is adopted by the electors, there is no requirement that the town board adopt a resolution approving the change before it takes effect. 1955 Ops St Compt File #7147.

2. Construction

Former § 43, subd. 12 must be read in conjunction with either former § 46-a or former § 48. Former § 46-a must be construed as referring to county having less than stated population according to last census immediately preceding action of board. Hurley v Cheshire, 234 A.D. 464, 255 N.Y.S. 486, 1932 N.Y. App. Div. LEXIS 10466 (N.Y. App. Div.), aff'd, 259 N.Y. 582, 182 N.E. 190, 259 N.Y. (N.Y.S.) 582, 1932 N.Y. LEXIS 1061 (N.Y. 1932).

It is not necessary to state in a proposition submitted to referendum, the specific source from which funds for the purpose will be obtained. 1953 Ops St Compt File #6310.

Local Finance Law § 35.00(b)(1)(4) is broad enough to include the compliance with administrative orders; thus where a town is obligated to build a salt water shed to comply with an enforceable determination of the Department of Environmental Conservation, a resolution authorizing the issuance of bonds for this purpose and the resolution authorizing the expenditure of bonds proceeds is not subject to referendum under either Town Law §§ 81 and 220, or Highway Law § 142(4). Inconsistent prior opinions are superseded. 1990 Op St Compt 90-32.

3. Effect of Local Finance Law

Sections 81 and 220 of the Town Law as amended require no referendum where a project is to be financed under provisions of the Local Finance Law, unless required by provisions of that law. Griffin v Town Board of Warrensburg, 43 Misc. 2d 550, 251 N.Y.S.2d 536, 1964 N.Y. Misc. LEXIS 1735 (N.Y. Sup. Ct. 1964), aff'd, 23 A.D.2d 944, 259 N.Y.S.2d 906, 1965 N.Y. App. Div. LEXIS 5115 (N.Y. App. Div. 3d Dep't 1965).

Town's argument that passage of referendum to acquire park land would impose severe financial burden on town was of no moment since CLS Town § 81 specifically authorizes financing of project pursuant to local finance law; in any event, statute is unequivocal in its authorization of referendum by petition for such acquisitions. Queensbury Ass'n v Town Bd. of Queensbury, 135 Misc. 2d 118, 515 N.Y.S.2d 193, 1987 N.Y. Misc. LEXIS 2189 (N.Y. Sup. Ct. 1987).

4. Petition, generally

Signatures on petition for referendum pursuant to CLS Town § 81 were not rendered invalid because not obtained within time period required by CLS Elec § 6-138; provision of CLS Town § 81 which directs that signatures be subscribed and authenticated in same manner as that prescribed in Election Law for authentication of nominating petitions does not extend to rigid time requirements of CLS Elec § 6-138. Also, signatures on petition for referendum pursuant to CLS Town § 81 affixed 4 to 6 years prior to filing of petition would be deemed stale under "rule of reason"; mere passage of such significant period of time undermined any contention that signatures evidenced present support for placing proposition on ballot. Jacobs v Ocker, 123 A.D.2d 801, 507 N.Y.S.2d 276, 1986 N.Y. App. Div. LEXIS 60942 (N.Y. App. Div. 2d Dep't 1986).

Proposition to acquire land for park was not insufficient even though it failed to specifically identify property to be acquired, type of public purpose to be utilized and cost of acquisition, since town had yet to conduct special election to determine whether property be acquired at all; CLS Town § 81 does not require such specific information prior to election. Environmental impact statement would not be required prior to town board conducting special election on proposition to acquire land for park since action in conducting mandated election is ministerial in nature not requiring exercise of discretion and thus not within purview of Environmental Conservation Law. Queensbury Ass'n v Town Bd. of Queensbury, 135 Misc. 2d 118, 515 N.Y.S.2d 193, 1987 N.Y. Misc. LEXIS 2189 (N.Y. Sup. Ct. 1987).

The petition to the town board for a referendum on a resolution to acquire lands for a park was held sufficient without a declaration of the registration of the voters or their party enrollment. In re Application of Sinicropi, 135 N.Y.S.2d 77, 1954 N.Y. Misc. LEXIS 2880 (N.Y. Sup. Ct.), aff'd, 284 A.D. 893, 134 N.Y.S.2d 596, 1954 N.Y. App. Div. LEXIS 3975 (N.Y. App. Div. 1954).

Where a petition to place a proposition before town electors as to whether the town should adopt the ward system for election of councilmen, pursuant to N.Y. Town Law § 81(2)(b), failed to include in the preamble that the signors' current place of residence was truly stated opposite their signature, pursuant to N.Y. Town Law § 81(4) and N.Y. Elec. Law § 6-140, the petition was invalid; such a statement was an essential part of the signature authentication. Matter of Fisher v Sampson, 27 A.D.3d 560, 813 N.Y.S.2d 136, 2006 N.Y. App. Div. LEXIS 2835 (N.Y. App. Div. 2d Dep't 2006).

5. —Former requirement as to acknowledgement

Supreme Court usurped town board's legislative authority by directing that proposed referendum be placed on ballot for particular general election, since CLS Town § 82 specifically confers on town board discretion to determine when special election on referendum shall be held; town board is required to submit proposition at general election only when general election is held in biennial town election year, under provisions of CLS Town § 81. Jacobs v Ocker, 123 A.D.2d 801, 507 N.Y.S.2d 276, 1986 N.Y. App. Div. LEXIS 60942 (N.Y. App. Div. 2d Dep't 1986).

A petition to a town board to hold a special election on a proposition must be dismissed where the petition was not acknowledged as required by subdivision 5 even though it was authenticated by witness to the signatures substantially as required by Election Law § 135. Where a petition requesting a Town Board to submit two propositions at a special election contained signatures which had not been acknowledged personally by the signatories before the notary public, but had been acknowledged by the subscribing witness the petition was defective. Election Law § 135 was not incorporated by reference into this section, and subd. 5 of this section requires that an elector must personally acknowledge his signature. Winebrenner v De Witt, 140 N.Y.S.2d 913, 207 Misc. 800, 1955 N.Y. Misc. LEXIS 2454 (N.Y. Sup. Ct.), aff'd, 286 A.D. 105, 142 N.Y.S.2d 602, 1955 N.Y. App. Div. LEXIS 3986 (N.Y. App. Div. 1955).

6. Voting on proposition

Qualified electors of a first class town who are not property owners may vote on propositions to increase the number of councilmen from four to six and to establish the ward system for the election of councilmen. 1955 Ops St Compt File #7180.

7. Miscellaneous

Local town law which expressly amended CLS Town § 81 with respect to timing of special elections on referendums was no longer viable where CLS Town § 81 had subsequently been substantially amended; under CLS Gen Const § 91, repeal of statute includes statute amendatory of statute repealed. Although qualified town electors who filed objections to referendum petitions were not necessary or indispensable parties in Article 78 proceedings to compel town clerk to place proposition on ballot, it would be "grossly inequitable" to deny standing to any qualified elector to challenge clerk's determination of petition's validity solely because of absence of explicit statutory mechanism for filing objections; thus, objectors were subject to permissive joinder under CLS CPLR § 1002, and where one objector had been named and served in proceedings, was subject to personal jurisdiction of court, and had served answer, it was error for court to refuse to consider his cross petition challenging clerk's determination validating signatures on petition. Jacobs v Ocker, 123 A.D.2d 801, 507 N.Y.S.2d 276, 1986 N.Y. App. Div. LEXIS 60942 (N.Y. App. Div. 2d Dep't 1986).

Provision of CLS Town § 81, requiring that town board "shall upon a petition" submit proposition for establishment of public park to town election, is nondiscretionary and ministerial; thus, it was improper for town board to refuse to put proposition regarding establishment of public park to popular vote. Queensbury Ass'n v Town Bd. of Queensbury, 141 A.D.2d 997, 530 N.Y.S.2d 861, 1988 N.Y. App. Div. LEXIS 7220 (N.Y. App. Div. 3d Dep't 1988).

Article 78 petition to compel town board to hold referendum, to enable electorate to decide whether television translators should be installed at town's expense, was properly dismissed since petitioner was collaterally estopped from relitigating issue where identical issue was decided in prior Article 78 proceeding; while current proposition and proposition previously presented to board for action differed in number of supporting signatures and anticipated cost of installing and maintaining translators, substantive issues were identical. Greene v Town Bd., Warrensburg, 159 A.D.2d 781, 552 N.Y.S.2d 62, 1990 N.Y. App. Div. LEXIS 2201 (N.Y. App. Div. 3d Dep't), app. dismissed, 76 N.Y.2d 771, 559 N.Y.S.2d 984, 559 N.E.2d 678, 1990 N.Y. LEXIS 1336 (N.Y. 1990), cert. denied, 498 U.S. 941, 111 S. Ct. 348, 112 L. Ed. 2d 313, 1990 U.S. LEXIS 5430 (U.S. 1990).

Former § 43 subd. 11 authorized electors of each town at town meeting to determine any question lawfully submitted to them, and former § 170, subds. 3 and 4 provided that town charges shall include moneys authorized to be raised by vote of town for any town purpose, and every sum directed by law to be raised for any town purpose. Town board, however, had no authority to bind town to pay for bridge tenders, and its resolution to that effect was nullity on its face. Expense has, therefore, not been made town charge under former § 43, subd. 11 and former § 170, subds. 3, 4, and funds for reimbursement of state for payment of bridge tenders have not been provided. Ridgeway v Treman, 129 N.Y.S. 1081, 72 Misc. 452, 1911 N.Y. Misc. LEXIS 420 (N.Y. Sup. Ct. 1911).

Proceeding to compel town board to call special election was not rendered moot by fact that election had not been conducted between 60 and 75 days following filing of petition with town clerk as required by CLS Town § 81, since action had been commenced within 4-month time limit of CLS CPLR § 217; Article 78 proceeding in nature of mandamus cannot be commenced until conditions precedent of demand and refusal have been fulfilled. Queensbury Ass'n v Town Bd. of Queensbury, 135 Misc. 2d 118, 515 N.Y.S.2d 193, 1987 N.Y. Misc. LEXIS 2189 (N.Y. Sup. Ct. 1987).

In Article 78 proceeding challenging town clerk's determination that proposition to establish ward system for election of members of town council could not be placed on ballot because CLS Town § 81(2) only allows such referendum in town of first class, town respondents were not equitably estopped from denying ballot placement after petitioner was erroneously informed by town clerk that town had first class status, where there was no showing that such misstatement was not innocently made, or that clerk allowed any other proposition or referendum which was permissible only for town of first class to get on ballot. Grossman v Town of Southampton, 170 Misc. 2d 822, 651 N.Y.S.2d 1006, 1996 N.Y. Misc. LEXIS 466 (N.Y. Sup. Ct. 1996).

Town clerk far exceeded the scope of a ministerial review of the election petition and became an objector by invalidating 148 signatures beyond the clerk's ministerial duty to determine if the signers were qualified voters in the town or if a qualified voter signed the petition twice; the clerk also used an incorrect base number concerning the total number of votes cast for governor in the previous election and thereby established that the election petition was factually and legally sufficient and presumptively valid. Cavallaro v Schimel, 194 Misc. 2d 788, 755 N.Y.S.2d 809, 2003 N.Y. Misc. LEXIS 101 (N.Y. Sup. Ct. 2003).

Combination town office highway building would be paid for from general town funds or from obligations, the debt service on which would be paid from general town funds. Surplus town funds may be used for such purpose. Unexpended balances of appropriations for town government may be used subject to restriction of section 115 of Town Law. 1947 Ops St Compt 120.

Under certain limited circumstances, town may exclude nonresidents from town park. 1988 Op St Compt No 88-22.

County, city, town or village may, in accordance with pertinent statutory requirements, contribute public funds to veterans memorial committee for purpose of erecting memorial monument. Ops St Compt 88-74.

II. Necessity of Referendum

8. In general

In an Article 78 proceeding in which petitioner sought to compel a town board to hold a public referendum respecting the installation and maintenance, at town expense, of a television translator system, the court properly dismissed the petition since a town or municipality may not submit a proposition to the electorate in the absence of express statutory authority permitting it to do so, and since a television translator is not a recreational facility analogous to a "park or playground" within the meaning of Town Law § 81(1)(d). Greene v Town Bd., 90 A.D.2d 916, 456 N.Y.S.2d 873, 1982 N.Y. App. Div. LEXIS 19196 (N.Y. App. Div. 3d Dep't 1982), app. denied, 58 N.Y.2d 604, 459 N.Y.S.2d 1027, 445 N.E.2d 654, 1983 N.Y. LEXIS 3666 (N.Y. 1983).

In absence of express authority for referendum to approve a town budget, such a referendum would be unlawful and would constitute an infringement upon right of town board to make decisions in area of its responsibility. Application of Town Board of Halfmoon, 81 Misc. 2d 157, 364 N.Y.S.2d 299, 1975 N.Y. Misc. LEXIS 2348 (N.Y. Sup. Ct. 1975).

Provided moneys are properly available therefor, a town board may appropriate town funds for recreational purposes without a referendum. 1947 Ops St Compt 336.

Where a town board adopts a resolution authorizing the town's participation in a Federal-State Comprehensive Planning Assistance Program, the resolution is not subject to referendum. 1969 Ops St Compt File #625.

Local Finance Law § 35.00(b)(1)(4) is broad enough to include the compliance with administrative orders; thus where a town is obligated to build a salt water shed to comply with an enforceable determination of the Department of Environmental Conservation, a resolution authorizing the issuance of bonds for this purpose and the resolution authorizing the expenditure of bonds proceeds is not subject to referendum under either Town Law §§ 81 and 220, or Highway Law § 142(4). Inconsistent prior opinions are superseded. 1990 Op St Compt 90-32.

Town electors may not, by petition, compel the town board to hold a referendum on a proposition to impose a limit on the amount by which real property taxes may be annually increased. 1991 Op St Compt No. 91-41.

Proposed lease of property for use as town recreational trail was subject to permissive referendum, or town board, on its own motion, could submit proposition therefor to referendum at special or biennial town election if lease payments were to be paid from moneys appropriated from taxes levied for current fiscal year. 1992 Op St Compt No. 92-49.

Town may expend current tax monies to dredge privately-owned waterway within town, subject to voter approval and other applicable laws and regulations, including any permit requirements; town must determine that dredging will provide, at most, only incidental benefit to private owner and will primarily serve town purposes, and dredging work may be carried out by town highway superintendent provided such work is reasonably related to and does not interfere with usual work of superintendent and cost of work is charged to town's general fund. 2002 Op St Compt No. 2002-4.

A referendum may not be initiated by petition on the question of fluoridating a water district water supply. There is no provision for federal or state aid in the taking of a special census. 1964 Ops St Compt File #915.

9. Airports, parking places and parks

Condemnation proceedings by a town for acquisition of property for a public beach were not fatally defective by reason of the town board's failure to obtain the electorate's prior approval on a referendum where town passed resolution that cost of acquisition was to be paid pursuant to the Local Finance Law, and passed a resolution for issuance of bonds. In re Town Board of Islip, 12 N.Y.2d 321, 239 N.Y.S.2d 541, 189 N.E.2d 808, 1963 N.Y. LEXIS 1303 (N.Y. 1963).

The acquisition of land for public park or playground containing bob runs, bridle paths, ski trails and other winter sports is authorized by this section and § 220. Rivet v Burdick, 255 A.D. 131, 6 N.Y.S.2d 79, 1938 N.Y. App. Div. LEXIS 4674 (N.Y. App. Div. 1938).

The 1943 and 1945 amendments of §§ 81, 220, and 223, Town Law, and § 35.00 Local Finance Law, having to do with elimination of one referendum in the event that the financing is to be accomplished by means of bonds of not more than five years duration, are inapplicable to the acquisition of land for a public beach, where the cost was defrayed out of unexpended budget balances which in turn could not be utilized for the acquisition of a park or playground or parking place save upon approval of qualified electors. Knapp v Fasbender, 278 A.D. 970, 105 N.Y.S.2d 780, 1951 N.Y. App. Div. LEXIS 5404 (N.Y. App. Div. 1951).

Referendum not required under Town Law or Local Finance Law when town park and playground is to be financed by capital note issue. 1946 Ops St Compt 317.

A town may enter into an agreement with a county for the joint development to a recreation park owned by the county. Such an agreement would be subject to a permissive referendum. 1966 Ops St Compt File #662.

In order for a town to establish a new town airport, it must follow the provisions of either Town Law, section 81, or Town Law, section 220. 1968 Ops St Compt File #842.

An expenditure for the construction of a swimming pool by a town is subject to referendum only if it is financed through current taxes. However, if it is financed by issuing obligations, then the bond resolution, but not the expenditure, is subject to permissive referendum only if the bonds have a proposed maturity of more than five years. 1969 Ops St Compt File #534.

10. Number of councilmen

There is no authority for the submission of a proposition decreasing the number of councilmen from six to four. A proposition to abolish the ward system of election of councilmen must be submitted on a petition therefor. 1954 Ops St Compt File #6704.

11. Ordinances

Town board may not submit proposed zoning ordinance for approval of people by referendum in absence of statute specifically authorizing such submission. 1945 Ops St Compt 356.

Proposed amendments to a town snowmobile ordinance may not be submitted to a referendum. 1974 Ops St Compt File #1317.

12. Town buildings and lands

Since amendment of this section to provide that any expenditure financed in whole by monies appropriated from surplus funds shall not be subject to referendum, no referendum is required in a second class town for purchase of a town hall site out of funds bequeathed to the town for erection and equipment of a town hall. Griffin v Town Board of Warrensburg, 43 Misc. 2d 550, 251 N.Y.S.2d 536, 1964 N.Y. Misc. LEXIS 1735 (N.Y. Sup. Ct. 1964), aff'd, 23 A.D.2d 944, 259 N.Y.S.2d 906, 1965 N.Y. App. Div. LEXIS 5115 (N.Y. App. Div. 3d Dep't 1965).

Neighborhood recreation centers may be created by a town board on its own initiative; referendum not necessary under Town Law or section 245 of General Municipal Law; possible referendum on bond issue. 1946 Ops St Compt 16.

A town board may appropriate current funds necessary to equip and improve land for use as a "recreation project" without a referendum. 1952 Ops St Compt File #5665.

Surplus moneys may be used to purchase and alter an existing structure for a town hall, however it is recommended that such proposition be submitted to special election. A proposition for

expenditures for such a purpose to be made from current taxes must be submitted to the voters. 1954 Ops St Compt File #6828.

The purchase, out of surplus funds, of land to expand a town cemetery is not subject to permissive or mandatory referendum in the town. 1968 Ops St Compt File #102.

A proposed acquisition by lease for a town recreation center is subject to referendum if current taxes are to be used for annual rental payments. 1974 Ops St Compt File #370.

Local Finance Law § 35.00(b)(1)(4) is broad enough to include the compliance with administrative orders; thus where a town is obligated to build a salt water shed to comply with an enforceable determination of the Department of Environmental Conservation, a resolution authorizing the issuance of bonds for this purpose and the resolution authorizing the expenditure of bonds proceeds is not subject to referendum under either Town Law §§ 81 and 220, or Highway Law § 142(4). Inconsistent prior opinions are superseded. 1990 Op St Compt 90-32.

Resolution of the town board authorizing purchase of a site for a new town hall is not subject to a permissive referendum where a portion of the cost is to be financed by the issuance of capital notes. 1955 St Compt File #7536.

13. Ward system

Town law, which restricted authorization of permitted referenda, was improper use of town's supersession powers (CLS Mun H R[1]0(1)(ii)(d)(3)), and thus law was properly declared invalid because it impermissibly provided additional requirements as to authorization of referenda relating to establishment of ward districts in town. Kepert v Allan, 287 A.D.2d 570, 731 N.Y.S.2d 664, 2001 N.Y. App. Div. LEXIS 9578 (N.Y. App. Div. 2d Dep't 2001), app. denied, 98 N.Y.2d 602, 744 N.Y.S.2d 762, 771 N.E.2d 835, 2002 N.Y. LEXIS 1025 (N.Y. 2002).

Article 78 proceeding by residents and electors of town, challenging determination which invalidated petitions seeking referendum to establish ward system for election of members of town council, was dismissed for failure to state cause of action, where witness statements of petitions lacked wording "and I am duly qualified to sign the petition" as required by CLS Elec § 6-140(1)(b); when language is statutorily mandated as part of content of petition, it is considered matter of substance and not form, requiring strict compliance. Article 78 proceeding, challenging determination that invalidated petitions seeking referendum to establish ward system for election of members of town council, was untimely where it was not commenced within time limits of CLS Elec § 16-102(2), which was applicable as result of incorporation language of CLS Town § 81 and broad operation of CLS Elec § 1-102. Heath v Town of Islip, 169 Misc. 2d 382, 645 N.Y.S.2d 702, 1996 N.Y. Misc. LEXIS 201 (N.Y. Sup. Ct. 1996).

There is no authority for the submission of a proposition decreasing the number of councilmen from six to four. A proposition to abolish the ward system of election of councilmen must be submitted on a petition therefor. 1954 Ops St Compt File #6704.

14. Waste disposal

Town board's resolution transferring operation of landfill to town's solid waste management authority was not invalid on ground that it was adopted without permissive referendum or prior public notice and hearing as required under CLS Town §§ 62(2), 81, 90, 91, and 221, since no expenditure in connection with project was being financed by taxes levied for fiscal year in which such expenditure was to be made. Also, town board's resolution transferring operation of landfill to town's solid waste management authority was not invalid on ground, inter alia, that it was adopted without permissive referendum since Authority took nonexclusive possession of land in question as coordinate municipal body, was not obligated to pay rent, and was unable to make capital improvements or expenditures on landfill site without prior written authorization from town. New York Public Interest Research Group, Inc. v North Hempstead, 153 A.D.2d 743, 545 N.Y.S.2d 308, 1989 N.Y. App. Div. LEXIS 11226 (N.Y. App. Div. 2d Dep't 1989).

Under this section, where a Town Board adopts a resolution authorizing construction of an incinerator and disposal plant and expenditure of $800,000 to be financed by a bond issue, such resolution is subject to permissive referendum upon petition. Application of Cox, 40 Misc. 2d 531, 243 N.Y.S.2d 605, 1963 N.Y. Misc. LEXIS 1509 (N.Y. Sup. Ct. 1963).

Referendum on proposition to construct incinerator required only where cost to be paid out of taxes collected during year in which expenditure is made. Where cost is to be financed, in town of the first class, only permissive referendum required on bond resolution, if term of bonds more than five years. 1946 Ops St Compt 520.

Second class towns, having a population of 5,000 or more, upon the adoption of proposition to provide for removal of garbage, etc., may award contracts. 1946 Ops St Compt 548.

Town which provides solid waste disposal facilities as town-wide function and has enacted legislation which requires solid waste to be processed at town's facilities may finance facilities through imposition of "solid waste generation fee" as user fee on owners of all improved properties within town that generate solid waste, and fee may be imposed retroactively for short period of time unless retroactivity would be so harsh and oppressive as to violate constitutional due process guarantees. 1992 Op St Compt No. 92-18.

Agency Opinions

Analysis

I. Generally

1. In general
2. Effect of prior rejection by electorate
3. Petition, generally
4. Voting on proposition
5. Miscellaneous

II. Necessity of Referendum

6. In general
7. Airports, parking places and parks
8. Number of councilmen
9. Ordinances
10. Town buildings and lands
11. Ward system
12. Waste disposal

I. Generally

1. In general

A town board, upon receipt of a petition, must cause to be submitted at a town election a proposition upon any question or resolution which may lawfully be submitted, pursuant to law. A proposition in reference to authorizing bingo is of the kind which must be submitted upon receipt of a petition. Following a favorable vote, the board must thereafter enact a bingo ordinance and submit a proposition thereon to referendum. 1958 NY Ops Atty Gen Apr 28 (informal).

A resolution of a town board providing for a proposition to establish the ward system for the election of councilmen should be adopted at least thirty days prior to a biennial town election. 1959 NY Ops Atty Gen Sept. 25 (informal).

A town may be divided only by following the procedure set forth in Town Law, § 73. Paragraph (f) of Town Law, § 81(1) is obsolete. 1981 NY Ops Atty Gen Oct 1 (Informal).

2. Effect of prior rejection by electorate

There is no provision in the Town Law, nor in any other State statute, which would prohibit a town board from adopting a resolution, subject to permissive referendum, or on its own motion, submitting a proposition at a special or biennial town election for the purchase of a building for town purposes even though such proposition had previously been voted on by the electors of the town two years prior thereto and such proposition had been defeated. 1971 NY Ops Atty Gen Aug 24.

3. Petition, generally

The signatures to a petition submitting a proposition to change the classification of a town may be proven in the same manner as a deed. 1953 NY Ops Atty Gen Apr 21 (Informal), 1953 N.Y. AG LEXIS 400.

Petition for a proposition to be submitted at a special or biennial town election; form and content, and authentication: general discussion. 1974 NY Ops Atty Gen June 14 (informal).

4. Voting on proposition

If the proposition to be submitted to town electors at the same time as a general election may be voted upon only by electors possessing real property ownership qualifications, voting thereon should be by separate ballot and the proposition should not appear upon the voting machines used at the general election. 1953 NY Ops Atty Gen Oct 14 (informal).

It is believed that town electors may vote on a proposition to change the classification of a town even though they may not be the owners of real property within the town. 1953 NY Ops Atty Gen July 15 (informal).

A proposition to establish the ward system for the election of councilmen in a town may properly appear on the voting machine used at the general election at which such proposition is submitted. 1955 NY Ops Atty Gen Sept 30 (informal).

A proposition authorized to be submitted by this section to town electors should be submitted at a special town election or a biennial town election. 1958 NY Ops Atty Gen Sept 9 (informal).

A town board resolution on a proposition which is to be submitted to the electors may not be submitted at a general election in an even-numbered year, and must be submitted at a special election. 1962 NY Ops Atty Gen July 17.

Town electors may not vote on a proposition to change its classification from second to first class at a general election to be held November 6, 1962, and such a proposition must either be put up to the electors at a special election or at the biennial election held in November, 1963. 1962 NY Ops Atty Gen June 28.

A proposition which would authorize change in classification of a town may only be submitted at a special election or a biennial November town election held in an odd-numbered year, but a special election can be called to be held at the same time and place as a general election in an even-numbered year if all the requirements applicable to special town elections are observed. 1962 NY Ops Atty Gen July 30.

The "qualified electors at a general election" who may vote at a public referendum mandated by L. 1968, c. 530(2) are those possessing the qualifications of voters enumerated in Election Law § 150. 1968 NY Ops Atty Gen Sept 19.

Pursuant to this section, a town may submit a proposition to dredge a navigable creek within the town, even though its bed and banks are privately owned. 1979 Op St Compt File #660.

Filing of petition on issue whether to establish ward system for election of council members in Town of North Hempstead is sufficient, assuming petition is otherwise proper, to require town board to submit proposition to voters under CLS Town § 81. 2002 NY Ops Atty Gen I 2002-18.

5. Miscellaneous

Where a town provides a trash pick-up service on a town-wide basis paid for out of general town-wide taxes, all taxpayers must be given an equal opportunity to take advantage of the service on some reasonable basis. 1982 Op St Compt File #82-215.

When a town needs additional space and no other practical alternative exists, it is probable that a town may purchase a vacant school building from a school district, and use only 50% of the space with the rest being leased for private purposes, if the town expects to need approximately 75% of the building within 15 to 20 years. Prior opinions are superseded to the extent they are inconsistent herewith. 1981 Op St Compt File #81-155.

(1) A town may operate a refreshment stand at its park facility or contract out the operation of a refreshment stand to a private party. (2) A town may charge a parking fee, on a per day or seasonal basis, to town residents utilizing a parking facility at a town park. 1982 Op St Compt File #82-237.

II. Necessity of Referendum

6. In general

A town board may not submit to a referendum a proposition to approve the action of a town housing authority in acquiring real property for proper purposes of the authority. 1954 NY Ops Atty Gen Apr 6 (informal).

A town board, upon receipt of a petition, must cause to be submitted at a town election a proposition upon any question or resolution which may lawfully be submitted, pursuant to law. A proposition in reference to authorizing bingo is of the kind which must be submitted upon receipt of a petition. Following a favorable vote, the board must thereafter enact a bingo ordinance and submit a proposition thereon to referendum. 1958 NY Ops Atty Gen Apr 28 (informal).

There is no constitutional or statutory authority for a town to conduct a public referendum on the proposition of revaluation and reassessment of real property, and, in the absence of same, it may not do so. 1965 NY Ops Atty Gen July 13.

Where it is wished to have a new town created, to be coterminous with boundaries of an existing village, the Municipal Annexation Law does not apply. The procedure is set forth in Article 5 of the Town Law, which still survives the partial repealer contained in the Municipal Annexation Law. The partial repealer applied only to change of boundaries of existing towns, not to creation of new towns. A town-wide referendum is required before a new town may be created from part of an existing town. 1975 NY Ops Atty Gen May 13.

A town may not conduct an advisory referendum on a proposal to permit the establishment of a retail shopping center within the town. 1979 Op St Compt File #617.

7. Airports, parking places and parks

A purchase of park lands to be financed in whole from monies appropriated from surplus funds is not subject to referendum. 1963 NY Ops Atty Gen Nov 7.

The only occasion upon which an expenditure for the establishment of a public park and playground and acquisition of the land for the same and the equipping of it with suitable structures and apparatus is subject to a referendum, is when such expenditure is to be made solely under the provisions of the Town Law and from taxes levied for the fiscal year in which the expenditure is to be made, in which case the expenditure is subject to a permissive referendum. One other method of expenditure is authorized when action is to be taken solely under the provisions of the Town Law and that is when the expenditure is to be made in whole from moneys appropriated from surplus funds, but when the expenditure is to be made from such surplus funds, it is not subject to a permissive referendum. On the other hand, where financing of the program is to be relied upon, this is provided for by following a combination of the provisions contained in the Town Law and in the Local Finance Law, in which case, if the financing (as distinguished from the expenditure) is to be accomplished through the sale of bonds with a proposed maturity greater than five years, it is subject to a permissive referendum whereas if the financing is to be accomplished through sale of bonds with a proposed maturity of not more than five years from the date of the bonds or from the date of the first bond anticipation note issued in anticipation of the sale of the bonds, whichever date is earlier, it is not subject to a permissive referendum. In the event of financing under the Local Finance Law, the expenditure itself is not subject to an additional referendum. If this were not the case, and two referenda could be held, the ridiculous result could be produced that the first referendum could be approved, authorizing sale of long-term obligations, and the second could be rejected, thus effectively preventing the expenditure of the funds so raised. 1976 Ops Atty Gen Oct 15.

A town may contribute to the cost of constructing a building in a village park pursuant to an Article 5-G agreement so long as the town first authorizes itself to establish and equip public parks. 1978 Op St Compt File #259.

A resolution of a town board agreeing to lease a parcel of land for use as a public parking lot would be subject to permissive referendum, unless rental payments and the costs of repair, maintenance and insurance are to be financed in whole from moneys appropriated from surplus funds. 1979 Op St Compt File #347.

8. Number of councilmen

A town wishing to increase the number of its councilmen and also to establish a ward system may submit both propositions at the same election. Town Law does not now provide for staggered

election of councilmen in a town divided into wards. 1968 NY Ops Atty Gen March 14.

Under § 81 of the Town Law it is necessary that a town of a second class first effectuate a change in classification to become a town of the first class prior to submission to the electorate of propositions to increase the number of councilpersons or to establish the ward system; the three propositions may not be submitted in the same election. A town of the second class may, however, increase the membership of his town council and establish the ward system through the enactment of local law subject to mandatory referendum; the referendum on each of these proposals may be held in the same election. 1990 N.Y. Op. Att'y Gen. No. I90-63.

9. Ordinances

A town board may not submit to a referendum of the town electors a proposition to repeal a town zoning ordinance. 1958 NY Ops Atty Gen May 5 (informal).

There is no authority in the Town Law for a second class town to have a referendum on adoption of a zoning ordinance. 1962 NY Ops Atty Gen Jan 22.

10. Town buildings and lands

A town may remodel its town hall pursuant to either § 81 or § 220 of the Town Law. 1962 NY Ops Atty Gen Apr 3.

The Town Board of the Town of Seneca Falls may demolish a Town building adjacent to the Town of Seneca Falls Hospital with the view of future expansion of the Town of Seneca Falls Hospital where surplus funds are available for such purpose without referendum either mandatory or permissive. 1975 NY Ops Atty Gen Jan 3.

A town may house in one building its town offices, justice court offices and police headquarters and may locate the building anywhere within the town or within a village wholly or partly within the town. 1981 NY Ops Atty Gen March 4 (informal).

A town board has discretion to submit a proposition to purchase land for public parks or playgrounds to the electors at either a special or biennial town election. N.Y. Op. Att'y Gen. No. 84-51.

A town may acquire a school district building having office space in excess of its present needs and rent the surplus space to third parties when the town board reasonably anticipates utilization of the additional space for town purposes within the foreseeable future. 1981 Op St Compt File # 81-197.

Where a town constructs a building to store highway salt at a cost of more than $100,000, such action is subject to either a permissive referendum pursuant to section 81(1)(c) and 220(3) of the Town Law or a mandatory referendum pursuant to section 142(4) of the Highway Law if the building could be used for the storage of machinery, tools, implements, or equipment. The financing of such a building may also be subject to a permissive referendum. 1982 Op St Compt File #82-192.

11. Ward system

The town board in a town of the first class may adopt a resolution to establish a ward system for the election of councilmen pursuant to this section. 1959 NY Ops Atty Gen July 9 (informal).

A town wishing to increase the number of its councilmen and also to establish a ward system may submit both propositions at the same election. Town Law does not now provide for staggered election of councilmen in a town divided into wards. 1968 NY Ops Atty Gen March 14.

A town which has adopted the ward system for the election of councilmen may change its ward boundaries by local law, which is not subject to any referendum. 1969 NY Ops Atty Gen Feb 14.

Under § 81 of the Town Law it is necessary that a town of a second class first effectuate a change in classification to become a town of the first class prior to submission to the electrorate of propositions to increase the number of councilpersons or to establish the ward system; the three propositions may not be submitted in the same election. A town of the second class may, however, increase the membership of his town council and establish the ward system through the enactment of local law subject to mandatory referendum; the referendum on each of these proposals may be held in the same election. 1990 N.Y. Op. Att'y Gen. No. I90-63.

12. Waste disposal

Absentee voting is permitted when a proposition for the establishment or extension of a sewer district is presented to the voters at the general town election. Absentee voting is also permitted at a special election where the town board of a town of the first class, by resolution has required personal registration. N.Y. Op. Att'y Gen. No. 83-6.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 12, 73, 232, 236; CLS Unconsol Ch 289 § 6.

Jurisprudences:

26 Am Jur 2d, Elections §§ 281–288, 405–409.

4 Am Jur Pl & Pr Forms (Rev ed), Aviation, Forms 92–94.

14A Am Jur Pl & Pr Forms (Rev ed), Initiative and Referendum, Forms 1–5.

Law Reviews:

Property qualifications for voting in special purpose districts: beyond the scope of "one man-one vote". 59 Cornell L. Rev. 687.

Annotations:

Validity of municipal bond issue as against owners of property annexation of which to municipality became effective after date of election at which issue was approved by voters. 10 ALR2d 559.

Validity of governmental requirement of oath of allegiance or loyalty. 18 ALR2d 268.

Matthew Bender's New York Practice Guides: 2 New York Practice Guide: Real Estate § 18.04.

ARTICLE 7 Permissive Referendum

Section

90. Acts or resolutions of the town board that are subject to a referendum on petition
91. Referendum on petition.

HISTORY:

Add, L 1932, ch 634.

§ 90. Acts or resolutions of the town board that are subject to a referendum on petition

Whenever this chapter shall expressly provide that an act or resolution of the town board is subject to a permissive referendum, such act or resolution shall be subject to a referendum on petition as set forth in the next section, unless a proposition therefor shall have been adopted at a town election. Within ten days after the adoption by the town board of any resolution which is subject to a permissive referendum as above defined, the town clerk, in the same manner as provided for notice of a special election, shall post and publish a notice which shall set forth the date of the adoption of the resolution and contain an abstract of such act or resolution concisely stating the purpose and effect thereof. The notice shall specify that such resolution was adopted subject to a permissive referendum.

HISTORY:

Add, L 1932, ch 634; amd, L 1942, ch 85, § 12; L 1943, ch 710, § 2605 (Part 1), eff Sept 2, 1945.

Revision Notes: [1943, ch 710] Amendment required by Local Finance Law § 35.00.

Notes to Decisions

Analysis

1. In general
2. Real property sale

3. Sidewalk construction
4. Town offices; officers
5. —Town fire district
6. Waste management

1. In general

A referendum is no more than a veto power vested in the electorate to review an act of the Town Board, and it can in no way constitute a direction to the local legislative body to do more than that body has already determined by its own resolution to accomplish. A Town Board exercises the town's legislative power, its inhabitants cannot initiate legislation except in rare instances, and only under limited conditions set forth in the statutes can they exercise a veto power over a legislative act of the Town Board in the form of a referendum. Olin v North Hempstead, 34 Misc. 2d 853, 231 N.Y.S.2d 286, 1962 N.Y. Misc. LEXIS 3199 (N.Y. Sup. Ct. 1962), aff'd, 18 A.D.2d 831, 237 N.Y.S.2d 991, 1963 N.Y. App. Div. LEXIS 4651 (N.Y. App. Div. 2d Dep't 1963).

In absence of express authority for referendum to approve a town budget, such a referendum would be unlawful and would constitute an infringement upon right of town board to make decisions in area of its responsibility. Application of Town Board of Halfmoon, 81 Misc. 2d 157, 364 N.Y.S.2d 299, 1975 N.Y. Misc. LEXIS 2348 (N.Y. Sup. Ct. 1975).

Failure to post and publish town board's resolution purporting to change classification of town from second to first class, subject to permissive referendum, was jurisdictional defect that prevented town from attaining first class status. Grossman v Town of Southampton, 170 Misc. 2d 822, 651 N.Y.S.2d 1006, 1996 N.Y. Misc. LEXIS 466 (N.Y. Sup. Ct. 1996).

An appropriation is illegal where the resolution of the town board authorizing such appropriation has not been submitted to permissive referendum when required to be by statute, and a contract based upon such illegal appropriation cannot be enforced against the town. 1969 Ops St Compt File #74.

2. Real property sale

A resolution of a town board approving an offer for the sale of real property subject to permissive referendum and effective 30 days after the adoption thereof provided no petition was filed in the meantime could not be rescinded within the 30-day period where no petition was filed and the purchaser was irrevocably committed to purchase the property. Lake George v Caldwell, 3 A.D.2d 550, 162 N.Y.S.2d 762, 1957 N.Y. App. Div. LEXIS 5536 (N.Y. App. Div. 3d Dep't 1957), aff'd, 5 N.Y.2d 727, 177 N.Y.S.2d 711, 152 N.E.2d 668, 1958 N.Y. LEXIS 893 (N.Y. 1958).

Permissive referendum provided for in CLS Town §§ 64(2) and 90 was not required before town could convey property designated as parkland to private developer for development of low income housing since CLS Pub Hous § 124 provided that such conveyance was lawful notwithstanding any other provisions of law; latter statute was special statute which took precedence over former general statutes. Grayson v Huntington, 144 Misc. 2d 1064, 545 N.Y.S.2d 633, 1989 N.Y. Misc. LEXIS 562 (N.Y. Sup. Ct. 1989), aff'd, 160 A.D.2d 835, 554 N.Y.S.2d 269, 1990 N.Y. App. Div. LEXIS 4479 (N.Y. App. Div. 2d Dep't 1990).

A notice of a resolution calling for the sale of town realty must be published in the official paper of the town. 1967 Ops St Compt File #962.

3. Sidewalk construction

A referendum may not be held on the proposition of whether a town should construct sidewalks in specified areas of the town. 1969 Ops St Compt File #295.

4. Town offices; officers

5. —Town fire district

The town board of a town and board of trustees of the village located within the town are authorized to establish a joint fire district by resolution subject to a permissible referendum. The members of the board of fire commissioners of a joint fire district may be appointed by the town board and village board of trustees or they may be elected pursuant to the provisions of Article 11 of the Town Law. 1990 Op St Compt 90-27.

6. Waste management

Town board's resolution transferring operation of landfill to town's solid waste management authority was not invalid on ground that it was adopted without permissive referendum or prior public notice and hearing as required under CLS Town §§ 62(2), 81, 90, 91, and 221, since no expenditure in connection with project was being financed by taxes levied for fiscal year in which such expenditure was to be made. Also, Town Board's resolution transferring operation of landfill to town's solid waste management authority was not invalid on ground, inter alia, that it was adopted without permissive referendum since Authority took nonexclusive possession of land in question as coordinate municipal body, was not obligated to pay rent, and was unable to make capital improvements or expenditures on landfill site without prior written authorization from town. New York Public Interest Research Group, Inc. v North Hempstead, 153 A.D.2d 743, 545 N.Y.S.2d 308, 1989 N.Y. App. Div. LEXIS 11226 (N.Y. App. Div. 2d Dep't 1989).

Cause of action seeking declaration of invalidity of town board's authorizing resolution and implementing agreement regarding debris landfill was time barred where (1) plaintiffs' challenge was directed not to substance of resolution and agreement but to town's failure to hold permissive referendum on resolution and to town's lack of authority to make agreement, (2) those procedural claims could have been brought in proceeding under CLS CPLR § 7803(2), and (3) thus, 4-month limitations period in CLS CPLR § 217, not 6-year period in CLS CPLR § 213, applied. Complaint seeking to impose personal liability on individual town board members under CLS Gen Mun § 51 for passing allegedly invalid resolution and making allegedly invalid agreement regarding debris landfill was properly dismissed for failure to state cause of action, absent allegation of necessary element of collusion, fraud, or personal gain. Atkins v Town of Rotterdam, 266 A.D.2d 631, 697 N.Y.S.2d 780, 1999 N.Y. App. Div. LEXIS 11231 (N.Y. App. Div. 3d Dep't 1999).

Chapter 509 of the Laws of 1962, attempting to legalize and validate certain official acts and proceedings of the Town Board of the Town of North Hempstead relating to construction of an incinerator plant and issuance of serial bonds and capital notes to finance its cost, in authorizing construction of the incinerator on a specific site notwithstanding mis-description of the contemplated site in a referendum election, was valid and constitutional. Olin v North Hempstead, 34 Misc. 2d 853, 231 N.Y.S.2d 286, 1962 N.Y. Misc. LEXIS 3199 (N.Y. Sup. Ct. 1962), aff'd, 18 A.D.2d 831, 237 N.Y.S.2d 991, 1963 N.Y. App. Div. LEXIS 4651 (N.Y. App. Div. 2d Dep't 1963).

Town of first class may provide for collection and disposal of refuse and garbage by adoption of resolution therefor, subject to permissive referendum. 1945 Ops St Compt 262.

A town may sell excess soil excavated from its refuse disposal pits without competitive bidding or adopting a resolution subject to a permissive referendum. 1958 Ops St Compt File #974.

Agency Opinions

Analysis

1. In general
2. Real property use, generally
3. —Shopping center development
4. Town offices; officers
5. Waste management
6. Zoning

1. In general

The town board must notify the county board of elections of a town proposition to be placed on the ballot in the general election soon enough for the board of elections to have the ballots printed in time to mail them to military voters by the date set each year as the latest date for such mailing. 1973 NY Ops Atty Gen July 26 (informal).

A non-charter county has the power to reapportion its legislative body only by enacting a local law in accordance with section 10(1)(ii)(a)(13) of the Municipal Home Rule Law. The local law is subject to a permissive referendum under section 24(2)(j) of that

law but under certain circumstances may be subject to a mandatory referendum. 1981 NY Ops Atty Gen Aug 14 (Informal).

The enabling legislation by which a county opts to participate in a regional off-track betting corporation takes effect without a referendum unless a valid petition for a referendum is filed in accordance with section 24 of the Municipal Home Rule Law. A county legislative body is not authorized to call for a referendum. 1981 NY Ops Atty Gen Sept 28 (Informal).

Notice of the adoption of a local law subject to permissive referendum should be appropriately published. 1978 Op St Compt File #675.

Where a town adopts a resolution subject to a permissive referendum, to change its classification to a town of the first class, failure to publish and post the resolution is a jurisdictional defect which prevents the town from attaining such status. 1980 Op St Compt File #247.

2. Real property use, generally

3. —Shopping center development

A town may not conduct an advisory referendum on a proposal to establish a shopping center since there is no statutory authorization therefor. 1979 NY Ops Atty Gen Sept 27 (informal).

A town may not conduct an advisory referendum on a proposal to permit the establishment of a retail shopping center within the town. 1979 Op St Compt File #617.

The question: "Shall the Town of Riverhead support the nuclear power plant project as Jamesport by operating and maintaining a recreational facility at or near the nuclear plant site?" is not a question which may legally be submitted to a referendum in the Town of Riverhead when four years ago the town board had resolved to operate and maintain such a recreational facility and entered into a contract which contemplated doing so. 1979 NY Ops Atty Gen Oct 2 (informal).

4. Town offices; officers

When a resolution of a town board is subject to a permissive referendum, it can be sent to referendum via the petition method or by resolution of the town board. In the absence of a petition or a specific resolution, no referendum is held. Town Law § 60-a enabled towns of the second class to reduce the number of councilmen to be on the town board by resolution subject to permissive referendum. A town which decreased the number from four to two may, by local law subject to mandatory referendum, increase the number to four. 1981 NY Ops Atty Gen June 2 (Informal).

If town approves restriction of office of town justice, justice must be elected to that position at next biennial election for term of 4 years commencing on first day of January following election. 1997 NY Ops Atty Gen I 97-55.

Filing of petition on issue whether to establish ward system for election of council members in Town of North Hempstead is sufficient, assuming petition is otherwise proper, to require town board to submit proposition to voters under CLS Town § 81. 2002 NY Ops Atty Gen I 2002-18.

A proposition to reduce the number of town justices from two to one may be presented to the voters at a biennial town election even though candidates for that office are running at the same election. N.Y. Op. Att'y Gen. No. 83-59.

5. Waste management

Absentee voting is permitted when a proposition for the establishment or extension of a sewer district is presented to the voters at the general town election. Absentee voting is also permitted at a special election where the town board of a town of the first class, by resolution has required personal registration. N.Y. Op. Att'y Gen. No. 83-6.

6. Zoning

A town may not conduct a referendum on a proposed zoning ordinance. 1974 NY Ops Atty Gen Mar 5.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 91, 170.

Consolidation of fire protection districts, § 172-b.

Alteration of boundaries of fire protection district, § 172-c.

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1225, 1230 .

50 NY Jur 2d Elections §§ 740, 743–745, 748–750, 752, 753 .

81 NY Jur 2d Parks, Recreation, and Historic Preservation § 143.

42 Am Jur 2d, Initiative and Referendum §§ 6, 7.

9B Am Jur Legal Forms 2d, Initiative and Referendum, Forms 146:2–146:8.

Annotations:

Adoption of zoning ordinance or amendment thereto through initiative process. 72 ALR3d 991.

Adoption of zoning ordinance or amendment thereto as subject of referendum. 72 ALR3d 1030.

§ 91. Referendum on petition.

Any such resolution or act of the town board as set forth in the preceding section shall not take effect until thirty days after its adoption; nor until approved by the affirmative vote of a majority of the qualified electors of such town or district affected, voting on such proposition, if within thirty days after its adoption there be filed with the town clerk a petition signed, and acknowledged or proved, or authenticated by electors of the town qualified to vote upon a proposition to raise and expend money, in number equal to at least five per centum of the total vote cast for governor in said town at the last general election held for the election of state officers, but which shall not be less than one hundred in a town of the first class nor less than twenty-five in a town of the second class, protesting against such act or resolution and requesting that it be submitted to the qualified electors of the town or district affected, for their approval or disapproval. If such petition be so filed not more than one hundred five days nor less than ninety days prior to a biennial town election, a proposition for the approval of such act or resolution shall be submitted at such biennial town election. If a petition be so filed at any other time, a proposition for the approval of such act or resolution shall be submitted at a special town election to be held not less than ninety nor more than one hundred five days after the filing of such petition. The petition may be made upon separate sheets and the signatures to each sheet shall be authenticated in the manner provided by the election law for the authentication of nominating petitions. The several sheets so signed and authenticated when fastened together and offered for filing shall be deemed to constitute one petition. If, within five days after the filing of such petition, a written objection thereto be filed with the town clerk, and a verified petition setting forth the objections be presented by the person so filing such objections to the supreme court or any justice thereof of the judicial district in which such town is located, such court or justice within twenty days shall determine any question arising thereunder and make such order as justice may require. Such proceeding shall be heard and determined in the manner prescribed by section 16-116 of the election law.

HISTORY:

Add, L 1932, ch 634; amd, L 1985, ch 117, § 3; L 2000, ch 37, § 8, eff Sept 1, 2000; L 2020, ch 128, § 1, effective July 29, 2020.

Editor's Notes Laws 2020, ch 128, § 2, eff July 30, 2020 provides:

§ 2. This act shall take effect immediately; provided, however, for referenda required pursuant to article 12-A of the town law, this act shall apply beginning on the first of January next succeeding such effective date.

Amendment Notes The 2020 amendment by ch 128, § 1, substituted "more than one hundred five days nor less than ninety days" for "not more than seventy-five days nor less than sixty days" in the second sentence; and substituted "less than ninety nor more than one hundred five days" for "less than sixty nor more than seventy-five days" in the third sentence.

Notes to Decisions

Analysis

1. In general
2. Sufficiency of petition
3. Time of referendum
4. Written objections to petition, generally
5. —Effect of Election Law $ 335
6. Other; miscellaneous

1. In general

The word "petition" as used in this section means substantially what is meant by § 135 of the Election Law, to which it refers, namely: a statement of purpose followed by the authenticated signatures of those seeking to advance that purpose. In re Brookhaven, 18 A.D.2d 662, 234 N.Y.S.2d 762, 1962 N.Y. App. Div. LEXIS 6693 (N.Y. App. Div. 2d Dep't 1962), app. denied, 12 N.Y.2d 646, 1963 N.Y. LEXIS 1555 (N.Y. 1963).

There is rational basis for not applying the substantial compliance rule to referendum petitions with the same strictness which governs designating petitions. Morabito v Campbell, 59 A.D.2d 703, 398 N.Y.S.2d 176, 1977 N.Y. App. Div. LEXIS 13653 (N.Y. App. Div. 2d Dep't 1977).

Requirements of CLS Election § 6-130 apply to referrendum petitions governed by CLS Town § 91. Gomberg v Gorman, 117 A.D.2d 583, 498 N.Y.S.2d 55, 1986 N.Y. App. Div. LEXIS 52852 (N.Y. App. Div. 2d Dep't 1986).

Property owners who do not timely seek permissive referendum on resolution establishing sewer district for judicial review pursuant Article 78 are precluded from challenging validity of resolution in subsequent action to determine validity of sewer district's operation and maintenance charge. Chiocchi v Montgomery, 120 A.D.2d 479, 502 N.Y.S.2d 34, 1986 N.Y. App. Div. LEXIS 56552 (N.Y. App. Div. 2d Dep't 1986).

Town board's resolution transferring operation of landfill to town's solid waste management authority was not invalid on ground that it was adopted without permissive referendum or prior public notice and hearing as required under CLS Town §§ 62(2), 81, 90, 91, and 221, since no expenditure in connection with project was being financed by taxes levied for fiscal year in which such expenditure was to be made. Also, resolution was not invalid because adopted without permissive referendum since Authority took nonexclusive possession of land in question as coordinate municipal body, was not obligated to pay rent, and was unable to make capital improvements or expenditures on landfill site without prior written authorization from town. New York Public Interest Research Group, Inc. v North Hempstead, 153 A.D.2d 743, 545 N.Y.S.2d 308, 1989 N.Y. App. Div. LEXIS 11226 (N.Y. App. Div. 2d Dep't 1989).

This section applies only to acts or resolutions of the Town Board that are subject to a referendum on petition. Winebrenner v De Witt, 140 N.Y.S.2d 913, 207 Misc. 800, 1955 N.Y. Misc. LEXIS 2454 (N.Y. Sup. Ct.), aff'd, 286 A.D. 105, 142 N.Y.S.2d 602, 1955 N.Y. App. Div. LEXIS 3986 (N.Y. App. Div. 1955).

Although a referendum petition was filed with the town clerk within the required 30 days after adoption of a town board resolution for construction of an incinerator and issuance of bonds to cover the expense, and no objections were filed by anyone to the petition within five days thereafter, under this section it become the function of the Town Board to determine when the election should be held and to make arrangements therefor. Application of Cox, 40 Misc. 2d 531, 243 N.Y.S.2d 605, 1963 N.Y. Misc. LEXIS 1509 (N.Y. Sup. Ct. 1963).

A petition for a mandatory referendum pursuant to Town Law § 91 may be filed by mail. Application of Cohalan, 71 Misc. 2d 196, 335 N.Y.S.2d 747, 1972 N.Y. Misc. LEXIS 1607 (N.Y. Sup. Ct. 1972), aff'd, 41 A.D.2d 840, 342 N.Y.S.2d 153, 1973 N.Y. App. Div. LEXIS 4780 (N.Y. App. Div. 2d Dep't 1973).

No referendum was required or necessary regarding town's construction of swimming pool complex with 50% state aid for the project. Ecker v West Seneca, 87 Misc. 2d 322, 384 N.Y.S.2d 613, 1976 N.Y. Misc. LEXIS 2205 (N.Y. Sup. Ct. 1976).

When a town of the second class proposes to abolish the three elective offices of assessor and create one appointive office of assessor, a special election must be held if a referendum is requested. 1953 Ops St Compt File #6060.

A referendum on petition may be initiated by a petition containing signatures in a number equal to five per cent of the total votes cast for governor within the township at the last general election of state officers. 1967 Ops St Compt File #962.

The town board of a town and board of trustees of the village located within the town are authorized to establish a joint fire district by resolution subject to a permissible referendum. The members of the board of fire commissioners of a joint fire district may be appointed by the town board and village board of trustees or they may be elected pursuant to the provisions of Article 11 of the Town Law. 1990 Op St Compt 90-27.

2. Sufficiency of petition

Sheets attached to a petition to require submission of a proposition to the voters at a town election which, though properly authenticated, contained no statement of the substance of the petition, failed to comply with the requirements or this section and § 135 of the Election Law and could not be counted. In re Brookhaven, 18 A.D.2d 662, 234 N.Y.S.2d 762, 1962 N.Y. App. Div. LEXIS 6693 (N.Y. App. Div. 2d Dep't 1962), app. denied, 12 N.Y.2d 646, 1963 N.Y. LEXIS 1555 (N.Y. 1963).

Petitions for a referendum on a resolution of the town board approving the acquisition of a golf course and the means to commence it were rendered null and void by reason of the failure to incorporate in such referendum the authentication clause required by Election Law §§ 135, subd 3 and 138, subd 3 as incorporated by reference in Town Law § 91. Cohalan v Olmo, 41 A.D.2d 840, 342 N.Y.S.2d 153, 1973 N.Y. App. Div. LEXIS 4780 (N.Y. App. Div. 2d Dep't 1973).

Petition to place on ballot issue of whether town should establish award system for election of council members may be rejected for failure to include election districts of signers. Gomberg v Gorman, 117 A.D.2d 583, 498 N.Y.S.2d 55, 1986 N.Y. App. Div. LEXIS 52852 (N.Y. App. Div. 2d Dep't 1986).

In special proceeding under CLS Town § 91, by individual who was both town board member and water commissioner, to invalidate referendum petitions by property owners regarding change in water supplier, owners waived any objection to petitioner's standing to sue where they did not raise defense of lack of standing either in pre-answer motion or in their responsive pleadings. Santoro v Schreiber, 263 A.D.2d 953, 695 N.Y.S.2d 443, 1999 N.Y. App. Div. LEXIS 7913 (N.Y. App. Div. 4th Dep't), app. dismissed, 94 N.Y.2d 817, 701 N.Y.S.2d 708, 723 N.E.2d 564, 1999 N.Y. LEXIS 3805 (N.Y. 1999).

In special proceeding under CLS Town § 91, by individual who was both town board member and water commissioner, to invalidate referendum petitions by property owners regarding change in water supplier, Supreme Court lacked jurisdiction to add, sua sponte, 8 petitioners as parties where their petitions were not accompanied by orders to show cause in accordance with CLS Elec § 16-116; also, under CLS CPLR § 304, special proceeding is commenced by filing notice of petition or order to show cause and petition, and absent such filing, service of petitions is nullity. Santoro v Schreiber, 263 A.D.2d 953, 695 N.Y.S.2d 443, 1999 N.Y. App. Div. LEXIS 7913 (N.Y. App. Div. 4th Dep't), app. dismissed,

94 N.Y.2d 817, 701 N.Y.S.2d 708, 723 N.E.2d 564, 1999 N.Y. LEXIS 3805 (N.Y. 1999).

Trial court erred in granting petitions by a developer, an individual, and a town to invalidate the electors' petition for a permissive referendum because the referendum petition satisfied the statutory requirements by identifying the resolution, stating that the undersigned electors were signing in protest to it, and requesting that the resolution be submitted to a referendum of qualified electors, requiring more detail would read a new requirement into the statute that the legislature did not include, and the matter had not been rendered academic by the passage of time. Matter of Merlin Entertainments Group U.S. Holdings, Inc. v 409 Signatories to the Challenged Referendum Petition, 160 A.D.3d 867, 75 N.Y.S.3d 97, 2018 N.Y. App. Div. LEXIS 2594 (N.Y. App. Div. 2d Dep't 2018).

Petition which merely opposed the proposed site of a new town hall at a particular location was not a sufficient objection to the construction of the town hall nor a sufficient request that the voters be given an opportunity to vote upon the act or resolution and failed to comply with the technical requirements of the Town Law for petitions to submit the resolutions to the voters. In re Mt. Pleasant, 82 Misc. 2d 869, 372 N.Y.S.2d 8, 1975 N.Y. Misc. LEXIS 2827 (N.Y. Sup. Ct. 1975).

The petition to the town board for a referendum on a resolution to acquire lands for a park was held sufficient without a declaration of the registration of the voters or their party enrollment. Biennial town election can only be held on "Election Day" in odd numbered years. Court held that an election in 1954 was a special election and had to be held within forty days of filing of petition. The fact that petition asked that election be held on day which was not legal for holding it did not invalidate petition. In re Application of Sinicropi, 135 N.Y.S.2d 77, 1954 N.Y. Misc. LEXIS 2880 (N.Y. Sup. Ct.), aff'd, 284 A.D. 893, 134 N.Y.S.2d 596, 1954 N.Y. App. Div. LEXIS 3975 (N.Y. App. Div. 1954).

The requirement that the several sheets of a petition for permissive referendum be fastened together and deemed to constitute one petition, was designed to avoid a challenge to the whole petition on the ground that no one sheet thereof was sufficient to meet the requirements for an adequate petition. Where a permissive referendum petition was comprised of 134 pages, but the statements and verifications of subscribing witnesses on many of the pages were wholly inadequate to meet the requirements of this section and § 135 of the Election Law, and signatures on the remaining pages were insufficient in number to make the petition effective, the entire petition was invalid. Application of McComb, 232 N.Y.S.2d 861 (N.Y. Sup. Ct.), aff'd, 18 A.D.2d 662, 234 N.Y.S.2d 762, 1962 N.Y. App. Div. LEXIS 6693 (N.Y. App. Div. 2d Dep't 1962).

Sufficiency of petitions may be challenged by the Town Clerk rejecting signatures patently insufficient and by the procedure provided by the Town Law. Town board would be limited to bringing court action to determine sufficiency. Signatures may not be rejected by the Town Clerk because signed in pencil or with initials, or because a married woman signs as "Mrs. John Jones" or because similar names appear more than once. Signatures may be rejected because the signers witnessed their own signatures. 1953 Ops St Compt File #6331.

3. Time of referendum

Biennial town election can only be held on "Election Day" in odd numbered years. Court held that an election in 1954 was a special election and had to be held within forty days of filing of petition. The fact that petition asked that election be held on day which was not legal for holding it did not invalidate petition. In re Application of Sinicropi, 135 N.Y.S.2d 77, 1954 N.Y. Misc. LEXIS 2880 (N.Y. Sup. Ct.), aff'd, 284 A.D. 893, 134 N.Y.S.2d 596, 1954 N.Y. App. Div. LEXIS 3975 (N.Y. App. Div. 1954).

A special election held to vote on a resolution of the town board is without effect if held more than forty days after the town board moved to submit the resolution to a referendum. 1969 Ops St Compt File #523.

Where a town board has approved the creation of a proposed water district and has moved to submit it to a referendum, the referendum must be held within 40 days after such motion. 1973 Ops St Compt File #1086.

4. Written objections to petition, generally

Where no written objections were filed to a referendum petition within the prescribed five-day period, it was too late for a court to pass upon objections raised at a later date by special town counsel with respect to signatures and qualifications of some of the signers. A report by town counsel on a referendum petition, made to the Town Board and recommending its rejection, could not be considered as constituting written objections thereto within the meaning of this section. Application of Cox, 40 Misc. 2d 531, 243 N.Y.S.2d 605, 1963 N.Y. Misc. LEXIS 1509 (N.Y. Sup. Ct. 1963).

5. —Effect of Election Law $ 335

Since § 335 of the Election Law governs hearings under this section and requires only the giving of notice to such persons as the court may direct, persons attempting to intervene at such a hearing cannot charge that the petitions were defective because no provision was made for service of the show cause order upon them. In re Brookhaven, 18 A.D.2d 662, 234 N.Y.S.2d 762, 1962 N.Y. App. Div. LEXIS 6693 (N.Y. App. Div. 2d Dep't 1962), app. denied, 12 N.Y.2d 646, 1963 N.Y. LEXIS 1555 (N.Y. 1963).

Section 335 of the Election Law, to which this section refers, does not require that those who have circulated a petition for permissive referendum be served with an order to show cause against a petition for nullification of the referendum petition, unless the judge or justice so directs. Application of McComb, 232 N.Y.S.2d 861 (N.Y. Sup. Ct.), aff'd, 18 A.D.2d 662, 234 N.Y.S.2d 762, 1962 N.Y. App. Div. LEXIS 6693 (N.Y. App. Div. 2d Dep't 1962).

6. Other; miscellaneous

Where authentication by witness which stated the exact number of signatures appearing on each petition sheet was stapled to each signature sheet instead of appearing on the bottom of each sheet, method was not such a substantial deviation from section of Election Law as to invalidate the referendum petition. Morabito v Campbell, 59 A.D.2d 703, 398 N.Y.S.2d 176, 1977 N.Y. App. Div. LEXIS 13653 (N.Y. App. Div. 2d Dep't 1977).

Court properly dismissed, for lack of jurisdiction, proceeding challenging petition for referendum where petitioner did not file notice of petition or order to show cause prior to purported service of petition, and there was no order directing manner of service of petition; fact that court obtained jurisdiction over 4 signatories to petition for referendum was irrelevant since they did not represent town, nor was there any evidence to suggest that they represented other 141 signatories. Millar v Tolly, 252 A.D.2d 872, 675 N.Y.S.2d 440, 1998 N.Y. App. Div. LEXIS 8584 (N.Y. App. Div. 3d Dep't 1998).

In special proceeding under CLS Town § 91, by individual who was both town board member and water commissioner, to invalidate referendum petitions by property owners regarding change in water supplier, referendum petitions could not be invalidated on re-argument on grounds not raised by petitioner in his objections filed with town clerk or in his petitions filed in Supreme Court; fundamental fairness requires that prior notice by given of basis for challenge to referendum petitions, and re-argument is not vehicle for parties to raise new questions or advance arguments different from those tendered on original application. Also, all but one of those referendum petitions were properly invalidated on ground they had insufficient numbers of signature where they were filed separately and were not fastened together in accordance with § 91. Santoro v Schreiber, 263 A.D.2d 953, 695 N.Y.S.2d 443, 1999 N.Y. App. Div. LEXIS 7913 (N.Y. App. Div. 4th Dep't), app. dismissed, 94 N.Y.2d 817, 701 N.Y.S.2d 708, 723 N.E.2d 564, 1999 N.Y. LEXIS 3805 (N.Y. 1999).

Town did not fail to use its best efforts to complete purchase of gravel pit from defendants and thus was entitled to refund of its $20,000 deposit although public referendum was defeated by voters and sale did not occur, where town board unanimously approved bond resolution for purchase subject to permissive referendum and, when matter was referred for public referendum after various town residents objected, all members of board voted in favor of resolution. Town of Roxbury v Rodrigues, 277 A.D.2d 866, 716 N.Y.S.2d 814, 2000 N.Y. App. Div. LEXIS 12378 (N.Y.

App. Div. 3d Dep't 2000), app. denied, 96 N.Y.2d 708, 725 N.Y.S.2d 638, 749 N.E.2d 207, 2001 N.Y. LEXIS 638 (N.Y. 2001).

Even though personal registration procedures for referendum were not complied with, and even though election on bonding resolution for swimming pool was not held ten days after governing body's adoption of resolution, where there was extensive newspaper and media publicity which attended issue, where bonding referendum was mistakenly believed by town to be mandatory but was in fact permissive, and where there was no fraud, town properly complied with necessary procedures in conduct of election results of special referendum were valid. Ecker v West Seneca, 87 Misc. 2d 322, 384 N.Y.S.2d 613, 1976 N.Y. Misc. LEXIS 2205 (N.Y. Sup. Ct. 1976).

Order to show cause seeking to void admittedly defective referendum petition would be granted, notwithstanding fact that it was dated 13 days after referendum petition was filed, where objectors' petition was filed with Supreme Court within 5 days, as required by CLS Town § 91. Lamendola v Warner, 181 Misc. 2d 1024, 696 N.Y.S.2d 668, 1999 N.Y. Misc. LEXIS 420 (N.Y. Sup. Ct. 1999).

In a town of the second class where the town board has resolved that there shall be but one appointive assessor, and no timely demand for a referendum has been filed, then the positions of assessor which expire December 31 are not to be voted upon at the biennial town election, but a single assessor shall be appointed on the first day of January next succeeding. 1955 Ops St Compt File #7384.

Agency Opinions

Analysis

1. In general
2. Sufficiency of petition
3. Time of referendum
4. Other; miscellaneous

1. In general

The town board must notify the county board of elections of a town proposition to be placed on the ballot in the general election soon enough for the board of elections to have the ballots printed in time to mail them to military voters by the date set each year as the latest date for such mailing. 1973 NY Ops Atty Gen July 26 (informal).

2. Sufficiency of petition

Filing of petition on issue whether to establish ward system for election of council members in Town of North Hempstead is sufficient, assuming petition is otherwise proper, to require town board to submit proposition to voters under CLS Town § 81. 2002 NY Ops Atty Gen I 2002-18.

3. Time of referendum

Where a petition is filed with a town clerk requesting the submission of a resolution to a referendum and a special election is to be held, the town board may schedule the election no sooner than twenty days after the adoption of the resolution calling the election but not more than forty days from the filing of the petition with the town clerk. 1981 Op St Compt File #80-689.

4. Other; miscellaneous

When a resolution of a town board is subject to a permissive referendum, it can be sent to referendum via the petition method or by resolution of the town board. In the absence of a petition or a specific resolution, no referendum is held. Town Law § 60-a enabled towns of the second class to reduce the number of councilmen to be on the town board by resolution subject to permissive referendum. A town which decreased the number from four to two may, by local law subject to mandatory referendum, increase the number to four. 1981 NY Ops Atty Gen June 2 (Informal).

If town approves restriction of office of town justice, justice must be elected to that position at next biennial election for term of 4 years commencing on first day of January following election. 1997 NY Ops Atty Gen I 97-55.

Absentee voting is permitted when a proposition for the establishment or extension of a sewer district is presented to the voters at the general town election. Absentee voting is also permitted at a special election where the town board of a town of the first class, by resolution has required personal registration. N.Y. Op. Att'y Gen. No. 83-6.

When a town board resolution to dissolve a fire protection district is submitted for a permissive referendum, only qualified electors residing within the district may sign a petition and vote. 1982 Op St Compt File #82-149.

A permissive referendum to dissolve a fire protection district located in portions of three towns should be held throughout the district in all three towns, even though the petition is signed only by electors of the district in one town. 1982 Op St Compt File #82-178.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 90, 170, 172-b, 172-c, 198; CLS Unconsol Ch 289 § 6.

Consolidation of fire protection districts, § 172-b.

Alteration of boundaries of fire protection district, § 172-c.

Proceedings; provisions in relation thereto, CLS Elec § 16-116.

Jurisprudences:

1 NY Jur 2d Acknowledgements, Affidavits, Oaths, Notaries, and Commissioners § 4.

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1225, 1230 .

50 NY Jur 2d Elections §§ 740, 751 .

42 Am Jur 2d, Initiative and Referendum §§ 18 et seq.

14A Am Jur Pl & Pr Forms (Rev ed), Initiative and Referendum, Forms 11–16.

ARTICLE 8 Finances

Section

103. Definitions
104. Submission of estimates
105. Fire district estimates and budget
106. Preparation, filing and review of tentative and preliminary budgets
107. Contents of preliminary budget
112. Supplemental appropriations; unappropriated unreserved fund balances
115. Tax levy

HISTORY:

Add, L 1932, ch 634, with substance transferred from former Articles 6–A and 8.

§ 103. Definitions

For the purpose of this article, the following terms shall be defined as follows:

1. "Administrative unit" shall mean an office, department, division, bureau, board, commission, district, or other agency of town government, but shall exclude a fire district.

2. "Budget officer" shall mean the supervisor or, in towns which have more than one supervisor, the presiding supervisor; provided that the supervisor or presiding supervisor may appoint, to serve at his pleasure, any person including a town officer or employee, other than a member of the town board, to be budget officer. When a person other than the supervisor has been appointed as budget officer, the supervisor, in the event of a vacancy in the office of budget officer shall serve as budget officer unless and until another person shall be appointed as provided in this subdivision.

3. "Capital project" shall mean: (a) any physical public betterment or improvement or studies, sur-

veys and plans relative thereto, or (b) land or rights in land, or (c) any furnishings, machinery, apparatus or equipment for any physical public betterment or improvement when such betterment or improvement is first constructed or acquired, or (d) any combination of items (a), (b) and (c).

4. "Unappropriated unreserved fund balance" shall mean the difference between the total assets for a fund and the total liabilities, deferred revenues, encumbered appropriations, amounts appropriated for the ensuing fiscal year's budget, and amounts reserved for stated purposes pursuant to law, including reserve funds established pursuant to the general municipal law for the fund, as determined through application of the system of accounts prescribed by the state comptroller pursuant to section thirty-six of the general municipal law.

HISTORY:

Add, L 1969, ch 1049, § 15, eff Jan 1, 1971; amd, L 2000, ch 528, § 11, eff Oct 4, 2000 (see 2000 note below).

Prior Law: Former § 103, add, L 1932 ch 634; amd, L 1941, ch 601, § 11, L 1947, ch 726, L 1964, ch 631, § 1, L 1965, ch 222, § 2; renumbered § 118, L 1969, ch 1049, § 14, eff Jan 1, 1971.

Editor's Notes: Laws 2000, ch 528, § 19, eff Oct 4, 2000, provides as follows:

§ 19. This act shall take effect immediately and shall apply to budgets for fiscal years commencing on or after January 1, 2001.

Notes to Decisions

Taxpayers properly asserted claims against Town Trustees for misuse and waste of public funds since the Trustees were a public governmental agency and officers of the Town which were not financially independent from the Town and the Town Board, and were in the financial position of an administrative unit of the Town. Gessin v Throne-Holst, 979 N.Y.S.2d 776, 43 Misc. 3d 517, 2014 N.Y. Misc. LEXIS 518 (N.Y. Sup. Ct. 2014), rev'd, in part, dismissed, 134 A.D.3d 31, 20 N.Y.S.3d 367, 2015 N.Y. App. Div. LEXIS 6799 (N.Y. App. Div. 2d Dep't 2015).

Town supervisor may not be appointed to position of bookkeeper to supervisor and where supervisor also serves as budget officer, he may receive separate compensation as budget officer. 1987 Op St Compt No. 87-38.

Notes to Unpublished Decisions

Unpublished decision: Taxpayers properly asserted claims against Town Trustees for misuse and waste of public funds since the Trustees were a public governmental agency and officers of the Town which were not financially independent from the Town and the Town Board, and were in the financial position of an administrative unit of the Town. Gessin v Throne-Holst, 979 N.Y.S.2d 776, 43 Misc. 3d 517, 2014 N.Y. Misc. LEXIS 518 (N.Y. Sup. Ct. 2014), rev'd, in part, dismissed, 134 A.D.3d 31, 20 N.Y.S.3d 367, 2015 N.Y. App. Div. LEXIS 6799 (N.Y. App. Div. 2d Dep't 2015).

Agency Opinions

The town clerk may serve as budget officer and be compensated therefor. 1978 Op St Compt File #900.

A town budget officer must be a resident of the town in which he serves. 1979 Op St Compt File #107.

A town board may abolish the position of clerk to the supervisor which it had previously established. The town board may not abolish the position of budget officer. However, it would appear that the board may eliminate a salary already set therefor, providing it does not do so for the purpose of forcing the removal of the budget officer. 1980 Op St Compt File #115.

A town board may not determine that the budget officer's position comes into effect during the last three months of the year but the board does have the power to determine the budget officer's salary and when it may be paid. 1980 Op St Compt File #175.

In a town which has established the position of bookkeeper to the supervisor, the supervisor may appoint the bookkeeper to also be the budget officer. 1982 Op St Compt File #82-108.

Municipal recipients of in lieu of tax payments required under a lease agreement between an industrial development agency and a lessee must include the payment as estimated revenue in the annual preparation of their budgets. 1982 Op St Compt File #82-174.

The offices of appointed town assessor and town budget officer are compatible. 4 Op Counsel SBEA #91.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 102.

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations § 1578 .

§ 104. Submission of estimates

1. The head of each administrative unit, except as otherwise provided in section two hundred two-a of this chapter, shall submit on or before the twentieth day of September to the budget officer an estimate of revenues and expenditures of such administrative unit for the ensuing year. In towns in Westchester and Monroe counties such estimates shall be submitted on or before the twentieth day of October. Estimates shall be submitted in such form and shall contain such information as the budget officer shall prescribe.

2. If the head of an administrative unit shall fail to submit an estimate by the designated date, the budget officer shall forthwith prepare the estimate for such administrative unit.

HISTORY:

Add, L 1969, ch 1049, § 19, eff Jan 1, 1971, with substance transferred from former § 111; amd, L 2004, ch 402, § 1, eff Aug 17, 2004.

Repeal Notes: [1964, ch 946] Former § 104, repealed by this act, related to conflicts of interest and has been replaced and made unnecessary by the enactment of article 18 [§§ 800 et seq.] of the General Municipal Law by this act.

Prior Law: Former § 104, add, L 1932, ch 634; amd, L 1933, ch 751, § 1, L 1941, ch 601, § 12; repealed, L 1964, ch 946, § 16, eff Sept 1, 1964.

Amendment Notes:

2004. Chapter 402, § 1 amended:
Sub 1, by deleting "county".

Notes to Decisions

Analysis

1. In general
2. Under former § 111

1. In general

Local town law, requiring applicants for building permits to pay fee reflecting additional traffic generated by proposed construction, to be used for capital improvements to town, county and state roadway network, was inconsistent with and preempted by general laws regulating highway funding and municipal finance, primarily codified in CLS Town Art 8; permitting towns to raise revenues with impact fees would allow towns to circumvent statutory restrictions on how money is raised and would permit towns to create fund of money subject to limited accountability, not subject to statutory requirements governing how highway improvement funds are spent. Albany Area Builders Ass'n v Guilderland, 141 A.D.2d 293, 534 N.Y.S.2d 791, 1988 N.Y. App.

Div. LEXIS 10961 (N.Y. App. Div. 3d Dep't 1988), aff'd, 1989 N.Y. LEXIS 3171 (N.Y. Oct. 26, 1989).

Town highway superintendent's annual budget estimate must specify 4 major categories as set forth in CLS High § 141, and further must be in such form and contain such information as budget officer prescribes; town may not, by local law, supersede such budget estimate requirements. 1998 Op St Compt No. 98-14.

2. Under former § 111

An item for a reasonable amount to pay for an attorney's services in a litigation to which town was a party, covering a period of approximately four years, is properly included in estimate for town budget and a contention that fees and allowances for counsel must be estimated in advance and included in the estimate each year cannot be upheld, but the value of services performed in one year may properly be included in the budget for the next year provided they are reasonable. Coggeshall v Hennessey, 279 N.Y. 438, 18 N.E.2d 652, 279 N.Y. (N.Y.S.) 438, 1939 N.Y. LEXIS 876 (N.Y. 1939).

Where the town sets forth in the preliminary budget various department items for salary adjustments, the names of the individuals or employees for whom said adjustments are intended need not be specified. Conway v Sahm, 109 N.Y.S.2d 662, 202 Misc. 519, 1952 N.Y. Misc. LEXIS 2356 (N.Y. Sup. Ct. 1952).

Nowhere in the statutes is any permission granted to a town to include contingencies in its detailed estimates of expenditures to be made during the next fiscal year. This section, taken in conjunction with § 141 of the Highway Law, prohibits a Town Board including in its budget any contingent estimates for repair and improvement of highways. Sweeney v Farrington, 38 Misc. 2d 882, 239 N.Y.S.2d 254, 1963 N.Y. Misc. LEXIS 2156 (N.Y. Sup. Ct. 1963).

A town board may not in the preparation and adoption of the annual town budget diminish an estimate submitted by a fire district by striking from such estimate an item determined by the town board to be illegal. 1945 Ops St Compt 256.

Town welfare officer acts independently of town board in administering public welfare, except for reports and annual post-audit. 1945 Op St Compt No. 45–506.

Balance of fire district funds on hand at end of fiscal year must be used to reduce tax levy. Capital reserve fund may be established for purpose of making alterations to fire house. Capital reserve fund is alternative to Section 179 of the Town Law. 1946 Ops St Compt 57.

Unexpended balances of fire district funds must be included as revenue in estimate for ensuing fiscal year. 1946 Ops St Compt 483.

Moneys remaining unexpended at end of fiscal year of a fire district which were not included in first district budget for the ensuing fiscal year, constitute surplus funds in ensuing fiscal year. Subject to the spending limitation contained in subd. 18 of section 176 of the Town Law, such surplus funds may be expended for any lawful district purpose, or may be held and included as revenue in the next annual budget. 1946 Ops St Compt 540.

The costs of electricity, water, fuel and telephone for the town garage and the insurance expense on highway equipment are administrative expenses payable out of the general fund of the town. 1955 Ops St Compt File #7459.

A town participating in the State Retirement System must include an item in the budget in the amount estimated by the Comptroller to be sufficient to pay the amount which will be due from the town to the System the following May. 1955 Ops St Compt File #7672.

A budget for a water district is subject to the approval of the town board although water rents sustain the entire expense of water district. 1956 Ops St Compt File #7889.

The commissioner of public works of a town has the duty to submit a budget estimate of his department to the town clerk. This estimate of revenues and expenditures is subject to the approval of the town board pursuant to sections 112 and 113 of the Town Law. 1966 Ops St Compt File #423.

A town public library, being an arm or agency of the town, submits its budget request to the town board, which has the authority to amend such budget request. 1967 Op St Compt No. 67–780.

Agency Opinions

1. Under former § 111

The power of a suburban town board to revise estimates of town expenditures before approval of a preliminary budget is not curtailed by the direction given the supervisor of a suburban town to prepare such preliminary budget. 1966 NY Ops Atty Gen Sept 19.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 102, 198, 215; High § 141; Soc Serv § 89.

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1279, 1578, 1580 .

Law Reviews:

Constitutional, statutory and judicial restraints on local finance in New York State. 15 NYLF 852.

§ 105. Fire district estimates and budget

1. The board of commissioners of each fire district shall submit the fire district budget on or before the seventh day of November to the budget officer. The fire district budget shall be in the form prescribed by and pursuant to subdivision one of section one hundred seven of this article, and shall be adopted in the manner prescribed in section one hundred eighty-one of this chapter.

2. The budget officer shall affix the fire district budget to the annual town budget, established pursuant to section one hundred nine of this article, as a part thereof. No change shall be made by the budget officer or the town board in the budget submitted by a fire district.

3. [Repealed]

HISTORY:

Add, L 1969, ch 1049, § 21, eff Jan 1, 1971; amd, L 1979, ch 114, § 1, eff May 22, 1979; L 2004, ch 402, § 2, eff Aug 17, 2004; L 2006, ch 240, § 1, eff Jan 1, 2007; L 2007, ch 555, §§ 3, 4, eff Aug 15, 2007.

Prior Law: Former § 105, add, L 1932, ch 634; amd, L 1933, ch 751, L 1935, ch 351, L 1940, ch 374, § 14, L 1941, ch 601, § 13, L 1944, ch 638, § 7, L 1949, ch 48, L 1960, ch 621, § 2; renumbered § 123, L 1969, ch 1049, § 20, eff Jan 1, 1971.

Editor's Notes: Laws 2007, ch 555, § 10, eff Aug 15, 2007, provides as follows:

§ 10. This act shall take effect immediately and shall first apply to fire district budgets prepared for fiscal years commencing on or after January 1, 2008; provided, that the amendments to section 209-z of the general municipal law, made by section two of this act, shall take effect on the same date and in the same manner as chapter 237 of the laws of 2006 takes effect.

Amendment Notes:

2007. Chapter 555, § 3 amended:

Sub 1, by deleting "twentieth" and "an estimate of the revenues and expenditures for the ensuing year, except that in Westchester and Monroe county such estimate shall be submitted on or before the twentieth day of October. This estimate shall be known as the fire district budget and".

2006. Chapter 240, § 1 amended:

Sub 2, by deleting "tentative".

Agency Opinions

A town may not alter the annual budget submitted by a fire district, even where there is a wide difference between the

respective budgets of two fire districts in the same town which are similar in size and population. Such a difference in budgets could be attributable to a number of reasonable differences in circumstances. 1979 Op St Compt File #669.

A town may not alter the annual budget submitted by a fire district, even where there is a wide difference between the respective budgets of two fire districts in the same town which are similar in size and population. Such a difference in budgets could be attributable to a number of reasonable differences in circumstances. 1979 Op St Compt File #669.

Municipal recipients of in lieu of tax payments required under a lease agreement between an industrial development agency and a lessee must include the payment as estimated revenue in the annual preparation of their budgets. 1982 Op St Compt File #82-174.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 102, 181.

Codes, Rules and Regulations:

Requirement for notice of sale of bonds by municipalities, school districts and district corporation. 2 NYCRR §§ 25.1 et seq.

Requirements for notice of sale of notes by municipalities, school districts and district corporations. 2 NYCRR §§ 26.1 et seq.

Annual and supplemental debt statements for housing and urban renewal purposes to be used by cities, towns and villages. 2 NYCRR § 29.1.

Debt statement form to be used in connection with public sales of bonds by counties, towns, villages and cities having less than 125,000 inhabitants. 2 NYCRR § 31.1.

Debt statement form to be used in connection with public sales of bonds by fire districts. 2 NYCRR §§ 35.1 et seq.

Jurisprudences:

26 NY Jur 2d Counties, Towns, and Municipal Corporations § 1116 .

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1578, 1580, 1581, 1586 .

§ 106. Preparation, filing and review of tentative and preliminary budgets

1. The budget officer, upon receipt of the estimates of the various administrative units, shall review the estimates and may confer with the head of any such unit in regard to such estimates. He may require the head of any such unit to furnish information and to answer inquiries pertinent to such review.

2. Upon the completion of the review of the estimates, the budget officer shall prepare a tentative budget which shall include his recommendations and which shall be in the form prescribed in and in conformance with section one hundred seven of this article. He may also prepare a budget message explaining the main features of the tentative budget and containing such additional information as he may deem advisable. On or before the thirtieth day of September, or in towns in Westchester and Monroe counties on or before the thirtieth day of October, he shall file in the office of the town clerk the tentative budget, the budget message, if any, and the estimates and schedules.

3. The town clerk shall present the tentative budget to the town board at a regular or special meeting to be held on or before the fifth day of October. In towns in Westchester and Monroe counties the town clerk shall present the tentative budget to the town board at a regular or special meeting to be held on or before the tenth day of November. The town board may call upon the head of any administrative unit and the budget officer to discuss the tentative budget and the estimates as originally submitted. The head of any administrative unit may request in writing that he be permitted to explain his estimates to the town board. The town board shall review the tentative budget and may make such changes, alterations and revisions as it shall consider advisable and which are consistent with law.

4. Upon the completion of such review, the tentative budget and any modifications thereof as approved by the town board, shall become the preliminary budget. The preliminary budget shall be filed in the office of the town clerk and the town clerk shall reproduce for public distribution as many copies as the town board may direct.

HISTORY:

Add, L 1969, ch 1049, § 23, eff Jan 1, 1971, with substance derived from former § 112, and High Law § 267; amd, L 2004, ch 402, § 3, eff Aug 17, 2004.

Prior Law: Former § 106, add, L 1932, ch 634; amd, L 1934, ch 33, § 1; L 1939,ch 450, § 1; repealed, L 1943, ch 712, § 3; reenacted, L 1945, ch 838, § 55; renumbered, § 121, L 1969, ch 1049, § 22, eff Jan 1, 1971.

Amendment Notes:

2004. Chapter 402, § 3 amended:
Sub 2, by deleting "chapter" and "county".
2004. Chapter 402, § 3 amended:
Sub 3, by deleting "county".

Notes to Decisions

Analysis

1. In general
2. Under former § 267

1. In general

Actions of town officials in preparing tentative budget which eliminated positions of court assistant and court attendant, and presenting budget to town board, were purely legislative acts to which absolute immunity applied. Legislative immunity applied to action of town judge in preparing tentative budget for review by budget officer and presentation to town board, regardless of whether budget's elimination of positions of court assistant and court attendant was in retaliation for their having spoken out in opposition to necessity of full-time town justice. Gordon v Katz, 934 F. Supp. 79, 1995 U.S. Dist. LEXIS 21134 (S.D.N.Y. 1995), aff'd sub. nom., Gordon v Katz, 1996 U.S. App. LEXIS 19905 (2d Cir. N.Y. July 25, 1996).

A town board may not amend the preliminary budget after it has been approved and placed on file for public inspection, but before the public hearing on such budget has been held. 1976 Ops St Compt File #1047.

Town highway superintendent's annual budget estimate must specify 4 major categories as set forth in CLS High § 141, and further must be in such form and contain such information as budget officer prescribes; town may not, by local law, supersede such budget estimate requirements. 1998 Op St Compt No. 98-14.

2. Under former § 267

Where the petitioner is a resident of an incorporated village he is not subject to the highway tax and he cannot complain about it any more than he might complain about taxes in the various districts of which he is not a resident and to the taxes of which he is not subject. Conway v Sahm, 109 N.Y.S.2d 662, 202 Misc. 519, 1952 N.Y. Misc. LEXIS 2356 (N.Y. Sup. Ct. 1952).

As to the application of town unexpended balances in relation to particular funds, see 1945 Ops St Compt 12.

In event the appropriation therefor is insufficient, machinery repairs may not be paid out of the snow and miscellaneous fund but may be paid for by the issuance of budget notes pursuant to par 2 of subd a of § 29.00 of the Local Finance Law. 1945 Ops St Compt 379.

For an explanation of the budget requirements for machinery certificates and interest issued pursuant to § 172.00 of the Local Finance Law and former § 266 of the Highway Law, see 1945 Ops St Compt 502.

As to the procedure to be followed in raising town highway funds, see 1946 Ops St Compt 116.

No part of a compensation of town highway employees engaged in snow removal may be paid from town moneys raised in item 1 for the repair and improvement of town highways. 1946 Ops St Compt File #446.

A town may permit the use of its highway machinery by a village in the county, but rental must be paid therefor at not less than the rate fixed by the State Comptroller. 1946 Ops St Compt File #489.

The Town Board may approve a statement of estimated highway expenditures or increase or decrease any estimate therein upon the meeting or meetings held pursuant to section 113 of the Town Law. 1946 Ops St Compt 595.

Highway fund moneys may not be transferred to the general fund to pay town's share of social security of highway employees. 1954 Ops St Compt File #6579.

Surplus moneys in item 3 of the highway fund may not be transferred to increase another item of the highway fund. 1954 Ops St Compt File #6658.

Revenues of a particular item or fund in excess of the estimate for that item or fund are not surplus until revenues received exceed the amount of revenues estimated in the budget. The disposition of surplus is in the control of the town board. A town superintendent of highways may not expend or contract obligations in excess of the appropriations made for highway purposes. 1954 Ops St Compt File #6713.

Agency Opinions

Analysis

1. In general
2. Under former § 267

1. In general

If town board in Westchester County fails to adopt budget by December 20, the preliminary budget with changes approved by the town board shall constitute the budget for the ensuing fiscal year. 1979 Op St Compt File #826.

2. Under former § 267

A town superintendent of highways may incur charges for repairs of town highway machinery without the prior approval of the town board, provided the amount to be expended is within the amount made available to him in the annual estimate; but may not purchase repair parts and equipment without the prior approval. 1955 NY Ops Atty Gen Jan 18 (informal).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 102, 108, 202-a.

Limitations of amounts to be raised, CLS High § 271.

Expenditures for repair and improvement of highways, CLS High § 284.

Warrant; tax roll, CLS Real P Tax § 904.

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1578, 1581 .

87 NY Jur 2d Public Securities § 18 .

Law Reviews:

Constitutional, statutory and judicial restraints on local finance in New York State. 15 NYLF 852.

§ 107. Contents of preliminary budget

1. The preliminary budget shall be in the format prescribed by the state comptroller. The preliminary budget shall show by funds (a) proposed appropriations and estimated revenues in accordance with the classification of accounts prescribed by the state comptroller pursuant to article three of the general municipal law, (b) estimated fund balances, together with a breakdown of such fund balance estimated for encumbrances, amounts appropriated for the ensuing fiscal year's budget, amounts reserved for stated purposes pursuant to law, including reserve funds established pursuant to the general municipal law, and the remaining estimated unappropriated unreserved fund balance for each fund, provided that the remaining estimated unappropriated unreserved fund balance for each fund shall not exceed a reasonable amount, consistent with prudent budgeting practices, necessary to ensure the orderly operation of town government, taking into account factors including, but not limited to, the size of the fund, cash flows, the certainty with which the amounts of revenues and expenditures can be estimated, and the town's experience in prior fiscal years, (c) the amount of taxes to be levied, (d) salaries of elected officers, and (e) such other information pertinent to the above as shall be prescribed by the state comptroller.

2. Such budget may contain for general contingent purposes, an amount not to exceed ten per centum of the total amount estimated as necessary to provide for the operation of town government exclusive of the amount necessary to pay debt service and judgments, estimates for special district purposes, estimates for the repair and improvement of highways and estimates for purposes for which real property taxes are required to be levied on an area less than the entire town. A sum also* be included for special contingent purposes, which amount shall not exceed ten per centum of the total amount estimated as necessary to provide for the operation of town government and for which real property taxes are required to be levied on the area of the town outside villages, exclusive of the amount required to pay debt service, judgments and estimates for special district purposes and for the repair and improvement of highways.

3. Amounts to be raised by tax for highway purposes shall be within the limitations of section two hundred seventy-one of the highway law.

4. The preliminary budget shall include any other data which the town board may, by resolution, require.

HISTORY:

Add, L 1969, ch 1049, § 24, eff Jan 1, 1971, with substance derived from former § 112; amd, L 2000, ch 528, § 12, eff Oct 4, 2000 (see 2000 note below).

Repeal Notes: [1969, ch 1049] Former section 107 of the town law governing the use of surplus moneys, and § 115 of

*So in original.

such law which governs the use of unexpended balances, were repealed and the substance of such provisions is incorporated in a new § 112 added by this act.

Prior Law: Former § 107, add, L 1932, ch 634; amd, L 1933, ch 751, § 1, L 1937, ch 495, § 5, L 1962, ch 137, § 1; repealed, L 1969, ch 1049, § 3, eff Jan 1, 1971, with substance transferred to § 112.

Editor's Notes: Laws 2000, ch 528, § 19, eff Oct 4, 2000, provides as follows:

§ 19. This act shall take effect immediately and shall apply to budgets for fiscal years commencing on or after January 1, 2001.

Notes to Decisions

Analysis

1. Under former § 112, generally
2. —Itemization
3. —Appropriation for contingencies
4. —Fire districts
5. —Miscellaneous

1. Under former § 112, generally

The town board should pay for the space it rents in the library-owned building from its appropriation for rent in the annual budget and not by paying the bills of the library. The board of library trustees may direct the town supervisor to create a reserve for emergencies from unexpended balances of library funds in his custody. The town board may not reduce the budget submitted by the library trustees if such budget does not exceed the legal maximum approved by the voters. 1954 Op St Compt No. 54–6875.

A town public library, being an arm or agency of the town, submits its budget request to the town board, which has the authority to amend such budget request. 1967 Op St Compt No. 67–780.

A town recreation commission budget is subject to town board control in regard to budgetary appropriations and expenditures. 1967 Ops St Compt File #922.

2. —Itemization

The town board in preparing its statement of estimated revenues and expenditures, must itemize the funds, where practicable. The budget for the fiscal year 1952 of the Town of North Hempstead contained many lump sum items which were not itemized with the particularity required. Conway v Sahm, 109 N.Y.S.2d 662, 202 Misc. 519, 1952 N.Y. Misc. LEXIS 2356 (N.Y. Sup. Ct. 1952).

3. —Appropriation for contingencies

This section, prior to 1959 amendment, granted to a Town Board only a limited and circumscribed power to include appropriations for contingent purposes, such appropriations not to exceed 10% of the total budget exclusive of debt service and special district purposes, and the 1959 amendment went one step further by not only continuing the prohibition but by excluding the highway item from the base figure upon which the contingency percentage could be calculated. Sweeney v Farrington, 38 Misc. 2d 882, 239 N.Y.S.2d 254, 1963 N.Y. Misc. LEXIS 2156 (N.Y. Sup. Ct. 1963).

A town board may set up the appropriation for contingent purposes in 2 parts, one part to be used for "part town" functions but the amount thereof should not exceed 10% of the total amount which the town board appropriates for the "part town" functions. The appropriation for the contingent fund to be used for "part town" purposes should be a charge upon the taxable property of that part of the town outside of any incorporated villages. The base to be used in computing any contingent fund shall not include any appropriation for debt service, judgments or for special district purposes. 1958 Ops St Compt File #811; see also 1958 Ops St Compt File #910.

4. —Fire districts

A town board may not in the preparation and adoption of the annual town budget diminish an estimate submitted by a fire district by striking from such estimate an item determined by the town board to be illegal. 1945 Ops St Compt 256.

A town board must include in the preliminary and annual town budgets the estimate of expenditures submitted by the board of fire commissioners of a fire district, notwithstanding the disapproval by the voters of a proposed proposition authorizing the expenditure of sums in excess of those that may be spent without adoption of such a proposition. 1946 Ops St Compt 562.

5. —Miscellaneous

A town board in a town of the second class having a population of more than 5,000 may create the position of full time constable and funds for the payment of such compensation may be transferred from surplus, unexpended balances or contingent funds as provided by statute. 1945 Ops St Compt 63.

Rental for rooms for Marine Corps League may be provided from contingent or surplus funds or by budget note, when no item in budget. 1946 Ops St Compt 200.

If an appropriate item therefor is not contained in a town budget, such a town may provide care for children (pursuant to chapter 298 of the Laws of 1946) with funds from the contingent fund, surplus moneys, profits of municipal utilities, unexpended balances of war emergency appropriations, or budget notes. 1946 Ops St Compt 264.

Towns and villages may expend moneys to defray the cost of local or branch offices of county veterans' service agencies. 1946 Ops St Compt 410.

The item for Memorial Day observance and Armistice Day observance may be increased to the maximum amount set out in section 64, subd. 12, from the contingent fund, from surplus moneys and from unexpended balances. 1947 Ops St Compt 76.

Where town failed to provide in its budget for Memorial Day observance, contingent funds may be used therefor. 1953 Ops St Compt File #6099.

The town board may authorize payment of a claim for mileage only if moneys have been appropriated for such purpose and are available therefor. Such appropriation need not have been made in the original budget. 1953 Ops St Compt File #6431.

Payment of salary increases may be provided for by the use of surplus funds, unexpended balances, or contingent fund moneys. 1954 Ops St Compt File #6686.

The costs of electricity, water, fuel and telephone for the town garage and the insurance expense on highway equipment are administrative expenses payable out of the general fund of the town. 1955 Ops St Compt File #7459.

After the annual budget of a town is once adopted, there is no power to make any change therein. 1964 Ops St Compt File #1035.

Improvement district expenses for which no taxes or assessments have been levied may not be stated in the town's tax bills and collected in addition to the amounts levied. 1964 Ops St Compt File #1035.

Town board may employ clerk to assist justice of the peace and compensate such clerk from contingent fund. 1965 Ops St Compt File #458.

A town may issue budget notes in 1967 to pay for expenditures incurred in excess of the 1967 budget for highway items 1 through 4. 1967 Ops St Compt File #736.

The salaries of assessors and tax collector may be increased during their terms of office so long as sufficient funds are available in those budget items. 1968 Ops St Compt File #35.

Town funds may not be used, on a temporary basis, to pay water district expenses necessitated by unforeseen circumstances. 1972 Ops St Compt File #630.

Agency Opinions

Analysis

1. In general
2. Under former § 112, generally

1. In general

Under existing law, a contingency fund may not be established for special district purposes or for Highway Item one expenditures. 1978 Op St Compt File #843.

Fees collected for bingo licenses which are not paid to the State Comptroller are town revenues which may be used for town purposes. 1979 Op St Compt File #614.

Surplus revenues of a town-wide lighting district may not be accumulated and carried over from one fiscal year to another except by establishment of a lawful reserve fund. Unappropriated cash surplus may be used to finance an additional appropriation or an increase in an existing appropriation during a fiscal year. 1980 Op St Compt File #280.

In the event that a particular fund concludes a fiscal year with a surplus, it would not be appropriate for that fund to commence the next fiscal year with a balance of zero. 1981 Op St Compt File #81-128.

Moneys received by a town from taxes imposed on admissions to pari-mutuel tracks and moneys received as reimbursement for reductions in such admissions tax revenues are to be credited to the general fund, town-wide. 1981 Op St Compt File #784.

2. Under former § 112, generally

Final responsibility for budget content and accuracy rests by law with the town board of a suburban town and not with the town supervisor, whether or not the town has established the office of town comptroller. 1966 NY Ops Atty Gen Oct 13.

The power of a suburban town board to revise estimates of town expenditures before approval of a preliminary budget is not curtailed by the direction given the supervisor of a suburban town to prepare such preliminary budget. 1966 NY Ops Atty Gen Sept 19.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 102, 105, 106, 109.

Limitations of amounts to be raised, CLS High § 271.

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1578, 1582 .

87 NY Jur 2d Public Securities § 18 .

§ 112. Supplemental appropriations; unappropriated unreserved fund balances

1. The town board, during a fiscal year, by resolution, may make additional appropriations or increase existing appropriations and shall provide for the financing thereof. Moneys therefor may be provided from the unexpended balance of an appropriation, from the appropriation for contingencies, from unappropriated unreserved fund balance or unanticipated revenues within a fund or by borrowing pursuant to the local finance law. For the purposes of this subdivision, unappropriated unreserved fund balance or unanticipated revenues shall be utilized only to the extent that the total of all revenues of such fund recognized or reasonably expected to be recognized in the current fiscal year, together with unappropriated unreserved fund balance, exceeds the total of all revenues and appropriated fund balance as estimated in the budget.

2. If at any time during a fiscal year a town receives moneys from any source, except from loans, which are not otherwise committed or appropriated, the town board may direct the supervisor to pay the same or any part thereof to the treasurer of the county to be applied in reduction of the amount to be levied for state and county purposes, and the supervisor shall pay such moneys to the county treasurer prior to the levy.

3. Notwithstanding the provisions of subdivision one of this section, grants in aid from the state and federal governments, gifts which are required to be expended for particular objects or purposes, and insurance proceeds for the loss, theft, damage or destruction of real or personal property, when proposed to be used or applied to repair or replace such property, may be appropriated by resolution of the town board at any time for such objects and purposes.

HISTORY:

Add, L 1969, ch 1049, § 29, with substance derived from former §§ 107, 114, 115; amd, L 2000, ch 528, § 13, eff Oct 4, 2000 (see 2000 note below).

Repeal Notes: [1969, ch 1049] Section 112 of the town law, pertaining to the preliminary budget, was repealed and the substance of such provisions is incorporated in new §§ 106 and 107 added by this act.

Prior Law: Former § 112, add, L 1932, ch 634; amd, L 1934, ch 792, § 7, L 1936, ch 419, § 5, L 1938, ch 561, § 1, L 1939, ch 584, § 5, L 1941, ch 556, § 2, L 1941, ch 601, § 15, L 1942, ch 615, §§ 1–4, L 1943, ch 710, § 2606 (Part 1), L 1946, ch 536, § 1, L 1958, ch 328, §§ 1, 2, L 1959, ch 182, § 1; repealed, L 1969, ch 1049, § 5, eff Jan 1, 1971, with substance transferred to §§ 106, 107.

Editor's Notes: Laws 2000, ch 528, § 19, eff Oct 4, 2000, provides as follows:

§ 19. This act shall take effect immediately and shall apply to budgets for fiscal years commencing on or after January 1, 2001.

Notes to Decisions

Analysis

I. Generally

1. Use of surplus funds
2. Salary increases
3. Depletion of funds appropriated for particular purpose
4. Under former § 107, generally
5. —Use of surplus town funds, generally
6. — —Reduction of taxes
7. — —Retirement of bonds
8. — —Highway purposes
9. — —Town buildings
10. — —Payment of salaries
11. — —Other
12. —Use of surplus district funds
13. —Reserve fund
14. —Miscellaneous
15. Under former § 115, generally
16. —Use of unexpired town balances, generally
17. — —Highway purposes
18. — —Town buildings
19. — —Payment of salaries
20. — —Other
21. —Use of expended district funds
22. —Reserve fund
23. —Miscellaneous

I. Generally

1. Use of surplus funds

Where surplus bond proceeds are available to pay debt service for purposes of town improvement district and current assessments also have been raised and appropriated for purpose, debt service need not be paid from assessments. 1988 Op St Compt No. 88-7.

2. Salary increases

A nonelective officer or employee of a town such as a town constable may have his compensation increased during the fiscal year by the town board by resolution without the necessity of a public hearing. 1981 Op St Comp File #81-218.

3. Depletion of funds appropriated for particular purpose

If town superintendent of highways expenditures in fiscal year exceed amount appropriated for particular item or transferred to

it pursuant to other provisions of law, superintendent is personally liable on obligations he has thus incurred and continued persistence in such practice to detriment of township may also be grounds for removal of superintendent of highways. Myruski v Town Board of Goshen, 87 Misc. 2d 1063, 386 N.Y.S.2d 984, 1976 N.Y. Misc. LEXIS 2362 (N.Y. Sup. Ct. 1976).

4. Under former § 107, generally

There is no conflict between this section and §§ 51 and 52. Petito v Poulos, 51 Misc. 2d 1081, 274 N.Y.S.2d 930, 1966 N.Y. Misc. LEXIS 1344 (N.Y. Sup. Ct. 1966), modified, 28 A.D.2d 900, 282 N.Y.S.2d 146, 1967 N.Y. App. Div. LEXIS 3534 (N.Y. App. Div. 2d Dep't 1967).

Town board may set up welfare item for receipt of moneys found on a gambling device or apparatus. Surplus moneys in such item may be transferred to the general fund. 1947 Ops St Compt 450.

A surplus exists when the total revenues actually received for general town purposes exceeds the total revenues set up in the budget for general town purposes. 1954 Ops St Compt File #6668.

5. —Use of surplus town funds, generally

Unexpended balance in general town budgetary item may be transferred and appropriated to another item appearing in budget for general town purposes. Moneys in surplus town general funds may be transferred and appropriated to increase or create new item. Moneys received from bonding company as result of misappropriation of general town funds would become revenue. 1945 Ops St Compt 435.

Unexpended balances and surplus of welfare moneys may be used for any lawful town purpose. 1954 Ops St Compt File #6757.

6. — —Reduction of taxes

Procedure to be followed where surplus general town moneys are to be applied to reduce the amount to be levied for state and county taxes is the adoption of a resolution authorizing and directing the supervisor to pay to the county treasurer from such surplus moneys a fixed amount for such purpose. 1946 Ops St Compt 677.

Where an amount has been collected by taxation in excess of that appropriated to Item 1-a of the Highway Fund, the supervisor should apply such excess in the following year to reduce the amount to be raised by taxation for that purpose and should not treat it as surplus pursuant to § 107 of the Town Law. 1962 Ops St Compt #71.

A town may invest surplus moneys in special time deposit accounts or certificates of deposit on a temporary basis up to the end of the fiscal year, but must apply such surplus to the reduction of town taxes for the following year, if not expended before the end of the current fiscal year. The only means by which moneys can be accumulated from year to year is by establishing a valid reserve fund. 1969 Ops St Compt File #708.

7. — —Retirement of bonds

Town may not purchase its own obligations and may not invest town moneys, except as provided in sections referred to. 1946 Ops St Compt 36.

8. — —Highway purposes

Surplus general town funds may not be transferred and expended for highway purposes. 1945 Ops St Compt 93.

General town moneys may not be transferred, advanced or loaned to item of highway fund. 1945 Ops St Compt 394.

Widening town highway within right-of-way payable from item 1 of town highway fund; cost of sidewalk along such highway, if not paid by abutting owners, is a town charge. As to the widening, surplus general town moneys may not be used; as to the sidewalk, surplus general town moneys may be used and, if there is an item in the budget for the sidewalk, unexpended balances may be transferred to the sidewalk item. 1945 Ops St Compt 481.

Surplus general town moneys may not be transferred to town highway item I to be expended for repair or improvement of highways. On or after January 1, 1947, surplus general town funds may be transferred to town highway items II, III and IV and be expended for those purposes. 1946 Ops St Compt 656.

Surplus general town moneys may not be transferred to item 1 of the highway fund whether or not there is an incorporated village in the town. 1947 Ops St Compt 55.

Surplus moneys in item 3 of the Highway Fund may be used to purchase new highway machinery. 1955 Ops St Compt File #7408.

A surplus in the town general fund may be transferred by appropriate resolution to Item 3 of the highway fund and used to purchase highway machinery. 1956 Ops St Compt File #8040.

Unanticipated balances remaining in the town general fund at the end of the fiscal year become unanticipated revenues on January 1. If such unanticipated revenues constitute surplus funds, they may be transferred to item 3 of the highway fund. 1957 Ops St Compt File #755.

Unappropriated moneys in the general fund may be transferred to item 4 of the highway fund but not to item 1 of the highway fund. 1957 Ops St Compt File #757.

9. — —Town buildings

Surplus moneys or an unexpended balance in town general fund may be used to pay part of cost of construction of town building to be used for storing highway machinery and for town offices. 1945 Ops St Compt 324.

Surplus town funds may be used to finance a town hall without a referendum. 1946 Ops St Compt 389.

Combination town office highway building would be paid for from general town funds or from obligations, the debt service on which would be paid from general town funds. Surplus town funds may be used for such purpose. Unexpended balances of appropriations for town government may be used subject to restriction of section 115 of Town Law. 1947 Ops St Compt 120.

Surplus town moneys may be appropriated to finance purchase of accounting machine. If purchase price exceeds $1000, competitive bidding is required. Surplus moneys may be used to finance construction of addition to town hall. Referendum requirements discussed. 1953 Ops St Compt File #6383.

A town may expend unappropriated cash surplus to construct a town garage at a cost of $25,000 or less, without a referendum. 1957 Ops St Compt File #418.

10. — —Payment of salaries

A town board in a town of the second class having a population of more than 5,000 may create the position of full time constable and funds for the payment of such compensation may be transferred from surplus, unexpended balances or contingent funds as provided by statute. 1945 Ops St Compt 63.

Salary of newly created position may be paid from surplus funds, contingency funds and from proceeds of budget notes issued pursuant to section 29.00 of the Local Finance Law. 1946 Ops St Compt 30.

Town board may increase salaries of town assessors, including chairman, if moneys are available to pay such increases. Surplus moneys, unexpended balances, contingent fund, or proceeds of budget note may be transferred to budget item for assessors' salaries. 1946 Ops St Compt 495.

Payment of salary increases may be provided for by the use of surplus funds, unexpended balances, or contingent fund moneys. 1954 Ops St Compt File #6686.

Where there is no specific budgetary appropriation for the salary for a particular officer or employee, such salary may be paid from the contingent fund, surplus, unexpended balances, or from the proceeds of a budget note, pursuant to §§ 107, 112, and 115 of the Town Law and § 29.00 of the Local Finance Law. 1960 Ops St Compt File #899.

A town may create the position of park superintendent subsequent to the adoption of the final budget for the fiscal year and pay the salary assigned thereto from legally available funds. 1968 Ops St Compt File #56.

A town may increase the salary of a town justice by resolution, unless the town justice is a member of the town board, in which case a salary increase may be made only by a local law which is subject to a permissive referendum. A salary increase may be made from such legally available moneys as contingent funds, surpluses, unexpended balances, or the proceeds of budget notes. In certain circumstances, such as where one justice's position is vacant for a period of time money from the appropriation for the position of the vacant justice may constitute surplus funds from

which the salary increase can be paid. 1980 Op. St. Compt File #496.

11. — —Other

A suburban town had the power under this section and §§ 51 and 52 of the Town Law to transfer surplus funds to the use of a recreational program for handicapped children in a park district. Petito v Poulos, 51 Misc. 2d 1081, 274 N.Y.S.2d 930, 1966 N.Y. Misc. LEXIS 1344 (N.Y. Sup. Ct. 1966), modified, 28 A.D.2d 900, 282 N.Y.S.2d 146, 1967 N.Y. App. Div. LEXIS 3534 (N.Y. App. Div. 2d Dep't 1967).

Where no item has been placed in budget for payment of expenses incurred by assessors, an appropriation must be made in budget or a transfer made from general town funds. 1945 Ops St Compt 429.

Where sum of $75 is placed in annual town budget to be expended toward rent of rooms for American Legion Post located in town, town may not pay $150 for such purpose unless additional moneys are legally transferred and appropriated to such item. 1946 Ops St Compt 119.

Surplus general town funds may be transferred to and appropriated for town welfare purposes. 1946 Ops St Compt 126.

Rental for rooms for Marine Corps League may be provided from contingent or surplus funds or by budget note, when no item in budget. 1946 Ops St Compt 200.

Surplus town general funds may be expended pursuant to section 191-a of the Town Law for the purpose of financing the cost of the preparation of maps and plans for a proposed sewer district. 1946 Ops St Compt 257.

If an appropriate item therefor is not contained in a town budget, such town may provide care for children (pursuant to ch 298 of the Laws of 1946) with funds from the contingent fund, surplus money, profits of municipal utilities, unexpended balances of war emergency appropriations, or budget notes. 1946 Ops St Compt 264.

Surplus town moneys may be used to defray cost of recreation project. State aid is payable for approved expenditures based on application approved by town board and State Youth Commission. 1946 Ops St Compt 333.

The item for Memorial Day observance and Armistice Day observance may be increased to the maximum amount set out in section 64, subd. 12, from the contingent fund, from surplus moneys and from unexpended balances. 1947 Ops St Compt 76.

Compensation of architect payable from surplus funds if no budgetary appropriation therefor. 1947 Ops St Compt 96.

Surplus town moneys may be appropriated to finance purchase of accounting machine. If purchase price exceeds $1000, competitive bidding is required. Surplus moneys may be used to finance construction of addition to town hall. Referendum requirements discussed. 1953 Ops St Compt File #6383.

Where the budget appropriation for the town constabulary has been exhausted, an appropriation therefor may be made from the contingent fund, or from surplus moneys or unexpended balances, or from the proceeds of a budget note issued for that purpose. 1960 Ops St Compt File #670.

The town board may authorize payment of claims incurred in excess of appropriations and transfer moneys from surplus funds, contingent funds or unexpended balances for such payment. 1960 Ops St Compt File #843.

A town which has made no provision in its budget for funds for the payment of a general ambulance service contract may obtain such funds from a surplus or unexpended balance (if one exists) or by issuing budget notes. 1967 Ops St Compt File #349.

12. —Use of surplus district funds

Salaries of employees of a town water district may be increased over and above the amount placed in the budget provided there are surplus district funds or unexpended district balances from which transfers may be made to pay the same. 1945 Ops St Compt 135.

A water district may not expend surplus or an unexpended balance of district funds to purchase fire hose except in an amount necessary for the protection of district-owned property. 1945 Ops St Compt 185.

Unexpended balances of sewer district moneys may be used to increase item in district budget estimate but not for district purposes for which no appropriation was made in district budget estimate. 1945 Ops St Compt 346.

Surplus moneys in debt service item of water district budget may be transferred to item for repairs. 1946 Ops St Compt 44.

Surplus moneys of a water district may be used to retire bonds of a water district prior to maturity with the consent of the bondholder, but interest may not be paid beyond the date of redemption. 1956 Ops St Compt File #7990.

Moneys received on behalf of a sewer district as a condemnation award may be used for any general sewer district purpose. 1957 Ops St Compt File #317.

Town board may authorize expenditure, for any lawful purpose of fire protection district, of surplus moneys for such district or unexpended balances of appropriations made for district purposes. 1964 Ops St Compt File #933.

13. —Reserve fund

Board of fire commissioners of a fire district may establish a capital reserve fund to finance the purchase of fire apparatus. 1946 Ops St Compt 144.

No authority to create single capital reserve fund to finance two specific capital improvements not of the same type or class. Where town does not comply with requirements of law relating to establishment of capital reserve fund, such a fund cannot be deemed to have been created and moneys constitute surplus moneys. 1951 Ops St Compt File #5152.

A building fund (capital reserve fund) may be established for the construction of a town hall from surplus funds or unexpended balances. 1955 Ops St Compt File #7711.

There is no authority for a town to carry a surplus forward from year to year. Resolution that certain moneys "be deposited in a Special Fund entitled 'Capital Improvement' to be disbursed only on a referendum of the people" is not sufficient to establish a new capital reserve fund but might authorize payment into an existing duly established capital reserve fund. 1966 Ops St Compt File #1119.

Where a town has attempted to establish a capital reserve fund, but has not legally done so because of technicalities, the moneys must, nevertheless, be held as if a capital reserve fund had been legally established, pending proper procedures to cure the technical errors. 1968 Ops St Compt File #862.

A town may invest surplus moneys in special time deposit accounts or certificates of deposit on a temporary basis up to the end of the fiscal year, but must apply such surplus to the reduction of town taxes for the following year, if not expended before the end of the current fiscal year. The only means by which moneys can be accumulated from year to year is by establishing a valid reserve fund. 1969 Ops St Compt File #708.

14. —Miscellaneous

Additional moneys to pay for extraordinary repairs to highway machinery may be obtained only upon approval of the town electors voting upon a proposition therefor at a biennial or special election. The additional sum raised may not exceed one-third of one per centum of taxable property of the town as shown upon the last assessment roll thereof. 1945 Ops St Compt 206.

If authorized by plan, rule or order of the New York State Youth Commission, municipalities and school districts may provide care for children (pursuant to chapter 298 of the Laws of 1946) through the facilities of child care projects of nearby municipalities or school districts and the latter may provide the actual care on behalf of the former. 1946 Ops St Compt 264.

In the event of an omitted tax in a fire protection district such omitted tax may not be advanced and paid from general town funds to a volunteer fire company under contract to furnish fire protection to such district. 1946 Ops St Compt 267.

Town board may not contribute and appropriate general town funds to assist a town lighting district in the maintenance of street lights on highways located within such district. 1946 Ops St Compt 274.

Moneys may not be invested by a supervisor in federal obligations except as provided in section 6-f of the General Municipal Law and section 107-a of the Town Law. 1947 Ops St Compt 230.

Financing of youth project by town in absence of budgetary appropriation. 1950 Ops St Compt File #4478.

Town general fund moneys may not be used for a water district purpose after appropriations for water district have been expended. 1954 Ops St Compt File #6505.

Highway fund moneys may not be transferred to the general fund to pay town's share of social security of highway employees. 1954 Ops St Compt File #6579.

Discussion relating to purchase of land for town office building and garage. 1957 Ops St Compt File #559.

A town may issue budget notes in 1967 to pay for expenditures incurred in excess of the 1967 budget for highway items 1 through 4. 1967 Ops St Compt File #736.

15. Under former § 115, generally

Unexpended balances of district funds become either estimated revenues for the succeeding year or, at option of Town Board, part of funds appropriated for district purposes. 1963 Ops St Compt File #981.

Moneys should not be transferred from any account for which there was a specific budgetary appropriation until such time as the purpose has been accomplished or abandoned and there exists in such account an unexpended balance. 1968 Ops St Compt File #180.

16. —Use of unexpired town balances, generally

Unexpended balance in general town budgetary item may be transferred and appropriated to another item appearing in budget for general town purposes. Moneys in surplus town general funds may be transferred and appropriated to increase or create new item. Moneys received from bonding company as result of misappropriation of general town funds would become revenue. 1945 Ops St Compt 435.

Unexpended balances and surplus of welfare moneys may be used for any lawful town purpose. 1954 Ops St Compt File #6757.

General discussion of the use of unexpended balance of down payment to finance lawful town purposes. 1961 Ops St Compt #679.

17. — —Highway purposes

Unexpended balances of appropriations for support of town government may not, pursuant to Section 115 of Town Law, be applied toward purchase of snow plow for removal of snow from town highways. 1945 Ops St Compt 361.

Widening town highway within right-of-way payable from item 1 of town highway fund; cost of sidewalk along such highway, if not paid by abutting owners, is a town charge. As to the widening, surplus general town moneys may not be used; as to the sidewalk, surplus general town moneys may be used and, if there is an item in the budget for the sidewalk, unexpended balances may be transferred to the sidewalk item. 1945 Ops St Compt 481.

An unexpended balance in one item of the highway machinery fund may be transferred to another item of such fund. 1946 Ops St Compt 161.

Unexpended balances in the general town fund may not be transferred to the machinery fund (item No. 3) of the highway fund for the purpose of purchasing a snow plow. 1947 Ops St Compt 499.

Unanticipated balances remaining in the town general fund at the end of the fiscal year become unanticipated revenues on January 1. If such unanticipated revenues constitute surplus funds, they may be transferred to item 3 of the highway fund. 1957 Ops St Compt File #755.

The balance of an appropriation for snow removal in the 1968 budget as of March 18, 1968 cannot be considered an unexpended balance and is not available for transfer for any purpose within or without the highway account. 1968 Ops St Compt File #284.

18. — —Town buildings

Surplus moneys or an unexpended balance in town general fund may be used to pay part of cost of construction of town building to be used for storing highway machinery and for town offices. 1945 Ops St Compt 324.

Combination town office highway building would be paid for from general town funds or from obligations, the debt service on which would be paid from general town funds. Surplus town funds may be used for such purpose. Unexpended balances of appropriations for town government may be used subject to restriction of section 115 of Town Law. 1947 Ops St Compt 120.

19. — —Payment of salaries

A town board in a town of the second class having a population of more than 5,000 may create the position of full time constable and funds for the payment of such compensation may be transferred from surplus, unexpended balances or contingent funds as provided by statute. 1945 Ops St Compt 63.

Town board may increase salaries of town assessors, including chairman, if moneys are available to pay such increases. Surplus moneys, unexpended balances, contingent fund, or proceeds of budget note may be transferred to budget item for assessors' salaries. 1946 Ops St Compt 495.

20. — —Other

Where sum of $75 is placed in annual town budget to be expended toward rent of rooms for American Legion Post located in town, town may not pay $150 for such purpose unless additional moneys are legally transferred and appropriated to such item. 1946 Ops St Compt 119.

Unappropriated balances remaining from any one year in the highway fund may be reappropriated subsequently to pay claims incurred in the same year. 1946 Ops St Compt 439.

Balance in Federal Food Stamp Fund of a town, if composed of moneys raised by and belonging to such town, may be transferred to other town funds appropriated for general town purposes. 1946 Ops St Compt 622.

The item for Memorial Day observance and Armistice Day observance may be increased to the maximum amount set out in section 64, subd. 12, from the contingent fund, from surplus moneys and from unexpended balances. 1947 Ops St Compt 76.

Compensation of architect payable from surplus funds if no budgetary appropriation therefor. 1947 Ops St Compt 96.

Unexpended balances may not be used for library purposes where no provision is made therefor in the town budget. However, appropriations for such purposes may be made from the contingent fund or surplus fund. 1953 Ops St Compt File #6159.

Payment of salary increases may be provided for by the use of surplus funds, unexpended balances, or contingent fund moneys. 1954 Ops St Compt File #6686.

Unexpended balances of appropriations in the current fiscal year or surplus funds may be transferred to a fire district capital reserve fund or repair reserve fund. 1954 Ops St Compt File #6773.

The town board may authorize payment of claims incurred in excess of appropriations and transfer moneys from surplus funds, contingent funds or unexpended balances for such payment. 1960 Ops St Compt File #843.

Where no appropriation has been made for the operation of the public library, the town may obtain such funds from any true surplus, unexpended balance, the contingent fund, or the proceeds of budget notes. 1968 Ops St Compt File #508.

Where a town has budgeted an amount for fire protection district purposes, it cannot increase this amount or supplement it until surplus funds or unexpended balances exist. 1968 Ops St Compt File #970.

21. —Use of expended district funds

Salaries of employees of a town water district may be increased over and above the amount placed in the budget provided there are surplus district funds or unexpended district balances from which transfers may be made to pay the same. 1945 Ops St Compt 135.

A water district may not expend surplus or an unexpended balance of district funds to purchase fire hose except in an amount necessary for the protection of district-owned property. 1945 Ops St Compt 185.

Unexpended balances of sewer district moneys may be used to increase item in district budget estimate but not for district purposes for which no appropriation was made in district budget estimate. 1945 Ops St Compt 346.

22. —Reserve fund

Board of fire commissioners of a fire district may establish a capital reserve fund to finance the purchase of fire apparatus. 1946 Ops St Compt 144.

Unexpended balances of appropriations in the current fiscal year or surplus funds may be transferred to a fire district capital reserve fund or repair reserve fund. 1954 Ops St Compt File #6773.

A building fund (capital reserve fund) may be established for the construction of a town hall from surplus funds or unexpended balances. 1955 Ops St Compt File #7711.

23. —Miscellaneous

Budget system for towns, as provided for in §§ 110 to 120, does not require that every small item of possible expenditure shall be set forth therein, and reasonable lump sums for miscellaneous items and for contingencies may properly be included. Coggeshall v Hennessey, 279 N.Y. 438, 18 N.E.2d 652, 279 N.Y. (N.Y.S.) 438, 1939 N.Y. LEXIS 876 (N.Y. 1939).

Additional moneys to pay for extraordinary repairs to highway machinery may be obtained only upon approval of the town electors voting upon a proposition therefor at a biennial or special election. The additional sum raised may not exceed one-third of one per centum of taxable property of the town as shown upon the last assessment roll thereof. 1945 Ops St Compt 206.

General town moneys may not be transferred, advanced or loaned to item of highway fund. 1945 Ops St Compt 394.

Town board may not contribute and appropriate general town funds to assist a town lighting district in the maintenance of street lights on highways located within such district. 1946 Ops St Compt 274.

Procedure to be followed where surplus general town moneys are to be applied to reduce the amount to be levied for state and county taxes is the adoption of a resolution authorizing and directing the supervisor to pay to the county treasurer from such surplus moneys a fixed amount for such purpose. 1946 Ops St Compt 677.

Town general fund moneys may not be used for a water district purpose after appropriations for water district have been expended. 1954 Ops St Compt File #6505.

Highway fund moneys may not be transferred to the general fund to pay town's share of social security of highway employees. 1954 Ops St Compt File #6579.

If all of the facilities of a water district are sold to a water authority, the proceeds of the sale may not be invested, nor may in excess over the required reserve be used to acquire and maintain a park for the residents of the water district. 1957 Ops St Compt File #57-424.

Town board of suburban town, which established general reserve fund pursuant to § 55 of Town Law, may, subject to subdivision 3 of that section, authorize an expenditure therefrom for specific object or purpose having a period of probable usefulness of at least 5 years pursuant to § 11.00 of Local Finance Law. 1967 Ops St Compt File #846.

A town recreation commission budget is subject to town board control in regard to budgetary appropriations and expenditures. 1967 Ops St Compt File #922.

Agency Opinions

Analysis

I. Generally

1. In general
2. Receipt of revenues
3. Use of surplus funds
4. —Accumulation
5. Salary increases
6. Depletion of funds appropriated for particular purpose
7. Under former § 107, generally
8. —Use of surplus town funds, generally
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10. — —Other
11. —Miscellaneous

I. Generally

1. In general

A town board may authorize an officer or board of a town to employ outside counsel and may make the necessary appropriations for such purposes. In the absence of such action, the office of town attorney is responsible for defending an Article 78 action against the zoning board of appeals. N.Y. Op. Att'y Gen. No. 83-77.

An unconditional gift of money to a town may not be used to establish a reserve fund to pay tort claims. 1978 Op St Compt File #1063.

Under certain circumstances, a claim incurred in fiscal year 1979 for highway materials delivered in 1979 may be paid from legally available funds in 1980. 1980 Op St Compt File #286.

2. Receipt of revenues

Discussion of return of town's share of county sales tax revenues in circumstances where the town elects to receive its share of such revenues in cash. 1978 Op St Compt File #765.

A town may not elect to receive only a portion of its share of county sales tax revenues in cash and authorize the county to retain the remaining portion to be applied to reduce county taxes on real property in the town. However, it may direct that some or all of its cash share of county sales tax revenues which are not appropriated or committed to some lawful town purpose be paid to the county treasurer in the manner prescribed in Town Law, § 112(2). 1979 Op St Compt File #766.

A town and a county may not enter into an agreement whereby the county withholds a portion of the town's share of county sales tax revenues to be applied to reduce county taxes on real property in the town and turns over the remaining portion to the town in cash. 1980 Op St Compt File #331.

3. Use of surplus funds

4. —Accumulation

A town may not accumulate and build up surplus moneys from year to year. 1978 Op St Compt File #859.

Surplus revenues of a townwide lighting district may not be accumulated and carried over from one fiscal year to another except by establishment of a lawful reserve fund. Unappropriated cash surplus may be used to finance an additional appropriation or an increase in an existing appropriation during a fiscal year. 1980 Op St Compt File #280.

Discussion of manner in which a town may utilize surplus moneys in the general fund and/or the highway fund. 1978 Op St Compt File #320.

Discussion of purchase of a building, to be used as a town hall, from unappropriated surplus funds. 1978 Op St Compt File #978.

A town may not transfer general surplus moneys to a fire protection district. 1979 Op St Compt File #456.

A town board may not transfer unexpended moneys from its highway fund to pay amounts the town owes under an agreement to support a joint municipal library. 1979 Op St Compt File #567.

Where both a town and a village elect to receive their sales tax revenues in cash, the town may expend its share for any town purpose for which moneys raised in the area of the town exclusive of the village may be expended. Where a town receives its sales tax revenues in cash and these revenues exceed its expenditures for the unincorporated area of the town, the town may treat the excess funds as a surplus and use them to reduce the property taxes on those properties outside the village in the next fiscal year, or the town may pay over the surplus to the county treasurer to be applied to reducing county taxes on those properties outside the village. The use of such sales tax revenues to reduce property taxes would not enhance the "tax effort" for federal revenue sharing purposes. The eligibility of a town for state aid for highways is not affected by the application of the proceeds of the county sales tax. 1983 Op St Compt File #83-25.

5. Salary increases

A town may increase the salary of an elected receiver of taxes by resolution. A salary increase may be made from such legally available monies as contingent funds, surpluses, unexpended balances, or the proceeds of budget notes. 1982 Op St Compt File #82-7.

6. Depletion of funds appropriated for particular purpose

If the funds appropriated for a particular town department are completely depleted before the close of a fiscal year, no further expenditures may be made nor liabilities incurred for that de-

partment unless the amount of the appropriation is increased and funds are available to finance that increase. 1981 Op St Compt File #81-128.

7. Under former § 107, generally

8. —Use of surplus town funds, generally

9. — —Town buildings

Surplus town funds may be used for the construction of a town garage. No referendum is necessary if the cost of construction is not in excess of $25,000. 1953 NY Ops Atty Gen Apr 21 (informal).

10. — —Other

A town board may abolish the position of secretary to the planning board and may transfer the unexpended balance of the appropriation to another department. The town board may not appoint a secretary or clerk to the planning board nor may it force the planning board to share a secretary or clerk with another department, but it may offer the planning board the part-time services of a town employee. 1980 Op St Compt File #358.

Where there is an actual surplus in town fund, such moneys may be lawfully diverted to purposes other than those for which fund was established, without awaiting end of fiscal year. 1929 N.Y. Op. Att'y Gen. No. 151.

11. —Miscellaneous

Under certain circumstances, a claim incurred in fiscal year 1977 for materials delivered in 1977 may be paid in fiscal year 1980. 1980 Op St Compt File #646.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 68, 102, 117; County § 233-a.

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1443, 1578, 1591.

87 NY Jur 2d Public Securities § 18 .

§ 115. Tax levy

The town clerk shall prepare and certify in duplicate a copy of the annual budget as adopted by the town board, together with the estimates, if any, adopted pursuant to section two hundred two-a of this chapter. The town clerk shall then affix to each such copy of the annual budget adopted by the town board, as part thereof, a copy of the annual budget of each fire district located in whole or in part within the town as certified by the secretary of the fire district. Within five days thereof the town clerk shall deliver two copies of such budget to the supervisor of the town. The supervisor shall present the copies of the annual budget to the board of supervisors of the county in which such town is situated within ten days after his receipt thereof from the clerk as hereinabove provided. The board of supervisors shall levy and cause to be raised the amounts specified in said annual budget to be levied by tax or assessments, and such amounts shall be levied, assessed and raised by tax and assessments upon the real property of the town liable therefor, at the time and in the manner provided by law for the levy of state and county taxes. The clerk of the board of supervisors shall cause such annual budget to be printed in the journal or proceedings of the board of supervisors except that the board of supervisors of any county by majority vote may authorize the clerk to cause a summary, recapitulation or abstract of such budget to be so printed.

HISTORY:

Formerly § 116, add, L 1932, ch 634, with substance transferred from former § 148; L 1936, ch 419; L 1942, ch 615; L 1944, ch 454; L 1945, ch 503; renumbered § 115 and amd, L 1969, ch 1049, § 9; L 1975, ch 260, § 1; L 1977, ch 278, eff June 14, 1977; L 2006, ch 240, § 2, eff Jan 1, 2007; L 2007, ch 555, § 5, eff Aug 15, 2007.

Prior Law: Former § 115, repealed, L 1969, ch 1049, § 8, eff Jan 1, 1971, with substance transferred to § 112.

Editor's Notes: See 1969 note under § 107.

Laws 2007, ch 555, § 10, eff Aug 15, 2007, provides as follows:

§ 10. This act shall take effect immediately and shall first apply to fire district budgets prepared for fiscal years commencing on or after January 1, 2008; provided, that the amendments to section 209-z of the general municipal law, made by section two of this act, shall take effect on the same date and in the same manner as chapter 237 of the laws of 2006 takes effect.

Amendment Notes:

2007. Chapter 555, § 5 amended:

Par by deleting "including the fire district estimates adopted pursuant to section one hundred five of this article," and ", and within".

Notes to Decisions

In Article 78 proceeding, court properly invalidated town's 1991 tax assessment of petitioners' property where petitioners offered substantial proof that 1991 assessment of their property was based directly on resale of their property in 1983, and town failed to offer any proof in rebuttal. Feigert v Assessor of the Town of Bedford, 204 A.D.2d 543, 614 N.Y.S.2d 200, 1994 N.Y. App. Div. LEXIS 5228 (N.Y. App. Div. 2d Dep't 1994).

A water district may be extended to include territory which is not contiguous with the original district. Town bonds, issued to finance the construction of a water system in an extension to a water district, may be paid from the net income of the extension. 1946 Ops St Compt 360.

The power of fixing the rates of assessments for town districts is vested in the board of supervisors. 1947 Ops St Compt 455.

Estimated revenues must be deducted from estimated expenditures to determine amount of fire district tax levy. 1953 Ops St Compt File #6180.

All general items of a town budget are taxable in villages within the town unless exempted by statute. 1954 Ops St Compt File #6515.

The town clerk must certify only the exact budget as adopted and as set forth in detail in the minutes of the proceedings of the town board at the meeting held for the purposes of the adoption of the annual budget. The town clerk has no authority to certify to any other figures than those so entered in such minutes. 1960 Ops St Compt File #231.

The salaries of a town superintendent of highways and his deputies, if any, and the legal and related expenses in connection with tax certiorari proceedings involving real property located in the area of the town outside of any villages are expenses of the general fund, town-wide, which must be raised by taxes levied against the entire area of the town. 1981 Op. St Compt File #812.

Agency Opinions

The power of a suburban town board to revise estimates of town expenditures before approval of a preliminary budget is not curtailed by the direction given the supervisor of a suburban town to prepare such preliminary budget. 1966 NY Ops Atty Gen Sept 19.

A town cannot adopt a local law authorizing moneys necessary for the operation of the town justice court to be raised by taxes levied only on the unincorporated area of the town. 1980 Op St Compt File #334.

Where the amount of taxes levied for a fire district is less than the amount provided in the fire district budget due to a clerical error by the county, the town tax collecting officer may not pay the town in which the fire district is located the full amount of its budget—he may only pay the amount actually levied and specified in the warrant. The fire district will have to reduce its appropriations and/or, if necessary, issue budget notes to compen-

sate for the shortage in revenues which will result from the error. 1981 Op St Compt File #81-170.

Special franchise owner may credit paid franchise fee against all town taxes levied for town highway purposes. 9 Op Counsel SBEA No. 50 (1989).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 102; County § 233-a; High § 229.

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1564, 1578, 1587, 1588 .

72 Am Jur 2d, State and Local Taxation §§ 629 et seq.

ARTICLE 9 Ordinances and Licenses

Section

139. Agreements with fire districts.

HISTORY:

Add, L 1932, ch 634, with substance transferred from Articles 2 and 10.

§ 139. Agreements with fire districts.

If in the judgment of the town board it is advisable for the safety and welfare of the inhabitants of a fire district in the town that the issuance of a town fire permit to burn grass, leaves, brush, rubbish, refuse, buildings or other materials in a fire district should be issued, and preliminary investigations in relation thereto should be made, by a person or persons most familiar with local grass and brush fire hazard conditions in the fire district and the availability of fire-fighting vehicles and firefighters, then the town board, notwithstanding the provisions of section one hundred thirty-eight of this chapter, may provide in any fire prevention code, whether adopted by local law or by ordinance, that an agreement may be entered into with the board of fire commissioners of any fire district located wholly or partly in the town that the issuance of such permits, and preliminary investigations in relation thereto, on behalf of the town will be performed by the fire district within the limits of such district in such town, the fire district to utilize the services of the chief engineer and assistant engineers of the fire district fire department in the performance of such duties agreed to be performed by the fire district. Any such agreement shall be for such period of time and on such terms as may be agreed upon, except that it shall provide (1) that it may be terminated by the town after written notice to the fire district and after a change in such fire prevention code to provide a different procedure for issuing such permits will become effective and (2) that it may be terminated by the fire district upon sixty days written notice to the town. If any fire prevention code contains such a provision authorizing such an agreement, the town board of the town and the board of fire commissioners of any fire district located wholly or partly in the town shall have power to enter into such agreement.

HISTORY:

Add, L 1966, ch 470, § 2, eff May 31, 1966; L 2018, ch 476, § 93, effective December 28, 2018.

Amendment Notes The 2018 amendment by ch 476, § 93, substituted "firefighters" for "firemen" in the first sentence.

Notes to Decisions

Burning permits may be issued by a chief or assistant engineer of the fire district fire department pursuant to rules and regulations not inconsistent with the rules and regulations promulgated by the Air Pollution Control Board. 1968 Ops St Compt File #820.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 176, 176-a.

Jurisprudences:

26 NY Jur 2d Counties, Towns, and Municipal Corporations § 972 .

ARTICLE 11 Fire, Fire Alarm and Fire Protection Districts

Section

170. Establishment and extension of fire, fire alarm and fire protection districts
171. Petition and hearing
172-a. Alteration of boundaries of fire districts
172-c. Alteration of boundaries of fire protection district
172-e. Change of name of fire district
172-f. Resolution and hearing for diminution of fire district boundaries
172-g. Filing of determination
173. Filing of determination
174. Fire district officers
175. Election of fire district officers
175-a. Registration for voters
175-b. Absentee ballots for fire district elections; special provisions
175-c. Notice of hearings and elections
176. Powers and duties of fire district commissioners
176-a. Duties of chief and assistant chiefs of fire department of fire district
176-b. Volunteer members of fire district fire companies
176-c. Removal of fire commissioners
176-d. Funding of fire districts.
176-e. Training requirements for fire commissioners
177. Powers and duties of fire district treasurer
177-b. Powers and duties of deputy fire district treasurers
178. Powers and duties of fire district secretary
178-a. Expenses incurred in attending town and county officers training school
178-b. Expenses of the association of fire districts of the state of New York
178-c. Expenses of fire district officers, officials and employees
178-d. Costs, expenses and damages a fire district charge in certain cases
179. Special district elections to vote upon appropriations
180. Actions and proceedings against fire districts
181. Annual budget and levy of taxes
181-a. Budgetary controls
181-b. Independent audit of fire districts
182. Effect of incorporation of village or city including lands within a fire district
183. Fire alarm districts
184. Fire protection districts
184-a. Contract for water supply outside of fire districts
184-c. Water supply outside of fire districts

186. Savings clause
187. Exclusion of a fire district from a water supply district
188. Use of surplus town moneys for purchase of fire apparatus for use in town fire districts
189. Fire inspection of property in contract areas

HISTORY:
Add, L 1932, ch 634, with substance transferred from former Article 14; amd, L 1960, ch 273, eff March 22, 1960.

§ 170. Establishment and extension of fire, fire alarm and fire protection districts

1. The town board of any town or, if the proposed district or extension includes territory in more than one town, the town boards of each of the towns in which such proposed district or extension is situated, acting jointly by a majority vote of the members of each of such town boards, upon a written petition as hereinafter provided, may establish or extend fire districts, fire alarm districts and fire protection districts in said town or towns; provided, however, that any such district or extension shall be outside of any incorporated village or city, or existing fire, fire alarm or fire protection district. A fire district shall not be extended pursuant to the provisions of this subdivision except upon the consent in writing of a majority of the commissioners of such fire district. Such consent shall be acknowledged or proved in the same manner as a deed to be recorded.

2. Upon its own motion and without a petition, the town board of any town or, if the district as proposed or proposed to be extended includes territory in more than one town, the town boards of each of the towns acting jointly by a majority vote of the members of each of such boards may establish or extend fire districts or fire protection districts in such town or towns outside of any incorporated village or city or existing fire, fire alarm or fire protection district therein, after a public hearing thereon. The notice of such hearing shall be published and posted and such hearing shall be held in the manner provided in this article for a hearing upon the establishment of a fire district or fire protection district upon petition. After such hearing and upon the evidence given thereat, the town board or boards shall determine by resolution whether it be in the public interest to establish the proposed fire district or fire protection district or extend the existing fire district or fire protection district, as the case may be. If it be determined that the establishment or extension of such district be in the public interest, the town board or boards shall determine whether all the property, property owners and interested persons within the proposed district are benefited thereby and whether all property or property owners benefited are included therein and such town board or boards shall so alter the boundaries of the proposed district or extension, so that all property and property owners and only such property and property owners as are benefited shall be included within its limits. In the event, however, that it is found that any property, property owners or any interested persons not included in the district, as originally proposed, will be benefited thereby, a further notice shall be posted and published and another hearing held as provided herein, unless all said additional property owners or interested persons execute and file written consents to be included in such district or extension. When the boundaries of such fire protection district or extension shall have been finally determined, the town board or boards shall adopt a resolution establishing or extending the district and shall comply with the provisions of subdivision one of section one hundred seventy-three of this chapter. When the boundaries of such fire district or extension shall have been finally determined the town board or boards shall adopt a resolution approving the establishment or extension of the district, and shall comply with the provisions of subdivisions two and four of section one hundred seventy-three of this chapter, other than filing a certified copy of a petition as provided in such subdivision two. A fire district shall not be extended pursuant to the provisions of this subdivision except upon the consent in writing of a majority of the commissioners of such fire district. Such consent shall be acknowledged or proved in the same manner as a deed to be recorded.

3. If a fire alarm district or fire protection district is proposed to be established, or extended, and the district or extension will be situated in whole or in part in any town which is wholly or partly within the Adirondack park and has within the town boundaries state lands subject to taxation assessed at more than thirty per centum of the total taxable assessed valuation of the town as determined from the assessment rolls of the town, as completed from time to time, the town board or boards shall not adopt a resolution establishing or extending any such fire alarm district or fire protection district unless the state comptroller, on behalf of the state, previously has consented to the establishment or extension of the district.

4. Notwithstanding the provisions of subdivision one of this section, and subdivisions one and two of section one hundred seventy-one of this chapter, if a fire district embraces an area outside a village and also embraces more than fifty per centum of the area of such village, and if the village was incorporated after the fire district was established, the town board of the town in which such fire district and such village are situated, after a public hearing and upon the petition of the village board of such village and the board of fire commissioners of such fire district, may adopt a resolution, subject to permissive referendum, extending such fire district to include the portion of such village which is not in such fire district. The notice of public hearing shall be posted and published, and such hearing shall be held in the manner provided in this article for a hearing upon the establishment or extension of a fire district. The provisions of sections ninety and ninety-one of this chapter shall apply in relation to

such referendum except that a petition filed pursuant to such section ninety-one only need be signed by twenty-five qualified electors of the area of such extension, or if there are not twenty-five electors, then by at least fifty per centum of the qualified electors of such area. All of the other provisions of this article not inconsistent herewith shall be complied with in relation to any such extension.

HISTORY:

Add, L 1932, ch 634; amd, L 1934, ch 816, § 1; L 1936, ch 419, § 10; L 1940, ch 374, § 18; L 1940, ch 432, § 1; L 1941, ch 648, § 81; L 1948, ch 849, § 2; L 1951, ch 823; L 1953, ch 700, eff April 13, 1953; L 1956, ch 317, eff April 4, 1956; L 1960, ch 273, § 2, eff March 22, 1960,2; L 2001, ch 424, § 10, eff Oct 31, 2001.

Notes to Decisions

Analysis

1. In general
2. Boundaries and extent of territory
3. Consolidation and joint districts
4. Procedures and prerequisites
5. Finances and expenditures
6. Action or suit
7. Particular municipalities

1. In general

Fire company was political subdivision because it was essentially under complete control of fire district, and thus fact that fire company, rather than fire district, owned real property underlying fire station, was irrelevant for purposes of determining whether proposed construction of fire substation was exempt from area and site plan requirements of town building code. Nanuet Fire Engine Co. No. 1 v Amster, 177 Misc. 2d 296, 676 N.Y.S.2d 890, 1998 N.Y. Misc. LEXIS 300 (N.Y. Sup. Ct. 1998).

Town may contract for fire protection in a fire protection district. 1946 Ops St Compt 692.

It is doubtful that a fire district established pursuant to § 314-c of the Town Law of 1909 may be extended pursuant to this section. 1953 Ops St Compt File #6372.

A town's central fire alarm system may be used to service any authorized emergency calls. 1968 Ops St Compt File #116.

Where a fire district has been established pursuant to a special act of the Legislature and has been clothed with all the powers and charged with all the duties of a fire district it does not differ from a fire district established pursuant to the usual statutory procedures. 1969 Ops St Compt File #93.

Pursuant to procedural requirements of CLS Town article 11, town may dissolve fire protection district and establish fire district having same boundaries as dissolved fire protection district; however, there is no authority for fire district to establish scale of tax rates so that owners of multiple parcels are taxed at lower rate. 2001 Opns St Comp No. 01-8.

2. Boundaries and extent of territory

It is undisputed that town boards have the sole statutory authority to establish or extend fire districts by resolution. Guilderland Fire Dist. v Centi, 193 Misc. 2d 611, 749 N.Y.S.2d 696, 2002 N.Y. Misc. LEXIS 1352 (N.Y. Sup. Ct. 2002).

Fire district formed pursuant to Article 11 of the Town Law may not include territory situated within an incorporated village. 1947 Ops St Compt 148.

Fire department of the village of Bergen may operate outside of the village limits only if the village has authorized such operation. The town of Bergen may contract with the village of Bergen for the furnishing of fire protection outside of the village limits only if a fire protection or fire alarm district has been established. 1947 Ops St Compt 441.

Territory within a fire protection district may be included in an extension to a fire district only if the fire protection district is dissolved or diminished. 1955 Ops St Compt File #7480.

A fire district may be extended to include a territory in which there are no resident taxpayers, upon petition of resident taxpayers of the existing district. 1956 Ops St Compt File #8213.

A fire district may include territory in more than one county. 1959 Ops St Compt File #839.

A fire protection district may be established to include the entire area of a town outside of villages and cities. 1960 Ops St Compt File #416.

A fire district may be extended to include uninhabited lands within the town, outside of a village. 1968 Ops St Compt File #1020.

In case of extension of fire district located within 2 towns, if proposed extension is upon petition under CLS Town § 170(1), town board of town in which extension is to be located may proceed on its own, without action by other town, but if proposed extension is without petition and by board motion under CLS Town § 170(2), joint action by both town boards is necessary; if area of proposed extension is within adjoining fire protection district, town board of town within which extension is located may proceed on its own under CLS Town § 172-d unless fire protection district is located within more than one town. 1994 Op St Compt No. 94-23.

3. Consolidation and joint districts

Town board may not, at public hearings on the establishment of two proposed fire protection districts, determine to consolidate the proposed district. 1947 Ops St Compt 519.

Unlike fire districts, fire protection districts may not be zoned. A fire protection district may, however, be dissolved and two or more fire protection districts created from the territory formerly embraced by the original district. 1956 Ops St Compt File #8050.

4. Procedures and prerequisites

Appellate court properly affirmed the trial court's dismissal of the electors' referendum petition challenging the dissolution of the existing fire protection district (FPD) and the creation of two new FPDs because the town board fully and properly complied with all the requirements of the New N.Y. Government Reorganization and Citizen Empowerment Act in dissolving the existing FPD, no wind down was necessary as it had no employees, assets, or liabilities, the town board was empowered to create the new FPDs, and its decision to deliver the services formerly provided by the existing FPD by creating two new FPDs was a proper exercise of that authority. Matter of Waite v Town of Champion, 31 N.Y.3d 586, 106 N.E.3d 1167, 81 N.Y.S.3d 807, 2018 N.Y. LEXIS 1544 (N.Y. 2018).

Consent of State Comptroller is necessary to extension of town fire district. 1945 Ops St Compt 39.

Proceedings for the formation of a fire protection district may be initiated by the town board upon its own motion and without petition and the consent of the State Comptroller is not required for the formation of a fire protection district. 1946 Ops St Compt 592.

The consent of the State Comptroller is not required for the formation of a fire protection district. 1947 Ops St Compt 48.

A fire protection district may be formed without a petition. 1952 Ops St Compt File #5565.

Consent of State Comptroller is necessary to establishment of fire protection district in town of North Elba, Essex County. 1954 Ops St Compt File #6999.

Where a fire district located in town A is being extended to include territory wholly within town B, the town board of town B may act alone upon the petition and joint action with town A is not required. 1954 Ops St Compt File #7024.

Permission of the State Comptroller is not required for the establishment of a special improvement district where the only indebtedness to be incurred by the town on behalf of the district will be tax anticipation notes. 1956 Ops St Compt File #7928.

5. Finances and expenditures

There is no statutory limit upon the amount of money which may be expended in a fire protection district. 1945 Ops St Compt 134.

Town board may not purchase a fire truck or erect a fire house on behalf of a fire protection district. 1946 Ops St Compt 167.

No method exists for charging a proportionate share of the expenses of a fire district for a given fiscal year against the real property within an extension of the fire district, when the district was extended during such fiscal year. 1947 Ops St Compt 94.

The expense of establishment of a fire district may be charged back upon the fire district. 1947 Ops St Compt 176.

Services of town attorney rendered in the formation of a fire district are not a district charge and he may not be paid extra compensation by the town. 1954 Ops St Compt File #6528.

Certain funds of fire districts may be temporarily deposited to earn interest in: (a) time deposits, open account, and in (b) time certificates of deposit issued by banks or trust companies but not savings banks, industrial banks or savings and loan associations. 1964 Ops St Compt File #573 (Revised).

6. Action or suit

In consolidated actions for personal injuries and wrongful death arising out of alcohol-related automobile accident which occurred after intoxicated driver consumed beer at fund-raising event to benefit volunteer fire companies, court should have dismissed claims against fire protection district and associated volunteer fire company since protection district submitted proof that it was "defined taxing district" with no independent legal status; where town has created fire district, its volunteer firemen are employees of district, which is proper legal party to be sued. Haskell v Chautauqua County Fireman's Fraternity, Inc., 184 A.D.2d 12, 590 N.Y.S.2d 637, 1992 N.Y. App. Div. LEXIS 14048 (N.Y. App. Div. 4th Dep't 1992), app. dismissed, 81 N.Y.2d 954, 597 N.Y.S.2d 939, 613 N.E.2d 971, 1993 N.Y. LEXIS 5289 (N.Y. 1993).

In action by plaintiff who was injured in accident involving vehicle driven by volunteer firefighter responding to fire alarm, fire company incorporated under CLS N-PCL § 1402 was properly granted summary judgment on ground that it was not proper party to action, where town had chosen to establish "fire protection district" (which, unlike "fire district," is not political subdivision independent of town), fire company provided fire protection services within fire protection district pursuant to contract with town, and town retained complete control over fire company and ultimate responsibility for fire protection pursuant to § 1402. Miller v Savage, 237 A.D.2d 695, 654 N.Y.S.2d 215, 1997 N.Y. App. Div. LEXIS 2265 (N.Y. App. Div. 3d Dep't 1997).

The term "fire district" as used in § 205-b of the General Municipal Law, referring to liability for negligence of fire district and volunteer firemen, has a specific meaning in law and does not include fire companies. Heifetz v Rockaway Point Volunteer Fire Dep't, 124 N.Y.S.2d 257, 1953 N.Y. Misc. LEXIS 2150 (N.Y. Sup. Ct.), aff'd, 282 A.D. 1062, 126 N.Y.S.2d 604, 1953 N.Y. App. Div. LEXIS 5825 (N.Y. App. Div. 1953).

Fire districts as such are neither corporations nor quasi corporations and are not to be regarded as jural persons who might be subjected to suitAny recovery for legal liability on fire district contracts, express or implied, must be had, if at all, by proceedings against commissioners and other officials of fire district, in their capacity as such. Hellawell v Grafeld, 22 F. Supp. 765, 1938 U.S. Dist. LEXIS 2274 (D.N.Y. 1938).

7. Particular municipalities

Discussion re Town of Potsdam Fire Protection District. 1955 Ops St Compt File #7497.

City of Oneida may not establish a fire protection district in its outside tax district. 1955 Ops St Compt File #7606.

Agency Opinions

Analysis

1. In general
2. Boundaries and extent of territory
3. Procedures and prerequisites
4. Finances and expenditures
5. Action or suit

1. In general

Paid firemen of paid fire departments are public employees and not public officers; their residence qualifications are determined on that basis. 1975 NY Ops Atty Gen Aug 20 (informal).

A fire district commissioner may not hold the office of treasurer of the fire district but may hold the office of treasurer of a fire company. 1977 NY Ops Atty Gen March 2.

General Municipal Law § 122 is not applicable to a fire district created under Town Law, Article 11. 1978 NY Ops Atty Gen August 10.

The Joint Pawling Fire District may organize an emergency rescue and first aid squad by following the procedures set forth in General Municipal Law § 209-b subd 1, par a and thereafter, by following the procedure set forth in subdivision b, may provide general ambulance service. 1980 NY Ops Atty Gen June 26 (informal).

A fire district has a duty to provide fire protection services to the general public in all areas of the district, including that portion of a river located within the district, and to render rescue services in that area where emergency rescue services have been organized under General Municipal Law, § 209-b(1). A fire district is not liable for failure to provide fire protection or rescue services. 1983 NY Ops Atty Gen Jan 3 (Informal).

One person may not hold simultaneously the positions of a member of a town board and fire district commissioner. 1987 NY Ops Atty Gen No. 87-69 (Informal).

Board of flyer commissioners may require that prospective volunteer members of fire company have high school degrees or equivalency certificates; as alternative, board may consider requiring volunteers to undergo state's certified training currently required only for paid firefighters. 2000 NY Ops Atty Gen I 2000-4.

A fire district is obligated to provide fire protection to tax-exempt properties within the district. 1979 Op St Compt File #117.

It would seem that, as a general rule, a fire district is not subject to the rules and regulations of a town in which it is situate relative to permits for the installation of gasoline storage tanks and, thus, is not required to pay the permit fees. However, the applicability of specific rules and regulations to a fire district is a matter for local determination. 1983 Op St Compt File #83-39.

2. Boundaries and extent of territory

Where the boundaries of a fire district are extended to include "unorganized territory" the consent of a volunteer fire corporation is not required to extend the boundaries of the fire district. 1955 NY Ops Atty Gen Oct 13 (informal).

The exclusive firefighting jurisdiction of a village fire department does not automatically expand upon annexation by the village of territory in a neighboring fire district; an agreement by which a village fire department would provide services to the annexed portion of a fire district is possible under Town Law § 176(22). 1990 N.Y. Op. Att'y Gen. No. I90-59.

Fire district created in 1952 by town had responsibility for providing fire protection to territory annexed to town in 1998 following 1996 judicial decision which determined that disputed territory was within boundaries of neighboring town where, prior to 1996, fire district boundary included disputed territory; under facts presented, neither annexation of territory in 1998, nor 1996 judicial decision, affected boundaries of fire district. 2002 NY Ops Atty Gen I 02-14.

A fire district cannot include within its geographical boundaries any territory of a previously established fire district. Special legislation is recommended to remedy the overlapping of the area of one fire district by the boundaries of a district subsequently created. 1983 Op St Compt File #83-152.

3. Procedures and prerequisites

Section 170, subd. 2, does not permit town board to extend, without a petition to it (as required by subd. 1), any district other than a "fire protection district". 1943 N.Y. Op. Att'y Gen. No. 161.

The Joint Pawling Fire District may organize an emergency rescue and first aid squad by following the procedures set forth in General Municipal Law § 209-b subd 1, par a and thereafter, by following the procedure set forth in subdivision b, may provide general ambulance service. 1980 NY Ops Atty Gen June 26 (informal).

While there is no provision of law authorizing the change of a fire district into a fire protection district, a fire district could be dissolved and a fire protection district established to encompass

the same geographic area as the dissolved fire district. 1981 Op St Compt File #1.

4. Finances and expenditures

There appears to be no authority for either a town or a county to purchase fire apparatus; quaere, whether § 46 of War Emergency Act, which provides for the appropriation by towns of moneys for safety and protection of persons and property during existing state of war, furnishes such authority; it is suggested that localities desiring to purchase fire equipment create fire districts under this section. 1945 NY Ops Atty Gen Aug. 22.

A member of a town board may not be compensated for legal services rendered in the formation of a fire protection district. 1953 NY Ops Atty Gen Oct 9 (informal).

Expense of enlarging a fire district may be charged back to fire district, including Town Attorney paid on fee basis. 1967 NY Ops Atty Gen June 23.

A fire district has no power to tax real property, no power to assess real property and no power to grant or withhold a real property tax exemption. 1976 NY Ops Atty Gen Dec 29.

A fire district has no authority to pay the cost of construction of a memorial monument in memory of deceased volunteer firemen. 1980 NY Ops Atty Gen June 11 (informal).

It would be improper for a village to expend village funds for the purpose of sending letters to town residents informing them of possible consequences involved if a fire district is formed within the town. 1978 Op St Compt File #394.

A fire district, with voter approval, may increase its spending limitation by a specified sum to be raised and spent annually for the operation and maintenance expenses of the district's ambulance. 1980 Op St Compt File #206.

5. Action or suit

Volunteer Firemen are not covered by the provisions of the Volunteer Firemen's Benefit Law when attending a funeral, whether such attendance is pursuant to orders or by permission from the chief or fire district commissioners. It is questionable whether use of fire department apparatus to transport the body of a deceased fireman for burial is authorized by statute. If a court held that there is no such authorization, the immunity statute would not apply, the Volunteer Firemen's Benefit Law would not provide protection and personal liability might result. 1977 NY Ops Atty Gen Dec 7 (Informal).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 185.

Resolution of disputes in the course of collective negotiations, CLS Civ S § 209.

Prohibition of strikes, CLS Civ S § 210.

Contracts between municipalities and fire districts for joint fire training centers, CLS Gen Mun § 209-s.

Jurisprudences:

18A NY Jur 2d Civil Servants and Other Public Officers and Employees § 62 .

25 NY Jur 2d Counties, Towns, and Municipal Corporations § 34 .

26 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 486, 975—977, 983—985, 1005, 1011, 1045, 1047, 1105 .

56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 11.

Law Reviews:

Municipal liability for torts of firemen. 31 Alb. L. Rev. 256.

Right to adequate municipal services: thoughts and proposals. 44 NYU L Rev 753.

Inapplicability of municipal zoning ordinances to governmental land uses. 19 Syracuse L. Rev. 698.

§ 171. Petition and hearing

1. A petition to establish or extend afire, fire alarm or fire protection district pursuant to the provisions of section one hundred seventy of this article shall be signed, and acknowledged or proved in the same manner as a deed to be recorded, or authenticated in the manner provided by the election law for the authentication of nominating petitions, by resident taxpayers owning taxable real property aggregating at least one-half of the assessed valuation of all the taxable real property of the proposed district or extension thereof owned by resident taxpayers, as such valuations appear upon the latest completed assessment roll of said town or towns, except that where there are no resident taxpayers within a proposed fire protection district or fire alarm district or a proposed extension of a fire district, fire protection district or fire alarm district then the petition shall be signed by non-resident taxpayers owning taxable real property aggregating at least one-half of the assessed valuation of all the taxable real property in the proposed district or extension as shown on such last completed assessment roll. If a portion only of a parcel of such real estate appearing upon the assessment roll is situated within the proposed district or extension, then the town board or boards may determine the relative value of that part thereof within the proposed district or extension, based upon the valuation of the entire parcel as the same appears upon the assessment roll. If the boundaries of a proposed fire district as described in the petition therefor shall be coterminous with those of an existing water supply district having no bonded indebtedness, the petition may provide for the dissolution of such water supply district upon the establishment of said fire district and the assumption by said fire district of all the liabilities and indebtedness of such water supply district.

2. a. The town board or town boards shall hold a public hearing upon such petition and shall cause a notice thereof to be published at least once in a newspaper having general circulation in the territory affected, the first publication thereof to be not less than ten days nor more than twenty days before the day designated therein for the hearing, and the town clerk or town clerks shall cause copies of such notice to be posted on the sign-board of the town maintained pursuant to subdivision six of section thirty of this chapter, and conspicuously in such other places within or without the territory affected as the town board or town boards may direct, not less than ten nor more than twenty days before the day designated for the hearing as aforesaid. In the event that the town maintains a website, such information may also be provided on the website. Such notice shall contain a description of the proposed district or extension, state the estimated rate per thousand dollars of assessed valuation, based on the aggregate assessed valuation of taxable real property of the proposed district or extension district shown in the latest completed final assessment roll, projected to be assessed, levied and collected for purposes of the proposed district or extended district for the fiscal year of its operation and specify the time when and the place where the town board or boards will meet to consider such petition and to

hear all persons interested in the subject concerning the same. If the petition shall provide for the dissolution of an existing water supply district upon the establishment of the fire district, the notice of hearing shall so specify. If, upon the establishment or extension of a fire district, the fire district would become the sponsor of a service award program pursuant to section two hundred sixteen-b of the general municipal law, the notice of hearing shall so specify and contain a statement of the estimated annual cost of the service award program to the fire district; provided, however, that if, upon the establishment or extension of a fire district, the ensuing fire district would become the sponsor of a service award program pursuant to section two hundred sixteen-b of the general municipal law, the resolutions establishing the districts shall be submitted in each such town in the manner provided by article seven of this chapter. Prior to the publication of the notice, the board or boards shall cause to be prepared, and file for public inspection with the town clerk, a detailed explanation of how the estimated rate of assessment for the proposed district or extended district was computed.

b. (1) If the permission of the state comptroller is not required pursuant to section one hundred seventy-three of this article because it is not proposed to finance an expenditure for the district or extension by the issuance of bonds, notes, certificates or other evidences of indebtedness of the fire district, a certified copy of the notice shall be filed with the state comptroller on or about the date of the publication of such notice.

(2) Notwithstanding the provisions of subparagraph one of this paragraph the state comptroller shall not be precluded from requiring the submission of additional information or data in such form and detail as the state comptroller shall deem sufficient or from causing an investigation to be made with respect to the establishment or extension of a district or an increase in the maximum amount to be expended.

3. After a hearing held upon notice as hereinbefore provided and upon the evidence given thereat, the town board or boards shall determine by resolution:

(a) Whether the petition is signed, and acknowledged or proved, or authenticated as required by law and is otherwise sufficient;

(b) Whether all the property and property owners within the proposed district or extension are benefited thereby;

(c) Whether all the property and property owners benefited are included within the limits of the proposed district or extension;

(d) Whether it is in the public interest to grant in whole or in part the relief sought.

If the town board shall determine that the petition is not signed, and acknowledged or proved, or authenticated as required by law or that it is otherwise insufficient, or if it is determined that it be not in the public interest to grant in whole or in part the relief sought, the town board shall deny the petition.

If the town board shall determine that the petition is signed, and acknowledged or proved, or authenticated as required by law and is otherwise sufficient and that it is in the public interest to grant the relief sought, either in whole or in part, but shall find that any part or portion of the property or property owners within the proposed district or extension are not benefited thereby or that certain property or property owners benefited thereby have not been included therein, the town board shall specify the necessary changes of the boundaries of the proposed district or extension to be made in order that all of the property and property owners and only such property and property owners as are benefited shall be included within such proposed district or extension, and the board shall call a further hearing at a definite place and time not less than fifteen nor more than twenty-five days after such determination. Notice of such further hearing shall be posted, published and mailed in the manner provided in this section except that such notice shall also specify the manner in which it is proposed to alter the boundaries of the proposed district or extension. Such further hearing shall be conducted in the same manner as an original hearing upon a petition. If and when the town board shall determine in the affirmative all of the questions set forth in this subdivision, the board may adopt a resolution approving the establishment or extension of the district as the boundaries shall be finally determined, but no such resolution so approving shall be adopted unless the petition shall comply with the requirements of this section as to sufficiency of signers as the boundaries of the proposed district or extension shall be finally determined.

HISTORY:

Add, L 1932, ch 634; amd, L 1933, ch 705; L 1934, ch 816, § 2; L 1936, ch 419, § 11; L 1940, ch 432, § 2, eff April 13, 1940; L 1943, ch 566, § 1; L 1945, ch 730, § 1, eff July 1, 1945; L 1956, ch 505; L 1957, ch 338; L 1958, ch 351; L 1962, ch 487, § 1; L 1995, ch 397, § 1, eff Sept 1, 1995; L 2000, ch 37, § 9, eff Sept 1, 2000; L 2003, ch 62, § 15 (Part X), eff May 15, 2003; L 2004, ch 453, § 1, eff Sept 14, 2004; L 2004, ch 631, § 2, eff April 24, 2005.

Editor's Notes: Laws 1995, ch 397, § 14, eff Sept 1, 1995, provides as follows:

§ 14. This act shall take effect on the thirtieth day after it shall have become a law and shall apply to any proceeding for which a notice of hearing shall have been published after the effective date of this act.

Amendment Notes:

2004. Chapter 453, § 1 amended:

Sub 1, by deleting "for a permissive referendum" and "chapter".

Notes to Decisions

Analysis

1. In general
2. "Resident taxpayer", defined
3. "Taxable real property", defined

1. In general

Expense of proceedings taken by town board in establishing fire district is a town charge. Expense incurred by petitioners may be

refunded from district funds. If district is not established expense of petitioners may not be refunded. A town may not legally pay premium on insurance purchased by a fire company. Expense of town officer for travel in own automobile to conference of municipal officers is a town charge. 1946 Ops St Compt 127.

Where proposed fire district embraces territory situated in more than one town, each town board, in separate session, should fix the date of the public hearing to be held by the town boards jointly. Such resolution should also provide for the posting and publication of notice of hearing and prescribe the form of the notice. 1947 Ops St Compt 39.

Fire district may be described as all property within a fixed radius from a fixed point. 1947 Ops St Compt 48.

A public hearing must be held and the approval of the State Comptroller obtained before a fire district may be established or extended. 1947 Ops St Compt 70.

The boundaries of a fire district or fire district extension may be fixed at a given distance from the center line of a designated highway, without regard to property lines. 1947 Ops St Compt 323.

(1) A fire district may be established by a town board only after compliance with the procedure prescribed in Article 11 of the Town Law. (2) There is no requirement that the petitioner possess fire apparatus, equipment or housing. 1947 Ops St Compt 330.

2. "Resident taxpayer", defined

No corporation is a "resident taxpayer" within the meaning of Section 171 of the Town Law. 1946 Ops St Compt 669.

The term "resident taxpayers", as used in this section does not include corporations or the State of New York. 1955 Ops St Compt File #7300.

Only "resident taxpayers" need sign a petition for the establishment or extension of a fire district. 1956 Ops St Compt File #8011.

A fire district may be extended to include a territory in which there are no "resident taxpayers", upon petition of "resident taxpayers" of the existing fire district. 1956 Ops St Compt File #8213.

3. "Taxable real property", defined

Meaning of term "taxable real property" depends upon status of real property at time at which the statute speaks. As used in Sections 171 and 191 of the Town Law, "taxable real property" does not include property exempt from taxation for general governmental purposes. 1945 Ops St Compt 483.

Real property forming part of the New York City water supply system, excepting aqueducts, is "taxable real property" if benefited by the establishment of the district. 1947 Ops St Compt 176.

Agency Opinions

1. In general

A town board must hold a public hearing on a petition to extend a fire district. 1955 NY Ops Atty Gen Apr 19 (informal).

A fire district has no power to tax real property, no power to assess real property and no power to grant or withhold a real property tax exemption. 1976 NY Ops Atty Gen Dec 29.

A fire district commissioner may not hold the office of treasurer of the fire district but may hold the office of treasurer of a fire company. 1977 NY Ops Atty Gen March 2.

The Joint Pawling Fire District may organize an emergency rescue and first aid squad by following the procedures set forth in General Municipal Law § 209-b subd 1, par a and thereafter, by following the procedure set forth in subdivision b, may provide general ambulance service. 1980 NY Ops Atty Gen June 26 (informal).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 170, 172-d, 185, 187.

Jurisprudences:

1 NY Jur 2d Acknowledgements, Affidavits, Oaths, Notaries, and Commissioners § 4.

18A NY Jur 2d Civil Servants and Other Public Officers and Employees § 62 .

25 NY Jur 2d Counties, Towns, and Municipal Corporations § 34 .

26 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 486, 986—988, 996, 1011, 1045, 1047, 1105.

108 NY Jur 2d Water § 546 .

42 Am Jur 2d, Initiative and Referendum §§ 18 et seq.

§ 172-a. Alteration of boundaries of fire districts

1. Irrespective of the manner of their original establishment, whenever two or more fire districts adjoin and the boards of fire commissioners of each fire district affected have agreed by a written memorandum of proposed change to alter the boundaries of such fire districts, but not in such a manner as to include territory not previously situate within such fire districts, nor to exclude territory previously situate therein, and after a public hearing thereon, held jointly by such fire districts, the boundaries of such fire districts may be altered in accordance with such memorandum of proposed change, but not until such proposed change has been approved by the town board of the town in which such fire districts are located, or if located in two or more towns, by the town boards of such towns.

2. Such memorandum of proposed change shall be signed by a majority of the members of the board of fire commissioners of each fire district and shall be acknowledged or proved in the same manner as a deed to be recorded. The members of the board of fire commissioners of each district affected shall jointly hold a public hearing upon such memorandum of proposed change and shall cause a notice thereof to be published at least once in a newspaper having general circulation in the territory affected, the first publication thereof to be not less than ten days nor more than twenty days before the day designated therein for the hearing, and the secretary of the fire districts shall cause copies of such notice to be posted conspicuously in five public places in the district at least ten days prior to the date of such public hearing. In the event that the district maintains a website, one of the posting requirements may be fulfilled by posting such information on the website. Such notice shall specify the time when and the place where the boards of fire commissioners of the districts affected will meet to hear all persons interested in the subject concerning the same and shall specify each district affected and shall state in general terms the manner in which it is proposed to alter the boundaries thereof. Costs of publication shall be borne equally by each fire district affected.

3. After a hearing held upon notice as hereinbefore provided and upon the evidence given thereat, the boards of fire commissioners of the districts affected shall determine by joint resolution:

(a) Whether all the property and property owners within the districts are benefited by such change.

(b) Whether all the property and property owners within the area of such boundary change are benefited thereby.

(c) Whether it is in the public interest to grant the boundary line changes as set forth in the memorandum of proposed change.

If and when the boards of fire commissioners shall determine in the affirmative all of the questions set forth in this subdivision, the boards may adopt a resolution jointly approving the boundary line changes. Such joint resolution and memorandum of proposed change shall be filed with the town clerk of the town or towns in which such districts are wholly located and with the assessor of such town or towns.

4. The proposed change of boundaries shall be deemed to have been approved pursuant to this section in the event that no action is taken by the town board or town boards, either approving or disapproving, within thirty days of receipt of the memorandum of proposed change by the town clerk or clerks. If the town board or town boards approve such proposed change, such alteration of boundaries shall be deemed effective upon the date of such adoption. If the town board of any one of the two or more town boards in which the fire district is located disapprove such proposed change of boundaries, then, within ten days after the adoption of such resolution disapproving such change of boundaries the town clerk of the town disapproving such change shall notify the fire districts involved. Any fire district believing itself aggrieved may within thirty days of receipt of notification commence an appropriate proceeding in the supreme court of the state of New York in accordance with article seventy-eight of the civil practice law and rules, naming the town board or town boards as respondents.

5. In the event that the boundaries of a district having indebtedness, either bonded or temporary, shall be altered pursuant hereto, such district shall continue in law as it existed immediately prior to such change of boundaries for the purpose of paying such indebtedness, and there shall be annually assessed and levied upon and collected from the taxable real property within such district as it existed immediately prior to such alteration of boundaries, in the same manner and at the same time and by the same officers as town taxes are assessed, levied and collected, a sum sufficient to pay such indebtedness and interest thereon as the same shall become due. All and only the real property within the boundaries of the district as they exist after the alteration thereof shall be liable for the payment of indebtedness incurred for the purposes of such district after such alteration. For the purposes hereof, such alteration of boundaries shall be deemed effective upon the adoption by the boards of fire commissioners of the affected fire districts of the resolution providing therefor, unless such resolution shall specify some other date for such purpose, in which case such alteration shall be deemed effective upon the date so specified.

HISTORY:

Add, L 1980, ch 134, § 1, eff Sept 1, 1980; amd, L 2003, ch 62, § 16 (Part X), eff May 15, 2003.

Prior Law: Former § 172–a, add, L 1939, ch 584, § 9; amd, L 1940, ch 432, § 3, L 1942, ch 650, § 2; repealed, L 1980, ch 134, § 1, eff Sept 1, 1980.

Notes to Decisions

Analysis

1. In general
2. Under former § 172-a

1. In general

It is undisputed that town boards have the sole statutory authority to alter fire district boundaries. Guilderland Fire Dist. v Centi, 193 Misc. 2d 611, 749 N.Y.S.2d 696, 2002 N.Y. Misc. LEXIS 1352 (N.Y. Sup. Ct. 2002).

2. Under former § 172-a

There is no authority for the diminution of the area of a fire district other than that contained in section 172-a of the Town Law. 1947 Ops St Compt 195.

A portion of a fire district can be excluded therefrom only by alteration of the common boundary between two fire districts or by dissolution of the entire district. 1953 Ops St Compt File #6121.

A fire district established subsequent to January 1, 1934, may not contract for the furnishing of fire protection to a portion thereof. 1954 Ops St Compt File #6956.

A portion of a fire district can be excluded therefrom only by alteration of a common boundary between two fire districts or by dissolution of the entire district. 1956 Ops St Compt File #7880.

Two new fire districts may be created within the boundaries or an existing district only by first dissolving the latter fire district. 1967 Ops St Compt File #549.

Where the boundaries of a fire district which has incurred indebtedness are altered, the moneys to pay the interest and principal on such indebtedness must be raised from the area as it existed prior to said alteration. 1969 Ops St Compt File #852.

Agency Opinions

Analysis

1. In general
2. Under former § 172-a

1. In general

One person may not hold simultaneously the positions of a member of a town board and fire district commissioner. 1987 NY Ops Atty Gen No. 87-69 (Informal).

A fire district cannot include within its geographical boundaries any territory of a previously established fire district. Special legislation is recommended to remedy the overlapping of the area of one fire district by the boundaries of a district subsequently created. 1983 Op St Compt File #83-152.

2. Under former § 172-a

A fire district has no power to tax real property, no power to assess real property and no power to grant or withhold a real property tax exemption. 1976 NY Ops Atty Gen Dec 29.

A fire district commissioner may not hold the office of treasurer of the fire district but may hold the office of treasurer of a fire company. 1977 NY Ops Atty Gen March 2.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Proceeding against body or officer, CLS CPLR §§ 7801 et seq.

Jurisprudences:

18A NY Jur 2d Civil Servants and Other Public Officers and Employees § 62 .

25 NY Jur 2d Counties, Towns, and Municipal Corporations § 34 .

26 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 486, 997, 999, 1011, 1045, 1047, 1105 .

§ 172-c. Alteration of boundaries of fire protection district

The town board of a town in which any fire protection district has been established, or if established in two or more towns, the town boards of such

towns acting jointly by a majority vote of the members of each of such town boards, upon petition and after a public hearing, or upon the motion of such town board or town boards after a public hearing, may alter the boundaries of such fire protection district in accordance with such petition or motion and exclude from the district territory previously located therein. Such petition, if any, shall be signed by resident taxpayers owning taxable real property aggregating at least one-half of the assessed valuation of all the taxable real property owned by resident taxpayers in the territory to be excluded and at least one-half of the assessed valuation of all the taxable real property owned by resident taxpayers in the remaining territory of the district. The assessed valuations in either case shall be the assessed valuations of the taxable real property as shown by the latest completed assessment-roll of the town. Such petition, if any, shall be signed, and acknowledged or proved in the same manner as a deed to be recorded, or authenticated in the manner provided by the election law for the authentication of nominating petitions. Notice of such hearing shall be given and such hearing held and the subject matter thereof determined in the manner provided herein for hearings upon the establishment of fire protection districts, except that the notice of hearing shall state in general terms the purposes of the hearing and the manner in which it is proposed to alter the boundaries of the district. Any resolution altering the boundaries of such fire protection district made upon motion of the town board or town boards without a petition shall be subject to a permissive referendum as provided in article seven of this chapter. For the purposes of this section, the boundaries of such fire protection district shall be deemed to be altered pursuant to petition of resident taxpayers and the territory described in the notice excluded, upon the adoption by the town board or town boards of the resolution providing therefor, unless such resolution shall specify some other date for such purpose, in which case such boundaries shall be deemed to be altered and such territory excluded on the date so specified, and such alteration of boundaries upon motion of the town board or town boards without a petition shall become effective as provided in section ninety-one of this chapter. Unless renegotiated, any existing contract for the supplying of fire protection to any such fire protection district shall be carried out in the same manner as if such boundaries had not been altered or territory excluded from the district.

HISTORY:

Add, L 1945, ch 793; amd, L 1951, ch 294; L 1964, ch 862, § 1; L 1966, ch 907, § 2; L 2000, ch 37, § 12, eff Sept 1, 2000.

Notes to Decisions

Boundaries of a town fire protection district may be altered or reduced. 1945 Ops St Compt 127.

The boundaries of a fire protection district may be altered upon a petition signed by resident taxpayers owning at least one-half of the aggregate assessed valuation of all the taxable real property within the district. 1946 Ops St Compt 354.

The boundaries of a fire protection district may be altered and such fire protection district diminished in area. However, the excluded portion remains liable for its proportionate share of the price stipulated in an existing fire protection contract, unless such contract is renegotiated. 1947 Ops St Compt 99.

Balance of fire protection district moneys may not be transferred to the fire district but should be applied toward the payment of the amount of the contract. 1947 Ops St Compt 543.

Where a village is incorporated and includes a portion of a fire protection district, the fire protection district is not thereby automatically diminished in area. Exclusion of that portion of the fire protection district must be accomplished either by a proceeding pursuant to this section or by a proceeding pursuant to section 185 of the Town Law. 1953 Ops St Compt File #6041.

A fire protection district may be dissolved or its boundaries may be altered before the termination of existing fire protection contract. 1954 Ops St Compt File #6937.

Territory within a fire protection district may be included in an extension to a fire district only if the fire protection district is dissolved or diminished. 1955 Ops St Compt File #7480.

A petition for the alteration of boundaries of a fire protection district which is signed by resident taxpayers owning at least one-half of the total assessed valuation of the property owned by resident taxpayers in the portion of the district to remain intact would be sufficient if there are no resident taxpayers in the portion of the district to be excluded. 1956 Ops St Compt File #7967.

Two new fire districts may be created within the boundaries of an existing district only by first dissolving the latter fire district. 1967 Ops St Compt File #549.

A town may alter the boundaries of a fire protection district to exclude an area from the district. 1969 Ops St Compt File #480.

Agency Opinions

There is no authority in the Consolidated Laws for the creation and operation of a fire district to include an existing village and an adjacent fire protection district and there is a specific statutory prohibition against it. However, Chapter 595 of the Laws of 1938, as amended, may apply to your village and town, as may some other general but unconsolidated law or special act. This opinion does not include a search for such statutes. 1976 NY Ops Atty Gen July 13.

A fire district has no power to tax real property, no power to assess real property and no power to grant or withhold a real property tax exemption. 1976 NY Ops Atty Gen Dec 29.

A fire district commissioner may not hold the office of treasurer of the fire district but may hold the office of treasurer of a fire company. 1977 NY Ops Atty Gen March 2.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Permissive referendum, §§ 90 et seq.

Jurisprudences:

18A NY Jur 2d Civil Servants and Other Public Officers and Employees § 62 .

25 NY Jur 2d Counties, Towns, and Municipal Corporations § 34 .

26 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 486, 1002—1004, 1011, 1045, 1047, 1105 .

§ 172-e. Change of name of fire district

The name of a fire district may be changed upon a resolution of the board of fire commissioners of such fire district after a public hearing thereon. Such public hearing shall be held prior to the first day of September in any year. The notice of such hearing shall state the proposed new name and shall be published and posted, and such hearing shall be held, in the manner provided in this article for a hearing upon the establishment of a fire district upon petition. After such hearing and upon the evidence given thereat, the board of fire commission-

ers shall determine by resolution whether it be in the public interest to change the name of such fire district. If it be so determined, the board of fire commissioners, by an approving vote of not less than three-fifths of the voting strength of the board, shall adopt a resolution establishing the new name for the fire district to take effect on the first day of January of the next fiscal year of the fire district. Within ten days after the passage of such resolution, the fire district secretary shall file a certified copy of such resolution (1) in the office of the town clerk of each town in which such district is situated, (2) in the office of the county clerk of each county in which such district is situated, (3) in the office of the clerk of the board of supervisors of each county in which such district is situated, and (4) in the office of the state department of audit and control at Albany, New York.

HISTORY:

Add, L 1963, ch 381, eff April 16, 1963.

Agency Opinions

A fire district has no power to tax real property, no power to assess real property and no power to grant or withhold a real property tax exemption. 1976 NY Ops Atty Gen Dec 29.

A fire district commissioner may not hold the office of treasurer of the fire district but may hold the office of treasurer of a fire company. 1977 NY Ops Atty Gen March 2.

One person may not hold simultaneously the positions of a member of a town board and fire district commissioner. 1987 NY Ops Atty Gen No. 87-69 (Informal).

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

18A NY Jur 2d Civil Servants and Other Public Officers and Employees § 62 .

26 NY Jur 2d Counties, Towns, and Municipal Corporations § 982 .

§ 172-f. Resolution and hearing for diminution of fire district boundaries

1. Irrespective of the manner of its original establishment, whenever a board of fire commissioners resolves, by a two-thirds vote, to diminish the boundaries of such fire district, so as to exclude territory previously situate within such fire district, and after a public hearing thereon, held jointly by the fire district and the town in which such territory to be excluded is situate, the boundaries of such fire district may be altered in accordance with such resolution.

2. Such resolution of proposed diminution shall be signed by two-thirds of the members of the board of fire commissioners and shall be acknowledged or approved in the same manner as a deed to be recorded. The members of the board of fire commissioners shall jointly hold a public hearing with the members of the town board in which such territory is located and shall cause a notice thereof to be published at least once in a newspaper having general circulation in the territory affected. The first publication thereof shall be not less than ten days nor more than twenty days before the day designated therein for the hearing. Such notice shall specify the time when and the place where the board of fire commissioners and the town board will meet to hear all persons interested in the subject, and shall specify the territory affected. Cost of publication shall be borne solely by the fire district. Such notice shall also specify the area to be included in a proposed fire protection district, which fire protection district shall include the area of the fire district proposed to be excluded.

3. After a hearing held upon notice as hereinbefore provided and upon the evidence given thereat, the board of fire commissioners and the town board shall determine by resolution:

(a) Whether all the property and property owners within the area proposed to be excluded from the district and included in the fire protection district are benefited thereby;

(b) Whether all the property and property owners benefited are included within the limits of the proposed fire protection district;

(c) Whether it is in the public interest to grant in whole or in part the diminution of the district and the creation of the fire protection district by the town board.

If the board of fire commissioners and the town board shall determine that it is in the public interest to diminish the fire district and create the fire protection district but shall find that any part or portion of the property or property owners within the proposed area to be excluded from the fire district are not benefited thereby or that certain property or property owners benefited thereby have not been included in the proposed fire protection district, the board of fire commissioners and the town board shall specify the necessary changes of the boundaries of the area to be excluded from the fire district and the boundaries of the fire protection district in order that only such property and property owners as are benefited, shall be included within such proposed excluded area and within the fire protection district, and the board of fire commissioners shall, together with the town board, call a further hearing at a definite place and time not less than fifteen nor more than twenty-five days after such determination. Notice of such further hearing shall be published in the manner provided in this section except that such notice shall also specify the manner in which it is proposed to alter the boundaries of the area to be excluded and the boundaries of the fire protection district. Such further hearing shall be conducted in the same manner as the original hearing. If, and when, the board of fire commissioners and the town board shall determine in the affirmative all of the questions set forth in this subdivision, the board of fire commissioners may adopt a resolution approving the diminution of the fire district and the town board may adopt a resolution approving the establishment of the fire protection district, all as the boundaries shall be finally determined.

HISTORY:

Add, L 1985, ch 75, § 1, eff May 7, 1985.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

18A NY Jur 2d Civil Servants and Other Public Officers and Employees § 62 .

26 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 975, 983, 999, 1000 .

§ 172-g. Filing of determination

1. Whenever the board of fire commissioners and the town board shall adopt a resolution diminishing the area of a fire district and including such area in a fire protection district, the town clerk shall cause a certified copy of such resolution to be duly recorded in the office of the clerk of the county in which such fire district and fire protection district are located, and shall, within ten days cause a certified copy of such resolution to be filed in the state department of audit and control at Albany, New York. When so recorded, such resolution shall be presumptive evidence of the regularity of the establishment of the fire protection district and the diminution of the fire district. The expense of such recording shall be a charge against the fire district. The said determination shall be final and conclusive unless a proceeding has been commenced for a review in the manner provided by article seventy-eight of the civil practice law and rules within thirty days from the time of recording thereof.

2. In the event that the boundaries of a fire district having indebtedness, either bonded or temporary, shall be diminished pursuant hereto, such district shall continue in law as it existed immediately prior to such change of boundaries for the purpose of paying such indebtedness, and there shall be annually assessed and levied upon and collected from the taxable real property within such district as it existed immediately prior to such diminution of its boundaries, and in the same manner and at the time and by the same officers as town taxes are assessed, levied and collected, a sum sufficient to pay such indebtedness and interest thereon as the same shall become due. All and only the real property within the diminished boundaries of the district as they exist after the diminution thereof shall be liable for the payment of indebtedness incurred for the purposes of such district after such diminution. For the purposes hereof, such diminution of boundaries shall be deemed effective upon the adoption by the town board of the resolution providing therefor, unless such resolution shall specify some other date for such purpose, in which case such diminution shall be deemed effective upon the date so specified.

HISTORY:

Add, L 1985, ch 75, § 1, eff May 7, 1985.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

18A NY Jur 2d Civil Servants and Other Public Officers and Employees § 62 .

26 NY Jur 2d Counties, Towns, and Municipal Corporations § 1000 .

§ 173. Filing of determination

1. Whenever the town board or boards shall adopt a resolution establishing or extending a fire alarm district or a fire protection district, or consolidating two or more adjoining fire districts or fire protection districts, or altering the boundaries of a fire district or fire protection district, or dissolving a fire district, a fire alarm district or fire protection district, the town clerk or clerks shall cause a certified copy of such resolution to be duly recorded in the office of the clerk of the county or counties in which such fire district, fire alarm district, fire protection district, or consolidated or altered fire districts, or consolidated fire protection districts, are located, and shall, within ten days cause a certified copy of such resolution to be filed in the state department of audit and control at Albany, New York. When so recorded, such resolution shall be presumptive evidence of the regularity of the establishment, extension, consolidation, dissolution or alteration of such district or districts. The expense of such recording shall be a charge against the district or districts. The said determination shall be final and conclusive unless a proceeding has been commenced for review in the manner provided by article seventy-eight of the civil practice law and rules within thirty days from the time of recording thereof.

2. Whenever the town board or boards shall adopt a resolution establishing or extending a fire district for which it is proposed that an expenditure is to be financed by the issuance of bonds, notes, certificates or other evidences of indebtedness of the fire district, such resolution or determination shall be submitted to the state comptroller for approval in the following manner:

(a) Within ten days after the adoption of a resolution by a town board approving the establishment or extension of such a district, the town clerk of the town shall file a certified copy of such resolution, in duplicate, in the office of the state department of audit and control at Albany, New York, together with an application, in duplicate, for permission to create or extend such district as the case may be. Such application shall be executed and verified by the supervisor, or by such other officer of the town as the town board shall determine, and shall include the following:

(1) A certified copy of the petition, if there is one, omitting, however, the signatures and acknowledgments or proofs, or authentications.

(2) An itemized statement of the existing indebtedness of the town, both temporary and bonded, including the indebtedness of the town for all special district purposes.

(3) A statement of the aggregate assessed valuation of the taxable real property situated in the proposed district or extension thereof, and, if there is a petition, of the portion thereof owned by resident owners.

(b) Whenever such an application shall be filed in the office of the department of audit and control, the state comptroller shall within five days thereafter give notice thereof to the board of supervisors of the

county in which such proposed district or extension is located by filing with the clerk of such board of supervisors one copy of such application. At any time within fifteen days of the filing of the application, said board of supervisors may file an objection, in writing, in the office of said department of audit and control. In addition, the state comptroller shall determine whether the public interest will be served by the creation or extension of the district and also whether the cost thereof will be an undue burden upon the property of the proposed district or extension. The state comptroller may make such determinations upon the original or any amended application, or in his discretion may require the submission of additional information or data in such form and detail as he shall deem sufficient, or may cause an investigation to be made, to aid him in making the determinations above mentioned.

3. Upon the expiration of fifteen days from the date of the filing of such application with the clerk of the board of supervisors and upon reaching a determination, the comptroller shall make an order, in duplicate, granting or denying permission for the creation or extension of the district and shall file one copy of such order in the office of the state department of audit and control at Albany, New York, and the other in the office of the town clerk of the town in which the proposed district or extension is located. The town clerk shall present such order to the town board of the town at the next meeting thereof.

4. If the state comptroller shall deny permission for the creation or extension of the district, the town board shall forthwith adopt an order denying the petition. If the state comptroller shall grant permission therefor or if permission of the state comptroller is not required, the town board may adopt an order establishing the district or extension as the boundaries shall be finally determined. The town clerk shall cause certified copies of its resolution and such order to be duly recorded in the office of the clerk of the county or counties in which such fire district is located. When so recorded such resolution and order shall be presumptive evidence of the regularity of the establishment or extension of such district. The expense of such recording shall be a charge against the district. The said determination shall be final and conclusive unless a proceeding for review in the manner provided by article seventy-eight of the civil practice law and rules has been commenced within thirty days from the time of the recording thereof. Within ten days after the adoption of such order by the town board, establishing the district or extension, the town clerk shall cause a certified copy of such order to be filed in the office of the state department of audit and control at Albany, New York.

5. If the petition for the establishment of a fire district shall provide for the dissolution of an existing coterminous water supply district having no bonded indebtedness, then upon the establishment of the fire district the district so established shall assume and pay all the liabilities and indebtedness of the water supply district so dissolved.

HISTORY:

Add, L 1932, ch 634; amd, L 1934, ch 816, § 4; L 1940, ch 432, § 4; L 1941, ch 645; L 1945, ch 468, § 1; L 1945, ch 730, § 2; L 1946, ch 191, § 1, eff March 22, 1946; L 1947, ch 533, § 2; L 1947, ch 553, § 1; L 1951, ch 822; L 1956, ch 156, eff March 22, 1956; L 1959, ch 190; L 1962, ch 310, § 451, eff Sept 1, 1963,1; L 1995, ch 397, § 2, eff Sept 1, 1995 (see 1995 note below),3, eff Sept 1, 1995 (see 1995 note below); L 2000, ch 37, § 13, eff Sept 1, 2000.

Editor's Notes: See 1962 note under § 155.

Laws 1995, ch 397, § **14,** eff Sept 1, 1995, provides as follows:

§ 14. This act shall take effect on the thirtieth day after it shall have become a law and shall apply to any proceeding for which a notice of hearing shall have been published after the effective date of this act.

Notes to Decisions

Various provisions of this section indicate the Legislature's legitimate concern for fiscal integrity of fire districts created or extended, and its grant of power of approval and disapproval to the State Comptroller is in line with the constitutional powers of that office. Cheektowaga v Levitt, 12 A.D.2d 848, 209 N.Y.S.2d 911, 1961 N.Y. App. Div. LEXIS 13207 (N.Y. App. Div. 3d Dep't), aff'd, 10 N.Y.2d 931, 224 N.Y.S.2d 12, 179 N.E.2d 856, 1961 N.Y. LEXIS 950 (N.Y. 1961).

The consent of State Comptroller is necessary to extension of town fire district. 1945 Ops St Compt 39.

Proceedings for the formation of a fire protection district may be initiated by the town board upon its own motion and without petition and the consent of the State Comptroller is not required for the formation of a fire protection district. 1946 Ops St Compt 592.

There is no requirement that a copy of the order of the State Comptroller granting permission for the establishment or extension of a fire district be recorded in the office of the county clerk. 1946 Ops St Compt 712.

Real property forming part of the New York City water supply system, excepting aqueducts, is taxable if benefited by the establishment of the district. 1947 Ops St Compt 176.

(1) A fire district may be established by a town board only after compliance with the procedure prescribed in Article 11 of the Town Law. (2) There is no requirement that the petitioner possess fire apparatus, equipment or housing. 1947 Ops St Compt 330.

Expenses incurred by town in defending a certiorari proceeding to review its determination establishing a fire district may be charged back against the district as expenses incidental to its creation. 1954 Ops St Compt File #6887.

Approval of the State Comptroller is not required to establish a fire protection district. 1962 Ops St Compt #698.

Extension of fire district to include territory of fire protection district dissolved pursuant to CLS Town § 172-d is subject to approval of State Comptroller. 1992 Op St Compt No. 92-37.

A public hearing must be held and the approval of the State Comptroller obtained before a fire district may be established or extended. 1947 Ops St Comp 70.

Agency Opinions

A member of a town board may not be compensated for legal services rendered in the formation of a fire protection district. 1953 NY Ops Atty Gen Oct 9 (informal).

Appointment of the fire district commissioner expires at end of year in which he is appointed. 1965 NY Ops Atty Gen Jan 4.

A fire district has no power to tax real property, no power to assess real property and no power to grant or withhold a real property tax exemption. 1976 NY Ops Atty Gen Dec 29.

A fire district commissioner may not hold the office of treasurer of the fire district but may hold the office of treasurer of a fire company. 1977 NY Ops Atty Gen March 2.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 170, 172-d, 189-a.

Proceeding against body or officer, CLS CPLR §§ 7801 et seq.

Jurisprudences:

6 NY Jur 2d Article 78 and Related Proceedings § 149.

18A NY Jur 2d Civil Servants and Other Public Officers and Employees § 62 .

26 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 976, 978, 987, 996, 1005—1010, 1014, 1015 .

§ 174. Fire district officers

1. Whenever a fire district shall be established, within ten days thereafter the town board of the town in which such district is located or, in the case of a district including territory in two or more towns, the town boards of such towns acting jointly by a majority vote of the members of each of such town boards, shall appoint five fire district commissioners and a treasurer for such district who shall hold their respective offices until the thirty-first day of December next succeeding; provided, however, that if such district be established subsequent to the first day of October in any year, the officers so appointed by the town board shall hold office until the thirty-first day of December of the next succeeding calendar year. A person so appointed as fire district commissioner shall not serve as chief or assistant chief of the fire district fire department after taking his oath of office as such commissioner and during the time he serves as such commissioner pursuant to such appointment. The town clerk shall immediately notify the appointees of their appointment and of the time and place which he shall fix for the organization meeting of the board of fire commissioners, which meeting shall be held not later than ten days after the appointment of said officers. At such organization meeting, the treasurer shall preside until such time as a chairman of the board of fire commissioners shall be chosen, but such treasurer shall not be entitled to a vote at such meeting. The board of fire commissioners shall appoint a secretary who shall hold office until the thirty-first day of December following the first election of fire district officers.

2. The first election of fire district officers shall be held on the second Tuesday in December next succeeding the establishment or consolidation of such fire district; provided, however, that if such district be established at a time subsequent to the first day of October in any year, the first election of fire district officers shall be held on the second Tuesday in the month of December of the next succeeding calendar year. At the first annual election of fire district officers, five district commissioners shall be elected and a treasurer. The person receiving the greatest number of votes for the office of fire commissioner shall be elected for a term of five years; the person receiving the second highest number of votes shall be elected for a term of four years; the person receiving the third highest number of votes shall be elected for a term of three years; the person receiving the fourth highest number of votes shall be elected for a term of two years and the person receiving the fifth highest number of votes shall be elected for a term of one year. In the event that two persons shall receive the same number of votes the terms of office shall be decided by lot. At each subsequent election of fire district officers a commissioner shall be elected for the full term of five years. In the event that two or more persons receive the same number of votes thereat, a special election between the tying parties receiving the highest number of votes to fill the vacancy shall be held within forty-five days after such election. The fire district treasurer shall be elected for a term of three years. The fire district secretary shall be appointed by the fire district commissioners and shall serve for a period of one year. The fire district secretary in office at the time such election is held shall immediately notify the officers elected of their election and that an organization meeting will be held on the day specified in said notice, which shall not be later than the fifteenth day of January next ensuing. At such organization meeting, the treasurer shall preside until such time as a chairman of the board of fire commissioners shall be chosen, but such treasurer shall not be entitled to a vote at such meeting.

2-a. The fire district commissioners may adopt a resolution establishing the office of director of purchasing and appoint a director of purchasing who shall serve for a term, not to exceed five years, to be fixed by the fire district commissioners. If the fire district commissioners so determine, the duties of the director of purchasing may be combined with the duties of any other fire district officer or employee except members of the board of fire district commissioners and the fire district treasurer. The fire commissioners of any fire district in which the office of director of purchasing shall have been established may adopt a resolution abolishing such office, and upon the expiration of the term of office of the incumbent or such other time as may be set forth in the resolution, such office shall be abolished and no successor shall be appointed.

3. The fire district commissioners shall receive no compensation for their services, but a commissioner acting as secretary of the fire district may be compensated. The fire district secretary shall receive such compensation as the fire district commissioners may determine, but if the secretary be a member of the board of fire commissioners his compensation shall be fixed by the other members of the board. The fire district treasurer and the director of purchasing, when such office has been established, shall receive such compensation as the fire district commissioners may determine. Each fire district treasurer, each secretary in fire districts having a separate secretary, and each director of purchasing, when such office has been established, shall before entering upon the duties of his office take the constitutional oath of office and file the same with the town clerk of the town or one of the towns in which such fire district is located. The treasurer of each fire district shall before entering upon the duties of his office, execute and file with the town clerk of the town or one of the towns in which such fire district is

located, an official undertaking, conditioned for the faithful performance of his duties and that he will and truly keep, pay over and account for all moneys of the fire district coming into his hands as treasurer of the fire district. The undertaking shall be in such form, in such sum and with such sureties as the fire commissioners shall direct and approve and such approval shall be indicated upon such undertaking. The fire commissioners of any fire district may require the director of purchasing, when such office has been established, before entering upon the duties of that office, to execute and file with the town clerk of the town or one of the towns in which such fire district is located, an undertaking, conditioned for the faithful performance of his duties and for a due accounting of all property that may come under his care, custody and control. Such undertaking shall be in such form, in such sum and with such sureties as the fire commissioners shall direct and approve and such approval shall be indicated upon such undertaking.

4. The fire district treasurer or any commissioner of the fire district, whenever so appointed, may also act as fire district secretary. When the position of fire district treasurer or fire district secretary is appointive, and in the case of the director of purchasing, when such office has been established, and if no qualified resident of the district is willing to perform the duties of fire district treasurer, fire district secretary or director of purchasing, a person who is a nonresident of such fire district may be appointed as fire district treasurer, fire district secretary or director of purchasing. A person shall not hold the offices of fire district commissioner and fire district treasurer at the same time. A person shall not hold the office of fire district commissioner and the office of chief or assistant chief of the fire department of the fire district at the same time.

Notwithstanding any inconsistent provision of law, a person who is a fire district commissioner, may, if he is otherwise qualified, be a candidate for nomination, and may be nominated by the fire district fire department, for the office of chief or any assistant chief of the fire department, but only if such commissioner has filed with the fire district secretary at least five days, but not more than ten days, before the meeting of the fire department at which any such nomination would be made a written notice that he will be a candidate for such nomination. If a fire district commissioner is a candidate for nomination for any such office in the fire department and he is duly nominated for such office at a meeting of the fire department, he shall forthwith cease to be a fire district commissioner and his office as such commissioner shall thereupon become vacant. If a fire district commissioner is a candidate for nomination for any such office in the fire department and he is defeated for such nomination at the meeting of the fire department, he shall not participate in any vote of the board of fire commissioners in relation to the appointment of the successful nominee to the office for which such commissioner and such successful nominee were opposing candidates.

Notwithstanding any inconsistent provision of law, a person who is the chief or an assistant chief of the fire district fire department, if he is otherwise qualified, may be elected to the office of fire district commissioner or may be appointed to the office of fire district commissioner to fill a vacancy and, if he is so elected or appointed, his office as chief or assistant chief, as the case maybe [may be][*], shall become vacant upon his taking his oath of office as fire district commissioner.

5. A person who has been convicted of arson in any degree shall not be eligible for nomination, election or appointment to the office of fire district commissioner or fire district officer.

6. Each commissioner of a fire district before entering upon the duties of his office, shall take the constitutional oath of office and file the same with the town clerk of the town or one of the towns in which such fire district is located.

7. A fire district is a political subdivision of the state and a district corporation within the meaning of section three of the general corporation law.[**] The officers and employees of a fire district, including the paid and volunteer members of the fire department thereof, are officers and employees of such fire district and are not officers or employees of any other political subdivision.

HISTORY:

Add, L 1932, ch 634, eff Jan 1, 1934; amd, L 1934, ch 816, § 5; L 1935, ch 645, § 1; L 1937, ch 451, eff May 21, 1937; L 1938, ch 243; L 1940, ch 374, § 19; L 1940, ch 432, § 5; L 1942, ch 672; L 1945, ch 550; L 1957, ch 498; L 1960, ch 181, § 1; L 1962, ch 392, §§ 1, 2; L 1972, ch 776, § 1; L 1973, ch 540, § 1; L 1974, ch 511, § 1, eff May 23, 1974; L 1974, ch 808, § 1, eff June 7, 1974; L 1985, ch 719, § 3, eff Aug 1, 1985; L 1989, ch 269, § 1; L 1994, ch 448, § 1, eff Sept 18, 1994, expired and repealed Oct 18, 1994; L 1997, ch 77, § 1, eff May 23, 1997; L 2002, ch 670, §§ 1–3, eff Dec 9, 2002; L 2009, ch 74, § 6, eff March 21, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

§ 18. Savings clause. Notwithstanding the repeal or amendment of any law by this act, nothing in this act shall be construed to impair the consolidation or dissolution of any local government entity pursuant to any such repealed or amended law if there was commenced in or for such local government entity prior to the effective date of this act a consolidation or dissolution proceeding pursuant to such law, in which event the provisions of such former law shall govern such proceeding as though such former law had not been repealed hereby.

Amendment Notes: 2009. Chapter 74, § 6 amended:

By designating former formerly sub 1, par (a) as entire sub 1 and deleting sub 1, par (b).

Sub 2 by deleting at fig 1 "or consolidated".

[*]The bracketed words have been inserted by the Publisher.

[**]§ 3 of the General Corporation Law has been repealed; similar provisions may be found in CLS Bus Corp § 102.

Notes to Decisions

Analysis

1. In general
2. Compatibility and conflicts, generally
3. —Board of education member
4. —Fire district secretary
5. —Fire district treasurer
6. —Part-time judge; justice
7. Elections
8. Meetings
9. Oath and bond
10. Powers and duties
11. Compensation and benefits
12. Term of office and vacancies

1. In general

Auditing provisions of county charter, which empowered county comptroller to examine and audit accounts and records of any special district within county, did not authorize audit of financial affairs of fire district, which is political subdivision of state pursuant to CLS Town § 174(7) and therefore subject to exclusive jurisdiction of State Comptroller to conduct annual audits under CLS Gen Mun § 30 et seq. In re Inwood Fire Dist., 152 Misc. 2d 518, 577 N.Y.S.2d 575, 1991 N.Y. Misc. LEXIS 668 (N.Y. Sup. Ct. 1991).

Since a fire district is a political subdivision of the state, its paid drivers are, in fact, paid firemen. 1962 Ops St Compt #268.

2. Compatibility and conflicts, generally

Offices of fire district commissioner and water district commissioner (in a district operated by a separate board) are incompatible. 1946 Ops St Compt 651.

A fire district commissioner is a public officer and, although he serves without compensation, he may not enter into a contract with the fire district which he serves. 1955 Ops St Compt File #7343.

A fire district commissioner who is an employee of a business which services district vehicles has a conflict of interest in any contracts between the district and the business unless the exception contained in section 802(1)(b) is applicable. 1984 Op St Comp File #84-37.

3. —Board of education member

The offices of Fire District Commissioner and Member of the Board of Education are compatible. 1964 Ops St Compt File #719.

4. —Fire district secretary

A fire district may not sell at private sale its capital note to a fire company, a membership corporation, where all of the fire district commissioners and the secretary-treasurer of such district are members of the fire company. The fire district may accept the low bid of such a membership corporation on the public sale of a capital note if no member of the board of fire commissioners is an officer or director of the membership corporation. 1960 Ops St Compt File #400.

The same person may not hold the offices of town fire district commissioner and fire district treasurer, but may hold either of such offices and the office of fire district secretary. 1964 Ops St Compt #183.

5. —Fire district treasurer

The office of fire district treasurer is incompatible with employment as a paid fireman of the fire district. 1955 Ops St Compt File #7362.

A fire district may not sell at private sale its capital note to a fire company, a membership corporation, where all of the fire district commissioners and the secretary-treasurer of such district are members of the fire company. The fire district may accept the low bid of such a membership corporation on the public sale of a capital note if no member of the board of fire commissioners is an officer or director of the membership corporation. 1960 Ops St Compt File #400.

The same person may not hold the offices of town fire district commissioner and fire district treasurer, but may hold either of such offices and the office of fire district secretary. 1964 Ops St Compt #183.

The treasurer of a fire district may legally serve on the planning board of a town in which the fire district is located. 1968 Ops St Compt File #819.

6. —Part-time judge; justice

A justice of the peace in a town of the first class may hold the offices of fire commissioner of a fire district and member of the zoning board of appeals although these offices could not be held by a justice of the peace in a town of the second class. 1965 Ops St Compt File #879.

A part-time judge may serve as a secretary to a town fire district, and as a chair of the annual school board meeting for the presentation of the school budget. Advisory Committee on Judicial Ethics, Op 89-155 (1990).

A part-time judge may serve as captain of a voluntary rescue squad, and as secretary for the board of fire commissioners. Advisory Committee on Judicial Ethics, Op 90-3 (1990).

A part-time judge should not seek election to the position of treasurer of the local fire district. However, the judge may continue to serve in that position in the fire district until the end of the current term because there is no conflict of incompatibility in the duties of the two offices, but the judge cannot run for re-election while retaining judicial office. Advisory Committee on Judicial Ethics, Op 90-50 (1990).

Full-time judge should not serve as Commissioner of volunteer fire department, even though fire department is not in fire district (which is political subdivision of state), since such service as commissioner would be virtually identical in terms of duties and responsibilities. Ops Adv Comm Jud Ethics No. 03-79.

7. Elections

Fire district's board of commissioners properly refused to remove board candidate's request to remove his name from ballot, and thus result of election that he won would not be set aside on petition of losing candidate in Article 78 proceeding, where winning candidate was properly nominated, his subsequent discovery that he could not continue his employment as city police officer if he accepted nomination did not disqualify him, and Town Law contains no provision authorizing fire district commissioners to remove candidate's name from ballot once he or she has duly filed proper nominating petition. Cusumano v Board of Comm'rs, 251 A.D.2d 404, 674 N.Y.S.2d 86, 1998 N.Y. App. Div. LEXIS 6636 (N.Y. App. Div. 2d Dep't 1998).

A fire district commissioner may be nominated for the office of chief engineer or assistant engineer, but upon being nominated he ceases to be a fire district commissioner. 1963 Ops St Compt #171.

Election inspectors and ballot clerks at fire district elections may not be compensated from fire district funds. 1946 Ops St Compt 140.

A part-time judge should not seek election to the position of treasurer of the local fire district. However, the judge may continue to serve in that position in the fire district until the end of the current term because there is no conflict of incompatibility in the duties of the two offices, but the judge cannot run for re-election while retaining judicial office. Advisory Committee on Judicial Ethics, Op 90-50 (1990).

8. Meetings

The attendance of three fire district commissioners is necessary for a quorum and the affirmative vote of three such commissioners is necessary for the adoption of any resolution. 1953 Ops St Compt File #5967.

9. Oath and bond

Where one who was elected to office of fire district commissioner in December, 1939, failed to take and file the oath of office, as required by § 174, subd. 5, and he illegally held office until October 1, 1941, when board of fire district commissioners declared a vacancy to exist and appointed another to fill it, inasmuch as a vacancy in office had existed for over thirty days, appointment by board was violative of § 176, subd. 3. Rivette v Baker, 265 A.D. 89, 37 N.Y.S.2d 912, 1942 N.Y. App. Div. LEXIS 5685 (N.Y. App. Div. 3d Dep't), modified, 265 A.D. 894, 1942 N.Y. App. Div. LEXIS 6369 (N.Y. App. Div. 3d Dep't 1942).

Fire district commissioners not required to furnish official undertaking. Fire district treasurer must provide official undertaking. 1945 Ops St Compt 538.

Husband and wife may sign individually as sureties on fire district treasurer's bond, if both meet qualifications of section 11 of the Public Officers Law. It is not necessary to re-submit proposition to pay salary to fire district treasurer, once such proposition has been adopted. Board of fire commissioners should fix secretary's compensation annually. Treasurer's bond must be renewed, or new bond filed for each term of office. 1946 Ops St Compt 105.

Under subd. 3 of this section, as well as subd. 4 of § 176, it is clear that the undertaking of a fire district treasurer should be filed with the town clerk. 1961 Ops St Compt File #139.

Secretary of fire district may administer oath of office to district commissioner, but treasurer of fire district may not administer such oath. 1987 Op St Compt No. 87-60.

The constitutional oath of office of fire district officers, such as the treasurer, secretary, and commissioner, must be filed with the town clerk of the town, or one of the towns, in which the district is located, before such an officer enters upon the duties of his office. 1960 Ops St Compt File #341.

10. Powers and duties

Fire company could not be held vicariously liable for alleged negligence of firefighter in operating her vehicle in response to emergency since, under statute, (1) fire district, not fire company, employs, supervises and controls individual firefighters, (2) district is responsible for prevention and extinguishment of fires, (3) district possesses virtually total supervision and control over all aspects of creation and staffing of fire companies as well as over rules and regulations governing firefighting practices and procedures, and (4) district is answerable for negligence of its firefighters committed in course of their duties. Knapp v Union Vale Fire Co., 141 A.D.2d 509, 529 N.Y.S.2d 132, 1988 N.Y. App. Div. LEXIS 6348 (N.Y. App. Div. 2d Dep't 1988).

A chief engineer of the Fire Department of a town is not a public officer since he has no independent prerogatives or sovereign power, but is subject to the jurisdiction and control of the fire commissioners, and so is subject to removal from his position without the preferring of formal charges and without being accorded a hearing. Application of Barber, 100 N.Y.S.2d 668, 198 Misc. 135, 1950 N.Y. Misc. LEXIS 2169 (N.Y. Sup. Ct. 1950), aff'd, 278 A.D. 600, 101 N.Y.S.2d 924, 1951 N.Y. App. Div. LEXIS 4071 (N.Y. App. Div. 1951).

Officials of fire districts are merely administrative officials who are not subject to ordinary actions, and their inaction must be remedied, if at all, by mandamus. Hellawell v Grafeld, 22 F. Supp. 765, 1938 U.S. Dist. LEXIS 2274 (D.N.Y. 1938).

A chief engineer employed as a fire district commissioner becomes a paid fireman and loses his status as a volunteer fireman. 1954 Ops St Compt File #6654.

11. Compensation and benefits

A member of the Board of Fire Commissioners may be reimbursed for car expense and meals when such costs are incurred on district business. 1961 Ops St Compt #663.

A fire district may not provide disability benefits coverage for its employees. 1961 Ops St Compt #900.

A member of a board of fire commissioners of a fire district may not be provided health insurance through the state health insurance plan at the expense of the district. 1991 Op St Compt No. 91-44.

Salary of fire district treasurer, may not be increased by increasing it in the budget, though budget was submitted to vote of fire district electors. Defeat of budget does not affect such salary. Payment of increased salary to treasurer in prior years was improper. 1955 Ops St Compt File #7512.

Subdivision 3 of this section confers authority upon a town to compensate the fire district secretary on an annual basis, and the method whereby he may be compensated is set forth in § 176. 1964 Ops St Compt #533.

A fire district commissioner, who travels to an approved convention or other firemanic function in his own camper and takes lodging therein, may not be reimbursed the equivalent of a reasonable hotel or motel charge, but may be paid his actual and necessary expenses. 1968 Ops St Compt File #973.

12. Term of office and vacancies

Mandamus to compel town board and members thereof to fill vacancy is the proper remedy in case where there is no dispute of facts, and person illegally appointed by board of fire district commissioners to fill the vacancy was properly omitted as a party in proceeding. Rivette v Baker, 265 A.D. 89, 37 N.Y.S.2d 912, 1942 N.Y. App. Div. LEXIS 5685 (N.Y. App. Div. 3d Dep't), modified, 265 A.D. 894, 1942 N.Y. App. Div. LEXIS 6369 (N.Y. App. Div. 3d Dep't 1942).

A fire district secretary-treasurer serves for a term of one year, notwithstanding that the appointment was designated as a temporary one. 1974 Ops St Compt File #825.

Agency Opinions

Analysis

1. In general
2. Compatibility and conflicts, generally
3. —Board of education member
4. —Fire company director
5. —Fire company line officer
6. —Fire district counsel
7. —Fire district secretary
8. —Fire district treasurer
9. —Highway superintendent
10. Elections
11. Meetings
12. Oath and bond
13. Powers and duties
14. Compensation and benefits
15. Term of office and vacancies

1. In general

All real property owned by a school district, situated within a village, is subject to special ad valorem levies and special assessments of a fire district. 1966 NY Ops Atty Gen Aug 22 (Informal), 1966 N.Y. AG LEXIS 106.

A town is not liable for negligence on the part of members of a fire company engaged in fire fighting or other authorized activities of a fire district, even though the town serves as a conduit for the raising of taxes to be used for fire district purposes. 1967 NY Ops Atty Gen Mar 22.

A fire district is a public corporation and may hold title to real property. 1974 NY Ops Atty Gen Aug 22 (Informal), 1974 N.Y. AG LEXIS 135.

Paid firemen of paid fire departments are public employees and not public officers; their residence qualifications are determined on that basis. 1975 NY Ops Atty Gen Aug 20 (informal).

A fire district has no power to tax real property, no power to assess real property and no power to grant or withhold a real property tax exemption. 1976 NY Ops Atty Gen Dec 29.

The term "district" as used in section 64(2) of the Town Law refers to the improvement districts discussed in Article 12 of the Town Law, and, thus, section 64(2) does not infringe upon the condemnation power accorded a fire district board of fire commissioners as provided for in section 176(14) of the Town Law. 1979 NY Ops Atty Gen Apr 6 (informal).

An alien may not be a fire district officer; an alien may not vote in a fire district election; an alien may be a volunteer fireman; an alien may be appointed fire chief or assistant fire chief and may be elected to fire company corporate office. 1980 NY Ops Atty Gen Feb 6 (Informal), 1980 N.Y. AG LEXIS 152.

Person convicted of arson in any degree is, by statute, ineligible to hold office of fire district commissioner; certificate of relief from disabilities does not apply to public office such as fire district commissioner. 1998 NY Ops Atty Gen 98-50 (informal), 1998 N.Y. AG LEXIS 54.

Discussion of legality of and procedure for consolidation of two adjoining fire districts which are located in different towns, and the effect thereof on existing and future fire protection contracts. 1978 Op St Compt File #278.

Since fire district is public corporation as provided in CLS Town § 174(7) and defined in CLS Pub Off 86(3), it is "agency" subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-4496.

A fire district is an independent corporate entity governed by a separate board of fire commissioners, whereas a fire protection district is simply a geographic area, with no independent corporate status, for which the town board is responsible for providing fire protection. 1981 Op St Compt File #1.

2. Compatibility and conflicts, generally

3. —Board of education member

A person may hold the following positions at the same time: member of board of education of school district, part-time police officer of town and fire district commissioner. 1978 Op St Compt File # 297.

4. —Fire company director

Positions of fire district commissioner and member of board of directors of fire company are compatible. 1994 NY Ops Atty Gen I 94-39.

5. —Fire company line officer

A fire district commissioner may also serve as a line officer of a fire company in the fire department of the fire district. 1991 NY Ops Atty Gen I 91-43.

A paid fireman of a fire district should not serve on the board of fire commissioners of that district. 1980 Op St Compt File #7.

6. —Fire district counsel

Compatibility of fire district manager and counsel to the fire district is dependent on duties of each office, which are set independently by each fire district. 1985 NY Ops Atty Gen No. 85-64 (Informal).

7. —Fire district secretary

A fire commissioner may hold the office of secretary and receive such compensation as shall be fixed by the other members of the Board. A fire commissioner may be removed from office only in accordance with the provisions of Public Officers Law § 36. 1971 NY Ops Atty Gen Jan 5.

The same person may not at the same time hold the positions of fire district commissioner and an office in the fire department or fire district, except secretary, even though such an office is not contained in the prohibition against dual office holding contained in Town Law, § 174, subdivision 4. 1974 NY Ops Atty Gen Oct 22.

Positions of fire district commissioner and fire district secretary are compatible. 1985 NY Ops Atty Gen No. 85-64 (Informal).

A fire district commissioner may also serve as paid fire district secretary. 1978 Op St Compt File #676.

8. —Fire district treasurer

A fire district commissioner may not hold the office of treasurer of the fire district but may hold the office of treasurer of a fire company. 1977 NY Ops Atty Gen March 2.

Fire district commissioners and district treasurers may hold any office in a volunteer fire company that is not in the line of firefighting. 1983 NY Ops Atty Gen April 14 (informal).

An employee of the State whose principal employment is not in connection with an activity financed in whole or in part by federal funds, (so as to come within the Hatch Act) or who does not exercise administrative functions in connection with such activity may also serve as treasurer of a fire district so long as the duties of such office may be performed outside his regular work hours of State employment and do not interfere with the performance of his regular duties and so long as no departmental or administrative rule nor the Code of Ethics provides otherwise. 1978 Op St Compt File #635.

9. —Highway superintendent

Assuming the individual concerned is otherwise qualified to hold the offices of village street commissioner and fire district commissioner of a fire district in a town of which the village is a part, there is no incompatibility or conflict of interest in the simultaneous holding of these two offices by the same individual. 1975 NY Ops Atty Gen Nov 5 (informal).

The same person simultaneously may hold the two elective public offices of town superintendent of highways and commissioner of a fire district organized and operating under authority of Town Law Article 11. 1980 NY Ops Atty Gen Jan 9 (informal).

One person may serve simultaneously as a county fire coordinator and a town highway superintendent. 1982 NY Ops Atty Gen March 22 (informal).

There is no legal prohibition against a fire district commissioner serving as superintendent of highways of a town in which the district is situate. 1979 Op St Compt File #915.

A member of a town board should not at the same time serve as fire district commissioner. 1957 NY Ops Atty Gen Nov 19 (informal).

A fire commissioner of a fire district may serve at the same time as an assistant chief of a village fire department with which the fire district in which he is a commissioner contracts for fire protection. 1978 NY Ops Atty Gen May 26.

The determination whether commissioners of a joint fire district are to be elected or appointed must be made at the time of establishment of the district. 1991 NY Ops Atty Gen I 91-44.

Positions of town clerk and fire district commissioner are compatible. 1999 NY Ops Atty Gen I 99-40.

Positions of village mayor and fire commissioner of joint fire district established by that village are incompatible since statutory scheme governing joint fire districts gives towns and village boards substantial power to affect existence and structure of joint fire district. 2004 NY Ops Atty Gen I 04-6.

In constructing a firehouse to be utilized for fire fighting or fire prevention, a fire corporation in a fire district need not comply with town zoning and building regulations. 1983 N.Y. Op. Att'y Gen. No. 83-33.

A fire commissioner may also hold the elective office of town assessor. 1979 Op St Compt File #468.

A fire district commissioner does not have a conflict of interest when the fire district contracts with his adult son for electrical services, providing that the commissioner receives no direct or indirect pecuniary or material benefit as a result of such contracts. 1983 Op St Compt File #83-40.

10. Elections

Because the Town Law is lacking in provisions regulating this subject matter, the provisions of Article 6 of the Election Law govern the nominating procedure and requirements. The provisions peculiarly applicable to nominating petitions for nominating candidates for fire district officers are contained in Election Law § 138, which applies to independent nominations. 1969 NY Ops Atty Gen Dec 23 (Informal), 1969 N.Y. AG LEXIS 115.

It is necessary that a fire district commissioner of a fire district created under Town Law Article 11 (§§ 170–189) be a registered voter in the fire district in order to be elected to or to continue in that office. Providing differing statutory provisions setting qualifications to hold public office in different kinds of governmental units does not constitute an improper exercise of legislative judgment. 1978 NY Ops Atty Gen Dec 18.

11. Meetings

While a board of fire commissioners may properly hold a closed unofficial executive session, official action should be taken only at public meetings. 1955 NY Ops Atty Gen Jan 31 (informal).

Legislative acts of a fire district enacted on a Sunday at a regularly scheduled or duly called special meeting are valid. 1966 NY Ops Atty Gen Mar 15.

Board of commissioners of fire district is public body subject to Open Meetings Law. If board of fire commissioners designates itself as committee or designates committee consisting of at least 2 of its members, those committees also constitute public bodies required to comply with Open Meetings Law. Comm on Open Gov't OML-AO-2282.

Since district corporation is also public corporation, board of commissioners of fire district is public body subject to Open Meetings Law. Comm on Open Gov't OML-AO-2598.

12. Oath and bond

A fire commissioner should take and file the constitutional oath of office. 1956 NY Ops Atty Gen May 22 (informal).

13. Powers and duties

A Town Board may not delegate its authority to issue fire permits to officers of a fire district. 1962 NY Ops Atty Gen Dec 13.

It is questionable whether use of fire department apparatus to transport the body of a deceased fireman for burial is authorized by statute. If a court held that there is no such authorization, the immunity statute would not apply, the Volunteer Firemen's Benefit Law would not provide protection and personal liability might result. 1977 NY Ops Atty Gen Dec 7 (Informal).

A fire district has a duty to provide fire protection services to the general public in all areas of the district, including that portion of a river located within the district, and to render rescue services in that area where emergency rescue services have been organized under General Municipal Law, § 209-b(1). A fire district is not liable for failure to provide fire protection or rescue services. 1983 NY Ops Atty Gen Jan 3 (Informal).

Fire district is public corporation and, therefore, is "agency" required to comply with Freedom of Information Law. Comm on Open Gov't OML-AO-2598.

14. Compensation and benefits

A fire district is not authorized to provide disability benefits coverage for its employees pursuant to the Workmen's Compensation Law. 1967 NY Ops Atty Gen Nov 22 (Informal), 1967 N.Y. AG LEXIS 142.

Volunteer Firemen are not covered by the provisions of the Volunteer Firemen's Benefit Law when attending a funeral, whether such attendance is pursuant to orders or by permission from the chief or fire district commissioners. 1977 NY Ops Atty Gen Dec 7 (Informal).

15. Term of office and vacancies

Where a member of a Board of Fire Commissioners of the Montauk Fire District resigned his office on December 27, 1972 to be effective on December 31, 1972, a vacancy in that office did not occur until January 1, 1973 and any action of the Board of Fire Commissioners to fill such vacancy prior to January 1, 1973 was null and void. 1973 NY Ops Atty Gen Jan 12.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 176.

Jurisprudences:

Texts: Bjorklund, Fishman & Kurtz, New York Nonprofit Law and Practice with Tax Analysis § 3-7.

§ 175. Election of fire district officers

1. An annual election shall be held in each fire district on the second Tuesday in December, except that in the Ocean Bay Park fire district, the Lonelyville fire district, the Davis Park fire district, the Cherry Grove fire district, the Fair Harbor fire district and the Fire Island Pines fire district, Suffolk county, such annual election shall be held on the second Tuesday in July, except that in the town of Salisbury, Herkimer county, such annual election shall be held on the Tuesday next succeeding the first Monday in November from six o'clock in the morning until nine o'clock in the evening and except that in the Belfast fire district, Allegany county, such annual election shall be held on the first Tuesday in December. The board of fire commissioners shall give notice thereof by the publication of a notice once in one or more newspapers having a general circulation in the district. The first publication of such notice shall be not less than twenty-seven days and not more than thirty-four days prior to the date of such election. Such notice shall specify the time when and the place where such election will be held, the officers to be elected thereat and their terms of office, and the hours during which the polls will be open for the receipt of ballots. The secretary of such fire district shall prepare the ballots for all elections of fire district officers and the polls shall remain open for the receipt thereof at all elections of fire district officers from six o'clock in the evening until nine o'clock in the evening and such additional consecutive hours prior thereto as the board of fire commissioners of such district may have determined and specified in the notice thereof. The board of fire commissioners shall designate a resident fire district elector, who shall be a registered voter of the town, to act as chairman of any election of said district and shall designate not less than two nor more than four resident fire district electors, who shall be registered voters of the town to act as election inspectors and ballot clerks at such elections. No elective officer of the fire district shall serve as such chairman or as an election inspector or ballot clerk. The board of fire commissioners may adopt a resolution providing that such chairman, election inspectors and ballot clerks shall be paid for their respective services at any such annual election or at any special election of the fire district. Such resolution, if adopted, shall fix the amount of such compensation, as follows: if the hours during which the polls will be open for the receipt of ballots are from six o'clock in the evening until nine o'clock in the evening, a sum not to exceed thirty-five dollars for each such official; if additional consecutive hours prior to six o'clock in the evening are determined and specified in the notice of election, a sum not to exceed fifty dollars for each such official.

2. Every elector of the town who shall be a registered voter and who shall have resided in the district for the period of thirty days next preceding any election of fire district officers shall be qualified to vote for such officers. Every elector of the town who shall be a registered voter and who shall have resided in the fire district for the period of thirty days next preceding any election at which a proposition shall be submitted, shall be qualified to vote upon such proposition.

3. Every fire district commissioner, treasurer and secretary must at the time of his election or appointment and throughout his term of office be a resident of such fire district. Membership in a volunteer fire company shall not disqualify any such fire district commissioner, treasurer or secretary. A person who has been convicted of arson in any degree shall not be eligible for election or appointment to the office of fire district commissioner, treasurer or secretary. Any fire district commissioner, treasurer or secretary who is convicted of arson in any degree during his term of office shall be disqualified from completing such term of office.

4. There shall be conspicuously placed, by the resident fire elector, distance markers at a distance of one hundred feet from the polling place. Such distance markers shall be so placed at least one-half hour before the opening of the polls and shall remain until such polls are closed. The one hundred foot distance shall be deemed to include a one hundred foot radial measured from the entrances, designated

by the resident fire elector, to a building where such election is being held. While the polls are open no person shall do any electioneering within the polling place, or in any public street within the one hundred foot radial, or within such distance in any place in a public manner. No electioneering banner, button, poster or placard on behalf of or in opposition to any candidate or issue to be voted upon shall be allowed in or upon the polling place or within such one hundred feet therefrom during the election. Any person who willfully violates the provisions of this subdivision shall be guilty of a misdemeanor.

5. All official ballots shall remain in the custody of election inspectors within the polling place from the opening of the polls until the announcement of the result of the canvass and the signing of the inspectors' returns thereof. After the polls shall have been closed at any election held for the election of fire district officers or to vote upon a proposition, the election inspectors and ballot clerks shall immediately canvass publicly the ballots cast and the chairman of the election shall publicly announce the result. Within seventy-two hours thereafter, the chairman, election inspectors and ballot clerks shall execute and file a certificate of the result of the canvass with the board of fire commissioners and with the town clerk of each town in which said district or any part thereof may be located.

6. If in any fire district the number of voters is so great as to render it inexpedient or impossible to conduct the election at one polling place, the board of fire commissioners may divide the fire district into election districts and provide a polling place for each such election district, provided, however, that the number of election districts in any fire district shall not exceed one for each six hundred electors plus one for a remaining fraction of six hundred. In such event, the notice specified in subdivision one of this section shall describe the election districts and state where the polling places will be located, and the board of fire commissioners shall designate not less than two nor more than four resident fire district electors, who shall be registered voters of the town, to act as election inspectors and ballot clerks at each such polling place. The board of fire district commissioners may adopt a resolution providing that such election inspectors and ballot clerks shall be paid for their respective services at any such annual election or at any special election of the fire district. Such resolution, if adopted, shall fix the amount of such compensation as follows: if the hours during which the polls will be open for the receipt of ballots are from six o'clock in the evening until nine o'clock in the evening, a sum not to exceed thirty-five dollars for each such official; if additional consecutive hours prior to six o'clock in the evening are determined and specified in the notice of election, a sum not to exceed fifty dollars for each such official. No elective officer of the fire district shall serve as an election inspector or ballot clerk.

HISTORY:

Add, L 1932, ch 634, eff Jan 1, 1934; amd, L 1933, ch 705; L 1934, ch 816, § 6; L 1936, ch 746, § 1; L 1939, ch 584, § 10; L 1940, ch 374; L 1941, ch 648, § 9; L 1947, ch 143; L 1947, ch 602, §§ 1, 2; L 1949, ch 138, § 1; L 1952, ch 740; L 1956, ch 140; L 1966, ch 753, eff June 28, 1966; L 1967, ch 601, §§ 1, 2; L 1968, ch 767, § 3; L 1969, ch 27; L 1974, ch 408, § 1; L 1980, ch 901, § 1; L 1982, ch 16, § 1; L 1982, ch 106, § 2; L 1984, ch 202, § 2, eff June 12, 1984; L 1985, ch 719, § 4, eff Aug 1, 1985; L 1986, ch 160, § 1; L 1988, ch 42, §§ 1, 2; L 1988, ch 214, § 1; L 1988, ch 537, § 1; L 1988, ch 603, § 1; L 1989, ch 122, § 1; L 1989, ch 204, § 1; L 1992, ch 98, § 1, eff May 21, 1992; L 1997, ch 63, § 1; L 1997, ch 108, § 1, eff June 17, 1997; L 2004, ch 586, § 1, eff Oct 19, 2004; L 2010, ch 185, § 1, eff July 15, 2010; L 2011, ch 334, § 1, eff Jan 1, 2012.

Amendment Notes: 2011. Chapter 334, § 1 amended:
Sub 1 by adding the mater in italics.
2004. Chapter 586, § 1 amended:
By adding sub 4 and redesignating former sub 4 as sub 5.
Sub 5 by adding the matter in italics.
By redesignating former sub 5 as sub 6.

Notes to Decisions

Analysis

1. In general
2. Ballots and voting
3. Compatibility and conflicts
4. Election officials
5. Procedure generally
6. Qualification of officers, generally
7. —Property ownership requirement
8. —Residency requirement
9. Time and place of election
10. Voter eligibility

1. In general

Failure to give notice of special election regarding bond resolution did not deprive taxpayers of property without due process of law where the resolution did not impose an assessment on the taxpayers' property. Barrett v Cuskelly, 28 A.D.2d 532, 279 N.Y.S.2d 380, 1967 N.Y. App. Div. LEXIS 4278 (N.Y. App. Div. 2d Dep't 1967).

Fire district's board of commissioners properly refused to remove board candidate's request to remove his name from ballot, and thus result of election that he won would not be set aside on petition of losing candidate in Article 78 proceeding, where winning candidate was properly nominated, his subsequent discovery that he could not continue his employment as city police officer if he accepted nomination did not disqualify him, and Town Law contains no provision authorizing fire district commissioners to remove candidate's name from ballot once he or she has duly filed proper nominating petition. Cusumano v Board of Comm'rs, 251 A.D.2d 404, 674 N.Y.S.2d 86, 1998 N.Y. App. Div. LEXIS 6636 (N.Y. App. Div. 2d Dep't 1998).

A fire district bond resolution is not effective when a special election approving it is not held in the manner provided in § 179 of the Town Law. 1955 Ops St Compt File #7681.

2. Ballots and voting

There is no legal provision for the use of absentee ballots in a fire district annual election. 1968 Ops St Compt File #1024.

3. Compatibility and conflicts

One person may hold the office of commissioner of a fire district and also the office of commissioner of a sewer district. 1953 Ops St Compt File #6027.

There is no incompatibility or conflict of interest where one person holds, at the same time, the offices of fire district treasurer, fire district secretary, director of the incorporated fire company and member of a town Zoning and Planning Board. 1961 Ops St Compt #578.

If a Fire District Commissioner is nominated for the office of assistant engineer, he vacates the office of Commissioner forthwith, and similarly if an assistant engineer is elected to the office of Commissioner, he vacates the office of assistant engineer upon qualifying for that of Commissioner. 1962 Ops St Compt #715.

The president, treasurer or secretary of a volunteer fire company may serve as fire district commissioner for the fire district. 1963 Ops St Compt #12.

4. Election officials

Election inspectors and ballot clerks at fire district elections may not be compensated from fire district funds. 1946 Ops St Compt 140.

The Board of Commissioners of a fire district may provide for payment of compensation to election inspectors and ballot clerks at a fire district election. 1962 Ops St Compt #160.

There is no requirement that the chairman, election inspectors and ballot clerks designated to act as such for special or annual elections of a fire district take an oath of office. 1974 Ops St Compt File #972.

5. Procedure generally

The obvious intention of the legislature in requiring the notice of an election to be published in a newspaper "having a general circulation" is that the newspaper be distributed throughout the limits of the fire district and that it be a publication containing matters of general public interest as distinguished from trade journals catering to a special class of people, and therefore newspaper reasonably calculated to give notice to the persons affected provides adequate notice even though the circulation of such newspaper is less than the number of voters in the district. Barrett v Cuskelly, 52 Misc. 2d 250, 275 N.Y.S.2d 280, 1966 N.Y. Misc. LEXIS 1304 (N.Y. Sup. Ct. 1966), aff'd, 28 A.D.2d 532, 279 N.Y.S.2d 380, 1967 N.Y. App. Div. LEXIS 4278 (N.Y. App. Div. 2d Dep't 1967).

A person may be challenged at a fire district election pursuant to the provisions of § 225(1)(3) of the Election Law. 1954 Ops St Compt File #6759.

A special fire district election is held in the same manner as the annual fire district election. 1955 Ops St Compt File #7367.

Board of fire commissioners should appoint a commissioner to fill a vacancy on the board where the annual election was not held because of failure, by oversight, to publish the required notice of election. 1968 Ops St Compt File #1027.

6. Qualification of officers, generally

Town board has no authority to investigate qualifications for office of fire district commissioners. 1953 Ops St Compt File #6390.

7. —Property ownership requirement

Fire district commissioner is not required to own property assessed to him upon the last completed assessment roll. It is sufficient if the property owned by him was assessed to anyone. 1946 Ops St Compt 686.

Fire district commissioner does forfeit his office if during his term he disposes of all real property owned by him and as a result there is no real property assessed to him on the tax roll of the town in which the district is located. 1947 Ops St Compt 448.

The provisions of section 175(3) and (5) of the Town Law requiring fire commissioners to be property owners in the fire district and election inspectors and ballot clerks to be taxpayers within the fire district, are apparently no longer applicable. 1967 Ops St Compt File #899.

The requirement that fire commissioners be real property owners in the fire district is apparently invalid. 1967 Ops St Compt File #921.

8. —Residency requirement

A person who actually resides outside a fire district may not, by merely declaring himself a resident, qualify himself for election as a commissioner. 1955 Ops St Compt File #7658.

The office of fire commissioner automatically becomes vacant upon the incumbent's ceasing to be a resident of the district and it is not necessary for him to resign the office. 1956 Ops St Compt File #8010.

A person who is not a resident elector of a fire district may not serve as a fire district commissioner. The said office automatically becomes vacant upon the incumbent's removal of his residence from the fire district. 1974 Ops St Compt File #714.

9. Time and place of election

The annual election of fire district officers must be held within the fire district. 1960 Ops St Compt File #758.

A fire district in one town may acquire a fire house in another town. Such fire house may be used for storage of fire equipment and for fire company meetings but, because of its location outside the fire district, may not be used by such fire district for meetings of its board of fire commissioners or for its regular or special elections, and will not be exempt from taxation. 1965 Ops St Compt File #637.

10. Voter eligibility

Court erred in granting petition to set aside election for position of fire commissioner on ground that one of votes was cast by person who allegedly resided outside of fire district where it was undisputed that voter in question owned home within fire district, and he rented that home to tenant, voter testified that he slept and had his meals at home of friend outside of fire district but intended to return to his own home and that he had been advised to reside with someone for medical reasons, and voter kept substantial amounts of personal property at his home, and he maintained oral month-to-month lease with his tenant. Sauer v Springbrook Fire Dist., 284 A.D.2d 1016, 726 N.Y.S.2d 511, 2001 N.Y. App. Div. LEXIS 5839 (N.Y. App. Div. 4th Dep't 2001).

Town Law provision confining franchise to property owners was unconstitutional and participation of non-property owners in special election for issuance of bonds to purchase pumper for fire department was proper. Light v MacKenzie, 78 Misc. 2d 315, 356 N.Y.S.2d 991, 1974 N.Y. Misc. LEXIS 1391 (N.Y. Sup. Ct. 1974).

Voters must be registered under the system of permanent personal registration in order to be eligible to vote in a fire district election, and such requirement does not violate the constitution of the United States or the New York State Constitution. Tatay v Tatay, 349 F. Supp. 1300, 1972 U.S. Dist. LEXIS 11270 (E.D.N.Y. 1972).

In order to vote on a proposition under section 176(2-a) of the Town Law, making the office of fire district treasurer an appointive one, electors must be owners of real property in the fire district and must have resided for thirty days next preceding the election in the fire district. 1967 Ops St Compt File #841.

Fire district commissioners are elected by the qualified electors of the fire district. 1969 Ops St Compt File #35.

Agency Opinions

Analysis

1. In general
2. Ballots and voting
3. Compatibility and conflicts
4. Procedure generally
5. Qualification of officers, generally
6. —Property ownership requirement
7. —Residency requirement
8. Time and place of election
9. Voter eligibility

1. In general

A fire district treasurer should be elected in a fire district established under the provisions of the present town law. 1954 NY Ops Atty Gen June 10 (informal).

A fire district has no power to tax real property, no power to assess real property and no power to grant or withhold a real property tax exemption. 1976 NY Ops Atty Gen Dec 29.

2. Ballots and voting

It is believed that a write-in vote cast at a fire district election is not void simply because the voter failed to insert a cross mark after the name. 1953 NY Ops Atty Gen Dec 7 (informal).

Because elections for fire district commissioners are not general or special elections, there is no provision in the law for absentee or military ballots. 1968 NY Ops Atty Gen Sept 24.

Board of fire commissioners may provide details for preparation of paper ballots, including procedure for allowance of space for write-ins. 1997 NY Ops Atty Gen I 97-45.

Board of fire commissioners may provide details for preparation of paper ballots, including procedure for allowance of space for write-ins. 1997 NY Ops Atty Gen I 97-45.

3. Compatibility and conflicts

A fire district commissioner may also be an active fireman of the hose company in his fire district. Membership in a volunteer fire company shall not disqualify any such fire district commissioner, treasurer or secretary. 1959 NY Ops Atty Gen May 27 (informal).

The same person may not at the same time hold the positions of fire district commissioner and an office in the fire department or fire district, except secretary, even though such an office is not contained in the prohibition against dual office holding contained in Town Law, § 174, subdivision 4. 1974 NY Ops Atty Gen Oct 22.

A fire district commissioner may not hold the office of treasurer of the fire district but may hold the office of treasurer of a fire company. 1977 NY Ops Atty Gen March 2.

The same person simultaneously may hold the two elective public offices of town superintendent of highways and commissioner of a fire district organized and operating under authority of Town Law Article 11. 1980 NY Ops Atty Gen Jan 9 (informal).

Fire district commissioners and district treasurers may hold any office in a volunteer fire company that is not in the line of firefighting. 1983 NY Ops Atty Gen April 14 (informal).

One person may not hold simultaneously the positions of member of a town board and fire district commissioner. 1992 NY Ops Atty Gen I 92-16.

The positions of town assessor and member of a fire district board of commissioners are compatible. 1992 NY Ops Atty Gen I 92-25.

Positions of fire district commissioner and member of board of directors of fire company are compatible. 1994 NY Ops Atty Gen I 94-39.

Person may not hold both positions of master mechanic of fire district and fire district commissioner. 1997 NY Ops Atty Gen I 97-44.

4. Procedure generally

Failure to call an annual election of fire district officers leaves a vacancy to be filled under Town Law § 176. 1955 NY Ops Atty Gen Dec 13 (informal).

Candidates for fire district offices are required to submit their names in writing to the fire district secretary rather than orally notify him of their candidacy. 1983 Op St Compt File #83-41.

5. Qualification of officers, generally

6. —Property ownership requirement

The 1961 amendment of subd. 11-a of § 176 made no change in the provisions of subd. 3 of this section, which still require that fire district commissioners, treasurers, and secretaries be resident electors of the fire district and own real estate within the district. 1961 NY Ops Atty Gen Sept 13.

It is not necessary for a person to be the owner of property within a fire district assessed upon the latest completed assessment rolls of the town in which such district is located to qualify for the office of deputy fire district treasurer. 1967 NY Ops Atty Gen Apr 4.

L. 1968, c. 767, effective June 16, 1968, which eliminated the requirement of ownership of real property as a qualification for holding an elective town, village, fire or special district office, does not change the requirement of ownership of real property as a qualification of voters for improvement district commissioners as provided in Town Law, Section 213. 1968 NY Ops Atty Gen Oct 30.

The real property ownership requirement as a qualification for voting upon a fire district proposition is unconstitutional. 1974 NY Ops Atty Gen Apr 18 (informal).

7. —Residency requirement

The 1961 amendment of subd. 11-a of § 176 made no change in the provisions of subd. 3 of this section, which still require that fire district commissioners, treasurers, and secretaries be resident electors of the fire district and own real estate within the district. 1961 NY Ops Atty Gen Sept 13.

A fire district treasurer is in the competitive class of the civil service unless specifically placed in the exempt class; a fire district treasurer must be and remain a resident of the fire district in which he serves. 1966 NY Ops Atty Gen May 20.

It is necessary that a fire district commissioner of a fire district created under Town Law Article 11 (§§ 170–189) be a registered voter in the fire district in order to be elected to or to continue in that office. 1978 NY Ops Atty Gen Dec 18.

A non-resident who is engaged in his usual occupation within a fire district would appear to be eligible to election to membership in a fire district fire company. 1979 Op St Compt File #163.

A fire district commissioner who moves out of the fire district is ineligible to remain in office or to run for re-election. 1982 Op St Compt File #82-69.

A member of a volunteer fire company serving a fire district is not disqualified from serving as fire district commissioner. 1954 NY Ops Atty Gen Mar 4 (informal).

Providing differing statutory provisions setting qualifications to hold public office in different kinds of governmental units does not constitute an improper exercise of legislative judgment. 1978 NY Ops Atty Gen Dec 18.

An alien may not be a fire district officer; an alien may not vote in a fire district election; an alien may be a volunteer fireman; an alien may be appointed fire chief or assistant fire chief and may be elected to fire company corporate office. 1980 NY Ops Atty Gen Feb 6 (Informal), 1980 N.Y. AG LEXIS 152.

Person convicted of arson in any degree is, by statute, ineligible to hold office of fire district commissioner; certificate of relief from disabilities does not apply to public office such as fire district commissioner. 1998 NY Ops Atty Gen 98-50 (informal), 1998 N.Y. AG LEXIS 54.

A board of fire commissioners may not investigate into the eligibility of a candidate for the office of fire commissioner. 1980 Op St Compt File #91.

8. Time and place of election

Date of fire district elections—a fire district or a town has no power to pass a local law changing the date of fire district elections. 1969 NY Ops Atty Gen Feb 28.

Apart from an amendment to Town Law § 175 or the adoption of a special act for a particular district, there is no authority for changing the date of the annual election of fire district officers from the second Tuesday in December. 1978 Op St Compt File #1000.

9. Voter eligibility

(1) To vote at a fire district election a person must be a registered voter in the town under permanent personal registration and must have resided in the fire district for 30 days next preceding the fire district elections. There is no special registration provided for fire district election. (2) Challenges are governed by the election law provisions concerning challenges at elections other than primary elections. (3) Ballots are to be returned to the officer or board from whom or which they were received. 1970 NY Ops Atty Gen Nov 18.

The real property ownership requirement as a qualification for voting upon a fire district proposition is unconstitutional. 1974 NY Ops Atty Gen Apr 18.

For purposes of eligibility to vote in general or special fire district election, person must be registered in town where district is located and must reside in district for 30 days prior to date of election. NY Ops Atty Gen 89-51, 89-52 (Informal).

Discussion of definition of "elector" for the purpose of voting in fire district elections. 1978 Op St Compt File #671.

Every elector of a town who has resided in the fire district for a period of thirty days prior to any election in which a law proposition to purchase fire equipment is submitted may vote on such proposition, regardless of whether or not he owns any property in the fire district. 1979 Op St Compt File #163.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 175-a, 176.

Jurisprudences:

18A NY Jur 2d Civil Servants and Other Public Officers and Employees § 62 .

26 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1032—1036, 1039, 1057, 1063, 1071.

§ 175-a. Registration for voters

1. The board of fire commissioners of any fire district may provide by resolution, that a proposition

be submitted at any annual fire district election providing that additional personal registration of voters not registered with the board of elections shall be permitted for all elections in such fire district. Such additional personal registration may be terminated by a resolution of the board of fire commissioners and the passage of a proposition at any annual fire district election.

2. Registration for all fire district elections shall be conducted as follows:

(a) Only those persons registered with the board of elections on or before the twenty-third day before such election and those persons whose names are placed on the fire district register pursuant to the provisions of this section shall be entitled to vote in such district.

(b) In fire districts in which there is additional personal registration, the board of fire commissioners shall publish a resolution at least twenty-seven days prior to election day, which shall designate the dates prior to registration day on which the inspectors of election shall meet to commence the preparation of the register; the place in each fire district where such meetings, registration, if any, and election shall be held; the hours for such meetings, registration, if any, and election; but in no event shall the hours for registration be less than the hours from six o'clock in the evening until nine o'clock in the evening. Such resolution shall be adopted at least thirty days prior to election day.

(c) In a fire district whose electors have approved additional personal registration, such registration shall be held on the seventeenth day prior to the annual fire district election, except in those fire districts which provide by resolution adopted at least thirty-seven days prior to the date of the first election for which it shall be effective, for an additional day of registration to be held on the nineteenth day prior to the annual fire district election. Such resolution shall remain in effect for subsequent annual elections, unless amended, modified or repealed.

3. The register for the annual fire district election shall be prepared in each fire district by the inspectors of election thereof on the days prior to registration day, if any, designated therefor, on the registration day, if any, at the times and places designated by the resolution of the board of fire commissioners. In preparing such register, the inspectors of election shall comply with the following procedure:

(a) They shall adopt, use or copy from, the registration list certified and supplied by the county board of elections the names appearing thereon of all persons residing in the fire district and qualified to vote in such forthcoming annual fire district election and in those instances in which additional persons are entitled to register pursuant to this section, such register shall be completed by adding thereto the names of the persons personally appearing before them and providing to their satisfaction to then be or at the time of election qualified to vote.

(b) The register for each fire district shall include as a minimum the space for the name of the voter, his address within the fire district and a space for his or her signature to be signed by the voter on election day. Such register shall also contain a space for the signature of the voter to be signed by such voter on registration day, if any. If the register shall contain only space for the name, address and signature of the voter, the fire district secretary shall furnish a printed certificate to be signed by the voter who appears personally before the inspectors of election on registration day if his name does not already appear on the register. Such certificate shall contain a statement that the person possesses all the necessary qualifications for voting in fire district elections. Such certificate shall be accepted for all purposes as the equivalent of an affidavit, and if it contains a material false statement, shall subject the person signing it to the same penalty as if he had been duly sworn, and such provision shall be printed in bold type directly above the signature line of the certificate.

4. The fire district secretary shall furnish the inspectors of election, at fire district expense, with all necessary registration books, papers, equipment and supplies.

5. Registration for special fire district elections shall be held in the same manner as is provided herein for annual fire district elections, and registration days therefor shall be the same as if said special fire district election were the annual fire district election.

6. In lieu of the provisions for designating the chairman, election inspectors and ballot clerks, as set forth in subdivision one of section one hundred seventy-five of this chapter, the board of fire commissioners shall, by resolution adopted at least forty days prior to the annual fire district election, designate a resident fire district elector to act as chairman of any election of said district and shall designate not less than two nor more than four resident fire district electors to act as election inspectors and ballot clerks in such election. Such resolution shall fix the compensation of the chairman and inspectors and, in addition, the board of fire commissioners may provide for alternate inspectors who shall assume the office of inspector upon the inability or refusal of an inspector to assume or perform his duties and for any clerical help which they may deem necessary. Such clerical help shall perform their duties under the direction and control of the chairman and inspectors of election.

HISTORY:

Add, L 1984, ch 202, § 1, eff June 12, 1984; amd, L 1986, ch 456, § 1, eff July 21, 1986,2, eff July 21, 1986; L 1988, ch 42, § 3; L 1991, ch 122, § 1, eff May 17, 1991,2, eff May 17, 1991; L 1997, ch 169, § 1, eff July 3, 1997.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

18A NY Jur 2d Civil Servants and Other Public Officers and Employees § 62 .

26 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1035, 1037 .

§ 175-b. Absentee ballots for fire district elections; special provisions

1. The board of fire commissioners of any fire district in which officers are elected, may, by resolution, provide for absentee ballots for fire district elections, in accordance with the provisions of this section. Such resolution shall take effect at the first such election held more than sixty days after its adoption and shall continue in effect for all such elections until a subsequent resolution providing otherwise shall, in like manner, have taken effect.

2. a. An applicant for such an absentee ballot shall submit an application setting forth (1) his or her name and residence address, including the street and number, if any, or town and rural delivery route, if any; (2) that he or she is or will be, on the day of the election, a qualified voter of the district in which he or she resides in that he or she is or will be, on such date, over eighteen years of age, a citizen of the United States and has or will have resided in the district for thirty days next preceding such date; (3) that he or she is registered in the town; (4) that he or she will be unable to appear to vote in person on the day of the election for which the absentee ballot is requested because he or she is, or will be on such day (a) a patient in a hospital, or unable to appear personally at the polling place on such day because of illness or physical disability or (b) because his or her duties, occupation or business will require him or her to be outside of the county of his or her residence on such day, (c) because he or she will be on vacation outside the county of his or her residence on such day; or, (d) absent from his or her voting residence because he or she is detained in jail awaiting action by a grand jury or awaiting trial or is confined in prison after conviction for an offense other than a felony. Such application must be received by the district secretary at least seven days before the election if the ballot is to be mailed to the voter, or the day before the election, if the ballot is to be delivered personally to the voter or his or her agent.

b. (1) Where such duties, occupation or business are of such a nature as ordinarily to require such absence, a brief description of such duties, occupation or business shall be set forth in such affidavit. (2) Where such duties, occupation or business are not of such a nature as ordinarily to require such absence, such application shall contain a statement of the special circumstances on account of which such absence is required.

c. Where the applicant expects in good faith to be absent on the day of the election because he or she will be on vacation elsewhere on such day, such application shall also contain the dates upon which he or she expects to begin and end such vacation, the place or places where he or she expects to be on such vacation, the name and address of his or her employer, if any, and if self-employed, a statement to that effect.

d. Where the absence is because of detention or confinement to jail, such affidavit shall state whether the voter is detained awaiting action of the grand jury or is confined after conviction for an offense other than a felony.

e. Where a person is or would be, if he or she were a qualified voter, entitled to apply for the right to vote by absentee ballot under the provisions of this section, his or her spouse, parent or child, if a qualified voter and a resident of the same district, shall be entitled to vote as an absentee voter upon personally making and signing an application in accordance with the preceding provisions of this subdivision and showing that he or she expects to be absent from the district on the day of the district election by reason of accompanying or being with the spouse, child or parent who is or would be, if he or she were a qualified voter, so entitled to apply for the right to vote by absentee ballot, and, in the event no application is made by such spouse, child or parent, such further information as the fire district shall require.

f. Such application shall include the following statement to be signed by the voter.

I hereby declare that the foregoing is a true statement to the best of my knowledge and belief, and I understand that if I make any material false statement in the foregoing statement of application for absentee ballots, I shall be guilty of a misdemeanor.

Date ..... Signature of Voter .....

g. An applicant whose ability to appear personally at the polling place of the district of which he or she is a qualified voter is substantially impaired by reason of permanent illness or physical disability and whose registration record has been marked "permanently disabled" by the board of elections pursuant to the provisions of the election law shall be entitled to receive an absentee ballot pursuant to the provisions of this section without making separate application for such absentee ballot, and the secretary of the fire district, upon being advised by the board of elections on or with the list of registered voters that the registration record of a voter is marked "permanently disabled", shall send an absentee ballot to such voter at his or her last known address by first class mail with a request to the postal authorities not to forward same but to return same in five days in the event that it cannot be delivered to the addressee. The election inspectors of the fire district shall make an appropriate entry on the registration record indicating the fact that an absentee ballot has been sent and the date of mailing.

3. If, upon examining the application required under the provisions of subdivision two of this section, and upon such inquiry as it deems proper, the election inspectors of the fire district shall be satisfied that the applicant is a qualified voter of the

district, and entitled to vote by absentee ballot, such election inspectors shall place his or her name upon a list, thereupon the applicant shall be issued or mailed an absentee voter's ballot and the election inspectors of the fire district shall make an appropriate entry on the list indicating that an absentee ballot has been applied for by, and issued to, the applicant.

4. Ballots for absentee voters shall be, as nearly as practicable, in the same form as those to be voted at the district election; if the vote at such election shall be by ballot, the absentee ballot shall conform to that part of the regular ballot which relates to the election of district members; if the vote of such election shall be by voting machine, the absentee ballot shall be, as nearly practicable, in the same form as those to be voted in the district on election day and shall contain a space for a write-in or write-ins. On the back of such absentee ballots shall be printed the words "Official Ballot, Absentee Voter," followed by the words "For Officers of fire district."

5. a. The board of registration shall enclose each absentee voter's ballot in an envelope which shall be labelled:

ELECTION MATERIAL

PLEASE EXPEDITE

On one side of such envelope shall be printed:

OFFICIAL BALLOT, ABSENTEE VOTER

at

Fire District Election

Name of Voter .....
Residence (street and number, if any) .....
City (or Town) of .....
County of .....
Fire district .....

The date of the election and name of the district shall be printed, and the name of the voter, residence and district shall be written in by the fire district.

b. On the reverse side of such envelope shall be printed the following statement:

STATEMENT OF ABSENTEE VOTER

I do declare that I will have been a citizen of the United States for thirty days, and will be at least eighteen years of age, on the date of the district election; that I will have been a resident of this state and of the district if any, shown on the reverse side of this envelope for thirty days next preceding the said election and that I am or on such date will be, a registered voter of said district; that I will be unable to appear personally on the day of said district election at the polling place of the said district in which I am or will be a qualified voter because of the reason stated on my application heretofore submitted; that I have not qualified, or do I intend to vote, elsewhere than as set forth on the reverse side of this envelope; that I have not received or offered, do not expect to receive, have not paid, offered or promised to pay, contributed, offered or promised to contribute to another to be paid or used, any money or other valuable thing, as a compensation or reward for the giving or withholding of a vote at this district election, and have not made any promise to influence the giving or withholding of any such votes; that I have not made or become directly or indirectly interested in any bet or wager depending upon the result of this district election; and that I have not been convicted of bribery or any infamous crime, or, if so convicted, that I have been pardoned or restored to all the rights of a citizen, without restriction as to the right of suffrage, or received a certificate of relief from disabilities or a certificate of good conduct pursuant to article twenty-three of the correction law removing my disability to register and vote.

I hereby declare that the foregoing is a true statement to the best of my knowledge and belief, and I understand that if I make any material false statement in the foregoing statement of absentee voter, I shall be guilty of a misdemeanor.

Date _____ Signature of Voter

c. The envelope shall be gummed, ready for sealing, and shall have printed thereon, on the side opposite the statement, instructions as to the duties of the voter after the marking of the ballot, which instructions shall include a specific direction stating that the envelope must reach the office of the district not later than five P.M. on the day of the election in order that his or her vote may be canvassed.

d. A person who shall make any material false statement in the statement of absentee voter appearing on the reverse side of the envelope as provided in this subdivision, shall be guilty of a misdemeanor.

6. a. The secretary of the fire district shall make a list of all persons to whom absentee voter's [voters'][*] ballots shall have been issued and keep such list on file in the fire office where it shall be available for public inspection during regular office hours until the day of the election. Any qualified voter may, upon examination of such list, file a written challenge of the qualifications as a voter of any person whose name appears on such list, stating the reasons for such challenge. Such written challenge shall be transmitted by the secretary to the inspectors of election on election day.

b. Such list shall also be posted in a conspicuous place or places during the election, and any qualified voter may challenge the acceptance of the absentee voter's ballot of any person on such list, by making his or her challenge and the reasons therefor known to the election inspectors before the close of the polls.

[*]The bracketed word has been inserted by the Publisher.

7. a. The secretary of the fire district shall be authorized to call upon the commissioner of police or the county sheriff and the officers and members of the police force or sheriff's department for such assistance in the enforcement of the provisions of this section as such board shall require, and such commissioner and officers and members of the police force and sheriff's department shall be authorized to render such assistance.

b. The election inspectors of the fire district may require any person to attend before them at the office of the secretary of the district and be examined as to any matter in relation to which such district is charged with a duty under this section, and may issue a subpoena therefor. Each member of such election inspectors district shall be authorized to administer any oath that may be required or authorized by law in this connection.

8. No absentee voter's ballot shall be canvassed, unless it shall have been received in the office of the secretary of the district not later than five P.M. on the day of the election.

9. The secretary of the district shall, on the day of the election, transmit all absentee voters' envelopes, received by him or her in accordance with subdivision eight of this section, to the election inspectors.

10. If, at the district election, any absentee voters' envelopes shall have been received at the polling place, the election inspectors immediately after the closing of the polls shall examine them, and shall compare the signature, if any, on each envelope with the signature, if any, on the register, of the person of the same name who registered from the same address. If the signatures are found to correspond, the election inspectors shall certify thereto by signing their initials opposite the name of the voter at the appropriate place in the register. If a person whose name is on an envelope as a voter, shall have already voted in person at such district election, or if his or her name, residence and signature, as stated on the envelope, are not on the register, or if there is no signature on the envelope, this envelope shall be laid aside unopened and be returned unopened to the secretary of the district. If such person is found to be registered and has not so voted in person, and if no objection is made, or if an objection made be not sustained, the envelope shall be opened and the ballot withdrawn without unfolding and deposited in the proper box or boxes. At the time of the deposit of such ballot, the election inspectors shall enter the words "absentee vote" at an appropriate place in the register.

11. During such examination any qualified voter present in the polling place may object to the voting of the ballot contained in any envelope upon the ground or grounds (a) that the person named thereon is not a qualified voter of the district, or (b) that he or she was within the county or city while the polls of the election were open, except where the applicant is a patient in a hospital located within the county or city or detained or confined in a jail located within the county or city and except where the ballot was obtained upon the ground of inability to appear personally at the polling place on the day of the fire district election because of illness or physical disability, or (c) that he or she was able to appear personally while the polls were open, in cases where the ballot was obtained upon the ground that the voter was a patient in a hospital located within the county or city or detained or confined in a jail located within the county or city or upon the ground of inability to appear personally at the polling place on the day of the election because of illness or physical disability, or (d) that he or she was not entitled to cast such ballot. An election inspector shall make such an objection if he or she shall know or suspect that the person named on such envelope is not such a qualified voter or was so within the district or was able so to appear personally, or was not entitled to cast such ballot. The election inspectors shall forthwith proceed to determine each objection including any written challenge transmitted to them by the district secretary as provided in subdivision six of this section. Unless the election inspectors, by majority vote, shall sustain the objection, the chairman, or if he or she refuses, another election inspector shall endorse upon the envelope the objection and the words "not sustained," shall sign such endorsement, and shall open the envelope and deposit the ballot as provided in this section. Should the election inspectors, by majority vote, sustain such objection, the objection and word "sustained" shall be similarly endorsed upon the envelope, the envelope shall not be opened nor the ballots therein canvassed, and such envelope shall be returned unopened to the secretary of the district. If the election inspectors shall have received an envelope endorsed with the name of a person who to the knowledge of the election inspectors is deceased on the day of the election, the election inspectors shall return such envelope unopened to the secretary of the district with the words "deceased—objection sustained" endorsed on the envelope.

12. If the election inspectors shall have received an envelope, and upon opening the same no ballot shall be found therein, the election inspectors shall make a memorandum showing that the ballot is missing. When the casting of absentee voters' ballots shall have been completed, the election inspectors shall ascertain the number of such ballots which have been deposited in the ballot box by deducting from the number of envelopes opened the number of missing ballots, and shall make a separate return thereof in duplicate. The number of absentee voters' ballots deposited in the ballot box shall be added to the number of other ballots deposited in the ballot box in order to determine the number of all ballots to be accounted for in the ballot box. Such ballots shall then be counted or canvassed by the election inspectors along with the other ballots cast at such district election, or, where voting machines are used, shall be added to the votes recorded on such machines.

13. The provisions of this section shall apply to absentee ballots at fire district elections, notwithstanding any other provision of law. The provisions of any other law as they relate to fire district elections not inconsistent herewith shall apply to the conduct of such elections.

HISTORY:

Add, L 1996, ch 35, § 1; amd, L 1996, ch 401, § 1, eff July 30, 1996; L 2010, ch 56, § 11 (Part LL), eff June 22, 2010; L 2011, ch 170, § 5, eff July 20, 2011, expires and repealed Dec 31, 2014; L 2011, ch 170, § 6, eff Dec 31, 2012.

Editor's Notes: Laws 2011, ch 170, § 7, eff July 20, 2011, provides as follows:

§ 7. This act shall take effect immediately provided, however, that sections one, two, four and five of this act shall expire and be deemed repealed December 31, 2015, when upon such date the provisions of sections three and six of this act shall take effect. (Amd, L 2012, ch 482, § 3, eff Oct 3, 2012, L 2014, ch 273, § 3, eff Aug 11, 2014.).

Amendment Notes: 2011. Chapter 170, § 5 amended:

Sub 4 [first setout] by deleting at fig 1 "conform as closely as possible to the manner in which the names of the candidates appear on the voting machines, except that the absentee ballot shall also contain a space for a write-in or write-ins" and adding the matter in italics.

Sub 12 by deleting at fig 1 a comma and adding the matter in italics.

2011. Chapter 170, § 6 amended:

Sub 4 [second setout] by deleting at fig 1 "conform as closely as possible to the manner in which the names of the candidates appear on the voting machines, except that the absentee ballot shall also contain a space for a write-in or write-ins" and adding the matter in italics.

2010. Chapter 56, § 11 (Part LL) amended:

Sub 5, par b, Statement of Absentee Voter, first undesignated par by deleting at fig 1 "granted by the board of parole", at fig 2 "the provisions of the executive" and adding the matter in italics.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

18A NY Jur 2d Civil Servants and Other Public Officers and Employees § 62 .

26 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1040, 1041 .

§ 175-c. Notice of hearings and elections

1. In addition to any other notice or posting requirement, every fire district secretary shall cause a notice of any upcoming hearing or election to be posted on the fire district website, if one exists. Such notice shall be posted for at least fifteen days prior to such hearing or election and shall not be posted any sooner than twenty days before such hearing or election. If the fire district maintains a sign board, a copy of such notice shall also be posted on the sign board.

2. Every fire district secretary shall provide, in a timely manner, a notice of any upcoming hearing or election to be posted on the municipal website of any town located within the geographic boundaries of the district, or any town or fire district with which the district contracts. Such posting shall only be required if such a website exists. Such notice shall be posted for at least fifteen days prior to such hearing or election and shall not be posted any sooner than twenty days before such hearing or election. In addition, the town clerk shall post or cause to be posted on the bulletin board in his or her office a copy of such notice and on the sign board maintained by him or her pursuant to subdivision six of section thirty of this chapter. The town clerk shall cooperate with the fire district to ensure the timely notification of the upcoming hearing or election.

3. The notice required by this section shall specify the time when and the place where such hearing or election will be held, and, with respect to elections, the officers to be elected, their terms of office, and details regarding other matters to be voted on, as well as the hours during which the polls will be open for the receipt of ballots.

HISTORY:

Add, L 2006, ch 241, § 1, eff Jan 1, 2007.

§ 176. Powers and duties of fire district commissioners

Subject to law and the provisions of this chapter, the fire district commissioners of every fire district shall constitute and be known as the board of fire commissioners of such fire district. Such board of fire commissioners

1. Shall elect one of their members as chairman at the first meeting of fire commissioners after such district shall have been established and annually thereafter at the first meeting thereof following each election of fire district officers. Such chairman, when present, shall preside at the meetings of the board of fire commissioners. In the absence of the chairman the other members may designate one of their members to act as temporary chairman.

2. Shall appoint a fire district secretary.

2-a. May, notwithstanding the provisions of subdivision two of section one hundred seventy-four of this chapter, provide by resolution that a proposition shall be submitted at any annual fire district election, other than one at which a fire district treasurer is required to be elected, determining that the office of fire district treasurer shall be an appointive office in such district. If such proposition be approved at such election, the office of fire district treasurer shall thereafter be an appointive office in such district and no fire district treasurer shall be elected at the expiration of the term of office of the incumbent elected fire district treasurer. The board of fire commissioners at its organization meeting shall annually appoint a fire district treasurer to hold office until the thirty-first day of December next succeeding his appointment. In any fire district in which the office of fire district treasurer has been made appointive, the fire district commissioners shall designate one of their members to act as temporary chairman at the organization meeting each year until such time as a chairman of the board of fire commissioners shall be chosen.

In any fire district in which the office of appointed fire district treasurer may exist, the board of fire commissioners may provide by resolution that a proposition shall be submitted at any annual fire

district election determining that the office of fire district treasurer shall be an elective office in such district. If such proposition be approved at such election, the office of fire district treasurer shall thereafter be an elective office in such district and a fire district treasurer shall be elected at the next succeeding annual fire district election in accordance with the provisions of subdivision two of section one hundred seventy-four of this chapter and the term of office of the appointive fire district treasurer for whom such successor shall be elected shall expire on the thirty-first day of December next succeeding such annual fire district election.

3. Whenever a vacancy shall occur in any fire district office, the board of fire commissioners of such district, or a majority of the members thereof in office may appoint a qualified person to fill the vacancy. If the appointment be made to fill a vacancy in an appointive office, the person so appointed shall hold office for the remainder of the unexpired term. If the appointment be made to fill a vacancy in an elective office, the person so appointed shall hold office until the thirty-first day of December next succeeding the first annual fire district election held thereafter and at such election a successor shall be elected for the unexpired portion of the term beginning on the first day of January next succeeding. If a vacancy shall occur in any elective fire district office after the first day of October in any year, the person so appointed to fill the vacancy shall hold office until the thirty-first day of December of the following calendar year and a successor shall be elected at the annual fire district election held immediately prior thereto to serve for the unexpired portion of the term; provided, however, that if a vacancy so occurs in any elective fire district office, the term of which would expire on the thirty-first day of December next succeeding, the person so appointed shall hold office only until such thirty-first day of December.

4. Shall require the fire district treasurer, before entering upon the duties of his office, to give an official undertaking, conditioned for the faithful performance of his duties and that he will well and truly keep, pay over and account for all moneys and property belonging to the fire district and coming into his hands as such treasurer, in such form, in such sum and with such sureties as the board of fire commissioners shall direct and approve and such approval shall be indicated upon such undertaking, and when approved such undertaking shall be filed in the office of the town clerk of the town in which such fire district is located. If such district is situated in more than one town, a duplicate original of such undertaking, approved by the board of fire commissioners, shall be filed in the office of the town clerk of each town in which such district is located. The fire district commissioners may by resolution determine that such undertaking shall be executed by a surety company authorized to transact business in the state of New York and that the expense thereof shall be a charge on the fire district.

4-a. Shall audit all claims against the fire district and shall, by resolution, order the payment thereof by the fire district treasurer in the amounts allowed. Except as otherwise provided by this subdivision, no such claim shall be audited or ordered paid by the board of fire commissioners unless an itemized voucher therefor, in such form as the board of fire commissioners shall prescribe, shall have been presented to the board of fire commissioners for audit and allowance. The board of fire commissioners may provide by resolution that no such claims may be presented, audited or paid unless they be either verified under oath, or, in lieu of such verification, certified, to be true and correct in a statement signed by or on behalf of the claimant. The provisions of this subdivision shall not be applicable to claims for the payment of fixed salaries, compensation for services of officers or employees regularly engaged by the fire district at agreed wages by the hour, day, week, month or year unless so required by resolution of the board of fire commissioners adopted at the organization meeting in the month of January, the principal of or interest on obligations issued by the fire district, fixed amounts becoming due on lawful contracts for the purchase of water for fire protection, and amounts which the fire district may be required to pay to the state employees' retirement system on account of contributions for past and current services of firefighters. The board of fire commissioners may, further, by resolution authorize the payment in advance of audit of claims for light, telephone, postage, freight and express charges. All such claims shall be presented at the next regular meeting for audit, and the claimant and the officer incurring or approving the same shall be jointly and severally liable for any amount disallowed by the board of fire commissioners.

4-b. Any fire commissioner, secretary or treasurer of a fire district may administer any necessary oath in any matter or proceeding lawfully before him, or in connection with any paper to be filed with him as such officer.

4-c. Notwithstanding the provisions of subdivision four-a of this section, may by resolution establish a petty cash fund for the fire district treasurer for the payment, in advance of audit, of properly itemized and verified or certified bills for materials, supplies or services furnished to the fire district for the conduct of its affairs and upon terms calling for payment to the vendor upon the delivery of any such materials or supplies or the rendering of any such services. The amount of such petty cash fund shall not exceed two hundred fifty dollars. At the time of any payment from such fund, the treasurer shall require delivery to him of a bill in form sufficient for audit by the board of fire commissioners as required by law. At each meeting of the board of fire commissioners a list of all expenditures made from such fund since the last meeting of the board, together with the bills supporting such expenditures, shall be presented by the treasurer to the board of fire

commissioners for audit. The board of fire commissioners shall direct the treasurer to reimburse such petty cash fund from the appropriate budgetary item or items, in an amount equal to the total of such bills which it shall so audit and allow. Any of such bills or any portion of such bills which the board of fire commissioners shall refuse to audit and allow shall be the personal liability of the treasurer and he shall promptly reimburse such petty cash fund in the amount of such disallowances. If such reimbursement has not been made by the time of the first payment of salary to the treasurer after the action of the board of fire commissioners in disallowing an amount so expended, such amount shall be withheld from such salary payment to the treasurer and, if necessary, subsequent salary payments and paid into such petty cash fund until an amount equal to the amount so disallowed in the audit of the board of fire commissioners has been repaid to the petty cash fund. Any bond or undertaking filed by the treasurer shall be available to the fire district for recovery of any losses incurred by reason of the operation of such petty cash fund.

5. Shall cause a map to be prepared showing the exact boundaries of the fire district. If such map indicates boundary lines that are contiguous with an adjacent fire district or fire districts, then such adjacent fire district or fire districts shall be given written notice, by certified mail, return receipt requested, addressed to the secretary of such fire district, of the intention to file a fire district map, together with a copy of such map. Such notice shall be sent by the secretary of the fire district preparing such map. If an adjacent fire district objects to the location of a boundary line affecting such adjacent fire district, then within forty-five days of the receipt of such notification and map, such objections shall be filed with the fire district secretary of the fire district proposing such map and with the town clerk of each town in which any part of such fire district is located. If such map does not indicate any boundary lines contiguous with an adjacent fire district or fire districts, then a certified copy of such map shall be filed by the secretary of the fire district with the town clerk of each town in which any part of the fire district is located for approval by the town board and, when so approved and filed by the secretary of the fire district, in the office of the town clerk and filed by the secretary of the fire district in the office of the county clerk in which said fire district or any part thereof shall be located, shall constitute presumptive evidence of the boundaries of the fire district. If such map indicates any boundary lines that are contiguous with an adjacent fire district, such map shall be submitted by the secretary of the fire district to the town clerk of each town in which any part of the fire district is located, together with proof of service upon such adjacent fire district or fire districts of such proposed map, and that more than forty-five days have elapsed since such service was made. In addition, if objections have been filed, then a verified statement either amending the proposed map to meet such objections or denying such objection in whole or in part, shall also be filed. If the objections are denied, the town board in which town such disputed boundary line is located shall, within thirty days after the submission of all proofs, objections and denials, cause the town engineer, if there be one, or, if not, hire a licensed land surveyor, to survey the boundary line or lines. If the disputed line or lines lie in more than one town, the town boards, acting jointly by a majority vote of the members of each such town shall determine which town engineer or licensed land surveyor shall survey the boundary line or lines. The cost of this survey, if any, shall be borne equally by the fire districts involved. Upon receipt by the town board or town boards of the survey of the disputed boundary line or lines, each involved fire district shall be immediately notified by the town clerk or town clerks. If no objections are served upon the town clerk or clerks by adjacent fire districts within sixty days of receipt of such notification or the boundary line or lines have been adjusted to meet objections, then thereafter and within twenty days, the town board or town boards if one disputed line or lines lie in more than one town shall cause a public hearing to be held, at which hearing owners of real property in the affected area shall be given an opportunity to be heard. Upon the conclusion of said public hearing, the town board shall determine the disputed line or lines, and if the disputed line or lines lie in more than one town, the town boards acting jointly by a majority vote of the members of each such town board shall determine the disputed line or lines and a copy of such map, as finally approved by the town board or town boards, shall be filed in the office of the town clerk or clerks and certified copy shall be filed in the office of the county clerk in which said fire district or any part thereof shall be located. Such map shall then constitute presumptive evidence of the boundaries of the fire district. The town clerk shall notify each affected fire district of the filing of such map in such town clerk's office or offices and in the office of the county clerk. The town clerk or clerks shall also publish a notice of the filing of said map in the official paper of the town or towns. Any fire district believing itself aggrieved or aggrieved property owner may within thirty days of receipt of notification or publication commence an appropriate proceeding in the supreme court of the state of New York, in accordance with article seventy-eight of the civil practice law and rules, naming the involved fire district and the town board or boards as respondents. All fire district maps heretofore approved by the town board of each town in which any part of the fire district is located and which map was filed in the office of the clerk of each town in which said fire district is located and filed in the office of the county clerk in which said fire district or any part thereof is located, prior to the first day of January, nineteen hundred eighty-one, shall continue to be presumptive evidence of the boundaries of such fire district.

6. Shall give notice of annual elections in the manner provided in this article.

7. Shall require that candidates for district offices file their names with the secretary of the fire district at least twenty days prior to the date of such fire district elections and in addition may provide by resolution that such nominations be submitted in petition form subscribed by twenty-five qualified voters of the district. Thereafter the ballots prepared for the election of fire district officers shall specify the names of the candidates duly filed and in addition provide proper blank spaces for each office to be filled at such election. If any such resolution shall be adopted, the requirements thereof shall be specified in the notice of each fire district election held thereafter. The board of fire commissioners may rescind such resolution at any time and thereafter fire district officers shall be elected as otherwise provided herein.

8. Shall appoint officials for fire district elections as provided in section one hundred seventy-five of this chapter and may provide for their compensation pursuant to such section.

9. Shall have the power to make any and all contracts for the purposes herein authorized within the appropriations approved by the taxpayers of the district or within the statutory limitations specified herein.

10. May organize, operate, maintain and equip fire companies, including the purchase of uniforms to be used by the members of such companies, and provide for the removal of such members for cause.

11. May adopt rules and regulations governing all fire companies and fire departments in said district and prescribing the duties of the members thereof and enforce discipline and provide for public drills, parades, funerals, inspections and reviews of the fire district fire department, or any company or unit thereof, within the fire district or at other places within the state, any adjoining state or in Canada. Such rules and regulations shall not authorize any member of the board of fire commissioners to interfere with the duties of the chief or assistant chief at such times as the fire department or any company or squad thereof is on duty.

11-a. The members of the fire department of the fire district shall meet at a time and place designated by the board of fire commissioners on the Thursday following the first Tuesday in April of each year and nominate persons for the offices of chief and such assistant chiefs as may be provided for in the rules and regulations adopted by the board of fire commissioners. If the Thursday following the first Tuesday in April falls upon a day of special religious observance, the board of fire commissioners may designate any other weekday in April after such Thursday as the day upon which to hold such meeting. Each nominee shall be a member of the fire department. In addition, the board of fire commissioners may by resolution require that any or all of such fire department officers shall be residents of the fire district. All nominations shall be made by ballot. The person acting as secretary of such meeting shall promptly notify the fire district secretary in writing of such nominations. The board of fire commissioners at its meeting next succeeding the making of such nominations shall consider the same and shall appoint such persons to the offices to which they have been respectively nominated or, if a nomination is not approved the board of fire commissioners shall call another meeting of the members of the fire department at which a new nomination shall be made to take the place of any nomination not approved, which procedure shall continue until a full set of officers is approved. Any such person shall assume the duties of his office as soon as he has been appointed thereto by the board of fire commissioners and shall serve until his successor is appointed. A person who has been convicted of arson in any degree shall not be eligible for nomination, election or appointment to the office of fire department chief or assistant chief. Any fire department chief or assistant chief who is convicted of arson in any degree during his term of office shall be disqualified from completing such term of office.

11-b. The members of the fire department at a regular or special meeting of the department held after the month of April but prior to the month of November in any year may adopt a resolution recommending that future meetings for the nomination of the chief and assistant chiefs be held in December, either on the first Thursday, the first Saturday, the Thursday following the first Tuesday, the Saturday following the first Tuesday, the Thursday following the second Tuesday, or the Saturday following the second Tuesday in such month, instead of April as provided in subdivision eleven-a of this section. Provided, however, the Davis Park fire department may adopt a resolution to hold future meetings, for nomination of chief and assistant chiefs, on the last Sunday in September; the Caton fire district may adopt a resolution to hold future meetings, for nominations of chief and assistant chiefs, on the second Tuesday in December; and the Fair Harbor fire department may adopt a resolution to hold future meetings, for nomination of the chief and assistant chiefs, on the third Sunday in September. The notice or call for such meeting shall specify that such a resolution will be offered to be voted upon at such meeting. If such resolution is adopted, the board of fire commissioners may adopt a rule or regulation providing that future meetings for the nomination of chief and assistant chiefs shall be held in December, either on the first Thursday, the first Saturday, the Thursday following the first Tuesday, the Saturday following the first Tuesday, the Thursday following the second Tuesday, the Saturday following the second Tuesday in such month, the last Sunday in September in the Davis Park fire department, the second Tuesday in December in the Caton fire district, or the third Sunday in September in the Fair Harbor fire department, as specified in the fire

department resolution, instead of April as provided in subdivision eleven-a of this section. Each nominee shall be a member of the fire department. In addition, the board of fire commissioners may by resolution require that any or all of such fire department officers shall be residents of the fire district. All nominations shall be made by ballot. The person acting as secretary of such meeting shall promptly notify the fire district secretary in writing of such nominations. The board of fire commissioners at its organization meeting in the month of January next succeeding the making of such nominations shall consider the same and shall appoint such persons to the offices to which they have been respectively nominated or, if a nomination is not approved the board of fire commissioners shall call another meeting of the members of the fire department at which a new nomination shall be made to take the place of any nomination not approved, which procedure shall continue until a full set of officers is approved. Any such person shall assume the duties of his office as soon as he has been appointed thereto by the board of fire commissioners and shall serve until his successor is appointed. A person who has been convicted of arson in any degree shall not be eligible for nomination, election or appointment to the office of fire department chief or assistant chief. Any fire department chief or assistant chief who is convicted of arson in any degree during his term of office shall be disqualified from completing such term of office.

If the date of meetings for the nomination of chief and assistant chiefs is changed from April to September or December pursuant to the foregoing provisions of this subdivision, the members of the fire department at a regular or special meeting of the department held after the month of April but prior to the month of November in any year may adopt a resolution recommending that future meetings for the nomination for such officers shall be held in April pursuant to the provisions of subdivision eleven-a of this section. The call for such meeting shall specify that such a resolution will be offered to be voted upon at such meeting. If such a resolution is adopted, the board of fire commissioners may adopt a rule or regulation providing that future meetings for the nomination of chief and assistant chiefs shall be held in April pursuant to the provisions of subdivision eleven-a of this section and that the provisions of such subdivision eleven-a shall again become applicable.

11-c. May adopt a resolution to employ paid firefighters and paid fire officers including but not limited to a paid chief of the fire district department, provide for their powers and duties, determine the chain of command in the fire department as between volunteer and paid firefighters, determine that paid chief and/or any other paid officers shall have charge of apparatus and other equipment, and determine that the volunteer firefighters and volunteer officers of the fire department shall act under the orders and control of such paid fire officers. The board of fire commissioners may adopt a resolution to appoint a paid chief of the fire district department only after holding a public hearing prior to adopting such resolution. The notice of such hearing shall be published and posted and such hearing shall be held in the manner provided in section one hundred seventy-one of this article for a hearing upon the establishment of a fire district. The notice shall state the reason for the hearing including but not limited to the proposed employment of and proposed salary for the paid chief.

12. May contract for a supply of water and for the furnishing, erection, maintenance, care and replacement of fire hydrants, including the erection and maintenance of markers therefor, and removal of snow and ice to provide access thereto, for fire purposes for a period not exceeding five years without any appropriation vote therefor by the qualified voters of such district.

12-a. In order to provide a supply of water for firefighting purposes for any area of a fire district which does not have an adequate and available supply or which cannot be suitably supplied by contract pursuant to subdivision twelve of this section, (1) may purchase permanent or temporary rights to take water from cisterns, wells, and bodies of water and water-courses within the fire district, or may lease such rights, and (2) may purchase, construct or lease, and maintain, fire suction pools in bodies of water and water-courses, fire cisterns and fire wells, including necessary pipes, pumps, hydrants and other facilities in connection therewith, and may purchase and lease necessary real property and rights in land and water therefor. The water and improvements shall be used for firefighting purposes only and the water shall not be sold. The fire suction pools, fire cisterns and fire wells shall be fenced or covered to prevent trespass by children and domestic animals. Any such improvement shall be located upon real property within the fire district which is owned or leased by the fire district or upon which an easement has been acquired by the fire district, except such portions of the improvement which are located within the bounds of public highways, roads or streets with the consent of the state or local official charged with the supervision of the highway, road or street. The board of fire commissioners may purchase insurance to protect the fire district from liability for damage to persons or property resulting from the maintenance of any such improvement by the fire district. If, after proceeding pursuant to this subdivision, an adequate and available supply of water for fire-fighting purposes becomes available for such area or if a suitable supply may be obtained therefor by contract pursuant to subdivision twelve of this section, the fire district, nevertheless, may continue to act pursuant to this subdivision.

13. May purchase or lease apparatus and equipment for the extinguishment and the prevention of fires and for the purposes of emergency rescue and first aid and fire police squads.

14. For the preservation, protection and storing of fire apparatus and equipment and for the social and recreational use of the firefighters and residents of the district and for any of the purposes authorized by law, may acquire by purchase, lease, gift, devise or by condemnation, real property and erect, construct, alter, repair and equip suitable buildings, and may furnish necessary supplies for such purposes, and may lease portions thereof not required for fire district purposes. All real property required by any fire district for any purpose authorized by this article shall be deemed to be required for public use and may be acquired by such fire district.

15. May construct and maintain an adequate fire alarm system in said district.

16. May contract to provide outside of the fire district (1) fire protection, (2) emergency service in case of accidents, calamities or other emergencies, or (3) general ambulance service pursuant to the provisions of section two hundred nine-b of the general municipal law, upon such terms as the board of fire commissioners may determine proper, provided that such service can be supplied without undue hazard to the fire district furnishing the service. Whenever the fire department or fire company of a fire district provides any such service to outside territory pursuant to a contract, as aforesaid, the board of fire commissioners of such fire district may pay to the fire department of such fire district, or to any fire company or companies of such fire district, performing the service, such portion of the contract price as such board may deem proper, but not in any event to exceed thirty-five per centum of such contract price. The amount received pursuant to any such contract may be expended without being included in the amount that may be expended annually without the adoption of a proposition therefor as provided in subdivision numbered eighteen of this section and in section one hundred seventy-nine of this chapter.

17. May employ an attorney to counsel and assist in the discharge of its official duties and give it such professional services as it may require in conducting or defending any action or legal proceedings. If the town attorney shall be so employed he shall receive, in addition to his salary as town attorney, such compensation from the fire district as shall be agreed upon between the commissioners of the fire district and such town attorney, notwithstanding the provisions of section twenty-seven of this chapter.

18. May, without the adoption of a proposition, expend from the fire district revenues for any fiscal year amounts appropriated for

(1) the payments under contracts made pursuant to subdivisions twelve and twenty-two of this section,

(2) the payments required under a lease to provide a supply of water for fire fighting purposes entered into pursuant to subdivision twelve-a of this section,

(3) the payment of the principal of and interest on bonds, bond anticipation notes and capital notes issued by the fire district, and budget notes issued pursuant to the provisions of subdivisions five, six and seven of paragraph a of section 29.00 of the local finance law, and interest on tax anticipation notes issued pursuant to the provisions of paragraphs c-1 and c-2 of section 24.00 of the local finance law,

(4) the compensation of paid fire district officers, fire department officers, firefighters and other paid personnel of the fire department,

(5) contributions to the New York state employees' retirement system and the New York state and local police and fire retirement system on account of past and current services of paid fire district officers and employees, including the paid officers, firefighters and other personnel of the fire department,

(6) an assessment, charge, share or other payment required to be paid as the result of the participation by the fire district in any county self-insurance plan under article five of the workmen's compensation law,

(7) the cost of insurance secured to indemnify the fire district against liability for benefits or compensation required to be paid or furnished under or pursuant to the volunteer firefighters' benefit law and workers' compensation law, or for the payment of the benefits or compensation required to be paid or furnished under or pursuant to such laws by a fire district which is a self-insurer under such laws, to the extent that such benefits and compensation have not been recovered in such fiscal year under section twenty of the volunteer firefighters' benefit law or section twenty-nine of the workers' compensation law,

(7-a) the payment required annually to fund service awards to volunteer firefighters made pursuant to article eleven-A of the general municipal law,

(8) the cost of blanket accident insurance purchased under the provisions of section four thousand two hundred thirty-seven of the insurance law to insure volunteer firefighters against injury or death resulting from bodily injuries sustained by such firefighters in the performance of their duties,

(9) medical, surgical, hospital or other care or treatment and medical inspections required in connection with the disability of paid fire department personnel pursuant to section two hundred seven-a of the general municipal law, to the extent, if any, that such charges will not be paid by an insurance carrier or county self-insurance plan under the workmen's compensation law or have not been recovered in such fiscal year under such section two hundred seven-a or under section twenty-nine of the workmen's compensation law,

(10) employer's contributions for old age and survivors insurance coverage under article three of the retirement and social security law,

(11) the payment of the principal of and interest on indebtedness evidenced by tax anticipation notes issued pursuant to subdivision one of paragraph d of section 24.00 of the local finance law in relation to newly-created fire districts under subdivision twenty-six of this section, and

(12) the payment of compromised claims and judgments under subdivisions twenty-eight and thirty of this section;

(13) the cost of insurance secured to indemnify the fire district against liability arising out of the ownership, use or operation of motor vehicles owned by the fire district; and

(14) the payment of monetary rewards pursuant to subdivision thirty-one of this section.

(15) the cost of fuel for the fire district emergency vehicles, including fuel tax carry-overs.

(16) the cost of audits required pursuant to section one hundred eighty-one-a of this article.

(17) the cost of insurance secured to indemnify the fire district against liability for benefits required to be paid or furnished pursuant to the enhanced cancer disability benefit established in section two hundred five-cc of the general municipal law, or for the payment of benefits required to be paid or furnished pursuant to such law by a fire district which is a self-insurer under such law.

In addition to such expenditures, the board of fire commissioners of any fire district may, without the adoption of a proposition therefor, expend from the first district revenues for any fiscal year for purposes authorized by or pursuant to law not to exceed two thousand dollars and in districts having a full valuation of real property taxable for fire district purposes in excess of one million dollars an additional amount equivalent to one mill for each dollar of full valuation of taxable real property in excess of the first million dollars of full valuation of such taxable real property. Such full valuation shall, for the purposes of this subdivision, be computed by dividing the assessed valuation of the real property subject to taxation by the fire district, as shown on the assessment roll for the fire district which was completed in the second calendar year prior to that in which the expenditure is to be made, by the town equalization rate established for such roll by the state board of equalization and assessment. Where, in the case of a newly-created fire district, there is no such completed assessment roll for such fire district, full valuation shall be determined from the assessment roll upon which the real property included within the district was assessed for town purposes and which was completed in the second calendar year prior to that in which the expenditure is to be made. In any fire district the foregoing limitations provided in this subdivision may be exceeded if a proposition has been adopted pursuant to paragraph (d) of subdivision one of section one hundred seventy-nine of this chapter.

The foregoing limitations on expenditures shall not be applicable to the proceeds of a contract for fire department services entered into pursuant to the provisions of subdivision sixteen of this section and such proceeds may be expended for purposes authorized by or pursuant to law.

The foregoing limitations on expenditures shall not be applicable to appropriations to or expenditures from a repair reserve fund, contingency and tax stabilization reserve fund, capital reserve fund, debt stabilization fund, workers' compensation reserve fund, mandatory reserve fund, unemployment insurance reserve fund or liability and casualty reserve fund established pursuant to sections six-d, six-e, six-g, six-h, six-j, six-l, six-m and six-n of the general municipal law, or to the use of the income and capital gains realized on the investments of the assets of such funds.

The foregoing limitations on expenditures shall not be applicable to the use of premiums from the sale of fire district obligations, the unexpended portion of the proceeds of fire district obligations, the income and capital gains realized on the temporary investment of the proceeds, inclusive of premiums, of fire district obligations, as provided in section 165.00 of the local finance law.

The foregoing limitations on expenditures shall not be applicable to the use of the proceeds of a gift or gifts given to a fire district, and such proceeds may be expended for purposes authorized by or pursuant to law.

The provisions of this subdivision shall not be deemed to prevent the issuance of bonds, bond anticipation notes, capital notes or budget notes to finance any object or purpose for which the fire district may expend money.

The foregoing limitation on expenditures shall not be applicable to the use of insurance proceeds received for the loss, theft, damage or destruction of real or personal property when proposed to be used or applied to repair or replace such property. Such proceeds may be appropriated by resolution of the board of fire commissioners at any time for such objects and purposes.

The foregoing limitation on expenditures shall not be applicable to contributions to the state's unemployment insurance fund on account of salaries paid to fire district officers and employees, including the paid officers, firefighters and other personnel of the fire department.

18-a. May employ such persons as may be necessary to effectuate the objects and purposes of the district. Persons may be employed as paid firefighters, however, only after a public hearing in relation to such employment. Any such hearing shall be held by the board of fire commissioners and the notice of the hearing shall state the time when and place in the district where the hearing will be held, the number of paid firefighters to be employed and the total annual amount to be spent for the salaries or other compensation of such firefighters. The notice shall be published in the official newspaper of the district at least once not more than twenty nor less than ten days before the hearing.

19. Shall have the exclusive management and control of the property of the fire district and may insure the same against loss or damage from any risk whatsoever and may contract at the expense of the district for insurance indemnifying the district,

its officers, agents, employees and the members of all fire companies against any loss arising from injuries to persons or property through the operation and maintenance of such fire district and the performance of the duties thereof and insure the members of the fire department of the district against injury or death in the performance of their duties, or both.

20. May grant or withhold its consent to the formation of a fire corporation which intends to operate within the territory of such fire district, pursuant to subdivision (f) of section four hundred four of the not-for-profit corporation law.

21. Shall have and exercise all the powers conferred upon the fire district and such additional powers as shall be necessarily implied therefrom.

22.

(a) May contract for the furnishing of fire protection within the fire district with any city, village, fire district, or incorporated fire company having its headquarters outside such fire district and maintaining adequate and suitable apparatus and appliances for the furnishing of fire protection in such district; provided there is no fire company maintaining its headquarters in said district or provided the fire department of said district is, in the judgment of such fire commissioners, unable to render adequate and prompt fire protection to such district or any area thereof. The contract also may provide for the furnishing of (i) emergency service in case of accidents, calamities or other emergencies in connection with which the services of firefighters would be required and (ii) general ambulance service subject, however, to the provisions of section two hundred nine-b of the general municipal law. In the event that the fire department or fire company furnishing fire protection within the district pursuant to contract does not maintain and operate an ambulance and provision has not otherwise been made for ambulance service for the area of the district pursuant to section one hundred twenty two-b of the general municipal law then a separate contract may be made for the furnishing within the district of emergency ambulance service or general ambulance service, or both, with any city, village or fire district the fire department of which, or with an incorporated fire company having its headquarters outside the district which, maintains and operates an ambulance subject, however, in the case of general ambulance service, to the provisions of section two hundred nine-b of the general municipal law.

(b)(i) Except as provided in subparagraph (ii) of this paragraph, prior to commencing the negotiation process for such contract with an incorporated fire company, the incorporated fire company shall file with the board of fire commissioners a statement itemizing the estimated costs of the incorporated fire company attributable to the provision of services under the prospective contract. The estimated costs attributable to the provision of services under the prospective contract itemized in the statement shall include, at a minimum, those, if any, for: supplies; materials; operation, maintenance and repair of equipment and apparatus; insurance; training; protective clothing, gear and other personnel costs; building rental, maintenance and operation; and a specified proportionate share of capital costs. If the fire company is required to prepare any of the following documents, copies shall be included with the statement:

(1) the fire company's most recent annual report of directors pursuant to section five hundred nineteen of the not-for-profit corporation law;

(2) the fire company's most recent verified certificate pursuant to subdivision (f) of section fourteen hundred two of the not-for-profit corporation law;

(3) the fire company's most recent internal revenue service form 990; and

(4) the fire company's most recent annual report pursuant to section thirty-a of the general municipal law.

(ii) The provisions of subparagraph (i) of this paragraph shall not apply to the renewal of a contract when the contract is deemed renewed in accordance with paragraph (e) of this subdivision. Upon good cause shown, the board of fire commissioners may, by resolution, waive in whole or in part the requirement that the fire company file the statement, and copies of documents, required by subparagraph (i) of this paragraph.

(c) The contract shall not be entered into until a public hearing has been held by the board of fire commissioners. Notice of the hearing shall be published at least once in at least one newspaper having general circulation in the district. The notice shall specify the time when and place where the hearing will be held, and describe in general terms the proposed contract. The first publication thereof shall be at least ten days prior to the day specified for the hearing.

(d) Except as hereinafter provided, the term of the contract shall be for a definite period of time, but in no event shall the term exceed five years. The contract year or years in all such contracts entered into after the year nineteen hundred sixty shall terminate on December thirty-first.

(e) Instead of being for a definite term as hereinabove provided, the contract may be for an original term of one calendar year or less and provide that it shall be deemed renewed on the same basis each year thereafter for a further term of one full calendar year without any further public hearing unless one of the contracting parties shall notify the other in writing on or before the first day of August that it elects to terminate the contract on December thirty-first in that year. The term of any such contract, including renewals, shall not exceed five years, but the contract may provide that there shall be less than four such renewals. If the city, village or fire district fire department or fire company which is to furnish the service under such a contract is not a fully paid department or company, the city, village or

fire district governing board upon the request of the department or company, shall terminate the contract as provided in this paragraph. Any contract entered into pursuant to this paragraph may provide that in the month of July of each year in which such a renewal could occur the fire district secretary shall notify the secretary of the fire department or fire company which is to furnish the service under the contract that the contract shall be deemed renewed on the same basis for a further full term of one calendar year unless one of the contracting parties shall notify the other in writing on or before the first day of August that it elects to terminate the contract on December thirty-first in such year.

(f) The contract shall specify a definite sum to be paid each year for all of the services to be rendered thereunder and may provide that such amount shall be paid in one sum or in installments.

(g) By mutual consent of the contracting parties, and after a public hearing held pursuant to notice in the manner aforesaid, any such contract heretofore or hereafter executed may be (i) amended, (ii) terminated, or (iii) terminated and a new contract may be entered into in lieu thereof, if the board of fire commissioners, after such hearing, shall determine by resolution, that it is in the public interest so to do. Such notice shall state in general terms the reason why any existing contract is to be amended or terminated, and if a new contract is to be entered into the notice shall also describe the new contract in general terms.

(h) The term "fire protection", as used in this subdivision, includes inspections of buildings and properties in the fire district for the purposes specified in and as authorized by section eight hundred seven-a of the education law, subdivision four of section three hundred three of the multiple residence law, and section one hundred eighty-nine of the town law.

(i) The provisions of this subdivision shall not be deemed to have amended subdivision two of section two hundred nine-b or section two hundred nine-d of the general municipal law, or any other general, special or local law requiring the consent of a fire department, fire company or an emergency rescue and first aid squad to the entering into of a contract for services to be performed by such department, company or squad.

23. May sell or otherwise dispose of real and personal property of the district no longer necessary for any of its uses or purposes if, when and in the manner and to the extent authorized so to do in a proposition which is duly submitted and adopted or approved at a special or annual fire district election in the manner provided by section one hundred seventy-nine of this article for voting upon appropriations, except that if a proposition shall be submitted pursuant to the provisions of said section for the purchase of apparatus or if a proposition shall be submitted pursuant to the local finance law for the approval of a bond resolution or a capital note resolution for obligations to be issued for the purchase of apparatus, such proposition may specify that apparatus or equipment owned by the district or the proceeds of the sale thereof is to be used in part payment for new apparatus and the adoption of such proposition shall authorize the sale or such other disposition of such apparatus or equipment, or if apparatus or equipment is to be purchased without the submission of a proposition as aforesaid apparatus or equipment owned by the district may be used as part payment for new apparatus or equipment without the adoption of a proposition therefor, and except also that the board of fire commissioners may at any time sell or otherwise dispose of real and personal property of the district no longer necessary for any of its uses or purposes if valued at less than one hundred thousand dollars but not below twenty thousand dollars, if, when and in the manner and to the extent authorized so to do in a resolution which shall be subject to a permissive referendum governed in the manner provided in subdivision seven of section six-g of the general municipal law and except also that the board of fire commissioners may at any time sell or otherwise dispose of real and personal property of the district no longer necessary for any of its uses or purposes without the adoption of a proposition therefor if the value of such real and personal property does not exceed the sum of twenty thousand dollars.

23-a. Shall award all contracts for public work and, except when the office of director of purchasing has been established and a director of purchasing shall have been appointed and qualified, all purchase contracts to the lowest responsible bidder after advertisement for bids where so required by section one hundred three of the general municipal law. In any case of a purchase from a manufacturer of a motor vehicle used for fighting fires, whether or not including apparatus used in connection with such motor vehicle, having a period of probable usefulness of ten years as determined by section 11.00 of the local finance law, advertisement for sealed bids may be made and the purchase contract may be awarded for such motor vehicle and apparatus with the provision, if the board of fire commissioners shall so specify, that progress payments be made to the manufacturer as the motor vehicle or apparatus or both progresses, provided that evidence satisfactory to the board of fire commissioners as to the progress of such work be produced with each request by the manufacturer for a progress payment, and further provided that such progress payments shall not exceed four in number and that at least twenty-five per cent of the contract price of the motor vehicle or apparatus or both be withheld by the board of fire commissioners until such motor vehicle or apparatus or both are delivered to and accepted by the board of fire commissioners, and further provided that every such contract providing for progress payments shall be accompanied by a surety bond of a property/casualty insurance com-

pany, as defined in section one hundred seven of the insurance law, for the completion of the work, specified in the contract, within the amount stipulated therein, which bond shall be filed with the board of fire commissioners.

24. May enter into an agreement with the town in which the fire district is located in whole or in part for the fire district to issue fire permits on behalf of the town as provided in and subject to the provisions of sections one hundred thirty-nine and one hundred seventy-six-a of this chapter and may terminate any such agreement as provided in such section one hundred thirty-nine.

25. Shall have power to cause investigations to be made to determine whether the provisions of laws relating to fire prevention and fire equipment are being complied with within the fire district and, in case there is found what appears to be a violation of any town building code or of any town ordinances, rules and regulations for fire prevention, or for the removal or repair of unsafe buildings or collapsed structures, shall report the same to the town building inspector appointed pursuant to section one hundred thirty-eight of this chapter, or, if there be no such official, to the town board, for appropriate action.

26. The amount of any indebtedness incurred by a newly created fire district prior to the first fiscal year for which an annual estimate is adopted, and the amount of the interest thereon, shall be included in the first statement of expenditures of the district submitted pursuant to section one hundred eighty-one of this chapter and shall be assessed and levied on the taxable property of such district and collected in the same manner and at the same time as the other amounts included in such statement of expenditures. The amount so raised shall not be subject to the limitations of subdivision eighteen of this section.

27. Shall have power to establish within the fire district one or more zones in which the rate of tax for fire district purposes shall be different from the rate for other zones or for the portion of the district not included in any zone, after a public hearing thereon. The notice of such hearing shall be published and posted and such hearing shall be held in the manner provided in this article for a hearing upon the establishment of a fire, fire alarm or fire protection district upon petition, except that the secretary of the board of fire commissioners shall perform the duties of the town clerk. Such notice shall specify the boundaries of the proposed zone or zones and the items of expense of the district which shall be charged against such zone or zones, other than those charged against the district as a whole, or the other respects in which the rates of tax for the proposed zone or zones are to be different from the rates for the remainder of the district. After such hearing and upon the evidence given thereat, the board of fire commissioners shall determine by resolution whether it be in the public interest to establish the proposed zone or zones. If it be determined that the establishment of such zone or zones be in the public interest, such board shall determine whether all the property, property owners and interested persons within the proposed zone or zones are benefited thereby or enjoy benefits greater than are conferred upon the remainder of the district, and whether all property or property owners benefited or who enjoy such benefits are included within such zone or zones, and it shall so alter the boundaries of such zone or zones that all property and property owners and only such property and property owners as are benefited and enjoy such benefits shall be included within the limits of such zone or zones. In the event, however, that it is found that any property, property owner or any interested persons not included in the zone or zones as originally proposed will be benefited thereby or enjoy such benefits, a further notice shall be posted and published and another hearing held as provided herein, unless all said additional property owners or interested persons affected file a written consent to be included in such zone or zones. When the boundaries of such zone or zones shall have been finally determined by such board, a certificate thereof shall be filed in the office of the town clerk or, if the district be situated in more than one town, in the offices of the town clerks of all of the towns in which such district is situated, and such zone or zones shall be deemed established by the filing of such certificate. Such board shall also cause such zone or zones to be correctly marked upon the map of the fire district. It is intended that the provisions of this subdivision shall apply, for example, so as to permit one rate of taxation within a given distance of the fire house, where insurance rates are lower, and another rate for a greater distance from the fire house, or one rate for that portion of the district which does not have water hydrants and another rate for that portion of the district which has water hydrants, or in the event of any other unusual circumstances making the establishment of a zone or zones desirable. After such zone or zones shall be established, the annual statement of expenditures, filed pursuant to section one hundred eighty-one of this chapter, shall specify the amounts to be raised by taxation in said zone or zones, which are not to be a general charge against all of the property of the fire district, and such amounts shall be levied only upon the property included in such zone or zones. Notwithstanding any other provision of this chapter, the petition for the creation of a fire district may provide for the establishment of a zone or zones as aforesaid, and the town board or boards in the creation of the fire district may establish such separate zone or zones in the same manner that they established the fire district, but the provisions relating to the establishment of zones by the board of fire commissioners of a fire district shall be followed so far as applicable. In case a petition for the creation of a fire district calls for the establishment of such a zone or zones,

the notice of the public hearing with respect to the creation of the fire district shall contain information similar to that required to be contained in the notice given by the secretary of the board of fire commissioners where the zone or zones are to be created by the board of fire commissioners and the town board or boards shall have all of the powers of a board of fire commissioners with respect to the creation of such zone or zones. The board of fire commissioners of a fire district in which a zone or zones shall have been established as hereinbefore provided may alter the boundaries of any such zone or zones or cause any such zone or zones to be abolished by procedure similar to that provided in this section for the establishment of a zone or zones by the board of fire commissioners.

28. May compromise any suits or claims now existing or hereafter arising against the fire district under section two hundred five-b of the general municipal law, and a tax may be levied against the taxable property of the fire district for such purpose in addition to the sums authorized by subdivision eighteen of this section, without the adoption of a proposition therefor, provided, however, that such compromise shall have been approved by the court in which such action is pending, or if not pending in any court, by a justice of the supreme court of the judicial district in which such fire district is located, on motion of either party supported by the affidavits of both an officer of such fire district and the claimant or claimants, and the affidavits of such other persons as the court or justice may require, setting forth facts sufficient to establish the liability of the fire district and its lack of adequate defense.

29. May authorize the use of voting machines at any annual or special election held within the fire district and such voting machine shall be used in accordance with the provisions contained in article nine of the election law.

30. May provide by taxation the sum necessary to pay any judgment recovered against the fire district, or may provide such sum, in whole or in part, pursuant to the local finance law and any taxes levied for such purpose against the taxable property of the fire district shall be in addition to the sums authorized by subdivision eighteen of this section without the adoption of a proposition therefor.

31. May offer monetary rewards, in sums not to exceed one thousand dollars, to individuals for information leading to the arrest and conviction of any person or persons for felonies or misdemeanors directly connected to vandalism or theft of district property. Such rewards may be offered on any conditions the board may determine, subject to whatever qualifications it may deem appropriate.

32. May engage a certified public accountant or public accountant to audit the accounts and fiscal affairs of the fire district.

33. May authorize the use of fire equipment and apparatus belonging to the fire district for the purpose of participation in the funeral of a deceased member or former member of a fire department or fire company within the district including the transportation of the body of the deceased firefighter.

34. May adopt a resolution authorizing the application of the agricultural value assessment established pursuant to article twenty-five-AA of the agriculture and markets law to the special assessment or special ad valorem levy made on behalf of the district on land benefitting from the agricultural value assessment under article twenty-five-AA of the agriculture and markets law located within the district. A copy of this resolution shall be delivered to the assessor or assessors of the unit or units in which the district is located and shall be effective on the assessment roll prepared after the next taxable statue [status]* date following its adoption. A resolution repealing this exemption shall be delivered to the assessor or assessors of the assessing unit or units in which the district is located and shall be effective on the assessment roll prepared after the next taxable status date following its adoption.

HISTORY:

Add, L 1932, ch 634; amd, L 1933, ch 705, § 3; L 1934, ch 672; L 1934, ch 687; L 1934, ch 816, eff May 22, 1934; L 1935, ch 645, §§ 2–7, eff May 1, 1935; L 1936, ch 746, § 2; L 1937, ch 342; L 1937, ch 360; L 1937, ch 427; L 1937, ch 560; L 1938, ch 135; L 1939, ch 584, § 11; L 1940, ch 357, §§ 1, 2; L 1940, ch 374, § 20; L 1940, ch 432, §§ 6, 7; L 1940, ch 471, eff April 13, 1940; L 1941, ch 30, § 3, eff Feb 26, 1941; L 1941, ch 648, § 10; L 1942, ch 85, § 15; L 1942, ch 109, § 1; L 1942, ch 588; L 1942, ch 775, eff May 11, 1942; L 1943, ch 710, §§ 2610, 2611 (Part 1); L 1944, ch 546, § 1; L 1945, ch 277; L 1945, ch 456; L 1945, ch 509, §§ 1, 2, eff April 3, 1945; L 1946, ch 177; L 1946, ch 191, § 2; L 1947, ch 438; L 1947, ch 602, § 3, eff July 1, 1947; L 1947, ch 642, eff April 5, 1947; L 1948, ch 809, § 2; L 1949, ch 138, § 2; L 1949, ch 172; L 1949, ch 565, §§ 1–4; L 1949, ch 568, eff April 13, 1949; L 1949, ch 651; L 1950, ch 550, § 1; L 1951, ch 372, § 1, eff March 30, 1951; L 1952, ch 145, § 2; L 1952, ch 743, §§ 1, 2; L 1953, ch 786, eff April 17, 1953; L 1953, ch 861, § 10; L 1954, ch 411, § 2; L 1954, ch 699 §§ 1, 2, eff April 14, 1954; L 1954, ch 706; L 1955, ch 638, § 1; L 1955, ch 801; L 1955, ch 851; L 1956, ch 146; L 1956, ch 614, § 1; L 1957, ch 470, § 2; L 1958, ch 211, eff March 14, 1958; L 1958, ch 575, §§ 1, 2; L 1960, ch 122, §§ 1, 2; L 1960, ch 167, eff March 8, 1960; L 1960, ch 220, § 1; L 1961, ch 310, §§ 3, 4; L 1961, ch 929, §§ 1, 2; L 1962, ch 803, § 1, eff Jan 1, 1963; L 1962, ch 907; L 1963, ch 725, §§ 1, 2; L 1964, ch 221; L 1964, ch 520, §§ 5, 6; L 1964, ch 946, § 16, eff Sept 1, 1964; L 1965, ch 222, § 4; L 1965, ch 223; L 1965, ch 509, eff June 28, 1965; L 1965, ch 677, § 1; L 1966, ch 94, eff March 29, 1966; L 1966, ch 470, § 3, eff May 31, 1966; L 1966, ch 749, § 2; L 1967, ch 705, § 2, eff Sept 1, 1967; L 1969, ch 28, eff March 11, 1969; L 1970, ch 91; L 1971, ch 205; L 1972, ch 73, § 1, eff March 21, 1972; L 1972, ch 479, § 2; L 1973, ch 176, § 4, eff Sept 1, 1973; L 1974, ch 397, § 1; L 1974, ch 511, § 2; L 1974, ch 803, § 1; L 1976, ch 449, § 1; L 1978, ch 109, eff May 9, 1978; L 1980, ch 307, § 2; L 1980, ch 358, § 1, eff Jan 1, 1981; L 1980, ch 831, § 1, eff July 1, 1980; L 1981, ch 879, § 1; L 1981, ch 880, § 1; L 1982, ch 730, § 2, eff July 27, 1982; L 1983, ch 155, § 1; L 1983, ch 165, § 1, eff May 31, 1983; L 1983, ch 166, § 1; L 1983, ch 550, § 2, eff July 20, 1983; L 1983, ch 571, § 1, eff July 21, 1983; L 1983, ch 763, §§ 1, 2; L 1983, ch 854, § 1; L 1984, ch 130, §§ 1, 2, eff May 22, 1984; L 1984, ch 805, § 80, eff Sept 1, 1984; L 1985, ch 719, § 5; L 1986, ch 169, § 1, eff June 16, 1986; L 1986, ch 553, § 1; L 1988, ch 775, § 2, eff Sept 1, 1989; L 1991, ch 218, § 1, eff Sept 1, 1991; L 1992, ch 655, § 2, eff July 31, 1992; L 1993, ch 440, § 25, eff July 26, 1993; L 1995, ch 593, § 1,

*The bracketed word has been inserted by the Publisher.

eff Aug 8, 1995; L 1996, ch 35, § 2, eff April 2, 1996; L 1997, ch 288, § 1, eff July 29, 1997; L 2000, ch 351, § 1, eff Aug 23, 2000; L 2001, ch 480, § 1, eff Nov 21, 2001; L 2002, ch 670, § 4, eff Dec 9, 2002; L 2004, ch 549, § 1, eff Jan 1, 2005; L 2004, ch 656, § 7, eff Oct 26, 2004; L 2006, ch 237, § 2, eff July 26, 2006; L 2009, ch 74, § 7, eff March 21, 2010; L 2011, ch 170, § 2, eff July 20, 2011, expires and repealed Dec 31, 2014; L 2014, ch 313, § 1, effective August 11, 2014; L 2016, ch 351, § 1, effective September 29, 2016; L 2016, ch 430, § 1, effective November 14, 2016; L 2017, ch 294, § 1, effective January 1, 2018; L 2017, ch 365, § 1, effective October 23, 2017; L 2018, ch 248, § 1, effective January 1, 2019; L 2018, ch 476, § 97, effective December 28, 2018; L 2019, ch 208, § 1, effective September 28, 2019.

Revision Notes: [1954, ch 699] The matter deleted in subdivision 10 is covered in new section 176-b of the Town Law, as added by this act.

[1955, ch 638] Formerly many fire districts secured indemnity against workmen's compensation benefits for fire district officers and paid employees and for mandatory financial benefits in relation to volunteer firemen by the purchase of insurance. These districts are located mainly in 23 counties outside New York City. Such expense is inside the spending limitation of the fire district as set forth in subdivision 18 amended by this act.

In the remaining 34 counties outside New York City, the vast majority of fire districts, according to administrative practice and construction of the law, have such indemnity without purchasing insurance as the result of the participation of the town in which they are located in county mutual workmen's compensation plans. See First Interim Report of Temporary State Commission on Fire Laws, Leg. Doc. (1954) No. 71, pages 45-94. The spending power of such districts is not reduced by the cost of such insurance, it being covered in the town budget.

In some towns a single policy is purchased by the town under Workmen's Compensation Law, § 50(7), covering the town, villages and fire districts for liability for fireman benefits. The cost, being in the town's budget, does not reduce the first district spending power.

Under the Workmen's Compensation Law, § 50 (3-a), some fire districts can be direct participants in a county mutual workmen's compensation plan. Only one such participating district is now known. Suggestions for changes in such law could be made at the 1955 session of the Legislature which might increase direct fire district participation in such plans. The cost of such participation under then existing law might be inside the spending limitation of the fire district.

The Temporary State Commission on Fire Laws believed that the cost of insurance for workmen's compensation and firemen's benefits should be uniformly outside the spending limitation, whether such insurance is purchased or is provided by participation in a mutual plan. This act accomplishes such purpose.

[1958] This act embodied separate recommendations of the Association of Fire Districts of the State of New York and of the Joint Legislative Committee on Fire Laws. If separate bills had been introduced, there would have been considerable confusion to local officials and the fire service.

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

§ 18. Savings clause. Notwithstanding the repeal or amendment of any law by this act, nothing in this act shall be construed to impair the consolidation or dissolution of any local government entity pursuant to any such repealed or amended law if there was commenced in or for such local government entity prior to the effective date of this act a consolidation or dissolution proceeding pursuant to such law, in which event the provisions of such former law shall govern such proceeding as though such former law had not been repealed hereby.

Laws 2011, ch 170, § 7, eff July 20, 2011, provides as follows:

§ 7. This act shall take effect immediately provided, however, that sections one, two, four and five of this act shall expire and be deemed repealed December 31, 2015, when upon such date the provisions of sections three and six of this act shall take effect. (Amd, L 2012, ch 482, § 3, eff Oct 3, 2012, L 2014, ch 273, § 3, eff Aug 11, 2014.).

Laws 2017 ch 294, § 4, eff Jan 1, 2018, provides:

§ 4. This act shall take effect on January first next succeeding the date on which it shall have become a law and shall apply to contracts with a term commencing after March first of the year in which it shall have become a law.

Laws 2018, ch 248, § 2, eff January 1, 2019, provides:

§ 2. This act shall take effect on the same date and in the same manner as chapter 334 of the laws of 2017 takes effect. Effective immediately, the addition and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized to be made and completed on or before such effective date.

Laws 2019, ch 208, § 2, eff September 28, 2019, provides:

§ 2. This act shall take effect on the thirtieth day after it shall have become a law.

Amendment Notes 2011. Chapter 170, § 2 amended:

Sub 29 by deleting at fig 1 "and" at fig 2 "machine" and adding the matter in italics.

2009. Chapter 74, § 7 amended:

Sub 1 by deleting at fig 1 "or consolidated" and adding the matter in italics.

2006. Chapter 237, § 2 amended:

By adding sub 18, par (16).

2004. Chapter 549, § 1 amended:

By adding sub 18, par (15).

2004. Chapter 656, § 7 amended:

Sub 4-c by deleting at fig 1 "one".

The 2014 amendment by ch 313, § 1, in the first paragraph of 11-b, added "and the Caton fire district may adopt a resolution to hold future meetings, for nominations of chief and assistant chiefs, on the second Tuesday in December" at the end of the second sentence, added "or the second Tuesday in December in the Caton fire district" in the fourth sentence, and made related changes.

The 2016 amendment by ch 351, § 1, deleted "and a resident of the state of New York" at the fifth sentence of the first paragraph of 11-b.

The 2016 amendment by ch 430, § 1, substituted "section one hundred seventy-nine of this article" for "section one hundred seventy-nine", "less than one hundred thousand dollars but not below twenty thousand dollars" for "less than fifty thousand dollars" and "sum of twenty thousand dollars" for "sum of ten thousand dollars" in 23.

The 2017 amendment by ch 294, § 1, added 22(a) designation; redesignated former (a)(1) and (a)(2) as (a)(i) and (a)(ii) in 22(a); added 22(b); designated 22(c) through 22(i); and redesignated former (g)(1) through (g)(3) as (g)(i) through (g)(iii) in 22(g).

The 2017 amendment by ch 365, § 1, substituted "subdivision seven of section six-g" for "subdivision four of section six-g" in 23.

The 2018 amendment by ch 248, § 1, added 18(17).

The 2018 amendment by ch 476, § 97, substituted "firefighter" for "fireman" or variants wherever it appears in 4-a, 14, 18(4), 18(5), 18(7), 18(8), 18-a, 22(a) and 33; substituted "New York state and local police" for "New York state policemen's" in 18(5); and substituted "workers' compensation law" for "workmen's compensation law" twice in 18(7).

The 2019 amendment by ch 208, § 1, in 11-b, in the first paragraph, added "and the Fair Harbor fire department may adopt a resolution to hold future meetings, for nomination of the chief and assistant chiefs, on the third Sunday in September" in the second sentence and "or the third Sunday in September in the Fair Harbor fire department" in the fourth sentence; and made related changes.

Repeal Notes: [1954, ch 699] Subdivision 24 provided for admission of certain non-residents in fire district fire companies. It was repealed because the subject matter is covered in new section 176-b of the Town Law, as added by this act.

[1964, ch 946] Subdivision 31, repealed by this act, related to conflicts of interest and has been replaced and made unnecessary by the enactment of article 18 of the General Municipal Law by this act.

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I. Generally

1. In general

When a fire district filed a map of its boundaries with a town clerk, and the other fire districts adjacent to the filing fire district did not file written objections to the map within 45 days, N.Y. Town Law § 176(5) governed the town board's consideration of the map, under which the town board had the authority to determine what the district's boundaries were. Guilderland Fire Dist. v Centi, 193 Misc. 2d 611, 749 N.Y.S.2d 696, 2002 N.Y. Misc. LEXIS 1352 (N.Y. Sup. Ct. 2002).

Where the board of fire commissioners of a fire district is going to abolish all of the special zones of assessment in the district, the notice of hearing thereon does not have to describe the zones in the same detail as is required for the establishment of zones. 1969 Ops St Compt File #250.

CLS Town Law § 176(7) empowers board of fire commissioners to impose "requirements" on nominating petitions for fire district office, and since it is silent as to nature of these requirements, they could include prohibition against signing by qualified voter of multiple petitions for candidates for same fire district office. Ops St Compt 89-62.

The office of fire chief is a fire department rather than a fire district office and a vacancy in such office must be filled in the manner provided by section 176(11-a) of the Town Law. 1983 Op St Comp File #83-72.

2. Creation of districts and companies; management of affairs; scope of responsibility, generally

Fire company was political subdivision because it was essentially under complete control of fire district, and thus fact that fire company, rather than fire district, owned real property underlying fire station, was irrelevant for purposes of determining whether proposed construction of fire substation was exempt from area and site plan requirements of town building code. Nanuet Fire Engine Co. No. 1 v Amster, 177 Misc. 2d 296, 676 N.Y.S.2d 890, 1998 N.Y. Misc. LEXIS 300 (N.Y. Sup. Ct. 1998).

The certificate of incorporation of a volunteer fire company may be amended so as to include a fire district within the territory in which the fire company proposes to act. 1955 Op St Compt No. 55–7319.

Unlike fire districts, fire protection districts may not be zoned. A fire protection district may, however, be dissolved and two or more fire protection districts created from the territory formerly embraced by the original district. 1956 Ops St Compt File #8050.

A fire district fire department is obliged to respond to alarms concerning fires which occur on state-owned property located within the district. 1963 Ops St Compt #62.

Discussion of procedure for incorporation of volunteer fire company and the beneficial effect of a corporate status to simplify matters concerning the management of affairs and ownership of assets. 1967 Op St Compt No. 67–786.

The board of fire commissioners of a fire district may organize, operate, maintain and equip additional fire companies in the fire district. The board of fire commissioners may consent to the formation of a fire corporation which intends to operate within the territory of such fire district. In either case, either the fire company or the district could purchase and own real property and equipment. 1968 Op St Compt No. 68–926.

The by-laws of a volunteer fire company of a fire district are not subject to approval by the fire district board of fire commissioners, but fire company bylaws in conflict with duly prescribed rules and regulations of such board are invalid. 1969 Ops St Compt File #142.

3. —Control of internal affairs

A fire company or fire department in a fire district may adopt by-laws regulating its internal affairs without prior approval of the district board of fire commissioners so long as such by-laws are not inconsistent with the board's rules and regulations. 1968 Ops St Compt File #374.

4. —Coordination between districts

Fire companies from one or more fire districts may respond to calls for assistance in another fire district pursuant to General Municipal Law, § 209. 1969 Ops St Compt File #227.

5. —Emergency, rescue and relief

For a discussion of law with reference to fire districts answering calls for assistance and relative authority of civil defense commissions and fire defense coordinators, see 1953 Ops St Compt File #6413.

A fire district may purchase an ambulance and authorize the emergency relief squad of its fire department to render, in conjunction with its operation, general ambulance service in the fire district. 1960 Ops St Compt File #423.

6. —Fire outside of district

No provision of a law requires a fire district fire department to fight any fire outside the district. Forest rangers and other officers charged with duty of fighting fires may not compel use of fire district fire apparatus at a forest fire outside the fire district. 1953 Ops St Compt File #6404.

7. Employees, generally

Where a board of fire commissioners of a fire district has appointed a person to supervise and have charge of the maintenance of the district fire apparatus and equipment, it should define his duties and the duties of the chief engineer with sufficient exactitude so that there is no conflict of authority as between the two. 1953 Ops St Compt File #6068.

Board of fire commissioners may employ and compensate persons to answer fire calls and sound alarms in connection with a fire alarm system. 1954 Ops St Compt File #6597.

A fire district Board of Commissioners may appoint a "fire inspector" to inspect public places, gas stations and other premises within the district for hazards and make recommendations in relation thereto. 1961 Ops St Compt #405.

The Board of Fire Commissioners may provide for employment of a drill master and instructor for the fire district fire department. 1962 Ops St Compt #792.

When board of fire commissioners declines to approve nominee for fire chief, hearing is unnecessary and nominee need not be advised of reasons for disapproval. 1985 Op St Compt No. 85-49.

Otherwise qualified individual may be assigned to fire police squad immediately on becoming member of fire company of fire district fire department; however, board of fire commissioners may establish reasonable minimum service requirement for appointment to fire police squad, if board determines that such requirement is reasonably related to functions to be performed and is in best interest of fire district. 1998 Op St Compt No. 98-20.

Election inspectors and ballot clerks at fire district elections may not be compensated from fire district funds. 1946 Ops St Compt 140.

Fire district may hire a person either as an employee or an independent contractor to drive fire truck to distant city for installation of equipment even though he happens to be a volunteer fireman. 1955 Ops St Compt File #7392.

8. —Attorney

(1) The board of fire commissioners of a fire district may employ an attorney to perform legal services for the district. (2) The town attorney may be so employed and paid from fire district funds. 1947 Ops St Compt 353.

There is no statutory or common law impediment to a town attorney's representing both the town and fire districts therein. However, consideration should be given to the provisions of Canon No. 6 of the Canons of Professional Ethics. 1967 Ops St Compt File #1010.

A fire district may not directly or indirectly employ an attorney to represent an injured volunteer fireman in proceedings to determine such fireman's qualifications to retain his position of employment. 1968 Ops St Compt File #1086.

9. —Janitor

The board of fire commissioners of a fire district may not employ one of its members as janitor of the fire house. 1947 Ops St Compt 190.

10. Engineers and other officers, generally

A "write in" candidate for fire district officer who receives the majority of votes and is otherwise qualified, is the duly elected officer. 1955 Ops St Compt File #7067.

A blank space for "write in" candidates must be provided on the ballots prepared for the election of fire district officers. 1960 Ops St Compt File #573.

11. —Assistant engineers

It is not necessary for volunteer fire department to submit to board of fire commissioners names of and number of ballots cast for all candidates proposed for chief engineer and assistant engineers at department election. 1945 Ops St Compt 194.

The only officers of a fire department subject to the approval of fire commissioners are chief engineer and assistant engineers. 1946 Ops St Compt 659.

Only active members of a fire department are eligible to nomination for office of chief engineer or assistant chief engineer, and exempt firemen and those on leave of absence are ineligible for nomination. 1962 Ops St Compt #350.

Burning permits may be issued by a chief or assistant engineer of the fire district fire department pursuant to rules and regulations not inconsistent with the rules and regulations promulgated by the Air Pollution Control Board. 1968 Ops St Compt File #820.

12. —Chief engineer, generally

A chief engineer of the Fire Department of a town is not a public officer since he has no independent prerogatives or sovereign power, but is subject to the jurisdiction and control of the fire commissioners, and so is subject to removal from his position without the preferring of formal charges and without being accorded a hearing. Application of Barber, 100 N.Y.S.2d 668, 198 Misc. 135, 1950 N.Y. Misc. LEXIS 2169 (N.Y. Sup. Ct. 1950), aff'd, 278 A.D. 600, 101 N.Y.S.2d 924, 1951 N.Y. App. Div. LEXIS 4071 (N.Y. App. Div. 1951).

It is not necessary for volunteer fire department to submit to board of fire commissioners names of and number of ballots cast for all candidates proposed for chief engineer and assistant engineers at department election. 1945 Ops St Compt 194.

The only officers of a fire department subject to the approval of fire commissioners are chief engineer and assistant engineers. 1946 Ops St Compt 659.

A chief engineer employed as a fire district commissioner becomes a paid fireman and loses his status as a volunteer fireman. 1954 Ops St Compt File #6654.

A town councilman may also hold the office of chief engineer of a fire district. 1956 Ops St Compt File #7848.

The position of paid chief engineer may be abolished by resolution of the board of fire commissioners of a fire district. A

chief engineer whose paid job is abolished may be restored to his former status as a volunteer fireman, if he still retains membership in the volunteer fire company. 1957 Ops St Compt File #272.

There can be only one chief engineer in a fire district, and he is nominated at a meeting of the fire district fire department and appointed by the Board of Fire Commissioners. 1962 Ops St Compt #953.

Discussion of authority of fire district chief engineer to reassign company members from one company to another and to accept non-firemen's assistance or call for assistance in connection with fighting fires. The chief engineer of a fire district department in charge at the scene of a fire has no authority to employ anyone to assist activities of his department. 1963 Ops St Compt #329.

13. — —Nomination to office

The board of fire commissioners may refuse to appoint the person nominated to be chief engineer. 1954 Ops St Compt File #6544.

Only active members of a fire department are eligible to nomination for office of chief engineer or assistant chief engineer, and exempt firemen and those on leave of absence are ineligible for nomination. 1962 Ops St Compt #350.

There can be only one chief engineer of a fire district fire department, who must be nominated at the annual department meeting and appointed by the Board of Fire Commissioners. 1963 Ops St Compt #213.

A board of fire commissioners may not reject the nominee of the fire department for the office of chief and appoint a different person to such office. 1979 Op St Comp File #600.

14. —Secretary

A part-time judge may serve as a secretary to a town fire district, and as a chair of the annual school board meeting for the presentation of the school budget. Advisory Committee on Judicial Ethics, Op 89-155 (1990).

A part-time judge may serve as a secretary to a town fire district, and as a chair of the annual school board meeting for the presentation of the school budget. Advisory Committee on Judicial Ethics, Op 89-155 (1990).

15. —Treasurer

The office of fire district treasurer is incompatible with employment as a paid fireman of the fire district. 1955 Ops St Compt File #7362.

A board of fire commissioners of a fire district may cause to be submitted to the district electors at any annual fire district election, other than one at which a fire district treasurer is required to be elected, a proposition determining that the office of fire district treasurer shall be appointive and not elective in such district. 1969 Ops St Compt File #86.

16. —Volunteer chief

A paid fireman may not be appointed chief of a volunteer fire department. 1979 Op St Comp File #600.

17. Firemen; paid

In a fire district in which employment of paid firemen has already been authorized, the authorization continues from year to year and further authorization, either by public hearing or referendum, is necessary only if it is proposed to increase the number of paid firemen or to increase their salaries. 1963 Ops St Compt #264.

18. —Volunteers, generally

The provisions of this section as to removal of members of a fire company are complemented, as to removal of volunteer firemen, by § 209-1 of the General Municipal Law, governing procedure to be followed and rights of the accused. Busking v Kronimus, 41 Misc. 2d 985, 247 N.Y.S.2d 149, 1963 N.Y. Misc. LEXIS 1711 (N.Y. Sup. Ct. 1963), aff'd, 22 A.D.2d 888, 255 N.Y.S.2d 312, 1964 N.Y. App. Div. LEXIS 2631 (N.Y. App. Div. 2d Dep't 1964).

A person may not be a member of the volunteer fire department of each of two fire districts. 1953 Ops St Compt File #6350.

A volunteer fireman may be hired by the fire district as an independent contractor to provide painting, snow removal, grading, plumbing and other maintenance work without affecting his status as a volunteer fireman. 1967 Ops St Compt File #465.

If a volunteer fireman receives payment as a full or part-time dispatcher, and if such activity is fire-manic, the fireman's power to act as a volunteer fireman is temporarily suspended. 1967 Ops St Compt File #465.

Several fire districts may enter into cooperation agreement to implement advertising campaign for purpose of recruiting volunteer firefighters for fire companies of fire departments of districts; costs of campaign may be apportioned by property valuations, population, or any other equitable method or formula as agreed to by parties to agreement. 1996 Op St Compt No. 96-7.

19. — —Absenteeism among volunteers

A board of fire commissioners had the power and discretion to approve the recommendation of the board of officers of a fire district to dismiss the appellant (volunteer fireman) for absenteeism at fires and meetings, without serving charges on the appellant and without granting a hearing. Iannucci v Summa, 8 A.D.2d 841, 190 N.Y.S.2d 560, 1959 N.Y. App. Div. LEXIS 7887 (N.Y. App. Div. 2d Dep't 1959).

In an Article 78 proceeding, the court would reinstate a volunteer fireman who was dismissed for gross misconduct and insubordination after he allegedly refused his fire chief's order to shave off his beard, allegedly disobeyed an order not to respond to the scene of the fire until he had shaved off his beard, allegedly failed to attend a meeting to discuss that conduct, and, after being suspended, allegedly used recreational facilities reserved for firemen who had not been suspended, where there was no evidence in the record that the Board of Fire Commissioners had, under Town Law § 176, adopted a rule, regulation or bylaw prohibiting beards, where the chief's order thus was not binding, where the evidence supported the fireman's contention that he was at the fire as a spectator rather than as a firefighter, where the fireman's failure to attend the meeting was due to a conflict in employment schedules, his inability to reach the chief by telephone, and the chief's alleged refusal to listen to the fireman's explanation, and where the fireman was present at the recreational facilities as a guest of another fireman who was in good standing. Ittig v Huntington Manor Volunteer Fire Dept., Inc., 95 A.D.2d 829, 463 N.Y.S.2d 870, 1983 N.Y. App. Div. LEXIS 18767 (N.Y. App. Div. 2d Dep't 1983).

20. — —Disabled volunteers

A person is not disqualified from eligibility to active membership in a fire company because he is temporarily disabled by reason of illness. 1960 Ops St Compt File #632.

21. — —Women volunteers

A woman may be admitted to membership in a volunteer fire company to participate in all firemanic activities. Whether a woman may be excluded from membership in a volunteer fire company, in the face of a claim of unconstitutional discrimination, is a matter for judicial determination. 1974 Ops St Compt File #1171.

22. Municipal regulations

In proceeding to nullify decision of town board which vacated permit previously issued for construction of fire substation because proposed construction did not meet requirements of town's building code, case was remanded for town board to apply "balancing of public interests" test to determine whether proposed construction of substation on 43,841 square feet was subject to building code requirement of 80,000 square feet and filing of site plan. Nanuet Fire Engine Co. No. 1 v Amster, 177 Misc. 2d 296, 676 N.Y.S.2d 890, 1998 N.Y. Misc. LEXIS 300 (N.Y. Sup. Ct. 1998).

A board of fire commissioners must obtain a building permit and pay the fee therefor under the town building code for the construction of a firehouse. 1953 Ops St Compt File #6205.

Petition is not required to initiate proceedings to zone fire district. 1953 Ops St Compt File #6401.

A fire district may not be zoned so as to charge against an extension the amount of additional cost for fire protection incurred during the year by reason of such extension. 1954 Ops St Compt File #6538.

Although a fire district has no authority to levy fines for the transmission of false alarms, the town board of the town in which the fire district is located may enact a local law, ordinance, rule or

regulation making the transmission of a false alarm an offense punishable by a civil penalty or fine. 1984 Op St Comp File #84-21.

23. Powers and duties of fire commissioner, generally

The board of fire commissioners of a fire district may organize, operate, maintain and equip additional fire companies in the fire district. Upon dissolution of district, the property must be sold and proceeds distributed as provided in section 185. 1947 Ops St Compt 203.

Fire district taxpayers may attend the regular monthly meeting of the board of fire commissioners but may not interfere in any way in the conduct of its business. The board of fire commissioners may not disband an incorporated fire company constituting the fire department of the district, but may organize other companies. 1953 Ops St Compt File #6282.

A fire district commissioner is a public officer and, although he serves without compensation, he may not enter into a contract with the fire district which he serves. 1955 Ops St Compt File #7343.

A member of the board of fire commissioners, where authorized by resolution of the board, may ride the fire apparatus to a fire or other emergency without the specific permission of the officer in charge. 1960 Ops St Compt File #780.

Under certain circumstances, a Board of Fire District Fire Commissioners may approve and supervise intentional burning of a building and grass growing upon the parcel of land on which the building is located. 1963 Ops St Compt #475.

Board of fire commissioners may adopt regulations authorizing fire commissioner, who is not member of fire department, to ride on fire vehicles during emergency calls, so long as regulation does not have effect of interfering with duties of chief or assistant chief, with chief or assistant chief having discretion to determine whether commissioner's presence in any particular vehicle would hamper firefighting efforts; point at which fire commissioner's involvement interferes with performance of duties of chief or assistant chief is factual determination to be made on basis of circumstances of each case. 1992 Op St Compt No. 92-25.

Governing body of town fire district may not be changed from town board to separate elective board of fire commissioners. 1945 Ops St Compt 194.

A taxpayer of a fire district has the right to attend a meeting of the board of fire commissioners. 1954 Ops St Comp File #6544.

24. —Posting bond or undertaking

Fire district commissioner not required to furnish official undertaking. Fire district treasurer must provide official undertaking. 1945 Ops St Compt 538.

25. Selection of fire commissioner, generally

Pursuant to CLS Town § 176(11-b), board of fire commissioners was not required to give reason for its rejection of fire department's nomination of plaintiff to office of assistant chief. Leap v Finnen, 168 A.D.2d 432, 562 N.Y.S.2d 555, 1990 N.Y. App. Div. LEXIS 15019 (N.Y. App. Div. 2d Dep't 1990).

Fire department officers must be nominated on the Thursday following the first Tuesday of April (or, under certain circumstances, December) and thereafter be appointed by the board of fire commissioners of the district. Fire company line officers are elected by the individual fire company at its own election held at such time and place as the constitution and by-laws of the particular fire company may prescribe. 1967 Ops St Compt File #1007.

If the board of fire commissioners refuses to appoint a nominee for a fire department office it may not appoint the person receiving the next highest number of ballots. The conduct of the fire department meeting at which nominations for fire department offices are made is governed by the rules and regulations of the board of fire commissioners. 1953 Ops St Compt File #6282.

26. —Dual office holding

The same person may not hold the office of fire district commissioner and justice of the peace. 1955 Ops St Compt File #7767.

There is no prohibition against the same individual serving on a county legislature and on a board of fire commissioners within the county. 1969 Ops St Compt File #1040.

27. —Length of term, generally

A fire district secretary-treasurer serves for a term of one year, notwithstanding that the appointment was designated as a temporary one. 1974 Ops St Compt File #825.

28. — —Holding over

Where fire district fails to hold annual election, commissioners in office hold over until successors are appointed. 1947 Ops St Compt 520.

Where, through inadvertence, an office of the fire district is left off the ballot, the person holding the said office at the time of the election shall hold over until a successor is chosen. 1956 Ops St Compt File #7878.

29. —Removal; suspension

Fire district's board of commissioners properly refused to remove board candidate's request to remove his name from ballot, and thus result of election that he won would not be set aside on petition of losing candidate in Article 78 proceeding, where winning candidate was properly nominated, his subsequent discovery that he could not continue his employment as city police officer if he accepted nomination did not disqualify him, and Town Law contains no provision authorizing fire district commissioners to remove candidate's name from ballot once he or she has duly filed proper nominating petition. Cusumano v Board of Comm'rs, 251 A.D.2d 404, 674 N.Y.S.2d 86, 1998 N.Y. App. Div. LEXIS 6636 (N.Y. App. Div. 2d Dep't 1998).

Powers and duties of a Board of Fire Commissioners are further defined in § 209-1 of the General Municipal Law, particularly with respect to removal of volunteer members, and the board has no power to suspend a member without establishing that he violated established rules or was guilty of some act which might be considered incompetence or misconduct. Burkart v Board of Fire Comm'rs, 28 Misc. 2d 64, 219 N.Y.S.2d 289, 1960 N.Y. Misc. LEXIS 1947 (N.Y. Sup. Ct. 1960).

This section makes no provision for removal of an elected chairman of the Board of Fire Commissioners, but such an officer is subject to removal under the provisions of § 36 of the Public Officers Law. 1961 Ops St Compt #616.

The board of fire commissioners of a fire district may remove a member of an incorporated fire company for cause. 1954 Ops St Compt File #6544.

30. —Vacancy

Mandamus to compel town board and members thereof to fill vacancy is the proper remedy in case where there is no dispute of facts, and person illegally appointed by board of fire district commissioners to fill the vacancy was properly omitted as a party in proceeding. Where one who was elected to office of fire district commissioner in December, 1939, failed to take and file the oath of office, as required by § 174, subd. 5, and he illegally held office until October 1, 1941, when board of fire district commissioners declared a vacancy to exist and appointed another to fill it, inasmuch as a vacancy in office had existed for over thirty days, appointment by board was violative of § 176, subd 3. Rivette v Baker, 265 A.D. 89, 37 N.Y.S.2d 912, 1942 N.Y. App. Div. LEXIS 5685 (N.Y. App. Div. 3d Dep't), modified, 265 A.D. 894, 1942 N.Y. App. Div. LEXIS 6369 (N.Y. App. Div. 3d Dep't 1942).

A vacancy in the office of fire district commissioners should be filled as the statute provides. 1947 Ops St Compt 165.

A vacancy in the office of fire district commissioner may be filled by the town board if the board of fire commissioners fail to fill such vacancy within thirty days. 1953 Ops St Compt #6452.

Where a fire district election results in a tie vote for fire commissioner, the vacancy must be filled pursuant to this section. 1954 Ops St Compt File #6516.

Board of fire commissioners should appoint a commissioner to fill a vacancy on the board where the annual election was not held because of failure, by oversight, to publish the required notice of election. 1968 Ops St Compt File #1027.

II. Specific Matters

31. Contracts, generally

Board of fire commissioners (and town board, in a town-wide fire district having no separate board of fire commissioners) may

contract for the delivery of fire equipment and apparatus. 1946 Ops St Compt 18.

Fire district which has valid contract for fire apparatus may not pay vendor amount in excess of contract price if contract remains unamended. 1946 Ops St Compt 537.

Where a fire district commissioner is personally interested in a contract with the fire district, after notice of the impropriety thereof, the board of fire commissioners should decline to direct the expenditure of fire district funds therefor. 1947 Ops St Compt 165.

A fire district may not contract with a volunteer fire company for the storage of district-owned equipment if the commissioners of the district also are members of the fire company. 1953 Ops St Compt File #6390.

A fire district has no authority to lease fire fighting apparatus. If such equipment is purchased, the contracts must be competitively let. Fire district may not make purchases on an installment payment plan. 1956 Ops St Compt File #7886.

Where a fire district contracts with two towns for fire protection, and the fire department owns a part of the apparatus to be used, the district may pay a portion of the contract prices equal to or greater than 35%, but if the district owns all the apparatus, it can pay the fire department not in excess of 35% of the contract price. In either case, such amounts may be paid in addition to rental for district use of fire department buildings. 1960 Ops St Compt File #197.

A contract may not be entered into for the purchase of a fire engine unless the contract cost is available or provided for on the date the contract is signed. 1970 Ops St Compt File #24.

A fire district is not obligated to compensate a private waterworks corporation for the rental of fire hydrants unless a properly authorized contract for such rental exists. Property owners within the zone of assessment in a fire district cannot be assessed retroactively for costs incurred by the district prior to establishment of the zone. 33 Op St Compt 1977, p 187 and 5 Op St Compt 1949, p 345 are superseded to the extent that a private waterworks corporation would be entitled to receive compensation for the use of fire hydrants even in absence of a properly authorized contract. 1990 Op St Compt 90-25.

Where a fire district enters a fire protection contract with an outside fire company for fire protection within the fire district, the question of who will be in command of a fire scene is a term of the contract which must be negotiated by the parties. 1984 Op St Comp File #84-22.

Assistant chief of fire district's fire department who owns more than 5 percent of stock of private corporation contracting with fire district for sale and repair of radios to district does not have prohibited interest in contract if, as assistant chief, he or she does not have any powers and duties listed in CLS Gen Mun § 801 in connection with contract; if assistant chief, on behalf of corporation, exercises direction and control over any corporate employees involved in contract, such fact must be disclosed under CLS Gen Mun § 803(1). 2001 Opns St Comp No. 01-11.

32. —Bidding requirements

Where bid submitted to fire district on fire truck was low by a small margin but provided a progressive payment schedule whereas district was not allowed by law to make prepayments, board of fire commissioners of such district was not empowered to allow such contract to be changed to provide that price should be paid on delivery, after competitor's bid stating a price based on payment on delivery had been opened. In awarding public contracts, no scheme or device promotive of favoritism or unfairness or which imposes limits not applicable to all bidders alike will be tolerated. Though acceptance of particular bid by fire district was improper, board of fire commissioners of such district would not be ordered, in Article 78 proceeding, to award the contract to the lowest proper bidder, in light of provision in notice to bidders that board reserved the right to reject any and all bids and readvertise for new bids. Sanford Fire Apparatus Corp. v Board of Fire Comrs., Lysander-Cody Fire Dist., 81 Misc. 2d 992, 367 N.Y.S.2d 891, 1975 N.Y. Misc. LEXIS 2512 (N.Y. Sup. Ct. 1975).

Purchase of fire apparatus is subject to public bidding requirements of General Municipal Law, Article 5-A. 1953 Ops St Compt File #6416.

Where no direct or indirect interest in public contracts exists, a fire district contract may be awarded to the adult son of a member of the board of fire commissioners where the son is the lowest responsible bidder on the contract. 1956 Ops St Compt File #8231.

Where a fire district intends to finance purchase of apparatus by issuance of serial bonds, it may advertise for bids on the proposed purchase before a proposition authorizing the financing has been approved, if a clause in the advertisement makes awarding of the contract subject to referendum approving the same. 1961 Ops St Compt #279.

Fire commissioners may reject all bids and re-advertise for new bids. If condemnation proceeding is discontinued, fire district may be ordered to pay damages to owners of realty. Board may not expend in excess of estimate set forth in bond resolution. Board may issue bonds to an amount smaller than approved. Expenses incurred in connection with building construction project disapproved in referendum are legal liabilities and may be paid. 1966 Ops St Compt File #751.

The board of fire commissioners may invite bids on property prior to a required referendum authorizing the sale of such property. 1968 Ops St Compt File #867.

Fire district may purchase firefighting vehicle from fire department at cost of more than $5,000 only after compliance with competitive bidding requirements of CLS Gen Mun § 103. 1986 Op St Compt No. 86-67.

33. —Contracts for services, generally

(1) Fire commissioners of fire district established under former § 38 of County Law may contract with a fire company located within district for fire protection within such district. (2) Fire commissioners of a fire district established pursuant to § 316 of former Town Law may contract for fire protection within the district, with a fire company located in such district. (3) In a fire district established pursuant to § 316 of former Town Law and in which district town board acts as commissioners, such town board may contract for fire protection within district with a fire company located within such district. (4) Town board may contract with fire company located within fire district established pursuant to §§ 314-c or 314-d of former Town Law for furnishing fire protection in such district. (5) Board of fire commissioners of a district established subsequent to Jan. 1, 1934, pursuant to Art. II of the present Town Law may not contract with a fire company to furnish fire protection in such district. 1945 Ops St Compt 77.

Commissioners of a fire district formed on or after January 1, 1934, are not authorized to contract for the furnishing of fire protection in said district. 1947 Ops St Compt 72.

A fire district may contract to furnish fire protection to a fire protection district though the fire protection district can be reached only by traveling through another fire district. 1947 Ops St Compt 104.

Fire district formed in 1941 may not contract for fire protection. 1947 Ops St Compt 105.

Fire commissioners of a fire district established in 1938 may not contract with an incorporated village for the furnishing of fire protection within said district. 1947 Ops St Compt 459.

A fire district established subsequent to January 1, 1934, may not contract for the furnishing of fire protection to a portion thereof. 1954 Ops St Compt File #6956.

A fire district established pursuant to Town Law of 1909. Sec. 314-c may not contract for fire protection pursuant to this section or § 184. 1955 Ops St Compt File #7598.

A fire district which contracts for fire protection may not compel the fire company to accept a condition in the contract that it place a portion of the consideration in a reserve fund for the purchase of new fire apparatus and equipment. 1955 Ops St Compt File #7657.

A fire district established subsequent to December 31, 1933 may contract for the furnishing of fire protection within a portion of the fire district where, in the judgment of the board of fire commissioners, the district fire department is unable to render adequate and prompt fire protection to such area. 1957 Ops St Compt File #139.

Where all of the apparatus used in furnishing fire protection pursuant to contract is owned by the fire district, the portion of the contract price which may be paid over to the volunteer fire department which furnishes the protection may not exceed 35%, unless a greater portion was being paid over to the department on March 15, 1941. 1957 Ops St Compt File #227.

There is no statutory limit on the amount a village may be charged for fire protection under a fire protection contract. 1967 Ops St Compt File #815.

Where an area within a town is in need of fire protection, the town may enter into a contract with any city, village, fire district or incorporated fire company for fire protection, if the area to be served is within a fire alarm or fire protection district; however, if such area is within a fire district, the district is responsible for providing fire protection, and may contract with any city, village, fire department, or incorporated fire company having its headquarters outside the district if there is no fire company maintaining its headquarters in the district or if, in the judgment of the fire commissioners, the fire department of the district "is unable to render adequate and prompt fire protection to such district or any area thereof". 1985 Op St Compt No. 85-71.

34. — —Ambulance and other emergency services

A town may contract with a fire district to provide general ambulance service only under a fire protection contract entered into under General Municipal Law, Section 209-b. 1967 Ops St Compt File #76.

A fire district may contract for the furnishing of general ambulance service to the district by another district, municipality or other outside agency only where the fire district receives fire protection by contract with another district, municipality or outside agency. 1968 Ops St Compt File #224.

A town may contract with a fire district for general ambulance services to be provided to areas within a town fire protection district. Such services may be provided only as part of an overall fire protection contract. A contract for general ambulance services with a volunteer fire company where unrelated to fire protection contract is unauthorized. 1969 Ops St Compt File #4.

Fire district, fire department of which does not have emergency rescue and first aid squad, may contract with any city, town, village, or fire district which has in its fire department emergency rescue and first aid squad duly authorized to render emergency ambulance service to receive emergency ambulance service, but fire district may not contract to receive general ambulance service unless it also contracts to receive fire protection. 1987 Op St Compt No. 87-39.

Although town is authorized under CLS Gen Mun § 122-b to enter into contract with private ambulance company to provide advanced life support services on town-wide basis, fire district has no authority to enter into contract with private ambulance company for such services; consequently, town and fire district located therein may not under CLS Gen Mun Art 5-G enter into municipal cooperation agreement under which advanced life support services would be provided by private ambulance company. 1998 Op St Compt No. 98-21.

Fire district may not impose fees for emergency rescue services provided by emergency rescue and first aid squad of fire district fire department, irrespective of whether services involve ambulance. 2004 Op St Compt No. 04-1.

35. — —Annual report preparation

There is no conflict of interest or other legal impropriety where an accountant retained by a fire district to prepare its annual financial report is also the owner of a computer firm which is engaged by the district to perform data processing services. 1981 Op St Comp File #81-373.

36. — —Services outside fire district

Where a fire district contracts to furnish fire protection to an outside area, there is no limitation on the portion of the contract price which may be paid to the fire company furnishing the fire protection, unless the fire district owns all of the equipment used in furnishing the protection. 1960 Ops St Compt File #359.

A fire district may not enter into a direct contract with a county to provide fire protection for the latter's property located outside the district, but is required to furnish protection for such property if located within its geographical area of operation. 1963 Ops St Compt #1.

37. — —Services within fire district which was created before January 1, 1934

Only fire districts created prior to January 1, 1934, may contract for fire protection. Such districts may spend more than $1,000 annually for fire protection pursuant to a contract, without the adoption of a proposition therefor. 1946 Ops St Compt 530.

A contract for fire protection may be made by a fire district established prior to January 1, 1934 with a fire company which is not situated within the fire district. The amount of the contract is not subject to approval by referendum. 1954 Ops St Compt File #6700.

38. Equipment and apparatus, generally

Financing of purchase of fire equipment by fire district—$1,000 limitation does not apply if bonds or capital notes are issued. 1946 Ops St Compt 139.

For a discussion of rules and regulations relative to purchase of fire apparatus, see 1953 Ops St Compt File #6421.

A fire district may purchase apparatus owned by a fire company, but may not assume payment of fire company obligations. 1962 Ops St Compt #842.

Board of fire commissioners may adopt rule or regulation limiting, controlling, or prohibiting use of personal equipment at fire scene and, even in absence of such rule or regulation, chief of fire district fire department may restrict or prohibit such use. 1998 Op St Compt No. 98-2.

A proposition for the purchase of fire apparatus should specify that used apparatus owned by the district or the proceeds of the sale thereof will be used in part payment for the new apparatus. 1955 Ops St Compt File #7745.

A fire district may not make a gift to a fire company of an amount equal to the cost of firefighting equipment previously given as an unconditional gift by a fire company to the fire district. 1991 Op St Compt No. 91-19.

If fire district board of fire commissioners determines that, due to unique or unusual circumstances, properties within particular area of fire district will benefit to greater extent from particular piece of equipment, board may, through formations of zone of assessment, charge proportionately greater amount of cost of that equipment to zone of assessment, consistent with greater or special benefit to properties within zone. Fire district board of fire commissioners may permit specialized firefighting equipment, cost of which was charged only to zone of assessment, to be used, on occasion, for fire protection elsewhere within fire district. 1997 Op St Compt No. 97-26.

39. —Alarm systems

Fire district funds may be used to purchase blue lights for installation on private cars of volunteer firemen. 1955 Ops St Compt File #7412.

A town may not pay for a private fire alarm system to be placed in the central schools in the town. 1967 Ops St Compt File #538.

40. —Equipment, generally

Fire commissioners of a fire district may purchase equipment but there seems to be no statutory authority to lease the same. 1945 Ops St Compt 124.

Fire district equipment and apparatus having a value of $1,000 or less, no longer necessary for fire district purposes, may be sold without a public hearing, referendum, or public solicitation of bids. 1962 Ops St Compt #1083.

A town may not impose a special tax or other charge on behalf of a fire district on properties which are exempt from fire district taxes to defray the cost of specialized equipment needed to provide fire protection services to those properties. 1990 Op St Compt 90-39.

41. — —Radio, telephones and the like

Fire district funds may be expended to provide radio-telephone service for use in the private automobiles of fire department chiefs, in order to coordinate their movements. 1956 Ops St Compt File #8150.

Fire district funds may be expended to provide radio communication services between the firehouse and firefighting vehicles,

including the private automobiles of personnel, but radios installed in such private vehicles must remain property of the district and be returned thereto upon the individual's termination of service or disposition of his vehicle, and the communication system must be restricted to public use on fire-manic frequencies. 1963 Ops St Compt #624.

The board of fire commissioners of a fire district may purchase radios, monitors or other devices to be placed in active volunteer firemen's homes, if such devices will aid in the functioning of the fire company. 1969 Ops St Compt File #522.

42. —Vehicles, generally

The board of fire commissioners of a fire district may accept a gift of an automobile for the use of the chief engineer of the fire department without the adoption of a proposition by the qualified electors of the fire district, even though acceptance of the gift entails expenditures for operation, maintenance, repair and insurance. 1947 Ops St Compt 349.

Fire Commissioners of a fire district may house a fire district fire engine in a fire protection district which is protected under contract by the fire district if, in so doing, the adequacy of the protection in the fire district itself is not jeopardized. 1954 Ops St Compt File #6971.

An ambulance owned by a fire district fire company furnishing general ambulance service may be garaged in the fire district fire house. 1961 Ops St Compt #713.

A fire district has no authority to acquire, by means of a lease, vehicles to be used in the extinguishment and the prevention of fires. 1967 Ops St Compt File #875.

A fire district may pay for repairs to a fire truck lent to it by the county, if such repairs are necessary to keep the truck in the condition it was in when obtained by the fire district and if the fire district has agreed to pay for such repairs as consideration for the use of the truck. 1969 Ops St Compt File #63.

43. — —Purchase

Fire district has no power to buy fire truck for use by a village. 1947 Ops St Compt 105.

For a discussion in regard to control of board of fire commissioners over "jeep" purchased with fire company funds, see 1953 Ops St Compt File #6421.

The board of fire commissioners of a fire district may acquire an ambulance by purchase or accept the same as a gift. 1954 Ops St Compt File #7037.

Three fire districts may not jointly purchase and operate an ambulance. 1957 Ops St Compt File #180.

There is no constitutional authority for the joint purchase of a squad car by a village and a fire district jointly. However, a possible solution of such a problem would be the purchase of the squad car by either the fire district or the village and then entering into a fire protection contract pursuant to Town Law § 176, subd 16, subd 22, and Village Law § 89, subd 24. 1959 Ops St Compt File #600.

Fire district may purchase pick-up truck for use in transporting equipment for the extinguishment and prevention of fires. 1965 Ops St Compt File #848.

A fire district may not pay for a fire truck until after the truck is received and a proper voucher submitted, audited and ordered paid. 1969 Ops St Compt File #723.

A fire district may purchase an ambulance and other rescue equipment for use by the ambulance and rescue squads of its fire department. 1974 Ops St Compt File #951.

Fire district may purchase firefighting vehicle from fire department at cost of more than $5,000 only after compliance with competitive bidding requirements of CLS Gen Mun § 103. Fire district may purchase fire truck from its fire department utilizing current funds if spending limitation contained in CLS Town § 176 will not be exceeded or if proposition has been adopted pursuant to CLS Town § 179; alternatively, Reserve Funds may be used, subject to limitations of CLS Gen Mun § 6-g, CLS Local Fin § 38.00, or obligations may be issued subject to mandatory referendum under CLS Local Fin § 38.00. 1986 Op St Compt No. 86-67.

If board of fire commissioners makes reasoned determination that negotiated, rather than public, sale of unneeded pumper truck will yield best price or maximum financial benefits, it may resolve to sell by negotiated sale subject to applicable referendum requirement; board should take steps, such as soliciting quotations or obtaining appraisals, to ensure that negotiated sale is upon best or most beneficial terms. 1993 Op St Compt No. 93-21.

44. — —Sale

A fire district may not sell a used fire truck upon terms which would give the purchaser three years in which to pay the purchase price. 1954 Ops St Compt File #6989.

It is not necessary that a referendum be held where the fire district wishes to sell two used fire trucks no longer necessary and the combined value does not exceed $1000. 1961 Ops St Compt #629.

45. Finances and expenditures, generally

Board of fire commissioners may not permit fire company to retain and disburse moneys received from operation of a bowling alley operated by the district. Fire commissioners may dispose of bowling alley subject to approval of qualified electors at district election. 1946 Ops St Compt 138.

Moneys received for furnishing fire protection in territory outside of the fire district are not required to be kept in a separate account. Such moneys may be expended in addition to the $1,000 which may be expended without a referendum. A portion of such moneys may be paid to the fire department or fire company. 1947 Ops St Compt 84.

A fire district may not replace a worn battery in the fire chief's private automobile. 1965 Ops St Compt File #95.

A fire district may not turn over fire district funds to the district fire department for expenditure. Fire district moneys may be expended only by the board of fire commissioners and, in general, only upon the submission of valid claims. 1969 Ops St Compt File #728.

Town may not reimburse fire district for expenses of refilling air tanks and replacing certain damaged equipment incurred by district in cleaning up toxic chemical spill. 1986 Op St Compt No. 86-34.

Fire district may purchase fire truck from its fire department utilizing current funds if spending limitation contained in CLS Town § 176 will not be exceeded or if proposition has been adopted pursuant to CLS Town § 179; alternatively, Reserve Funds may be used, subject to limitations of CLS Gen Mun § 6-g, CLS Local Fin § 38.00, or obligations may be issued subject to mandatory referendum under CLS Local Fin § 38.00. 1986 Op St Compt No. 86-67.

Fire district may not expend moneys to repair "sidewalks" within district. 1992 Op St Compt No. 92-41.

Unexpended moneys raised by taxation in zone of assessment, and any property, cost of which was charged only to zoned of assessment, belong to fire district after zone is abolished. 1997 Op St Compt No. 97-26.

Board of Fire Commissioners should not submit the entire fire district budget, item by item, for approval at a fire district election, but should, if necessary, submit a single proposition under section 179(1-d) calling for the expenditure of a given amount over and above the spending limitation for the district as computed under this section. 1954 Ops St Compt File #6970.

46. —Advance payments

It is not legal for a Board of Fire Commissioners to pay in advance for travel and living expenses of a member of the Commission and its Secretary attending a convention outside the district. 1961 Ops St Compt #726.

47. —Bond proceeds

Fire district may not divert bond proceeds to pay current operating expenses. Fire district may not use taxes of 1947 to pay expenditures of 1946. Fire district may borrow pursuant to Local Finance Law, section 29.00 (a, 2), notwithstanding provisions of paragraph 1 of such section. 1946 Ops St Compt 583.

48. —Claims for payment, generally

The commissioners of a fire district may audit and order paid a claim made by a fire department officer for reimbursement for

expenditures to provide food and coffee to volunteer firemen on emergency duty, if the Board determines the expenditure to have been necessarily incurred. 1961 Ops St Compt #188.

Claims against a fire district must be itemized in sufficient detail that a determination may be made as to validity of the claim. 1961 Ops St Compt #663.

The members of a board of fire commissioners are not required to sign each voucher submitted for audit and allowed. 1969 Ops St Compt File #198.

A fire district may not pay the claim of an oil company for gasoline purchased by the district with the use of a credit card where the company refuses to submit duly executed vouchers therefor. 1974 Ops St Compt File #430.

49. — —Verification; certification

Claims against fire district must be verified unless resolution is adopted prescribing form of certified claim, and claim is made on such form. (Opinion No. 1859 commented upon.) 1947 Ops St Compt 173.

Claims against a fire district must be verified. 1946 Ops St Compt 201.

A fire commissioner may take claimant's oath to a verification of a claim against a fire district. 1946 Ops St Compt 336.

Claims against a fire district, with certain exceptions must be presented in the form of an itemized voucher, verified by or in behalf of the claimant. 1946 Ops St Compt 350.

Claims presented to fire commissioners of fire district must be verified except as provided in subdivision 4-a of section 176 of the Town Law. 1947 Ops St Compt 43.

For a form of resolution authorizing certification of claims, see this section. 1954 Ops St Compt File #6542.

Where a fire district purchases gasoline on a credit card the company so selling the gasoline, in order to be paid, must submit a verified claim or a certified claim upon a form prescribed by the fire commissioners. 1963 Ops St Compt #392.

Where a fuel oil company refuses to execute and submit verified or certified vouchers in claim for payment for fuel oil deliveries to a fire district, the district, in view of the current fuel oil market, may make payment on the certification of a district officer, employee, or volunteer fireman that the amount of the product stated in the invoice has actually been received. 1974 Ops St Compt File #186.

A fire district may audit and pay a voucher certified on behalf of the New York Telephone Company on the company's own form rather than require the company to use the regular voucher form supplied by the district. 1974 Ops St Compt File #752.

Claims submitted by a public utility for electricity and telephone service furnished to a fire district must be verified or, if the board of fire commissioners has so authorized, certified. 1957 Ops St Compt File #453.

50. —Compensation and reimbursement

Wages of paid firemen of a fire district may not be increased without a vote at an election. 1947 Ops St Compt 157.

A fire district may not reimburse a volunteer fireman for damages to his private automobile while answering a fire alarm. 1951 Ops St Compt File #5269.

Paid firemen of a fire district may not be paid extra compensation for extra hours of duty occasioned by granting of vacations to such firemen. 1954 Ops St Compt File #7006.

A fire district employing paid firemen may pay them overtime compensation for work in excess of their regularly established hours of employment. 1958 Ops St Compt File #72.

A Board of Fire Commissioners may establish a salary schedule including longevity and annual increment provisions, which will be binding upon future boards of fire commissioners unless they determine to increase or decrease scheduled items. 1963 Ops St Compt #964.

Neither a fire chief, nor any other volunteer fireman, may be compensated or reimbursed from fire district funds for time lost from regular employment as a result of performing firemanic functions. 1967 Ops St Compt File #186.

A fire district may raise the salaries of its paid firemen either by holding a referendum on the question or by holding a public hearing. 1968 Ops St Compt File #823.

Fire district expenditures for fringe benefits, which have been authorized by statute or have been provided for in collective bargaining agreement, are part of compensation of district officers or employees, and excludible from district's spending limit. 1987 Op St Compt No. 87-33.

Authorization in CLS Town § 178-c to reimburse paid and volunteer officers of fire district fire department for actual and necessary expenses incurred in execution of duties of office does not provide authority to reimburse individual designated as "chief" of fire company, as distinguished from chief of fire district fire department. 1987 Op St Compt No. 87-66.

A fire district has no statutory authority to reimburse its volunteer firemen for expenses incurred as a result of being subpoenaed to testify in civil actions arising from events which they attended in the course of their duties. A fire district has no power to adopt a local law or resolution giving it such authority. 1984 Op St Comp File #84-43.

51. —Fitness training

A fire district may pay for supervised physical fitness training sessions for its active volunteer firefighters so long as the particular training program provides the type of conditioning necessary for the firefighters to efficiently fill their firemanic functions, the nature of the supervision is such that the fire district has reasonable assurance that it is realizing sufficient benefits to justify the expenditure, and the cost is reasonable in relation to the benefits received by the district. 1992 Op St Compt No. 92-4.

52. —Meals and refreshments

Fire district commissioners may expend district funds for meals of volunteer firemen at a parade or inspection only when such meals are an incident to such parade or inspection and not when such parade or inspection is an incident to such meals. 1945 Ops St Compt 52.

A budget appropriation may be made to provide refreshments for firemen who respond to a fire or other emergency in the fire district. 1962 Ops St Compt #673.

Where an inspection or review of fire department personnel is purely incidental to a banquet for the volunteer firemen, their families and guests, the use of fire district funds for such banquet is unauthorized. 1967 Ops St Compt File #820.

(a) The board of fire commissioners of a fire district may provide for refreshments at a monthly drill. (b) However, alcoholic beverages may not be included. 1969 Ops St Compt File #522.

53. —Membership fees

A fire district may not sell at private sale its capital note to a fire company, a membership corporation, where all of the fire district commissioners and the secretary-treasurer of such district are members of the fire company. The fire district may accept the low bid of such a membership corporation on the public sale of a capital note if no member of the board of fire commissioners is an officer or director of the membership corporation. 1960 Ops St Compt File #400.

Fire district may expend monies to become member of volunteer firefighters museum if board of fire commissioners determines that fire district's statutory functions will be enhanced thereby and that fire district will receive sufficient benefits in furtherance of its statutory purposes to constitute fair consideration for cost of membership. 2000 Op St Compt No. 2000-20.

54. —Petty cash

Fire districts may not establish petty cash funds. Claims against such a district must be verified. Treasurer thereof may be reimbursed for incidental office expenses but may not generally pay district claims and then seek reimbursement, save in special circumstances. 1946 Ops St Compt 190.

55. —Public relations events; publicity

Fire district commissioners may pay for the printing and distribution of fire prevention circulars and for fire prevention meetings, courses and programs. 1968 Ops St Compt File #798.

56. —Rewards

Fire district may offer reward of up to $1,000 for information leading to arrest and conviction of individuals for felonies and misdemeanors directly connected to vandalism or theft of fire

district property; however, fire district may not offer rewards in connection with other matters. 2001 Op St Compt No. 2001-5.

57. —Spending limitations, generally

There is no statutory limit upon the amount of money which may be expended in a fire protection district. 1945 Ops St Compt 134.

Subject to the spending limitation contained in subd. 18 of section 176 of the Town Law, such surplus funds may be expended for any lawful district purpose, or may be held and included as revenue in the next annual budget. 1946 Ops St Compt 540.

The commissioners of a fire district, whose annual expenditures are limited to $1,000.00, may not expend in addition to such $1,000.00, surplus funds resulting from an unexpended balance of the previous year. Capital reserve fund suggested. 1946 Ops St Compt 687.

A proposition adopted by the electors of a fire district authorizing the fire commissioners to spend moneys in excess of the limitation prescribed by subdivision 18 of section 176 of the Town Law cannot be effective for more than one fiscal year. 1947 Ops St Compt 412.

The basic spending limitation on a fire district having an assessed valuation of one million dollars is $2,000. 1955 St Compt File #7193.

The spending limitation for a fire district is provided in § 176 (18) and may be exceeded as provided in § 179. 1955 Ops St Compt File #7741.

A fire district cannot expend outside the spending limitation, except pursuant to section 179 of the Town Law, an amount received from the Federal Government as its share of a matching fund project. 1956 Ops St Compt File #8101.

Where a proposition authorizing a fire district to exceed the spending limitation by a stated amount has been approved at referendum, and the budget containing the excess already includes an appropriation for a fire-fighting vehicle, no separate referendum on the purchase of the fire-fighting vehicle is required. 1972 Ops St Compt File #1045.

Pursuant to CLS Town Law § 176(18), referendum would not be required to authorize expenditure for fire district's share of ambulance from current funds if such expenditure, together with any other expenditures that are subject to fire district's spending limitations, can be made within district's spending limit; however, referendum will be necessary if it is to be made from current funds in excess of district's spending limit or if expenditure is not to be made from current funds. 1985 Op St Compt No. 85-55.

Where a fire district will exceed its spending limitation, the purchase of land must be submitted to referendum unless a proposition is adopted to exceed the spending limitation and the amount of the purchase is not in excess of the maximum amount stated in the proposition. 1954 Ops St Compt File #6871.

A fire district may purchase cable television service for its fire house for the social and recreational use of firemen and residents. Opns St Comp, 1966, 66-1098 is hereby superseded. 1984 Op St Comp File #84-40.

58. — —Borrowing

Subdivision 18 of this section fixes a maximum limit on the amount which a fire district may expend in any one year. It does not prohibit borrowing for fire district purposes, however, pursuant to the Local Finance Law. 1955 Ops St Compt File #7228.

59. — —Capital reserve funds

Creation of capital reserve funds by fire districts; payment therein of moneys set aside for building fire house; appropriations to capital reserve funds notwithstanding limitation on amount that may be expended without a vote on a proposition. 1946 Ops St Compt 514.

60. —Surplus funds

Board of fire commissioners must deduct unexpended balances remaining at close of fiscal year from amount authorized to be expended without adoption of a proposition. 1945 Ops St Compt 382.

Moneys remaining unexpended at end of fiscal year of a fire district which were not included in first district budget for the ensuing year, constitute surplus funds in ensuing fiscal year. 1946 Ops St Compt 540.

A town board must include in the preliminary and annual town budgets the estimate of expenditures submitted by the board of fire commissioners of a fire district, notwithstanding the disapproval by the voters of a proposed proposition authorizing the expenditure of sums in excess of those that may be spent without adoption of such a proposition. 1946 Ops St Compt 562.

Surplus funds of a fire district may be used to redeem bonds or capital notes and interest thereon. 1946 Ops St Compt 600.

A fire district may establish a capital reserve fund and transfer thereto surplus fire district funds. 1951 Ops St Compt File #5493.

A fire district may use surplus funds through supplemental appropriation, but, where this will result in exceeding the statutory spending limitation, it must be done by adopting a proposition subject to mandatory referendum. 1973 Ops St Compt File #957.

61. —Tax matters

Tax anticipation notes may not be issued to finance the purchase of fire apparatus and fire apparatus may not be purchased by a fire district unless a proposition has been adopted by the electors of the fire district pursuant to either section 179 of the Town Law or section 38.00 of the Local Finance Law. 1947 Ops St Compt 416.

All tax moneys collected for fire district purposes must be paid over to the treasurer of the fire district. 1953 Ops St Compt File #6128.

Property of a fire district acquired subsequent to the taxable status date is liable for taxes for the ensuing year. 1958 Ops St Compt File #866.

A town may not impose a special tax or other charge on behalf of a fire district on properties which are exempt from fire district taxes to defray the cost of specialized equipment needed to provide fire protection services to those properties. 1990 Op St Compt 90-39.

A fire district may as part of the purchase price pay a pro rata share of the property taxes on the property purchased. 1958 Ops St Compt File #866.

There is no authority for fire district to establish scale of tax rates so that owners of multiple parcels are taxed at lower rate. 2001 Opns St Comp No. 01-8.

62. —Uniforms and other clothing expenses

In an Article 78 proceeding, the court would order reinstatement of two firemen who were terminated for wearing their own turn-out coats to a fire training drill in violation of an order prohibiting all members of the fire department from using any individually owned equipment while on duty, even though it was beyond the question that under Town Law § 176, the members of the board of fire commissioners had the ultimate authority to adopt rules and regulations concerning the type and nature of the equipment to be used by the members of the fire department, where the record indicated that numerous members of the fire department had been using individually owned equipment, and where the record failed to disclose any evidence that a formal resolution, rule or regulation prohibiting the use of individually owned equipment had ever been validly adopted by the board. Converse v Horan, 95 A.D.2d 842, 464 N.Y.S.2d 530, 1983 N.Y. App. Div. LEXIS 18784 (N.Y. App. Div. 2d Dep't), app. denied, 60 N.Y.2d 552 (N.Y. 1983).

A cash clothing allowance to volunteer firemen may not be paid from district funds of a fire district. 1945 Ops St Compt 152.

Fire commissioners may expend $3000.00 for uniforms for members of fire department upon adoption of proposition therefor by qualified voters of district. 1946 Ops St Compt 68.

Town may not pay volunteer fireman value of clothing damaged while answering a call for assistance in territory of the town outside of the fire district. 1946 Ops St Compt 187.

Fire district funds may not be expended to purchase baseball jackets for a team composed of volunteer firemen of the district. 1946 Ops St Compt 460.

(a) The board of fire commissioners of a fire district may provide for the replacements of uniforms owned by the district. (b) The

board may also provide for the upkeep of such uniforms. (c) Such replacements remain the property of the fire district. 1969 Ops St Compt File #522.

A fire district may not purchase uniforms and instruments for a band comprised of volunteer firemen and those who are not volunteer firemen who play at fire district parades and inspections. 1973 Ops St Compt File #1205.

63. Firehouses and buildings, generally

While the statute does not impose any duty to allow private companies to connect into the fire alarm system, the statute is broad enough to authorize the Commissioners, if in their discretion they deem it appropriate to do so, to permit private companies to make such connections. But although the Town Law does not mandate such action, the equal protection clauses do require, that when the District elects to grant permission for such a connection, the grant be equally applicable to all. AFA Protective Systems, Inc. v Crouchley, 63 Misc. 2d 695, 313 N.Y.S.2d 504, 1970 N.Y. Misc. LEXIS 1547 (N.Y. Sup. Ct. 1970).

The commissioners of a fire district may agree with a utility company for furnishing a light outside the fire house. 1961 Ops St Compt #188.

Fire district may not improve vacant land owned by district with permanent outdoor competitive sports facilities such as softball fields and tennis courts. 1993 Op St Compt No. 93-24.

64. —Condemnation

A town board could, subject to a permissive referendum, convey property, acquired for the purpose of erecting a town garage but no longer necessary for that purpose, to a fire district for a fair and reasonable consideration. A town may lease space in a fire house for use as a town clerk's office. There is serious doubt that a fire district could condemn such property for fire district purposes. 1955 Ops St Compt File #7272.

65. —Construction

There is no requirement that any specified period of time must elapse before the re-submission, pursuant to Section 179 of the Town Law, of a defeated proposition to construct a building for the preservation, protection and storing of fire apparatus and equipment and for the social and recreational use of the firemen and residents of the district. 1945 Ops St Compt 200.

Board of fire commissioners of fire district may establish capital reserve fund for the erection of fire house. Establishment of such capital reserve fund is subject to permissive referendum. Board of fire commissioners may make budgetary appropriation to the capital reserve fund. Amount which may be appropriated is not subject to spending limitation prescribed by subd.18 of section 176 of Town Law or to referendum provisions of section 179 of Town Law. 1946 Ops St Compt 559.

Current funds of a fire district may be used to erect a storage garage for equipment without a referendum if the proposed expenditure is within the district's spending limitation. 1955 Ops St Compt File #7628.

Town and fire district located therein may, under CLS Gen Mun Art 5-G, enter into municipal cooperation agreement to jointly acquire real property and construct building thereon for use as combined town hall and fire station; both town and fire district must comply with all statutory requirements applicable to individual undertaking and financing of such project. 1996 Op St Compt No. 96-19.

66. —Lease; rental

Commissioners of fire district may lease firehouse owned by volunteer fire company. 1945 Ops St Compt 584.

Fire district may lease a fire house from an incorporated fire company. 1954 Ops St Compt File #6601.

A town board could, subject to a permissive referendum, convey property, acquired for the purpose of erecting a town garage but no longer necessary for that purpose, to a fire district for a fair and reasonable consideration. A town may lease space in a fire house for use as a town clerk's office. There is serious doubt that a fire district could condemn such property for fire district purposes. 1955 Ops St Compt File #7272.

The board of fire commissioners of a fire district may not set apart a room in a fire district fire house for the exclusive use of a fireman's benevolent association; however, if the room is not needed for fire district purposes, board may lease such room to the association for a fair and adequate consideration. 1955 Ops St Compt File #7372.

Fire district may lease its real property and collect rent therefor. 1955 Ops St Compt File #7560.

There is no maximum statutory amount which a fire district may expend for rental of a fire department building. 1960 Ops St Compt File #197.

There is no legal requirement that the Board of Fire Commissioners must conduct its meetings in a firehouse not owned by the fire department, and such board may rent such quarters as are necessary for transacting district business. 1963 Ops St Compt #7.

A referendum is required for the sale of real property of a fire district but not for the lease of that property. 1967 Ops St Compt File #912.

A fire company may, under certain conditions, lease a portion of its real property to a fire district in which the property is located for parking of vehicles of members and residents of the fire district while in attendance at social functions at the district fire house. Where the rent under any such lease does not exceed the amount of carrying, maintenance and depreciation charges, the leased portion may remain or become tax exempt. 1968 Op St Compt No. 68–252.

Fire district may, without referendum, negotiate lease of portion of its vacant land with not-for-profit association if it is determined land is temporarily not needed for fire district purposes, and lease may be for reasonable term and must be in exchange for fair and adequate consideration; prior to negotiating with any particular lessee, fire district board of commissioners should take steps to ensure that negotiated lease is upon best or most beneficial terms, and lease may permit lessee to construct, maintain and operate, with lessee's own funds, building on vacant land, subject to applicable zoning, building code or other similar requirements. 1994 Op St Compt No. 94-12.

67. —Purchase

Proposed acquisition of petitioner's property would be allowed to proceed where condemnor fire district showed that such acquisition would provide much needed parking for firefighters who utilized district's firehouse, which was located just across street from petitioner's parcel. Salvation Army v Central Islip Fire Dist., 230 A.D.2d 841, 646 N.Y.S.2d 558, 1996 N.Y. App. Div. LEXIS 8570 (N.Y. App. Div. 2d Dep't 1996).

Fire district may acquire real estate for fire house purposes upon condition that the property be used for such purposes and will revert to donor on breach of such condition. The condition of such deed may provide that fire district shall remove the building in the event of breach of condition. The fire house upon such property so acquired may be financed by issuance of serial bonds. 1947 Ops St Compt 225.

Surplus funds of a fire district may be used to purchase a site for a fire house. If the expenditure does not exceed the spending limitation, no referendum is necessary. 1952 Ops St Compt File #5784.

A town board could, subject to a permissive referendum, convey property, acquired for the purpose of erecting a town garage but no longer necessary for that purpose, to a fire district for a fair and reasonable consideration. A town may lease space in a fire house for use as a town clerk's office. There is serious doubt that a fire district could condemn such property for fire district purposes. 1955 Ops St Compt File #7272.

A fire district may purchase land and the firehouse thereon although the conveyance provides that the land shall revert to the grantor in the event that the premises cease to be used for fire-manic purposes. 1960 Ops St Compt File #1129.

A Board of Fire Commissioners on behalf of the district may purchase real property owned by a fire company which is a membership corporation, although one or more commissioners are members of the fire company. If a Board of Fire Commissioners wishes to purchase real property from a fire company for the district, and the company is a membership corporation, the board

may engage and pay from district funds an independent appraiser to appraise the property. 1963 Ops St Compt #169.

A fire district may make a budgetary appropriation for the purchase of real property for fire district purposes, but if such appropriation exceeds the aggregate annual spending limitation of the fire district, either a proposition to exceed the spending limitation or a proposition to purchase such property must be adopted and such proposition is subject to a mandatory referendum. 1968 Ops St Compt File #988.

A fire district may purchase an option on real property without voter approval, only if the cost of the option, plus the cost of the property if purchased, will not create expenditures in excess of the statutory spending limitation. 1974 Ops St Compt File #951.

Town and fire district located therein may, under CLS Gen Mun Art 5-G, enter into municipal cooperation agreement to jointly acquire real property and construct building thereon for use as combined town hall and fire station; both town and fire district must comply with all statutory requirements applicable to individual undertaking and financing of such project. 1996 Op St Compt No. 96-19.

68. —Repair; remodeling

Board of fire commissioners of fire district may not expend surplus funds of district to paint and repair fire house, where such expenditure would exceed the spending limitation prescribed by subdivision 18 of section 176 of the Town Law. Such expenditure may not be authorized by referendum pursuant to section 179 of the Town Law. Such surplus funds may be transferred to a capital reserve fund and, if not so transferred, must be included in the budget for the following fiscal year as a revenue. 1946 Ops St Compt 563.

The board of commissioners of a fire district may spend moneys of the fire district for the preparation of plans and specifications for alterations and an addition to the fire house without submitting the proposition to referendum if the expenditure will not exceed the spending limitation of the district. 1954 Ops St Compt File #6529.

Volunteer firemen may construct an addition to the firehouse on a volunteer basis and the cost of materials used therefor may be paid for with money raised through taxation, if the expenditure does not exceed the fire district's spending limitation. 1962 Ops St Compt #405.

69. —Sale

The board of fire commissioners may sell the district fire house only if it is no longer necessary for any of its uses or purposes and then only after approval at a fire election. 1953 Ops St Compt File #6282.

Proceeds of sale of real property no longer needed for fire district purposes may be used for capital improvement on firehouse. If spending limitation prescribed in this section would thereby be exceeded, referendum must be held to authorize such expenditure. 1953 Ops St Compt File #6349.

In order for a fire district to sell a building valued at $450, a fire district election is necessary. 1956 Ops St Compt File #7842.

The Board of Fire Commissioners of a fire district may not convey district-owned real property formerly used as the fire district headquarters to a school district or to a town for a nominal consideration. 1962 Ops St Compt #999.

The Board of Commissioners of a fire district may not dispose of real property of the district without a proposition therefor being submitted to the electorate at either a special or annual district election. 1962 Ops St Compt #1054.

A referendum is required for the sale of real property of a fire district but not for the lease of that property. 1967 Ops St Compt File #912.

Neither a town nor a fire district may sell real property to the other for a nominal consideration. 1970 Ops St Compt File #47.

70. —Use, generally

The board of fire commissioners of a fire district may grant the use of district recreational facilities to local civic organizations whose membership is comprised of district residents. 1954 Ops St Compt File #6551.

The board of fire commissioners may in its discretion permit the use of the fire hall when such hall is not needed for fire district purposes. 1954 Ops St Compt File #6998.

Discussion of use of fire house for other than fire district purposes. 1961 Ops St Compt #627.

A fire district's fire house may not be used for private functions, whether for rental or not. 1962 Ops St Compt #61-805.

A fire district in one town may acquire a fire house in another town. Such fire house may be used for storage of fire equipment and for fire company meetings but, because of its location outside the fire district, may not be used by such fire district for meetings of its board of fire commissioners or for its regular or special elections, and will not be exempt from taxation. 1965 Ops St Compt File #637.

A village may not restrict a social room within the village firehouse for the exclusive use of the fire department, to the exclusion of all others. 1968 Ops St Compt File #423.

71. — —Political meetings

Fire houses are primarily dedicated to fire district purposes and the commissioner's refusal to allow the use of the fire house for a political meeting was not discriminatory. Hooker v Conte, 143 N.Y.S.2d 750, 208 Misc. 188, 1955 N.Y. Misc. LEXIS 2901 (N.Y. Sup. Ct. 1955).

A fire district may not lawfully permit the use of its assembly hall for a rally by a political party. 1967 Ops St Compt File #788.

72. — —Private functions

The board of fire commissioners may not allow private individuals to use the fire house for private social functions and exclude any fire district residents. 1967 Ops St Compt File #422.

73. —Wrecking; destruction

Proposition for wrecking of old fire house and disposal of lumber need not be submitted to the voters, if the value is less than $250.00. If cost of destruction of old firehouse is less than $2500, competitive bidding is not required. 1953 Ops St Compt File #6410.

74. Gifts and bequests

Fire commissioners of town fire district may not give district funds to a volunteer fire department to expend for recreational activities. 1945 Ops St Compt 14.

Fire district commissioners may accept a bequest to its fire company under cy pres doctrine. 1945 Ops St Compt 580.

The board of fire commissioners of a fire district may accept a gift of an ambulance and provide for the storing and maintenance thereof. 1947 Ops St Compt 52.

A fire district may not gift or loan money to a fire company for the purpose of repairing or improving fire company property. 1953 Ops St Compt File #6239.

Fire districts may acquire by gift land on which fire suction pool is located. Such a pool may not be used for recreation program of the town, but only for fire fighting purposes. 1953 Ops St Compt File #6279.

A fire district may accept an ambulance as a gift. It may not, however, sell any of its property for less than its reasonable market value. 1967 Ops St Compt File #590.

A fire district may accept a gift of a dam from the owner thereof and may accept a gift of money from a service organization to maintain and repair the dam. 1967 Ops St Compt File #592.

A fire district is authorized to accept as a gift a parcel of property upon the condition that the grantor thereof shall have the right to use the parcel for parking from 6:30 AM to 4:30 PM Mondays through Fridays. 1983 Op St Comp File #83-93.

75. Hydrants and water supply, generally

A fire district may purchase and maintain fire suction pools, watercourses, fire cisterns and fire wells, including necessary pipes, pumps, hydrants and other facilities. Water may be used for fire-fighting purposes only. 1953 Ops St compt File #6202.

Fire commissioners may spend money to provide the district with an adequate water supply for fire purposes. 1953 Ops St Compt File #6465.

A water district may charge different rates for hydrant rentals to two fire districts located wholly or partly within the water

district if the hydrants do not provide equal services or equal volumes of water in all instances. 1955 Ops St Compt File #7559.

Reconstruction of a reservoir maintained by a fire district for fire-fighting purposes may be financed by issuing serial bonds or capital notes, except where only minor repairs are to be effected; for minor repairs the cost may be met by issuing a budget note and appropriating funds from fire district revenues for the fiscal year. 1963 Ops St Compt #396.

The board of fire commissioners of a fire district may contract with a village for a term not to exceed five years for the erection and maintenance of hydrants on the village supply line running through the fire district. The cost of such contract would be a general district charge unless the district were zoned. A water supply district could be established to accomplish the same purpose as zoning of the fire district. 1953 Ops St Compt File #6185.

76. —Installation of hydrants

Under subd. 3, fire commissioners are clothed with authority to require a public service corporation engaged in supplying water to install a fire hydrant even though the express contract has expired. Company must comply and recover on a theory of implied assumpsit. People ex rel. Arthur v Huntington Water Works Co., 208 A.D. 807, 203 N.Y.S. 808, 1924 N.Y. App. Div. LEXIS 6037 (N.Y. App. Div. 1924).

The board of fire commissioners of a fire district may not contract with a water district for erection of a hydrant on school district property, since water district lacks authority to make such installation. 1955 Ops St Compt File #7315.

Board of fire commissioners may not purchase and install hydrants on a village supply main running through the district and then contract with the village to supply water and maintain the hydrants. 1955 Ops St Compt File #7363.

The Board of Fire Commissioners of a fire district may not pay for installation of a water main and hydrant to be used for training purposes where such installation will be on privately-owned premises. 1961 Ops St Compt #490.

77. —Rental of hydrants

In an action by a county water authority to recover unpaid fire hydrant rental fees from a fire district, an order of the Appellate Division which modified a judgment for the county, would be affirmed, where the fire district cited no authority to support its contention that the county should have been compelled to enter into a contract specifying the terms on which its service was to be provided, where the clear import of Pub A Law § 1085 was that the making of such a contract was permissive, in that the statute did no more than authorize the authority to contract with a municipality or fire district. Suffolk County Water Authority v Board of Fire Comm'rs, 59 N.Y.2d 646, 463 N.Y.S.2d 191, 449 N.E.2d 1269, 1983 N.Y. LEXIS 3046 (N.Y. 1983).

Town board may not contract on behalf of fire protection district for rental of hydrants and purchase of water from a water company. Fire district furnishing protection to fire protection district may make such contract with the water company. 1945 Ops St Compt 494.

If a board of water commissioners of a water district, created under and pursuant to the Town Law, has been delegated power to sell water and rent hydrants to a fire district, it may enter into a contract for such sale and rental as provided in subdivision 3(b) of section 198 of the Town Law. In the absence of such contract it has no authority to permit the use of such water by the fire district. 1947 Ops St Compt 379.

A fire district is not obligated to compensate a private water-works corporation for the rental of fire hydrants unless a properly authorized contract for such rental exists. Property owners within the zone of assessment in a fire district cannot be assessed retroactively for costs incurred by the district prior to establishment of the zone. 33 Op St Compt 1977, p 187 and 5 Op St Compt 1949, p 345 are superseded to the extent that a private water-works corporation would be entitled to receive compensation for the use of fire hydrants even in absence of a properly authorized contract. 1990 Op St Compt 90-25.

General fire district funds may not be used to pay amounts due under a contract for the use of hydrants which serve only a zone within the district; under the facts presented, the fire district annual budget may include an amount sufficient to pay for the use of hydrants under a contract for both the preceding fiscal year and the current fiscal year. 1992 Op St Compt No. 92-2.

78. Injury or death claims

Where a town volunteer fireman had been summoned to assist two men caught in a manhole in a fire district and suffered asphyxiation in his efforts to release the two men, the decedent at the time of his death was an employee of the fire district and not of the defendant town. Hence, his common law action against the fire district should be dismissed on the ground that the Workmen's Compensation Law was a complete bar to such an action and a motion to dismiss the complaint against the town should have been denied. Bauman v Irondequoit, 122 N.Y.S.2d 47, 204 Misc. 494, 1953 N.Y. Misc. LEXIS 1809 (N.Y. Sup. Ct.), aff'd, 282 A.D. 916, 125 N.Y.S.2d 250, 1953 N.Y. App. Div. LEXIS 5406 (N.Y. App. Div. 1953).

Where person ceases to be member of volunteer fire company and there is no compliance with subdivision 24 of section 176, Town Law, he is not entitled to benefits provided by section 205, General Municipal Law. 1947 Ops St Compt 317.

If a volunteer fireman is injured while participating in an outing or clambake or while engaging in a sport as a member of a departmental athletic team, he is not protected by the provisions of section 205 of the General Municipal Law and section 10 of the Workmen's Compensation Law. 1949 Ops St Compt File #4042.

Volunteer fireman injured while participating in civil defense drill is performing a firemanic duty; thus, insurance providing coverage in case of injury or death while performing firemanic duty, provides coverage during such drills. 1955 Ops St Compt File #7359.

In order to be eligible for benefits under the Volunteer Firemen's Benefit Law, a person must be an active member of a volunteer fire company. 1957 Ops St Compt File #272.

Although the fire district may not pay a chiropractor's bills incurred by a volunteer fireman who, in conjunction with the treatment of injuries received while performing firemanic duties, has incurred such bills, the fire district may purchase insurance indemnifying volunteer firemen for injuries occasioned to them in the performance of their duties, including the payment of chiropractor's bills incurred in connection with the treatment of such injuries. 1959 Ops St Compt File #755.

While a fire district is authorized to employ paid firemen, volunteer members of its fire department who are compensated for service on stand-by duty during emergencies are not within the coverage of the Volunteer Firemen's Benefit Law. 1963 Ops St Compt #588.

Although fire district funds may not be expended for erection of a memorial to a deceased district fireman, fire company funds may be so employed. 1964 Ops St Compt #74.

79. Insurance, generally

Real property of an incorporated association of volunteer firemen is exempt from taxation and fire district funds may not be expended to pay the cost of insurance on such property. 1946 Ops St Compt 162.

Insurance policies purchased by a fire district should be made payable to the fire district rather than to the board of fire commissioners. 1947 Ops St Compt 91.

A fire district may not purchase insurance under this section to protect persons who may not legally be members of the fire district fire department. 1953 Ops St Compt File #6074.

Fire district may insure against loss arising out of negligence in use of fire apparatus at authorized parade in connection with funerals of deceased members. 1953 Ops St Compt File #6317.

A fire district may not purchase group insurance which would supply blood, crutches and wheel chairs to fire district firemen and members of their families. 1963 Ops St Compt #247.

An emergency relief squad of a fire district fire department may pay the expenses of operating the fire district ambulance and it may reimburse the fire district for insurance paid on the latter's ambulance, provided there is nothing in the certificate of incor-

poration or bylaws of the fire company or fire department prohibiting such expenditures. 1967 Ops St Compt File #590.

A fire district may not enter into a municipal cooperation agreement with a town pursuant to which the fire district and the town would jointly purchase insurance coverage for their paid employees. 1969 Ops St Compt File #558.

80. —Accident insurance

Fire district may insure member of fire department against injury or death, or both, in addition to insurance under General Municipal Law, section 205, and Workmen's Compensation Law. 1947 Ops St Compt 275.

The purchase of supplemental accident insurance covering volunteer firemen against injury or death in line of duty in no way affects the primary benefits payable pursuant to General Municipal Law § 205 or Workmen's Compensation Law, § 10. 1955 Ops St Compt File #7646.

A fire district may not purchase accident insurance for members of the ladies auxiliary. 1967 Ops St Compt File #832.

A fire district may not purchase a group accident and health insurance policy for its volunteer firemen. 1968 Ops St Compt File #1085.

A fire district may purchase a life and accident insurance policy for its volunteer firemen where the benefits are payable only for injury or death incurred in the line of duty. 1969 Ops St Compt File #557.

81. —Liability insurance

The town board of a town may insure against the liability imposed by section 207-a of the General Municipal Law arising from injuries to paid town firemen. 1947 Ops St Compt 358.

A fire district may contract, at district expense, for liability insurance covering an ambulance owned by a fire company and operated by an emergency relief squad. 1953 Ops St Compt File #6135.

A fire district is not compelled to carry liability insurance on the fire apparatus or equipment of the fire district. In the absence of negligence on the part of the board of fire commissioners, they are not personally liable for damages in the event of an accident involving apparatus or equipment of the fire district. 1953 Ops St Compt File #6217.

Village insurance does not cover its volunteer firemen engaged in protecting property in fire district pursuant to a contract. Fire district is liable in such case. Board of fire commissioners may not delegate to village board the power to purchase insurance to cover such liability. 1953 Ops St Compt File #6326.

Board of fire commissioners may not purchase liability insurance covering "jeep" owned by fire company against liability arising out of use in connection with company social and recreational activities; however, fire district funds may be used to purchase liability insurance to protect the fire district against loss arising out of use of the "jeep" for district purposes. 1953 Ops St Compt File #6358.

The board of fire commissioners may permit children who are residents of the district to use real property leased by the district from a private individual as a playground, and may purchase liability insurance indemnifying the district against any loss arising from injuries occasioned to children so using the property. 1960 Ops St Compt File #351.

A fire district may purchase liability insurance covering emergency vehicles owned by its fire company. 1962 Ops St Compt #602.

A board of fire commissioners may contract, at the expense of the fire district, for liability insurance covering fire apparatus and emergency vehicles owned by the fire district fire department. The district may maintain such fire apparatus, but may not undertake the cost of repairing such equipment. 1968 Ops St Compt File #362.

82. —Life insurance

Fire district may insure member of fire department against injury or death, or both, in addition to insurance under General Municipal Law, section 205, and Workmen's Compensation Law. 1947 Ops St Compt 275.

Fire districts may not insure firemen for death from any cause by purchase of life insurance. 1951 Ops St Compt File #5367.

A fire district may not properly assume the cost of premiums for life insurance insuring the volunteer firemen against death resulting other than in the performance of their duties. 1967 Ops St Compt File #360.

A fire district may not purchase a group accident and health insurance policy for its volunteer firemen. 1968 Ops St Compt File #1085.

A fire district may not purchase group life insurance for its volunteer firemen where they will be covered against death arising other than in the performance of their duties. 1969 Ops St Compt File #315.

A fire district may purchase a life and accident insurance policy for its volunteer firemen where the benefits are payable only for injury or death incurred in the line of duty. 1969 Ops St Compt File #557.

The fire district may purchase life insurance for its paid firemen; however, such policies must be payable only as a result of death occurring as a result of the performance of the fireman's duties as a paid fireman. 1970 Ops St Compt File #73.

83. —Workers' compensation

Fire district may insure member of fire department against injury or death, or both, in addition to insurance under General Municipal Law, section 205, and Workmen's Compensation Law. 1947 Ops St Compt 275.

The purchase of supplemental accident insurance covering volunteer firemen against injury or death in line of duty in no way affects the primary benefits payable pursuant to General Municipal Law § 205 or Workmen's Compensation Law, § 10. 1955 Ops St Compt File #7646.

84. Residency requirements

(1) Residents of territory outside of a fire district may be appointed members of the fire department of such district only if such outside territory is afforded fire protection by the fire department of the fire district, and the board of fire commissioners of the fire district has, by resolution, authorized residents of the outside territory to become members. Such non-resident members may vote upon the nomination of the officers of the fire department. (2) Any active member of the fire department of a fire district is protected by the provisions of § 205 of the General Municipal Law while going to or returning from a fire within the district. Whether or not the contract of insurance indemnifying the district against the liability imposed by § 205 covers non-resident members of the fire department depends upon the terms of the contract. 1945 Ops St Compt 126.

Residents of territory outside of a fire district may become members of the fire department of the district if (1) the territory in which they reside is afforded protection by the fire department of the district and (2) the fire commissioners by resolution authorize such membership. 1946 Ops St Compt 169.

If member of volunteer fire company located within fire district moves outside such district, he is no longer a member of such company unless there is compliance with provisions of subdivision 24 of Section 176 of Town Law. 1947 Ops St Compt 317.

For a discussion of problems involved when volunteer fireman moves from one fire district to an adjoining fire district, see 1953 Ops St Compt File #6207.

A fire company may not restrict the powers, duties, immunities and privileges of a non-resident member to a greater extent than is provided by statute. 1956 Ops St Compt File #7850.

Where a volunteer fireman moves from one fire district into another fire district he may continue his membership in the fire department of the first fire district under certain circumstances. 1957 Ops St Compt File #149.

In order to vote on a proposition under section 176(2-a) of the Town Law, making the office of fire district treasurer an appointive one, electors must be owners of real property in the fire district and must have resided for thirty days next preceding the election in the fire district. 1967 Ops St Compt File #841.

A person who is not a resident elector of a fire district may not serve as a fire district commissioner. The said office automatically

becomes vacant upon the incumbent's removal of his residence from the fire district. 1974 Ops St Compt File #714.

All of the members of a volunteer fire department of a fire district are entitled to the same privileges regardless of whether they reside within or without the district, including protection under the provisions of § 205 of the General Municipal Law and the provisions of the Workmen's Compensation Law. 1952 Ops St Comp File #5803.

85. Tort liability

Fire company could not be held vicariously liable for alleged negligence of firefighter in operating her vehicle in response to emergency since, under statute, (1) fire district, not fire company, employs, supervises and controls individual firefighters, (2) district is responsible for prevention and extinguishment of fires, (3) district possesses virtually total supervision and control over all aspects of creation and staffing of fire companies as well as over rules and regulations governing firefighting practices and procedures, and (4) district is answerable for negligence of its firefighters committed in course of their duties. Knapp v Union Vale Fire Co., 141 A.D.2d 509, 529 N.Y.S.2d 132, 1988 N.Y. App. Div. LEXIS 6348 (N.Y. App. Div. 2d Dep't 1988).

A property damage negligence action brought against an oil burner repair service, a district fire department, and a town, would be dismissed as against the town which could not be held liable for the negligence of members of the fire district, having no control over or responsibility for the acts and conduct of the fire district under Town Law § 176(19) and Gen Mun Law § 205-b. Harland Enterprises, Inc. v Commander Oil Corp., 108 Misc. 2d 511, 437 N.Y.S.2d 506, 1981 N.Y. Misc. LEXIS 2231 (N.Y. Sup. Ct. 1981).

Fire districts no longer have immunity from tort liability in the performance of a governmental function such as fire fighting. 1946 Ops St Compt 400.

A fire district is liable for negligence of its volunteer firemen while driving private vehicles in performance of duty. A piece of fire apparatus is any equipment for the purpose of extinguishing fires. 1953 Ops St Compt File #6300.

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I. Generally

1. In general

There is no authority for a fire district, or a volunteer fire company serving the district, to levy a per diem charge upon an individual of the district for furnishing fire-fighting apparatus and volunteer firemen at specific times. 1957 NY Ops Atty Gen May 14 (informal).

The secretary of a fire district has authority to determine the validity of nominating petitions submitted pursuant to Town Law § 176(7) with regard to patent defects only. 1965 NY Ops Atty Gen Aug 26.

A board of fire commissioners cannot require a fire company or department to elect anyone to membership. This is a right reserved to the company or department, subject only to disapproval by the board of fire commissioners. This is particularly so as regards "honorary", etc., memberships which are not recognized by law. 1965 NY Ops Atty Gen Dec 28.

A board of fire commissioners has no authority to assess fines, penalties or other charges against the owners of school buildings, private hospitals and nursing homes in which the fire district has installed fire alarm systems which are activated because of mechanical difficulties and carelessness on the part of personnel employed in such places. 1976 NY Ops Atty Gen Apr 19 (informal).

A fire district commissioner may not hold the office of treasurer of the fire district but may hold the office of treasurer of a fire company. 1977 NY Ops Atty Gen March 2.

Where a vacancy in an elective fire district office exists prior to October 1, the appointee to such office serves until December 31 of the same year. An election to fill the unexpired term must be held in December. 1979 Op St Compt File #4.

The offices of town clerk-tax collector and secretary of a fire district within the town are not incompatible. 1980 Op St Compt File #82.

2. Creation of districts and companies; management of affairs; scope of responsibility, generally

3. —Control of internal affairs

It is doubted that a board of fire commissioners may adopt rules and regulations dealing with the purely internal affairs of a volunteer fire company. 1955 NY Ops Atty Gen Sept 9 (informal).

The board of fire commissioners may adopt internal rules and regulations governing all fire companies and fire departments in its fire district. At the same time, a fire company, may adopt a by-law more stringent as respects attendance at fires by members of the company than is provided in rules and regulations of the fire commissioner. 1959 NY Ops Atty Gen No. 25 (informal).

Fire District Commissioners may make internal rules for admission and expulsion of members of the district fire companies, but the companies themselves may make more rigid requirements for admission and fix additional grounds for expulsion. 1962 NY Ops Atty Gen July 31.

4. —Coordination between districts

As between village and town fire districts, there is no provision for, and there is a prohibition against, inclusion of territory of one in the territory of the other; but a contractual relationship may be entered into so as to accomplish the desired result. 1961 NY Ops Atty Gen Aug 30.

Discussion of legality of and procedure for consolidation of two adjoining fire districts which are located in different towns, and the effect thereof on existing and future fire protection contracts. 1978 Op St Compt File #278.

A fire district cannot include within its geographical boundaries any territory of a previously established fire district. Special legislation is recommended to remedy the overlapping of the area of one fire district by the boundaries of a district subsequently created. 1983 Op St Compt File #83-152.

Where two fire departments respond to a fire, the chief of each department remains in control of the crew and the apparatus and equipment of his fire department. A contract may, however, provide guidelines to coordinate the services of the two departments at a fire. N.Y. Op. Att'y Gen. No. 84-36.

5. —Emergency, rescue and relief

The emergency relief squad of a fire district volunteer fire department may operate an ambulance. Such ambulance may not be used to operate a general ambulance service for hire even though all proceeds therefrom are used for the maintenance of the ambulance. 1953 NY Ops Atty Gen Sept 25 (informal).

The Joint Pawling Fire District may organize an emergency rescue and first aid squad by following the procedures set forth in General Municipal Law § 209-b subd 1, par a and thereafter, by following the procedure set forth in subdivision b, may provide general ambulance service. 1980 NY Ops Atty Gen June 26 (informal).

A fire district has a duty to provide fire protection services to the general public in all areas of the district, including that portion of a river located within the district, and to render rescue services in that area where emergency rescue services have been organized under General Municipal Law, § 209-b(1). A fire district is not liable for failure to provide fire protection or rescue services. 1983 NY Ops Atty Gen Jan 3 (Informal).

Use of loan of public property by private interests prohibited. Fire District Commissioners have full control over management and use of Fire District property. Payment for janitorial services from rentals will not remove tax exempt status. 1968 NY Ops Atty Gen March 27.

The date of a meeting of a fire department in a fire district for the nomination of persons for the positions of chief and assistant chief is governed by § 176(11-a), (11-b) of CLS Town. 1987 NY Ops Atty Gen No. 87-68 (Informal).

A fire district is obligated to provide fire protection to tax-exempt properties within the district. 1979 Op St Compt File #117.

A fire district may remove any fire alarm box and fire system line which it has installed. It may not compel owners of real property within the district to pay for the repair and maintenance of its fire alarm system, nor may it compel property owners to install their own fire alarms. 1982 Op St Compt File #82-273.

6. Employees, generally

7. —Attorney

Positions of fire district manager and fire district secretary are compatible; compatibility of fire district manager and counsel to the fire district is dependent on duties of each office, which are set independently by each fire district. 1985 NY Ops Atty Gen No. 85-64 (Informal).

An individual may be employed as fire district or school district attorney and compensated by an annual fixed amount for certain specified services plus a per diem rate for other specified services. Opn No. 69-194 superseded to the extent inconsistent. 1981 Op St Compt File #80-783.

8. —Janitor

A fire district may employ a janitor. 1954 NY Ops Atty Gen Oct 11 (informal).

A board of fire commissioners may properly employ a stenographer to render purely stenographic and clerical assistance to the fire district secretary and to the fire district treasurer. A fire commissioner may not be appointed deputy fire district treasurer. 1954 NY Ops Atty Gen Mar 29 (informal).

A board of fire commissioners may properly employ a full time business manager to take care of the administrative details of operating the fire district. 1957 NY Ops Atty Gen Jan 24 (informal).

CLS Town § 176-b(10) prohibits person from becoming member of more than one fire company, whether company is formed for firefighting or emergency and general ambulance services; member of one company may assist another company or department in provision of emergency and general ambulance services. 1999 NY Ops Atty Gen I 99-2.

Positions of town clerk and fire district commissioner are compatible. 1999 NY Ops Atty Gen I 99-40.

9. Engineers and other officers, generally

10. —Assistant engineers

The Fire Department of a fire district may, at the annual meeting, elect a chief engineer and as many assistants as are provided by the rules and regulations of the fire district. 1954 NY Ops Atty Gen Feb 8 (informal).

Nominations and elections of persons for the offices of chief engineer and assistant engineer must be made in the manner provided in this section. 1959 NY Ops Atty Gen May 12 (informal).

Assistant engineers, appointed by the Board of Fire Commissioners without first being nominated by members of the department, have no status under the law, and the Board of Fire Commissioners has no power to approve or disapprove election by members of fire companies of their captains and lieutenants. 1963 NY Ops Atty Gen Jan 21.

The board of fire commissioners of the Forks Fire District No. 3 may create the position of a third assistant engineer, if the rules and regulations they have adopted provide for at least that number of assistant engineers and they may prescribe the duties to be performed by the members of the fire department in the fire district. 1970 NY Ops Atty Gen March 2.

Where the Board of Fire Commissioners in a town does not approve a nomination, a different person should be nominated by the fire department for the office of chief engineer or assistant engineer. 1972 NY Ops Atty Gen Aug 3 (informal).

The positions of fire district treasurer and second assistant engineer should not be held by the same person. Therefore, the same person should not be the fire district treasurer and second assistant engineer. 1972 NY Ops Atty Gen Aug 8 (informal).

The board of fire commissioners of a fire district may require the chief engineer and assistant chief engineer to be residents of the fire district. 1975 NY Ops Atty Gen Feb 5.

11. —Chief engineer, generally

12. — —Nomination to office

Nominations and elections of persons for the offices of chief engineer and assistant engineer must be made in the manner provided in this section. 1959 NY Ops Atty Gen May 12 (informal).

Where the Board of Fire Commissioners in a town does not approve a nomination, a different person should be nominated by the fire department for the office of chief engineer or assistant engineer. 1972 NY Ops Atty Gen Aug 3 (informal).

Members of fire companies in the same district should meet at the same meeting to nominate a chief engineer. Seconding a nomination is not necessary. 1972 NY Ops Atty Gen Aug 8 (informal).

The board of fire commissioners has no power of appointment to fill a vacancy in the position of chief engineer but may call a special meeting of the members to nominate a candidate to be appointed by the board of fire commissioners to the position of chief engineer. 1981 NY Ops Atty Gen Jan 26 (informal).

The Fire Department of a fire district may, at the annual meeting, elect a chief engineer and as many assistants as are provided by the rules and regulations of the fire district. 1954 NY Ops Atty Gen Feb 8 (informal).

The Chief Engineer of the Bayport Fire District may not allow his spouse to be a passenger in a vehicle which is fire district property. The Chief Engineer may be allowed to leave the vehicle at his residence. 1973 NY Ops Atty Gen Aug 21 (informal).

The board of fire commissioners of a fire district may require the chief engineer and assistant chief engineer to be residents of the fire district. 1975 NY Ops Atty Gen Feb 5.

13. —Treasurer

It is not necessary for a person to be the owner of property within a fire district assessed upon the latest completed assessment rolls of the town in which such district is located to qualify for the office of deputy fire district treasurer. 1967 NY Ops Atty Gen Apr 4.

14. —Volunteer chief

Chief of a volunteer fire department shall be a member of the fire department, a resident of New York State and, if the by-laws so provide, a resident of the fire district. 1971 NY Ops Atty Gen May 26.

Because the Town Law is lacking in provisions regulating this subject matter, the provisions of Article 6 of the Election Law govern the nominating procedure and requirements. The provisions peculiarly applicable to nominating petitions for nominating candidates for fire district officers are contained in Election Law § 138, which applies to independent nominations. 1969 NY Ops Atty Gen Dec 23 (Informal), 1969 N.Y. AG LEXIS 115.

15. Firemen; paid

16. —Volunteers, generally

17. — —Absenteeism among volunteers

A board of fire commissioners may adopt a rule or regulation providing that membership in a fire company is dependent upon attendance at fires. 1955 NY Ops Atty Gen June 9 (informal).

A board of fire commissioners may not restrict leaves of absence granted volunteer firemen pursuant to company bylaws. 1980 Op St Compt File #535.

18. — —Disabled volunteers

A board of fire commissioners may properly approve the appointment of members of a volunteer fire company serving the district even though such members have physical disabilities but are nevertheless licensed by the Motor Vehicle Bureau. 1953 NY Ops Atty Gen June 2 (informal).

There is no statutory restriction upon the appointment to volunteer fire companies of persons who are suffering from some physical disabilities; nor does the Volunteer Firemen's Benefit Law limit the coverage of such persons. 1960 NY Ops Atty Gen Jan 12 (informal).

When a fire district volunteer fireman suffers from a physical disability, the extent to which he may perform fire-manic duties is in the discretion of the board of fire commissioners. 1983 Op St Compt File #83-179.

There is no legal prohibition against a person being a paid fireman and a volunteer fireman in the same fire district, but it is so undesirable and raises such serious problems that a paid fireman should not be granted membership as a volunteer member of the fire company in the same fire district. 1971 NY Ops Atty Gen May 26.

Board of fire commissioners may require that prospective volunteer members of fire company have high school degrees or equivalency certificates; as alternative, board may consider requiring volunteers to undergo state's certified training currently required only for paid firefighters. 2000 NY Ops Atty Gen I 2000-4.

Paid firefighters are "members of the fire department" eligible to cast ballots at annual meeting to nominate volunteer fire chief. 2006 NY Ops Atty Gen I 06-10.

A fire district may not replace personal property of a volunteer fireman which was lost by him in a fire. 1982 Op St Compt File #82-21.

There is no doubt that a paid fireman may properly continue his membership as a volunteer fireman in a fire department serving the district. 1954 NY Ops Atty Gen Dec 13 (informal).

In a fire district functioning under the provisions of Article 11 of the Town Law (§§ 170 through 189), a paid fireman is not a public officer unless some overt act has occurred or a positive step has been taken to convert the department from a voluntary to a professional department: such a paid fireman is an employee of the fire district. The board of commissioners of a fire district have no authority to impose residency restrictions upon employees. The state or local civil service commissions may require applicants for employment to live in a restricted area but can not control residence after appointment and such restrictions do not apply to promotional positions; however, the board of commissioners of the fire district may require that eligibles for appointment (as distinguished from promotion) who are residents of the fire district, be certified first. 1975 NY Ops Atty Gen Feb 27.

A paid fireman may be enrolled as an active member of a volunteer fire company and may hold company offices such as captain, lieutenant, president or vice-president if the company by-laws or constitution permit. 1979 Op St Compt File #806.

A paid fireman of a fire district should not serve on the board of fire commissioners of that district. 1980 Op St Compt File #7.

As used in CLS Town Art 11, phrase "members of the fire department" appears to include both paid and volunteer firefighters. 2006 NY Ops Atty Gen I 06-10.

The board of fire commissioners of a fire district may require paid firemen to take regular physical exams at district expense and may select the doctor or doctors who will administer the exams. 1982 Op St Compt File #82-204.

19. Municipal regulations

It is believed that the fire district commissioners may properly direct district volunteer firemen to inspect and report violations of town building codes or town ordinances dealing with fire prevention. 1954 NY Ops Atty Gen Nov 1 (informal).

In the absence of specific requirement that a building permit shall not be issued by a Zoning Board of Appeals without written approval of the Board of Fire Commissioners of the district, no such approval is necessary. 1962 NY Ops Atty Gen Aug 8.

A town board has no authority to enact a local ordinance requiring a board of fire commissioners to appoint a fire inspector. 1972 NY Ops Atty Gen Sept 6 (informal).

20. Powers and duties of fire commissioner, generally

21. —Conflicts of interest

A member of a board of fire commissioners has a prohibited conflict of interest in any agreement between the board and himself as a private businessman, for rental of a portion of the firehouse for use as a barber shop. 1978 Op St Compt File #995.

A chief of a fire district is not deemed to have an interest in contracts between the district and a corporation of which his spouse is a director and officer. The existence of a statutory

interest depends on whether he receives a pecuniary or material benefit as a result of the contract. Courts may find conflicts of interest where facts indicate violation of spirit, but not letter, of Article 18 legislation. 1980 Op St Compt File #38.

A Board of Fire Commissioners may properly provide telephone service for the official use of the district. 1954 NY Ops Atty Gen Feb 8 (informal).

While a board of fire commissioners may properly hold a closed unofficial executive session, official action should be taken only at public meetings. 1955 NY Ops Atty Gen Jan 31 (informal).

Fire district commissioners of fire districts created under Town Law Article 11 have no authority to use the position title "Fire Marshal", which appears in a general law and several special laws applicable to specific positions in the fire service of particular cities. 1976 NY Ops Atty Gen May 5 (Informal), 1976 N.Y. AG LEXIS 109.

22. Selection of fire commissioner, generally

23. —Dual office holding

The same person may not at the same time hold the positions of fire district commissioner and an office in the fire department or fire district, except secretary, even though such an office is not contained in the prohibition against dual office holding contained in Town Law, § 174, subdivision 4. 1974 NY Ops Atty Gen Oct 22.

A fire commissioner of a fire district may serve at the same time as an assistant chief of a village fire department with which the fire district in which he is a commissioner contracts for fire protection. 1978 NY Ops Atty Gen May 26.

Person may not hold both positions of master mechanic of fire district and fire district commissioner. 1997 NY Ops Atty Gen I 97-44.

One person may simultaneously hold elected offices of commissioner of water district and commissioner of fire district, but must recuse himself or herself from participating in any matters relating to contract between districts for installation and maintenance of fire hydrants, sale of water, and testing of backflow devices; if those or other matters involving 2 districts lead to frequent or substantial conflicts, recusal would not be appropriate remedy, and individual may not hold both positions. 2002 NY Ops Atty Gen I 2002-11.

24. —Eligibility; qualifications

Establishment of qualifications to hold line offices in fire department of fire district are established solely by board of fire commissioners of fire district. 1997 NY Ops Atty Gen No. 97-49, 1997 N.Y. AG LEXIS 76.

A board of fire commissioners may not investigate into the eligibility of a candidate for the office of fire commissioner. 1980 Op St Compt File #91.

25. —Length of term, generally

26. — —Holding over

Where a fire district fails to hold an annual election, commissioners in office hold over until their successors are appointed. 1953 NY Ops Atty Gen Dec 7 (informal).

Fire district commissioners appointed after October 1, to fill an existing vacancy, hold office until the end of the following calendar year. 1965 NY Ops Atty Gen Nov 8.

Fire District Commissioner elected to fill unexpired term is elected for total number of years remaining in said term. 1966 NY Ops Atty Gen Jan 5.

27. —Vacancy

Vacancy is to be filled by appointment by Board of Fire Commissioners for unexpired portion of term. Failure to appoint, through failure to act or a tie vote, allows Governor to proclaim a special election, in his discretion. The vacancy may remain unfilled for the duration of the term. 1965 NY Ops Atty Gen Oct 27.

Where a member of a Board of Fire Commissioners of the Montauk Fire District resigned his office on December 27, 1972 to be effective on December 31, 1972, a vacancy in that office did not occur until January 1, 1973 and any action of the Board of Fire Commissioners to fill such vacancy prior to January 1, 1973 was null and void. 1973 NY Ops Atty Gen Jan 12.

Under CLS Town § 176(3) (and not CLS Gen Const § 41), 2 fire commissioners then in office may appoint qualified persons to fill 3 vacancies on board of fire commissioners; on filling of first vacancy, 3 should appoint fourth, and so on. 2008 N.Y. Op. Att'y Gen. No. 2008-1, 2008 N.Y. AG LEXIS 1.

Nominations for the election of fire commissioners may be provided for in a resolution adopted by the board of fire commissioners pursuant to this section. 1960 NY Ops Atty Gen Aug 22 (informal).

A fire commissioner who is serving a term which will not expire for more than a year is not eligible to be nominated for the office of fire commissioner for a five-year term and his election under such circumstances is nugatory. 1970 NY Ops Atty Gen Feb 3.

Board of fire commissioners may provide details for preparation of paper ballots, including procedure for allowance of space for write-ins. 1997 NY Ops Atty Gen I 97-45.

Candidates for fire district offices are required to submit their names in writing to the fire district secretary rather than orally notify him of their candidacy. 1983 Op St Compt File #83-41.

Where a board of fire commissioners failed to call a meeting of the district fire department to nominate fire department officers at the time specified in subdivision 11-a of this section, it is believed that such a board may thereafter call a meeting for that purpose. 1958 NY Ops Atty Gen Apr 25 (informal).

The positions of assistant fire chief of a joint fire district and county director of emergency services are compatible. 2017 N.Y. Op. Att'y Gen. No. 2017-2, 2017 N.Y. AG LEXIS 2.

II. Specific Matters

28. Contracts, generally

29. —Bidding requirements

A board of fire commissioners may not properly submit specifications in advertising for bids for a new fire truck which specifications can be met by but one manufacturer. 1954 NY Ops Atty Gen May 24 (informal).

The purchase by a fire district of equipment and apparatus for use by the fire department emergency rescue and first aid squad is subject to competitive bidding requirements even though moneys bequeathed to the fire district specifically to be used for such purchases are utilized. 1981 Op St Compt File #81-187.

30. —Contracts for services, generally

31. — —Ambulance and other emergency services

A town cannot contract with a fire district in the town to furnish ambulance service outside of the fire district and outside of the area in which the fire district has contracted to furnish fire protection. 1961 NY Ops Atty Gen Oct 18.

A fire district may not contract with a private not-for-profit ambulance squad to provide ambulance services to its area. 1979 Op St Compt File #611.

There is no authority for a town to contract with a fire company or a fire district to provide for general ambulance service on a town-wide basis. General ambulance service may be provided to fire protection districts within the town pursuant to fire protection contracts. 1980 Op St Compt File #684.

A fire district may not contract with a private not-for-profit ambulance service to provide emergency ambulance service to their respective service areas on a mutual aid basis. 1982 Op St Compt File #82-310.

A fire district having an emergency rescue and first aid squad may contract with a school district to provide "stand-by" ambulance service at high school football games where the high school is located in another fire district. 1983 Op St Compt File #83-188.

32. — —Services outside fire district

A town cannot contract with a fire district in the town to furnish ambulance service outside of the fire district and outside of the area in which the fire district has contracted to furnish fire protection. 1961 NY Ops Atty Gen Oct 18.

The exclusive firefighting jurisdiction of a village fire department does not automatically expand upon annexation by the village of territory in a neighboring fire district; an agreement by which a village fire department would provide services to the annexed portion of a fire district is possible under Town Law § 176(22). 1990 N.Y. Op. Att'y Gen. No. I90-59.

The Wantagh Fire District may contract with the State Office of Parks and Recreation to provide fire protection outside the district to a State park (Jones Beach) not within a fire alarm or fire protection district. 1979 Op St Compt No. 79-887, 1979 N.Y. Comp. LEXIS 126.

The provisions of section 209 of the General Municipal Law relating to answering calls for assistance outside the area regularly served and protected and financial liability for expenses incurred in use of fire equipment when responding to such calls have no application where fire protection is provided pursuant to contract. 1982 Op St Compt File #82-276.

A fire district may enter into a municipal cooperation agreement with an adjoining fire district under Article 5-G of the General Municipal Law under which it would provide one of its emergency rescue vehicles not needed for rescue operations in the district to the adjoining district at such times when the latter's rescue vehicle is inoperative. N.Y. Op. Att'y Gen. No. 83-41.

33. — —Services to individuals

It is doubtful if a volunteer fire department serving a fire district may properly contract with an individual taxpayer in the territory protected by the fire department to station a piece of equipment and a number of volunteer firemen on the property of such taxpayer for a certain number of hours each day of an agreed period. 1953 NY Ops Atty Gen Jan 7 (informal).

34. — —Services within fire district which was created before January 1, 1934

A fire district, established after 1932, may not contract for fire protection. 1953 NY Ops Atty Gen Oct 15 (informal).

35. — —Training services

A fire district may pay an annual fee pursuant to a contract with a not-for-profit corporation which owns a fire training facility for the use thereof for training of volunteer fireman. 1981 Op St Compt File #81-116.

A fire district is not required to inspect school buildings located within the fire district but may enter into a contract with the school authorities of the school district (or of a private school) to perform fire inspection services. 1983 Op St Compt File #83-188.

Since a fire protection contract entered into by a fire district or by a town, on behalf of a fire protection district, must specify a definite annual sum to be paid for all of the services to be rendered thereunder, provisions whereby the fire district and the fire protection district would also be liable for loss or damage to fire apparatus or equipment and for personal injury or death of firemen, are invalid. 1980 Op St Compt File #757.

A fire district, under section 176(12) of the Town Law, may obtain a supply of water from the fire hydrants of a water authority by entering into a written or oral contract with the authority. 1981 NY Ops Atty Gen Oct 19 (Informal).

A fire district may not enter into a lease whereby the fire district fire house would be leased to a volunteer fire company. 1978 Op St Compt File #355.

A member of a board of fire commissioners who is also a private businessman has a prohibited conflict of interest in any contracts between himself and the fire district. 1979 Op St Compt File #4.

A fire district may contract for the furnishing of general ambulance service to the town in which it is situated or to an adjoining fire district only pursuant to a fire protection contract with the town on behalf of a fire protection or fire alarm district or with the adjoining fire district, unless another entity is furnishing fire protection to the fire protection or fire alarm district or the adjoining fire district and does not operate and maintain an ambulance, in which case a separate contract for general ambulance service may be entered into. 1979 Op St Compt File #201.

A municipal (or fire district) governing board may retain private consultants and computer service companies for the purpose of assisting the chief fiscal officer in maintaining the financial records of the municipality. The financial records cannot be permanently removed from municipal custody, although they may be temporarily removed for the purpose of working on them consistent with the right of inspection accorded the general public under the Freedom of Information Law. Opns St Comp, 1969, No. 69-509 is superseded to the extent that it is inconsistent with this opinion. 1980 Op St Compt File #540.

36. Equipment and apparatus, generally

37. —Alarm systems

Fire district funds may be expended to purchase an electric siren used solely for civil defense purposes. 1954 NY Ops Atty Gen Dec 29 (informal).

A Board of Fire Commissioners may construct and maintain an adequate fire alarm system in their district. 1962 NY Ops Atty Gen Mar 9.

The board of fire commissioners of a fire district may permit a private alarm company or other commercial establishment to connect into the fire district alarm system and, may charge an installation and service fee. 1974 NY Ops Atty Gen Dec 5.

The board of commissioners of a fire district may not adopt a resolution of the board which prohibits the use of electronic devices which use the telephone lines to transmit alarms to the fire department. 1979 Op St Compt File #395.

38. —Equipment, generally

39. — —Radio, telephones and the like

Fire district funds may be expended to purchase special radio receiving equipment to be installed in the private cars of firemen. 1956 NY Ops Atty Gen Mar 7 (informal).

Fire district commissioners have authority to install a radio in a fire company truck and to permit fire company pumper truck to be garaged in the fire district firehouse, and a fire company may own its own pumper truck even when it is under jurisdiction of the fire district. 1964 NY Ops Atty Gen Oct 8.

There appears to be no authority for a board of fire commissioners to lease "surplus" fire equipment to a private corporation. 1953 NY Ops Atty Gen Feb 6 (informal).

Two or more fire districts jointly or cooperatively may purchase, use, maintain and operate non-mobile apparatus and equipment which each fire district separately could purchase, use, maintain and operate. 1976 NY Ops Atty Gen Feb 13 (informal).

40. —Vehicles, generally

41. — —Purchase

The Town Board of the Town of Sullivan, acting as Fire Commissioners of said town under Town Law § 176 (18), may purchase a fire truck without submission of a proposition to the electors for their approval, provided that the expenditure is to be made from cash on hand if the expenditure is within the district's spending limitation, but if such purchase is to be made under Town Law § 179 or Local Finance Law § 38.00, approval by the electors of a proposition on referendum is necessary. 1968 NY Ops Atty Gen Oct 16.

(1) A fire district may purchase and maintain a bus to be used to transport firemen back and forth from fire-related training sessions. Title must be acquired in the name of the district. (2) A fire district bus may not be used for recreational purposes. 1979 Op St Compt File #335.

42. — —Sale

Where a fire district sells a surplus truck (subject to pertinent referendum requirements), the sale need not be at public auction and the proceeds may be treated as surplus moneys and used for repairs to fire district real property so long as the expenditure is within the district's spending limitation. 1978 Op St Compt File #403.

Fire district commissioners have authority to install a radio in a fire company truck and to permit fire company pumper truck to be garaged in the fire district firehouse, and a fire company may own its own pumper truck even when it is under jurisdiction of the fire district. 1964 NY Ops Atty Gen Oct 8.

A fire district may permit chief's cars to be used to transport firemen to firematic meetings in other towns such as lectures on fire prevention and discussions of mutual aid systems. 1980 Op St Compt File #299.

Where a volunteer fire company has purchased apparatus for corporate purposes from company funds, such apparatus remains the property of the company. Board of Fire Commissioners has no control over expenditure of the fire company moneys. 1955 NY Ops Atty Gen Apr 28 (informal).

A mandatory referendum is required for the sale of personal property of a fire district no longer necessary for fire district purposes unless one of the exceptions mentioned in the statute applies. 1976 NY Ops Atty Gen Jan 26 (informal).

It is questionable whether use of fire department apparatus to transport the body of a deceased fireman for burial is authorized by statute. If a court held that there is no such authorization, the immunity statute would not apply, the Volunteer Firemen's Benefit Law would not provide protection and personal liability might result. 1977 NY Ops Atty Gen Dec 7 (Informal).

It is the responsibility of the Board of Fire Commissioners of a fire district to establish policy regarding use of district equipment, and the responsibility of the Chief to see that the policy is carried out. 1981 NY Ops Atty Gen Oct 27 (Informal).

Discussion of whether a fire district may expend funds for the purpose of transporting racing trucks to a State tournament where the volunteer members of the fire district fire department will compete in various events related to fire-fighting. 1978 Op St Compt File #1065.

The board of fire commissioners may, to the extent they deem necessary, expend moneys for the purpose of maintaining and insuring fire apparatus and emergency vehicles owned by the fire district fire department (24 Opn St Comp, 1968, p 373, superseded). Kitchen equipment purchased by a fire department ladies auxiliary and placed in a fire district owned fire house is under the exclusive management and control of the fire district commissioners. 1979 Op St Compt File #729.

Kent Fire District Number One may lease a room on the second floor of the fire house which is not needed for fire district purposes to the Kent Volunteer Fire Department for fair and adequate consideration, but the use of fire district property for a non-fire district purpose will result in loss of tax exemption. 1980 Op St Compt File #171.

A fire district may lease its training facility to fire districts and fire companies at such times as the facility is not needed for fire district purposes so long as use by lessee does not interfere with fire district use and the district receives the right to utilize the facility during the lease period if the need arises. Leases to fire districts may be without consideration. 1983 Op St Compt File #83-241.

43. Finances and expenditures, generally

44. —Advance payments

A fire district may not advance moneys to physicians as an inducement for the physicians to treat firemen who are injured in the line of duty with the understanding that the physician will reimburse the district when he receives payment from the district's volunteer firemen's benefit or worker's compensation insurance carrier. 1978 Op St Compt File #986.

A fire district may pay a deposit or down payment for a room and a band in connection with its annual inspection-dinner. 1983 Op St Compt File #83-154.

45. —Bond proceeds

Proceeds from the sale of bonds may be used only for the purpose issued, and not for maintenance and repair. 1953 NY Ops Atty Gen Nov 30 (informal).

46. —Claims for payment, generally

47. — —Verification; certification

A claim submitted by a multi-purpose credit card company must be certified by the claimant or on behalf of the claimant by a duly authorized agent, and may not be certified by the municipal officer or employee who used the card. 1979 Op St Compt File #726.

A town board, on behalf of a water district, may charge a fire district for the use of fire hydrants and water by the fire district. 1978 Op St Compt File #630.

The board of fire commissioners, on advice from legal counsel, may compromise or settle a claim for damages against the fire district if there is a legal basis for fire district liability for such damages. 1978 Op St Compt File #896.

A fire district treasurer does not have statutory authority to require a claimant to submit an outstanding claim to the board of fire commissioners for audit. 1979 Op St Compt File #579.

A fire district may pay a claim for services rendered in a prior year if the contract pursuant to which the services were rendered was validly entered into, provided that the claim is not barred by the statute of limitations and that moneys are available from which to pay the claim. If moneys are not presently available, the district may issue budget notes. 1981 Op St Compt File #81-153.

A board of fire district commissioners must audit claims at a formal meeting of the commissioners and order, by resolution, the payment thereof by the fire district treasurer. 1982 Op St Compt File #82-158.

48. —Compensation and reimbursement

Fire district moneys may not be expended to reimburse officers of the fire department for time lost in answering a subpoena as a witness in criminal prosecutions. 1955 NY Ops Atty Gen Jan 17 (informal).

Fire district funds may not properly be expended to purchase gasoline to be given to volunteer firemen serving the fire district for use in their personally owned automobiles in responding to alarms. 1956 NY Ops Atty Gen Oct 5 (informal).

A fire district may not replace personal property of a volunteer fireman which was lost by him in a fire. 1982 Op St Compt File #82-21.

Upon request of the paid fire chief of a fire district, the board of fire commissioners may delay payment to him until the next fiscal year of $2500 of his salary earned in the current year. 1981 Op St Compt File #81-195.

49. —Fines for false alarms

Board of fire commissioners of fire district is not authorized to impose fines on property owners for fire department's response to false alarms. 1999 NY Ops Atty Gen I 99-10.

50. —Membership fees

Discussion of fire districts paying a membership or policy fee to the Fire Districts of New York Mutual Insurance Company, Inc., and also of fire districts guaranteeing repayment of a loan made to such company by a bank or lending institution. 1978 Op St Compt File #567.

51. —Public relations events; publicity

Neither this statute nor any other authorizes a fire district to expend its funds for publicity purposes. 1969 NY Ops Atty Gen July 10.

A fire district board of fire commissioners may not expend district funds for conducting a 25th anniversary celebration for the district. 1981 Op St Compt File #81-196.

Fire district funds may be expended: (1) to hire bands to march in parades in which the fire department participates, either within or without the district (2) to purchase plaques and awards for presentation to firemen at the annual inspection-dinner. 1983 Op St Compt File #83-15.

A fire district may pay a deposit or down payment for a room and a band in connection with its annual inspection-dinner. 1983 Op St Compt File #83-154.

52. —Rewards

A fire district may have implied authority to offer a reward for information leading to the apprehension, arrest and conviction of a person responsible for a suspected arson but in light of the General Municipal Law provisions pertaining to rewards and arson investigation, the best course of action may be for the fire district commissioners to discuss with the town officials the possibility of the town offering a reward and to determine what steps the town may be taking to apprehend a suspected arsonist. 1982 Op St Compt File #82-242.

53. —Spending limitations, generally

54. — —Capital reserve funds

Discussion of fire district spending limitation and of appropriation of surplus to capital reserve fund. 1978 Op St Compt File #820.

An appropriation by a fire district to a capital reserve fund is exempt from the fire district's spending limit, regardless of whether it is made during the budget process for the upcoming year or during a fiscal year. 1983 Op St Compt File #83-119.

Where a proposition to increase to $1500 the limitation on fire district expenditures was approved by the fire district voters and

such proposition set up the precise sum authorized to be expended, it is not believed that the 1954 amendment to § 176 has the effect of increasing the maximum limitation on expenditures thereafter authorized. 1954 NY Ops Atty Gen Sept 15 (informal).

Fire district surplus moneys may be appropriated to a capital reserve fund without regard to the spending limitation, but the establishment of the capital reserve fund may be subject to referendum requirements. 1978 Op St Compt File #1041.

In computing the fire district spending limitations contained in Town Law, § 176(18) an accrual basis or a reservation of surplus (i.e. encumbrance) may be used. 1979 Op St Compt File #644.

The adoption of a proposition to increase a fire district's spending limitation requires approval of the proposed increase by a majority of those voting. 1982 Op St Compt File #82-240.

55. —Surplus funds

Fire district surplus moneys may be appropriated to a capital reserve fund. 1978 Op St Compt File #764.

Fire district surplus moneys may be appropriated to a capital reserve fund without regard to the spending limitation, but the establishment of the capital reserve fund may be subject to referendum requirements. 1978 Op St Compt File #1041.

Moneys in a duly established capital reserve fund may be expended by a fire district, pursuant to the procedures set forth in General Municipal Law, § 6-g, for the purchase of land. 1981 Op St Compt File #765.

Surplus moneys may be used by a fire district without the adoption of a proposition for the purpose of reducing the principal due on outstanding bond application notes. 1982 Op St Compt File #82-347.

56. —Tax matters

Fire district's payment of a sewer tax lawfully imposed is subject to the statutory spending limitations. 1973 NY Ops Atty Gen Jan 19.

A fire district's payment of a sewer tax lawfully imposed is subject to the statutory spending limitations. 1973 NY Ops Atty Gen Jan 19 (informal).

A fire district has no power to tax real property, no power to assess real property and no power to grant or withhold a real property tax exemption. 1976 NY Ops Atty Gen Dec 29.

The rate of tax for fire district purposes in Zone I of the Branchport Fire District, established pursuant to the provisions of this section, should be higher than the rate of tax in the remainder of the District not included within such zone. 1980 Op St Compt File #603.

Where a fire district is situated within two towns and district taxes are incorrectly levied in one town causing an excess of taxes to be collected, the excess amount should be held by the fire district treasurer until the succeeding fiscal year and used to reduce the fire district tax levy within that town. 1981 Op St Compt File #3.

Although fire district boundaries must be indicated on tax matter provided for assessments of real property, determination of those boundaries or resolutions of dispute is a responsibility of the District and the Town Board, not the assessor. 8 Op Counsel SBEA No. 121.

57. —Uniforms and other clothing expenses

Fire district funds may not be expended to purchase baseball uniforms for a team composed of volunteer firemen of the district. 1953 NY Ops Atty Gen May 4 (informal).

The amount to be expended by a fire district for the purchase of uniforms together with all other expenditures for purposes other than the so-called "priority items" in any one fiscal year may not exceed $2,000 or such higher amount as may be applicable in a fire district whose full valuation of real property taxable for fire district purposes exceeds $1,000,000, unless a proposition authorizing the expenditure of a higher amount is approved by the district voters. 1982 Op St Compt File #82-270.

Boards of commissioners of a fire district may permit its fire companies and departments to engage and participate in fire training programs outside the area regularly served by them and may contribute toward the cost of improvements made necessary by such use within the appropriations approved by the taxpayers of the district or within the statutory limitations specified in Town Law, § 176. 1972 NY Ops Atty Gen Aug 31 (informal).

The board of fire commissioners of a fire district may dedicate a fire district building in memory of deceased volunteer firemen but no expense involved in the dedication may be paid for by fire district funds. 1980 NY Ops Atty Gen Sept 15 (informal).

Officers of an emergency rescue and first aid squad may wear badges of rank. A fire district may purchase such badges at the squad's request, but it is not mandatory that it do so. 1983 NY Ops Atty Gen April 15 (informal).

A fire district is authorized to expend funds for the purpose of furnishing a certified check where such check is required as a condition to the granting of a permit by the New York State Department of Transportation for the construction of a driveway within the state highway right of way. 1978 Op St Compt File #393.

Fire district moneys may not be expended in connection with a program designed to insure that all homeowner's in the district correctly designate the fire district in which they reside on their homeowner's insurance policies. 1979 Op St Compt File #324.

A fire district may pay the expenses incurred by firemen under the age of 18, including the expense of travel to drills or for instruction, and may also pay for the purchase of equipment in connection with a properly authorized youth program. 1979 Op St Compt File #877.

58. Firehouses and buildings, generally

59. —Condemnation

The term "district" as used in section 64(2) of the Town Law refers to the improvement districts discussed in Article 12 of the Town Law, and, thus, section 64(2) does not infringe upon the condemnation power accorded a fire district board of fire commissioners as provided for in section 176(14) of the Town Law. 1979 NY Ops Atty Gen Apr 6 (informal).

60. —Construction

Where the issuance of serial bonds to finance the cost of constructing a fire house by a board of fire commissioners has been approved at a referendum, the board is empowered to determine whether to go forward to construct the fire house and issue the bonds. 1956 NY Ops Atty Gen Sept 19 (informal).

In constructing a firehouse to be utilized for fire fighting or fire prevention, a fire corporation in a fire district need not comply with town zoning and building regulations. 1983 N.Y. Op. Att'y Gen. No. 83-33.

61. —Easement

A fire district may not gratuitously grant an easement to a gas company to lay gas pipes across its property. 1978 Op St Compt File #82.

62. —Lease; rental

A board of fire commissioners may rent a hall in a firehouse owned by the fire district when it is not needed for fire district purposes. The charge for such rental can only cover the expenses of cleaning and maintenance of the hall and not for profit. 1958 NY Ops Atty Gen Feb 27 (informal).

A 99-year lease of real property no longer required for fire district purposes should be made only after submission at a special or annual fire district election. In no event should such lease be made for a merely nominal price or a wholly inadequate consideration. 1973 NY Ops Atty Gen Jan 22.

A member of a board of fire commissioners has a prohibited conflict of interest in any agreement between the board and himself as a private businessman, for rental of a portion of the firehouse for use as a barber shop. 1978 Op St Compt File #995.

A fire district may lease unneeded space in one of its substations to a neighboring fire district for the purpose of vehicle storage, either with or without compensation therefor; two fire districts may enter into an agreement pursuant to Article 5-G of the General Municipal Law to effect such purpose. 1979 Op St Compt File #5.

A fire district may lease part of a fire station to a private ambulance service only if it receives fair consideration. The incidental or occasional use of any portion of fire district property for purposes not related to the fire district will not normally cause

the entire parcel of real property to lose its tax exemption. 1981 Op St Compt File #81-55.

63. —Purchase

While a fire district is not required to specify the location of a parcel of real property for the purchase of which a capital reserve fund is established, it may establish such a fund for the purchase of a specific parcel of real property located outside the boundaries of the district to be used as a fire sub-station. 1982 Op St Compt File #82-187.

64. —Sale

Fire district real property no longer necessary for fire district purposes may be sold at private sale, and the Board of Fire Commissioners may agree to pay a licensed real estate broker a commission in the event that he is successful in selling such property. 1963 NY Ops Atty Gen Feb 20.

A fire district may sell or otherwise dispose of, real property of the district no longer necessary for any of its uses or purposes, if it is authorized to do so at a special or annual fire district election, even though it originally acquired such real property from a school district in accordance with Education Law § 405. 1967 NY Ops Atty Gen Feb 16.

65. —Use, generally

66. — —Private functions

Fire district property may not be used for private purposes. 1953 NY Ops Atty Gen July 29 (informal).

The Board of Fire Commissioners may permit the use of the fire house within the scope of this section. 1960 NY Ops Atty Gen June 24 (informal).

The Board of Fire Commissioners of the Franklin Square-Munson Fire District, Town of Hempstead, is not authorized to set aside space in the fire headquarters for the exclusive use of an association consisting of former volunteer firemen. 1969 NY Ops Atty Gen July 10.

A fire district may allow a firehouse to be used for the repose of a deceased volunteer fireman. 1974 NY Ops Atty Gen Feb 14.

A board of fire commissioners may charge a fee or rental for use of the fire hall by fire district residents and formal groups made up of residents, or may allow the free use of the fire hall by them; a fee or rental may be charged to non-residents of the district and formal groups not limited in membership to residents of the fire district; such use, if it makes the use of the premises fall within the Labor Law definition of a place of public assembly, subjects the property to Labor Law Article 17; if rental from the premises results in any profit the tax exempt status of the property may be lost; any use of the property is subject to reasonable regulation by the board of fire commissioners. 1977 NY Ops Atty Gen March 24.

A member of a board of fire commissioners has a prohibited conflict of interest in any agreement between the board and himself as a private businessman, for rental of a portion of the firehouse for use as a barber shop. 1978 Op St Compt File #995.

A fire district is a public corporation and may hold title to real property. 1974 NY Ops Atty Gen Aug 22 (Informal), 1974 N.Y. AG LEXIS 135.

67. Gifts and bequests

The board of fire commissioners of a fire district may accept a gift of money from a volunteer fire company upon condition that the money be used to construct an addition to a fire district building to be used for recreational and social purposes; fire commissioners may construct such addition without adoption of a proposition by the district electors and may expend district moneys to maintain said addition. 1957 NY Ops Atty Gen May 23 (informal).

There is no authority for a fire district to donate to a privately owned business interest the temporary use of a portion of a building owned by the fire district. 1975 NY Ops Atty Gen Feb 7.

A fire district may not make a gift to a fire company of 25% of the proceeds from the sale of a fire house given to the district by the fire company. The fire district may, however, accept the gift of such fire house subject to the condition that the fire district pay to the fire company 25% of the proceeds from the sale of such fire house. 1978 Op St Compt File #658.

An incorporated volunteer fire company may expend funds received from donations and foreign fire insurance taxes to erect an addition to a firehouse and then donate this addition to the fire district. 1980 Op. St. Compt. No. 80–627.

68. Hydrants and water supply, generally

69. —Rental of hydrants

A town board, on behalf of a water district, may charge a fire district for the use of fire hydrants and water by the fire district. 1978 Op St Compt File #630.

The Bellrose Terrace Fire District may make advance payments to the Jamaica Water Supply Company for the rental of fire hydrants. 1980 Op St Compt File #102.

A fire district may not sell water to a private organization for domestic use. 1955 NY Ops Atty Gen Mar 2 (informal).

A fire district, under section 176(12) of the Town Law, may obtain a supply of water from the fire hydrants of a water authority by entering into a written or oral contract with the authority. 1981 NY Ops Atty Gen Oct 19 (Informal).

A town board, on behalf of a water district, may charge a fire district for the use of fire hydrants and water by the fire district. 1978 Op St Compt File #630.

A fire district located outside the boundaries of a village may purchase water from the village for use at the firehouse. A village water works situate outside of the village and within a fire district is not exempt from fire district taxation. 1982 Op St Compt File #82-257.

A fire district located outside the boundaries of a village may purchase water from the village for use at the fire house. A village water works situate outside of the village and within a fire district may be exempted from fire district taxes by the town board. Notwithstanding the exemption, the village is entitled to receive consideration from the fire district for the water consumed by the district. Opns St Comp, No. 82-257 superseded to the extent it is inconsistent herewith. 1983 Op St Compt File #83-56.

70. Injury or death claims

A fire district is not authorized to provide disability benefits coverage for its employees pursuant to the Workmen's Compensation Law. 1967 NY Ops Atty Gen Nov 22 (Informal), 1967 N.Y. AG LEXIS 142.

The laws relating to volunteer fireman recognize only active volunteer members of fire companies and only such active volunteer members are protected in case of injury or death in the performance of fire-manic duties and are accorded rights and privileges of volunteer firemen. 1970 NY Ops Atty Gen Nov 12.

Two fire districts may enter into an "automatic mutual aid plan" pursuant to which both fire departments would automatically respond to alarms from certain defined areas within their respective boundaries. Liability for loss or damage to equipment incurred while responding to such alarms would be governed by the provisions of General Municipal Law, § 209(2) and benefits to a fireman injured while responding to such alarms would be the responsibility of the fireman's "home" district. 1982 Op St Compt File #82-164.

71. Insurance, generally

72. —Accident insurance

A fire district may not purchase accident insurance for members of the ladies' auxiliary. 1978 Op St Compt File #382.

A fire district may provide its volunteer firemen with insurance against injury or death occurring in the performance of their duties. 1978 Op St Compt File #676.

73. —Liability insurance

An endorsement naming a fire department or company, fire commissioners and/or fire chiefs as additional insureds cannot be added to nor form a part of a fire district's Volunteer Firemen's Benefit Law insurance policy originally issued to take effect on or after March 1, 1962. A fire district may purchase liability insurance for the fire departments or companies, fire commissioners and fire chiefs serving the district. 1983 NY Ops Atty Gen April 14 (informal).

Discussion of liability for loss or damage to fire equipment incurred while answering a call for assistance from another fire

district or municipality and the need for insurance to cover the possibility of such loss or damage. 1978 Op St Compt File #268.

A fire district may self-insure for liability claims. However, at this time there is no authority for the establishment of reserve funds for such purpose. 1978 Op St Compt File #737.

A fire district may be a self-insurer for motor vehicle liability purposes, but may not establish a reserve fund in connection therewith. 1978 Op St Compt File #855.

74. —Life insurance

A fire district may provide its volunteer firemen with insurance against injury or death occurring in the performance of their duties. 1978 Op St Compt File #676.

Discussion of the purchase of life insurance for volunteer firemen with fire district moneys, moneys of a volunteer fireman's benevolent association and foreign fire insurance fund moneys. 1978 Op St Compt File #909.

75. —Workers' compensation

Board of fire district commissioners of fire district established under provisions of Town Law are authorized to insure volunteer firemen constituting members of department under provisions of Workmen's Compensation Law. 1935 N.Y. Op. Att'y Gen. No. 352.

A county that administers a county self-insurance plan under Article 5 of the Workers' Compensation Law may not decline to cover an individual volunteer firefighter who has been duly approved for membership in a fire department. N.Y. Op. Att'y Gen. No. 84-62.

Volunteer Firemen are not covered by the provisions of the Volunteer Firemen's Benefit Law when attending a funeral, whether such attendance is pursuant to orders or by permission from the chief or fire district commissioners. 1977 NY Ops Atty Gen Dec 7 (Informal).

There is no authority for a municipality to pay a portion of the cost of automobile insurance premiums of volunteer firemen who use their private automobiles in the course of fire-fighting activities. 1978 Op St Compt File #1023.

It is permissible to procure position schedule, name schedule bonds, or public employees blanket bonds as undertakings to cover a fire district treasurer. Discussion of principles of Surety Law. 1979 Op St Compt File #390.

76. Residency requirements

Since elimination, by 1961 amendment, of the prior requirement that officers of fire districts be residents of the district and of the state, any volunteer member of a fire company may be elected district chief engineer or assistant chief engineer, if a resident of the state, whether or not he is an elector or property owner in the fire district. 1961 NY Ops Atty Gen Sept 13.

77. Tort liability

A town is not liable for negligence on the part of members of a fire company engaged in fire fighting or other authorized activities of a fire district, even though the town serves as a conduit for the raising of taxes to be used for fire district purposes. 1967 NY Ops Atty Gen Mar 22.

The board of fire commissioners, on advice from legal counsel, may compromise or settle a claim for damages against the fire district if there is a legal basis for fire district liability for such damages. 1978 Op St Compt File #896.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 176-a, 177-b, 179, 181, 186, 189; CLS Gen Mun §§ 6-g, 209; CLS Loc Fin § 29.00.

Functions, powers and duties of the office, CLS Exec § 156.

Fire safety advisory board, CLS Exec § 158.

Unemployment insurance payment reserve fund, CLS Gen Mun § 6-m.

Insurance reserve fund, CLS Gen Mun § 6-n.

Contracts for joint fire alarm systems, CLS Gen Mun § 209-t.

Permanent appointment of fire fighters; completion of training program, CLS Gen Mun § 209-w.

Periods of probable usefulness, CLS Loc Fin § 11.00.

Enforcement, CLS Mult R § 303.

Approvals and consents, CLS N-PCL § 404.

Contracts for purchase and sale of water, CLS Vill § 11-1124.

Succession of powers and duties, CLS Vill § 17-1704.

Fire districts; preservation of fire districts, fire protection districts and fire alarm districts, CLS Vill § 17-1720.

Remedies of employees; subrogation, CLS Work Comp § 29.

County self-insurance plan, CLS Work Comp §§ 60 et seq.

Proceeding against body or officer, CLS CLS CPLR §§ 7801 et seq.

Jurisprudences:

20 Am Jur Legal Forms 2d, Waterworks and Water Companies, Forms 261:16 et seq.

5A Am Jur Pl & Pr Forms (Rev ed), Carriers, Forms 139–141.

24 Am Jur Proof of Facts 599, Emergency Vehicle Accidents.

Annotations:

Validity and construction of statute authorizing or requiring governmental unit to procure liability insurance covering public officers or employees for liability arising out of performance of public duties. 71 ALR3d 6.

Texts: Weinstein, Korn, Miller, CPLR Manual (Matthew Bender) § 27.05.

§ 176-a. Duties of chief and assistant chiefs of fire department of fire district

1. The chief shall, under the direction of the board of fire commissioners, have exclusive control of the members of the fire department of the fire district at all fires, inspections, reviews and other occasions when the fire department is on duty or parade; he shall also have supervision of the engines, fire trucks, pumpers, hose wagons and other apparatus and of the equipment and other property used for the prevention or extinguishment of fire and of all officers and employees of the fire department. He shall see that the rules and regulations of the board of fire commissioners are observed and that the orders of the board of fire commissioners are duly executed. He shall, whenever required by the board of fire commissioners, report to said board the condition of the property of said fire district and such other information as may be required of him. He shall hold the members, officers and employees of the fire department strictly to account for neglect of duty and may suspend them for improper conduct, subject to the action of the board of fire commissioners at its next meeting. In case of the disability or absence of the chief, the first assistant chief, and in the case of the disability or absence of both the chief and first assistant chief, the other assistants, in numerical order, shall perform the duties and exercise the powers of the chief. When the fire department or any company or squad thereof is on duty no member of the board of fire commissioners shall interfere with the duties of the chief or assistant chief.

2. If an agreement in relation to the issuance of fire permits is entered into between the town board and the board of fire commissioners pursuant to section one hundred thirty-nine and subdivision twenty-four of section one hundred seventy-six of this chapter, the duties performed for the fire district by the chief, or an assistant chief, of the fire

district fire department in relation to the issuance of the fire permit, or any preliminary investigation in connection therewith shall, in the case of any such officer who is a volunteer firefighter, be deemed to have been performed by him or her in his or her capacity as such and to be a duty within the meaning of paragraph c of subdivision one of section five of the volunteer firefighters' benefit law and shall, in the case of any such officer who is a paid firefighter, be deemed to have been performed by him or her in his or her capacity as such and to be a duty within the meaning of section two hundred seven-a of the general municipal law and other laws applicable in the event of injuries to or death of paid firefighters in line of duty. A chief or an assistant chief who is a volunteer firefighter shall not receive any remuneration for his or her services in relation to the issuance of such permits and any investigation in relation thereto, and any such officer who is a paid firefighter shall not receive any additional remuneration above his or her regular salary for any such service. Any such officer shall, however, be entitled to his or her actual and necessary travel expenses or mileage in connection with such services as provided in section one hundred seventy-eight-c of this article.

HISTORY:

Add, L 1940, ch 363; amd, L 1960, ch 220, § 2; L 1966, ch 470, § 1; L 1974, ch 511, § 3, eff May 23, 1974; L 2018, ch 476, § 98, effective December 28, 2018.

Amendment Notes The 2018 amendment by ch 476, § 98, in 2, substituted "firefighter" for "fireman" or variants wherever it appears and substituted "this article" for "this chapter" in the last sentence; and made stylistic changes.

Notes to Decisions

Analysis

1. In general
2. Compatibility and conflicts, generally
3. —Chief engineer
4. —District commissioner
5. Boards of fire commissioners

1. In general

An otherwise qualified person may serve as a member of a fire district volunteer company where he resides in an area of the protection district not served by the company, if, by reason of residence in the vicinity and usual occupation he will be available to render active service. 1962 Ops St Compt #956.

Town liability and liability of a fire district for injuries sustained by volunteer assistance in fighting a fire by a fire district fire department are not within the coverage of either the Workmen's Compensation Law or the Volunteer Firemen's Benefit Law and depend upon the facts and principles of common-law negligence. 1963 Ops St Compt #329.

Fire district employees who maintain the district firehouses, answer any and all emergency alarms, clean fire apparatus and perform general custodial duties are "employees of the fire department" within the meaning of this section. 1963 Ops St Compt #679.

2. Compatibility and conflicts, generally

The fire district should not employ the first assistant engineer as a relief houseman and/or dispatcher. 1959 Ops St Compt File #756.

A paid fireman may not be appointed chief of a volunteer fire department. 1979 Op St Comp File #600.

Where a fire district enters a fire protection contract with an outside fire company for fire protection within the fire district, the question of who will be in command of a fire scene is a term of the contract which must be negotiated by the parties. 1984 Op St Comp File #84-22.

Assistant chief of fire district's fire department who owns more than 5 percent of stock of private corporation contracting with fire district for sale and repair of radios to district does not have prohibited interest in contract if, as assistant chief, he or she does not have any powers and duties listed in CLS Gen Mun § 801 in connection with contract; if assistant chief, on behalf of corporation, exercises direction and control over any corporate employees involved in contract, such fact must be disclosed under CLS Gen Mun § 803(1). 2001 Opns St Comp No. 01-11.

3. —Chief engineer

A town councilman may also hold the office of chief engineer of a fire district. 1956 Ops St Compt File #7848.

A chief engineer of a fire district may not be employed by the district as a cleaner of fire headquarters. 1957 Ops St Compt File #57-653.

A dispatcher-cleaner at fire headquarters while on leave of absence may not hold the position of chief engineer of the fire district, since he is still an employee though on leave of absence. 1959 Ops St Compt File #605.

The chief engineer of a fire district may not be appointed by the district as a full-time paid fire inspector. 1961 Ops St Compt #328.

Where the fire department chief engineer is responsible for the servicing of fire district vehicles, a prohibited conflict of interest occurs when such vehicles are serviced at a service station owned by him. 1969 Ops St Compt File #942.

The chief engineer of a fire district does not have a prohibited interest in contracts for the purchase of fire fighting equipment between the district and a firm by which he is employed unless, as a fire district officer, he performs certain functions enumerated in General Municipal Law, § 801(1) in connection with such contracts. 1975 Ops St Compt File #457.

4. —District commissioner

A chief engineer employed as a fire district commissioner becomes a paid fireman and loses his status as a volunteer fireman. 1954 Ops St Compt File #6654.

Board of fire commissioners may adopt regulations authorizing fire commissioner, who is not member of fire department, to ride on fire vehicles during emergency calls, so long as regulation does not have effect of interfering with duties of chief or assistant chief, with chief or assistant chief having discretion to determine whether commissioner's presence in any particular vehicle would hamper firefighting efforts; point at which fire commissioner's involvement interferes with performance of duties of chief or assistant chief is factual determination to be made on basis of circumstances of each case. 1992 Op St Compt No. 92-25.

5. Boards of fire commissioners

Where a board of fire commissioners of a fire district has appointed a person to supervise and have charge of the maintenance of the district fire apparatus and equipment, it should define his duties and the duties of the chief engineer with sufficient exactitude so that there is no conflict of authority as between the two. 1953 Ops St Compt File #6068.

A member of the board of fire commissioners, where authorized by resolution of the board, may ride the fire apparatus to a fire or other emergency without the specific permission of the officer in charge. 1960 Ops St Compt File #780.

Board of fire commissioners may adopt rule or regulation limiting, controlling, or prohibiting use of personal equipment at fire scene and, even in absence of such rule or regulation, chief of fire district fire department may restrict or prohibit such use. 1998 Op St Compt No. 98-2.

Agency Opinions

Analysis

1. In general
2. Compatibility and conflicts, generally

3. —Chief engineer
4. —District commissioner
5. Boards of fire commissioners

1. In general

The fire department of a fire district, when responding to a fire call from a school within the district, should be in charge of fighting the fire under the supervision of the chief engineer. 1958 NY Ops Atty Gen Apr 3 (informal).

A fire district has no power to tax real property, no power to assess real property and no power to grant or withhold a real property tax exemption. 1976 NY Ops Atty Gen Dec 29.

Volunteer Firemen are not covered by the provisions of the Volunteer Firemen's Benefit Law when attending a funeral, whether such attendance is pursuant to orders or by permission from the chief or fire district commissioners. It is questionable whether use of fire department apparatus to transport the body of a deceased fireman for burial is authorized by statute. If a court held that there is no such authorization, the immunity statute would not apply, the Volunteer Firemen's Benefit Law would not provide protection and personal liability might result. 1977 NY Ops Atty Gen Dec 7 (Informal).

An alien may not be a fire district officer; an alien may not vote in a fire district election; an alien may be a volunteer fireman; an alien may be appointed fire chief or assistant fire chief and may be elected to fire company corporate office. 1980 NY Ops Atty Gen Feb 6 (Informal), 1980 N.Y. AG LEXIS 152.

As used in CLS Town Art 11, phrase "members of the fire department" appears to include both paid and volunteer firefighters. 2006 NY Ops Atty Gen I 06-10.

In constructing a firehouse to be utilized for fire fighting or fire prevention, a fire corporation in a fire district need not comply with town zoning and building regulations. 1983 N.Y. Op. Att'y Gen. No. 83-33.

Discussion of computation of mileage allowance for volunteer fire chiefs. 1978 Op St Compt File #430.

Members of an emergency rescue and first aid squad are subject to the authority of the board of fire commissioners and the fire chief (and assistant chiefs) and such other fire department officers in accordance with district rules or company by-laws. Town Law, § 176-b(1): Volunteer fireman are selected as provided in the said statute. 1981 Op St Compt File #81-25.

The positions of assistant fire chief of a joint fire district and county director of emergency services are compatible. 2017 N.Y. Op. Att'y Gen. No. 2017-2, 2017 N.Y. AG LEXIS 2.

2. Compatibility and conflicts, generally

3. —Chief engineer

A chief engineer of a volunteer fire department, or other officer who may be called upon to be the acting chief of a volunteer fire department, may not be a paid employee of the department but a volunteer fireman of the fire department may be an employee of the fire department if, and only if, the duties for which he is paid are non-fire-manic in nature. If he performs any fire-manic duties as a paid employee, then he becomes a paid fireman and is not covered under the provisions of the Volunteer Firemen's Benefit Law. 1974 NY Ops Atty Gen Mar 15.

4. —District commissioner

A fire district commissioner may not hold the office of treasurer of the fire district but may hold the office of treasurer of a fire company. 1977 NY Ops Atty Gen March 2.

A fire district commissioner may also serve as a line officer of a fire company in the fire department of the fire district. 1991 NY Ops Atty Gen I 91-43.

Positions of fire district commissioner and member of board of directors of fire company are compatible. 1994 NY Ops Atty Gen I 94-39.

A person may not hold simultaneously the two positions of fire chief and clerk of the works in a fire district. N.Y. Op. Att'y Gen. No. 83-35.

In instances of concurrent police department and fire department jurisdiction, the determination as to which of the two has primary jurisdiction over the event in question is dependent upon the circumstances of the particular case. In general, a fire department is in absolute command at the scene of a fire emergency until such time as, in the judgment of the fire chief, the premises are free from immediate danger of fire or explosion and safe for occupancy. N.Y. Op. Att'y Gen. No. 83-67.

A fire chief of a fire district volunteer fire department does not have a prohibited interest in contracts between the district and a business in which he has a partnership interest unless he exercises certain functions, as fire chief, with respect to such contracts. However, disclosure is required. 1979 Op St Compt File #76.

A paid fireman may be enrolled as an active member of a volunteer fire company and may hold company offices such as captain, lieutenant, president or vice-president if the company by-laws or constitution permit. 1979 Op St Compt File #806.

An assistant chief of a fire district fire department does not have a prohibited interest in purchases of fire-matic equipment made by the district from a company owned by him, even though he makes recommendations to the board with respect to such equipment needed by the department. 1983 Op St Compt File #83-30.

5. Boards of fire commissioners

Members of the Board of Fire Commissioners are without power to give orders or to countermand orders given by the fire chief or assistant fire chief of a fire department to members of the department with regard to fire fighting operations at a fire. 1962 NY Ops Atty Gen Nov 15.

The board of fire commissioners of the Forks Fire District No. 3 may create the position of a third assistant engineer, if the rules and regulations they have adopted provide for at least that number of assistant engineers and they may prescribe the duties to be performed by the members of the fire department in the fire district. 1970 NY Ops Atty Gen March 2.

It is the responsibility of the Board of Fire Commissioners of a fire district to establish policy regarding use of district equipment, and the responsibility of the Chief to see that the policy is carried out. 1981 NY Ops Atty Gen Oct 27 (Informal).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 176.

Jurisprudences:

18A NY Jur 2d Civil Servants and Other Public Officers and Employees § 62 .

26 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 972, 1077 .

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1193—1199, 1200, 1201, 1203.

§ 176-b. Volunteer members of fire district fire companies

1. The volunteer members of a fire company shall be elected and appointed as provided in this section.

2. The board of fire commissioners shall appoint residents of the fire district as the volunteer members of any newly organized fire company. Thereafter, the fire company may elect other eligible persons, including fire district officers, as volunteer members. The election shall be pursuant to the by-laws, if any, of the fire company; otherwise, by a three-fourths vote of the members of the fire company present and voting at a regular or special meeting thereof. The membership of any person so elected shall become effective when approved by resolution of the board of fire commissioners. Membership shall be deemed to have been approved pursuant to this subdivision in the event that no action is taken by the board of fire commissioners, either approving or disapproving, within forty days after service of written notice of election to membership shall have been made by the secretary of the

fire company upon the secretary of the board of fire commissioners, either personally or by mail.

3. Any person elected to membership as a volunteer member of a fire company shall be a resident of the fire district or of territory outside the fire district which is afforded fire protection by the fire department of the fire district, or any fire company thereof, pursuant to a contract for fire protection, except as otherwise provided in subdivision six.

4. The membership of a volunteer member of a fire company shall terminate when he ceases to be a resident of the fire district or of any territory outside the fire district which is afforded fire protection by the fire department of the fire district, or any fire company thereof, pursuant to a contract for fire protection, except as otherwise provided in subdivision five.

5. Any fire company may authorize the continued membership of any volunteer member where such member notifies the secretary of his or her fire company (a) that he or she plans to change his or her residence to territory which is not in the fire district and is not protected by the fire department of the district, or any fire company thereof, pursuant to a contract for fire protection, and (b) that by reason of his or her residence in the vicinity or his or her usual occupation he or she will be available to render active service as a volunteer firefighter in the fire district or in territory outside the fire district which is afforded fire protection pursuant to a contract for fire protection by the fire department of the fire district, or a fire company thereof. Such authorization shall be pursuant to the by-laws, if any, of the fire company of which he or she is a member, otherwise by a three-fourths vote of the members of such fire company present and voting at a regular or special meeting thereof. Such authorization shall not become effective unless approved by resolution of the board of fire commissioners. Such authorization shall be deemed to have been approved pursuant to this subdivision in the event that no action is taken by the board of fire commissioners, either approving or disapproving, within forty days after service of written notice of such authorization shall have been made by the secretary of the fire company upon the secretary of the board of fire commissioners, either personally or by mail. Any membership continued pursuant to the provisions of this subdivision shall terminate when the member cannot meet either the requirements of this subdivision or the residence requirements of subdivision three of this section. In the case of a fire district which adjoins another state, the term "vicinity", as used in this subdivision, includes territory in this state and territory in the adjoining state.

6. A person who cannot meet the residence requirements of subdivision three of this section may be elected to membership as a volunteer member of any fire company of the fire department if by reason of his or her residence in the vicinity or his or her usual occupation he or her will be available to render active service as a volunteer firefighter in the fire district or in territory which is afforded fire protection pursuant to a contract for fire protection by the fire department of the fire district, or a fire company thereof. Such election shall be pursuant to the by-laws, if any, of the fire company; otherwise by a three-fourths vote of the members of the fire company present and voting at a regular or special meeting thereof. The membership of any person so elected shall not become effective unless approved by resolution of the board of fire commissioners. Membership shall be deemed to have been approved pursuant to this subdivision in the event that no action is taken by the board of fire commissioners, either approving or disapproving within seventy days after service of written notice of election to membership shall have been made by the secretary of the fire company upon the secretary of the board of fire commissioners, either personally or by mail. The membership of any volunteer member elected pursuant to the provisions of this subdivision shall terminate when the member cannot meet either the requirements of this subdivision or the residence requirements of subdivision three of this section. In the case of a fire district which adjoins another state, the term "vicinity", as used in this subdivision, includes territory in this state and territory in the adjoining state.

7. (a) [As amended, L 2010, ch 114, § 1, L 2010, ch 270, § 1, L 2010, ch 272, § 1] The membership of any volunteer firefighter shall not be continued pursuant to subdivision five of this section, and persons shall not be elected to membership pursuant to subdivision six of this section, if, by so doing, the percentage of such non-resident members in the fire company would exceed forty-five per centum of the actual membership of the fire company, provided however, that the provisions of this subdivision shall not apply to the memberships of the Shelter Island Heights fire district, the Cherry Grove fire district, the Fire Island Pines fire district, the Davis Park fire department, and the Cold Spring Harbor fire district in Suffolk county, the New Hampton fire district, the Mechanicstown fire district, the Pocatello fire district, the Washington Heights fire district and the Good Will fire district in Orange county, the Jericho fire district, the Westbury fire district and the Roslyn Rescue Hook and Ladder Company, No. 1 in Nassau county, the Orangeburg fire district in Rockland county, the South Lockport Fire Company and the Terry's Corners volunteer fire company in Niagara County, the Taunton fire district and the Onondaga Hill fire department in Onondaga county, the Town of Batavia fire department in Genesee County, the Schuyler Heights fire district, the Boght Community fire district and the Slingerlands fire district I in Albany county, the town of Providence fire district in Saratoga county, the River Road fire district, No. 3 and the Armor Volunteer Fire Company in Erie county, the Sir William Johnson Fire Company in Fulton county, the Fort Johnson Fire

district in Montgomery county or the memberships of the Millwood fire district, the Purchase Fire District, the North Castle South Fire District, No. 1 in Westchester county, the Thornwood fire company, No. 1 in Westchester county and the Rockland Lake fire district in Rockland county.

(b) Upon application by a fire district or fire company to the state fire administrator, the requirements of paragraph (a) of this subdivision shall be waived, provided that no adjacent fire district objects within sixty days of notice, published in the state register. Any such objection shall be made in writing to the state fire administrator setting forth the reasons such waiver should not be granted. In cases where an objection is properly filed, the state fire administrator shall have the authority to grant a waiver upon consideration of (1) the difficulty of the fire company or district in retaining and recruiting adequate personnel; (2) any alternative means available to the fire company or district to address such difficulties; and (3) the impact of such waiver on adjacent fire districts.

8. The board of fire commissioners by resolution may restrict the membership of volunteer members in any or all of the fire companies of the fire department to residents of the fire district. Any volunteer member who then resides in territory outside the fire district shall cease to be a member of any fire company to which the restriction is applicable unless the resolution provides that his membership shall continue during the existence of any contract for fire protection to such territory by his company or during the period in which he may continue to meet the requirements of subdivision three, five or six.

9. Residents of outside territory which is protected pursuant to a contract for fire protection who have been elected to volunteer membership, and non-residents whose volunteer memberships have been continued or authorized pursuant to subdivision five or six of this section may be elected or appointed to any office in the fire company or fire department and, shall have all the powers, duties, immunities, and privileges of resident volunteer members, except a non-resident of this state whose membership has been continued pursuant to subdivision five of this section, or a non-resident of this state who was elected to membership pursuant to subdivision six of this section, shall not be considered to be performing any firemanic duty, or to be engaged in any firemanic activity, as a member of the fire company while he or she is outside of this state unless and until he or she has first reported to the officer or firefighter in command of his or her fire department, or any company, squad or other unit thereof, engaged or to be engaged in rendering service outside this state, or has received orders or authorization from an officer of the fire department or fire company to participate in or attend authorized activities outside of this state in the same manner as resident members of the fire company.

10. A person shall not be eligible to volunteer membership in more than one fire company at one time.

11. The term "contract for fire protection" as used in this section means one under which a cash consideration is received by the fire district or by the fire department or a fire company thereof for the furnishing of fire protection to an area outside the fire district. Any such contract shall be deemed in full force and effect for the purposes of this section if negotiations are pending for the renewal thereof.

12. The provisions of this section shall not be deemed to authorize the election of any person as a member of a fire company, or the continuance of membership in a fire company as herein provided, if such election or continuance of membership shall be contrary to the by-laws, rules or regulations of the fire company or of the fire department of the fire district.

13. Any person:

(1) who was recognized prior to the first day of July, nineteen hundred fifty-four, as a volunteer member of any fire company of the fire district by the board of fire commissioners of the fire district or by the officers and members of his fire company, and

(2) who rendered active service with such fire company prior to such date, and

(3) who was, at the time of his or her election to membership, a resident of the fire district or of territory outside the fire district which was afforded fire protection by the fire department of the fire district, or any fire company thereof, pursuant to a contract for fire protection,

shall for all purposes in law be considered to have been duly elected and appointed to membership in such fire company as of the date of such appointment, if any, and, if none, then as of the date of such election; notwithstanding that there may have been some legal defect in such election, or the proceedings precedent thereto, or a failure of the board of fire commissioners to appoint such member, as provided by the law in force at the time of such election, and the status of such person as a volunteer firefighter as of the date of such appointment or election is hereby legalized, validated, and confirmed. This subdivision shall not apply to a person, if any, whose volunteer membership in a fire company was declared invalid by a court of competent jurisdiction prior to the first day of January, nineteen hundred fifty-five.

14. Any person:

(1) who was recognized on and after the first day of July, nineteen hundred fifty-four and prior to the first day of January, two thousand eleven, as a volunteer member of any fire company of the fire district by the board of fire commissioners of the fire district or by the officers and members of his fire company, and

(2) who rendered active service with such fire company between such dates, and

(3) who was, at the time of his election to membership, a resident of the fire district or of territory

outside the fire district which was afforded fire protection by the fire department of the fire district, or any fire company thereof, pursuant to a contract for fire protection, or, who was a nonresident who was elected to membership or who was continued as a member, pursuant to the provisions of subdivision five or six of this section, shall for all purposes in law be considered to have been duly elected and approved, or continued, as a member in such fire company as of the date of such approval, if any, and, if none, then as of the date of such election or, in the case of a continuance, as of the date of the approval, if any, by the board of fire commissioners, and, if none, as of the date of authorization of continuance by the fire company; notwithstanding that there may have been some legal defect in such election, or the proceedings precedent thereto, or a failure of the board of fire commissioners to approve such member, or approve the continuance of membership of such member, as provided by the law in force at the time of such election or continuance, and the status of such person as a volunteer firefighter as of such date is hereby legalized, validated, and confirmed. This subdivision shall not apply to a person, if any, whose volunteer membership in a fire company was disapproved by the board of fire commissioners or declared invalid by a court of competent jurisdiction prior to the first day of January, two thousand eleven.

15. (a) It shall be an unlawful discriminatory practice for any volunteer fire department or fire company, through any member or members thereof, officers, board of fire commissioners or other body or office having power of appointment of volunteer firefighters in any fire department or fire company pursuant to this section, because of the race, creed, color, national origin, sex or marital status of any individual, to exclude or to expel from its volunteer membership such individual, or to discriminate against any of its members because of the race, creed, color, national origin, sex or marital status of such volunteer members.

(b) Any person claiming to be aggrieved by an unlawful discriminatory practice pursuant to this section may by himself or his attorney at law make, sign and file with the state division of human rights, a verified complaint which shall set forth the particulars of the alleged unlawful discriminatory practice and contain such other information as the division of human rights may require. The division shall thereupon cause to be made an investigation and disposition of the charges pursuant to the provisions of article fifteen of the executive law.

16. A person who has been convicted of arson in any degree shall not be eligible to be elected or appointed as a volunteer member of a fire company. The membership of any volunteer member of a fire company shall immediately terminate if he is convicted of arson in any degree while a member of a fire company.

17. Upon application by any person for membership in a fire company operating pursuant to this section, the fire chief shall cause the applicant's background to be checked pursuant to section eight hundred thirty-seven-o of the executive law for a criminal history involving a conviction for arson and conviction of a crime which requires the person to register as a sex offender under article six-C of the correction law. Where such criminal history information includes conviction of a crime which requires the person to register as a sex offender under article six-C of the correction law, a fire company shall determine whether or not such person shall be eligible to be elected or appointed as a volunteer member of such fire company. Such determination shall be made in accordance with the criteria established in sections seven hundred fifty-two and seven hundred fifty-three of the correction law.

HISTORY:

Add, L 1954, ch 699, § 3, eff April 14, 1954; amd, L 1955, ch 12, eff Feb 18, 1955; L 1955, ch 83, § 1; L 1957, ch 882; L 1958, ch 337; L 1959, ch 101, eff March 17, 1959; L 1959, ch 752; L 1961, ch 80; L 1961, ch 310, § 5, eff April 5, 1961; L 1963, ch 170; L 1967, ch 628, § 2, eff Sept 1, 1967; L 1969, ch 122; L 1969, ch 359, § 14, eff May 2, 1969; L 1971, ch 213, § 1, eff May 4, 1971; L 1973, ch 273, § 1, eff May 1, 1973; L 1976, ch 273, § 1, eff June 3, 1976; L 1978, ch 215, § 4, eff Sept 1, 1978; L 1980, ch 133, § 1, eff May 16, 1980; L 1984, ch 185, § 3; L 1985, ch 719, § 6, eff Aug 1, 1985; L 1986, ch 474, § 1; L 1986, ch 705, § 1; L 1996, ch 565, § 1; L 1997, ch 120, § 1; L 1998, ch 171, § 1; L 1999, ch 369, § 1; L 1999, ch 423, § 3, eff April 1, 2000; L 2000, ch 281, § 1; L 2000, ch 351, § 2, eff Aug 23, 2000; L 2001, ch 520, § 1; L 2002, ch 42, § 1; L 2002, ch 642, § 1; L 2003, ch 23, § 1; L 2003, ch 393, §§ 4, 5, eff Aug 19, 2003; L 2003, ch 655, § 1; L 2004, ch 89, § 1, eff May 25, 2004; L 2004, ch 409, § 1, eff Aug 17, 2004; L 2004, ch 537, § 1, eff Sept 28, 2004; L 2004, ch 561, § 1, eff Oct 5, 2004; L 2004, ch 592, § 1, eff Oct 19, 2004; L 2006, ch 213, § 1, eff July 26, 2006; L 2007, ch 461, § 1, eff Aug 1, 2007; L 2007, ch 691, § 1, eff Dec 31, 2007; L 2008, ch 358, § 1, eff July 21, 2008; L 2008, ch 378, § 1, eff July 21, 2008; L 2008, ch 380, § 1, eff July 21, 2008; L 2008, ch 645, § 1, eff Jan 27, 2009; L 2009, ch 302, § 1, eff Aug 11, 2009; L 2009, ch 314, § 1, eff Aug 11, 2009; L 2009, ch 468, § 1, eff Sept 16, 2009; L 2009, ch 474, § 1, eff Sept 16, 2009; L 2010, ch 56, § 3 (Part EE), eff June 22, 2010; L 2010, ch 114, § 1, eff June 15, 2010; L 2010, ch 270, § 1, eff July 30, 2010; L 2010, ch 272, § 1, eff July 30, 2010; L 2011, ch 373, §§ 4, 5, eff Aug 3, 2011; L 2014, ch 198, § 2, effective December 2, 2014; L 2018, ch 476, § 99, effective December 28, 2018.

Editor's Notes Laws 1999, ch 423, §§ 1, 6, eff April 1, 2000, provides as follows:

Section 1. Legislative intent. The efforts of volunteer firefighters in New York state embody many of the values and traditions long respected and admired by our citizens. Volunteer firefighters devote many hours acquiring necessary training and then expend their energies to protect lives and property while placing their own lives and physical well being in jeopardy. They are heroes to our children, are trusted in our hour of need and provide role models for dedication and discipline.

Unfortunately, each year the public and members of the volunteer firefighting services are shocked to learn that a very few volunteers among the ranks have themselves been responsible for setting fires in their communities. These are the very individuals who have received specific training as firefighters in the arts and techniques of the arsonist. While observers may differ as to whether these fires are set by individuals who are fascinated by fire itself, or are set by those who seek to create opportunities in which they can be viewed as brave heroes by others, the results are the same: a serious erosion in public confidence in the volunteer firefighting services as a whole, and a loss of trust and morale within the volunteer companies themselves. This small number of

individuals also places our communities and citizens at serious physical risk.

Mindful of these consequences, the legislature enacted chapter 719 of the laws of 1985, making an arson conviction in any degree an absolute bar to membership in a fire company. This law, however, relied too heavily upon an individual's willingness to admit an arson conviction and resigning as a volunteer or in refraining from applying in the first instance. It is the intent of this law to strengthen the ability of fire companies to police their own ranks by enabling fire chiefs to require new applicants for membership as volunteer firefighters, including transfers between fire companies, to undergo an arson conviction record check prior to acceptance as members. The authority afforded will enable the early identification of persons convicted of arson who may not serve.

§ 6. This act shall take effect April 1, 2000 except that the division of criminal justice services and the department of state are immediately authorized to promulgate such rules and regulations necessary to implement this act on or before such effective date.

Laws 2003, ch 393, § 1, eff Aug 19, 2003, provides as follows:

Section 1. Legislative intent. This legislation is designed to update certain provisions of the village law, the town law, the general city law and the not-for-profit corporation law relating to recognition of volunteer firefighters as duly elected or approved members of their respective fire companies. Periodically, these provisions of law should be updated to ensure that firefighters recently recognized as volunteers are considered to be duly elected and approved members in their respective fire companies, notwithstanding any legal defect in the election or approval process. This bill updates the relevant statutory provisions and ensures that more recently elected or approved volunteer members of fire companies are recognized as duly elected or approved for all purposes in law, including but not limited to coverage under the volunteer firefighters' benefit law.

Laws 2011, ch 373, § 1, eff Aug 3, 2011, provides as follows:

Section 1. Legislative intent. This legislation is designed to update certain provisions of the village law, the town law, the general city law and the not-for-profit corporation law relating to recognition of volunteer firefighters as duly elected or approved members of their respective fire companies. Periodically, these provisions of law should be updated to ensure that firefighters recently recognized as volunteers are considered to be duly elected and approved members in their respective fire companies, notwithstanding any legal defect in the election or approval process. This act updates the relevant statutory provisions and ensures that more recently elected or approved volunteer members of fire companies are recognized as duly elected or approved for all purposes in law, including but not limited to coverage under the volunteer firefighters' benefit law.

Amendment Notes 2011. Chapter 373, § 4 amended:

Sub 14, par (1) by deleting at fig 1 "two thousand three" and adding the matter in italics.

2011. Chapter 373, § 5 amended:

Sub 14, par (3) by deleting at fig 1 "two thousand eleven" and adding the matter in italics.

2010. Chapter 56, § 3 (Part EE) amended:

Sub 7 by designating entire sub 7 as sub 7, par (a).

Sub 7 by adding par (b).

2010. Chapter 114, § 1 amended:

Sub 7, par (a) by deleting at fig 1 "and" and adding the matter in italics.

2010. Chapter 270, § 1 amended:

Sub 7, par (a) by adding the matter between figs 2 and 3.

2010. Chapter 272, § 1 amended:

Sub 7, par (a) by adding the matter between figs 4 and 5.

The 2014 amendment by ch 198, § 2, in 17, added "and conviction of a crime which requires the person to register as a sex offender under article six-C of the correction law" at the end of the first sentence and added the second and last sentences.

The 2018 amendment by ch 476, § 99, substituted "firefighter" for "fireman" or variants wherever it appears in 5, 6, 9, 13(3) and 15(a); added "or her" wherever it appears in 5, 6, 9 and 13(3); added "or she" wherever it appears in 5 and 9; substituted "subdivision three of this section" for "subdivision three" wherever it appears in 5 and 6; and substituted "subdivision five of this section" for "subdivision five" in 9.

Notes to Decisions

Analysis

1. In general
2. Election, appointment or admission to membership, generally
3. —Residency requirements
4. — —Move outside district
5. —Women as volunteers
6. —Compatibility and conflicts; multiple memberships
7. —Eligibility under Volunteer Firemen's Benefit Law or similar provision

1. In general

A "social member" has no legal standing as a volunteer fireman and is ineligible for the offices of chief engineer or assistant of the district fire department. 1962 Ops St Compt #175.

A fire district may use surplus funds through supplemental appropriation, but, where this will result in exceeding the statutory spending limitation, it must be done by adopting a proposition subject to mandatory referendum. 1973 Ops St Compt File #957.

By-laws of volunteer fire department may provide for class of membership of volunteer firefighters to perform fire-manic functions other than fighting fires, such as dispatching. 1987 Op St Compt No. 87-57.

Several fire districts may enter into cooperation agreement to implement advertising campaign for purpose of recruiting volunteer firefighters for fire companies of fire departments of districts; costs of campaign may be apportioned by property valuations, population, or any other equitable method or formula as agreed to by parties to agreement. 1996 Op St Compt No. 96-7.

2. Election, appointment or admission to membership, generally

Board of commissioners of fire district has discretion and authorization to approve or disapprove any person elected for membership in fire company, but board does not have unfettered discretion since (1) CLS Town § 176-b(3) and (16) expressly prohibit membership of nonresidents and convicted arsonists, and (2) discretion is also limited by antidiscrimination statutes. Waskewicz v Guy, 141 Misc. 2d 983, 535 N.Y.S.2d 345, 1988 N.Y. Misc. LEXIS 732 (N.Y. Sup. Ct. 1988).

Members of fire district fire company elect persons to membership in the company, subject to approval of the Board of Fire Commissioners. 1962 Ops St Compt #365.

The board of fire commissioners of a fire district may not approve the election to membership of a person presently serving in the armed forces, regardless of his availability. 1968 Ops St Compt File #226.

Village, fire districts or cities may require that persons elected to membership in a volunteer fire company satisfactorily complete a physical examination. The cost of such a physical examination may be assumed by the respective municipality. 1969 Ops St Compt File #597.

Where the membership of an individual in a volunteer fire department has neither been approved nor disapproved by action of the board of fire commissioners within forty days after having received notice of election of that individual to membership by the members of the company, his membership is deemed to have been approved. 1984 Op St Comp File #84-42.

3. —Residency requirements

For a general explanation of Chapter 699 of Laws of 1954 in relation to non-resident members of volunteer fire departments, see 1954 Ops St Compt File #7063.1.

Admission of non-resident volunteer members in fire district fire department discussed. 1955 Op St Compt No. 55–7275.

A non-resident is not eligible to membership of a volunteer fire department when he is available for service only during the summer months. 1957 Ops St Compt File #1160.

Certain nonresidents of a fire district and of the territory protected by it are eligible for volunteer membership in the fire district company where, by reason of usual daily occupation, they are present during working hours in the fire district, subject to the 30% limitation on such membership and the absence of any restriction on membership to residents. 1961 Ops St Compt #299.

A foreigner residing within a fire district may be a volunteer fireman. 1968 Ops St Compt File #396.

The board of fire commissioners may require that all volunteer fire company members be residents of the fire district and may disapprove and veto the election of particular members for cause, but may not mandate other qualifications for membership in a volunteer fire company. 1969 Ops St Compt File #142.

A New York State resident who is a non-resident member of a fire district fire company be elected a "line officer" of such company. 1969 Ops St Compt File #144.

A non-resident of a fire district may be allowed membership in a fire company of the fire district fire department if such membership is authorized by the fire company. Where such membership is permitted, the non-resident member shall have all the powers, duties, immunities, and privileges of resident members, including the right to hold a fire company office, unless the nonresident is also a non-resident of the State. A volunteer fireman may belong to only one fire company at a time and where such fireman joins a second company, he may be removed from membership in the original company. 1985 Op St Compt 85-31.

4. — —Move outside district

Petition to annul alleged action of commissioners of fire district in removing petitioners, who had moved from fire district, from membership roll which alleged that fire company had voted to retain them as firemen despite their change of residence and that commissioners had received new roster containing petitioners' addresses outside of district was insufficient in that it failed to allege approval of retention by resolution of fire district. Forwarding to commissioners of fire district of new roster of membership of company bearing new address for one of members who has moved outside the district does not give sufficient notice to commissioners that fire company has voted to authorize retention of that member, and thus approval by commissioners of new roster does not amount to necessary resolution to continue membership of member who has moved outside district. Morley v Lake Shore Fire Dist., 74 Misc. 2d 977, 346 N.Y.S.2d 606, 1973 N.Y. Misc. LEXIS 1720 (N.Y. Sup. Ct. 1973).

Where a volunteer fireman moves his residence from one fire district to another fire district, it is possible for him to retain his membership in the fire department of the first fire district subject to compliance with statutory requirements. 1954 Ops St Compt File #6781.

A fire department rule which requires a member of the district fire department to reside within the district precludes a person who has moved from the district from continuing his membership. 1962 Ops St Compt #534.

5. —Women as volunteers

Rejected female applicant for membership in volunteer fire company may reapply and be reconsidered after membership receives policy statement providing that female candidates must be given equal consideration, where only 2 other female applicants were also rejected and it is highly likely that some members believe that, as association of volunteers, they are free to reject applicants according to whim or social unacceptability, because applicant deserves such relief under CLS Town Law § 176-b(15)(a). Gibson v Hurleyville Fire Co. No.1, 1 F. Supp. 2d 329, 1998 U.S. Dist. LEXIS 5435 (S.D.N.Y. 1998).

Women may be elected to membership in an incorporated fire company, if the by-laws do not prohibit such membership and if their election is approved by the board of fire commissioners or town board. 1955 Op St Compt No. 55–7128.

Women may be elected to volunteer fire company membership if not barred by the district constitution or by-laws or by rule or regulation of the Board of Fire Commissioners. 1962 Ops St Compt #161.

A woman may be admitted to membership in a volunteer fire company to participate in all fire-manic activities. Whether a woman may be excluded from membership in a volunteer fire company, in the face of a claim of unconstitutional discrimination, is a matter for judicial determination. 1974 Ops St Compt File #1171.

6. —Compatibility and conflicts; multiple memberships

A volunteer fireman may not be a member of two volunteer fire companies on or after July 1, 1954. 1954 Op St Compt No. 54–6669.

Persons who are not active members of a volunteer fire company, though they may be carried on a roster as inactive, honorary, life on social members, are not prohibited from membership in another volunteer fire company. 1954 Ops St Compt File #6961.

The board of fire commissioners of a fire district may refuse to appoint a person as a member of a volunteer fire company if, in the due exercise of discretion, it believes that the applicant, because of membership in the armed forces, cannot efficiently serve the fire department. 1956 Ops St Compt File #8168.

A volunteer firefighter may not simultaneously be a member of 2 fire companies, regardless of whether the companies are part of the same fire department or different fire departments. 1991 Op St Compt No. 91-23.

There is no statutory prohibition on individual becoming member of fire company and member of volunteer ambulance corps at same time. 1997 Op St Compt No. 97-23.

Individual who is member of volunteer fire company may not join second company unless he or she first terminates membership in original company. 2000 Op St Compt No. 2000-13.

7. —Eligibility under Volunteer Firemen's Benefit Law or similar provision

Workers' Compensation Board properly determined that claimant, as 16-year-old member of junior corps of town fire department, became active member of department and was entitled to benefits provided by Volunteer Firefighters' Benefit Law following injury incurred while operating his vehicle in response to fire alarm, since members of junior corps were required to respond to alarms once school day was completed, they were under direction and control of chief of department, and their duties at scene were consistent with those of active firefighter save for certain limitations such as not entering building that is scene of fire; furthermore, given these facts, junior corps is not youth program and thus its members are not excluded from benefits by operation of CLS Gen Mun § 204-b. Elander v Pleasantville Fire Dist., 124 A.D.2d 388, 507 N.Y.S.2d 334, 1986 N.Y. App. Div. LEXIS 61399 (N.Y. App. Div. 3d Dep't 1986), app. denied, 69 N.Y.2d 608, 516 N.Y.S.2d 1023, 509 N.E.2d 358, 1987 N.Y. LEXIS 16376 (N.Y. 1987).

Members of a volunteer fire company who are anything less than active members are not protected in case of injury or death if they should serve at fires. 1969 Ops St Compt File #90.

Agency Opinions

Analysis

1. In general
2. Election, appointment or admission to membership, generally
3. —Residency requirements
4. — —Move outside district
5. — —Student residence
6. —Women as volunteers
7. —Compatibility and conflicts; multiple memberships
8. —Eligibility under Volunteer Firemen's Benefit Law or similar provision

1. In general

There is no statutory limitation on the number of volunteer firemen who may be members of a fire district company, but such

limitation may be expressed in the certificate of incorporation of an incorporated company, in its constitution, bylaws or rules, or may be made effective by board of fire commissioners' disapproval of elected new members of a fire company. 1970 NY Ops Atty Gen April 14.

A fire district has no power to tax real property, no power to assess real property and no power to grant or withhold a real property tax exemption. 1976 NY Ops Atty Gen Dec 29.

Board of flyer commissioners may require that prospective volunteer members of fire company have high school degrees or equivalency certificates; as alternative, board may consider requiring volunteers to undergo state's certified training currently required only for paid firefighters. 2000 NY Ops Atty Gen I 2000-4.

A fire district may pay the expenses incurred by firemen under the age of 18, including the expense of travel to drills or for instruction, and may also pay for the purchase of equipment in connection with a properly authorized youth program. 1979 Op St Compt File #877.

A member of the Hewlett Fire Department may not resign from the Fire Department and remain a "member" of the Hewlett Bay Fire District. We express no opinion with respect to the notion of a volunteer fireman resigning his membership in a fire district, since firemen do not become members of the fire district. 1981 Op St Compt File #81-53.

When a fire district volunteer fireman suffers from a physical disability, the extent to which he may perform fire-manic duties is in the discretion of the board of fire commissioners. 1983 Op St Compt File #83-179.

2. Election, appointment or admission to membership, generally

3. —Residency requirements

4. — —Move outside district

A fire district commissioner who moves out of the fire district is ineligible to remain in office or to run for re-election. 1982 Op St Compt File #82-69.

5. — —Student residence

Residence outside of the fire district by a volunteer fireman, who is a student, for the purpose of attending college results in his ineligibility to continue as a member of the fire department, if so provided in the by-laws of the department. 1982 Op St Compt File #82-278.

Residents of outside territory and non-residents whose volunteer membership have been continued or authorized may not be elected to the office of chief engineer or any assistant engineer of the fire department. 1960 NY Ops Atty Gen May 6 (informal).

It is at least doubtful if a person living "8 or 10 miles" away from a fire district and who is employed full time in a city the same distance away is eligible for membership in a volunteer fire company in such district. 1968 NY Ops Atty Gen Feb 14.

Chief of a volunteer fire department shall be a member of the fire department, a resident of New York State and, if the by-laws so provide, a resident of the fire district. 1971 NY Ops Atty Gen May 26.

The board of fire commissioners of a fire district may require the chief engineer and assistant chief engineer to be residents of the fire district. 1975 NY Ops Atty Gen Feb 5.

A non-resident who is engaged in his usual occupation within a fire district would appear to be eligible to election to membership in a fire district fire company. 1979 Op St Compt File #163.

Volunteer members of a village fire department or of a fire district fire company who are non-residents of the village, the first district, or of the territory protected by a fire protection contract, may still be elected or appointed to a fire company or fire department office if they are residents of the state. 1982 Op St Compt File #82-67.

Persons who reside and work in the fringe area outside a fire district, or who reside there but whose work requires them to commute, and yet permits them to render active fire service, may be elected as volunteer firemen in the district but the percentage of such nonresident members may not exceed 30% of the membership of the fire company. 1957 NY Ops Atty Gen May 2 (informal).

6. —Women as volunteers

Unless barred by the company's by-laws, a woman can be elected to membership in a volunteer fire company. 1955 NY Ops Atty Gen Mar 29 (informal).

7. —Compatibility and conflicts; multiple memberships

Though not prohibited by statute, town police officers' duties may make their membership as volunteer firemen inadvisable. There is, however no such conflict of duty in the case of town highway employees. 1970 NY Ops Atty Gen March 6.

There is no legal prohibition against a person being a paid fireman and a volunteer fireman in the same fire district, but it is so undesirable and raises such serious problems that a paid fireman should not be granted membership as a volunteer member of the fire company in the same fire district. 1971 NY Ops Atty Gen May 26.

Volunteer firemen may not belong to more than one volunteer fire company at the same time. 1972 NY Ops Atty Gen Feb 29.

A volunteer fireman may not be a member of a fire company within New York State and a volunteer fire company located out of New York State at the same time. 1975 NY Ops Atty Gen Feb 24 (Informal), 1975 N.Y. AG LEXIS 74.

A fire district commissioner may not hold the office of treasurer of the fire district but may hold the office of treasurer of a fire company. 1977 NY Ops Atty Gen March 2.

CLS Town § 176-b(10) prohibits person from becoming member of more than one fire company, whether company is formed for firefighting or emergency and general ambulance services; member of one company may assist another company or department in provision of emergency and general ambulance services. 1999 NY Ops Atty Gen I 99-2.

A paid fireman may not be appointed chief of a volunteer fire department. 1979 Op St Compt File #600.

A paid fireman may be enrolled as an active member of a volunteer fire company and may hold company offices such as captain, lieutenant, president or vice-president if the company by-laws or constitution permit. 1979 Op St Compt File #806.

8. —Eligibility under Volunteer Firemen's Benefit Law or similar provision

Honorary, active, life members are not volunteer members of the fire department entitled to benefits under the General Municipal Law, § 205, and under Workmen's Compensation Law, § 10. 1960 NY Ops Atty Gen May 2 (informal).

Only as volunteer firemen would youths 16 to 18 years of age be covered by the Volunteer Firemen's Benefit Law. 1970 NY Ops Atty Gen March 6.

Volunteer Firemen are not covered by the provisions of the Volunteer Firemen's Benefit Law when attending a funeral, whether such attendance is pursuant to orders or by permission from the chief or fire district commissioners. 1977 NY Ops Atty Gen Dec 7 (Informal).

It is questionable whether use of fire department apparatus to transport the body of a deceased fireman for burial is authorized by statute. If a court held that there is no such authorization, the immunity statute would not apply, the Volunteer Firemen's Benefit Law would not provide protection and personal liability might result. 1977 NY Ops Atty Gen Dec 7 (Informal).

A county by local law may exclude all volunteer firemen from coverage in a county self-insurance plan, but may not administratively exclude, on physical grounds, an individual volunteer fireman who is duly approved for membership in a fire company. 1979 Op St Compt File #889.

Full time college students who attend colleges outside the vicinity of the fire district and are therefore not available for service and/or training during most of the year, are eligible for membership as volunteer members of the fire companies which comprise the Chappaqua Fire Department, if the Board of Fire Commissioners reasonably determines that they will be ale to serve the Fire Department efficiently. 1980 Op St Compt File #535.

The laws relating to volunteer firemen recognize only active volunteer members of fire companies and only such active volunteer members are protected in case of injury or death in the performance of firemanic duties and are accorded rights and privileges of volunteer firemen. 1970 NY Ops Atty Gen Nov 12.

Board of fire commissioners cannot require a fire company or department to elect anyone to membership. This is a right reserved to the company or department, subject only to disapproval by the board of fire commissioners. This is particularly so as regards "honorary", etc., memberships which are not recognized by law. 1965 NY Ops Atty Gen Dec 28.

Youths of 16 to 18 years of age may be admitted to membership as volunteer firemen of an incorporated fire company if the bylaws or constitution of the company so provide and the board of fire commissioners of the fire district have taken no positive action to the contrary. 1970 NY Ops Atty Gen March 6.

The law recognizes no classifications of membership of volunteer firemen. There is no authority for probationary or provisional appointment of a volunteer member of a volunteer fire company in a town fire district. Because a person elected to membership in a volunteer fire company is not a member until the election is approved by the board of fire commissioners, the person is not entitled to benefits under the Volunteer Firemen's Benefit Law and the person should not be allowed to perform any firemanic duties until the membership becomes effective. 1975 NY Ops Atty Gen Dec 18 (informal).

By-law provisions for the admission of members of volunteer fire companies which provide that three negative votes or black balls will defeat election to membership appear to be valid but if they are used in a manner contrary to the Constitutions of the United States or of the State of New York or the anti-discrimination statutes of the state, such a by-law would be invalid. 1977 NY Ops Atty Gen May 9 (Informal), 1977 N.Y. AG LEXIS 114.

Only the first volunteer members of a newly organized fire company are "appointed" by the board of fire commissioners; thereafter, those members and their successors elect new members to the fire company, whose memberships do not become effective until the board of fire commissioners "approves" of their election, and board approval is deemed to have been given if the board takes no action within 40 days of being informed of the election. 1978 NY Ops Atty Gen July 26.

An alien may not be a fire district officer; an alien may not vote in a fire district election; an alien may be a volunteer fireman; an alien may be appointed fire chief or assistant fire chief and may be elected to fire company corporate office. 1980 NY Ops Atty Gen Feb 6 (Informal), 1980 N.Y. AG LEXIS 152.

Person convicted of arson in any degree is, by statute, ineligible to become member of volunteer fire company, but issuance to that person of unrestricted certificate of relief from disabilities prevents automatic statutory disqualification; however, certificate does not prevent fire company or fire district commissioners from exercising discretion to deny membership based on facts and circumstances surrounding arson conviction. 1998 NY Ops Atty Gen 98-50 (informal), 1998 N.Y. AG LEXIS 54.

Governing body of fire company or department may permit commanding officer to accept services of volunteer firefighter who is member of another company. 1999 NY Ops Atty Gen I 99-41.

An incorporated volunteer fire company may amend its by-laws and constitution to require that members of the company attend at least three meetings annually as a qualification to vote for company officers. 1983 Op. St. Compt. No. 83-65, 1983 N.Y. Comp. LEXIS 420.

An individual 16 or 17 years old may be elected to membership in a volunteer fire company providing the fire company's by-laws, constitution or articles of incorporation do not prohibit such individuals from becoming members. 1983 Op St Compt File #83-66.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS Gen Mun § 200.

§ 176-c. Removal of fire commissioners

Any fire commissioner may be removed for dereliction of duty. Dereliction of duty shall include, but not be limited to, excessive unexcused absences from regularly scheduled meetings. These criteria for removal are in addition to the criteria provided in section thirty-six of the public officers law. Any removal pursuant to this section shall take place pursuant to the procedure for removal established in section thirty-six of the public officers law.

HISTORY:

Add, L 2011, ch 462, § 1, eff Jan 1, 2012.

§ 176-d. Funding of fire districts.

Notwithstanding any other provision of law to the contrary, a fire district may include as part of its budget an appropriation to fund an annual firefighters' inspection-dinner for each fire company within the fire district.

HISTORY:

Add, L 1975, ch 838, § 2, eff Aug 9, 1975; L 2018, ch 476, § 100, effective December 28, 2018.

Editor's Notes: Laws 1975, ch 838, § 1, provides as follows:

Section 1. Legislative declaration. The services provided by volunteer firemen in this state are invaluable. In the highest tradition of exemplary public service, these firemen serve their neighbors, their community and their state. In order to insure the continued availability of this irreplaceable work force, it is in the best interest of the people of our state to provide financial assistance for programs of local fire districts and villages which facilitate the recruitment, training and administration of new personnel who can contribute their loyalty and devotion in the interest of fire protection.

Amendment Notes The 2018 amendment by ch 476, § 100, substituted "firefighters' inspection-dinner" for "fireman's inspection-dinner."

Notes to Decisions

Board of fire commissioners of fire district generally may not expend district funds in connection with celebration of district fire department's anniversary; however, district may expend funds pursuant to CLS Town § 176-d if anniversary celebration of fire department consists of dinner and coincides with annual inspection dinner for fire company or companies within district. 1994 Op St Compt No. 94-11.

Agency Opinions

A fire district has no power to tax real property, no power to assess real property and no power to grant or withhold a real property tax exemption. 1976 NY Ops Atty Gen Dec 29.

A fire district commissioner may not hold the office of treasurer of the fire district but may hold the office of treasurer of a fire company. 1977 NY Ops Atty Gen March 2.

Aside from the annual inspection dinner for its fire department, a fire district may not contribute money for picnics, dinners and other so-called "morale-building activities" for the volunteer firemen. 1978 Op St Compt File #379.

A fire district may purchase inexpensive plaques and present them to outgoing fire commissioners at the annual inspection dinner as a part of the cost of such dinner. 1978 Op St Compt File #784.

A fire district may award an inexpensive plaque to a volunteer fireman in recognition of meritorious service at the annual inspection dinner. 1979 Op St Compt File #6.

A fire district may, at the annual inspection dinner, award an inexpensive plaque to a private person in recognition of meritorious non-firematic, administrative service to the fire district fire department. 1979 Op St Compt File #141.

A town may not expend Federal Revenue Sharing funds for fire district purposes. 1979 Op St Compt File #299.

A town may not give Federal Revenue Sharing funds to a fire district. 1979 Op St Compt File #653.

A fire district board of fire commissioners may not expend district funds for conducting a 25th anniversary celebration for the district. 1981 Op St Compt File #81-196.

Fire district funds may be expended: (1) to hire bands to march in parades in which the fire department participates, either

within or without the district (2) to purchase plaques and awards for presentation to firemen at the annual inspection-dinner. 1983 Op St Compt File #83-15.

A fire district may pay a deposit or down payment for a room and a band in connection with its annual inspection-dinner. 1983 Op St Compt File #83-154.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

18A NY Jur 2d Civil Servants and Other Public Officers and Employees § 62 .

26 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1116, 1122 .

§ 176-e. Training requirements for fire commissioners

Each fire commissioner shall attend and successfully complete a commissioner-specific state-approved training course within two hundred seventy days of the taking of such office. The course will contain training related to legal, fiduciary, financial, procurement, and ethical responsibilities and such other disciplines as may be prescribed by the state comptroller. Such course shall be prescribed and certified in rules promulgated by the state comptroller. The manner, frequency, and duration of such course shall be established by such rules. Course materials should be made available upon request. When approved by the board of fire commissioners in advance of a commissioner attending such training course, the actual and necessary expenses incurred by a commissioner in successfully completing the training required by this section shall be a charge against the fire district.

HISTORY:

Add, L 2006, ch 242, § 1, eff Jan 22, 2007 (see 2006 note below); amd, L 2007, ch 555, § 6, eff Aug 15, 2007 (see 2007 note below).

Editor's Notes: Laws 2006, ch 242, § 2, eff Jan 22, 2007, provides as follows:

§ 2. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided, however, that the state comptroller is authorized and directed to promulgate any rules and regulations necessary to implement the provisions of this act on its effective date on or before such date.

Laws 2007, ch 555, § 10, eff Aug 15, 2007, provides as follows:

§ 10. This act shall take effect immediately and shall first apply to fire district budgets prepared for fiscal years commencing on or after January 1, 2008; provided, that the amendments to section 209-z of the general municipal law, made by section two of this act, shall take effect on the same date and in the same manner as chapter 237 of the laws of 2006 takes effect.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

Department of audit and control: required training for commissioners of fire districts. 2 NYCRR Part 153.

§ 177. Powers and duties of fire district treasurer

The fire district treasurer shall be the fiscal officer of the fire district and shall receive and have the custody of the funds of the district and shall disburse the same for the purposes herein authorized when so ordered by resolution of the board of fire commissioners, except that no such resolution of the board of fire commissioners shall be required for the payment of fixed salaries, compensation for services of officers or employees regularly engaged by the fire district at agreed wages by the hour, day, week, month or year unless so required by resolution of the board of fire commissioners adopted at the organization meeting in the month of January, the principal of or interest on obligations issued by the fire district, fixed amounts becoming due on lawful contracts for the purchase of water for fire protection, and amounts which the fire district may be required to pay to the state and local employees' retirement system on account of contributions for past and current services of firefighters. All such disbursements shall be made by check payable to the order of the person or persons entitled thereto. The fire district treasurer shall also be responsible for filing any paperwork necessary to obtain permits or secure any refunds provided pursuant to section three hundred seventy-eight-a of the public authorities law. The board of fire commissioners shall designate in the manner provided by section ten of the general municipal law the depositaries in which the fire district treasurer shall, within ten days, deposit and secure all moneys coming into his or her hands by virtue of his or her office.

At the annual organization meeting of the board of fire commissioners of a fire district the fire district treasurer shall account with the board of fire commissioners for all moneys received and disbursed by him during the preceding fiscal year and shall produce all books, records, receipts, orders, vouchers and cancelled checks or check images as authorized by section ninety-nine-b of the general municipal law respecting the same. At such meeting the fire district treasurer shall file with the board of fire commissioners a statement in writing showing his receipts and disbursements for the preceding fiscal year, which statement shall be in detail and shall be entered in the minutes of the meeting by the fire district secretary, except that the fire district treasurer, if authorized by the board of fire commissioners at a meeting held prior to the annual organization meeting, may within sixty days after the end of the fiscal year, submit to the said board a copy of the annual report required by section thirty of the general municipal law, in lieu of such statement, in which case the fire district treasurer shall account for all moneys received and disbursed by him during the preceding fiscal year, and shall produce all books, records, receipts, orders, vouchers and cancelled checks or check images as authorized by section ninety-nine-b of the general municipal law respecting the same, at the meeting of the board of fire commissioners at which the said annual report is submitted or at the next meeting held subsequent to the submission of the report if not submitted at a meeting of the board, in lieu of producing such records at the annual organization meeting. Such authorization shall remain in effect from year to year until rescinded by the board of fire commissioners. The annual report shall be entered in the minutes of the meeting by the fire district secretary.

The board of fire commissioners may require the fire district treasurer to submit to the board of fire commissioners at any time for examination his books, records, receipts, orders, vouchers and cancelled checks or check images as authorized by section ninety-nine-b of the general municipal law.

HISTORY:

Add, L 1932, ch 634; amd, L 1942, ch 124; L 1945, ch 792; L 1952, ch 181, § 1; L 1965, ch 222, § 5; L 1965, ch 677, § 2; L 1966, ch 749; L 1975, ch 161, § 1; L 1992, ch 708, § 35, eff Nov 28, 1992; L 1996, ch 140, § 20, eff June 11, 1996 (see 1996 note below); L 2010, ch 23, § 1, eff June 1, 2012; L 2018, ch 476, § 101, effective December 28, 2018.

Editor's Notes: Laws 1996, ch 140, § 24, eff June 11, 1996, provides as follows:

§ 24. This act shall take effect immediately and shall apply to all budgets which are adopted after the date on which it shall have become a law.

Amendment Notes: 2010. Chapter 23, § 1, amended:

First undesignated par, by adding the matter in italics.

The 2018 amendment by ch 476, § 101, substituted "firefighters" for "firemen" in the first sentence; and added "or her" twice in the last sentence.

Notes to Decisions

Analysis

1. In general
2. Banking; checks

1. In general

Fire district treasurer may not sell fuel oil to fire district of which he is an officer. 1946 Ops St Compt 20.

Board of fire commissioners may not permit fire company to retain and disburse moneys received from operation of a bowling alley operated by the district. Fire commissioners may dispose of bowling alley subject to approval of qualified electors at district election. 1946 Ops St Compt 138.

The fire district secretary is the custodian of all books, records and papers of the fire district, including financial records. 1946 Ops St Compt 463.

Annual report of fire district must be signed by retiring treasurer and not his successor. 1947 Ops St Compt 78.

A vacancy in the office of fire district commissioners should be filled as the statute provides. Where a fire district commissioner is personally interested in a contract with the fire district, after notice of the impropriety thereof, the board of fire commissioners should decline to direct the expenditure of fire district funds thereof. 1947 Ops St Compt 165.

Town may not reimburse fire district for expenses of refilling air tanks and replacing certain damaged equipment incurred by district in cleaning up toxic chemical spill. 1986 Op St Compt No. 86-34.

Fire district treasurer who is officer and stockholder of insurance agency with which fire district contracts has interest in contract; interest must be disclosed under CLS Gen Mun § 803, but is not prohibited. 1997 Op St Compt No. 97-19.

The interest in contract is not prohibited where a corporation, stock of which is owned by a fire district secretary-treasurer, sells insurance to the district. Disclosure is required. 1970 Ops St Compt File #52.

2. Banking; checks

Where the presiding officer of a town fire district is designated as president rather than as chairman, district checks may be signed by such officer in addition to the treasurer. Such president should be designated as chairman. 1945 Ops St Compt 64.

Fire district funds may not be deposited with a savings and loan association nor may fire district moneys be deposited in a commercial bank and a certificate of deposit accepted for a six-month period. 1947 Ops St Compt 77.

Fire district treasurer must deposit fire district moneys in a bank or trust company designated by the board of fire commissioners. Such moneys may not be invested. If paid into a duly established reserve fund, they may be invested in certain described securities. 1955 Ops St Compt File #7503.

Fire district monies may not be deposited in a bank of which a fire commissioner is a director and stockholder. 1963 Ops St Compt #569.

A fire district board of commissioners may not authorize anyone to sign checks drawn on district funds where the treasurer is absent on vacation. 1969 Ops St Compt File #166.

Fire district funds must be expended by district check signed by the district treasurer, and not by bank check. Where separate interest-bearing accounts are maintained for different capital purposes, one pass-through checking account may be established into which funds may be transferred from the interest-bearing accounts for the purpose of issuing district checks for authorized expenditures from such accounts. 1975 Ops St Compt File #337.

When a secretary-treasurer of a fire district performs the functions of executing the district's bonds and issuing checks for the payment of principal and interest, and has no other powers and duties with respect to the sale, issuance or payment of bonds, the secretary-treasurer would not have a contractual interest prohibited by article 18 of the General Municipal Law if he or she purchased bonds issued by the district. 1991 Op St Compt No. 91-8, superseding any earlier opinion to the extent inconsistent.

Agency Opinions

Analysis

1. In general
2. Banking; checks
3. Tax matters

1. In general

A town is not liable for negligence on the part of members of a fire company engaged in fire fighting or other authorized activities of a fire district, even though the town serves as a conduit for the raising of taxes to be used for fire district purposes. 1967 NY Ops Atty Gen Mar 22.

A fire district commissioner may not hold the office of treasurer of the fire district but may hold the office of treasurer of a fire company. 1977 NY Ops Atty Gen March 2.

A fire district has no authority to pay the cost of construction of a memorial monument in memory of deceased volunteer firemen. 1980 NY Ops Atty Gen Jun 11 (Informal), 1980 N.Y. AG LEXIS 104.

2. Banking; checks

A fire district may not deposit money in savings banks. 1962 NY Ops Atty Gen Dec 19.

In the absence of statute, fire district funds should not be deposited in a bank in which a fire commissioner is a director and stockholder. 1963 NY Ops Atty Gen Aug 7.

A fire district may not designate a savings bank as its depositary bank. 1983 Op St Compt File #83-129.

3. Tax matters

A fire district has no power to tax real property, no power to assess real property and no power to grant or withhold a real property tax exemption. 1976 NY Ops Atty Gen Dec 29.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Reports, CLS Gen Mun § 30.

Codes, Rules and Regulations:

Debt statement form to be used in connection with public sales of bonds by fire districts. 2 NYCRR §§ 35.1 et seq.

Jurisprudences:

18A NY Jur 2d Civil Servants and Other Public Officers and Employees § 62 .

26 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1050, 1114, 1115, 1128.

§ 177-b. Powers and duties of deputy fire district treasurers

The board of fire commissioners of any fire district

may appoint a deputy fire district treasurer to hold office until the thirty-first day of December next succeeding his appointment. During the absence or inability to act of the fire district treasurer, or while the office of fire district treasurer is vacant, the deputy fire district treasurer shall be vested with all of the powers and may perform all of the duties of the fire district treasurer under this chapter or any other law, including the provisions of subdivision four of section one hundred seventy-six of this chapter relating to the giving and filing of an official undertaking. The fire district treasurer shall not be liable for the acts of a deputy fire district treasurer.

HISTORY:

Add, L 1950, ch 667; amd, L 1970, ch 90, eff March 24, 1970.

Notes to Decisions

A fire district board of commissioners may not authorize anyone to sign checks drawn on district funds where the treasurer is absent on vacation. 1969 Ops St Compt File #166.

In order to qualify for appointment as deputy treasurer of fire district, individual must meet same requirements as those applicable to fire district treasurer. 1994 Op St Compt No. 94-9.

Agency Opinions

A fire commissioner may not be appointed deputy fire district treasurer. 1954 NY Ops Atty Gen Mar 29 (informal).

It is not necessary for a person to be the owner of property within a fire district assessed upon the latest completed assessment rolls of the town in which such district is located to qualify for the office of deputy fire district treasurer. 1967 NY Ops Atty Gen Apr 4.

A fire district has no power to tax real property, no power to assess real property and no power to grant or withhold a real property tax exemption. 1976 NY Ops Atty Gen Dec 29.

A fire district commissioner may not hold the office of treasurer of the fire district but may hold the office of treasurer of a fire company. 1977 NY Ops Atty Gen March 2.

A fire district may have a deputy treasurer and, furthermore, there would be no prohibited interest in contract if the fire district treasurer were an insurance agent who sells insurance to the fire district. 1978 Op St Compt File #670.

(1) The wife of a member of the board of fire commissioners may be appointed deputy treasurer in the same district. (2) A deputy fire district treasurer may be compensated, but only for services rendered when he is acting due to the absence or disability of the district treasurer. 1983 Op St Compt File #83-129.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

18A NY Jur 2d Civil Servants and Other Public Officers and Employees § 62 .

26 NY Jur 2d Counties, Towns, and Municipal Corporations § 1051 .

§ 178. Powers and duties of fire district secretary

The fire district secretary shall attend all meetings of the board of fire commissioners, act as clerk thereof, and keep a complete and accurate record of the proceedings of each meeting and of all propositions, rules and regulations adopted pursuant to this article. The fire district secretary shall have such additional powers and perform such additional duties as the board of fire commissioners may determine, not inconsistent with law.

HISTORY:

Add, L 1932, ch 634; amd, L 1940, ch 374, § 21; L 1966, ch 279; L 1987, ch 737, § 9, eff Aug 5, 1988.

Revision Notes: [1966, ch 279] The amendment of Town Law, § 176(3) by L 1964, ch 221, removed the necessity of notifying the town clerk of a vacancy in the office of fire district commissioner.

Notes to Decisions

The fire district secretary is the custodian of all books, records and papers of the fire district, including financial records. 1946 Ops St Compt 463.

The interest in contract is not prohibited where a corporation, stock of which is owned by a fire district secretary-treasurer, sells insurance to the district. Disclosure is required. 1970 Ops St Compt File #52.

A part-time judge may serve as a secretary to a town fire district, and as a chair of the annual school board meeting for the presentation of the school budget. Advisory Committee on Judicial Ethics, Op 89-155 (1990).

Agency Opinions

The resignation of a fire district commissioner should be filed with the fire district secretary. 1958 NY Ops Atty Gen May 5 (informal).

A fire district has no power to tax real property, no power to assess real property and no power to grant or withhold a real property tax exemption. 1976 NY Ops Atty Gen Dec 29.

A fire district commissioner may not hold the office of treasurer of the fire district but may hold the office of treasurer of a fire company. 1977 NY Ops Atty Gen March 2.

Positions of fire district manager and fire district secretary are compatible; compatibility of fire district manager and counsel to the fire district is dependent on duties of each office, which are set independently by each fire district. 1985 NY Ops Atty Gen No. 85-64 (Informal).

There is no statutory requirement that resolutions and motions of a board of fire commissioners be recorded by the fire district secretary in a separate book used solely for that purpose. However, the board may impose such a requirement. 1981 Op St Compt File #81-184.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

18A NY Jur 2d Civil Servants and Other Public Officers and Employees § 62 .

26 NY Jur 2d Counties, Towns, and Municipal Corporations § 1052 .

§ 178-a. Expenses incurred in attending town and county officers training school

The actual and necessary expenses incurred by a fire district officer or person duly elected as a fire district officer, in attending a course of training for his respective office as provided by the town and county officers training school of the state of New York for the purpose of improving the administration of municipal affairs in the town and counties of the state, shall be a charge against the fire district of which he is an officer or officer-elect. No person, however, shall be allowed such expenses for attending a regional school unless his district shall be included within the area of such region as established by the board of trustees of the town and county officers training school of the state of New York. The board of fire commissioners, in lieu of auditing and allowing the claim of a fire district officer or officer-elect for actual and necessary expenses for travel in attending any such course of training, may determine by resolution to allow and pay such officer or officer-elect a reasonable mileage allowance for the use of his own automobile for each mile actually and necessarily traveled by him in attending such course of training.

HISTORY:
Add, L 1941, ch 648, § 11; amd, L 1962, ch 486, eff April 13, 1962.

Notes to Decisions

Laws authorizing (1) municipal appropriations to specified municipal associations, and (2) payment of expenses of municipal officers and employees in going to and from and attending conferences of municipal officials, training courses and schools, etc., outlined and discussed. Laws of first type are regarded as valid. Laws of second type generally cover traveling, hotel and eating expenses but do not cover personal registration or membership fees of individual officers in various associations. No provision authorizing payment of such membership fees in case of local public welfare officials who are members of State Association of Public Welfare Officials. 1946 Ops St Compt 60.

A town may not appropriate or expend town funds for a fire training program. 1947 Ops St Compt 501.

Agency Opinions

A fire district has no power to tax real property, no power to assess real property and no power to grant or withhold a real property tax exemption. 1976 NY Ops Atty Gen Dec 29.

A fire district commissioner may not hold the office of treasurer of the fire district but may hold the office of treasurer of a fire company. 1977 NY Ops Atty Gen March 2.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 178-c.

Jurisprudences:

18A NY Jur 2d Civil Servants and Other Public Officers and Employees § 62 .

26 NY Jur 2d Counties, Towns, and Municipal Corporations § 1065 .

§ 178-b. Expenses of the association of fire districts of the state of New York

The board of fire commissioners of any fire district may determine to expend and raise by taxation annually such sums as may be required toward defraying the actual and necessary expenses of maintaining and continuing the association of fire districts of the state of New York, and any of its activities in this state for the purpose of devising practical ways and means of obtaining greater economy and efficiency in the administration of fire district affairs.

The board of fire commissioners of any fire district may determine to expend and raise by taxation annually such sums as may be required to defray the proportionate share of such fire district to meet the actual and necessary expenses of maintaining and continuing (1) the county association of fire districts or the county association of fire district officers of the fire districts in a county in which all or part of such fire district is located and (2) a regional association of fire districts or a regional association of fire district officers of the fire districts located in an area of adjoining counties, and to maintain and continue any of the activities of any such association, for the purposes of obtaining greater economy and efficiency in the administration of fire district affairs.

HISTORY:
Add, L 1946, ch 62, eff Feb 28, 1946; amd, L 1960, ch 195; L 1962, ch 166, eff March 20, 1962.

Notes to Decisions

A school district may not appropriate and expend school money as dues of the district to a local county association of school boards. 1947 Ops St Compt 510.

A fire district may expend district moneys to pay dues to the county association of fire district officers in the county in which the fire district is located. 1960 Ops St Compt File #355.

Agency Opinions

A fire district has no power to tax real property, no power to assess real property and no power to grant or withhold a real property tax exemption. 1976 NY Ops Atty Gen Dec 29.

A fire district commissioner may not hold the office of treasurer of the fire district but may hold the office of treasurer of a fire company. 1977 NY Ops Atty Gen March 2.

A fire district has no authority to pay the cost of construction of a memorial monument in memory of deceased volunteer firemen. 1980 NY Ops Atty Gen Jun 11 (Informal), 1980 N.Y. AG LEXIS 104.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

18A NY Jur 2d Civil Servants and Other Public Officers and Employees § 62 .

26 NY Jur 2d Counties, Towns, and Municipal Corporations § 1123 .

§ 178-c. Expenses of fire district officers, officials and employees

When incurred by the authority of the board of fire commissioners, the actual and necessary expenses, including expenses for travel, of all fire district officers and paid employees of the fire district, and of all paid and volunteer officers of the fire district fire department, incurred and paid by any such fire district officer, paid employee or fire department officer in executing the duties of his office or position shall be a fire district charge. The board of fire commissioners of any fire district, in lieu of auditing and allowing the claim of a fire district officer, paid employee or fire department officer for actual and necessary expenses for travel, may determine by resolution to allow and pay such fire district officer, paid employee or fire department officer a reasonable mileage allowance for the use of his own automobile for each mile actually and necessarily traveled by him in executing the duties of his office or position. In determining the amount of such allowance, the board of fire commissioners may consider the cost of gasoline, but in no event shall such allowance exceed the standard mileage allowance for business-related travel adopted or prescribed for federal income tax purposes. The provisions of this section shall not be deemed to amend, modify or supersede any of the provisions of section one hundred seventy-eight-a of this article and sections seventy-two-g and seventy-seven-b of the general municipal law.

HISTORY:
Add, L 1962, ch 710, eff April 24, 1962; amd, L 2006, ch 239, § 2, eff July 26, 2006.

Amendment Notes:

2006. Chapter 239, § 2 amended:
Par by deleting "chapter".

Notes to Decisions

Analysis

1. Generally
2. Particular expenses

1. Generally

Fire district's contention that grand jury report on use of public funds to finance convention trip should be sealed due to deficiencies in charge to grand jury was without merit where grand jury was properly instructed on applicable law governing use of public funds by district officials for convention expenses (i.e., CLS Town § 178-c and CLS Gen Mun § 77-b). In re Report of 1985-1986 Special Grand Jury, Term IX, 150 A.D.2d 580, 541 N.Y.S.2d 842, 1989 N.Y. App. Div. LEXIS 6898 (N.Y. App. Div. 2d Dep't 1989).

2. Particular expenses

Neither a fire chief, nor any other volunteer fireman, may be compensated or reimbursed from fire district funds for time lost from regular employment as a result of performing fire-manic functions. 1967 Ops St Compt File #186.

A fire district may not directly or indirectly employ an attorney to represent an injured volunteer fireman in proceedings to determine such fireman's qualifications to retain his position of employment. 1968 Ops St Compt File #1086.

Expenses of a fire district chief engineer incurred by the authority of the board of fire commissioners and incidental to the duties of his office, are reimburseable upon submission of a voucher by the chief and audit by the board. 1972 Ops St Compt File #207.

Town may not reimburse fire district for expenses of refilling air tanks and replacing certain damaged equipment incurred by district in cleaning up toxic chemical spill. 1986 Op St Compt No. 86-34.

Authorization in CLS Town § 178-c to reimburse paid and volunteer officers of fire district fire department for actual and necessary expenses incurred in execution of duties of office does not provide authority to reimburse individual designated as "chief" of fire company, as distinguished from chief of fire district fire department. 1987 Op St Compt No. 87-66.

Fire district may not pay for post-meeting dinners of members of fire district board of fire commissioners when monthly meeting commences at 8:00 p.m. and ends approximately 9:00 p.m. or 10:00 p.m., and commissioners customarily arrive before meeting at approximately 5:30 p.m. or 6:00 p.m. to review correspondence and bills until meeting commences. 1998 Op St Compt No. 98-2.

Wages lost from private employment while an individual is performing his or her public duties are not actual and necessary expenses incurred in the performance of public duties within meaning of CLS Town Law § 178-c. Ops St Compt 89-40.

A fire district has no statutory authority to reimburse its volunteer firemen for expenses incurred as a result of being subpoenaed to testify in civil actions arising from events which they attended in the course of their duties. A fire district has no power to adopt a local law or resolution giving it such authority. 1984 Op St Comp File #84-43.

Agency Opinions

Analysis

1. Generally
2. Particular expenses
3. —Travel expenses

1. Generally

A fire district has no power to tax real property, no power to assess real property and no power to grant or withhold a real property tax exemption. 1976 NY Ops Atty Gen Dec 29.

A fire district commissioner may not hold the office of treasurer of the fire district but may hold the office of treasurer of a fire company. 1977 NY Ops Atty Gen March 2.

Volunteer Firemen are not covered by the provisions of the Volunteer Firemen's Benefit Law when attending a funeral, whether such attendance is pursuant to orders or by permission from the chief or fire district commissioners. 1977 NY Ops Atty Gen Dec 7 (Informal).

It is questionable whether use of fire department apparatus to transport the body of a deceased fireman for burial is authorized by statute. If a court held that there is no such authorization, the immunity statute would not apply, the Volunteer Firemen's Benefit Law would not provide protection and personal liability might result. 1977 NY Ops Atty Gen Dec 7 (Informal).

2. Particular expenses

3. —Travel expenses

§§ 178-c; 176-a: Discussion of computation of mileage allowance for volunteer fire chiefs. 1978 Op St Compt File #430.

A fire district may not reimburse volunteer firemen or chiefs or assistant chiefs with fire district gasoline for use in their private cars. 1979 Op St Compt File #153.

A fire district may reimburse a chief of a volunteer fire department for actual and necessary travel expenses incurred in connection with his attendance at meetings related to fire department business or, in lieu thereof, he may receive a mileage allowance for use of his own automobile in connection with such activities. 1979 Op St Compt File #154.

It is within the discretion of the board of fire commissioners to determine what constitutes a reasonable mileage allowance. 1979 Op St Compt File #360.

A fire district may neither supply nor subsidize the purchase of gasoline used by volunteer firemen in their private vehicles. 1979 Op St Compt File #360.

A fire district may not, pursuant to this section, reimburse a volunteer fireman for gasoline used by him in responding to an alarm with his private vehicle. A fire district may not adopt a local law authorizing it to make such reimbursement, since a fire district does not have local law powers. 1980 Op St Compt File #303.

A fire district may reimburse the fire commissioners for actual and necessary travel expenses incurred in connection with their attendance at meetings of an organization consisting of all the fire district commissioners within the town at which common problems are discussed or, in lieu thereof, they may receive a mileage allowance for use of their own automobiles in connection with attending such meetings. 1981 Op St Compt File #81-35.

A fire district may authorize reimbursement of the actual and necessary expenses incurred by the fire chief and paid firemen in lieu of a mileage allowance, provided that such expenses can be accurately documented. 1981 Op St Compt File #81-75.

The board of fire commissioners may not pay dues to firemanic organizations, such as firemen's associations and chiefs' associations for past-chiefs who are still active firemen. 1981 Op St Compt File #81-159.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 176-a.

Jurisprudences:

18A NY Jur 2d Civil Servants and Other Public Officers and Employees § 62 .

26 NY Jur 2d Counties, Towns, and Municipal Corporations § 1064 .

§ 178-d. Costs, expenses and damages a fire district charge in certain cases

Whenever the fire district commissioners or board of fire commissioners of any fire district, or any fire district officers, have been or shall be instructed by a resolution adopted at a regular special meeting of the board of fire commissioners to defend any action brought against them, or to bring or defend an action or proceeding affecting any district property or claim of the district, or involving its rights or interests, or to continue any such action or defense, all their costs and reasonable expenses, as well as all costs and damages adjudged against them, shall be a district charge and shall be levied upon the taxable property of such district in the same manner as moneys raised for the support of such district. Whenever any fire district commissioner or fire district officer shall defend any action or proceeding,

other than a criminal proceeding, hereafter brought against him, arising out of the exercise of his powers or the performance of his duties, provided such commissioner or officer was acting in the discharge of his duties and within the scope of his authority at the time damages were sustained, all his reasonable costs and expenses, as well as all costs and damages adjudged against him, shall be a district charge and shall be levied upon the taxable property of such district in the same manner as money raised for the support of such district, provided (a) such fire district commissioner or fire district officer shall notify the board of fire commissioners in writing of the commencement of such action or proceedings against him within five days after service of process upon him; and (b) the board of fire commissioners shall, at any time during the ten days next following the notice to them of the commencement of such action or proceedings, have the right to designate and appoint the legal counsel to represent such fire district commissioner or fire district officer in such action or proceedings against him, in the absence of which designation and appointment within the time specified such fire district commissioner or fire district officer may select his own legal counsel.

HISTORY:

Add, L 1977, ch 813, § 1, eff Aug 5, 1977.

Notes to Decisions

Wages lost by fire district commissioner when commissioner was subpoenaed to testify in court in a case in which the fire district was the defendant are not reimbursable as litigation expenses pursuant to CLS Town Law § 178-d. Ops St Compt 89-40.

Agency Opinions

Volunteer firemen are not covered by the provisions of the Volunteer Firemen's Benefit Law when attending a funeral, whether such attendance is pursuant to orders or by permission from the chief or fire district commissioners. It is questionable whether use of fire department apparatus to transport the body of a deceased fireman for burial is authorized by statute. If a court held that there is no such authorization, the immunity statute would not apply, the Volunteer Firemen's Benefit Law would not provide protection and personal liability might result. 1977 NY Ops Atty Gen Dec 7 (Informal).

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

18A NY Jur 2d Civil Servants and Other Public Officers and Employees § 62 .

26 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1066, 1121 .

§ 179. Special district elections to vote upon appropriations

The board of fire commissioners upon its own motion may submit, and upon petition, as hereinafter provided, shall cause to be submitted, at a special or annual fire district election, a proposition:

1. (a) To purchase fire apparatus and fire-fighting vehicles for the extinguishment or prevention of fires in said fire district, or motorized equipment for emergency relief squads or fire police squads.

(b) To purchase or install an adequate fire alarm system for the fire district, or to make necessary additions thereto.

(c) To lease, purchase, construct, reconstruct, alter, repair or equip suitable buildings for the preservation, protection and storing of vehicles, apparatus and equipment of the fire district and for the social and recreational use of the firefighters and residents of the district, and purchase the necessary lands therefor.

(d) To expend in any one fiscal year, or to expend annually, an amount in excess of the amount authorized by subdivision eighteen of section one hundred seventy-six of this chapter, as amended from time to time, to be expended annually without the adoption of a proposition therefor for any of the purposes authorized by the provisions of this article. If the proposition authorizes an annual expenditure, it shall state a maximum amount which may be expended annually in excess of the amount authorized by subdivision eighteen of section one hundred seventy-six of this chapter, as amended from time to time, and such amount may not be exceeded thereafter unless authorized at a fire district election. If a proposition authorizes an annual expenditure, the authorization shall continue in effect until changed by vote of a district election.

(e) To purchase permanent or temporary rights to take water from cisterns, wells and bodies of water and water-courses within the fire district for the purposes, and subject to the limitations, set forth in subdivision twelve-a of section one hundred seventy-six of this chapter.

(f) To purchase or construct fire suction pools in bodies of water and water-courses, fire cisterns and fire wells, including necessary pipes, pumps, hydrants and other facilities in connection therewith, and to purchase and lease necessary real property and rights in land and water therefor, for the purposes, and subject to the limitations, set forth in subdivision twelve-a of section one hundred seventy-six of this chapter.

2. Any sum authorized to be expended, pursuant to subdivision one of this section, shall be raised by tax and shall be spent only during the fiscal year for which such tax is to be levied but nothing contained in this section shall be construed to prevent the financing in whole or in part, pursuant to the local finance law, of expenditures pursuant to section one hundred seventy-six of this chapter. If the proposition is approved at an election held in any fiscal year after September twentieth, or after October twentieth in the case of fire districts located wholly within the county of Westchester, the proposition shall not become effective for the purpose of levying taxes until the first day of September of the fiscal year succeeding the fiscal year in which such proposition is approved.

3. Such petition shall be signed, and acknowledged or proved in the same manner as a deed to be recorded, or authenticated in the manner provided by the election law for authentication of nominating petitions, by resident taxpayers owning taxable real property aggregating at least one-quarter of the

assessed valuation of all the taxable real property of the district owned by resident taxpayers, as such valuations appear upon the latest completed assessment roll of said town. Notice of such special district election shall be given in the same manner as provided herein for annual district elections. The special election shall be held on a Tuesday, provided that such date is not a public holiday, and shall be conducted and scheduled in a manner that maximizes voter participation. The polls shall remain open for the receipt of ballots from six o'clock in the evening to nine o'clock in the evening and such additional consecutive hours prior thereto as the board of fire commissioners may determine. The secretary of the fire commissioners shall prepare the ballots which shall separately state and number each proposition to be voted upon.

4. Every elector of the town who shall be a registered voter of the town and who shall have resided in the district for the period of thirty days next preceding a special or annual fire district election shall be qualified to vote upon such proposition.

HISTORY:

Add, L 1932, ch 634; amd, L 1933, ch 751, § 24; L 1940, ch 432, § 8; L 1942, ch 85, § 16; L 1942, ch 109, § 2; L 1943, ch 710, § 2610 (Part 1); L 1945, ch 838, § 57; L 1949, ch 565, § 5, eff July 1, 1949; L 1951, ch 372, § 2, eff March 30, 1951; L 1980, ch 901, § 2, eff Dec 4, 1980; L 1991, ch 244, § 1; L 2000, ch 37, § 14, eff Sept 1, 2000; L 2006, ch 235, § 1, eff July 26, 2006; L 2018, ch 476, § 102, effective December 28, 2018.

Revision Note: Amendment by L 1943, ch 710, required by Local Finance Law § 29.00.

Amendment Notes:

2006. Chapter 235, § 1 amended:

Sub 3, by deleting "and the".

The 2018 amendment by ch 476, § 102, substituted "firefighters and residents" for "firemen and residents" in 1(c).

Notes to Decisions

Analysis

1. In general
2. Election procedure
3. Expenditures requiring approval of voters, generally
4. Purchase of fire apparatus
5. Firehouses and other real property expenditures
6. Increase of spending limitation
7. Capital reserves fund and surplus
8. Issuance of bonds and obligations to finance acquisitions
9. Gifts
10. Disposal of property

1. In general

Fire Commissioners of a fire district may house a fire district fire engine in a fire protection district which is protected under contract by the fire district if, in so doing, the adequacy of the protection in the fire district itself is not jeopardized. 1954 Ops St Compt File #6971.

A mandatory referendum to establish a service award program for volunteer firefighters of a fire district, pursuant to CLS Gen Mun Law § 216, may be conducted at a special election or at the fire district's annual election, pursuant to CLS Town Law § 179, but in either case, board of fire commissioners is not required to hold public hearing before establishment of service award program. Ops St Compt 89-41.

2. Election procedure

Failure to give notice of special election regarding bond resolution did not deprive taxpayers of property without due process of law where the resolution did not impose an assessment on the taxpayers' property. Barrett v Cuskelly, 28 A.D.2d 532, 279 N.Y.S.2d 380, 1967 N.Y. App. Div. LEXIS 4278 (N.Y. App. Div. 2d Dep't 1967).

Town Law provision confining franchise to property owners was unconstitutional and participation of nonproperty owners in special election for issuance of bonds to purchase pumper for fire department was proper. Light v MacKenzie, 78 Misc. 2d 315, 356 N.Y.S.2d 991, 1974 N.Y. Misc. LEXIS 1391 (N.Y. Sup. Ct. 1974).Light v MacKenzie, 78 Misc. 2d 315, 356 N.Y.S.2d 991, 1974 N.Y. Misc. LEXIS 1391 (N.Y. Sup. Ct. 1974).

There is no requirement that any specified period of time must elapse before the re-submission, pursuant to § 179 of the Town Law, of a defeated proposition to construct a building for the preservation, protection and storing of fire apparatus and equipment and for the social and recreational use of the firemen and residents of the district. 1945 Ops St Compt 200.

Board of Fire Commissioners should not submit the entire fire district budget, item by item, for approval at a fire district election, but should, if necessary, submit a single proposition under this section calling for the expenditure of a given amount over and above the spending limitation for the district as computed under § 176(18). 1954 Ops St Compt File #6970.

In determining the sufficiency of a petition filed pursuant to this section for acquisition of emergency relief apparatus, the assessed valuation of property owned as tenants by the entirety or as joint tenants may not be considered if only one of the owners has signed the petition. 1955 Ops St Compt File #7323.

A special fire district election is held in the same manner as the annual fire district election. 1955 Ops St Compt File #7367.

A fire district bond resolution is not effective when a special election approving it is not held in the manner provided in this section. 1955 Ops St Compt File #7681.

3. Expenditures requiring approval of voters, generally

Fire commissioners may expend $3000.00 for uniforms for members of fire department upon adoption of proposition therefor by qualified voters of district. 1946 Ops St Compt 68.

Salary of fire district treasurer, may not be increased by increasing it in the budget, though budget was submitted to vote of fire district electors. Defeat of budget does not affect such salary. Payment of increased salary to treasurer in prior years was improper. 1955 Ops St Compt File #7512.

Pursuant to CLS Town Law § 176(18), referendum would not be required to authorize expenditure for fire district's share of ambulance from current funds if such expenditure, together with any other expenditures that are subject to fire district's spending limitations, can be made within district's spending limit; however, referendum will be necessary if it is to be made from current funds in excess of district's spending limit or if expenditure is not to be made from current funds. 1985 Op St Compt No. 85-55.

4. Purchase of fire apparatus

Fire district has no power to buy fire truck for use by a village. 1947 Ops St Compt 105.

Fire apparatus may not be purchased by a fire district unless a proposition has been adopted by the electors of the fire district pursuant to either section 179 of the Town Law or section 38.00 of the Local Finance Law. 1947 Ops St Compt 416.

For a discussion of rules and regulations relative to purchase of fire apparatus, see 1953 Ops St Compt File #6421.

A contract may not be entered into for the purchase of a fire engine unless the contract cost is available or provided for on the date the contract is signed. 1970 Ops St Compt File #24.

Fire district may purchase fire truck from its fire department utilizing current funds if spending limitation contained in CLS Town § 176 will not be exceeded or if proposition has been adopted pursuant to CLS Town § 179; alternatively, Reserve Funds may be used, subject to limitations of CLS Gen Mun § 6-g, CLS Local Fin § 38.00, or obligations may be issued subject to mandatory referendum under CLS Local Fin § 38.00. 1986 Op St Compt No. 86-67.

5. Firehouses and other real property expenditures

Fire district which has valid contract for fire apparatus may not pay vendor amount in excess of contract price if contract remains unamended. 1946 Ops St Compt 537.

Fire district may acquire real estate for fire house purposes upon condition that the property be used for such purposes and will revert to donor on breach of such condition. The condition of such deed may provide that fire district shall remove the building in the event of breach of condition. The fire house upon such property so acquired may be financed by issuance of serial bonds. 1947 Ops St Compt 225.

Surplus funds of a fire district may be used to purchase a site for a fire house. If the expenditure does not exceed the spending limitation, no referendum is necessary. 1952 Ops St Compt File #5784.

The board of commissioners of a fire district may spend moneys of the fire district for the preparation of plans and specifications for alterations and an addition to the fire house without submitting the proposition to referendum if the expenditure will not exceed the spending limitation of the district. 1954 Ops St Compt File #6529.

Expenditures authorized by a proposition pursuant to this section must be raised by a single tax levy. However, a fire district may finance the cost of constructing a fire house garage under the provisions of the Local Finance Law. 1954 Ops St Compt File #6677.

Current funds of a fire district may be used to erect a storage garage for equipment without a referendum if the proposed expenditure is within the district's spending limitation. 1955 Ops St Compt File #7628.

No referendum is necessary to authorize the expenditure of a legal budgetary appropriation for reconstruction of a fire district building. 1961 Ops St Compt File #274.

Expenses incurred in connection with building construction project disapproved in referendum are legal liabilities and may be paid. 1966 Ops St Compt File #751.

A fire district may purchase an option on real property without voter approval, only if the cost of the option, plus the cost of the property if purchased, will not create expenditures in excess of the statutory spending limitation. 1974 Ops St Compt File #951.

6. Increase of spending limitation

Board of fire commissioners of fire district may not expend surplus funds of district to paint and repair fire house, where such expenditure would exceed the spending limitation prescribed by subdivision 18 of section 176 of the Town Law. Such expenditure may not be authorized by referendum pursuant to section 179 of the Town Law. Such surplus funds may be transferred to a capital reserve fund and, if not so transferred, must be included in the budget for the following fiscal year as a revenue. 1946 Ops St Compt 563.

A proposition adopted by the electors of a fire district authorizing the fire commissioners to spend moneys in excess of the limitations prescribed by subdivision 18 of section 176 of the Town Law cannot be effective for more than one fiscal year. 1947 Ops St Compt 412.

Where a fire district will exceed its spending limitation, the purchase of land must be submitted to referendum unless a proposition is adopted to exceed the spending limitation and the amount of the purchase is not in excess of the maximum amount stated in the proposition. 1954 Ops St Compt File #6871.

The spending limitation for a fire district is provided in § 176 (18) and may be exceeded as provided in § 179. 1955 Ops St Compt File #7741.

A proposition to increase the spending limitation in a fire district must state a definite, fixed amount by which the spending limitations proposed to be exceeded. 1957 Ops St Compt File #220.

A fire district may make a budgetary appropriation for the purchase of real property for fire district purposes, but if such appropriation exceeds the aggregate annual spending limitation of the fire district, either a proposition to exceed the spending limitation or a proposition to purchase such property must be adopted and such proposition is subject to a mandatory referendum. 1968 Ops St Compt File #988.

Where a proposition authorizing a fire district to exceed the spending limitation by a stated amount has been approved at referendum, and the budget containing the excess already includes an appropriation for a fire-fighting vehicle, no separate referendum on the purchase for the fire-fighting vehicle is required. 1972 Ops St Compt File #1045.

7. Capital reserves fund and surplus

Board of fire commissioners of fire district may establish a capital reserve fund for acquisition of real property for firehouse and purchase of fire apparatus and equipment. 1945 Ops St Compt 352.

Surplus funds of fire district may be appropriated by board of fire commissioners of fire district to establish capital reserve funds for acquisition of fire house and purchase of fire apparatus and equipment. 1945 Ops St Compt 352.

Balance of fire district funds on hand at end of fiscal year must be used to reduce tax levy. Capital reserve fund may be established for purpose of making alterations to fire house. Capital reserve fund is alternative to Section 179 of the Town Law. 1946 Ops St Compt 57.

Board of fire commissioners of a fire district may establish a capital reserve fund to finance the purchase of fire apparatus. 1946 Ops St Compt 144.

Creation of capital reserve funds by fire districts; payment therein of moneys set aside for building fire house; appropriations to capital reserve funds notwithstanding limitation on amount that may be expended without a vote on a proposition. 1946 Ops St Compt 514.

Board of fire commissioners of fire district may establish capital reserve fund for the erection of fire house. Establishment of such capital reserve fund is subject to permissive referendum. Board of fire commissioners may make budgetary appropriation to the capital reserve fund. Amount which may be appropriated is not subject to spending limitation prescribed by subd.18 of section 176 of Town Law or to referendum provisions of section 179 of Town Law. 1946 Ops St Compt 559.

The commissioners of a fire district, whose annual expenditures are limited to $1,000.00 may not expend in addition to such $1,000.00, surplus funds resulting from an expended balance of the previous year. Capital reserve fund suggested. 1946 Ops St Compt 687.

8. Issuance of bonds and obligations to finance acquisitions

Fire district which has adopted proposition to purchase fire apparatus may not finance part of cost by issuance of bonds or capital notes. 1946 Ops St Compt 537.

Tax anticipation notes may not be issued to finance the purchase of fire apparatus. 1947 Ops St Compt 416.

Where the cost of a fire house is to be financed by the issuance of bonds, a referendum pursuant to § 38.00 of the Local Finance Law is required. 1952 Ops St Compt File #5645.

If the purchase of fire apparatus is to be financed by the issuance of serial bonds or capital notes, a referendum is necessary pursuant to Local Finance Law § 38.00 and a referendum may not be held pursuant to § 179 of this Law. 1957 Ops St Compt File #309.

Where a town plans, subject to referendum, to issue bonds to finance purchase of a fire truck, a referendum may not be held pursuant to this section. 1961 Ops St Compt #710.

9. Gifts

The board of fire commissioners of a fire district may accept a gift of an ambulance and provide for the storing and maintenance thereof. 1947 Ops St Compt 52.

The board of fire commissioners of a fire district may accept a gift of an automobile for the use of the chief engineer of the fire department without the adoption of a proposition by the qualified electors of the fire district, even though acceptance of the gift entails expenditures for operation, maintenance, repair and insurance. 1947 Ops St Compt 349.

10. Disposal of property

Fire commissioners of town fire district may not give district funds to a volunteer fire department to expend for recreational activities. 1945 Ops St Compt 14.

A fire district, through its Board of Commissioners and pursuant to authority set forth in this law, may convey to a school

district the real property no longer necessary for its uses or purposes, by resolution of the Board of Fire Commissioners subject to referendum under this section. 1964 Ops St Compt #788.

Agency Opinions

Analysis

1. In general
2. Election procedure
3. Purchase of fire apparatus
4. Increase of spending limitation
5. Capital reserves fund and surplus
6. Disposal of property

1. In general

A fire district has no power to tax real property, no power to assess real property and no power to grant or withhold a real property tax exemption. 1976 NY Ops Atty Gen Dec 29.

A fire district commissioner may not hold the office of treasurer of the fire district but may hold the office of treasurer of a fire company. 1977 NY Ops Atty Gen March 2.

A fire district, under section 176(12) of the Town Law, may obtain a supply of water from the fire hydrants of a water authority by entering into a written or oral contract with the authority. 1981 NY Ops Atty Gen Oct 19 (Informal).

2. Election procedure

For purposes of eligibility to vote in general or special fire district election, person must be registered in town where district is located and must reside in district for 30 days prior to date of election. NY Ops Atty Gen 89-51, 89-52 (Informal).

3. Purchase of fire apparatus

The Town Board of the Town of Sullivan, acting as Fire Commissioners of said town under Town Law § 176(18), may purchase a fire truck without submission of a proposition to the electors for their approval, provided that the expenditure is to be made from cash on hand if the expenditure is within the district's spending limitation, but if such purchase is to be made under Town Law § 179 or Local Finance Law § 38.00, approval by the electors of a proposition on referendum is necessary. 1968 NY Ops Atty Gen Oct 16.

A fire district may exceed its spending limitation in order to procure funds to purchase a fire vehicle and to make capital improvements, in accordance with the procedure set forth in the said statute. 1983 Op St Compt File #83-111.

4. Increase of spending limitation

A fire district, with voter approval, may increase its spending limitation by a specified sum to be raised and spent annually for the operation and maintenance expenses of the district's ambulance. 1980 Op St Compt File #206.

The adoption of a proposition to increase a fire district's spending limitation requires approval of the proposed increase by a majority of those voting. 1982 Op St Compt File #82-240.

5. Capital reserves fund and surplus

Fire district surplus moneys may be appropriated to a capital reserve fund. 1978 Op St Compt File #764.

6. Disposal of property

A fire district may sell, or otherwise dispose of, real property of the district no longer necessary for any of its uses or purposes, if it is authorized to do so at a special or annual fire district election, even though it originally acquired such real property from a school district in accordance with Education Law § 405. 1967 NY Ops Atty Gen Feb 16.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 176, 186; Gen Mun § 6-h; Loc Fin § 38.00.

Jurisprudences:

1 NY Jur 2d Acknowledgements, Affidavits, Oaths, Notaries, and Commissioners § 4.

18A NY Jur 2d Civil Servants and Other Public Officers and Employees § 62 .

26 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1036, 1042, 1082, 1105, 1106, 1108, 1126 .

87 NY Jur 2d Public Securities § 46 .

26 Am Jur 2d, Elections §§ 281 et seq.

Law Reviews:

Property qualifications for voting in special purpose districts: beyond the scope of "one man-one vote". 59 Cornell L. Rev. 687.

§ 180. Actions and proceedings against fire districts

No action shall be maintained against a fire district upon or arising out of a contract entered into by the fire district, unless the same shall be commenced within eighteen months after the cause of action thereof shall have accrued, nor unless a written verified claim shall have been filed with the fire district secretary within six months after the cause of action shall have accrued, but no such action shall be brought upon any such claim until forty days have elapsed after the filing of the claim in the office of the fire district secretary.

HISTORY:

Add, L 1984, ch 24, § 1, eff Jan 1, 1985, and applicable to contracts entered into on or after April 1, 1985.

Prior Law: Former § 180, add, L 1932, ch 634, § 1; amd, L 1933, ch 705, L 1933, ch 751, L 1937, ch 495, L 1938, ch 219, L 1940, ch 374, L 1940, ch 432, § 1; repealed, L 1943, ch 712, with substance covered by Local Finance Law §§ 10.00, 11.00, 21.00, 23.00, 30.00, 38.00, 50.00, 51.00, 54.00, 56.00 through 61.00, inclusive, 100.00, 104.00, 163.00 and 174.00.

Notes to Decisions

Court properly granted fire district's application to permanently stay arbitration of breach of contract claim where contractor admittedly failed to file verified claim under CLS Town § 180, condition precedent to commencement of action against fire district; such omission foreclosed contractor's right under contract to demand arbitration of its wrongful termination claim. Elmont Fire Dist. v Lapeka Constr. Corp., 232 A.D.2d 636, 648 N.Y.S.2d 999, 1996 N.Y. App. Div. LEXIS 11318 (N.Y. App. Div. 2d Dep't 1996).

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

18A NY Jur 2d Civil Servants and Other Public Officers and Employees § 62 .

26 NY Jur 2d Counties, Towns, and Municipal Corporations § 1120 .

§ 181. Annual budget and levy of taxes

1. The fiscal year of each fire district shall begin on the first day of January and end on the thirty-first day of December.

For each fiscal year, the board of fire commissioners of each fire district shall prepare and adopt an annual budget inaccordance with this section.

2. (a) On or before the twenty-first day prior to the public hearing required by subdivision three of this section, the board of fire commissioners shall prepare and adopt a proposed budget for the ensuing fiscal year. Within the limitations specified in this article, the proposed budget shall contain detailed estimates in writing of the amount of revenues to be received and the appropriations required for expenditures to be made during such fiscal year for the purposes of such fire district.

(b) On or before the last date provided by law for the adoption of the proposed budget, the board of fire commissioners shall prepare an estimate of the fund balance which shall be affixed to the proposed budget as an appendix thereto. The estimate of fund balance shall include a breakdown of such fund balance estimated for encumbrances, amounts estimated to be expended for the ensuing fiscal year, amounts reserved for stated purposes pursuant to law, including reserve funds established pursuant to the general municipal law, and the remaining unappropriated unreserved fund balance as that term is defined in section one hundred three of this chapter, provided that the remaining estimated unappropriated unreserved fund balance for each fund shall not exceed a reasonable amount, consistent with prudent budgeting practices, necessary to ensure the orderly operation of the fire district and the continued provision of services, taking into account factors including, but not limited to, the size of the fund, cash flows, the certainty with which the amounts of revenues and expenditures can be estimated, and the fire district's experience in prior fiscal years. For those districts which employ the cash basis of accounting, fund balance means the cash surplus estimated to be on hand at the close of the current fiscal year less claims payable therefrom and amounts reserved pursuant to law for stated purposes, including reserve funds established pursuant to the general municipal law.

(c) Upon adoption of the proposed budget by the board of fire commissioners, the proposed budget shall be filed in the office of the fire district secretary and maintained as a public document available for inspection and copying. The fire district secretary shall also reproduce a sufficient number of copies of the proposed budget for distribution upon request to the public and at no cost to the public. In addition, if the fire district maintains an internet website, the fire district secretary shall cause the proposed budget to be posted and maintained on the fire district's website until the day after the public hearing on the proposed budget.

3.

(a) The board of commissioners of each fire district shall hold a public hearing on the third Tuesday in October to discuss the contents of the proposed budget. The hearing shall be conducted and scheduled in a manner that maximizes participation. Notice of such public hearing shall be published at least once in the official newspaper, or if no official newspaper has been designated, in any newspaper having general circulation in the district. At least five days shall elapse between the date of the first publication of the notice and the date specified for the hearing. The notice of hearing shall state the time when and the place where the public hearing will be held, the purpose thereof and that a copy of the proposed budget is available at the office of the town clerk or clerks and fire district secretary where it may be inspected by any interested person during office hours. In the case of a fire district that maintains an internet website, the notice of hearing shall also state that the proposed budget is posted on the fire district's website. The town clerk or clerks shall cause a copy of the notice to be posted on the signboard of the town or towns, maintained pursuant to subdivision six of section thirty of this chapter, not later than five days before the day designated for such hearing. The notice shall also be posted on the municipal and/or fire district website or websites, if one exists. At such hearing, any person may be heard in favor of or against the proposed budget as compiled, or for or against any item or items therein contained.

(b) After the public hearing, the board of fire commissioners may adopt changes, alterations and revisions to the proposed budget subject to the requirements of paragraph (a) of subdivision two of this section, except that the board of fire commissioners shall not add or increase an appropriation to a capital reserve fund. On or before the fourth day of November, the board of fire commissioners shall adopt as the annual budget of the fire district either the proposed budget or the proposed budget as changed, altered or revised after the public hearing. In the event that the board of fire commissioners fails to adopt the annual budget by such date, the proposed budget with such changes, alterations and revisions as shall have been adopted by the board of fire commissioners by that date shall constitute the annual budget of the fire district.

(c) Within three days after the adoption of the annual budget of a fire district, the fire district secretary shall prepare and deliver to the town clerk of each town in which the fire district is located two certified copies of the annual budget. Neither the town board, town supervisor, town clerk nor any other officer or employee of the town shall make any change to the annual budget of the fire district.

4. After the annual budget of a fire district has been affixed to the annual budget adopted by the town board and a certified copy presented to the board of supervisors of the county in which the town is situated as required by section one hundred fifteen of this chapter, the board of supervisors shall assess and levy upon the taxable real property within the several fire districts the amounts to be raised by tax for the purposes of the respective districts as specified in such annual fire district budget and shall cause the amount so assessed and levied to be collected, in the same manner and at the same time and by the same officers as town taxes are assessed, levied and collected. When such taxes are collected, the amount thereof shall be paid to the supervisor of the town and by him immediately paid to the treasurer of the respective fire districts. If a fire district includes taxable property located in more than one town, the amount to be assessed, levied and collected upon the property within each of such towns shall be apportioned in accordance with section eight hundred six of the real property tax law.

5. In any case where a parcel of real property separately assessed on the town assessment roll shall be divided by the line of the fire district or of any zone established therein as provided in subdivision twenty-seven of section one hundred seventy-six of this chapter, it shall be the duty of the town assessors, after the valuation of the whole of such parcel shall have been fixed, to determine what proportion of such valuation is on account of that part of such parcel lying within the limits of the fire district or of such zone or zones, and the assessors shall enter such proportion separately on the assessment roll. The valuation of the real property lying within such fire district or within such zone or zones, as so fixed and determined, shall be the valuation subject to taxation for the purposes of such fire district or of such zone or zones.

6. The treasurer of each fire district shall prepare and file annually in the office of the town clerk of each town in which any part of such fire district shall be located, and in the office of the state comptroller, a financial statement setting forth in detail the receipts and expenditures of such fire district. Such statement shall be filed in such offices within sixty days after the close of the fiscal year of the fire district.

HISTORY:

Add, L 1932, ch 634; amd, L 1934, ch 816, § 8; L 1937, ch 427, § 2; L 1941, ch 601, § 22; L 1942, ch 615, § 12; L 1943, ch 586, § 2; L 1945, ch 343, § 1; L 1949, ch 565, § 6, eff July 1, 1949; L 1958, ch 575, § 3; L 1969, ch 1049, § 36; L 2000, ch 528, § 14, eff Oct 4, 2000 (see 2000 note below); L 2006, ch 240, § 3, eff Jan 1, 2007; L 2006, ch 644, § 1, eff Aug 16, 2006; L 2007, ch 555, § 7, eff Aug 15, 2007 (see 2007 note below).

Editor's Notes: Laws 2000, ch 528, § 19, eff Oct 4, 2000, provides as follows:

§ 19. This act shall take effect immediately and shall apply to budgets for fiscal years commencing on or after January 1, 2001.

Laws 2007, ch 555, § 10, eff Aug 15, 2007, provides as follows:

§ 10. This act shall take effect immediately and shall first apply to fire district budgets prepared for fiscal years commencing on or after January 1, 2008; provided, that the amendments to section 209-z of the general municipal law, made by section two of this act, shall take effect on the same date and in the same manner as chapter 237 of the laws of 2006 takes effect.

Notes to Decisions

Analysis

1. In general
2. Disposition of unexpended balance
3. Estimates of expenditures
4. Fire district treasurers
5. Persons and property subject to levy and payment of tax
6. Taxing power as affecting civil liability

1. In general

Failure to give notice of special election regarding bond resolution did not deprive taxpayers of property without due process of law where the resolution did not impose an assessment on the taxpayers' property. Barrett v Cuskelly, 28 A.D.2d 532, 279 N.Y.S.2d 380, 1967 N.Y. App. Div. LEXIS 4278 (N.Y. App. Div. 2d Dep't 1967).

Fire district may not borrow in anticipation of taxes for 1946 to spend in 1945 for current expenses. Town may not advance such tax money to a fire district. Question if Sec. 29.00(a, 2) of Local Finance Law applies to fire districts. If it does, it will be of no substantial assistance. 1945 Ops St Compt 572.

The fire district secretary is the custodian of all books, records and papers of the fire district, including financial records. 1946 Ops St Compt 463.

Where fire district situated in two towns, both are liable for payment of benefits for death of firemen. 1947 Ops St Compt 207.

A town supervisor may not withhold moneys due to a fire district pending filing of the annual district report. 1954 Ops St Compt File #6525.

A town may not withhold from a fire district a portion of the assessments collected by the town on behalf of the fire district, even though the town claims such money is owed to a water district governed by the town board. 1976 Ops St Compt File #275.

Fiscal year of fire district may be changed only by act of state legislature. 1996 Op St Compt No. 96-12.

There is no conflict of interest or other legal impropriety where an accountant retained by a fire district to prepare its annual financial report is also the owner of a computer firm which is engaged by the district to perform data processing services. 1981 Op St Comp File #81-373.

There is no authority for fire district to establish scale of tax rates so that owners of multiple parcels are taxed at lower rate. 2001 Ops St Comp No. 01-8.

Provisions in County Law and Town Law are dispositive as to when liability attaches for county sewer district and town fire district special ad valorem levies. 11 Op. Counsel SBRPS No. 101.

2. Disposition of unexpended balance

Balance of fire district funds on hand at end of fiscal year must be used to reduce tax levy. Capital reserve fund may be established for purpose of making alterations to fire house. Capital reserve fund is alternative to Section 179 of the Town Law. 1946 Ops St Compt 57.

Unexpended balances of fire district funds must be included as revenue in estimate for ensuing fiscal year. 1946 Ops St Compt 483.

Fire district unexpended balance should be included in the annual estimate as a revenue. If not so included such moneys become unanticipated revenues in the following year and may be either included as a revenue in the annual estimate for the following fiscal year. 1947 Ops St Compt 106.

Application of unexpended balances of appropriations of fire districts to reduction of taxes of such district. 1947 Ops St Compt 405.

Moneys remaining unexpended at end of fiscal year of a fire district which were not included in first district budget for the ensuing fiscal year, constitute surplus funds in ensuing years and subject to the spending limitations contained in subdivision 18 of § 176 of the Town Law, such surplus funds may not be expended for any lawful district purpose, or may be held and included as revenue in the next annual budget. 1946 Ops St Compt 540.

3. Estimates of expenditures

A town board may not in the preparation and adoption of the annual town budget diminish an estimate submitted by a fire district by striking from such estimate an item determined by the town board to be illegal. 1945 Ops St Compt 256.

There is no requirement that a fire district annual estimate be approved by the qualified voters of the district. 1946 Ops St Compt 541.

A town board must include in the preliminary and annual town budgets the estimate of expenditures submitted by the board of fire commissioners of a fire district, notwithstanding the disapproval by the voters of a proposed proposition authorizing the expenditure of sums in excess of those that may be spent without adoption of such a proposition. 1946 Ops St Compt 562.

Where the annual estimate of a fire district failed to include an item for payment of debt service, the tax moneys received must nevertheless be used to pay such debt service. 1955 St Compt File #7199.

A town may not impose a special tax or other charge on behalf of a fire district on properties which are exempt from fire district taxes to defray the cost of specialized equipment needed to provide fire protection services to those properties. 1990 Op St Compt 90-39.

4. Fire district treasurers

Annual report of fire district must be signed by retiring treasurer and not his successor. 1947 Ops St Compt 78.

Fire district treasurer must file annual statement in town clerk's office. 1947 Ops St Compt 137.

All tax moneys collected for fire district purposes must be paid over to the treasurer of the fire district. 1953 Ops St Compt File #6128.

5. Persons and property subject to levy and payment of tax

Assessments made against county property located within fire hydrant district organized pursuant to this section are not exempt by § 4 of the Tax Law. County of Westchester v Harrison, 114 N.Y.S.2d 492, 201 Misc. 211, 1951 N.Y. Misc. LEXIS 2863 (N.Y. Sup. Ct. 1951).

Taxes for the payment of indebtedness incurred by a fire district prior to its extension must be collected from the district as a whole, including the extension. 1945 Ops St Compt 460.

Fire district tax must be levied upon the assessed valuation of both the buildings and the land included within the district. 1955 Ops St Compt File #7086.

Enrollees of volunteer fire companies which serve the fire district may not be forgiven or exempted from fire district taxes. 1960 Ops St Compt File #174.

A town may not impose a special tax or other charge on behalf of a fire district on properties which are exempt from fire district taxes to defray the cost of specialized equipment needed to provide fire protection services to those properties. 1990 Op St Compt 90-39.

6. Taxing power as affecting civil liability

Fact that funds for fire districts are collected by municipal agencies does not operate to vest municipal authorities with control or jurisdiction of fire districts, so that members of town board could not be charged with condoning alleged discriminators practices of fire district. Owens v Hanse, 51 Misc. 2d 471, 273 N.Y.S.2d 406, 1966 N.Y. Misc. LEXIS 1600 (N.Y. Sup. Ct. 1966).

Agency Opinions

Analysis

1. In general
2. Disposition of unexpended balance
3. Fire district treasurers
4. Taxing power as affecting civil liability

1. In general

A fire district has no power to tax real property, no power to assess real property and no power to grant or withhold a real property tax exemption. 1976 NY Ops Atty Gen Dec 29.

A fire district has no authority to pay the cost of construction of a memorial monument in memory of deceased volunteer firemen. 1980 NY Ops Atty Gen Jun 11 (Informal), 1980 N.Y. AG LEXIS 104.

A town may not expend Federal Revenue Sharing funds for fire district purposes. 1979 Op St Compt File #299.

A town may not alter the annual budget submitted by a fire district, even where there is a wide difference between the respective budgets of two fire districts in the same town which are similar in size and population. Such a difference in budgets could be attributable to a number of reasonable differences in circumstances. 1979 Op St Compt File #669.

A fire district budget must be incorporated into the town budget by the town board without change. Moneys received by the town collecting officer for town taxes must be paid over to the town supervisor who must immediately turn such funds over to the fire district treasurer until the fire district budget is satisfied. If the supervisor fails to pay over such funds within a reasonable time, the fire district may in its discretion, initiate an Article 78 proceeding in the nature of mandamus against the supervisor to force him to pay over such funds. 1981 Op St Compt File #80-662.

2. Disposition of unexpended balance

In computing the fire district spending limitations contained in Town Law, § 176(18) an accrual basis or a reservation of surplus (i.e. encumbrance) may be used. 1979 Op St Compt File #644.

3. Fire district treasurers

A fire district commissioner may not hold the office of treasurer of the fire district but may hold the office of treasurer of a fire company. 1977 NY Ops Atty Gen March 2.

Where a fire district is situated within two towns and district taxes are incorrectly levied in one town causing an excess of taxes to be collected, the excess amount should be held by the fire district treasurer until the succeeding fiscal year and used to reduce the fire district tax levy within that town. 1981 Op St Compt File #3.

4. Taxing power as affecting civil liability

A town is not liable for negligence on the part of members of a fire company engaged in fire fighting or other authorized activities of a fire district, even though the town serves as a conduit for the raising of taxes to be used for fire district purposes. 1967 NY Ops Atty Gen Mar 22.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 186.

Jurisprudences:

18A NY Jur 2d Civil Servants and Other Public Officers and Employees § 62 .

26 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1114, 1116—1118, 1129 .

§ 181-a. Budgetary controls

1. The fire district treasurer shall maintain a separate account for each appropriation made in the annual budget of the fire district. Each such account shall show the amount appropriated, the several amounts expended from the account, and the unexpended balance of the appropriation.

2. No expenditure shall be made, nor shall any contract which in any manner involves the expenditure of money or the incurring of any pecuniary liability be entered into, unless an amount has been appropriated for the particular purpose and is available for that purpose or has been authorized to be borrowed pursuant to the local finance law. Nothing in this subdivision shall prevent the making of a contract or lease for a term exceeding one year when authorized by law nor shall anything in this subdivision require a fire district which has entered into a contract or lease for a term exceeding one year to pay during the current fiscal year any amounts larger than those which become due and owing during that year under the terms of such lease or contract.

3. Whenever during a fiscal year it shall appear probable to the fire district treasurer that the moneys available for such year will be insufficient to meet the amounts appropriated, he or she shall forthwith notify the board of fire commissioners of such fact, stating the probable amount of such deficiency. The treasurer may include his or her recommendations as to the action which should be taken. The board of fire commissioners may reduce any appropriation or appropriations so as to prevent the making of expenditures in excess of moneys

available. An appropriation shall not be reduced below the minimum amount required by law to be appropriated, nor shall an appropriation be reduced by more than the balance therein less outstanding and unpaid claims chargeable to such appropriation.

4. The board of fire commissioners, during a fiscal year, may make additional appropriations or increase existing appropriations. Moneys therefor may be provided by transfer from the unexpended balance of an appropriation, from unappropriated unreserved fund balance, or unanticipated revenues, or by borrowing pursuant to the local finance law. For the purposes of this subdivision, unappropriated unreserved fund balance or unanticipated revenues shall be available for transfer only to the extent that the total of all revenues recognized or reasonably expected to be recognized in the current fiscal year, including unappropriated unreserved fund balance, exceeds the total of all revenues as estimated in the budget, including appropriated fund balance.

5. Notwithstanding the provisions of subdivision four of this section, grants in aid from the state and federal governments, other gifts which are required to be expended for particular objects or purposes, and insurance proceeds for the loss, theft, damage or destruction of real or personal property, when proposed to be used or applied to repair or replace such property, may be appropriated by the board of fire commissioners at any time for such objects and purposes.

HISTORY:

Add, L 2007, ch 555, § 8, eff Aug 15, 2007 (see 2007 note below).

Prior Law: Former § 181–a, renumbered § 181–b, L 2007, ch 555, § 8, eff Aug 15, 2007 (see 2007 note below).

Editor's Notes: Laws 2007, ch 555, § 10, eff Aug 15, 2007, provides as follows:

§ 10. This act shall take effect immediately and shall first apply to fire district budgets prepared for fiscal years commencing on or after January 1, 2008; provided, that the amendments to section 209-z of the general municipal law, made by section two of this act, shall take effect on the same date and in the same manner as chapter 237 of the laws of 2006 takes effect.

§ 181-b. Independent audit of fire districts

1. The commissioner of each fire district with revenues of four hundred thousand dollars or more shall obtain an annual audit of its records by an independent certified public accountant or an independent public accountant. The report of such annual audit shall be presented to the fire district board of fire commissioners by such accountant. Such fire district audit shall include, but not be limited to, the district's financial conditions and resources and such other things as the state comptroller may designate. A copy of the audit report in form prescribed by the state comptroller and certified by the accountant, shall be furnished to the commissioners, the town boards served by the district and the state comptroller within one hundred eighty days following the end of the fiscal year audited.

2. The commissioner of each fire district with revenues of less than four hundred thousand dollars shall report the district's financial conditions and resources and such other things as the state comptroller may designate on a form prescribed by him or her. A copy of such report shall be issued to the state comptroller within one hundred eighty days following the end of the fiscal year. The state comptroller may designate an amount below which no report shall be required.

3. On or after January first, two thousand seven, all fire districts subject to the provisions of subdivision one of this section shall utilize a competitive request for proposal process when contracting for such annual audit. In addition, no audit engagement shall be for a term longer than five consecutive years; provided, however, that nothing in this subdivision shall preclude a district, in its discretion, from permitting an independent certified public accountant or an independent public accountant engaged under an existing contract for such services to (i) submit a proposal for such services in response to a request for competitive proposals, or (ii) be awarded a contract to provide such services under a request for proposal process.

4. Notwithstanding the provisions of subparagraph one of paragraph (b) of subdivision four of section thirty-five of the general municipal law, each fire district shall (i) prepare a corrective action plan in response to any findings contained in the annual external audit report or management letter, or any final audit report issued by the state comptroller, within ninety days of receipt of such report or letter, and (ii) to the extent practicable, begin implementation of such corrective action plan no later than the end of the next fiscal year.

HISTORY:

Formerly § 181–a, add, L 2006, ch 237, § 1, eff July 26, 2006 (see 2006 note below); renumbered § 181–b, L 2007, ch 555, § 8, eff Aug 15, 2007 (see 2007 note below); L 2013, ch 470, § 2, eff Nov 13, 2013; L 2020, ch 262, § 2, effective November 11, 2020.

Editor's Notes: Laws 2006, ch 237, § 4, eff July 26, 2006, provides as follows:

§ 4. This act shall take effect immediately; provided however that the provisions of subdivision 1 of section 181-a of the town law, as added by section one of this act, shall apply to districts with revenues of one million dollars or more, beginning in 2007; districts with revenues of $500,000 or more beginning in 2008 and districts with revenues of less than $500,000 beginning in 2009; and provided further that the provisions of section three of this act shall take effect August 1, 2007.

Laws 2007, ch 555, § 10, eff Aug 15, 2007, provides as follows:

§ 10. This act shall take effect immediately and shall first apply to fire district budgets prepared for fiscal years commencing on or after January 1, 2008; provided, that the amendments to section 209-z of the general municipal law, made by section two of this act, shall take effect on the same date and in the same manner as chapter 237 of the laws of 2006 takes effect.

Amendment Notes: 2013. Chapter 470, § 2 amended:

Sub 1 by deleting at fig 1 "two" and adding the matter in italics.

Sub 2 by deleting at fig 1 "two" and adding the matter in italics.

The 2020 amendment by ch 262, § 2, substituted "four hundred thousand dollars" for "three hundred thousand dollars" in the first sentence of 1 and 2.

§ 182. Effect of incorporation of village or city including lands within a fire district

1. Whenever any portion of any fire district heretofore or hereafter established shall be incorporated into the corporate limits of any incorporated village or city, the town board or town boards of the town or towns in which such fire district is located, upon the petition of the resident taxpayers of the incorporated portion of such fire district, shall adopt a resolution changing the boundaries of such district by the exclusion therefrom of the incorporated portion of the district, or, upon the petition of the resident taxpayers of the unincorporated portion of such fire district, shall adopt a resolution changing the boundaries of such district by the exclusion therefrom of the incorporated portion of the district, and thereafter such excluded portions of the district shall not be entitled to protection, nor liable to be assessed or taxed for the fire district purposes of such district, but such portion of the total account of the bonded or other indebtedness of such district as the assessed valuation, according to the last preceding town assessment roll, of the territory so excluded and incorporated in such city or village bears to the assessed valuation, according to the last preceding town assessment roll, of the entire territory of such district before exclusion of such part, shall be assumed and borne by the city or village in which such territory is included and paid over from time to time to the treasurer of such district in accordance with the necessary requirements of the district in paying such indebtedness. Such amounts to be paid by the city or village may be levied with the city tax or village tax upon the parcels of land formerly a part of the fire district, or raised by general taxation, as the village board or governing body of the city may determine. Such petition shall be signed, and acknowledged or proved in the same manner as a deed to be recorded, or authenticated in the manner provided by the election law for authentication of a nominating petition, by resident taxpayers owning taxable real property aggregating at least one-half of the assessed valuation of all the taxable real property owned by resident taxpayers of the portion of the district proposed to be continued or by resident taxpayers owning taxable real property aggregating at least one-half of the assessed valuation of all the taxable real property owned by resident taxpayers of that portion of the district incorporated, as such may appear. Valuation for purposes of this section shall be, as such valuations appear upon the latest completed assessment roll of the town or towns in which such district is located.

2. Whenever any fire district is located entirely within the corporate limits of two or more villages by virtue of incorporation of such villages after the establishment of such fire district and the said villages or either of them have not been excluded from the limits or boundaries of such fire district in accordance with the provisions of subdivision one of this section, the town board and the board of fire commissioners of such fire district shall meet together at least sixty days before the annual meeting of the board of supervisors and estimate the amount necessary and proper to be raised for fire district purposes and shall certify the same to the board of supervisors of the county. Such board shall cause the amount thereof to be assessed and levied on the taxable property of such fire district and collected in the same manner and at the same time and by the same officers as town taxes are assessed, levied and collected and, when collected, the amount thereof shall be paid to the supervisor of the town and by him immediately paid to the treasurer of such fire district.

HISTORY:

Add, L 1932, ch 634, eff Jan 1, 1934; amd, L 1933, ch 705; L 1957, ch 847; L 2000, ch 37, § 15, eff Sept 1, 2000.

Notes to Decisions

If fire district boundaries are unaltered after a portion of the district is annexed by a village, the annexed portion remains part of the fire district for fire protection purposes, although town fire prevention regulations would not apply therein. Where a fire district has bonded or other indebtedness at time a portion thereof is annexed by a village, such portion is liable for a share of such indebtedness, to be levied and collected in accordance with the pertinent provisions of the Town Law. If a village extends its boundaries to include part of an existing fire district, the rest of the village being in a different district, boundaries of the district may be changed so as to place the annexed part of the village in the same district as the rest of the village, or they may remain unaltered. 1962 Ops St Compt #243.

Where a village became incorporated on June 21, 1962 and included within its boundaries territory which was within a larger fire district, and no affirmative action was taken pursuant to Town Law, § 182 to exclude from the district the area within the new village, the fire district continued to exist within the village. 1966 Ops St Compt File #692.

Where area of fire district becomes incorporated village, fire district may continue to provide service to such village; if, upon petition, boundaries are changed by resolution of town board, fire district would be required to provide such services until first day of June following first day of January next succeeding date of incorporation of village. 1985 Op St Compt No. 85-50.

Agency Opinions

A petition signed by nonresident property owners to change the boundaries of a fire district by excluding therefrom the portion incorporated into a village or city does not meet the requirements of this section. 1963 NY Ops Atty Gen May 6.

A fire district has no power to tax real property, no power to assess real property and no power to grant or withhold a real property tax exemption. 1976 NY Ops Atty Gen Dec 29.

A fire district commissioner may not hold the office of treasurer of the fire district but may hold the office of treasurer of a fire company. 1977 NY Ops Atty Gen March 2.

Fire district created in 1952 by town had responsibility for providing fire protection to territory annexed to town in 1998 following 1996 judicial decision which determined that disputed territory was within boundaries of neighboring town where, prior to 1996, fire district boundary included disputed territory; under facts presented, neither annexation of territory in 1998, nor 1996 judicial decision, affected boundaries of fire district. 2002 NY Ops Atty Gen I 02-14.

The term "resident taxpayers" as used in this section does not include corporations. 1981 Op St Compt File #81-193.

An area within a fire district which has been annexed by a village may be excluded from the fire district under the procedure prescribed by section 182 of the Town Law. 1983 Op St Compt File #83-177.

If a village board of trustees determines that exclusion from village boundaries of an area of a fire district which has been annexed to the village will serve a village purpose, it may expend village moneys and utilize the village attorney's office to assist in preparing the petition for such exclusion. 1983 Op St Compt File #83-192.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

1 NY Jur 2d Acknowledgements, Affidavits, Oaths, Notaries, and Commissioners § 4.

18A NY Jur 2d Civil Servants and Other Public Officers and Employees § 62 .

26 NY Jur 2d Counties, Towns, and Municipal Corporations § 1001 .

§ 183. Fire alarm districts

Whenever the town board shall have established a fire alarm district pursuant to the provisions of this article, the town board shall prepare, or cause to be prepared, plans, specifications, estimates and a proposed contract for the installation, extension and maintenance of a fire alarm system in such district. Upon the completion of the plans, specifications, estimates and proposed contract therefor, the town clerk shall give notice of a public hearing thereon in the same manner as provided in this article for notice of hearing upon the creation of such district. At such hearing, the town board shall hear such persons as may be interested in the subject matter thereof and may make such modification and changes in the plans, specifications, estimates and proposed contract as the town board shall deem expedient, and thereupon the town board may adopt or reject same. So far as consistent with the provisions of this section, the town board shall award contracts for the performance of the work and the supplying of materials or may cause the same to be done by day labor under the direction of the town engineer or any other town officer, in the same manner as provided by section one hundred ninety-seven of this chapter for the making of special improvements, and may enter into contracts with persons or corporations for the use of their property in connection with such fire alarm system.

After a public hearing as hereinafter specified, the town board, in addition, shall provide for the furnishing of fire protection within such fire alarm district and for that purpose may contract for a period not exceeding five years with any city, incorporated village, fire district or incorporated fire company maintaining adequate and suitable apparatus and appliances for the furnishing of fire protection in such district. Notice of such hearing shall be published in at least one newspaper having general circulation in the district. Such notice shall specify the time when and place where said hearing will be held, and describe in general terms the proposed contract. The first publication thereof shall be at least ten days prior to the day specified for such hearing. The expense incurred by reason of the establishment of such fire alarm district, the maintenance of said fire alarm system and the contract for fire protection, shall be assessed and levied upon the taxable property in said district and collected in the same manner, at the same time and by the same officers as town taxes are assessed, levied and collected and, when collected, the amount thereof shall be paid to the supervisor of the town. The supervisor shall pay to the city, incorporated village, fire district or incorporated fire company furnishing such fire protection, the expense thereof pursuant to said contract. The expense of the installation or extension of such fire alarm system may be raised, in whole or in part, in the same manner as the expense of maintenance or may be financed, in whole or in part, pursuant to the local finance law.

If a fire alarm district shall be situated partly in each of two or more towns any action which would be taken by the town board in the case of a district situated in only one town shall be taken by the town boards of the several towns acting jointly by a majority vote of the members of each of such town boards, and the notices of public hearing required by this section shall be given by the town clerks of the several towns acting jointly.

By mutual consent of the contracting parties, and after a public hearing held pursuant to notice in the manner provided in this section in relation to fire protection contracts, any such contract heretofore or hereafter executed may be (1) amended, (2) terminated, or (3) terminated and a new contract may be entered into in lieu thereof, if the town board, after such hearing, shall determine, by resolution, that it is in the public interest so to do. Such notice shall state in general terms the reason why any existing contract is to be amended or terminated, and if a new contract is to be entered into the notice shall also describe the new contract in general terms.

HISTORY:

Add, L 1932, ch 634; amd, L 1940, ch 432, § 10, eff April 13, 1940; L 1941, ch 648, § 12; L 1943, ch 174; L 1943, ch 710; L 1945, ch 838, § 58eff Sept 2, 1945; L 1955, ch 391, § 1, eff April 15, 1955.

Notes to Decisions

Fire department of the village of Bergen may operate outside of the village limits only if the village has authorized such operation. The town of Bergen may contract with the village of Bergen for the furnishing of fire protection outside of the village limits only if a fire protection or fire alarm district has been established. 1947 Ops St Compt 441.

A town may not contract for fire protection unless a fire alarm or fire protection district has been established. A town may contract, on behalf of a fire alarm or fire protection district, with a fire district which is within another town. 1953 Ops St Compt File #6129.

Towns may not contract with unincorporated fire companies to provide fire protection for fire protection or fire alarm districts within such towns. 1954 Ops St Compt File #6872.

A town may contract with a city to provide fire protection to fire protection or fire alarm districts within the town. Call firemen who receive compensation for executing firemanic duties are not volunteer firemen. 1954 Ops St Compt File #6872.

Fire alarm district has authority to install a fire alarm system. 1955 Ops St Compt File #7300.

If a trailer park area is within a fire alarm district or fire protection district, the town of New Hartford may contract with any city, village, fire district or incorporated fire company maintaining adequate and suitable apparatus and appliances to provide fire protection for that area, pursuant to the provisions of Town Law, § 183 or § 184, as the case may be; as to contracts made by a town on behalf of a fire alarm district, there is nothing in this section which would preclude such a contract from being on a "per call" basis; nonetheless, it is questionable as to the advisability of such a provision since it would create an open ended obligation which could make it difficult for the town to estimate the amount to be assessed and levied against the taxable property within the district. 1985 Op St Compt No. 85-71.

Agency Opinions

A fire district has no power to tax real property, no power to assess real property and no power to grant or withhold a real property tax exemption. 1976 NY Ops Atty Gen Dec 29.

A fire district commissioner may not hold the office of treasurer of the fire district but may hold the office of treasurer of a fire company. 1977 NY Ops Atty Gen March 2.

One person may not hold simultaneously the positions of a member of a town board and fire district commissioner. 1987 NY Ops Atty Gen No. 87-69 (Informal).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 189; Vol Fire Ben § 31.

Contracts for purchase and sale of water, CLS Vill § 11-1124.

Jurisprudences:

18A NY Jur 2d Civil Servants and Other Public Officers and Employees § 62 .

26 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1021—1023, 1093, 1095, 1097, 1099, 1101, 1103 .

§ 184. Fire protection districts

1. Whenever the town board shall have established or extended a fire protection district pursuant to the provisions of this article, the town board shall provide for the furnishing of fire protection within the district and for that purpose may (a) contract with any city, village, fire district or incorporated fire company maintaining adequate and suitable apparatus and appliances for the furnishing of fire protection in such district or (b) may acquire by gift or purchase such apparatus and appliances for use in such district and may contract with any city, village, fire district or incorporated fire company for operation, maintenance, and repair of the same and for the furnishing of fire protection in such district, or both. The contract may also provide for the furnishing of (1) emergency service in case of accidents, calamities or other emergencies in connection with which the services of firefighters would be required and (2) general ambulance service subject, however, to the provisions of section two hundred nine-b of the general municipal law. In the event that the fire department or fire company furnishing fire protection within the district pursuant to contract does not maintain and operate an ambulance then a separate contract may be made for the furnishing within the district of emergency ambulance service or general ambulance service, or both, with any city, village or fire district the fire department of which, or with an incorporated fire company having its headquarters outside the district which, maintains and operates an ambulance subject, however, in the case of general ambulance service, to the provisions of section two hundred nine-b of the general municipal law, or with an ambulance service, certified or registered pursuant to article thirty of the public health law, which is not organized under the provisions of section two hundred nine-b of the general municipal law. Any such contract with any such ambulance service permitted herein shall be subject to the provisions of this section.

1-a.

(a) Except as provided in paragraph (b) of this subdivision, prior to commencing the negotiation process for such contract with an incorporated fire company, the incorporated fire company shall file with the town board a statement itemizing the estimated costs of the incorporated fire company attributable to the provision of services under the prospective contract. The estimated costs attributable to the provision of services under the prospective contract itemized in the statement shall include, at a minimum, those, if any, for: supplies; materials; operation, maintenance and repair of equipment and apparatus; insurance; training; protective clothing, gear and other personnel costs; building rental, maintenance and operation; and a specified proportionate share of capital costs. If the fire company is required to prepare any of the following documents, copies shall be included with the statement:

(1) the fire company's most recent annual report of directors pursuant to section five hundred nineteen of the not-for-profit corporation law;

(2) the fire company's most recent verified certificate pursuant to subdivision (f) of section fourteen hundred two of the not-for-profit corporation law;

(3) the fire company's most recent internal revenue service form 990; and

(4) the fire company's most recent annual report pursuant to section thirty-a of the general municipal law.

(b) The provisions of paragraph (a) of this subdivision shall not apply to the renewal of a contract when the contract is deemed renewed in accordance with subdivision four of this section. Upon good cause shown, the town board may, by resolution, waive in whole or in part the requirement that the fire company file the statement, and copies of documents, required by paragraph (a) of this subdivision.

2. The contract shall not be entered into until a public hearing has been held by the town board. Notice of the hearing shall be published at least once in at least one newspaper having general circulation in the district. The notice shall specify the time when and place where the hearing will be held, and describe in general terms the proposed contract. The first publication shall be at least ten days prior to the day specified for the hearing. Before any contract to furnish general ambulance service by an ambulance service is entered into pursuant to this section, and before any public hearing is conducted

as herein provided, the consent of such ambulance service to furnish general ambulance sevice [service][*] shall be obtained. Such consent shall be evidenced by a copy of a resolution certified by the secretary of a voluntary ambulance service or the chief executive officer of a professional ambulance service.

3. Except as provided in subdivision four of this section, the term of the contract shall be for a definite period of time, but in no event shall the term exceed five years. The contract year or years in all such contracts entered into after the year nineteen hundred sixty shall terminate on December thirty-first.

4. Instead of being for a definite term as provided in subdivision three, the contract may be for an original term of one calendar year or less and provide that it shall be deemed renewed on the same basis each year thereafter for a further term of one full calendar year without any further public hearing unless one of the contracting parties shall notify the other in writing on or before the twentieth day of August that it elects to terminate the contract on December thirty-first in that year. The term of any such contract, including renewals, shall not exceed five years, but the contract may provide that there shall be less than four such renewals. If the city, village or fire district, fire department or fire company which is to furnish the service under such a contract is not a fully paid department or company, the city, village or fire district governing board, upon the request of the department or company, shall terminate the contract as provided in this subdivision. Any such contract may provide that in the month of July of each year in which such a renewal could occur the town clerk of the town in which the fire protection district or the major portion thereof is located shall notify the secretary of the fire department, fire company or ambulance service which is to furnish the service under the contract that the contract shall be deemed renewed on the same basis for a further full term of one calendar year unless one of the contracting parties shall notify the other in writing on or before the twentieth day of August that it elects to terminate the contract on December thirty-first in such year.

5. The contract shall specify a definite sum to be paid each year for all of the services to be rendered thereunder.

6. The amount which is to be paid each year pursuant to any contract entered into pursuant to the provisions of this section, together with all other expenses necessarily incurred or occasioned by reason of the establishment or extension of the fire protection district, shall be assessed and levied upon the taxable property in the district and collected in the same manner, at the same time and by the same officers as town taxes are assessed, levied and collected and, when collected, the amount thereof shall be paid to the supervisor of the town. The supervisor shall pay to the city, village, fire district, incorporated fire company or ambulance service furnishing such service the amount to be paid each year for the service in one sum or in installments as the contract may provide.

7. If a fire protection district shall be situated partly in each of two or more towns any action which would be taken by the town board in the case of a district situated in only one town shall be taken by the town boards of the several towns acting jointly by a majority vote of the members of each of such town boards, and the notice of public hearing required by this section shall be given by the town clerks of the several towns acting jointly.

8. By mutual consent of the contracting parties, and after a public hearing held pursuant to notice in the manner aforesaid, any such contract heretofore or hereafter executed may be (1) amended, (2) terminated, or (3) terminated and a new contract may be entered into in lieu thereof, if the town board, after such hearing, shall determine, by resolution, that it is in the public interest so to do. Such notice shall state in general terms the reason why any existing contract is to be amended or terminated, and if a new contract is to be entered into the notice shall also describe the new contract in general terms.

9. The term "fire protection," as used in this section, includes inspections of buildings and properties in the fire protection district for the purposes specified in and as authorized by sections eight hundred seven-a and eight hundred seven-b of the education law, subdivision four of section three hundred three of the multiple residence law, and section one hundred eighty-nine of the town law.

10. The provisions of this section shall not be deemed to have amended subdivision two of section two hundred nine-b or section two hundred nine-d of the general municipal law, or any other general, special or local law requiring the consent of a fire department, fire company or an emergency rescue and first aid squad to the entering into of a contract for services to be performed by such department, company or squad.

HISTORY:

Add, L 1932, ch 634; amd, L 1935, ch 141; L 1935, ch 645, § 8; L 1939, ch 584, § 12; L 1940, ch 432, § 11; L 1955, ch 391, § 2; L 1960, ch 77, eff Feb 23, 1960; L 1967, ch 705, § 3, eff Sept 1, 1967; L 1971, ch 324, eff May 25, 1971; L 1981, ch 223, § 1,2; L 1982, ch 780, § 1, eff July 27, 1982; L 1994, ch 599, § 2, eff July 26, 1994; L 2017, ch 294, § 2, effective January 1, 2018.

Revision Notes: [1955, ch 391] After a fire protection contract has been entered into, changing conditions often require the amendment or termination of the contract or the substitution of a new contract. Opinion No. 6419 of the Department of Audit and Control, October 30, 1953, held in effect that such changes could not be made if they resulted in increased compensation to the unit of government or fire corporation furnishing the fire protection. The Temporary State Commission on Fire Laws believes that there should be

[*]The bracketed word has been inserted by the Publisher.

greater flexibility in relation to such changes. This act permits any such change after a public hearing and a determination by the town board that the change is in the public interest.

Editor's Notes Laws 2017 ch 294, § 4, eff Jan 1, 2018, provides:

§ 4. This act shall take effect on January first next succeeding the date on which it shall have become a law and shall apply to contracts with a term commencing after March first of the year in which it shall have become a law.

Amendment Notes The 2017 amendment by ch 294, § 2, added (1-a).

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1. In general

In negligence action by homeowners whose residence was destroyed by rekindling of fire after fire chief had assured them that earlier fire had been extinguished, defendant town was not entitled to summary judgment on basis that fire company was independent contractor over which it exercised no control, since CLS N-PCL § 1402(e) specifies that fire company incorporated under statute is under control of town authorities having, by law, control over prevention or extinguishment of fires, and town's concession that it had established fire protection district pursuant to CLS Town § 184(1) made it responsible for providing fire protection. Miller v Morania Oil, O.C.P., 194 A.D.2d 770, 599 N.Y.S.2d 303, 1993 N.Y. App. Div. LEXIS 6724 (N.Y. App. Div. 2d Dep't 1993).

Town board was not required to seek competitive bids on contract for fire protection district. Riley v Town Board, Halfmoon, 86 Misc. 2d 114, 382 N.Y.S.2d 230, 1976 N.Y. Misc. LEXIS 2408 (N.Y. Sup. Ct. 1976).

Town may contract for fire protection in a fire protection district. 1946 Ops St Compt 692.

A town on behalf of a fire protection district is not authorized to contract for emergency relief ambulance service as such. 1954 Ops St Compt File #7057.

A town's central fire alarm system may be used to service any authorized emergency calls. 1968 Ops St Compt File #116.

With respect to operation of fire protection district, town board does not possess powers and duties equivalent to those afforded commissioners of fire district, and in absence of contractual provision to contrary, town board may not require that fire company which provides fire protection to fire protection district pursuant to contract submit company books to town for audit and review. 1987 Op St Compt No. 87-28.

In addition to ambulance service provided as part of a fire protection contract entered into by a town on behalf of fire protection districts, a town may contract for the provision of an additional level or type of ambulance service in the town and may specify the circumstances under which that service is to be available, provided that the service is available on a town-wide basis. The town or, if so provided in the town's rules and regulations, the ambulance service provider, may send to the user's insurance carrier a copy of the bill for the amount of the fee or charge imposed by the town for ambulance services rendered to the insured and may collect the fee or charge directly from the insurance carrier. 1991 Op St Compt No. 91-20.

Fire protection contract between town on behalf of fire protection district and incorporated fire company is subject to public hearing, but is not required or authorized to be subject to referendum. 2010 Op St Compt No. 10-3.

New York Power Authority is exempt from special ad valorem levies for fire protection districts under CLS Town § 184(6) and county water district under CLS County § 270. 10 Op. Counsel SBRPS No. 116.

2. Cost of services and payment, generally

There is no limitation on amount which may be raised in fire protection district for purpose of providing fire protection. 1945 Ops St Compt 342.

Town may contract to pay a stipulated annual sum to a fire district for furnishing fire protection in a fire protection district. 1946 Ops St Compt 346.

Town board may assess real property within fire protection district for purpose of raising money to pay for fire protection, when a contract is contemplated but has not been entered into at the time of the preparation of the assessment-roll. 1946 Ops St Compt 467.

A contract for furnishing fire protection within a fire protection district must state a definite, fixed sum as entire consideration for all services and may not provide for indefinite sums as reimbursement for materials used and damages to apparatus and equipment. 1961 Ops St Compt #733.

Amount to be paid in each year pursuant to fire protection contract shall be assessed and levied upon taxable property in the district. 1964 Ops St Compt File #933.

Upon a proper assignment by an incorporated fire company of proceeds due to it under a fire protection contract, the town board which has entered into the fire protection contract is required to make the designated payment to the transferee. 1965 Ops St Compt File #867.

There is nothing which would determine the price of a fire protection contract other than the agreement of the parties. 1967 Ops St Compt File #836.

A contract made by a town on behalf of fire protection district could not be on a "per call" basis since Town Law, § 184(5) provides that such a contract shall specify a "definite sum". 1985 Op St Compt No. 85-71.

In addition to ambulance service provided as part of a fire protection contract entered into by a town on behalf of fire protection districts, a town may contract for the provision of an additional level or type of ambulance service in the town and may specify the circumstances under which that service is to be available, provided that the service is available on a town-wide basis. The town or, if so provided in the town's rules and regulations, the ambulance service provider, may send to the user's insurance carrier a copy of the bill for the amount of the fee or charge imposed by the town for ambulance services rendered to the insured and may collect the fee or charge directly from the insurance carrier. 1991 Op St Compt No. 91-20.

3. —Budget matters

Village which contracts to furnish fire protection to fire protection districts is not required to submit any part of its budget to the town boards of the towns in which the district is located. 1954 Ops St Compt File #6941.

Where a certain sum was inadvertently subtracted from a fire protection contract during the preparation of the 1967 town budget, the town may add such deficiency to the 1968 budget and pay the same over to the fire company when received in the 1968 tax levy. 1967 Ops St Compt File #743.

Where a town has budgeted an amount for fire protection district purposes, it cannot increase this amount or supplement it until surplus funds or unexpended balances exist. 1968 Ops St Compt File #970.

4. —Consideration for contract

Consideration in fire protection contract should be a fixed and definite amount. 1954 Ops St Compt File ##6589, 6941.

A fire protection contract made between a village and a town board on behalf of a fire protection district may provide for payment of a portion of the consideration to the village and a portion to the fire department, as limited in § 209-d of the General Municipal Law. 1955 Ops St Compt File #7141.

Where a town contains four fire protection districts, the aggregate consideration in four contracts may not be lumped and spread as one tax over the area of the four districts. 1956 Ops St Compt File #8074.

The consideration for a contract for fire protection must be a definite sum to be paid each year for all of the services to be rendered thereunder. 1960 Ops St Compt File #359.

The consideration in a contract for furnishing fire protection to a fire protection district may not be expressed as a tax rate to be applied to assessed valuation of the fire protection district. 1963 Ops St Compt #489.

A town board has no authority to increase the consideration provided for in an existing fire protection contract, where no additional, increased, or improved services are to be rendered by the fire company. 1967 Ops St Compt File #563.

A town which has established a fire protection district may not pay the cost of extra equipment used by a fire company in fighting a fire since this added cost is deemed to be anticipated in fixing the specified and fixed consideration in the fire protection contract between the district and said fire company. 1967 Ops St Compt File #790.

5. —Transfer of funds

Balance of fire protection district moneys may not be transferred to the fire district. Should be applied toward the payment of the amount of the contract. 1947 Ops St Compt 543.

6. Dual office holding

The same person may not hold the office of fire district commissioner and justice of the peace. 1955 Ops St Compt File #7767.

7. Entities with which district may contract, generally

A fire protection district may contract for fire protection with incorporated volunteer fire company located in such district. Such district may not purchase fire apparatus. 1946 Ops St Compt 166.

A fire district may contract to furnish fire protection to a fire protection district though the fire protection district can be reached only by traveling through another fire district. 1947 Ops St Compt 104.

Fire department of the village of Bergen may operate outside of the village limits only if the village has authorized such operation. The town of Bergen may contract with the village of Bergen for the furnishing of fire protection outside of the village limits only if a fire protection or fire alarm district has been established. 1947 Ops St Compt 441.

A town may not contract for fire protection unless a fire alarm or fire protection district has been established. A town may contract, on behalf of a fire alarm or fire protection district, with a fire district which is within another town. 1953 Ops St Compt File #6129.

A town board may contract with a village in another county for the furnishing of fire protection in a fire protection district. 1953 Ops St Compt File #6150.

A town may contract for fire protection with a fire company of another state, at least where firemen from this State are entitled to benefits under the laws of such other state in the manner prescribed in § 209-a(2) of the General Municipal Law. 1953 Ops St Compt File #6351.

A town board may contract with an incorporated village for the furnishing of fire protection. It is immaterial that the village is situated in another county. 1954 Ops St Compt File #6586.

A town may contract with a city to provide fire protection to fire protection or fire alarm districts within the town. 1954 Ops St Compt File #6872.

A Town Board may not contract with a village fire department to provide fire protection in a fire protection district when the supervisor of the town is also treasurer of the fire department. 1962 Ops St Compt #419.

Village must be party to any contract for fire protection provided by volunteer fire company situated within the village. 1987 Op St Compt No 87-73.

Town may not enter into municipal cooperation agreement under CLS Gen Mun Art 5-G to receive fire protection services on behalf of fire protection district; CLS Town § 184 provides exclusive authority for town to contract for fire protection services on behalf of fire protection district. 1993 Op St Compt No. 93-6.

8. —Contracts with more than one outside agency

Town board may enter into a contract with two outside agencies for the furnishing of fire protection in a fire protection district. 1947 Ops St Compt 108.

Towns may not contract with unincorporated fire companies to provide fire protection for fire protection or fire alarm districts within such towns. 1954 Ops St Compt File #6872.

A town may, on behalf of a fire protection district contract with more than one outside agency to provide fire protection within the district. 1956 Ops St Compt File #7967.

9. Establishment of districts

The consent of the State Comptroller is not required for the formation of a fire protection district. 1947 Ops St Compt 48.

Where a fire protection district has been established, and the town board has failed to provide fire protection therein for several years, the town board may now proceed to contract for fire protection in such district. 1947 Ops St Compt 426.

The town board, during the period intervening between the dissolution of a fire district and the establishment of the fire protection district, may not contract for the furnishing of fire protection in the area. 1947 Ops St Compt 486.

Town may not contract for fire protection in town unless fire protection district is formed. Contract for fire protection should be for a fixed annual amount and not on basis of fixed sum per fire. Town may not borrow money to finance amount of fire protection contract. Borrowing unnecessary when new contract is contemplated. 1947 Ops St Compt 539.

A fire district established pursuant to Town Law of 1909, § 314-c may not contract for fire protection pursuant to this section or § 176(22). 1955 Ops St Compt File #7598.

10. Firehouses and apparatus

Town board may not purchase a fire truck or erect a fire house on behalf of a fire protection district. The town may erect a town hall. 1946 Ops St Compt 167.

A fire protection district may not purchase fire apparatus and equipment. 1955 Ops St Compt File #7657.

A village may construct an addition to the village owned firehouse for the purpose of housing fire equipment, owned by the incorporated fire company and to be used outside of the village. Providing the arrangement is provident for the village, rental need not be charged the fire company for such use. 1965 Op St Compt No. 65–320.

Fire protection districts within a town may not enter into a municipal cooperation agreement for the acquisition of aerial ladder equipment for fire-fighting purposes. 1970 Ops St Compt File #107.

A town which has entered into a fire protection contract may not purchase fire-fighting equipment for the fire protection district. 1973 Ops St Compt File #659.

A town may not build a fire station within a fire protection district, but a village with which the town contracts for fire protection on behalf of that fire protection district may do so. 1975 Ops St Compt File #268.

11. Hearing and notice

Towns should not further compensate members of a volunteer fire company for fighting forest fires within an area furnished fire protection by their company pursuant to contract. 1954 Ops St Compt File #6503.

Call firemen who receive compensation for executing firemanic duties are not volunteer firemen. 1954 Ops St Compt File #6872.

A fire district which enters into a contract to furnish fire protection must furnish all services and apparatus necessary to extinguish a fire, unless the contract otherwise provides, and accordingly a supervisor of the town with which the contract is made has no authority to hire men to watch a smoldering fire not totally extinguished by the contracting fire district. 1962 Ops St Compt #517.

12. Hiring and compensation of personnel

(1) The notice of hearing prescribed by Section 184 of the Town Law must state the amount proposed to be expended under the terms of a contract for fire protection. (2) A hearing must be held, upon notice, pursuant to Section 184 of the Town Law, in order to renew a contract for fire protection or to enter into a new contract for fire protection. 1945 Ops St Compt 154.

A town may not contract for fire protection, on behalf of a fire protection district, in excess of the amount stated in the notice of public hearing. 1953 Ops St Compt File #6126.

After a fire protection district has been established and a contract duly made for fire protection, no notice to any taxpayer is required in order to assess, levy and collect the amount of the contract. 1954 Ops St Compt File #6640.

A contract for fire protection is a product of arm's-length bargaining and subject to a public hearing before adoption by a town board. 1969 Ops St Compt File #56.

13. Indemnification for property damage or personal injury

In action by plaintiff who was injured in accident involving vehicle driven by volunteer firefighter responding to fire alarm, fire company incorporated under CLS N-PCL § 1402 was properly granted summary judgment on ground that it was not proper party to action, where town had chosen to establish "fire protection district" (which, unlike "fire district," is not political subdivision independent of town), fire company provided fire protection services within fire protection district pursuant to contract with town, and town retained complete control over fire company and ultimate responsibility for fire protection pursuant to § 1402. Miller v Savage, 237 A.D.2d 695, 654 N.Y.S.2d 215, 1997 N.Y. App. Div. LEXIS 2265 (N.Y. App. Div. 3d Dep't 1997).

Members of fire police squads are covered under § 205 of the General Municipal Law and § 10 of the Workmen's Compensation Law and other sections related thereto when injured outside of the village while rendering services pursuant to a mutual aid arrangement or while rendering services pursuant to a contract between the fire protection district and the village of which their fire company and fire police squad is a part. 1955 Ops St Compt File #7238.

A fire protection contract may not be entered into between a town board, on behalf of a fire protection district, and village whereby the town at large is required to assume the responsibility for any loss or damage sustained to the fire apparatus of the village in answering, attending or returning from calls in the fire protection district and whereby the town will reimburse the village for such damage and also assume the cost of all materials used by the village in its fire department in connection with such calls excepting gasoline and transportation charges. 1956 Ops St Compt File #8266.

A fire protection contract may not contain provisions whereby the town assumes liability for damage to private vehicles used by volunteer firemen in answering calls or agrees to provide insurance for fire equipment answering protection calls. A town is not liable for damage to apparatus or equipment of a volunteer fire company which contracts to furnish fire protection to one of its fire protection districts. 1963 Ops St Compt #178.

Where the entire unincorporated area of a town is a fire protection district receiving protection under a fire protection contract with a volunteer fire company located within the said unincorporated area of the town, the town is the "home area" liable for volunteer firemen's benefits for members of the fire company. 1967 Ops St Compt File #477.

14. Modification, renewal or termination of contracts

The town board on behalf of a fire protection district may not consent to substitute a new agreement for, nor modify an existing protection contract with a fire district for the purpose of providing increased compensation to the fire district. 1953 Ops St Compt File #6419.

A contract entered into by a town board on behalf of a fire protection district may include a provision whereby the district assumes the responsibility for any damage to the apparatus or equipment of the protecting company while answering calls in the district. 1955 Ops St Compt File #7094.

A town, on behalf of a fire protection district, and with the consent of its fire company, may, upon statutory conditions, terminate a present contract for fire protection and enter into a new one for five years at an annual price of $2,000. 1963 Ops St Compt #77.

A fire protection contract entered into by a village and a Town Board on behalf of a fire protection district for a definite term of three years may not be unilaterally cancelled by the village. 1964 Ops St Compt #559.

Fire protection contract for an original term of one year and a stated number of renewals may be terminated by either party by the notification of the other in writing on or before the 20th day of August of election to terminate the contract on December 31st in that year. Contract for the furnishing of fire protection for a definite period of time may be terminated or amended by mutual consent of parties and after a public hearing. 1964 Ops St Compt File #933.

15. Terms of contracts

Fire protection contract may not be sub-contracted. 1954 Ops St Compt File #6986.

A Town Board, on behalf of a fire protection district, may not agree that in case it cancels a fire protection contract for failure of the fire company to provide adequate protection it will continue to make payment under the contract to any lending institution to which the fire company may have assigned such payments as security. 1963 Ops St Compt #751.

Moneys received by a village from fire protection contracts may not be paid over to the village volunteer fire company furnishing the fire protection unless such contracts so provide. 1968 Ops St Compt File #515.

A town on behalf of a fire protection district may not enter into a five-year contract with a volunteer fire company, leaving the price open and providing for the annual renegotiation of the price. However, other alternatives to a straight five-year contract are available. 1969 Ops St Compt File #242.

Town may not unilaterally impose audit requirement on fire company that provides fire protection by contract to town fire protection district. 2007 Op St Compt No. 07-8.

Fire protection contract with fire company may include provision requiring outside audit of books and records of fire company and, in connection with its authority over fundraising activities of certain fire companies under CLS Gen Mun § 204-a, town board may require, as condition on conduct of those fund raising activities, submission of financial report on receipts and expenditures of proceeds of such activities, and submission of related books and records of fire company for audit. 2007 Op St Compt No. 07-8.

Fire company's debt service expenses for debt incurred to finance firehouse used in connection with providing fire protection service may be considered in course of negotiating "definite sum" payable by town under contract. 2010 Op St Compt No. 10-3.

16. Water supply

Town board may not contract on behalf of fire protection district for rental of hydrants and purchase of water from a water company. Fire district furnishing protection to fire protection district may make such contract with the water company. 1945 Ops St Compt 494.

A water storage reservoir, water pipes and hydrants constructed in a fire protection district may not be financed by the issuance of either bonds or capital notes. 1952 Ops St Compt File #5725.

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1. In general

A fire district has no power to tax real property, no power to assess real property and no power to grant or withhold a real property tax exemption. 1976 NY Ops Atty Gen Dec 29.

Transaction in which municipality would apply for loan from emergency services revolving loan account as "surrogate" for private fire company or ambulance service is not authorized under CLS St Fin § 97-pp. 1999 NY Ops Atty Gen F 99-3.

There is no procedure whereby the area of a fire protection district may be annexed to a village solely for purposes of fire protection—a village may provide fire protection to the area of a fire protection district on an on-going basis only by entering into a contract for that purpose with the town board pursuant to Town Law, § 184. 1980 Op St Compt File #43.

A fire district is an independent corporate entity governed by a separate board of fire commissioners, whereas a fire protection district is simply a geographic area, with no independent corporate status, for which the town board is responsible for providing fire protection. 1981 Op St Compt File #1.

The provisions of section 209 of the General Municipal Law relating to answering calls for assistance outside the area regularly served and protected and financial liability for expenses incurred in use of fire equipment when responding to such calls have no application where fire protection is provided pursuant to contract. 1982 Op St Compt File #82-276.

A county may adopt a local law authorizing an appropriation of county moneys to a town to be used to pay a portion of the cost of providing fire protection and ambulance service in a town fire protection district which contains a marina leased by the county. 1983 Op St Compt File #83-49.

2. Cost of services and payment, generally

3. —Consideration for contract

A town on behalf of a fire protection district may provide gasoline as part of the consideration under a fire protection contract so long as a reasonable dollar value is placed on the gasoline and the quantity to be provided is expressed in precise, definite terms. 1983 Op St Compt File #83-10.

4. —Transfer of funds

A town may not transfer general surplus moneys to a fire protection district. 1979 Op St Compt File #456.

There appears to be no authority for the establishment of zones with varying tax rates in a fire protection district. 1953 NY Ops Atty Gen Oct 28 (informal).

The amount of a fire protection contract may be assessed and levied upon the taxable property in a fire protection district at the same time and by the same officers as town taxes are assessed, levied and collected. 1956 NY Ops Atty Gen Sept 10 (informal).

A fire company which provides fire protection in a fire protection district may not bill charitable institutions for its services nor may a town compel the county to issue a bill for fire protection to charitable institutions. 1981 Op St Compt File #81-201.

Where there are three fire protection districts within a town, the cost of the fire protection contract for each of them must be levied against the property of that district; the cost of the separate contracts may not be lumped and levied as a single tax. 1982 Op St Compt File #82-313.

5. Dual office holding

A fire district commissioner may not hold the office of treasurer of the fire district but may hold the office of treasurer of a fire company. 1977 NY Ops Atty Gen March 2.

Positions of member of town board and attorney to water district or fire district are incompatible. 1987 NY Ops Atty Gen No. 87-63 (Informal).

One person may not hold simultaneously the positions of a member of a town board and fire district commissioner. 1987 NY Ops Atty Gen No. 87-69 (Informal).

Town board members who are also members of village fire council do not have conflict of interest with respect to fire protection contract between village and town. 1980 Op St Compt File #101.

6. Entities with which district may contract, generally

7. —Contracts for ambulance services

A town board on behalf of a fire protection district, may contract with a village for the furnishing of general ambulance service by the village fire department emergency rescue and first aid squad where the entity providing fire protection to the fire protection district does not maintain and operate an ambulance, but such contract must first be approved by the fire department and the rescue squad. 1978 Op St Compt File #546.

A fire district may contract for the furnishing of general ambulance service to the town in which it is situated or to an adjoining fire district only pursuant to a fire protection contract with the town on behalf of a fire protection or fire alarm district or with the adjoining fire district, unless another entity is furnishing fire protection to the fire protection or fire alarm district or the adjoining fire district and does not operate and maintain an ambulance, in which case a separate contract for general ambulance service may be entered into. 1979 Op St Compt File #201.

There is no statutory authority for a town to contract with a fire district or the emergency rescue and first aid squad of a fire company for emergency ambulance service to be provided to the town on a town-wide basis. 1980 Op St Compt File #539.

There is no authority for a town to contract with a fire company or a fire district to provide for general ambulance service on a town-wide basis. General ambulance service may be provided to fire protection districts within the town pursuant to fire protection contracts. 1980 Op St Compt File #684.

8. —Contracts with more than one outside agency

A town board acting on behalf of a fire protection district may contract with more than one agency for the furnishing of fire protection within the fire protection district. 1953 NY Ops Atty Gen Oct 15 (informal).

A town may not supply gasoline for fire trucks used by a volunteer fire company that has a contract with a fire protection district in the town. 1979 Op St Compt File #445.

9. Firehouses and apparatus

The Village of Savannah may house all of its fire fighting equipment in a fire house owned and operated by a fire company within an adjacent fire protection district in which the Village furnishes fire protection. 1975 NY Ops Atty Gen Feb 4.

An incorporated volunteer fire company performing services in a fire protection district may set aside part of the payment received each year under the contract to accumulate money for a new fire truck. 1979 Op St Compt No. 79–648.

10. Hearing and notice

A member of a town board may not be compensated for legal services rendered in the formation of a fire protection district. 1953 NY Ops Atty Gen Oct 9 (informal).

Where a village provides fire protection to a fire protection district, the fire protection contract may not require the town, on behalf of the district, to pay for, or provide insurance for volunteer firemen's benefits. However, the additional cost to the village of providing insurance for benefits could be reflected in the contract. 1979 Op St Compt File #858.

11. Hiring and compensation of personnel

The amount payable under a proposed contract for furnishing fire protection to a fire protection district should be mentioned in the notice of hearing. 1949 NY Ops Atty Gen Oct 13.

12. Indemnification for property damage or personal injury

Volunteer Firemen are not covered by the provisions of the Volunteer Firemen's Benefit Law when attending a funeral, whether such attendance is pursuant to orders or by permission

from the chief or fire district commissioners. It is questionable whether use of fire department apparatus to transport the body of a deceased fireman for burial is authorized by statute. If a court held that there is no such authorization, the immunity statute would not apply, the Volunteer Firemen's Benefit Law would not provide protection and personal liability might result. 1977 NY Ops Atty Gen Dec 7 (Informal).

A volunteer member of the emergency rescue and first aid squad of a fire company injured in the line of duty while responding to a call from a fire protection district which the company provides fire protection pursuant to contract would be entitled to coverage under the Volunteer Firemen's Benefit Law regardless of whether or not the contract required the company to provide emergency ambulance service. 1982 Op St Compt File #82-236.

13. Modification, renewal or termination of contracts

A town board on behalf of a fire protection district may contract with a village for the furnishing of general ambulance service by the village fire department emergency rescue and first aid squad when the entity providing fire protection to the fire protection district does not maintain and operate an ambulance, but such contract must first be approved by the fire department and the rescue squad. 1979 Op St Compt File #48.

14. Terms of contracts

A town board on behalf of a fire protection district, may contract with a village for the furnishing of general ambulance service by the village fire department emergency rescue and first aid squad where the entity providing fire protection to the fire protection district does not maintain and operate an ambulance, but such contract must first be approved by the fire department and the rescue squad. 1978 Op St Compt File #546.

A village may not contract separately with a central school district to provide fire protection to two school buildings, one within the village and the other outside the village in a fire protection district. 1980 Op St Compt File #45.

Since a fire protection contract entered into by a fire district or by a town, on behalf of a fire protection district, must specify a definite annual sum to be paid for all of the services to be rendered thereunder, provisions whereby the fire district and the fire protection district would also be liable for loss or damage to fire apparatus or equipment and for personal injury or death of firemen, are invalid. 1980 Op St Compt File #757.

Members of an emergency rescue and first aid squad of a volunteer fire company are covered by the Volunteer Firemen's Benefit Law when responding to calls for assistance outside of the fire protection district which the company serves pursuant to contract with a town, whether the call is pursuant to a mutual aid plan or otherwise. A town cannot contract with the company to provide ambulance service for the area of the town outside of the fire protection district. 1981 Op St Compt File #81-112.

There is no requirement that a town board on behalf of a fire protection district award contracts for fire protection pursuant to formal competitive bidding requirements. 1982 Op St Compt File #82-163.

15. Water supply

Where a village fire department which is providing fire protection to a fire protection district constructs a fire station in the district, the town, on behalf of the fire protection district, may not bear the expense of connecting the fire station to the water system. However, the cost of connection may be reflected in a new fire protection contract. 1979 Op St Compt File #658.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 172-d, 189; CLS Vol Fire Ben § 31.

Enforcement, CLS Mult R § 303.

Emergency medical services, CLS Pub Health §§ 3000 et seq.

Contracts for purchase and sale of water, CLS Vill § 11-1124.

Jurisprudences:

18A NY Jur 2d Civil Servants and Other Public Officers and Employees § 62 .

26 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 959, 960, 1093, 1094, 1097, 1099, 1100, 1101, 1103 .

Annotations:

Coverage and exclusions under liability policy issued to municipal corporation or similar governmental body. 23 ALR3d 1282.

§ 184-a. Contract for water supply outside of fire districts

The town board of any town, on behalf of a fire protection district or fire alarm district situated therein, or on behalf of the area of the town outside of any village, fire district, fire protection district or fire alarm district, which area is hereinafter referred to as the "unprotected area", may contract for a supply of water and for the furnishing, erection, maintenance, care and replacement of fire hydrants, including the erection and maintenance of markers therefor, and the removal of snow and ice to provide access thereto, for fire purposes for a period not exceeding five years.

Before a contract shall be entered into pursuant to the authority given in this section, the town board shall hold a public hearing in the district or unprotected area or at such other place within the town as the town board shall designate. Notice of the hearing shall be published at least once in at least one newspaper having general circulation in the district or unprotected area, the first publication thereof to be at least ten days prior to the day specified for the hearing. The notice shall specify the time when and place where the hearing will be held, and shall describe in general terms the proposed contract. The amount of any contract that may be entered into pursuant to the provisions of this section together with all other expenses necessarily incurred or occasioned thereby, shall be assessed and levied upon the taxable real property in the district or unprotected area and collected in the same manner, at the same time and by the same officers as town taxes are assessed, levied and collected and, when collected, the amount thereof shall be paid to the supervisor of the town. The supervisor shall pay to the person, company or corporation entitled thereto the amount specified in the contract.

If a fire protection district or fire alarm district shall be situated partly in each of two or more towns any action which would be taken by the town board in the case of a district situated in only one town shall be taken by the town boards of the several towns acting jointly by a majority vote of the members of each of such town boards, and the notice of public hearing required by this section shall be given by the town clerks of the several towns acting jointly.

HISTORY:

Add, L 1946, ch 859; amd, L 1951, ch 373, § 1; L 1959, ch 763, eff April 23, 1959.

Notes to Decisions

Assessments made against county property located within hydrant district organized pursuant to this section are not exempt by Section 4 of the tax law. County of Westchester v Harrison, 114 N.Y.S.2d 492, 201 Misc. 211, 1951 N.Y. Misc. LEXIS 2863 (N.Y. Sup. Ct. 1951).

Town board may not purchase a fire truck or erect a fire house on behalf of a fire protection district. The town may erect a town hall. 1946 Ops St Compt 167.

Section 184-a of the Town Law does not apply to fire districts. Taxes levied for the purposes of said section 184-a are assessed and levied upon an "ad valorem" basis. A town board may not install fire hydrants unless such hydrants are installed as part of the water system of a water district. 1947 Ops St Compt 237.

In the absence of a contract, the town board may not withhold hydrant rentals from funds due a fire company for fire protection. 1954 Ops St Compt File #6903.

Contract for hydrant rentals may be made with either a fire protection district or with the incorporated fire company furnishing fire protection therein. 1955 Ops St Compt File #7481.

A fire protection district may not purchase fire apparatus and equipment. 1955 Ops St Compt File #7657.

Fire hydrant rental expense for fire protection cannot be made a general town charge. 1957 Ops St Compt File ##274, 352.

Notices of hearing required by this section and § 184-c may not omit reference to location of proposed fire hydrants. 1963 Ops St Compt #981.

A fire protection district may contract for a supply of water and hydrant service with a village. The expense for such a contract must be assessed against all the property within the district. 1967 Ops St Compt File #363.

Town superintendent of highways may, with the approval of the town board and the county superintendent of highways, permit the use of town highway equipment to remove snow from private roads to provide access to hydrants, pursuant to fire protection contracts, where property within the fire protection district benefited is ultimately charged with the cost of such removal. 1969 Ops St Compt File #9.

Agency Opinions

A fire district has no power to tax real property, no power to assess real property and no power to grant or withhold a real property tax exemption. 1976 NY Ops Atty Gen Dec 29.

A fire district commissioner may not hold the office of treasurer of the fire district but may hold the office of treasurer of a fire company. 1977 NY Ops Atty Gen March 2.

Positions of member of town board and attorney to water district or fire district are incompatible. 1987 NY Ops Atty Gen No. 87-63 (Informal).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 184-c, 198; CLS Vill § 11-1124.

Contracts for purchase and sale of water, CLS Vill § 11-1124.

Jurisprudences:

18A NY Jur 2d Civil Servants and Other Public Officers and Employees § 62 .

26 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1084—1086 .

99 NY Jur 2d Taxation and Assessment §§ 754, 761, 762 .

108 NY Jur 2d Water § 607 .

§ 184-c. Water supply outside of fire districts

The town board of any town, on behalf of a fire protection district or fire alarm district situated therein, or on behalf of the area of the town outside of any village, fire district, fire protection district or fire alarm district, which area is hereinafter referred to as the "unprotected area", (1) may purchase permanent or temporary rights to take water from cisterns, wells, and bodies of water and water-courses within the fire protection district, fire alarm district or unprotected areas, or may lease such rights, and (2) may construct and maintain, fire suction pools in bodies of water and water-courses, fire cisterns and fire wells, including necessary pipes, pumps, hydrants and other facilities in connection therewith and may purchase and lease necessary real property and rights in land and water therefor, in order to provide a supply of water for any area of such district or unprotected area which does not have an adequate and available supply or which cannot be suitably supplied by contract pursuant to section one hundred eighty-four-a of this chapter.

Before making any purchase or lease of water rights or constructing fire suction pools, fire cisterns and fire wells or acquiring any real property and rights in land and water therefor, the town board (1) shall secure the written statement of the fire chief, or chief engineer, of the fire department or fire company, if any, furnishing fire protection in the district or unprotected area that such sources of water supply are adequate and that such fire suction pools, fire cisterns and fire wells are located properly for fire-fighting purposes and (2) shall hold a public hearing in the district or unprotected area. Notice of the hearing shall be published at least once in at least one newspaper having general circulation in the district or unprotected area, the first publication thereof to be at least ten days prior to the day set for the hearing. The notice shall specify the time when and place where the hearing shall be held, and shall describe in general terms what is proposed to be done pursuant to the provisions of this section.

The water and improvements shall be used for fire-fighting purposes only and such water shall not be sold. The fire suction pools, fire cisterns and fire wells constructed and maintained for the purposes of any such district or unprotected area shall be fenced or covered to prevent trespass by children and domestic animals. Any such improvement shall be located upon real property within the fire protection district, fire alarm district, or unprotected area, which has been acquired by gift, purchase or lease, or upon which an easement has been acquired, by the town board in the name of the town for the purposes of any such district or area, except such portions of the improvement which are located within the bounds of public highways, roads or streets with the consent of the state or local official charged with the supervision of the highway, road or street. No officer or employee of the town shall be liable personally for any damages to persons or property resulting from the maintenance of any such improvement on behalf of any such district or unprotected areas, except such damages as result from his wilful negligence or malfeasance. The town board may purchase insurance to protect the district or unprotected area from liability for damage to persons and property resulting from the maintenance of any such improvement for the district or unprotected area. Expenditures for any such purposes, and any liabilities for any such damage, shall be raised only upon the taxable real property in the district or unprotected area and shall be assessed, levied and collected in the same manner, at the same time, and by the same officers as town taxes are

assessed, levied and collected, and, when collected, the amount thereof shall be paid to the supervisor of the town. The supervisor shall disburse such moneys for the purposes aforesaid. Moneys shall not be borrowed to finance the cost of any expenditure made pursuant to this section.

If a fire protection district or fire alarm district shall be situated partly in each of two or more towns any action which would be taken by the town board in the case of a district situated in only one town shall be taken by the town boards of the several towns acting jointly by a majority vote of the members of each of such town boards, and the notice of public hearing required by this section shall be given by the town clerks of the several towns acting jointly.

If, after proceeding pursuant to this section, an adequate supply of water for fire-fighting purposes becomes available for such area, or if a suitable supply may be obtained therefor by contract pursuant to section one hundred eighty-four-a of this chapter, the town board, nevertheless, may continue to act in relation to any such district or unprotected area pursuant to this section.

HISTORY:

Add, L 1951, ch 373, § 3, eff March 30, 1951.

Notes to Decisions

Fire cistern may not be constructed on private property in fire protection district unless lease or easement is obtained. 1953 Ops St Compt File #6309.

A fire protection district may not purchase fire apparatus and equipment. 1955 Ops St Compt File #7657.

Agency Opinions

Pursuant to this section, a town board may provide a source of water for the purposes of a fire protection district. 1953 NY Ops Atty Gen May 12 (informal).

A fire district has no power to tax real property, no power to assess real property and no power to grant or withhold a real property tax exemption. 1976 NY Ops Atty Gen Dec 29.

A fire district commissioner may not hold the office of treasurer of the fire district but may hold the office of treasurer of a fire company. 1977 NY Ops Atty Gen March 2.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

18A NY Jur 2d Civil Servants and Other Public Officers and Employees § 62 .

26 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1087—1092 .

Annotations:

Validity and construction of statute authorizing or requiring governmental unit to procure liability insurance covering public officers or employees for liability arising out of performance of public duties. 71 ALR3d 6.

Validity and construction of statute authorizing or requiring governmental unit to indemnify public officer or employee for liability arising out of performance of public duties. 71 ALR3d 90.

§ 186. Savings clause

1. Except as otherwise provided by law, fire districts now existing shall continue to exist as now established, subject to the provisions of this chapter. Except as hereinafter provided no fire district officers shall be appointed or elected as successors to such officers holding office at the time this article shall take effect.

2. Nothing herein contained shall be construed to require the election of fire district commissioners or a fire district treasurer in any water district, highway district, town fire district, water supply district or school district in which fire protection was provided on June first, nineteen hundred thirty-three, pursuant to the provisions of article fourteen of chapter sixty-three of the laws of nineteen hundred nine, entitled "An act relating to towns, constituting chapter sixty-two of the consolidated laws," and acts amendatory thereof and supplemental thereto, if there were no fire district commissioners in or for such district on the said first day of June, nineteen hundred thirty-three; but in each town fire district established pursuant to the provisions of chapter two hundred twenty-six of the laws of nineteen hundred sixteen, in which there were town fire commissioners on the first day of June, nineteen hundred thirty-three, five fire district commissioners but no treasurer shall be elected on the fifth day of December, nineteen hundred thirty-three, upon the notice, in the manner and for the terms specified in this section for election of fire district commissioners on such date, and one commissioner shall be elected annually thereafter in the manner provided in this article. The fire district commissioner so elected shall have and may exercise all the powers conferred by this chapter or any other law upon the commissioners of fire districts but the supervisor of the town shall act as the treasurer and the town clerk as secretary of such fire district; provided, however, that in any such town fire district the fire district commissioners may submit at a special fire district election held prior to the first day of October in any year, or at any annual fire district election, the proposition "Shall the fire district treasurer be elected and the fire district secretary be appointed?" If a majority of the votes cast on such proposition submitted as herein provided be in the affirmative, a fire district treasurer shall be elected at the next annual fire district election and a fire district secretary shall thereafter be appointed, as provided in this article. The terms of office of such fire district treasurer and such fire district secretary shall commence on the first day of January next succeeding the date of such annual election. In a town fire district established pursuant to the provisions of chapter two hundred twenty-six of the laws of nineteen hundred sixteen in which there were no town fire commissioners on June first, nineteen hundred thirty-three, the town board shall have and may exercise all the powers conferred upon fire district commissions pursuant to this chapter or any other law except that the supervisor of the town shall act as treasurer of the district and chairman of the commission and the town clerk shall act as secretary thereof. The supervisor whenever acting as treasurer of the fire district shall not be required to give the additional undertaking provided in subdivision four of section one hundred seventy-six but the undertaking executed pursuant to section twenty-

five of this chapter shall include and cover the moneys and property of the fire district coming into his hands as treasurer.

3. Every incorporated fire company, and every town fire company established and existing on June first, nineteen hundred thirty-three, pursuant to sections three hundred ten, three hundred eleven and three hundred twelve of article fourteen of chapter sixty-three of the laws of nineteen hundred nine, entitled "An act relating to towns, constituting chapter sixty-two of the consolidated laws," and acts amendatory thereof and supplemental thereto, which shall have its headquarters in any water district, water supply district, or highway district, and providing fire protection in such district on the first day of June, nineteen hundred thirty-three, shall continue to exist and may provide fire protection in such districts or any of them, and each such district shall constitute a fire protection district and be subject to all of the provisions of this chapter relating to fire protection districts, so far as the same do not conflict with the provisions of this subdivision. However, any water district, governed by district commissioners, providing fire protection pursuant to this subdivision shall constitute and be a fire district, with all powers and limitations of a fire district so far as the same do not conflict with the provisions of this subdivision. The town board of the town in which any such district is located may contract with any such incorporated fire company or town fire company for the furnishing of fire protection within such district and the amount of any such contract shall be assessed and levied upon the taxable property in such district and collected in the same manner as town charges are assessed, levied and collected. The funds so collected shall be paid by the collector to the supervisor of the town who shall apply the same in payment of the amount of such contract. The board of water commissioners, in the case of water districts to which the provisions of article thirteen of this chapter apply, or the town board of the town in the case of the other districts hereinbefore specified, shall have and may exercise any and all of the powers and duties of fire district commissioners as provided in subdivisions nine to twenty-five inclusive of section one hundred seventy-six of this chapter, and may purchase, equip and operate an ambulance for the benefit of the residents of the district and may, upon its own motion and shall, upon petition, cause to be submitted at a special or annual district election a proposition in the manner and for any of the purposes specified in section one hundred seventy-nine of this chapter. The board of water commissioners, if there be any, in the case of water districts, and the town board in the case of other districts shall annually prepare and file with the supervisor and town clerk of each town in which such district is located, an itemized and verified statement of the amount of moneys necessary to be raised in such district for fire purposes and the amount thereof shall be assessed and levied on the taxable property of such district, and collected, all in the manner provided in section one hundred eighty-one of this chapter. An annual financial statement setting forth in detail the receipts and expenditures of such district for fire purposes shall be filed by the board of water commissioners, if there be any, in the case of water districts and by the town board, in the case of all other districts, in the manner provided in section one hundred eighty-one.

4. Nothing herein contained shall affect or impair the validity or restrict the exercise of any power or limit the obligation or liability conferred or imposed by law upon any now existing fire district or the officers thereof or the qualified voters or electors thereof, except to the extent specified in this chapter.

HISTORY:

Add, L 1932, ch 634, 1933, ch 705; amd, L 1933, ch 751; L 1934, ch 816, §§ 9, 10, 1935, ch 645, § 9; L 1936, ch 817; L 1943, ch 710, § 2616 (Part 1); L 1946, ch 959; L 1947, ch 830; L 1952, ch 774, eff July 1, 1952.

Notes to Decisions

(1) Fire commissioners of fire district established under former § 38 of County Law may contract with a fire company located within district for fire protection within such district. (2) Fire commissioners of a fire district established pursuant to § 316 of former Town Law may contract for fire protection within the district, with a fire company located in such district. (3) In a fire district established pursuant to § 316 of former Town Law and in which district town board acts as commissioners, such town board may contract for fire protection within district with a fire company located within such district. (4) Town board may contract with fire company located within fire district established pursuant to §§ 314-c or 314-d of former Town Law for furnishing fire protection in such district. (5) Board of fire commissioners of a district established subsequent to Jan. 1, 1934, pursuant to Art. II of the present Town Law may not contract with a fire company to furnish fire protection in such district. 1945 Ops St Compt 77.

A fire district created pursuant to former § 38 of the County Law must function through a board of fire commissioners, which shall have the management and control of all of the property and affairs of such district, including control of the activities of all fire companies situated within such district. 1945 Ops St Compt 196.

Board of fire commissioners (and town board, in a town wide fire district having no separate board of fire commissioner) may contract for the delivery of fire equipment and apparatus. 1946 Ops St Compt 18.

A water district may contract with a fire district for the purchase of water and the rental of hydrants for use in protecting against fires. 1946 Ops St Compt 391.

In a fire district formed pursuant to section 38 of the County Law, the election of a fire district treasurer should have been held in December, 1945, or in December, 1946, the date depending upon whether the fire district held an election pursuant to section 186 of the Town Law on December 5, 1933, or pursuant to chapter 187 of the Laws of 1934 on December 4, 1934. 1947 Ops St Compt 63.

The town board of the town of Harrison may not appoint fire commissioners to exercise fire protection functions which were formerly exercised by boards of water commissioners. 1947 Ops St Compt 175.

A fire district established prior to January 1, 1934, must be extended pursuant to the provisions of the present Town Law. 1953 Ops St Compt File #6092.

Dissolution of the New Cassel Water District automatically effected dissolution of the New Cassel Fire District. Extension of the Westbury Water District did not automatically effect an extension of the Westbury Fire District. 1955 Ops St Compt File #7085.

Agency Opinions

Duties of a deputy town comptroller are not incompatible with those of fire district treasurer, where the district encompasses the whole town. 1961 NY Ops Atty Gen Oct 2.

A fire district has no power to tax real property, no power to assess real property and no power to grant or withhold a real property tax exemption. 1976 NY Ops Atty Gen Dec 29.

A fire district commissioner may not hold the office of treasurer of the fire district but may hold the office of treasurer of a fire company. 1977 NY Ops Atty Gen March 2.

The Garden City Park Water District may not charge back to the Garden City Park Fire District the cost of clerical and administrative services which it provides to the Fire District. 1981 Op St Compt File #81-192.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS Vill § 17-1720.

Periods of probable usefulness, CLS Loc Fin § 11.00.

Jurisprudences:

18A NY Jur 2d Civil Servants and Other Public Officers and Employees § 62 .

26 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 975, 1044, 1048, 1052 .

108 NY Jur 2d Water § 539 .

§ 187. Exclusion of a fire district from a water supply district

1. Petition. Whenever a fire district shall be located wholly within the boundaries of a water supply district which shall have no bonded indebtedness, a written petition as hereinafter provided may be presented to the town board of the town in which the water supply district is located asking for the exclusion of the area included in the fire district from the water supply district. Such petition shall be signed, and acknowledged or proved in the same manner as a deed to be recorded, or authenticated in the manner provided in the election law for the authentication of nominating petitions, by resident taxpayers owning taxable real property aggregating at least one-half of the assessed valuation of all the taxable real property of the fire district owned by resident taxpayers, as such valuations appear upon the latest completed assessment roll of said town. Such petition shall have endorsed thereon the approval of a majority of the board of fire commissioners of such fire district. The town board shall hold a public hearing upon such petition within the limits of the water supply district and shall cause a notice thereof to be published and posted in the same manner provided for hearings held pursuant to section one hundred seventy-one hereof. Such notice shall contain a description of the fire district referred to in the petition and specify the time when and the place where the town board will meet to consider such petition and to hear all the persons interested in the subject concerning the same. After a hearing held upon notice as provided hereinbefore, and upon the evidence given thereat, the town board shall determine whether it is in the public interest to grant the relief sought. If it is determined that it be not in the public interest to grant the relief sought, it shall deny the petition, but if it is determined that it be in the public interest, it may grant the relief sought by the petition.

2. Filing of determination. Whenever the town board shall adopt a resolution excluding the area included in a fire district from a water supply district, the town clerk shall cause a certified copy of such resolution to be duly recorded in the office of the clerk of the county in which such fire district is located and a certified copy of such resolution to be filed with the secretary of the board of fire commissioners of said district. When so recorded such resolution shall be presumptive evidence of the regularity of the exclusion of such fire district from the water supply district. The expense of such recording shall be a charge against the fire district. The said determination shall be final and conclusive unless a proceeding for review in the manner provided by article seventy-eight of the civil practice law and rules has been commenced within thirty days from the time of filing thereof.

3. Liability for indebtedness; apportionment of liabilities and property. If the town board shall grant a petition for the exclusion of the territory of a fire district from a water supply district and the territory included within the boundaries of the fire district be so excluded, such territory within such fire district shall not be relieved from bearing its proportionate share of any liability or indebtedness incurred for water supply district purposes while such territory was a part of such water supply district, and until such liability shall have been discharged or such indebtedness paid the proportionate share thereof to which such territory would be liable if it had not been excluded from the water supply district, in accordance with assessed valuations as appear on the latest completed assessment roll of said town, shall be added to the annual budget of the fire district by the town board.

The proportion of the liability created or the indebtedness incurred in behalf of the water supply district and payable by a tax against the property within the fire district which shall be assumed by the fire district and the apportionment of the personal and real property belonging to the water supply district shall be determined according to the relative assessed valuation of the personal and real property in that portion of the water supply district without the fire district, and that portion within the fire district, in the following manner: The town board of the town when acting as a board for the water supply district, exclusive of a member who may reside in the fire district and the board of commissioners of the fire district being unable to agree within six months after the exclusion of the fire district from the water supply district becomes final upon the proportion of the debt and the apportionment of the personal and real property, then the supreme court shall have power to determine such division and to enforce such award, division and determination as shall be made in the premises in a suit in equity to be brought in the name of either of said parties.

HISTORY:

Add, L 1936, ch 419, § 12, eff May 3, 1936; amd, L 1962, ch 310,

§ 453, eff Sept 1, 1963; L 1962, ch 487, § 3; L 2000, ch 37, § 17, eff Sept 1, 2000.

Editor's Notes: See 1962 note under § 155.

Agency Opinions

A fire district has no power to tax real property, no power to assess real property and no power to grant or withhold a real property tax exemption. 1976 NY Ops Atty Gen Dec 29.

A fire district commissioner may not hold the office of treasurer of the fire district but may hold the office of treasurer of a fire company. 1977 NY Ops Atty Gen March 2.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Proceeding against body or officer, CLS CPLR §§ 7801 et seq.

Jurisprudences:

1 NY Jur 2d Acknowledgements, Affidavits, Oaths, Notaries, and Commissioners § 4.

18A NY Jur 2d Civil Servants and Other Public Officers and Employees § 62 .

26 NY Jur 2d Counties, Towns, and Municipal Corporations § 976 .

108 NY Jur 2d Water § 546 .

§ 188. Use of surplus town moneys for purchase of fire apparatus for use in town fire districts

The town board in a town in which a town fire district has been established pursuant to the provisions of chapter two hundred and twenty-six of the laws of nineteen hundred sixteen may authorize the expenditure of surplus moneys of the town for the purchase of apparatus for the extinguishment and the prevention of fires in such town fire district.

HISTORY:

Add, L 1941, ch 640, eff April 21, 1941.

Notes to Decisions

Town may not spend money for purchase of fire equipment for general town use except where town fire district has been established pursuant to Chapter 226, Laws of 1916. 1945 Ops St Compt 287.

Town board may not legally pay, from general town moneys, a portion of the cost of fire apparatus for a town fire district, unless such moneys constitute surplus funds. 1946 Ops St Compt 97.

Agency Opinions

A fire district has no power to tax real property, no power to assess real property and no power to grant or withhold a real property tax exemption. 1976 NY Ops Atty Gen Dec 29.

A fire district commissioner may not hold the office of treasurer of the fire district but may hold the office of treasurer of a fire company. 1977 NY Ops Atty Gen March 2.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

18A NY Jur 2d Civil Servants and Other Public Officers and Employees § 62 .

26 NY Jur 2d Counties, Towns, and Municipal Corporations § 1107 .

§ 189. Fire inspection of property in contract areas

The chief officer of the fire department or fire company which is to furnish fire protection service in a fire district, fire alarm district or fire protection district under a contract for fire protection entered into pursuant to the provisions of subdivision twenty-two of section one hundred seventy-six, section one hundred eighty-three or section one hundred eighty-four of this chapter may inspect (1) any public building and (2) with the consent of the owner, any privately-owned building, located within the fire district, fire alarm district or fire protection district or the portion thereof required to be protected under such contract, for fire hazards, or such chief officer may delegate such power of inspection to an officer or member of such department or company.

The term "building," as used in this section does not include a multiple dwelling which may be inspected by such fire department or company under and pursuant to the provisions of subdivision four of section three hundred three of the multiple residence law.

The failure of any such officer or member to discover and properly report any such fire hazards or his or her neglect or omission to perform such duties shall not subject him or her, his or her fire department, fire company, or the city, village, fire district or town in which or of which he or she is a firefighter to any civil or other liability. Any such fire officer or member shall not be liable civilly for any act or acts done by him or her as a firefighter in the performance of such duties, except for wilful negligence or malfeasance, but the provisions of this section shall not relieve any such city, village, fire district, town, or fire company from liability, if any, for the negligent or wrongful acts of the officer or member in the actual performance of such duty.

HISTORY:

Add, L 1958, ch 762, § 1; amd, L 1959, ch 694, § 1, eff April 22, 1959; L 2018, ch 476, § 103, effective December 28, 2018.

Amendment Notes The 2018 amendment by ch 476, § 103, in the last paragraph, added "or her" wherever it appears; substituted "firefighter" for "fireman" in the first and second sentences, and substituted "of which he or she is" for "of which he is" in the first sentence.

Agency Opinions

Fire district commissioners of fire districts created under Town Law Article 11 have no authority to use the position title "Fire Marshal", which appears in a general law and several special laws applicable to specific positions in the fire service of particular cities. 1976 NY Ops Atty Gen May 5 (Informal), 1976 N.Y. AG LEXIS 109.

A fire district has no power to tax real property, no power to assess real property and no power to grant or withhold a real property tax exemption. 1976 NY Ops Atty Gen Dec 29.

A fire district commissioner may not hold the office of treasurer of the fire district but may hold the office of treasurer of a fire company. 1977 NY Ops Atty Gen March 2.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 176, 184.

Enforcement, CLS Mult R § 303.

Jurisprudences:

11 NY Jur 2d Buildings, Zoning, and Land Controls § 27 .

18A NY Jur 2d Civil Servants and Other Public Officers and Employees § 62 .

26 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 971, 1093, 1096 .

ARTICLE 11-A Joint Fire Districts in Towns and Villages

Section

189-a. Procedure

189-b. Sale of firehouse, land and apparatus

189-d. Establishment of district
189-e. Management of affairs of joint fire districts
189-f. Powers of board of commissioners
189-g. Appointment of district treasurer
189-h. Annual statement of expenditures and levy of taxes
189-i. Fire protection

HISTORY:
Add, L 1988, ch 241, § 1, eff July 8, 1988.

§ 189-a. Procedure

1. The town board of a town or the town boards of more than one town, and the board of trustees of an incorporated village or the boards of trustees of more than one incorporated village, as defined in the village law, located in said town or towns are hereby authorized to establish in such town or towns and village or villages a joint fire district for the purposes hereinafter stated and in the manner hereinafter provided, provided all of the territory in such joint fire district shall be contiguous.

2. (a) Whenever it shall appear to the participating municipalities to be in the public interest, the town board of such town and the board of trustees of such village shall hold a joint meeting at one location within the proposed joint district for the purpose of jointly proposing the establishment of a joint fire district.

(b) If at such joint meeting it is determined by a majority vote of each board to make such proposal, each such board shall, within thirty days thereafter, hold a joint public hearing at one location within the proposed joint district upon such proposal and shall cause notice of such public hearing to be published in a newspaper having general circulation in such town and village, at least once, and posted in five public conspicuous places in the town outside such village and in five public conspicuous places in the village, not less than ten days before the date of the hearing. In the event that the district maintains a website, one of the posting requirements may be fulfilled by posting such information on the website. Notice of such hearing also shall be served by such clerk upon the members of the town board and the members of the board of trustees of the village, by mail addressed to such members at their last known post office addresses, at least ten days before the date of the hearing. Such notice shall contain a brief description of the boundaries of the proposed joint fire district and of the objects and purposes for which it is proposed that a new district be created, and shall specify the single time when and place where such town and village boards will jointly meet to consider the proposal and to hear all persons interested in the establishment of the district. If, upon the establishment of a joint fire district, the joint fire district would become the sponsor of a service award program pursuant to section two hundred sixteen-b of the general municipal law, the notice of hearing shall so specify and contain a statement of the estimated annual cost of the service award program to the joint fire district; provided, however, that if, upon the establishment of a joint fire district, the joint fire district would become the sponsor of a service award program pursuant to section two hundred sixteen-b of the general municipal law, the resolutions establishing the district shall be submitted to referendum in each such town and village in the manner provided by article seven of this chapter or article nine of the village law, respectively.

(c) After such hearing, and upon evidence given thereat, and after considering the objections, if any, the town board of such town and the board of trustees of such village shall determine whether it is or is not in the public interest to establish such joint fire district, and, if it is determined to be in the public interest, subject to permissive referendum, such town board and board of trustees shall, by resolution, duly adopted by a majority of each board, establish such joint fire district; provided, however, that if, upon the establishment of a joint fire district, the joint fire district would become the sponsor of a service award program pursuant to section two hundred sixteen-b of the general municipal law, the resolutions establishing the district shall be submitted to referendum in each such town and village in the manner provided by article seven of this chapter or article nine of the village law, respectively.

(d) In all respects the provisions of article eleven of this chapter, not inconsistent herewith, shall apply to the establishment, operation and management of any joint fire district provided for by this section.

(e) In all respects the provisions of this article, not inconsistent herewith, shall apply to the operation and management of any joint fire district heretofore established pursuant to the unconsolidated laws.

3. If, subsequent to the joint meeting for the establishment of a joint fire district as provided in subdivision two of this section and before the establishment of such district, it is desired to include in such proposed district any portion of the territory of an adjoining town, the procedure shall be as follows:

(a) The town board of the town or towns and the board or boards of trustees of the villages which held such joint meeting and the town board of each adjoining town may hold a joint meeting for the purpose of jointly proposing the inclusion of the territory of such adjoining town in the proposed joint fire district.

(b) If at such meeting it is determined by a majority vote of each board to make such proposal, each such board shall, within thirty days thereafter, hold a joint public hearing upon such proposal and shall cause notice of such public hearing to be published in a newspaper having general circulation in each such town and village, at least once, and posted in five public conspicuous places in each such town outside each such village and in five public conspicuous places in each such village, not less than ten days before the date of the hearing. Notice of such hearing also shall be served by such clerk

upon the members of the town board or boards and the members of the board of trustees of the village or villages, by mail addressed to such members at their last known post office addresses, at least ten days before the date of the hearing. Such notice shall contain a brief description of the boundaries of the proposed joint fire district and of the objects and purposes for which it is proposed that a new district be created, and shall specify the time when and place where such town and village boards will meet to consider the proposal and to hear all persons interested in the establishment of the district.

(c) After such hearing, and upon evidence given thereat, and after considering the objections, if any, the town boards of such town and the board of trustees of such villages, shall determine whether it is in the public interest to establish such joint fire district and if it is determined to be in the public interest, subject to permissive referendum, such town boards and boards of trustees shall by resolution, duly adopted by a majority of each board, establish such joint fire district.

(d) In all respects the provisions of article eleven of this chapter, not inconsistent herewith, shall apply to the establishment and the operation and management of any joint fire district provided for by this section.

4. Any joint fire district formed pursuant to the provisions of this article may be extended from time to time to include contiguous territory except contiguous territory in a city. The procedure for extending the district shall be as follows:

(a) The town board of each town and the board of trustees of each village in which any portion of the district as proposed to be extended is located shall hold a joint meeting at one location for the purpose of jointly proposing the extension of the district.

(b) If at such meeting it is determined by a majority vote of each board to make such proposal, each such board shall, within thirty days thereafter, hold a joint public hearing at one location upon such proposal and shall cause notice of such public hearing to be published in a newspaper having general circulation in each affected town and village, at least once, and posted in five public conspicuous places in each affected town outside any affected village and in five public conspicuous places in each affected village, not less than ten days before the date of the hearing. Notice of such hearing also shall be served by such clerk upon the members of each town board and the members of each village board of trustees, by mail addressed to such members at their last known post office addresses, at least ten days before the date of the hearing. Such notice shall contain a brief description of the boundaries of the proposed extension of the joint fire district and of the objects and purposes for which it is proposed that the district be extended and shall specify the single time when and place where such town and village boards will jointly meet to consider the proposal and to hear all persons interested in the extension of the district. If, upon the extension of a joint fire district, the joint fire district would become the sponsor of a service award program pursuant to section two hundred sixteen-b of the general municipal law, the notice of hearing shall so specify and contain a statement of the estimated annual cost of the service award program to the joint fire district; provided, however, that if, upon the extension of a joint fire district, the joint fire district would become the sponsor of a service award program pursuant to section two hundred sixteen-b of the general municipal law, the resolutions establishing the districts shall be submitted in each such town and village in the manner provided by article seven of this chapter or article nine of the village law, respectively.

(c) After such hearing, and upon evidence given thereat, and after considering the objections, if any, the town board of each such affected town and the board of trustees of each such affected village shall determine whether it is or is not in the public interest to extend such joint fire district, and, if it is determined to be in the public interest, subject to permissive referendum, such town board and board of trustees shall, by resolution, duly adopted by a majority of each board, extend such joint fire district; provided, however, that if, upon the extension of a joint fire district, the joint fire district would become the sponsor of a service award program pursuant to section two hundred sixteen-b of the general municipal law, the resolutions establishing the districts shall be submitted in each such town and village in the manner provided by article seven of this chapter or article nine of the village law, respectively.

(d) A signed or certified copy of the determination extending the district shall be recorded in the office of the county clerk and, when so recorded, shall be presumptive evidence of the regularity and validity of the extension of the district and of the acts of the town board or boards and village board or boards of trustees relating thereto. A review of such determination may be had in the manner provided in section one hundred seventy-three of this chapter, except that the undertaking for costs and expenses shall run to such town or towns and village or villages and apply to the costs and expenses of each.

(e) In all respects the provisions of article eleven of this chapter, not inconsistent herewith, shall apply to the extension, operation and management of any joint fire district provided for by this section.

HISTORY:

Add, L 1988, ch 241, § 1, eff July 8, 1988; amd, L 1989, ch 121, § 1, eff June 2, 1989,2, eff June 2, 1989; L 2003, ch 62, § 17 (Part X), eff May 15, 2003; L 2004, ch 631, §§ 4, 5, eff April 24, 2005.

Amendment Notes:

2004. Chapter 631, § 5 amended:
Sub 2, par (c), by deleting a comma.
2004. Chapter 631, § 5 amended:
Sub 4, par (b), by deleting a comma.
2004. Chapter 631, § 5 amended:
Sub 4, par (c), by deleting a comma.

Notes to Decisions

Analysis

1. In general
2. Under former Unconsolidated Laws Ch 203 § 1

1. In general

The town board of a town and the board of trustees of a village located within the town are authorized to establish a joint fire district by resolution subject to permissive referendum. The members of the board of fire commissioners of a joint fire district may be appointed by the town board and village board of trustees or they may be elected pursuant to the provisions of Article 11 of the Town Law. 1990 Op St Compt 90-27.

Where there is proposed formation of joint fire district containing village located within 2 towns, both towns must participate in formation process. 2000 Op St Compt No. 2000-21.

2. Under former Unconsolidated Laws Ch 203 § 1

A joint fire department may be formed embracing a portion of a town of the second class and a portion of a village of the fourth class. The joint fire district may contract to furnish fire protection to exempt property outside of the district. 1953 Ops St Compt File #6288.

A fire district may be established which will embrace territory in an incorporated village pursuant to this chapter. A joint fire district is governed by a board of fire commissioners. 1955 Ops St Compt File #7135.

Once the method of selecting joint fire district commissioners has been established, an act of the Legislature would be necessary to change that method of selection. Town Law, section 185, dealing with the dissolution of fire districts also governs the dissolution of a joint fire district. The expenses of forming a joint fire district may, after the district's formation, be wholly borne by the district. 1968 Ops St Compt File #884.

Agency Opinions

Analysis

1. In general
2. Under former Unconsolidated Laws Ch 203 § 1

1. In general

There is no authority in the Consolidated Laws for the creation and operation of a fire district to include an existing village and an adjacent fire protection district and there is a specific statutory prohibition against it. However, Chapter 595 of the Laws of 1938, as amended, may apply, as may some other general but unconsolidated law or special act. 1976 NY Ops Atty Gen July 13.

The determination whether commissioners of a joint fire district are to be elected or appointed must be made at the time of establishment of the district. 1991 NY Ops Atty Gen I 91-44.

Positions of village mayor and fire commissioner of joint fire district established by that village are incompatible since statutory scheme governing joint fire districts gives towns and village boards substantial power to affect existence and structure of joint fire district. 2004 NY Ops Atty Gen I 04-6.

The positions of assistant fire chief of a joint fire district and county director of emergency services are compatible. 2017 N.Y. Op. Att'y Gen. No. 2017-2, 2017 N.Y. AG LEXIS 2.

2. Under former Unconsolidated Laws Ch 203 § 1

A joint fire district, in constructing a firehouse, is exempt from the application of site plan approval requirements contained in Town Law, § 274-a. 1978 Op St Compt File #886.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Filing of determination, § 173.

Jurisprudences:

26 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1011, 1012, 1015 .

27 NY Jur 2d Counties, Towns, and Municipal Corporations § 1153 .

§ 189-b. Sale of firehouse, land and apparatus

The board of trustees of a village or the commissioners of a fire district, all of the territory of which is embraced within the boundaries of a joint fire district established or extended pursuant to the provisions of this article, may by resolution authorize the sale or transfer of a firehouse (including the plot of land on which the building or fire district is situated), fire apparatus and fire equipment owned by such village or by such fire district to said joint fire district with or without consideration and, upon such terms and conditions as to such board of trustees or board of commissioners may deem fitting and proper.

HISTORY:

Add, L 1988, ch 241, § 1, eff July 8, 1988.

Notes to Decisions

Analysis

1. In general
2. Under former Unconsolidated Laws Ch 203 § 1 -c

1. In general

If the town board and village board determine that it is in the public interest to establish the joint fire district, they shall, by local law, dissolve the existing fire protection district. In addition, the village board of trustees may, by resolution, authorize the sale or transfer of the fire house and fire equipment owned by the village to the joint fire district with or without consideration and upon such terms and conditions as they deem proper. 1990 Op St Compt 90-27.

2. Under former Unconsolidated Laws Ch 203 § 1 -c

A village wholly within a joint fire district may sell its firehouse, apparatus and equipment to the joint district on terms and conditions it deems reasonable. Competitive bidding statutes do not apply in this case. 1968 Ops St Compt File #884.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

26 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1016, 1116 .

27 NY Jur 2d Counties, Towns, and Municipal Corporations § 1153 .

§ 189-d. Establishment of district

The clerk of such town or village designated by the town and village boards participating in the determination to establish or extend any joint fire district pursuant to this article shall, within ten days, cause a certified copy of the determination establishing or extending the district to be filed in the state department of audit and control at Albany, New York, and shall, within ten days, cause a certified copy of such determination to be recorded in the office of the county clerk, and when so recorded it shall be presumptive evidence of the regularity and validity of the creation of the district and of the acts of such boards relating thereto. A review of such determination may be had in the manner provided in section one hundred seventy-three of this chapter, except that the undertaking for costs and expenses shall run to such town and village and apply to the costs and expenses of each.

HISTORY:

Add, L 1988, ch 241, § 1, eff July 8, 1988.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

26 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1014, 1015, 1116 .

27 NY Jur 2d Counties, Towns, and Municipal Corporations § 1153 .

§ 189-e. Management of affairs of joint fire districts

Subject to the restrictions hereinafter established, the property and affairs of joint fire districts shall be under the management and control and in charge of a board of not less than three and not more than seven commissioners, appointed by the town board of the town or the town boards of the towns and the board of trustees of the village or the boards of trustees of the villages in joint session as hereinafter provided, or elected as provided in article eleven of this chapter, as may be determined by resolution adopted at the meeting for the establishment of the district in the same manner as the resolution for the establishment of the district is adopted; or as may be determined by a joint consolidation agreement or elector initiated consolidation plan in accordance with article seventeen-A of the general municipal law. In case it is determined that the commissioners shall be selected in the manner provided by article eleven of this chapter, the appointments as provided for in subdivision one of section one hundred seventy-four of this chapter shall be made by the town board, or, if the district includes territory in more than one town, by the town board of all of the towns at a joint session held at one location within the district and thereafter elections shall be held as provided in article eleven of this chapter except that the terms of the commissioners shall be as hereinafter provided. They shall be residents of such district and in case selection is made as provided in article eleven of this chapter there shall be no other residential requirement, but otherwise if there are an even number of commissioners not more than half at any time shall be residents of such village or villages and if there are an odd number, the number that are residents of such village or villages shall not exceed the number that are residents of such town or towns by more than one. First appointments hereunder shall be made in the following manner: If there be three commissioners, the term of one shall expire one year, of another two years and of the other three years from the then next ensuing thirty-first day of December, and thereafter one shall be appointed annually for a term of three years from the date of the expiration of the term of his predecessor. If there be four commissioners, the term of one shall expire one year, of another two years, of another three years, and of the other four years from the then next ensuing thirty-first day of December, and thereafter one shall be appointed annually for a term of four years from the date of the expiration of the term of his predecessor. If there be five commissioners, the term of one shall expire one year, of another two years, of another three years, of another four years, and of the other five years from the then next ensuing thirty-first day of December, and thereafter one shall be appointed annually for a term of five years from the date of the expiration of a term of his predecessor. If there be six commissioners, the term of one shall expire one year, of another two years, of another three years, of another four years, and of the remaining two, five years from the then next ensuing thirty-first day of December, and thereafter appointments shall be made for a term of five years from the date of the expiration of the term of each commissioner. If there be seven commissioners, the term of one shall expire one year, of another two years, of another three years, and of two of the others four years, and of the remaining two, five years from the then next ensuing thirty-first day of December, and thereafter appointments shall be made for a term of five years from the date of the expiration of the term of each commissioner. Such board of commissioners may employ necessary labor and assistants, at a compensation approved by such boards in joint session. Such commissioners shall receive no compensation for their services, but they and their employees shall be allowed and paid their necessary expenses, payable as expenses of the district.

HISTORY:

Add, L 1988, ch 241, § 1, eff July 8, 1988; amd, L 2009, ch 74, § 8, eff March 21, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

§ 18. Savings clause. Notwithstanding the repeal or amendment of any law by this act, nothing in this act shall be construed to impair the consolidation or dissolution of any local government entity pursuant to any such repealed or amended law if there was commenced in or for such local government entity prior to the effective date of this act a consolidation or dissolution proceeding pursuant to such law, in which event the provisions of such former law shall govern such proceeding as though such former law had not been repealed hereby.

Amendment Notes: 2009. Chapter 74, § 8 amended:

By adding the matter in italics.

Notes to Decisions

Once the joint fire district has been established, the property and affairs of the district are under the management and control of a board of fire commissioners which may have from 3 to 7 members. The board of commissioners may be appointed by the town board and the village board of trustees in joint session or may be elected in a manner provided in Article 11 of the Town Law. The determination of whether the board of commissioners is appointed or elected is made by the town and village boards "by resolution adopted at the meeting of the establishment of the district in the same manner as a resolution for the establishment of the district is adopted." If the commissioners are appointed, § 189-e of the Town Law provides that where there is an even number of commissioners, village residents may not constitute more than half the board, and where there is an odd number of commissioners, the number of village residents on the board may not exceed the number of town residents by more than one. 1990 Op St Compt 90-27.

Agency Opinions

The determination whether commissioners of a joint fire district are to be elected or appointed must be made at the time of establishment of the district. 1991 NY Ops Atty Gen I 91-44.

§ 189-f. Powers of board of commissioners

The board of commissioners shall have and exercise, with respect to such district, the applicable powers and duties of a board of fire district commissioners as prescribed by the town law, with respect to similar functions of a fire district in a town and all of the provisions of article eleven of this chapter shall be applicable to a joint fire district created pursuant to this article. Such powers and duties of the board of district commissioners are subject to the following restriction:

No real property or easement therein shall be acquired by the board of commissioners without the approval of the village board or boards and the town board or boards of each village or town in which any portion of the district is situated. But this restriction shall not apply if, at the meeting for the establishment of any such district hereafter established, a resolution to that effect is adopted in the same manner as the resolution for the establishment of the district is adopted.

HISTORY:

Add, L 1988, ch 241, § 1, eff July 8, 1988.

Agency Opinions

@(P)Positions of village mayor and fire commissioner of joint fire district established by that village are incompatible since statutory scheme governing joint fire districts gives towns and village boards substantial power to affect existence and structure of joint fire district. 2004 NY Ops Atty Gen I 04-6.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

26 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1047, 1116 .

27 NY Jur 2d Counties, Towns, and Municipal Corporations § 1153 .

§ 189-g. Appointment of district treasurer

The board of fire commissioners shall appoint to serve during its pleasure, a district treasurer, who shall receive and have the custody of the funds of the district and shall disburse the same for the purposes herein authorized on the order of the board of fire commissioners. The board of fire commissioners also shall appoint a district secretary, who shall have the custody of all the records, books and papers of the district. The secretary shall attend all meetings of the board of fire commissioners and act as clerk thereof, shall keep a complete and accurate record of the proceedings of each meeting; and shall have and exercise such additional duties as the board of fire commissioners may determine not inconsistent with law.

HISTORY:

Add, L 1988, ch 241, § 1, eff July 8, 1988.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

26 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1116, 1118 .

27 NY Jur 2d Counties, Towns, and Municipal Corporations § 1153 .

§ 189-h. Annual statement of expenditures and levy of taxes

1.

(a) The fiscal year of each joint fire district shall begin on the first day of January and end on the thirty-first day of December. For each fiscal year, the board of commissioners of each joint fire district shall prepare and adopt an annual budget in accordance with subdivisions two and three of section one hundred eighty-one of this chapter.

(b) Within three days after the adoption of the annual budget of a joint fire district, the fire district secretary shall prepare and deliver to the town clerk of each town in which the fire district is located two certified copies of the annual budget, and file a certified copy of the annual budget with the clerk of each village in which the joint fire district is located. Neither the town board, town supervisor, town clerk or any other officer or employee of any such town, nor the board of trustees, mayor, clerk, treasurer or any other officer or employee of any such village, shall make any change to the annual budget of the fire district.

(c) After the annual budget of the joint fire district has been affixed to the annual budget adopted by the town board and a certified copy presented to the board of supervisors of the county in which the town is situated as required by section one hundred fifteen of this chapter, the board of supervisors shall assess and levy upon the taxable real property within the joint fire districts the amounts to be raised by tax for the purposes of the respective districts as specified in such annual budgets and shall cause the amount so assessed and levied to be collected, in the same manner and at the same time and by the same officers as town taxes are assessed, levied and collected, provided, that when a joint fire district is located in more than one town, the amount to be raised by tax from the area of each such town in which the joint fire district is located shall be determined in accordance with subdivision (d) of this section. When such taxes are collected, the amount thereof shall be paid to the supervisor of the town and by him immediately paid to the treasurer of the joint fire district.

(d) If a joint fire district includes taxable property located in more than one town, the amount to be assessed, levied and collected upon the property within each of such towns shall be apportioned in accordance with section eight hundred six of the real property tax law.

2. In any case where a parcel of real property separately assessed on the town assessment roll shall be divided by the line of the joint fire district or of any zone established therein as provided in subdivision twenty-seven of section one hundred seventy-six of this chapter, it shall be the duty of the town assessors, after the valuation of the whole of such parcel shall have been fixed, to determine what proportion of such valuation is on account of that part of such parcel lying within the limits of the joint fire district or of such zone or zones, and the assessors shall enter such proportion separately on the assessment roll. The valuation of the real property

lying within such joint fire district or within such zone or zones, as so fixed and determined, shall be the valuation subject to taxation for the purposes of such joint fire district or of such zone or zones.

3. The treasurer of each joint fire district shall prepare and file annually in the office of the town clerk of each town in which any part of such joint fire district shall be located, and in the office of the state comptroller, a financial statement setting forth in detail the receipts and expenditures of such joint fire district. Such statement shall be filed in such offices within sixty days after the close of the fiscal year of the joint fire district.

HISTORY:

Add, L 1988, ch 241, § 1, eff July 8, 1988; amd, L 1989, ch 121, § 3, eff June 2, 1989; L 2006, ch 644, § 2, eff Aug 16, 2006; L 2007, ch 555, § 9, eff Aug 15, 2007 (see 2007 note below).

Editor's Notes: Laws 2007, ch 555, § 10, eff Aug 15, 2007, provides as follows:

§ 10. This act shall take effect immediately and shall first apply to fire district budgets prepared for fiscal years commencing on or after January 1, 2008; provided, that the amendments to section 209-z of the general municipal law, made by section two of this act, shall take effect on the same date and in the same manner as chapter 237 of the laws of 2006 takes effect.

Amendment Notes:

2007. Chapter 555, § 9 amended:

Sub 1, par (a), by deleting "The" and "annually" and "and file with the budget officer of each town and village in which the joint fire district is located, in accordance with section one hundred five of this chapter, detailed estimates in writing of the amount of revenues to be received and expenditures to be made during the next fiscal year for the purposes of such joint fire district and within the limitations specified in this article. The town board or the board of trustees of the village shall make no change in the estimate submitted by the board of fire commissioners of any joint fire district".

2007. Chapter 555, § 9 amended:

Sub 1, par (c), by deleting "has been" and "and the board of trustees" and "district" and "budget".

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

26 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1114, 1116, 1118, 1129 .

27 NY Jur 2d Counties, Towns, and Municipal Corporations § 1153 .

§ 189-i. Fire protection

The board of fire commissioners shall provide fire protection throughout the entire district and for that purpose may accept the services of any volunteer fire department or company organized and operating within the village, or if the commissioners are unable to provide such fire protection by volunteer services, it may employ and fix the compensation of such firefighters as may be necessary to provide such protection. Moneys, if any, paid to firefighters shall be deemed a part of the cost of maintenance and operation of the district.

HISTORY:

Add, L 1988, ch 241, § 1, eff July 8, 1988.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

26 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1047, 1116 .

27 NY Jur 2d Counties, Towns, and Municipal Corporations § 1153 .

ARTICLE 12 District and Special Improvements

Section

195. Recording of determination; review by certiorari
198. Powers of town boards with respect to improvement districts
202-c. Dissolution and diminishing area of certain districts

HISTORY:

Add, L 1932, ch 634.

§ 195. Recording of determination; review by certiorari

1. The town clerk shall cause a certified copy of the determination or order of the town board adopted pursuant to the provisions of this article, or adopted pursuant to the provisions of article seventeen-A of the general municipal law, establishing, extending, dissolving or diminishing any district, consolidating districts or increasing the maximum amount proposed to be expended for the improvement in any district or extension thereof, or determining to construct any improvement authorized by this article, to be duly recorded in the office of the clerk of the county in which the town is located, within ten days after the adoption of such order or determination by the town board, and when so recorded such determination or order shall be presumptive evidence of the regularity of the proceedings for the establishment, extension, dissolution or diminution of such district, of the proceedings instituted for the construction of such improvement and of all other action taken by said town board in relation thereto.

Within ten days after the adoption of a determination or order by the town board establishing, extending, dissolving or diminishing a district, or consolidating districts, the town clerk shall cause a certified copy thereof to be filed in the office of the state department of audit and control at Albany, New York.

2. Any interested person aggrieved by any final determination or order made pursuant to the provisions of this article may review the same by certiorari provided that the application for such order of certiorari is made within thirty days from the date of the recording of the certified copy of the order or determination in the office of the clerk of the county. The said determination or order shall be final and conclusive unless application has been made for review by certiorari within thirty days from the time of recording thereof. No review shall be had unless at the time of the application for a certiorari order the interested person seeking the review shall give an undertaking approved by the supreme court, or a justice thereof, as to form, amount and sufficiency or sureties, that, in the event of failure to modify said

final determination or order he or they will pay to the town board, all such costs and expenses as are incurred by it on account of the said certiorari proceedings, as shall be determined by the court. In the event that upon such review there shall be any modification by the court of said final determination or order the court shall direct the modification thereof by order which shall be final and conclusive and such town board shall cause such order to be recorded and filed in the same places and manner as was the determination or order appealed from.

HISTORY:

Add, L 1932, ch 634; amd, L 1940, ch 338, § 3; L 1941, ch 263, § 6; L 1942, ch 515, § 2; L 1947, ch 553, §§ 3, 4, eff April 1, 1947; L 1953, ch 869, § 1; L 1954, ch 522, eff April 7, 1954; L 2009, ch 74, § 9, eff March 21, 2010.

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

§ 18. Savings clause. Notwithstanding the repeal or amendment of any law by this act, nothing in this act shall be construed to impair the consolidation or dissolution of any local government entity pursuant to any such repealed or amended law if there was commenced in or for such local government entity prior to the effective date of this act a consolidation or dissolution proceeding pursuant to such law, in which event the provisions of such former law shall govern such proceeding as though such former law had not been repealed hereby.

Notes to Decisions

N.Y. Town Law § 195(2)'s requirement that an interested person aggrieved by a town's final determination or order establishing or extending an improvement district must seek judicial review within 30 days did not bar a power company's challenges to the impositions, by three towns, of special ad valorem levies to finance various special districts because § 195(2) did not bar a plenary action attacking a town's authority or jurisdiction to impose a special ad valorem levy on real property for a special district, which was the nature of the company's challenges. Matter of Niagara Mohawk Power Corp. v Town of Watertown, 6 N.Y.3d 744, 810 N.Y.S.2d 399, 843 N.E.2d 1138, 2005 N.Y. LEXIS 3428 (N.Y. 2005).

In taxpayer's action to review assessment for benefits arising because lands assessed are in water district, water commissioners cannot be joined nor can proceeding review formation of water district. People ex rel. Smith v Parker, 246 A.D. 674, 283 N.Y.S. 343, 1935 N.Y. App. Div. LEXIS 9649 (N.Y. App. Div. 1935).

A motion to dismiss a petition, on grounds of lack of jurisdiction because of late filing of the order referred to in subd. 1 of this section, will not be granted. Hempstead v Listengart, 275 A.D. 953, 90 N.Y.S.2d 664, 1949 N.Y. App. Div. LEXIS 5228 (N.Y. App. Div. 1949).

Where the proceeding is commenced within the 30 day period prescribed by subd 2 of the above statute, it brings up for review the preliminary order by which jurisdiction to make the final order was obtained. A bond which may be required under subd. 2 of this section as a condition precedent to obtaining review of a determination establishing a water district is intended to cover only security for "cost and expenses", not possible damages, and requiring a bond in the amount of $140,000 is grossly excessive. Tenants by the entirety of property within the proposed district have standing to maintain a proceeding to review the determination of the town board establishing such district since they are "interested persons" within the meaning of subd 2 of the above statute. Reister v Town Board of Fleming, 24 A.D.2d 548, 261 N.Y.S.2d 504, 1965 N.Y. App. Div. LEXIS 3801 (N.Y. App. Div. 4th Dep't 1965), aff'd, 18 N.Y.2d 92, 271 N.Y.S.2d 965, 218 N.E.2d 681, 1966 N.Y. LEXIS 1171 (N.Y. 1966).

The mere filing of an order establishing a sewer district extension does not satisfy the requirement of recording provided in § 195 of the Town Law. Mareno v Kibbe, 32 A.D.2d 825, 302 N.Y.S.2d 324, 1969 N.Y. App. Div. LEXIS 3649 (N.Y. App. Div. 2d Dep't 1969).

Property owners' causes of action, including actions for declaratory judgment and injunctive relief, challenging town's expansion of its sewage treatment facility were time-barred where (1) town board authorized and approved expansion by resolutions in 1988, 1989, and 1990, (2) owners did not challenge those decisions until 1993 or later, well beyond 30-day statute of limitations, and (3) owners did not commence Article 78 proceeding, which CLS Town § 195(2) provides as exclusive method for such challenge. Herzog v Town of Thompson, 251 A.D.2d 917, 674 N.Y.S.2d 830, 1998 N.Y. App. Div. LEXIS 7729 (N.Y. App. Div. 3d Dep't), app. dismissed, 92 N.Y.2d 943, 681 N.Y.S.2d 471, 704 N.E.2d 224, 1998 N.Y. LEXIS 4002 (N.Y. 1998).

City not entitled to order of certiorari to review Town Board's action in adopting resolution approving establishment of water district and seeking State Comptroller's approval of creation thereof since resolution not such final determination entitling person aggrieved to review. Rochester v Town Board of Livonia, 56 N.Y.S.2d 850, 185 Misc. 518, 1945 N.Y. Misc. LEXIS 2134 (N.Y. Sup. Ct. 1945).

Remedy under this section of direct review by certiorari is full, complete, expeditious, exclusive and forbids collateral attack. Gusdore Corp. v Michaels, 13 Misc. 2d 762, 180 N.Y.S.2d 375, 1958 N.Y. Misc. LEXIS 2619 (N.Y. Sup. Ct. 1958), aff'd, 8 A.D.2d 663, 185 N.Y.S.2d 106, 1959 N.Y. App. Div. LEXIS 9037 (N.Y. App. Div. 3d Dep't 1959).

A proceeding challenging a town board resolution establishing a garbage district and authorizing the issuance of bonds for the construction of a solid waste transfer station, on the basis that certain requirements of the State Environmental Quality Review Act had not been complied with, would be governed by the 30-day limitation period of Town Law §§ 195, 209-g, and not by the four month period of CPLR § 217, since the Town Law statutes require that a review of the establishment of a district, or a determination to construct an improvement, must be made by way of certiorari within 30 days from the recording of the determination in the county clerk's office. Andzel v Gaylord, 126 Misc. 2d 406, 482 N.Y.S.2d 683, 1984 N.Y. Misc. LEXIS 3632 (N.Y. Sup. Ct. 1984).

Property located within a garbage and refuse district is liable for the payment of rates, charges and fees, whether in actuality benefited or not, if the affirmative determination of the town board has become final after appropriate procedure. 1954 Ops St Compt File #6772.

Town clerk must cause to be filed with State Comptroller certified copy of each determination or order establishing or extending district under CLS Town Articles 12 or 12-A, irrespective of whether establishment or extension is subject to prior approval of State Comptroller. 2000 Op St Compt No. 00-3.

When water district was established more than 3 years previously, no improvement has been constructed for district or services provided by district and no indebtedness is outstanding to accomplish purposes of district, district may be dissolved (subject to public hearing requirements) if town board's determines dissolution to be in public interest; certified copies of board's determination must be recorded in county clerk's office and filed with State Comptroller within 10 days of board's determination. 2002 Op St Compt No. 02-8.

Agency Opinions

If two towns, by contract, operate a dump or sanitary landfill project, all residents of each town, including the residents of any village therein, must be given the same rights to use the project, and on the same basis, unless an improvement district for this purpose has been formed in only a part of a town or an agreement has been entered into between a town and a village under General Municipal Law § 120-v. 1977 NY Ops Atty Gen Feb 16.

The Grist Mill Water District was established upon adoption by the town board of the resolution required by section 194(2)(b) of the Town Law. If the issuance of indebtedness is proposed to

finance the cost of a district, establishment does not occur until the town board adopts an order following the approval of the State Comptroller. 1980 NY Ops Atty Gen Dec. 16 (informal).

A water district is responsible for the accuracy, operation and maintenance of water meters installed in residences to measure water usage. 1978 Op St Compt File #553.

The Port Washington Water Pollution Control District may not provide a credit to certain property owners within the District who have paid special assessments for establishment and maintenance of the District although they are not connected to the sewer system. 1981 Op St Compt File #81-80.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 190-c, 207.

Recording of determination; review by certiorari, § 209-g.

Jurisprudences:

25 Am Jur 2d, Drains and Drainage Districts § 17.

70C Am Jur 2d, Special or Local Assessments §§ 146 et seq.

5B Am Jur Pl & Pr Forms (Rev ed), Certiorari, Forms 73 et seq.

§ 198. Powers of town boards with respect to improvement districts

The town board of every town, except as otherwise provided by law, shall have authority to and may exercise the following powers with respect to improvement districts, heretofore or hereafter established, subject to the provisions of this article:

* * * * *

3. Water districts.

* * * * *

(b) Purchase and sale of water. The town board may contract with any person or corporation, municipal or otherwise, or with a town or county on behalf of a water district, for a supply of water, for a term not to exceed forty years, and shall have the power and authority to resell said water to the inhabitants and consumers in said water district and may use such portion thereof within the district as it may see fit and proper for public purposes and provide for the payment as a town charge of that portion of the cost of said water used by the town. The town board may also sell water for the benefit of such water district to municipalities, water districts, water supply districts and fire districts, and for fire purposes to fire protection districts, fire alarm districts and for "unprotected areas" pursuant to section one hundred eighty-four-a of this chapter, but the town board shall not supply water of such water district to that portion of any fire district, fire protection district, fire alarm district or any such "unprotected area" which shall be included within the boundaries of another water district. The town board, in its discretion, may permit the use of water from hydrants of a water district for fire purposes without charge in all or any part of the area of a fire district, fire protection district, fire alarm district, or "unprotected area", which is wholly or partly included within the area of such water district. The town board may permit any person or corporation owning real estate outside of the water district to use water from a district system for a rental, subject to the restrictions to be prescribed by said board, provided, however, that no such use shall be permitted outside of the town in which such district is located if such territory is served by another water district, a water supply company, city, village or joint water works system unless the approval of the water power and control commission is first obtained. The town board shall not sell nor permit the use of water under this section outside of the district if such use will reduce the supply of water so that it will not be sufficient for the district affected or its inhabitants.

* * * * *

HISTORY:

Add, L 1932, ch 634, eff May 3, 1933; amd, L 1933, ch 645; L 1935, ch 915, § 4; L 1937, ch 495, § 15; L 1938, ch 634, §§ 2–4, eff April 9, 1938; L 1939, ch 589, §§ 1, 2; L 1940, ch 365; L 1940, ch 599, §§ 4–6; L 1940, ch 662, eff April 19, 1940; L 1941, ch 263, §§ 7, 8, 10–12, eff April 11, 1941; L 1942, ch 674; L 1943, ch 184; L 1943, ch 345, § 1; L 1945, ch 797, § 1; L 1946, ch 325; L 1946, ch 709, eff April 10, 1946; L 1947, ch 760, § 3, eff April 9, 1947; L 1950, ch 399; L 1951, ch 765, §§ 5–7, eff May 1, 1951; L 1952, ch 76, § 2; L 1952, ch 773, § 1; L 1952, ch 775; L 1953, ch 740; L 1953, ch 858, § 3, eff April 20, 1953; L 1954, ch 269, § 4, eff March 26, 1954; L 1955, ch 345, § 5, eff April 15, 1955; L 1955, ch 729, § 2, eff April 27, 1955; L 1956, ch 433; L 1957, ch 777; L 1959, ch 30, §§ 2–6; L 1960, ch 750; L 1961, ch 789, § 1, eff April 22, 1961; L 1962, ch 250; L 1962, ch 320, § 7, eff April 4, 1962; L 1962, ch 538, § 3, eff April 14, 1962; L 1962, ch 725; L 1963, ch 420, § 7, eff Jan 1, 1964; L 1963, ch 520, § 7, eff April 1, 1964; L 1963, ch 764; L 1964, ch 61, eff March 2, 1964; L 1966, ch 945, § 3, eff Aug 1, 1966; L 1967, ch 602, § 2, eff April 24, 1967; L 1968, ch 420, § 303, eff May 31, 1968; L 1968, ch 722, § 2, eff Sept 1, 1968; L 1968, ch 812, § 1; L 1969, ch 1049, § 37, eff Jan 1, 1971; L 1970, ch 798, § 1, eff May 12, 1970; L 1972, ch 72, § 1, eff March 21, 1972; L 1973, ch 136, §§ 2, 3, eff April 3, 1973; L 1973, ch 326, §§ 4, 5, eff May 14, 1973; L 1973, ch 672, § 1, eff June 11, 1973; L 1980, ch 388, § 8, eff June 23, 1980; L 1984, ch 622, § 24, eff July 27, 1984; L 1988, ch 24, § 3, eff Jan 1, 1989; L 2000, ch 37, § 21, eff Sept 1, 2000; L 2009, ch 409, § 1, eff Aug 26, 2009; L 2012, ch 378, § 3, eff Aug 17, 2012.

Editor's Notes: Laws 2009, ch 409, § 3, eff Aug 26, 2009, provides as follows:

§ 3. Nothing in this act shall be construed to impair the validity of any action taken by any public official prior to the time this act shall take effect.

Amendment Notes: 2012. Chapter 378, § 3 amended:

By adding sub 10-g.

2009. Chapter 409, § 1 amended:

By redesignating former sub 9, pars (b)–(d) as sub 9, par (c)–(e), respectively.

By adding sub 9, par (b).

Sub 9, par (c) by adding the matter in italics.

Sub 9, par (d) by adding the matter in italics.

Sub 9, par (e) by deleting at fig 1 "one hundred and thirty-five" and adding the matter in italics.

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I. Generally

1. In general

Corporation was entitled to reimbursement of sewer and water tap-in fees it paid without protest under town resolutions that were subsequently declared void since (1) there was direct threat to corporation's property rights in that it could not obtain building permit for scheduled work unless it paid tap-in fees in addition to building permit fee, (2) corporation commenced action to declare resolutions void shortly after tap-in fees were paid, and (3) town would be unjustly enriched if entitled to retain tap-in fees. Video Aid Corp. v Town of Wallkill, 203 A.D.2d 554, 610 N.Y.S.2d 610, 1994 N.Y. App. Div. LEXIS 4337 (N.Y. App. Div. 2d Dep't 1994), rev'd, vacated, 85 N.Y.2d 663, 628 N.Y.S.2d 18, 651 N.E.2d 886, 1995 N.Y. LEXIS 1038 (N.Y. 1995).

Towns generally are not required to provide sidewalks or drainage, but, in a case where public health, safety and welfare will be served, issuance of building permits may be conditioned upon the making of "suitable improvements" on streets adjacent to the lot for which the building permit is sought and propriety of imposing such conditions presents issues of fact for determination at trial. Catalfamo v Zirk, 42 Misc. 2d 429, 248 N.Y.S.2d 315, 1964 N.Y. Misc. LEXIS 1949 (N.Y. Sup. Ct.), rev'd, 22 A.D.2d 802, 254 N.Y.S.2d 186, 1964 N.Y. App. Div. LEXIS 2825 (N.Y. App. Div. 2d Dep't 1964).

Town board may establish district for purpose of acquiring system previously constructed. 1953 Ops St Compt File #6038.

Where real property is divided by the boundary line of an improvement district, only the value of the part lying within the district is subject to taxation for district purposes. 1974 Ops St Compt File #410.

Town may not establish electrical power district either by local law or pursuant to provisions of CLS Town Arts 12 or 12-A, but town may operate public utility service serving less than entire town if town board determines that such system will nonetheless benefit entire town and serve town purpose. 1987 Op St Compt No. 87-44.

Town board may restrict use of facilities of park district to district residents. 1988 Op St Compt No 88-22.

Town board is without authority to gratuitously transfer personal property to sewer district so that personal property may be sold to generate revenue for district; town may not adopt local law authorizing such gratuitous transfer. 1995 Op St Compt No. 95-17.

Town board, which provides emergency medical service, general ambulance service, or combination thereof on town-wide basis or in ambulance district, may fix schedule of municipal fees for charges to be paid by persons requesting use of those services; absent action by town board to fix such schedule of fees for charges for services to be provided on town-wide basis or within ambulance district, persons within town or ambulance district must receive those services without fee or charge. 1998 Op St Compt No. 98-9.

Town board, on behalf of water district, may establish schedule of water rates including classification under which senior citizens meeting certain income criteria are charged at reduced rate. Ops St Compt 88-57.

2. Leases

Town's agreement with county water authority for construction and retail lease of water system facilities, and operation of all town water districts, was not invalid although its term exceeded maximum 40-year statutory term under CLS Town § 198(12)(b), as plaintiffs failed to show that such illegality amounted to actionable waste or injury, or that town thereby ceded control of its water system, where water authority was obligated to return all leased property at expiration of agreement, and town was afforded opportunity to purchase at cost, less depreciation, any replacements or improvements to which water authority had title. Agreement did not effectuate sale of town's water system without compensation in violation of CLS Town § 198(12)(b) where water authority undertook to make improvements costing more than $3 million and was obligated to operate and maintain town's water system at its own expense. Also, agreement did not abrogate CLS Town § 198(12)(c) on ground that it would generate no proceeds, as statute does not require that lease generate proceeds, but rather provides that proceeds realized (if any) must be applied to satisfy outstanding debt on particular property or facilities being leased. Langdon v Town of Webster, 270 A.D.2d 896, 706 N.Y.S.2d 547, 2000 N.Y. App. Div. LEXIS 3413 (N.Y. App. Div. 4th Dep't), app. denied, 95 N.Y.2d 766, 716 N.Y.S.2d 641, 739 N.E.2d 1146, 2000 N.Y. LEXIS 2944 (N.Y. 2000).

If property leased by a town to a corporation were not part of a public improvement, the property could be leased by the town subject only to a permissive referendum. Town of Islip was not required to comply with this section before leasing land under the waters of Great South Bay for planting and cultivating shellfish, since land was proprietory in nature and did not change its character because the patent was granted by the state rather than the king or a colonial governor. Bevelander v Islip, 17 Misc.

2d 819, 185 N.Y.S.2d 508, 1959 N.Y. Misc. LEXIS 4221 (N.Y. Sup. Ct. 1959).

North Elba Park Commission may, subject to approval of town board, let or lease property to school district without public hearing or referendum. 1965 Ops St Compt File #742.

Separate board of commissioners which governs town water district under CLS Town Art 13, with approval of town board and after complying with public hearing requirements, may enter into lease to permit mobile communications company to use portion of district's real property that is not needed for district purposes, even though remainder of such property may be so needed; lease (1) should contain provision reserving district's right to cancel if leased portion of property is needed for district purposes at future date, (2) should contain other provisions as district deems necessary to ensure that remainder of property may be properly used for district purposes, (3) should be for reasonable term which may bind successor governing boards, and (4) should be for best price obtainable or most beneficial terms and conditions in public interest. 1992 Op St Compt No. 92-23.

Town water district with separately elected board of commissioners is not required to utilize competitive bidding process when selling vehicles that are no longer needed for district purposes; however, method of sale chosen should be one that local officials believe will yield best price or maximum financial benefits. 2010 Op St Compt No. 10-2.

II. Specific Districts

A. Fire Districts

3. In general

Section 184-a of the Town Law does not apply to fire districts. Taxes levied for the purpose of said section 184-a are assessed and levied upon an "ad valorem" basis. A town board may not install fire hydrants unless such hydrants are installed as part of the water system of a water district. 1947 Ops St Compt 237.

4. Hydrants, generally

Water commissioners must charge hydrant rentals to fire district, though both districts co-terminous. 1945 Ops St Compt 396.

A water district may contract with a fire district for the purchase of water and the rental of hydrants for use in protecting against fires. 1946 Ops St Compt 391.

If a board of water commissioners of a water district, created under and pursuant to the Town Law, has been delegated power to sell water and rent hydrants to a fire district, it may enter into a contract for such sale and rental as provided in subdivision 3(b) of section 198 of the Town Law. In the absence of such contract it has no authority to permit the use of such water by the fire district. 1947 Ops St Compt 379.

A town board may not permit the use of water and hydrants for fire protection purposes in a water district unless a contract for the purchase of water and the rental of hydrants has been made. There is no statutory provision indicating the basis for fixing such price although it would not seem reasonable that the town board should be permitted to fix an exorbitant figure. 1952 Ops St Compt File #5803.

A town board has no authority to contract, on behalf of a water supply district, for the erection and maintenance of fire hydrants for a term to exceed five years. 1953 Ops St Compt File #5971.

The board of fire commissioners of a fire district may contract with a village for a term not to exceed five years for the erection and maintenance of hydrants on the village supply line running through the fire district. The cost of such contract would be a general district charge unless the district were zoned. A water supply district could be established to accomplish the same purpose as zoning of the fire district. 1953 Ops St Compt File #6185.

In the absence of a contract, the town board may not withhold hydrant rentals from funds due a fire company for fire protection. 1954 Ops St Compt File #6903.

No water district may permit a fire district to use its fire hydrants until a contract had been made and the town board may not evade this requirement by charging a nominal amount only. 1955 Ops St Compt File #7753.

Rental of fire hydrants is not a general town charge. 1957 Ops St Compt File #274.

A town board may not furnish water for fire protection by rental of hydrants, as a general town charge. 1957 Ops St Compt File #352.

As a possible solution for the problem created by the hydrant charge being assessed against the entire area of the fire protection district, those residents requesting the hydrant service might form a water district or a water supply district. 1967 Ops St Compt File #363.

5. —Location of hydrants

A town board may, in its discretion, change the location of a hydrant in a water district, at the expense of the district. 1955 Ops St Compt File #7283.

The board of fire commissioners of a fire district may not contract with a water district for erection of a hydrant on school district property, since water district lacks authority to make such installation. 1955 Ops St Compt File #7315.

B. Garbage And Refuse Districts

6. In general

Property owners within residential district of town are entitled to judgment enjoining town and members of town board from erecting garbage disposal plant on property of town situated in zoning residence "A" district in violation of zoning ordinance enacted pursuant to former § 141-c, subd. 18, under which property owners have acquired vested rights. Disposal of garbage and refuse constitutes corporate and not governmental function of town. O'Brien v Greenburgh, 239 A.D. 555, 268 N.Y.S. 173, 1933 N.Y. App. Div. LEXIS 8096 (N.Y. App. Div. 1933), aff'd, 266 N.Y. 582, 195 N.E. 210, 266 N.Y. (N.Y.S.) 582, 1935 N.Y. LEXIS 1463 (N.Y. 1935), limited, New Rochelle v State, 19 A.D.2d 674, 241 N.Y.S.2d 272, 1963 N.Y. App. Div. LEXIS 3478 (N.Y. App. Div. 3d Dep't 1963), disapproved, In re County of Monroe's Compliance with Certain Zoning & Permit Requirements, etc., 72 N.Y.2d 338, 533 N.Y.S.2d 702, 530 N.E.2d 202, 1988 N.Y. LEXIS 2697 (N.Y. 1988).

Town sanitation commission's denial of petitioner's application to operate solid waste collection business was not arbitrary and capricious, or abuse of discretion under town code, in view of evidence that petitioner's parent company, which solely controlled petitioner's operations, had violated local and federal regulations concerning waste collection in numerous states. Browning-Ferris Indus. v Danahy, 210 A.D.2d 477, 620 N.Y.S.2d 1004, 1994 N.Y. App. Div. LEXIS 13123 (N.Y. App. Div. 2d Dep't 1994).

Pursuant to N.Y. Town Law § 198(9), a town improvement district could only enter into a contract by action of the town board. Therefore, the town improvement district's motion to dismiss a service provider's breach of contract action because of the provider's failure to file a notice of claim was granted because the appropriate defendant was the town and, irrespective of the defendant named, a notice of claim was required under N.Y. Town Law § 65(3). Covanta Niagara, L.P. v Town of Amherst Garbage & Refuse Dist. No.1, 840 N.Y.S.2d 689, 16 Misc. 3d 656, 2007 N.Y. Misc. LEXIS 4095 (N.Y. Sup. Ct. 2007), aff'd, 49 A.D.3d 1295, 853 N.Y.S.2d 518, 2008 N.Y. App. Div. LEXIS 2208 (N.Y. App. Div. 4th Dep't 2008).

A town board may, on its own motion, and on behalf of a refuse and garbage district, increase the services to be supplied within the district to include the collection of rubbish as well as garbage so long as the total annual expenditure for all services supplied does not exceed the maximum amount, if any, stated in the petition for the establishment of the district. 1953 Ops St Compt File #6385.

The commissioners of a sanitary district (garbage and refuse district) operating pursuant to the provisions of Chapter II, Title I, Article 1 of the Nassau County Civil Divisions Act may enact a sanitary ordinance providing for penalties for its willful disobedience. 1966 Ops St Compt File #459.

A town board may not contract with a private landfill operator for collection and disposal of refuse on lands the town has not acquired pursuant to statute, and retains no control over the

operation and services to be rendered. 1972 Ops St Compt File #95.

A town board, on behalf of a refuse and garbage district, may contract with villages located within the town, but excluded from the district, for the collection of village refuse; the town board's resolution authorizing the contract would not be subject to referendum. 1991 Op St Compt No. 91-14.

7. Budgeting matters

Annual budget adopted for a certain year need not provide for entire amount due under a contract for garbage removal where contract runs until April 1st of the next year. 1955 Ops St Compt File #7336.

The annual budget and assessment roll of a refuse and garbage district, the cost of which is assessed on the benefit basis, is subject to the public hearing required by section 202-a of the Town Law. A unit basis charge imposed against users of the service does not require such a hearing. 1972 Ops St Compt File #894.

8. Exclusive contracts

Local law mandating that all solid waste processed or otherwise handled within locality be processed at designated facility constituted valid exercise of locality's police power. Nor did local law constitute unlawful taking of property in violation of due process rights of operators of solid waste transfer station since operators could still operate recycling facility at their site within locality and were thus not deprived of all economically viable uses of their property; while operators had some vested interest in their permit to operate solid waste transfer station, expiration of that permit rendered moot any claim that local law retrospectively diminished or retroactively invalidated their vested rights. Clarkstown v C&A Carbone, 182 A.D.2d 213, 587 N.Y.S.2d 681, 1992 N.Y. App. Div. LEXIS 10378 (N.Y. App. Div. 2d Dep't), app. denied, 80 N.Y.2d 760, 591 N.Y.S.2d 138, 605 N.E.2d 874, 1992 N.Y. LEXIS 3848 (N.Y. 1992), rev'd, 511 U.S. 383, 114 S. Ct. 1677, 128 L. Ed. 2d 399, 1994 U.S. LEXIS 3477 (U.S. 1994).

A town may not enter into a contract whereby exclusive collection and removal privileges of garbage and waste from premises occupied by residents of the town may be given to one contractor. 1955 Ops St Compt File #7743.

9. Rates, charges and fees, generally

Where party is precluded from receiving any garbage collection services from town, there is no basis for town to impose garbage collection tax on party. Condominium homeowner's association was entitled to declaratory judgment that imposition of town garbage collection taxes against association was improper where town resolution that allowed development of condominium made garbage collection sole responsibility of association and prohibited association from requesting or petitioning town to provide garbage collection services; there was no merit to town's contentions (1) that garbage collection services existed and had been refused by association, since record was devoid of evidence that town resolution had been rescinded or that town ever offered to provide garbage collection services to association, and (2) that, by agreeing to town resolution provision regarding garbage collection, condominium's developer intended to continue imposition of tax and waive collection of services, since record did not support such interpretation of provision. Where imposition of garbage collection tax against condominium homeowner's association was held to be improper, association was entitled to refund of taxes paid for period starting on date that association's attorney notified town attorney by letter that it would seek refund of taxes, but not for period prior to that date, since there was no evidence that association paid taxes under duress. Landmark Colony at Oyster Bay Homeowners' Ass'n v Oyster Bay, 145 A.D.2d 542, 536 N.Y.S.2d 96, 1988 N.Y. App. Div. LEXIS 13669 (N.Y. App. Div. 2d Dep't 1988).

Local law mandating that all solid waste processed or otherwise handled within locality be processed at designated facility did not amount to unreasonable, discriminatory burden on interstate commerce as applied to operators of solid waste transfer station, even though garbage is article of commerce within meaning of Commerce Clause, since (1) Commerce Clause protects interstate market, not particular interstate firm, (2) local law imposed no special fees, taxes, prohibitions or duties on those transporting out-of-state articles of commerce but instead applied evenhandedly to all solid waste processed within locality, regardless of point of origin, and (3) $11 difference between locality's "tipping" fee and tipping fee charged by instant operators had no more than incidental effect on interstate flow of solid waste. Clarkstown v C&A Carbone, 182 A.D.2d 213, 587 N.Y.S.2d 681, 1992 N.Y. App. Div. LEXIS 10378 (N.Y. App. Div. 2d Dep't), app. denied, 80 N.Y.2d 760, 591 N.Y.S.2d 138, 605 N.E.2d 874, 1992 N.Y. LEXIS 3848 (N.Y. 1992), rev'd, 511 U.S. 383, 114 S. Ct. 1677, 128 L. Ed. 2d 399, 1994 U.S. LEXIS 3477 (U.S. 1994).

Court erred in granting a homeowners association (HOA) summary judgment and declaring that garbage disposal taxes a town imposed on HOA members pursuant to N.Y. Town Law 198(9) were invalid under N.Y. Real Prop. Law § 102(14); although the town did not collect the members' garbage, there was a triable issue of fact as to whether the members received the benefit of other services provided by the town's solid waste disposal district. Landmark Colony at Oyster Bay Homeowners Assn., Inc. v Town of Oyster Bay, 91 A.D.3d 726, 936 N.Y.S.2d 301, 2012 N.Y. App. Div. LEXIS 356 (N.Y. App. Div. 2d Dep't 2012).

Property located within a garbage and refuse district is liable for the payment of rates, charges and fees, whether in actuality benefited or not, if the affirmative determination of the town board has become final after appropriate procedure. 1954 Ops St Compt File #6772.

The commissioners of a sanitary district can provide for such extra services as may be necessary to properly care for the disposal of unusual amount of garbage and refuse from business properties and to charge such extra rates or fees as are commensurate with the additional services. 1955 Ops St Compt File #7291.

Charges, fees or rates for the collection or disposal, or for both the collection and disposal of waste matter in a town refuse and garbage district should be collected by the town and not by the individual contractor or contractors providing the service. 1972 Ops St Compt File #270.

Under CLS Mun H R § 10, town may finance town-wide refuse collection services through system of user fees instead of through town general tax, and system of user fees may be established with varying rates to be charged to different classes of users related to varying benefits received by each class of owner. 1987 Op St Comp No. 86-88.

10. —Ad valorem assessment

Ad valorem assessments by refuse and garbage district to provide garbage collection services are permissible under CLS Town §§ 198(9)(b) and 202(3). Sysco Corp. v Hempstead, 133 A.D.2d 751, 520 N.Y.S.2d 40, 1987 N.Y. App. Div. LEXIS 51792 (N.Y. App. Div. 2d Dep't 1987).

Utility company was entitled to summary judgment declaring invalid ad valorem levies imposed against company's gas and electric transmission and distribution facilities by various garbage collection districts within town since there was no question that properties in question did not generate any solid refuse, and thus were not benefited properties as defined by CLS RPTL § 102(14) and could not be subject of taxes imposed under CLS Town § 198. Long Island Lighting Co. v Office of Supervisor, 233 A.D.2d 300, 649 N.Y.S.2d 717, 1996 N.Y. App. Div. LEXIS 11596 (N.Y. App. Div. 2d Dep't 1996), app. dismissed, 89 N.Y.2d 1029, 658 N.Y.S.2d 244, 680 N.E.2d 618, 1997 N.Y. LEXIS 403 (N.Y. 1997).

Town was properly enjoined from continuing to impose special ad valorem taxes on a taxpayer's mass property, even though control of property taxation was centralized at the county level in Nassau County, as under this section, the town could establish and extend special districts for garbage and refuse collection services; the town and the county both had roles in determining which properties were subject to special ad valorem taxes. New York Tel. Co. v Supervisor of Town of Hempstead, 115 A.D.3d 821, 982 N.Y.S.2d 162, 2014 N.Y. App. Div. LEXIS 1689 (N.Y. App. Div. 2d Dep't), app. denied, 24 N.Y.3d 905, 995 N.Y.S.2d 714, 20 N.E.3d 660, 2014 N.Y. LEXIS 2553 (N.Y. 2014).

Although the town board has the right to assess the expense of providing garbage and rubbish collection service on an ad valorem basis, it could not at the same time restrict the benefit to the point where it was in effect nonexistent. The restricted volume of 40 pounds per day rubbish collection at an industrial plant which generated 45,000 pounds per day refuse and garbage rendered ad valorem assessments, inequitable. Sperry Rand Corp. v North Hempstead, 53 Misc. 2d 970, 280 N.Y.S.2d 600, 1967 N.Y. Misc. LEXIS 1560 (N.Y. Sup. Ct. 1967), aff'd, 29 A.D.2d 968, 290 N.Y.S.2d 864, 1968 N.Y. App. Div. LEXIS 4244 (N.Y. App. Div. 2d Dep't 1968).

Telephone lines, wires, cables, supports, electrical enclosures, and easements that were owned by a telephone company were not "benefited" properties under Real Prop. Tax Law § 102(14) for purposes of an ad valorem tax that was imposed to defray the cost of collecting garbage because those properties did not generate solid waste, and the trial court properly granted the telephone company's motion for summary judgment on its claim that it was illegally taxed. N.Y. Tel. Co. v Supervisor of Oyster Bay, 6 A.D.3d 511, 775 N.Y.S.2d 349, 2004 N.Y. App. Div. LEXIS 4443 (N.Y. App. Div. 2d Dep't 2004), aff'd, 4 N.Y.3d 387, 796 N.Y.S.2d 7, 828 N.E.2d 964, 2005 N.Y. LEXIS 702 (N.Y. 2005).

11. What items are disposable

The primary responsibility for determining what items may be disposed of in the public refuse disposal system as waste or rubbish rests with the municipality. 1966 Ops St Compt File #113.

A refuse and garbage district may be created for the purpose of collecting leaves, brush and twigs during the spring and fall. 1967 Ops St Compt File #466.

C. Lighting Districts

12. In general

A town is authorized to erect street lights as a municipal function. In dispute as to whether contract between public utility and town for installation of lighting standards was a public works contract, it was within the competence of the industrial commissioner to determine whether the utility's employees were performing work in the field surveyed by him and to find the classification of the jobs involved. Long Island Lighting Co. v Industrial Comm'r, 40 A.D.2d 1003, 338 N.Y.S.2d 751, 1972 N.Y. App. Div. LEXIS 3063 (N.Y. App. Div. 2d Dep't 1972), app. dismissed, 32 N.Y.2d 646, 342 N.Y.S.2d 852, 295 N.E.2d 652, 1973 N.Y. LEXIS 1452 (N.Y. 1973), aff'd, 34 N.Y.2d 725, 357 N.Y.S.2d 493, 313 N.E.2d 787, 1974 N.Y. LEXIS 1607 (N.Y. 1974).

Contrary to contention that attachment of lighting equipment to telephone utility's poles by town and its lighting district constituted an authorized de facto condemnation of an interest in real property because utility's special franchise to erect and maintain poles in public highways was an interest in real property, such franchise was not an interest in real property. Real property necessary for functioning of a town lighting district may be acquired by means of condemnation, but town and its lighting district do not have power to condemn personal property. New York Tel. Co. v North Hempstead, 86 Misc. 2d 487, 385 N.Y.S.2d 436, 1975 N.Y. Misc. LEXIS 3362 (N.Y. Sup. Ct. 1975), aff'd, 52 A.D.2d 934, 385 N.Y.S.2d 505, 1976 N.Y. App. Div. LEXIS 12804 (N.Y. App. Div. 2d Dep't 1976).

Where a town board made contract for lighting of town, the remedy of an unpaid creditor is against town rather than against town board since board acted as agent of town in making contract. Dunn v Whitestown, 185 F. 585, 1911 U.S. App. LEXIS 5105 (C.C.D.N.Y. 1911).

A corporate taxpayer may not contract with an electric utility for the lighting of public streets and highways. 1955 Ops St Compt File #7350.

A village may extend its lighting system outside of the village and sell electricity to individuals, with the approval of the public service commission and the consent of the town board. It is not necessary that a lighting district be established in order that electricity be sold outside a village. 1955 Ops St Compt File #7427.

A town board has discretion to contract for as many lights in a lighting district as it sees fit, from time to time. If a maximum expenditure for the service was stated in the petition for the establishment of the lighting district, the contract amount may not exceed that sum. 1967 Ops St Compt File #201.

Town board, on behalf of lighting district whose sole asset is service contract, may (subject to mandatory referendum) sell service contract to town in which district is located, in order for town to include area encompassing district as part of its general town lighting function, and town board may then dissolve lighting district, under CLS Town § 198(12). 2001 Opns St Comp No. 01-15.

13. Lighting for schools

A lighting district cannot be established to include only property owned by a central school district. 1960 Ops St Compt File #227.

Where certain lighting is to be installed by the town to light a portion of highway, an agreement may be entered into by the town and a school district for jointly lighting the highway and the exterior of the school building. 1968 Ops St Compt File #742.

D. Park Districts

14. In general

Subdivision 4 of this section empowers town boards to sell any property acquired for park purposes and to apply the proceeds to the purchase of other property for park purposes, and allows town board to fix reasonably charges for the use of parks by persons other than inhabitants and taxpayers of such district. Atlantic Beach Property Owners' Ass'n v Hempstead, 3 N.Y.2d 434, 165 N.Y.S.2d 737, 144 N.E.2d 409, 1957 N.Y. LEXIS 903 (N.Y.), reh'g denied, 3 N.Y.2d 942, 1957 N.Y. LEXIS 1528 (N.Y. 1957).

The provisions of this section deal solely with a "park district" park, which is a completely different type of park from a town public park. Hence, this section did not qualify other sections authorizing the establishment of public parks by a town or require village consent to the establishment of a public park within the area of a village. Lloyd Harbor v Huntington, 4 N.Y.2d 182, 173 N.Y.S.2d 553, 149 N.E.2d 851, 1958 N.Y. LEXIS 1064 (N.Y. 1958).

The town board, on behalf of a park district, may not acquire and operate a water system for general household use by residents. Expenditure of $17,000 for acquisition of a water system in a water district would not be an undue burden where the assessed valuation of a district is between $80,000 and $90,000. 1947 Ops St Compt 291.

A park district may not be established in a town, in which title to park property will be retained by the present owner, said owner to be reimbursed, however, from park district moneys, for the original cost of acquisition of the park property and also the facilities of a park district may be limited to residents and property owners within the park district. 1947 Ops St Compt 316.

A town board, after a park district has been established and the maximum amount fixed by the petition expended for acquisition of park lands and improvement thereof, may not expend further sums in subsequent years for further capital improvements. 1953 Ops St Compt File #6176.

The Manhasset Park District may not dispose of its lands held for park purposes unless the proceeds of such sale at least equal the cost of such lands and unless the proceeds are used to acquire other lands for park purposes. 1953 Ops St Compt File #6247.

If all of the facilities of a water district are sold to a water authority, the proceeds of the sale may not be invested, nor may an excess over the required reserve be used to acquire and maintain a park for the residents of the water district. 1957 Ops St Compt File #57-424.

Cost of construction of park facilities undertaken solely for purpose of increasing possibility of obtaining state and federal aid for sewer district project may not be included as part of cost of district. 1988 Op St Compt No 88-22.

Town may not, pursuant to CLS Town Law Article 12 or 12-A, establish overlapping town districts authorized to provide same improvements or services, such that town may not establish park district within boundaries of existing park district. Ops State Compt 89-58.

15. Easements

Town Board may acquire lands in park district for public parking without consent of State Comptroller and without following procedure for establishment of an improvement district. 1945 Ops St Compt 438.

Subject to the limitations contained herein, a town board may sell, convey or transfer easements acquired for park purposes. 1953 Ops St Compt File #6194.

16. Recreational facilities, generally

Property acquired in park district for park purposes may not be leased to private corporation for a ski lift and ski trail. 1945 Ops St Compt 187.

Town may not charge its residents an admission for admittance to its public parks though it may charge for the use of special park facilities located therein. 1946 Ops St Compt 406.

The recreational facilities of a park district cannot be rented out for the exclusive use of any private organization, whether for one evening or for a longer period. 1968 Ops St Compt File #958.

Where three park districts become owners, as tenants in common, of park property, the town boards, jointly, may grant a license to private organizations for use of buildings thereon which are unnecessary and unused for park purposes. 1971 Ops St Compt File #632.

The Town of North Elba Public Parks and Playgrounds District may not acquire or construct recreational facilities outside the district. 1976 Ops St Compt File #992.

Subject to equal protection guaranties, town board may exclude nonresidents of park district from facilities of district; however, town board may also permit nonresidents to use park facilities, with or without fee; if town board permits use of park district facilities by nonresidents, it may impose reasonable regulations on that use, subject to constitutional equal protection guaranties. 1988 Op St Compt No 88-25.

Subject to equal protection guaranties, town board may exclude nonresidents of park district from facilities of district; however, town board may also permit nonresidents to use park facilities, with or without fee; if town board permits use of park district facilities by nonresidents, it may impose reasonable regulations on that use, subject to constitutional equal protection guaranties. 1988 Op St Compt No 88-25.

17. —Beaches

Bathing beaches are parks. A town could establish a public bathing beach any place within the town, including town-owned land within an incorporated village even though a village zoning law prohibited such a park. Chapter 840 of Laws of 1955 providing that a certain town could establish public bathing beaches in a town only confirmed power which the town already possessed, and effected no change in the village charter and was not violative of the Constitution. Town Law § 198(4) was not applicable and did not qualify other statutes granting authority to establish public parks. Lloyd Harbor v Huntington, 4 N.Y.2d 182, 173 N.Y.S.2d 553, 149 N.E.2d 851, 1958 N.Y. LEXIS 1064 (N.Y. 1958).

Easements to construct and maintain a boardwalk fronting on a beach may be acquired by park district where such easements are described in the petition presented for the establishment of such district. 1945 Ops St Compt 448.

Pre-existing beach or lake rights are not abrogated by a town's mere purchase of the property involved. The extent to which the owners of such rights may be subjected to rules and regulations depends on the propriety thereof as an exercise of the police power. 1972 Ops St Compt File #54.

18. —Swimming pools

A town board on behalf of a park district may impose charges for the use of a swimming pool or tennis court within a park district park. 1965 Ops St Compt File #285.

A park district may be formed by a town for the construction of a swimming pool. 1967 Ops St Compt File #960.

E. Parking Districts

19. In general

A town parking district is not a legal entity which may be sued. However, the members of the town board were liable for negligence in the performance of their official duties and since they were named as defendants in the action "as commissioners" of the district their description "as commissioners" could be treated as surplusage and the complaint should not be dismissed. Anderson v Port Washington Public Parking Dist., 1 A.D.2d 826, 148 N.Y.S.2d 489, 1956 N.Y. App. Div. LEXIS 6428 (N.Y. App. Div. 2d Dep't 1956).

A parking authority, created by a Town Board, was said not to be a public or private corporation subject to suit but the members of the Town Board could be sued for any negligence in construction or maintenance. Anderson v Port Washington Public Parking Dist., 143 N.Y.S.2d 136, 207 Misc. 824, 1955 N.Y. Misc. LEXIS 3619 (N.Y. Sup. Ct. 1955), rev'd, 1 A.D.2d 826, 148 N.Y.S.2d 489, 1956 N.Y. App. Div. LEXIS 6428 (N.Y. App. Div. 2d Dep't 1956).

Town board may acquire lands in park district for public parking without consent of State Comptroller, but may not acquire lands for other purposes without consent of State Comptroller, unless moneys available from sale of other park lands. 1945 Ops St Compt 410.

Town may establish public parking areas within a village. 1953 Ops St Compt File #6345.

The Manhasset Park District of the Town of N. Hempstead in Nassau County may acquire town lands not devoted to a public purpose and create a public parking place in such district without a special act of the legislature. 1955 Ops St Compt File #7330.

Where a town has established a parking district it may, nevertheless, purchase or lease land in the parking district for public parking purposes as a general town charge. 1969 Ops St Compt File #339.

20. "Entry fee"

Town could not, by local law, impose one-time "entry fee" on properties within extension of public parking district, in amount equivalent to assessments that would have been imposed on properties for 5 previous years had they been in parent district. 2001 Opns St Comp No. 01-7.

F. Sewer And Drainage Districts

21. In general

Town exceeded its permissible powers by exacting sewer and water tap-in fees in order to offset cost of capital improvements. Video Aid Corp. v Town of Wallkill, 203 A.D.2d 554, 610 N.Y.S.2d 610, 1994 N.Y. App. Div. LEXIS 4337 (N.Y. App. Div. 2d Dep't 1994), rev'd, vacated, 85 N.Y.2d 663, 628 N.Y.S.2d 18, 651 N.E.2d 886, 1995 N.Y. LEXIS 1038 (N.Y. 1995).

Sewer district lands, not required for the purposes of the district, may be leased to the town. 1947 Ops St Compt 462.

A town board may prohibit the connection of roof gutter leads with a sanitary sewer and enforce its ordinance, rule or regulation by providing for appropriate punishment, and may further enforce such prohibition by injunction. 1953 Ops St Compt File #6128.

A drainage district may be established for the purpose of constructing improvements designed to prevent silting of a creek outlet and consequent flooding of riparian real property. 1953 Ops St Compt File #6382.

Town board may enter into contracts on behalf of sewer district for joint disposal of sewage and apportionment of expense. 1954 Ops St Compt File #6543.

A town board, acting on behalf of a sewer district may not accept a gift of water to facilitate the treatment of sewage upon the condition that the sewer district never be extended (Town L Articles 12, 12-A) or upon the condition that disposal plant operations be limited to sewage originating within the original district (Town L § 64, subd 8). However, the board could accept such a gift where the term thereof was limited to so long as a disposal plant should remain in operation or for so long as such plant did not treat outside sewage (Town L §§ 198, subd 1, 202, subd 5). 1959 Ops St Compt #18.

A town board may act pursuant to Town Law § 64(11-a) to protect property within the town from overflowing water courses or it may establish a drainage district and improve such water course to protect such district. 1960 Ops St Compt File #432.

After a sewer district shall have been established, the town board may contract with any person or corporation, municipal or otherwise, for supplying the inhabitants of such district with sanitary sewer facilities and contract for joint disposal of sewage with apportionment of costs between contracting parties. In addition to any other general or special powers vested in municipal corporations and districts, they have the power to enter into agreements among themselves to do jointly all that which they are empowered to do severally. 1968 Ops St Compt File #943.

Cost of construction of park facilities undertaken solely for purpose of increasing possibility of obtaining state and federal aid for sewer district project may not be included as part of cost of district. 1988 Op St Compt No 88-22.

A town, on behalf of a town sewer district, may contract with a county to provide sewer service to properties within a county sewer district; the cost of such a contract would be financed by the county in the same manner as other operation and maintenance costs incurred by the district. 1991 Op St Compt No. 91-24.

County parks are not subject to the mandate contained in the sewer ordinances of villages and towns in which they are located that all property owners within a specified distance of a newly installed sewer line connect to the municipal sewer system. If the county elects to connect, the town or village is not precluded by Article VIII, § 1 of the State Constitution from exempting the county from payment of sewer rents and connection fees. Whether such exemption would be subject to attack by other users of the system as a denial of equal protection of the laws or discriminatory depends upon the validity of the classification of the county as an exempt user. 1981 Op St Comp File # 81-400.

22. Article 78 proceeding

In an Article 78 proceeding, an application by a landowner to tie into the sewer system of a town the sewer system of a warehouse that he wanted to convert into an office building would be granted, where the town's conditioning of approval of the sewer connection on the landowner's limiting the occupancy of the building to 54 employees and parking to 50 spaces was arbitrary, capricious, and an abuse of discretion, even though the landowner did not have an automatic right to the sewer connection without the consent of the town, where the application was rejected because of the potential increase in traffic, where there was no indication in the record that such an increase would adversely impact on the sewer system, where traffic in any case would be substantially lessened by conversion of the building from a warehouse to an office building, and where the town attorney in response to the landowner's application had noted that the sewer line was readily available to the landowner's property. Svenningsen v Passidomo, 95 A.D.2d 833, 463 N.Y.S.2d 874, 1983 N.Y. App. Div. LEXIS 18771 (N.Y. App. Div. 2d Dep't 1983), aff'd, 62 N.Y.2d 967, 479 N.Y.S.2d 335, 468 N.E.2d 290, 1984 N.Y. LEXIS 4477 (N.Y. 1984).

23. Condemnation

Moneys received on behalf of a sewer district as a condemnation award may be used for any general sewer district purpose. 1957 Ops St Compt File #317.

24. Multiple sewer districts

Where enlargement of a sewage disposal plant owned by one sewer district is contemplated to serve three other sewer districts in the same town, it is not necessary to have four separate bond issues for the four separate districts. 1954 Ops St Compt File #6724.

The town board may adopt, in one ordinance, rules and regulations covering all sewer districts in the town. Such ordinance may also be made applicable to future districts upon their creation. 1955 Ops St Compt File #7603.

25. Out-of-district service

Under circumstances that petitioner, whose property consisted of two contiguous parcels bisected by boundary line between town and city, had been treated by town officials who authorized sewer hook-in to petitioner's building as though his entire property were located in the sewer district and no actual contract was entered into, nor was petitioner given an estimate of fee prior to hook-in, town officials could not claim benefit of statute allowing upon board to contract to dispose of sewage from property outside of sewer district. Geller v O'Neill, 57 A.D.2d 865, 394 N.Y.S.2d 248, 1977 N.Y. App. Div. LEXIS 12090 (N.Y. App. Div. 2d Dep't 1977).

The board of commissioners of a sewer district may not extend sewer district sewers into territory outside of the district. 1955 Ops St Compt File #7398.

A town board and/or a board of commissioners, on behalf of a sewer district, may enter into a contract with a private individual for disposal of sewage from his real property which is situated outside of the sewer district. 1972 Ops St Compt File #199.

26. Sewer rents

Local law enacted by town which established sewer rent schedule for district did not violate CLS Gen Mun § 451(1)(e) as applied to commercial office and small store buildings such as petitioner's corporate office, even if it computed sewer rents for such properties based simply on assessed valuation because, where sewage discharge was not monitored by individual meters and district was subject to substantial inflow and infiltration problems caused by age of system, unrelated to any actual consumption of services, district was unable to calculate precise individual usage, and employing assessed valuation as basis for additional rent and debt points for commercial buildings was neither unreasonable nor arbitrary given nexus between higher assessed valuation and number of people served within commercial unit and corresponding amount of sewage created. Also, local law did not violate equal protection on ground that commercial office and small store buildings (such as petitioner's corporate office) were only properties subject to surcharge based on threshold assessed valuation, even if sewer rent schedule did not create exact congruence between cost of services provided and rates charged to particular customers, as scheme did not involve fundamental interest or challenged classification, and employing assessed valuation as basis for additional rent and debt points for commercial buildings had rational basis given nexus between higher assessed valuation and number of people served within commercial unit and corresponding amount of sewage created. Frontier Ins. Co. v Town Bd., 285 A.D.2d 953, 728 N.Y.S.2d 311, 2001 N.Y. App. Div. LEXIS 7631 (N.Y. App. Div. 3d Dep't 2001).

Moneys in a sewer rent fund shall be used, first, to pay maintenance expenses and, thereafter, to pay debt service on capital improvements to the sewer system which have been financed in the first instance by the issuance of obligations, and to the extent that moneys are raised for such expenditures by sewer rents, assessments may not be levied upon the benefited real property of the district. 1985 Op St Compt No. 85-69.

G. Water Districts

27. In general

Town board's causes of action against water districts to recover unpaid minimum consumption rates were time barred under CLS Town § 65(3) due to town board's failure to file notices of claim against water districts within 6 months of date on which its right to make demand for payment had accrued. Town Bd. v Meehan, 226 A.D.2d 702, 642 N.Y.S.2d 42, 1996 N.Y. App. Div. LEXIS 4594 (N.Y. App. Div. 2d Dep't), app. denied, 88 N.Y.2d 811, 649 N.Y.S.2d 378, 672 N.E.2d 604, 1996 N.Y. LEXIS 3048 (N.Y. 1996).

In declaratory judgment action challenging town's appropriation of up to $1,021,259 from water district capital reserve fund account for costs related to agreements with county water authority for construction and lease of water facilities and operation of all town water districts, court properly ruled that use of water fund was controlled by CLS Town § 198(3)(d) which states that money collected from water charges "shall be applied toward the maintenance, operation, enlargement and improvement of the water system" and for payment of principal and interest of bonds issued for such purposes; thus, while some Town Law provisions require expenses to be apportioned on correlative benefit basis (e.g., CLS Town §§ 202, 202-a, 202-b, 208), there was no such restriction on expenditure of funds generated from town's sale of water. Langdon v Town of Webster, 270 A.D.2d 896, 706 N.Y.S.2d 547, 2000 N.Y. App. Div. LEXIS 3413 (N.Y. App. Div. 4th Dep't), app. denied, 95 N.Y.2d 766, 716 N.Y.S.2d 641, 739 N.E.2d 1146, 2000 N.Y. LEXIS 2944 (N.Y. 2000).

The distribution system of a water district may not be leased to a city, the city to maintain and repair the system, and to grant

refunds to the district for each person purchasing water from the system. 1947 Ops St Compt 471.

The town board, as governing board of the water district may permit the developer to connect to the district water system for the purpose of purchasing water from the district. 1954 Ops St Compt File #6991.

Water district may not permit free use of a facility for town park purposes even though the facility is no longer needed for water district purposes. 1954 Ops St Compt File #6997.

Water district may purchase disused town garage. Town board may employ a qualified realty appraiser. After acquiring the building, the district may sell or lease any part thereof not required for district purposes. 1966 Ops St Compt File #736.

A water district may not make a gift of its water to a town. A fair and adequate consideration, for the class of consumer serviced, must be received for such water. 1968 Ops St Compt File #1068.

Where a town board on behalf of a water district acquires a private water company facility, it may also acquire such company's accounts receivable and enforce the payment thereof by civil action. 1976 Ops St Compt File #298.

Town, by ordinance, may require district property owners to connect to district water system in proper exercise of its police powers; costs of establishing, operating and maintaining district are, to extent not raised by user charges, charged upon all properties in district. 1988 Op St Compt No 88-30.

28. Bonds

A water district may be extended to include territory, which is not contiguous with the original district and town bonds, issued to finance the construction of a water system in an extension to a water district, may be paid from the net income of the extension. 1946 Ops St Compt 360.

Town may not issue bonds for major portion of cost of water system in town water district, the eventual ownership of which will be in a city. The district may purchase water for resale, but may not permit city to collect and retain water rents. 1947 Ops St Compt 143.

Surplus revenues from water rent, over and above the cost of operation, maintenance, and improvement of the district, should be applied to debt service on district bonds before property in the district is assessed. School district property within the district is liable for its share of the resulting levy. 1958 Ops St Compt File #406.

A town board may not transfer a portion of the revenue of an entire water district to the bond and interest account of one of the constituent districts. 1964 Ops St Compt File #764.

29. Conflicts of interest

Officer of fire department commissioner and water district commissioner (in a district operated by a separate board) are incompatible. 1946 Ops St Compt 651.

30. Construction, including construction of laterals

Town board may purchase lateral main constructed in extension of district by private person. 1946 Ops St Compt 441.

(1) Additional or new construction within an established water district may be undertaken by the town board without consent of State Comptroller. (2) Town board may, on behalf of water district, expend district moneys to lay pipe line for purpose of selling surplus water outside of water district. (3) Town board may not, on behalf of a water district, pay to owner of water main within district, a fixed sum for each connection made thereto by residents of the district. 1947 Ops St Compt 310.

A water district may not make a flat charge to each consumer and deposit money in a fund for the construction of new lines and facilities, the money to be repaid to the depositors in annual installments. 1952 Ops St Compt File #5868.

Where proceedings for the construction of laterals in a water district have progressed to the point where the construction is under way, the town board may not abandon the project, in the absence of factors of illegality or financial inability. 1953 Ops St Compt File #6119.

In a water district in which assessments are levied on a "benefit" basis, rather than an "ad valorem" basis, the cost of constructing laterals must be assessed on the "benefit" basis. Such expense may not be appropriated as a general district charge in the budget. Receipts from water rentals from the benefited properties may be used to meet installments of debt service to the extent that such receipts exceed the proper share of operation and maintenance chargeable against such properties. 1953 Ops St Compt File #6352.

Surplus moneys of a water district may be used to construct laterals within the district if the district is on the "ad valorem" or "area" basis, but not if the district is on the "benefit" basis. 1956 Ops St Compt File #7972.

Discussion in regard to financing construction of water system and administration of water district. 1957 Ops St Compt File #57-992.

31. Fees, including hook-up and tap-in fees

Town law requiring all new customers of water district to pay initial hook-up fee, to be deposited in special account to be used solely for capital developments in district, was not authorized by CLS Town § 198(3)(a), which refers only to "that portion of a supply pipe within the bounds of a public highway" and provides for "a uniform service charge for the installation of such portion of a supply pipe." Local law requiring all new customers of water district to pay initial hook-up fee, to be deposited in special account to be used solely for capital developments in district, was not authorized by CLS NY Const Art IX § 2 and CLS Mun H R § 10 since Articles 12 and 12-A of Town Law establish comprehensive scheme for financing water district improvements, manifesting legislature's intent to preempt area of financing capital improvements to water districts. Also, it was not authorized by CLS NY Const Art IX § 1(f)(1), which grants municipal water systems right to make fair return over and above costs of operation and maintenance and necessary and proper reserves; although CLS Town § 198(3)(d) authorizes town board to set and raise water rates, charge for hooking up to town water system is not within its purview. Further, local law was invalid since it violated proscription against town's establishment of capital reserve funds to finance all or part of cost of improvements to be constructed, reconstructed or acquired, or equipment to be acquired, on behalf of improvement district within such town as provided by CLS Gen Mun § 6-c(3)(a). And, local law was unconstitutional as applied to developers of "planned unit development" since it imposed uniform fee on all new dwelling units without regard to whether development had necessitated expansion of existing facilities or whether developers would be primarily and proportionately benefited by any such expansion; as such, fee constituted tax, prohibited by Municipal Home Rule Law and violative of state and federal constitutions. Coconato v Esopus, 152 A.D.2d 39, 547 N.Y.S.2d 953, 1989 N.Y. App. Div. LEXIS 14365 (N.Y. App. Div. 3d Dep't 1989), app. denied, 76 N.Y.2d 701, 558 N.Y.S.2d 891, 557 N.E.2d 1187, 1990 N.Y. LEXIS 1309 (N.Y. 1990).

Town exceeded its permissible powers by exacting sewer and water tap-in fees in order to offset cost of capital improvements. Video Aid Corp. v Town of Wallkill, 203 A.D.2d 554, 610 N.Y.S.2d 610, 1994 N.Y. App. Div. LEXIS 4337 (N.Y. App. Div. 2d Dep't 1994), rev'd, vacated, 85 N.Y.2d 663, 628 N.Y.S.2d 18, 651 N.E.2d 886, 1995 N.Y. LEXIS 1038 (N.Y. 1995).

Restrictions under CLS Town § 198(3)(a) are inapplicable to out-of-district users; thus, town board had authority to charge out-of-district property owner "hookup" fee under CLS Town § 198(3)(b). Fox Den Dev. Corp. v Town of Yorktown, 231 A.D.2d 551, 647 N.Y.S.2d 34, 1996 N.Y. App. Div. LEXIS 9259 (N.Y. App. Div. 2d Dep't 1996).

Use of tap-in fee to defray cost of maintaining and improving village water system was improper. Torsoe Bros. Constr. Corp. v Board of Trustees, 81 Misc. 2d 702, 366 N.Y.S.2d 810, 1975 N.Y. Misc. LEXIS 2450 (N.Y. Sup. Ct.), modified, 49 A.D.2d 461, 375 N.Y.S.2d 612, 1975 N.Y. App. Div. LEXIS 11413 (N.Y. App. Div. 2d Dep't 1975).

Residential property owners, who had refused to permit installation of water meter on their property, could not be billed by water district on basis of average of highest 5% of residential billings in the area where such a billing scheme was not authorized by any town board resolution or regulations of any other

rate-making body. Even if residential property owners had damage claim against town or water district with regard to entry onto owners' land and installation of water meter, such would not have affected validity of owners' water bills or justified failure to pay such bills. Fact that town officials had announced that billing on basis of water meter readings would await district-wide installation of meters did not preclude billing on basis of such readings after meters had been installed in less than all but over 99% of the homes in water district, in that such announcement was not part of any binding contract but was merely a statement of policy which town and water district would change at any time. Hagen v Hempstead, 84 Misc. 2d 502, 377 N.Y.S.2d 434, 1975 N.Y. Misc. LEXIS 3161 (N.Y. Sup. Ct. 1975).

Owners of property lying within an established water district may not be charged a flat rate "entrance fee" upon such owners' election to be serviced by the district's facilities. 1969 Ops St Compt File #408.

32. Fluoridation of water

Discussion of propriety of town water district fluoridating its water supply. 1961 Ops St Compt #385.

A referendum may not be initiated by petition on the question of fluoridating a water district water supply. There is no provision for federal or state aid in the taking of a special census. 1964 Ops St Compt File #915.

33. Highway matters

A water district is responsible for the cost of relocation of its pipes necessitated by the improvement of the highways along or under which they are located, when such improvements are made by the county. 1968 Ops St Compt File #526.

34. Hydrants

Town board may not, on behalf of a water supply district, enter into a contract with a water company whereby it will pay each year, in addition to hydrant rental, a surcharge of 9% of the cost of installation of the hydrants for an unlimited period of years. 1953 Ops St Compt File #6243.

35. Out-of-district water service

Restrictions under CLS Town § 198(3)(a) are inapplicable to out-of-district users; thus, town board had authority to charge out-of-district property owner "hookup" fee under CLS Town § 198(3)(b). Fox Den Dev. Corp. v Town of Yorktown, 231 A.D.2d 551, 647 N.Y.S.2d 34, 1996 N.Y. App. Div. LEXIS 9259 (N.Y. App. Div. 2d Dep't 1996).

A water district may not extend its mains outside the district for the purpose of serving outside consumers. 1956 Ops St Compt File #7972.

The cost of the connecting line to the district's facilities must be borne by the outside user and any reimbursement for such cost may not be made by the sewer district in the event other outside users are permitted to utilize the line. 1972 Ops St Compt File #199.

Town water district may provide service to users located outside district under CLS Town § 198(3)(b), so long as use will not reduce water supply so that it will be insufficient for district or its inhabitants, and all required approvals and permits are obtained. 2005 Op St Compt No. 05-7.

36. Private property, generally

A board of water commissioners may not maintain privately owned water supply lines between the curb line and house, but it may seal and insist on repair of meters by district employees. 1954 Ops St Compt File #6650.

37. —Easements

A town water district may not lay mains in private streets without obtaining easements from property owners. 1947 Ops St Compt 371.

A town board may grant an easement over water district property for an adequate consideration where such easement will not interfere with the use of the property for the purposes for which it was acquired by the water district. 1958 Ops St Compt File #873.

The Board of Commissioners of a park district may not grant an easement to a water district for installation of a water main. 1961 Ops St Compt #868.

Town board may construct large water main along an easement on private property, and enter into contract with owner for payment to town board of sum equal to cost of constructing smaller water main originally planned by owner. 1966 Ops St Compt File #526.

A town, acting on behalf of water and sewer districts, must obtain easements in order to lay water and sewer lines across private property. If no such easements were obtained prior to the town's installation of the pipes, it is the town's obligation to obtain them now. 1972 Ops St Compt File #723.

Town on behalf of water district may obtain easement in privately owned lake for supply of drinking water and take reasonable measures to make lake satisfactory source of drinking water at district's expense. 1986 Op St Compt No. 86-56.

38. Refunds

A town board, on behalf of a water district, may not enter into a contract with a water company whereby the water company will install service connections, meters and hydrants, maintain and repair the distribution system and eventually purchase the system through refunds, the company to have title to the system in proportion to the refunds made. 1947 Ops St Compt 472.

While a village may sell surplus water to a town water district, the duty of maintaining and repairing the pipelines serving the district is upon the Town Board, and the village may accordingly not refund part of a water bill where the water district has paid for excessive water because of a leak in the line. 1961 Ops St Compt #587.

The granting of a refund to an individual water user for excess water consumption caused by undetected leaks on the consumer's property is illegal. 1967 Ops St Compt File #414.

There is no authority whereby a town may, on closing out accounts of water district customers, withhold from such customers small refunds which are less than a specified amount. 1969 Ops St Compt File #489.

39. Repairs, removal, reconstruction and the like

A town board, on behalf of a water district, may not enter into a contract with a water company whereby the water company will install service connections, meters and hydrants, maintain and repair the distribution system and eventually purchase the system through refunds, the company to have title to the system in proportion to the refunds made. 1947 Ops St Compt 472.

A water district is responsible for the cost of relocation of its pipes necessitated by the improvement of the highways along or under which they are located, when such improvements are made by the county. 1968 Ops St Compt File #526.

Agreement by town on behalf of water district for removal and retention by contractor of underground water tanks and related equipment, in compliance with county health department order and in conjunction with connection to new water supply, constitutes contract for public work subject to competitive bidding under CLS Gen Mun § 103 if it involves direct or indirect expenditure in excess of $20,000; value of tanks and equipment exchanged as consideration for removal work constitutes indirect expenditure for purposes of competitive bidding monetary threshold. 1999 Op St Compt No. 99-14.

40. Sale of property, generally

Water district land may be sold without referendum, but a public hearing is required if the value exceeds $1,000. The seller has no authority to accept, as the purchase price, anything but money. The purchasing town has no authority to pay the purchase price by giving an installment contract. 1966 Ops St Compt File #1129.

A water district governed by a board of water commissioners may sell to retiring district superintendent, for a fair and reasonable consideration, district vehicle he currently uses provided that automobile is no longer required for district purposes; approval of a majority of town board is required and, if value of vehicle exceeds $1,000, public hearing must be held. 1985 Op St Compt No. 85-45.

Governing board of town water district may, subject to mandatory referendum, sell all property and facilities of water district to public authority and dissolve district; moneys received from sale

must be placed in reserve fund for purpose of retiring outstanding debt on behalf of district. 1995 Op St Compt No. 95-29.

Town may not, under either CLS Town § 198 or local law, use proceeds from sale of county of all property and facilities of town water district for construction of new town hall. 1996 Op St Compt No. 96-16.

41. —Water sales

A town board, subject to a referendum, may sell the water supply and distribution system of a water district to a water authority and dissolve the district. 1959 Ops St Compt File #911.

A town may not lay pipes for the purposes of supplying and selling water to a private concern where it has not established a water district. 1960 Ops St Compt File #550.

The town board may sell water for the benefit of a water district to municipalities, water districts or water supply districts. 1968 Ops St Compt File #894.

City which operates water public utility may sell water to town water district pursuant to contract with town, but General Municipal Law § 94 does impose limits on amount of money which city may earn on such sale. 1986 Op St Compt No. 86-33.

42. Surplus funds

A water district may not expend surplus or an unexpended balance of district funds to purchase fire hose except in an amount necessary for the protection of district-owned property. 1945 Ops St Compt 185.

Surplus moneys of a water district may be used to construct laterals within the district if the district is on the "ad valorem" or "area" basis, but not if the district is on the "benefit" basis. 1956 Ops St Compt File #7972.

Surplus revenues from water rent, over and above the cost of operation, maintenance, and improvement of the district, should be applied to debt service on district bonds before property in the district is assessed. School district property within the district is liable for its share of the resulting levy. 1958 Ops St Compt File #406.

Discussion concerning disposition of surplus funds of a water district whose facilities are to be acquired by a county water authority. 1978 St Compt File #350.

43. Tax matters

Landowners were liable for water tax assessment even though they had not connected their premises to water system. Larkin v Farrell, 52 A.D.2d 1069, 384 N.Y.S.2d 60, 384 N.Y.S.2d 605, 1976 N.Y. App. Div. LEXIS 12995 (N.Y. App. Div. 4th Dep't 1976), app. denied, 41 N.Y.2d 802, 1977 N.Y. LEXIS 2990 (N.Y. 1977), cert. denied, 434 U.S. 836, 98 S. Ct. 125, 54 L. Ed. 2d 97, 1977 U.S. LEXIS 2969 (U.S. 1977).

Subsequent to the date of the establishment of a water district and until such time as the existing water supply systems are taken over by the town board, the operation of such existing systems is the responsibility of the owners thereof, and tax anticipation notes may be issued to finance the cost of operation and maintenance of such systems after the town board has taken them over and until taxes can be levied to pay for such cost of operation and maintenance. 1947 Ops St Compt 112.

The town board should provide for the transmittal to the receiver of taxes and assessments of a list of the water rents which should be collected by him. 1954 Ops St Compt File #6556.

Supervisor of town of Claverack should pay to supervisor of town of Greenport the amount of delinquent water rent received by him from tax collection. 1955 Ops St Compt File #7332.

44. Termination of water service

Town and water authority acted appropriately and within their authority in terminating water service through existing line and in directing property owner to install new line since water authority regulations permitted termination of service where there was willful waste by use of water through improper and imperfect pipes, and property owner was legally responsible for expense of installing and maintaining service line for its property. Hasenoehrl Leasing, Inc. v Hamburg, 182 A.D.2d 1091, 583 N.Y.S.2d 79, 1992 N.Y. App. Div. LEXIS 6960 (N.Y. App. Div. 4th Dep't 1992).

A Town Board may enforce payment of water rents by providing for cutting off supply of water. 1964 Ops St Compt #209.

45. Water rents, generally

Town may not issue bonds for major portion of cost of water system in town water district, the eventual ownership of which will be in a city. The district may purchase water for resale, but may not permit city to collect and retain water rents. 1947 Ops St Compt 143.

In a water district in which assessments are levied on a "benefit" basis, rather than an "ad valorem" basis, the cost of constructing laterals must be assessed on the "benefit" basis. Such expense may not be appropriated as a general district charge in the budget. Receipts from water rentals from the benefited properties may be used to meet installments of debt service to the extent that such receipts exceed the proper share of operation and maintenance chargeable against such properties. 1953 Ops St Compt File #6352.

The town board should provide for the transmittal to the receiver of taxes and assessments of a list of the water rents which should be collected by him. 1954 Ops St Compt File #6556.

Supervisor of town of Claverack should pay to supervisor of town of Greenport the amount of delinquent water rent received by him from tax collection. 1955 Ops St Compt File #7332.

Surplus revenues from water rent, over and above the cost of operation, maintenance, and improvement of the district, should be applied to debt service on district bonds before property in the district is assessed. School district property within the district is liable for its share of the resulting levy. 1958 Ops St Compt File #406.

There is no statutory authority for village to require town to levy delinquent water rents on town tax roll, or for town to do so at request of village. 2004 Op St Compt No. 04-7.

CLS Town § 198(3)(d) is limited in its application to users of town water district whose property is located in adjoining town; there is no similar statutory procedure for levy on town tax roll of delinquent water charges owed by outside users of village water system. 2004 Op St Compt No. 04-7.

Should town in which outside properties are located form water district, village, in lieu of providing water to individual outside users, may contract with town for provision of water to district. 2004 Op St Compt No. 04-7.

CLS Town Law §§ 202 and 202-a, when read together and harmonized with § 198(3)(d), require that towns levy assessments for cost of establishment and operation and maintenance of water districts only to extent that such costs are not raised by user charges, and accordingly, in absence of statutory limitation on use of water rents, town board has express authority to impose water rights in amount which would be sufficient to pay cost of both maintenance and operation and debt service on obligations issued for district purposes. Ops St Compt 89-59.

It is within the discretion of the town board to increase water rates from time to time and, in the first instance, the amount of the increase will be determined by the town board. 1983 Op St Comp File #83-116.

Assessments for expense of establishment and operation and maintenance of water district must be raised on an ad valorem basis unless petition submitted pursuant to Article 12 of Town Law requesting establishment of district, or order of town board adopted pursuant to Article 12-A of Town Law for establishment of district, provides that cost be raised on a benefit basis. Basis for raising such assessments may not be changed after district is established; however, water rents may also be imposed to pay costs of operating, maintaining and improving district. 1986 Op State Compt No. 86-10.

46. —Discounts; exemptions

The owner of a complex of six apartment buildings was not entitled to a declaratory judgment that the town water district had to bill all six buildings as one "consumer" so that the owner could take advantage of rates which decreased as usage increased, where the governing ordinance distinguished between "consumers," which the water district could charge for water usage, and "property owners," which the district could charge for fire-line connections, and such distinction would be meaningless

if "consumers" and "property owners" were equivalent in meaning. Renley Dev. Co. v Town Bd. of Kirkwood, 106 A.D.2d 717, 484 N.Y.S.2d 175, 1984 N.Y. App. Div. LEXIS 21660 (N.Y. App. Div. 3d Dep't 1984).

A water district may not furnish water to the fire houses of fire companies situated in the water district at no cost. 1946 Ops St Compt 689.

A water district established on a benefit basis pursuant to Town Law, Article 12, may establish water rates with different classifications of consumers. 1968 Ops St Compt File #770.

There is no authority for a town to contract with a banking corporation for the collection of water district water rents. 1972 Ops St Compt File #1061.

A school district may be charged for its use of water through the imposition of water rents by the town water district. 1973 Ops St Compt File #1086.

Town board, on behalf of water district, may establish schedule of water rates including classification under which senior citizens meeting certain income criteria are charged at reduced rate. Ops St Compt 88-57.

47. —Penalties for late or non-payment

Penalties collected for late payment of water rents shall be credited to the water district account. 1954 Ops St Compt File #6613.

48. Zoning matters

A park water district, in erecting a new water tower of larger capacity to take the place of one already existing and the purpose of which is to supply water for inhabitants for domestic and commercial uses and for fire protection, is exercising a governmental function and exempt from compliance with zoning ordinances. Barnathan v Kramer, 44 Misc. 2d 203, 253 N.Y.S.2d 144, 1964 N.Y. Misc. LEXIS 1590 (N.Y. Sup. Ct. 1964).

H. Miscellaneous Districts

49. Public dock districts

A town board has no authority to grant a franchise for operation of a ferry. A town board in which there is a public dock district does not possess the authority to require a ferry which uses the docking facilities therein to impose an additional fee on each passenger in order that such fee might be applied by the town toward reduction of assessments against real property in the public dock district. 1950 Ops St Compt File #4554.

Town board may not expand activities of public dock district to include maintenance and operation of recreational facilities such as playground and swimming pool. 2002 Op St Compt No. 2002-3.

50. Snow removal districts

A snow removal district may not be formed within a larger area which itself constitutes a snow removal district. 1945 Ops St Compt 457.

Agency Opinions

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H. Miscellaneous Districts

31. Town improvement districts

I. Generally

1. In general

Town board when operating improvement districts enumerated in this section is exempt from payment of motor fuel tax. 1934 N.Y. Op. Att'y Gen. No. 209.

Town of the second class may not license plumbers under this section. 1955 NY Ops Atty Gen March 7 (informal).

Provisions of Article 34 of the General Business Law relating to creditor billing errors are not applicable to statements of account issued to customers by the special districts in the Town of Hempstead. 1974 NY Ops Atty Gen Jan 24.

Discussion of inalienability of sewer district, park district and park lands. 1977 NY Ops Atty Gen Nov 17.

One person may simultaneously hold elected offices of commissioner of water district and commissioner of fire district, but must recuse himself or herself from participating in any matters relating to contract between districts for installation and maintenance of fire hydrants, sale of water, and testing of backflow devices; if those or other matters involving 2 districts lead to frequent or substantial conflicts, recusal would not be appropriate remedy, and individual may not hold both positions. 2002 NY Ops Atty Gen I 2002-11.

2. Leases

Land not used by town parking district may be sold or leased. 1960 NY Ops Atty Gen Feb 4 (informal).

II. Specific Districts

A. Fire Districts

3. In general

The term "district" as used in section 64(2) of the Town Law refers to the improvement districts discussed in Article 12 of the Town Law, and, thus, section 64(2) does not infringe upon the condemnation power accorded a fire district board of fire commissioners as provided for in section 176(14) of the Town Law. 1979 NY Ops Atty Gen Apr 6 (informal).

4. Hydrants, generally

A town board, on behalf of a water district, may charge a fire district for the use of fire hydrants and water by the fire district. 1978 Op St Compt File #630.

B. Garbage And Refuse Districts

5. In general

If two towns, by contract, operate a dump or sanitary landfill project, all residents of each town, including the residents of any village therein, must be given the same rights to use the project, and on the same basis, unless an improvement district for this purpose has been formed in only a part of a town or an agreement has been entered into between a town and a village under General Municipal Law § 120-v. 1977 NY Ops Atty Gen Feb 16.

A town board is not required to hold a public hearing prior to awarding a contract for refuse and garbage collection in a refuse and garbage district. 1978 Op St Compt File #941.

The Town of Oyster Bay may not establish a town-wide refuse and garbage district for the disposal of refuse and garbage since portions of the Town already contain refuse and garbage districts and because all villages in the Town would have to consent to the formation of such a district by the adoption of appropriate local laws. 1981 Op St Compt File #80-791.

6. Budgeting matters

The cost of operation and maintenance of a sewer district may be financed from either sewer rents or benefit assessments or both. If sewer rents are collected they must first be expended for operation and maintenance before they may be spent for indebtedness or further construction. The town budget should reflect the fact that operation and maintenance costs are being raised through either sewer rents or benefit assessments or both and how such funds are being apportioned. 1981 Op St Compt File #80-708.

7. Rates, charges and fees, generally

The cost of operation and maintenance of a sewer district may be financed from either sewer rents or benefit assessments or both. If sewer rents are collected they must first be expended for operation and maintenance before they may be spent for indebtedness or further construction. The town budget should reflect the fact that operation and maintenance costs are being raised through either sewer rents or benefit assessments or both and how such funds are being apportioned. 1981 Op St Compt File #80-708.

C. Lighting Districts

8. In general

The governing board of a lighting district has inherent authority to return pro rata portions of a refund received by the district for overpayments made to a power company, to present and former district residents who were victims of the overpayment, on an equitable basis to be determined by the board. 1979 Op St Compt File #561.

Surplus revenues of a town-wide lighting district may not be accumulated and carried over from one fiscal year to another except by establishment of a lawful reserve fund. Non-appropriated cash surplus may be used to finance an additional appropriation or an increase in an existing appropriation during a fiscal year. 1980 Op St Compt File #280.

(1) A town may not use general funds to install or maintain street lights within the boundaries of an incorporated village except on public bridges which are not under the jurisdiction of the village and (2) a town lighting district may only provide street lighting in a village if the village is within the district. 1980 Op St Compt File #368.

D. Park Districts

9. In general

Without statutory authority a park district may not be created within another park district with the use of the facilities within the smaller district limited to the properties within it. 1969 NY Ops Atty Gen Apr 10 (informal).

In Nassau County, violations of town ordinances regulating conduct in parks of a Town Park District may not be prosecuted in village justice courts. 1980 NY Ops Atty Gen Dec. 3 (informal).

Park land may not be sold or diverted to other uses without authorization by the State Legislature. Land can become dedicated for park purposes through its improvement and use as a park. 1981 NY Ops Atty Gen July 21 (Informal opinion).

A town board, on behalf of a park district, may not authorize payment of a claim for services rendered, at the request of district residents and without board authorization, in connection with dredging a portion of a lake bordering on district property. However, the board may ratify the contract for such services and then authorize payment. 1979 Op St Compt File #90.

Under certain circumstances and provided certain conditions are complied with, a town may purchase park property from a park district within the town. Opns St Comp, 1973, No. 73-863, unreported, and any other prior opinions are hereby superseded. 1980 Op St Compt File #44.

10. Easements

A town board may grant an easement through park district property where such easement will not interfere with the use of the property for which it was acquired by the park district. Adequate consideration must be given for the easement and the consideration may consist of either money or services rendered to the park district. Where the value of such grant exceeds $1,000, a public hearing must be held. 1980 Op St Compt File #147.

11. Recreational facilities, generally

Hot-air ballooning is a recreational activity that a town may sponsor by permitting use of parklands for launching. Previous informal opinion clarified. 1981 NY Ops Atty Gen July 21 (Informal opinion).

A town board, on behalf of a park district, may not charge district residents and taxpayers for use of park district facilities, but may charge a fee to non-residents for use of such facilities. 1979 Op St Compt File #728.

E. Parking Districts

12. In general

There appears to be no authority for the commissioners of a public parking district, in which the town board does not act as the governing board, to name persons to enforce parking rules and regulations within the district. 1954 NY Ops Atty Gen Nov 22 (informal).

F. Sewer And Drainage Districts

13. In general

Discussion of conveyance by a village, and a town, on behalf of a sewer district, respectively, of sewer facilities to a county sewer district and the adequacy of consideration therefor. 1978 Op St Compt File #286.

Discussion of the propriety of a town being connected to a private sewer line. 1978 Op St Compt File #359.

Discussion of extending a sewer district to include several residents of a neighboring village. 1978 Op St Compt File #696.

A sewer district may convey unneeded property to a village in which the district is located, but such conveyance must be for a fair and adequate consideration. 1979 Op St Compt File #234.

The cost of replacement of inadequate sewer pipes running from sewer laterals located in the street and connecting private properties to the laterals, is borne by property owners rather than by the sewer district, when such pipes are not owned by the district. 1979 Op St Compt File #416.

14. Condemnation

The Town of Newburgh is authorized to obtain easements on, and condemn if necessary, land within the City of Newburgh, for the purpose of constructing thereon a sewer trunk line to the City's sewage treatment plant. 1974 NY Ops Atty Gen Nov 8.

15. Easements

The Town of Newburgh is authorized to obtain easements on, and condemn if necessary, land within the City of Newburgh, for the purpose of constructing thereon a sewer trunk line to the City's sewage treatment plant. 1974 NY Ops Atty Gen Nov 8.

16. Sewer rents

A city, by applying the provisions of the Sewer Rent Law or by local law, may collect unpaid sewer rents by adding them to the tax roll and collecting them at the same time and in the same manner as real property taxes. A city by local law may establish the same procedure for collection of unpaid water rents. Subject to due process requirements, city water service may be termi-

nated for nonpayment of water rents. 1981 N.Y. Op. Att'y Gen. No. 81–56, 1981 N.Y. AG LEXIS 97.

Discussion of refund of sewer and water rent penalties in circumstances where the penalties imposed exceeded 10% of the amounts due. 1978 Op St Compt File #890.

The real property of schools, churches and cemeteries is exempt from taxes but is subject to sewer rents for the operation and maintenance of a town sewer system. 1979 Op St Compt File #353.

G. Water Districts

17. In general

Where the boundaries of a water district are extended and the district acquires an existing water line for inclusion in the water system by purchase or condemnation, the town board, on behalf of the district, may pay to the owner of such existing water line the fair market value of that line. 1980 Op St Compt File #679.

As a general rule, a village may not wholly or partially forgive an amount due from a water district arising from leaks in the supply lines located in the district. The village may compromise claims which the water district might have against the village with regard to the leaks. 1980 Op St Compt File #899.

The terms and conditions of a water supply contract between a town and a village are matters for negotiation between the contracting parties and the Department of Audit & Control has no regulatory powers with respect to such contracts. 1981 Op St Compt File #81-48.

18. Conflicts of interest

Conflict of interest results if town highway superintendent in his or her official or private capacity operates heavy equipment on behalf of water district in town to repair water pipes located under road. 1998 NY Ops Atty Gen I 98-11.

19. Fees, including hook-up and tap-in fees

A town board may, in a local law to establish tapping or connection fees for a town water district, direct the elected town superintendent of highways to do the necessary excavations in town highways between the water main and the curb line. 1978 Op St Compt File #253.

20. Highway matters

Water pipes may not be laid under a village highway by a water district without the consent of village board of trustees. 1956 NY Ops Atty Gen Sept 13 (informal).

A town may have water pipes and mains laid in or along state, county and town highway right of way lines, without obtaining an easement therefor; since pipes and mains will not be laid under state or county highways, consent of the state superintendent of public works is not required and consent of the state and county superintendents of highways are not required under Highway Law § 52 and § 136, but permits should be obtained. 1957 NY Ops Atty Gen May 13 (informal).

The expense of relocating water district water pipes and fire hydrants following reconstruction of a town highway by the town highway department is chargeable to the water district and not the highway department. 1980 Op St Compt File #486.

A town board may, by resolution, provide that the cost of repairing that portion of a supply pipe within the bounds of a public highway in a water district shall be a district expense. 1982 Op St Compt File #82-155.

21. Out-of-district water service

A sale of water by a municipal water district outside the district requires the consent of the New York State Water Resources Commission. The purchase of water wholesale from a municipal water district by a private individual who was the developer of a residential area outside the water district for resale to home owners in the development would also require the consent of the Water Resources Commission. 1966 NY Ops Atty Gen Oct 24.

A provision in a contract for water supply between a town, on behalf of a water district, and a developer owning property outside the district, which provides for payment for water at a higher rate than that which is paid by district residents does not violate the equal protection clauses of the State and Federal Constitutions so long as all non-residents who are similarly situated pay the same higher rate. 1980 Op St Compt File #179.

22. Private property, generally

Discussion of the ramifications of a situation where a water district mistakenly drilled a well on private property and the owner of such property subsequently offers to sell the well and the property to the district. 1978 Op St Compt File #646.

23. Refunds

Discussion of refund of sewer and water rent penalties in circumstances where the penalties imposed exceeded 10% of the amounts due. 1978 Op St Compt File #890.

In cases of extreme hardship and in the absence of negligence on the part of the consumer or a contractual provision to the contrary, it would seem that a refund may be granted to a consumer for water lost due to an undetectable subterranean leak in a water pipe located within the consumer's property. Prior inconsistent opinions superseded. Opn No. 67-414 superseded to the extent inconsistent with this opinion but result reaffirmed on the facts. 1980 Op St Compt File #543.

Except in cases of extreme hardship where there is no negligence on the part of the consumer, as a general rule, a water district may not refund an amount due from a consumer for water lost due to an undetectible subterranean leak in a water pipe located within the consumer's property. The issue of whether it is appropriate for a water district to refund water rents in a given situation involves questions of fact which should be resolved at the local level. 1982 Op St Compt File #82-33.

24. Repairs, removal, reconstruction and the like

Highway Law § 10 and Town Law, Arts. 12 and 13, authorize superintendent of public works to expend available funds for reconstruction of State highways, and at State expense remove, relocate, etc., water mains and sewer pipes owned by town water and sewer districts; and town board in charge of such a district or board of water commissioners or sewer commissioners in charge of such a district may contract with superintendent of public works for performance of work. Superintendent of Public Works, pursuant to Highway Law § 10, has power to perform work of construction and reconstruction contemplated by such section, at request of a town water district or town sewer district and at its expense; in this respect, there is no distinction between a town board and a board of commissioner operating such a district. 1946 NY Ops Atty Gen May 17.

The expense of relocating water district water pipes and fire hydrants following reconstruction of a town highway by the town highway department is chargeable to the water district and not the highway department. 1980 Op St Compt File #486.

A town board may, by resolution, provide that the cost of repairing that portion of a supply pipe within the bounds of a public highway in a water district shall be a district expense. 1982 Op St Compt File #82-155.

25. Sale of property, generally

26. —Water sales

A sale of water by a municipal water district outside the district requires the consent of the New York State Water Resources Commission. The purchase of water wholesale from a municipal water district by a private individual who was the developer of a residential area outside the water district for resale to home owners in the development would also require the consent of the Water Resources Commission. 1966 NY Ops Atty Gen Oct 24.

A town water district may sell unneeded real property having no facilities or improvements thereon in accordance with the procedure in section 198(12)(a) of the Town Law. Real property with facilities must be sold in accordance with section 198(12)(b) of the Town Law. 1982 NY Ops Atty Gen Jan 15 (informal).

A water district governed by a board of water commissioners may dispose of obsolete office and shop maintenance equipment by sale or lease. The approval of a majority of the town board is required and, if the value of the equipment exceeds $1,000, a public hearing must be held. The proceeds from the sale or lease of district property must be paid to the supervisor and credited to the district and may be expended for any lawful district purpose. 1981 Op St Compt File #81-171.

27. Surplus funds

Legislation would be required to authorize the disposition of surplus funds remaining in a water district to the credit of the

water users in the town where the facilities of such district have been leased to a water authority. 1979 Op St Compt File #482.

28. Water rents, generally

29. —Discounts; exemptions

Town-owned property, such as the town hall, is not exempt from the payment of water rents. 1978 Op St Compt File #630.

The City of Kingston may adopt a local law authorizing the Board of Water Commissioners to grant a partial exemption from water rents to senior citizens who earn $6,500 a year or less. 1981 Op St Compt No. 81-8, 1981 N.Y. Comp. LEXIS 890.

30. —Penalties for late or non-payment

A public school district or a not-for-profit hospital, located within a town water district, is not entitled to an exemption from a penalty which may be imposed by the town board for the late payment of water charges; nor is a town board authorized to grant such an exemption when the board has authorized the collection of a penalty for a late payment pursuant to the provisions of section 198(3)(d) of the Town Law. 1976 NY Ops Atty Gen March 3 (informal).

Discussion concerning the limits within which a town may impose a penalty for the late payment of water rents. 1978 Op St Compt File #832.

Discussion of refund of sewer and water rent penalties in circumstances where the penalties imposed exceeded 10% of the amounts due. 1978 Op St Compt File #890.

A lien for unpaid water rents attaches by operation of law to the property in connection with which the water was used. In the case of rental property, the lien attaches even though a tenant moves without paying the balance of the water rents due or leaving a sufficient security deposit to cover the unpaid water rents. 1980 Op St Compt File #8.

H. Miscellaneous Districts

31. Town improvement districts

There is no requirement or authority for referendum on conveyance by town improvement district of easement in real property. 1997 NY Ops Atty Gen I 97-42.

Employees of town improvement districts may serve in same ministerial capacity for county improvement districts. 2003 NY Ops Atty Gen I 2003-5.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 54, 61, 64, 194, 202, 202-b, 202-e, 209-f, 209-q, 209-r, 215, 341; CLS County § 233-a.

Special improvements, § 54.

Sewer, drainage or water improvements, § 209-q.

Agricultural districts; effects, CLS Agr & M § 305.

Emergency rescue and first aid squads, CLS Gen Mun § 209-b.

County roads, CLS High §§ 110 et seq.

Town highways, CLS High §§ 170 et seq.

Construction or improvement of town highways by county and town, CLS High § 194.

County aid for construction, improvement and maintenance of town highways, CLS High § 195.

State aid: planning for construction of solid waste management facilities, CLS Pub Health §§ 1380 et seq.

Traffic regulation in all towns, CLS Veh & Tr § 1660.

Contracts for purchase and sale of water, CLS Vill § 11-1124.

Grants of powers to local governments, CLS Stat Loc Govt § 10.

Jurisprudences:

1 NY Jur 2d Acknowledgements, Affidavits, Oaths, Notaries, and Commissioners § 4.

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1212, 1217, 1234, 1247, 1251, 1254, 1258, 1277, 1525, 1539 .

64 NY Jur 2d Health and Sanitation § 114 .

77 NY Jur 2d Military and Civil Defense § 124 .

81 NY Jur 2d Parks, Recreation, and Historic Preservation §§ 134, 143, 145 .

99 NY Jur 2d Taxation and Assessment § 758 .

108 NY Jur 2d Water §§ 137, 530, 540, 543, 583, 607, 611, 613, 614, 619, 622, 623, 642, 654, 661, 669, 670, 714, 739, 741, 808, 817, 823–825, .

109 NY Jur 2d Wharves §§ 18, 25.

8 Am Jur Proof of Facts 2d 101, Municipality's Failure to Maintain Sewers Properly.

Law Reviews:

Local contracts and sub-contracts: the roles of city government and private citizen groups. 14 Buff. L. Rev. 140.

Lease-purchase agreements by New York municipalities. 34 NYSBJ 459.

Annotations:

Right of municipality or public to use of subsurface of street or highway for purposes other than sewers, pipes, conduits for wires, and the like. 11 ALR2d 180.

Sewage disposal plant as nuisance. 40 ALR2d 1177.

Liability for injury to or death of child from burns caused by hot ashes, cinders, or other hot waste material. 42 ALR2d 930.

§ 202-c. Dissolution and diminishing area of certain districts

1. The town board of any town may dissolve and discontinue those districts described hereinafter pursuant either to the provisions of article seventeen-A of the general municipal law or the procedures provided in this section.

1-a. Upon a petition, the town board of any town may dissolve and discontinue any lighting, snow removal, water supply, or refuse and garbage district or a sewer district in which no sewer system has been constructed, provided that there be no indebtedness, outstanding and unpaid, incurred to accomplish any of the purposes of such district. Such petition shall be signed by at least ten percent or five thousand, whichever is less, of the registered voters in this state registered to vote in such district and authenticated in the manner provided by the election law for the authentication of nominating petitions. When any such petition containing the required signatures shall have been presented, the town board shall adopt an order and enter the same in the minutes of its proceedings, reciting in general terms the filing of the petition, and specifying the purpose thereof, the name and boundaries of the district and the time when and place where said board will meet to consider the petition and to hear all persons interested in the subject thereof concerning the same. If the petition shall propose that the area of the district be diminished, the order shall also describe the portion of the district to be eliminated. The board shall cause a copy of such order, certified by the town clerk, to be published at least once in the official paper, the first publication thereof to be not less than ten nor more than twenty days before the day set therein for the hearing as aforesaid, and shall cause a copy thereof to be posted on the sign board of the town maintained pursuant to subdivision six of section thirty of this chapter not less than ten nor more than twenty days before the day designated for the hearing as aforesaid. If the town board shall determine, after such hearing and upon the evidence given thereat, that it is in the public interest to dissolve the district or to diminish the area thereof, the town board shall adopt an order

accordingly dissolving the district or diminishing its area. If there are any contracts to accomplish the purpose of such district in force and effect, the town board shall not dissolve such district, nor diminish the area thereof, prior to the expiration of such contracts. If the district dissolved be wholly within a village incorporated since said district was formed and prior to April first, nineteen hundred sixty-five, all of the property of such district shall be and become the property of such village and such village upon delivery thereof, shall assume and pay all of the debts of such district. If the district shall not be wholly included within the limits of any village incorporated since said district was formed, all the property of such district shall become the property of the town and such town upon delivery thereof, shall assume and pay all the debts of such district.

* * * * *

[**Editor's Note**: Various exceptions for specific municipalities are set forth in this section of the Town Law and reference is to be made to the statute for particular provisions.]

* * * * *

3. Sidewalk districts created in towns pursuant to the provisions of chapter sixty-three of the laws of nineteen hundred nine, as amended, or pursuant to the provisions of this chapter as originally enacted or subsequently amended, are hereby dissolved. The improvements constructed in any sidewalk district hereby dissolved shall be and become the property of the town in which the improvements are located, unless any portion of such district shall on January first, nineteen hundred forty-six, be within a village or city in which event the improvements constructed in any such district, which are located in any such village or city, shall be and become the property of the village or city, as the case may be. Taxes shall continue to be levied within the present area of such districts, as heretofore, for the payment of any debts and liabilities of such districts existing on January first, nineteen hundred forty-six. If any such district shall have moneys on hand on January first, nineteen hundred forty-six, such moneys shall be applied to the payment of the debts and liabilities, if any, of such district and the excess shall be and become the property of the town in which such district is located unless any such district shall be now located wholly within a village or city in which event such excess shall be and become the property of the village or city, as the case may be. If any such district be located in two or more towns, and is not wholly within a village or city, such excess shall be divided among such towns in proportion to the assessed valuations of the properties within such district as shown on the completed assessment rolls for such district pursuant to which the last tax was levied for the purposes of such district.

* * * * *

HISTORY:

Add, L 1935, ch 520; amd, L 1937, ch 495, § 17; L 1938, ch 634, § 7; L 1939, ch 593; L 1941, ch 263, § 19, eff April 11, 1941; L 1945, ch 804, §§ 1, 2, eff Jan 1, 1946; L 1963, ch 420, § 11; L 1965, ch 141, § 2; L 1979, ch 534, § 1, eff July 10, 1979; L 1988, ch 667, § 2; L 1990, ch 569, § 1, eff July 18, 1990; L 1995, ch 160, § 1, eff July 19, 1995; L 1995, ch 209, § 1, eff July 26, 1995; L 1997, ch 93, § 1, eff June 11, 1997; L 1997, ch 454, § 1, eff Aug 26, 1997; L 1999, ch 608, § 1; L 2000, ch 37, § 24, eff Sept 1, 2000; L 2000, ch 216, § 1, eff Aug 16, 2000; L 2002, ch 690, § 1, eff Dec 20, 2002; L 2006, ch 625, § 1, eff Aug 16, 2006; L 2007, ch 467, § 1, eff Aug 1, 2007; L 2009, ch 74, § 10, eff March 21, 2010; L 2009, ch 373, § 1, eff Aug 26, 2009; L 2010, ch 189, § 1, eff July 15, 2010; L 2010, ch 394, § 1, eff Aug 13, 2010; L 2010, ch 400, § 1, eff Aug 13, 2010; L 2014, ch 384, § 1, effective September 23, 2014; L 2019, ch 460, § 1, effective November 8, 2019; L 2020, ch 291, § 4, effective November 27, 2020.

Editor's Notes Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

§ 18. Savings clause. Notwithstanding the repeal or amendment of any law by this act, nothing in this act shall be construed to impair the consolidation or dissolution of any local government entity pursuant to any such repealed or amended law if there was commenced in or for such local government entity prior to the effective date of this act a consolidation or dissolution proceeding pursuant to such law, in which event the provisions of such former law shall govern such proceeding as though such former law had not been repealed hereby.

Amendment Notes 2010. Chapter 189, § 2 amended:

By adding sub 8 [first setout].

2010. Chapter 394, § 1 amended:

By adding sub 8 [second setout].

2010. Chapter 400, § 1 amended:

By adding sub 2-g.

2009. Chapter 74, § 10 amended:

Sub 1 by deleting at fig 1 "Upon a petition, as hereinafter provided, the" and at fig 2 "any lighting, snow removal, water supply, or refuse and garbage district or a sewer district in which no sewer system has been constructed, provided that there be no indebtedness, outstanding and unpaid, incurred to accomplish any of the purposes of such district" and adding the matter in italics.

By redesignating part of sub 1 as sub 1-a.

Sub 1-a by deleting at fig 1 "resident owners of taxable real property aggregating at least one-half of all the taxable real property of the district owned by resident owners according to the latest completed assessment roll of the town, and acknowledged or proved in the same manner as a deed to be recorded, or" and adding the matter in italics.

2009. Chapter 373, § 1 amended:

By adding sub 7.

2007. Chapter 467, § 1 amended:

By adding sub 6.

2006. Chapter 625, § 1 amended:

Sub 5 by adding the matter in italics.

The 2014 amendment by ch 384, § 1 redesignated former 8 as 9; and added 10.

The 2019 amendment by ch 460, § 1, added 11.

The 2020 amendment by ch 291, § 4, added 12.

Notes to Decisions

Analysis

1. In general
2. Diminution
3. Dissolution

1. In general

A village incorporated in territory which formerly was administered by a town sanitary district had the power to render garbage service within its territorial limits upon the expiration of the contract existing with the sanitary district at the time of

incorporation. Atlantic Beach v Kimmel, 18 N.Y.2d 485, 276 N.Y.S.2d 993, 223 N.E.2d 489, 1966 N.Y. LEXIS 920 (N.Y. 1966).

Town's ad valorem levy for garbage collection services was invalid as imposed against owners of property in planned development where owners did not receive benefits of town garbage collection services by reason of declaration that owners were required to provide their own garbage collection, to which owners had agreed in return for town's allowance of favorable zoning conditions at time when development was formed; declaration did not constitute waiver of owners' right to object to levy, and public hearing was not required by CLS Town § 202-c. Applebaum v Oyster Bay, 81 N.Y.2d 733, 593 N.Y.S.2d 765, 609 N.E.2d 118, 1992 N.Y. LEXIS 4221 (N.Y. 1992).

There is nothing in this section to indicate a legislative intent to transfer from the State of New York, or grant to a town, jurisdiction over any sidewalk lying within the right of way of a state highway. Ryan v State, 21 Misc. 2d 74, 197 N.Y.S.2d 106, 1959 N.Y. Misc. LEXIS 2518 (N.Y. Ct. Cl. 1959).

Sidewalk districts may not be established in towns. Such improvements are handled under section 200 of Town Law. 1946 Ops St Compt 723.

Portions of a fire protection district and lighting district which are annexed to a village do not cease to be parts of the respective districts without affirmative action of the Town Board. 1962 Ops St Compt #876.

Separate valuation of trailers or mobile homes may not be considered as part of all the taxable real property of lighting district unless located on exempt land and separately assessed pursuant to statute. 1965 Ops St Compt File #760.

2. Diminution

That § 202-c of the Town Law was not designed to be the exclusive method of discontinuing or reducing the size of a special improvement district is indicated by § 3-354 of the Village Law which provides this result may also occur by "operation of law." Atlantic Beach v Kimmel, 18 N.Y.2d 485, 276 N.Y.S.2d 993, 223 N.E.2d 489, 1966 N.Y. LEXIS 920 (N.Y. 1966).

Town board may not diminish the area of a water district. 1946 Ops St Compt 347.

Area of sewer district in which sewer system has been constructed may not be diminished. Sewer system may be extended within a sewer district. Sewer system extension may be financed over a thirty-year period. 1947 Ops St Compt 319.

There is no authority for the diminution of the area of an existing water district. 1954 Ops St Compt File #6859.

3. Dissolution

That § 202-c of the Town Law was not designed to be the exclusive method of discontinuing or reducing the size of a special improvement district is indicated by § 3-354 of the Village Law which provides this result may also occur by "operation of law." Atlantic Beach v Kimmel, 18 N.Y.2d 485, 276 N.Y.S.2d 993, 223 N.E.2d 489, 1966 N.Y. LEXIS 920 (N.Y. 1966).

A town sewer district may be dissolved where no improvement has been constructed therein and where no indebtedness is outstanding on behalf of the district. Discussion of claims for preliminary expenses of a sewer district. 1968 Ops St Compt File #155.

Only qualified electors of the district affected may properly sign a petition protesting the adoption of a resolution by a town board dissolving a park district, and only such electors may properly vote on the proposition. 1968 Ops St Compt File #786.

Where a town water district is annexed to a village and the water district is dissolved in accordance with the agreement between the town and the village, any surplus funds of the water district should be turned over to the village. 1973 Ops St Compt File #900.

Governing board of town water district may, subject to mandatory referendum, sell all property and facilities of water district to public authority and dissolve district; moneys received from sale must be placed in reserve fund for purpose of retiring outstanding debt on behalf of district. 1995 Op St Compt No. 95-29.

When water district was established more than 3 years previously, no improvement has been constructed for district or services provided by district and no indebtedness is outstanding to accomplish purposes of district, district may be dissolved (subject to public hearing requirements) if town board's determines dissolution to be in public interest; certified copies of board's determination must be recorded in county clerk's office and filed with State Comptroller within 10 days of board's determination. 2002 Op St Compt No. 02-8.

Petition to dissolve lighting district under CLS Town § 202-c(1) is proper only if signed by appropriate number of individual owners of real property who have established domicile within district ("resident owners") and, consequently, if there are only corporate owners within lighting district, district may not be dissolved pursuant to CLS Town § 202-c. 2001 Opns St Comp No. 01-15.

Agency Opinions

Analysis

1. In general
2. Diminution
3. Dissolution

1. In general

The granting of a cable television franchise by a town creates vested rights and obligations which cannot be altered by the subsequent incorporation of a village within part of the town: consequently, 1. The franchise continues in effect within the area of the village without change or alteration; 2. The village is not entitled to receive any fee from the holder of the franchise for the exercise of the franchise right granted by the town; and 3. The village is not entitled to demand from the town and to receive any portion of the fee received or receivable by the town from the holder of the franchise. 1976 NY Ops Atty Gen Nov 29.

If two towns, by contract, operate a dump or sanitary landfill project, all residents of each town, including the residents of any village therein, must be given the same rights to use the project, and on the same basis, unless an improvement district for this purpose has been formed in only a part of a town or an agreement has been entered into between a town and a village under General Municipal Law § 120-v. 1977 NY Ops Atty Gen Feb 16.

Discussion of inalienability of sewer district, park district and park lands. 1977 NY Ops Atty Gen Nov 17.

Where the cost of a town sewer district improvement exceeds the original estimate, the increase must be approved by the property owners in the manner prescribed by the Town Law depending on whether the town proceeds under Articles 12, 12A or 12C. 1979 NY Ops Atty Gen August 13 (informal).

2. Diminution

There is no authority for the diminution of the area of an existing town water district. 1978 Op St Compt File #287.

There is no authority for the diminution of the area of an existing water district. 1978 Op St Compt File #407.

There is no authority for the diminution of the area of an existing town water district. 1979 Op St Compt File #571.

Generally, construction of sewer lines in only one portion of a sewer district would be improper where it has been determined that construction of an entire system within the maximum amount authorized to be expended is not feasible. In such circumstances, consideration should be given to diminishing or dissolving the existing district or modifying the plans for the district. 1983 Op St Compt File #83-216.

3. Dissolution

Where improvements have been made in a park district, such district may be dissolved or discontinued only by a special act of the State Legislature. 1978 Op St Compt File #624.

Generally, construction of sewer lines in only one portion of a sewer district would be improper where it has been determined that construction of an entire system within the maximum amount authorized to be expended is not feasible. In such circumstances, consideration should be given to diminishing or dissolving the existing district or modifying the plans for the district. 1983 Op St Compt File #83-216.

TRANSPORTATION LAW

Article
2. Powers, Duties and Jurisdiction of the Department of Transportation

HISTORY:
Add, L 1967, ch 717, § 27, eff Sept 1, 1967.

ARTICLE 2 Powers, Duties and Jurisdiction of the Department of Transportation

Section
14-f. Transportation of hazardous materials

HISTORY:
Add, L 1967, ch 717, § 27, eff Sept 1, 1967.

§ 14-f. Transportation of hazardous materials

1. The commissioner of transportation is hereby authorized to promote safety in the transportation of hazardous materials by all modes of transportation, and in connection therewith shall:

(a) Have the power to make rules and regulations governing transportation of hazardous materials, which shall mean a substance or material in a quantity and form which may pose an unreasonable risk to health and safety or property when transported in commerce, by all modes as defined by the rules and regulations of the department.

Such rules and regulations shall be no less protective of public safety than the rules and regulations promulgated by the federal government with respect to the transportation of hazardous materials. The regulations shall set forth the criteria for identifying and listing, and a list of hazardous materials subject to this section as may be amended by the commissioner of transportation from time to time in a manner consistent with the state administrative procedure act and consistent with those substances and materials designated by the United States secretary of transportation as hazardous under section 5103 of title 49 of the United States code as amended from time to time, including those designated as hazardous in the hazardous materials table set forth in section 172.101 and materials that meet the defining criteria for hazard classes and divisions in part 173 of subchapter C of title 49 of the code of federal regulations as amended from time to time. Such regulations shall include specifications for marking and placarding of vehicles transporting hazardous materials as will be applied pursuant to paragraph (a) of subdivision three of this section. The regulations promulgated hereunder shall include notice that a violation of the rules and regulations is subject to a fine or a period of imprisonment, and the rules and regulations shall set forth the penalty provisions contained in subdivision four of this section. Provided, however, that all local laws or ordinances, except those of cities having a population of one million or more, regulating the transportation of flammable liquids in trucks, trailers or semi-trailers, are hereby superseded and without force and hereafter no such local law or ordinance shall be adopted to regulate or control the equipment or means of transporting flammable liquids in trucks, trailers or semi-trailers.

For the purposes of this section, a "vehicle" shall mean every device in which property may be transported upon a highway, stationary rails or tracks, or on the navigable waterways of the state.

(b) Have power to enforce said rules and regulations through the use of department staff or others pursuant to cooperative agreement.

(c) Have power and is hereby authorized to enter into cooperative agreements with agencies of this and other states and of the federal government in relation to enforcement of said rules and regulations.

(d) Consult with and receive the full cooperation from the commissioner of environmental conservation and other agencies in order to aid the commissioner of transportation in establishing an information system capable of identifying the amount and type of hazardous materials transported in New York, and the methods used for transporting such materials. This system shall be established and maintained in order to assess the volume and potential danger of hazardous materials transported in commerce, by all modes.

(e) Establish and publicize, after consultation with the commissioner of environmental conservation, a public education program to provide publications and technical assistance regarding the regulations governing the transportation of hazardous materials.

(f) Develop a training program for the state police and environmental conservation officers in order to aid such officers in the enforcement of the rules and regulations made pursuant to this section.

2. It shall be unlawful for any person, corporation, company, association, partnership or any officer or agent thereof to transport or cause to be transported hazardous materials in violation of the rules and regulations promulgated by the commissioner pursuant to this section.

3. (a) It shall be unlawful for any person, corporation, company, association, partnership or any officer or agent thereof to operate or cause to be operated in this state a vehicle transporting hazardous materials unless the vehicle is conspicuously marked or placarded to identify the material transported or its principal hazard in a manner specified in rules and regulations promulgated by the commissioner that are consistent with related federal requirements; provided that the commissioner may, by rules and regulations prescribe with respect to any specific hazardous materials the minimum quantities below which no placard shall be required.

(b) It shall be unlawful for any person, corporation, company, association, partnership or any officer or agent thereof to operate or cause to be operated in this state a vehicle transporting those hazardous wastes identified and listed pursuant to section 27-0903 of the environmental conservation law or those regulated wastes listed and defined pursuant to section 27-0303 of the environmental conservation law unless such person complies with the requirements applicable to the transport of such wastes as set forth in article twenty-seven of the environmental conservation law and any rules and regulations promulgated thereunder.

4. (a) Except as provided in paragraph (b) of this subdivision, any person, corporation, company, association or partnership found guilty of violating any such rule or regulation shall be guilty of a traffic infraction, and all of the provisions of the vehicle and traffic law, except as otherwise specifically provided herein, shall be applicable thereto, and shall be subject to a fine of not less than three hundred fifty dollars nor more than one thousand dollars for the first offense, and upon being found guilty of a second or subsequent offense committed within eighteen months by a fine of not less than one thousand dollars nor more than two thousand five hundred dollars, or by imprisonment for not more than ninety days or by both such fine and imprisonment . Except as otherwise provided by law, such a violation shall not be a crime and the penalty or punishment imposed therefor shall not be deemed for any purpose a criminal penalty or punishment and shall not impose any disability upon or affect or impair the credibility as a witness, or otherwise, of a person found guilty thereof; provided, however, that any person transporting hazardous waste in violation of article twenty-seven of the environmental conservation law shall be subject to the penalties provided in article seventy-one of such law.

(b) Any person, corporation, company, association or partnership found guilty of violating any such rules or regulations involving an out-of-service defect relating to brake systems, steering components and/or coupling devices shall be subject to a fine of not less than five hundred dollars nor more than one thousand five hundred dollars, or by imprisonment for not more than sixty days or by both such fine and imprisonment, and upon being found guilty of a second or subsequent offense committed within eighteen months by a fine of not less than one thousand five hundred dollars nor more than two thousand five hundred dollars, or by imprisonment for not more than ninety days or by both such fine and imprisonment.

(c) Operation of an out-of-service vehicle shall constitute a misdemeanor and shall be punished by a fine of not less than two thousand five hundred dollars nor more than five thousand dollars, or by imprisonment for not more than one year or by both such fine and imprisonment. A conviction for a second or subsequent offense committed within eighteen months shall constitute a class E felony and shall be punished by a fine of not less than three thousand five hundred dollars or by a period of imprisonment as provided in the penal law, or by both such fine and imprisonment.

(d) If any person does not appear in response to an appearance ticket or the court's direction, or pay any fine imposed, the commissioner of motor vehicles shall have the power to suspend the registration or privilege of operation of any such vehicle operated or alleged to have been operated in violation of such rules and regulations.

(e) (i) Any complaint issued for an equipment violation, except for a violation involving an out-of-service defect or except for a violation involving the operation of any motor vehicle after it has been placed out of service, shall be dismissed by the court before such summons is returnable if the violation as set forth in the summons is corrected not later than one-half hour after sunset on the first full business day after the issuance of the summons and proof of such correction as set forth in subparagraph (ii) of this paragraph is submitted to the court. For the purposes of this subparagraph, "business day" shall mean any calendar day except Sunday, or the following business holidays: New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day and Christmas Day.

(ii) Acceptable proof of repair or adjustment shall consist of submission to the court on or before the return date of the summons of (A) a statement of correction from an officially designated state inspection station duly executed by the person performing or making such inspection and bearing the official stamp of the state inspection station, (B) a statement of correction from an automobile repair shop on the letterhead of such repair shop duly executed by the person who made the correction or (C) a signed statement of any police officer or a department inspector that the necessary corrections have been made. The statement required by this subparagraph shall be directed to the court having jurisdiction of the alleged violation, shall be affirmed as true under penalty of perjury, and shall include the name, occupation and position of the person making the statement, the time and date that the repairs or inspection were made and a statement that the defective equipment, cited in the violation, on the vehicle in question, is in proper working order.

5. With respect to the transportation of radioactive materials, nothing in this section shall be construed to abrogate or effect the provisions of any federal or state statute or local ordinance, regulation or resolution which are more restrictive than or which supersede the provisions of this section.

6. Any police officer having lawfully stopped any vehicle which he has reason to believe is transporting hazardous materials or hazardous waste may require that such vehicle shall be driven to a place designated by such police officer to be inspected

pursuant to the provisions of this section and the rules and regulations of the commissioner concerning transportation of hazardous materials or pursuant to title nine of article twenty-seven of the environmental conservation law. Provided, however, that such place designated by such police officer shall not exceed a distance of five miles from the place at which such vehicle was stopped. Furthermore, that when such place designated by such officer or any other place utilized for inspection of vehicles pursuant to this section is a roadside rest area, such rest area shall be kept open for the use of the public to the extent practicable.

HISTORY:

Add, L 1981, ch 963, § 2, generally eff Nov 28, 1981, with sub 1, pars (a), (d)–(f), eff July 31, 1981; amd, L 1983, ch 901, § 11; L 1987, ch 186, §§ 1–3, eff Oct 27, 1987 (see 1987 note below); L 1987, ch 431, § 8, eff April 1, 1988; L 1987, ch 504, § 1; L 1989, ch 180, § 30, eff June 22, 1989; L 1989, ch 190, § 5, eff Sept 22, 1989; L 1990, ch 173, § 1, eff Aug 19, 1990; L 1992, ch 141, § 1, eff June 16, 1992; L 1993, ch 402, § 1, eff July 21, 1993; L 2012, ch 58, § 13 (Part G), eff March 30, 2012.

Prior Law: Former § 14-f, add, L 1976, ch 641, § 1; repealed, L 1981, ch 963, § 1, eff Nov 28, 1981.

Editor's Notes: Laws 1987, ch 186, § 6, eff Oct 27, 1987, provides as follows:

§ 6. This act shall take effect on the one hundred twentieth day after it shall have become a law, provided however, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of the foregoing sections of this act on their effective date are authorized and directed to be made and completed on or before such effective date.

Laws 1987, ch 431, § 9, eff April 1, 1988, provides as follows:

§ 9. This act shall take effect April first, nineteen hundred eighty-eight, provided that sections five, six and seven of this act shall take effect September first, nineteen hundred eighty-eight, and provided further, however, that the commissioner of environmental conservation and the commissioner of transportation shall, after mutual consultation, promulgate rules and regulations prior to such effective date as may be necessary to implement the provisions of this act.

Amendment Notes: 2012. Chapter 58, § 13 (Part G) amended:

Sub 1, par (a), opening par by deleting at fig 1 "For purposes of this section, the term 'hazardous materials' shall include the following:" and adding the matter in italics.

By deleting sub 1, par (a), subpars (1)–(12), respectively.

Sub 1, par (a), second undesignated par by deleting at fig 1 "this section" and adding the matter in italics.

Notes to Decisions

Corporation involved in petroleum transport and its district manager and operations manager were properly charged with illegal possession, transportation and storage of hazardous waste where waste in tanker had flashpoint of 80.2 degrees Fahrenheit, and defendants had no authorization to possess hazardous waste, no permit or manifest to transport it, and no permit to store or dispose of it; prosecutor was not obligated to charge grand jury on each possible exemption in hazardous waste regulations. People v Roth, 176 A.D.2d 1186, 576 N.Y.S.2d 968, 1991 N.Y. App. Div. LEXIS 13823 (N.Y. App. Div. 4th Dep't 1991), modified, 80 N.Y.2d 239, 590 N.Y.S.2d 30, 604 N.E.2d 92, 1992 N.Y. LEXIS 3479 (N.Y. 1992).

Charges of operating with improper placarding, improper shipping papers, defective steering and insufficient air pressure would not be dismissed on ground that information did not contain factual allegations establishing each element of offenses; simplified traffic information can be used to charge violation of regulations made under Transportation Law which refer to traffic matters. People v Kavanaugh, 133 Misc. 2d 689, 507 N.Y.S.2d 952, 1986 N.Y. Misc. LEXIS 2929 (N.Y. Dist. Ct. 1986).

Defendant was not entitled to dismissal of simplified traffic information which charged violation of non-existent 49 CFR 396.3(A)(5) as supposedly incorporated by reference into 17 NYCRR 507.4 under authority granted Commissioner of Transportation by CLS Trans § 14-f where information stated correct references to both Transportation Law and Codes, Rules and Regulations, and it clearly stated facts in violation of 49 CFR 396.3(a)(1). People v SNR Delivery, Inc., 134 Misc. 2d 570, 511 N.Y.S.2d 1000, 1987 N.Y. Misc. LEXIS 2065 (N.Y. Dist. Ct. 1987).

Simplified traffic informations charging violations of various regulations of Commissioner of Transportation concerning transportation of hazardous materials, and incorporating federal regulations by reference, were not subject to dismissal on ground that copies of federal regulations on file with Department of State were outdated where there had been no change in particular regulatory provisons defendant had violated; each reprinting of Code of Federal Regulations does not constitute establishment of entirely new body of law, and mandates of CLS NY Const Art IV § 8 are met where text of regulation being enforced is on file and has not been amended at time of alleged violation. People v SNR Delivery, Inc., 134 Misc. 2d 570, 511 N.Y.S.2d 1000, 1987 N.Y. Misc. LEXIS 2065 (N.Y. Dist. Ct. 1987).

Routine traffic stop of truck transporting hazardous material was unlawful in absence of any articulable or objective basis therefor or proof that stop and inspection were carried out under neutral, nonarbitrary plan or program for regular or systematic inspection of trucks engaged in such transport; thus, since predicate for inspection of vehicle transporting hazardous material is "lawful" stop under CLS Trans § 14-f(6), traffic informations resulting from inspection following stop would be dismissed. People v Deacy, 140 Misc. 2d 232, 530 N.Y.S.2d 753, 1988 N.Y. Misc. LEXIS 379 (N.Y. Dist. Ct. 1988).

Unlawful stop and search of truck carrying hazardous material was not justified as administrative search since there was no underlying inspection program having certainty and regularity of application. People v Deacy, 140 Misc. 2d 232, 530 N.Y.S.2d 753, 1988 N.Y. Misc. LEXIS 379 (N.Y. Dist. Ct. 1988).

Pursuant to CLS Veh & Tr § 207, simplified traffic information adopted by Commissioner of Motor Vehicles is proper instrument for prosecution of violation of CLS Trans § 14-f concerning transportation of hazardous materials. People v Scantlebury, 143 Misc. 2d 9, 539 N.Y.S.2d 641, 1989 N.Y. Misc. LEXIS 170 (N.Y. Dist. Ct. 1989).

Defendant was not entitled to dismissal of simplified traffic information charging him with marking or placarding of vehicle as carrying hazardous materials when in fact vehicle was not carrying such materials, even though CLS Trans § 14-f did not prohibit such conduct, since 17 NYCRR § 507.4, adopted by Transportation Commissioner under authority of § 14-f(1)(a), incorporated by specific reference 49 CFR § 172.502(a), which prohibited affixation of placard on vehicle that did not contain placarded material. People v Scantlebury, 143 Misc. 2d 9, 539 N.Y.S.2d 641, 1989 N.Y. Misc. LEXIS 170 (N.Y. Dist. Ct. 1989).

Simplified traffic information, which stated "Placarded Flammable not carrying Haz. Material," and had number "172.502" written above words "Transportation Law," was sufficient to apprise defendant that he was being charged with violating 49 CFR § 172.502, which was incorporated by reference into New York regulations adopted by Transportation Commissioner under authority of CLS Trans § 14-f(1)(a). People v Scantlebury, 143 Misc. 2d 9, 539 N.Y.S.2d 641, 1989 N.Y. Misc. LEXIS 170 (N.Y. Dist. Ct. 1989).

As defendant's inability to locate the hazardous materials in the cargo hold of defendant's tractor trailer did not constitute a failure to make hazardous materials available for inspection under N.Y. Transp. Law § 14-f(2), the evidence was legally insufficient to establish defendant's guilt beyond a reasonable doubt. People v Gaugh, 951 N.Y.S.2d 826, 37 Misc. 3d 9, 2012 N.Y. Misc. LEXIS 2866 (N.Y. App. Term 2012).

In defendant's appeal from his conviction for violating N.Y. Transp. Law § 14-f(2), (3)(a) by having a prohibited hazardous

materials identification marking on a commercial vehicle, there was no merit in his contention that the accusatory instrument was defective in that it incorrectly cited 49 CFR 172.303(a), pertaining to packages, in support of the charge rather than 49 CFR 172.502, which pertained to vehicles, because he was fully apprised of the nature of his alleged offense. People v Chiosie, 820 N.Y.S.2d 400, 12 Misc. 3d 88, 2006 N.Y. Misc. LEXIS 1608 (N.Y. App. Term 2006).

Defendant was improperly convicted of violating N.Y. Transp. Law § 14-f(2), (3)(a) by operating a vehicle that displayed a prohibited hazardous materials identification marking because he was not transporting any hazardous materials; all the provisions of N.Y. Transp. Law § 14-f pertain to the transportation of hazardous materials, and there is no indication of any legislative intent to regulate the display of a hazardous material identification marking on the outside of a vehicle that is not transporting hazardous materials. People v Chiosie, 820 N.Y.S.2d 400, 12 Misc. 3d 88, 2006 N.Y. Misc. LEXIS 1608 (N.Y. App. Term 2006).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS Exec § 156-a; CLS Gen Mun § 371; CLS St Fin § 90; CLS Veh & Tr §§ 378, 510, 514, 1690, 1803.

Definitions, CLS ECL § 27-0303.

Identification and listing of hazardous waste, CLS ECL § 27-0903.

Collection, treatment and disposal of refuse and other solid waste, CLS ECL Art 27 §§ 27-0101 et seq.

Enforcement, CLS ECL §§ 71-0101 et seq.

Explosives, CLS Labor §§ 450 et seq.

Uniform traffic summons and complaint CLS Veh & Tr § 207.

Additional safety requirements for commercial vehicles and vehicles transporting hazardous materials, CLS Veh & Tr § 378.

Codes, Rules and Regulations:

Farm plate vehicle safety requirements. 17 NYCRR § 820.20.

VEHICLE AND TRAFFIC LAW

Title
- I. Words and Phrases Defined
- II. Department of Motor Vehicles; Commissioner
- III. Safety Responsibility; Financial Security; Equipment; Inspection; Size and Weight; and Other Provisions
- IV. Registration of Vehicles
- V. Drivers' Licenses
- VI. Accidents and Accident Reports
- VII. Rules of the Road
- VIII. Respective Powers of State and Local Authorities
- IX. Penalties and Disposition of Fines and Forfeitures
- X. Uniform Vehicle Certificate of Title Act

HISTORY:
Add, L 1959, ch 775, eff Oct 1, 1960; amd, L 1959, ch 776, § 1; L 1960, ch 464, eff Jan 1, 1961.

TITLE I Words and Phrases Defined

Article 1. Words and Phrases Defined

Section
- 100-b. Ambulance
- 101. Authorized emergency vehicle
- 106-a. Civil defense emergency vehicle
- 109-b. County emergency medical services vehicle
- 109-c. Conviction
- 113. Driver
- 114-b. Emergency operation
- 115-a. Fire vehicle
- 115-c. Emergency ambulance service vehicle
- 116. Flammable liquid
- 117-d. Blood delivery vehicle
- 125. Motor vehicles.
- 129-a. Parking area of a shopping center

HISTORY:
Add, L 1959, ch 775, eff Oct 1, 1960, with substance transferred from former Title II.

ARTICLE 1 Words and Phrases Defined

HISTORY:
Add, L 1959, ch 775, eff Oct 1, 1960, with substance transferred from former Arts 1 and 10.

§ 100-b. Ambulance

Every motor vehicle designed, appropriately equipped and used for the purpose of carrying sick or injured persons by a person or entity registered or certified as an ambulance service by the department of health.

HISTORY:
Add, as 100-a, L 1970, ch 197, § 1; renumbered § 100–b, L 1983, ch 1008, § 1; L 1991, ch 374, § 1, eff Jan 1, 1992.

Prior Law: Former § 100–b, renumbered § 100–c, L 1983, ch 1008, § 1, eff Sept 30, 1983.

§ 101. Authorized emergency vehicle

Every ambulance, police vehicle or bicycle, correction vehicle, fire vehicle, civil defense emergency vehicle, emergency ambulance service vehicle, blood delivery vehicle, county emergency medical services vehicle, environmental emergency response vehicle, sanitation patrol vehicle, hazardous materials emergency vehicle and ordnance disposal vehicle of the armed forces of the United States.

HISTORY:
Add, L 1970, ch 197, § 3; amd, L 1971, ch 288, § 1; L 1978, ch 263, § 1; L 1981, ch 142, § 1; L 1986, ch 196, § 1; L 1987, ch 152, § 1; L 1987, ch 568, § 1; L 1987, ch 827, § 3, eff Aug 7, 1987; L 1994, ch 606, § 1, eff July 26, 1994; L 1996, ch 460, § 1, eff Aug 8, 1996; L 2003, ch 446, § 1, eff Sept 25, 2003.

Repeal Notes: [1970, ch 197] Section one hundred one of the vehicle and traffic law, which was repealed by section two of this act, contained the definition of the term "authorized emergency vehicle".

Prior Law: Former § 101, add, L 1959, ch 775, with substance transferred from former § 101; amd, L 1960, ch 300, § 1, L 1961, ch 491, § 1; repealed, L 1970, ch 197, § 2, eff July 1, 1971.

Notes to Decisions

Analysis

1. In general
2. Colored light or flasher
3. Siren
4. Sign
5. Operation of emergency vehicle

1. In general

Trooper was entitled to qualified immunity under N.Y. Veh. & Traf. Law § 1104(e) in a claim arising from an accident in which the trooper's car was struck by a motorist while the trooper was making a U-turn because, given the evidence of precautions taken by the trooper, he did not act with "conscious indifference" to the consequences of his actions; the trooper testified that after he stopped in the breakdown lane, he activated his left turn signal and looked over his shoulder and out the front window several times to ensure that traffic had stopped in both directions. Before starting his turn, he saw that the motorist's car appeared to have stopped about 20 yards behind him. Green v State of New York, 71 A.D.3d 1310, 897 N.Y.S.2d 536, 2010 N.Y. App. Div. LEXIS 2020 (N.Y. App. Div. 3d Dep't 2010).

Under the definition of "authorized emergency vehicle" in § 101, a private citizen driving his own car in pursuit of a speeder, and himself violating the speed limit, is subject to conviction of speeding, regardless of his good faith. People v Nagell, 23 Misc. 2d 452, 206 N.Y.S.2d 654, 1960 N.Y. Misc. LEXIS 3055 (N.Y. J. Ct. 1960).

A conservation department game protector was not driving an "emergency vehicle", so as to be exempt from prosecution for violating a village speed ordinance, where the police justice was not convinced that he was acting in an emergency in following up an anonymous telephone call advising him that someone was spearing fish at a point not far distant. People v McIntosh, 35 Misc. 2d 865, 231 N.Y.S.2d 714, 1962 N.Y. Misc. LEXIS 2762 (N.Y. County Ct. 1962).

General Municipal Law provision giving additional right of action to fireman injured as a result of any neglect, omission, willful or culpable negligence of any person in failing to comply with statutes or ordinances was available to one who, while performing duties as fireman, driving official automobile, was injured in collision with defendant's automobile, allegedly as result of defendant's negligence in failing to comply with Vehicle and Traffic Law provisions requiring defendant to stop and yield. Burigo v Di Leo, 38 Misc. 2d 851, 239 N.Y.S.2d 166, 1963 N.Y. Misc. LEXIS 2213 (N.Y. County Ct. 1963).

Statute giving an additional right of action for injury or death of a fireman as result of negligence of any person in failing to comply with statutes and ordinances is not limited to injuries sustained by firemen while engaged in extinguishing a fire on premises, and claims by firemen whose official automobile was in collision on public highway with automobile owned and driven by defendants, who allegedly failed to yield right of way to firemen's emergency vehicle, was sufficient to state a cause of action for personal injuries. McAvoy v Di Leo, 40 Misc. 2d 46, 242 N.Y.S.2d 682, 1963 N.Y. Misc. LEXIS 1798 (N.Y. County Ct. 1963), rev'd, 43 Misc. 2d 164, 250 N.Y.S.2d 444, 1964 N.Y. Misc. LEXIS 1848 (N.Y. App. Term 1964).

Uncontradicted evidence established that police officers suing driver of private automobile as result of collision between the vehicles had reasonable ground for believing emergency existed at time of collision and that an emergency call for apprehension of man with a gun had actually been sent out and had been received by officers before collision. Bravata v Russo, 41 Misc. 2d 376, 245 N.Y.S.2d 702, 1963 N.Y. Misc. LEXIS 1270 (N.Y. Sup. Ct. 1963), rev'd, 21 A.D.2d 689, 250 N.Y.S.2d 582, 1964 N.Y. App. Div. LEXIS 3706 (N.Y. App. Div. 2d Dep't 1964).

2. Colored light or flasher

Plaintiff, member volunteer fire department, was not entitled judgment declaring that fire district board of commissioners could not promulgate any regulations prohibiting plaintiff from displaying red flashing light on his personal vehicle while responding to emergencies in discharge of his duties as volunteer emergency medical technician. Nicosia v Shultis, 239 A.D.2d 473, 658 N.Y.S.2d 640, 1997 N.Y. App. Div. LEXIS 5359 (N.Y. App. Div. 2d Dep't), app. dismissed, in part, app. denied, 90 N.Y.2d 1003, 665 N.Y.S.2d 955, 688 N.E.2d 1038, 1997 N.Y. LEXIS 3678 (N.Y. 1997).

Law prohibits use of amber, white or red lights on privately owned vehicles of any nature, including those owned by and operated by civil defense employees or volunteers, and there is no statutory exception which can be granted by any public employee or official, including police officials. People v Hesselink, 76 Misc. 2d 418, 351 N.Y.S.2d 270, 1973 N.Y. Misc. LEXIS 1504 (N.Y. J. Ct. 1973).

A county fire coordinator and the deputy fire coordinator may operate private vehicles with flashing red and white lights. The district fire coordinator and the ambulance coordinator could only operate such vehicles with red and white flashing lights when operated in official capacity under the direction of the county or deputy county fire coordinator. 1979 Op Atty Gen Mar 21 (informal).

Town board may purchase patrol car with blinker light and siren for police duties of special policeman, but special policeman may not use blinker light and siren on privately owned car on police duties. 1953 Ops St Compt 354.

Part-time town policemen in Westchester County may not operate their privately owned vehicles equipped with flasher lights and sirens, but a town board may authorize the use of a detachable "police sign" on privately owned vehicles operated by part-time town policemen. 1967 Ops St Compt File #597.

3. Siren

A town constable may not attach or use a siren on his privately owned vehicle, notwithstanding that such vehicle is used in the performance of his official duties. 1953 Ops St Compt 200.

Town board may purchase patrol car with blinker light and siren for police duties of special policeman, but special policeman may not use blinker light and siren on privately owned car on police duties. 1953 Ops St Compt 354.

Part-time town policemen in Westchester County may not operate their privately owned vehicles equipped with flasher lights and sirens, but a town board may authorize the use of a detachable "police sign" on privately owned vehicles operated by part-time town policemen. 1967 Ops St Compt File #597.

4. Sign

Part-time town policemen in Westchester County may not operate their privately owned vehicles equipped with flasher lights and sirens, but a town board may authorize the use of a detachable "police sign" on privately owned vehicles operated by part-time town policemen. 1967 Ops St Compt File #597.

5. Operation of emergency vehicle

Unmarked New York City Department of Corrections vehicle equipped with emergency warning devices was police vehicle as defined in CLS Veh & Tr §§ 101 and 132-a. Klayman v New York, 130 A.D.2d 551, 515 N.Y.S.2d 285, 1987 N.Y. App. Div. LEXIS 46553 (N.Y. App. Div. 2d Dep't), amended, 134 A.D.2d 408, 520 N.Y.S.2d 1015, 1987 N.Y. App. Div. LEXIS 50598 (N.Y. App. Div. 2d Dep't 1987).

It was reversible error to deny request to charge jury that plaintiff was operating authorized "emergency vehicle" engaged in "emergency operation" at time that ambulance she was driving collided with truck since ambulance is authorized emergency vehicle, and it was undisputed that she was transporting patient who had experienced respiratory distress to hospital at time of accident. Mulholland v Nabisco, Inc., 264 A.D.2d 411, 693 N.Y.S.2d 242, 1999 N.Y. App. Div. LEXIS 8647 (N.Y. App. Div. 2d Dep't 1999).

CLS Veh & Tr § 1104(a) applied to police van being driven by civilian operator while transporting prisoners even though it was not equipped with lights or siren, because every police vehicle is authorized emergency vehicle (CLS Veh & Tr §§ 101, 132) and use of authorized emergency vehicle to transport prisoners is emergency operation (CLS Veh & Tr § 114-b), there being no limiting language in statute bearing on either definition. Church v City of New York, 268 A.D.2d 382, 702 N.Y.S.2d 274, 2000 N.Y. App. Div. LEXIS 784 (N.Y. App. Div. 1st Dep't 2000).

Police officer's squad car was an emergency vehicle and his pursuit of a speeding vehicle was an emergency operation for purposes of N.Y. Veh. & Traf. Law § 1104, however, the officer was not entitled to qualified immunity under that statute regarding a traffic accident that occurred during the pursuit because the officer acted recklessly in taking part in the pursuit. Flack v State of New York, 57 A.D.3d 1199, 870 N.Y.S.2d 500, 2008 N.Y. App. Div. LEXIS 9575 (N.Y. App. Div. 3d Dep't 2008).

Under the definition of "authorized emergency vehicle" in § 101, a private citizen driving his own car in pursuit of a speeder, and himself violating the speed limit, is subject to conviction of speeding, regardless of his good faith. People v Nagell, 23 Misc. 2d 452, 206 N.Y.S.2d 654, 1960 N.Y. Misc. LEXIS 3055 (N.Y. J. Ct. 1960).

A conservation department game protector was not driving an "emergency vehicle", so as to be exempt from prosecution for violating a village speed ordinance, where the police justice was not convinced that he was acting in an emergency in following up an anonymous telephone call advising him that someone was spearing fish at a point not far distant. People v McIntosh, 35 Misc. 2d 865, 231 N.Y.S.2d 714, 1962 N.Y. Misc. LEXIS 2762 (N.Y. County Ct. 1962).

Police officers who were responding to emergency call and were traveling in lane for oncoming traffic when their vehicle hit preceding private automobile which had been turned across white line into the oncoming lane were not contributorily at fault, and collision was proximately due to negligence of driver of private automobile. Bravata v Russo, 41 Misc. 2d 376, 245 N.Y.S.2d 702, 1963 N.Y. Misc. LEXIS 1270 (N.Y. Sup. Ct. 1963), rev'd, 21 A.D.2d 689, 250 N.Y.S.2d 582, 1964 N.Y. App. Div. LEXIS 3706 (N.Y. App. Div. 2d Dep't 1964).

Where the officer, while attempting to replace the officer's patrol car microphone after receiving a dispatch for a traffic stop, drifted into an intersection and struck the injured party, the officer and city were entitled to summary judgment pursuant to N.Y. C.P.L.R. 3212 in the injured party's personal injury action; the officer was deemed to have been driving an emergency vehicle involved in an emergency operation pursuant to N.Y. Veh. & Traf. Law §§ 101, 114-b, and the officer's actions were measured under the reckless disregard standard pursuant to N.Y. Veh. & Traf. Law § 1104(e), which the injured party failed to satisfy in the instant case. Hughes v Chiera, 4 A.D.3d 872, 772 N.Y.S.2d 772, 2004 N.Y. App. Div. LEXIS 1382 (N.Y. App. Div. 4th Dep't 2004).

When a cyclist was hurt when trying to pass a sheriff's department vehicle parked partly in a two-lane roadway while

investigating an accident, because he collided with a vehicle traveling the opposite direction, the operator of the sheriff's department vehicle was not liable for the cyclist's injuries because the vehicle was an "authorized emergency vehicle," under N.Y. Veh. & Traf. Law § 101, and its operator was engaged in an "emergency operation," under N.Y. Veh. & Traf. Law § 114-b, so the operator was afforded the benefits of N.Y. Veh. & Traf. Law § 1104, protecting her from civil liability because she was not engaged in an act of reckless disregard, as her vehicle's emergency lights were clearly visible to both parties involved in the accident for at least half a mile, it was daylight and not raining, and her vehicle was parked pursuant to sheriff's department policies to insure maximum safety. Gonyea v County of Saratoga, 23 A.D.3d 790, 803 N.Y.S.2d 764, 2005 N.Y. App. Div. LEXIS 12390 (N.Y. App. Div. 3d Dep't 2005).

In defendant's prosecution for vehicular assault in the second degree under N.Y. Penal Law § 120.03, defendant was properly barred from claiming that the failure of a police officer, who was struck in his patrol car by defendant's vehicle, to wear a seat belt was the intervening cause of his serious physical injuries because the officer was not required to wear a seat belt under N.Y. Veh. & Traf. Law §§ 101, 1229-c(3), (4). People v Mojica, 62 A.D.3d 100, 874 N.Y.S.2d 195, 241 N.Y.L.J. 44, 2009 N.Y. App. Div. LEXIS 1499 (N.Y. App. Div. 2d Dep't), app. denied, 12 N.Y.3d 856, 881 N.Y.S.2d 668, 909 N.E.2d 591, 2009 N.Y. LEXIS 2801 (N.Y. 2009).

Agency Opinions

Analysis

1. In general
2. Colored light or flasher
3. Siren
4. Sign
5. Operation of emergency vehicle

1. In general

There is no statutory authority for the use of siren or red light by a constable on his privately owned automobile. 1952 NY Ops Atty Gen 22 (informal).

There is no statutory authority for the use of a siren or a red light by a special deputy sheriff on his privately owned automobile. 1952 NY Ops Atty Gen 23 (informal).

A vehicle operated by a special deputy sheriff is not an authorized emergency vehicle and may not be equipped with a red light and siren. 1960 NY Ops Atty Gen July 6 (informal).

A village having a police department created under Village Law Article 8 or former Village Law § 188-a may authorize the police chief, deputy chief or assistant chief to install a siren and red light and/or certain white lights on his private motor vehicle to be used when (and only when) that vehicle is being operated by the officer on official village police department business while engaged in an emergency operation. 1980 NY Ops Atty Gen July 14 (informal).

Vehicles owned by City University of New York (CUNY) and operated by special patrolmen on its security and public safety force are "police vehicles" as defined in CLS Veh & Tr § 132-a; thus, those vehicles may display red or white flashing lights while engaged in emergency operations on CUNY property. 2000 NY Ops Atty Gen F 00-4.

School district is not authorized to designate motor vehicles owned by district and operated by school district's superintendent, supervisor of transportation and health and safety coordinator as authorized emergency vehicles pursuant to CLS Veh & Tr Law; since vehicles owned and operated by school district do not meet any of criteria of authorized emergency vehicles, display of emergency lights is not permitted under CLS Veh & Tr Law § 375. NY Ops Atty Gen 88-74 (Informal).

2. Colored light or flasher

The chief of a volunteer fire department when responding to a fire alarm in his privately owned automobile may display a red light and use a siren. 1956 NY Ops Atty Gen Feb 23 (informal).

A station wagon which may be used as an emergency ambulance for civil defense purposes and for emergency purposes in aid of the Civil Air Patrol may not be equipped with a flashing red light to be used only when the vehicle is devoted to civil defense or other emergency purposes. Such vehicle may, however, use such colored lights as are authorized by applicable regulation of the New York State Civil Defense Commission when used for civil defense purposes. 1958 NY Ops Atty Gen Jul 16 (informal).

A vehicle operated by a special deputy sheriff is not an authorized emergency vehicle and may not be equipped with a red light and siren. 1960 NY Ops Atty Gen July 6 (informal).

Privately owned vehicles used in civil defense emergency operations may not display the emergency lights permitted on civil defense emergency vehicles owned by the State, a county, town, city or village. 1972 NY Ops Atty Gen Apr 6 (informal).

Fire policemen may not affix red lights to their own vehicles, regardless of what duties they are engaged in. 1976 NY Ops Atty Gen June 4.

A town constable does not have the authority to affix a red light or use a siren on a motor vehicle, regardless of whether such vehicle is owned by the constable or the town; a town board has the authority to purchase a town motor vehicle for official duties only for the town constable; and, there is no authority of law for a town board to appoint a chief of town constables to direct the other constables. 1976 NY Ops Atty Gen Apr 22 (informal).

Town constables may not affix a red light or use a siren on a motor. Nor may they exceed speed limits and violate other traffic rules. Town constables may affix emblems to town vehicles identifying them as constable vehicles. Town constables may not be used to assist other local governments requesting aid. 1981 NY Ops Atty Gen Feb 23 (informal).

Rear-facing blue lights may not, under current legislative scheme, be added to State Police vehicles. 2003 NY Ops Atty Gen F 2003-2.

A red or white flashing light may be affixed to a vehicle ordinarily operated by a town fire co-ordinator and these lights may be displayed on the vehicle when it is engaged in an emergency operation and while it is returning from a fire or other emergency. N.Y. Op. Att'y Gen. No. 86-2.

3. Siren

The chief of a volunteer fire department when responding to a fire alarm in his privately owned automobile may display a red light and use a siren. 1956 NY Ops Atty Gen Feb 23 (informal).

A vehicle operated by a special deputy sheriff is not an authorized emergency vehicle and may not be equipped with a red light and siren. 1960 NY Ops Atty Gen July 6 (informal).

Town constables may not affix a red light or use a siren on a motor vehicle. Nor may they exceed speed limits and violate other traffic rules. Town constables may affix emblems to town vehicles identifying them as constable vehicles. Town constables may not be used to assist other local governments requesting aid. 1981 NY Ops Atty Gen Feb 23 (informal).

4. Sign

Town constables may not affix a red light or use a siren on a motor vehicle. Nor may they exceed speed limits and violate other traffic rules. Town constables may affix emblems to town vehicles identifying them as constable vehicles. Town constables may not be used to assist other local governments requesting aid. 1981 NY Ops Atty Gen Feb 23 (informal).

5. Operation of emergency vehicle

Person described in CLS Veh & Tr § 1103(b) who, with reckless disregard for safety of others, violates any rules of road described thereunder does not commit traffic infraction, but may incur liability in civil law action. 1992 NY Ops Atty Gen F 92-9.

If a person is so infirm that he is incapable of traveling from a nursing home to a hospital by ordinary means of transportation and for that reason is transported with the aid of an ambulance, the driver of the ambulance may use sirens, flashing red lights, etc., pursuant to Vehicle and Traffic Law, § 1104, even though the person being transported is in no imminent danger. 1979 Op St Compt File #22.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 115-a, 132-a, 1229-c.

Annotations:

Liability for personal injury or damage from operation of fire department vehicle. 82 ALR2d 312.

Liability of operator of ambulance service for personal injuries to person being transported. 68 ALR4th 14.

§ 106-a. Civil defense emergency vehicle

Every communications vehicle and rescue vehicle owned by the state, a county, town, city or village and operated for civil defense purposes and equipped and marked as a civil defense emergency communications or rescue vehicle in compliance with the rules and regulations of the state civil defense commission.

HISTORY:

Add, L 1971, ch 288, § 2, eff May 18, 1971.

Notes to Decisions

Under Vehicle and Traffic Law § 375, subd 41, § 117-a, and § 106-a, individual member of civilian defense was not authorized to have rotating amber lights affixed to bar across top of his privately-owned vehicle. People v Hesselink, 76 Misc. 2d 418, 351 N.Y.S.2d 270, 1973 N.Y. Misc. LEXIS 1504 (N.Y. J. Ct. 1973).

Agency Opinions

Privately owned vehicles used in civil defense emergency operations may not display the emergency lights permitted on civil defense emergency vehicles owned by the State, a county, town, city or village. 1972 NY Ops Atty Gen Apr 6 (informal).

§ 109-b. County emergency medical services vehicle

Every vehicle operated by a county emergency medical services coordinator or deputy county emergency medical services coordinator appointed pursuant to the provisions of section two hundred twenty-three-b of the county law, when operated in an official capacity while engaged in an emergency operation.

HISTORY:

Add, L 2003, ch 446, § 2, eff Sept 25, 2003.

§ 109-c. Conviction

Any conviction as defined in subdivision thirteen of section 1.20 of the criminal procedure law; provided, however, where a conviction or administrative finding in this state or another state results in a mandatory sanction against a commercial driver's license, as set forth in sections five hundred ten, five hundred ten-a, eleven hundred ninety-two and eleven hundred ninety-four of this chapter, conviction shall also mean an unvacated adjudication of guilt, or a determination that a person has violated or failed to comply with the law in a court of original jurisdiction or by an authorized administrative tribunal, an unvacated forfeiture of bail or collateral deposited to secure the person's appearance in court, a plea of guilty or nolo contendere accepted by the court, the payment of a fine or court cost, or violation of a condition of release without bail, regardless of whether or not the penalty is rebated, suspended, or probated.

HISTORY:

Add, L 2005, ch 60, § 1 (Part E), eff April 12, 2005.

Editor's Notes: Laws 2005, ch 60, § 21 (Part E), eff April 12, 2005, provides as follows:

§ 21. This act shall take effect immediately and shall apply to violations committed on and after such date; provided, however, that section twenty of this act shall be deemed to have been in full force and effect on and after April 1, 2005; provided further that sections two, five, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen and nineteen of this act shall take effect September 30, 2005; and provided further that the amendments to subdivision 5 of section 530 of the vehicle and traffic law made by section fifteen of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

8 NY Jur 2d Automobiles and Other Vehicles § 11.

§ 113. Driver

Every person who operates or drives or is in actual physical control of a vehicle. Whenever the terms "chauffeur" or "operator" or "chauffeur's license" or "operator's license" are used in this chapter, such terms shall be deemed to mean driver and driver's license respectively.

HISTORY:

Add, L 1959, ch 775, with substance transferred from former § 113; amd, L 1972, ch 780, § 3, eff April 1, 1973.

Notes to Decisions

1. In general

Ownership of an automobile did not create a presumption that the owner was the driver where police used a "phototraffic camera" which took two pictures at a set time interval apart thereby showing that defendant's automobile was proceeding at an illegal rate of speed. People v Hildebrandt, 308 N.Y. 397, 126 N.E.2d 377, 308 N.Y. (N.Y.S.) 397, 1955 N.Y. LEXIS 996 (N.Y. 1955).

Person "operates" motor vehicle when he begins to use mechanism of automobile for purpose of putting automobile in motion even though he does not move it. People v Marriott, 37 A.D.2d 868, 325 N.Y.S.2d 177, 1971 N.Y. App. Div. LEXIS 3240 (N.Y. App. Div. 3d Dep't 1971).

Passenger of taxicab was not "operator" under CLS Veh & Tr § 113; thus, while taxicab owner's business auto policy provided liability coverage for owner and its drivers in personal injury action resulting from passenger's negligent opening of taxicab door in path of bicyclist, policy's liability coverage did not extend to passenger. Swee v Vals Trans, 225 A.D.2d 113, 649 N.Y.S.2d 146, 1996 N.Y. App. Div. LEXIS 11499 (N.Y. App. Div. 1st Dep't 1996), app. denied, 90 N.Y.2d 802, 660 N.Y.S.2d 712, 683 N.E.2d 335, 1997 N.Y. LEXIS 1635 (N.Y. 1997).

When taxicab passenger opened cab's door in the path of another vehicle, she was "using" the cab within statute rendering vehicle owner liable for the negligence of any person using the same with the permission of such owner. Epstein v Kernon, 68 Misc. 2d 29, 326 N.Y.S.2d 137, 1971 N.Y. Misc. LEXIS 1149 (N.Y. Civ. Ct. 1971).

§ 114-b. Emergency operation

The operation, or parking, of an authorized emergency vehicle, when such vehicle is engaged in transporting a sick or injured person, transporting prisoners, delivering blood or blood products in a situation involving an imminent health risk, pursuing an actual or suspected violator of the law, or responding to, or working or assisting at the scene of an accident, disaster, police call, alarm of fire, actual or potential release of hazardous materials or other emergency. Emergency operation shall not include returning from such service.

HISTORY:

Add, L 1970, ch 197, § 4; amd, L 1987, ch 152, § 3; L 1987, ch 827, § 4, eff Aug 7, 1987; L 1996, ch 460, § 2, eff Aug 8, 1996.

Notes to Decisions

Analysis

1. In general
2. Liability standard
3. Immunity

1. In general

New York City Department of Corrections vehicle was in emergency operation as defined by CLS Veh & Tr § 114-b when it was driven by department captain en route to inmate disturbance at correctional facility. Klayman v New York, 130 A.D.2d 551, 515 N.Y.S.2d 285, 1987 N.Y. App. Div. LEXIS 46553 (N.Y. App. Div. 2d Dep't), amended, 134 A.D.2d 408, 520 N.Y.S.2d 1015, 1987 N.Y. App. Div. LEXIS 50598 (N.Y. App. Div. 2d Dep't 1987).

Police officers' vehicle was engaged in emergency operation under CLS Veh & Tr § 114-b where officers were pursing suspect who reportedly had stolen car and had gun. Olivera by Santos v City of New York, 239 A.D.2d 300, 658 N.Y.S.2d 853, 1997 N.Y. App. Div. LEXIS 5714 (N.Y. App. Div. 1st Dep't 1997).

Police officer, who was responding to radio call from driver of another police vehicle, was engaged in "emergency operation" as defined by CLS Veh & Tr § 114-b. McCarthy v City of New York, 250 A.D.2d 654, 673 N.Y.S.2d 160, 1998 N.Y. App. Div. LEXIS 5509 (N.Y. App. Div. 2d Dep't 1998).

It was reversible error to deny request to charge jury that plaintiff was operating authorized "emergency vehicle" engaged in "emergency operation" at time that ambulance she was driving collided with truck since ambulance is authorized emergency vehicle, and it was undisputed that she was transporting patient who had experienced respiratory distress to hospital at time of accident. Mulholland v Nabisco, Inc., 264 A.D.2d 411, 693 N.Y.S.2d 242, 1999 N.Y. App. Div. LEXIS 8647 (N.Y. App. Div. 2d Dep't 1999).

Question of whether police vehicle was involved in emergency operation was for jury where driver testified that family dispute call being answered was "noncrime" and was not considered emergency requiring turret lights or siren; court did not err in failing to read to jury language of CLS Veh & Tr § 114-b. Criscione v City of New York, 279 A.D.2d 547, 719 N.Y.S.2d 687, 2001 N.Y. App. Div. LEXIS 611 (N.Y. App. Div. 2d Dep't), rev'd, 97 N.Y.2d 152, 736 N.Y.S.2d 656, 762 N.E.2d 342, 2001 N.Y. LEXIS 3738 (N.Y. 2001).

City had the obligation to take steps to prevent the automatic erasure of any audio recording, and its failure to do so constituted spoliation because it was placed on notice of pedestrians' claim and its claimed "emergency operation" affirmative defense within the 180 days after the recording was made; preventing the city from introducing testimony as to the contents of the audio recording was appropriate. Strong v City of New York, 112 A.D.3d 15, 973 N.Y.S.2d 152, 2013 N.Y. App. Div. LEXIS 6601 (N.Y. App. Div. 1st Dep't 2013).

2. Liability standard

City was entitled to summary judgment in a passenger's personal injury case, alleging the passenger was injured in a collision with a city-owned fire truck, because the firefighter was engaged in an emergency operation at the time of the collision the firefighter's conduct did not rise to the level of reckless disregard for the safety of others, the fire truck's emergency lights and siren were activated, and the firefighter either stopped or slowed sufficiently before entering the intersection. Jobson v SM Livery, Inc., 175 A.D.3d 1510, 109 N.Y.S.3d 376, 2019 N.Y. App. Div. LEXIS 6771 (N.Y. App. Div. 2d Dep't 2019).

City was entitled to summary judgment on a driver's personal injury action because the police officer, who collided with the driver, was responding to the scene of a police call at the time of the accident and, thus, was engaged in an emergency operation; the officer's conduct in making a sharp left turn and not seeing the driver's vehicle before the collision might have constituted a momentary lapse in judgment, but it did not rise to the level of reckless disregard for the safety of others. Proce v Town of Stony Point, 185 A.D.3d 975, 127 N.Y.S.3d 541, 2020 N.Y. App. Div. LEXIS 4290 (N.Y. App. Div. 2d Dep't 2020).

3. Immunity

City of New York was immune from liability when a patrol officer closely pursued a traffic violator at high speed and in the wrong direction without contacting the police dispatcher because the patrol officer was involved in an emergency operation and did not act in reckless disregard for the safety of others. The violator's operation of his vehicle, not the manner in which the police officers conducted their pursuit, was the proximate cause of the accident. Fuchs v City of New York, 57 Misc. 3d 778, 60 N.Y.S.3d 654, 2017 N.Y. Misc. LEXIS 3549 (N.Y. Sup. Ct. 2017), aff'd, 186 A.D.3d 459, 126 N.Y.S.3d 652, 2020 N.Y. App. Div. LEXIS 4522 (N.Y. App. Div. 2d Dep't 2020).

2. Liability standard

Police officer who was driving patrol car in response to 911 dispatch call to investigate family dispute was engaged in "emergency operation" of vehicle as defined in CLS Veh & Tr § 114-b as matter of law, although police department classified family disputes as "non-crime" incidents and both officers in car testified that they considered call "non-emergency," and consequently defendant driver's actions should not have been measured by jury under ordinary negligence standard, but rather under "reckless disregard" standard of CLS Veh & Tr 1104(e). Criscione v City of New York, 97 N.Y.2d 152, 736 N.Y.S.2d 656, 762 N.E.2d 342, 2001 N.Y. LEXIS 3738 (N.Y. 2001).

Court erred in granting deputy sheriff's motion for summary judgment where fact issue existed as to whether deputy, who was involved in police pursuit of plaintiff's motorcycle, deliberately drove his vehicle into path of plaintiff's motorcycle in such manner that collision was likely, if not unavoidable, and thereby consciously disregarded known serious risk of harm. Rouse v Dahlem, 228 A.D.2d 777, 643 N.Y.S.2d 744, 1996 N.Y. App. Div. LEXIS 6428 (N.Y. App. Div. 3d Dep't 1996).

City was entitled to dismissal of police officer's personal injury action under CLS Gen Mun § 205-e, because plaintiff and another officer were engaged in "emergency operation" under CLS Veh & Tr § 114-b, and thus other officer's driving was privileged, where officers used portable light and siren of unmarked patrol car to get suspected stolen car to pull over, driver of patrol car triple parked and left driver's side door open on exiting, passing bus hit open door, and impact caused patrol car to hit plaintiff. Williams v City of New York, 240 A.D.2d 734, 659 N.Y.S.2d 302, 1997 N.Y. App. Div. LEXIS 7076 (N.Y. App. Div. 2d Dep't 1997).

In action arising from collision between police car engaged in emergency operation and car driven by plaintiff, it was error to grant defendants' motion for judgment as matter of law at close of plaintiff's case, where evidence indicated that police officer, after hearing on his radio that fellow officer and ambulance had been dispatched to medical emergency at nearby location, drove at high rate of speed down center turning lane of main thoroughfare heavily congested with traffic, without engaging emergency siren or attempting to decelerate when he approached red light. Gordon v County of Nassau, 261 A.D.2d 359, 689 N.Y.S.2d 192, 1999 N.Y. App. Div. LEXIS 4505 (N.Y. App. Div. 2d Dep't 1999).

Summary judgment for a city and a police department was proper in passengers' personal injury suit because the city and the police department established that police officers were engaged in an emergency operation at the time of the collision with the passengers' vehicle, and the officers' conduct did not rise to reckless disregard, as required by N.Y. Veh. & Traf. Law §§ 114-b, 1104(e); in opposition, the passengers failed to raise a triable fact issue. Meade v Chestnut, 53 A.D.3d 645, 863 N.Y.S.2d 446, 2008 N.Y. App. Div. LEXIS 6299 (N.Y. App. Div. 2d Dep't 2008).

Police officer's squad car was an emergency vehicle and his pursuit of a speeding vehicle was an emergency operation for purposes of N.Y. Veh. & Traf. Law § 1104, however, the officer was not entitled to qualified immunity under that statute regarding a traffic accident that occurred during the pursuit because the officer acted recklessly in taking part in the pursuit. Flack v State of New York, 57 A.D.3d 1199, 870 N.Y.S.2d 500, 2008 N.Y. App. Div. LEXIS 9575 (N.Y. App. Div. 3d Dep't 2008).

Summary judgment for a county in a motorist's claim arising from a rear-end accident in which a deputy's vehicle rear-ended

the motorist's vehicle was error because, even if the deputy was involved in an emergency operation at the time of the accident, the "reckless disregard" provision of N.Y. Veh. & Traf. Law § 1104(e) was inapplicable as the deputy's conduct did not fall within the four categories of privileged activity set forth in § 1104(b); the deputy was merely traveling in a normal stream of traffic, driving well within the speed limit and in the proper lane of the roadway when he looked down at his data terminal to ascertain the location of a burglary, leading to the accident. Thus, the liability exemption of § 1104(e) never became applicable, and the county and the deputy failed to provide a nonnegligent explanation for the rear-end collision, while the motorist met her burden in support of her cross motion for partial summary judgment by submitting evidence that her vehicle was rear-ended by the deputy's vehicle. Kabir v County of Monroe, 68 A.D.3d 1628, 892 N.Y.S.2d 714, 2009 N.Y. App. Div. LEXIS 9555 (N.Y. App. Div. 4th Dep't 2009), aff'd, 16 N.Y.3d 217, 920 N.Y.S.2d 268, 945 N.E.2d 461, 2011 N.Y. LEXIS 156 (N.Y. 2011).

Trooper was entitled to qualified immunity under N.Y. Veh. & Traf. Law § 1104(e) in a claim arising from an accident in which the trooper's car was struck by a motorist while the trooper was making a U-turn because, given the evidence of precautions taken by the trooper, he did not act with "conscious indifference" to the consequences of his actions; the trooper testified that after he stopped in the breakdown lane, he activated his left turn signal and looked over his shoulder and out the front window several times to ensure that traffic had stopped in both directions. Before starting his turn, he saw that the motorist's car appeared to have stopped about 20 yards behind him. Green v State of New York, 71 A.D.3d 1310, 897 N.Y.S.2d 536, 2010 N.Y. App. Div. LEXIS 2020 (N.Y. App. Div. 3d Dep't 2010).

Because a pursuing police officer's conduct fell within the protection of Vehicle and Traffic Law § 1104 when he ran a red light in pursuit of a driver, and nothing in the record refuted that the driver passed through two red lights prior to losing control and hitting the injured pedestrians, the City was entitled to summary judgment. Rodriguez v City of New York, 105 A.D.3d 623, 963 N.Y.S.2d 640, 2013 N.Y. App. Div. LEXIS 2634 (N.Y. App. Div. 1st Dep't 2013).

Police officer who was dispatched to investigate "burglar/fire alarm" was involved in emergency operation as defined in CLS Veh & Tr § 114-b when he was traveling partly on shoulder of road, although he did not have lights or sirens operating on his vehicle; thus, in action by plaintiff whose vehicle was struck by police car when it attempted to pass him, standard of liability to be applied was whether defendant officer acted with "reckless disregard for the safety of others." Sims v Town of Ramapo, 177 Misc. 2d 302, 676 N.Y.S.2d 421, 1998 N.Y. Misc. LEXIS 297 (N.Y. Sup. Ct. 1998).

Where the officer, while attempting to replace the officer's patrol car microphone after receiving a dispatch for a traffic stop, drifted into an intersection and struck the injured party, the officer and city were entitled to summary judgment pursuant to N.Y. C.P.L.R. 3212 in the injured party's personal injury action; the officer was deemed to have been driving an emergency vehicle involved in an emergency operation pursuant to N.Y. Veh. & Traf. Law §§ 101, 114-b, and the officer's actions were measured under the reckless disregard standard pursuant to N.Y. Veh. & Traf. Law § 1104(e), which the injured party failed to satisfy in the instant case. Hughes v Chiera, 4 A.D.3d 872, 772 N.Y.S.2d 772, 2004 N.Y. App. Div. LEXIS 1382 (N.Y. App. Div. 4th Dep't 2004).

Judgment for the survivors of a decedent in a wrongful death action was affirmed; trial court properly allowed the survivors to introduce evidence of the nature of the call to which a police officer was responding when he caused an accident, because while all police officers in patrol vehicles responding to police calls were involved in an emergency operation within the meaning of N.Y. Veh. & Traf. Law § 114-b, the nature of the call nevertheless was relevant in determining whether a responding officer's conduct was in reckless disregard for the safety of others; because defendants failed to perfect its appeal from an order precluding a town from calling any experts or eliciting any expert opinion testimony, that appeal was deemed abandoned and dismissed, N.Y. Comp. Codes R. & Regs. tit. 22, § 1000.12(b). Allen v Town of Amherst, 8 A.D.3d 996, 778 N.Y.S.2d 598, 2004 N.Y. App. Div. LEXIS 8090 (N.Y. App. Div. 4th Dep't), app. denied, 3 N.Y.3d 609, 786 N.Y.S.2d 812, 820 N.E.2d 291, 2004 N.Y. LEXIS 2480 (N.Y. 2004).

When a cyclist was hurt when trying to pass a sheriff's department vehicle parked partly in a two-lane roadway while investigating an accident, because he collided with a vehicle traveling the opposite direction, the operator of the sheriff's department vehicle was not liable for the cyclist's injuries because the vehicle was an "authorized emergency vehicle," under N.Y. Veh. & Traf. Law § 101, and its operator was engaged in an "emergency operation," under N.Y. Veh. & Traf. Law § 114-b, so the operator was afforded the benefits of N.Y. Veh. & Traf. Law § 1104, protecting her from civil liability because she was not engaged in an act of reckless disregard, as her vehicle's emergency lights were clearly visible to both parties involved in the accident for at least half a mile, it was daylight and not raining, and her vehicle was parked pursuant to sheriff's department policies to insure maximum safety. Gonyea v County of Saratoga, 23 A.D.3d 790, 803 N.Y.S.2d 764, 2005 N.Y. App. Div. LEXIS 12390 (N.Y. App. Div. 3d Dep't 2005).

Motorist's affirmative defense of negligence was dismissed in a deputy's case seeking damages for injuries suffered when a vehicle driven by the motorist collided with the vehicle of the deputy who was making a U-turn on a highway to pursue a speeding vehicle; N.Y. Veh. & Traf. Law § 1104 applied to the deputy's claim, and the deputy's conduct did not rise to the level of reckless disregard as a matter of law. There was no doubt that, for purposes of N.Y. Veh. & Traf. Law § 1104, an officer in a patrol car responding to a speeding vehicle was deemed to be engaged in an emergency operation, and the deputy had every right to assume that the motorist was going to yield the right of way to an emergency vehicle with lights activated. Ayers v O'Brien, 852 N.Y.S.2d 730, 19 Misc. 3d 449, 2008 N.Y. Misc. LEXIS 621 (N.Y. Sup. Ct.), aff'd in part, modified, 60 A.D.3d 27, 870 N.Y.S.2d 587, 2008 N.Y. App. Div. LEXIS 9975 (N.Y. App. Div. 3d Dep't 2008).

Although a parole officer failed to use a turn signal or sound the horn while driving a police vehicle that was involved in an emergency operation pursuant to N.Y. Veh. & Traf. Law §§ 1104(a), 114-b, the officer's conduct did not rise to the level of reckless disregard or conscious indifference required for liability to attach. Rusho v State of New York, 878 N.Y.S.2d 855, 24 Misc. 3d 752, 2009 N.Y. Misc. LEXIS 1018 (N.Y. Ct. Cl. 2009), rev'd, 76 A.D.3d 783, 906 N.Y.S.2d 836, 2010 N.Y. App. Div. LEXIS 6551 (N.Y. App. Div. 4th Dep't 2010).

Agency Opinions

Vehicles owned by City University of New York (CUNY) and operated by special patrolmen on its security and public safety force are "police vehicles" as defined in CLS Veh & Tr § 132-a; thus, those vehicles may display red or white flashing lights while engaged in emergency operations on CUNY property. 2000 NY Ops Atty Gen F 00-4.

If a person is so infirm that he is incapable of traveling from a nursing home to a hospital by ordinary means of transportation and for that reason is transported with the aid of an ambulance, the driver of the ambulance may use sirens, flashing red lights, etc., pursuant to Vehicle and Traffic Law, § 1104, even though the person being transported is in no imminent danger. 1979 Op St Compt File #22.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 1233.

Matthew Bender's New York Practice Guides: LexisNexis AnswerGuide New York Negligence § 2.09 Identifying Applicable Theories of Liability in Motor Vehicle Cases.

Warren's Negligence in the New York Courts Ch. 228 (motor vehicle liability).

§ 115-a. Fire vehicle

Every vehicle operated for fire service purposes owned and identified as being owned by the state, a public authority, a county, town, city, village or fire

district, or a fire corporation subject to the provisions of subdivision (e) of section fourteen hundred two of the not-for-profit corporation law or a fire company as defined in section one hundred of the general municipal law. Any of the following vehicles shall be fire vehicles only for the purpose of section one hundred one of this chapter:

1. a vehicle operated by officials of the office of fire prevention and control,

2. a vehicle ordinarily operated by a chief or assistant chief of a fire department, or a county or deputy county fire coordinator, or county or assistant county fire marshall, or town or assistant town fire coordinator, or such vehicle when operated in an official capacity by or under the direction of such person, and

3. a vehicle specially designed and equipped for firefighting purposes which is regularly used for firefighting purposes by a firefighting unit on property used for industrial, institutional or commercial purposes and which vehicle is owned by the owner or lessee of such property.

HISTORY:

Add, L 1970, ch 197, § 5, eff July 1, 1971; amd, L 1971, ch 282, § 1, eff July 1, 1971; L 1973, ch 176, § 5, eff Sept 1, 1973; L 1979, ch 225, § 21, eff Sept 1, 1979; L 1979, ch 609, § 1, eff July 10, 1979; L 2010, ch 56, § 59 (Part B), eff July 1, 2010.

Notes to Decisions

A county fire coordinator and the deputy fire coordinator may operate private vehicles with flashing red and white lights. The district fire coordinator and the ambulance coordinator could only operate such vehicles with red and white flashing lights when operated in official capacity under the direction of the county or deputy county fire coordinator. 1979 Op Atty Gen Mar 21 (informal).

Agency Opinions

Fire policemen may not affix red lights to their own vehicles, regardless of what duties they are engaged in. 1976 NY Ops Atty Gen June 4.

Rear-facing blue lights may not, under current legislative scheme, be added to State Police vehicles. 2003 NY Ops Atty Gen F 2003-2.

A red or white flashing light may be affixed to a vehicle ordinarily operated by a town fire co-ordinator and these lights may be displayed on the vehicle when it is engaged in an emergency operation and while it is returning from a fire or other emergency. N.Y. Op. Att'y Gen. No. 86-2.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Fire company, definition, CLS Gen Mun § 100.

Jurisprudences:

8 NY Jur 2d Automobiles and Other Vehicles § 13.

§ 115-c. Emergency ambulance service vehicle

An emergency ambulance service vehicle shall be defined as an appropriately equipped motor vehicle owned or operated by an ambulance service as defined in section three thousand one of the public health law and used for the purpose of transporting emergency medical personnel and equipment to sick or injured persons.

HISTORY:

Add, L 1981, ch 142, § 2, eff May 26, 1981.

Notes to Decisions

Emergency medical technician/member of volunteer ambulance service was authorized to have red light affixed to dashboard of his personal vehicle, and thus could not be convicted of violating CLS Veh & Tr § 375(41)(2) although he was not involved in emergency situation at time, as his personal vehicle was "emergency ambulance service vehicle" under CLS Veh & Tr § 115-c, as broadly defined in CLS Pub Health § 3001(2). People v Levy, 188 Misc. 2d 103, 727 N.Y.S.2d 248, 2001 N.Y. Misc. LEXIS 167 (N.Y. App. Term 2001).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Ambulance service, definition of, CLS Pub Health § 3001.

§ 116. Flammable liquid

Any liquid which has a flash point of eighty degrees Fahrenheit, or less, as determined by a tagliabue or equivalent open-cup test device.

HISTORY:

Add, L 1959, ch 775, with substance transferred from former § 116; amd, L 1971, ch 756, § 1, eff Jan 1, 1972.

§ 117-d. Blood delivery vehicle

Every vehicle owned, designated and operated by the not-for-profit corporation incorporated under the name New York blood center specifically equipped for and used in response to reports of the need for transportation of blood or blood products to general hospitals or other health care facilities. No blood delivery vehicle shall be operated as an authorized emergency vehicle engaged in an emergency operation unless the driver of such vehicle has undergone appropriate training for the operation of authorized emergency vehicles during emergency operations.

HISTORY:

Add, L 1996, ch 460, § 3, eff Aug 8, 1996.

§ 125. Motor vehicles.

Every vehicle operated or driven upon a public highway which is propelled by any power other than muscular power, except (a) electrically-driven mobility assistance devices operated or driven by a person with a disability, (a-1) electric personal assistive mobility devices operated outside a city with a population of one million or more, (b) vehicles which run only upon rails or tracks, (c) snowmobiles as defined in article forty-seven of this chapter, (d) all terrain vehicles as defined in article forty-eight-B of this chapter, (e) bicycles with electric assist as defined in section one hundred two-c of this article, and (f) electric scooters as defined in section one hundred fourteen-e of this article. For the purposes of title four of this chapter, the term motor vehicle shall exclude fire and police vehicles other than ambulances. For the purposes of titles four and five of this chapter the term motor vehicles shall exclude farm type tractors and all terrain type vehicles used exclusively for agricultural purposes, or for snow plowing, other than for hire, farm equipment, including self-propelled machines used exclusively in growing, harvesting or handling farm produce, and self-propelled caterpillar or crawler-type equipment while being operated on the contract site.

HISTORY:

Add, L 1959, ch 775, with substance transferred from former § 125; amd, L 1960, ch 300, § 3; L 1960, ch 608, § 2; L 1962, ch 290; L 1962, ch 708; L 1962, ch 930; L 1964, ch 757; L 1967, ch 706; L 1970, ch 459, § 1; L 1972, ch 661, § 25; L 1973, ch 839, § 1; L 1985, ch 346, § 1; L 1985, ch 671, § 1; L 1987, ch 15, § 1; L 1991, ch 374, § 2, eff Jan 1, 1992; L 2008, ch 365, § 2, eff July 21, 2008; L 2020, ch 58, § 3 (Part XX), effective April 3, 2020.

Amendment Notes The 2020 amendment by ch 58, § 3 (Part XX), added (e) and (f) at the end of the first sentence, and made a related change.

Notes to Decisions

Analysis

1. In general
2. Inoperable
3. Not a vehicle
4. Truck
5. Motorcycle
6. Machinery
7. Ambulance, police, or fire vehicle
8. Bicycle, mini-bike
9. All terrain vehicle

1. In general

A mobile home is a motor vehicle within the meaning of § 9-302 of the Uniform Commercial Code which requires that a financing statement must be filed to perfect a security interest therein. Recchio v Manufacturers & Traders Trust Co., 35 A.D.2d 769, 316 N.Y.S.2d 915, 1970 N.Y. App. Div. LEXIS 3635 (N.Y. App. Div. 4th Dep't 1970).

Automobile liability insurer was obligated to provide plaintiff insureds with uninsured motorist benefits for injuries caused by uninsured all-terrain vehicle operator, since policy coverage extended, as matter of law, to all motor vehicles as defined by CLS Veh & Tr § 125, which, at time of accident, did not specifically exclude all-terrain vehicles (although it was subsequently amended to exclude them). Harper v Lumbermens Mut. Casualty Co., 174 A.D.2d 1031, 572 N.Y.S.2d 195, 1991 N.Y. App. Div. LEXIS 8976 (N.Y. App. Div. 4th Dep't), app. dismissed, 78 N.Y.2d 1110, 578 N.Y.S.2d 873, 586 N.E.2d 56, 1991 N.Y. LEXIS 4975 (N.Y. 1991).

At the time of the incident in question, a utility vehicle was being operated on defendants' private property - not a public highway. Accordingly, the utility vehicle was not a motor vehicle within the meaning of N.Y. Veh. & Traf. Law § 125, and it was error for trial court to conclude otherwise. Wright v O'Leary, 172 A.D.3d 1495, 99 N.Y.S.3d 477, 2019 N.Y. App. Div. LEXIS 3421 (N.Y. App. Div. 3d Dep't 2019).

Under former §§ 2 and 59 a town is liable for the negligence of its employee in the operation of a motor truck upon a public highway in connection with the duty imposed upon town. Jones v Clarkson, 223 N.Y.S. 611, 130 Misc. 57, 1927 N.Y. Misc. LEXIS 995 (N.Y. Sup. Ct. 1927).

A "go-cart" is a motor vehicle subject to registration as such if operated upon the public highway. Stevenson v Merchants Mut. Ins. Co., 37 Misc. 2d 996, 235 N.Y.S.2d 589, 1962 N.Y. Misc. LEXIS 2149 (N.Y. Sup. Ct. 1962).

Fact that automobile subjected to inspection was concededly mechanically without fault did not serve to diminish defendant's objective basis for inspection. People v Gondrez, 74 Misc. 2d 73, 343 N.Y.S.2d 833, 1973 N.Y. Misc. LEXIS 1914 (N.Y. City Crim. Ct. 1973).

Plaintiffs were required to meet serious injury standard of CLS Ins § 5102 in action arising out of incident in which defendant attempted to unhitch trailer carrying boat from his automobile, and trailer rolled backward down road and into tent in which plaintiffs were sleeping, even though defendant's automobile was parked and not being operated on highway, and trailer was detached from automobile; trailer fell within CLS Veh & Tr § 311(2) definition of motor vehicle since it had been drawn to site by automobile and would not have been present and in position to roll out of control if not for its attachment to automobile, and it did not lose its identity as motor vehicle by virtue of sudden and accidental detachment from automobile. Christopher v Caldarulo, 160 Misc. 2d 360, 608 N.Y.S.2d 998, 1994 N.Y. Misc. LEXIS 60 (N.Y. Sup. Ct. 1994).

A "tournament car" owned by the members of the tournament team is required to be registered and to display registration plates. 1953 Ops St Compt File #6035.

2. Inoperable

Where it appeared from the affidavits that the injuries occurred when the automobile "started and ran into" claimant, it was therefore apparently in operable condition, rather than junk, and was undergoing repairs and was a "motor vehicle" within the definition of Vehicle and Traffic Law § 125. Hall v Royal Indem. Ins. Co., 34 A.D.2d 1090, 313 N.Y.S.2d 76, 1970 N.Y. App. Div. LEXIS 4380 (N.Y. App. Div. 4th Dep't 1970).

In action by insured whose child was pinned between bumpers of pickup truck and car being manually pushed toward truck, insurer was not entitled to summary judgment dismissing uninsured motorist claim on ground that car, because it was temporarily inoperable at time of accident, did not qualify as motor vehicle under CLS Veh & Tr § 125 and thus was not "uninsured motor vehicle" under subject policy as matter of law; factual issues existed whether accident arose out of maintenance or use of vehicle within meaning of policy. Dupra v Benoit, 270 A.D.2d 856, 705 N.Y.S.2d 781, 2000 N.Y. App. Div. LEXIS 3490 (N.Y. App. Div. 4th Dep't 2000).

Convictions of fourth degree grand larceny, N.Y. Penal Law § 155.30(8), were supported by sufficient evidence because defendant's sale of two vehicles owned by her former tenants, and left by the former tenants on defendant's property within approximately one week of vacancy, defendant's false statement to police concerning the whereabouts of the vehicles, and her denial of receiving payment for the vehicles supported an inference of larcenous intent and undermined defendant's claim of right; defendant did not argued that, due to their condition, the vehicles did not satisfy the definition of "motor vehicles." People v Lowin, 71 A.D.3d 1194, 896 N.Y.S.2d 231, 2010 N.Y. App. Div. LEXIS 1698 (N.Y. App. Div. 3d Dep't 2010).

A grand jury indictment for third degree arson under Penal Law § 150.10 would be dismissed where the evidence presented to the grand jury was legally insufficient to support an arson indictment in that the arson statute contemplates a motor vehicle in operable condition, and the evidence presented indicated that defendant had set fire to a tow truck that had no battery and contained "no electric whatever," and where the prosecutor's instructions to the grand jury that "a motor vehicle is any vehicle not propelled by muscular power" but which omitted the phrase "operated . . . on a public highway" from the definition of "motor vehicle" were incorrect and so emasculated the statutory definition of "motor vehicle" in the context of the limited testimony provided to the grand jury as to prejudice the interests of defendant and impair the integrity of the grand jury. People v Carey, 120 Misc. 2d 862, 466 N.Y.S.2d 887, 1983 N.Y. Misc. LEXIS 3812 (N.Y. County Ct. 1983).

Defendant was properly charged with operating motor vehicle while under influence of alcohol, based on activity of steering car without battery as it was being pushed, since car was "motor vehicle" within meaning of CLS Veh & Tr § 125 regardless of whether it was technically capable of being operated under motorized power. People v Lopez, 144 Misc. 2d 325, 544 N.Y.S.2d 410, 1989 N.Y. Misc. LEXIS 484 (N.Y. Sup. Ct. 1989).

Defendant may properly be charged with operating a motor vehicle while under the influence of alcohol for steering a car that lacked a battery since an automobile and all other ordinary motorized vehicles are "motor vehicles" (Vehicle and Traffic Law § 125) regardless of whether technically capable of being operated under motorized power. Only a limited class of vehicles, which are ordinarily muscle powered, such as bicycles and other lightweight vehicles, should be exempted from the definition of "motor vehicle". People v Lopez, 144 Misc. 2d 325, 544 N.Y.S.2d 410, 1989 N.Y. Misc. LEXIS 484 (N.Y. Sup. Ct. 1989).

3. Not a vehicle

Court would reverse defendant's convictions for vehicular manslaughter and vehicular assault involving snowmobile accident

where, at time of occurrence, snowmobiles were not vehicles within purview of CLS Veh & Tr § 1192. People v Davis, 178 A.D.2d 714, 576 N.Y.S.2d 947, 1991 N.Y. App. Div. LEXIS 16011 (N.Y. App. Div. 3d Dep't 1991), app. denied, 79 N.Y.2d 946, 583 N.Y.S.2d 200, 592 N.E.2d 808, 1992 N.Y. LEXIS 2237 (N.Y. 1992).

Trial court did not err in granting a contractor's motion for summary judgment dismissing an employee's action alleging that the contractor as vicariously liable for a coworker's negligent acts because at the time of the accident, the skid steer the coworker used was being operated in a parking lot that was not open to the public, rather than on a public highway; thus, the machine was not a motor vehicle for purposes of liability. Calvert v Duggan & Duggan Gen. Contr., Inc., 159 A.D.3d 1490, 73 N.Y.S.3d 331, 2018 N.Y. App. Div. LEXIS 2147 (N.Y. App. Div. 4th Dep't), app. denied, 31 N.Y.3d 912, 106 N.E.3d 754, 81 N.Y.S.3d 371, 2018 N.Y. LEXIS 1563 (N.Y. 2018).

A trailer is not a motor vehicle. Herrick v Arborio, 258 N.Y.S. 5, 144 Misc. 15, 1932 N.Y. Misc. LEXIS 1154 (N.Y. Sup. Ct. 1932).

City had authority to regulate "parking" of a pushcart which was neither a motor vehicle nor a motor cycle though the definition of "parking" in the Vehicle and Traffic Law could not be applied to such vehicle. People ex rel. Laskowski v Weinberger, 8 Misc. 2d 953, 165 N.Y.S.2d 229, 1957 N.Y. Misc. LEXIS 2684 (N.Y. Magis. Ct. 1957).

The mere fact that an unregistered and uninsured vehicle was driven backwards into claimant while he was working in automobile body shop on private property would not preclude the responsibility of the MVAIC for the accident upon the theory that the automobile which struck claimant was not a motor vehicle as defined by this section. Prato v Motor Vehicle Accident Indemnification Corp., 49 Misc. 2d 955, 268 N.Y.S.2d 834, 1966 N.Y. Misc. LEXIS 2031 (N.Y. Sup. Ct.), aff'd, 26 A.D.2d 993, 275 N.Y.S.2d 817, 1966 N.Y. App. Div. LEXIS 6677 (N.Y. App. Div. 2d Dep't 1966).

Snowmobile operator was not an "occupant of another motor vehicle" within no-fault law providing first-party benefits to persons "other than occupants of another motor vehicle." McConnell v Fireman's Fund American Ins. Co., 79 Misc. 2d 219, 359 N.Y.S.2d 224, 1974 N.Y. Misc. LEXIS 1630 (N.Y. Sup. Ct. 1974), aff'd, 49 A.D.2d 676, 370 N.Y.S.2d 730, 1975 N.Y. App. Div. LEXIS 10522 (N.Y. App. Div. 4th Dep't 1975).

Court would dismiss charge of third degree unauthorized use of motor vehicle (all terrain vehicle) since all terrain vehicle is excluded from definition of motor vehicle in CLS Veh & Tr § 125 and is thus not motor vehicle under CLS Penal § 10.00(14). People v Church, 148 Misc. 2d 909, 563 N.Y.S.2d 620, 1990 N.Y. Misc. LEXIS 622 (N.Y. J. Ct. 1990).

4. Truck

An insurer was not obligated to provide coverage under a comprehensive general liability policy, which contained an exclusion for bodily injury arising out of loading or unloading, where the tractor-trailer owned by the insured and involved in the accident came within the policy definition of "automobile" and was a motor vehicle within the meaning of Veh & Tr Law §§ 125 and 359(k), where the deaths of the insured's employees occurred while they were transferring gasoline from one tractor-trailer to another, and where the record on appeal provided nothing to challenge the compelling conclusion that the accident arose out of the ownership, maintenance, operation, use, loading or unloading of the tractor-trailer; accordingly, the trial court erred in denying the insurer's motion for summary judgment. Duncan Petroleum Transport, Inc. v Aetna Ins. Co., 96 A.D.2d 942, 466 N.Y.S.2d 394, 1983 N.Y. App. Div. LEXIS 19577 (N.Y. App. Div. 2d Dep't), aff'd, 61 N.Y.2d 665, 472 N.Y.S.2d 88, 460 N.E.2d 229, 1983 N.Y. LEXIS 3616 (N.Y. 1983).

A motor truck on which is permanently mounted a large crane is not a "tractor crane" exempt from license requirements under former § 2 sub 8. People v P. T. Cox Const. Co., 15 N.Y.S.2d 756, 172 Misc. 244, 1939 N.Y. Misc. LEXIS 2450 (N.Y. Magis. Ct. 1939), aff'd, 259 A.D. 707, 19 N.Y.S.2d 145, 1940 N.Y. App. Div. LEXIS 6299 (N.Y. App. Div. 1940).

A crane boom permanently mounted on a truck chassis, with a maximum speed of 28 miles per hour, and operated in the city of Rochester and its environs, is a motor vehicle, and not a tractor crane. People v C. P. Ward, Inc., 74 N.Y.S.2d 181, 189 Misc. 288, 1947 N.Y. Misc. LEXIS 3205 (N.Y. City Ct. 1947).

A tractor dump truck, designed to vary heavy loads over highways, is not a piece of road building machinery within the legislative intent to exempt such machinery from registration as a motor vehicle. 1930 Ops Atty Gen 158.

5. Motorcycle

A motorcycle is not a motor vehicle. Hence, the defendant who allegedly permitted an unlicensed person to drive his motorcycle on a public highway should not have been charged with a violation of former § 20 but should have been charged with a violation of former § 41. People v Asselta, 1 A.D.2d 960, 150 N.Y.S.2d 32, 1956 N.Y. App. Div. LEXIS 5791 (N.Y. App. Div. 2d Dep't 1956).

"Goped" portable motorized scooter—weighing 19 pounds, started by muscle power for first 15 or 20 feet, and then powered by 1.2 horsepower motor capable of speed of 20 miles per hour—was "motor vehicle," defined in CLS Veh & Tr § 125 as "vehicle...propelled by any power other than muscular power," for which insurance was required under CLS Veh & Tr §§ 312 and 319(1); exceptions in § 125 do not include "lightweight" vehicles or vehicles not capable of causing serious injury if operated improperly. Reilley v DMV, 240 A.D.2d 296, 658 N.Y.S.2d 316, 1997 N.Y. App. Div. LEXIS 6649 (N.Y. App. Div. 1st Dep't 1997).

To extent that "Goped" portable motorized scooter Reilley v DMV, 240 A.D.2d 296, 658 N.Y.S.2d 316, 1997 N.Y. App. Div. LEXIS 6649 (N.Y. App. Div. 1st Dep't 1997).

A motorcycle, owned by the police department, is a police vehicle within exception of the definition of "motor vehicle" in this former § 2 sub 8. People ex rel. Lehr v MacDonald, 3 N.Y.S.2d 784, 167 Misc. 670, 1938 N.Y. Misc. LEXIS 1505 (N.Y. City Ct. 1938).

Conventional bicycle from which had been removed various operational parts and which was propelled by a lawnmower gasoline engine and was capable of being stopped only by shorting the spark plug was not, at time it was being operated by 12-year-old boy on public highway prior to fatal collision with automobile, "an automobile" within meaning of any automobile insurance policy issued to various persons who might be conceivably liable since device could not be legally used on public highway as a "motor vehicle" in view of New York statutes; nor was it a "bicycle", "motorcycle" or "motor scooter". Lalomia v Bankers & Shippers Ins. Co., 58 Misc. 2d 530, 296 N.Y.S.2d 464, 1968 N.Y. Misc. LEXIS 952 (N.Y. Sup. Ct. 1968), modified, 35 A.D.2d 114, 312 N.Y.S.2d 1018, 1970 N.Y. App. Div. LEXIS 3949 (N.Y. App. Div. 2d Dep't 1970).

Where legislature defined "motor vehicle, motorcycle," and "motor-driven cycle" and regulated operation of first two vehicles but not third, "motor-driven cycles" were exempt from regulations. People v Garfinkel, 64 Misc. 2d 774, 315 N.Y.S.2d 689, 1970 N.Y. Misc. LEXIS 1216 (N.Y. Dist. Ct. 1970).

Motorcycles are "motor vehicles" within definitional section of Vehicle and Traffic Law. Cycleway, Inc. v Kawasaki Motors Corp., 77 Misc. 2d 829, 354 N.Y.S.2d 812, 1974 N.Y. Misc. LEXIS 1248 (N.Y. Sup. Ct. 1974), disapproved, Tappan Motors, Inc. v Volvo of America Corp., 85 A.D.2d 624, 444 N.Y.S.2d 938, 1981 N.Y. App. Div. LEXIS 16445 (N.Y. App. Div. 2d Dep't 1981).

Vehicle known as a "Tri-Sport," which had three wheels, a two-cylinder 21-horsepower engine and which could attain speeds as great as 65 miles per hour, was a "motorcycle" as defined in Vehicle and Traffic Law. Moses v National Grange Mut. Ins. Co., 89 Misc. 2d 106, 390 N.Y.S.2d 575, 1977 N.Y. Misc. LEXIS 1850 (N.Y. Sup. Ct. 1977).

A village ordinance limiting the speed of a "motor vehicle" does not embrace a motorcycle in light of former § 2 sub 8, excepting motorcycles from the definition of motor vehicle. People v Higgins, 31 N.Y.S.2d 508, 1941 N.Y. Misc. LEXIS 2414 (N.Y. County Ct. 1941).

Motorcycle is "private passenger motor vehicle", as defined by CLS Ins § 3440(a)(1), for which rental vehicle insurance coverage must be provided. Insurance Department, Opinions of General Counsel, Opinion Number 03-10-12.

Insurance Department, in interpreting Insurance Law, has generally construed term "motor vehicle" to include motorcycles, except where there is specific exclusion of motorcycles from definition of motor vehicle, such as can be found in CLS Ins § 5102; in addition, department also construes term "automobile," as used in CLS Ins § 2335, to have same meaning as motor vehicle. Insurance Department, Opinions of General Counsel, Opinion Number 04-10-06.

6. Machinery

A gasoline driven farm tractor on which was mounted a crane and hoist for the purpose of moving and tiering heavy cargo at steamship piers was a tractor crane within the meaning of this section. People v Jarka Corp., 285 N.Y. 548, 33 N.E.2d 239, 285 N.Y. (N.Y.S.) 548, 1941 N.Y. LEXIS 1584 (N.Y. 1941).

A four-wheeled electric truck mounted with an electrically operated crane, used principally on "private piers", and moved periodically between Manhattan and Brooklyn over public highways under its own power is exempt from registration. People v Bay Ridge Operating Co., 259 A.D. 260, 19 N.Y.S.2d 140, 1940 N.Y. App. Div. LEXIS 6110 (N.Y. App. Div. 1940).

"Bobcat"—machine used for plowing snow or in connection with landscaping work—was "motor vehicle" being operated on "public highway" when its owner-operator was moving it "on the sidewalk" when it "slid right into the side of" county-owned bus; thus, county was not entitled to stay arbitration of uninsured motorist claim on grounds, inter alia, that uninsured bobcat was neither "motor vehicle" nor was being operated on "public highway." County of Westchester v Winstead, 231 A.D.2d 630, 647 N.Y.S.2d 536, 1996 N.Y. App. Div. LEXIS 9471 (N.Y. App. Div. 2d Dep't 1996).

A motor truck on which is permanently mounted a large crane is not a "tractor crane" exempt from license requirements under former § 2 sub 8. People v P. T. Cox Const. Co., 15 N.Y.S.2d 756, 172 Misc. 244, 1939 N.Y. Misc. LEXIS 2450 (N.Y. Magis. Ct. 1939), aff'd, 259 A.D. 707, 19 N.Y.S.2d 145, 1940 N.Y. App. Div. LEXIS 6299 (N.Y. App. Div. 1940).

A crane boom permanently mounted on a truck chassis, with a maximum speed of 28 miles per hour, and operated in the city of Rochester and its environs, is a motor vehicle, and not a tractor crane. People v C. P. Ward, Inc., 74 N.Y.S.2d 181, 189 Misc. 288, 1947 N.Y. Misc. LEXIS 3205 (N.Y. City Ct. 1947).

Plaintiffs cannot avail themselves of the provisions permitting service upon a nonresident owner of a motor vehicle in the absence of showing that the agricultural tractor was being used for nonagricultural purposes inasmuch as the mere operation of such a tractor upon public highway is not a proof of nonagricultural use. Wilson v Heidenreich, 109 N.Y.S.2d 428, 201 Misc. 333, 1951 N.Y. Misc. LEXIS 2685 (N.Y. Sup. Ct. 1951).

Although an owner of an excavator was not liable for an employee's injuries under N.Y. Lab. Law § 241(6), because the excavator was a motor vehicle under N.Y. Veh. & Traf. Law §§ 125, 388, that the owner negligently entrusted to an untrained co-employee in violation of N.Y. Lab. Law § 200, the owner was not entitled to summary judgment. Martinez v Hitachi Constr. Mach. Co., Ltd., 829 N.Y.S.2d 814, 15 Misc. 3d 244, 236 N.Y.L.J. 82, 2006 N.Y. Misc. LEXIS 4130 (N.Y. Sup. Ct. 2006).

"The Oliver", a tractor-like vehicle with a scooplike shovel loader is not a "motor vehicle" within the purview of former § 2. People v Felder, 116 N.Y.S.2d 39, 1952 N.Y. Misc. LEXIS 1797 (N.Y. Magis. Ct. 1952).

Where crane mobile was not subject to motor vehicle registration on June 22, 1951 and (prior to revision of general liability manuals) it was not excluded or included in exceptions in general liability policy, court held it was not an automobile under the policy. Liberty Mut. Ins. Co. v Dooley Electric Co., 133 N.Y.S.2d 785, 1954 N.Y. Misc. LEXIS 2438 (N.Y. Sup. Ct. 1954).

Lawn tractor fit within the broad definition of a motor vehicle set forth in N.Y. Veh. & Traf. Law § 125. Therefore, defendant was properly charged with the operation of a motor vehicle on a public highway while knowing or having reason to know that his license to operate a motor vehicle was revoked when he operated a lawn tractor on a public highway in the early morning hours, en route from a bar to his home, while his license to operate a motor vehicle was revoked and while he was intoxicated. People v Canute, 8 A.D.3d 1125, 778 N.Y.S.2d 247, 2004 N.Y. App. Div. LEXIS 8201 (N.Y. App. Div. 4th Dep't 2004).

Vicarious liability of N.Y. Veh. & Traf. Law § 388 that ordinarily makes owners of motor vehicles financially responsible for injuries occurring as a result of the operation of the motor vehicle did not attach to make an airline who owned a forklift liable to an independent contractor's employee for injuries sustained when he was struck by the forklift where a hi-lo forklift is not a motor vehicle. Mangra v China Airlines, Ltd., 790 N.Y.S.2d 370, 7 Misc. 3d 499, 233 N.Y.L.J. 36, 2005 N.Y. Misc. LEXIS 224 (N.Y. Civ. Ct. 2005).

7. Ambulance, police, or fire vehicle

Under the definition of former § 2, subds. 7 and 8, a police automobile is a vehicle but not a motor vehicle. Booth v Rochester, 258 A.D. 849, 15 N.Y.S.2d 945, 1939 N.Y. App. Div. LEXIS 7226 (N.Y. App. Div. 1939).

A complaint in an action against a city to recover damages for personal injuries suffered by plaintiff when struck by an automobile owned by defendant city, which alleges that the accident was caused solely by the negligence of defendant's police officer while operating the automobile, is sufficient to comply with former § 59 but is insufficient to state a good cause of action, because it fails to allege the exception in sub. 8 of former § 2 that the automobile was not a "police patrol wagon." Kelly v Niagara Falls, 229 N.Y.S. 328, 131 Misc. 934, 1928 N.Y. Misc. LEXIS 885 (N.Y. Sup. Ct. 1928).

A motorcycle, owned by the police department, is a police vehicle within exception of the definition of "motor vehicle" in this former § 2 sub 8. People ex rel. Lehr v MacDonald, 3 N.Y.S.2d 784, 167 Misc. 670, 1938 N.Y. Misc. LEXIS 1505 (N.Y. City Ct. 1938).

A game protector in the department of conservation is subject to the restrictions of a speed ordinance of the city of Rochester, and the contention that defendant is a peace officer (Conservation Law § 169) and that a car driven by him in line of duty is a "police vehicle" within the meaning of former §§ 2(8), 10, excepting same from the application of traffic laws, must be rejected, since the ordinance does not except "police vehicle" from its provisions and former § 54 preserves the powers of cities of the first class to enact ordinances if not inconsistent with said law, and the legislature by defining "motor vehicle" and excepting therefrom "fire and police vehicles" did not intend to deny the city the right to restrict the operation of fire and police vehicles. Rochester v Lindner, 4 N.Y.S.2d 4, 167 Misc. 790, 1938 N.Y. Misc. LEXIS 1532 (N.Y. City Ct. 1938).

Unmarked automobile owned by state police was not subject to inspection under Vehicle and Traffic Law, irrespective of purpose or intent of state police, and use of police motor vehicles for enforcement of inspection regulations was not authorized. People v Conrow, 68 Misc. 2d 471, 326 N.Y.S.2d 971, 1971 N.Y. Misc. LEXIS 1386 (N.Y. County Ct. 1971).

Where motor vehicle of state police met standards of commissioner, defendant could not be guilty of improper inspection of the vehicle. People v Conrow, 68 Misc. 2d 471, 326 N.Y.S.2d 971, 1971 N.Y. Misc. LEXIS 1386 (N.Y. County Ct. 1971).

Exemption of police vehicles from statutory definition of "motor vehicle" did not preclude use of vehicle owned by state police to determine whether motor vehicle inspections were properly performed at service station owned and operated by defendant. People v Wehmann, 70 Misc. 2d 278, 332 N.Y.S.2d 516, 1972 N.Y. Misc. LEXIS 1875 (N.Y. J. Ct. 1972).

Exemption of police vehicles from statutory definition of "motor vehicle" did not preclude use of unmarked automobile owned by state police to determine whether motor vehicle inspections were properly performed at defendant's state licensed motor vehicle inspection station. People v Gondrez, 74 Misc. 2d 73, 343 N.Y.S.2d 833, 1973 N.Y. Misc. LEXIS 1914 (N.Y. City Crim. Ct. 1973).

Evidence including showing that operator of state licensed motor vehicle inspection station certified an unmarked automobile of police department which was free from defects violated statute in improperly performing inspection in failing to abide by detailed procedure set forth in regulations before certifying

automobile for use. People v Gondrez, 74 Misc. 2d 73, 343 N.Y.S.2d 833, 1973 N.Y. Misc. LEXIS 1914 (N.Y. City Crim. Ct. 1973).

Insurer's petition for a permanent stay of arbitration should have been denied because a police officer was occupying a motor vehicle being operated by a fellow officer at the time it was involved in a collision with an underinsured vehicle, and while the negligence section of the Vehicle and Traffic Law (VTL) excluded police vehicles, the definition of a "motor vehicle" in the general provisions of the VTL applied to the entire VTL and the uninsured/underinsured motorist endorsement at issue. Matter of State Farm Mut. Auto. Ins. Co. v Fitzgerald, 112 A.D.3d 166, 973 N.Y.S.2d 801, 2013 N.Y. App. Div. LEXIS 7135 (N.Y. App. Div. 2d Dep't 2013), rev'd, 25 N.Y.3d 799, 38 N.E.3d 325, 16 N.Y.S.3d 796, 2015 N.Y. LEXIS 1526 (N.Y. 2015).

8. Bicycle, mini-bike

Bicycle is not included within statutory definition of "motor vehicle." General Accident Ins. Co. v Gladstone, 260 A.D.2d 855, 687 N.Y.S.2d 830, 1999 N.Y. App. Div. LEXIS 4031 (N.Y. App. Div. 3d Dep't 1999).

A "mini-bike" or "mini-motorcycle" comes within the statutory definition of a "motorcycle" or "motor-driven cycle" rather than a "motor vehicle" and would in a proper case be governed by §§ 410 and 503 and not §§ 401 and 501 of the Vehicle and Traffic Law. People v Moe, 62 Misc. 2d 27, 307 N.Y.S.2d 921, 1969 N.Y. Misc. LEXIS 975 (N.Y. App. Term 1969).

A two-wheeled vehicle with a seat and a motor known as a "mini-bike" is a vehicle which is regulated and required to be registered under the Vehicle and Traffic Law. People v Devlin, 64 Misc. 2d 327, 314 N.Y.S.2d 670, 1970 N.Y. Misc. LEXIS 1280 (N.Y. Dist. Ct. 1970).

Defendant, a 14-year-old boy, who attached a 2 ½ horsepower lawnmower motor to his bicycle using the end of a baseball bat as a means of transmitting power of the motor to the rear wheel of the bicycle thereby created a "motor-driven cycle" not subject to regulations relating to motor vehicles or motorcycles. People v Garfinkel, 64 Misc. 2d 774, 315 N.Y.S.2d 689, 1970 N.Y. Misc. LEXIS 1216 (N.Y. Dist. Ct. 1970).

The infant plaintiff was an occupant of a mini-bike, for purposes of the no-fault insurance statute Ins Law § 3672, even though the mini-bike was not operating at the time, where the plaintiff was seated on the mini-bike within the boundaries of the public highway at the time of the accident. Tyler v Traveler's Ins. Co., 110 Misc. 2d 471, 442 N.Y.S.2d 746, 1981 N.Y. Misc. LEXIS 3109 (N.Y. Sup. Ct. 1981).

Only limited class of vehicles, including bicycles and other lightweight muscle-powered vehicles, should be exempted from definition of "motor vehicle" in CLS Veh & Tr § 125. People v Lopez, 144 Misc. 2d 325, 544 N.Y.S.2d 410, 1989 N.Y. Misc. LEXIS 484 (N.Y. Sup. Ct. 1989).

A village ordinance or local law may validly require the testing of children, and others, by the application of reasonable standards, to determine their fitness to operate bicycles on public ways within the village, and may also provide for the issuance or withholding of licenses so to operate bicycles. The power to license the operation of bicycles implies the power to suspend or revoke such license by the application of reasonable standards. A village board of trustees may appoint a commission to administer such ordinance or local law and may delegate to this commission the power to test applicants, issue or withhold licenses and suspend or revoke the same, but not the power to hear prosecutions for violations of the enactment, since this power belongs exclusively to the courts. 1965 Ops St Compt File #296.

Defendant's motion to dismiss the simplified traffic informations was denied because whether the vehicle at issue was a limited use motorcycle and not a motor vehicle was a question of fact that could not be resolved based upon what had been presented to the court, where the year, model number, and vehicle identification number were noticeably absent from the description of the vehicle on the simplified traffic information. People v Lewis, 51 Misc. 3d 372, 28 N.Y.S.3d 762, 2015 N.Y. Misc. LEXIS 4867 (N.Y. Dist. Ct. 2015).

9. All terrain vehicle

An all terrain vehicle (ATV) is excluded from the definition of motor vehicle found in Vehicle and Traffic Law § 125 and is therefore not a vehicle for the purposes of the Penal Law which defines vehicle as a " 'motor vehicle', 'trailer,' or 'semi trailer' as defined in the vehicle and traffic law" (Penal Law § 10.00 [14]). Accordingly, defendant's motion, at the conclusion of the People's case, for dismissal of the count charging unauthorized use of a motor vehicle (Penal Law § 165.05) involving an ATV, is granted. People v Church, 148 Misc. 2d 909, 563 N.Y.S.2d 620, 1990 N.Y. Misc. LEXIS 622 (N.Y. J. Ct. 1990).

Despite defendant's act of driving an off-road motorcycle, or all terrain vehicle, which was not a motor vehicle under N.Y. Veh. & Traf. Law § 125, he could still be found guilty of reckless driving, due to his act of interfering with the victim's use of a public highway, by causing her to swerve out of her lane and collide with another, contributing to her accident. People v Miller, 196 Misc. 2d 591, 764 N.Y.S.2d 498, 2003 N.Y. Misc. LEXIS 896 (N.Y. J. Ct. 2003).

Agency Opinions

Analysis

1. In general
2. Truck
3. Motorcycle
4. Machinery
5. Ambulance, police, or fire vehicle

1. In general

A vehicle owned by a railroad corporation and used by such corporation as a police vehicle is not within the exclusion of Vehicle and Traffic Law § 125 and must therefore comply with the registration provisions of the Vehicle and Traffic Law. 1969 NY Ops Atty Gen May 9.

QEZE-certified petitioner's construction equipment which has wheels and tires and is operated or driven on public highway is "motor vehicle" for purposes of CLS Tax § 1115(z); petitioner's tool trucks are also motor vehicles for purposes of § 1115(z). NY Adv Op Comm T & F TSB-A-05-(2)S.

QEZE-certified petitioner's construction equipment which does not have wheels or tires is not "motor vehicle" when operated on construction sites. NY Adv Op Comm T & F TSB-A-05-(2)S.

If transportation activities performed by petitioner's tool truck either originate or terminate, or both, in empire zone in which petitioner is certified as QEZE under CLS Gen Mun Art 18-B, and at least 50 percent of truck's use is in such activities, tool truck, property related to such truck, and repair parts and services used to repair or maintain such truck, would qualify for exemption from sales and use tax. NY Adv Op Comm T & F TSB-A-05-(2)S.

2. Truck

A "truck crane" consisting of a crane mounted on a truck chassis is a motor vehicle and should be licensed as such. 1939 N.Y. Op. Att'y Gen. No. 188.

3. Motorcycle

A motorcycle is a motor vehicle. Operators of same must have operator's license. 1967 NY Ops Atty Gen May 17.

4. Machinery

A gasoline shovel is not a motor vehicle within the statutory definition, and the fine imposed for violation of said § 329 of the Highway Law belongs to the town and not to the state. 1930 N.Y. Op. Att'y Gen. No. 436.

No license is required by a person operating a public works mower along a highway. 1938 N.Y. Op. Att'y Gen. No. 221.

A "truck crane" consisting of a crane mounted on a truck chassis is a motor vehicle and should be licensed as such. 1939 N.Y. Op. Att'y Gen. No. 188.

5. Ambulance, police, or fire vehicle

An ambulance is a motor vehicle within the definition of this law, and if passengers are to be carried in it for hire, it should be covered by a bond or insurance policy as required by that statute. 1930 N.Y. Op. Att'y Gen. No. 122.

An operator of a fire vehicle must be a licensed driver. 1978 Op St Compt File #999.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 107-a, 156, 253, 308, 311, 359, 375, 388, 401, 2229; CLS CPLR § 1602; CLS ECL § 38-0103; CLS Gen Bus §§ 391-i, 396-q, 616; CLS Ins § 5202; CLS Penal §§ 155.30, 165.45; CLS Tax §§ 509, 1111, 1115, 1117, 1132, 1160, 1214.

Words and phrases defined, §§ 100–159.

Definition of vehicle, § 159.

Snowmobile, not a motor vehicle, § 2229.

Jurisprudences:

7A Am Jur 2d, Automobiles and Highway Traffic § 2.

8 NY Jur 2d Automobiles and Other Vehicles § 20.

Texts: 2-28 New Appleman New York Insurance Law § 28.04.

§ 129-a. Parking area of a shopping center

An area or areas of private property totaling at least one acre, near or contiguous to and provided in connection with premises having one or more stores or business establishments, and used by the public as a means of access to and egress from such stores and business establishments and for the free parking of motor vehicles of customers and patrons of such stores and business establishments.

HISTORY:

Add, L 1970, ch 679, § 1, eff Jan 1, 1971.

Agency Opinions

Violations of § 1203-c of the Vehicle and Traffic Law, requiring off-street parking spaces for the handicapped are enforced under the provisions of Article II-A of the Vehicle & Traffic Law, relating to a traffic infractions, rather than Article II-B, relating to parking infractions. The latter refers to parking violations by operators of vehicles, not failure of shopping center owners, to provide parking spaces. 1990 N.Y. Op. Att'y Gen. No. I90-34.

TITLE II Department of Motor Vehicles; Commissioner

Article 2. Department of Motor Vehicles; Commissioner

Section
202. Fees for searches and copies of documents.

HISTORY:

Add, L 1959, ch 775, eff Oct 1, 1960, with substance transferred in part from former Art 2; amd, L 1960, ch 464, § 4, eff Jan 1, 1961.

ARTICLE 2 Department of Motor Vehicles; Commissioner

HISTORY:

Add, L 1959, ch 775, eff Oct 1, 1960, with substance transferred in part from former Art 2; amd, L 1960, ch 464, § 4; L 1960, ch 465, § 2, eff Jan 1, 1961.

§ 202. Fees for searches and copies of documents.

1. Except in those cases in which it is provided by law that no fee shall be charged, the fees for searching the records of the department of motor vehicles kept pursuant to the provisions of this chapter and for furnishing copies of documents in said department kept pursuant to the provisions of this chapter shall be as provided in this section. Provided, however, that no fee shall be charged any public officer, board or body, volunteer fire company, volunteer ambulance service, or legal aid bureau or society or other private entity when acting pursuant to section seven hundred twenty-two of the county law, for searches or copies of documents to be used for a public purpose.

2. Fees for searches of records.

(a) [Eff until April 1, 2022] The fee for a search which is made manually by the department shall be ten dollars.

(a) [Eff April 1, 2022] The fee for a search which is made manually by the department shall be five dollars.

(b) [Eff until April 1, 2022] The fee for a search which is made by direct entry by a requester who has been approved for such entry by the commissioner shall be seven dollars.

(b) [Eff April 1, 2022] The fee for a search which is made by direct entry by a requester who has been approved for such entry by the commissioner shall be four dollars.

(c) [Eff until April 1, 2022] The fee for a search which is made by means of an electronic medium which has been prepared by a requester who has been approved for such service by the commissioner and which is processed by the department shall be seven dollars.

(c) [Eff April 1, 2022] The fee for a search which is made by means of an electronic medium which has been prepared by a requester who has been approved for such service by the commissioner and which is processed by the department shall be four dollars.

(d) The commissioner may condition approval for direct entry of a request or use of an electronic medium by a requester upon the establishment and maintenance of an account with the department with a minimum balance established by the commissioner from which fees chargeable to the requester shall be deducted. In addition, the commissioner shall prescribe the specifications and procedures for use of electronic media and may establish a minimum and/or a maximum number of searches which may be contained on any one such electronic medium submission.

(e) For the purposes of this section, a search shall consist of a single entry of an acceptable identifier for the purpose of obtaining a specific category of information relating to a person, vehicle or number plate. The commissioner shall by regulation define such categories and identifiers acceptable for such categories. Except as provided in subdivision three of this section, a search of the record of the department shall include the furnishing of the information disclosed by such search, and with respect to searches made manually by the department, shall include a certification of such record.

3. Fees for copies of documents. The fees for copies of documents, other than accident reports, shall be one dollar per page. A page shall consist of

either a single or double side of any document. The fee for a copy of an accident report shall be fifteen dollars. All copies of documents shall be certified at no additional fee. Whenever search of records of the department is required in conjunction with a request for a copy of a document, the fee for such search shall be the fee provided in paragraph (a) of subdivision two of this section. The result of such search will be the locating of the document to be copied, or if no document can be located, a certification to that effect will be the result of the search.

4. Registration lists and title information. (a) The commissioner shall have discretion to contract with the highest responsible bidder or bidders to furnish the registration information specified in this section from the records of all vehicle registrations from any registration period, or number of periods not exceeding five years in the aggregate, with respect to a given territory or information on titles. In such event, the fees provided by this section shall not apply to copies of records furnished under any such contract. Any such contract entered into by the commissioner pursuant to this section shall not be for a term of more than two years and shall contain language prohibiting the successful bidder from assigning the contract and from any use or resale of the information received which use or resale is contrary to the public policy of this state or is contrary to the public morals or welfare. In addition, any such sale of registration information shall be limited to only that part of the vehicle registration records describing the name and address of the owner of the vehicle and the make, model, year, weight, body style, number of passengers and cylinders, fuel, license number, type of registration and transaction, validation and expiration date and vehicle identification number of the vehicle.

(b) The commissioner shall notify each vehicle registrant that the registration information specified in paragraph (a) of this subdivision has been or will be furnished to the contracting party. The commissioner shall inform each vehicle registrant when such registrant first makes application for a vehicle registration or when such registrant applies to renew an existing vehicle registration how to achieve the deletion of such information from the contracting party's file. The contract between the commissioner and the contracting party shall provide that, upon the request of the registrant made in such manner and in such form as shall be prescribed by the commissioner, such registration information shall be deleted from the contracting party's file for all purposes, except: (i) issuance of manufacturer's warranty, safety recall or similar notices, or (ii) statistical complications.

(c) Any material violation of the terms of such contract by the successful bidder not corrected or discontinued within thirty days following receipt of notice of such violation will automatically cancel and void its contract with the commissioner and disqualify it from bidding for the five successive years following such cancellation.

(d) Any contract authorized by this section shall be subject to the provisions of article nine of the state finance law.

(e) The commissioner may from time to time require that the contracting party pursuant to this section submit written reports, in form satisfactory to the commissioner, concerning the use of such registration or title information.

5. Miscellaneous charges. The commissioner upon request may furnish copies of documents and records of searches by means other than first class mail upon prior payment of any additional cost involved in such transmission. Where the cost of such requested transmission cannot be readily determined before transmission, the commissioner may establish a reasonable fee to cover the cost of such transmission. Nothing herein shall be construed to require the commissioner to provide such service.

HISTORY:

Add, L 1959, ch 775, eff Oct 1, 1960, with substance transferred from former § 6–a; amd, L 1961, ch 444; L 1966, ch 621; L 1968, ch 75, § 1; L 1969, ch 761, § 1; L 1972, ch 799, § 1; L 1973, ch 327, § 2; L 1989, ch 61, § 3, eff May 1, 1989; L 1989, ch 293, § 1, eff Nov 1, 1993; L 1991, ch 166, § 222, eff Aug 1, 1991; L 1993, ch 269, § 1, eff July 21, 1993; L 1994, ch 169, § 119, eff June 9, 1994, deemed eff April 1, 1994; L 1995, ch 496, § 1, eff Aug 2, 1995; L 2003, ch 62, § 1 (Part U1), eff May 15, 2003; L 2005, ch 61, § 1 (Part V) (amd, L 2005, ch 63, § 1–b (Part A), eff Oct 1, 2005), eff Oct 1, 2005; L 2006, ch 708, § 1, eff Sept 13, 2006; L 2011, ch 376, § 1, eff Aug 3, 2011.

Editor's Notes: Laws 1989, ch 293, § 2, eff Nov 1, 1993, provides as follows:

§ 2. This act shall take effect November 1, 1993, and shall apply to all contracts effective after such date, provided, however, that the commissioner of motor vehicles shall promulgate rules and regulations prior to such effective date necessary to implement the provisions of this act.

Laws 2003, ch 62, § 13 (Part U1), eff May 15, 2003, provides as follows:

§ 13. This act shall take effect immediately; provided however that sections one through seven of this act, the amendments to subdivision 2 of section 205 of the tax law made by section eight of this act, and section nine of this act shall expire and be deemed repealed on April 1, 2022; provided further, however, that the provisions of section eleven of this act shall take effect April 1, 2004 and shall expire and be deemed repealed on April 1, 2022 (Amd, L 2005, ch 61, § 16 (Part V) (added by L 2005, ch 63, § 1-b (Part A), eff April 12, 2005), eff April 12, 2005; L 2009, ch 59, § 1 (Part P), eff April 7, 2009, deemed eff on and after April 1, 2009; L 2013, ch 58, § 2 (Part B), eff April 1, 2013; L 2014, ch 57, § 1 (Part C), eff March 31, 2014; L 2015, ch 58, § 1 (Part A), eff April 13, 2015; L 2017, ch 58, § 1 (Part A), eff April 20, 2017, deemed eff on and after April 1, 2017; L 2020, ch 58, § 1 (Part YY), eff April 3, 2020).

Laws 2005, ch 61, § 18 (a) (Part V) (amd, L 2005, ch 63, § 1-b (Part A), eff April 12, 2005), eff April 1, 2005, provides as follows:

§ 18. This act shall take effect immediately; provided that sections one through fifteen of this act shall take effect October 1, 2005; provided, however, that: (Amd, L 2005, ch 61, § 18 (Part V) (amd, L 2005, ch 63, § 1-b (Part A), eff April 12, 2005), eff April 12, 2005.).

(a) the amendments to paragraphs (a), (b) and (c) of subdivision 2 of section 202 of the vehicle and traffic law made by section one of this act shall not affect the repeal of such paragraphs and shall be deemed repealed therewith;

Notes to Decisions

1. In general

Petitioner, holding a contract as highest responsible bidder pursuant to subd. 3 of this section requiring the State Motor Vehicle Commissioner to furnish it with copies of all motor vehicle registrations, was not entitled to a writ of prohibition against favored treatment accorded to the prior holder of such a contract by the Commissioner in allowing the latter to use his offices after hours without payment of appropriate fees for a mass copying operation of vehicle registrations from the records. Circulation Associates, Inc. v Hults, 40 Misc. 2d 92, 242 N.Y.S.2d 722, 1963 N.Y. Misc. LEXIS 1778 (N.Y. Sup. Ct. 1963).

Motion to dismiss claim for breach of contract on grounds that it failed to state a cause of action was properly denied where claimant alleged that it was intended by an agreement entered into between claimant and the commissioner of motor vehicles following a public bidding pursuant to subd 3 of § 202 of the Vehicle and Traffic Law that claimant would be the sole party to receive in bulk from the commissioner, information contained in motor vehicle registration records for the years 1962, 1963 and 1964 and that the commissioner's subsequent agreement with a competitor to permit the microfilming of copies of a form known as MV-50 which contained information substantially identical to that of vehicle registrations at a cost less than the statutory rate, constituted a breach thereof, since these allegations stated a cause of action. Circulation Associates, Inc. v Hults, 40 Misc. 2d 92, 242 N.Y.S.2d 722, 1963 N.Y. Misc. LEXIS 1778 (N.Y. Sup. Ct. 1963).

Plaintiff's complaint seeking declaratory and injunctive relief to prevent the Commissioner of Motor Vehicles to sell the lists of driver registrations to the highest bidder as an unconstitutional violation of his right of privacy was dismissed, since the information was not vital or intimate and was in the category of "public records" available to anyone upon demand. Lamont v Commissioner of Motor Vehicles, 269 F. Supp. 880, 1967 U.S. Dist. LEXIS 8802 (S.D.N.Y.), aff'd, 386 F.2d 449, 1967 U.S. App. LEXIS 4195 (2d Cir. N.Y. 1967).

Agency Opinions

1. In general

Department of Motor Vehicles is not authorized to contract with private vendor to print and distribute Driver's Manual in exchange for vendor's right to sell advertising therein. 1992 NY Ops Atty Gen F 92-5.

Computerized listing of all licensed passenger-car drivers residing in 3 counties would be available under Freedom of Information Law if Department of Motor Vehicles could generate requested data based on its existing computer programs; CLS Veh & Tr § 202 does not prohibit applicant from seeking database or portion of database consisting of driver license information. Comm on Open Gov't FOIL-AO-10106.

CLS Veh & Tr § 202 which authorizes copying fee of $15.00 for accident reports obtained from Department of Motor Vehicles (DMV) and one dollar per page for copies of other records, and authorizes DMV to collect fees for searching for records, does not authorize other agencies (such as municipal police or sheriff's departments) to charge more than 25 cents per copy when accident reports are requested under Freedom of Information Law. Comm on Open Gov't FOIL-AO-12263.

Since CLS Veh & Tr § 202 pertains to particular records in possession of Department of Motor Vehicles only, other agencies, such as municipal police or sheriff's departments, cannot unilaterally adopt policy or regulations authorizing fees in excess of 25 cents per photocopy or other fees without specific statutory authority to do so. Comm on Open Gov't FOIL-AO-12409.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 354, 401, 410; CLS CPLR § 8008; CLS Ins § 5225.

Fees of public officers, CLS Pub O §§ 67-70-a.

TITLE III Safety Responsibility; Financial Security; Equipment; Inspection; Size and Weight; and Other Provisions

Article 5. Periodic Inspection of Motor Vehicles

Section
308. Definitions

Article 6. Motor Vehicle Financial Security Act

311. Definitions

Article 7. Motor Vehicle Safety Responsibility Act

359. Definitions

Article 9. Equipment of Motor Vehicles and Motorcycles

375. Equipment. [Effective until April 17, 2021]
375. Equipment. [Effective April 17, 2021]
381. Motorcycle equipment

Article 10. Dimensions and Weights of Vehicles

385. Dimensions and weights of vehicles.

Article 11. Civil Liability

388. Negligence in use or operation of vehicle attributable to owner

Article 12. Other Provisions

396. Use of state and other seals and insignia on private vehicles prohibited

HISTORY:

Add, L 1959, ch 775, eff Oct 1, 1960, with substance transferred from former Arts 6–A and 6–B.

ARTICLE 5 Periodic Inspection of Motor Vehicles

HISTORY:

Add, L 1959, ch 775, eff Oct 1, 1960, with substance transferred from former Art 3–A.

§ 308. Definitions

As used in this article the term "motor vehicle" shall include trailers and all vehicles included in the definition of the term "motor vehicle" contained in section one hundred twenty-five of this chapter except the following:

1. Road rollers, tractor cranes, truck cranes, power shovels, road building machines, snow plows, road sweepers, sand spreaders, well drillers, well servicing rigs, feed processing machines, mobile car crushers, earth movers, trucks with small wheels used in a factory, warehouse or railroad station, agricultural spreaders and sprayers, or a tractor-trailer combination designed and used exclusively for the same purpose as a vehicle specifically included in the foregoing, or

2. Vehicles inspected by or operating under a certificate of inspection authorized by the commissioner of transportation or the interstate commerce commission, or of a municipally owned and operated transit system, or

3. Farm vehicles registered under subdivision thirteen of section four hundred one of this chapter, self-propelled combines, self-propelled corn and hay harvesting machines and tractors used exclusively for agricultural purposes, or

4. Vehicles subject to inspection and licensing by local authorities provided such inspection by such local authorities conforms with the standards established by the commissioner under this article, or

5. Fire vehicles, except ambulances; or

6. Police vehicles for which the department operating such vehicles has submitted a plan approved by the commissioner, who shall establish the standards therefor, for periodic inspection thereof. Such plans shall be submitted to the commissioner by September thirtieth of each year. In determining the acceptability of such inspection plans and in establishing standards therefor, the commissioner shall require that such periodic inspections shall be substantially equivalent to inspections required for other motor vehicles under this article and shall be made with respect to such mechanisms and equipment as shall be determined by the commissioner to be necessary for the proper and safe operation of such vehicles.

HISTORY:

Add, L 1959, ch 775, with substance transferred from former § 37; amd, L 1960, ch 90, § 2; L 1960, ch 300, § 13, eff Oct 1, 1960; L 1966, ch 68, § 1; L 1966, ch 248, § 2; L 1969, ch 90, § 1, eff March 25, 1969; L 1970, ch 267, § 58, eff March 1, 1971; L 1972, ch 48, § 2; L 1972, ch 169, § 1, eff Jan 1, 1973; L 1977, ch 220, § 1, eff Oct 1, 1977; L 1989, ch 409, § 1, eff Oct 14, 1989; L 1990, ch 275, § 1, eff Sept 1, 1990.

Notes to Decisions

1. In general

A police vehicle was not subject to inspection, irrespective of the purpose or intent of the state police in the use of police motor vehicles for such purposes. People v Conrow, 68 Misc. 2d 471, 326 N.Y.S.2d 971, 1971 N.Y. Misc. LEXIS 1386 (N.Y. County Ct. 1971).

Exemption of police vehicles from statutory definition of "motor vehicle" did not preclude use of vehicle owned by state police to determine whether motor vehicle inspections were properly performed at service station owned and operated by defendant. People v Wehmann, 70 Misc. 2d 278, 332 N.Y.S.2d 516, 1972 N.Y. Misc. LEXIS 1875 (N.Y. J. Ct. 1972).

Fact that police vehicles are exempt from inspection did not prevent prosecution of defendant charged with failing to make a proper inspection of an unmarked police vehicle. People v Gondrez, 74 Misc. 2d 73, 343 N.Y.S.2d 833, 1973 N.Y. Misc. LEXIS 1914 (N.Y. City Crim. Ct. 1973).

Evidence indicating that defendant failed to follow procedures for inspection of vehicle set forth in statute was sufficient to establish violation of such statute where defendant certified as passing inspection an unmarked police vehicle. People v Gondrez, 74 Misc. 2d 73, 343 N.Y.S.2d 833, 1973 N.Y. Misc. LEXIS 1914 (N.Y. City Crim. Ct. 1973).

A village may adopt an ordinance requiring taxicabs to be inspected at an inspection station for a fee if it is reasonable and is not inconsistent with the Vehicle and Traffic Law. 1966 Ops St Compt File #670.

ARTICLE 6 Motor Vehicle Financial Security Act

HISTORY:

Add, L 1959, ch 775, eff Oct 1, 1960, with substance transferred from former Art 6–A.

§ 311. Definitions

As used in this article:

1. The term "superintendent" shall mean the superintendent of financial services of this state.

2. The term "motor vehicle" shall be defined as in section one hundred twenty-five of this chapter, except that it shall also include trailers, semi-trailers and tractors other than tractors used exclusively for agricultural purposes, and shall exclude fire and police vehicles, farm equipment, including self-propelled machines used exclusively in growing, harvesting or handling farm produce, tractors used exclusively for agricultural purposes, or for snowplowing other than for hire, and self-propelled caterpillar or crawler-type equipment while being operated on the contract site.

3. The term "proof of financial security" shall mean proof of ability to respond in damages for liability arising out of the ownership, maintenance or use of a motor vehicle as evidenced by an owner's policy of liability insurance, a financial security bond, a financial security deposit, or qualifications as a self-insurer under section three hundred sixteen of this chapter or, in the case of a non-resident, under self-insurance provisions of the laws of the jurisdiction of such non-resident. Notwithstanding any other provision of any law or regulation, any proof of financial security shall for any self-propelled motor vehicle also provide coverage required by this article to any non-commercial trailer hauled by any such motor vehicle, other than a mobile home. For the purposes of this article, a mobile home or "manufactured home" means a mobile home or manufactured home as defined in section one hundred twenty-two-c of this chapter.

4. The term "owner's policy of liability insurance" shall mean a policy

(a) Affording coverage as defined in the minimum provisions prescribed in a regulation which shall be promulgated by the superintendent at least ninety days prior to effective date of this act. The superintendent before promulgating such regulations or any amendment thereof, shall consult with all insurers licensed to write automobile liability insurance in this state and shall not prescribe minimum provisions which fail to reflect the provisions of automobile liability insurance policies, other than motor vehicle liability policies as defined in section three hundred forty-five of this chapter, issued within this state at the date of such regulation or amendment thereof. Nothing contained in such regulation or in this article shall prohibit any insurer from affording coverage under an owner's policy of liability insurance more liberal than that required by said minimum provisions. Every such owner's policy of liability insurance shall provide insurance subject to said regulation against loss from the liability imposed by law for damages, including damages for care and loss of services, because of bodily injury to or death of any person and injury to or destruction of property arising out of the ownership, maintenance, use,

or operation of a specific motor vehicle or motor vehicles within the state of New York, or elsewhere in the United States in North America or the Dominion of Canada, subject to a limit, exclusive of interest and costs, with respect to each such motor vehicle except a tow truck, of twenty-five thousand dollars because of bodily injuries to and fifty thousand dollars because of death of one person in any one accident and, subject to said limit for one person, to a limit of fifty thousand dollars because of bodily injury to and one hundred thousand dollars because of death of two or more persons in any one accident, and to a limit of ten thousand dollars because of injury to or destruction of property of others in any one accident provided, however, that such policy need not be for a period coterminous with the registration period of the vehicle insured. The limit, exclusive of interest and costs, with respect to a tow truck shall be a combined single limit of at least three hundred thousand dollars because of bodily injury or death to one or more persons or because of injury or destruction of property of others in any one accident, and to a limit of twenty-five thousand dollars because of damage to a vehicle in the care, custody and control of the insured. Any insurer authorized to issue an owner's policy of liability insurance as provided for in this article may, pending the issue of such a policy, make an agreement, to be known as a binder, or may, in lieu of such a policy, issue a renewal endorsement or evidence of renewal of an existing policy; each of which shall be construed to provide indemnity or protection in like manner and to the same extent as such a policy. The provisions of this article shall apply to such binders, renewal endorsements or evidences of renewal. Every such policy issued insuring private passenger vehicles and every renewal policy, renewal endorsement, or other evidence of renewal issued shall have attached thereto a rating information form which clearly specifies and defines the rating classification assigned thereto, including any applicable merit rating plan; and

(b) In the case of a vehicle registered in this state, a policy issued by an insurer duly authorized to transact business in this state; or

(c) In the case of a vehicle lawfully registered in another state, or in both this state and another state, either a policy issued by an authorized insurer, or a policy issued by an unauthorized insurer authorized to transact business in another state if such unauthorized insurer files with the commissioner in form to be approved by him a statement consenting to service of process and declaring its policies shall be deemed to be varied to comply with the requirements of this article; and

(d) The form of which has been approved by the superintendent. No such policy shall be issued or delivered in this state until a copy of the form of policy shall have been on file with the superintendent for at least thirty days, unless sooner approved in writing by the superintendent, nor if within said period of thirty days the superintendent shall have notified the carrier in writing that in his opinion, specifying the reasons therefor, the form of policy does not comply with the laws of this state.

5. The term "certificate of insurance" shall mean any evidence issued by or on behalf of an insurance company duly authorized to transact business in this state, stating in such form as the commissioner may prescribe or approve that such company has issued an owner's policy of liability insurance on the motor vehicle or vehicles designated therein. Such certificate shall contain information as required by the commissioner including at least the following except as otherwise provided:

(a) The name and address of the person to whom the policy was issued.

(b) The number and effective period of the policy. If all of the motor vehicles owned by one person during a defined period are insured under the same owner's policy of liability insurance the certificate of insurance may so state and it shall then not be necessary to identify the specific vehicle insured. The requirements of this article for an owner's policy of liability insurance may be fulfilled by the policies of one or more insurance carriers which policies together meet such requirements.

(c) As to new policies, a statement that at least ten per cent of the annual premium due on the policy has been paid. For the purposes of this paragraph a transfer of insurance from one company to another by an agent or broker shall not be considered the issuance of a new policy.

6. The term "financial security bond" shall mean for each motor vehicle a bond executed by the owner and by a surety company duly authorized to transact business in this state. The provisions of subdivision (e) of section three hundred forty-nine of this chapter shall apply to such bond.

7. The term "financial security deposit" shall mean for each motor vehicle the deposit with the commissioner of twenty-five thousand dollars in cash, or securities, such as may legally be purchased by savings banks or trust funds, of a market value of twenty-five thousand dollars and an additional deposit in an amount determined by the commissioner to be sufficient to satisfy the requirements of article fifty-one of the insurance law.

8. The term "self-insurer" shall mean a person who shall have been determined by the commissioner in accordance with section three hundred sixteen to be financially responsible.

9. The word "state" when used in this article shall unless the context clearly indicates otherwise, mean any state, territory or possession of the United States, the District of Columbia or any province of the Dominion of Canada.

10. "Insurance Identification Card" shall mean a card issued by or on behalf of an insurance company or bonding company duly authorized to transact business in this state, stating in such form as the commissioner may prescribe or approve that such

company has issued an owner's policy of liability insurance or a financial security bond on the motor vehicle or vehicles designated therein. Such card shall contain such information and shall be valid during such period as may be prescribed by the commissioner. If an owner shall have filed a financial security deposit, or shall have qualified as a self-insurer under section three hundred sixteen of this chapter, the term "insurance identification card" shall mean a card issued by the department which evidences that such deposit has been filed or that such owner has so qualified.

HISTORY:

Add, L 1959, ch 775; amd, L 1960, ch 300, § 14; L 1960, ch 608, § 2; L 1967, ch 569, § 1, eff Sept 1, 1967; L 1971, ch 1025, § 1; L 1972, ch 103, § 1, eff April 5, 1972; L 1972, ch 117, § 1; L 1973, ch 13, § 10; L 1974, ch 200, §§ 1–3, eff April 16, 1974; L 1979, ch 665, § 5, eff Dec 1, 1979; L 1981, ch 569, § 1, eff Sept 1, 1982; L 1983, ch 228, § 1, eff Jan 1, 1984; L 1984, ch 805, § 82, eff Sept 1, 1984; L 1989, ch 192, § 1, eff June 24, 1989; L 1993, ch 322, § 7, eff July 1, 1994; L 1994, ch 552, § 10, eff Jan 22, 1995; L 1995, ch 305, § 4, eff Jan 1, 1996; L 2011, ch 62, § 104 (Part A), eff Oct 3, 2011.

Editor's Notes: Laws 1983, ch 781, §§ 10, 11, provide as follows:

§§ 10, 11. [Repealed by (amd, L 1983, ch 718, § 15 (amd, L 1986, ch 351, § 2, eff July 17, 1986; L 1991, ch 319, § 2, eff July 15, 1991, L 1996, ch 309, § 77, eff July 13, 1996, L 2002, ch 6, § 2, eff Jan 31, 2002, L 2007, ch 59, § 2 (Part I), eff April 9, 2007, deemed eff on and after April 1, 2007, L 2009, ch 59, § 2, eff April 7, 2009, deemed eff on and after April 1, 2009.) L 2011, ch 60, § 2 (Part E), eff March 31, 2011].

Laws 1983, ch 781, § 15, provide as follows:

§ 15. This act shall take effect immediately except that sections ten and eleven hereof shall not take effect and are hereby repealed. (Amd, L 1986, ch 351, § 2, eff July 17, 1986; L 1991, ch 319, § 2, eff July 15, 1991, L 1996, ch 309, § 77, eff July 13, 1996, L 2002, ch 6, § 2, eff Jan 31, 2002, L 2007, ch 59, § 2 (Part I), eff April 9, 2007, deemed eff on and after April 1, 2007, L 2009, ch 59, § 2, eff April 7, 2009, deemed eff on and after April 1, 2009, L 2011, ch 60, § 1 (Part E), eff March 31, 2011.).

Laws 1993, ch 322, § 18, eff July 1, 1994, provides as follows:

§ 18. This act shall take effect July 1, 1994, provided however, that effective immediately, the addition, amendment and/or repeal of any rules or regulations necessary for the implementation of the foregoing sections of this act on its effective date are authorized and directed to be made and completed on or before such effective date.

Laws 1994, ch 552, § 12, eff Jan 22, 1995, provides as follows:

§ 12. This act shall take effect on the one hundred eightieth day after it shall have become a law and shall apply to applications for new registrations and renewals of existing registrations submitted on and after such date.

Laws 1995, ch 305, § 12, eff July 26, 1995, provides as follows:

§ 12. This act shall take effect immediately, except that sections one through eleven of this act shall take effect January 1, 1996 and shall apply to all accidents occurring on or after such date.

Laws 2011, ch 60, § 1 (Part E), eff March 31, 2011, amended Laws 1981, ch 569, § 12 (amd, L 1983, ch 781, § 9, eff July 30, 1983, L 1986, ch 351, § 1, eff July 17, 1986, L 1991, ch 319, § 1, eff July 15, 1991, L 1996, ch 309, § 76, eff July 13, 1996, L 2002, ch 6, § 1, eff Jan 31, 2002, L 2007, ch 59, § 1 (Part I), eff April 9, 2007, deemed eff on and after April 1, 2007, L 2009, ch 59, § 1 (Part J), eff April 7, 2009, deemed eff on and after April 1, 2009, L 2011, ch 60, § 1 (Part E), eff March 31, 2011.) so as to delete the expiration provisions applicable to subivision 5, opening paragraph.

Laws 2011, ch 60, § 2 (Part E), eff March 31, 2011, amended Laws 1983, ch 781, § 15 (amd, L 1986, ch 351, § 2, eff July 17, 1986; L 1991, ch 319, § 2, eff July 15, 1991, L 1996, ch 309, § 77, eff July 13, 1996, L 2002, ch 6, § 2, eff Jan 31, 2002, L 2007, ch 59, § 2 (Part I), eff April 9, 2007, deemed eff on and after April 1, 2007, L 2009, ch 59, § 2, eff April 7, 2009, deemed eff on and after April 1, 2009) so as to delete expiration provisions applicable to subdivision 5, opening paragraph.

Repeal Notes: [1983, ch 781] Section eleven of chapter five hundred sixty-nine of the laws of nineteen hundred eighty-one, repealed by section eight of this act provided for a report by the superintendent of insurance [superintendent of financial services] to the legislature and is to be substantially replaced by section eleven of this act. Sections ten and eleven of this act repealing sections one through nine of such chapter and sections one through seven of this act, respectively, merely repeal amendments to the vehicle and traffic law and the insurance law which will have simultaneously expired by the terms of their respective enacting chapters.

Notes to Decisions

Analysis

1. In general
2. Arbitration
3. Conditional or absolute policy
4. Amount of coverage
5. Certificate of insurance
6. Out of state insurer
7. Choice of laws
8. Miscellaneous

1. In general

The compulsory automobile insurance requirement is designed to cover a car-owner's liability, not create it; the applicable statute was not intended to impose liability where none would otherwise exist. Neumeier v Kuehner, 31 N.Y.2d 121, 335 N.Y.S.2d 64, 286 N.E.2d 454, 1972 N.Y. LEXIS 1127 (N.Y. 1972).

Object of compulsory automobile insurance is to assure the protection of members of the public who are innocent victims of motor vehicle accidents by providing compensation for and protection from tortious wrongs committed against them. Rosado v Eveready Ins. Co., 34 N.Y.2d 43, 356 N.Y.S.2d 8, 312 N.E.2d 153, 1974 N.Y. LEXIS 1587 (N.Y. 1974).

There was rational basis for exclusion of motorcycles from definition of motor vehicle in no-fault insurance law. Montgomery v Daniels, 38 N.Y.2d 41, 378 N.Y.S.2d 1, 340 N.E.2d 444, 1975 N.Y. LEXIS 2242 (N.Y. 1975).

Where action against insurer involved interpretation of a liability policy between New York law, involved a resident of the Province of Ontario and a foreign insurer, and involved an accident which occurred in New York, New York properly denied insurer's motion to dismiss on the grounds of forum non conveniens. Radke v Lloyd's of London, 58 A.D.2d 966, 397 N.Y.S.2d 288, 1977 N.Y. App. Div. LEXIS 13172 (N.Y. App. Div. 4th Dep't 1977).

Nonresident operator of foreign-registered vehicle may not drive on public highways of New York State with complete immunity from New York's financial security laws, even if such conduct may not be traffic infraction. General Accident Ins. Co. v Loi Tran, 246 A.D.2d 543, 667 N.Y.S.2d 417, 1998 N.Y. App. Div. LEXIS 204 (N.Y. App. Div. 2d Dep't 1998).

The Superintendent of Insurance may determine the requirements of policies to be issued under the Motor Vehicle Financial Security Act provided the requirements are not less than standard policies, and the Commissioner may or may not include provisions making the policies absolute. General Accident Fire & Life Assurance Corp. v Martino, 12 Misc. 2d 935, 175 N.Y.S.2d 894, 1958 N.Y. Misc. LEXIS 3385 (N.Y. Sup. Ct. 1958).

Defendant's conviction for driving without financial security, defendant having failed to produce a temporary insurance iden-

tification card, is reversed since, although the temporary card set forth a 60-day expiration date, expiration was not self-executing but was conditioned upon service of a proper notice of termination (Vehicle and Traffic Law, § 313; § 311, subd 4, par [a]; 15 NYCRR 32.7) and the People offered no proof that such notice was sent to defendant instead relying upon the presumption that the failure to produce an insurance identification card is "presumptive evidence" of driving without financial security (Vehicle and Traffic Law, § 319, subd 3); in order for a criminal statutory presumption to satisfy constitutional requirements it must at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend and, while the presumption herein satisfies this requirement where its effect is to show that a defendant never secured insurance at all, it cannot be constitutionally extended to prove that insurance properly secured was lawfully canceled in a case where a defendant alleges that this was not so. People v Baron, 103 Misc. 2d 1057, 431 N.Y.S.2d 234, 1980 N.Y. Misc. LEXIS 2253 (N.Y. App. Term), app. denied, 49 N.Y.2d 1001, 1980 N.Y. LEXIS 5593 (N.Y. 1980).

Filing requirement imposed by CLS Veh & Tr § 311(4)(c) is independent of that imposed by CLS Ins § 1214. Insurance Department, Opinions of General Counsel, Opinion Number 00-01-06.

Third-party liability exclusion provision in business automobile insurance policy is not permissible under 11 NYCRR Part 60-1 (Regulation 35-A), which establishes minimum provisions for all motor vehicle policies in New York that provide coverage and satisfaction of financial security requirements of Vehicle and Traffic Law. Insurance Department, Opinions of General Counsel, Opinion Number 02-01-28.

There is not exclusion in 11 NYCRR § 260-1.2 (1996) (Reg. 35-A) that permits denial of coverage on ground that claim arose while insured was operating motor vehicle with expired registration; thus, insurer may not include such exclusion in automobile liability insurance policy that is used to satisfy New York's motor vehicle financial security requirements. Insurance Department, Opinions of General Counsel, Opinion Number 02-08-16.

2. Arbitration

The application of the MVAIC for a stay of arbitration was properly denied, since the vehicle involved in the accident was registered in North Carolina and carried liability insurance in accordance with the minimum limitation of that state, but in an amount insufficient to meet the financial security provisions of Vehicle and Traffic Law § 311. The court held the North Carolina vehicle was "an uninsured motor vehicle" and the owner a "financially irresponsible motorist" for purposes of this action. Buglione v Motor Vehicle Accident Indemnification Corp., 32 A.D.2d 525, 299 N.Y.S.2d 661, 1969 N.Y. App. Div. LEXIS 4137 (N.Y. App. Div. 1st Dep't 1969).

An endorsement in plaintiff's automobile insurance policy defined an uninsured automobile as "an automobile used without permission of the owner thereof, if there is no bodily injury liability insurance applicable." The owner of an automobile involved in an accident, in which the plaintiffs were injured, stated in the accident report that the operator of his car did not have his consent to drive the car. Held: such statement constituted sufficient evidence that the car was an uninsured car within the meaning of plaintiff's policy so as to entitle the plaintiff to arbitration under the endorsement. Lowe v Ocean Acci. & Guarantee Corp., 21 Misc. 2d 1042, 193 N.Y.S.2d 361, 1959 N.Y. Misc. LEXIS 2603 (N.Y. Sup. Ct. 1959).

An automobile which has only $5,000 and $10,000 insurance coverage is inadequately insured to meet the requirements of subd. 4(a) of this section requiring $10,000 and $20,000 coverage, and hence an injured person is entitled to require MVAIC to submit to arbitration pursuant to § 601 of the Insurance Law of his claim for damages for injuries sustained through negligent operation of an uninsured motor vehicle. Cruzado v Underwood, 39 Misc. 2d 859, 242 N.Y.S.2d 74, 1963 N.Y. Misc. LEXIS 1832 (N.Y. Sup. Ct. 1963).

Where MVAIC applies for a stay of arbitration under its uninsured motorist policy indorsement pending determination of the question of whether another vehicle was actually uninsured or not, it should not be permitted to withdraw from defense of the action on the merits until there has been a determination of whether defendant was in fact an uninsured motorist. Ratchford v Fisk, 43 Misc. 2d 127, 250 N.Y.S.2d 88, 1964 N.Y. Misc. LEXIS 1715 (N.Y. Sup. Ct. 1964), aff'd, 26 A.D.2d 685, 272 N.Y.S.2d 1008, 1966 N.Y. App. Div. LEXIS 3646 (N.Y. App. Div. 2d Dep't 1966).

3. Conditional or absolute policy

Endorsement on policy issued to lessor of automobiles excluding coverage for drive-yourself private vehicles except vehicles leased on annual basis was contrary to law and to public policy of state to protect innocent victims of traffic accidents. Rosado v Eveready Ins. Co., 34 N.Y.2d 43, 356 N.Y.S.2d 8, 312 N.E.2d 153, 1974 N.Y. LEXIS 1587 (N.Y. 1974).

The language of this section evinces indications that policies of automobile insurance thereby dealt with, unlike those required by § 345 and the "Safety Responsibility Act," do not impose absolute liability upon casualty and indemnity insurers which cannot be avoided, to the detriment of innocent victims of accidents, by the raising of such defenses as the insurer may have against liability to the insured by reason of his breach of conditions, such as a condition requiring him to cooperate in the defense of any claim. National Grange Mut. Liability Co. v Fino, 13 A.D.2d 10, 212 N.Y.S.2d 684, 1961 N.Y. App. Div. LEXIS 11892 (N.Y. App. Div. 3d Dep't 1961).

An automobile policy which is issued under the Motor Vehicle Financial Security Act and under the applicable regulations of the Superintendent of Insurance may validly contain a condition requiring the insured to notify the insurance company in writing of an accident as soon as practicable and said policies are not absolute policies. General Accident Fire & Life Assurance Corp. v Martino, 12 Misc. 2d 935, 175 N.Y.S.2d 894, 1958 N.Y. Misc. LEXIS 3385 (N.Y. Sup. Ct. 1958).

The Superintendent of Insurance may determine the requirements of policies to be issued under the Motor Vehicle Financial Security Act provided the requirements are not less than standard policies, and the Commissioner may or may not include provisions making the policies absolute. General Accident Fire & Life Assurance Corp. v Martino, 12 Misc. 2d 935, 175 N.Y.S.2d 894, 1958 N.Y. Misc. LEXIS 3385 (N.Y. Sup. Ct. 1958).

4. Amount of coverage

Where automobile liability policy provided a limit of $5,000.00 for injury or death to one person, the fact that the policy also provided that liability should comply with the provisions of any motor vehicle financial responsibility law to the extent of coverage and limits, but in no event in excess of the policy limits, did not entitle the holder of a judgment against the assured to recover more than $5,000.00. La Paglia v American Casualty Co., 285 A.D. 1065, 139 N.Y.S.2d 683, 1955 N.Y. App. Div. LEXIS 6684 (N.Y. App. Div. 1955).

The minimum insurance coverage which motor vehicle owners are required to carry by the Superintendent of Insurance under subd. 4(a) of this section was intended by the Legislature to be the measure of MVAIC liability to persons injured by uninsured motorists. Garcia v Motor Vehicle Acci. Indemnification Corp., 18 A.D.2d 62, 238 N.Y.S.2d 195, 1963 N.Y. App. Div. LEXIS 4228 (N.Y. App. Div. 1st Dep't 1963).

Uninsured motorist coverage carrier is liable for the difference between the amount of a driver's recovery from the other motorist and the minimum limits of $10,000 and $20,000 set by the statute fixing financial responsibility. Neals v Allstate Ins. Co., 34 A.D.2d 265, 311 N.Y.S.2d 315, 1970 N.Y. App. Div. LEXIS 4612 (N.Y. App. Div. 3d Dep't 1970).

When a driver's insurer was found liable to a motorist, in a proceeding initiated under N.Y. Ins. Law § 3420(a)(2), for the driver's negligence, the insurer's liability was limited to the statutory minimum coverage required for personal injury liability under N.Y. Veh. & Traf. Law § 311(4)(a) because the insurer met the insurer's burden to show that the insurer had no relevant coverage in effect at the time of the subject vehicle collision. Creinis v Hanover Ins. Co., 59 A.D.3d 371, 872 N.Y.S.2d 544, 2009 N.Y. App. Div. LEXIS 740 (N.Y. App. Div. 2d Dep't), app. denied, 12 N.Y.3d 710, 881 N.Y.S.2d 660, 909 N.E.2d 583, 2009 N.Y. LEXIS 976 (N.Y. 2009).

An automobile which has only $5,000 and $10,000 insurance coverage is inadequately insured to meet the requirements of subd. 4(a) of this section requiring $10,000 and $20,000 coverage, and hence an injured person is entitled to require MVAIC to submit to arbitration pursuant to § 601 of the Insurance Law of his claim for damages for injuries sustained through negligent operation of an uninsured motor vehicle. Cruzado v Underwood, 39 Misc. 2d 859, 242 N.Y.S.2d 74, 1963 N.Y. Misc. LEXIS 1832 (N.Y. Sup. Ct. 1963).

Town ordinance requirement that tow truckers licensed to be called by police to scenes of accidents on a rotating basis have minimum insurance coverage of $100,000 to $300,000 for bodily injury liability and $15,000 property damage as well as garage liability insurance was not void as being in conflict with state law since responding to police emergency calls amounted to extra hazardous duty and the requirement of additional insurance coverage was reasonable for the protection of public. Richard's Service Station, Inc. v Huntington, 79 Misc. 2d 834, 361 N.Y.S.2d 497, 1974 N.Y. Misc. LEXIS 1766 (N.Y. Sup. Ct. 1974), modified, 47 A.D.2d 963, 367 N.Y.S.2d 296, 1975 N.Y. App. Div. LEXIS 9438 (N.Y. App. Div. 2d Dep't 1975).

An automobile liability insurance policy issued to a Pennsylvania resident which provided a $75,000 limit of liability to be used to satisfy all claims against the insured but included a provision permitting adjustments above that limit if an accident occurred in a state whose law required a higher minimum limit of liability, would meet the minimum requirements of New York for an accident involving a vehicle driven by the insured in which one person died and three were injured since New York law requires minimum coverage of $50,000 for one death, $20,000 for bodily injury to two or more individuals and $5,000 to compensate for property damage arising out of any one accident and, therefore, since the $75,000 coverage meets the maximum cumulative exposure of the insured arising from the accident, the policy as it stands would not be modified to provide greater coverage since the court does not have the authority to modify a contract that is clear and unambiguous on its face. Harleysville Mut. Ins. Co. v Boerst, 115 Misc. 2d 1006, 454 N.Y.S.2d 826, 1982 N.Y. Misc. LEXIS 3804 (N.Y. Sup. Ct. 1982), aff'd, 101 A.D.2d 686, 475 N.Y.S.2d 809, 1984 N.Y. App. Div. LEXIS 18226 (N.Y. App. Div. 4th Dep't 1984).

A reduction-in-coverage clause contained in an endorsement to a policy of automobile liability insurance, which reduces the amount recoverable under the policy's underinsured motorist coverage by the amount paid by the third-party insurer, should not be given effect; inasmuch as Veh & Tr Law § 311(4) requires a motorist to carry at least $10,000 liability coverage, the full amount stated in the policy's underinsured motorist declaration would never be paid; thus, the reduction-in-coverage clause is misleading and ambiguous, and therefore, must be construed against the insurer; accordingly, a woman who was injured while riding as a passenger in a motor vehicle being driven by her husband and who sought to recover for personal injuries pursuant to the underinsured motorist declaration of her husband's insurance policy, which contained such reduction-in-coverage clause, was entitled to coverage up to the declaration's $25,000 limit, without any offset for the amount paid to her by the third-party insurer. United Community Ins. Co. v Mucatel, 127 Misc. 2d 1045, 487 N.Y.S.2d 959, 1985 N.Y. Misc. LEXIS 2782 (N.Y. Sup. Ct. 1985), aff'd, 119 A.D.2d 1017, 501 N.Y.S.2d 761, 1986 N.Y. App. Div. LEXIS 49862 (N.Y. App. Div. 1st Dep't 1986).

Exclusion contained in the umbrella liability policy relating to the relative of a named insured party did not violate the legislative intent and public policy underlying N.Y. Veh. & Traf. Law § 311(4)(a) since the primary car insurance policy satisfied the statutory minimum coverage amounts. Pfoh v Electric Ins. Co., 14 A.D.3d 777, 788 N.Y.S.2d 441, 2005 N.Y. App. Div. LEXIS 41 (N.Y. App. Div. 3d Dep't), app. denied, 4 N.Y.3d 711, 798 N.Y.S.2d 724, 831 N.E.2d 969, 2005 N.Y. LEXIS 1137 (N.Y. 2005).

Trial court properly granted summary judgment to a driver in his action under N.Y. Ins. Law § 3420(a)(2) against another car owner's insurer, arising from an unsatisfied judgment obtained by the driver against the other car owner after the driver was struck by the other owner's car, as the insurer had failed to assert that there was no coverage of the owner in an earlier proceeding and accordingly, it was estopped to deny coverage; the judgment against the insurer should not have been limited to the statutory minimum limit of N.Y. Veh. & Traf. Law § 311(4)(a), as the driver was entitled to the full amount of the judgment obtained where the insurer had failed to offer evidence as to any limitation on coverage. Kleynshvag v GAN Ins. Co., 21 A.D.3d 999, 801 N.Y.S.2d 383, 2005 N.Y. App. Div. LEXIS 9198 (N.Y. App. Div. 2d Dep't 2005).

Insurance company may not contract with insured to provide less than legally mandated personal injury protection coverage in automobile insurance policy in exchange for lower premium; there are number of other possible ways to reduce costs of total automobile insurance premium (e.g., one can choose not to purchase optional automobile insurance coverages, one can request higher deductible, and one can purchase automobile safety or security devices or take driver safety course). Insurance Department, Opinions of General Counsel, Opinion Number 02-02-11.

Motor vehicle policy that has combined single limits of liability of $65,000 satisfies financial security requirements for accident in which one person was injured. Insurance Department, Opinions of General Counsel, Opinion Number 02-11-21.

Plaintiff's obligation to indemnify defendants in an underlying personal injury action was limited to the statutory minimum, as the savings clause in the policy provided for coverage up to the minimum amounts required by the financial responsibility law, N.Y. Ins. Law § 3420(f)(1), it was in compliance with N.Y. Veh. & Traf Law §§ 311(4)(a), 341, and 345(b)(3), and did not violate public policy. Connecticut Indem. Co. v Hines, 40 A.D.3d 903, 837 N.Y.S.2d 183, 2007 N.Y. App. Div. LEXIS 6375 (N.Y. App. Div. 2d Dep't 2007).

5. Certificate of insurance

A certificate of insurance is merely evidence that a contract has been issued. Hill v Johnson, 35 A.D.2d 407, 316 N.Y.S.2d 536, 1970 N.Y. App. Div. LEXIS 3086 (N.Y. App. Div. 2d Dep't 1970), app. denied, 28 N.Y.2d 484, 1971 N.Y. LEXIS 1797 (N.Y. 1971).

A certificate of insurance is not a contract of insurance but is merely evidence that a contract has been issued and is conditioned upon the issuance and existence of a policy. Country-Wide Ins. Co. v Wills, 51 A.D.2d 701, 380 N.Y.S.2d 1, 1976 N.Y. App. Div. LEXIS 11145 (N.Y. App. Div. 1st Dep't 1976), aff'd, 41 N.Y.2d 835, 393 N.Y.S.2d 400, 361 N.E.2d 1048, 1977 N.Y. LEXIS 1876 (N.Y. 1977).

A "certificate of insurance" as defined in subd. 5 of this section need not state the number of the policy, as specified herein, in order to impose liability upon the insurance company where the other required factors pointing to insurance coverage are present. Dembitzer v Gilliam, 44 Misc. 2d 487, 254 N.Y.S.2d 47, 1964 N.Y. Misc. LEXIS 1634 (N.Y. Sup. Ct. 1964).

Insurance identification card is treated as certificate of insurance; where certificate furnished by insurer does not resemble official certificate of insurance document and states that insurance afforded by policies described in certificate is subject to all terms, exclusions and conditions of policies, certificate does not constitute official certificate under § 311, and is simply notice that policy of insurance has been issued. Taylor v Kinsella, 742 F.2d 709, 1984 U.S. App. LEXIS 19477 (2d Cir. N.Y. 1984).

6. Out of state insurer

Owner and operator of motor vehicle registered in Canada, and insured for liability by Canadian insurance company is not covered person within meaning of Insurance Law § 5102 (j); Insurance Law § 5104 (b) provides in action by covered person against noncovered person for personal injuries arising out of use or operation of motor vehicle, insurer which paid first-party benefits on account of such injuries has lien against any recovery to extent of benefits paid to covered person; plaintiff, passenger in vehicle registered in Canada, is covered person and defendant, insurer of vehicle owned by plaintiff, paid first-party benefits to him; plaintiff argues since insurance policy covering Canadian vehicle was liability policy with limits in excess of minimum prescribed by Vehicle and Traffic Law § 311 (4) (a), vehicle had required financial security in effect, making owner and operator

covered person irrespective of whether liability policy provided for no-fault benefits; Vehicle and Traffic Law § 311 (4) (c), however, contains additional requirement in case of vehicle lawfully registered in another State, which includes any province of Canada; liability policy covering Canadian vehicle was issued by unauthorized insurer which has not filed required form; accordingly, owner and operator is not covered person. Marshall v Nationwide Mut. Ins. Co., 166 A.D.2d 852, 562 N.Y.S.2d 832, 1990 N.Y. App. Div. LEXIS 12833 (N.Y. App. Div. 3d Dep't 1990).

Owner/operator of motor vehicle registered in Province of Quebec, Canada and insured for liability by Canadian insurance company was not covered person within meaning of CLS Ins § 5102(j), notwithstanding that Canadian insurance policy was liability policy with limits in excess of minimum prescribed by CLS Veh & Tr § 311(4)(a), since Canadian insurance company was neither authorized insurer nor unauthorized insurer which had filed form consenting to service of process and declaring that its policy would be deemed to comply with requirements of CLS Veh & Tr Art 6. Marshall v Nationwide Mut. Ins. Co., 166 A.D.2d 852, 562 N.Y.S.2d 832, 1990 N.Y. App. Div. LEXIS 12833 (N.Y. App. Div. 3d Dep't 1990).

Since this section requires a motorist to procure a liability policy from an insurer authorized to do business in this state, or from one authorized to do business where he resided or registered his vehicle, a policy issued by a company authorized only to do business in Arkansas to a Tennessee resident temporarily stationed in New York and there driving his car failed to meet either requirement. Gowler v Hults, 35 Misc. 2d 902, 231 N.Y.S.2d 932, 1962 N.Y. Misc. LEXIS 2831 (N.Y. Sup. Ct. 1962).

The fact that a Georgia insurance company, which did not issue automobile liability policies in New York, filed with the New York Motor Vehicle Bureau a statement and resolution agreeing to variance of the terms of its policies to comply with liability limits required by this state did not make such insurer liable to reimburse MVAIC for money paid out by MVAIC in connection with a New York automobile accident where the policy issued by the Georgia company was a special one issued to a member of the Armed Force then stationed in Georgia for a very low premium and limited to accidents occurring "within the boundaries of any military post, camp or cantonment." Motor Vehicle Accident Indemnification Corp. v American Southern Ins. Co., 44 Misc. 2d 525, 254 N.Y.S.2d 44, 1964 N.Y. Misc. LEXIS 1322 (N.Y. Sup. Ct. 1964), aff'd, 25 A.D.2d 719, 268 N.Y.S.2d 971, 1966 N.Y. App. Div. LEXIS 7344 (N.Y. App. Div. 1st Dep't 1966).

Under subd. 4(c) of this section the term "owner's policy of liability insurance", in application to vehicles registered in another state, is a policy issued by an authorized insurer, that is to say, one authorized to do business under the laws of the state in which the vehicle is registered or one authorized to do business in New York by having filed specified required statements. Motor Vehicle Acci. Indemnification Corp. v Malone, 232 N.Y.S.2d 565, 1962 N.Y. Misc. LEXIS 4143 (N.Y. Sup. Ct. 1962), aff'd, 19 A.D.2d 542, 240 N.Y.S.2d 879, 1963 N.Y. App. Div. LEXIS 3736 (N.Y. App. Div. 2d Dep't 1963).

"Covered persons" include individuals who have liability coverage in excess of the minimum coverage required by N.Y. Veh. & Traf. Law § 311(4)(a), issued by an insurer authorized to do business in New York; § 311 provides that "proof of financial security" consists of an "owner's policy of liability insurance," which: (1) affords minimum coverage to any one person in the sum of $25,000 where injury is sustained, and the sum of $50,000 where death results, and coverage to two or more people in the sum of $50,000 for injury, and $100,000 for death; and (2) in the case of a vehicle registered in another state, is either issued by an insurer authorized to issue policies in New York, or by an unauthorized insurer who has filed a statement with the New York State Commissioner of Motor Vehicles consenting to service of process and indicating that its policies may be deemed to be varied so as to comply with the requirements of N.Y. Veh. & Traf. Law art. 6. Hunter v OOIDA Risk Retention Group, Inc., 79 A.D.3d 1, 909 N.Y.S.2d 88, 2010 N.Y. App. Div. LEXIS 7265 (N.Y. App. Div. 2d Dep't 2010).

There is no New York insurance law that prohibits municipality from purchasing insurance from unauthorized insurer; however, statutes other than Insurance Law may require insurance that is purchased only from New York authorized insurers (such as CLS Veh & Tr Law § 311), and municipality purchasing insurance may have laws or regulations with requirements for purchasing insurance. Insurance Department, Opinions of General Counsel, Opinion Number 04-07-06.

7. Choice of laws

The fact that the deceased guest and driver, both New York domiciliaries and in which state the vehicle was insured, were in Michigan for an extended period of time is irrelevant in determining whether the New York or Michigan law applied to an accident occurring in Michigan. Tooker v Lopez, 24 N.Y.2d 569, 301 N.Y.S.2d 519, 249 N.E.2d 394, 1969 N.Y. LEXIS 1343 (N.Y. 1969).

Action for death of New York domiciliary, a passenger in a car registered and insured in New York, and driven by New York domiciliary, was governed by New York law, rather than the Guest Statute of Michigan, in which state the accident occurred. Tooker v Lopez, 24 N.Y.2d 569, 301 N.Y.S.2d 519, 249 N.E.2d 394, 1969 N.Y. LEXIS 1343 (N.Y. 1969).

Fact that insurance policies issued in New York on New York-based vehicles cover liability regardless of the place of accident did not call for application of internal New York law in New York action to recover for wrongful death of Ontario, Canada domiciliary who was killed when automobile in which she was riding, owned and driven by a New York resident, collided with a train in Ontario. Neumeier v Kuehner, 31 N.Y.2d 121, 335 N.Y.S.2d 64, 286 N.E.2d 454, 1972 N.Y. LEXIS 1127 (N.Y. 1972).

8. Miscellaneous

Insurer of lessor of automobiles, by payment on at least one instance of claim arising out of a short term lease, waived any right to assert policy exclusion of coverage for drive-yourself private passenger vehicles except leased on annual basis. Rosado v Eveready Ins. Co., 34 N.Y.2d 43, 356 N.Y.S.2d 8, 312 N.E.2d 153, 1974 N.Y. LEXIS 1587 (N.Y. 1974).

Vehicle owned by Quebec citizen in automobile accident occurring in Quebec was not "uninsured" within meaning of either Insurance Law or policy issued to New York accident victims where Quebec vehicle was covered by province's mandatory system of insurance reparations which is "tantamount to an owner's policy of liability insurance" in that it permits its insureds to respond in damages for any bodily injury which they may cause to others, and thus provides its insureds with proof of financial security. Federal Ins. Co. v Watnick, 80 N.Y.2d 539, 592 N.Y.S.2d 624, 607 N.E.2d 771, 1992 N.Y. LEXIS 4225 (N.Y. 1992).

Where non-trucking-use endorsement in insurance policy obtained by owner of commercial vehicle was void as against public policy due to absence of express language stating that exclusion was effective only if vehicle's lessee was required to obtain insurance coverage, it was also ineffective to limit liability to financial security minima required by New York law; owner's policy was to be read as if exclusion did not exist. Royal Indem. Co. v Providence Wash. Ins. Co., 92 N.Y.2d 653, 684 N.Y.S.2d 470, 707 N.E.2d 425, 1998 N.Y. LEXIS 4141 (N.Y. 1998).

Step-down provision in automobile insurance policy, which provided specific amount of over-all coverage to owner-lessor of automobile andprovided that coverage to lessee was subject to any limit of liability contained in lease agreement, was valid even though provision created 2-tiered coverage since no statute or rule prohibited such coverage. Liberty Mut. Ins. Co. v Aetna Casualty & Surety Co., 168 A.D.2d 121, 571 N.Y.S.2d 735, 1991 N.Y. App. Div. LEXIS 8047 (N.Y. App. Div. 2d Dep't 1991).

New York residents, who were injured in automobile accident in province of Quebec, Canada, when their car collided with vehicle operated by Quebec resident, could not recover under uninsured motorist endorsement contained in policy of motor vehicle liability insurance on their car issued by New York insurance carrier since offending vehicle was insured for bodily injury liability under Quebec Automobile Insurance Act (QAIA), mandatory system of insurance reparations that compensates nonresident claimants to extent they are not responsible for accident to maximum of $20,000; offending vehicle was not "uninsured" simply because coverage was provided by governmental repara-

tion program, and QAIA coverage applicable to offending vehicle, being tantamount to "owner's policy of liability insurance" (CLS Veh & Tr § 311(4)(a)), and clearly enabling offending driver "to respond in damages" (CLS Veh & Tr § 311(3)), constituted requisite proof of financial security. Federal Ins. Co. v Watnick, 176 A.D.2d 38, 578 N.Y.S.2d 624, 1992 N.Y. App. Div. LEXIS 738 (N.Y. App. Div. 2d Dep't), aff'd, modified, 80 N.Y.2d 539, 592 N.Y.S.2d 624, 607 N.E.2d 771, 1992 N.Y. LEXIS 4225 (N.Y. 1992).

Nonresident operator of Florida-registered vehicle was not uninsured within meaning of New York driver's uninsured motorist endorsement where nonresident operator was "subject to the financial responsibility law...of [this] state," so that her policy furnished bodily injury liability protection under its "Out of State Insurance" clause, and such protection conformed to that required by version of New York's Financial Security Act (CLS Veh & Tr § 311(3) and (4)(a)) in effect at time of accident, irrespective of whether such coverage must be read into policy under CLS Ins § 5107(a). General Accident Ins. Co. v Loi Tran, 246 A.D.2d 543, 667 N.Y.S.2d 417, 1998 N.Y. App. Div. LEXIS 204 (N.Y. App. Div. 2d Dep't 1998).

Court erred in declaring that plaintiff was obligated to defend and provide primary coverage to its insured in underlying personal injury action, which arose from accident while insured was driving rental vehicle, where rental company's automobile liability insurance policy with defendant, which defined insured to exclude anyone who granted covered auto from named insured under written rental agreement or anyone who operated, drove, or in any way used covered auto rented under such rental agreement, conflicted with CLS Veh & Tr § 345(b)(2) and was unenforceable, and defendant's policy also provided that coverage for any covered auto owned by named insured was primary; further, plaintiff's policy provided that any insurance plaintiff provided for vehicle insured did not own would be excess over any other collectible insurance. Government Emples. Ins. Co. v Chrysler Ins. Co., 256 A.D.2d 1212, 682 N.Y.S.2d 508, 1998 N.Y. App. Div. LEXIS 14379 (N.Y. App. Div. 4th Dep't 1998).

Plaintiffs were required to meet serious injury standard of CLS Ins § 5102 in action arising out of incident in which defendant attempted to unhitch trailer carrying boat from his automobile, and trailer rolled backward down road and into tent in which plaintiffs were sleeping, even though defendant's automobile was parked and not being operated on highway, and trailer was detached from automobile; trailer fell within CLS Veh & Tr § 311(2) definition of motor vehicle since it had been drawn to site by automobile and would not have been present and in position to roll out of control if not for its attachment to automobile, and it did not lose its identity as motor vehicle by virtue of sudden and accidental detachment from automobile. Christopher v Caldarulo, 160 Misc. 2d 360, 608 N.Y.S.2d 998, 1994 N.Y. Misc. LEXIS 60 (N.Y. Sup. Ct. 1994).

Automobile insurer that paid no-fault medical benefits to insured could not recover, as subrogee of insured, from New Jersey tort-feasor who himself was insured at level above minimum required by New York law, and who had personal injury protection (PIP) coverage and did not operate commercial or public vehicle without PIP coverage under New Jersey law. Allstate Ins. Co. v Mazzola, 986 F. Supp. 756, 1997 U.S. Dist. LEXIS 10443 (S.D.N.Y. 1997), vacated, 175 F.3d 255, 1999 U.S. App. LEXIS 8187 (2d Cir. N.Y. 1999).

Employee of insurer or of insurer's wholly-owned subsidiary did not need to be licensed as bail bond agent in supervising placement of bail bond's by insurer's agents where employee had no discretion in determining which bonds were to be accepted or rejected. Insurance Department, Opinions of General Counsel, Opinion Number 02-02-08.

Whether insurer is required to provide automobile liability insurance coverage where member of named insureds' household is involved in accident while driving automobile that is not owned by named insureds or household member depends on whether or not vehicle not owned by named insureds or household member was furnished or made available to household member for regular use; if automobile was not provided for household member's regular use, mandatory liability coverage for non-owned automobile applies and there is coverage, but if automobile was provided for household member's regular use, mandatory coverage for non-owned automobile does not apply and there is no coverage. Insurance Department, Opinions of General Counsel, Opinion Number 02-07-21.

Risk retention group, which is registered in New York but is not chartered or licensed in New York, is not "an insurer duly authorized to transact business in this state," and thus insurance policy issued by risk retention group would not satisfy financial responsibility requirements of Vehicle and Traffic Law. Insurance Department, Opinions of General Counsel, Opinion Number 03-06-10.

Risk retention group (RRG), which is registered in New York but is not chartered or licensed in New York, is not "an insurer duly authorized to transact business in this state," and thus insurance policy issued by RRG would not satisfy financial responsibility requirements of Vehicle and Traffic Law. Insurance Department, Opinions of General Counsel, Opinion Number 03-06-10.

CLS Veh & Tr § 311(5)(c) requires insurer to collect at least 10 percent of annual premium due for all new policies. Insurance Department, Opinions of General Counsel, Opinion Number 08-10-04.

Insurer must apply CLS Veh & Tr § 311(5)(c) in fair and non-discriminatory manner to all new automobile insurance applicants; specifically, insurer may not require applicants to pay different down payments unless underwriting criteria used to determine down payments relate to risks being insured, and if use of underwriting criteria results in discrimination in benefits under CLS Ins Art 23 or is otherwise expressly prohibited by law, then insurer may not use criteria to determine down payments. Insurance Department, Opinions of General Counsel, Opinion Number 08-10-04.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 318; CLS CPLR § 1602; CLS Ins § 5202.

Codes, Rules and Regulations:

Mandatory provisions, permissible exclusions, and discretionary provisions in automobile liability insurance policies. 11 NYCRR §§ 60-1.1–60-1.3.

Insurance department: minimum provisions for automobile liability insurance. 11 NYCRR § 60-1.6 (Regulation 35-A).

Department of motor vehicles: insurance identification cards. 15 NYCRR Part 32.

Annotations:

What constitutes an "automobile" for purposes of uninsured motorist provisions. 65 ALR3d 851.

Texts: 2-26 New Appleman New York Insurance Law § 26.11.

ARTICLE 7 Motor Vehicle Safety Responsibility Act

HISTORY:

Add, L 1959, ch 775, eff Oct 1, 1960, with substance transferred from former Art 6–B.

§ 359. Definitions

The following words and phrases when used in this article shall, for the purpose of this article, have the following meanings: (a) The singular shall include the plural; the masculine shall include the feminine and neuter, as requisite.

(b) Commissioner. The commissioner of motor vehicles of this state.

(c) Department. The department of motor vehicles of this state acting directly or through its duly authorized officers and agents.

(d) Person. Shall include individuals, firms, partnerships, associations, corporations, receivers, referees, trustees, assignees for the benefit of creditors; executors and administrators; and shall include the owner of any motor vehicle as requisite; but shall not include the state or any political subdivision thereof.

(e), (f) [Repealed]

(g) Owner. A person who holds the legal title of a motor vehicle; or in the event a motor vehicle is subject to a security interest, or lease with the right of purchase upon performance of conditions stated in the lease and with an immediate right of possession vested in the debtor or lessee, then such debtor or lessee shall be deemed the owner for the purpose of this act.

(h) Insured. The person in whose name there is issued a motor vehicle liability policy, as defined in this article, and any other person insured under the terms of such policy.

(i) Judgment. Any judgment, except a judgment rendered against this state or any political subdivision thereof or any municipality therein, which shall have become final by expiration without appeal of the time within which appeal might have been perfected, or by final affirmance on appeal, rendered by a court of competent jurisdiction of any state, any province of Canada, the Dominion of Canada, the District of Columbia, or the United States.

(j) Non-resident. Every person who is not a resident of this state.

(k) Motor vehicle. As used in this article, the term "motor vehicle" shall be defined as in section one hundred twenty-five of this chapter, except that it shall also include trailers, semi-trailers and tractors other than tractors used exclusively for agricultural purposes, and shall exclude fire and police vehicles, self-propelled combines, self-propelled corn and hay harvesting machines, tractors used exclusively for agricultural purposes and self-propelled caterpillar or crawler-type equipment while being operated on the contract site.

HISTORY:

Add, L 1959, ch 775, eff Oct 1, 1960, with substance transferred from former § 94–ee; amd, L 1960, ch 300, § 21; L 1960, ch 464, § 22, eff Jan 1, 1961; L 1960, ch 608, § 2, eff Oct 1, 1960; L 1962, ch 552, § 86, eff Sept 27, 1964; L 1972, ch 780, § 5, eff April 1, 1973.

Repeal Notes: [1972, ch 780] Subdivisions (e) and (f) of Section 359, repealed by this act, defined "operator" and "chauffeur" respectively for the purposes of Article 7 (the Motor Vehicle Safety Responsibility Act), distinguishing between the two by purpose of employment. The act eliminates the separate terms and classifies all such persons as drivers, in conformity with all other provisions of the Vehicle and Traffic Law. See § 113.

Notes to Decisions

1. In general

Police vehicles are not "motor vehicles" subject to financial security and responsibility requirements of CLS Veh & Tr Art 6 and Art 7. State Farm Mut. Auto. Ins. Co. v Amato, 72 N.Y.2d 288, 532 N.Y.S.2d 239, 528 N.E.2d 162, 1988 N.Y. LEXIS 1670 (N.Y. 1988).

The New York City Transit Authority, which operates vehicles that it does not own, must provide uninsured motorists coverage for its passengers, and others, injured as a result of the operation of its vehicles, since subdivision 1 of section 370 of the Vehicle and Traffic Law provides that every person, firm, association or corporation engaged in the business of carrying or transporting passengers for hire in any motor vehicle, except motor vehicles owned and operated by a municipality, must obtain liability insurance as well as uninsured motorists coverage, and subdivision 3 of section 370 authorizes self-insurance in certain instances; although the authority is specifically considered a political subdivision of the State for certain purposes, there is no statutory provision so providing with respect to section 370 of the Vehicle and Traffic Law, and although "person" does not include the State or any political subdivision (Vehicle and Traffic Law, § 359), the authority is not a political subdivision, and section 359 is applicable only to article 7 of the Vehicle and Traffic Law, and not to article 8, within which section 370 is found, and in any event, subdivision 1 of section 370 relates not only to a person, but to a corporation, which the authority is. Additionally, even though the authority is a self-insurer (see Vehicle and Traffic Law, § 370, subd 3), it is required to provide uninsured motorists coverage, since the Legislature did not intend for a carrier to be exempt from the obligation to provide uninsured motorists coverage when the owner of even a single vehicle is required to provide it, merely by the fortuity that it had chosen the self-insurance option as to financial security and safety responsibility. New York City Transit Authority v Thom, 70 A.D.2d 158, 419 N.Y.S.2d 689, 1979 N.Y. App. Div. LEXIS 12315 (N.Y. App. Div. 2d Dep't 1979), aff'd, 52 N.Y.2d 1032, 438 N.Y.S.2d 504, 420 N.E.2d 385, 1981 N.Y. LEXIS 2267 (N.Y. 1981).

An insurer was not obligated to provide coverage under a comprehensive general liability policy, which contained an exclusion for bodily injury arising out of loading or unloading, where the tractor-trailer owned by the insured and involved in the accident came within the policy definition of "automobile" and was a motor vehicle within the meaning of Veh & Tr Law §§ 125 and 359(k), where the deaths of the insured's employees occurred while they were transferring gasoline from one tractor-trailer to another, and where the record on appeal provided nothing to challenge the compelling conclusion that the accident arose out of the ownership, maintenance, operation, use, loading or unloading of the tractor-trailer; accordingly, the trial court erred in denying the insurer's motion for summary judgment. Duncan Petroleum Transport, Inc. v Aetna Ins. Co., 96 A.D.2d 942, 466 N.Y.S.2d 394, 1983 N.Y. App. Div. LEXIS 19577 (N.Y. App. Div. 2d Dep't), aff'd, 61 N.Y.2d 665, 472 N.Y.S.2d 88, 460 N.E.2d 229, 1983 N.Y. LEXIS 3616 (N.Y. 1983).

Person sitting in driver's seat with motor running on the traveled portion of a highway is an operator of a motor vehicle and may be lawfully arrested on charges stemming from the alleged operation of the vehicle. People v Vasquez, 51 Misc. 2d 1058, 275 N.Y.S.2d 14, 1966 N.Y. Misc. LEXIS 1342 (N.Y. Dist. Ct. 1966), rev'd, 57 Misc. 2d 138, 292 N.Y.S.2d 134, 1968 N.Y. Misc. LEXIS 1503 (N.Y. App. Term 1968).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 360, 361.

Termination of filing provisions, § 346.

Annotations:

What constitutes an "automobile" for purposes of uninsured motorist provisions. 65 ALR3d 851.

ARTICLE 9 Equipment of Motor Vehicles and Motorcycles

HISTORY:

Add, L 1959, ch 775, eff Oct 1, 1960.

§ 375. Equipment. [Effective until April 17, 2021]

1. (a) Every motor vehicle, operated or driven upon the public highways of the state, shall be

provided with adequate brakes and steering mechanism in good working order and sufficient to control such vehicle at all times when the same is in use, and a suitable and adequate horn or other device for signaling, which horn or device shall produce a sound sufficiently loud to serve as a danger warning but shall not be used other than as a reasonable warning nor be unnecessarily loud or harsh.

(b) Every such motor vehicle shall be equipped with suitable wipers or other device which shall clear a sufficient area of the windshields to provide reasonable driving vision. (i) The use or placing of posters or stickers on windshields or rear windows of motor vehicles other than those authorized by the commissioner, is hereby prohibited. The attaching to windshields and windshield wipers of handbills and other forms of advertisements, is hereby prohibited.

(ii) In a city of one million or more, the attaching or affixing by any means whatsoever of handbills or other forms of advertisements to a motor vehicle is hereby prohibited. In any prosecution for an alleged violation of this subparagraph, there shall be a rebuttable presumption that the person whose name, telephone number, or other identifying information appears on any handbill or other form of advertisement attached or affixed to a motor vehicle shall be in violation of the provisions of this subparagraph.

(iii) Notwithstanding any other provision of law, in addition to those persons otherwise authorized to enforce this subdivision and adjudicate violations thereof, the provisions of subparagraph (ii) of this paragraph shall also be enforceable in a city having a population of one million or more by an agency or agencies designated for such purpose by the mayor of such city, and notices of violation may be returnable to the environmental control board of such city, which shall have the power to impose the monetary penalties provided in subdivision (b) of section eighteen hundred of this chapter. Notwithstanding any other provision of law, service of a notice of violation of subparagraph (ii) of this paragraph committed in such city may be made upon a person by first class mail, postage prepaid, and any such notice served by mail shall be returnable only to such environmental control board. Such service by first class mail shall be deemed complete upon mailing of the notice of violation, unless the notice of violation is returned to the sender by the United States postal service for any reason other than refusal of delivery. In addition, any notice of violation for a violation of subparagraph (ii) of this paragraph may be served by a means prescribed in article three of the civil practice law and rules or article three of the business corporation law. Notwithstanding any other provision of law, such penalties imposed by such environmental control board shall be paid into the general fund of such city.

(iv) Any final order issued pursuant to subparagraph (ii) of this paragraph by an environmental control board of a city having a population of one million or more shall constitute a judgment which may be entered in any place provided for the entry of civil judgments within the state, and may be enforced without court proceeding in the same manner as the enforcement of money judgments entered in civil actions. Notwithstanding the preceding sentence, before a judgment based upon a default may be so entered, such environmental control board must have notified the respondent by first class mail in such form as such environmental control board may direct: (A) of the default decision and order and the penalty imposed; (B) that a judgment will be entered in any place provided for the entry of civil judgments in the state; and (C) that the entry of such judgment may be avoided by requesting a stay of default for good cause shown and either requesting a hearing or entering a plea pursuant to the rules of such environmental control board within thirty days of the mailing of such notice. No judgment based upon a default may be so entered by the environmental control board within thirty days of the mailing of such notice. No judgment based upon a default may be so entered by the environmental control board within less than sixty days from the completion of service by mail of the notice of violation as provided in subparagraph (iii) of this paragraph. Any requirement of any provision of law other than this subdivision that related to the manner of service of the notice of violation that precedes any final order of such environmental control board shall not apply to a final order issued pursuant to this subparagraph. A judgment entered pursuant to this subdivision shall remain in full force and effect for eight years.

(c) Every trailer and semi-trailer weighing more than one thousand pounds unladen and every trailer and semi-trailer manufactured or assembled on or after January first, nineteen hundred seventy-one having a registered maximum gross weight, an actual gross weight or gross weight consisting of the unladen weight and maximum carrying capacity recommended by the manufacturer in excess of three thousand pounds also shall be equipped with adequate brakes in good working order if operated or drawn on the public highways of this state. Every trailer while being drawn upon the public highways of this state shall be so attached to the vehicle drawing the same as to prevent the wheels of such trailer from being deflected more than six inches from the path of the towing vehicle's wheels. On and after January first, nineteen hundred seventy-one every trailer, except a semi-trailer, while being drawn upon the public highways of this state, shall be attached to the vehicle drawing the same by a device of a type approved by the commissioner.

(d) The commissioner shall make rules prescribing standards of brake efficiency, except for motor vehicles the standard of brake efficiency of which are fixed by the department of public service, and no brakes shall be deemed adequate within the meaning of this subdivision unless they meet the require-

ments of such rules. Such rules shall be filed in the office of the secretary of state and thereafter published once in the state advertising bulletin and shall become effective one month after such publication. Any amendment to such rules shall be likewise filed and published and shall take effect one month after such publication.

(e) No operator or registered owner of any motor vehicle having a registered maximum gross weight of eighteen thousand pounds or more shall disconnect or knowingly permit the disconnection of any set of service brakes on such motor vehicle. Any violation of the provisions of this paragraph shall occur only when such vehicle is actually operated on the public highways. Such violation shall be punishable as a misdemeanor.

2. (a) Every motor vehicle except a motorcycle, driven upon a public highway during the period from one-half hour after sunset to one-half hour before sunrise or at any other time when windshield wipers are in use, as a result of rain, sleet, snow, hail or other unfavorable atmospheric condition, and at such other times as visibility for a distance of one thousand feet ahead of such motor vehicle is not clear, shall display:

1. at least two lighted head lamps on the front, one on each side, having light sources of equal power;

2. if manufactured prior to January first, nineteen hundred fifty-two, at least one lighted lamp on the rear which shall display a red light visible from the rear for a distance of at least five hundred feet;

3. if manufactured on or after January first, nineteen hundred fifty-two, at least two lighted lamps on the rear, one on each side, which lamps shall display a red light visible from the rear for a distance of at least one thousand feet; and

4. if required to display a number plate on the rear, a white light which shall illuminate the numerals on such plate in such manner as to render such numerals legible for at least fifty feet from the rear. The provisions of this subparagraph shall also apply to trailers.

(b) All lamps used on a motor vehicle except a motorcycle shall be so arranged, adjusted and operated, as to avoid dangerous glare or dazzle. Except as provided in paragraph (d) of this subdivision, the upper outline of any beam of dazzling light projected to the left of the longitudinal axis of the vehicle by the lowermost light distribution of a headlamp designed to produce more than one light distribution, or by the single light distribution of any other lamp used on such a motor vehicle, shall not rise higher than the lamp center at a distance of twenty-five feet nor higher than forty-two inches at a distance of seventy-five feet. In each case, the height of the beam shall be measured from the plane upon which the vehicle stands and the distance shall be measured from the lamp projecting the light.

(c) No lamp shall be used on a motor vehicle having a light source greater than thirty-two candle power, unless such lamp is approved by the commissioner as provided by this section. The provisions of this paragraph shall not apply to any light which is permitted to be displayed only on an authorized emergency vehicle, a hazard vehicle or a vehicle which is permitted to display a blue or green light pursuant to paragraphs four and five of subdivision forty-one of this section.

(d) A motor vehicle, other than a motorcycle, equipped with any device such as, but not limited to, a snow plow blade, which blocks or impairs the projection of light from the headlamps of such vehicle, shall be equipped with at least two additional headlamps on the front which headlamps meet all the requirements of this subdivision for headlamps except those provisions of paragraph (b) of this subdivision specifically limiting the height of the beam of any headlamp.

3. Headlamps required pursuant to the provisions of subdivision two of this section may be of the multiple beam type designed to produce more than one distribution of light or of the single beam type designed to produce only one distribution of light.

Provided that, whenever a vehicle approaching from ahead is within five hundred feet, or when approaching a moving vehicle from the rear and within two hundred feet of the same, the headlamps, if of the multiple beam type, or the auxiliary front facing lamps, if the vehicle is so equipped, shall be operated so that dazzling light does not interfere with the driver of the approaching vehicle, or the vehicle being approached, and, whenever the highway is so lighted or traffic thereon is such that illumination of the highway for more than two hundred feet ahead of the vehicle by lights on such vehicle is unnecessary or impracticable, the headlamps, if of the multiple beam type, or the auxiliary front facing lamps, if the vehicle is so equipped, shall be operated with the lowermost distribution of light in use. Nothing contained in this subdivision shall be construed to prevent the use of flashing high beams to signify an intention to pass a vehicle or vehicles when two or more vehicles are traveling in the same direction, the operation of any headlamp as defined in paragraph d [(d)]* of subdivision two of this section, nor shall it apply to any auxiliary front facing lamp permitted to be displayed only on an authorized emergency vehicle.

4. No headlamp shall be used upon any motor vehicle except a motorcycle operated upon the public highways of this state, unless such lamp is approved by the commissioner or is equipped with a lens or other device approved by the commissioner. Every such headlamp, lens or other device shall be applied and adjusted in accordance with the requirements of the certificate approving the use thereof. Every such headlamp shall be firmly and substantially mounted

*The bracketed designator has been inserted by the Publisher.

on the motor vehicle in such manner as to allow the lamp to be properly and readily adjusted. The operator of every motor vehicle shall permit any police officer or other person exercising police powers to inspect the equipment of such motor vehicle, and make such tests as may be necessary to determine whether the provisions of this section are being complied with.

Any certificate of approval heretofore issued pursuant to law, or hereafter issued by the commissioner may be revoked by the commissioner, after a hearing of which the person or corporation named therein, or his or its successor in interest, shall have been given reasonable notice and an opportunity to appear and be heard upon the ground that the device does not comply with the provisions of this section, and the rules and regulations of the commissioner and the decision of the commissioner revoking such certificate shall be final; such revocation, however, of a lens or other headlighting device heretofore or hereafter approved shall not take effect until six months after the decision of the commissioner revoking the same and shall apply only to vehicles manufactured and used thereafter on the highways of this state.

The foregoing provisions governing lights on motor vehicles do not apply to so-called dimmers the use of which is permitted or required by local ordinances.

The commissioner may make such rules and regulations relative to lights on motor vehicles and the approval of the same as are not inconsistent with the specific provisions of this section.

5, 6. [Repealed]

7. It shall be unlawful for any person, firm, association or corporation to sell or offer for sale a headlighting device without delivering therewith to the purchaser a printed sheet of instructions describing the device in detail, its method of mounting, arrangement and adjustment and specifying the candle power of the lamps to be used thereon and any other matter that may be necessary to insure compliance in the use of such device with the provisions of this article and the certificate of approval. Such instructions shall be printed with a photogravure of the pattern of light from one headlight shown on a regulation testing screen with respect to a horizontal cross line placed across the face of such screen at a height equal to the height of the center of such headlight, and with the headlight adjusted in accordance with the rules and regulations of the commissioner. The sale of a headlighting device not approved under the provisions of this section is prohibited. A violation of any of the provisions of this subdivision shall be a misdemeanor.

8. [Repealed]

9. Every omnibus operating upon the public highways of the state having a carrying capacity of ten or more passengers, shall be equipped with one hand fire extinguisher of at least 4 B:C Underwriters' Laboratories rating or a similar rating by any qualified laboratory or testing organization which meets the criteria of American Society for Testing Materials test E548-76. Fire extinguishers shall be kept in good operating condition at all times and must be mounted in a place readily accessible for use.

10. a. Every motor vehicle, when driven or operated upon a public highway, shall be equipped with a mirror or other reflecting device so adjusted that the operator of such vehicle shall have a clear and full view of the road and condition of traffic behind such vehicle.

b. In addition to the above requirements, an omnibus having a capacity of ten or more passengers registered in this state and manufactured or assembled after July first, nineteen hundred seventy, shall be equipped with a mirror attached to the right side of such vehicle and so adjusted that the driver thereof shall have a clear and full view of the road and condition of traffic behind such vehicle.

c. Every passenger motor vehicle registered in this state and manufactured or assembled after June thirtieth, nineteen hundred sixty-nine, and designated as a nineteen hundred seventy or subsequent year model, shall be equipped with adjustable interior mirrors meeting specifications established by the commissioner which specifications may provide minimum and maximum reflectance values.

d. Every new passenger-type motor vehicle, except a motorcycle, manufactured for sale in New York state on or after January first, in the year next succeeding the effective date of this paragraph shall be manufactured with an interior rear-view mirror of the selective position prismatic type with a reflectance value in the night driving position of at least four percent; or its functional equivalent. For purposes of this section, "passenger-type motor vehicle" shall mean any motor vehicle with a seating capacity of not more than fifteen adults, not including the driver, that is equipped with one or more rear windows. Any violation of the provisions of this paragraph by any manufacturer shall constitute an offense and shall be punishable by a civil fine of not more than seven hundred fifty dollars for each offense.

e. Every single-unit motor vehicle registered in this state, operated for commercial purposes and having a cube style or enclosed walk-in delivery bay, where such delivery bay has a length of eight feet six inches or more, but not exceeding a length of eighteen feet, shall be equipped with a cross-view back-up mirror system, rear video system, rear object detection system, or other device, which enables the driver of the vehicle to detect by means of a visual, or visual and audible warning-indicator, persons and objects located directly behind the vehicle. The commissioner is hereby authorized to promulgate regulations providing specifications for mirrors or other devices as required by this paragraph.

f. Every sani-van and motor vehicle commonly classified as a garbage truck purchased on or after

January first, two thousand eight and registered in this state, which is operated in and engages in the collection of garbage or refuse in the county of Westchester shall be equipped with a rear video system, rear object detection system, or other device which enables the driver of the vehicle to detect by means of a visual, or visual and audible warning-indicator, persons and objects located directly behind the vehicle. The commissioner is hereby authorized to promulgate regulations providing specifications for mirrors or other devices as required by this paragraph. Provided, however, that the provisions of this paragraph shall not apply to motor vehicles commonly classified as rolloff vehicles that are used for the express purpose of transporting waste containers such as open boxes or compactors.

10-a. It shall be unlawful after July first, nineteen hundred sixty-seven to operate on any public highway in this state any motor vehicle registered in this state, manufactured or assembled on or after such date, and designated as a nineteen hundred sixty-eight or later model, unless such vehicle is equipped with an adjustable side view mirror which shall be affixed to the left outside of such vehicle and which shall be adjustable so that the operator of such vehicle may have a clear view of the road and condition of traffic on the left side and to the rear of such vehicle.

10-b. It shall be unlawful after June thirtieth, nineteen hundred seventy-three to operate on any public highway or street in this state, any passenger type motor vehicle except convertible, suburban and omnibus or other motor vehicle that has a roll-down rear window or a rear window or windows located in a movable closure (door-like) member registered in this state, manufactured or assembled after said date, and designated as a nineteen hundred seventy-four or subsequent model unless such vehicle be equipped with a rear window defogger or defroster, which shall be so located and adjusted that its operation will give the operator of such vehicle, by means of the mirror or other reflecting device required by subdivision ten of this section, a view of the road and the condition of traffic behind such vehicle.

10-c. It shall be unlawful after June thirtieth, nineteen hundred eighty-five to operate on any public highway or street in this state, any passenger type motor vehicle that has a rear window or windows located in a movable closure (door-like) member, except for a multipurpose passenger vehicle (designed to carry ten persons or less and constructed either on a truck chassis or with special features for occasional off-road operation) registered in this state and manufactured or assembled after said date, and designated as a nineteen hundred eighty-six or subsequent model unless such vehicle be equipped with a rear window defogger or defroster, which shall be so located and adjusted that its operation will give the operator of such vehicle, by means of the mirror or other reflecting device required by subdivision ten of this section, a view of the road and the condition of traffic behind such vehicle.

10-d. It shall be unlawful after December thirty-first, nineteen hundred ninety-two to operate on any public highway or street in this state, any passenger type motor vehicle that has a rear window located in a single movable closure (door-like) member and which has a non-removable top, registered in this state and manufactured or assembled after said date, and designated as a nineteen hundred ninety-three or subsequent model unless such vehicle be equipped with a rear window defogger or defroster, which shall be so located and adjusted that its operation will give the operator of such vehicle, by means of the mirror or other reflecting device required by subdivision ten of this section, a view of the road and the condition of traffic behind such vehicle.

10-e. [Repealed upon conditions set forth in L 2011, ch 138, § 2] Every truck, tractor, and tractor-trailer or semitrailer combination registered in this state having a gross vehicle weight rating of twenty-six thousand pounds or more, and a conventional cab configuration in which more than half of the engine length is forward of the foremost point of the windshield base and the steering wheel hub is in the forward quarter of the vehicle length, whenever operated within a city having a population of one million or more on highways other than controlled-access highways, shall be equipped with a convex mirror on the front of such vehicle or combination of vehicles. When such vehicle or combination of vehicles is being operated, such mirror shall be adjusted so as to enable the operator thereof to see all points on an imaginary horizontal line which: (a) is three feet above the road, (b) is one foot directly forward from the midpoint of the front of such motor vehicle, and (c) extends the full width of the front of such vehicle or combination of vehicles. Provided, however, the commissioner, in consultation with the commissioner of transportation, may promulgate rules and regulations exempting from the requirements of this subdivision any vehicle or combination of vehicles where such commissioner has determined that the use of such convex mirrors would not increase the visibility of persons or objects located directly in front of such vehicle or combination of vehicles.

11. It shall be unlawful after January first, nineteen hundred thirty-four to operate on any public highway or street, in this state, a motor vehicle manufactured or assembled after said date, designed or used for the purpose of carrying passengers for hire, or as a public conveyance to transport school children and others, unless such vehicle be equipped with safety glass wherever glass is used in doors, windows and windshields.

12. It shall be unlawful to operate on any public highway or street in this state any motor vehicle

registered in New York state unless such vehicle be equipped with safety glass wherever glass is used in doors, windows and windshields. For the purposes of this subdivision, any device other than a trailer, which is attached to or carried upon a motor vehicle and which lawfully can be occupied while the motor vehicle is in motion, shall be considered a part of such motor vehicle.

12-a. (a) Every motor vehicle, except a motorcycle, when driven or operated upon a public highway, road or street shall be equipped with a front windshield in a fixed and more or less upright position constructed of safety glass as defined in subdivision fourteen of this section and required by subdivisions eleven and twelve hereof. No person shall drive any motor vehicle with any sign or other nontransparent material other than a certificate or paper required to be displayed by law upon the front windshield or the sidewings or side windows on either side forward of or adjacent to the operator's seat.

(b) No person shall operate any motor vehicle upon any public highway, road or street:

(1) the front windshield of which is composed of, covered by or treated with any material which has a light transmittance of less than seventy percent unless such materials are limited to the uppermost six inches of the windshield; or

(2) the sidewings or side windows of which on either side forward of or adjacent to the operator's seat are composed of, covered by or treated with any material which has a light transmittance of less than seventy percent; or

(3) if it is classified as a station wagon, sedan, hardtop, coupe, hatchback or convertible and any rear side window has a light transmittance of less than seventy percent; or

(4) the rear window of which is composed of, covered by or treated with any material which has a light transmittance of less than seventy percent. A rear window may have a light transmittance of less than seventy percent if the vehicle is equipped with side mirrors on both sides of the vehicle so adjusted that the driver thereof shall have a clear and full view of the road and condition of traffic behind such vehicle.

(c) Any person required for medical reasons to be shielded from the direct rays of the sun and/or any person operating a motor vehicle belonging to such person or in which such person is an habitual passenger shall be exempt from the provisions of subparagraphs one and two of paragraph (b) of this subdivision provided the commissioner has granted an exemption and notice of such exemption is affixed to the vehicle as directed by the commissioner. The applicant for such exemption must provide a physician's statement with the reason for the exemption, the name of the individual with a medically necessary condition operating or transported in the vehicle, the specific condition involved, and the minimum level of light transmission required. The commissioner shall only authorize exemptions where the medical condition certified by the physician is contained on a list of medical conditions prepared by the commissioner of health pursuant to subdivision sixteen of section two hundred six of the public health law. If such [such]* exemption is granted, the commissioner shall make a record thereof and shall distribute a sufficiently noticeable sticker to the applicant to be attached to any window so shielded or altered pursuant to such exemption.

(d) The commissioner may test any window for a person who has been charged with violating this subdivision. If such window is found to be in conformity with this subdivision, a small label attesting to the conformity shall be affixed to the window tested.

(e) On and after January first, nineteen hundred ninety-two, no person shall manufacture, sell, offer for sale, equip or operate a motor vehicle in this state in violation of the provisions of this subdivision, except that a person may operate a nineteen hundred ninety-one or earlier model year vehicle without violating this subdivision if the windows on said vehicle were in conformity with this subdivision as it existed on December thirty-first, nineteen hundred ninety-one.

(f) The commissioner shall make such rules and regulations as he shall deem necessary to carry out the provisions of this subdivision.

(ff) Notwithstanding any other provision of this section or any other general, special or local law, charter, administrative code, ordinance, rule or regulation to the contrary, any person operating a motor vehicle in a burial or funeral procession while travelling to or from a funeral, interment or cremation may place a funeral sign no larger than eight and one half by fourteen inches in any window of such vehicle, as long as such sign when so placed will not prevent such person from having a clear and full view of the road and the condition of traffic behind such vehicle.

13. It shall be unlawful for any person, firm or corporation to replace glass in doors, windows, or windshields of motor vehicles unless such replacement be made with safety glass.

14. The term "safety glass" as used in this section shall be construed to mean any product composed of glass, so manufactured, fabricated or treated as substantially to prevent shattering and flying of the glass when struck or broken, or such other or similar product as may be approved by the commissioner.

15. The commissioner of motor vehicles shall maintain a list of types of glass approved by him as conforming to the specifications and requirements for safety glass as set forth in this section, and shall not issue a license for or relicense any motor vehicle subject to the provisions of subdivisions eleven and twelve unless such motor vehicle be equipped as therein provided with such approved type of glass.

*Brackets have been inserted by the Publisher around this word as it is superfluous.

16. The owner and operator of any motor vehicle operated in violation of the provisions of subdivisions eleven and twelve shall be guilty of a traffic infraction. In case of the violation of such subdivisions by any common carrier or person operating under a permit issued by the public service commission (or other authorized body or person), said permit shall be revoked, or, in the discretion of the commissioner, suspended until the provisions of such subdivisions are satisfactorily complied with.

17. Every omnibus having a seating capacity of more than ten passengers, every truck having a maximum gross weight in excess of twelve thousand pounds and every combination of tractor and trailer operated upon a public highway shall carry emergency lighting equipment ready at all times for immediate use. The equipment of the vehicle or combination of vehicles may consist of flares of the type used by railroads, flaring candles, torches, lanterns or red emergency reflectors provided it is adequate to provide a warning light in all kinds of weather both in front of and in the rear of the vehicle for at least eight hours. No red emergency reflector shall be deemed adequate within the meaning of this subdivision unless it is of a size and type approved by the commissioner, and conforms to minimum specifications established by him, which minimum shall not be less than the minimum established by the interstate commerce commission for buses and trucks in interstate commerce. When any such vehicle or a combination of vehicles, except an omnibus which stops for the purpose of taking on or discharging passengers, is parked or left standing on a public highway except within a city or incorporated village, during the period from one-half hour after sunset to one-half hour before sunrise, the operator of such vehicle or combination of vehicles shall cause at least one light, or reflector or lighted flare to be placed on the highway in front of such vehicle or combination of vehicles, and at least one light, reflector or lighted flare on the highway in the rear of such vehicle or combination of vehicles at a distance of approximately one hundred feet in the front of and at the rear of such vehicle or combination of vehicles, provided that if such vehicle is parked or left standing within three hundred feet of a curve, crest of hill, or other obstruction, the flare, candle, torch, lantern, or reflector in that direction shall be so placed as to afford ample warning to other highway users but in no case less than approximately one hundred feet or more than approximately three hundred feet from the stopped vehicle.

18. Except as otherwise provided herein, it shall be unlawful to operate on any public highway or street in this state any motor vehicle, or combination of motor vehicle and trailer, so constructed or so loaded that the driver thereof is unable to indicate clearly by hand signals to approaching and following traffic his intention of stopping or turning, unless such motor vehicle or combination of vehicles shall be equipped with directional signals approved by the commissioner, provided, however, it shall be unlawful after January first, nineteen hundred fifty-two to operate on any public highway or street in this state any motor vehicle registered in this state, manufactured or assembled after said date unless such vehicle be equipped with directional signals approved by the commissioner. It shall also be unlawful to fail to cause such signals to be maintained, at all times in good and sufficient working order. The provisions of this subdivision shall not apply to special purpose commercial motor vehicles registered under schedule F of subdivision seven of section four hundred one of this chapter or to a vehicle or combination of vehicles lawfully operated under registration issued, under section four hundred fifteen of this chapter or under a similar provision of the law of another jurisdiction.

18-a. Any motor vehicle may be equipped with and every motor vehicle registered in this state and manufactured or assembled after June thirtieth, nineteen hundred sixty-five, and designated as a nineteen hundred sixty-six or subsequent year model, shall be equipped with a device, approved by the commissioner, by means of which the operator may cause the two front and two rear directional signals to flash simultaneously for the purpose of warning the operators of other vehicles of the presence of a vehicular traffic hazard requiring the exercise of unusual care in approaching, overtaking or passing. The provisions of this subdivision requiring that certain motor vehicles shall be so equipped shall not apply to special purpose commercial motor vehicles registered under schedule F of subdivision seven of section four hundred one or to a vehicle or combination of vehicles lawfully operated under registration issued under section four hundred fifteen.

19. It shall be unlawful for the owner to operate, park or stand a motor vehicle or trailer on any public highway or street in this state, or to authorize another to so operate, park or stand a motor vehicle or trailer, with the consent of such owner, expressed or implied, unless such motor vehicle or trailer be equipped and lighted as provided by this section and by section three hundred seventy-six, and the operation, parking or standing on a public highway or street in this state of a motor vehicle or trailer which is not so equipped and lighted or which is defectively equipped and lighted is hereby prohibited.

20. Every omnibus having a seating capacity of more than seven passengers, used exclusively to transport pupils, teachers and other persons acting in a supervisory capacity to and from school or school activities, or to transport children, instructors or other persons acting in a supervisory capacity to and from child care centers maintained for migrant farm and food processing laborers or to transport children, instructors or other persons acting in a supervisory capacity to and from camp or camp activities, or to transport children, instructors or other persons acting in a supervisory capacity to

and from religious services or instruction shall be equipped in the manner provided by this subdivision and any such omnibus used by any state facility or not-for-profit agency licensed by the state and used to transport persons with disabilities, instructors or other persons acting in a supervisory capacity may be equipped in the manner provided by this subdivision:

(a) For each such omnibus having a seating capacity in excess of fifteen children, there shall be colored flashing signal lamps conforming to regulations prescribed by the commissioner on the front and on the rear thereof, including at least one flashing red signal lamp on the front thereof and at least one flashing red signal lamp on the rear thereof. For each such omnibus having a seating capacity of not more than fifteen children, there shall be colored flashing signal lamps conforming to regulations prescribed by the commissioner facing the front and facing the rear thereof, and at least one flashing red signal lamp facing the front thereof and at least one flashing red signal lamp facing the rear thereof. The driver of every such vehicle shall keep such red signal lamps lighted whenever passengers are being received or discharged or whenever he has stopped within fifty feet to the rear of a vehicle with such red signal lamps lighted, and shall light all other required signal lamps, as a warning, prior to stopping to receive or discharge passengers in accordance with regulations prescribed by the commissioner.

(b) (1) In addition to such signal lamps, two signs shall be conspicuously displayed on the exterior of every such omnibus designating it as a school omnibus by the use of the words "SCHOOL BUS" which shall be painted or otherwise inscribed thereon in black letters. Such letters shall be of uniform size, at least eight inches in height, and each stroke of each letter shall be not less than one inch in width. The background of each such sign shall be painted the color known as "national school bus chrome." For each such omnibus having a seating capacity in excess of fifteen children, such signs shall be securely mounted on top of such vehicle, one of which shall be affixed on the front and one on the rear thereof. For each such omnibus having a seating capacity of not more than fifteen children, such signs shall be securely mounted on top of such vehicle, one of which shall face the front and one of which shall face the rear thereof. Each such sign shall be visible and readable from a point at least two hundred feet distant.

(2) The universal handicapped symbol shall be conspicuously displayed on the exterior of every omnibus equipped with a wheelchair lift which transports children with disabilities. The commissioner shall promulgate regulations regarding the size and location of such universal handicapped symbol. The commissioner shall require that any new signage relating to accessibility installed or replaced on or after the effective date of the chapter of the laws of two thousand fourteen which amended this subparagraph depict the logo promulgated by the secretary of state pursuant to section one hundred one of the executive law.

(c) In the event such vehicle is operated on a public highway during the period between one-half hour after sunset and one-half hour before sunrise, the signs required by paragraph (b) of this subdivision shall be illuminated as to be visible from a point at least five hundred feet distant.

(d) Every such omnibus shall be equipped as provided in paragraphs (a) and (b) of this subdivision, and such signs shall be displayed and illuminated in accordance with paragraphs (b) and (c) of this subdivision, and such signal lamps shall be operated as provided in paragraph (a) of this subdivision at all times when such omnibus shall be engaged in transporting pupils to and from school or school activities or in transporting children to and from child care centers maintained for children of migrant farm and food processing laborers, or in transporting children to and from camp or camp activities or transporting children to and from religious services or instruction or transporting persons with disabilities on any such omnibus used by any state facility or not-for-profit agency licensed by the state.

(e) Every such omnibus, having its engine located ahead of the driver, with a seating capacity of more than twelve school children shall be equipped with a mirror, convex in shape, at least eight inches in diameter, firmly mounted at hood, windshield or fender-top height in front of the bus. It shall be located on either the left or right side of the bus in such manner that the seated driver may observe through its use the road from the front bumper forward to the point where direct observation is possible.

(f) The commissioner of motor vehicles is hereby authorized and empowered to adopt and, from time to time, to amend such regulations, not inconsistent with this subdivision, governing the color, number, size, type, construction and use of such signal lamps and signs, as he may deem necessary for public safety. On and after July first, nineteen hundred fifty-one, no such signal lamp or sign shall be deemed to comply with the requirements of this subdivision unless it is of a size and type approved by the commissioner and unless it shall conform to the specifications prescribed and promulgated by him.

(g) In the event, however, that such an omnibus, equipped as herein provided, shall cease to be used to transport pupils or pupils and teachers or children of migrant laborers and migrant child care center instructors, or children and camp instructors, the equipment, markings and paint, herein provided for, shall be removed and changed within fifteen days after relicense. Nothing contained in this section, however, shall be deemed to waive any other requirements as to equipment, markings and paint, contained in this chapter.

(h) All the provisions of this chapter relating to school buses shall apply with equal force and effect to buses used in transporting children and instructors to and from child care centers maintained for children of migrant farm and food processing laborers and to buses used in transporting children to and from camp or camp activities and to buses used in transporting children to and from religious services or instruction. As used in this subdivision, camp or camp activities shall mean day camp or day camp activities respectively.

(i) Every omnibus subject to the provisions of this subdivision shall be operated with headlights and taillights illuminated at all times of day or night.

(j) The commissioner of transportation, in his discretion, by regulation or upon written request, by departmental order, for good cause, may exempt any school bus that does not receive or discharge passengers on or along the public highways on regularly scheduled routes from the requirements of any or all paragraphs of subdivisions twenty and twenty-one of this section.

(k) All omnibuses manufactured or assembled prior to April first, nineteen hundred seventy-seven and all omnibuses manufactured or assembled after April first, nineteen hundred seventy-seven which do not meet federal standards for school bus safety, shall be phased out of use beginning with the nineteen hundred ninety-six–nineteen hundred ninety-seven school year and ending with the nineteen hundred ninety-seven–nineteen hundred ninety-eight school year. In each of such school years, at least one-half of such omnibuses shall be retired from use according to the following formula: in the nineteen hundred ninety-six–nineteen hundred ninety-seven school year, the minimum number of such omnibuses to be phased out of each owner/operator's fleet shall be the total number of such omnibuses divided by two and rounded upwards to the nearest whole number. All such omnibuses remaining shall be phased out in the nineteen hundred ninety-seven–nineteen hundred ninety-eight school year.

Notwithstanding the foregoing provisions of this paragraph the commissioner of education may make exceptions on a case by case basis if a school district certifies to the commissioner of education that a certain omnibus should not be retired for reason of economic hardship and the commissioner of transportation determines upon inspection that such omnibus is in good working order. In making his determination, the commissioner of transportation shall consider, among other relevant factors, the relative age and structure of each such omnibus. When such determination is made, every such omnibus so certified shall be reinspected by the commissioner of transportation once every six months. Any school district receiving an exemption from the provisions of this paragraph for any omnibus shall provide to the commissioner of education an annual recertification of economic hardship.

(*l*) (1) Every such omnibus used on a regular basis to transport pupils with a disability on a regularly scheduled route shall, with the written consent of the parent, guardian, or person in a position of loco parentis, have maintained on such omnibus the following information about each such pupil:

(i) name;

(ii) nature of the disability; and

(iii) the name of such pupil's parent, guardian, or person in a position of loco parentis and one or more telephone numbers where such person can be reached in an emergency, and/or the name and telephone number of any other person designated by such parent, guardian or person in a position of loco parentis as a person who can be contacted in an emergency.

(2) Such information shall be used solely for the purpose of contacting such pupil's parent, guardian, person in a position of loco parentis, or designee in the event of an emergency involving such pupil, shall be kept in a manner which retains the privacy of the pupil, and shall not be accessible to any person other than the driver or a teacher acting in a supervisory capacity. Provided, however, that in the event that such driver or teacher is incapacitated, such information may be accessed by any emergency services provider for the purpose authorized by this subparagraph.

(3) Such information shall be updated as needed, but at least once each school year. Such information shall be destroyed if: parental consent is revoked; the pupil no longer attends such school; or, the disability no longer exists.

(4) For the purposes of this paragraph, the term "disability" shall mean a physical or mental impairment that substantially limits one or more of the major life activities of a pupil, whether of a temporary or permanent nature.

21. Every motor vehicle having a seating capacity of more than seven passengers, and used primarily to transport pupils or pupils and teachers to and from school, shall be painted the color known as "national school bus chrome."

In the event, however, such a motor vehicle so painted shall cease to be used to transport pupils or pupils and teachers, the color of paint herein provided for, shall be changed to another color, within fifteen days of relicense.

21-a. In any case where a New York state police or New York city, Albany, Buffalo, Rochester, Syracuse or Yonkers police department vehicle is painted a distinctive color which would designate it in the public's view as such a state or city police vehicle, the purchaser of such vehicle shall cause the color of its paint to be altered and any designated markings to be removed within fifteen days of registration.

21-b. The commissioner shall promulgate rules and regulations for the use of two-way radios on school buses.

21-c. The commissioner, in consultation with the commissioner of transportation, shall promulgate

rules and regulations for the use of stop-arms on school buses which shall include provisions for a second stop-arm to be located on the driver's side as close as is practical to the rear corner of the bus. Every school bus designed with a capacity of forty-five persons or more, and manufactured for use in this state on or after January first, two thousand two shall be equipped with a second stop-arm in compliance with such regulations.

21-d. The commissioner shall promulgate rules and regulations for the use of back up beepers on school buses.

21-e. The commissioner shall promulgate rules and regulations for the use of front crossing arms on school buses.

21-f. The commissioner shall promulgate rules and regulations for the use of safety sensor devices on school buses.

21-g. Every school bus manufactured for use in this state after April first, nineteen hundred ninety, shall be equipped with back-up beepers.

21-h. [There are two paras 21-h] It shall be unlawful for any motor vehicle having a seating capacity of more than seven passengers, and used primarily to transport pupils or pupils and teachers to and from school to be mounted with, or have placed or installed thereon any sign, placard or other display except as provided by law. Provided, however, that the provisions of this subdivision shall not apply to such motor vehicles operating in a city with a population of one million or more.

21-h. (a) [There are two paras 21-h] Every school bus manufactured for use in this state on or after April first, two thousand, shall be equipped with exterior reflective markings which comply with the rules and regulations promulgated by the commissioner pursuant to paragraph (c) of this subdivision.

(b) Every school bus used to transport ten or more passengers in this state on or after September first, two thousand two, shall be equipped with exterior reflective markings which comply with the rules and regulations promulgated by the commissioner pursuant to paragraph (c) of this subdivision.

(c) The commissioner shall promulgate rules and regulations for exterior reflective markings required to be attached on school buses. Such rules and regulations:

(1) shall require the rear of school buses to be marked with reflective material to outline the perimeter of the back of the bus and of the rear emergency exit;

(2) shall require the horizontal application of strips of reflective material, not less than one and three-quarters inches wide, above the rear windows, and above the rear bumper from the edges of the rear emergency exit door to both corners of the school bus with vertical strips of reflective material at each corner connected to the horizontal strips;

(3) shall require the horizontal application of strips of reflective material, not less than one and three-quarters inches wide, the entire length of the sides of the school bus body and located equidistant between the floorline and the beltline of the bus; and

(4) may require the marking of the front, rear or both bumpers of school buses with reflective material between one and three-quarters and two and one-quarter inches wide applied thereto at a forty-five degree angle to the center line of the road surface.

21-i. (a) (1) Every school bus manufactured on or after January first, nineteen hundred ninety, fueled with other than diesel fuel and used to transport three or more students who use wheelchairs or other assistive mobility devices or with a total capacity of more than eight passengers and used to transport students who use wheelchairs or other assistive mobility devices shall be equipped with an engine fire suppression system.

(2) Every school bus manufactured for use in this state on or after September first, two thousand seven fueled with diesel fuel and used to transport three or more students who use wheelchairs or other assistive mobility devices or with a total capacity of more than eight passengers and used to transport students who use wheelchairs or other assistive mobility devices shall be equipped with an engine fire suppression system.

(b) The commissioner of the department of transportation shall promulgate rules and regulations establishing standards for the use of engine fire suppression systems on school buses used to transport students who use wheelchairs or other assistive mobility devices.

22. It shall be unlawful to operate a motor vehicle upon the public highways of this state which is equipped with any glass which is so broken, fractured or discolored as to distort visibility.

23. Every motor vehicle operated for hire upon the public highways of this state shall be equipped with handles or other devices which shall permit the door or doors to the passenger compartment to be readily opened from the interior of the vehicle.

24. It shall be unlawful to operate upon any public highway in this state a motor vehicle which is equipped with a television receiving set within view of the operator or in which a television receiving set is in operation within the view of the operator. A motor vehicle shall not be deemed to be equipped with a television receiving set solely because such set utilizes power from such vehicle. The provisions of this subdivision shall not prohibit a vehicle with a weight of ten thousand pounds or more or a school bus from using closed-circuit television receiving equipment exclusively for safety and maneuvering purposes, in accordance with regulations to be established by the commissioner.

24-a. It shall be unlawful to operate upon any public highway in this state a motor vehicle, limited use automobile, limited use motorcycle or bicycle while the operator is wearing more than one earphone attached to a radio, tape player or other audio device.

25. (a) On and after the first day of January, nineteen hundred seventy-four it shall be unlawful to operate on any public highway or street in this state any tractor, commercial motor vehicle, combination of a commercial motor vehicle and trailer, or combination of a truck-tractor and semi-trailer which is not so constructed or equipped as reasonably to bar water or other road surface substances from being thrown by the rearmost wheels beyond the extreme rear of the vehicle or combination of vehicles, and to minimize side spray.

(b) Unless the commercial vehicle or combination vehicle is so designed or constructed to accomplish the objectives set forth in paragraph (a) of this subdivision by reason of fender or body construction or other means of enclosure, any such commercial vehicle or combination vehicle shall be equipped, on and after January first, nineteen hundred fifty-seven, with splash guards and stone deflectors which shall be composed of materials substantial enough to withstand ripping or tearing by ordinary means and withstand the action of the elements for a reasonable length of time. Such splash guards and stone deflectors shall also have a reasonable degree of flexibility and the distance from the lower end thereof to the ground shall not exceed one-third of the distance, measured along the ground, from the bottom of the splash guard to the point of contact of the rear wheel.

(c) The commissioner of motor vehicles is hereby authorized and empowered to make rules and regulations with respect to splash guards and stone deflectors, their type and construction, manner of attachment to vehicles and all other matters requisite for the proper effectuation of the purposes of this subdivision. In making such rules and regulations the commissioner shall be guided by the desirability of uniformity in requirements with regard to splash guards and stone deflectors among the several states.

(d) The provisions of this subdivision shall not apply to motor vehicles, trailers and semi-trailers registered pursuant to subdivision thirteen of section four hundred one of this chapter, and not operated upon the public highways in excess of one and one-half miles by direct route between farms or portions of farms under single or common ownership or operation.

26. A gong or siren whistle shall not be used on any vehicle other than an authorized emergency vehicle. This shall not be construed to apply to a gong or siren designed and used solely as a burglar alarm on a vehicle.

27. When a vehicle (a) has a crane, boom or other similar device attached or (b) is loaded with any material, and such crane, boom, device or material extends four feet or more beyond the front or rear of such vehicle, such vehicle shall be provided with a red flag not less than twenty-four inches square by day and a red light visible from the rear and an amber light visible from the front for a distance of at least five hundred feet by night on the extreme end of the extending portion of such crane, boom, device or material.

28. No person shall operate upon a public highway a vehicle which emits unnecessary smoke or unnecessary offensive vapors.

28-a. Except as permitted or authorized by law, no person shall remove, dismantle or otherwise cause to be inoperative any equipment or feature constituting an operational element of a motor vehicle's air pollution control system or mechanism required by federal or state law or by any rules or regulations promulgated pursuant thereto.

28-b. Except where inconsistent with federal law, every motor vehicle registered in this state and manufactured or assembled after June thirty, nineteen hundred sixty-three shall be equipped with a crankcase ventilating system of a type approved by the state commissioner of environmental conservation for the purpose of reducing the emission of pollutants into the atmosphere. Such system shall be maintained in good working order in continued conformity with standards promulgated by the state commissioner of environmental conservation. For the purposes of this subdivision the term "motor vehicle" shall exclude diesel powered motor vehicles, motorcycles, vehicles driven by electric power and special purpose commercial motor vehicles registered under paragraph F of subdivision seven of section four hundred one of this chapter.

28-c. Except where inconsistent with federal law, rules and regulations, every motor vehicle registered in this state and manufactured or assembled after June thirty, nineteen hundred sixty-seven and known as a nineteen hundred sixty-eight or subsequent model shall be equipped with an air contaminant emission control system of a type approved by the state commissioner of environmental conservation. Such systems shall be maintained in good working order in continued conformity with emission standards promulgated by the state commissioner of environmental conservation. For the purposes of this subdivision, "air contaminant emission control systems" may include, but shall not be limited to, exhaust control systems and gasoline evaporation control systems but shall exclude crankcase ventilating systems.

28-d. The state commissioner of environmental conservation may exempt or partially exempt from the provisions of subdivisions twenty-eight-b and twenty-eight-c of this section any type or class of motor vehicle for which no practical control systems have been developed or are necessary.

28-e. Standards and exemptions established by the state commissioner of environmental conservation pursuant to subdivisions twenty-eight-b, twenty-eight-c and twenty-eight-d of this section, shall be consistent with applicable federal laws and regulations.

28-f. (a) Except where inconsistent with federal law, rules and regulations, in addition to any air

contaminant emission control systems required by subdivisions twenty-eight-b and twenty-eight-c of this section, the commissioner of environmental conservation may by regulation require the installation of exhaust emission control devices in proper working condition on all or any vehicles of any class or classes of gasoline powered motor vehicle having a registered maximum gross weight in excess of six thousand pounds. The commissioner of environmental conservation shall not promulgate any such regulation unless he (i) has determined, with the concurrence of the commissioner, that any such device is, or devices are, effective and reliable, (ii) has determined that the installation of any such device on all or any vehicles of such class or classes is necessary to the achievement of federal ambient air quality standards pursuant to an approved air quality implementation plan adopted pursuant to the federal clean air act, as amended (42 U.S.C. 1857 et seq.) and (iii) has determined that the effect of such regulation will not be diluted by the absence of a comparable requirement in an adjoining state; provided, however, that the effective date of the requirements of such regulation shall not be prior to the approval or promulgation of a transportation control plan pursuant to the Federal clean air act as amended for those portions of adjoining states designated as the territorial areas forming parts of the New Jersey-New York-Connecticut Interstate Air Quality Control Region under such act and not prior to the effective date of comparable requirements for such vehicles registered in, required to be registered in, or operated in any such portions. Any such requirement shall take effect with respect to any such motor vehicle as of the date of issuance of a registration for such vehicle in the year next succeeding the date on which the regulation requiring the installation of such a device is promulgated by the commissioner of environmental conservation, but in no event prior to March first, nineteen hundred seventy-six.

(b) The provisions of paragraph (a) of this subdivision shall apply only to gasoline powered vehicles which are registered in or are required by law to be registered pursuant to subdivision seven of section four hundred one of this chapter in, or are regularly operated in that portion of the state designated as the territorial area forming part of the New Jersey-New York-Connecticut Interstate Air Quality-Control Region under the federal clean air act, as amended (42 U.S.C. 1857 et seq.) or any part of such region.

(c) Whenever a motor vehicle registered pursuant to subdivision seven of section four hundred one of this chapter is not required by a regulation promulgated pursuant to this subdivision, to have an exhaust emission control device installed in accordance with this subdivision, the applicant for registration for any such motor vehicle shall be required to file a statement as prescribed by the commissioner in conjunction with such registration that such motor vehicle is not required to have such a device. A false statement in relation to such exemption shall constitute a material false statement in an application for registration.

(d) A notation on the registration for a vehicle and an identifying sticker on the vehicle, both of which indicate that such vehicle is required to have an exhaust emission control device shall be presumptive evidence that such device in proper working condition is required on that vehicle pursuant to paragraph (a) of this subdivision.

(e) The rules and regulations promulgated pursuant to paragraph (a) of this subdivision shall contain provisions necessary or appropriate to implement this subdivision, including the definition of terms and exemptions for motor vehicles registered in areas from which no substantial numbers of motor vehicles are regularly operated in the portion of the state referred to in paragraph (b) of this subdivision.

(f) No registered owner shall permit a motor vehicle, required to have an exhaust emission control device in proper working condition pursuant to the provisions of this subdivision, to be operated in the portion of the state to which this subdivision is applicable, unless such vehicle is equipped with an approved exhaust emission control device in proper working condition. Every person convicted of a violation of this paragraph shall for a first violation thereof with respect to a particular motor vehicle be punished by a fine of seven hundred fifty dollars. Such fine may not be waived, suspended or in any other manner not levied, except that four hundred fifty dollars of such fine may be waived upon presentation of acceptable evidence prior to the final determination of the violation that the device required pursuant to paragraph (a) of this subdivision has been installed on the vehicle and is in proper working condition. Every person convicted of a second or subsequent violation with respect to a particular vehicle shall be punished by a fine of seven hundred fifty dollars, which fine may not be waived, suspended or in any other manner not levied.

29. (a) A motor vehicle shall not be used to tow more than one other vehicle.

(b) Notwithstanding the provisions of paragraph (a) of this subdivision, the following vehicles or combination of vehicles are permitted to be operated in New York state:

1. Municipal garbage or ash collecting systems consisting of three vehicles;

2. A tow truck or wrecker being used to tow a disabled tractor semitrailer combination;

3. A tractor being used to tow a semitrailer and trailer outside the city of New York or counties of Nassau and Suffolk or on any qualifying highway or access highway within the city of New York or counties of Nassau or Suffolk;

3-a. A tractor semitrailer-semitrailer combination of vehicles where the two semitrailers are connected by a B-train assembly and such combinations of vehicles is operated outside the city of New

York or counties of Nassau and Suffolk or on any qualifying highway or access highway within the city of New York or counties of Nassau or Suffolk;

4. Subject to rules and regulations of the commissioner of transportation, a combination of an automotive powered cab and truck chassis being used to tow two such additional vehicles in double saddlemount fashion, each mounted upon a device designed and constructed so as to be readily dismountable and which performs the function of a conventional fifth wheel, so that while all the wheels of the towing powered chassis touch the roadway, only the wheels on the rear axle of each of the towed vehicles are in contact with the roadway; and

5. Subject to rules and regulations of the commissioner of transportation, a combination of an automotive powered cab and truck chassis being used to tow three such additional vehicles in triple saddlemount fashion on a qualifying or access highway, each mounted upon a device designed and constructed so as to be readily dismountable and which performs the function of a conventional fifth wheel, so that while all the wheels of the towing powered chassis touch the roadway, only the wheels on the rear axle of each of the towed vehicles are in contact with the roadway.

(c) No vehicle shall be towed by a rope or other non-rigid connection which is longer than sixteen feet.

(d) A motor vehicle being towed by a rope or other non-rigid connection must have a licensed driver in such motor vehicle who shall steer it when it is being towed.

29-a. No vehicle or mobile equipment shall be towed with the use of a dolly unless the dolly, vehicle or mobile equipment is secured to the towing vehicle by safety chains or cables which will prevent the dolly, vehicle or mobile equipment from separating from the towing vehicle and the towed vehicle or mobile equipment is securely fastened to the dolly. Dolly shall mean a multi-wheel device utilized to raise a part of a towed vehicle or mobile equipment while it is being towed by another vehicle.

30. It shall be unlawful for any person to operate a motor vehicle with any object placed or hung in or upon the vehicle, except required or permitted equipment of the vehicle, in such a manner as to obstruct or interfere with the view of the operator through the windshield, or to prevent him from having a clear and full view of the road and condition of traffic behind such vehicle.

31. Mufflers and exhaust systems. Prevention of noise. Every motor vehicle, operated or driven upon the highways of the state, shall at all times be equipped with an adequate muffler and exhaust system in constant operation and properly maintained to prevent any excessive or unusual noise and no such muffler or exhaust system shall be equipped with a cut-out, bypass, or similar device. No person shall modify the muffler or exhaust system of a motor vehicle in a manner which will amplify or increase the noise emitted by the motor or exhaust system of such vehicle above that emitted by the muffler or exhaust system originally installed on the vehicle and such original muffler and exhaust system shall comply with all the requirements of this section.

A muffler is a device consisting of a series of chambers or baffle plates, or other mechanical design for the purpose of receiving exhaust gas from an internal combustion engine, and effective in reducing noise.

An exhaust system is a series of mechanical devices for the purpose of receiving exhaust gas from an internal combustion engine and expelling it into the atmosphere.

31-a. No person shall, in the state, sell, install or use a motorcycle exhaust device without internal baffles, known as “straight pipes”.

31-b. No person shall, in the state, sell, install or use a motorcycle exhaust device that is intentionally designed to allow for the internal baffling to be fully or partially removed or interchangeable. This subdivision shall not apply to a motorcycle manufactured or assembled prior to nineteen hundred seventy-nine or a motorcycle registered as a limited use vehicle or an all terrain vehicle pursuant to article forty-eight-A or forty-eight-B of this chapter.

32. The violation of any of the provisions of this section with respect to adequate brakes except those relating to emergency or hand brakes shall constitute a misdemeanor and the violation of any of the other provisions of this section, including those relating to emergency or hand brakes, shall be punishable by a fine not exceeding one hundred fifty dollars or by imprisonment for not exceeding thirty days, or by both such fine and imprisonment, except as herein otherwise provided.

33. The provisions of this section shall not apply to fire and police vehicles, self-propelled combines, self-propelled corn and hay harvesting machines, farm type tractors used exclusively for agricultural purposes or for snow plowing other than for hire, and self-propelled caterpillar or crawler-type equipment while being operated on the contract site except when reference is specifically made to such vehicle.

34. Any motor vehicle may be equipped with and every passenger vehicle registered in this state and manufactured or assembled after January first, nineteen hundred sixty-nine, shall be equipped with at least one back-up light. Such light shall display a white light to the rear when the ignition switch is energized and reverse gear is engaged. Such light shall not be lighted when the motor vehicle is in forward motion.

35. Tires. (a) The commissioner may establish standards for the manufacture, regrooving or retreading of tires which are produced or sold in this state, and for the use of tires on vehicles operated in this state.

(b) No tire shall be manufactured, distributed, offered for sale or sold in this state if it does not

comply with the standards established by the commissioner pursuant to paragraph (a) of this subdivision. A violation of this paragraph shall be punishable as a misdemeanor.

(c) No person shall operate a motor vehicle or a trailer on a public highway if such vehicle is equipped with tires that do not meet the standards established by the commissioner pursuant to paragraph (a) of this subdivision.

35-a. It shall be unlawful to operate a motor vehicle or trailer equipped with tires having metal objects protruding from the tire tread upon any public highway. The prohibition contained in this section shall not apply to pneumatic tires containing metal type studs, the diameter of which studs inclusive of the stud casing does not exceed three-eighths of an inch and which do not protrude beyond the tread surface of such tires more than three thirty-seconds of an inch and the contact area of which does not exceed three-fourths of one per cent of the total nominal contact area of said tires determined by multiplying the circumference of the outermost edge of tread times the tread width, except that no vehicle equipped with such tires, other than school buses and state or municipally-owned vehicles, may operate on a public highway during the period from the first day of May to the fifteenth day of October, inclusive.

36. (a) The slow-moving vehicle emblem as developed by the American Society of Agricultural Engineers shall be recognized as the official state slow moving vehicle emblem. The commissioner of motor vehicles shall adopt standards and specifications for design, creation and use, in conformance with those recommendations of the American Society of Agricultural Engineers for the size, design and mounting of said slow-moving vehicle emblem.

(b) Farm machinery and implements of husbandry and other machinery including road construction and maintenance machinery designed to operate at twenty-five miles per hour or less, traveling on a public highway during day or night, whether self-propelled or used in combination, shall each separately display a slow-moving vehicle emblem as specified in paragraph (a) of this subdivision.

(c) The use of such emblem shall be in addition to any lighting devices, flags or other equipment required by law. Such emblem shall be used only on farm machinery and implements of husbandry on road construction and maintenance machinery, and on such other vehicles, machinery and equipment as may be specified in regulations issued by the commissioner. All use shall be in accordance with such regulations. Use of such emblem as a clearance marker or on stationary objects on the highways is prohibited.

37. The commissioner shall promulgate rules and regulations prescribing appropriate cautionary devices to be affixed to motor vehicles engaged in retail sales of frozen desserts directly to consumers which shall include, but not be limited to, front crossing arms to be activated only when such vehicle is stopped and its occupants are engaged in such retail sales. Such rules and regulations shall be designed to warn oncoming vehicles of the likelihood of pedestrians in or about the vicinity of such sales oriented motor vehicles. No person shall engage in the retail sale by motor vehicle of frozen desserts directly to consumers in violation of the rules and regulations promulgated by the commissioner. As used in this subdivision, "frozen desserts" shall mean ice cream, frozen custard, French ice cream, French custard ice cream, artificially sweetened ice cream, ice milk, artificially sweetened ice milk, fruit sherbet, non-fruit sherbet, water ices, non-fruit water ices, quiescently frozen confection, quiescently frozen dairy confection, manufactured desserts mix, frozen confection, mellorine frozen dessert, parevine, frozen yogurt, freezer made shakes, freezer made milk shakes, lo-mel, and dietary frozen dessert as all such products are commonly known, together with any mix used in such frozen desserts and any products which are similar in appearance, odor or taste to such products, or are prepared or frozen as frozen desserts are customarily prepared or frozen, whether made with dairy products or non-dairy products.

38. [None]

39. Every motor vehicle registered in this state and manufactured or assembled after October first, nineteen hundred sixty-four shall be equipped with a defrosting device, in good working order, for the purpose of preventing the formation of snow or ice on the windshield directly in front of the operator. For the purposes of this subdivision the term "motor vehicle" shall exclude motorcycles, tractors used exclusively for agricultural purposes, self-propelled combines, self-propelled harvesting machines and farm equipment and self-propelled caterpillar or crawler-type equipment while being operated on the contract site.

40. Stop lamps. (a) Every motor vehicle, except a motorcycle, operated or driven upon the public highways of the state, if manufactured prior to January first, nineteen hundred fifty-two, shall be equipped with at least one stop lamp which shall display a red to amber light visible at least five hundred feet from the rear of the vehicle when the brake of such vehicle is applied.

(b) Every motor vehicle, except a motorcycle, operated or driven upon the public highways of the state, if manufactured on or after January first, nineteen hundred fifty-two, shall be equipped with at least two stop lamps, one on each side, each of which shall display a red to amber light visible at least five hundred feet from the rear of the vehicle when the brake of such vehicle is applied.

41. Colored and flashing lights. The provisions of this subdivision shall govern the affixing and display of lights on vehicles, other than those lights required by law. 1. No light, other than a white light, and no revolving, rotating, flashing, oscillating

or constantly moving white light shall be affixed to, or displayed on any vehicle except as prescribed herein.

2. Red lights and certain white lights. One or more red or combination red and white lights, or one white light which must be a revolving, rotating, flashing, oscillating or constantly moving light, may be affixed to an authorized emergency vehicle, and such lights may be displayed on an authorized emergency vehicle when such vehicle is engaged in an emergency operation, and upon a fire vehicle while returning from an alarm of fire or other emergency.

3. Amber lights. a. One or more amber lights may be affixed to a hazard vehicle, and such a light or lights which display an amber light visible to all approaching traffic under normal atmospheric conditions from a distance of five hundred feet from such vehicle shall be displayed on a hazard vehicle when such vehicle is engaged in a hazardous operation. Such light or lights shall not be required to be displayed during daylight hours provided at least two red flags visible from a distance of five hundred feet are placed both in or on the front of, and to or on the rear of the vehicle and two such flags are placed to each side of the vehicle open to traffic. Such lights or flags need not be displayed on the vehicle when the vehicle is operating, or parked, within a barricaded work area and said lights or flags are displayed on the barricade. The provisions of this subdivision shall not prohibit the temporary affixing and display of an amber light to be used as a warning on a disabled motor vehicle or on a motor vehicle while it is stopped on a highway while engaged in an operation which would restrict, impede or interfere with the normal flow of traffic.

b. In any city in this state having a population of one million or more, one amber light may be affixed to any motor vehicle owned or operated by a volunteer member of a civilian or crime patrol provided such volunteer civilian or crime patrol member has been authorized in writing to so affix an amber light by the police commissioner of the municipality in which he patrols, which authorization shall be subject to revocation at any time by the police commissioner who issued the same or his successor in office. Such amber light may be operated by such volunteer civilian or crime patrol member in such a vehicle only when engaged in a patrol operation as defined and authorized by rules and regulations promulgated by the police commissioner and only in such a manner and at such times as may be authorized by the police commissioner pursuant to said rules and regulations.

4. Blue light.

a. One blue light may be affixed to any motor vehicle owned by a volunteer member of a fire department or on a motor vehicle owned by a member of such person's family residing in the same household or by a business enterprise in which such person has a proprietary interest or by which he or she is employed, provided such volunteer firefighter has been authorized in writing to so affix a blue light by the chief of the fire department or company of which he or she is a member, which authorization shall be subject to revocation at any time by the chief who issued the same or his or her successor in office. Such blue light may be displayed exclusively by such volunteer firefighter on such a vehicle only when engaged in an emergency operation. The use of blue lights on vehicles shall be restricted for use only by a volunteer firefighter except as otherwise provided for in subparagraphs b and b-1 of this paragraph.

b. In addition to the red and white lights authorized to be displayed pursuant to paragraph two of this subdivision, one or more blue lights or combination blue and red lights or combination blue, red and white lights may be affixed to a police vehicle, fire vehicle, ambulance, emergency ambulance service vehicle, and county emergency medical services vehicle provided that such blue light or lights shall be displayed on a police vehicle, fire vehicle, ambulance, emergency ambulance service vehicle, and county emergency medical services vehicle for rear projection only. In the event that the trunk or rear gate of a police vehicle, fire vehicle, ambulance, emergency ambulance service vehicle, and county emergency medical services vehicle obstructs or diminishes the visibility of other emergency lighting on such vehicles, a blue light may be affixed to and displayed from the trunk, rear gate or interior of such vehicles. Such lights may be displayed on a police vehicle, fire vehicle, ambulance, emergency ambulance service vehicle, and county emergency medical services vehicle when such vehicles are engaged in an emergency operation. Nothing contained in this subparagraph shall be deemed to authorize the use of blue lights on police vehicles, fire vehicles, ambulances, emergency ambulance service vehicles, and county emergency medical services vehicles unless such vehicles also display one or more red or combination red and white lights as otherwise authorized in this subdivision.

b-1. In addition to the amber light authorized to be displayed pursuant to paragraph three of this subdivision, one or more blue lights or combination blue and amber lights may be affixed to a hazard vehicle designed for the towing or pushing of disabled vehicles provided that such blue light or lights shall be displayed on such a hazard vehicle for rear projection only. Such blue light or lights may be displayed on a hazard vehicle designed for the towing or pushing of disabled vehicles when such vehicle is engaged in a hazardous operation and is also displaying the amber light or lights required to be displayed during a hazardous operation pursuant to paragraph three of this subdivision. Nothing contained in this subparagraph shall be deemed to authorize the use of blue lights on hazard vehicles designed for the towing or pushing of disabled vehicles unless such hazard vehicles also display one or more amber lights as otherwise authorized in this subdivision.

c. The commissioner is authorized to promulgate rules and regulations relating to the use, placement, power and display of blue lights on a police vehicle, fire vehicle, and hazard vehicle designed for the towing or pushing of disabled vehicles.

5. Green light. One green light may be affixed to any motor vehicle owned by a member of a volunteer ambulance service, or on a motor vehicle owned by a member of such person's family, or by a business enterprise in which such person has a proprietary interest or by which he is employed, provided such member has been authorized in writing to so affix a green light by the chief officer of such service as designated by the members thereof. Such green light may be displayed exclusively by such member of a volunteer ambulance service only when engaged in an emergency operation. The use of green lights on vehicles shall be restricted for use only by a member of a volunteer ambulance service as provided for in this paragraph.

As used in this paragraph volunteer ambulance service means:

a. a non-profit membership corporation (other than a fire corporation) incorporated under or subject to the provisions of the membership corporations law, or any other law, operating its ambulance or ambulances on a non-profit basis for the convenience of the members thereof and their families or of the community or under a contract with a county, city, town or village pursuant to section one hundred twenty-two-b of the general municipal law; or

b. an unincorporated association of persons operating its ambulance or ambulances on a non-profit basis for the convenience of the members and their families or of the community.

6. The commissioner is authorized to promulgate regulations with respect to the affixing and display of colored lights and to promulgate specifications with respect to such lights.

7. The provisions of this subdivision forty-one shall not be applicable to vehicles from other states or from the Dominion of Canada which have entered this state to render police, fire or civil defense aid, or ambulance service, while such vehicles are here or are returning to their home stations if the lights on such vehicles comply with the laws of their home states or the Dominion of Canada and are displayed in this state in the same manner permitted by their home states or the Dominion of Canada, nor shall the provisions of this subdivision forty-one be deemed to amend, supersede or in any manner affect the provisions of the New York state defense emergency act as now in force or as it may be amended from time to time.

8. The provisions of this subdivision shall not be applicable to the driver of a vehicle from another state or foreign jurisdiction which vehicle has colored lights affixed but not revolving, rotating, flashing, oscillating or constantly moving if the lights on such vehicle comply with the laws of the state or home foreign jurisdiction in which the vehicle is registered.

42. Every motor vehicle registered in this state which is manufactured or assembled on or after September first, nineteen hundred eighty and operated or driven upon the highways of the state shall be equipped with a speedometer device which is capable of measuring the speed of such vehicle and displaying the same in miles per hour.

43. No dealer shall sell a motor vehicle or a trailer which is to be registered in this state unless such motor vehicle or trailer has all the equipment required for operation on the public highways of this state.

44. Driver education vehicles. Any motor vehicle used for the purpose of driving instruction for hire or for driver education by a school and being operated by a person receiving such instruction or education shall bear identification, visible to both oncoming and following traffic, to indicate that the vehicle is being driven by a student driver. The commissioner may establish standards for such identification.

45. Hydrocarbon gas powered vehicles. It shall be unlawful to operate upon any public highway or street in this state a motor vehicle that uses hydrocarbon gas as its primary or secondary fuel supply, unless the motor vehicle conspicuously displays a reflective placard designed to alert emergency personnel to the extraordinary hazards which may arise from proximity with this fuel. The commissioner shall, in cooperation with the state fire administrator, establish regulations as to the location and design of this warning placard.

46. Tamper-resistant odometers or speedometers. It shall be unlawful after July first, nineteen hundred ninety-one for any person, firm, association or corporation to sell or offer for sale in this state a new motor vehicle which is to be registered in this state and which was manufactured or assembled on or after such date, and designed as a nineteen hundred ninety-two or later model, unless such vehicle is equipped with a tamper-resistant odometer or speedometer designed with the intent to reduce the likelihood of unlawful tampering with the mileage reading thereon.

The commissioner shall promulgate such rules and regulations relative to tamper-resistant odometers and speedometers on motor vehicles and the approval of the same as are not inconsistent with the provisions of federal law, if any, relating thereto. Such rules shall, at a minimum, require odometers and speedometers which indicate mileage with a minimum of six digits exclusive of digits indicating fractions of a mile. This section shall not apply to motorcycles.

47. (a) It shall be unlawful for any person to operate or cause to be operated, an audio amplification system which is operated in, installed in or powered by a vehicle which generates an A-weighted sound level in excess of seventy dB (A) measured at, or adjusted to, a distance of twenty-five feet from the vehicle which is driven, standing, or parked on a public highway, or within one hundred feet of a

public highway unless that system is being operated to request assistance or warn of a hazardous situation. This section shall not apply to authorized emergency vehicles or vehicles operated by gas, electric, communications or water utilities. This section shall not apply to the sound systems of vehicles used for advertising, or in parades, political or other special events, except that the use of sound systems on those motor vehicles may be prohibited by a local authority by ordinance or local law.

(b) Any person convicted of a violation of this section shall for a first conviction thereof be punished by a fine of up to one hundred fifty dollars; for a conviction of a second violation, both of which were committed within a period of eighteen months, such person shall be guilty of a traffic infraction and shall be punished by a fine of not less than one hundred fifty dollars and not more than three hundred dollars; upon conviction of a third or subsequent violation, all of which were committed within a period of eighteen months, such person shall be guilty of a traffic infraction and shall be punished by a fine of not less than three hundred seventy-five dollars and not more than seven hundred fifty dollars.

48. Bumpers or similar devices. (a) For the purposes of this subdivision, the following terms shall have the following meanings:

(i) Bumper. A system, the primary function of which is to provide protection against damage affecting front or rear external lamps, body parts and vehicle occupants during low speed impacts.

(ii) Passenger car. A motor vehicle whose body style is a sedan, hardtop, coupe, convertible, station wagon or hatchback but not a van, minivan, multipurpose passenger vehicle, truck, tractor, motorcycle or bus.

(b) No person shall operate a passenger car registered in New York unless it is equipped with both a front and rear bumper, each securely fastened and with some part of the bumper located between sixteen inches and twenty inches above the ground. This provision shall not apply to a vehicle registered as an historical vehicle.

(c) Except insofar as paragraph (b) of this subdivision shall apply, no person shall operate a motor vehicle designated as a nineteen hundred ninety or newer model year vehicle, which is registered in this state, except a motorcycle or special purpose commercial vehicle registered under schedule F of subdivision seven of section four hundred one of this chapter, which is so constructed that the body has a clearance at the front end of more than thirty inches from the ground when empty, unless the front end of the vehicle is equipped with bumpers or devices serving similar purposes which shall be so constructed and located that (i) some part of the bumpers or devices must be at least sixteen but not more than thirty inches above the ground with the vehicle empty; (ii) the maximum distance between the closest points between bumpers or devices, if more than one is used, shall not exceed twenty-four inches; (iii) the maximum transverse distance from the widest part of the motor vehicle at the front to the bumper or device shall not exceed eighteen inches; and (iv) the bumpers or devices shall be substantially constructed and firmly attached. A motor vehicle constructed and maintained so that the body, chassis, or other parts of the vehicle afford the front end protection contemplated shall be deemed to be in compliance with this section.

(d) Except insofar as paragraph (b) of this subdivision shall apply, no person shall operate a motor vehicle or a combination of vehicles, designated as a nineteen hundred ninety or newer model year vehicle, except a tractor, pole trailer, vehicle engaged in saddle-mount operation, motorcycle or special purpose commercial vehicle registered under schedule F of subdivision seven of section four hundred one of this chapter, if the motor vehicle is registered in this state, and which is so constructed that the body, or the chassis assembly without the body, has a clearance at the rear end of more than thirty inches from the ground when empty, unless the rear end of the vehicle or combination of vehicles is equipped with bumpers or devices serving similar purposes which shall be so constructed and located that: (i) some part of the bumpers or devices must be at least sixteen but not more than thirty inches above the ground with the vehicle empty; (ii) the maximum distance between the closest points between bumpers, or devices, if more than one is used, shall not exceed twenty-four inches; (iii) the maximum transverse distance from the widest part of the motor vehicle at the rear to the bumper or device shall not exceed eighteen inches; (iv) the bumpers or devices shall be located not more than twenty-four inches forward of the extreme rear of the vehicle; and (v) the bumpers or devices shall be substantially constructed and firmly attached. Motor vehicles constructed and maintained so that the body, chassis, or other parts of the vehicle afford the rear end protection contemplated shall be deemed to be in compliance with this section.

49. Truck warning lights. (a) Every truck registered in this state and manufactured or assembled after September first, nineteen hundred ninety-two, which has a bed capable of being tilted or lifted by controls that are located within the cab of such truck and which is operated upon any public highway or street in this state shall be equipped with a warning light in its cab that is activated whenever the bed of the truck is elevated.

(b) Every tractor registered in this state and manufactured or assembled after September first, nineteen hundred ninety-three, which is used primarily for the towing of a trailer capable of being tilted or lifted and which is operated upon any public highway or street in this state shall be equipped with a warning light in its cab that is activated whenever the trailer is elevated.

50. Taxicab partitions and shields. Every taxicab registered in this state and registered or licensed by

a city, town or village of seventy-five thousand persons or more pursuant to section one hundred eighty-one of the general municipal law shall be equipped with (a) partitions or shields made of plexiglass or other shatterproof material located between and effectively separating the front and rear seats, and (b) amber colored distress lights, mounted on and clearly visible to passersby from the front and rear of the taxicab; provided, however, that the requirements of this subdivision shall not apply to taxicabs registered or licensed by such city, town or village which elects not to be subjected to the requirements of this subdivision pursuant to a duly enacted or adopted local law, ordinance or regulation. Nothing contained herein shall be construed to restrict the power of a city, town or village which elects not to be subject to the requirements of this subdivision to adopt or enforce a local law, ordinance or regulation regarding the use of taxicab partitions and distress lights.

51. [Contingently effective] Taxicab, livery and stretch limousine notices.

(a) Every taxicab, livery, and altered motor vehicle commonly referred to as a "stretch limousine" which was altered on or after January first, two thousand twenty-one or retrofitted pursuant to subdivision one-a of section three hundred eighty-three of this article registered in this state shall have posted therein the following notice: "Seatbelts must be available for your use. Please buckle up."

(b) The notices required to be posted pursuant to paragraph (a) of this subdivision shall be posted in a manner legible and conspicuous to passengers in all seating positions of such vehicles.

51. [contingently effective] (a) Every taxicab and livery registered in this state shall have posted therein the following notice: "Seatbelts must be available for your use. Please buckle up."

(b) The notices required to be posted pursuant to paragraph (a) of this subdivision shall be posted in a manner legible and conspicuous to passengers in all seating positions of such vehicles.

52. No police vehicle owned by the state, a public authority, a county, town, city or village shall be sold unless, prior to such sale, such vehicle is decommissioned and any distinctive markings and affixed lights which would designate it in the public's view as such a police vehicle have been removed. The commissioner of the division of criminal justice services, in consultation with the commissioner, shall promulgate rules and regulations determining the specifications for decommissioning police vehicles and for the removal of such distinctive markings and affixed lights prior to sale.

53. Federal motor vehicle safety standard certification label. No person shall, with intent to defraud, knowingly remove, deface, destroy, cover, alter, or otherwise change the form or appearance of a federal motor vehicle safety standard certification label, issued in accordance with section 30115 of title 49 of the United States Code and part 567 of title 49 of the code of federal regulations, on an altered motor vehicle. No person shall, with intent to defraud, affix to an altered motor vehicle a federal motor vehicle safety standard certification label except in accordance with section 30115 of title 49 of the United States Code and part 567 of title 49 of the code of federal regulations. A violation of this subdivision shall be punishable as a misdemeanor.

54. Stretch limousine commercial GPS.

(a) Every stretch limousine registered in this state shall be equipped with commercial global positioning system (GPS) technology within no later than one year of the date upon which the national highway traffic safety administration promulgates final regulations establishing standards for commercial GPS.

(b) It shall be unlawful to operate or cause to be operated a stretch limousine registered in this state on any public highway or private road open to public motor vehicle traffic unless such stretch limousine is equipped with commercial global positioning system (GPS) technology as required by this subdivision and such commercial global positioning system (GPS) technology is used. The presence in such stretch limousine of commercial global positioning system (GPS) technology connected to a power source and in an operable condition is presumptive evidence of its use by any person operating such stretch limousine. Such presumption may be rebutted by any credible and reliable evidence which tends to show that such commercial global positioning system (GPS) technology was not in use.

(c) For the purposes of this subdivision:

(i) "Stretch limousine" shall mean an altered motor vehicle having a seating capacity of nine or more passengers, including the driver, commonly referred to as a "stretch limousine" and which is used in the business of transporting passengers for compensation; and

(ii) "Commercial global positioning system (GPS) technology" shall mean global positioning system (GPS) technology which has been specifically designed to assist in the navigation of commercial motor vehicles.

HISTORY:

Add, L 1959, ch 775, eff Oct 1, 1960, with substance transferred from former §§ 15, 70(1); amd, L 1959, ch 517; L 1959, ch 582; L 1959, ch 760; L 1959, ch 813; L 1960, ch 300, § 24, eff Oct 1, 1960; L 1960, ch 464, § 24, eff Jan 1, 1961; L 1960, ch 608, § 3; L 1960, ch 663, § 3, eff Oct 1, 1960; L 1962, ch 225, § 1, eff Oct 1, 1962; L 1962, ch 930, § 3; L 1962, ch 994, § 1; L 1963, ch 501, § 1; L 1963, ch 645, § 1; L 1963, ch 653, § 1; L 1963, ch 971, §§ 1–3, eff July 1, 1963; L 1963, ch 973, § 1; L 1963, ch 975, § 1; L 1964, ch 332; L 1964, ch 472, § 1; L 1964, ch 652, § 1; L 1964, ch 910, § 1; L 1965, ch 289; L 1965, ch 600, § 1, eff Jan 1, 1966; L 1966, ch 169, § 1; L 1966, ch 172, §§ 1, 2; L 1966, ch 184, §§ 1, 4, eff April 5, 1966; L 1966, ch 381, § 1; L 1966, ch 471, § 1, eff May 31, 1966; L 1966, ch 723, § 1; L 1966, ch 856, § 1; L 1966, ch 902, §§ 1, 42; L 1967, ch 10, § 1; L 1967, ch 20, § 1, eff Oct 1, 1967; L 1967, ch 121, § 1, eff Oct 1, 1967; L 1967, ch 359, § 1; L 1968, ch 375, § 1; L 1968, ch 520, § 1; L 1968, ch 575, § 1, eff Oct 1, 1968; L 1968, ch 909, § 1; L 1968, ch 910, §§ 1, 2; L 1969, ch 18, § 1; L 1969, ch 322, § 1, eff Sept 1, 1969; L 1969, ch 444, § 1; L 1970, ch 197, §§ 9–11, eff July 1, 1971; L 1970, ch 328, § 1, eff Oct 1, 1970; L

1970, ch 388, § 1, eff Jan 1, 1971; L 1970, ch 459, § 2, eff May 5, 1970; L 1970, ch 573, §§ 1, 2, eff Jan 1, 1971; L 1970, ch 604, § 1, eff Sept 1, 1970; L 1970, ch 679, § 3, eff May 8, 1970; L 1970, ch 814, § 1, eff Jan 1, 1971; L 1970, ch 914, § 1, eff Oct 15, 1970; L 1971, ch 282, § 4; L 1971, ch 337, § 1, eff Sept 1, 1971; L 1971, ch 432, § 1, eff Sept 1, 1973; L 1971, ch 656, § 1; L 1971, ch 734, § 1; L 1971, ch 763, § 1; L 1971, ch 764, §§ 1, 2; L 1971, ch 965, § 1, eff July 2, 1971; L 1971, ch 1026 §§ 1, 3–7, eff July 2, 1971; L 1972, ch 90, § 1, eff April 5, 1972; L 1972, ch 169, § 2, eff Jan 1, 1973; L 1972, ch 560, § 1, eff Jan 1, 1973; L 1972, ch 704, § 1; L 1972, ch 780, § 6; L 1973, ch 19, § 1; L 1973 ch 64, § 2; L 1973, ch 64, § 1; L 1973, ch 96, § 1, eff Sept 1, 1973; L 1973, ch 1038, § 1, eff Jan 1, 1974; L 1975, ch 761, § 1, eff Aug 9, 1975; L 1976, ch 14, § 1, eff March 2, 1976; L 1976, ch 204, § 1; L 1976, ch 221, § 1, eff Sept 1, 1976; L 1976, ch 300, § 1; L 1976, ch 307, § 1, eff Oct 1, 1976; L 1977, ch 402, § 1; L 1977, ch 435, § 1, eff July 12, 1977; L 1977, ch 592, §§ 1–6, eff Jan 1, 1978; L 1978, ch 144, § 1, eff May 16, 1978; L 1978, ch 724, § 1, eff Sept 1, 1978; L 1979, ch 434, § 1, eff Sept 1, 1979; L 1979, ch 608, § 1, eff Sept 1, 1979; L 1981, ch 144, § 1; L 1981, ch 224, § 1; L 1981, ch 770, § 1; L 1982, ch 124, § 1; L 1982, ch 148, § 1; L 1982, ch 392, § 1, eff Jan 1, 1983; L 1983, ch 604, § 1, eff Sept 1, 1983; L 1983, ch 856, § 1, eff Aug 8, 1983; L 1983, ch 1008, § 4, eff Sept 30, 1983; L 1984, ch 535, § 1, eff Sept 1, 1984; L 1984, ch 536, § 1; L 1984, ch 736, § 1, eff Aug 3 1984; L 1985, ch 437, § 1, eff Jan 1, 1986; L 1985, ch 567, §§ 1, 2, eff Sept 1, 1985; L 1985, ch 576, § 3, eff Nov 23, 1985; L 1986, ch 345, § 1, eff July 17, 1986; L 1986, ch 612, § 1, eff Nov 1, 1986; L 1986, ch 816, § 1, eff Oct 31, 1986; L 1988, ch 236, § 1; L 1988, ch 351, § 1, eff Nov 26, 1988; L 1988, ch 361, § 1, eff Nov 26, 1988; L 1988, ch 730, § 3; L 1989, ch 39, § 1, eff Aug 12, 1989; L 1989, ch 61, § 36, effective and applicable to violations committed on and after May 19, 1989; L 1989, ch 303, § 1, eff July 10, 1989; L 1989, ch 305, § 1, eff July 10, 1989; L 1989, ch 312, § 1, eff July 10, 1989; L 1989, ch 623, § 1, eff Aug 31, 1989; L 1990, ch 173, § 10, eff Aug 19, 1990; L 1990, ch 366, § 1, eff Jan 1, 1991; L 1990, ch 827, § 1, eff July 25, 1990; L 1990, ch 856, § 1, eff Aug 24, 1990; L 1991, ch 155, §§ 1–3, eff Jan 1, 1992; L 1991, ch 278, § 1, eff July 15, 1991; L 1991, ch 476, § 1, eff Jan 1, 1992; L 1992, ch 148, § 1, eff June 16, 1992; L 1992, ch 156, § 1, eff Sept 1, 1992; L 1992, ch 242, § 1, eff April 1, 1994; L 1994, ch 135, § 2, eff Nov 27, 1994; L 1994, ch 545, § 1, eff Sept 24, 1994; L 1994, ch 654, § 4, eff Jan 29, 1995; L 1995, ch 391, § 1, eff Sept 1, 1995; L 1995, ch 655, § 1, eff Aug 8, 1995; L 1996, ch 32, § 1, eff May 2, 1996; L 1996, ch 112, § 1, eff June 4, 1996; L 1996, ch 550, § 2, eff Feb 4, 1997; L 1997, ch 74, § 1, eff May 23, 1997, deemed eff Feb 4, 1997; L 1998, ch 267, § 1, eff Jan 6, 1999; L 1999, ch 95, § 1, eff July 1, 1999; L 1999, ch 415, § 1, eff Aug 31, 1999; L 1999, ch 525, § 1, eff Sept 28, 1999; L 2001, ch 83, § 1, eff June 29, 2002; L 2001, ch 425, § 1, eff Oct 31, 2001; L 2001, ch 430, § 1, eff Oct 31, 2001; L 2002, ch 12, §§ 1, 2, eff April 18, 2002; L 2003, ch 62, §§ 12–15 (Part C), eff May 15, 2003; L 2003, ch 231, § 1, eff Sept 1, 2003; L 2003, ch 495, § 2, eff Jan 7, 2004; L 2004, ch 205, § 2, eff July 20, 2004; L 2004, ch 349, §§ 1, 2, eff Aug 10, 2004; L 2005, ch 447, § 1, eff Sept 1, 2005; L 2005, ch 453, § 1, eff Sept 1, 2006; L 2005, ch 608, § 1, eff Feb 26, 2006; L 2005, ch 624, § 1, eff Nov 28, 2005; L 2006, ch 45, § 1, eff June 7, 2006; L 2006, ch 203, § 1, eff Sept 1, 2006; L 2006, ch 686, § 1, eff March 12, 2007; L 2008, ch 350, § 2, eff Jan 1, 2009; L 2008, ch 386, § 1, eff July 21, 2008; L 2010, ch 465, § 2, eff Aug 30, 2010; L 2011, ch 138, § 1, eff Jan 14, 2012; L 2011, ch 143, § 1, eff July 18, 2011; L 2014, ch 190, § 2, effective November 22, 2014; L 2018, ch 476, § 18, effective December 28, 2018; L 2018, ch 478, § 1, effective June 26, 2019; L 2018, ch 486, §§ 1, 2, effective June 26, 2019; L 2019, ch 59, § 8 (Part III), effective November 1, 2019; L 2020, ch 10, § 4, effective January 1, 2021; L 2020, ch 11, § 1, effective March 4, 2020; L 2020, ch 38, § 3, effective April 17, 2021; L 2020, ch 58, §§ 1, 2 (Part C), effective April 3, 2020.

Revision Notes: [1966, chs 169, 172, 381, 471, 1967] These acts were prepared under the direction of the New York State Department of Motor Vehicles and were introduced at its request.

[1972, chs 560, 780] This act was prepared under the direction of the New York State Department of Motor Vehicles and was introduced at its request.

Editor's Notes: Laws 1971, ch 328, § 1, amended Laws 1970, ch 197, § 15 so as to change the effective date of the enactment of sub 41 of this section from April 1, 1971 to July 1, 1971.

Laws 1972, ch 738, § 1, amended Laws 1971, ch 432, § 2 so as to change the effective date of the enactment of sub 21 of this section from Sept 1, 1972 to Sept 1, 1973.

Laws 1988, ch 351, § 6, eff Nov 26, 1988, provides as follows:

§ 6. This act shall take effect on the one hundred twentieth day after it shall have become a law, provided, however, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date is authorized and directed to be made and completed on or before such effective date and provided that the amendment to paragraph b of subdivision seven of section thirty-six hundred two of the education law made by section four of this act shall not affect the expiration of certain provisions contained therein as enacted by chapter seven hundred forty-seven of the laws of nineteen hundred eighty-six.

Laws 1988, ch 361, § 3, eff Nov 26, 1988, provides as follows:

§ 3. This act shall take effect on the one hundred twentieth day after it shall have become a law; provided however, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of the foregoing sections of this act on their effective date are authorized and directed to be made and completed on or before such effective date.

Laws 1989, ch 39, § 2, eff Aug 12, 1989, provides as follows:

§ 2. This act shall take effect on the one hundred twentieth day after it shall have become a law, provided however, that effective immediately, all actions and procedures with respect to the proposed adoption, amendment, suspension or repeal of any rule or regulation necessary to the timely implementation of this act are directed and authorized.

Laws 1992, ch 242, § 2, eff April 1, 1994, provides as follows:

§ 2. This act shall take effect April 1, 1994, provided however that, effective immediately, necessary rules and regulations shall be promulgated to ensure timely implementation of the provisions of this act on its effective date.

Laws 1994, ch 135, § 3, eff Nov 27, 1994, provides as follows:

§ 3. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided, however that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized and directed to be made and completed on or before such effective date.

Laws 1994, ch 654, §§ 1, 8, eff Jan 29, 1995 and Aug 2, 1994, respectively, provide as follows:

Section 1. Legislative findings and declaration. The legislature hereby finds that agriculture is an important and unique industry in the state, providing fresh, nutritious food and valuable fiber at an economical cost to the state's consumers. The legislature further finds that agricultural producers occasionally need to make use of the public roadways to transport crops, equipment and supplies from one part of their farms to the other, especially during harvest season, in order to maintain an efficient, viable farm enterprise. The vehicles used to transport such commodities must be equipped to satisfy the production needs of farmers yet meet certain minimum standards to assure the safety of both the farm vehicle driver and the motoring public. Because of the reliance of farmers on registered farm vehicles at critical times in the growing season, it is also important to minimize out-of-service time and expense associated with equipment repairs. Therefore, it is the purpose of this act to address the need of farmers to use farm vehicles in connection with crop production while maintaining the safety of the public roadways, by setting or requiring development of safety equip-

ment and registration standards for farm vehicles registered pursuant to subdivision thirteen of section four hundred one of the vehicle and traffic law.

§ 8. This act shall take effect immediately, provided, however, that sections one through six of this act shall take effect on the one hundred eightieth day after it shall have become a law, except that any rules and regulations necessary for the effective implementation of this act shall be promulgated on or before that date.

Laws 1996, ch 550, §§ **1, 3,** eff Feb 4, 1997, provide as follows:

Section 1. This act shall be known and cited as the Michael E. Cook Law.

§ 3. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided, however that effective immediately the commissioner of motor vehicles shall adopt such rules and regulations as are necessary so that the provisions of this act may be implemented on such date.

Laws 2001, ch 83, § **2,** eff June 29, 2002, provides as follows:

§ 2. This act shall be deemed repealed if any federal agency or any court of competent jurisdiction determines that this act would render New York state ineligible for the receipt of federal funds.

Laws 2003, ch 495, §§ **1, 4,** eff Jan 7, 2004, provide as follows:

Section 1. Short title. This act shall be known and may be cited as "Adam's Law".

§ 4. Notwithstanding the provisions of paragraph (a) of subdivision 51 of section 375 of the vehicle and traffic law, as added by section two of this act, nothing contained in such paragraph shall be deemed to supercede the requirements of any local law, ordinance, rule or regulation in effect prior to the effective date of this act requiring notice to passengers of taxicabs and liveries, which notice provides substantially the same information as required by section two of this act.

Laws 2005, ch 453, § **4,** eff Sept 1, 2006, provides as follows:

§ 4. This act shall take effect September 1, 2006; provided that the department of transportation is authorized to promulgate any and all rules and regulations and take any other measures necessary to implement this act on its effective date on or before such date. (Amd, ch 203, § 3, eff Sept 1, 2006.).

Laws 2005, ch 608, § **2,** eff Feb 26, 2006, provides as follows:

§ 2. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided, however, that effective immediately, the addition, amendment and/or repeal of any rules or regulations necessary for the implementation of this act on its effective date are authorized and directed to be made and completed on or before such effective date.

Laws 2005, ch 624, § **2,** eff Nov 28, 2005, provides as follows:

§ 2. This act shall take effect on the ninetieth day after it shall have become a law and shall apply to violations of paragraph (b) of subdivision 1 of section 375 of the vehicle and traffic law committed on and after such date.

Laws 2006, ch 686, §§ **2 and 3,** eff March 12, 2007, provide as follows:

§ 2. This act shall be deemed repealed if any federal agency or any court of competent jurisdiction determines that this act would render New York state ineligible for the receipt of federal funds.

§ 3. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided, however, that effective immediately, the addition, amendment and/or repeal of any rules or regulations necessary for the implementation of this act on its effective date are authorized and directed to be made and completed on or before such effective date.

Laws 2008, ch 350, § **5,** eff Jan 1, 2009, provides as follows:

§ 5. This act shall take effect January 1, 2009; provided, however, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized to be made on or before such effective date.

Laws 2011, ch 138, § **2,** eff Jan 14, 2012, provides as follows:

§ 4. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided, however, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date is authorized to be made and completed on or before such effective date; and provided that the commissioner of the department of transportation shall notify the legislative bill drafting commission upon the occurrence of the provisions of section two of this act in order that the commission may maintain an accurate data base of the official text of the laws of the state of New York in furtherance of effecting the provisions of section 44 of the legislative law and section 70-b of the public officers law.

Laws 2014, ch 190, § **3**, eff Nov 22, 2014, provides:

§ 3. This act shall take effect on the one hundred twentieth day after it shall have become a law; provided, however, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized and directed to be made and completed on or before such effective date.

Laws 2018, ch 478, § **2,** eff June 26, 2019, provides:

§ 2. This act shall take effect on the one hundred eightieth day after it shall have become a law. Effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized to be made and completed on or before such effective date.

Laws 2018, ch 486, § **3,** eff June 26, 2019, provides:

§ 3. This act shall take effect on the one hundred eightieth day after it shall have become a law and shall apply to all police vehicles sold on and after such date. Effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized and directed to be made and completed on or before such effective date.

Laws 2019, ch 59, § **20 (Part III),** eff April 12, 2019, provides:

§ 20. This act shall take effect immediately; provided, however, that sections eight, ten, eleven and fourteen of this act shall take effect on the first of November next succeeding the date on which it shall have become a law; provided, however, sections nine and twelve of this act shall take effect on the one hundred eightieth day after it shall have become a law; provided, however, sections thirteen and nineteen of this act shall take effect on the first day of January next succeeding the date on which it shall have become a law and shall apply to all policies issued, renewed, altered, or modified on or after such date; provided, however, section fifteen of this act shall take effect on the thirtieth day after it shall have become a law; provided, however, section eighteen of this act shall take effect October 1, 2019; provided, further, that effective immediately, the department of transportation and the department of motor vehicles are authorized and directed to promulgate such rules and regulations as are necessary for the implementation of this act on its effective date.

Laws 2020, ch 10, § **6,** eff January 1, 2021, provides:

§ 2. This act shall take effect January 1, 2021; provided, however, that section two of this act shall take effect two years after this act shall have become a law; provided, further, this act shall be deemed repealed if any federal agency determines in writing that this act would render New York state ineligible for the receipt of federal funds or any court of competent jurisdiction finally determines that this act would render New York state out of compliance with federal law or regulation. The commissioner of motor vehicles or the commissioner of transportation shall notify the legis-

lative bill drafting commission upon the occurrence of any federal agency determining in writing that this act would render New York state ineligible for the receipt of federal funds or any court of competent jurisdiction finally determines that this act would render New York state out of compliance with federal law or regulation in order that the commission may maintain an accurate and timely effective data base of the official text of the laws of the state of New York in furtherance of effectuating the provisions of section 44 of the legislative law and section 70-b of the public officers law. Effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized to be made and completed on or before such effective date.

Laws 2020, ch 11, § 3, eff January 1, 2021, provides:

§ 3. This act shall take effect thirty days after it shall have become a law; provided, further, that this act shall be deemed repealed if any federal agency determines in writing that this act would render New York state ineligible for the receipt of federal funds or any court of competent jurisdiction finally determines that this act would render New York state out of compliance with federal law or regulation; and provided that the commissioner of transportation shall notify the legislative bill drafting commission upon the occurrence of the provisions of this act in order that the commission may maintain an accurate and timely effective data base of the official text of the laws of the state of New York in furtherance of effectuating the provisions of section 44 of the legislative law and section 70-b of the public officers law. Effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized to be made and completed on or before such effective date.

Laws 2020, ch 38, § 5, eff November 1, 2020, provides:

§ 5. This act shall take effect on the same date and in the same manner as a chapter of the laws of 2020, amending the vehicle and traffic law relating to safety belt requirements for taxis and livery vehicles, as proposed in legislative bills numbers S. 7134 and A. 8990, takes effect; provided, however, that section three of this act shall take effect one year after this act shall have become a law. Effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized to be made and completed on or before such effective date.

Amendment Notes The 2018 amendment by ch 476, § 18, deleted "policeman" following "shall permit any" in the last sentence of the first paragraph of 4.

The 2018 amendment by ch 478, § 1, added the (36)(a)(i) designation; added "and Biological" twice in (36)(a)(i); added (36)(a)(ii); added the (36)(b)(i) designation; added (36)(b)(ii); and added "and symbol" twice in (36)(c).

The 2018 amendment by ch 486, §§ 1, 2, deleted "and any designated markings to be removed" following "to be altered" in (21-a); and added (52).

The 2019 amendment by ch 59, § 8 (Part III), added 53.

The 2020 amendment by ch 10, § 4, substituted "Taxicab, livery, and stretch limousine notices" for "Taxicab and livery notices" in 51; and rewrote 51(a), which formerly read: "Every taxicab and livery registered in this state shall have posted therein the following notice: 'Seatbelts must be available for your use. Please buckle up.'"

The 2020 amendment by ch 11, § 1, added 54.

The 2020 amendment by ch 38, § 3, substituted "You must buckle up, it's the law" for "Please buckle up" in the last sentence of 51(a) and added the second sentence of 51(b).

The 2020 amendment by ch 58, §§ 1, 2 (Part C), substituted "provided for in subparagraphs b and b-1 of this paragraph" for "provided for in subparagraph b of this paragraph" at the end of (41)(4)(a); added (41)(4)(b-1); and substituted "a police vehicle, fire vehicle, and hazard vehicle designed for the towing or pushing of disabled vehicles" for "a police vehicle and fire vehicle" in (41)(4)(c).

Repeal Notes: [1963, ch 971] Former subdivision 33 of § 375, which was repealed by this act, contained a definition of "motor vehicles" for purposes of determining applicability of the entire section by excepting certain vehicles from the existing definition in § 125. Because of the exclusion from applicability of the section to these same named vehicles together with others under the provisions of former subdivision 34 as amended and renumbered by this act, former subdivision 33 is unnecessary.

[1970, ch 197] Paragraph c of subdivision two of section three hundred seventy-five, which was repealed by section nine of this act, related to lamps used on motor vehicles.

[1970, ch 573] Subdivision 35 of § 375 of the Vehicle and Traffic Law, repealed by this act, provided for the promulgation of standards governing the use of tires on vehicles. The authority for establishing such standards is re-enacted in the more comprehensive subdivision 35 of same section, added by this act.

[1975, ch 761] Vehicle and Traffic Law § 375, former subdivision (28-f) of which was repealed, authorized the Commissioner of the Department of Environmental Conservation to study the economic and technological feasibility of requiring air contaminant emission control system used in motor vehicles.

[1977, ch 592] Paragraphs (d) and (e) of subdivision 2 of Section 375, subdivisions 2 through 8, 11 and 13 of Section 376 of the Vehicle and Traffic Law repealed by this act related to reflective device requirements, placement of specific lighting devices, definitions of terms and inclusion of noncommercial trailers which would be covered by Section 376 as amended by this act and regulations which would be promulgated thereunder. Subdivisions 5, 6 and 8 of Section 375 of the Vehicle and Traffic Law repealed by this act contained provisions relating to lights on parked vehicles and methods of approval of lighting devices and appeals therefrom which have become obsolete.

Notes to Decisions

Analysis

1. In general
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1. In general

Motorist's operator's license was properly suspended for 90 days on evidence that motorist failed to exercise due care to avoid collision with pedestrian, who was struck and killed while intoxicated and while walking in driving lane of highway. McKenzie v

Fisher, 39 N.Y.2d 103, 382 N.Y.S.2d 975, 346 N.E.2d 813, 1976 N.Y. LEXIS 2386 (N.Y. 1976).

Any violation of requirement that school buses keep warning lights flashing when passengers are being received or discharged, could not have been substantial factor in bringing about injuries sustained by high school student, who was struck by automobile on high school premises after she had walked into roadway from between two school buses which students were then boarding since any motor vehicle operator would have been chargeable with notice that pupils were boarding or alighting from bus and driver of automobile conceded that she had actual knowledge that buses were loading, and thus student could not recover from bus company based on such a violation. Aridas v Caserta, 41 N.Y.2d 1059, 396 N.Y.S.2d 170, 364 N.E.2d 835, 1977 N.Y. LEXIS 2059 (N.Y. 1977).

Under former § 54, authorizing a city of the first class to enact "traffic regulations with regard to the operation of motor vehicles," the commissioner of police of New York City had authority to promulgate the traffic rules and regulations of the city of New York, Art. 5 § 67, which provides, in language identical with that of this section for the display of lights on motor vehicles driven at night. People v Killmeyer, 13 N.Y.S.2d 839, 171 Misc. 778, 1939 N.Y. Misc. LEXIS 2107 (N.Y. Spec. Sess. 1939).

In a prosecution for violation of this section, no intent to violate the statute need be established. People v Pinnock, 142 N.Y.S.2d 771, 207 Misc. 1097, 1955 N.Y. Misc. LEXIS 3539 (N.Y. Spec. Sess. 1955).

Ordinance requiring taxis to be insured for $100,000 "for damages for death or injuries to persons" and for $300,000 "for damages arising out of any one accident" was valid. Foley v McKnealley, 67 Misc. 2d 889, 325 N.Y.S.2d 165, 1971 N.Y. Misc. LEXIS 1231 (N.Y. Sup. Ct. 1971).

City ordinance regulating private car business, requiring certain equipment and periodic inspections, fell within the broad permissible area provided for under General City Law § 20, subd 13 which empowers cities to regulate and license occupations and businesses under the municipal police power, and said ordinance furthermore did not conflict with state law governing the operation and licensing of motor vehicles generally. Main Private Car Service, Inc. v Mayor of Yonkers, 71 Misc. 2d 417, 336 N.Y.S.2d 207, 1971 N.Y. Misc. LEXIS 1563 (N.Y. Sup. Ct.), aff'd, 37 A.D.2d 1044, 327 N.Y.S.2d 583, 1971 N.Y. App. Div. LEXIS 7147 (N.Y. App. Div. 2d Dep't 1971).

Town ordinance requirement that tow truck be equipped with dual rear wheels, fire extinguisher, crow bar, shovel, emergency flashing light, first aid kit, red flares and similar equipment was not in conflict with state law since it did not permit anything prohibited and did not prohibit anything permitted. Richard's Service Station, Inc. v Huntington, 79 Misc. 2d 834, 361 N.Y.S.2d 497, 1974 N.Y. Misc. LEXIS 1766 (N.Y. Sup. Ct. 1974), modified, 47 A.D.2d 963, 367 N.Y.S.2d 296, 1975 N.Y. App. Div. LEXIS 9438 (N.Y. App. Div. 2d Dep't 1975).

Bus driver and the county were not subject to liability for failure to comply with N.Y. Veh. & Traf. Law §§ 375(20) and 1174, as the bus from which the infant alighted was not being used exclusively to transport pupils, N.Y. Veh. & Traf. Law § 375(20), and in addition, the driver's duty to the infant as a passenger terminated when the infant alighted safely onto the sidewalk. Wisoff v County of Westchester, 296 A.D.2d 402, 745 N.Y.S.2d 60, 2002 N.Y. App. Div. LEXIS 7019 (N.Y. App. Div. 2d Dep't 2002).

This provision mandates every motor vehicle to have a horn that can sound a danger warning and proscribes that horn from being used other than as a reasonable danger warning. Honking is a traffic infraction if used in a non-emergency situation. People v Velazquez, 64 Misc. 3d 575, 103 N.Y.S.3d 801, 2019 N.Y. Misc. LEXIS 2887 (N.Y. City Crim. Ct. 2019).

2. Constitutionality

The provision of subdivision 3 of this section that headlamps "shall be operated so that dazzling light does not interfere with the driver of the approaching vehicle" is not so uncertain, indefinite, and vague as to cause it to be unconstitutional. In the context of this provision, the operation of headlights so as to produce "dazzling light" can mean only operation of headlights. Thus, two elements are necessary to constitute the offense: (1) the use of high beams when an approaching vehicle is within 500 feet and (2) interference with the vision of the driver thereof by reason of such high beams. Since a trooper testified that he signaled the defendant to dim her lights precisely because the high beams interfered with his operation of his car, requiring him to reduce his speed, proof was thus offered to establish both elements of the offense. People v Meola, 7 N.Y.2d 391, 198 N.Y.S.2d 276, 165 N.E.2d 851, 1960 N.Y. LEXIS 1431 (N.Y. 1960).

This section is not unconstitutional as being too vague and indefinite to give a clear, positive, and unequivocal warning of the rule to be obeyed. People v Byron, 17 N.Y.2d 64, 268 N.Y.S.2d 24, 215 N.E.2d 345, 1966 N.Y. LEXIS 1543 (N.Y. 1966).

Subdivision 1 of this section which provides that motor vehicles "shall have a suitable muffler or device to prevent unnecessary noise from exhaust gases" is unconstitutional for indefiniteness. People v Zanchelli, 8 Misc. 2d 1069, 169 N.Y.S.2d 197, 1957 N.Y. Misc. LEXIS 1968 (N.Y. County Ct. 1957).

The provisions of subdivision 1 of this section were unconstitutional in that they failed to set up any standard sufficient to define a violation thereof. However, it should be noted that the new provision, relating to mufflers, subdivision 31, effective July 1, 1959 corrects the error by setting up sufficient standards. People v Sisson, 12 Misc. 2d 18, 176 N.Y.S.2d 785, 1958 N.Y. Misc. LEXIS 2862 (N.Y. County Ct. 1958).

Subdivision 1 of this section is constitutional and the word "unnecessary" therein provides a sufficient standard of conduct. People v Merry, 12 Misc. 2d 20, 178 N.Y.S.2d 454, 1958 N.Y. Misc. LEXIS 3226 (N.Y. J. Ct. 1958).

This section (former § 70) is constitutional. People ex rel. Seagrist v Mederer, 33 N.Y.S.2d 114, 1942 N.Y. Misc. LEXIS 1330 (N.Y. Sup. Ct. 1942).

3. Construction

This section must be strictly construed. People v Strauss, 260 A.D. 880, 22 N.Y.S.2d 880, 1940 N.Y. App. Div. LEXIS 5204 (N.Y. App. Div. 1940).

Vehicle and Traffic Law will not be construed as imposing absolute liability for violation of its provisions regardless of negligence unless it clearly appears that legislature so intended, and, in absence of such legislative intent, whether exercise of reasonable care would excuse observance of statute is for jury. People v Pulizzi, 106 N.Y.S.2d 680, 199 Misc. 405, 1950 N.Y. Misc. LEXIS 2557 (N.Y. Magis. Ct. 1950).

The meaning and implication of New York City traffic regulations making it unlawful to operate a motor vehicle whose brakes do not comply with standards established by regulation are at least as malum prohibitum as subdivision of Vehicle and Traffic Law regulating braking equipment of motor vehicles and mere inadequacy of brakes makes out a prima facie case of violation of regulation. People v Pulizzi, 106 N.Y.S.2d 680, 199 Misc. 405, 1950 N.Y. Misc. LEXIS 2557 (N.Y. Magis. Ct. 1950).

Standards to be applied in determining whether action prohibited by provision of traffic law precluding operation of vehicles which emit "unnecessary smoke or unnecessary offensive vapors" is defined with sufficient clarity to give clear warning of rule which is to be obeyed are same as standards used for criminal charges. People v Cohen, 85 Misc. 2d 982, 381 N.Y.S.2d 979, 1976 N.Y. Misc. LEXIS 2096 (N.Y. Dist. Ct. 1976).

Provision of traffic law precluding operation on public highways of vehicles which emit "unnecessary smoke or unnecessary offensive vapors" is unconstitutionally vague. People v Cohen, 85 Misc. 2d 982, 381 N.Y.S.2d 979, 1976 N.Y. Misc. LEXIS 2096 (N.Y. Dist. Ct. 1976).

Subd. 2 should be read as a whole and the requirements as to lights being displayed between sunset and sunrise embraces reflectors as well. People v Palmiter, 15 N.Y.S.2d 858, 1939 N.Y. Misc. LEXIS 2458 (N.Y. County Ct. 1939).

4. Absolute liability

Subdivision 1 does not impose absolute liability for violation of its provisions regardless of negligence, and where the owner of the automobile had no previous knowledge that his brakes were inadequate or not in working order or insufficient to control the vehicle the question of the defendant's negligence should be

submitted to the jury. Schaeffer v Caldwell, 273 A.D. 263, 78 N.Y.S.2d 652, 1948 N.Y. App. Div. LEXIS 4581 (N.Y. App. Div. 1948).

The statute requiring that every motor vehicle operated on public highways be provided with adequate brakes in good working order and sufficient to control vehicle at all times when in use does not impose absolute liability for its violation regardless of negligence, but unexcused omission to comply therewith is negligence in itself. Alongi v Beuter, 286 A.D. 990, 144 N.Y.S.2d 756, 1955 N.Y. App. Div. LEXIS 4857 (N.Y. App. Div. 1955).

Under requirement of subd 1 of above statute that every motor vehicle shall be provided with adequate brakes, liability of owner thereof for noncompliance is not absolute; he is only required to take reasonable steps to inspect brakes and to ascertain their safety. He is not in class of supplier of dangerous instrumentality who has a duty to inspect. And although it was held on facts before court that he was charged with constructive notice of the defect in his brakes, such owner was not in pari delicto with creator of such defect; as between them, the owner may be found passively negligent and such creator actively negligent. Alfano v Amchir, 23 A.D.2d 659, 257 N.Y.S.2d 2, 1965 N.Y. App. Div. LEXIS 4765 (N.Y. App. Div. 2d Dep't 1965).

Liability of owner for noncompliance with statute requiring that automobile have adequate brakes is not absolute and he is required to take reasonable steps to inspect brakes and to ascertain their safety. Alfano v Amchir, 23 A.D.2d 659, 257 N.Y.S.2d 2, 1965 N.Y. App. Div. LEXIS 4765 (N.Y. App. Div. 2d Dep't 1965).

Vehicle and Traffic Law will not be construed as imposing absolute liability for violation of its provisions regardless of negligence unless it clearly appears that legislature so intended, and, in absence of such legislative intent, whether exercise of reasonable care would excuse observance of statute is for jury. People v Pulizzi, 106 N.Y.S.2d 680, 199 Misc. 405, 1950 N.Y. Misc. LEXIS 2557 (N.Y. Magis. Ct. 1950).

In a prosecution for violation of this section, no intent to violate the statute need be established. People v Pinnock, 142 N.Y.S.2d 771, 207 Misc. 1097, 1955 N.Y. Misc. LEXIS 3539 (N.Y. Spec. Sess. 1955).

The provision of subdivision 1 requiring every motor vehicle, operated or driven upon the public highway, to be provided with adequate brakes and steering mechanism in good working order, does not impose absolute liability for violation of same regardless of neglience, since it is for the jury to determine whether the exercise of reasonable care would excuse observance of the statute. Where the defendant's papers showed what caused the failure and what the defects were in the brakes on his vehicle but that they had no prior knowledge of same, a triable issue of fact was raised. Lepke v Sclafani & Sons, Inc., 20 Misc. 2d 50, 192 N.Y.S.2d 58, 1959 N.Y. Misc. LEXIS 3040 (N.Y. Sup. Ct. 1959).

Subdivision 2(a) of this section, requiring motor vehicles driven on the highway between sunset and sunrise to display lighted lamps at front and rear, imposes absolute liability for its violation regardless of the operator's lack of knowledge that some of the required lamps are not functioning. People v Treen, 33 Misc. 2d 571, 225 N.Y.S.2d 787, 1962 N.Y. Misc. LEXIS 3726 (N.Y. County Ct. 1962).

Requirement of subd 2(a) of above statute that motor vehicle on public highway must display lighted lamp on rear thereof may be found to be violated without proof of knowledge on part of violator, since such traffic infraction is only malum prohibitum and hence requires no proof of knowledge of violation in order to complete offense. People v Attaldo, 44 Misc. 2d 772, 255 N.Y.S.2d 188, 1964 N.Y. Misc. LEXIS 1133 (N.Y. County Ct. 1964).

5. Applicability

This section was applicable where an accident took place more than a half an hour before sunrise and the defendant's truck was parked on a highway with no lights on it. Van Horn v Messina, 3 A.D.2d 918, 162 N.Y.S.2d 604, 1957 N.Y. App. Div. LEXIS 5654 (N.Y. App. Div. 2d Dep't 1957), aff'd, 4 N.Y.2d 884, 174 N.Y.S.2d 466, 150 N.E.2d 769, 1958 N.Y. LEXIS 1035 (N.Y. 1958).

In action for injuries sustained by infant plaintiff when he crossed in front of bus from which he had just disembarked and was struck by vehicle that was maneuvering around stopped bus, defendants were entitled to summary judgment dismissing claim that bus used to transport infant plaintiff home from school was not equipped with red flashing signal lamps and other indicia of school bus as required by CLS Veh & Tr § 375(20), where record established that bus in question was not used exclusively to transport pupils. Sigmond v Liberty Lines Transit, Inc., 261 A.D.2d 385, 689 N.Y.S.2d 239, 1999 N.Y. App. Div. LEXIS 4549 (N.Y. App. Div. 2d Dep't 1999).

6. Pleading

In an action where defendant is charged with the violation of former §§ 15, 56 and 58, he need not verify his answer. King v Terwilliger, 259 A.D. 437, 19 N.Y.S.2d 657, 1940 N.Y. App. Div. LEXIS 6167 (N.Y. App. Div. 1940).

An information charging defendant with a traffic violation, in that he operated an automobile on a highway and he failed to come to a complete stop and remain standing upon overtaking a school bus stopped for the purpose of discharging passengers, was sufficient to charge a violation of this law. People v Skolnick, 108 N.Y.S.2d 857, 200 Misc. 389, 1951 N.Y. Misc. LEXIS 2607 (N.Y. County Ct.), aff'd, 303 N.Y. 630, 101 N.E.2d 704, 303 N.Y. (N.Y.S.) 630, 1951 N.Y. LEXIS 1064 (N.Y. 1951).

Defendant's motion to dismiss the count of the superseding information charging him with vehicle equipment violation was denied because the allegation sufficiently pleaded every element of the statute; the deponent, a police officer, alleged that defendant was operating a minivan with defective license plate lights, in that it was not illuminated. People v Lowe, 61 Misc. 3d 370, 83 N.Y.S.3d 402, 2017 N.Y. Misc. LEXIS 5492 (N.Y. City Crim. Ct. 2017).

7. Instruction to jury

The failure of a trial judge to instruct jury, pursuant to request of defendant's counsel, as to legal effect of the violation by plaintiff of this section, subd. 2, regarding the necessity of displaying lights at the time of the accident, constitutes error. Raufeisen v Rochester Transit Corp., 258 A.D. 846, 15 N.Y.S.2d 670, 1939 N.Y. App. Div. LEXIS 7205 (N.Y. App. Div. 1939).

A refusal of the court to charge that this section required lights on a motor vehicle which would reveal an object for a distance of 350' constituted reversible error in a case where the jury was to determine that the operator's negligence was the sole proximate cause of the accident rather than the city's negligent maintenance of the highway. Friedman v New York, 286 A.D. 881, 142 N.Y.S.2d 425, 1955 N.Y. App. Div. LEXIS 4433 (N.Y. App. Div. 1955).

In automobile negligence action, trial court's charge to jury, indicating that there was some burden on plaintiff to establish that defendant knew or should have known of defective condition of brakes on his automobile, was erroneous. Alongi v Beuter, 286 A.D. 990, 144 N.Y.S.2d 756, 1955 N.Y. App. Div. LEXIS 4857 (N.Y. App. Div. 1955).

In a negligence action to recover damages for personal injuries sustained when plaintiff's vehicle was hit from behind by defendant's vehicle after plaintiff had walked to the front of his vehicle following a tire blowout and electrical system failure, judgment in favor of defendant would be reversed, and a new trial granted, where the jury had been instructed that if they found a violation by plaintiff of the statutory requirement of illumination of vehicle headlights and taillights, that this violation would be the proximate cause of the accident, and where the court had improperly refused to instruct the jury that an emergency situation preventing the functioning of the vehicle's lights would not constitute a violation of the statute (Veh & Tr Law § 375(2)(a)). Bassey v Mistrough, 88 A.D.2d 894, 450 N.Y.S.2d 604, 1982 N.Y. App. Div. LEXIS 17220 (N.Y. App. Div. 2d Dep't 1982).

8. Lights; generally

The provision of subdivision 3 of this section that headlamps "shall be operated so that dazzling light does not interfere with the driver of the approaching vehicle" is not so uncertain, indefinite, and vague as to cause it to be unconstitutional. In the context of this provision, the operation of headlights so as to produce "dazzling light" can mean only operation of headlights. Thus, two elements are necessary to constitute the offense: (1) the use of high beams when an approaching vehicle is within 500 feet

and (2) interference with the vision of the driver thereof by reason of such high beams. Since a trooper testified that he signaled the defendant to dim her lights precisely because the high beams interfered with his operation of his car, requiring him to reduce his speed, proof was thus offered to establish both elements of the offense. People v Meola, 7 N.Y.2d 391, 198 N.Y.S.2d 276, 165 N.E.2d 851, 1960 N.Y. LEXIS 1431 (N.Y. 1960).

Where the plaintiff collided with the rear end of a trailer attached to defendant's automobile truck, the fact that plaintiff's front lights did not comply with this section is prima facie negligence, but it cannot be said that plaintiff was guilty of contributory negligence as a matter of law. Lewis v Rowland, 225 A.D. 25, 232 N.Y.S. 71, 1928 N.Y. App. Div. LEXIS 8732 (N.Y. App. Div. 1928).

In action for death of motorist who sustained fatal injuries when automobile he was operating collided with truck owned by New York City and parked in a public street, whether statutory provisions requiring motor vehicles proceeding on a public highway to display two lighted headlamps was violated was for jury. Krtil v New York, 259 A.D. 1049, 20 N.Y.S.2d 981, 1940 N.Y. App. Div. LEXIS 7920 (N.Y. App. Div. 1940).

The lights required by this section, subd. 2, are not intended merely to avert collisions between vehicles traveling in parallel directions, but are also intended to be used to avert collisions between vehicles approaching from other directions, and the requirement that lights shall be visible at a distance of 500 feet ahead of the vehicle only prescribes the measure of their intensity. Kerner v Surface Transp. Corp., 262 A.D. 89, 28 N.Y.S.2d 126, 1941 N.Y. App. Div. LEXIS 5296 (N.Y. App. Div. 1941).

A refusal of the court to charge that this section required lights on a motor vehicle which would reveal an object for a distance of 350' constituted reversible error in a case where the jury was to determine that the operator's negligence was the sole proximate cause of the accident rather than the city's negligent maintenance of the highway. Friedman v New York, 286 A.D. 881, 142 N.Y.S.2d 425, 1955 N.Y. App. Div. LEXIS 4433 (N.Y. App. Div. 1955).

The jury was properly charged that a violation of Vehicle and Traffic Law § 375(2a) would be a sufficient predicate for a finding of negligence if that violation was the proximate cause of the accident. It was held the mere fact that plaintiff saw defendant's vehicle 450 distant was not controlling, since the jury could find that the absence of lights made an estimate of speed or motion difficult or impossible, thereby causing the accident. Smith v Conway, 32 A.D.2d 868, 300 N.Y.S.2d 930, 1969 N.Y. App. Div. LEXIS 3635 (N.Y. App. Div. 3d Dep't), app. denied, 25 N.Y.2d 741, 1969 N.Y. LEXIS 1883 (N.Y. 1969).

Stopping of automobile by police officers at time when automobile was being operated without headlights upon public highway was proper. People v Middleton, 50 A.D.2d 1040, 377 N.Y.S.2d 938, 1975 N.Y. App. Div. LEXIS 12044 (N.Y. App. Div. 3d Dep't 1975), aff'd, 43 N.Y.2d 703, 401 N.Y.S.2d 207, 372 N.E.2d 41, 1977 N.Y. LEXIS 2510 (N.Y. 1977).

Defendant was not entitled to suppression of evidence since initial stop of his vehicle was proper where his headlights were on high beam, affecting oncoming state trooper's vision, and he failed to dim them when trooper flashed his own high beams several times. People v Hines, 155 A.D.2d 722, 547 N.Y.S.2d 435, 1989 N.Y. App. Div. LEXIS 13869 (N.Y. App. Div. 3d Dep't 1989), app. denied, 76 N.Y.2d 736, 558 N.Y.S.2d 898, 557 N.E.2d 1194, 1990 N.Y. LEXIS 2176 (N.Y. 1990).

A conviction of "willfully" and "knowingly" operating his car without having the license plate light in operation cannot be sustained, as against defendant's testimony that he did not know that the light was not operating, in the absence of evidence to show that he had knowledge of the fact or of facts from which such knowledge could be inferred. People v Cross, 25 Misc. 2d 221, 209 N.Y.S.2d 1006, 1960 N.Y. Misc. LEXIS 2250 (N.Y. County Ct. 1960).

Subdivision 2(a) of this section, requiring motor vehicles driven on the highway between sunset and sunrise to display lighted lamps at front and rear, imposes absolute liability for its violation regardless of the operator's lack of knowledge that some of the required lamps are not functioning. People v Treen, 33 Misc. 2d 571, 225 N.Y.S.2d 787, 1962 N.Y. Misc. LEXIS 3726 (N.Y. County Ct. 1962).

Evidence that the defendant, within a distance of about half a mile, turned his headlights on and off five times at 30 second intervals, neither established that the lights were by their nature in violation of this statute, nor that they were being operated in a manner which could be described as "constantly flashing" within the meaning of this statute, and therefore defendant was not guilty of a violation, since if a light displayed by a motorist is not proscribed by this section or the statute, his motive in displaying the light will not render him guilty of its violation. People v Wright, 53 Misc. 2d 942, 280 N.Y.S.2d 213, 1967 N.Y. Misc. LEXIS 1488 (N.Y. County Ct. 1967).

Smoke from a brush fire 600 feet from a highway obstructing the vision of motorists was not the "proximate cause" of injuries to passengers in a vehicle which was carelessly and recklessly driven due to the limited light range as compared with the speed of the vehicle. Pfohl v State, 42 N.Y.S.2d 372, 1943 N.Y. Misc. LEXIS 2012 (N.Y. Ct. Cl. 1943).

In action for injuries sustained when pedestrian crossing street intersection in the morning while it was yet dark with traffic light green in his favor was struck by hit and run driver, evidence established that defendant's truck was operated in a negligent manner in failing to permit plaintiff, a pedestrian, crossing in cross-walk with traffic lights in his favor to continue to safety, that headlights on truck failed to comply with statutory requirements and that plaintiff was free from contributory negligence. Garippa v Wisotsky, 108 N.Y.S.2d 67, 1951 N.Y. Misc. LEXIS 2469 (N.Y. Sup. Ct. 1951), aff'd, 280 A.D. 807, 113 N.Y.S.2d 772, 1952 N.Y. App. Div. LEXIS 3780 (N.Y. App. Div. 1952).

Appellate court held that, even assuming plaintiff violated N.Y. Veh. & Traf. Law §§ 375(2) and 385(3) when he attempted to pull a tree across a public road with a tractor at 5:15 p.m., evidence that a driver who was traveling 55 to 60 miles per hour when she saw what appeared to be a snow drift in the road did not reduce her speed enough to avoid a collision with the tree raised an issue of fact about whether the driver contributed to causing the accident, and the trial court erred by granting the driver's motion for summary judgment. Dumas v Shafer, 4 A.D.3d 720, 772 N.Y.S.2d 411, 2004 N.Y. App. Div. LEXIS 2013 (N.Y. App. Div. 3d Dep't 2004).

Where the driver of a tractor-trailer outfit had already dimmed his lights upon seeing a car approaching around a slight curve from the opposite direction, his negligence, if any, in flashing on his lights as a warning when he noted that the other vehicle was on the wrong side or partly on the wrong side of the highway and that a collision between them was imminent and would occur in a matter of a second or two unless immediate action was taken, while it might be considered some possible evidence of negligence, could not be considered a proximate cause of the ensuing collision. Harshberger v Associated Transport, Inc., 282 F.2d 179, 1960 U.S. App. LEXIS 3788 (2d Cir. N.Y. 1960), cert. denied, 364 U.S. 934, 81 S. Ct. 381, 5 L. Ed. 2d 366, 1961 U.S. LEXIS 1894 (U.S. 1961).

9. —Police vehicles

Police officer's use of her white "wiggle-waggle" headlights (which alternate back and forth) in attempt to pull over reckless driver was not unexcused violation of CLS Veh & Tr § 375(3). Martin v Miller, 255 A.D.2d 816, 680 N.Y.S.2d 300, 1998 N.Y. App. Div. LEXIS 12927 (N.Y. App. Div. 3d Dep't 1998).

No light, other than white or yellow, may be displayed upon a motor vehicle owned by a town constable so as to be visible from a point directly in front of the vehicle. 1953 Ops St Compt File 200.

Town board may purchase patrol car with blinker light and siren for police duties of special policeman, but special policeman may not use blinker light and siren on privately owned car on police duties. 1953 Ops St Compt File 354.

There is no legal authority for placing a red signal light on the grill of the private automobile of a constable or special deputy. 1964 Ops St Compt #208.

Part-time town policemen in Westchester County may not operate their privately owned vehicles equipped with flasher lights and sirens, but a town board may authorize the use of a

detachable "police sign" on privately owned vehicles operated by part-time town policemen. 1967 Ops St Compt File #597.

A town constable may not use a siren or revolving red light on his privately-owned vehicle. 1969 Ops St Compt File #48.

10. —Fire department vehicles

Plaintiff, member volunteer fire department, was not entitled judgment declaring that fire district board of commissioners could not promulgate any regulations prohibiting plaintiff from displaying red flashing light on his personal vehicle while responding to emergencies in discharge of his duties as volunteer emergency medical technician. Nicosia v Shultis, 239 A.D.2d 473, 658 N.Y.S.2d 640, 1997 N.Y. App. Div. LEXIS 5359 (N.Y. App. Div. 2d Dep't), app. dismissed, in part, app. denied, 90 N.Y.2d 1003, 665 N.Y.S.2d 955, 688 N.E.2d 1038, 1997 N.Y. LEXIS 3678 (N.Y. 1997).

Fire district funds may be used to purchase blue lights for installation on private cars of volunteer firemen. 1955 Ops St Compt File 383.

The provisions in relation to red lights on the private automobiles of the chief and assistant chief engineer of a fire department were not changed in the 1961 recompilation of this law. 1961 Ops St Compt #328.

11. —Ambulances

Emergency medical technician/member of volunteer ambulance service was authorized to have red light affixed to dashboard of his personal vehicle, and thus could not be convicted of violating CLS Veh & Tr § 375(41)(2) although he was not involved in emergency situation at time, as his personal vehicle was "emergency ambulance service vehicle" under CLS Veh & Tr § 115-c, as broadly defined in CLS Pub Health § 3001(2). People v Levy, 188 Misc. 2d 103, 727 N.Y.S.2d 248, 2001 N.Y. Misc. LEXIS 167 (N.Y. App. Term 2001).

12. —Civil defense vehicle

Under Vehicle & Traffic Law § 375, subd 41, § 117-a, and § 106-a, individual member of civilian defense was not authorized to have rotating amber lights affixed to bar across top of his privately-owned vehicle. People v Hesselink, 76 Misc. 2d 418, 351 N.Y.S.2d 270, 1973 N.Y. Misc. LEXIS 1504 (N.Y. J. Ct. 1973).

13. —Highway equipment

A road grader plowing snow at night on its wrong side of a highway, down hill, carrying only two small white lights at the top of the cab, each covered with wire mesh, and of a position and appearance to blend with lights along the highway, is not equipped with clearly visible lights as required by this section and § 318 of the Highway Law. Neddo v State, 85 N.Y.S.2d 54, 194 Misc. 379, 1948 N.Y. Misc. LEXIS 3709 (N.Y. Ct. Cl. 1948), aff'd, 275 A.D. 492, 90 N.Y.S.2d 650, 1949 N.Y. App. Div. LEXIS 3803 (N.Y. App. Div. 1949), aff'd, 275 A.D. 982, 91 N.Y.S.2d 515, 1949 N.Y. App. Div. LEXIS 5318 (N.Y. App. Div. 1949).

The parking of road maintenance equipment at night, partially on the road and shoulder, for the convenience of the highway department, improperly lighted, is negligence on the part of the state. McLane v State, 53 N.Y.S.2d 194, 1945 N.Y. Misc. LEXIS 1470 (N.Y. Ct. Cl. 1945).

14. —Driving with dim lights

In view of the limitations contained in this section, subd 3, and conditions at the time of the accident, there was no merit to defendant's claim that plaintiff was negligent as a matter of law in proceeding without headlights of sufficient power to illuminate the road for 200 feet distant. Rutledge v New York, 256 A.D. 515, 10 N.Y.S.2d 417, 1939 N.Y. App. Div. LEXIS 4768 (N.Y. App. Div. 1939).

A defendant-motorist who drove an automobile equipped only with dim lights which threw no beams was found guilty of violating this section, where he operated such vehicle over a poorly lighted street on which the visibility was such that one could see only fifty feet ahead. Nilson v Oppenheimer, 260 A.D. 670, 23 N.Y.S.2d 621, 1940 N.Y. App. Div. LEXIS 4687 (N.Y. App. Div. 1940), reh'g denied, 261 A.D. 828, 25 N.Y.S.2d 997, 1941 N.Y. App. Div. LEXIS 7645 (N.Y. App. Div. 1941), aff'd, 285 N.Y. 824, 35 N.E.2d 498, 285 N.Y. (N.Y.S.) 824, 1941 N.Y. LEXIS 1793 (N.Y. 1941).

A judgment was for the plaintiff where it appeared that plaintiff's testator, while crossing a street, was struck by the defendant's automobile; that defendant had proceeded about three or four hundred feet east of an intersection when he first saw the testator about ten or twelve feet from the front of his car; that he did not sound his horn; that the only lights defendant had on his car were his dim lights and the evidence justified the jury in finding that this section had been violated. Nilson v Oppenheimer, 260 A.D. 670, 23 N.Y.S.2d 621, 1940 N.Y. App. Div. LEXIS 4687 (N.Y. App. Div. 1940), reh'g denied, 261 A.D. 828, 25 N.Y.S.2d 997, 1941 N.Y. App. Div. LEXIS 7645 (N.Y. App. Div. 1941), aff'd, 285 N.Y. 824, 35 N.E.2d 498, 285 N.Y. (N.Y.S.) 824, 1941 N.Y. LEXIS 1793 (N.Y. 1941).

Where defendant's car was traveling with headlamps "dim" when accident in suit occurred and there was varying testimony as to illumination afforded by street lights, all relevant provisions of this section, subd. 3, should have been read, and jury should have been instructed to determine first, what general conditions as to light were, second, what headlamps were required to be used under subd. 3, and then, whether a violation of this section had occurred which had been proximate cause of accident. Hanratty v Bartley, 268 A.D. 512, 51 N.Y.S.2d 878, 1944 N.Y. App. Div. LEXIS 3206 (N.Y. App. Div. 1944).

Motorist did not violate CLS Veh & Tr § 375(3) when she flipped her high beams on and off to inform oncoming motorists of presence of police patrol car. People v Lauber, 162 Misc. 2d 19, 617 N.Y.S.2d 419, 1994 N.Y. Misc. LEXIS 439 (N.Y. App. Term 1994).

It is not contributory negligence where plaintiff, upon entering a village, lowered his headlight beam and did not see an excavation in the street, which was unmarked, since upon entering the congested part of a village he was required by statute to lower his lights. Smith v Pleasantville, 20 N.Y.S.2d 594, 1940 N.Y. Misc. LEXIS 1825 (N.Y. J. Ct. 1940).

15. —Rear lights or reflectors

Town justice erred by concluding that a tractor defendant was driving on the date he was issued a simplified traffic information for operating a motor vehicle without rear lights, in violation of N.Y. Veh. & Traf. Law § 376, was not a motor vehicle under N.Y. Veh. & Traf. Law §§ 375 or 376. People v Berrus, 1 N.Y.3d 535, 770 N.Y.S.2d 691, 802 N.E.2d 1089, 2003 N.Y. LEXIS 3981 (N.Y. 2003).

The failure to have a red light on the rear of a truck trailer is prima facie negligence under this section. Lewis v Rowland, 225 A.D. 25, 232 N.Y.S. 71, 1928 N.Y. App. Div. LEXIS 8732 (N.Y. App. Div. 1928).

The failure of defendant to display a rear light on his motor vehicle one-half hour after sunset justified the finding of an inference of negligence and, therefore, the complaint as to that defendant was improperly dismissed, and a new trial should be granted. Brown v McCullough, 240 A.D. 381, 270 N.Y.S. 37, 1934 N.Y. App. Div. LEXIS 10655 (N.Y. App. Div.), aff'd, 265 N.Y. 652, 193 N.E. 429, 265 N.Y. (N.Y.S.) 652, 1934 N.Y. LEXIS 1239 (N.Y. 1934).

The state was not liable because of failure to erect reflector signs at approach to curve and underpass on state highway for damages resulting from collision on misty night between approaching automobile and motorist who alleged that he did not see signs erected on side of highway, but did observe a curve ahead beyond which he could not see and that as he neared underpass he stepped on the brakes erroneously believing that underpass might be too narrow to permit passage of two automobiles simultaneously and skidded on the damp roadway into approaching automobile, since proximate cause of accident was skidding and not absence of reflector signs. Vande Walker v State, 253 A.D. 226, 2 N.Y.S.2d 477, 1937 N.Y. App. Div. LEXIS 5129 (N.Y. App. Div. 1937), rev'd, 278 N.Y. 454, 17 N.E.2d 128, 278 N.Y. (N.Y.S.) 454, 1938 N.Y. LEXIS 1324 (N.Y. 1938).

Evidence held to sustain judgment for passenger in automobile which collided with rear of truck driven by defendant, on the ground that the truck was not provided with rear lights and reflectors required by law. Weyrauch v Linkletter, 255 A.D. 746, 6 N.Y.S.2d 874, 1938 N.Y. App. Div. LEXIS 4986 (N.Y. App. Div. 1938).

A judgment dismissing plaintiff's complaint on the merits was reversed and a new trial ordered in action for injuries suffered where plaintiff was struck by automobile being backed out of a vacant lot as plaintiff was about to board a bus at two A.M., and the jury could have found that if defendants had observed requirements of this section, subd. 2, as to lights, the accident could have been prevented. Kerner v Surface Transp. Corp., 262 A.D. 89, 28 N.Y.S.2d 126, 1941 N.Y. App. Div. LEXIS 5296 (N.Y. App. Div. 1941).

In narcotics prosecution, evidence adduced at suppression hearing indicates that stop of vehicle operated by defendant by police officer at 3:30 A.M. was reasonable, since it was based upon fact that it was being operated with one taillight in violation of Vehicle and Traffic Law § 375 (2) (a) (3) –officer properly ordered defendant to step out of car since defendant's glazed and bloodshot eyes, as well as odor of alcohol, alerted officer to defendant's possible intoxication–while officer administered "alcosensor" test, other officer shined his flashlight on inspection and registration stickers on vehicle's windshield to check validation dates–as he did so, that officer observed, in plain view, on floor of driver's side of vehicle, clear plastic bag, containing white powder, which, based on his training and experience, he believed to be cocaine–officer seized contraband and defendant was placed under arrest–upon returning to vehicle, officer retrieved two additional bags, also containing cocaine, which were also in plain view–decisional law permits seizure of articles which come into officer's plain view from lawfully obtained vantage point, and officer's use of flashlight was not unreasonable intrusion and did not convert proper observation into impermissible search–viewing, with aid of flashlight, of clear plastic bag containing white substance on floor of car by officer trained and experienced in field of narcotics constitutes probable cause to arrest defendant and seize contraband –warrantless search of vehicle, resulting in seizure of two other bags of cocaine, was authorized as search incident to arrest under plain view doctrine and under automobile exception to warrant requirement. People v Ricciardi, 149 A.D.2d 742, 540 N.Y.S.2d 526, 1989 N.Y. App. Div. LEXIS 5368 (N.Y. App. Div. 2d Dep't 1989).

In action for wrongful death of plaintiff's decedent, who sustained injuries causing his death when automobile in which he was riding collided with a parked truck, evidence, including testimony that no lights were on parked truck and that accident happened more than half hour before sunrise was sufficient to present question for the jury as to negligence of driver in leaving truck parked on the street unlighted. Van Horn v Messina, 3 A.D.2d 918, 162 N.Y.S.2d 604, 1957 N.Y. App. Div. LEXIS 5654 (N.Y. App. Div. 2d Dep't 1957), aff'd, 4 N.Y.2d 884, 174 N.Y.S.2d 466, 150 N.E.2d 769, 1958 N.Y. LEXIS 1035 (N.Y. 1958).

Defendants' manure spreader, which was being towed on a public highway at night by a farm tractor and was equipped with none of the lights specified in section 376 of the Vehicle and Traffic Law or in 15 NYCRR Part 43, was, as a matter of law, unlawfully upon the highway. Accordingly, in an action by plaintiffs, who struck the unlighted manure spreader from the rear, the trial court's charge that defendants were guilty of negligence as a matter of law was proper, although the court's reason for said instruction was premised upon an erroneous view of sections 375 and 376 of the Vehicle and Traffic Law; the error was only technical and does not warrant a new trial, either as a matter of law or in the interest of justice. Gentile v De Jong, 77 A.D.2d 167, 433 N.Y.S.2d 226, 1980 N.Y. App. Div. LEXIS 13009 (N.Y. App. Div. 3d Dep't 1980), app. denied, 53 N.Y.2d 601, 1981 N.Y. LEXIS 3342 (N.Y. 1981).

Defendant in personal injury action was not entitled to summary judgment where fact issues existed as to whether she violated CLS Veh & Tr § 375(2)(a)(1) and (3) by failing to display lighted tail lights on vehicle she was attempting to park; unexcused violation of statute constitutes prima facie evidence of negligence and it is for jury to determine whether violation was proximate cause of accident. Tepoz v Sosa, 241 A.D.2d 449, 663 N.Y.S.2d 831, 1997 N.Y. App. Div. LEXIS 7282 (N.Y. App. Div. 2d Dep't 1997).

Requirement of subd 2(a) of above statute that motor vehicle on public highway must display lighted lamp on rear thereof may be found to be violated without proof of knowledge on part of violator, since such traffic infraction is only malum prohibitum and hence requires no proof of knowledge of violation in order to complete offense. People v Attaldo, 44 Misc. 2d 772, 255 N.Y.S.2d 188, 1964 N.Y. Misc. LEXIS 1133 (N.Y. County Ct. 1964).

Offense of operating vehicle on highway without displaying lighted lamp on rear is malum prohibitum and not malum in se, and conviction does not require proof of knowledge on the part of the violator. People v Attaldo, 44 Misc. 2d 772, 255 N.Y.S.2d 188, 1964 N.Y. Misc. LEXIS 1133 (N.Y. County Ct. 1964).

Order granting suppression motion was error because the trial court's sua sponte experiment to determine that the deputy did not see white light coming from defendant's tail light as he testified and to rule that the deputy's traffic stop of defendant for not having a red tail light as required by N.Y. Veh. & Traf. Law § 375(2)(a)(3) was improper; N.Y. Veh. & Traf. Law § 375 required a tail light to display only red light. Considering the evidence and ignoring the trial court's improper experiment, the deputy lawfully stopped defendant's vehicle, requiring denial of the suppression motion on that basis. People v Allen, 90 A.D.3d 1082, 933 N.Y.S.2d 756, 2011 N.Y. App. Div. LEXIS 8532 (N.Y. App. Div. 3d Dep't 2011).

16. Brakes

In automobile negligence action, jury's finding that defendant, who stated that collision was caused by failure of brakes on his automobile, exercised reasonable care sufficient to excuse his violation of statute requiring that every motor vehicle be provided with adequate brakes in good working order and sufficient to control vehicle at all times, was against weight of evidence, in absence of any evidence as to what caused brakes' failure or what defect in brakes was. Alongi v Beuter, 286 A.D. 990, 144 N.Y.S.2d 756, 1955 N.Y. App. Div. LEXIS 4857 (N.Y. App. Div. 1955).

Plaintiff was employed as truck driver to pick up bulk milk at farms and haul it to defendant's facilities; while making "hairpin" turn, with load of 45,000 pounds of milk, tractor trailer began to jackknife and rolled over, causing plaintiff injury–although it was possible to find brakes on vehicle were not adequate under Vehicle and Traffic Law § 375, and defendant was notified of this condition before plaintiff's accident and failed to correct it, this finding would lead only to inference of negligence; plaintiff must also show by fair preponderance of credible evidence that such negligence, if found, was proximate cause of his accident; plaintiff admitted truck had no baffles to prevent load shifts, shifting occurs in trailers when not fully loaded, shifting was especially common on sharp turns, he was traveling at 60 miles per hour 500 feet before exit and left 183-foot skid mark, and brake locking problem he had previously experienced caused no incident for two months he continued to drive after he discovered it–in view of these admissions, plaintiff did not sustain burden imposed upon him in regard to issue of proximate cause; Supreme Court, therefore, correctly dismissed plaintiff's case at close of his proof. Peck v Tuscan Dairy Farms, Inc., 169 A.D.2d 1027, 565 N.Y.S.2d 307, 1991 N.Y. App. Div. LEXIS 827 (N.Y. App. Div. 3d Dep't 1991).

In an action for damages sustained by plaintiff, a passenger in a parked car, when the foot brake on defendant's car failed as he was attempting to park it behind the parked vehicle and defendant was unable to stop the car with the hand brake, negligence of defendant in operating without adequate brakes was a question for the jury. Wheeler v Rabine, 15 A.D.2d 407, 224 N.Y.S.2d 483, 1962 N.Y. App. Div. LEXIS 11373 (N.Y. App. Div. 3d Dep't 1962).

With respect to actions for property damages sustained to plaintiffs' automobiles, when struck by defendant's truck due to failure of its brakes while descending a hill with a heavy load, testimony of defendant's driver that the brakes had previously been working all right did not ipso facto absolve defendant-owner from negligence, and, in the absence of evidence as to previous inspection of the brakes or cause of their failure, applicability of § 1 of this section, requiring brakes to be in working order, was a question of fact for the trial judge to determine. Manny v Casale, 15 A.D.2d 857, 224 N.Y.S.2d 291, 1962 N.Y. App. Div. LEXIS 11434 (N.Y. App. Div. 3d Dep't 1962).

Under the requirement of subd 1 of above statute that every motor vehicle shall be provided with adequate brakes, if person drives such vehicle with actual notice of defective brakes, his negligence is active and bars his recovery for any resulting accident. Alfano v Amchir, 23 A.D.2d 659, 257 N.Y.S.2d 2, 1965 N.Y. App. Div. LEXIS 4765 (N.Y. App. Div. 2d Dep't 1965).

In action for personal injuries against used car dealer, allegedly caused by failure of brakes on car recently purchased, it was error to direct verdict for defendant at close of plaintiff's evidence where there were sufficient questions of fact raised to warrant submission of the issue of liability to the jury in view of this section and § 417 of the Vehicle and Traffic Law. Gluck v Royal Motors, Inc., 24 A.D.2d 442, 260 N.Y.S.2d 882, 1965 N.Y. App. Div. LEXIS 3740 (N.Y. App. Div. 1st Dep't 1965).

A prosecution for an inadequate emergency brake is proper, since an emergency brake is not for parking purposes only. People v Cicardo, 250 N.Y.S. 477, 140 Misc. 332, 1931 N.Y. Misc. LEXIS 1350 (N.Y. Magis. Ct. 1931).

A violation of provision of Vehicle and Traffic Law regulating braking equipment of motor vehicles is a misdemeanor and therefore a crime. People v Pulizzi, 106 N.Y.S.2d 680, 199 Misc. 405, 1950 N.Y. Misc. LEXIS 2557 (N.Y. Magis. Ct. 1950).

The meaning and implication of New York City traffic regulations making it unlawful to operate a motor vehicle whose brakes do not comply with standards established by regulation are at least as malum prohibitum as subdivision of Vehicle and Traffic Law regulating braking equipment of motor vehicles and mere inadequacy of brakes makes out a prima facie case of violation of regulation. People v Pulizzi, 106 N.Y.S.2d 680, 199 Misc. 405, 1950 N.Y. Misc. LEXIS 2557 (N.Y. Magis. Ct. 1950).

In a motion to dismiss an indictment charging the defendant with criminally negligent homicide and reckless endangerment of life in the first and second degrees, arising out of an accident wherein the defendant passed a stopped school bus and struck the victim disembarking from the bus, the prior conviction of the defendant, based upon his guilty pleas, of driving without adequate brakes and passing a stopped school bus, a misdemeanor and traffic violation respectively, did not bar prosecution under the indictment. People v Taylor, 66 Misc. 2d 1058, 322 N.Y.S.2d 818, 1971 N.Y. Misc. LEXIS 1530 (N.Y. County Ct. 1971).

17. —Notice of defect

Subdivision 1 does not impose absolute liability for violation of its provisions regardless of negligence, and where the owner of the automobile had no previous knowledge that his brakes were inadequate or not in working order or insufficient to control the vehicle the question of the defendant's negligence should be submitted to the jury. Schaeffer v Caldwell, 273 A.D. 263, 78 N.Y.S.2d 652, 1948 N.Y. App. Div. LEXIS 4581 (N.Y. App. Div. 1948).

Under requirement of subd 1 of above statute that every motor vehicle shall be provided with adequate brakes, liability of owner thereof for noncompliance is not absolute; he is only required to take reasonable steps to inspect brakes and to ascertain their safety. He is not in class of supplier of dangerous instrumentality who has a duty to inspect. And although it was held on facts before court that he was charged with constructive notice of the defect in his brakes, such owner was not in pari delicto with creator of such defect; as between them, the owner may be found passively negligent and such creator actively negligent. Alfano v Amchir, 23 A.D.2d 659, 257 N.Y.S.2d 2, 1965 N.Y. App. Div. LEXIS 4765 (N.Y. App. Div. 2d Dep't 1965).

Owner of automobile was not in class of supplier of dangerous instrumentality with duty to inspect but owner was charged with constructive notice of defect in brakes. Alfano v Amchir, 23 A.D.2d 659, 257 N.Y.S.2d 2, 1965 N.Y. App. Div. LEXIS 4765 (N.Y. App. Div. 2d Dep't 1965).

In action by truck driver for injuries sustained in accident which occurred when brakes locked on trailer which contained less than full load of milk while driver exited highway via hairpin turn, court properly dismissed case at close of driver's proof, notwithstanding that evidence was sufficient to establish that brakes were not adequate under CLS Veh & Tr § 375 and that defendant trailer owner was notified of condition and failed to correct it, where driver admitted that trailer had no baffles to prevent shifting of load and that shifting was common on sharp turns, that he was speeding before he entered turn and left 183-foot skid mark, and that he was aware of brake problem but continued to drive with trailer. Peck v Tuscan Dairy Farms, Inc., 169 A.D.2d 1027, 565 N.Y.S.2d 307, 1991 N.Y. App. Div. LEXIS 827 (N.Y. App. Div. 3d Dep't 1991).

A municipality is liable for damage caused by its fire truck, responding to a fire alarm, where the truck failed to stop due to inadequate brakes since the brakes were of an exposed type, so that when wet they would not take hold, thus constituting a violation of subd. 1 of this section. Hardin v Schenectady, 278 N.Y.S. 28, 154 Misc. 411, 1935 N.Y. Misc. LEXIS 1018 (N.Y. County Ct. 1935).

A judgment of conviction of a defendant for a violation of this section was reversed, where the fair inference from the uncontroverted proof is that the defendant had provided his automobile with adequate brakes; that on the day in question his automobile was so equipped and that he had no knowledge of any defect in the brakes; and that, while on the road in a sparsely settled location, an accident occurred to a brake rod on one of the wheels which, in the exercise of reasonable care, could not have been foreseen; and that, while proceeding to the nearest place where he could repair the broken rod or have it repaired, he was arrested. People v De Witt, 25 N.Y.S.2d 236, 175 Misc. 481, 1940 N.Y. Misc. LEXIS 2573 (N.Y. County Ct. 1940).

Subdivision of Vehicle and Traffic Law regulating braking equipment of motor vehicles does not impose absolute liability for violation of its provisions regardless of negligence and whether exercise of reasonable care will excuse observance of statute is a question for jury. People v Pulizzi, 106 N.Y.S.2d 680, 199 Misc. 405, 1950 N.Y. Misc. LEXIS 2557 (N.Y. Magis. Ct. 1950).

The provision of subdivision 1 requiring every motor vehicle, operated or driven upon the public highway, to be provided with adequate brakes and steering mechanism in good working order, does not impose absolute liability for violation of same regardless of negligence, since it is for the jury to determine whether the exercise of reasonable care would excuse observance of the statute. Where the defendant's papers showed what caused the failure and what the defects were in the brakes on his vehicle but that they had no prior knowledge of same, a triable issue of fact was raised. Lepke v Sclafani & Sons, Inc., 20 Misc. 2d 50, 192 N.Y.S.2d 58, 1959 N.Y. Misc. LEXIS 3040 (N.Y. Sup. Ct. 1959).

In prosecution for failing to maintain sufficient brakes in violation of CLS Veh & Tr § 375(1), based on inspection of defendant's car after accident involving fatality, which revealed noncompliance with brake efficiency standards, defendant's motion to dismiss would be granted due to People's failure to make prima facie showing that defendant had any knowledge or reason to believe brakes were defective where defendant had experienced no problems with brakes, car had been inspected 8 months before accident and had proper inspection sticker affixed to windshield, and defendant's husband was former auto mechanic who himself inspected brakes and found them to be adequate. People v Troiano, 146 Misc. 2d 770, 552 N.Y.S.2d 541, 1990 N.Y. Misc. LEXIS 90 (N.Y. Dist. Ct. 1990).

After defendant's car was involved in a two-car accident which resulted in the death of the driver of the other vehicle, defendant's vehicle was impounded and an inspection of the vehicle revealed that one of the wheels did not meet the requirements promulgated by the Commissioner of Motor Vehicles prescribing standards of brake efficiency. Accordingly, defendant was charged with a violation of Vehicle and Traffic Law § 375 (1), insufficient brakes. Defendant had not experienced any problems with the braking system of the car, the car had been inspected some eight months before the accident and had a proper inspection sticker affixed to the windshield, and defendant's husband, who had been employed as an automobile mechanic, found the subject brake lining to be adequate. Defendant's motion for a trial order of dismissal due to the People's failure to make a prima facie showing that defendant had any knowledge or reason to believe that the brakes were defective is granted. Vehicle and Traffic Law § 375 provides that every motor vehicle operated on the highways of the State shall be provided with adequate brakes, and

that any violation shall constitute a misdemeanor. The statute is not one of strict liability, and proof of inadequate brakes does not create a presumption of knowledge or reasonable grounds to believe that such a defect existed. People v Troiano, 146 Misc. 2d 770, 552 N.Y.S.2d 541, 1990 N.Y. Misc. LEXIS 90 (N.Y. Dist. Ct. 1990).

18. Steering

To be guilty of a violation of this section one must either know that the steering apparatus is in a defective condition, or it must be such a defect that in the exercise of due care one should have discovered the defect. People v Foster, 117 N.Y.S.2d 641, 204 Misc. 507, 1952 N.Y. Misc. LEXIS 2056 (N.Y. County Ct. 1952).

Notwithstanding absence of any specific reference to scienter in Vehicle and Traffic Law section relating to operation of motor vehicle with defective steering mechanism, one must either know that his steering apparatus is in defective condition, or it must be such defect that in exercise of due care he would have discovered defect, in order to be guilty of violation of statute. People v Foster, 117 N.Y.S.2d 641, 204 Misc. 507, 1952 N.Y. Misc. LEXIS 2056 (N.Y. County Ct. 1952).

19. Muffler

Stop of vehicle in which defendant was passenger was not mere pretext to improperly stop vehicle for undisclosed purpose where (1) 2 officers stopped vehicle to issue driver ticket for having inadequate muffler, (2) while one officer was speaking to driver, second officer saw defendant throw small container out of window, and (3) second officer retrieved container, which contained cocaine, and placed defendant under arrest. People v Thomas, 210 A.D.2d 269, 619 N.Y.S.2d 733, 1994 N.Y. App. Div. LEXIS 12318 (N.Y. App. Div. 2d Dep't 1994), app. denied, 84 N.Y.2d 1039, 623 N.Y.S.2d 196, 647 N.E.2d 467, 1995 N.Y. LEXIS 646 (N.Y. 1995).

Police officer reasonably initiated a traffic stop of defendant's vehicle based upon the existence of probable cause because the officer observed the exhaust system on defendant's vehicle was excessively loud, N.Y. Veh. & Traf. Law § 375(31), and defendant was operating the vehicle without wearing a seatbelt, N.Y. Veh. & Traf. Law § 1229-c(3). People v Issac, 107 A.D.3d 1055, 968 N.Y.S.2d 631, 2013 N.Y. App. Div. LEXIS 3974 (N.Y. App. Div. 3d Dep't 2013).

Defendant's statement to the police and a loaded firearm, seized from the passenger of defendant's vehicle, were not subject to suppression because the police lawfully stopped defendant's vehicle for having an inadequate muffler; defendant lacked standing to challenge the search of the passenger because defendant was not the person against whom the search was directed. People v Gibson, 137 A.D.3d 1657, 27 N.Y.S.3d 772, 2016 N.Y. App. Div. LEXIS 2171 (N.Y. App. Div. 4th Dep't), app. denied, 27 N.Y.3d 1151, 62 N.E.3d 125, 39 N.Y.S.3d 385, 2016 N.Y. LEXIS 2573 (N.Y. 2016).

The use of any muffler which emits offensive noise constitutes a violation of this section since it is unnecessary and remote to the efficient and proper operation of the vehicle. People v James, 6 Misc. 2d 441, 162 N.Y.S.2d 927, 1957 N.Y. Misc. LEXIS 3017 (N.Y. City Ct. 1957).

Subdivision 1 of this section which provides that motor vehicles "shall have a suitable muffler or device to prevent unnecessary noise from exhaust gases" is unconstitutional for indefiniteness. People v Zanchelli, 8 Misc. 2d 1069, 169 N.Y.S.2d 197, 1957 N.Y. Misc. LEXIS 1968 (N.Y. County Ct. 1957).

The statute providing that every such motor vehicle shall have a suitable muffler or device to prevent unnecessary noise from exhaust gases is invalid as denying due process of law on the ground that it does not set up a sufficiently definite standard and is not sufficiently explicit to inform those who may become subjected to its penalty as to what conduct on their part will render them liable. People v Zanchelli, 8 Misc. 2d 1069, 169 N.Y.S.2d 197, 1957 N.Y. Misc. LEXIS 1968 (N.Y. County Ct. 1957).

To establish violation of motorcycle equipment statute providing, inter alia, that motorcycles shall have a suitable muffler or device to prevent unnecessary noise, the People must show either a decibel rating above that allowed by law under another statute or that the vehicle in question made noise in excess of what was usual for vehicles of its class, and mere showing that defendant's vehicle made noise was insufficient. People v Meyer, 63 Misc. 2d 580, 313 N.Y.S.2d 93, 1970 N.Y. Misc. LEXIS 1468 (N.Y. Spec. Sess. 1970).

20. Horn

A judgment was for the plaintiff where it appeared that plaintiff's testator, while crossing a street, was struck by the defendant's automobile; that defendant had proceeded about three or four hundred feet east of an intersection when he first saw the testator about ten or twelve feet from the front of his car; that he did not sound his horn; that the only lights defendant had on his car were his dim lights and the evidence justified the jury in finding that this section had been violated. Nilson v Oppenheimer, 260 A.D. 670, 23 N.Y.S.2d 621, 1940 N.Y. App. Div. LEXIS 4687 (N.Y. App. Div. 1940), reh'g denied, 261 A.D. 828, 25 N.Y.S.2d 997, 1941 N.Y. App. Div. LEXIS 7645 (N.Y. App. Div. 1941), aff'd, 285 N.Y. 824, 35 N.E.2d 498, 285 N.Y. (N.Y.S.) 824, 1941 N.Y. LEXIS 1793 (N.Y. 1941).

A statutory prohibition against sounding of horns on vehicles except as necessary to warn "a person or animal of danger," cannot be made the basis for imposing liability for alleged negligence in unnecessarily sounding a horn where injury results to the driver of another car who stops and gets out into the traffic to investigate why the horn is being sounded and is truck by a totally different vehicle. O'Brien v Falmore Cab Corp., 18 A.D.2d 1078, 239 N.Y.S.2d 380, 1963 N.Y. App. Div. LEXIS 4059 (N.Y. App. Div. 2d Dep't 1963), aff'd, 15 N.Y.2d 648, 255 N.Y.S.2d 868, 204 N.E.2d 200, 1964 N.Y. LEXIS 794 (N.Y. 1964).

Car stop was valid because an officer observed defendant use his horn to ask the police vehicle or a double parked vehicle to move, providing reasonable suspicion that defendant had used his horn in the absence of an emergency situation, in a violation of this provision. People v Velazquez, 64 Misc. 3d 575, 103 N.Y.S.3d 801, 2019 N.Y. Misc. LEXIS 2887 (N.Y. City Crim. Ct. 2019).

20.5. —Obstruction of view.

Trial court properly denied defendant's motion to suppress certain physical evidence obtained during a traffic stop because the suppression court's credibility finding is supported by the record, and a police officer's stop of a vehicle in which defendant was a passenger was not improper where the office had reasonable cause to believe that a sandal was hung from the rearview mirror in such a manner as to obstruct or interfere with the view of the operator through the windshield in violation of the Vehicle and Traffic Law. 131 A.D.3d 1258, 16 N.Y.S.3d 848, 2015 N.Y. App. Div. LEXIS 6969.

21. Mirror

In an action resulting from a bus-bicycle collision, the jury properly concluded that the transit authority was negligent in not equipping the bus with a right side mirror pursuant to Veh & Tr Law § 375(10)(a), which required that "every motor vehicle . . . be equipped with a mirror . . . [giving] a clear and full view . . . behind such vehicle," notwithstanding that Veh & Tr Law § 375(10)(b), which required right side mirrors on busses manufactured or assembled after July 1, 1970, was inapplicable to the pre-1970 bus involved in the case. Flynn v Manhattan & Bronx Surface Transit Operating Authority, 61 N.Y.2d 769, 473 N.Y.S.2d 154, 461 N.E.2d 291, 1984 N.Y. LEXIS 4055 (N.Y. 1984).

22. Safety glass

Police had reasonable basis on which to follow and attempt to detain defendant after observing that he was operating vehicle with damaged windshield. People v Cassidy, 252 A.D.2d 561, 675 N.Y.S.2d 890, 1998 N.Y. App. Div. LEXIS 8380 (N.Y. App. Div. 2d Dep't), app. denied, 92 N.Y.2d 923, 680 N.Y.S.2d 465, 703 N.E.2d 277, 1998 N.Y. LEXIS 3775 (N.Y. 1998).

Defendant was not entitled to suppress evidence seized from his vehicle because a police officer observed that defendant's vehicle had a cracked windshield and an object hanging from the rearview mirror, and, as such, the officer properly stopped defendant's vehicle upon observing violations of this statute. People v Parson, 122 A.D.3d 1441, 997 N.Y.S.2d 198, 2014 N.Y. App. Div. LEXIS 8139 (N.Y. App. Div. 4th Dep't 2014), aff'd, 27 N.Y.3d 1107,

55 N.E.3d 1058, 36 N.Y.S.3d 85, 2016 N.Y. LEXIS 1685 (N.Y. 2016).

In an action premised upon injuries allegedly sustained by plaintiff when she was struck by shattered glass from a window of a bus on which she was riding, a motion by defendant, New York City Transit Authority, for summary judgment would be denied, where a question of fact was presented as to whether the window glass of the bus in question conformed to safety standards on the date of the incident; it has been held that a failure to comply with equipment and safety standards as provided in the Vehicle and Traffic Law constitutes negligence. Lewis v New York City Transit Authority, 123 Misc. 2d 293, 473 N.Y.S.2d 704, 1984 N.Y. Misc. LEXIS 2995 (N.Y. Civ. Ct. 1984).

23. Flares

In an action to recover for personal injuries and for damages to a truck, the plaintiff, driving motor truck south on state highway, more than one-half hour after sunset, ran into defendant's trailer parked on westerly lane, without lights or flares, judgment in favor of plaintiff; trial justice instructed jury as to duties of each party under various provisions in this section and former §§ 56 and 58 and submitted to them question as to defendant's negligence and plaintiff's freedom from contributory negligence. Lonstein v Onondaga Freight Corp., 290 N.Y. 735, 49 N.E.2d 1005, 290 N.Y. (N.Y.S.) 735, 1943 N.Y. LEXIS 1347 (N.Y. 1943).

Where a truck was parked under a bridge light, but no flares were lighted it was error to charge that this section, subd. 17, had no application and that there was no obligation to use flares; it was for the jury to determine whether defendant should have placed lighted flares as a warning. Stieglitz v Stewart, 252 A.D. 378, 300 N.Y.S. 203, 1937 N.Y. App. Div. LEXIS 5670 (N.Y. App. Div. 1937).

With respect to damage sustained when a tractor-trailer driven by plaintiff ran into the rear end of another tractor-trailer, driven by defendant, which has been left parked partly on the highway when the driver experienced motor trouble and left the vehicle to go in search of help with the trailer lights left on but without putting out flares as required by subd. 17 of this section, contributory negligence of plaintiff in failing to observe the other vehicle in time to avoid a collision was a question for the jury. Neish v Walsh, 15 A.D.2d 716, 223 N.Y.S.2d 576, 1962 N.Y. App. Div. LEXIS 11805 (N.Y. App. Div. 3d Dep't 1962).

Evidence presented jury question as to whether plaintiff was guilty of contributory negligence in failing to observe defendant's tractor-trailer unit which was stopped in the nighttime with a portion of the unit on paved portion of highway, without flares having been placed. Neish v Walsh, 15 A.D.2d 716, 223 N.Y.S.2d 576, 1962 N.Y. App. Div. LEXIS 11805 (N.Y. App. Div. 3d Dep't 1962).

Trial court erred in failing to charge jury that fact defendant stopped his vehicle on a highway without putting out flares or other emergency devices in controvention of § 375, was negligence per se. McConnell v Nabozny, 110 A.D.2d 1060, 489 N.Y.S.2d 24, 1985 N.Y. App. Div. LEXIS 48938 (N.Y. App. Div. 4th Dep't 1985).

24. Vehicles stopped on or near highway

In an action to recover for personal injuries and for damages to a truck, the plaintiff, driving motor truck south on state highway, more than one-half hour after sunset, ran into defendant's trailer parked on westerly lane, without lights or flares, judgment in favor of plaintiff; trial justice instructed jury as to duties of each party under various provisions in this section and former §§ 56 and 58 and submitted to them question as to defendant's negligence and plaintiff's freedom from contributory negligence. Lonstein v Onondaga Freight Corp., 290 N.Y. 735, 49 N.E.2d 1005, 290 N.Y. (N.Y.S.) 735, 1943 N.Y. LEXIS 1347 (N.Y. 1943).

This section was applicable where an accident took place more than a half an hour before sunrise and the defendant's truck was parked on a highway with no lights on it. Van Horn v Messina, 3 A.D.2d 918, 162 N.Y.S.2d 604, 1957 N.Y. App. Div. LEXIS 5654 (N.Y. App. Div. 2d Dep't 1957), aff'd, 4 N.Y.2d 884, 174 N.Y.S.2d 466, 150 N.E.2d 769, 1958 N.Y. LEXIS 1035 (N.Y. 1958).

With respect to damage sustained when a tractor-trailer driven by plaintiff ran into the rear end of another tractor-trailer, driven by defendant, which had been left parked partly on the highway when the driver experienced motor trouble and left the vehicle to go in search of help with the trailer lights left on but without putting out flares as required by subd. 17 of this section, contributory negligence of plaintiff in failing to observe the other vehicle in time to avoid a collision was a question for the jury. Neish v Walsh, 15 A.D.2d 716, 223 N.Y.S.2d 576, 1962 N.Y. App. Div. LEXIS 11805 (N.Y. App. Div. 3d Dep't 1962).

Trial court erred in failing to charge jury that fact defendant stopped his vehicle on highway without putting out flares or other emergency devices in controvention of § 375 was negligence per se. McConnell v Nabozny, 110 A.D.2d 1060, 489 N.Y.S.2d 24, 1985 N.Y. App. Div. LEXIS 48938 (N.Y. App. Div. 4th Dep't 1985).

Jury verdict finding no negligence by town bus driver was against weight of evidence in action which arose when plaintiff was struck by automobile while assisting bus driver in removing deer carcasses from highway where it was uncontradicted that bus driver failed to place triangle reflectors to front and rear of stopped school bus, which plainly violated CLS Veh & Tr § 375(17) and constituted negligence in and of itself; further, although court correctly charged that statutory violation constituted negligence in its general instructions to jury at close of proof, it erroneously told jury, in response to subsequent question, that it was merely "evidence of negligence." Goode v Meyn, 165 A.D.2d 436, 568 N.Y.S.2d 472, 1991 N.Y. App. Div. LEXIS 4222 (N.Y. App. Div. 3d Dep't 1991).

Defendants' conduct could not be deemed proximate cause of rear-end collision, even if their vehicle were illegally stopped on shoulder without any warning lights, where plaintiffs' vehicle was travelling, in daylight, in left westbound lane of interstate at speed of 70 to 80 miles per hour, and it abruptly changed to right lane and then onto shoulder, where it smashed into right rear of defendant's trailer. Lectora v Gundrum, 225 A.D.2d 738, 640 N.Y.S.2d 202, 1996 N.Y. App. Div. LEXIS 3139 (N.Y. App. Div. 2d Dep't), app. denied, 88 N.Y.2d 807, 647 N.Y.S.2d 164, 670 N.E.2d 448, 1996 N.Y. LEXIS 1605 (N.Y. 1996).

The parking of road maintenance equipment at night, partially on the road and shoulder, for the convenience of the highway department, improperly lighted, is negligence on the part of the state. McLane v State, 53 N.Y.S.2d 194, 1945 N.Y. Misc. LEXIS 1470 (N.Y. Ct. Cl. 1945).

Where truck was left standing diagonally in a street in violation of former § 88 and without lights in violation of this section responsibility for foreseeing accidents which might be claimed of driver might also be claimed of bystander who went into street to look at injuries to truck and so he has no action against truck owner for his injuries arising from such accident. Levine v Shell Eastern Petroleum Products, Inc., 73 F.2d 292, 1934 U.S. App. LEXIS 2673 (2d Cir. N.Y. 1934), cert. denied, 294 U.S. 719, 55 S. Ct. 545, 79 L. Ed. 1251, 1935 U.S. LEXIS 172 (U.S. 1935).

25. Passing stopped school bus

There is no requirement that school buses must display flashing red lights when receiving or discharging pupils on a private road owned and maintained by a school district; any extension of the law in such regard is properly a matter for the legislature. Aridas v Caserta, 53 A.D.2d 853, 385 N.Y.S.2d 586, 1976 N.Y. App. Div. LEXIS 13682 (N.Y. App. Div. 2d Dep't 1976), aff'd in part, 41 N.Y.2d 1059, 396 N.Y.S.2d 170, 364 N.E.2d 835, 1977 N.Y. LEXIS 2059 (N.Y. 1977).

In prosecution for violation of Vehicle and Traffic Law provision pertaining to overtaking and passing school bus having a visual signal as specified elsewhere in the Vehicle and Traffic Law, to sustain a conviction the people need only to prove substantial, not strict, compliance with the other Vehicle and Traffic Law provision pertaining to the specifications for such signal. People v Geiselmann, 26 Misc. 2d 34, 204 N.Y.S.2d 272, 1960 N.Y. Misc. LEXIS 2551 (N.Y. County Ct. 1960).

Where a vehicle is marked and equipped as required for school buses under subd. 20 of this section, in a prosecution for illegally passing such a bus it is not necessary to prove anything further in order to establish that the vehicle passed was a school bus. People v Praete, 32 Misc. 2d 595, 228 N.Y.S.2d 474, 1962 N.Y. Misc. LEXIS 3829 (N.Y. Spec. Sess. 1962).

Conviction of a motorist for passing a parked school bus cannot stand where the prosecution fails to prove that a flashing red signal lamp was affixed to the rear of the bus no more than six inches below its top. People v Cuskley, 44 Misc. 2d 436, 254 N.Y.S.2d 187, 1964 N.Y. Misc. LEXIS 1386 (N.Y. App. Term 1964).

In a motion to dismiss an indictment charging the defendant with criminally negligent homicide and reckless endangerment of life in the first and second degrees, arising out of an accident wherein the defendant passed a stopped school bus and struck the victim disembarking from the bus, the prior conviction of the defendant, based upon his guilty pleas, of driving without adequate brakes and passing a stopped school bus, a misdemeanor and traffic violation respectively, did not bar prosecution under the indictment. People v Taylor, 66 Misc. 2d 1058, 322 N.Y.S.2d 818, 1971 N.Y. Misc. LEXIS 1530 (N.Y. County Ct. 1971).

Defendant was improperly convicted of failing to stop for a school bus since there was no proof that the school bus was in compliance with N.Y. Veh. & Traf. Law § 375(20); the bus could transport less than six children, and there was only one "SCHOOL BUS" sign, and its lettering and its background (white) failed to conform to the requirements of § 375(20). People v D'Agostino, 852 N.Y.S.2d 596, 18 Misc. 3d 92, 2007 N.Y. Misc. LEXIS 8417 (N.Y. App. Term 2007).

In a prosecution of a motorist for passing a stopped school bus the burden of establishing that the motorist passed the school bus and that it displayed the proper signal lights was upon the people. People v Belfer, 141 N.Y.S.2d 124, 1955 N.Y. Misc. LEXIS 2480 (N.Y. County Ct. 1955).

In prosecution of motorist for failing to stop for school bus unloading passengers, evidence was insufficient to establish that vehicle was such as complied with requirements of statute for school buses. People v Belfer, 141 N.Y.S.2d 124, 1955 N.Y. Misc. LEXIS 2480 (N.Y. County Ct. 1955).

In prosecution under statute prohibiting motorist from passing school bus while it is receiving or discharging passengers, burden of establishing that motorist passed school bus which displayed proper signal lights as required by statute is upon state. People v Belfer, 141 N.Y.S.2d 124, 1955 N.Y. Misc. LEXIS 2480 (N.Y. County Ct. 1955).

Defective tire or lack of inspection certificate would not give rise to necessary suspicion for police officer, who has no probable cause to make arrest for driving while intoxicated, to demand that motorist give him a breath sample under statute authorizing officer to demand sample of breath after violation of any provision of the Vehicle and Traffic Law. People v Graser, 90 Misc. 2d 219, 393 N.Y.S.2d 1009, 1977 N.Y. Misc. LEXIS 2023 (N.Y. Town Ct. 1977).

26. Traffic stops

A criminal negligence conviction arising out of the negligent operation of an automobile should be reversed where prosecutor in opening statement discussed defendant's consumption of alcoholic beverages on night of accident but introduced no evidence of intoxication and successfully opposed motion by defense for disclosure of results of chemical blood tests. Instructions to jury adequately defined criminal negligence but became confused by further charges of statutory violations and common law negligence and may have led jury to believe that proof of ordinary negligence was sufficient. People v Lowe, 285 A.D. 207, 136 N.Y.S.2d 454, 1955 N.Y. App. Div. LEXIS 5477 (N.Y. App. Div. 1955).

Vehicle in which defendant was passenger was lawfully stopped for having broken headlight in violation of CLS Veh & Tr § 375(2)(a)(1), and thus weapon and bag of cocaine found in plain view on floor of vehicle were properly ruled admissible at trial. People v Lopez, 154 A.D.2d 715, 546 N.Y.S.2d 690, 1989 N.Y. App. Div. LEXIS 13748 (N.Y. App. Div. 2d Dep't 1989).

Police officer had probable cause to make a stop of defendant's vehicle because while it was argued that the officer knew that defendant was exempt under N.Y. Veh. & Traf. Law § 250(1) from the requirements of N.Y. Veh. & Traf. Law § 375(12-a)(b)(4) regarding window tinting based on the vehicle's Georgia plates, the officer did not know whether defendant was the vehicle owner, whether the vehicle was properly registered in Georgia, or whether the light transmittance complied with Georgia law and the rear window of defendant's vehicle appeared to transmit less than 70% light as required under § 375(12-a)(b)(4). People v Estrella, 48 A.D.3d 1283, 851 N.Y.S.2d 793, 2008 N.Y. App. Div. LEXIS 1141 (N.Y. App. Div. 4th Dep't), aff'd, 10 N.Y.3d 945, 862 N.Y.S.2d 857, 893 N.E.2d 134, 2008 N.Y. LEXIS 1926 (N.Y. 2008), cert. denied, 555 U.S. 1032, 129 S. Ct. 608, 172 L. Ed. 2d 457, 2008 U.S. LEXIS 8409 (U.S. 2008).

State trooper was justified in stopping defendant's vehicle for driving in the early morning hours and having his headlights on high beam while approaching the trooper's marked vehicle as such conduct was a violation of N.Y. Veh. & Traf. Law § 375(2)(b); thus, evidence of defendant's blood alcohol content was properly not suppressed in his prosecution for driving while intoxicated. People v Rorris, 52 A.D.3d 869, 859 N.Y.S.2d 272, 2008 N.Y. App. Div. LEXIS 4824 (N.Y. App. Div. 3d Dep't), app. denied, 11 N.Y.3d 741, 864 N.Y.S.2d 399, 894 N.E.2d 663, 2008 N.Y. LEXIS 3188 (N.Y. 2008).

Court properly refused to suppress tangible evidence obtained from defendant by police officers following the stop of the car in which he was the back seat passenger. Officers were authorized to stop the car under New York traffic law and the police conduct was justified from inception to every subsequent stage of the encounter. People v Booth, 158 A.D.3d 1253, 70 N.Y.S.3d 704, 2018 N.Y. App. Div. LEXIS 970 (N.Y. App. Div. 4th Dep't), app. denied, 31 N.Y.3d 1078, 103 N.E.3d 1247, 79 N.Y.S.3d 100, 2018 N.Y. LEXIS 1809 (N.Y. 2018).

Trial court did not err in refusing to suppress the handgun seized from a vehicle being driven by defendant following a traffic stop. The stop was justified because the officer's testimony established that he observed an excessively tinted window and that he measured the tint after the stop, thereby confirming that it was excessive, and the police were permitted to seize the handgun because it was observed in plain view on the floor behind the driver's seat of the vehicle. People v Swift, 185 A.D.3d 1442, 128 N.Y.S.3d 132, 2020 N.Y. App. Div. LEXIS 4178 (N.Y. App. Div. 4th Dep't 2020), app. denied, 2020 N.Y. LEXIS 3237 (N.Y. Dec. 8, 2020).

Denial of defendant's motion to suppress the baton recovered from the vehicle and his statements to the officer was proper because the record supported the supreme court's finding that the stop of the vehicle that he was driving was based upon the officer's observation of the vehicle driving at night with a defective headlight. And, based on the observation, the officer had probable cause to believe that a traffic violation occurred so as to permit a stop of his vehicle. People v Garcia, 2020 N.Y. App. Div. LEXIS 7356 (N.Y. App. Div. 2d Dep't 2020).

County court did not err in denying defendant's motion to suppress under the Fourth Amendment and N.Y. Const. art. I, § 12 because traffic stop was lawful as officer had probable cause to believe that defendant committed a traffic violation based on officer's observation that rear license plate of defendant's vehicle was inadequately lit as its numerals did not illuminate in the dark and that defendant was driving without a seatbelt. People v Blandford, 2021 N.Y. App. Div. LEXIS 85 (N.Y. App. Div. 3d Dep't 2021).

Where motorist is stopped for defective tire or for no inspection certificate and is arrested, search of vehicle or defendant or demand for breath sample may not be considered search and seizure incident to lawful arrest unless there are reasonable grounds for suspecting that officer is in danger or probable cause for believing that motorist is guilty of crime rather than simple traffic infraction. People v Graser, 90 Misc. 2d 219, 393 N.Y.S.2d 1009, 1977 N.Y. Misc. LEXIS 2023 (N.Y. Town Ct. 1977).

Arrestee's false arrest, false imprisonment, and malicious prosecution suit was dismissed because troopers lawfully stopped vehicle being driven by the arrestee for a violation of N.Y. Veh. & Traf. Law § 375(2)(a)(4) and did not inordinately prolong detention, during which drugs were discovered on the arrestee's person and in the vehicle, leading to the arrest and criminal charges. Anderson v State of New York, 901 N.Y.S.2d 500, 28 Misc. 3d 336, 2010 N.Y. Misc. LEXIS 963 (N.Y. Ct. Cl. 2010).

Police officer had probable cause to stop defendant's vehicle because the officer articulated credible facts, namely that one

taillight out of four on defendant's vehicle was not operating, establishing reasonable cause to believe that defendant violated this statute. People v Abrucci-Kohan, 52 Misc. 3d 919, 37 N.Y.S.3d 816, 2016 N.Y. Misc. LEXIS 949 (N.Y. J. Ct. 2016).

Defendant's motion to suppress all evidence obtained by police after stop of defendant's motor vehicle was granted because police officer's mistaken belief of N.Y. Veh. & Traf. Law § 375(2)(a)(3) was not objectively reasonable, and police lacked probable cause for the stop as there was no evidence that defendant committed any other traffic offense; testimony provided during hearing illustrated that officer based the stop on her belief that missing tail light constituted an equipment violation. People v Paniccia, 61 Misc. 3d 397, 82 N.Y.S.3d 859, 2018 N.Y. Misc. LEXIS 3629 (N.Y. City Ct. 2018).

Defendant's motion to suppress observational evidence, chemical test evidence, videotape evidence and statement evidence was granted because the stop of defendant's car was unlawful; the sole predicate for the traffic stop was police officer's observation of a travelling tinted vehicle, which to police officer was a violation of N.Y. Veh. & Traf. Law § 375 (12-a)(b)(1)-(3), however, the People failed to develop any testimony as to degree to which defendant's car windows were tinted. People v Anonymous, 60 Misc. 3d 405, 77 N.Y.S.3d 268, 2018 N.Y. Misc. LEXIS 1894 (N.Y. City Crim. Ct. 2018).

Arrestee's federal constitutional rights were not violated when police officer stopped and arrested him under CLS Veh & Tr § 155 and CLS CPL § 140.10(1)(a) after observing him driving with excessively tinted windows in violation of CLS Veh & Tr § 375, where he did not produce evidence of driver's license when asked, and search of "grab area" turned up nightstick which he was unable to prove he lawfully possessed; thus, 42 USCS § 1983 cause of action was properly dismissed. Woods v Candela, 921 F. Supp. 1140, 1996 U.S. Dist. LEXIS 4484 (S.D.N.Y.), aff'd, 104 F.3d 355, 1996 U.S. App. LEXIS 37989 (2d Cir. N.Y. 1996).

Arrestee's federal civil rights challenge to his arrest and conviction must fail, because trooper was authorized to stop him for excessively tinted windows in violation of CLS Veh & Tr Law § 375 12-a[b], was authorized to arrest him under CLS Veh & Tr Law § 155 and CPL § 140.10(1)(a), and was authorized to search grab area around arrestee which led to confiscation of nightstick. Woods v Candela, 921 F. Supp. 1140, 1996 U.S. Dist. LEXIS 4484 (S.D.N.Y.), aff'd, 104 F.3d 355, 1996 U.S. App. LEXIS 37989 (2d Cir. N.Y. 1996).

27. Miscellaneous

Trailers and semitrailers are "vehicles" within Vehicle and Traffic Law, but not "motor vehicles" within section thereof declaring motor vehicle owner liable for death or injuries resulting from negligent operation thereof by any person legally using it with owner's express or implied permission, especially since such law as whole clearly shows Legislature's purpose and intent to classify motor vehicles, trailers and other vehicles separately. Hennessy v Walker, 279 N.Y. 94, 17 N.E.2d 782, 279 N.Y. (N.Y.S.) 94, 1938 N.Y. LEXIS 802 (N.Y. 1938).

Where tractor and trailer equipment, in approaching a main intersection in a village, skidded onto a sidewalk and fire broke out in the tractor destroying plaintiff's adjacent building, in an action to recover for resulting damages, the judgment affirmed; the testimony that the condition of the road was the cause of the accident, judgment entered on verdict for defendant affirmed by Appellate Division and contentions of appellant based on alleged errors in the admission of evidence and in the charge to the jury. Saroodis v Liberty Motor Freight Lines, Inc., 290 N.Y. 804, 50 N.E.2d 231, 290 N.Y. (N.Y.S.) 804, 1943 N.Y. LEXIS 1404 (N.Y. 1943).

In action by bus driver who was hit by school bus being operated in reverse in school bus parking yard, verdict was properly directed in favor of defendant bus manufacturer at close of plaintiff's case with respect to claim that bus was defectively designed because it did not incorporate, as standard equipment, optional back-up alarm that would automatically sound when driver shifted it into reverse gear, where plaintiff's employer, having owned and operated school buses for decades and being aware that bus driver has blind spot when bus is operated in reverse, was highly knowledgeable consumer in better position than manufacturer to make risk-utility assessment, and it knew that back-up alarm was available but chose not to purchase it. Scarangella v Thomas Built Buses, Inc., 93 N.Y.2d 655, 695 N.Y.S.2d 520, 717 N.E.2d 679, 1999 N.Y. LEXIS 1432 (N.Y. 1999).

In a personal injury action, it was reversible error for the trial court to charge the jury that a "Go-cart" was not a motor vehicle within the meaning of the Vehicle and Traffic Law and that the equipment requirements of § 375 of that law does not apply thereto under evidence that the "Go-cart" was a construction of metal tubing about 4 ½ feet long, with 4 small tires, a steering wheel, a lawnmower type engine, and gas and braking pedals, without, however, a horn, a windshield or wipers, a signal device, a light or reflector, or a speedometer. Zapp v Ross Pontiac, Inc., 39 A.D.2d 739, 332 N.Y.S.2d 121, 1972 N.Y. App. Div. LEXIS 4693 (N.Y. App. Div. 2d Dep't 1972).

Notwithstanding broad constitutional home rule powers conferred on local government, county ordinance providing for licensing of school bus companies was unconstitutional and void not only because it conflicted with CLS Veh & Tr § 1604—which expressly prohibits local government entities from requiring licenses for use of public highways—but also because state has preempted field of student transportation by enacting CLS Educ §§ 3623 and 3624, CLS Trans § 140(2)(a) and (c), and CLS Veh & Tr § 375(20), (21), and (21-b); local government cannot impose additional layer of regulation where state legislature has evidenced its intent to preempt field, nor may it exercise its police powers inconsistently with state law, since doing so would thwart state's general laws and operation of state's overriding policy concerns. Board of Educ. of Farmingdale Union Free School Dist. v Gulotta, 157 A.D.2d 642, 549 N.Y.S.2d 740, 1990 N.Y. App. Div. LEXIS 257 (N.Y. App. Div. 2d Dep't 1990).

In action arising from collision in which driver backed his truck into plaintiffs' car, which was traveling behind truck in same direction before truck stopped and backed up, plaintiffs were entitled to partial summary judgment on issue of truck driver's negligence, defendants' counterclaim was properly dismissed, and defendants' motion for additional time to serve amended bill of particulars was properly denied where truck driver never noticed whether vehicles were traveling behind him in same direction, he was fully aware of many potential hazards associated with backing up, including existence of blind spot in rear, he neither exited truck nor sounded horn despite lack of rear movement warning devices, and he was issued violation for unsafe backing of vehicle to which he later pleaded guilty. Weather v North Am. Recycling Corp., 255 A.D.2d 666, 679 N.Y.S.2d 213, 1998 N.Y. App. Div. LEXIS 11675 (N.Y. App. Div. 3d Dep't 1998).

Because a triable issue of fact existed as to whether the owner and driver of a disabled truck violated N.Y. Veh. & Traf. Law §§ 375(17) and 49 C.F.R. §§ 392.22 and 393.95 by failing to set reflective triangles in place at the required distance from the truck, and because the trial court properly held the amnesiac plaintiff to a lesser standard of proof, the owner and driver were not entitled to summary judgment in the plaintiff's personal injury action. Franklin v 2 Guys from Long Pond, Inc., 50 A.D.3d 846, 858 N.Y.S.2d 186, 2008 N.Y. App. Div. LEXIS 3373 (N.Y. App. Div. 2d Dep't 2008).

Patrol officer had probable cause to stop defendant's vehicle because the officer believed defendant's vehicle had excessively tinted windows, N.Y. Veh. & Traf. Law § 375(12-a)(b), and the strong odor of marihuana emanating from the vehicle coupled with defendant's false statements provided the officer with a founded suspicion that criminality was afoot and permitted questions that focused on defendant's possible wrongdoing; thus, evidence of crack cocaine and digital scales that were recovered after defendant was subdued was properly not suppressed. People v Brock, 107 A.D.3d 1025, 968 N.Y.S.2d 624, 2013 N.Y. App. Div. LEXIS 3961 (N.Y. App. Div. 3d Dep't), app. denied, 21 N.Y.3d 1072, 974 N.Y.S.2d 321, 997 N.E.2d 146, 2013 N.Y. LEXIS 2975 (N.Y. 2013).

Police lawfully stopped defendant's car because the officer testified that the window tints on the car that defendant drove were dark, it was hard for the officer to see inside the car, and anything under 70 percent light transmittance was a summonsable offense. People v Bacquie, 154 A.D.3d 648, 62 N.Y.S.3d 425,

2017 N.Y. App. Div. LEXIS 6929 (N.Y. App. Div. 2d Dep't 2017), app. denied, 30 N.Y.3d 1113, 101 N.E.3d 979, 77 N.Y.S.3d 338, 2018 N.Y. LEXIS 537 (N.Y. 2018), cert. denied, 139 S. Ct. 102, 202 L. Ed. 2d 29, 2018 U.S. LEXIS 5178 (U.S. 2018).

Traffic stop of defendant's vehicle was justified because a trooper observed excessively tinted windows on defendant's vehicle. People v Rudolph, 170 A.D.3d 1258, 95 N.Y.S.3d 629, 2019 N.Y. App. Div. LEXIS 1659 (N.Y. App. Div. 3d Dep't), app. denied, 34 N.Y.3d 937, 133 N.E.3d 427, 109 N.Y.S.3d 724, 2019 N.Y. LEXIS 2787 (N.Y. 2019).

That part of a village ordinance prohibiting the spilling of certain materials upon the highways within the village was valid but a further portion of such ordinance requiring the use of metal or canvass coverings on certain vehicles to prevent such spillage was invalid as prescribing equipment, the authority to prescribe such a requirement never having been delegated to local subdivisions. New York Trap Rock Corp. v Roslyn, 66 Misc. 2d 334, 320 N.Y.S.2d 584, 1971 N.Y. Misc. LEXIS 1675 (N.Y. Sup. Ct. 1971).

A uniform traffic ticket can only be issued under Veh & Tr Law 375(35)(c) when the tire tread groove has been measured by a tread depth guage, and not solely on the basis of a visual inspection by the traffic officer. People v Putzer, 110 Misc. 2d 162, 442 N.Y.S.2d 36, 1981 N.Y. Misc. LEXIS 3055 (N.Y. J. Ct. 1981).

Defendant driver of a car equipped with a radar detector was improperly convicted under Veh & Tr Law § 375(30) for obstructing the view through the vehicle's windshield, where no standard existed under the statute for determination of what constituted an obstruction and the statute was therefore unconstitutional. People v Lew, 115 Misc. 2d 421, 454 N.Y.S.2d 225, 1982 N.Y. Misc. LEXIS 3703 (N.Y. County Ct. 1982).

Defendant could not be convicted of any crime for operating his car with nonworking defroster in violation of CLS Veh & Tr § 375(39) since that provision refers to "registration" and not "operation" of vehicles and does not provide any penal sanction for operation of non-complying vehicles. People v O'Neill, 134 Misc. 2d 536, 511 N.Y.S.2d 771, 1987 N.Y. Misc. LEXIS 2059 (N.Y. City Ct. 1987).

N.Y. Veh. & Traf. Law § 375(12-a)(b)(1), by its clear terms, permits "materials" to be affixed to a windshield provided they are limited to the uppermost six inches of the windshield; thus, defendant was not violating N.Y. Veh. & Traf. Law § 371(1) by operating a car that had a stencil stretching across the top five or six inches of the windshield. People v Huurman, 192 Misc. 2d 363, 746 N.Y.S.2d 553, 2002 N.Y. Misc. LEXIS 1251 (N.Y. J. Ct. 2002).

Police officers' mistaken belief that a vehicle had illegally tinted windows did not provide a sufficient basis for a traffic stop, as the officers' mistake was one of law, not fact. United States v Jenkins, 324 F. Supp. 2d 504, 2004 U.S. Dist. LEXIS 12884 (S.D.N.Y. 2004).

Sentence or execution of sentence imposing fine or imprisonment for violation of Vehicle and Traffic Law former § 15 may not be suspended. 1953 Ops St Compt File 259.

Notes to Unpublished Decisions

1. Safety glass

Unpublished decision: Defendant's motion to suppress the evidence obtained as a result of a traffic stop was denied where the court found that the officers had probable cause to stop the green sedan based on the suspected tint violation under N.Y. Veh. & Traf. Law § 375(12-a)(b). Dodd v Barnes, 279 F. Supp. 291, 1967 U.S. Dist. LEXIS 8054 (E.D. Tenn. 1967).

Agency Opinions

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1. In general

The city of Gloversville may not enact ordinances relating to equipment required on motor vehicles. 1974 NY Ops Atty Gen Mar 12.

Town constables may not affix a red light or use a siren on a motor vehicle. Nor may they exceed speed limits and violate other traffic rules. Town constables may affix emblems to town vehicles identifying them as constable vehicles. Town constables may not be used to assist other local governments requesting aid. 1981 NY Ops Atty Gen Feb 23 (informal).

Town constables as peace officers may issue uniform traffic tickets for violations of the Vehicle and Traffic Law and also may issue appearance tickets for violations of the Penal Law of less than felony grade if the town board has by local law authorized them to do so. 1980 Op St Compt No. 80-318, 1980 N.Y. Comp. LEXIS 332.

2. Constitutionality

For the purposes specified in Vehicle and Traffic Law, § 375, a city street is a public highway and the provisions of Vehicle and Traffic Law, § 375, relating to public highways do relate to city streets except as the content of any portion of that section of the law, by its own terms, can not relate to a city street and Vehicle and Traffic Law, § 375, subdivision 35, paragraph a, and subdivision 35-a, do apply to city streets. 1976 NY Ops Atty Gen June 17.

3. Applicability

Busses used in school transportation and also in franchise and charter operation are subject to the requirements of this section, subd. 20. 1947 NY Ops Atty Gen June 3.

4. Lights; generally

5. —Police vehicles

There is no statutory authority for the use of siren or red light by a constable on his privately owned automobile. 1952 NY Ops Atty Gen 22 (Informal), Feb 4; nor is there any statutory authority for the use of a siren or red light by a special deputy sheriff on his privately owned automobile. 1952 NY Ops Atty Gen 23 (Informal).

A village police chief, village policeman and town constables may not use red lights and sirens on their privately owned motor vehicles while being used in the performance of official police duties. 1958 NY Ops Atty Gen Jun 23 (informal).

A vehicle operated by a special deputy sheriff is not an authorized emergency vehicle and may not be equipped with a red light and siren. 1960 NY Ops Atty Gen July 6 (informal).

A town constable does not have the authority to affix a red light or use a siren on a motor vehicle, regardless of whether such vehicle is owned by the constable or the town; a town board has the authority to purchase a town motor vehicle for official duties only for the town constable; and, there is no authority of law for a town board to appoint a chief of town constables to direct the other constables. 1976 NY Ops Atty Gen Apr 22 (informal).

A village having a police department created under Village Law Article 8 or former Village Law § 188-a may authorize the police chief, deputy chief or assistant chief to install a siren and red light and/or certain white lights on his private motor vehicle to be used when (and only when) that vehicle is being operated by the officer on official village police department business while engaged in an emergency operation. 1980 NY Ops Atty Gen July 14 (informal).

Vehicles owned by City University of New York (CUNY) and operated by special patrolmen on its security and public safety force are "police vehicles" as defined in CLS Veh & Tr § 132-a; thus, those vehicles may display red or white flashing lights while engaged in emergency operations on CUNY property. 2000 NY Ops Atty Gen F 00-4.

Rear-facing blue lights may not, under current legislative scheme, be added to State Police vehicles. 2003 NY Ops Atty Gen F 2003-2.

Village, consistent with provisions of Veh & Tr L, may lease vehicle and dedicate its use as police vehicle, so that village may lease vehicle from police officer for specified period of time to be used as police vehicle; however, during period of lease, police officer would have no personal use of vehicle. NY Ops Atty Gen 89-7 (Informal).

6. —Fire department vehicles

Privately owned motor vehicles of volunteer fire department surgeons may not be equipped with sirens or visible red lights from a point directly in front of such vehicles. 1955 NY Ops Atty Gen 186 (informal).

A blue light may properly be displayed on a motor vehicle operated by a chief or assistant chief of a fire department. 1956 NY Ops Atty Gen June 19 (informal).

The chief of a volunteer fire department when responding to a fire alarm in his privately owned automobile may display a red light and use a siren. 1956 NY Ops Atty Gen Feb 23 (informal).

A fire truck returning from a fire may operate its red blinker signal. 1962 NY Ops Atty Gen May 18.

Subdivision 26 of this section does not preclude the placing of a siren on the private automobile of both an assistant chief of a volunteer fire department and a village police officer. 1962 NY Ops Atty Gen May 21.

A siren and flashing red light may be placed on the private automobile of a deputy chief of a volunteer fire department, but may be operated only when the vehicle is responding to a fire alarm. 1962 NY Ops Atty Gen June 28.

A red or white flashing light may be affixed to a vehicle ordinarily operated by a town fire co-ordinator and these lights may be displayed on the vehicle when it is engaged in an emergency operation and while it is returning from a fire or other emergency. N.Y. Op. Att'y Gen. No. 86-2.

Fire policemen may not affix red lights to their own vehicles, regardless of what duties they are engaged in. 1976 NY Ops Atty Gen June 4.

A county fire coordinator and the deputy fire coordinator may operate private vehicles with flashing red and white lights. The district fire coordinator and the ambulance coordinator could only operate such vehicles with red and white flashing lights when operated in official capacity under the direction of the county or deputy county fire coordinator. 1979 NY Ops Atty Gen Mar 21 (informal).

7. —Ambulances

A station wagon which may be used as an emergency ambulance for civil defense purposes and for emergency purposes in aid of the Civil Air Patrol may not be equipped with a flashing red light to be used only when the vehicle is devoted to civil defense or other emergency purposes. Such vehicles may however, use such colored lights as are authorized by applicable regulation of the New York State Civil Defense Commission when used for civil defense purposes. 1958 NY Ops Atty Gen Jul 16 (informal).

Paid off-duty employees of the ambulance service operated by the Town of Lyons may not, when they are responding to an emergency in their privately owned vehicles, display on such vehicles the flashing green light authorized by Vehicle and Traffic Law, § 375, subd 41, par 5. 1979 NY Ops Atty Gen May 11. (Informal).

8. —Civil defense vehicle

Privately owned vehicles used in civil defense emergency operations may not display the emergency lights permitted on civil defense emergency vehicles owned by the State, a county, town, city or village. 1972 NY Ops Atty Gen Apr 6 (informal).

9. —News media vehicle

Yellow flashing lights may be used on mobile radio and television news cars, provided the light source is no greater than 21-1 candle power. 1959 NY Ops Atty Gen Dec. 15 (informal).

10. —Rear lights or reflectors

The reflector requirements as stated in this section, subd. 2, apply only to motor vehicles using the public highways from one-half hour after sunset to one-half hour before sunrise. 1940 NY Ops Atty Gen Apr 24.

A civilian employed by the United States Government may not, by virtue of such employment, display a red light or a blue light on his privately owned automobile. 1952 NY Ops Atty Gen 27 (Informal).

It is not illegal for a person to have an unlighted red or unlighted blue light affixed to the front of his automobile. 1956 NY Ops Atty Gen Aug 24 (informal).

School district is not authorized to designate motor vehicles owned by district and operated by school district's superintendent, supervisor of transportation and health and safety coordinator as authorized emergency vehicles pursuant to CLS Veh & Tr Law; since vehicles owned and operated by school district do not meet any of criteria of authorized emergency vehicles, display of emergency lights is not permitted under CLS Veh & Tr Law § 375. NY Ops Atty Gen 88-74 (Informal).

11. Brakes

A conviction for reckless driving under former § 58, following within eighteen months upon a conviction for driving with inadequate brakes, former §§ 15 and 70 should carry with it punishment as a second offender. 1938 N.Y. Op. Att'y Gen. No. 192.

12. Mirror

Although the driver's view through the rear window is obstructed, if the motor vehicle is equipped with a mirror affording said driver a clear and full view to the rear, there is no violation of law. 1956 NY Ops Atty Gen Dec 4 (informal).

13. Safety glass

Under this section, a motor vehicle that is put together for the first time after January 1, 1934, and which is used to carry passengers for hire must be equipped with safety glass. 1935 N.Y. Op. Att'y Gen. No. 211.

14. Vehicles stopped on or near highway

A dirt road in a town, not formally laid out or dedicated to and accepted by the town though used by the public for 20 years or more, does not thereby become a highway unless during the same period it has been kept in repair and adopted by the public authorities. Such a road, not being a public road, is not a "street or highway" within the meaning of subd. 6 of this section, so that one is not guilty of violating that subdivision by parking or leaving a motor vehicle standing thereon without lights after sunset. 1953 NY Ops Atty Gen 83 (informal).

15. Miscellaneous

A dirt road in a town, not formally laid out or dedicated to and accepted by the town though used by the public for 20 years or more, does not thereby become a highway unless during the same period it has been kept in repair and adopted by the public authorities. Such a road, not being a public road, is not a "street or highway" within the meaning of subd. 6 of this section, so that one is not guilty of violating that subdivision by parking or leaving a motor vehicle standing thereon without lights after sunset. 1953 NY Ops Atty Gen 83 (informal).

Subdivision 1 of this section which prohibits attaching hand bills and other forms of advertisement to windshields or windshield wipers is considered inapplicable to vehicles left in a village owned metered commuter parking lot. 1963 NY Ops Atty Gen Nov 8.

There is substantial possibility that municipality lacks authority to pass local law prohibiting driver from holding and using hand-held mobile phone while operating motor vehicle on roads within County. 2001 NY Ops Atty Gen I 01-1.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 375-a, 376, 376-a, 401, 510, 514, 1163, 1174, 1202, 1640, 1650, 1660, 1801; CLS Penal § 270.00.

Authorized emergency vehicle, § 101.

Emergency operation, § 114-b.

Fire vehicle, § 115-a.

Hazard vehicle, § 117-a.

Hazardous operation, § 117-b.

Periodic inspection of air pollution equipment, § 301(c 2).

Motor vehicle sound level limits, § 386.

Promulgation of standards for crankcase ventilating systems and air contamitant emission control standards, CLS ECL § 19-0301.

Designation and classification of misdemeanors, CLS Penal §§ 55.05(2), 55.10(2).

New York state defense emergency act, CLS Unconsol ch 131.

Codes, Rules and Regulations:

Motor vehicle emissions. 6 NYCRR §§ 217-1.1 et seq.

Tinted glass in motor vehicles. 10 NYCRR § 69-7.1.

Standards of brake efficiency. 15 NYCRR §§ 41.1, 41.2.

Colored lights. 15 NYCRR §§ 44.1–44.6.

Emergency lighting equipment. 15 NYCRR §§ 45.1–45.5.

School bus equipment. 15 NYCRR §§ 46.1–46.5.

Splash guards. 15 NYCRR §§ 47.1–47.6.

Tires. 15 NYCRR §§ 51.1–51.6.

Traffic hazard warning devices. 15 NYCRR §§ 52.1–52.5.

Trailer hitches. 15 NYCRR §§ 57.1–57.6.

Rear-view mirrors. 15 NYCRR §§ 58.1–58.5.

Department of motor vehicles: rear-view mirrors and rear object detection devices. 15 NYCRR § 58.8.

Tamper resistant odometers. 15 NYCRR §§ 60.1 et seq.

Slow-moving vehicle emblem. 15 NYCRR §§ 68.1–68.8.

Caution arms on vehicles vending frozen desserts to pedestrians. 15 NYCRR §§ 69.1 et seq.

Warning placards on motor vehicles using hydrocarbon gas as a fuel source. 15 NYCRR §§ 70.1 et seq.

Auto theft prevention program. 15 NYCRR Part 72.

Federal Aspects:

National Traffic and Motor Vehicle Safety Act, 15 USCS §§ 1381 et seq.

Jurisprudences:

7A Am Jur 2d, Automobiles and Highway Traffic § 183 et seq.

8 NY Jur Automobiles and Other Vehicles § 148 et seq.

Law Reviews:

Liability of used car dealer for damages caused by defective condition of used automobile in course of demonstration. 21 St. John's L. Rev. 84.

Violation of "proper brakes" statute apparently excused by reasonable efforts to comply. 11 Syracuse L. Rev. 319.

Matthew Bender's New York Practice Guides: LexisNexis AnswerGuide New York Negligence § 2.09[1][a][ii][5] Identifying Applicable Theories of Liability in Motor Vehicle Cases.

LexisNexis AnswerGuide New York Negligence § 2.09[2][b] Identifying Applicable Theories of Liability in Motor Vehicle Cases.

LexisNexis AnswerGuide New York Negligence § 2.09 Identifying Applicable Theories of Liability in Motor Vehicle Cases.

Warren's Negligence in the New York Courts Ch. 228 (motor vehicle liability).

Texts: NY Pattern Jury Instructions 3d, PJI 2:86, 2:86.1.

Warren's Negligence in the New York Courts § 2.02 Defendant's duty of care.

Warren's Negligence in the New York Courts Ch. 228 Motor Vehicle Liability.

§ 375. Equipment. [Effective April 17, 2021]

1. (a) Every motor vehicle, operated or driven upon the public highways of the state, shall be provided with adequate brakes and steering mechanism in good working order and sufficient to control such vehicle at all times when the same is in use, and a suitable and adequate horn or other device for signaling, which horn or device shall produce a sound sufficiently loud to serve as a danger warning but shall not be used other than as a reasonable warning nor be unnecessarily loud or harsh.

(b) Every such motor vehicle shall be equipped with suitable wipers or other device which shall clear a sufficient area of the windshields to provide reasonable driving vision. (i) The use or placing of posters or stickers on windshields or rear windows of motor vehicles other than those authorized by the commissioner, is hereby prohibited. The attaching to windshields and windshield wipers of handbills and other forms of advertisements, is hereby prohibited.

(ii) In a city of one million or more, the attaching or affixing by any means whatsoever of handbills or other forms of advertisements to a motor vehicle is hereby prohibited. In any prosecution for an alleged violation of this subparagraph, there shall be a rebuttable presumption that the person whose name, telephone number, or other identifying information appears on any handbill or other form of advertisement attached or affixed to a motor vehicle shall be in violation of the provisions of this subparagraph.

(iii) Notwithstanding any other provision of law, in addition to those persons otherwise authorized to enforce this subdivision and adjudicate violations thereof, the provisions of subparagraph (ii) of this paragraph shall also be enforceable in a city having a population of one million or more by an agency or agencies designated for such purpose by the mayor of such city, and notices of violation may be returnable to the environmental control board of such city, which shall have the power to impose the monetary penalties provided in subdivision (b) of section eighteen hundred of this chapter. Notwithstanding any other provision of law, service of a notice of violation of subparagraph (ii) of this paragraph committed in such city may be made upon a person by first class mail, postage prepaid, and any such notice served by mail shall be returnable only to such environmental control board. Such service by first class mail shall be deemed complete upon mailing of the notice of violation, unless the notice of violation is returned to the sender by the United States postal service for any reason other than refusal of delivery. In addition, any notice of violation for a violation of subparagraph (ii) of this paragraph may be served by a means prescribed in article three of the civil practice law and rules or article three of the business corporation law. Notwithstanding any other provision of law, such penalties imposed by such environmental control board shall be paid into the general fund of such city.

(iv) Any final order issued pursuant to subparagraph (ii) of this paragraph by an environmental control board of a city having a population of one million or more shall constitute a judgment which may be entered in any place provided for the entry of civil judgments within the state, and may be enforced without court proceeding in the same manner as the enforcement of money judgments entered in civil actions. Notwithstanding the preceding sentence, before a judgment based upon a default may be so entered, such environmental control board

must have notified the respondent by first class mail in such form as such environmental control board may direct: (A) of the default decision and order and the penalty imposed; (B) that a judgment will be entered in any place provided for the entry of civil judgments in the state; and (C) that the entry of such judgment may be avoided by requesting a stay of default for good cause shown and either requesting a hearing or entering a plea pursuant to the rules of such environmental control board within thirty days of the mailing of such notice. No judgment based upon a default may be so entered by the environmental control board within thirty days of the mailing of such notice. No judgment based upon a default may be so entered by the environmental control board within less than sixty days from the completion of service by mail of the notice of violation as provided in subparagraph (iii) of this paragraph. Any requirement of any provision of law other than this subdivision that related to the manner of service of the notice of violation that precedes any final order of such environmental control board shall not apply to a final order issued pursuant to this subparagraph. A judgment entered pursuant to this subdivision shall remain in full force and effect for eight years.

(c) Every trailer and semi-trailer weighing more than one thousand pounds unladen and every trailer and semi-trailer manufactured or assembled on or after January first, nineteen hundred seventy-one having a registered maximum gross weight, an actual gross weight or gross weight consisting of the unladen weight and maximum carrying capacity recommended by the manufacturer in excess of three thousand pounds also shall be equipped with adequate brakes in good working order if operated or drawn on the public highways of this state. Every trailer while being drawn upon the public highways of this state shall be so attached to the vehicle drawing the same as to prevent the wheels of such trailer from being deflected more than six inches from the path of the towing vehicle's wheels. On and after January first, nineteen hundred seventy-one every trailer, except a semi-trailer, while being drawn upon the public highways of this state, shall be attached to the vehicle drawing the same by a device of a type approved by the commissioner.

(d) The commissioner shall make rules prescribing standards of brake efficiency, except for motor vehicles the standard of brake efficiency of which are fixed by the department of public service, and no brakes shall be deemed adequate within the meaning of this subdivision unless they meet the requirements of such rules. Such rules shall be filed in the office of the secretary of state and thereafter published once in the state advertising bulletin and shall become effective one month after such publication. Any amendment to such rules shall be likewise filed and published and shall take effect one month after such publication.

(e) No operator or registered owner of any motor vehicle having a registered maximum gross weight of eighteen thousand pounds or more shall disconnect or knowingly permit the disconnection of any set of service brakes on such motor vehicle. Any violation of the provisions of this paragraph shall occur only when such vehicle is actually operated on the public highways. Such violation shall be punishable as a misdemeanor.

2. (a) Every motor vehicle except a motorcycle, driven upon a public highway during the period from one-half hour after sunset to one-half hour before sunrise or at any other time when windshield wipers are in use, as a result of rain, sleet, snow, hail or other unfavorable atmospheric condition, and at such other times as visibility for a distance of one thousand feet ahead of such motor vehicle is not clear, shall display:

1. at least two lighted head lamps on the front, one on each side, having light sources of equal power;

2. if manufactured prior to January first, nineteen hundred fifty-two, at least one lighted lamp on the rear which shall display a red light visible from the rear for a distance of at least five hundred feet;

3. if manufactured on or after January first, nineteen hundred fifty-two, at least two lighted lamps on the rear, one on each side, which lamps shall display a red light visible from the rear for a distance of at least one thousand feet; and

4. if required to display a number plate on the rear, a white light which shall illuminate the numerals on such plate in such manner as to render such numerals legible for at least fifty feet from the rear. The provisions of this subparagraph shall also apply to trailers.

(b) All lamps used on a motor vehicle except a motorcycle shall be so arranged, adjusted and operated, as to avoid dangerous glare or dazzle. Except as provided in paragraph (d) of this subdivision, the upper outline of any beam of dazzling light projected to the left of the longitudinal axis of the vehicle by the lowermost light distribution of a headlamp designed to produce more than one light distribution, or by the single light distribution of any other lamp used on such a motor vehicle, shall not rise higher than the lamp center at a distance of twenty-five feet nor higher than forty-two inches at a distance of seventy-five feet. In each case, the height of the beam shall be measured from the plane upon which the vehicle stands and the distance shall be measured from the lamp projecting the light.

(c) No lamp shall be used on a motor vehicle having a light source greater than thirty-two candle power, unless such lamp is approved by the commissioner as provided by this section. The provisions of this paragraph shall not apply to any light which is permitted to be displayed only on an authorized emergency vehicle, a hazard vehicle or a vehicle which is permitted to display a blue or green light pursuant to paragraphs four and five of subdivision forty-one of this section.

(d) A motor vehicle, other than a motorcycle, equipped with any device such as, but not limited to,

a snow plow blade, which blocks or impairs the projection of light from the headlamps of such vehicle, shall be equipped with at least two additional headlamps on the front which headlamps meet all the requirements of this subdivision for headlamps except those provisions of paragraph (b) of this subdivision specifically limiting the height of the beam of any headlamp.

3. Headlamps required pursuant to the provisions of subdivision two of this section may be of the multiple beam type designed to produce more than one distribution of light or of the single beam type designed to produce only one distribution of light.

Provided that, whenever a vehicle approaching from ahead is within five hundred feet, or when approaching a moving vehicle from the rear and within two hundred feet of the same, the headlamps, if of the multiple beam type, or the auxiliary front facing lamps, if the vehicle is so equipped, shall be operated so that dazzling light does not interfere with the driver of the approaching vehicle, or the vehicle being approached, and, whenever the highway is so lighted or traffic thereon is such that illumination of the highway for more than two hundred feet ahead of the vehicle by lights on such vehicle is unnecessary or impracticable, the headlamps, if of the multiple beam type, or the auxiliary front facing lamps, if the vehicle is so equipped, shall be operated with the lowermost distribution of light in use. Nothing contained in this subdivision shall be construed to prevent the use of flashing high beams to signify an intention to pass a vehicle or vehicles when two or more vehicles are traveling in the same direction, the operation of any headlamp as defined in paragraph d [(d)]* of subdivision two of this section, nor shall it apply to any auxiliary front facing lamp permitted to be displayed only on an authorized emergency vehicle.

4. No headlamp shall be used upon any motor vehicle except a motorcycle operated upon the public highways of this state, unless such lamp is approved by the commissioner or is equipped with a lens or other device approved by the commissioner. Every such headlamp, lens or other device shall be applied and adjusted in accordance with the requirements of the certificate approving the use thereof. Every such headlamp shall be firmly and substantially mounted on the motor vehicle in such manner as to allow the lamp to be properly and readily adjusted. The operator of every motor vehicle shall permit any police officer or other person exercising police powers to inspect the equipment of such motor vehicle, and make such tests as may be necessary to determine whether the provisions of this section are being complied with.

Any certificate of approval heretofore issued pursuant to law, or hereafter issued by the commissioner may be revoked by the commissioner, after a hearing of which the person or corporation named therein, or his or its successor in interest, shall have been given reasonable notice and an opportunity to appear and be heard upon the ground that the device does not comply with the provisions of this section, and the rules and regulations of the commissioner and the decision of the commissioner revoking such certificate shall be final; such revocation, however, of a lens or other headlighting device heretofore or hereafter approved shall not take effect until six months after the decision of the commissioner revoking the same and shall apply only to vehicles manufactured and used thereafter on the highways of this state.

The foregoing provisions governing lights on motor vehicles do not apply to so-called dimmers the use of which is permitted or required by local ordinances.

The commissioner may make such rules and regulations relative to lights on motor vehicles and the approval of the same as are not inconsistent with the specific provisions of this section.

5, 6. [Repealed]

7. It shall be unlawful for any person, firm, association or corporation to sell or offer for sale a headlighting device without delivering therewith to the purchaser a printed sheet of instructions describing the device in detail, its method of mounting, arrangement and adjustment and specifying the candle power of the lamps to be used thereon and any other matter that may be necessary to insure compliance in the use of such device with the provisions of this article and the certificate of approval. Such instructions shall be printed with a photogravure of the pattern of light from one headlight shown on a regulation testing screen with respect to a horizontal cross line placed across the face of such screen at a height equal to the height of the center of such headlight, and with the headlight adjusted in accordance with the rules and regulations of the commissioner. The sale of a headlighting device not approved under the provisions of this section is prohibited. A violation of any of the provisions of this subdivision shall be a misdemeanor.

8. [Repealed]

9. Every omnibus operating upon the public highways of the state having a carrying capacity of ten or more passengers, shall be equipped with one hand fire extinguisher of at least 4 B:C Underwriters' Laboratories rating or a similar rating by any qualified laboratory or testing organization which meets the criteria of American Society for Testing Materials test E548-76. Fire extinguishers shall be kept in good operating condition at all times and must be mounted in a place readily accessible for use.

10. a. Every motor vehicle, when driven or operated upon a public highway, shall be equipped with a mirror or other reflecting device so adjusted that the operator of such vehicle shall have a clear and full view of the road and condition of traffic behind such vehicle.

*The bracketed designator has been inserted by the Publisher.

b. In addition to the above requirements, an omnibus having a capacity of ten or more passengers registered in this state and manufactured or assembled after July first, nineteen hundred seventy, shall be equipped with a mirror attached to the right side of such vehicle and so adjusted that the driver thereof shall have a clear and full view of the road and condition of traffic behind such vehicle.

c. Every passenger motor vehicle registered in this state and manufactured or assembled after June thirtieth, nineteen hundred sixty-nine, and designated as a nineteen hundred seventy or subsequent year model, shall be equipped with adjustable interior mirrors meeting specifications established by the commissioner which specifications may provide minimum and maximum reflectance values.

d. Every new passenger-type motor vehicle, except a motorcycle, manufactured for sale in New York state on or after January first, in the year next succeeding the effective date of this paragraph shall be manufactured with an interior rear-view mirror of the selective position prismatic type with a reflectance value in the night driving position of at least four percent; or its functional equivalent. For purposes of this section, "passenger-type motor vehicle" shall mean any motor vehicle with a seating capacity of not more than fifteen adults, not including the driver, that is equipped with one or more rear windows. Any violation of the provisions of this paragraph by any manufacturer shall constitute an offense and shall be punishable by a civil fine of not more than seven hundred fifty dollars for each offense.

e. Every single-unit motor vehicle registered in this state, operated for commercial purposes and having a cube style or enclosed walk-in delivery bay, where such delivery bay has a length of eight feet six inches or more, but not exceeding a length of eighteen feet, shall be equipped with a cross-view back-up mirror system, rear video system, rear object detection system, or other device, which enables the driver of the vehicle to detect by means of a visual, or visual and audible warning-indicator, persons and objects located directly behind the vehicle. The commissioner is hereby authorized to promulgate regulations providing specifications for mirrors or other devices as required by this paragraph.

f. Every sani-van and motor vehicle commonly classified as a garbage truck purchased on or after January first, two thousand eight and registered in this state, which is operated in and engages in the collection of garbage or refuse in the county of Westchester shall be equipped with a rear video system, rear object detection system, or other device which enables the driver of the vehicle to detect by means of a visual, or visual and audible warning-indicator, persons and objects located directly behind the vehicle. The commissioner is hereby authorized to promulgate regulations providing specifications for mirrors or other devices as required by this paragraph. Provided, however, that the provisions of this paragraph shall not apply to motor vehicles commonly classified as rolloff vehicles that are used for the express purpose of transporting waste containers such as open boxes or compactors.

10-a. It shall be unlawful after July first, nineteen hundred sixty-seven to operate on any public highway in this state any motor vehicle registered in this state, manufactured or assembled on or after such date, and designated as a nineteen hundred sixty-eight or later model, unless such vehicle is equipped with an adjustable side view mirror which shall be affixed to the left outside of such vehicle and which shall be adjustable so that the operator of such vehicle may have a clear view of the road and condition of traffic on the left side and to the rear of such vehicle.

10-b. It shall be unlawful after June thirtieth, nineteen hundred seventy-three to operate on any public highway or street in this state, any passenger type motor vehicle except convertible, suburban and omnibus or other motor vehicle that has a roll-down rear window or a rear window or windows located in a movable closure (door-like) member registered in this state, manufactured or assembled after said date, and designated as a nineteen hundred seventy-four or subsequent model unless such vehicle be equipped with a rear window defogger or defroster, which shall be so located and adjusted that its operation will give the operator of such vehicle, by means of the mirror or other reflecting device required by subdivision ten of this section, a view of the road and the condition of traffic behind such vehicle.

10-c. It shall be unlawful after June thirtieth, nineteen hundred eighty-five to operate on any public highway or street in this state, any passenger type motor vehicle that has a rear window or windows located in a movable closure (door-like) member, except for a multipurpose passenger vehicle (designed to carry ten persons or less and constructed either on a truck chassis or with special features for occasional off-road operation) registered in this state and manufactured or assembled after said date, and designated as a nineteen hundred eighty-six or subsequent model unless such vehicle be equipped with a rear window defogger or defroster, which shall be so located and adjusted that its operation will give the operator of such vehicle, by means of the mirror or other reflecting device required by subdivision ten of this section, a view of the road and the condition of traffic behind such vehicle.

10-d. It shall be unlawful after December thirty-first, nineteen hundred ninety-two to operate on any public highway or street in this state, any passenger type motor vehicle that has a rear window located in a single movable closure (door-like) member and which has a non-removable top, registered in this state and manufactured or assembled after said

date, and designated as a nineteen hundred ninety-three or subsequent model unless such vehicle be equipped with a rear window defogger or defroster, which shall be so located and adjusted that its operation will give the operator of such vehicle, by means of the mirror or other reflecting device required by subdivision ten of this section, a view of the road and the condition of traffic behind such vehicle.

10-e. [Repealed upon conditions set forth in L 2011, ch 138, § 2] Every truck, tractor, and tractor-trailer or semitrailer combination registered in this state having a gross vehicle weight rating of twenty-six thousand pounds or more, and a conventional cab configuration in which more than half of the engine length is forward of the foremost point of the windshield base and the steering wheel hub is in the forward quarter of the vehicle length, whenever operated within a city having a population of one million or more on highways other than controlled-access highways, shall be equipped with a convex mirror on the front of such vehicle or combination of vehicles. When such vehicle or combination of vehicles is being operated, such mirror shall be adjusted so as to enable the operator thereof to see all points on an imaginary horizontal line which: (a) is three feet above the road, (b) is one foot directly forward from the midpoint of the front of such motor vehicle, and (c) extends the full width of the front of such vehicle or combination of vehicles. Provided, however, the commissioner, in consultation with the commissioner of transportation, may promulgate rules and regulations exempting from the requirements of this subdivision any vehicle or combination of vehicles where such commissioner has determined that the use of such convex mirrors would not increase the visibility of persons or objects located directly in front of such vehicle or combination of vehicles.

11. It shall be unlawful after January first, nineteen hundred thirty-four to operate on any public highway or street, in this state, a motor vehicle manufactured or assembled after said date, designed or used for the purpose of carrying passengers for hire, or as a public conveyance to transport school children and others, unless such vehicle be equipped with safety glass wherever glass is used in doors, windows and windshields.

12. It shall be unlawful to operate on any public highway or street in this state any motor vehicle registered in New York state unless such vehicle be equipped with safety glass wherever glass is used in doors, windows and windshields. For the purposes of this subdivision, any device other than a trailer, which is attached to or carried upon a motor vehicle and which lawfully can be occupied while the motor vehicle is in motion, shall be considered a part of such motor vehicle.

12-a. (a) Every motor vehicle, except a motorcycle, when driven or operated upon a public highway, road or street shall be equipped with a front windshield in a fixed and more or less upright position constructed of safety glass as defined in subdivision fourteen of this section and required by subdivisions eleven and twelve hereof. No person shall drive any motor vehicle with any sign or other nontransparent material other than a certificate or paper required to be displayed by law upon the front windshield or the sidewings or side windows on either side forward of or adjacent to the operator's seat.

(b) No person shall operate any motor vehicle upon any public highway, road or street:

(1) the front windshield of which is composed of, covered by or treated with any material which has a light transmittance of less than seventy percent unless such materials are limited to the uppermost six inches of the windshield; or

(2) the sidewings or side windows of which on either side forward of or adjacent to the operator's seat are composed of, covered by or treated with any material which has a light transmittance of less than seventy percent; or

(3) if it is classified as a station wagon, sedan, hardtop, coupe, hatchback or convertible and any rear side window has a light transmittance of less than seventy percent; or

(4) the rear window of which is composed of, covered by or treated with any material which has a light transmittance of less than seventy percent. A rear window may have a light transmittance of less than seventy percent if the vehicle is equipped with side mirrors on both sides of the vehicle so adjusted that the driver thereof shall have a clear and full view of the road and condition of traffic behind such vehicle.

(c) Any person required for medical reasons to be shielded from the direct rays of the sun and/or any person operating a motor vehicle belonging to such person or in which such person is an habitual passenger shall be exempt from the provisions of subparagraphs one and two of paragraph (b) of this subdivision provided the commissioner has granted an exemption and notice of such exemption is affixed to the vehicle as directed by the commissioner. The applicant for such exemption must provide a physician's statement with the reason for the exemption, the name of the individual with a medically necessary condition operating or transported in the vehicle, the specific condition involved, and the minimum level of light transmission required. The commissioner shall only authorize exemptions where the medical condition certified by the physician is contained on a list of medical conditions prepared by the commissioner of health pursuant to subdivision sixteen of section two hundred six of the public health law. If such [such]* exemption is granted, the commissioner shall make a record thereof and shall distribute a sufficiently noticeable

*Brackets have been inserted by the Publisher around this word as it is superfluous.

sticker to the applicant to be attached to any window so shielded or altered pursuant to such exemption.

(d) The commissioner may test any window for a person who has been charged with violating this subdivision. If such window is found to be in conformity with this subdivision, a small label attesting to the conformity shall be affixed to the window tested.

(e) On and after January first, nineteen hundred ninety-two, no person shall manufacture, sell, offer for sale, equip or operate a motor vehicle in this state in violation of the provisions of this subdivision, except that a person may operate a nineteen hundred ninety-one or earlier model year vehicle without violating this subdivision if the windows on said vehicle were in conformity with this subdivision as it existed on December thirty-first, nineteen hundred ninety-one.

(f) The commissioner shall make such rules and regulations as he shall deem necessary to carry out the provisions of this subdivision.

(ff) Notwithstanding any other provision of this section or any other general, special or local law, charter, administrative code, ordinance, rule or regulation to the contrary, any person operating a motor vehicle in a burial or funeral procession while travelling to or from a funeral, interment or cremation may place a funeral sign no larger than eight and one half by fourteen inches in any window of such vehicle, as long as such sign when so placed will not prevent such person from having a clear and full view of the road and the condition of traffic behind such vehicle.

13. It shall be unlawful for any person, firm or corporation to replace glass in doors, windows, or windshields of motor vehicles unless such replacement be made with safety glass.

14. The term "safety glass" as used in this section shall be construed to mean any product composed of glass, so manufactured, fabricated or treated as substantially to prevent shattering and flying of the glass when struck or broken, or such other or similar product as may be approved by the commissioner.

15. The commissioner of motor vehicles shall maintain a list of types of glass approved by him as conforming to the specifications and requirements for safety glass as set forth in this section, and shall not issue a license for or relicense any motor vehicle subject to the provisions of subdivisions eleven and twelve unless such motor vehicle be equipped as therein provided with such approved type of glass.

16. The owner and operator of any motor vehicle operated in violation of the provisions of subdivisions eleven and twelve shall be guilty of a traffic infraction. In case of the violation of such subdivisions by any common carrier or person operating under a permit issued by the public service commission (or other authorized body or person), said permit shall be revoked, or, in the discretion of the commissioner, suspended until the provisions of such subdivisions are satisfactorily complied with.

17. Every omnibus having a seating capacity of more than ten passengers, every truck having a maximum gross weight in excess of twelve thousand pounds and every combination of tractor and trailer operated upon a public highway shall carry emergency lighting equipment ready at all times for immediate use. The equipment of the vehicle or combination of vehicles may consist of flares of the type used by railroads, flaring candles, torches, lanterns or red emergency reflectors provided it is adequate to provide a warning light in all kinds of weather both in front of and in the rear of the vehicle for at least eight hours. No red emergency reflector shall be deemed adequate within the meaning of this subdivision unless it is of a size and type approved by the commissioner, and conforms to minimum specifications established by him, which minimum shall not be less than the minimum established by the interstate commerce commission for buses and trucks in interstate commerce. When any such vehicle or a combination of vehicles, except an omnibus which stops for the purpose of taking on or discharging passengers, is parked or left standing on a public highway except within a city or incorporated village, during the period from one-half hour after sunset to one-half hour before sunrise, the operator of such vehicle or combination of vehicles shall cause at least one light, or reflector or lighted flare to be placed on the highway in front of such vehicle or combination of vehicles, and at least one light, reflector or lighted flare on the highway in the rear of such vehicle or combination of vehicles at a distance of approximately one hundred feet in the front of and at the rear of such vehicle or combination of vehicles, provided that if such vehicle is parked or left standing within three hundred feet of a curve, crest of hill, or other obstruction, the flare, candle, torch, lantern, or reflector in that direction shall be so placed as to afford ample warning to other highway users but in no case less than approximately one hundred feet or more than approximately three hundred feet from the stopped vehicle.

18. Except as otherwise provided herein, it shall be unlawful to operate on any public highway or street in this state any motor vehicle, or combination of motor vehicle and trailer, so constructed or so loaded that the driver thereof is unable to indicate clearly by hand signals to approaching and following traffic his intention of stopping or turning, unless such motor vehicle or combination of vehicles shall be equipped with directional signals approved by the commissioner, provided, however, it shall be unlawful after January first, nineteen hundred fifty-two to operate on any public highway or street in this state any motor vehicle registered in this state, manufactured or assembled after said date unless such vehicle be equipped with directional signals approved by the commissioner. It shall also be unlawful to fail to cause such signals to be maintained, at all times in good and sufficient working order. The provisions of this subdivision shall not apply to special purpose commercial motor vehicles registered under schedule F of subdivision seven of

section four hundred one of this chapter or to a vehicle or combination of vehicles lawfully operated under registration issued, under section four hundred fifteen of this chapter or under a similar provision of the law of another jurisdiction.

18-a. Any motor vehicle may be equipped with and every motor vehicle registered in this state and manufactured or assembled after June thirtieth, nineteen hundred sixty-five, and designated as a nineteen hundred sixty-six or subsequent year model, shall be equipped with a device, approved by the commissioner, by means of which the operator may cause the two front and two rear directional signals to flash simultaneously for the purpose of warning the operators of other vehicles of the presence of a vehicular traffic hazard requiring the exercise of unusual care in approaching, overtaking or passing. The provisions of this subdivision requiring that certain motor vehicles shall be so equipped shall not apply to special purpose commercial motor vehicles registered under schedule F of subdivision seven of section four hundred one or to a vehicle or combination of vehicles lawfully operated under registration issued under section four hundred fifteen.

19. It shall be unlawful for the owner to operate, park or stand a motor vehicle or trailer on any public highway or street in this state, or to authorize another to so operate, park or stand a motor vehicle or trailer, with the consent of such owner, expressed or implied, unless such motor vehicle or trailer be equipped and lighted as provided by this section and by section three hundred seventy-six, and the operation, parking or standing on a public highway or street in this state of a motor vehicle or trailer which is not so equipped and lighted or which is defectively equipped and lighted is hereby prohibited.

20. Every omnibus having a seating capacity of more than seven passengers, used exclusively to transport pupils, teachers and other persons acting in a supervisory capacity to and from school or school activities, or to transport children, instructors or other persons acting in a supervisory capacity to and from child care centers maintained for migrant farm and food processing laborers or to transport children, instructors or other persons acting in a supervisory capacity to and from camp or camp activities, or to transport children, instructors or other persons acting in a supervisory capacity to and from religious services or instruction shall be equipped in the manner provided by this subdivision and any such omnibus used by any state facility or not-for-profit agency licensed by the state and used to transport persons with disabilities, instructors or other persons acting in a supervisory capacity may be equipped in the manner provided by this subdivision:

(a) For each such omnibus having a seating capacity in excess of fifteen children, there shall be colored flashing signal lamps conforming to regulations prescribed by the commissioner on the front and on the rear thereof, including at least one flashing red signal lamp on the front thereof and at least one flashing red signal lamp on the rear thereof. For each such omnibus having a seating capacity of not more than fifteen children, there shall be colored flashing signal lamps conforming to regulations prescribed by the commissioner facing the front and facing the rear thereof, and at least one flashing red signal lamp facing the front thereof and at least one flashing red signal lamp facing the rear thereof. The driver of every such vehicle shall keep such red signal lamps lighted whenever passengers are being received or discharged or whenever he has stopped within fifty feet to the rear of a vehicle with such red signal lamps lighted, and shall light all other required signal lamps, as a warning, prior to stopping to receive or discharge passengers in accordance with regulations prescribed by the commissioner.

(b) (1) In addition to such signal lamps, two signs shall be conspicuously displayed on the exterior of every such omnibus designating it as a school omnibus by the use of the words "SCHOOL BUS" which shall be painted or otherwise inscribed thereon in black letters. Such letters shall be of uniform size, at least eight inches in height, and each stroke of each letter shall be not less than one inch in width. The background of each such sign shall be painted the color known as "national school bus chrome." For each such omnibus having a seating capacity in excess of fifteen children, such signs shall be securely mounted on top of such vehicle, one of which shall be affixed on the front and one on the rear thereof. For each such omnibus having a seating capacity of not more than fifteen children, such signs shall be securely mounted on top of such vehicle, one of which shall face the front and one of which shall face the rear thereof. Each such sign shall be visible and readable from a point at least two hundred feet distant.

(2) The universal handicapped symbol shall be conspicuously displayed on the exterior of every omnibus equipped with a wheelchair lift which transports children with disabilities. The commissioner shall promulgate regulations regarding the size and location of such universal handicapped symbol. The commissioner shall require that any new signage relating to accessibility installed or replaced on or after the effective date of the chapter of the laws of two thousand fourteen which amended this subparagraph depict the logo promulgated by the secretary of state pursuant to section one hundred one of the executive law.

(c) In the event such vehicle is operated on a public highway during the period between one-half hour after sunset and one-half hour before sunrise, the signs required by paragraph (b) of this subdivision shall be illuminated as to be visible from a point at least five hundred feet distant.

(d) Every such omnibus shall be equipped as provided in paragraphs (a) and (b) of this subdivi-

sion, and such signs shall be displayed and illuminated in accordance with paragraphs (b) and (c) of this subdivision, and such signal lamps shall be operated as provided in paragraph (a) of this subdivision at all times when such omnibus shall be engaged in transporting pupils to and from school or school activities or in transporting children to and from child care centers maintained for children of migrant farm and food processing laborers, or in transporting children to and from camp or camp activities or transporting children to and from religious services or instruction or transporting persons with disabilities on any such omnibus used by any state facility or not-for-profit agency licensed by the state.

(e) Every such omnibus, having its engine located ahead of the driver, with a seating capacity of more than twelve school children shall be equipped with a mirror, convex in shape, at least eight inches in diameter, firmly mounted at hood, windshield or fender-top height in front of the bus. It shall be located on either the left or right side of the bus in such manner that the seated driver may observe through its use the road from the front bumper forward to the point where direct observation is possible.

(f) The commissioner of motor vehicles is hereby authorized and empowered to adopt and, from time to time, to amend such regulations, not inconsistent with this subdivision, governing the color, number, size, type, construction and use of such signal lamps and signs, as he may deem necessary for public safety. On and after July first, nineteen hundred fifty-one, no such signal lamp or sign shall be deemed to comply with the requirements of this subdivision unless it is of a size and type approved by the commissioner and unless it shall conform to the specifications prescribed and promulgated by him.

(g) In the event, however, that such an omnibus, equipped as herein provided, shall cease to be used to transport pupils or pupils and teachers or children of migrant laborers and migrant child care center instructors, or children and camp instructors, the equipment, markings and paint, herein provided for, shall be removed and changed within fifteen days after relicense. Nothing contained in this section, however, shall be deemed to waive any other requirements as to equipment, markings and paint, contained in this chapter.

(h) All the provisions of this chapter relating to school buses shall apply with equal force and effect to buses used in transporting children and instructors to and from child care centers maintained for children of migrant farm and food processing laborers and to buses used in transporting children to and from camp or camp activities and to buses used in transporting children to and from religious services or instruction. As used in this subdivision, camp or camp activities shall mean day camp or day camp activities respectively.

(i) Every omnibus subject to the provisions of this subdivision shall be operated with headlights and taillights illuminated at all times of day or night.

(j) The commissioner of transportation, in his discretion, by regulation or upon written request, by departmental order, for good cause, may exempt any school bus that does not receive or discharge passengers on or along the public highways on regularly scheduled routes from the requirements of any or all paragraphs of subdivisions twenty and twenty-one of this section.

(k) All omnibuses manufactured or assembled prior to April first, nineteen hundred seventy-seven and all omnibuses manufactured or assembled after April first, nineteen hundred seventy-seven which do not meet federal standards for school bus safety, shall be phased out of use beginning with the nineteen hundred ninety-six–nineteen hundred ninety-seven school year and ending with the nineteen hundred ninety-seven–nineteen hundred ninety-eight school year. In each of such school years, at least one-half of such omnibuses shall be retired from use according to the following formula: in the nineteen hundred ninety-six–nineteen hundred ninety-seven school year, the minimum number of such omnibuses to be phased out of each owner/operator's fleet shall be the total number of such omnibuses divided by two and rounded upwards to the nearest whole number. All such omnibuses remaining shall be phased out in the nineteen hundred ninety-seven–nineteen hundred ninety-eight school year.

Notwithstanding the foregoing provisions of this paragraph the commissioner of education may make exceptions on a case by case basis if a school district certifies to the commissioner of education that a certain omnibus should not be retired for reason of economic hardship and the commissioner of transportation determines upon inspection that such omnibus is in good working order. In making his determination, the commissioner of transportation shall consider, among other relevant factors, the relative age and structure of each such omnibus. When such determination is made, every such omnibus so certified shall be reinspected by the commissioner of transportation once every six months. Any school district receiving an exemption from the provisions of this paragraph for any omnibus shall provide to the commissioner of education an annual recertification of economic hardship.

(*l*) (1) Every such omnibus used on a regular basis to transport pupils with a disability on a regularly scheduled route shall, with the written consent of the parent, guardian, or person in a position of loco parentis, have maintained on such omnibus the following information about each such pupil:

(i) name;

(ii) nature of the disability; and

(iii) the name of such pupil's parent, guardian, or person in a position of loco parentis and one or more

telephone numbers where such person can be reached in an emergency, and/or the name and telephone number of any other person designated by such parent, guardian or person in a position of loco parentis as a person who can be contacted in an emergency.

(2) Such information shall be used solely for the purpose of contacting such pupil's parent, guardian, person in a position of loco parentis, or designee in the event of an emergency involving such pupil, shall be kept in a manner which retains the privacy of the pupil, and shall not be accessible to any person other than the driver or a teacher acting in a supervisory capacity. Provided, however, that in the event that such driver or teacher is incapacitated, such information may be accessed by any emergency services provider for the purpose authorized by this subparagraph.

(3) Such information shall be updated as needed, but at least once each school year. Such information shall be destroyed if: parental consent is revoked; the pupil no longer attends such school; or, the disability no longer exists.

(4) For the purposes of this paragraph, the term "disability" shall mean a physical or mental impairment that substantially limits one or more of the major life activities of a pupil, whether of a temporary or permanent nature.

21. Every motor vehicle having a seating capacity of more than seven passengers, and used primarily to transport pupils or pupils and teachers to and from school, shall be painted the color known as "national school bus chrome."

In the event, however, such a motor vehicle so painted shall cease to be used to transport pupils or pupils and teachers, the color of paint herein provided for, shall be changed to another color, within fifteen days of relicense.

21-a. In any case where a New York state police or New York city, Albany, Buffalo, Rochester, Syracuse or Yonkers police department vehicle is painted a distinctive color which would designate it in the public's view as such a state or city police vehicle, the purchaser of such vehicle shall cause the color of its paint to be altered and any designated markings to be removed within fifteen days of registration.

21-b. The commissioner shall promulgate rules and regulations for the use of two-way radios on school buses.

21-c. The commissioner, in consultation with the commissioner of transportation, shall promulgate rules and regulations for the use of stop-arms on school buses which shall include provisions for a second stop-arm to be located on the driver's side as close as is practical to the rear corner of the bus. Every school bus designed with a capacity of forty-five persons or more, and manufactured for use in this state on or after January first, two thousand two shall be equipped with a second stop-arm in compliance with such regulations.

21-d. The commissioner shall promulgate rules and regulations for the use of back up beepers on school buses.

21-e. The commissioner shall promulgate rules and regulations for the use of front crossing arms on school buses.

21-f. The commissioner shall promulgate rules and regulations for the use of safety sensor devices on school buses.

21-g. Every school bus manufactured for use in this state after April first, nineteen hundred ninety, shall be equipped with back-up beepers.

21-h. [There are two paras 21-h] It shall be unlawful for any motor vehicle having a seating capacity of more than seven passengers, and used primarily to transport pupils or pupils and teachers to and from school to be mounted with, or have placed or installed thereon any sign, placard or other display except as provided by law. Provided, however, that the provisions of this subdivision shall not apply to such motor vehicles operating in a city with a population of one million or more.

21-h. (a) [There are two paras 21-h] Every school bus manufactured for use in this state on or after April first, two thousand, shall be equipped with exterior reflective markings which comply with the rules and regulations promulgated by the commissioner pursuant to paragraph (c) of this subdivision.

(b) Every school bus used to transport ten or more passengers in this state on or after September first, two thousand two, shall be equipped with exterior reflective markings which comply with the rules and regulations promulgated by the commissioner pursuant to paragraph (c) of this subdivision.

(c) The commissioner shall promulgate rules and regulations for exterior reflective markings required to be attached on school buses. Such rules and regulations:

(1) shall require the rear of school buses to be marked with reflective material to outline the perimeter of the back of the bus and of the rear emergency exit;

(2) shall require the horizontal application of strips of reflective material, not less than one and three-quarters inches wide, above the rear windows, and above the rear bumper from the edges of the rear emergency exit door to both corners of the school bus with vertical strips of reflective material at each corner connected to the horizontal strips;

(3) shall require the horizontal application of strips of reflective material, not less than one and three-quarters inches wide, the entire length of the sides of the school bus body and located equidistant between the floorline and the beltline of the bus; and

(4) may require the marking of the front, rear or both bumpers of school buses with reflective material between one and three-quarters and two and one-quarter inches wide applied thereto at a forty-five degree angle to the center line of the road surface.

21-i. (a) (1) Every school bus manufactured on or after January first, nineteen hundred ninety,

fueled with other than diesel fuel and used to transport three or more students who use wheelchairs or other assistive mobility devices or with a total capacity of more than eight passengers and used to transport students who use wheelchairs or other assistive mobility devices shall be equipped with an engine fire suppression system.

(2) Every school bus manufactured for use in this state on or after September first, two thousand seven fueled with diesel fuel and used to transport three or more students who use wheelchairs or other assistive mobility devices or with a total capacity of more than eight passengers and used to transport students who use wheelchairs or other assistive mobility devices shall be equipped with an engine fire suppression system.

(b) The commissioner of the department of transportation shall promulgate rules and regulations establishing standards for the use of engine fire suppression systems on school buses used to transport students who use wheelchairs or other assistive mobility devices.

22. It shall be unlawful to operate a motor vehicle upon the public highways of this state which is equipped with any glass which is so broken, fractured or discolored as to distort visibility.

23. Every motor vehicle operated for hire upon the public highways of this state shall be equipped with handles or other devices which shall permit the door or doors to the passenger compartment to be readily opened from the interior of the vehicle.

24. It shall be unlawful to operate upon any public highway in this state a motor vehicle which is equipped with a television receiving set within view of the operator or in which a television receiving set is in operation within the view of the operator. A motor vehicle shall not be deemed to be equipped with a television receiving set solely because such set utilizes power from such vehicle. The provisions of this subdivision shall not prohibit a vehicle with a weight of ten thousand pounds or more or a school bus from using closed-circuit television receiving equipment exclusively for safety and maneuvering purposes, in accordance with regulations to be established by the commissioner.

24-a. It shall be unlawful to operate upon any public highway in this state a motor vehicle, limited use automobile, limited use motorcycle or bicycle while the operator is wearing more than one earphone attached to a radio, tape player or other audio device.

25. (a) On and after the first day of January, nineteen hundred seventy-four it shall be unlawful to operate on any public highway or street in this state any tractor, commercial motor vehicle, combination of a commercial motor vehicle and trailer, or combination of a truck-tractor and semi-trailer which is not so constructed or equipped as reasonably to bar water or other road surface substances from being thrown by the rearmost wheels beyond the extreme rear of the vehicle or combination of vehicles, and to minimize side spray.

(b) Unless the commercial vehicle or combination vehicle is so designed or constructed to accomplish the objectives set forth in paragraph (a) of this subdivision by reason of fender or body construction or other means of enclosure, any such commercial vehicle or combination vehicle shall be equipped, on and after January first, nineteen hundred fifty-seven, with splash guards and stone deflectors which shall be composed of materials substantial enough to withstand ripping or tearing by ordinary means and withstand the action of the elements for a reasonable length of time. Such splash guards and stone deflectors shall also have a reasonable degree of flexibility and the distance from the lower end thereof to the ground shall not exceed one-third of the distance, measured along the ground, from the bottom of the splash guard to the point of contact of the rear wheel.

(c) The commissioner of motor vehicles is hereby authorized and empowered to make rules and regulations with respect to splash guards and stone deflectors, their type and construction, manner of attachment to vehicles and all other matters requisite for the proper effectuation of the purposes of this subdivision. In making such rules and regulations the commissioner shall be guided by the desirability of uniformity in requirements with regard to splash guards and stone deflectors among the several states.

(d) The provisions of this subdivision shall not apply to motor vehicles, trailers and semi-trailers registered pursuant to subdivision thirteen of section four hundred one of this chapter, and not operated upon the public highways in excess of one and one-half miles by direct route between farms or portions of farms under single or common ownership or operation.

26. A gong or siren whistle shall not be used on any vehicle other than an authorized emergency vehicle. This shall not be construed to apply to a gong or siren designed and used solely as a burglar alarm on a vehicle.

27. When a vehicle (a) has a crane, boom or other similar device attached or (b) is loaded with any material, and such crane, boom, device or material extends four feet or more beyond the front or rear of such vehicle, such vehicle shall be provided with a red flag not less than twenty-four inches square by day and a red light visible from the rear and an amber light visible from the front for a distance of at least five hundred feet by night on the extreme end of the extending portion of such crane, boom, device or material.

28. No person shall operate upon a public highway a vehicle which emits unnecessary smoke or unnecessary offensive vapors.

28-a. Except as permitted or authorized by law, no person shall remove, dismantle or otherwise cause to be inoperative any equipment or feature constituting an operational element of a motor vehicle's air pollution control system or mechanism re-

quired by federal or state law or by any rules or regulations promulgated pursuant thereto.

28-b. Except where inconsistent with federal law, every motor vehicle registered in this state and manufactured or assembled after June thirty, nineteen hundred sixty-three shall be equipped with a crankcase ventilating system of a type approved by the state commissioner of environmental conservation for the purpose of reducing the emission of pollutants into the atmosphere. Such system shall be maintained in good working order in continued conformity with standards promulgated by the state commissioner of environmental conservation. For the purposes of this subdivision the term "motor vehicle" shall exclude diesel powered motor vehicles, motorcycles, vehicles driven by electric power and special purpose commercial motor vehicles registered under paragraph F of subdivision seven of section four hundred one of this chapter.

28-c. Except where inconsistent with federal law, rules and regulations, every motor vehicle registered in this state and manufactured or assembled after June thirty, nineteen hundred sixty-seven and known as a nineteen hundred sixty-eight or subsequent model shall be equipped with an air contaminant emission control system of a type approved by the state commissioner of environmental conservation. Such systems shall be maintained in good working order in continued conformity with emission standards promulgated by the state commissioner of environmental conservation. For the purposes of this subdivision, "air contaminant emission control systems" may include, but shall not be limited to, exhaust control systems and gasoline evaporation control systems but shall exclude crankcase ventilating systems.

28-d. The state commissioner of environmental conservation may exempt or partially exempt from the provisions of subdivisions twenty-eight-b and twenty-eight-c of this section any type or class of motor vehicle for which no practical control systems have been developed or are necessary.

28-e. Standards and exemptions established by the state commissioner of environmental conservation pursuant to subdivisions twenty-eight-b, twenty-eight-c and twenty-eight-d of this section, shall be consistent with applicable federal laws and regulations.

28-f. (a) Except where inconsistent with federal law, rules and regulations, in addition to any air contaminant emission control systems required by subdivisions twenty-eight-b and twenty-eight-c of this section, the commissioner of environmental conservation may by regulation require the installation of exhaust emission control devices in proper working condition on all or any vehicles of any class or classes of gasoline powered motor vehicle having a registered maximum gross weight in excess of six thousand pounds. The commissioner of environmental conservation shall not promulgate any such regulation unless he (i) has determined, with the concurrence of the commissioner, that any such device is, or devices are, effective and reliable, (ii) has determined that the installation of any such device on all or any vehicles of such class or classes is necessary to the achievement of federal ambient air quality standards pursuant to an approved air quality implementation plan adopted pursuant to the federal clean air act, as amended (42 U.S.C. 1857 et seq.) and (iii) has determined that the effect of such regulation will not be diluted by the absence of a comparable requirement in an adjoining state; provided, however, that the effective date of the requirements of such regulation shall not be prior to the approval or promulgation of a transportation control plan pursuant to the Federal clean air act as amended for those portions of adjoining states designated as the territorial areas forming parts of the New Jersey-New York-Connecticut Interstate Air Quality Control Region under such act and not prior to the effective date of comparable requirements for such vehicles registered in, required to be registered in, or operated in any such portions. Any such requirement shall take effect with respect to any such motor vehicle as of the date of issuance of a registration for such vehicle in the year next succeeding the date on which the regulation requiring the installation of such a device is promulgated by the commissioner of environmental conservation, but in no event prior to March first, nineteen hundred seventy-six.

(b) The provisions of paragraph (a) of this subdivision shall apply only to gasoline powered vehicles which are registered in or are required by law to be registered pursuant to subdivision seven of section four hundred one of this chapter in, or are regularly operated in that portion of the state designated as the territorial area forming part of the New Jersey-New York-Connecticut Interstate Air Quality-Control Region under the federal clean air act, as amended (42 U.S.C. 1857 et seq.) or any part of such region.

(c) Whenever a motor vehicle registered pursuant to subdivision seven of section four hundred one of this chapter is not required by a regulation promulgated pursuant to this subdivision, to have an exhaust emission control device installed in accordance with this subdivision, the applicant for registration for any such motor vehicle shall be required to file a statement as prescribed by the commissioner in conjunction with such registration that such motor vehicle is not required to have such a device. A false statement in relation to such exemption shall constitute a material false statement in an application for registration.

(d) A notation on the registration for a vehicle and an identifying sticker on the vehicle, both of which indicate that such vehicle is required to have an exhaust emission control device shall be presumptive evidence that such device in proper working condition is required on that vehicle pursuant to paragraph (a) of this subdivision.

(e) The rules and regulations promulgated pursuant to paragraph (a) of this subdivision shall contain provisions necessary or appropriate to implement this subdivision, including the definition of terms and exemptions for motor vehicles registered in areas from which no substantial numbers of motor vehicles are regularly operated in the portion of the state referred to in paragraph (b) of this subdivision.

(f) No registered owner shall permit a motor vehicle, required to have an exhaust emission control device in proper working condition pursuant to the provisions of this subdivision, to be operated in the portion of the state to which this subdivision is applicable, unless such vehicle is equipped with an approved exhaust emission control device in proper working condition. Every person convicted of a violation of this paragraph shall for a first violation thereof with respect to a particular motor vehicle be punished by a fine of seven hundred fifty dollars. Such fine may not be waived, suspended or in any other manner not levied, except that four hundred fifty dollars of such fine may be waived upon presentation of acceptable evidence prior to the final determination of the violation that the device required pursuant to paragraph (a) of this subdivision has been installed on the vehicle and is in proper working condition. Every person convicted of a second or subsequent violation with respect to a particular vehicle shall be punished by a fine of seven hundred fifty dollars, which fine may not be waived, suspended or in any other manner not levied.

29. (a) A motor vehicle shall not be used to tow more than one other vehicle.

(b) Notwithstanding the provisions of paragraph (a) of this subdivision, the following vehicles or combination of vehicles are permitted to be operated in New York state:

1. Municipal garbage or ash collecting systems consisting of three vehicles;

2. A tow truck or wrecker being used to tow a disabled tractor semitrailer combination;

3. A tractor being used to tow a semitrailer and trailer outside the city of New York or counties of Nassau and Suffolk or on any qualifying highway or access highway within the city of New York or counties of Nassau or Suffolk;

3-a. A tractor semitrailer-semitrailer combination of vehicles where the two semitrailers are connected by a B-train assembly and such combinations of vehicles is operated outside the city of New York or counties of Nassau and Suffolk or on any qualifying highway or access highway within the city of New York or counties of Nassau or Suffolk;

4. Subject to rules and regulations of the commissioner of transportation, a combination of an automotive powered cab and truck chassis being used to tow two such additional vehicles in double saddlemount fashion, each mounted upon a device designed and constructed so as to be readily dismountable and which performs the function of a conventional fifth wheel, so that while all the wheels of the towing powered chassis touch the roadway, only the wheels on the rear axle of each of the towed vehicles are in contact with the roadway; and

5. Subject to rules and regulations of the commissioner of transportation, a combination of an automotive powered cab and truck chassis being used to tow three such additional vehicles in triple saddlemount fashion on a qualifying or access highway, each mounted upon a device designed and constructed so as to be readily dismountable and which performs the function of a conventional fifth wheel, so that while all the wheels of the towing powered chassis touch the roadway, only the wheels on the rear axle of each of the towed vehicles are in contact with the roadway.

(c) No vehicle shall be towed by a rope or other non-rigid connection which is longer than sixteen feet.

(d) A motor vehicle being towed by a rope or other non-rigid connection must have a licensed driver in such motor vehicle who shall steer it when it is being towed.

29-a. No vehicle or mobile equipment shall be towed with the use of a dolly unless the dolly, vehicle or mobile equipment is secured to the towing vehicle by safety chains or cables which will prevent the dolly, vehicle or mobile equipment from separating from the towing vehicle and the towed vehicle or mobile equipment is securely fastened to the dolly. Dolly shall mean a multi-wheel device utilized to raise a part of a towed vehicle or mobile equipment while it is being towed by another vehicle.

30. It shall be unlawful for any person to operate a motor vehicle with any object placed or hung in or upon the vehicle, except required or permitted equipment of the vehicle, in such a manner as to obstruct or interfere with the view of the operator through the windshield, or to prevent him from having a clear and full view of the road and condition of traffic behind such vehicle.

31. Mufflers and exhaust systems. Prevention of noise. Every motor vehicle, operated or driven upon the highways of the state, shall at all times be equipped with an adequate muffler and exhaust system in constant operation and properly maintained to prevent any excessive or unusual noise and no such muffler or exhaust system shall be equipped with a cut-out, bypass, or similar device. No person shall modify the muffler or exhaust system of a motor vehicle in a manner which will amplify or increase the noise emitted by the motor or exhaust system of such vehicle above that emitted by the muffler or exhaust system originally installed on the vehicle and such original muffler and exhaust system shall comply with all the requirements of this section.

A muffler is a device consisting of a series of chambers or baffle plates, or other mechanical design for the purpose of receiving exhaust gas from an internal combustion engine, and effective in reducing noise.

An exhaust system is a series of mechanical devices for the purpose of receiving exhaust gas from an internal combustion engine and expelling it into the atmosphere.

31-a. No person shall, in the state, sell, install or use a motorcycle exhaust device without internal baffles, known as "straight pipes".

31-b. No person shall, in the state, sell, install or use a motorcycle exhaust device that is intentionally designed to allow for the internal baffling to be fully or partially removed or interchangeable. This subdivision shall not apply to a motorcycle manufactured or assembled prior to nineteen hundred seventy-nine or a motorcycle registered as a limited use vehicle or an all terrain vehicle pursuant to article forty-eight-A or forty-eight-B of this chapter.

32. The violation of any of the provisions of this section with respect to adequate brakes except those relating to emergency or hand brakes shall constitute a misdemeanor and the violation of any of the other provisions of this section, including those relating to emergency or hand brakes, shall be punishable by a fine not exceeding one hundred fifty dollars or by imprisonment for not exceeding thirty days, or by both such fine and imprisonment, except as herein otherwise provided.

33. The provisions of this section shall not apply to fire and police vehicles, self-propelled combines, self-propelled corn and hay harvesting machines, farm type tractors used exclusively for agricultural purposes or for snow plowing other than for hire, and self-propelled caterpillar or crawler-type equipment while being operated on the contract site except when reference is specifically made to such vehicle.

34. Any motor vehicle may be equipped with and every passenger vehicle registered in this state and manufactured or assembled after January first, nineteen hundred sixty-nine, shall be equipped with at least one back-up light. Such light shall display a white light to the rear when the ignition switch is energized and reverse gear is engaged. Such light shall not be lighted when the motor vehicle is in forward motion.

35. Tires. (a) The commissioner may establish standards for the manufacture, regrooving or retreading of tires which are produced or sold in this state, and for the use of tires on vehicles operated in this state.

(b) No tire shall be manufactured, distributed, offered for sale or sold in this state if it does not comply with the standards established by the commissioner pursuant to paragraph (a) of this subdivision. A violation of this paragraph shall be punishable as a misdemeanor.

(c) No person shall operate a motor vehicle or a trailer on a public highway if such vehicle is equipped with tires that do not meet the standards established by the commissioner pursuant to paragraph (a) of this subdivision.

35-a. It shall be unlawful to operate a motor vehicle or trailer equipped with tires having metal objects protruding from the tire tread upon any public highway. The prohibition contained in this section shall not apply to pneumatic tires containing metal type studs, the diameter of which studs inclusive of the stud casing does not exceed three-eighths of an inch and which do not protrude beyond the tread surface of such tires more than three thirty-seconds of an inch and the contact area of which does not exceed three-fourths of one per cent of the total nominal contact area of said tires determined by multiplying the circumference of the outermost edge of tread times the tread width, except that no vehicle equipped with such tires, other than school buses and state or municipally-owned vehicles, may operate on a public highway during the period from the first day of May to the fifteenth day of October, inclusive.

36. (a) The slow-moving vehicle emblem as developed by the American Society of Agricultural Engineers shall be recognized as the official state slow moving vehicle emblem. The commissioner of motor vehicles shall adopt standards and specifications for design, creation and use, in conformance with those recommendations of the American Society of Agricultural Engineers for the size, design and mounting of said slow-moving vehicle emblem.

(b) Farm machinery and implements of husbandry and other machinery including road construction and maintenance machinery designed to operate at twenty-five miles per hour or less, traveling on a public highway during day or night, whether self-propelled or used in combination, shall each separately display a slow-moving vehicle emblem as specified in paragraph (a) of this subdivision.

(c) The use of such emblem shall be in addition to any lighting devices, flags or other equipment required by law. Such emblem shall be used only on farm machinery and implements of husbandry on road construction and maintenance machinery, and on such other vehicles, machinery and equipment as may be specified in regulations issued by the commissioner. All use shall be in accordance with such regulations. Use of such emblem as a clearance marker or on stationary objects on the highways is prohibited.

37. The commissioner shall promulgate rules and regulations prescribing appropriate cautionary devices to be affixed to motor vehicles engaged in retail sales of frozen desserts directly to consumers which shall include, but not be limited to, front crossing arms to be activated only when such vehicle is stopped and its occupants are engaged in such retail sales. Such rules and regulations shall be designed to warn oncoming vehicles of the likelihood of pedestrians in or about the vicinity of such sales oriented motor vehicles. No person shall engage in the retail sale by motor vehicle of frozen desserts directly to consumers in violation of the rules and regulations promulgated by the commissioner. As used in this subdivision, "frozen desserts" shall mean ice cream,

frozen custard, French ice cream, French custard ice cream, artificially sweetened ice cream, ice milk, artificially sweetened ice milk, fruit sherbet, non-fruit sherbet, water ices, non-fruit water ices, quiescently frozen confection, quiescently frozen dairy confection, manufactured desserts mix, frozen confection, mellorine frozen dessert, parevine, frozen yogurt, freezer made shakes, freezer made milk shakes, lo-mel, and dietary frozen dessert as all such products are commonly known, together with any mix used in such frozen desserts and any products which are similar in appearance, odor or taste to such products, or are prepared or frozen as frozen desserts are customarily prepared or frozen, whether made with dairy products or non-dairy products.

38. [None]

39. Every motor vehicle registered in this state and manufactured or assembled after October first, nineteen hundred sixty-four shall be equipped with a defrosting device, in good working order, for the purpose of preventing the formation of snow or ice on the windshield directly in front of the operator. For the purposes of this subdivision the term "motor vehicle" shall exclude motorcycles, tractors used exclusively for agricultural purposes, self-propelled combines, self-propelled harvesting machines and farm equipment and self-propelled caterpillar or crawler-type equipment while being operated on the contract site.

40. Stop lamps. (a) Every motor vehicle, except a motorcycle, operated or driven upon the public highways of the state, if manufactured prior to January first, nineteen hundred fifty-two, shall be equipped with at least one stop lamp which shall display a red to amber light visible at least five hundred feet from the rear of the vehicle when the brake of such vehicle is applied.

(b) Every motor vehicle, except a motorcycle, operated or driven upon the public highways of the state, if manufactured on or after January first, nineteen hundred fifty-two, shall be equipped with at least two stop lamps, one on each side, each of which shall display a red to amber light visible at least five hundred feet from the rear of the vehicle when the brake of such vehicle is applied.

41. Colored and flashing lights. The provisions of this subdivision shall govern the affixing and display of lights on vehicles, other than those lights required by law. 1. No light, other than a white light, and no revolving, rotating, flashing, oscillating or constantly moving white light shall be affixed to, or displayed on any vehicle except as prescribed herein.

2. Red lights and certain white lights. One or more red or combination red and white lights, or one white light which must be a revolving, rotating, flashing, oscillating or constantly moving light, may be affixed to an authorized emergency vehicle, and such lights may be displayed on an authorized emergency vehicle when such vehicle is engaged in an emergency operation, and upon a fire vehicle while returning from an alarm of fire or other emergency.

3. Amber lights. a. One or more amber lights may be affixed to a hazard vehicle, and such a light or lights which display an amber light visible to all approaching traffic under normal atmospheric conditions from a distance of five hundred feet from such vehicle shall be displayed on a hazard vehicle when such vehicle is engaged in a hazardous operation. Such light or lights shall not be required to be displayed during daylight hours provided at least two red flags visible from a distance of five hundred feet are placed both in or on the front of, and to or on the rear of the vehicle and two such flags are placed to each side of the vehicle open to traffic. Such lights or flags need not be displayed on the vehicle when the vehicle is operating, or parked, within a barricaded work area and said lights or flags are displayed on the barricade. The provisions of this subdivision shall not prohibit the temporary affixing and display of an amber light to be used as a warning on a disabled motor vehicle or on a motor vehicle while it is stopped on a highway while engaged in an operation which would restrict, impede or interfere with the normal flow of traffic.

b. In any city in this state having a population of one million or more, one amber light may be affixed to any motor vehicle owned or operated by a volunteer member of a civilian or crime patrol provided such volunteer civilian or crime patrol member has been authorized in writing to so affix an amber light by the police commissioner of the municipality in which he patrols, which authorization shall be subject to revocation at any time by the police commissioner who issued the same or his successor in office. Such amber light may be operated by such volunteer civilian or crime patrol member in such a vehicle only when engaged in a patrol operation as defined and authorized by rules and regulations promulgated by the police commissioner and only in such a manner and at such times as may be authorized by the police commissioner pursuant to said rules and regulations.

4. Blue light.

a. One blue light may be affixed to any motor vehicle owned by a volunteer member of a fire department or on a motor vehicle owned by a member of such person's family residing in the same household or by a business enterprise in which such person has a proprietary interest or by which he or she is employed, provided such volunteer firefighter has been authorized in writing to so affix a blue light by the chief of the fire department or company of which he or she is a member, which authorization shall be subject to revocation at any time by the chief who issued the same or his or her successor in office. Such blue light may be displayed exclusively by such volunteer firefighter on such a vehicle only when engaged in an emergency operation. The use of blue lights on vehicles shall be restricted for use only by

a volunteer firefighter except as otherwise provided for in subparagraphs b and b-1 of this paragraph.

b. In addition to the red and white lights authorized to be displayed pursuant to paragraph two of this subdivision, one or more blue lights or combination blue and red lights or combination blue, red and white lights may be affixed to a police vehicle, fire vehicle, ambulance, emergency ambulance service vehicle, and county emergency medical services vehicle provided that such blue light or lights shall be displayed on a police vehicle, fire vehicle, ambulance, emergency ambulance service vehicle, and county emergency medical services vehicle for rear projection only. In the event that the trunk or rear gate of a police vehicle, fire vehicle, ambulance, emergency ambulance service vehicle, and county emergency medical services vehicle obstructs or diminishes the visibility of other emergency lighting on such vehicles, a blue light may be affixed to and displayed from the trunk, rear gate or interior of such vehicles. Such lights may be displayed on a police vehicle, fire vehicle, ambulance, emergency ambulance service vehicle, and county emergency medical services vehicle when such vehicles are engaged in an emergency operation. Nothing contained in this subparagraph shall be deemed to authorize the use of blue lights on police vehicles, fire vehicles, ambulances, emergency ambulance service vehicles, and county emergency medical services vehicles unless such vehicles also display one or more red or combination red and white lights as otherwise authorized in this subdivision.

b-1. In addition to the amber light authorized to be displayed pursuant to paragraph three of this subdivision, one or more blue lights or combination blue and amber lights may be affixed to a hazard vehicle designed for the towing or pushing of disabled vehicles provided that such blue light or lights shall be displayed on such a hazard vehicle for rear projection only. Such blue light or lights may be displayed on a hazard vehicle designed for the towing or pushing of disabled vehicles when such vehicle is engaged in a hazardous operation and is also displaying the amber light or lights required to be displayed during a hazardous operation pursuant to paragraph three of this subdivision. Nothing contained in this subparagraph shall be deemed to authorize the use of blue lights on hazard vehicles designed for the towing or pushing of disabled vehicles unless such hazard vehicles also display one or more amber lights as otherwise authorized in this subdivision.

c. The commissioner is authorized to promulgate rules and regulations relating to the use, placement, power and display of blue lights on a police vehicle, fire vehicle, and hazard vehicle designed for the towing or pushing of disabled vehicles.

5. Green light. One green light may be affixed to any motor vehicle owned by a member of a volunteer ambulance service, or on a motor vehicle owned by a member of such person's family, or by a business enterprise in which such person has a proprietary interest or by which he is employed, provided such member has been authorized in writing to so affix a green light by the chief officer of such service as designated by the members thereof. Such green light may be displayed exclusively by such member of a volunteer ambulance service only when engaged in an emergency operation. The use of green lights on vehicles shall be restricted for use only by a member of a volunteer ambulance service as provided for in this paragraph.

As used in this paragraph volunteer ambulance service means:

a. a non-profit membership corporation (other than a fire corporation) incorporated under or subject to the provisions of the membership corporations law, or any other law, operating its ambulance or ambulances on a non-profit basis for the convenience of the members thereof and their families or of the community or under a contract with a county, city, town or village pursuant to section one hundred twenty-two-b of the general municipal law; or

b. an unincorporated association of persons operating its ambulance or ambulances on a non-profit basis for the convenience of the members and their families or of the community.

6. The commissioner is authorized to promulgate regulations with respect to the affixing and display of colored lights and to promulgate specifications with respect to such lights.

7. The provisions of this subdivision forty-one shall not be applicable to vehicles from other states or from the Dominion of Canada which have entered this state to render police, fire or civil defense aid, or ambulance service, while such vehicles are here or are returning to their home stations if the lights on such vehicles comply with the laws of their home states or the Dominion of Canada and are displayed in this state in the same manner permitted by their home states or the Dominion of Canada, nor shall the provisions of this subdivision forty-one be deemed to amend, supersede or in any manner affect the provisions of the New York state defense emergency act as now in force or as it may be amended from time to time.

8. The provisions of this subdivision shall not be applicable to the driver of a vehicle from another state or foreign jurisdiction which vehicle has colored lights affixed but not revolving, rotating, flashing, oscillating or constantly moving if the lights on such vehicle comply with the laws of the state or home foreign jurisdiction in which the vehicle is registered.

42. Every motor vehicle registered in this state which is manufactured or assembled on or after September first, nineteen hundred eighty and operated or driven upon the highways of the state shall be equipped with a speedometer device which is capable of measuring the speed of such vehicle and displaying the same in miles per hour.

43. No dealer shall sell a motor vehicle or a trailer which is to be registered in this state unless such

motor vehicle or trailer has all the equipment required for operation on the public highways of this state.

44. Driver education vehicles. Any motor vehicle used for the purpose of driving instruction for hire or for driver education by a school and being operated by a person receiving such instruction or education shall bear identification, visible to both oncoming and following traffic, to indicate that the vehicle is being driven by a student driver. The commissioner may establish standards for such identification.

45. Hydrocarbon gas powered vehicles. It shall be unlawful to operate upon any public highway or street in this state a motor vehicle that uses hydrocarbon gas as its primary or secondary fuel supply, unless the motor vehicle conspicuously displays a reflective placard designed to alert emergency personnel to the extraordinary hazards which may arise from proximity with this fuel. The commissioner shall, in cooperation with the state fire administrator, establish regulations as to the location and design of this warning placard.

46. Tamper-resistant odometers or speedometers. It shall be unlawful after July first, nineteen hundred ninety-one for any person, firm, association or corporation to sell or offer for sale in this state a new motor vehicle which is to be registered in this state and which was manufactured or assembled on or after such date, and designed as a nineteen hundred ninety-two or later model, unless such vehicle is equipped with a tamper-resistant odometer or speedometer designed with the intent to reduce the likelihood of unlawful tampering with the mileage reading thereon.

The commissioner shall promulgate such rules and regulations relative to tamper-resistant odometers and speedometers on motor vehicles and the approval of the same as are not inconsistent with the provisions of federal law, if any, relating thereto. Such rules shall, at a minimum, require odometers and speedometers which indicate mileage with a minimum of six digits exclusive of digits indicating fractions of a mile. This section shall not apply to motorcycles.

47. (a) It shall be unlawful for any person to operate or cause to be operated, an audio amplification system which is operated in, installed in or powered by a vehicle which generates an A-weighted sound level in excess of seventy dB (A) measured at, or adjusted to, a distance of twenty-five feet from the vehicle which is driven, standing, or parked on a public highway, or within one hundred feet of a public highway unless that system is being operated to request assistance or warn of a hazardous situation. This section shall not apply to authorized emergency vehicles or vehicles operated by gas, electric, communications or water utilities. This section shall not apply to the sound systems of vehicles used for advertising, or in parades, political or other special events, except that the use of sound systems on those motor vehicles may be prohibited by a local authority by ordinance or local law.

(b) Any person convicted of a violation of this section shall for a first conviction thereof be punished by a fine of up to one hundred fifty dollars; for a conviction of a second violation, both of which were committed within a period of eighteen months, such person shall be guilty of a traffic infraction and shall be punished by a fine of not less than one hundred fifty dollars and not more than three hundred dollars; upon conviction of a third or subsequent violation, all of which were committed within a period of eighteen months, such person shall be guilty of a traffic infraction and shall be punished by a fine of not less than three hundred seventy-five dollars and not more than seven hundred fifty dollars.

48. Bumpers or similar devices. (a) For the purposes of this subdivision, the following terms shall have the following meanings:

(i) Bumper. A system, the primary function of which is to provide protection against damage affecting front or rear external lamps, body parts and vehicle occupants during low speed impacts.

(ii) Passenger car. A motor vehicle whose body style is a sedan, hardtop, coupe, convertible, station wagon or hatchback but not a van, minivan, multipurpose passenger vehicle, truck, tractor, motorcycle or bus.

(b) No person shall operate a passenger car registered in New York unless it is equipped with both a front and rear bumper, each securely fastened and with some part of the bumper located between sixteen inches and twenty inches above the ground. This provision shall not apply to a vehicle registered as an historical vehicle.

(c) Except insofar as paragraph (b) of this subdivision shall apply, no person shall operate a motor vehicle designated as a nineteen hundred ninety or newer model year vehicle, which is registered in this state, except a motorcycle or special purpose commercial vehicle registered under schedule F of subdivision seven of section four hundred one of this chapter, which is so constructed that the body has a clearance at the front end of more than thirty inches from the ground when empty, unless the front end of the vehicle is equipped with bumpers or devices serving similar purposes which shall be so constructed and located that (i) some part of the bumpers or devices must be at least sixteen but not more than thirty inches above the ground with the vehicle empty; (ii) the maximum distance between the closest points between bumpers or devices, if more than one is used, shall not exceed twenty-four inches; (iii) the maximum transverse distance from the widest part of the motor vehicle at the front to the bumper or device shall not exceed eighteen inches; and (iv) the bumpers or devices shall be substantially constructed and firmly attached. A motor vehicle constructed and maintained so that the body, chassis, or other parts of the vehicle afford the front end protection contemplated shall be deemed to be in compliance with this section.

(d) Except insofar as paragraph (b) of this subdivision shall apply, no person shall operate a motor

vehicle or a combination of vehicles, designated as a nineteen hundred ninety or newer model year vehicle, except a tractor, pole trailer, vehicle engaged in saddle-mount operation, motorcycle or special purpose commercial vehicle registered under schedule F of subdivision seven of section four hundred one of this chapter, if the motor vehicle is registered in this state, and which is so constructed that the body, or the chassis assembly without the body, has a clearance at the rear end of more than thirty inches from the ground when empty, unless the rear end of the vehicle or combination of vehicles is equipped with bumpers or devices serving similar purposes which shall be so constructed and located that: (i) some part of the bumpers or devices must be at least sixteen but not more than thirty inches above the ground with the vehicle empty; (ii) the maximum distance between the closest points between bumpers, or devices, if more than one is used, shall not exceed twenty-four inches; (iii) the maximum transverse distance from the widest part of the motor vehicle at the rear to the bumper or device shall not exceed eighteen inches; (iv) the bumpers or devices shall be located not more than twenty-four inches forward of the extreme rear of the vehicle; and (v) the bumpers or devices shall be substantially constructed and firmly attached. Motor vehicles constructed and maintained so that the body, chassis, or other parts of the vehicle afford the rear end protection contemplated shall be deemed to be in compliance with this section.

49. Truck warning lights. (a) Every truck registered in this state and manufactured or assembled after September first, nineteen hundred ninety-two, which has a bed capable of being tilted or lifted by controls that are located within the cab of such truck and which is operated upon any public highway or street in this state shall be equipped with a warning light in its cab that is activated whenever the bed of the truck is elevated.

(b) Every tractor registered in this state and manufactured or assembled after September first, nineteen hundred ninety-three, which is used primarily for the towing of a trailer capable of being tilted or lifted and which is operated upon any public highway or street in this state shall be equipped with a warning light in its cab that is activated whenever the trailer is elevated.

50. Taxicab partitions and shields. Every taxicab registered in this state and registered or licensed by a city, town or village of seventy-five thousand persons or more pursuant to section one hundred eighty-one of the general municipal law shall be equipped with (a) partitions or shields made of plexiglass or other shatterproof material located between and effectively separating the front and rear seats, and (b) amber colored distress lights, mounted on and clearly visible to passersby from the front and rear of the taxicab; provided, however, that the requirements of this subdivision shall not apply to taxicabs registered or licensed by such city, town or village which elects not to be subjected to the requirements of this subdivision pursuant to a duly enacted or adopted local law, ordinance or regulation. Nothing contained herein shall be construed to restrict the power of a city, town or village which elects not to be subject to the requirements of this subdivision to adopt or enforce a local law, ordinance or regulation regarding the use of taxicab partitions and distress lights.

51. [contingently effective] Taxicab, livery and stretch limousine notices. (a) Every taxicab, livery, and altered motor vehicle commonly referred to as a "stretch limousine" which was altered on or after January first, two thousand twenty-one or retrofitted pursuant to subdivision one-a of section three hundred eighty-three of this article registered in this state shall have posted therein the following notice: “Seatbelts must be available for your use. You must buckle up, it’s the law.”

(b) The notices required to be posted pursuant to paragraph (a) of this subdivision shall be posted in a manner legible and conspicuous to passengers in all seating positions of such vehicles. Provided, however, that in addition to the requirements of this paragraph, such notices posted within taxis and liveries subject to registration and licensing by cities having a population of one million or more shall also be provided in the top two designated citywide languages as such term is defined in section 23-1101 of the administrative code of the city of New York.

51. [contingently effective] (a) Every taxicab and livery registered in this state shall have posted therein the following notice: “Seatbelts must be available for your use. Please buckle up.”

(b) The notices required to be posted pursuant to paragraph (a) of this subdivision shall be posted in a manner legible and conspicuous to passengers in all seating positions of such vehicles.

52. No police vehicle owned by the state, a public authority, a county, town, city or village shall be sold unless, prior to such sale, such vehicle is decommissioned and any distinctive markings and affixed lights which would designate it in the public’s view as such a police vehicle have been removed. The commissioner of the division of criminal justice services, in consultation with the commissioner, shall promulgate rules and regulations determining the specifications for decommissioning police vehicles and for the removal of such distinctive markings and affixed lights prior to sale.

53. Federal motor vehicle safety standard certification label. No person shall, with intent to defraud, knowingly remove, deface, destroy, cover, alter, or otherwise change the form or appearance of a federal motor vehicle safety standard certification label, issued in accordance with section 30115 of title 49 of the United States Code and part 567 of title 49 of the code of federal regulations, on an altered motor vehicle. No person shall, with intent to defraud, affix to an altered motor vehicle a federal motor vehicle safety standard certification label ex-

cept in accordance with section 30115 of title 49 of the United States Code and part 567 of title 49 of the code of federal regulations. A violation of this subdivision shall be punishable as a misdemeanor.

54. Stretch limousine commercial GPS.

(a) Every stretch limousine registered in this state shall be equipped with commercial global positioning system (GPS) technology within no later than one year of the date upon which the national highway traffic safety administration promulgates final regulations establishing standards for commercial GPS.

(b) It shall be unlawful to operate or cause to be operated a stretch limousine registered in this state on any public highway or private road open to public motor vehicle traffic unless such stretch limousine is equipped with commercial global positioning system (GPS) technology as required by this subdivision and such commercial global positioning system (GPS) technology is used. The presence in such stretch limousine of commercial global positioning system (GPS) technology connected to a power source and in an operable condition is presumptive evidence of its use by any person operating such stretch limousine. Such presumption may be rebutted by any credible and reliable evidence which tends to show that such commercial global positioning system (GPS) technology was not in use.

(c) For the purposes of this subdivision:

(i) "Stretch limousine" shall mean an altered motor vehicle having a seating capacity of nine or more passengers, including the driver, commonly referred to as a "stretch limousine" and which is used in the business of transporting passengers for compensation; and

(ii) "Commercial global positioning system (GPS) technology" shall mean global positioning system (GPS) technology which has been specifically designed to assist in the navigation of commercial motor vehicles.

HISTORY:

Add, L 1959, ch 775, eff Oct 1, 1960, with substance transferred from former §§ 15, 70(1); amd, L 1959, ch 517; L 1959, ch 582; L 1959, ch 760; L 1959, ch 813; L 1960, ch 300, § 24, eff Oct 1, 1960; L 1960, ch 464, § 24, eff Jan 1, 1961; L 1960, ch 608, § 3; L 1960, ch 663, § 3, eff Oct 1, 1960; L 1962, ch 225, § 1, eff Oct 1, 1962; L 1962, ch 930, § 3; L 1962, ch 994, § 1; L 1963, ch 501, § 1; L 1963, ch 645, § 1; L 1963, ch 653, § 1; L 1963, ch 971, §§ 1–3, eff July 1, 1963; L 1963, ch 973, § 1; L 1963, ch 975, § 1; L 1964, ch 332; L 1964, ch 472, § 1; L 1964, ch 652, § 1; L 1964, ch 910, § 1; L 1965, ch 289; L 1965, ch 600, § 1, eff Jan 1, 1966; L 1966, ch 169, § 1; L 1966, ch 172, §§ 1, 2; L 1966, ch 184, §§ 1, 4, eff April 5, 1966; L 1966, ch 381, § 1; L 1966, ch 471, § 1, eff May 31, 1966; L 1966, ch 723, § 1; L 1966, ch 856, § 1; L 1966, ch 902, §§ 1, 42; L 1967, ch 10, § 1; L 1967, ch 20, § 1, eff Oct 1, 1967; L 1967, ch 121, § 1, eff Oct 1, 1967; L 1967, ch 359, § 1; L 1968, ch 375, § 1; L 1968, ch 520, § 1; L 1968, ch 575, § 1, eff Oct 1, 1968; L 1968, ch 909, § 1; L 1968, ch 910, §§ 1, 2; L 1969, ch 18, § 1; L 1969, ch 322, § 1, eff Sept 1, 1969; L 1969, ch 444, § 1; L 1970, ch 197, §§ 9–11, eff July 1, 1971; L 1970, ch 328, § 1, eff Oct 1, 1970; L 1970, ch 388, § 1, eff Jan 1, 1971; L 1970, ch 459, § 2, eff May 5, 1970; L 1970, ch 573, §§ 1, 2, eff Jan 1, 1971; L 1970, ch 604, § 1, eff Sept 1, 1970; L 1970, ch 679, § 3, eff May 8, 1970; L 1970, ch 814, § 1, eff Jan 1, 1971; L 1970, ch 914, § 1, eff Oct 15, 1970; L 1971, ch 282, § 4; L 1971, ch 337, § 1, eff Sept 1, 1971; L 1971, ch 432, § 1, eff Sept 1, 1973; L 1971, ch 656, § 1; L 1971, ch 734, § 1; L 1971, ch 763, § 1; L 1971, ch 764, §§ 1, 2; L 1971, ch 965, § 1, eff July 2, 1971; L 1971, ch 1026 §§ 1, 3–7, eff July 2, 1971; L 1972, ch 90, § 1, eff April 5, 1972; L 1972, ch 169, § 2, eff Jan 1, 1973; L 1972, ch 560, § 1, eff Jan 1, 1973; L 1972, ch 704, § 1; L 1972, ch 780, § 6; L 1973, ch 19, § 1; L 1973 ch 64, § 2; L 1973, ch 64, § 1; L 1973, ch 96, § 1, eff Sept 1, 1973; L 1973, ch 1038, § 1, eff Jan 1, 1974; L 1975, ch 761, § 1, eff Aug 9, 1975; L 1976, ch 14, § 1, eff March 2, 1976; L 1976, ch 204, § 1; L 1976, ch 221, § 1, eff Sept 1, 1976; L 1976, ch 300, § 1; L 1976, ch 307, § 1, eff Oct 1, 1976; L 1977, ch 402, § 1; L 1977, ch 435, § 1, eff July 12, 1977; L 1977, ch 592, §§ 1–6, eff Jan 1, 1978; L 1978, ch 144, § 1, eff May 16, 1978; L 1978, ch 724, § 1, eff Sept 1, 1978; L 1979, ch 434, § 1, eff Sept 1, 1979; L 1979, ch 608, § 1, eff Sept 1, 1979; L 1981, ch 144, § 1; L 1981, ch 224, § 1; L 1981, ch 770, § 1; L 1982, ch 124, § 1; L 1982, ch 148, § 1; L 1982, ch 392, § 1, eff Jan 1, 1983; L 1983, ch 604, § 1, eff Sept 1, 1983; L 1983, ch 856, § 1, eff Aug 8, 1983; L 1983, ch 1008, § 4, eff Sept 30, 1983; L 1984, ch 535, § 1, eff Sept 1, 1984; L 1984, ch 536, § 1; L 1984, ch 736, § 1, eff Aug 3 1984; L 1985, ch 437, § 1, eff Jan 1, 1986; L 1985, ch 567, §§ 1, 2, eff Sept 1, 1985; L 1985, ch 576, § 3, eff Nov 23, 1985; L 1986, ch 345, § 1, eff July 17, 1986; L 1986, ch 612, § 1, eff Nov 1, 1986; L 1986, ch 816, § 1, eff Oct 31, 1986; L 1988, ch 236, § 1; L 1988, ch 351, § 1, eff Nov 26, 1988; L 1988, ch 361, § 1, eff Nov 26, 1988; L 1988, ch 730, § 3; L 1989, ch 39, § 1, eff Aug 12, 1989; L 1989, ch 61, § 36, effective and applicable to violations committed on and after May 19, 1989; L 1989, ch 303, § 1, eff July 10, 1989; L 1989, ch 305, § 1, eff July 10, 1989; L 1989, ch 312, § 1, eff July 10, 1989; L 1989, ch 623, § 1, eff Aug 31, 1989; L 1990, ch 173, § 10, eff Aug 19, 1990; L 1990, ch 366, § 1, eff Jan 1, 1991; L 1990, ch 827, § 1, eff July 25, 1990; L 1990, ch 856, § 1, eff Aug 24, 1990; L 1991, ch 155, §§ 1–3, eff Jan 1, 1992; L 1991, ch 278, § 1, eff July 15, 1991; L 1991, ch 476, § 1, eff Jan 1, 1992; L 1992, ch 148, § 1, eff June 16, 1992; L 1992, ch 156, § 1, eff Sept 1, 1992; L 1992, ch 242, § 1, eff April 1, 1994; L 1994, ch 135, § 2, eff Nov 27, 1994; L 1994, ch 545, § 1, eff Sept 24, 1994; L 1994, ch 654, § 4, eff Jan 29, 1995; L 1995, ch 391, § 1, eff Sept 1, 1995; L 1995, ch 655, § 1, eff Aug 8, 1995; L 1996, ch 32, § 1, eff May 2, 1996; L 1996, ch 112, § 1, eff June 4, 1996; L 1996, ch 550, § 2, eff Feb 4, 1997; L 1997, ch 74, § 1, eff May 23, 1997, deemed eff Feb 4, 1997; L 1998, ch 267, § 1, eff Jan 6, 1999; L 1999, ch 95, § 1, eff July 1, 1999; L 1999, ch 415, § 1, eff Aug 31, 1999; L 1999, ch 525, § 1, eff Sept 28, 1999; L 2001, ch 83, § 1, eff June 29, 2002; L 2001, ch 425, § 1, eff Oct 31, 2001; L 2001, ch 430, § 1, eff Oct 31, 2001; L 2002, ch 12, §§ 1, 2, eff April 18, 2002; L 2003, ch 62, §§ 12–15 (Part C), eff May 15, 2003; L 2003, ch 231, § 1, eff Sept 1, 2003; L 2003, ch 495, § 2, eff Jan 7, 2004; L 2004, ch 205, § 2, eff July 20, 2004; L 2004, ch 349, §§ 1, 2, eff Aug 10, 2004; L 2005, ch 447, § 1, eff Sept 1, 2005; L 2005, ch 453, § 1, eff Sept 1, 2006; L 2005, ch 608, § 1, eff Feb 26, 2006; L 2005, ch 624, § 1, eff Nov 28, 2005; L 2006, ch 45, § 1, eff June 7, 2006; L 2006, ch 203, § 1, eff Sept 1, 2006; L 2006, ch 686, § 1, eff March 12, 2007; L 2008, ch 350, § 2, eff Jan 1, 2009; L 2008, ch 386, § 1, eff July 21, 2008; L 2010, ch 465, § 2, eff Aug 30, 2010; L 2011, ch 138, § 1, eff Jan 14, 2012; L 2011, ch 143, § 1, eff July 18, 2011; L 2014, ch 190, § 2, effective November 22, 2014; L 2018, ch 476, § 18, effective December 28, 2018; L 2018, ch 478, § 1, effective June 26, 2019; L 2018, ch 486, §§ 1, 2, effective June 26, 2019; L 2019, ch 59, § 8 (Part III), effective November 1, 2019; L 2020, ch 10, § 4, effective January 1, 2021; L 2020, ch 11, § 1, effective March 4, 2020; L 2020, ch 38, § 3, effective April 17, 2021; L 2020, ch 58, §§ 1, 2 (Part C), effective April 3, 2020.

§ 381. Motorcycle equipment

1. (a) Every motorcycle, driven upon the public highways of this state, shall be provided with adequate brakes in good working order and sufficient to control such motorcycle at all times, when the same is in use, a suitable and adequate bell, horn or other device for signaling, one red to amber stop lamp and shall, whenever such motorcycle is being operated upon the public highways of the state, display one lighted lamp in front and one on the

rear, or, when such motorcycle is operated with a passenger or other truck attached to the side or front two such lamps on the front and one on the rear; and in all cases the lamps on a motorcycle shall include a red light visible from the rear. The rays of such rear lamp shall shine upon the number plate carried on the rear of such motorcycle in such manner as to render the numerals thereon visible for at least fifty feet in the direction from which the motorcycle is proceeding. The light of the front lamp or lamps shall be visible at least two hundred feet in the direction in which the motorcycle is proceeding. Every such motorcycle shall have a suitable muffler or device to prevent unnecessary noise from exhaust gases, and the use of so-called "cut-outs" is prohibited.

(b) Driving a motorcycle without the display of one lighted lamp in front and one on the rear, during a period other than from one-half hour after sunset to one-half hour before sunrise, shall not be deemed to constitute negligence or contributory negligence in any action or proceeding arising out of the operation of such motorcycle.

(c) The provisions of this subdivision relating to the display of one lighted lamp in front and one on the rear during a period other than from one-half hour after sunset to one-half hour before sunrise shall not apply to a motorcycle, driven at a speed of less than twenty miles per hour, owned by a municipality and used for the collection of parking fees or the enforcement of parking regulations.

1-a. Every motorcycle registered in this state and manufactured or assembled after January first, nineteen hundred seventy-one and designated as a nineteen hundred seventy-one or subsequent year model shall be equipped with brakes acting on the front as well as the rear wheel.

2. No head lamp shall be used upon any motorcycle operated upon the public highways of the state, unless such lamp is approved by the commissioner or is equipped with a lens or other device approved by the commissioner. Every such head lamp, lens or other device shall be applied and adjusted in accordance with the requirements of the certificate approving the use thereof. Every such head lamp shall be firmly and substantially mounted on the motorcycle in such manner as to allow the lamp to be properly and readily adjusted. Each reflector which is used as a part of such head lamp shall have a polished silver or glass reflecting surface, or a reflecting surface which gives candle power intensity meeting the requirements of rules and regulations established by the commissioner, and shall be substantially free from dents, rust and other imperfections. The operator of every motorcycle shall permit any police officer or other person exercising police powers to inspect the equipment of such motorcycle and make such tests as may be necessary to determine whether the provisions of this section are being complied with. The commissioner may make reasonable rules and regulations relative to lights on motorcycles and the approval of the same which may be necessary to effectuate the foregoing provisions of this section.

2-a. It shall be unlawful for any person to operate on the public highways of the state any motorcycle manufactured or assembled after October first, nineteen hundred sixty-eight and designated as a nineteen hundred sixty-nine or subsequent year model unless such motorcycle is equipped with the lamps required by this section, which lamps shall be of a type, design and construction approved by the commissioner.

3. Except as hereinafter provided, only a white or yellow light shall be displayed upon a motorcycle so as to be visible from a point directly in front of the vehicle. Any color light, except blue, may be displayed, so as to be visible from a point directly in front of the vehicle, on a police vehicle or on a motorcycle operated by a sheriff or regular deputy sheriff when engaged in the performance of duty as a police officer. Any color light, including blue, may be displayed, so as to be visible from a point directly in front of the vehicle, on a motorcycle operated by a chief or assistant chief of a fire department, a county or deputy county fire coordinator, or a county or assistant county fire marshal. A blue light may be displayed upon a motorcycle, so as to be visible from a point directly in front of the vehicle, when operated by an active volunteer member of a fire department or company duly authorized as hereinafter provided, and while such vehicle is in use for fire or other emergency service. No volunteer firefighter shall be permitted to display a blue light upon a motorcycle as hereinbefore provided except while actually enroute to the scene of a fire or other emergency requiring his or her services and unless he or she shall be an active volunteer member of a fire department or company and shall have been authorized in writing to so display a blue light by the chief of the fire department or company of which he or she is a member, which authorization shall be subject to revocation at any time by the chief who issued the same, or his or her successor in office.

4. Every motorcycle shall have at least one adequate red reflector securely attached to the rear. Such reflector may be a part of the rear lamp. No reflector shall be deemed adequate within the meaning of this subdivision unless it is of a size and type approved by the commissioner, and unless it is so designed, located and maintained as to be visible for at least two hundred feet when opposed by a motor vehicle displaying lawful undimmed headlights at night on an unlighted highway. The provisions of this subdivision with respect to reflectors shall be applicable, both day and night, whenever the motorcycle is on a public highway.

5. No person shall operate on a public highway a motorcycle on which the handle bars or grips are more than the height of the operator's shoulders.

6. It shall be unlawful for any person to operate or ride upon a motorcycle unless he wears a protective

helmet of a type which meets the requirements set forth in section 571.218 of the federal motor vehicle safety standards as may from time to time be amended. The commissioner is hereby authorized and directed to adopt regulations for helmets which are consistent with the requirements as specified in section 571.218 of the federal motor vehicle safety standards as may from time to time be amended. The police authorities of a city, town or village may issue a permit exempting members of organizations sponsoring or conducting parades or other public exhibitions from the provisions of this subdivision while such members are participating in such parades or other public exhibitions.

7. It shall be unlawful, on and after January first, nineteen hundred sixty-seven, for any person to operate a motorcycle unless he wears goggles or a face shield of a type approved by the commissioner. The commissioner is hereby authorized and empowered to adopt and amend regulations covering types of goggles and face shields and the specifications therefor and to establish and maintain a list of approved goggles and face shields which meet the specifications as established hereunder.

8. It shall be unlawful to operate on any public highway in this state any motorcycle registered in this state which is equipped with a wind screen, unless such wind screen meets the specifications established therefor by the commissioner. The commissioner is hereby authorized to adopt and amend regulations covering types of wind screens and specifications therefor.

9. It shall be unlawful to sell, offer for sale or distribute any goggles or face shields for use by the operators of motorcycles unless they are of a type and specification approved by the commissioner and appear on the list of approved devices maintained by the commissioner.

9-a. It shall be unlawful to sell, offer for sale or distribute any protective helmets for use by the operators or passengers of motorcycles unless they are consistent with the regulations of the commissioner as provided in subdivision six of this section and within the requirements specified in section 571.218 of the federal motor vehicle safety standards as may from time to time be amended.

10. It shall be unlawful after July first, nineteen hundred sixty-seven to operate on any public highway in this state any motorcycle registered in this state, unless such motorcycle is equipped with a rear view mirror which shall be adjusted so that the operator of such motorcycle shall have a clear view of the road and condition of traffic behind such motorcycle.

11. No person shall operate a motorcycle on any highway which is: (1) not equipped with a muffler to prevent excessive or unusual noise; (2) equipped with a muffler from which the baffle plates, screens or other original internal parts have been removed or altered; (3) equipped with an exhaust device without internal baffles, known as "straight pipes"; or (4) equipped with an exhaust system that has been modified in a manner that will amplify or increase the noise emitted by the motor of such vehicle above that emitted by the exhaust system originally installed on the vehicle.

12. No person shall operate a motorcycle on any highway which is equipped with an exhaust device that is intentionally designed to allow for the internal baffling to be fully or partially removed or interchangeable. This subdivision shall not apply to a motorcycle manufactured or assembled prior to nineteen hundred seventy-nine or a motorcycle registered as a limited use vehicle or an all terrain vehicle pursuant to article forty-eight-A or forty-eight-B of this chapter.

13. A violation of any of the provisions of this section shall be punishable by a fine not exceeding one hundred dollars or by imprisonment for not exceeding thirty days, or by both such fine and imprisonment.

HISTORY:

Add, L 1959, ch 775, eff Oct 1, 1960, with substance transferred from former § 43; amd, L 1960, ch 300, § 26, eff Oct 1, 1960; L 1966, ch 979, § 1, eff Jan 1, 1967; L 1967, ch 358, § 1; L 1967, ch 538, § 1; L 1968, ch 910, §§ 3, 4, eff Oct 1, 1968; L 1968, ch 1005, § 1, eff June 22, 1968; L 1969, ch 719, § 1, eff May 22, 1969; L 1969, ch 720, § 1; L 1970, ch 256, § 1, eff Oct 1, 1971; L 1970, ch 590, § 1, eff Jan 1, 1971; L 1979, ch 434, § 2, eff Sept 1, 1979; L 1981, ch 47, § 1, eff April 6, 1981; L 1986, ch 612, § 2, eff Nov 1, 1986; L 1989, ch 61, § 38, effective and applicable to violations committed on and after May 19, 1989; L 1994, ch 471, §§ 1–3, eff Jan 1, 1995; L 2005, ch 395, § 1, eff Nov 1, 2005; L 2018, ch 476, § 19, effective December 28, 2018.

Revision Notes: [1966, ch 979] This act was prepared under the direction of the New York State Department of Motor Vehicles and was introduced at its request.

Editor's Notes: Laws 1994, ch 471, § 4, eff Jan 1, 1995, provides as follows:

§ 4. This act shall take effect January 1, 1995, except that any rules and regulations necessary for the timely implementation of this act on its effective date shall be promulgated on or before such date.

Amendment Notes The 2018 amendment by ch 476, § 19, deleted "policeman" following "shall permit any" in the fifth sentence of 2; substituted "firefighter" for "fireman" in the last sentence of 3; and made stylistic changes.

Notes to Decisions

Analysis

1. In general
2. Lights
3. Protective helmets

1. In general

In action arising from accident that occurred when defendants' truck collided with motorcycle on which plaintiff was riding as passenger, plaintiff was entitled to summary judgment dismissing defendants' allegation of culpable conduct on her part where her deposition testimony, and that of driver of motorcycle, established that she had no opportunity to say or do anything to avoid accident, and defendants tendered no evidence that she was aware of dangerous situation or impending collision, or acted other reasonably prudent passenger in prevailing circumstances. Luck v Tellier, 222 A.D.2d 783, 634 N.Y.S.2d 814, 1995 N.Y. App. Div. LEXIS 12684 (N.Y. App. Div. 3d Dep't 1995).

Motorcycle operator, who was stopped for violating § 1181 of the Vehicle and Traffic Law, relating to minimum speeds, was properly arrested a second time for violating § 1120 of the Vehicle

and Traffic Law, when he refused to comply with the order and direction of a state trooper to start the motor so a determination could be made whether the muffler complied with subdivision 1 of this section. Krafft v State, 52 Misc. 2d 35, 275 N.Y.S.2d 109, 1966 N.Y. Misc. LEXIS 1276 (N.Y. Ct. Cl. 1966).

This section is too indefinite and is therefore unconstitutional. People v Smallwood, 52 Misc. 2d 1027, 277 N.Y.S.2d 429, 1967 N.Y. Misc. LEXIS 1785 (N.Y. Spec. Sess. 1967).

In a prosecution for a noisy muffler on a motorcycle in violation of Section 381, subd. 1 of the Vehicle and Traffic Law, the People must show either a decibel rating above that allowed by law under Vehicle and Traffic Law § 386, or that the vehicle in question made noise in excess of what was usual for vehicles of its class. People v Meyer, 63 Misc. 2d 580, 313 N.Y.S.2d 93, 1970 N.Y. Misc. LEXIS 1468 (N.Y. Spec. Sess. 1970).

A mini-bike comes within the definition of motorcycle under Vehicle & Traf L § 123; the operator of such a vehicle is required to wear a protective helmet pursuant to Vehicle & Traf L § 381, subd 6. Dean v Holland, 76 Misc. 2d 517, 350 N.Y.S.2d 859, 1973 N.Y. Misc. LEXIS 1525 (N.Y. Sup. Ct. 1973).

2. Lights

In an action to recover for personal injuries resulting from collision in the night time between a motorcycle with the side car attached while plaintiff was driving, and defendant's horsedrawn vehicle, plaintiff's failure to establish that at the time of the accident he was complying with statute as to the number and power of lights on his machine precludes a recovery. Willie v Luczka, 193 A.D. 826, 184 N.Y.S. 751, 1920 N.Y. App. Div. LEXIS 5658 (N.Y. App. Div. 1920).

In action for injuries resulting from automobile accident whether plaintiff was guilty of negligence contributing to the accident because motorcycle with passenger truck attached was being operated with but one headlight by plaintiff, in violation of statute, was for the jury. Anderson v Calkins, 252 A.D. 836, 298 N.Y.S. 985, 298 N.Y.S. 986, 1937 N.Y. App. Div. LEXIS 6408 (N.Y. App. Div. 4th Dep't 1937).

In action arising from accident that occurred when defendants' truck collided with plaintiffs' motorcycle, court erred in granting summary judgment to plaintiffs based on truck driver's plea of guilty to violating CLS Veh & Tr § 1141 (failing to yield right of way when turning left), as defendants were not thereby foreclosed from claiming that violation did not actually occur, or was excused, where truck driver denied that he was negligent, claiming that it was foggy and raining at time of collision and that he never saw motorcycle because its light was "dim." Luck v Tellier, 222 A.D.2d 783, 634 N.Y.S.2d 814, 1995 N.Y. App. Div. LEXIS 12684 (N.Y. App. Div. 3d Dep't 1995).

3. Protective helmets

Law requiring motorcyclists to wear protective helmets is valid exercise of state's police power and is constitutional. People v Bielmeyer, 54 Misc. 2d 466, 282 N.Y.S.2d 797, 1967 N.Y. Misc. LEXIS 1282 (N.Y. City Ct. 1967).

Subdivision 9 of this section requiring that a motorcycle operator or rider wear a protective helmet of a type approved by the commissioner is not so vague and uncertain as to render it unconstitutional. People v Schmidt, 54 Misc. 2d 702, 283 N.Y.S.2d 290, 1967 N.Y. Misc. LEXIS 1229 (N.Y. County Ct. 1967), app. dismissed, 23 N.Y.2d 686, 295 N.Y.S.2d 936, 243 N.E.2d 153, 1968 N.Y. LEXIS 1049 (N.Y. 1968).

The provisions of subd 6 of this section making it unlawful to operate or ride upon a motorcycle unless wearing a protective helmet of a type approved by the commissioner is a legitimate use of the state's police power not beyond the scope of legislative action. People v Schmidt, 54 Misc. 2d 702, 283 N.Y.S.2d 290, 1967 N.Y. Misc. LEXIS 1229 (N.Y. County Ct. 1967), app. dismissed, 23 N.Y.2d 686, 295 N.Y.S.2d 936, 243 N.E.2d 153, 1968 N.Y. LEXIS 1049 (N.Y. 1968).

Vehicle and Traffic Law § 381, subd 6 is not too vague and indefinite and does not unreasonably limit one's personal freedom so as to be unconstitutional. People v Newhouse, 55 Misc. 2d 1064, 287 N.Y.S.2d 713, 1968 N.Y. Misc. LEXIS 1806 (N.Y. City Ct. 1968).

A New Jersey resident could not be found guilty of violating Vehicle and Traffic Law § 381, subd 6, where his motorcycle complied with provisions of New Jersey law relative to registration and equipment. People v Driscoll, 56 Misc. 2d 220, 288 N.Y.S.2d 158, 1968 N.Y. Misc. LEXIS 1669 (N.Y. Dist. Ct. 1968).

While subd (6) of this section may infringe on the rights of the individual, it is equally apparent that such is incidental to a valid exercise of the police power and is not unreasonable; and when the general tendency and sole object of legislation is to promote public welfare, it is not unconstitutional even if enforcement interferes to some extent with liberty or property. People v Carmichael, 56 Misc. 2d 388, 288 N.Y.S.2d 931, 1968 N.Y. Misc. LEXIS 1694 (N.Y. County Ct. 1968).

Vehicle and Traffic Law § 381, subd 6 is clear, definite and a valid exercise of the state's police power. The statute is not discriminatory so as to deny defendant equal protection of the laws, and does not constitute an unreasonable burden on interstate commerce. The delegation to the Commissioner of Motor Vehicles of the power to adopt and amend regulations governing the required type of helmets does not constitute an improper delegation of legislative powers, and the law in no way contemplates an infringement upon defendant's right of privacy. People v Carmichael, 56 Misc. 2d 388, 288 N.Y.S.2d 931, 1968 N.Y. Misc. LEXIS 1694 (N.Y. County Ct. 1968).

A mini-bike comes within the definition of motorcycle under Vehicle & Traf L § 123; the operator of such a vehicle is required to wear a protective helmet pursuant to Vehicle & Traf L § 381, subd 6. Dean v Holland, 76 Misc. 2d 517, 350 N.Y.S.2d 859, 1973 N.Y. Misc. LEXIS 1525 (N.Y. Sup. Ct. 1973).

In view of fact that legislature could rationally have believed that a motorcyclist falling to the ground at great speed would sustain greater personal injuries without a helmet than with one and because statute requiring motorcycle operators and riders to wear protective helmets had clear, rational relation to purpose of protecting the individuals involved and the public interest, statute was constitutional. People v Bennett, 89 Misc. 2d 382, 391 N.Y.S.2d 506, 1977 N.Y. Misc. LEXIS 1872 (N.Y. J. Ct. 1977).

Fact that statute requiring that motorcycle operators or riders wear protective helmets was enacted because of desire to qualify State for federal highway construction funds and that federal government thereafter eliminated requirement of a compulsory helmet law did not render statute invalid. People v Bennett, 89 Misc. 2d 382, 391 N.Y.S.2d 506, 1977 N.Y. Misc. LEXIS 1872 (N.Y. J. Ct. 1977).

Wearing motorcycle helmet in such manner that helmet sits on back of head, resting on top of motorcyclist's shoulders, leaving better part of head exposed, known as "cowboy style", is equivalent to not wearing helmet at all in violation of Motorcycle Helmet Law (CLS Veh & Tr Law § 381[6].) People v Bloomfield, 130 Misc. 2d 151, 495 N.Y.S.2d 133, 1985 N.Y. Misc. LEXIS 3154 (N.Y. J. Ct. 1985).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 125-a, 376-a, 411-b, 2265.

Codes, Rules and Regulations:

Protective helmets, goggles, face shields and wind screens for motorcycles. 15 NYCRR §§ 54.1 et seq.

Annotations:

Liability for failure to provide motor vehicle with adequate rearview mirror. 27 ALR2d 1040.

Public regulation requiring mufflers or similar noise–preventing devices on motor vehicles, aircraft, or boats. 49 ALR2d 1202.

Validity of traffic regulations requiring motorcyclists to wear protective headgear. 32 ALR3d 1270.

Automobile occupant's failure to use seat belt as contributory negligence. 92 ALR3d 9.

Motorcyclist's failure to wear helmet or other protective equipment as affecting recovery for personal injury or death. 85 ALR4th 365.

Validity of traffic regulations requiring motorcyclists to wear helmets or other protective headgear. 72 ALR5th 607.

ARTICLE 10 Dimensions and Weights of Vehicles

HISTORY:
Add, L 1959, ch 775, eff Oct 1, 1960.

§ 385. Dimensions and weights of vehicles.

No person shall operate or move, or cause or knowingly permit to be operated or moved on any highway or bridge thereon, in any county not wholly included within a city, any vehicle or combination of vehicles of a size or weight exceeding the limitations provided for in this section. Except as otherwise specifically provided in subdivision fifteen of this section, no person shall operate or move, or cause or knowingly permit to be operated or moved on any highway or bridge thereon, in any city not wholly included within one county, any vehicle or combination of vehicles of a size or weight exceeding the limitations provided for in the rules and regulations of the city department of transportation of such city adopted pursuant to section sixteen hundred forty-two of this chapter.

1. * * * * *

(h) Notwithstanding the provisions of paragraph (a) of this subdivision, a house coach used for non-commercial purposes may exceed the maximum width applicable on the highway upon which such house coach is traveling if such excess width is wholly attributable to an awning and its support hardware that is no less than seven and one-half feet off the ground and extends no more than six inches beyond the body of the vehicle on the passenger side and four inches beyond the body of the vehicle on the driver's side. A fifth wheel trailer designed to provide temporary living quarters for recreational, camping, or travel use not to exceed four hundred square feet in the set-up mode and used for non-commercial purposes may exceed the maximum width applicable on the highway upon which such fifth wheel trailer is traveling if such excess width is wholly attributable to an awning and its support hardware that is no less than seven and one-half feet off the ground and extends no more than six inches beyond the body of the vehicle on the passenger side. This provision shall not apply to any city not wholly included within one county except such house coaches and fifth wheel trailers used for non-commercial purposes may be operated on that portion of interstate ninety-five which connects interstate two hundred eighty-seven with interstate two hundred ninety-five, that portion of interstate two hundred ninety-five which connects interstate ninety-five with interstate four hundred ninety-five and that portion of interstate four hundred ninety-five between interstate ninety-five and the Nassau-Queens county line.

(i) The commissioner of transportation may promulgate such rules and regulations as shall be necessary or desirable to effectuate the provisions of this subdivision.

* * * * *

3. * * * * *

(c) The length of buses having a carrying capacity of more than seven passengers shall not exceed forty-five feet, except that the length of articulated buses shall not exceed sixty-two feet. A house coach shall not exceed forty-five feet in length, provided however, that if a house coach exceeds forty feet in length, its wall-to-wall turning diameter shall not exceed ninety feet three inches and moreover, such house coach shall have permanently affixed to its body on the front passenger side door jamb, a data-plate on which the house coach manufacturer indicates the vehicle identification number and wall-to-wall turning diameter and attests to the fact that the wall-to-wall turning diameter is calculated in accordance with the Society of Automotive Engineers J-695 Standard as such standard existed on June first, two thousand three, regarding turning capability. In the event such a house coach exceeds either twenty-six thousand pounds gross vehicle weight rating, is greater than forty feet in length or exceeds both, the operator of such house coach must have a driver's license with a personal use vehicle endorsement as set forth in subparagraph (vii) of paragraph (b) of subdivision two of section five hundred one of [the]* this chapter. This provision shall not apply to any city not wholly included within one county except such house coaches and fifth wheel trailers used for non-commercial purposes may be operated on that portion of interstate ninety-five which connects interstate two hundred eighty-seven with interstate two hundred ninety-five, that portion of interstate two hundred ninety-five which connects interstate ninety-five with interstate four hundred ninety-five and that portion of interstate four hundred ninety-five between interstate ninety-five and the Nassau-Queens county line.

* * * * *

6. The weight per inch width of tire on any one wheel of a single vehicle or a combination of vehicles equipped with pneumatic tires, when loaded, shall be not more than eight hundred pounds.

7. The weight on any one wheel of a single vehicle or a combination of vehicles, equipped with pneumatic tires, when loaded, shall be not more than eleven thousand two hundred pounds.

8. The weight on any one axle of a single vehicle or a combination of vehicles, equipped with pneumatic tires, when loaded, shall be not more than twenty-two thousand four hundred pounds.

9. The weight on any two consecutive axles of a single vehicle or a combination of vehicles, equipped with pneumatic tires, when loaded, and when such axles are spaced less than eight feet from center to center, shall be not more than thirty-six thousand

*The bracketed word was inadvertently added by the Legislature.

pounds, except where axles are spaced eight feet or greater, but less than ten feet, the weight on those two axles shall not exceed that permitted by paragraph (b) of subdivision ten of this section and, in addition, shall not exceed forty thousand pounds. Axles to be counted as provided in subdivision five of this section.

10. A single vehicle or a combination of vehicles having three axles or more and equipped with pneumatic tires, when loaded, may have a total weight on all axles not to exceed thirty-four thousand pounds, plus one thousand pounds for each foot and major fraction of a foot of the distance from the center of the foremost axle to the center of the rearmost axle. Axles to be counted as provided in subdivision five of this section. In no case, however, shall the total weight exceed eighty thousand pounds except for a vehicle if operated by an engine fueled primarily by natural gas which may have a maximum gross weight of up to eighty-two thousand pounds. For any vehicle or combination of vehicles having a total gross weight less than seventy-one thousand pounds, the higher of the following shall apply:

(a) the total weight on all axles shall not exceed thirty-four thousand pounds plus one thousand pounds for each foot and major fraction of a foot of the distance from the center of the foremost axle to the center of the rearmost axle, or

(b) the overall gross weight on a group of two or more consecutive axles shall not exceed the weight produced by application of the following formula:

$$W = 500\ ((LxN)/(N-1) + (12xN)+36)$$

where W equals overall gross weight on any group of two or more consecutive axles to the nearest five hundred pounds, L equals distance in feet from the center of the foremost axle to the center of the rearmost axle of any group of two or more consecutive axles, and N equals number of axles in group under consideration, except that two consecutive sets of tandem axles may carry a gross load of thirty-four thousand pounds each providing the overall distance between the first and last axles of such consecutive sets of tandem axles is thirty-six feet or more.

For any vehicle or combination of vehicles having a total gross weight of seventy-one thousand pounds or greater, paragraph (b) shall apply to determine maximum gross weight which is permitted hereunder.

* * * * *

11. A vehicle or combination of vehicles equipped with any solid rubber tires shall not have weights more than eighty per centum of those permitted in this section for pneumatic tires. Notwithstanding the provisions of this section, vehicles equipped with solid rubber tires and registered in this state prior to January first, nineteen hundred thirty-two shall be permitted to operate until January first, nineteen hundred thirty-three under tire and axle loadings prescribed by chapter four hundred ninety-eight of the laws of nineteen hundred thirty.

12. Motor vehicles or vehicles drawn by motor vehicles when equipped with metal tires shall not have weights more than forty per centum of those permitted in this section for pneumatic tires.

* * * * *

17-b. Except over any highway which is a part of a state interstate route, the following weight limits shall apply to any fire vehicle equipped with pneumatic tires.

(a) The total weight on any one wheel shall not be more than sixteen thousand pounds.

(b) The total weight on a single axle shall not be more than thirty-two thousand pounds.

(c) The total weight on two consecutive axles, when such axles are spaced less than ten feet from center to center, shall not be more than forty-two thousand pounds.

(d) The total weight on all axles of a two axle vehicle shall not be more than fifty-two thousand pounds.

* * * * *

23. Except on highways designated as part of the interstate system, the provisions of subdivisions six, seven, eight, nine, ten, eleven and twelve of this section shall not apply to any fire vehicle, as such term is defined in section one hundred fifteen-a of this chapter.

24. The provisions of subdivisions six, seven, eight, nine, ten, eleven and twelve of this section shall not apply to any tow truck that is transporting a disabled vehicle from the place where such vehicle became disabled to the nearest appropriate repair facility and has a gross vehicle weight that is equal to or exceeds the gross vehicle weight of the disabled vehicle being transported.

Note: Above is abridged §385 of the Vehicle and Traffic Law; refer to complete section for omitted parts applicable in individual circumstances.

HISTORY:

Add, L 1959, ch 775, eff Oct 1, 1960, with substance transferred from former §§ 14, 70(1), (2); amd, L 1960, ch 934, §§ 21, 22; L 1961, ch 221, § 1; L 1962, ch 462, § 1; L 1962, ch 993, § 1; L 1963, ch 264, § 1, eff April 4, 1963; L 1963, ch 513, § 1; L 1964, ch 824, § 1; L 1966, ch 973, § 1, eff Aug 2, 1966; L 1968, ch 420, §§ 320, 321; L 1968, ch 920, § 1; L 1969, ch 18, § 2; L 1969, ch 93, § 1; L 1970, ch 697, § 1; L 1971, ch 656, § 2; L 1971, ch 734, § 2; L 1972, ch 704, § 2; L 1973, ch 450, § 1; L 1975, ch 563, § 1; L 1977, ch 593, § 1, eff Aug 1, 1977; L 1977, ch 735, § 1, eff Aug 5, 1977; L 1978, ch 80, § 1; L 1979, ch 657, § 1; L 1980, ch 33, § 1; L 1980, ch 675, §§ 1, 2; L 1980, ch 843, § 87; L 1981, ch 27, § 1, eff March 24, 1981; L 1981, ch 348, § 1; L 1981, ch 369, § 1; L 1981, ch 986, § 1; L 1981, ch 1001, § 1; L 1982, ch 574, § 1; L 1982, ch 907, § 1; L 1983, ch 136, § 2, eff May 23, 1983; L 1983, ch 446, § 1; L 1983, ch 728, § 1; L 1983, ch 959, § 1; L 1983, ch 1008, §§ 5–10, eff Sept 30, 1983; L 1984, ch 736, § 2; L 1984, ch 807, § 1; L 1984, ch 811, § 1, eff Aug 5, 1984; L 1984, ch 894, § 1; L 1985, ch 515, § 1; L 1985, ch 549, §§ 1–5, eff Jan 1, 1986; L 1985, ch 929, §§ 1–4, eff Jan 1, 1986; L 1986, ch 538, §§ 1, 2, eff July 24, 1986; L 1986, ch 603, § 1, eff Aug 23, 1986; L 1987, ch 110, § 1; L 1987, ch 181, § 1, eff June 29, 1987; L 1987, ch 710, § 1, eff Aug 5, 1987; L 1987, ch 740, § 1; L 1987, ch 758, §§ 2–4, eff Aug 7, 1987; L 1988, ch 549, § 1, eff Aug 11, 1988; L 1989, ch 253, § 1, eff July 7, 1989; L 1990, ch 173, §§ 13–19, eff Aug 19, 1990; L 1990, ch 696, § 1, eff Aug 19, 1990; L 1991, ch 739, §§ 1, 2, eff Dec 19, 1991; L 1992, ch 153, §§ 1–3, eff June 16, 1992; L 1993, ch 656, §§ 3–5, eff Jan 1,

1994; L 1994, ch 169, § 124, eff June 9, 1994, deemed eff April 1, 1994; L 1994, ch 472, § 1, eff July 20, 1994; L 1995, ch 659, § 3, eff Jan 1, 1996; L 1996, ch 219, § 1, eff June 25, 1996; L 1996, ch 222, § 1, eff Oct 24, 1996; L 1998, ch 247, § 1, eff July 7, 1998; L 1998, ch 608, § 1, eff Sept 30, 1998; L 1999, ch 351, § 1, eff July 27, 1999; L 2000, ch 63, § 15 (Part EE), eff April 1, 2000; L 2001, ch 451, § 1, eff Nov 1, 2002; L 2002, ch 26, § 4, eff April 9, 2002; L 2003, ch 493, §§ 1, 2, eff Dec 8, 2003; L 2004, ch 59, §§ 1, 3–8 (Part C), eff Aug 20, 2004, deemed eff on and after April 1, 2004; L 2004, ch 205, §§ 3, 4, eff July 20, 2004; L 2005, ch 333, § 1, eff July 26, 2005; L 2005, ch 626, § 1, eff Aug 30, 2005; L 2005, ch 669, § 1, eff Sept 16, 2005; L 2006, ch 681, § 1, eff Sept 13, 2006; L 2007, ch 117, § 1, eff July 3, 2007; L 2008, ch 353, § 1, eff July 21, 2008; L 2010, ch 434, § 1, eff Nov 28, 2010; L 2014, ch 252, § 1, effective September 10, 2014; L 2014, ch 277, § 1, effective August 11, 2014; L 2014, ch 303, § 4, effective August 11, 2014; L 2015, ch 526, § 1, effective December 11, 2015; L 2017, ch 58, § 1 (Part B), effective April 20, 2017; L 2017, ch 58, §§ 2-5 (Part D), effective April 20, 2017; L 2018, ch 299, § 1, effective November 30, 2018; L 2020, ch 58, § 2 (Part B), effective September 30, 2020; L 2020, ch 58, § 1 (Part E), effective April 3, 2020.

Revision Notes: [1960, ch 934] New provisions covering the same subject matter as former subdivisions 15, 16 and 18 were re-enacted in §§ 1627, 1628, 1640, 1650 and 1660.

Editor's Notes Laws 1995, ch 659, § 5, eff Jan 1, 1996, provides as follows:

§ 5. This act shall take effect on January 1, 1996, provided however, that effective immediately, the addition, amendment or repeal of any rule or regulation necessary for the implementation of the foregoing sections of this act on their effective date are authorized to be made on or before such effective date.

Laws 1996, ch 222, § 3, eff Oct 24, 1996, provides as follows:

§ 3. This act shall take effect 120 days after it shall have become a law; provided however that such rules or regulations necessary for the implementation of this act may be promulgated immediately.

Laws 2014, ch 277, § 2, eff Aug 11, 2014, provides:

§ 2. This act shall be deemed repealed if any federal agency or any court of competent jurisdiction finally determines that this act would render New York state ineligible for the receipt of federal funds.

Laws 2018, ch 299, § 2, eff November 30, 2018, provides:

§ 2. This act shall take effect on the sixtieth day after it shall have become a law; provided, however, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized and directed to be made and completed on or before such effective date.

Laws 2020, ch 58, § 3 (Part B), eff September 30, 2020, provides:

§ 3. This act shall take effect on the one hundred eightieth day after it shall have become a law.

Amendment Notes: The 2014 amendment by ch 252, § 1 added 3(g) [first setout]; and redesignated former 3(g) as 3(h).

The 2014 amendment by ch 277, § 1 substituted "December thirty-first, two thousand nineteen" for "December thirty-first, two thousand fourteen" in the third paragraph of 15(f).

The 2014 amendment by ch 303, § 4 added 3(g) [second setout]; redesignated former 3(g) as 3(h).

The 2015 amendment by ch 526, § 1, added 23.

The 2017 amendment by ch 58, § 1 (Part B), added the last sentence of the sixth undesignated paragraph of 15(f).

The 2017 amendment by ch 58, §§ 2–5 (Part D), in the second sentence of 4(b)6, substituted "Stinger-steered boat transporters" for "Such vehicles" and added "and stinger-steered automobile transporters shall not exceed eighty feet exclusive of an overhang of not more than four feet on the front and six feet on the rear of the vehicle"; added 4(b)7; in 4(c), added "an overhang of not more than four feet on the front and six feet on the rear of a" and "an overhang of not more than three feet on the front and four feet on the rear of"; added "except for a vehicle if operated by an engine fueled primarily by natural gas which may have a maximum gross weight of up to eighty-two thousand pounds" in the third sentence of the opening paragraph of 10; added 24; and made related changes.

The 2018 amendment by ch 299, § 1, added the eleventh sentence of 15(a).

Amendment Notes The 2020 amendment by ch 58, § 2 (Part B), substituted "provided in subdivisions eighteen-a or nineteen" for "provided in subdivision nineteen" in the first sentence of (18); and added (18-a).

The 2020 amendment by ch 58, § 1 (Part E), added (16)(v) to (16)(ii).

Notes to Decisions

Analysis

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1. In general

The statute giving to plaintiff a cause of action for damages caused by a vehicle of a height greater than statutorily permitted, provides for absolute liability, and the defense of contributory negligence is not available. New York State Thruway Authority v Maislin Bros. Transport, Ltd., 35 A.D.2d 301, 315 N.Y.S.2d 954, 1970 N.Y. App. Div. LEXIS 3290 (N.Y. App. Div. 4th Dep't 1970).

The distribution of a load on a vehicle or the knowledge or lack of knowledge of the accuracy of scales on the part of the operator of the said vehicle are questions of fact and not of law. People v Rodenbach, 126 N.Y.S.2d 295, 204 Misc. 905, 1953 N.Y. Misc. LEXIS 2434 (N.Y. County Ct. 1953), aff'd, 307 N.Y. 614, 120 N.E.2d 826, 307 N.Y. (N.Y.S.) 614, 1954 N.Y. LEXIS 1383 (N.Y. 1954).

The mere payment of registration fees pursuant to § 11 of the Vehicle and Traffic Law or the payment of a highway use tax pursuant to Article 21 of the Tax Law has no effect whatsoever upon the provisions of this section. People v Rodenbach, 126 N.Y.S.2d 295, 204 Misc. 905, 1953 N.Y. Misc. LEXIS 2434 (N.Y. County Ct. 1953), aff'd, 307 N.Y. 614, 120 N.E.2d 826, 307 N.Y. (N.Y.S.) 614, 1954 N.Y. LEXIS 1383 (N.Y. 1954).

The manifest legislative intent was the maintenance of the safety and preservation of the highways and § 385 and its subdivisions were enacted by the legislature to affect that intent. The provisions of the various subdivisions of the statute are clear, precise and logical with regard to tire width, wheel and axle overweights, with definitive penalty deterrence. People v Hayes, 60 Misc. 2d 208, 302 N.Y.S.2d 484, 1969 N.Y. Misc. LEXIS 1394 (N.Y. Dist. Ct. 1969).

Police were justified in stopping and weighing truck where they observed splash guards touching ground, tires ballooning out, diesel stack emitting black exhaust, and truck body tilting back; thus, defendant was not entitled to dismissal of prosecution for operating overloaded truck (in violation of CLS Veh & Tr § 385) on ground that evidence obtained after stop of truck should have been suppressed. People v Delta Carting Corp., 136 Misc. 2d 268, 518 N.Y.S.2d 572, 1987 N.Y. Misc. LEXIS 2422 (N.Y. Dist. Ct. 1987).

Regulation limiting use of interstate highway for overwidth and overlength vehicles to use of right lane only, and only between 7:00 p.m. and 7:00 a.m., was unenforceable since procedure contained in 49 USCS § 2311(i) was not utilized in enacting regulation, and enforcement of regulation was therefore preempted by federal statute. People v R.C. Services, Inc., 141 Misc.

2d 230, 532 N.Y.S.2d 988, 1988 N.Y. Misc. LEXIS 637 (N.Y. Dist. Ct. 1988).

Where a corporation was charged with violating vehicle weight restrictions, the controlling provision was N.Y. Veh. & Traf. Law § 385(20-a), not N.Y. C.P.L.R. 311(a)(1). The CPLR governed procedure in civil judicial proceedings, and because the underlying administrative proceeding was not a civil judicial proceeding, the service provisions of N.Y. C.P.L.R. 311(a)(1) did not apply. IESI NY Corp. v Martinez, 8 A.D.3d 667, 778 N.Y.S.2d 900, 2004 N.Y. App. Div. LEXIS 9149 (N.Y. App. Div. 2d Dep't 2004).

While N.Y. Veh. & Traf. Law § 1642(a) lists certain "enumerated subjects" where local laws shall supersede the provisions of the Vehicle and Traffic Law in cities having a population in excess of one million, service of process is not one of such enumerated subjects; therefore, under N.Y. Veh. & Traf. Law § 385(20-a), service upon a corporation's driver was effective to obtain personal jurisdiction over the corporation. IESI NY Corp. v Martinez, 8 A.D.3d 667, 778 N.Y.S.2d 900, 2004 N.Y. App. Div. LEXIS 9149 (N.Y. App. Div. 2d Dep't 2004).

Trial court erred when it annulled a decision by the New York State Department of Motor Vehicles Appeals Board which found that a towing company violated New York City, N.Y., R. tit. 34, § 4-15(b)(9) and (10) by operating an overweight truck on the ground that N.Y. Veh. & Traf. Law § 385(20-a) did not allow the City to serve the towing company with process by giving the ticket to the company's driver. Sureway Towing, Inc. v Martinez, 8 A.D.3d 490, 779 N.Y.S.2d 109, 2004 N.Y. App. Div. LEXIS 8405 (N.Y. App. Div. 2d Dep't 2004).

2. Constitutionality

Subdivision 8 of this section is unconstitutional in that it violates the due process clause by depriving a man of his livelihood without due process of law when the statute is attempted to be applied to the driver of a vehicle who did not load the truck and for whom it would be impossible to check the weight of the truck upon each of the wheels and drive wheels of his tractor. When a driver receives a bill of lading specifying the weight of the load on his truck, he has done everything possible to comply with the law and if it turns out that the vehicle delivered to him by his employer exceeds the weight limits, he cannot then be found guilty of violating this section with the resultant loss of his license and opportunity to make a living. People v Vadakin, 125 N.Y.S.2d 25, 204 Misc. 904, 1953 N.Y. Misc. LEXIS 2268 (N.Y. County Ct. 1953).

Subdivision 8 of this section is constitutional. People v Rodenbach, 126 N.Y.S.2d 295, 204 Misc. 905, 1953 N.Y. Misc. LEXIS 2434 (N.Y. County Ct. 1953), aff'd, 307 N.Y. 614, 120 N.E.2d 826, 307 N.Y. (N.Y.S.) 614, 1954 N.Y. LEXIS 1383 (N.Y. 1954).

Two region system of permits for trucks, tractor trailers and semi-trailers, allowing greater weights in down state areas because restricted weight limits cause disproportionately greater increase in travel time and construction costs in down state area due to greater traffic congestion, is not unconstitutional since legislation imposing less severe restrictions in down state area reflect rational policy designed to preserve highways and bridges of state with minimal increase in construction costs. Bonded Concrete, Inc. v State, 131 Misc. 2d 567, 500 N.Y.S.2d 927, 1986 N.Y. Misc. LEXIS 2562 (N.Y. Sup. Ct. 1986).

This section (former § 70) is constitutional. People ex rel. Seagrist v Mederer, 33 N.Y.S.2d 114, 1942 N.Y. Misc. LEXIS 1330 (N.Y. Sup. Ct. 1942).

3. Construction

This section (former § 70) must be strictly construed. People v Strauss, 260 A.D. 880, 22 N.Y.S.2d 880, 1940 N.Y. App. Div. LEXIS 5204 (N.Y. App. Div. 1940).

Under CLS Veh & Tr § 385(20), local law violating prohibitory provision of Federal Surface Transportation Assistance Act of 1982 may not be enacted or enforced; local law that is contrary to funding provisions of STAA is unenforceable only upon notification of eminent loss of federal funds, and then, only to extent that local law is inconsistent with STAA; former § 211(10) of New York City Traffic Regulations Article 19 was unenforceable only to degree it was inconsistent with STAA, and then, only upon notification of eminent loss of funding, as former § 211(10) contravened funding provision of STAA, not prohibitory provision, such that CLS Veh & Tr § 385(20) had no impact on enforcement of former § 211(10) of New York City Traffic Regulations until New York State received notification of eminent loss of federal highway funds. Ruiz v Commissioner of Dep't of Transp., 679 F. Supp. 341, 1988 U.S. Dist. LEXIS 553 (S.D.N.Y.), aff'd, 858 F.2d 898, 1988 U.S. App. LEXIS 14188 (2d Cir. N.Y. 1988).

4. Length of vehicles

In action for injuries sustained when defendant's automobile collided with left front end of hay baler operated on highway in violation of statute providing that width of vehicle shall not be more than eight feet, question whether causal connection between violation of statute and collision existed should have been submitted to jury. Conant v Bradley, 281 A.D. 732, 117 N.Y.S.2d 830, 1952 N.Y. App. Div. LEXIS 3367 (N.Y. App. Div. 1952).

The operation of a 52-foot panel truck and house trailer unit during the hours of darkness, being violative of the 50-foot dimensions set forth in Vehicle and Traffic Law § 385 subdivision 4 and the daylight use limitations set forth in a permit issued by the superintendent of public works, is negligence as a matter of law. Pelkey v Kent, 28 A.D.2d 636, 280 N.Y.S.2d 517, 1967 N.Y. App. Div. LEXIS 4234 (N.Y. App. Div. 4th Dep't 1967).

In a prosecution for violating subd. 4 of this section by operating a tractor and trailer exceeding 50 feet in length, it is not incumbent upon the prosecution to establish that the vehicles in question were not owned and used by a public service corporation for repair and maintenance of its properties and facilities, since the exception of such vehicles is by way of "proviso." People v Odermatt, 39 Misc. 2d 217, 240 N.Y.S.2d 295, 1963 N.Y. Misc. LEXIS 2063 (N.Y. Dist. Ct. 1963).

Defendant operating a flat-bed truck, not a tractor trailer or true tow truck, with one disabled vehicle on top and another disabled car attached to a tow bar with its front wheels off the ground, comprising a total length of 48 feet 6 inches was not operating a "combination" of vehicles within the purview of § 385(4) of the Vehicle and Traffic Law and consequently was in violation of § 385(3) of that statute. People v Mazzio, 53 Misc. 2d 10, 277 N.Y.S.2d 763, 1967 N.Y. Misc. LEXIS 1742 (N.Y. Dist. Ct. 1967).

Appellate court held that, even assuming plaintiff violated N.Y. Veh. & Traf. Law §§ 375(2) and 385(3) when he attempted to pull a tree across a public road with a tractor at 5:15 p.m., evidence that a driver who was traveling 55 to 60 miles per hour when she saw what appeared to be a snow drift in the road did not reduce her speed enough to avoid a collision with the tree raised an issue of fact about whether the driver contributed to causing the accident, and the trial court erred by granting the driver's motion for summary judgment. Dumas v Shafer, 4 A.D.3d 720, 772 N.Y.S.2d 411, 2004 N.Y. App. Div. LEXIS 2013 (N.Y. App. Div. 3d Dep't 2004).

5. Weight generally

Conviction for overloading truck axles was affirmed over contention that subdivision 19 provided an exception which the people failed to negative. People v Walker, 308 N.Y. 825, 125 N.E.2d 874, 308 N.Y. (N.Y.S.) 825, 1955 N.Y. LEXIS 1084 (N.Y. 1955).

Judge erred in failing to impose minimum fines required by statute for second and subsequent offenses of driving overloaded truck. In re Schmidt, 31 A.D.2d 214, 296 N.Y.S.2d 49, 1968 N.Y. App. Div. LEXIS 2545 (N.Y. App. Div. 2d Dep't 1968).

Court properly determined that CLS Veh & Tr § 385(15) and related regulations governing issuance of divisible load overweight permits, 17 NYCRR Part 154, do not violate due process rights of truck haulers as guaranteed by Fourteenth Amendment and CLS NY Const Art I § 6, since regulation of weight of vehicles for purposes of highway safety and protection of highways and bridges is valid exercise of state power, and plaintiff failed to meet heavy burden of demonstrating that regulations are not reasonably related to those purposes. Intrastate Trucking Corp. v White, 185 A.D.2d 697, 586 N.Y.S.2d 65, 1992 N.Y. App. Div. LEXIS 9255 (N.Y. App. Div. 4th Dep't 1992).

Court properly determined that CLS Veh & Tr § 385(15) and related regulations governing issuance of divisible load overweight permits, 17 NYCRR Part 154, do not violate equal protection clauses of Fourteenth Amendment and CLS NY Const Art I § 11, although they authorize issuance of permits for vehicles registered prior to 1986 and their replacements of same type and purpose, while making vehicles registered after January 1, 1986 ineligible for such permits, since establishment of cut-off date for issuance of permits or grandfathering of certain vehicles registered prior to cut-off date does not constitute invalid classification where legislation and regulatory scheme are rationally related to achievement of governmental purpose of reducing overall weight of vehicles travelling on state highways. Intrastate Trucking Corp. v White, 185 A.D.2d 697, 586 N.Y.S.2d 65, 1992 N.Y. App. Div. LEXIS 9255 (N.Y. App. Div. 4th Dep't 1992).

Court properly determined that CLS Veh & Tr § 385(15) and related regulations governing issuance of divisible load overweight permits, 17 NYCRR Part 154, do not impose undue burden on interstate commerce, since regulation of weight of vehicles for purposes of highway safety and protection of highways and bridges is valid exercise of state power, and plaintiff failed to meet heavy burden of demonstrating that regulations discriminate against interstate commerce. Intrastate Trucking Corp. v White, 185 A.D.2d 697, 586 N.Y.S.2d 65, 1992 N.Y. App. Div. LEXIS 9255 (N.Y. App. Div. 4th Dep't 1992).

Summons issued under CLS Veh & Tr § 385 was proper means of charging owner of cement mixer operated in Queens with violation of vehicle weight regulations applicable in New York City. Corona Ready Mix v State DMV Traffic Violations Bureau Appeals Bd., 226 A.D.2d 630, 641 N.Y.S.2d 128, 1996 N.Y. App. Div. LEXIS 4391 (N.Y. App. Div. 2d Dep't 1996).

Court would annul determination finding that petitioner violated CLS Veh & Tr § 385(9) where necessary element of charged offense (i.e., that offending vehicle was equipped with pneumatic tires at time of alleged offense) was not shown by substantial evidence. New York Paving, Inc. v Jackson, 272 A.D.2d 330, 708 N.Y.S.2d 306, 2000 N.Y. App. Div. LEXIS 4809 (N.Y. App. Div. 2d Dep't 2000).

The heaviest vehicle or combination of vehicles permitted on any highway or bridge in any county not wholly within a city is limited to 71,000 pounds or 35 ½ tons. Bakery Salvage Corp. v Lackawanna, 48 Misc. 2d 975, 265 N.Y.S.2d 471, 1965 N.Y. Misc. LEXIS 1262 (N.Y. Sup. Ct. 1965), rev'd, 30 A.D.2d 207, 291 N.Y.S.2d 104, 1968 N.Y. App. Div. LEXIS 3546 (N.Y. App. Div. 4th Dep't 1968).

Under statute defining arrest as taking of person into custody that he may be held to answer for an offense, stopping of vehicle on public highway for purposes of inspection and to detect overloading did not constitute an "arrest". People v Amitrano, 59 Misc. 2d 471, 299 N.Y.S.2d 275, 1969 N.Y. Misc. LEXIS 1653 (N.Y. Dist. Ct. 1969).

Use by police or a weight loader under each rear wheel of defendant's vehicle for purpose of determining weight on each wheel was logical, reasonable, consistent with legislative intent, and in conformity with the provisions of the statute. People v Hayes, 60 Misc. 2d 208, 302 N.Y.S.2d 484, 1969 N.Y. Misc. LEXIS 1394 (N.Y. Dist. Ct. 1969).

Defendant was not entitled to dismissal of prosecution for operating overloaded truck in violation of CLS Veh & Tr § 385, on ground that police did not check to see if his truck was loaded when it was stopped and weighed, since People were required to prove only that gross weight on truck's rear axles exceeded 36,000 pounds, whether truck was loaded or unloaded; under CLS Veh & Tr § 117, "gross weight" is weight of vehicle without load, plus load (if any). People v Delta Carting Corp., 136 Misc. 2d 268, 518 N.Y.S.2d 572, 1987 N.Y. Misc. LEXIS 2422 (N.Y. Dist. Ct. 1987).

Absolute liability imposed by state statute upon the operator of an over-weight vehicle for damages sustained by virtue of an excessively high load runs to private plaintiffs as well as the State, and contributory negligence is not a defense. Ebasco Services, Inc. v Pacific Intermountain Express Co., 398 F. Supp. 565, 1975 U.S. Dist. LEXIS 11795 (S.D.N.Y. 1975).

6. —Knowledge of over-weight

Absent direct or circumstantial evidence that petitioner had knowledge that dump truck he owned but was not driving had excessive weight load on rear axle, petitioner was improperly convicted of violating CLS Veh & Tr § 385(9), which makes it offense to operate or "knowingly permit" overweight vehicle to be operated on highway. Accorso v Appeals Bd. of Administrative Adjudication Bureau, 185 A.D.2d 611, 586 N.Y.S.2d 40, 1992 N.Y. App. Div. LEXIS 9122 (N.Y. App. Div. 4th Dep't 1992).

Sanitation company was properly found responsible for violation of CLS Veh & Tr § 385, despite its assertion that it lacked actual knowledge of excessive weight of its truck, since company was responsible for knowledge and deeds of its officers and agents acting within scope of their employment duties. Allied Sanitation v Adduci, 226 A.D.2d 195, 640 N.Y.S.2d 541, 1996 N.Y. App. Div. LEXIS 3873 (N.Y. App. Div. 1st Dep't 1996).

Employee-operator could not be convicted of charge of operating motor vehicle upon highway in excess of weight limitations prescribed by statute, in the absence of proof that he had knowledge of the breach or the basis upon which an inference of knowledge could be drawn. People v Cubiotti, 4 Misc. 2d 44, 157 N.Y.S.2d 784, 1956 N.Y. Misc. LEXIS 1264 (N.Y. City Ct. 1956).

The defendant in a prosecution under this section could not contend that they had no knowledge of the over-weight where they admitted that they did not know whether they were overweight or not at the time they went to a weigh station. People v Fortino, 14 Misc. 2d 725, 183 N.Y.S.2d 213, 1958 N.Y. Misc. LEXIS 2380 (N.Y. Spec. Sess. 1958).

Proof of knowledge for violation of subdivision 10 of this section is required only in the case of an owner or employer not operating the vehicle. People ex rel. Harding v Matessino, 15 Misc. 2d 7, 179 N.Y.S.2d 911, 1958 N.Y. Misc. LEXIS 2941 (N.Y. County Ct. 1958).

Conviction of a driver for overloading a truck under subd 8 of this section does not require proof of his knowledge as to weight of the load. People v Vinciguerra, 24 Misc. 2d 63, 203 N.Y.S.2d 953, 1960 N.Y. Misc. LEXIS 2562 (N.Y. Sup. Ct. 1960).

If City of Poughkeepsie employees, who are driving city trucks are arrested in a nearby town on charges of operating overweight vehicles, even though they had no knowledge of the overloading, no duties in relation to loading the trucks and no means of weighing their loaded trucks, the Corporation Counsel may not represent them. However, the city could pay claims submitted by them for reimbursement for their losses. 1980 Op Atty Gen Aug 4 (informal).

7. Accuracy of scales

On appeal from conviction under this section, the court would not admit proof of truck weight where there was not adequate legal proof of accuracy of the weighing devices. People v Brandon, 5 Misc. 2d 946, 165 N.Y.S.2d 640, 1957 N.Y. Misc. LEXIS 3249 (N.Y. County Ct. 1957).

In prosecution for violation under this section, judgment of conviction was set aside where the evidence as to the accuracy of the weighing devices was not sufficient. People v Marotta, 5 Misc. 2d 947, 165 N.Y.S.2d 639, 1957 N.Y. Misc. LEXIS 3231 (N.Y. County Ct. 1957).

In prosecution for violation of subdivision of Vehicle and Traffic Law limiting the weight of trucks when in operation on public highways, the accuracy of device used to weigh truck must be established to the degree required by law to establish guilt in criminal proceedings, and the burden of proof cannot be shifted to defendant by requiring that he disprove the prosecution's testimony. People v Marotta, 5 Misc. 2d 947, 165 N.Y.S.2d 639, 1957 N.Y. Misc. LEXIS 3231 (N.Y. County Ct. 1957).

A judgment of conviction under subdivision 10 of this section was reversed and the fine remitted where (1) certificates of the State Department of Agriculture and Markets stating that "Load-O-Meters" had been approved were improperly admitted to evidence. People v Hazelton, 10 Misc. 2d 361, 169 N.Y.S.2d 490, 1957 N.Y. Misc. LEXIS 2210 (N.Y. County Ct. 1957).

A conviction for violation of this section could not be sustained where the evidence showed that scales had not previously been tested for a period of 12 months and no witness was able to testify to the accuracy thereof at the date of the alleged violation. People v Dazi, 14 Misc. 2d 774, 179 N.Y.S.2d 910, 1957 N.Y. Misc. LEXIS 2849 (N.Y. County Ct. 1957).

Defendant was properly convicted of violating subdivision 8 of this section where the scales used were tested 2 months before the defendant was arrested. The period of 2 months was not excessive. People v Macomb, 9 Misc. 2d 1027, 174 N.Y.S.2d 330, 1958 N.Y. Misc. LEXIS 3717 (N.Y. County Ct. 1958).

In a prosecution under subdivision 10 of this section, where measuring devices used were portable scales known as "loadometers," readings were not incompetent because no proper evidence of accuracy of the scales on the day of the offense was offered. The scales had been tested 3 and ½ months prior to the offense and the overload was nearly 35 percent above the allowable limit. There was no evidence of damage to the scales or that they were grossly inaccurate. People ex rel. Harding v Matessino, 15 Misc. 2d 7, 179 N.Y.S.2d 911, 1958 N.Y. Misc. LEXIS 2941 (N.Y. County Ct. 1958).

The burden of proof rests on the prosecution to establish the accuracy of scales used in measuring the weight of a truck. People ex rel. Harding v Matessino, 15 Misc. 2d 7, 179 N.Y.S.2d 911, 1958 N.Y. Misc. LEXIS 2941 (N.Y. County Ct. 1958).

In a prosecution for overloading a truck, testimony of a state inspector of weights and measures, with over 20 years' service, that he had tested the scales used to weigh defendant's truck three and one-half months prior to and four days after the day on which defendant's truck was weighed and found them to be correct on both dates, and that he had never found scales of the type in question in error was sufficient to establish accuracy of the scales. People v Vinciguerra, 24 Misc. 2d 63, 203 N.Y.S.2d 953, 1960 N.Y. Misc. LEXIS 2562 (N.Y. Sup. Ct. 1960).

In prosecution under Vehicle and Traffic Law § 385 as to the weight of the vehicle which the defendant was operating, where the People's expert can testify in detail as to the procedure following in testing the scales in order to certify their accuracy, and can testify that the scales must have read within 3 percent of the weights applied, he can testify that in his opinion they were accurate at the time they were tested, even though he is unable to recall the weights that were applied to the scales or what the scales read after the weights were applied to them. People v Dionne, 61 Misc. 2d 211, 304 N.Y.S.2d 1022, 1969 N.Y. Misc. LEXIS 1404 (N.Y. Dist. Ct. 1969).

Where automobile had been leased for period of three days, lessee, sued to recover for injuries sustained when vehicle was involved in accident while being operated by party to whom lessee had lent vehicle, was not "owner" within meaning of statute imputing to owner negligence of one who uses or operates with his permission, with owner defined to include lessee having exclusive use for period greater than 30 days. Carasso v Sternberg, 63 Misc. 2d 861, 313 N.Y.S.2d 851, 1970 N.Y. Misc. LEXIS 1404 (N.Y. Sup. Ct. 1970).

Defendant was not entitled to dismissal of prosecution for operating overloaded truck in violation of CLS Veh & Tr § 385, on ground that scales used to weigh truck were not shown to be accurate, where scales had been certified as accurate 7 months previously; scales need not be certified as accurate more frequently. People v Delta Carting Corp., 136 Misc. 2d 268, 518 N.Y.S.2d 572, 1987 N.Y. Misc. LEXIS 2422 (N.Y. Dist. Ct. 1987).

In a prosecution under this section, evidence that defendant's vehicle was overloaded based upon testimony of what the state's scales showed was inadmissible without proof of the accuracy of the scales upon which the vehicle had been weighed. There is no presumption that the scales of the state of New York are any more accurate than the scales of any private individual. People v Du Shane, 125 N.Y.S.2d 9, 1953 N.Y. Misc. LEXIS 2266 (N.Y. County Ct. 1953); People v Vadakin, 125 N.Y.S.2d 25, 204 Misc. 904, 1953 N.Y. Misc. LEXIS 2268 (N.Y. County Ct. 1953)).

Finding that the corporation's truck exceeded weight limits in violation of N.Y. Veh. & Traf. Law §§ 385(9), 401(7)(F)(b) was supported by substantial evidence and, as a result, the corporation was not entitled to relief under N.Y. C.P.L.R. art. 78; the traffic enforcement agent's testimony regarding the condition of the roadway at the location of the weighing site, the agent's training, the accuracy of the scales, the manner in which the agent weighed the corporation's vehicle, and the weight observed and recorded for each measurement provided a sufficient basis for the determination of the that the truck exceeded the weight limit, and the agent's uncontroverted testimony established that the ground where the scales were placed was level, even, and clear of dirt and debris. Sprint Recycling, Inc. v Martinez, 12 A.D.3d 451, 784 N.Y.S.2d 597, 2004 N.Y. App. Div. LEXIS 13301 (N.Y. App. Div. 2d Dep't 2004).

8. Permit to exceed weight or size limitations

A permit to operate over a town highway a vehicle to transport steel trusses which exceed the dimensions allowed for trucks should be issued by the town highway superintendent. 1960 Ops St Compt File #569.

A town may, under cited section, issue a permit authorizing the operation of overweight vehicles on town roads. 1967 Ops St Compt File #626.

9. Posting limitations on bridges

Where a bridge had been part of a town highway but its repair and maintenance had been taken over by a county, although this section did not expressly require the county to post load-limit signs on the approaches to the bridge, as distinguished from the bridge itself, the legislative purpose was clearly to require that signs be adequate in size and placement. Such obligation rested on the county irrespective of this section. The purpose thereof was to give fair warning of load danger ahead; otherwise the driver could rightfully assume that a bridge was safe. Turner v County of Clinton, 285 A.D. 210, 136 N.Y.S.2d 471, 1954 N.Y. App. Div. LEXIS 3311 (N.Y. App. Div. 1954), reh'g denied, 285 A.D. 987, 139 N.Y.S.2d 264, 1955 N.Y. App. Div. LEXIS 6387 (N.Y. App. Div. 1955), app. dismissed, 308 N.Y. 1011, 127 N.E.2d 856, 308 N.Y. (N.Y.S.) 1011, 1955 N.Y. LEXIS 1239 (N.Y. 1955).

Regardless of whether or not it was the duty of the county superintendent, under subd 17 to "post" the bridge, there is no responsibility on the county to maintain same unless the bridge has been inspected by the county superintendent and has been ordered posted by the town superintendent of highways as safe for restricted use. Wilson v Board of Sup'rs, 273 N.Y.S. 924, 152 Misc. 645, 1934 N.Y. Misc. LEXIS 1589 (N.Y. Sup. Ct. 1934).

The duty to post bridges is placed upon the town superintendent of highways under this section. Blooming Grove v Clark, 87 N.Y.S.2d 678, 194 Misc. 684, 1949 N.Y. Misc. LEXIS 1978 (N.Y. Sup. Ct. 1949).

In wrongful death action, alleging that death resulted from blow on head suffered when deceased's head was struck by an overhead bridge while deceased was riding on top of a loaded truck, evidence failed to establish the negligence of the city in failing to post a sign indicating overhead clearance, but did establish that decedent was contributorily negligent. Aetna Casualty & Surety Co. v New York, 5 Misc. 2d 110, 160 N.Y.S.2d 365, 1956 N.Y. Misc. LEXIS 1329 (N.Y. Sup. Ct. 1956).

Motor carrier was liable under state law to consignee for damage to shipment sustained when top of shipment struck under side of state vehicle bridge. Ebasco Services, Inc. v Pacific Intermountain Express Co., 398 F. Supp. 565, 1975 U.S. Dist. LEXIS 11795 (S.D.N.Y. 1975).

10. Variance

Conviction of truck drivers was sustained despite the fact that they were charged with violation subdivision 11 of this section although proof showed violation of subdivision 10 of this section. Reference to wrong subdivision was mere surplusage where information advised defendants of acts relied upon to constitute violation. People v Santiago, 3 N.Y.2d 809, 166 N.Y.S.2d 9, 144 N.E.2d 648, 1957 N.Y. LEXIS 913 (N.Y. 1957).

11. Disposition of violation

Truck operator, the operator's employer, and the truck owner were not entitled to summary judgment in a driver's action, arising from the driver rear-ending the truck that had suddenly stopped upon hitting a bridge overpass, as an issue of fact existed as to whether it was negligent to be on that expressway due to the height maximums. Baez-Pena v MM Truck & Body Repair, Inc., 151 A.D.3d 473, 56 N.Y.S.3d 307, 2017 N.Y. App. Div. LEXIS 4450 (N.Y. App. Div. 1st Dep't 2017).

A justice of the peace may, in the exercise of sound judicial discretion, fix the amount of bail for a defendant at less than the minimum amount of the fine, providing he is satisfied that the

defendant will appear for his trial as ordered. 1964 Ops St Compt File #1007.

Agency Opinions

Analysis

1. In general
2. Construction
3. Length of vehicles
4. Weight generally
5. Permit to exceed weight or size limitations
6. Posting limitations on bridges
7. Disposition of violation

1. In general

Where two inconsistent enactments are passed in the same year but adopted on different dates amending the same sections of a former statute and the effective date is different, the later statute will be deemed controlling. 1932 N.Y. Op. Att'y Gen. No. 108.

When under the laws of a foreign state a semi-trailer and tractor are registered as one vehicle this will be deemed sufficient when such vehicles are operated in New York, although New York requires each vehicle to be registered. 1933 N.Y. Op. Att'y Gen. No. 113.

A statute that limits the length of a combination of motor vehicles must be uniform in its application and not discriminate against non-residents. 1934 N.Y. Op. Att'y Gen. No. 202.

Motor vehicles owned by towns and villages are not exempt from the truck weight limitations, but no markings are required on such vehicles. 1963 NY Ops Atty Gen Mar 18.

Town board's limited power to exclude certain vehicles from certain highways—general discussion. 1980 NY Ops Atty Gen Aug 11 (Informal), 1980 N.Y. AG LEXIS 71.

CLS Veh & Tr § 385 applies to village streets and roads, which come within Vehicle and Traffic Law's definition of public highways. 2004 NY Ops Atty Gen I 04-10.

Maximum axle weight limitations permitted by New York law are grandfathered by federal law; state law, in establishing 34,000 lb weight limit for each set of consecutive tandem axles, is consistent with federal law; maximum overall gross weight limitation of 80,000 lbs contained in New York law equals overall gross weight limitation permitted by federal law; therefore, State may not amend CLS Veh & Tr Law § 385 regarding axle weight requirements for vehicles with overall gross weight between 71,000 and 80,000 lbs. N.Y. Op. Att'y Gen. No. 89-F6.

2. Construction

Where a statute provides that the "length of single vehicle, inclusive of load, . . . , shall be not more than thirty-three feet" and "a combination of such vehicles, inclusive of load, shall be not more than eighty-five feet," no vehicle, including its load, within the combination shall be more than thirty-three feet in length. 1931 N.Y. Op. Att'y Gen. No. 240.

CLS Veh & Tr § 1640(a)(20) must be read in relation to and consistent with CLS Veh & Tr § 385. 2004 NY Ops Atty Gen I 04-10.

Maximum axle weight limitations permitted by New York law are grandfathered by federal law; state law, in establishing 34,000 lb weight limit for each set of consecutive tandem axles, is consistent with federal law; maximum overall gross weight limitation of 80,000 lbs contained in New York law equals overall gross weight limitation permitted by federal law; therefore, State may not amend CLS Veh & Tr Law § 385 regarding axle weight requirements for vehicles with overall gross weight between 71,000 and 80,000 lbs. N.Y. Op. Att'y Gen. No. 89-F6.

3. Length of vehicles

Where a statute provides that the "length of single vehicle, inclusive of load, . . . , shall be not more than thirty-three feet" and "a combination of such vehicles, inclusive of load, shall be not more than eighty-five feet," no vehicle, including its load, within the combination shall be more than thirty-three feet in length. 1931 N.Y. Op. Att'y Gen. No. 240.

4. Weight generally

A state trooper under certain circumstances can direct an operator of a vehicle required to have a highway use permit under Article 21 of the Tax Law to proceed to a weighing station for the purpose of verifying its weight thereunder even if such station is more than three miles distant. The three mile limitation contained in Vehicle & Traffic Law § 70(2-a) does not apply to Article 21 of the Tax Law. 1953 N.Y. Op. Att'y Gen. No. 127.

The weight of the driver is included in the maximum weights permitted for a vehicle or combination of vehicles under this section. 1955 N.Y. Op. Att'y Gen. No. 217.

Issuance of special permits for divisible loads which will allow trucks to exceed State and Federal weight limits is encompassed by grandfathering provision, but DOT's authority is limited by established maximum weight ceilings for various classes of vehicles in geographic areas, and issuance of special permits should not jeopardize Federal highway funding. 1986 NY Ops Atty Gen No. 86-F12.

Village may enact local law excluding from village highways trucks weighing less than maximum weight limits permitted under state law, but it may enforce such local law and impose fines for violations thereof only with respect to conduct that does not also violate state weight limits. 2004 NY Ops Atty Gen I 04-10.

Delegation to exclude heavy trucks in CLS Veh & Tr § 1640(a)(20) is most reasonably interpreted as delegating authority to exclude trucks that weigh less than maximum weight permitted under CLS Veh & Tr § 385, rather than as delegating authority to regulate and punish conduct that otherwise violates maximum weight limits already established by § 385. 2004 NY Ops Atty Gen I 04-10.

Maximum axle weight limitations permitted by New York law are grandfathered by federal law; state law, in establishing 34,000 lb weight limit for each set of consecutive tandem axles, is consistent with federal law; maximum overall gross weight limitation of 80,000 lbs contained in New York law equals overall gross weight limitation permitted by federal law; therefore, State may not amend CLS Veh & Tr Law § 385 regarding axle weight requirements for vehicles with overall gross weight between 71,000 and 80,000 lbs. N.Y. Op. Att'y Gen. No. 89-F6.

5. Permit to exceed weight or size limitations

A county engineer has no authority to issue permits for motor trucks to exceed legal weight limits on public highways. However, it seems the state commissioner of highways may grant such authority to a county superintendent. 1930 N.Y. Op. Att'y Gen. No. 390.

The State Superintendent of Public Works has authority, in proper cases, to issue permits to operate motor vehicles upon state highways, the weights and dimensions of which exceed the limitations provided by this section. It would seem that, at the present time, the propriety of issuing such a permit would be dependent upon whether the use of such overweight vehicles would be conducive to the war effort. 1944 NY Ops Atty Gen May 24.

The Superintendent of Public Works lacks the authority to permit a highway towing operation involving more than two vehicles. 1955 N.Y. Op. Att'y Gen. No. 218.

The former Department of Public Works, now the Department of Transportation, on July 1, 1956, had legal authority under the provisions of section 14, subdivision 19 of the Vehicle and Traffic Law, L 1956, ch 348 (now section 385, subd 15), to issue special hauling permits for the operation upon the highways of a vehicle or combination of vehicles which exceeded the statutory limits even if the load dimension or weight was divisible. 1979 NY Ops Atty Gen June 25 (Informal).

6. Posting limitations on bridges

Railroad corporations must erect signs at both ends of all bridges or viaducts upon highways of the state system crossing such railroads, stating the capacity in tons which such bridges or viaducts can safely carry. 1935 N.Y. Op. Att'y Gen. No. 245.

Town bridges should be posted in accordance with Vehicle and Traffic Law, § 1660, subd 20(b). 1980 NY Ops Atty Gen Jan 9 (Informal), 1980 N.Y. AG LEXIS 158.

7. Disposition of violation

The provision in former § 70, subd 2, that sentence or execution of sentence for any violation thereunder may not be suspended is valid. 1955 NY Ops Atty Gen (informal).

A fine for violation of the cited section may not be less than the minimum prescribed under subdivision 16. A sentence or execution of a sentence imposing a fine or imprisonment may not be suspended. 1965 NY Ops Atty Gen Dec 21.

The court may not suspend the sentence of a fine or imprisonment or the execution thereof for any violation of the provisions of Section 385 of the Vehicle and Traffic Law. 1970 NY Ops Atty Gen June 10.

The possible dispositions of a proceeding wherein violation of Vehicle and Traffic Law, § 385 is charged include alternate sentences of conditional or unconditional discharge and intermittent imprisonment, as well as dismissal in the interest of justice or adjournment in contemplation of dismissal pursuant to CPL 170.40 and CPL 170.55. 1973 NY Ops Atty Gen July 6 (Informal), 1973 N.Y. AG LEXIS 82.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 226, 227, 393, 401, 510, 514, 1621, 1627, 1640, 1650, 1660, 1803; CLS High § 341; CLS CPL § 420.35.

Overhead clearance signs, §§ 1621(c), 1627(b), 1640(d), 1650(c), 1660(c).

Regulation of dimensions of vehicles and of weights and loads of vehicles on restricted highways, § 1625.

Payments to state treasurer; financial statements, CLS St Fin § 121.

Former §§ 14 and 70 from which this section is derived, referred to in Canal Law § 69.

Codes, Rules and Regulations:

Department of transportation: overdimensional and overweight vehicles. 15 NYCRR Part 8160.

Special hauling permits. 17 NYCRR §§ 154-1.0 et seq.

Federal Aspects:

The Surface Transportation Assistance Act of 1982, cited in statutory text, appears generally as 23 USCS §§ 112 et seq.

Jurisprudences:

7A Am Jur 2d, Automobiles and Highway Traffic § 208 et seq. 8 NY Jur Automobiles and Other Vehicles § 240 et seq.

ARTICLE 11 Civil Liability

HISTORY:

Add, L 1959, ch 775, eff Oct 1, 1960.

§ 388. Negligence in use or operation of vehicle attributable to owner

1. Every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner. Whenever any vehicles as hereinafter defined shall be used in combination with one another, by attachment or tow, the person using or operating any one vehicle shall, for the purposes of this section, be deemed to be using or operating each vehicle in the combination, and the owners thereof shall be jointly and severally liable hereunder.

2. As used in this section, "vehicle" means a "motor vehicle", as defined in section one hundred twenty-five of this chapter, except fire and police vehicles, self-propelled combines, self-propelled corn and hay harvesting machines and tractors used exclusively for agricultural purposes, and shall also include "semitrailer" and "trailer" as defined in article one of this chapter, whether or not such vehicles are used or operated upon a public highway. For the purpose of this section, self-propelled caterpillar or crawler-type equipment while being operated on the contract site, shall not be defined as motor vehicles.

3. As used in this section, "owner" shall be as defined in section one hundred twenty-eight of this chapter and their liability under this section shall be joint and several. If a vehicle be sold under a contract of sale which reserves a security interest in the vehicle in favor of the vendor, such vendor or his assignee shall not, after delivery of such vehicle, be deemed an owner within the provisions of this section, but the vendee, or his assignee, receiving possession thereof, shall be deemed such owner notwithstanding the terms of such contract, until the vendor or his assignee shall retake possession of such vehicle. A secured party in whose favor there is a security interest in any vehicle out of his possession, shall not be deemed an owner within the provisions of this section.

4. All bonds executed by or policies of insurance issued to the owner of any vehicle subject to the provisions of this section shall contain a provision for indemnity or security against the liability and responsibility provided in this section; but, except as provided in paragraphs one and two of subsection (g) of section three thousand four hundred twenty of the insurance law, this provision shall not be construed as requiring that such a policy include insurance against any liability of the insured, being an individual, for death of or injuries to his or her spouse or for injury to property of his or her spouse, where the injured spouse, to be entitled to recover, must prove the culpable conduct of the insured spouse.

HISTORY:

Add, L 1959, ch 775, eff Oct 1, 1960, with substance transferred from former § 59; amd, L 1960, ch 300, § 28; L 1960, ch 608, § 4, eff Oct 1, 1960; L 1962, ch 552, § 87, eff Sept 27, 1964; L 1976, ch 617, § 1, eff Aug 1, 1976; L 2002, ch 584, § 4, eff Sept 24, 2002.

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I. Generally

1. In general

Under this section, the owner of a motor vehicle is now liable for injuries to another resulting from negligence in its operation, where the driver was legally operating it with permission of the owner, whether in the owner's business or otherwise. Irwin v Klein, 271 N.Y. 477, 3 N.E.2d 601, 271 N.Y. (N.Y.S.) 477, 1936 N.Y. LEXIS 1225 (N.Y. 1936).

This section is designed in the interest of public safety in the exercise of police power of the state, and is applicable to a carrier engaged in interstate commerce. Dittman v Davis, 274 A.D. 836, 80 N.Y.S.2d 737, 1948 N.Y. App. Div. LEXIS 3572 (N.Y. App. Div. 1948), aff'd, 299 N.Y. 601, 86 N.E.2d 175, 299 N.Y. (N.Y.S.) 601, 1949 N.Y. LEXIS 1066 (N.Y. 1949).

This section does not extend the liability of an owner beyond the ordinary liability of a master for the acts of his servant within the course of his employment. Burmaster v State, 7 A.D.2d 775, 179 N.Y.S.2d 980, 1958 N.Y. App. Div. LEXIS 4095 (N.Y. App. Div. 3d Dep't 1958), aff'd, 7 N.Y.2d 65, 195 N.Y.S.2d 385, 163 N.E.2d 742, 1959 N.Y. LEXIS 874 (N.Y. 1959).

Neither public policy nor any language in CLS Veh & Tr § 388 prohibited insurance companies' insureds from privately contracting to permit defendant insurance company's insured (car rental company) from disclaiming that portion of its liability that exceeded amount for which vehicle owners were required to be insured under CLS Veh & Tr §§ 388 and 370. Government Emples. Ins. Co. v Chrysler Ins. Co., 256 A.D.2d 1212, 682 N.Y.S.2d 508, 1998 N.Y. App. Div. LEXIS 14379 (N.Y. App. Div. 4th Dep't 1998).

Under the former analogous section if the owner chose to intrust his car to another person, he invested such person, as long as he used the automobile, with the same authority in regard to the management of the automobile which the owner possessed, including the right to select the operator. Feitelberg v Matuson, 208 N.Y.S. 786, 124 Misc. 595, 1925 N.Y. Misc. LEXIS 713 (N.Y. Mun. Ct. 1925).

The responsibility imposed upon the owner of a motor vehicle by this section includes injury to the person or damage to the property of the lender. Shuler v Whitmore, Rauber & Vicinus, 246 N.Y.S. 528, 138 Misc. 814, 1930 N.Y. Misc. LEXIS 1693 (N.Y. Sup. Ct. 1930), aff'd, 233 A.D. 892, 251 N.Y.S. 886, 1931 N.Y. App. Div. LEXIS 13647 (N.Y. App. Div. 1931).

Under this section, liability is dependent upon legal use or operation in business "or otherwise" with permission or consent, and the legislature has not otherwise changed the rules governing the liability of the master for acts of his servant. Bindert v Elmhurst Taxi Corp., 6 N.Y.S.2d 666, 168 Misc. 892, 1938 N.Y. Misc. LEXIS 1916 (N.Y. Mun. Ct. 1938).

This section which provides that an owner of an automobile is responsible for injuries caused by the negligence of any person operating the vehicle with his permission, does not otherwise change any of the rules of liability. Rodgers v Ward, 8 N.Y.S.2d 167, 169 Misc. 559, 1938 N.Y. Misc. LEXIS 2168 (N.Y. Sup. Ct. 1938), aff'd, 256 A.D. 986, 11 N.Y.S.2d 240, 1939 N.Y. App. Div. LEXIS 5777 (N.Y. App. Div. 2d Dep't 1939).

The automobile owner's liability arising by statutory imputation to owner of negligence of driver with permissive use of the vehicle results in species of "quasi employment" or control similar to employment, and is derivative and akin to liability of master for his servant's negligent acts under "respondeat superior" doctrine. Jenks v Veeder Contracting Co., 30 N.Y.S.2d 278, 177 Misc. 240, 1941 N.Y. Misc. LEXIS 2257 (N.Y. Sup. Ct. 1941), modified, 264 A.D. 979, 37 N.Y.S.2d 230, 1942 N.Y. App. Div. LEXIS 5606 (N.Y. App. Div. 1942).

Owner passenger has derivative liability and responsibility for death or injuries to persons or property resulting from negligence in the use or operation of the owner's vehicle by permittee. Durham v Holmes, 79 Misc. 2d 143, 359 N.Y.S.2d 736, 1974 N.Y. Misc. LEXIS 1602 (N.Y. Sup. Ct. 1974).

Under this section an owner of a motor car is not a joint tort feasor with one whom he allowed to drive it but is in effect his surety. Kramer v Morgan, 85 F.2d 96, 1936 U.S. App. LEXIS 4041 (2d Cir. N.Y. 1936).

Under this section the owner of an automobile is held responsible for damages caused by another person's negligent driving of the owner's car when the car is taken with consent of such owner. ((American) Lumbermens Mut. Casualty Co. v Timms & Howard, Inc., 108 F.2d 497, 1939 U.S. App. LEXIS 2598 (2d Cir. N.Y. 1939).

2. Procedure

Where a release has been given to the driver of an automobile, but the releasor reserves the right to proceed against other wrongdoers, affect should be given to the intention of the parties as expressed by these reservations and a suit may be subsequently maintained against the owner of the vehicle. Plath v Justus, 28 N.Y.2d 16, 319 N.Y.S.2d 433, 268 N.E.2d 117, 1971 N.Y. LEXIS 1551 (N.Y. 1971).

Where driver of automobile which struck and killed decedent received release from decedent's executor which release reserved rights against the owner of the automobile, the owner was not released from liability where he demonstrated no prejudice. Plath v Justus, 33 A.D.2d 833, 306 N.Y.S.2d 80, 1969 N.Y. App. Div. LEXIS 2677 (N.Y. App. Div. 3d Dep't 1969), aff'd, 28 N.Y.2d 16, 319 N.Y.S.2d 433, 268 N.E.2d 117, 1971 N.Y. LEXIS 1551 (N.Y. 1971).

This section created a new liability directly against an owner. An injured party may sue the operator alone or the owner alone, or both jointly. The death of one does not abate an action against the other. Hatch v Lovejoy, 254 N.Y.S. 35, 142 Misc. 137, 1931 N.Y. Misc. LEXIS 1555 (N.Y. Sup. Ct. 1931).

Subdivision 3 of section 167 of the Insurance Law was amended so as to limit the presumptive exclusion of interspousal coverage to cases where the injured spouse must prove the culpable conduct of the insured spouse in order to recover; therefore, in an action for contribution against the defendant husband, following a judgment in favor of the defendant's wife, and dismissal of the husband's suit against plaintiffs, resulting from an automobile accident in which the wife sustained injury, the wife's insurance company was obligated to defend and indemnify the defendant husband, since the wife's recovery was not dependent upon proof of her husband's negligence. Ward v Accordino, 93 Misc. 2d 746, 403 N.Y.S.2d 438, 1978 N.Y. Misc. LEXIS 2129 (N.Y. Sup. Ct. 1978).

Where a counterclaim in a N.Y. Veh. & Traf. Law § 388 action was filed against a guardian, individually, the counterclaim potentially placed the guardian's pecuniary interests in conflict with those of the minor passengers; therefore, the guardian had to be removed and the attorney could not continue to represent both the guardian and the passengers, since continued representation could violate N.Y. Code of Prof. Resp. DR 5-105(B), N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.24. Alcantara v Mendez, 303 A.D.2d 337, 756 N.Y.S.2d 90, 2003 N.Y. App. Div. LEXIS 2133 (N.Y. App. Div. 2d Dep't 2003).

In action by New York residents who were injured in collision in New Jersey with automobile leased to driver by California corporation, if applicable conflict-of-laws rules dictated that New York law would apply, CLS Veh & Tr Law § 388 would render lessor liable for plaintiffs' injuries because New York courts have interpreted § 388 to have extraterritorial effect. Heisler v Toyota Motor Credit Corp., 884 F. Supp. 128, 1995 U.S. Dist. LEXIS 6472 (S.D.N.Y. 1995).

Under New Jersey choice-of-law rules, New York law, which provides that owner of vehicle is liable for injuries resulting from negligence of any person using vehicle with permission of owner, rather than New Jersey law, which provides that vehicle owner is not liable for negligence of another operating vehicle in absence of agency or employment relationship between owner and driver, applies in action against, inter alia, driver and lessor of vehicle, where New York is state where vehicle is registered, where lease between lessor and driver was entered into, and where relevant defendants reside and do business, because application of New York law will substantially further New York's strong policy of holding owners of vehicles registered in New York financially responsible for torts of those permitted to use vehicles. McKinney v S & S Trucking, 885 F. Supp. 105, 1995 U.S. Dist. LEXIS 6457 (D.N.J. 1995).

3. Purpose

It could not be inferred that by the enactment of the former analogous section the legislature intended to afford additional protection to those for whom the legislature had already provided. Ottmann v Rockville Centre, 273 N.Y. 205, 7 N.E.2d 102, 273 N.Y. (N.Y.S.) 205, 1937 N.Y. LEXIS 1193 (N.Y.), reh'g denied, 275 N.Y. 270, 9 N.E.2d 862, 275 N.Y. (N.Y.S.) 270, 1937 N.Y. LEXIS 1426 (N.Y. 1937).

Although, under common law, the rule is that an owner of an automobile, who merely permits another to drive his car, would not be liable for negligence of the driver, except under the theory of respondeat superior or agency, the Legislature enacted Vehicle and Traffic Law § 388 for the purpose of fixing liability on an owner of an automobile for the negligent operation of his car by another with his consent, and in so doing, the Legislature intended that the injured party be afforded a financially responsible insured person against whom to recover for injuries. Plath v Justus, 28 N.Y.2d 16, 319 N.Y.S.2d 433, 268 N.E.2d 117, 1971 N.Y. LEXIS 1551 (N.Y. 1971).

It was the intention of the legislature to provide that the owner of an automobile should be liable if a third person was using the automobile with the owner's permission, and to prevent an owner from escaping liability by saying that his automobile was being used at the time and place of the accident without specific authority or not in his business. Plaumbo v Ryan, 213 A.D. 517, 210 N.Y.S. 225, 1925 N.Y. App. Div. LEXIS 8534 (N.Y. App. Div. 1925).

Statute regarding liability for negligent operation of motor vehicle merely creates liability, where none would otherwise exist, by making owner, who consents to use of his automobile by another, responsible for negligence of user, even though automobile is being employed solely for user's personal and private use. Jackson v Brown & Kleinhenz, Inc., 246 A.D. 445, 284 N.Y.S. 44, 1935 N.Y. App. Div. LEXIS 8699 (N.Y. App. Div. 1935), rev'd, 273 N.Y. 365, 7 N.E.2d 265, 273 N.Y. (N.Y.S.) 365, 1937 N.Y. LEXIS 1214 (N.Y. 1937).

It was not the intention of the legislature that the provisions of this section should insure the safety of passengers riding in a car which had been left in the custody of a repairman for the purpose of making repairs, when the passengers were in the car for their own benefit and enjoyment through no invitation of the owner, express or implied, but through invitation of the repairman, who had no authority, express or implied, to invite them. Such an owner reasonably could not have contemplated or anticipated that his car would be used upon the street or roadway for any such purpose. Svenson v Zakrocki, 268 A.D. 777, 48 N.Y.S.2d 567, 1944 N.Y. App. Div. LEXIS 3435 (N.Y. App. Div. 1944).

An owner's liability under this section is purely statutory, being designed to prevent an owner, who has given permission for use of his car, from escaping liability to injured persons by claiming that the car was not being used in his business, and the statute may not be presumed to make any innovation upon the common law further than required by the mischief to be remedied. Sikora v Keillor, 17 A.D.2d 6, 230 N.Y.S.2d 571, 1962 N.Y. App. Div. LEXIS 8567 (N.Y. App. Div. 2d Dep't 1962), aff'd, 13 N.Y.2d 610, 240 N.Y.S.2d 601, 191 N.E.2d 88, 1963 N.Y. LEXIS 1220 (N.Y. 1963).

Statutory presumption that vehicle is being operated under insured owner's consent at time of accident is supportive of policy that there should be recourse to financially responsible defendant for one injured by negligent operation of vehicle. Phoenix v Bolton, 59 A.D.2d 464, 399 N.Y.S.2d 914, 1977 N.Y. App. Div. LEXIS 13949 (N.Y. App. Div. 3d Dep't 1977), app. denied, 44 N.Y.2d 641, 1978 N.Y. LEXIS 4238 (N.Y. 1978).

The purpose of the former analogous section was to protect the public and to make an owner liable for an injury caused by the negligent operation of his car, where his implied permission to use or operate it, in his business or otherwise, could be gathered from all the circumstances surrounding its possession by another, at the time it was negligently operated. Katz v Wolff & Reinheimer, Inc., 221 N.Y.S. 476, 129 Misc. 384, 1927 N.Y. Misc. LEXIS 744 (N.Y. Mun. Ct. 1927).

This section was passed to establish liability where none before existed, not to limit an existing liability. It fixes liability on an absentee owner where his car is being operated by another with his consent even though not in his business. The enactment of this section was not intended to defeat or limit the liability of a servant to his master and the agent to his principal for his own

tort. Hence, the section could not be used to defeat an action brought by plaintiff to recover damages for the death of her husband caused by an accident while the decedent was riding in an automobile owned by him but alleged to have been operated at the time of the accident by the defendant. Urquhart v McEvoy, 126 N.Y.S.2d 539, 204 Misc. 426, 1953 N.Y. Misc. LEXIS 2458 (N.Y. Sup. Ct. 1953).

This section was intended to make the "owner" of a vehicle liable to the injured party when the vehicle is used with his permission, whether or not used in his behalf, and was not intended to change the owner's common-law liability to any other extent. Singerman Bus Corp. v American Fidelity Fire Ins. Co., 44 Misc. 2d 4, 252 N.Y.S.2d 780, 1964 N.Y. Misc. LEXIS 1620 (N.Y. Sup. Ct. 1964).

Sup. 1952. The purpose of the statute imposing liability upon owner of automobile for injury resulting from negligence in operation of automobile by a person legally operating automobile with owner's express or implied permission was to remove hardship which common-law rule visited upon innocent persons by preventing owner from escaping liability on ground that his automobile was being used without authority or not on owner's business. Parker v Telesco, 111 N.Y.S.2d 481, 1952 N.Y. Misc. LEXIS 2530 (N.Y. Sup. Ct. 1952).

4. Construction of terms

Statute making owner of automobile liable for injuries caused while it is driven with his consent must be confined to cases which fairly fall within scope of its language, but statute must be given construction which will result in fulfillment of its purpose. Jackson v Brown & Kleinhenz, 273 N.Y. 365, 7 N.E.2d 265, 273 N.Y. (N.Y.S.) 365, 1937 N.Y. LEXIS 1214 (N.Y. 1937).

Statute establishing liability of owner of motor vehicle used or operated by another with his permission is in derogation of common law and is to be strictly construed. Hanley v Albano, 20 A.D.2d 644, 246 N.Y.S.2d 380, 1964 N.Y. App. Div. LEXIS 4580 (N.Y. App. Div. 2d Dep't 1964).

Defendant, the insurer of a trailer unit, was not liable to plaintiff, the insurer of a tractor unit, for any portion of the amount paid by plaintiff to settle personal injury and property damage claims arising out of an accident involving the tractor trailer rig operated in combination by an employee of the tractor owner, since the insurance coverage required by Vehicle and Traffic Law § 388 for every owner of a vehicle used or operated in the State is for liability of the owner of each unit of a combined rig and, while liability of owners of units of a combined rig may be joint and several with respect to injured third parties, the statute creates no right of contribution or indemnification on behalf of plaintiff insurer against defendant insurer. Aetna Casualty & Surety Co. v Merchants Mut. Ins. Co., 100 A.D.2d 318, 475 N.Y.S.2d 517, 1984 N.Y. App. Div. LEXIS 17008 (N.Y. App. Div. 3d Dep't 1984), aff'd, 64 N.Y.2d 840, 487 N.Y.S.2d 322, 476 N.E.2d 648, 1985 N.Y. LEXIS 14170 (N.Y. 1985).

That the former analogous section was added to the Highway Law, Art 11, after that article had been substantially repealed and re-enacted in the Vehicle and Traffic Law, was of no merit, for this section was enacted by the legislature and signed by the governor, and while it may be an orphan it became and is a part of the statutory law of the state. Snyder v Binghamton, 245 N.Y.S. 497, 138 Misc. 259, 1930 N.Y. Misc. LEXIS 1616 (N.Y. Sup. Ct. 1930), aff'd, 233 A.D. 782, 250 N.Y.S. 917, 1931 N.Y. App. Div. LEXIS 12620 (N.Y. App. Div. 1931).

Though remedial, this section must be strictly construed. Houlihan v Selengut, 25 N.Y.S.2d 371, 175 Misc. 854, 1941 N.Y. Misc. LEXIS 1455 (N.Y. Sup. Ct.), rev'd, 263 A.D. 811, 31 N.Y.S.2d 560, 1941 N.Y. App. Div. LEXIS 5092 (N.Y. App. Div. 1941).

The liability of automobile owner for damages resulting from negligent operation of automobile by another person with owner's consent is derivative only, being imposed by statute, and is not dependent upon any wrongdoing of the owner, nor does the operator's negligence become the negligence of the owner. Puccio v Carr, 31 N.Y.S.2d 805, 177 Misc. 706, 1941 N.Y. Misc. LEXIS 2456 (N.Y. Sup. Ct. 1941), aff'd, 263 A.D. 1042, 33 N.Y.S.2d 684, 1942 N.Y. App. Div. LEXIS 7983 (N.Y. App. Div. 1942).

The public policy of New York, as evidenced by New York statute attributing negligence in use or operation of vehicle to owner, requires New York court to construe similar Massachusetts statute no less liberally than have courts of Massachusetts. Tirone v Tirone, 32 Misc. 2d 962, 222 N.Y.S.2d 986, 1961 N.Y. Misc. LEXIS 2647 (N.Y. Sup. Ct.), aff'd, 14 A.D.2d 992, 222 N.Y.S.2d 1016, 1961 N.Y. App. Div. LEXIS 7557 (N.Y. App. Div. 4th Dep't 1961).

In light of other statutes, it appeared unlikely that Legislature in granting City of New York power to prohibit, restrict or regulate parking intended to withhold from City Council the authority to impose fines upon automobile owners not actually involved in commission of the parking violations. Kinney Car Corp. v New York, 58 Misc. 2d 365, 295 N.Y.S.2d 288, 1968 N.Y. Misc. LEXIS 1035 (N.Y. Sup. Ct. 1968).

Both Vehicle and Traffic Law § 388 and Insurance Law § 167, subd 2 require coverage of the owner only, and not of the user with permission of the named insured. Neither statute mandates nor projects coverage of users with permission into policies issued to owners. Hiscock v Kuinlan, 62 Misc. 2d 842, 310 N.Y.S.2d 331, 1970 N.Y. Misc. LEXIS 1741 (N.Y. Sup. Ct. 1970).

Vehicle and Traffic Law § 388 apparently is not designed to deny an absentee owner a recovery on the basis of imputed contributory negligence although he may at the very same time be found liable as a defendant when the concurrent negligence attributable to the driver is imputed to him. Cadran v Fanni, 72 Misc. 2d 1, 338 N.Y.S.2d 532, 1972 N.Y. Misc. LEXIS 1413 (N.Y. Dist. Ct. 1972).

By adding the words "or otherwise," the legislature created a liability where none existed at common law. Bandych v Ross, 26 N.Y.S.2d 830, 1941 N.Y. Misc. LEXIS 1645 (N.Y. City Ct. 1941).

This section is in derogation of the common law and is strictly construed. New York Tel. Co. v Scofield, 31 N.Y.S.2d 393, 1941 N.Y. Misc. LEXIS 2395 (N.Y. J. Ct. 1941).

5. —"In this state"

The legislature was not concerned with the extraterritorial effect of Vehicle and Traffic Law § 388 by adding the words "in this state" to the statutory provision, in view of the fact that it was substituting "in this state" for the former words "upon a public highway" in the predecessor statute in order to cover the situation of an accident on private roadways and parking lots. Farber v Smolack, 20 N.Y.2d 198, 282 N.Y.S.2d 248, 229 N.E.2d 36, 1967 N.Y. LEXIS 1266 (N.Y. 1967).

The grounds of a private racing association are not a "public place" within the definition of "public highway," as used in this section. Sylvester v Brockway Motor Truck Corp., 232 A.D. 364, 250 N.Y.S. 35, 1931 N.Y. App. Div. LEXIS 13812 (N.Y. App. Div. 1931).

Although section 388 of the Vehicle and Traffic Law, which imposes liability upon an owner of a motor vehicle for injuries caused by the negligent operator thereof, so long as the latter is driving the car with the consent or permission of the former, speaks of the use or operation of a vehicle in the State, the legislative history of section 388 indicates that the Legislature intended to enlarge the vehicle owner's vicarious liability and not to draw the line at the border. Bank v Rebold, 69 A.D.2d 481, 419 N.Y.S.2d 135, 1979 N.Y. App. Div. LEXIS 11827 (N.Y. App. Div. 2d Dep't 1979).

6. —"Exclusively for agricultural purposes"

In instructing jury as to meaning of phrase "exclusively for agricultural purposes" in CLS Veh & Tr § 388(2), courts use of dictionary definition of exclusively was proper. Palmer v Rouse, 232 A.D.2d 909, 649 N.Y.S.2d 76, 1996 N.Y. App. Div. LEXIS 11264 (N.Y. App. Div. 3d Dep't 1996).

Phrase "exclusively for agricultural purposes" under CLS Veh & Tr § 388(2) may not be interpreted so as to consider only primary, dominant, or principal use and ignore "incidental" uses. Palmer v Rouse, 232 A.D.2d 909, 649 N.Y.S.2d 76, 1996 N.Y. App. Div. LEXIS 11264 (N.Y. App. Div. 3d Dep't 1996).

7. —"Operated"

The contention that the word "operate" as used in the statute signifies a personal act in driving a motor vehicle cannot be sustained. If the legal user at the time be present in the car, its

operation is his operation though the hands at the wheel are those of another and negligent driving will bind the owner with whose permission the car is used. Witherstine v Employers' Liability Assurance Corp., 235 N.Y. 168, 139 N.E. 229, 235 N.Y. (N.Y.S.) 168, 1923 N.Y. LEXIS 1162 (N.Y. 1923).

Assuming that "use or operation" of vehicle for purposes of CLS Veh & Tr § 388(1) encompasses loading and unloading, party's independent, preparatory and preliminary activity in removing concrete base from light standard, which he intended to transport in truck, did not, as matter of law, constitute loading and thus was not "use or operation." Frontuto v Ray Burgun Trucking Co., 78 N.Y.2d 938, 573 N.Y.S.2d 634, 578 N.E.2d 432, 1991 N.Y. LEXIS 1006 (N.Y. 1991).

Plaintiff's loading and unloading of truck constituted "use or operation" of vehicle under CLS Veh & Tr § 388(1). Argentina v Emery World Wide Delivery Corp., 93 N.Y.2d 554, 693 N.Y.S.2d 493, 715 N.E.2d 495, 1999 N.Y. LEXIS 1431 (N.Y. 1999).

Act of negligently parking vehicle constituted use or operation within meaning of CLS Veh & Tr § 388(1). Bouchard v Canadian Pac. Ltd., 267 A.D.2d 899, 700 N.Y.S.2d 540, 1999 N.Y. App. Div. LEXIS 13595 (N.Y. App. Div. 3d Dep't 1999).

Plaintiff injured in motor vehicle accident involving taxi cab was entitled to summary judgment declaring that cab owner's insurer was required to provide liability insurance protection to owner under CLS Veh & Tr § 388 for any injuries sustained by plaintiff as result of cab passengers' negligence use of cab where (1) passengers' act of opening cab door in order to exit was "use and operation" of cab under § 388, (2) thus, owner would be liable for plaintiff's injuries if passengers' "use and operation" were negligent, and (3) under liability policy issued by insurer to owner, insurer was required to provide coverage to owner under such circumstances. Cohn v Nationwide Mut. Ins. Co., 286 A.D.2d 699, 730 N.Y.S.2d 152, 2001 N.Y. App. Div. LEXIS 8548 (N.Y. App. Div. 2d Dep't 2001).

The word "operated," as used in an insurance policy which prohibits the insured from permitting his motor vehicle "to be operated by any person under age limit fixed by law," when construed in connection with the word "operating," as used in this section, means physical operation. Devitt v Continental Casualty Co., 277 N.Y.S. 844, 154 Misc. 603, 1934 N.Y. Misc. LEXIS 1957 (N.Y. Sup. Ct. 1934), rev'd, 245 A.D. 115, 281 N.Y.S. 336, 1935 N.Y. App. Div. LEXIS 10241 (N.Y. App. Div. 1935).

The term "used or operated" on a public highway covers more than actual driving of a motor vehicle on the highway and extends to a situation where it is stopped on a highway for purposes of unloading. Stole v United States Steel Corp., 34 Misc. 2d 103, 227 N.Y.S.2d 595, 1962 N.Y. Misc. LEXIS 3529 (N.Y. Sup. Ct. 1962).

The phrase "use or operation" as used in automobile owner's responsibility law encompasses more than just driving a car; it includes all activities necessarily part of driving a car, such as getting in and out. Fireman's Fund American Ins. Cos. v Olin of New York, Inc., 84 Misc. 2d 504, 376 N.Y.S.2d 800, 1975 N.Y. Misc. LEXIS 3162 (N.Y. Sup. Ct. 1975).

A hi-lo forklift is not a motor vehicle as defined by N.Y. Veh. Traf. Law § 125 because a forklift operator does not need to be specially licensed and a forklift does not need to be registered with the Department of Motor Vehicles. Mangra v China Airlines, Ltd., 790 N.Y.S.2d 370, 7 Misc. 3d 499, 233 N.Y.L.J. 36, 2005 N.Y. Misc. LEXIS 224 (N.Y. Civ. Ct. 2005).

8. —"Used"

Assuming that "use or operation" of vehicle for purposes of CLS Veh & Tr § 388(1) encompasses loading and unloading, party's independent, preparatory and preliminary activity in removing concrete base from light standard, which he intended to transport in truck, did not, as matter of law, constitute loading and thus was not "use or operation." Frontuto v Ray Burgun Trucking Co., 78 N.Y.2d 938, 573 N.Y.S.2d 634, 578 N.E.2d 432, 1991 N.Y. LEXIS 1006 (N.Y. 1991).

Plaintiff's loading and unloading of truck constituted "use or operation" of vehicle under CLS Veh & Tr § 388(1). Argentina v Emery World Wide Delivery Corp., 93 N.Y.2d 554, 693 N.Y.S.2d 493, 715 N.E.2d 495, 1999 N.Y. LEXIS 1431 (N.Y. 1999).

An exclusionary clause in a policy issued by an insurer providing excess coverage of only one vehicle in a tractor-trailer combination, which clause states that "This policy does not apply . . . while any trailer covered by this policy is used with any automobile owned or hired by the insured and not covered by like insurance in the company", must be read as affording excess coverage not only for the trailer, but also for the tractor, by virtue of subdivision 4 of section 388 of the Vehicle and Traffic Law, which provides that all policies of insurance issued to owners of tractors and trailers used in combination with one another are to provide the required coverage; moreover, such an exclusionary clause, whether it applies to primary or excess insurance, is void as contrary to State policy, and the fact that it tracks the language of an Insurance Department regulation (11 NYCRR 60.2 [c]) is immaterial, for to the extent that regulation conflicts with and is inconsistent with the design and purpose of the statute it has no significance. Mt. Vernon Fire Ins. Co. v Travelers Indem. Co., 63 A.D.2d 254, 407 N.Y.S.2d 23, 1978 N.Y. App. Div. LEXIS 11342 (N.Y. App. Div. 1st Dep't 1978), aff'd, 47 N.Y.2d 575, 419 N.Y.S.2d 899, 393 N.E.2d 974, 1979 N.Y. LEXIS 2183 (N.Y. 1979).

Defendant, tow truck operator, was not entitled to summary judgment in action seeking to impose vicarious liability under CLS Veh & Tr § 388(1), even though vehicles in question were parked prior to accident, where vehicles were still chained together and it appeared that owner of towed vehicle might have required additional tow since he was attempting to shut off his vehicle's engine, thus raising fact issue as to whether vehicles were being used in towing operation at time of accident. Boyce v Vazquez, 249 A.D.2d 724, 671 N.Y.S.2d 815, 1998 N.Y. App. Div. LEXIS 4080 (N.Y. App. Div. 3d Dep't 1998).

Act of negligently parking vehicle constituted use or operation within meaning of CLS Veh & Tr § 388(1). Bouchard v Canadian Pac. Ltd., 267 A.D.2d 899, 700 N.Y.S.2d 540, 1999 N.Y. App. Div. LEXIS 13595 (N.Y. App. Div. 3d Dep't 1999).

Plaintiff injured in motor vehicle accident involving taxi cab was entitled to summary judgment declaring that cab owner's insurer was required to provide liability insurance protection to owner under CLS Veh & Tr § 388 for any injuries sustained by plaintiff as result of cab passengers' negligence use of cab where (1) passengers' act of opening cab door in order to exit was "use and operation" of cab under § 388, (2) thus, owner would be liable for plaintiff's injuries if passengers' "use and operation" were negligent, and (3) under liability policy issued by insurer to owner, insurer was required to provide coverage to owner under such circumstances. Cohn v Nationwide Mut. Ins. Co., 286 A.D.2d 699, 730 N.Y.S.2d 152, 2001 N.Y. App. Div. LEXIS 8548 (N.Y. App. Div. 2d Dep't 2001).

While N.Y. Veh. & Traf. Law § 388(1) does not itself speak to whether loading and unloading of a vehicle fall within its reach, the history of the provision makes clear that those activities are indeed covered, and an exclusion to coverage in a motor vehicle insurance policy, for injuries resulting from negligence in the use and operation of a motor vehicle, would be unenforceable as against the public policy of New York, because to tolerate such an exclusion would leave innocent victims, acting in good faith, and presumably, in reliance upon an insurer's compliance with the law, without legal redress or prospect of recompense for injuries sustained. Progressive Cas. Ins. Co. v Baker, 290 A.D.2d 676, 736 N.Y.S.2d 447, 2002 N.Y. App. Div. LEXIS 82 (N.Y. App. Div. 3d Dep't 2002).

The word "use" included a person who has the actual, though not physical, control of the motor vehicle, and who was constituted by the owner thereof its master ad hoc. Feitelberg v Matuson, 208 N.Y.S. 786, 124 Misc. 595, 1925 N.Y. Misc. LEXIS 713 (N.Y. Mun. Ct. 1925).

The term "used or operated" on a public highway covers more than actual driving of a motor vehicle on the highway and extends to a situation where it is stopped on a highway for purposes of unloading. Stole v United States Steel Corp., 34 Misc. 2d 103, 227 N.Y.S.2d 595, 1962 N.Y. Misc. LEXIS 3529 (N.Y. Sup. Ct. 1962).

If a passenger in a taxicab opens the door negligently, the passenger was "using" the cab and the cab's owner would be liable for damages to a car colliding with the opened door. Epstein v

Kernon, 68 Misc. 2d 29, 326 N.Y.S.2d 137, 1971 N.Y. Misc. LEXIS 1149 (N.Y. Civ. Ct. 1971).

The phrase "use or operation" as used in automobile owner's responsibility law encompasses more than just driving a car; it includes all activities necessarily part of driving a car, such as getting in and out. Fireman's Fund American Ins. Cos. v Olin of New York, Inc., 84 Misc. 2d 504, 376 N.Y.S.2d 800, 1975 N.Y. Misc. LEXIS 3162 (N.Y. Sup. Ct. 1975).

The term "use", as applied in section 388 of the Vehicle and Traffic Law, which imputes a driver's negligence to the owner of the vehicle, may not be construed to include the act of a person who has the owner's permission to use the vehicle in instructing the injured party in the operation of a motorcycle as a permissive use expressly or impliedly approved by the owner. Maringo v Senior, 102 Misc. 2d 1011, 424 N.Y.S.2d 862, 1980 N.Y. Misc. LEXIS 2051 (N.Y. Sup. Ct. 1980).

9. —"Permission"

Automobile insurer presented sufficient evidence to rebut strong presumption of permissive use under CLS Veh & Tr § 388 where driver of vehicle at time of accident testified that its owner, his landlady, did not permit him to use vehicle unless emergency existed, and driver's purpose in using vehicle at time of accident (to attend appointment at Department of Social Services) did not constitute emergency. Aetna Casualty & Surety Co. v Santos, 175 A.D.2d 91, 573 N.Y.S.2d 695, 1991 N.Y. App. Div. LEXIS 9389 (N.Y. App. Div. 2d Dep't 1991).

"Permission" means the same as consent, and consent implies knowledge. Atwater v Lober, 233 N.Y.S. 309, 133 Misc. 652, 1929 N.Y. Misc. LEXIS 689 (N.Y. County Ct. 1929).

In making the owner of a vehicle liable for death or damage resulting from its negligent use or operation by anyone using it with his permission, "express or implied," the word "express" means "direct and distinct" and "implied" is a correlative meaning virtual or inferential. Hubert v Stasiak, 31 Misc. 2d 307, 220 N.Y.S.2d 748, 1961 N.Y. Misc. LEXIS 2239 (N.Y. Sup. Ct. 1961).

10. —"In the business of"

The operation of a motor vehicle "in the business of such owner or otherwise" includes its use for profit as well as for other purposes, including health or pleasure, and does not necessarily mean an enterprise for gain. Feitelberg v Matuson, 208 N.Y.S. 786, 124 Misc. 595, 1925 N.Y. Misc. LEXIS 713 (N.Y. Mun. Ct. 1925).

11. —"Negligence"

"Negligence in operation" is not restricted to the manner in which a vehicle is driven but includes the act of putting a defective vehicle in operation on the highway. Elfeld v Burkham Auto Renting Co., 299 N.Y. 336, 87 N.E.2d 285, 299 N.Y. (N.Y.S.) 336, 1949 N.Y. LEXIS 940 (N.Y. 1949).

Summary judgment was improperly granted to a railroad company and an employee, dismissing a driver's suit to recover for injuries sustained when he was struck by a wheel that dislodged from the company's vehicle, because a question of fact existed as to whether defendants were negligent under N.Y. Veh. & Traf. Law § 388 in the inspection and maintenance of the vehicle, in that they failed to produce the company's daily vehicle inspection reports for the date of the accident. Glenn v Couvopoulo, 21 A.D.3d 526, 800 N.Y.S.2d 737, 2005 N.Y. App. Div. LEXIS 8666 (N.Y. App. Div. 2d Dep't 2005).

Statute imputing user's negligence to automobile owner covers more than actual driving of vehicle on highway. Stole v United States Steel Corp., 34 Misc. 2d 103, 227 N.Y.S.2d 595, 1962 N.Y. Misc. LEXIS 3529 (N.Y. Sup. Ct. 1962).

As a non-covered person, a taxi-cab passenger retained a right to sue the driver that caused an accident in negligence for both economic and non-economic loss. Laba v Petrullo, 191 Misc. 2d 758, 742 N.Y.S.2d 787, 2002 N.Y. Misc. LEXIS 572 (N.Y. Sup. Ct. 2002), aff'd, 2003 N.Y. Misc. LEXIS 438 (N.Y. App. Term Mar. 11, 2003).

Although an owner of an excavator was not liable for an employee's injuries under N.Y. Lab. Law § 241(6), because the excavator was a motor vehicle under N.Y. Veh. & Traf. Law §§ 125, 388, that the owner negligently entrusted to an untrained co-employee in violation of N.Y. Lab. Law § 200, the owner was not entitled to summary judgment. Martinez v Hitachi Constr. Mach. Co., Ltd., 829 N.Y.S.2d 814, 15 Misc. 3d 244, 236 N.Y.L.J. 82, 2006 N.Y. Misc. LEXIS 4130 (N.Y. Sup. Ct. 2006).

Summary judgment dismissal of a wife's personal injury complaint, which was premised on the theory that a domestic rental car company, as apparent agent of the Mexican owner and renter of a vehicle, was vicariously liable for the driver's negligence under N.Y. Veh. & Traf. Law § 388, was affirmed where it was undisputed that the wife's husband was negligent in causing an automobile accident that resulted in the wife's injuries. The Mexican entity that owned and leased the vehicle was in no way negligent, so the wife could not use the doctrine of apparent agency to impose liability on the Mexican entity's domestic parent company; there was no negligence of the company or the Mexican entity for vicarious liability to be applicable. Ashkenazi v Hertz Rent a Car, 18 A.D.3d 584, 795 N.Y.S.2d 624, 2005 N.Y. App. Div. LEXIS 5291 (N.Y. App. Div. 2d Dep't 2005).

Because a driver's testimony corroborated a lessee's recount that an accident occurred as a result of an emergency situation not of the lessee's making, an injured passenger was not entitled to summary judgment since a question existed as to whether a "qualifying emergency" negated the lessee's liability under N.Y. Veh. & Traf. Law § 388(1). Cook v Garrant, 27 A.D.3d 984, 811 N.Y.S.2d 801, 2006 N.Y. App. Div. LEXIS 3577 (N.Y. App. Div. 3d Dep't 2006).

12. Constitutionality

The former analogous section was not a special or local law passed in violation of Const. Art. XII, § 2. It did not discriminate between the municipalities which provide police and fire protection by reason of a statutory duty imposed upon them, and those which provide such protection, not because of a statutory requirement, but of their own volition. Miller v New York, 235 A.D. 259, 257 N.Y.S. 33, 1932 N.Y. App. Div. LEXIS 7939 (N.Y. App. Div. 1932).

The former analogous section was constitutional under the police power inherent in the state for the protection of its citizens and others within its borders. Feitelberg v Matuson, 208 N.Y.S. 786, 124 Misc. 595, 1925 N.Y. Misc. LEXIS 713 (N.Y. Mun. Ct. 1925).

N.Y. Veh. & Traf. Law § 388 does not violate due process as applied to long-term vehicle lessors, as one of its purposes is to ensure that persons injured by the negligent operation of a motor vehicle have recourse to a financially responsible person, which is a valid governmental purpose, and imposing liability on lessors for the negligence of long-term lessees is a reasonable means of accomplishing this objective. Chilberg v Chilberg, 13 A.D.3d 1089, 788 N.Y.S.2d 533, 2004 N.Y. App. Div. LEXIS 16334 (N.Y. App. Div. 4th Dep't 2004).

N.Y. Veh. & Traf. Law § 388 does not violate the Equal Protection Clause as applied to long-term vehicle lessors, as it was rational for the legislature to distinguish between vehicle owners, including long-term lessors, and nonowners, including lienholders, and to allocate the statutory burdens based on that distinction. Chilberg v Chilberg, 13 A.D.3d 1089, 788 N.Y.S.2d 533, 2004 N.Y. App. Div. LEXIS 16334 (N.Y. App. Div. 4th Dep't 2004).

The state statute making the owner of an automobile liable for personal injuries resulting from its negligent operation by another to whom he has entrusted it, is consistent with due process as applied to a non-resident owner who was not in that state when the accident occurred and who had merely lent his machine to one not his agent or engaged on business for him, with express or implied permission to take it there from the state of the owner's residence, where the bailment occurred and whose laws did not impose such liability. Young v Masci, 289 U.S. 253, 53 S. Ct. 599, 77 L. Ed. 1158, 1933 U.S. LEXIS 178 (U.S. 1933).

Put colloquially, applying choice-of-law principles to the analysis of the constitutional scope of New York's substantive law mixed apples and oranges. For purposes of the decision, it was sufficient to conclude that there was no constitutional bar to the application of New York law to the dispute. Budget Rent-A-Car Sys., Inc. v Chappell, 407 F.3d 166, 2005 U.S. App. LEXIS 7783

(3d Cir. Pa.), cert. denied, 546 U.S. 978, 126 S. Ct. 567, 163 L. Ed. 2d 463, 2005 U.S. LEXIS 7891 (U.S. 2005).

13. Applicability

The provision of this section exempting from liability imposed upon owners of motor vehicles for negligence of others driving their cars with their consent, those engaged in business of renting motor vehicles, who carry liability insurance in stated amounts protecting renter from liability arising from his negligence in operation of rented vehicle, is violative neither of the federal nor of the state constitution. The exception in the statute does not apply to cars rented or hired when operated by servants or employees of the owner. Atkins v Hertz Drivurself Stations, Inc., 261 N.Y. 352, 185 N.E. 408, 261 N.Y. (N.Y.S.) 352, 1933 N.Y. LEXIS 1293 (N.Y. 1933), aff'd, 291 U.S. 641, 54 S. Ct. 437, 78 L. Ed. 1039, 1934 U.S. LEXIS 527 (U.S. 1934).

This section does not apply to a trailer and semitrailers as defined. Hennessy v Walker, 279 N.Y. 94, 17 N.E.2d 782, 279 N.Y. (N.Y.S.) 94, 1938 N.Y. LEXIS 802 (N.Y. 1938).

This section does not apply where the damages were not caused by the operation of the motor vehicle upon a public highway. Hogan v Comac Sales, 245 A.D. 216, 281 N.Y.S. 207, 1935 N.Y. App. Div. LEXIS 10268 (N.Y. App. Div. 1935), aff'd, 271 N.Y. 562, 2 N.E.2d 695, 271 N.Y. (N.Y.S.) 562, 1936 N.Y. LEXIS 1289 (N.Y. 1936).

This section is not applicable if an operator of a car, at the time of the accident, was not acting within the scope of his employment. Enstrom v New York, 258 A.D. 672, 17 N.Y.S.2d 964, 1940 N.Y. App. Div. LEXIS 8269 (N.Y. App. Div.), reh'g denied, 259 A.D. 832, 19 N.Y.S.2d 1022, 1940 N.Y. App. Div. LEXIS 6894 (N.Y. App. Div. 1940).

This section is designed in the interest of public safety in the exercise of police power of the state, and is applicable to a carrier engaged in interstate commerce. Dittman v Davis, 274 A.D. 836, 80 N.Y.S.2d 737, 1948 N.Y. App. Div. LEXIS 3572 (N.Y. App. Div. 1948), aff'd, 299 N.Y. 601, 86 N.E.2d 175, 299 N.Y. (N.Y.S.) 601, 1949 N.Y. LEXIS 1066 (N.Y. 1949).

Vehicle and Traffic Law § 388 (1) imputes to owner of motor vehicle negligence of one who uses or operates it with his or her permission; that section gives rise to presumption that vehicle is being operated with owner's consent–presumption was rebutted as matter of law here; driver of vehicle owned by defendant, which was involved in accident in question, admitted at his examination before trial that he had taken vehicle without defendant's permission; this testimony was corroborated by defendant's affidavit as well as testimony at examination before trial of defendant's 15-year-old son, who was passenger in vehicle; parties opposing defendant's motion failed to submit any evidence sufficient to raise triable issue of fact as to permission and, therefore, complaints and cross claims insofar as they are asserted against defendant should have been severed and dismissed. Bruno v Privilegi, 148 A.D.2d 652, 539 N.Y.S.2d 403, 1989 N.Y. App. Div. LEXIS 4184 (N.Y. App. Div. 2d Dep't 1989).

With regard to machines with multiple functions, statute providing that owners of vehicles used in state shall be liable for death or injuries to persons or property resulting from negligence in use or operation of such vehicle by any person using or operating it with express or implied permission of owner, is not applicable to a function other than that of a vehicle. Monell v International Business Machines Corp., 47 A.D.2d 637, 363 N.Y.S.2d 657, 1975 N.Y. App. Div. LEXIS 8802 (N.Y. App. Div. 2d Dep't 1975), aff'd, 38 N.Y.2d 888, 382 N.Y.S.2d 747, 346 N.E.2d 548, 1976 N.Y. LEXIS 2332 (N.Y. 1976).

This section is applicable only in actions brought by third persons against the owner of the vehicle involved, and accordingly the contributory negligence of the driver does not bar recovery by the owner where the latter seeks to recover for damages to his automobile. Tuttle v State, 78 N.Y.S.2d 820, 191 Misc. 1014, 1948 N.Y. Misc. LEXIS 2325 (N.Y. Ct. Cl. 1948).

Immunity afforded allegedly negligent operator, a federal employee, from any civil liability arising out of automobile collision by reason of Federal Drivers Act could not be extended to the nonnegligent, absentee owner of vehicle operated by immune negligent operator so as to exempt him from any derivative liability under Vehicle and Traffic Law provision imposing upon owner of a vehicle a statutory liability for the negligence of any person using or operating that vehicle within state with permission of owner, express or implied. Padlo v Spoor, 90 Misc. 2d 1002, 396 N.Y.S.2d 798, 1977 N.Y. Misc. LEXIS 2208 (N.Y. Sup. Ct. 1977), aff'd, 72 A.D.2d 665, 422 N.Y.S.2d 895, 1979 N.Y. App. Div. LEXIS 13821 (N.Y. App. Div. 4th Dep't 1979).

This section does not apply where both motorists are negligent. Plunkett v Heath, 1 N.Y.S.2d 778, 1938 N.Y. Misc. LEXIS 1226 (N.Y. City Ct. 1938).

N.Y. Veh. & Traf. Law § 388(1) and (4) read together provide that every owner of a vehicle used or operated in this state shall be liable for negligence in the permissive use or operation of its vehicles and that insurance policies on said vehicles must indemnify the owner against said liability. Paul M. Maint., Inc. v Transcon. Ins. Co., 300 A.D.2d 209, 755 N.Y.S.2d 3, 2002 N.Y. App. Div. LEXIS 13319 (N.Y. App. Div. 1st Dep't 2002).

Trial court properly denied a trust's motion for summary judgment pursuant to N.Y. C.P.L.R. 3212 in consolidated personal injury and wrongful death actions; the evidence failed to conclusively establish that injuries and the death of a decedent resulted from an intentional act of a driver, and therefore there was an issue of fact as to whether N.Y. Veh. & Traf. Law § 388 rendered the trust jointly and severally liable as the owner of the driver's vehicle. Estate of Marone v Chaves, 306 A.D.2d 372, 760 N.Y.S.2d 860, 2003 N.Y. App. Div. LEXIS 7011 (N.Y. App. Div. 2d Dep't 2003).

The state statute making the owner of an automobile liable for personal injuries resulting from its negligent operation by another to whom he has entrusted it, is consistent with due process as applied to a non-resident owner who was not in that state when the accident occurred and who had merely lent his machine to one not his agent or engaged on business for him, with express or implied permission to take it there from the state of the owner's residence, where the bailment occurred and whose laws did not impose such liability. Young v Masci, 289 U.S. 253, 53 S. Ct. 599, 77 L. Ed. 1158, 1933 U.S. LEXIS 178 (U.S. 1933).

Insurer's suit was premised on a vicarious liability theory pursuant to N.Y. Veh. & Traf. Law § 388, however the application of § 388 to lessors, such as defendants, was preempted by the Graves Amendment, 49 U.S.C.S. § 30106; the insurer argued that the Graves amendment did not apply to the instant action, which was first filed in October 2003, but the enactment date for the Graves Amendment fell in the interim period between the dismissal of the insurer's suit without prejudice on July 11, 2005, and June 2006, when the matter was reopened. Because the insurer's original suit was prematurely filed and, therefore, not justiciable, the date in which the case was reopened was considered the date when the suit was commenced for purposes of determining the applicability of the Graves Amendment. Merchs. Ins. Group v Mitsubishi Motor Credit Ass'n, 525 F. Supp. 2d 309, 2007 U.S. Dist. LEXIS 70942 (E.D.N.Y. 2007), vacated, 356 Fed. Appx. 548, 2009 U.S. App. LEXIS 27409 (2d Cir. N.Y. 2009).

In an action arising out of injuries sustained by plaintiff when he was struck by a bus, bus owner's concession that it owned the bus at time of the accident would make it liable for plaintiff's injuries under New York Vehicle and Traffic Law unless it could demonstrate that it was entitled to protection of the federal Graves Amendment, which preempted state law. Summary judgment was precluded in favor of owner, as issues of fact remained as to whether owner was actually engaged in trade or business of renting or leasing motor vehicles and as to whether it knew or should have known that the driver was a dangerous driver. Williams v Blvd. Lines, Inc., 2013 U.S. Dist. LEXIS 40843 (S.D.N.Y. Mar. 12, 2013).

14. —Injured third persons

Vicarious liability imposed by CLS Veh & Tr § 388(1) does not extend to owners of vehicles that have never been registered, used, operated or intended for use within New York. Fried v Seippel, 80 N.Y.2d 32, 587 N.Y.S.2d 247, 599 N.E.2d 651, 1992 N.Y. LEXIS 1538 (N.Y. 1992).

In action for wrongful death, defendant was not entitled to contribution from third party defendant on basis of CLS Veh & Tr

§ 388 since intent of statute was to benefit injured parties by broadening base of liability in order to provide greater likelihood of recovery. Rodriguez v Yosi Trucking, 151 A.D.2d 556, 542 N.Y.S.2d 335, 1989 N.Y. App. Div. LEXIS 7895 (N.Y. App. Div. 2d Dep't 1989).

Court correctly applied CLS Veh & Tr § 388(1) in action for injuries sustained by passengers of van, although accident occurred in Pennsylvania and owner of van was Pennsylvania corporation, since plaintiff passengers and defendant lessee of van were all New York residents; New York has strong interest in insuring that motorists will be financially able to respond in damages for their negligent acts so that innocent victims of motor vehicle accidents may be recompensed for injuries sustained. Vasquez v Christian Herald Ass'n, 186 A.D.2d 467, 588 N.Y.S.2d 291, 1992 N.Y. App. Div. LEXIS 12171 (N.Y. App. Div. 1st Dep't 1992), app. dismissed, 81 N.Y.2d 783, 594 N.Y.S.2d 719, 610 N.E.2d 392, 1993 N.Y. LEXIS 5273 (N.Y. 1993).

Plaintiffs, who were sued in 2 earlier actions by driver and passenger of other motor vehicle, were not entitled to summary judgment on their claim that owner of other vehicle was liable for contribution for percentage of damages awarded to passenger pursuant to CLS Veh & Tr § 388 based on jury's apportionment of liability in driver's earlier action against plaintiffs; § 388 applies only to actions brought by injured parties against vehicle owners and does not apply where joint tortfeasor sues for contribution. Murray v Sterner, 218 A.D.2d 334, 636 N.Y.S.2d 521, 1995 N.Y. App. Div. LEXIS 14133 (N.Y. App. Div. 4th Dep't 1995), app. dismissed, 87 N.Y.2d 1055, 644 N.Y.S.2d 147, 666 N.E.2d 1061, 1996 N.Y. LEXIS 352 (N.Y. 1996).

Defendants, statutorily immune from suit as result of "exclusive remedy" provisions of CLS Work Comp § 29(6), could not be held vicariously liable under CLS Veh & Tr § 388 as owners of service van which caused plaintiff's injuries; thus, it was error to deny defendants' summary judgment motion to dismiss action brought under latter statute. Allen v Blum, 232 A.D.2d 591, 649 N.Y.S.2d 162, 1996 N.Y. App. Div. LEXIS 11388 (N.Y. App. Div. 2d Dep't 1996).

Provisions of CLS Veh § Tr § 388(1) may be invoked only in actions brought by third persons against owner of vehicle. Boyce v Vazquez, 249 A.D.2d 724, 671 N.Y.S.2d 815, 1998 N.Y. App. Div. LEXIS 4080 (N.Y. App. Div. 3d Dep't 1998).

The operator of a motorcycle who was using the vehicle without the owner's express or implied permission and who injured himself while operating the motorcycle may not utilize section 388 of the Vehicle and Traffic Law to impute his own negligence to the owner of the vehicle since, as the operator, he is not among the class of persons, injured third persons, who are entitled to protection under the statute. Maringo v Senior, 102 Misc. 2d 1011, 424 N.Y.S.2d 862, 1980 N.Y. Misc. LEXIS 2051 (N.Y. Sup. Ct. 1980).

In a personal injury action, a third party complaint for contribution/indemnity could not be dismissed on summary judgment against a vehicle owner, who was the wife of a co-employee of an injured employee, because, although the co-employee could not be liable for contribution/indemnity as he and the employee were in the course of their business when the car accident occurred and the employee did not sustain a grave injury as required under N.Y. Workers' Comp. Law § 11, the owner had no employment relationship with the employee and could be liable for contribution/indemnity under § 11, N.Y. Workers' Comp. Law § 29(6), and N.Y. Veh. & Traf. § 388 because the owner in that capacity could be liable for the employee's negligence, if any. Clamp v Estate of Hales, 807 N.Y.S.2d 512, 10 Misc. 3d 988, 2005 N.Y. Misc. LEXIS 2926 (N.Y. Sup. Ct. 2005), overruled, Isabella v Hallock, 22 N.Y.3d 788, 987 N.Y.S.2d 293, 10 N.E.3d 673, 2014 N.Y. LEXIS 569 (N.Y. 2014).

When an injured party was hurt by a diplomat's negligent operation of a motor vehicle leased from a long-term lessee, which, in turn, leased the vehicle from the vehicle's owner, while the diplomat could not be held liable, due to diplomatic immunity, this immunity did not insulate the owner or long-term lessee from liability because there was no statutory scheme, such as the workers' compensation statutes, providing the injured party's exclusive means of compensation nor did public policy require that the owner and long-term lessee be shielded from liability, so the owner and long-term lessee were not entitled to summary judgment in the injured party's suit against them. Tikhonova v Ford Motor Co., 10 A.D.3d 185, 779 N.Y.S.2d 47, 2004 N.Y. App. Div. LEXIS 8678 (N.Y. App. Div. 1st Dep't 2004), aff'd, 4 N.Y.3d 621, 797 N.Y.S.2d 799, 830 N.E.2d 1127, 2005 N.Y. LEXIS 1087 (N.Y. 2005).

15. —Atypical injury

A complaint against a defendant-owner of a car which alleged that the plaintiff was injured when he alighted from the car and another defendant closed the door on his hand did not state a cause of action under this section. Glouzwski v Ruback, 3 A.D.2d 692, 159 N.Y.S.2d 71, 1957 N.Y. App. Div. LEXIS 6705 (N.Y. App. Div. 4th Dep't 1957).

In an action based upon an alleged fist fight between plaintiff passenger and defendant taxi driver, the court improperly ruled that the incident fell within the ambit of Veh & Tr Law § 388 since the statute imposes liability for injuries resulting from negligence in the use or operation of a vehicle and, accepting plaintiff's version of the incident, he was struck by defendant in a fist fight on the street outside the vehicle. Horney v Tisyl Taxi Corp., 93 A.D.2d 291, 461 N.Y.S.2d 799, 1983 N.Y. App. Div. LEXIS 17118 (N.Y. App. Div. 1st Dep't 1983).

CLS Labor Law §§ 240, 241 and CLS Vehicle and Traffic Law § 388 are inapplicable to death incurred during transfer of 28-foot boat from cinder block supports to trailer. McGahey v Kimbrow, 112 A.D.2d 203, 491 N.Y.S.2d 426, 1985 N.Y. App. Div. LEXIS 55950 (N.Y. App. Div. 2d Dep't 1985).

Defendants, plaintiff's brother-in-law who borrowed truck and truck owner, were improperly granted summary judgment in action for injuries sustained when plaintiff fell from one of 2 unsecured planks that had been placed by brother-in-law from tailgate of truck to blacktop driveway to facilitate moving of furniture where fact issues existed as to whether brother-in-law negligently placed ramps, whether it was reasonably foreseeable that someone could be injured as result of way he placed ramps, and whether his negligence, if any, was proximate cause of plaintiff's injuries; further, if brother-in-law was found negligent, liability would be imposed on owner under CLS Veh & Tr § 388(1) since brother-in-law was using truck with owner's permission. Smith v Zink, 274 A.D.2d 885, 711 N.Y.S.2d 594, 2000 N.Y. App. Div. LEXIS 8276 (N.Y. App. Div. 3d Dep't 2000).

Because the decision in Kalechman prohibited a driver from seeking to impose vicarious liability upon a passenger pursuant to N.Y. Veh. & Traf. Law § 388(1) for the negligent acts of the passenger's boyfriend in driving the passenger's vehicle, the trial court erred in granting the driver's N.Y. C.P.L.R. 3025(b) motion for leave to serve an amended answer. Schuyler v Perry, 69 A.D.3d 33, 886 N.Y.S.2d 228, 2009 N.Y. App. Div. LEXIS 6703 (N.Y. App. Div. 2d Dep't 2009).

16. —Effect of foreign ownership

If a foreign owner permits his car to be operated in New York State, he subjects himself to the laws of New York touching such operation. Lovetere v Stackhouse, 25 A.D.2d 628, 267 N.Y.S.2d 758, 1966 N.Y. App. Div. LEXIS 4813 (N.Y. App. Div. 1st Dep't 1966).

In action for damages arising out of collision in which Ontario resident was fatally injured while a passenger in automobile owned by Ontario resident and operated by another Ontario resident, which accident occurred in New York with an automobile owned and operated by New York resident, section of Vehicle and Traffic Law providing that "Every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries * * * resulting from negligence * * *," did not prevent Canadian defendant from pleading the Ontario guest statute; the section of the Vehicle and Traffic Law was inapplicable since its purpose was to impute the negligence of the driver to an absentee owner, and such statute did not establish a choice of law rule for accidents occurring in New York. Rye v Kolter, 39 A.D.2d 821, 333 N.Y.S.2d 96, 1972 N.Y. App. Div. LEXIS 4587 (N.Y. App. Div. 4th Dep't 1972).

Where nonresident decedent was killed in automobile accident occurring in Pennsylvania, which vehicle was driven by a New

York resident but was neither registered nor owned by a New York resident, New York statute imputing negligence of driver of motor vehicle to owner was not applicable and Pennsylvania law would be applied. Rogers v U-Haul Co., 41 A.D.2d 834, 342 N.Y.S.2d 158, 1973 N.Y. App. Div. LEXIS 4823 (N.Y. App. Div. 2d Dep't 1973).

New York's vicarious liability statute did not apply in wrongful death action arising from single-car accident in New York involving vehicle rented in District of Columbia, where plaintiff's decedent and defendant car rental company were domiciled in Virginia, and all significant contacts (aside from accident site) were with Virginia and District of Columbia; law of Virginia applied pursuant to first "Neumeier" rule. Dorsey v Yantambwe, 276 A.D.2d 108, 715 N.Y.S.2d 566, 2000 N.Y. App. Div. LEXIS 11452 (N.Y. App. Div. 4th Dep't 2000), app. denied, 96 N.Y.2d 712, 729 N.Y.S.2d 439, 754 N.E.2d 199, 2001 N.Y. LEXIS 1076 (N.Y. 2001).

This section provides substantially that every owner of a vehicle used or operated in New York state shall be liable and responsible for death or injuries to persons or property resulting from negligence in the use or operation of the vehicle in the business of the owner or otherwise by any person operating the same with permission, express or implied, of the owner, and this section is not limited to New York state residents, and, consequently, out of state owners and operators who elect to use the highways of this state subject themselves to this section, and the law makes no distinction between residents and nonresidents, people in transit or otherwise, and the Ontario "guest statute" is not applicable in this state. Kell v Henderson, 47 Misc. 2d 992, 263 N.Y.S.2d 647, 1965 N.Y. Misc. LEXIS 1427 (N.Y. Sup. Ct. 1965), aff'd, 26 A.D.2d 595, 270 N.Y.S.2d 552, 1966 N.Y. App. Div. LEXIS 4068 (N.Y. App. Div. 3d Dep't 1966).

Although the ownership of a motor vehicle creates a presumption that its operation is with the consent of the owner under Vehicle and Traffic Law § 388, that presumption may be rebutted by substantial evidence to the contrary. Accordingly, since the defendant owner gave express consent to the plaintiff to operate his motor vehicle and neither the plaintiff nor the defendant owner gave the defendant passenger permission to interfere with the plaintiff's operation of the vehicle by reaching across another passenger to yank the wheel to the right, causing the vehicle to hit one or more pedestrians and necessitating the plaintiff to quickly react, in the course of which he caused the vehicle to strike a telephone pole and house resulting in the plaintiff's injuries, the plaintiff's cause of action against the defendant owner pursuant to section 388 based on the theory that the defendant passenger was operating or using the vehicle with the defendant owner's permission is dismissed. Good v MacDonell, 149 Misc. 2d 315, 564 N.Y.S.2d 949, 1990 N.Y. Misc. LEXIS 661 (N.Y. Sup. Ct. 1990).

Non-resident owner was required to comply with N.Y. Veh. & Traf. Law § 388 and his knowing failure to maintain proof of financial security might subject him to various penalties under N.Y. Veh. & Traf. Law § 318(4)(a), (b). Property & Cas. Ins. Co. of Hartford v Clarke, 793 N.Y.S.2d 883, 7 Misc. 3d 358, 233 N.Y.L.J. 24, 2005 N.Y. Misc. LEXIS 86 (N.Y. Sup. Ct. 2005).

The statute authorizing constructive service on nonresident owners of motor vehicles was applicable to accident occurring on private property, and as so construed did not deny due process. Raspante v Trans. Supply & Management, Inc., 214 N.Y.S.2d 583 (N.Y. Sup. Ct. 1961).

Summary judgment dismissal of a wife's personal injury complaint, which was premised on the theory that a domestic rental car company, as apparent agent of the Mexican owner and renter of a vehicle, was vicariously liable for the driver's negligence under N.Y. Veh. & Traf. Law § 388, was affirmed where there was no issue raised of the extraterritorial effect of § 388. The wife's conclusory assertion that she and her husband intended to drive the vehicle back to New York was insufficient in the face of contrary evidence that the husband never requested permission to drive the vehicle out of Mexico and the husband testified that he had purchased round trip tickets to Mexico for himself and the wife. Ashkenazi v Hertz Rent a Car, 18 A.D.3d 584, 795 N.Y.S.2d 624, 2005 N.Y. App. Div. LEXIS 5291 (N.Y. App. Div. 2d Dep't 2005).

Under New York's conflict of law rules, New Jersey law governed action by New York residents against California lessor, arising from collision in New Jersey with car leased and driven by New Jersey resident, where there was no showing that application of New York law would advance purposes underlying CLS Veh & Tr § 388 without simultaneously undermining multi-state litigation (e.g., by encouraging forum shopping, appearing to favor local party, or producing uncertainty for litigants), and there was no showing that auto lessor had requisite contacts with plaintiffs or New York to implicate New York's public policy. Heisler v Toyota Motor Credit Corp., 884 F. Supp. 128, 1995 U.S. Dist. LEXIS 6472 (S.D.N.Y. 1995).

17. —Effect of foreign accident site

To recover for personal injuries alleged to have been sustained by plaintiff in a foreign state through the negligent operation of an automobile belonging to defendant by his son, there must be sufficient evidence that, at the time of the accident, the automobile was operated by defendant's son as his agent and that it was a family car. The accident happening in a foreign state, this section has no application. Miranda v Lo Curto, 249 N.Y. 191, 163 N.E. 557, 249 N.Y. (N.Y.S.) 191, 1928 N.Y. LEXIS 787 (N.Y. 1928).

This section has no extraterritorial effect and does not apply where the accident happened in another state. Cherwien v Geiter, 272 N.Y. 165, 5 N.E.2d 185, 272 N.Y. (N.Y.S.) 165, 1936 N.Y. LEXIS 885 (N.Y. 1936).

In wrongful death action arising out of automobile accident which occurred in North Carolina, this statute which attributes negligence of automobile driver to owner of car was applicable rather than the North Carolina statute, where all of the people involved were citizens and domiciliaries of New York, the car was registered in New York, arrangement for its use had been made in New York, and it was on its way back to New York when the accident occurred, despite the fact that the New York statute by its terms stated that it was applicable to the use and operation of a vehicle "in this state." Farber v Smolack, 20 N.Y.2d 198, 282 N.Y.S.2d 248, 229 N.E.2d 36, 1967 N.Y. LEXIS 1266 (N.Y. 1967).

Car rental companies operating or based in New York (defendants) could not be held liable under CLS Veh & Tr § 388 in actions arising from 2 unrelated automobile accidents on West Indies island of Jamaica and leased from Jamaican companies that were licensed, directly or indirectly, by defendants. Fried v Seippel, 80 N.Y.2d 32, 587 N.Y.S.2d 247, 599 N.E.2d 651, 1992 N.Y. LEXIS 1538 (N.Y. 1992).

This section, imposing liability upon an owner of a vehicle for negligence of one driving it with his permission, applies only when the vehicle is used or operated in New York State and cannot be invoked where the accident in question occurred in New Jersey and under New Jersey law the owner is liable only if the vehicle is being used in course of his business. Fornaro v Jill Bros., Inc., 22 A.D.2d 695, 253 N.Y.S.2d 771, 1964 N.Y. App. Div. LEXIS 3075 (N.Y. App. Div. 2d Dep't 1964), aff'd, 15 N.Y.2d 819, 257 N.Y.S.2d 938, 205 N.E.2d 862, 1965 N.Y. LEXIS 1592 (N.Y. 1965).

Where nonresident decedent was killed in automobile accident occurring in Pennsylvania, which vehicle was driven by a New York resident but was neither registered nor owned by a New York resident, New York statute imputing negligence of driver of motor vehicle to owner was not applicable and Pennsylvania law would be applied. Rogers v U-Haul Co., 41 A.D.2d 834, 342 N.Y.S.2d 158, 1973 N.Y. App. Div. LEXIS 4823 (N.Y. App. Div. 2d Dep't 1973).

Fact that parties were domiciled in different states did not require application of law of locus of accident (New Jersey) as "tie-breaker" where application of CLS Veh & Tr § 388 was consistent with law of all parties' domiciles and thus with parties' expectations, no party was domiciled in New Jersey, and thus New Jersey would be neither benefited nor burdened by outcome of litigation; § 388 is loss-allocating rule, as to which jurisdiction of parties' domiciles has paramount interest. Janssen v Ryder Truck Rental, 246 A.D.2d 364, 667 N.Y.S.2d 369, 1998 N.Y. App. Div. LEXIS 232 (N.Y. App. Div. 1st Dep't 1998).

Law of New York, not Croatia, would govern tort action brought by New York citizen against insurer of United Nations agency for injuries sustained in motor vehicle accident in Croatia where insurer's domicile, for choice of law purposes, was also New York, its principal place of business. Urlic v Insurance Co. of Pa., 259 A.D.2d 1, 696 N.Y.S.2d 126, 1999 N.Y. App. Div. LEXIS 9574 (N.Y. App. Div. 1st Dep't 1999), app. denied, 94 N.Y.2d 763, 708 N.Y.S.2d 51, 729 N.E.2d 708, 2000 N.Y. LEXIS 576 (N.Y. 2000).

In action by New York domiciliaries to recover for injuries sustained in car accident that occurred in Idaho while they were passengers in rented vehicle driven by New York domiciliary, defendant car rental agency was not entitled to summary judgment because, under laws of both Idaho and New York, when vehicle is involved in accident within their respective borders owner of vehicle is vicariously liable; thus, there was no meaningful conflict between New York law and law of Idaho with respect to issue of vicarious liability and, without further inquiry, court would apply Idaho law to effectuate public policy reflected in policy of both jurisdictions. Elson v Defren, 283 A.D.2d 109, 726 N.Y.S.2d 407, 2001 N.Y. App. Div. LEXIS 6269 (N.Y. App. Div. 1st Dep't 2001).

Grant of summary judgment to rental car company in injured party's action to recover for personal injuries was affirmed where the injured party was a New York resident, the driver of the rental car was a South Carolina resident and had rented the car from a South Carolina location, and South Carolina law did not impose vicarious liability upon the vehicle owner for the negligence of the operator; because the car involved in the accident with the injured party was rented from an agency in South Carolina, and was operated in South Carolina, where the accident occurred, the State of South Carolina had the greater interest in having its laws applied to the litigation. Darby v Avis Rent A Car Sys., 289 A.D.2d 191, 733 N.Y.S.2d 689, 2001 N.Y. App. Div. LEXIS 11835 (N.Y. App. Div. 2d Dep't 2001).

Summary judgment dismissal of a wife's personal injury complaint, which was premised on the theory that a domestic rental car company, as apparent agent of the Mexican owner and renter of a vehicle, was vicariously liable for the driver's negligence under N.Y. Veh. & Traf. Law § 388, was affirmed where there was no issue raised of the extraterritorial effect of § 388. The wife's conclusory assertion that she and her husband intended to drive the vehicle back to New York was insufficient in the face of contrary evidence that the husband never requested permission to drive the vehicle out of Mexico and the husband testified that he had purchased round trip tickets to Mexico for himself and the wife. Ashkenazi v Hertz Rent a Car, 18 A.D.3d 584, 795 N.Y.S.2d 624, 2005 N.Y. App. Div. LEXIS 5291 (N.Y. App. Div. 2d Dep't 2005).

N.Y. Veh. & Traf. Law § 388(1) applied in a federal district court action resulting from a car accident that occurred in Pennsylvania between a New York driver and a Pennsylvania driver because the application of Pennsylvania law would impair New York's interest in providing injured plaintiffs with financially responsible defendant and imposing high degree of responsibility on vehicle owners, while on the contrary, the application of Pennsylvania law would impair New York's interest in providing injured plaintiffs with a financially responsible defendant, and imposing a high degree of responsibility on the owners of vehicles. Garcia v Plaza Oldsmobile LTD., 421 F.3d 216, 2005 U.S. App. LEXIS 19063 (3d Cir. Pa. 2005).

Under New York's conflict of law rules, New Jersey law governed action by New York residents against California lessor, arising from collision in New Jersey with car leased and driven by New Jersey resident, where there was no showing that application of New York law would advance purposes underlying CLS Veh & Tr § 388 without simultaneously undermining multi-state litigation (e.g., by encouraging forum shopping, appearing to favor local party, or producing uncertainty for litigants), and there was no showing that auto lessor had requisite contacts with plaintiffs or New York to implicate New York's public policy. Heisler v Toyota Motor Credit Corp., 884 F. Supp. 128, 1995 U.S. Dist. LEXIS 6472 (S.D.N.Y. 1995).

18. —Derivative actions

The contention that a father's action for loss of services did not come within the meaning of the words "injuries to person or property," contained in the former analogous section, and that the liability under this section applied only to the person who received the injury, could not be sustained. Psota v Long Island R. Co., 246 N.Y. 388, 159 N.E. 180, 246 N.Y. (N.Y.S.) 388, 1927 N.Y. LEXIS 888 (N.Y. 1927).

Injured passenger was not precluded from bringing a lawsuit for the owner's vicarious liability under N.Y. Veh. & Traf. Law § 388 even though the driver of the vehicle, a diplomat, was immune from liability and the passenger's recovery against the driver was limited to recovery under 22 U.S.C.S. § 254e and 28 U.S.C.S. § 1364. Tikhonova v Ford Motor Co., 4 N.Y.3d 621, 797 N.Y.S.2d 799, 830 N.E.2d 1127, 2005 N.Y. LEXIS 1087 (N.Y. 2005).

This section does not make the prior owner of an automobile liable for negligence in its operation after he has parted with title to and control over it. Mason v Allstate Ins. Co., 12 A.D.2d 138, 209 N.Y.S.2d 104, 1960 N.Y. App. Div. LEXIS 6284 (N.Y. App. Div. 2d Dep't 1960).

Law firm was properly granted a directed verdict in a legal malpractice suit alleging failure to sue the lessor of a vehicle that struck a client because (1) the client did not show the offending vehicle was owned by or leased from the lessor on the date of the accident, and (2) the law firm did not concede the vehicle was owned by or leased from the lessor. Verdi v Jacoby & Meyers, LLP, 154 A.D.3d 901, 63 N.Y.S.3d 71, 2017 N.Y. App. Div. LEXIS 7317 (N.Y. App. Div. 2d Dep't 2017).

There is nothing in this section that creates a liability over to a bailor, against the bailee for whose negligence the bailor must respond in damages. Kurzon v Union R. Co., 21 N.Y.S.2d 310, 1940 N.Y. Misc. LEXIS 1916 (N.Y. City Ct. 1940).

19. Common law liability

By the former analogous section an owner's common-law liability was not only continued but extended. Under the statute "use" as well as "operation" could fasten liability upon him. Grant v Knepper, 245 N.Y. 158, 156 N.E. 650, 245 N.Y. (N.Y.S.) 158, 1927 N.Y. LEXIS 604 (N.Y. 1927).

This section does not affect the common-law liability of an owner present and in control of his car nor does it make more favorable his position, under like circumstances, when he sues to recover damages for personal injuries or injury to his car. In either situation the common-law rule applies and the negligence of the driver of his car is imputable to him. Gochee v Wagner (1931) 257 NY 344, 178 NE 553 ovrld by Kalechman v Drew Auto Rental, Inc. (1973) 33 NY2d 397, 353 NYS2d 414, 308 NE2d 886.holding that the general rule to be applied without exception is that a plaintiff passenger may recover for negligent operation of a vehicle, no matter what his relationship to the driver may be, unless it is shown that his own personal negligence contributed to the injury).

In a negligence action arising out of an automobile accident which occurred in South Carolina, section of Vehicle and Traffic Law of New York providing that negligence of operator of an automobile other than the owner is attributable to the owner, had no application, but the law of South Carolina was controlling, and in the absence of any showing of the law that jurisdiction, Court of Appeals would presume that the common law of South Carolina was the same as the common law of New York. Selles v Smith, 4 N.Y.2d 412, 176 N.Y.S.2d 267, 151 N.E.2d 838, 1958 N.Y. LEXIS 851 (N.Y. 1958).

This section does not render the owner of an automobile responsible for the negligence of a third party to whom the borrower had temporarily intrusted the vehicle without the owner's knowledge or consent and who is using it for his own private purpose. This section has not changed the common-law rules relating to master and servant. Jackson v Brown & Kleinhenz, Inc., 246 A.D. 445, 284 N.Y.S. 44, 1935 N.Y. App. Div. LEXIS 8699 (N.Y. App. Div. 1935), rev'd, 273 N.Y. 365, 7 N.E.2d 265, 273 N.Y. (N.Y.S.) 365, 1937 N.Y. LEXIS 1214 (N.Y. 1937).

This section has not changed the common-law rule so as to bar an action by the owner for damages to his motor vehicle when the person operating it with the owner's consent, but in his absence and not upon his business, has been guilty of negligence contributing to the accident. Mills v Gabriel, 259 A.D. 60, 18 N.Y.S.2d 78,

1940 N.Y. App. Div. LEXIS 6049 (N.Y. App. Div.), aff'd, 284 N.Y. 755, 31 N.E.2d 512, 284 N.Y. (N.Y.S.) 755, 1940 N.Y. LEXIS 1358 (N.Y. 1940).

This section changes the common law as to an owner's nonliability to a third person, and bars his own recovery through negligence of a gratuitous bailee in addition to making him liable. Darrohn v Russell, 277 N.Y.S. 783, 154 Misc. 753, 1935 N.Y. Misc. LEXIS 1000 (N.Y. City Ct. 1935).

The rule that a master is not liable for acts of his servant unless the servant is acting within the scope of his employment is not affected by this section. Cuba v Turmelie, 5 N.Y.S.2d 811, 168 Misc. 256, 1938 N.Y. Misc. LEXIS 1741 (N.Y. App. Term 1938).

This section imputes the negligence of a borrower to the owner in actions against the owner but does not impute such negligence in actions by an owner; in actions by an owner, the statute has not changed the common law rule that negligence of a member of a family who borrows the owner's car with his consent may not be imputed to the owner. Juliano v State, 71 N.Y.S.2d 474, 190 Misc. 180, 1947 N.Y. Misc. LEXIS 2580 (N.Y. Ct. Cl. 1947), aff'd, 273 A.D. 936, 77 N.Y.S.2d 826, 1948 N.Y. App. Div. LEXIS 5338 (N.Y. App. Div. 1948).

The statutory imposition of liability upon the owner of a motor vehicle for negligence of a person operating it with his consent has not changed the common-law liability arising from relationship of master and servant upon proof that the servant's negligence in operating the master's car was in course of the master's business. Waterman v Thrift Leasing Corp., 34 Misc. 2d 39, 228 N.Y.S.2d 66, 1962 N.Y. Misc. LEXIS 3682 (N.Y. Sup. Ct. 1962).

At common law, the owner of an automobile could be held liable for his own negligence in entrusting the vehicle to an operator known to be incompetent, and this section does not prevent imposing liability on that basis. Rice v Spencer, 43 Misc. 2d 331, 250 N.Y.S.2d 620, 1963 N.Y. Misc. LEXIS 1448 (N.Y. Sup. Ct. 1963).

This section was intended to make the "owner" of a vehicle liable to the injured party when the vehicle is used with his permission, whether or not used in his behalf, and was not intended to change the owner's common-law liability to any other extent. Singerman Bus Corp. v American Fidelity Fire Ins. Co., 44 Misc. 2d 4, 252 N.Y.S.2d 780, 1964 N.Y. Misc. LEXIS 1620 (N.Y. Sup. Ct. 1964).

This section changes the common law rule and imputes the negligence of a borrower of a car to the owner in actions against the owner, but it does not change the common rule in actions brought by the owner against third persons. New York Tel. Co. v Scofield, 31 N.Y.S.2d 393, 1941 N.Y. Misc. LEXIS 2395 (N.Y. J. Ct. 1941).

II. Liability of Owner

20. In general

Where one leaves his motor vehicle in a busy street in such a position that a reasonably prudent person should anticipate that in event of an emergency or other necessity it must be moved, the owner is responsible for negligent act of person left in charge. Winnowski v Polito, 294 N.Y. 159, 61 N.E.2d 425, 294 N.Y. (N.Y.S.) 159, 1945 N.Y. LEXIS 814 (N.Y. 1945).

The owner of an automobile, which, at the time of the accident causing the death of plaintiff's intestate, was being used in military service on a military errand, is not liable under this section. Carmody v Davis, 241 A.D. 88, 270 N.Y.S. 711, 1934 N.Y. App. Div. LEXIS 8174 (N.Y. App. Div. 1934).

Amendment to statute governing automobile owner's liability for injury was intended only to clarify definition of "owner." Tyrnauer v Travelers Ins. Co., 15 A.D.2d 293, 223 N.Y.S.2d 151, 1961 N.Y. App. Div. LEXIS 6804 (N.Y. App. Div. 2d Dep't 1961), aff'd, 13 N.Y.2d 613, 240 N.Y.S.2d 603, 191 N.E.2d 89, 1963 N.Y. LEXIS 1222 (N.Y. 1963).

In action for personal injuries resulting from being hit by car, owner of car was entitled to summary judgment where, at time of accident, car was being driven without owner's permission or consent. Rosenberg v Mazzone, 251 A.D.2d 565, 673 N.Y.S.2d 943, 1998 N.Y. App. Div. LEXIS 7568 (N.Y. App. Div. 2d Dep't 1998).

Court erred in declaring that plaintiff was obligated to defend and indemnify its insured against personal injury claims arising from automobile accident involving insured's brother, driver of insured's vehicle, where insured was not party to instant action, and plaintiff asserted that it had not raised any issue as to CLS Veh & Tr § 388. Progressive Ins. Cos. v Brouse, 272 A.D.2d 996, 708 N.Y.S.2d 673, 2000 N.Y. App. Div. LEXIS 5145 (N.Y. App. Div. 4th Dep't 2000).

Judgment as a matter of law for the owner of a vehicle involved in an accident was error in plaintiff's personal injury suit because the owner admitted in its answer that it had leased the vehicle to the driver, and was identified as the owner on the certificate of title; the owner thus made a formal judicial admission that it was listed as owner on vehicle's certificate of title. A certificate of title was prima facie evidence of ownership pursuant to Vehicle and Traffic Law § 2108(c), and there was no evidence to rebut that presumption. Zegarowicz v Ripatti, 67 A.D.3d 672, 888 N.Y.S.2d 554, 2009 N.Y. App. Div. LEXIS 7846 (N.Y. App. Div. 2d Dep't 2009).

Action was properly initiated in reliance upon record of ownership of automobile in accordance with registration in another state. Staunton v Robbins, 239 N.Y.S. 565, 136 Misc. 197, 1930 N.Y. Misc. LEXIS 996 (N.Y. City Ct. 1930).

With regard to a car sold by a Nevada dealer to a purchaser under either a conditional sale contract or chattel mortgage transaction and assigned by the dealer in Nevada to a finance company, in connection with which the Nevada vehicle records showed purchaser as the registered owner and the finance company as the legal owner, the finance company could not be held legally responsible for negligence of the purchaser in operating the car in New York State either under the common law or the statute law of Nevada or New York. Buehler v Bogino, 39 Misc. 2d 1074, 242 N.Y.S.2d 528, 1963 N.Y. Misc. LEXIS 1821 (N.Y. Civ. Ct. 1963).

Under Connecticut law, imputation of automobile operator's negligence to automobile owner must be predicated upon "family car doctrine", rental of car, or agency. Monko v Cicoria, 46 Misc. 2d 565, 260 N.Y.S.2d 70, 1965 N.Y. Misc. LEXIS 1950 (N.Y. Sup. Ct. 1965).

Statutory liability of automobile owner for negligence of driver is designed to provide remedy where no other remedy is available, and such liability should not otherwise be applied. Geller v Sherman, 48 Misc. 2d 1049, 266 N.Y.S.2d 671, 1965 N.Y. Misc. LEXIS 1263 (N.Y. Sup. Ct. 1965), aff'd, 28 A.D.2d 959, 282 N.Y.S.2d 937, 1967 N.Y. App. Div. LEXIS 7519 (N.Y. App. Div. 2d Dep't 1967).

Claim against state for damages resulting from collision with state owned truck parked on highway could not be based on statutory liability of owner of motor vehicle for negligence of one operating vehicle with owner's permission, where truck was being used in violation of orders of representative of state in charge of project on which truck and driver were employed and in pursuit of driver's personal aims and not on business of the state. Naylon v State, 40 N.Y.S.2d 587, 1943 N.Y. Misc. LEXIS 1711 (N.Y. Ct. Cl. 1943).

Notice by insured truck's owner five months after an accident was untimely as a matter of law and the owner's belief of nonliability for the driver's alleged negligence was unreasonable as matter of law upon consideration of an owner's liability under N.Y. Veh. & Traf. Law §§ 388(1), 1219; since the owner's failure of notice was not excused, the insurer had no duty to defend or indemnify the owner or the driver in a negligence action by a company to recover costs incurred from having to clean a spill and repair road damage that were caused when containers fell from the truck due to the collision. The insurer's motion for a summary judgment declaration that it was not obligated to provide coverage was improperly denied. Modern Cont. Constr. Co., Inc. v Giarola, 27 A.D.3d 431, 812 N.Y.S.2d 115, 2006 N.Y. App. Div. LEXIS 2614 (N.Y. App. Div. 2d Dep't 2006).

New York will broadly apply N.Y. Veh. & Traf. Law § 388(1) (2002), perhaps as broadly as is permissible under constitutional choice-of-law principles. Budget Rent-A-Car Sys., Inc. v Chappell, 407 F.3d 166, 2005 U.S. App. LEXIS 7783 (3d Cir. Pa.), cert. denied, 546 U.S. 978, 126 S. Ct. 567, 163 L. Ed. 2d 463, 2005 U.S. LEXIS 7891 (U.S. 2005).

N.Y. Veh. & Traf. Law § 388(1) (2002) applies unless the accident vehicle has never been registered, used, operated or intended for use within New York. By virtue of its prior use and operation in New York, the accident vehicle was indisputably within the substantive coverage of § 388. Budget Rent-A-Car Sys., Inc. v Chappell, 407 F.3d 166, 2005 U.S. App. LEXIS 7783 (3d Cir. Pa.), cert. denied, 546 U.S. 978, 126 S. Ct. 567, 163 L. Ed. 2d 463, 2005 U.S. LEXIS 7891 (U.S. 2005).

Because the Graves Amendment preempted N.Y. Veh. & Traf. Law § 388, upon which plaintiff's vicarious liability claim against defendant leasing company was founded, plaintiff's claim against the leasing company was dismissed. Green v Toyota Motor CreditCorp, 605 F. Supp. 2d 430, 2009 U.S. Dist. LEXIS 26278 (E.D.N.Y. 2009).

21. —Elements of tort law

Vehicle need not be proximate cause of injury before vehicle's owner may be held vicariously liable for plaintiff's injuries under CLS Veh & Tr § 388(1). Argentina v Emery World Wide Delivery Corp., 93 N.Y.2d 554, 693 N.Y.S.2d 493, 715 N.E.2d 495, 1999 N.Y. LEXIS 1431 (N.Y. 1999).

An automobile owner's liability for damages suffered by others because of operator's negligence is derivative and akin to that of master for his servant's negligent acts under respondeat superior doctrine. Sarine v American Lumbermen's Mut. Casualty Co., 258 A.D. 653, 17 N.Y.S.2d 754, 1940 N.Y. App. Div. LEXIS 8263 (N.Y. App. Div. 1940).

In personal injury action arising when defendant's automobile, while being driven by another on a private parking lot maintained in conjunction with a restaurant, negligently struck plaintiff, admission in pleadings that defendant owned, operated, managed, maintained, and controlled automobile at time of accident and proof of such ownership was sufficient to sustain judgment for plaintiff, even though accident had not taken place on a public highway within meaning of Vehicle and Traffic Law provision making owners of motor vehicles operated upon a public highway liable for negligent operation of such motor vehicles by person legally operating such vehicles with express or implied permission of owners. Babajko v Frawley, 9 A.D.2d 764, 192 N.Y.S.2d 232, 1959 N.Y. App. Div. LEXIS 6363 (N.Y. App. Div. 2d Dep't 1959).

Where a complaint against a cab owner and driver alleged negligence by the driver, but the driver's actions were intentional, the complaint against the driver could be amended to include causes of action under N.Y. C.P.L.R. 203(f), 207, 213-b, and 215(8); however, because the owner could not be held vicariously liable for the driver's intentional acts under N.Y. Veh. & Traf. Law § 388(1), the trial court erred in denying the owner's motion for summary judgment. Gomez v Singh, 309 A.D.2d 620, 767 N.Y.S.2d 67, 2003 N.Y. App. Div. LEXIS 10821 (N.Y. App. Div. 1st Dep't 2003).

Where automobile was driven by a party other than owner at time it was involved in automobile accident, as respects liability to third parties arising out of operation of automobile, driver and owner are not joint tort-feasors, in absence of facts establishing actual negligence of owner. Kurzon v Union R. Co., 14 N.Y.S.2d 530, 172 Misc. 37, 1939 N.Y. Misc. LEXIS 2256 (N.Y. City Ct. 1939).

Where operator of automobile is negligent, he and owner of the automobile are "joint tort feasors" and as such are jointly and severally liable, and they can be sued either jointly or severally, but if a recovery is had in each case the satisfaction of one judgment would satisfy the other. Sarine v Maher, 63 N.Y.S.2d 241, 187 Misc. 199, 1946 N.Y. Misc. LEXIS 2350 (N.Y. Sup. Ct. 1946).

Owner could be held liable for negligence in furnishing automobile to known incompetent driver, even in absence of consent rendering applicable statute imposing liability in such cases. Rice v Spencer, 43 Misc. 2d 331, 250 N.Y.S.2d 620, 1963 N.Y. Misc. LEXIS 1448 (N.Y. Sup. Ct. 1963).

In an action arising out of an automobile accident which occurred while the car was being driven, contrary to the terms of a lease, by the lessee's minor son, it was held that although the lessee of a car is regarded as the owner with respect to liability for negligence under Vehicle and Traffic Law §§ 128 and 388, under Insurance Law § 167 the self-insured lessor was the owner and the lessee's liability insurance policy constituted excess insurance, since a non-owned car was used without permission of the owner. Aetna Casualty & Surety Co. v World Wide Rent-A-Car, Inc., 52 Misc. 2d 552, 276 N.Y.S.2d 401, 1966 N.Y. Misc. LEXIS 1176 (N.Y. Sup. Ct. 1966), modified, 28 A.D.2d 286, 284 N.Y.S.2d 807, 1967 N.Y. App. Div. LEXIS 2928 (N.Y. App. Div. 1st Dep't 1967).

Negligence of driver, who was licensed learner, and who, in mounting curb and crossing sidewalk, struck pedestrian and her dog, while they were walking on sidewalk, was imputable to driver's husband, who was instructing driver at time of accident, as owner of vehicle. Cromwell v Rodriguez, 66 Misc. 2d 243, 319 N.Y.S.2d 1014, 1971 N.Y. Misc. LEXIS 1816 (N.Y. City Ct. 1971).

Statute prohibiting person in charge of automobile from leaving key in ignition was not applicable to automobile owner, who left vehicle's key in its ignition in owner's driveway, and thus owner was not liable for negligence of thief who was involved in collision while driving such vehicle. General Accident Group v Noonan, 66 Misc. 2d 528, 321 N.Y.S.2d 483, 1971 N.Y. Misc. LEXIS 1604 (N.Y. Sup. Ct. 1971).

Although it has consistently been held that liability for torts occurring subsequent to death of a property owner rests upon the executor or administrator individually, and that no judgment can be rendered against the estate or against him in his representative capacity, in connection with motor vehicle accidents arising out of alleged negligence in the operation of a car which is part of the assets of the estate of a decedent, this section might be construed as imposing liability upon the estate or upon the executor or administrator in his representative capacity if the car was registered in his name and being used with his permission and consent in furtherance of estate business. Koernig v Frimel, 216 N.Y.S.2d 477, 1961 N.Y. Misc. LEXIS 3701 (N.Y. Sup. Ct. 1961).

While the owner or lessee of a vehicle is not vicariously liable to the operator of a motor vehicle for the operator's own negligence, N.Y. Veh. & Traf. Law § 388 does not preclude an operator from attempting to impose vicarious liability on the owner for the negligence of other permissive users of the vehicle; thus, where the owners of a tractor/trailer allowed employees a manufacturer to operate the owners' vehicle while it was being loaded with paper rolls, the owners could be vicariously liable to the injured driver of the vehicle if the employees negligence in operating the vehicle was a proximate cause of the accident that injured the driver. Perrin v Chase Equip. Leasing, Inc., 9 A.D.3d 839, 780 N.Y.S.2d 256, 2004 N.Y. App. Div. LEXIS 9466 (N.Y. App. Div. 4th Dep't 2004).

22. Who is owner

If the seller or transferor of a motor vehicle does not remove his license plates and permits the new owner to operate the car with them on, he is estopped to deny ownership and may be held liable for injury or damage resulting from operation of the vehicle, but such estoppel does not prevent his insurer from disclaiming liability on the insurance policy if the vehicle has been transferred without the insurer's consent and the transferor has relinquished control over the car, unless the policy provides for coverage under such circumstances. Mason v Allstate Ins. Co., 12 A.D.2d 138, 209 N.Y.S.2d 104, 1960 N.Y. App. Div. LEXIS 6284 (N.Y. App. Div. 2d Dep't 1960).

The change in definition of "owner" in former § 59, by 1958 amendment, was intended merely to clarify the earlier definition. Where the purchaser and original owner of a car was a Rabbi who taught at a rabbinical school which conducted a charitable summer camp for its students, and transferred title to the car to a corporation organized to operate the camp, which thereupon registered title in its name, intending to make a gift of the vehicle but nevertheless continuing in possession of it, he remained liable under former § 59 as its "owner" within the intendment of that section. Tyrnauer v Travelers Ins. Co., 15 A.D.2d 293, 223 N.Y.S.2d 151, 1961 N.Y. App. Div. LEXIS 6804 (N.Y. App. Div. 2d Dep't 1961), aff'd, 13 N.Y.2d 613, 240 N.Y.S.2d 603, 191 N.E.2d 89, 1963 N.Y. LEXIS 1222 (N.Y. 1963).

Company leasing vehicle for period in excess of thirty days for its exclusive use considered owner thereof within meaning of § 128 and consequently subject to liability under Vehicle & Traf. L § 388(3). Aetna Casualty & Surety Co. v World Wide Rent-A-Car, Inc., 28 A.D.2d 286, 284 N.Y.S.2d 807, 1967 N.Y. App. Div. LEXIS 2928 (N.Y. App. Div. 1st Dep't 1967).

In consolidated actions to recover for personal injuries sustained in motor vehicle accident, question of fact existed as to who was owner of automobile in question at time of injury to plaintiffs, precluding summary judgment, although presumption existed that defendant owned automobile because its registration indicated that ownership had been transferred to her, since such presumption had been cast into doubt by evidence tending to indicate that neither third-party defendant nor defendant ever intended for title to be transferred and that lease arrangement may have existed. Doughty v Johnson, 155 A.D.2d 513, 547 N.Y.S.2d 373, 1989 N.Y. App. Div. LEXIS 14232 (N.Y. App. Div. 2d Dep't 1989).

Order granting an owner's N.Y. C.P.L.R. 4401 motion for judgment as a matter of law was error because the owner admitted that it had leased the vehicle involved in the underlying accident to the driver, and was identified as the owner on the certificate of title; under Vehicle and Traffic Law § 2108(c), a certificate of title was prima facie evidence of ownership and New York law made vehicle lessors, their assignees, and their agents vicariously liable as "owners" under the Vehicle and Traffic Law in an action, such as this one, which was commenced prior to the effective date of the Graves Amendment, 49 U.S.C.S. § 30106. Zegarowicz v Ripatti, 77 A.D.3d 650, 911 N.Y.S.2d 69, 2010 N.Y. App. Div. LEXIS 7267 (N.Y. App. Div. 2d Dep't 2010).

Summary judgment for a business was properly denied because the business failed to demonstrate, prima facie, that it was not an owner of a vehicle entrusted to it for sale on consignment approximately a month earlier or that its employee did not have its permission to operate the vehicle at the time of the accident. Kelly v Starr, 181 A.D.3d 799, 120 N.Y.S.3d 373, 2020 N.Y. App. Div. LEXIS 1956 (N.Y. App. Div. 2d Dep't 2020).

Evidence sufficient to justify jury verdict against lessee who operated and controlled vehicle at time of accident and immediately prior thereto and lessor-owner, even if jury verdict was founded solely on defective maintenance or an existing defect, since the lessee for a period of over 30 days, is deemed an owner, and the title owner and lessor are jointly and severally liable. Accelerated Trucking Corp. v McLean Trucking Co., 53 Misc. 2d 321, 278 N.Y.S.2d 516, 1967 N.Y. Misc. LEXIS 1886 (N.Y. Civ. Ct. 1967).

The term "owner" under Vehicle and Traffic Law § 128 includes any lessee having the exclusive use for a period greater than 30 days, and does not exclude the title holder as an owner for purposes of Vehicle and Traffic Law § 388 and under Vehicle and Traffic Law § 388 subdivision 3 the liability of the lessor and lessee of an automobile is joint and several. Location Auto Leasing Corp. v Lembo Corp., 62 Misc. 2d 856, 310 N.Y.S.2d 365, 1970 N.Y. Misc. LEXIS 1689 (N.Y. Sup. Ct. 1970).

An action brought against the sheriff's department and county for bodily injuries sustained by a deputy sheriff while on patrol duty, when the automobile he was driving malfunctioned and left the highway, was barred against the county on the grounds that the vehicle was not a "police vehicle" within the purview of Veh & Tr Law § 388 which specifically excludes fire and police vehicles from the vicarious liability statute and was barred against the sheriff by Workers' Compensation Law since the deputy sheriff was considered to be in the joint employment of the sheriff and the county. Cady v Andrews, 109 Misc. 2d 571, 440 N.Y.S.2d 477, 1981 N.Y. Misc. LEXIS 2432 (N.Y. Sup. Ct. 1981).

In an action arising out of a motor vehicle accident in which plaintiff police officer sustained injuries while pursuing defendant, who was allegedly speeding, the motion of the municipality which employed plaintiff for summary judgment dismissing the third-party complaint of defendant is denied since defendant third-party plaintiff's papers raise issues of fact which may found the municipality's liability on more than the vicarious basis of Vehicle and Traffic Law § 388, which specifically excludes police vehicles; those issues include an allegation that the municipality failed, by virtue of inadequate supervision of plaintiff, to prevent him from conducting a high-speed pursuit in violation of its own rules and regulations. The argument of the municipality that allowing the third-party action to go forward will cause a double reduction in defendant's liability is without merit since the liability of the municipality, if any, will be determined on the basis of its own acts or omissions. Brown v Ellis, 145 Misc. 2d 1085, 548 N.Y.S.2d 841, 1989 N.Y. Misc. LEXIS 766 (N.Y. Civ. Ct. 1989), aff'd, 150 Misc. 2d 375, 575 N.Y.S.2d 622, 1990 N.Y. Misc. LEXIS 746 (N.Y. App. Term 1990).

Since the mere fact that a bus was leased provided no basis for exculpating the city from liability under N.Y. Veh. & Traf. Law § 388, the city's motion to dismiss or for summary judgment was denied as to a passenger's negligence suit. Gaines v City of New York, 797 N.Y.S.2d 901, 8 Misc. 3d 968, 233 N.Y.L.J. 5, 2005 N.Y. Misc. LEXIS 1273 (N.Y. Sup. Ct. 2005).

In action against owner of automobile for damages inflicted while such automobile was being operated by another, wherein parties stipulated that driver was negligent, when the defendant conceded ownership of the automobile, plaintiff's case prima facie was proved. Parker v Telesco, 111 N.Y.S.2d 481, 1952 N.Y. Misc. LEXIS 2530 (N.Y. Sup. Ct. 1952).

Trial court erred in granting summary judgment pursuant to N.Y. C.P.L.R. 3212 to a bank in a personal injury action; as the leaseholder, the bank was an owner of the vehicle which allegedly hit the injured party pursuant to of N.Y. Veh. & Traf. Law § 388(1), and thus the bank failed to show entitled to summary judgment. Litvak v Fabi, 8 A.D.3d 631, 780 N.Y.S.2d 155, 2004 N.Y. App. Div. LEXIS 9141 (N.Y. App. Div. 2d Dep't 2004).

23. Legal title holder

A bank which was appointed committee of property of an incompetent did not thereby acquire title to automobile owned by incompetent and could not be held liable on theory of ownership of automobile for injuries alleged to have resulted from alleged negligent driving of such automobile by infant to whom incompetent loaned automobile. Robinson v People's Bank of Hamburg, 281 A.D. 351, 120 N.Y.S.2d 317, 1953 N.Y. App. Div. LEXIS 3049 (N.Y. App. Div. 1953).

In a negligence action in which it was alleged that one of the defendants, a foreign corporation doing business in New York, rented a car to the defendant driver and gave the latter, a New York resident, permission to drive in Germany, where plaintiff, a passenger in the rented car and also a New York resident, sustained injuries when the defendant driver collided with a truck driven and owned by German nationals, and wherein the only claim of negligence alleged was in connection with the operation of the two vehicles, summary judgment is granted to the defendant corporation dismissing the complaint as against it, since the relationship between the corporation and the driver was not that of master and servant and plaintiff could not therefore rely on the doctrine of respondeat superior in her attempt to impose liability on the corporation, and since the corporation was not the record owner of the rented car, the record owner being a Belgian company owned by the defendant corporation and another foreign company, and the owner company having a license from the defendant corporation to participate in a vehicle rental business, plaintiff could not impose liability under section 388 of the Vehicle and Traffic Law, which renders an owner of a motor vehicle liable for injuries caused by the negligent operator thereof, as long as the latter is driving the car with the consent or permission of the former; the defendant corporation could not be treated as the owner-lessor under the alter ego doctrine, since it had only a minority interest in the owner company, which owned the vehicle, insured it and fixed the rental charges, and liability could not be sustained on a theory of alter ego where each corporation has separate assets, employees and business, and additionally, plaintiff could not rely on the doctrine of apparent authority or agency by estoppel to impose liability on the defendant corporation, since plaintiff made no showing of any evidentiary facts indicating how she relied on any representations of the defendant corporation that the owner company was the former's agent, and there was no allegation that the owner company was in any way responsible for the accident. Bank v Rebold, 69 A.D.2d

481, 419 N.Y.S.2d 135, 1979 N.Y. App. Div. LEXIS 11827 (N.Y. App. Div. 2d Dep't 1979).

Defendant, which had acquired security interest in vehicle, was not owner thereof so as to be liable for its negligent use merely because defendant took actions consistent with its rights as lienholder under CLS UCC Art 9 when vehicle lessor defaulted on its obligations; thus, defendant was properly granted summary judgment in action for injuries sustained while plaintiff was passenger in vehicle. Kelly v Fleet Bank, 271 A.D.2d 654, 706 N.Y.S.2d 190, 2000 N.Y. App. Div. LEXIS 4511 (N.Y. App. Div. 2d Dep't 2000), app. denied, 96 N.Y.2d 702, 722 N.Y.S.2d 794, 745 N.E.2d 1016, 2001 N.Y. LEXIS 81 (N.Y. 2001).

Public policy will not permit the real owner of an automobile to escape the consequences of his own negligence and recover property damages to his vehicle by taking refuge behind a rebuttable presumption of title in the registered owner, his wife, and it was implicit in the jury's verdict that they found the husband was the real owner of the vehicle he was operating at the time of the collision and that he was negligent and therefore the motion to set aside the verdict as inconsistent as it relates to claim for property damage was denied. Britt v Perry, 64 Misc. 2d 655, 315 N.Y.S.2d 357, 1970 N.Y. Misc. LEXIS 1201 (N.Y. Sup. Ct. 1970).

Where a corporation, the registered owner of an automobile, transferred all of its assets, including the automobile, to the majority stockholder of the corporation, the latter was in fact the owner of the car and was liable for an accident involving the driver of said car. Schomer v Andy Le Grow, Inc., 198 N.Y.S.2d 974, 1960 N.Y. Misc. LEXIS 3924 (N.Y. Sup. Ct. 1960).

24. —Effect of failure to transfer registration, etc.

An auto renting company which claims to have transferred title of a truck to a bakery corporation and retained the registration to avoid ration regulations is considered as the owner, and disclaimer of ownership does not constitute a legal defense. Elfeld v Burkham Auto Renting Co., 299 N.Y. 336, 87 N.E.2d 285, 299 N.Y. (N.Y.S.) 336, 1949 N.Y. LEXIS 940 (N.Y. 1949).

The registered owner of a motor vehicle, contending that ownership was retained to avoid a wartime regulation by the actual owner of the vehicle, will not be allowed to disclaim ownership to avoid liability under this section. Elfeld v Burkham Auto Renting Co., 299 N.Y. 336, 87 N.E.2d 285, 299 N.Y. (N.Y.S.) 336, 1949 N.Y. LEXIS 940 (N.Y. 1949).

The execution by the purchaser of a vehicle of a note and purchase agreement, and by both seller and purchaser of a security agreement stating that the vehicle was owned by the purchaser, was a sufficient transfer of ownership of the vehicle to constitute the purchaser's insurance carrier the primary insurer of personal injuries thereafter inflicted during the purchaser's operation of the vehicle, notwithstanding that the prior owner's license plates remained on the vehicle and that the certificate of title was not transferred until after the injury-causing accident, since, even though a registered owner who transfers a vehicle without removing the license plates is estopped as against an injured third party from denying ownership, the estoppel does not prevent his insurance carrier from denying ownership within the meaning of its policy as against another carrier, since the seller's reservation of a security interest does not affect the requirement of Veh & Tr Law § 128 that the purchaser, as an owner of the vehicle, must obtain its own insurance coverage and cannot rely on the seller's policy, and since the seller's reservation of his security interest does not constitute the seller an owner pursuant to Veh & Tr Law § 388(3); Veh & Tr Law § 2113 did not mandate a different result, since its provisions do not purport to define when a previous owner remains the owner for purposes of insurance coverage, and is inapplicable between insurance carriers, and since the section does not defer vesting of title in a purchaser until the Uniform Vehicle Certificate of Title Act (Veh & Tr Law Title 10) has been complied with. Dairylea Cooperative, Inc. v Rossal, 64 N.Y.2d 1, 483 N.Y.S.2d 1001, 473 N.E.2d 251, 1984 N.Y. LEXIS 4754 (N.Y. 1984).

Because an owner's conclusory affidavit, supported only by a handwritten, undated, and unnotarized statement purportedly from the driver, was insufficient under N.Y. Veh. & Traf. Law §§ 128 and 388(1) to demonstrate that the owner was not the owner of the vehicle, the trial court properly denied the owner's motion for summary judgment in the insurer's action to recover payments made to its insured. Allstate Ins. Co. v Persampire, 45 A.D.3d 706, 846 N.Y.S.2d 288, 2007 N.Y. App. Div. LEXIS 11919 (N.Y. App. Div. 2d Dep't 2007).

Summary judgment for the alleged owner of driver-A's vehicle was proper with respect to a claim of vicarious liability that arose from a vehicle accident, as the owner showed that driver-A had the sole possessory interest in, as well as dominion and control over, the vehicle, and the failure to properly register the vehicle in his name did not raise an issue of fact with respect to ownership. Oscier v Musty, 138 A.D.3d 1402, 31 N.Y.S.3d 697, 2016 N.Y. App. Div. LEXIS 3282 (N.Y. App. Div. 4th Dep't 2016).

25. Co-owner's liability

The co-owner of a car was not liable under the former analogous section, the statute not being designed to make each part owner of an automobile liable for the consequences of the negligent operation of it by his co-owner. Leppard v O'Brien (1929) 252 NY 563, 170 NE 144 ovrld by Payne v Payne (1971) 28 NY2d 399, 322 NYS2d 238, 271 NE2d 220)., holding that the question of "consent" is one of fact which in the absence of other evidence would be established inferentially upon proof of co-ownership and use, and that the presumption normally arising upon proof of co-ownership and use, however, is not conclusive and may be rebutted by a showing that the common owners have not in fact consented among themselves to possession and use by both.

In considering the question of the liability of an absent co-owner for damages caused by the negligence of the other co-owner in the operation of the automobile, the question of "consent" is one of fact, which in the absence of other evidence would be established inferentially upon proof of co-ownership and use. Payne v Payne, 28 N.Y.2d 399, 322 N.Y.S.2d 238, 271 N.E.2d 220, 1971 N.Y. LEXIS 1247 (N.Y. 1971).

In an action against a co-owner of a motor vehicle for damages caused by the operation of the vehicle by other co-owner, where the plaintiff introduced evidence of co-ownership and use but it appeared from the record that the driver was unlicensed, that fact served to rebut the presumption arising upon proof of co-ownership and use, and the matter should be allowed to proceed to trial and not determined on a motion for summary judgment. Payne v Payne, 28 N.Y.2d 399, 322 N.Y.S.2d 238, 271 N.E.2d 220, 1971 N.Y. LEXIS 1247 (N.Y. 1971).

The former analogous section as it existed September 8, 1927, did not apply so as to make a co-owner liable for the negligence of his joint owner. Leppard v O'Brien (1928) 225 App Div 162, 232 NYS 454, affd (1929) 252 NY 563, 170 NE 144 ovrld by Payne v Payne (1971) 28 NY2d 399, 322 NYS2d 238, 271 NE2d 220), holding that the question of "consent" is one of fact which in the absence of other evidence would be established inferentially upon proof of co-ownership and use, and that the presumption normally arising upon proof of co-ownership and use, however, is not conclusive and may be rebutted by a showing that the common owners have not in fact consented among themselves to possession and use by both.

This section is not applicable when the defendant husband is the co-owner of the car. Wadsworth v Webster, 237 A.D. 319, 261 N.Y.S. 670, 1932 N.Y. App. Div. LEXIS 5339 (N.Y. App. Div. 1932).

This section (formerly the Highway Law § 282-e) making the negligence of an operator, other than the owner, attributable to the owner is not applicable in an action against a partner by the wife of a member of the partnership for her husband's tortious act because plaintiff's husband was co-owner of the vehicle. Caplan v Caplan, 243 A.D. 456, 278 N.Y.S. 475, 1935 N.Y. App. Div. LEXIS 7093 (N.Y. App. Div.), aff'd, 268 N.Y. 445, 198 N.E. 23, 268 N.Y. (N.Y.S.) 445, 1935 N.Y. LEXIS 958 (N.Y. 1935).

Question of fact exists as to issue of who was owner of automobile in question at time of injury to plaintiffs; although presumption exists that defendant owned vehicle, because its registration indicated that its ownership had been transferred to her, this presumption has been cast in doubt by evidence tending to indicate that neither respondent, nor defendant or codefendant ever intended for title to be transferred; leasing arrangement may in fact have existed with respondent as lessor, defendant as

lessee, and codefendant as prior lessee; thus, although court correctly determined that plaintiffs offered no evidence tending to prove negligence on part of respondents, vicarious liability may yet exist on their part pursuant to Vehicle and Traffic Law § 388. Doughty v Johnson, 155 A.D.2d 513, 547 N.Y.S.2d 373, 1989 N.Y. App. Div. LEXIS 14232 (N.Y. App. Div. 2d Dep't 1989).

Leasing company was not entitled to summary judgment in action against it for personal injuries arising out of motor vehicle accident since triable issue of fact existed as to whether leasing company was registered owner of vehicle alleged to have caused accident. Gliem v Parker, 145 A.D.2d 534, 536 N.Y.S.2d 977, 538 N.Y.S.2d 977, 1988 N.Y. App. Div. LEXIS 13647 (N.Y. App. Div. 2d Dep't 1988).

Automobile dealership was entitled to summary judgment in the plaintiff's personal injury action because there was no evidence that the dealership shared ownership of an employee's vehicle for purposes of N.Y. Veh. & Traf. Law § 388(1), and there was no evidence that the dealership possessed special knowledge that rendered a customer's use of the employee's vehicle unreasonably dangerous. Monette v Trummer, 105 A.D.3d 1328, 964 N.Y.S.2d 345, 2013 N.Y. App. Div. LEXIS 2923 (N.Y. App. Div. 4th Dep't), aff'd, 22 N.Y.3d 944, 976 N.Y.S.2d 696, 999 N.E.2d 174, 2013 N.Y. LEXIS 2910 (N.Y. 2013).

In event self-insured car rental company desired to terminate questionable renewal leasing arrangements with its lessee, it was under a duty to other motorists to diligently take proper steps to remove vehicle from roadways of state before disclaiming its responsibility as a self-insurer of vehicle. Banner Casualty Co. v Lazar, 81 Misc. 2d 360, 366 N.Y.S.2d 314, 1975 N.Y. Misc. LEXIS 2389 (N.Y. Sup. Ct. 1975).

26. Absentee owner

The absentee owner of an automobile which, at the time of the accident, was being operated by his 18-year-old daughter, was not chargeable with the daughter's negligence as driver at a time when the automobile was not being used in his business as against negligent third party. Siekierski v Derleth, 13 A.D.2d 715, 213 N.Y.S.2d 941, 1961 N.Y. App. Div. LEXIS 11577 (N.Y. App. Div. 4th Dep't 1961).

The negligence of an automobile driver is not imputable to the owner of the car as against negligent third party, when the car is being operated with his consent, but in his absence, unless it is being used in his business or for his benefit and on his account. Bulat v O'Brien, 13 A.D.2d 904, 215 N.Y.S.2d 635, 217 N.Y.S.2d 575, 1961 N.Y. App. Div. LEXIS 10761 (N.Y. App. Div. 4th Dep't 1961).

In an action wherein respondent, as absentee owner of a motor vehicle was sued for damages sustained by plaintiff allegedly by reason of failure of a person operating respondent's car with his consent stopped the car on a grade and left it without setting the brakes, wherein respondent filed a third-party complaint against a garage for negligence in repairing the brakes, the third-party complaint was sufficient to sustain a cause of action in favor of respondent against the garage if, in exercise of due care, he failed to discover the defective condition of the brakes after the repair job. Glassman v Goldman, 35 Misc. 2d 429, 230 N.Y.S.2d 947, 1962 N.Y. Misc. LEXIS 3374 (N.Y. Sup. Ct. 1962).

This section provides substantially that every owner of a vehicle used or operated in New York state shall be liable and responsible for death or injuries to persons or property resulting from negligence in the use or operation of the vehicle in the business of the owner or otherwise by any person operating the same with permission, express or implied, of the owner, and this section is not limited to New York state residents, and, consequently, out of state owners and operators who elect to use the highways of this state subject themselves to this section, and the law makes no distinction between residents and nonresidents, people in transit or otherwise, and the Ontario "guest statute" is not applicable in this state. Kell v Henderson, 47 Misc. 2d 992, 263 N.Y.S.2d 647, 1965 N.Y. Misc. LEXIS 1427 (N.Y. Sup. Ct. 1965), aff'd, 26 A.D.2d 595, 270 N.Y.S.2d 552, 1966 N.Y. App. Div. LEXIS 4068 (N.Y. App. Div. 3d Dep't 1966).

Where two automobiles, each being operated by persons not the owners thereof with permission of, but in the absence of said respective owners, collided by reason of the negligence of each driver, each owner was liable in damages to the other. Bandych v Ross, 26 N.Y.S.2d 830, 1941 N.Y. Misc. LEXIS 1645 (N.Y. City Ct. 1941).

The state statute making the owner of an automobile liable for personal injuries resulting from its negligent operation by another to whom he has entrusted it, is consistent with due process as applied to a non-resident owner who was not in that state when the accident occurred and who had merely lent his machine to one not his agent or engaged on business for him, with express or implied permission to take it there from the state of the owner's residence, where the bailment occurred and whose laws did not impose such liability. Young v Masci, 289 U.S. 253, 53 S. Ct. 599, 77 L. Ed. 1158, 1933 U.S. LEXIS 178 (U.S. 1933).

27. Permission to drive

Wrongful death actions against a Pennsylvania car owner were barred in New York where the issue as to whether the Pennsylvania resident had given permission to another to use his car had been tried out in an action in New Hampshire against the non-owner driver and the insurance company on the owner's risk. The issue of permission of the insured under the insurance policy decided in New Hampshire action was the same as the issue of permission of the owner under this section. Hinchey v Sellers, 7 N.Y.2d 287, 197 N.Y.S.2d 129, 165 N.E.2d 156, 1959 N.Y. LEXIS 903 (N.Y. 1959).

Lessor of automobile may not enforce restrictions on use by lessee, and thereby escape liability to third person, on ground that violation of restriction removed element of consent required by CLS Veh & Tr § 388(1). Wynn v Middleton, 184 A.D.2d 1019, 584 N.Y.S.2d 684, 1992 N.Y. App. Div. LEXIS 8250 (N.Y. App. Div. 4th Dep't 1992).

Statement signed by vehicle's owner (second defendant) that he had loaned vehicle to driver (first defendant) made out prima facie case that second defendant was liable for negligence in case in which first defendant struck pedestrian. DeProssino v Noorzad, 225 A.D.2d 581, 638 N.Y.S.2d 782, 1996 N.Y. App. Div. LEXIS 2183 (N.Y. App. Div. 2d Dep't 1996).

Summary judgment granted to the employer for alleged liability, inter alia, under N.Y. Veh. and Traf. Law § 388(1) was affirmed because the uncontradicted evidence from the employee and a supervisor supported a conclusion that the employee did not have permission for personal use of the employer's van at the time of the accident. Britt v Pharmacologic Pet Servs., Inc., 36 A.D.3d 1039, 828 N.Y.S.2d 630, 2007 N.Y. App. Div. LEXIS 262 (N.Y. App. Div. 3d Dep't), app. dismissed, 9 N.Y.3d 831, 840 N.Y.S.2d 563, 872 N.E.2d 249, 2007 N.Y. LEXIS 1641 (N.Y. 2007).

Because defendant failed to sufficiently rebut the strong presumption that an unidentified driver was operating defendant's vehicle with its permission at the time of an accident, defendant failed to establish its prima facie entitlement to judgment as a matter of law on a cause of action alleging that defendant was vicariously liable for the driver's negligence under N.Y. Veh. & Traf. Law § 388. Han v BJ Laura & Son, Inc., 122 A.D.3d 591, 996 N.Y.S.2d 132, 2014 N.Y. App. Div. LEXIS 7417 (N.Y. App. Div. 2d Dep't 2014).

Where someone using a stolen driver's license rented a vehicle from defendant and allegedly drove it into a collision with plaintiff, the defendant as an owner could not avoid liability under Vehicle and Traffic Law § 388 on the ground that there was no permission express or implied for the operation of the vehicle. Lorippo v Chrysler Leasing Corp., 59 Misc. 2d 534, 299 N.Y.S.2d 672, 1968 N.Y. Misc. LEXIS 976 (N.Y. Civ. Ct. 1968).

Civil court erred in granting an owner's motion for summary judgment in automobile salesmen's action to recover damages for injuries they sustained while riding in a vehicle during a test drive on the ground that the salesmen had released the owner from liability because the owner's attempt to completely disclaim the liability imposed upon it under Vehicle and Traffic Law § 388 was contrary to public policy; therefore, the release, insofar as it was in favor of the owner was unenforceable unless the owner could establish at trial that the operator of the vehicle used it without the owner's express or implied permission. Kim v Doe,

890 N.Y.S.2d 250, 25 Misc. 3d 65, 2009 N.Y. Misc. LEXIS 2083 (N.Y. App. Term 2009).

Consent of an owner of an automobile either express or implied, to its use by another, is an essential element to his own liability for any damages inflicted while his automobile is being operated by another. Parker v Telesco, 111 N.Y.S.2d 481, 1952 N.Y. Misc. LEXIS 2530 (N.Y. Sup. Ct. 1952).

There is a strong presumption that the driver of a vehicle is operating it with the owner's consent, which can only be rebutted by substantial evidence, in order to find permissive use, there must be a consensual link between the negligent operator and one whose possession of the vehicle is authorized. Lancer Ins. Co. v Republic Franklin Ins. Co., 304 A.D.2d 794, 759 N.Y.S.2d 734, 2003 N.Y. App. Div. LEXIS 4540 (N.Y. App. Div. 2d Dep't 2003).

If licensed driver has permission from insured owner to operate motor vehicle in New York, insurance policy for vehicle would provide coverage in event that its operator is involved in accident. Insurance Department, Opinions of General Counsel, Opinion Number 08-02-02.

28. —Express

The owner of an automobile is liable to an invited guest for any negligence of the driver under this section where it appears that the owner, driver, and guest were seated in the driver's seat; that the driver was operating the automobile with permission and under the eye of the defendant; that as the automobile was proceeding at a speed of about fifteen miles per hour along a busy highway leading to N. Y. City and in a procession of cars, it suddenly swerved to the left, ran across the road and into a ditch, and turned over against an obstruction, as a result of which the guest suffered injuries. Bennett v Edward, 239 A.D. 157, 267 N.Y.S. 417, 1933 N.Y. App. Div. LEXIS 7984 (N.Y. App. Div. 1933).

29. —Implied

Evidence was insufficient to sustain finding that employee had implied permission to drive a truck for his personal use at the time of the collision. Schied v Davey Tree Expert Co., 2 A.D.2d 926, 156 N.Y.S.2d 707, 1956 N.Y. App. Div. LEXIS 3942 (N.Y. App. Div. 3d Dep't 1956).

In an action against the owner of an automobile for injuries inflicted due to the driver's negligence, defendant's written statement six months after the accident wherein she stated that the operator "still had my implied permission to use my car anytime he wished" was sufficient basis for imposing liability on the owner. State Farm Mut. Auto. Ins. Co. v Huther, 22 A.D.2d 747, 253 N.Y.S.2d 727, 1964 N.Y. App. Div. LEXIS 3028 (N.Y. App. Div. 4th Dep't 1964).

Evidence that the owner of a motor vehicle had given his son unrestricted use of it and that one of his son's friends had, during a period of time just prior to an accident, frequently driven it pursuant to an understanding with the son, with the only requirement being that he replace the gasoline consumed, could form a basis for a jury finding that the son's friend was driving the vehicle with the implied permission of the owner. Lincoln v Austic, 60 A.D.2d 487, 401 N.Y.S.2d 1020, 1978 N.Y. App. Div. LEXIS 9691 (N.Y. App. Div. 3d Dep't), app. denied, 44 N.Y.2d 644, 405 N.Y.S.2d 1028, 1978 N.Y. LEXIS 4321 (N.Y. 1978).

Trial court's denial of a vehicle owner's motion for summary judgment dismissal of a personal injury negligence complaint against him, as well as cross claims asserted against him, arising from a motor vehicle accident involving his minivan, was proper, as an issue of material fact was raised as to whether the driver of the minivan at the time that the accident occurred had the owner's implied consent to use the vehicle; pursuant to the policy under N.Y. Veh. & Traf. Law § 388, where the owner gave his friend permission to use the minivan, although whether such permission was restricted or not was an issue of fact, it was reasonable to find that the friend's son had the owner's implied consent to use the minivan, as the keys were in the friend and son's house, the son was promised a new car from his father, and the totality of the circumstances supported the creation of a factual issue as to the consent. Bernard v Mumuni, 22 A.D.3d 186, 802 N.Y.S.2d 1, 2005 N.Y. App. Div. LEXIS 8652 (N.Y. App. Div. 1st Dep't 2005), aff'd, 6 N.Y.3d 881, 817 N.Y.S.2d 210, 850 N.E.2d 25, 2006 N.Y. LEXIS 1259 (N.Y. 2006).

Where an owner of an automobile delivered it to a dealer in part payment of a new car and prior to the consummation of sale the automobile was involved in an accident in which driver thereof was found to be negligent, it was held that car was being driven at the time of the accident with the implied permission of the owner so as to render the owner liable for negligence. Samiof v Kehn, 228 N.Y.S. 734, 131 Misc. 764, 1928 N.Y. Misc. LEXIS 858 (N.Y. County Ct. 1928), aff'd, 226 A.D. 842, 234 N.Y.S. 884, 1929 N.Y. App. Div. LEXIS 10555 (N.Y. App. Div. 1929).

Automobile owner who left auto at service station for repairs could not be charged with implied assent to automobile's be driven by one who was not a licensed driver and the driver's negligence would not be imputed to him. Malone v Liss, Inc. Service Station, 5 Misc. 2d 1002, 162 N.Y.S.2d 637, 1957 N.Y. Misc. LEXIS 3344 (N.Y. City Ct. 1957).

Evidence that an employer had given permission to his employee to use a truck was sufficient where the proof showed that the driver of the truck was with the owner at a bar and the owner there authorized him to drive two girls to his home in one of his trucks and from there to take the girls to their destination. Although the driver had ignored instructions to await service calls and had gone on a joy ride with one of the girls, implied permission was found in view of the employer's previous practice in acquiescing in the use of his vehicles for the pleasure and convenience of others. Leahy v Kaszubski, 123 N.Y.S.2d 246, 1953 N.Y. Misc. LEXIS 1951 (N.Y. Sup. Ct. 1953), aff'd, 283 A.D. 947, 130 N.Y.S.2d 221, 1954 N.Y. App. Div. LEXIS 5892 (N.Y. App. Div. 1954).

On the facts, the court properly found that whoever the driver of defendant's car was at the time of the accident, that person was driving with the implied permission of the defendant. Poller v Casagrande, 154 N.Y.S.2d 520 (N.Y. County Ct. 1956).

Summary judgment entered in favor of a rental car company and its parent company was reversed because the companies, as owner of the vehicle at issue, had not adequately rebutted the presumption under N.Y. Veh & Traf. Law § 388(1) that the vehicle had been used with their implied consent. Cherry v Tucker, 5 A.D.3d 422, 773 N.Y.S.2d 405, 2004 N.Y. App. Div. LEXIS 2452 (N.Y. App. Div. 2d Dep't 2004).

30. —Question of fact

Grant of summary judgment in favor of the owner of a vehicle was proper where the disavowals that the employee was driving without permission were reinforced by the owner's contemporaneous accident reports and the employee accepted a punishment based on a written allegation that he took the truck without authority. Country Wide Ins. Co. v Nat'l R. R. Passenger Corp., 6 N.Y.3d 172, 811 N.Y.S.2d 302, 844 N.E.2d 756, 2006 N.Y. LEXIS 152 (N.Y. 2006).

In action for injuries sustained by infant plaintiff when struck by automobile, against both owner and one operating automobile at time of accident, contradictory testimony as to whether one operating automobile at time of accident was doing so with permission of owner within meaning of the Vehicle and Traffic Law was for jury. Vincinere v Ward, 259 A.D. 1019, 20 N.Y.S.2d 451, 1940 N.Y. App. Div. LEXIS 7795 (N.Y. App. Div. 1940), aff'd, 285 N.Y. 823, 35 N.E.2d 497, 285 N.Y. (N.Y.S.) 823, 1941 N.Y. LEXIS 1792 (N.Y. 1941).

Order which denied plaintiff's motions to dismiss affirmative defense of contributory negligence and counterclaim affirmed–plaintiff and coplaintiffs brought action to recover for injuries sustained when plaintiff drove pickup truck off highway; complaint alleged town negligently maintained highway and failed to adequately warn of dangerous condition; town asserted as affirmative defense that accident was proximately caused by plaintiff's culpable conduct, and pleaded counterclaim against plaintiff on same ground, seeking indemnification for judgment rendered in favor of coplaintiffs; town also brought third-party action against owner of vehicle, seeking indemnification and/or contribution as result of his alleged negligence; at close of proof, owner made trial motion to dismiss third-party complaint; Supreme Court granted motion, and judgment was entered dismissing third-party action; jury returned verdict in favor of plaintiffs; judgment dismissing third-party action was affirmed by Appellate Division upon basis there was no duty imposed upon owner to

equip vehicle with seat belts or to check plaintiff's condition before permitting him to borrow truck; however, judgment in favor of plaintiffs was reversed and new trial ordered "on all issues"; plaintiff brought motions for orders dismissing affirmative defense of plaintiff's culpable conduct and counterclaim as barred by doctrine of law of case; Supreme Court denied motions–in its appeal from judgment dismissing third-party complaint, town took issue only with Supreme Court's determination that it failed to establish prima facie owner's direct negligence and, as is clear from prior decision, only that issue was considered by court; however, reversal of judgment entered on jury verdict in favor of plaintiffs had effect of vacating jury's determination that plaintiff's negligence did not proximately cause plaintiffs' damages; as such, it eliminated basis for Supreme Court's judgment dismissing third-party complaint to extent it stated derivative claim under Vehicle and Traffic Law § 388; thus, judgment dismissing third-party action should have been reversed to that extent; this error notwithstanding, order affirming Supreme Court's judgment dismissing third-party action will operate as estoppel only with respect to questions actually litigated and determined. Ramundo v Guilderland, 163 A.D.2d 712, 558 N.Y.S.2d 310, 1990 N.Y. App. Div. LEXIS 8421 (N.Y. App. Div. 3d Dep't 1990).

Rental car company was not entitled to summary judgment dismissing wrongful death action brought on behalf of passenger who was killed while riding in rented automobile which was being driven at time of accident by friend of lessee's brother, notwithstanding fact that car was being used beyond lease period by driver who was neither covered by rental agreement nor given permission by lessee, since company failed to meet burden of overcoming presumption that vehicle was being operated with owner's consent (CLS Veh & Tr § 388(1)). Wynn v Middleton, 184 A.D.2d 1019, 584 N.Y.S.2d 684, 1992 N.Y. App. Div. LEXIS 8250 (N.Y. App. Div. 4th Dep't 1992).

In action by passenger to recover damages for injuries sustained in automobile accident, owner of automobile was not entitled to summary judgment, although he rebutted presumption of permission under CLS Veh & Tr § 388 by offering proof that automobile was stolen at time of accident, since question of fact existed as to issue of consent where (1) owner allegedly knew that automobile had been stolen at 2:00 a.m., (2) shortly thereafter, police notified owner that automobile had been "totaled" in accident, and (3) owner did not report that automobile had been stolen at time of contact with police but waited until 4:30 a.m. to report automobile as stolen. Guerrieri v Gray, 203 A.D.2d 324, 610 N.Y.S.2d 301, 1994 N.Y. App. Div. LEXIS 3708 (N.Y. App. Div. 2d Dep't 1994).

Presumption that driver of vehicle was operating it with owner's permission and consent was rebutted as matter of law where (1) owner submitted affidavit averring that his employee was operating van at time of accident without his knowledge, consent, or permission, that to extent that employee had set of keys to van, employee had obtained them without owner's knowledge or consent, and that following prior accident with van, employee was specifically instructed by owner that he was not to use van for any reason, (2) employee conceded at his examination before trial that, following prior accident, owner told him that he was not to use van for personal matters, and (3) employee conceded that he did not have owner's permission to use van on night he attended concert and was involved in accident; thus, court should have granted owner's motion for summary judgment in action for injuries sustained by van's passenger in accident. Leonard v Karlewicz, 215 A.D.2d 973, 627 N.Y.S.2d 169, 1995 N.Y. App. Div. LEXIS 5603 (N.Y. App. Div. 3d Dep't 1995).

Defendants, owners of vehicle which struck plaintiff's vehicle, were properly denied summary judgment, despite their contention that they never gave driver permission to use their vehicle, where testimony in support of their summary judgment motion by witnesses, all of whom were closely related and obviously interested in favorable outcome for defendant and his business, was rife with inconsistencies and raised credibility issues. Carter v Rosa Rosa, Inc., 284 A.D.2d 110, 725 N.Y.S.2d 202, 2001 N.Y. App. Div. LEXIS 5655 (N.Y. App. Div. 1st Dep't 2001).

Order granting an employer's motion for summary judgment dismissing the complaint was reversed because the employee driving the employer's vehicle directly contradicted the employer's claim that the employee did not have permission to use the vehicle for non-work related purposes, thus, the issue of the employee's permissive use of the vehicle had to be resolved at trial. Baker v Lisconish, 156 A.D.3d 1324, 68 N.Y.S.3d 233, 2017 N.Y. App. Div. LEXIS 9048 (N.Y. App. Div. 4th Dep't 2017), app. dismissed, 31 N.Y.3d 1042, 100 N.E.3d 843, 76 N.Y.S.3d 504, 2018 N.Y. LEXIS 855 (N.Y. 2018).

The ownership of an automobile by a corporate defendant created a presumption under this section that it was being used at the time of the accident with defendant's permission, and it was for the jury to decide whether to credit salesman's testimony which, if believed, would destroy the presumption and exonerate the corporate defendant from liability. Aarons v Standard Varnish Works, 296 N.Y.S. 312, 163 Misc. 84, 1937 N.Y. Misc. LEXIS 1282 (N.Y. Sup. Ct. 1937), aff'd, 254 A.D. 560, 3 N.Y.S.2d 910, 1938 N.Y. App. Div. LEXIS 6559 (N.Y. App. Div. 1938).

Defendant owners of a motor vehicle, the driver of which is charged with negligent operation, are not entitled to summary judgment solely on the basis of their allegation that the operator was not using the vehicle with their permission, where they admit ownership of the vehicle, as against a contention of implied permission or consent to its use. Potter v Kahler, 31 Misc. 2d 15, 219 N.Y.S.2d 522, 1961 N.Y. Misc. LEXIS 3039 (N.Y. Sup. Ct. 1961).

Affidavits submitted by defendant owner of a motor vehicle charged under this section with damages arising from negligent operation of the car by his son while using the car with defendant's permission, were insufficient to establish lack of permission to use the vehicle, particularly in view of conflicting affidavits and the fact that defendant had no operator's license himself and had permitted the son to use the car with his wife's permission on various occasions, showing existence of a question of fact for the jury. Hubert v Stasiak, 31 Misc. 2d 307, 220 N.Y.S.2d 748, 1961 N.Y. Misc. LEXIS 2239 (N.Y. Sup. Ct. 1961).

Issue of whether automobile was being driven with owner's consent when it hit plaintiff could be submitted to jury, where out-of-state father had permitted his son to take automobile to college in New York with limiting instructions not to let others use it; jury might hold father to knowledge that so generous entrustment, far from home and for protracted period, was not reasonably susceptible to limitation not to loan car to others. Rodak v Longnecker, 176 Misc. 2d 833, 673 N.Y.S.2d 998, 1998 N.Y. Misc. LEXIS 192 (N.Y. Sup. Ct. 1998).

Trial court properly denied summary judgment motions by defendants in an action in which a child driving a rented car caused and accident; before any pretrial disclosure, the issue of whether the child had permission to use the vehicle was exclusively within the knowledge of defendants, so further discovery was required to determine whether defendants were responsible for the injuries under N.Y. Veh. & Traf. Law § 388, and because the renter failed to establish, prima facie, that the rental agreement was not for a period of greater than 30 days, N.Y. Veh. & Traf. Law § 128. Donato v ELRAC, Inc., 18 A.D.3d 696, 795 N.Y.S.2d 348, 2005 N.Y. App. Div. LEXIS 5645 (N.Y. App. Div. 2d Dep't 2005).

Trial court properly denied summary judgment to a vehicle owner as to a claim for personal injuries arising from an automobile accident, as there was a triable issue of fact on whether the vehicle was stolen at the time of the accident, or the owner allowed her grandson to use the vehicle, and was thus liable under N.Y. Veh. & Traf. Law § 388(1). Harris v Jackson, 30 A.D.3d 1027, 816 N.Y.S.2d 791, 2006 N.Y. App. Div. LEXIS 7588 (N.Y. App. Div. 4th Dep't 2006).

Where a plaintiff proved that defendant owned truck in question, and defendant and driver, who relied on the former analogous section, denied that consent had been given to driver to use truck, there was evidence to go to jury on question of whether driver used truck with defendant's consent. Pariso v Towse, 45 F.2d 962, 1930 U.S. App. LEXIS 3759 (2d Cir. N.Y. 1930).

31. — —Procedure

In an automobile negligence action, question as to whether automobile was being operated with defendant's permission,

expressed or implied, is a question of fact which should be submitted to the jury. Carr v Sciandra, 281 A.D. 1072, 122 N.Y.S.2d 132, 1953 N.Y. App. Div. LEXIS 4365 (N.Y. App. Div. 1953).

Once substantial evidence is introduced of a denial of permission to operate the owner's vehicle, the issue becomes one of fact for the jury. Antonik v Kochansky, 37 A.D.2d 821, 324 N.Y.S.2d 988, 1971 N.Y. App. Div. LEXIS 3274 (N.Y. App. Div. 1st Dep't 1971).

When the owner of a motor vehicle offers proof tending to rebut the presumption that the driver of it was using it with his consent, the issue of consent becomes a question of fact for the jury. Lincoln v Austic, 60 A.D.2d 487, 401 N.Y.S.2d 1020, 1978 N.Y. App. Div. LEXIS 9691 (N.Y. App. Div. 3d Dep't), app. denied, 44 N.Y.2d 644, 405 N.Y.S.2d 1028, 1978 N.Y. LEXIS 4321 (N.Y. 1978).

There was no need for jury determination of whether vehicle was operated with owner's permission where Supreme Court had decided that issue after hearing. Asaro v McGuire Auto Rental Leasing, 238 A.D.2d 366, 657 N.Y.S.2d 334, 1997 N.Y. App. Div. LEXIS 3841 (N.Y. App. Div. 2d Dep't 1997).

In actions against the owner of a vehicle driven by another for damages growing out of vehicular collisions, New York cases indicate that even where the owner and driver testify without contradiction as a part of defendant's case that driver had no permission or was out of scope of employment, the case should still go to trier of facts and, if that evidence of interested witnesses is disbelieved, the presumption that owner of vehicle is responsible for manner in which vehicle is driven has not been overcome. Mandelbaum v United States, 251 F.2d 748, 1958 U.S. App. LEXIS 3609 (2d Cir. N.Y. 1958).

32. Evidence of permission

The owner of an automobile is liable to an invited guest for any negligence of the driver under this section where it appears that the owner, driver, and guest were seated in the driver's seat; that the driver was operating the automobile with permission and under the eye of the defendant; that as the automobile was proceeding at a speed of about fifteen miles per hour along a busy highway leading to N. Y. City and in a procession of cars, it suddenly swerved to the left, ran across the road and into a ditch, and turned over against an obstruction, as a result of which the guest suffered injuries. Bennett v Edward, 239 A.D. 157, 267 N.Y.S. 417, 1933 N.Y. App. Div. LEXIS 7984 (N.Y. App. Div. 1933).

The owner of an automobile is liable, under this section, where the vehicle was used and operated with his consent to the extent that he not only kept the vehicle in repair but supplied a chauffeur and fuel with which to operate it. Irwin v Klein, 243 A.D. 23, 276 N.Y.S. 41, 1934 N.Y. App. Div. LEXIS 5476 (N.Y. App. Div. 1934).

In an action against the owner of an automobile for injuries inflicted due to the driver's negligence, defendant's written statement six months after the accident wherein she stated that the operator "still had my implied permission to use my car anytime he wished" was sufficient basis for imposing liability on the owner. State Farm Mut. Auto. Ins. Co. v Huther, 22 A.D.2d 747, 253 N.Y.S.2d 727, 1964 N.Y. App. Div. LEXIS 3028 (N.Y. App. Div. 4th Dep't 1964).

Evidence that the owner of a motor vehicle had given his son unrestricted use of it and that one of his son's friends had, during a period of time just prior to an accident, frequently driven it pursuant to an understanding with the son, with the only requirement being that he replace the gasoline consumed, could form a basis for a jury finding that the son's friend was driving the vehicle with the implied permission of the owner. Lincoln v Austic, 60 A.D.2d 487, 401 N.Y.S.2d 1020, 1978 N.Y. App. Div. LEXIS 9691 (N.Y. App. Div. 3d Dep't), app. denied, 44 N.Y.2d 644, 405 N.Y.S.2d 1028, 1978 N.Y. LEXIS 4321 (N.Y. 1978).

Evidence that an employer had given permission to his employee to use a truck was sufficient where the proof showed that the driver of the truck was with the owner at a bar and the owner there authorized him to drive two girls to his home in one of his trucks and from there to take the girls to their destination. Although the driver had ignored instructions to await service calls and had gone on a joy ride with one of the girls, implied permission was found in view of the employer's previous practice in acquiescing in the use of his vehicles for the pleasure and convenience of others. Leahy v Kaszubski, 123 N.Y.S.2d 246, 1953 N.Y. Misc. LEXIS 1951 (N.Y. Sup. Ct. 1953), aff'd, 283 A.D. 947, 130 N.Y.S.2d 221, 1954 N.Y. App. Div. LEXIS 5892 (N.Y. App. Div. 1954).

33. Evidence negating permission

Defendant's automobile was not being used with his permission where it appeared that the driver at the time of the accident was only hired to wash the vehicle and was not given permission to use it and was using it on personal business at time of accident, and never had driven the vehicle outside the garage before. Darlow v Drake Bakeries, Inc., 2 N.Y.2d 983, 163 N.Y.S.2d 598, 143 N.E.2d 338, 1957 N.Y. LEXIS 1095 (N.Y. 1957).

Plaintiff was injured when she was struck by car owned by defendant and operated by defendant's brother, codefendant–defendant's motion for summary judgment dismissing complaint and third-party complaint against her was properly granted; Vehicle and Traffic Law § 388 (1), which imputes to owner of motor vehicle liability for negligence of person who uses or operates vehicle with owner's permission, express or implied, creates rebuttable presumption; evidence submitted by defendant in support of her motion established she left her car with another brother to be repaired; he then repaired car and parked it in driveway of his residence; at his examination before trial codefendant testified that he was living with other brother during relevant time period and that on three separate occasions during that period, including day of accident, he took keys to defendant's car and drove car without knowledge or permission of other brother or defendant; codefendant further testified that following accident, he pleaded guilty to unauthorized use of motor vehicle; codefendant's testimony was corroborated by that of other brother and defendant who stated they did not give codefendant permission to drive defendant's car and that they were unaware he had been driving car; this evidence is sufficient to rebut statutory presumption of consent as matter of law–further, Supreme Court's denial of plaintiff's motion to renew was proper; plaintiff's motion was based upon assertion that stolen vehicle report belatedly filed by other brother casts some doubt on defendant's credibility; plaintiff had knowledge of existence of report in advance of return date of defendant's motion, and affidavit of plaintiff's counsel does not provide justifiable excuse for failure to obtain copy of report earlier. Polsinelli v Rotterdam, 167 A.D.2d 579, 562 N.Y.S.2d 844, 1990 N.Y. App. Div. LEXIS 13022 (N.Y. App. Div. 3d Dep't 1990).

Defendant, whose automobile was involved in accident, was entitled to summary judgment dismissing action for injuries as result thereof where (1) driver of defendant's vehicle admitted at examination before trial that he had taken vehicle without defendant's permission, (2) driver's testimony was corroborated by defendant's affidavit and by testimony at examination before trial of defendant's son, who was passenger at time of accident, and (3) parties opposing defendant's motion failed to submit any evidence sufficient to raise triable issue regarding owner's consent; under circumstances, presumption of consent under CLS Veh & Tr § 388(1) was rebutted as matter of law. Bruno v Privilegi, 148 A.D.2d 652, 539 N.Y.S.2d 403, 1989 N.Y. App. Div. LEXIS 4184 (N.Y. App. Div. 2d Dep't 1989).

Defendants, owners of car involved in one-car accident, were properly granted summary judgment where their granddaughter, who was driving car at time of accident, testified that she was not given permission to drive car (she pleaded guilty to its theft), defendant, in his deposition and affidavit, attested that he never allowed granddaughter, who did not have license, to operate any of his cars, plaintiff, as evidenced in her deposition testimony, knew car was stolen, but continued riding in it, both as driver and passenger, and granddaughter further testified that although she found ignition keys in car, they were located in console covered by loose papers. Manning by Manning v Brown, 232 A.D.2d 849, 649 N.Y.S.2d 202, 1996 N.Y. App. Div. LEXIS 10536 (N.Y. App. Div. 3d Dep't 1996), aff'd, 91 N.Y.2d 116, 667 N.Y.S.2d 336, 689 N.E.2d 1382, 1997 N.Y. LEXIS 3681 (N.Y. 1997).

Car owner was entitled to summary judgment in action for injury to passengers in one-car accident where her affidavit, and driver's admission to police, established that driver and passengers had taken car without her permission while she slept. Bost v Thomas, 275 A.D.2d 513, 712 N.Y.S.2d 218, 2000 N.Y. App. Div. LEXIS 8419 (N.Y. App. Div. 3d Dep't 2000).

Defendant whose car was involved in motor vehicle collision was entitled to summary judgment on issue of whether he was vicariously liable for negligence of driver, where he submitted affidavit and documentary evidence showing that his car was stolen at time of accident, and there was no evidence to support opposing parties' claim that he had violated CLS Veh & Tr § 1210(a). Adamson v Evans, 283 A.D.2d 527, 724 N.Y.S.2d 760, 2001 N.Y. App. Div. LEXIS 6254 (N.Y. App. Div. 2d Dep't 2001).

Pursuant to N.Y. Veh. & Traf. Law § 388(1), a trial court erred in denying a vehicle owner's summary judgment dismissal (SJD) motion of a personal injury action against her by a motorist who was involved in a vehicle collision with the owner's vehicle, and in granting SJD to the motorist of the owner's nonpermissive use defense, as the owner provided substantial evidence to rebut the presumption of permissive use by the driver of her vehicle at the time of a collision under N.Y. Veh. & Traf. Law § 388(1); as a prior proceeding had imposed a stay of arbitration with respect to the motorist's uninsured claim upon finding that the owner's insurer's disclaimer of nonpermissive use was not timely filed, such did not bar the owner's use of that defense under collateral estoppel principles in the personal injury action, as the defense in the prior action was not reviewed on the merits. McDonald v Rose, 37 A.D.3d 781, 830 N.Y.S.2d 765, 2007 N.Y. App. Div. LEXIS 2327 (N.Y. App. Div. 2d Dep't 2007).

Automobile owner who left auto at service station for repairs could not be charged with implied assent to automobile's be driven by one who was not a licensed driver and the driver's negligence would not be imputed to him. Malone v Liss, Inc. Service Station, 5 Misc. 2d 1002, 162 N.Y.S.2d 637, 1957 N.Y. Misc. LEXIS 3344 (N.Y. City Ct. 1957).

Where automobile was parked on private property in garage attached to owner's house at time it was stolen and owner saw car being stolen and reported such fact to police prior to occurrence of accident in which plaintiff was injured, owner was not liable for such injuries despite fact that keys were in ignition of car. Johnson v Mahyna, 74 Misc. 2d 1, 343 N.Y.S.2d 815, 1973 N.Y. Misc. LEXIS 2101 (N.Y. Sup. Ct. 1973).

Sworn police statements rebutted the presumption under N.Y. Veh. & Traf. Law § 388(1) that the driver was driving with the owner's consent and established a lack of permission for the driver to operate the vehicle where the sworn police statements from most of the attendees of a party indicated that the driver of the car asked the car owner's son for his car keys to prevent him from driving after having consumed alcohol, the keys were put away so the son would not find them, the driver had never been permitted to drive the vehicle before, the vehicle was locked, the son did not then nor ever tell nor imply to the driver that he could drive the vehicle, and the next morning the son was not aware that his car was gone, was not sure who had taken it, and was upset that someone had taken it. N.Y. Cent. Mut. Fire Ins. Co. v Nationwide Mut. Ins. Co., 307 A.D.2d 449, 761 N.Y.S.2d 730, 2003 N.Y. App. Div. LEXIS 7694 (N.Y. App. Div. 3d Dep't 2003).

34. Presumption of permission

It is axiomatic that proof of ownership of a motor vehicle creates a rebuttable presumption that the driver was using the vehicle with the owner's permission, express or implied, which presumption continues until there is substantial evidence to the contrary, and, if there is some such evidence, the question of consent and authority is for the jury. Leotta v Plessinger, 8 N.Y.2d 449, 209 N.Y.S.2d 304, 171 N.E.2d 454, 1960 N.Y. LEXIS 837 (N.Y. 1960), reh'g denied, 9 N.Y.2d 688, 1961 N.Y. LEXIS 1809 (N.Y. 1961).

Although this section requires permission of the owner to operate his car in order to create liability, if the ownership is established, there is a presumption that the operator was using the car with the permission of the owner and this presumption continues until there is substantial evidence to the contrary. Hukey v Massachusetts Bonding & Ins. Co., 277 A.D. 411, 100 N.Y.S.2d 643, 1950 N.Y. App. Div. LEXIS 3073 (N.Y. App. Div. 1950).

Proof of the ownership of a motor vehicle creates a rebuttable presumption that the driver was using the vehicle with the owner's permission, express or implied, and this presumption continues until there is substantial evidence to the contrary. If the owner restricts the use of the vehicle when in the hands of another, and the restriction is violated, the vehicle is driven without the owner's permission; and where the owner of a car had requested the driver to take her automobile to pick up a pizza and to "bring it right back", the driver's conduct in going for a ride while waiting for the pizza to be prepared was not such a deviation from the permission granted that would relieve the owner from responsibility of the driver's negligent conduct. De Lancey v Nationwide Ins. Co., 26 A.D.2d 631, 272 N.Y.S.2d 468, 1966 N.Y. App. Div. LEXIS 3661 (N.Y. App. Div. 2d Dep't 1966), aff'd, 20 N.Y.2d 807, 284 N.Y.S.2d 701, 231 N.E.2d 288, 1967 N.Y. LEXIS 1179 (N.Y. 1967).

In action against automobile dealership for injuries sustained when automobile loaned by its repair shop to customer allegedly sped forward when driver, who was customer's friend, pulled gear shift lever without depressing accelerator pedal, court erred in determining that factual issue existed as to whether driver was permissive user of automobile since no evidence was presented to rebut presumption of permissive use created by CLS Veh & Tr § 388. Fili v Matson Motors, Inc., 183 A.D.2d 324, 590 N.Y.S.2d 961, 1992 N.Y. App. Div. LEXIS 14057 (N.Y. App. Div. 4th Dep't 1992).

Defendant was not entitled to summary judgment, since presumption that driver operated motor vehicle with defendant's implied permission was not rebutted as matter of law, where driver had previously been allowed to use vehicle on several occasions. Stewart v Town of Hempstead, 204 A.D.2d 431, 611 N.Y.S.2d 909, 1994 N.Y. App. Div. LEXIS 5100 (N.Y. App. Div. 2d Dep't 1994).

Insurer was required to provide notice of disclaimer of coverage to injured passenger under motor vehicle policy issued to owner of vehicle in which she was riding, despite insurer's contention that driver of vehicle was nonpermissive user and policy did not provide coverage for nonpermissive users, where nonpermissive use was not specifically denominated as exclusion under policy but appeared as definition of coverage; strong statutory presumption of permissive use would be deemed in force at time of accident so that subsequent finding of nonpermissive use negating coverage would require notice of disclaimer. Greater N.Y. Mut. Ins. Co. v Clark, 205 A.D.2d 857, 613 N.Y.S.2d 295, 1994 N.Y. App. Div. LEXIS 6073 (N.Y. App. Div. 3d Dep't), app. denied, 84 N.Y.2d 807, 621 N.Y.S.2d 516, 645 N.E.2d 1216, 1994 N.Y. LEXIS 3475 (N.Y. 1994).

Defendant owner of vehicle involved in traffic accident was not entitled to summary judgment where it failed to rebut strong presumption, created by CLS Veh & Tr § 388(1), that driver of motor vehicle that caused plaintiffs' injuries was operating vehicle with owner's permission or consent. Mills v Marquez, 251 A.D.2d 304, 673 N.Y.S.2d 1019, 1998 N.Y. App. Div. LEXIS 6327 (N.Y. App. Div. 2d Dep't 1998).

Presumption that vehicle was being operated with consent of owner (CLS Veh & Tr § 388) was not sufficiently overcome to warrant summary judgment for defendant in vehicular accident case where affidavits of defendant and his daughter failed to allege that purported theft of vehicle was reported to police, defendant did not disclose his whereabouts at time of accident, and defendant did not address question of whether he fit plaintiff's description of other driver. Minaya v Horner, 279 A.D.2d 333, 718 N.Y.S.2d 839, 2001 N.Y. App. Div. LEXIS 421 (N.Y. App. Div. 1st Dep't 2001).

Credit company and the lessor of a vehicle were entitled to summary judgment as to a personal injury action, because the company and the lessor established that the driver of a vehicle was not a permissive user of the leased car at the time of the accident for purposes of N.Y. Veh. & Traf. Law § 388(1), and plaintiff failed to submit competent evidence suggesting implausibility, collusion, or implied permission so as to require the issue of consent to be submitted to a jury, and thus the negligence of the

driver could not be imputed to the company or the lessor. Nelson v Ford Motor Credit Co., 41 A.D.3d 444, 838 N.Y.S.2d 130, 2007 N.Y. App. Div. LEXIS 6987 (N.Y. App. Div. 2d Dep't 2007).

In a personal injury action after a pedestrian was allegedly struck by a vehicle, the N.Y. Veh. & Traf. Law § 388 presumption of permissive use was not sufficiently rebutted at a hearing; therefore, a finding that no permission, express or implied, was given by the vehicle's owner to the driver did not establish their prima facie entitlement to judgment as a matter of law. Asfia Talat v Thompson, 47 A.D.3d 705, 850 N.Y.S.2d 486, 2008 N.Y. App. Div. LEXIS 254 (N.Y. App. Div. 2d Dep't 2008).

The presumption that the operator of an automobile was using the car with the owner's permission was overcome when the evidence showed that permission was given only for use in a particular territory and the borrower used the car outside that territory. Lozada v Copeland, 138 N.Y.S.2d 521, 207 Misc. 382, 1955 N.Y. Misc. LEXIS 2637 (N.Y. Sup. Ct. 1955).

Special referee did not err in granting petitioner first insurer's application to stay an uninsured motorist arbitration demanded by respondent insured arising out of an accident involving a vehicle owned by respondent owner and insured by respondent, the owner's insurer, as a fair interpretation of the evidence supported the special referee's finding that the owner failed to rebut the strong presumption of permissive use of the offending vehicle under N.Y. Veh. & Traf. Law § 388(1), where the owner admitted that the owner left the owner's car parked behind the owner's shop and left the keys to the car with an employee. Travelers Prop. Cas. Corp. v Maxwill-Singleton, 300 A.D.2d 225, 751 N.Y.S.2d 367, 2002 N.Y. App. Div. LEXIS 13381 (N.Y. App. Div. 1st Dep't 2002).

N.Y. Veh. & Traf. Law § 388(1) creates a presumption that the driver was using the vehicle with the owner's express or implied permission, which only may be rebutted by substantial evidence sufficient to show that the vehicle was not operated with the owner's consent; a finding that the insurer failed to prove that the vehicle at issue was stolen at the time of the accident was proper where, while the affidavit of the insured indicated that the insured did not give anyone permission to operate his vehicle at the time of the accident, it failed to address whether any person had implied consent to do so, and thus did not establish that the vehicle was stolen at the time of the accident. Matter of New York Cent. Mut. Fire Ins. Co. v Dukes, 14 A.D.3d 704, 789 N.Y.S.2d 267, 2005 N.Y. App. Div. LEXIS 853 (N.Y. App. Div. 2d Dep't 2005).

In opposition to the owner's motion to dismiss personal injury actions on the ground of nonpermissive use, plaintiffs submitted uncontroverted proof in the form of summonses the police issued to the driver establishing that he operated the owner's vehicle on at least three occasions during the applicable time frame. The owner and his wife submitted affidavits containing statements contradicting the assertions in their prior affidavits; upon the record, the court concluded that the owner did not rebut the presumption in N.Y. Veh. & Traf. Law § 388(1) that a vehicle was being operated with the owner's consent. Correa v City of New York, 18 A.D.3d 418, 794 N.Y.S.2d 408, 2005 N.Y. App. Div. LEXIS 4826 (N.Y. App. Div. 2d Dep't 2005).

Because a lessor failed to rebut the presumption in N.Y. Veh. & Traf. Law § 388(1) that a rental vehicle involved in a traffic accident was operated with its permission, the trial court properly denied its motion for summary judgment. Bernstein v Diaz, 27 A.D.3d 602, 812 N.Y.S.2d 597, 2006 N.Y. App. Div. LEXIS 3471 (N.Y. App. Div. 2d Dep't 2006).

35. —Procedure

Once ownership of the automobile is shown, there is a presumption under this section that the car was being driven with the permission of the owner. Burmaster v State, 7 A.D.2d 775, 179 N.Y.S.2d 980, 1958 N.Y. App. Div. LEXIS 4095 (N.Y. App. Div. 3d Dep't 1958), aff'd, 7 N.Y.2d 65, 195 N.Y.S.2d 385, 163 N.E.2d 742, 1959 N.Y. LEXIS 874 (N.Y. 1959).

The presumption of consent created by Vehicle and Traffic Law § 388, subd 1 has been characterized as "very strong" and continues until there is substantial evidence to the contrary. Blunt v Zinni, 32 A.D.2d 882, 302 N.Y.S.2d 504, 1969 N.Y. App. Div. LEXIS 3583 (N.Y. App. Div. 4th Dep't 1969), aff'd, 27 N.Y.2d 521, 312 N.Y.S.2d 996, 261 N.E.2d 107, 1970 N.Y. LEXIS 1304 (N.Y. 1970).

Proof of ownership of a motor vehicle creates a rebuttable presumption that the driver was using it with the owner's permission. Lincoln v Austic, 60 A.D.2d 487, 401 N.Y.S.2d 1020, 1978 N.Y. App. Div. LEXIS 9691 (N.Y. App. Div. 3d Dep't), app. denied, 44 N.Y.2d 644, 405 N.Y.S.2d 1028, 1978 N.Y. LEXIS 4321 (N.Y. 1978).

There is a rebuttable presumption that the driver of a motor vehicle was operating the vehicle with the permission of the owner. Carey v AAA Con Transport, Inc., 61 A.D.2d 113, 401 N.Y.S.2d 1015, 1978 N.Y. App. Div. LEXIS 9710 (N.Y. App. Div. 3d Dep't 1978).

CLS Veh & Tr § 388 gives rise to presumption that vehicle is being operated with owner's consent, and such strong presumption continues until there is substantial evidence to contrary. Walls v Zuvic, 113 A.D.2d 936, 493 N.Y.S.2d 628, 1985 N.Y. App. Div. LEXIS 52557 (N.Y. App. Div. 2d Dep't 1985), app. denied, 67 N.Y.2d 602, 499 N.Y.S.2d 1028, 490 N.E.2d 557, 1986 N.Y. LEXIS 16716 (N.Y. 1986).

Service of process on Secretary of State under CLS Veh & Tr § 253, which authorizes such service on nonresident owner of vehicle where vehicle was used with owner's permission, was proper in light of strong presumption under CLS Veh & Tr § 388 that vehicle driven by individual defendant was operated with consent of owner, where that presumption was not overcome by substantial evidence. Asaro v McGuire Auto Rental Leasing, 238 A.D.2d 366, 657 N.Y.S.2d 334, 1997 N.Y. App. Div. LEXIS 3841 (N.Y. App. Div. 2d Dep't 1997).

Insurance company was obliged to defend under the policy because the incident involved use of the flatbed truck as a covered automobile by a named insured and as pleaded in the complaint and elaborated upon during discovery, those facts suggested a reasonable possibility of coverage. Farm Family Cas. Ins. Co. v Henderson, 179 A.D.3d 1193, 116 N.Y.S.3d 771, 2020 N.Y. App. Div. LEXIS 29 (N.Y. App. Div. 3d Dep't), app. denied, 35 N.Y.3d 915, 157 N.E.3d 134, 2020 N.Y. LEXIS 2353 (N.Y. 2020).

The language of this statute makes it clear that permission of the owner to operate his car is essential in order to create liability on his part, and that he is not liable for injuries sustained by negligence in its unauthorized operation, but it likewise gives rise to a presumption that one who is operating a motor vehicle is doing so in the service of the owner and with his permission. Mireider v New Hampshire Fire Ins. Co., 24 Misc. 2d 765, 204 N.Y.S.2d 504, 1960 N.Y. Misc. LEXIS 2561 (N.Y. City Ct. 1960).

It has been held the language of § 388 of the Vehicle and Traffic Law gives rise to a presumption that one who is operating a motor vehicle is doing so with the owner's permission, and that proof of the ownership of a motor vehicle creates a rebuttable presumption that the driver is using the vehicle with the owner's permission. Teska v Atlantic Nat'l Ins. Co., 59 Misc. 2d 615, 300 N.Y.S.2d 375, 1969 N.Y. Misc. LEXIS 1649 (N.Y. Dist. Ct. 1969).

The statutory provision creates a strong, although rebuttable, presumption that a vehicle is being driven with permission of the owner. Febbraro v Hertz Corp., 64 Misc. 2d 794, 315 N.Y.S.2d 702, 1970 N.Y. Misc. LEXIS 1182 (N.Y. Civ. Ct. 1970).

Under provision of Vehicle and Traffic Law that every owner of a vehicle used or operated in state shall be liable and responsible for death or injuries to person or property resulting from negligence in use or operation of such vehicle, proof of ownership of vehicle creates a rebuttable presumption that driver was using vehicle with owner's permission, express or implied, and presumption continues until there is substantial evidence to contrary. Banner Casualty Co. v Lazar, 81 Misc. 2d 360, 366 N.Y.S.2d 314, 1975 N.Y. Misc. LEXIS 2389 (N.Y. Sup. Ct. 1975).

Identity of driver of offending vehicle is not element of injured plaintiff's prima facie case under CLS Veh & Tr § 388(1). Horvath v Lindenhurst Auto Salvage, 104 F.3d 540, 1997 U.S. App. LEXIS 520 (2d Cir. N.Y. 1997).

36. —Particular facts raising presumption

Where owner double-parked his automobile on busy thoroughfare in shopping district, left key in ignition switch and went into

a nearby store leaving his 14 year old boy sitting in rear seat and boy at order of policeman attempted to drive automobile to curb but ran onto sidewalk and struck pedestrians, in personal injury actions, trial judge properly determined that statutory presumption of implied permission had not been overcome by uncontradicted testimony of owner, his wife and infant driver that no permission to drive automobile had been given. Winnowski v Polito, 294 N.Y. 159, 61 N.E.2d 425, 294 N.Y. (N.Y.S.) 159, 1945 N.Y. LEXIS 814 (N.Y. 1945).

Proof by plaintiff of defendant corporation's ownership of a truck at the time of an accident created a presumption under this section that the person operating the truck was engaged in the service of the corporation or was using it with its permission. Christie v B. F. Vineburg, Inc., 259 A.D. 342, 19 N.Y.S.2d 252, 1940 N.Y. App. Div. LEXIS 6144 (N.Y. App. Div. 1940).

In an action for damages arising out of a collision with a farm tractor driven by a part-time employee of its owner, the motion of defendant, owner of the tractor, for summary judgment, could not be granted because of the rebuttable presumption set up by this section, notwithstanding his claim that he gave the driver of it permission to use it only for a limited purpose and time. Cosimo v Hollenbeck, 19 A.D.2d 921, 244 N.Y.S.2d 9, 1963 N.Y. App. Div. LEXIS 2971 (N.Y. App. Div. 3d Dep't 1963).

Evidence was sufficient to permit jury to find that employee was acting within scope of his employment or had implied authority to use employer's truck to assist coemployee in emergency situation, during the weekend, involving malfunctioning oil burner in coemployee's house, and thus presumption that employee was engaged in employer's service or was using truck with employer's implied permission was not conclusively rebutted and made case for jury. Basile v Huntington Utilities Fuel Corp., 47 A.D.2d 625, 363 N.Y.S.2d 642, 1975 N.Y. App. Div. LEXIS 8788 (N.Y. App. Div. 2d Dep't), app. dismissed, 36 N.Y.2d 914, 372 N.Y.S.2d 652, 334 N.E.2d 600, 1975 N.Y. LEXIS 2001 (N.Y. 1975).

Statutory presumption that automobile owned by insured mother was operated by son with mother's implied permission at time of automobile collision was not rebutted, even though there was evidence suggesting that son's permission had been limited, where automobile was purchased for son's use, son was given keys and possession of automobile, and son was told on day before accident that all insurance forms had been completed. Phoenix v Bolton, 59 A.D.2d 464, 399 N.Y.S.2d 914, 1977 N.Y. App. Div. LEXIS 13949 (N.Y. App. Div. 3d Dep't 1977), app. denied, 44 N.Y.2d 641, 1978 N.Y. LEXIS 4238 (N.Y. 1978).

Appellant failed to sufficiently rebut the strong presumption pursuant to this section that his son was operating his vehicle with his permission as: (1) the son had access to appellant's residence; (2) the key to the vehicle was kept in a central location inside a bin located in the kitchen of appellant's residence; and (3) on previous occasions, the son had been permitted by appellant to drive other vehicles owned by appellant. State Farm Fire & Cas. Co. v Sajewski, 150 A.D.3d 1297, 56 N.Y.S.3d 204, 2017 N.Y. App. Div. LEXIS 4239 (N.Y. App. Div. 2d Dep't 2017).

In action brought by motorist seeking recovery for hit-and-run accident allegedly caused by motor vehicle owned by defendant, defendant, which was shown by fair preponderance of the evidence to be owner of vehicle, and which offered no proof that driver of automobile was not an employee or that if he was an employee he had no permission to drive vehicle on day of accident, failed to rebut presumption of permissive use, and was liable to plaintiff. Mihelis v Trend Service Corp., 89 Misc. 2d 220, 391 N.Y.S.2d 63, 1977 N.Y. Misc. LEXIS 1861 (N.Y. Civ. Ct. 1977).

A concession of ownership, by an employer, of an automobile being driven by his employee at the time of an accident, creates a presumption that the employee was engaged in the employer's service or was using the car with the employer's permission, which presumption continues until there is substantial evidence to the contrary. Healy v Moss, 104 N.Y.S.2d 694, 1951 N.Y. Misc. LEXIS 1802 (N.Y. Sup. Ct. 1951), aff'd, 279 A.D. 926, 111 N.Y.S.2d 762, 1952 N.Y. App. Div. LEXIS 5332 (N.Y. App. Div. 1952).

Trial court properly denied an owner's motion for summary judgment because the owner's testimony that his car was operated without his permission, by itself, did not overcome the presumption of permissive use in N.Y. Veh. & Traf. Law § 388(1), and the owner failed to show that the other driver's failure to yield the right-of-way was the sole proximate cause of the accident. Vinueza v Tarar, 100 A.D.3d 742, 954 N.Y.S.2d 160, 2012 N.Y. App. Div. LEXIS 7627 (N.Y. App. Div. 2d Dep't 2012).

37. —Presumption rebuttable

Under this section the owner of a motor vehicle is presumptively responsible for the manner in which it is driven even though it appears that it was not being used in his service or for his business. The presumption of such responsibility disappears, however, where it is shown that no permission was given. St. Andrassy v Mooney, 262 N.Y. 368, 186 N.E. 867, 262 N.Y. (N.Y.S.) 368, 1933 N.Y. LEXIS 957 (N.Y. 1933).

Presumption that the driver was using the vehicle with the defendant's permission was not rebutted as a matter of law by the testimony of the defendant owner that he had given the car to the mechanic for repair work to correct a difficulty in starting the engine and that he had not given the mechanic permission to drive the car, and this issue should have been submitted to the jury. Reyes v Sternberg, 27 A.D.2d 828, 278 N.Y.S.2d 167, 1967 N.Y. App. Div. LEXIS 4577 (N.Y. App. Div. 1st Dep't 1967).

Testimony by owner's representative that he did not give driver permission to use automobile at time of accident did not as matter of law rebut presumption of permissive use. Ryder v Cue Car Rental, Inc., 32 A.D.2d 143, 302 N.Y.S.2d 17, 1969 N.Y. App. Div. LEXIS 3978 (N.Y. App. Div. 4th Dep't 1969).

Proof of ownership creates a presumption that the vehicle was used with the consent of the owner, but such presumption is rebuttable. Kenneth v Gardner, 36 A.D.2d 575, 317 N.Y.S.2d 798, 1971 N.Y. App. Div. LEXIS 4961 (N.Y. App. Div. 4th Dep't 1971).

Proof of ownership of automobile creates a rebuttable presumption of its use with permission of owner, express or implied. Peemoller v Viscarra, 36 A.D.2d 971, 321 N.Y.S.2d 809, 1971 N.Y. App. Div. LEXIS 4072 (N.Y. App. Div. 2d Dep't 1971).

In action for injuries sustained when rental van owned by defendant struck pedestrian, presumption of permissive use was not rebutted where (1) van was rented by codefendant on behalf of his employer, (2) codefendant and fellow employee were using van at time of accident after becoming intoxicated at bar, (3) shortly after accident, principal of employer reported van as stolen, (4) principal testified that he probably locked keys to van in cash register, but did not recall if keys were in register at time he reported van to be stolen, and (5) it was unclear whether codefendant or fellow employee was driving van at time of accident and whether ignition had been hot-wired. McCollum v U-Haul Int'l Corp., 204 A.D.2d 56, 611 N.Y.S.2d 522, 1994 N.Y. App. Div. LEXIS 4605 (N.Y. App. Div. 1st Dep't), app. dismissed, 84 N.Y.2d 850, 617 N.Y.S.2d 139, 641 N.E.2d 160, 1994 N.Y. LEXIS 2680 (N.Y. 1994).

Testimony of lessor of rented vehicle, that her 19-year-old daughter had stolen vehicle and was driving it without permission when it hit pedestrian, failed to rebut presumption that vehicle was being operated with lessor's consent, and thus defendant rental company and vehicle lessor were not entitled to summary judgment on ground that neither of them could be held liable to pedestrian under CLS Veh & Tr § 388 as matter of law. Roness v Hertz Corp. (Canada), 283 A.D.2d 416, 724 N.Y.S.2d 195, 2001 N.Y. App. Div. LEXIS 4687 (N.Y. App. Div. 2d Dep't 2001).

Because an employee failed to sufficiently rebut the strong presumption in N.Y. Veh. & Traf. Law § 388 that a child was operating the employee's work vehicle with the permission, neither the employee nor the employer was entitled to judgment as a matter of law in an insurer's action to recover insurance benefits allegedly paid to it insureds. Amex Assur. Co. v Kulka, 67 A.D.3d 614, 888 N.Y.S.2d 577, 2009 N.Y. App. Div. LEXIS 7824 (N.Y. App. Div. 2d Dep't 2009).

The ownership of an automobile by a corporate defendant created a presumption under this section that it was being used at the time of the accident with defendant's permission, and it was for the jury to decide whether to credit salesman's testimony which, if believed, would destroy the presumption and exonerate the corporate defendant from liability. Aarons v Standard Varnish Works, 296 N.Y.S. 312, 163 Misc. 84, 1937 N.Y. Misc. LEXIS 1282

(N.Y. Sup. Ct. 1937), aff'd, 254 A.D. 560, 3 N.Y.S.2d 910, 1938 N.Y. App. Div. LEXIS 6559 (N.Y. App. Div. 1938).

Under provision of Vehicle and Traffic Law that every owner of a vehicle used or operated in state shall be liable and responsible for death or injuries to person or property resulting from negligence in use or operation of such vehicle, proof of ownership of vehicle creates a rebuttable presumption that driver was using vehicle with owner's permission, express or implied, and presumption continues until there is substantial evidence to contrary. Banner Casualty Co. v Lazar, 81 Misc. 2d 360, 366 N.Y.S.2d 314, 1975 N.Y. Misc. LEXIS 2389 (N.Y. Sup. Ct. 1975).

Because a repairman, an employee, and the passengers used the owner's vehicle, without the owner's express or implied permission, to drive to a dealership to pick up a part for the passengers' vehicle, despite the presumption of consent in N.Y. Veh. & Traf. Law § 388(1), the owner established a prima facie entitlement to summary judgment. Padilla v Felson, 28 A.D.3d 530, 813 N.Y.S.2d 744, 2006 N.Y. App. Div. LEXIS 4371 (N.Y. App. Div. 2d Dep't 2006).

38. — —Substantial or undisputed evidence

Vehicle and Traffic Law § 388 creates a presumption that the driver was using the vehicle with the owner's permission, express or implied; although the presumption is rebuttable, it is a continuing presumption and can be rolled back only by substantial evidence to the contrary. Rivera v W. & R. Service Station, Inc., 34 A.D.2d 115, 309 N.Y.S.2d 274, 1970 N.Y. App. Div. LEXIS 5146 (N.Y. App. Div. 1st Dep't 1970).

Statutory presumption that truck was operated with its owner's knowledge and consent at time of automobile-truck collision was rebutted by evidence presented, in automobile passengers' personal injury action, by truck owner showing that truck had been rented to individual for one-day use, that lessee failed to return vehicle, that owner's attempts to secure return of truck were unsuccessful, that truck owner filed complaint with police listing truck as missing and that accident occurred five days after filing of complaint. Speller v Ryder Truck Rental, Inc., 47 A.D.2d 608, 363 N.Y.S.2d 823, 1975 N.Y. App. Div. LEXIS 8744 (N.Y. App. Div. 1st Dep't 1975).

Strong presumption of owner's consent arises from use or operation of motor vehicle, and that presumption continues until there is substantial evidence to contrary; no factual issue existed with respect to whether vehicle was being operated with consent of owner where person operating vehicle was convicted and sentenced for crime of grand larceny in connection with taking of car. Gee v Gee, 113 A.D.2d 736, 493 N.Y.S.2d 202, 1985 N.Y. App. Div. LEXIS 52433 (N.Y. App. Div. 2d Dep't 1985).

Vehicle owner rebutted presumption of permissive use under CLS Veh & Tr § 388(1) by showing that vehicle in question was rented under false pretenses by woman who failed to return vehicle on expiration of term of rental agreement. Molina v NYRAC, Inc., 228 A.D.2d 655, 645 N.Y.S.2d 819, 1996 N.Y. App. Div. LEXIS 7435 (N.Y. App. Div. 2d Dep't 1996).

Defendant rebutted presumption that his daughter's boyfriend had been driving defendant's vehicle with his consent where uncontroverted evidence established that defendant had explicitly told boyfriend that he was not permitted to drive defendant's vehicle and that defendant's daughter let boyfriend drive car after she arrived at his home on date of accident. Jimenez v Regan, 248 A.D.2d 510, 669 N.Y.S.2d 968, 1998 N.Y. App. Div. LEXIS 2574 (N.Y. App. Div. 2d Dep't 1998).

Trial court properly denied a driver's motions for a declaratory judgment and to dismiss a vehicle owner's affirmative defenses and cross-claims because the evidence submitted by the owner, and, in particular, its submission of an extract of the driver's license record provided substantial evidence to rebut the presumption that he was a permissive user of the vehicle that was loaned to his wife at the time of his accident. Staropoli v Agrelopo, LLC, 136 A.D.3d 791, 24 N.Y.S.3d 722, 2016 N.Y. App. Div. LEXIS 974 (N.Y. App. Div. 2d Dep't 2016).

Trial court properly determined that an injured driver and passenger demonstrated that they had a valid uninsured motorist claim against the vehicle's insurer, denied the insurer's petition to permanently stay arbitration, and dismissed the proceeding because the record established that the statutory presumption of permissive use was overcome by substantial evidence where the owner of the car that hit the insured vehicle had given her vehicle and keys to a repair person, whose garage was in Pennsylvania, for the limited purpose of repairing the vehicle, and she had not given permission to anyone else to use her vehicle. Matter of Allstate Ins. Co. v Jae Kan Shim, 185 A.D.3d 919, 128 N.Y.S.3d 49, 2020 N.Y. App. Div. LEXIS 4250 (N.Y. App. Div. 2d Dep't 2020).

An owner's consent to allow another to operate his automobile is a presumption often derived from the mere ownership, but the presumption is rebuttable, and it disappears where upon all the evidence it appears that no permission was given. Houlihan v Selengut, 25 N.Y.S.2d 371, 175 Misc. 854, 1941 N.Y. Misc. LEXIS 1455 (N.Y. Sup. Ct.), rev'd, 263 A.D. 811, 31 N.Y.S.2d 560, 1941 N.Y. App. Div. LEXIS 5092 (N.Y. App. Div. 1941).

Evidence that city's truck was being operated by one not authorized to drive it at time of accident nullified statutory presumption that it was being operated with city's permission, so as to preclude recovery of resulting damages from city, in absence of proof that such unauthorized assumption of control over truck resulted from negligent conduct of city's employees. Nickens v New York, 71 N.Y.S.2d 877, 1947 N.Y. Misc. LEXIS 2666 (N.Y. App. Term 1947).

Even if an employee had consented to her boyfriend's use of a company van, an employee handbook explicitly restricted its use and rebutted the presumption of the lessee's liability; however, whether the lessors constructively consented to the boyfriend's use of the van depended not on the employee handbook restrictions, but on the boyfriend's status as either a thief or a permissive user. Murdza v Zimmerman, 99 N.Y.2d 375, 756 N.Y.S.2d 505, 786 N.E.2d 440, 2003 N.Y. LEXIS 162 (N.Y. 2003).

Court certified five questions to the New York Court of Appeals regarding the operation and effect of N.Y. Veh. & Traf. Law § 388(1); certification of the questions was appropriate because it was not clear that the Second Circuits prior holding, that a case should go to the trier of fact even if a vehicle owner presented evidence to rebut the presumption of permissive use created under the statute, was still good law. More recent decisions by the New York courts had indicated that summary judgment or dismissal as a matter of law could be entered, despite § 388(1), if the owner of a vehicle presented uncontradicted evidence that a driver did not have permission to use its vehicle, and there was no competent evidence from which permission or authority could be inferred, Country Wide Ins. Co. v Amtrak, 407 F.3d 84, 2005 U.S. App. LEXIS 7337 (2d Cir. N.Y. 2005).

Rental car company came forward with substantial and undisputed evidence rebutting statutory presumption of consensual use, and thus was not liable for plaintiff's injuries, where there was no evidence to discredit its showing that its service agent who was involved in accident with plaintiff was driving rental car in violation of company policy restricting use of rental vehicles by employees. Buckingham v Rapid Rental, 3 F. Supp. 2d 479, 1998 U.S. Dist. LEXIS 6766 (S.D.N.Y. 1998).

39. Restrictive permission

The former analogous section did not change the rule that a master is not liable for the acts of his servant unless acting within the scope of his employment. The defendant should have been permitted to prove that the chauffeur, in inviting plaintiffs to ride with him, was acting contrary to her instructions. Grant v Knepper, 245 N.Y. 158, 156 N.E. 650, 245 N.Y. (N.Y.S.) 158, 1927 N.Y. LEXIS 604 (N.Y. 1927).

This section may not be construed to include a case where injuries are caused by a person who, at the time of accident, was using a motor vehicle unlawfully, without permission of owner and even contrary to his orders, merely because owner had given the person operating the vehicle permission to use it for another purpose at another place. Chaika v Vandenberg, 252 N.Y. 101, 169 N.E. 103, 252 N.Y. (N.Y.S.) 101, 1929 N.Y. LEXIS 531 (N.Y. 1929).

An owner was not liable when the use was beyond the limited consent. Thompson v Morgan, 224 A.D. 691, 228 N.Y.S. 670, 1928 N.Y. App. Div. LEXIS 10387 (N.Y. App. Div. 1928).

Proof of the ownership of a motor vehicle creates a rebuttable presumption that the driver was using the vehicle with the owner's permission, express or implied, and this presumption continues until there is substantial evidence to the contrary. If the owner restricts the use of the vehicle when in the hands of another, and the restriction is violated, the vehicle is driven without the owner's permission; and where the owner of a car had requested the driver to take her automobile to pick up a pizza and to "bring it right back", the driver's conduct in going for a ride while waiting for the pizza to be prepared was not such a deviation from the permission granted that would relieve the owner from responsibility of the driver's negligent conduct. De Lancey v Nationwide Ins. Co., 26 A.D.2d 631, 272 N.Y.S.2d 468, 1966 N.Y. App. Div. LEXIS 3661 (N.Y. App. Div. 2d Dep't 1966), aff'd, 20 N.Y.2d 807, 284 N.Y.S.2d 701, 231 N.E.2d 288, 1967 N.Y. LEXIS 1179 (N.Y. 1967).

New York statutes imposing a showing of financial responsibility as a condition to registration and operation of motor vehicles expresses a strong public policy that a person injured by the negligence of a driver should have recourse to a defendant able to respond in damages; thus, renters of automobiles may not enforce restrictions on the use of the automobiles by the lessee and thereby escape liability to a third person on the ground that the violation of the restriction removed the statutory element of consent. Allstate Ins. Co. v Dailey, 47 A.D.2d 375, 367 N.Y.S.2d 87, 1975 N.Y. App. Div. LEXIS 9249 (N.Y. App. Div. 2d Dep't 1975), aff'd, 39 N.Y.2d 759, 384 N.Y.S.2d 776, 349 N.E.2d 876, 1976 N.Y. LEXIS 2702 (N.Y. 1976).

Statutory presumption that automobile owned by insured mother was operated by son with mother's implied permission at time of automobile collision was not rebutted, even though there was evidence suggesting that son's permission had been limited, where automobile was purchased for son's use, son was given keys and possession of automobile, and son was told on day before accident that all insurance forms had been completed. Phoenix v Bolton, 59 A.D.2d 464, 399 N.Y.S.2d 914, 1977 N.Y. App. Div. LEXIS 13949 (N.Y. App. Div. 3d Dep't 1977), app. denied, 44 N.Y.2d 641, 1978 N.Y. LEXIS 4238 (N.Y. 1978).

An owner who has contracted with an auto transporter which in turn contracted with a driver for the delivery of a vehicle is not unlike a lessor of the vehicle and public policy requires that any restriction in use be clearly and unequivocally established so as to limit the permission granted and avoid liability. Carey v AAA Con Transport, Inc., 61 A.D.2d 113, 401 N.Y.S.2d 1015, 1978 N.Y. App. Div. LEXIS 9710 (N.Y. App. Div. 3d Dep't 1978).

In granting permission for use of automobile, owner may limit its use to specified area or purpose and any use outside scope of permission negates owner's liability under section; proof of limitation of permission for use of automobile may serve to rebut presumption of consent. Walls v Zuvic, 113 A.D.2d 936, 493 N.Y.S.2d 628, 1985 N.Y. App. Div. LEXIS 52557 (N.Y. App. Div. 2d Dep't 1985), app. denied, 67 N.Y.2d 602, 499 N.Y.S.2d 1028, 490 N.E.2d 557, 1986 N.Y. LEXIS 16716 (N.Y. 1986).

Owner of vehicle involved in accident while driven by codefendant was entitled to summary judgment dismissing personal injury action against owner where presumption of permission under CLS Veh & Tr § 388(1) was rebutted by substantial evidence that, at time of accident, codefendant was driving vehicle in place and for purpose that exceeded terms of owner's consent. Naidu v Harwin, 281 A.D.2d 525, 721 N.Y.S.2d 826, 2001 N.Y. App. Div. LEXIS 2560 (N.Y. App. Div. 2d Dep't 2001).

The negligence of a driver of defendant's car colliding with a child's bicycle and injuring the child on the highway is imputable to the owner of the car in absence of definite proof of violation of restrictive permission given the driver to use the vehicle. Paul v Ulrich, 79 N.Y.S.2d 758, 191 Misc. 838, 1948 N.Y. Misc. LEXIS 2465 (N.Y. City Ct. 1948).

Where the owner's permission to use his car is for a specific purpose and a limited time only, he is not responsible for damage caused by negligence of the operator using the car for other purposes or after the time has expired. O'Toole v United States, 284 F.2d 792, 1960 U.S. App. LEXIS 3145 (2d Cir. N.Y. 1960), cert. denied, 366 U.S. 927, 81 S. Ct. 1648, 6 L. Ed. 2d 387, 1961 U.S. LEXIS 1121 (U.S. 1961).

40. —Area or route restriction

In wrongful death action, judgment in favor of plaintiff in amount of $1,750,000 reversed and new trial granted on issue of damages, unless plaintiff stipulates to reduce verdict to principal sum of $500,000–record supports jury finding of liability of defendant under Vehicle and Traffic Law § 128; court's charge on this issue and other theory of liability, viz., failure of defendant to inspect and maintain trailer in question, was neither so confusing nor erroneous that new trial as to liability is warranted; defendant failed to object at any time to submission of jury sheet, and hence any complaints concerning it are unpreserved for appellate review–codefendant is not entitled to contribution from third-party defendants; intent of Vehicle and Traffic Law § 388 was to benefit injured parties by broadening base of liability in order to provide greater likelihood of recovery; it was not intended to be used as codefendant, which is not injured party, seeks to use it here; additionally, jury found that third-party defendants had not been negligent, depriving codefendant of that basis for contribution–verdict was excessive. Rodriguez v Yosi Trucking, 151 A.D.2d 556, 542 N.Y.S.2d 335, 1989 N.Y. App. Div. LEXIS 7895 (N.Y. App. Div. 2d Dep't 1989).

Plaintiff was injured while dismantling light standard attached to concrete base; it was necessary to remove base before it could be prepared for loading on third-party defendant's truck; as base was being removed from standard on private property, standard fell, injuring plaintiff; defendant who assisted in removal of base, served third-party complaint upon third- party defendant, who owned truck plaintiff drove to premises and in which standard was to be transported; third-party defendant moved for summary judgment dismissing third-party complaint; defendant argues third-party defendant, as owner of truck, was responsible under Vehicle and Traffic Law § 388 (1) for any negligence in removal of concrete base from standard because such removal constituted use and operation of vehicle, which occurred during "complete operation" of loading–"complete operation" doctrine does not extend to acts in preparation for loading, such as crating goods for shipment, or, as here, dismantling goods before transporting them to vehicle. Frontuto v Ray Burgun Trucking Co., 168 A.D.2d 914, 564 N.Y.S.2d 882, 1990 N.Y. App. Div. LEXIS 16439 (N.Y. App. Div. 4th Dep't 1990), aff'd, 78 N.Y.2d 938, 573 N.Y.S.2d 634, 578 N.E.2d 432, 1991 N.Y. LEXIS 1006 (N.Y. 1991).

A bill of lading agreement which, upon its face, simply represents that the owner of a motor vehicle is engaging a transporter to convey her car from New Jersey to Florida, that the actual conveyance will be done by a "driver" of the automobile who is to be an "independent contractor" and that the vehicle will be in the possession of the transporter and/or driver for a certain specified period, does not as a matter of law establish that permission to use the vehicle was restricted to transportation by the most direct route from New Jersey to Florida. Carey v AAA Con Transport, Inc., 61 A.D.2d 113, 401 N.Y.S.2d 1015, 1978 N.Y. App. Div. LEXIS 9710 (N.Y. App. Div. 3d Dep't 1978).

A restriction as to damages contained in an agreement between an auto transporter and a driver who agreed to drive the owner's car from New Jersey to Florida, pursuant to which agreement the driver guaranteed "that in the event that I detour from the most direct route or delay in the delivery of this vehicle from the agreed due date on the bill of lading that I will be liable for damages", is insufficient to find that the owner had limited permission solely to travel to Florida from New Jersey. Carey v AAA Con Transport, Inc., 61 A.D.2d 113, 401 N.Y.S.2d 1015, 1978 N.Y. App. Div. LEXIS 9710 (N.Y. App. Div. 3d Dep't 1978).

Enforcement of clause in car rental agreement, purporting to prohibit use of rental car in New York, was precluded on public policy grounds as "unreasonable and unrealistic" in that defendant lessor knew or should have known of great likelihood that car rented in Massachusetts would be driven to neighboring New York; thus, lessor of car was not entitled to summary judgment absolving it of responsibility under CLS Veh & Tr § 388. Brown v Agency Rent-A-Car, 234 A.D.2d 82, 650 N.Y.S.2d 220, 1996 N.Y. App. Div. LEXIS 12395 (N.Y. App. Div. 1st Dep't 1996).

The presumption that the operator of an automobile was using the car with the owner's permission was overcome when the evidence showed that permission was given only for use in a

particular territory and the borrower used the car outside that territory. Lozada v Copeland, 138 N.Y.S.2d 521, 207 Misc. 382, 1955 N.Y. Misc. LEXIS 2637 (N.Y. Sup. Ct. 1955).

While an owner may restrict the use of his automobile to a particular locality and so escape liability for its unlawful use outside the permitted area, he may not restrict the manner of its operation and so escape liability if the driving mandate is violated to the injury of another. Goschar v Bauer, 13 N.Y.S.2d 328, 1939 N.Y. Misc. LEXIS 2026 (N.Y. City Ct. 1939).

41. —Use restriction

An owner in loaning his automobile may reasonably restrict the uses to which it may be put; consequently, its employment for a proscribed purpose cannot be a permitted use. On the other hand, if limiting instructions relate to the manner of operation, such as speeding or careless pilotage of car, though instructions be disobeyed, nevertheless use is with "permission" of the owner. Arcara v Moresse, 258 N.Y. 211, 179 N.E. 389, 258 N.Y. (N.Y.S.) 211, 1932 N.Y. LEXIS 1173 (N.Y. 1932).

The owner of an automobile may restrict its use by another to a specified purpose, in which case, any other use of the vehicle must be deemed to be without the owner's consent. Harper v Parker, 12 A.D.2d 327, 211 N.Y.S.2d 325, 1961 N.Y. App. Div. LEXIS 12393 (N.Y. App. Div. 1st Dep't 1961), aff'd, 11 N.Y.2d 1095, 230 N.Y.S.2d 719, 184 N.E.2d 310, 1962 N.Y. LEXIS 1052 (N.Y. 1962).

Where presumption that operator was operating tractor trailer with permission of trailer owner and tractor lessee was overcome by uncontradicted proof that operator was carrying passenger in violation of company regulations, at time of accident operator was operating tractor trailer beyond scope of permission which had been given, and therefore owner lessee was not liable for injuries to passenger resulting from operator's alleged negligence in connection with collision of tractor trailer with bridge abutment. Capalario v Murray, 52 A.D.2d 1037, 384 N.Y.S.2d 579, 1976 N.Y. App. Div. LEXIS 12945 (N.Y. App. Div. 4th Dep't 1976).

A company was properly held not to be responsible for the negligence of the driver of a van owned by it, where the driver was the half brother of the company's employee to whom the van had been entrusted, the accident occurred while the driver was delivering a bed to the home of his parents, and both the employee and representatives of the company testified that the employee had been instructed that the van was not to be driven for anything but company purposes. Morris v Palmier Oil Co., 94 A.D.2d 911, 463 N.Y.S.2d 631, 1983 N.Y. App. Div. LEXIS 18361 (N.Y. App. Div. 3d Dep't 1983).

Provision in rental car lease prohibiting use of rented car as a public conveyance was reasonable and realistic; the provision's breach by the lessee by using the car as a gypsy cab precluded vicarious liability of the lessor for injuries sustained when the rented car was involved in an accident. Hannibal v Kimbeni, 289 A.D.2d 446, 735 N.Y.S.2d 567, 2001 N.Y. App. Div. LEXIS 12931 (N.Y. App. Div. 2d Dep't 2001).

Operator of vehicle who had been given keys by owner with explicit instructions to wash car in area of owner's business but never to operate vehicle cannot be deemed to have been operating vehicle with owner's consent for purposes of imputing negligence to owner under CLS Veh & Tra § 388(1) when he drove car in violation of owner's explicit instructions to contrary and became involved in collision with another vehicle, since proof of stringent restriction placed on driver by owner, coupled with driver's blatant disregard of such restriction, is sufficient to rebut statutory presumption of permissive use; fact that owner provided driver with access to car is insufficient to establish permissive use since owner's conduct was reasonable in view of 8-year course of dealing with driver during which time driver never violated owner's instructions. Clarke v Longo, 132 Misc. 2d 39, 503 N.Y.S.2d 219, 1986 N.Y. Misc. LEXIS 2633 (N.Y. Sup. Ct. 1986).

Where the owner's permission to use his car is for a specific purpose and a limited time only, he is not responsible for damage caused by negligence of the operator using the car for other purposes or after the time has expired. O'Toole v United States, 284 F.2d 792, 1960 U.S. App. LEXIS 3145 (2d Cir. N.Y. 1960), cert. denied, 366 U.S. 927, 81 S. Ct. 1648, 6 L. Ed. 2d 387, 1961 U.S. LEXIS 1121 (U.S. 1961).

Summary judgment for the United States was proper either under Vehicle and Traffic Law § 388 or the Tort Claims Act in an action arising when a government employee driving a government car collided with plaintiffs while attending his uncle's funeral in the Bronx, after obtaining the car from a government pool for an authorized business trip to upstate New York upon certification that he would use it only on official business. Tomack v United States, 369 F.2d 350, 1966 U.S. App. LEXIS 4242 (2d Cir. N.Y. 1966).

42. —Restriction on who may drive

Where a defendant loaned his car to his nephew for the latter's personal use, instructing him not to let any person other than himself operate the vehicle, and that at time of accident the nephew was in the car but it was being driven, with his permission, by a friend who was negligent, recoveries were authorized under this section even though nephew was not guilty of negligence except as the acts and omissions of driver were his. Arcara v Moresse, 258 N.Y. 211, 179 N.E. 389, 258 N.Y. (N.Y.S.) 211, 1932 N.Y. LEXIS 1173 (N.Y. 1932).

Restrictions sought to be imposed by insurer of lessor of automobile so as to exclude coverage for driver who was not a permitted user under terms of lease agreement violated public policy of the state. Motor Vehicle Accident Indemnification Corp. v Cont'l Nat'l Am. Group Co., 35 N.Y.2d 260, 360 N.Y.S.2d 859, 319 N.E.2d 182, 1974 N.Y. LEXIS 1294 (N.Y. 1974).

Even though automobile lease agreement provided that vehicle would be driven by lessee or an adult member of his immediate family and that lessee would not surrender use of vehicle to any other person without first obtaining lessor's consent, lessor gave constructive consent to driver who was not the permitted user under the lease agreement but who had permission of lessee to operate the vehicle, and driver was operating the vehicle with the constructive consent of lessor and with the "permission" envisioned by financial responsibility statute at time of accident and driver was insured under policy issued to lessor. Motor Vehicle Accident Indemnification Corp. v Cont'l Nat'l Am. Group Co., 35 N.Y.2d 260, 360 N.Y.S.2d 859, 319 N.E.2d 182, 1974 N.Y. LEXIS 1294 (N.Y. 1974).

Statute providing that owner of motor vehicle shall be liable for death resulting from negligence in operation of vehicle in business of owner or otherwise by any person legally using or operating vehicle with permission, express or implied, of owner, was not intended to render owner of vehicle responsible for injuries of owner's permittee, where permittee has automobile for his own pleasure, takes a guest into automobile without owner's knowledge, permits guest to drive, and is injured by negligent driving of guest. Billy v Zajac, 7 A.D.2d 729, 180 N.Y.S.2d 809, 1958 N.Y. App. Div. LEXIS 4103 (N.Y. App. Div. 2d Dep't 1958), amended, 7 A.D.2d 929, 183 N.Y.S.2d 1008, 1959 N.Y. App. Div. LEXIS 9859 (N.Y. App. Div. 2d Dep't 1959).

In action for injuries sustained in car accident, court properly dismissed complaint against car's previous owner who had authorized purchaser of car to drive with his plates and insurance prior to transfer of title, where accident occurred while purchaser's cousin was driving car and sales agreement expressly withheld consent to drive from all but purchaser, thus rebutting presumption of permissive driving under CLS Veh & Tr § 388. Rooney v Myers, 132 A.D.2d 839, 517 N.Y.S.2d 627, 1987 N.Y. App. Div. LEXIS 49326 (N.Y. App. Div. 3d Dep't), app. denied, 70 N.Y.2d 612, 523 N.Y.S.2d 496, 518 N.E.2d 7, 1987 N.Y. LEXIS 19030 (N.Y. 1987).

In action for injuries sustained by minor plaintiff in crash of car in which she was riding, jury's finding that defendant owner of car was liable under CLS Veh & Tr 388(1) based on having permitted driver to use vehicle was not unreasonable, since proof of ownership of vehicle created rebuttable presumption that driver was using it with owner's permission, and while defendant gave express permission to use vehicle only to his son, there was testimony that son may have in turn given driver permission to use vehicle, resulting in defendant's failure to have rebutted statutory presumption. Schrader v Carney, 180 A.D.2d 200, 586

N.Y.S.2d 687, 1992 N.Y. App. Div. LEXIS 8206 (N.Y. App. Div. 4th Dep't 1992).

42.5. Rented or leased vehicles; tractor-trailers

Motorcycle passenger was entitled to summary judgment as to the liability of the employer of the driver of a van the motorcycle collided with because the passenger showed (1) the employer leased the van for more than 30 days, so the employer "owned" the van, and (2) the driver operated the van in the course of the driver's employment. Jung v Glover, 169 A.D.3d 782, 93 N.Y.S.3d 390, 2019 N.Y. App. Div. LEXIS 1116 (N.Y. App. Div. 2d Dep't 2019).

Intermodal chassis lessees were not vicariously liable for a tractor-trailer's driver's negligence as for more than 30 days before the accident, they did not have exclusive control of the chassis, which was rented to another company, and they were not statutory owners of the chassis. 131 A.D.3d 1198, 17 N.Y.S.3d 457, 2015 N.Y. App. Div. LEXIS 6935.

43. Respondeat superior

In an action to recover for personal injuries alleged to have been sustained by plaintiff through his being struck by a motor car, a finding by the jury that defendant permitted use of the vehicle in its business does not warrant a direction of judgment against it, where the jury also found that it did not own the vehicle and that the driver was not in its employ. Liability may not be predicated merely upon use of the car in such defendant's business by the servant of another. There must be established some relationship of respondeat superior. Brown v S.S. Terminal Operating Corp., 267 N.Y. 83, 195 N.E. 692, 267 N.Y. (N.Y.S.) 83, 1935 N.Y. LEXIS 1190 (N.Y. 1935).

The liability of the owner of a motor vehicle under this section is derivative and akin to that imposed on a master for negligent acts of his servant under the doctrine of respondeat superior. Liability on the part of an owner can arise only if the operator of the automobile is negligent. Good Health Dairy Products Corp. v Emery, 275 N.Y. 14, 9 N.E.2d 758, 275 N.Y. (N.Y.S.) 14, 1937 N.Y. LEXIS 1393 (N.Y. 1937).

Under applicable common law, owner would not be held liable for his wife's negligent operation of vehicle during pleasure trip, in absence of proof that she was his agent, acting within the scope of her employment, or of a master and servant relationship. Selles v Smith, 5 A.D.2d 677, 168 N.Y.S.2d 363, 1957 N.Y. App. Div. LEXIS 3796 (N.Y. App. Div. 2d Dep't 1957), rev'd, 4 N.Y.2d 412, 176 N.Y.S.2d 267, 151 N.E.2d 838, 1958 N.Y. LEXIS 851 (N.Y. 1958).

The driver and owner of an automobile were held liable for injuries to plaintiffs in an accident, where the owner impliedly if not expressly had authorized an intermediary to deliver the automobile to the driver as an independent contractor for repair work on the car and the driver then negligently caused the accident; the intermediary was absolved of liability where he had no ownership interest in the car and the driver was in no way the intermediary's employee under its control at the time of the accident. Wilson v Williams, 37 A.D.2d 781, 325 N.Y.S.2d 349, 1971 N.Y. App. Div. LEXIS 3413 (N.Y. App. Div. 2d Dep't 1971), aff'd, 30 N.Y.2d 848, 335 N.Y.S.2d 90, 286 N.E.2d 472, 1972 N.Y. LEXIS 1251 (N.Y. 1972).

In wrongful death and personal injury actions arising out of a head-on collision which occurred in the early hours of the morning, when a car being operated by a salesman, and owned by his wife, entered the westbound side of a highway, traveled easterly on that side, and struck a westbound car, the trial court erred when it submitted to the jury the issue of whether the salesman's employers were liable to the plaintiffs on the theory of respondeat superior, since the evidence established that, at the time of the accident, the task of the salesman was purely personal in nature, and, therefore, the risk itself personal, and not a scintilla of evidence was adduced which would indicate that he was then acting on behalf of his employers. Nero v Ris Paper Co., 60 A.D.2d 340, 400 N.Y.S.2d 825, 1978 N.Y. App. Div. LEXIS 9679 (N.Y. App. Div. 1st Dep't 1978), aff'd, 46 N.Y.2d 967, 415 N.Y.S.2d 828, 389 N.E.2d 141, 1979 N.Y. LEXIS 1886 (N.Y. 1979).

Defendant, alleged to be employer of driver of truck which struck and killed plaintiff's decedent, was entitled to summary judgment despite driver's cross-claim against defendant, and plaintiff's uncontested allegation that defendant's advertising was placed on side of truck, where driver testified at deposition that he had been self-employed as sole proprietor for 19 years, and that he received neither payment nor salary from defendant, but rather purchased defendant's products from independent distributor who delivered product to driver's warehouse, and defendant's affidavit stated that driver had never been employee and had no contract with it. Conroy v Bevilacqua, 179 A.D.2d 596, 579 N.Y.S.2d 655, 1992 N.Y. App. Div. LEXIS 854 (N.Y. App. Div. 1st Dep't 1992).

Liability insurers of partnership could not be held liable for judgment arising from rental car accident in which driver of car was son of partner, although partner had used partnership credit card to rent car, since son's use of car was not for carrying on of business pursuant to CLS Partn law § 20, and policies covered only partnership's use of vehicle and liabilities imposed on partnership by law or contract. Lanera v Hertz Corp., 180 A.D.2d 667, 579 N.Y.S.2d 720, 1992 N.Y. App. Div. LEXIS 1461 (N.Y. App. Div. 2d Dep't 1992).

Defendant messenger company was not entitled to summary judgment in action arising from accident in which pedestrian was struck by van that was owned and operated by individual defendant, notwithstanding that contract between individual and messenger service stated that individual was independent contractor, since there was triable issue of fact as to whether individual was agent of messenger service where (1) individual worked exclusively for messenger service from about 9:00 a.m. until 5:00 p.m. Monday through Friday (and accident occurred at about 9:00 a.m. on weekday), (2) individual carried beeper so as to be on moment's notice, (3) messenger service paid workers' compensation benefits for individual, (4) individual had not filed any documents with any governmental entity to indicate that he was sole proprietor, (5) individual was obligated to file accident report with messenger service, and (6) messenger service issued payroll check cashing card to individual. Carrion v Orbit Messenger, 192 A.D.2d 366, 596 N.Y.S.2d 50, 1993 N.Y. App. Div. LEXIS 3697 (N.Y. App. Div. 1st Dep't), aff'd, 82 N.Y.2d 742, 602 N.Y.S.2d 325, 621 N.E.2d 692, 1993 N.Y. LEXIS 3050 (N.Y. 1993).

In action against employers of allegedly negligent driver on respondeat superior theory that driver was operating his vehicle in course of his employment, employers were entitled to summary judgment where they had not directed driver's activities for at least 2 hours before accident. James v Le Feber, 275 A.D.2d 973, 715 N.Y.S.2d 193, 2000 N.Y. App. Div. LEXIS 9508 (N.Y. App. Div. 4th Dep't 2000).

Employer failed to establish its entitlement to summary judgment in a driver's claim under this statute, which alleged that the employer was vicariously liable for the employee's negligent operation of its van, because triable issues of fact existed as to whether the employee's use or operation of the van was negligent and whether the employee's allegedly improper driving was a proximate cause of the driver's injuries. Gray v Air Excel Serv. Corp., 171 A.D.3d 1026, 98 N.Y.S.3d 259, 2019 N.Y. App. Div. LEXIS 2868 (N.Y. App. Div. 2d Dep't 2019).

Where the defendant's son was legally using defendant's automobile with express permission of defendant it was held that the son, in its operation, was an agent of defendant, within the meaning of the former analogous section, and this being so the son's negligence, if any, was attributable to the defendant. Amann v Thurston, 231 N.Y.S. 657, 133 Misc. 293, 1928 N.Y. Misc. LEXIS 1161 (N.Y. Sup. Ct.), aff'd, 224 A.D. 874, 230 N.Y.S. 794, 1928 N.Y. App. Div. LEXIS 12198 (N.Y. App. Div. 1928).

In action against owner of truck which collided with trolley car, based on owner's derivative liability for negligence of truck driver, who was a co-employee of plaintiffs who were riding in the truck and were engaged in their employer's business, defenses of assumption of risk, fellow-servant rule, and joint enterprise were available to truck owner. Schwartz v Forty-Second S., M. & S. N. A. R. Co., 22 N.Y.S.2d 752, 175 Misc. 49, 1940 N.Y. Misc. LEXIS 2214 (N.Y. Sup. Ct. 1940).

Under statute attributing to owner negligence in the use or operation of a motor vehicle, negligence of employees of car wash in failing to keep automobile which had just been washed under

control was imputable to automobile owner even though the car wash was an independent contractor and the negligence occurred on private property; thus, owner of automobile which rolled down incline without an operator and struck parked automobile after emerging from car wash was liable for damage sustained by the parked automobile. Allcity Ins. Co. v Old Greenwich Delicatessen, 75 Misc. 2d 898, 349 N.Y.S.2d 240, 1973 N.Y. Misc. LEXIS 1324 (N.Y. Civ. Ct. 1973).

Under New York Law, once an employee has driven his employer's car outside the scope of his employment an intention to re-enter and driving the vehicle in the correct direction is not sufficient to constitute re-entry, and the intent must be accompanied by a reasonable connection in time and space. Tomack v United States, 369 F.2d 350, 1966 U.S. App. LEXIS 4242 (2d Cir. N.Y. 1966).

44. —Government employees

Where superior permitted state employee to drive state automobile home for week end, it having been determined that employee's work would be more efficiently done if he was provided with an automobile for his work, state was liable for injuries caused by such employee's negligent operation of automobile while returning to work. Adams v State, 269 A.D. 482, 57 N.Y.S.2d 42, 1945 N.Y. App. Div. LEXIS 3018 (N.Y. App. Div. 1945), rev'd, 295 N.Y. 946, 68 N.E.2d 44, 295 N.Y. (N.Y.S.) 946, 1946 N.Y. LEXIS 1095 (N.Y. 1946).

Town had no vicarious liability under CLS Veh & Tr § 388 as owner of ambulance involved in accident since vicarious liability cannot be imposed on owner unless there is liability on part of driver, and volunteer fireman who was driving ambulance had immunity for his acts of ordinary negligence under CLS Gen Mun § 205-b. Nelson v Garcia, 152 A.D.2d 22, 548 N.Y.S.2d 963, 1989 N.Y. App. Div. LEXIS 14856 (N.Y. App. Div. 4th Dep't 1989).

Where the city that owned a vehicle contested the issue of whether a probationary employee was using the vehicle with its knowledge and permission at the time of hitting a pedestrian and refused to provide the employee with a defense in a separate action against the employee, a default judgment against the employee did not collateral estop the city from contesting liability in an action against it and the employee; therefore, the trial court had erred in entering summary judgment in favor of the pedestrian on the issue of liability, since issues regarding actual negligence and causation, as well as the city's knowledge and permission, required decision by a finder of fact. Chambers v City of New York, 309 A.D.2d 81, 764 N.Y.S.2d 708, 2003 N.Y. App. Div. LEXIS 9867 (N.Y. App. Div. 2d Dep't 2003).

III. Specific Factors Affecting Liability

45. In general

As the negligence of the driver in the operation of a car was not in issue, the trial court correctly charged that the owner in providing a defective and dangerous vehicle would be liable to third persons only where it failed to give notice to the driver of the defective condition and the driver did not know of such condition. Greenbaum v Tiltz Air Conditioning Corp., 297 N.Y. 544, 74 N.E.2d 475, 297 N.Y. (N.Y.S.) 544, 1947 N.Y. LEXIS 1032 (N.Y. 1947).

Where a defendant was driving plaintiff's car with plaintiff's consent and plaintiff's wife, a passenger in the car, was fatally injured because of the negligent driving of defendant, the plaintiff, as administrator and sole beneficiary was able to recover. The test was whether the wife, had she not died, would have had a cause of action against the defendant under this section. Rozewski v Rozewski, 46 N.Y.S.2d 743, 181 Misc. 793, 1944 N.Y. Misc. LEXIS 1680 (N.Y. Sup. Ct. 1944).

Public policy will not permit the real owner of an automobile to escape the consequences of his own negligence and recover property damages to his vehicle by taking refuge behind a rebuttable presumption of title in the registered owner, his wife, and it was implicit in the jury's verdict that they found the husband was the real owner of the vehicle he was operating at the time of the collision and that he was negligent and therefore the motion to set aside the verdict as inconsistent as it relates to claim for property damage was denied. Britt v Perry, 64 Misc. 2d 655, 315 N.Y.S.2d 357, 1970 N.Y. Misc. LEXIS 1201 (N.Y. Sup. Ct. 1970).

Where the defendant-instructor was the owner of the vehicle, which struck pedestrians at a time when he was instructing his wife how to drive, the negligence of the driver was imputable to him as owner, not as instructor. Cromwell v Rodriguez, 66 Misc. 2d 243, 319 N.Y.S.2d 1014, 1971 N.Y. Misc. LEXIS 1816 (N.Y. City Ct. 1971).

Because the bus passengers' personal injury claims against the trailer owners and their affiliates under N.Y. Veh. & Traf. Law § 388(1) were preempted by the Graves Amendment, 49 U.S.C.S. § 30106(a), which was a valid exercise of Congressional authority, the owners and their affiliates were entitled to summary judgment with regard to their liability. Edwards v Erie Coach Lines Co., 239 N.Y.L.J. 116, 2008 N.Y. Misc. LEXIS 3732 (N.Y. Sup. Ct. May 22, 2008).

46. State or municipal ownership of vehicle

The State was liable under this section for injuries sustained by wife of district game protector, age 69, as a result of the negligence of the husband while taking a 60-mile trip in a state-owned car on state business. The State was not excused from liability on the ground that prior thereto the superintendent of the law enforcement bureau had sent a communication to its district game protectors requesting them to discontinue carrying members of their families for purposes not strictly in line with the performance of their official duties, in view of the fact that there was a memo attached which said that this did not prohibit game protectors from having others with them if their presence tied in with the work to be performed. In this case, the district game protector took his wife along on the trip in order that she might assist him in driving when he became tired. Burmaster v State, 7 N.Y.2d 65, 195 N.Y.S.2d 385, 163 N.E.2d 742, 1959 N.Y. LEXIS 874 (N.Y. 1959).

Municipality, as unregulated self-insurer, was not required to provide uninsured motorist coverage to police officers who were injured when their police vehicles were struck by uninsured vehicles, since police vehicle is specifically excluded from definition of "motor vehicle" in CLS Veh & Tr § 388, and thus CLS Ins § 3420(f) has no application to such vehicle. State Farm Mut. Auto. Ins. Co. v Amato, 72 N.Y.2d 288, 532 N.Y.S.2d 239, 528 N.E.2d 162, 1988 N.Y. LEXIS 1670 (N.Y. 1988).

The former analogous section did not make New York city liable for the death of a person killed when a truck driven by a city employee ran into a horse-drawn truck belonging to deceased, where the driver of the city vehicle was engaged in his own business at the time with permission of his foreman. Downing v New York, 219 A.D. 444, 220 N.Y.S. 76, 1927 N.Y. App. Div. LEXIS 10936 (N.Y. App. Div.), aff'd, 245 N.Y. 597, 157 N.E. 873, 245 N.Y. (N.Y.S.) 597, 1927 N.Y. LEXIS 765 (N.Y. 1927).

In taking a city employee to his home, the driver of the city's automobile was not acting in the discharge of the city's business and the former analogous section did not impose liability upon the city. Aspinall v New York, 221 A.D. 753, 223 N.Y.S. 501, 1927 N.Y. App. Div. LEXIS 6567 (N.Y. App. Div.), aff'd, 246 N.Y. 644, 159 N.E. 685, 246 N.Y. (N.Y.S.) 644, 1927 N.Y. LEXIS 1043 (N.Y. 1927).

A city inspector of tenement houses used city's car to transport him to summer home. His superior officer knew that he was thus using city's car for his private purposes, although no express consent by anybody had been given for such private use of car which was furnished to him by city for use in making inspections. While at the summer resort he accidentally met the owner of a tenement house upon whom he served oral notice regarding keeping of lights burning at night in halls of tenement house. While returning from the summer resort on that occasion an accident occurred. It was error to permit jury to find that car was being driven by an employee in the city's business at the time of accident and that city consented in any way to employee's use of its car on his private business. Perhaps an implied consent by his superior officer could be spelled out, but no consent that was binding on the city. Fox v Syracuse, 231 A.D. 273, 247 N.Y.S. 429, 1931 N.Y. App. Div. LEXIS 16034 (N.Y. App. Div.), aff'd, 258 N.Y. 550, 180 N.E. 328, 258 N.Y. (N.Y.S.) 550, 1931 N.Y. LEXIS 805 (N.Y. 1931).

Where evidence that plaintiff's intestate was killed through the negligence of a deputy sheriff, the driver of a prison van owned by New York city and transporting prisoners in the city to the state prison, the verdict against the city and sheriff were set aside as to city, where the verdict should have been set aside as to the sheriff; the transportation of the prisoners was a function of the city and it was not unconstitutional to relieve the sheriff of the function of transporting prisoners; the city is liable as the owner of the vehicle being used with its permission. Miller v New York, 266 A.D. 565, 43 N.Y.S.2d 79, 1943 N.Y. App. Div. LEXIS 3622 (N.Y. App. Div. 1943), aff'd, 292 N.Y. 571, 54 N.E.2d 690, 292 N.Y. (N.Y.S.) 571, 1944 N.Y. LEXIS 1725 (N.Y. 1944).

Claimant sustained injuries in accident while riding with her husband in state-owned car which had been assigned to him as state employee. Accident was caused by husbnd's negligence and claimant was free from contributory negligence. Husband had received letter from his superior which ordered employees not to carry anyone who did not tie in with work performed involving use of car. Husband said that on day of accident he was on state business and that, as he had not felt good in the morning, he had taken claimant along to help with driving. Held: that uncontradicted testimony indicated claimant's presence did directly connect with husband's use of car. Finding that car was being driven without state's permission in that state had no knowledge that claimant was passenger was improper. Judgment dismissing claim reversed. Burmaster v State, 7 A.D.2d 775, 179 N.Y.S.2d 980, 1958 N.Y. App. Div. LEXIS 4095 (N.Y. App. Div. 3d Dep't 1958), aff'd, 7 N.Y.2d 65, 195 N.Y.S.2d 385, 163 N.E.2d 742, 1959 N.Y. LEXIS 874 (N.Y. 1959).

The words "every owner" included a municipality, outside of the express exceptions, and a city was liable, under said section, for the negligence of one of its police officers while operating a motor vehicle on streets of the city. Kelly v Niagara Falls, 229 N.Y.S. 328, 131 Misc. 934, 1928 N.Y. Misc. LEXIS 885 (N.Y. Sup. Ct. 1928).

A municipal corporation was not liable for the negligence of a federal civil works administration worker, who was paid by the federal government but under the control of a municipal corporation, in the operation of an automobile owned by the municipality, for injuries to a third person, either under the common law or this section, where the worker at the time was not engaged within the scope of his employment. It seems, however, that a municipality was liable for the tortious acts of a worker employed under the civil works administration committed within the course of his employment. Irolla v New York, 280 N.Y.S. 873, 155 Misc. 908, 1935 N.Y. Misc. LEXIS 1780 (N.Y. Mun. Ct. 1935).

A municipal corporation is not liable for the negligence of a federal civil works administration worker, who is paid by the federal government but under the control of a municipal corporation, in the operation of an automobile owned by the municipality, for injuries to a third person either under the common law, this section, or the Highway Law, where the worker at the time was not engaged within the scope of his employment. It seems, however, that the municipality is liable for the tortious acts of a worker employed under civil works administration committed within the course of his employment. Irolla v New York, 280 N.Y.S. 873, 155 Misc. 908, 1935 N.Y. Misc. LEXIS 1780 (N.Y. Mun. Ct. 1935).

The state is liable for negligence in the operation of a state-owned vehicle in its business "or otherwise, by any person mutually using or operating the same with the permission, express or implied," of the state. Callahan v State, 107 N.Y.S.2d 319, 201 Misc. 378, 1951 N.Y. Misc. LEXIS 2347 (N.Y. Ct. Cl. 1951).

Liability of county, if any, for damages resulting from alleged negligence of deputy sheriff while operating county-owned automobile is based upon this section, and not upon the employment relationship between county and deputy sheriff. Reck v County of Onondaga, 51 Misc. 2d 259, 273 N.Y.S.2d 146, 1966 N.Y. Misc. LEXIS 1705 (N.Y. Sup. Ct. 1966).

The negligence of a deputy sheriff in driving a county-owned vehicle is attributable to the county as owner of the vehicle. George v County of Erie, 66 Misc. 2d 871, 322 N.Y.S.2d 278, 1971 N.Y. Misc. LEXIS 1505 (N.Y. Sup. Ct. 1971).

47. —Governmental immunity inapplicable

The former analogous section, which made a city liable for the negligence of a municipal employee operating a municipally owned vehicle, applied to the operation of vehicles used in the discharge of governmental duties and annulled the former rule of non-liability in such cases. Miller v New York, 235 A.D. 259, 257 N.Y.S. 33, 1932 N.Y. App. Div. LEXIS 7939 (N.Y. App. Div. 1932).

The Court of Claims Act § 12-a, places the state in the same position under this section as an individual or a private corporation. Adams v State, 264 A.D. 978, 37 N.Y.S.2d 229, 1942 N.Y. App. Div. LEXIS 5600 (N.Y. App. Div. 1942).

The Binghamton City Charter § 217, which eliminated city firemen as officers or agents of the city and provided that the city should not be held liable in a civil action for injuries to persons or property from the acts or omissions of said officers or agents was superseded by the former analogous section for the clear intent of which was to destroy the exemption of a municipality from liability in a particular instance covered by the Binghamton Charter § 217. Snyder v Binghamton, 245 N.Y.S. 497, 138 Misc. 259, 1930 N.Y. Misc. LEXIS 1616 (N.Y. Sup. Ct. 1930), aff'd, 233 A.D. 782, 250 N.Y.S. 917, 1931 N.Y. App. Div. LEXIS 12620 (N.Y. App. Div. 1931).

The former analogous section applied to the operation of vehicles used in a public or governmental duty, the enactment of which annulled the rule of non-liability of municipal corporations for negligence in the operation of city-owned vehicles and created a statutory liability. Snyder v Binghamton, 245 N.Y.S. 497, 138 Misc. 259, 1930 N.Y. Misc. LEXIS 1616 (N.Y. Sup. Ct. 1930), aff'd, 233 A.D. 782, 250 N.Y.S. 917, 1931 N.Y. App. Div. LEXIS 12620 (N.Y. App. Div. 1931).

Governmental immunity was waived or abrogated by the former analogous section in so far as third parties were concerned. Miller v Albany, 287 N.Y.S. 889, 158 Misc. 720, 1935 N.Y. Misc. LEXIS 1743 (N.Y. Sup. Ct. 1935), aff'd, 247 A.D. 848, 286 N.Y.S. 326, 1936 N.Y. App. Div. LEXIS 9033 (N.Y. App. Div. 1936).

48. Fire truck or police vehicle

Since under the General Municipal Law, § 205, compensation for the death of a volunteer fireman resulting from injuries incurred in the performance of his duties was accorded to his personal representative, an action to recover, under the former analogous section, for the death of a volunteer fireman who was fatally injured while in the discharge of his duty as a fireman through the alleged negligence of the driver of a fire truck who was employed by the defendant village, was properly dismissed. Ottmann v Rockville Centre, 273 N.Y. 205, 7 N.E.2d 102, 273 N.Y. (N.Y.S.) 205, 1937 N.Y. LEXIS 1193 (N.Y.), reh'g denied, 275 N.Y. 270, 9 N.E.2d 862, 275 N.Y. (N.Y.S.) 270, 1937 N.Y. LEXIS 1426 (N.Y. 1937).

A defendant city was not liable for the negligence of a motorcycle policeman committed in the act of performing a governmental function. Lacock v Schenectady, 224 A.D. 512, 231 N.Y.S. 379, 1928 N.Y. App. Div. LEXIS 10050 (N.Y. App. Div. 1928), aff'd, 251 N.Y. 575, 168 N.E. 433, 251 N.Y. (N.Y.S.) 575, 1929 N.Y. LEXIS 832 (N.Y. 1929).

An action could be brought under the former analogous section for the negligent operation of a fire truck. Section 205 of the General Municipal Law was not an exclusive remedy. Ottmann v Rockville Center, 241 A.D. 843, 271 N.Y.S. 391, 1934 N.Y. App. Div. LEXIS 9984 (N.Y. App. Div. 1934).

The former analogous section, which made a village liable for the negligence of a person operating a municipally owned vehicle upon public streets in the discharge of a statutory duty imposed upon a municipality, applied to the operation of a fire truck owned by the village and being operated while in the performance of governmental duties, viz., on the way to a fire in answer to an alarm. Rosenthal v Hastings-On-Hudson, 241 A.D. 890, 272 N.Y.S. 1, 1934 N.Y. App. Div. LEXIS 10322 (N.Y. App. Div. 1934).

The former analogous section imposed no liability upon a town for the negligent operation of a fire truck owned and maintained, under County Law § 38, by a fire district within the township. Miller v Irondequoit, 243 A.D. 240, 276 N.Y.S. 497, 1935 N.Y. App. Div. LEXIS 7041 (N.Y. App. Div.), aff'd, 268 N.Y. 578, 198 N.E. 412, 268 N.Y. (N.Y.S.) 578, 1935 N.Y. LEXIS 1043 (N.Y. 1935).

The former analogous section was enacted for the benefit of wayfarers and occupants of vehicles who were strangers to the immediate service being then rendered in the operation of a municipally-owned vehicle in the discharge of a statutory duty. Ottmann v Rockville Centre, 248 A.D. 592, 287 N.Y.S. 367, 1936 N.Y. App. Div. LEXIS 6448 (N.Y. App. Div. 1936), aff'd, 273 N.Y. 205, 7 N.E.2d 102, 273 N.Y. (N.Y.S.) 205, 1937 N.Y. LEXIS 1193 (N.Y. 1937), modified, 275 N.Y. 270, 9 N.E.2d 862, 275 N.Y. (N.Y.S.) 270, 1937 N.Y. LEXIS 1426 (N.Y. 1937).

Since § 205-b of the General Municipal Law exempts a volunteer fireman from liability for negligent operation of a motor vehicle in course of duty, the owner of the vehicle which the fireman is operating at the time of the accident and in the owner's absence cannot be held liable for the injuries inflicted. Sikora v Keillor, 17 A.D.2d 6, 230 N.Y.S.2d 571, 1962 N.Y. App. Div. LEXIS 8567 (N.Y. App. Div. 2d Dep't 1962), aff'd, 13 N.Y.2d 610, 240 N.Y.S.2d 601, 191 N.E.2d 88, 1963 N.Y. LEXIS 1220 (N.Y. 1963).

Trial court erred in denying a city's amended motion for summary judgment in a driver's negligence action because the driver did not show that the city's traffic enforcement agent failed to ask a car wash attendant if he had a driver's license, the police vehicle's keys were given to the attendant for the sole purpose of having the vehicle washed, the attendant's isolated negligent act of slipping his foot off the brake pedal and onto the gas was the sole proximate cause of the accident, and the city was not vicariously liable as the owner of the vehicle. Guevara v Ortega, 136 A.D.3d 508, 26 N.Y.S.3d 12, 2016 N.Y. App. Div. LEXIS 1108 (N.Y. App. Div. 1st Dep't 2016).

Trial court properly granted an application filed by a town's supplementary uninsured/underinsured motorist (SUM) insurer to permanently stay arbitration between the parties because a police officer was not an insured under the terms of the SUM endorsement where the police vehicle that he was operating at the time of an accident was not a "motor vehicle" for purposes of SUM coverage, "fire and police vehicles" were expressly excluded from the statutory definition of a motor vehicle, the fact that the officer was operating an unmarked police vehicle at the time of the accident was of no moment, and without coverage under the policy, the doctrines of waiver and estoppel could not operate to create such coverage. Matter of U.S. Speciality Ins. Co. (Denardo), 151 A.D.3d 1520, 57 N.Y.S.3d 743, 2017 N.Y. App. Div. LEXIS 5217 (N.Y. App. Div. 3d Dep't), app. denied, 30 N.Y.3d 904, 89 N.E.3d 1258, 67 N.Y.S.3d 578, 2017 N.Y. LEXIS 3162 (N.Y. 2017).

A municipality was liable under the former analogous section for damage caused by its fire truck, responding to a fire alarm, where the truck failed to stop due to inadequate brakes, since the brakes were of an exposed type, so that when wet they would not take hold, thus constituting a violation of the Vehicle and Traffic Law, former § 15, sub 1. Hardin v Schenectady, 278 N.Y.S. 28, 154 Misc. 411, 1935 N.Y. Misc. LEXIS 1018 (N.Y. County Ct. 1935).

Insurer's petition for a permanent stay of arbitration should have been denied because a police officer was occupying a motor vehicle being operated by a fellow officer at the time it was involved in a collision with an underinsured vehicle, and while the negligence section of the Vehicle and Traffic Law (VTL) excluded police vehicles, the definition of a "motor vehicle" in the general provisions of the VTL applied to the entire VTL and the uninsured/underinsured motorist endorsement at issue. Matter of State Farm Mut. Auto. Ins. Co. v Fitzgerald, 112 A.D.3d 166, 973 N.Y.S.2d 801, 2013 N.Y. App. Div. LEXIS 7135 (N.Y. App. Div. 2d Dep't 2013), rev'd, 25 N.Y.3d 799, 38 N.E.3d 325, 16 N.Y.S.3d 796, 2015 N.Y. LEXIS 1526 (N.Y. 2015).

Provision in automobile liability insurance policy on tractor-truck, containing "truckmen's endorsement", exempting from coverage accidents which occur while automobile is being used in business of any person or organization to whom automobile is rented, is against New York public policy by reason of absence of limitation to such provision to effect that provision would only apply when tractor is in custody of lessee under written lease agreement which requires lessee to provide insurance covering tractor. Transport Ins. Co. v Protective Ins. Co., 647 F. Supp. 1381, 1986 U.S. Dist. LEXIS 17765 (N.D.N.Y. 1986).

49. Trailers and campers

The fact that a trailer is hitched to and drawn by a motor vehicle does not change its character as a separate and distinct vehicle or make it a motor vehicle or in part a motor vehicle within the meaning of this section. Hennessy v Walker, 279 N.Y. 94, 17 N.E.2d 782, 279 N.Y. (N.Y.S.) 94, 1938 N.Y. LEXIS 802 (N.Y. 1938).

Trial court erred in denying a dairy's motions for summary judgment in a personal injury claim against it based on its ownership of a hay wagon which was being towed by a vehicle involved in an accident because the hay wagon was not a "trailer" as defined in N.Y. Veh. & Traf. Law § 156, but instead was designed and primarily used for non-highway purposes. Miller v Richardson, 48 A.D.3d 1298, 852 N.Y.S.2d 530, 2008 N.Y. App. Div. LEXIS 1179 (N.Y. App. Div. 4th Dep't 2008).

The complaint in this section for personal injuries arising from the collision between an automobile in which plaintiffs were riding and a trailer owned by one of defendants and loaned to another, must be dismissed as to the owner of the trailer, since the trailer is not a motor vehicle, and this section does not impose any liability on the owner of a trailer. Herrick v Arborio, 258 N.Y.S. 5, 144 Misc. 15, 1932 N.Y. Misc. LEXIS 1154 (N.Y. Sup. Ct. 1932).

Former § 59 of the Vehicle and Traffic Law did not impose any liability on the owner of a trailer or any other vehicle being towed by a motor vehicle, towed vehicles not being within the meaning of that section. Corsi Bros., Inc. v Daly, 39 Misc. 2d 1076, 242 N.Y.S.2d 865, 1963 N.Y. Misc. LEXIS 1762 (N.Y. Sup. Ct. 1963), aff'd, 21 A.D.2d 853, 252 N.Y.S.2d 253, 1964 N.Y. App. Div. LEXIS 5502 (N.Y. App. Div. 2d Dep't 1964).

50. Tractor-trailer trucks

Under this section driver of tractor-trailer is operator of both units and it was error to dismiss complaint of insurer of tractor seeking contribution from insurer of trailer notwithstanding clause in trailer policy purporting to exclude coverage in such circumstances. General Mut. Ins. Co. v Sun Ins. Co., 24 A.D.2d 135, 264 N.Y.S.2d 716, 1965 N.Y. App. Div. LEXIS 2914 (N.Y. App. Div. 3d Dep't 1965).

An exclusionary clause in a policy issued by an insurer providing excess coverage of only one vehicle in a tractor-trailer combination, which clause states that "This policy does not apply . . . while any trailer covered by this policy is used with any automobile owned or hired by the insured and not covered by like insurance in the company", must be read as affording excess coverage not only for the trailer, but also for the tractor, by virtue of subdivision 4 of section 388 of the Vehicle and Traffic Law, which provides that all policies of insurance issued to owners of tractors and trailers used in combination with one another are to provide the required coverage; moreover, such an exclusionary clause, whether it applies to primary or excess insurance, is void as contrary to State policy, and the fact that it tracks the language of an Insurance Department regulation (11 NYCRR 60.2 [c]) is immaterial, for to the extent that regulation conflicts with and is inconsistent with the design and purpose of the statute it has no significance. Mt. Vernon Fire Ins. Co. v Travelers Indem. Co., 63 A.D.2d 254, 407 N.Y.S.2d 23, 1978 N.Y. App. Div. LEXIS 11342 (N.Y. App. Div. 1st Dep't 1978), aff'd, 47 N.Y.2d 575, 419 N.Y.S.2d 899, 393 N.E.2d 974, 1979 N.Y. LEXIS 2183 (N.Y. 1979).

Plaintiff injured in head-on collision with tractor-trailer was not entitled to partial summary judgment on issue of vicarious liability of employer, or former employer, of driver of tractor-trailer where (1) there was triable issue of fact as to whether driver was operating without employer's consent, despite driver's retention of indicia of authority to operate as carrier authorized by Interstate Commerce Commission (ICC), and (2) employer's violations of ICC regulations did not require that it be estopped from denying responsibility for employee's actions; same triable issue of fact precluded grant of summary judgment dismissing complaint against employer. Davis v Rajbar, 266 A.D.2d 828, 698 N.Y.S.2d 373, 1999 N.Y. App. Div. LEXIS 11868 (N.Y. App. Div. 4th Dep't 1999).

Plaintiff injured in head-on collision with tractor-trailer was not entitled to partial summary judgment on issue of vicarious liability of individual and 2 transport companies of which that

individual was sole stockholder and chief executive officer where triable issue of fact existed as to whether those defendants acted as brokers or carriers with respect to tractor-trailer's trip during which accident occurred or whether they acted as mere factors by buying invoice for trip and then billing supplier; same triable issue of fact precluded grant of summary judgment dismissing complaint against those defendants. Davis v Rajbar, 266 A.D.2d 828, 698 N.Y.S.2d 373, 1999 N.Y. App. Div. LEXIS 11868 (N.Y. App. Div. 4th Dep't 1999).

In action by motorist injured in head-on collision with tractor-trailer, court properly denied cross motion by 2 transport companies and their sole stockholder and chief executive officer for summary judgment seeking determination that tractor-trailer driver's employer, or former employer, was liable for driver's alleged negligence under CLS Veh & Tr § 388 where triable issue of fact existed as to whether driver operated as carrier with employer's authority. Davis v Rajbar, 266 A.D.2d 828, 698 N.Y.S.2d 373, 1999 N.Y. App. Div. LEXIS 11868 (N.Y. App. Div. 4th Dep't 1999).

Road worker hit by tractor-trailer was entitled to partial summary judgment on issue of liability of driver, driver's employer, and owners of truck where (1) driver's negligence was sole proximate cause of accident, (2) worker was not contributorily negligent merely because he was working with his back toward traffic and with no coworkers around to warn him, (3) driver's employer was liable, under doctrine of respondeat superior, because driver was acting within scope of his employment, and (4) truck owners were vicariously liable under CLS Veh & Tr § 388(1). Gusek v Compass Transp. Corp., 266 A.D.2d 923, 697 N.Y.S.2d 886, 1999 N.Y. App. Div. LEXIS 11779 (N.Y. App. Div. 4th Dep't 1999).

Under this section, liability of the driver of a trailer-truck, and of his employer who owned the truck, for negligence, if any, in so backing the vehicle as to injure a pedestrian on the sidewalk, was indistinguishable. De Sessa v White Plains, 30 Misc. 2d 817, 219 N.Y.S.2d 190, 1961 N.Y. Misc. LEXIS 2553 (N.Y. Sup. Ct. 1961).

The fact that a disabled tractor was being towed piggyback by another tractor would not bring its operation within the purview of former § 59 of the Vehicle and Traffic Law, it nonetheless being a towed vehicle and not itself operated on the highway. Corsi Bros., Inc. v Daly, 39 Misc. 2d 1076, 242 N.Y.S.2d 865, 1963 N.Y. Misc. LEXIS 1762 (N.Y. Sup. Ct. 1963), aff'd, 21 A.D.2d 853, 252 N.Y.S.2d 253, 1964 N.Y. App. Div. LEXIS 5502 (N.Y. App. Div. 2d Dep't 1964).

Where a tractor was hauling a trailer, if the driver of the tractor was not the owner of the tractor, but merely the driver of such vehicle, he would be separately covered as an additional insured under a policy covering the trailer by virtue of the omnibus clause mandated by statute, the Vehicle and Traffic Law § 388 as implemented by the regulations of the Insurance Department. Hiscock v Kuinlan, 62 Misc. 2d 842, 310 N.Y.S.2d 331, 1970 N.Y. Misc. LEXIS 1741 (N.Y. Sup. Ct. 1970).

In justice and fairness and as a matter of logic and equity, both insurer of tractor and insurer of semitrailer which tractor was pulling at time of accident should pay their proportionate shares to the full extent of their respective policies in recompensing loss for injuries which resulted when the combined vehicles were involved in accident. Mt. Vernon Fire Ins. Co. v Travelers Indem. Co., 90 Misc. 2d 717, 395 N.Y.S.2d 948, 1977 N.Y. Misc. LEXIS 2139 (N.Y. Sup. Ct. 1977), modified, 63 A.D.2d 254, 407 N.Y.S.2d 23, 1978 N.Y. App. Div. LEXIS 11342 (N.Y. App. Div. 1st Dep't 1978).

51. —Multiple owners

The owner of a semitrailer attached to a separately owned motor vehicle is not liable, under this section, for the negligent operation of the two vehicles by an employee of the owner of the tractor. Hennessy v Walker, 279 N.Y. 94, 17 N.E.2d 782, 279 N.Y. (N.Y.S.) 94, 1938 N.Y. LEXIS 802 (N.Y. 1938).

Under former § 59 of the Vehicle and Traffic Law, now subsection 1 of this section, negligence may be imputed from the operator of a motor vehicle to the owner thereof only in actions brought by third persons against the owner, and therefore any negligence of driver of tractor to which owner's trailer was attached was not imputable to trailer owner in owner's action against motorist colliding with tractor. George W. Brown, Inc. v Pipe Welding Supply, Inc., 26 A.D.2d 855, 274 N.Y.S.2d 41, 1966 N.Y. App. Div. LEXIS 3352 (N.Y. App. Div. 3d Dep't 1966).

This section (former § 59-a) does not change the common-law rule under which the owner of a trailer used with a tractor and involved in an accident may hold the driver of the tractor for his negligence, and a power company for its negligence in excavating the street at the point of the accident, although the trailer owner is liable under this section to the party injured by the negligence of the driver of the tractor. Cote v Autocar Sales & Service Co., 79 N.Y.S.2d 130, 191 Misc. 988, 1948 N.Y. Misc. LEXIS 2369 (N.Y. Sup. Ct. 1948).

Owner of a tractor and a different owner of a trailer were jointly liable for tractor operator's negligence; but where the negligence of the trailer owner was merely passive, he could recover over from the tractor owner. Mondelli v Harrison Hub, Bed & Spring Co., 10 Misc. 2d 883, 172 N.Y.S.2d 931, 1958 N.Y. Misc. LEXIS 3549 (N.Y. City Ct. 1958).

Former § 59-a simply provided that both owners were "jointly liable" for damage done by a combination tractor-trailer, the two parts of which were separately owned but which were being operated by an employee of one of the owners as agent of each, and the words "jointly liable," may not be given the connotation of partnership, nor is it to be implied that separate insurance policies obtained by the respective owners of the tractor and trailer are thereby converted into policies of co-insurance. Employers Mut. Liability Ins. Co. v Indemnity Ins. Co., 37 Misc. 2d 421, 234 N.Y.S.2d 839, 1962 N.Y. Misc. LEXIS 2278 (N.Y. Sup. Ct. 1962).

The owners of a tractor and trailer, defendants in a negligence action, are jointly and severally liable and responsible for 50 percent of the recovery to the plaintiff in an action arising from a collision with the plaintiff's automobile. Hiscock v Kuinlan, 62 Misc. 2d 842, 310 N.Y.S.2d 331, 1970 N.Y. Misc. LEXIS 1741 (N.Y. Sup. Ct. 1970).

Under the Vehicle and Traffic Law, owners of tractor and trailer are jointly and severally liable for any injuries resulting from negligence in the operation of either the tractor or the trailer or of both in combination. Mt. Vernon Fire Ins. Co. v Travelers Indem. Co., 90 Misc. 2d 717, 395 N.Y.S.2d 948, 1977 N.Y. Misc. LEXIS 2139 (N.Y. Sup. Ct. 1977), modified, 63 A.D.2d 254, 407 N.Y.S.2d 23, 1978 N.Y. App. Div. LEXIS 11342 (N.Y. App. Div. 1st Dep't 1978).

52. Rented or leased vehicles, generally

Plaintiff passenger may recover for negligent operation of vehicle—no matter what his relationship to the driver might be—unless it is shown that his own personal negligence contributed to the injury; thus, representative of deceased passenger was entitled to recover from owner of rented automobile in which deceased was riding when he was killed and over which he exercised supervisory control where deceased's father-in-law was driving at time of accident and was contributorily negligent in causing accident. Kalechman v Drew Auto Rental, Inc., 33 N.Y.2d 397, 353 N.Y.S.2d 414, 308 N.E.2d 886, 1973 N.Y. LEXIS 871 (N.Y. 1973).

Where person driving car rented from self-insured rental company was involved in accident, causing injury to third person, rental company could not seek indemnification from renters to extent that damage fell below minimum insurance that company was required to provide for benefit of permissive users under CLS Veh & Tr § 370(1); however, indemnification clause of rental contract, if otherwise valid, was enforceable as to amounts exceeding statutory minimums. ELRAC, Inc. v Ward, 96 N.Y.2d 58, 724 N.Y.S.2d 692, 748 N.E.2d 1, 2001 N.Y. LEXIS 695 (N.Y. 2001).

New York law was applicable in action arising out of Maryland vehicular accident involving automobile, which was owned and driven by New York residents, which was being driven on trip beginning and terminating in New York and in which plaintiff New York resident was a passenger, and automobile, which was registered in Virginia and which nationwide car rental agency leased in Maryland to a Mississippi resident; thus, agency was

vicariously liable for any misdeeds on part of driver of leased automobile. Cunningham v McNair, 48 A.D.2d 546, 370 N.Y.S.2d 577, 1975 N.Y. App. Div. LEXIS 9938 (N.Y. App. Div. 1st Dep't 1975).

In an explosives company's declaratory judgment action to determine the respective obligations of several insurers to provide the company with insurance coverage for claims arising from the explosion of a parked, rented truck which the company's employee had overloaded with dynamite, claims against the explosives company would be covered by the basic automobile insurance policy that was carried by the truck rental company as claims arising "out of the use, including loading and unloading" of the truck by the insured and its lessees as "additional insureds" where overloading the truck in violation of the rental agreement would not rebut the presumption of permissive use for purposes of relieving the insurer of its obligations, and where the legal transportation of explosives would not render the purpose of the rental illegal, although the manner in which they were transported might constitute negligence. The explosives company's comprehensive general liability policy, however, would apply to a claim for indemnification by its customer for breach of contract arising from the company's improper use or handling of explosives that it had contracted to deliver. Aetna Casualty & Surety Co. v Liberty Mut. Ins. Co., 91 A.D.2d 317, 459 N.Y.S.2d 158, 1983 N.Y. App. Div. LEXIS 16134 (N.Y. App. Div. 4th Dep't 1983).

Lessor of automobile may not enforce restrictions on use by lessee, and thereby escape liability to third person, on ground that violation of restriction removed element of consent required by CLS Veh & Tr § 388(1). Wynn v Middleton, 184 A.D.2d 1019, 584 N.Y.S.2d 684, 1992 N.Y. App. Div. LEXIS 8250 (N.Y. App. Div. 4th Dep't 1992).

Where someone using a stolen driver's license rented a vehicle from defendant and allegedly drove it into a collision with plaintiff, the defendant as an owner could not avoid liability under Vehicle and Traffic Law § 388 on the ground that there was no permission express or implied for the operation of the vehicle. Lorippo v Chrysler Leasing Corp., 59 Misc. 2d 534, 299 N.Y.S.2d 672, 1968 N.Y. Misc. LEXIS 976 (N.Y. Civ. Ct. 1968).

The term "owner" under Vehicle and Traffic Law § 128 includes any lessee having the exclusive use for a period greater than 30 days, and does not exclude the title holder as an owner for purposes of Vehicle and Traffic Law § 388 and under Vehicle and Traffic Law § 388 subdivision 3 the liability of the lessor and lessee of an automobile is joint and several. Location Auto Leasing Corp. v Lembo Corp., 62 Misc. 2d 856, 310 N.Y.S.2d 365, 1970 N.Y. Misc. LEXIS 1689 (N.Y. Sup. Ct. 1970).

Failure on part of lessee of commercially rented vehicle to pay for or leave a proper deposit for period covering date of accident did not give lessor reason for disclaiming its responsibility as a self insurer of vehicle on ground that vehicle had been stolen or, at least, converted, nor did reporting of theft of vehicle to police give lessor a reason for disclaiming on ground that vehicle was no longer being driven with its permission, express or implied, where original rental contract, based on prior dealings between parties, was at best open ended and, though full payment was not made during critical period, partial payment was made, and vehicle was not only in possession of lessee at time of accident, but lessor failed to establish a demand for a return of vehicle and a refusal by lessee. Banner Casualty Co. v Lazar, 81 Misc. 2d 360, 366 N.Y.S.2d 314, 1975 N.Y. Misc. LEXIS 2389 (N.Y. Sup. Ct. 1975).

Lessee of automobile was an "owner" for purpose of owner's responsibility law. Fireman's Fund American Ins. Cos. v Olin of New York, Inc., 84 Misc. 2d 504, 376 N.Y.S.2d 800, 1975 N.Y. Misc. LEXIS 3162 (N.Y. Sup. Ct. 1975).

In action for injuries sustained by plaintiff when car leased by him and his father was involved in accident while his friend was driving and he was passenger, plaintiff's father and defendant leasing corporation were entitled to summary judgment dismissing vicarious liability claims under CLS Veh & Tr § 388, as plaintiff was not innocent party intended to be protected by § 388 where he had willingly allowed his friend to drive. Sipp v McGee, 183 Misc. 2d 407, 703 N.Y.S.2d 695, 2000 N.Y. Misc. LEXIS 28 (N.Y. Sup. Ct. 2000).

Supreme court properly granted that branch of a rental car corporation's motion which sought summary judgment for conditional contractual indemnification, to the extent granting contractual indemnification to the corporation for any sums which it may be required to pay in excess of the statutory minimum in insurance coverage required by N.Y. Veh. & Traf. Law § 388(1). Ruddock v Boland Rentals, Inc., 5 A.D.3d 368, 774 N.Y.S.2d 50, 2004 N.Y. App. Div. LEXIS 2158 (N.Y. App. Div. 2d Dep't 2004).

Even though car owner/lessors moved under N.Y. C.P.L.R. 3211(a)(5) to dismiss a passenger's accident injury complaint against them because the car's driver was an unauthorized driver, the court sua sponte granted summary judgment to dismiss the passenger's complaint against the owner/lessors since the passenger had settled with the car's lessee and car's driver and drafted and executed a release that released "all other persons, firms, or corporations liable or who could be claimed to be liable." The passenger did not create a genuine issue of fact that she did not intend to also expressly release, under N.Y. Gen. Oblig. Law § 15-108(a), the owner/lessors from their potential vicarious liability under N.Y. Veh. & Traf. Law § 388. Mei Ling Yi v Enter. Rent A Car, 800 N.Y.S.2d 350, 6 Misc. 3d 1004(A), 2004 N.Y. Misc. LEXIS 2862 (N.Y. Sup. Ct. 2004).

53. Owner's agent

The provision of this section exempting from liability imposed upon owners of motor vehicles for negligence of others driving their cars with their consent, those engaged in business of renting motor vehicles, who carry liability insurance in stated amounts protecting renter from liability arising from his negligence in operation of rented vehicle, is violative neither of the federal nor of the state constitution. The exception in the statute does not apply to cars rented or hired when operated by servants or employees of the owner. Atkins v Hertz Drivurself Stations, Inc., 261 N.Y. 352, 185 N.E. 408, 261 N.Y. (N.Y.S.) 352, 1933 N.Y. LEXIS 1293 (N.Y. 1933), aff'd, 291 U.S. 641, 54 S. Ct. 437, 78 L. Ed. 1039, 1934 U.S. LEXIS 527 (U.S. 1934).

In an action for personal injury caused by the negligent operation of a van driven by the employee of the van's long-term lessee who had obtained the use of the van through the fraudulent deception of the van's lessor, a judgment awarding damages against the lessor and not the lessee was supported by evidence which clearly showed that the lessee had no knowledge of its employee's unauthorized use of the van, so that the jury could properly have found that the lessee was an unwitting victim of its employee's fraud, that the lessee never expressly or impliedly consented to the employee's use of the van on the night of the accident, and that the decision to release the van was based on facts known to the lessor alone and on its own assessment of the situation, thereby permitting a jury further to find that the lessor's liability was separate and distinct from the lessee's in that circumstances which may have constituted an unauthorized taking as far as the lessee was concerned might be viewed differently when measured against the lessor's role in the transaction; moreover there was no due process violation in that the lessor's agent gave permission in fact and had the authority under the rental agreement to refuse to do so; finally, Veh & Tr Law § 388(3) expressly makes the liability of the lessor and lessee joint and several. Hardeman v Mendon Leasing Corp., 58 N.Y.2d 892, 460 N.Y.S.2d 499, 447 N.E.2d 47, 1983 N.Y. LEXIS 2870 (N.Y. 1983).

Company leasing vehicle for period in excess of thirty days for its exclusive use considered owner thereof within meaning of § 128 and consequently subject to liability under Vehicle & Traf L § 388(3). Aetna Casualty & Surety Co. v World Wide Rent-A-Car, Inc., 28 A.D.2d 286, 284 N.Y.S.2d 807, 1967 N.Y. App. Div. LEXIS 2928 (N.Y. App. Div. 1st Dep't 1967).

In action by passenger who was injured while riding in rented vehicle driven by her co-employee during business trip, lessor of vehicle was entitled to summary judgment since passenger could not recover against lessor for negligence of co-employee, who was statutorily immune from suit under Workers' Compensation Law. Houston v Avis Rent A Car Sys., 209 A.D.2d 583, 619 N.Y.S.2d 640, 1994 N.Y. App. Div. LEXIS 11532 (N.Y. App. Div. 2d Dep't 1994).

N.Y. Veh. & Traf. Law § 388 claim against an owner of a vehicle was barred by the Graves Amendment, 49 U.S.C.S. § 30106, since it barred state law vicarious liability actions commenced on or after August 10, 2005, against owners of motor vehicles engaged in the trade or business of renting or leasing motor vehicles. Hernandez v Sanchez, 40 A.D.3d 446, 836 N.Y.S.2d 577, 2007 N.Y. App. Div. LEXIS 6277 (N.Y. App. Div. 1st Dep't 2007).

An owner engaged in the car rental business within the context of Vehicle and Traffic Law § 388, subd 1 gives its lessee general control of the vehicle without limitation of authority. Febbraro v Hertz Corp., 64 Misc. 2d 794, 315 N.Y.S.2d 702, 1970 N.Y. Misc. LEXIS 1182 (N.Y. Civ. Ct. 1970).

That lessee allowed another person to drive commercially rented vehicle, even a person who was not licensed, was not enough to allow lessor to disclaim as a self-insurer of vehicle. Banner Casualty Co. v Lazar, 81 Misc. 2d 360, 366 N.Y.S.2d 314, 1975 N.Y. Misc. LEXIS 2389 (N.Y. Sup. Ct. 1975).

Graves Amendment to the Safe, Accountable, Flexible, Efficient Transportation Equity Act (Graves Amendment), 49 U.S.C.S. § 30106, which effectively preempted the vicarious liability of car leasing companies established by N.Y. Veh. & Traf. Law § 388 by providing that leasing companies could not be held vicariously liable for damages sustained in car accidents, did not apply to an allegedly injured party's amended complaint filed against a leasing company after the effective date of the Graves Amendment; under 49 U.S.C.S. § 30106(c), the Graves Amendment applied to actions commenced after its effective date and therefore did not apply to the injured party's vicarious liability claim against the leasing company, which was derivative of her underlying action filed before the effective date of the Graves Amendment and related back to the date the underlying action was commenced. Leuchner v Cavanaugh, 820 N.Y.S.2d 786, 13 Misc. 3d 654, 2006 N.Y. Misc. LEXIS 2294 (N.Y. Sup. Ct. 2006), aff'd, 42 A.D.3d 893, 837 N.Y.S.2d 887, 2007 N.Y. App. Div. LEXIS 8190 (N.Y. App. Div. 4th Dep't 2007).

Graves Amendment, 49 USCS § 30106, did not apply to an accident in which a motorist struck a trailer leased by leasing company because the leasing company was in the business of leasing trailers which had no motor and were not motor vehicles; nothing required the Graves Amendment to be applied to delivery equipment that did not contain a motor. Lee v Rivera (2009, Sup) 242 NYLJ 24, reargument gr 27 Misc. 3d 1201A (Sup 2010).

54. —Automobiles

In an action against a corporation engaged in the business of renting automobiles to be operated on public highways to recover for injuries received by plaintiff through the negligent operation of one of defendant's cars by the renter thereof, an allegation in the answer that defendant carried insurance protecting renter against liability as required by this section constitutes a complete defense, and a motion by defendant for judgment in its favor upon pleadings is properly granted. Atkins v Hertz Drivurself Stations, Inc., 261 N.Y. 352, 185 N.E. 408, 261 N.Y. (N.Y.S.) 352, 1933 N.Y. LEXIS 1293 (N.Y. 1933), aff'd, 291 U.S. 641, 54 S. Ct. 437, 78 L. Ed. 1039, 1934 U.S. LEXIS 527 (U.S. 1934).

An individual defendant, renter of automobiles, in the course of his business, furnished a motor car and driver to defendant corporation, instructing the driver to accept orders or instructions from that company, which in turn, pursuant to a contract to furnish certain equipment, turned over the car and driver to defendant. While the motor car was being used in the business of that defendant, under direction of its employee, an accident happened and plaintiff was injured. In this action to recover for such injuries the owner of the car was properly held liable under this section. No liability attached, however, to defendant corporation which had agreed only to furnish equipment and not to do any of the work. Irwin v Klein, 271 N.Y. 477, 3 N.E.2d 601, 271 N.Y. (N.Y.S.) 477, 1936 N.Y. LEXIS 1225 (N.Y. 1936).

Lessor of automobile liable by virtue of statute for injuries caused by negligent driving of party who had rented automobile from lessee despite restrictive terms of lease between lessor and lessee which were violated by the fact that the driver was under 25 years of age and unlicensed. Cooperman v Ferrentino, 37 A.D.2d 474, 326 N.Y.S.2d 675, 1971 N.Y. App. Div. LEXIS 2912 (N.Y. App. Div. 2d Dep't 1971).

An automobile lessor's insurer was liable on its policy for the defense of a lawsuit for personal injuries caused by a vehicle covered by its policy and leased to the operator of a day camp where, despite the operator's violation of the lease by allowing the vehicle to be driven by a 19-year-old counselor, on camp business, without a chauffeur's license, public policy prevented insurers of automobile rental companies from availing themselves of a lessee's violation of a rental agreement for the purpose of escaping the duty to indemnify persons covered by the policy for liability for injuries to innocent third parties (see Veh & Tr Law §§ 128, 388; Ins Law [former] § 167[2], [2-a], now § 3420[e], [f]). Tom Sawyer Country Day School v Providence Washington Ins. Co., 108 A.D.2d 810, 485 N.Y.S.2d 126, 1985 N.Y. App. Div. LEXIS 43130 (N.Y. App. Div. 2d Dep't), app. denied, 65 N.Y.2d 608, 494 N.Y.S.2d 1028, 484 N.E.2d 671, 1985 N.Y. LEXIS 14577 (N.Y. 1985).

Rental car company was not entitled to summary judgment dismissing wrongful death action brought on behalf of passenger who was killed while riding in rented automobile which was being driven at time of accident by friend of lessee's brother, notwithstanding fact that car was being used beyond lease period by driver who was neither covered by rental agreement nor given permission by lessee, since company failed to meet burden of overcoming presumption that vehicle was being operated with owner's consent (CLS Veh & Tr § 388(1)). Wynn v Middleton, 184 A.D.2d 1019, 584 N.Y.S.2d 684, 1992 N.Y. App. Div. LEXIS 8250 (N.Y. App. Div. 4th Dep't 1992).

In action by car passenger injured when driver swerved to avoid deer and lost control of car, passenger was not entitled to partial summary judgment on issue of vicarious liability of owner of car leased to driver where owner's liability under CLS Veh & Tr § 388 derived from alleged negligence of driver, and there were triable issues of fact concerning driver's alleged negligence, including whether emergency doctrine applied. Fitz-Gerald v Rich, 251 A.D.2d 1017, 674 N.Y.S.2d 232, 1998 N.Y. App. Div. LEXIS 7043 (N.Y. App. Div. 4th Dep't 1998).

In plaintiff passengers' personal injury action arising from a vehicle accident, the trial court properly denied the summary judgment motions of defendants, lessee and owner, as the deposition testimony they relied upon was insufficient to rebut the statutory presumption of N.Y. Veh. & Traf. Law § 388(1) of permissive use by the lessee's brother. Hamilton v Hunt, 288 A.D.2d 86, 733 N.Y.S.2d 153, 2001 N.Y. App. Div. LEXIS 10997 (N.Y. App. Div. 1st Dep't 2001).

Because the words "administrators" and "assigns" in an injured party's release of a lessee did not include the lessor, it remained liable under N.Y. Veh. & Traf. Law § 388 for injuries resulting from the negligence of any person operating its automobile with its permission; therefore, the trial court properly denied summary judgment to the lessor. Morales v Rotino, 27 A.D.3d 433, 812 N.Y.S.2d 582, 2006 N.Y. App. Div. LEXIS 2615 (N.Y. App. Div. 2d Dep't 2006).

Because a lessor did not make a such showing warranting "displacement" of the "normally applicable" New York law in a "split-domicile" wrongful death action, N.Y. Veh. & Traf. Law § 388 applied to hold the lessor vicariously liable for any liability found against the lessee. Zatuchny v "John Doe", 34 A.D.3d 398, 825 N.Y.S.2d 458, 2006 N.Y. App. Div. LEXIS 14127 (N.Y. App. Div. 1st Dep't 2006).

In an action arising out of an automobile accident which occurred while the car was being driven, contrary to the terms of a lease, by the lessee's minor son, it was held that although the lessee of a car is regarded as the owner with respect to liability for negligence under Vehicle and Traffic Law §§ 128 and 388, under Insurance Law § 167 the self-insured lessor was the owner and the lessee's liability insurance policy constituted excess insurance, since a non-owned car was used without permission of the owner. Aetna Casualty & Surety Co. v World Wide Rent-A-Car, Inc., 52 Misc. 2d 552, 276 N.Y.S.2d 401, 1966 N.Y. Misc. LEXIS 1176 (N.Y. Sup. Ct. 1966), modified, 28 A.D.2d 286, 284 N.Y.S.2d 807, 1967 N.Y. App. Div. LEXIS 2928 (N.Y. App. Div. 1st Dep't 1967).

Company which was named as "lessee" in car rental agreement, but which merely acted as go-between in arranging for use of car

by another company, was not vicariously liable for deaths of 2 pedestrians while wife of other company's employee was driving car, and court would grant motion to dismiss action against it, since it was not actual party to lease, did not sign lease agreement, and had no possession, use or control of car, and was therefore not "owner" within meaning of CLS Veh & Tr §§ 128 and 388. Giardina v Avis Rent A Car, Inc., 135 Misc. 2d 1052, 517 N.Y.S.2d 349, 1986 N.Y. Misc. LEXIS 3149 (N.Y. Sup. Ct. 1986).

Under N.Y. Veh. & Traf. Law § 388(1), rental agency could be found vicariously liable for injuries resulting from the use of one of its rented vehicles, even though the vehicle was driven by an unauthorized driver. Talron Enters. v Garcia, 191 Misc. 2d 634, 743 N.Y.S.2d 833, 2002 N.Y. Misc. LEXIS 595 (N.Y. Civ. Ct. 2002).

Rental car company was not entitled to summary judgment against the passenger, who was an authorized driver of the vehicle, but had lent the car to an unauthorized driver to operate, because there were issues remaining over whether or not the driver's use of the car was permissive under N.Y. Veh. & Traf. Law § 388. Diaz v ELRAC, Inc., 14 A.D.3d 428, 789 N.Y.S.2d 116, 2005 N.Y. App. Div. LEXIS 497 (N.Y. App. Div. 1st Dep't 2005).

Summary judgment dismissal of a wife's personal injury complaint, which was premised on the theory that a domestic rental car company, as apparent agent of the Mexican owner and renter of a vehicle, was vicariously liable for the driver's negligence under N.Y. Veh. & Traf. Law § 388, was affirmed where it was undisputed that the wife's husband was negligent in causing an automobile accident that resulted in the wife's injuries. The Mexican entity that owned and leased the vehicle was in no way negligent, so the wife could not use the doctrine of apparent agency to impose liability on the Mexican entity's domestic parent company; there was no negligence of the company or the Mexican entity for vicarious liability to be applicable. Ashkenazi v Hertz Rent a Car, 18 A.D.3d 584, 795 N.Y.S.2d 624, 2005 N.Y. App. Div. LEXIS 5291 (N.Y. App. Div. 2d Dep't 2005).

Driver could not pursue a vicarious liability claim pursuant to N.Y. Veh. & Traf. Law § 388 against a lessor of the vehicle that collided with the driver's vehicle because § 388 was preempted by the Graves Amendment, 49 U.S.C.S. § 30106(a), which eliminated the vicarious liability of motor vehicle lessors. Stampolis v Provident Auto Leasing Co., 586 F. Supp. 2d 88, 2008 U.S. Dist. LEXIS 91024 (E.D.N.Y. 2008).

55. — — Theft or conversion

Fact that lessee obtained automobile from leasing company through fraudulent means, i. e., use of credit card issued in name of another and a forged or stolen identification card and license, did not relieve leasing company from its statutory liability as owner for injuries which another motorist sustained in collision with leased vehicle; under circumstances, the leased vehicle was being operated by the lessee with the owner's consent; lessee, having put the automobile into the traffic stream and having at his disposal opportunity to check the means by which the automobile was leased, bore responsibility for the injury. Allstate Ins. Co. v Dailey, 47 A.D.2d 375, 367 N.Y.S.2d 87, 1975 N.Y. App. Div. LEXIS 9249 (N.Y. App. Div. 2d Dep't 1975), aff'd, 39 N.Y.2d 759, 384 N.Y.S.2d 776, 349 N.E.2d 876, 1976 N.Y. LEXIS 2702 (N.Y. 1976).

The victims of an automobile accident involving a rented vehicle could not recover from the lessor/owner or its insurer, even though it was the policy of the state that there should be recourse to a financially responsible defendant for a person injured by the negligent operation of an automobile, where an innocent victim of an accident may not recover from a lessor or other owner when the offending vehicle was being operated without the owner's permission, where the lessee of the rented automobile was guilty of the unauthorized use of a vehicle for a period of some 21 days beyond the term of his rental agreement, and where the lessor/owner made telephone calls to the lessee's relatives, sent letters to him via certified mail, contacted the local police concerning the vehicle, and filed a criminal complaint regarding the lessee's failure to return the vehicle in accordance with the rental agreement. Utica Mut. Ins. Co. v Lahey, 95 A.D.2d 150, 465 N.Y.S.2d 553, 1983 N.Y. App. Div. LEXIS 18532 (N.Y. App. Div. 2d Dep't 1983).

Presumption under CLS Veh & Tr § 388(1) that vehicle was being operated with owner's consent was rebutted where (1) rental agreement listed individual lessee as sole authorized driver, (2) before leaving town, lessee parked and locked car on public street near her home, (3) she did not give permission to anyone to use car, and she kept in her possession lone set of keys supplied to her by rental agency, (4) on discovery that car had been stolen, she immediately notified police, (5) police department and Department of Motor Vehicles records indicated that on day before lessee's return, car was involved in collision with another vehicle in which plaintiff was passenger, (6) operator of lessee's car, identified only as "John Doe," abandoned car at scene and was not apprehended, and (6) plaintiff merely offered affirmation from her attorney, who was not person with knowledge of facts. Guerra v Kings Plaza Leasing Corp., 172 A.D.2d 583, 568 N.Y.S.2d 413, 1991 N.Y. App. Div. LEXIS 4676 (N.Y. App. Div. 2d Dep't 1991).

Car rental company successfully rebutted strong presumption of vicarious liability under CLS Veh & Tr § 388(1) where (1) police accident report indicated that driver of rented car had fled scene of accident and was unknown, (2) renter stated that car was stolen while she was at work, and (3) plaintiff's suggestion that car might have been operated with renter's permission was mere speculation. Villamil v Budget Rental, 281 A.D.2d 207, 721 N.Y.S.2d 638, 2001 N.Y. App. Div. LEXIS 2191 (N.Y. App. Div. 1st Dep't 2001).

56. —Trucks

Where a motorist recovered against a lessee carrier and driver for negligence of its driver in operation of a tractor-trailer truck leased from another carrier in no way connected with its operation, and also against such lessor the latter's liability is solely derivative under this section, and the lessor may recover over against the lessee and driver for any amount it has paid the motorist. Dittman v Davis, 299 N.Y. 601, 86 N.E.2d 175, 299 N.Y. (N.Y.S.) 601, 1949 N.Y. LEXIS 1066 (N.Y. 1949).

Verdict against lessor and lessee of truck, but which exonerated driver, was not inconsistent where evidence disclosed that truck was loaded by fellow employees of driver and pedestrian was injured by open door of truck. Guadagno v H. S. Trucking, 29 A.D.2d 979, 289 N.Y.S.2d 691, 1968 N.Y. App. Div. LEXIS 4197 (N.Y. App. Div. 2d Dep't 1968).

Truck rental agency would be liable to third persons for personal injuries sustained in collision involving truck if driver of truck had implied permission from his employer and from rental agency to be driving truck for nonbusiness purposes outside business hours at time accident occurred. Samuels v Hertz Truck Rental, Inc., 48 A.D.2d 936, 370 N.Y.S.2d 20, 1975 N.Y. App. Div. LEXIS 10228 (N.Y. App. Div. 2d Dep't 1975).

Truck lessor's liability policy, executed in New York, excluding coverage of truck being used in business of any person or organization to whom truck is rented was invalid under New York law for failing to require the existence of other insurance sufficient to meet minimum standards of coverage established by financial responsibility laws. Randazzo v Cunningham, 56 A.D.2d 702, 392 N.Y.S.2d 740, 1977 N.Y. App. Div. LEXIS 10864 (N.Y. App. Div. 4th Dep't 1977), aff'd, 43 N.Y.2d 937, 403 N.Y.S.2d 894, 374 N.E.2d 1245, 1978 N.Y. LEXIS 1833 (N.Y. 1978).

Where deceased's death occurred when he fell from truck which was being rented by its owner to deceased's employer and being driven by deceased's coemployee, truck owner was not liable for deceased's death to the extent that it resulted from coemployee's conduct in operating vehicle, but owner could be liable insofar as complaint stated cause of action based solely upon independent acts of negligence on owner's part as in maintaining and renting a defective vehicle. Di Bernardo v Heimroth, 58 A.D.2d 344, 396 N.Y.S.2d 904, 1977 N.Y. App. Div. LEXIS 12412 (N.Y. App. Div. 3d Dep't 1977).

Lessee of tractor-trailer was entitled to summary judgment dismissing cause of action alleging that it was vicariously liable under CLS Veh & Tr § 388 for negligence of owner-lessor's employee, who was driving tractor-trailer when it collided with plaintiffs' vehicle, as it was not "owner" under CLS Veh & Tr § 128 because it did not have requisite exclusive control during 30 days preceding accident, where tractor-trailer was leased to

other companies on at least 3 occasions during that time. La Plant v Cutlip, 258 A.D.2d 769, 685 N.Y.S.2d 840, 1999 N.Y. App. Div. LEXIS 1185 (N.Y. App. Div. 3d Dep't), app. denied, 93 N.Y.2d 811, 694 N.Y.S.2d 633, 716 N.E.2d 698, 1999 N.Y. LEXIS 1844 (N.Y. 1999).

Where an auto renting company leased trucks to bakeries for route coverage and in an accident the driver of the truck, an employee of the bakery, was killed, the renting company and the bakery were not joint tort-feasors and barred from the use of impleader, but the auto renting company who is the registered owner of the truck can be held liable under this section. Elfeld v Burkham Auto Renting Co., 92 N.Y.S.2d 249, 196 Misc. 446, 1949 N.Y. Misc. LEXIS 2806 (N.Y. Sup. Ct. 1949).

In the absence of a failure to show that defendant, a truck rental agency, gave express or implied permission for the operation of the vehicle by an unlicensed driver, the truck lessor may validly restrict the operation of its vehicle to licensed drivers only pursuant to the terms of its written rental agreement signed by the lessee. Platt v Hertz Corp., 66 Misc. 2d 505, 321 N.Y.S.2d 613, 1971 N.Y. Misc. LEXIS 1686 (N.Y. App. Term 1971).

Since lessee and lessee's employee were guilty of active negligence and lessor's liability was based on passive negligence and arose by virtue of its ownership of the truck involved in the accident, the lessor was entitled to judgment over and against the lessee and lessee's employee. Campanile v Yoss-Weiss Baking Corp., 129 N.Y.S.2d 616, 1954 N.Y. Misc. LEXIS 3197 (N.Y. Sup. Ct. 1954).

Nontrucking use endorsement to trucking firm's liability policy, which excluded coverage when tractor was rented and used in lessee's business without making provision for coverage when lessee was uninsured, was not valid under Veh & Tr § 388 in those instances in which lessee was in fact insured. Conn. Indem. Co. v 21st Century Transp. Co., Inc., 186 F. Supp. 2d 264, 2002 U.S. Dist. LEXIS 3164 (E.D.N.Y. 2002).

57. —Buses

The owner of a school bus was not liable under this section where the bus had been leased to one who contracted to transport school children, the owner was not a party to the contract, and the negligence of the driver of the bus, if any, was not in the "operation" of the bus. Scalzo v Vincent, 279 A.D. 1141, 113 N.Y.S.2d 218, 1952 N.Y. App. Div. LEXIS 6096 (N.Y. App. Div. 1952).

58. —Joint liability of lessor and lessee

A corporation that rents motor vehicles is not a joint tort feasor with the operator if the corporation has secured the insurance required under this section. Therefore, a release to the corporation is not a bar to an action against the operator. Landau v Hertz Drivurself Stations, Inc., 237 A.D. 141, 260 N.Y.S. 561, 1932 N.Y. App. Div. LEXIS 5292 (N.Y. App. Div. 1932).

The victims of an automobile accident involving a rented vehicle could not recover from the lessor/owner or its insurer, even though it was the policy of the state that there should be recourse to a financially responsible defendant for a person injured by the negligent operation of an automobile, where an innocent victim of an accident may not recover from a lessor or other owner when the offending vehicle was being operated without the owner's permission, where the lessee of the rented automobile was guilty of the unauthorized use of a vehicle for a period of some 21 days beyond the term of his rental agreement, and where the lessor/owner made telephone calls to the lessee's relatives, sent letters to him via certified mail, contacted the local police concerning the vehicle, and filed a criminal complaint regarding the lessee's failure to return the vehicle in accordance with the rental agreement. Utica Mut. Ins. Co. v Lahey, 95 A.D.2d 150, 465 N.Y.S.2d 553, 1983 N.Y. App. Div. LEXIS 18532 (N.Y. App. Div. 2d Dep't 1983).

In action to recover for injuries sustained in collision with automobile under lease for 22-month term, court erred in dismissing complaint as against vehicle lessor since (1) fact that term "owner" in CLS Veh & Tr § 128 "includes any lessee . . . having the exclusive use . . . for a period greater than thirty days" does not exclude title holder as owner for purposes of CLS Veh & Tr § 388, which makes vehicle owner jointly and severally liable with operator owner for negligent use of vehicle, and (2) although secured party in whose favor there is security interest in vehicle out of his possession is not deemed owner by virtue of CLS Veh & Tr § 388(3), it was not shown that lease in question was intended merely to create security interest in lessor. Sullivan v Spandau, 186 A.D.2d 641, 589 N.Y.S.2d 49, 1992 N.Y. App. Div. LEXIS 11316 (N.Y. App. Div. 2d Dep't 1992).

Although neither public policy nor CLS Veh & Tr §§ 370 and 388 prohibited self-insured rental car agency from disclaiming any part of its liability to injured pedestrian that exceeded amount for which motor vehicle owners were required to be insured and from seeking indemnification for such sums under parties' agreement, public policy barred agency from obtaining indemnification from operator of rental car that hit pedestrian where agency's liability to pedestrian had been fixed settlement with pedestrian for sum that was less than required coverage. Snorac, Inc. v Skura, 273 A.D.2d 886, 709 N.Y.S.2d 311, 2000 N.Y. App. Div. LEXIS 6952 (N.Y. App. Div. 4th Dep't 2000).

Where an auto renting company leased trucks to bakeries for route coverage and in an accident the driver of the truck, an employee of the bakery, was killed, the renting company and the bakery were not joint tort-feasors and barred from the use of impleader, but the auto renting company who is the registered owner of the truck can be held liable under this section. Elfeld v Burkham Auto Renting Co., 92 N.Y.S.2d 249, 196 Misc. 446, 1949 N.Y. Misc. LEXIS 2806 (N.Y. Sup. Ct. 1949).

Evidence sufficient to justify jury verdict against lessee who operated and controlled vehicle at time of accident and immediately prior thereto and lessor-owner, even if jury verdict was founded solely on defective maintenance or an existing defect, since the lessee for a period of over 30 days, is deemed an owner, and the title owner and lessor are jointly and severally liable. Accelerated Trucking Corp. v McLean Trucking Co., 53 Misc. 2d 321, 278 N.Y.S.2d 516, 1967 N.Y. Misc. LEXIS 1886 (N.Y. Civ. Ct. 1967).

The term "owner" under Vehicle and Traffic Law § 128 includes any lessee having the exclusive use for a period greater than 30 days, and does not exclude the title holder as an owner for purposes of Vehicle and Traffic Law § 388 and under Vehicle and Traffic Law § 388 subdivision 3 the liability of the lessor and lessee of an automobile is joint and several. Location Auto Leasing Corp. v Lembo Corp., 62 Misc. 2d 856, 310 N.Y.S.2d 365, 1970 N.Y. Misc. LEXIS 1689 (N.Y. Sup. Ct. 1970).

59. —Action by lessor against lessee or driver

Self-insured car rental companies are not immune from anti-subrogation principles; thus, indemnification clause in rental agreement which sought to disclaim self-insured car rental company's duty to provide primary insurance to renters up to statutory minimum liability limits, and to assign risk to renters themselves, was unenforceable to that extent. ELRAC, Inc. v Ward, 96 N.Y.2d 58, 724 N.Y.S.2d 692, 748 N.E.2d 1, 2001 N.Y. LEXIS 695 (N.Y. 2001).

Lessor of truck was entitled to indemnification from lessee where employee of lessee had secured judgment against lessor for injuries received when struck by the truck through the negligence of lessee's driver, where lease provided that lessor would maintain indemnity insurance protecting all parties from damages caused by operation of truck and would pay all expenses of the operation of the truck except wages. Gorham v Arons, 282 A.D. 147, 121 N.Y.S.2d 669, 1953 N.Y. App. Div. LEXIS 4420 (N.Y. App. Div. 1953), aff'd, 306 N.Y. 782, 118 N.E.2d 600, 306 N.Y. (N.Y.S.) 782, 1954 N.Y. LEXIS 1128 (N.Y. 1954).

Where the lessor of a truck settled a tort action resulting from the death of a pedestrian killed by the truck driven by the lessee's agent, where the settlement was for an amount in excess of the coverage specifically provided by the lessor to the lessee, where the lessor's liability was derivative, arising from a statutory obligation imposed by Veh & Tr Law § 388 and not from the lessor's negligence, and where the lessee was the primary and active tortfeasor, the lessee was liable in indemnity to the lessor for the amount of the settlement in excess of the coverage provided by the lessor. Hertz Corp. v Dahill Moving & Storage Co., 79 A.D.2d 589, 434 N.Y.S.2d 386, 1980 N.Y. App. Div. LEXIS

13921 (N.Y. App. Div. 1st Dep't 1980), aff'd, 54 N.Y.2d 619, 442 N.Y.S.2d 502, 425 N.E.2d 890, 1981 N.Y. LEXIS 2587 (N.Y. 1981).

In a personal injury action arising out of an automobile accident, there was no basis to impose vicarious liability upon the lessee of a taxi pursuant to Veh & Tr Law § 388, based upon the taxi driver's active negligence where the lessee was at most a lessee for periods of 12 hours and thus could not be deemed an owner for purposes of that section unless he had exclusive use of the vehicle for period greater than 30 days pursuant to Veh & Tr Law § 128. Simon v El Service Corp., 85 A.D.2d 556, 452 N.Y.S.2d 407, 1981 N.Y. App. Div. LEXIS 16342 (N.Y. App. Div. 1st Dep't 1981).

Vehicle lessor was entitled to summary judgment on its common-law indemnification claim against lessee for sums it paid to third party, where it submitted evidence that lessee struck rear end of third party's vehicle while it was stopped, and lessee failed to offer any explanation for accident. ELRAC, Inc. v Beckford, 250 A.D.2d 725, 673 N.Y.S.2d 192, 1998 N.Y. App. Div. LEXIS 5784 (N.Y. App. Div. 2d Dep't 1998).

In personal injury action arising from accident involving vehicle leased from defendant by plaintiff, personally and as president of closely-held corporation, and operated by plaintiff's son (who was also principal member of lessee corporation), plaintiff was not entitled to summary judgment on counterclaims for common-law and contractual indemnification, where accident occurred after lease term ended and before parties entered into 2-month lease extension retroactive to expiration of original term, and triable issues of fact existed as to whether, inter alia, plaintiff complied with conditions of termination as stated in lease and whether accident occurred while he was still lessee and therefore co-owner of vehicle under CLS Veh & Tr § 128. Kovacs v Andy's Carpentry Co., 270 A.D.2d 394, 705 N.Y.S.2d 254, 2000 N.Y. App. Div. LEXIS 2976 (N.Y. App. Div. 2d Dep't 2000).

In personal injury action by lessee of rented van that went off road while lessee's friend was driving it, lessor's enforcement of indemnity provision of rental agreement did not violate public policy as embodied in antisubrogation rule propounded in Penn Gen. Ins. Co. v. Austin Co., 68 NY2d 465; thus, lessor's counterclaim for indemnity remained valid in respect to loss in excess of policy limits of insurance provided in rental agreement. Layaw v Maguire Ford Lincoln Mercury, 164 Misc. 2d 113, 623 N.Y.S.2d 731, 1995 N.Y. Misc. LEXIS 65 (N.Y. Sup. Ct. 1995), aff'd, 219 A.D.2d 73, 639 N.Y.S.2d 544, 1996 N.Y. App. Div. LEXIS 2788 (N.Y. App. Div. 3d Dep't 1996).

Since lessee and lessee's employee were guilty of active negligence and lessor's liability was based on passive negligence and arose by virtue of its ownership of the truck involved in the accident, the lessor was entitled to judgment over and against the lessee and lessee's employee. Campanile v Yoss-Weiss Baking Corp., 129 N.Y.S.2d 616, 1954 N.Y. Misc. LEXIS 3197 (N.Y. Sup. Ct. 1954).

The vicarious liability imposed on an owner by the statute leaves him with a claim over against the active wrongdoer and against the active wrongdoer's employer. Roscher v Cecere, 132 N.Y.S.2d 840, 1954 N.Y. Misc. LEXIS 2701 (N.Y. Sup. Ct. 1954).

Lessor's suit against a lessee of a vehicle seeking indemnification for damages arising from the vehicle use by an unauthorized driver was dismissed because the amounts paid by the lessor for both bodily injury and property damage were below the minimum required by N.Y. Veh. & Traf. Law § 370(1), and thus lessor was not allowed to maintain the instant action; it was a natural extension of the holdings of the Court of Appeals of New York to require a plaintiff rental car company to maintain statutory minimum for every permissive user, whether explicitly authorized to drive the vehicle or not. ELRAC, LLC v Manzo, 957 N.Y.S.2d 826, 38 Misc. 3d 646, 2012 N.Y. Misc. LEXIS 5515 (N.Y. Civ. Ct. 2012).

60. —Effect of lease terms

Where a tractor and trailer are leased by the owner on a one-trip lease basis, and the lease agreement is ambiguous as to whether the lessor's driver has permission to use and operate the equipment for purposes of seeking and finding a return trip load, the question of whether he has such permission is a question for the jury. Leotta v Plessinger, 8 N.Y.2d 449, 209 N.Y.S.2d 304, 171 N.E.2d 454, 1960 N.Y. LEXIS 837 (N.Y. 1960), reh'g denied, 9 N.Y.2d 688, 1961 N.Y. LEXIS 1809 (N.Y. 1961).

Lessor of truck was entitled to indemnification from lessee where employee of lessee had secured judgment against lessor for injuries received when struck by the truck through the negligence of lessee's driver, where lease provided that lessor would maintain indemnity insurance protecting all parties from damages caused by operation of truck and would pay all expenses of the operation of the truck except wages. Gorham v Arons, 282 A.D. 147, 121 N.Y.S.2d 669, 1953 N.Y. App. Div. LEXIS 4420 (N.Y. App. Div. 1953), aff'd, 306 N.Y. 782, 118 N.E.2d 600, 306 N.Y. (N.Y.S.) 782, 1954 N.Y. LEXIS 1128 (N.Y. 1954).

In personal injury action against car rental company based on its vicarious liability as owner of vehicle, brought by car renter for injuries sustained while her husband drove car and she was passenger, provision which required plaintiff as renter to indemnify rental company applied to any action brought against rental company, whether by renter or by third party; moreover, even if provision applied only to actions brought by third parties, plaintiff commenced action in her capacity as third party victim and not in her capacity as renter. Morris v Snappy Car Rental, 189 A.D.2d 115, 595 N.Y.S.2d 577, 1993 N.Y. App. Div. LEXIS 2928 (N.Y. App. Div. 4th Dep't), reh'g denied, 193 A.D.2d 1148, 600 N.Y.S.2d 673, 1993 N.Y. App. Div. LEXIS 5875 (N.Y. App. Div. 4th Dep't 1993), aff'd, 84 N.Y.2d 21, 614 N.Y.S.2d 362, 637 N.E.2d 253, 1994 N.Y. LEXIS 1297 (N.Y. 1994).

In personal injury action against car rental company based on its vicarious liability as owner of vehicle, brought by car renter for injuries sustained while her husband drove car and she was passenger, provision which required plaintiff as renter to indemnify rental company in any action brought against rental company, whether by renter or by third party, was not void as against public policy; however, indemnity provision could not deprive plaintiff of her right as injured party to have recourse against financially responsible party under CLS Veh & Tr § 388. Morris v Snappy Car Rental, 189 A.D.2d 115, 595 N.Y.S.2d 577, 1993 N.Y. App. Div. LEXIS 2928 (N.Y. App. Div. 4th Dep't), reh'g denied, 193 A.D.2d 1148, 600 N.Y.S.2d 673, 1993 N.Y. App. Div. LEXIS 5875 (N.Y. App. Div. 4th Dep't 1993), aff'd, 84 N.Y.2d 21, 614 N.Y.S.2d 362, 637 N.E.2d 253, 1994 N.Y. LEXIS 1297 (N.Y. 1994).

In personal injury action by plaintiff who was involved in accident while passenger in vehicle leased from defendant, defendant was not entitled to summary judgment based on indemnification claus in lease where indemnification clause would permit lessor to avoid all liability, rendering it void as against public policy behind CLS Veh & Tr § 388, and lease did not provide for modification to comport with state law or public policy. Griffin v Fun Jung La, 229 A.D.2d 468, 645 N.Y.S.2d 528, 1996 N.Y. App. Div. LEXIS 7776 (N.Y. App. Div. 2d Dep't 1996).

Enforcement of clause in car rental agreement, purporting to prohibit use of rental car in New York, was precluded on public policy grounds as "unreasonable and unrealistic" in that defendant lessor knew or should have known of great likelihood that car rented in Massachusetts would be driven to neighboring New York; thus, lessor of car was not entitled to summary judgment absolving it of responsibility under CLS Veh & Tr § 388. Brown v Agency Rent-A-Car, 234 A.D.2d 82, 650 N.Y.S.2d 220, 1996 N.Y. App. Div. LEXIS 12395 (N.Y. App. Div. 1st Dep't 1996).

Car rental company was entitled to summary judgment on its cross claim for contractual indemnity against individual defendant in personal injury action where (1) rental agreement provided that individual defendant, as lessee, would indemnify company for all claims arising from use of rental vehicle, (2) individual defendant was involved in accident while driving rental vehicle, (3) company did not violate CLS CPLR § 4544, and (4) company was not required, as self-insurer, to provide at least minimum uninsured motorist insurance coverage under CLS Veh & Tr § 388, because § 388 was designed to protect injured persons, and individual defendant was not injured person. Cuthbert v Pederson, 266 A.D.2d 255, 698 N.Y.S.2d 254, 1999 N.Y. App. Div. LEXIS 11307 (N.Y. App. Div. 2d Dep't 1999).

Policy underlying CLS Veh & Tr § 388 was not undercut by enforcement of indemnification clause of rental agreement, and defendant lessor was entitled to summary judgment on issue of contractual indemnity against defendant lessee, where it was undisputed that member of lessee's family was driving rental vehicle when accident occurred, injuring pedestrian. Ward v ELRAC, Inc., 270 A.D.2d 254, 704 N.Y.S.2d 274, 2000 N.Y. App. Div. LEXIS 2506 (N.Y. App. Div. 2d Dep't), app. dismissed, 95 N.Y.2d 880, 715 N.Y.S.2d 214, 738 N.E.2d 361, 2000 N.Y. LEXIS 3770 (N.Y. 2000), modified, 96 N.Y.2d 58, 724 N.Y.S.2d 692, 748 N.E.2d 1, 2001 N.Y. LEXIS 695 (N.Y. 2001).

Under Veh & Traf L § 388, automobile lessor's insurer had obligation to defend lessee's son in personal injury action, despite lease clause purporting to restrict insurance coverage to persons named therein, where, at time of accident, son was operating leased vehicle with lessee's permission. Sternberg v Liberty Mut. Ins. Co., 72 Misc. 2d 655, 340 N.Y.S.2d 550, 1972 N.Y. Misc. LEXIS 1282 (N.Y. Sup. Ct. 1972).

No public policy was violated by private contract making rental customer's insurance primary and lessor's insurance secondary, and legislative intent of CLS Veh & Tr §§ 388 and 370 was completely fulfilled, where rental customer was free to either bargain for lower rate by relying on her own coverage or purchase lessor's coverage at slightly higher rental fee or, if rental customer had no coverage, then lessor would provide minimum coverage required by state's financial responsibility law. Miller v Sullivan, 174 Misc. 2d 690, 666 N.Y.S.2d 892, 1997 N.Y. Misc. LEXIS 553 (N.Y. Sup. Ct. 1997).

Provision in automobile liability insurance policy on tractor-truck, containing "truckmen's endorsement", exempting from coverage accidents which occur while automobile is being used in business of any person or organization to whom automobile is rented, is against New York public policy by reason of absence of limitation to such provision to effect that provision would only apply when tractor is in custody of lessee under written lease agreement which requires lessee to provide insurance covering tractor. Transport Ins. Co. v Protective Ins. Co., 647 F. Supp. 1381, 1986 U.S. Dist. LEXIS 17765 (N.D.N.Y. 1986).

61. — —Designated driver

Lessor of automobile liable by virtue of statute for injuries caused by negligent driving of party who had rented automobile from lessee despite restrictive terms of lease between lessor and lessee which were violated by the fact that the driver was under 25 years of age and unlicensed. Cooperman v Ferrentino, 37 A.D.2d 474, 326 N.Y.S.2d 675, 1971 N.Y. App. Div. LEXIS 2912 (N.Y. App. Div. 2d Dep't 1971).

Fine print on reverse side of car rental agreement which limited permissive use of vehicle to certain drivers, and which varied with limitations contained in larger type on front of agreement, was ineffective to cut off lessor's liability as owner of vehicle where accident involving rented auto occurred while being operated by person as to whom small-print exclusion applied. Allstate Ins. Co. v La Perta, 42 A.D.2d 104, 345 N.Y.S.2d 138, 1973 N.Y. App. Div. LEXIS 3916 (N.Y. App. Div. 2d Dep't 1973).

A defendant, which rented an automobile to a third party under an agreement providing that no one other than said lessee would drive the vehicle, was not liable to plaintiff where said lessee turned the automobile over to another, who, while driving it, collided with plaintiff's automobile. Stapleton v Hertz Drivurself Stations, Inc., 225 N.Y.S. 661, 131 Misc. 52, 1927 N.Y. Misc. LEXIS 1238 (N.Y. App. Term 1927).

In an action arising out of an automobile accident which occurred while the car was being driven, contrary to the terms of a lease, by the lessee's minor son, it was held that although the lessee of a car is regarded as the owner with respect to liability for negligence under Vehicle and Traffic Law §§ 128 and 388, under Insurance Law § 167 the self-insured lessor was the owner and the lessee's liability insurance policy constituted excess insurance, since a non-owned car was used without permission of the owner. Aetna Casualty & Surety Co. v World Wide Rent-A-Car, Inc., 52 Misc. 2d 552, 276 N.Y.S.2d 401, 1966 N.Y. Misc. LEXIS 1176 (N.Y. Sup. Ct. 1966), modified, 28 A.D.2d 286, 284 N.Y.S.2d 807, 1967 N.Y. App. Div. LEXIS 2928 (N.Y. App. Div. 1st Dep't 1967).

Where motor vehicle rental agreement contained a condition on the back of the agreement to the effect that the vehicle would not be driven by anyone other than an employee of the lessee, which print was very small and very difficult to read, such condition did not rebut the presumption that the car was being driven with the permission of the owner and did not preclude liability of the lessor where the car was involved in an accident while being driven by one other than an employee of the lessee. Febbraro v Hertz Corp., 64 Misc. 2d 794, 315 N.Y.S.2d 702, 1970 N.Y. Misc. LEXIS 1182 (N.Y. Civ. Ct. 1970).

That lessee allowed another person to drive commercially rented vehicle, even a person who was not licensed, was not enough to allow lessor to disclaim as a self-insurer of vehicle. Banner Casualty Co. v Lazar, 81 Misc. 2d 360, 366 N.Y.S.2d 314, 1975 N.Y. Misc. LEXIS 2389 (N.Y. Sup. Ct. 1975).

Operator of vehicle was not driving car with permission, express or implied of automobile dealer, where dealer loaned car to operator's wife under agreement providing that wife would not sublet or loan car to any third person, nor could automobile dealer's insurance carrier be held liable as contract of insurance specifically provided that policy would not cover liability resulting from operation of vehicle that was "rented to others", such that insurance company plainly did not undertake to insure rental agency, but instead sought to insure liability arising from automobile dealer's garage operations. Reliance Ins. Co. v Calderon, 685 F. Supp. 72, 1988 U.S. Dist. LEXIS 4439 (S.D.N.Y. 1988).

62. Bailment of vehicle

A baking corporation maintaining a truck, keeping it in a garage and using it for deliveries with the permission of the owner was legally using the truck within the meaning of this section and the owner may be held liable for negligent operation of the truck by the legal user. Elfeld v Burkham Auto Renting Co., 299 N.Y. 336, 87 N.E.2d 285, 299 N.Y. (N.Y.S.) 336, 1949 N.Y. LEXIS 940 (N.Y. 1949).

Company which was not named in car rental agreement could be said to be "bailee" of car within meaning of vicarious liability statute, where it was intended that company would have exclusive use of car, but company was not liable as "owner," and was entitled to dismissal of personal injury action against it, although its employee had exclusive use of car for more than 10 months; rental was on monthly basis and could have been terminated at end of any designated period, and thus there was no possessory right "under a lease or otherwise" for more than 30 days, as required by CLS Veh & Tr § 128. Giardina v Avis Rent A Car, Inc., 135 Misc. 2d 1052, 517 N.Y.S.2d 349, 1986 N.Y. Misc. LEXIS 3149 (N.Y. Sup. Ct. 1986).

In a negligence suit brought by an injured driver against a car manufacturer, its finance company, and a car dealer, their motion to dismiss the complaint was denied since the loaning of a vehicle that was involved in a collision was not a lease or a rental under the Graves Amendment, 42 U.S.C.S. § 30106, entitling them to the protection from vicarious liability under the Graves Amendment. Zizersky v Life Quality Motor Sales, Inc., 866 N.Y.S.2d 501, 21 Misc. 3d 871, 240 N.Y.L.J. 82, 2008 N.Y. Misc. LEXIS 5975 (N.Y. Sup. Ct. 2008).

The negligence of the bailee operator coupled with the owner's permission to drive on a public highway is the basis of the owner's liability under this section. Goschar v Bauer, 13 N.Y.S.2d 328, 1939 N.Y. Misc. LEXIS 2026 (N.Y. City Ct. 1939).

As to third persons, a bailor, under this section, is also made liable for the negligence of a bailee. Kurzon v Union R. Co., 21 N.Y.S.2d 310, 1940 N.Y. Misc. LEXIS 1916 (N.Y. City Ct. 1940).

Supermarket offering valet parking through an independent contractor was not entitled to summary judgment on a personal injury complaint and cross claims involving a valet-driven vehicle. The vehicle's owner, whose liability was purely vicarious, was presumptively entitled to common-law defense and indemnification; moreover, public policy supported a theory of ostensible agency or apparent authority because an auto business exclusion precluded coverage under the vehicle owner's insurance policy. Berger v Rokeach, 58 Misc. 3d 827, 63 N.Y.S.3d 835, 2017 N.Y. Misc. LEXIS 4375 (N.Y. Sup. Ct. 2017).

63. Insurance coverage

In an action against a corporation, engaged in the business of renting automobiles to be operated on public highways, to recover for injuries received by plaintiff through the negligent operation of one of defendant's cars by the renter thereof, an allegation in the answer that defendant carried insurance protecting renter against liability as required by this section constitutes a complete defense, and a motion by defendant for judgment in its favor upon pleadings is properly granted. Atkins v Hertz Drivurself Stations, Inc., 261 N.Y. 352, 185 N.E. 408, 261 N.Y. (N.Y.S.) 352, 1933 N.Y. LEXIS 1293 (N.Y. 1933), aff'd, 291 U.S. 641, 54 S. Ct. 437, 78 L. Ed. 1039, 1934 U.S. LEXIS 527 (U.S. 1934).

Although, ordinarily, whether a defendant has or has not obtained liability insurance is irrelevant and the introduction of evidence as to insurance coverage is highly prejudicial, such evidence is admissible where it has bearing upon whether or not the vehicle, at the time of the accident, was being operated with the owner's permission. Leotta v Plessinger, 8 N.Y.2d 449, 209 N.Y.S.2d 304, 171 N.E.2d 454, 1960 N.Y. LEXIS 837 (N.Y. 1960), reh'g denied, 9 N.Y.2d 688, 1961 N.Y. LEXIS 1809 (N.Y. 1961).

Non-trucking-use exclusion referring to lessee's contractual obligation to obtain business coverage, but not expressly providing that exclusion was only operative if lessee had business use liability coverage in effect for accident in question, was not valid because lessee's contractual obligation might be insufficient to provide coverage if lessee breached contract by not having insurance in effect at time of accident. Royal Indem. Co. v Providence Wash. Ins. Co., 92 N.Y.2d 653, 684 N.Y.S.2d 470, 707 N.E.2d 425, 1998 N.Y. LEXIS 4141 (N.Y. 1998).

A defendant lessor was exempt from liability by reason of carrying insurance pursuant to this section, which inured to the benefit of lessee, and the question as to the liability of the defendant lessor was improperly submitted to the jury. Mauzer v Larmar Auto Co., 243 A.D. 610, 277 N.Y.S. 625, 1935 N.Y. App. Div. LEXIS 7311 (N.Y. App. Div.), aff'd, 268 N.Y. 570, 198 N.E. 409, 268 N.Y. (N.Y.S.) 570, 1935 N.Y. LEXIS 1038 (N.Y. 1935).

This section does not provide coverage to an employee or permittee of the owner of an automobile. The coverage required by this section is coverage of the owner as assured for the acts of his employee or permittee. Kuhn v Auto Cab Mut. Indem. Co., 244 A.D. 272, 279 N.Y.S. 60, 1935 N.Y. App. Div. LEXIS 5806 (N.Y. App. Div. 1935), aff'd, 270 N.Y. 587, 1 N.E.2d 343, 270 N.Y. (N.Y.S.) 587, 1936 N.Y. LEXIS 1643 (N.Y. 1936).

A mother who resides in the same household with her son, while operating the son's automobile, must be presumed to be operating it with his permission, so as to be covered by his liability insurance and not eligible to sue the Motor Vehicle Accident Indemnification Corporation under § 618 of the Insurance Law. Zuckerman v Motor Vehicle Acci. Indemnification Corp., 13 A.D.2d 574, 212 N.Y.S.2d 179, 1961 N.Y. App. Div. LEXIS 12207 (N.Y. App. Div. 3d Dep't 1961).

64. —Insurers

Self-insured automobile rental company is subject to same minimum liability insurance requirements as companies that purchase insurance policies or post surety bonds under CLS Veh & Tr § 370(1). ELRAC, Inc. v Ward, 96 N.Y.2d 58, 724 N.Y.S.2d 692, 748 N.E.2d 1, 2001 N.Y. LEXIS 695 (N.Y. 2001).

Judgments in prior actions against a city and one of its employees, for negligent operation of a city automobile, determining that the city had no power to consent to the use of such vehicle for pleasure purposes so as to subject it to liability under this section, are not res judicata as to whether there was permission to use the vehicle under a policy of automobile liability insurance issued to the city and covering said vehicle. Fox v Employers' Liability Assurance Corp., 239 A.D. 671, 268 N.Y.S. 536, 1934 N.Y. App. Div. LEXIS 10914 (N.Y. App. Div. 1934).

The provisions of this section did not render an insurer under an automobile liability policy liable where the insured had sold the car some 23 days before the accident but had left his license plates on the car. Phoenix Ins. Co. v Guthiel, 1 A.D.2d 99, 147 N.Y.S.2d 341, 1955 N.Y. App. Div. LEXIS 3621 (N.Y. App. Div. 4th Dep't 1955), aff'd, 2 N.Y.2d 584, 161 N.Y.S.2d 874, 141 N.E.2d 909, 1957 N.Y. LEXIS 1089 (N.Y. 1957).

A default judgment obtained against the driver of an automobile for injuries sustained by plaintiffs does not establish that he was driving the car without the consent of its owner within the meaning of this section so as to entitle the owner's insurer to summary judgment, on principles of res judicata, in a subsequent action by plaintiffs to enforce liability of the insurer under an omnibus coverage clause in the policy. Manard v Hardware Mut. Casualty Co., 12 A.D.2d 29, 207 N.Y.S.2d 807, 1960 N.Y. App. Div. LEXIS 6780 (N.Y. App. Div. 4th Dep't 1960), reh'g denied, 12 A.D.2d 891, 212 N.Y.S.2d 1020, 1961 N.Y. App. Div. LEXIS 13341 (N.Y. App. Div. 4th Dep't 1961).

Plaintiff car rental agency was entitled to summary judgment directing defendant insurer to pay proportionate share of its litigation expenses in defending underlying personal injury action, where defendant's insured had rented van from plaintiff to transport her family members to family reunion and, although she informed plaintiff that she would not actually be traveling in van and she was not in van at time of accident, complained-of injuries arose out of her "use" of non-owned vehicle within meaning of policy issued by defendant in that she had agreed with her friend (who was sole authorized driver) and other passengers to use van for purpose for which it was rented. Hertz Corp. v GEICO, 250 A.D.2d 181, 683 N.Y.S.2d 483, 1998 N.Y. App. Div. LEXIS 12917 (N.Y. App. Div. 1st Dep't 1998), app. denied, 1999 N.Y. App. Div. LEXIS 5215 (N.Y. App. Div. 1st Dep't Apr. 22, 1999), app. dismissed, 93 N.Y.2d 1040, 697 N.Y.S.2d 568, 719 N.E.2d 929, 1999 N.Y. LEXIS 2181 (N.Y. 1999).

Plaintiff injured in motor vehicle accident involving taxi cab was entitled to summary judgment declaring that cab owner's insurer was required to provide liability insurance protection to owner under CLS Veh & Tr § 388 for any injuries sustained by plaintiff as result of cab passengers' negligence use of cab where (1) passengers' act of opening cab door in order to exit was "use and operation" of cab under § 388, (2) thus, owner would be liable for plaintiff's injuries if passengers' "use and operation" were negligent, and (3) under liability policy issued by insurer to owner, insurer was required to provide coverage to owner under such circumstances. Cohn v Nationwide Mut. Ins. Co., 286 A.D.2d 699, 730 N.Y.S.2d 152, 2001 N.Y. App. Div. LEXIS 8548 (N.Y. App. Div. 2d Dep't 2001).

A motor vehicle liability insurer was not liable on a policy issued to the owner for its negligent operation by a third person in New York State where the policy was issued to the owner in Iowa and the car was neither principally garaged nor principally operated in New York and the owner was not in the car at the time of the accident since, under the governing law of Iowa, there was no insurance coverage where the owner was not the driver or accompanying the driver. Stobinsky v Kyser, 42 Misc. 2d 53, 247 N.Y.S.2d 567, 1964 N.Y. Misc. LEXIS 2036 (N.Y. Sup. Ct. 1964).

Where a bus company which had purchased a bus from another bus line was loaned a different bus by the seller until the one purchased was ready for delivery, the seller's liability insurer was not a person for whom the protection of this section was intended and could not avoid a substantial part of its obligation under its insurance contract. Singerman Bus Corp. v American Fidelity Fire Ins. Co., 44 Misc. 2d 4, 252 N.Y.S.2d 780, 1964 N.Y. Misc. LEXIS 1620 (N.Y. Sup. Ct. 1964).

In an action arising out of an automobile accident which occurred while the car was being driven, contrary to the terms of a lease, by the lessee's minor son, it was held that although the lessee of a car is regarded as the owner with respect to liability for negligence under Vehicle and Traffic Law §§ 128 and 388, under Insurance Law § 167 the self-insured lessor was the owner and the lessee's liability insurance policy constituted excess insurance, since a non-owned car was used without permission of the owner. Aetna Casualty & Surety Co. v World Wide Rent-A-Car, Inc., 52 Misc. 2d 552, 276 N.Y.S.2d 401, 1966 N.Y. Misc. LEXIS 1176 (N.Y. Sup. Ct. 1966), modified, 28 A.D.2d 286, 284 N.Y.S.2d 807, 1967 N.Y. App. Div. LEXIS 2928 (N.Y. App. Div. 1st Dep't 1967).

Where a tractor was hauling a trailer, if the driver of the tractor was not the owner of the tractor, but merely the driver of such vehicle, he would be separately covered as an additional insured under a policy covering the trailer by virtue of the omnibus clause

mandated by statute, the Vehicle and Traffic Law § 388 as implemented by the regulations of the Insurance Department. Hiscock v Kuinlan, 62 Misc. 2d 842, 310 N.Y.S.2d 331, 1970 N.Y. Misc. LEXIS 1741 (N.Y. Sup. Ct. 1970).

Under Veh & Traf L § 388, automobile lessor's insurer had obligation to defend lessee's son in personal injury action, despite lease clause purporting to restrict insurance coverage to persons named therein, where, at time of accident, son was operating leased vehicle with lessee's permission. Sternberg v Liberty Mut. Ins. Co., 72 Misc. 2d 655, 340 N.Y.S.2d 550, 1972 N.Y. Misc. LEXIS 1282 (N.Y. Sup. Ct. 1972).

The spousal exclusion clauses found in the Vehicle and Traffic Law (§ 388, subd 4) and the Insurance Law (§ 167, subd 3), to the effect that no policy shall be deemed to insure against any liability of an insured because of injuries to his spouse, are inapplicable to payments made by an insurer under the no-fault insurance provisions (Insurance Law, §§ 670–678) to the wife of the operator of a car which hit a utility pole since the no-fault law did not require payment because of any liabiity of the insured, but, rather, the obligation of the insured arose by reason of the law's provisions and their legislatively mandated incorporation into its policy with the insured; payment under no-fault is to be made irrespective of the insured's fault and liability whereas the statutory spousal exclusion is applicable only when an insured seeks indemnification for injuries to his spouse sustained as a result of his negligence. Liberty Mut. Ins. Co. v State, 94 Misc. 2d 676, 405 N.Y.S.2d 945, 1978 N.Y. Misc. LEXIS 2295 (N.Y. Ct. Cl. 1978).

Self-insured car rental company was required to provide minimum coverage for renters of its automobiles, and thus was precluded from enforcing rental agreement to extent that agreement denied coverage to renter up to statutory amount and required renter to indemnify it for liability that fell within statutory amount. Worldwide Ins. Co. v United States Capital Ins. Co., 181 Misc. 2d 480, 693 N.Y.S.2d 901, 1999 N.Y. Misc. LEXIS 314 (N.Y. Sup. Ct. 1999).

65. —Particular policy provisions

This section does not require that all policies of liability insurance issued to the owner of a motor vehicle afford coverage not only to the owner for his vicarious liability created by the statute but in addition to every user with permission as an additional insured. General Acci. Fire & Life Assurance Corp. v Piazza, 4 N.Y.2d 659, 176 N.Y.S.2d 976, 152 N.E.2d 236, 1958 N.Y. LEXIS 886 (N.Y. 1958).

Where plaintiff was injured while riding in a police vehicle driven by a fellow officer that was struck by an underinsured vehicle, the fellow officer's insurer was not required to provide plaintiff supplementary uninsured/underinsured motorist coverage because a police vehicle was not a "motor vehicle" for purposes of mandatory underinsured motorist coverage under N.Y. Ins. Law § 3420(f)(2)(a). Matter of State Farm Mut. Auto. Ins. Co. v Fitzgerald, 25 N.Y.3d 799, 38 N.E.3d 325, 16 N.Y.S.3d 796, 2015 N.Y. LEXIS 1526 (N.Y. 2015).

Supplementary uninsured/underinsured motorist (SUM) endorsement prescribed by N.Y. Ins. Law § 3420(f)(2)(a) exempts police vehicles from its definition of the term "motor vehicle" absent a specific provision to the contrary in a given SUM endorsement. Matter of State Farm Mut. Auto. Ins. Co. v Fitzgerald, 25 N.Y.3d 799, 38 N.E.3d 325, 16 N.Y.S.3d 796, 2015 N.Y. LEXIS 1526 (N.Y. 2015).

In an action brought under the Insurance Law, § 109, the terms and conditions of an omnibus coverage clause extending coverage afforded by the policy to a named assured, "to any person . . . legally responsible for operation of such automobiles, provided such use or operation is with permission of named assured," were not changed or modified by a rider attached to comply with requirements of the Insurance Law, § 109, and this section, which extends the policy to protect the named assured "against liability and responsibility for damages resulting from negligence in operation of such motor vehicles . . . in business of such owner or otherwise, by any person legally using or operating same with permission, express or implied, of such owner." The clauses insure the operator of the vehicle only when he is lawfully using the vehicle in the business of the owner municipality or with the municipality's permission, express or implied. Fox v Employers' Liability Assurance Corp., 243 A.D. 325, 276 N.Y.S. 917, 1935 N.Y. App. Div. LEXIS 7062 (N.Y. App. Div.), aff'd, 267 N.Y. 609, 196 N.E. 604, 267 N.Y. (N.Y.S.) 609, 1935 N.Y. LEXIS 1331 (N.Y. 1935).

In an action for declaratory judgment as to which of defendants could be liable to plaintiff for the payment of any judgment obtained against the driver of an automobile in an underlying negligence action involving a one-car collision, defendant insurance company would be required to defend and indemnify the driver since the insured's policy contained a "replacement vehicle" clause, permissive use of the vehicle by the driver could be presumed, and the insurance company failed to introduce any evidence that its insured did not own the automobile in the accident or that the vehicle was not a newly acquired automobile replacing the insured vehicle within the meaning of that clause. Chang v Utica Mut. Ins. Co., 79 A.D.2d 626, 433 N.Y.S.2d 629, 1980 N.Y. App. Div. LEXIS 13975 (N.Y. App. Div. 2d Dep't 1980).

Because the lessee of a vehicle procured the insurance from an insurer that was required by N.Y. Veh. & Traf. Law § 388(4) and in compliance with the vehicle lease agreement, the lessor was not required to maintain primary insurance coverage for the subject vehicle; consequently, the trial court properly declared that the insurer had the primary obligation to defend and indemnify the lessor and the lessee in an underlying personal injury action. DePascale v Wolkoff, 37 A.D.3d 399, 829 N.Y.S.2d 633, 2007 N.Y. App. Div. LEXIS 1566 (N.Y. App. Div. 2d Dep't 2007).

Incorporation of the provisions of Vehicle & Traffic Law former § 59 into an insurance policy pursuant to Insurance Law § 167(2) did not give any specific primary action on the contract against an insurer to an injured party. Liability can only be fixed in an action against the owner of the vehicle involved. Bornhurst v Massachusetts Bonding & Ins. Co., 12 Misc. 2d 149, 175 N.Y.S.2d 542, 1958 N.Y. Misc. LEXIS 3115 (N.Y. Sup. Ct. 1958), rev'd, 11 A.D.2d 632, 200 N.Y.S.2d 955, 1960 N.Y. App. Div. LEXIS 10055 (N.Y. App. Div. 4th Dep't 1960).

Subdivision (2) of § 167 of the Insurance Law as well as this section of the Vehicle and Traffic Law require that all liability insurance cover the insured against liability incurred under § 388, but as long as the policy provides that coverage nothing in either of these sections require that it use the precise language of the statutes. Singerman Bus Corp. v American Fidelity Fire Ins. Co., 44 Misc. 2d 4, 252 N.Y.S.2d 780, 1964 N.Y. Misc. LEXIS 1620 (N.Y. Sup. Ct. 1964).

Where the coverage extended by an insurer to the owner of taxicabs and his drivers included damages "resulting from the use of the vehicle," the insurer was required to defend any action brought against the owner or his drivers as the result of the negligence of a passenger in opening the cab's door with which another vehicle collided. Epstein v Kernon, 68 Misc. 2d 29, 326 N.Y.S.2d 137, 1971 N.Y. Misc. LEXIS 1149 (N.Y. Civ. Ct. 1971).

Provision contained in motor vehicle rental agreement, limiting lessor's liability to insurance coverage purchased by lessee as part of rental transaction, did not violate law or public policy. Layaw v Maguire Ford Lincoln Mercury, 164 Misc. 2d 113, 623 N.Y.S.2d 731, 1995 N.Y. Misc. LEXIS 65 (N.Y. Sup. Ct. 1995), aff'd, 219 A.D.2d 73, 639 N.Y.S.2d 544, 1996 N.Y. App. Div. LEXIS 2788 (N.Y. App. Div. 3d Dep't 1996).

By virtue of this section and by the Insurance Law § 109, subd 3 and 4 (now § 167), a policy of automobile liability insurance in New York must be read as containing a provision insuring the owner against liability for personal injury or property damage resulting from negligence in the operation of a motor vehicle "in the business of such owner or otherwise, by any person legally using or operating the same with the permission, express or implied, of such owner." (American) Lumbermens Mut. (American) Lumbermens Mut. Casualty Co. v Timms & Howard, Inc., 108 F.2d 497, 1939 U.S. App. LEXIS 2598 (2d Cir. N.Y. 1939).

66. — —Exclusions

Former § 2, sub 18 and former §§ 59 and 94-g of the Vehicle and Traffic Law and the Safety-Responsibility Act (Vehicle and Traffic Law, former Art 6-A) do not require a policy which

excluded from coverage owners and employees of the owners of hired automobiles to read contrary to its meaning, where the owner, a resident of Ohio, had leased a truck to and operated it for a Massachusetts corporation and an accident occurred in this state. Chesher v United States Casualty Co., 303 N.Y. 589, 105 N.E.2d 99, 303 N.Y. (N.Y.S.) 589, 1952 N.Y. LEXIS 786 (N.Y. 1952).

Non-trucking-use exclusion from coverage in insurance policy obtained by owner of commercial vehicle, which did not expressly state that it was effective only if vehicle's lessee was required to obtain insurance coverage, violated New York law and public policy even if insurer established that its standard underwriting policy was to not issue policies containing such exclusion unless vehicle owner provided proof that vehicle's lessee had insurance coverage. Royal Indem. Co. v Providence Wash. Ins. Co., 92 N.Y.2d 653, 684 N.Y.S.2d 470, 707 N.E.2d 425, 1998 N.Y. LEXIS 4141 (N.Y. 1998).

The clause required to be inserted in automobile liability insurance policies by § 167 of the Insurance Law, with respect to liability while the insured vehicle is being operated with the insured owner's permission, is designed to protect car owners who are affected by the provisions of this section making them liable for negligence of one who is operating the vehicle with their permission and was never intended to extend liability of the insurer to cover negligence of one to whom the car has been sold or otherwise transferred. Mason v Allstate Ins. Co., 12 A.D.2d 138, 209 N.Y.S.2d 104, 1960 N.Y. App. Div. LEXIS 6284 (N.Y. App. Div. 2d Dep't 1960).

Automobile insurance policy was valid where it provided limited compulsory bodily injury liability coverage for tractor, even though it contained endorsement excluding coverage for, inter alia, claims arising when tractor or any trailer attached to it was "used to carry property in any business," since policy also provided that endorsement was "not applicable to any compulsory coverages," and it provided excess liability coverage for nontrucking operations. Hanover Ins. Co. v Connor, 232 A.D.2d 925, 648 N.Y.S.2d 839, 1996 N.Y. App. Div. LEXIS 11263 (N.Y. App. Div. 3d Dep't 1996).

A policy insuring against liability of a tractor, and another company's policy insuring against the liability of a trailer each contained void exclusions as to the use of the vehicle with another vehicle not insured by that company. Held: each insurer was liable to its insured, and cannot cross-claim against each other, but subrogation was not precluded. Mondelli v Harrison Hub, Bed & Spring Co., 10 Misc. 2d 883, 172 N.Y.S.2d 931, 1958 N.Y. Misc. LEXIS 3549 (N.Y. City Ct. 1958).

Exclusionary clause in truck lessor's nontrucking use policy, providing "bobtail" coverage for truck cab use only and excluding coverage when trailer is attached to truck and is being used to carry property in any business, was invalid as against state's public policy requiring existence of insurance to meet minimum standards of liability coverage, and policy would accordingly be construed to provide coverage whether vehicle was being used in lessor's or lessee's business at time of accident. Planet Ins. Co. v Gunther, 160 Misc. 2d 67, 608 N.Y.S.2d 763, 1993 N.Y. Misc. LEXIS 573 (N.Y. Sup. Ct. 1993).

Truckmen's Endorsement, providing that insurance does not apply while insured vehicle is used to carry property in any business or while insured vehicle is being used in business of any person or organization to whom vehicle is rented or while on route for such purpose, is against public policy of New York as embodied in CLS Veh & Tr L § 388, and thus is unenforceable. Transport Ins. Co. v Protective Ins. Co., 696 F. Supp. 870, 1988 U.S. Dist. LEXIS 14764 (S.D.N.Y.), aff'd, 868 F.2d 1267, 1988 U.S. App. LEXIS 18327 (2d Cir. N.Y. 1988).

Exclusion in "bobtail" policy which (under facts of case) operated to defeat coverage because subleasing carrier's insurers refused to extend coverage, thereby creating "gap" in coverage for legal liability accruing to owner under CLS Veh & Tr § 388, was invalid given potential disclaimer of coverage by third party sublessor whose load truck was going to pick up at time of accident. R. E. Turner, Inc. v Connecticut Indem. Co., 925 F. Supp. 139, 1996 U.S. Dist. LEXIS 6647 (W.D.N.Y. 1996).

Tractor owner's insurer must cover $65,000 environmental cleanup bill resulting from crash of tractor and diesel fuel spill, even though "bobtail" exclusion purports to defeat coverage, because New York public policy as stated in CLS Veh & Tr Law § 388 places ultimate insuring responsibility on owner of vehicle and carrier which issued coverage allowing insured owner's vehicle to be operated on New York's roads when not covered by other insurance, and carrier has not established applicability of any other insurance. R. E. Turner, Inc. v Connecticut Indem. Co., 925 F. Supp. 139, 1996 U.S. Dist. LEXIS 6647 (W.D.N.Y. 1996).

"Bobtail" exclusion of coverage in liability policy issued to truck lessor (excluding from coverage those instances in which lessor's vehicle was used in business of lessee) was invalid because it contravened public policy as contained in CLS Veh & Tr § 388 and CLS Ins § 3420(a); policy would be interpreted as if bobtail exclusion did not exist. Royal Indem. Co. v Providence Wash. Ins. Co., 952 F. Supp. 125, 1997 U.S. Dist. LEXIS 1267 (N.D.N.Y.), amended, 966 F. Supp. 149, 1997 U.S. Dist. LEXIS 9102 (N.D.N.Y. 1997), aff'd, 172 F.3d 38, 1999 U.S. App. LEXIS 10560 (2d Cir. N.Y. 1999).

67. Workers' compensation

The Workmen's Compensation Law (§ 29(6)) precludes a plaintiff from maintaining an action under Vehicle & Traffic Law former § 59 against an owner of a motor vehicle for personal injuries due to the negligent operation of the motor vehicle by one other than the owner, who at the time of the accident, is a co-employee of the plaintiff-passenger and while both the co-employee and the plaintiff-passenger are acting in the course of their employment. Naso v Lafata, 4 N.Y.2d 585, 176 N.Y.S.2d 622, 152 N.E.2d 59, 1958 N.Y. LEXIS 876 (N.Y.), reh'g denied, 5 N.Y.2d 861, 1958 N.Y. LEXIS 1696 (N.Y. 1958), limited, Bellefeuille v City & County Sav. Bank, 43 A.D.2d 335, 351 N.Y.S.2d 738, 1974 N.Y. App. Div. LEXIS 5833 (N.Y. App. Div. 3d Dep't 1974).

Plaintiff, a passenger in a tractor-trailer and a fellow-employee of the operator of the vehicle, was injured solely through the operator's negligence. In an action against the trailer owner (he was neither plaintiff's employer nor a fellow-employee), the Workmen's Compensation Law was set up as a complete defense. Although Vehicle and Traffic Law former § 59-a imposes joint liability on the separate owners of a tractor and trailer, its purpose, with former § 59 of the same law, was to create a remedy for losses to which an injured person has been subjected, in a class of cases where no right to relief existed. Hence, since the Workmen's Compensation Law § 29(6) was an exclusive remedy and it deprived the injured employee of a right to maintain an action against the negligent co-employee, it also barred the derivative action. Rauch v Jones, 4 N.Y.2d 592, 176 N.Y.S.2d 628, 152 N.E.2d 63, 1958 N.Y. LEXIS 877 (N.Y. 1958), limited, Bellefeuille v City & County Sav. Bank, 43 A.D.2d 335, 351 N.Y.S.2d 738, 1974 N.Y. App. Div. LEXIS 5833 (N.Y. App. Div. 3d Dep't 1974).

A defendant may not pursue a third-party contribution claim under N.Y. Veh. & Traf. Law § 388 against a vehicle owner where the driver's negligence was a cause of the plaintiff's injuries, but the driver is insulated from a lawsuit under N.Y. Workers' Comp. Law § 29 (6). Isabella v Hallock, 22 N.Y.3d 788, 987 N.Y.S.2d 293, 10 N.E.3d 673, 2014 N.Y. LEXIS 569 (N.Y. 2014).

The plaintiff, in the course of his employment, was struck by a car driven by a fellow employee and owned by the fellow employee's wife. The plaintiff could not maintain an action against the wife because Workmen's Compensation was his exclusive remedy. Further, Vehicle and Traffic Law former § 59 was inapplicable because the accident occurred on a private rather than a public road. Roberts v Gagnon, 1 A.D.2d 297, 149 N.Y.S.2d 743, 1956 N.Y. App. Div. LEXIS 5935 (N.Y. App. Div. 3d Dep't 1956).

As against derivative liability imposed by subd. 1 of this section on the owner of a grader used by a city for snow removal and, with the owner's permission, operated by a city employee, for injuries sustained by plaintiff's husband, a city policeman, the owner of the grader was entitled to defend on the ground that plaintiff's exclusive remedy was under the Workmen's Compensation Law because plaintiff's decedent and the grader operator were fellow-employees. Castle v North End Contracting Corp., 21 A.D.2d 8, 248 N.Y.S.2d 95, 1964 N.Y. App. Div. LEXIS 4181 (N.Y. App. Div.

3d Dep't 1964), limited, Bellefeuille v City & County Sav. Bank, 43 A.D.2d 335, 351 N.Y.S.2d 738, 1974 N.Y. App. Div. LEXIS 5833 (N.Y. App. Div. 3d Dep't 1974).

Even if defendant's vehicle which had been leased to decedent's employer and which was being loaded by fellow employee who was allegedly negligent in handling of hand cart had a causal connection with accident, workmen's compensation was the sole remedy available, just as if the fellow employee had been operating the vehicle. Albarran v New York, 56 A.D.2d 822, 393 N.Y.S.2d 37, 1977 N.Y. App. Div. LEXIS 11132 (N.Y. App. Div. 1st Dep't 1977).

In a personal injury action grounded in negligence, the court erred in refusing to dismiss the employee's complaint against his employer, a truck and car rental corporation, since the employee had already recovered benefits under the workers' compensation statute, which barred his derivative action against the owner of the vehicle pursuant to Veh & Tr Law § 388. Betancourt v Hertz Corp., 86 A.D.2d 883, 447 N.Y.S.2d 534, 1982 N.Y. App. Div. LEXIS 15532 (N.Y. App. Div. 2d Dep't 1982).

Court properly dismissed cab company employee's personal injury action against owner of taxicab that crashed into cab company office where (1) employee did not plead negligence on part of taxi's owner, and (2) driver was injured employee's coemployee, and thus was immune from suit under Workers' Compensation Law, precluding imposition of vicarious liability on taxi's owner. Trizzino v Mildank Taxi Corp., 128 A.D.2d 607, 512 N.Y.S.2d 864, 1987 N.Y. App. Div. LEXIS 44298 (N.Y. App. Div. 2d Dep't 1987).

Where plaintiff was seeking to recover for injuries sustained in automobile collision from owner of automobile, plaintiff's right to recovery was statutory one under statute making automobile owner liable for negligence of person operating automobile with permission of owner, and owner could not defend the action on ground that plaintiff and driver were in employ of a common employer and that at time of collision were in scope of their employment, so that award of workmen's compensation was plaintiff's exclusive remedy. Goldwasser v Ranieri, 2 Misc. 2d 606, 151 N.Y.S.2d 170, 1956 N.Y. Misc. LEXIS 2037 (N.Y. App. Term 1956).

The immunity afforded by the Workmen's Compensation Law to the co-employee-driver of a truck in which plaintiff was injured did not extend to the truck owner who was not the employer or a co-employee. The negligence of the operator could be imputed to the owner of the motor vehicle notwithstanding the fact that the operator was not liable. Milone v Bono, 8 Misc. 2d 826, 162 N.Y.S.2d 1002, 1957 N.Y. Misc. LEXIS 3196 (N.Y. Sup. Ct. 1957).

Plaintiff's negligence claim against owner of trailer leased to plaintiff's employer for injuries plaintiff sustained when plaintiff fell through hole in floor of trailer was barred because even though N.Y. Veh. & Traf. Law § 388, on its face, permitted any negligence by plaintiff's employer to be imputed to owner of trailer, it was improper to impute negligence to owner of trailer because any negligence claim against plaintiff's employer was barred by Workers' Compensation Law, and thus there was nothing to impute to owner of trailer. Black v Consol. Freightways Corp., 219 F. Supp. 2d 243, 2002 U.S. Dist. LEXIS 13691 (E.D.N.Y. 2002).

68. Passengers invited by driver

The former analogous section did not change the rule that a master is not liable for the acts of his servant unless acting within the scope of his employment. The defendant should have been permitted to prove that the chauffeur, in inviting plaintiffs to ride with him, was acting contrary to her instructions. Grant v Knepper, 245 N.Y. 158, 156 N.E. 650, 245 N.Y. (N.Y.S.) 158, 1927 N.Y. LEXIS 604 (N.Y. 1927).

The former analogous section gave a remedy against a defendant where plaintiffs were injured while riding in his car driven by his daughter, if the car were negligently driven by the defendant's daughter on an errand assented to by the defendant. The defendant need not have specifically directed his daughter to drive the plaintiffs. Cohen v Neustadter, 247 N.Y. 207, 160 N.E. 12, 247 N.Y. (N.Y.S.) 207, 1928 N.Y. LEXIS 1059 (N.Y. 1928).

Plaintiff passenger may recover for negligent operation of vehicle—no matter what his relationship to the driver might be—unless it is shown that his own personal negligence contributed to the injury; thus, representative of deceased passenger was entitled to recover from owner of rented automobile in which deceased was riding when he was killed and over which he exercised supervisory control where deceased's father-in-law was driving at time of accident and was contributorily negligent in causing accident. Kalechman v Drew Auto Rental, Inc., 33 N.Y.2d 397, 353 N.Y.S.2d 414, 308 N.E.2d 886, 1973 N.Y. LEXIS 871 (N.Y. 1973).

A defendant owner was liable for the negligence of the person to whom she loaned her automobile, although she did not know that plaintiff's intestate was to be invited to ride. Roche v New York C. R. Co., 221 A.D. 497, 224 N.Y.S. 656, 1927 N.Y. App. Div. LEXIS 6480 (N.Y. App. Div. 1927).

Notwithstanding the fact that an employee may have been in his master's employment at the time of the accident, this section is of no avail to plaintiffs, when the employee was without the pale of his employment in respect of inviting passengers to ride with him contrary to instructions. Rhodes v Ocean Acci. Guarantee Corp., 239 A.D. 92, 266 N.Y.S. 681, 1933 N.Y. App. Div. LEXIS 7956 (N.Y. App. Div. 1933), aff'd, 264 N.Y. 436, 191 N.E. 502, 264 N.Y. (N.Y.S.) 436, 1934 N.Y. LEXIS 1476 (N.Y. 1934).

It was not the intention of the legislature that the provisions of this section should insure the safety of passengers riding in a car which had been left in the custody of a repairman for the purpose of making repairs, when the passengers were in the car for their own benefit and enjoyment through no invitation of the owner, express or implied, but through invitation of the repairman, who had no authority, express or implied, to invite them. Such an owner reasonably could not have contemplated or anticipated that his car would be used upon the street or roadway for any such purpose. Svenson v Zakrocki, 268 A.D. 777, 48 N.Y.S.2d 567, 1944 N.Y. App. Div. LEXIS 3435 (N.Y. App. Div. 1944).

Where plaintiff testified that defendant's truck driver requested plaintiff to accompany him on trip because driver was not feeling well, jury could infer that plaintiff's presence in defendant's truck was not in violation of Public Service Commission's Rule respecting the carrying of passengers, and that plaintiff was therefore entitled to recover for injuries resulting from negligent operation of the truck. Lamica v Vollmer, 270 A.D. 1063, 63 N.Y.S.2d 31, 1946 N.Y. App. Div. LEXIS 5316 (N.Y. App. Div.), aff'd, 296 N.Y. 660, 69 N.E.2d 817, 296 N.Y. (N.Y.S.) 660, 1946 N.Y. LEXIS 1236 (N.Y. 1946).

Driver's cause of action against vehicle owner pursuant to CLS Veh & Tr § 388, based on theory that defendant passenger was operating or using vehicle with owner's permission, would be dismissed where neither driver nor owner gave passenger permission to interfere with operation of vehicle by reaching across another passenger to yank wheel to right, causing driver to react quickly, in course of which he was injured when he caused vehicle to strike telephone pole and house. Good v MacDonell, 149 Misc. 2d 315, 564 N.Y.S.2d 949, 1990 N.Y. Misc. LEXIS 661 (N.Y. Sup. Ct. 1990).

Driver's cause of action against vehicle owner for negligently entrusting vehicle to intoxicated passenger, who interfered with operation of vehicle by reaching across another passenger to yank wheel to right, causing driver to react quickly, in course of which he was injured when vehicle struck telephone pole and house, would be dismissed, even if owner should have known that passenger was intoxicated, since mere fact that owner allowed intoxicated passenger to ride in vehicle he entrusted to driver did not rise to level of negligent entrustment. Good v MacDonell, 149 Misc. 2d 315, 564 N.Y.S.2d 949, 1990 N.Y. Misc. LEXIS 661 (N.Y. Sup. Ct. 1990).

69. Operation by driver's permittee

The owner of an automobile could not be held responsible for the act of a person to whom he loaned the automobile in loaning it to a third person without the knowledge of the owner. Owen v Gruntz, 216 A.D. 19, 214 N.Y.S. 543, 1926 N.Y. App. Div. LEXIS 9153 (N.Y. App. Div. 1926).

This section does not make a defendant corporation liable for injuries suffered by plaintiff, its president, where he, on a

business trip in a corporate automobile, turned over the operation of vehicle to one of the salesmen of defendant riding solely for his personal convenience, and the salesman negligently struck a bridge, proof showing that the salesman was plaintiff's agent. Glennie v Falls Equipment Co., 238 A.D. 7, 263 N.Y.S. 124, 1933 N.Y. App. Div. LEXIS 9404 (N.Y. App. Div. 1933).

Company is liable for negligence of person driving its automobile with permission of company salesman to whom company gave complete control of automobile. Clarke v Mason Au & Magenheimer Confectionery Mfg. Co., 240 A.D. 1001, 268 N.Y.S. 290, 1933 N.Y. App. Div. LEXIS 7844 (N.Y. App. Div. 1933), aff'd, 264 N.Y. 661, 191 N.E. 614, 264 N.Y. (N.Y.S.) 661, 1934 N.Y. LEXIS 1693 (N.Y. 1934).

This section does not render the owner of an automobile responsible for the negligence of a third party to whom the borrower had temporarily intrusted the vehicle without the owner's knowledge or consent and who is using it for his own private purpose. This section has not changed the common-law rules relating to master and servant. Jackson v Brown & Kleinhenz, Inc., 246 A.D. 445, 284 N.Y.S. 44, 1935 N.Y. App. Div. LEXIS 8699 (N.Y. App. Div. 1935), rev'd, 273 N.Y. 365, 7 N.E.2d 265, 273 N.Y. (N.Y.S.) 365, 1937 N.Y. LEXIS 1214 (N.Y. 1937).

Former section 59 was never intended to render the owner of a motor vehicle responsible for injuries of the owner's permittee, where the permittee has the car for his own pleasure, takes a guest into it without the owner's knowledge, permits the guest to drive, and is injured by the guest's negligent driving. Parker v Metropolitan Casualty Ins. Co., 20 A.D.2d 951, 248 N.Y.S.2d 985, 1964 N.Y. App. Div. LEXIS 3936 (N.Y. App. Div. 3d Dep't 1964).

Operation of vehicle at time of accident fell outside grant of permission where sole purpose for which defendant entrusted car to driver was to permit her to test drive it and have it inspected by mechanic so she could make informed decision regarding prospective purchase, and plaintiff drove car to pick up boyfriend and allowed boyfriend to drive car on excursion during which accident occurred. Walls v Zuvic, 113 A.D.2d 936, 493 N.Y.S.2d 628, 1985 N.Y. App. Div. LEXIS 52557 (N.Y. App. Div. 2d Dep't 1985), app. denied, 67 N.Y.2d 602, 499 N.Y.S.2d 1028, 490 N.E.2d 557, 1986 N.Y. LEXIS 16716 (N.Y. 1986).

A defendant who owned a taxicab and who had turned it over to a third party to operate was liable where it appeared that the vehicle collided with plaintiffs' automobile while being operated by a person to whom one of said "operator's" chauffeurs, on becoming ill, had turned it over. Katz v Wolff & Reinheimer, Inc., 221 N.Y.S. 476, 129 Misc. 384, 1927 N.Y. Misc. LEXIS 744 (N.Y. Mun. Ct. 1927).

Where a plaintiff was injured by an automobile truck operated by an employee of a corporation who was not licensed to operate the truck, and it appeared that the truck belonged to an individual and was being used by the corporation; that the chauffeur of the truck was instructed not to permit his helpers to operate the truck; that the chauffeur and two helpers became drunk and the chauffeur abandoned the truck, but thereafter one of the helpers operated the truck and was operating it when the accident occurred, the owner of the truck was not liable. Rosenbluth v Concourse Van Co., 229 N.Y.S. 609, 132 Misc. 647, 1928 N.Y. Misc. LEXIS 910 (N.Y. Sup. Ct. 1928).

Owner of van was entitled to summary judgment dismissing action under CLS Veh & Tr § 388 for death of 3 men who had borrowed van and, while sleeping in it, suffocated from inhalation of carbon monoxide fumes emitted by propane gas heater, since (1) it was undisputed that vehicle was passenger van, not camper, (2) at time of accident it was being used as shelter, not as motor vehicle, and (3) using vehicle for its intended purpose was not proximate cause of death; under circumstances, vehicle was not being "used or operated" as motor vehicle within meaning of statute, as matter of law. Du Mortier v Bernz-O-Matic Corp., 139 Misc. 2d 303, 526 N.Y.S.2d 755, 1988 N.Y. Misc. LEXIS 97 (N.Y. Sup. Ct. 1988).

Lessor of van was not entitled to dismissal of action by lessee who was injured when van went off road while his friend was driving it, despite fact that lessee had allowed his friend to drive van in violation of his agreement with lessor, where lessee claimed to have asked his friend to drive because he felt drowsy, in which case lessee's paramount duty of reasonable care and prudence would have demanded change of drivers; there is no legal or moral reason to prefer claims of injured third party to claims of injured lessee who may have been equally innocent of any negligence. Layaw v Maguire Ford Lincoln Mercury, 164 Misc. 2d 113, 623 N.Y.S.2d 731, 1995 N.Y. Misc. LEXIS 65 (N.Y. Sup. Ct. 1995), aff'd, 219 A.D.2d 73, 639 N.Y.S.2d 544, 1996 N.Y. App. Div. LEXIS 2788 (N.Y. App. Div. 3d Dep't 1996).

70. Operation by co-employee

Vehicle owner was not liable to third-party plaintiffs for contribution or indemnification, because the driver of the vehicle was the co-worker of the injured plaintiff and therefore immune under the Workers' Compensation Law. Isabella v Hallock, 22 N.Y.3d 788, 987 N.Y.S.2d 293, 10 N.E.3d 673, 2014 N.Y. LEXIS 569 (N.Y. 2014).

Defendant employer of both plaintiff parking attendant and coworker who backed employer's car into plaintiff was entitled to summary judgment dismissing personal injury action on ground that plaintiff's exclusive remedy against employer was under Workers' Compensation Law, even though that bar does not apply to cases of employer's affirmative negligence toward injured employee, where plaintiff sued his employer based on employer's vicarious liability as owner of car operated by coworker, and there was no allegation of affirmative negligence by employer. Chiriboga v Ebrahimoff, 281 A.D.2d 353, 722 N.Y.S.2d 533, 2001 N.Y. App. Div. LEXIS 3150 (N.Y. App. Div. 1st Dep't 2001).

Trial court did not err in granting a contractor's motion for summary judgment dismissing an employee's action alleging that the contractor as vicariously liable for a coworker's negligent acts because at the time of the accident, the skid steer the coworker used was being operated in a parking lot that was not open to the public, rather than on a public highway; thus, the machine was not a motor vehicle for purposes of liability. Calvert v Duggan & Duggan Gen. Contr., Inc., 159 A.D.3d 1490, 73 N.Y.S.3d 331, 2018 N.Y. App. Div. LEXIS 2147 (N.Y. App. Div. 4th Dep't), app. denied, 31 N.Y.3d 912, 106 N.E.3d 754, 81 N.Y.S.3d 371, 2018 N.Y. LEXIS 1563 (N.Y. 2018).

The effect of certain decisions of the Court of Appeals dealing with inapplicability of this section to support an action against the owner of an automobile by one who is a coemployee of the person who was driving the car at the time of the accident and whose negligence caused the accident, is simply to prevent a recovery under this section where the motor vehicle is merely the instrument causing the injury, but is at the time an instrument being used by a coemployee of the person injured, and such an action against the owner of the car, based on the common law, is sustainable if the driver of the car was, at the time, a special employee of the owner but not a coemployee of the person injured. Johnson v Freeman, 25 Misc. 2d 140, 202 N.Y.S.2d 639, 1960 N.Y. Misc. LEXIS 3305 (N.Y. Sup. Ct. 1960).

This section is inapplicable to a situation where plaintiff was struck by an automobile owned by defendant and operated with defendant's consent, but by a fellow employee of plaintiff who was then and there engaged with plaintiff in the furtherance of the business of their employer. Hanley v Weisburger, 32 Misc. 2d 672, 223 N.Y.S.2d 434, 1962 N.Y. Misc. LEXIS 4067 (N.Y. Sup. Ct. 1962).

Plaintiff, an employee of the garage where defendant's automobile was stored, was injured when a fellow employee backed defendant's automobile into him while he was standing on the sidewalk next to the ramp. A contract exempting the garage owner from liability for damages for injury to person resulting from the negligence of its employees was void against public property, however, plaintiff was confined to the exclusive remedy of Workmen's Compensation. Kahne v Lipkind, 145 N.Y.S.2d 884, 1955 N.Y. Misc. LEXIS 3857 (N.Y. Sup. Ct. 1955).

71. Operation by garage or parking attendant

This section, making the owner of a car liable for the negligent operation thereof by any person legally using or operating same with the owner's permission is applicable where the owner of an automobile, which he stored in a garage, which gave service including delivery of the car to him when wanted, ordered the car delivered to him and an employee of the garage, not having an

operator's license, in delivering the car, ran into a child. Shannon v Samuels, 278 N.Y. 510, 15 N.E.2d 670, 278 N.Y. (N.Y.S.) 510, 1938 N.Y. LEXIS 1363 (N.Y. 1938).

Where an automobile owner leaves his car at a repair shop and has reason to know that, in the performance of the work thereon, the car will be used on a public highway by employees of the shop, he is liable for its negligent operation, such use being with his implied permission within this section. Drollinger v McCurdy, 228 A.D. 664, 238 N.Y.S. 219, 1929 N.Y. App. Div. LEXIS 11536 (N.Y. App. Div. 1929).

The owner of an automobile was not liable for an injury sustained while a garage man, acting as an independent contractor, was giving an automobile a road test. Drollinger v McCurdy, 228 A.D. 664, 238 N.Y.S. 219, 1929 N.Y. App. Div. LEXIS 11536 (N.Y. App. Div. 1929).

The mere leaving of car keys with a garageman by an owner storing his car with said garageman may imply consent to the garageman to drive the car out on the sidewalk so as to make the owner liable for the garageman's negligence under this section. Houlihan v Selengut, 263 A.D. 811, 31 N.Y.S.2d 560, 1941 N.Y. App. Div. LEXIS 5092 (N.Y. App. Div. 1941).

It was not the intention of the legislature that the provisions of this section should insure the safety of passengers riding in a car which had been left in the custody of a repairman for the purpose of making repairs, when the passengers were in the car for their own benefit and enjoyment through no invitation of the owner, express or implied, but through invitation of the repairman, who had no authority, express or implied, to invite them. Such an owner reasonably could not have contemplated or anticipated that his car would be used upon the street or roadway for any such purpose. Svenson v Zakrocki, 268 A.D. 777, 48 N.Y.S.2d 567, 1944 N.Y. App. Div. LEXIS 3435 (N.Y. App. Div. 1944).

Automobile owner who turns vehicle over to parking lot attendant with keys or who parks vehicle in lot and leaves it there with keys is liable when attendant, who is not licensed operator and who is not familiar with stick shift in automobile, strikes another attendant while moving automobile, notwithstanding fact that owner would not have permitted attendant to move car had he known either that attendant was not licensed or that attendant was not familiar with stick shift. Carter v Travelers Ins. Co., 113 A.D.2d 178, 495 N.Y.S.2d 168, 1985 N.Y. App. Div. LEXIS 52347 (N.Y. App. Div. 1st Dep't 1985).

Owner of taxi, owner of garage, and plaintiff's fellow mechanics at garage could not be held vicariously liable under CLS Veh & Tr § 388 for their alleged negligence in using taxi, even though plaintiff was burned when fellow mechanic spilled gasoline on him as consequence of attempting to start taxi during repair, since fellow mechanic, as plaintiff's coemployee, was immune from suit under Workers' Compensation Law, under which plaintiff had previously received compensation. Ulysse v Nelsk Taxi, Inc., 135 A.D.2d 528, 522 N.Y.S.2d 162, 1987 N.Y. App. Div. LEXIS 52481 (N.Y. App. Div. 2d Dep't 1987), app. denied, 73 N.Y.2d 702, 536 N.Y.S.2d 743, 533 N.E.2d 673, 1988 N.Y. LEXIS 3435 (N.Y. 1988).

An automobile which was in garage on wheel-aligning machine, motor off, brake set, with no one in it when automobile rolled back into street and collided with plaintiff's automobile was not being "operated" at the time within statute imputing liability to owner of automobile being operated on a public highway, and hence automobile owner was not liable for resulting injuries. Blake v Salmonson, 67 N.Y.S.2d 607, 188 Misc. 97, 1946 N.Y. Misc. LEXIS 3288 (N.Y. Mun. Ct. 1946).

In a claim by plaintiff for personal injuries incurred while attempting to move defendant's vehicle at the parking facility due to defendant's failure to leave her keys, defendant was not entitled to summary judgment for personal injuries claim by plaintiff because there were genuine issues of material fact as to defendant's liability as owner in relation to her conduct, and as to whether she revoked the permission she gave to plaintiff and the parking facility by her failure to leave the keys to her vehicle. Bencosme v Allon, 60 Misc. 3d 531, 78 N.Y.S.3d 876, 2018 N.Y. Misc. LEXIS 1587 (N.Y. Sup. Ct. 2018).

72. Public highway

This section does not apply where the damages were not caused by the operation of the motor vehicle upon a public highway. Hogan v Comac Sales, 245 A.D. 216, 281 N.Y.S. 207, 1935 N.Y. App. Div. LEXIS 10268 (N.Y. App. Div. 1935), aff'd, 271 N.Y. 562, 2 N.E.2d 695, 271 N.Y. (N.Y.S.) 562, 1936 N.Y. LEXIS 1289 (N.Y. 1936).

The plaintiff, in the course of his employment, was struck by a car driven by a fellow employee and owned by the fellow employee's wife. The plaintiff could not maintain an action against the wife because Workmen's Compensation was his exclusive remedy. Further, Vehicle and Traffic Law former § 59 was inapplicable because the accident occurred on a private rather than a public road. Roberts v Gagnon, 1 A.D.2d 297, 149 N.Y.S.2d 743, 1956 N.Y. App. Div. LEXIS 5935 (N.Y. App. Div. 3d Dep't 1956).

Where plaintiff was struck by the automobile of a co-employee while crossing a private road located on the employer's property when he paused on a safety island, the accident did not occur on a "public highway" within the statute respecting liability of owner for an accident occurring on a public highway when the automobile is driven with his permission, express or implied. Roberts v Gagnon, 1 A.D.2d 297, 149 N.Y.S.2d 743, 1956 N.Y. App. Div. LEXIS 5935 (N.Y. App. Div. 3d Dep't 1956).

Former § 59, dealing with imputation of negligence of the operator of a car driving it with the owner's permission, to the owner, applied only to operation of motor vehicles upon a public highway and could not impose liability on an owner for death of a passenger in the car from carbon monoxide poisoning while the car was still in the garage with the engine running. Harper v Parker, 12 A.D.2d 327, 211 N.Y.S.2d 325, 1961 N.Y. App. Div. LEXIS 12393 (N.Y. App. Div. 1st Dep't 1961), aff'd, 11 N.Y.2d 1095, 230 N.Y.S.2d 719, 184 N.E.2d 310, 1962 N.Y. LEXIS 1052 (N.Y. 1962).

Three actions to recover damages for the wrongful deaths of plaintiffs' decedents, who were killed as the result of a two-car collision, should have been dismissed against defendant, who owned one of the cars, where the driver of the car owned by defendant admitted that she had stolen the vehicle from the parking lot or driveway of the school at which it had been left unattended with the motor running, and where the argument by plaintiffs that proof would be adduced at trial that the vehicle was taken from a public road, thereby establishing defendant's statutory liability, would not have been sufficient to defeat a motion for summary judgment, inasmuch as parties opposing a motion for summary judgment are under a duty to lay bare their proof in opposing papers in order to show that their allegations are capable of being established at trial. Albouyeh v County of Suffolk, 96 A.D.2d 543, 465 N.Y.S.2d 50, 1983 N.Y. App. Div. LEXIS 19073 (N.Y. App. Div. 2d Dep't 1983), aff'd, 62 N.Y.2d 681, 476 N.Y.S.2d 522, 465 N.E.2d 29, 1984 N.Y. LEXIS 4288 (N.Y. 1984).

The presence of automobile on public highway does not necessarily imply that it is being "operated" within statute imputing liability to owner of automobile being operated on public highway, since to "operate" means to put into operation or to continue in operation or activity, to manage, to conduct, to carry out or through, and necessarily implies agency of a rational being with intent to carry activity through to accomplishment of original purpose of moving or operating. Blake v Salmonson, 67 N.Y.S.2d 607, 188 Misc. 97, 1946 N.Y. Misc. LEXIS 3288 (N.Y. Mun. Ct. 1946).

Complaint dismissed in action for personal injuries sustained by plaintiff while alighting from defendant's automobile where there was no allegation that the accident occurred on a public highway. D'Arienzo v Yarwood, 159 N.Y.S.2d 288 (N.Y. Sup. Ct. 1957), app. dismissed, 6 A.D.2d 1019, 178 N.Y.S.2d 637, 1958 N.Y. App. Div. LEXIS 4765 (N.Y. App. Div. 3d Dep't 1958).

Former § 59-a of the Vehicle and Traffic Law did not limit an owner's liability to accidents occurring on a public highway. Raspante v Trans. Supply & Management, Inc., 214 N.Y.S.2d 583 (N.Y. Sup. Ct. 1961).

73. Dealer plates

A dealer, who had permitted the use of his plates by purchaser for more than the five days permitted by § 63, was properly held liable under this section for damages arising from negligent operation of the car with the purchaser's permission. Reese v

Reamore, 292 N.Y. 292, 55 N.E.2d 35, 292 N.Y. (N.Y.S.) 292, 1944 N.Y. LEXIS 1363 (N.Y. 1944).

If an automobile dealer fails to comply with the requirements of former § 63 in respect of the use of dealer plates, he will not be permitted to deny his ownership of the vehicle for the purpose of avoiding liability under this section. Hence, the complaint in a wrongful death action against an automobile dealer should not have been dismissed where, four days before a fatal accident, the dealer had sold the truck involved therein and let the purchaser take the vehicle with his dealer's plates thereon. Switzer v Aldrich, 307 N.Y. 56, 120 N.E.2d 159, 307 N.Y. (N.Y.S.) 56, 1954 N.Y. LEXIS 1000 (N.Y. 1954).

Plaintiff's intestate was killed by a truck operated by the defendant. Four days before the accident, the defendant bought the truck under a conditional sales contract from a used car dealer who let him use a set of dealer's plates. The plates were on the truck at the time of the accident. Then plaintiffs after having an execution against the defendant returned unsatisfied served a notice of the judgment on the dealer's insurer. The insurer disclaimed liability under its garage liability policy. Held: the dealer was liable under this section because the dealer's act in lending the plates made possible the defendant's use of the truck after the sale and that act constituted permission both within the meaning of this section and the policy. Switzer v Merchants Mut. Casualty Co., 2 N.Y.2d 575, 161 N.Y.S.2d 867, 141 N.E.2d 904, 1957 N.Y. LEXIS 1088 (N.Y. 1957).

Automobile dealer was estopped from denying liability for wrongful death of pedestrian struck by automobile bearing dealer's plates, despite plaintiff's failure to trace plates from dealer to automobile, where dealer had violated applicable statutes by failing to report fact that plates had been loaned for more than five days. Jamison v Walker, 48 A.D.2d 320, 369 N.Y.S.2d 469, 1975 N.Y. App. Div. LEXIS 9889 (N.Y. App. Div. 2d Dep't 1975).

Automobile dealer who violates statutes effectuating strong public policy to protect victims of injuries caused by negligently driven automobiles is estopped from disclaiming liability. Jamison v Walker, 48 A.D.2d 320, 369 N.Y.S.2d 469, 1975 N.Y. App. Div. LEXIS 9889 (N.Y. App. Div. 2d Dep't 1975).

74. Defective brakes

Under the provisions of this section, although the owner of a vehicle involved in an accident was not in the car at the time, and had no notice that the brakes of the vehicle were defective, if the driver had notice that they were defective the owner may be held liable to persons injured as a result of the accident. Lipsman v Warren, 10 A.D.2d 868, 199 N.Y.S.2d 761, 1960 N.Y. App. Div. LEXIS 10709 (N.Y. App. Div. 2d Dep't), reh'g denied, 10 A.D.2d 970, 202 N.Y.S.2d 252, 1960 N.Y. App. Div. LEXIS 10001 (N.Y. App. Div. 2d Dep't 1960).

Where an accident results from defective brakes on the vehicle, following their repair by a mechanic, and the owner of the automobile is not aware of the defect, but the driver of the car is, the driver's knowledge and negligence in continuing to drive the car with knowledge of its defective condition may not be imputed to the owner so as to preclude his right of recovery over against the driver and the mechanic on the basis of their active negligence. Lipsman v Warren, 10 A.D.2d 868, 199 N.Y.S.2d 761, 1960 N.Y. App. Div. LEXIS 10709 (N.Y. App. Div. 2d Dep't), reh'g denied, 10 A.D.2d 970, 202 N.Y.S.2d 252, 1960 N.Y. App. Div. LEXIS 10001 (N.Y. App. Div. 2d Dep't 1960).

Under above statute if person drives a motor vehicle with actual notice of defective brakes, his negligence is attributable to owner thereof. But such derivative liability would not bar third-party action against manufacturer of car because of such brakes. Alfano v Amchir, 23 A.D.2d 659, 257 N.Y.S.2d 2, 1965 N.Y. App. Div. LEXIS 4765 (N.Y. App. Div. 2d Dep't 1965).

In negligence action against owner of truck that was left unattended by owner's employee and rolled down driveway and over plaintiff's arm, plaintiff was not entitled to partial summary judgment on issue of liability where her descriptions of how accident occurred contradicted each other in essential particulars —especially as to whether truck's parking brake was set—and thus raised triable issues of fact and credibility. Vitiello v Mayrich Constr. Corp., 255 A.D.2d 182, 680 N.Y.S.2d 482, 1998 N.Y. App. Div. LEXIS 12529 (N.Y. App. Div. 1st Dep't 1998).

Although the owner of a car has no knowledge that the brakes are defective, if the driver has such knowledge the owner may be held liable to passengers for passive negligence under this section. Cohen v Wasserman, 28 Misc. 2d 58, 208 N.Y.S.2d 865, 1960 N.Y. Misc. LEXIS 2296 (N.Y. Sup. Ct. 1960).

75. Unlawful use

Where, in an action to recover for a death alleged to have been occasioned through negligent operation of an automobile, uncontradicted evidence proved that the driver of the car was using it at time of the accident for his own purposes exclusively, without permission and against commands of the defendant, his employer, the plaintiff gained nothing from the former analogous section. Fluegel v Coudert, 244 N.Y. 393, 155 N.E. 683, 244 N.Y. (N.Y.S.) 393, 1927 N.Y. LEXIS 1067 (N.Y.), reh'g denied, 245 N.Y. 539, 157 N.E. 849, 245 N.Y. (N.Y.S.) 539, 1927 N.Y. LEXIS 695 (N.Y. 1927).

In plaintiff's action for injuries sustained in collision which occurred when she and her friend were "joyriding" in defendants' car, summary judgment was properly granted in favor of defendants based on proof that car was operated without their consent, where plaintiff's friend pleaded guilty to theft of car and plaintiff admitted that she knew car was stolen; likewise, plaintiff's claim that defendants violated CLS Veh & Tr § 1210(a) lacked merit, where plaintiff's friend testified that she found car keys under set of papers on front seat of car, out of plain view. Manning by Manning v Brown, 91 N.Y.2d 116, 667 N.Y.S.2d 336, 689 N.E.2d 1382, 1997 N.Y. LEXIS 3681 (N.Y. 1997), limited, Alami v Volkswagen of Am., Inc., 97 N.Y.2d 281, 739 N.Y.S.2d 867, 766 N.E.2d 574, 2002 N.Y. LEXIS 218 (N.Y. 2002).

Owner of vehicle which was stolen and became involved in accident with plaintiff was entitled to summary judgment dismissing complaint, even though vehicle was not reported stolen until 3 ½ hours after accident, since discrepancy between time of accident and time vehicle was reported stolen would not raise issue of fact as to whether statutory presumption that vehicle was being operated with owner's permission was conclusively rebutted. Pow v Black, 182 A.D.2d 484, 582 N.Y.S.2d 186, 1992 N.Y. App. Div. LEXIS 5982 (N.Y. App. Div. 1st Dep't 1992).

Defendant, owner of offending vehicle, was properly granted summary judgment in wrongful death action where it was shown that driver, who was subsequently charged with second degree murder in connection with incident in question, intentionally ran down plaintiffs' decedent. Marchetti v Avis Rent-A-Car Sys., 249 A.D.2d 518, 672 N.Y.S.2d 368, 1998 N.Y. App. Div. LEXIS 4616 (N.Y. App. Div. 2d Dep't 1998).

Where a plaintiff was injured by an automobile truck operated by an employee of a corporation who was not licensed to operate the truck, and it appeared that the truck belonged to an individual and was being used by the corporation; that the chauffeur of the truck was instructed not to permit his helpers to operate the truck; that the chauffeur and two helpers became drunk and the chauffeur abandoned the truck, but thereafter one of the helpers operated the truck and was operating it when the accident occurred, the owner of the truck was not liable. Rosenbluth v Concourse Van Co., 229 N.Y.S. 609, 132 Misc. 647, 1928 N.Y. Misc. LEXIS 910 (N.Y. Sup. Ct. 1928).

An owner's liability for negligence of one whom she permits to operate the vehicle cannot be avoided by a contention that she did not give the operator permission to violate the law, and accordingly did not "legally" consent to his operation without proper registration plates and without an operator's license. State Farm Mut. Auto. Ins. Co. v Huther, 38 Misc. 2d 346, 238 N.Y.S.2d 176, 1963 N.Y. Misc. LEXIS 2226 (N.Y. County Ct. 1963), aff'd, 22 A.D.2d 747, 253 N.Y.S.2d 727, 1964 N.Y. App. Div. LEXIS 3028 (N.Y. App. Div. 4th Dep't 1964).

An automobile owner may give permission to another to use his unlicensed automobile so as to make liability attach to the owner, even though such operator is operating the automobile in violation of law at the time of the accident, both by reason of absence of proper license plates and his own failure to have an operator's license. State Farm Mut. Auto. Ins. Co. v Huther, 38 Misc. 2d 346,

238 N.Y.S.2d 176, 1963 N.Y. Misc. LEXIS 2226 (N.Y. County Ct. 1963), aff'd, 22 A.D.2d 747, 253 N.Y.S.2d 727, 1964 N.Y. App. Div. LEXIS 3028 (N.Y. App. Div. 4th Dep't 1964).

Owner of jeep, stolen prior to accident in which plaintiff was injured while riding in jeep, cannot be held vicariously liable to plaintiff under CLS Veh & Tr § 388 based upon owner's possible statutory violation of CLS Veh & Tr § 1210, by leaving keys in jeep prior to its theft, since violation of § 1210 warrants imposition of liability only if violation was proximate cause of accident; as matter of law, lapse of 2 days from time of theft to time of accident mandates finding that owner's negligence was not proximate cause of plaintiff's injuries. Delfino v Ranieri, 131 Misc. 2d 600, 501 N.Y.S.2d 248, 1986 N.Y. Misc. LEXIS 2569 (N.Y. Sup. Ct. 1986).

76. Atypical vehicle use

A plaintiff was entitled to judgment against an appellant corporation, the owner of an automobile, and an individual appellant, the driver thereof, for personal injuries, where it appeared that plaintiff was injured while assisting the individual appellant, at his request, in changing a tire on the paved portion of a highway, in violation of former § 87, subd 3; that the individual appellant had assured plaintiff that he would watch out for, and protect him from danger of, passing traffic; and that plaintiff was injured when the driver of an automobile, approaching around a curve and being blinded by lights of appellant's automobile, collided therewith. Eckert v G. B. Farrington Co., 262 A.D. 9, 27 N.Y.S.2d 343, 1941 N.Y. App. Div. LEXIS 5269 (N.Y. App. Div. 1941), aff'd, 287 N.Y. 714, 39 N.E.2d 932, 287 N.Y. (N.Y.S.) 714, 1942 N.Y. LEXIS 1732 (N.Y. 1942).

Statute providing that owners of vehicles used in state shall be liable for death or injuries to personal property resulting from negligence in use or operation of such vehicle by any person using or operating it with express or implied permission of owner was inapplicable to accident in which crane, which was mounted on truck, fell over and dropped load of angle irons on plaintiff's decedent while truck was immobile. Monell v International Business Machines Corp., 47 A.D.2d 637, 363 N.Y.S.2d 657, 1975 N.Y. App. Div. LEXIS 8802 (N.Y. App. Div. 2d Dep't 1975), aff'd, 38 N.Y.2d 888, 382 N.Y.S.2d 747, 346 N.E.2d 548, 1976 N.Y. LEXIS 2332 (N.Y. 1976).

In negligence action against owner of truck that was left unattended by owner's employee and rolled down driveway and over plaintiff's arm, res ipsa loquitur doctrine did not entitle plaintiff to partial summary judgment on issue of liability where employee was plaintiff's husband, who thus had motive to collude in plaintiff's story as to how accident occurred, and her story was "uncontroverted" only because she chose not to depose her husband, who was sole person with knowledge of facts, and her motion halted discovery process before owner could depose husband. Vitiello v Mayrich Constr. Corp., 255 A.D.2d 182, 680 N.Y.S.2d 482, 1998 N.Y. App. Div. LEXIS 12529 (N.Y. App. Div. 1st Dep't 1998).

Plaintiff stated cause of action seeking to hold appellants liable under CLS Veh & Tr § 388 where (1) plaintiff was walking in crosswalk when van, owned by and leased to appellants, that was being towed by truck owned by nonappealing defendant became detached from tow truck and struck plaintiff, (2) van was being towed because keys to it were lost, (3) at time of accident, van driver was passenger in tow truck, van was locked, no persons were in it, and its engine was not running, (4) § 388 is not limited to situations in which attached or towed vehicle is operable, but applies "whenever any vehicles" are used in combination, by attachment or tow, and (5) fact that van was not being driven at time of accident did not mean that it was not being "used" under § 388. Alcalay v Fleetmark Inc., 266 A.D.2d 118, 698 N.Y.S.2d 676, 1999 N.Y. App. Div. LEXIS 12107 (N.Y. App. Div. 1st Dep't 1999).

In a personal injury action arising out of an accident allegedly caused by a car wash employee's negligence when driving an owner's car while it was being washed, the employer was not entitled to summary judgment dismissing the owner's common-law indemnification claim against it; as a passive vehicle owner vicariously liable under N.Y. Veh. & Traf. Law § 388, the owner was entitled to common-law indemnification from the employer. Scherer v North Shore Car Wash Corp., 32 A.D.3d 426, 821 N.Y.S.2d 219, 2006 N.Y. App. Div. LEXIS 9924 (N.Y. App. Div. 2d Dep't 2006).

Although, as a passive vehicle owner vicariously liable under N.Y. Veh. & Traf. Law § 388, a car owner was entitled to common-law indemnification from an employer who operated a car wash in a personal injury action arising out of an accident allegedly caused by an employee's negligence while driving the owner's car, the owner was not entitled to summary judgment on the indemnification claim; the owner's refusal to permit the employer to inspect the vehicle for malfunctions before it was repaired prejudiced the employer's defense on the indemnification claim. Scherer v North Shore Car Wash Corp., 32 A.D.3d 426, 821 N.Y.S.2d 219, 2006 N.Y. App. Div. LEXIS 9924 (N.Y. App. Div. 2d Dep't 2006).

Pedestrian's negligence action against an owner of a car failed as the pedestrian's injury was caused by the throwing of a cup from the car, and did not arise out of the operation of the car under N.Y. Veh. & Traf. Law § 388(1). Ciminello v Sullivan, 65 A.D.3d 1002, 885 N.Y.S.2d 118, 2009 N.Y. App. Div. LEXIS 6295 (N.Y. App. Div. 2d Dep't 2009).

Defendant was entitled to summary judgment in personal injury action arising out of plaintiff being hit in eye by egg thrown from car owned by defendant, where complaint was based solely on vicarious liability under CLS Veh & Tr § 388, defendant was not present at time of plaintiff's injury, and he did not participate in conduct complained of; proximate cause of plaintiff's injury was independent act of throwing egg, and thus plaintiff's injury did not arise from "use or operation" of defendant's vehicle and § 388 did not apply. Levitt v Peluso, 168 Misc. 2d 239, 638 N.Y.S.2d 878, 1995 N.Y. Misc. LEXIS 680 (N.Y. Sup. Ct. 1995).

Loading and unloading of a vehicle constituted use thereof within the meaning of N.Y. Veh. & Traf. Law § 388; there was no basis to vacate the default of an auto insurer since it failed to show a meritorious defense in a declaratory judgment action. N. Ins. Co. v TIG Ins. Co., 2 A.D.3d 422, 767 N.Y.S.2d 809, 2003 N.Y. App. Div. LEXIS 12893 (N.Y. App. Div. 2d Dep't 2003).

Denial of an owner's summary judgment motion seeking dismissal of a third party complaint in a cable splicer's underlying personal injury claim was proper because the owner failed to establish, prima facie, that N.Y. Veh. & Traf. Law § 388 did not apply under circumstances in which the owner's bucket truck slid down an embankment, striking the wire that supported the pole on which the cable splicer was standing and causing injuries to the cable splicer; a triable issue of fact existed as to whether the manner in which a coworker operated the vehicle portion of the truck contributed to the accident. Additionally, it was immaterial that the subject truck was not operated on a public highway. Campbell v City of New York, 50 A.D.3d 722, 855 N.Y.S.2d 232, 2008 N.Y. App. Div. LEXIS 3238 (N.Y. App. Div. 2d Dep't 2008).

77. Miscellaneous application of statute

When one leaves his motor vehicle in a busy street in such a position that a reasonably prudent person should anticipate that in the event of an emergency or other necessity, it must be moved, this section imposes upon the owner responsibility for the negligent acts of the person left in charge. Winnowski v Polito, 294 N.Y. 159, 61 N.E.2d 425, 294 N.Y. (N.Y.S.) 159, 1945 N.Y. LEXIS 814 (N.Y. 1945).

A judgment for plaintiff in an action for the death of plaintiff's intestate as a result of a collision between a sedan, in which he was a passenger, and a motor truck, where the proof established that the sedan was traveling at an excessive rate of speed and was being used by an employee of defendant owner in the latter's business "or otherwise" and the facts justified the jury in finding that the failure of the operator of the motor truck to turn to the extreme right to avert the collision was a concurring act of negligence resulting in intestate's death. Hartstein v United States Trucking Corp., 260 A.D. 643, 23 N.Y.S.2d 251, 1940 N.Y. App. Div. LEXIS 4677 (N.Y. App. Div.), reh'g denied, 260 A.D. 1006, 25 N.Y.S.2d 400, 1940 N.Y. App. Div. LEXIS 9035 (N.Y. App. Div. 1940).

In an action against a foreign diplomat, a permanent representative to the United Nations from the Republic of Chile, the

Supreme Court of the United States has exclusive jurisdiction, which could not be waived in an action in a state court by personal appearance or by pleading. Friedberg v Santa Cruz, 274 A.D. 1072, 86 N.Y.S.2d 369, 1949 N.Y. App. Div. LEXIS 6116 (N.Y. App. Div. 1949).

Neither owner of moped operated by 14-year-old boy who was injured in collision nor driver of other vehicle involved in collision was entitled to summary judgment dismissing personal injury action where (1) moped owner, who was accused of negligent entrustment, failed to prove that moped is not dangerous instrument, (2) there was triable issue of fact as to whether moped owner was or should have been aware of its use by her children's friends, and (3) as to driver of other vehicle, who was accused of negligent operation of vehicle, there was triable issue of fact as to whether emergency doctrine applied. Ripton v Gracie, 266 A.D.2d 885, 698 N.Y.S.2d 208, 1999 N.Y. App. Div. LEXIS 11875 (N.Y. App. Div. 4th Dep't 1999).

Defendant, owner of negligently parked motor vehicle alleged to be substantial cause of accident, could be held liable to plaintiff under CLS Veh & Tr § 388(1); thus, court improperly granted defendant's summary judgment motion. Bouchard v Canadian Pac. Ltd., 267 A.D.2d 899, 700 N.Y.S.2d 540, 1999 N.Y. App. Div. LEXIS 13595 (N.Y. App. Div. 3d Dep't 1999).

Owner of motor vehicle was entitled to summary judgment in action to hold it vicariously liable under CLS Veh & Tr § 388 for injuries sustained by plaintiffs when vehicle was driven onto sidewalk, where defendant driver admitted that he intended to injure individual who was standing on sidewalk; owner could not be held liable for driver's intentional act. Beddingfield v LaBarbera, 276 A.D.2d 575, 714 N.Y.S.2d 312, 2000 N.Y. App. Div. LEXIS 10407 (N.Y. App. Div. 2d Dep't 2000).

Where an owner has avoided responsibility, under this section, for the death of plaintiff's husband on the ground that the operator had no permission to use the automobile, the defendant operator is guilty of larceny under the Penal Law, § 1293-a. Schillaci v Fountaine, 299 N.Y.S. 944, 164 Misc. 567, 1937 N.Y. Misc. LEXIS 1885 (N.Y. Sup. Ct. 1937).

Where a taxicab owned by defendant and operated by one of its employees was hailed by another who directed the employee to assist in pursuing the other's stolen cab which, at the time, was still in sight, and in the pursuit a collision occurred between defendant's cab and plaintiff's car, the plaintiff is not entitled to recover from the defendant for the property damage sustained. Bindert v Elmhurst Taxi Corp., 6 N.Y.S.2d 666, 168 Misc. 892, 1938 N.Y. Misc. LEXIS 1916 (N.Y. Mun. Ct. 1938).

Negligence of car wash employees in permitting automobile under their control to roll down incline on car wash property into automobile parked on public street was imputed to owner of freshly-washed auto under Vehicle & Traffic Law § 388. Allcity Ins. Co. v Old Greenwich Delicatessen, 75 Misc. 2d 898, 349 N.Y.S.2d 240, 1973 N.Y. Misc. LEXIS 1324 (N.Y. Civ. Ct. 1973).

Driver's cause of action against vehicle owner for negligently entrusting vehicle to him with knowledge that he was intoxicated would be dismissed, even if owner should have known that driver was intoxicated, where driver's intoxication was not cause of accident, which resulted when passenger interfered with operation of vehicle by reaching across another passenger to yank wheel to right, causing driver to react quickly, in course of which he was injured when vehicle struck telephone pole and house. Good v MacDonell, 149 Misc. 2d 315, 564 N.Y.S.2d 949, 1990 N.Y. Misc. LEXIS 661 (N.Y. Sup. Ct. 1990).

Owner of car that struck and killed plaintiff's decedent was not entitled to summary judgment in wrongful death action on ground that she was not liable under CLS Veh & Tr § 388 because driver of car acted recklessly in that he was intoxicated when accident occurred; owner's liability under statute extends to reckless or grossly negligent conduct. Lynch-Fina v Paredes, 164 Misc. 2d 963, 627 N.Y.S.2d 255, 1995 N.Y. Misc. LEXIS 228 (N.Y. Sup. Ct. 1995).

In personal injury action by plaintiff who was run down by driver of taxicab owned by defendant and operated with his permission, defendant was entitled to summary judgment on negligence claim predicated on CLS Veh & Tr § 388 pursuant to doctrine of collateral estoppel, where driver had been convicted of first degree assault under CLS Penal § 120.10(1) as result of incident; criminal jury necessarily concluded beyond reasonable doubt that driver intended physical injury toward plaintiff, driver had full and fair opportunity to litigate issue of intent, and plaintiff's claim against owner of vehicle depended on whether his injury was caused by driver's negligent rather than intentional use of vehicle. DeJesus v New York City Transit Auth., 173 Misc. 2d 918, 661 N.Y.S.2d 952, 1997 N.Y. Misc. LEXIS 409 (N.Y. Sup. Ct. 1997).

Because a passenger established that a driver failed to yield to traffic on the roadway while exiting a parking lot, in violation of N.Y. Veh. & Traf. Law § 1143, and that the vehicle owner was vicariously liable under N.Y. Veh. & Traf. Law § 388, the trial court erred in denying the passenger's motion for summary judgment on the issue of liability in the passenger's personal injury action. Van Doren v Dressler, 45 A.D.3d 1366, 844 N.Y.S.2d 794, 2007 N.Y. App. Div. LEXIS 11482 (N.Y. App. Div. 4th Dep't 2007).

In action against U.S. by driver of a horse-drawn wagon for injuries sustained when the rear end of his wagon was struck by an army truck, evidence that the soldier driving the truck had had a beer on two occasions, had struck an automobile and sped from the scene just prior to the accident in question, and that, at the time of the accident he, being a stranger to the vicinity, was lost, which accounted for his driving in the wrong direction to return to his base, was insufficient under New York law to rebut the presumption that the soldier was not acting in the line of duty at the time of the accident. Mandelbaum v United States, 251 F.2d 748, 1958 U.S. App. LEXIS 3609 (2d Cir. N.Y. 1958).

In action by New York resident against French company for injuries sustained in automobile accident in France, where companion of plaintiff was operating vehicle which was rented by plaintiff from French company, action must be governed by French law. Boxer v Gottlieb, 652 F. Supp. 1056, 1987 U.S. Dist. LEXIS 181 (S.D.N.Y. 1987).

IV. Practice Matters

78. In general

In automobile negligence action, wherein father of infant plaintiff testified without objection as to location of center line of street in question, that evidence, standing alone, was sufficient to establish a prima facie case that accident occurred upon the public highway and dismissal of complaint on merits at close of plaintiff's case apparently on ground that there was a failure to prove that accident occurred on public highway was erroneous. Lewis v Meyers, 9 A.D.2d 1022, 194 N.Y.S.2d 160, 1959 N.Y. App. Div. LEXIS 5451 (N.Y. App. Div. 4th Dep't 1959).

A 15-year-old daughter could assert a cause of action against the owner of a vehicle driven by her father when she was injured as the car struck a raised manhole cover and went out of control as the father and daughter were traveling on a road in a real estate development having visited a house being built there for their family. Winnick v Kupperman Constr. Co., 29 A.D.2d 261, 287 N.Y.S.2d 329, 1968 N.Y. App. Div. LEXIS 4608 (N.Y. App. Div. 2d Dep't 1968).

Automobile owner, who was only statutorily liable under CLS Veh & Tr § 388, could maintain action for indemnification against driver and lessee of automobile after paying settlement to injured party in prior suit; fact that owner, lessee, and driver had negotiated settlement of prior action did not impair their rights to pursue indemnification claims among themselves, and lessee and driver were not entitled to dismissal of indemnification suit where factual issues existed with respect to their negligence. Denton Leasing Corp. v Breezy Point Surf Club, Inc., 133 A.D.2d 95, 518 N.Y.S.2d 634, 1987 N.Y. App. Div. LEXIS 49623 (N.Y. App. Div. 2d Dep't 1987).

Defendant, registered owner who allegedly sold uninsured vehicle to co-defendant 2 weeks prior to accident, was not entitled to summary judgment in action by Motor Vehicle Accident Indemnification Corporation for reimbursement of monies paid to guardian of infant who was injured when struck by defendant's vehicle by unidentified driver where fact issue existed as to whether use of vehicle was permissive. Motor Vehicle Accident Indemnification Corp. v Levinson, 218 A.D.2d 606, 630 N.Y.S.2d

747, 1995 N.Y. App. Div. LEXIS 8853 (N.Y. App. Div. 1st Dep't 1995).

Court erred in denying defendant's motion for summary judgment where it showed that its vehicle was being driven without its permission and consent at time plaintiff was struck and injured, and plaintiff failed to submit admissible proof to rebut defendant's showing. Leonard v Elite Investigations, 221 A.D.2d 322, 633 N.Y.S.2d 214, 1995 N.Y. App. Div. LEXIS 11240 (N.Y. App. Div. 2d Dep't 1995).

Defendant, vehicle lessor, should have been granted summary judgment in personal injury action which arose from accident involving leased vehicle where defendant sufficiently rebutted presumption of consent under CLS Veh & Tr § 388, and only evidence submitted in opposition was affirmation of plaintiff's attorney and police report. Molina v NYRAC, Inc., 228 A.D.2d 655, 645 N.Y.S.2d 819, 1996 N.Y. App. Div. LEXIS 7435 (N.Y. App. Div. 2d Dep't 1996).

Defendant, rent-a-car company, should have been granted summary judgment where plaintiff failed to submit any proof to rebut defendant's proof that its vehicle was being driven without its permission and consent at time of accident. Benavides v Value Rent-A-Car, 230 A.D.2d 814, 646 N.Y.S.2d 632, 1996 N.Y. App. Div. LEXIS 8563 (N.Y. App. Div. 2d Dep't 1996).

It was harmless error to admit evidence that owner had used tractor for excavating purposes some 5 years after accident since there was otherwise ample evidence regarding agreement as to possession and use of tractor between owner and operator when tractor was purchased and as to actual uses to which tractor was put by operator during next 6 weeks leading up to accident; under circumstances, admission of such evidence was not likely to have had substantial influence on jury's finding that tractor was not "used exclusively for agricultural purposes" (CLS Veh & Tr § 388(2)). Palmer v Rouse, 232 A.D.2d 909, 649 N.Y.S.2d 76, 1996 N.Y. App. Div. LEXIS 11264 (N.Y. App. Div. 3d Dep't 1996).

Court erred in declaring that plaintiff was obligated to defend and provide primary coverage to its insured in underlying personal injury action, which arose from accident while insured was driving rental vehicle, where rental company's automobile liability insurance policy with defendant, which defined insured to exclude anyone who granted covered auto from named insured under written rental agreement or anyone who operated, drove, or in any way used covered auto rented under such rental agreement, conflicted with CLS Veh & Tr § 345(b)(2) and was unenforceable, and defendant's policy also provided that coverage for any covered auto owned by named insured was primary; further, plaintiff's policy provided that any insurance plaintiff provided for vehicle insured did not own would be excess over any other collectible insurance. Government Emples. Ins. Co. v Chrysler Ins. Co., 256 A.D.2d 1212, 682 N.Y.S.2d 508, 1998 N.Y. App. Div. LEXIS 14379 (N.Y. App. Div. 4th Dep't 1998).

Court properly denied insurer's summary judgment motion to declare that it was not obligated to defend estate of insured's brother, even though it was undisputed that brother was not "relative" as defined in policy because he did not reside in same household as insured, where insurer failed to show as matter of law that brother did not have implied permission to drive insured's vehicle, which was involved in accident. Progressive Ins. Cos. v Brouse, 272 A.D.2d 996, 708 N.Y.S.2d 673, 2000 N.Y. App. Div. LEXIS 5145 (N.Y. App. Div. 4th Dep't 2000).

Where defendant, driver of United States post-office truck which ran into plaintiff's vehicle, failed to plead or prove any facts upon which to base finding that defendant was operating post-office truck in the scope of his employment, defendant was not immune from liability for his negligence under federal statute providing immunity from tort liability to employee of federal government acting within scope of his office or employment. Dwyer v Mott, 87 Misc. 2d 965, 386 N.Y.S.2d 312, 1976 N.Y. Misc. LEXIS 2334 (N.Y. City Ct. 1976).

Despite fact that automobile accident occurred on September 7, 1974, where insured and insured's wife brought action against driver of other vehicle involved in accident, where such other driver filed counterclaim seeking indemnity from insured for any judgment which might ultimately have been determined in favor of insured's wife, and where issue of such other driver's negligence had not yet been determined, driver's cause of action, if any, was one that was still in futuro and thus arose after August 1, 1976, date on which legislation requiring insurer to defend such a claim became effective, and thus insurer was under duty to defend insured with respect to counterclaim. Lumbermens Mut. Casualty Co. v Barnett, 91 Misc. 2d 3, 396 N.Y.S.2d 1007, 1977 N.Y. Misc. LEXIS 2222 (N.Y. Sup. Ct. 1977).

Smoke from a brush fire 600 feet from a highway obstructing the vision of motorists was not the "proximate cause" of injuries to passengers in a vehicle which was carelessly and recklessly driven due to the limited light range as compared with the speed of the vehicle. Pfohl v State, 42 N.Y.S.2d 372, 1943 N.Y. Misc. LEXIS 2012 (N.Y. Ct. Cl. 1943).

In a personal injury action by an injured child, counsel representing a driver as assigned by an excess insurance carrier was relieved; having multiple counsel representing the defendants was not allowable, as the liability that could be imposed on a defendant was vicarious pursuant to N.Y. Veh. & Traf. Law § 388(1) and (4), and the driver failed to show good cause, a judicially recognized conflict of interest, or a valid disclaimer of coverage by a primary carrier. Lukic v Garrett, 195 Misc. 2d 438, 759 N.Y.S.2d 306, 2003 N.Y. Misc. LEXIS 329 (N.Y. Sup. Ct. 2003).

Trial court properly entered judgment in favor of an injured party in a personal injury action, as the trial court properly charged the jury on N.Y. Veh. & Traf. Law § 388(1), as defendants failed to rebut the presumption that at the time of the accident, a minibus was used or operated with the owner's express or implied consent, but the jury award for past pain and suffering deviated materially from what would have been reasonable compensation under the circumstances pursuant to N.Y. C.P.L.R. 5501(c), and either a new trial or a stipulation to a smaller award was required. Lanigan v United Sch. Bus, Inc., 2 A.D.3d 410, 767 N.Y.S.2d 793, 2003 N.Y. App. Div. LEXIS 12824 (N.Y. App. Div. 2d Dep't 2003).

In a personal injury action arising from a truck/automobile collision, the truck driver, his employer, and a trailer lessor were entitled to partial summary judgment under Fed. R. Civ. P. 56(b) dismissing the automobile driver's punitive damages claims; although the tires on the trailer were worn and the driver's record was less than perfect, defendants' conduct did not evidence the degree of recklessness and wantonness requisite for an award of punitive damages under New York law; further, N.Y. Veh. & Traf. Law § 388 did not subject the trailer lessor to punitive damages for any conduct by the trailer lessee or its truck driver employee. Marcoux v Farm Serv. & Supplies, Inc., 283 F. Supp. 2d 901, 2003 U.S. Dist. LEXIS 16437 (S.D.N.Y. 2003).

79. Procedural matters

Owner of vehicle who is vicariously liable under CLS Veh & Tr § 388 can be tacked onto primary lawsuit through third-party contribution claim even though injured party initially fails to sue owner and is legally foreclosed from doing so at later point, because vehicle owner remains potentially subject to liability for contribution purposes. Mowczan v Bacon, 92 N.Y.2d 281, 680 N.Y.S.2d 431, 703 N.E.2d 242, 1998 N.Y. LEXIS 3209 (N.Y. 1998).

Upon truck owner's rebuttal of statutory presumption that truck was operated with owner's knowledge and consent at time of automobile-truck collision, burden fell upon automobile passengers who brought personal injury action against truck owner to demonstrate owner's responsibility. Speller v Ryder Truck Rental, Inc., 47 A.D.2d 608, 363 N.Y.S.2d 823, 1975 N.Y. App. Div. LEXIS 8744 (N.Y. App. Div. 1st Dep't 1975).

New Jersey law to effect that owner and lessee of tractor could not recover over against trailer owner for indemnity on settlement of action to recover for personal injury inflicted on cargo checker due to alleged negligence of driver of tractor trailer was applicable where, inter alia, though checker was New York resident, he worked in New Jersey, where, though lessee was New York corporation, its principal office was in New Jersey, where, though trailer owner was New York corporation, its principal operation took place in New Jersey and where driver was New Jersey resident and accident occurred in New Jersey. Belisario v Manhattan Motor Rental, Inc., 48 A.D.2d 477, 370 N.Y.S.2d 574, 1975 N.Y. App. Div. LEXIS 9922 (N.Y. App. Div. 1st Dep't 1975).

Where vehicle owner overcame presumption of permissive use in CLS Veh & Tr § 388 with admissible evidence that her vehicle was being operated without her permission at time of accident, and no defendant came forward with admissible evidence to create issue of fact on such question, owner and her insurer were entitled to judgment declaring that neither had any duty or obligation to injured persons. Government Emples. Ins. Co. v Prudential Prop. & Cas. Ins. Co., 241 A.D.2d 479, 661 N.Y.S.2d 525, 1997 N.Y. App. Div. LEXIS 7407 (N.Y. App. Div. 2d Dep't 1997).

Rule that summary judgment should not be granted when facts on which motion is predicated are exclusively within moving party's knowledge was especially applicable where movant was plaintiff in negligence action against owner of truck driven by owner's employee, who was plaintiff's husband, and thus there was danger of collusion by virtue of marital relationship. Vitiello v Mayrich Constr. Corp., 255 A.D.2d 182, 680 N.Y.S.2d 482, 1998 N.Y. App. Div. LEXIS 12529 (N.Y. App. Div. 1st Dep't 1998).

A court may not take judicial notice of a foreign statute similar to this section, nor can it presume that such statute exists in another state. Shaw v Blainey, 277 N.Y.S. 466, 154 Misc. 495, 1935 N.Y. Misc. LEXIS 972 (N.Y. Mun. Ct. 1935).

Section 3130 of CPLR, which denies to one party the right to submit interrogatories in a negligence action to another party thereto, did not apply where a defendant in an automobile negligence case sought to take the deposition of another out-of-state defendant in one of three unconsolidated actions arriving out of the same accident, since the defendant whose deposition was sought was not a party in the present situation, but a witness. Moreover, rule 3108 of the CPLR expressly authorizes the submission of written questions with respect to out-of-state depositions, and such questions are to be distinguished from the written interrogatories referred to in § 3130 of the CPLR. Ryan v Saunders, 45 Misc. 2d 1089, 259 N.Y.S.2d 31, 1964 N.Y. Misc. LEXIS 1337 (N.Y. Sup. Ct. 1964).

Family unity doctrine did not operate to bar action by unemancipated minor against corporation for injuries sustained while he was riding in a motor vehicle owned by the corporation and operated and managed by his mother. Kemp v Rockland Leasing, Inc., 51 Misc. 2d 1073, 274 N.Y.S.2d 952, 1966 N.Y. Misc. LEXIS 1361 (N.Y. Sup. Ct. 1966).

Owner of vehicle is not liable for punitive damages because of the driver's conduct. Ingle v Mark, 58 Misc. 2d 895, 296 N.Y.S.2d 664, 1969 N.Y. Misc. LEXIS 1850 (N.Y. Sup. Ct. 1969).

Under comparative negligence statute, contributory negligence of driver of vehicle could not be imputed to owner of vehicle. Avis Rent-A-Car System, Inc. v Johnson, 90 Misc. 2d 263, 394 N.Y.S.2d 373, 1977 N.Y. Misc. LEXIS 2034 (N.Y. Civ. Ct. 1977).

Given the vicarious nature of the statutorily imposed liability upon the owners of vehicles for the negligence of those permitted to use or operate said vehicles, N.Y. Veh. & Traf. Law § 388(1), (4), and the mandate that the policies of insurance indemnify the owners, absent good cause, a judicially recognized conflict of interest, or a valid disclaimer of coverage by a primary carrier as to one of the otherwise covered defendants, there can only be one attorney representing those covered under the primary insurance policy. The excess carrier must be relegated to a passive role in the litigation. Lukic v Garrett, 195 Misc. 2d 438, 759 N.Y.S.2d 306, 2003 N.Y. Misc. LEXIS 329 (N.Y. Sup. Ct. 2003).

80. Discovery

In action against employers of allegedly negligent driver on respondeat superior theory that driver was operating his vehicle in course of his employment, plaintiff's claim that facts essential to his opposition to employers' motion for summary judgment were within employers' exclusive possession was unavailing where plaintiff had deposed employers and another person having knowledge of driver's activities. James v Le Feber, 275 A.D.2d 973, 715 N.Y.S.2d 193, 2000 N.Y. App. Div. LEXIS 9508 (N.Y. App. Div. 4th Dep't 2000).

81. Action by owner

Contributory negligence of lessee operator of automobile is not imputable to absentee lessor of such auto so as to bar recovery for property damage to such auto. Continental Auto Lease Corp. v Campbell, 19 N.Y.2d 350, 280 N.Y.S.2d 123, 227 N.E.2d 28, 1967 N.Y. LEXIS 1597 (N.Y. 1967).

Statute which imputes to an absentee owner the negligence of his driver, for the purpose of imposing liability to an injured third party, does not impute contributory negligence to such an absentee owner in his action to recover his own damage. Molino v County of Putnam, 29 N.Y.2d 44, 323 N.Y.S.2d 817, 272 N.E.2d 323, 1971 N.Y. LEXIS 1187 (N.Y. 1971).

The derivative negligence of an owner under this section for the negligence of a driver in actions by 3rd parties, does not apply to an action by the owner against the driver. Lamoureaux v Crowe, 6 A.D.2d 930, 176 N.Y.S.2d 22, 1958 N.Y. App. Div. LEXIS 5249 (N.Y. App. Div. 3d Dep't 1958).

In this action by the owner-occupant of an automobile against her chauffeur and railway company for injuries suffered following a collision between her automobile and a street car the negligence of the chauffeur might be imputed to plaintiff as a defense to her action against the railway company, but it may not be imputed so as to defeat her action against her chauffeur. Webb v Elmira W., L. & R. Co., 258 N.Y.S. 892, 144 Misc. 506, 1932 N.Y. Misc. LEXIS 1539 (N.Y. Sup. Ct. 1932).

In an action by the owner of automobile against his bailee and another for injury to plaintiff's car, in which it is alleged that both bailee and the other defendant were negligent and an accident happened while plaintiff's car was being driven with his permission by his bailee, such other defendant is not entitled to have the complaint dismissed, on the theory that under this section the bailee became a servant or agent of the owner. Nannes v Ideal Garage, Inc., 269 N.Y.S. 777, 150 Misc. 522, 1934 N.Y. Misc. LEXIS 1108 (N.Y. App. Term 1934).

In action by owner of automobile to recover for personal injuries and damage to his car, the negligence of the driver of his car should be imputed to the owner when the car was being driven with the permission of the owner, on the business of the owner and with the owner present in the car. Mosher v State, 124 N.Y.S.2d 223, 204 Misc. 580, 1953 N.Y. Misc. LEXIS 2139 (N.Y. Ct. Cl. 1953).

The failure of owner of vehicle to give driver instructions to drive with extreme care and at a slow rate of speed was proof of contributory negligence on the part of the owner where there was 6–8 inches of heavy snow and visibility was only about 100 feet. Mosher v State, 124 N.Y.S.2d 223, 204 Misc. 580, 1953 N.Y. Misc. LEXIS 2139 (N.Y. Ct. Cl. 1953).

This section did not apply to an action brought by the owner against a third person who was the owner and operator of an automobile involved in a collision with the plaintiff's automobile which was driven by his bailee. Petro v Eisenberg, 138 N.Y.S.2d 705, 207 Misc. 380, 1955 N.Y. Misc. LEXIS 2668 (N.Y. Sup. Ct. 1955).

The doctrine of imputed negligence has no application as between joint venturers themselves, when one sues the other as the actual wrongdoer, and the owner of a vehicle made liable by virtue of this section would seem to be in no better position. Breasette v Briscoe, 21 Misc. 2d 968, 197 N.Y.S.2d 866, 1960 N.Y. Misc. LEXIS 3864 (N.Y. Sup. Ct. 1960).

Where owner of vehicle was being sued together with the driver of the vehicle and the claim was in excess of the insurance carried by the owner, the owner could file a cross claim against the driver. Ammann v Devinney, 62 Misc. 2d 225, 308 N.Y.S.2d 237, 1970 N.Y. Misc. LEXIS 1836 (N.Y. Sup. Ct. 1970).

Vehicle and Traffic Law § 388 apparently is not designed to deny an absentee owner a recovery on the basis of imputed contributory negligence although he may at the very same time be found liable as a defendant when the concurrent negligence attributable to the driver is imputed to him. Cadran v Fanni, 72 Misc. 2d 1, 338 N.Y.S.2d 532, 1972 N.Y. Misc. LEXIS 1413 (N.Y. Dist. Ct. 1972).

This section which imputes the negligence of a borrower to an owner in actions against the owner, does not impute such negligence in actions by an owner. Hessler v Nelipowitz, 55 N.Y.S.2d 692, 1945 N.Y. Misc. LEXIS 1905 (N.Y. Mun. Ct. 1945).

82. —Family member drivers

If infant plaintiff were found negligent in operation of motorcycle, application of doctrine of contributory negligence would

defeat both his action and derivative causes of father. Zambraski v Eller, 44 A.D.2d 691, 355 N.Y.S.2d 460, 1974 N.Y. App. Div. LEXIS 5328 (N.Y. App. Div. 2d Dep't 1974).

Third-party complaint of owner and operator of automobile, who alleged negligence on part of both infant motorcyclist and infant's father, and who asserted that in event that they were found liable to plaintiffs they would be entitled to recovery against the father to extent that he had contributed to happening of collision between motorcycle and automobile, failed to state a cause of action. Zambraski v Eller, 44 A.D.2d 691, 355 N.Y.S.2d 460, 1974 N.Y. App. Div. LEXIS 5328 (N.Y. App. Div. 2d Dep't 1974).

Court properly granted defendant's motion to disqualify and remove plaintiff, owner of vehicle. as guardian of infant plaintiffs, his children, where plaintiff's pecuniary interests were adverse to those of infant plaintiffs by reason of CLS Veh & Tr § 388, which renders vehicle owner vicariously liable for injuries caused by negligence of driver. Boyd v Trent, 287 A.D.2d 475, 731 N.Y.S.2d 209, 2001 N.Y. App. Div. LEXIS 9428 (N.Y. App. Div. 2d Dep't 2001), app. denied, 98 N.Y.2d 671, 746 N.Y.S.2d 459, 774 N.E.2d 224, 2002 N.Y. LEXIS 1584 (N.Y. 2002).

A defendant owner could not sustain a verdict in his favor to recover damages for injuries to his automobile where his wife was operating the automobile with his consent and was acting as his agent, and he was responsible under the former analogous section for her negligence. Her contributory negligence bars the defendant owner from recovering. Swartout v Van Auken, 228 N.Y.S. 671, 132 Misc. 89, 1928 N.Y. Misc. LEXIS 850 (N.Y. Sup. Ct. 1928), aff'd, 227 A.D. 644, 235 N.Y.S. 732, 1929 N.Y. App. Div. LEXIS 6780 (N.Y. App. Div. 1929).

Although considered a statutory owner under N.Y. Veh. & Traf. Law § 128, an employee was not precluded from bringing a claim under N.Y. Veh. & Traf. Law § 388 against other statutory co-owners because the employee's husband was operating a leased company car with the co-owners' consent at the time of an accident. Hassan v Montuori, 99 N.Y.2d 348, 756 N.Y.S.2d 126, 786 N.E.2d 25, 2003 N.Y. LEXIS 150 (N.Y. 2003).

83. Action by operator

Even assuming that the owner of the vehicle implicitly consented to plaintiff's operation of the vehicle, plaintiffs pointed to no authority which would permit plaintiff, as the driver of the vehicle rather than an innocent third party, to recover from the owner for injuries sustained in the accident. Heins v Vanbourgondien, 180 A.D.3d 1019, 119 N.Y.S.3d 158, 2020 N.Y. App. Div. LEXIS 1403 (N.Y. App. Div. 2d Dep't 2020).

This statute does not give the operator of an automobile a cause of action against the owner for the operator's own negligence. Mordecai v Hollis, 50 Misc. 2d 248, 269 N.Y.S.2d 863, 1966 N.Y. Misc. LEXIS 1908 (N.Y. Sup. Ct. 1966).

84. Pleading

A complaint must be dismissed as to a defendant insurance company in an action for personal injuries suffered by plaintiff, a passenger in an automobile owned by defendant insurance company and operated by an employee, the individual defendant's intestate, where proof shows that intestate drove the vehicle into a private roadway and across a private railroad crossing, whereupon he immediately turned the vehicle around and drove back onto the grade crossing directly in front of an oncoming train, since the presumption of an employer's liability by virtue of ownership of the automobile was overcome by evidence that the driver was not engaged in the scope of his employment at the time of the accident. Berry v Employers' Liability Assurance Corp., 254 A.D. 424, 5 N.Y.S.2d 887, 1938 N.Y. App. Div. LEXIS 6442 (N.Y. App. Div. 1938).

A judgment dismissing a complaint was reversed and a new trial granted in an action for personal injuries suffered by a passenger in an automobile which collided with a motor truck claimed to be owned by the corporate defendant, where it appeared that there were involved issues of fact, which a jury alone should decide, as to whether the truck which collided with the automobile in which plaintiff was a passenger belonged to the corporation, and, if it did, whether at the time of the accident it was being operated in the course of business of the corporation or with its consent, and whether the operator at time of the accident was one of the employees of the corporation, and, if so, the circumstances under which he was driving the truck. Christie v B. F. Vineburg, Inc., 259 A.D. 342, 19 N.Y.S.2d 252, 1940 N.Y. App. Div. LEXIS 6144 (N.Y. App. Div. 1940).

Since personal injury action arising from automobile accident was submitted to jury, without objection by either side, on theory that defendant corporation, which rented vehicle wherein plaintiffs were riding at time of accident, could validly shield itself from derivative liability by clause of rental agreement against more than two people using vehicle, it was unnecessary to determine validity of clause in contract. Furletti v Hertz Corp., 36 A.D.2d 973, 322 N.Y.S.2d 47, 1971 N.Y. App. Div. LEXIS 3971 (N.Y. App. Div. 2d Dep't 1971).

In action for damages from personal injury sustained in automobile accident, there was no abuse of discretion in denying motion to amend complaint, made after jury had been selected, to assert new facts and new theory of liability under CLS Veh & Tr § 388 where proposed amendment would have alleged that car was operated by third party rather than defendant at time of accident and that car was being operated with defendant owner's consent, but plaintiffs offered no excuse for delay of more than 3 years in seeking amendment, deposition of third party had not been taken, and proposed amendment would result in prejudice to defendant. Cummings v Calascione, 127 A.D.2d 625, 511 N.Y.S.2d 653, 1987 N.Y. App. Div. LEXIS 43116 (N.Y. App. Div. 2d Dep't), app. denied, 70 N.Y.2d 607, 521 N.Y.S.2d 224, 515 N.E.2d 909, 1987 N.Y. LEXIS 18907 (N.Y. 1987).

Driver of offending vehicle and vehicle owner were united in interest where there was no claim that driver was operating vehicle without permission; thus, court properly granted plaintiff's motion to amend complaint to add driver as party defendant after expiration of statute of limitations. Poulard v Papamihlopoulos, 254 A.D.2d 266, 678 N.Y.S.2d 383, 1998 N.Y. App. Div. LEXIS 10042 (N.Y. App. Div. 2d Dep't 1998).

A cross-complaint, under Civil Practice Act § 264, of an employer, against whom an action had been brought for personal injuries which arose out of negligent operation of an automobile by one of its employees during course of his employment, against defendant owner of the vehicle, was insufficient, in the absence of specific allegation that the accident was caused by some mechanical defect in the automobile, which would constitute primary negligence on the owner's part, since the Civil Practice Act § 264, contemplates situation wherein there may be a right of indemnification between codefendants, while here the liability of defendant owner is derivative and exists because of this section, and the defendant owner stands in the position of an indemnitee and not that of an active wrongdoer or indemnitor. Miller v Green, 26 N.Y.S.2d 54, 176 Misc. 303, 1941 N.Y. Misc. LEXIS 1531 (N.Y. Sup. Ct. 1941).

In an action wherein respondent, as absentee owner of a motor vehicle was sued for damages sustained by plaintiff allegedly by reason of failure of a person operating respondent's car with his consent stopped the car on a grade and left it without setting the brakes, wherein respondent filed a third-party complaint against a garage for negligence in repairing the brakes, the third-party complaint was sufficient to sustain a cause of action in favor of respondent against the garage if, in exercise of due care, he failed to discover the defective condition of the brakes after the repair job. Glassman v Goldman, 35 Misc. 2d 429, 230 N.Y.S.2d 947, 1962 N.Y. Misc. LEXIS 3374 (N.Y. Sup. Ct. 1962).

The cross-complaints of an owner of an automobile against the car driver and the defendant town filed in an action by an infant passenger injured when the car left a slippery road and struck a tree were dismissed, since if as the owner's answer alleged the car was being operated without his consent, there could be no recovery against the owner and no reason for indemnification; and if upon trial it were determined that the automobile was operated with the owner's consent, the vicarious liability of the owner for the operator's negligence could not be passed on to the town. Vescera v Dancy, 52 Misc. 2d 830, 277 N.Y.S.2d 37, 1967 N.Y. Misc. LEXIS 1800 (N.Y. Sup. Ct. 1967).

In action against U.S. by driver of a horse-drawn wagon for injuries sustained when the rear end of his wagon was struck by

an army truck, evidence that the soldier driving the truck had had a beer on two occasions, had struck an automobile and sped from the scene just prior to the accident in question, and that, at the time of the accident he, being a stranger to the vicinity, was lost, which accounted for his driving in the wrong direction to return to his base, was insufficient under New York law to rebut the presumption that the soldier was not acting in the line of duty at the time of the accident. Mandelbaum v United States, 251 F.2d 748, 1958 U.S. App. LEXIS 3609 (2d Cir. N.Y. 1958).

85. Evidence

In action for death of man struck by truck driven by defendant, who purchased it from co-defendant automobile dealer, plaintiff's evidence that dealer's license plates on truck at time of accident had been issued to co-defendant constituted prima facie evidence that he owned truck. Switzer v Aldrich, 307 N.Y. 56, 120 N.E.2d 159, 307 N.Y. (N.Y.S.) 56, 1954 N.Y. LEXIS 1000 (N.Y. 1954).

Although, ordinarily, whether a defendant has or has not obtained liability insurance is irrelevant and the introduction of evidence as to insurance coverage is highly prejudicial, such evidence is admissible where it has bearing upon whether or not the vehicle, at the time of the accident, was being operated with the owner's permission. Leotta v Plessinger, 8 N.Y.2d 449, 209 N.Y.S.2d 304, 171 N.E.2d 454, 1960 N.Y. LEXIS 837 (N.Y. 1960), reh'g denied, 9 N.Y.2d 688, 1961 N.Y. LEXIS 1809 (N.Y. 1961).

Evidence justified judgment against bus company for damage to store and its contents into which bus crashed on ground that bus was being operated with permission of company at time of accident. Mattera v Green Bus Lines, Inc., 258 A.D. 800, 15 N.Y.S.2d 458, 1939 N.Y. App. Div. LEXIS 7004 (N.Y. App. Div. 1939).

In actions for injuries and death arising from automobile accident, presumption under provision of the Vehicle and Traffic Law making owner of automobile liable for negligence of one using automobile with owner's permission made prima facie case against automobile owner. Deyo v Belotte, 261 A.D. 1119, 27 N.Y.S.2d 1, 1941 N.Y. App. Div. LEXIS 9034 (N.Y. App. Div.), reh'g denied, 262 A.D. 921, 29 N.Y.S.2d 910, 1941 N.Y. App. Div. LEXIS 6487 (N.Y. App. Div. 1941).

Evidence as to whether driver was using automobile with owner's permission so as to make owner liable under the Vehicle and Traffic Law for such driver's negligent operation was for the jury, where much of the evidence was given by interested witnesses. Deyo v Belotte, 261 A.D. 1119, 27 N.Y.S.2d 1, 1941 N.Y. App. Div. LEXIS 9034 (N.Y. App. Div.), reh'g denied, 262 A.D. 921, 29 N.Y.S.2d 910, 1941 N.Y. App. Div. LEXIS 6487 (N.Y. App. Div. 1941).

Where deceased was killed when struck by a newspaper delivery truck in the city of New York, evidence that the driver of the truck was convicted of "dangerous driving" in connection with the same accident is inadmissible. Walther v News Syndicate Co., 276 A.D. 169, 93 N.Y.S.2d 537, 1949 N.Y. App. Div. LEXIS 3137 (N.Y. App. Div. 1949).

In action to recover for wrongful death of occupant of motor vehicle arising out of collision between automobile and tractor-trailer, implied finding that intestate was not operating motor vehicle, which was being negligently operated, was against the weight of the evidence, particularly in view of injuries to intestate's chest. Billy v Zajac, 7 A.D.2d 729, 180 N.Y.S.2d 809, 1958 N.Y. App. Div. LEXIS 4103 (N.Y. App. Div. 2d Dep't 1958), amended, 7 A.D.2d 929, 183 N.Y.S.2d 1008, 1959 N.Y. App. Div. LEXIS 9859 (N.Y. App. Div. 2d Dep't 1959).

Where uncontradicted evidence conclusively destroyed any presumption that owner of motor vehicle gave implied permission to another person to operate the vehicle, owner could not be held liable for wrongful death of an occupant of vehicle caused in part by negligent operation thereof. Billy v Zajac, 7 A.D.2d 729, 180 N.Y.S.2d 809, 1958 N.Y. App. Div. LEXIS 4103 (N.Y. App. Div. 2d Dep't 1958), amended, 7 A.D.2d 929, 183 N.Y.S.2d 1008, 1959 N.Y. App. Div. LEXIS 9859 (N.Y. App. Div. 2d Dep't 1959).

In a wrongful death action against a city arising from an automobile accident in which plaintiff's wife was killed while riding with a city employee to work in the morning, judgment for plaintiff would be reversed and the complaint dismissed, where liability of the city had been premised on the presumption that the employee had been driving the automobile with the city's consent, and where the evidence showed that the employee had no authorization or permission to use the car after work, that the garage in which the automobile was kept was across the street from the employee's job site, that the employee had no reason to have the car at home absent some work-related necessity, and where the evidence would not support any basis for the inference that the employee's use of the automobile was in any way related to the performance of his duties. Burgin v New York, 91 A.D.2d 926, 457 N.Y.S.2d 814, 1983 N.Y. App. Div. LEXIS 16211 (N.Y. App. Div. 1st Dep't), app. dismissed, 59 N.Y.2d 763, 1983 N.Y. LEXIS 5029 (N.Y. 1983).

In personal injury action involving van owned by defendant and operated by defendant's employee, wherein defendant claimed that it was not liable to plaintiffs under CLS Veh & Tr § 388 because employee lacked authority to operate van and therefore presumption of consensual operation was rebutted, defendant was not entitled to summary judgment prior to examinations before trial; absent proof that employee stole van, summary judgment would be premature, since facts underlying defendant's claim were solely within defendant's knowledge. Silverman v Arrow Linen Supply Co., 131 A.D.2d 459, 516 N.Y.S.2d 92, 1987 N.Y. App. Div. LEXIS 47915 (N.Y. App. Div. 2d Dep't 1987).

In action arising out of hit and run automobile accident, defendant's pretrial testimony that, at time of accident, his vehicle was parked at his place of employment and he possessed only set of keys to it, was insufficient to eliminate issues of fact such as identity of car involved in accident and, if it was defendant's vehicle, presumption of permissive use imputed to owner under CLS Veh & Tr § 388, where defendant never reported his vehicle stolen, and record contained no evidence that it was stolen. Delgado by Velazquez v Sikora, 227 A.D.2d 176, 642 N.Y.S.2d 12, 1996 N.Y. App. Div. LEXIS 4852 (N.Y. App. Div. 1st Dep't 1996).

Court erred in admitting evidence that owner had used tractor for excavating purposes some 5 years after accident since that evidence was irrelevant to question of whether tractor was being used "exclusively for agricultural purposes" during period leading up to accident. Palmer v Rouse, 232 A.D.2d 909, 649 N.Y.S.2d 76, 1996 N.Y. App. Div. LEXIS 11264 (N.Y. App. Div. 3d Dep't 1996).

Evidence of negligence of one operating an automobile by permission of the owner must be of such a character as to render it admissible as to and binding upon the owner before the statutory liability of the owner for death or injuries to person or property resulting from such negligence is established. Linde v Bracken, 68 N.Y.S.2d 871, 1947 N.Y. Misc. LEXIS 2170 (N.Y. Sup. Ct. 1947).

In negligence action arising from automobile accident, plaintiff's offer of proof that former owner of other car would testify that she had transferred car and certificate of title to defendant for $50 was sufficient for jury to infer that defendant owned car; thus, fact that plaintiff did not intend to introduce evidence regarding record ownership of other car did not warrant dismissal of action. Horvath v Lindenhurst Auto Salvage, 60 F.3d 120, 1995 U.S. App. LEXIS 17083 (2d Cir. N.Y. 1995).

86. Res judicata

Judgments in prior actions against a city and one of its employees, for negligent operation of a city automobile, determining that the city had no power to consent to the use of such vehicle for pleasure purposes so as to subject it to liability under this section, are not res judicata as to whether there was permission to use the vehicle under a policy of automobile liability insurance issued to the city and covering said vehicle. Fox v Employers' Liability Assurance Corp., 239 A.D. 671, 268 N.Y.S. 536, 1934 N.Y. App. Div. LEXIS 10914 (N.Y. App. Div. 1934).

Since a van owner was not in privity with its driver in a prior suit in which claims by a church's van's driver against the van owner's driver were dropped, the van owner was not protected by collateral estoppel in church's van's passengers' suit. N.Y. Veh. & Traf. Law § 388's vicarious liability did not create privity for collateral estoppel purposes and the van owner did not control, participate in, or have an interest in the church's driver's action.

Carter v Gospel Temple Church of God in Christ, 19 A.D.3d 353, 796 N.Y.S.2d 417, 2005 N.Y. App. Div. LEXIS 6088 (N.Y. App. Div. 2d Dep't 2005).

A judgment in an action brought by the owner of an automobile to recover for property damages is not res judicata on the issue of contributory negligence in an action by the driver of an automobile, subsequently tried, for personal injuries. Applebaum v New York R. Corp., 300 N.Y.S. 526, 166 Misc. 129, 1937 N.Y. Misc. LEXIS 1952 (N.Y. Sup. Ct. 1937).

Finding of negligence in action against driver of rented truck was not res judicata in subsequent action against owner of truck. De Laurentis v Firemans Fund Indem. Co., 5 Misc. 2d 706, 165 N.Y.S.2d 942, 1956 N.Y. Misc. LEXIS 1301 (N.Y. Sup. Ct. 1956).

For purpose of raising question of res judicata in action by operator of motor vehicle where previous actions between owner thereof and owner of other automobile involved in same accident had resulted in verdict of no cause of action against owner of car which was driven by plaintiff, above statute creates no relationship of privity since the liability created under it is in favor of third parties. Willsey v Strawway, 44 Misc. 2d 601, 255 N.Y.S.2d 224, 1963 N.Y. Misc. LEXIS 1423 (N.Y. Sup. Ct. 1963), aff'd, 22 A.D.2d 973, 254 N.Y.S.2d 830, 1964 N.Y. App. Div. LEXIS 2548 (N.Y. App. Div. 3d Dep't 1964).

A judgment against a plaintiff occupant of an automobile for personal injuries in an action brought against the vehicle's owner was res judicata in plaintiff's subsequent suit against the driver of the automobile. Andrasko v Calkins, 47 Misc. 2d 816, 263 N.Y.S.2d 256, 1965 N.Y. Misc. LEXIS 1480 (N.Y. Sup. Ct. 1965).

In personal injury action arising out of plaintiff being hit in eye by egg thrown from car owned by defendant, defendant was not bound by admissions to reckless conduct made by infant defendants who were in car when egg was thrown, which necessarily included negligence; because defendant was not collaterally estopped from denying negligence, he was entitled to present evidence to rebut claim predicated on vicarious liability statute (CLS Veh & Tr § 388), and plaintiff's summary judgment motion would be denied. Levitt v Peluso, 168 Misc. 2d 239, 638 N.Y.S.2d 878, 1995 N.Y. Misc. LEXIS 680 (N.Y. Sup. Ct. 1995).

Personal injury claimant was entitled to summary judgment against state on liability issue based on res judicata and collateral estoppel effect of Supreme Court's determination that state employee who was driving car was 100 percent responsible for accident for failing to yield right of way to plaintiff's vehicle, considering state's participation in defense of Supreme Court action through appearance by Attorney General pursuant to CLS Pub O § 17 and relation between state and negligent driver through doctrine of respondeat superior and CLS Veh & Tr § 388. Pratt v State, 181 Misc. 2d 488, 694 N.Y.S.2d 604, 1999 N.Y. Misc. LEXIS 315 (N.Y. Ct. Cl. 1999).

Injured plaintiff was entitled to partial summary judgment on issue of liability of owner of vehicle involved in accident, although owner appeared and contested liability, where default judgment was granted against driver pursuant to CLS CPLR § 3215, default judgment was entitled to res judicata and collateral estoppel effect, and thus issue of driver's negligence was conclusive as matter of law. Myung H. Ha v T.W. Smith Corp., 185 Misc. 2d 895, 714 N.Y.S.2d 873, 2000 N.Y. Misc. LEXIS 433 (N.Y. Sup. Ct. 2000).

Liability of a taxicab corporation for alleged negligence of its driver, being derivative under this section, and the corporation having been absolved of liability by a jury after the operator of the cab failed to appear and defend, the driver, if subsequently called upon to defend, could defend on the ground of res judicata. Campbell v Jat Transp. Corp., 207 N.Y.S.2d 707 (N.Y. Sup. Ct. 1960).

Notes to Unpublished Decisions

I. Generally

1. Common law liability

Unpublished decision: District court's denial of the corporation's motion for indemnification was in error; under the statute which the corporation was liable, N.Y. Veh. & Traf. Law § 388, the common law rule that a vehicle owner could recover indemnity from a negligent user/lessee, even absent an express indemnity provision, was not abrogated. The jury unanimously found that the corporation was not involved in the accident other than as owner of the vehicle. Desena v Pavel, 289 Fed. Appx. 426, 2008 U.S. App. LEXIS 15636 (2d Cir. N.Y. 2008).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 2113; CLS Ins § 3420.

Who is owner after transfer of vehicle, § 2113.

Codes, Rules and Regulations:

Insurance department: minimum provisions for automobile liability insurance. 11 NYCRR § 60-1.6 (Regulation 35-A).

Law Reviews:

Imputed negligence in automobile accident cases. 16 St. John's L. Rev. 222.

There is no presumption that owner of automobile was driving at time of traffic infraction. 20 Alb. L. Rev. 99.

Symposium: motor vehicle law. 35 Alb. L. Rev. 431.

Alternative paths toward nonfault automobile insurance. 71 Colum. L. Rev. 241 (1971).

Interspousal immunity in the conflict of laws automobile accident claims. 53 Cornell L. Rev. 406.

Present status of automobile guest statutes. 59 Cornell L. Rev. 659.

Statutory liability of an owner whose automobile is driven by another in New York. 11 NYU Intra L Rev 97.

Case of the sleeping motorist. 25 NYU L Rev 362.

Epileptic drivers face possible indictment for criminal negligence. 8 Syracuse L. Rev. 294.

Lack of civil liability for violation of key leaving statute poses new problem under state unsatisfied judgment fund laws. 11 Syracuse L. Rev. 302.

The contributory negligence of a co-owning driver is not imputed to a co-owning passenger. 11 Syracuse L. Rev. 314.

Falling asleep while driving, negligence as a matter of law. 14 Syracuse L. Rev. 699.

Annotations:

Guest statute as applicable to member of family riding in car driven by another member. 2 ALR2d 932.

Insurance as covering automobile while being used for illegal purposes. 4 ALR2d 134.

Automobile liability insurance: permission or consent to employee's use of car within meaning of omnibus coverage clause. 5 ALR2d 600.

Contributory negligence of driver as imputable to owner under statute making owner responsible for negligence of driver. 11 ALR2d 1437.

What constitutes "operation" or "negligence in operation" within statute making owner liable for negligence in operation. 13 ALR2d 378.

Dealer's liability for negligent operation of car by prospective purchaser or one acting for him. 31 ALR2d 1445.

Liability of employer for negligent operation of motor vehicle by automobile salesman. 53 ALR2d 631.

Validity and construction of statutes making parents liable for torts committed by their minor children. 8 ALR3d 612.

Liability of owner or operator of motor vehicle for injury caused thereby while it is being repaired or serviced. 15 ALR3d 1387.

Who is "owner" within statute making owner responsible for injury or death inflicted by operator of automobile. 74 ALR3d 739.

Rental agency's liability for negligent entrustment of vehicle. 78 ALR3d 1170.

Liability of owner of motor vehicles for negligence of garagemen or mechanic. 8 ALR4th 265.

Negligent entrustment: bailor's liability to bailee injured through his own negligence or incompetence. 12 ALR4th 1062.

Fact that passenger in vehicle is owner as affecting right to recover from driver for injuries to, or death of, passenger incurred in consequence of driver's negligence. 21 ALR4th 459.

Propriety of allowing person injured in motor vehicle accident to proceed against vehicle owner under theory of negligent entrustment where owner admits liability under another theory of recovery. 30 ALR4th 838.

Fact that passenger in negligently operated motor vehicle is owner as affecting passenger's liability to or rights against third person–modern cases. 37 ALR4th 565.

Construction and application of statute imposing liability expressly upon motor vehicle lessor for damage caused by operation of vehicle. 41 ALR4th 993.

Automobiles: liability for U-turn collisions. 53 ALR4th 849.

Liability for personal injury or property damage caused by unauthorized use of automobile which has been parked with keys removed from ignition. 70 ALR4th 276.

Matthew Bender's New York AnswerGuides: LexisNexis AnswerGuide New York Negligence § 2.09 Identifying Applicable Theories of Liability in Motor Vehicle Cases.

LexisNexis AnswerGuide New York Negligence § 2.10 Identifying Appropriate Plaintiffs in Motor Vehicle Cases.

LexisNexis AnswerGuide New York Negligence § 2.11 Identifying Appropriate Defendants in Motor Vehicle Cases.

LexisNexis AnswerGuide New York Negligence § 2.13 Raising Appropriate Defenses in Motor Vehicle Cases.

Warren's Negligence in the New York Courts: Warren's Negligence in the New York Courts § 228.04 (negligent use or operation not limited to driving).

Warren's Negligence in the New York Courts § 228.08 (motor vehicle liability for injuries to passengers).

Warren's Negligence in the New York Courts Ch. 228 (motor vehicle liability).

Warren's Negligence in the New York Courts Ch. 9 (affirmative defenses).

Texts: NY Pattern Jury Instructions 3d, PJI 2:245, 2:249.

4 Frumer & Biskind, Bender's New York Evidence—CPLR § 11.05.

New York Insurance Law (Matthew Bender's New York Practice Series) § 51.01[3][f].

Warren's Negligence in the New York Courts § 42.01 Workers' Compensation.

Warren's Negligence in the New York Courts § 224.03 Vicarious Liability.

Warren's Negligence in the New York Courts Ch. 228 Motor Vehicle Liability.

ARTICLE 12 Other Provisions

HISTORY:
Add, L 1959, ch 775, eff Oct 1, 1960.

§ 396. Use of state and other seals and insignia on private vehicles prohibited

1. A person who shall use any seal, device of arms, sign, lettering or insignia of the United States, or of this state or political subdivision thereof, on any vehicle not owned or used by the United States, this state or by such political subdivision thereof, which such seal, device of arms, sign, lettering or insignia represents, is guilty of a traffic infraction.

2. A person who shall use or display the words "Police Department," "Police" or any sign, lettering or device with the letters "P.D.," or any other matter indicating ownership, possession or use by a police department, on any motor vehicle or motor cycle not used by a duly organized police department within this state and not actually operated or used by a member or an employee of a duly organized police department on any public highway, is guilty of a traffic infraction.

3. A person who shall use or display the words "Fire Department," "Fire" or any sign lettering or device with the letters "F. D. N. Y.," or any other matter indicating ownership, possession or use by a fire department, on any motor vehicle or motor cycle not used by a duly organized fire department within this state and not actually operated or used by a member or an employee of a duly organized fire department on any public highway, is guilty of a traffic infraction.

HISTORY:
Add, L 1965, ch 1031, § 192, deriving from Penal Law § 958; amd, L 1968, ch 575, § 2, eff Oct 1, 1968.

Agency Opinions

Analysis

1. In General
2. Under former Penal Law § 958

1. In General

The New York State Bridge Authority may identify its cars, used by Bridge Authority patrolmen in the performance of their official duties, by lettering them with words "Bridge Police" or "Police Patrol". 1949 N.Y. Op. Att'y Gen. No. 194, 1949 N.Y. AG LEXIS 21.

Police insignia stickers cannot be placed on the cars of members of an unpaid auxiliary police force. 1967 NY Ops Atty Gen Oct 18.

A town which has not established a police department does not have the authority to designate motor vehicles used by town constables as police vehicles. 1980 NY Ops Atty Gen Dec. 9 (informal).

Civil defense auxiliary police may not operate vehicles owned by a police department unless the insignia on such vehicles unmistakably indicate from a distance that such vehicles are being operated by auxiliary police and not by members of the police department. 1981 NY Ops Atty Gen Dec 22.

Town constables may not affix a red light or use a siren on a motor vehicle. Nor may they exceed speed limits and violate other traffic rules. Town constables may affix emblems to town vehicles identifying them as constable vehicles. Town constables may not be used to assist other local governments requesting aid. 1981 NY Ops Atty Gen Feb 23 (informal).

2. Under former Penal Law § 958

The New York State Bridge Authority may identify its cars, used by Bridge Authority patrolmen in the performance of their official duties, by lettering them with words "Bridge Police" or "Police Patrol". 1949 N.Y. Op. Att'y Gen. No. 194, 1949 N.Y. AG LEXIS 21.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:
Designation of misdemeanors, CLS Penal § 55.10(2).

TITLE IV Registration of Vehicles

Article 14. Registration of Motor Vehicles

Section
401. Registration of motor vehicles; fees; renewals.
404-b. Distinctive plates for volunteer firefighters

Article 16. Registration of Dealers and Transporters

417-c. Mandatory disclosures by sellers prior to resale.

HISTORY:
Add, L 1959, ch 775, eff Oct 1, 1960 with substance transferred from former Title I; amd, L 1964, ch 154, eff July 1, 1964.

ARTICLE 14 Registration of Motor Vehicles

HISTORY:
Add, L 1959, ch 775, eff Oct 1, 1960.

§ 401. Registration of motor vehicles; fees; renewals.

* * * * *

6. Registration fees.

* * * * *

b-1. The provisions of this article with respect to the payment of registration fees shall not apply to (i) fire vehicles, as defined in section one hundred fifteen-a of this chapter, owned or controlled by a fire company, as defined in section three of the volunteer firefighters' benefit law, or to (ii) emergency ambulance service vehicles, as defined in section one hundred fifteen-c of this chapter, owned or controlled by an ambulance company, as defined in section three of the volunteer ambulance workers' benefit law. Upon the filing of an application in such form and detail as the commissioner may prescribe, the commissioner shall issue plates for such vehicles in the same manner as plates issued to vehicles owned or controlled by fire districts pursuant to paragraph b of this subdivision.

* * * * *

HISTORY:
Add, L 1959, ch 775, eff Oct 1, 1960 with substance transferred from former §§ 11, 70(1)(2); amd, L 1959, ch 776, § 5; L 1960, ch 4, § 1; L 1960, ch 183, §§ 1; L 1960, ch 300, §§ 30–34; L 1960, ch 562, §§ 1, 2; L 1960, ch 604, §§ 2–4; L 1960, ch 604, § 2; L 1960, ch 604, § 1; L 1960, ch 673, § 2; L 1961, ch 267, § 1; L 1961, ch 888, § 1, eff Oct 1, 1961; L 1962, ch 419, § 1; L 1962, ch 442, § 1; L 1962, ch 930, § 4, eff April 29, 1962; L 1963, ch 441, § 1; L 1964, ch 806, § 1; L 1964, ch 893, § 1; L 1964, ch 893, eff Nov 1, 1964; L 1965, ch 87, § 1; L 1965, ch 87, eff Nov 1, 1965; L 1965, ch 92, § 1; L 1965, ch 515, § 1; L 1965, ch 777, § 1, eff Nov 1, 1965; L 1966, ch 35, § 1; L 1966, ch 227, § 2, eff Oct 1, 1966; L 1966, ch 242, § 1, eff Nov 1, 1966; L 1966, ch 330, § 1; L 1966, ch 849, § 1, eff Nov 1, 1966; L 1966, ch 974, § 1; L 1967, ch 81, § 1; L 1967, ch 195, § 1; L 1967, ch 816, § 1; L 1968, ch 70, § 1; L 1968, ch 107, § 1, eff April 2, 1968; L 1968, ch 575, § 3; L 1968, ch 710, § 1; L 1968, ch 847, § 1, eff June 22, 1968; L 1969, ch 110, § 1; L 1969, ch 136, § 1, eff Jan 1, 1970; L 1969, ch 547, § 1; L 1969, ch 1058, § 1; L 1970, ch 116, § 1, eff Oct 1, 1971; L 1970, ch 164, § 1, eff June 1, 1970; L 1970, ch 168, § 2, eff April 22, 1970; L 1970, ch 198, § 1; L 1970, ch 267, § 59; L 1970, ch 881, § 1; L 1970, ch 1000, § 1; L 1971, ch 254, § 1; L 1971, ch 678, § 1; L 1971, ch 838, § 1; L 1971, ch 953, § 1; L 1971, ch 1060, § 1, eff July 2, 1971; L 1972, ch 48, § 3; L 1972, ch 229, § 1; L 1972, ch 518, § 1; L 1973, ch 43; L 1974, ch 105, § 1; L 1976, ch 251, § 1; L 1977, ch 188, § 1; L 1977, ch 793, §§ 2, 3, eff Dec 3, 1977; L 1978, ch 146, § 1, eff Oct 1, 1978; L 1978, ch 264, § 1; L 1979, ch 438, § 1; L 1979, ch 691, § 1; L 1980, ch 376, § 1, eff June 23, 1980; L 1980, ch 378, § 1; L 1980, ch 843, § 92; L 1982, ch 650, § 1, eff Sept 1, 1982; L 1982, ch 789, § 1; L 1983, ch 15, §§ 8–22; L 1983, ch 734, § 1, eff Jan 1, 1984; L 1983, ch 945, § 1; L 1984, ch 823, § 1, eff Nov 1, 1984; L 1984, ch 843, § 2, eff March 31, 1985; L 1985, ch 29, §§ 41–45, eff Sept 1, 1985; L 1985, ch 549, §§ 6–8, eff Jan 1, 1986; L 1985, ch 826, §§ 4, 5; L 1986, ch 43, § 1, eff April 14, 1986; L 1986, ch 132, §§ 2, 3; L 1986, ch 548, § 3, eff Sept 1, 1986; L 1987, ch 168, § 1, eff Sept 1, 1987; L 1987, ch 339, § 6; L 1987, ch 592, § 1; L 1988, ch 746, § 11, eff Jan 25, 1989; L 1989, ch 61, §§ 15, 40, effective and applicable to violations committed on and after May 19, 1989; L 1989, ch 137, § 1, eff June 9, 1989; L 1989, ch 433, § 1, eff Nov 1, 1989; L 1990, ch 152, § 3, eff Jan 1, 1991; L 1990, ch 173, §§ 33, 34, eff Feb 19, 1991; L 1990, ch 173, § 22-a, eff Aug 19, 1990; L 1990, ch 190, § 271, eff July 1, 1990; L 1990, ch 356, § 1, eff July 2, 1990; L 1990, ch 496, § 5, eff July 18, 1990; L 1990, ch 696, § 2, eff Aug 19, 1990; L 1991, ch 68, § 2; L 1991, ch 166, §§ 127, 216-b, eff Aug 1, 1991; L 1991, ch 199, § 1, eff July 1, 1991; L 1991, ch 329, § 8, eff April 1, 1992; L 1991, ch 329, § 9, eff July 15, 1991; L 1991, ch 385, § 2, eff July 15, 1991, deemed eff April 22, 1991; L 1992, ch 48, § 1, eff April 10, 1992; L 1992, ch 55, §§ 370–374, eff July 1, 1992; L 1992, ch 55, § 370, eff July 1, 1992; L 1992, ch 521, § 1, eff Oct 22, 1992; L 1992, ch 789, § 2, eff Aug 7, 1992; L 1993, ch 487, § 4, eff July 26, 1993; L 1994, ch 112, § 1, eff May 24, 1994; L 1994, ch 170, § 165, eff June 9, 1994; L 1994, ch 373, § 1, eff July 20, 1994; L 1994, ch 552, § 3, eff Jan 22, 1995; L 1994, ch 654, § 6, eff Jan 29, 1995; L 1996, ch 222, § 2, eff Oct 24, 1996; L 1996, ch 425, § 1, eff Aug 2, 1996; L 1998, ch 56, § 74 (Part A), eff July 1, 1998; L 1998, ch 56, § 75 (Part A), eff April 1, 1998; L 1998, ch 621, § 9, eff Oct 15, 1998; L 1998, ch 642, § 1, eff Dec 21, 1998; L 2000, ch 63, § 9 (Part EE), eff May 15, 2000; L 2001, ch 415, § 7, eff Feb 28, 2002; L 2002, ch 203, § 1, eff July 30, 2002; L 2003, ch 62, § 1 (Part B), eff May 15, 2003; L 2003, ch 62, § 10 (Part C), eff May 15, 2003; L 2003, ch 685, § 3, eff Jan 1, 2004; L 2004, ch 34, § 1, eff April 13, 2004, deemed eff on and after Feb 13, 2004; L 2004, ch 710, § 2, eff Nov 16, 2004; L 2008, ch 367, § 1, eff Aug 20, 2008; L 2009, ch 19, §§ 1, 2, eff May 28, 2009; L 2009, ch 20, §§ 14, 15, eff May 28, 2009; L 2009, ch 21, §§ 14, 15, eff May 28, 2009; L 2009, ch 22, §§ 14, 15, eff May 28, 2009; L 2009, ch 23, §§ 1, 2, eff May 28, 2009; L 2009, ch 59, §§ 1, 3, 6–13, 20, 24, 25 (Part G), eff Sept 1, 2009; L 2009, ch 59, § 1 (Part H), eff April 1, 2010; L 2009, ch 383, §§ 14, 15, eff Sept 25, 2009; L 2010, ch 57, § 1 (Part SS), eff Sept 20, 2010; L 2010, ch 59, §§ 8, 8-b (Part II), eff Sept 20, 2010; L 2013, ch 189, §§ 9–9-c, eff Aug 30, 2013; L 2015, ch 20, § 2 (Part C, Subpart E), effective June 26, 2015; L 2015, ch 222, §§ 8–8-f, effective September 12, 2015; L 2015, ch 527, § 1, effective March 10, 2016; L 2016, ch 288, § 1, effective September 30, 2016; L 2016, ch 295, § 1, effective August 31, 2016; L 2019, ch 59, § 9 (Part III), effective October 9, 2019; L 2019, ch 145, §§ 8–8-g, effective September 5, 2019; L 2019, ch 148, §§ 11–11-g, effective September 6, 2019; L 2019, ch 500, § 1, effective November 20, 2019.

Editor's Notes: Laws 1977, ch 799, §§ 1, 7, 8 and 9, provides as follows:

Section 1. Legislative intent. The legislature hereby finds that a large number of states offer their residents the option of choosing their own personal license plate identification numbers, and such states derive significant revenues from such programs for the support of motor vehicle and other programs. Often these plates contain only letters or combination of letters and numbers of special meaning to the registrant. New York state has for many years offered its residents a limited variety of special number plates, but not to the extent offered to residents of other states. The legislature hereby declares it to be the policy of this state to authroize issuance of special plates in combinations of up to eight letters or numbers and to cause the public to be apprised of the availability of such plates. The legislature further finds that the imposition of surcharges or other taxes by administrative order is an usurpation of legislative powers and prerogatives. Therefore, the commissioner of motor vehicles is directed to refund all moneys collected pursuant to regulations issued by the commissioner imposing a surcharge on certain license renewals.

§ 7. Notwithstanding any other provision of law, the commissioner of motor vehicles shall refund to or credit the account of any person who, on and after September first, nineteen hundred seventy-six, paid a surcharge on the fees imposed upon the issuance and renewal of any driver's license pursuant to section five hundred three of the vehicle and traffic law, in accordance with certain regulations promulgated by the commissioner.

§ 8. The amount named in this section, or so much thereof as shall be sufficient to accomplish the purposes designated by the appropriation, is hereby appropriated and authorized to be paid to the commissioner of motor vehicles which amount shall be immediately available for payment when this act becomes a law.

DEPARTMENT OF MOTOR VEHICLES.

REFUNDS OF FEES AND SURCHARGES IMPOSED ON AND AFTER.

SEPTEMBER FIRST, NINETEEN HUNDRED SEVENTY-SIX, PURSUANT.

TO REGULATIONS PROMULGATED BY THE COMMISSIONER.

Maintenance undistributed.

For refunds of fees and surcharges imposed on and after September first, nineteen hundred seventy-six, pursuant to regulations promulgated by the commissioner of motor vehicles under the purported authority of chapter fifty of the laws of nineteen hundred seventy-six . . . . . 1,665,500.

§ 9. This act shall take effect on the one hundred twentieth day after it shall have become a law and shall apply to registrations and renewals of registrations after such date, except that sections five, six, seven, and eight of this act shall take effect immediately.

Laws 1988, ch 746, § 17, eff Jan 25, 1989, provides as follows:

§ 17. This act shall take effect on the thirtieth day after it shall have become a law and shall remain in full force and effect until December 1, 2024 when upon such date the amendments and provisions made by this act shall be deemed repealed; provided, however, any such local laws as may be enacted pursuant to this act shall remain in full force and effect only until the expiration on December 1, 2024 (Amd, L 1991, ch 212, § 2, L 1993, ch 582, § 1, L 1995, ch 651, § 2, L 1999, ch 503, § 2, L 2004, ch 667, § 2, eff Oct 26, 2004, L 2009, ch 18, § 3, eff April 28, 2009; L 2014, ch 134, § 1, eff July 22, 2014; L 2019, ch 58, § 5 (Part TT), eff April 12, 2019).

Laws 1990, ch 190, § 385(s), eff May 25, 1990, provides as follows:

(s) sections two hundred seventy, two hundred seventy-one, two hundred seventy-two, and two hundred seventy-six of this act shall take effect July 1, 1990 and sections two hundred seventy-three, two hundred seventy-four and two hundred seventy-five of this act shall take effect January 1, 1991 and shall also apply to the renewal of a registration expiring on or after January 1, 1991;

Laws 1990, ch 496, § 13, eff July 18, 1990, provides as follows:

§ 13. This act shall take effect immediately; provided, however, that section 374 of the general municipal law, as added by section four of this act, shall take effect only in the event that the county of Nassau shall have by local law established a traffic and parking violations agency; and provided, further, that the amendments to section 371 of the general municipal law and paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by sections three and five of this act shall be deemed repealed upon the repeal of such provisions and shall not affect the reversion of such provisions (Amd, L 1995, ch 135, § 1, eff July 5, 1995.).

Laws 1991, ch 329, § 17, eff July 15, 1991, provides as follows:

§ 17. This act shall take effect immediately except that section four of this act shall take effect April 1, 1992 and shall apply with respect to motor fuel and diesel motor fuel purchased on and after such date, section seven of this act shall take effect April 1, 1993, and section eight of this act shall take effect April 1, 1992. (Amd, L 1991, ch 330, § 10, eff July 15, 1991.).

Laws 1992, ch 521, § 10, eff Oct 22, 1992, provides as follows:

§ 10. This act shall take effect on the ninetieth day after it shall have become a law, provided, however, that the commissioner of motor vehicles shall take all actions necessary to implement the provisions of this act and promulgate necessary regulations thereunder prior to such effective date.

§ 564. This act shall take effect immediately provided, however, that:

6. Section one hundred sixty-four of this act shall take effect January 1, 1995 and shall apply to return periods commencing on or after such date; provided further that sections one hundred sixty-two and one hundred sixty-three of this act shall take effect January 1, 1996 and shall apply to return periods commencing on or after such date, provided, however, that any rules or regulations necessary to implement the provisions of sections one hundred sixty-two through one hundred sixty-five of this act may be promulgated and any procedures, forms, or instructions necessary for such implementation may be adopted and issued on or after the date this act shall have become a law; provided further, the provisions of section one hundred sixty-four of this act shall expire and be deemed repealed on January 1, 1996.

Laws 1994, ch 373, § 2, eff July 20, 1994, provides as follows:

§ 2. This act shall take effect immediately and shall not affect the expiration of paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law.

Laws 1994, ch 552, § 12, eff Jan 22, 1995, provides as follows:

§ 12. This act shall take effect on the one hundred eightieth day after it shall have become a law and shall apply to applications for new registrations and renewals of existing registrations submitted on and after such date.

Laws 1994, ch 654, §§ 1, 8, eff Jan 29, 1995 and Aug 2, 1994, respectively, provide as follows:

Section 1. Legislative findings and declaration. The legislature hereby finds that agriculture is an important and unique industry in the state, providing fresh, nutritious food and valuable fiber at an economical cost to the state's consumers. The legislature further finds that agricultural producers occasionally need to make use of the public roadways to transport crops, equipment and supplies from one part of their farms to the other, especially during harvest season, in order to maintain an efficient, viable farm enterprise. The vehicles used to transport such commodities must be equipped to satisfy the production needs of farmers yet meet certain minimum standards to assure the safety of both the farm vehicle driver and the motoring public. Because of the reliance of farmers on registered farm vehicles at critical times in the growing season, it is also important to minimize out-of-service time and expense associated with equipment repairs. Therefore, it is the purpose of this act to address the need of farmers to use farm vehicles in connection with crop production while maintaining the safety of the public roadways, by setting or requiring development of safety equipment and registration standards for farm vehicles registered pursuant to subdivision thirteen of section four hundred one of the vehicle and traffic law.

§ 8. This act shall take effect immediately, provided, however, that sections one through six of this act shall take effect on the one hundred eightieth day after it shall have become a law, except that any rules and regulations necessary for the effective implementation of this act shall be promulgated on or before that date.

Laws 1996, ch 222, § 3, eff Oct 24, 1996, provides as follows:

§ 3. This act shall take effect 120 days after it shall have become a law; provided however that such rules or regulations necessary for the implementation of this act may be promulgated immediately.

Laws 1998, ch 621, §§ 1, 2 and 10, eff Oct 15, 1998, provide as follows:

Section 1. This act shall be known and may be cited as the "heavy duty vehicle emissions reduction act".

§ 2. Legislative intent. The legislature hereby finds and declares that emissions from diesel-powered heavy duty vehicles such as trucks and buses pose a potential threat to the health and well-being of the citizens of New York State. Recent studies have concluded that particulate emissions from such vehicles have significant health impacts. While the federal Clean Air Act requires that light duty vehicles be regularly inspected to determine if they exceed emission

standards, there is currently no federal requirement that diesel-powered heavy duty vehicles be similarly inspected. Therefore, it is the intent of the legislature to protect the health and well-being of New York citizens by requiring that diesel-powered heavy duty vehicles be inspected to determine if they exceed emissions standards.

§ 10. This act shall take effect immediately provided that it shall not apply to vehicles defined by section one hundred forty-two of the vehicle and traffic law or vehicles owned by counties, towns, cities, or villages, and vehicles defined by section one hundred four of the vehicle and traffic law until June 1, 2000. (Amd, L 2003, ch 62, § 6 (Part W1), eff May 15, 2003, deemed eff April 1, 2003.).

Laws 2003, ch 62, § 6 (Part W1), eff May 15, 2003, deemed eff April 1, 2003, amended Laws 1998, ch 621, § 10, so as to delete an expiration provision, applicable to the addition of subsection 7, schedules K and L.

Laws 2003, ch 685, § 8, eff Oct 21, 2003, provides as follows:

§ 8. This act shall take effect immediately; provided, however, that sections two and three of this act shall take effect January 1, 2004 and shall apply to all vehicles registered on and after such date.

Laws 2009, ch 19, § 10, eff May 28, 2009, provides as follows:

§ 10. This act shall take effect on the thirtieth day after it shall have become a law and shall expire December 1, 2024 when upon such date the provisions of this act shall be deemed repealed; provided that the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section one of this act shall be subject to the expiration and reversion of such paragraph pursuant to section 17 of chapter 746 of the laws of 1988, as amended, when upon such date the provisions of section two of this act shall take effect; provided that the amendments to the opening paragraph and paragraph (c) of subdivision 1 of section 1809 of the vehicle and traffic law made by section four of this act shall be subject to the expiration and reversion of such subdivision pursuant to chapter 166 of the laws of 1991, as amended, when upon such date the provisions of section five of this act shall take effect; provided, however, that the amendments to the opening paragraph of subdivision 1 of section 1809 of the vehicle and traffic law made by section five of this act shall not affect the expiration of such subdivision and shall expire therewith; provided, however, that the amendments to subdivision 2 of section 371 of the general municipal law made by section seven of this act shall not affect the expiration of such section and shall be deemed to expire therewith; and provided, further, that any such local laws as may be enacted pursuant to this act shall remain in full force and effect only until December 1, 2024 (Amd, L 2014, ch 133, § 1, eff July 22, 2014; L 2019, ch 58, § 3 (Part TT), eff April 12 2019).

Laws 2009, ch 20, § 24 intro and subs (h) and (k), eff May 28, 2009, provides as follows:

§ 24. This act shall take effect on the thirtieth day after it shall have become a law and shall expire December 1, 2024 when upon such date the provisions of this act shall be deemed repealed; provided that (Amd, L. 2014, ch 128, § 1, eff July 22, 2014; L 2019, ch 58, § 9 (Part TT), eff April 12, 2019):

(h) the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section fourteen of this act shall be subject to the expiration and reversion of such paragraph pursuant to section 17 of chapter 746 of the laws of 1988, as amended, when upon such date the provisions of section fifteen of this act shall take effect;

(k) any such local laws as may be enacted pursuant to this act shall remain in full force and effect only until December 1, 2024 (Amd, L 2014, ch 128, § 1, eff July 22, 2014; L 2019, ch 58, § 9 (Part TT), eff April 12, 2019).

Laws 2009, ch 21, § 22 intro and subs (h) and (j), eff May 28, 2009, expires and repealed Dec 1, 2014, provides as follows:

§ 22. This act shall take effect on the thirtieth day after it shall have become a law and shall expire December 1, 2014 when upon such date the provisions of this act shall be deemed repealed; provided that:

(h) the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section fourteen of this act shall be subject to the expiration and reversion of such paragraph pursuant to section 17 of chapter 746 of the laws of 1988, as amended, when upon such date the provisions of section fifteen of this act shall take effect;

(j) any such local laws as may be enacted pursuant to this act shall remain in full force and effect only until December 1, 2014.

Laws 2009, ch 22, § 22 intro and subs (h) and (j), eff May 28, 2009, expires and repealed Dec 1, 2014, provides as follows:

§ 22. This act shall take effect on the thirtieth day after it shall have become a law and shall expire December 1, 2014 when upon such date the provisions of this act shall be deemed repealed; provided that:

(h) the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section fourteen of this act shall be subject to the expiration and reversion of such paragraph pursuant to section 17 of chapter 746 of the laws of 1988, as amended, when upon such date the provisions of section fifteen of this act shall take effect;

(j) any such local laws as may be enacted pursuant to this act shall remain in full force and effect only until December 1, 2014.

Laws 2009, ch 23, § 9, eff May 28, 2009, provides as follows:

§ 9. This act shall take effect on the thirtieth day after it shall have become a law and shall expire December 1, 2024 when upon such date the provisions of this act shall be deemed repealed; provided that the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section one of this act shall be subject to the expiration and reversion of such paragraph pursuant to section 17 of chapter 746 of the laws of 1988, as amended, when upon such date the provisions of section two of this act shall take effect; provided that the amendments to the opening paragraph and paragraph (c) of subdivision 1 of section 1809 of the vehicle and traffic law made by section four of this act shall be subject to the expiration and reversion of such subdivision pursuant to chapter 166 of the laws of 1991, as amended, when upon such date the provisions of section five of this act shall take effect; provided, however, that the amendments to the opening paragraph of subdivision 1 of section 1809 of the vehicle and traffic law made by section five of this act shall not affect the expiration of such subdivision and shall expire therewith; and provided, further, that any such local laws as may be enacted pursuant to this act shall remain in full force and effect only until December 1, 2024 (Amd, L 2014, ch 127, § 1, eff July 22, 2014; L 2019, ch 58, § 7 (Part TT), eff April 12, 2019).

Laws 2009, ch 59, § 27 (Part G), eff Sept 1, 2009, provides as follows:

§ 27. This act shall take effect September 1, 2009; provided, however, that sections one, four through thirteen, sixteen, eighteen, nineteen and twenty-five of this act shall apply to registrations issued or renewed on and after such date; provided, further, that section two of this act shall apply to registrations transferred on and after such date; provided, further, that section fourteen of this act shall apply to cab cards and trip permits issued on and after such date; provided, further, that section fifteen of this act shall apply to in-transit permits issued on and after such date; provided, further, that sections seventeen and twenty-one through twenty-four of this act shall apply to license plates issued or renewed on and after such date; and provided, further, that section twenty-six of this act shall apply to registrations transferred and changes in ownership occurring on and after such date.

Laws 2009, ch 59, § 2 (Part H), eff April 1, 2010, provides as follows:

§ 2. This act shall take effect on April 1, 2010 and shall apply to applications for new registrations and renewals of

existing registrations of any vehicle required to be registered on or after such date.

Laws 2009, ch 383, § 24 intro and subs (h), (k), eff Sept 25, 2009, expires and repealed Dec 1, 2014, provides as follows:

§ 24. This act shall take effect on the thirtieth day after it shall have become a law and shall expire December 1, 2014 when upon such date the provisions of this act shall be deemed repealed; provided that:

(h) the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section fourteen of this act shall be subject to the expiration and reversion of such paragraph pursuant to section 17 of chapter 746 of the laws of 1988, as amended, when upon such date the provisions of section fifteen of this act shall take effect;

(k) any such local laws as may be enacted pursuant to this act shall remain in full force and effect only until December 1, 2014.

Laws 2010, ch 59, § 14 (Part II), intro and subs (n), (o), eff Sept 20, 2010, 2020, provides as follows:

§ 14. This act shall take effect on the ninetieth day after it shall have become a law and shall expire 15 years after such effective date when upon such date the provisions of this act shall be deemed repealed; and provided that any rules and regulations related to this act shall be promulgated on or before such effective date, provided that (Amd, L 2015, ch 239, § 6, eff Sept 18, 2015; L 2019, ch 39, § 2 (Part D), eff June 24, 2019):

(n) the amendments to subparagraph (i) of paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section eight of this act shall be subject to the expiration and reversion of such subparagraph pursuant to section 17 of chapter 746 of the laws of 1988, as amended, when upon such date the provisions of section eight-a of this act shall take effect;

(o) the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section eight-a of this act shall be subject to the expiration and reversion of such paragraph pursuant to chapters 19, 20, 21, 22, 23 and 383 of the laws of 2009, as amended, when upon such date the provisions of section eight-b of this act shall take effect.

Laws 2013, ch 189, § 15, intro par and subs (v)–(x), eff Aug 30, 2013, provides as follows:

§ 15. This act shall take effect on the thirtieth day after it shall have become a law and shall expire and be deemed repealed July 1, 2022; and provided further that any rules necessary for the implementation of this act on its effective date shall be promulgated on or before such effective date, provided that (Amd, L 2019, ch 30, § 6, eff July 11, 2019):

(v) the amendments to subparagraph (i) of paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section nine of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section nine-a of this act shall take effect;

(w) the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section nine-a of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section nine-b of this act shall take effect;

(x) the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section nine-b of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section nine-c of this act shall take effect.

Laws 2014, ch 43, § 12, intro par and subs (a)-(d), eff July 25, 2014, provides as follows:

§ 12. This act shall take effect on the thirtieth day after it shall have become a law; provided that sections one through ten of this act shall expire 4 years after such effective date when upon such date the provisions of such sections of this act shall be deemed repealed; and provided further that any rules necessary for the implementation of this act on its effective date shall be promulgated on or before such effective date, provided that (Amd, L 2019, ch 30, § 5 (Part TT), eff July 11, 2019):

(a) the amendments to subparagraph (i) of paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section one of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section one-a of this act shall take effect

(b) the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section one-a of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eight-b of this act shall take effect;

(c) the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section one-b of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eight-c of this act shall take effect;

(d) the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by one eight-c of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eight-d of this act shall take effect.

Laws 2014, ch 99, § 15, intro par and subs (z)-(cc), eff Aug 21, 2014, provides as follows:

§ 15. This act shall take effect on the thirtieth day after it shall have become a law and shall and be deemed repealed December 1, 2024; and provided further that any rules necessary for the implementation of this act on its effective date shall be promulgated on or before such effective date, provided that (Amd, L 2019, ch 58, § 4 (Part TT), eff April 12, 2019):

(z) the amendments to subparagraph (i) of paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section eight of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eight-a of this act shall take effect;

(aa) the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section eight-a of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eight-b of this act shall take effect;

(bb) the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section eight-b of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eight-c of this act shall take effect;

(cc) the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section eight-c of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eight-d of this act shall take effect.

Laws 2014, ch 101, § 15, intro par and subs (z)-(cc), eff Aug 21, 2014, provides as follows:

(z) the amendments to subparagraph (i) of paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section eight of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eight-a of this act shall take effect;

(aa) the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section eight-a of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eight-b of this act shall take effect;

(bb) the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section eight-b of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eight-c of this act shall take effect;

(cc) the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section eight-c of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eight-d of this act shall take effect.

Laws 2014, ch 123, § 15, intro par and subs (z)-(cc), eff Aug 21, 2014, provides as follows:

§ 15. This act shall take effect on the thirtieth day after it shall have become a law and shall expire and be deemed repealed December 1, 2024; and provided further that any rules necessary for the implementation of this act on its effective date shall be promulgated on or before such effective date, provided that (Amd, L 2019, ch 58, § 1 (Part TT), eff April 12, 2019):

(z) the amendments to subparagraph (i) of paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section eight of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eight-a of this act shall take effect;

(aa) the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section eight-a of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eight-b of this act shall take effect;

(bb) the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section eight-b of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eight-c of this act shall take effect;

(cc) the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section eight-c of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eight-d of this act shall take effect.

Laws 2015 ch 222 § 15, intro par and subs (ff)-(kk), eff September 12, 2015, provides:

§ 15. This act shall take effect on the thirtieth day after it shall have become a law and shall expire and be deemed repealed December 1, 2024; and provided further that any rules necessary for the implementation of this act on its effective date shall be promulgated on or before such effective date, provided that (Amd, L 2019, ch 58, § 8 (Part TT), eff April 12, 2019):

(ff) the amendments to subparagraph (i) of paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section eight of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eight-a of this act shall take effect;

(gg) the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section eight-a of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eight-b of this act shall take effect;

(hh) the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section eight-b of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eight-c of this act shall take effect;

(ii) the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section eight-c of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eight-d of this act shall take effect;

(jj) the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section eight-d of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eight-e of this act shall take effect;

(kk) the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section eight-e of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eight-f of this act shall take effect.

Laws 2019, ch 59, § 20 (Part III), eff April 12, 2019, provides:

§ 20. This act shall take effect immediately; provided, however, that sections eight, ten, eleven and fourteen of this act shall take effect on the first of November next succeeding the date on which it shall have become a law; provided, however, sections nine and twelve of this act shall take effect on the one hundred eightieth day after it shall have become a law; provided, however, sections thirteen and nineteen of this act shall take effect on the first day of January next succeeding the date on which it shall have become a law and shall apply to all policies issued, renewed, altered, or modified on or after such date; provided, however, section fifteen of this act shall take effect on the thirtieth day after it shall have become a law; provided, however, section eighteen of this act shall take effect October 1, 2019; provided, further, that effective immediately, the department of transportation and the department of motor vehicles are authorized and directed to promulgate such rules and regulations as are necessary for the implementation of this act on its effective date.

Laws 2019, ch 143, § 25, eff September 5, 2019, provides:

§ 25. This act shall take effect on the thirtieth day after it shall have become a law and shall expire December 1, 2024 when upon such date the provisions of this act shall be deemed repealed; provided that any such local law as may be enacted pursuant to this act shall remain in full force and effect only until December 1, 2024 and provided, further, that:

(a) the amendments to subdivision 1 of section 235 of the vehicle and traffic law made by section one of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section one-a of this act shall take effect;

(b) the amendments to section 235 of the vehicle and traffic law made by section one-a of this act shall not affect the expiration of such section and shall be deemed to expire therewith, when upon such date the provisions of section one-b of this act shall take effect;

(c) the amendments to section 235 of the vehicle and traffic law made by section one-b of this act shall not affect the expiration of such section and shall be deemed to expire therewith, when upon such date the provisions of section one-c of this act shall take effect;

(d) the amendments to section 235 of the vehicle and traffic law made by section one-c of this act shall not affect the expiration of such section and shall be deemed to expire therewith, when upon such date the provisions of section one-d of this act shall take effect;

(e) the amendments to section 235 of the vehicle and traffic law made by section one-d of this act shall not affect the expiration of such section and shall be deemed to expire therewith, when upon such date the provisions of section one-e of this act shall take effect;

(f) the amendments to section 235 of the vehicle and traffic law made by section one-e of this act shall not affect the expiration of such section and shall be deemed to expire therewith, when upon such date the provisions of section one-f of this act shall take effect;

(g) the amendments to section 235 of the vehicle and traffic law made by section one-f of this act shall not affect the expiration of such section and shall be deemed to expire therewith, when upon such date the provisions of section one-g of this act shall take effect;

(h) the amendments to subdivision 1 of section 236 of the vehicle and traffic law made by section two of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section two-a of this act shall take effect;

(i) the amendments to subdivision 1 of section 236 of the vehicle and traffic law made by section two-a of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section two-b of this act shall take effect;

(j) the amendments to subdivision 1 of section 236 of the vehicle and traffic law made by section two-b of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section two-c of this act shall take effect;

(k) the amendments to subdivision 1 of section 236 of the vehicle and traffic law made by section two-c of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section two-d of this act shall take effect;

(l) the amendments to subdivision 1 of section 236 of the vehicle and traffic law made by section two-d of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section two-e of this act shall take effect;

(m) the amendments to subdivision 1 of section 236 of the vehicle and traffic law made by section two-e of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section two-f of this act shall take effect;

(n) the amendments to paragraph f of subdivision 1 of section 239 of the vehicle and traffic law made by section four of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section four-a of this act shall take effect;

(o) the amendments to paragraph f of subdivision 1 of section 239 of the vehicle and traffic law made by section four-a of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section four-b of this act shall take effect;

(p) the amendments to paragraph f of subdivision 1 of section 239 of the vehicle and traffic law made by section four-b of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section four-c of this act shall take effect;

(q) the amendments to paragraph f of subdivision 1 of section 239 of the vehicle and traffic law made by section four-c of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section four-d of this act shall take effect;

(r) the amendments to paragraph f of subdivision 1 of section 239 of the vehicle and traffic law made by section four-d of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section four-e of this act shall take effect;

(s) the amendments to paragraph f of subdivision 1 of section 239 of the vehicle and traffic law made by section four-e of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section four-f of this act shall take effect;

(t) the amendments to subdivisions 1 and 1-a of section 240 of the vehicle and traffic law made by section five of this act shall not affect the expiration of such subdivisions and shall be deemed to expire therewith, when upon such date the provisions of section five-a of this act shall take effect;

(u) the amendments to subdivisions 1 and 1-a of section 240 of the vehicle and traffic law made by section five-a of this act shall not affect the expiration of such subdivisions and shall be deemed to expire therewith, when upon such date the provisions of section five-b of this act shall take effect;

(v) the amendments to subdivisions 1 and 1-a of section 240 of the vehicle and traffic law made by section five-b of this act shall not affect the expiration of such subdivisions and shall be deemed to expire therewith, when upon such date the provisions of section five-c of this act shall take effect;

(w) the amendments to subdivisions 1 and 1-a of section 240 of the vehicle and traffic law made by section five-c of this act shall not affect the expiration of such subdivisions and shall be deemed to expire therewith, when upon such date the provisions of section five-d of this act shall take effect;

(x) the amendments to subdivisions 1 and 1-a of section 240 of the vehicle and traffic law made by section five-d of this act shall not affect the expiration of such subdivisions and shall be deemed to expire therewith, when upon such date the provisions of section five-e of this act shall take effect;

(y) the amendments to subdivisions 1 and 1-a of section 240 of the vehicle and traffic law made by section five-e of this act shall not affect the expiration of such subdivisions and shall be deemed to expire therewith, when upon such date the provisions of section five-f of this act shall take effect;

(z) the amendments to paragraphs a and g of subdivision 2 of section 240 of the vehicle and traffic law made by section six of this act shall not affect the expiration of such paragraphs and shall be deemed to expire therewith, when upon such date the provisions of section six-a of this act shall take effect;

(aa) the amendments to paragraphs a and g of subdivision 2 of section 240 of the vehicle and traffic law made by section six-a of this act shall not affect the expiration of such paragraphs and shall be deemed to expire therewith, when upon such date the provisions of section six-b of this act shall take effect;

(bb) the amendments to paragraphs a and g of subdivision 2 of section 240 of the vehicle and traffic law made by section six-b of this act shall not affect the expiration of such paragraphs and shall be deemed to expire therewith, when upon such date the provisions of section six-c of this act shall take effect;

(cc) the amendments to paragraphs a and g of subdivision 2 of section 240 of the vehicle and traffic law made by section six-c of this act shall not affect the expiration of such paragraphs and shall be deemed to expire therewith, when upon such date the provisions of section six-d of this act shall take effect;

(dd) the amendments to paragraphs a and g of subdivision 2 of section 240 of the vehicle and traffic law made by section six-d of this act shall not affect the expiration of such paragraphs and shall be deemed to expire therewith, when upon such date the provisions of section six-e of this act shall take effect;

(ee) the amendments to paragraphs a and g of subdivision 2 of section 240 of the vehicle and traffic law made by section six-e of this act shall not affect the expiration of such paragraphs and shall be deemed to expire therewith, when upon such date the provisions of section six-f of this act shall take effect;

(ff) the amendments to subdivisions 1 and 2 of section 241 of the vehicle and traffic law made by section seven of this act shall not affect the expiration of such subdivisions and shall be deemed to expire therewith, when upon such date the provisions of section seven-a of this act shall take effect;

(gg) the amendments to subdivisions 1 and 2 of section 241 of the vehicle and traffic law made by section seven-a of this act shall not affect the expiration of such subdivisions and shall be deemed to expire therewith, when upon such date the provisions of section seven-b of this act shall take effect;

(hh) the amendments to subdivisions 1 and 2 of section 241 of the vehicle and traffic law made by section seven-b of this

act shall not affect the expiration of such subdivisions and shall be deemed to expire therewith, when upon such date the provisions of section seven-c of this act shall take effect;

(ii) the amendments to subdivisions 1 and 2 of section 241 of the vehicle and traffic law made by section seven-c of this act shall not affect the expiration of such subdivisions and shall be deemed to expire therewith, when upon such date the provisions of section seven-d of this act shall take effect;

(jj) the amendments to subdivisions 1 and 2 of section 241 of the vehicle and traffic law made by section seven-d of this act shall not affect the expiration of such subdivisions and shall be deemed to expire therewith, when upon such date the provisions of section seven-e of this act shall take effect;

(kk) the amendments to subdivisions 1 and 2 of section 241 of the vehicle and traffic law made by section seven-e of this act shall not affect the expiration of such subdivisions and shall be deemed to expire therewith, when upon such date the provisions of section seven-f of this act shall take effect;

(ll) the amendments to subparagraph (i) of paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section eight of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eight-a of this act shall take effect;

(mm) the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section eight-a of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eight-b of this act shall take effect;

(nn) the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section eight-b of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eight-c of this act shall take effect;

(oo) the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section eight-c of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eight-d of this act shall take effect;

(pp) the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section eight-d of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eight-e of this act shall take effect;

(qq) the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section eight-e of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eight-f of this act shall take effect;

(rr) the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section eight-f of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eight-g of this act shall take effect;

(ss) the amendments to subdivision 1 of section 1809 of the vehicle and traffic law made by section ten of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section ten-a of this act shall take effect;

(tt) the amendments to subdivision 1 of section 1809 of the vehicle and traffic law made by section ten-a of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section ten-b of this act shall take effect;

(uu) the amendments to subdivision 1 of section 1809 of the vehicle and traffic law made by section ten-b of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section ten-c of this act shall take effect;

(vv) the amendments to subdivision 1 of section 1809 of the vehicle and traffic law made by section ten-c of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section ten-d of this act shall take effect;

(ww) the amendments to subdivision 1 of section 1809 of the vehicle and traffic law made by section ten-d of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section ten-e of this act shall take effect;

(xx) the amendments to subdivision 1 of section 1809 of the vehicle and traffic law made by section ten-e of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section ten-f of this act shall take effect;

(yy) the amendments to subdivision 1 of section 1809 of the vehicle and traffic law made by section ten-f of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section ten-g of this act shall take effect;

(zz) the amendments to paragraph a of subdivision 1 of section 1809-e of the vehicle and traffic law made by section eleven of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eleven-a of this act shall take effect;

(aaa) the amendments to paragraph a of subdivision 1 of section 1809-e of the vehicle and traffic law made by section eleven-a of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eleven-b of this act shall take effect;

(bbb) the amendments to paragraph a of subdivision 1 of section 1809-e of the vehicle and traffic law made by section eleven-b of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eleven-c of this act shall take effect;

(ccc) the amendments to paragraph a of subdivision 1 of section 1809-e of the vehicle and traffic law made by section eleven-c of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eleven-d of this act shall take effect;

(ddd) the amendments to paragraph a of subdivision 1 of section 1809-e of the vehicle and traffic law made by section eleven-d of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eleven-e of this act shall take effect;

(eee) the amendments to paragraph a of subdivision 1 of section 1809-e of the vehicle and traffic law made by section eleven-e of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eleven-f of this act shall take effect;

(fff) the amendments made to subdivision 1 of section 371 of the general municipal law made by section thirteen of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section thirteen-a of this act shall take effect;

(ggg) the amendments made to section 371 of the general municipal law made by section thirteen-a of this act shall not affect the expiration of such section and shall be deemed to expire therewith, when upon such date the provisions of section thirteen-b of this act shall take effect;

(hhh) the amendments made to section 371 of the general municipal law made by section thirteen-b of this act shall not affect the expiration of such section and shall be deemed to expire therewith, when upon such date the provisions of section thirteen-c of this act shall take effect;

(iii) the amendments made to section 371 of the general municipal law made by section thirteen-c of this act shall not affect the expiration of such section and shall be deemed to

expire therewith, when upon such date the provisions of section thirteen-d of this act shall take effect;

(jjj) the amendments made to section 371 of the general municipal law made by section fourteen of this act shall not affect the expiration of such section and shall be deemed to expire therewith, when upon such date the provisions of section fourteen-a of this act shall take effect; and

(kkk) the amendments made to section 2590-h of the education law made by section twenty-one of this act shall not affect the expiration and reversion of such section and shall expire therewith.

Laws 2019, ch 148, § 14, eff September 6, 2019, provides:

§ 14. This act shall take effect on the thirtieth day after it shall have become a law and shall expire 5 years after such effective date when upon such date the provisions of this act shall be deemed repealed; and provided further that any rules necessary for the implementation of this act on its effective date shall be promulgated on or before such effective date, provided that:

(a) the amendments to subdivision 1 of section 235 of the vehicle and traffic law made by section one of this act shall not affect the expiration of such section and shall be deemed to expire therewith, when upon such date the provisions of section one-a of this act shall take effect;

(a-1) the amendments to section 235 of the vehicle and traffic law made by section one-a of this act shall not affect the expiration of such section and shall be deemed to expire therewith, when upon such date the provisions of section one-b of this act shall take effect;

(a-2) the amendments to section 235 of the vehicle and traffic law made by section one-b of this act shall not affect the expiration of such section and shall be deemed to expire therewith, when upon such date the provisions of section one-c of this act shall take effect;

(a-3) the amendments to section 235 of the vehicle and traffic law made by section one-c of this act shall not affect the expiration of such section and shall be deemed to expire therewith, when upon such date the provisions of section one-d of this act shall take effect;

(a-4) the amendments to section 235 of the vehicle and traffic law made by section one-d of this act shall not affect the expiration of such section and shall be deemed to expire therewith, when upon such date the provisions of section one-e of this act shall take effect;

(a-5) the amendments to section 235 of the vehicle and traffic law made by section one-e of this act shall not affect the expiration of such section and shall be deemed to expire therewith, when upon such date the provisions of section one-f of this act shall take effect;

(a-6) the amendments to section 235 of the vehicle and traffic law made by section one-f of this act shall not affect the expiration of such section and shall be deemed to expire therewith, when upon such date the provisions of section one-g of this act shall take effect;

(b) the amendments to subdivision 1 of section 236 of the vehicle and traffic law made by section two of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section two-a of this act shall take effect;

(b-1) the amendments to subdivision 1 of section 236 of the vehicle and traffic law made by section two-a of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section two-b of this act shall take effect;

(b-2) the amendments to subdivision 1 of section 236 of the vehicle and traffic law made by section two-b of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section two-c of this act shall take effect;

(b-3) the amendments to subdivision 1 of section 236 of the vehicle and traffic law made by section two-c of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section two-d of this act shall take effect;

(b-4) the amendments to subdivision 1 of section 236 of the vehicle and traffic law made by section two-d of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section two-e of this act shall take effect;

(b-5) the amendments to subdivision 1 of section 236 of the vehicle and traffic law made by section two-e of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section two-f of this act shall take effect;

(c) the amendments to paragraph f of subdivision 1 of section 239 of the vehicle and traffic law made by section four of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section four-a of this act shall take effect;

(c-1) the amendments to paragraph f of subdivision 1 of section 239 of the vehicle and traffic law made by section four-a of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section four-b of this act shall take effect;

(c-2) the amendments to paragraph f of subdivision 1 of section 239 of the vehicle and traffic law made by section four-b of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section four-c of this act shall take effect;

(c-3) the amendments to paragraph f of subdivision 1 of section 239 of the vehicle and traffic law made by section four-c of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section four-d of this act shall take effect;

(c-4) the amendments to paragraph f of subdivision 1 of section 239 of the vehicle and traffic law made by section four-d of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section four-e of this act shall take effect;

(c-5) the amendments to paragraph f of subdivision 1 of section 239 of the vehicle and traffic law made by section four-e of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section four-f of this act shall take effect;

(d) the amendments to subdivisions 1 and 1-a of section 240 of the vehicle and traffic law made by section five of this act shall not affect the expiration of such subdivisions and shall be deemed to expire therewith, when upon such date the provisions of section five-a of this act shall take effect;

(d-1) the amendments to subdivisions 1 and 1-a of section 240 of the vehicle and traffic law made by section five-a of this act shall not affect the expiration of such subdivisions and shall be deemed to expire therewith, when upon such date the provisions of section five-b of this act shall take effect;

(d-2) the amendments to subdivisions 1 and 1-a of section 240 of the vehicle and traffic law made by section five-b of this act shall not affect the expiration of such subdivisions and shall be deemed to expire therewith, when upon such date the provisions of section five-c of this act shall take effect;

(d-3) the amendments to subdivisions 1 and 1-a of section 240 of the vehicle and traffic law made by section five-c of this act shall not affect the expiration of such subdivisions and shall be deemed to expire therewith, when upon such date the provisions of section five-d of this act shall take effect;

(d-4) the amendments to subdivisions 1 and 1-a of section 240 of the vehicle and traffic law made by section five-d of this act shall not affect the expiration of such subdivisions and shall be deemed to expire therewith, when upon such date the provisions of section five-e of this act shall take effect;

(d-5) the amendments to subdivisions 1 and 1-a of section 240 of the vehicle and traffic law made by section five-e of this act shall not affect the expiration of such subdivisions and

shall be deemed to expire therewith, when upon such date the provisions of section five-f of this act shall take effect;

(e) the amendments to paragraphs a and g of subdivision 2 of section 240 of the vehicle and traffic law made by section six of this act shall not affect the expiration of such paragraphs and shall be deemed to expire therewith, when upon such date the provisions of section six-a of this act shall take effect;

(e-1) the amendments to paragraphs a and g of subdivision 2 of section 240 of the vehicle and traffic law made by section six-a of this act shall not affect the expiration of such paragraphs and shall be deemed to expire therewith, when upon such date the provisions of section six-b of this act shall take effect;

(e-2) the amendments to paragraphs a and g of subdivision 2 of section 240 of the vehicle and traffic law made by section six-b of this act shall not affect the expiration of such paragraphs and shall be deemed to expire therewith, when upon such date the provisions of section six-c of this act shall take effect;

(e-3) the amendments to paragraphs a and g of subdivision 2 of section 240 of the vehicle and traffic law made by section six-c of this act shall not affect the expiration of such paragraphs and shall be deemed to expire therewith, when upon such date the provisions of section six-d of this act shall take effect;

(e-4) the amendments to paragraphs a and g of subdivision 2 of section 240 of the vehicle and traffic law made by section six-d of this act shall not affect the expiration of such paragraphs and shall be deemed to expire therewith, when upon such date the provisions of section six-e of this act shall take effect;

(e-5) the amendments to paragraphs a and g of subdivision 2 of section 240 of the vehicle and traffic law made by section six-e of this act shall not affect the expiration of such paragraphs and shall be deemed to expire therewith, when upon such date the provisions of section six-f of this act shall take effect;

(f) the amendments to subdivisions 1 and 2 of section 241 of the vehicle and traffic law made by section seven of this act shall not affect the expiration of such subdivisions and shall be deemed to expire therewith, when upon such date the provisions of section seven-a of this act shall take effect;

(f-1) the amendments to subdivisions 1 and 2 of section 241 of the vehicle and traffic law made by section seven-a of this act shall not affect the expiration of such subdivisions and shall be deemed to expire therewith, when upon such date the provisions of section seven-b of this act shall take effect;

(f-2) the amendments to subdivisions 1 and 2 of section 241 of the vehicle and traffic law made by section seven-b of this act shall not affect the expiration of such subdivisions and shall be deemed to expire therewith, when upon such date the provisions of section seven-c of this act shall take effect;

(f-3) the amendments to subdivisions 1 and 2 of section 241 of the vehicle and traffic law made by section seven-c of this act shall not affect the expiration of such subdivisions and shall be deemed to expire therewith, when upon such date the provisions of section seven-d of this act shall take effect;

(f-4) the amendments to subdivisions 1 and 2 of section 241 of the vehicle and traffic law made by section seven-d of this act shall not affect the expiration of such subdivisions and shall be deemed to expire therewith, when upon such date the provisions of section seven-e of this act shall take effect;

(f-5) the amendments to subdivisions 1 and 2 of section 241 of the vehicle and traffic law made by section seven-e of this act shall not affect the expiration of such subdivisions and shall be deemed to expire therewith, when upon such date the provisions of section seven-f of this act shall take effect;

(g) the amendments to subdivision 1 of section 1809 of the vehicle and traffic law made by section nine of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section nine-a of this act shall take effect;

(g-1) the amendments to subdivision 1 of section 1809 of the vehicle and traffic law made by section nine-a of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section nine-b of this act shall take effect;

(g-2) the amendments to subdivision 1 of section 1809 of the vehicle and traffic law made by section nine-b of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section nine-c of this act shall take effect;

(g-3) the amendments to subdivision 1 of section 1809 of the vehicle and traffic law made by section nine-c of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section nine-d of this act shall take effect;

(g-4) the amendments to subdivision 1 of section 1809 of the vehicle and traffic law made by section nine-d of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section nine-e of this act shall take effect;

(g-5) the amendments to subdivision 1 of section 1809 of the vehicle and traffic law made by section nine-e of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section nine-f of this act shall take effect;

(g-6) the amendments to subdivision 1 of section 1809 of the vehicle and traffic law made by section nine-f of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith, when upon such date the provisions of section nine-g of this act shall take effect;

(h) the amendments to paragraph a of subdivision 1 of section 1809-e of the vehicle and traffic law made by section ten of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section ten-a of this act shall take effect;

(h-1) the amendments to paragraph a of subdivision 1 of section 1809-e of the vehicle and traffic law made by section ten-a of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section ten-b of this act shall take effect;

(h-2) the amendments to paragraph a of subdivision 1 of section 1809-e of the vehicle and traffic law made by section ten-b of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section ten-c of this act shall take effect;

(h-3) the amendments to paragraph a of subdivision 1 of section 1809-e of the vehicle and traffic law made by section ten-c of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section ten-d of this act shall take effect;

(h-4) the amendments to paragraph a of subdivision 1 of section 1809-e of the vehicle and traffic law made by section ten-d of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section ten-e of this act shall take effect;

(h-5) the amendments to paragraph a of subdivision 1 of section 1809-e of the vehicle and traffic law made by section ten-e of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section ten-f of this act shall take effect;

(i) the amendments to subparagraph (i) of paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section eleven of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eleven-a of this act shall take effect;

(i-1) the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section eleven-a of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when

upon such date the provisions of section eleven-b of this act shall take effect;

(i-2) the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section eleven-b of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eleven-c of this act shall take effect;

(i-3) the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section eleven-c of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eleven-d of this act shall take effect;

(i-4) the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section eleven-d of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eleven-e of this act shall take effect;

(i-5) the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section eleven-e of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eleven-f of this act shall take effect; and

(i-6) the amendments to paragraph a of subdivision 5-a of section 401 of the vehicle and traffic law made by section eleven-f of this act shall not affect the expiration of such paragraph and shall be deemed to expire therewith, when upon such date the provisions of section eleven-g of this act shall take effect.

Amendment Notes: The 2015 amendment by ch 20, § 2 (Part C, Subpart E), substituted "subdivision (c), (e), (f) or (g)" for "subdivision (c), (e) or (f)" in 6(d)(ii).

The 2015 amendment by ch 222, § 8, added "or (vi) the registrant was liable in accordance with section eleven hundred eleven-e of this chapter for a violation of subdivision (d) of section eleven hundred eleven of this chapter" in the first sentence of 5-a.a(i).

The 2015 amendment by ch 222, § 8-a, added "or (vi) the registrant was liable in accordance with section eleven hundred eleven-e of this chapter for a violation of subdivision (d) of section eleven hundred eleven of this chapter" in the first sentence of 5-a.a.

The 2015 amendment by ch 222, § 8-b, added "or (v) the registrant was liable in accordance with section eleven hundred eleven-e of this chapter for a violation of subdivision (d) of section eleven hundred eleven of this chapter" in the first sentence of 5-a.a.

The 2015 amendment by ch 222, § 8-c, added "or (iv) the registrant was liable in accordance with section eleven hundred eleven-e of this chapter for a violation of subdivision (d) of section eleven hundred eleven of this chapter" in the first sentence of 5-a.a; and made stylistic changes.

The 2015 amendment by ch 222, § 8-d, added "or the registrant was liable in accordance with section eleven hundred eleven-e of this chapter for a violation of subdivision (d) of section eleven hundred eleven of this chapter" in the first sentence of 5-a.a; and made stylistic changes.

The 2015 amendment by ch 222, § 8-e, added "or the registrant was liable in accordance with section eleven hundred eleven-e of this chapter for a violation of subdivision (d) of section eleven hundred eleven of this chapter" in the first sentence of 5-a.a; and made stylistic changes.

The 2015 amendment by ch 222, § 8-f, added "or the registrant was liable in accordance with section eleven hundred eleven-e of this chapter for a violation of subdivision (d) of section eleven hundred eleven of this chapter" in the first sentence of 5-a.a; and made stylistic changes.

The 2015 amendment by ch 527, § 1, added "and agricultural trailers" in the subdivision heading of 7E; added "and agricultural trailer" in 7E1 and the second sentence of 7E2; added "and an agricultural trailer shall be a trailer, other than a coach or house trailer or semitrailer" in the first sentence of 7E2; added "and a trailer registered as an 'agricultural trailer' under this schedule" in 7E3; added "and an agricultural trailer" in 7E4; and made a stylistic change.

The 2016 amendment by ch 288, § 1, in Schedule C of 7, added the 1 designation and added 2.

The 2016 amendment by ch 295, § 1, added "and the point of sale of the vehicle" in the first sentence of 13; added 13(d); and made related changes.

Repeal Notes: [1960 ch 183] Paragraphs 2 and 3 of schedule D of subdivision 7 of § 401 of the vehicle and traffic law, repealed by this act, prescribed the license fees for suburban motor vehicles and defined the term "suburban" as it related to said schedule. By eliminating the category of "suburban" such vehicles have become subject to the basic registration fees for motor vehicles found in subdivision 6 of § 401 of the vehicle and traffic law.

[1960 ch 300] Subdivision 8-a of § 401, repealed by § 34 of chapter 300, related to special provisions for half fees, which no longer apply.

[1973 ch 43] Subdivision 16 of section four hundred one of the vehicle and traffic law, repealed by this act, provided for the registration of earth moving equipment.

Amendment Notes The 2019 amendment by ch 59, § 9 (Part III), added 22 and 23.

The 2019 amendments by ch 145, § 8, added "or (vii) the registrant was liable in accordance with section eleven hundred seventy-four-a of this chapter for a violation of section eleven hundred seventy-four of this chapter" in the first sentence of 5-a(a)(i) [first setout of a].

The 2019 amendments by ch 145, § 8-a, added "or (vii) the registrant was liable in accordance with section eleven hundred seventy-four-a of this chapter for a violation of section eleven hundred seventy-four of this chapter" in the first sentence of 5-a(a) [second setout].

The 2019 amendments by ch 145, § 8-b, added "or (vii) the registrant was liable in accordance with section eleven hundred seventy-four-a of this chapter for a violation of section eleven hundred seventy-four of this chapter" in the first sentence of 5-a(a) [third setout].

The 2019 amendments by ch 145, § 8-c, added "or (v) the registrant was liable in accordance with section eleven hundred seventy-four-a of this chapter for a violation of section eleven hundred seventy-four of this chapter" and "or she" in the first sentence of 5-a(a) [fourth setout].

The 2019 amendments by ch 145, § 8-d, added "or the registrant was liable in accordance with section eleven hundred seventy-four-a of this chapter for a violation of section eleven hundred seventy-four of this chapter" in the first sentence of 5-a(a) [fifth setout].

The 2019 amendments by ch 145, § 8-e, added "or the registrant was liable in accordance with section eleven hundred seventy-four-a of this chapter for a violation of section eleven hundred seventy-four of this chapter" in the first sentence of 5-a(a) [sixth setout].

The 2019 amendments by ch 145, § 8-f, added "or the registrant was liable in accordance with section eleven hundred seventy-four-a of this chapter for a violation of section eleven hundred seventy-four of this chapter" in the first sentence of 5-a(a) [seventh setout].

The 2019 amendments by ch 145, § 8-g, added "or the registrant was liable in accordance with section eleven hundred seventy-four-a of this chapter for a violation of section eleven hundred seventy-four of this chapter" and "or she" in the first sentence of 5-a(a) [eighth setout].

The 2019 amendment by ch 148, § 11, added "or (vii) the registrant was liable in accordance with section eleven hundred eighty-d of this chapter for a violation of subdivision (c) or (d) of section eleven hundred eighty of this chapter" in the first sentence of 5-aa [first setout](i).

The 2019 amendment by ch 148, § 11-a, added "or (vii) the registrant was liable in accordance with section eleven hundred eighty-d of this chapter for a violation of subdivision

(b), (c), (d), (f) or (g) of section eleven hundred eighty of this chapter" in the first sentence of 5-aa[second setout].

The 2019 amendment by ch 148, § 11-b, added "or the registrant was liable in accordance with section eleven hundred eighty-d of this chapter for a violation of subdivision (b), (c), (d), (f) or (g) of section eleven hundred eighty of this chapter" in the first sentence of 5-aa [third setout].

The 2019 amendment by ch 148, § 11-c, added or the registrant was liable in accordance with section eleven hundred eighty-d of this chapter for violations of subdivision (b), (c), (d), (f) or (g) of section eleven hundred eighty of this chapter" in 5-aa [fourth setout].

The 2019 amendment by ch 148, § 11-d, added "or the registrant was liable in accordance with section eleven hundred eighty-d of this chapter for violations of subdivision (b), (c), (d), (f) or (g) of section eleven hundred eighty of this chapter" in the first sentence of 5-aa [fifth setout].

The 2019 amendment by ch 148, § 11-e, added "or the registrant was liable in accordance with section eleven hundred eighty-d of this chapter for violations of subdivision (b), (c), (d), (f) or (g) of section eleven hundred eighty of this chapter" in the first sentence of 5-aa [sixth setout].

The 2019 amendment by ch 148, § 11-f, added "or the registrant was liable in accordance with section eleven hundred eighty-d of this chapter for violations of subdivision (b), (c), (d), (f) or (g) of section eleven hundred eighty of this chapter" in the first sentence of 5-aa [seventh setout].

The 2019 amendment by ch 148, § 11-g, added "or the registrant was liable in accordance with section eleven hundred eighty-d of this chapter for violations of subdivision (b), (c), (d), (f) or (g) of section eleven hundred eighty of this chapter" in the first sentence of 5-aa[eight setout].

The 2019 amendment by ch 500, § 1, added "which designated point is" in the second sentence of 13.

Notes to Decisions

Analysis

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1. In general

Motorist has general right to be free from arbitrary state intrusion on his freedom of movement even in an automobile. People v Ingle, 36 N.Y.2d 413, 369 N.Y.S.2d 67, 330 N.E.2d 39, 1975 N.Y. LEXIS 1821 (N.Y. 1975).

Police may stop automobile to ascertain if occupant has driver's license and motor vehicle registration. People v Merola, 30 A.D.2d 963, 294 N.Y.S.2d 301, 1968 N.Y. App. Div. LEXIS 3232 (N.Y. App. Div. 2d Dep't 1968).

Officers have right to stop and question motorist in course of routine traffic check. People v Jeffries, 45 A.D.2d 6, 355 N.Y.S.2d 878, 1974 N.Y. App. Div. LEXIS 4849 (N.Y. App. Div. 4th Dep't 1974), aff'd, 38 N.Y.2d 722, 381 N.Y.S.2d 37, 343 N.E.2d 755, 1975 N.Y. LEXIS 2314 (N.Y. 1975).

The exceptions set forth in this section are not specifically set forth in the enacting clause and are in the nature of provisos. Under such circumstances, it is not necessary to plead the exceptions in an information charging a defendant with operating an unregistered motor vehicle. Whether the defendant was within the exceptions was a matter of defense and the burden is upon the defendant to show them. People v Rockwell, 123 N.Y.S.2d 201, 1953 N.Y. Misc. LEXIS 1940 (N.Y. County Ct. 1953).

2. Purpose

The provisions of this statute requiring the owner of a motor vehicle to register same and to display registration number thereon are not intended to afford greater protection to the public. Hyde v McCreery, 145 A.D. 729, 130 N.Y.S. 269, 1911 N.Y. App. Div. LEXIS 4826 (N.Y. App. Div. 1911).

The object and purpose of this section is to promote the safety of those traveling public highways. Schultz v Morrison, 154 N.Y.S. 257, 91 Misc. 248, 1915 N.Y. Misc. LEXIS 892 (N.Y. Sup. Ct. 1915), aff'd, 172 A.D. 940, 156 N.Y.S. 1144, 1916 N.Y. App. Div. LEXIS 9675 (N.Y. App. Div. 1916).

Two objects of requirements of statute for registration of motor vehicles were to facilitate identification of owner and to protect general public using highways by eliminating certain classes of operators and by requiring production of evidence of financial responsibility in the event of injury to others. American Motorists Ins. Co. v Snyder, 63 Misc. 2d 690, 313 N.Y.S.2d 200, 1970 N.Y. Misc. LEXIS 1414 (N.Y. Sup. Ct. 1970).

A claim against the state to recover damages for the claimant's alleged inability to bring an action against the owner of a vehicle that struck his automobile because the address on the vehicle's registration is incorrect, which claim is predicated upon the state's alleged negligence in failing to establish proper registration procedures for motor vehicles and to properly supervise and insure the registration of motor vehicles within the state, would be dismissed, since the claimant failed to specify in what manner the state's alleged culpability caused his injury, since the system by which the state registers automobiles is purely an exercise of discretion and the state's authorization to maintain motor vehicle records is peculiarly governmental, and since the registration requirements of the Vehicle and Traffic Law are designed for the protection of the general public and do not give rise to a special duty to specific individuals. Chung v State, 122 Misc. 2d 676, 471 N.Y.S.2d 524, 1984 N.Y. Misc. LEXIS 2885 (N.Y. Ct. Cl. 1984).

3. Constitutionality

While former § 51 of the Vehicle and Traffic Law may have imposed a burden "of sorts on interstate commerce", the state might under its police power, without violating the commerce clause, regulate the use of its own highways and exact compensation for their use, and, for that purpose, impose moderate, reasonable, uniform, non-discriminatory registration regulations and fees, even on vehicles engaged directly in interstate commerce, at least so long as the State regulations do not contravene congressional enactments on the same subject. People v Learnard, 305 N.Y. 495, 114 N.E.2d 9, 305 N.Y. (N.Y.S.) 495, 1953 N.Y. LEXIS 792 (N.Y. 1953).

The provisions of this section providing for higher registration fees for station wagons than for other private passenger vehicles and a shorter time for registering and re-registering station wagons were not confiscatory or discriminatory nor did they deprive an owner of a station wagon of the equal protection of law. Farrall v Bragalini, 11 Misc. 2d 1075, 178 N.Y.S.2d 850, 1958 N.Y. Misc. LEXIS 3558 (N.Y. Sup. Ct.), app. dismissed, 4 N.Y.2d 1030, 177 N.Y.S.2d 683, 152 N.E.2d 648, 1958 N.Y. LEXIS 947 (N.Y. 1958).

Provisions of the Vehicle and Traffic Law imposing higher registration fees on station wagons than on private passenger vehicles are not constitutional, on ground that they deny equal protection of the laws. Farrall v Bragalini, 11 Misc. 2d 1075, 178 N.Y.S.2d 850, 1958 N.Y. Misc. LEXIS 3558 (N.Y. Sup. Ct.), app. dismissed, 4 N.Y.2d 1030, 177 N.Y.S.2d 683, 152 N.E.2d 648, 1958 N.Y. LEXIS 947 (N.Y. 1958).

Amendment provision of the Vehicle and Traffic Law shortening the period of grace for use of motor vehicle registrations following expiration date from end of January to January 15, except that passenger motor vehicle registration may still be used during all of the month of January following expiration date, is not unconstitutional on ground that it is a denial of equal protection of the laws. Farrall v Bragalini, 11 Misc. 2d 1075, 178 N.Y.S.2d 850, 1958 N.Y. Misc. LEXIS 3558 (N.Y. Sup. Ct.), app. dismissed, 4 N.Y.2d 1030, 177 N.Y.S.2d 683, 152 N.E.2d 648, 1958 N.Y. LEXIS 947 (N.Y. 1958).

Statute requiring motor vehicle operator to produce registration certificate or operator's license on demand of policeman is declaratory of common-law right of police to briefly stop and inquire of citizen or criminal to ascertain that only legal activity is being carried on. People v Russo, 38 Misc. 2d 957, 239 N.Y.S.2d 374, 1963 N.Y. Misc. LEXIS 2136 (N.Y. City Crim. Ct. 1963).

CLS Veh & Tr § 401, which penalizes improper registration of vehicle, was not unconstitutional as applied to defendant on grounds of vagueness or failure to provide notice since defendant had clear notice from statutory definition of both "truck" and "suburban" motor vehicle that his pickup truck was improperly registered as suburban vehicle when it should have been registered as commercial vehicle. People v Mulcahy, 149 Misc. 2d 419, 564 N.Y.S.2d 974, 1990 N.Y. Misc. LEXIS 657 (N.Y. City Ct. 1990).

4. Effect of violation

In an action to recover for personal injuries caused by defendant's alleged negligence in the operation of his automobile it was error to charge the jury that they could consider defendant's failure to register his machine, in violation of law, as prima facie proof of negligence. Hyde v McCreery, 145 A.D. 729, 130 N.Y.S. 269, 1911 N.Y. App. Div. LEXIS 4826 (N.Y. App. Div. 1911).

In weapons prosecution, trial court properly denied motion to suppress gun found in defendant's van–police officer may stop automobile based upon reasonable suspicion that occupants of vehicle have committed violation of law, including traffic violations, and when vehicle has justifiably been stopped, Vehicle and Traffic Law requires that motorist produce, upon demand of police officer, automobile registration, certificate and all other information required concerning his license to operate (Vehicle and Traffic Law § 401 [4])–failure to exhibit valid operator's license to policeman is presumptive evidence that motorist is not duly licensed–accordingly, stop of defendant's van was proper where defendant initially failed to produce his license and drove off, and gun which was discovered in plain view was not product of unlawful search. People v Phillips, 159 A.D.2d 326, 552 N.Y.S.2d 603, 1990 N.Y. App. Div. LEXIS 2677 (N.Y. App. Div. 1st Dep't 1990).

An instruction to a jury that defendant was chargeable with negligence in permitting his son to drive the car in violation of this section was proper. Schultz v Morrison, 154 N.Y.S. 257, 91 Misc. 248, 1915 N.Y. Misc. LEXIS 892 (N.Y. Sup. Ct. 1915), aff'd, 172 A.D. 940, 156 N.Y.S. 1144, 1916 N.Y. App. Div. LEXIS 9675 (N.Y. App. Div. 1916).

This section was inapplicable in an action for imputed negligence where the evidence failed to bring the driver within the provisions of this section. Limbacher v Fannon, 169 N.Y.S. 490, 102 Misc. 703, 1918 N.Y. Misc. LEXIS 934 (N.Y. App. Term 1918).

Where automobile was sold, but seller failed to remove license plate upon transfer of ownership as required by statute, and buyer failed to register automobile in accordance with statute, seller could not deny ownership in action brought against seller arising out of accident occurring after sale, and seller could be held liable for damages resulting from negligent operation of automobile. Phoenix Ins. Co. v Guthiel, 132 N.Y.S.2d 478, 206 Misc. 3, 1954 N.Y. Misc. LEXIS 2629 (N.Y. Sup. Ct. 1954), rev'd, 1 A.D.2d 99, 147 N.Y.S.2d 341, 1955 N.Y. App. Div. LEXIS 3621 (N.Y. App. Div. 4th Dep't 1955).

A violation of subdivision 7 of this section did not constitute a misdemeanor and where a certificate of conviction recited that the defendant had committed a misdemeanor for a violation of subdivision 7 a new trial had to be ordered. The error could not be remedied by a mere change in the certificate of conviction. People v Osborn, 10 Misc. 2d 712, 175 N.Y.S.2d 705, 1958 N.Y. Misc. LEXIS 3762 (N.Y. County Ct. 1958).

The fact that the Department of Motor Vehicles allowed defendant to register his pickup truck with passenger plates rather than commercial plates does not prevent his conviction for operating an improperly registered vehicle in violation of section 401 of the Vehicle and Traffic Law, since defendant was fully aware that the vehicle was improperly registered and the registration was issued on the basis of defendant's representations on the registration application forms (Vehicle and Traffic Law § 401 [1] [b]). Moreover, the statute is not unconstitutional on grounds of vagueness or failure to provide notice since defendant had clear notice from the statutory definition of both "truck" and "suburban" motor vehicle that his pickup truck was improperly registered as a "suburban" vehicle (Vehicle and Traffic Law § 401 [6]) when it should have been registered as a commercial vehicle. People v Mulcahy, 149 Misc. 2d 419, 564 N.Y.S.2d 974, 1990 N.Y. Misc. LEXIS 657 (N.Y. City Ct. 1990).

5. Application to particular vehicles or persons

A children's bus is not an "ambulance" within subd 6. In re Children's Bus Service, Inc., 247 A.D. 735, 285 N.Y.S. 477, 1936 N.Y. App. Div. LEXIS 8543 (N.Y. App. Div.), aff'd, 272 N.Y. 523, 4 N.E.2d 429, 272 N.Y. (N.Y.S.) 523, 1936 N.Y. LEXIS 1018 (N.Y. 1936).

A "go-cart" is a motor vehicle subject to registration as such if operated upon the public highway. Stevenson v Merchants Mut. Ins. Co., 37 Misc. 2d 996, 235 N.Y.S.2d 589, 1962 N.Y. Misc. LEXIS 2149 (N.Y. Sup. Ct. 1962).

Conventional bicycle from which had been removed various operational parts and which was propelled by a lawnmower gasoline engine and was capable of being stopped only by shorting the spark plug was not, at time it was being operated by 12-year-old boy on public highway prior to fatal collision with automobile, "an automobile" within meaning of any automobile insurance policy issued to various persons who might be conceivably liable since device could not be legally used on public highway as a "motor vehicle" in view of New York statutes; nor was it a "bicycle", "motorcycle" or "motor scooter". Lalomia v Bankers & Shippers Ins. Co., 58 Misc. 2d 530, 296 N.Y.S.2d 464, 1968 N.Y. Misc. LEXIS 952 (N.Y. Sup. Ct. 1968), modified, 35 A.D.2d 114, 312 N.Y.S.2d 1018, 1970 N.Y. App. Div. LEXIS 3949 (N.Y. App. Div. 2d Dep't 1970).

A "mini-bike" or "mini-motorcycle" comes within the statutory definition of a "motorcycle" or "motor-driven cycle" rather than a "motor vehicle" and would in a proper case be governed by §§ 410 and 503 and not §§ 401 and 501 of the Vehicle and Traffic Law. People v Moe, 62 Misc. 2d 27, 307 N.Y.S.2d 921, 1969 N.Y. Misc. LEXIS 975 (N.Y. App. Term 1969).

A two-wheeled vehicle with a seat and a motor known as a "mini-bike" is a vehicle which is regulated and required to be registered under the Vehicle and Traffic Law. People v Devlin, 64 Misc. 2d 327, 314 N.Y.S.2d 670, 1970 N.Y. Misc. LEXIS 1280 (N.Y. Dist. Ct. 1970).

Vehicle, which is commonly known as "The Oliver" and which has four rubber tired wheels with two moveable metal rods or arms as part thereof at end of which a metal scooper dipper is attached and has seat between the two rear wheels and behind the steering wheel for operator, is not a motor vehicle but is a "power shovel" within statute requiring registration of motor vehicles. People v Felder, 116 N.Y.S.2d 39, 1952 N.Y. Misc. LEXIS 1797 (N.Y. Magis. Ct. 1952).

In prosecution for violation of statute requiring registration of all motor vehicles operated or driven upon public highways, ruling of commissioner of motor vehicles that shoveloader was not a motor vehicle was not binding upon the magistrate's court, but was entitled to great weight. People v Felder, 116 N.Y.S.2d 39, 1952 N.Y. Misc. LEXIS 1797 (N.Y. Magis. Ct. 1952).

Charge of driving an unregistered motor vehicle was dismissed, as defendant was driving an off-road motorcycle, which was not a motor vehicle under N.Y. Veh. & Traf. Law § 125. People v Miller, 196 Misc. 2d 591, 764 N.Y.S.2d 498, 2003 N.Y. Misc. LEXIS 896 (N.Y. J. Ct. 2003).

Where defendant's van was equipped with bullet restraint features, including the windows and gun ports, and was primarily used to transport money and other valuables to and from defendant's check cashing business, the van had been clearly modified to an "armored truck," requiring commercial registration under N.Y. Veh. & Traf. Law § 401(1)(b). People v David's Check Cashing, Inc., 781 N.Y.S.2d 864, 4 Misc. 3d 826, 2004 N.Y. Misc. LEXIS 1133 (N.Y. City Ct. 2004).

Finding that the corporation's truck exceeded weight limits in violation of N.Y. Veh. & Traf. Law §§ 385(9), 401(7)(F)(b) was supported by substantial evidence and, as a result, the corporation was not entitled to relief under N.Y. C.P.L.R. art. 78; the traffic enforcement agent's testimony regarding the condition of the roadway at the location of the weighing site, the agent's training, the accuracy of the scales, the manner in which the agent weighed the corporation's vehicle, and the weight observed and recorded for each measurement provided a sufficient basis for the determination of the that the truck exceeded the weight limit, and the agent's uncontroverted testimony established that the ground where the scales were placed was level, even, and clear of dirt and debris. Sprint Recycling, Inc. v Martinez, 12 A.D.3d 451, 784 N.Y.S.2d 597, 2004 N.Y. App. Div. LEXIS 13301 (N.Y. App. Div. 2d Dep't 2004).

Insurer was obligated to indemnify a driver for a personal injury claim arising from a traffic accident on a public roadway; the fact that the pickup truck being operated by the driver was registered as an agricultural truck, N.Y. Veh. & Traf. Law § 401(7)(E), rather than as a farm vehicle, § 401(13) was not a basis to deny coverage because the pickup truck was used exclusively for farm purposes and the accident occurred along the most direct route between the two farm parcels. Thus, the pickup truck was not subject to regular motor vehicle registration because of its exclusive use as a farm vehicle. McLaughlin v Midrox Ins. Co., 70 A.D.3d 1463, 894 N.Y.S.2d 648, 2010 N.Y. App. Div. LEXIS 1263 (N.Y. App. Div. 4th Dep't), app. denied, 72 A.D.3d 1658, 899 N.Y.S.2d 722, 2010 N.Y. App. Div. LEXIS 3540 (N.Y. App. Div. 4th Dep't 2010).

A "Tournament car" owned by the members of the tournament team is required to be registered and to display registration plates. 1953 Ops St Compt File #6035.

A 14-year-old boy who had attached a 2 and ½ horsepower lawnmower motor to his bicycle using the end of a baseball bat as a means of transmitting the power of the motor to the rear wheel of his bicycle could not be convicted of a violation of the regulations pertaining to motor vehicles and motorcycles. People v Garfinkel, 64 Misc. 2d 774, 315 N.Y.S.2d 689, 1970 N.Y. Misc. LEXIS 1216 (N.Y. Dist. Ct. 1970).

Where defendant's van was equipped with bullet restraint features, including the windows and gun ports, and was primarily used to transport money and other valuables to and from defendant's check cashing business, the van had been clearly modified to an "armored truck," requiring commercial registration under N.Y. Veh. & Traf. Law § 401(1)(b). People v David's Check Cashing, Inc., 781 N.Y.S.2d 864, 4 Misc. 3d 826, 2004 N.Y. Misc. LEXIS 1133 (N.Y. City Ct. 2004).

6. —Publicly owned vehicles

A peremptory mandamus order directing the state tax commission to register as a private motor vehicle for personal use a Ford automobile with the wooden body of the type known as "Station Wagon" was properly granted under this section where it appeared that use of car was entirely personal and not commercial. Zabriskie v Law, 203 A.D. 40, 196 N.Y.S. 423, 1922 N.Y. App. Div. LEXIS 7118 (N.Y. App. Div. 1922).

Where a certificate of registration shows the owner of a motor vehicle to be the "Sheriff, Richmond County," but the vehicle is in fact maintained and repaired by a municipality, and no registration fees have been paid, a denial of ownership by the city will not prevail since the exemption from the payment of registration fees is allowed only with respect to motor vehicles owned or controlled by a municipality. Enstrom v New York, 258 A.D. 672, 17 N.Y.S.2d 964, 1940 N.Y. App. Div. LEXIS 8269 (N.Y. App. Div.), reh'g denied, 259 A.D. 832, 19 N.Y.S.2d 1022, 1940 N.Y. App. Div. LEXIS 6894 (N.Y. App. Div. 1940).

Where a motor vehicle of a municipal department of sanitation is illegally parked, the department of sanitation as the registered owner may be the defendant. It may, like any other registered owner, relieve itself of responsibility for the violation by disclosing who actually parked the vehicle. People ex rel. Hunter v Department of Sanitation, 86 N.Y.S.2d 437, 193 Misc. 233, 1948 N.Y. Misc. LEXIS 3910 (N.Y. Magis. Ct. 1948).

7. —Non-resident owners

A conviction for operating an unregistered motor vehicle upon New York highways must be reversed where it appeared that the vehicle was owned and operated by New Jersey residents, registered in New Jersey, and merely operated in New York to deliver bakery products produced in New Jersey to New York stores and for return of stale products from such stores to the New Jersey bakery. People v Hager, 14 A.D.2d 556, 218 N.Y.S.2d 180, 1961 N.Y. App. Div. LEXIS 9676 (N.Y. App. Div. 2d Dep't 1961).

Defendant was properly convicted of operating an unregistered motor vehicle upon the public highways of New York, although his employer, a New York corporation owning the vehicle, maintained a place of business in New Jersey where the vehicle was garaged and out of which it was operated and in which state it was registered, where he failed to bring himself within the protection of subd. 1 of § 250 by showing that the motor vehicle was one which his employer was "compelled to register" in New Jersey. People v Uzzolino, 14 A.D.2d 559, 218 N.Y.S.2d 895, 1961 N.Y. App. Div. LEXIS 9683 (N.Y. App. Div. 2d Dep't 1961).

Defendant found guilty of operating unregistered vehicle where proof established that defendant operated a vehicle which was not registered in the state of New York and defendant failed to establish, by any evidence, that vehicle in question was properly registered in Rhode Island and that Rhode Island and/or Massachusetts would offer like immunity to New York residents, although defendant's employer, owner of vehicle, was Massachusetts corporation and vehicle was registered in Rhode Island. People v Nettleton, 57 Misc. 2d 854, 293 N.Y.S.2d 746, 1968 N.Y. Misc. LEXIS 1198 (N.Y. J. Ct. 1968).

Where the petitioner, who was in the service and stationed in Oklahoma, had registered a car there and that registration expired on January 31, 1968, his conviction for operation of an unregistered vehicle on June 19, 1968 constituted a traffic infraction only; and therefore, would not qualify as a basis for revocation of his operator's license when coupled with two speeding convictions within 18 months. Lyons v Tofany, 60 Misc. 2d 310, 303 N.Y.S.2d 431, 1969 N.Y. Misc. LEXIS 1625 (N.Y. Sup. Ct. 1969).

8. —Trailers

Trailers and semitrailers are "vehicles" within Vehicle and Traffic Law, but not "motor vehicles" within section thereof declaring motor vehicle owner liable for death or injuries resulting from negligent operation thereof by any person legally using it with owner's express or implied permission, especially since such law as whole clearly shows Legislature's purpose and intent to classify motor vehicles, trailers and other vehicles separately. Hennessy v Walker, 279 N.Y. 94, 17 N.E.2d 782, 279 N.Y. (N.Y.S.) 94, 1938 N.Y. LEXIS 802 (N.Y. 1938).

It was error to dismiss a prosecution for operating an unregistered vehicle on a public highway, where, on the basis of testimony of defendant and the arresting officer, a question of fact was presented as to whether the vehicle was a "trailer" requiring registration, it being a portable building equipped with removable wheels and ordinarily used as a field office in connection with construction jobs, but which was susceptible of being used as a habitation, even though it was only moved once a year. People v Guilianti, 10 N.Y.2d 433, 224 N.Y.S.2d 4, 179 N.E.2d 850, 1962 N.Y. LEXIS 1467 (N.Y. 1962).

Trailer held not "motor vehicle" within statute making owner liable for accident from negligent operation of motor vehicle by any one with owner's permission. Herrick v Arborio, 258 N.Y.S. 5, 144 Misc. 15, 1932 N.Y. Misc. LEXIS 1154 (N.Y. Sup. Ct. 1932).

The defendant was properly convicted of operating an unregistered trailer where the evidence showed that he was operating a tractor with a 1957 New York registration and a trailer with a New Jersey 1957 registration and that he picked up a load of

scrap copper at Mt. Kisco, New York, and was transporting the same over the public highways of New York State in an intrastate shipment to Rome, New York. People v Sauerhafer, 9 Misc. 2d 1022, 171 N.Y.S.2d 174, 1958 N.Y. Misc. LEXIS 3813 (N.Y. County Ct. 1958).

Defendant was properly convicted of operating an unregistered motor vehicle where he drove a trailer of cars, which trailer was unregistered in New York, from Buffalo through New Jersey back into New York. Registration could not be avoided merely by routing the shipment through part of New Jersey and therein into New York where the cargo was unloaded even though the route taken was the most direct route. People v Janusewski, 11 Misc. 2d 866, 171 N.Y.S.2d 298, 1958 N.Y. Misc. LEXIS 4043 (N.Y. County Ct. 1958).

Non-resident owner and operator of truck-trailer was obligated to have trailer hauled by tractor which was duly registered in New York when it hauled the trailer between two points in New York State. People ex rel. Heerbrandt v Dantschisch, 153 N.Y.S.2d 519 (N.Y. Magis. Ct. 1956).

9. —Tractors, cranes, and the like

A gasoline-driven farm tractor on which was mounted a crane and hoist for the purpose of moving and tiering heavy cargo at steamship piers was a tractor crane within the meaning of former § 2, and the owner was not required to register said vehicle. People v Jarka Corp., 285 N.Y. 548, 33 N.E.2d 239, 285 N.Y. (N.Y.S.) 548, 1941 N.Y. LEXIS 1584 (N.Y. 1941).

This section (former § 11) subd. 1, is not applicable to an owner of a crane which comes within the exception contained in former § 2, subd. 8. People v Bay Ridge Operating Co., 259 A.D. 260, 19 N.Y.S.2d 140, 1940 N.Y. App. Div. LEXIS 6110 (N.Y. App. Div. 1940).

A motor truck on which is permanently mounted a large crane is not a "tractor crane" exempt from the license requirements under former § 2, subd. People v P. T. Cox Const. Co., 15 N.Y.S.2d 756, 172 Misc. 244, 1939 N.Y. Misc. LEXIS 2450 (N.Y. Magis. Ct. 1939), aff'd, 259 A.D. 707, 19 N.Y.S.2d 145, 1940 N.Y. App. Div. LEXIS 6299 (N.Y. App. Div. 1940).

Bottom dump earth mover was required to be registered in accordance with statute which authorized registration of earth moving equipment to be confined in operations solely to contract site, and the machine was thus an "automobile" within comprehensive general liability policy provision excluding from coverage automobiles if accident involved occurred away from premises owned by, rented to, or controlled by insured. McConville, Inc. v Merchants Mut. Ins. Co., 47 Misc. 2d 279, 262 N.Y.S.2d 521, 1965 N.Y. Misc. LEXIS 1611 (N.Y. Sup. Ct. 1965).

10. Production of license and registration --requirement generally

A single automobile on a public highway may be stopped only upon reasonable suspicion of a violation of the Vehicle and Traffic Law and, absent a minimal degree of such suspicion, a "routine traffic check" may be conducted only according to nonarbitrary, nondiscriminatory, uniform procedures, such as at roadblocks, checkpoints and weighing stations. People v Ingle, 36 N.Y.2d 413, 369 N.Y.S.2d 67, 330 N.E.2d 39, 1975 N.Y. LEXIS 1821 (N.Y. 1975).

A police officer is clearly authorized to stop an automobile and demand of its occupants the certificate of its registration and such other information as is set forth in the above statute. People v Hoffman, 24 A.D.2d 497, 261 N.Y.S.2d 651, 1965 N.Y. App. Div. LEXIS 3892 (N.Y. App. Div. 2d Dep't 1965).

Police may stop automobile to ascertain if occupant has driver's license and motor vehicle registration. People v Merola, 30 A.D.2d 963, 294 N.Y.S.2d 301, 1968 N.Y. App. Div. LEXIS 3232 (N.Y. App. Div. 2d Dep't 1968).

Police officers could not, under vehicle and traffic law sections which authorize inspections for overloading and require production of registration certificates and operator's licenses on demand, stop automobile in absence of probable cause, or even sufficient reasonable suspicion to authorize street detention, in circumvention of Fourth Amendment rights prohibition against warrantless searches. People v Bennett, 47 A.D.2d 322, 366 N.Y.S.2d 639, 1975 N.Y. App. Div. LEXIS 9236 (N.Y. App. Div. 1st Dep't), overruled, People v Simone, 48 A.D.2d 497, 370 N.Y.S.2d 583, 1975 N.Y. App. Div. LEXIS 9927 (N.Y. App. Div. 1st Dep't 1975).

In prosecution for third degree possession of stolen property arising from incident in which defendant and companion were found sitting in stolen car which had its steering column partially exposed, defendant's right to remain silent was violated when prosecutor was permitted to ask officer if defendant or companion offered explanation as to what they were doing, where they were going or where they had come from; CLS Veh & Tr § 401(4), which created affirmative duty for operator of vehicle to supply information necessary for identification of vehicle and its owner, did not encompass questions asked by prosecutor. People v Glover, 163 A.D.2d 174, 559 N.Y.S.2d 518, 1990 N.Y. App. Div. LEXIS 8443 (N.Y. App. Div. 1st Dep't), app. denied, 76 N.Y.2d 986, 563 N.Y.S.2d 774, 565 N.E.2d 523, 1990 N.Y. LEXIS 4598 (N.Y. 1990).

Police report was admissible as business record where driver of offending vehicle was under duty to provide responding officer with certificate of registration under CLS Veh & Tr § 401(4), and report indicated that any information as to ownership of offending vehicle came from that document. Lopez v Ford Motor Credit Co., 238 A.D.2d 211, 656 N.Y.S.2d 257, 1997 N.Y. App. Div. LEXIS 3891 (N.Y. App. Div. 1st Dep't 1997).

Subdivision 4 of this section, requiring persons operating motor vehicles to produce registration certificates and provide all information demanded by a peace officer as to their operating licenses, imposes no limitation upon an officer's right to demand production of the documents in question, and a police officer may lawfully stop a moving vehicle for the sole purpose of determining whether its driver has a certificate of registration and an operator's license. People v Isaac, 38 Misc. 2d 1018, 239 N.Y.S.2d 624, 1963 N.Y. Misc. LEXIS 2141 (N.Y. Sup. Ct. 1963).

Where the police have a legitimate reason to believe that surreptitious circumstances may surround the operation of a vehicle, they may inquire into all areas of identification thereof in order to verify the accuracy of any document certifying ownership of the vehicle, all without a warrant. People v Goldstein, 60 Misc. 2d 745, 304 N.Y.S.2d 106, 1969 N.Y. Misc. LEXIS 1180 (N.Y. Sup. Ct. 1969).

11. —Propriety of request, under particular circumstances

A police officer may not arbitrarily stop an automobile on a public highway, solely because of its unusual appearance, to examine the motorist's license and registration or to inspect the vehicle for possible equipment violations. People v Ingle, 36 N.Y.2d 413, 369 N.Y.S.2d 67, 330 N.E.2d 39, 1975 N.Y. LEXIS 1821 (N.Y. 1975).

Where police had observed automobile being driven in suspicious manner in circles in high crime area, they were entitled to stop automobile in order to check registration of vehicle and license of driver. People v Denti, 44 A.D.2d 44, 353 N.Y.S.2d 10, 1974 N.Y. App. Div. LEXIS 5506 (N.Y. App. Div. 1st Dep't 1974).

Officer, who, after stopping automobile and asking to see accused-driver's license registration, learned that accused was not man police were looking for in belief that he was carrying gun and who had no further ground to suspect accused of anything, did not have probable cause to question accused about large sealed envelopes which were on front seat and which contained gambling items. People v Jeffries, 45 A.D.2d 6, 355 N.Y.S.2d 878, 1974 N.Y. App. Div. LEXIS 4849 (N.Y. App. Div. 4th Dep't 1974), aff'd, 38 N.Y.2d 722, 381 N.Y.S.2d 37, 343 N.E.2d 755, 1975 N.Y. LEXIS 2314 (N.Y. 1975).

When policemen found van in street obstructing traffic with its motor still running, he had duty to remove it from line of traffic and it was proper for him to look for registration papers. People v Maier, 47 A.D.2d 344, 366 N.Y.S.2d 660, 1975 N.Y. App. Div. LEXIS 9241 (N.Y. App. Div. 1st Dep't 1975).

Undercover narcotics officer was justified in approaching defendant to make reasonable inquiry and in requesting that he produce his license and vehicle registration after officer observed defendant, while stopped at traffic light, tilt his head back and snort what officer believed to be substance, and then followed defendant at rapid speed until he stopped approximately 30

blocks later at phone booth. People v Sanders, 143 A.D.2d 1063, 533 N.Y.S.2d 639, 1988 N.Y. App. Div. LEXIS 10834 (N.Y. App. Div. 2d Dep't 1988), app. denied, 73 N.Y.2d 982, 540 N.Y.S.2d 1016, 538 N.E.2d 368, 1989 N.Y. LEXIS 1674 (N.Y. 1989).

Police officers, who stopped automobile speeding on turnpike, had duty to enforce traffic laws of state and properly requested operator's license and automobile's registration. People v Anonymous, 56 Misc. 2d 1022, 290 N.Y.S.2d 337, 1968 N.Y. Misc. LEXIS 1594 (N.Y. County Ct. 1968).

Check of car registration and numbers pursuant to Vehicle and Traffic Law § 401 was not an illegal search, even though defendant was not in vehicle when police requested him to permit identification thereof, where state police had requested investigating officer to determine whether defendant still had in his possession a vehicle registered in New York which was the subject of a New Jersey stolen car alarm. People v Hart, 75 Misc. 2d 908, 349 N.Y.S.2d 289, 1973 N.Y. Misc. LEXIS 1329 (N.Y. City Crim. Ct. 1973).

Police officer, who before commencing his tour of duty observed a picture on a wanted poster in precinct house, and who, while later on duty in patrol car which was stopped at traffic light, saw man in a car facing in the opposite direction who officer testified "looked like" the person on the poster, had authority, under the Vehicle and Traffic Law, to stop defendant's vehicle at that time and place, not for purpose of searching the vehicle and arresting defendant, but to satisfy officer's curiosity and suspicions regarding identity of the driver. People v Howell, 78 Misc. 2d 538, 357 N.Y.S.2d 828, 1974 N.Y. Misc. LEXIS 1441 (N.Y. Sup. Ct. 1974).

Where police officer noticed defendant and two companions looking into and trying door handles on automobiles parked in airport parking lot at 2:30 a.m., stopped defendant's automobile as it left airport, ordered defendant out of automobile upon defendant's failure to produce automobile registration or driver's license, and, upon defendant's exit, noticed paper towel concealing 11 opaque manila envelopes of the type used for packaging small loose quantities of marijuana, officer had probable cause to seize envelopes and, upon verifying that they contained marijuana, arrest defendant and conduct further search of automobile. People v Roldan, 82 Misc. 2d 450, 368 N.Y.S.2d 938, 1975 N.Y. Misc. LEXIS 2698 (N.Y. Sup. Ct. 1975).

Police officer's stop of vehicle was pretextual, and entitled driver to suppression of evidence of intoxication and driving without valid registration, where officer was primarily motivated to investigate unfounded suspicion that prostitution activity had been, or was about to be, committed, unrelated to any observed traffic infraction. People v Reynolds, 185 Misc. 2d 674, 713 N.Y.S.2d 813, 2000 N.Y. Misc. LEXIS 376 (N.Y. County Ct. 2000), rev'd, 97 N.Y.2d 341, 741 N.Y.S.2d 147, 767 N.E.2d 638, 2001 N.Y. LEXIS 3790 (N.Y. 2001).

A police officer has a clear right to require a person seated behind the wheel of a parked vehicle to produce his license and registration, even though at the time he was not driving said vehicle, since this statute is only declaratory of a long established and recognized common-law right of police officers to briefly stop and inquire of citizens and/or criminals to ascertain that only legal activity was being carried on. United States ex rel. Farrugia v Bhono, 256 F. Supp. 391, 1966 U.S. Dist. LEXIS 6527 (S.D.N.Y. 1966).

12. —Propriety of arrest, search, or seizure after stop

Defendant's inability to produce registration for car he was driving, coupled with his statement and that of his passenger that they did not know who owned car, authorized police to detain car and its occupants in order to run radio check to ascertain whether car was properly registered and whether it had been reported stolen. People v Pena, 209 A.D.2d 744, 618 N.Y.S.2d 149, 1994 N.Y. App. Div. LEXIS 10854 (N.Y. App. Div. 3d Dep't 1994), app. denied, 85 N.Y.2d 941, 627 N.Y.S.2d 1003, 651 N.E.2d 928, 1995 N.Y. LEXIS 1971 (N.Y. 1995).

A state policeman was within his right as a peace officer in asking to see a motorist's ownership registration of the vehicle he was driving and his driver's license, and the actions of the motorist in using obscene, violent and indecent language toward the state troopers were disorderly conduct. Lippert v State, 139 N.Y.S.2d 751, 207 Misc. 632, 1955 N.Y. Misc. LEXIS 3488 (N.Y. Ct. Cl. 1955).

Subdivision 4 of this section, in authorizing a police officer to stop a car and ask the driver to produce his registration and driver's license, is declaratory of long- established common-law custom, and, where in pursuance of it, the officer observes that the driver is carrying a loaded gun in the vehicle, contrary to § 245 of the Conservation Law, he can properly arrest the driver for violating that law and seize the gun as evidence. People v Russo, 38 Misc. 2d 957, 239 N.Y.S.2d 374, 1963 N.Y. Misc. LEXIS 2136 (N.Y. City Crim. Ct. 1963).

A motorist's production of his registration certificate and driver's license in court, resulting in dismissal of charges against him for driving without the required documents, does not make his arrest by an officer without a warrant and an incidental search of his person illegal, the arrest having been in good faith on the basis of a misdemeanor committed in the officer's presence. People v Isaac, 38 Misc. 2d 1018, 239 N.Y.S.2d 624, 1963 N.Y. Misc. LEXIS 2141 (N.Y. Sup. Ct. 1963).

A police officer stopping a moving automobile to demand production of registration certificates and information concerning the driver's operating license, can lawfully arrest the operator without a warrant if he fails to produce the requested documents or give the requested information as to identity, etc., and, following such arrest, to search the person of the operator for weapons in the interest of self-protection, and any contraband, such as narcotics, turned up in course of such search is not evidence illegally obtained. People v Isaac, 38 Misc. 2d 1018, 239 N.Y.S.2d 624, 1963 N.Y. Misc. LEXIS 2141 (N.Y. Sup. Ct. 1963).

Peace officer who, after stopping motorist to determine registration of his vehicle and his authorization to drive, arrests the motorist for failure to produce the documents may conduct a search of the motorist's person in order to remove weapons or other instrumentalities which might be used for resisting officer, for escape, or for similar purposes. People v Isaac, 38 Misc. 2d 1018, 239 N.Y.S.2d 624, 1963 N.Y. Misc. LEXIS 2141 (N.Y. Sup. Ct. 1963).

Where defendant stopped for driving over speed limit was arrested for traffic misdemeanors of being unlicensed operator and driving unregistered vehicle and officer did not arrest defendant for possessing stolen car although there was probable cause for arrest on that ground, seizure of brown paper bag found in automobile was reasonable and justifiable as incident to arrest upon probable cause that defendant possessed stolen car. People v Smith, 62 Misc. 2d 473, 308 N.Y.S.2d 909, 1970 N.Y. Misc. LEXIS 1779 (N.Y. Sup. Ct. 1970).

Where defendant drove into deserted parking lot at 3:00 a.m. while plainclothesed police were in process of arresting another individual for possession of a controlled substance and defendant refused to show his driver's license and registration when ordered to do so by the police and attempted to drive away, police had probable cause to arrest the defendant without a warrant because of the reasonable likelihood that the automobile was to be moved, and thus search which produced allegedly forged license and registration was legal. People v Kelly, 77 Misc. 2d 264, 353 N.Y.S.2d 111, 1974 N.Y. Misc. LEXIS 1121 (N.Y. City Crim. Ct.), modified, 79 Misc. 2d 534, 361 N.Y.S.2d 135, 1974 N.Y. Misc. LEXIS 1700 (N.Y. App. Term 1974).

Where defendant produced driver's license with typeface different from that normally used by Department of Motor Vehicles, police had probable cause to arrest defendant for felony possession of a forged instrument, and subsequent station-house search which produced narcotics was authorized as incident to lawful arrest. People v Kelly, 79 Misc. 2d 534, 361 N.Y.S.2d 135, 1974 N.Y. Misc. LEXIS 1700 (N.Y. App. Term 1974).

Where police officer noticed defendant and two companions looking into and trying door handles on automobiles parked in airport parking lot at 2:30 a.m., stopped defendant's automobile as it left airport, ordered defendant out of automobile upon defendant's failure to produce automobile registration or driver's license, and, upon defendant's exit, noticed paper towel concealing 11 opaque manila envelopes of the type used for packaging small loose quantities of marijuana, officer had probable cause to seize envelopes and, upon verifying that they contained mari-

juana, arrest defendant and conduct further search of automobile. People v Roldan, 82 Misc. 2d 450, 368 N.Y.S.2d 938, 1975 N.Y. Misc. LEXIS 2698 (N.Y. Sup. Ct. 1975).

Illegal arrest of individual for traffic violation after officer pursued him to an apartment building and broke down the apartment door was violative of defendant's Fourth Amendment rights and could not be basis for a charge of resisting arrest. People v Jones, 108 Misc. 2d 574, 438 N.Y.S.2d 75, 1981 N.Y. Misc. LEXIS 2243 (N.Y. City Ct. 1981).

The removal by defendant of a motorcycle from a garage at the request of a policeman, who had immediately before observed defendant operating the motor vehicle on a public street without registration plates affixed to it, was neither a search of the garage nor a seizure of the motorcycle, since the police officer simply wanted to check the motorcycle's vehicle identification number (VIN) to see if the motorcycle had been stolen (it had been). The officer had the right to demand that the motorcycle be produced to check the VIN (Veh & Tr Law § 401), and the fact that the vehicle was then behind the closed door to the garage did not change the officer's authority or the defendant's duty; no expectation of privacy in the garage was violated and there was no random stop of an otherwise lawfully operated vehicle. People v Angelella, 127 Misc. 2d 1001, 487 N.Y.S.2d 643, 1985 N.Y. Misc. LEXIS 2770 (N.Y. County Ct. 1985).

District court erred in convicting defendant, after a nonjury trial, of operating an unregistered motor vehicle because, while a police officer observed that the vehicle registration tag was expired and confirmed the expiration date of the registration with the State Department of Motor Vehicles, defendant's statements to a police officer that "the plates were expired" constituted admissions that were suppressible, and notice was required. People v Ermmarino (Rocco), 60 Misc. 3d 50, 80 N.Y.S.3d 845, 2018 N.Y. Misc. LEXIS 3159 (N.Y. App. Term 2018).

State trial judge correctly concluded that arrest for possession of marijuana and search incident to arrest following stop of car, apparently for routine traffic check, were proper, where officers were authorized by statute to stop car for routine check of license and registration and one officer observed the ejection from the stopped car of container of what appeared to be marijuana and cigarette papers. United States ex rel. Gray v New York State Bd. of Parole, 416 F. Supp. 823, 1976 U.S. Dist. LEXIS 15413 (S.D.N.Y. 1976).

13. —Parked vehicles

The statute is applicable even though the automobile was parked on a gas station and the defendant was not physically operating the automobile. People v Frank, 61 Misc. 2d 450, 305 N.Y.S.2d 940, 1969 N.Y. Misc. LEXIS 1465 (N.Y. Sup. Ct. 1969).

Check of car registration and numbers pursuant to Vehicle and Traffic Law § 401 was not an illegal search, even though defendant was not in vehicle when police requested him to permit identification thereof, where state police had requested investigating officer to determine whether defendant still had in his possession a vehicle registered in New York which was the subject of a New Jersey stolen car alarm. People v Hart, 75 Misc. 2d 908, 349 N.Y.S.2d 289, 1973 N.Y. Misc. LEXIS 1329 (N.Y. City Crim. Ct. 1973).

A police officer has a clear right to require a person seated behind the wheel of a parked vehicle to produce his license and registration, even though at the time he was not driving said vehicle, since this statute is only declaratory of a long established and recognized common-law right of police officers to briefly stop and inquire of citizens and/or criminals to ascertain that only legal activity was being carried on. United States ex rel. Farrugia v Bhono, 256 F. Supp. 391, 1966 U.S. Dist. LEXIS 6527 (S.D.N.Y. 1966).

14. —Vehicle identification number

Where defendant had a certificate of registration establishing his lawful possession of a truck, and the engine number was incorrectly stated in the certificate because the engine had been changed, he should not be held to have violated this section when he produced a duplicate certificate showing the correction had been made. People v Palter, 271 A.D. 882, 66 N.Y.S.2d 388, 1946 N.Y. App. Div. LEXIS 3566 (N.Y. App. Div. 1946).

The removal by defendant of a motorcycle from a garage at the request of a policeman, who had immediately before observed defendant operating the motor vehicle on a public street without registration plates affixed to it, was neither a search of the garage nor a seizure of the motorcycle, since the police officer simply wanted to check the motorcycle's vehicle identification number (VIN) to see if the motorcycle had been stolen (it had been). The officer had the right to demand that the motorcycle be produced to check the VIN (Veh & Tr Law § 401), and the fact that the vehicle was then behind the closed door to the garage did not change the officer's authority or the defendant's duty; no expectation of privacy in the garage was violated and there was no random stop of an otherwise lawfully operated vehicle. People v Angelella, 127 Misc. 2d 1001, 487 N.Y.S.2d 643, 1985 N.Y. Misc. LEXIS 2770 (N.Y. County Ct. 1985).

Because of the important role played by the vehicle identification number in the pervasive governmental regulation of the automobile and the efforts by the Federal Government to insure that the vehicle identification number is placed in plain view, there is no reasonable expectation of privacy in the vehicle identification number, for purposes of the Fourth Amendment, even if papers in a car obscure the vehicle identification number from the plain view of a police officer; the placement of obscuring papers is insufficient to create a privacy interest in the vehicle identification number, and a police officer's mere viewing of a vehicle identification number by moving obscuring papers is not a violation of the Fourth Amendment. New York v Class, 475 U.S. 106, 106 S. Ct. 960, 89 L. Ed. 2d 81, 1986 U.S. LEXIS 5 (U.S. 1986).

15. —Evidence; presumptions

In an action to recover for personal injuries caused by defendant's alleged negligence in the operation of his automobile it was error to charge the jury that they could consider defendant's failure to register his machine, in violation of law, as prima facie proof of negligence. Hyde v McCreery, 145 A.D. 729, 130 N.Y.S. 269, 1911 N.Y. App. Div. LEXIS 4826 (N.Y. App. Div. 1911).

Where defendant had a certificate of registration establishing his lawful possession of a truck, and the engine number was incorrectly stated in the certificate because the engine had been changed, he should not be held to have violated this section when he produced a duplicate certificate showing the correction had been made. People v Palter, 271 A.D. 882, 66 N.Y.S.2d 388, 1946 N.Y. App. Div. LEXIS 3566 (N.Y. App. Div. 1946).

The failure to produce for inspection a certificate of registration for a motor vehicle may not be the basis for a conviction under this act, for this section, subd. 4, prescribes a rule of evidence only and the presumption of guilt may be rebutted by uncontradicted evidence of proper registration, such as subsequent production of the certificate itself. People v Simon, 33 N.Y.S.2d 14, 178 Misc. 49, 1942 N.Y. Misc. LEXIS 1312 (N.Y. County Ct. 1942).

Conviction of traffic offenses of driving without license and without required registration were not "crimes" and could not be introduced to impair credibility of witness. People v Oliver, 80 Misc. 2d 905, 365 N.Y.S.2d 422, 1975 N.Y. Misc. LEXIS 2283 (N.Y. Sup. Ct. 1975).

Defendant's prior convictions of driving motor vehicle without insurance, without proper driver's license and without required registration were not admissible for impeachment purposes at robbery trial. People v Oliver, 80 Misc. 2d 905, 365 N.Y.S.2d 422, 1975 N.Y. Misc. LEXIS 2283 (N.Y. Sup. Ct. 1975).

The exceptions set forth in this section are not specifically set forth in the enacting clause and are in the nature of provisos. Under such circumstances, it is not necessary to plead the exceptions in an information charging a defendant with operating an unregistered motor vehicle. Whether the defendant was within the exceptions was a matter of defense and the burden is upon the defendant to show them. People v Rockwell, 123 N.Y.S.2d 201, 1953 N.Y. Misc. LEXIS 1940 (N.Y. County Ct. 1953).

16. What is "public highway"

Public park owned by municipality with neither roads nor sidewalks was not a "public highway" within statutes prohibiting unlicensed operation and unregistered vehicles. People v Moe, 62

Misc. 2d 27, 307 N.Y.S.2d 921, 1969 N.Y. Misc. LEXIS 975 (N.Y. App. Term 1969).

Where driveway went around store and on one side was used as parking facility, and driveway appeared to give passage and unrestricted access to road, driveway was "public highway" within statute concerning use of uninspected, uninsured and unregistered vehicle on public highway. People v Garcia, 85 Misc. 2d 693, 380 N.Y.S.2d 491, 1975 N.Y. Misc. LEXIS 3328 (N.Y. Dist. Ct. 1975).

17. Police power to look under hood

The raising of the hood of an automobile to ascertain whether it is a stolen car, particularly where there was probable cause to believe that it was in fact a stolen car, does not constitute search in violation of the Fourth Amendment. People v Frank, 61 Misc. 2d 450, 305 N.Y.S.2d 940, 1969 N.Y. Misc. LEXIS 1465 (N.Y. Sup. Ct. 1969).

A police officer has the power to raise the hood of an automobile in order to verify the ownership of a registered car from the serial number appearing on the motor. People v Frank, 61 Misc. 2d 450, 305 N.Y.S.2d 940, 1969 N.Y. Misc. LEXIS 1465 (N.Y. Sup. Ct. 1969).

18. Ownership of vehicle

There is no presumption that owner of automobile was driving at time of traffic infraction. People v Hildebrandt, 308 N.Y. 397, 126 N.E.2d 377, 308 N.Y. (N.Y.S.) 397, 1955 N.Y. LEXIS 996 (N.Y. 1955).

One who has deliberately caused a motor vehicle to be registered in his name as owner will not be permitted, after it has been involved in an accident and caused an injury to deny the truth of a statement as to ownership, and the rule is not altered by the fact that the registration was in another state. People v Simon, 33 N.Y.S.2d 14, 178 Misc. 49, 1942 N.Y. Misc. LEXIS 1312 (N.Y. County Ct. 1942).

Ownership of a motor vehicle is presumed from proof of registration and in the absence of evidence showing that another is the true owner, the presumption will prevail. Scholick v Fifth Ave. Coach Co., 68 N.Y.S.2d 208, 188 Misc. 476, 1947 N.Y. Misc. LEXIS 2052 (N.Y. Mun. Ct. 1947).

Proof of registration of motor vehicle constitutes presumptive proof of ownership by person in whose name it is registered which, unexplained, destroys any presumption of ownership which would otherwise arise from evidence that another paid the purchase price and cost of all repairs, maintenance and operation of automobile. Scholick v Fifth Ave. Coach Co., 68 N.Y.S.2d 208, 188 Misc. 476, 1947 N.Y. Misc. LEXIS 2052 (N.Y. Mun. Ct. 1947).

Distinctions between legal ownership and equitable ownership cannot be recognized in collision cases. Hence, plaintiff, who was not the registered owner of an automobile, and who had the automobile registered in the name of his mother, was not entitled to judgment for collision damage to the automobile. Soos v Soos, 4 Misc. 2d 727, 162 N.Y.S.2d 373, 1956 N.Y. Misc. LEXIS 1360 (N.Y. County Ct. 1956).

Under CPLR § 4518, the registration of a motor vehicle, in compliance with Vehicle and Traffic Law § 401, may be admitted as prima facie evidence of ownership. People v Meyers, 72 Misc. 2d 1003, 340 N.Y.S.2d 505, 1973 N.Y. Misc. LEXIS 2288 (N.Y. City Crim. Ct. 1973).

Evidence established violation of operating unregistered motor vehicle where officer testified that defendant failed to produce certificate of registration and that teletype check revealed that vehicle was not registered; defendant's lack of ownership and lack of knowledge were immaterial since there is no knowledge requirement and proscription is not limited to owners. People v Hakimi-Fard, 137 Misc. 2d 116, 519 N.Y.S.2d 766, 1987 N.Y. Misc. LEXIS 2656 (N.Y. City Ct. 1987).

19. Report of change of address

Where an insured motorist fails to comply with the statute requiring him to notify the Commissioner of his various changes of address, his failure to receive notices sent to him of cancellation of insurance coverage and license revocations, due to address changes, has no bearing upon the validity of his license revocation. Courtney v Hults, 18 A.D.2d 1091, 239 N.Y.S.2d 562, 1963 N.Y. App. Div. LEXIS 3930 (N.Y. App. Div. 2d Dep't 1963).

Petitioner could not be heard to complain of the delay in the receipt of a notice as to the revocation of his operator's license, where he failed to comply with the statute requiring him to notify the respondent of his various changes of address. Triana v Tofany, 66 Misc. 2d 36, 319 N.Y.S.2d 746, 1971 N.Y. Misc. LEXIS 1782 (N.Y. Sup. Ct. 1971).

In subrogation action arising from motor vehicle accident, court should have granted defendant's motion to vacate default judgment, even though he did not comply with CLS Veh & Tr § 401(3)(a), relating to change of address, and was thus estopped from raising jurisdictional defect, where his moving papers established existence of meritorious defense. USAA Cas. Ins. Co. v Singh, 184 Misc. 2d 296, 714 N.Y.S.2d 627, 2000 N.Y. Misc. LEXIS 181 (N.Y. App. Term 2000).

As the motorcycle owner was estopped from raising a claim of defective service because she failed to apprise the Commissioner of Motor Vehicles of her current address pursuant to N.Y. Veh. & Traf. Law § 401(3), her motion to vacate the default judgment pursuant to N.Y. C.P.L.R. 5015 should have been denied. Labozzetta v Fabbro, 22 A.D.3d 644, 804 N.Y.S.2d 353, 2005 N.Y. App. Div. LEXIS 11132 (N.Y. App. Div. 2d Dep't 2005).

Because a defendant failed to properly notify the department of motor vehicles of a change of address under N.Y. Veh. & Traf. Law § 401(3), the defendant's actions could be viewed as a deliberate attempt to avoid notice of a plaintiff's personal injury action; therefore, the defendant was not entitled to relief of a default judgment under N.Y. C.P.L.R. 317, 5015. Cruz v Narisi, 32 A.D.3d 981, 821 N.Y.S.2d 643, 2006 N.Y. App. Div. LEXIS 11459 (N.Y. App. Div. 2d Dep't 2006).

20. Use of dealer plates

A dealer violated subd. 1 in allowing the lessee of a customer to use a commercial truck bearing dealer number of plates in the ordinary course of lessee's business for transporting property, prohibited by former § 62 subd. 3. People v Christensen & Weiss, Inc., 250 A.D. 470, 294 N.Y.S. 591, 1937 N.Y. App. Div. LEXIS 8374 (N.Y. App. Div. 1937).

A dealer who permitted his salesman to use a car with dealer plates attached on a personal errand was not barred from recovering damages from driver of the other car, even though the dealer violated subdivision 3 of former § 62, since the violation had nothing to do with the accident. Two Bros. Motors, Inc. v Blackburn, 112 N.Y.S.2d 501, 1952 N.Y. Misc. LEXIS 2664 (N.Y. County Ct.), aff'd, 280 A.D. 961, 117 N.Y.S.2d 668, 1952 N.Y. App. Div. LEXIS 4376 (N.Y. App. Div. 1952).

21. Administrative matters; disposition of fees, fines, etc.

A regulation by the commissioner of motor vehicles to the effect that the only records which could be inspected in the Albany office were those records which were not available in the offices of various county clerks, and also fixing the period of inspection at one hour per day, which period must be apportioned as between those applying for inspection was unreasonable and deprived public of the right to inspection which is given by this section. Page v Harnett, 223 N.Y.S. 622, 130 Misc. 239, 1927 N.Y. Misc. LEXIS 1000 (N.Y. Sup. Ct. 1927).

Statute providing that expenditures from appropriations for administration of driver improvement programs were to be reimbursed from receipts from fees established by Commissioner of Motor Vehicles meant that Commissioner was empowered to spend only so much of said appropriation for driver improvement programs as could be funded from fees which had already been, or could thereafter be, established by Commissioner pursuant to discretionary authority which was already his under existing statutes. Perloff v Melton, 89 Misc. 2d 103, 390 N.Y.S.2d 372, 1976 N.Y. Misc. LEXIS 2822 (N.Y. Sup. Ct. 1976), modified, 57 A.D.2d 491, 395 N.Y.S.2d 725, 1977 N.Y. App. Div. LEXIS 11402 (N.Y. App. Div. 3d Dep't 1977).

State cannot be held liable for negligently maintaining motor vehicle registration data within its computers for title information allegedly causing claimant insurer to sustain loss when police department released stolen car to former owner who had already been paid by insurer for loss of car, since maintaining and disseminating motor vehicle and operator's records involve exercise of power completely sovereign in nature and State has not

waived sovereign immunity for such act. Eagle Ins. Co. v State, 131 Misc. 2d 357, 500 N.Y.S.2d 478, 1986 N.Y. Misc. LEXIS 2395 (N.Y. Ct. Cl. 1986).

Plaintiff's complaint seeking declaratory and injunctive relief to prevent the Commissioner of Motor Vehicles to sell the lists of driver registrations to the highest bidder as an unconstitutional violation of his right of privacy was dismissed, since the information was not vital or intimate and was in the category of "public records" available to anyone upon demand. Lamont v Commissioner of Motor Vehicles, 269 F. Supp. 880, 1967 U.S. Dist. LEXIS 8802 (S.D.N.Y.), aff'd, 386 F.2d 449, 1967 U.S. App. LEXIS 4195 (2d Cir. N.Y. 1967).

Where there was substantial evidence to support an administrative determination under N.Y. Veh. & Traf. Law art. 2-A that the driver was speeding, driving an uninsured and unregistered vehicle, and had improper plates affixed to the vehicle, the driver's N.Y. C.P.L.R. art. 78 proceeding was dismissed. Stamos v Appeals Bd. of the N.Y. State DMV, 309 A.D.2d 572, 765 N.Y.S.2d 342, 2003 N.Y. App. Div. LEXIS 10506 (N.Y. App. Div. 1st Dep't), app. denied, 1 N.Y.3d 505, 775 N.Y.S.2d 782, 807 N.E.2d 895, 2003 N.Y. LEXIS 4218 (N.Y. 2003).

22. Miscellaneous matters

This section provides the only method for the legal transfer of an automobile from one person to another. Armstrong v Boomansour, 223 A.D. 511, 228 N.Y.S. 722, 1928 N.Y. App. Div. LEXIS 6253 (N.Y. App. Div. 1928), app. dismissed, 251 N.Y. 590, 168 N.E. 439, 251 N.Y. (N.Y.S.) 590, 1929 N.Y. LEXIS 851 (N.Y. 1929), aff'd, 252 N.Y. 590, 170 N.E. 155, 252 N.Y. (N.Y.S.) 590, 1929 N.Y. LEXIS 670 (N.Y. 1929).

The state is not liable to the purchaser of an automobile where a registration certificate was issued to the seller on presentation of forged certificate of sale forms stolen from a dealer for an automobile which was stolen after issuance of such certificate, in the absence of sufficient proof to establish the state's negligence; but, assuming that the state was negligent, the issuance of the registration certificate was not the proximate cause of claimant's loss, since such certificate was issued prior to the time that the car was stolen. Paglia v State, 278 A.D. 281, 105 N.Y.S.2d 597, 1951 N.Y. App. Div. LEXIS 3793 (N.Y. App. Div. 1951), aff'd, 303 N.Y. 821, 104 N.E.2d 369, 303 N.Y. (N.Y.S.) 821, 1952 N.Y. LEXIS 1304 (N.Y. 1952).

Where police officer had probable cause to justify arrest and detention of motorist because of motorist's failure to produce motor vehicle registration and operator's license, and motorist did not attempt to distinguish which items of his alleged damage were attributable to the valid arrest and which were attributable to an invalid arrest for reckless driving, motorist was not entitled to recover from city for false arrest or imprisonment. Burden v Niagara Falls, 44 A.D.2d 754, 352 N.Y.S.2d 42, 354 N.Y.S.2d 42, 1974 N.Y. App. Div. LEXIS 5283 (N.Y. App. Div. 4th Dep't 1974).

State was entitled to summary judgment in action to recover for injuries sustained by claimant in motor vehicle accident with driver of vehicle registered as farm vehicle, notwithstanding contention that state negligently issued farm registration for vehicle on registration application that was patently false and made solely to register personal passenger vehicle without purchasing liability insurance, since there was no special duty owed by state to claimant. Swift v State, 166 A.D.2d 833, 562 N.Y.S.2d 825, 1990 N.Y. App. Div. LEXIS 12794 (N.Y. App. Div. 3d Dep't 1990), app. denied, 77 N.Y.2d 806, 568 N.Y.S.2d 914, 571 N.E.2d 84, 1991 N.Y. LEXIS 558 (N.Y. 1991).

Plaintiff insurer was properly granted summary judgment declaring that defendant insurer had issued farmowner's insurance policy under which it must cover liability of defendant's insured and his employee arising out of ownership, use, and operation of pick-up truck that was involved in accident with vehicle driven by plaintiff's insured where truck was properly registered as farm vehicle under CLS Veh & Tr § 401(13), was used exclusively for farm purposes, and, at time of accident, was traveling along most direct route between 2 farms operated by insured; moreover, under policy, highway where accident occurred was part of "insured premises." Nationwide Mut. Ins. Co. v Erie & Niagara Ins. Ass'n, 249 A.D.2d 898, 672 N.Y.S.2d 596, 1998 N.Y. App. Div. LEXIS 4977 (N.Y. App. Div. 4th Dep't 1998).

Specific and particular authorization of local motor vehicle tax would have to be given effect in preference to general prohibition against local taxes, even if general prohibition were latest legislative expression, since the particular prevails over the general. McLean Trucking Co. v New York, 116 N.Y.S.2d 292, 202 Misc. 604, 1952 N.Y. Misc. LEXIS 1866 (N.Y. Sup. Ct. 1952).

The mere payment of registration fees pursuant to this section or the payment of a highway use tax pursuant to article 21 of the Tax Law had no effect whatsoever on the provisions of former § 14 of the Vehicle and Traffic Law. People v Rodenbach, 126 N.Y.S.2d 295, 204 Misc. 905, 1953 N.Y. Misc. LEXIS 2434 (N.Y. County Ct. 1953), aff'd, 307 N.Y. 614, 120 N.E.2d 826, 307 N.Y. (N.Y.S.) 614, 1954 N.Y. LEXIS 1383 (N.Y. 1954).

The defendant, charged with driving an unregistered motor vehicle, and who was induced to plead guilty by virtue of the contention by the state trooper that his 10-day temporary certificate issued on June the 3rd expired at midnight on June 12th, was entitled to have his judgment of conviction vacated, since permit did not expire until midnight of June 13th. People v Breckenridge, 16 Misc. 2d 704, 190 N.Y.S.2d 122, 1959 N.Y. Misc. LEXIS 3830 (N.Y. County Ct. 1959).

City ordinance regulating private car rental business, requiring certain equipment and periodic inspections, fell within the broad permissible area provided for under General City Law § 20, subd 13 which empowers cities to regulate and license occupations and businesses under the municipal police power, and said ordinance furthermore did not conflict with state law governing the operation and licensing of motor vehicles generally. Main Private Car Service, Inc. v Mayor of Yonkers, 71 Misc. 2d 417, 336 N.Y.S.2d 207, 1971 N.Y. Misc. LEXIS 1563 (N.Y. Sup. Ct.), aff'd, 37 A.D.2d 1044, 327 N.Y.S.2d 583, 1971 N.Y. App. Div. LEXIS 7147 (N.Y. App. Div. 2d Dep't 1971).

Even though property being transported originated outside New York, where property was being transported from one point within state to other points within the state in motor vehicle which was registered in another state but not registered in New York, there was a violation of statute prohibiting operation of unregistered vehicles on public highways. People v Schiff, 86 Misc. 2d 90, 381 N.Y.S.2d 957, 1976 N.Y. Misc. LEXIS 2399 (N.Y. Village Ct. 1976).

An arresting officer would be permitted to testify to an answer given to him by a person stopped for a routine motor vehicle check in connection with his request for the driver's vehicle documents, even though no Miranda warning had been given to the driver, where the officer had observed an expired inspection sticker on the vehicle's windshield thus constituting an articulable and reasonable suspicion that there was a violation of the Veh & Tr Law; Miranda, which does not apply to vehicle and traffic infractions since they are not crimes, would not protect against the use of physical evidence without first giving a warning, and a request for evidentiary material such as the driver's registration and insurance card did not call for any personal statement on the part of the driver. People v Burn, 113 Misc. 2d 481, 449 N.Y.S.2d 569, 1982 N.Y. Misc. LEXIS 3323 (N.Y. J. Ct. 1982).

Fact that Department of Motor Vehicles allowed defendant to register his pickup truck with passenger rather than commercial plates did not prevent his conviction for operating improperly registered vehicle in violation of CLS Veh & Tr § 401 since defendant was fully aware that vehicle was improperly registered, and registration was issued on basis of his misrepresentations on application form. People v Mulcahy, 149 Misc. 2d 419, 564 N.Y.S.2d 974, 1990 N.Y. Misc. LEXIS 657 (N.Y. City Ct. 1990).

CLS Penal § 450.10 covers key, registration, and insurance identification essential to operation of stolen motor vehicle pursuant to CLS Veh & Tr §§ 312 and 401; thus, police or district attorney were required to at least photocopy key, registration, and insurance identification obtained from defendant's pocket during search incident to his arrest for driving stolen vehicle, and to voucher such photocopies before any release to complainant, just as automobile itself had to be photographed before returning it to complainant. People v Blyden, 160 Misc. 2d 355, 608 N.Y.S.2d 1003, 1994 N.Y. Misc. LEXIS 53 (N.Y. Sup. Ct. 1994).

Information charging defendant with attempted illegal possession of vehicle identification number (VIN) was not fatally defec-

tive due to absence of owner's corroborating affidavit, on basis that information did not indicate that defendant lacked owner's permission or authority to possess VIN from car registered in owner's name; VINs are not property of vehicle owner, and thus owner does not have power to authorize anyone else to possess VIN from vehicle registered in his name. People v Codrington, 165 Misc. 2d 214 (N.Y. J. Ct. 1995).

Company's N.Y. C.P.L.R. art. 78 proceeding failed, as the administrative law judge's finding that the company violated N.Y. Veh. & Traf. Law § 401(7)(F)(b) was supported by substantial evidence, as the testimony of the traffic enforcement agent who issued the summons regarding the location of the weighing site and the agent's training, accompanied by certificates establishing the accuracy of the devices the agent used in weighing the company's vehicle, provided a sufficient basis for the determination of the administrative law judge. N.Y. Paving, Inc. v Martinez, 1 A.D.3d 518, 767 N.Y.S.2d 237, 2003 N.Y. App. Div. LEXIS 12077 (N.Y. App. Div. 2d Dep't 2003).

Accusatory instruments and supporting deposition charging defendant with operating an unregistered motor vehicle were deemed insufficient and were dismissed because they did not set forth the source of the officer's information. People v Singh, 50 Misc. 3d 656, 18 N.Y.S.3d 319, 2015 N.Y. Misc. LEXIS 3795 (N.Y. J. Ct. 2015).

Plaintiff's complaint seeking declaratory and injunctive relief to prevent the Commissioner of Motor Vehicles to sell the lists of driver registrations to the highest bidder as an unconstitutional violation of his right of privacy was dismissed, since the information was not vital or intimate and was in the category of "public records" available to anyone upon demand. Lamont v Commissioner of Motor Vehicles, 269 F. Supp. 880, 1967 U.S. Dist. LEXIS 8802 (S.D.N.Y.), aff'd, 386 F.2d 449, 1967 U.S. App. LEXIS 4195 (2d Cir. N.Y. 1967).

As required under N.Y. C.P.L.R. 7803, substantial evidence supported the administrative law judge's determination that the corporation violated N.Y. Veh. & Traf. Law § 401(7)(F)(b); this evidence included the uncontradicted testimony of the traffic enforcement agent concerning the condition of the roadway at the location of the weigh site, the manner in which the weighing of the vehicle was conducted, the agent's training, and the accuracy of the scales used. Quality Concrete of N.Y., Inc. v Martinez, 11 A.D.3d 697, 783 N.Y.S.2d 292, 2004 N.Y. App. Div. LEXIS 12484 (N.Y. App. Div. 2d Dep't 2004).

Agency Opinions

Analysis

1. Application to particular vehicles or persons
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1. Application to particular vehicles or persons

2. —Publicly owned vehicles

The statutory provision for free registration of motor vehicles owned or controlled by a county farm or home bureaus extends to cars owned and used in various branches of such county extension work. 1930 N.Y. Op. Att'y Gen. No. 179.

Where a sanitary district is established pursuant to L 1928 c 516 and amendments thereto, a motor vehicle purchased by such district and used for the purpose for which said district was established is not entitled to free registration under this section. 1932 N.Y. Op. Att'y Gen. No. 165.

Motor vehicles purchased by funds of a town but actually used by the town commission must be deemed owned by the commission and therefore exempt from registration fees. 1932 N.Y. Op. Att'y Gen. No. 174.

Among several exemptions from the payment of registration fees, this section exempts motor vehicles "owned or controlled by state." 1933 N.Y. Op. Att'y Gen. No. 100.

The Jones Beach Parkway Authority is exempt from registration fees upon automobiles used by it. 1933 N.Y. Op. Att'y Gen. No. 397.

The Civil Air Patrol is not an instrumentality or agency of the federal government. Automobiles owned by it are not exempt from registration fee requirements. 1957 NY Ops Atty Gen Apr 10.

3. —Diplomatic vehicles

The fee for registration of motor vehicles in this state is for regulation and for compensation for use of the highways, and a federal treaty, exempting consular officers from all taxation upon their persons or property, has no application thereto. 1929 N.Y. Op. Att'y Gen. No. 296.

Individuals accredited to the United Nations, who appear on the diplomatic immunity and privilege list of that organization as maintained by the Department of State of the United States, are not subject to the laws of this state as to registration of motor vehicles. Representatives to the United Nations having status equivalent to that of ambassadors are not required to obtain either operators' licenses or registrations for automobiles owned by them. 1949 NY Ops Atty Gen Oct 27.

The Commissioner of Motor Vehicles may not issue certificates of registration in name of Soviet Delegation to the UNO where applicant is not distinct, separate entity but name is merely appropriated by group of individuals. 1954 N.Y. Op. Att'y Gen. No. 215.

By virtue of "most favored nation" clsuse in Consular Convention with Italy and of provisions of Consular Conventions between United States and Costa Rica and United States and Mexico, certain members of staff of Italian Consulate General are exempt from payment of automobile registration fees, conditioned on reciprocity. 1954 N.Y. Op. Att'y Gen. No. 224.

4. —Non-resident owners

A non-resident owner of a motor vehicle registered in the State of his residence is not required to register the vehicle in this State under certain conditions. 1955 NY Ops Atty Gen 86 (informal).

5. —Tractors, cranes, and the like

Farm tractors and vehicles drawn by them need not be registered. 1962 NY Ops Atty Gen July 31.

6. —Native American reservations

Tribal Indians residing on a reservation must register their motor vehicles in accordance with this section in order to use them upon any public highway. 1939 N.Y. Op. Att'y Gen. No. 189, 1939 N.Y. AG LEXIS 160.

Motor vehicles of the suburban type, used for both passenger and delivery purposes, should be registered pursuant to this section as station wagons or suburban vehicles. 1955 NY Ops Atty Gen 109 (informal).

7. Production of license and registration --requirement generally

8. —Propriety of arrest, search, or seizure after stop

Police officers may impound vehicles being operated without licenses, registrations or insurance only in accordance with CLS Veh & Tr. 1987 N.Y. Op. Att'y Gen. No. 87-70.

9. —Evidence; presumptions

A charge of operating an unregistered vehicle may be dismissed when the defendant has rebutted the presumption set forth in Section 401(4) by producing his registration. 1971 NY Ops Atty Gen Jan 14.

10. Use of dealer plates

CLS Veh & Tr § 415 does not authorize use of dealer number plates on vehicles used to transport customers or pick up supplies; such use does not constitute "sale or demonstration" of vehicle or fall within other permitted uses under statute. 1997 NY Ops Atty Gen I 97-27.

11. Administrative matters; disposition of fees, fines, etc.

Fines, penalties and forfeitures collected by a local justice court for violations of sections 306, 401 and 402 of the Vehicle and Traffic Law should be reported to the Justice Court Fund as violations of those sections, even though parking tickets were used by police officers to cite the vehicles. 1981 Op St Compt File #81-85.

The expense incurred by the county clerk in mailing validated driver's licenses and registrations may not be passed on to the applicants. 1982 Op St Compt File #82-120.

12. Miscellaneous matters

The requirement as to exhibiting certain weight figures on specified trucks or trailors applies only to the owner thereof. This section may not be extended by implication to include an operator who is not an owner. 1953 N.Y. Op. Att'y Gen. No. 191.

Civil penalties and fines imposed for violations of the Vehicle and Traffic Law are not dischargeable in bankruptcy, except where provided for in a Chapter 13 plan and where the debtor completes payments under the plan. Where the debtor's driving or business privileges have been suspended or revoked prior to bankruptcy, the Commissioner of Motor Vehicles is authorized to continue to withhold such privileges after bankruptcy has been filed based upon the debtor's failure to pay such penalties or fines, except where dischargeable in a Chapter 13 case, or based upon the debtor's failure to appear in response to charges of parking or traffic violations. NY Ops Atty Gen 83-F19.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 121-a, 121-c, 205, 218, 226, 227, 301, 308. 318, 321, 376, 393, 400-a, 403-a, 404, 404-a-404-g, 415, 416, 428, 510, 514, 1164, 1192, 1193, 1229-c, 1630, 2101, 2257, 2261, 2281; CLS CPL § 420.35; CLS Tax §§ 282-a, 120.

"Fire vehicle" defined, § 115-a.

Exemption for members of Armed Forces and their dependents, § 251.

Fees for the registration of snowmobiles, § 2222.

Shipment of motor vehicles outside the continental United States, CLS Gen Bus Law § 398-a.

Payments to state treasurer; financial statements, CLS St Fin § 121.

Codes, Rules and Regulations:

Van pool registration. 15 NYCRR §§ 26.1 et seq.

County motor vehicle use taxes. 15 NYCRR §§ 29.1 et seq.

Special purpose commercial vehicles. 15 NYCRR §§ 105.1 et seq.

Department of motor vehicles: registration of pickup trucks. 15 NYCRR § 106.6.

Passenger and commercial registrations. 15 NYCRR §§ 106.1 et seq.

Department of motor vehicles: fleet registration. 15 NYCRR Part 30.

Texts: 6 Frumer & Biskind, Bender's New York Evidence —CPLR § 28.18.

§ 404-b. Distinctive plates for volunteer firefighters

1. Any member of any volunteer fire department or company in this state or the spouse of any such member shall, upon request, be issued a license plate bearing a Maltese cross and the letters "V.F.". If a distinctive plate is issued to any such member pursuant to this section, such a distinctive plate shall not be issued to the spouse of such member. Application for said license plate shall be filed with the commissioner in such form and detail as the commissioner shall prescribe, and shall be verified annually by the applicant.

2. The distinctive plate authorized in subdivision one of this section shall be issued upon proof, satisfactory to the commissioner, that the applicant or the spouse of the applicant is presently an active member of a volunteer fire department or company.

3. A distinctive plate issued pursuant to this section shall be issued in the same manner as other number plates upon payment of the regular registration fee prescribed by section four hundred one of this chapter and an initial one time service charge of fifteen dollars.

HISTORY:

Add, L 1983, ch 154, § 2; amd, L 1985, ch 822, § 1, eff Oct 1, 1985; L 1991, ch 277, § 1, eff Jan 10, 1992.

Editor's Notes: Laws 1991, ch 277, § 8, eff Jan 10, 1992, provides as follows:

§ 8. This act shall take effect on the one hundred eightieth day after it shall have become a law, provided however, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of the foregoing sections of this act on their effective date are authorized and directed to be made and completed on or before such effective date.

ARTICLE 16 Registration of Dealers and Transporters

HISTORY:

Add, L 1959, ch 775, eff Oct 1, 1960.

§ 417-c. Mandatory disclosures by sellers prior to resale.

1. Certificate of prior nonconformity by manufacturer or dealer. Upon the sale or transfer of title by a manufacturer, its agent or any dealer of any second-hand fire vehicle or ambulance, previously returned to a manufacturer or dealer for nonconformity to its warranty or after final determination, adjudication or settlement pursuant to section one hundred nine-d of the general municipal law, the manufacturer or dealer shall execute and deliver to the buyer an instrument in writing in a form prescribed by the commissioner setting forth the following information printed in conspicuous in ten point, all capital type: "IMPORTANT: THIS VEHICLE WAS RETURNED TO THE MANUFACTURER OR DEALER BECAUSE IT DID NOT CONFORM TO ITS WARRANTY AND THE DEFECT OR CONDITION WAS NOT FIXED WITHIN A REASONABLE TIME AS PROVIDED BY NEW YORK LAW." Such notice that a vehicle was returned to the manufacturer or dealer because it did not conform to its warranty shall also be conspicuously printed on the motor vehicle's certificate of title.

2. Violation. The failure of a manufacturer or dealer to deliver to the buyer the instrument required by this section or the delivery of an instrument containing false or misleading information shall constitute a violation of this section.

3. Private remedy. A consumer injured by a violation of this section may bring an action to recover damages. Judgment may be entered for three times the actual damages suffered by a consumer or one hundred dollars, whichever is greater. A court also may award reasonable attorneys' fees to a prevailing plaintiff buyer.

4. Action by the attorney general. a. Upon any violation of this section, an application may be made by the attorney general in the name of the people of the state of New York to a court or justice having jurisdiction to issue an injunction, and upon notice to the defendant of not less than five days, to enjoin and restrain the continuance of the violation. If it shall appear to the satisfaction of the court or justice that the defendant has violated this section, an injunction may be issued by the court or justice, enjoining and restraining any further violation, without requiring proof that any person has, in fact, been injured or damaged thereby. In any such proceeding, the court may award a sum not exceeding two thousand dollars against each defendant, whether or not costs have been awarded, and direct restitution.

b. Whenever the court shall determine that a violation of this section has occurred, it may impose a civil penalty of not more than one thousand dollars for each violation. In connection with an application made under this subdivision, the attorney general is authorized to take proof and to make a determination of the relevant facts and to issue subpoenas in accordance with the civil practice law and rules.

HISTORY:
L 2018, ch 387, § 2, effective January 1, 2019.

Editor's Notes Laws 2018, ch 387, § 3, eff January 1, 2019, provides:

§ 3. This act shall take effect on the first of January next succeeding the date on which it shall have become a law. Effective immediately, the attorney general is authorized and directed to promulgate any and all rules and regulations necessary to implement the provisions of this act on or before its effective date.

TITLE V Drivers' Licenses

Article 19. Licensing of Drivers

Section
501. Drivers' licenses and learners' permits
501-a. Definitions
502. Requirements for licensing.

HISTORY:
Add, L 1959, ch 775; amd, L 1972, ch 780, § 7, eff April 1, 1973.

ARTICLE 19 Licensing of Drivers

HISTORY:
Add, L 1972, ch 780, § 9, eff April 1, 1973.

§ 501. Drivers' licenses and learners' permits

1. The commissioner shall issue classified drivers' licenses as provided in this article. Any such license shall be valid only for the operation of the type of vehicles specified for each such class of license but shall not be valid for the operation of any type of vehicle for which an endorsement is required by this section or regulations promulgated hereunder unless the license contains such endorsement and shall be subject to any restrictions contained thereon.

2. Driver license classifications, endorsements and restrictions and exceptions.

(a) License classifications.

(i) Class A. Such license shall be valid to operate any motor vehicle or any combination of vehicles except it shall not be valid to operate a motorcycle other than a class B or C limited use motorcycle.

(ii) Class B. Such license shall be valid to operate any vehicle or combination of vehicles which may be operated with a class E license and shall be valid to operate any motor vehicle or any such vehicle, other than a tractor, towing a vehicle having a GVWR of not more than ten thousand pounds and shall be valid to operate any altered motor vehicle commonly referred to as a "stretch limousine" having a seating capacity of nine or more passengers including the driver except it shall not be valid to operate a motorcycle other than a class B or C limited use motorcycle.

(iii) Class C. Such license shall be valid to operate any vehicle or combination of vehicles which may be operated with a class E license and shall be valid to operate any motor vehicle with a GVWR of not more than twenty-six thousand pounds and any such vehicle towing another vehicle with a GVWR of not more than ten thousand pounds except it shall not be valid to operate a tractor or a motorcycle other than a class B or C limited use motorcycle.

(iv) Class D. Such license shall be valid to operate any passenger or limited use automobile or any truck with a GVWR of not more than twenty-six thousand pounds or any such vehicle towing a vehicle with a GVWR of not more than ten thousand pounds, or any such vehicle towing another vehicle with a GVWR of more than ten thousand pounds provided such combination of vehicles has a GCWR of not more than twenty-six thousand pounds, or any personal use vehicle with a GVWR of not more than twenty-six thousand pounds or any such vehicle towing a vehicle with a GVWR of not more than ten thousand pounds, except it shall not be valid to operate a tractor, a motorcycle other than a class B or C limited use motorcycle, a vehicle used to transport passengers for hire or for which a hazardous materials endorsement is required, or a vehicle defined as a bus in subdivision one of section five hundred nine-a of this title.

(v) Class E. Such license shall be valid to operate only vehicles which may be operated with a class D license, except that in addition it shall be valid to operate any such motor vehicle, other than a vehicle defined as a bus in subdivision one of section five hundred nine-a of this chapter, used to transport up to fourteen passengers for hire and other than an altered motor vehicle commonly referred to as a "stretch limousine" having a seating capacity of nine or more passengers including the driver.

(vi) Class DJ. Such license shall be valid to operate only vehicles which may be operated with a class D license by a person under eighteen years of age, except it shall not be valid to operate a motor vehicle

with an unladen weight or a GVWR of more than ten thousand pounds or any motor vehicle towing another vehicle with an unladen weight or GVWR of more than three thousand pounds. Such license shall automatically become a class D license when the holder becomes eighteen years of age.

(vii) Class M. Such license shall be valid to operate any motorcycle, or any motorcycle, other than a limited use motorcycle, towing a trailer.

(viii) Class MJ. Such license shall be valid to operate any motorcycle or limited use motorcycle by a person under eighteen years of age. Such license shall automatically become a class M license when the holder becomes eighteen years of age.

(b) Endorsements. The following endorsements shall be required to operate vehicles as set forth herein. In addition the commissioner by regulation may provide for further endorsements.

(i) T endorsement. Shall be required to operate double and triple trailers.

(ii) H endorsement. Shall be required to transport hazardous materials as defined in section one hundred three of the hazardous materials transportation act, public law 93-633, title I, when the vehicle transporting such materials is required to be placarded under the hazardous materials regulation, 49 CFR part 172, subpart F or is transporting any quantity of material listed as a select agent or toxin in 42 CFR part 73. An applicant for a commercial driver's license in this state who wishes to transport hazardous materials must obtain a New York state hazardous materials endorsement even if such applicant holds a valid hazardous materials endorsement issued by another state. A farm vehicle shall be exempt from the requirement for such endorsement when transporting hazardous materials within one hundred fifty miles of the person's farm. However, a separate non-commercial endorsement shall be required for such exempted transportation. In order to obtain such endorsement, the license holder must submit fingerprints for purposes of a criminal history record check pursuant to subdivision six of this section.

(iii) N endorsement. Shall be required to operate tank vehicles.

(iv) P endorsement. Shall be required to operate a bus as defined in sections one hundred four and five hundred nine-a of this chapter, any altered motor vehicle commonly referred to as a "stretch limousine" having a seating capacity of nine or more passengers including the driver or any motor vehicle with a gross vehicle weight or gross vehicle weight rating of more than twenty-six thousand pounds which is designed to transport passengers in commerce. For the purposes of this subparagraph the gross vehicle weight of a vehicle shall mean the actual weight of the vehicle and the load.

(v) X endorsement. Shall be an endorsement combining H and N endorsements.

(vi) [Repealed]

(vii) Personal use vehicle endorsement. Shall be required to operate a personal use vehicle or a combination of personal use vehicles which may not be operated with a class C, D or E license. The identification and scope of any such endorsement or endorsements shall be as prescribed by regulation of the commissioner, but no such endorsement shall permit the operation of a rental truck towing a vehicle with a GVWR of more than ten thousand pounds.

(viii) W endorsement. Shall be required to operate a tow truck.

(ix) Metal coil endorsement. Shall be required to operate any commercial motor vehicle, as defined in subdivision four of section five hundred one-a of this article, carrying metal coils. The identification and scope of such endorsement shall be as prescribed by regulation of the commissioner.

(x) S endorsement. Shall be required to operate a school bus, as defined in section one hundred forty-two of this chapter, which is designed or used to transport fifteen or more passengers.

(c) Restrictions. Notwithstanding the foregoing provisions of this subdivision, the operation of vehicles may be limited by a restriction or restrictions placed on a license. The following restrictions may be issued by the commissioner based upon the representative vehicle in which the road test was taken, or if the license is issued based on driving experience, the vehicle in which the experience was gained. In addition, the commissioner may by regulation provide for additional restrictions based upon other types of vehicles or other factors deemed appropriate by the commissioner.

(i) A restriction prohibiting the operation of a vehicle with air brakes.

(ii) A restriction limiting the operation of a combination of vehicles to truck-trailer combinations.

(iii) A restriction limiting operation to vehicles of not more than a specified GVWR.

(d) Exceptions. (i) Notwithstanding the foregoing provisions of this subdivision, a motor vehicle or combination of vehicles, other than a motorcycle, that is (A) a military vehicle operated by a member of the armed forces, or (B) a police vehicle or fire vehicle during its use in an emergency operation as defined in section one hundred fourteen-b of this chapter, or in the performance of official duties, or activities related to the execution of emergency governmental functions pursuant to section 383.3 (d)(2) of title 49 of the code of federal regulations, or (C) a vehicle owned and identified as being owned by the state or a political subdivision thereof or an ambulance service as defined in subdivision two of section three thousand one of the public health law or a voluntary ambulance service as defined in subdivision three of such section and used to provide emergency medical service as defined in section three thousand one of the public health law, or to perform official duties, or activities related to the execution of emergency governmental functions pursuant to section 383.3 (d)(2) of title 49 of the code of federal regulations, may be operated with any class

license other than a class DJ, M or MJ license. For the purposes of this paragraph the term "member of the armed forces" shall include active duty military personnel; members of the reserve components of the armed forces; members of the national guard on active duty, including personnel on full time active guard duty, personnel on part-time national guard training, and national guard military technicians (civilians who are required to wear military uniforms); and active duty United States coast guard personnel. The term shall not include United States reserve technicians. Notwithstanding the provisions of section one hundred fourteen-b of this chapter, for the purposes of this subparagraph, the term "emergency operation" shall include returning from emergency service.

(ii) Notwithstanding the foregoing provisions of this subdivision, a motor vehicle or combination of vehicles which is designed and primarily used for purposes other than the transportation of persons or property which is excluded from the definition of commercial motor vehicle pursuant to the provisions of subparagraph (iv) of paragraph (a) of subdivision four of section five hundred one-a of this chapter may be operated with any class license other than a class DJ, M or MJ license.

3. Restrictions on use of class DJ and class MJ licenses. A class DJ or class MJ license shall permit the holder to operate a vehicle in accordance with the following restrictions:

(a) in the counties of Nassau and Suffolk:

(i) for the purpose of driving to and from a state-approved cooperative work-study educational program, or to or from an approved program for credit in a post-secondary institution, or to or from a state-approved registered evening high school or while engaged in farm employment, or to or from an approved driver education course; or

(ii) from five o'clock in the morning to nine o'clock in the evening, to and from a place of business where the holder is regularly employed, or when accompanied by a duly licensed parent, guardian, person in a position of loco parentis, driver education teacher, or driving school instructor.

(b) in all other areas of the state, except for the city of New York:

(i) from five o'clock in the morning to nine o'clock in the evening; or

(ii) from nine o'clock in the evening to five o'clock in the morning when going to or from school, or to or from a place of business where the holder is employed on a regularly scheduled basis, or when accompanied by a duly licensed parent, guardian or one in a position of loco parentis to the licensee.

(c) in the city of New York, driving shall be prohibited.

(d) for the purpose of this subdivision, the term "school" shall mean instruction, education or training licensed or approved by a department or agency of the state or training conducted by the armed forces of the United States except it shall not include extra-curricular activities or social events for which scholastic credits are not given.

(e) any person operating a motor vehicle to or from school or to or from a place of business as authorized by this subdivision must possess documentation signed by such person's instructor or employer. The commissioner shall, by regulation, prescribe the form and content of such documentation.

4. Probationary licenses. Any driver's license, other than a class DJ and class MJ license, shall be considered probationary until the expiration of six months following the date of issuance thereof, and thereafter as provided in section five hundred ten-b of this title, but this subdivision shall not apply to renewals of a license, or, unless so provided by the commissioner, to a license for which a road test has been waived by the commissioner.

5. Learners' permits. (a) The commissioner shall issue learner's permits as provided in this article. Such permit shall be valid only

(i) for the operation of a motor vehicle of a type which could be operated by the holder of the class of license for which application is being made;

(ii) when the holder is under the immediate supervision and control of a person at least twenty-one years of age who holds a license valid in this state for the operation of the type of vehicle being operated; and

(iii) in accordance with any additional restrictions prescribed by the commissioner and noted on such permit.

(b) In addition to the restrictions contained in paragraph (a) of this subdivision, a learner's permit issued to a person applying for a class DJ or class MJ license shall be subject to the restrictions contained in section five hundred one-b of this article and shall not be valid for the operation of any motor vehicle:

(i) within the city of New York, except that the holder of such permit may operate a motor vehicle within the city of New York from five o'clock in the morning to nine o'clock in the evening when such person is under the immediate supervision and control of a person at least twenty-one years of age who is such holder's parent, guardian, person in a position of loco parentis, driver education teacher for the purpose of certification pursuant to section eight hundred six-a of the education law or driving school instructor for the purpose of certification pursuant to subdivision seven-a of section three hundred ninety-four of this chapter and such vehicle is equipped with dual controls as prescribed by the commissioner;

(ii) in the counties of Nassau and Suffolk, except that the holder of such permit may operate a motor vehicle within the counties of Nassau and Suffolk from five o'clock in the morning to nine o'clock in the evening when such person is under the immediate supervision and control of a person at least twenty-one years of age who is such holder's licensed parent, guardian, person in a position of loco par-

entis, driver education teacher for the purpose of certification pursuant to section eight hundred six-a of the education law, or driving school instructor for the purpose of certification pursuant to subdivision seven-a of section three hundred ninety-four of this chapter, or a person at least twenty-one years of age who holds a license valid in this state for the operation of the type of vehicle being operated, for the purpose of certification pursuant to subdivision two of section five hundred two of this article, and who has been designated by such holder's parent, guardian or person in a position of loco parentis to accompany such holder, as evidenced by a written statement to that effect;

(iii) from nine o'clock in the evening to five o'clock in the morning, unless the holder of such permit is under the immediate supervision and control of a person at least twenty-one years of age who is such holder's licensed parent, guardian, person in a position of loco parentis, driver education teacher for the purpose of certification pursuant to section eight hundred six-a of the education law, or driving school instructor for the purpose of certification pursuant to subdivision seven-a of section three hundred ninety-four of this chapter.

(c) The restrictions contained in paragraphs (a) and (b) of this subdivision shall apply to a learner's permit which has been issued to a person who has made application for a class M or class MJ license, except that the required supervising driver need exercise only general supervision and control over the learner as prescribed by regulation of the commissioner when the learner is operating a motorcycle, provided, however, a person who possesses a learner's permit and who has made application for a class M or class MJ license, shall not operate a motorcycle while there is another person on such motorcycle unless such other person possesses a valid class M license.

6. H endorsement criminal history record check. Upon receipt of an application and completion of all other requirements imposed by the commissioner for an H endorsement to permit the operator to transport hazardous materials as defined in section one hundred three of the hazardous materials transportation act, public law 93-633, title I, when the vehicle transporting such materials is required to be placarded under the hazardous materials regulation, 49 CFR part 172, subpart F, or is transporting any quantity of material listed as a select agent or toxin in 42 CFR part 73, the commissioner, subject to the rules and regulations of the division of criminal justice services, shall initiate a criminal history record check of the person making the application. The commissioner shall obtain from each applicant two sets of fingerprints and the division of criminal justice services processing fee imposed pursuant to subdivision eight-a of section eight hundred thirty-seven of the executive law and any fee imposed by the federal bureau of investigation. The commissioner shall promptly transmit such fingerprints and fees to the division of criminal justice services for processing. The federal bureau of investigation and the division of criminal justice services shall forward such criminal history record, if any, to the commissioner. All such criminal history records processed and sent pursuant to this section shall be confidential pursuant to the applicable federal and state laws, rules and regulations, and shall not be published or in any way disclosed to persons other than authorized personnel, unless otherwise authorized by law. No cause of action against the commissioner, the department or the division of criminal justice services for damages related to the dissemination of criminal history records pursuant to this section shall exist when the commissioner, department or division of criminal justice services has reasonably and in good faith relied upon the accuracy and completeness of criminal history information furnished to it by qualified agencies. The provision of such information by the division of criminal justice services shall be subject to the provisions of subdivision sixteen of section two hundred ninety-six of the executive law. The consideration of such criminal history record by the commissioner shall be subject to article twenty-three-A of the correction law. The commissioner shall review such criminal history record for a conviction within the previous ten years for: (i) any violent felony offense, as defined in section 70.02 of the penal law; or (ii) any felony defined in article one hundred twenty, one hundred twenty-five, one hundred thirty, one hundred thirty-five, one hundred forty, one hundred forty-five, one hundred fifty, one hundred fifty-five, one hundred sixty, one hundred seventy, one hundred seventy-five, two hundred, two hundred ten, two hundred twenty, two hundred twenty-one, two hundred forty, two hundred sixty-five, four hundred sixty, four hundred seventy, four hundred eighty-five, or four hundred ninety of the penal law or section fifty-three-e of the railroad law; or (iii) any offense in another jurisdiction which includes all of the essential elements of such offenses described in paragraphs (i) and (ii) of this subdivision and for which a sentence of imprisonment for more than one year was authorized in the other jurisdiction and is authorized in this state, regardless of whether such sentence was imposed; or any of the following federal offenses: improper transportation of a hazardous material, as defined in 49 U.S.C. 46312, conveying false information or threats, as defined in 49 U.S.C. 46507, espionage, as defined in 18 U.S.C. 793, 794 or 3077, sedition, as defined in 18 U.S.C. 2384, 2385 or section 4 of the subversive activities control act of 1950, treason, as defined in 18 U.S.C. 2381 or conspiracy or solicitation, as defined in 18 U.S.C. 371 or 373; or (iv) an attempt or conspiracy to commit any of the offenses specified in paragraphs (i), (ii), or (iii) of this subdivision. In calculating such ten year period, any period of time during which the person was incarcerated for any reason between the time of commission of the previous felony and the

time of commission of the present felony shall be excluded and such ten year period shall be extended by a period or periods equal to the time served under such incarceration. After receipt of a criminal history record from the division of criminal justice services, if any, and review of such record, the commissioner shall promptly notify the applicant whether he or she will be granted an H endorsement based upon the applicant's criminal history and promptly notify such applicant of the determination and the procedure for requesting a hearing pursuant to this subdivision. If the commissioner denies an applicant an H endorsement based either in whole or in part on such applicant's criminal record, the commissioner must notify such applicant of the basis for such denial, and afford such applicant notice and an opportunity to be heard and offer proof in opposition to such determination. If the applicant requests a hearing to contest the commissioner's determination, such hearing must be requested no later than thirty days after the applicant's receipt of the determination and must be scheduled by the commissioner within sixty days of such request. Upon request and pursuant to the rules and regulations of the division of criminal justice services, any applicant may obtain, review and seek correction of his or her criminal history record.

HISTORY:

Add, L 1972, ch 780, § 9, eff April 1, 1973; amd, L 1973, ch 77, § 1; L 1974, ch 102, § 1; L 1974, ch 380, § 1; L 1977, ch 931, §§ 5, 7, 8; L 1979, ch 193, § 1; L 1980, ch 382, §§ 1, 2; L 1983, ch 312, § 1; L 1983, ch 894, § 1; L 1983, ch 999, § 2; L 1984, ch 111, § 1; L 1985, ch 692, § 1, eff April 1, 1986; L 1986, ch 540, § 1; L 1987, ch 87, § 1; L 1989, ch 449, §§ 1, 2, eff Jan 1, 1990; L 1990, ch 84, § 1, eff April 13, 1990; L 1990, ch 173, §§ 35–38, eff Feb 19, 1991; L 1990, ch 696, § 3, eff Feb 19, 1990; L 1992, ch 84, § 1, eff May 10, 1992, deemed eff April 1, 1992; L 1994, ch 552, §§ 5, 6, eff Jan 22, 1995; L 1998, ch 382, § 1, eff July 14, 1998; L 2000, ch 604, § 2, eff Dec 27, 2000; L 2001, ch 260, § 2, eff March 4, 2002; L 2002, ch 63, § 1, eff May 7, 2002; L 2002, ch 644, §§ 2–6, eff Sept 1, 2003; L 2003, ch 62, §§ 1, 2 (Part I), eff May 15, 2003; L 2005, ch 60, §§ 3, 4, 6, 7 (Part E), eff April 12, 2005; L 2005, ch 60, § 5 (Part E), eff Sept 30, 2005; L 2005, ch 339, § 1, eff July 26, 2005; L 2009, ch 36, § 1, eff May 21, 2009; L 2009, ch 59, § 4 (Part K), eff April 7, 2009; L 2009, ch 403, § 1, eff Feb 22, 2010; L 2016, ch 58, §§ 1, 4 (Part E), effective July 11, 2016; L 2020, ch 6, §§ 3, 4, effective February 3, 2021.

Prior Law: Former § 501, add, L 1959, ch 775, with substance transferred from former §§ 20, 70(1)(2); amd, L 1959, ch 518, § 4, L 1960, ch 101, §§ 1, 2, L 1960, ch 185, §§ 1, 2, L 1960, ch 186, § 1, L 1960, ch 300 §§ 38–42, L 1960, ch 408, §§ 1, 2, L 1960, ch 603, § 1, L 1961, ch 260, § 1, L 1961, ch 364, § 1, L 1961, ch 487, § 1, L 1961, ch 821, §§ 1–4, L 1962, ch 310 § 466, L 1962, ch 930, § 4, L 1963, ch 204 § 44, L 1963, ch 265, §§ 1, 2, L 1963, ch 435, § 1, L 1963, ch 754, § 1, L 1963, ch 961, § 1, L 1964, ch 450, § 1, L 1964, ch 540, §§ 1, 2, L 1965, ch 49, § 1, L 1965, ch 229, § 1, L 1965, ch 393, § 1, L 1965, ch 525, § 1, L 1965, ch 650, § 2, L 1965, ch 968, § 2, L 1966, ch 174, § 1, L 1966, ch 185, § 1, L 1966, ch 229, § 1, L 1966, ch 703, § 1, L 1967, ch 464, § 1, L 1967, ch 557, § 1, L 1967, ch 637, § 1, L 1968, ch 79, § 1, L 1968, ch 80, § 1, L 1968, ch 104, § 1, L 1968, ch 262, § 1, L 1968, ch 295, § 1, L 1968, ch 575, §§ 5, 6, L 1968, ch 784, § 1, L 1969, ch 46, § 1, L 1969, ch 86, § 1, L 1969, ch 147, §§ 1–3, L 1969, ch 445, § 1, 2, L 1969, ch 533, § 1, L 1969, ch 594, §§ 1, 2, L 1970, ch 252, §§ 1, 2, L 1970, ch 679, § 4, L 1971, ch 274, § 1, L 1971, ch 292, § 1; repealed, L 1972, ch 780, § 9; amd, L 1972, ch 99, §§ 1, 2, eff April 1, 1973. The amendments made by the 1972 act were repealed by L 1973, ch 168, §§ 1, 2, eff April 1, 1973.

Editor's Notes: Laws 1983, ch 999, § 5, provides as follows:

§ 5. This act shall take effect immediately, provided, however that the provisions of this act shall be deemed to have been in full force and effect on and after September first, nineteen hundred eighty-three and provided further, however, that the provisions of this act shall only be applicable to persons who attain the age of sixteen on or after January first, nineteen hundred eighty-four.

Laws 1989, ch 449, § 4, eff Jan 1, 1990, provides as follows:

§ 4. This act shall take effect January 1, 1990, provided, however, that the provisions of section one of this act shall not apply to any license issued prior to such date and the provisions of section two of this act shall not apply to any learner's permit issued prior to such date; and provided further, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of the foregoing sections of this act on their effective date are authorized and directed to be made and completed on or before such effective date.

Laws 1994, ch 552, § 12, eff Jan 22, 1995, provides as follows:

§ 12. This act shall take effect on the one hundred eightieth day after it shall have become a law and shall apply to applications for new registrations and renewals of existing registrations submitted on and after such date.

Laws 2000, ch 604, § 3, eff Dec 27, 2000, provides as follows:

§ 3. This act shall take effect immediately and shall apply to violations occurring on or after such effective date.

Laws 2001, ch 206, § 3, eff Sept 5, 2002, deemed eff on and after Dec 27, 2000, provides as follows:

§ 3. This act shall take effect immediately, and shall be deemed to have been in full force and effect on and after December 27, 2000, except that section two of this act shall apply only to applications for original licenses and renewals of existing licenses made on or after June 1, 2002, except that all existing license holders must obtain the endorsement no later than June 1, 2006. (Amd, L 2002, ch 63, § 2, eff May 7, 2002, deemed eff on and after Dec 27, 2000.).

Laws 2002, ch 63, § 3, eff May 7, 2002, deemed eff on and after Dec 27, 2000, provides as follows:

§ 3. This act shall take effect immediately, except that the provisions of section one of this act shall apply in accordance with the provisions of section 3 of chapter 260 of the laws of 2001, as amended by section two of this act.

Laws 2005, ch 60, § 21 (Part E), eff April 12, 2005, provides as follows:

§ 21. This act shall take effect immediately and shall apply to violations committed on and after such date; provided, however, that section twenty of this act shall be deemed to have been in full force and effect on and after April 1, 2005; provided further that sections two, five, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen and nineteen of this act shall take effect September 30, 2005; and provided further that the amendments to subdivision 5 of section 530 of the vehicle and traffic law made by section fifteen of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith.

Laws 2005, ch 223, § 1, eff Nov 1, 2005, provides as follows:

Section 1. Short title. This act shall be known and may be cited as the "work zone safety act of 2005".

Laws 2009, ch 403, § 14(a), eff Aug 26, 2009, provides as follows:

§ 14. This act shall take effect immediately; provided, however, that:

(a) sections one, five, six, eight, nine and ten and the amendments to paragraph (d) of subdivision 1 of section 501-b of the vehicle and traffic law made by section two of this

act shall take effect on the one hundred eightieth day after it shall have become a law and shall apply to licenses issued on or after such effective date. Any license issued pursuant to section 503-a of the vehicle and traffic law prior to such effective date shall remain in effect until the expiration date of such license; (Amd, L 2010, ch 215, § 3, eff July 15, 2010.)

Laws 2020, ch 6, § 5, eff February 3, 2021, provides:

§ 5. This act shall take effect one year after it shall have become a law. Effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized to be made and completed on or before such effective date.

Amendment Notes The 2016 amendment by ch 58, §§ 1, 4 (Part E), in 2(b)(iv), added "or any motor vehicle with a gross vehicle weight or gross vehicle weight rating of more than twenty-six thousand pounds which is designed to transport passengers in commerce" in the first sentence and added the second sentence and repealed 2(b)(vi), which read: "Farm endorsement. Shall be required to operate a farm vehicle or a combination of farm vehicles which may not be operated with a class C, D or E license. The identification and scope of any such endorsement or endorsements shall be as prescribed by regulation of the commissioner. Such identification and scope shall, at a minimum, include a distinction between the operation of a farm vehicle having a GVWR of more than twenty-six thousand pounds within one hundred fifty miles of the person's farm and the operation of a combination of farm vehicles having a GVWR of more than twenty-six thousand pounds within one hundred fifty miles of the person's farm."

The 2020 amendment by ch 6, §§ 3, 4, added "and shall be valid to operate any altered motor vehicle commonly referred to as a 'stretch limousine' having a seating capacity of nine or more passengers including the driver" in 2(a)(ii); added "and other than an altered motor vehicle commonly referred to as a 'stretch limousine' having a seating capacity of nine or more passengers including the driver" in 2(a)(v); and added "any altered motor vehicle commonly referred to as a 'stretch limousine' having a seating capacity of nine or more passengers including the driver" in 2(b)(iv).

Repeal Note: [1973, ch 168] Paragraph a of subdivision 1 of § 501 of the Vehicle and Traffic Law and subdivision 5 of § 501 of such law as amended by Chapter 99 of the Laws of 1972 reduced the waiting period before which a court could send a notice of non-appearance in response to a moving traffic ticket from six to three months. These sections were repealed by Chapter 780 of the Laws of 1972. The reduced time period contained in the sections repealed are reenacted in the appropriate sections added by Chapter 780. The repeal of the two sections was intended to clarify the intended results of the two separate acts enacted at the 1972 Legislative Session.

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1. In general; purpose

Manifest purpose of Vehicle and Traffic Law is to extend liability of owner of automobile for injuries caused by persons operating automobile with owner's permission regardless of operator's competency or whether operator is authorized by law to operate automobiles on highway. Devitt v Continental Casualty Co., 245 A.D. 115, 281 N.Y.S. 336, 1935 N.Y. App. Div. LEXIS 10241 (N.Y. App. Div. 1935), rev'd, 269 N.Y. 474, 199 N.E. 765, 269 N.Y. (N.Y.S.) 474, 1936 N.Y. LEXIS 1413 (N.Y. 1936).

A license to operate an automobile is something of real value and may not be revoked arbitrarily or taken away capriciously. Application of Wignall, 278 A.D. 28, 103 N.Y.S.2d 7, 1951 N.Y. App. Div. LEXIS 3728 (N.Y. App. Div. 1951), aff'd, 303 N.Y. 435, 103 N.E.2d 728, 303 N.Y. (N.Y.S.) 435, 1952 N.Y. LEXIS 806 (N.Y. 1952).

A rule of the police commission, which attempts to prohibit a certain class of persons holding chauffeur's licenses from using such license, is unenforceable since such rule contravenes the underlying purpose of former § 10 to establish a uniform system of operation and use of motor vehicles. Boord v Wallander, 89 N.Y.S.2d 796, 195 Misc. 557, 1949 N.Y. Misc. LEXIS 2343 (N.Y. Sup. Ct. 1949), modified, 277 A.D. 253, 98 N.Y.S.2d 1, 1950 N.Y. App. Div. LEXIS 3035 (N.Y. App. Div. 1950).

It does not follow, from the fact that this statute requires an applicant for operator's license to furnish such proof of fitness "as the Commissioner shall in his discretion determine" that a driver's license is nothing but a privilege solely within the discretion of the Commissioner to grant or withhold. Davis v Hults, 24 Misc. 2d 954, 204 N.Y.S.2d 865, 1960 N.Y. Misc. LEXIS 2738 (N.Y. Sup. Ct. 1960).

A roadway over lands in an Indian reservation must be regarded as a private roadway under Art. I § 13 of the Constitution, and a member of the tribe driving over such roads is entitled to operate a motor vehicle over them without a driver's license. People v Williams, 43 Misc. 2d 790, 252 N.Y.S.2d 347, 1964 N.Y. Misc. LEXIS 1538 (N.Y. County Ct. 1964).

One of the objects of this section is to protect users of highways from the inexperience and immaturity of those under 18 years of age. Plunkett v Heath, 1 N.Y.S.2d 778, 1938 N.Y. Misc. LEXIS 1226 (N.Y. City Ct. 1938).

2. Construction

The amendment of the former analogous section in 1924 merely relieved the person who was legally authorized to drive an automobile on July 1, 1924, from the duty of procuring an operator's license before Oct. 1, 1924, but did not authorize any person, without regard to age, to drive an automobile during that period. Wagoner v Fidelity & Casualty Co., 215 A.D. 170, 213 N.Y.S. 188, 1926 N.Y. App. Div. LEXIS 10930 (N.Y. App. Div. 1926), aff'd, 253 N.Y. 608, 171 N.E. 803, 253 N.Y. (N.Y.S.) 608, 1930 N.Y. LEXIS 979 (N.Y. 1930).

Violations of Vehicle and Traffic Law, though classed as misdemeanors and punishable by imprisonment in penitentiary, should be punished, in cities of first class as well as in State at large, as specifically provided in Vehicle and Traffic Law, and with respect to such violations it was not intended that offenders should be sentenced to indeterminate terms. People v Guariglia, 13 A.D.2d 809, 216 N.Y.S.2d 22, 1961 N.Y. App. Div. LEXIS 10907 (N.Y. App. Div. 2d Dep't 1961).

Subdivision 7 of this section, providing that no person shall at the same time hold more than one unexpired driver's license issued by the Commissioner "pursuant to this section," does not make it illegal for a motorist to hold an unexpired license issued by another state as well as an unexpired New York driver's license. Snyder v State, 20 A.D.2d 827, 247 N.Y.S.2d 757, 1964 N.Y. App. Div. LEXIS 4209 (N.Y. App. Div. 3d Dep't 1964).

The word "business" as used in this section, subd. 1 means the interest, concern or duty of a parent or guardian, and is not

limited to productive trade, profession or occupation. People v Gillette, 16 N.Y.S.2d 361, 172 Misc. 847, 1939 N.Y. Misc. LEXIS 2542 (N.Y. City Ct. 1939).

3. Constitutionality

One-year delay between defendant's arraignment on attempted murder and other charges and his subsequent indictment on such charges did not result in violation of constitutional and statutory rights to speedy trial where, although delay occurred because of clerical error in district attorney's office, where papers on defendant's case were mislaid, charges were serious, defendant was incarcerated for only eight days, and there was no indication that defense had been impaired by delay. People v Taranovich, 37 N.Y.2d 442, 373 N.Y.S.2d 79, 335 N.E.2d 303, 1975 N.Y. LEXIS 2044 (N.Y. 1975).

Vehicle and Traffic Law § 501, subd 1, ¶ b, is constitutional insofar as it provides that junior-operators' licenses do not entitle the licensees thereunder to operate motor vehicles in Nassau County. Pratt v Tofany, 37 A.D.2d 854, 326 N.Y.S.2d 257, 1971 N.Y. App. Div. LEXIS 3290 (N.Y. App. Div. 2d Dep't 1971).

The restriction in former Vehicle and Traffic Law § 501, subd 1(b), prohibiting a junior operator from operating an automobile within Nassau County, except for the purpose of driving to and from a state approved co-operative work-study educational program does not violate the equal protection clause of the New York State Constitution. Pratt v Tofany, 37 A.D.2d 854, 326 N.Y.S.2d 257, 1971 N.Y. App. Div. LEXIS 3290 (N.Y. App. Div. 2d Dep't 1971).

While constitutionality of subd. 8 of this section has admittedly been upheld as against the contention that due process requires a hearing before revocation, its constitutionality has been questioned if made to apply to a motor vehicle operator without distinction as to whether or not he was at fault in any of the three accidents within 18 months on the basis of which his license is suspended. Devine v Hults, 25 Misc. 2d 59, 202 N.Y.S.2d 886, 1960 N.Y. Misc. LEXIS 2896 (N.Y. Sup. Ct.), rev'd, 12 A.D.2d 624, 208 N.Y.S.2d 227, 1960 N.Y. App. Div. LEXIS 6697 (N.Y. App. Div. 2d Dep't 1960).

Statute insofar as it restricts use of junior operators' licenses in Nassau county is unreasonable and unconstitutional. People v Joy, 50 Misc. 2d 690, 271 N.Y.S.2d 15, 1966 N.Y. Misc. LEXIS 1750 (N.Y. Dist. Ct. 1966).

4. Right to counsel

Where a motorist was not informed of his right to counsel but was convicted of operating a motor vehicle without being duly licensed, the judgment of conviction was reversed and a new trial ordered. People v Warcup, 285 A.D. 1077, 139 N.Y.S.2d 721, 1955 N.Y. App. Div. LEXIS 6711 (N.Y. App. Div. 1955).

The right to drive an automobile is not an inherent or acquired property right but a license granted to an individual which can be revoked by proper legislation. An arbitrary procedure is not to be countenanced but inasmuch as a traffic infraction is not for any purpose a penal or criminal act, it is not necessary to advise the accused of his rights to counsel if he is advised of the penalty and given a sufficient opportunity to defend himself. People ex rel. Joyce v Hogenson, 117 N.Y.S.2d 260, 1952 N.Y. Misc. LEXIS 2015 (N.Y. Magis. Ct. 1952).

5. Violation as negligence

No presumption of negligence or contributory negligence arose from the fact that the driver of an automobile had no operator's license. Adams v Surlock, 286 N.Y. 667, 36 N.E.2d 699, 286 N.Y. (N.Y.S.) 667, 1941 N.Y. LEXIS 2210 (N.Y. 1941).

A violation of this section is not evidence of negligence nor does it establish a prima facie case against the violator. Phass v MacClenathen, 274 A.D. 535, 85 N.Y.S.2d 643, 1948 N.Y. App. Div. LEXIS 3123 (N.Y. App. Div. 1948).

An error in charging that an unlicensed operator is prima facie guilty of negligence in the operation of his automobile is not cured by additional statements to the effect that he might rebut the presumption. Phass v MacClenathen, 274 A.D. 535, 85 N.Y.S.2d 643, 1948 N.Y. App. Div. LEXIS 3123 (N.Y. App. Div. 1948).

The failure to carry a driver's license by a licensed driver at the time of an accident does not constitute contributory negligence as a matter of law. Balterman v Flores, 103 N.Y.S.2d 815, 199 Misc. 830, 1951 N.Y. Misc. LEXIS 1679 (N.Y. App. Term 1951).

6. Insurance provisions

A clause in a policy of liability insurance excluding insurer from obligation where the liability of insured arises from injuries caused by an automobile owned by him while being driven "by any person under age fixed by law" does not constitute a defense in an action upon the policy where the facts are undisputed that the accident occurred after midnight, while the automobile was being driven, with permission of insured, by his son, a boy of seventeen years, who possessed a junior operator's license. The fact that the boy, in driving the automobile at the time of the accident, was violating this section does not relieve insurer from liability. The clause in policy relates solely to the question of age, not to violations of traffic law, and the boy was old enough lawfully to drive the automobile. S. & E. Motor Hire Corp. v New York Indem. Co., 255 N.Y. 69, 174 N.E. 65, 255 N.Y. (N.Y.S.) 69, 1930 N.Y. LEXIS 710 (N.Y. 1930).

A clause in a policy of liability insurance excluding the insurer from an obligation where liability arises from injuries caused by an automobile owned by him while being driven "by any person under age limit fixed by law" constitutes sufficient defense in an action on the policy where it appears that the accident occurred while the automobile was being driven, in the presence of the insured, by his son, a boy under the age of sixteen years. Devitt v Continental Casualty Co., 269 N.Y. 474, 199 N.E. 765, 269 N.Y. (N.Y.S.) 474, 1936 N.Y. LEXIS 1413 (N.Y. 1936).

A holder of a junior operator's license could not be considered as outside the coverage of his mother's liability insurance policy on her car because he was operating it during hours of darkness while unaccompanied by a licensed operator over 18 where it appeared that his operator's license was not revoked or suspended after a hearing at which there was unequivocal testimony that the accident in which he was involved occurred during twilight. Motor Vehicle Acci. Indemnification Corp. v Carilli, 39 Misc. 2d 335, 240 N.Y.S.2d 666, 1963 N.Y. Misc. LEXIS 1994 (N.Y. Sup. Ct. 1963).

7. Learner's permit

An ordinance by the Westchester County Park Commission which prohibited the use of drives and parkways by learners and their instructors was a reasonable enactment. The ordinance in no way encroached upon the power to license, which belonged exclusively to the Commissioner of Motor Vehicles, since the Legislature specifically provided that persons driving with learners' permits and their licensed instructors shall be liable for any breach of the Vehicle & Traffic Law or of any local ordinance, rule, or regulation. People v Alexander, 7 N.Y.2d 39, 194 N.Y.S.2d 495, 163 N.E.2d 323, 1959 N.Y. LEXIS 963 (N.Y. 1959).

In view of statute to effect that persons driving with learner's permits and their licensed instructors shall be liable for any breach of Vehicle and Traffic Law or of any local ordinance, rule or regulation, power of Westchester County Park Commission to restrict use of its parkways by learners in no way encroached upon power to license which belonged exclusively to Commissioner of Motor Vehicles. People v Alexander, 7 N.Y.2d 39, 194 N.Y.S.2d 495, 163 N.E.2d 323, 1959 N.Y. LEXIS 963 (N.Y. 1959).

In view of traffic conditions on Saw Mill River Parkway in Village of Pleasantville, ordinance of Westchester County Park Commission prohibiting person having automobile under his control from permitting unlicensed operator to drive it on parkway and prohibiting person to receive instructions to operate, under a learner's permit, a motor vehicle on parkway in village, was not unreasonable and Park Commission had authority to enact such ordinance. People v Alexander, 7 N.Y.2d 39, 194 N.Y.S.2d 495, 163 N.E.2d 323, 1959 N.Y. LEXIS 963 (N.Y. 1959).

In an action by a three-year old grandson of defendant for injuries suffered while a passenger with his mother in an automobile driven by defendant under a learner's permit, the negligence of the mother in connection with the operation of the automobile is not imputable to plaintiff and the operation of the automobile under a learner's permit is immaterial to case. Spaulding v Mineah, 239 A.D. 460, 268 N.Y.S. 772, 1933 N.Y. App. Div. LEXIS 8067 (N.Y. App. Div. 1933), aff'd, 264 N.Y. 589, 191

N.E. 578, 264 N.Y. (N.Y.S.) 589, 1934 N.Y. LEXIS 1615 (N.Y. 1934).

Licensed driver is not in same position with respect to learner-driver as passenger, in view of statute placing control of learner-driver in licensed driver, and if learner-driver is negligent, it is duty of licensed driver to take necessary measures to have learner-driver cease and desist his negligent conduct. Lazofsky v New York, 22 A.D.2d 858, 254 N.Y.S.2d 349, 1964 N.Y. App. Div. LEXIS 2656 (N.Y. App. Div. 1st Dep't 1964).

Traffic Regulations of the City of New York requiring a motor vehicle operator, holding a learner's permit, to operate a vehicle only on streets designated by the Police Commissioner of the city does not violate this section. Schwartzberg v Wallander, 73 N.Y.S.2d 675, 190 Misc. 236, 1947 N.Y. Misc. LEXIS 3102 (N.Y. Sup. Ct. 1947).

Defendant, an unlicensed motorcycle operator with a learner's permit who was doing carpentry work with his alleged supervisor when he rode to a shopping center an eighth of a mile away to get some food and got into an accident, may lawfully be convicted of operating a motorcyle without a license while unsupervised (Vehicle and Traffic Law, § 509) since his supervisor could not have been exercising the required "general supervision and control over the learner" (Vehicle and Traffic Law, § 501, subd 5, par [a]) while he was located in a house an eighth of a mile away from the accident; had there been testimony that the supervisor was outside the house where they were doing the carpentry work and that defendant was within his sight at all times the outcome might be different but it is inconceivable that the Department of Motor Vehicles would ever authorize anyone to supervise a learner from a distance of an eighth of a mile away when the alleged supervisor is in a house and could not possibly see the operator of the motorcycle. People v Tropiano, 103 Misc. 2d 940, 427 N.Y.S.2d 155, 1980 N.Y. Misc. LEXIS 2227 (N.Y. Village Ct. 1980).

A designation of "learner's streets" and a prohibition against learner licensees operating motor vehicles on streets not so designated is not a valid regulation of traffic. People v Velich, 70 N.Y.S.2d 49, 1947 N.Y. Misc. LEXIS 2339 (N.Y. Magis. Ct. 1947).

8. Driver's test

A test may be taken in an automobile owned and furnished by an automobile driving school. Leder v Harnett, 252 N.Y. 619, 170 N.E. 166, 252 N.Y. (N.Y.S.) 619, 1930 N.Y. LEXIS 691 (N.Y. 1930).

Where a bus driver's driving license was revoked for being involved in three accidents within an 18-month period and he was required to submit to re-examination under subd. 8 of this section, the evidence was insufficient to support a finding that the examiner giving him a road test in connection with the re-examination acted arbitrarily and capriciously in connection with administering the road test and refusing to pass petitioner where the only evidence of antagonism was testimony that the examiner had a hostile tone of voice. Devine v Hults, 12 A.D.2d 624, 208 N.Y.S.2d 227, 1960 N.Y. App. Div. LEXIS 6697 (N.Y. App. Div. 2d Dep't 1960).

Although the holder of a driver's license has driven automobiles for many years, without being charged with any traffic infraction, where, following involvement in a minor traffic accident, and at age 83, he is required to take a road test as the result of a hearing held by the Commissioner of Motor Vehicles, fails to pass that test, and his license is revoked, a court can accord him no relief unless satisfied from the record that the action of the Commissioner was unreasonable, arbitrary, or capricious. Harris v Hults, 23 Misc. 2d 1086, 206 N.Y.S.2d 722, 1960 N.Y. Misc. LEXIS 2632 (N.Y. Sup. Ct. 1960).

Where petitioner, aged 83, had his driver's license revoked under subd. 8 of this section after being involved in a collision with an unattended parked truck resulting in damage exceeding $100, and thereafter was twice, upon his request, given a road test to determine his qualifications, but failed both tests, so that his license stood revoked, the determinations resulting from the road test could not be upset as arbitrary or malicious merely because the petitioner had a clear record as a driver up to the time of his first accident. Application of Sidney, 24 Misc. 2d 335, 208 N.Y.S.2d 291, 1960 N.Y. Misc. LEXIS 2900 (N.Y. Sup. Ct. 1960), aff'd, 13 A.D.2d 613, 214 N.Y.S.2d 671, 1961 N.Y. App. Div. LEXIS 11735 (N.Y. App. Div. 4th Dep't 1961).

9. Junior operator --generally

A clause in a policy of liability insurance excluding insurer from obligation where the liability of insured arises from injuries caused by an automobile owned by him while being driven "by any person under age fixed by law" does not constitute a defense in an action upon the policy where the facts are undisputed that the accident occurred after midnight, while the automobile was being driven, with permission of insured, by his son, a boy of seventeen years, who possessed a junior operator's license. The fact that the boy, in driving the automobile at the time of the accident, was violating this section does not relieve insurer from liability. The clause in policy relates solely to the question of age, not to violations of traffic law, and the boy was old enough lawfully to drive the automobile. S. & E. Motor Hire Corp. v New York Indem. Co., 255 N.Y. 69, 174 N.E. 65, 255 N.Y. (N.Y.S.) 69, 1930 N.Y. LEXIS 710 (N.Y. 1930).

Junior operator was properly convicted of a misdemeanor under this section where he drove an automobile from a basketball game at night, unaccompanied by a driver over 18. People v Harms, 308 N.Y. 35, 123 N.E.2d 627, 308 N.Y. (N.Y.S.) 35, 1954 N.Y. LEXIS 940 (N.Y. 1954).

Task of court in construing statute prohibiting holders of "junior operator's" licenses from driving automobile after dark unaccompanied by senior operator, except going to and from school, is to discover legislative intent, considering, among other things, that such statute is a public safety law and part of effort to reduce number of accidents. People v Harms, 308 N.Y. 35, 123 N.E.2d 627, 308 N.Y. (N.Y.S.) 35, 1954 N.Y. LEXIS 940 (N.Y. 1954).

Owner was absolved from liability for injuries resulting from the negligence of her 17-year-old grandson in operating her car in 2 a.m. accident, where she had told him to drive her car to get a flat tire fixed and to be home before dark, and her grandson's junior-operator's license did not permit his driving a car during hours of darkness except going to and from school. Rachon v Cheuvant, 37 A.D.2d 911, 325 N.Y.S.2d 452, 1971 N.Y. App. Div. LEXIS 3151 (N.Y. App. Div. 4th Dep't 1971).

The holder of a junior operator's license was properly operating a family vehicle under this section sub 1 ¶ b of the Vehicle and Traffic Law prior to the 1949 amendment thereto, when he is returning from arranging a summer job for himself, and his conviction of violating this section sub 4 of this law must be reversed. People v Gray, 77 N.Y.S.2d 805, 191 Misc. 541, 1948 N.Y. Misc. LEXIS 2197 (N.Y. County Ct. 1948).

Purpose of junior license would normally be to permit a young person to run errands for his parents, to drive to beach on a summer day and to drive to school or to work. People v Joy, 50 Misc. 2d 690, 271 N.Y.S.2d 15, 1966 N.Y. Misc. LEXIS 1750 (N.Y. Dist. Ct. 1966).

Where original junior license reciting statutory restriction that operator should not drive during hours of darkness unaccompanied by parent or one in loco parentis was lost and duplicate license failed to contain such a restriction, absence of notations of conditions did not relieve minor driver from duty of complying with statutory restrictions. People v Erickson, 51 Misc. 2d 149, 273 N.Y.S.2d 7, 1966 N.Y. Misc. LEXIS 1658 (N.Y. City Ct. 1966).

10. —School exception

Under statute prohibiting holders of "junior operator's" licenses from operating automobile after dark except in going to and from school, phrase "to and from school" means regular school sessions, and does not authorize such license holders to drive to and from school to take part in, or attend, extra-curricular activities of school held at night, and high school student who held junior operator's license was properly convicted for driving unaccompanied to and from high school basketball game at night. People v Harms, 308 N.Y. 35, 123 N.E.2d 627, 308 N.Y. (N.Y.S.) 35, 1954 N.Y. LEXIS 940 (N.Y. 1954).

11. —Work or parent's business exception

An information charging defendant with unlawfully operating a motor vehicle without being duly licensed was dismissed and defendant discharged where it appeared that a junior license had

been issued to defendant and that he was operating his father's automobile with his permission in the "usual and ordinary pursuit of the business of the parent," within the meaning of this section, subd. 1. People v Gillette, 16 N.Y.S.2d 361, 172 Misc. 847, 1939 N.Y. Misc. LEXIS 2542 (N.Y. City Ct. 1939).

Failure of defendant, who had a class 6 license and who was stopped while driving at 1:30 in the morning, to produce a letter indicating that he was driving to work demonstrated that defendant was driving in noncompliance with the law. People v Masciarelli, 87 Misc. 2d 3, 384 N.Y.S.2d 980, 1976 N.Y. Misc. LEXIS 2140 (N.Y. City Ct. 1976).

12. —Night driving restriction

A holder of a junior operator's license could not be considered as outside the coverage of his mother's liability insurance policy on her car because he was operating it during hours of darkness while unaccompanied by a licensed operator over 18 where it appeared that his operator's license was not revoked or suspended after a hearing at which there was unequivocal testimony that the accident in which he was involved occurred during twilight. Motor Vehicle Acci. Indemnification Corp. v Carilli, 39 Misc. 2d 335, 240 N.Y.S.2d 666, 1963 N.Y. Misc. LEXIS 1994 (N.Y. Sup. Ct. 1963).

Where original junior license reciting statutory restriction that operator should not drive during hours of darkness unaccompanied by parent or one in loco parentis was lost and duplicate license failed to contain such a restriction, absence of notations of conditions did not relieve minor driver from duty of complying with statutory restrictions. People v Erickson, 51 Misc. 2d 149, 273 N.Y.S.2d 7, 1966 N.Y. Misc. LEXIS 1658 (N.Y. City Ct. 1966).

13. —Person in locl parentis

Eighteen-year-old friend who had allegedly been told by defendant's mother to make sure that defendant did not get into any trouble was not in position of loco parentis in order to permit defendant to drive at 1:30 in the morning on a junior operator's license. People v Masciarelli, 87 Misc. 2d 3, 384 N.Y.S.2d 980, 1976 N.Y. Misc. LEXIS 2140 (N.Y. City Ct. 1976).

14. —Restriction in certain cities or counties

Decision revoking 17-year-old boy's junior operator's license on plea of guilty to second violation consisting of operating motor vehicle within county of Nassau while holding junior operator's license was recalled, where violation was crime and established criminal record for juvenile and it was court's opinion that restriction which prevents use of junior operator's license in Nassau county seemed to be unreasonable and perhaps unconstitutional. People v Joy, 50 Misc. 2d 690, 271 N.Y.S.2d 15, 1966 N.Y. Misc. LEXIS 1750 (N.Y. Dist. Ct. 1966).

15. Requiring exhibition of license

Motorist has right to detach convictions stub from his operator's license and withhold the stub from police inspection. People v Lawton, 17 N.Y.2d 637, 269 N.Y.S.2d 137, 216 N.E.2d 340, 1966 N.Y. LEXIS 1511 (N.Y. 1966).

Where arrested motorist voluntarily gives police officer motorist's operator's license without detaching convictions stub, examination of convictions stub by police officer is not a violation of section of Vehicle and Traffic Law providing that convictions stub shall not be subject to inspection by any officer. People v Lawton, 17 N.Y.2d 637, 269 N.Y.S.2d 137, 216 N.E.2d 340, 1966 N.Y. LEXIS 1511 (N.Y. 1966).

That part of this section by which failure of an operator to exhibit his license on demand by an officer is made presumptive evidence that he is not licensed, is a rule of evidence merely. People ex rel. Keegan v Meyer, 194 A.D. 822, 186 N.Y.S. 434, 1921 N.Y. App. Div. LEXIS 9363 (N.Y. App. Div. 1921).

Officers checking registration of vehicle and license of driver of that vehicle which they had observed driving in erratic and suspicious manner in circles in high crime area was legitimate action and in conformity with normal police duty to know what is going on in the streets. People v Denti, 44 A.D.2d 44, 353 N.Y.S.2d 10, 1974 N.Y. App. Div. LEXIS 5506 (N.Y. App. Div. 1st Dep't 1974).

Where police officer had probable cause to justify arrest and detention of motorist because of motorist's failure to produce motor vehicle registration and operator's license, and motorist did not attempt to distinguish which items of his alleged damage were attributable to the valid arrest and which were attributable to an invalid arrest for reckless driving, motorist was not entitled to recover from city for false arrest or imprisonment. Burden v Niagara Falls, 44 A.D.2d 754, 352 N.Y.S.2d 42, 354 N.Y.S.2d 42, 1974 N.Y. App. Div. LEXIS 5283 (N.Y. App. Div. 4th Dep't 1974).

A state policeman was within his right as a peace officer in asking to see a motorist's ownership registration and his driver's license, and the actions of the motorist in using obscene, violent and indecent language toward the state trooper was disorderly conduct. Lippert v State, 139 N.Y.S.2d 751, 207 Misc. 632, 1955 N.Y. Misc. LEXIS 3488 (N.Y. Ct. Cl. 1955).

Peace officer who, after stopping motorist to determine registration of his vehicle and his authorization to drive, arrests the motorist for failure to produce the documents may conduct a search of the motorist's person in order to remove weapons or other instrumentalities which might be used for resisting officer, for escape, or for similar purposes. People v Isaac, 38 Misc. 2d 1018, 239 N.Y.S.2d 624, 1963 N.Y. Misc. LEXIS 2141 (N.Y. Sup. Ct. 1963).

That arresting officer looked at conviction part of defendant's operator's license at time of arrest for traffic violations, when summons was issued, infringed upon defendant's statutory rights, violated his right to fair and impartial trial and constituted prejudicial error. People v Murdock, 44 Misc. 2d 498, 254 N.Y.S.2d 295, 1964 N.Y. Misc. LEXIS 1270 (N.Y. Spec. Sess. 1964).

Motorist is not required and cannot be compelled to exhibit to arresting officer his "record of conviction stub" prior to or at time of his arrest for motor vehicle violation, and if compelled a resultant conviction is nullified, but fact that motorist upon demand of arresting officer to see his operator's license exhibits to officer the license in toto, including portion known as "record of conviction stub" does not prevent arrest or conviction. People v Lobdell, 46 Misc. 2d 888, 261 N.Y.S.2d 321, 1965 N.Y. Misc. LEXIS 1722 (N.Y. County Ct. 1965).

Failure of arresting officer, who asked only to see defendant's driver's license, to advise defendant of his right to detach conviction stub, did not require reversal of speeding conviction. People v Misch, 48 Misc. 2d 204, 264 N.Y.S.2d 419, 1965 N.Y. Misc. LEXIS 1334 (N.Y. County Ct. 1965).

Where printed summons, in lieu of oral warning, issued to petitioner contained statutory warning required to be made by presiding criminal court judge before accepting plea of guilty to traffic violation, attempt to find infirmity in petitioner's suspension based on size of type and location of warning on summons form constituted attempt to exalt form over substance. Lewitus v Hults, 52 Misc. 2d 539, 276 N.Y.S.2d 347, 1966 N.Y. Misc. LEXIS 1204 (N.Y. Sup. Ct. 1966).

Where trooper, after stopping automobile, observed driver and passenger attempting to swap places, trooper could reasonably suspect that the passenger was violating Vehicle and Traffic L § 501, subd 4 by permitting unlicensed operation and could in investigation of such violation require the passenger to produce his driver's license. People v Williams, 69 Misc. 2d 1038, 332 N.Y.S.2d 693, 1970 N.Y. Misc. LEXIS 1572 (N.Y. Town Ct. 1970).

16. Driving without license

A conviction of operating a motor vehicle without a license in violation of this section was improper where defendant, who was driving an automobile bearing a Massachusetts license plate, had a New York operator's license on his person and an operator's button on his hat at the time the officer demanded that he exhibit his New York license. People ex rel. Keegan v Meyer, 194 A.D. 822, 186 N.Y.S. 434, 1921 N.Y. App. Div. LEXIS 9363 (N.Y. App. Div. 1921).

It is permissible on cross-examination to elicit the fact that the operator of an automobile did not possess an operator's license at the time of the accident, as bearing upon the issue of his credibility. Phass v MacClenathen, 274 A.D. 535, 85 N.Y.S.2d 643, 1948 N.Y. App. Div. LEXIS 3123 (N.Y. App. Div. 1948).

A conviction of reckless driving should be reversed and the information dismissed where the defendant was charged with a violation of "section 20 of subdivision 1" in that he drove a motor

vehicle "without being of age" and the court on its own motion amended the complaint when the defendant was arraigned for decision and sentence to charge a violation of "subdivision 4 of section 20" in that he drove without being "duly licensed". People v Grogan, 281 A.D. 706, 117 N.Y.S.2d 617, 1952 N.Y. App. Div. LEXIS 3317 (N.Y. App. Div. 1952).

An infant, under sixteen years of age, who drove an automobile without a license in violation of subdivision 4 of this section was a juvenile delinquent within the definition contained in paragraph (a) of subdivision 2 of § 2 of the Children's Court Act. In re Jacobsen, 283 A.D. 719, 127 N.Y.S.2d 356, 1954 N.Y. App. Div. LEXIS 5061 (N.Y. App. Div.), app. dismissed, 307 N.Y. 675, 120 N.E.2d 849, 307 N.Y. (N.Y.S.) 675, 1954 N.Y. LEXIS 1415 (N.Y. 1954).

A conviction for violating subd. 4, par. a of this section was reversed because the complaint upon which the prosecution was based made no mention of defendant and was against a person having an entirely different name. People ex rel. McCabe v Blasenstein, 15 A.D.2d 778, 224 N.Y.S.2d 951, 1962 N.Y. App. Div. LEXIS 11219 (N.Y. App. Div. 1st Dep't 1962).

Because of the definitions of "sidewalk" and "street" in §§ 134 and 144, a motorist can be found guilty of operating a vehicle without an operating license although he is merely operating it at an extremely moderate rate over the sidewalk adjacent to a filling station. People v Marcus, 19 A.D.2d 813, 243 N.Y.S.2d 463, 1963 N.Y. App. Div. LEXIS 3129 (N.Y. App. Div. 1st Dep't 1963), aff'd, 14 N.Y.2d 505, 248 N.Y.S.2d 227, 197 N.E.2d 622, 1964 N.Y. LEXIS 1360 (N.Y. 1964).

An oral charge of a violation of subdivision 4, par a, in permitting the operation of a motor vehicle by one not licensed to drive was insufficient and was not waived by defendant's plea of guilty. Moreover, the charge failed to include the word "knowingly" and that the vehicle was operated on a public highway of this State. People v Tompkins, 114 N.Y.S.2d 297, 202 Misc. 147, 1952 N.Y. Misc. LEXIS 2887 (N.Y. County Ct. 1952).

A nonresident with a Tennessee driver's license who had been present in New York for more than 30 days was convicted of driving without a license under this section. People v Utsman, 8 Misc. 2d 501, 166 N.Y.S.2d 358, 1957 N.Y. Misc. LEXIS 2543 (N.Y. Police Ct. 1957).

Evidence held sufficient to sustain conviction of defendant of driving a car without an operator's license where defendant admitted that she did not have a driver's license and had operated the car for a short distance, and there was testimony that she was seen in the operator's seat and that the car had moved that distance. People v Tavani, 27 Misc. 2d 604, 213 N.Y.S.2d 843, 1961 N.Y. Misc. LEXIS 3053 (N.Y. County Ct. 1961).

In a prosecution for driving without an operator's license, the over-all burden of proof is upon the prosecution to establish guilt, notwithstanding the burden of making out a prima facie defense of exemption from the New York operator's license requirements by possession of a foreign driver's license rests, in the first instance, upon defendant. People v Cooper, 35 Misc. 2d 90, 229 N.Y.S.2d 287, 1962 N.Y. Misc. LEXIS 3100 (N.Y. County Ct. 1962).

An information is sufficient to charge the offense of driving without an operator's license where it specifically refers to this section and charges defendant with the crime of "unlicensed operator," and likewise states details as to time and place, gives the manner in which the offense was committed, and identifies the vehicle. People v Cooper, 35 Misc. 2d 90, 229 N.Y.S.2d 287, 1962 N.Y. Misc. LEXIS 3100 (N.Y. County Ct. 1962).

An information charging a motorist with driving without an operator's license need not negative his possession of a driver's license issued under the law of another state, as possession of a foreign driver's license is matter of defense, if available, under § 250. People v Cooper, 35 Misc. 2d 90, 229 N.Y.S.2d 287, 1962 N.Y. Misc. LEXIS 3100 (N.Y. County Ct. 1962).

Fact that charges of driving unregistered vehicle and driving while being an unlicensed operator for which defendant had been arrested were dismissed when defendant later produced the required documents in court did not establish illegality of arrest or search of driver's person which was conducted pursuant thereto and which disclosed illegal narcotics in view of fact that failure to exhibit the requested documents to the officer would also have justified an arrest. People v Isaac, 38 Misc. 2d 1018, 239 N.Y.S.2d 624, 1963 N.Y. Misc. LEXIS 2141 (N.Y. Sup. Ct. 1963).

The owner of an automobile may not permit his son to drive his car without a license and then claim recompense for damages arising out of a collision between the son and plaintiff-motorist, since driving without a license is a misdemeanor and one may not permit another to violate the law and then claim damages growing out of such violation. Plunkett v Heath, 1 N.Y.S.2d 778, 1938 N.Y. Misc. LEXIS 1226 (N.Y. City Ct. 1938).

17. Permitting unlicensed operator to drive

Proof was not sufficient to sustain a conviction of knowingly permitting an unlicensed person to operate a car solely on testimony of policeman who said he stopped car, questioned operator, learned he was unlicensed, found defendant in front seat on passenger's side and on his admission of ownership, arrested him. People v Shapiro, 4 N.Y.2d 597, 176 N.Y.S.2d 632, 152 N.E.2d 65, 1958 N.Y. LEXIS 878 (N.Y. 1958).

The fact that an automobile which was damaged by a collision with another automobile was being driven at the time of the accident by an unlicensed chauffeur in violation of this section does not absolutely bar the owner from recovering damages. Clark v Doolittle, 205 A.D. 697, 199 N.Y.S. 814, 1923 N.Y. App. Div. LEXIS 5119 (N.Y. App. Div. 1923).

A motorcycle is not a motor vehicle. Hence, the defendant who allegedly permitted an unlicensed person to drive his motorcycle on a public highway should not have been charged with a violation of (former) § 20 but should have been charged with a violation of (former) § 41. People v Asselta, 1 A.D.2d 960, 150 N.Y.S.2d 32, 1956 N.Y. App. Div. LEXIS 5791 (N.Y. App. Div. 2d Dep't 1956).

Judgment of conviction for a violation of paragraph a of subdivision 4 of this section was reversed where there was no proof from which it could be found that defendant authorized or permitted the operation of his automobile by a person he knew to be an unlicensed driver. People ex rel. Gittens v Shapiro, 5 A.D.2d 821, 170 N.Y.S.2d 762, 1958 N.Y. App. Div. LEXIS 6916 (N.Y. App. Div. 1st Dep't), aff'd, 4 N.Y.2d 597, 176 N.Y.S.2d 632, 152 N.E.2d 65, 1958 N.Y. LEXIS 878 (N.Y. 1958).

The owner of a motor vehicle is not under a duty to make inquiry as to whether a person permitted to operate the vehicle is duly licensed. A conviction of subdivision 4 could not therefore be sustained in the absence of knowledge or facts from which knowledge could reasonably be inferred. People v Crean, 136 N.Y.S.2d 688, 206 Misc. 311, 1954 N.Y. Misc. LEXIS 3490 (N.Y. County Ct. 1954).

To sustain a conviction of violating subd. 4 par. a of this section, for permitting an unlicensed operator to drive one's automobile, the prosecution must establish some fact or circumstance from which it may be inferred that the owner had knowledge that the person allowed to operate the vehicle was not properly licensed to drive, and it is not sufficient merely to establish that the driver was unlicensed. People v Irving, 24 Misc. 2d 37, 203 N.Y.S.2d 531, 1960 N.Y. Misc. LEXIS 2627 (N.Y. Sup. Ct. 1960).

A father, by permitting his son to use his automobile illegally upon a public highway, aided and abetted his son in the commission of a misdemeanor, and thereby became a principal as defined in former § 2. Plunkett v Heath, 1 N.Y.S.2d 778, 1938 N.Y. Misc. LEXIS 1226 (N.Y. City Ct. 1938).

18. Revocation or refusal to renew

The Commissioner of Motor Vehicles was without power to revoke an operator's license as a result of a proceeding instituted under former § 71 (subd 3, par [b]) to determine the operator's physical ability to hold the license. Wignall v Fletcher, 303 N.Y. 435, 103 N.E.2d 728, 303 N.Y. (N.Y.S.) 435, 1952 N.Y. LEXIS 806 (N.Y. 1952).

Where hearing of motorist was scheduled under provision of Vehicle and Traffic Law that driver's license may be revoked where driver is physically or mentally disabled, it was improper to revoke license under provision that, if Commissioner of Motor Vehicles had reasonable grounds to believe that holder of driver's license is not qualified to operate a motor vehicle, he may require

holder to submit to an examination. Wignall v Fletcher, 303 N.Y. 435, 103 N.E.2d 728, 303 N.Y. (N.Y.S.) 435, 1952 N.Y. LEXIS 806 (N.Y. 1952).

A petitioner was not entitled to an order rescinding, revoking and annulling a chauffeur's license issued by the bureau of motor vehicles to a subject of Great Britain, in alleged violation of former § 20, subd. 1-a. Magnani v Harnett, 257 A.D. 487, 14 N.Y.S.2d 107, 1939 N.Y. App. Div. LEXIS 7790 (N.Y. App. Div. 1939), aff'd, 282 N.Y. 619, 25 N.E.2d 395, 282 N.Y. (N.Y.S.) 619, 1940 N.Y. LEXIS 1432 (N.Y. 1940).

In determining whether to refuse to issue an operator's license, the Commissioner of Motor Vehicles was not restricted to a determination of the applicant's capacity to operate a motor vehicle in determining his "fitness". He could properly consider the applicant's convictions for bookmaking, reckless driving and speeding, revocations of his licenses and other criminal activities. Bernola v Fletcher, 280 A.D. 870, 114 N.Y.S.2d 152, 1952 N.Y. App. Div. LEXIS 3954 (N.Y. App. Div. 1952).

The Commissioner was not arbitrary in denying a license to petitioner who had suffered one epileptic seizure. The Commissioner established as prerequisite for the issuance of the license that the statement of a neuropsychiatrist be submitted showing, among other things, that petitioner had been free from seizures for a period of at least two years after discontinuance of medication. Derouchie v Kelly, 1 A.D.2d 921, 149 N.Y.S.2d 694, 1956 N.Y. App. Div. LEXIS 5973 (N.Y. App. Div. 3d Dep't 1956).

Results of examination of driver may not be utilized to sustain preliminary requirement of reasonable grounds within section of Vehicle and Traffic Law providing that if commissioner has reasonable grounds to believe that person holding license is not qualified to drive, commissioner may require such person to submit to examination to determine his qualifications. Breslow v Hults, 26 A.D.2d 931, 275 N.Y.S.2d 226, 1966 N.Y. App. Div. LEXIS 2990 (N.Y. App. Div. 1st Dep't 1966).

Where motorist was advised by magistrate that a plea of guilty to speeding would subject motorist to a penalty and that his probationary operator's license would be subject to suspension and revocation, and traffic ticket issued to motorist contained instructions required by statute, motorist was not entitled to a hearing on ground that "someone" had advised him that plea of guilty would have no effect on his license, and hence Commissioner of Motor Vehicles properly cancelled motorist's license. Marino v Tofany, 29 A.D.2d 588, 285 N.Y.S.2d 546, 1967 N.Y. App. Div. LEXIS 2760 (N.Y. App. Div. 3d Dep't 1967).

Commissioner did not act in an arbitrary manner in revoking license of petitioner age 75 where the petitioner on an ordered road test accumulated 47 demerits; 16 demerits being sufficient under departmental procedure to cause an applicant to fail. Walsh v Kelly, 19 Misc. 2d 971, 186 N.Y.S.2d 513, 1959 N.Y. Misc. LEXIS 4129 (N.Y. Sup. Ct. 1959).

The Commissioner may refuse to grant or renew an operator's license upon any ground specified in § 71 for revocation of such a license. Davis v Hults, 24 Misc. 2d 954, 204 N.Y.S.2d 865, 1960 N.Y. Misc. LEXIS 2738 (N.Y. Sup. Ct. 1960).

Statute governing cancellation of probationary drivers' licenses was not intended to apply to persons who have driven for a considerable length of time but merely to new operators who are just commencing to drive. Lewitus v Hults, 52 Misc. 2d 539, 276 N.Y.S.2d 347, 1966 N.Y. Misc. LEXIS 1204 (N.Y. Sup. Ct. 1966).

Determination of Commissioner of Motor Vehicles, which had effect of extending period of revocation of petitioner's license by the time during which petitioner illegally operated his automobile with a license which had been ordered revoked, was in furtherance of duty imposed upon Commissioner to carry out State's public policy, so that period of suspension ordered by the revocation, while operative immediately, did not begin to run so far as a renewal of petitioner's license was concerned until such license and registration plates were surrendered in accordance with notice of revocation. Simpson v Tofany, 58 Misc. 2d 843, 296 N.Y.S.2d 845, 1969 N.Y. Misc. LEXIS 1847 (N.Y. Sup. Ct. 1969).

The right to drive an automobile is not an inherent or acquired property right but a license granted to an individual which can be revoked by proper legislation. An arbitrary procedure is not to be countenanced but inasmuch as a traffic infraction is not for any purpose a penal or criminal act, it is not necessary to advise the accused of his rights to counsel if he is advised of the penalty and given a sufficient opportunity to defend himself. People ex rel. Joyce v Hogenson, 117 N.Y.S.2d 260, 1952 N.Y. Misc. LEXIS 2015 (N.Y. Magis. Ct. 1952).

19. —Necessity of hearing

Under sub 3 of former § 20, the permissive revocation is authorized when the licensee is guilty of certain prohibited conduct and the hearing is, therefore, to determine the fact of the licensee's misconduct. Former section 20(8), on the contrary, authorizes and directs the commissioner to re-examine a licensee to determine his qualifications to operate a motor vehicle, thus supplying the commissioner directly with personal knowledge of those qualifications. The provisions of the two sections are entirely distinct and independent of each other, each dealing with a separate problem—the one providing in substance for the trial of an issue of fact, the other for an examination by the commissioner to determine the licensee's qualifications. Application of Muscarella, 281 A.D. 565, 121 N.Y.S.2d 382, 1953 N.Y. App. Div. LEXIS 3097 (N.Y. App. Div. 1953).

A licensee who had his automobile driver's license revoked for failure to pass a driver's examination given under sub 8 of this section, after having had three accidents within 18 months, is not entitled to a hearing. Application of Muscarella, 281 A.D. 565, 121 N.Y.S.2d 382, 1953 N.Y. App. Div. LEXIS 3097 (N.Y. App. Div. 1953).

Subdivision 5 of this section does not provide for a hearing procedure with respect to the refusal of the Commissioner to issue or renew an operator's license. It is expressly stated therein that such administrative action may be reviewed by a proceeding under Article 78 of the Civil Practice Act. Therefore, there is no statutory or implied right to a hearing. Hence, where petitioner's renewal application for a license was refused and he failed to institute an action to review under Article 78 for more than 4 months after the denial of his application, his petition was dismissed. Nelson v Kelly, 4 A.D.2d 596, 168 N.Y.S.2d 74, 1957 N.Y. App. Div. LEXIS 3802 (N.Y. App. Div. 1st Dep't 1957).

The Commissioner of Motor Vehicles followed proper procedure, in respect to an operator who was over 65 years of age and was involved in an accident where he held a hearing pursuant to former § 71, closed the hearing without making any determination other than that operator would be asked to take a road test, served a new notice on the operator pursuant to § 20(8) to take the road test and revoked the operator's license when he failed the road test. Applebaum v Kelly, 9 Misc. 2d 748, 170 N.Y.S.2d 921, 1957 N.Y. Misc. LEXIS 3737 (N.Y. Sup. Ct. 1957).

In effect, hearing officer's statement that he was going to close case, involving issue as to whether driver's license should be suspended or revoked because of automobile accident in which he had been involved, constituted a determination that no grounds existed for suspension or revocation under any part of section 71 of the Vehicle and Traffic Law, and that no such suspension or revocation would be made thereunder, notwithstanding hearing officer's recommendation that driver be asked to submit to road test; and where new notice was thereafter served on driver, pursuant to section 20, subdivision 8, requiring him to appear at time and place fixed for road test, there was no failure of due process when driver's license was revoked for failure to pass such test. Applebaum v Kelly, 9 Misc. 2d 748, 170 N.Y.S.2d 921, 1957 N.Y. Misc. LEXIS 3737 (N.Y. Sup. Ct. 1957).

There was no provision under subd. 8 of former § 20 for any hearing before revocation of a license following failure of the holder, after being required by the Commissioner to take a road test, to pass such test. Harris v Hults, 23 Misc. 2d 1086, 206 N.Y.S.2d 722, 1960 N.Y. Misc. LEXIS 2632 (N.Y. Sup. Ct. 1960).

20. —Criminal record of applicant

In determining whether to refuse to issue an operator's license, the Commissioner of Motor Vehicles was not restricted to a determination of the applicant's capacity to operate a motor vehicle in determining his "fitness". He could properly consider the applicant's convictions for bookmaking, reckless driving and speeding, revocations of his licenses and other criminal activities.

Bernola v Fletcher, 280 A.D. 870, 114 N.Y.S.2d 152, 1952 N.Y. App. Div. LEXIS 3954 (N.Y. App. Div. 1952).

Commissioner of motor vehicles in determining the fitness of an applicant for license to operate motor vehicle is not limited to consideration of the applicant's capacity to operate a motor vehicle, but may consider also applicant's past criminal record and traffic violations. Bernola v Fletcher, 280 A.D. 870, 114 N.Y.S.2d 152, 1952 N.Y. App. Div. LEXIS 3954 (N.Y. App. Div. 1952).

It was within the discretion of the Commissioner of Motor Vehicles, under subds. 1 and 5 of this section, to refuse to grant renewal of petitioner's chauffeur's license on the basis of his criminal record and failure to give full and true answer to one of the questions on the renewal application, and the Commissioner's exercise of discretion, being neither arbitrary nor capricious, was not subject to judicial review. Funaro v Hults, 16 A.D.2d 654, 226 N.Y.S.2d 618, 1962 N.Y. App. Div. LEXIS 10640 (N.Y. App. Div. 2d Dep't 1962).

The fact that an applicant for renewal of operator's license is a known and active Communist who has been found guilty of seditious conspiracy against the Government of the United States, and likewise of contempt of court, will not sustain a determination of the Commissioner to deny his application for renewal of operator's license, in the absence of any indication of legislative policy to deny drivers' licenses to Communists. Davis v Hults, 24 Misc. 2d 954, 204 N.Y.S.2d 865, 1960 N.Y. Misc. LEXIS 2738 (N.Y. Sup. Ct. 1960).

New regulations under N.Y. Comp. Codes R. & Regs. tit. 15, Part 136, as applied to an applicant for a driver's license, were not in conflict with N.Y. Veh. & Traf. Law § 1193. Further, the decision to deny the applicant's application for a renewed license under the regulations was rationally based and neither arbitrary, nor capricious because of the applicant's three alcohol or drug related incidents or convictions and revocation of the applicant's license for an alcohol or drug related incident or conviction. Matter of Brown v New York State Dept. of Motor Vehs., 988 N.Y.S.2d 428, 44 Misc. 3d 182, 2014 N.Y. Misc. LEXIS 1399 (N.Y. Sup. Ct. 2014).

21. —Requiring proof of fitness

The requirement that the applicant furnish such "proof of his fitness as the Commissioner shall in his discretion determine," was not intended to be limited to "fitness" in the sense of "physical and mental capacity." Davis v Hults, 24 Misc. 2d 954, 204 N.Y.S.2d 865, 1960 N.Y. Misc. LEXIS 2738 (N.Y. Sup. Ct. 1960).

It does not follow, from the fact that this statute requires an applicant for operator's license to furnish such proof of fitness "as the Commissioner shall in his discretion determine" that a driver's license is nothing but a privilege solely within the discretion of the Commissioner to grant or withhold. Davis v Hults, 24 Misc. 2d 954, 204 N.Y.S.2d 865, 1960 N.Y. Misc. LEXIS 2738 (N.Y. Sup. Ct. 1960).

Although subd. 1 of former § 20 required an applicant for operator's license to furnish proof of his "fitness", and the requirement could mean more than proof of fitness to operate an automobile, the Commissioner of Motor Vehicles was not entitled to rely upon this requirement in refusing to consider, after lapse of a year from revocation, issuance of a new driver's license to one whose license had been revoked, under former § 93-h, for operating a vehicle while proof of financial security was not in effect. Boiko v Hults, 25 Misc. 2d 995, 206 N.Y.S.2d 261, 1960 N.Y. Misc. LEXIS 2739 (N.Y. Sup. Ct. 1960), vacated, 13 A.D.2d 888, 215 N.Y.S.2d 429, 1961 N.Y. App. Div. LEXIS 10963 (N.Y. App. Div. 4th Dep't 1961).

22. Discretion of commissioner

It was within the discretion of the Commissioner of Motor Vehicles, under subds. 1 and 5 of this section, to refuse to grant renewal of petitioner's chauffeur's license on the basis of his criminal record and failure to give full and true answer to one of the questions on the renewal application, and the Commissioner's exercise of discretion, being neither arbitrary nor capricious, was not subject to judicial review. Funaro v Hults, 16 A.D.2d 654, 226 N.Y.S.2d 618, 1962 N.Y. App. Div. LEXIS 10640 (N.Y. App. Div. 2d Dep't 1962).

In renewing operator's license, the Commissioner's determination involves judgment or discretion as distinguished from a ministerial act. Nelson v Kelly, 7 Misc. 2d 655, 164 N.Y.S.2d 309, 1957 N.Y. Misc. LEXIS 3320 (N.Y. Sup. Ct.), rev'd, 4 A.D.2d 596, 168 N.Y.S.2d 74, 1957 N.Y. App. Div. LEXIS 3802 (N.Y. App. Div. 1st Dep't 1957).

Reviewing court would not interfere with order of commissioner of motor vehicles revoking operator's license, where record disclosed reasonable basis for revocation and would not warrant conclusion that revocation was arbitrary or capricious. Walsh v Kelly, 19 Misc. 2d 971, 186 N.Y.S.2d 513, 1959 N.Y. Misc. LEXIS 4129 (N.Y. Sup. Ct. 1959).

That two friends of driver who rode in rear seat of automobile during road test disagreed with findings of examiners as to driver's qualifications to be a licensed motor vehicle operator was not a sufficient basis for judicial interference with determination of commissioner of motor vehicles revoking operator's license. Walsh v Kelly, 19 Misc. 2d 971, 186 N.Y.S.2d 513, 1959 N.Y. Misc. LEXIS 4129 (N.Y. Sup. Ct. 1959).

Record, showing failure of licensee to pass two successive road tests following hearing to determine his physical condition after minor collision, disclosed reasonable basis for action of commissioner of motor vehicles in revoking operator's license and would not warrant conclusion that revocation was arbitrary or capricious. Walsh v Kelly, 19 Misc. 2d 971, 186 N.Y.S.2d 513, 1959 N.Y. Misc. LEXIS 4129 (N.Y. Sup. Ct. 1959).

Where reviewing court stayed order of commissioner of motor vehicles revoking operator's license upon his failure to pass road test and directed that he be given another road test, commissioner could have left revocation order in existence, but stayed until date specified by court, and licensee could not complain of action of commissioner in rescinding revocation order. Walsh v Kelly, 19 Misc. 2d 971, 186 N.Y.S.2d 513, 1959 N.Y. Misc. LEXIS 4129 (N.Y. Sup. Ct. 1959).

Although the holder of a driver's license has driven automobiles for many years, without being charged with any traffic infraction, where, following involvement in a minor traffic accident, and at age 83, he is required to take a road test as the result of a hearing held by the Commissioner of Motor Vehicles, fails to pass that test, and his license is revoked, a court can accord him no relief unless satisfied from the record that the action of the Commissioner was unreasonable, arbitrary, or capricious. Harris v Hults, 23 Misc. 2d 1086, 206 N.Y.S.2d 722, 1960 N.Y. Misc. LEXIS 2632 (N.Y. Sup. Ct. 1960).

It does not follow, from the fact that this statute requires an applicant for operator's license to furnish such proof of fitness "as the Commissioner shall in his discretion determine" that a driver's license is nothing but a privilege solely within the discretion of the Commissioner to grant or withhold. Davis v Hults, 24 Misc. 2d 954, 204 N.Y.S.2d 865, 1960 N.Y. Misc. LEXIS 2738 (N.Y. Sup. Ct. 1960).

A refusal to renew an operator's license is tantamount to taking it away, and unless the applicant is not "fit" to receive an operator's license it may not be denied him on the basis of the personal and unrestrained edict of the Commissioner. Davis v Hults, 24 Misc. 2d 954, 204 N.Y.S.2d 865, 1960 N.Y. Misc. LEXIS 2738 (N.Y. Sup. Ct. 1960).

The provisions of subd. 1, par. a, of former § 20 did not give the Commissioner of Motor Vehicles any discretion to extend the mandatory suspension period of one year specified in former § 93-h, for operating a vehicle while proof of financial responsibility was not in effect, under the guise of a determination of unfitness of the applicant. Boiko v Hults, 25 Misc. 2d 995, 206 N.Y.S.2d 261, 1960 N.Y. Misc. LEXIS 2739 (N.Y. Sup. Ct. 1960), vacated, 13 A.D.2d 888, 215 N.Y.S.2d 429, 1961 N.Y. App. Div. LEXIS 10963 (N.Y. App. Div. 4th Dep't 1961).

New York State Department of Motor Vehicles (DMV) was enjoined and restrained during the pendency of a declaratory action from requiring or any way imposing a legal presence requirement or any immigration status as a condition to receipt of a driver's license, renewal license, learner's permit, or non-driver identification card. The internal rules instituted by DMV requiring such documentation was an unauthorized exercise of its rule-making power and, as such, the plaintiffs made a prima facie

showing of the likelihood that they would prevail at trial on the merits of its claims as well as demonstrated irreparable injury in that DMV's rules made certain persons afraid to apply for a license, caused the plaintiffs to be unable to travel to their work, or bring their children to necessary medical treatment. Cubas v Martinez, 233 N.Y.L.J. 93, 2005 N.Y. Misc. LEXIS 3358 (N.Y. Sup. Ct. May 16, 2005), rev'd, 33 A.D.3d 96, 819 N.Y.S.2d 10, 2006 N.Y. App. Div. LEXIS 8662 (N.Y. App. Div. 1st Dep't 2006).

23. Liability of instructor

In a civil action for damages against an instructor and learner-driver, where the case was submitted to the jury on both the erroneous theory of imputed negligence under this section and upon the correct theory of the instructor's failure to use reasonable care, a judgment for the plaintiff will be reversed, where it cannot be determined upon which theory the jury arrived at its verdict. Wolpert v Garrett, 278 A.D. 893, 105 N.Y.S.2d 21, 1951 N.Y. App. Div. LEXIS 5094 (N.Y. App. Div. 1951).

In action brought by holder of learner's permit for the operation of motorcycle against operator of automobile to recover for injuries sustained in collision, substantial fact issue existed as to liability of third-party defendant motorcyclist who was supervising plaintiff at time of collision, precluding summary judgment as to third-party claim against such motorcyclist. McEwen v Keator, 57 A.D.2d 1030, 395 N.Y.S.2d 260, 1977 N.Y. App. Div. LEXIS 12331 (N.Y. App. Div. 3d Dep't 1977).

It is duty of licensed automobile driver to use general care in the instruction of a learner under his supervision, and there is no reason to depart from such basic rule merely because standards governing the discharging of that duty might have to be measured or evaluated somewhat differently when motorcycles are involved. McEwen v Keator, 57 A.D.2d 1030, 395 N.Y.S.2d 260, 1977 N.Y. App. Div. LEXIS 12331 (N.Y. App. Div. 3d Dep't 1977).

Licensed driver who accompanies holder of learner's permit has duty of reasonable care in instruction and supervision of learner-driver, but negligence of learner-driver is not imputable to licensed driver. Savone v Donges, 122 A.D.2d 34, 504 N.Y.S.2d 474, 1986 N.Y. App. Div. LEXIS 59106 (N.Y. App. Div. 2d Dep't 1986).

Sub. 5 of this section does not make a duly licensed driver accompanying a learner civilly liable for the latter's negligence. A licensed operator is liable penally for violation of the statute but the statute has no effect on his civil liability or rights. Sardo v Herlihy, 256 N.Y.S. 690, 143 Misc. 397, 1932 N.Y. Misc. LEXIS 1016 (N.Y. Sup. Ct. 1932).

24. Judicial review

Coram nobis is available in a Court of Special Sessions but not in a case where defect is made clear by the record. People v Eastman, 306 N.Y. 658, 116 N.E.2d 494, 306 N.Y. (N.Y.S.) 658, 1953 N.Y. LEXIS 937 (N.Y. 1953).

Conviction under this section by city court of Ithaca may not be vacated by county court and fine remitted after time for appeal has expired. People v Eastman, 282 A.D. 330, 123 N.Y.S.2d 147, 1953 N.Y. App. Div. LEXIS 4470 (N.Y. App. Div.), aff'd, 306 N.Y. 658, 116 N.E.2d 494, 306 N.Y. (N.Y.S.) 658, 1953 N.Y. LEXIS 937 (N.Y. 1953).

An appeal from a determination of the commissioner of motor vehicles does not become academic even though a motor vehicle operator has complied with the order for suspension and has his license back. The suspension order could effect the operator's future qualification and if there were no evidence to support the determination, he was entitled to have it annulled. Strasser v MacDuff, 282 A.D. 1106, 126 N.Y.S.2d 357, 1953 N.Y. App. Div. LEXIS 5921 (N.Y. App. Div. 1953).

A fine imposed for violating this section by operating a commercial type motor vehicle without a chauffeur's license could not be sustained under the existing definition of "chauffeur" in this law where defendant was not, at the time, employed for the principal purpose of operating a motor vehicle and the one which he was operating was not in use as a public or common carrier of persons or property. People v Moroney, 10 A.D.2d 858, 199 N.Y.S.2d 100, 1960 N.Y. App. Div. LEXIS 10835 (N.Y. App. Div. 2d Dep't 1960).

In dismissing an appeal from a Special Term order annulling denial of a driver's license application, as moot, the Appellate Division nevertheless states that it was improper for the Commissioner to fix a future date when petitioner might reapply for a license, his former license having been revoked for driving without insurance, and the postponement of time for reconsidering a new license application being by reason of an interim conviction for driving without a license. Boiko v Hults, 13 A.D.2d 888, 215 N.Y.S.2d 429, 1961 N.Y. App. Div. LEXIS 10963 (N.Y. App. Div. 4th Dep't 1961).

A conviction for violating subd. 4, par. a of this section was reversed because the complaint upon which the prosecution was based made no mention of defendant and was against a person having an entirely different name. People ex rel. McCabe v Blasenstein, 15 A.D.2d 778, 224 N.Y.S.2d 951, 1962 N.Y. App. Div. LEXIS 11219 (N.Y. App. Div. 1st Dep't 1962).

Reviewing court would not interfere with order of commissioner of motor vehicles revoking operator's license, where record disclosed reasonable basis for revocation and would not warrant conclusion that revocation was arbitrary or capricious. Walsh v Kelly, 19 Misc. 2d 971, 186 N.Y.S.2d 513, 1959 N.Y. Misc. LEXIS 4129 (N.Y. Sup. Ct. 1959).

A sentence for driving without an operator's license to a fine of $100 and 60 days in jail is not excessive. People v Cooper, 35 Misc. 2d 90, 229 N.Y.S.2d 287, 1962 N.Y. Misc. LEXIS 3100 (N.Y. County Ct. 1962).

Where defendant motorist was charged with violating § 501 by operating a motor vehicle without a license on the same occasion as violating § 1180 by speeding, but the magistrate dismissed the charge of operating without a license at request of the District Attorney for "insufficient identification," his conviction for speeding was reversed by the County Court on the ground that the evidence must have been likewise insufficient to establish his identity as operator of the speeding vehicle. People v Quinzi, 39 Misc. 2d 1070, 242 N.Y.S.2d 334, 1963 N.Y. Misc. LEXIS 1713 (N.Y. County Ct. 1963).

Conviction for operating motor vehicle while unlicensed was unwarranted, where, aside from defendant's confession, there was no proof of defendant's operation of vehicle on public highway other than circumstances that she was found by officer near automobile registered in her husband's name and parked in private driveway of third party following accident which was not described. People v Herman, 50 Misc. 2d 644, 270 N.Y.S.2d 809, 1966 N.Y. Misc. LEXIS 1791 (N.Y. Police Ct. 1966).

25. Miscellaneous matters

Wording of printed warning on summons substantially complied with provisions of code section in reference to type size and there was no merit to contention that code section was not properly complied with in connection with conviction for speeding. Application of Lewitus, 28 A.D.2d 1097, 284 N.Y.S.2d 386, 1967 N.Y. App. Div. LEXIS 3088 (N.Y. App. Div. 1st Dep't 1967).

Commissioner of Motor Vehicles was authorized to cancel petitioner's probationary license for conviction for two violations within probationary six-month period. Britt v Hults, 30 A.D.2d 535, 291 N.Y.S.2d 269, 1968 N.Y. App. Div. LEXIS 4078 (N.Y. App. Div. 2d Dep't 1968).

A licensed operator who accompanies an operator possessing only a learner's permit, in order to instruct the unlicensed operator, assumes the risk of the permittee's inexperience and cannot recover damages for injuries caused by the latter's inexperience or lack of skill, even though the learner may have completed an adult education driver training course, as such a permittee is presumed by law to be an incompetent operator until she has passed her operator's examination. Aloisio v Nelson, 27 Misc. 2d 343, 209 N.Y.S.2d 674, 1961 N.Y. Misc. LEXIS 3606 (N.Y. Sup. Ct. 1961).

Where a motorist was arrested on charges of driving while intoxicated and without a license, but no immediate search of his car was made until, sometime later, an officer searched it for liquor, found none, but turned up a switch blade knife and bludgeon, the articles found and seized are illegally obtained and subject to suppression as evidence because the search was not incidental to the primary purpose of arrest and was too remote in time and place from the time and place of arrest. People v

Beaman, 44 Misc. 2d 336, 253 N.Y.S.2d 674, 1964 N.Y. Misc. LEXIS 1321 (N.Y. City Crim. Ct. 1964).

Public park owned by municipality with neither roads nor sidewalks was not a "public highway" within statutes prohibiting unlicensed operation and unregistered vehicles. People v Moe, 62 Misc. 2d 27, 307 N.Y.S.2d 921, 1969 N.Y. Misc. LEXIS 975 (N.Y. App. Term 1969).

Where defendant stopped for driving over speed limit was arrested for traffic misdemeanors of being unlicensed operator and driving unregistered vehicle and officer did not arrest defendant for possessing stolen car although there was probable cause for arrest on that ground, seizure of brown paper bag found in automobile was reasonable and justifiable as incident to arrest upon probable cause that defendant possessed stolen car. People v Smith, 62 Misc. 2d 473, 308 N.Y.S.2d 909, 1970 N.Y. Misc. LEXIS 1779 (N.Y. Sup. Ct. 1970).

Driver's operation of a vehicle in violation of N.Y. Veh. & Traf. Law § 501(3)(b) could not be used as evidence of negligence regarding an accident in which the driver struck a minor pedestrian because the provision only related to the authority of a junior operator to drive and did not create any standard of care relating to the vehicle's operation. St. Andrew v O'Brien, 45 A.D.3d 1024, 845 N.Y.S.2d 184, 2007 N.Y. App. Div. LEXIS 11159 (N.Y. App. Div. 3d Dep't 2007), app. denied, app. dismissed, 10 N.Y.3d 929, 862 N.Y.S.2d 332, 892 N.E.2d 398, 2008 N.Y. LEXIS 1898 (N.Y. 2008).

The driver of a school bus need not be licensed as a chauffeur if he does not drive the school bus within a city. 1962 Ops St Compt #1009.

L 1942, c 560 (see note following this section) applies to all persons who are or may hereafter be in the military service. 1942 Ops Atty Gen June 30.

Agency Opinions

Analysis

1. In general; purpose
2. Learner's permit
3. Junior operator --generally
4. Miscellaneous matters

1. In general; purpose

Where the legislature has granted to the Westchester County Park Commission authority to enact "traffic ordinances" this does not include authority to prohibit operation of motor vehicles by unlicensed drivers, such act being expressly prohibited by the Vehicle and Traffic Law. 1934 N.Y. Op. Att'y Gen. No. 129.

Tribal Indians residing on a reservation must secure operators' licenses in accordance with this section in order to use motor vehicles upon any public highway. 1939 NY Ops Atty Gen Apr. 19.

Farm tractors and vehicles drawn by them may be operated by an unlicensed operator. 1962 NY Ops Atty Gen July 31.

An operator of a fire vehicle must be a licensed driver. 1978 Op St Compt File #999.

2. Learner's permit

Outside of New York City, a holder of a learner's permit may lawfully drive a motor vehicle during daylight hours when accompanied by a licensed junior operator, who supervises and controls the learner's driving. 1955 NY Ops Atty Gen 113 (informal).

3. Junior operator --generally

A junior operator may accompany and instruct a learner if the junior operator himself could legally operate a motor vehicle at the time and place of operation. 1958 NY Ops Atty Gen Apr 21 (informal).

A licensed automobile operator, over 18 years of age, who accompanies a licensed junior operator at night is not liable with the junior operator for the latter's reckless driving. However, the law provides that a licensee, when instructing a learner, shall be answerable with the learner for any traffic violation. 1959 NY Ops Atty Gen Aug. 17 (informal).

4. Miscellaneous matters

A road on state-owned hospital grounds is a public place or highway within the meaning of the Vehicle and Traffic Law and consequently the operation of a motor vehicle thereon without an operator's license is illegal. 1941 NY Ops Atty Gen Apr. 23.

Volunteer fireman operating a fire truck to a fire and returning to fire house is not required to have operator's license. 1956 NY Ops Atty Gen Apr 9 (informal).

Although there is no specific provision to this effect, the Commissioner of Motor Vehicles would seem to have implied authority to accept surrender of an operator's license from one who no longer desires to drive, but he should not accept such a license for cancellation where possible penalty proceedings are contemplated or pending against the holder. 1962 NY Ops Atty Gen Nov 29.

Volunteer firemen of the Village of Port Chester who reside in Connecticut and hold a Connecticut driver's license may drive an emergency vehicle owned by the Village of Port Chester. 1974 NY Ops Atty Gen July 26 (informal).

The expense incurred by the county clerk in mailing validated driver's licenses and registrations may not be passed on to the applicants. 1982 Op St Compt File #82-120.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 250, 510-b.

Codes, Rules and Regulations:

Class DJ and MJ drivers' licenses. 15 NYCRR §§ 1.1–1.6.
Driver licensing and training. 15 NYCRR §§ 1.1 et seq.
Drivers' licenses. 15 NYCRR §§ 3.1–3.10.
Learner's permits. 15 NYCRR §§ 4.1–4.4.

Federal Aspects:

Section one hundred three of the Hazardous Materials Transportation Act, cited in statutory text, formerly appeared as 49 USCS Appx § 1802, prior to the enactment of Title 49 into positive law by Acts Oct. 17, 1978, P. L. 95-473, § 1, 92 Stat. 1337, Jan. 12, 1983, P. L. 97-449, § 1, 96 Stat. 2413, July 5, 1994, P. L. 103-272, § 1(a), 108 Stat. 7; similar provisions now appear as 49 USCS § 5102.

Section 4 of the Subversive Activities Control Act of 1950, cited in statutory text, appears as 50 USCS § 783.

Annotations:

Retrospective operation of criminal negligence statute. 14 ALR2d 726.

Lack of proper automobile registration or operator's license as evidence of operator's negligence. 29 ALR2d 963.

Construction, application, and effect of legislation making it an offense to permit, or imputing negligence to one who permits, an authorized or unlicensed person to operate motor vehicle. 69 ALR2d 978.

What amounts to adjudication of guilt for purposes of refusal, revocation, or suspension of automobile driver's license. 79 ALR2d 866.

Age of minor operator of automobile or other motor-powered vehicle or craft as affecting his primary or contributory negligence. 97 ALR2d 872.

Validity and construction of statute making it a criminal offense for the operator of a motor vehicle not to carry or display his operator's license or the vehicle registration certificate. 6 A.L.R.3d 506.

§ 501-a. Definitions

The following terms when used in this article and in articles twenty and thirty-one of this chapter, shall have the following meanings:

1. Commercial driver's license or CDL. A class A or B driver's license or a class C driver's license which bears an H, P or X endorsement, which licenses contain the legend commercial driving license or CDL thereon and which is issued in accordance with the commercial motor vehicle safety act of 1986, public law 99-570, title XII, and this article which authorizes a person to operate a commercial motor vehicle and an altered motor vehicle commonly referred to as a "stretch limousine" having a

seating capacity of nine or more passengers including the driver.

2. Gross vehicle weight rating or GVWR. The weight of a vehicle consisting of the unladen weight and the maximum carrying capacity recommended by the manufacturer of such vehicle. The GVWR of a combination of vehicles (commonly referred to as the "Gross Combination Weight Rating" or GCWR) is the GVWR of the power unit plus the GVWR of each vehicle in the combination.

3. Hazardous materials. Any material that has been designated as hazardous under 49 U.S.C. 5103 and is required to be placarded under subpart F of 49 CFR part 172 or any quantity of a material listed as a select agent or toxin in 42 CFR part 73.

4. Commercial motor vehicle. (a) A motor vehicle or combination of vehicles designed or used to transport passengers or property:

(i) which has a GVWR of more than twenty-six thousand pounds; or

(ii) which has a GCWR of more than twenty-six thousand pounds, including any towed unit with a GVWR of more than ten thousand pounds; or

(iii) designed or used to transport fifteen or more passengers, in addition to the driver; or

(iv) defined as a bus in subdivision one of section five hundred nine-a of this chapter; or

(v) of any size, other than a farm vehicle operated within one hundred fifty miles of the operator's farm, used in the transportation of materials found by the United States secretary of transportation to be hazardous under the hazardous materials transportation act and which requires the motor vehicle transporting such materials to be placarded under the hazardous materials regulation, 49 CFR part 172, subpart F or is transporting any quantity of a material listed as a select agent or toxin in 42 CFR part 73.

(b) However, a commercial motor vehicle shall not include: (i) a personal use vehicle or a covered farm vehicle or a combination of such vehicles; (ii) any motor vehicle or combination of motor vehicles operated by a member of the armed forces for military purposes; (iii) a police vehicle or fire vehicle, or combination of such vehicles during its use in an emergency operation as defined in section one hundred fourteen-b of this chapter, or in the performance of official duties, or activities related to the execution of emergency governmental functions pursuant to section 383.3 (d)(2) of title 49 of the code of federal regulations; (iv) a vehicle or combination of vehicles owned and identified as being owned by the state or a political subdivision thereof or an ambulance service as defined in subdivision two of section three thousand one of the public health law or a voluntary ambulance service as defined in subdivision three of such section and used to provide emergency medical service as defined in section three thousand one of the public health law, or to perform official duties, or activities related to the execution of emergency governmental functions pursuant to section 383.3 (d)(2) of title 49 of the code of federal regulations; or (v) a vehicle or combination of vehicles which is designed and primarily used for purposes other than the transportation of persons or property and which is operated on a public highway only occasionally for the purpose of being transported to a construction or off-highway site at which its primary purpose is to be performed except as may otherwise be specifically provided by regulation of the commissioner. For the purposes of this paragraph, the term "member of the armed forces" shall include active duty military personnel; members of the reserve components of the armed forces; members of the national guard on active duty, including personnel on full time active guard duty, personnel on part-time national guard training, and national guard military technicians (civilians who are required to wear military uniforms); and active duty United States coast guard personnel. The term shall not include United States reserve technicians. Notwithstanding the provisions of section one hundred fourteen-b of this chapter, for the purposes of this paragraph, the term "emergency operation" shall include returning from emergency service.

(c) [Repealed]

5. Representative vehicle. The type of motor vehicle or combination of vehicles specified by regulation of the commissioner that an applicant for a driver's license must operate during a road test in order to receive a specific class of license or endorsement.

6. Tank vehicle. Any commercial motor vehicle designed to transport any liquid or gaseous material within a tank or tanks having an individual rated capacity of more than one hundred nineteen gallons and an aggregate rated capacity of one thousand gallons or more that is either permanently or temporarily attached to the vehicle or the chassis. Such term shall not include a commercial motor vehicle transporting an empty storage container tank, not designed for transportation, with a rated capacity of one thousand gallons or more that is temporarily attached to a flatbed trailer.

7. Personal use vehicle. A vehicle constructed or altered to be used for recreational purposes which is exclusively used to transport family members and/or personal possessions of such family members for non-business recreational purposes by the operator, or a rental truck which is exclusively used to transport personal possessions of the person who has rented the truck for non-business purposes.

8. Covered farm vehicle. (a) A vehicle or combination of vehicles registered in this state, which (i) displays a covered farm vehicle designation issued by the commissioner, (ii) is operated by the owner or operator of a farm or ranch, or an employee or family member of an owner or operator of a farm or ranch, (iii) is used to transport agricultural commodities, livestock, machinery or supplies to or from a farm or ranch, (iv) is not used in for-hire motor carrier operations, exclusive of operation by a tenant pur-

suant to a crop share farm lease agreement to transport the landlord's portion of the crops under that agreement; and (v) is not used for the transportation of hazardous materials.

(b) A covered farm vehicle with a gross vehicle weight or gross vehicle weight rating, whichever is greater, of more than twenty-six thousand pounds may only be operated within one hundred fifty air miles of the farm or ranch.

(c) The commissioner shall, by regulation, designate an endorsement or endorsements for the operation of covered farm vehicles with a gross vehicle weight or gross vehicle weight rating of more than twenty-six thousand pounds. Such endorsement or endorsements shall be required to operate such a covered farm vehicle or combination of covered farm vehicles. The identification and scope of such endorsement or endorsements shall, at a minimum, include a distinction between the operation of a covered farm vehicle having a gross vehicle weight or gross vehicle weight rating of more than twenty-six thousand pounds and the operation of a combination of covered farm vehicles having a gross vehicle weight or gross vehicle weight rating of more than twenty-six thousand pounds.

(d) For the purposes of this subdivision, the gross vehicle weight of a vehicle shall mean the actual weight of the vehicle and the load.

HISTORY:

Add, L 1990, ch 173, § 39, eff Feb 19, 1991; amd, L 1990, ch 696, § 4, eff Feb 19, 1991; L 1992, ch 84, § 2, eff May 10, 1992, deemed eff April 1, 1992; L 1993, ch 550, § 1, eff Jan 24, 1994; L 1998, ch 382, § 2, eff July 14, 1998; L 2005, ch 60, §§ 8–10 (Part E), eff April 12, 2005; L 2007, ch 251, § 2, eff July 18, 2007; L 2009, ch 36, § 2, eff May 21, 2009; L 2009, ch 59, § 5 (Part K), eff April 7, 2009; L 2015, ch 58, § 2 (Part I), effective July 8, 2015; L 2016, ch 58, §§ 2, 3 (Part E), effective July 11, 2016; L 2020, ch 6, § 2, effective February 3, 2021.

Editor's Notes: Laws 2005, ch 60, § 21 (Part E), eff April 12, 2005, provides as follows:

§ 21. This act shall take effect immediately and shall apply to violations committed on and after such date; provided, however, that section twenty of this act shall be deemed to have been in full force and effect on and after April 1, 2005; provided further that sections two, five, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen and nineteen of this act shall take effect September 30, 2005; and provided further that the amendments to subdivision 5 of section 530 of the vehicle and traffic law made by section fifteen of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith.

Laws 2015, ch 58, § 11 (Part I), eff July 8, 2015, provides:

§ 11. This act shall take effect July 8, 2015 and shall apply to violations committed on or after such date, and shall apply to permits issued on or after such date.

Laws 2020, ch 6, § 5, eff February 3, 2021, provides:

§ 5. This act shall take effect one year after it shall have become a law. Effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized to be made and completed on or before such effective date.

Amendment Notes: The 2015 amendment by ch 58, § 2 (Part I), in 6, added "or tanks having an individual rated capacity of more than one hundred nineteen gallons and an aggregate rated capacity of one thousand gallons or more" in the first sentence, deleted the former last two sentences, which read: "Such vehicles include, but are not limited to, cargo and portable tanks, as defined in 49 CFR part 171. However, this definition does not include portable tanks having a rated capacity under one thousand gallons," and added the second sentence.

The 2016 amendment by ch 58, §§ 2, 3 (Part E), added "covered" in 4(b)(i); repealed 7, which read: "Farm vehicle. A vehicle having a GVWR of not more than twenty-six thousand pounds which is controlled and operated by a farmer, is used to transport agricultural products, farm machinery, farm supplies or all of the aforementioned to or from the farm and is not used in the operations of a common or contract motor carrier and, such a vehicle having a GVWR of more than twenty-six thousand pounds while being used within one hundred fifty miles of the person's farm"; redesignated former 8 as 7; and added 8.

The 2020 amendment by ch 6, § 2, added "and an altered motor vehicle commonly referred to as a 'stretch limousine' having a seating capacity of nine or more passengers including the driver" in 1.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 502, 510-a.

Federal Aspects:

Section one hundred three of the Hazardous Materials Transportation Act, cited in statutory text, formerly appeared as 49 USCS Appx § 1802, prior to the enactment of Title 49 into positive law by Acts Oct. 17, 1978, P. L. 95-473, § 1, 92 Stat. 1337, Jan. 12, 1983, P. L. 97-449, § 1, 96 Stat. 2413, July 5, 1994, P. L. 103-272, § 1(a), 108 Stat. 7; similar provisions now appear as 49 USCS § 5102.

The Commercial Motor Vehicle Safety Act of 1986, Public Law 99-570, Title XII, cited in statutory text, formerly appeared as 49 USCS Appx §§ 2710, prior to the enactment of Title 49 into positive law by Acts Oct. 17, 1978, P. L. 95-473, § 1, 92 Stat. 1337, Jan. 12, 1983, P. L. 97-449, § 1, 96 Stat. 2413, July 5, 1994, P. L. 103-272, § 1(a), 108 Stat. 7; similar provisions now appear as 49 USCS §§ 31301 et seq.

§ 502. Requirements for licensing.

* * * * *

3. Application for learner's permit. An application for a learner's permit shall be included in the application for a license. A learner's permit shall be issued in such form as the commissioner shall determine but shall not be issued unless the applicant has successfully passed the vision test required by this section and the test set forth in paragraph (a) of subdivision four of this section with respect to laws relating to traffic and ability to read and comprehend traffic signs and symbols and has satisfactorily completed any course required pursuant to paragraph (a) of subdivision four of this section. Upon acceptance of an application for a learner's permit the commissioner shall provide the applicant with a driver's manual which includes but is not limited to the laws relating to traffic, the laws relating to and physiological effects of driving while ability impaired and driving while intoxicated, the law for exercising due care to avoid colliding with a parked, stopped or standing vehicle pursuant to section eleven hundred forty-four-a of this chapter, explanations of traffic signs and symbols and such other matters as the commissioner may prescribe.

* * * * *

HISTORY:

Add, L 1972, ch 780, § 9, eff April 1, 1973; amd, L 1973, ch 168, § 4; L 1973, ch 229, §§ 2–4; L 1977, ch 931, § 10, eff Aug 11,

1977; L 1979, ch 436, § 1; L 1980, ch 381, § 3; L 1981, ch 138, § 1, eff Aug 24, 1981; L 1983, ch 719, §§ 2–5; L 1985, ch 692, §§ 2–4, eff April 1, 1986; L 1987, ch 342, § 1; L 1987, ch 857, § 1, eff April 21, 1988; L 1990, ch 173, §§ 40–46, eff Feb 19, 1991; L 1991, ch 520, § 1, eff July 19, 1991; L 1993, ch 60, § 47, eff April 15, 1993, deemed eff April 1, 1993; L 1995, ch 81, §§ 209, 210, eff Oct 1, 1995; L 1996, ch 309, §§ 83–87, eff July 13, 1996; L 2001, ch 536, §§ 1, 2, eff Sept 1, 2002; L 2002, ch 533, § 1, eff March 16, 2003; L 2002, ch 585, §§ 1, 2, eff Sept 1, 2002; L 2002, ch 644, § 8, eff Sept 1, 2003; L 2005, ch 60, § 11 (Part E), eff Sept 30, 2005; L 2006, ch 639, § 4, eff Feb 12, 2007; L 2009, ch 59, §§ 2, 3 (Part K), eff April 7, 2009; L 2009, ch 59, § 1 (Part L), eff July 6, 2009; L 2009, ch 403, § 5, eff Feb 22, 2010; L 2010, ch 215, § 1, eff Aug 14, 2010; L 2010, ch 387, §§ 2, 3, eff Sept 1, 2010; L 2011, ch 58, § 2 (Part CC), eff Jan 30, 2012; L 2011, ch 458, §§ 1, 2, eff Sept 1, 2011; L 2012, ch 58, § 1 (Part D), eff March 30, 2012; L 2012, ch 465, § 5, eff Oct 3, 2013; L 2012, ch 487, § 2, eff Oct 3, 2013; L 2015, ch 405, § 3, effective October 26, 2015; L 2016, ch 97, §§ 1, 2, effective January 17, 2017; L 2016, ch 248, § 4, effective February 14, 2017; L 2017, ch 355, §§ 1, 2, effective April 21, 2018; L 2019, ch 37, §§ 3–5, effective December 14, 2019; L 2019, ch 368, §§ 2, 3, effective June 30, 2020; L 2019, ch 513, § 1, effective May 18, 2020; L 2019, ch 740, § 1, effective June 20, 2020; L 2020, ch 31, § 1, effective June 20, 2020.

Prior Law: Former § 502, add, L 1959, ch 775, with substance transferred from former § 21; repealed, L 1972, ch 780, § 9, eff April 1, 1973.

Editor's Notes Laws 1983, ch 719, § 1, eff Jan 1, 1984, provides as follows:

Section 1. Legislative findings. National studies indicate that nearly one-half of all annual highway fatalities are attributable to drunk driving. Statistics reveal, in fact, that sixteen to twenty-four year olds account for over forty-five percent of the drivers involved in alcohol related accidents, yet comprise only seventeen percent of the driving population. New, tougher laws have been enacted in recent years to deter drunk driving. However, these measures were designed to effect a positive result mainly after a drunk driving arrest has occurred and after loss of life or infliction of injury has resulted. In addition, little emphasis has been placed on preventive education as a means of curtailing driving while intoxicated episodes. Since young people are provided the opportunity to learn to drive a motor vehicle before acquiring the legal drinking age, incorporating an alcohol and drug prevention component to the present pre-licensing curriculum, would inform prospective new drivers of the potential dangers of drinking and driving. A combined effort to impose harsh penalties with statewide implementation of the revised pre-licensing course is necessary in order to redirect society's acceptance of alcohol and drug use in conjunction with driving. As a result, lives will be saved and injuries prevented.

Laws 1987, ch 342, § 2, provides as follows:

§ 2. This act shall take effect on the first day of October next succeeding the date on which it shall have become a law, provided, however, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of the provisions of this act on its effective date are authorized and directed to be made and completed on or before such effective date.

Laws 1995, ch 81, § 246(17), (17-a), eff June 20, 1995, provide as follows:

§ 246. This act shall take effect immediately, provided that:

17. The commissioners of social services, taxation and finance, health, labor and motor vehicles and any appropriate council shall be authorized to promulgate regulations on an emergency basis to ensure the implementation of this act and may take any steps necessary to implement this act prior to its effective date;

17-a. The provisions of this act shall become effective notwithstanding the failure of the commissioner of health, or the commissioner of social services, or any council to adopt or amend or promulgate regulations implementing this act;

Laws 1996, ch 309, § 469, sub 3(d), eff July 13, 1996, provides as follows:

§ 469. This act shall take effect immediately, provided that:

3. (d) sections seventy-nine, eighty, eighty-one and eighty-two of this act shall take effect on January 1, 1997; the amendments to provisions of the vehicle and traffic law made by sections eighty-three, eighty-four, eighty-five, eighty-six and eighty-seven of this act shall expire and be deemed repealed on September 30, 1997 and upon such date the provisions of the vehicle and traffic law amended by such sections shall revert to and be read as set out in law on the date immediately preceding the effective date of this act; and sections eighty-eight, eighty-nine, ninety, ninety-one, ninety-two, ninety-three, ninety-four, ninety-five, ninety-six, ninety-seven and ninety-eight of this act shall take effect August 31, 1996. (Amd, L 1997, ch 435, § 7, eff Aug 20, 1997.).

Laws 1997, ch 57, § 41, eff May 8, 1997, deemed eff April 1, 1997, provides as follows:

§ 41. Notwithstanding any provision of law to the contrary, sections 83 through 87 of chapter 309 of the laws of 1996 shall continue in full force and effect through June 20, 1997.

Laws 1997, ch 145, § 38, eff June 26, 1997, deemed eff April 1, 1997, provides as follows:

§ 38. Notwithstanding any provision of law to the contrary, sections 83 through 87 of chapter 309 of the laws of 1996 shall continue in full force and effect through July 4, 1997.

Laws 1997, ch 162, § 26, eff July 3, 1997, deemed eff April 1, 1997, provides as follows:

§ 26. Nothwithstanding any provision of law to the contrary, sections 83 through 87 of the chapter 309 of the laws of 1996 shall continue in full force and effect through July 11, 1997.

Laws 1997, ch 194, § 31, eff July 8, 1997, deemed eff April 1, 1997, provides as follows:

§ 31. Notwithstanding any provision of law to the contrary, sections 83 through 87 of chapter 309 of the laws of 1996 shall continue in full force and effect through July 18, 1997.

Laws 1997, ch 211, § 49, eff July 18, 1997, deemed eff April 1, 1997, provides as follows:

§ 49. Notwithstanding any provision of law to the contrary, sections 83 through 87 of chapter 309 of the laws of 1996 shall continue in full force and effect through July 25, 1997.

Laws 1997, ch 264, § 32, eff July 23, 1997, deemed eff April 1, 1997, provides as follows:

§ 32. Notwithstanding any provision of law to the contrary, sections 83 through 87 of chapter 309 of the laws of 1996 shall continue in full force and effect through August 1, 1997.

Laws 2002, ch 533, § 1, eff March 16, 2003, provides as follows:

§ 2. This act shall take effect 180 days after it shall have become law; provided, however, that effective immediately, the commissioner of motor vehicles is authorized to promulgate any rule or regulation necessary to implement the provisions of this act.

Laws 2005, ch 60, § 21 (Part E), eff April 12, 2005, provides as follows:

§ 21. This act shall take effect immediately and shall apply to violations committed on and after such date; provided, however, that section twenty of this act shall be deemed to have been in full force and effect on and after April 1, 2005; provided further that sections two, five, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen and nineteen of this act shall take effect September 30, 2005; and provided further that the amendments to subdivision 5 of section 530 of the vehicle and traffic law made by section fifteen of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith.

Laws 2006, ch 639, § 6, eff Feb 12, 2007, provides as follows:

§ 6. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided that the commissioner of health and the commissioner of motor vehicles shall take all actions necessary to implement the provisions of this act on or before such effective date.

Laws 2009, ch 403, § 14(a), eff Aug 26, 2009, provides as follows:

§ 14. This act shall take effect immediately; provided, however, that:

(a) sections one, five, six, eight, nine and ten and the amendments to paragraph (d) of subdivision 1 of section 501-b of the vehicle and traffic law made by section two of this act shall take effect on the one hundred eightieth day after it shall have become a law and shall apply to licenses issued on or after such effective date. Any license issued pursuant to section 503-a of the vehicle and traffic law prior to such effective date shall remain in effect until the expiration date of such license; (Amd, L 2010, ch 215, § 3, eff July 15, 2010.)

Laws 2010, ch 215, § 4, eff July 15, 2010, provides as follows:

§ 4. This act shall take effect immediately; provided, however, that sections one and two of this act shall take effect thirty days after it shall have become a law and shall apply to all persons enrolling in approved driver education courses on or after such date.

Laws 2010, ch 387, §§ 1, 5(a), eff Sept 1, 2010, provide as follows:

Section 1. Short title. This act shall be known and may be cited as the "Ambrose-Searles move over act".

§ 5. This act shall take effect immediately, provided that:

(a) sections two and three of this act shall take effect September 1, 2010, except that the promulgation of any rules and regulations, and the taking of any other actions necessary to implement the provisions of such sections of this act are authorized and directed to be made on or before the effective date of such sections of this act; and.

Laws 2011, ch 58, § 9 (Part CC), eff May 30, 2011, provides as follows:

§ 9. This act shall take effect on the sixtieth day after it shall have become a law; provided, however, that sections two, three, four, five and six of this act shall take effect January 30, 2012, provided, however, that the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized and directed to be made and completed on or before such effective date.

Laws 2011, ch 458, § 4, eff Aug 17, 2011, provides as follows:

§ 4. This act shall take effect immediately, provided that: (a) sections one and two of this act shall take effect September 1, 2011, except that the promulgation of any rules and regulations, and the taking of any other actions necessary to implement the provisions of such sections of this act are authorized and directed to be made on or before the effective date of such sections; and (b) section three of this act shall take effect January 1, 2012.

Laws 2012, ch 465, § 1, eff Oct 3, 2013, provide as follows:

Section 1. Short title. This act shall be known and may be cited as "Lauren's law".

Laws 2012, ch 465, § 6, eff Oct 3, 2013, provides:

§ 6. This act shall take effect one year after it shall have become a law; provided that the commissioners of health and motor vehicles may implement sections two, four and five of this act within their respective jurisdictions before that date (Amd, L 2016, ch 174, § 1, eff July 21, 2016; L 2017, ch 331, § 1, eff Oct 16, 2017).

Laws 2015 ch 405, § 4, eff Oct 26, 2015, provide:

§ 4. This act shall take effect immediately; provided that the amendments to subdivision (ii) of paragraph (b) of subdivision 5 of section 4310 of the public health law, made by section one of this act, shall not affect the expiration of the amendments to such subdivision by chapter 465 of the laws of 2012, and shall expire therewith; provided, further that the amendments to the third undesignated paragraph of subdivision 2 of section 490 of the vehicle and traffic law, made by section two of this act, shall not affect the expiration and repeal of such paragraph, and shall be deemed repealed therewith; and provided, further that the amendments to the third undesignated paragraph of subdivision 1 of section 502 of the vehicle and traffic law, made by section three of this act, shall not affect the expiration of the amendments to such subdivision by chapter 465 of the laws of 2012, and shall expire therewith.

Laws 2016, ch 248, § 5, eff February 14, 2017, provides:

§ 5. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided that the amendments to paragraph (a) and subparagraph (ii) of paragraph (b) of subdivision 5 of section 4310 of the public health law, made by section two of this act, shall not affect the expiration and reversion of such subdivision, and shall expire therewith; provided, further that the amendments to the third undesignated paragraph of subdivision 2 of section 490 of the vehicle and traffic law, made by section three of this act, shall not affect the expiration and repeal of such paragraph, and shall be deemed repealed therewith; and provided, further that the amendments to the third undesignated paragraph of subdivision 1 of section 502 of the vehicle and traffic law, made by section four of this act, shall not affect the expiration of the amendments to such subdivision by chapter 465 of the laws of 2012, and shall expire therewith.

Laws 2017, ch 332, § 1, eff Oct 16, 2017, amended Laws 2012, ch 465, § 6, so as to delete a provision providing for an expiration applicable to subdivision 1 of this section

Laws 2017, ch 355, § 3, eff Apr 21, 2018, provides:

§ 3. This act shall take effect on the one hundred eightieth day after it shall have become a law provided that, effective immediately, the commissioner of motor vehicles is authorized to promulgate such rules and regulations as he or she deems necessary to effectuate the provisions of this act on such date.

Laws 2019, ch 37, § 1, eff December 14, 2019, provides:

Section 1. This act shall be known and may be cited as the "driver's license access and privacy act".

Laws 2019, ch 37, § 8, eff December 14, 2019, provides:

§ 8. This act shall take effect on the one hundred eightieth day after it shall have become a law. Effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized to be made and completed on or before such date.

Laws 2019, ch 368, § 6, eff June 30, 2020, provides:

§ 6. This act shall take effect June 30, 2020 and shall expire and be deemed repealed June 30, 2025; provided, however, that the amendments to paragraph (a) of subdivision 3 of section 89-b of the state finance law made by section four of this act shall be subject to the expiration and reversion of such subdivision pursuant to section 13 of part U1 of chapter 62 of the laws of 2003, as amended, when upon such date the provisions of section five of this act shall take effect. Effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized to be made and completed on or before such effective date.

Laws 2019, ch 513, § 2, eff May 18, 2020, provides:

§ 2. This act shall take effect on the one hundred eightieth day after it shall have become a law. Effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized to be made and completed on or before such effective date.

Laws 2019, ch 740, § 3, eff June 20, 2020, provides:

§ 3. This act shall take effect on the one hundred eightieth day after it shall have become a law. Effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized to be made and completed on or before such effective date.

Laws 2020, ch 31, § 2, eff June 20, 2020, provides:

§ 2. This act shall take effect on the same date and in the same manner as a chapter of the laws of 2019 amending the vehicle and traffic law relating to the licensing of drivers where there is evidence of the loss of consciousness by such

person, as proposed in legislative bills numbers S.5225-A and A.4751-A, takes effect.

Amendment Notes The 2015 amendment by ch 405, § 3, deleted "the department of" following "The commissioner of" in the first sentence; added "Except where the application is made in person or electronically" in the second sentence; and made a stylistic change.

The 2016 amendment by ch 248, § 4, added "except as otherwise provided pursuant to the provisions of paragraph (b) of subdivision one of section forty-three hundred one of the public health law" in the third sentence of the third paragraph of 1.

The 2016 amendment by ch 97, §§ 1, 2, deleted "authorized emergency vehicle or hazard" following "stopped or standing " in the last sentence of 3 and in the fifth sentence of 4(a)(i).

The 2017 amendment by ch 355, §§ 1, 2, added 4(c-3); in 4(a)(i), added "and 'Motorcycle Safety' awareness" in the first sentence and added the fifth sentence; added "and a 'Motorcycle Safety' awareness component as described in paragraph (c-3) of this subdivision" in the first sentence of 4(b); and in 4(d), added "and (c-3)" in the first sentence and "and 'Motorcycle Safety' awareness" in the second sentence; and made related changes.

The 2019 amendment ch 37, §§ 3–5, in the introductory language of 1, added the fifth and sixth sentences, substituted "social security number or, in lieu thereof, with respect to an application for a non-commercial driver's license or learner's permit which does not meet federal standards for identification, an affidavit signed by such applicant that they have not been issued a social security number" for "social security number and" in the second to the last sentence, and added "The commissioner also" in the last sentence; added "or, in lieu thereof, with respect to an application for a non-commercial driver's license or learner's permit which does not meet federal standards for identification, an affidavit signed by such applicant that they have not been issued a social security number" in the second sentence of 6(a); added 7 and 8; and made a stylistic change.

The 2019 amendment by ch 368, §§ 2, 3, in 2(d), added "(i)" and "and (ii) if such applicant completed an internet delivered pre-licensing course approved by the commissioner pursuant to article twelve-d of this chapter, that such applicant participated throughout such course"; added the last sentence of 4(h); and made a related change.

The 2019 amendment by ch 513, § 1, in 4(a)(i), added "'School Bus Safety' awareness" in the first sentence and added the fourth to the last sentence; added "and a 'School Bus Safety' awareness component as described in paragraph (c-4) of this subdivision" in the first sentence of 4(b); added 4(c-4); in 4(d), added "and (c-4)" in the first sentence and "and 'School Bus Safety' awareness" in the second sentence; and made related changes.

The 2019 amendment by ch 740, § 1, added 8.

The 2020 amendment by ch 31, § 1, redesignated former 8 [XX setout] as 9; substituted "denominated" for "denominate" in 9(b); in 9(d)(i), substituted "Upon a scheduled review of a statement as required under paragraph e of this section or upon receipt of evidence from a police agency, police accident report or physician, physician assistant or nurse practitioner confirmed" for "Upon receipt of an application for an original driver's license, or for renewal of a driver's license, or upon a scheduled review of evidence confirmed" and "subparagraph (iii)" for "subparagraph (ii)" in the first sentence, and added the last two sentences; added 9(d)(ii); and redesignated former 9(d)(ii) as 9(d)(iii).

Repeal Notes: [1990, ch 173] Subdivision 2 of section 502 of the vehicle and traffic law, repealed by this act, contain minimum ages for licensing and fees for licenses and are reenacted in modified form in proposed new subdivisions similarly numbered. Paragraph (e) of subdivision 4 of section 502 of such law, proposed to be repealed herein, provided for a report by the commissioner of motor vehicles evaluating the prelicensing course by March 1, 1987. Paragraph (b) of subdivision 5 of section 502 of such law, repealed herein, provided for restrictions on driver licenses and licensing requirement for the operation of limited use vehicles and are reenacted in subdivision 2 of section 501 of such law.

Notes to Decisions

Analysis

1. Privacy rights
2. Constitutionality
3. Immigration status

1. Privacy rights

Mandamus did not lie to compel Department of Motor Vehicles (DMV) to issue driver's license to petitioner who refused, on privacy grounds, to supply his Social Security number, because petitioner was explicitly asking DMV to perform discretionary act not premised on any specific authority, and he did not establish clear right to relief on ground that he was noncommercial driver and was not liable for child support. Adler v Jackson, 185 Misc. 2d 45, 712 N.Y.S.2d 240, 2000 N.Y. Misc. LEXIS 279 (N.Y. Sup. Ct. 2000).

Department of Motor Vehicles' refusal to process petitioner's license renewal application, due to petitioner's refusal to comply with provisions of CLS Veh & Tr § 502 on privacy grounds, did not constitute denial of due process. Adler v Jackson, 185 Misc. 2d 45, 712 N.Y.S.2d 240, 2000 N.Y. Misc. LEXIS 279 (N.Y. Sup. Ct. 2000).

Petitioner's refusal to supply Social Security number on his license renewal application, as required by CLS Veh & Tr § 502, was not protected by Federal Privacy Act of 1974 (5 USCS § 552a) based on his concerns about information sharing permitted by Driver's Privacy Protection Act of 1994 (18 USCS §§ 2721-2725), considering policies behind 1976 amendment to Social Security relating to driver's licenses (42 USCS § 405). Adler v Jackson, 185 Misc. 2d 45, 712 N.Y.S.2d 240, 2000 N.Y. Misc. LEXIS 279 (N.Y. Sup. Ct. 2000).

2. Constitutionality

Department of Motor Vehicles did not unconstitutionally impede petitioner's right to interstate travel by denying him driver's license because he refused to supply his social security number pursuant to CLS Veh & Tr § 502, because petitioner did not have fundamental right to drive motor vehicle. Adler v Jackson, 185 Misc. 2d 45, 712 N.Y.S.2d 240, 2000 N.Y. Misc. LEXIS 279 (N.Y. Sup. Ct. 2000).

Veh § Tr § 502 did not violate applicant's First Amendment right to free exercise of religion, despite claim that result of disclosure was confiscation of driver's licenses of predominantly poor individuals who were delinquent in paying spousal and child support obligations, and that such discrimination was contrary to applicant's religion, since statute was facially neutral toward religion, and any effect on applicant's religion was incidental and permitted. Stoianoff v Comm'r of Motor Vehicles, 107 F. Supp. 2d 439, 2000 U.S. Dist. LEXIS 11019 (S.D.N.Y. 2000), aff'd, 12 Fed. Appx. 33, 2001 U.S. App. LEXIS 11000 (2d Cir. N.Y. 2001).

3. Immigration status

N.Y. Veh. & Traf. Law §§ 502(1) and 508 granted broad discretionary powers to the Commissioner of the New York State Department of Motor Vehicles, obviating the need for him to resort to the State Administrative Procedures Act to implement internal administrative procedures such as the designation of documents acceptable to prove ineligibility for a Social Security number. It was a reasonable exercise of this discretion for the Commissioner to require that to receive a driver's license or a non-driver identification card, an alien claiming to be ineligible for a Social Security number had to supply Department of Homeland Security documentation together with a Social Security Administration ineligibility letter; the fact that the documentation requirements had an adverse impact on those who did not possess the documentation did not render them ultra vires. Cubas v Martinez, 33 A.D.3d 96, 819 N.Y.S.2d 10, 2006 N.Y. App. Div. LEXIS 8662 (N.Y. App. Div. 1st Dep't 2006), aff'd in part, modified, 8 N.Y.3d 611, 838 N.Y.S.2d 815, 870 N.E.2d 133, 2007 N.Y. LEXIS 1456 (N.Y. 2007).

New York State Department of Motor Vehicles (DMV) was enjoined and restrained during the pendency of a declaratory action from requiring or any way imposing a legal presence requirement or any immigration status as a condition to receipt of a driver's license, renewal license, learner's permit, or non-driver identification card. The internal rules instituted by DMV requiring such documentation was an unauthorized exercise of its rule-making power and, as such, the plaintiffs made a prima facie showing of the likelihood that they would prevail at trial on the merits of its claims as well as demonstrated irreparable injury in that DMV's rules made certain persons afraid to apply for a license, caused the plaintiffs to be unable to travel to their work, or bring their children to necessary medical treatment. Cubas v Martinez, 233 N.Y.L.J. 93, 2005 N.Y. Misc. LEXIS 3358 (N.Y. Sup. Ct. May 16, 2005), rev'd, 33 A.D.3d 96, 819 N.Y.S.2d 10, 2006 N.Y. App. Div. LEXIS 8662 (N.Y. App. Div. 1st Dep't 2006).

Immigrants' action challenging the enforcement of N.Y. Veh. & Traf. Law §§ 502(1) and 508 (2) had to be dismissed, as the immigrants failed to show that a policy of requiring Department of Homeland Security documents as proof of ineligibility for a Social Security number prior to issuance of a driver's license was invalid, as the obligation to supply proof that an applicant was not eligible for a Social Security number was imposed by a pre-existing regulation which the immigrants admitted was valid, and the policy merely specified what proof was acceptable; furthermore, the implementation of the policy did not violate N.Y. Const. art. IV, § 8, or N.Y. A.P.A. Law § 202(1), as the documentation requirement was merely an interpretation or explanation of a pre-existing rule, and thus the rule did not have to be filed with the Secretary of State prior to implementation. Cubas v Martinez, 8 N.Y.3d 611, 838 N.Y.S.2d 815, 870 N.E.2d 133, 2007 N.Y. LEXIS 1456 (N.Y. 2007).

Agency Opinions

In view of the varying degrees of color blindness, the granting of a driver's license to an applicant, who on examination is found to be color blind, is for the commissioner's determination, denial being justified where the degree of color blindness is such that an applicant cannot distinguish colors in a matter consistent with public safety. 1940 NY Ops Atty Gen June 18.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Definitions, CLS Veh & Tr § 501-a.

Codes, Rules and Regulations:

Periodic vision re-examinations. 15 NYCRR §§ 5.1–5.7.

Prelicensing classroom driver training and highway safety instruction. 15 NYCRR §§ 7.1 et seq.

Road and written tests, waiver and effect. 15 NYCRR §§ 8.1–8.4.

Driver license qualifications after loss of consciousness, 15 NYCRR §§ 9.1 et seq.

Federal Aspects:

The Commercial Motor Vehicle Safety Act of 1986, Public Law 99-570, Title XII, cited in statutory text, formerly appeared as 49 USCS Appx §§ 2710, prior to the enactment of Title 49 into positive law by Acts Oct. 17, 1978, P. L. 95-473, § 1, 92 Stat. 1337, Jan. 12, 1983, P. L. 97-449, § 1, 96 Stat. 2413, July 5, 1994, P. L. 103-272, § 1(a), 108 Stat. 7; similar provisions now appear as 49 USCS §§ 31301 et seq.

The Selective Service Act, cited in statutory text, appears generally as 50 USCS Appx §§ 451 et seq.

Annotations:

State's liability for improperly licensing negligent driver. 79 ALR3d 955.

Validity, construction, and application of age requirements for licensing of motor vehicle operators. 86 ALR3d 475.

Negligent entrustment of motor vehicle to unlicensed driver. 55 ALR4th 1100.

TITLE VI Accidents and Accident Reports

Article 22. Accidents and Accident Reports

Section
605. Report required upon accident

HISTORY:

Add, L 1959, ch 775, eff Oct 1, 1960.

ARTICLE 22 Accidents and Accident Reports

HISTORY:

Add, L 1959, ch 775, eff Oct 1, 1960.

§ 605. Report required upon accident

(a) 1. Every person operating a motor vehicle, except a police officer (as defined in subdivision thirty-four of section 1.20 of the criminal procedure law), a correction officer, or a firefighter, operating a police department, a correction department, or fire department vehicle respectively while on duty, if a report has been filed by the owner of such vehicle, which is in any manner involved in an accident, anywhere within the boundaries of this state, in which any person is killed or injured, or in which damage to the property of any one person, including himself, in excess of one thousand dollars is sustained, shall within ten days after such accident, report the matter in writing to the commissioner. If such operator or chauffeur be physically incapable of making such report and there be another participant in the accident not incapacitated, such participant shall make such report within ten days after such accident. If the operator or chauffeur involved in such accident be unable to make such report, the owner of the motor vehicle involved in such accident, if such owner be not involved in such accident or incapacitated, shall within ten days after he learns of the fact of such accident report the matter to the commissioner together with such information as may have come to his knowledge relating to such accident. Every such operator or chauffeur of a motor vehicle, or participant in any such accident, or owner of the motor vehicle involved in any such accident, shall make such other and additional reports as the commissioner shall require.

2. Failure to report an accident as herein provided or failure to give correctly the information required of him by the commissioner in connection with such report shall be a misdemeanor and shall constitute a ground for suspension or revocation of the operator's (or chauffeur's) license or all certificates of registration for any motor vehicle, or of both, of the person failing to make such report as herein required. In addition, the commissioner may temporarily suspend the driver's license or permit or certificate of registration of the motor vehicle involved in the accident, or of

both, of the person failing to report an accident within the period prescribed in paragraph one of this subdivision, until such report has been filed. However, no suspension or a revocation shall be made of a license or certificate of registration of any police officer, correction officer, or firefighter involved in an accident while on duty for failure to report such accident within ten days thereof if a report has been filed by the owner of such vehicle.

3. In the case of a non-resident the failure to report an accident as herein provided shall constitute ground for suspension or revocation of his privileges of operating a motor vehicle in this state and of the operation within this state of any motor vehicle owned by him.

4. When a report required by this section is made by an owner or an operator of a fire vehicle, as defined by section one hundred fifteen-a of this chapter, or a police vehicle, as defined by section one hundred thirty-two-a of this chapter, when such accident occurred during the operation of such vehicle in response to an emergency where the operator was responding to a call to duty as a paid or volunteer member of any fire department, or in the case of a police vehicle, when such accident occurred during emergency operation, as defined by section one hundred fourteen-b of this chapter, the commissioner shall omit the event described in such report from the operator's external license abstract. Provided, however, the commissioner shall not omit the event described in such report from the operator's external license abstract if as a result of such event such operator has either (i) been charged with a violation of this chapter or of the penal law, unless the commissioner receives evidence that such charge has been dismissed, or that the action has otherwise been terminated in favor of the accused pursuant to section 160.50 of the criminal procedure law, or that the charge has otherwise been adjudicated in an administrative or other proceeding in favor of the defendant operator or (ii) been found to have been grossly negligent by a final order of a court of competent jurisdiction.

(b) Every person operating a bicycle which is in any manner involved in an accident on a public highway in this state in which any person is killed, other than the operator, or suffers serious physical injury as defined pursuant to subdivision ten of section 10.00 of the penal law, shall within ten days after such operator learns of the fact of such death or serious physical injury, report the matter in writing to the commissioner. If such operator is physically incapable of making such report within ten days, he or she shall make the report immediately upon recovery from the physical incapacity. If such operator is an unemancipated minor who is incapable of making such report for any reason, the parent or guardian of such operator shall make such report within ten days after learning of the fact of such accident. Every such operator of a bicycle, or parent or guardian of such unemancipated minor operator, shall make such other and additional reports as the commissioner shall require.

(c) The report required by this section shall be made in such form and number as the commissioner may prescribe. Such report shall include information on the width and length of trucks, tractors, trailers and semitrailers, which are in excess of ninety-five inches in width or thirty-four feet in length and which are involved in such accidents, whether such accident took place in a work area and whether it was being operated with an overweight or over dimension permit. Such report shall distinctly indicate and include information as to whether the inflatable restraint system inflated and deployed.

HISTORY:

Add, L 1959, ch 775, eff Oct 1, 1960, with substance transferred from former § 94–f; amd, L, 1965, ch 307, § 2; L 1965, ch 158, § 3; L 1965, ch 307, §§ 1, 2; L 1969, ch 84, § 3; L 1972, ch 265, § 1; L 1978, ch 537, § 3; L 1985, ch 144, § 1; L 1989, ch 254, § 2, eff Nov 4, 1989; L 1990, ch 173, § 26, eff Aug 19, 1990; L 1991, ch 166, § 218, eff Aug 1, 1991; L 1993, ch 379, § 1, eff Nov 1, 1993; L 1996, ch 161, § 10, eff Jan 1, 1997; L 1996, ch 522, § 1, eff Oct 7, 1996; L 1999, ch 498, § 1, eff Nov 27, 1999; L 2004, ch 71, § 1, eff May 11, 2004.

Editor's Notes: Laws 1989, ch 254, §§ 1, 3, eff Nov 4, 1989, provide as follows:

Section 1. Legislative findings. The legislature finds that bicycle-related injuries and fatalities constitute a significant ongoing problem. The legislature further finds that the available statistical data on bicycle accidents is too imprecise to allow the development of effectively focused safety countermeasures. Since the existing reporting system for motor vehicle accidents can readily accommodate bicycle accident reporting, additional information can be derived relatively easily and inexpensively. Therefore, it is the intent of the legislature to improve the quality of bicycle safety information through the establishment of a bicycle accident reporting system.

§ 3. This act shall take effect on the one hundred twentieth day after it shall have become a law except that any rules and regulations necessary for the timely implementation of this act on its effective date shall be promulgated on or before such date.

Laws 1996, ch 161, §§ 1 and 11, eff June 18, 1996, provide as follows:

Section 1. Short title. This act shall be known and may be cited as the "Airbag Safety and Anti-theft Act."

§ 11. This act shall take effect immediately, provided, that subdivision 7 of section 398-d of the vehicle and traffic law as added by section five of this act and the amendment to subdivision (c) of section 605 of the vehicle and traffic law made by section ten of this act shall take effect January 1, 1997, provided, further, the commissioner of motor vehicles shall promulgate such rules and regulations as are necessary to implement the provisions of this act on or before January 1, 1997.

Notes to Decisions

Analysis

1. In general
2. Constitutionality

1. In general

Statute requiring motor vehicle operator involved in accident, whether culpable or not, to remain at scene of accident, identify himself and report accident to police is valid; duties imposed by it are reasonable exercises of police power by state to regulate activities directly relevant to public safety, and incidental and limited risk of inculpation by identification and report of motor vehicle operators whose conduct involves, or is likely to involve,

criminal accusations is insufficient to inhibit regulatory power by interposition of privilege against self-incrimination. People v Samuel, 29 N.Y.2d 252, 327 N.Y.S.2d 321, 277 N.E.2d 381, 1971 N.Y. LEXIS 967 (N.Y. 1971).

It was not legislative intent, in statute requiring motor vehicle operator involved in accident to remain at scene, identify himself and report accident to police, to prohibit use of such information in any criminal prosecution which might ensue. People v Samuel, 29 N.Y.2d 252, 327 N.Y.S.2d 321, 277 N.E.2d 381, 1971 N.Y. LEXIS 967 (N.Y. 1971).

In a negligence action arising out of an automobile collision denial of motion to compel disclosure of report filed by operator of car under the provisions of the above statute, sustained on the ground that such report is a public record and hence requirement thereof on disclosure was receivable in evidence as an admission by the defendant. Yeargans v Yeargans, 24 A.D.2d 280, 265 N.Y.S.2d 562, 1965 N.Y. App. Div. LEXIS 2693 (N.Y. App. Div. 1st Dep't 1965).

An accident report made by the defendant to the Commissioner of Motor Vehicles, when properly certified, was receivable in evidence as an admission by the defendant in plaintiff's action to recover damages arising out of the collision of defendant's automobile with the rear end of plaintiff's allegedly stopped automobile. Carter v Castle Electric Contracting Co., 26 A.D.2d 83, 271 N.Y.S.2d 51, 1966 N.Y. App. Div. LEXIS 4006 (N.Y. App. Div. 2d Dep't 1966).

Automobile accident case defendant who gave his former address to plaintiff at time of accident and who had not filed accident report or notified Motor Vehicle Commissioner of change of address was estopped from contending that notice affixed at former residence did not comply with statutory requirement that summons be affixed to dwelling place or usual place of abode. Cohen v Arista Truck Renting Corp., 70 Misc. 2d 729, 335 N.Y.S.2d 30, 1972 N.Y. Misc. LEXIS 1805 (N.Y. Sup. Ct. 1972).

New York Department of Motor Vehicles form MV-104, required to be filed following accident in which person is killed or injured or damage exceeds $600, does not constitute prima facie evidence of insurance coverage so as to shift burden of proving lack of coverage to insurer since (1) form is unsupported by any independent proof of insurance coverage, (2) form is not certificate or affidavit as to fact ascertained or act performed by public officer in course of official duty (CLS CPLR § 4520), and (3) form is unlike police report containing insurance information based on insurance identification card, which does shift burden of proof to named insurer. Mona Leasing, Inc. v Travelers Indem. Co., 148 Misc. 2d 877, 564 N.Y.S.2d 665, 1990 N.Y. Misc. LEXIS 636 (N.Y. Dist. Ct. 1990).

New York Department of Motor Vehicles (DMV) form MV-104, required to be filed following accident in which person is killed or injured or damage exceeds $600, does not constitute prima facie evidence of insurance coverage so as to shift burden of proving lack of coverage to insurer since form is unsupported by any independent proof of insurance coverage and is thus unlike either DMV form FS-25, which does constitute prima facie evidence of insurance coverage, or registration application, which has been held barely adequate to shift burden of proof to named insurer. Mona Leasing, Inc. v Travelers Indem. Co., 148 Misc. 2d 877, 564 N.Y.S.2d 665, 1990 N.Y. Misc. LEXIS 636 (N.Y. Dist. Ct. 1990).

2. Constitutionality

Rationale that automobile operation is privilege and not right, and that acceptance of such privilege with its conditions constitutes waiver of constitutional rights is no longer acceptable. People v Samuel, 29 N.Y.2d 252, 327 N.Y.S.2d 321, 277 N.E.2d 381, 1971 N.Y. LEXIS 967 (N.Y. 1971).

The contention that it is contrary to public policy to disclose confidential accident reports and that this section would compel that person to be a witness against himself in a criminal action, in violation of the New York Constitution Art. I, § 6, can be raised only by a person making statements at the time when those statements are offered in evidence, and not before. People ex rel. Stenstrom v Harnett, 224 A.D. 127, 230 N.Y.S. 28, 1928 N.Y. App. Div. LEXIS 9947 (N.Y. App. Div.), aff'd, 249 N.Y. 606, 164 N.E. 602, 249 N.Y. (N.Y.S.) 606, 1928 N.Y. LEXIS 965 (N.Y. 1928).

Where defendant was convicted upon a plea of guilty of violating § 600, following an adjournment for two and one-half weeks to enable him to obtain counsel after original arraignment and being advised of his right to counsel, and likewise of the danger of pleading guilty under § 335-a of the Code of Criminal Procedure and § 605 of this law relating to leaving the scene of an accident without reporting it, his conviction would not be reversed because of alleged confusion on his part caused by the court's reading to him provisions other than that under which he was charged. People v Witt, 26 Misc. 2d 836, 207 N.Y.S.2d 194, 1960 N.Y. Misc. LEXIS 2204 (N.Y. County Ct. 1960).

Agency Opinions

An auto accident, within the meaning of the Vehicle and Traffic Law, includes every accident in which a motor vehicle is involved in any manner within the boundaries of the state and must be reported to the motor vehicle commissioner. 1942 NY Ops Atty Gen May 19.

A member of a municipal fire department who is involved in an accident while operating fire department apparatus must file an accident report with the State Department of Motor Vehicles if the accident involves either property damage in excess of $100 or injury or death of any person. 1961 NY Ops Atty Gen Nov 13.

A bus company carrying passengers within the confines of the New York World's Fair site must file a report of accident occurring therein with the Commissioner of Motor Vehicles. 1964 NY Ops Atty Gen Aug 26.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 343, 506; CLS Gen Bus § 396-z.

Definitions of terms of general use in this chapter, CLS Pen § 10.00.

Termination of filing provisions, § 346.

Matthew Bender's New York Practice Guides: LexisNexis AnswerGuide New York Negligence § 2.03[7] Conducting Initial Client Interview.

LexisNexis AnswerGuide New York Negligence § 2.03 Conducting Initial Client Interview.

Warren's Negligence in the New York Courts Ch. 12 (statute of limitations).

Texts: 5 Frumer & Biskind, Bender's New York Evidence —CPLR § 20.02.

TITLE VII Rules of the Road

Article 23. Obedience To and Effect of Traffic Laws

Section
1102. Obedience to police officers and flagpersons
1103. Public officers and employees to obey title; exceptions
1104. Authorized emergency vehicles

Article 24. Traffic Signs, Signals and Markings

1110. Obedience to and required traffic-control devices

Article 25. Driving on Right Side of Roadway, Overtaking and Passing, Etc.

1131. Driving on shoulders and slopes

Article 26. Right of Way

1144. Operation of vehicles on approach of authorized emergency vehicles
1144-a. Operation of vehicles when approaching a parked, stopped or standing authorized emergency vehicle or hazard vehicle or vehicle displaying a blue or green light

Article 28. Turning and Starting and Signals on Stopping and Turning

1164. Signals by hand and arm or signal lamps

Article 30. Speed Restrictions

1180. Basic rule and maximum limits

Article 32. Stopping, Standing, and Parking

Section
1202. Stopping, standing or parking prohibited in specified places [Effective until April 5, 2021]
1202. Stopping, standing or parking prohibited in specified places [Effective April 5, 2021]

Article 33. Miscellaneous Rules

1217. Following emergency fire vehicles prohibited
1218. Crossing fire hose
1229-c. Operation of vehicles with safety seats and safety belts.

HISTORY:
Add, L 1959, ch 775, eff Oct 1, 1960, with substance transferred from former Title III.

ARTICLE 23 Obedience To and Effect of Traffic Laws

HISTORY:
Add, L 1959, ch 775, eff Oct 1, 1960, with substance transferred from former Art 12.

§ 1102. Obedience to police officers and flagpersons

No person shall fail or refuse to comply with any lawful order or direction of any police officer or flagperson or other person duly empowered to regulate traffic.

HISTORY:
Add, L 1959, ch 775, with substance transferred from former § 1102; amd, L 1980, ch 7, § 2, eff Feb 27, 1980.

Notes to Decisions

Analysis

1. In general
2. Police officers
3. Crossing guards

1. In general

A false arrest complaint alleging arrest made by general manager and assistant secretary-treasurer of Thruway Authority was illegal was dismissed. Sutton v Evans, 4 A.D.2d 580, 168 N.Y.S.2d 112, 1957 N.Y. App. Div. LEXIS 3799 (N.Y. App. Div. 1st Dep't 1957), app. dismissed, 7 N.Y.2d 741, 193 N.Y.S.2d 647, 162 N.E.2d 734, 1959 N.Y. LEXIS 1076 (N.Y. 1959).

While acts of uttering a vulgarity, failure to produce a certificate of registration, refusing to comply with a lawful order and direction of a police officer and reckless endangerment, growing out of the disturbance at a downtown tavern and imputed to the licensee, might be characterized as stubborn or childish, they are not those of a dissolute person nor do they demonstrate lack of moral turpitude rather they show nothing more than a traffic infraction; with the spotless license history of the licensee as well as the lack of showing of an unsavory background for the corporate officer, the acts do not evince "unsatisfactory character and/or fitness" of the licensee such as to properly justify denial of the issuance of a license or renewal and, the cancellation was arbitrary and capricious and not justified. Ogdensburg Hotel Corp. v State Liquor Authority, 35 A.D.2d 869, 315 N.Y.S.2d 229, 1970 N.Y. App. Div. LEXIS 3515 (N.Y. App. Div. 3d Dep't 1970).

Sections 390 and 393 of this law are to be read in connection with this section in determining what constitutes a "refusal to comply" with orders or directions of a traffic officer. People v Mann, 43 Misc. 2d 786, 251 N.Y.S.2d 976, 1964 N.Y. Misc. LEXIS 1598 (N.Y. County Ct. 1964).; O'Hayer v De St. Aubin, 44 Misc. 2d 786, 255 N.Y.S.2d 101, 1964 N.Y. Misc. LEXIS 1197 (N.Y. Sup. Ct. 1964), aff'd, 24 A.D.2d 604, 262 N.Y.S.2d 225, 1965 N.Y. App. Div. LEXIS 3594 (N.Y. App. Div. 2d Dep't 1965).

A person cannot be convicted of failing or refusing to comply with a lawful order or direction where the evidence does not clearly establish that the officer or other person directing traffic gave any particular order or direction. People v Mann, 43 Misc. 2d 786, 251 N.Y.S.2d 976, 1964 N.Y. Misc. LEXIS 1598 (N.Y. County Ct. 1964).; O'Hayer v De St. Aubin, 44 Misc. 2d 786, 255 N.Y.S.2d 101, 1964 N.Y. Misc. LEXIS 1197 (N.Y. Sup. Ct. 1964), aff'd, 24 A.D.2d 604, 262 N.Y.S.2d 225, 1965 N.Y. App. Div. LEXIS 3594 (N.Y. App. Div. 2d Dep't 1965).

Failure or refusal of owner to exhibit license or registration when properly requested was not a violation of statute making it unlawful to refuse to obey any lawful order or direction of police officer or other person empowered to regulate traffic. People v Bohn, 91 Misc. 2d 132, 397 N.Y.S.2d 514, 1977 N.Y. Misc. LEXIS 2257 (N.Y. App. Term 1977).

Where operator of motor vehicle fails to exhibit license or registration when properly requested he may be charged with being an unlicensed operator or operating an unregistered vehicle; if he fails or refuses to sufficiently identify himself he may also be arrested. People v Bohn, 91 Misc. 2d 132, 397 N.Y.S.2d 514, 1977 N.Y. Misc. LEXIS 2257 (N.Y. App. Term 1977).

The tort of false arrest is essentially the same as the tort of false imprisonment and every false arrest is itself a false imprisonment, with the imprisonment commencing with the arrest; since, applying the reasonable and prudent person test, claimant's conduct in blowing his horn at a State trooper's vehicle after the vehicle suddenly and without warning made a U-turn in front of his car, tossing his insurance card at the trooper through his open window to avoid receiving a ticket and then having a heated argument with the trooper, did not afford the trooper probable cause to arrest claimant for disorderly conduct (Penal Law, § 240.20), refusing to comply with a lawful order of a police officer (Vehicle and Traffic Law, § 1102) or resisting arrest (Penal Law, § 205.30), there being no lawful arrest to begin with, there exists a cause of action for false arrest and false imprisonment. Budgar v State, 98 Misc. 2d 588, 414 N.Y.S.2d 463, 1979 N.Y. Misc. LEXIS 2119 (N.Y. Ct. Cl. 1979).

Defendant could not be charged with violating CLS Veh & Tr § 1102 by reason of his disobedience of direction to stop by school security officer as he was driving on school property, since (1) even though school crossing guards are duly empowered to regulate traffic pursuant to § 1102 (because CLS Gen Mun § 208-a provides for municipal appointment of crossing guards and specifically grants them authority to regulate traffic), no similar authority exists with respect to school security guards, and (2) while school district has authority under CLS Veh & Tr § 1670 to regulate traffic through traffic control devices, there is no legal requirement that driver obey school security officer's direction. People v Bassett, 156 Misc. 2d 346, 593 N.Y.S.2d 176, 1992 N.Y. Misc. LEXIS 591 (N.Y. J. Ct. 1992).

Defendant's conviction of violating N.Y. Veh. & Traf. Law § 1102 was reversed; N.Y. Veh. & Traf. Law § 1102 was designed to compel obedience to an order regulating traffic, and an officer's order directing defendant to return to his vehicle while the officer administered field sobriety tests to defendant's son did not fall within the scope of the statute. People v DeCerbo, 783 N.Y.S.2d 202, 4 Misc. 3d 23, 2004 N.Y. Misc. LEXIS 621 (N.Y. App. Term 2004).

Driver violated N.Y. Veh. & Traf. Law § 1102 where he failed to yield to the directions of volunteer firefighters who were directing traffic at the scene of an automobile accident, as the firefighters had authority to act pursuant to the instructions given to them by their fire chief, who had properly delegated his authority to regulate traffic at such incidents pursuant to the emergency doctrine contained in N.Y. Veh. & Traf. Law § 1602; although the firefighters were not fire police officers, pursuant to N.Y. Gen. Mun. Law § 209-c, they were acting under the direction and control of their chief pursuant to N.Y. Village Law § 10-1018. People v Loren, 4 N.Y.3d 411, 796 N.Y.S.2d 26, 828 N.E.2d 983, 2005 N.Y. LEXIS 1039 (N.Y. 2005).

Vehicle and Traffic Law § 1102 would apply to recreation or athletic fields owned by a city, where such areas are open to free

and unrestricted use by the public for motor vehicle traffic. 1966 Ops Atty Gen Dec 7.

2. Police officers

In a prosecution for resisting a police officer in the discharge of his duty in that defendants refused to drive their trucks onto a scale for weighing (§ 69) and refused to deliver the truck keys to the police, the jury should not have been allowed to convict defendants, in effect, of disobeying an order of a peace officer engaged in the direction of traffic (§ 88, sub 6). People v Fidler, 280 A.D. 698, 117 N.Y.S.2d 313, 1952 N.Y. App. Div. LEXIS 3559 (N.Y. App. Div. 1952).

Substantial evidence supported determination that petitioner failed to comply with lawful direction of police officer in violation of CLS Veh & Tr § 1102 where officer testified that while he was directing traffic, he raised his hand to allow child and school crossing guard to cross street, that light-colored mid-sized vehicle ignored officer's signal and kept going, that license plate number taken down by officer matched petitioner's vehicle, and that petitioner fit officer's description of driver. Ortenberg v Commissioner of Motor Vehicles, 191 A.D.2d 898, 595 N.Y.S.2d 127, 1993 N.Y. App. Div. LEXIS 2355 (N.Y. App. Div. 3d Dep't 1993).

It was appropriate to suspend petitioner's driving license and privileges for 45 days based on his failure to comply with police officer's direction to stop his vehicle to allow child and school crossing guard to cross street, especially given that petitioner's vehicle almost struck child. Ortenberg v Commissioner of Motor Vehicles, 191 A.D.2d 898, 595 N.Y.S.2d 127, 1993 N.Y. App. Div. LEXIS 2355 (N.Y. App. Div. 3d Dep't 1993).

Charged violations of CLS Penal §§ 120.05(3) and 205.30(a) and CLS Veh & Tr §§ 1225-a and 1102 could properly serve as predicate for action under CLS Gen Mun § 205-e where complaint alleged that (1) while on duty as police officer, plaintiff saw defendant drive vehicle onto sidewalk, (2) defendant refused plaintiff's continuing directions to stop and then jumped out of car and "came up at" him, and (3) defendant refused to be handcuffed and struggled with plaintiff, causing him to fall on ground and be injured. Healy v Moeller, 242 A.D.2d 366, 661 N.Y.S.2d 279, 1997 N.Y. App. Div. LEXIS 8466 (N.Y. App. Div. 2d Dep't 1997).

State trooper did not act recklessly in pursuing dirt bike that accelerated after driver ignored his gesture to pull over (for failure of driver and passenger to wear helmets), trooper's conduct was not proximate cause of accident in which driver lost control of bike, even though trooper's car came to rest on top of injured passenger, and thus state was not liable for passenger's injuries, where (1) passenger's own expert acknowledged that operation of bike was threat to public safety and that trooper, having perceived Vehicle and Traffic Law violation, had authority and duty to follow bike and remove it from highway, (2) although trooper exceeded 35 miles-per-hour speed limit during part of brief pursuit, he never exceeded 50 and was traveling only 17 to 20 miles per hour when he left road, (3) trooper's exceeding of speed limit did not warrant liability, given that weather was clear and dry, it was light outside, and there was no traffic in rural area of pursuit, and (4) although trooper's car ultimately came into contact with bike and passenger's ejected body on side of road, that unintentional contact resulted from trooper's reasonable efforts to avoid what he thought was going to be collision on road. Schieren v State, 281 A.D.2d 828, 722 N.Y.S.2d 128, 2001 N.Y. App. Div. LEXIS 3011 (N.Y. App. Div. 3d Dep't 2001).

A truck driver would be subject to conviction for violating this section in failing or refusing to comply with a traffic officer's order or direction to drive his truck onto a portable scale, but only if he was clearly directed to do so. People v Mann, 43 Misc. 2d 786, 251 N.Y.S.2d 976, 1964 N.Y. Misc. LEXIS 1598 (N.Y. County Ct. 1964).

Motorcycle operator, who was stopped for violating § 1181 of the Vehicle and Traffic Law, relating to minimum speeds, was properly arrested a second time for violating this section, when he refused to comply with the order and direction of a state trooper to start the motor so a determination could be made whether the muffler complied with subdivision 1 of section 381. Krafft v State, 52 Misc. 2d 35, 275 N.Y.S.2d 109, 1966 N.Y. Misc. LEXIS 1276 (N.Y. Ct. Cl. 1966).

The tort of false arrest is essentially the same as the tort of false imprisonment and every false arrest is itself a false imprisonment, with the imprisonment commencing with the arrest; since, applying the reasonable and prudent person test, claimant's conduct in blowing his horn at a State trooper's vehicle after the vehicle suddenly and without warning made a U-turn in front of his car, tossing his insurance card at the trooper through his open window to avoid receiving a ticket and then having a heated argument with the trooper, did not afford the trooper probable cause to arrest claimant for disorderly conduct (Penal Law, § 240.20), refusing to comply with a lawful order of a police officer (Vehicle and Traffic Law, § 1102) or resisting arrest (Penal Law, § 205.30), there being no lawful arrest to begin with, there exists a cause of action for false arrest and false imprisonment. Budgar v State, 98 Misc. 2d 588, 414 N.Y.S.2d 463, 1979 N.Y. Misc. LEXIS 2119 (N.Y. Ct. Cl. 1979).

Cab driver found guilty of violating CLS Veh & Tr § 1102 was not denied due process by officer's mistake in checking "Traffic Rules" box on summons instead of box labeled "VTL" (Vehicle and Traffic Law) where correct section number was specified, infraction was described in words, and it was clear that driver was not confused as to nature of charge. Sei Young Choi v Commissioner of Motor Vehicles, 185 Misc. 2d 502, 713 N.Y.S.2d 806, 2000 N.Y. Misc. LEXIS 374 (N.Y. Sup. Ct. 2000).

3. Crossing guards

A school crossing guard, having power to direct traffic under General Municipal Law § 208-a, was a "person duly empowered to regulate traffic" within the meaning of Vehicle and Traffic Law § 1102, and guard's request that defendant remove her car was a "lawful order" within the meaning of Vehicle and Traffic Law § 1102, where guard's belief that stopping of auto created a potentially hazardous situation was supported by fact that auto was blocking traveling lane, preventing free passage of other vehicles unless they crossed into oncoming traffic. People v Jennings, 75 Misc. 2d 408, 347 N.Y.S.2d 818, 1973 N.Y. Misc. LEXIS 1663 (N.Y. J. Ct. 1973).

A village may appoint school crossing guards on a part time basis. Such guards must be village policemen. 1955 Ops St Compt File #7360.

Agency Opinions

1. Crossing guards

The only county police departments or police districts in the state are in counties which by charter have established a police department or police district. The boards of supervisors in other counties have no authority to appoint school crossing guards. A sheriff is an independent elected official and may assign a deputy to perform school crossing guard duty but the deputy, when performing this activity, is acting in his capacity as deputy sheriff and not as a school crossing guard. When appropriate, the deputy sheriff may direct a school bus to cross railroad tracks without first coming to a stop. Two towns may enter into a municipal cooperation agreement to provide the service. Also, the two towns may appoint a single school crossing guard to act at an unguarded railroad grade crossing of a town highway which is divided longitudinally by the boundary line of the two towns. Under these circumstances, the school crossing guard would not be performing duties outside the municipality making the appointment. 1975 NY Ops Atty Gen Dec 5 (informal).

A school crossing guard may control vehicular traffic for purposes of protecting school children in school buses going to and from school. N.Y. Op. Att'y Gen. No. 84-30.

§ 1103. Public officers and employees to obey title; exceptions

(a) The provisions of this title applicable to the drivers of vehicles upon the highways shall apply to drivers of all vehicles owned or operated by the United States, this state, or any county, city, town, district, or any other political subdivision of the state, except as provided in this section and subject to such specific exceptions as are set forth in this title with reference to authorized emergency vehicles.

(b) Unless specifically made applicable, the provisions of this title, except the provisions of sections eleven hundred ninety-two through eleven hundred ninety-six of this chapter, shall not apply to persons, teams, motor vehicles, and other equipment while actually engaged in work on a highway nor shall the provisions of subsection (a) of section twelve hundred two apply to hazard vehicles while actually engaged in hazardous operation on or adjacent to a highway but shall apply to such persons and vehicles when traveling to or from such hazardous operation. The foregoing provisions of this subdivision shall not relieve any person, or team or any operator of a motor vehicle or other equipment while actually engaged in work on a highway from the duty to proceed at all times during all phases of such work with due regard for the safety of all persons nor shall the foregoing provisions protect such persons or teams or such operators of motor vehicles or other equipment from the consequences of their reckless disregard for the safety of others.

HISTORY:

Add, L 1959, ch 775, eff Oct 1, 1960, with substance transferred from former § 1103; amd, L 1970, ch 197, § 12; L 1974, ch 223, § 1; L 1987, ch 528, § 1, eff July 30, 1987.

Notes to Decisions

Analysis

1. In general
2. Applicability
3. Negligence standard
4. Recklessness
5. —Reckless disregard

1. In general

In a case in which plaintiff sued a city's sanitation department and others for personal injuries incurred when a street sweeper collided with plaintiff's vehicle, the sweeper operator was engaged in highway maintenance and thus subject to the recklessness standard of care. Defendants were not entitled to summary judgment because material issues of fact existed as to whether the sweeper operator operated the sweeper in a reckless manner and the extent of plaintiff's own negligence. Deleon v New York City Sanitation Dept., 25 N.Y.3d 1102, 35 N.E.3d 448, 14 N.Y.S.3d 280, 2015 N.Y. LEXIS 1362 (N.Y. 2015).

Court of Claims properly concluded that CLS Veh & Tr § 1103 need not be pleaded as affirmative defense. Wilson v State, 269 A.D.2d 854, 703 N.Y.S.2d 848, 2000 N.Y. App. Div. LEXIS 1810 (N.Y. App. Div. 4th Dep't), aff'd sub. nom., Riley v County of Broome, 95 N.Y.2d 455, 719 N.Y.S.2d 623, 742 N.E.2d 98, 2000 N.Y. LEXIS 3523 (N.Y. 2000).

City had the obligation to take steps to prevent the automatic erasure of any audio recording, and its failure to do so constituted spoliation because it was placed on notice of pedestrians' claim and its claimed "emergency operation" affirmative defense within the 180 days after the recording was made; preventing the city from introducing testimony as to the contents of the audio recording was appropriate. Strong v City of New York, 112 A.D.3d 15, 973 N.Y.S.2d 152, 2013 N.Y. App. Div. LEXIS 6601 (N.Y. App. Div. 1st Dep't 2013).

County employee operating a street sweeper was entitled to immunity in a driver's action alleging she sustained injuries when the street sweeper struck her car because, inter alia, the street sweeper did not necessarily need to be in the debris area in order to be "actually engaged" in protected work, the employee checked her mirror and looked to the left and right before moving to the passing lane, and the employee's conduct did not amount to reckless disregard for the safety of others. Matsch v Chemung County Dept. of Pub. Works, 128 A.D.3d 1259, 9 N.Y.S.3d 724, 2015 N.Y. App. Div. LEXIS 4321 (N.Y. App. Div. 3d Dep't), app. denied, 26 N.Y.3d 997, 41 N.E.3d 76, 19 N.Y.S.3d 218, 2015 N.Y. LEXIS 3559 (N.Y. 2015).

CLS Veh & Tr § 1103 need not be pleaded as affirmative defense; thus, in negligence action by claimants who were involved in accident with state vehicle engaged in work on highway, defendant did not waive its qualified immunity by failing to interject "reckless disregard" standard of care into litigation until close of evidence. McDonald v State, 176 Misc. 2d 130, 673 N.Y.S.2d 512, 1998 N.Y. Misc. LEXIS 83 (N.Y. Ct. Cl. 1998).

Higher court's analysis of whether CLS Gen Oblig § 9-103 constituted affirmative defense was not dispositive of whether CLS Veh & Tr §§ 1103(b) and 1104(e) constituted affirmative defenses. Culhane v State, 180 Misc. 2d 61, 687 N.Y.S.2d 542, 1999 N.Y. Misc. LEXIS 105 (N.Y. Ct. Cl. 1999).

2. Applicability

Because Veh and Tr Law § 1103(b) does not apply in the City of New York and there is no comparable provision in the City of New York Traffic Regulations, a public service corporation vehicle double-parked on a city street for a purpose other than actual work on the street is unlawfully parked. Somersall v New York Tel. Co., 52 N.Y.2d 157, 436 N.Y.S.2d 858, 418 N.E.2d 373, 1981 N.Y. LEXIS 2114 (N.Y. 1981).

Protections of CLS Veh & Tr § 1103(b) do not apply only to vehicles operating in designated "work area" as defined in CLS Veh & Tr 160. Riley v County of Broome, 95 N.Y.2d 455, 719 N.Y.S.2d 623, 742 N.E.2d 98, 2000 N.Y. LEXIS 3523 (N.Y. 2000).

Statute prohibiting stopping or parking of vehicle on expressway except in emergency was applicable to city's department of sanitation's foreman, whose departmental car was struck from the rear after he had stopped car partially off highway and proceeded to instruct driver of snowplow to clear exits and entrances, contrary to contention that foreman was exempt from operation of statutes governing motorists generally because he was a person "actually engaged in work on a highway." Petosa v New York, 52 A.D.2d 919, 383 N.Y.S.2d 397, 1976 N.Y. App. Div. LEXIS 12763 (N.Y. App. Div. 2d Dep't 1976).

Court of Claims properly determined that snowplow, plowing snow on highway at time of accident, was "vehicle ... (or) other equipment ... actually engaged in work on highway" within meaning of CLS Veh & Tr § 1103(b). Wilson v State, 269 A.D.2d 854, 703 N.Y.S.2d 848, 2000 N.Y. App. Div. LEXIS 1810 (N.Y. App. Div. 4th Dep't), aff'd sub. nom., Riley v County of Broome, 95 N.Y.2d 455, 719 N.Y.S.2d 623, 742 N.E.2d 98, 2000 N.Y. LEXIS 3523 (N.Y. 2000).

Trial court properly granted partial summary judgment pursuant to N.Y. C.P.L.R. 3212 to injured parties in a personal injury action, holding that municipal defendants were not entitled to a "rules of the road" exemption pursuant to N.Y. Veh. & Traf. Law § 1103(b), because an employee was not engaged in work on a highway when he caused an auto accident, and therefore did not qualify for the exemption. Davis v Inc. Vill. of Babylon, 13 A.D.3d 331, 786 N.Y.S.2d 550, 2004 N.Y. App. Div. LEXIS 14919 (N.Y. App. Div. 2d Dep't 2004).

N.Y. Veh. & Traf. Law § 1103(b) applied only to vehicles actually engaged in work upon a highway, which was construed as being limited to vehicles performing construction, repair, maintenance, or similar work; since the ordinary municipal refuse collection in which a garbage truck was engaged at the time of the accident at issue was not such work, the statute was inapplicable. Guzman v Bowen, 38 A.D.3d 837, 833 N.Y.S.2d 548, 2007 N.Y. App. Div. LEXIS 4014 (N.Y. App. Div. 2d Dep't 2007).

State was not entitled to summary judgment as to related claims to recover damages for personal injuries because triable issues of fact existed as to whether a state employee operating a snowplow truck was actually engaged in work on a highway at the time of the accident; thus, it was not clear if N.Y. Veh. & Traf. Law § 1103(b) applied as the standard for the State's liability. O'Keeffe v State of New York, 40 A.D.3d 607, 835 N.Y.S.2d 434, 2007 N.Y. App. Div. LEXIS 5637 (N.Y. App. Div. 2d Dep't 2007).

This section applied in the negligence action because the truck operated by the municipal employee was actually engaged in

work, albeit unassigned work, on a highway at the time of the accident, but there were triable issues of fact whether the employee acted with reckless disregard at the time of the accident; this section does not exempts only those vehicles engaged in "assigned" work. Gawron v Town of Cheektowaga, 117 A.D.3d 1410, 984 N.Y.S.2d 715, 2014 N.Y. App. Div. LEXIS 3089 (N.Y. App. Div. 4th Dep't 2014).

Municipal parking lot where a pedestrian was injured by a front-end loader operated by a village employee was a "highway" for purposes of this statute because the lot was publicly maintained and the traveling public had a general right of passage through it at the time the accident occurred. Freitag v Village of Potsdam, 155 A.D.3d 1227, 64 N.Y.S.3d 396, 2017 N.Y. App. Div. LEXIS 7869 (N.Y. App. Div. 3d Dep't 2017).

Snowplow operator was actually engaged in work on highway, and CLS Veh & Tr § 1103 therefore applied, where she collided with claimant's vehicle while making U-turn to plow road surfaces on her return to Department of Transportation. McDonald v State, 176 Misc. 2d 130, 673 N.Y.S.2d 512, 1998 N.Y. Misc. LEXIS 83 (N.Y. Ct. Cl. 1998).

3. Negligence standard

Vehicles actually engaged in work on highway have benefit of same lesser standard of care as emergency vehicles. Riley v County of Broome, 95 N.Y.2d 455, 719 N.Y.S.2d 623, 742 N.E.2d 98, 2000 N.Y. LEXIS 3523 (N.Y. 2000).

In action for personal injuries sustained when plaintiffs' vehicle struck city's department of sanitation's foreman's departmental car from rear after he stopped car partially off expressway and proceeded to give instructions to driver of snowplow, mere objection to "charging the Traffic Regulations and the Vehicle and Traffic Code, and particularly the Vehicle and Traffic Code as constituting negligence merely if there is a violation" was insufficient to preserve for review the contention that giving charge on statute prohibiting stopping or parking vehicle on expressway except in emergency was error on ground that foreman was exempt from operation of statute. Petosa v New York, 52 A.D.2d 919, 383 N.Y.S.2d 397, 1976 N.Y. App. Div. LEXIS 12763 (N.Y. App. Div. 2d Dep't 1976).

Denial of summary judgment was ordered where the movants, two construction companies and a trucking company being sued by the administratrix of the decedent's estate, failed meet their initial burden of proof as to overcoming the administratrix's claims of negligence as N.Y. Veh. & Traf. Law § 1103 did not, as they claimed, eliminate the duty that they owed the decedent not to act negligently at the construction site. Godinez v Siena College, 288 A.D.2d 659, 733 N.Y.S.2d 262, 2001 N.Y. App. Div. LEXIS 10862 (N.Y. App. Div. 3d Dep't 2001), app. denied, 97 N.Y.2d 722, 740 N.Y.S.2d 691, 767 N.E.2d 148, 2002 N.Y. LEXIS 646 (N.Y. 2002).

In an action by plaintiff motorist against defendants, a town and its employee, seeking damages for personal injuries which the motorist suffered when the motorist's vehicle was struck by a snowplow operated by the employee, the trial court properly granted defendants' cross motion for dismissal of the motorist's cause of action against the town for negligent or reckless hiring or retention of the employee given that (1) the employee was operating a hazard vehicle within the meaning of N.Y. Veh. & Traf. Law § 117-a, which meant that the employee was exempt from the rules of the road under N.Y. Veh. & Traf. Law § 1103(b) except insofar as the employee acted with reckless disregard for others' safety; (2) since negligence was therefore not a basis for liability against the employee, it was not a basis for liability against the town for negligent hiring because an underlying requirement in actions for negligent hiring or retention was that the employee was individually liable for a tort or guilty of a claimed wrong against a third person; and (3) if the employee was reckless, then the town was vicariously liable under the motorist's second cause of action for vicarious liability without a need for the reckless hiring or retention claim. Primeau v Town of Amherst, 303 A.D.2d 1035, 757 N.Y.S.2d 201, 2003 N.Y. App. Div. LEXIS 2960 (N.Y. App. Div. 4th Dep't 2003).

Summary judgment for town and its street sweeper operator against car passenger was properly denied; town and operator did not make prima facie case, under under N.Y. Veh. & Traf. Law 1103(b), that sweeper was actually engaged in hazardous operation at time of sweeper's collision with car. Ibarra v Town of Huntington, 6 A.D.3d 391, 773 N.Y.S.2d 897, 2004 N.Y. App. Div. LEXIS 3841 (N.Y. App. Div. 2d Dep't 2004).

State was entitled to summary judgment in personal injury action by claimant whose pickup truck was hit by snowplow which was engaged in clearing snow in opposite lane of traffic, where accident report and testimony of both drivers established that at time of accident combination of snow and wind had created almost total "whiteout" condition which frequently obscured all pavement markings, and claimant could, at most, prove negligence on part of snowplow driver. Gawelko v State, 184 Misc. 2d 581, 710 N.Y.S.2d 762, 2000 N.Y. Misc. LEXIS 238 (N.Y. Ct. Cl. 2000).

State of New York was not shielded from liability under the statute where its employee negligently operated a tractor and damaged a gas company's property because the statute was intended to address multi-vehicle collisions resulting from the hazards inherent in highway maintenance and not property damage of the sort at issue. New York State Elec. & Gas Corp. v State, 194 Misc. 2d 356 (Ct Cl 2002).

4. Recklessness

Street sweepers cleaning streets and snowplows clearing roads during snowstorms are "hazard vehicles" exempt from "rules of the road" under CLS Veh & Tr § 1103(b) and subject only to recklessness standard. Riley v County of Broome, 95 N.Y.2d 455, 719 N.Y.S.2d 623, 742 N.E.2d 98, 2000 N.Y. LEXIS 3523 (N.Y. 2000).

Under CLS Veh & Tr § 1103(b), recklessness standard applied in personal injury action arising out of accident allegedly caused by New York State Thruway truck engaged in dismantling lane closure on highway. Bliss v State, 95 N.Y.2d 911, 719 N.Y.S.2d 631, 742 N.E.2d 106, 2000 N.Y. LEXIS 3525 (N.Y. 2000).

In a case in which plaintiff sued a city's sanitation department and others for personal injuries incurred when a street sweeper collided with plaintiff's vehicle, the sweeper operator was engaged in highway maintenance and thus subject to the recklessness standard of care. Defendants were not entitled to summary judgment because material issues of fact existed as to whether the sweeper operator operated the sweeper in a reckless manner and the extent of plaintiff's own negligence. Deleon v New York City Sanitation Dept., 25 N.Y.3d 1102, 35 N.E.3d 448, 14 N.Y.S.3d 280, 2015 N.Y. LEXIS 1362 (N.Y. 2015).

Town was entitled to immunity in a case arising from a traffic accident allegedly caused by a town employee who was driving slowly on the shoulder of a road, inspecting a job site, and using the blinking yellow hazard light on the top of his truck along with the four was flashers to warn of his slow travel; the burden of proving an exception to the rule of immunity shifted to the plaintiff, but no testimony contradicted the employee's description of his work, and there was no viable contention of recklessness. Sullivan v Town of Vestal, 301 A.D.2d 824, 753 N.Y.S.2d 607, 2003 N.Y. App. Div. LEXIS 277 (N.Y. App. Div. 3d Dep't 2003).

Trial court erred in granting summary judgment pursuant to N.Y. C.P.L.R. 3212 to defendants in a personal injury action; there was a triable issue of fact as to whether defendant's use of a backhoe near traffic without a flagman constituted reckless conduct, and therefore on whether defendants were subject to liability under N.Y. Veh. & Traf. Law § 1103(b). Mendoza v Grace Indus., 4 A.D.3d 272, 772 N.Y.S.2d 687, 2004 N.Y. App. Div. LEXIS 1986 (N.Y. App. Div. 1st Dep't 2004).

Trial court erred in denying defendants' motion pursuant to N.Y. C.P.L.R. 4404 to set aside a verdict in favor of an injured party in a personal injury action; because the driver of a city snowplow did not act recklessly in allowing the plow to enter an intersection, the city and the driver could not be held liable for the injuries pursuant to N.Y. Veh. & Traf. Law § 1103(b). Primeau v Town of Amherst, 17 A.D.3d 1003, 794 N.Y.S.2d 169, 2005 N.Y. App. Div. LEXIS 4567 (N.Y. App. Div. 4th Dep't), aff'd, 5 N.Y.3d 844, 806 N.Y.S.2d 145, 840 N.E.2d 114, 2005 N.Y. LEXIS 2719 (N.Y. 2005).

Trial court erred in denying a town's motion to set aside a verdict in favor of a corporation in its suit seeking damages

arising from a collision between the town's snowplow and the corporation's bus because the evidence was insufficient to support a finding that the town's employee operated the snowplow recklessly within the meaning of N.Y. Veh. & Traf. Law § 1103(b); according to his testimony, the town's employee looked in his side mirrors as he approached the intersection where the accident occurred, but did not look in them immediately before turning, and he either failed to see the bus, or believed that the bus was far enough behind him that he could safely make the turn. He then moved into the left U-turn lane to make the wide turn, and made a right turn into the approaching bus. Rockland Coaches, Inc. v Town of Clarkstown, 49 A.D.3d 705, 854 N.Y.S.2d 172, 2008 N.Y. App. Div. LEXIS 2501 (N.Y. App. Div. 2d Dep't 2008).

Because the municipal defendants complied N.Y. Veh. & Traf. Law § 1103(b), the applicable regulations, and were not reckless in operating a front-end loader while removing snow at a bus stop, and because a collision was caused solely by an intoxicated driver's negligence, they were entitled to summary judgment in an administrator's wrongful death actions. Small v City of New York, 54 A.D.3d 747, 864 N.Y.S.2d 437, 2008 N.Y. App. Div. LEXIS 6708 (N.Y. App. Div. 2d Dep't 2008).

Village and an employee were not entitled to summary judgment in a pedestrian's personal injury action because the village chose not to implement the safety zone policy in place during the daytime during nighttime operations, the employee testified that a flagperson would have been helpful and possibly able to stop the pedestrian before she crossed behind the loader, and there was no admissible expert opinion dispositive of the village's claim that it did not act with recklessness. Freitag v Village of Potsdam, 155 A.D.3d 1227, 64 N.Y.S.3d 396, 2017 N.Y. App. Div. LEXIS 7869 (N.Y. App. Div. 3d Dep't 2017).

Where claimant sought to recover for injuries he sustained when a snowplow sideswiped a disabled minivan on the road's shoulder, the court of claims erred in applying Vehicle and Traffic Law 1104, which applied to the driver of an authorized emergency vehicle and which applied an ordinary negligence standard of care, instead of Vehicle and Traffic Law § 1103(b), which imposed a recklessness standard of care. On an independent review of the probative weight of the evidence, the court found that the driver was plowing at an appropriate speed when he spotted the disabled minivan, and his actions, which led to the wing plow sideswiping rather than running headlong into the minivan, were not in any way reckless. Howell v State of New York, 169 A.D.3d 1208, 93 N.Y.S.3d 736, 2019 N.Y. App. Div. LEXIS 1299 (N.Y. App. Div. 3d Dep't), app. denied, 33 N.Y.3d 907, 127 N.E.3d 317, 103 N.Y.S.3d 359, 2019 N.Y. LEXIS 1657 (N.Y. 2019).

In action by claimants whose vehicle collided with snowplow engaged in task of plowing snow from highway, facts did not warrant holding that snowplow operator's failure to observe claimants' vehicle prior to changing lanes, whether resulting from blind spot or inattention, rose to level of "reckless disregard for safety of others" so as to warrant recovery by claimants under CLS Veh & Tr § 1103(b), where all warning lights on snowplow were in operation and there was credible testimony that left-hand turn directional signal was on before snowplow changed lanes. McDonald v State, 176 Misc. 2d 130, 673 N.Y.S.2d 512, 1998 N.Y. Misc. LEXIS 83 (N.Y. Ct. Cl. 1998).

City was entitled to summary judgment on a victim's tort claim, after he was struck by a snowplow, because under N.Y. Veh. & Traf. Law § 1103(b), the snowplow operator was actually engaged in a hazardous operation, and thus was held to a recklessness standard instead of a negligence standard. Oliveira v City of Mt. Vernon, 401 F. Supp. 2d 379, 2005 U.S. Dist. LEXIS 31085 (S.D.N.Y. 2005), aff'd in part, vacated in part, 209 Fed. Appx. 82, 2006 U.S. App. LEXIS 31486 (2d Cir. N.Y. 2006).

5. —Reckless disregard

Court of Claims correctly determined that "reckless disregard" standard under CLS Veh & Tr § 1103(b) is same as that under CLS Veh & Tr § 1104(e). Bliss v State, 272 A.D.2d 567, 709 N.Y.S.2d 417, 2000 N.Y. App. Div. LEXIS 6004 (N.Y. App. Div. 2d Dep't), aff'd in part, modified, 95 N.Y.2d 911, 719 N.Y.S.2d 631, 742 N.E.2d 106, 2000 N.Y. LEXIS 3525 (N.Y. 2000).

In action arising from collision between plaintiff's vehicle and village sand truck, village employees who were operating truck were entitled to summary judgment on ground that "reckless disregard" standard set forth in CLS Veh & Tr § 1103(b) governed their conduct and plaintiff could not prove that they had acted with reckless disregard for her safety, where they were applying sand/salt mixture to icy road surface at time of accident, truck was traveling at less than 20 miles per hour on moderate downgrade, and driver downshifted and gradually applied brakes when approaching intersection but truck failed to stop because its wheels locked. Kearns v Piatt, 277 A.D.2d 677, 716 N.Y.S.2d 418, 2000 N.Y. App. Div. LEXIS 12052 (N.Y. App. Div. 3d Dep't 2000).

In action for personal injuries to passenger in car that was hit from behind by tow truck while car was stopped to allow town's snow plow to complete turn after banking snow at intersection, town and driver of plow were entitled to summary judgment dismissing cross claim by owner and driver of truck for contribution where (1) plow was "actually engaged in work on a highway" and thus exempt from rules of road under CLS Veh & Tr § 1103(b) unless its driver acted recklessly, and (2) there was no evidence that plow driver recklessly disregarded safety of motorists. Guereschi v Bouchard, 286 A.D.2d 997, 730 N.Y.S.2d 659, 2001 N.Y. App. Div. LEXIS 8966 (N.Y. App. Div. 4th Dep't 2001), app. denied, 2001 N.Y. App. Div. LEXIS 12825 (N.Y. App. Div. 4th Dep't Dec. 21, 2001), app. denied, 97 N.Y.2d 613, 742 N.Y.S.2d 606, 769 N.E.2d 353, 2002 N.Y. LEXIS 552 (N.Y. 2002).

Where defendants, a highway department and a town employee, established that the town employee was actually engaged in work on a highway within the meaning of N.Y. Veh. & Traf. § 1103(b) when plaintiff motorcyclist suddenly came upon the tractor the employee was operating and was injured in trying to avoid driving into it, and where the motorcyclist failed to raise an issue of fact as to whether the tractor was being operated in reckless disregard of others resulting in a risk so great as to make it highly probable that harm would follow, the supreme court should have granted defendants' motion for summary judgment dismissing the motorcyclist's personal injury complaint. Farese v Town of Carmel, 296 A.D.2d 436, 745 N.Y.S.2d 197, 2002 N.Y. App. Div. LEXIS 7314 (N.Y. App. Div. 2d Dep't 2002).

Where a village employee was plowing the employee's own driveway with a village vehicle when the employee ran into plaintiff, defendants were not entitled to have the employee's conduct judged by the "reckless disregard" standard applicable to public employees while acting within the scope of their employment under § 1103(b). Niro v Vill. of Lake George, 299 A.D.2d 689, 749 N.Y.S.2d 589, 2002 N.Y. App. Div. LEXIS 10766 (N.Y. App. Div. 3d Dep't 2002).

Utility technician's actions of parking his utility truck as far off the road as possible, with some 17 feet of paved roadway adjacent to it for passing, leaving the truck's lights flashing and three cones placed behind it to a distance of 18 feet, and fact that the sun was shining such that the truck could be seen from a distance of nearly 600 feet by southbound motorists, did not create a hazardous condition, such that an injured driver could not prove that the technician's actions arose to the level of reckless disregard; thus, summary judgment against the injured driver was appropriate. Green v Covington, 299 A.D.2d 636, 750 N.Y.S.2d 162, 2002 N.Y. App. Div. LEXIS 10581 (N.Y. App. Div. 3d Dep't 2002).

In a personal injury action, denial of defendants' summary judgment motion was proper, as defendants failed to establish as a matter of law that a snowplow operator did not act with reckless disregard for the safety of others, N.Y. Veh. & Traf. Law § 1103(b), by allegedly crossing over into another lane of travel. In support of their motion, defendants submitted the deposition testimony of plaintiffs wherein they testified that the operator was traveling too fast and veered into plaintiffs' lane to avoid hitting a mailbox. Haist v Town of Newstead, 27 A.D.3d 1133, 811 N.Y.S.2d 518, 2006 N.Y. App. Div. LEXIS 3252 (N.Y. App. Div. 4th Dep't 2006).

In a personal injury action, a town met its burden of establishing entitlement to summary judgment, that its employees did not act in "reckless disregard for the safety of others" (N.Y. Veh. & Traf. Law § 1103(b)), by submitting deposition testimony of a snowplow driver and snowplow "wing man" wherein they each testified that the snowplow stopped behind two vehicles that were

stopped on the side of the road and waited for traffic in the opposite direction to clear, and once that traffic had cleared the snowplow proceeded around the stopped vehicles at a very low rate of speed. In response, plaintiff failed to raise a triable issue of fact. Ferreri v Town of Penfield, 34 A.D.3d 1243, 824 N.Y.S.2d 835, 2006 N.Y. App. Div. LEXIS 15989 (N.Y. App. Div. 4th Dep't 2006).

Neither party was entitled to summary judgment on the reckless disregard standard because there were conflicting descriptions of the circumstances surrounding the accident and, as such, issues of fact existed to whether the city's snowplow was a vehicle actually engaged in work on a highway at the time of the accident with the driver. Martinez v City of Buffalo, 149 A.D.3d 1469, 53 N.Y.S.3d 419, 2017 N.Y. App. Div. LEXIS 3258 (N.Y. App. Div. 4th Dep't 2017).

Trial court erred in imposing liability against a truck driver because the driver's actions—positioning the truck completely off of the travel lane and activating various hazard lights—were not so unreasonable as to make it highly probable that harm would follow given the favorable weather and road conditions for motorists, and, even if the driver could have positioned the truck even farther to the left and off of the rumble strips, that failing established, at most, a lack of due care under the circumstances, which was insufficient to impose liability under the recklessness standard. Alexandra R. v Krone, 186 A.D.3d 981, 129 N.Y.S.3d 579, 2020 N.Y. App. Div. LEXIS 4784 (N.Y. App. Div. 4th Dep't), app. dismissed, 36 N.Y.3d 933, 2020 N.Y. LEXIS 2854 (N.Y. 2020).

Court of claims erred in finding the department of transportation (DOT) to be 100% at fault in the happening of an accident—a DOT dump truck, engaged in the task of locating and retrieving a deer carcass, collided with the claimant's moped while he was traveling in the bike lane of a county highway—because the DOT workers were "actually engaged in work on a highway" at the time of the accident, and the claimant failed to show that their actions constituted a "reckless disregard for the safety of others." Rascelles v State of New York, 187 A.D.3d 953, 130 N.Y.S.3d 739, 2020 N.Y. App. Div. LEXIS 5943 (N.Y. App. Div. 2d Dep't 2020).

Snowplow engaged in task of plowing snow from highway is vehicle engaged in work on highway, and therefore is subject to "reckless disregard" standard of care prescribed in CLS Veh & Tr § 1103(b). McDonald v State, 176 Misc. 2d 130, 673 N.Y.S.2d 512, 1998 N.Y. Misc. LEXIS 83 (N.Y. Ct. Cl. 1998).

None of the parties in a passenger's personal injury action were entitled to summary judgment because there were triable issues of fact as to whether a city employee acted with reckless disregard while driving a snowplow and as to whether the driver of the passenger's vehicle should have seen the snowplow and whether he used reasonable care to avoid the accident where the employee was actively engaged in work within the scope of his duties on the highway, the employee continued at a speed of at least 10-15 mph, ran two red lights, had an obstructed view, knew that there might have been a car behind the obstruction, and provided no rationale as to why his running of the red lights was justified. Holmes v Fiore, 52 Misc. 3d 171, 28 N.Y.S.3d 225, 2014 N.Y. Misc. LEXIS 6129 (N.Y. Sup. Ct. 2014), aff'd, 136 A.D.3d 1326, 24 N.Y.S.3d 562, 2016 N.Y. App. Div. LEXIS 789 (N.Y. App. Div. 4th Dep't 2016).

Agency Opinions

Use of special equipment such as sirens, red lights or blinkers by police or fire personnel on privately owned vehicles. 1952 NY Ops Atty Gen 22, 23; 1953 Ops St Compt 200, 354.

Person described in CLS Veh & Tr § 1103(b) who, with reckless disregard for safety of others, violates any rules of road described thereunder does not commit traffic infraction, but may incur liability in civil law action. 1992 NY Ops Atty Gen F 92-9.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

"Hazardous operation", § 117-b.

Annotations:

What is "motor vehicle" or the like within statute waiving governmental immunity as to operation of such vehicles. 77 ALR2d 945.

Liability of governmental unit for injuries caused by driver of third vehicle to person whose vehicle had been stopped by police car. 17 ALR4th 897.

Municipal or state liability for injuries resulting from police roadblocks or commandeering of private vehicles. 19 ALR4th 937.

Matthew Bender's New York Practice Guides: LexisNexis AnswerGuide New York Negligence § 6.09 Choosing Appropriate Basis of Liability.

Warren's Negligence in the New York Courts §§ 33.04, 99.03[4], 146.01[8], 194.01[5] (vicarious liability; scope of employment).

§ 1104. Authorized emergency vehicles

(a) The driver of an authorized emergency vehicle, when involved in an emergency operation, may exercise the privileges set forth in this section, but subject to the conditions herein stated.

(b) The driver of an authorized emergency vehicle may:

1. Stop, stand or park irrespective of the provisions of this title;

2. Proceed past a steady red signal, a flashing red signal or a stop sign, but only after slowing down as may be necessary for safe operation;

3. Exceed the maximum speed limits so long as he does not endanger life or property;

4. Disregard regulations governing directions of movement or turning in specified directions.

(c) Except for an authorized emergency vehicle operated as a police vehicle or bicycle, the exemptions herein granted to an authorized emergency vehicle shall apply only when audible signals are sounded from any said vehicle while in motion by bell, horn, siren, electronic device or exhaust whistle as may be reasonably necessary, and when the vehicle is equipped with at least one lighted lamp so that from any direction, under normal atmospheric conditions from a distance of five hundred feet from such vehicle, at least one red light will be displayed and visible.

(d) An authorized emergency vehicle operated as a police, sheriff or deputy sheriff vehicle may exceed the maximum speed limits for the purpose of calibrating such vehicles' speedometer. Notwithstanding any other law, rule or regulation to the contrary, a police, sheriff or deputy sheriff bicycle operated as an authorized emergency vehicle shall not be prohibited from using any sidewalk, highway, street or roadway during an emergency operation.

(e) The foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others.

(f) Notwithstanding any other law, rule or regulation to the contrary, an ambulance operated in the course of an emergency shall not be prohibited from using any highway, street or roadway; provided, however, that an authority having jurisdiction over any such highway, street or roadway may specifically prohibit travel thereon by ambulances if such authority shall deem such travel to be extremely hazardous and would endanger patients being transported thereby.

HISTORY:

Add, L 1959, ch 775, eff Oct 1, 1960, with substance transferred from former § 1104; amd, L 1968, ch 336, § 1, eff March 21, 1968; L 1968, ch 711, § 1; L 1970, ch 197, §§ 13, 14, eff July 1, 1971; L 1975, ch 400, § 1, eff July 8, 1975; L 1994, ch 606, §§ 2, 3, eff July 26, 1994.

Editor's Notes: Laws, 1971, ch 328, § 1, amended Laws 1970, ch 197, § 15 so as to change the effective date of the amendments to subs (a) and (c) of this section from April 1, 1971 to July 1, 1971.

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1. In general

The driver of an automobile, approaching at right angles a street over which fire apparatus is proceeding to a fire, is required, to stop on hearing a siren. Auburn v Roate, 246 A.D. 461, 284 N.Y.S. 1, 1935 N.Y. App. Div. LEXIS 8702 (N.Y. App. Div. 1935).

The privilege accorded by Vehicle and Traffic Laws § 1104 to an emergency vehicle driver can only be denied when there is evidence of an exercise of these privileges that is not reasonable under the circumstances. Strobel v State, 36 A.D.2d 485, 321 N.Y.S.2d 11, 1971 N.Y. App. Div. LEXIS 3993 (N.Y. App. Div. 3d Dep't 1971), aff'd, 30 N.Y.2d 629, 331 N.Y.S.2d 442, 282 N.E.2d 331, 1972 N.Y. LEXIS 1425 (N.Y. 1972).

Although subd. (a) of this section permits the driver of an authorized emergency vehicle in pursuit of a violator of the law to exceed maximum speed limits, a private citizen, driving his own automobile in pursuit of a speeder, is not within the protection of this provision. People v Nagell, 23 Misc. 2d 452, 206 N.Y.S.2d 654, 1960 N.Y. Misc. LEXIS 3055 (N.Y. J. Ct. 1960).

Recklessness standard set forth in CLS Veh & Tr § 1103(b) applied in personal injury action by claimant whose car impacted with rear of New York State Thruway Authority truck which was operating in reverse as part of crew dismantling lane closure on Thruway bridge. Bliss v State, 179 Misc. 2d 549, 686 N.Y.S.2d 556, 1998 N.Y. Misc. LEXIS 661 (N.Y. Ct. Cl. 1998).

State defendants were entitled to summary judgment in personal injury action by claimant whose car impacted with rear of New York State Thruway Authority (NYSTA) truck, which was operating in reverse as part of crew dismantling lane closure on Thruway bridge, as truck driver's alleged failure to adhere to NYSTA rules and regulations, even coupled with his plea of guilty to unsafe backing under CLS Veh & Tr § 1211, did not meet recklessness standard under CLS Veh & Tr § 1103(b). Bliss v State, 179 Misc. 2d 549, 686 N.Y.S.2d 556, 1998 N.Y. Misc. LEXIS 661 (N.Y. Ct. Cl. 1998).

In action by claimant whose car was hit by state trooper responding to nearby accident scene, state was permitted to amend its answer to assert recklessness standard under CLS Veh & Tr § 1104(e) as claimant could not claim resulting surprise or prejudice in that trooper car accelerating toward oncoming traffic with its emergency lights activated should have alerted her, at time of accident, that trooper was involved in emergency operation. Culhane v State, 180 Misc. 2d 61, 687 N.Y.S.2d 542, 1999 N.Y. Misc. LEXIS 105 (N.Y. Ct. Cl. 1999).

City had the obligation to take steps to prevent the automatic erasure of any audio recording, and its failure to do so constituted spoliation because it was placed on notice of pedestrians' claim and its claimed "emergency operation" affirmative defense within the 180 days after the recording was made; preventing the city from introducing testimony as to the contents of the audio recording was appropriate. Strong v City of New York, 112 A.D.3d 15, 973 N.Y.S.2d 152, 2013 N.Y. App. Div. LEXIS 6601 (N.Y. App. Div. 1st Dep't 2013).

2. Construction

An ambulance was not entitled to emergency status since its operator did not, as required by Vehicle & Traf L § 1104(c), give an audible warning as it approached and entered an intersection against a red signal. Abood v Hospital Ambulance Service, Inc., 30 N.Y.2d 295, 332 N.Y.S.2d 877, 283 N.E.2d 754, 1972 N.Y. LEXIS 1322 (N.Y. 1972).

Judgment in favor of plaintiffs on issue of liability affirmed–defendant's vehicle turned into path of emergency vehicle driven by paramedic third-party defendant; plaintiff also paramedic who was riding in emergency vehicle, sustained injuries; jury found defendant's negligent operation of vehicle was proximate cause of collision and plaintiff and third-party defendant did not operate their emergeny vehicle recklessly–Supreme Court properly charged jury as to standard of care required of operator of emergency vehicle; Supreme Court charged jury it could find ageinst third-party defendant as long as it found he had operated his emergency vehicle in "manner more than just ordinarily negligent, that is with a ... reckless disregard for the safety of others"; although defendants apparently argue that Vehicle and Traffic Law § 1104 (e) indicates that standard of care incumbent upon operator of emergency vehicle is same standard of care imposed under ordinary principles of negligence, such argument is illogical and has been rejected by court. Dugan v Longo, 169 A.D.2d 872, 564 N.Y.S.2d 601, 1991 N.Y. App. Div. LEXIS 43 (N.Y. App. Div. 3d Dep't 1991).

With respect to a collision between plaintiff's car and an ambulance driven by defendant at a street intersection, issues of negligence and contributory negligence could not be determined as matter of law where there were issues of fact as to whether the ambulance siren was operating when it entered the intersection against a red light and whether the ambulance speed was reduced and due caution exercised in proceeding into the intersection. Meighan v Wehnau, 17 A.D.2d 879, 233 N.Y.S.2d 357, 1962 N.Y. App. Div. LEXIS 7313 (N.Y. App. Div. 3d Dep't 1962).

For sound policy reasons a defendant's judgment of conviction following a trial for a traffic infraction may not be used by plaintiffs in an ensuing negligence action as a basis for pleading the affirmative defense of collateral estoppel—because of the impracticality of allowing Traffic Court to become the crucial forum in a negligence suit, possible injustice to codefendants in the civil litigation who could not participate in the disposition of the traffic infraction charge, and the detrimental effect of inviting a piecemeal approach to the determination of several issues which may be involved in a negligence case, which approach is inconsistent with the orderly and fair resolution of such issues. Accordingly, defendant ambulance driver and two codefendants, the owners of the vehicle, are not collaterally estopped from alleging that the defendant driver was free from negligence and that the plaintiff was wholly or partially culpable where defendant was found guilty of failing to obey the instruction of an official traffic control device while driving an emergency vehicle (Vehicle and Traffic Law, § 1110, subd [a]), and fined $25, upon a finding that he failed to comply with requirements that the vehicle have lights on and siren sounding and that the operator of an emergency vehicle use due care for the safety of others. Augustine v Interlaken, 68 A.D.2d 705, 418 N.Y.S.2d 683, 1979 N.Y. App. Div. LEXIS 11308 (N.Y. App. Div. 4th Dep't), app. dismissed, 48 N.Y.2d 608, 424 N.Y.S.2d 1025, 399 N.E.2d 1205 (N.Y. 1979), app. dismissed, 48 N.Y.2d 881, 1979 N.Y. LEXIS 7850 (N.Y. 1979).

Ambulance owner was entitled to summary judgment dismissing action for wrongful death of individual killed when struck by ambulance being driven by person who had stolen it after emergency workers entered building to render assistance and left

engine running with key in ignition, since ambulance is emergency vehicle and is exempt from provisions of CLS Veh & Tr § 1210 which require driver to turn off his car's engine and remove keys when leaving vehicle unattended. Cox v Kelly, 131 A.D.2d 809, 517 N.Y.S.2d 174, 1987 N.Y. App. Div. LEXIS 48255 (N.Y. App. Div. 2d Dep't 1987).

It was reversible error to deny request to charge jury that plaintiff was operating authorized "emergency vehicle" engaged in "emergency operation" at time that ambulance she was driving collided with truck since ambulance is authorized emergency vehicle, and it was undisputed that she was transporting patient who had experienced respiratory distress to hospital at time of accident. Mulholland v Nabisco, Inc., 264 A.D.2d 411, 693 N.Y.S.2d 242, 1999 N.Y. App. Div. LEXIS 8647 (N.Y. App. Div. 2d Dep't 1999).

Ambulance driver operating his vehicle at 75 miles per hour in a 50 mile per hour zone was justified where there was ample evidence to show that defendant reasonably believed he was responding to an emergency call. People v Bisig, 46 Misc. 2d 299, 259 N.Y.S.2d 452, 1965 N.Y. Misc. LEXIS 1988 (N.Y. Spec. Sess. 1965).

The motion of the driver of a private ambulance to dismiss an information charging him with the violation of a speeding ordinance on the Long Island State Parkway was denied, since pursuant to Vehicle and Traffic Law § 1630 the parkway commission established maximum speed limits and provided for the operation of authorized emergency vehicles upon its roads in accordance with those speed limits fixed for all users of the highway. People v Bartlett, 56 Misc. 2d 185, 287 N.Y.S.2d 850, 1967 N.Y. Misc. LEXIS 1222 (N.Y. Dist. Ct. 1967), aff'd, 57 Misc. 2d 914, 293 N.Y.S.2d 741, 1968 N.Y. Misc. LEXIS 1353 (N.Y. App. Term 1968).

Emergency medical technician/member of volunteer ambulance service was authorized to have red light affixed to dashboard of his personal vehicle, and thus could not be convicted of violating CLS Veh & Tr § 375(41)(2) although he was not involved in emergency situation at time, as his personal vehicle was "emergency ambulance service vehicle" under CLS Veh & Tr § 115-c, as broadly defined in CLS Pub Health § 3001(2). People v Levy, 188 Misc. 2d 103, 727 N.Y.S.2d 248, 2001 N.Y. Misc. LEXIS 167 (N.Y. App. Term 2001).

Reckless disregard, which removes the protection from liability of an "authorized emergency vehicle" engaged in an "emergency operation," under N.Y. Veh. & Traf. Law § 1104, is described as the conscious or intentional doing of an act of an unreasonable character in disregard of a known or obvious risk so great as to make it highly probable that harm would follow, and done with conscious indifference to the outcome. Gonyea v County of Saratoga, 23 A.D.3d 790, 803 N.Y.S.2d 764, 2005 N.Y. App. Div. LEXIS 12390 (N.Y. App. Div. 3d Dep't 2005).

N.Y. Veh. & Traf. Law § 1104(a) exempted the drivers of authorized emergency vehicles from the requirements of certain traffic laws when they were involved in an emergency operation, and the statute precluded the imposition of liability for otherwise privileged conduct except where the conduct rose to the level of recklessness. Muniz v City of Schenectady, 38 A.D.3d 989, 830 N.Y.S.2d 622, 2007 N.Y. App. Div. LEXIS 2246 (N.Y. App. Div. 3d Dep't 2007).

Summary judgment for a county in a motorist's claim arising from a rear-end accident in which a deputy's vehicle rear-ended the motorist's vehicle was error because, even if the deputy was involved in an emergency operation at the time of the accident, the "reckless disregard" provision of N.Y. Veh. & Traf. Law § 1104(e) was inapplicable as the deputy's conduct did not fall within the four categories of privileged activity set forth in § 1104(b); the deputy was merely traveling in a normal stream of traffic, driving well within the speed limit and in the proper lane of the roadway when he looked down at his data terminal to ascertain the location of a burglary, leading to the accident. Thus, the liability exemption of § 1104(e) never became applicable, and the county and the deputy failed to provide a non-negligent explanation for the rear-end collision, while the motorist met her burden in support of her cross motion for partial summary judgment. Kabir v County of Monroe, 68 A.D.3d 1628, 892 N.Y.S.2d 714, 2009 N.Y. App. Div. LEXIS 9555 (N.Y. App. Div. 4th Dep't 2009), aff'd, 16 N.Y.3d 217, 920 N.Y.S.2d 268, 945 N.E.2d 461, 2011 N.Y. LEXIS 156 (N.Y. 2011).

This section requires an emergency vehicle to slow down to the extent necessary for its safe operation. People ex rel. Donnelly v Rosen, 40 Misc. 2d 583, 243 N.Y.S.2d 449, 1963 N.Y. Misc. LEXIS 1704 (N.Y. County Ct. 1963).

This section qualifies the right of way of emergency vehicles at intersections by requiring them to slow down as may be necessary for safe operation, requiring them to proceed with due regard for safety of all persons, etc., thus prescribing certain procedures to be followed when exercising the statutory privilege of emergency right of way. People ex rel. Donnelly v Rosen, 40 Misc. 2d 583, 243 N.Y.S.2d 449, 1963 N.Y. Misc. LEXIS 1704 (N.Y. County Ct. 1963).

The provision in this section that the driver of an authorized emergency vehicle is not relieved of the duty to drive with due regard for safety of all persons or protected from consequences of reckless disregard of safety of others does not require that he operate with the degree of care necessary to avoid guilt of common-law negligence but only that he avoid gross negligence through reckless disregard for safety of others. Bravata v Russo, 41 Misc. 2d 376, 245 N.Y.S.2d 702, 1963 N.Y. Misc. LEXIS 1270 (N.Y. Sup. Ct. 1963), rev'd, 21 A.D.2d 689, 250 N.Y.S.2d 582, 1964 N.Y. App. Div. LEXIS 3706 (N.Y. App. Div. 2d Dep't 1964).

In action by claimant whose car was hit by state trooper responding to nearby accident scene, state's general denial in its answer and its assertion that it was "not negligent in any manner, nor guilty of any culpable conduct" did not embrace recklessness standard set forth in CLS Veh & Tr § 1104(e); defense under § 1104(e) should have been affirmatively raised in state's answer, to enable claimant to evaluate merits of claim before proceeding to trial. Culhane v State, 180 Misc. 2d 61, 687 N.Y.S.2d 542, 1999 N.Y. Misc. LEXIS 105 (N.Y. Ct. Cl. 1999).

3. Construction with other laws

Summary judgment dismissal of plaintiff's suit against a city and police officer whose patrol car he collided with was proper because the officer's operation of his vehicle did not rise to the level of "reckless disregard" for the safety of others necessary for liability under this section; while he had driving against the flow of traffic, he had activated his lights and siren, was traveling at only 15 to 25 mph in a 30 mph zone, and tried to avoid the collision by braking hard and veering. Frezzell v City of New York, 24 N.Y.3d 213, 997 N.Y.S.2d 367, 21 N.E.3d 1028, 2014 N.Y. LEXIS 3191 (N.Y. 2014).

CLS Veh & Tr §§ 1104 and 1144 can serve as predicates for action under CLS Gen Mun § 205-e, and those sections applied where police officer was injured when patrol car in which he was passenger collided with another vehicle. Kelly v City of New York, 240 A.D.2d 709, 661 N.Y.S.2d 515, 1997 N.Y. App. Div. LEXIS 7078 (N.Y. App. Div. 2d Dep't 1997).

Court should have permitted plaintiff to amend her complaint to cite CLS Veh & Tr § 1104 in support of her cause of action under CLS Gen Mun § 205-e because, if finder of fact ultimately concluded that vehicle in which plaintiff was passenger was being operated in emergency situation, her § 205-e claim could be predicated on finding that operation of vehicle violated § 1104. Liguori v City of New York, 250 A.D.2d 738, 672 N.Y.S.2d 916, 1998 N.Y. App. Div. LEXIS 5773 (N.Y. App. Div. 2d Dep't 1998).

Court of Claims correctly determined that "reckless disregard" standard under CLS Veh & Tr § 1103(b) is same as that under CLS Veh & Tr § 1104(e). Bliss v State, 272 A.D.2d 567, 709 N.Y.S.2d 417, 2000 N.Y. App. Div. LEXIS 6004 (N.Y. App. Div. 2d Dep't), aff'd in part, modified, 95 N.Y.2d 911, 719 N.Y.S.2d 631, 742 N.E.2d 106, 2000 N.Y. LEXIS 3525 (N.Y. 2000).

Where claimant sought to recover for injuries he sustained when a snowplow sideswiped a disabled minivan on the road's shoulder, the court of claims erred in applying Vehicle and Traffic Law 1104, which applied to the driver of an authorized emergency vehicle and which applied an ordinary negligence standard of care, instead of Vehicle and Traffic Law § 1103(b), which imposed a recklessness standard of care. On an independent review of the probative weight of the evidence, the court found that the driver

was plowing at an appropriate speed when he spotted the disabled minivan, and his actions, which led to the wing plow sideswiping rather than running headlong into the minivan, were not in any way reckless. Howell v State of New York, 169 A.D.3d 1208, 93 N.Y.S.3d 736, 2019 N.Y. App. Div. LEXIS 1299 (N.Y. App. Div. 3d Dep't), app. denied, 33 N.Y.3d 907, 127 N.E.3d 317, 103 N.Y.S.3d 359, 2019 N.Y. LEXIS 1657 (N.Y. 2019).

Section 1104 (subd [b], par 3) of the Vehicle and Traffic Law, which provides that the driver of an authorized emergency vehicle may exceed the maximum speed limits, is not an exception to subdivision (b) of section 1180 of the Vehicle and Traffic Law, which prohibits driving a vehicle at a speed in excess of 55 miles per hour and is not required to be pleaded and proved by the prosecution in order to make out a prima facie case under subdivision (b) of section 1180, as would be a true exception; subdivision (b) of section 1104 is not an exception to section 1180 since it is not set forth in the enacting clause of section 1180; in order to be a proviso, it need not be set forth subsequent to section 1180 since the distinction between exception and proviso should not be mechanically applied; furthermore, the prosecution is not required to adduce proof of a negative such as the status of the driver as a driver of an emergency vehicle since the exceptive fact is peculiarly within the driver's knowledge; therefore, the prosecution is not required to plead or prove that a defendant is not the driver of an emergency vehicle in order to make a prima facie case of speeding. People v Baur, 102 Misc. 2d 971, 423 N.Y.S.2d 800, 1980 N.Y. Misc. LEXIS 2046 (N.Y. Dist. Ct. 1980).

Higher court's analysis of whether CLS Gen Oblig § 9-103 constituted affirmative defense was not dispositive of whether CLS Veh & Tr §§ 1103(b) and 1104(e) constituted affirmative defenses. Culhane v State, 180 Misc. 2d 61, 687 N.Y.S.2d 542, 1999 N.Y. Misc. LEXIS 105 (N.Y. Ct. Cl. 1999).

4. Ambulance

State trooper did not act recklessly in pursuing dirt bike that accelerated after driver ignored his gesture to pull over (for failure of driver and passenger to wear helmets), trooper's conduct was not proximate cause of accident in which driver lost control of bike, even though trooper's car came to rest on top of injured passenger, and thus state was not liable for passenger's injuries, where (1) passenger's own expert acknowledged that operation of bike was threat to public safety and that trooper, having perceived Vehicle and Traffic Law violation, had authority and duty to follow bike and remove it from highway, (2) although trooper exceeded 35 miles-per-hour speed limit during part of brief pursuit, he never exceeded 50 and was traveling only 17 to 20 miles per hour when he left road, (3) trooper's exceeding of speed limit did not warrant liability, given that weather was clear and dry, it was light outside, and there was no traffic in rural area of pursuit, and (4) although trooper's car ultimately came into contact with bike and passenger's ejected body on side of road, that unintentional contact resulted from trooper's reasonable efforts to avoid what he thought was going to be collision on road. Schieren v State, 281 A.D.2d 828, 722 N.Y.S.2d 128, 2001 N.Y. App. Div. LEXIS 3011 (N.Y. App. Div. 3d Dep't 2001).

In a personal injury action, municipal defendants failed to eliminate all triable issues of fact regarding whether an ambulance entered an intersection with the traffic light in its favor and whether another driver's alleged failure to yield the right-of-way was the sole proximate cause of the accident. Municipal defendants also failed to establish, prima facie, their entitlement to judgment as a matter of law under the reckless disregard standard of care, as they did not demonstrate that the siren and lights on the ambulance were activated. Wynter v City of New York, 173 A.D.3d 1122, 104 N.Y.S.3d 645, 2019 N.Y. App. Div. LEXIS 4985 (N.Y. App. Div. 2d Dep't 2019).

In a car driver's personal injury action arising an ambulance colliding with his vehicle at an intersection, the ambulance driver and his ambulance service employer were not entitled to summary judgment on the issue of liability pursuant to this section because they had failed to eliminate all material issues of fact as to whether the ambulance driver had activated the ambulance's siren and lights prior to the accident, given the car driver's conflicting version of the accident; although the ambulance driver alleged that he engaged the lights and sirens before entering the intersection, the car driver alleged that he was in the intersection first when he was hit by the ambulance and that the ambulance's lights and sirens were not engaged. Sardar v Park Ambulance Serv. Inc., 56 Misc. 3d 756, 53 N.Y.S.3d 515, 2017 N.Y. Misc. LEXIS 2007 (N.Y. Sup. Ct. 2017).

5. Police vehicle

CLS Gen Mun § 205-e supported lawsuit by injured police officer against New York City based on fellow officer's violation of CLS Veh & Tr § 1104(e) which resulted in traffic accident. Gonzalez v Iocovello, 93 N.Y.2d 539, 693 N.Y.S.2d 486, 715 N.E.2d 489, 1999 N.Y. LEXIS 1422 (N.Y. 1999).

Former §§ 56, subd 1-a, 58 and 67 do not relate to police vehicles, and it was prejudicial error for the trial court so to charge. Booth v Rochester, 258 A.D. 849, 15 N.Y.S.2d 945, 1939 N.Y. App. Div. LEXIS 7226 (N.Y. App. Div. 1939).

A driver of a police patrol car when in pursuit of an actual or suspected violator may exceed the maximum speed limits and may disregard regulations governing directions of movement or turning in specified directions, as long as the officer does not endanger life or property. The requirement that the operator of an emergency vehicle have "due regard for the safety of all persons," and the imposition of responsibility for "the consequences of his reckless disregard for the safety of others" are not such as to require compliance with generally accepted definitions of negligence. Stanton v State, 29 A.D.2d 612, 285 N.Y.S.2d 964, 1967 N.Y. App. Div. LEXIS 2643 (N.Y. App. Div. 3d Dep't 1967), aff'd, 26 N.Y.2d 990, 311 N.Y.S.2d 28, 259 N.E.2d 494, 1970 N.Y. LEXIS 1346 (N.Y. 1970).

Police vehicles generally have right-of-way over pedestrians. Booth v Rochester, 258 A.D. 849, 15 N.Y.S.2d 945, 1939 N.Y. App. Div. LEXIS 7226 (N.Y. App. Div. 1939).

Where there is clear and immediate threat to public safety, officer has right to use whatever means necessary, short of recklessness, to overtake and apprehend offending driver. Mullane v City of Amsterdam, 212 A.D.2d 848, 622 N.Y.S.2d 346, 1995 N.Y. App. Div. LEXIS 931 (N.Y. App. Div. 3d Dep't 1995).

Police officer engaged in high-speed pursuit of another vehicle must comply with instructions set forth in CLS Veh & Tr § 1104 and departmental procedures; although certain emergency allowances are accorded to police officers engaged in hot pursuit, due care to ensure safety of all persons must nevertheless be exercised. Mercado v Vega, 161 A.D.2d 365, 556 N.Y.S.2d 30, 1990 N.Y. App. Div. LEXIS 5299 (N.Y. App. Div. 1st Dep't 1990), rev'd, 77 N.Y.2d 918, 569 N.Y.S.2d 595, 572 N.E.2d 36, 1991 N.Y. LEXIS 368 (N.Y. 1991).

Jury charge in a negligence suit against an officer who was responding to an emergency call was not confusing because the trial court did not rely solely on N.Y. Veh. & Traf. Law § 1104(e), but after reading the statute, went on to give a charge that closely mirrored the pattern jury instruction, and referenced the fact that the officer and a driver were to be judged by different standards; the verdict sheet clearly indicated these differing standards. Further, the jury did not request a clarification on the instructions given. Alvarado v Dillon, 67 A.D.3d 1214, 888 N.Y.S.2d 673, 2009 N.Y. App. Div. LEXIS 8367 (N.Y. App. Div. 3d Dep't 2009).

The freedom of police officers from the requirement of compliance with the generally accepted definition of negligence applies to the permissible manner of operation of emergency vehicles as authorized by the statute, but not as to the conduct or actions of police officers in the general discharge of their duties; as to such conduct, the generally accepted definition of negligence applies. Jansen v State, 60 Misc. 2d 36, 301 N.Y.S.2d 811, 1968 N.Y. Misc. LEXIS 1566 (N.Y. Ct. Cl. 1968), aff'd, 32 A.D.2d 889, 302 N.Y.S.2d 1016 (N.Y. App. Div. 4th Dep't 1969).

In action by plaintiff whose car was struck by another vehicle that city police had been pursuing, city was entitled to summary judgment as plaintiff was unable to show excessive speed or disregard for traffic devices on part of police, and police did not act with reckless disregard for safety of others where they were in constant communication with dispatcher, they reasonably believed that vehicle they were pursuing was stolen, and they ended chase well before accident occurred. Foster v Abrams, 167 Misc.

2d 909, 640 N.Y.S.2d 417, 1996 N.Y. Misc. LEXIS 83 (N.Y. Sup. Ct. 1996), modified, aff'd, 242 A.D.2d 952, 662 N.Y.S.2d 899, 1997 N.Y. App. Div. LEXIS 10561 (N.Y. App. Div. 4th Dep't 1997).

Trial court erred by dismissing a couple's affirmative defense alleging that the suing officer's own culpable conduct caused or contributed to his damages such that any damage award must be proportionately diminished in the negligence suit brought by the officer as a result of a motor vehicle collision as the officer, as the operator of an emergency vehicle, was precluded from invoking the reckless disregard standard outlined under Vehicle and Traffic Law § 1104(e) in seeking to hold a bystander liable for such operator's own injuries. Ayers v O'Brien, 60 A.D.3d 27, 870 N.Y.S.2d 587, 2008 N.Y. App. Div. LEXIS 9975 (N.Y. App. Div. 3d Dep't 2008), aff'd, 13 N.Y.3d 456, 896 N.Y.S.2d 295, 923 N.E.2d 578, 2009 N.Y. LEXIS 4483 (N.Y. 2009).

Trial court erred in denying summary judgment pursuant to N.Y. C.P.L.R. 3212 to a city and a police officer in a personal injury action; the officer was not acting with reckless disregard for the safety of others when the automobile accident occurred, and defendants were therefore immune pursuant to N.Y. Veh. & Traf. Law § 1104(e). Palmer v City of Syracuse, 13 A.D.3d 1229, 787 N.Y.S.2d 802, 2004 N.Y. App. Div. LEXIS 16222 (N.Y. App. Div. 4th Dep't 2004).

Motorist's affirmative defense of negligence was dismissed in a deputy's case seeking damages for injuries suffered when a vehicle driven by the motorist collided with the vehicle of the deputy who was making a U-turn on a highway to pursue a speeding vehicle; N.Y. Veh. & Traf. Law § 1104 applied to the deputy's claim, and the deputy's conduct did not rise to the level of reckless disregard as a matter of law. There was no doubt that, for purposes of N.Y. Veh. & Traf. Law § 1104, an officer in a patrol car responding to a speeding vehicle was deemed to be engaged in an emergency operation, and the deputy had every right to assume that the motorist was going to yield the right of way to an emergency vehicle with lights activated. Ayers v O'Brien, 852 N.Y.S.2d 730, 19 Misc. 3d 449, 2008 N.Y. Misc. LEXIS 621 (N.Y. Sup. Ct.), aff'd in part, modified, 60 A.D.3d 27, 870 N.Y.S.2d 587, 2008 N.Y. App. Div. LEXIS 9975 (N.Y. App. Div. 3d Dep't 2008).

Police officer's conduct in pursuing a suspected lawbreaker may not form the basis of civil liability to an injured bystander unless the officer acted in reckless disregard for the safety of others. Ayers v O'Brien, 60 A.D.3d 27, 870 N.Y.S.2d 587, 2008 N.Y. App. Div. LEXIS 9975 (N.Y. App. Div. 3d Dep't 2008), aff'd, 13 N.Y.3d 456, 896 N.Y.S.2d 295, 923 N.E.2d 578, 2009 N.Y. LEXIS 4483 (N.Y. 2009).

Although a parole officer failed to use a turn signal or sound the horn while driving a police vehicle that was involved in an emergency operation pursuant to N.Y. Veh. & Traf. Law §§ 1104(a), 114-b, the officer's conduct did not rise to the level of reckless disregard or conscious indifference required for liability to attach. Rusho v State of New York, 878 N.Y.S.2d 855, 24 Misc. 3d 752, 2009 N.Y. Misc. LEXIS 1018 (N.Y. Ct. Cl. 2009), rev'd, 76 A.D.3d 783, 906 N.Y.S.2d 836, 2010 N.Y. App. Div. LEXIS 6551 (N.Y. App. Div. 4th Dep't 2010).

In a driver's personal injury suit against a county, its police department, and one of its police officers, there was legally sufficient evidence to support the jury verdict on liability, finding that the police officer was 50 percent negligent with regard to a motor vehicle collision, as the evidence established that the police officer came to a virtual stop extremely abruptly in front of the driver's vehicle, in rush hour traffic, proceeding at 40 miles per hour, without any warning and just seconds before the collision while responding to a dispatch call regarding a disabled vehicle. Thus, it could not be said that there was no rational process by which the jury could have found that the police officer operated his vehicle in reckless disregard for the safety of others and that he was partially at fault for the accident. Tutrani v County of Suffolk, 64 A.D.3d 53, 878 N.Y.S.2d 412, 2009 N.Y. App. Div. LEXIS 3633 (N.Y. App. Div. 2d Dep't 2009).

6. —Emergency operation

Officer did not act with reckless disregard for the safety of others as: (1) he was responding to a highest priority disturbance; (2) he almost stopped his vehicle, looked to his right and left, and slowly proceeded into the intersection at about 5 miles per hour; and (3) when he saw the driver's vehicle, he slammed his brake and attempted to avoid colliding with the driver's vehicle. Levere v City of Syracuse, 173 A.D.3d 1702, 103 N.Y.S.3d 212, 2019 N.Y. App. Div. LEXIS 4585 (N.Y. App. Div. 4th Dep't 2019).

Conduct of police officer, who was struck by a tractor trailer, was subject to the principles of ordinary negligence rather than the reckless disregard standard under this statute because at the time that the officer parked his vehicle on the roadway, the officer was conducting a seatbelt traffic checkpoint and was not engaged in an emergency operation. Cioffi v S.M. Foods, Inc., 178 A.D.3d 1006, 116 N.Y.S.3d 306, 2019 N.Y. App. Div. LEXIS 9339 (N.Y. App. Div. 2d Dep't 2019).

City was entitled to summary judgment on a driver's personal injury action because the police officer, who collided with the driver, was responding to the scene of a police call at the time of the accident and, thus, was engaged in an emergency operation; the officer's conduct in making a sharp left turn and not seeing the driver's vehicle before the collision might have constituted a momentary lapse in judgment, but it did not rise to the level of reckless disregard for the safety of others. Proce v Town of Stony Point, 185 A.D.3d 975, 127 N.Y.S.3d 541, 2020 N.Y. App. Div. LEXIS 4290 (N.Y. App. Div. 2d Dep't 2020).

In view of the dictionary definition of "emergency", there was no pressing necessity or urgency for a game protector driving at almost 60 miles an hour in a 30-mile an-hour zone in response to a tip that a game law violation was going on in the vicinity. People v McIntosh, 35 Misc. 2d 865, 231 N.Y.S.2d 714, 1962 N.Y. Misc. LEXIS 2762 (N.Y. County Ct. 1962).

Assuming that a police car is on an emergency trip, it has the right of way, even against a red light, providing it is being driven with caution and adequate warning is sounded. Brennan v Albany, 284 A.D. 997, 135 N.Y.S.2d 293, 1954 N.Y. App. Div. LEXIS 4355 (N.Y. App. Div. 1954).

A state conservation department game protector was not exempt from prosecution for violating a village speed limit where the village police justice found, as matter of fact, that he was not operating the car in an "emergency" in responding to an anonymous phone message that the game law was being violated at a certain spot not too far from the village. People v McIntosh, 35 Misc. 2d 865, 231 N.Y.S.2d 714, 1962 N.Y. Misc. LEXIS 2762 (N.Y. County Ct. 1962).

Police officer who was driving patrol car in response to 911 dispatch call to investigate family dispute was engaged in "emergency operation" of vehicle as defined in CLS Veh & Tr § 114-b as matter of law, although police department classified family disputes as "non-crime" incidents and both officers in car testified that they considered call "non-emergency," and consequently defendant driver's actions should not have been measured by jury under ordinary negligence standard, but rather under "reckless disregard" standard of CLS Veh & Tr 1104(e). Criscione v City of New York, 97 N.Y.2d 152, 736 N.Y.S.2d 656, 762 N.E.2d 342, 2001 N.Y. LEXIS 3738 (N.Y. 2001).

In action arising from police officer's operation of authorized emergency vehicle while responding to report of 5 men fighting, police defendants were properly granted trial order of dismissal at close of proof as evidence that police vehicle struck plaintiff's decedent, who was attempting to cross street on bicycle, when police officer looked down momentarily to turn on emergency equipment, was insufficient to establish that officer acted in reckless disregard of known and obvious risk that was so great as to make it highly probable that harm would follow. Szczerbiak v Pilat, 229 A.D.2d 977, 645 N.Y.S.2d 256, 1996 N.Y. App. Div. LEXIS 9022 (N.Y. App. Div. 4th Dep't 1996), aff'd, 90 N.Y.2d 553, 664 N.Y.S.2d 252, 686 N.E.2d 1346, 1997 N.Y. LEXIS 3221 (N.Y. 1997).

In an action for injuries sustained by an infant passenger in a car being pursued by a state trooper, where the car in which the infant was riding was involved in a one-car accident, the claim was dismissed under evidence that the trooper drove through the city, at times at high speed, at other times slowly, but always with his lights and siren on for warning, watching others on the highway for safety sake and continually re-evaluating the wisdom of continuing or discontinuing the chase, his conduct thereby being reasonable under the circumstances. Strobel v State, 36

A.D.2d 485, 321 N.Y.S.2d 11, 1971 N.Y. App. Div. LEXIS 3993 (N.Y. App. Div. 3d Dep't 1971), aff'd, 30 N.Y.2d 629, 331 N.Y.S.2d 442, 282 N.E.2d 331, 1972 N.Y. LEXIS 1425 (N.Y. 1972).

CLS Veh & Tr § 1104(a) applied to police van being driven by civilian operator while transporting prisoners even though it was not equipped with lights or siren, because every police vehicle is authorized emergency vehicle (CLS Veh & Tr §§ 101, 132) and use of authorized emergency vehicle to transport prisoners is emergency operation (CLS Veh & Tr § 114-b), there being no limiting language in statute bearing on either definition. Church v City of New York, 268 A.D.2d 382, 702 N.Y.S.2d 274, 2000 N.Y. App. Div. LEXIS 784 (N.Y. App. Div. 1st Dep't 2000).

Because a police officer's admitted failure to observe a pedestrian while turning into a parking lot in response to an emergency call did not fall within any of the categories of privileged conduct set forth in N.Y. Veh. & Traf. Law § 1104(b), and because notations of significant limitations in the pedestrian's shoulders and neck by the defendants' orthopedic surgeon were sufficient to invoke N.Y. Ins. Law § 5102(d), the officer, police department, county were not entitled to summary judgment in the pedestrian's personal injury action. Katanov v County of Nassau, 91 A.D.3d 723, 936 N.Y.S.2d 285, 2012 N.Y. App. Div. LEXIS 343 (N.Y. App. Div. 2d Dep't 2012).

Accident victim was entitled to summary judgment on the issue of liability because a police officer was not aware of any emergency situation that needed to be addressed, the officer did not see the victim until after the officer struck the victim with the police car, and the officer's conduct was not specified in N.Y. Veh. & Traf. Law § 1104(b) as exempt from the rules of the road. Starkman v City of Long Beach, 106 A.D.3d 1076, 965 N.Y.S.2d 609, 2013 N.Y. App. Div. LEXIS 3761 (N.Y. App. Div. 2d Dep't 2013).

A police patrol car is an "emergency vehicle" responding to an "emergency message" when it has received an emergency call for apprehension of a man with a gun in the general vicinity of the region which it is patrolling whether or not it is then within the five-block radius of the stated location within which, according to police department rules, it is required to respond. Bravata v Russo, 41 Misc. 2d 376, 245 N.Y.S.2d 702, 1963 N.Y. Misc. LEXIS 1270 (N.Y. Sup. Ct. 1963), rev'd, 21 A.D.2d 689, 250 N.Y.S.2d 582, 1964 N.Y. App. Div. LEXIS 3706 (N.Y. App. Div. 2d Dep't 1964).

An "emergency call" exists when, on receipt of a message, police car occupants truly believe that an emergency exists and have reasonable grounds for such belief. Bravata v Russo, 41 Misc. 2d 376, 245 N.Y.S.2d 702, 1963 N.Y. Misc. LEXIS 1270 (N.Y. Sup. Ct. 1963), rev'd, 21 A.D.2d 689, 250 N.Y.S.2d 582, 1964 N.Y. App. Div. LEXIS 3706 (N.Y. App. Div. 2d Dep't 1964).

Because there was a triable issue of fact as to whether a police officer's conduct in rear-ending an insured's vehicle while responding to a 911 call rose to the level of reckless disregard, in violation of the qualified privilege in N.Y. Veh. & Traf. Law § 1104, the insurer was not entitled to summary judgment. Allstate Ins. Co. v City of New York, 833 N.Y.S.2d 859, 15 Misc. 3d 450, 2007 N.Y. Misc. LEXIS 316 (N.Y. Civ. Ct. 2007).

Where the officer, while attempting to replace the officer's patrol car microphone after receiving a dispatch for a traffic stop, drifted into an intersection and struck the injured party, the officer and city were entitled to summary judgment pursuant to N.Y. C.P.L.R. 3212 in the injured party's personal injury action; the officer was deemed to have been driving an emergency vehicle involved in an emergency operation pursuant to N.Y. Veh. & Traf. Law §§ 101, 114-b, and the officer's actions were measured under the reckless disregard standard pursuant to N.Y. Veh. & Traf. Law § 1104(e), which the injured party failed to satisfy in the instant case. Hughes v Chiera, 4 A.D.3d 872, 772 N.Y.S.2d 772, 2004 N.Y. App. Div. LEXIS 1382 (N.Y. App. Div. 4th Dep't 2004).

Trial court erred in denying summary judgment pursuant to N.Y. C.P.L.R. 3212 to defendants in a wrongful death action; defendants were not liable for the decedent's death, as a police officer was driving reasonably in an emergency situation pursuant to N.Y. Veh. & Traf. Law § 1104(b)(1-4), (e), when the auto accident in question occurred. Turini v County of Suffolk, 8 A.D.3d 260, 778 N.Y.S.2d 66, 2004 N.Y. App. Div. LEXIS 7487 (N.Y. App. Div. 2d Dep't), app. denied, 3 N.Y.3d 611, 786 N.Y.S.2d 814, 820 N.E.2d 293, 2004 N.Y. LEXIS 3505 (N.Y. 2004).

Vehicle owned by county Society for Prevention of Cruelty to Children, and operated by society employee, was not "police vehicle" under CLS Veh & Tr § 132-a for purposes of claiming exemption from enforcement of traffic laws under CLS Veh & Tr § 1104 since society is not equivalent to state or public authority by virtue of its limited powers under CLS N-PCL § 1403, and is not authorized to maintain law enforcement unit under CLS N-PCL § 202. People v Ellman, 135 Misc. 2d 1010, 517 N.Y.S.2d 664, 1987 N.Y. Misc. LEXIS 2351 (N.Y. City Ct. 1987).

While the nature of an underlying police call or an officer's perception of its urgency was irrelevant for purposes of ascertaining whether the officer was engaged in an emergency operation within the meaning of N.Y. Veh. & Traf. Law § 1104(a), the nature of the call nevertheless was relevant in determining whether a responding officer's conduct was in reckless disregard for the safety of others. Muniz v City of Schenectady, 38 A.D.3d 989, 830 N.Y.S.2d 622, 2007 N.Y. App. Div. LEXIS 2246 (N.Y. App. Div. 3d Dep't 2007).

Summary judgment for a city and a police department was proper in passengers' personal injury suit because the city and the police department established that police officers were engaged in an emergency operation at the time of the collision with the passengers' vehicle, and the officers' conduct did not rise to reckless disregard, as required by N.Y. Veh. & Traf. Law §§ 114-b, 1104(e); in opposition, the passengers failed to raise a triable fact issue. Meade v Chestnut, 53 A.D.3d 645, 863 N.Y.S.2d 446, 2008 N.Y. App. Div. LEXIS 6299 (N.Y. App. Div. 2d Dep't 2008).

Neither an injured plaintiff, a city, its police department, nor a police officer were entitled to summary judgment in the plaintiff's negligence action because, even if the officer was "speeding" by driving 4 m.p.h., or 6 m.p.h., when he turned into the plaintiff's driveway and struck him, he was responding to the plaintiff's 911 call, and issues of fact existed as to whether the defendants were negligent given the expert testimony of the driver's obstructed line-of-sight, the lighting condition, and the other circumstances. Barcacel v City of Yonkers, 52 Misc. 3d 544, 32 N.Y.S.3d 460, 2016 N.Y. Misc. LEXIS 1627 (N.Y. Sup. Ct. 2016), app. dismissed, 2017 N.Y. App. Div. LEXIS 5847 (N.Y. App. Div. 2d Dep't July 5, 2017).

7. —Police negligence

Although a deputy sheriff responding to an emergency was authorized to proceed past a stop sign but only after slowing down as might be necessary for safe operation, he was in no event relieved from the duty to drive with due regard for the safety of all persons. Tompkins County v Day, 29 A.D.2d 709, 286 N.Y.S.2d 157, 1968 N.Y. App. Div. LEXIS 4893 (N.Y. App. Div. 3d Dep't 1968).

It is prejudicial error to charge a statute where there is no evidence to support a finding that the statute was violated; accordingly, in an action by plaintiff who was injured when the taxi in which she was a passenger struck the rear of a stopped unmarked police car on an expressway, the trial court committed reversible error by charging the jury concerning a city regulation which prohibits persons from stopping vehicles on a highway, since the police were authorized to stop after they observed a car parked on the expressway with its apparent passengers standing in the roadway in front of the vehicle looking for help and, therefore, the parties were entitled to a charge to the jury that it should consider whether the timing and the place of the stop were negligent, and if so, whether that negligence was a proximate cause of the accident. Wilmot v New York, 73 A.D.2d 201, 426 N.Y.S.2d 8, 1980 N.Y. App. Div. LEXIS 10041 (N.Y. App. Div. 1st Dep't 1980).

City was not entitled to summary judgment in action for injuries sustained when officer in police vehicle, while responding to call for assistance from another officer, struck plaintiff as he crossed street since fact issues existed as to whether officer drove his vehicle in reckless disregard for safety of others. McKenica v City of Tonawanda, 239 A.D.2d 951, 661 N.Y.S.2d 814, 1997 N.Y. App. Div. LEXIS 6379 (N.Y. App. Div. 4th Dep't 1997).

County and a deputy were not entitled to summary judgment in a motorist's injury claim arising from a traffic accident because the reckless disregard standard of care in N.Y. Veh. & Traf. Law § 1104(e) was limited to accidents or incidents caused by the

exercise of a privilege identified in § 1104(b); N.Y. Veh. & Traf. Law § 1104(e) did not create a reckless disregard standard of care independent of the privileges in § 1104(b). The accident at issue occurred when the deputy glanced down at his terminal display to view the names of the cross streets involved in a burglar alarm. Kabir v County of Monroe, 16 N.Y.3d 217, 920 N.Y.S.2d 268, 945 N.E.2d 461, 2011 N.Y. LEXIS 156 (N.Y. 2011).

As the trial court properly found in an action for negligence and wrongful death arising out of a high-speed pursuit, the argument of county defendants that they were entitled to immunity outside of the qualified immunity granted by N.Y. Veh. & Traf. Law § 1104, an argument which had been raised and rejected in factually similar cases, was without merit. Foster v Suffolk County Police Dept., 137 A.D.3d 855, 26 N.Y.S.3d 781, 2016 N.Y. App. Div. LEXIS 1632 (N.Y. App. Div. 2d Dep't 2016).

In plaintiffs personal injury suit arising from car crash with police vehicle, the city and its police department were not prejudiced by thea court's failure to redact the portion of a police investigator's report that stated that the driver of the police vehicle misjudged the clearance while attempting to pass another vehicle because the standard of care was not whether the driver of the police car was negligent but, pursuant to N.Y. Veh. & Traf. Law § 1104, whether he drove with reckless disregard for the safety of others. Ramirez v Luna, 780 N.Y.S.2d 840, 4 Misc. 3d 46, 2004 N.Y. Misc. LEXIS 731 (N.Y. App. Term 2004).

Trial court erred in vacating its prior order that an officer's failure to come to a complete stop did not constitute recklessness, as the expert's report stated that the officer's failure to stop and the obstructed view of the road were proximate causes of the accident; expert's report failed to identify any reckless conduct on the part of the officer. Salzano v Korba, 296 A.D.2d 393, 745 N.Y.S.2d 56, 2002 N.Y. App. Div. LEXIS 7051 (N.Y. App. Div. 2d Dep't 2002).

Trial court properly denied defendants' summary judgment motion pursuant to N.Y. C.P.L.R. 3212 in a personal injury action, because there was an issue of fact as to whether a police officer was acting recklessly pursuant to N.Y. Veh. & Traf. Law § 1104 when the automobile accident in question occurred. Lupole v Romano, 307 A.D.2d 697, 762 N.Y.S.2d 838, 2003 N.Y. App. Div. LEXIS 8505 (N.Y. App. Div. 3d Dep't 2003).

Trial court properly denied a trooper's summary judgment motion pursuant to N.Y. C.P.L.R. 3212 in a personal injury action; there was an issue of fact as to whether the trooper's driving in an emergency situation, which caused an accident, demonstrated a reckless disregard for the safety of others, as required by N.Y. Veh. & Traf. Law § 1104(e). Sweeney v Peterson, 1 A.D.3d 650, 766 N.Y.S.2d 255, 2003 N.Y. App. Div. LEXIS 11582 (N.Y. App. Div. 3d Dep't 2003).

When alleged injured parties were hurt because their vehicle struck a police vehicle making a left turn in front of them, there were genuine fact issues as to whether the driver of the police vehicle was reckless, depriving him of immunity, under N.Y. Veh. & Traf. Law § 1104(a), because he testified that (1) while he was responding to a routine, nonemergency call, he made a left turn despite his limited visibility, (2) the accident occurred at about 11:00 p.m. on wet roads, but he did not activate his siren or emergency lights, and (3) rather than completing his turn onto a street that was free of traffic, he stopped in the alleged injured parties' lane of travel when their vehicle was 20 to 30 yards away. Muniz v City of Schenectady, 38 A.D.3d 989, 830 N.Y.S.2d 622, 2007 N.Y. App. Div. LEXIS 2246 (N.Y. App. Div. 3d Dep't 2007).

8. —Citizen's negligence

Defendant motorist, who skidded off thruway in severe snow storm and collided with police car parked on shoulder, was not entitled to summary judgment dismissing police officer's cause of action under CLS Gen Mun § 205-e(1), regardless of persuasiveness of motorist's explanation, where mere happening of collision outside of motorist's authorized lanes of travel created triable issue of fact as to whether she was negligent, and there were similar issues as to whether she was traveling too fast for weather conditions in violation of CLS Veh & Tr § 1180 and negligent in sliding off side of road in violation of CLS Veh & Tr § 1131. Dubois v Vanderwalker, 245 A.D.2d 758, 665 N.Y.S.2d 460, 1997 N.Y. App. Div. LEXIS 12940 (N.Y. App. Div. 3d Dep't 1997).

In action arising from collision between 2 police cars, both of which were responding to police radio call, defendants were not entitled to judgment as matter of law at close of evidence on issue of defendant officer's recklessness, where defendant, whose marked car was behind plaintiff's unmarked car, attempted to cut plaintiff off as they turned left on wet road in fog with no emergency signals in use, colliding with enough force to push plaintiff's car 20 to 30 feet. McCarthy v City of New York, 250 A.D.2d 654, 673 N.Y.S.2d 160, 1998 N.Y. App. Div. LEXIS 5509 (N.Y. App. Div. 2d Dep't 1998).

State could not be held liable for head-on collision on ground that state trooper parked patrol car too close to crest of hill with its emergency lights flashing (while ticketing speeder) since sole proximate cause of collision was negligence of driver who, on approaching patrol car, crossed center line of highway and struck oncoming car; trooper's actions were reasonable, and accorded with CLS Veh & Tr §§ 1104 and 1201, and in any event conduct of approaching driver was intervening act not chargeable to state. Nikolaus v State, 129 A.D.2d 865, 513 N.Y.S.2d 893, 1987 N.Y. App. Div. LEXIS 45554 (N.Y. App. Div. 3d Dep't), app. dismissed, 70 N.Y.2d 728, 519 N.Y.S.2d 645, 513 N.E.2d 1306, 1987 N.Y. LEXIS 18184 (N.Y. 1987), app. denied, 70 N.Y.2d 616, 526 N.Y.S.2d 437, 521 N.E.2d 444, 1988 N.Y. LEXIS 105 (N.Y. 1988).

Estate of state trooper, who was killed when his police vehicle was struck by second tractor trailer after parking behind disabled tractor trailer, was not entitled to summary judgment on ground that trooper was subject to protection of CLS Veh & Tr Hudson v Boutin, 239 A.D.2d 624, 656 N.Y.S.2d 781, 1997 N.Y. App. Div. LEXIS 4499 (N.Y. App. Div. 3d Dep't 1997).

Summary judgment was granted dismissing a motorist's suit against the State to recover for damages sustained in a car accident with another car, which was traveling at a high rate of speed, because the motorist was unable to show that the driver of the speeding vehicle was aware that he was being pursued by state troopers, in that the troopers never activated their sirens or lights, and thus, the motorist could not prove that police action was a proximate cause of the driver's unsafe driving. Further, the motorist could not show that the failure of the troopers to engage in a formal pursuit of the car rose to the level of recklessness, thereby imposing liability under N.Y. Veh. & Traf. Law § 1104(e), in that there was no special relationship between the motorist and the troopers. Bracci v State, 800 N.Y.S.2d 290, 9 Misc. 3d 874, 2005 N.Y. Misc. LEXIS 1777 (N.Y. Ct. Cl. 2005).

9. —Safety required

In action arising from collision between police car engaged in emergency operation and car driven by plaintiff, it was error to grant defendants' motion for judgment as matter of law at close of plaintiff's case, where evidence indicated that police officer, after hearing on his radio that fellow officer and ambulance had been dispatched to medical emergency at nearby location, drove at high rate of speed down center turning lane of main thoroughfare heavily congested with traffic, without engaging emergency siren or attempting to decelerate when he approached red light. Gordon v County of Nassau, 261 A.D.2d 359, 689 N.Y.S.2d 192, 1999 N.Y. App. Div. LEXIS 4505 (N.Y. App. Div. 2d Dep't 1999).

When a cyclist was hurt when trying to pass a sheriff's department vehicle parked partly in a two-lane roadway while investigating an accident, because he collided with a vehicle traveling the opposite direction, the operator of the sheriff's department vehicle was not liable for the cyclist's injuries because the vehicle was an "authorized emergency vehicle," under N.Y. Veh. & Traf. Law § 101, and its operator was engaged in an "emergency operation," under N.Y. Veh. & Traf. Law § 114-b, so the operator was afforded the benefits of N.Y. Veh. & Traf. Law § 1104, protecting her from civil liability because she was not engaged in an act of reckless disregard, as her vehicle's emergency lights were clearly visible to both parties involved in the accident for at least half a mile, it was daylight and not raining, and her vehicle was parked pursuant to sheriff's department policies to insure maximum safety. Gonyea v County of Saratoga, 23 A.D.3d 790, 803 N.Y.S.2d 764, 2005 N.Y. App. Div. LEXIS 12390 (N.Y. App. Div. 3d Dep't 2005).

City was properly found liable where its police officer, who was responding to emergency, drove his police vehicle into subject intersection at unsafe speed and against red light without sounding his siren or adequately reducing speed before suddenly stopping and blocking plaintiff's lane of traffic, making no attempt to avoid colliding with plaintiff's oncoming vehicle. Baines v City of New York, 269 A.D.2d 309, 703 N.Y.S.2d 463, 2000 N.Y. App. Div. LEXIS 2029 (N.Y. App. Div. 1st Dep't), app. denied, 95 N.Y.2d 757, 713 N.Y.S.2d 1, 734 N.E.2d 1212, 2000 N.Y. LEXIS 1770 (N.Y. 2000).

In a personal injury action, the trial court properly denied the motion for summary judgment filed by a police officer and a city because there was an issue of fact as to whether the officer was operating his police vehicle in reckless disregard of others within the meaning of N.Y. Veh. & Traf. Law § 1104(e) when he entered a blind intersection against the red traffic light at a questionable speed without first activating his emergency lights and siren. Ham v City of Syracuse, 37 A.D.3d 1050, 829 N.Y.S.2d 770, 2007 N.Y. App. Div. LEXIS 1071 (N.Y. App. Div. 4th Dep't), app. dismissed, 8 N.Y.3d 976, 836 N.Y.S.2d 545, 868 N.E.2d 228, 2007 N.Y. LEXIS 1022 (N.Y. 2007).

Trooper was entitled to qualified immunity under N.Y. Veh. & Traf. Law § 1104(e) in a claim arising from an accident in which the trooper's car was struck by a motorist while the trooper was making a U-turn because, given the evidence of precautions taken by the trooper, he did not act with "conscious indifference" to the consequences of his actions; the trooper testified that after he stopped in the breakdown lane, he activated his left turn signal and looked over his shoulder and out the front window several times to ensure that traffic had stopped in both directions. Before starting his turn, he saw that the motorist's car appeared to have stopped about 20 yards behind him. Green v State of New York, 71 A.D.3d 1310, 897 N.Y.S.2d 536, 2010 N.Y. App. Div. LEXIS 2020 (N.Y. App. Div. 3d Dep't 2010).

Summary judgment for a city in plaintiff's N.Y. Gen. Mun. Law § 205-e claim arising from a traffic accident with a police officer at an intersection was improper because the city failed to meet its initial burden of establishing, prima facie, that the police officer did not act in reckless disregard for the safety of others when she entered the intersection; the city's submissions failed to eliminate questions of fact as to whether the police vehicle had its emergency siren and flashers on and whether the police officer operating the vehicle accelerated, rather than slowed down, as she approached the intersection. Moreover, there were issues of fact as to whether the police officer's view of the intersection was obstructed by a parked vehicle and/or the inclement weather. Burrell v City of New York, 49 A.D.3d 482, 853 N.Y.S.2d 598, 2008 N.Y. App. Div. LEXIS 1907 (N.Y. App. Div. 2d Dep't 2008).

The statute permits the state police under certain circumstances to operate their vehicles at rates of speed in excess of legally prescribed limits and to disregard regulations governing directions of movement. Furthermore the responsibility imposed on the police officers under the statute to drive with due regard for the safety of all persons does not require compliance with the generally accepted definitions of negligence. Jansen v State, 60 Misc. 2d 36, 301 N.Y.S.2d 811, 1968 N.Y. Misc. LEXIS 1566 (N.Y. Ct. Cl. 1968), aff'd, 32 A.D.2d 889, 302 N.Y.S.2d 1016 (N.Y. App. Div. 4th Dep't 1969).

In automobile accident case, sufficient evidence existed from which jury could find that New York City Department of Corrections officer, as driver of police vehicle in emergency operation, was at fault when he drove through intersection against signal and struck crossing vehicles, where factual questions existed as to (1) whether vehicle's siren was on at all, or, if it was operating, whether it was loud enough to be heard by motorists at intersection so as to avoid collision, and (2) whether officer, who was familiar with obstructed nature of intersection, slowed down sufficiently to safely proceed past steady red signal facing him. Klayman v New York, 130 A.D.2d 551, 515 N.Y.S.2d 285, 1987 N.Y. App. Div. LEXIS 46553 (N.Y. App. Div. 2d Dep't), amended, 134 A.D.2d 408, 520 N.Y.S.2d 1015, 1987 N.Y. App. Div. LEXIS 50598 (N.Y. App. Div. 2d Dep't 1987).

10. —Injuries caused by pursuit

Police officer's use of her white "wiggle-waggle" headlights (which alternate back and forth) in attempt to pull over reckless driver was not unexcused violation of CLS Veh & Tr § 375(3). Martin v Miller, 255 A.D.2d 816, 680 N.Y.S.2d 300, 1998 N.Y. App. Div. LEXIS 12927 (N.Y. App. Div. 3d Dep't 1998).

Police officer did not act in reckless disregard for safety of others, in violation of CLS Veh & Tr § 1104, where he received report of reckless driving, saw vehicle that matched description round corner with its tires squealing, and pursued vehicle briefly at speed not exceeding 40 miles per hour in effort to pull it over by activating first red patrol car lights and then white "wiggle-waggle" headlights, and motorist increased his speed as he approached curve and ultimately crashed into plaintiff's house. Martin v Miller, 255 A.D.2d 816, 680 N.Y.S.2d 300, 1998 N.Y. App. Div. LEXIS 12927 (N.Y. App. Div. 3d Dep't 1998).

In action for injuries sustained in collision with police car that was responding to emergency radio call, court erred in refusing to allow defendant to amend its answer to interpose emergency doctrine defense where defense had merit, plaintiffs were aware of emergency claim from police report, which they received some 6 years before trial, and they also possessed SPRINT report of radio-run received by officer and deposed officer, whom they did not serve, prior to trial. Romero v Romero, 231 A.D.2d 460, 647 N.Y.S.2d 502, 1996 N.Y. App. Div. LEXIS 9411 (N.Y. App. Div. 1st Dep't 1996).

City was entitled to dismissal of police officer's personal injury action under CLS Gen Mun § 205-e, because plaintiff and another officer were engaged in "emergency operation" under CLS Veh & Tr § 114-b, and thus other officer's driving was privileged, where officers used portable light and siren of unmarked patrol car to get suspected stolen car to pull over, driver of patrol car triple parked and left driver's side door open on exiting, passing bus hit open door, and impact caused patrol car to hit plaintiff. Williams v City of New York, 240 A.D.2d 734, 659 N.Y.S.2d 302, 1997 N.Y. App. Div. LEXIS 7076 (N.Y. App. Div. 2d Dep't 1997).

City should have been granted summary judgment where there was nothing in police officer's high speed pursuit of offending vehicle showing that officer intentionally committed acts of unreasonable character, in disregard of known risk so great that harm to others was probable. Powell v City of Mount Vernon, 228 A.D.2d 572, 644 N.Y.S.2d 766, 1996 N.Y. App. Div. LEXIS 7213 (N.Y. App. Div. 2d Dep't 1996), app. denied, 89 N.Y.2d 807, 654 N.Y.S.2d 717, 677 N.E.2d 289, 1997 N.Y. LEXIS 19 (N.Y. 1997), app. denied sub. nom., Black v City of Mount Vernon, 89 N.Y.2d 806, 654 N.Y.S.2d 716, 677 N.E.2d 288 (N.Y. 1997).

In an action for damages for personal injuries arising out of an accident in which the driver of an automobile struck a tree while being pursued by a state trooper, the Court of Claims properly granted the state's motion for a summary judgment on the ground that, as a matter of law, the state trooper's actions did not violate the appropriate standard of care and that, in any event, the trooper's conduct was not a proximte cause of the accident, where the trooper began to follow the car on noticing that its inspection sticker had expired and, as the trooper attempted to follow the car, the vehicle backed up rapidly and sped off down another street so that the trooper activated his grill lights and siren and broadcast that he was in active pursuit, but lost sight of the automobile and then discovered the demolished vehicle against the tree, as the trooper's action as of the time and under the circumstances, and judged in light of Veh & Tr Law § 1104 and by departmental training, complied with the prevailing standard of care and his conduct was not unreasonable. Rightmyer v State, 108 A.D.2d 1047, 486 N.Y.S.2d 99, 1985 N.Y. App. Div. LEXIS 43366 (N.Y. App. Div. 3d Dep't 1985).

In automobile accident case involving city police vehicle, plaintiff was properly precluded from questioning driver and his partner as to police driver training which they had undergone where principal issue was whether driver was negligent at time of accident, not whether he was improperly trained; moreover, since officers were not operating under emergency conditions, they were bound to exercise reasonable care under circumstances so that statutory provision governing standard of care imposed on officers when responding to emergency was inapplicable. La Motta v New York, 130 A.D.2d 627, 515 N.Y.S.2d 554, 1987 N.Y. App. Div. LEXIS 46641 (N.Y. App. Div. 2d Dep't 1987).

Decision to ignore grave risk, which is likely to result in harm to others, may satisfy intentional aspect sufficient to impose liability for violation of privileges of emergency vehicle under CLS Veh & Tr § 1104. Campbell v City of Elmira, 84 N.Y.2d 505, 620 N.Y.S.2d 302, 644 N.E.2d 993, 1994 N.Y. LEXIS 4111 (N.Y. 1994).

Jury had rational evidentiary basis to find that city, through its fire truck driver, acted with reckless disregard for safety of others, where driver proceeded through intersection at speed of 10 to 15 miles per hour against red light, despite disputed issues of fact as to whether driver looked toward lane that plaintiff was travelling before entering intersection, whether driver noticed color of light when he entered intersection, and whether any emergency soundings were heard by plaintiff. Campbell v City of Elmira, 84 N.Y.2d 505, 620 N.Y.S.2d 302, 644 N.E.2d 993, 1994 N.Y. LEXIS 4111 (N.Y. 1994).

Because a pursuing police officer's conduct fell within the protection of Vehicle and Traffic Law § 1104 when he ran a red light in pursuit of a driver, and nothing in the record refuted that the driver passed through two red lights prior to losing control and hitting the injured pedestrians, the City was entitled to summary judgment. Rodriguez v City of New York, 105 A.D.3d 623, 963 N.Y.S.2d 640, 2013 N.Y. App. Div. LEXIS 2634 (N.Y. App. Div. 1st Dep't 2013).

Defendants, a city and its police department, were entitled to summary judgment on plaintiffs' personal injury and wrongful death claims because the police officers did not act in reckless disregard for the safety of others in commencing, conducting, or failing to terminate their pursuit of a vehicle prior to the driver's decision to abruptly accelerate his vehicle to an excessive speed and run through a red light. Wonderly v City of Poughkeepsie, 185 A.D.3d 632, 125 N.Y.S.3d 734, 2020 N.Y. App. Div. LEXIS 3772 (N.Y. App. Div. 2d Dep't 2020).

Where stolen automobile crashed into vehicle being driven by claimant, and being pursued by state troopers, it was held that upon all the evidence and upon all the facts and circumstances of the accident, the state of New York through its said agents and employees was guilty of negligence that was a concurring proximate cause of said accident and the resulting injuries and damages sustained by claimant that were attributable thereto. Jansen v State, 60 Misc. 2d 36, 301 N.Y.S.2d 811, 1968 N.Y. Misc. LEXIS 1566 (N.Y. Ct. Cl. 1968), aff'd, 32 A.D.2d 889, 302 N.Y.S.2d 1016 (N.Y. App. Div. 4th Dep't 1969).

Where the estate's decedent sped away from a police traffic stop and operated his vehicle at breakneck speeds and he repeatedly crossed the double yellow line into oncoming traffic prior to the accident that resulted in his death, the estate could not recover on a theory of negligence because the claim was subject to the enhanced reckless disregard standard applicable to emergency police operations whereby civil liability could not be imposed for a police officer's conduct in pursuing a suspected lawbreaker unless the officer acted in reckless disregard for the safety of others. Estate of Nicholas Christian Gambino-Vasile v Town of Warwick, 62 Misc. 3d 646, 89 N.Y.S.3d 577, 2018 N.Y. Misc. LEXIS 6025 (N.Y. Sup. Ct. 2018).

In a personal injury case in which plaintiff appealed district court's entry of summary judgment in favor of a county and a sheriff's department, no reasonable jury could conclude that the police officers were reckless, as the New York courts had defined that term, in their pursuit of an individual in a nine-mile, ten-minute car chase; plaintiff's unfortunate injuries were not caused by police recklessness, but by the individual's unlawful attempts to evade the authorities. Mfon v Cty. of Dutchess, 722 Fed. Appx. 46, 2018 U.S. App. LEXIS 1859 (2d Cir. N.Y. 2018).

11. —Standard of care

Police officer's conduct in pursuing suspected lawbreaker may not form basis of civil liability to injured bystander unless officer acted in reckless disregard for safety of others; such standard demands more than showing of lack of "due care under the circumstances" and instead requires evidence that "the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow," and has done so with conscious indifference to outcome. Saarinen v Kerr, 84 N.Y.2d 494, 620 N.Y.S.2d 297, 644 N.E.2d 988, 1994 N.Y. LEXIS 4131 (N.Y. 1994).

Trial court properly refused to grant defendants' request to instruct the jury on the reckless disregard standard of care in plaintiff's personal injury action, as defendant, a police officer, was not involved in an emergency operation pursuant to N.Y. Veh. & Traf. Law § 1104(b) when he entered a highway without his vehicle's lights on after plaintiff reported a minor traffic infraction by another driver to the officer, which caused another vehicle to swerve to avoid the patrol car and hit plaintiff, who was standing on the shoulder of the highway. DeLuca v Blanco, 31 A.D.3d 600, 819 N.Y.S.2d 86, 2006 N.Y. App. Div. LEXIS 9395 (N.Y. App. Div. 2d Dep't 2006).

In proceeding on claims brought against State by passengers in car, which was struck from the rear by one of two cars after they were struck by motorist while such two cars were stopped at red light and while such motorist was being chased by police vehicle, on theory that pursuing officer violated his duty to conduct himself with due regard for safety of others because he "boxed in" pursued vehicle, evidence supported finding that officer used his best judgment and acted without disregard for safety of others, and, thus, that no liability should attach to his conduct. Selkowitz v State, 55 A.D.2d 709, 389 N.Y.S.2d 45, 1976 N.Y. App. Div. LEXIS 15482 (N.Y. App. Div. 3d Dep't 1976).

In an action against the state resulting from the collision of an automobile driven by plaintiff with an automobile that had been pursued by a state trooper, the Court of Claims properly dismissed the claim on the basis that it was not unreasonable for the trooper initially to have undertaken pursuit of the car in an effort to apprehend its driver, whose operation of the vehicle had posed a serious threat to other users of the highway, to the occupants of the vehicle and to himself, where, at the time of claimant's collision with the other vehicle, the trooper was following the car at a speed of about 50 miles per hour and, although the trooper was not then using his siren and emergency lights in contravention of departmental regulations, his failure to do so at that time, even if considered negligent, could not be said to have risen to the level of reckless disregard for the safety of others that would be required to find him responsible for the accident, and where the trooper's failure to use his siren and emergency lights was not a proximate cause of the accident when all that the trooper was doing on the road was following the vehicle at a speed that was neither dangerous nor unreasonable in the circumstances. Mitchell v State, 108 A.D.2d 1033, 486 N.Y.S.2d 97, 1985 N.Y. App. Div. LEXIS 43356 (N.Y. App. Div. 3d Dep't), app. dismissed, 64 N.Y.2d 1128, 490 N.Y.S.2d 189, 479 N.E.2d 825, 1985 N.Y. LEXIS 18647 (N.Y. 1985), app. denied, 64 N.Y.2d 611, 1985 N.Y. LEXIS 18911 (N.Y. 1985).

In negligence action against county to recover damages for personal injuries sustained by passengers in automobile which was struck by a speeding automobile being pursued by police, jury was adequately instructed as to obligations of a police officer to use due care while discharging his duties and as to the law dealing with authorized emergency vehicles. Selkowitz v County of Nassau, 58 A.D.2d 888, 396 N.Y.S.2d 885, 1977 N.Y. App. Div. LEXIS 13071 (N.Y. App. Div. 2d Dep't 1977), aff'd, 45 N.Y.2d 97, 408 N.Y.S.2d 10, 379 N.E.2d 1140, 1978 N.Y. LEXIS 2101 (N.Y. 1978).

In action against county, sheriff's department, and deputy for injuries sustained when plaintiff's truck was struck by vehicle being pursued by deputy, court properly instructed jury that standard to be used was whether deputy acted with "reckless disregard for the safety of others." Kerwin v County of Broome, 134 A.D.2d 812, 521 N.Y.S.2d 871, 1987 N.Y. App. Div. LEXIS 50967 (N.Y. App. Div. 3d Dep't 1987), app. denied, 71 N.Y.2d 802, 527 N.Y.S.2d 768, 522 N.E.2d 1066, 1988 N.Y. LEXIS 1200 (N.Y. 1988).

In action for injuries sustained in collision with police car that was responding to emergency radio call as to burglary in progress, court erred by charging jury with standard principles of negligence—whether defendant had failed to exercise ordinary or reasonable care—rather than whether officer had acted with reckless disregard. Romero v Romero, 231 A.D.2d 460, 647

N.Y.S.2d 502, 1996 N.Y. App. Div. LEXIS 9411 (N.Y. App. Div. 1st Dep't 1996).

Fact that police officer pursuing suspect in car may have been speeding during some part of pursuit could not alone constitute predicate for liability of city and its police department, and did not preclude summary judgment in their favor in action by persons injured in collision with suspect's car. Dorsey v City of Poughkeepsie, 275 A.D.2d 386, 712 N.Y.S.2d 604, 2000 N.Y. App. Div. LEXIS 8843 (N.Y. App. Div. 2d Dep't 2000).

In action for injuries sustained in accident arising from police officers' pursuit of suspected lawbreaker, it was reversible error for court to fail to instruct jury, as matter of law, that city could only be held liable if conduct of operator of vehicle demonstrated reckless disregard for safety of others. Molinari v City of New York, 267 A.D.2d 436, 700 N.Y.S.2d 489, 1999 N.Y. App. Div. LEXIS 13340 (N.Y. App. Div. 2d Dep't 1999).

Standard of "reckless disregard for the safety of others," set forth in Saarinen v Kerr, 84 NY2d 494, to govern police officer's conduct in pursuing suspected law breaker, is not limited to high-speed pursuits. Martin v Miller, 255 A.D.2d 816, 680 N.Y.S.2d 300, 1998 N.Y. App. Div. LEXIS 12927 (N.Y. App. Div. 3d Dep't 1998).

Color of the traffic light was a material issue of fact precluding summary judgment in a driver's action that sought to recover damages for injuries she sustained when she collided with a police vehicle because if the police officer was engaged in the exempt conduct of proceeding past a steady red signal, the reckless disregard standard of care applied, but if he was proceeding through a green light, the principles of ordinary negligence applied. Oddo v City of Buffalo, 159 A.D.3d 1519, 72 N.Y.S.3d 706, 2018 N.Y. App. Div. LEXIS 1944 (N.Y. App. Div. 4th Dep't 2018).

Reckless disregard standard of care applied as an officer was operating an authorized emergency vehicle and was involved in an emergency operation at the time of the accident, and the officer was performing exempted conduct when he proceeded past a steady red signal, but only after slowing down as might be necessary for safe operation. Levere v City of Syracuse, 173 A.D.3d 1702, 103 N.Y.S.3d 212, 2019 N.Y. App. Div. LEXIS 4585 (N.Y. App. Div. 4th Dep't 2019).

12. —Driving Conditions

Although a police officer was operating an emergency vehicle and was involved in an emergency operation when he was in pursuit of a speeding vehicle, the officer acted recklessly and was not entitled to qualified immunity regarding a traffic accident where the officer pursued the vehicle at a speed in excess of 80 miles per hour, it was raining heavily at the time, all other traffic was traveling below the speed limit, the road contained S-curves and knolls, and the officer knew that there recently had been other serious accidents caused by inappropriate speed in the area where the subject collision occurred. Flack v State of New York, 57 A.D.3d 1199, 870 N.Y.S.2d 500, 2008 N.Y. App. Div. LEXIS 9575 (N.Y. App. Div. 3d Dep't 2008).

Failure of police officers of different city to sound their siren or operate their flashing lights during pursuit of a traffic violator, prior to time fleeing vehicle ran through a red traffic light and collided with vehicle driven by plaintiff, who had entered intersection with a green light in his favor, constituted negligence and was a concurrent proximate cause of accident, where, had siren been sounding and lights flashing at time plaintiff-driver observed fleeing vehicle, plaintiff would have been warned and would not have entered intersection. Thain v New York, 35 A.D.2d 545, 313 N.Y.S.2d 484, 1970 N.Y. App. Div. LEXIS 4150 (N.Y. App. Div. 2d Dep't 1970), aff'd, 30 N.Y.2d 524, 330 N.Y.S.2d 67, 280 N.E.2d 892, 1972 N.Y. LEXIS 1509 (N.Y. 1972).

Village police officer's pursuit of suspected drunken driver did not, as matter of law, overstep limits of qualified privilege under CLS Veh & Tr § 1104, even though officer exceed posted speed limit, road was wet, there was possibility of other vehicular traffic in vicinity and officer did not immediately call his headquarters before pursuit; officer was entitled to act quickly and to take certain risk in interest of stopping motorist whose conduct on road presented clear and immediate threat to public safety. Saarinen v Kerr, 84 N.Y.2d 494, 620 N.Y.S.2d 297, 644 N.E.2d 988, 1994 N.Y. LEXIS 4131 (N.Y. 1994).

In personal injury action against county, sheriff's department, and deputy, jury was adequately apprised of role of departmental regulations in considering deputy's conduct during high-speed chase where court's charge stated that "conduct of a police officer, while in pursuit of another vehicle, is governed by Section 1104 of the Vehicle and Traffic Law and by the particular departmental training which the officer has received," and court told jury to review exhibits, most of which consisted of departmental guidelines used in officer's training. Kerwin v County of Broome, 134 A.D.2d 812, 521 N.Y.S.2d 871, 1987 N.Y. App. Div. LEXIS 50967 (N.Y. App. Div. 3d Dep't 1987), app. denied, 71 N.Y.2d 802, 527 N.Y.S.2d 768, 522 N.E.2d 1066, 1988 N.Y. LEXIS 1200 (N.Y. 1988).

In an action by persons injured when an automobile being pursued by a state trooper went out of control and crashed into their car, the trial court erred in finding the state liable where the trooper's conduct in tracking a motorist to ascertain its speed after seeing the motorist run a red light and before activating his siren to stop the motorist was negligent inasmuch as the trooper had no reason to believe or to expect that the motorist would not stop; the trooper was not negligent in pursuing the motorist since the pursuit took place during the early hours of morning when no other traffic impeded the pursuit and less than one minute elapsed before the collision occurred. Simmen v State, 81 A.D.2d 398, 442 N.Y.S.2d 216, 1981 N.Y. App. Div. LEXIS 10924 (N.Y. App. Div. 3d Dep't 1981), aff'd, 55 N.Y.2d 924, 449 N.Y.S.2d 173, 434 N.E.2d 242, 1982 N.Y. LEXIS 3117 (N.Y. 1982).

Defendants, including city housing authority, were not entitled to summary judgment where patrol car driven by 2 housing police officers, responding to emergency radio run, collided with another vehicle, as result of which police car jumped curb and hit infant plaintiffs, where parties disputed whether (1) police car had both lights and siren on at time of impact, (2) driver of other vehicle cut in front of speeding police car, and (3) police car was traveling too fast in crowded commercial district. Foster v New York City Hous. Auth., 251 A.D.2d 42, 672 N.Y.S.2d 718, 1998 N.Y. App. Div. LEXIS 6427 (N.Y. App. Div. 1st Dep't 1998).

There was sufficient evidence of reckless disregard for the safety of others under N.Y. Veh. & Traf. Law § 1104(e) to withstand summary judgment, where although the defendant city's officers claimed that they never saw the suspect vehicle while in pursuit, and were going at or under the speed limit, disinterested witnesses claimed that the officers were chasing the suspect vehicle at approximately 90 miles per hour on a curvy highway while it was raining heavily; further, the officers knew or should have known that the suspect was not armed, that the car was equipped with an electronic locator so that it could be located at a later time, and that the heavy rain and the dangerous curves of the highway, in combination with the extremely high rates of speed they were traveling, made it highly probable that harm would (as it did) follow. Greges v City of White Plains, 200 F. Supp. 2d 302, 2002 U.S. Dist. LEXIS 7035 (S.D.N.Y. 2002).

Denial of the city's summary judgment motion was reversed, and the complaint seeking damages for the death of a decedent from a high speed police pursuit was dismissed, where city showed that officers did not act with reckless disregard for safety of others; the city established that the pursuing officers had followed the third party at a safe distance, did not exceed speed limits by more than 20 miles per hour, in compliance with the police pursuit policy, that the dispatcher was kept apprised of the actions of the police, and that other officers took measures to protect the public. Pacelli v City of Syracuse, 305 A.D.2d 1062, 760 N.Y.S.2d 790, 2003 N.Y. App. Div. LEXIS 4822 (N.Y. App. Div. 4th Dep't 2003).

The trial court erred in granting a village's summary judgment motion in an injured party's action to recover for injuries sustained when the injured party's vehicle was struck by a police vehicle involved in a high-speed chase, as the injured party submitted the affidavits of two experts, each of whom opined that the speed of the police vehicles during the pursuit averaged over 70 miles per hour and at times approached 90 miles per hour through congested areas and ultimately into a heavily traveled

intersection, and this raised triable issues of fact whether the officers acted in reckless disregard for the safety of others in violation of N.Y. Veh. & Traf. Law § 1104(e), and, if so, whether the recklessness of the officers was a proximate cause of the accident. Spalla v Vill. of Brockport, 295 A.D.2d 900, 744 N.Y.S.2d 731, 2002 N.Y. App. Div. LEXIS 6347 (N.Y. App. Div. 4th Dep't 2002).

Jury verdict for plaintiff motorist hit by another car being pursued by police car was not against weight of evidence, even though car being pursued had violated 2 traffic regulations, where pursuit was through residential area in dark during rush hour at speeds of 60 to 80 miles per hour in 25 to 30 speed zone, officer was aware of police procedures dictating that he slow down if automobile pursuit "gets out of hand," officer continued even though he had considered that someone might be killed, and there was conflicting evidence as to whether officer activated his siren and flashing lights. Fioriello v Sasson, 255 A.D.2d 549, 680 N.Y.S.2d 662, 1998 N.Y. App. Div. LEXIS 12944 (N.Y. App. Div. 2d Dep't 1998), app. denied, 93 N.Y.2d 817, 697 N.Y.S.2d 564, 719 N.E.2d 925, 1999 N.Y. LEXIS 2920 (N.Y. 1999).

Deputy sheriff, whose police vehicle struck plaintiffs' car while he was responding to report of fight in vicinity, was not entitled to summary judgment on ground that he was immune from liability under CLS Veh & Tr § 1104 where he failed to prove that he did not act in reckless disregard for safety of others when he crossed into turning lane for oncoming traffic and proceeded through congested intersection at speed exceeding 50 miles per hour. Schaeffer v DiDomenico, 238 A.D.2d 931, 661 N.Y.S.2d 154, 1997 N.Y. App. Div. LEXIS 4749 (N.Y. App. Div. 4th Dep't 1997).

City was entitled to summary judgment in action for injuries sustained by plaintiffs when vehicle being pursued by police officer crashed into their vehicle, since officer had duty to investigate and stop progress of vehicle which was involved in race and which was being driven recklessly; officer was entitled to take risk posed by speed of offending vehicle and his own vehicle in order to protect public from clear and immediate threat to public safety where night was clear and roads were dry. Mullane v City of Amsterdam, 212 A.D.2d 848, 622 N.Y.S.2d 346, 1995 N.Y. App. Div. LEXIS 931 (N.Y. App. Div. 3d Dep't 1995).

In an action by the estates of decedents who died from injuries sustained when their vehicle was struck during a high-speed police chase while it was stopped at a railroad crossing waiting for a train to pass, a state trooper whose hot pursuit of speeding vehicles precipitated the accident would not be entitled to the immunity accorded to drivers of authorized emergency vehicles under the privilege, conferred by Veh & Tr Law § 1104, to disregard various traffic regulations and maximum speed limits, since the trooper, by failing to reduce his speed and instead accelerating his vehicle in disregard of the railroad crossing signal, failed to exercise his best judgment under the circumstances and displayed a lack of due regard for the safety of others; furthermore, even were the privileges and immunities granted by Veh & Tr Law § 1104 inapplicable to railroad grade crossings and railroad crossing signals, the trooper was negligent in the operation of his vehicle even under a common law analysis. Zulauf v State, 119 Misc. 2d 135, 462 N.Y.S.2d 560, 1983 N.Y. Misc. LEXIS 3473 (N.Y. Ct. Cl. 1983), aff'd, 110 A.D.2d 1042, 489 N.Y.S.2d 1019, 1985 N.Y. App. Div. LEXIS 48917 (N.Y. App. Div. 4th Dep't 1985).

13. —Motorcycle

Because a motorcyclist's operation of a motorcycle in attempting to elude the police, not the manner in which the police officers conducted their pursuit, was the proximate cause of the motorcyclist's accident, the officers were properly granted summary judgment in the motorcyclist's personal injury action based on the immunities in N.Y. Veh. & Traf. Law § 1104. Greenawalt v Village of Cambridge, 67 A.D.3d 1158, 888 N.Y.S.2d 295, 2009 N.Y. App. Div. LEXIS 7963 (N.Y. App. Div. 3d Dep't 2009).

Court properly determined, as matter of law, that driver of patrol car in which plaintiff was seated did not act with "reckless disregard for the safety of others," ignoring known serious risks of harm (CLS Veh & Tr § 1104(e) while pursuing stolen moped, where it was undisputed that police officer was unaware that he was turning in wrong direction onto one-way street and that he was not driving at excessive rate of speed; thus, court properly granted defendant city's summary judgment motion dismissing action under CLS Gen Mun § 205-e. Gervasi v Peay, 254 A.D.2d 172, 679 N.Y.S.2d 45, 1998 N.Y. App. Div. LEXIS 11179 (N.Y. App. Div. 1st Dep't 1998).

Village police officer's conduct in his pursuit of plaintiff fell within ambit of qualified privilege afforded by CLS Veh & Tr § 1104 and was not proximate cause of accident as matter of law, and thus village defendants were entitled to summary judgment in action for injuries sustained by plaintiff who crashed his motorcycle while intoxicated and fleeing from officer; officer was justified in trying to stop plaintiff after hearing bar employee tell him that he should not be driving because he had too much to drink and after observing plaintiff's erratic driving as he exited parking lot of bar, department procedures authorized officer to engage in high-speed pursuit when it was safe for himself and others, road block was utilized as alternative to high-speed pursuit but plaintiff drove around it, and there was no evidence that officer intentionally tried to impact motorcycle in effort to stop it, or in any way attempted to force plaintiff off road. King v Village of Cobleskill, 237 A.D.2d 689, 654 N.Y.S.2d 439, 1997 N.Y. App. Div. LEXIS 2230 (N.Y. App. Div. 3d Dep't 1997).

State trooper did not act in reckless disregard for safety of others under CLS Veh & Tr § 1104(e) where (1) on receiving radio report of motorcycle accident, he activated his emergency lights and siren and proceeded at speed variously estimated at 55 to 70 miles per hour to scene of accident, (2) as he approached scene, he saw car ahead slow down, and (3) although he assumed that car ahead was yielding to right so that he could pass, as required by CLS Veh & Tr § 1144, car instead turned left without signaling and was struck in rear by patrol car, causing injuries to plaintiff passenger. Notorangelo v State, 240 A.D.2d 716, 659 N.Y.S.2d 312, 1997 N.Y. App. Div. LEXIS 7114 (N.Y. App. Div. 2d Dep't), app. denied, 90 N.Y.2d 811, 666 N.Y.S.2d 100, 688 N.E.2d 1382, 1997 N.Y. LEXIS 3576 (N.Y. 1997).

In action for injuries sustained when plaintiff's truck was struck by vehicle being pursued by deputy sheriff in high-speed chase, finding of no liability on part of deputy, county, and sheriff's department was not against weight of evidence where (1) incident occurred on Sunday morning when traffic was light, (2) testimony indicated that area of chase was not heavily populated and parts of route were flat, straight and 3 lanes, (3) deputy was very familiar with area, and (4) there was evidence that deputy terminated pursuit over one mile before accident occurred. Kerwin v County of Broome, 134 A.D.2d 812, 521 N.Y.S.2d 871, 1987 N.Y. App. Div. LEXIS 50967 (N.Y. App. Div. 3d Dep't 1987), app. denied, 71 N.Y.2d 802, 527 N.Y.S.2d 768, 522 N.E.2d 1066, 1988 N.Y. LEXIS 1200 (N.Y. 1988).

Court erred in denying town's motion for summary judgment dismissing action for injuries allegedly sustained when car plaintiff was driving was struck by motorcycle being chased at high speed by police since (1) it was undisputed that, at time of accident, no town police officer was engaged in high speed chase of motorcycle, (2) assuming that such chase were in progress, officer's conduct was reasonable and did not show reckless disregard for safety of others, (3) sole proximate cause of accident was manner in which motorcyclist operated motorcycle, (4) there was no support for plaintiff's general and conclusory allegation that another officer located at intersection where accident occurred was negligent in failing to monitor traffic, and (5) officer's failure to act, even assuming that such failure constituted negligence, was not proximate cause of accident. Friel v Town of Brighton, 206 A.D.2d 863, 615 N.Y.S.2d 207, 1994 N.Y. App. Div. LEXIS 7774 (N.Y. App. Div. 4th Dep't 1994).

Court erred in granting deputy sheriff's motion for summary judgment where fact issue existed as to whether deputy, who was involved in police pursuit of plaintiff's motorcycle, deliberately drove his vehicle into path of plaintiff's motorcycle in such manner that collision was likely, if not unavoidable, and thereby consciously disregarded known serious risk of harm. Rouse v Dahlem, 228 A.D.2d 777, 643 N.Y.S.2d 744, 1996 N.Y. App. Div. LEXIS 6428 (N.Y. App. Div. 3d Dep't 1996).

14. —Pursuit stopped

City and its police department were immune from tort liability based on discretionary decision allegedly made by police lieuten-

ant in failing to call off police pursuit in which suspect being pursued collided with plaintiffs' car, and thus municipal defendants were entitled to summary judgment in plaintiffs' personal injury action. Dorsey v City of Poughkeepsie, 275 A.D.2d 386, 712 N.Y.S.2d 604, 2000 N.Y. App. Div. LEXIS 8843 (N.Y. App. Div. 2d Dep't 2000).

State troopers were not entitled to summary judgment dismissing action for wrongful death of occupants of vehicle struck by pickup truck pursued by troopers where troopers' testimony that they slowed down and broke off chase on entering village was contradicted by 4 independent witnesses, who stated that troopers pursued truck through village at 90 to 100 miles per hour, and one witness averred that, because of its speed and closeness of pursuit, troopers' vehicle narrowly missed crashing into other vehicles at scene of accident. Sisson v Baritot, 245 A.D.2d 1084, 666 N.Y.S.2d 85, 1997 N.Y. App. Div. LEXIS 13863 (N.Y. App. Div. 4th Dep't 1997).

Defendant town's motion for summary judgment was properly denied, even though town presented evidence that its police officers never exceeded 60 miles per hour and they broke off chase well before collision occurred, since plaintiffs submitted proof that average speed of pursuing officers exceeded 90 miles per hour and that collision occurred within moments after they terminated pursuit; under circumstances, fact issues existed as to whether officers acted in reckless disregard for safety of others and, if so, whether their recklessness was proximate cause of accident. Lopez v Town of Gates, 249 A.D.2d 934, 672 N.Y.S.2d 576, 1998 N.Y. App. Div. LEXIS 5026 (N.Y. App. Div. 4th Dep't 1998).

State was entitled to summary judgment dismissing claim for injuries sustained when automobile in which claimant was passenger overturned while being pursued by state trooper since (1) it was proper for trooper to initiate pursuit of stolen vehicle and to maintain pursuit given erratic operation of vehicle, and (2) trooper exercised due regard for safety of others as evidenced by his discontinuance of pursuit on 3 occasions when he lost visual contact. Palella v State, 141 A.D.2d 999, 530 N.Y.S.2d 650, 1988 N.Y. App. Div. LEXIS 7219 (N.Y. App. Div. 3d Dep't 1988).

Town should have been granted summary judgment dismissing action for its police officer's alleged recklessness in pursuing traffic violator whose car struck plaintiffs' car where officer acted "swiftly and resolutely" but prudently in pursuing driver at comparatively low speeds over course of several miles, after observing him speeding and driving erratically, and when driver suddenly accelerated to 80 miles per hour, officer briefly followed suit, but within seconds decelerated and broke off chase. Lorber v Town of Hamburg, 225 A.D.2d 1062, 639 N.Y.S.2d 607, 1996 N.Y. App. Div. LEXIS 2899 (N.Y. App. Div. 4th Dep't 1996), reh'g denied, 1996 N.Y. App. Div. LEXIS 7036 (N.Y. App. Div. 4th Dep't May 31, 1996).

Because the police officers involved in a car chase did not intentionally commit any unreasonable acts with conscience indifference to known or obvious risks so great as to make harm highly probable, which would have violated N.Y. Veh. & Traf. Law § 1104, and because the officers disengaged from their pursuit almost two minutes before the accident occurred, the city was entitled to summary judgment in the plaintiff's wrongful death action. Aqeel v Tony Casale, Inc., 44 A.D.3d 572, 845 N.Y.S.2d 8, 2007 N.Y. App. Div. LEXIS 10940 (N.Y. App. Div. 1st Dep't 2007).

15. Fire department vehicle

The rule of a municipal fire department that members driving apparatus in response to an alarm of fire should "use all speed consistent with safety," is warranted and the driver of such apparatus, all other things being equal, has the right of way. Garrett v Schenectady, 268 N.Y. 219, 197 N.E. 257, 268 N.Y. (N.Y.S.) 219, 1935 N.Y. LEXIS 928 (N.Y.), reh'g denied, 268 N.Y. 708, 198 N.E. 569, 268 N.Y. (N.Y.S.) 708, 1935 N.Y. LEXIS 1167 (N.Y. 1935).

Summary judgment was properly denied to defendant driver of vehicle in which passenger was injured when that vehicle was struck in rear by fire engine, despite defendant driver's reliance on inference of negligence created by rear-end collision, where fire engine was on its way to fire and had its red rotating lights, siren, and air horn activated, defendant driver violated CLS Veh & Tr § 1144 by failing to yield right of way and stay clear of intersection, and thus there was triable issue of fact as to whether that violation was negligent under circumstances. Tobacco v North Babylon Fire Dep't, 251 A.D.2d 398, 674 N.Y.S.2d 125, 1998 N.Y. App. Div. LEXIS 6646 (N.Y. App. Div. 2d Dep't 1998).

In action by passenger injured when vehicle in which she was riding was struck in rear by fire engine, driver of fire engine was entitled to summary judgment dismissing all cross claim against him where (1) as member of volunteer fire company, he could not be held liable for act done in performance of his duties "except for wilful negligence or malfeasance," (2) on observing vehicle stopped about 200 feet in front of him, fire engine driver repeatedly applied brakes and slowed to 5 to 7 miles per hour when he skidded into stopped vehicle, (3) there was no evidence that his failure to avoid accident was wilful negligence or malfeasance, and (4) he was also entitled to privilege under CLS Veh & Tr § 1104 because there was no evidence that he acted with "reckless disregard for the safety of others." Tobacco v North Babylon Fire Dep't, 251 A.D.2d 398, 674 N.Y.S.2d 125, 1998 N.Y. App. Div. LEXIS 6646 (N.Y. App. Div. 2d Dep't 1998).

City was entitled to summary judgment in a passenger's personal injury case, alleging the passenger was injured in a collision with a city-owned fire truck, because the firefighter was engaged in an emergency operation at the time of the collision the firefighter's conduct did not rise to the level of reckless disregard for the safety of others, the fire truck's emergency lights and siren were activated, and the firefighter either stopped or slowed sufficiently before entering the intersection. Jobson v SM Livery, Inc., 175 A.D.3d 1510, 109 N.Y.S.3d 376, 2019 N.Y. App. Div. LEXIS 6771 (N.Y. App. Div. 2d Dep't 2019).

General Municipal Law provision giving additional right of action to fireman injured as a result of any neglect, omission, willful or culpable negligence of any person in failing to comply with statutes or ordinances was available to one who, while performing duties as fireman, driving official automobile, was injured in collision with defendant's automobile, allegedly as result of defendant's negligence in failing to comply with Vehicle and Traffic Law provisions requiring defendant to stop and yield. Burigo v Di Leo, 38 Misc. 2d 851, 239 N.Y.S.2d 166, 1963 N.Y. Misc. LEXIS 2213 (N.Y. County Ct. 1963).

Statute giving an additional right of action for injury or death of a fireman as result of negligence of any person in failing to comply with statutes and ordinances is not limited to injuries sustained by firemen while engaged in extinguishing a fire on premises, and claims by firemen whose official automobile was in collision on public highway with automobile owned and driven by defendants, who allegedly failed to yield right of way to firemen's emergency-vehicle, was sufficient to state a cause of action for personal injuries. McAvoy v Di Leo, 40 Misc. 2d 46, 242 N.Y.S.2d 682, 1963 N.Y. Misc. LEXIS 1798 (N.Y. County Ct. 1963), rev'd, 43 Misc. 2d 164, 250 N.Y.S.2d 444, 1964 N.Y. Misc. LEXIS 1848 (N.Y. App. Term 1964).

In personal injury action arising from collision between car and fire truck driven by volunteer firefighter, defendant volunteer fire department was not entitled CLS CPLR § 4401 dismissal on ground that firefighter had been granted summary judgment due to lack of proof that he acted with reckless disregard for safety of others and only claim against fire department was based on vicarious liability for his conduct, as immunity granted to volunteer firefighters by CLS Gen Mun § 205-b does not extend to volunteer fire departments, which remain liable for negligence of volunteer firefighters while operating department vehicles in discharge of their duties. Tobacco v North Babylon Volunteer Fire Dep't, 182 Misc. 2d 480, 696 N.Y.S.2d 340, 1999 N.Y. Misc. LEXIS 403 (N.Y. Sup. Ct. 1999), app. dismissed, 276 A.D.2d 551, 714 N.Y.S.2d 450, 2000 N.Y. App. Div. LEXIS 10154 (N.Y. App. Div. 2d Dep't 2000).

Where a village's fire truck was responding to an emergency call when its rear compartment door swung open and struck plaintiff's car, as N.Y. Veh. & Traf. Law § 1104 did not immunize occurrences that were ancillary to the operation of an emergency vehicle, nor did it contemplate a defect in an authorized emergency vehicle that was exacerbated by reckless driving, the village was not immune from liability for negligence. Wenger v

Incorporated Vil. of Rockville Ctr., 909 N.Y.S.2d 333, 29 Misc. 3d 1086, 2010 N.Y. Misc. LEXIS 4964 (N.Y. Dist. Ct. 2010).

Although a village's fire truck was involved in an emergency operation at the time its rear door swung open and struck plaintiff's car, and had its lights flashing and sirens sounding, as the village did not establish that the fire truck was engaged in any of the four enumerated privileged categories of N.Y. Veh. & Traf. Law § 1104(b), the qualified immunity set forth in § 1104(e) never became applicable. Wenger v Incorporated Vil. of Rockville Ctr., 909 N.Y.S.2d 333, 29 Misc. 3d 1086, 2010 N.Y. Misc. LEXIS 4964 (N.Y. Dist. Ct. 2010).

Where plaintiff, a volunteer firefighter, suffered injuries in a traffic accident on the way to a structure fire, his complaint against the driver (another volunteer firefighter) was dismissed, as he failed to demonstrate a triable issue as to whether the conduct of the driver constituted willful negligence or malfeasance, as his driving did not bespeak conscious indifference to a highly probable risk that calamity would ensue. Plaintiff's claims against the town were dismissed, as the benefits of Vehicle and Traffic Law § 19 were the exclusive remedy of a volunteer firefighter for a line of duty injury as against the town. Lee v Verstraete, 65 Misc. 3d 531, 109 N.Y.S.3d 594, 2019 N.Y. Misc. LEXIS 4781 (N.Y. Sup. Ct. 2019).

Agency Opinions

Analysis

1. In general
2. Ambulance
3. Police vehicle
4. Fire department vehicle

1. In general

Person described in CLS Veh & Tr § 1103(b) who, with reckless disregard for safety of others, violates any rules of road described thereunder does not commit traffic infraction, but may incur liability in civil law action. 1992 NY Ops Atty Gen F 92-9.

The use of sirens, flashing lights, etc. by authorized emergency vehicles is permissible only when the vehicle operator reasonably believes that an emergency exists. 1978 Op St Compt File #768.

2. Ambulance

Ambulance driver, even though operating his vehicle in emergency, is subject to laws relating to speed. 1953 NY Ops Atty Gen 131 (informal).

If a person is so infirm that he is incapable of traveling from a nursing home to a hospital by ordinary means of transportation and for that reason is transported with the aid of an ambulance, the driver of the ambulance may use sirens, flashing red lights, etc., pursuant to Vehicle and Traffic Law, § 1104, even though the person being transported is in no imminent danger. 1979 Op St Compt File #22.

3. Police vehicle

Town constables may not affix a red light or use a siren on a motor vehicle. Nor may they exceed speed limits and violate other traffic rules. Town constables may affix emblems to town vehicles identifying them as constable vehicles. Town constables may not be used to assist other local governments requesting aid. 1981 NY Ops Atty Gen Feb 23 (informal).

4. Fire department vehicle

Volunteer firemen had no right under former § 81 to attach a siren or gong to private vehicle. 1933 N.Y. Op. Att'y Gen. No. 116.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Authorized emergency vehicle, § 101.

Emergency operation, § 114-b.

Police vehicle, § 132-a.

Operation of vehicle on approach of authorized emergency vehicles, § 1144.

Annotations:

Liability of governmental unit or its officers for injury to innocent pedestrian or occupant of parked vehicle, or for damage to such vehicle, as result of police chase. 100 ALR3d 815.

Liability of governmental unit or its officers for injury to innocent occupant of moving vehicle, or for damages to such vehicle, as result of police chase. 4 ALR4th 865.

Liability of governmental unit for injuries caused by driver of third vehicle to person whose vehicle had been stopped by police car. 17 ALR4th 897.

Automobiles: liability for U-turn collisions. 53 ALR4th 849.

Liability of operator of ambulance service for personal injuries to person being transported. 68 ALR4th 14.

Matthew Bender's New York Practice Guides: LexisNexis AnswerGuide New York Negligence § 2.09[2][b] Identifying Applicable Theories of Liability in Motor Vehicle Cases.

LexisNexis AnswerGuide New York Negligence § 6.09[1][c][ii] Choosing Appropriate Basis of Liability.

LexisNexis AnswerGuide New York Negligence § 2.09 Identifying Applicable Theories of Liability in Motor Vehicle Cases.

LexisNexis AnswerGuide New York Negligence § 6.09 Choosing Appropriate Basis of Liability.

Warren's Negligence in the New York Courts §§ 33.04, 99.03[4], 146.01[8], 194.01[5] (vicarious liability; scope of employment).

Warren's Negligence in the New York Courts Ch. 228 (motor vehicle liability).

Texts: NY Pattern Jury Instructions 3d, PJI 2:79A.

ARTICLE 24 Traffic Signs, Signals and Markings

HISTORY:

Add, L 1959, ch 775, eff Oct 1, 1960, with substance transferred from former Art 13.

§ 1110. Obedience to and required traffic-control devices

(a) Every person shall obey the instructions of any official traffic-control device applicable to him placed in accordance with the provisions of this chapter, unless otherwise directed by a traffic or police officer, subject to the exceptions granted the driver of an authorized emergency vehicle in this title.

(b) No provision of this title for which signs are required shall be enforced against an alleged violator if at the time and place of the alleged violation an official sign is not in proper position and sufficiently legible to be seen by an ordinarily observant person. Whenever a particular section does not state that signs are required, such section shall be effective even though no signs are erected or in place.

(c) Whenever official traffic-control devices are placed in position approximately conforming to the requirements of this chapter, such devices shall be presumed to have been so placed by the official act or direction of lawful authority, unless the contrary shall be established by competent evidence.

(d) Any official traffic-control device placed pursuant to the provisions of this chapter and purporting to conform to the lawful requirements pertaining to such devices shall be presumed to comply with the requirements of this chapter, unless the contrary shall be established by competent evidence.

(e) For purposes of this article, "intersection" shall include the area embracing the juncture of a

highway with a private road or driveway and "intersecting roadway" shall include an intersecting private road or driveway.

HISTORY:

Add, L 1959, ch 775, eff Oct 1, 1960, with substance transferred from former § 1110; amd, L 1960, ch 300, § 47; L 1963, ch 662 § 1; L 1964, ch 259, § 1, eff Oct 1, 1964; L 1964, ch 653, § 3, eff Oct 1, 1964; L 1976, ch 948, § 1, eff Jan 1, 1977.

Prior Law: Former § 1110, add, L 1957, ch 698, § 4; amd, L 1959, ch 723, § 1; repealed, L 1959, ch 775, § 2014, eff Oct 1, 1960.

Notes to Decisions

Analysis

1. In general; legislative intent
2. Construction
3. Signal light
4. Stop sign

1. In general; legislative intent

The direction, maintenance and control of traffic lights in question were under the supervision of the state through the state traffic commission; and passenger claimants were improperly denied recovery on the theory that the negligence of both drivers was the sole proximate cause of the accident and that the acts of both drivers were superseding acts of negligence sufficient to relieve the state from liability. Foley v State, 265 A.D. 682, 41 N.Y.S.2d 256, 1943 N.Y. App. Div. LEXIS 6384 (N.Y. App. Div. 1943), aff'd, 294 N.Y. 275, 62 N.E.2d 69, 294 N.Y. (N.Y.S.) 275, 1945 N.Y. LEXIS 801 (N.Y. 1945).

Where truckdriver, at time of accident, had passed not only first intersection from which warning sign was allegedly absent, but had also passed second intersection, and prior to continuing south in northbound traffic lane where accident occurred, had disregarded the "DO NOT ENTER" and "KEEP RIGHT" signs designed to divert southbound traffic from northbound lane, absence of first sign was not proximate cause of accident. Henderberg v State, 52 A.D.2d 713, 381 N.Y.S.2d 562, 1976 N.Y. App. Div. LEXIS 12398 (N.Y. App. Div. 4th Dep't 1976).

Determination of administrative law judge that petitioner disobeyed official traffic-control device in violation of CLS Veh & Tr § 1110(a) was supported by substantial evidence where testimony adduced at hearing established that vehicle driven by petitioner crossed over continuous cone line on exiting tunnel. Schwartz v Traffic Violations Appeals Bd. of N.Y. State Dep't of Motor Vehicles, 189 A.D.2d 876, 592 N.Y.S.2d 981, 1993 N.Y. App. Div. LEXIS 570 (N.Y. App. Div. 2d Dep't 1993).

In personal injury action arising from intersectional collision, lessee of storage container that blocked motorist's view was not entitled to summary judgment dismissing all claims and cross claims against it where there were material issues of fact as to whether its container was illegally parked at intersection and whether container contributed to accident. Dixon v Cassone Leasing, Inc., 251 A.D.2d 534, 674 N.Y.S.2d 727, 1998 N.Y. App. Div. LEXIS 7576 (N.Y. App. Div. 2d Dep't 1998).

County was properly granted summary judgment dismissing action alleging that there should have been route junction signs at intersection in question and advance warning sign, where County showed that under CLS Veh & Tr § 1681 New York State Department of Transportation exclusively controlled area where such signs would be placed, and county further showed that, according to studies performed by it under 17 NYCRR § 200.2(f), no advance warning sign was necessary. Monica v County of Jefferson, 262 A.D.2d 947, 692 N.Y.S.2d 553, 1999 N.Y. App. Div. LEXIS 7103 (N.Y. App. Div. 4th Dep't), app. denied, 94 N.Y.2d 753, 700 N.Y.S.2d 427, 722 N.E.2d 507, 1999 N.Y. LEXIS 3697 (N.Y. 1999).

Defendant, which had contracted with city to maintain and repair traffic lights, should have been granted summary judgment in action arising from motor vehicle accident resulting, in part, from malfunction of traffic light at intersection since contract between defendant and city did not indicate intention that city's nondelegable duty to maintain its highways in reasonably safe condition be supplemented with comparable duty on part of defendant, or that defendant's orbit of duty be broadened to members of general public. Ray v Hertz Corp., 271 A.D.2d 374, 707 N.Y.S.2d 161, 2000 N.Y. App. Div. LEXIS 4622 (N.Y. App. Div. 1st Dep't), app. denied, 95 N.Y.2d 766, 716 N.Y.S.2d 641, 739 N.E.2d 1146, 2000 N.Y. LEXIS 2920 (N.Y. 2000), app. denied sub. nom., Eagle Ins. Co. v Hertz Corp., 95 N.Y.2d 766, 716 N.Y.S.2d 640, 739 N.E.2d 1145, 2000 N.Y. LEXIS 4469 (N.Y. 2000), app. denied sub. nom., Graham v City of New York, 95 N.Y.2d 766, 716 N.Y.S.2d 641, 739 N.E.2d 1146, 2000 N.Y. LEXIS 4481 (N.Y. 2000).

Legislative field pertaining to vehicular traffic at intersections controlled by traffic signals has been pre-empted by state in Vehicle and Traffic Law. People v Scanlan, 27 Misc. 2d 442, 211 N.Y.S.2d 635, 1961 N.Y. Misc. LEXIS 3481 (N.Y. County Ct. 1961).

Legislature, in enacting Vehicle and Traffic Law intended to enact a uniform law throughout state regulating use of motor vehicles on streets and highways. People v Scanlan, 27 Misc. 2d 442, 211 N.Y.S.2d 635, 1961 N.Y. Misc. LEXIS 3481 (N.Y. County Ct. 1961).

Where a question was raised under subd c of the above statute as to the admissibility of a letter from the State Traffic Commission relative to posting of signs, it was held that the letter clearly came within the exception to the hearsay rule in regard to records made in the regular course of business. People v Hollingsworth, 46 Misc. 2d 1017, 261 N.Y.S.2d 470, 1965 N.Y. Misc. LEXIS 1841 (N.Y. County Ct. 1965).

In a prosecution for failure to obey a traffic-control device, where the arresting officer failed to testify as to the size, shape, height, background color, color of letters, or location of the devices in regard to the intersection they were to control, the state failed to meet its burden and the charge would be dismissed. People v Cooper, 112 Misc. 2d 277, 446 N.Y.S.2d 965, 1981 N.Y. Misc. LEXIS 3422 (N.Y. J. Ct. 1981).

In trial for traffic infraction of disobeying traffic control device in violation of CLS Veh & Tr § 1110(a), People made out prima facie identification of defendant where (1) simplified traffic information contained defendant's name and address, date of birth, operator's license number and date of expiration, and registration number and description of vehicle, and (2) arresting officer testified that he recognized defendant in court, even though he did not point her out. People v Northrup, 142 Misc. 2d 973, 539 N.Y.S.2d 246, 1988 N.Y. Misc. LEXIS 836 (N.Y. J. Ct. 1988).

Under presumption established by CLS Veh & Tr § 1110(d), testimony was sufficient to establish that speed limit sign complied with requirements of law where police officer testified that sign was 30-mile-per-hour sign that was approximately one foot by 2 feet in size. People v Praete, 144 Misc. 2d 801, 545 N.Y.S.2d 499, 1989 N.Y. Misc. LEXIS 549 (N.Y. J. Ct. 1989), aff'd, 150 Misc. 2d 389, 575 N.Y.S.2d 623, 1991 N.Y. Misc. LEXIS 608 (N.Y. App. Term 1991).

Defendant was entitled to dismissal of speeding charge where village speed sign was obliterated by foliage since (1) pursuant to CLS Veh & Tr § 1110(b), signs not properly positioned and sufficiently legible cannot be enforced against alleged violator, (2) in enacting CLS Veh & Tr §§ 1683-1685, legislature intended that motorists could not be presumed to know various speed limits enacted by cities and villages, and therefore required municipalities to erect signs warning motorists of such speed limits, and (3) any presumption of validity of signs arising from CLS Veh & Tr § 1110(b) was overcome by village prosecutor's previous dismissal of several other cases for alleged speeding violations in same geographic area because of obliteration of speed sign, and by photographic exhibits. People v Fox, 157 Misc. 2d 238, 596 N.Y.S.2d 984, 1993 N.Y. Misc. LEXIS 104 (N.Y. J. Ct. 1993).

In the absence of any evidence offered by defendant to the contrary, the testimony of the police officer, who ticketed defendant for making an illegal left turn (Vehicle and Traffic Law § 1110 [a]), regarding the description, size and location of the no-left turn signs (see, 17 NYCRR 213.2) entitles the People to the

presumption that the signs were placed by lawful act or authority and comply with all requirements necessary to give fair notice of the traffic regulation (Vehicle and Traffic Law § 1110 [c], [d]). The People are not required to prove that a police officer was not directing traffic at the intersection since the presence of a police officer taking precedence over a traffic control device is in the nature of a defense rather than an element which the People must prove. Finally, the testimony of the police officer that he recognized defendant in court, although he did not point her out, was sufficiently reliable identification of defendant to make out a prima facie case when coupled with the simplified traffic information containing defendant's name and address, date of birth, operator's license number and date of expiration, and the registration and ownership of the vehicle. People v Northrup, 142 Misc. 2d 973, 539 N.Y.S.2d 246, 1988 N.Y. Misc. LEXIS 836 (N.Y. J. Ct. 1988).

Defendant, charged with a violation of section 1110 (a) of the Vehicle and Traffic Law, failure to obey a traffic control device, a moving violation, in that he parked his vehicle at approximately 9:00 A.M. at a location where a sign was posted which specifically stated "no stopping between 8:00 A.M. and 4:00 P.M." and brought his daughter into a nearby school, is found not guilty and the violation is dismissed. While the subject sign clearly constituted a traffic control device within the meaning of section 153 of the Vehicle and Traffic Law, defendant's actions were tantamount to parking and did not constitute the active operation of the automobile. The point system promulgated by the Commissioner of Motor Vehicles, pursuant to which a driver's license may be suspended for habitual violations of the Vehicle and Traffic Law, provides for a penalty of two points for a conviction of a failure to obey a traffic control device while a conviction of a parking violation carries no points and the applicable regulations state that no points shall be imposed for any violation not resulting from the operation of a motor vehicle. Accordingly, defendant did not violate Vehicle and Traffic Law § 1110 (a). The statute should be construed to avoid an absurd result, unreasonableness and injustice; the spirit of the law would be violated by assessing points against the defendant, since the vehicle was not in operation and no true moving violation occurred. People v Erdman, 145 Misc. 2d 358, 546 N.Y.S.2d 775, 1989 N.Y. Misc. LEXIS 653 (N.Y. J. Ct. 1989).

Defendant was entitled to withdraw his plea of guilty to violation of CLS Veh & Tr § 1110(a) on ground that it was involuntarily entered, where neither defense counsel nor court advised him of civil penalties that were ultimately imposed against him by Department of Motor Vehicles. People v Woodward, 188 Misc. 2d 7, 727 N.Y.S.2d 575, 2001 N.Y. Misc. LEXIS 123 (N.Y. J. Ct. 2001).

The legislature, by enactment of former § 84, never intended that the presence of traffic control signals at intersections should excuse the use of reasonable care and caution on the part of motorists. Adams v Berkun, 2 N.Y.S.2d 98, 1938 N.Y. Misc. LEXIS 1258 (N.Y. City Ct. 1938).

Where the no-left-turn sign at an intersection where defendant made a left turn was not in a proper position to be seen by an ordinarily observant person, N.Y. Veh. & Traf. Law § 1110(b) precluded enforcing N.Y. Veh. & Traf. Law § 1110(a) against defendant, and defendant's conviction for disobeying a traffic-control device was reversed. People v Brahms, 192 Misc. 2d 357, 746 N.Y.S.2d 529, 2002 N.Y. Misc. LEXIS 1036 (N.Y. App. Term 2002).

Trial court did not grant defendant's N.Y. Crim. Proc. Law § 170.30(1)(f) motion to dismiss a violation of N.Y. Veh. & Traf. Law § 1110(a), failure to obey a traffic control device, because State failed to timely provide a supporting deposition; under N.Y. Crim. Proc. Law § 100.25(2) did not authorize, nor did trial court deem it advisable to allow, a defendant's requests for depositions by fax. People v Smith, 195 Misc. 2d 41, 757 N.Y.S.2d 217, 2002 N.Y. Misc. LEXIS 1825 (N.Y. County Ct. 2002).

Because the plaintiff established that the defendant negligently disregarded a sign that prohibited turns, in violation N.Y. Veh. & Traf. Law §§ 1110(a), 1160(a), the trial court erred in denying the plaintiff's motion for summary judgment in an action for personal injuries. Blangiardo v Hirsch, 29 A.D.3d 841, 815 N.Y.S.2d 692, 2006 N.Y. App. Div. LEXIS 6853 (N.Y. App. Div. 2d Dep't 2006).

Failure of a motorist to obey a traffic control signal or device located in the village is in violation of subd. (a) of this section, and the fine or money collected is the property of the village but must be remitted to the State Comptroller with the justice's monthly report. 1962 Ops St Compt #937.

2. Construction

Substantial evidence supported finding that motorist failed to obey traffic control device where (1) in order to make left turn at congested intersection with expressway, motorist entered marked safety zone separating opposing traffic lanes, (2) motorist merely "assumed" that he was being directed to do so by police officer directing traffic at intersection, (3) there was no description of officer's alleged verbal or nonverbal direction, and (4) police were present in area for purpose of discouraging drivers from doing what motorist did. Levy v Jackson, 266 A.D.2d 636, 697 N.Y.S.2d 747, 1999 N.Y. App. Div. LEXIS 11215 (N.Y. App. Div. 3d Dep't 1999).

In Article 78 proceeding challenging finding of Department of Motor Vehicles that motorist failed to obey traffic control device, Appellate Division would not substitute its judgment and find that police officer's testimony was perjured where inconsistency in officer's testimony concerned conversation with motorist that was irrelevant to motorist's guilt or innocence. Levy v Jackson, 266 A.D.2d 636, 697 N.Y.S.2d 747, 1999 N.Y. App. Div. LEXIS 11215 (N.Y. App. Div. 3d Dep't 1999).

The provisions of former § 83 that signs, signals and markings shall be visible at all times for a distance of at least 50 feet, referred to normal conditions only, and not conditions where compliance is impossible such as continuing snowfall, smoke, fog, etc. Mosher v State, 124 N.Y.S.2d 223, 204 Misc. 580, 1953 N.Y. Misc. LEXIS 2139 (N.Y. Ct. Cl. 1953).

The effect of the adoption of subd c and d of the above statute was to shift the burden of proof as to whether special zones were properly established from the prosecution to the defendant. But it does not follow that because the District Attorney formerly had to produce a certified statement, that the defendant is now required to do so since he is entitled to a narrow construction of such statute. People v Hollingsworth, 46 Misc. 2d 1017, 261 N.Y.S.2d 470, 1965 N.Y. Misc. LEXIS 1841 (N.Y. County Ct. 1965).

Obviously § 21 of the Penal Law is not pertinent to the construction of the above statute. People v Hollingsworth, 46 Misc. 2d 1017, 261 N.Y.S.2d 470, 1965 N.Y. Misc. LEXIS 1841 (N.Y. County Ct. 1965).

People are entitled to rely on statutory presumption that speed ordinance had been properly enacted when signs and traffic devices in approximate conformity with the Vehicle and Traffic Law had been erected and need not prove enactment and filing of an ordinance in absence of proof to the contrary by defense in prosecution for speeding. People v Bradfute, 49 Misc. 2d 1092, 269 N.Y.S.2d 192, 1966 N.Y. Misc. LEXIS 1944 (N.Y. County Ct. 1966).

Road was not properly posted, and state speed limit rather than lower village speed limit applied, where defendant at time of his arrest had passed only one 18-inch by 24-inch R5C sign. People v Churton, 67 Misc. 2d 645, 324 N.Y.S.2d 500, 1971 N.Y. Misc. LEXIS 1298 (N.Y. J. Ct. 1971).

3. Signal light

For sound policy reasons a defendant's judgment of conviction following a trial for a traffic infraction may not be used by plaintiffs in an ensuing negligence action as a basis for pleading the affirmative defense of collateral estoppel—because of the impracticality of allowing Traffic Court to become the crucial forum in a negligence suit, possible injustice to codefendants in the civil litigation who could not participate in the disposition of the traffic infraction charge, and the detrimental effect of inviting a piecemeal approach to the determination of several issues which may be involved in a negligence case, which approach is inconsistent with the orderly and fair resolution of such issues. Accordingly, defendant ambulance driver and two codefendants, the owners of the vehicle, are not collaterally estopped from alleging that the defendant driver was free from negligence and

that the plaintiff was wholly or partially culpable where defendant was found guilty of failing to obey the instruction of an official traffic control device while driving an emergency vehicle (Vehicle and Traffic Law, § 1110, subd [a]), and fined $25, upon a finding that he failed to comply with requirements that the vehicle have lights on and siren sounding and that the operator of an emergency vehicle use due care for the safety of others. Augustine v Interlaken, 68 A.D.2d 705, 418 N.Y.S.2d 683, 1979 N.Y. App. Div. LEXIS 11308 (N.Y. App. Div. 4th Dep't), app. dismissed, 48 N.Y.2d 608, 424 N.Y.S.2d 1025, 399 N.E.2d 1205 (N.Y. 1979), app. dismissed, 48 N.Y.2d 881, 1979 N.Y. LEXIS 7850 (N.Y. 1979).

In personal injury action, plaintiff was properly granted summary judgment on issue of liability based on accident report in which operator of offending vehicle admitted that he had "run" red light, where only evidence submitted by defendants in opposition was deposition testimony of plaintiff which failed to indicate that she had been contributorily negligent in failing to exercise reasonable care in entering intersection or in avoiding collision. Salenius v Lisbon, 217 A.D.2d 692, 630 N.Y.S.2d 531, 1995 N.Y. App. Div. LEXIS 8212 (N.Y. App. Div. 2d Dep't 1995).

Motorist was entitled to summary judgment dismissing all claims, cross claims, and counterclaims against her where her car was hit in rear while lawfully stopped at red light, vehicle that hit her car was then struck by third vehicle, and there was no explanation in record for either collision—especially second collision, in which driver of third vehicle saw second vehicle when it was about 75 feet away. Rigo v Ludke, 246 A.D.2d 588, 667 N.Y.S.2d 302, 1998 N.Y. App. Div. LEXIS 409 (N.Y. App. Div. 2d Dep't 1998).

Substantial evidence supported finding of Department of Motor Vehicles that motorist entered intersection without sufficient unobstructed space beyond it where he was stopped in intersection "blocking the box" when light turned red against his direction of traffic, and he conceded that traffic was "incredibly heavy"; his claim that he would have made it through intersection before light turned red if his forward movement had not been impeded by cars in parallel lanes to his left that were turning right in front of him raised issues of credibility inappropriate for appellate review. Carver v State, 251 A.D.2d 268, 675 N.Y.S.2d 58, 1998 N.Y. App. Div. LEXIS 7803 (N.Y. App. Div. 1st Dep't 1998).

Substantial evidence supported finding of Department of Motor Vehicles (DMV) that motorist made illegal right turn where turn was in violation of signs prohibiting right turn during certain hours; although motorist claimed that, once he found himself "blocking the box" at intersection, his turn was justified because it enabled him to leave intersection more quickly, that claim required knowledge of intersection's traffic pattern, and drawing of inferences therefrom as to efficacy and safety of intersection's traffic rules when traffic through it becomes blocked, and thus his claim should be left to DMV's expertise. Carver v State, 251 A.D.2d 268, 675 N.Y.S.2d 58, 1998 N.Y. App. Div. LEXIS 7803 (N.Y. App. Div. 1st Dep't 1998).

Plaintiff, whose northbound vehicle was struck by defendant's eastbound vehicle, should have been granted summary judgment where she submitted affidavit averring that she had stopped at red light and entered intersection after light turned green, and unsworn motor vehicle accident report filed by defendant did not constitute evidence in admissible form and, in any event, was ambiguous. Hegy v Coller, 262 A.D.2d 606, 692 N.Y.S.2d 463, 1999 N.Y. App. Div. LEXIS 7658 (N.Y. App. Div. 2d Dep't 1999).

Motorist was entitled to summary judgment dismissing action by injured pedestrian where pedestrian suddenly walked into passenger side of motorist's car between front wheel and sideview mirror while motorist was slowly approaching red light. Carrasco v Monteforte, 266 A.D.2d 330, 698 N.Y.S.2d 326, 1999 N.Y. App. Div. LEXIS 11549 (N.Y. App. Div. 2d Dep't 1999).

Defendant should have been granted summary judgment where codefendant's admission that his truck entered intersection where accident occurred while light was red established, prima facie, that he was solely at fault for accident, and no fact issue was raised as to whether defendant had been negligent in failing to exercise reasonable care in entering intersection, or in avoiding collision. King v Dalton, 267 A.D.2d 208, 699 N.Y.S.2d 465, 1999 N.Y. App. Div. LEXIS 12608 (N.Y. App. Div. 2d Dep't 1999).

Defendants, owner and driver of vehicle in which plaintiff was passenger, were properly granted summary judgment where sole proximate cause of collision was failure of driver of other vehicle to stop for red light. White v Clyburn, 284 A.D.2d 328, 725 N.Y.S.2d 557, 2001 N.Y. App. Div. LEXIS 5570 (N.Y. App. Div. 2d Dep't 2001).

In a personal injury action, municipal defendants failed to eliminate all triable issues of fact regarding whether an ambulance entered an intersection with the traffic light in its favor and whether another driver's alleged failure to yield the right-of-way was the sole proximate cause of the accident. Municipal defendants also failed to establish, prima facie, their entitlement to judgment as a matter of law under the reckless disregard standard of care, as they did not demonstrate that the siren and lights on the ambulance were activated. Wynter v City of New York, 173 A.D.3d 1122, 104 N.Y.S.3d 645, 2019 N.Y. App. Div. LEXIS 4985 (N.Y. App. Div. 2d Dep't 2019).

In trial for traffic infraction of disobeying traffic control device in violation of CLS Veh & Tr § 1110(a), People were entitled to presumption that traffic control signs were placed by lawful act or authority and complied with all requirements necessary to give fair notice where patrolman testified to size and content of signs, his description showed that signs substantially complied with requirements of 17 NYCRR § 213.2, and there was no contrary evidence. People v Northrup, 142 Misc. 2d 973, 539 N.Y.S.2d 246, 1988 N.Y. Misc. LEXIS 836 (N.Y. J. Ct. 1988).

4. Stop sign

Testimony showing that a stop sign had the appearance of a usual lawfully erected and maintained traffic signal and was erected at a place in respect to an intersection where a lawful sign would be customarily placed, was sufficient showing of validity and authority of the sign, its construction and location under statute. Such testimony forms an adequate basis for presumption that the sign was suitably constructed, erected and maintained and for the further presumption that it was not constructed, erected and maintained in violation of provisions of subd. 9 of former § 88. Meadows v Lewis, 235 A.D. 243, 257 N.Y.S. 137, 1932 N.Y. App. Div. LEXIS 7932 (N.Y. App. Div. 1932).

Subd. 6 of former § 88 prescribed, in effect, that such nonfeasance as failure to stop in accordance with the direction on a stop sign, erected pursuant to a city ordinance, would be a violation of a direct statutory command. Manard v Sheppard, 243 A.D. 265, 276 N.Y.S. 494, 1935 N.Y. App. Div. LEXIS 7049 (N.Y. App. Div. 1935).

Evidence authorized finding that plaintiff who stopped for stop sign and allowed one automobile to pass on cross-street and, after waiting about 30 seconds, proceeded into intersection at about five miles per hour and was hit by defendant on left had not been contributorily negligent. Harker v Chase, 26 A.D.2d 854, 274 N.Y.S.2d 64, 1966 N.Y. App. Div. LEXIS 3350 (N.Y. App. Div. 3d Dep't 1966).

Jury could rationally find that driver's heedless driving was overriding cause of automobile accident where credible eyewitness testimony established that other vehicle was proceeding at proper speed with right-of-way and that accident occurred when driver's vehicle ran stop sign at 45 miles per hour. Sansone v Lake, 124 A.D.2d 990, 508 N.Y.S.2d 1021, 508 N.Y.S.2d 957, 1986 N.Y. App. Div. LEXIS 62310 (N.Y. App. Div. 4th Dep't 1986), app. denied, 69 N.Y.2d 611, 517 N.Y.S.2d 1025, 511 N.E.2d 84, 1987 N.Y. LEXIS 16848 (N.Y. 1987).

There was no fair interpretation of evidence by which jury could have entered verdict finding no negligence by defendant motorist where plaintiff proved that, despite presence of stop sign, defendant proceeded into intersection without yielding right of way to plaintiff and hit side of plaintiff's car. Iqbal v Rubin, 238 A.D.2d 378, 657 N.Y.S.2d 329, 1997 N.Y. App. Div. LEXIS 3832 (N.Y. App. Div. 2d Dep't 1997).

Plaintiffs, car driver and 2 passengers, were entitled to summary judgment in negligence action arising from intersectional collision with cab where (1) car driver averred that she entered intersection when cab was about 2 car lengths away from stop

signs, that from time she first saw cab until collision she had "no more than a second or two" to try to avoid accident, that cab was traveling at over 30 miles per hour and made no effort to avoid collision, that she heard no sound of brakes or screeching tires coming from cab, and that after collision cab driver said "I'm sorry, it's all my fault," (2) car driver's description of accident was confirmed by passengers, 2 nonparty witnesses, and certified police report, and (3) defendants submitted only their attorney's unsubstantiated and speculative assertions and cab driver's unsworn and self-serving "accident report." Perez v Brux Cab Corp., 251 A.D.2d 157, 674 N.Y.S.2d 343, 1998 N.Y. App. Div. LEXIS 7316 (N.Y. App. Div. 1st Dep't 1998).

Plaintiff driver in intersectional collision case had no duty to watch for and avoid driver who might fail to stop or fail to proceed with due caution at stop sign. Perez v Brux Cab Corp., 251 A.D.2d 157, 674 N.Y.S.2d 343, 1998 N.Y. App. Div. LEXIS 7316 (N.Y. App. Div. 1st Dep't 1998).

There was no evidence of plaintiff driver's comparative negligence in intersectional collision case where she had right of way at intersection and no chance to avoid accident in "split second" in which accident occurred as result of defendant driver's failure to stop at stop sign. Perez v Brux Cab Corp., 251 A.D.2d 157, 674 N.Y.S.2d 343, 1998 N.Y. App. Div. LEXIS 7316 (N.Y. App. Div. 1st Dep't 1998).

Plaintiff was entitled to partial summary judgment on issue of liability where defendant, after bringing his vehicle to stop at stop sign at intersection, proceeded into intersection and collided with plaintiff's oncoming vehicle, which had right of way. Rumanov v Greenblatt, 251 A.D.2d 566, 673 N.Y.S.2d 614, 1998 N.Y. App. Div. LEXIS 7483 (N.Y. App. Div. 2d Dep't), app. dismissed, 92 N.Y.2d 946, 681 N.Y.S.2d 476, 704 N.E.2d 229, 1998 N.Y. LEXIS 3680 (N.Y. 1998).

Plaintiffs were entitled to partial summary judgment on issue of liability where their car had right of way at intersection, defendants' car failed to stop at stop sign, and testimony that plaintiff driver did not see defendants' car until contact was insufficient to show that accident did not result solely from defendant driver's negligence. Gravina v Wakschal, 255 A.D.2d 291, 679 N.Y.S.2d 420, 1998 N.Y. App. Div. LEXIS 11610 (N.Y. App. Div. 2d Dep't 1998).

Plaintiff should have been granted summary judgment where she established prima facie case that defendant's vehicle proceeded into intersection governed by stop sign without yielding to vehicle in which plaintiff was passenger, which had right of way, and defendant failed to raise fact issue in opposition thereto. Wolfson v Milillo, 262 A.D.2d 636, 692 N.Y.S.2d 679, 1999 N.Y. App. Div. LEXIS 7665 (N.Y. App. Div. 2d Dep't 1999).

Plaintiff motorist was entitled to summary judgment on issue of liability of motorist who turned left in front of her at intersection without stopping at stop sign or yielding right of way where plaintiff was traveling at 40 to 45 miles per hour in 45 zone, there was no stop sign in her direction at intersection, she had time only to apply brakes but not to take other action before collision, she had right of way and right to anticipate that defendant would stop and yield right of way, there was no evidence of plaintiff's comparative fault, defendant did not see plaintiff's vehicle before collision, and defendant pleaded guilty to charge of failure to yield right of way. Kelsey v Degan, 266 A.D.2d 843, 697 N.Y.S.2d 426, 1999 N.Y. App. Div. LEXIS 11884 (N.Y. App. Div. 4th Dep't 1999).

Defendant, driver of vehicle in which plaintiff was passenger, should have been granted summary judgment where, inter alia, defendant's unrebutted deposition testimony indicated that as she approached intersection, she was going "slow," and that she looked both ways before proceeding through intersection, there were no traffic control devices for defendant to heed, driver of other vehicle admitted passing through stop sign which he did not notice, and that he did not remember having ever looked in direction of defendant's vehicle before proceeding into intersection, and defendant did not see other vehicle until it struck her vehicle from side, causing "heavy" impact. Gramble v Precision Health, Inc., 267 A.D.2d 66, 699 N.Y.S.2d 393, 1999 N.Y. App. Div. LEXIS 12637 (N.Y. App. Div. 1st Dep't 1999).

In action arising from automobile accident at intersection, defendant town was improperly granted summary judgment on ground that 13 days was insufficient time to charge town with constructive notice of missing stop sign. Herrera v Moran, 272 A.D.2d 374, 707 N.Y.S.2d 217, 2000 N.Y. App. Div. LEXIS 5068 (N.Y. App. Div. 2d Dep't 2000).

The driver of an automobile is not required to obey a stop sign where no proof is offered of the existence of an ordinance designating a street as a main artery of travel. Epolito v Epolito, 71 N.Y.S.2d 611, 189 Misc. 424, 1947 N.Y. Misc. LEXIS 2604 (N.Y. Sup. Ct. 1947).

Conviction for passing a stop sign reversed for failure to prove beyond a reasonable doubt that sign was proper, and properly placed. People v Gay, 5 Misc. 2d 648, 164 N.Y.S.2d 526, 1957 N.Y. Misc. LEXIS 3705 (N.Y. County Ct. 1957).

In trial for traffic infraction of disobeying traffic control device in violation of CLS Veh & Tr § 1110(a), court would infer that no police officer was directing traffic at intersection at which defendant made illegal left turn from arresting officer's testimony that he was able to observe intersection and saw defendant turn left contrary to sign; moreover, possible presence of officer directing traffic was in nature of defense rather than element that People were required to prove or disprove. People v Northrup, 142 Misc. 2d 973, 539 N.Y.S.2d 246, 1988 N.Y. Misc. LEXIS 836 (N.Y. J. Ct. 1988).

In an injured party's personal injury action against a driver, the driver raised no issues of fact as to the injured party's negligence when the driver's car struck her car in an intersection because the driver was stopped at a stop sign when the injured party, who had the right of way, entered the intersection, and she was entitled to expect him to yield; he pled guilty to failing to obey a traffic control device under N.Y. Veh. & Traf. Law § 1110(a), and neither his argument that the injured party did not take reasonable evasive action nor his use of an accident reconstruction expert were persuasive. Horton v Warden, 32 A.D.3d 570, 819 N.Y.S.2d 356, 2006 N.Y. App. Div. LEXIS 9817 (N.Y. App. Div. 3d Dep't 2006).

Defendant who parked vehicle in violation of "no stopping" sign to bring daughter to nearby school would be found not guilty of violating CLS Veh & Tr § 1110(a), defining moving violation of failure to obey traffic control device, since although sign was traffic control device within meaning of CLS Veh & Tr § 153, defendant was not involved in active operation of vehicle. People v Erdman, 145 Misc. 2d 358, 546 N.Y.S.2d 775, 1989 N.Y. Misc. LEXIS 653 (N.Y. J. Ct. 1989).

Agency Opinions

1. Signal light

The offense of passing a red signal light falls within the provisions of former § 88, subd. 6. 1938 N.Y. Op. Att'y Gen. No. 136.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Traffic-control signal, § 154.

Traffic-control devices, §§ 1680–1684.

Codes, Rules and Regulations:

Traffic control signals. 15 NYCRR §§ 2001.01 et seq.

Annotations:

Motorist's liability for collision at intersection of ordinary and arterial highways as affected by absence, displacement, or malfunctioning of stop sign or other traffic signal. 74 ALR2d 242.

Liability of highway authorities arising out of motor vehicle accident allegedly caused by failure to erect or properly maintain traffic control device at intersection. 34 ALR3d 1008.

Motorists' liability for signaling other vehicle or pedestrian to proceed, or to pass signaling vehicle, 14 A.L.R.5th 1.

Matthew Bender's New York Practice Guides: LexisNexis AnswerGuide New York Negligence § 2.09[1][c][ii] Identifying Applicable Theories of Liability in Motor Vehicle Cases.

LexisNexis AnswerGuide New York Negligence § 2.09 Identifying Applicable Theories of Liability in Motor Vehicle Cases.

Warren's Negligence in the New York Courts Ch. 228 (motor vehicle liability).

Texts: NY Pattern Jury Instructions 3d, PJI 2:79.

Warren's Negligence in the New York Courts Ch. 228 Motor Vehicle Liability.

ARTICLE 25 Driving on Right Side of Roadway, Overtaking and Passing, Etc.

HISTORY:

Add, L 1959, ch 775, eff Oct 1, 1960, with substance transferred from former Art 14.

§ 1131. Driving on shoulders and slopes

Except for bicycles and those classes of vehicles required to travel on shoulders or slopes, no motor vehicle shall be driven over, across, along, or within any shoulder or slope of any state controlled-access highway except at a location specifically authorized and posted by the department of transportation. The foregoing limitation shall not prevent tow trucks from using shoulders or slopes in as limited and incidental a manner as practicable when dispatched to the scene of an accident by a law enforcement agency or an authority, department or agency having jurisdiction over such controlled-access highway and all lanes are obstructed by traffic, provided, however, that the foregoing shall not relieve the driver of a tow truck from the duty to drive with due regard for the safety of all persons nor shall such provision protect the tow truck driver from the consequences of his or her reckless disregard for the safety of others and shall at all times operate such tow truck in compliance with all standards of care imposed to prevent those injuries or damages to persons or property of another which may result from the operator's negligence, recklessness or intentional misconduct, nor shall it prevent motor vehicles from using shoulders or slopes when directed by police officers or flagpersons, nor does it prevent motor vehicles from stopping, standing, or parking on shoulders or slopes where such stopping, standing, or parking is lawful.

HISTORY:

Add, L 1990, ch 162, § 3, eff May 21, 1990; L 2016, ch 294, § 1, effective November 29, 2016.

Editor's Notes Laws 2016, ch 294, § 3, eff November 29, 2016, provides:

§ 3. This act shall take effect on the ninetieth day after it shall have become a law; provided, however, that effective immediately, the commissioner of motor vehicles is authorized to promulgate any regulations necessary to effectuate the provisions of this act on its effective date.

Amendment Notes The 2016 amendment by ch 294, § 1, added "tow trucks from using shoulders or slopes in as limited and incidental a manner as practicable when dispatched to the scene of an accident by a law enforcement agency or an authority, department or agency having jurisdiction over such controlled-access highway and all lanes are obstructed by traffic, provided, however, that the foregoing shall not relieve the driver of a tow truck from the duty to drive with due regard for the safety of all persons nor shall such provision protect the tow truck driver from the consequences of his or her reckless disregard for the safety of others and shall at all times operate such tow truck in compliance with all standards of care imposed to prevent those injuries or damages to persons or property of another which may result from the operator's negligence, recklessness or intentional misconduct, nor shall it prevent" in the second sentence.

Repeal Notes: [1968, ch 522] This act repealed former § 1131 of the Vehicle and Traffic Law which required a vehicle to be driven in the extreme right traffic lane when practicable and consistent with traffic conditions. The basic requirements of this section are contained in subdivision (b) of § 1120 as amended by this act.

Prior Law: Former § 1131, add, L 1963, ch 619, § 1; repealed, L 1968, ch 522, § 2, eff Oct 1, 1968.

Notes to Decisions

1. In general

Defendants' conduct could not be deemed proximate cause of rear-end collision, even if their vehicle were illegally stopped on shoulder without any warning lights, where plaintiffs' vehicle was travelling, in daylight, in left westbound lane of interstate at speed of 70 to 80 miles per hour, and it abruptly changed to right lane and then onto shoulder, where it smashed into right rear of defendant's trailer. Lectora v Gundrum, 225 A.D.2d 738, 640 N.Y.S.2d 202, 1996 N.Y. App. Div. LEXIS 3139 (N.Y. App. Div. 2d Dep't), app. denied, 88 N.Y.2d 807, 647 N.Y.S.2d 164, 670 N.E.2d 448, 1996 N.Y. LEXIS 1605 (N.Y. 1996).

Defendant motorist, who skidded off thruway in severe snow storm and collided with police car parked on shoulder, was not entitled to summary judgment dismissing police officer's cause of action under CLS Gen Mun § 205-e(1), regardless of persuasiveness of motorist's explanation, where mere happening of collision outside of motorist's authorized lanes of travel created triable issue of fact as to whether she was negligent, and there were similar issues as to whether she was traveling too fast for weather conditions in violation of CLS Veh & Tr § 1180 and negligent in sliding off side of road in violation of CLS Veh & Tr § 1131. Dubois v Vanderwalker, 245 A.D.2d 758, 665 N.Y.S.2d 460, 1997 N.Y. App. Div. LEXIS 12940 (N.Y. App. Div. 3d Dep't 1997).

Although it was undisputed that a driver struck the mother's child with the driver's vehicle, the mother's submissions raised triable issues of fact as to whether the child was comparatively negligent and as to whether the driver exercised due care to avoid striking the child; therefore, the mother failed to make a prima facie showing that the driver violated N.Y. Veh. & Traf. Law §§ 1131, 1146, or a similar duty of care. Sauter v Calabretta, 90 A.D.3d 1702, 936 N.Y.S.2d 469, 2011 N.Y. App. Div. LEXIS 9511 (N.Y. App. Div. 4th Dep't 2011).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 1120, 1123.

Annotations:

Reciprocal rights, duties, and liabilities where driver of motor vehicle attempts to pass on right of other motor vehicle proceeding in same direction. 38 ALR2d 114.

ARTICLE 26 Right of Way

HISTORY:

Add, L 1959, ch 775, eff Oct 1, 1960, with substance transferred from former Art 15.

§ 1144. Operation of vehicles on approach of authorized emergency vehicles

(a) Upon the immediate approach of an authorized emergency vehicle equipped with at least one lighted lamp exhibiting red light visible under normal atmospheric conditions from a distance of five hundred feet to the front of such vehicle other than a police vehicle or bicycle when operated as an authorized emergency vehicle, and when audible signals are sounded from any said vehicle by siren,

exhaust whistle, bell, air-horn or electronic equivalent; the driver of every other vehicle shall yield the right of way and shall immediately drive to a position parallel to, and as close as possible to the right-hand edge or curb of the roadway, or to either edge of a one-way roadway three or more lanes in width, clear of any intersection, and shall stop and remain in such position until the authorized emergency vehicle has passed, unless otherwise directed by a police officer.

(b) This section shall not operate to relieve the driver of an authorized emergency vehicle from the duty to drive with reasonable care for all persons using the highway.

HISTORY:

Add, L 1959, ch 775, with substance transferred from former § 1144; amd, L 1960, ch 300, § 48, eff Oct 1, 1960; L 1968, ch 711, § 2; L 1991, ch 41, § 1, eff May 6, 1991; L 1994, ch 606, § 4, eff July 26, 1994.

Notes to Decisions

Analysis

1. In general
2. Police vehicle
3. Fire apparatus
4. Ambulance

1. In general

Jury verdict exonerating defendant from all liability in personal injury action was against weight of evidence where it was shown that defendant, unable to see source of sirens and unable to pull over to right due to traffic, stopped in left-hand, northbound lane at intersection for some 15 to 20 seconds before signaling and making left turn, whereupon she was truck by unmarked police car which had pulled out of northbound lanes and was proceeding north in southbound lanes with its headlights and siren operating, following which defendant's car jumped curb and struck plaintiff and her child; however, court erred by directing judgment against defendant and should have ordered new trial on issue of defendant's liability since question of whether defendant was negligent in light of CLS Veh & Tr § 1144, requiring motorists to yield right-of-way to emergency vehicles, was essentially factual in nature. Plowden v Manganiello, 138 A.D.2d 243, 525 N.Y.S.2d 218, 1988 N.Y. App. Div. LEXIS 2073 (N.Y. App. Div. 1st Dep't), app. dismissed, 72 N.Y.2d 1042, 534 N.Y.S.2d 940, 531 N.E.2d 660, 1988 N.Y. LEXIS 2923 (N.Y. 1988).

CLS Veh & Tr § 1144(b) may serve as predicate for action under CLS Gen Mun § 205-e. Gleavy v City of New York, 240 A.D.2d 700, 659 N.Y.S.2d 504, 1997 N.Y. App. Div. LEXIS 7071 (N.Y. App. Div. 2d Dep't 1997), app. denied, 1997 N.Y. App. Div. LEXIS 13208 (N.Y. App. Div. 2d Dep't Oct. 16, 1997).

CLS Veh & Tr §§ 1104 and 1144 can serve as predicates for action under CLS Gen Mun § 205-e, and those sections applied where police officer was injured when patrol car in which he was passenger collided with another vehicle. Kelly v City of New York, 240 A.D.2d 709, 661 N.Y.S.2d 515, 1997 N.Y. App. Div. LEXIS 7078 (N.Y. App. Div. 2d Dep't 1997).

A violation of the rule giving emergency vehicles the right-of-way is at most merely evidence of negligence or reckless driving, not a crime of itself. People v Simmons, 7 Misc. 2d 517, 168 N.Y.S.2d 485, 1957 N.Y. Misc. LEXIS 2866 (N.Y. County Ct. 1957).

Before a defendant motorist can be found guilty of violating this section, it must be made to appear that he had a reasonable opportunity to comply with its requirements. People ex rel. Donnelly v Rosen, 40 Misc. 2d 583, 243 N.Y.S.2d 449, 1963 N.Y. Misc. LEXIS 1704 (N.Y. County Ct. 1963).

2. Police vehicle

Village police officer's pursuit of suspected drunken driver did not, as matter of law, overstep limits of qualified privilege under CLS Veh & Tr § 1104, even though officer exceed posted speed limit, road was wet, there was possibility of other vehicular traffic in vicinity and officer did not immediately call his headquarters before pursuit; officer was entitled to act quickly and to take certain risk in interest of stopping motorist whose conduct on road presented clear and immediate threat to public safety. Saarinen v Kerr, 84 N.Y.2d 494, 620 N.Y.S.2d 297, 644 N.E.2d 988, 1994 N.Y. LEXIS 4131 (N.Y. 1994).

As between a police car and a pedestrian, all other things being equal, the police car has the right of way, notwithstanding the right of way granted to a pedestrian by former § 85, subd. 1, and the failure of the court so to charge constitutes reversible error. Booth v Rochester, 258 A.D. 849, 15 N.Y.S.2d 945, 1939 N.Y. App. Div. LEXIS 7226 (N.Y. App. Div. 1939).

Assuming that a police car is on an emergency trip, it has the right of way, even against a red light, providing it is being driven with caution and adequate warning is sounded. Brennan v Albany, 284 A.D. 997, 135 N.Y.S.2d 293, 1954 N.Y. App. Div. LEXIS 4355 (N.Y. App. Div. 1954).

State trooper did not act in reckless disregard for safety of others under CLS Veh & Tr § 1104(e) where (1) on receiving radio report of motorcycle accident, he activated his emergency lights and siren and proceeded at speed variously estimated at 55 to 70 miles per hour to scene of accident, (2) as he approached scene, he saw car ahead slow down, and (3) although he assumed that car ahead was yielding to right so that he could pass, as required by CLS Veh & Tr § 1144, car instead turned left without signaling and was struck in rear by patrol car, causing injuries to plaintiff passenger. Notorangelo v State, 240 A.D.2d 716, 659 N.Y.S.2d 312, 1997 N.Y. App. Div. LEXIS 7114 (N.Y. App. Div. 2d Dep't), app. denied, 90 N.Y.2d 811, 666 N.Y.S.2d 100, 688 N.E.2d 1382, 1997 N.Y. LEXIS 3576 (N.Y. 1997).

Motorist whose vehicle was struck from behind when he stopped at yield sign was free of negligence and entitled to summary judgment dismissing complaint where he stopped to allow police vehicle to pass. Fassbender v Conrey, 273 A.D.2d 22, 708 N.Y.S.2d 396, 2000 N.Y. App. Div. LEXIS 6360 (N.Y. App. Div. 1st Dep't 2000).

State trooper did not act recklessly in pursuing dirt bike that accelerated after driver ignored his gesture to pull over (for failure of driver and passenger to wear helmets), trooper's conduct was not proximate cause of accident in which driver lost control of bike, even though trooper's car came to rest on top of injured passenger, and thus state was not liable for passenger's injuries, where (1) passenger's own expert acknowledged that operation of bike was threat to public safety and that trooper, having perceived Vehicle and Traffic Law violation, had authority and duty to follow bike and remove it from highway, (2) although trooper exceeded 35 miles-per-hour speed limit during part of brief pursuit, he never exceeded 50 and was traveling only 17 to 20 miles per hour when he left road, (3) trooper's exceeding of speed limit did not warrant liability, given that weather was clear and dry, it was light outside, and there was no traffic in rural area of pursuit, and (4) although trooper's car ultimately came into contact with bike and passenger's ejected body on side of road, that unintentional contact resulted from trooper's reasonable efforts to avoid what he thought was going to be collision on road. Schieren v State, 281 A.D.2d 828, 722 N.Y.S.2d 128, 2001 N.Y. App. Div. LEXIS 3011 (N.Y. App. Div. 3d Dep't 2001).

Police officer whose squad car hit a motorist's vehicle could not use collateral estoppel to bar her suit against him based on her conviction of N.Y. Veh. & Traf. Law § 1144(a) (operation of vehicles on approach of authorized emergency vehicles), as a determination concerning a traffic violation could not be given collateral estoppel effect in a subsequent negligence action. Marotta v Hoy, 55 A.D.3d 1194, 866 N.Y.S.2d 415, 2008 N.Y. App. Div. LEXIS 8102 (N.Y. App. Div. 3d Dep't 2008).

No crime was charged by the simple statement in an information that the defendant violated this section by failing to yield the right of way to a police vehicle on an emergency call. Hence, a judgment of conviction for a violation of this section was reversed

and the information dismissed. People v Simmons, 7 Misc. 2d 517, 168 N.Y.S.2d 485, 1957 N.Y. Misc. LEXIS 2866 (N.Y. County Ct. 1957).

A police vehicle in performance of duty has right of way notwithstanding the right of way that another motorist might otherwise have. Lederman v Kavanaugh, 24 Misc. 2d 1037, 209 N.Y.S.2d 426, 1960 N.Y. Misc. LEXIS 2400 (N.Y. Sup. Ct. 1960).

Where a police car answering an emergency call with the sirens sounding and lights flashing swung over into the nearest westbound lane of a four-lane highway to pass congested eastbound traffic, it had the right of way over a motorist in that lane who had ample time to get out of the way and avoid a collision. Lederman v Kavanaugh, 24 Misc. 2d 1037, 209 N.Y.S.2d 426, 1960 N.Y. Misc. LEXIS 2400 (N.Y. Sup. Ct. 1960).

Defendant motorist did not have a reasonable opportunity to avoid collision with a police car chasing a speeder through an intersection red light where the police car was approaching the intersection at 80 miles an hour and sped into it at about 75 miles and the time lapse after he first observed the police car approaching with its red light in action and siren sounding was less than one second. People ex rel. Donnelly v Rosen, 40 Misc. 2d 583, 243 N.Y.S.2d 449, 1963 N.Y. Misc. LEXIS 1704 (N.Y. County Ct. 1963).

Trial court properly dismissed a deputy sheriff's N.Y. Gen. Mun. Law § 205-e claim against a driver because the driver did not violate any statute. The driver did not violate N.Y. Veh. & Traf. Law § 1129 or § 1144 where she struck the deputy while he was attempting to make a U-turn to pursue another driver without utilizing his directional or otherwise signaling his intention to reenter the roadway from the shoulder. Aldrich v Sampier, 2 A.D.3d 1101, 769 N.Y.S.2d 338, 2003 N.Y. App. Div. LEXIS 13546 (N.Y. App. Div. 3d Dep't 2003).

Motorist's affirmative defense of negligence was dismissed in a deputy's case seeking damages for injuries suffered when a vehicle driven by the motorist collided with the vehicle of the deputy who was making a U-turn on a highway to pursue a speeding vehicle; N.Y. Veh. & Traf. Law § 1104 applied to the deputy's claim, and the deputy's conduct did not rise to the level of reckless disregard as a matter of law. There was no doubt that, for purposes of N.Y. Veh. & Traf. Law § 1104, an officer in a patrol car responding to a speeding vehicle was deemed to be engaged in an emergency operation, and the deputy had every right to assume that the motorist was going to yield the right of way to an emergency vehicle with lights activated. Ayers v O'Brien, 852 N.Y.S.2d 730, 19 Misc. 3d 449, 2008 N.Y. Misc. LEXIS 621 (N.Y. Sup. Ct.), aff'd in part, modified, 60 A.D.3d 27, 870 N.Y.S.2d 587, 2008 N.Y. App. Div. LEXIS 9975 (N.Y. App. Div. 3d Dep't 2008).

3. Fire apparatus

Jury had rational evidentiary basis to find that city, through its fire truck driver, acted with reckless disregard for safety of others, where driver proceeded through intersection at speed of 10 to 15 miles per hour against red light, despite disputed issues of fact as to whether driver looked toward lane that plaintiff was travelling before entering intersection, whether driver noticed color of light when he entered intersection, and whether any emergency soundings were heard by plaintiff. Campbell v City of Elmira, 84 N.Y.2d 505, 620 N.Y.S.2d 302, 644 N.E.2d 993, 1994 N.Y. LEXIS 4111 (N.Y. 1994).

The driver of an automobile approaching at right angles a street over which fire apparatus is proceeding to a fire, is required to stop on hearing a siren. Auburn v Roate, 246 A.D. 461, 284 N.Y.S. 1, 1935 N.Y. App. Div. LEXIS 8702 (N.Y. App. Div. 1935).

Summary judgment was properly denied to defendant driver of vehicle in which passenger was injured when that vehicle was struck in rear by fire engine, despite defendant driver's reliance on inference of negligence created by rear-end collision, where fire engine was on its way to fire and had its red rotating lights, siren, and air horn activated, defendant driver violated CLS Veh & Tr § 1144 by failing to yield right of way and stay clear of intersection, and thus there was triable issue of fact as to whether that violation was negligent under circumstances. Tobacco v North Babylon Fire Dep't, 251 A.D.2d 398, 674 N.Y.S.2d 125, 1998 N.Y. App. Div. LEXIS 6646 (N.Y. App. Div. 2d Dep't 1998).

In action by passenger injured when vehicle in which she was riding was struck in rear by fire engine, driver of fire engine was entitled to summary judgment dismissing all cross claim against him where (1) as member of volunteer fire company, he could not be held liable for act done in performance of his duties "except for wilful negligence or malfeasance," (2) on observing vehicle stopped about 200 feet in front of him, fire engine driver repeatedly applied brakes and slowed to 5 to 7 miles per hour when he skidded into stopped vehicle, (3) there was no evidence that his failure to avoid accident was wilful negligence or malfeasance, and (4) he was also entitled to privilege under CLS Veh & Tr § 1104 because there was no evidence that he acted with "reckless disregard for the safety of others." Tobacco v North Babylon Fire Dep't, 251 A.D.2d 398, 674 N.Y.S.2d 125, 1998 N.Y. App. Div. LEXIS 6646 (N.Y. App. Div. 2d Dep't 1998).

A motorist who is guilty of negligence in failing to yield the right of way to fire equipment is not liable to suit by a fireman riding in the equipment who was injured as the result of the collision under § 205-a of the General Municipal Law. McAvoy v Di Leo, 43 Misc. 2d 164, 250 N.Y.S.2d 444, 1964 N.Y. Misc. LEXIS 1848 (N.Y. App. Term 1964).

A pump truck of a fire district did not abuse the statutory right of preference at an intersection, despite the fact that the stop sign was against it, where both the siren and the oscillating red light was flashing, and it was daylight. Hashey v Board of Fire Comm'rs, 192 N.Y.S.2d 767, 1959 N.Y. Misc. LEXIS 4637 (N.Y. Sup. Ct. 1959).

4. Ambulance

With respect to a collision between an ambulance and a truck at an intersection controlled by traffic signals, jury questions were presented by conflicting evidence as to whether the siren on the ambulance was being so sounded at approach of the intersection as to give adequate warning of its approach, whether the truck driver entered the intersection with due caution in view of partial impairment of his view, and likewise, in view of diverse permissible inferences, as to whether the ambulance was on an emergency mission. Wood v County of Broome, 13 A.D.2d 881, 215 N.Y.S.2d 338, 1961 N.Y. App. Div. LEXIS 10711 (N.Y. App. Div. 3d Dep't), app. denied, 14 A.D.2d 593, 219 N.Y.S.2d 236, 1961 N.Y. App. Div. LEXIS 9456 (N.Y. App. Div. 3d Dep't 1961), app. denied, 10 N.Y.2d 707, 1961 N.Y. LEXIS 2110 (N.Y. 1961).

With respect to a collision between plaintiff's car and an ambulance driven by defendant at a street intersection, issues of negligence and contributory negligence could not be determined as matter of law where there were issues of fact as to whether the ambulance siren was operating when it entered the intersection against a red light and whether the ambulance speed was reduced and due caution exercised in proceeding into the intersection. Meighan v Wehnau, 17 A.D.2d 879, 233 N.Y.S.2d 357, 1962 N.Y. App. Div. LEXIS 7313 (N.Y. App. Div. 3d Dep't 1962).

There were questions of fact presented for the jury's determination whether the defendant in driving his vehicle into an intersection acted reasonably in entering and remaining in the intersection; upon the most favorable inferences to be drawn for the patrolman, who was riding as a passenger in the ambulance, which was coming toward the intersection with its siren and light audible and visible, the complaint was improperly dismissed without submitting the case to the jury. Felice v Gershkon, 34 A.D.2d 1008, 312 N.Y.S.2d 824, 1970 N.Y. App. Div. LEXIS 4299 (N.Y. App. Div. 2d Dep't 1970).

Verdict for automobile owner and operator was set aside where the operator of the automobile, involved in a collision with an ambulance, violated the statute giving emergency vehicles the right of way, and this violation contributed to the happening of the accident. Parisi v Moore, 37 A.D.2d 783, 325 N.Y.S.2d 378, 1971 N.Y. App. Div. LEXIS 3416 (N.Y. App. Div. 2d Dep't 1971).

Court properly dismissed action brought by plaintiff, who was injured while passenger in defendant's car, where parties' deposition testimony conclusively showed that defendant's vehicle was struck in rear when she stopped in intersection to yield to ambulance displaying emergency lights. DiPaola v Scherpich, 239 A.D.2d 459, 657 N.Y.S.2d 883, 1997 N.Y. App. Div. LEXIS 5355 (N.Y. App. Div. 2d Dep't 1997).

Plaintiff was properly granted summary judgment where parties' deposition testimony conclusively showed that defendants' vehicle struck plaintiff's vehicle in rear when she stopped in intersection to yield to ambulance displaying emergency lights. DiPaola v Scherpich, 239 A.D.2d 459, 657 N.Y.S.2d 883, 1997 N.Y. App. Div. LEXIS 5355 (N.Y. App. Div. 2d Dep't 1997).

In an action involving whether or not the operator of an ambulance, being an authorized emergency vehicle, was "responding to an emergency call," and exceeding speed limits, proceeding past signals and stop signs, etc., the state of mind of the operator at the time, based upon facts known by him or brought to his attention, must necessarily be a factor in determining whether he had a reasonable basis for his belief that an emergency did exist. Delgado v Brooklyn Ambulance Service Corp., 29 Misc. 2d 454, 211 N.Y.S.2d 297, 1961 N.Y. Misc. LEXIS 3449 (N.Y. Sup. Ct. 1961).

Agency Opinions

1. Ambulance

A volunteer fireman has no right under former § 81 to attach a siren or gong to his privately owned automobile. 1933 N.Y. Op. Att'y Gen. No. 116.

RESEARCH REFERENCES AND PRACTICE AIDS

Annotations:

Liability of governmental unit or its officers for injury to innocent occupant of moving vehicle, or for damages to such vehicle, as result of police chase. 4 ALR4th 865.

Liability of operator of ambulance service for personal injuries to person being transported. 68 ALR4th 14.

§ 1144-a. Operation of vehicles when approaching a parked, stopped or standing authorized emergency vehicle or hazard vehicle or vehicle displaying a blue or green light

(a) Every operator of a motor vehicle shall exercise due care to avoid colliding with an authorized emergency vehicle which is parked, stopped or standing on the shoulder or any portion of such highway and such authorized emergency vehicle is displaying one or more red or combination red and white lights pursuant to the provisions of paragraph two of subdivision forty-one of section three hundred seventy-five of this chapter or is displaying one or more blue, combination blue and red or combination blue, red and white lights pursuant to the provisions of subparagraph b of paragraph four of subdivision forty-one of section three hundred seventy-five of this chapter. For operators of motor vehicles on parkways or controlled access highways, such due care shall include, but not be limited to, moving from a lane which contains or is immediately adjacent to the shoulder where such authorized emergency vehicle displaying one or more red, blue or white or any combination of red and white lights or blue or combination blue and red or combination blue, red and white lights pursuant to the provisions of paragraph two or subparagraph b of paragraph four, as applicable of subdivision forty-one of section three hundred seventy-five of this chapter is parked, stopped or standing to another lane, provided that such movement otherwise complies with the requirements of this chapter including, but not limited to, the provisions of sections eleven hundred ten of this title and eleven hundred twenty-eight of this title.

(b) Every operator of a motor vehicle shall exercise due care to avoid colliding with a hazard vehicle which is parked, stopped or standing on the shoulder or on any portion of such highway and such hazard vehicle is displaying one or more amber lights pursuant to the provisions of paragraph three of subdivision forty-one of section three hundred seventy-five of this chapter or, if such hazard vehicle is designed for the towing or pushing of disabled vehicles such hazard vehicle is displaying one or more amber lights or one or more blue or combination blue and amber lights pursuant to the provisions of paragraph three or subparagraph b-1 of paragraph four, as applicable, of subdivision forty-one of section three hundred seventy-five of this chapter. For operators of motor vehicles on parkways or controlled access highways, such due care shall include, but not be limited to, moving from a lane which contains or is immediately adjacent to the shoulder where (i) such hazard vehicle displaying one or more amber lights pursuant to the provisions of paragraph three of subdivision forty-one of section three hundred seventy-five of this chapter or (ii) such hazard vehicle designed for the towing or pushing of disabled vehicles displaying one or more amber lights or one or more blue or combination blue and amber lights pursuant to the provisions of paragraph three or subparagraph b-1 of paragraph four, as applicable, of subdivision forty-one of section three hundred seventy-five of this chapter, is parked, stopped or standing to another lane, provided that such movement otherwise complies with the requirements of this chapter including, but not limited to, the provisions of sections eleven hundred ten and eleven hundred twenty-eight of this title.

(c) Every operator of a motor vehicle shall exercise due care to avoid colliding with a vehicle displaying a blue light pursuant to the provisions of paragraph four or a green light pursuant to the provisions of paragraph five of subdivision forty-one of section three hundred seventy-five of this chapter which is parked, stopped or standing on the shoulder or any portion of such highway. For operators of motor vehicles on parkways or controlled access highways, such due care shall include, but not be limited to, moving from a lane which contains or is immediately adjacent to the shoulder where such vehicle displaying a blue light pursuant to the provisions of paragraph four or a green light pursuant to the provisions of paragraph five of subdivision forty-one of section three hundred seventy-five of this chapter is parked, stopped or standing to another lane, provided that such movement otherwise complies with the requirements of this chapter including, but not limited to, the provisions of sections eleven hundred ten and eleven hundred twenty-eight of this title.

HISTORY:

Add, L 2010, ch 387, § 4, eff Jan 1, 2011; amd, L 2011, ch 458, § 3, eff Jan 1, 2012; L 2013, ch 248, § 1, eff July 31, 2013; L 2016, ch 97, §§ 3, 4, effective January 17, 2017; L 2020, ch 58, § 3 (Part C), effective April 3, 2020.

Editor's Notes: Laws 2010, ch 387, § 1, eff Jan 1, 2011, provides as follows:

Section 1. Short title. This act shall be known and may be cited as the "Ambrose-Searles move over act".

Laws 2011, ch 458, § **4,** eff Aug 17, 2011, provides as follows:

§ 4. This act shall take effect immediately, provided that: (a) sections one and two of this act shall take effect September 1, 2011, except that the promulgation of any rules and regulations, and the taking of any other actions necessary to implement the provisions of such sections of this act are authorized and directed to be made on or before the effective date of such sections; and (b) section three of this act shall take effect January 1, 2012.

Amendment Notes The 2016 amendment by ch 97, §§ 3, 4, added "or vehicle displaying a blue or green light" in the section heading and added (c).

The 2020 amendment by ch 58, § **3 (Part C),** in (3)(b), added "or, if such hazard vehicle is designed for the towing or pushing of disabled vehicles such hazard vehicle is displaying one or more amber lights or one or more blue or combination blue and amber lights pursuant to the provisions of paragraph three or subparagraph b-1 of paragraph four, as applicable, of subdivision forty-one of section three hundred seventy-five of this chapter" in the first sentence, and in the second sentence, added "(i)" and "or (ii) such hazard vehicle designed for the towing or pushing of disabled vehicles displaying one or more amber lights or one or more blue or combination blue and amber lights pursuant to the provisions of paragraph three or subparagraph b-1 of paragraph four, as applicable, of subdivision forty-one of section three hundred seventy-five of this chapter."

ARTICLE 28 Turning and Starting and Signals on Stopping and Turning

HISTORY:

Add, L 1959, ch 775, eff Oct 1, 1960, with substance transferred from former Art 17.

§ 1164. Signals by hand and arm or signal lamps

(a) Any stop or turn signal when required herein shall be given either by means of the hand and arm or by signal lamps, except as otherwise provided in subsection (b).

(b) Any motor vehicle in use on a highway shall be equipped with, and required signal shall be given by, signal lamps when the distance from the center of the top of the steering post to the left outside limit of the body, cab, or load of such motor vehicle exceeds twenty-four inches, or when the distance from the center of the top of the steering post to the rear limit of the body or load thereof exceeds fourteen feet. The latter measurement shall apply to any single vehicle, also to any combination of vehicles. On a combination of vehicles, the rear signal lamps shall be at the rear of the last vehicle in the combination. The provisions of this subdivision shall not apply to a vehicle, alone or in combination with other vehicles or implements, if such vehicle is used solely for agricultural purposes, and is not designed and intended primarily for use on the highway, or to fire vehicles, or to special purpose commercial motor vehicles registered under schedule F of subdivision seven of section four hundred one of this chapter.

HISTORY:

Add, L 1959, ch 775, eff Oct 1, 1960, with substance transferred from former § 1164; amd, L 1959, ch 6, § 1; L 1960, ch 245, § 2; L 1960, ch 300, § 49; L 1960, ch 663, § 2; L 1966, ch 83, § 1, eff Oct 1, 1966.

Notes to Decisions

1. In general

Failure to give directional signal as required by above statute held not to be sole proximate cause of accident to the happening of which it was held that negligence of both drivers contributed. Martucci v Suess, 23 A.D.2d 519, 255 N.Y.S.2d 325, 1965 N.Y. App. Div. LEXIS 5066 (N.Y. App. Div. 3d Dep't 1965).

In action to recover damages for injuries sustained in automobile collision, in which defendant conceded his own negligence, leaving as sole issue whether plaintiff was contributorily negligent in coming to sudden and unexpected stop, trial court did not err in charging jury that no person shall stop or suddenly decrease speed of vehicle without first giving appropriate signal, in charging jury as to method of giving hand and arm signals, and in refusing plaintiff's requested charge providing that driver shall not follow another vehicle more closely than is reasonable and prudent. Walczyk v Chresfield, 52 A.D.2d 601, 382 N.Y.S.2d 274, 1976 N.Y. App. Div. LEXIS 12215 (N.Y. App. Div. 2d Dep't 1976), aff'd, 42 N.Y.2d 934, 397 N.Y.S.2d 1008, 366 N.E.2d 1362, 1977 N.Y. LEXIS 2263 (N.Y. 1977).

It was abuse of discretion to set aside jury verdict of no cause of action for negligence against defendant truck driver arising from accident in which plaintiff's car rearended truck as it was making right turn, since defendant's testimony, which was generally corroborated by state trooper who arrived at scene immediately after collision, indicated that rear taillights of truck were operational, that right directional signal was flashing, and that truck was struck by plaintiff's car while in process of making turn; moreover, trooper stated that force of impact pushed truck forward about one foot and caused car to rebound several feet, and skid marks of plaintiff's car from point of braking to impact were 110 feet long. Lachanski v Craig, 141 A.D.2d 995, 530 N.Y.S.2d 648, 1988 N.Y. App. Div. LEXIS 7238 (N.Y. App. Div. 3d Dep't 1988).

Defendant, as owner of rental car, was not entitled to summary judgment in action to recover for injuries sustained by driver rear-ended by codefendant's car, notwithstanding contention that codefendant was negligent in failing to maintain safe following distance as vehicles approached changing traffic light, where brake lights on rented car failed to function when plaintiff braked immediately before accident. Bradt v Scardillo, 192 A.D.2d 860, 596 N.Y.S.2d 483, 1993 N.Y. App. Div. LEXIS 3750 (N.Y. App. Div. 3d Dep't 1993).

Defendant should have been granted summary judgment, despite his alleged failure to illuminate his turn signal, where plaintiff saw defendant's vehicle when it was stopped to make lawful turn into driveway about 400 feet ahead of plaintiff's vehicle, and accident occurred when plaintiff applied his brakes, skidded on snowy road, crossed into oncoming traffic, and collided with another vehicle. Velez v Hurley, 264 A.D.2d 513, 694 N.Y.S.2d 705, 1999 N.Y. App. Div. LEXIS 8916 (N.Y. App. Div. 2d Dep't 1999).

Defendant was entitled to summary judgment dismissing wrongful death action where decedent, without signaling or yielding right of way, turned left about 12 to 15 feet in front of defendant's oncoming vehicle, and there were no triable issues of fact as to whether defendant acted reasonably or could have avoided accident. Loweth v Estate of Cusack, 273 A.D.2d 283, 708 N.Y.S.2d 720, 2000 N.Y. App. Div. LEXIS 6522 (N.Y. App. Div. 2d Dep't 2000).

In a personal injury action, a bicyclist was entitled to set aside a jury verdict under N.Y. C.P.L.R. § 4404(a) as inconsistent because a finding that an automobile driver was negligent but not the proximate cause of the accident was against the weight of the evidence as although the bicyclist failed to signal in violation of N.Y. Veh. & Traf. Law §§ 1163, 1164, the driver saw the bicyclist change lanes to avoid an obstruction and it was foreseeable that she would move back; the driver should have sounded his horn as required by N.Y. Veh. & Traf. Law § 1146. Doubrovinskaya v Dembitzer, 858 N.Y.S.2d 874, 20 Misc. 3d 440, 239 N.Y.L.J. 113, 2008 N.Y. Misc. LEXIS 3074 (N.Y. Sup. Ct. 2008), app. dismissed,

77 A.D.3d 608, 908 N.Y.S.2d 590, 2010 N.Y. App. Div. LEXIS 7231 (N.Y. App. Div. 2d Dep't 2010).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:
This section referred to in § 1163.

Annotations:
Automobiles: liability for U-turn collisions. 53 ALR4th 849.

Texts: NY Pattern Jury Instructions 3d, PJI 2:83.

ARTICLE 30 Speed Restrictions

HISTORY:
Add, L 1959, ch 775, eff Oct 1, 1960, with substance transferred from former Art 5.

§ 1180. Basic rule and maximum limits

(a) No person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing.

(b) Except as provided in subdivision (g) of this section and except when a special hazard exists that requires lower speed for compliance with subdivision (a) of this section or when maximum speed limits have been established as hereinafter authorized, no person shall drive a vehicle at a speed in excess of fifty-five miles per hour.

(c) Except as provided in subdivision (g) of this section, whenever maximum school speed limits have been established on a highway adjacent to a school as authorized in section sixteen hundred twenty, sixteen hundred twenty-two, sixteen hundred thirty, sixteen hundred forty-three or sixteen hundred sixty-two-a, no person shall drive in excess of such maximum school speed limits during:

(1) school days at times indicated on the school zone speed limit sign, provided, however, that such times shall be between the hours of seven o'clock A.M. and six o'clock P.M. or alternative times within such hours; or

(2) a period when the beacons attached to the school zone speed limit sign are flashing and such sign is equipped with a notice that indicates that the school zone speed limit is in effect when such beacons are flashing, provided, however, that such beacons shall only flash during student activities at the school and up to thirty minutes immediately before and up to thirty minutes immediately after such student activities.

(d) 1. Except as provided in subdivision (g) of this section, whenever maximum speed limits, other than school speed limits, have been established as authorized in sections sixteen hundred twenty, sixteen hundred twenty-two, sixteen hundred twenty-three, sixteen hundred twenty-seven, sixteen hundred thirty, sixteen hundred forty-three, sixteen hundred forty-four, sixteen hundred fifty-two, sixteen hundred sixty-two-a, sixteen hundred sixty-three, and sixteen hundred seventy, no person shall drive in excess of such maximum speed limits at any time.

2. Except as provided in subdivision (g) of this section, whenever maximum speed limits, other than school speed limits, have been established with respect to any restricted highway as authorized in section sixteen hundred twenty-five, no person shall drive in excess of such maximum speed limits at any time.

(e) The driver of every vehicle shall, consistent with the requirements of subdivision (a) of this section, drive at an appropriate reduced speed when approaching and crossing an intersection or railway grade crossing, when approaching and going around a curve, when approaching a hill crest, when approaching and passing by an emergency situation involving any authorized emergency vehicle which is parked, stopped or standing on a highway and which is displaying one or more red or combination red, white, and/or blue lights pursuant to the provisions of paragraph two and subparagraph b of paragraph four of subdivision forty-one of section three hundred seventy-five of this chapter, when traveling upon any narrow or winding roadway, and when any special hazard exists with respect to pedestrians, or other traffic by reason of weather or highway conditions, including, but not limited to a highway construction or maintenance work area, or when approaching a hazard vehicle which is parked, stopped or standing on the shoulder or on any portion of such highway and such hazard vehicle is displaying one or more amber lights pursuant to the provisions of paragraph three of subdivision forty-one of section three hundred seventy-five of this chapter.

(f) Except as provided in subdivision (g) of this section and except when a special hazard exists that requires lower speed for compliance with subdivision (a) or (e) of this section or when a lower maximum speed limit has been established, no person shall drive a vehicle through a highway construction or maintenance work area at a speed in excess of the posted work area speed limit. The agency having jurisdiction over the affected street or highway may establish work area speed limits which are less than the normally posted speed limits; provided, however, that such normally posted speed limit may exceed the work area speed limit by no more than twenty miles per hour; and provided further that no such work area speed limit may be established at less than twenty-five miles per hour.

(g) (i) No person who uses a radar or laser detector in a vehicle with a gross vehicle weight rating of more than eighteen thousand pounds, or a commercial motor vehicle with a gross vehicle weight rating of more than ten thousand pounds, shall drive at a speed in excess of fifty-five miles per hour or, if a maximum speed limit other than fifty-five miles per hour as hereinbefore authorized has been established, at a speed in excess of such speed limit. The presence in any such vehicle of either: (1) a radar or laser detector connected to a power source and in an operable condition; or (2) a concealed radar or laser detector where a part of such detector is securely affixed to some part of the vehicle outside of the cab, in a manner which renders the detector not readily

observable, is presumptive evidence of its use by any person operating such vehicle. Either such presumption shall be rebutted by any credible and reliable evidence which tends to show that such radar or laser detector was not in use.

(ii) The provisions of this section shall not be construed as authorizing the seizure or forfeiture of a radar or laser detector, unless otherwise provided by law.

(h) Upon a conviction for a violation of subdivision (b), (c), (d), (f) or (g) of this section, the court shall record the speed upon which the conviction was based on the certificate required to be filed with the commissioner pursuant to section five hundred fourteen of this chapter, or if the conviction occurs in an administrative tribunal established pursuant to article two-A of this chapter, the speed upon which the conviction was based shall be entered in the department's records.

1. Every person convicted of a violation of subdivision (b) or paragraph one of subdivision (d) of this section shall be punished as follows:

(i) Where the court or tribunal records or enters that the speed upon which the conviction was based exceeded the applicable speed limit by not more than ten miles per hour, by a fine of not less than forty-five nor more than one hundred fifty dollars;

(ii) Where the court or tribunal records or enters that the speed upon which the conviction was based exceeded the applicable speed limit by more than ten miles per hour but not more than thirty miles per hour, by a fine of not less than ninety nor more than three hundred dollars or by imprisonment for not more than fifteen days or by both such fine and imprisonment;

(iii) Where the court or tribunal records or enters that the speed upon which the conviction was based exceeded the applicable speed limit by more than thirty miles per hour, by a fine of not less than one hundred eighty nor more than six hundred dollars, or by imprisonment for not more than thirty days, or by both such fine and imprisonment.

2. Every person convicted of a violation of subdivision (a) or (e) of this section shall be punished by a fine of not less than forty-five nor more than one hundred fifty dollars, or by imprisonment for not more than fifteen days, or by both such fine and imprisonment.

3. Every person convicted of a violation of paragraph two of subdivision (d), subdivision (f) or (g) of this section shall be punished as follows:

(i) Where the court or tribunal records or enters that the speed upon which the conviction was based exceeded the applicable speed limit by not more than ten miles per hour, by a fine of not less than ninety nor more than one hundred fifty dollars;

(ii) Where the court or tribunal records or enters that the speed upon which the conviction was based exceeded the applicable speed limit by more than ten miles per hour, but not more than thirty miles per hour, by a fine of not less than one hundred eighty nor more than three hundred dollars or by imprisonment for not more than thirty days, or by both such fine and imprisonment, provided, however, that where the vehicle is either (A) in violation of any rules or regulations involving an out-of-service defect relating to brake systems, steering components and/or coupling devices, or (B) transporting flammable gas, radioactive materials or explosives, the fine shall be three hundred dollars or imprisonment for not more than thirty days, or both such fine and imprisonment;

(iii) Where the court or tribunal records or enters that the speed upon which the conviction was based exceeded the applicable speed limit by more than thirty miles per hour, by a fine of not less than three hundred sixty nor more than six hundred dollars or by imprisonment for not more than thirty days or by both such fine and imprisonment, provided, however, that where the vehicle is either (A) in violation of any rules or regulations involving an out-of-service defect relating to brake systems, steering components and/or coupling devices, or (B) transporting flammable gas, radioactive materials or explosives, the fine shall be six hundred dollars or imprisonment for not more than thirty days, or both such fine and imprisonment.

4. Every person convicted of a violation of subdivision (c) of this section when such violation occurs in a school speed zone during a school day between the hours of seven o'clock A.M. and six o'clock P.M., shall be punished as follows:

(i) Where the court or tribunal records or enters that the speed upon which the conviction was based exceeded the applicable speed limit by not more than ten miles per hour, by a fine of not less than ninety nor more than three hundred dollars;

(ii) Where the court or tribunal records or enters that the speed upon which the conviction was based exceeded the applicable speed limit by more than ten miles per hour but not more than thirty miles per hour, by a fine of not less than one hundred eighty nor more than six hundred dollars or by imprisonment for not more than fifteen days or by both such fine and imprisonment;

(iii) Where the court or tribunal records or enters that the speed upon which the conviction was based exceeded the applicable speed limit by more than thirty miles per hour, by a fine of not less than three hundred sixty nor more than one thousand two hundred dollars, or by imprisonment for not more than thirty days, or by both such fine and imprisonment.

5. Notwithstanding the foregoing provisions of this subdivision, the maximum fine provided herein for the violation for which the person is sentenced may be increased by an additional one hundred fifty dollars if the conviction is for a second violation of any subdivision of this section where both violations were committed within an eighteen month period, and the maximum fine provided herein for the violation for which the person is sentenced may be

increased by an additional three hundred seventy-five dollars if the conviction is for a third or subsequent violation of any subdivision of this section where all such violations were committed within an eighteen month period. Where an additional fine is provided by this paragraph, a sentence of imprisonment for not more than thirty days may be imposed in place of or in addition to any fine imposed.

HISTORY:

Add, L 1959, ch 775, with substance transferred from former § 56; amd, L 1960, ch 300, § 51; L 1960, ch 601, § 1; L 1960, ch 602, § 1; L 1960, ch 934, § 1; L 1961 ch 308, § 1; L 1961, ch 519, § 3; L 1962, ch 880, § 1; L 1963, ch 938, § 12; L 1964, ch 773, § 1; L 1966, ch 950, § 1; L 1968, ch 420, § 400; L 1969, ch 83, § 1; L 1970, ch 679, § 8; L 1981, ch 162, § 1; L 1981, ch 297, § 1; L 1983, ch 249, § 1; L 1984, ch 92, § 2, eff April 24, 1984; L 1989, ch 61, § 47, effective and applicable to violations committed on and after May 19, 1989; L 1989, ch 173, § 1; L 1990, ch 173, § 61, eff Aug 19, 1990; L 1993, ch 81, § 1, eff Aug 30, 1993; L 1995, ch 446, §§ 2, 3, eff Sept 1, 1995; L 1997 ch 432, §§ 72–75, eff Nov 18, 1997; L 1999, ch 101, § 1, eff Nov 1, 1999; L 1999, ch 484, §§ 1, 2, eff Nov 1, 1999; L 2002, ch 563, § 1, eff Sept 24, 2003; L 2003, ch 62, §§ 4–8 (Part C), eff May 15, 2003; L 2004, ch 211, § 1, eff Nov 1, 2004; L 2010, ch 465, § 1, eff Aug 30, 2010; L 2016, ch 293, § 4, effective November 1, 2016.

Editor's Notes: Laws 1995, ch 446, § 1, eff Sept 1, 1995, provides as follows:

Section 1. Legislative findings. The legislature hereby finds and declares that highway work areas pose a significant hazard to the travelling public and to maintenance and construction employees who work on highways in New York state. It further finds and declares that the highway work zone is among the most hazardous work environments and that drivers who fail to obey posted speed limits in highway work areas are a great danger. It is appropriate, therefore, that severe penalties be imposed on drivers who violate posted speed limits in work areas.

Laws 1997, ch 432, § 96(7), eff Aug 20, 1997, provide as follows:

§ 96. This act shall take effect immediately and shall be deemed to have been in full force and effect on and after April 1, 1997, provided, that:

(7) nothing contained herein shall be deemed to affect the application, qualification, expiration, reversion or repeal of any provision of law amended by any section of this act and the provisions of this act shall be applied or qualified or shall expire or revert or be deemed repealed in the same manner, to the same extent and on the same date as the case may be as otherwise provided by law.

Laws 2002, ch 563, § 7, eff Sept 24, 2003, provides as follows:

§ 7. Notwithstanding any inconsistency with sections two, three, four, five and six of this act, any school zone speed limit established prior to the effective date of this act on a highway passing a school building for not more than three hundred feet in either direction from the building line of a school abutting on the highway may be continued.

Repeal Notes: [1989, ch 61] Subdivision (f) of section 1180 of the vehicle and traffic law repealed by section forty-seven of this act contained penalties for speeding convictions and is reenacted in a modified form in a new subdivision (f) [(g)].

Amendment Notes The 2016 amendment by ch 293, § 4, added "or when approaching a hazard vehicle which is parked, stopped or standing on the shoulder or on any portion of such highway and such hazard vehicle is displaying one or more amber lights pursuant to the provisions of paragraph three of subdivision forty-one of section three hundred seventy-five of this chapter" in (e).

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1. In general

Although a traffic infraction is differentiated from a crime, the rules of criminal law are applicable to prosecutions for such infractions. People v Lewis, 13 N.Y.2d 180, 245 N.Y.S.2d 1, 194 N.E.2d 831, 1963 N.Y. LEXIS 867 (N.Y. 1963).

The enforcement of speeding statute by police officers depends upon the individual officer's judgment. In re Application of Blackburn, 134 N.Y.S.2d 138, 206 Misc. 393, 1954 N.Y. Misc. LEXIS 2494 (N.Y. Sup. Ct. 1954).

The general purpose of laws regulating traffic is not primarily to protect fast driver from consequences of his folly; rather the purpose is to protect life and property of others lawfully using highway. People v Staples, 5 Misc. 2d 619, 162 N.Y.S.2d 131, 1957 N.Y. Misc. LEXIS 3222 (N.Y. County Ct. 1957).

Under the definition of "authorized emergency vehicle", a private citizen driving his own car in pursuit of a speeder, and himself violating the speed limit, is subject to conviction of speeding, regardless of his good faith. People v Nagell, 23 Misc. 2d 452, 206 N.Y.S.2d 654, 1960 N.Y. Misc. LEXIS 3055 (N.Y. J. Ct. 1960).

2. —Negligence

In automobile negligence action, contention that Supreme Court erred in failing to direct verdict for plaintiff on issue of liability is without merit; such motion is to be directed to court at close of defendant's case (see, CPLR 4401); no such motion was

made by plaintiff's counsel; rather, counsel merely stated his opposition to defendant's motion to dismiss plaintiff's cause of action; however, even if such motion had been made by plaintiff, denial would have been appropriate; although defendant driver made admission by way of his plea of guilty to violating Vehicle and Traffic Law § 1180 (e), operating his vehicle too fast for conditions present, there was also evidence that boisterous behavior of plaintiff's 14- year-old daughter, passenger in defendant's car, and other passengers was contributing factor to accident; issue of liability was thus created and directed verdict would have been inappropriate. Cavuto v Lilledah, 161 A.D.2d 853, 555 N.Y.S.2d 901, 1990 N.Y. App. Div. LEXIS 4935 (N.Y. App. Div. 3d Dep't), app. denied, 76 N.Y.2d 710, 563 N.Y.S.2d 61, 564 N.E.2d 671, 1990 N.Y. LEXIS 3352 (N.Y. 1990).

Whether northbound motorist was negligent in proceeding through intersection after left-turning motorist had cleared the intersection and traffic light favored east-west traffic was question for jury in passenger's action against the northbound motorist and the driver of westbound vehicle which struck the northbound vehicle. Kinsfather v Grueneberg, 47 A.D.2d 789, 365 N.Y.S.2d 903, 1975 N.Y. App. Div. LEXIS 9105 (N.Y. App. Div. 3d Dep't 1975).

Drivers are under duty to maintain a reasonably safe rate of speed, have the automobile under reasonable control, and to use reasonable care under the circumstances to avoid an accident. Oberman v Alexander's Rent-A-Car, 56 A.D.2d 814, 392 N.Y.S.2d 662, 1977 N.Y. App. Div. LEXIS 11110 (N.Y. App. Div. 1st Dep't), app. denied, 42 N.Y.2d 806, 1977 N.Y. LEXIS 3768 (N.Y. 1977).

Whether speed of driver on favored street was reasonable under conditions was question of fact for jury. Smart v Wozniak, 58 A.D.2d 993, 397 N.Y.S.2d 489, 1977 N.Y. App. Div. LEXIS 13205 (N.Y. App. Div. 4th Dep't), app. denied, 43 N.Y.2d 643, 1977 N.Y. LEXIS 4955 (N.Y. 1977).

Statute did not mandate that a driver reduce his or her speed at every intersection, but only when warranted by the conditions presented; summary judgment in favor of defendant motorists was affirmed where they entered an intersection under a green light and plaintiff entered the intersection against a red light, leading to a collision. Mosch v Hansen, 295 A.D.2d 717, 744 N.Y.S.2d 222, 2002 N.Y. App. Div. LEXIS 6102 (N.Y. App. Div. 3d Dep't 2002).

In plaintiff's personal injury suit arising from a single-vehicle accident that occurred when he was the passenger in a van that defendant drove on a snowy road while under the influence of drugs, plaintiff was entitled to summary judgment on the issue of liability; as a result of the incident, defendant pleaded guilty to driving while ability impaired by drugs and speed not prudent for the conditions. The evidence that defendant was consuming alcoholic drinks and taking a prescription pain pill before the accident established a prima facie case of negligence that was the proximate cause of the accident. Norris v Menard, 135 A.D.3d 1127, 23 N.Y.S.3d 672, 2016 N.Y. App. Div. LEXIS 228 (N.Y. App. Div. 3d Dep't 2016).

3. —Criminal procedure

Speed at which a defendant was traveling and specific area in which he was traveling were essential elements of offense of speeding in a controlled zone. People v Rich, 8 Misc. 2d 148, 167 N.Y.S.2d 244, 1957 N.Y. Misc. LEXIS 2265 (N.Y. County Ct. 1957).

To warrant a conviction for violating former subd. 1 of this section, the prosecution has the burden of establishing beyond a reasonable doubt that (1) defendant was traveling at a speed greater than reasonable and prudent, (2) under conditions existing, and (3) with regard to actual and potential hazards then existing. People v Le Bous, 29 Misc. 2d 850, 215 N.Y.S.2d 829, 1961 N.Y. Misc. LEXIS 2984 (N.Y. City Ct. 1961).

Whether defendant was speeding was question for trier of fact. People v Murdock, 44 Misc. 2d 498, 254 N.Y.S.2d 295, 1964 N.Y. Misc. LEXIS 1270 (N.Y. Spec. Sess. 1964).

Person who had been arraigned on a speeding charge and had pleaded not guilty was entitled to a speedy and public trial. Santacrose v Bean, 52 Misc. 2d 167, 275 N.Y.S.2d 418, 1964 N.Y. Misc. LEXIS 1161 (N.Y. Sup. Ct. 1964).

The special rules for protection against self-incrimination laid down in the Miranda Case have no bearing in traffic infraction cases, nor is there any statutory requirement for such warning and waiver in traffic infraction cases at the police apprehension and preliminary interrogation stage. Unless the traditional rules as to coercion have been violated so as to render a confession "involuntary" as determined by a hearing held under Title 2C of Part 6 of the Code of Criminal Procedure, admissions or confessions are admissible in traffic infraction cases. People v Bliss, 53 Misc. 2d 472, 278 N.Y.S.2d 732, 1967 N.Y. Misc. LEXIS 1640 (N.Y. County Ct. 1967).

Where reliance is placed upon an emergency as the justification for exceeding the speed limit, careful scrutiny of the situation should be made. People v Hariton, 61 Misc. 2d 209, 305 N.Y.S.2d 247, 1969 N.Y. Misc. LEXIS 1401 (N.Y. Dist. Ct. 1969).

Offenses of speeding and passing red traffic light had substantial different elements from driving while intoxicated and reckless endangerment, and acts establishing each offense were clearly distinguishable from those establishing others, and traffic offenses would not be dismissed merely because of disposition of offenses of driving while intoxicated and reckless endangerment. People v Green, 89 Misc. 2d 639, 392 N.Y.S.2d 804, 1977 N.Y. Misc. LEXIS 1910 (N.Y. Dist. Ct. 1977).

Jury acted reasonably in crediting the highly experienced sergeant's professional opinion as the sole witness that a defendant was drunk driving in violation of the law; the odor of alcohol, the defendant's bloodshot eyes and unsteadiness, the admission to drinking beers and attempt to dispose of an open beer can, his failure on two field tests and refusal to take a chemical test despite warnings all supported the conclusion that the defendant was intoxicated. People v Gallup, 302 A.D.2d 681, 755 N.Y.S.2d 498, 2003 N.Y. App. Div. LEXIS 1255 (N.Y. App. Div. 3d Dep't), app. denied, 100 N.Y.2d 594, 766 N.Y.S.2d 169, 798 N.E.2d 353, 2003 N.Y. LEXIS 3508 (N.Y. 2003).

Defendant was not guilty of violating N.Y. Veh. & Traf. Law § 1180(d) and N.Y. Veh. & Traf. Law § 1180(a) because defendant was deprived of the investigator's notes as material for cross-examination since the People, in the course of discovery, neither brought to the trial court nor produced the large file containing all of the investigator's notes pertaining to defendant's vehicle speed at the time of the collision. People v Lamb, 59 Misc. 3d 699, 72 N.Y.S.3d 799, 2018 N.Y. Misc. LEXIS 821 (N.Y. City Ct. 2018).

4. —Administrative procedure

Criminal Procedure Law did not apply to proceedings before administrative adjudication bureau on charges of speeding in violation of Vehicle and Traffic Law to require complaining officer to provide deposition. Sulli v Appeal Bd. of Administrative Adjudication Bureau, 55 A.D.2d 457, 390 N.Y.S.2d 758, 1977 N.Y. App. Div. LEXIS 10000 (N.Y. App. Div. 4th Dep't 1977).

In administrative adjudication of motorist's speeding infraction, police officer's estimate that motorist was exceeding 35-mile per hour speed limit by 45 miles per hour was sufficient, unaided by mechanical devices, to establish that motorist was exceeding speed limits under reasonable doubt test. Sulli v Appeal Bd. of Administrative Adjudication Bureau, 55 A.D.2d 457, 390 N.Y.S.2d 758, 1977 N.Y. App. Div. LEXIS 10000 (N.Y. App. Div. 4th Dep't 1977).

5. Construction

Insofar as this section defines a traffic infraction of driving at a speed greater than reasonable and prudent under existing conditions, recklessness is not an element of the offense, or intentional disregard of safety of others, the statute being directed only to speed under existing conditions. People v Lewis, 13 N.Y.2d 180, 245 N.Y.S.2d 1, 194 N.E.2d 831, 1963 N.Y. LEXIS 867 (N.Y. 1963).

Where defendant was traveling at about 20 to 25 miles per hour and as he applied his brakes to halt for a traffic signal his car skidded and collided with a stopped police car with an impact so slight as to cause no damage or injury, his conviction pursuant to Veh & Tr L § 1180(a) was reversed. The Court of Appeals held that as a matter of law the evidence was insufficient to establish that defendant was driving at an unsafe or imprudent speed, and that subdivision (a) of § 1180 was not intended to cover all possible acts of careless driving, but specifically directed against

excessive speed. People v Davis, 24 N.Y.2d 796, 300 N.Y.S.2d 580, 248 N.E.2d 437, 1969 N.Y. LEXIS 1422 (N.Y. 1969).

The language of this section in clear and positive terms prohibits the driving of a motor vehicle at a rate of speed greater than will permit the bringing of the vehicle to a stop without injury to another or his property and a violation thereof is an infraction. McNellis v Fletcher, 96 N.Y.S.2d 599, 197 Misc. 80, 1950 N.Y. Misc. LEXIS 1576 (N.Y. Sup. Ct. 1950).

The plain language of this section prohibits the operation of a motor vehicle at such a speed as to endanger the life, limb or property of another or at a rate of speed greater than will permit such operator to bring the vehicle to a stop without injury to another or his property. A violation of this section constitutes an infraction and does furnish a proper basis for a charge set forth in an information to that effect. People v Pier, 121 N.Y.S.2d 342, 203 Misc. 117, 1952 N.Y. Misc. LEXIS 2290 (N.Y. County Ct. 1952).

An examination of the memorandum of the Joint Legislative Committee, in respect to the bill in 1957 amending this subdivision indicates that the purpose of the bill was to eliminate the requirement of a certificate of the State Traffic Commission which prior thereto was a necessary part of the People's case in speeding violations. People v Van Wieren, 15 Misc. 2d 106, 180 N.Y.S.2d 560, 1958 N.Y. Misc. LEXIS 2255 (N.Y. County Ct. 1958).

Section 1104 (subd [b], par 3) of the Vehicle and Traffic Law, which provides that the driver of an authorized emergency vehicle may exceed the maximum speed limits, is not an exception to subdivision (b) of section 1180 of the Vehicle and Traffic Law, which prohibits driving a vehicle at a speed in excess of 55 miles per hour and is not required to be pleaded and proved by the prosecution in order to make out a prima facie case under subdivision (b) of section 1180, as would be a true exception; subdivision (b) of section 1104 is not an exception to section 1180 since it is not set forth in the enacting clause of section 1180; in order to be a proviso, it need not be set forth subsequent to section 1180 since the distinction between exception and proviso should not be mechanically applied; furthermore, the prosecution is not required to adduce proof of a negative such as the status of the driver as a driver of an emergency vehicle since the exceptive fact is peculiarly within the driver's knowledge; therefore, the prosecution is not required to plead or prove that a defendant is not the driver of an emergency vehicle in order to make a prima facie case of speeding. People v Baur, 102 Misc. 2d 971, 423 N.Y.S.2d 800, 1980 N.Y. Misc. LEXIS 2046 (N.Y. Dist. Ct. 1980).

6. Constitutionality

The provisions of this section as amended in 1960, making it a traffic infraction to drive a motor vehicle on a public highway at a speed greater than reasonable and prudent under existing conditions and having regard to actual and potential hazards, are not unconstitutional as too vague or insufficiently defining the offense. People v Lewis, 13 N.Y.2d 180, 245 N.Y.S.2d 1, 194 N.E.2d 831, 1963 N.Y. LEXIS 867 (N.Y. 1963).

Subd (c) of this section applies the provisions of subd (a) to the specific situations enumerated therein, and is not unconstitutionally vague and indefinite. People v Nappi, 18 N.Y.2d 136, 272 N.Y.S.2d 347, 219 N.E.2d 176, 1966 N.Y. LEXIS 1177 (N.Y. 1966).

Legislature could, despite claim of denial of equal protection of law, in cities above certain population floor, constitutionally authorize administrative rather than judicial adjudication of traffic infractions and as an incident thereto, despite claim of denial of due process, establish "clear and convincing evidence" as the required quantum of proof for a determination of guilt where such determination could result in the imposition of a fine but not imprisonment. Rosenthal v Hartnett, 36 N.Y.2d 269, 367 N.Y.S.2d 247, 326 N.E.2d 811, 1975 N.Y. LEXIS 1750 (N.Y. 1975).

Statute prohibiting operation of motor vehicle upon public highway at a rate of speed greater than will permit operator to bring vehicle to a stop without injury to another or his property, imposed an unreasonable standard of care under which motorist could have been found negligent merely because he was unable to prevent a collision under any circumstances, and giving of charge in words of objectionable statute in action arising out of collision when motorist struck automobile being backed into road from between eight-foot snowbanks bordering driveway, constituted reversible error. Armondi v Johnson, 16 A.D.2d 712, 226 N.Y.S.2d 714, 1962 N.Y. App. Div. LEXIS 10318 (N.Y. App. Div. 3d Dep't 1962).

It was reversible error for the trial court, in its charge to the jury, to invoke former § 56 of the Vehicle and Traffic Law (now § 1180) as a basis for finding negligence on the part of the defendant, since that section had been declared to be unconstitutional prior to the date of the accident upon which plaintiff instituted suit. Karnbach v Bould, 24 A.D.2d 600, 262 N.Y.S.2d 265, 1965 N.Y. App. Div. LEXIS 3588 (N.Y. App. Div. 2d Dep't 1965).

Since the legislature has relegated to the jurisdiction of an administrative agency traffic infraction such as speeding, quantum of proof prescribed, i. e., "clear and convincing evidence," meets the requirements of due process, despite contention that such standard is uncertain, vague and indefinite. Beck v Melton, 54 A.D.2d 919, 388 N.Y.S.2d 117, 1976 N.Y. App. Div. LEXIS 14763 (N.Y. App. Div. 2d Dep't 1976), app. dismissed, 42 N.Y.2d 1101, 1977 N.Y. LEXIS 4879 (N.Y. 1977).

The uncertainty in subd. 1 of former § 56, dealing with driving at excessive speed under existing conditions, being declared unconstitutional, was eliminated in the revision of subd. 1 of this section, the provisions of which are now sufficiently definite, clear, and positive to give unequivocal meaning to citizens of the rule to be obeyed. People v Le Bous, 29 Misc. 2d 850, 215 N.Y.S.2d 829, 1961 N.Y. Misc. LEXIS 2984 (N.Y. City Ct. 1961).

Subdivision (a) of this section is a mere revision of former § 56, which was declared unconstitutional as being too vague and indefinite, to establish violation of it by driving at a speed greater than reasonable and prudent under existing conditions requires a clear and positive showing that something more was involved than an error of judgment or simple negligence and of conduct amounting to gross negligence, and where the prosecution fails to establish that defendant was thus guilty of violating this section beyond reasonable doubt, the charge against him must be dismissed. People v Benway, 41 Misc. 2d 39, 244 N.Y.S.2d 163, 1963 N.Y. Misc. LEXIS 1691 (N.Y. J. Ct. 1963).

6.5. Sufficiency of evidence

Trial court erred in convicting defendant of speeding and driving while intoxicated because the People laid no basis for a deputy's "professional opinion," the fact that defendant lost control of his vehicle on a snow and ice-covered road was insufficient to conclude that he operated it at an unreasonable or imprudent speed or an intoxicated or unsafe manner where his admissions were corroborated by his presence at the scene, the deputy's observations, defendant's performance on the field sobriety tests, and the results of the breath test, no testimony was elicited as to whether the deputy formed an opinion that defendant was intoxicated, and the evidence established the lesser-included offense of driving while ability impaired. People v Elithorpe, 50 Misc. 3d 1077, 21 N.Y.S.3d 848, 2015 N.Y. Misc. LEXIS 4712 (N.Y. County Ct. 2015).

7. Speeding as traffic infraction

Although a violation of this section is a traffic infraction, a violation thereof cannot be inferred merely because of an accident. Hence, it was error to revoke a license upon proof that the operator was driving well under the statutory speed limit, came upon ice, lost control of his car and car travelled up to 200 feet before overturning. Hessney v MacDuff, 284 A.D. 70, 130 N.Y.S.2d 405, 1954 N.Y. App. Div. LEXIS 3344 (N.Y. App. Div. 1954).

Violation of rule of reasonable care provided by statute regulating speeds of motor vehicles is a traffic infraction. Hessney v MacDuff, 284 A.D. 70, 130 N.Y.S.2d 405, 1954 N.Y. App. Div. LEXIS 3344 (N.Y. App. Div. 1954).

A violation of this section itself is not made a misdemeanor. People v Kitendaugh, 77 N.Y.S.2d 321, 190 Misc. 410, 1947 N.Y. Misc. LEXIS 3697 (N.Y. County Ct. 1947).

The language of this section in clear and positive terms prohibits the driving of a motor vehicle at a rate of speed greater than will permit the bringing of the vehicle to a stop without injury to another or his property and a violation thereof is an

infraction. McNellis v Fletcher, 96 N.Y.S.2d 599, 197 Misc. 80, 1950 N.Y. Misc. LEXIS 1576 (N.Y. Sup. Ct. 1950).

The plain language of this section prohibits the operation of a motor vehicle at such a speed as to endanger the life, limb or property of another or at a rate of speed greater than will permit such operator to bring the vehicle to a stop without injury to another or his property. A violation of this section constitutes an infraction and does furnish a proper basis for a charge set forth in an information to that effect. People v Pier, 121 N.Y.S.2d 342, 203 Misc. 117, 1952 N.Y. Misc. LEXIS 2290 (N.Y. County Ct. 1952).

A violation of sub 1 of former § 56 is an infraction, for the language used therein is clear and positive and prohibits the driving of a motor vehicle at a speed greater than will permit the bringing of the vehicle to a stop without injury to another or his property. People v Sprague, 120 N.Y.S.2d 725, 204 Misc. 99, 1953 N.Y. Misc. LEXIS 1673 (N.Y. County Ct. 1953).

A charge of speeding is criminal in nature if not in fact. People v Wiltse, 28 Misc. 2d 410, 212 N.Y.S.2d 713, 1961 N.Y. Misc. LEXIS 3161 (N.Y. County Ct. 1961).

This section does not make the driving of an automobile in excess of the specified miles an hour a criminal act. People v Marketos, 54 N.Y.S.2d 857, 1945 N.Y. Misc. LEXIS 1781 (N.Y. County Ct. 1945).

Where there was substantial evidence to support an administrative determination under N.Y. Veh. & Traf. Law art. 2-A that the driver was speeding, driving an uninsured and unregistered vehicle, and had improper plates affixed to the vehicle, the driver's N.Y. C.P.L.R. art. 78 proceeding was dismissed. Stamos v Appeals Bd. of the N.Y. State DMV, 309 A.D.2d 572, 765 N.Y.S.2d 342, 2003 N.Y. App. Div. LEXIS 10506 (N.Y. App. Div. 1st Dep't), app. denied, 1 N.Y.3d 505, 775 N.Y.S.2d 782, 807 N.E.2d 895, 2003 N.Y. LEXIS 4218 (N.Y. 2003).

Motion to suppress the officer's observations was not allowed because probable cause existed for defendant's arrest since defendant was observed driving approximately twenty miles over the posted speed limit, and failing to maintain his lane on a public highway, in violation of vehicle and traffic laws. People v Buelelituma, 64 Misc. 3d 219, 101 N.Y.S.3d 566, 2019 N.Y. Misc. LEXIS 2630 (N.Y. City Crim. Ct. 2019).

8. Burden of proof

Ownership of an automobile did not create a presumption that the owner was the driver where police used a "photo traffic camera" which took 2 pictures at time intervals thereby showing that defendant's automobile was proceeding at an illegal rate of speed. People v Hildebrandt, 308 N.Y. 397, 126 N.E.2d 377, 308 N.Y. (N.Y.S.) 397, 1955 N.Y. LEXIS 996 (N.Y. 1955).

Where defendant was charged with driving in excess of 50 miles per hour in violation of Vehicle and Traffic Law § 1180, subdivision [b] which statute provided such limit except "when maximum speed limits have been established as hereinafter authorized", the court could take judicial notice of the Official Compilation of Codes, Rules and Regulations of the State of New York, which did not contain any change in the 50-mile-per-hour speed limit for the village in question and, thus, the people met the burden of proof placed upon them by law. People v Foster, 27 N.Y.2d 47, 313 N.Y.S.2d 384, 261 N.E.2d 389, 1970 N.Y. LEXIS 1156 (N.Y. 1970).

Because of the former analogous section a defendant charged with driving his motor vehicle at the rate of forty-two miles per hour had the burden of showing that in the circumstances he was not driving in a reckless or imprudent manner. People v Mellen, 172 N.Y.S. 165, 104 Misc. 355, 1918 N.Y. Misc. LEXIS 702 (N.Y. County Ct. 1918).

In a speeding violation prosecution, the question as to whether or not the state traffic commission may possibly have a rule or regulation whereby a speed in excess of 50 miles per hour on the state highways would not be a violation of the speed limit is a question of fact to be pleaded and proved by the People in its prima facie case, and in such case the certificate of the state traffic commission which was duly received in evidence that no such rule or regulation existed was sufficient. People v Thomas, 105 N.Y.S.2d 611, 199 Misc. 163, 1950 N.Y. Misc. LEXIS 2522 (N.Y. County Ct. 1950).

In a prosecution for speeding, the People have the burden of establishing beyond a reasonable doubt every fact essential to the conviction of the defendant. People v Harndon, 15 Misc. 2d 100, 180 N.Y.S.2d 799, 1959 N.Y. Misc. LEXIS 4569 (N.Y. County Ct. 1959).

Under subd. 3 of this section, providing that a rate of speed by a motor vehicle on a public highway in excess of 50 miles an hour for a distance of one-fourth mile, except as otherwise provided, shall be unlawful, the prosecution has the burden of establishing the offense beyond a reasonable doubt and evidence merely that an officer "clocked" a car at a speed considerably in excess of 50 mph, without testimony as to the distance at which the excessive speed was maintained, is insufficient to sustain a conviction. People v Canham, 23 Misc. 2d 441, 201 N.Y.S.2d 386, 1960 N.Y. Misc. LEXIS 2974 (N.Y. County Ct. 1960).

In a prosecution for exceeding the speed limit in a restricted speed zone the prosecution has the burden of establishing beyond reasonable doubt every fact essential to conviction, defendant being presumed innocent. People v Radzinski, 24 Misc. 2d 109, 205 N.Y.S.2d 440, 1960 N.Y. Misc. LEXIS 2417 (N.Y. County Ct. 1960).

Where a speeding charge is based upon violation of subd. 3 of this section, the prosecution must prove all elements of the charge beyond a reasonable doubt and has the burden of proving (1) that defendant was operating his motor vehicle on a public highway in excess of 50 miles per hour, and (2) that no greater speed was permitted by the State Traffic Commission at the time and place where the violation is alleged to have occurred. People v Riordan, 29 Misc. 2d 174, 212 N.Y.S.2d 515, 1961 N.Y. Misc. LEXIS 3130 (N.Y. County Ct. 1961).

People had burden of proving that defendant was driving over 50 miles per hour for one-fourth mile and that no greater speed was permitted by State Traffic Commission. People v Metz, 29 Misc. 2d 181, 212 N.Y.S.2d 986, 1961 N.Y. Misc. LEXIS 3125 (N.Y. County Ct. 1961).

Trial of traffic infraction is quasi-criminal, people must establish beyond reasonable doubt every act essential to conviction, and defendant is presumed innocent. People v Metz, 29 Misc. 2d 181, 212 N.Y.S.2d 986, 1961 N.Y. Misc. LEXIS 3125 (N.Y. County Ct. 1961).

To warrant a conviction for violating subd. 1 of this section, the prosecution has the burden of establishing beyond a reasonable doubt that (1) defendant was traveling at a speed greater than reasonable and prudent, (2) under conditions existing, and (3) with regard to actual and potential hazards then existing. People v Le Bous, 29 Misc. 2d 850, 215 N.Y.S.2d 829, 1961 N.Y. Misc. LEXIS 2984 (N.Y. City Ct. 1961).

Under the phrasing of subd. 3 of this section, prohibiting a motor vehicle from traveling at a speed in excess of 50 miles per hour "except where greater speed is permitted by the State Traffic Commission," the prosecution in a speeding case has the burden of both pleading and proving that speed in excess of 50 miles per hour was not permitted where the alleged violation occurred on a state highway outside of an incorporated city or village. People v Hilger, 32 Misc. 2d 975, 225 N.Y.S.2d 611, 1962 N.Y. Misc. LEXIS 3662 (N.Y. County Ct. 1962).

Defendant was found not guilty of speeding in violation of N.Y. Veh. & Traf. Law § 1180(d), because even though it is not a crime, the fundamental rules of criminal procedure governed the trial of a traffic infraction, N.Y. Veh. & Traf. Law § 155, and thus the People had to prove beyond a reasonable doubt not only every element of such offense but the defendant's commission thereof, N.Y. Crim. Proc. Law § 70.20, and a police officer's testimony was insufficient to establish that defendant was the perpetrator of the offense, as the officer was unable to unequivocally identify defendant as the driver of the vehicle. People v Nicol, 191 Misc. 2d 711, 744 N.Y.S.2d 657, 2002 N.Y. Misc. LEXIS 708 (N.Y. J. Ct. 2002).

The effect of this former section, subd. 1, par. c and e was to shift the burden upon defendant who exceeds 25 miles per hour, of showing such facts that would constitute "careful and prudent" driving. People v Brown, 33 N.Y.S.2d 58, 1942 N.Y. Misc. LEXIS 1320 (N.Y. County Ct. 1942).

The burden was upon the people to not only allege in the information but to prove upon the trial that no greater speed than

fifty miles an hour was permitted on the highway in question. People v Conte, 130 N.Y.S.2d 66, 1954 N.Y. Misc. LEXIS 3262 (N.Y. County Ct. 1954).

9. Degree of proof

Defendant's speeding conviction was reversed where the people failed to prove defendant's guilt beyond a reasonable doubt or by a fair preponderance of the evidence. The people relied upon the trooper's testimony and a speedometer deviation record which was erroneously received in evidence. People v Martindale, 6 Misc. 2d 85, 162 N.Y.S.2d 806, 1957 N.Y. Misc. LEXIS 2944 (N.Y. County Ct. 1957).

To sustain a conviction of speeding in a truck on New York Thruway, in violation of the traffic law, the state must prove beyond a reasonable doubt, that the rate of speed was in excess of 50 miles per hour, the maximum speed allowed for trucks on the Thruway, that such speed was maintained for a distance of one quarter of a mile, and that no greater speed was permitted by the state traffic commission. People v Martindale, 6 Misc. 2d 85, 162 N.Y.S.2d 806, 1957 N.Y. Misc. LEXIS 2944 (N.Y. County Ct. 1957).

A violation of subdivision 3 of the former § 56 proscribing speeding even though deemed an infraction, rather than a crime, must be proved in all of its essential elements beyond a reasonable doubt. People v Marsellus, 9 Misc. 2d 1030, 168 N.Y.S.2d 1008, 1957 N.Y. Misc. LEXIS 1913 (N.Y. County Ct. 1957).

In prosecution for speeding, evidence failed to establish beyond reasonable doubt the required erection and maintenance of signs to inform public of existence and limits of speed zone. People v Ryan, 32 Misc. 2d 800, 220 N.Y.S.2d 428, 1961 N.Y. Misc. LEXIS 2220 (N.Y. County Ct. 1961).

The accuracy of a radar unit in order for such radar unit to be considered tested and for it alone to support a conviction for speeding beyond a reasonable doubt, must be established by clear, convincing and unequivocal proof and beyond a reasonable doubt. People v Lynch, 61 Misc. 2d 117, 304 N.Y.S.2d 985, 1969 N.Y. Misc. LEXIS 1099 (N.Y. County Ct. 1969).

The standards of proof applicable in criminal cases is applicable to prosecutions for speeding infractions. Rosenthal v Hartnett, 71 Misc. 2d 264, 335 N.Y.S.2d 758, 1972 N.Y. Misc. LEXIS 1581 (N.Y. Sup. Ct. 1972), rev'd, 36 N.Y.2d 269, 367 N.Y.S.2d 247, 326 N.E.2d 811, 1975 N.Y. LEXIS 1750 (N.Y. 1975).

At a suppression hearing, a state trooper testified that defendant violated N.Y. Veh. & Traf. Law § 1180(a) by traveling at an imprudent speed, given the hazardous weather conditions. As the trial court was entitled to credit this testimony, the traffic stop was justified and defendant's motion to suppress physical evidence and statements obtained as a result of the stop was properly denied. People v Miller, 57 A.D.3d 568, 869 N.Y.S.2d 150, 2008 N.Y. App. Div. LEXIS 9246 (N.Y. App. Div. 2d Dep't 2008), app. denied, 12 N.Y.3d 819, 881 N.Y.S.2d 26, 908 N.E.2d 934, 2009 N.Y. LEXIS 2145 (N.Y. 2009).

10. Sufficiency of information

An information, which fails to charge that the violation of this section occurred at a place where a greater speed is not permitted by the state traffic commission, is fatally defective. People v Smith, 299 N.Y. 707, 87 N.E.2d 123, 299 N.Y. (N.Y.S.) 707, 1949 N.Y. LEXIS 1149 (N.Y. 1949).

Speeding summons not signed by complaining officer, although his name was printed on it, did not comply with regulations promulgated by commissioner of motor vehicles. Reynolds v New York State Dep't of Motor Vehicles, 52 A.D.2d 1048, 384 N.Y.S.2d 567, 1976 N.Y. App. Div. LEXIS 12961 (N.Y. App. Div. 4th Dep't 1976).

An information which arose under this former section alleging no acts of careless and imprudent driving beyond the presumption of carelessness arising out of speed, did not support a conviction where the defendant offered any evidence of careful driving. People v De Gironimo, 15 N.Y.S.2d 1017, 172 Misc. 1100, 1939 N.Y. Misc. LEXIS 2481 (N.Y. Spec. Sess. 1939).

Information charging a violation of above statute must not only be written but it must be properly verified, that is, made under oath. People v Ragusa, 44 Misc. 2d 940, 255 N.Y.S.2d 269, 1964 N.Y. Misc. LEXIS 1145 (N.Y. County Ct. 1964).

Information which charged defendant with speeding in Northern State Parkway was sufficient, though sworn to before sergeant of Long Island State Parkway Commission instead of by state park patrolman of rank of captain, lieutenant, or acting lieutenant. People v Malone, 49 Misc. 2d 681, 268 N.Y.S.2d 424, 1966 N.Y. Misc. LEXIS 2078 (N.Y. Dist. Ct. 1966).

Rules concerning information in criminal matter also apply to traffic offense. People ex rel. Refinburg v Bremner, 51 Misc. 2d 632, 273 N.Y.S.2d 682, 1966 N.Y. Misc. LEXIS 1473 (N.Y. Spec. Sess. 1966).

Where uniform traffic complaint which accused motorist of speeding in violation of Vehicle and Traffic Law did not conform to section of Code of Criminal Procedure setting forth form of complaint and was not the alternate form prescribed by Commissioner of Motor Vehicles pursuant to Vehicle and Traffic Law, complaint was insufficient to confer jurisdiction on Court of Special Sessions. People ex rel. Refinburg v Bremner, 51 Misc. 2d 632, 273 N.Y.S.2d 682, 1966 N.Y. Misc. LEXIS 1473 (N.Y. Spec. Sess. 1966).

Defendant was improperly convicted for speeding in violation of subd (b) ¶ 2 of this section where the complaint, contrary to the rules and regulations of the Commissioner of Motor Vehicles, was not signed before a justice of the peace. People v Campbell, 52 Misc. 2d 63, 275 N.Y.S.2d 164, 1966 N.Y. Misc. LEXIS 1466 (N.Y. County Ct. 1966).

A uniform traffic complaint accusing the defendant of speeding was subject to dismissal when the court was not in session on the return date of the ticket. People ex rel. Moochler v D'Agostino, 52 Misc. 2d 448, 276 N.Y.S.2d 183, 1966 N.Y. Misc. LEXIS 1264 (N.Y. Spec. Sess. 1966).

Where a complaint charged defendant motorist with speeding on November 5, 1967 and the only testimony as to date was that the arresting officer was on duty on the 23rd day of October, the people's motion to amend the testimony to conform to the date set forth in the complaint was improperly granted. Although amendments of an indictment to conform to proof were permitted under certain conditions, there is no power to permit amendment of proof and testimony to conform to the indictment or information and where proof fails, the only cure is more or different evidence. People v Parmelee, 56 Misc. 2d 146, 288 N.Y.S.2d 659, 1968 N.Y. Misc. LEXIS 1667 (N.Y. County Ct. 1968).

The defendant could not be found guilty of speeding, even though he was clearly speeding in violation of Veh & Tr Law § 1180, where the issuing patrolman placed the wrong information in connection with the description of the vehicle the defendant was driving on the summons, the testifying officer positively identified the wrong vehicle, and there was no testimony about the speed limits. People v Goldsmith, 110 Misc. 2d 528, 442 N.Y.S.2d 760, 1981 N.Y. Misc. LEXIS 3118 (N.Y. Village Ct. 1981).

Supporting deposition given by laser gun operator failed to comply with CLS CPL § 100.25 where complainant officer who pulled defendant over and issued him ticket was not same officer who operated laser gun which recorded defendant's speed, and only supporting deposition given in response to defendant's demand for same was from laser gun operator; failure of complainant officer to give supporting deposition was jurisdictionally fatal. People v Noblett, 172 Misc. 2d 826, 660 N.Y.S.2d 517, 1997 N.Y. Misc. LEXIS 237 (N.Y. County Ct. 1997).

Informations charging reckless driving and speeding stated facts sufficient to constitute the crimes charged. People v Bruno, 43 N.Y.S.2d 942, 1943 N.Y. Misc. LEXIS 2362 (N.Y. County Ct. 1943).

An information charging a violation of sub 1 of former § 56 was defective where it failed to set forth, in addition to the statutory language, the particular acts constituting the violation. People v Rockwell, 123 N.Y.S.2d 201, 1953 N.Y. Misc. LEXIS 1940 (N.Y. County Ct. 1953).

Where a deputy chief clerk lacked authority under N.Y. Uniform City Ct. Act § 105(a), 22 NYCRR[2]10.43 to accept defendant's not guilty plea to speeding (in violation of N.Y. Veh. & Traf. Law § 1180(d)), defendant had not been arraigned on a simplified traffic information in accordance with N.Y. Crim. Proc. Law § 170.10(1)(a), (b) and jurisdiction was not acquired; as a result,

defendant's N.Y. Crim. Proc. Law § 170.30(1)(a) motion to dismiss the information was denied. People v Furst, 765 N.Y.S.2d 753, 1 Misc. 3d 654, 2003 N.Y. Misc. LEXIS 1249 (N.Y. City Ct. 2003).

11. —Evidence supporting charge

Where information was based on information and belief and was unsupported by depositions of persons in possession of the facts, resulting conviction was a nullity. People v Drebitko, 4 Misc. 2d 753, 159 N.Y.S.2d 28, 1957 N.Y. Misc. LEXIS 3615 (N.Y. County Ct. 1957).

In prosecution against motorist for speeding, information was defective in that it was not made by a person witnessing the alleged crime, and in that it was not based upon depositions of persons who had first hand knowledge of the facts, and in that it did not set forth the specific acts constituting the crime or all the elements of the offense. People v Staples, 5 Misc. 2d 619, 162 N.Y.S.2d 131, 1957 N.Y. Misc. LEXIS 3222 (N.Y. County Ct. 1957).

An information charging defendant with driving 52 mph in a 30-mile speed zone is defective, and will not sustain conviction, where made by an officer who states that the speed was checked by radar, implying that he was operating the radar, but it is established by affidavit and concessions that he was in the police car on the highway and not operating the radar, the information is not stated to be on information and belief, and is not supported by deposition of anyone operating the radar. People v Allyn, 22 Misc. 2d 663, 201 N.Y.S.2d 464, 1960 N.Y. Misc. LEXIS 2860 (N.Y. County Ct. 1960).

An information charging defendant with traveling at a speed in excess of 50 miles per hour, "no greater speed being permitted at this place by the New York State Traffic Commission," sworn to as matter of direct knowledge, by complainant, a state trooper, was jurisdictionally sufficient under subd. 3 of former § 56. People v Grammer, 25 Misc. 2d 223, 206 N.Y.S.2d 588, 1960 N.Y. Misc. LEXIS 2280 (N.Y. County Ct. 1960).

An information charging violation of this section by driving at a speed greater than reasonable and prudent under the conditions can be based on admissions of the defendant, and, where it is stated that the information is so based, it is sufficient. People v Pupillo, 37 Misc. 2d 455, 235 N.Y.S.2d 522, 1962 N.Y. Misc. LEXIS 2109 (N.Y. County Ct. 1962).

Information in prosecution for speeding was based upon unsupported hearsay and, therefore, defective ab initio, where facts constituting alleged violation were not within personal knowledge of peace officer filing information, information did not state that it was based upon information and belief, and depositions were not attached thereto. People v Weeks, 39 Misc. 2d 765, 242 N.Y.S.2d 121, 1963 N.Y. Misc. LEXIS 1783 (N.Y. County Ct.), rev'd, 13 N.Y.2d 944, 244 N.Y.S.2d 316, 194 N.E.2d 132, 1963 N.Y. LEXIS 921 (N.Y. 1963).

Court dismissed traffic complaint accusing defendant of violating subdivision (b), paragraph 3 of this section, where the complaint was signed by the officer issuing the summons and based on his information and belief obtained from the radar officer, but the signature and notation of the radar officer were omitted and his deposition was not attached. People ex rel. Williams v Crouch, 51 Misc. 2d 898, 274 N.Y.S.2d 642, 1966 N.Y. Misc. LEXIS 1448 (N.Y. Spec. Sess. 1966).

Where a uniform traffic complaint and ticket were issued by a trooper operating a pick-up vehicle, while the actual speed of the defendant was registered by a different trooper operating a radar unit, and there were no affidavits attached to the complaint which obviously was based upon information and belief, it was held the ticket was subject to a motion to dismiss unless depositions or bills of particulars in the form of affidavits were filed by the troopers prior to the motion to dismiss. People ex rel. Moochler v D'Agostino, 52 Misc. 2d 448, 276 N.Y.S.2d 183, 1966 N.Y. Misc. LEXIS 1264 (N.Y. Spec. Sess. 1966).

Defendant who requested a supporting deposition had an absolute right under statute to a supporting deposition before commencement of trial for speeding, and court's offer of an adjournment for purpose of furnishing deposition could not cure defect and thus information was insufficient on its face requiring that it be dismissed. People v De Feo, 77 Misc. 2d 523, 355 N.Y.S.2d 905, 1974 N.Y. Misc. LEXIS 1180 (N.Y. App. Term 1974).

Defendant will be granted dismissal pursuant to CLS CPL 170.30 on grounds that supporting deposition is defective in that allegation of violation as to CLS Veh & Tra § 1180(d) is unsustainable, since nowhere in supporting deposition does police officer state whether his determination of excessive speed is based on personal observation or by mechanical means or technical device, rendering simplified information insufficient on its face. People v Cohen, 131 Misc. 2d 898, 502 N.Y.S.2d 123, 1986 N.Y. Misc. LEXIS 2592 (N.Y. City Ct. 1986) (disagreed with by People v Jeck-Tisch, 133 Misc. 2d 1090, 509 N.Y.S.2d 463, 1986 N.Y. Misc. LEXIS 3035 (N.Y. City Ct. 1986), overruled, People v Aucello, 146 Misc. 2d 417, 558 N.Y.S.2d 436, 1990 N.Y. Misc. LEXIS 292 (N.Y. App. Term 1990)) and (disagreed with by People v Chess, 149 Misc. 2d 430, 565 N.Y.S.2d 416, 1991 N.Y. Misc. LEXIS 15 (N.Y. J. Ct. 1991).

Defendant's motion to dismiss simplified traffic information for insufficiency of supporting deposition would be denied where defendant was charged with speeding and supporting deposition alleged that police officer first observed defendant traveling at estimated 40 miles per hour in posted 30 mile per hour zone and then again observed him traveling at 50 to 55 miles per hour in same zone; means used by officer to estimate speed would be matter for proof at trial and did not need to be stated in supporting deposition. People v Jeck-Tisch, 133 Misc. 2d 1090, 509 N.Y.S.2d 463, 1986 N.Y. Misc. LEXIS 3035 (N.Y. City Ct. 1986), overruled, People v Aucello, 146 Misc. 2d 417, 558 N.Y.S.2d 436, 1990 N.Y. Misc. LEXIS 292 (N.Y. App. Term 1990).

12. —Failure to specify speed

An information charging violation of subd. (a) of this section need not state the rate of operating speed if enough facts and circumstances are set forth in detail so that, in relation to existing conditions and hazards, the trier of facts could determine that the speed was not reasonable and prudent. People v Lewis, 13 N.Y.2d 180, 245 N.Y.S.2d 1, 194 N.E.2d 831, 1963 N.Y. LEXIS 867 (N.Y. 1963).

An information which contained no allegation as to speed was insufficient to charge a crime under subdivision 1 of former § 56. People v Stoky, 5 Misc. 2d 624, 167 N.Y.S.2d 207, 1957 N.Y. Misc. LEXIS 3260 (N.Y. County Ct. 1957).

Even though Schenectady ordinance which made it unlawful to operate vehicle in excess of 25 miles per hour, except as otherwise provided by traffic commission rules, also made it unlawful to drive at speed greater than was reasonable and prudent under existing conditions, it was essential for information charging violation of ordinance to allege what specific speed limit was and that speed limit was exceeded at time and place of arrest. People v Hosier, 20 Misc. 2d 649, 194 N.Y.S.2d 395, 1959 N.Y. Misc. LEXIS 2334 (N.Y. County Ct. 1959).

An information charging violation of subd. 1 of this section, by operating a vehicle at a speed greater than reasonably prudent under existing conditions, need not specify the rate of speed, in miles per hour, at which defendant was proceeding at the time in question, but such a specification is merely surplusage, if included, and does not affect sufficiency of the information. People v Le Bous, 29 Misc. 2d 850, 215 N.Y.S.2d 829, 1961 N.Y. Misc. LEXIS 2984 (N.Y. City Ct. 1961).

Complaint alleging speed in excess of established limit of 35 m.p.h. adequately spelled out nature of speeding charge. People v Lupiani, 55 Misc. 2d 1, 284 N.Y.S.2d 275, 1967 N.Y. Misc. LEXIS 1200 (N.Y. Spec. Sess. 1967).

13. —Informing accused of charge

Complaining officer's failure to sign speeding summons did not offend notice requirements of due process because alleged violator would be apprised of nature and specifics of charge, date, place of appearance and accusing officer's name. Reynolds v New York State Dep't of Motor Vehicles, 52 A.D.2d 1048, 384 N.Y.S.2d 567, 1976 N.Y. App. Div. LEXIS 12961 (N.Y. App. Div. 4th Dep't 1976).

An information based on violation of subd. 1 of this section was sufficient to advise defendant of the nature of the offense charged where it referred to this section, stated the place where the alleged violation occurred and when it took place and the rate of

speed being traveled, and claimed that such speed was greater than was reasonable and prudent. People v Pupillo, 37 Misc. 2d 455, 235 N.Y.S.2d 522, 1962 N.Y. Misc. LEXIS 2109 (N.Y. County Ct. 1962).

An information which apparently charged the defendant with speeding in violation of Vehicle and Traffic Law § 1180(b)(3) was sufficient, although the section had been renumbered to omit subdivision (b) ¶¶ 1 and 2 and redesignate former ¶ (3) as subdivision (d), where there was no demonstrable evidence that defendant failed to understand the charge brought against him. People v Weale, 52 Misc. 2d 889, 277 N.Y.S.2d 363, 1967 N.Y. Misc. LEXIS 1814 (N.Y. County Ct. 1967).

Reference, in an accusatory instrument, to an erroneous section of the law may be disregarded as surplusage if the information fully advises the defendant of the acts relied upon to constitute the alleged violation. Thus, where the information contains a clear statement of the offense of speeding, a motion to dismiss a simplified traffic information as jurisdictionally defective on the ground it cites a city ordinance (Code of Ordinances of the City of Long Beach, § 14-106) as a basis for such violation and not subdivision (d) of section 1180 of the Vehicle and Traffic Law which creates the offense, should be denied. People v Levin, 93 Misc. 2d 106, 402 N.Y.S.2d 324, 1978 N.Y. Misc. LEXIS 2021 (N.Y. City Ct. 1978).

In prosecution for speeding, People's failure to disclose in either simplified traffic information or supporting deposition that radar had been used to establish defendant's speed was improper since defendant accused of speeding should be informed as to manner in which People intend to prove speed either in simplified information itself or in supporting deposition. People v Chess, 149 Misc. 2d 430, 565 N.Y.S.2d 416, 1991 N.Y. Misc. LEXIS 15 (N.Y. J. Ct. 1991).

Where the Simplified Information charged a violation of N.Y. Veh. & Traf. Law § 1180(B) and the supporting deposition specified § 1180(A) as the statute violated, the difference might materially affect the manner in which defendant would seek to defend himself, and even his decision to go to trial, as there were different potential penalties; thus, the case was dismissed. People v Kehoe, 922 N.Y.S.2d 749, 31 Misc. 3d 931, 2011 N.Y. Misc. LEXIS 1814 (N.Y. J. Ct. 2011).

14. —Violation of local law

Section 1180, subdivision (b) paragraph 3 of the Vehicle & Traffic Law applied in the City of New York only to the extent that it authorized the appropriate city authorities to adopt speeding regulations, and the proper pleading of a speeding violation in New York City should have referred to Article 6, § 60 of the Traffic Law regulations of the City. People v Harvin, 47 Misc. 2d 367, 262 N.Y.S.2d 750, 1965 N.Y. Misc. LEXIS 1900 (N.Y. Sup. Ct. 1965).

Where the defendant was served a Uniform Traffic Ticket charging him with a violation of Village Regulation No. 22, and the information alleged that defendant was speeding 38 miles per hour in a 25 mile per hour zone, the defendant was sufficiently apprised of the violation of which he was charged, although a prosecution for violation of the regulation should have been brought under this section. People v Blattman, 50 Misc. 2d 606, 270 N.Y.S.2d 903, 1966 N.Y. Misc. LEXIS 1829 (N.Y. County Ct. 1966).

The defendant's motion to dismiss a uniform traffic complaint accusing him of violating a village speeding ordinance, rather than charging him with a violation of the Vehicle and Traffic Law § 1180(d), was granted, and it was held that although pursuant to Vehicle and Traffic Law § 1643 cities and villages might establish speed limits applicable generally to all streets, the prosecution for the violation of such a law should be brought pursuant to § 1180(d). People v Kramer, 55 Misc. 2d 550, 285 N.Y.S.2d 763, 1967 N.Y. Misc. LEXIS 1014 (N.Y. Spec. Sess. 1967).

A complaint alleging a speeding violation which specified a violation of a local ordinance rather than § 1180 of the Vehicle and Traffic Law was held to be a valid pleading. People v Baratta, 56 Misc. 2d 447, 288 N.Y.S.2d 976, 1968 N.Y. Misc. LEXIS 1633 (N.Y. Dist. Ct. 1968).

If local ordinance is duplicative of and/or in conflict with Vehicle and Traffic Law or established without any authority from Vehicle and Traffic Law, citation to that local ordinance on accusatory instrument would be jurisdictional defect prohibiting prosecution under cited ordinance and court would be without authority to allow any amendment to correct defect, but where local ordinance is not in conflict with any vehicle and traffic law section, citing of only local ordinance is not jurisdictional defect. People v Morris, 131 Misc. 2d 55, 499 N.Y.S.2d 329, 1986 N.Y. Misc. LEXIS 2475 (N.Y. City Ct. 1986).

Court would dismiss uniform traffic ticket charging defendant with driving 43 miles per hour in 25 mile-per-hour zone since traffic sign posted by village stated "Area Speed Limit 25 MPH" and CLS Veh & Tr § 1643 prohibits establishment of area or village speed limit at less than 30 miles per hour; since posted sign was nullity, village speed limit was unenforceable under CLS Veh & Tr § 1683. People v Stone, 138 Misc. 2d 520, 524 N.Y.S.2d 1001, 1988 N.Y. Misc. LEXIS 51 (N.Y. J. Ct. 1988).

15. Admissibility of evidence of speed traveled

Where the defendant's car approached police car from the rear, the testimony of policeman, as to the speed of the defendant's car, was not inadmissible as a matter of law. People v Dusing, 5 N.Y.2d 126, 181 N.Y.S.2d 493, 155 N.E.2d 393, 1959 N.Y. LEXIS 1625 (N.Y. 1959).

Defendant's conviction of speeding was proper where the sole evidence produced was that derived from the use of a device known as Vascar (visual average speed computer recorder), which measures the distance a vehicle travels and the time it takes the vehicle to cover that distance and computes the average speed of the vehicle and visually displays that speed to the operator. Holding that since the instrument was new, expert testimony as to the scientific accuracy of the device had to be proven beyond a reasonable doubt, the court reviewed proof consisting of the testimony of qualified experts in charge of the development, manufacture and marketing of the device and evidence of the competence of the arresting trooper who clocked defendant's speed and accordingly affirmed the conviction. People v Persons, 60 Misc. 2d 803, 303 N.Y.S.2d 728, 1969 N.Y. Misc. LEXIS 1251 (N.Y. Spec. Sess. 1969).

Opinion testimony of an arresting officer regarding a defendant's rate of speed is admissible in a speeding case providing the arresting officer first established his credentials sufficiently to accord his opinion a degree of accuracy. People v Stafford, 62 Misc. 2d 1027, 310 N.Y.S.2d 637, 1970 N.Y. Misc. LEXIS 1691 (N.Y. J. Ct. 1970).

The fact that the simplified traffic information contained the word "radar" in the charge block and that the attached bill of particulars cited only the radar reading relative to speed did not limit the state to presenting evidence based solely on the radar reading and the opinion testimony of deputies corroborating the untested radar reading was admissible. People v Smalley, 64 Misc. 2d 363, 314 N.Y.S.2d 924, 1970 N.Y. Misc. LEXIS 1239 (N.Y. County Ct. 1970).

In trial for speeding, photocopies of "Certification pursuant to CPLR 4518 of Records Maintained in the Regular Course of Business," prepared Bureau for Municipal Police, and bureau's reports concerning accuracy of radar unit used to measure defendant's speed, were admissible under CLS CPLR § 4518 since (1) copies of original documents in bureau's custody, sent to local police department as matter of bureau's business duty, were business records of local department, (2) such copies were also admissible as "other records" under § 4518(c) because they were police department "papers" under CLS CPLR § 2307, and (3) formalities of certification contained in CLS CPLR § 4540(b) are not required by § 4518(c), and thus officer's affidavit to which copies were annexed, stating that documents were true, complete copies of original records, constituted sufficient certification. People v Farrell, 137 Misc. 2d 926, 523 N.Y.S.2d 383, 1987 N.Y. Misc. LEXIS 2738 (N.Y. J. Ct. 1987).

16. —Speedometer readings

In a prosecution for speeding, a reading from an untested speedometer or radar device is admissible but is not, without, more sufficient for a speeding conviction. The deficiency in proof

can be supplied by the testimony of qualified observers. People v Dusing, 5 N.Y.2d 126, 181 N.Y.S.2d 493, 155 N.E.2d 393, 1959 N.Y. LEXIS 1625 (N.Y. 1959).

In a speeding case, the reading of a pursuing officer's untested speedometer is admissible in evidence, but insufficient, without more, to sustain a conviction. People v Riordan, 29 Misc. 2d 174, 212 N.Y.S.2d 515, 1961 N.Y. Misc. LEXIS 3130 (N.Y. County Ct. 1961).

In a prosecution for speeding, based in part on clocking of defendant's speed by a pursuing police officer, it was error to admit a so-called "speed deviation record" to establish accuracy of the officer's speedometer where the only foundation for admission of such record was the officer's own testimony that he witnessed calibration of his speedometer, and there was no testimony by the person who conducted the test as to its results or how it was made. People v Skupien, 33 Misc. 2d 908, 227 N.Y.S.2d 165, 1962 N.Y. Misc. LEXIS 3475 (N.Y. County Ct. 1962).

Evidence of the reading of an untested speedometer is admissible, but not, without more, sufficient for a speeding conviction. People v Skupien, 33 Misc. 2d 908, 227 N.Y.S.2d 165, 1962 N.Y. Misc. LEXIS 3475 (N.Y. County Ct. 1962).

I police departments keep regular records in writing on speedometer calibration and testings, the records may be introduced in evidence to sustain accuracy of a speedometer reading without the necessity of taking an extra officer off duty to testify in that regard in speeding cases. People ex rel. Collins v Wachs, 37 Misc. 2d 1001, 235 N.Y.S.2d 176, 1962 N.Y. Misc. LEXIS 2119 (N.Y. City Crim. Ct. 1962).

There being no showing by any witness that records concerning speedometer deviation tests made on pursuing police officer's car were made in regular course of police department business, a speeding conviction could not be sustained on a basis of his speedometer readings while following defendant's car and testimony of other members of the state police that the speedometer had been tested November 25, 1961 and again on April 3, 1962, not in the presence of the pursuing officer, where he made the check in question on March 22, 1962. People v Gentile, 38 Misc. 2d 162, 235 N.Y.S.2d 446, 1962 N.Y. Misc. LEXIS 2647 (N.Y. County Ct. 1962).

The statute fixes no stated intervals for calibration of speedometers on police vehicles, but the court decisions indicate that frequent calibrating is both necessary and advisable. 1961 Ops St Compt File #168.

17. —Radar

In a prosecution for speeding, a reading from an untested speedometer or radar device is admissible but is not, without, more sufficient for a speeding conviction. The deficiency in proof can be supplied by the testimony of qualified observers. People v Dusing, 5 N.Y.2d 126, 181 N.Y.S.2d 493, 155 N.E.2d 393, 1959 N.Y. LEXIS 1625 (N.Y. 1959).

Evidence derived from either stationary or moving radar devices is admissible without need for expert testimony, insofar as underlying scientific principles of moving and stationary radar are same; however, due to greater potential for error when moving radar is used, prosecution should bear greater burden of proof in demonstrating accuracy of particular radar unit involved, and should, in addition to those factors involved in establishing accuracy of stationary radar, show that officer independently verified speed of patrol vehicle on which device was located, and that radar was used in area posing minimal risk of misidentification or distortion. People v Knight, 72 N.Y.2d 481, 534 N.Y.S.2d 353, 530 N.E.2d 1273, 1988 N.Y. LEXIS 2714 (N.Y. 1988).

In trial for speeding, photocopies of "Certification pursuant to CPLR 4518 of Records Maintained in the Regular Course of Business," prepared Bureau for Municipal Police, and bureau's reports concerning accuracy of radar unit used to measure defendant's speed, were admissible under CLS CPLR § 4518 since (1) copies of original documents in bureau's custody, sent to local police department as matter of bureau's business duty, were business records of local department, (2) such copies were also admissible as "other records" under § 4518(c) because they were police department "papers" under CLS CPLR § 2307, and (3) formalities of certification contained in CLS CPLR § 4540(b) are not required by § 4518(c), and thus officer's affidavit to which copies were annexed, stating that documents were true, complete copies of original records, constituted sufficient certification. People v Farrell, 137 Misc. 2d 926, 523 N.Y.S.2d 383, 1987 N.Y. Misc. LEXIS 2738 (N.Y. J. Ct. 1987).

In trial for speeding, photocopies of radar activity log and operation certificates were admissible under CLS CPLR § 4518 since (1) they were certified as exact copies of original documents contained in police department files, and (2) reliability of unit in question was established by light test, internal calibration test, and 2 tuning fork tests, and by comparison with calibrated speedometer of arresting officer's car; fact that radar activity log was usable in litigation did not render it inadmissible since it provided permanent record of officer's daily activity and had general use for purposes of traffic control and record-keeping, and thus was admissible as police department business record. People v Farrell, 137 Misc. 2d 926, 523 N.Y.S.2d 383, 1987 N.Y. Misc. LEXIS 2738 (N.Y. J. Ct. 1987).

People proved case of speeding beyond reasonable doubt based on police officer's visual estimate of speed of defendant's vehicle (school van), together with his testimony that he used laser gun "LTI 20-20" device to obtain reading of defendant's speed; use of such device is based on well-accepted scientific principles and can be accepted as accurate method of measuring speed of moving vehicle. People v Depass, 165 Misc. 2d 217 (N.Y. City Crim. Ct. 1995).

In prosecution for speeding, People proved through expert testimony that "LT1 20-20 Laser Gun" was extremely reliable device to measure velocity and was accepted within scientific community. People v Clemens, 168 Misc. 2d 56, 642 N.Y.S.2d 760, 1995 N.Y. Misc. LEXIS 694 (N.Y. J. Ct. 1995).

18. Admissibility of administrative certificates

In a prosecution of defendant for speeding in excess of 50 m.p.h. along Route 17 in the Town of Wallkill, Orange County, a certificate of the State Traffic Commission was introduced into evidence that it had not fixed a maximum speed limit greater than 50 m.p.h. on or along any highway within the State of New York, except on portions of Route 17 in Sullivan and Orange Counties. Held: a conviction could not be obtained on the basis of this certificate, because exclusion therein contained could apply, by its terms, to this particular stretch of highway, which runs between a portion of Orange County and a portion of Sullivan County. People v Skeados, 20 Misc. 2d 893, 193 N.Y.S.2d 787, 1959 N.Y. Misc. LEXIS 2483 (N.Y. County Ct. 1959).

In a prosecution for exceeding the speed limit in a restricted speed zone, legal designation of the area as a restricted speed zone can be established by introducing in evidence a certified copy of the order of the commission establishing it. People v Radzinski, 24 Misc. 2d 109, 205 N.Y.S.2d 440, 1960 N.Y. Misc. LEXIS 2417 (N.Y. County Ct. 1960).

The provision in subd. 3 of former § 56, that the absence of speed signs along a state highway outside of an incorporated village or city should be presumptive evidence that no speed greater than 50 miles per hour is allowable, permitted proof of the 50-mile limit either by proof of absence of signs or by introduction of a proper certificate of the State Traffic Commission. People v Grammer, 25 Misc. 2d 223, 206 N.Y.S.2d 588, 1960 N.Y. Misc. LEXIS 2280 (N.Y. County Ct. 1960).

Where the charge is speeding on a public highway by driving in excess of 50 miles per hour, the prosecution can meet its burden of proving that no speed in excess of 50 miles an hour was permitted by the State Traffic Commission either by offering in evidence a certificate of the Commission or by offering testimony to absence of signs indicating that a greater speed was permitted. People v Riordan, 29 Misc. 2d 174, 212 N.Y.S.2d 515, 1961 N.Y. Misc. LEXIS 3130 (N.Y. County Ct. 1961).

In a prosecution for speeding in violation of subd. 3 of this section, the prosecution can establish that a speed in excess of 50 miles per hour was not permitted at the place in question either by certificate of the State Traffic Commission to that effect, or, if the violation occurred outside of an incorporated village or city, by proof of absence of speed signs, and a conviction cannot be sustained if the prosecution fails, in these or any other way, to

establish that a speed in excess of 50 miles per hour was unlawful. People v Hilger, 32 Misc. 2d 975, 225 N.Y.S.2d 611, 1962 N.Y. Misc. LEXIS 3662 (N.Y. County Ct. 1962).

In a prosecution for exceeding the general 50-mile-an-hour-speed limit, while the prosecution is entitled to the benefit of the presumption contained in § 1620 that a higher rate of speed was not authorized because no signs had been erected by the State Traffic Commission at the place in question so indicating, at least some proof is necessary in order to make out the necessary element that the Traffic Commission had not raised the speed limit, either by testimony to lack of signs or by presenting a certificate of the Commission to that effect. People v Aubin, 231 N.Y.S.2d 466 (N.Y. County Ct. 1962).

19. Sufficiency of evidence of speed traveled

Where defendant was traveling at about 20 to 25 miles per hour and as he applied his brakes to halt for a traffic signal his car skidded and collided with a stopped police car with an impact so slight as to cause no damage or injury, his conviction pursuant to Veh & Tr L § 1180(a) was reversed. The Court of Appeals held that as a matter of law the evidence was insufficient to establish that defendant was driving at an unsafe or imprudent speed, and that subdivision (a) of § 1180 was not intended to cover all possible acts of careless driving, but specifically directed against excessive speed. People v Davis, 24 N.Y.2d 796, 300 N.Y.S.2d 580, 248 N.E.2d 437, 1969 N.Y. LEXIS 1422 (N.Y. 1969).

Motorist driving on wet, hilly, winding road at speed which required him to brake with such force as to blow out hose in brake line system in order to avoid hitting school bus was traveling at speed excessive for driving conditions in which he found himself and regardless of whether he was exceeding speed limit was negligent in striking child crossing road in front of school bus. Gleich v Volpe, 32 N.Y.2d 517, 346 N.Y.S.2d 806, 300 N.E.2d 148, 1973 N.Y. LEXIS 1179 (N.Y. 1973).

Suspension of petitioner's operator's license for driving at an "imprudent rate of speed" was annulled where, at the hearing, petitioner denied knowledge of slippery condition of the highway, the only other witness said that he didn't believe he was going too fast, and the only additional evidence with respect to the road surface was a state trooper's report stating generally that roads in that area were "very slippery." Wilber v Hults, 22 A.D.2d 844, 254 N.Y.S.2d 71, 1964 N.Y. App. Div. LEXIS 2742 (N.Y. App. Div. 3d Dep't 1964).

The mere leaving of the pavement to the right, the swerving to the left and the running into a ditch does not warrant the conclusion that the statute in question has been violated. Beadle v Tofany, 36 A.D.2d 985, 320 N.Y.S.2d 873, 1971 N.Y. App. Div. LEXIS 4096 (N.Y. App. Div. 3d Dep't 1971).

There was substantial evidence before the Referee to sustain his finding that petitioner violated subdivision (e) of § 1180 of the Vehicle and Traffic Law, and that her license should be suspended where it appeared that petitioner was traveling at or in excess of the lawful statewide speed limit in an inhabited country area on a narrow hilly road when there existed a special hazard produced by the blinding headlights of an approaching vehicle and a slow moving vehicle ahead in her lane of travel, and she made no effort to slow down or minimize the danger inherent in the situation. Cardinal v Tofany, 36 A.D.2d 1000, 321 N.Y.S.2d 54, 1971 N.Y. App. Div. LEXIS 4053 (N.Y. App. Div. 3d Dep't 1971).

Substantial evidence supported administrative determination that petitioner violated CLS Veh & Tr § 1180(d) where ticketing police officer testified that, based on his training and expertise, he estimated petitioner's speed at 50 miles per hour in posted 30-mile-per-hour zone, and that his visual estimate was verified by radar. Pernick v New York State Dep't of Motor Vehicles, 217 A.D.2d 630, 629 N.Y.S.2d 783, 1995 N.Y. App. Div. LEXIS 7799 (N.Y. App. Div. 2d Dep't 1995).

In action by plaintiff who was injured in one-car collision that occurred while she was riding in car driven by defendant's decedent, summary judgment was not appropriate where opinions offered by parties' experts conflicted as to how fast decedent was driving and whether that speed was reasonable. Eaton v Di Perno, 259 A.D.2d 1034, 688 N.Y.S.2d 320, 1999 N.Y. App. Div. LEXIS 3445 (N.Y. App. Div. 4th Dep't 1999).

Given that the driver had a sufficient amount of time and distance between the onset of sun-impaired vision and the slow moving school bus ahead to reduce her speed to adjust to such condition, there was a sufficient basis for the determination that she violated N.Y. Veh. & Traf. Law § 1180(e). Black v N.Y. State DMV, 290 A.D.2d 635, 736 N.Y.S.2d 149, 2002 N.Y. App. Div. LEXIS 41 (N.Y. App. Div. 3d Dep't 2002).

The testimony failed to sustain a charge of speeding where it failed to set forth the rate of speed at or near the place of arrest, the distance covered by the trooper in following defendant, his qualifications to judge speed, or his observation as to the speed shown on his speedometer. People v Greer, 20 Misc. 2d 629, 193 N.Y.S.2d 929, 194 N.Y.S.2d 80, 1959 N.Y. Misc. LEXIS 2342 (N.Y. County Ct. 1959).

Where, in prosecution for speeding, defendant was originally charged with traveling at 60 miles per hour, and state trooper testified at trial that defendant was traveling at 70 miles per hour, and that it was customary to allow 10 miles an hour leeway, conviction would be sustained, in view of evidence that there were no signs at point of arrest allowing a speed greater than 50 miles an hour. People v Knowles, 20 Misc. 2d 859, 193 N.Y.S.2d 263, 1959 N.Y. Misc. LEXIS 2564 (N.Y. County Ct. 1959).

A violation of this statutory provision with respect to speed greater than is reasonable and prudent under the conditions cannot be based upon the mere happening of an accident. People v Bliss, 53 Misc. 2d 472, 278 N.Y.S.2d 732, 1967 N.Y. Misc. LEXIS 1640 (N.Y. County Ct. 1967).

Defendant's conviction of speeding was proper where the sole evidence produced was that derived from the use of a device known as Vascar (visual average speed computer recorder), which measures the distance a vehicle travels and the time it takes the vehicle to cover that distance and computes the average speed of the vehicle and visually displays that speed to the operator. Holding that since the instrument was new, expert testimony as to the scientific accuracy of the device had to be proven beyond a reasonable doubt, the court reviewed proof consisting of the testimony of qualified experts in charge of the development, manufacture and marketing of the device and evidence of the competence of the arresting trooper who clocked defendant's speed and accordingly affirmed the conviction. People v Persons, 60 Misc. 2d 803, 303 N.Y.S.2d 728, 1969 N.Y. Misc. LEXIS 1251 (N.Y. Spec. Sess. 1969).

Opinion evidence coupled with a reading from an untested speedometer is sufficient to convict. People v Hariton, 61 Misc. 2d 209, 305 N.Y.S.2d 247, 1969 N.Y. Misc. LEXIS 1401 (N.Y. Dist. Ct. 1969).

In absence of evidence that speed measuring device used to measure defendant's speed was accurate, reading from the device was not sufficient to sustain defendant's conviction of operating a motor vehicle at a speed of 94 miles per hour in a 55-mile per hour zone. People v Leatherbarrow, 69 Misc. 2d 563, 330 N.Y.S.2d 676, 1972 N.Y. Misc. LEXIS 2011 (N.Y. County Ct. 1972).

There was no evidence in the record raising a genuine factual issue as to a violation by plaintiff driver of N.Y. Veh. & Traf. Law § 1180(e) because the unrebutted testimony of plaintiff was that she was driving below the speed limit and defendant driver failed to present evidence of any condition which required plaintiff to further reduce her speed. Furthermore, plaintiff applied her brakes when she saw defendant ignore the stop sign. Carmody v Sass, 787 N.Y.S.2d 676, 3 Misc. 3d 1110(A), 2004 N.Y. Misc. LEXIS 723 (N.Y. Sup. Ct. 2004).

Where conflicting inferences could have been drawn as to the speed at which defendant's truck was traveling, the jury should decide what inference was to be drawn. Blaszyk v Eastern Auto Forwarding Co., 134 F.2d 600, 1943 U.S. App. LEXIS 3625 (2d Cir. N.Y. 1943).

20. —Testimony of police officer

The opinion evidence of police officers, properly qualified to testify as experts, is sufficient to sustain a conviction for speeding, even though the vehicle's speed is not checked or corroborated by some electrical or mechanical device. People v Olsen, 22 N.Y.2d 230, 292 N.Y.S.2d 420, 239 N.E.2d 354, 1968 N.Y. LEXIS 1317 (N.Y. 1968).

Department of Motor Vehicles sustained its burden of proving violation of speed limit since (1) arresting officer sufficiently established accuracy of radar device by using 2 tuning forks and internal calibration test before and after stopping driver, and (2) officer's estimate of vehicle's speed would have been sufficient to confirm even untested radar reading in view of officer's testimony that his visual estimates had been proven to be within 3 to 5 miles per hour of actual vehicle speeds. Henig v State Dep't of Motor Vehicles, 122 A.D.2d 250, 505 N.Y.S.2d 174, 1986 N.Y. App. Div. LEXIS 59594 (N.Y. App. Div. 2d Dep't 1986).

Evidence supported finding that petitioner was guilty of speeding in violation of CLS Veh & Tr § 1180(d) where accuracy of radar device was shown by use of tuning fork and internal calibration test before and after petitioner was stopped, and radar reading was confirmed by observation of police officer, who testified that his visual estimates had been proven to be accurate within 2 to 4 miles per hour of actual vehicle speeds. Winer v Adduci, 141 A.D.2d 827, 530 N.Y.S.2d 32, 1988 N.Y. App. Div. LEXIS 7131 (N.Y. App. Div. 2d Dep't 1988).

Determination by Department of Motor Vehicles finding petitioner guilty of violating CLS Veh & Tr § 1180(d) was supported by substantial evidence where police officer who issued summons testified that petitioner was traveling 90 miles per hour in 50-mile-per-hour zone. Hirsch v New York State Dep't of Motor Vehicles, 182 A.D.2d 761, 582 N.Y.S.2d 755, 1992 N.Y. App. Div. LEXIS 6239 (N.Y. App. Div. 2d Dep't 1992).

Finding of violation of CLS Veh & Tr § 1180(d) was supported by testimony of ticketing officer, properly referring to his notes, that he estimated petitioner's speed at 76 in 50-mph zone, and that this visual estimate was verified by radar. Neiman v State DMV Appeals Bd., 265 A.D.2d 558, 697 N.Y.S.2d 310, 1999 N.Y. App. Div. LEXIS 10803 (N.Y. App. Div. 2d Dep't 1999).

Conviction of speeding was supported by state trooper's testimony that he followed defendant's car and obtained "pace" indicating that defendant was traveling at about 75 miles per hour, and defense expert's attempt to refute that testimony left evidence proving, at minimum, that defendant was traveling in excess of posted speed limit. People v Burdick, 266 A.D.2d 711, 699 N.Y.S.2d 173, 1999 N.Y. App. Div. LEXIS 12115 (N.Y. App. Div. 3d Dep't 1999).

Petitioner's guilt of violating CLS Veh & Tr § 1180(d) was supported by testimony of police officer who issued summons as to his visual estimation of petitioner's speed as well as his extensive training in making such estimations. DeOliveira v New York State DMV, 271 A.D.2d 607, 706 N.Y.S.2d 173, 2000 N.Y. App. Div. LEXIS 4307 (N.Y. App. Div. 2d Dep't 2000).

Substantial evidence supported violation of CLS Veh & Tr § 1180 by speeding where patrol officer's visual estimate of speed confirmed untested radar reading, and officer's estimate alone would have been sufficient. Gentile v Jackson, 273 A.D.2d 235, 709 N.Y.S.2d 444, 2000 N.Y. App. Div. LEXIS 6285 (N.Y. App. Div. 2d Dep't 2000).

Testimony of a police officer was sufficient to sustain conviction of defendant for violating subd. 1 of this section, by driving at an imprudent rate of speed under existing conditions, where the officer observed defendant for some distance before his car started to skid and wound up by colliding with another car, the pavement was then wet and slippery, and, after qualifying as an expert on estimating speed of vehicles from observation, further testified that defendant, before attempting to stop, was traveling at 40 mph in a 30-mile speed zone, as he admitted to the officer twice after the collision, and should have been able to stop in far less distance than was required after his car started to skid. People v Le Bous, 29 Misc. 2d 850, 215 N.Y.S.2d 829, 1961 N.Y. Misc. LEXIS 2984 (N.Y. City Ct. 1961).

The proof was sufficient to sustain a conviction of speeding by defendant where an officer testified to long experience in estimating speed of vehicles, that he followed defendant for two miles at a distance of 200 feet, that his own speedometer read 70 miles per hour and that he likewise so estimated the speed at which defendant was traveling. People v Phippen, 32 Misc. 2d 877, 224 N.Y.S.2d 756, 1962 N.Y. Misc. LEXIS 3812 (N.Y. County Ct. 1962).

Reversal of a speeding conviction was deemed to be required by error of the magistrate in overruling an objection of defendant's counsel to the qualifications of one officer who testified as an "alleged" expert on speed, notwithstanding another officer in the following police car sufficiently qualified as an expert and both testified as to the speedometer reading on their car. People v Bokman, 36 Misc. 2d 132, 232 N.Y.S.2d 180, 1962 N.Y. Misc. LEXIS 2616 (N.Y. County Ct. 1962).

Conviction for speeding under CLS Veh & Tr § 1180 can, but need not, result from police officer's independent estimate of speed, regardless of whether that estimate was made after officer's observance of faulty or unreliable radar clocking and regardless of whether officer made estimate while in stationary position as opposed to pacing mode; sufficiency of such evidence must be determined on case-by-case basis in light of and considering particular facts and circumstances, including nature and extent of officer's opportunity to view moving vehicle. People v Correia, 140 Misc. 2d 813, 531 N.Y.S.2d 998, 1988 N.Y. Misc. LEXIS 488 (N.Y. J. Ct. 1988).

Defendant's guilt of speeding in violation of CLS Veh & Tr § 1180 was not established by police officer's spur-of-the-moment estimate of speed from stationary position, after being alerted by unreliable radar readout, since it was impossible to determine whether officer was influenced by readout. People v Correia, 140 Misc. 2d 813, 531 N.Y.S.2d 998, 1988 N.Y. Misc. LEXIS 488 (N.Y. J. Ct. 1988).

Evidence was legally sufficient to sustain defendant's speeding conviction because there was no reason to discredit a state trooper's testimony that defendant traveled 60 miles per hour in a 45 miles per hour speed zone. People v Cervera, 971 N.Y.S.2d 789, 40 Misc. 3d 89, 2013 N.Y. Misc. LEXIS 2989 (N.Y. App. Term 2013).

21. — —Opinion evidence

Though arresting officer reached an opinion as to defendant's speed as seen by officer through his rearview mirror at 400 feet, where testimony of officer was presented to bolster evidence of a speed reading from a radar device, a device which had not been properly tested, and court, faced with defendant's testimony that his speed had not exceeded 55 m. p. h. was without the benefit of another expert opinion, i. e., a second police officer, defendant could not be found guilty of speeding beyond a reasonable doubt. People v Perlman, 89 Misc. 2d 973, 392 N.Y.S.2d 985, 1977 N.Y. Misc. LEXIS 2703 (N.Y. Dist. Ct. 1977), overruled, Graf v Foschio, 102 A.D.2d 891, 477 N.Y.S.2d 190, 1984 N.Y. App. Div. LEXIS 19120 (N.Y. App. Div. 2d Dep't 1984).

Where police officers were qualified to testify as experts, opinion evidence as to speed of vehicle was sufficient to sustain a conviction for speeding where witnesses estimated speed at between 50 and 55 miles per hour in 30 mile per hour zone. People v Olsen, 22 N.Y.2d 230, 292 N.Y.S.2d 420, 239 N.E.2d 354, 1968 N.Y. LEXIS 1317 (N.Y. 1968).

Commissioner of Motor Vehicles properly sustained finding by administrative law judge that petitioner violated CLS Veh & Tr § 1180(b) based on testimony of police officer who issued summons that petitioner was driving at 95 miles per hour; officer's opinion that petitioner was driving at speed nearly twice legal limit did not require corroboration by mechanical devices. Martin v Adduci, 138 A.D.2d 599, 526 N.Y.S.2d 181, 1988 N.Y. App. Div. LEXIS 3150 (N.Y. App. Div. 2d Dep't 1988).

Opinion testimony of police officer without more is not sufficient proof to support a conviction for violating a speed ordinance. People v Wilson, 17 Misc. 2d 731, 188 N.Y.S.2d 344, 1959 N.Y. Misc. LEXIS 3745 (N.Y. County Ct. 1959).

Mere "expert" opinion of arresting officer as to speed of defendant's automobile, not supported by other or further corroborative testimony as to any speedometer reading, is insufficient to sustain a conviction for speeding. People v Whitney, 53 Misc. 2d 977, 280 N.Y.S.2d 729, 1967 N.Y. Misc. LEXIS 1653 (N.Y. Spec. Sess. 1967).

22. — —Officer's qualifications

There was substantial evidence to support findings that petitioner was driving at excessive speed, failed to stay right, and operated motor vehicle with gross negligence or in manner

showing reckless disregard for life and property of others where (1) investigating officer, based on his 17 years' experience investigating over 3,000 vehicle accidents and on his attendance at seminars and additional in-service training in traffic science investigation, testified that petitioner's vehicle was traveling between 40 and 45 miles per hour on wet roadway surface in 25-mile-per-hour zone at time of accident, (2) vehicle was found at accident scene in lane of oncoming traffic, and (3) officer testified that there was strong smell of alcohol on petitioner's breath, and petitioner admitted drinking beer just prior to accident; thus, commissioner of motor vehicles had authority to revoke petitioner's driver's license. Farrell v Adduci, 138 A.D.2d 944, 526 N.Y.S.2d 686, 1988 N.Y. App. Div. LEXIS 2748 (N.Y. App. Div. 4th Dep't 1988).

An officer, who had no experience or occasion to estimate the speed of moving cars, or training or qualification in taking measurements, readings and timings, was not qualified to testify as to the speed of the defendant's car. People v Harndon, 15 Misc. 2d 100, 180 N.Y.S.2d 799, 1959 N.Y. Misc. LEXIS 4569 (N.Y. County Ct. 1959).

Arresting officer, who for a period of five years in connection with his patrol duties had calculated the speed of cars by checking their speed against the speedometer of his car, was qualified to testify as to speed of defendant's car. People v Wimmer, 15 Misc. 2d 568, 182 N.Y.S.2d 148, 1959 N.Y. Misc. LEXIS 4527 (N.Y. County Ct. 1959).

A state policeman, was qualified to testify as to defendant's speed, where he stated that for six month period as a policeman and for 10 year period as a driver, he had formed opinions as to speed of automobiles and had checked his opinions with speedometers and various measuring devices from 5 to 10 times daily as a policeman, and that his speed estimates did not vary a great deal from the devices against which same was checked. People v La Bare, 16 Misc. 2d 890, 184 N.Y.S.2d 107, 1959 N.Y. Misc. LEXIS 4029 (N.Y. County Ct. 1959).

In a prosecution for speeding, it cannot be assumed that every State Trooper is an expert on judging speed, and a State Trooper's statement that his position as State Trooper qualifies him to give an adequate opinion as to speed will not qualify him as an expert, without particularization of his experience and knowledge. People v Barone, 24 Misc. 2d 1020, 205 N.Y.S.2d 914, 1960 N.Y. Misc. LEXIS 2365 (N.Y. County Ct. 1960).

In order that a witness may be qualified to estimate and express an opinion as to rate of speed in miles per hour, in a prosecution for speeding, the prosecution must establish specific experience of the witness and familiarity with motor vehicles and their speed, and it is not sufficient to show mere general experience by casual observation. People v Riordan, 29 Misc. 2d 174, 212 N.Y.S.2d 515, 1961 N.Y. Misc. LEXIS 3130 (N.Y. County Ct. 1961).

To sustain a conviction for speeding on the basis, alone, of testimony of a pursuing police officer and his reading of his untested speedometer, on opinion evidence of the officer as to defendant's rate of speed, from his personal observation, the prosecution has the burden of proving qualification of the witness to make a speed estimate and express an opinion, as a police officer is not presumed to be qualified to testify as an expert on speed and must, like any other witness, qualify as to his experience. People v Riordan, 29 Misc. 2d 174, 212 N.Y.S.2d 515, 1961 N.Y. Misc. LEXIS 3130 (N.Y. County Ct. 1961).

In a prosecution for speeding, the arresting officer sufficiently testifies as to his experience in estimating speeds of vehicles to qualify as an expert where he testifies that he has been estimating and checking such speeds over a period of years with a calibrated speedometer, and the evidence is then sufficient to sustain a conviction notwithstanding it is alleged that the speedometer on his car has not been calibrated for accuracy within a reasonable time. People ex rel. Haley v Fletcher, 30 Misc. 2d 468, 216 N.Y.S.2d 34, 1961 N.Y. Misc. LEXIS 2800 (N.Y. County Ct. 1961), cert. denied, 369 U.S. 807, 82 S. Ct. 650, 7 L. Ed. 2d 554, 1962 U.S. LEXIS 1759 (U.S. 1962).

A state trooper's experience in operating automobiles for a period of 20 years and being a member of the State Police for 15, with frequent checking of his opinions as to speed of vehicles against measuring devices, qualified him to testify as an expert on defendant's speed after following defendant's truck for two miles. People v Phippen, 32 Misc. 2d 877, 224 N.Y.S.2d 756, 1962 N.Y. Misc. LEXIS 3812 (N.Y. County Ct. 1962).

Although a member of the State Police, seeking to testify to speed of an automobile from his observation, testifies to several years of experience on the force, he fails properly to qualify himself as an expert where he does not particularize his experience in judging and estimating speed and the accuracy of his estimates. People v Skupien, 33 Misc. 2d 908, 227 N.Y.S.2d 165, 1962 N.Y. Misc. LEXIS 3475 (N.Y. County Ct. 1962).

Evidence held sufficient to sustain conviction of driving on a public highway in excess of 50 miles per hour where pursuing police officers testified they followed his car for about two miles, their speedometer readings showed that he was traveling 70 miles an hour, and one officer qualified as an expert on estimating speed of vehicles and gave his opinion that defendant was going between 65 and 70 miles an hour. People v Scordo, 36 Misc. 2d 49, 231 N.Y.S.2d 456, 1962 N.Y. Misc. LEXIS 2756 (N.Y. County Ct. 1962).

The law is clear that two elements of proof necessary to sustain a speeding conviction are the reading from an untested speedometer or radar device, and the opinion of an officer properly qualified as an expert to estimate speed; and testimony in regard to the arresting officer's qualifications that he had spent 19 months assigned to road patrol, that he had estimated the speed of moving vehicles approximately 200 times, that he had compared these estimates against calibrated speedometers and was accurate within 5 miles per hour was sufficient to qualify the officer as an expert, notwithstanding his admission that he knew only through hearsay that such speedometers were calibrated. People v Higley, 55 Misc. 2d 460, 285 N.Y.S.2d 467, 1967 N.Y. Misc. LEXIS 1045 (N.Y. Spec. Sess. 1967).

Police officer's testimony that defendant was driving 40 miles per hour in 25 mile-per-hour zone sustained speeding conviction where officer had been on force for 11 years, was taught to estimate speeds visually as part of his training as certified radar operator, and could estimate speeds with less than 5 mile-per-hour error. People v Farrell, 137 Misc. 2d 926, 523 N.Y.S.2d 383, 1987 N.Y. Misc. LEXIS 2738 (N.Y. J. Ct. 1987).

23. —Speedometer readings

In a prosecution for speeding, a reading from an untested speedometer or radar device is admissible but is not, without, more sufficient for a speeding conviction. The deficiency in proof can be supplied by the testimony of qualified observers. People v Dusing, 5 N.Y.2d 126, 181 N.Y.S.2d 493, 155 N.E.2d 393, 1959 N.Y. LEXIS 1625 (N.Y. 1959).

Proof consisting merely of reading of untested speedometer in vehicle operated by arresting officer is not sufficient to justify conviction for speeding. People v Harndon, 15 Misc. 2d 100, 180 N.Y.S.2d 799, 1959 N.Y. Misc. LEXIS 4569 (N.Y. County Ct. 1959).

In a prosecution for speeding, although testimony of witnesses for the prosecution was based upon readings from an untested speedometer, the evidence was sufficient to sustain a conviction where the witnesses were also testifying from observation and personal estimates of speed based upon their specific experience and familiarity with motor vehicles and their speed and not on mere casual observation. People v Zambito, 21 Misc. 2d 815, 194 N.Y.S.2d 724, 1959 N.Y. Misc. LEXIS 2343 (N.Y. County Ct. 1959).

Testimony of an arresting officer to accuracy of his speedometer upon checking it, following a speeding arrest, with another car whose speedometer had been calibrated, is not sufficient to establish an accurate test of the officer's speedometer on the basis of which a conviction for speeding can be sustained on testimony of the officer as to speed of defendant while being clocked by such officer. People v Canham, 23 Misc. 2d 441, 201 N.Y.S.2d 386, 1960 N.Y. Misc. LEXIS 2974 (N.Y. County Ct. 1960).

It is not sufficient to establish that a defendant was traveling at a speed in excess of 50 miles per hour for the arresting officer to testify that he "clocked" defendant at a speed of 65–70 miles per hour, in the absence of testimony or evidence as to accuracy of the

officer's speedometer. People v Barone, 24 Misc. 2d 1020, 205 N.Y.S.2d 914, 1960 N.Y. Misc. LEXIS 2365 (N.Y. County Ct. 1960).

In a speeding case, the reading of a pursuing officer's untested speedometer is admissible in evidence, but insufficient, without more, to sustain a conviction. People v Riordan, 29 Misc. 2d 174, 212 N.Y.S.2d 515, 1961 N.Y. Misc. LEXIS 3130 (N.Y. County Ct. 1961).

The proof was sufficient to sustain a conviction of speeding by defendant where an officer testified to long experience in estimating speed of vehicles, that he followed defendant for two miles at a distance of 200 feet, that his own speedometer read 70 miles per hour and that he likewise so estimated the speed at which defendant was traveling. People v Phippen, 32 Misc. 2d 877, 224 N.Y.S.2d 756, 1962 N.Y. Misc. LEXIS 3812 (N.Y. County Ct. 1962).

Evidence of the reading of an untested speedometer is admissible, but not, without more, sufficient for a speeding conviction. People v Skupien, 33 Misc. 2d 908, 227 N.Y.S.2d 165, 1962 N.Y. Misc. LEXIS 3475 (N.Y. County Ct. 1962).

Evidence held sufficient to sustain conviction of driving on a public highway in excess of 50 miles per hour where pursuing police officers testified they followed his car for about two miles, their speedometer readings showed that he was traveling 70 miles an hour, and one officer qualified as an expert on estimating speed of vehicles and gave his opinion that defendant was going between 65 and 70 miles an hour. People v Scordo, 36 Misc. 2d 49, 231 N.Y.S.2d 456, 1962 N.Y. Misc. LEXIS 2756 (N.Y. County Ct. 1962).

Evidence of the reading of an untested speedometer on a pursuing police vehicle is insufficient to sustain a speeding conviction, and it is not sufficient to bring out in testimony that the speedometer had been calibrated without details as to the calibration test and its results. People v Bokman, 36 Misc. 2d 132, 232 N.Y.S.2d 180, 1962 N.Y. Misc. LEXIS 2616 (N.Y. County Ct. 1962).

In a prosecution for violating a 40-mile-per-hour speed limit by driving for more than half a mile at a speed above 50 miles per hour, evidence as to speed as checked by the use of a calibrated clocking device on the arresting officer's car over a distance of about one-half mile was sufficient to sustain conviction. People v Kilpatrick, 36 Misc. 2d 259, 232 N.Y.S.2d 54, 1962 N.Y. Misc. LEXIS 2602 (N.Y. County Ct. 1962).

The evidence was sufficient to sustain a conviction of defendant for speeding by traveling 60 miles an hour in a 35 mile per hour zone, on the basis of a pursuing officer's testimony to following defendant's car for three-tenths of a mile and checking his speed with a calibrated speedometer, supported by testimony as to testing of the speedometer both before and after the occurrence. People ex rel. Collins v Wachs, 37 Misc. 2d 1001, 235 N.Y.S.2d 176, 1962 N.Y. Misc. LEXIS 2119 (N.Y. City Crim. Ct. 1962).

In a prosecution under subd b(2) of this section a police officer was qualified to give an opinion regarding the speed of the defendant's vehicle where he followed such vehicle for 2 ½ miles while observing his speedometer, and his testimony that the speedometer never read below 60 miles an hour was sufficient to sustain a conviction. People v Misch, 48 Misc. 2d 204, 264 N.Y.S.2d 419, 1965 N.Y. Misc. LEXIS 1334 (N.Y. County Ct. 1965).

Opinion evidence coupled with a reading from an untested speedometer is sufficient to convict. People v Hariton, 61 Misc. 2d 209, 305 N.Y.S.2d 247, 1969 N.Y. Misc. LEXIS 1401 (N.Y. Dist. Ct. 1969).

The statute fixes no stated intervals for calibration of speedometers on police vehicles, but the court decisions indicate that frequent calibrating is both necessary and advisable. 1961 Ops St Compt File #168.

24. —Radar

In a prosecution for speeding, a reading from an untested speedometer or radar device is admissible but is not, without, more sufficient for a speeding conviction. The deficiency in proof can be supplied by the testimony of qualified observers. People v Dusing, 5 N.Y.2d 126, 181 N.Y.S.2d 493, 155 N.E.2d 393, 1959 N.Y. LEXIS 1625 (N.Y. 1959).

Substantial evidence supported violation of CLS Veh & Tr § 1180 by speeding where patrol officer's visual estimate of speed confirmed untested radar reading, and officer's estimate alone would have been sufficient. Gentile v Jackson, 273 A.D.2d 235, 709 N.Y.S.2d 444, 2000 N.Y. App. Div. LEXIS 6285 (N.Y. App. Div. 2d Dep't 2000).

Testimony of a police officer was sufficient to sustain conviction of defendant for violating subd. 1 of this section, by driving at an imprudent rate of speed under existing conditions, where the officer observed defendant for some distance before his car started to skid and wound up by colliding with another car, the pavement was then wet and slippery, and, after qualifying as an expert on estimating speed of vehicles from observation, further testified that defendant, before attempting to stop, was traveling at 40 mph in a 30-mile speed zone, as he admitted to the officer twice after the collision, and should have been able to stop in far less distance than was required after his car started to skid. People v Le Bous, 29 Misc. 2d 850, 215 N.Y.S.2d 829, 1961 N.Y. Misc. LEXIS 2984 (N.Y. City Ct. 1961).

The defendant's contention that his speeding conviction must be set aside because the radar graph evidence upon which he was convicted was no longer available for consideration upon appeal was rejected and the conviction affirmed; the court held that, in the absence of the expert testimony of the state police officer who used the instrument, the markings on the graph tape would be unintelligible, pointing out that testimony was in the record although the actual tape had disappeared. People v Shalman, 50 Misc. 2d 405, 270 N.Y.S.2d 337, 1966 N.Y. Misc. LEXIS 1832 (N.Y. County Ct. 1966).

It is possible to convict on the basis of the reading of an untested radar device if some other form of corroboration has been provided. People v Perlman, 89 Misc. 2d 973, 392 N.Y.S.2d 985, 1977 N.Y. Misc. LEXIS 2703 (N.Y. Dist. Ct. 1977), overruled, Graf v Foschio, 102 A.D.2d 891, 477 N.Y.S.2d 190, 1984 N.Y. App. Div. LEXIS 19120 (N.Y. App. Div. 2d Dep't 1984).

In determining validity of test performed on a digital radar device used to apprehend a motorist for speeding, it is not the quantity of tests which must be considered by the court, but the quality of the test performed, and more important, whether the testing has provided ample opportunity for simple comparative analyses of the tests in question. People v Perlman, 89 Misc. 2d 973, 392 N.Y.S.2d 985, 1977 N.Y. Misc. LEXIS 2703 (N.Y. Dist. Ct. 1977), overruled, Graf v Foschio, 102 A.D.2d 891, 477 N.Y.S.2d 190, 1984 N.Y. App. Div. LEXIS 19120 (N.Y. App. Div. 2d Dep't 1984).

While the reliability of radar as a competent speed detection device, while in a stationary position, has long been recognized, the reliability of this particular type of unit to accurately measure the speed of an oncoming vehicle while the unit is located in a police car traveling in the opposite direction has not been established. Before such readings can be considered reliable there must be testimony detailing the operative principles underlying the capability of this type of radar unit to accurately compensate for the relative speeds and directions of the respective vehicles. People v Bellizzi, 108 Misc. 2d 209, 441 N.Y.S.2d 147, 1980 N.Y. Misc. LEXIS 2927 (N.Y. App. Term 1980).

Evidence was legally insufficient to support defendant's conviction for speeding (N.Y. Veh. & Traf. Law § 1180(d)). It appeared that the trial court improperly shifted the burden of proof from the prosecution to defendant in regard to demonstrating the accuracy of the particular radar unit involved, and the return did not show the existence of any testimony from the officer or other proof that the police officer independently verified the speed of the patrol vehicle (e.g., by comparing the speed registered by the radar unit with the speed indicated by the patrol vehicle speedometer), and that the radar was used in an area posing a minimal risk of misidentification or distortion (i.e., from heavy traffic, large trucks or large roadside objects such as billboards). People v Kahan, 842 N.Y.S.2d 155, 16 Misc. 3d 37, 2007 N.Y. Misc. LEXIS 3290 (N.Y. App. Term 2007).

25. — —Instrument calibration

Admission of calibration records of a lidar speed detecting device in defendant's trial for speeding in a school zone in

violation of N.Y. Veh. & Traf. Law § 1180(c)(1) did not violate her rights under the confrontation clause of U.S. Const. amend. VI; the calibration records were admissible as business records under N.Y. C.P.L.R. 4518(c), and not as testimonial documents, since the device was calibrated as part of a routine examination nearly a month before defendant was charged and was not calibrated solely in order to gather evidence for her prosecution. People v Deep, 821 N.Y.S.2d 381, 12 Misc. 3d 1137, 2006 N.Y. Misc. LEXIS 1600 (N.Y. City Ct. 2006).

Defendant's motion to set aside a verdict of guilty to a speeding violation (Vehicle and Traffic Law, § 1180, subd [b]), upon the grounds that it had not been established that the radar equipment used was correctly tested, is properly denied where the trooper, a trained radar operator, made various calibration tests, both before and after its use, which included internal calibration tests as well as tests with two tuning forks, and found the radar to be functioning correctly, with the court noting the history of general reliability regarding the type of radar employed and the tests used to check it. People v Maniscalco, 94 Misc. 2d 915, 405 N.Y.S.2d 888, 1978 N.Y. Misc. LEXIS 2318 (N.Y. J. Ct. 1978).

Digital radar device, which was used to apprehend motorist for speeding, could not be said to have been operating accurately or to have been adequately tested on day in question and, hence, conviction could not be obtained on basis of information provided, notwithstanding that an internal calibration device contained in equipment itself, and operating from same electrical source, confirmed that equipment was functioning properly, where no external test had been performed before or after particular setup, no graphic record was kept of radar test, no proof was offered of testing of equipment by expert technicians within a reasonable proximity to date in question, and no scientific testimony was offered as to reliability or fallibility of internal calibration device. People v Perlman, 89 Misc. 2d 973, 392 N.Y.S.2d 985, 1977 N.Y. Misc. LEXIS 2703 (N.Y. Dist. Ct. 1977), overruled, Graf v Foschio, 102 A.D.2d 891, 477 N.Y.S.2d 190, 1984 N.Y. App. Div. LEXIS 19120 (N.Y. App. Div. 2d Dep't 1984).

Where an individual has been charged with speeding by means of radar detection, there should be a showing of a testing of the instrument before and after each setup, including at least one test by an outside source to insure that a simple comparative analysis can be made, and there should be a proof of expert technical testing of the machine periodically, within a reasonable proximity of the violation. People v Perlman, 89 Misc. 2d 973, 392 N.Y.S.2d 985, 1977 N.Y. Misc. LEXIS 2703 (N.Y. Dist. Ct. 1977), overruled, Graf v Foschio, 102 A.D.2d 891, 477 N.Y.S.2d 190, 1984 N.Y. App. Div. LEXIS 19120 (N.Y. App. Div. 2d Dep't 1984).

If expediency, practicality and economy dictate the need for utilization of a one-man radar setup, and a law enforcement agency finds it impractical to conduct comparative analyses before and after each setup, then at the very least, expert testimony should be presented so that a body of precedents can be formulated from which the courts might conclude that an internal calibration test is sufficient in and of itself, due to its recognized reliability, to test the accuracy of the radar device. People v Perlman, 89 Misc. 2d 973, 392 N.Y.S.2d 985, 1977 N.Y. Misc. LEXIS 2703 (N.Y. Dist. Ct. 1977), overruled, Graf v Foschio, 102 A.D.2d 891, 477 N.Y.S.2d 190, 1984 N.Y. App. Div. LEXIS 19120 (N.Y. App. Div. 2d Dep't 1984).

The accuracy of a radar unit in order for such radar unit to be considered tested and for it alone to support a conviction for speeding beyond a reasonable doubt, must be established by clear, convincing and unequivocal proof and beyond a reasonable doubt. People v Lynch, 61 Misc. 2d 117, 304 N.Y.S.2d 985, 1969 N.Y. Misc. LEXIS 1099 (N.Y. County Ct. 1969).

Where a speeding conviction was based upon a radar unit, the accuracy of the unit was established by clear, convincing and unequivocal proof and beyond a reasonable doubt by internal checks made of the radar unit within the machine itself, consisting of a check as to accuracy by testing the tuning fork calibrated at 50 miles per hour and a check made by testing the tuning fork calibrated at 30 miles per hour. People v Lynch, 61 Misc. 2d 117, 304 N.Y.S.2d 985, 1969 N.Y. Misc. LEXIS 1099 (N.Y. County Ct. 1969).

Testimony that a radar device was calibrated by use of a tuning fork and by an officer driving through the speed zone at 9:50 p.m. and 11:15 p.m., and by tuning fork at 11:45 p.m. constituted reasonable proof of accuracy sufficient to sustain the defendant's conviction of speeding at 11:35 p.m. based upon radar determination of his speed. People v Stuck, 54 Misc. 2d 811, 283 N.Y.S.2d 564, 1967 N.Y. Misc. LEXIS 1206 (N.Y. County Ct. 1967).

Evidence was legally sufficient to sustain speeding conviction where moving radar unit which registered defendant's excessive speed was correctly calibrated, officer was qualified Doppler Traffic Radar Operator, he had independently verified speed of his patrol vehicle by comparing speed registered by radar unit with vehicle speedometer, and road and traffic conditions were such that any distortion or misidentification by unit was highly unlikely; moreover, even if radar evidence standing alone were deemed insufficient, corroborative evidence was provided by trained officer's visual estimation of defendant's speed. People v Knight, 72 N.Y.2d 481, 534 N.Y.S.2d 353, 530 N.E.2d 1273, 1988 N.Y. LEXIS 2714 (N.Y. 1988).

A determination revoking petitioner's driver's license for violating Veh & Tr Law § 1180(b) in operating a vehicle at 64 miles per hour in an area posted with a 50 mile per hour limit would be confirmed, where the arresting officer sufficiently established the accuracy of a radar device used at the scene by employing a tuning fork and internal calibration tests at the beginning and end of his tour of duty, and where the officer estimated that the vehicle in question was traveling at 65 miles per hour at the time. Graf v Foschio, 102 A.D.2d 891, 477 N.Y.S.2d 190, 1984 N.Y. App. Div. LEXIS 19120 (N.Y. App. Div. 2d Dep't 1984).

Department of Motor Vehicles sustained its burden of proving violation of speed limit since (1) arresting officer sufficiently established accuracy of radar device by using 2 tuning forks and internal calibration test before and after stopping driver, and (2) officer's estimate of vehicle's speed would have been sufficient to confirm even untested radar reading in view of officer's testimony that his visual estimates had been proven to be within 3 to 5 miles per hour of actual vehicle speeds. Henig v State Dep't of Motor Vehicles, 122 A.D.2d 250, 505 N.Y.S.2d 174, 1986 N.Y. App. Div. LEXIS 59594 (N.Y. App. Div. 2d Dep't 1986).

Evidence supported finding that petitioner was guilty of speeding in violation of CLS Veh & Tr § 1180(d) where accuracy of radar device was shown by use of tuning fork and internal calibration test before and after petitioner was stopped, and radar reading was confirmed by observation of police officer, who testified that his visual estimates had been proven to be accurate within 2 to 4 miles per hour of actual vehicle speeds. Winer v Adduci, 141 A.D.2d 827, 530 N.Y.S.2d 32, 1988 N.Y. App. Div. LEXIS 7131 (N.Y. App. Div. 2d Dep't 1988).

Where the state police set up and tested a radar device by causing a tuning fork, calibrated at 50 miles an hour, to be struck in front of and within the zone of influence of the radar device and by driving a police test car through the radar zone of influence at 50 miles an hour, and these two "tests" were repeated at the end of the tour of duty at the same location with the same results, the defendant's conviction of speeding could rest upon evidence of the radar device, as a "tested" radar instrument. People v Stephens, 52 Misc. 2d 1070, 277 N.Y.S.2d 567, 1967 N.Y. Misc. LEXIS 1746 (N.Y. County Ct. 1967).

Though arresting officer reached an opinion as to defendant's speed as seen by officer through his rearview mirror at 400 feet, where testimony of officer was presented to bolster evidence of a speed reading from a radar device, a device which had not been properly tested, and court, faced with defendant's testimony that his speed had not exceeded 55 m. p. h. was without the benefit of another expert opinion, i. e., a second police officer, defendant could not be found guilty of speeding beyond a reasonable doubt. People v Perlman, 89 Misc. 2d 973, 392 N.Y.S.2d 985, 1977 N.Y. Misc. LEXIS 2703 (N.Y. Dist. Ct. 1977), overruled, Graf v Foschio, 102 A.D.2d 891, 477 N.Y.S.2d 190, 1984 N.Y. App. Div. LEXIS 19120 (N.Y. App. Div. 2d Dep't 1984).

26. —Admissions by driver

Where defendant voluntarily testified on his own behalf and admitted that he had been speeding on Lake Ontario State Parkway prior to his arrest, court properly instructed jury that it

could consider this admission in connection with speeding charge in indictment, even though bill of particulars alleged that defendant was speeding in vicinity of route 390. People v McDonough, 132 A.D.2d 997, 518 N.Y.S.2d 524, 1987 N.Y. App. Div. LEXIS 49471 (N.Y. App. Div. 4th Dep't), app. denied, 70 N.Y.2d 801, 522 N.Y.S.2d 119, 516 N.E.2d 1232, 1987 N.Y. LEXIS 19497 (N.Y. 1987).

Evidence justified conviction of driving a bus in excess of 50 mph in a 50-mile zone, where defendant admitted driving over that speed for at least some part of the nine-tenths of a mile in which he was "clocked" by the police. People v Williams, 23 Misc. 2d 581, 196 N.Y.S.2d 790, 1960 N.Y. Misc. LEXIS 3547 (N.Y. County Ct. 1960).

Where a police officer testified in a prosecution for violation of subd. 1 of this section that defendant admitted to him, twice, in a conversation following the accident, that he had been traveling at 40 mph and accordingly in excess of a 30 mph speed limit just prior to the emergency, the court is not required to credit defendant's testimony on the stand repudiating such admissions and asserting that he was driving within the speed limit, as against the officer's testimony, not only as to the admissions but also as to defendant's speed on the basis of his personal observations, after qualifying as an expert on speeds of vehicles from observation. People v Le Bous, 29 Misc. 2d 850, 215 N.Y.S.2d 829, 1961 N.Y. Misc. LEXIS 2984 (N.Y. City Ct. 1961).

27. —Excuses for speeding

Evidence that a driver in attempting to pass a second car at a speed not in excess of forty miles an hour lost control of his automobile, drove off the road and then struck the second car in attempting to regain the highway, is insufficient to sustain a conviction for reckless driving under this section where there is evidence that the second car swung over the center line of the highway and forced the first car off the road. People v Parker, 84 N.Y.S.2d 187, 192 Misc. 551, 1948 N.Y. Misc. LEXIS 3541 (N.Y. County Ct. 1948).

Defendant was convicted of speeding as against his contention that in order to avoid being struck in the rear by a suddenly approaching vehicle it was necessary for him to increase his speed to permit the vehicle to pass when he could not move safely into the right-hand lane. People v Hariton, 61 Misc. 2d 209, 305 N.Y.S.2d 247, 1969 N.Y. Misc. LEXIS 1401 (N.Y. Dist. Ct. 1969).

Where defendant accelerated to 67 miles an hour in a 50 mile an hour zone in order to pass around a rapidly slowing vehicle, the speed of the defendant was justifiable under the circumstances and he could not be convicted of a violation of the statute. People v Cataldo, 65 Misc. 2d 286, 316 N.Y.S.2d 873, 1970 N.Y. Misc. LEXIS 1135 (N.Y. Dist. Ct. 1970).

28. Sufficiency of evidence of speed limit

The failure of the People to prove that the stretch of road involved did not fall within the areas expressly excepted from the operation of subdivision 3 of former § 56 was not fatal, since the court would take judicial notice that the place where the speeding occurred was neither a city nor an incorporated village. People v Shapiro, 7 N.Y.2d 370, 197 N.Y.S.2d 715, 165 N.E.2d 564, 1960 N.Y. LEXIS 1426 (N.Y. 1960).

Where defendant was charged with driving in excess of 50 miles per hour in violation of Vehicle and Traffic Law § 1180, subdivision [b] which statute provided such limit except "when maximum speed limits have been established as hereinafter authorized", the court could take judicial notice of the Official Compilation of Codes, Rules and Regulations of the State of New York, which did not contain any change in the 50-mile-per-hour speed limit for the village in question, and, thus, the people met the burden of proof placed upon them by law. People v Foster, 27 N.Y.2d 47, 313 N.Y.S.2d 384, 261 N.E.2d 389, 1970 N.Y. LEXIS 1156 (N.Y. 1970).

The failure of the People to prove that a speed limit had been set by the traffic Commission did not bar conviction of defendant for speeding, where the evidence showed that the trooper was required to speed as high as 100 m.p.h. to apprehend the defendant, and that defendant during this time was driving not less than 85 m.p.h., which speed was in excess of any reasonable or accepted speed limits known in the State of New York. People v Loucks, 20 Misc. 2d 606, 194 N.Y.S.2d 399, 1959 N.Y. Misc. LEXIS 2356 (N.Y. County Ct. 1959).

The law does not require the doing of a useless act, whether in proof of lawsuit or otherwise; and where evidence clearly indicates that defendant was proceeding at rate greater than any reasonable or acceptable rate of speed known in state, speeding violation is so obvious and patent that proof of speed limit is academic and unnecessary. People v Hosier, 20 Misc. 2d 649, 194 N.Y.S.2d 395, 1959 N.Y. Misc. LEXIS 2334 (N.Y. County Ct. 1959).

Where a defendant is charged with speeding, failure of the prosecution to prove that a rate of speed greater than 50 mph was not permitted by the State Traffic Commission at the time and place set forth in the information is fatal to making out a case. People v Barone, 24 Misc. 2d 1020, 205 N.Y.S.2d 914, 1960 N.Y. Misc. LEXIS 2365 (N.Y. County Ct. 1960).

In a prosecution for speeding in violation of an order, rule, or regulation of the State Traffic Commission limiting speed of vehicles on a state highway outside of a city or incorporated village, the prosecution has the burden of proving, not only that the area in question was designated as a restricted zone by the Traffic Commission, but also that the order, rule, or regulation of the Commission was filed in the office of the Department of State as required by art. IV § 8 of the Constitution, and it is insufficient merely to introduce a certificate of the Department of Taxation and Finance that such an order was issued. People v Cull, 26 Misc. 2d 668, 210 N.Y.S.2d 10, 1961 N.Y. Misc. LEXIS 3567 (N.Y. County Ct.), aff'd, 10 N.Y.2d 123, 218 N.Y.S.2d 38, 176 N.E.2d 495, 1961 N.Y. LEXIS 1080 (N.Y. 1961).

People's failure to prove that no greater speed than 50 miles per hour was permitted by State Traffic Commission was fatal to prosecution for speeding. People v Metz, 29 Misc. 2d 181, 212 N.Y.S.2d 986, 1961 N.Y. Misc. LEXIS 3125 (N.Y. County Ct. 1961).

Where the prosecution presented substantial evidence the defendant was driving at 65 miles per hour and the court took judicial notice that the maximum speed limit on which the defendant was proceeding was 50 miles per hour, the evidence was sufficient to sustain a conviction for speeding, notwithstanding the prosecution had not proven there were no higher speed limits established on that particular section of highway. People v Kasprzyk, 59 Misc. 2d 236, 298 N.Y.S.2d 334, 1969 N.Y. Misc. LEXIS 1788 (N.Y. J. Ct. 1969).

In a prosecution for driving at a speed of 45 miles per hour within a village which had a speed limit of 30 miles per hour in violation of Vehicle and Traffic Law § 1180(d), proof by the People that there was a single speed sign posting the village speed at a specified point, was insufficient to establish the element of reasonable notice of speed limit to the defendant where there was no evidence that defendant entered the village by way of the street on which the speed limit was posted nor was there any evidence that other entrances to the village were similarly posted. People v Stafford, 62 Misc. 2d 1027, 310 N.Y.S.2d 637, 1970 N.Y. Misc. LEXIS 1691 (N.Y. J. Ct. 1970).

The defendant could not be found guilty of speeding, even though he was clearly speeding in violation of Veh & Tr Law § 1180, where the issuing patrolman placed the wrong information in connection with the description of the vehicle the defendant was driving on the summons, the testifying officer positively identified the wrong vehicle, and there was no testimony about the speed limits. People v Goldsmith, 110 Misc. 2d 528, 442 N.Y.S.2d 760, 1981 N.Y. Misc. LEXIS 3118 (N.Y. Village Ct. 1981).

Under presumption established by CLS Veh & Tr § 1110(d), testimony was sufficient to establish that speed limit sign complied with requirements of law where police officer testified that sign was 30-mile-per-hour sign that was approximately one foot by 2 feet in size. People v Praete, 144 Misc. 2d 801, 545 N.Y.S.2d 499, 1989 N.Y. Misc. LEXIS 549 (N.Y. J. Ct. 1989), aff'd, 150 Misc. 2d 389, 575 N.Y.S.2d 623, 1991 N.Y. Misc. LEXIS 608 (N.Y. App. Term 1991).

Village-wide 30-mile-per-hour speed limit was valid and enforceable in regard to defendant, even though speed limit signs were not posted at each and every entrance to village, where speed limit signs were posted at principal entrances to village and

on road on which defendant was stopped for speeding, in close proximity to location of stop. People v Praete, 144 Misc. 2d 801, 545 N.Y.S.2d 499, 1989 N.Y. Misc. LEXIS 549 (N.Y. J. Ct. 1989), aff'd, 150 Misc. 2d 389, 575 N.Y.S.2d 623, 1991 N.Y. Misc. LEXIS 608 (N.Y. App. Term 1991).

In prosecution for speeding within village, it was unnecessary for People to establish that area speed limit signs were posted at entrances to village where (1) evidence showed that defendant actually passed speed limit sign, and (2) testimony of police officer as to size of sign sufficiently established its conformity to legal requirements, even if defendant was travelling on 4-lane conventional highway. People v Praete, 150 Misc. 2d 389, 575 N.Y.S.2d 623, 1991 N.Y. Misc. LEXIS 608 (N.Y. App. Term 1991).

The statutory proviso, granting state traffic commission right to create exceptional speed zones, must be negatived both by pleading and by proof in a prosecution for violation of speed limits. People v Gross, 130 N.Y.S.2d 282, 1954 N.Y. Misc. LEXIS 2027 (N.Y. County Ct. 1954).

In a prosecution for exceeding the general 50-mile-an-hour-speed limit, while the prosecution is entitled to the benefit of the presumption contained in § 1620 that a higher rate of speed was not authorized because no signs had been erected by the State Traffic Commission at the place in question so indicating, at least some proof is necessary in order to make out the necessary element that the Traffic Commission had not raised the speed limit, either by testimony to lack of signs or by presenting a certificate of the Commission to that effect. People v Aubin, 231 N.Y.S.2d 466 (N.Y. County Ct. 1962).

29. —Absence of signs

The People, in a speeding case, were privileged to prove their case against the defendant by resorting to the presumption in subdivision 3 of former § 56, based on absence of signs; since the presumption is still valid. They did not need to rely on a certificate from the State Traffic Commission stating that the maximum speed limit at the location in question was 50 m.p.h. People v Shapiro, 7 N.Y.2d 370, 197 N.Y.S.2d 715, 165 N.E.2d 564, 1960 N.Y. LEXIS 1426 (N.Y. 1960).

Since the repeal of § 95-c of the Vehicle and Traffic Law (L 1957 ch 698) and the failure of the Legislature to re-enact similar powers in § 1620 and the other sections dealing with the powers of the State Traffic Commission, there is serious question whether the method of proving the speed limit by showing the absence of signs is now available in traffic prosecutions. People v Skeados, 20 Misc. 2d 893, 193 N.Y.S.2d 787, 1959 N.Y. Misc. LEXIS 2483 (N.Y. County Ct. 1959).

The defendant could not be convicted of speeding on the evidence of a state trooper where he testified that, for $^{3}/_{10}$ ths of a mile in which he observed the speed of the defendant, there were no signs along the road indicating the speed limit. People v Skeados, 20 Misc. 2d 893, 193 N.Y.S.2d 787, 1959 N.Y. Misc. LEXIS 2483 (N.Y. County Ct. 1959).

The provision in subd. 3 of former § 56, that the absence of speed signs along a state highway outside of an incorporated village or city should be presumptive evidence that no speed greater than 50 miles per hour is allowable, permitted proof of the 50-mile limit either by proof of absence of signs or by introduction of a proper certificate of the State Traffic Commission. People v Grammer, 25 Misc. 2d 223, 206 N.Y.S.2d 588, 1960 N.Y. Misc. LEXIS 2280 (N.Y. County Ct. 1960).

Where the charge is speeding on a public highway by driving in excess of 50 miles per hour, the prosecution can meet its burden of proving that no speed in excess of 50 miles an hour was permitted by the State Traffic Commission either by offering in evidence a certificate of the Commission or by offering testimony to absence of signs indicating that a greater speed was permitted. People v Riordan, 29 Misc. 2d 174, 212 N.Y.S.2d 515, 1961 N.Y. Misc. LEXIS 3130 (N.Y. County Ct. 1961).

In a prosecution for speeding in violation of subd. 3 of this section, the prosecution can establish that a speed in excess of 50 miles per hour was not permitted at the place in question either by certificate of the State Traffic Commission to that effect, or, if the violation occurred outside of an incorporated village or city, by proof of absence of speed signs, and a conviction cannot be sustained if the prosecution fails, in these or any other way, to establish that a speed in excess of 50 miles per hour was unlawful. People v Hilger, 32 Misc. 2d 975, 225 N.Y.S.2d 611, 1962 N.Y. Misc. LEXIS 3662 (N.Y. County Ct. 1962).

Defendant's motion to dismiss a charge of operating his motor vehicle 60 miles per hour in a 40-mile-an-hour zone was granted, where the prosecution proved that speed signs were properly posted, but failed to prove that defendant had passed a speed limit sign prior to the alleged violation. People v Mayoue, 50 Misc. 2d 150, 269 N.Y.S.2d 922, 1966 N.Y. Misc. LEXIS 1968 (N.Y. Spec. Sess. 1966).

Defendant's motion to dismiss an information charging him with driving at a speed of 48 m.p.h. in a 30 m.p.h. zone would be granted where there had been no signs properly notifying him that he was in either an area or a town in which there was a maximum speed limit of 30 m.p.h. Moreover, the presumption of innocence of the defendant could not be overcome by a showing of "substantial compliance" with notice requirements on the part of the town amounting to anything less than "actual notice" to the defendant. People v Hall, 108 Misc. 2d 507, 437 N.Y.S.2d 606, 1981 N.Y. Misc. LEXIS 2230 (N.Y. J. Ct. 1981).

The posting of speed limit signs is not required in order for the prosecution to convict a driver of operating a motor vehicle in excess of 55 miles per hour, since Vehicle and Traffic Law §§ 1180, 1180-a, prohibits such speeds anywhere on any public highway in the State. People v Heyman, 121 Misc. 2d 1071, 469 N.Y.S.2d 874, 1983 N.Y. Misc. LEXIS 4034 (N.Y. City Ct. 1983).

Defendant was entitled to dismissal of speeding charge where village speed sign was obliterated by foliage since (1) pursuant to CLS Veh & Tr § 1110(b), signs not properly positioned and sufficiently legible cannot be enforced against alleged violator, (2) in enacting CLS Veh & Tr §§ 1683-1685, legislature intended that motorists could not be presumed to know various speed limits enacted by cities and villages, and therefore required municipalities to erect signs warning motorists of such speed limits, and (3) any presumption of validity of signs arising from CLS Veh & Tr § 1110(b) was overcome by village prosecutor's previous dismissal of several other cases for alleged speeding violations in same geographic area because of obliteration of speed sign, and by photographic exhibits. People v Fox, 157 Misc. 2d 238, 596 N.Y.S.2d 984, 1993 N.Y. Misc. LEXIS 104 (N.Y. J. Ct. 1993).

30. Suspension of driver's license

A determination suspending petitioner's license for a violation of former § 58 had to be annulled and the license restored, where proof showed that, although the accident was the result of bad judgment on petitioner's part, it could not be said to have constituted "reckless driving" within the meaning of former § 58. Seid v Harnett, 256 A.D. 200, 9 N.Y.S.2d 426, 1939 N.Y. App. Div. LEXIS 4682 (N.Y. App. Div. 1939).

Suspension of operator's license on evidence that he was driving 25–30 mph on a wet cobblestone road when his vehicle skidded and struck a stanchion which separated the road was improper. The mere happening of the accident was not sufficient to support the suspension. Weisinger v MacDuff, 285 A.D. 607, 139 N.Y.S.2d 531, 1955 N.Y. App. Div. LEXIS 5550 (N.Y. App. Div. 1955).

Suspension of petitioner's license was confirmed for violation of subdivision 1 of former § 56 where the only testimony concerning speed was that he was going between 25 and 30 miles per hour 3 car lengths behind the vehicle with which he collided. Pardo v Kelly, 2 A.D.2d 993, 158 N.Y.S.2d 773, 1956 N.Y. App. Div. LEXIS 3389 (N.Y. App. Div. 2d Dep't 1956).

Suspension of petitioner's operator's license for driving at an "imprudent rate of speed" was annulled where, at the hearing, petitioner denied knowledge of slippery condition of the highway, the only other witness said that he didn't believe he was going too fast, and the only additional evidence with respect to the road surface was a state trooper's report stating generally that roads in that area were "very slippery." Wilber v Hults, 22 A.D.2d 844, 254 N.Y.S.2d 71, 1964 N.Y. App. Div. LEXIS 2742 (N.Y. App. Div. 3d Dep't 1964).

Where petitioner was proceeding at an unsafe speed for the conditions of the highway, suspension of driver's license for 45 days was not excessive. Alexander v Tofany, 29 A.D.2d 1015, 289 N.Y.S.2d 438, 1968 N.Y. App. Div. LEXIS 4138 (N.Y. App. Div. 3d Dep't 1968).

Suspension of motor vehicle operator's license for 60 days for violation of speed restrictions, was, under the circumstances, an abuse of discretion and suspension would be reduced for 10 days. Szabo v Comm'r of Motor Vehicles, 38 A.D.2d 835, 329 N.Y.S.2d 765, 1972 N.Y. App. Div. LEXIS 5453 (N.Y. App. Div. 2d Dep't 1972).

Suspension of a driver's license was unwarranted where it was pure speculation as to any condition created by a rain rendered proceeding at the legal rate of 60 miles per hour imprudent within the meaning of subdivision (e) of § 1180 of the Vehicle and Traffic Law. Blakeney v Tofany, 40 A.D.2d 740, 336 N.Y.S.2d 733, 1972 N.Y. App. Div. LEXIS 3621 (N.Y. App. Div. 3d Dep't 1972).

Substantial evidence existed supporting the determination that defendant violated Veh & Tr Law § 1180(d) by driving 68 miles per hour in a 35-mile-per-hour zone, and upon the finding that said section was violated imposing a 30-day suspension of his driver's license and a penalty of $150, where the violation was defendant's second speeding conviction in 18 months. La Bue v Melton, 87 A.D.2d 975, 450 N.Y.S.2d 101, 1982 N.Y. App. Div. LEXIS 16509 (N.Y. App. Div. 4th Dep't 1982).

Suspension of truck drivers' operator's licence for 30 days by Commissioner of Motor Vehicles was appropriate penalty where driver's rig struck passenger car which had partially left road and was skidding sideways out of control at highway construction site at which traffic was restricted to one lane of travel, and evidence supported finding by administrative law judge that truck driver violated CLS Veh & Tr § 1180 by failing to reduce his speed once he knew or should have known that passenger car was experiencing trouble. Draper v Passidomo, 122 A.D.2d 564, 505 N.Y.S.2d 21, 1986 N.Y. App. Div. LEXIS 59841 (N.Y. App. Div. 4th Dep't 1986).

An automobile operator's license may be suspended upon a determination of the Commissioner of Motor Vehicles after a hearing that the operator was unable to stop his motor vehicle at an intersection in time to avoid a collision with another motor vehicle. McNellis v Fletcher, 96 N.Y.S.2d 599, 197 Misc. 80, 1950 N.Y. Misc. LEXIS 1576 (N.Y. Sup. Ct. 1950).

Where driver was arrested, charged with speeding, and arraigned, and driver, who deposited bail, failed to appear upon date set for trial, but there was no trial, no plea of guilty and no hearing, driver's license to operate motor vehicle should not have been temporarily suspended. Zimmerman v Kelly, 9 Misc. 2d 989, 170 N.Y.S.2d 847, 1958 N.Y. Misc. LEXIS 3794 (N.Y. Sup. Ct. 1958).

The stamping on driver's license of legend that license had been temporarily suspended was prejudicial and should not have been put down by Commissioner of Motor Vehicles and hence conviction of motorist for speeding upon arrest by officer who was shown driver's license was unwarranted since the examination of license by officer was just as incriminating to defendant as if officer had examined a stub containing a record of convictions. People v Dawley, 51 Misc. 2d 367, 273 N.Y.S.2d 162, 1966 N.Y. Misc. LEXIS 1609 (N.Y. County Ct. 1966), rev'd, 19 N.Y.2d 663, 278 N.Y.S.2d 855, 225 N.E.2d 548, 1967 N.Y. LEXIS 1751 (N.Y. 1967).

City court judge, in proper exercise of his discretion, had the power to suspend petitioner's driver's licenses pending trial of petitioners on speeding charges. Hague v Sedita, 56 Misc. 2d 203, 288 N.Y.S.2d 212, 1968 N.Y. Misc. LEXIS 1723 (N.Y. Sup. Ct. 1968).

Motorist was not entitled to have hearing on proposed suspension of his license to operate transferred from Watertown to a place in the capital district, preferably in Schenectady, on ground of convenience of licensee, of passenger in his automobile at time of issuance of ticket and of his attorney or because of possibility of inclement weather and dangerous driving conditions if licensee was required to travel to Watertown. Department of Motor Vehicles v Slowek, 66 Misc. 2d 987, 322 N.Y.S.2d 900, 1971 N.Y. Misc. LEXIS 1616 (N.Y. Sup. Ct. 1971).

31. Revocation of driver's license

An operator's license was properly revoked and his registration suspended pending compliance with the financial responsibility provisions of the statute, following conviction for a traffic infraction where, following an accident, the licensee pleaded guilty to a violation of former § 56, subd 1, and there was proof before the commissioner, of such violation. Jones v Fletcher, 279 A.D. 1118, 112 N.Y.S.2d 577, 1952 N.Y. App. Div. LEXIS 6021 (N.Y. App. Div. 1952).

A determination revoking an operator's license for failure to operate an automobile at a speed permitting the operator to stop the car was annulled where the evidence showed the automobile was operated at 40 miles per hour in a 50 mile an hour zone and the car left the road as the operator attempted to turn the wheel. The mere happening of an accident does not justify revocation. Dietrichsen v MacDuff, 280 A.D. 1016, 116 N.Y.S.2d 887, 1952 N.Y. App. Div. LEXIS 4573 (N.Y. App. Div. 1952).

A license was improperly revoked for violation of this section where the uncontradicted proof showed that the operator, a tree trimmer with high top boots on, was driving a pick-up truck when he approached an intersection. He slowed down by taking his foot off the accelerator but when he attempted to apply the brakes, his shoestrings were undone and the workman on his right had his foot on the strings. By the time he disengaged his foot, the truck went through a stop-sign at the intersection and hit another car. Maines v MacDuff, 284 A.D. 66, 130 N.Y.S.2d 91, 1954 N.Y. App. Div. LEXIS 3342 (N.Y. App. Div. 1954).

Although a violation of this section is a traffic infraction, a violation thereof cannot be inferred merely because of an accident. Hence, it was error to revoke a license upon proof that the operator was driving well under the statutory speed limit, came upon ice, lost control of his car and car travelled up to 200 feet before overturning. Hessney v MacDuff, 284 A.D. 70, 130 N.Y.S.2d 405, 1954 N.Y. App. Div. LEXIS 3344 (N.Y. App. Div. 1954).

Validity of prior conviction for traffic violation could not be collaterally attacked in proceeding to review action of Commissioner of Motor Vehicles in revoking motorist's operator's license. Gross v MacDuff, 284 A.D. 786, 135 N.Y.S.2d 435, 1954 N.Y. App. Div. LEXIS 3498 (N.Y. App. Div. 1954).

Evidence that truck driver entered unguarded one-track railroad spur crossing at speed of twenty-five to thirty miles an hour as locomotive backed into crossing, resulting in collision and fatal injuries to locomotive conductor, and that driver was familiar with crossing and knew that spur was used intermittently for freight purposes, sustained Motor Vehicles Commissioner's determination that driver violated Vehicle and Traffic Law by driving at such speed that he could not stop without causing property damage or personal injuries, so as to authorize revocation of his chauffeur's license. Hume v Kelly, 1 A.D.2d 742, 147 N.Y.S.2d 146, 1955 N.Y. App. Div. LEXIS 3774 (N.Y. App. Div. 3d Dep't 1955).

Under statute requiring revocation of operator's license if he is convicted of a third or subsequent traffic violation within a period of eighteen months, plea of guilty by operator to a charge of reckless driving constituted a "conviction" even though record disclosed that fine was suspended, and license was properly revoked when operator had also twice pleaded quilty to speeding within eighteen months. Jones v Kelly, 9 A.D.2d 395, 194 N.Y.S.2d 585, 1959 N.Y. App. Div. LEXIS 5406 (N.Y. App. Div. 4th Dep't 1959).

Revocation of an operator's license for violating either subd. 1 or 4 of this section could not be sustained where it merely appeared that he was driving without chains on an S turn at 45 miles per hour where the center of the pavement was clear but the edges were icy, got over onto the icy portion, ran over an embankment, and one passenger was killed and others injured, as the accident was obviously not caused by speed but by negligence in getting over onto the icy part. Application of Disney, 16 A.D.2d 494, 229 N.Y.S.2d 587, 1962 N.Y. App. Div. LEXIS 9007 (N.Y. App. Div. 3d Dep't 1962).

Where justice before whom speeder was arraigned made two conflicting affidavits as to whether speeder was instructed that plea of guilty was equal to conviction and that upon conviction he was subject to possible revocation of his license, and there was no

record of any proceedings before the Commissioner of Motor Vehicles, revocation was annulled pending determination by the Commissioner. Schayes v MacDuff, 133 N.Y.S.2d 478, 1954 N.Y. Misc. LEXIS 2238 (N.Y. Sup. Ct. 1954), rev'd, 285 A.D. 1220, 140 N.Y.S.2d 764 (N.Y. App. Div. 1955).

32. Warning required by Code of Criminal Procedure § 335-a

As a result of the 1953 amendment to Code of Criminal Procedure § 335-a, a defendant must be warned in compliance with that section in every case involving a violation of the Vehicle and Traffic Law. The commissioner could not suspend the license of a person three times convicted of speeding within eighteen months relying on the presumptive evidence of facts recited in the certificates of conviction where petitioner alleged that he was not properly afforded the warning when arraigned on the second offense. Hubbell v Macduff, 2 N.Y.2d 563, 161 N.Y.S.2d 857, 141 N.E.2d 897, 1957 N.Y. LEXIS 1086 (N.Y. 1957).

Where statute requiring magistrate to warn one arraigned on charge of violating law or ordinance respecting operation of motor vehicles that, if convicted, his driver's license is subject to suspension or revocation, before accepting his plea of guilty, is not complied with, defendant, at his option, may attack validity of such conviction in criminal proceeding or allow conviction to stand, and challenge its use as basis for revocation or suspension of his license. Application of Arcuri (1955) 286 AD 17, 141 NYS2d 1, vacated on other grounds 1 AD2d 733, 147 NYS2d 115.

On arraignment of licensed chauffeur, charged with violation of village speed ordinance after effective date of statutory amendment, requiring magistrate to warn person arraigned on charge of violating law or ordinance respecting operation of motor vehicles, before accepting plea of guilty, that, if convicted, his driver's license is subject to suspension or revocation, magistrate owed duty to give defendant such warning, though his ensuing conviction was only second of three speeding convictions because of which Motor Vehicles Commissioner subsequently revoked his license. Application of Arcuri, 286 A.D. 17, 141 N.Y.S.2d 1, 1955 N.Y. App. Div. LEXIS 3975 (N.Y. App. Div.), vacated, 1 A.D.2d 733, 147 N.Y.S.2d 115, 1955 N.Y. App. Div. LEXIS 3760 (N.Y. App. Div. 3d Dep't 1955).

In proceeding against Commissioner of Motor Vehicles upon application for order restoring petitioner's operator's license which had been revoked following petitioner's third conviction of speeding violations committed within 18 months, pleadings and documentary proof accompanying pleadings were sufficient to raise, in regard to question of compliance with Code of Criminal Procedure provision requiring petitioner to be informed that, upon conviction, his license and certificate of registration could be suspended or revoked, substantial issue which would preclude determining of question of compliance solely on the pleadings and documentary proof. Johnson v Kelly, 2 A.D.2d 213, 153 N.Y.S.2d 792, 1956 N.Y. App. Div. LEXIS 4663 (N.Y. App. Div. 3d Dep't 1956).

Where justice before whom speeder was arraigned made two conflicting affidavits as to whether speeder was instructed that plea of guilty was equal to conviction and that upon conviction he was subject to possible revocation of his license, and there was no record of any proceedings before the Commissioner of Motor Vehicles, revocation was annulled pending determination by the Commissioner. Schayes v MacDuff, 133 N.Y.S.2d 478, 1954 N.Y. Misc. LEXIS 2238 (N.Y. Sup. Ct. 1954), rev'd, 285 A.D. 1220, 140 N.Y.S.2d 764 (N.Y. App. Div. 1955).

On review of a determination of the Commissioner of Motor Vehicles revoking motorist's license and suspending his registration, an affidavit of the justice of the peace that he gave the motorist the necessary warning before accepting his plea to a third charge of speeding was accepted as against the assertion of the motorist that no such warning was given. Collins v Veness, 141 N.Y.S.2d 334, 1955 N.Y. Misc. LEXIS 2526 (N.Y. Sup. Ct. 1955).

In proceeding to review determination of Deputy Commissioner of Motor Vehicles revoking motorist's license and suspending his certificate of registration, evidence sustained finding that justice of peace gave motorist necessary statutory warning before accepting his plea to charge of speeding against motorist, who had been convicted twice for speeding within the previous 18 months. Collins v Veness, 141 N.Y.S.2d 334, 1955 N.Y. Misc. LEXIS 2526 (N.Y. Sup. Ct. 1955).

Justice of peace must advise motorist, who has two previous convictions for speeding within 18 months, of consequences of conviction on a present charge of speeding before accepting a plea to the charge. Collins v Veness, 141 N.Y.S.2d 334, 1955 N.Y. Misc. LEXIS 2526 (N.Y. Sup. Ct. 1955).

33. Restricted speed zone

This section, in dealing with driving at a speed unreasonable under existing conditions, renders a motorist guilty, if in view of existing conditions or actual and potential hazards reasonably to be anticipated, he is guilty of ordinary negligence with respect to speed. People v Lewis, 13 N.Y.2d 180, 245 N.Y.S.2d 1, 194 N.E.2d 831, 1963 N.Y. LEXIS 867 (N.Y. 1963).

In a prosecution for exceeding the speed limit in a restricted speed zone, legal designation of the area as a restricted speed zone can be established by introducing in evidence a certified copy of the order of the commission establishing it. People v Radzinski, 24 Misc. 2d 109, 205 N.Y.S.2d 440, 1960 N.Y. Misc. LEXIS 2417 (N.Y. County Ct. 1960).

Where an information charges defendant with operating a motor vehicle at excessive speed in a zone restricted to a speed of 35 mph, conviction cannot be sustained on mere testimony of the arresting officer that the speed zone was set up by the State Traffic Commission and legally posted as required for such a zone, as an officer's testimony does not establish that a speed zone was legally set up, and, in addition, the prosecution must prove that whatever signs have been erected are in accordance with requirements of the commission. People v Radzinski, 24 Misc. 2d 109, 205 N.Y.S.2d 440, 1960 N.Y. Misc. LEXIS 2417 (N.Y. County Ct. 1960).

The evidence was insufficient to sustain a conviction for operating an automobile at 55 miles per hour in a 35-mile-per-hour speed zone established by the State Traffic Commission where there was no competent evidence to describe in detail the speed signs erected and where they were located, but only the testimony of the arresting officer that defendant traveling at 50 miles per hour, "ran into a 35 mile per hour zone legally posted and maintained by the State Traffic Commission." People v Higby, 27 Misc. 2d 362, 207 N.Y.S.2d 3, 1960 N.Y. Misc. LEXIS 2210 (N.Y. County Ct. 1960).

In a prosecution for speeding in a restricted speed zone, it is an essential part of the People's case to prove legal establishment of the restricted zone, and conviction cannot be sustained where the only proof consisted of a certified copy of an order by the State Traffic Commission which the record on appeal fails to show was either marked as an exhibit or admitted in evidence. People v Smith, 32 Misc. 2d 513, 221 N.Y.S.2d 538, 1961 N.Y. Misc. LEXIS 1941 (N.Y. County Ct. 1961).

The contention of a defendant charged with speeding in violation of a 30 mile an hour speed zone that the prosecution must prove that no greater speed was allowed would be applicable to a prosecution under subd (b)(2), of this section, but is not applicable to a prosecution under subd (b)(3). People v Drachenberg, 49 Misc. 2d 791, 268 N.Y.S.2d 462, 1966 N.Y. Misc. LEXIS 2293 (N.Y. Spec. Sess. 1966).

34. School speed zone

Evidence was insufficient to support a conviction under subdivision 2 of former § 56 where there was an absence of evidence that the alleged violation occurred during school noon hour, school recess, or opening or closing hours. People v Mendelow, 6 Misc. 2d 660, 167 N.Y.S.2d 298, 1957 N.Y. Misc. LEXIS 3070 (N.Y. County Ct. 1957).

Subdivision 2 (a) was designed for the protection of school children and it should be liberally interpreted. People v Underwood, 36 Misc. 2d 498, 233 N.Y.S.2d 377, 1962 N.Y. Misc. LEXIS 2393 (N.Y. County Ct. 1962).

Where the city had established a school zone embracing areas within 200 feet of school property, and signs had been posted, this was sufficient to put in effect the 15-mile-per-hour speed limit "when passing a school building" under subd. 2 (a) of this section with respect to a street to which a side exit from the school

building gave access, regardless of the fact that the school building did not front on such street. People v Underwood, 36 Misc. 2d 498, 233 N.Y.S.2d 377, 1962 N.Y. Misc. LEXIS 2393 (N.Y. County Ct. 1962).

With reference to the speed limit in a school zone, the opening of school commences at the time that the school crossing guard takes his position in directing traffic, and the closing of school is that time at which the school crossing guard leaves for his station. People v Worosz, 69 Misc. 2d 426, 330 N.Y.S.2d 196, 1972 N.Y. Misc. LEXIS 2058 (N.Y. Dist. Ct. 1972).

After a non-jury hearing, defendant was found guilty on a charge of speeding in a school zone in violation of N.Y. Veh. & Traf. Law § 1180(c)(1), although she claimed that she was outside the school zone when her speed was measured, because two police officers were credible in testifying that, while part of a speed detail that was measuring the speed of vehicles traveling in the school zone, they observed defendant driving in the school zone at a speed that exceeded the posted limit, and their testimony was consistent with the log generated by the speed detecting device that they were using. People v Deep, 821 N.Y.S.2d 381, 12 Misc. 3d 1137, 2006 N.Y. Misc. LEXIS 1600 (N.Y. City Ct. 2006).

35. Park and parkway speed limits

In negligence action arising from 3-car chain collision on controlled-access parkway, jury could reasonably conclude that 2 following cars were not following too closely, even though they were near entrance ramp, where second car was about 24 to 25 feet behind first and was traveling at about 30 miles per hour, and third car was about same distance behind second and was proceeding at speed of traffic. Barath v Marron, 255 A.D.2d 280, 684 N.Y.S.2d 553, 1998 N.Y. App. Div. LEXIS 11617 (N.Y. App. Div. 2d Dep't 1998).

In view of the provisions of §§ 1180 and 1183 of this law, a parkway authority need not post special signs on highways within its jurisdiction giving notice of its speed regulations where they are not in variance or conflicting with the general 50 mph limit under this section on highways generally. People v Kane, 40 Misc. 2d 826, 243 N.Y.S.2d 809, 1963 N.Y. Misc. LEXIS 1538 (N.Y. County Ct. 1963).

A motion for dismissal of a speeding charge based on violation of a state park ordinance because of failure to prove that the ordinance was filed with the Department of State pursuant to Art. IV § 8 of the Constitution cannot succeed because Rule 4511 of the CPLR permits the court to take judicial notice of such ordinances. People v Goldstein, 43 Misc. 2d 945, 252 N.Y.S.2d 534, 1964 N.Y. Misc. LEXIS 1465 (N.Y. Dist. Ct. 1964).

36. Thruway speed limits

Defendant motorist, who skidded off thruway in severe snow storm and collided with police car parked on shoulder, was not entitled to summary judgment dismissing police officer's cause of action under CLS Gen Mun § 205-e(1), regardless of persuasiveness of motorist's explanation, where mere happening of collision outside of motorist's authorized lanes of travel created triable issue of fact as to whether she was negligent, and there were similar issues as to whether she was traveling too fast for weather conditions in violation of CLS Veh & Tr § 1180 and negligent in sliding off side of road in violation of CLS Veh & Tr § 1131. Dubois v Vanderwalker, 245 A.D.2d 758, 665 N.Y.S.2d 460, 1997 N.Y. App. Div. LEXIS 12940 (N.Y. App. Div. 3d Dep't 1997).

Officer was not required to follow defendant for a quarter of a mile in order to establish violation of Thruway Regulation barring speed in excess of 60 miles per hour. People v Wilson, 17 Misc. 2d 731, 188 N.Y.S.2d 344, 1959 N.Y. Misc. LEXIS 3745 (N.Y. County Ct. 1959).

The provision of subdivision 3 of former § 56 permitting a driver to exceed the speed limit for a distance of one quarter of a mile, is intended to protect a motorist in passing another on an undivided highway and does not apply to the violation of the speed limit on the Thruway, since on the Thruway there is two lane traffic going in opposite directions. People ex rel. O'Toole v Roth, 17 Misc. 2d 1072, 192 N.Y.S.2d 592, 1959 N.Y. Misc. LEXIS 4008 (N.Y. County Ct. 1959).

37. Local speeding ordinances

Defendant village should have been granted summary judgment, even though it was responsible for regulating traffic speed and posting speed limit signs on roadway, where there was no evidence that speed limit was inappropriate, and village showed that county owned and maintained road where accident occurred. Rosenfeld v County of Nassau, 272 A.D.2d 388, 707 N.Y.S.2d 665, 2000 N.Y. App. Div. LEXIS 5108 (N.Y. App. Div. 2d Dep't 2000).

The Legislature intended in the enactment of the Vehicle and Traffic Law that the motorist, although presumed to know provisions of law regulating operation of vehicle on highways outside of municipalities, could not be presumed to know various speed limitations enacted by cities and villages, and therefore required municipalities to erect signs warning motorists of speed limitations. People v Schrader, 16 N.Y.S.2d 424, 172 Misc. 246, 1939 N.Y. Misc. LEXIS 2559 (N.Y. County Ct. 1939).

A motorist may be presumed to know that the general speed limit through the state as fixed in this law outside of cities and villages is 50 miles an hour, but it would not be possible nor reasonable to expect that the millions of motorists should be aware, without specific notice, of the various and special speeds in the 60 cities and 566 villages in this state. People v Wadsworth, 108 N.Y.S.2d 224, 200 Misc. 1049, 1950 N.Y. Misc. LEXIS 2572 (N.Y. County Ct. 1950).

A village speed ordinance which establishes a maximum speed less than that set by this section cannot be effective until signs or markings giving notice of such maximum speed limits are posted, and, in a prosecution for violating such an ordinance, the prosecution must prove as part of its case that the required signs were posted at the time of the alleged violation. People v Silcox, 34 Misc. 2d 335, 228 N.Y.S.2d 634, 1962 N.Y. Misc. LEXIS 3252 (N.Y. County Ct. 1962).

A city ordinance which fixes a maximum speed limit within the city "unless otherwise posted" or in the absence of posted signs indicating a lesser or greater speed clearly expresses and sufficiently defines what constitutes speeding. People ex rel. Wildey v Freidus, 40 Misc. 2d 636, 243 N.Y.S.2d 721, 1963 N.Y. Misc. LEXIS 1563 (N.Y. County Ct. 1963).

Subd (b)(3) of this section and §§ 1600 and 1643 of the Vehicle and Traffic Law, when read together, mean that a village may, by local law, ordinance, order, rule, or regulation, establish maximum speed limits for a designated area or street within the village, provided § 1684 of the Vehicle and Traffic Law is not violated. People v Blattman, 50 Misc. 2d 606, 270 N.Y.S.2d 903, 1966 N.Y. Misc. LEXIS 1829 (N.Y. County Ct. 1966).

Where a town became subject to the Suburban Town Law on January 1, 1966, the town board had power on December 21, 1965 to enact a local law setting a speed limit effective December 31, 1965 pursuant to the authority of Town Law § 50-a, subd 4. People v Baratta, 56 Misc. 2d 447, 288 N.Y.S.2d 976, 1968 N.Y. Misc. LEXIS 1633 (N.Y. Dist. Ct. 1968).

Either subdivision (d) of section 1180 of the Vehicle and Traffic Law or an applicable section of a local law or ordinance may serve as a basis for a prosecution for speeding within a city, since subdivision (d) of section 1180 does not state that it is the exclusive basis for such a charge and subdivisions (a) and (c) of section 1800 of the Vehicle and Traffic Law expressly provide conviction for this offense may rest upon violation of local law or ordinance. People v Levin, 93 Misc. 2d 106, 402 N.Y.S.2d 324, 1978 N.Y. Misc. LEXIS 2021 (N.Y. City Ct. 1978).

A town of the first class may not enact an ordinance limiting the speed of motor vehicles on town highways pursuant to former § 90 of the Vehicle and Traffic Law. 1955 Ops St Compt 198.

Violation of a village highway speed limit ordinance is a violation of subd. 3 of this section, and while the fine or money collected is property of the village it must be remitted to the State Comptroller with the justice's monthly report. 1962 Ops St Compt #937.

A suburban town may enact a local law regulating speed on town highways, but other towns have no power to adopt such a local law. 1964 Ops St Compt #104.

38. Speeding as negligence

This section, in dealing with driving at a speed unreasonable under existing conditions, renders a motorist guilty, if in view of

existing conditions or actual and potential hazards reasonably to be anticipated, he is guilty of ordinary negligence with respect to speed. People v Lewis, 13 N.Y.2d 180, 245 N.Y.S.2d 1, 194 N.E.2d 831, 1963 N.Y. LEXIS 867 (N.Y. 1963).

A violation of this former section and former § 67, sub 1, in not slowing down on a curve or where visibility ahead is impaired, did not constitute negligence as a matter of law if the operator was doing everything in his power to stop the car. McCormick v Merritt, 232 A.D. 619, 250 N.Y.S. 443, 1931 N.Y. App. Div. LEXIS 13903 (N.Y. App. Div. 1931).

Evidence merely disclosing that in early morning hours an automobile driven by defendant struck concrete abutment of small highway culvert on left side of road, causing automobile to be deflected from highway and to overturn and kill an occupant of automobile and that automobile was being driven at a speed variously estimated at from 50 to 65 miles an hour, was insufficient to sustain conviction for criminal negligence in operation of motor vehicle resulting in death. People v Gardner, 255 A.D. 683, 8 N.Y.S.2d 917, 1939 N.Y. App. Div. LEXIS 6336 (N.Y. App. Div. 1939).

Evidence that defendant's automobile was operated at a speed of at least 45 miles an hour and had been so operated for more than one-quarter of a mile, taken in connection with blowout and the number of times which automobile turned over after the blowout, supported finding of jury that plaintiff's injuries were proximately caused by defendant's negligence. Mantione v Picone, 273 A.D. 1049, 80 N.Y.S.2d 163, 1948 N.Y. App. Div. LEXIS 5905 (N.Y. App. Div. 1948).

It was reversible error for the trial court, in its charge to the jury, to invoke former § 56 of the Vehicle and Traffic Law (now § 1180) as a basis for finding negligence on the part of the defendant, since that section had been declared to be unconstitutional prior to the date of the accident upon which plaintiff instituted suit. Karnbach v Bould, 24 A.D.2d 600, 262 N.Y.S.2d 265, 1965 N.Y. App. Div. LEXIS 3588 (N.Y. App. Div. 2d Dep't 1965).

In action by automobile driver, who was driving at 25 miles per hour on street as he proceeded past gas service station on his right and observed jeep through window of station but could not see whether it was occupied by driver, against jeep driver for back injuries sustained when jeep hit his automobile when he was just about by station, trial court's charge to jury of section of Vehicle and Traffic Law which requires driver to operate vehicle at reasonable and prudent speed was prejudicially erroneous in that record was devoid of any proof that automobile driver's speed was imprudent. Putnam v Lamoreaux, 59 A.D.2d 974, 399 N.Y.S.2d 333, 1977 N.Y. App. Div. LEXIS 14240 (N.Y. App. Div. 3d Dep't 1977).

State troopers were not entitled to summary judgment dismissing action for wrongful death of occupants of vehicle struck by pickup truck pursued by troopers where troopers' testimony that they slowed down and broke off chase on entering village was contradicted by 4 independent witnesses, who stated that troopers pursued truck through village at 90 to 100 miles per hour, and one witness averred that, because of its speed and closeness of pursuit, troopers' vehicle narrowly missed crashing into other vehicles at scene of accident. Sisson v Baritot, 245 A.D.2d 1084, 666 N.Y.S.2d 85, 1997 N.Y. App. Div. LEXIS 13863 (N.Y. App. Div. 4th Dep't 1997).

First and ninth motorists in chain-reaction pile-up were entitled to summary judgment in action by 10th motorist where 10th motorist, after spinning out on ice, stopped without hitting anyone else and was not injured until her vehicle was struck repeatedly by vehicles that followed, and thus any negligence of first and ninth motorists was not proximate cause of her injuries. Lester v Chmaj, 251 A.D.2d 1069, 674 N.Y.S.2d 222, 1998 N.Y. App. Div. LEXIS 7172 (N.Y. App. Div. 4th Dep't 1998).

Court should have granted plaintiffs' summary judgment motion where defendants failed to controvert plaintiffs' evidence, including statement by injured plaintiff, who was passenger in defendant's vehicle, that defendant's vehicle was exceeding speed limit at time of accident, eyewitness' statement that vehicle was traveling "at a high rate of speed," and investigating officer's testimony that damage sustained by vehicle "indicated to me there had to be an excessive amount of speed." Pinkow v Herfield, 264 A.D.2d 356, 695 N.Y.S.2d 20, 1999 N.Y. App. Div. LEXIS 8785 (N.Y. App. Div. 1st Dep't 1999).

Plaintiff was entitled to summary judgment on issue of liability for injuries sustained when he was struck by vehicle owned and operated by defendants, where he established that sole proximate cause of accident was driver's loss of control of vehicle due to intoxication and excessive speed, and defendants failed to raise issue of fact concerning proximate cause. Arumugam v Smith, 277 A.D.2d 979, 716 N.Y.S.2d 518, 2000 N.Y. App. Div. LEXIS 11412 (N.Y. App. Div. 4th Dep't 2000).

Driver and a waste removal company were not entitled to summary judgment in personal injury actions, as their own submissions raised an issue of fact as to whether the driver failed to use reasonable care when proceeding into an intersection as required by N.Y. Veh. & Traf. Law § 1180, because testimony submitted by defendants stated that the driver was speeding and was looking down when he entered the intersection. Halbina v Brege, 41 A.D.3d 1218, 838 N.Y.S.2d 288, 2007 N.Y. App. Div. LEXIS 7042 (N.Y. App. Div. 4th Dep't 2007).

Jury verdict should have been set aside under N.Y. C.P.L.R. § 4404(a) in personal injury action as it was inconsistent in finding that defendant driver was negligent in violating N.Y. Veh. & Traf. Law §§ 1129, 1180 by striking plaintiff driver's vehicle in the rear but was not the substantially contributing factor in causing the accident; the verdict was also ambiguous as it did not address the issue of whether defendant driver's negligence proximately caused plaintiff driver's injuries. Rodriguez v Budget Rent-A-Car Sys., Inc., 44 A.D.3d 216, 841 N.Y.S.2d 486, 2007 N.Y. App. Div. LEXIS 9303 (N.Y. App. Div. 1st Dep't 2007).

Jury's finding that a driver was negligent but not the proximate cause of a motorcyclist's injures was not against the weight of the evidence because the driver backed out of his driveway before he was aware of the oncoming motorcyclist, who could have avoided the collision if he had not been speeding as he approached the hill or if he had applied his front brake as well as his rear brake. Berner v Little, 137 A.D.3d 1675, 28 N.Y.S.3d 519, 2016 N.Y. App. Div. LEXIS 2235 (N.Y. App. Div. 4th Dep't 2016).

There was a rational process by which the jury could find that driver 1 was negligent because the jury could conclude that, although driver 1 had the right-of-way, she failed to exercise reasonable care to avoid the collision and failed to drive at a speed that was reasonable and prudent under the conditions; the jury was permitted to reject driver 1's testimony, particularly in considering the evidence that the force of the impact from the collision "propelled" driver 2's vehicle into a tree. Guo v Efkarpidis, 185 A.D.3d 949, 127 N.Y.S.3d 545, 2020 N.Y. App. Div. LEXIS 4282 (N.Y. App. Div. 2d Dep't 2020).

The plaintiff's car was stopped at a traffic light with a directional left hand signal on. The plaintiff started a turn to the left when the light changed. The defendant driving a car directly behind the plaintiff at a speed of 25 m.p.h. collided with the plaintiff's car. Held: the defendant was negligent as a matter of law in driving 25 m.p.h. under the circumstances. Kiel v Diamond, 191 N.Y.S.2d 567, 1959 N.Y. Misc. LEXIS 4638 (N.Y. Sup. Ct. 1959).

Administrative determination that a driver had not operated at a reasonable and prudent speed did not have collateral estoppel effect in a personal injury action arising from the underlying motor vehicle accident because the administrative law judge lacked authority to decide whether the violation was a proximate cause of the accident and because the hearing, which did not include testimony from witnesses other than the driver, did not afford a full and fair opportunity to contest negligence. Deliz v Davis, 66 Misc. 3d 299, 114 N.Y.S.3d 610, 2019 N.Y. Misc. LEXIS 6100 (N.Y. Sup. Ct. 2019).

39. —Hazardous conditions

Where a driver was issued a ticket for speed not reasonable and prudent, in violation of N.Y. Veh. & Traf. Law § 1180(e), due to his vehicle having skidded on the road after passing a sanding truck while it was snowing out, and the driver pleaded guilty to a reduced charge, the university that owned the car should not have been granted summary judgment dismissal of the personal

injury complaint of the injured passenger, as the circumstances did not establish as a matter of law that the driver was not negligent; the fact that he had passed a sanding machine could have allowed an inference that the roads were in a dangerous state, and his having pleaded guilty to a traffic infraction, while explainable, did not establish a complete lack of negligence. Feeley v St. Lawrence Univ., 13 A.D.3d 782, 788 N.Y.S.2d 179, 2004 N.Y. App. Div. LEXIS 14997 (N.Y. App. Div. 3d Dep't 2004).

Speed of 30 miles per hour on a wet, slippery day by motorist approaching an intersection constituted negligence, although visibility was good. Hotine v Monett, 137 N.Y.S.2d 727, 1955 N.Y. Misc. LEXIS 2573 (N.Y. Sup. Ct. 1955), aff'd, 3 A.D.2d 836, 161 N.Y.S.2d 838, 1957 N.Y. App. Div. LEXIS 5997 (N.Y. App. Div. 2d Dep't 1957).

Smoke from a brush fire 600 feet from a highway obstructing the vision of motorists was not the "proximate cause" of injuries to passengers in a vehicle which was carelessly and recklessly driven due to the limited light range as compared with the speed of the vehicle. Pfohl v State, 42 N.Y.S.2d 372, 1943 N.Y. Misc. LEXIS 2012 (N.Y. Ct. Cl. 1943).

In action against state for damages sustained when plaintiff's automobile, while avoiding barricade protecting excavation located on curve in highway, struck defect in shoulder, evidence established that accident was caused by motorist's own negligence as to speed. Fogarty v State, 127 N.Y.S.2d 76, 205 Misc. 120, 1954 N.Y. Misc. LEXIS 1935 (N.Y. Ct. Cl. 1954).

The failure of owner of vehicle to give driver instructions to drive with extreme care and at a slow rate of speed was proof of contributory negligence on the part of the owner where there was 6–8 inches of heavy snow and visibility was only about 100 feet. Mosher v State, 124 N.Y.S.2d 223, 204 Misc. 580, 1953 N.Y. Misc. LEXIS 2139 (N.Y. Ct. Cl. 1953).

Court properly granted plaintiff's motion to set aside verdict finding that defendant was not negligent in operation of her vehicle where plaintiff presented evidence that defendant failed to slow her vehicle in response to "special hazard" of which she admittedly was aware, failed to sound her horn or give any warning of her intent to veer around recycling truck, and failed to keep proper lookout and to see what with proper use of her senses she could have seen, defendant's version of accident was that she left road at near "highway speed" and admittedly failed to see what was in her field of vision and there to be seen, and defendant admitted her awareness that workers were likely to be around truck, but that she proceeded at barely reduced speed in disregard of risk of hitting worker. Augustine v Dandrea, 274 A.D.2d 962, 710 N.Y.S.2d 748, 2000 N.Y. App. Div. LEXIS 7647 (N.Y. App. Div. 4th Dep't 2000).

Jury verdict in favor of defendant would be reversed, and plaintiff granted judgment as matter of law, where it was undisputed that defendant violated CLS Veh & Tr § 1126(a) by crossing over double yellow line, he claimed that he skidded over double yellow line because roadway was "very wet," "dark," and "very curvy," but he further acknowledged at trial that he was traveling at 25 miles per hour, 5 miles above posted speed limit, he also admitted to police officer responding to scene of accident that he crossed double yellow line because he was traveling "too fast," and he pleaded guilty to crossing double yellow line and paid fine. Haughey v Noone, 262 A.D.2d 284, 691 N.Y.S.2d 553, 1999 N.Y. App. Div. LEXIS 5889 (N.Y. App. Div. 2d Dep't), app. dismissed, 94 N.Y.2d 858, 704 N.Y.S.2d 533, 725 N.E.2d 1095, 1999 N.Y. LEXIS 3998 (N.Y. 1999).

Emergency doctrine did not preclude triable issue of fact as to negligence of motorist who came over hill at 60 miles per hour and spun out on black ice when she braked to avoid rear-end collision with slower moving vehicle, resulting in chain-reaction pile-up of multiple vehicles behind motorist. Lester v Chmaj, 251 A.D.2d 1069, 674 N.Y.S.2d 222, 1998 N.Y. App. Div. LEXIS 7172 (N.Y. App. Div. 4th Dep't 1998).

Emergency doctrine did not preclude triable issue of fact as to negligence of ninth motorist in chain-reaction pile-up, after first vehicle spun out on patch of black ice just over crest of hill, where ninth motorist admitted that he had encountered black ice on roadway earlier that morning, and jury could conclude that emergency was one that he should have anticipated and been prepared to meet. Lester v Chmaj, 251 A.D.2d 1069, 674 N.Y.S.2d 222, 1998 N.Y. App. Div. LEXIS 7172 (N.Y. App. Div. 4th Dep't 1998).

Defendant motorists who followed plaintiff motorist into chain-reaction pile-up, after 10th vehicle ahead of plaintiff's spun out on patch of black ice just over crest of hill, were entitled to summary judgment where they were confronted with sudden and unanticipated emergency that was not of their own making. Lester v Chmaj, 251 A.D.2d 1069, 674 N.Y.S.2d 222, 1998 N.Y. App. Div. LEXIS 7172 (N.Y. App. Div. 4th Dep't 1998).

In action for injuries sustained by plaintiff who was hit by car that skidded and went out of control on slippery highway in New York City, court improperly charged jury that it would constitute negligence if driver of car violated CLS Veh & Tr § 1180(e), which constrains drivers to proceed at appropriate reduced speeds in presence of special hazards, since § 1180(e) was superseded by City of New York Traffic Regulation § 60; violation of regulation, unlike violation of statute, merely constitutes "some evidence" of negligence. Fox v Lyte, 143 A.D.2d 390, 532 N.Y.S.2d 432, 1988 N.Y. App. Div. LEXIS 9233 (N.Y. App. Div. 2d Dep't 1988).

In an action for damages arising out of a collision of a car driven by appellant, on a two-lane rural road on the day following a heavy snow storm and while there were eight-foot snow banks bordering the driveway from which respondent was backing out, it was reversible error for the trial court to charge the jury in terms of subd. 1 of former § 56 to the effect that appellant could be found negligent on the mere fact that he was unable to prevent his car from colliding with respondent's car, no matter what the circumstances. Armondi v Johnson, 16 A.D.2d 712, 226 N.Y.S.2d 714, 1962 N.Y. App. Div. LEXIS 10318 (N.Y. App. Div. 3d Dep't 1962).

Whether actions of westbound motorist, in proceeding at 45–50 miles per hour toward busy intersection at a time when the pavement was wet and he was denied a full view of possible approaching traffic on intersecting street by the presence of vehicles in the exiting lanes, were unreasonable and concurrent cause of intersectional collision with northbound vehicle was question for the jury. Kinsfather v Grueneberg, 47 A.D.2d 789, 365 N.Y.S.2d 903, 1975 N.Y. App. Div. LEXIS 9105 (N.Y. App. Div. 3d Dep't 1975).

Plaintiff, who in support of her motion for summary judgment in a negligence action against a common carrier and a driver, stated she was a passenger in a chartered bus that, on a snow-covered New York State Thruway, had suddenly left the extreme right hand lane and crossed over the other lanes before turning over in the center mall area, is entitled to summary judgment where she establishes a prima facie case so convincing that the inference of negligence arising therefrom is inescapable, if not rebutted, through the evidentiary value of her own affidavit, the submission of a certificate of conviction regarding defendant bus driver's plea of guilty to driving the bus at a speed greater than was reasonable and prudent under the snowy conditions (Vehicle and Traffic Law, § 1180, subd [a]) and the operability of the doctrine of Fres ipsa loquitur which is applicable because it was incumbent upon the carrier to come forward with a reasonable explanation for the occurrence since plaintiff was a passenger in the carrier and, in view of the fact that the bus overturned in the center mall area, it was necessary for the defendants to advance a satisfactory explanation for the incident. Horowitz v Kevah Konner, Inc., 67 A.D.2d 38, 414 N.Y.S.2d 540, 1979 N.Y. App. Div. LEXIS 10073 (N.Y. App. Div. 1st Dep't 1979).

40. Speed at intersection

In personal injury action arising out of broadside striking of plaintiff's turning vehicle at intersection, failure of defendant to have reduced speed of his vehicle as he approached intersection did not constitute negligence per se, since CLS Veh & Tr § 1180(e), providing that motorist shall drive at "appropriate reduced speed" when approaching and crossing intersection, when read in conjunction with CLS Veh & Tr § 1180(a), which prohibits driving at greater speed than is "reasonable and prudent" under conditions," does not mandate that driver reduce speed at every intersection. Bagnato v Romano, 179 A.D.2d 713, 578 N.Y.S.2d 613, 1992 N.Y. App. Div. LEXIS 347 (N.Y. App. Div.

2d Dep't), app. denied, 81 N.Y.2d 701, 594 N.Y.S.2d 715, 610 N.E.2d 388, 1992 N.Y. LEXIS 4378 (N.Y. 1992).

Defendant was properly granted directed verdict in action for injuries sustained when her eastbound vehicle collided with plaintiff's vehicle as plaintiff proceeded into intersection heading north after stopping at 2-way stop sign, since there was no condition shown that would have required defendant to reduce her speed as she approached intersection, there was no evidence that defendant had any opportunity to avoid collision, and defendant's uncontroverted testimony stated that she never saw plaintiff before accident and had no time to apply her brakes or to turn her steering wheel. Anastasio v Scheer, 239 A.D.2d 823, 658 N.Y.S.2d 467, 1997 N.Y. App. Div. LEXIS 5552 (N.Y. App. Div. 3d Dep't 1997).

In automobile collision case involving 2 defendant drivers, with plaintiff apparently being passenger, jury's finding that appellant was 25 percent at fault and that other driver was 75 percent at fault was based on fair interpretation of evidence where jury properly could have inferred, from location of damage to 2 cars and point of impact, that appellant's car was traveling considerably faster than he claimed, and there was evidence that appellant failed to see other car until impact, at which time other car was already in intersection. Donahue v Smorto, 240 A.D.2d 464, 658 N.Y.S.2d 650, 1997 N.Y. App. Div. LEXIS 6087 (N.Y. App. Div. 2d Dep't 1997).

Defendants, owner and operator of northbound vehicle which struck plaintiff's left-turning southbound vehicle in intersection, were improperly granted summary judgment given plaintiff's testimony suggesting that as defendant approached intersection she failed to keep proper lookout and to see that which was there to be seen, and fact issue existed as to whether defendant may have been traveling too fast for circumstances. Greco v Boyce, 262 A.D.2d 734, 691 N.Y.S.2d 599, 1999 N.Y. App. Div. LEXIS 6491 (N.Y. App. Div. 3d Dep't 1999).

Jury properly found defendant motorist 30 percent at fault and plaintiff motorcyclist 70 percent at fault for intersectional collision in which motorcycle struck defendant's car on rear passenger side as defendant was about ¾ of way through process of turning left in front of motorcycle where defendant stopped her car and checked for oncoming traffic before entering intersection, sole vehicle within sight was large truck that blocked her view of motorcycle behind it, she turned after deciding that truck was safe distance away and traveling slowly, and plaintiff changed lanes and accelerated past truck on its right as he approached intersection. Teller v Anzano, 263 A.D.2d 647, 694 N.Y.S.2d 780, 1999 N.Y. App. Div. LEXIS 7833 (N.Y. App. Div. 3d Dep't 1999).

Although defendant motorist was negligent in trying to turn left at intersection without yielding to plaintiff approaching motorist with right of way, plaintiff was not entitled to summary judgment dismissing defendant's counterclaim for comparative negligence where there were triable issues of fact as to whether plaintiff (1) was traveling too fast at 20 to 30 miles per hour in view of slippery road conditions and (2) should have reduced his speed when he saw defendant approaching intersection without appearing to slow down or look in plaintiff's direction. King v Washburn, 273 A.D.2d 725, 710 N.Y.S.2d 185, 2000 N.Y. App. Div. LEXIS 7433 (N.Y. App. Div. 3d Dep't 2000).

In action for injuries sustained by plaintiff when southbound vehicle in which she was passenger collided with defendant's westbound vehicle at intersection controlled by 4-way signal which was flashing yellow for east/west traffic and flashing red for north/south traffic, defendant was not entitled to summary judgment on ground that sole proximate cause of accident was southbound vehicle's failure to stop at flashing red signal, where evidence submitted by plaintiff raised question of fact whether defendant failed to use reasonable care when proceeding into intersection. Doctor v Juliana, 277 A.D.2d 1013, 716 N.Y.S.2d 196, 2000 N.Y. App. Div. LEXIS 11378 (N.Y. App. Div. 4th Dep't 2000).

In personal injury action arising from 2-vehicle rear-end collision while plaintiff's car was stopped at intersection, plaintiff was entitled to summary judgment on issue of following driver's liability where following driver breached his duties to drive at safe speed and to maintain safe distance between 2 vehicles, always compensating for any known adverse road conditions. Ortega v City of New York, 281 A.D.2d 466, 721 N.Y.S.2d 790, 2001 N.Y. App. Div. LEXIS 2353 (N.Y. App. Div. 2d Dep't 2001).

In personal injury action against city transit authority and others, jury could have fairly found that authority's bus driver did not violate Vehicle and Traffic Law, and thus court properly denied plaintiff's motion for order setting aside verdict for defendants and ordering new trial, where jury heard conflicting evidence as to speed at which plaintiff was traveling, lane in which he was traveling, his state of intoxication, distance that his motorcycle was from intersection when bus driver saw him, and bus driver's sight lines. Karoon v N.Y. City Transit Auth., 286 A.D.2d 648, 730 N.Y.S.2d 331, 2001 N.Y. App. Div. LEXIS 8836 (N.Y. App. Div. 1st Dep't 2001).

An automobile operator's license may be suspended upon a determination of the Commissioner of Motor Vehicles after a hearing that the operator was unable to stop his motor vehicle at an intersection in time to avoid a collision with another motor vehicle. McNellis v Fletcher, 96 N.Y.S.2d 599, 197 Misc. 80, 1950 N.Y. Misc. LEXIS 1576 (N.Y. Sup. Ct. 1950).

An operator was properly convicted of a violation of sub 1 of former § 56 where it appeared that he drove an automobile at a rate of speed that endangered the lives of pedestrians crossing at a street intersection when, while blinded by the setting sun, he turned the corner at the rate of 15 to 18 miles per hour. People v Zurn, 127 N.Y.S.2d 178, 205 Misc. 35, 1954 N.Y. Misc. LEXIS 1939 (N.Y. County Ct. 1954).

Trial court properly granted summary judgment pursuant to N.Y. C.P.L.R. 3212 to a driver in an injured party's personal injury action arising from an automobile accident; the driver went through an intersection with a green light, and was entitled to anticipate that another defendant would yield, the injured party testified without contradiction, that the vehicle was traveling at 15 to 20 miles per hour at the time of the accident, having reduced speed as it approached the intersection, and such testimony refuted the injured party's otherwise baseless speculation that the driver failed to operate the vehicle at an appropriate reduced speed as she entered and crossed the intersection, N.Y. Veh. & Traf. Law § 1180(e), and further, the roads were clear and dry at the time of the accident, thereby belying the injured party's unsubstantiated assertion that the driver was operating the vehicle at speeds not reasonable and prudent for the conditions, N.Y. Veh. & Traf. Law § 1180(a). Rowe v Harrison, 303 A.D.2d 863, 758 N.Y.S.2d 693, 2003 N.Y. App. Div. LEXIS 2487 (N.Y. App. Div. 3d Dep't 2003).

In applying New York law to a case arising out of an accident at an intersection in Germany, charge that each driver must "maintain a reasonable safe rate of speed" adequately reflected the applicable New York State law and brought the factor of appropriate speed to the attention of the jury. Loebig v Larucci, 572 F.2d 81, 1978 U.S. App. LEXIS 12278 (2d Cir. N.Y. 1978).

In applying New York law to a case arising out of an accident in Germany, New York courts would assume that the general negligence standard of care would be applicable but would be unlikely to add the statutory refinements to the standard of care requiring an apparent slight extra duty of care in approaching intersections. Loebig v Larucci, 572 F.2d 81, 1978 U.S. App. LEXIS 12278 (2d Cir. N.Y. 1978).

Reference to "an appropriate reduced speed" in CLS Vehicle and Traffic Law § 1180, subd e does not indicate the quantum of reduction or that reduction in speed is always necessary when entering an intersection. Loebig v Larucci, 572 F.2d 81, 1978 U.S. App. LEXIS 12278 (2d Cir. N.Y. 1978).

41. —Known intersection

Where westbound motorist was proceeding at 45–50 miles per hour, he knew there was a busy intersection ahead, he could observe that the pavement was wet and he was denied full view of possible approaching traffic on intersecting street by presence of vehicles in exiting lane, the motorist was not entitled to invoke the emergency doctrine with respect to northbound vehicles in the intersection. Kinsfather v Grueneberg, 47 A.D.2d 789, 365 N.Y.S.2d 903, 1975 N.Y. App. Div. LEXIS 9105 (N.Y. App. Div. 3d Dep't 1975).

Plaintiff motorist was not entitled to summary judgment, even though defendant motorist appeared to have been negligent in attempting to turn left at "Y" intersection without yielding right of way, resulting in collision with plaintiff's approaching car, where plaintiff appeared to be to some degree at fault in causing accident, because (1) she was familiar with road and considered intersection dangerous, (2) although she was fully aware of 25-miles-per-hour speed limit sign, her speed was 35 to 40 when she entered intersection, (3) she could not recall where she was looking before accident, and (4) despite her clear and unobstructed view of intersection, she unaccountably saw defendant's car "less than a fraction of a second" before collision. Anderson v Miller, 263 A.D.2d 643, 692 N.Y.S.2d 816, 1999 N.Y. App. Div. LEXIS 7857 (N.Y. App. Div. 3d Dep't 1999).

42. Emergency vehicles

Former § 56 subd. 1-a and relative portions of former §§ 58 and 67 do not relate to police vehicles, and it was prejudicial error for the trial court so to charge. Booth v Rochester, 258 A.D. 849, 15 N.Y.S.2d 945, 1939 N.Y. App. Div. LEXIS 7226 (N.Y. App. Div. 1939).

Defendants, including city housing authority, were not entitled to summary judgment where patrol car driven by 2 housing police officers, responding to emergency radio run, collided with another vehicle, as result of which police car jumped curb and hit infant plaintiffs, where parties disputed whether (1) police car had both lights and siren on at time of impact, (2) driver of other vehicle cut in front of speeding police car, and (3) police car was traveling too fast in crowded commercial district. Foster v New York City Hous. Auth., 251 A.D.2d 42, 672 N.Y.S.2d 718, 1998 N.Y. App. Div. LEXIS 6427 (N.Y. App. Div. 1st Dep't 1998).

Jury verdict for plaintiff motorist hit by another car being pursued by police car was not against weight of evidence, even though car being pursued had violated 2 traffic regulations, where pursuit was through residential area in dark during rush hour at speeds of 60 to 80 miles per hour in 25 to 30 speed zone, officer was aware of police procedures dictating that he slow down if automobile pursuit "gets out of hand," officer continued even though he had considered that someone might be killed, and there was conflicting evidence as to whether officer activated his siren and flashing lights. Fioriello v Sasson, 255 A.D.2d 549, 680 N.Y.S.2d 662, 1998 N.Y. App. Div. LEXIS 12944 (N.Y. App. Div. 2d Dep't 1998), app. denied, 93 N.Y.2d 817, 697 N.Y.S.2d 564, 719 N.E.2d 925, 1999 N.Y. LEXIS 2920 (N.Y. 1999).

Police officer did not act in reckless disregard for safety of others, in violation of CLS Veh & Tr § 1104, where he received report of reckless driving, saw vehicle that matched description round corner with its tires squealing, and pursued vehicle briefly at speed not exceeding 40 miles per hour in effort to pull it over by activating first red patrol car lights and then white "wiggle-waggle" headlights, and motorist increased his speed as he approached curve and ultimately crashed into plaintiff's house. Martin v Miller, 255 A.D.2d 816, 680 N.Y.S.2d 300, 1998 N.Y. App. Div. LEXIS 12927 (N.Y. App. Div. 3d Dep't 1998).

Standard of "reckless disregard for the safety of others," set forth in Saarinen v Kerr, 84 NY2d 494, to govern police officer's conduct in pursuing suspected law breaker, is not limited to high-speed pursuits. Martin v Miller, 255 A.D.2d 816, 680 N.Y.S.2d 300, 1998 N.Y. App. Div. LEXIS 12927 (N.Y. App. Div. 3d Dep't 1998).

State trooper did not act recklessly in pursuing dirt bike that accelerated after driver ignored his gesture to pull over (for failure of driver and passenger to wear helmets), trooper's conduct was not proximate cause of accident in which driver lost control of bike, even though trooper's car came to rest on top of injured passenger, and thus state was not liable for passenger's injuries, where (1) passenger's own expert acknowledged that operation of bike was threat to public safety and that trooper, having perceived Vehicle and Traffic Law violation, had authority and duty to follow bike and remove it from highway, (2) although trooper exceeded 35 miles-per-hour speed limit during part of brief pursuit, he never exceeded 50 and was traveling only 17 to 20 miles per hour when he left road, (3) trooper's exceeding of speed limit did not warrant liability, given that weather was clear and dry, it was light outside, and there was no traffic in rural area of pursuit, and (4) although trooper's car ultimately came into contact with bike and passenger's ejected body on side of road, that unintentional contact resulted from trooper's reasonable efforts to avoid what he thought was going to be collision on road. Schieren v State, 281 A.D.2d 828, 722 N.Y.S.2d 128, 2001 N.Y. App. Div. LEXIS 3011 (N.Y. App. Div. 3d Dep't 2001).

Ambulance driver operating his vehicle at 75 miles per hour in a 50 mile per hour zone was justified where there was ample evidence to show that defendant reasonably believed he was responding to an emergency call. People v Bisig, 46 Misc. 2d 299, 259 N.Y.S.2d 452, 1965 N.Y. Misc. LEXIS 1988 (N.Y. Spec. Sess. 1965).

43. Fines

It is doubtful whether a fine of $100 is proper for a first offense of speeding. People v Marsellus, 9 Misc. 2d 1030, 168 N.Y.S.2d 1008, 1957 N.Y. Misc. LEXIS 1913 (N.Y. County Ct. 1957).

City could enforce its 30-mile-per-hour speed limit without enforcing provision of same ordinance setting maximum fine for violation of speed limit since provision setting maximum fine had been preempted by CLS Veh & Tr § 1180; CLS Veh & Tr § 3002(a) and (b) provides that local laws are void if they conflict with Vehicle and Traffic Law. People v Fried, 153 Misc. 2d 764, 583 N.Y.S.2d 135, 1992 N.Y. Misc. LEXIS 127 (N.Y. City Ct. 1992).

Maximum fine for violation of city speed limit was not limited to $50, notwithstanding provision of CLS Gen City § 20(32) that local traffic commission can set fine of not more than $50 for violations of its rules and regulations, since such statute had nothing to do with speeding violations, which are exclusively governed by CLS Veh & Tr § 1180. People v Fried, 153 Misc. 2d 764, 583 N.Y.S.2d 135, 1992 N.Y. Misc. LEXIS 127 (N.Y. City Ct. 1992).

CLS Veh & Tr § 1180 has preempted local municipal field on fines for violations of speed limits. People v Fried, 153 Misc. 2d 764, 583 N.Y.S.2d 135, 1992 N.Y. Misc. LEXIS 127 (N.Y. City Ct. 1992).

Notwithstanding validity of city ordinance establishing city-wide 30 mile per hour speed limit, fine for violation of speed limit was not limited by provision of same ordinance, which set fine for first violation at $50, since CLS Veh & Tr § 1180(h) and (h)(4) preempted local municipal field on speeding fines and made provision of city ordinance regarding fines obsolete. People v Fried, 153 Misc. 2d 764, 583 N.Y.S.2d 135, 1992 N.Y. Misc. LEXIS 127 (N.Y. City Ct. 1992).

44. Jurisdiction of courts

Failure of the Appeals Board of the Administrative Adjudication Bureau of the Department of Motor Vehicles to render its decision in petitioner's case within 60 days as provided in applicable regulation did not operate to deprive the Board of its jurisdiction in matter where the subject regulation was directory and not mandatory. Tipon v Appeals Bd. of Administrative Adjudication Bureau, 52 A.D.2d 1065, 384 N.Y.S.2d 324, 1976 N.Y. App. Div. LEXIS 12987 (N.Y. App. Div. 4th Dep't), app. denied, 40 N.Y.2d 806 (N.Y. 1976).

Court of Special Sessions had no jurisdiction to try defendant upon information charging an infraction of this section. People v Bullis, 5 Misc. 2d 1, 158 N.Y.S.2d 560, 1957 N.Y. Misc. LEXIS 3707 (N.Y. County Ct. 1957).

Traffic summons charging operation of motor vehicle at speed of 51 miles per hour in 60-mile zone in violation of statute was a nullity. People v Decker, 28 Misc. 2d 845, 215 N.Y.S.2d 602, 1961 N.Y. Misc. LEXIS 2860 (N.Y. County Ct. 1961).

A motorist arrested for speeding and given a uniform traffic ticket directing him to appear before the Court of Special Sessions of a specified town on a specified date and hour, who appeared with counsel at the time and place specified, found the building locked and no court in session after waiting for 15 minutes for the justice of the peace to arrive, was entitled to a writ of prohibition against being called before the same court on a later date on the same charge, the court having lost jurisdiction to proceed for failing to be present on return day. Abbott v Rose, 40 Misc. 2d 64, 242 N.Y.S.2d 773, 1963 N.Y. Misc. LEXIS 2160 (N.Y. Sup. Ct. 1963).

The failure of justice of peace to be present in court on return day deprived justice of jurisdiction to proceed further with prosecution of defendant for speeding. Abbott v Rose, 40 Misc. 2d 64, 242 N.Y.S.2d 773, 1963 N.Y. Misc. LEXIS 2160 (N.Y. Sup. Ct. 1963).

Justice of the peace who had jurisdiction of the accused at the time of arraignment did not lose such jurisdiction by making an unauthorized or improper adjournment of the case. Santacrose v Bean, 52 Misc. 2d 167, 275 N.Y.S.2d 418, 1964 N.Y. Misc. LEXIS 1161 (N.Y. Sup. Ct. 1964).

So long as an alleged speeding infraction occurred somewhere within the five western towns of Suffolk County, the District Court had jurisdiction. People v Rosgaard, 61 Misc. 2d 151, 304 N.Y.S.2d 1013, 1969 N.Y. Misc. LEXIS 1400 (N.Y. Dist. Ct. 1969).

Uniform traffic ticket which advised defendant that he was charged with operating his truck without proper plate or certificate was jurisdictionally valid even though it used erroneous number in referring to statute. People v Demar, 65 Misc. 2d 465, 317 N.Y.S.2d 676, 1970 N.Y. Misc. LEXIS 1074 (N.Y. Dist. Ct. 1970).

Fact that officer merely printed his name on defendant's copy of uniform traffic summons and that his signature in script did not appear thereon did not preclude court from acquiring jurisdiction on theory that summons failed to comply with regulations of Commissioner of Motor Vehicles requiring officer to sign defendant's copy. People v Godin, 80 Misc. 2d 919, 365 N.Y.S.2d 412, 1975 N.Y. Misc. LEXIS 2285 (N.Y. J. Ct. 1975).

Neither fact that date on information charging defendant with speeding in violation of Vehicle and Traffic Law had been changed prior to issuance of ticket, nor fact that officer used two different signatures, one on ticket and one to verify information, nor fact that officer failed to indicate whether defendant was charged with a traffic infraction or misdemeanor was sufficiently fatal to divest court of its jurisdiction in matter. People v Perlman, 89 Misc. 2d 973, 392 N.Y.S.2d 985, 1977 N.Y. Misc. LEXIS 2703 (N.Y. Dist. Ct. 1977), overruled, Graf v Foschio, 102 A.D.2d 891, 477 N.Y.S.2d 190, 1984 N.Y. App. Div. LEXIS 19120 (N.Y. App. Div. 2d Dep't 1984).

The failure of an information charging a violation of sub 3 of former § 56 to negative the exception that an automobile may be operated in excess of 50 miles per hour where a greater speed is permitted by the state traffic commission is fatally defective and deprives the court of special session of jurisdiction. However, a conviction under such information cannot be attacked after the time for appeal has expired. People v Zajkowski, 121 N.Y.S.2d 586, 1953 N.Y. Misc. LEXIS 1770 (N.Y. County Ct. 1953).

45. Judicial review

Where an intermediate appellate court reversed defendant's conviction of violating subd (c) of this section both on the law and on the facts, it should not have dismissed the information, but was obliged to grant a new trial. People v Nappi, 18 N.Y.2d 136, 272 N.Y.S.2d 347, 219 N.E.2d 176, 1966 N.Y. LEXIS 1177 (N.Y. 1966).

In occupant's action for injuries sustained when automobile was driven off pavement to avoid striking a truck blocking pavement, a charge permitting jury to find negligence if truck's speed exceeded 20 miles per hour under statutory presumption that such speed was not prudent was reversibly erroneous where evidence was undisputed that truck was only going 18 miles per hour when it started skid which resulted in blocking pavement. Akin v Pruyn Lumber & Supply Co., 254 A.D. 34, 4 N.Y.S.2d 370, 1938 N.Y. App. Div. LEXIS 6332 (N.Y. App. Div. 1938).

In proceeding to revoke chauffeur's license for failure to use reasonable care in driving automobile on icy road, where chauffeur testified that distance from first patch of ice on which automobile began to skid and he brought it back under control to second patch of ice on which automobile skidded and overturned did not exceed 200 feet, finding that automobile was out of control for approximately 200 feet was contrary to evidence. Hessney v MacDuff, 284 A.D. 70, 130 N.Y.S.2d 405, 1954 N.Y. App. Div. LEXIS 3344 (N.Y. App. Div. 1954).

Instruction invoking subdivision of statute as basis for finding either negligence or contributory negligence on part of drivers of respective vehicles was reversibly erroneous, where, prior to trial, such section had been declared unconstitutional. Carroll v Harris, 23 A.D.2d 582, 256 N.Y.S.2d 715, 1965 N.Y. App. Div. LEXIS 4800 (N.Y. App. Div. 2d Dep't 1965).

Failure to present at administrative hearing the matters urged on appeal from determinations of the Appeals Board of the Administrative Adjudication Bureau of the Department of Motor Vehicles constituted a waiver so as to preclude petitioner from raising such matters. Tipon v Appeals Bd. of Administrative Adjudication Bureau, 52 A.D.2d 1065, 384 N.Y.S.2d 324, 1976 N.Y. App. Div. LEXIS 12987 (N.Y. App. Div. 4th Dep't), app. denied, 40 N.Y.2d 806 (N.Y. 1976).

The Supreme Court, Appellate Division, could not substitute its view for that of the administrative agency in proceeding on petition in Article 78 proceeding to review determinations of the Appeals Board of the Administrative Adjudication Bureau of the Department of Motor Vehicles where the hearing minutes showed substantial questions of fact. Tipon v Appeals Bd. of Administrative Adjudication Bureau, 52 A.D.2d 1065, 384 N.Y.S.2d 324, 1976 N.Y. App. Div. LEXIS 12987 (N.Y. App. Div. 4th Dep't), app. denied, 40 N.Y.2d 806 (N.Y. 1976).

An information was dismissed and defendant discharged where the credibility and weight to be given conflicting testimony in the Justice's Court could not be judged since it was merely summarized in narrative form and not set out verbatim. People v Woodard, 2 Misc. 2d 26, 150 N.Y.S.2d 366, 1956 N.Y. Misc. LEXIS 1949 (N.Y. County Ct. 1956).

Defendant who had been convicted of speeding would not be permitted, in absence of statutory authority, to amend affidavit of errors, which was complete on its face and contained no errors or defects, by including new grounds or errors after 30-day period authorized for taking appeals had elapsed. People v Hansen, 27 Misc. 2d 885, 209 N.Y.S.2d 1010, 1961 N.Y. Misc. LEXIS 3445 (N.Y. County Ct. 1961).

A conviction of speeding after trial in Justice's Court must be reversed when the Justice fails to file a return on appeal containing minutes of the trial or a record of the evidence upon which judgment was based. People v Wiltse, 28 Misc. 2d 410, 212 N.Y.S.2d 713, 1961 N.Y. Misc. LEXIS 3161 (N.Y. County Ct. 1961).

On appeal to a County Court from a conviction for violating subd. 3 of former § 56, alleging insufficiency of the evidence to sustain the conviction, conviction can only be reversed and a new trial ordered where no stenographic record of the testimony of the witnesses is presented to the reviewing court and it only appears from the justice's summary of testimony that there was a sharp conflict of testimony as between that of the arresting trooper and passengers riding in the defendant's car as to how fast the vehicle was traveling. People v Trafton, 28 Misc. 2d 475, 220 N.Y.S.2d 81, 1961 N.Y. Misc. LEXIS 3342 (N.Y. County Ct. 1961).

A defendant, convicted of violating subd. 4 of the section by exceeding the speed limit established by the State Traffic Commission, having failed to raise the question that the Commission's regulation fixing the speed limit had not been filed with the Department of State prior to his conviction, and the time to appear having long since expired, could not challenge his conviction by application for coram nobis. People v Schwartz, 31 Misc. 2d 409, 220 N.Y.S.2d 889, 1961 N.Y. Misc. LEXIS 2205 (N.Y. Dist. Ct. 1961), aff'd, 12 N.Y.2d 753, 234 N.Y.S.2d 708, 186 N.E.2d 559, 1962 N.Y. LEXIS 940 (N.Y. 1962).

It is clearly a question of fact for court determination whether the prosecution has established beyond reasonable doubt that defendant, at the time and place in question, was operating his car at a speed greater than reasonable and prudent under existing conditions, and an Appellate Court cannot substitute its judgment for that of the trier of facts on such matters. People v Pupillo, 37 Misc. 2d 455, 235 N.Y.S.2d 522, 1962 N.Y. Misc. LEXIS 2109 (N.Y. County Ct. 1962).

Where defendant motorist was charged with violating § 501 by operating a motor vehicle without a license on the same occasion as violating § 1180 by speeding, but the magistrate dismissed the charge of operating without a license at request of the District Attorney for "insufficient identification," his conviction for speeding was reversed by the County Court on the ground that the

evidence must have been likewise insufficient to establish his identity as operator of the speeding vehicle. People v Quinzi, 39 Misc. 2d 1070, 242 N.Y.S.2d 334, 1963 N.Y. Misc. LEXIS 1713 (N.Y. County Ct. 1963).

Evidence that each petitioner had previously been convicted of a speeding violation was insufficient to support order suspending petitioners' driver's licenses pending trials of speeding charges. Hague v Sedita, 56 Misc. 2d 203, 288 N.Y.S.2d 212, 1968 N.Y. Misc. LEXIS 1723 (N.Y. Sup. Ct. 1968).

46. —Effect of receipt of evidence of prior offenses

In an Article 78 proceeding to review the revocation of a driver's license, revocation was proper where he had three speeding violations in 18 months. Further, application of the clear and convincing evidence rule in an administrative hearing resulting in mandatory revocation of a driver's license was constitutional. Filsame v Melton, 89 A.D.2d 604, 452 N.Y.S.2d 460, 1982 N.Y. App. Div. LEXIS 17695 (N.Y. App. Div. 2d Dep't), app. denied, 57 N.Y.2d 608, 1982 N.Y. LEXIS 7264 (N.Y. 1982).

Penalty of $100 fine and 60-day license suspension was not excessive where petitioner was found guilty of driving at 95 miles per hour and his driving record contained numerous other moving violations. Martin v Adduci, 138 A.D.2d 599, 526 N.Y.S.2d 181, 1988 N.Y. App. Div. LEXIS 3150 (N.Y. App. Div. 2d Dep't 1988).

Speeding conviction was reversed where prosecutor failed to make opening statement and information referred to motorist's prior speeding conviction. People v Sperbeck, 5 Misc. 2d 849, 165 N.Y.S.2d 958, 1957 N.Y. Misc. LEXIS 3455 (N.Y. County Ct. 1957).

A conviction of speeding was confirmed over a contention that the justice of the peace who heard the case should have disqualified himself after receiving information of defendant's prior conviction. Such information was given to the justice by a volunteer, without improper act of any of the parties or of the justice, and there was no indication that the justice placed any reliance upon the hearsay statements in the volunteer's letter. People v Hartgrove, 12 Misc. 2d 201, 173 N.Y.S.2d 951, 1958 N.Y. Misc. LEXIS 3404 (N.Y. County Ct. 1958).

Admission of defendant's affirmative answer, as to prior convictions for speeding, though error, was not prejudicial where under the other evidence in the case, the justice could find the defendant guilty. People v Molnar, 16 Misc. 2d 174, 184 N.Y.S.2d 23, 1959 N.Y. Misc. LEXIS 4030 (N.Y. County Ct. 1959).

A judgment of conviction for speeding should be reversed where conviction can only be considered as having occurred after the magistrate asked to see defendant's driver's license, noted two prior convictions for speeding indorsed thereon, and then made the statement that he was inclined to believe that defendant was speeding on the occasion in question and guilty as charged. People v Patton, 27 Misc. 2d 357, 210 N.Y.S.2d 591, 1961 N.Y. Misc. LEXIS 3396 (N.Y. County Ct. 1961).

Prior to conviction of a person charged with speeding, the court before which the charge is presented should not look at his driver's license to see if there are any notations thereon of prior speeding convictions, and it is a violation of defendant's rights to do so. People v Patton, 27 Misc. 2d 357, 210 N.Y.S.2d 591, 1961 N.Y. Misc. LEXIS 3396 (N.Y. County Ct. 1961).

The record in a speeding case, was insufficient to show that prejudice resulted to defendant by the arresting officer's inspection of his driver's license following arrest, or from the magistrate's mere glancing at such license when it was handed to him by defendant's own attorney. People v Bokman, 36 Misc. 2d 132, 232 N.Y.S.2d 180, 1962 N.Y. Misc. LEXIS 2616 (N.Y. County Ct. 1962).

A Town Justice erred in requesting a copy of defendant's motor vehicle record prior to trial in which defendant was charged with the offense of speeding in violation of Veh & Tr Law § 1180. People v Meisenzahl, 108 Misc. 2d 648, 438 N.Y.S.2d 434, 1981 N.Y. Misc. LEXIS 2261 (N.Y. County Ct. 1981).

47. Jury instructions

Where various sections of the Vehicle and Traffic Law read by the judge in his main charge were appropriate to the case and no exception was taken to this part of the charge; his refusal to charge the language of this section at the request of the plaintiffs was not error in the context of the general instructions given by the judge that due care and caution must be observed by both drivers. Wells v Goodrich, 3 A.D.2d 865, 161 N.Y.S.2d 174, 1957 N.Y. App. Div. LEXIS 5882 (N.Y. App. Div. 3d Dep't 1957).

Although the accident in suit occurred when defendant's car ran into decedent's car after it had backed out of a driveway into a position across one lane of the highway on which defendant was approaching and partly across the other lane, and not within an intersection which was about a car length beyond, it was not error for the trial court to charge the jury in terms of the maximum speed for vehicles "approaching or entering" an intersection within a business or residential district not controlled by a traffic officer or traffic signal, there being evidence that defendant was traveling considerably in excess of that speed. Kinner v Kuroczka, 12 A.D.2d 383, 212 N.Y.S.2d 479, 1961 N.Y. App. Div. LEXIS 11924 (N.Y. App. Div. 3d Dep't 1961).

Trial court's omission of the word "and" in its reading to the jury of statute pertaining to speed in certain situations constituted harmless error in personal injury action arising out of intersectional collision. Kinsfather v Grueneberg, 47 A.D.2d 789, 365 N.Y.S.2d 903, 1975 N.Y. App. Div. LEXIS 9105 (N.Y. App. Div. 3d Dep't 1975).

In action by automobile driver, who was driving at 25 miles per hour on street as he proceeded past gas service station on his right and observed jeep through window of station but could not see whether it was occupied by driver, against jeep driver for back injuries sustained when jeep hit his automobile when he was just about by station, trial court's charge to jury of section of Vehicle and Traffic Law which requires driver to operate vehicle at reasonable and prudent speed was prejudicially erroneous in the record was devoid of any proof that automobile driver's speed was imprudent. Putnam v Lamoreaux, 59 A.D.2d 974, 399 N.Y.S.2d 333, 1977 N.Y. App. Div. LEXIS 14240 (N.Y. App. Div. 3d Dep't 1977).

In action for injuries sustained when plaintiff was struck by defendant's vehicle while crossing intersection on her bicycle, it was error to refuse plaintiff's request to charge CLS Veh & Tr § 1180(a) and (e) and to charge jury that defendant did not violate any law, since defendant testified that she accelerated and pulled into oncoming lane of traffic to pass slower vehicle as she approached intersection, and that her view of intersection was blocked; under circumstances, jury could find that defendant violated § 1180(a) and (e) by driving her vehicle at greater speed than was reasonable and prudent when entering intersection. Gabrielli v Biro, 140 A.D.2d 948, 529 N.Y.S.2d 626, 1988 N.Y. App. Div. LEXIS 5775 (N.Y. App. Div. 4th Dep't 1988).

In personal injury action arising out of car-train collision at railroad crossing, court did not err in charging jury on CLS Veh & Tr §§ 1180(a), (b) and (e), in view of substantial testimony from witnesses indicating that plaintiff was driving recklessly and police accident report indicating that plaintiff's car was found with backup lights activated, from which it could be inferred that plaintiff was driving at unreasonable speed in attempting to beat train through crossing, and was attempting to back up when struck. Vasquez by Vega v Conrail, 180 A.D.2d 247, 584 N.Y.S.2d 345, 1992 N.Y. App. Div. LEXIS 7958 (N.Y. App. Div. 3d Dep't), app. denied, 80 N.Y.2d 762, 592 N.Y.S.2d 671, 607 N.E.2d 818, 1992 N.Y. LEXIS 3958 (N.Y. 1992), app. denied, 80 N.Y.2d 762, 592 N.Y.S.2d 671, 607 N.E.2d 818 (N.Y. 1992).

In personal injury action arising out of car-train collision at railroad crossing, court did not err in charging jury on CLS Veh & Tr § 1180(b), although reference to 55-mile-per-hour speed limit of statute was inapplicable to case, since statute also requires drivers to reduce speed whenever special hazard exists. Vasquez by Vega v Conrail, 180 A.D.2d 247, 584 N.Y.S.2d 345, 1992 N.Y. App. Div. LEXIS 7958 (N.Y. App. Div. 3d Dep't), app. denied, 80 N.Y.2d 762, 592 N.Y.S.2d 671, 607 N.E.2d 818, 1992 N.Y. LEXIS 3958 (N.Y. 1992), app. denied, 80 N.Y.2d 762, 592 N.Y.S.2d 671, 607 N.E.2d 818 (N.Y. 1992).

48. Applicability

Although skidding itself is not evidence of negligence, where it is alleged and proved that defendant, while operating his car on a slippery and icy street with knowledge of its nature, started his car from a stop on three separate occasions each time spinning

the car around and sliding off into a snow bank, that is sufficient to sustain a conviction. People v Lewis, 13 N.Y.2d 180, 245 N.Y.S.2d 1, 194 N.E.2d 831, 1963 N.Y. LEXIS 867 (N.Y. 1963).

Police did not exceed bounds of normal traffic stop by detaining defendants' vehicle beyond time necessary to issue ticket for driving at speed not prudent under conditions where defendants were detained for 10 to 12 minutes, during which troopers observed duffle bag ultimately found to contain fruits of crime uncomfortably stuffed between one defendant's legs while car's back seat was empty, and determined that other defendant had received traffic ticket in certain town on same date he claimed to be elsewhere visiting friends, prompting police to obtain permission to search vehicle. People v Durgey, 186 A.D.2d 899, 589 N.Y.S.2d 631, 1992 N.Y. App. Div. LEXIS 12391 (N.Y. App. Div. 3d Dep't 1992), app. denied, 81 N.Y.2d 787, 594 N.Y.S.2d 733, 610 N.E.2d 406 (N.Y. 1993), app. denied, 81 N.Y.2d 788, 594 N.Y.S.2d 734, 610 N.E.2d 407, 1993 N.Y. LEXIS 402 (N.Y. 1993).

School district was not precluded from discharging petitioner from her employment as school bus driver on her conviction of violating CLS Veh & Tr § 1180(e) merely because she had earlier signed agreement consenting to 20-day suspension in connection with same incident, since suspension was authorized by administrative regulation contained in district's school bus drivers' handbook, based on petitioner's receipt of citation, while her termination was mandated by different section of same regulation, following her conviction for speeding. Herbison v Board of Educ., 224 A.D.2d 618, 638 N.Y.S.2d 678, 1996 N.Y. App. Div. LEXIS 1375 (N.Y. App. Div. 2d Dep't 1996).

Defendants, owner and operator of van which rear-ended 3-wheeled "scooter" in which police officer was seated while on scene investigating unrelated accident, were improperly granted summary judgment in officer's action under CLS Gen Mun § 205-e, and alleged violation of CLS Veh & Tr § 1180 (a), where fact issues existed, inter alia, as to whether van operator should have seen alleged oil spill before he collided with officer's vehicle. Cammilleri v S & W Realty Assocs., 243 A.D.2d 530, 663 N.Y.S.2d 222, 1997 N.Y. App. Div. LEXIS 9807 (N.Y. App. Div. 2d Dep't 1997).

In action for wrongful death against driver of car in which decedent was passenger and against driver of oncoming car that struck first car, driver of first car was entitled to summary judgment where she was driving at legal speed, second driver was convicted of crossing double yellow line in violation of CLS Veh & Tr § 1126(a), and opposition to summary judgment was mere speculation that first driver might have done something to avoid accident. Tran v Nowak, 245 A.D.2d 1083, 666 N.Y.S.2d 84, 1997 N.Y. App. Div. LEXIS 13862 (N.Y. App. Div. 4th Dep't 1997).

Plaintiff motorist was not entitled to partial summary judgment on issue of liability of defendant owner of another vehicle, even though defendant's vehicle hit plaintiff's stopped vehicle from behind, where defendant rebutted presumption of negligence of driver of rear vehicle by submitting nonnegligent explanation for collision, and it was for jury to decide whether following driver breached his duties to keep proper lookout and maintain reasonably safe speed and distance. Pitchure v Kandefer Plumbing & Heating, 273 A.D.2d 790, 710 N.Y.S.2d 259, 2000 N.Y. App. Div. LEXIS 6719 (N.Y. App. Div. 4th Dep't 2000).

In a personal injury action by a vehicle's passenger after a collision, there was an issue of fact as to whether the operator of the other vehicle was negligent, precluding summary judgment, as the operator testified that as he was making a left turn from the right lane, there was a vehicle to his left that was also making a left turn and his ability to see the traffic entering the intersection from the west therefore was impaired. Strasburg v Campbell, 28 A.D.3d 1131, 816 N.Y.S.2d 627, 2006 N.Y. App. Div. LEXIS 5469 (N.Y. App. Div. 4th Dep't 2006).

Finding of misconduct by a police sergeant and the sergeant's reassignment to a lower rank were proper because, inter alia, given the sergeant's clear violations of N.Y. Veh. & Traf. Law §§ 1111(d)(1), 1128(d), 1180(b), during the sergeant's off-duty pursuit of another vehicle, substantial evidence supported the finding that the sergeant violated a pertinent regulation and brought discredit on the state police. Matter of Revella v Felton, 60 A.D.3d 1184, 875 N.Y.S.2d 316, 2009 N.Y. App. Div. LEXIS 1692 (N.Y. App. Div. 3d Dep't 2009).

Although defendant was arrested for speeding and driving while intoxicated under N.Y. Veh. & Traf. Law §§ 1180(d), 1192(2), (3) shortly after the homicide death of defendant's husband and defendant's miscarriage of a child, defendant's actions produced little or no harm to anyone, defendant had no prior criminal record, and the public safety or confidence in the criminal justice system would not be harmed; therefore, pursuant to N.Y. Crim. Proc. Law §§ 170.30(1)(g), 170.40, the charges were dismissed in the interest of justice. People v Haugh, 894 N.Y.S.2d 359, 26 Misc. 3d 1029, 2009 N.Y. Misc. LEXIS 3552 (N.Y. J. Ct. 2009).

49. Procedural matters

Conviction for speeding would be reversed as matter of discretion in interest of justice where (1) defendant was issued simplified traffic information which charged him with speeding, (2) information was dismissed on trial date for failure to timely serve and file supporting deposition, and (3) defendant was immediately issued new simplified information and supporting deposition based on same allegations. People v Rosenfeld, 163 Misc. 2d 982, 626 N.Y.S.2d 352, 1994 N.Y. Misc. LEXIS 670 (N.Y. App. Term 1994).

Although a motorist's plea of guilty to failure to yield was evidence of her negligence in a passenger's traffic accident case, it did not preclude the existence of a fact issue as to the driver's comparative fault. Lopez-Viola v Duell, 100 A.D.3d 1239, 955 N.Y.S.2d 220, 2012 N.Y. App. Div. LEXIS 7902 (N.Y. App. Div. 3d Dep't 2012).

Remaining charges against defendant of violating N.Y. Veh. & Traf. Law §§ 1192(1) and 1180(A) were dismissed under N.Y. Crim. Proc. Law § 170.40(1)(h) as: (1) two unclassified misdemeanor offenses, N.Y. Veh. & Traf. Law §§ 1192(3) and 1212, had been dismissed, but were charged on the original docket; (2) N.Y. Crim. Proc. Law § 30.30(1)(b) provided for a 90-day time period where at least one misdemeanor charge punishable by a sentence of imprisonment of more than three months was present on the docket; (3) 95 chargeable days had passed; and (4) a traffic infraction was an offense under § 30.30(1)(b). People v Ashley, 927 N.Y.S.2d 536, 32 Misc. 3d 644, 2011 N.Y. Misc. LEXIS 2625 (N.Y. City Crim. Ct. 2011), rev'd, 972 N.Y.S.2d 145, 39 Misc. 3d 149(A), 2013 N.Y. Misc. LEXIS 2429 (N.Y. App. Term 2013).

Where a jury found that defendant committed the offense of speeding in a construction zone in violation of N.Y. Veh. & Traf. Law § 1180(f) but the jury failed to make a specific finding as to the speed at which defendant was traveling, the trial court was not allowed to impose a sentence under N.Y. Veh. & Traf. Law § 1180(h)(3)(iii) based on its own finding that defendant's speed exceeded the applicable limit by more than 30 miles an hour; thus, defendant was entitled to resentencing pursuant to N.Y. Veh. & Traf. Law § 1180(h)(3)(i). People v Peacock, 193 Misc. 2d 672, 751 N.Y.S.2d 676, 2002 N.Y. Misc. LEXIS 1574 (N.Y. App. Term 2002).

Two supporting depositions were more than sufficient, and were subscribed and verified by the police officer, and were based upon his direct observation and contained sufficient factual allegations to provide a reasonable likelihood that defendant violated N.Y. Veh. & Traf. Law § 1180(d). The supporting depositions described defendant's operation of the motor vehicle described in the summons, the license plate number, that defendant was traveling at 53 miles per hour in a 30 miles per hour zone and that the speed was determined by a laser device. People v Stevens, 58 Misc. 3d 393, 66 N.Y.S.3d 589, 2017 N.Y. Misc. LEXIS 4498 (N.Y. J. Ct. 2017).

Trial court erred in finding defendant guilty of speeding because there was no dispute that the request for a supporting deposition was timely, the court's choice of the trial date had the effect of rendering it all but impossible for the supporting deposition to be served "five days before trial," and the subsequent adjournment of the trial did not cure the defect. People v Wolner, 58 Misc. 3d 907, 68 N.Y.S.3d 805, 2017 N.Y. Misc. LEXIS 5262 (N.Y. County Ct. 2017).

Conviction for speeding precludes convicted person from disproving such conduct in later civil action against state troopers

who issued citation; such traffic infraction is to be given collateral estoppel effect notwithstanding its status as non-criminal violation. Pastre v Weber, 717 F. Supp. 987, 1988 U.S. Dist. LEXIS 16728, 1989 U.S. Dist. LEXIS 9676 (S.D.N.Y. 1988).

Prosecutor who, on his own motion, had previously dismissed several other cases for alleged speeding violations in same geographic area where defendant was charged with speeding violation, because speed sign was obliterated by foliage, was collaterally estopped to deny sign obliteration in defendant's case, necessitating dismissal of charge. People v Fox, 157 Misc. 2d 238, 596 N.Y.S.2d 984, 1993 N.Y. Misc. LEXIS 104 (N.Y. J. Ct. 1993).

Prosecutor who, on his own motion, had previously dismissed several other cases for alleged speeding violations in same geographic area where defendant was charged with speeding violation, because speed sign was obliterated by foliage, was required by CLS Code of Pros Respons EC 7-23 to disclose existence of previous cases to defendant when defendant requested dismissal of charge. People v Fox, 157 Misc. 2d 238, 596 N.Y.S.2d 984, 1993 N.Y. Misc. LEXIS 104 (N.Y. J. Ct. 1993).

Prosecutor who, on his own motion, had previously dismissed several other cases for alleged speeding violations in same geographic area where defendant was charged with speeding violation, because speed sign was obliterated by foliage, acted arbitrarily and capriciously, in violation of defendant's right to equal protection under both Fourteenth Amendment and CLS NY Const Art I § 11 in failing to afford defendant same treatment extended to other defendants in same circumstances by opposing his motion to dismiss charge. People v Fox, 157 Misc. 2d 238, 596 N.Y.S.2d 984, 1993 N.Y. Misc. LEXIS 104 (N.Y. J. Ct. 1993).

In prosecution for speeding in violation of CLS Veh & Tr § 1180(d), defendant's CLS CPL § 240.20 motion for pretrial disclosure of radar device used to measure speed would be denied since violation was traffic infraction and CLS CPL § 240.20 applies only to misdemeanors, and use of radar is not "scientific test" as contemplated by CLS CPL § 240.20(1)(c). People v Guagnini, 143 Misc. 2d 676, 541 N.Y.S.2d 907, 1989 N.Y. Misc. LEXIS 326 (N.Y. Village Ct. 1989).

Where defendant was charged with passing a stop sign, driving 67 miles per hour in a 30 mile per hour zone, and driving while impaired, and where driving while impaired charge was sent to a conference part, which resulted in defendant pleading guilty to amended charge of speeding, defendant could not thereafter be convicted of driving 67 miles per hour in a 30 mile per hour zone since this charge, and the one to which he pleaded guilty, were identical and arose out of the same act or criminal transaction. People v Billeci, 77 Misc. 2d 1089, 356 N.Y.S.2d 187, 1974 N.Y. Misc. LEXIS 1307 (N.Y. Dist. Ct. 1974).

Motorist accused of speeding in county in which such charges are adjudicated administratively was not denied due process by traffic violations bureau's refusal of his request for discovery pertaining to type of radar used and its associated testing and operating procedures, since motorist had no statutory or regulatory right to such disclosure. Miller v Schwartz, 72 N.Y.2d 869, 532 N.Y.S.2d 354, 528 N.E.2d 507, 1988 N.Y. LEXIS 1649 (N.Y. 1988).

Defendant charged with speeding violation was entitled to issuance of judicial subpoena duces tecum under CLS CPLR § 2307 for production of radar device which allegedly detected speeding since 15 NYCRR § 123.1 did not bar use of statute to obtain subpoena; however, radar device would only be turned over immediately prior to cross examination at his hearing since earlier surrender would improperly permit unauthorized discovery. People v Russo, 149 A.D.2d 255, 545 N.Y.S.2d 211, 1989 N.Y. App. Div. LEXIS 11230 (N.Y. App. Div. 2d Dep't 1989).

Sixth Amendment right to effective assistance of counsel did not require issuance of judicial subpoena duces tecum for radar device which allegedly detected speeding by defendant since defendant had no constitutional right to counsel on charge of traffic infraction. People v Russo, 149 A.D.2d 255, 545 N.Y.S.2d 211, 1989 N.Y. App. Div. LEXIS 11230 (N.Y. App. Div. 2d Dep't 1989).

Prosecution of a speeding charge by the District Attorney's office is not essential, as either the town attorney or a state trooper may prosecute it. Hogg v Parker, 38 Misc. 2d 41, 238 N.Y.S.2d 92, 1963 N.Y. Misc. LEXIS 2251 (N.Y. Sup. Ct.), rev'd, 20 A.D.2d 611, 245 N.Y.S.2d 406, 1963 N.Y. App. Div. LEXIS 2603 (N.Y. App. Div. 3d Dep't 1963).

A defendant who received a uniform traffic summons for speeding and who made several appearances in traffic court only to discover that neither the arresting officer nor the district attorney was present was entitled to dismissal of the charge. People ex rel. Panek v Radak, 52 Misc. 2d 300, 275 N.Y.S.2d 937, 1966 N.Y. Misc. LEXIS 1258 (N.Y. Spec. Sess. 1966).

50. —Adjudication by justice of the peace

A justice of the peace holding a court of special sessions may suspend execution of sentence imposing a fine upon the conviction of a second offender for the violation of this former section. 1945 Ops St Compt 405.

There is no authority for the district attorney to give blanket authorization to a magistrate to accept a plea to a lower rate of speed on a violation of Vehicle and Traffic Law, § 1180(b). 1978 Op Atty Gen May 26.

A magistrate who is hearing a Vehicle and Traffic Law, § 1180(b), violation, with no district attorney or assistant district attorney present, can accept a plea to a lower rate of speed than that indicated on the U.T.T. without the prior approval of a member of the district attorney's staff, as long as the police officer or his superior who is prosecuting the violation consents to such a plea. 1978 Opp Atty Gen May 26.

After hearing defendant's witnesses, a Justice of the Peace had no power to reserve decision on a speeding charge until the jury rendered its verdict on the charge of driving while license was revoked. People v Baranowski, 147 N.Y.S.2d 882, 208 Misc. 862, 1955 N.Y. Misc. LEXIS 3218 (N.Y. County Ct. 1955).

In prosecution under this section the justice of the peace was bound to inform the defendant of his right to counsel and it was reversible error for the justice to state that it might cost the defendant a lot of money to get a lawyer. People v Pier, 121 N.Y.S.2d 342, 203 Misc. 117, 1952 N.Y. Misc. LEXIS 2290 (N.Y. County Ct. 1952).

In a nonjury prosecution of a speeding charge, conducted by a deputy sheriff, it was not error for the justice of the peace either to permit reopening of the People's case, in exercise of discretion, or to question a witness in order to elicit sufficient facts to enable him to reach a decision. People v DeLeyden, 10 N.Y.2d 293, 220 N.Y.S.2d 961, 177 N.E.2d 924, 1961 N.Y. LEXIS 971 (N.Y. 1961).

Where motorist, charged with traffic infraction, upon arraignment before a justice of the peace, demanded an immediate trial, the justice could adjourn the case over defendant's objection, since he had jurisdiction of defendant and the offense and had the power to adjourn the case. Hogg v Parker, 20 A.D.2d 611, 245 N.Y.S.2d 406, 1963 N.Y. App. Div. LEXIS 2603 (N.Y. App. Div. 3d Dep't 1963), aff'd, 14 N.Y.2d 728, 250 N.Y.S.2d 74, 199 N.E.2d 171, 1964 N.Y. LEXIS 1154 (N.Y. 1964).

Agency Opinions

Analysis

1. In general
2. Speeding as traffic infraction
3. Sufficiency of information
4. Absence of signs
5. Local speeding ordinances
6. Speed at intersection
7. Emergency vehicles
8. Fines

1. In general

A public defender (County Law, Art. 18-A) is not required to represent an indigent defendant charged with a traffic infraction (Vehicle and Traffic Law, §§ 1101, 1180[f]). 1975 NY Ops Atty Gen Jan 16.

A town justice, when a ticket charging violation of Vehicle and Traffic Law § 1180(b) is filed with him, may not change the charge unilaterally to violation of § 1180(d). 1980 NY Ops Atty Gen Dec. 2 (informal).

2. Speeding as traffic infraction

A local government must enforce vehicle speed laws under the

provisions of the Vehicle and Traffic Law. N.Y. Op. Att'y Gen. No. 84-56.

3. Sufficiency of information

An information alleging a violation of this section need not specify that the defendant is a second offender in order to convict him as such. 1953 NY Ops Atty Gen 128 (informal).

4. Absence of signs

Where the Taconic State Park Commission has adopted a regulation fixing a maximum speed of 50 miles per hour on that section of Taconic State Parkway between Putnam County south line and Route No. 55 in Dutchess County, it is not necessary to post signs in regard to the 50 mile speed limit on the indicated section of parkway in view of former § 2 and this section. 1946 NY Ops Atty Gen July 2.

5. Local speeding ordinances

Any prosecution of a motorist for speeding must be under the Vehicle & Traffic Law and not under a village ordinance. 1961 NY Ops Atty Gen Dec. 8.

Subdivision (c) of this section does not empower a village to limit speed to less than 25 miles an hour on curves and winding roadways within the village. 1962 NY Ops Atty Gen Nov 19.

Villages and cities may establish speed limits and traffic control devices on state highways passing through their boundaries if they comply with all requirements imposed by the Vehicle and Traffic Law, and speeding infractions become violations of that law regardless of the agency authorized to fix such speed limits. 1962 NY Ops Atty Gen Oct 31.

A violation of a village ordinance authorized by section 1643 of the Vehicle and Traffic Law must be prosecuted under section 1180(d) of the Vehicle and Traffic Law and not under the village ordinance. 1977 NY Ops Atty Gen March 23.

6. Speed at intersection

Speed in excess of twenty miles an hour at an intersection having a flashing amber signal does not violate subdivision (2)(c) of former § 56. 1957 NY Ops Atty Gen Sept 12 (informal).

7. Emergency vehicles

Ambulance driver, even though operating his vehicle in emergency, is subject to laws relating to speed. 1953 NY Ops Atty Gen 131 (informal).

8. Fines

Fines, etc. for violations of § 1180 relating to speed limits established by a suburban town pursuant to § 1662-a should be distributed by the Comptroller to such suburban towns pursuant to § 1803(5) within the limitations thereof. Other fines, etc. covered by § 1803(1.a.) imposed and collected by the District Courts of Nassau and Suffolk Counties should be paid to the county treasurers thereof and credited, in Nassau County, to the county general fund pursuant to UDCA § 2408-a(4) and, in Suffolk County, to the first judicial district thereof pursuant to USDA § 2503(4). 1967 NY Ops Atty Gen Feb 1, 1967.

Fines or penalties collected by the Village of Grand View-On Hudson for violations of maximum speed limits established pursuant to sections 1643 and 1644 of the Vehicle and Traffic Law must be remitted to the Comptroller, but if the Village has established the office of police justice, the yearly amount of such fines not exceeding two dollars for every inhabitant of the Village shall be distributed by the Comptroller to the Village. 1975 NY Ops Atty Gen Apr 4.

Article 45 of the Vehicle and Traffic Law does not authorize a pre-prepared schedule of fines to enable a motorist simultaneously to mail his fine and guilty plea in relation to a traffic offense. 1990 N.Y. Op. Att'y Gen. No. I90-61.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 510, 510-a, 510-b, 1690, 1803; CLS Gen Mun §§ 99-l, 371.

Suspension and revocation for violations committed during probationary periods, § 510-b.

Traffic regulations on restricted highways, § 1625.

Codes, Rules and Regulations:

Speed regulations. 15 NYCRR §§ 1000 et seq.

Law Reviews:

Speeding and due process. 28 Fordham L. Rev. 115.

Annotations:

Meaning of "residence district," "business district," "school area," and the like in statutes and ordinances regulating speed of motor vehicles. 50 ALR2d 343.

Applicability of res ipsa loquitur where motor vehicle leaves road. 79 ALR2d 6.

Indefiniteness of automobile speed regulations as affecting validity. 6 ALR3d 1326.

Validity, construction, and application of criminal statutes specifically directed against racing of automobiles on public streets and highways (drag racing). 24 ALR3d 1286.

Opinion testimony as to speed of motor vehicle based on skid marks and other facts. 29 A.L.R.3d 248.

Establishment of Negligence Within Meaning of Statute Penalizing Negligent Homicide by Operation of Motor Vehicle — Speeding or Driving at Unsafe Speed. 84 ALR6th 427.

Matthew Bender's New York Practice Guides: Lexis-Nexis AnswerGuide New York Negligence § 2.09 Identifying Applicable Theories of Liability in Motor Vehicle Cases.

Warren's Negligence in the New York Courts Ch. 228 (motor vehicle liability).

Texts: 1-111 Bender's New York Evidence § 111.15.

ARTICLE 32 Stopping, Standing, and Parking

HISTORY:

Add, L 1959, ch 775, eff Oct 1, 1960, with substance transferred from former Art 19.

§ 1202. Stopping, standing or parking prohibited in specified places [Effective until April 5, 2021]

(a) Except when necessary to avoid conflict with other traffic, or when in compliance with law or the directions of a police officer or official traffic-control device, no person shall:

1. Stop, stand or park a vehicle:

a. On the roadway side of any vehicle stopped, standing or parked at the edge or curb of a street;

b. On a sidewalk;

c. Within an intersection, except when permitted by official signs or parking meters on the side of a highway opposite a street which intersects but does not cross such highway;

d. On a cross walk;

e. Between a safety zone and the adjacent curb or within thirty feet of points on the curb immediately opposite the ends of a safety zone, unless a different distance is indicated by official signs, markings or parking meters;

f. Alongside or opposite any street excavation or obstruction when stopping, standing or parking would obstruct traffic;

g. Upon any bridge or other elevated structure upon a highway or within a highway tunnel, unless otherwise indicated by official signs, markings or parking meters;

h. On any railroad tracks;

i. In the area between roadways of a divided highway, including crossovers, except in an emergency;

j. On a state expressway highway or state interstate route highway, including the entrances thereto

and exits therefrom, which are a part thereof, except in an emergency.

k. Engage in the retail sale of frozen desserts as that term is defined in subdivision thirty-seven of section three hundred seventy-five of this chapter directly to pedestrians on any highway having a speed limit in excess of thirty miles per hour. Nothing herein shall be construed to prohibit the operator of such vehicle from stopping such vehicle off such highway, in a safe manner, for the sole purpose of delivering such retail product directly to the residence of a consumer or to the business address of a customer of such retailer.

2. Stand or park a vehicle, whether occupied or not, except momentarily to pick up or discharge a passenger or passengers:

a. In front of a public or private driveway;

b. Within twenty feet of a cross walk at an intersection, unless a different distance is indicated by official signs, markings or parking meters;

c. Within thirty feet upon the approach to any flashing signal, stop or yield sign or traffic-control signal located at the side of the roadway, unless a different distance is indicated by official signs, markings or parking meters;

d. Within twenty feet of the driveway entrance to any fire station and, when on the side of the street opposite to the entrance of any fire station, within seventy-five feet of said entrance, when properly signposted, unless a different distance is indicated by official signs, markings or parking meters.

e. Alongside or obstructing a curb area which has been cut down, lowered or constructed so as to provide accessibility to the sidewalk.

3. Park a vehicle, whether occupied or not, except temporarily for the purpose of and while actually engaged in loading or unloading merchandise or passengers, within fifty feet of the nearest rail of a railroad crossing, unless a different distance is indicated by official signs, markings or parking meters.

(b) 1. No person shall stop, stand or park a vehicle within fifteen feet of a fire hydrant except when such vehicle is attended by a licensed operator or chauffeur who is seated in the front seat and who can immediately move such vehicle in case of emergency, unless a different distance is indicated by official signs, markings or parking meters.

2. No person shall stop, stand or park a vehicle within fifteen feet of a fire hydrant except when such vehicle is attended by a licensed operator or chauffeur who is seated in the front seat and who can immediately move such vehicle in case of emergency, when such vehicle impairs or hinders the access of a fire vehicle to a fire hydrant while such fire vehicle is engaged in an emergency operation, unless a different distance is indicated by official signs, markings, parking meters or the provisions of any local law, rule, or ordinance.

(c) No person shall move a vehicle not lawfully under his control into any prohibited area or away from a curb such distance as is unlawful.

HISTORY:

Add, L 1964, ch 653, § 14; amd, L 1966, ch 171, § 1, eff Oct 1, 1966; L 1967, ch 78, § 1, eff Oct 1, 1967; L 1969, ch 654, § 3, eff Oct 1, 1969; L 1970, ch 679, § 9, eff Jan 1, 1971; L 1981, ch 224, § 3, eff Sept 1, 1982; L 1983, ch 666, § 1, eff Sept 1, 1983; L 1998, ch 267, § 3, eff Jan 6, 1999; L 2006, ch 574, § 1, eff Nov 1, 2006.

Editor's Notes Laws 2020, ch 206, § 2, eff April 5, 2021, provides:

§ 2. This act shall take effect on the one hundred eightieth day after it shall have become a law.

Laws 2020, ch 206, § 2, eff April 5, 2021, provides:

§ 2. This act shall take effect on the one hundred eightieth day after it shall have become a law.

Repeal Notes: [1964, ch 653] Section 1202 of the Vehicle and Traffic Law as repealed by this act referred to stopping, standing or parking in specified places. The material deleted was merely replaced in a different form and under a different arrangement for purposes of clarification.

Prior Law: Former § 1202, add, L 1959, ch 775, with substance transferred from former § 1202; repealed, L 1964, ch 653, § 14, eff Oct 1, 1964.

Amendment Notes The 2020 amendment by ch 206, § 1, added (a)(1)(l); and made related changes.

Notes to Decisions

Analysis

1. In general
2. Construction
3. Applicability
4. Disabled vehicle
5. Arrest
6. Procedure
7. —Jurisdiction
8. —Statute of limitations
9. —Summary judgment
10. Evidence
11. Prima facia case
12. Jury instructions
13. Directed verdict

1. In general

Parking violations could not be used as justification for act of police officers in "heading off" defendant's car with an unmarked police vehicle where parking violations amounted to a mere pretext on part of police officers who were assigned to an anti-crime unit and were not assigned to traffic duty. People v Flanagan, 56 A.D.2d 658, 391 N.Y.S.2d 907, 1977 N.Y. App. Div. LEXIS 10798 (N.Y. App. Div. 2d Dep't 1977).

The driver, and likewise the owner, of a truck-trailer was liable for injuries sustained by a pedestrian where the driver backed the vehicle in such manner as to mount the curb and tilt an iron grate running across the sidewalk into the street in such manner as to strike and injure the pedestrian. De Sessa v White Plains, 30 Misc. 2d 817, 219 N.Y.S.2d 190, 1961 N.Y. Misc. LEXIS 2553 (N.Y. Sup. Ct. 1961).

2. Construction

Former § 86 of the Vehicle and Traffic Law, prohibiting parking or stopping on a sidewalk, was given a broad construction, one of its obvious purposes being to protect pedestrians on the sidewalk. De Sessa v White Plains, 30 Misc. 2d 817, 219 N.Y.S.2d 190, 1961 N.Y. Misc. LEXIS 2553 (N.Y. Sup. Ct. 1961).

3. Applicability

Statute prohibiting stopping or parking of vehicle on expressway except in emergency was applicable to city's department of sanitation's foreman, whose departmental car was struck from the rear after he had stopped car partially off highway and proceeded to instruct driver of snowplow to clear exits and entrances, contrary to contention that foreman was exempt from operation of statutes governing motorists generally because he was a person "actually engaged in work on a highway." Petosa v New York, 52 A.D.2d 919, 383 N.Y.S.2d 397, 1976 N.Y. App. Div. LEXIS 12763 (N.Y. App. Div. 2d Dep't 1976).

4. Disabled vehicle

Court properly refused to instruct jury as to violations of CLS Veh & Tr §§ 1201(b) and 1202 where defendant's vehicle, while being driven on highway, had completely lost power, and thus was clearly "disabled" vehicle in "emergency" circumstances, to which statutes do not apply. Koseatac v Rubin, 4 Fed. Appx. 84, 2001 U.S. App. LEXIS 2540 (2d Cir. N.Y. 2001).

5. Arrest

Police officer acted lawfully when he stopped vehicle and directed defendant to produce his license and registration where he actually observed defendant engage in minor traffic violation of stopping in crosswalk, and when defendant failed to produce operator's license, officer acquired grounds to charge him with additional infraction. People v Cortes, 86 Misc. 2d 155, 382 N.Y.S.2d 445, 1976 N.Y. Misc. LEXIS 2417 (N.Y. Sup. Ct. 1976).

Where the trooper knocked on the car window, at which point defendant opened the window and the officer smelled burning marijuana in the car, the trooper had reason to approach the vehicle, as stopping, standing, or parking at the location in question was prohibited under N.Y. Veh. & Traf. Law § 1202(a)(1)(j) unless there was an emergency; after the trooper found partially smoked marijuana cigarettes in the ashtrays, the officer had the right under N.Y. Const. art. I, § 12 search the vehicle and the probable cause to arrest defendant. People v Semanek, 30 A.D.3d 547, 816 N.Y.S.2d 569, 2006 N.Y. App. Div. LEXIS 8044 (N.Y. App. Div. 2d Dep't 2006).

6. Procedure

In action for personal injuries sustained when plaintiffs' vehicle struck city's department of sanitation's foreman's departmental car from rear after he stopped car partially off expressway and proceeded to give instructions to driver of snowplow, mere objection to "charging the Traffic Regulations and the Vehicle and Traffic Code, and particularly the Vehicle and Traffic Code as constituting negligence merely if there is a violation" was insufficient to preserve for review the contention that giving charge on statute prohibiting stopping or parking vehicle on expressway except in emergency was error on ground that foreman was exempt from operation of statute. Petosa v New York, 52 A.D.2d 919, 383 N.Y.S.2d 397, 1976 N.Y. App. Div. LEXIS 12763 (N.Y. App. Div. 2d Dep't 1976).

Defendant in prosecution for operating motor vehicle with .10% or more by weight of alcohol in bloodstream was deprived of fair trial by being subjected to trial which began at 9:00 p.m. and ended with return of jury verdict at 6:05 a.m. on following morning. People v Hurley, 86 Misc. 2d 601, 383 N.Y.S.2d 177, 1976 N.Y. Misc. LEXIS 2492 (N.Y. County Ct. 1976).

7. —Jurisdiction

The parking of a truck across a sidewalk within a housing community operated by the Federal Government is a violation and the state courts have jurisdiction over an action for injuries to an infant occasioned upon his being injured in the street while going around the truck. Mullen v Fayette, 274 A.D. 527, 85 N.Y.S.2d 64, 1948 N.Y. App. Div. LEXIS 3121 (N.Y. App. Div. 1948), reh'g denied, 275 A.D. 730, 87 N.Y.S.2d 920, 1949 N.Y. App. Div. LEXIS 4234 (N.Y. App. Div. 1949), aff'd, 300 N.Y. 501, 89 N.E.2d 20, 300 N.Y. (N.Y.S.) 501, 1949 N.Y. LEXIS 1393 (N.Y. 1949).

8. —Statute of limitations

Defendant was properly convicted on 23 counts of illegal parking over his contention that the prosecution of some of them was barred by the two-year statute of limitations applicable to misdemeanors. People v Levine, 308 N.Y. 685, 124 N.E.2d 322, 308 N.Y. (N.Y.S.) 685, 1954 N.Y. LEXIS 1796 (N.Y. 1954).

9. —Summary judgment

In an action arising out of a collision between a truck and two buses that occurred when the truck driver was attempting to alleviate his stuck accelerator pedal and swerved, striking the buses, which were parked on the shoulder of the Long Island Expressway in violation of Veh & Tr Law § 1202(a)(1)(j), which prohibits stopping or standing on a state expressway except in an emergency, defendant bus company's motion for summary judgment would be denied, since the section clearly embodies a legislative judgment that the stopping, standing or parking of a vehicle, either on the roadways or shoulders of express highways, constitutes an unacceptable danger of accidents, and therefore, for the purposes of the motion, the negligence of the bus company was properly considered a substantial cause of the injuries sustained by plaintiffs, as it was closely connected in time and space to the injuries sustained, and violated a public policy. Dowling v Consolidated Carriers Corp., 103 A.D.2d 675, 478 N.Y.S.2d 883, 1984 N.Y. App. Div. LEXIS 19289 (N.Y. App. Div. 1st Dep't), app. dismissed, 63 N.Y.2d 952, 1984 N.Y. LEXIS 6402 (N.Y. 1984), aff'd, 65 N.Y.2d 799, 493 N.Y.S.2d 116, 482 N.E.2d 912, 1985 N.Y. LEXIS 15423 (N.Y. 1985).

In action by plaintiff whose vehicle was rear-ended while stopped on highway due to traffic jam caused by defendants, who had stopped their vehicles to argue with one another in apparent case of road rage, court erred in granting summary judgment to defendants on ground that their alleged negligence in stopping on highway was not proximate cause of rear-end collision as matter of law, as question of fact existed as to whether rear-ending accident was normal or foreseeable consequence of situation created by defendants. Mitchum v Friend, 270 A.D.2d 841, 705 N.Y.S.2d 152, 2000 N.Y. App. Div. LEXIS 3552 (N.Y. App. Div. 4th Dep't 2000).

Defendants, owner and driver of heating fuel delivery truck, should have been granted summary judgment dismissing complaint insofar as it alleged violations of CLS Veh & Tr §§ 1122, 1129, 1146, 1201(a), and 1202 since none of those sections applied to conduct of driver in stopping alongside road for purpose of making fuel delivery; however, defendants' summary judgment motion was properly denied as to action alleging negligence of driver (for which owner would be vicariously liable) where driver's deposition testimony stated that he did not park in driveway of subject residence because hose would not reach fuel tank from that location, but plaintiffs' expert opined that 150-foot hose originating from truck would have reached fuel tank from driveway of subject residence.. Falker v Ostrander, 272 A.D.2d 988, 708 N.Y.S.2d 532, 2000 N.Y. App. Div. LEXIS 5166 (N.Y. App. Div. 4th Dep't 2000).

Defendant was properly granted summary judgment, despite plaintiff's assertion that defendant's stopping in crosswalk, in violation of CLS Veh & Tr § 1202(a)(1)(d), was negligence per se and created jury question as to whether that violation was proximate cause of accident in which another vehicle that was passing defendant's vehicle on right struck plaintiff's decedent's motorcycle as it was making left-hand turn; statute was enacted to protect pedestrians and could not establish negligence per se by defendant since decedent was not within class of individuals intended to be protected, and plaintiff failed to show that defendant's decision to stop his vehicle where he did breached his common-law duty of ordinary care under circumstances or that he was otherwise negligent in operation of his vehicle. Boston v Dunham, 274 A.D.2d 708, 711 N.Y.S.2d 54, 2000 N.Y. App. Div. LEXIS 7784 (N.Y. App. Div. 3d Dep't 2000).

In a personal injury action, a third driver was not entitled to summary judgment as the third driver failed to show his conduct in stopping his vehicle in a single travel lane in a construction zone was not negligent under N.Y. Veh. & Traf. Law § 1202(a) and that such conduct did not cause or contribute to the accident in which the vehicle behind the third driver was rear-ended by a second vehicle. Owsian v Cobo, 45 A.D.3d 1368, 846 N.Y.S.2d 824, 2007 N.Y. App. Div. LEXIS 11498 (N.Y. App. Div. 4th Dep't 2007).

Negligence claim was not appropriately resolved on summary judgment, although the city made a prima facie showing of its entitlement to summary judgment by demonstrating that its truck was lawfully stopped on the highway by reason of an emergency; fact issues existed as to whether the driver of the city's truck failed to exercise reasonable care to warn other motorists of the obstruction and, if so, whether such failure was a proximate cause of the accident. Pinilla v City of New York, 136 A.D.3d 774, 24 N.Y.S.3d 710, 2016 N.Y. App. Div. LEXIS 981 (N.Y. App. Div. 2d Dep't 2016).

10. Evidence

In action by minor against owner and operator of double-parked ice cream truck for injuries he sustained when he was struck by vehicle while he was sitting on his bicycle behind the

double-parked truck, evidence as to truck owner's negligence in double parking in violation of traffic regulations was sufficient for jury. Giordano v Sheridan Maintenance Corp., 38 A.D.2d 552, 328 N.Y.S.2d 241, 1971 N.Y. App. Div. LEXIS 2805 (N.Y. App. Div. 2d Dep't 1971).

11. Prima facia case

Passenger who was injured while exiting from rear passenger side of taxi owned and operated by defendants, when passing car struck open door of taxi, established prima facie case that defendants were negligent based on evidence that taxi driver violated CLS Veh & Tr § 1202(a)(1)(a) by double parking on left side of one-say street to allow her to exit. Ferguson v Gassman, 229 A.D.2d 464, 645 N.Y.S.2d 331, 1996 N.Y. App. Div. LEXIS 7778 (N.Y. App. Div. 2d Dep't 1996).

12. Jury instructions

In action arising from accident in which infant plaintiff was struck by car after he passed in front of double parked van which obstructed vision of driver whose car struck him, court correctly instructed jury that, if it found that accident occurred at time when double parked van was actually loading passengers, then double parking was lawful at moment of accident regardless of fact that van had been unlawfully double parked for period of time prior to accident while awaiting arrival of passengers. Ramos v City of New York, 212 A.D.2d 480, 623 N.Y.S.2d 206, 1995 N.Y. App. Div. LEXIS 2301 (N.Y. App. Div. 1st Dep't 1995), reh'g denied, 1995 N.Y. App. Div. LEXIS 8586 (N.Y. App. Div. 1st Dep't Aug. 3, 1995), app. denied, 87 N.Y.2d 804, 639 N.Y.S.2d 782, 662 N.E.2d 1072, 1995 N.Y. LEXIS 5706 (N.Y. 1995).

Trial court committed reversible error in prosecution for operating motor vehicle with .10% or more by weight of alcohol in his bloodstream when it interjected its own opinion on facts into jury instruction concerning issue whether defendant was operating motor vehicle when he was found slumped over vehicle's steering wheel while motor was running. People v Hurley, 86 Misc. 2d 601, 383 N.Y.S.2d 177, 1976 N.Y. Misc. LEXIS 2492 (N.Y. County Ct. 1976).

13. Directed verdict

Directed verdict for a truck driver and owner was improper in a personal injury case arising out of an accident in which the van driver collided with the rear corner of the truck and then struck a vehicle in which the passenger was riding because the jury rationally concluded that the truck driver and owner were negligent in violating N.Y. Veh. & Traf. Law § 1202(a); however, the jury's apportionment of liability of 70 percent to the truck driver and owner and 30 percent to the van driver was unsupported by the evidence. The van driver's conduct in failing to maintain a safe distance, slow down, and change lanes when confronted with the well marked truck was clearly more of a cause of the accident than the jury found. Ivezic v Tully Constr. Corp., 47 A.D.3d 480, 850 N.Y.S.2d 65, 2008 N.Y. App. Div. LEXIS 288 (N.Y. App. Div. 1st Dep't 2008).

Agency Opinions

1. In general

Parking except in an emergency is prohibited on the side of a street opposite a "T" intersection. 1953 NY Ops Atty Gen Dec 7 (Informal), 1953 N.Y. AG LEXIS 345.

State law authorizes local governments to establish minimum distances that differ from permissible distances otherwise applicable under CLS Veh & Tr § 1202. 2005 N.Y. Op. Att'y Gen. No. 2005-3, 2005 N.Y. AG LEXIS 3.

State law does not preclude local government from permitting parking closer to intersections than otherwise permitted under state law. 2005 N.Y. Op. Att'y Gen. No. 2005-3, 2005 N.Y. AG LEXIS 3.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 1103, 1210.

State expressway routes, § 145-a.

State interstate routes, § 145-b.

Driving on sidewalks, § 1225-a.

Annotations:

Duties and liabilities between owners or drivers of parked or parking vehicles. 25 ALR2d 1224.

Liability of owner or driver of double-parked motor vehicle for ensuing injury, death, or damage. 82 ALR2d 726.

Validity of regulation providing for reserved parking spaces or parking priorirty on publicly owned property for members of a designated group. 70 ALR3d 1323.

Matthew Bender's New York AnswerGuides: LexisNexis AnswerGuide New York Negligence § 2.09 Identifying Applicable Theories of Liability in Motor Vehicle Cases.

Warren's Negligence in the New York Courts Ch. 228 (motor vehicle liability).

Texts: 1-109 Bender's New York Evidence § 109.06.

§ 1202. Stopping, standing or parking prohibited in specified places [Effective April 5, 2021]

(a) Except when necessary to avoid conflict with other traffic, or when in compliance with law or the directions of a police officer or official traffic-control device, no person shall:

1. Stop, stand or park a vehicle:

a. On the roadway side of any vehicle stopped, standing or parked at the edge or curb of a street;

b. On a sidewalk;

c. Within an intersection, except when permitted by official signs or parking meters on the side of a highway opposite a street which intersects but does not cross such highway;

d. On a cross walk;

e. Between a safety zone and the adjacent curb or within thirty feet of points on the curb immediately opposite the ends of a safety zone, unless a different distance is indicated by official signs, markings or parking meters;

f. Alongside or opposite any street excavation or obstruction when stopping, standing or parking would obstruct traffic;

g. Upon any bridge or other elevated structure upon a highway or within a highway tunnel, unless otherwise indicated by official signs, markings or parking meters;

h. On any railroad tracks;

i. In the area between roadways of a divided highway, including crossovers, except in an emergency;

j. On a state expressway highway or state interstate route highway, including the entrances thereto and exits therefrom, which are a part thereof, except in an emergency;

k. Engage in the retail sale of frozen desserts as that term is defined in subdivision thirty-seven of section three hundred seventy-five of this chapter directly to pedestrians on any highway having a speed limit in excess of thirty miles per hour. Nothing herein shall be construed to prohibit the operator of such vehicle from stopping such vehicle off such highway, in a safe manner, for the sole purpose of delivering such retail product directly to the residence of a consumer or to the business address of a customer of such retailer;

l. In a space designated as provided in this subparagraph for the exclusive purpose of charging an electric vehicle at an electric vehicle charging station, unless such vehicle is an electric vehicle connected to such charging station. Provided, however,

that an electric motor vehicle disconnected from the electric vehicle charging station for no more than thirty continuous minutes while stopped, standing or parked in such designated space shall not be in violation of this subparagraph. Parking spaces designated for the exclusive purpose of charging an electric vehicle at an electric vehicle charging station shall be clearly identified, and such designation shall include conspicuous and permanently installed above grade signs which shall be positioned from the parking space surface at a height of not less than five feet nor more than seven feet and which identify such space as an electric vehicle charging station, indicate that such space is only for electric vehicle charging and include any day or time restrictions. For the purposes of this subparagraph, the term "electric vehicle" shall mean a motor vehicle that is propelled at least in part by an electric motor and associated power electronics which provide acceleration torque to the drive wheels sometime during normal vehicle operation, and that draws electricity from a battery or hydrogen fuel cell that is capable of being recharged from an external source of electricity, such that the external source of electricity cannot be connected to the vehicle while the vehicle is in motion, and the term "electric vehicle charging station" shall mean the equipment needed to convey electric power from the electric grid or another power source to an onboard motor vehicle energy storage system.

2. Stand or park a vehicle, whether occupied or not, except momentarily to pick up or discharge a passenger or passengers:

a. In front of a public or private driveway;

b. Within twenty feet of a cross walk at an intersection, unless a different distance is indicated by official signs, markings or parking meters;

c. Within thirty feet upon the approach to any flashing signal, stop or yield sign or traffic-control signal located at the side of the roadway, unless a different distance is indicated by official signs, markings or parking meters;

d. Within twenty feet of the driveway entrance to any fire station and, when on the side of the street opposite to the entrance of any fire station, within seventy-five feet of said entrance, when properly signposted, unless a different distance is indicated by official signs, markings or parking meters.

e. Alongside or obstructing a curb area which has been cut down, lowered or constructed so as to provide accessibility to the sidewalk.

3. Park a vehicle, whether occupied or not, except temporarily for the purpose of and while actually engaged in loading or unloading merchandise or passengers, within fifty feet of the nearest rail of a railroad crossing, unless a different distance is indicated by official signs, markings or parking meters.

(b) 1. No person shall stop, stand or park a vehicle within fifteen feet of a fire hydrant except when such vehicle is attended by a licensed operator or chauffeur who is seated in the front seat and who can immediately move such vehicle in case of emergency, unless a different distance is indicated by official signs, markings or parking meters.

2. No person shall stop, stand or park a vehicle within fifteen feet of a fire hydrant except when such vehicle is attended by a licensed operator or chauffeur who is seated in the front seat and who can immediately move such vehicle in case of emergency, when such vehicle impairs or hinders the access of a fire vehicle to a fire hydrant while such fire vehicle is engaged in an emergency operation, unless a different distance is indicated by official signs, markings, parking meters or the provisions of any local law, rule, or ordinance.

(c) No person shall move a vehicle not lawfully under his control into any prohibited area or away from a curb such distance as is unlawful.

HISTORY:
Add, L 1964, ch 653, § 14; amd, L 1966, ch 171, § 1, eff Oct 1, 1966; L 1967, ch 78, § 1, eff Oct 1, 1967; L 1969, ch 654, § 3, eff Oct 1, 1969; L 1970, ch 679, § 9, eff Jan 1, 1971; L 1981, ch 224, § 3, eff Sept 1, 1982; L 1983, ch 666, § 1, eff Sept 1, 1983; L 1998, ch 267, § 3, eff Jan 6, 1999; L 2006, ch 574, § 1, eff Nov 1, 2006; L 2020, ch 206, § 1, effective April 5, 2021.

ARTICLE 33 Miscellaneous Rules

HISTORY:
Add, L 1959, ch 775, eff Oct 1, 1960, with substance transferred from former Art 20.

§ 1217. Following emergency fire vehicles prohibited

The driver of any vehicle other than one on official business shall not follow any authorized emergency fire vehicle in the same lane or an adjacent lane to the one being used by such fire vehicle at a distance closer than two hundred feet while such fire vehicle is displaying one or more red or combination red and white lights, or one white light which must be a revolving, rotating, flashing, oscillating or constantly moving light, nor shall such driver drive into or park his or her vehicle within the block or where there is no block, within one thousand feet of where such fire vehicle has stopped in answer to a fire alarm.

HISTORY:
Add, L 1959, ch 775, with substance transferred from former § 1217; amd, L 1971, ch 280, § 1; L 1976, ch 283, § 1, eff Sept 1, 1976; L 1988, ch 79, § 1, eff Nov 1, 1988.

§ 1218. Crossing fire hose

No vehicle shall be driven over any unprotected hose of a fire department when laid down on any street or private driveway, to be used at any fire or alarm of fire, without the consent of the fire department official in command.

HISTORY:
Add, L 1959, ch 775, eff Oct 1, 1960, with substance transferred from former § 1218.

§ 1229-c. Operation of vehicles with safety seats and safety belts.

1. No person shall operate a motor vehicle in this

state unless: (a) all back seat passengers of such vehicle under the age of four are restrained in a specially designed seat which meets the Federal Motor Vehicle Safety Standards set forth in 49 C.F.R. 571.213 and which is either permanently affixed or is affixed to such vehicle by a safety belt and which shall be rear-facing whenever the passenger being restrained in such seat is under the age of two except that in the event that the weight or height of such passenger under the age of two exceeds the occupant size and weight recommendations of the manufacturer of such rear-facing seat, such seat may be forward-facing; provided, however, that in the event that the weight of such passenger under the age of four exceeds forty pounds, such passenger may be restrained (i) in an appropriate child restraint system as defined in subdivision four of this section used with combination lap safety and shoulder harness belts or (ii) by a lap safety belt in the event such vehicle is not equipped with combination lap safety and shoulder harness belts or all the combination lap safety and shoulder harness belts are being used to properly restrain other passengers who are under the age of sixteen; (b) all back seat passengers of such vehicle who are age four or older but under age eight (i) are restrained in an appropriate child restraint system as defined in subdivision four of this section used with combination lap and shoulder harness belts or (ii) are restrained in a lap safety belt in the event such vehicle is not equipped with combination lap safety and shoulder harness belts or all the combination lap safety and shoulder harness belts are being used to properly restrain other passengers who are under the age of sixteen; or (c) in the case of any other back seat passenger under the age of sixteen, he or she is restrained by a safety belt approved by the commissioner.

2. No person shall operate a motor vehicle unless all front seat passengers (a) under the age of sixteen are restrained by a safety belt; or (b) if they are under the age of four, by a specially designed seat which is either permanently affixed or affixed to such vehicle by a safety belt as required by subdivision one of this section, or in the event that the weight of such passenger under the age of four exceeds forty pounds, such passenger may be restrained (i) in an appropriate child restraint system as defined in subdivision four of this section used with combination lap safety and shoulder harness belts or (ii) by a lap safety belt in the event such vehicle is not equipped with combination lap safety and shoulder harness belts or all the combination lap safety and shoulder harness belts are being used to properly restrain other passengers who are under the age of sixteen; or (c) if they are age four or older but under age eight, (i) are restrained in an appropriate child restraint system as defined in subdivision four of this section used with combination lap safety and shoulder harness belts or (ii) are restrained in a lap safety belt in the event such vehicle is not equipped with combination lap safety and shoulder harness belts or all the combination lap safety and shoulder harness belts are being used to properly restrain other passengers who are under the age of sixteen.

3. No person shall operate a motor vehicle unless such person is restrained by a safety belt approved by the commissioner. No person sixteen years of age or over shall be a passenger in a motor vehicle unless such person is restrained by a safety belt approved by the commissioner.

3-a. Except as otherwise provided for passengers under the age of four, it shall be a violation of this section if a person is seated in a seating position equipped with both a lap safety belt and a shoulder harness belt and such person is not restrained by both such lap safety belt and shoulder harness belt.

3-b. No person holding a class DJ learner's permit or class DJ license issued pursuant to section five hundred two of this chapter, shall operate a motor vehicle in this state unless such person is restrained by a safety belt approved by the commissioner, and all passengers under the age of four are restrained in a specially designed seat which meets the federal motor vehicle safety standards set forth in 49 C.F.R. 571.213 and which is either permanently affixed or is affixed to such vehicle by a safety belt and, in the case of any other passenger under the age of sixteen, he or she is restrained by a safety belt approved by the commissioner. No person sixteen years of age or over shall be a passenger in a motor vehicle operated by a person holding a class DJ learner's permit, a class DJ license or a limited class DJ license unless such passenger is restrained by a safety belt approved by the commissioner.

3-c. (a) No person shall operate a taxi or livery unless such person is restrained by a safety belt approved by the commissioner.

(b) No person sixteen years of age or over shall be a passenger in a taxi or livery unless such person is restrained by a safety belt approved by the commissioner.

(c) No person eight years of age or older but under age sixteen shall be a passenger in a taxi or livery unless such person is restrained by a safety belt approved by the commissioner. A police officer shall only issue a summons for a violation of this paragraph to the parent or guardian of such person if the violation by such person occurs in the presence of such person's parent or guardian and where such parent or guardian is eighteen years of age or more. Such summons shall only be issued to such parent or guardian and shall not be issued to the person eight years of age or older but under age sixteen.

4. For the purposes of this section, the following terms shall have the following meanings: (a) "motor vehicle" shall include all motor vehicles which are required by section three hundred eighty-three of this chapter or regulation or would be required if such motor vehicle were registered in New York state to be equipped by a safety belt but

shall not include those vehicles which are used as school buses, as such term is defined in section one hundred forty-two of this chapter and those vehicles which are authorized emergency vehicles, as such term is defined in section one hundred one of this chapter, provided, however, that for purposes of this section, "motor vehicle" shall also include fire vehicles owned and/or operated by a fire company as defined by subdivision two of section one hundred of the general municipal law and ambulances owned and/or operated by a voluntary ambulance service as defined by subdivision three of section one hundred of the general municipal law;

(b) "child restraint system" shall mean any device, used in conjunction with safety belts, designed for use in a motor vehicle to restrain, seat, or position children and which meets the applicable Federal Motor Vehicle Safety Standards set forth in 49 C.F.R. 571.213; and

(c) "appropriate child restraint system" shall mean a child restraint system for which the occupant meets the occupant size and weight recommendations of the manufacturer of such system.

5. Any person who violates the provisions of subdivision three, three-c or ten-a of this section shall be punished by a civil fine of up to fifty dollars. Any person who violates the provisions of subdivision one, two, eleven or thirteen of this section shall be punished by a civil fine of not less than twenty-five nor more than one hundred dollars. In any prosecution or proceeding alleging a violation of paragraph (b) of subdivision one or paragraph (c) of subdivision two of this section, it shall be an affirmative defense that the passenger subject to the requirements of such paragraphs was restrained by a safety belt and measures more than four feet nine inches in height and/or weighs more than one hundred pounds. In any prosecution or proceeding alleging a violation of paragraph (b) or paragraph (c) of subdivision three-c of this section, it shall be an affirmative defense that such taxi or livery was in violation of subdivision four-b of section three hundred eighty-three of this chapter.

6. The court shall waive any fine for which a person who violates the provisions of this section would be liable with respect to passengers under the age of eight if such person supplies the court with proof that, between the date on which he is charged with having violated this section and the appearance date for such violation, he purchased or rented a child restraint system which meets the requirements of subdivision one of this section. Provided, however, that such waiver of fine shall not apply to a second or subsequent conviction under this section.

7. The provisions of this section shall not apply to a passenger or operator with a physically disabling condition whose physical disability would prevent appropriate restraint in such safety seat or safety belt provided, however, such condition is duly certified by a physician who shall state the nature of the handicap, as well as the reason such restraint is inappropriate.

8. Non-compliance with the provisions of this section shall not be admissible as evidence in any civil action in a court of law in regard to the issue of liability but may be introduced into evidence in mitigation of damages provided the party introducing said evidence has pleaded such non-compliance as an affirmative defense.

9. Notwithstanding the provisions of subdivision four of this section, the provisions of this section shall not apply to buses other than school buses and the provisions of subdivisions one, two, three and three-a of this section shall not apply to taxis and liveries except that the provisions of subdivision three-a of this section shall be applicable to any person operating a taxi or livery and to taxi and livery passengers age eight or older.

10. The provisions of this section shall not apply to persons employed as rural letter carriers, as defined by the United States postal service, while such persons are discharging the duties of such employment.

10-a. Notwithstanding the provisions of subdivision one of this section, no person sixteen years of age or over shall be a passenger in the rear seat of a fire vehicle owned and/or operated by a fire company as defined by subdivision two of section one hundred of the general municipal law or in the rear seat of an ambulance owned and/or operated by a voluntary ambulance service as defined by subdivision three of section one hundred of the general municipal law unless such person is restrained by a safety belt approved by the commissioner. Provided, however, that the provisions of this subdivision shall not apply: (a) to a passenger in the rear seat of such fire vehicle or ambulance if such seat is not required to be equipped with safety belts pursuant to the provisions of section three hundred eighty-three of this chapter, nor (b) to emergency medical personnel during the course of providing patient care in the rear compartment of an ambulance in accordance with applicable patient care standards, guidelines and protocols established pursuant to article thirty of the public health law.

11. Notwithstanding the provisions of subdivision four of this section, no person shall operate a school bus unless all passengers under the age of four are restrained in a specially designed detachable or removable seat as required by subdivision one of this section, or another restraining device approved by the commissioner.

12. (a) Every rental vehicle company, as defined in paragraph (c) of subdivision one of section three hundred ninety-six-z of the general business law, shall post a sign in their place of business which states in conspicuous lettering of at least seventy-two point boldface type:

NEW YORK STATE LAW REQUIRES ALL CHILDREN UNDER THE AGE OF EIGHT TO BE RESTRAINED IN A FEDERALLY APPROVED CHILD RESTRAINT SYSTEM.

(b) Such sign shall be placed in an upright position and in a conspicuous place where it can easily be read by the clientele of the rental vehicle company.

(c) Any rental vehicle company which violates the provisions of this subdivision shall be subject to a civil penalty, not to exceed one hundred dollars for each day of violation.

13. Notwithstanding the provisions of subdivision four of this section, no person shall operate a school bus for which there are no applicable federal school bus safety standards unless all occupants are restrained by a safety belt approved by the commissioner or, regarding occupants age four or older but under age seven, are restrained pursuant to subdivision one or two of this section.

HISTORY:

Add, L 1984, ch 365, § 1, eff Jan 1, 1985; amd, L 1984, ch 366, § 1, eff Jan 1, 1985; L 1986, ch 154, § 1; L 1989, ch 28, § 1, eff April 6, 1989; L 1989, ch 41, § 1, eff Nov 1, 1989; L 1989, ch 471, § 1, eff July 16, 1989; L 1989, ch 653, § 4; L 1991, ch 104, §§ 1, 2, eff Nov 1, 1991; L 1992, ch 209, § 1, eff Oct 21, 1992; L 1992, ch 333, § 1, eff Jan 13, 1993; L 1996, ch 390, § 1, eff Nov 1, 1996; L 2000, ch 410, § 1, eff Nov 28, 2000; L 2002, ch 546, § 1, eff Nov 16, 2002; L 2002, ch 644, § 12, eff Sept 1, 2003; L 2004, ch 232, §§ 1, 2, eff July 27, 2004; L 2004, ch 509, § 1, eff March 27, 2005; L 2005, ch 18, § 1, eff April 19, 2005; L 2005, ch 598, § 1, eff Aug 30, 2005; L 2007, ch 241, §§ 1, 2, eff Nov 1, 2007; L 2008, ch 20, § 1, eff Nov 1, 2007; L 2009, ch 403, § 10, eff Feb 22, 2010; L 2009, ch 405, §§ 1–4, eff Nov 24, 2009; L 2015, ch 448, §§ 1–4, effective November 1, 2016; L 2017, ch 340, §§ 1, 2, effective November 1, 2017; L 2017, ch 393, § 1, effective November 1, 2019; L 2020, ch 8, §§ 1, 2, effective November 1, 2020; L 2020, ch 38, §§ 1, 2, effective November 1, 2020; L 2020, ch 136, § 1, effective November 1, 2020.

Prior Law: Former § 1229-c, add, L 1981, ch 407, § 1; amd, L 1982, ch 29, § 1, L 1982, ch 30, § 1, L 1983, ch 368, § 1, L 1983, ch 392, § 1; repealed, L 1984, ch 365, § 1, eff Jan 1, 1985.

Editor's Notes Laws 1992, ch 209, § 2, eff Oct 21, 1992, provides as follows:

§ 2. This act shall take effect on the one hundred twentieth day after it shall have become a law except that any rules and regulations necessary for the timely implementation of this act on its effective date shall be promulgated on or before such date.

Laws 2004, ch 509, § 1, eff March 27, 2005 purported to amend subdivision 4 of this section but such amendment was not executed by the Publisher as **Laws 2004, ch 232, § 1** had previously made the same amendment to subdivision 4.

Laws 2009, ch 403, § 14(a), eff Aug 26, 2009, provides as follows:

§ 14. This act shall take effect immediately; provided, however, that:

(a) sections one, five, six, eight, nine and ten and the amendments to paragraph (d) of subdivision 1 of section 501-b of the vehicle and traffic law made by section two of this act shall take effect on the one hundred eightieth day after it shall have become a law and shall apply to licenses issued on or after such effective date. Any license issued pursuant to section 503-a of the vehicle and traffic law prior to such effective date shall remain in effect until the expiration date of such license; (Amd, L 2010, ch 215, § 3, eff July 15, 2010.)

Laws 2017, ch 340, § 3, eff Nov 1, 2017, provides:

§ 3. This act shall take effect November 1, 2017. Effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date is authorized to be made on or before such effective date.

Laws 2017, ch 393, § 2, eff Nov 1, 2019, provides:

§ 2. This act shall take effect November 1, 2019.

Laws 2020, ch 8, § 3, eff November 1, 2020, provides:

§ 3. This act shall take effect on the first of November next succeeding the date on which it shall have become a law.

Laws 2020, ch 38, § 5, eff November 1, 2020, provides:

§ 5. This act shall take effect on the same date and in the same manner as a chapter of the laws of 2020, amending the vehicle and traffic law relating to safety belt requirements for taxis and livery vehicles, as proposed in legislative bills numbers S. 7134 and A. 8990, takes effect; provided, however, that section three of this act shall take effect one year after this act shall have become a law. Effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized to be made and completed on or before such effective date.

Laws 2020, ch 136, § 2, eff November 1, 2020, provides:

§ 2. This act shall take effect on the first of November next succeeding the date on which it shall have become a law.

1988 Recommendations of Advisory Committee on Criminal Law and Procedure: The Committee recommends that subdivision six of section 1229-c of the Vehicle and Traffic Law be amended to provide that a fine for violating the mandatory seat belt law provisions relating to restraint of children under age 4 (VTL § 1229-c(1), (2)) may be waived only where the court is supplied with proof that a child seating system has been purchased or rented since the date of the violation.

The purpose of this measure is to correct a loophole in section 1229-c. Subdivisions one and two of section 1229-c require that children under the age of four be restrained in specially-designed car seats meeting Federal Motor Vehicle Safety Standards set forth in 49 C.F.R. 571.213. Subdivision five of that section provides that a violation of any of the provisions of section 1129-c shall be punishable by a civil fine, not exceeding 50 dollars. Subdivision six, however, requires the court to waive any such fine where the violation of section 1229-c involves failure to comply with its requirements concerning seat restraints for children under four and the court is presented with proof that the violator has "purchased or rented a child seating system . . . on or before the appearance date [of his or her] violation."

Herein lies the loophole. It has been pointed out to the Advisory Committee that subdivision six prescribes no date *after which* a violator, seeking to benefit from the waiver provision, must have purchased the necessary seating system. Thus, the statute would seem to require that, where a violator is convicted for failing to use a seating system that he or she already owned at the time the violation occured, the fine must be waived. The Legislature cannot have intended such an anomaly. Accordingly, this measure would amend subdivision six of section 1229-c to clarify that waiver of the fine may be ordered only where a child seating system is purchased *after* the date of the violation.

Amendment Notes The 2015 amendment by ch 448 §§ 1–4, redesignated former 3-a as 3-b; added "provided, however, that for purposes of this section, 'motor vehicle' shall also include fire vehicles owned and/or operated by a fire company as defined by subdivision two of section one hundred of the general municipal law and ambulances owned and/or operated by a voluntary ambulance service as defined by subdivision three of section one hundred of the general municipal law" in 4(a); added "or ten-a" in the first sentence of 5; and added 10-a.

The 2017 amendment by ch 340, §§ 1, 2, in 5, added "three-c" in the first sentence, and added the last sentence; in 9, added "of this section, the provisions of," deleted "taxis, liveries and" following "shall not apply to," and added "and the provisions of subdivisions one, two, three and three-a of this section shall not apply to taxis and liveries"; and added 3-c.

The 2017 amendment by ch 393, § 1, substituted "and which shall be rear-facing whenever the passenger being restrained in such seat is under the age of two except that in

the event that the weight or height of such passenger under the age of two exceeds the occupant size and weight recommendations of the manufacturer of such rear-facing seat, such seat may be forward-facing; provided, however, that" for "or" in 1.

The 2020 amendments by ch 8, §§ 1, 2, deleted "the front seat of" preceding "a taxi" in 3-c(b); added 3-c(c); and added "except that the provisions of subdivision three-a of this section shall be applicable to any person operating a taxi or livery and to taxi and livery passengers age eight or older" in 9.

The 2020 amendments by ch 38, §§ 1, 2, in 3-c(c), substituted "person eight years of age" for "person shall operate a taxi or livery unless all passengers who are age eight" and "age sixteen shall be a passenger in a taxi or livery unless such person is restrained" for "age sixteen are restrained" in the first sentence, and added the second and third sentences; added "or paragraph (c)" in the last sentence of 5.

The 2020 amendment by ch 136, § 1, deleted "the front seat of" following "a passenger in" in 3.

Notes to Decisions

Analysis

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1. In general

State legislation addressing vehicle rental practices, including regulations imposed on all motor vehicles, does not set forth sufficiently comprehensive scheme of regulation to preempt further legislation in field by municipalities. Hertz Corp. v City of N.Y., 80 N.Y.2d 565, 592 N.Y.S.2d 637, 607 N.E.2d 784, 1992 N.Y. LEXIS 4238 (N.Y. 1992).

Where defendant was convicted of criminal possession of a controlled substance, the county court properly denied his motion to suppress the evidence seized from his vehicle because the police were justified in making the initial stop based an informant's tip that a vehicle matching the description had a large quantity of ecstacy in it. An officer stopped defendant after observing him driving without a seat belt. People v Portelli, 116 A.D.3d 1163, 983 N.Y.S.2d 355, 2014 N.Y. App. Div. LEXIS 2405 (N.Y. App. Div. 3d Dep't 2014).

CLS Veh & Tr § 1229-c was enacted in response to federal regulation and did not prohibit comparative fault approach to seat belt defense in wrongful death action. Karczmit v State, 155 Misc. 2d 486, 588 N.Y.S.2d 963, 1992 N.Y. Misc. LEXIS 437 (N.Y. Ct. Cl. 1992).

Father's violation of N.Y. Veh. & Traf. Law § 1229-c(1) for his failure to adequately secure the infant decedent in a child safety seat did not disqualify the father as an intestate distributee of the decedent's estate. Matter of Wigfall, 859 N.Y.S.2d 864, 20 Misc. 3d 648, 239 N.Y.L.J. 124, 2008 N.Y. Misc. LEXIS 3515 (N.Y. Sur. Ct. 2008).

2. Constitutionality

Mandatory seatbelt use law (CLS Vehicle and Traffic Law § 1229-c) constitutes proper and constitutional exercise of state's police power, since fastening seatbelt can hardly be termed burdensome, and benefits flowing from their use are vast; preventing or reducing injuries to unrestrained driver or occupant is valid state interest; classification created by statute which exempts taxis, liveries, tractors and certain heavy trucks and buses other than school buses does not violate Fourteenth Amendment of United States Constitution in that exemptions bear reasonable relation to desired legislative purposes; further, law is not invalid for vagueness in requiring use of safety belt approved by commissioner. People v Weber, 129 Misc. 2d 993, 494 N.Y.S.2d 960, 1985 N.Y. Misc. LEXIS 2892 (N.Y. Town Ct. 1985).

State's mandatory "seatbelt law," CLS Veh & Tr § 1229-c, is valid constitutional exercise of legislative power, as statute serves compelling state interest of saving lives and promoting welfare of citizens, and does not violate equal protection by exempting certain classes of vehicles and persons on requirement to wear seatbelts, as classifications are not suspect classifications and need only serve rational basis to be sustained, and further, State is not obligated to regulate all phases of problem or every class of acts or actors involved. Wells v State, 130 Misc. 2d 113, 495 N.Y.S.2d 591, 1985 N.Y. Misc. LEXIS 3147 (N.Y. Sup. Ct. 1985), aff'd, 134 A.D.2d 874, 521 N.Y.S.2d 604, 1987 N.Y. App. Div. LEXIS 51060 (N.Y. App. Div. 4th Dep't 1987).

3. Applicability

A defendant who operated a commercial van with two passengers under the age of five unrestrained by child safety seats violated Veh & Tr Law § 1229-c, where the law applied to all passenger motor vehicles, and a commercial van was such a vehicle. People v Hall, 117 Misc. 2d 1085, 459 N.Y.S.2d 970, 1983 N.Y. Misc. LEXIS 3253 (N.Y. J. Ct. 1983).

4. Construction

Term "safety belt" can refer to either "seat safety belts" or "shoulder harness safety belts," and thus defendant was not deemed in violation of CLS Veh & Tr § 1229-c(2) where her son (who was under 16 years of age) was wearing lap belt, but not provided shoulder harness, at time of police stop. People v Cucinello, 183 Misc. 2d 50, 701 N.Y.S.2d 599, 1999 N.Y. Misc. LEXIS 573 (N.Y. App. Term 1999).

Based on plain language of CLS Veh & Tr § 1229-c read in conjunction with 15 NYCRR § 49.2(a), driver or passenger in front seat of motor vehicle was not required to use shoulder harness safety belt if lap safety belt was connected. People v Widrick, 185 Misc. 2d 765, 713 N.Y.S.2d 847, 2000 N.Y. Misc. LEXIS 380 (N.Y. City Ct. 2000).

Defendant did not violate N.Y. Veh. & Traf. Law § 1229-c(3-a) by wearing defendant's shoulder belt portion of defendant's seatbelt under defendant's left arm rather than over the shoulder; the statute required defendant to be restrained by both the shoulder and lap belts, and defendant was still being restrained by the shoulder belt even though defendant wore it under defendant's arm. People v Locke, 765 N.Y.S.2d 468, 1 Misc. 3d 482, 2003 N.Y. Misc. LEXIS 1187 (N.Y. City Ct. 2003).

Because defendant stipulated to wearing the shoulder portion of a seat belt under an arm instead of over a shoulder, the prosecution proved him guilty, beyond a reasonable doubt, of violating N.Y. Veh. & Traf. Law § 1229-c(3)(a). People v Fortin, 839 N.Y.S.2d 672, 16 Misc. 3d 615, 2007 N.Y. Misc. LEXIS 4162 (N.Y. City Ct. 2007).

5. No duty on passenger

In action for injuries sustained by 16-year-old boy in motor vehicle accident, defendant was entitled to have allegation stricken from bill of particulars which stated that driver of vehicle in which boy was passenger was negligent in failing to ensure that boy wore safety belt, since CLS Veh & Tr § 1229-c(3) does not impose duty on driver to require passenger who is 16 or older to wear safety belt or to ensure that passenger is restrained by safety belt before operating vehicle. Stewart v Taylor, 193 A.D.2d 1078, 598 N.Y.S.2d 627, 1993 N.Y. App. Div. LEXIS 5702 (N.Y. App. Div. 4th Dep't 1993).

Mother who chose to hold her 2-month-old son in her arms while riding as passenger in back seat of car could not be held liable for comparative negligence when child was killed as result of car accident since (1) her decision was within parameters of her parental discretion and judgment, (2) any breach of duty of care in failing to place infant in child safety seat did not give rise to viable cause of action based on negligence because she did not owe such duty to world at large, and (3) CLS Veh & Tr § 1229-c

imposes duty to restrain child passenger on operator of vehicle, not on fellow passenger. Thurel v Varghese, 207 A.D.2d 220, 621 N.Y.S.2d 633, 1995 N.Y. App. Div. LEXIS 318 (N.Y. App. Div. 2d Dep't 1995).

Although N.Y. Veh. & Traf. Law § 1229-c, imposed a duty upon operators of motor vehicles to ensure that child passengers are properly restrained, this statute did not impose a duty on a passenger to cause her child to be put in a restraint system under circumstances in which the motorist did not claim that the passenger was in any way involved in the operation of plaintiffs' vehicle; dismissal of the motorist's counterclaim against the passenger was proper. Horan v Brown, 43 A.D.3d 608, 842 N.Y.S.2d 597, 2007 N.Y. App. Div. LEXIS 8901 (N.Y. App. Div. 3d Dep't 2007).

6. Emergency vehicles

In defendant's prosecution for vehicular assault in the second degree under N.Y. Penal Law § 120.03, defendant was properly barred from claiming that the failure of a police officer, who was struck in his patrol car by defendant's vehicle, to wear a seat belt was the intervening cause of his serious physical injuries because the officer was not required to wear a seat belt under N.Y. Veh. & Traf. Law §§ 101, 1229-c(3), (4). People v Mojica, 62 A.D.3d 100, 874 N.Y.S.2d 195, 241 N.Y.L.J. 44, 2009 N.Y. App. Div. LEXIS 1499 (N.Y. App. Div. 2d Dep't), app. denied, 12 N.Y.3d 856, 881 N.Y.S.2d 668, 909 N.E.2d 591, 2009 N.Y. LEXIS 2801 (N.Y. 2009).

City could not be held negligent as matter of law for injury caused by absence of seat belts in fire truck, in view of statutory exemption provided to emergency vehicles in CLS Veh & Tr § 1229-c. Weyant v City of New York, 162 Misc. 2d 132, 616 N.Y.S.2d 428, 1994 N.Y. Misc. LEXIS 359 (N.Y. Sup. Ct. 1994).

In action against city by firefighter who was injured in accident while riding in fire truck from which seat belts had been removed, city was not entitled to have verdict against it set aside on basis of statutory exemption to seat belt law provided to emergency vehicles in CLS Veh & Tr § 1229-c, since city could still be found to have been negligent in removing seat belts that were provided with fire truck at time of purchase. Weyant v City of New York, 162 Misc. 2d 132, 616 N.Y.S.2d 428, 1994 N.Y. Misc. LEXIS 359 (N.Y. Sup. Ct. 1994).

7. Violations of seat belt law

Police were justified in stopping vehicle in which defendant was passenger where he was not wearing seat belt as required by CLS Veh & Tr § 1229-c. People v Mikel, 152 A.D.2d 603, 543 N.Y.S.2d 712, 1989 N.Y. App. Div. LEXIS 9632 (N.Y. App. Div. 2d Dep't 1989).

Complaint failed to state cause of action for abuse of process, even if plaintiff could establish impropriety of defendant's alleged ulterior motive for issuance of traffic ticket charging violation of seat belt law, where process was both issued and used for its intended purpose. Ackermann v Maloney, 223 A.D.2d 982, 636 N.Y.S.2d 882, 1996 N.Y. App. Div. LEXIS 522 (N.Y. App. Div. 3d Dep't), app. dismissed, 88 N.Y.2d 841, 644 N.Y.S.2d 682, 667 N.E.2d 332, 1996 N.Y. LEXIS 1039 (N.Y. 1996).

Conviction of failure to use safety belt was supported by state trooper's testimony that, after stopping defendant for speeding, he approached driver's side of car, advised defendant to step out, and saw that defendant was not wearing seat belt. People v Burdick, 266 A.D.2d 711, 699 N.Y.S.2d 173, 1999 N.Y. App. Div. LEXIS 12115 (N.Y. App. Div. 3d Dep't 1999).

On defendant's motion, the trial court improperly suppressed physical evidence because a police officer's decision to stop the vehicle in which defendant was a passenger was justified by the officer's observation that the driver was not wearing a seat belt in violation of N.Y. Veh. & Traf. Law § 1229-c(3); as a passenger, defendant demonstrated no legitimate expectation of privacy in the vehicle and thus lacked standing to challenge the search. Moreover, defendant did not have automatic standing since the People did not rely on the statutory presumption of N.Y. Penal Law § 220.25(1); at any rate, once the officer observed the plastic bag of what appeared to be cocaine in plain view, he was entitled to seize the narcotics and arrest defendant. People v Robinson, 38 A.D.3d 572, 832 N.Y.S.2d 585, 2007 N.Y. App. Div. LEXIS 2616 (N.Y. App. Div. 2d Dep't 2007).

Because a state trooper was able to observe that defendant was not wearing a safety belt in violation of N.Y. Veh. & Traf. Law § 1229-c(3), the trooper was justified in stopping defendant's vehicle; accordingly, the hearing court properly denied defendant's motion to suppress physical evidence. People v Souris, 46 A.D.3d 711, 846 N.Y.S.2d 587, 2007 N.Y. App. Div. LEXIS 12619 (N.Y. App. Div. 2d Dep't 2007), app. denied, 10 N.Y.3d 964, 863 N.Y.S.2d 148, 893 N.E.2d 454, 2008 N.Y. LEXIS 2691 (N.Y. 2008).

Police officer reasonably initiated a traffic stop of defendant's vehicle based upon the existence of probable cause because the officer observed the exhaust system on defendant's vehicle was excessively loud, N.Y. Veh. & Traf. Law § 375(31), and defendant was operating the vehicle without wearing a seatbelt, N.Y. Veh. & Traf. Law § 1229-c(3). People v Issac, 107 A.D.3d 1055, 968 N.Y.S.2d 631, 2013 N.Y. App. Div. LEXIS 3974 (N.Y. App. Div. 3d Dep't 2013).

County court did not err in denying defendant's motion to suppress under the Fourth Amendment and N.Y. Const. art. I, § 12 because traffic stop was lawful as officer had probable cause to believe that defendant committed a traffic violation based on officer's observation that rear license plate of defendant's vehicle was inadequately lit as its numerals did not illuminate in the dark and that defendant was driving without a seatbelt. People v Blandford, 2021 N.Y. App. Div. LEXIS 85 (N.Y. App. Div. 3d Dep't 2021).

8. Seat belt defense

In an action arising out of an automobile accident in which an eight-year-old child, who was riding in the back seat of defendants' automobile but was not restrained by a safety belt, was injured, summary judgment was properly granted dismissing all causes of action predicated on alleged noncompliance with Vehicle and Traffic Law § 1229-c, which provides that no person shall operate a motor vehicle in New York unless all backseat passengers under the age of 10 are restrained by a safety belt, since the plain language of subdivision (8) of the statute prohibits proof in support of plaintiffs' causes of action predicated, directly or indirectly, upon noncompliance with section 1229-c. The statute, in the broadest and clearest of terms, prohibits any evidence of noncompliance in regard to the issue of liability, and absent ambiguity, courts may not resort to rules of construction to vary the scope and application of a statute. Hamilton v Purser, 162 A.D.2d 91, 563 N.Y.S.2d 163, 1990 N.Y. App. Div. LEXIS 12076 (N.Y. App. Div. 3d Dep't 1990).

In action for injuries sustained by minor plaintiff in crash of car in which she was riding, it was error to submit seat belt defense to jury and reduce gross verdict in plaintiff's favor by 25 percent on basis of defense, since there was no evidence tying plaintiff's injury to fact that her head may have hit windshield because she was not wearing seat belt. Schrader v Carney, 180 A.D.2d 200, 586 N.Y.S.2d 687, 1992 N.Y. App. Div. LEXIS 8206 (N.Y. App. Div. 4th Dep't 1992).

Seemingly contrary dictum in Obercon v Glebatis, 89 AD2d 762, did not alter rule that defense of failure to use available seat belt has nothing to do with issues of liability or serious injury threshold. Carson v De Lorenzo, 238 A.D.2d 790, 657 N.Y.S.2d 469, 1997 N.Y. App. Div. LEXIS 3944 (N.Y. App. Div. 3d Dep't), app. denied, 90 N.Y.2d 810, 666 N.Y.S.2d 99, 688 N.E.2d 1381, 1997 N.Y. LEXIS 3628 (N.Y. 1997).

CLS Veh & Tr § 1229-c prohibits proof in civil action predicated, directly or indirectly, on noncompliance with statute. Baker v Keller, 241 A.D.2d 947, 661 N.Y.S.2d 330, 1997 N.Y. App. Div. LEXIS 7892 (N.Y. App. Div. 4th Dep't 1997).

Plaintiff was not entitled to amend complaint to allege that defendant was negligent in permitting plaintiff's son to ride in back seat of car without wearing safety belt, since CLS Veh & Tr § 1129-c prohibits proof of noncompliance with seat belt law in civil action and thus amendment was patently lacking in merit. Baker v Keller, 241 A.D.2d 947, 661 N.Y.S.2d 330, 1997 N.Y. App. Div. LEXIS 7892 (N.Y. App. Div. 4th Dep't 1997).

Seatbelt defense against plaintiff passenger in intersection collision case should be limited to jury's determination of damages and mitigation of damages. Garcia v Tri County Ambulette

Serv., 282 A.D.2d 206, 723 N.Y.S.2d 163, 2001 N.Y. App. Div. LEXIS 3364 (N.Y. App. Div. 1st Dep't 2001).

Unambiguous language of N.Y. Veh. & Traf. Law § 1229-c(8) precluded a town sued for negligent road maintenance from defending against liability on a claim that injured children were not strapped in their child-car seats. Boyd v Trent, 297 A.D.2d 301, 746 N.Y.S.2d 191, 2002 N.Y. App. Div. LEXIS 7920 (N.Y. App. Div. 2d Dep't 2002).

Trial court erred, in an infant's suit against his father based on the father's improper placement of the infant in a vehicle, in denying the infant's motion to strike an affirmative defense alleging the infant's failure to use the available seatbelt because, inter alia, as the driver, the father had a duty to restrain any child under the age of four in the front seat under N.Y. Veh. & Traf. Law § 1229-c(2); the trial court also erred in denying the father's cross motion seeking dismissal of the infant's claim based on a violation of N.Y. Veh. & Traf. Law § 1229-c because, pursuant to N.Y. Veh. & Traf. Law § 1229-c(8) evidence of non-compliance was inadmissible in regard to the issue of liability. Smith v Kinsey, 50 A.D.3d 1456, 858 N.Y.S.2d 495, 2008 N.Y. App. Div. LEXIS 4658 (N.Y. App. Div. 4th Dep't 2008).

In action to recover for injuries sustained by 14-month-old child in motor vehicle accident, court granted plaintiffs' motion to strike affirmative defenses alleging comparative fault, assumption of risk and failure to mitigate damages due to child's failure to use seat belt or child car seat, as 14-month-old is incapable of contributory negligence, and contributory negligence of child's parent or other custodian cannot be imputed to child. Rider v Speaker, 180 Misc. 2d 999, 692 N.Y.S.2d 920, 1999 N.Y. Misc. LEXIS 254 (N.Y. Sup. Ct. 1999).

9. —Use in determining liability

In action by car passenger injured when driver swerved to avoid deer and lost control of car, passenger was not entitled to dismissal of car owner's seat belt defense, even though owner cited inapplicable section of Vehicle and Traffic Law, where owner provided passenger with notice of its intention to rely on seat belt defense in its amended answer and amended verified bill of particulars, and thus there was no surprise to passenger, and owner raised triable issue of fact as to whether passenger was wearing available seat belt. Fitz-Gerald v Rich, 251 A.D.2d 1017, 674 N.Y.S.2d 232, 1998 N.Y. App. Div. LEXIS 7043 (N.Y. App. Div. 4th Dep't 1998).

Where failure to wear seat belt is alleged to be cause of accident, conduct of party in failing to wear belt may be considered on issue of liability. Muzammil v Singh, 275 A.D.2d 398, 712 N.Y.S.2d 875, 2000 N.Y. App. Div. LEXIS 8830 (N.Y. App. Div. 2d Dep't 2000).

Forklift operator's motion to strike seat belt defense was denied where expert testimony provided a sufficient predicate for trier of fact to reasonably conclude that the operator's use of a seatbelt would have prevented, or minimized, his injuries. Zollinger v Owens-Brockway Glass Container, Inc., 233 F. Supp. 2d 349, 2002 U.S. Dist. LEXIS 22437 (N.D.N.Y. 2002).

10. —Use in mitigation of damages

In personal injury action arising from motor vehicle accident in which plaintiff's decedent died when defendant ran stop sign, hit decedent's automobile, and caused decedent to be ejected from automobile, court erred in barring plaintiff from eliciting testimony from medical examiner as to whether decedent would have died even if he wore seat belt, since such question was pertinent and relevant to jury's determination of mitigation of damages. Stein v Penatello, 185 A.D.2d 976, 587 N.Y.S.2d 37, 1992 N.Y. App. Div. LEXIS 10377 (N.Y. App. Div. 2d Dep't 1992).

Any issue of fact as to whether the injured passenger in a vehicle involved in a traffic accident failed to use an available seat belt did not prevent the granting of the injured passenger's motion for summary judgment on the issue of liability; whether the injured passenger failed to use an available seat belt, and whether any such failure resulted in an exacerbation of the injuries that he suffered, were among the issues that may have been decided at the trial on the issue of damages. Martinez v Novin, 303 A.D.2d 653, 757 N.Y.S.2d 317, 2003 N.Y. App. Div. LEXIS 3184 (N.Y. App. Div. 2d Dep't 2003).

Trial court acted within its discretion in permitting a driver to amend his answer to assert a seatbelt defense in an injured police officer's action because while the injured police officer was not statutorily required to wear a seatbelt at the time of the accident, and his failure to do so was not relevant to the issue of the driver's liability, the seatbelt defense could be introduced into evidence in mitigation of damages. Freder v Costello Indus., Inc., 162 A.D.3d 984, 80 N.Y.S.3d 371, 2018 N.Y. App. Div. LEXIS 4650 (N.Y. App. Div. 2d Dep't 2018).

In wrongful death action against state arising from accident in which decedent failed to wear seat belt and would have survived with minimal injuries if she had worn seat belt, failure to use seat belt would not bar all recovery but was "culpable conduct" within meaning of CLS CPLR § 1411 and would cause reduction in recovery. Karczmit v State, 155 Misc. 2d 486, 588 N.Y.S.2d 963, 1992 N.Y. Misc. LEXIS 437 (N.Y. Ct. Cl. 1992).

11. —Evidence permitted

Supreme Court was not required to strike testimony of defendant's engineering expert, including his opinion that plaintiff was not using seat belt at time of accident and that if she had been using it, her head would not have struck windshield. Carson v De Lorenzo, 238 A.D.2d 790, 657 N.Y.S.2d 469, 1997 N.Y. App. Div. LEXIS 3944 (N.Y. App. Div. 3d Dep't), app. denied, 90 N.Y.2d 810, 666 N.Y.S.2d 99, 688 N.E.2d 1381, 1997 N.Y. LEXIS 3628 (N.Y. 1997).

Defendants, driver of vehicle and residential complex owner, were improperly granted summary judgment in action for injuries sustained when plaintiff fell off tailgate of vehicle as driver and plaintiff were driving around complex as volunteers replacing light bulbs in complex's common areas since plaintiff's assumption of risk, if any, was but factor to be considered in ascertaining proportionate culpable conduct of parties, and to the extent that plaintiff's decision to sit on tailgate rather than in vehicle with seat belt could be considered functional equivalent of nonuse of available seat belt, that fact could be considered in mitigation of damages; further, whether plaintiff was intoxicated, and whether such intoxication was factor in his fall, was fact question. Roach v Szatko, 244 A.D.2d 470, 664 N.Y.S.2d 101, 1997 N.Y. App. Div. LEXIS 11643 (N.Y. App. Div. 2d Dep't 1997), app. dismissed, 91 N.Y.2d 956, 671 N.Y.S.2d 717, 694 N.E.2d 886, 1998 N.Y. LEXIS 906 (N.Y. 1998).

Seat belt defense was properly submitted to jury in automobile collision case where (1) plaintiff testified that he was not wearing his seat belt at time of accident, that his face hit windshield, and that glass from windshield was still surfacing from his lacerations at time of trial, (2) defendants' accident reconstruction specialist testified that seat belts are effective in preventing occupant from hitting windshield during front-impact collision and that seat belts would prevent head injuries in collisions involving occupants of car that was decelerating, (3) defendants' engineering professor testified that seat belt is the most effective restraint system if vehicle is hit directly in front or from any angle within 45 degrees to right or left, and (4) plaintiff's safety engineer admitted that, in crash tests conducted on make and model of car at issue, belted dummy passenger's face never came into contact with windshield. Lustyik v Manaher, 246 A.D.2d 887, 668 N.Y.S.2d 410, 1998 N.Y. App. Div. LEXIS 514 (N.Y. App. Div. 3d Dep't 1998).

Evidence that motorist was not wearing seat belt at time pickup truck he was driving collided with tree, which resulted in fuel-fed fire in which motorist was killed, was admissible in products liability action against truck manufacturer based on alleged design defect in fuel tank; failure to wear seat belt, while not causing fire, may have caused some of motorist's injuries and was relevant to claim for damages for motorist's conscious pain and suffering before, and was also relevant to theory of manufacturer as to how accident occurred. Ake v GMC, 942 F. Supp. 869, 1996 U.S. Dist. LEXIS 16017 (W.D.N.Y. 1996).

12. —Evidence not permitted

In action for personal injuries from automobile accident, defendants were properly precluded from inquiring into plaintiff's failure to wear seat belt during liability phase of trial since such testimony was relevant only to issue of damages, and defendants

were also properly prevented from eliciting such testimony and arguing seat belt defense during damages phase where record indicated that defendants did not intend to present any competent evidence to indicate that any of plaintiff's injuries were caused by his failure to wear seat belt. Siegfried v Siegfried, 123 A.D.2d 621, 507 N.Y.S.2d 20, 1986 N.Y. App. Div. LEXIS 60769 (N.Y. App. Div. 2d Dep't 1986).

Court properly dismissed seat belt defense (CLS Veh & Tr § 1229-c) raised by defendant in wrongful death action arising from accident in which defendant's van crashed into side of car from which decedent, who was not wearing seat belt, was partially ejected and killed when car flipped over and landed on his head, since defendant's expert testified only that decedent "would not have sustained the injuries he did" had he worn seat belt but gave no opinion whether decedent could have survived internal injuries to his lung, liver and pelvis had he not also suffered head injury, whereas plaintiff's expert testified to ineffectiveness of seat belts in protecting human body against lateral impacts and concluded that while seat belt may have prevented head injury, it would not have prevented decedent's other internal injuries caused by lateral impact and that it was unlikely that decedent would have survived "whether or not he was wearing a seat belt." Baginski v New York Tel. Co., 130 A.D.2d 362, 515 N.Y.S.2d 23, 1987 N.Y. App. Div. LEXIS 46374 (N.Y. App. Div. 1st Dep't 1987).

13. Procedure

In personal injury action arising from motor vehicle accident, court did not abuse its discretion in allowing defendant to amend its answer to assert defense that plaintiff failed to mitigate his injuries by wearing seat belt, despite lateness of defendant's motion, where (1) motion was based on belated discovery of photograph of vehicle which depicted existence of seat belt, which flatly contradicted plaintiff's testimony at examination before trial that there were no seat belts in vehicle, (2) both parties had responsibility for delay in bringing action to trial, and (3) both parties had equal opportunity to inspect vehicle and should have discovered presence of seat belt at earlier date. Sass v Mack Trucks, Inc., 158 A.D.2d 332, 551 N.Y.S.2d 21, 1990 N.Y. App. Div. LEXIS 1244 (N.Y. App. Div. 1st Dep't 1990).

In personal injury action arising from motor vehicle accident in which plaintiff's decedent died when defendant ran stop sign, hit decedent's automobile, and caused decedent to be ejected from automobile, court erred in submitting interrogatory to jury which asked whether decedent's death was caused by his failure to use seat belt, and effectively precluded jury from determining whether decedent would have sustained any other compensable injuries had he worn seat belt; evidence established possibility that decedent would have sustained injury even if he had worn seat belt, and it was therefore improper to frame interrogatory in manner which precluded jury from considering failure to use seat belt as mitigating damages rather than as full defense. Stein v Penatello, 185 A.D.2d 976, 587 N.Y.S.2d 37, 1992 N.Y. App. Div. LEXIS 10377 (N.Y. App. Div. 2d Dep't 1992).

Supreme Court lacked authority, in automobile collision case, to consider juror affidavits or to amend amount reported by jury on special verdict sheet asking amount to which, rather than by which, plaintiff's total damages should be reduced because of his failure to use seat belt where, although there was confusion among counsel and court as to amount awarded, nothing in record indicated confusion among jurors in reaching their verdict. Lustyik v Manaher, 246 A.D.2d 887, 668 N.Y.S.2d 410, 1998 N.Y. App. Div. LEXIS 514 (N.Y. App. Div. 3d Dep't 1998).

Since CLS Veh & Tr § 1229-c allows noncompliance with seatbelt requirement to be introduced in mitigation of damages only where party introducing such evidence has pleaded noncompliance as affirmative defense, defendant in personal injury action who failed to specifically plead plaintiff's nonuse of seatbelts but instead relied solely on defense of "culpable conduct" would be precluded from introducing evidence of nonuse. Costanza v New York, 147 Misc. 2d 94, 553 N.Y.S.2d 616, 1990 N.Y. Misc. LEXIS 126 (N.Y. Civ. Ct. 1990).

Defendant in personal injury action who failed to specifically plead plaintiff's nonuse of seatbelts as affirmative defense, as required by CLS Veh & Tr § 1229-c, would not be permitted to introduce expert testimony tending to show that plaintiff was not wearing seatbelts at time of accident on theory that expert would merely be attacking plaintiff's credibility, since it would be impossible to admit such evidence for limited purpose advanced without violating clear intent of statute. Costanza v New York, 147 Misc. 2d 94, 553 N.Y.S.2d 616, 1990 N.Y. Misc. LEXIS 126 (N.Y. Civ. Ct. 1990).

14. —Summary judgment

In action for injuries sustained in automobile accident by 8-year-old child, who was riding in back seat of defendants' car but was not restrained by safety belt, court properly granted summary judgment dismissing causes of action predicated on noncompliance with CLS Veh & Tr § 1229-c since plain language of subdivision (8) of that statute prohibits any evidence of noncompliance in regard to issue of liability. Hamilton v Purser, 162 A.D.2d 91, 563 N.Y.S.2d 163, 1990 N.Y. App. Div. LEXIS 12076 (N.Y. App. Div. 3d Dep't 1990).

Owner and driver of approaching vehicle were not entitled to summary judgment dismissing wrongful death action against them where there was triable issue of fact as to whether driver had enough time to take evasive action before hitting plaintiff's decedent, who had been ejected from cab of pickup truck onto road, and defendants did not prove that alleged failure of decedent to wear available seatbelt was sole cause of accident. Van Ostberg v Crane, 273 A.D.2d 895, 709 N.Y.S.2d 774, 2000 N.Y. App. Div. LEXIS 6894 (N.Y. App. Div. 4th Dep't), reh'g denied, 716 N.Y.S.2d 351, 2000 N.Y. App. Div. LEXIS 9714 (N.Y. App. Div. 4th Dep't 2000).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in CLS Gen Bus § 396-z.

Law Reviews:

Schwarz, The New York seat belt defense. 59 NYS Bar J 30.

Benguerel, Mandatory seat belt legislation: panacea for highway traffic fatalities? 36 Syracuse L. Rev. 1341.

Annotations:

Nonuse of seat belt as failure to mitigate damages. 80 ALR3d 1033.

Automobile occupant's failure to use seat belt as contributory negligence. 92 ALR3d 9.

Matthew Bender's New York AnswerGuides: LexisNexis AnswerGuide New York Negligence § 2.13 Raising Appropriate Defenses in Motor Vehicle Cases.

Warren's Negligence in the New York Courts: Warren's Negligence in the New York Courts Ch. 9 (affirmative defenses).

Texts: NY Pattern Jury Instructions 3d, PJI 2:87.1, 2:87.2.

TITLE VIII Respective Powers of State and Local Authorities

Article 35. Uniform Statewide Application

Section
1602. Emergency rule

Article 39. Regulation of Traffic by Cities and Villages

1640-a. Traffic regulations at parking areas and driveways of hospitals, shopping centers, office buildings and office building complexes, places of public assembly, facilities owned or leased by not-for-profit corporations, private apartment complexes and fire stations; private condominium complex; mobile home parks; manufactured home parks

Article 41. Regulation of Traffic by Towns

Section
1660-a. Traffic regulations at parking areas and driveways of hospitals, shopping centers, office buildings and office building complexes, places of public assembly, private apartment complexes, fire stations, private condominium complexes, mobile home parks, manufactured home parks, industrial parks and industrial complexes

HISTORY:
Add, L 1959, ch 775, eff Oct 1, 1960, with substance transferred from former Title IV.

ARTICLE 35 Uniform Statewide Application

HISTORY:
Add, L 1959, ch 775, eff Oct 1, 1960, with substance transferred from former Art 22.

§ 1602. Emergency rule

(a) Whenever a police officer shall deem it advisable during a fire or at the time of any accident or special emergency and only for such period of time as is necessitated thereby for the public safety or convenience, temporarily to close any street or part thereof to vehicular traffic, or to vehicles of a certain description, or to divert the traffic thereof, or to divert or break a course of pedestrian traffic, such official shall have power and authority to do so.

(b) In the event of a fire or other emergency or to expedite traffic or to safeguard pedestrians or property: any police officer or other person empowered to regulate traffic at the scene may, to the extent authorized by local law, ordinance, order, rule, regulation or administrative code provision adopted by local authorities with respect to highways within their corporate boundaries, direct traffic as conditions may require notwithstanding the provisions of this chapter or of local laws, ordinances, orders, rules, regulations, administrative code or sanitary code provisions regulating traffic; and, in addition, outside of cities and villages any member of the state police may direct traffic as conditions may require notwithstanding the provisions of this chapter or of local laws, ordinances, orders, rules or regulations regulating traffic.

(c) Whenever the head of any police force or police department or the chief executive officer of a city, town or village shall deem it advisable during a snow storm or in order to remove snow or to plow streets, provided that signs or markings giving notice are posted as required by section sixteen hundred eighty-three of this chapter, such head of the police force or police department or the chief executive officer of a city, town or village may close any street or part thereof to vehicular traffic or prohibit, restrict or limit the stopping, standing or parking of vehicles.

(d) The superintendent of the New York state police or the head of any police force or police department may authorize the temporary closure of any street or part thereof to vehicular traffic, or to vehicles of a certain description, or to divert the traffic thereof, or to divert or break a course of pedestrian traffic in the following situations:

1. during the time of any speed contest, exhibition of speed or similar special event which is being held pursuant to section eleven hundred eighty-two-a of this chapter;

2. during the time of the filming of any movie, commercial or similar event which is being undertaken pursuant to section eleven hundred eighty-two-b of this chapter.

HISTORY:
Add, L 1959, ch 775, with substance transferred from former § 1602; amd, L 1969, ch 498, § 1, eff May 10, 1969; L 1987, ch 593, § 4, eff Jan 30, 1988.

Editor's Notes: Laws 1987, ch 593, § 5, eff Jan 30, 1988, provides as follows:

§ 5. This act shall take effect on the one hundred eightieth day after it shall have become a law provided the department of transportation shall have the power to promulgate the necessary rules and regulations for the implementation of this act immediately.

Notes to Decisions

Driver violated N.Y. Veh. & Traf. Law § 1102 where he failed to yield to the directions of volunteer firefighters who were directing traffic at the scene of an automobile accident, as the firefighters had authority to act pursuant to the instructions given to them by their fire chief, who had properly delegated his authority to regulate traffic at such incidents pursuant to the emergency doctrine contained in N.Y. Veh. & Traf. Law § 1602; although the firefighters were not fire police officers, pursuant to N.Y. Gen. Mun. Law § 209-c, they were acting under the direction and control of their chief pursuant to N.Y. Village Law § 10-1018. People v Loren, 4 N.Y.3d 411, 796 N.Y.S.2d 26, 828 N.E.2d 983, 2005 N.Y. LEXIS 1039 (N.Y. 2005).

Agency Opinions

A volunteer fireman, who is not a member of a fire police squad, may not be held personally liable for damages resulting from his negligence in directing traffic as part of a firemanic operation. 1975 NY Ops Atty Gen Jan 17.

ARTICLE 39 Regulation of Traffic by Cities and Villages

HISTORY:
Add, L 1959, ch 775, eff Oct 1, 1960, with substance transferred from former Art 26.

§ 1640-a. Traffic regulations at parking areas and driveways of hospitals, shopping centers, office buildings and office building complexes, places of public assembly, facilities owned or leased by not-for-profit corporations, private apartment complexes and fire stations; private condominium complex; mobile home parks; manufactured home parks

The legislative body of any city or village, with respect to the parking areas and driveways of a hospital or parking area of a shopping center, office building and office building complex or place of public assembly, or the parking areas and driveways of facilities owned or leased by a not-for-profit corporation or the parking areas, driveways, and private streets or roadways of a private apartment house complex, private condominium complex, or cooperative apartment complex, or the parking ar-

eas, private streets, roadways or driveways of mobile home parks or manufactured home parks, or the parking areas and driveways of a fire station, and pursuant to the written request of the owner, the person in general charge of the operation and control of such area, the fire chief of the city or village fire department or the police chief or the police commissioner of the police department serving such area, may, by local law or ordinance:

1. Order stop signs, flashing signals or yield signs erected at specified entrance or exit locations to any such area or designate any intersection in such area as a stop intersection or as a yield intersection and order like signs or signals at one or more entrances to such intersection.

2. Regulate traffic in any such area, including regulation by means of traffic-control signals.

2-a. Notwithstanding the provisions of section sixteen hundred forty-three to the contrary, establish maximum speed limits in any such area at not less than fifteen miles per hour.

3. Prohibit or regulate the turning of vehicles or specified types of vehicles at intersections or other designated locations in any such area.

4. Regulate the crossing of any roadway in any such area by pedestrians.

5. Designate any separate roadway in any such area for one-way traffic.

6. Prohibit, regulate, restrict or limit the stopping, standing or parking of vehicles in specified areas of any such area.

7. Designate safety zones in any such area.

8. Provide for the removal and storage of vehicles parked or abandoned in any such area during snowstorms, floods, fires or other public emergencies, or found unattended in any such area, (1) where they constitute an obstruction to traffic or (2) where stopping, standing or parking is prohibited, and for the payment of reasonable charges for such removal and storage by the owner or operator of any such vehicle.

9. Adopt such additional reasonable rules and regulations with respect to traffic and parking in any such area as local conditions may require for the safety and convenience of the public or of the users of any such area.

10. Make special provisions with relation to stopping, standing or parking of vehicles registered pursuant to section four hundred four-a of this chapter or those possessing a special vehicle identification parking permit issued in accordance with section one thousand two hundred three-a of this chapter.

In the case of a college or university, as defined in section two of the education law, the provisions of this section shall apply only upon the written request of the governing body of such college or university.

HISTORY:

Add, L 1966, ch 459, § 1; amd, L 1970, ch 679 § 11; L 1970, ch 679, § 11, eff Jan 1, 1971; L 1976, ch 389, § 1, eff July 15, 1976; L 1979, ch 646, § 1, eff July 11, 1979; L 1980, ch 181, § 6; L 1985, ch 344, § 4, eff July 16, 1985; L 1990, ch 72, § 1; L 1991, ch 161, §§ 1, 2, eff June 10, 1991; L 1996, ch 14, § 2, eff March 20, 1996; L 2000, ch 200, § 1, eff Sept 15, 2000; L 2002, ch 177, § 1, eff July 23, 2002.

Notes to Decisions

While CLS Veh & Tr § 1640-a(2) grants additional authority to local government entity to regulate traffic, it was not meant to preclude application of CLS Veh & Tr §§ 1162, 1192, and 1211(a), and it clearly does not give village exclusive right to regulate traffic in public parking areas. People v Murphy, 169 Misc. 2d 357, 649 N.Y.S.2d 962, 1996 N.Y. Misc. LEXIS 413 (N.Y. App. Term 1996).

Agency Opinions

Vehicle and Traffic Law § 1640-a authorizes a village board of trustees to regulate traffic in a shopping center in the village upon request. 1980 NY Ops Atty Gen Oct 8 (informal).

A city or village, when requested, by local law or ordinance may establish traffic regulations for hospitals, shopping centers, apartment complexes, condominiums and fire stations. 1981 NY Ops Atty Gen July 21 (Informal).

A village may not regulate traffic on the private streets of a single family housing complex, where development consists of single family homes owned in fee simple by separate owners, with all roads in development private roads and not open to public traffic and development is not co-operative for condominium complex. NY Ops Atty Gen 89-67 (informal).

Upon the written request of the owner, a village may regulate parking in the private parking lot of a shopping center, but may not regulate parking in other parking lots of private businesses unless justified by the need to protect the public safety, health and welfare. 1978 Op St Compt File #564.

A village may adopt and enforce traffic regulations applicable to the parking areas and driveways of a private condominium complex pursuant to a written request from the owner or person in charge of the area or the village fire chief. 1980 Op St Compt File #104.

A village may, by local law, regulate parking and traffic on the private streets, roadways or parking areas of a co-operative apartment complex. 1982 Op St Compt File #82-331.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

"Parking area of a shopping center" defined, § 129-a.

Operation without license at shopping center forbidden, § 509(1).

Applicability to parking area of shopping center of provisions requiring obedience to traffic laws, § 1100(b).

ARTICLE 41 Regulation of Traffic by Towns

HISTORY:

Add, L 1959, ch 775, eff Oct 1, 1960, with substance transferred from former Art 28.

§ 1660-a. Traffic regulations at parking areas and driveways of hospitals, shopping centers, office buildings and office building complexes, places of public assembly, private apartment complexes, fire stations, private condominium complexes, mobile home parks, manufactured home parks, industrial parks and industrial complexes

The town board of any town, with respect to the parking areas and driveways of a hospital, office building or office building complex or place of public assembly, or parking area of a shopping center or the parking areas and driveways of facilities owned or leased by a not-for-profit corporation or the parking areas, driveways and private streets or roadways of a private apartment house complex, private condo-

minium complex or cooperative apartment complex, or the parking areas, private streets, roadways or driveways of mobile home parks or manufactured home parks, or the parking areas and driveways of a fire station, or the parking areas, private streets, roadways or driveways of an industrial park or industrial complex, and pursuant to the written request of either the owner or the person in general charge of the operation and control of such area, the fire chief of the fire department or the police chief or the police commissioner of the police department serving such area, may, by local law or ordinance:

1. Order stop signs, flashing signals or yield signs erected at entrance or exit locations to any such area or designate any intersection in such area as a stop intersection or as a yield intersection and order like signs or signals at one or more entrances to such intersection.

2. Regulate traffic in any such area, including regulation by means of traffic-control signals.

2-a. Notwithstanding the provisions of section sixteen hundred sixty-two-a to the contrary, establish maximum speed limits in any such area at not less than fifteen miles per hour.

3. Prohibit or regulate the turning of vehicles or specified types of vehicles at intersections or other designated locations in any such area.

4. Regulate the crossing of any roadway in any such area by pedestrians.

5. Designate any separate roadway in any such area for one-way traffic.

6. Prohibit, regulate, restrict or limit the stopping, standing or parking of vehicles in specified areas of any such area.

7. Designate safety zones in any such area.

8. Provide for the removal and storage of vehicles parked or abandoned in any such area during snowstorms, floods, fires or other public emergencies, or found unattended in any such area, (1) where they constitute an obstruction to traffic or (2) where stopping, standing or parking is prohibited, and for the payment of reasonable charges for such removal and storage by the owner or operator of any such vehicle.

9. Adopt such additional reasonable rules and regulations with respect to traffic and parking in any such area as local conditions may require for the safety and convenience of the public or of the users of any such area.

10. Make special provisions with relation to stopping, standing or parking of vehicles registered pursuant to section four hundred four-a of this chapter or those possessing a special vehicle identification parking permit issued in accordance with section one thousand two hundred three-a of this chapter.

In the case of a college or university, as defined in section two of the education law, the provisions of this section shall apply only upon the written request of the governing body of such college or university.

HISTORY:

Add, L 1970, ch 679, § 12; amd, L 1975, ch 199, § 1; L 1975 ch 368, § 1; L 1975, ch 368, § 1, eff Sept 1, 1975; L 1976, ch 389, § 2, eff July 15, 1976; L 1977, ch 925, § 1; L 1977, ch 926, § 1; L 1979, ch 646, § 2; L 1980, ch 181, § 9; L 1985, ch 344, § 7, eff July 16, 1985; L 1985, ch 423, § 1; L 1990, ch 72, § 2; L 1991, ch 161, §§ 3, 4, eff June 10, 1991; L 1996, ch 14, § 3, eff March 20, 1996; L 2000, ch 200, § 2, eff Sept 15, 2000; L 2002, ch 177, § 2, eff July 23, 2002.

Notes to Decisions

Town ordinance which gave town police authority to regulate and control traffic at shopping plaza should not be read to empower town to prescribe traffic signals and signs at plaza, so as to relieve plaza owners for liability in personal injury action arising from vehicular collision at plaza, where ordinance was granted at written request of owners pursuant to CLS Veh & Tr §§ 1603 and 1660-a, request was limited to creation and enforcement of no-parking zone along store fronts, and owners specified that they did "not consent to or request any other control or regulation" by town. Remmely v Irondequoit, 125 A.D.2d 984, 510 N.Y.S.2d 381, 1986 N.Y. App. Div. LEXIS 63177 (N.Y. App. Div. 4th Dep't 1986).

The installation of traffic controls by a town upon the parking area of a privately-owned shopping center is a town charge and the cost of same may not be assessed against the owner thereof. 1972 Ops St Compt File #573.

Town may not, pursuant to CLS Veh & Tr § 1660, regulate traffic on private roads within residential subdivisions consisting of detached, single-family dwellings, although "Rules of the Road" would apply upon private roads open to public traffic; however, suburban town with population over 50,000 may, within limitations expressed in CLS Veh & Tr § 1662-a, establish town speed limits within residential subdivisions on private roads that are open to public motor vehicle traffic. 1992 Op St Compt No. 92-19.

Pursuant to an ordinance or local law, a town is empowered to lay down markings and erect signs designating fire safety zones in shopping centers upon the request of the chief of the fire department serving the area in which the center is located, notwithstanding the objections thereto of the owner of the shopping center. 1984 Op St Comp File #84-47.

Agency Opinions

While a town does not have specific authority under the Vehicle and Traffic Law to regulate parking on private property, except in enumerated circumstances, a town may enact an ordinance pursuant to its general police powers prohibiting parking on private property without the permission of the property owner and providing for the removal of motor vehicles parked in violation of such an ordinance. 1980 NY Ops Atty Gen June 24 (Informal), 1980 N.Y. AG LEXIS 95.

Town may regulate parking on grounds of state facility if asked to do so by appropriate governing board of facility. 1985 NY Ops Atty Gen No. 85-44, 1985 N.Y. AG LEXIS 55.

Provisions of Vehicle and Traffic Law do not give town authority to enact local law establishing 15 mile per hour speed limit within mobile home park; however, if private roads within mobile home park are open to public motor vehicle traffic, town may establish and enforce speed limit of not less than 25 miles per hour within park. 1998 NY Ops Atty Gen I 98-25.

Provisions of CLS Veh & Tr § 1660-a do not extend to mobile home parks; thus, town could not erect stop signs within mobile home park under its provisions. 1998 N.Y. Op. Att'y Gen. No. 98-28, 1998 N.Y. AG LEXIS 38.

Vehicle and Traffic Law, § 1660-a permits a town board to regulate parking for the handicapped in private housing complexes upon receipt of a written request from the complex owner or other person in general charge of its operation. N.Y. Op. Att'y Gen. No. 84-1.

Regulation of parking and traffic in a private condominium complex is an exercise of a town's police powers, and a town is subject to the same constitutional principles as when it regulates parking and traffic on public streets and highways—e.g., regulations should bear reasonable relation to public welfare and operate with substantial equality and uniformity. The installa-

tion of signs and traffic controls in a private condominium complex is a town charge and may not be charged back against the property in question. 1978 Op St Compt File #269.

A town board, which has adopted traffic regulations for a privately owned shopping center, at the owner's request pursuant to Vehicle and Traffic Law, § 1660-a, may not be subsequently compelled to repeal such negotiation if so requested by the shopping center owner. 1979 Op St Compt File #78.

A town board does not have authority to adopt parking regulations for parking areas of a county community college. 1980 Op St Compt No. 80–353.

The cost of installing and maintaining traffic control signs in a private apartment complex is a town charge, and may not be charged back against the apartment owners. 1981 Op St Compt File #80-733.

TITLE IX Penalties and Disposition of Fines and Forfeitures

Article 45. Penalties and Disposition of Fines and Forfeitures

Section
1800. Penalties for traffic infractions

HISTORY:
Add, L 1959, ch 775, eff Oct 1, 1960, with substance transferred from former Title V.

ARTICLE 45 Penalties and Disposition of Fines and Forfeitures

HISTORY:
Add, L 1959, ch 775, eff Oct 1, 1960, with substance transferred from former Art 32.

§ 1800. Penalties for traffic infractions

(a) It is a traffic infraction for any person to violate any of the provisions of this chapter or of any local law, ordinance, order, rule or regulation adopted pursuant to this chapter, unless such violation is by this chapter or other law of this state declared to be a misdemeanor or a felony.

(b) 1. Every person convicted of a traffic infraction for a violation of any of the provisions of this chapter or of any ordinance, order, rule or regulation adopted pursuant to section sixteen hundred thirty or sixteen hundred thirty-one of this chapter for which another penalty is not provided shall for a first conviction thereof be punished by a fine of not more than one hundred fifty dollars or by imprisonment for not more than fifteen days or by both such fine and imprisonment; for a conviction of a second violation, both of which were committed within a period of eighteen months, such person shall be punished by a fine of not more than three hundred dollars or by imprisonment for not more than forty-five days or by both such fine and imprisonment; upon a conviction of a third or subsequent violation, all of which were committed within a period of eighteen months, such person shall be punished by a fine of not more than four hundred fifty dollars or by imprisonment for not more than ninety days or by both such fine and imprisonment, except that a person convicted of a traffic infraction for a violation of paragraph one of subdivision (d) of section one thousand one hundred eleven of this chapter outside of a city having a population of one million or more shall, for a first conviction thereof, be punished by a fine of not less than seventy-five dollars nor more than two hundred twenty-five dollars or by imprisonment for not more than fifteen days or by both such fine and imprisonment; for a conviction of a second violation, both of which were committed within a period of eighteen months, such person shall be punished by a fine of not less than one hundred fifty dollars nor more than three hundred seventy-five dollars or by imprisonment for not more than forty-five days or by both such fine and imprisonment; upon a conviction of a third or subsequent violation, all of which were committed within a period of eighteen months, such person shall be punished by a fine of not less than three hundred seventy-five dollars nor more than six hundred seventy-five dollars or by imprisonment for not more than ninety days or by both such fine and imprisonment except that a person convicted for a violation of paragraph one of subdivision (d) of section one thousand one hundred eleven of this chapter shall, for a first conviction thereof, be punished by a fine of not less than one hundred fifty dollars nor more than four hundred fifty dollars or by imprisonment for not more than fifteen days or by both such fine and imprisonment; for a conviction of a second violation, both of which were committed within a period of eighteen months, such person shall be punished by a fine of not less than three hundred dollars nor more than seven hundred fifty dollars or by imprisonment for not more than forty-five days or by both such fine and imprisonment; upon a conviction of a third or subsequent violation, all of which were committed within a period of eighteen months, such person shall be punished by a fine of not less than seven hundred fifty dollars nor more than one thousand five hundred dollars or by imprisonment for not more than ninety days or by both such fine and imprisonment.

2. Notwithstanding the provisions of paragraph one of this subdivision, a person convicted of a traffic infraction for a violation of paragraph two of subdivision (b) of section twelve hundred two of this chapter shall for a first conviction thereof be punished by a fine of not more than four hundred dollars or by imprisonment for not more than fifteen days or by both such fine and imprisonment. Upon a conviction for a second violation, both of which were committed within a period of eighteen months, such person shall be punished by a fine of not more than six hundred dollars or by imprisonment for not more than forty-five days or by both such fine and imprisonment; upon a conviction of a third or subsequent violation, all of which were committed within a period of eighteen months, such person shall be punished by a fine of not more than seven hundred fifty dollars or by imprisonment for not more than ninety days or by both such fine and imprisonment.

(c) Every person convicted of a traffic infraction for a violation of any local law, ordinance, order, rule,

regulation or administrative code provision adopted pursuant to this chapter by any local authority or continued in effect by this chapter, except those adopted pursuant to sections sixteen hundred thirty and sixteen hundred thirty-one, shall be punished in the same manner as has heretofore been prescribed by law unless or until otherwise prescribed by local law, ordinance or state statute.

(d) A conviction of violation of any provision of this chapter shall not be a bar to a prosecution for an assault or for a homicide committed by any person in operating a motor vehicle or motorcycle.

(e) Every person convicted of a violation of the provisions of section eleven hundred forty-four of this chapter shall for a first conviction thereof be punished by a fine of not more than two hundred seventy-five dollars or by imprisonment for not more than fifteen days or by both such fine and imprisonment. For a conviction of a second violation, both of which were committed within a period of eighteen months, such person shall be punished by a fine of not more than four hundred fifty dollars or by imprisonment for not more than forty-five days or by both such fine and imprisonment. For a conviction of a third violation and all subsequent violations, all of which were committed within a period of eighteen months, such person shall be punished by a fine of not more than seven hundred fifty dollars or by imprisonment for not more than ninety days or by both such fine and imprisonment.

(f) Every person convicted of operating a truck, tractor or tractor-trailer combination having a total gross weight in excess of ten thousand pounds in violation of a local law, ordinance, rule or regulation enacted by the legislative body of any city with a population in excess of one million pursuant to the provisions of paragraph ten of subdivision (a) of section sixteen hundred forty of this chapter shall, for a first offense thereof, be punished by a fine of not less than two hundred dollars nor more than five hundred dollars or by imprisonment for not more than fifteen days or by both such fine and imprisonment. For a conviction of a second violation, both of which were committed within a period of eighteen months, such person shall be punished by a fine of not less than five hundred dollars nor more than one thousand dollars or by imprisonment for not more than forty-five days or by both such fine and imprisonment. For a conviction of a third violation and all subsequent violations, all of which were committed within a period of eighteen months, such person shall be punished by a fine of not less than one thousand dollars nor more than two thousand dollars, or by imprisonment for not more than ninety days or by both such fine and imprisonment.

(g) Notwithstanding the provisions of subdivisions (b) and (c) of this section, a person convicted of a traffic infraction for a violation of any ordinance, order, rule, regulation or local law adopted pursuant to one or more of the following provisions of this chapter: paragraphs two and nine of subdivision (a) of section sixteen hundred twenty-one; subdivision three of section sixteen hundred thirty; or subdivision five of section seventy-one of the transportation law, prohibiting the operation on a highway or parkway of a motor vehicle registered as a commercial vehicle and having a gross vehicle weight rating of less than ten thousand pounds shall, for a first conviction thereof, be punished by a fine of not more than two hundred fifty dollars or by imprisonment of not more than fifteen days or by both such fine and imprisonment; for a conviction of a second violation, both of which were committed within a period of eighteen months, such person shall be punished by a fine of not more than five hundred dollars or by imprisonment for not more than forty-five days or by both such fine and imprisonment; upon a conviction of a third or subsequent violation, all of which were committed within a period of eighteen months, such person shall be punished by a fine of not more than seven hundred fifty dollars or by imprisonment of not more than ninety days or by both such fine and imprisonment. Provided, however, the provisions of this subdivision shall not apply to a commercial motor vehicle as such term is defined in paragraph (a) of subdivision four of section five hundred one-a of this chapter.

(h) Notwithstanding the provisions of subdivisions (b) and (c) of this section, a person convicted of a traffic infraction for a violation of any ordinance, order, rule, regulation or local law adopted pursuant to one or more of the following provisions of this chapter: paragraphs two and nine of subdivision (a) of section sixteen hundred twenty-one; subdivision three of section sixteen hundred thirty; or subdivision five of section seventy-one of the transportation law, prohibiting the operation on a highway or parkway of a motor vehicle registered as a commercial vehicle and having a gross vehicle weight rating of at least ten thousand pounds but no more than twenty-six thousand pounds shall, for a first conviction thereof, be punished by a fine of not more than three hundred fifty dollars or by imprisonment of not more than fifteen days or by both such fine and imprisonment; for a conviction of a second violation, both of which were committed within a period of eighteen months, such person shall be punished by a fine of not more than seven hundred dollars or by imprisonment for not more than forty-five days or by both such fine and imprisonment; upon a conviction of a third or subsequent violation, all of which were committed within a period of eighteen months, such person shall be punished by a fine of not more than one thousand dollars or by imprisonment of not more than ninety days or by both such fine and imprisonment; provided, however, the provisions of this subdivision shall not apply to a commercial motor vehicle as such term is defined in paragraph (a) of subdivision four of section five hundred one-a of this chapter.

(i) Notwithstanding the provisions of subdivisions (b) and (c) of this section, a person convicted of

a traffic infraction for a violation of any ordinance, order, rule, regulation or local law adopted pursuant to one or more of the following provisions of this chapter: paragraphs two and nine of subdivision (a) of section sixteen hundred twenty-one; subdivision three of section sixteen hundred thirty; or subdivision five of section seventy-one of the transportation law, prohibiting the operation on a highway or parkway of a commercial motor vehicle as defined in paragraph (a) of subdivision four of section five hundred one-a of this chapter, for a first conviction thereof, be punished by a fine of not more than seven hundred dollars or by imprisonment of not more than fifteen days or by both such fine and imprisonment; for a conviction of a second violation, both of which were committed within a period of eighteen months, such person shall be punished by a fine of not more than one thousand five hundred dollars or by imprisonment for not more than forty-five days or by both such fine and imprisonment; upon a conviction of a third or subsequent violation, all of which were committed within a period of eighteen months, such person shall be punished by a fine of not more than two thousand dollars or by imprisonment of not more than ninety days or by both such fine and imprisonment.

HISTORY:

Add, L 1959, ch 775, eff Oct 1, 1960, with substance transferred from former §§ 70(12), 1800; amd, L 1967, ch 783, § 3; L 1968, ch 186, § 1; L 1969, ch 1075, § 2; L 1970, ch 337, § 8, eff July 1, 1970; L 1981, ch 162, § 2; L 1983, ch 926, § 1; L 1983, ch 927, § 1; L 1989, ch 61, § 48, effective and applicable to violations committed on and after May 19, 1989; L 1993, ch 540, § 1, eff Nov 1, 1993; L 1995, ch 202, § 1, eff Aug 25, 1995; L 2003, ch 62, § 1 (Part C), eff May 15, 2003; L 2003, ch 203, § 1, eff Nov 1, 2003; L 2006, ch 574, § 2, eff Nov 1, 2006; L 2008, ch 221, § 1, eff Nov 1, 2008; L 2020, ch 58, § 1 (Part B), effective September 30, 2020.

Editor's Notes: Laws 1995, ch 202, § 2, eff Aug 25, 1995, provides as follows:

§ 2. This act shall take effect on the thirtieth day after it shall have become a law and shall apply to violations committed on and after such date.

Laws 2020, ch 58, § 3 (Part B), eff September 30, 2020, provides:

§ 3. This act shall take effect on the one hundred eightieth day after it shall have become a law.

Amendment Notes The 2020 amendment by ch 58, § 1 (Part B), substituted "less than ten" for "less than twenty six" in the first sentence of (g); added (h); added the (i) designation; and in (i), substituted "not more than seven hundred dollars" for "not more than three hundred fifty dollars," "not more than one thousand five hundred dollars" for "not more than seven hundred dollars" and "not more than two thousand dollars" for "not more than one thousand dollars."

Repeal Notes: [1970, ch 337] Subdivision (e) of § 1800 of the Vehicle and Traffic Law has been repealed since its provisions substantially duplicated provisions contained in the Code of Criminal Procedure.

Notes to Decisions

Analysis

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1. In general

The plain intention of legislature is that violations of Vehicle and Traffic Law, although classed as misdemeanors and punishable by imprisonment in penitentiary, should be punished as specifically provided in the above article (§§ 1800-1803). People v Ragusa, 44 Misc. 2d 940, 255 N.Y.S.2d 269, 1964 N.Y. Misc. LEXIS 1145 (N.Y. County Ct. 1964).

2. Construction

The Vehicle and Traffic Law being penal in nature must be construed strictly. People v Burton, 47 Misc. 2d 1077, 264 N.Y.S.2d 89, 1965 N.Y. Misc. LEXIS 1476 (N.Y. City Ct. 1965).

The words "enforce" and "enjoin" in former § 95-j related to the equitable powers of the supreme court rather than the trial of informations. People v Gilberg, 21 N.Y.S.2d 920, 1940 N.Y. Misc. LEXIS 2027 (N.Y. Spec. Sess. 1940).

3. Intention

Under provisions of the Vehicle & Traffic Law involving offenses mala prohibita, the people are not required to establish any criminal intent on the part of the defendant. People v Janoske, 132 N.Y.S.2d 186, 206 Misc. 155, 1954 N.Y. Misc. LEXIS 3414 (N.Y. County Ct. 1954).

4. Procedure

For the purpose of prosecuting traffic infractions the procedural rules for the trial of misdemeanors are applicable, and the court had the right to issue a warrant of arrest for a violation of former § 86, subd 3. People v Propp, 15 N.Y.S.2d 83, 172 Misc. 314, 1939 N.Y. Misc. LEXIS 2358 (N.Y. County Ct. 1939), rev'd, 284 N.Y. 491, 31 N.E.2d 915, 284 N.Y. (N.Y.S.) 491, 1940 N.Y. LEXIS 816 (N.Y. 1940).

Where many costs included in respondents' computation for police tow away program of illegally parked automobiles were ordinary police costs and not costs of removing vehicles, fixation of $50 removal fee or towing charge was illegal, unreasonable, arbitrary and capricious and paragraph of temporary operating procedure doubling fee from $25 to $50 would be annulled. Freidus v Leary, 66 Misc. 2d 70, 320 N.Y.S.2d 122, 1971 N.Y. Misc. LEXIS 1721 (N.Y. Sup. Ct. 1971), rev'd, 38 A.D.2d 919, 329 N.Y.S.2d 897, 1972 N.Y. App. Div. LEXIS 5140 (N.Y. App. Div. 1st Dep't 1972).

Right to speedy trial under CLS CPL 30.30 is available to defendant charged for traffic infraction punishable by jail term under CLS Vehicle and Traffic § 1800. People v Attie, 131 Misc. 2d 921, 502 N.Y.S.2d 342, 1986 N.Y. Misc. LEXIS 2594 (N.Y. City Ct. 1986).

Delay of more than 10 months between entry of plea of no guilty to traffic infraction and date case is first noticed for trial is excessive and deprives defendant of right to speedy trial where people do not attempt to explain or excuse delay. People v Attie, 131 Misc. 2d 921, 502 N.Y.S.2d 342, 1986 N.Y. Misc. LEXIS 2594 (N.Y. City Ct. 1986).

A traffic infraction is treated as a misdemeanor for the purposes of procedure only. People v Wilson, 168 N.Y.S.2d 391 (N.Y. Sup. Ct. 1957).

Defendant has no right to apply for certificate of removal when charged with a traffic infraction. 1947 Ops St Compt 51.

The members of a village board may apprehend, and the village police justice may try violators of village traffic ordinances. 1958 Ops St Compt File #405.

5. Validity of arrest

An arrest under a warrant at night for the infraction of a parking ordinance, although illegal, did not affect the validity of

the motorist's trial and conviction. People v Baxter, 36 N.Y.S.2d 1020, 178 Misc. 625, 1942 N.Y. Misc. LEXIS 1948 (N.Y. County Ct.), app. dismissed, 37 N.Y.S.2d 489 (N.Y. App. Div. 1942).

6. Admissibility of evidence of conviction in subsequent litigation

Where after a motor vehicle accident, evidence presented at a hearing pursuant to § 71, standing alone, was insufficient to prove that the driver operated his car in a manner which unreasonably interfered with the free and proper use of a public highway or unreasonably endangered the users thereof, additional evidence that he had been tried and found guilty in a traffic court of "failure to give a pedestrian the right of way" was insufficient, when considered with the evidence theretofore received, to justify the commissioner of motor vehicles in finding that at the time of the accident such driver was guilty of "reckless driving" in violation of § 58 and directing revocation of his operator's license. Hart v Mealey, 287 N.Y. 39, 38 N.E.2d 121, 287 N.Y. (N.Y.S.) 39, 1941 N.Y. LEXIS 1388 (N.Y. 1941).

In a negligence action the cross-examination of defendant as to a conviction of a violation of an ordinance regulating speed under former § 2 subdivision 29 was improper to affect his credibility but the conviction was prima facie evidence of the facts involved. Same v Davison, 253 A.D. 123, 1 N.Y.S.2d 374, 1937 N.Y. App. Div. LEXIS 5122 (N.Y. App. Div. 1937).

Where deceased was killed when struck by a newspaper delivery truck in the city of New York, evidence that the driver of the truck was convicted of "dangerous driving" in connection with the same accident is inadmissible. Walther v News Syndicate Co., 276 A.D. 169, 93 N.Y.S.2d 537, 1949 N.Y. App. Div. LEXIS 3137 (N.Y. App. Div. 1949).

7. Speeding

Ownership of an automobile did not create a presumption that the owner was the driver where police used a "phototraffic camera" which took two pictures at a set time interval apart thereby showing that defendant's automobile was proceeding at an illegal rate of speed. People v Hildebrandt, 308 N.Y. 397, 126 N.E.2d 377, 308 N.Y. (N.Y.S.) 397, 1955 N.Y. LEXIS 996 (N.Y. 1955).

Speeding is a traffic infraction and not a crime and hence it is not necessary for a magistrate to inform a defendant that he is entitled to the aid of counsel. Lea v MacDuff, 126 N.Y.S.2d 646, 205 Misc. 24, 1953 N.Y. Misc. LEXIS 2474 (N.Y. Sup. Ct. 1953).

Either subdivision (d) of section 1180 of the Vehicle and Traffic Law or an applicable section of a local law or ordinance may serve as a basis for a prosecution for speeding within a city, since subdivision (d) of section 1180 does not state that it is the exclusive basis for such a charge and subdivisions (a) and (c) of section 1800 of the Vehicle and Traffic Law expressly provide conviction for this offense may rest upon violation of local law or ordinance. People v Levin, 93 Misc. 2d 106, 402 N.Y.S.2d 324, 1978 N.Y. Misc. LEXIS 2021 (N.Y. City Ct. 1978).

8. Truck ordinance

Penalties for violations of a town truck route ordinance may be prescribed pursuant to § 135 of the Town Law; however any such violation is a "traffic infraction" and may not be constituted a misdemeanor. 1953 Ops St Compt File 257.

9. Parking violations

The failure to park a vehicle as close to the curb as practicable is not a crime. Breland v Gray, 2 Misc. 2d 15, 37 N.Y.S.2d 291, 1942 N.Y. Misc. LEXIS 1228 (N.Y. Sup. Ct. 1942).

Since this section makes it a traffic infraction punishable by fine, imprisonment, or both, to violate any provisions of this chapter, including ordinances enacted under § 1670, a county has plenary power to assess a charge for parking in an area around the Court house with penalties for overtime or illegal parking in a prescribed metered area. People v Korn, 221 N.Y.S.2d 101, 1961 N.Y. Misc. LEXIS 3630 (N.Y. City Ct. 1961).

A parking ticket issued for violation of a village parking ordinance is subject to different statutes of limitations, depending on whether a civil or criminal proceeding is involved. 1974 Op State Compt File No. 1284.

10. Restriction of traffic

In order to restrict traffic on town highways pursuant to Vehicle and Traffic Law § 1660, the town board must cause the highway to be posted with signs. 1968 Ops St Compt File #1045.

Such restrictions may be made for a temporary period. The length of time which may be considered temporary is a question of fact. 1968 Ops St Compt File #1045.

Such restrictions may be made by ordinance, order, rule or regulation. If made by an order, rule or regulation, no public hearing is necessary and a person who violates the order, rule or regulation may be charged with the commission of a traffic infraction. 1968 Ops St Compt File #1045.

11. Thruway violations

A justice of the peace, when imposing fines and penalties on motorists for violations committed on the New York State Thruway, is governed by the provisions of § 1630(5) of the Vehicle and Traffic Law on the determination of whether or not an offense has been committed, and § 361 of the Public Authorities Law as to the punishment for such an offense. 1960 Ops St Compt File #246.

12. Suspension or revocation of license

A violation of former § 83 was not one of the infractions mentioned in either subd 2 or 3 of § 71, which designate instances in which suspensions and revocations are mandatory or discretionary. People v Stoner, 7 N.Y.S.2d 510, 169 Misc. 469, 1938 N.Y. Misc. LEXIS 2066 (N.Y. County Ct. 1938).

Motorist who breached conditional driver's license limitation by operating a motor vehicle at 1:10 a.m. was properly charged with a traffic infraction under Vehicle and Traffic Law provision prohibiting any person from operating any motor vehicle in violation of any restriction contained on his license, rather than being charged with a misdemeanor under Vehicle and Traffic Law provision pertaining to operating a motor vehicle upon a public highway while one's driver's license is suspended or revoked. People v Tousley, 86 Misc. 2d 1059, 383 N.Y.S.2d 996, 1976 N.Y. Misc. LEXIS 2579 (N.Y. County Ct. 1976).

13. Fines and imprisonment

Maximum fine that may be imposed for the violation of driving without headlights was $150 and the fine imposed upon defendant's conviction of circumvention of an ignition interlock device exceeded the maximum fine that might be imposed for the first conviction of such crime ($300) as set forth in N.Y. Veh. & Traf. Law § 1801(1). Pursuant to N.Y. Veh. & Traf. Law § 1801(1), the fine imposed upon defendant was reduced to $300. People v Mooney, 188 A.D.3d 1360, 135 N.Y.S.3d 185, 2020 N.Y. App. Div. LEXIS 6621 (N.Y. App. Div. 3d Dep't 2020).

Where defendant failed to pay parking ticket and then was arrested, the court could impose an increased fine. People v Carter, 68 Misc. 2d 283, 325 N.Y.S.2d 772, 1971 N.Y. Misc. LEXIS 1152 (N.Y. County Ct. 1971).

A village board of trustees may not prescribe the fines to be collected by a traffic violations bureau. 1967 Ops St Compt File #1020.

Although the law is somewhat unclear, a village may impose a civil penalty for a violation of its parking ordinance. 1978 Op St Compt File #831.

14. Prior convictions

CLS Veh & Tr § 1800(d) supercedes CLS CPL § 40.20 and, to extent that it does not conflict with constitutional double jeopardy principles, permits successive prosecution for homicide and assault notwithstanding prior prosecution for traffic offenses arising out of same incident. Corbin v Hillery, 74 N.Y.2d 279, 545 N.Y.S.2d 71, 543 N.E.2d 714, 1989 N.Y. LEXIS 1002 (N.Y. 1989), aff'd, 495 U.S. 508, 110 S. Ct. 2084, 109 L. Ed. 2d 548, 1990 U.S. LEXIS 2698 (U.S. 1990).

Prosecution of indictment for reckless manslaughter, second degree vehicular manslaughter, criminally negligent homicide, and third degree reckless assault was prohibited under federal double jeopardy principles following defendant's guilty plea to driving while intoxicated and failing to keep right, even though homicide and assault crimes were not "same offenses" as traffic offenses, where prosecution stated in its bill of particulars that it intended to use acts underlying traffic offenses as major part of its

proof on homicide and assault crimes; thus, CLS Veh & Tr § 1800(d) could not be applied to overcome statutory double jeopardy prohibition of CLS CPL § 40.20. Corbin v Hillery, 74 N.Y.2d 279, 545 N.Y.S.2d 71, 543 N.E.2d 714, 1989 N.Y. LEXIS 1002 (N.Y. 1989), aff'd, 495 U.S. 508, 110 S. Ct. 2084, 109 L. Ed. 2d 548, 1990 U.S. LEXIS 2698 (U.S. 1990).

CLS Veh & Tr § 1800(d) was inapplicable by its terms to counts of indictment for driving while intoxicated in violation of CLS Veh & Tr § 1192(2) and (3), which were brought against defendant who had previously pleaded guilty to infractions of driving while intoxicated and failing to keep right, since counts did not charge homicide or assault crime; thus, general statutory double jeopardy provision of CLS CPL § 40.20 was controlling. Corbin v Hillery, 74 N.Y.2d 279, 545 N.Y.S.2d 71, 543 N.E.2d 714, 1989 N.Y. LEXIS 1002 (N.Y. 1989), aff'd, 495 U.S. 508, 110 S. Ct. 2084, 109 L. Ed. 2d 548, 1990 U.S. LEXIS 2698 (U.S. 1990).

In view of the initial penalties imposed by this section for a second traffic infraction conviction, the provisions of §§ 1940 et seq. of the Penal Law dealing with multiple convictions for other offenses and the method of bringing them to the court's attention are inapplicable in a traffic infraction case. People v Bommarito, 29 Misc. 2d 171, 216 N.Y.S.2d 948, 1961 N.Y. Misc. LEXIS 2669 (N.Y. County Ct. 1961).

Where it is sought to invoke this section for imposition of an additional penalty upon a traffic law violator by reason of prior conviction of a traffic infraction, the previous convictions should be alleged in the information, and, unless they are so alleged, there is no basis for proceeding against the defendant, following conviction of the offense charged in the information, under the general multiple offender provisions of the Penal Code. People v Bommarito, 29 Misc. 2d 171, 216 N.Y.S.2d 948, 1961 N.Y. Misc. LEXIS 2669 (N.Y. County Ct. 1961).

15. Res judicata

In a motion to dismiss an indictment charging the defendant with criminally negligent homicide and reckless endangerment of life in the first and second degrees, arising out of an accident wherein the defendant passed a stopped school bus and struck the victim disembarking from the bus, the prior conviction of the defendant, based upon his guilty pleas, of driving without adequate brakes and passing a stopped school bus, a misdemeanor and traffic violation respectively, did not bar prosecution under the indictment. People v Taylor, 66 Misc. 2d 1058, 322 N.Y.S.2d 818, 1971 N.Y. Misc. LEXIS 1530 (N.Y. County Ct. 1971).

16. Miscellaneous matters

Ownership of an automobile did not create a presumption that the owner was the driver where police used a "phototraffic camera" which took two pictures at a set time interval apart thereby showing that defendant's automobile was proceeding at an illegal rate of speed. People v Hildebrandt, 308 N.Y. 397, 126 N.E.2d 377, 308 N.Y. (N.Y.S.) 397, 1955 N.Y. LEXIS 996 (N.Y. 1955).

In Article 78 proceeding to review determination fining car dealer $1,000 for 5 violations of Vehicle and Traffic Law and regulations promulgated thereunder, court would remit matter to Commissioner of Motor Vehicles for imposition of appropriate penalty where court had disaffirmed one of 5 violations. Old Country Toyota Corp. v Adduci, 136 A.D.2d 706, 524 N.Y.S.2d 56, 1988 N.Y. App. Div. LEXIS 857 (N.Y. App. Div. 2d Dep't), app. denied, 72 N.Y.2d 803, 532 N.Y.S.2d 368, 528 N.E.2d 520, 1988 N.Y. LEXIS 1732 (N.Y. 1988).

The penalty for violation of former § 83 was found in former § 91. People v Stoner, 7 N.Y.S.2d 510, 169 Misc. 469, 1938 N.Y. Misc. LEXIS 2066 (N.Y. County Ct. 1938).

A violation of former § 86, subd 3, is a traffic infraction under former § 2, subd 29 and under this former § 70 subd 10. People v Propp, 15 N.Y.S.2d 83, 172 Misc. 314, 1939 N.Y. Misc. LEXIS 2358 (N.Y. County Ct. 1939), rev'd, 284 N.Y. 491, 31 N.E.2d 915, 284 N.Y. (N.Y.S.) 491, 1940 N.Y. LEXIS 816 (N.Y. 1940).

Although the provision of Local Tow Car Ordinance which required licensing by town and prohibited soliciting for hire, was violative of this section of the Vehicle and Traffic Law in that it set a fine and penalty in excess of the maximum, the ordinance was not invalidated thereby since it provided for severability in the event of a finding that any portion thereof was invalid and therefore court could impose a penalty under this section of the Vehicle and Traffic Law. People v Francis, 53 Misc. 2d 606, 279 N.Y.S.2d 483, 1967 N.Y. Misc. LEXIS 1571 (N.Y. Dist. Ct. 1967).

Defendant's operation of limousine in which he picked up passengers from several stops within a housing development and transported them to specified areas in Manhattan for specified price constituted an operation of a "bus line" or "omnibus line" as defined by state statutes, and since the vehicle was not franchised, defendant's action constituted the unauthorized operation of a bus on city street within meaning of New York City traffic regulations. People v Schuster, 83 Misc. 2d 871, 374 N.Y.S.2d 951, 1975 N.Y. Misc. LEXIS 3006 (N.Y. City Crim. Ct. 1975).

While statute imposing penalty for operation of unfranchised bus in city of New York is penal in nature, court is not in a straightjacket so as to foreclose application of historic doctrine that intent of framers is the primary object; statute may not be so strictly construed as to pervert such legislative intent. People v Schuster, 83 Misc. 2d 871, 374 N.Y.S.2d 951, 1975 N.Y. Misc. LEXIS 3006 (N.Y. City Crim. Ct. 1975).

Jumping off the Atlantic Beach Bridge on a $10 bet is a violation of section 303.4 of the Rules and Regulations of the Nassau County Bridge Authority (21 NYCRR 303.4), which prohibits persons from diving from the bridge and, therefore, constitutes a traffic infraction under sections 1630 and 1800 of the Vehicle and Traffic Law. People v Noto, 92 Misc. 2d 611, 400 N.Y.S.2d 691, 1977 N.Y. Misc. LEXIS 2594 (N.Y. Dist. Ct. 1977).

Motion to dismiss a refusing to take a breath test in violation of N.Y. Veh. & Traf. Law § 1194(1)(b) charge was denied as refusing to take a breath test was a traffic infraction under N.Y. Veh. & Traf. Law §§ 1101 and 1800(a), which provided that it was a traffic infraction unless a misdemeanor was specified for any person to violate a New York Vehicle and Traffic Law provision; while there was contrary authority, appellate cases and cases from the New York Court of Appeals had recognized that the failure to submit to a lawful request for a preliminary or portable breath test was a cognizable offense. People v Leontiev, 956 N.Y.S.2d 832, 38 Misc. 3d 716, 2012 N.Y. Misc. LEXIS 5565 (N.Y. Dist. Ct. 2012).

Agency Opinions

Analysis

1. In general
2. Speeding
3. Parking violations
4. Restriction of traffic
5. Suspension or revocation of license
6. Fines and imprisonment
7. Prior convictions
8. Miscellaneous matters

1. In general

A traffic infraction is not a crime and should not be included in the statistics of "crime and criminals" required by the Code of Criminal Procedure, §§ 947 and 949. 1934 N.Y. Op. Att'y Gen. No. 449.

A traffic infraction is not a crime and there is no authority to take fingerprints or photographs of a person so convicted. 1934 N.Y. Op. Att'y Gen. No. 452.

Traffic infractions, though no longer criminal, are to be prosecuted in the same manner as if they were misdemeanors. 1935 N.Y. Op. Att'y Gen. No. 124.

Where the vehicle and traffic law has not expressly declared the violation of a local ordinance governing or regulating traffic to be a misdemeanor or a felony, the violation is considered a traffic infraction. 1935 N.Y. Op. Att'y Gen. No. 340.

Traffic infraction is not a crime. 1953 N.Y. Op. Att'y Gen. No. 125.

2. Speeding

Speeding in violation of either a village ordinance or of the vehicle and traffic law is merely a traffic infraction and such a charge is not subject to removal from a court of special sessions

for prosecution by indictment. 1955 NY Ops Atty Gen 106 (informal).

3. Parking violations

A village may amend its parking ordinance by local law to provide that if a parking violation fine is not paid within a specified period of time, the fine will be doubled, except that the total fine cannot exceed the maximum amount set forth in Vehicle and Traffic Law, § 1800. However, it is doubtful that local legislation can be enacted doubling a fine for violation of a parking regulation for failure of the violator to appear on the return date specified in the appearance ticket. 1981 Op St Compt File #80-798.

Where towns, cities and villages have designated spaces for handicapped parking, a county does not have the power to adopt a local law applicable county-wide to all municipalities in the county fixing a fine of $100 for parking in such spaces without a permit. 1983 Op St Compt File #83-170.

4. Restriction of traffic

When traffic regulations of a school district do not provide specific penalties for violations, the penalties set forth in § 1800(b) are applicable. 1979 Op St Compt File #26.

5. Suspension or revocation of license

Where the office of village justice is established, a village is entitled to the fines imposed for violations of sections of the Vehicle and Traffic Law and traffic regulations enacted locally pursuant thereto, in accordance with the provisions of section 1803. 1983 Op St Compt File #83-137.

6. Fines and imprisonment

Should defendant fail to pay fine imposed for violation of statute relating to stop sign, he may be imprisoned. 1953 NY Ops Atty Gen 105 (informal).

Village may not impose its own schedule of penalties for traffic infractions, since penalties are set by Vehicle and Traffic Law. 1986 N.Y. Op. Att'y Gen. No. 86-11.

Fines and other penalties for violations of local traffic regulations (defined as traffic infractions) must be consistent with parameters set forth in CLS Veh & Tr § 1800, must bear reasonable relationship to severity of offense and not be abhorrent to sense of justice or shocking to conscience. 2004 NY Ops Atty Gen I 04-10.

Although the law is somewhat unclear, a city may impose a civil as well as a criminal penalty for a violation of its parking ordinance. 1978 Op St Compt No. 78–465.

Article 45 of the Vehicle and Traffic Law does not authorize a pre-prepared schedule of fines to enable a motorist simultaneously to mail his fine and guilty plea in relation to a traffic offense. 1990 N.Y. Op. Att'y Gen. No. I90-61.

7. Prior convictions

A second offender, under former § 70, subd 10, is one who, within a period of eighteen months, is for the second time convicted of any misdemeanor specified in the Vehicle and Traffic Law, for which no other punishment is specially prescribed, and it is not necessary that it be a repetition of the identical offense or act. 1938 N.Y. Op. Att'y Gen. No. 192.

8. Miscellaneous matters

The provision in former § 70 subd 2 of the Vehicle and Traffic Law, which directs that sentence or execution thereof for any violation thereunder may not be suspended, is valid. 1955 NY Ops Atty Gen 182 (informal).

Traffic regulations imposed by a school district on school district property may be enforced by the police or other peace officers of the municipality in which said property is situated. 1969 NY Ops Atty Gen Jan 10 (informal).

While under its general powers the Village of Nyack Housing Authority may invoke speed, fire zone and parking regulations on streets under its jurisdiction within a housing project, such rules and regulations not having been invoked by the Village of Nyack may not be enforced by the police of such Village. 1974 NY Ops Atty Gen Nov 25.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 398-e; CLS PRHPL § 27.11.

Suspension, revocation or refusal to issue registration; civil penalty; restitution; surrender of certificate of registration, § 398-e.

Duty to inform defendant of consequences of judgment of conviction, CLS CPL § 170.10(4)(b).

Penal provisions as to traffic infractions, CLS Penal § 10.00(2).

Designation of offenses, CLS Penal § 55.10.

Authorized dispositions; traffic infraction, CLS Penal § 60.20.

Annotations:

Homicide by automobile as murder. 21 ALR3d 116.

TITLE X Uniform Vehicle Certificate of Title Act

Article 46. Uniform Vehicle Certificate of Title Act

Section
2101. Definitions
2102. Exclusions
2104. Certificate of title required

HISTORY:

Add, L 1971, ch 1134, § 2, eff July 1, 1972.

ARTICLE 46 Uniform Vehicle Certificate of Title Act

HISTORY:

Add, L 1971, ch 1134, § 2, eff July 1, 1972.

§ 2101. Definitions

Except when the context otherwise requires, as used in this article:

(a) "Dealer" means a person registered as a dealer under section four hundred fifteen or twenty-two hundred fifty-seven of this chapter.

(b) "Commissioner" includes the office and a branch office of the commissioner and, when authorized to receive a document or fee as agent of the commissioner, the clerk of a county.

(c) "Identifying number" means the numbers, and letters if any, on a vehicle designated by the commissioner for the purpose of identifying the vehicle.

(d) "Implement of husbandry" means a vehicle designed and adapted exclusively for agricultural, horticultural or livestock raising operations or for lifting or carrying an implement of husbandry and in either case not subject to registration if used upon the highways.

(e) "Lienholder" means a person holding a security interest in a vehicle.

(f) To "mail" means to deposit in the United States mail properly addressed and with postage prepaid.

(g) "Owner" means a person, other than a lienholder, having the property in or title to a vehicle. The term includes a person entitled to the use and possession of a vehicle subject to a security interest in another person, but excludes a lessee under a lease not intended as security.

(h) "Person" means a natural person, firm, copartnership, association or corporation.

(i) "Pole trailer" means a vehicle without motive power designed to be drawn by another vehicle and

attached to the towing vehicle by means of a reach, or pole, or by being boomed or otherwise secured to the towing vehicle, and ordinarily used for transporting long or irregularly shaped loads such as logs, poles, pipes, or structural members capable, generally, of sustaining themselves as beams between the supporting connections.

(j) "Security agreement" means a written agreement which reserves or creates a security interest.

(k) "Security interest" means an interest in a vehicle reserved or created by agreement and which secures payment or performance of an obligation. The term includes the interest of a lessor under a lease intended as security. The term also includes an interest in a vehicle pursuant to a lien arising under section two hundred eleven of the lien law and section one hundred eleven-u of the social services law. A security interest is "perfected" when it is valid against third parties generally, subject only to specific statutory exceptions.

(*l*) "Special mobile equipment" means a vehicle not designed for the transportation of persons or property upon a highway and only incidentally operated or moved over a highway, which if registered would be registered pursuant to schedule F of subdivision seven of section four hundred one of this chapter.

(m) "State" means a state, territory or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a province of the Dominion of Canada.

(n) "Vehicle" means a vehicle as defined in section one hundred fifty-nine of this chapter except that it shall not include a device for which a registration is denied pursuant to section four hundred-a of this chapter and, except with respect to section twenty-one hundred two of this article, shall also mean a vessel as defined in section twenty-two hundred fifty of this chapter. Unless otherwise specified, "vehicle" also means a "mobile home" or a "manufactured home" as defined in section one hundred twenty-two-c of this chapter.

HISTORY:

Add, L 1971, ch 1134, § 2, eff July 1, 1972; amd, L 1973, ch 934, § 1, eff June 22, 1973; L 1974, ch 556, § 1; L 1985, ch 484, §§ 3, 4, eff June 1, 1986; L 1993, ch 322, § 9, eff July 1, 1994; L 1997, ch 398, § 68, eff Jan 1, 1998; L 1999, ch 105, § 1, eff June 22, 1999.

Editor's Notes: Laws 1985, ch 484, § 15, eff June 1, 1986, provides as follows:

§ 15. This act shall take effect June first, nineteen hundred eighty-six, except that (a) those provisions of this act relating to the registration fee for vessels shall not apply to the renewal of a registration for a vessel which expires on or prior to May thirty-first, nineteen hundred eighty-six, which is issued prior to September first, nineteen hundred eighty-six, and the fee for such renewal shall be the fee which was in effect on May thirty-first, nineteen hundred eighty-six and (b) the commissioner of motor vehicles may accept applications for and issue dealer registrations on and after January first, nineteen hundred eighty six (Amd, L 1986, ch 21, § 1).

Laws 1993, ch 322, § 18, eff July 1, 1994, provides as follows:

§ 18. This act shall take effect July 1, 1994, provided however, that effective immediately, the addition, amendment and/or repeal of any rules or regulations necessary for the implementation of the foregoing sections of this act on its effective date are authorized and directed to be made and completed on or before such effective date.

Laws 1997, ch 398, §§ 1, 147, eff Jan 1, 1998, provide as follows:

Section 1. The legislature hereby finds and declares:

It is essential that New York state's child support enforcement program meet the needs of children, including providing for the timely and efficient establishment of paternity and child support orders and the collection of child support payments.

It is also essential that New York state meet the child support requirements contained in the federal Personal Responsibility and Work Opportunity Reconciliation Act.

In recognition of these goals, we hereby enact a number of measures to strengthen New York state's child support system, including establishing a cost of living adjustment process to ensure that child support order amounts keep pace with inflation. In addition, we have determined that state and local child support agencies should have additional enforcement remedies and improved paternity establishment measures. Finally, we fulfill federal requirements by adopting several initiatives, including the Uniform Interstate Family Support Act, establishing a computerized state case registry and making improvements to New York state's new hire reporting program. These changes and others contained in this legislation are intended to help families by ensuring that New York state's children receive the child support that they deserve.

§ 147. Notwithstanding any provision of law to the contrary, the commissioners of social services, taxation and finance, health, labor and motor vehicles and the chair of the workers' compensation board, and any appropriate entity of the state, shall be authorized to promulgate regulations on an emergency basis to ensure the implementation of this act and may take any steps necessary to implement this act prior to its effective date.

Notes to Decisions

Article 9 of Uniform Commercial Code, requiring issuance of certificate showing whether financing statement is on file naming particular debtor, manifested intent to protect certain class of people, and Secretary of State's error in issuing such certificate was therefore actionable. Hudleasco, Inc. v State, 90 Misc. 2d 1057, 396 N.Y.S.2d 1002, 1977 N.Y. Misc. LEXIS 2219 (N.Y. Ct. Cl. 1977), aff'd, 63 A.D.2d 1042, 405 N.Y.S.2d 784, 1978 N.Y. App. Div. LEXIS 12139 (N.Y. App. Div. 3d Dep't 1978).

Purpose of Uniform Vehicle Certificate of Title Act and regulations promulgated thereunder includes not only the orderly transfer of motor vehicles and protection of those who purchase them, but also the protection of those who loan money in reliance on the security which a lien upon a vehicle may provide. Security Trust Co. v Valley Cadillac Corp., 91 Misc. 2d 511, 398 N.Y.S.2d 194, 1977 N.Y. Misc. LEXIS 2344 (N.Y. Sup. Ct. 1977).

A violation of regulation placing duty upon automobile dealer who sells vehicle and forwards to the Motor Vehicle Department an application for certificate of title does not establish negligence per se, but is simply evidence of negligence which the trier of fact may take into consideration with all of the other evidence bearing on that subject; in order to recover, lender must show not only the negligence of automobile dealer, but also that negligence was the proximate cause of its loss and that it itself was not contributorily negligent. Security Trust Co. v Valley Cadillac Corp., 91 Misc. 2d 511, 398 N.Y.S.2d 194, 1977 N.Y. Misc. LEXIS 2344 (N.Y. Sup. Ct. 1977).

Lender could not recover from automobile dealer on conversion theory as result of dealer's failure to notify Motor Vehicle Department of existence of lender's lien on automobile, in view of fact that lender's interest was equitable, not legal, since its lien was never recorded. Security Trust Co. v Valley Cadillac Corp., 91 Misc. 2d 511, 398 N.Y.S.2d 194, 1977 N.Y. Misc. LEXIS 2344 (N.Y. Sup. Ct. 1977).

Where check issued by lender and payable to buyer of automobile and automobile dealer contained on its reverse side a notice that a $3 filing fee was included on face amount of check and that lender was to be listed on registration form as first lienholder, dealer was negligent in failing to notify Motor Vehicle Department of existence of lender's lien, and such negligence was proximate cause of lender's loss of balance of loan made to buyer of automobile, and therefore, vendor was entitled to recover from dealer balance of such loan. Security Trust Co. v Valley Cadillac Corp., 91 Misc. 2d 511, 398 N.Y.S.2d 194, 1977 N.Y. Misc. LEXIS 2344 (N.Y. Sup. Ct. 1977).

Judgment creditor's motion seeking an order compelling a judgment debtor to turn over cash or a vehicle was denied; among other things, a website report showed that a third party was listed as a title holder to the vehicle at issue, and, as a joint owner, it was required that such person be given the opportunity to be heard. Erin Capital Mgt., LLC v Celis, 854 N.Y.S.2d 640, 19 Misc. 3d 390, 2008 N.Y. Misc. LEXIS 592 (N.Y. Dist. Ct. 2008).

Repair shop was not entitled to a garageman's lien on a motor vehicle under N.Y. Lien Law § 184(1), as the company that owned the vehicle did not consent to the shop's claimed repair and storage charges, and the shop failed to investigate whether a man it knew to be the vehicle's lessee had authority from the company to place liens on the vehicle. Matter of DCFS Trust v New York State Dept. of Motor Veh., 821 N.Y.S.2d 852, 13 Misc. 3d 1056, 2006 N.Y. Misc. LEXIS 2621 (N.Y. Sup. Ct. 2006).

Trial court properly denied the respective parties' motion and cross motion for summary judgment in a suit seeking a declaration of insurance coverage relating to a boating accident because the certificate of title to the boat was in the name of the insured's brother-in-law on the date of the accident, was not prima facie proof of ownership of the outboard engine, and nothing in the record suggested that the boat was purchased apart from the outboard engine, or that the ownership of one was ever separate from the other. RLI Ins. Co. v Steely, 88 A.D.3d 975, 932 N.Y.S.2d 80, 2011 N.Y. App. Div. LEXIS 7493 (N.Y. App. Div. 2d Dep't 2011).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 239, 1224.
Fire company, definition, CLS Gen Mun § 100.
Fire corporations, CLS N-PCL § 1402.

§ 2102. Exclusions

(a) The following are excluded from the provisions of this title:

(1) A vehicle owned by the United States unless it is registered in this state;

(2) A vehicle owned by a manufacturer or dealer and held for sale, even though incidentally moved on the highway or used for purposes of testing or demonstration; or a vehicle used by a manufacturer solely for testing other than: (i) a vehicle registered by a dealer or manufacturer, or (ii) a vehicle for which a physical examination is required under section four hundred thirty of this chapter before a certificate of title may be issued, or (iii) a vehicle held for sale by a dealer which was purchased by the dealer as a result of sale upon repossession or a sale by a sheriff or marshall to satisfy a judgment, or (iv) a vehicle held for sale by a dealer for which a certificate of title containing an error attributable to processing by the department has been issued, or (v) a vehicle held for sale by a dealer for which ordinarily acceptable proof of ownership cannot be obtained by the dealer with reasonable diligence but for which a certificate of title would ordinarily be issued upon the filing of a bond with the commissioner as prescribed in subdivision (d) of section twenty-one hundred five of this article, or (vi) a vehicle for which a manufacturer or dealer has submitted a notice of repurchase as required by subdivision two of section four hundred seventeen-a of this chapter and regulations of the commissioner, or (vii) a vehicle held for sale by a dealer which was purchased by a dealer as the result of a sale by a police department, or (viii) a vehicle held for sale by a dealer which was purchased by a dealer as the result of a sale by the United States government;

(3) A vehicle owned by a non-resident of this state and not required by law to be registered in this state provided, however, that a certificate of title may be issued to such a non-resident for a vehicle purchased by or transferred to such non-resident as a result of a sale after repossession, or a sale by a sheriff or marshall to satisfy a judgement [judgment]*, or a sale to foreclose a garageman's lien, provided such sale was held in this state, or a result of the settlement of an estate of a deceased if such settlement is pursuant to the estates, powers and trusts law of this state or a sale by a police department, provided such sale was held in this state;

(4) A vehicle regularly engaged in the interstate transportation of persons or property for which a currently effective certificate of title has been issued in another state;

(5) A vehicle moved solely by animal power;

(6) An implement of husbandry;

(7) Special mobile equipment;

(8) A self-propelled wheel chair or an adapted tricycle operated or driven by a person with a disability;

(9) A pole trailer or a trailer with an unladen weight of less than one thousand pounds;

(10) A vehicle manufactured prior to July first, nineteen hundred seventy-two and designated by the manufacturer as being a nineteen hundred seventy-two or earlier model year vehicle, and any vehicle manufactured or assembled prior to January first, nineteen hundred seventy-three for which the manufacturer or assembler has not designated a model year;

(11) Snowmobiles, off-highway motorcycles and limited use motorcycles;

(12) A motor vehicle set off to a surviving spouse or surviving minor child pursuant to section 5-3.1 of the estates, powers and trusts law until an application for registration is made by such survivor or until after the survivor transfers the vehicle, in which case the transferee must apply for a certificate of title;

(13) A vessel not required to be registered in this state and which is not registered in this state;

(14) A vessel designated by the manufacturer as being a nineteen hundred eighty-six or earlier model year vessel and any vessel manufactured or as-

*The bracketed word has been inserted by the Publisher.

sembled prior to August first, nineteen hundred eighty-six for which the manufacturer or assembler has not designated a model year;

(15) Any vessel having a valid marine document issued by the United States or a foreign government;

(16) Any vessel under fourteen feet in length;

(17) A vehicle owned or leased by the state of New York and regularly utilized or intended to be utilized for undisclosed or undercover law enforcement purposes;

(18) A vehicle owned by a non-resident of this state for which a currently effective certificate of title has been issued in another state and which is leased to a resident of, and registered in, this state.

(19) A mobile home or a manufactured home, manufactured prior to July first, nineteen hundred ninety-four and designated by the manufacturer as being a nineteen hundred ninety-four or earlier model year mobile home or manufactured home, and any mobile home or manufactured home manufactured or assembled prior to January first, nineteen hundred ninety-four for which the manufacturer has not designated a model year.

(b) [Repealed]

(c) A person engaged in the business of selling vehicles who does not place such vehicles in his own consumer use and who is not required to be registered as a dealer under section four hundred fifteen of this chapter, shall not be deemed a dealer with respect to such vehicles and shall not be required to apply for or receive a certificate of title for any such vehicles. A local authority, which acquires title to a vehicle or vehicles under the provisions of section twelve hundred twenty-four of this chapter, and which does not place such vehicle or vehicles in its own consumer use shall not be required to apply for or receive a certificate of title for any such vehicle or vehicles.

(d) No certificate of title shall be issued to a vehicle excluded from the provisions of this article.

(e) The commissioner may, by regulation, exclude from the provisions of this title vehicles designated by the manufacturer as being of a model year more than nine years prior to the current calendar year. The commissioner may provide that such exclusion shall apply to all such vehicles or to any categories or classes of such vehicles.

HISTORY:

Add, L 1971, ch 1134, § 2, eff July 1, 1972; amd, L 1972, ch 521, § 2, eff July 1, 1972; L 1974, ch 196, §§ 1, 2, eff April 16, 1974; L 1977, ch 931, § 14; L 1978, ch 262, § 1, eff Sept 1, 1978; L 1983, ch 241, §§ 1, 2, eff June 6, 1983; L 1983, ch 905, § 3, eff Jan 1, 1984; L 1985, ch 484, §§ 5, 6, eff June 1, 1986; L 1985, ch 691, §§ 1–3, eff Oct 30, 1985; L 1986, ch 142, §§ 1, 2, eff June 9, 1986; L 1986, ch 602, § 1, eff July 24, 1986; L 1987, ch 79, § 1; L 1988, ch 577, § 15; L 1989, ch 160, § 1, eff June 17, 1989; L 1990, ch 240, § 1, eff June 15, 1990; L 1991, ch 135, §§ 1, 2, eff May 24, 1991; L 1993, ch 322, §§ 10, 11, eff July 1, 1994; L 1995, ch 667, § 1, eff Aug 8, 1995; L 1996, ch 169, § 1, eff June 18, 1996.

Editor's Notes: Laws 1985, ch 484, § 15, eff June 1, 1986, provides as follows:

§ 15. This act shall take effect June first, nineteen hundred eighty-six, except that (a) those provisions of this act relating to the registration fee for vessels shall not apply to the renewal of a registration for a vessel which expires on or prior to May thirty-first, nineteen hundred eighty-six, which is issued prior to September first, nineteen hundred eighty-six, and the fee for such renewal shall be the fee which was in effect on May thirty-first, nineteen hundred eighty-six and (b) the commissioner of motor vehicles may accept applications for and issue dealer registrations on and after January first, nineteen hundred eighty six (Amd, L 1986, ch 21, § 1).

Laws 1993, ch 322, § 18, eff July 1, 1994, provides as follows:

§ 18. This act shall take effect July 1, 1994, provided however, that effective immediately, the addition, amendment and/or repeal of any rules or regulations necessary for the implementation of the foregoing sections of this act on its effective date are authorized and directed to be made and completed on or before such effective date.

Notes to Decisions

Department of Motor Vehicles, in processing application for certificate of title to automobile which applicant had purchased in Florida, should have insisted on the production of a Florida certificate of title, since the Department knew that Florida was a vehicle certificate of title state. Exchange Nat'l Bank v State, 88 Misc. 2d 444, 388 N.Y.S.2d 971, 1976 N.Y. Misc. LEXIS 2683 (N.Y. Ct. Cl. 1976).

Statutes must be construed in light of the intent of the Legislature, which must be derived from reading the statute itself, unless, because of ambiguity, it is found necessary to resort to extraneous material. Since the intent of the Legislature cannot readily be ascertained from a literal reading of subdivision 5 of section 415-a of the Vehicle and Traffic Law, which requires vehicle dismantlers to keep certain records of motor vehicles and major component parts thereof while in their possession, and the memorandum in support of the statute makes it apparent that the intent of the Legislature in enacting section 415-a was to provide a method by which the police can trace stolen vehicles and their component parts, the court concluded that vehicle dismantlers are required to keep records of major component parts that have been removed from vehicles that have been issued a certificate of title by the Commissioner of Motor Vehicles or vehicles that are eligible to have a certificate of title, and, accordingly, where evidence submitted to the Grand Jury indicated that defendant, while working as a vehicle dismantler, had in his possession a nose clip, which is a major component part of a motor vehicle (15 NYCRR 81.20 [b]), from a 1978 Lincoln Continental, a vehicle that was eligible to have a certificate of title (Vehicle and Traffic Law, §§ 2102, 2104), and the evidence further indicates that defendant failed to maintain a record of the nose clip, the court found that the evidence was sufficient to sustain an indictment under section 415-a, which makes the failure to produce such records upon the request of the Commissioner of Motor Vehicles or the police a class A misdemeanor. People v Ruggieri, 102 Misc. 2d 238, 423 N.Y.S.2d 108, 1979 N.Y. Misc. LEXIS 2852 (N.Y. Sup. Ct. 1979).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 2101, 2104.

Exemption for benefit of family, CLS EPTL § 5-3.1.

§ 2104. Certificate of title required

(a) Every owner of a vehicle which is in this state and is not excluded from provisions of this title by section two thousand one hundred two of this article, and for which no certificate of title has been issued by the commissioner shall make application to the commissioner for a certificate of title of the vehicle within thirty days after transfer to him of the vehicle; provided, however, that a person may, but need not, make application to the commissioner for a certificate of title for a fire truck designed, used and maintained for fire service purposes and the

transportation of property in connection therewith owned and identified as being owned by the state, a public authority, a county, town, city, village or fire district, or a fire corporation subject to the provisions of paragraph (e) of section fourteen hundred two of the not-for-profit corporation law, or a fire company as defined in section one hundred of the general municipal law.

(b) The commissioner shall not register or renew the registration of a vehicle unless a certificate of title has been issued by the commissioner to the owner or an application therefor has been made by the owner and delivered to the commissioner.

HISTORY:

Add, L 1971, ch 1134, § 2, eff July 1, 1972; amd, L 1972, ch 521, § 4; L 1985, ch 691, § 4, eff Oct 30, 1985; L 1999, ch 105, § 2, eff June 22, 1999.

Notes to Decisions

Certificate of title is prima facie evidence of ownership of automobile but is not conclusive proof. Chesworth v Block, 145 A.D.2d 418, 535 N.Y.S.2d 392, 1988 N.Y. App. Div. LEXIS 12903 (N.Y. App. Div. 2d Dep't 1988).

Statutes must be construed in light of the intent of the Legislature, which must be derived from reading the statute itself, unless, because of ambiguity, it is found necessary to resort to extraneous material. Since the intent of the Legislature cannot readily be ascertained from a literal reading of subdivision 5 of section 415-a of the Vehicle and Traffic Law, which requires vehicle dismantlers to keep certain records of motor vehicles and major component parts thereof while in their possession, and the memorandum in support of the statute makes it apparent that the intent of the Legislature in enacting section 415-a was to provide a method by which the police can trace stolen vehicles and their component parts, the court concluded that vehicle dismantlers are required to keep records of major component parts that have been removed from vehicles that have been issued a certificate of title by the Commissioner of Motor Vehicles or vehicles that are eligible to have a certificate of title, and, accordingly, where evidence submitted to the Grand Jury indicated that defendant, while working as a vehicle dismantler, had in his possession a nose clip, which is a major component part of a motor vehicle (15 NYCRR 81.20 [b]), from a 1978 Lincoln Continental, a vehicle that was eligible to have a certificate of title (Vehicle and Traffic Law, §§ 2102, 2104), and the evidence further indicates that defendant failed to maintain a record of the nose clip, the court found that the evidence was sufficient to sustain an indictment under section 415-a, which makes the failure to produce such records upon the request of the Commissioner of Motor Vehicles or the police a class A misdemeanor. People v Ruggieri, 102 Misc. 2d 238, 423 N.Y.S.2d 108, 1979 N.Y. Misc. LEXIS 2852 (N.Y. Sup. Ct. 1979).

Trial court properly denied the respective parties' motion and cross motion for summary judgment in a suit seeking a declaration of insurance coverage relating to a boating accident because the certificate of title to the boat was in the name of the insured's brother-in-law on the date of the accident, was not prima facie proof of ownership of the outboard engine, and nothing in the record suggested that the boat was purchased apart from the outboard engine, or that the ownership of one was ever separate from the other. RLI Ins. Co. v Steely, 88 A.D.3d 975, 932 N.Y.S.2d 80, 2011 N.Y. App. Div. LEXIS 7493 (N.Y. App. Div. 2d Dep't 2011).

It is at least theoretically possible that purported owner of life tenancy in mobile home could present proof sufficient to establish such interest; however, proving such interest is difficult, especially as to those mobile homes manufactured since July 1, 1994, which are transferable by means of certificate of title from Department of Motor Vehicles that do not accommodate such limited ownership interest. 11 Op. Counsel SBRPS No. 96.

Departmental procedures and certificate of title form of Department of Motor Vehicles do not allow for only life interest in mobile home. 11 Op. Counsel SBRPS No. 96.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

Certificate of title. 15 NYCRR §§ 20.1–20.35.

VILLAGE LAW

Article
2. Incorporation
3. Officers and Elections
4. Powers, Duties and Compensation of Officers
5. Finances
9. Permissive Referendum
10. Fire Department
11. Water
17. Provisions Applicable to a Village Embracing the Entire Territory of a Town
22-A. Joint Fire Districts

ARTICLE 2 Incorporation

Section
2-252. Town and district services continued
2-254. Effect of incorporation on all districts entirely within village

HISTORY:
Add, L 1972, ch 892, eff Sept 1, 1973.

§ 2-252. Town and district services continued

1.

a. Any town in which any part of a newly incorporated village is located shall, from the date of such incorporation until the first day of June following the first day of January next succeeding such date of incorporation, continue to perform and to render to and in such incorporated area all those functions and services performed and rendered by it therein and therefor on the date of the filing of the petition for incorporation which function and services, except for the requirements of this section, would otherwise have ceased to be required to be performed or rendered therein upon such incorporation.

b. Any town improvement district and any fire district, fire protection district or fire alarm district partially located in a newly incorporated village and which upon the incorporation of such area would by operation of law or could thereafter pursuant to law, cease to exist in such village shall, nevertheless, from the date of such incorporation until the first day of June following the first day of January next succeeding such date of incorporation, continue to perform and to render to and in such incorporated area all those functions and services rendered by it therein and therefore [therefor]* on the date of the filing of the petition for incorporation.

2. The cost and expense of so performing and so rendering said functions and services shall be budgeted, levied upon, assessed against and collected from the entire town or district, as the case may be, as if such village had not been incorporated. In budgeting such cost and expense such town or district shall provide for a full year's cost and expense of providing such functions and services in the incorporated area.

3. The collector or receiver of taxes of a town and the treasurer of a county shall continue to perform their duties in respect to the property included in such incorporated area until all taxes and assessments extended and levied against such property prior to the village incorporation or subsequent thereto, as provided in subdivision two of this section, have been collected.

4. Such collector or receiver of taxes of a town and such treasurer of a county shall, on the first day of June following the first day of January next succeeding the date of incorporation, pay over to the treasurer of the village seven-twelfths of the collected taxes and assessments extended and levied against the real property in said area for the functions and services referred to in subdivision one hereof. Such collector or receiver of taxes of a town and such treasurer of a county shall, commencing on the first day of July following the first day of January next succeeding the date of incorporation, pay over to the treasurer of village monthly, as collected after the first day of June, seven-twelfths of the taxes and assessments extended and levied against the real property in said area for the functions and services referred to in subdivision one hereof. However, the village, town and district or any of them may agree to a different amount or manner of payment or both.

5. All sums received by the village treasurer pursuant to this section shall be deposited in the general village fund.

6. Nothing contained in this section shall be deemed to cause or require the abolition or diminution of such a town improvement district, a fire district, a fire protection district, or a fire alarm district.

HISTORY:
Add, L 1972, ch 892, eff Sept 1, 1973.

Editor's Notes: Substance transferred from § 3–354.

Notes to Decisions

Analysis

1. In general
2. Under former § 3-354

1. In general

Where area of fire district becomes incorporated village, fire district may continue to provide service to such village; if, upon petition, boundaries are changed by resolution of town board, fire district would be required to provide such services until first day of June following first day of January next succeeding date of incorporation of village. 1985 Op St Compt No. 85-50.

2. Under former § 3-354

That § 202-c of the Town Law was not designed to be the exclusive method of discontinuing or reducing the size of a special improvement district is indicated by former § 3-354 of the Village Law which provides this result may also occur by "operation of

*Bracketed language inserted by the Publisher.

law." Atlantic Beach v Kimmel, 18 N.Y.2d 485, 276 N.Y.S.2d 993, 223 N.E.2d 489, 1966 N.Y. LEXIS 920 (N.Y. 1966).

A village incorporated in territory which formerly was administered by a town sanitary district had the power to render garbage service within its territorial limits upon the expiration of the contract existing with the sanitary district at the time of incorporation. Atlantic Beach v Kimmel, 18 N.Y.2d 485, 276 N.Y.S.2d 993, 223 N.E.2d 489, 1966 N.Y. LEXIS 920 (N.Y. 1966).

Former §§ 358 and 360 dealing with improvement districts part of which are included within the boundaries in a newly created village with respect to proportionate obligation, apportionment of personal and real property, discharge of liability, and apportionment of taxes and adjustments constitutes an inherent recognition by the Legislature of a termination of such districts' jurisdiction within the village limits. And a further indication that such was the intention of the Legislature is to be found in subd 1(b) of the above statute which expressly states that such a district shall cease to exist within such village. Atlantic Beach v Kimmel, 48 Misc. 2d 193, 264 N.Y.S.2d 562, 1965 N.Y. Misc. LEXIS 1369 (N.Y. Sup. Ct. 1965), aff'd, 25 A.D.2d 531, 267 N.Y.S.2d 534, 1966 N.Y. App. Div. LEXIS 4996 (N.Y. App. Div. 2d Dep't 1966).

Section 202-c of the Town Law is not the exclusive means of dissolving or diminishing an improvement district inasmuch as the Legislature specifically recognized in subd b of the above statute that such a change may also occur by "operation of law". Atlantic Beach v Kimmel, 48 Misc. 2d 193, 264 N.Y.S.2d 562, 1965 N.Y. Misc. LEXIS 1369 (N.Y. Sup. Ct. 1965), aff'd, 25 A.D.2d 531, 267 N.Y.S.2d 534, 1966 N.Y. App. Div. LEXIS 4996 (N.Y. App. Div. 2d Dep't 1966).

Where a village became incorporated on June 21, 1962 and included within its boundaries territory which was within a larger fire district, and no affirmative action was taken pursuant to Town Law, § 182 to exclude from the district the area within the new village, the fire district continued to exist within the village. 1966 Ops St Compt File #692.

Where town improvement districts are partially within a newly incorporated village, the segments of such districts which are within the village may or may not continue to be portions of such districts and continue to receive and pay for district services, depending on the circumstances of each case. 1967 Ops St Compt File #307.

Where assessments have been made by the town for a lighting district prior to its dissolution by the action of a village board, such assessments shall be collected by the town and paid over to the village treasurer. 1967 Ops St Compt File #959.

Agency Opinions

1. In general

The granting of a cable television franchise by a town creates vested rights and obligations which cannot be altered by the subsequent incorporation of a village within part of the town: consequently, The franchise continues in effect within the area of the village without change or alteration; The village is not entitled to receive any fee from the holder of the franchise for the exercise of the franchise right granted by the town; and The village is not entitled to demand from the town and to receive any portion of the fee received or receivable by the town from the holder of the franchise. 1976 NY Ops Atty Gen Nov 29.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 3-354, 17-1720.

§ 2-254. Effect of incorporation on all districts entirely within village

1. Whenever the term "district" is used in this section it shall be construed as referring to a fire district, fire protection district or fire alarm district, or a town special district, or a town improvement district; and the term "governing body" as used in this section shall be construed as referring to all boards, bodies of persons, in which any of the governing powers of a district are vested.

2. If on the date of incorporation or a village the limits of the village are coterminous with the limits of, or wholly include, the territory of a district, such district shall cease to exist at the end of the fiscal year of such district next following the first day of June following the first day of January next succeeding the date of incorporation; except as otherwise provided in this section, the powers and duties of the governing body of the district and of all the officers of the district in connection therewith shall then cease and determine; and any board of commissioners, any office of commissioner and any other office of any such district shall also cease to exist at such time.

2-a. If the limits of a village incorporated prior to the first day of April, nineteen hundred sixty-five are coterminous with the limits of, or wholly include the territory of, a district, the board of trustees of the village, by local law or pursuant to the provisions of article seventeen-A of the general municipal law, may abolish any such district. In addition to any other notice required in connection with the adoption of such local law generally, thirty days' written notice of the hearing to be held in connection with such local law shall be given to the governing body of any such district and to the town clerk. A certified copy of any such local law shall be served upon or mailed to such governing body and clerk within five days following the adoption thereof. Except as otherwise provided in this section, the powers and duties of the governing body of a district so abolished and of all the officers of the district in connection therewith shall cease and determine upon the effective date of such local law and any board of commissioners, any office of commissioner and any other office of any such district shall also cease to exist at such time. No such local law shall become effective except on the last day of a fiscal year of the town or district, as the case may be.

3.

a. The obligations and the contracts of a district which shall so cease to exist and the obligations and contracts of a town for the benefit of or chargeable to such a district shall not be impaired by this section.

b. Notwithstanding the dissolution of a district pursuant to this section,

(1) an amount shall be levied and collected annually sufficient to pay in regular course the principal of and interest on all bonds or obligations issued pursuant to the local finance law or otherwise by or on behalf of such district which are outstanding and unpaid as of the date of the dissolution of the district. Such annual levy and collection shall continue until all such outstanding bonds and obligations are paid in full.

(2) all levies, assessments, fees, rates or other charges of the district unpaid as of the date of dissolution and all penalties and interest thereon shall be collected.

(3) all moneys collected under subparagraph two of this paragraph which would be available for

district purposes if the district were not dissolved shall be applied to the payment of all obligations of the district, other than those described in subparagraph one of this paragraph, which are due and payable at the time of the dissolution of the district. All such moneys so collected and not required for such purpose shall be paid over to the village treasurer.

(4) the levies, collections and payments described in subparagraphs one, two and three of this paragraph shall be made in the same manner as if the district had not been dissolved, except that for the purposes of this paragraph:

(a) if a fire district is dissolved, the board of trustees of the village shall constitute the board of fire commissioners of the former fire district and

(b) if a district other than a fire district is dissolved, the powers of the governing body of the district shall be exercised and performed by the town board of the town in which the district is located.

(5) in lieu of the requirements set forth in subparagraph one of this paragraph, the board of trustees by resolution, subject to permissive referendum, may provide that the village shall assume responsibility for the levy and collection, as a general village charge, of all amounts required to pay the bonds or obligations therein described. In such event the village shall annually pay an amount sufficient to pay the principal and interest on such bonds or obligations as same become due and payable in regular course. In the case of bonds or obligations of a district other than a fire district, such payment shall be made to the supervisor of the town in which the district is located. In the case of fire district bonds or obligations, payment shall be made directly to the holder of such bonds or obligations. The board of trustees shall give written notice of such resolution to the town board before same shall become effective. Nothing herein contained shall prevent the village from prepaying to the town for the purpose of redeeming such bonds or obligations, other than those of a fire district, in whole or in part provided the bonds or obligations permit such part payment or redemption. Nothing herein contained shall prevent the village from prepaying or redeeming such fire district bonds or obligations in whole or in part provided the bonds or obligations permit such part payment or redemption.

c. All contracts of or on behalf of and chargeable to a district which ceases to exist hereunder, including all amounts unpaid under such contracts but excluding all amounts unpaid thereunder which were due and payable at the time of dissolution of such district, other than obligations incurred pursuant to the local finance law, shall, to the extent they are the responsibility of or beneficial to such a district, be assumed by the village and all expenditures under such contracts shall be charged as provided in subdivision six of this section. The terms and conditions and all rights of or on behalf of the district, including any right of amendment or rescission of such contract, shall inure to the benefit of the village.

4. The governing body of a district shall be responsible for the payment of all obligations of the district other than those described in subparagraph one of paragraph b of subdivision three of this section which are due and payable at the time of the dissolution of the district. The governing body of a district shall be responsible for the payment of all obligations of the district described in subparagraph one of paragraph b of subdivision three of this section.

5. Upon a district ceasing to exist hereunder, all property of a district shall automatically become the property of the village and, in connection therewith, the governing body and any other officer or person empowered to transfer title to or having the custody or control of any moneys of such district, any moneys in a reserve fund, any real or personal property of such district or used or applied for the purposes of such district, any policies of insurance for the benefit of such district, any documents, instruments and other muniments of title to district property and of any official books, records and other data relating to the operation and management of such district shall prepare or cause to be prepared an inventory of all such property, shall certify same, shall deliver same to the village clerk and shall:

a. pay over to the village treasurer all such moneys except so much thereof as was collected for the purpose of paying principal of and interest on bonds or other obligations issued pursuant to the local finance law or otherwise by or on behalf of the district and further except so much of the balance of such moneys as may be required to pay those obligations of the district described in subdivision four of this section. The village treasurer on receipt of such moneys, shall set same aside and apply them pursuant to law to the purposes of the district which ceases to exist hereunder so long as the village continues to provide the service or function thereof and thereafter to be applied in reduction of village taxes levied against the area of such former district; provided, however, that so long as the village provides the service or function of the former district any moneys held by or on behalf of a district in a reserve fund subject to the provisions of article two of the general municipal law or section fifty-five-a of the town law shall be held and administered by the village as a reserve fund subject to those provisions of article two of the general municipal law pertaining to villages for the same or similar purpose for which any such fund was established.

d.* surrender and deliver all such insurance policies, books, such real or personal property.

c. assign such policies of insurance and its inter-

*So in original. Probably should be "b".

est thereunder to the extent permitted therein to the village.

d. surrender and deliver all such insurance policies, books, records and other data to the village clerk. Copies of official books, records and other data relating to the operation and management of such district and certified by the officer responsible for same shall be sufficient to satisfy the requirements of this paragraph. No fees or expenses shall be charged for the making of such copies and same shall be entitled to the same admissibility in evidence in a court proceeding as the originals thereof.

e. surrender and deliver all other such personal property to such village officer, employee, board or commission as the board of trustees of the village shall designate** The failure of the governing body or any other officer or person to comply with the requirements of this subdivision shall in no way impair the automatic transfer to the village of the right, title or interest of the district of, in or to such property.

6. Upon a district ceasing to exist hereunder and until such time as the village may discontinue the service or function pursuant to subdivision seven of this section, the service or function of such former district shall become a village service or function and shall be continued as, in the discretion of the board of trustees of the village, may be needed in all territory which previously received same and the board of trustees shall have all the powers and duties granted by law to village officials in connection with such service or function and such additional powers formerly held by the governing body or any officer of the district which may be necessary to continue the service or function of the district, provided, however:

a. if the limits of a district which ceases to exist hereunder are wholly within but are not coterminous with those of the village and the service or function formerly provided by such district is not extended outside the limits of the former district, all the costs and expenses of such service or function may be chargeable only to the territory of such former district.

b. if the limits of a district which ceases to exist hereunder are wholly within but are not coterminous with those of the village and the service or function formerly provided by such district is extended outside the limits of such former district, so much of all costs and expenses of such extension of service or function to such outside territory as is represented by the payment of the principal and interest on obligations incurred therefor by the village pursuant to the local finance law may be chargeable to and collected from such outside territory; and all other costs and expenses of such service or function may be chargeable only to that part of the entire territory of the village in which such service or function is provided. In any event and regardless of the territory to which such other costs and expenses may be made chargeable, same shall be apportioned and collected uniformly and without discrimination within such territory.

c. upon any fire district ceasing to exist hereunder, all fire, hose, protective or hook and ladder companies and all authorized squads or other units of such district, including the memberships thereof, shall continue to exist and shall not be affected thereby except as follows:

(1) the members of all such companies, squads or units shall constitute a corporation and the fire department of the village.

(2) all such companies, squads or units shall thereafter be subject to and governed by all the provisions of this chapter regulating and pertaining to any such company, squad or unit and the fire department of the village.

d. upon the incorporation of a village all existing fire, hose, protective or hook and ladder companies and all other firemanic squads or units independently organized and incorporated which are not companies, squads or units of any fire district ceasing to exist hereunder and the boundaries of which companies, squads or units as specified in their certificates of incorporation or charters or any laws establishing such companies, squads or units are coterminous with or wholly included within the limits of the village and the memberships thereof shall continue to exist and shall not be affected thereby except as follows:

(1) the members of all such companies, squads or units shall constitute a corporation and the fire department of the village.

(2) all such companies, squads or units shall thereafter be subject to and governed by all the provisions of this chapter regulating and pertaining to any such company, squad or unit and the fire department of the village.

e. all officers and employees of any district which ceases to exist hereunder shall to the greatest extent practicable in the discretion of the board of trustees be continued in the same or similar positions as village employees and, in connection therewith, shall have all the rights provided by the civil service law as if their former positions with the district had originally been established by the village.

7. The board of trustees of the village at any time by local law may discontinue the service or function of the former district in all or any part of the village; provided, however, that any such local law shall be subject to a permissive referendum of the qualified voters in the territory receiving the service or function at the time of the adoption of such local law and in which the service or function is proposed to be discontinued. For the purpose of such referendum such territory shall be considered as if it comprised the entire territory of the village.

8. This section shall not apply to any special assessment area or any area of assessment for

**So in original. Period at end omitted.

benefit the boundaries of which are coterminous with or wholly included within the limits of the village, which was established only to pay the original cost of any special improvement or facility or any addition thereto, benefitting such area. As to any such area the assessments therein established shall continue to be levied and collected as if the village had not been incorporated. However, any such publicly owned improvement or facility shall become the property of the village in the same manner as provided in subdivision five of this section for property of a district.

9. Any other special assessment area or any other area of assessment for benefit the boundaries of which are coterminous with or wholly included within the limits of a village, shall be considered as a district subject to the provisions of this section and chapter if same was established not only to pay the original cost of any special improvement or facility, or any addition thereto, benefitting such area but also to pay the cost of the operation, maintenance, repair or replacement thereof.

HISTORY:

Add, L 1972, ch 892, eff Sept 1, 1973, with substance transferred from § 3–356; amd, L 2009, ch 74, § 12, eff March 21, 2010 (see 2009 note below).

Editor's Notes: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

§ 18. Savings clause. Notwithstanding the repeal or amendment of any law by this act, nothing in this act shall be construed to impair the consolidation or dissolution of any local government entity pursuant to any such repealed or amended law if there was commenced in or for such local government entity prior to the effective date of this act a consolidation or dissolution proceeding pursuant to such law, in which event the provisions of such former law shall govern such proceeding as though such former law had not been repealed hereby.

Notes to Decisions

Analysis

1. In general
2. Under former § 3-356

1. In general

After report of incorporation of new village is filed with secretary of state, town in which village is located may not take action to prevent dissolution of ambulance district which is wholly located within bounds of new village; however, town can, with consent of village, establish new ambulance district to encompass boundaries of former district after former district has ceased to exist. 1986 Op St Compt No. 86-47.

2. Under former § 3-356

A village incorporated in territory which formerly was administered by a town sanitary district had the power to render garbage service within its territorial limits upon the expiration of the contract existing with the sanitary district at the time of incorporation. Atlantic Beach v Kimmel, 18 N.Y.2d 485, 276 N.Y.S.2d 993, 223 N.E.2d 489, 1966 N.Y. LEXIS 920 (N.Y. 1966).

The provisions of former § 89, subd 25(a), in regard to the powers of the board of village trustees over the disposition of garbage show that the legislature intended a village upon incorporation to have the final say with respect to garbage removal service within its territorial limits. And this intention is further evidenced by the provision of subd 2 of the above statute that town improvement districts "shall cease to exist at the end of the fiscal year of the district next following the first day of June following the first day of January next succeeding the date of incorporation" where the improvement district is coterminous with the limits of or wholly included within the village boundaries. Atlantic Beach v Kimmel, 48 Misc. 2d 193, 264 N.Y.S.2d 562, 1965 N.Y. Misc. LEXIS 1369 (N.Y. Sup. Ct. 1965), aff'd, 25 A.D.2d 531, 267 N.Y.S.2d 534, 1966 N.Y. App. Div. LEXIS 4996 (N.Y. App. Div. 2d Dep't 1966).

Where town improvement districts are partially within a newly incorporated village, the segments of such districts which are within the village may or may not continue to be portions of such districts and continue to receive and pay for district services, depending on the circumstances of each case. 1967 Ops St Compt File #307.

Where assessments have been made by the town for a lighting district prior to its dissolution by the action of a village board, such assessments shall be collected by the town and paid over to the village treasurer. 1967 Ops St Compt File #959.

Agency Opinions

1. In general

The granting of a cable television franchise by a town creates vested rights and obligations which cannot be altered by the subsequent incorporation of a village within part of the town: consequently, The franchise continues in effect within the area of the village without change or alteration; The village is not entitled to receive any fee from the holder of the franchise for the exercise of the franchise right granted by the town; and The village is not entitled to demand from the town and to receive any portion of the fee received or receivable by the town from the holder of the franchise. 1976 NY Ops Atty Gen Nov 29.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 17-1720.

Separate boards of commissioners §§ 3-308, 4-412.

General powers of the board of trustees § 4-412.

Fire corporations §§ 10-1004, 10-1008; CLS N-PCL § 1402(c-h).

Sale and issuance of local obligations, CLS Loc Fin §§ 50.00–62.10.

Delivery of books and papers to successor in office, CLS Pub O § 80.

Extension of fire district partly in village to include entire village, CLS Town § 170(4).

Effect of incorporation of village including lands within fire district, CLS Town § 182.

Transfer of debts and property of dissolved fire district to fire corporation organized by trustees of village, CLS Town § 185(1).

Sewer districts, CLS Town § 198(1, 1-a).

Town water districts, CLS Town § 198(3).

Town lighting districts, CLS Town § 198(6).

Town water supply districts, CLS Town § 198(8).

ARTICLE 3 Officers and Elections

Section

3-308. Separate boards of commissioners

HISTORY:

Add, L 1972, ch 892, eff Sept 1, 1973.

§ 3-308. Separate boards of commissioners

1. The board of trustees may establish or abolish a board or boards of fire, ambulance, water, light, sewer, park or cemetery commissioners or a single municipal board having the powers, duties and responsibilities of two or more such separate boards.

2. The board of trustees may also establish or abolish a separate board of police commissioners.

3. The board of trustees shall establish the composition, powers, duties and responsibilities of each board of commissioners and may, from time to time, amend same.

4. Any board established hereunder shall be composed of not less than three members, who shall perform their duties subject to the approval of the board of trustees.

5. The mayor, subject to the approval of the board of trustees, shall appoint the members of any board of commissioners and the first appointments of members thereto shall be for terms so fixed that at least one will expire at the end of each official year commencing at the end of the current such year and continuing in succeeding year [years]* until the entire original appointments run out. No such term shall exceed five years.

6. Commencing with the first annual meeting following the establishment of any such board, and continuing annually thereafter, successors to former appointees, the term of whose offices have then expired, shall be appointed for a full term. The length of such term shall be determined by the board of trustees but in no event shall exceed five years.

7. A person who has been convicted of arson in any degree shall not be eligible for appointment to any board of fire commissioners. Any fire commissioner who is convicted of arson in any degree during his term of office shall be disqualified from completing such term of office.

8. The board of trustees may also abolish any such board of boards established under any prior provision of law. If not so abolished such board or boards shall continue and the commissioners thereof shall continue in office during their respective terms.

9. Any action of the board of trustees hereunder establishing, relating to or abolishing any such board or fixing the terms of office of the members thereof shall be by resolution or local law adopted at a regular meeting by a majority vote of the entire board. No such action shall be taken unless a public hearing has first been held of which at least ten days public notice shall have been given by publication in the official village newspaper, or, if there be none, in a newspaper of general circulation in the village.

HISTORY:

Add, L 1972, ch 892, eff Sept 1, 1973; amd, L 1985, ch 719, § 7, eff Aug 1, 1985; L 1988, ch 24, § 17, eff Jan 1, 1989.

Editor's Notes: Substance transferred from §§ 4–412,.

Notes to Decisions

1. In general

A village board of water commissioners is not authorized to establish a capital reserve fund for improvements to the water system. 1983 Op St Comp File #83-73.

UNDER FORMER § 4-454

A village Board of Water and Light Commissioners was validly set up under this section by action of the Board of Trustees although the minutes of its meeting merely showed that a "Municipal Commission of Water and Light" was set up composed of five members named as appointed thereto with designated terms of office, although it failed to specify that the action was by "resolution." Amatulli v Sweeney, 33 Misc. 2d 324, 224 N.Y.S.2d 330, 1962 N.Y. Misc. LEXIS 4058 (N.Y. Sup. Ct.), aff'd, 17 A.D.2d 631, 230 N.Y.S.2d 677, 1962 N.Y. App. Div. LEXIS 8663 (N.Y. App. Div. 2d Dep't 1962).

A village Board of Trustees having substantially complied with the requirements of this section in setting up a Board of Water and Light Commissioners, could not thereafter abolish such Board without a public hearing upon notice given as provided herein, or oust any duly appointed member before expiration of his term except by proceedings according to law. Amatulli v Sweeney, 33 Misc. 2d 324, 224 N.Y.S.2d 330, 1962 N.Y. Misc. LEXIS 4058 (N.Y. Sup. Ct.), aff'd, 17 A.D.2d 631, 230 N.Y.S.2d 677, 1962 N.Y. App. Div. LEXIS 8663 (N.Y. App. Div. 2d Dep't 1962).

Each of the three duly appointed park commissioners of a village has equal authority where the commission acts as a body in the discharge of its public duty. 1953 Ops St Compt 64.

Exercise of power of water commissioners is subject to approval of board of trustees. 1955 Ops St Compt 311.

A village may establish a board of water commissioners. 1955 Ops St Compt 319.

The Board of Water and Light Commissioners in a village has the authority to sell scrap materials to the highest bidder upon reasonable regulations. Receipts from such sales must be paid to the village treasurer for deposit to the credit of the village. 1955 Ops St Compt 495.

A village planning board and zoning board of appeals are not separate boards of commissioners within the meaning of these sections and are not required to file annual reports with the board of trustees. 1969 Ops St Compt File #965.

The same person may simultaneously hold the offices of acting village justice, town justice and village water board commissioner provided the village water supply is entirely distinct from the town water supply and no contract exists between the respective municipalities for sale of water by the village to the town or vice versa. 1972 Ops St Compt File #52.

In a village having no separate board of water commissioners, the board of trustees may establish such a board in accordance with the procedure set out in former § 63. 1955 Ops Gen 178 (informal).

Agency Opinions

Analysis

1. In general
2. Establishment of boards
3. Abolition of boards
4. Appointment of board members
5. Effect of failure to approve appointment
6. Compatibility of particular offices
UNDER FORMER § 4-454

1. In general

A local village law which transfers the power of appointment from the mayor to the board of trustees is subject to a mandatory referendum; members of the village planning board are village officers appointed by the village board of trustees. 1974 NY Ops Atty Gen Apr 11.

Village police commissioner is prohibited from holding interest in hotel, to be located in different county, which would sell alcoholic beverages. NY Ops Atty Gen 89-38 (Informal).

Discussion of increase in number of members of village recreation commission. 1978 Op St Compt File #499.

2. Establishment of boards

A village board of trustees may establish a planning board of five members; the mayor appoints members subject to approval of the board of trustees; the mayor has the power to remove members of the board for just cause after notice and a hearing;

*Bracketed language inserted by the Publisher.

the mayor has the power to fill a vacancy in office of member of the planning board. 1976 NY Ops Atty Gen Jan 9 (informal).

No mandatory referendum is required in order to establish a separate board of police commissioners in a village. No more than two members of the board of trustees may be members of such separate board and the mayor may not serve thereon. 1978 Op St Compt File #537.

3. Abolition of boards

The Board of Trustees of the Village of Port Chester may abolish the present Port Chester Park Commission and create a new park commission and respecify its duties by local law. 1975 NY Ops Atty Gen Sept 11 (informal).

4. Appointment of board members

Mayor may appoint single member of board of trustees to be commissioner of village police department. 1995 NY Ops Atty Gen I 95-36.

The appointment of members of a village housing authority is controlled by the Public Housing Law and in the Village Law. 1978 Op St Compt File #404.

The village board of trustees, and not the village mayor subject to the board's approval, appoints members of the village recreation commission. 1979 Op St Compt File #385.

5. Effect of failure to approve appointment

If a village officer appointed by the mayor is not approved by the board of trustees pursuant to Village Law, § 3-301(3), the incumbent officer continues in office beyond the date of the expiration of his term; if the board of trustees fails to approve the officer's appointment, the board of trustees does not have independent authority to appoint a village officer; If the board of trustees fails to approve appointments by the mayor to the board of fire commissioners pursuant to Village Law, § 3-308, the incumbent members continue in office beyond the date of the expiration of their term of office. 1974 NY Ops Atty Gen Apr 11.

6. Compatibility of particular offices

A village trustee may be appointed to the board of fire commissioners if not more than one trustee is already a member of the board. 1979 Op St Compt File #312.

A member of a village housing authority may be appointed to the village board of water commissioners if, at the time of appointment, no other members of the authority are officers or employees of the village. 1979 Op St Compt File #612.

UNDER FORMER § 4-454

Complete control of any separate board of commissioners always remains vested in the board of trustees. 1953 NY Ops Atty Gen 40 (informal).

A village of the first or second class may establish a separate board of police commissioners. 1954 NY Ops Atty Gen 122 (informal).

A member of a Village Board of Water Commissioners holds over in office after the expiration of his term and until a successor has been chosen. 1966 NY Ops Atty Gen June 17.

ARTICLE 4 Powers, Duties and Compensation of Officers

Section
4-412. The board of trustees

HISTORY:

Add, L 1972, ch 892, eff Sept 1, 1973.

§ 4-412. The board of trustees

1. General powers of the board of trustees. a. In addition to any other powers conferred upon villages, the board of trustees of a village shall have management of village property and finances, may take all measures and do all acts, by local law, not inconsistent with the provisions of the constitution, and not inconsistent with a general law except as authorized by the municipal home rule law, which shall be deemed expedient or desirable for the good government of the village, its management and business, the protection of its property, the safety, health, comfort, and general welfare of its inhabitants, the protection of their property, the preservation of peace and good order, the suppression of vice, the benefit of trade, and the preservation and protection of public works. The board of trustees may create or abolish by resolution offices, boards, agencies and commissions and delegate to said offices, boards, agencies and commissions so much of its powers, duties and functions as it shall deem necessary for effectuating or administering the board of trustees duties and functions.

b. Whenever the constitutionality of any local law, ordinance, rule or regulation of a village is brought into issue upon a trial or hearing of any civil cause of action or proceeding in any court, and the village is not a party to such action or proceeding, notice shall be served upon the village in accordance with section one thousand twelve of the civil practice law and rules.

2. Procedure for meetings. The mayor of the village shall preside at the meetings of the board of trustees as provided in section 4-400 of this article. A majority of the board shall constitute a quorum for the transaction of business, but a less number may adjourn and compel the attendance of absent members. Whenever required by a member of the board, the vote upon any question shall be taken by ayes and noes, and the names of the members present and their votes shall be entered in the minutes. The board may determine the rules of its procedure, and may compel the attendance of absent members by the entry of a resolution in the minutes, directing any peace officer, acting pursuant to his special duties, or police officer residing within the village to arrest such absent member and take him before the board of trustees to answer for his neglect. A copy of the resolution, certified by the clerk of the village, shall be sufficient authority to such officer residing in the village to arrest such absent member and bring him before the board.

3. In addition the board of trustees:

(1) Drains. May, for the purpose of arresting and preventing damage to property within the village resulting from floods or erosion, construct drains, culverts, dams and bulkheads, and dredge channels, and regulate water courses, ponds and watering places within or without the village. Power and authority is hereby conferred upon the board of trustees of a village, in the name of the village, to acquire property necessary for such public improvements, whether located within or without such village, by purchase or by condemnation in the manner provided by the condemnation law. No property shall be acquired or such a public improvement constructed without the corporate limits of a village except with the consent of the governing board or body of the city, town or village in which such property is situated or such public improvement is

proposed to be constructed. Such consent may only be given after a public hearing held within such city, town or village pursuant to notice published at least once and at least ten days prior to the hearing in a newspaper having general circulation in the municipality in which the hearing is to be held. Consent given by the governing board or body by any such municipality shall not impose a liability against the city, town or village and the maintenance and repair of any such improvement shall remain the responsibility of the village making the improvement. The cost of the work, including the acquisition of property, shall be a charge against the village, except that in respect of improvements wholly within the village, or that part thereof located therein, the work may be done wholly at the expense of the village or of the owners of the property benefited, or partly at the expense of each as a local improvement. The term "property" as used in this section is defined to include lands, structures, rights in lands, including lands under water, riparian rights and any and all other things and rights usually included within the said town, and shall include also easements, rights of way, uses, leases, licenses and any and all interests in such property less than full title.

(2) Banks of deposit. Shall designate in the manner provided by section ten of the general municipal law the depositaries for the deposit of all moneys received by the treasurer, clerk, receiver, and town receiver who is designated and appointed as village receiver; and may require a report by the cashier thereof to each regular meeting of the board of the amount on deposit to the credit of the treasurer and such other village officers.

(3) Payment and compromise of claims. The board of trustees may pay or compromise claims equitably payable by the village, though not constituting obligations legally binding on it in those cases in which there has been a payment to the village through error or mistake and to which funds the village is not entitled, but the trustees shall have no power to waive the defense of the statute of limitations or to grant extra compensation to any public officer, servant or contractor.

(4) Waste disposal. May, whenever in its judgment, the interest of the village require it, purchase or acquire by condemnation proceedings, lands for the establishment of a public waste disposal site or disposal plant within or without any such village, and prohibit the use of any other lands within the village for such purpose. But no land shall be acquired without the corporate limits of the village for such purpose without the consent of the board of trustees, town board, common council or other similar legislative body of the village, town or city in which such land is situate.

(5) Sale of abandoned or lost property. May transfer to the general fund the proceeds realized from the sale of lost or abandoned property.

(6) Franchises; competing light or water system. May grant rights and franchises or permission to use the streets, highways, public places or any part thereof or the space above or under them or any of them for any specific purpose upon such terms and conditions as it may deem proper and as may be permitted by law. No franchise shall be granted without a public hearing notice of which shall be given by publication in the official newspaper at least ten days before the meeting. If a village operates a municipal lighting system or water system the granting of a right or franchise in competition with such system shall be subject to a permissive referendum as defined in this chapter.

(7) Acceptance of dedicated streets. Is authorized to accept the dedication of lands in the village for a public street or streets in the village.

(8) Public docks. Subject to the provisions of general law, may acquire, construct, enlarge, extend or improve public docks, as a municipal purpose, within or without the corporate limits thereof and may acquire land therefor, provided however that one end of any such dock shall be within the corporate limits of the village. Before any such dock shall be acquired, constructed or extended beyond the corporate limits of the village into a town, the consent of the town board shall be obtained. Charges for use of the facilities of any such dock may be imposed.

(9) Fire protection and ambulance service. a. May contract for the furnishing of fire protection within the village with the fire department in the village or with any city, village, fire district, or incorporated fire company having its headquarters outside such village and maintaining adequate and suitable apparatus and appliances for the furnishing of fire protection in such village. The contract also may provide for the furnishing of emergency service in case of accidents, calamities or other emergencies in connection with which the services of firefighters would be required, as well as in case of alarms of fire. The contract also may provide for the furnishing of general ambulance service subject, however, to the provisions of section two hundred nine-b of the general municipal law. In the event that the fire department or fire company furnishing fire protection within the village pursuant to contract does not maintain and operate an ambulance then a separate contract may be made for the furnishing within the village of emergency ambulance service or general ambulance service, or both, with any city, village or fire district the fire department of which, or with an incorporated fire company having its headquarters outside the village which, maintains and operates an ambulance subject, however, in the case of general ambulance service, to the provisions of section two hundred nine-b of the general municipal law.

a-1.

(i) Except as provided in clause (ii) of this subparagraph, prior to commencing the negotiation process for such contract with an incorporated fire company, the incorporated fire company shall file

with the board of trustees a statement itemizing the estimated costs of the incorporated fire company attributable to the provision of services under the prospective contract. The estimated costs attributable to the provision of services under the prospective contract itemized in the statement shall include, at a minimum, those, if any, for: supplies; materials; operation, maintenance and repair of equipment and apparatus; insurance; training; protective clothing, gear and other personnel costs; building rental, maintenance and operation; and a specified proportionate share of capital costs. If the fire company is required to prepare any of the following documents, copies shall be included with the statement:

(A) the fire company's most recent annual report of directors pursuant to section five hundred nineteen of the not-for-profit corporation law;

(B) the fire company's most recent verified certificate pursuant to subdivision (f) of section fourteen hundred two of the not-for-profit corporation law;

(C) the fire company's most recent internal revenue service form 990; and

(D) the fire company's most recent annual report pursuant to section thirty-a of the general municipal law.

(ii) Upon good cause shown, the board of trustees may, by resolution, waive in whole or in part the requirement that the fire company file the statement, and copies of documents, required by clause (i) of this subparagraph.

b. The period for which such service may be furnished under any such contract shall not exceed five years. The contract shall specify a definite sum to be paid each year for such service. No such contract shall be entered into until a public hearing has been held by the board of trustees. Notice of such hearing shall be published at least once in at least one newspaper having general circulation in the village. Such notice shall specify the time when and place where said hearing will be held, and describe in general terms the proposed contract. The first publication thereof shall be at least ten days prior to the day specified for such hearing.

c. By mutual consent of the contracting parties, and after a public hearing held pursuant to notice in the manner aforesaid, any such contract heretofore or hereafter executed may be (1) amended, (2) terminated, or (3) terminated and a new contract may be entered into in lieu thereof, if the board of trustees, after such hearing, shall determine, by resolution, that it is in the public interest so to do. Such notice shall state in general terms the reason why any existing contract is to be amended or terminated, and if a new contract is to be entered into the notice shall also describe the new contract in general terms.

d. The provisions of this subdivision shall not be deemed to have amended subdivision two of section two hundred nine-b or section two hundred nine-d of the general municipal law, or any other general, special or local law requiring the consent of a fire department, fire company or an emergency rescue and first aid squad to the entering into of a contract for services to be performed by such department, company or squad.

e. The term "fire protection", as used in this section, includes inspections of buildings and properties in the village or portion thereof, required to be protected under a contract for fire protection pursuant to the provisions of this subdivision, for the purposes specified in and as authorized by sections eight hundred seven-a and eight hundred seven-b of the education law, subdivision four of section three hundred three of the multiple residence law, and section two hundred fourteen of this chapter.

(10) Air rights and subsurface areas. May, in addition to such powers as may be granted by any other law, lease to any person, firm or corporation, for commercial or private use, the air rights over or the subsurface area under any property of the village acquired or to be acquired for street purposes, public parking garages, parking spaces or public off-street loading facilities. Such lease may only be entered into when such air rights or subsurface areas are not needed for village purposes. Any such lease may be for a term not exceeding fifty years and may be renewed for such additional term or terms as the board of trustees may provide. Any such lease shall contain provisions requiring the lessee to construct facilities adequate to support and maintain, without interference, the village parking or off-street loading facilities being conducted by the village and in such manner as to minimize or avoid the relocation of public utility facilities and may also contain such other provisions, conditions and restrictions, including the responsibility of the lessee to excavate land or erect or construct buildings, structures, substructures or superstructures at the expense of the lessee, as the board of trustees may prescribe. Such lease must provide that title to any buildings, structures, substructures or superstructures erected or constructed by the lessee shall vest in the village at the termination of the lease. Any such buildings, structures, substructures, or superstructures, the title to which remains in the lessee, during the term of the lease, shall be deemed to be real property for purposes of taxation as defined in subdivision twelve of section one hundred two of the real property tax law.

(11) Every officer, board or agency of a village shall let all contracts for public work and all purchase contracts to the lowest responsible bidder after advertisement for bids where so required by section one hundred three of the general municipal law.

(12) An officer or person who assumes to create a liability or appropriate money or property of the village without authority of law, or assents thereto, is personally liable for such debt, or to the village for such money or property. Each member of a village board present at a meeting thereof when such un-

lawful action is taken is deemed to have assented thereto, unless he expressly dissents and requests such dissent to be entered upon the minutes of the meeting. If any person shall have heretofore appropriated or shall hereafter appropriate money or preperty [property][*] of the village, contrary to law, and the facts in relation thereto are known to the board of trustees, and, after this section as amended takes effect, such board fail for thirty days to bring an action against such person to recover such money or property, each member of the board having such knowledge shall be guilty of a misdemeanor and liable to removal from office unless within such period of thirty days he shall file with the village clerk a written request, signed by him, requesting the bringing of, such action or shall cause to be entered upon the minutes of a meeting of the board a motion made by him for the bringing of such action, or his vote in favor of such a motion.

(13) Loitering. May prohibit and punish loitering; provided however, that such ordinance or law shall only prohibit loitering for a specific illegal purpose or loitering in a specific place of restricted public access and shall therein set forth guidelines for application of such prohibitions by law enforcement officers so as to prevent arbitrary or discriminatory enforcement of such prohibitions.

HISTORY:

Add, L 1972, ch 892, eff Sept 1, 1973; amd, L 1973, ch 976 §§ 10–13, eff Sept 1, 1973; L 1980, ch 843, § 164, eff Sept 1, 1980; L 1992, ch 708, § 38, eff Nov 28, 1992; L 1994, ch 660, § 3, eff Nov 1, 1994; L 2003, ch 296, § 4, eff Jan 1, 2005; L 2017, ch 294, § 3, effective January 1, 2018; L 2018, ch 476, § 108, effective December 28, 2018.

Derivation Notes: Derived in part from §§ 88, 89, 332–a, 333.

Editor's Notes Laws 2017, ch 294, § 4, eff Jan 1, 2018, provides:

§ 4. This act shall take effect on January first next succeeding the date on which it shall have become a law and shall apply to contracts with a term commencing after March first of the year in which it shall have become a law.

Amendment Notes:

1992. Chapter 708, § 38 amended:

Sub 3, par (2), by deleting ", by written resolution duly adopted by a majority vote of such board which shall be entered in its minutes, banks or trust companies" and "Such designation and deposit of the moneys received by any such village officer shall release him and his sureties from any liability for loss of such moneys by reason of the default or insolvency of any such depositary."

The 2017 amendment by ch 294, § 3, added 3(9)a-1.

The 2018 amendment by ch 476, § 108, substituted "firefighters" for "firemen" in the second sentence of 3(9)a.

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I. In General

1. In general

No village officer has power to waive or suspend enforcement of an ordinance. People v Frederico, 88 Misc. 2d 32, 387 N.Y.S.2d 521, 1976 N.Y. Misc. LEXIS 2376 (N.Y. J. Ct. 1976), aff'd, 91 Misc. 2d 131, 397 N.Y.S.2d 515, 1977 N.Y. Misc. LEXIS 2256 (N.Y. App. Term 1977).

The legislative power of village boards of trustees may be exercised by simple resolution, ordinance or local law, depending upon the subject matter of the legislation. 1974 Op St Compt No. 74–104.

Absent act of state legislature, village may not conduct advisory referendum on question of whether village should become city. 1996 Op St Compt No. 96-18, 1996 N.Y. Comp. LEXIS 15.

2. Creation of offices

Village board of trustees' resolution creating position of Village Administrator was authorized by CLS Vill § 4-412(1) where position entailed specifically enumerated responsibilities subject to control and direction of mayor and board of trustees. Fairgrieve v Incorporated Village of Mineola, 238 A.D.2d 466, 656 N.Y.S.2d 643, 1997 N.Y. App. Div. LEXIS 4035 (N.Y. App. Div. 2d Dep't 1997).

3. Employment of village attorney

A village may not designate a law firm as village attorney. 1974 Op St Compt No. 74–1.

A village may adopt a local law authorizing a village to engage a law firm on a fee basis in lieu of appointing a village attorney. 1974 Op St Compt No. 74–1.

4. Hiring of other employees

The board of trustees may ratify the mayor's act of hiring an attorney as labor negotiator but is not obliged to do so. The board of trustees determines its own rules in regard to an agenda since an agenda is procedural in nature. Also, policy-making power lies with the board of trustees. 1981 Op St Comp No. 81-417, 1981 N.Y. Comp. LEXIS 466.

5. —Residence requirement

Members of village board of trustees who also are affiliated with volunteer fire department should recuse themselves from voting on those portions of budget that affect fire department; board may, however, establish exceptions to such rule if public interest would be served. 1994 Op St Compt No. 94-31, 1994 N.Y. Comp. LEXIS 29.

6. Conduct of meetings; hearings

The trustees of a village had no power to appoint a village attorney where a local law required that, at least four business hours prior to each board meeting, a copy of each resolution to be submitted to the board be delivered to the village clerk, and this procedure had not been followed with respect to the resolution appointing the new attorney. D'Ambrosio v Reile, 106 A.D.2d 856, 483 N.Y.S.2d 555, 1984 N.Y. App. Div. LEXIS 21757 (N.Y. App. Div. 4th Dep't 1984).

A village board may not regularly convene special meetings to handle regular village business, but, instead, if the work load so requires, the board should provide in its rules for one or more additional regular meetings each month. Where, however, urgent matters arise which must be dealt with prior to the next scheduled meeting of the village board, then special meetings may be called by the board and such meetings may, where necessary, be called without notice to the general public. 1975 Op St Compt No. 75–680.

7. Village contracts

Village defendants were entitled to dismissal of civil damages action under 42 USCS § 1983 alleging that they illegally changed zoning classification of property used by factory located next to plaintiffs' property, as village board of trustees did not exceed its authority when it executed stipulation which settled litigation against factory owners by modifying restrictions imposed on factory's use of its property, and plaintiffs failed to identify any protected interest under § 1983. Konrad v Incorporated Village of Valley Stream, 270 A.D.2d 459, 705 N.Y.S.2d 77, 2000 N.Y. App. Div. LEXIS 3166 (N.Y. App. Div. 2d Dep't), app. dismissed, 95 N.Y.2d 886, 715 N.Y.S.2d 377, 738 N.E.2d 781, 2000 N.Y. LEXIS 3451 (N.Y. 2000).

Where board of trustees of village adopted formal resolution which authorized finalization of certain plans for building to be erected on village property for recreational purposes and where, in conformance with such resolution, village clerk notified licensed engineer to proceed with finalization of plans, city was estopped from denying existence of valid contract and right of engineer to seek compensation in accordance with his performance, despite fact that village did not provide engineer with a purchase order. Dour v Port Jefferson, 89 Misc. 2d 146, 390 N.Y.S.2d 965, 1976 N.Y. Misc. LEXIS 2837 (N.Y. Sup. Ct. 1976).

In contracting with petitioner to manage its golf club, village was acting through its "business" persona rather than its governmental one, and thus terms of that contract could legally transcend terms of village trustees who approved it, and was binding on village trustees (past, present and future) who might not approve of it, notwithstanding absence of mayor's signature. Karedes v Colella, 187 Misc. 2d 656, 722 N.Y.S.2d 714, 2001 N.Y. Misc. LEXIS 60 (N.Y. Sup. Ct. 2001), aff'd in part, modified, 292 A.D.2d 138, 740 N.Y.S.2d 526, 2002 N.Y. App. Div. LEXIS 3845 (N.Y. App. Div. 3d Dep't 2002), rev'd, 306 A.D.2d 769, 761 N.Y.S.2d 534, 2003 N.Y. App. Div. LEXIS 7473 (N.Y. App. Div. 3d Dep't 2003).

8. Liability insurance

Village may contract for services of emergency first-aid rescue squad of village fire department only in context of contract for fire protection; if contract for fire protection provides for furnishing of ambulance services, it should describe services to be provided on specified terms; village may not purchase liability insurance for vehicles owned by village fire department. 1987 Op St Compt No 87-76.

Village may not purchase liability insurance, nor agree to indemnify third parties against claims for damage to vehicles owned by village fire department. Ops St Compt 89-15.

9. Maintenance of private property

Village ordinance which required property owners to maintain buildings and structures in good repair, and to keep structures painted or covered in protective coating, was based on sound governmental objectives and passed constitutional muster where ordinance was based on legislative finding which established its purpose to foster health, safety and welfare and to maintain

neighborhood and property values. People v Beecher, 153 Misc. 2d 247, 580 N.Y.S.2d 980, 1992 N.Y. Misc. LEXIS 49 (N.Y. J. Ct. 1992).

Village ordinance which required property owners to maintain buildings and structures "in good repair" was not void as vague or indefinite since phrase was not incapable of definition and was not one which common sense of reasonable person would not comprehend. People v Beecher, 153 Misc. 2d 247, 580 N.Y.S.2d 980, 1992 N.Y. Misc. LEXIS 49 (N.Y. J. Ct. 1992).

Village ordinance which required property owners to keep structures painted or covered in protective coating was not void as too subjective or as placing too much discretion in hands of building inspector since person of ordinary intelligence would be capable of recognizing if structure needed painting or protective coating. People v Beecher, 153 Misc. 2d 247, 580 N.Y.S.2d 980, 1992 N.Y. Misc. LEXIS 49 (N.Y. J. Ct. 1992).

Where a landlord of a multiple dwelling within a village neglects to properly heat the building, the village may not order fuel oil on behalf of the landlord, pay the cost thereof to the dealer, and seek reimbursement by assessing the cost thereof against the property. However, the village may enact legislation requiring sufficient heat to be provided by a landlord to maintain minimum temperatures. 1974 Ops St Compt File #35.

A municipality may adopt a local law requiring the removal of trash and debris from private premises and in default thereof by the owner, providing for removal by the municipality and the assessment of the cost thereof against the property, to be collected by levy and inclusion on the tax bill. Prior inconsistent opinions e.g. 24 Opns St Comp, 1968, p 659; 26 Opns St Comp, 1970, p 10) are superseded. 1981 Op St Comp File #81-372.

Village may dredge privately owned pond within village where such pond is integral part of village's drainage system and where filled in condition is result of its drainage function; entire cost of dredging may be assessed against properties benefited; if village authorizes such dredging, cost may be financed through issuance of bonds if village has interest in property during time obligations are outstanding, such as easements from owners of pond to restrict owners from taking any actions which prevent pond from fulfilling its village draining function; such easements would ensure that pond is "drainage improvement" within meaning of CLS Local Fin Law § 11.00(a)(3). Ops St Comp 90-4.

10. Regulation of park land

Agreement to operate facility at park which is termed license or concession, but which, in substance, constitutes lease, contravenes common law restriction against alienation of park property without specific legislative authority. Ops St Compt 88-60.

11. Waste disposal

A village may reasonably regulate the conduct of a commercial garbage compacting business within the village. Whether the village may prohibit use of the compaction station in relation to garbage originating outside of the village, depends upon the facts and circumstances, and principles of constitutional law. 1976 Ops St Compt File #9.

Villages may provide for refuse collection services on co-operative basis either by jointly acquiring equipment and hiring personnel or by one village acting as "lead agency" and contracting to provide services to others. 1988 Op St Compt No. 88-12.

12. Zoning powers

Amendment to village zoning ordinance, which placed greater restrictions on use of property in zone containing plaintiff's parcel, was properly applied to parcel notwithstanding plaintiff's contention that he made subdivision application under prior ordinance, since plaintiff did not have complete subdivision application before planning board when ordinance was amended. Elstein v Board of Trustees, 184 A.D.2d 1079, 584 N.Y.S.2d 374, 1992 N.Y. App. Div. LEXIS 8348 (N.Y. App. Div. 4th Dep't 1992).

Amendment to village zoning ordinance, which placed greater restrictions on use of property, was valid where it was enacted in accordance with comprehensive plan for land use within village and did not constitute spot zoning. Elstein v Board of Trustees, 184 A.D.2d 1079, 584 N.Y.S.2d 374, 1992 N.Y. App. Div. LEXIS 8348 (N.Y. App. Div. 4th Dep't 1992).

Village ordinance which prohibited issuance of permit to construct outdoor residential swimming pool if pool was detrimental to general character of district or to orderly development of village and which contained rear yard, set back requirements and fixed maximum percentage of lot area pool could occupy was not a legitimate exercise of police power but a zoning regulation invalid and unenforceable because of village's lack of power to enact zoning legislation. Garnett v Atlantic Beach, 84 Misc. 2d 460, 376 N.Y.S.2d 802, 1975 N.Y. Misc. LEXIS 3150 (N.Y. Sup. Ct. 1975).

Signs are traditionally and properly included within definitions of zoning capacity. Century Federal Sav. & Loan Ass'n v Atlantic Beach, 86 Misc. 2d 863, 383 N.Y.S.2d 524, 1976 N.Y. Misc. LEXIS 2534 (N.Y. Sup. Ct. 1976).

Village which was located in Nassau County and which did not have zoning powers had the power to regulate signs, at least in some reasonable way. Century Federal Sav. & Loan Ass'n v Atlantic Beach, 86 Misc. 2d 863, 383 N.Y.S.2d 524, 1976 N.Y. Misc. LEXIS 2534 (N.Y. Sup. Ct. 1976).

Newly incorporated village may adopt zoning legislation to supersede zoning laws of town which were in effect upon date of incorporation of village and town may not enact zoning or land use legislation affecting property within village subsequent to date of incorporation. 1987 Op St Compt No. 87-12.

13. Banks of deposit

It seems that a village treasurer no longer has the discretionary power to require depositaries of village funds to furnish security. 1974 Ops St Compt File #111.

14. Use of village funds

Trial court erred annulling three village resolutions on the basis that the public opinion surveys constituted impermissible advisory referenda or opinion polls because the village board did not seek to submit any of the survey questions to voters at an election and, therefore, even if the surveys were characterized as opinion polls, the village board was authorized to appropriate public funds to conduct them pursuant to N.Y. Village Law § 4-412(1)(a). Matter of Woodburn v Village of Owego, 151 A.D.3d 1216, 57 N.Y.S.3d 537, 2017 N.Y. App. Div. LEXIS 4433 (N.Y. App. Div. 3d Dep't 2017).

A village may not expend moneys for the purpose of planting shrubs and trees on the center mall of a State highway which runs through the village. 1975 Ops St Compt File #836.

Village can refund special franchise taxes levied against a cablevision corporation for past 2 fiscal years in amount equal to special franchise fees paid to village prior to levy of taxes, where corporation has received no credit for such fees against taxes as required by CLS Real Property Law § 626. 1985 Op St Compt No. 85-59.

The effect of the amendments to § 208-f of the General Municipal Law, Chapter 415 of Laws of 1982 and Chapter 348 of Laws of 1989, is to permit the special accidental death benefit to be paid to the deceased member's children under the age of 18 in both the situation where the deceased member is divorced at the time of his death and in the situation where the deceased member's spouse predeceases him. Further § 5 of Chapter 415 of the Laws of 1982 provided that payments to the children of deceased member may be made retroactive to September 1, 1978. While it appears that claims of eligible children, either retroactive from September 1, 1978 or thereafter, may be subject to a municipality obligation to interpose an appropriately statute of limitations defense, it should be noted that the 4 month statute of limitations contained in CPLR § 217 (subject to tolling for infancy), which would be applicable to the Article 78 proceeding in the nature of mandamus to compel payment, would not begin to run until there was a demand and a refusal, although a claim may be barred by laches even where no demand has been made if the claimant unreasonably delays in making the appropriate demand. 1990 Op St Compt 90-43.

Village, by local law, may establish publicity fund and may provide for limitation on amount of fund; such limitation provided for by local law may be increased or eliminated only by adoption of another local law. 1998 Op St Compt No. 98-22.

There is no statute pursuant to which a village may purchase smoke detector units in bulk and then resell them to village residents at its cost, nor can authority to do so be provided by local law. 1982 Op St Comp File #82-50.

Broad grant of general authority set forth in N.Y. Village Law § 4-412 authorizes public opinion surveys regardless of whether they are labeled surveys or opinion polls. Matter of Woodburn v Village of Owego, 151 A.D.3d 1216, 57 N.Y.S.3d 537, 2017 N.Y. App. Div. LEXIS 4433 (N.Y. App. Div. 3d Dep't 2017).

15. Payment and compromise of claims

It would be an unconstitutional gift of public funds should a village compromise a claim for damages incurred by a homeowner by reason of a ruptured water main, unless there is a legal basis for village liability for such damages. 1977 Ops St Compt File #235.

The effect of the amendments to § 208-f of the General Municipal Law, Chapter 415 of Laws of 1982 and Chapter 348 of Laws of 1989, is to permit the special accidental death benefit to be paid to the deceased member's children under the age of 18 in both the situation where the deceased member is divorced at the time of his death and in the situation where the deceased member's spouse predeceases him. Further § 5 of Chapter 415 of the Laws of 1982 provided that payments to the children of deceased member may be made retroactive to September 1, 1978. While it appears that claims of eligible children, either retroactive from September 1, 1978 or thereafter, may be subject to a municipality obligation to interpose an appropriately statute of limitations defense, it should be noted that the 4 month statute of limitations contained in CPLR § 217 (subject to tolling for infancy), which would be applicable to the Article 78 proceeding in the nature of mandamus to compel payment, would not begin to run until there was a demand and a refusal, although a claim may be barred by laches even where no demand has been made if the claimant unreasonably delays in making the appropriate demand. 1990 Op St Compt 90-43.

In village which has established office of village auditor, village board of trustees may not, by resolution or local law, authorize auditor to audit and order paid only certain claims; village board of trustees may not delegate its authority to make budget transfers between appropriations; village board of trustees may permit claims against village to be processed without either certification or verification by oath of claimant. Ops St Comp 90-9.

16. Compensation of officers and employees

The salaries of village elective officers may be increased during their terms of office only by adoption of local laws subject to permissive referenda. 1974 Ops St Compt File #104.

A village trustee may request and receive payment of salary at a time outside the regular meetings of the village board of trustees unless board procedures require prior audit. If audit is required, authorization for such payment may only take place at regular or special meetings open to the general public. Village trustees may not receive salary prior to times previously designated by the board unless authorized to do so by formal resolution. CIVIL SERVICE LAW, § 35(a): An elected village trustee is exempt from civil service classifications and therefore does not require certification before requesting payment of salary. 1982 St Compt File #82-227.

In absence of pre-existing authority under state statute, local law, or collective bargaining agreement provision, village may not pay legal expenses incurred by village police officers in connection with criminal proceedings; village may not pay as moral or equitable obligation legal expenses of village police officers arising out of allegations of misconduct. 2000 Op St Compt No. 00-1.

It would appear that village which owns electric utility system may, by local law, extend to its officers and employees, as part of their compensation, credit up to a specified dollar amount for utility service. 1986 Op State Compt No. 86-12.

17. Purchase or sale of property

Trial court's dismissal of a parking field purchaser's action, seeking specific performance and injunctive relief against a village, was proper, as the purchaser had contracted for the sale of the field with the village's community development agency, but the agency had never actually acquired the field under N.Y. Gen. Mun. Law §§ 555(1)(a), (c), and 556, it never obtained the approval for the sale from the village pursuant to N.Y. Village Law § 4-412(1)(a), and it accordingly lacked authority to sell the field. RB Hempstead, LLC v Incorporated Vil. of Hempstead, 34 A.D.3d 552, 824 N.Y.S.2d 407, 2006 N.Y. App. Div. LEXIS 13524 (N.Y. App. Div. 2d Dep't 2006), app. dismissed, app. denied, 8 N.Y.3d 1019, 839 N.Y.S.2d 451, 870 N.E.2d 691, 2007 N.Y. LEXIS 1569 (N.Y. 2007).

The purchase of an option to buy a building by a town and village for the purpose of future assignment of such option to a private corporation would not be in furtherance of a proper town or village purpose and is, therefore, impermissible. 1974 Ops St Compt File #576.

18. Lease of village property

A village board of trustees may lease village-owned real property not acquired for park or recreational purposes and not presently needed for any other village purpose, and the question of whether or not to enter into such a lease may not be submitted to an advisory referendum. 1975 Ops St Compt File #594.

Agreement to operate facility at park which is termed license or concession, but which, in substance, constitutes lease, contravenes common law restriction against alienation of park property without specific legislative authority. Ops St Compt 88-60.

19. Village fees or assessments

Special assessments levied against petitioners' properties in village to defray portion of cost of municipal parking facility were not illegal and void, notwithstanding that primary purpose of facility was supervised parking for commuter convenience, where petitioners' properties received a concomitant if perhaps secondary but significant special benefit in that new parking spaces were created, existing short-term public parking was opened up, and more parkers of whatever character, including commuters, were attracted. Scarsdale Chateaux RTN v Steyer, 41 N.Y.2d 1043, 396 N.Y.S.2d 166, 364 N.E.2d 830, 1977 N.Y. LEXIS 2042 (N.Y. 1977).

Board may not use its tap-in fee for the purpose of defraying a portion of the cost of maintaining and improving its water system; Board's permit fee is sustainable only as a regulatory measure and only where the amount charged is not greater than a sum reasonably necessary to cover costs of issuance, inspection, and enforcement. Torsoe Bros. Constr. Corp. v Board of Trustees, 49 A.D.2d 461, 375 N.Y.S.2d 612, 1975 N.Y. App. Div. LEXIS 11413 (N.Y. App. Div. 2d Dep't 1975).

A village may not pay a monthly fee for cable television for village homeowners since such payment is not authorized. A village could not impose a tax to pay such a fee, even by adoption of a local law, because taxation is a matter of state concern and the legislature has not authorized a cable television tax. 1985 Op St Compt 85-32.

Village may dredge privately owned pond within village where such pond is integral part of village's drainage system and where filled in condition is result of its drainage function; entire cost of dredging may be assessed against properties benefited; if village authorizes such dredging, cost may be financed through issuance of bonds if village has interest in property during time obligations are outstanding, such as easements from owners of pond to restrict owners from taking any actions which prevent pond from fulfilling its village draining function; such easements would ensure that pond is "drainage improvement" within meaning of CLS Local Fin Law § 11.00(a)(3). Ops St Comp 90-4.

20. Practice and procedure

Apartment owner was not barred by laches from recovering damages from village based on imposition of additional charges which involved unequal assessment of charges for garbage collection without reasonable basis therefor. Juleah Co. v Roslyn, 56 A.D.2d 483, 392 N.Y.S.2d 926, 1977 N.Y. App. Div. LEXIS 10489 (N.Y. App. Div. 2d Dep't 1977), aff'd, 44 N.Y.2d 845, 406 N.Y.S.2d 760, 378 N.E.2d 123, 1978 N.Y. LEXIS 2041 (N.Y. 1978).

Village violated constitutional guarantee of equal protection of the laws when it set lower limits on amount of garbage it collected per dwelling unit in apartment developments than that imposed on one and two-family homes and, in addition, imposed on owner

of apartment development a substantial additional charge for such service over and above ad valorem real estate taxes collected from such owner. Juleah Co. v Roslyn, 56 A.D.2d 483, 392 N.Y.S.2d 926, 1977 N.Y. App. Div. LEXIS 10489 (N.Y. App. Div. 2d Dep't 1977), aff'd, 44 N.Y.2d 845, 406 N.Y.S.2d 760, 378 N.E.2d 123, 1978 N.Y. LEXIS 2041 (N.Y. 1978).

Since village ordinance governing proceedings to declare damaged buildings nuisances was not invalid and was self-executing, commencement of special proceeding in the Supreme Court by resolution was appropriate. Scheid v Eight Sixteen Main Street Corp., 57 A.D.2d 1018, 394 N.Y.S.2d 492, 1977 N.Y. App. Div. LEXIS 12312 (N.Y. App. Div. 3d Dep't 1977).

Fact that village ordinance governing proceedings for declaration of a damaged building as a nuisance does not specify that the proceedings are to be brought in the Supreme Court nor the fact that the ordinance does not provide for the same time limits as did former provisions of the Village Law did not mean that the ordinance was not validly enacted. Scheid v Eight Sixteen Main Street Corp., 57 A.D.2d 1018, 394 N.Y.S.2d 492, 1977 N.Y. App. Div. LEXIS 12312 (N.Y. App. Div. 3d Dep't 1977).

Stipulation in action against village to determine boundary between two parcels of land under which any possible defense of adverse possession was removed from the case did not violate section of Village Law prohibiting trustees from waiving defense of statute of limitations. Salesian Soc. v Ellenville, 58 A.D.2d 711, 396 N.Y.S.2d 711, 1977 N.Y. App. Div. LEXIS 12820 (N.Y. App. Div. 3d Dep't), app. denied, 42 N.Y.2d 810, 399 N.Y.S.2d 1025, 369 N.E.2d 774, 1977 N.Y. LEXIS 3899 (N.Y. 1977).

Petitioner who owned property in village and was engaged in business of mineral extraction had standing to ask court to annul local law regulating extraction of natural products within village due to village respondents' alleged failure to comply with State Environmental Quality Review Act (SEQRA), and thus petitioner's combined Article 78 proceeding and action for declaratory judgment was improperly dismissed for failure to allege specific adverse environmental impact; property owner has legally cognizable interest in being assured that municipality satisfied SEQRA before taking action. Skenesborough Stone, Inc. v Village of Whitehall, 229 A.D.2d 780, 645 N.Y.S.2d 579, 1996 N.Y. App. Div. LEXIS 7829 (N.Y. App. Div. 3d Dep't 1996).

Aspect of Article 78 petition seeking declaration of validity of contract between petitioner and respondent village was converted to action for declaratory judgment, thus saving time and expense of another lawsuit over same basic issue, where parties were jurisdictionally before court and each, in one way or another, had asked for determination as to legality and enforceability of contract. Karedes v Colella, 187 Misc. 2d 656, 722 N.Y.S.2d 714, 2001 N.Y. Misc. LEXIS 60 (N.Y. Sup. Ct. 2001), aff'd in part, modified, 292 A.D.2d 138, 740 N.Y.S.2d 526, 2002 N.Y. App. Div. LEXIS 3845 (N.Y. App. Div. 3d Dep't 2002), rev'd, 306 A.D.2d 769, 761 N.Y.S.2d 534, 2003 N.Y. App. Div. LEXIS 7473 (N.Y. App. Div. 3d Dep't 2003).

21. Miscellaneous

In municipalities other than New York City, cable franchises are granted by the town board, village board of trustees, or the common council of the city, as required by N.Y. Town Law § 64(7), N.Y. Village Law § 4-412(6), N.Y. Gen. City Law §§ 20(10) and 23(2)(b), and N.Y. Second Class Cities Law § 37, respectively; in New York City, however, the City Charter requires that the New York City Franchise and Concession Review Committee (FCRC) approve franchises and explicitly bars any participation by the Council after the Council passes an authorizing resolution. Thus, the FCRC was the body with authority to approve cable franchise renewals and the New York Public Service Commission's regulation did not require or authorize the additional approval of the Council. Council of N.Y. v PSC, 99 N.Y.2d 64, 751 N.Y.S.2d 822, 781 N.E.2d 886, 2002 N.Y. LEXIS 3371 (N.Y. 2002).

It was premature for village to commence Article 78 proceeding to review determination of Public Employment Relations Board, which found that village's appointment of hearing officer to conduct employee disciplinary action could be subject to collective bargaining and thus remanded matter to hearing officer to take further evidence on issue, since there was no final resolution of ultimate issue as to whether village was guilty of improper employer practice based on its unilateral departure from alleged past practice of holding disciplinary hearings before its board of trustees, and determination challenged herein was limited to ruling that if such past practice was established in future hearing, village was not free to change it without negotiation; moreover, determination had no coercive impact as village's only burden was to proceed with hearing. Hempstead v Public Employment Relations Bd., 137 A.D.2d 378, 529 N.Y.S.2d 219, 1988 N.Y. App. Div. LEXIS 6085 (N.Y. App. Div. 3d Dep't), app. denied, 72 N.Y.2d 808, 534 N.Y.S.2d 666, 531 N.E.2d 298, 1988 N.Y. LEXIS 3307 (N.Y. 1988).

In action against village board of trustees for judgment declaring right of plaintiffs to use certain pool facilities in village, plaintiffs were not entitled to judgment declaring that they were currently residents of village and had same rights as other residents to use pool facilities where (1) plaintiffs' properties were traversed by boundary separating village from neighboring town, (2) court entered judgment declaring that plaintiffs were residents of village, and (3) village thereafter amended ordinance to define residents as persons residing in dwellings located entirely within village; however, validity of amendment to ordinance and its effects on plaintiffs' preexisting rights were proper subjects of hearing. Beyda v Board of Trustees, 155 A.D.2d 500, 547 N.Y.S.2d 578, 547 N.Y.S.2d 579, 1989 N.Y. App. Div. LEXIS 14294 (N.Y. App. Div. 2d Dep't 1989).

Absent delegation of power from state, village may not mandate manner in which property may be owned; thus, inasmuch as local law encumbered sponsors' efforts to convert apartments, which village zoning ordinance classified as multifamily dwellings, into condominiums, also considered multifamily dwellings, it went beyond village's enabling legislation and was thus ultra vires and void. P.O.K. RSA, Inc. v New Paltz, 157 A.D.2d 15, 555 N.Y.S.2d 476, 1990 N.Y. App. Div. LEXIS 4732 (N.Y. App. Div. 3d Dep't), app. dismissed, 76 N.Y.2d 886, 561 N.Y.S.2d 546, 562 N.E.2d 871, 1990 N.Y. LEXIS 3186 (N.Y. 1990).

Village law establishing classifications as to who would and would not be deemed "residents" of village for purposes of use of village pool did not violate equal protection. Beyda v Board of Trustees, 207 A.D.2d 517, 616 N.Y.S.2d 72, 1994 N.Y. App. Div. LEXIS 8562 (N.Y. App. Div. 2d Dep't), app. dismissed, 84 N.Y.2d 977, 622 N.Y.S.2d 916, 647 N.E.2d 122, 1994 N.Y. LEXIS 4373 (N.Y. 1994), app. denied, 85 N.Y.2d 804, 626 N.Y.S.2d 755, 650 N.E.2d 414, 1995 N.Y. LEXIS 1265 (N.Y. 1995).

Village board of trustees had authority to amend its local law to permit taking of deer under nuisance deer permits duly issued by Department of Environmental Conservation. Coalition to Save the Deer v Village of N. Haven, 231 A.D.2d 669, 647 N.Y.S.2d 987, 1996 N.Y. App. Div. LEXIS 9676 (N.Y. App. Div. 2d Dep't 1996).

Village ordinance prohibiting public consumption of alcoholic beverages was reasonable exercise of municipal police power. People v Finch, 88 Misc. 2d 581, 388 N.Y.S.2d 820, 1976 N.Y. Misc. LEXIS 2707 (N.Y. J. Ct. 1976).

Village ordinance which prohibits "excessive or unusually loud sound which either annoys, disturbs, injures or endangers the comfort, repose, health, peace or safety of a reasonable person of normal sensitivities", is not unconstitutionally vague, since its provisions clearly and expressly state what is prohibited and its enforcement depends upon objective standard to be applied and determined by court before which cases are to be tried. People v Hollstegge, 129 Misc. 2d 580, 493 N.Y.S.2d 720, 1985 N.Y. Misc. LEXIS 2655 (N.Y. J. Ct. 1985).

Village law, which prohibited parking in residential district of village without sticker available to residents and their visitors, was valid exercise of police power by village board of trustees where board of trustees made clear at time of enactment of law that intent was to exercise police power in connection with prevention of burglary and apprehension of persons suspected of crimes committed within village. People v Weinberg, 142 Misc. 2d 608, 537 N.Y.S.2d 1003, 1988 N.Y. Misc. LEXIS 823 (N.Y. J. Ct. 1988).

Village law, which prohibited parking in residential district of village without sticker available to residents and their visitors, did not violate equal protection since law rationally promoted its objectives to control traffic and parking congestion and to aid

police in investigation of burglaries and other crimes. People v Weinberg, 142 Misc. 2d 608, 537 N.Y.S.2d 1003, 1988 N.Y. Misc. LEXIS 823 (N.Y. J. Ct. 1988).

Court would invalidate, as unconstitutionally vague and overbroad, sections of village code which established music licensing system which, except for coin-operated juke boxes, prohibited owner or operator of places of amusement from offering live or mechanically reproduced music without first obtaining permit granted on basis of, inter alia, applicant's "good moral character," lack of objection by adjoining residents to "objectionable" music, "suitable parking so as to avoid traffic congestion," no "reasonable objection" by police chief, and absence of any adverse effect on health, welfare or morals of village residents, and which further authorized music license to be terminated on showing that continuation of such permit was "injurious to health, welfare or morals of residents of village." Dawson v Spring Valley, 151 Misc. 2d 128, 572 N.Y.S.2d 1000, 1991 N.Y. Misc. LEXIS 361 (N.Y. Sup. Ct. 1991).

A local law of the Village of Bellerose, which prohibits parking in the "Residence District" unless the parked automobile bears a sticker available to residents of the district and their visitors, is constitutional as a valid exercise of the village's police power (Village Law § 4-412 [1]) even though the desire to eliminate traffic, parking congestion and pollution might not be sufficient to sustain the ordinance (see, New York State Pub. Employees Fedn. v City of Albany, 72 NY2d 96) since the law was also enacted for the specific and legitimate purpose of aiding the police in the investigation of burglaries and other crimes within the village. The local law is entitled to the strong presumption of regularity and constitutionality and the village is also entitled to the full benefit of the further presumption that it has investigated and found the existence of a situation showing or indicating the need for or desirability of the law. Defendant, a nonresident, has failed to meet his burden of showing that there is no reasonable basis at all for the challenged law. People v Weinberg, 142 Misc. 2d 608, 537 N.Y.S.2d 1003, 1988 N.Y. Misc. LEXIS 823 (N.Y. J. Ct. 1988).

While a town or village may not provide its gasoline for use by volunteer firemen in their private cars, such municipality may assist volunteer firemen by providing a place to store the volunteer firemen's emergency allocation of gasoline. 1974 Ops St Compt File #181.

The use of a village "code", which consists merely of a compilation of existing ordinances into a bound volume for easy reference, may be discontinued by resolution of the village board of trustees; thereafter, reference to such legislation should be as originally enacted. 1974 Ops St Compt File #704.

A municipality has concurrent jurisdiction with the State to regulate the use of tidal wetlands within such municipality. However, a municipality may not permit a use of such wetlands which would be inconsistent with State regulations with respect thereto. 1974 Ops St Compt File #868.

A village may appropriate funds for an education program which promotes fire prevention. 1984 Op St Compt 84-67.

A village, by local law, may regulate vending from vehicles on state highways located within the village; accordingly, a village may adopt a local law which prohibits peddlers from vending their wares from vehicles parked on state highways within the village. 1985 Op St Compt No. 85-65.

Although a village may abolish positions of employment and contract with private entities to perform services formerly performed by municipal employees in order to provide more cost efficient services, so long as there is no circumvention of civil service requirements, it may not abolish the office of clerk-treasurer and engage a private contractor to fulfill statutory duties of that office. 1985 Op St Compt No. 85-70.

Village board may rename street by resolution and without special public notice. 1986 Op St Compt No. 86-30.

Village board of trustees may not establish audit commission consisting of mayor and clerk-treasurer which would have authority to audit claims against village. 1987 Op St Compt No. 87-65.

When property is intersected by boundary line between village and city, village, in absence of municipal corporation agreement, is obligated to continue to provide services to property, including police, fire, ambulance, and sanitation. 1987 Op St Compt No. 87-68.

Village may establish special assessment district for purpose of financing all or portion of cost of flood control project against lands deemed benefited by such project. 1987 Op St Compt No. 87-92.

Village, by local law, may provide for publication and distribution of newsletter for its residents containing information including notices of public meetings, information as to structure and function of village government, schedules of village activities, and financial reports; however, village may not sell advertising space in such newsletter. 1992 Op St Compt No. 92-31.

Village board has authority to enact local law providing for licensure and control of cats; however, village's local law may not regulate cats that are lost, strayed, homeless or abandoned animals within meaning of provisions of Agriculture and Markets Law. 1994 Op St Compt No. I 94-27.

Subject to equal protection considerations, coterminous village/town may expend publicity fund monies under contract with not-for-profit corporation, to advertise and publicize resources available in downtown area of village/town, including day labor hiring site, and to monitor and document use of such resources. 2002 Op St Compt No. 02-16.

While there is no statute requiring fire company which constitutes village fire department to submit its books and records pertaining to receipt and expenditure of proceeds from fire protection contracts and fund raising to village board for audit, village board may make such requirement condition to entering into fire protection contracts for outside service or to allowing company to undertake fund raising activities; financial information concerning fire department may also be obtained under provisions of CLS Not-For-Profit Corporation Law and Freedom of Information Law; board of fire commissioners or, if there is no board of fire commissioners, board of trustees of village may require submission of report by chief of fire department. 1988 Ops St Compt 88-55.

Village may contract for services of emergency first aid rescue squad of village fire department only in context of contract for fire protection; if contract for fire protection provides for furnishing of ambulance services, it should describe services to be provided on specified terms; village may not purchase liability insurance for vehicles owned by village fire department. 1987 Op St Comp No. 87-76.

A village which operates under the village manager form of government may adopt a local law authorizing the board of trustees to designate an officer or employee, as necessary, to serve as acting village manager when the office of village manager is temporarily vacant, or if the manager is absent or disabled. 1979 Op St. Compt File #408.

A village may adopt a resolution as a matter of personnel policy requiring employees of the village who are sent to school at village expense for specialized training in order to qualify for a job promotion, to reimburse the village for the cost of such training if they terminate employment within a specified period of time. 1982 Op St. Compt File #82-4.

II. Under Former § 88

22. In general

Where a quorum of four out of five members of Village Board were present at meeting, and one member disqualified himself, a vote of less than a majority of the board was sufficient to defeat a petition for a change of zone. Steers Sand & Gravel Corp. v Village Bd. of Northport, 129 N.Y.S.2d 403, 1954 N.Y. Misc. LEXIS 3147 (N.Y. Sup. Ct. 1954).

When three members of a village board of trustees vote for a resolution, two vote against and one refuses or abstains from voting, such resolution is adopted. 1955 Ops St Compt 286.

A village board may not restrict participation at a public hearing on the village budget to only taxpayers of the village. 1965 Ops St Compt File #343.

To govern the conduct of its meetings, a village board should follow the procedure set down in former § 88 of the Village Law and should further adopt some recognized set of rules to govern

procedure in matters not specifically covered by this section. 1967 Ops St Compt File #565.

Resolution of town board should be passed and filed with board of elections at least 120 days prior to next biennial election. 1954 Ops St Compt 344.

III. Under Former § 89

A. Financial and Contractual Powers

23. In general

For a discussion re legality of establishment of purchasing system for village see, 1953 Ops St Compt 175.

A village may not erect a building for use by the county. 1964 Ops St Compt #321.

A village may not enact an ordinance requiring insurance agents to obtain a license or permit to do business in the village. 1964 Ops St Compt #412.

24. Banks of deposit

Where the only commercial bank in a village is a bank of which the mayor is an officer, such bank may, nevertheless, be designated as the depositary of village funds. 1945 Ops St Compt 52.

Village officers may not be interested in village depositories (unless it is only bank in village). Village board of trustees designates depository of separate water board funds. 1946 Ops St Compt 173.

Where all the banks in a village are represented on the village board of trustees, such banks may be designated as depositories of village funds. Within the limits of Local Finance Law, § 60.10, a village may sell its bonds to a bank which is represented on the village board of trustees. 1953 Ops St Compt 418.

Where one of the two commercial banks in a village is represented on the village board, the interested bank may not be designated as village depository. To a limited extent, village obligations may be sold to the interested bank. 1955 Ops St Compt 320.

Where village board of trustees have, by resolution, designated a bank as depositary for village funds, the village treasurer is not liable for loss of such funds by reason of the default or insolvency of such bank. 1955 Ops St Compt 328.

Banks or trust companies located without the village may be designated as depositories for village funds, even though an eligible bank or trust company is located within the village. 1957 Ops St Compt 339.

There is no authority for a village to designate, as depositaries of village funds, banks located outside its boundaries, in which village officers have an interest. 1960 Ops St Compt 332.

When a village deposits in a bank or trust company either current funds or moneys not required for immediate expenditure, the obligations pledged by the bank as security do not have to be delivered to the sole custody of the village treasurer, but they must be physically segregated and designated, approved by the village treasurer, and deposited in such place and held under such conditions as the village treasurer may determine, which conditions shall include at least joint control by such treasurer. 1967 Ops St Compt File #487.

A prohibited conflict of interest does not occur when a village board designates a bank as the depository of village funds, notwithstanding the membership of a trustee on the bank's advisory board. Disclosure, however, is necessary. 1968 Ops St Compt File #323.

Discussion of village and town financial transactions whose village or town officer is interested in the bank with whom such village or town does business. Such banks may be village or town depositories. 1946 Ops St Compt 113.

25. Village funds

Village moneys must be expended by the village board of trustees through the village treasurer. Such moneys may not be paid over to the fire council for expenditure. 1954 Ops St Compt 240.

Balance of proceeds derived from activities of the local War Council of the village during the Second World War is public money and should be transferred to the general fund. 1955 Ops St Compt File #7386.

For a discussion of investments for town and village reserve and sinking funds and proceeds from sale of obligations, see 1954 Ops St Compt 238.

No provision for establishment of contingent fund for a village. 1946 Ops St. Compt 193.

26. Use of village funds

Villages may appropriate monies, operate and receive State Aid for recreation, education and child care projects. 1946 Ops St Compt 386.

Village funds may be expended to repair a firehouse owned by the village fire department but leased to the village. 1946 Ops St Compt 426.

A village need not pay 4% interest on consumers' deposits furnished by customers of a village-operated electric utility. 1947 Ops St Compt 128.

Village Law does not authorize village to pay all or part of rent for premises to be used exclusively by state police for substation purposes; village may rent space in a building wherein state police also rent space for substation purposes. 1947 Ops St Compt 383.

Fire insurance money received by village as result of destruction of village hall by fire should be placed in village general fund and may thereafter be expended for purchase of highway equipment provided there appears a budgetary item for this purpose in current budget. 1947 Ops St Compt 481.

Where no emergency exists, village moneys may be expended on doing restoration work on private property only where the village has obtained title through purchase or condemnation or has obtained an easement from the owner. 1954 Ops St Compt 367.

Village may appropriate money for a survey of the governmental structure and efficiency of the village. 1955 Ops St Compt 559.

Moneys appropriated pursuant to former subdivision 68 may be used to conduct a study of the advantages of adopting "the village manager plan" form of government. 1955 Ops St Compt File #7763.

A village may not insert a renewal clause in a garbage collection contract whereby it will run from year to year indefinitely, nor may such a contract contain an "escalator clause" providing for direct billing of occupants in new homes after June 1 at a specified rate and for a rate increase to such occupants at the end of the year. 1962 Ops St Compt 46.

If a village desires to erect a fire station the cost of which will exceed $2,500, it must comply with the requirements of § 103 of the General Municipal Law. 1962 Ops St Compt 167.

A village may not pay the travel expenses of a foreign exchange student. 1962 Ops St Compt 199.

Village may not use proceeds of sale of bonds to defray part of costs of a project more expensive than that for which the bonds were authorized. 1966 Ops St Compt File #683.

Expenses incurred by village for medical examinations, blood tests and chemical analyses in prosecuting crimes are proper village charges. However, witness fees are not payable in courts of special sessions. 1955 Ops St Compt File #7224.

27. Presentment and payment of claims

Water company's claim against city should be presented to board of trustees in itemized account properly verified for audit, and no action should be brought upon it within month after such presentation. Commonwealth Water Co. v Castleton, 192 A.D. 697, 183 N.Y.S. 753, 1920 N.Y. App. Div. LEXIS 7537 (N.Y. App. Div. 1920).

Where a party who had rendered services to a village filed with such village notices of claim for services subsequent to the commencement of the original action but over 30 days before moving for leave to amend the complaint in the original action such plaintiff sufficiently complied with the requirements of this section that no action should be commenced within 30 days of presentation of a claim for audit. Potts v Haverstraw, 110 F.2d 58, 1940 U.S. App. LEXIS 4478 (2d Cir. N.Y.), cert. denied, 311 U.S. 660, 61 S. Ct. 17, 85 L. Ed. 423, 1940 U.S. LEXIS 379 (U.S. 1940).

Payments to private corporations contracting to perform services under Village Law, former § 89(64) must be paid after

rendition of services. Lump sum contributions to such corporations may not be made. Doubt exists in villages whether such contracts may be entered into. 1946 Ops St Compt 256.

Verified claims, vouchers or bills need not be submitted in villages operating under Village Law for compensation by officers and employees compensated on regular salary basis. 1946 Ops St Compt 445.

A village board of trustees may determine that bills and accounts against the village may be paid on certified vouchers. 1947 Ops St Compt 402.

Unless the contract between the village and a contractor calls for the payment of certain sums at definitely ascertainable times as the work progresses, no payment should be made thereunder save on a proper voucher audited and allowed by the village board. 1947 Ops St Compt 410.

A claim against a village must be sworn to or certified to prior to audit, except village payrolls and the payment of principal and interest on village bonds and notes. 1947 Ops St Compt 463.

Expense of hospitalization of two men injured while fleeing arrest on a criminal charge is proper charge against village where arrest was made by village officers. 1954 Ops St Compt 329.

The requirements as to form which a claim must satisfy before it may be audited by a village board of trustees apply regardless of the amount of the claim. The board of trustees should, by resolution, order the approved claims to be paid and such resolution must appear in the minutes. A majority of the members of the board of trustees must approve the resolution. 1955 Ops St Compt 644.

A board of trustees of a village may not cancel or compromise tax liens acquired subsequent to January 1, 1944. 1955 Ops St Compt File #7764.

Where change orders and extras raise total cost of waterworks construction above amount which was appropriated and which was approved by referendum, village has no authority to pay claim for the additional amount in the absence of litigation or a special act of the Legislature. 1965 Ops St Compt File #340.

Fees collected pursuant to an invalid ordinance may be refunded upon the adoption of a local law authorizing the payment of equitable claims against the town. 1967 Ops St Compt File #765.

A police officer of a village may not be paid unless his appointment or employment has been certified by the county civil service commission to have been made in accordance with civil service law and rules. 1954 Ops St Compt 203.

28. Compensation of officers and employees

Where act incorporating village contained list of village officers in which village attorney was not named, attorney retained by village at annual rate was employee of village and not public officer, and entitled to compensation for year, notwithstanding that few months after his appointment as village attorney village was incorporated as city. Fisher v Mechanicville, 225 N.Y. 210, 121 N.E. 764, 225 N.Y. (N.Y.S.) 210, 1919 N.Y. LEXIS 1120 (N.Y. 1919).

Village may not compensate a volunteer fireman for clothes damaged or ruined while fighting fires, or for amounts deducted from his wages by his employer for time lost while fighting fires. 1946 Ops St Compt 217.

A village may not compensate a volunteer fireman for service. 1946 Ops St Compt 366.

Salaries of village police constables and fire department drivers may be increased during fiscal year if funds are legally available therefor. 1947 Ops St Compt 383.

A village attorney may properly be compensated above his fixed salary for services not included in his appointment. 1947 Ops St Compt 546.

The salaries of members of a village board of trustees, whose terms do not expire until 1955, may be increased as of the first Monday in April. 1954 Ops St Compt 68.

A village engineer appointed at an annual salary for certain specific duties is not entitled to additional compensation for his official work. 1954 Ops St Compt 279.

Overtime pay may not be authorized for a village superintendent of public works; such officer is entitled to his fixed salary and only such salary no matter how much or how little time he spends in the performance of his duties. 1955 Ops St Compt 251.

While former § 89 contemplated that the village attorney may be employed on fixed annual salary basis, it is believed to permit the village to compensate, on a fee basis, such attorney for additional legal services rendered to the village and not contemplated in his contract of employment. 1960 Ops St Compt 410.

The village attorney is a village employee, and other paid officers and employees of the village may not serve as village attorney and receive compensation therefor. 1960 Ops St Compt 410.

A village attorney may receive compensation in addition to his salary for special services not contemplated at the time of his appointment. 1963 Ops St Compt #88.

A former village attorney may be compensated for legal work performed subsequent to his period of public service if the Board of Trustees has specifically resolved to engage him as special counsel or has ratified his efforts. 1963 Ops St Compt #311.

A village may not pay the officers of the village fire department the amount of money budgeted for fire department purchases, so that such purchases may be made and paid for such fire department. 1965 Ops St Compt File #190.

A village attorney should be paid an annual salary for normal duties, but may be paid additional sums for extraordinary work. 1967 Ops St Compt File #296.

Extra compensation may be paid by a village to the village attorney for extraordinary services performed by him, where an agreement to that effect exists. Where insufficient village moneys are available to pay such additional compensation, budget notes may be issued therefor, subject to statutory limitations. 1967 Ops St Compt File #674.

The fee of an attorney hired by the volunteer firemen of a village fire department, to represent them in negotiations with the village board of trustees, is not a proper village charge. 1969 Ops St Compt File #413.

The operator of machinery and equipment rented by a village may not be paid extra compensation as a village employee but he may be employed by the political subdivision hiring the machinery or equipment. 1954 Ops St Compt 111.

29. Employee benefits

Village may not purchase uniforms for employees of highway department. 1953 Ops St Compt 420.

A village board may require receipts of actual expenditures to be submitted by volunteer firemen in order to receive reimbursement for expenses incurred in attending training schools and instruction courses. 1960 Ops St Compt 299.

A village may not pay a uniform allowance to its water meter readers or waters maintenance department employees. It may, however, purchase uniforms or badges for use by its water meter readers and protective clothing for use by its water maintenance department employees. 1968 Ops St Compt File #422.

30. Expenditures for holidays or celebrations

A village may finance or appropriate village funds toward the expenses of a celebration to be held in honor of those who served in the Armed Forces during "World War II", such celebration to be held at a time other than on Memorial Day. 1946 Ops St Compt 601.

Expenditures of village funds in connection with annual parade and inspection of fire department should be disbursed through the village treasurer after claims therefor have been audited and allowed by the board of trustees of the village. 1947 Ops St Compt 295.

The proper limitation for an appropriation for Memorial Day observance as pertaining to a first class village is $1000. 1955 Ops St Compt 141.

A village of the second class may appropriate $500 for the expense of the proper observance of Memorial Day. While a village should designate an authorized patriotic organization to have charge of the observance in advance thereof, if the village has appropriated a sum for such observance and the patriotic

organization has acted with the informal concurrence of the village board, its claim for reimbursement may be audited and paid despite failure to formally designate. 1955 Ops St Compt File #7353.

A village, not of the first class, may expend moneys for printing of brochures commemorating its 25th anniversary. The amount which may be raised by taxation is limited to $1,500. However, such a village may borrow moneys not in excess of the limitations set forth in section 29.00(2) of the Local Finance Law provided it has a local historian. 1956 Ops St Compt 225.

Villages may appropriate funds for the Hudson-Champlain celebration, but the expenditures must be controlled by the respective village boards. 1959 Ops St Compt 208.

A village may expend monies from the publicity fund in order to decorate village streets at Christmas time, as long as such decorations are for the benefit of the village. 1961 Ops St Compt 119.

Money appropriated by a village for observance of Independence Day may be expended only by the Board of Trustees, but, under stated conditions, money appropriated for observance of Memorial Day may be paid to veterans organizations. 1963 Ops St Compt #212.

The village board may reimburse a veterans' organization for expenses of a village Memorial Day observance, within the amount appropriated by the board for this purpose. The propriety of particular items of expense is a matter for the determination of the local authorities. 1964 Ops St Compt File #804.

A village may expend money to celebrate the 75th anniversary of the founding of both the village and the village fire department, but may not contribute toward a fire department celebration. 1965 Ops St Compt File #551.

A village may expend moneys for a historical commemoration only if funds have been appropriated for such and are retained in control of the village board. 1966 Ops St Compt File #723.

A village may not expend funds in conjunction with other villages for the celebration of a United Nations Day Program. 1968 Ops St Compt File #454.

A village may not establish a reserve fund for a centennial celebration. 1968 Ops St Compt File #724.

A town and a village within the town may expend funds jointly to celebrate an historical commemoration. 1969 Ops St Compt File #1023.

Control of municipal funds appropriated for an historical commemoration may not be turned over to private citizens for administering the program. 1969 Ops St Compt File #1023.

Village Law, former § 89(31-a), which limits the amounts which may be appropriated for Independence Day observances, may be superseded under the authority of Municipal Home Rule Law, § 10(1)(ii)(e)(3). However, the constitutionality of the latter statute is questionable. 1972 Ops St Compt File #184.

31. Plaques or memorials

Village funds may not be expended for the purchase and erection of a plaque commemorating the State's construction of a bridge in the village nor for the entertainment of officials attending its opening ceremony. 1960 Ops St Compt 319.

A village may purchase a plaque in memory of departed police officers. 1967 Ops St Compt File #365.

A village may not contribute money or land to an American Legion Post for the erection of a veterans' memorial, but may itself erect such a memorial and accept gifts to help defray the expense. 1969 Ops St Compt File #754.

32. Private enterprises

Annual membership dues of municipal attorneys in the New York State Bar Association (payment of which is a condition to membership in the Municipal Section of such Association) are personal obligations of such attorneys and are not proper charges against municipalities. 1946 Ops St Compt 85.

Towns and villages may not spend money to defray expenses of meeting of a county historical society. 1947 Ops St Compt 148, 149.

Village may not make appropriation of village funds to village drum corps. 1953 Ops St Compt 11.

A village may not sponsor and contribute funds towards the running of an automobile race. 1953 Ops St Compt 236.

A board of trustees of a village may not appropriate funds for a donation to a veterans' organization. 1955 Ops St Compt File #7764.

A village board may not contribute $2,500 to a public library located in the village without submitting such expenditure to a referendum, if an original proposition approved by referendum, establishing the library, fixed a maximum annual expenditure therefor; but if no such maximum annual expenditure was fixed by referendum, no referendum is necessary to make a further annual expenditure. 1961 Ops St Compt 86.

33. Publicity fund

Publicity fund moneys may be expended for Christmas lighting and decorations in the business and commercial area of the village. 1954 Ops St Compt 408.

A newsletter published for and in the interest of the village residents alone, does not qualify as the type of publication for which publicity funds may be expended. 1959 Ops St Compt 326.

A village may not permit a civic association to control or disburse monies from its publicity fund in the absence of written contract. 1962 Ops St Compt 38.

A village may appropriate money for promotion of the location of a community college in the area, and such monies must thereafter be used for publicity purposes. 1963 Ops St Compt File #919.

34. Acquisition of property

Just compensation had to be paid by the state to a village for land which the village acquired by unlimited deed and which land was used by the village to attract business to its inhabitants by serving as local baseball team's home ground. The village did not acquire this land as an agency of the state or for the use of the general public of the state. Canajoharie v State, 13 Misc. 2d 293, 177 N.Y.S.2d 799, 1958 N.Y. Misc. LEXIS 3137 (N.Y. Ct. Cl. 1958), aff'd, 8 A.D.2d 656, 184 N.Y.S.2d 871, 1959 N.Y. App. Div. LEXIS 9027 (N.Y. App. Div. 3d Dep't 1959).

A decision by a village Board of Trustees to acquire certain property for park purposes involves exercise of the Board's own responsibility, which cannot be left to the voters by referendum. Gerzof v Sweeney, 34 Misc. 2d 1039, 229 N.Y.S.2d 807, 1962 N.Y. Misc. LEXIS 3292 (N.Y. Sup. Ct. 1962).

A village board of trustees may purchase real property for a village purpose without holding a referendum thereon. 1953 Ops St Compt 13.

A village may purchase a building for the sum of $650.00 pursuant to a resolution of the board of trustees and without the necessity of a referendum. 1953 Ops St Compt 138.

A village may not acquire title to a privately owned bridge situated on a private road within a contiguous city. 1953 Ops St Compt 245.

Village board may purchase land and building for a garage and finance transaction without referendum. 1953 Ops St Compt 260.

Two municipalities may jointly acquire property for a recreation center pursuant to Article 13 of the General Municipal Law at least where such property is situated entirely within one of the municipalities. 1953 Ops St Compt 317.

A village may not purchase land under a reservation that it be used exclusively by local Boy Scout Troop. 1956 Ops St Compt 39.

In the interest of public use, convenience and necessity, a village may acquire land outside of the village owned by the village fire department, for the purpose of constructing a firehouse on such land, where such firehouse will mainly serve a village purpose. 1964 Ops St Compt File #1011.

A village may not purchase property in order to rent it to a physician at a nominal consideration. The village may, however, establish a hospital or seek special legislation to create a health center for the village. 1967 Ops St Compt File #468.

The acquisition of a village hall is not subject to a referendum, unless it is to be financed and the statutes governing financing contain referendum requirements under the specific circumstances. 1968 Ops St Compt File #153.

Village board of trustees may agree to compromise on value of real property taken by the county by condemnation without submission of compromise to referendum. Village Treasurer should accept tender of that amount. 1955 Ops St Comp 164.

35. —for parks

The acquisition by a village of property for park and recreational purposes was for a public purpose and the village has power to acquire by condemnation property for such purposes even though the use is to be limited to the residents of the village. Hicks Development Corp. v Lawrence, 282 A.D. 1048, 126 N.Y.S.2d 222, 1953 N.Y. App. Div. LEXIS 5787 (N.Y. App. Div. 1953), aff'd, 306 N.Y. 922, 119 N.E.2d 604, 306 N.Y. (N.Y.S.) 922, 1954 N.Y. LEXIS 1227 (N.Y. 1954).

Land acquired in fee for general purposes without any restriction even though used for a park may be used for other municipal purposes. Pearlman v Anderson, 62 Misc. 2d 24, 307 N.Y.S.2d 1014, 1970 N.Y. Misc. LEXIS 1929 (N.Y. Sup. Ct.), aff'd, 35 A.D.2d 544, 314 N.Y.S.2d 173, 1970 N.Y. App. Div. LEXIS 4148 (N.Y. App. Div. 2d Dep't 1970).

While a village may not lease park lands held by it for the public use, it may grant a concession or license for the construction, maintenance and operation of a golf course to a private individual. 1955 Ops St Compt 159.

If a village street is discontinued and if a village owns the fee, it may establish such area as a park, playground or recreational area and the use thereof may be restricted to residents or to certain reasonable classifications of non-residents. 1955 Ops St Compt 234.

A village may not lease its park land to a private association under any circumstances, without specific legislative authority. A village may permit the use of its park lands by a private association or sport team, but such user may not charge admission fees. The village may require the user to procure adequate liability insurance coverage as a condition to such use. 1960 Ops St Compt 392.

The statutory grant of power to a village to establish one or more parks implies the power to acquire suitable sites, if sites already owned by the village are not suited to the envisioned purpose. 1965 Ops St Compt File #196.

The acquisition by a village of lands located outside of the village to be used for park and recreational purposes is not subject to the provisions of § 247 of the General Municipal Law. 1965 Ops St Compt File #483.

Village may designate and set apart for use as playgrounds or neighborhood recreation centers any land owned by such municipality and not dedicated or devoted to another inconsistent public use. 1956 Ops St Compt 54.

36. —Personal property

Board of trustees of village has power to enter into conditional sales contract for purchase of engines and machinery for municipal electric lighting plant providing for payment of contract price in installments from revenues of lighting system. Kelly v Merry, 262 N.Y. 151, 186 N.E. 425, 262 N.Y. (N.Y.S.) 151, 1933 N.Y. LEXIS 928 (N.Y. 1933).

Village may purchase fire-fighting apparatus and equipment, which becomes property of village. Individual fire companies may not purchase fire apparatus and equipment and bill village therefor. 1945 Ops St Compt 215.

A village may not purchase street machinery under a contract pursuant to which the machinery would be paid for in five annual installments, with interest. Such machinery may be financed over a period of years only as provided by the Local Finance Law. 1947 Ops St Compt 362.

There is no special procedure required to authorize a village to make purchases for civil defense purposes and to pay for the same. 1955 Ops St Compt File #7511.

A village may purchase an existing dock for municipal purposes where the dock is affixed to realty which is the subject of the purchase. 1956 Ops St Compt File #7937.

A village may purchase and supply protective weather gear and waders to the members of the drainage crew of the highway department. 1957 Ops St Compt 283.

37. Lease of village property

The board of trustees of a village may not lease village property acquired by the village for public parking purposes to private interests for use as a private parking lot. 1956 Ops St Compt 174.

A village may lease its real property, which is not necessary to village purposes and which has not been impressed with a public trust, to a commercial or nonprofit organization for a fair consideration. 1964 Ops St Compt File #985.

A village may lease real property not dedicated to public use and not presently needed for village purposes to the local grange for a fair consideration. 1965 Ops St Compt File #146.

A village may lease village land, not impressed with a public trust and not needed for village purposes, to a Little League ball club for a fair and adequate consideration, but the lease should be executed by the mayor, pursuant to a resolution of the board of trustees, and not by the village recreation commission. A village may provide improvements and maintenance for such leased land consistent with revenues received from the lease. 1965 Ops St Compt File #217.

A village board may lease village real property not impressed with a public trust and not presently needed for a village purpose, and may require the lessee to provide fire and liability insurance, for the protection of the village, in such amounts as the village board deems necessary. 1967 Ops St Compt File #1027.

A village may rent space in a portion of a multideck, offstreet parking facility to persons on a monthly basis, while the remainder of the facility is metered on an hourly and daily basis. 1969 Ops St Compt File #795.

Village property may not be leased for commercial purposes if it is in current use by the village. 1970 Ops St Compt File #63.

A village, owning and operating a general public hospital, established pursuant to the terms of a trust created by a donor of real property, may not lease a portion of said premises, unneeded for village or hospital purposes, in violation of the terms of said trust. 1971 Ops St Compt File #981.

A village may lease real property for a village dump. 1955 Ops St Comp File #7504.

38. —Docks

Where instruments conveying lands from state to village had clearly indicated that village received the lands for public use, and where, in constructing docks on such land for the benefit of the village, the village held such docks in a public capacity, the village would be enjoined from leasing a dock and related facilities to a private corporation engaged in sight-seeing activities on adjacent lake. Lake George S.B. Co. v Blais, 30 N.Y.2d 48, 330 N.Y.S.2d 336, 281 N.E.2d 147, 1972 N.Y. LEXIS 1503 (N.Y. 1972).

The act of the Village officials, in entering into a lease conveying exclusive use of a village dock for use as a base for a "sightseeing" boat, was an improper exercise of their authority and discretion, where there was no showing that the premises in question were dedicated exclusively to a public use, at least to the extent of prohibiting public authorities from leasing part of the lake frontage for docks to private enterprise. Lake George S.B. Co. v Blais, 30 N.Y.2d 48, 330 N.Y.S.2d 336, 281 N.E.2d 147, 1972 N.Y. LEXIS 1503 (N.Y. 1972).

The requirements of former Subd. 39 for public hearings do not apply to a lease by a village of a wharf or dock since such a lease is not a franchise. Ocean Beach Ferry Corp. v Ocean Beach, 92 N.Y.S.2d 275, 1949 N.Y. Misc. LEXIS 2811 (N.Y. Sup. Ct. 1949), aff'd, 276 A.D. 920, 94 N.Y.S.2d 826, 1950 N.Y. App. Div. LEXIS 5135 (N.Y. App. Div. 1950).

Where no special legislative authority exists, a village is without authority to lease the use of a public dock held by it for public use so as to divert it to a possession or use exclusively private for private business purposes. 1947 Ops St Compt 178.

Except for permissible charges for the use of public docks pursuant to Village Law former § 89(65), a village may not require a permit fee for issuing licenses to moor boats. 1960 Ops St Compt 116.

A village may install, maintain, and rent water and electric outlet units on the docks to cruisers mooring in the area. 1961 Ops St Compt 128.

39. Sale or transfer of property

Village property may not be conveyed to veterans' organizations for nominal consideration only. 1946 Ops St Compt 646.

Proceeds from sale of village realty should be paid into village general fund. 1953 Ops St Compt 373.

Dedicated streets may be discontinued as such, but title thereto may possibly revert to the grantor or his heirs. If title remains in the village after discontinuance the land may be sold without referendum or hearing. 1954 Ops St Compt 24.

A village may not loan or sell to a person, for resale to another person, village property of a nature difficult to procure otherwise. 1955 Ops St Compt 323.

A village board of trustees may, by resolution, authorize the sale of personal property of the village at private sale. 1956 Ops St Compt 154.

Where the village originally acquired by purchase certain real property for a specific public use and it does not now hold it for that use or for the use and benefit of the public, such property may be properly sold for private purposes without public notice. 1956 Ops St Compt 269.

Public property must be sold for the best price obtainable with reasonable diligence. The use to be made of the property by prospective purchaser, however beneficial it may be to community, is not legal consideration. 1960 Ops St Compt File #158.

As a general rule, where a village wishes to sell real property the Board of Trustees has a general power of conveyance, and, if the property has ceased to be of public use or benefit, or is no longer required for such purposes, its sale may be authorized by resolution of the Board of Trustees and does not require a referendum of public notice of sale. 1961 Ops St Compt 113.

A village may not take back a purchase money mortgage as part of the consideration for the sale of village-owned property which it no longer requires for any public use. 1967 Ops St Compt File #904.

A village may sell its property, real or personal, at public auction. 1968 Ops St Compt File #73.

Village property may not be conveyed to an incorporated volunteer fire company with the purpose of leasing it back for the storage of village fire-fighting equipment. 1968 Ops St Compt File #123.

A village may engage the services of a real estate broker and pay commissions therefor, where such services will be rendered in selling a hotel acquired by the village for non-payment of taxes. 1968 Ops St Compt File #520.

A village may transfer a barn located on village property to an historical society in return for the society's removal of the unwanted structure from the village property. 1968 Ops St Compt File #570.

A lot, which is unimproved, unneeded and has not been devoted to a public purpose, does not become inalienable solely by virtue of its continued informal use as a parking lot by the general public and may be sold by resolution of the village board. 1969 Ops St Compt File #375.

A village may not donate its real property to a private corporation pursuant to an agreement that the property, together with the buildings and improvements to be erected thereon, will revert to the village after forty years for a nominal payment of $1.00. 1969 Ops St Compt File #1068.

A village may sell property which houses the village office and assembly hall and such sale is not subject to a referendum. 1953 Ops St Compt 101.

A village may not convey a dedicated public street, unless its use has been discontinued. Discontinuance may be accomplished pursuant to the procedure detailed in Village Law, former §§ 145–148 (inclusive). Upon discontinuance as a street, the property may be sold at private sale, without public notice. A referendum on the sale is not required. 1958 Ops St Compt 460.

Where a village maintains a public general hospital and desires to discontinue the same, it would seem to have authority to do so and, in the process, to transfer, for a fair and adequate consideration, to a private eleemosynary hospital corporation, the assets of such village hospital, both real and personal. This would seem to include trust or endowment funds established for the use and benefit of the village hospital, provided there is no express prohibition in the instruments creating such trusts or endowments. No mandatory or permissive referendum would be involved. 1965 Ops St Compt File #868.

40. —Park lands

Village Board of Trustees had authority to sell land allegedly restricted for park purposes where the land was never dedicated or used for such purpose and the deed of conveyance and the judgment registering title to the property did not restrict its use to such purpose. O'Shea v Hanse, 3 Misc. 2d 307, 147 N.Y.S.2d 792, 1955 N.Y. Misc. LEXIS 2235 (N.Y. Sup. Ct. 1955).

Action by taxpayer for judgment restraining Village Board of Trustees from consummating contract for sale of land acquired by village for park purposes was dismissed where the contract purchaser, an indispensable party was not joined as a party in the action and did not intervene. O'Shea v Hanse, 3 Misc. 2d 307, 147 N.Y.S.2d 792, 1955 N.Y. Misc. LEXIS 2235 (N.Y. Sup. Ct. 1955).

A village of the second, third or fourth class may not sell park property devoted to public use without express statutory authority. 1953 Ops St Compt 252.

Land conveyed to a village by a developer for park purposes under the authority of former § 179- *l* (1) of the Village Law becomes impressed with a public trust and may not be alienated without a special act of the Legislature. 1968 Ops St Compt File #976.

Property bought by village for purpose of public park, never devoted to such use and now unsuited therefor, may be sold for private purposes without express legislative authority. 1953 Ops St Comp 251.

41. Assessments

Although former § 223 of the Village Law, providing for the original establishment of a water system, does not confer upon a village any assessing power, and former § 224 authorizes assessments only for extensions of such a system, a village may nevertheless levy special assessments to cover the original installation by virtue of the provisions of subds. 16 and 38 of former § 89 which grant to the village the power to furnish water supply and to levy assessments for all local improvements. Board of Education v Alexander, 92 N.Y.S.2d 471, 197 Misc. 814, 1949 N.Y. Misc. LEXIS 2843 (N.Y. Sup. Ct. 1949).

The duty of fixing assessments rests exclusively upon the assessors and cannot be delegated to a person or a corporation employed to appraise the value of real property to assist assessors in the assessment thereof. Barrett v Munger, 115 N.Y.S.2d 708, 201 Misc. 985, 1952 N.Y. Misc. LEXIS 1741 (N.Y. Sup. Ct. 1952).

A first class village is not authorized nor do we believe that a local law could be passed to create a special district in the village whereby a special assessment could be levied on an ad valorem basis to cover the excess cost of services rendered to said area. 1957 Ops St Compt 349.

A village may not properly re-assess the aggregate debt service each year of a local improvement. A village board may levy a special assessment for a local improvement against real property exempt from general village taxes. The cost of the improvement or service must be apportioned and assessed against those properties benefited, according to frontage, area, or assessed value, and must be just and equitable. 1968 Ops St Compt File #782.

42. Contract bid requirements

Village operating under Village Law need not advertise for bids on equipment, as general rule, if contract for installation is not involved. 1946 Ops St Compt 252.

Street resurfacing contract in village must be awarded after bids. 1946 Ops St Compt 252.

43. Particular contracts

Village board of trustees may enter into a contract for fire protection with fire department of village. 1946 Ops St Compt 83.

There is no limit on amount village may pay for fire protection under contract. 1947 Ops St Compt 211.

A contract for fire protection made between a village and the fire department may provide for payment of the contract price in advance of their rendition of the service. 1953 Ops St Compt 303.

Modification of existing municipal contract for the sole benefit of the private contracting party would constitute a constitutionally prohibited gift of municipal funds. 1953 Ops St Compt 325.

Where a village has entered into a contract to furnish fire protection to a fire protection district in the town and the contract does not provide for any payment to the volunteer fire department furnishing the protection, the village may not pay any portion of the contract price to the volunteer fire company. 1957 Ops St Compt 120.

There is no constitutional authority for the joint purchase of a squad car by a village and a fire district jointly. However, a possible solution of such a problem would be the purchase of the squad car by either the fire district or the village and then entering into a fire protection contract pursuant to Town Law § 176, subd 16, subd 22, and Village Law former § 89, subd 24. 1959 Ops St Compt File #600.

While a village board may take all measures not inconsistent with existing law to protect the public health and possesses broad powers as a Board of Health, it has no authority to enter into an agreement to maintain and repair a private sewer pump except under conditions where public health is jeopardized, and any agreement for maintenance and repairs under other circumstances would violate § 1 of art. VIII of the Constitution. 1960 Ops St Compt 493.

A village may enter into a franchise with a telephone company whereby the village, for a monetary consideration based upon a percentage of the receipts, will permit placement and maintenance of public telephone booths on village streets. 1962 Ops St Compt 470.

There is no statutory limit on the amount a village may be charged for fire protection under a fire protection contract. 1967 Ops St Compt File #815.

A village may purchase liability insurance covering fire-fighting apparatus owned by a village fire company. 1968 Ops St Compt File #672.

There is no statutory bar to prevent a village which contracts to furnish fire protection to another village from charging a sum which, when translated into a tax rate, is proportionately greater than the sums charged to fire protection districts protected by the same village. 1968 Ops St Compt File #216.

A village need not contract for fire protection with a fire company located in the village but may do so if it desires. Village should be a party to any contract to furnish fire protection to outside area. 1968 Ops St Compt File #672.

Where claimants performed engineering services for a village over a period of time, making periodic reports and meeting periodically with the village board, ratification of the contract may be implied from such acquiescence and other affirmative acts of the board of trustees. 1955 Ops St Comp 52.

B. Regulatory Powers

44. In general

The exercise of the police power by a Village is not, generally, or by the language of Village Law former § 89, subdivision 69, limited to mere regulation. Within the general authority to regulate may exist the power to prohibit in the furtherance of aesthetic values or the public well-being provided, however, that the exercise of that power is not arbitrary, capricious or irrational. Friedland v Diamond, 67 Misc. 2d 642, 324 N.Y.S.2d 578, 1971 N.Y. Misc. LEXIS 1297 (N.Y. Sup. Ct. 1971).

45. Amusements

Neither a town nor a village is authorized to license pin ball machines, juke boxes or shufflboard games. 1946 Ops St Compt 709.

A village may enter into an agreement to permit a private organization to erect lights on a village baseball field for the conduct of after-dark events, and to charge for use of such lights. 1955 Ops St Compt 160.

While a village may, subject to provisions of existing law, license and otherwise regulate circuses, places of amusement, amusement parks and shows, and other exhibitions and performances, such enterprises are apparently lawful business which a village may not entirely prohibit. 1961 Ops St Compt 325.

46. Bicycles

A village ordinance or local law may validly require the testing of children, and others, by the application of reasonable standards, to determine their fitness to operate bicycles on public ways within the village, and may also provide for the issuance or withholding of licenses so to operate bicycles. The power to license the operation of bicycles implies the power to suspend or revoke such license by the application of reasonable standards. A village board of trustees may appoint a commission to administer such ordinance or local law and may delegate to this commission the power to test applicants, issue or withhold licenses and suspend or revoke the same, but not the power to hear prosecutions for violations of the enactment, since this power belongs exclusively to the courts. 1965 Ops St Compt File #296.

47. Boats and waterways

Ordinance enacted pursuant to former § 90, prohibiting landing of excursion boats in village without consent of trustees of village was valid. Mills v Fremd, 213 A.D. 742, 211 N.Y.S. 247, 1925 N.Y. App. Div. LEXIS 8581 (N.Y. App. Div. 1925).

Where a waterway is less than 1500 feet in width, one side of which is owned by a town and the other side by a village, the town is excluded from any jurisdiction to regulate the speed and operation of boats thereon. 1956 Ops St Compt 314.

A village may issue fishing permits for use in the village reservoir for a fee of $2.00 per annum, but may not restrict nonresident permits to members of a particular private club, or delegate the sale of such permits to said club to use monies received for restocking the reservoir. 1962 Ops St Compt 17.

A first class village has power to regulate, by ordinance, the anchoring or mooring of houseboats and barges within its harbor line, subject them to police inspection, and regulate their sewage disposal, garbage removal, and use of toilets. 1963 Ops St Compt #163.

A village may charge nonresidents for use of a village beach and its privileges, although residents are not required to pay for such use. 1964 Ops St Compt #380.

A town may not take over the function of establishing and maintaining aids to navigation on a lake formerly maintained by an incorporated village within the town. 1966 Ops St Compt File #746.

48. Businesses

Certain portions of a Port Chester village ordinance dealing with dancing and entertainment in night clubs and restaurants serving liquor, and the permissible days and hours for dancing and entertainment, and imposing fines and penalties were considered too vague to be valid in failing to inform operators of such places when and under what conditions they could operate. Sa-Bleu, Inc. v Port Chester, 42 Misc. 2d 360, 247 N.Y.S.2d 943, 1963 N.Y. Misc. LEXIS 1263 (N.Y. Sup. Ct. 1963).

The Village of Port Chester has power, through its Board of Trustees and subject to provisions of existing law, to provide for licensing and otherwise regulating establishments licensed to sell alcoholic beverages to customers and operating as night clubs and restaurants, and, under the village charter, may sanction or prohibit theatrical shows or exhibitions or "performances for money." Sa-Bleu, Inc. v Port Chester, 42 Misc. 2d 360, 247 N.Y.S.2d 943, 1963 N.Y. Misc. LEXIS 1263 (N.Y. Sup. Ct. 1963).

A village ordinance which requires every person who carries on the business of plumbing to obtain a license, but which does not require such person to possess any qualifications or meet any standards, is invalid. 1953 Ops St Compt 406.

Business concerns whether within or without the village may not be licensed or regulated under an ordinance enacted pursuant to sub 48 of former § 89 where they merely solicit orders of goods for future delivery from another state. 1954 Ops St Compt 7.

A village may, by ordinance, regulate maintenance and operation of coin-operated washing machines, drying machines, and/or dry cleaning machines. 1961 Ops St Compt 185.

A village may, by ordinance, require that a dealer in used auto parts procure a license and may provide that such a license shall be refused if the applicant has been convicted of larceny or receiving stolen property. 1961 Ops St Compt 286.

A village may grant a concession or license to place sandwich and beverage vending machines in the village playground and swimming pool area, basing the amount on a percentage of monies taken in by vending machines, and there is no requirement for taking of bids before granting such a concession or license. 1963 Ops St Compt #469.

A village may adopt an ordinance requiring taxicabs to be inspected at an inspection station for a fee if it is reasonable and is not inconsistent with the Vehicle and Traffic Law. 1966 Ops St Compt File #670.

While a town and a village may establish a "joint public vehicle commission", they may not confer upon such commission the power to jointly regulate and control the operation of taxicabs within the area. 1967 Ops St Compt File #660.

A village may not issue a permit or license to a mobile vendor of food and merchandise and at the same time, restrict the licensee from operating within 400 feet of any immobile competing establishment. 1967 Ops St Compt File #1026.

49. —Peddlers

An ordinance barring the taking of orders for future delivery of goods, wares and merchandise within a village, within the intent of evading provision against peddling, without license issued therefor, does not prohibit plaintiff from selling furniture from catalogue on installment plan and making collections therefor, and an injunction will issue permanently restraining village from interfering with his employees in conduct of business in so far as it is transacted in said village. Saidel v Tupper Lake, 254 A.D. 22, 4 N.Y.S.2d 814, 1938 N.Y. App. Div. LEXIS 6329 (N.Y. App. Div. 1938).

Subdivisions 48 and 52 of former § 89 did not empower a board of village trustees to prohibit peddling by a particular individual or by peddlers generally. Supreme Industrial Catering Corp. v Fuerst, 30 Misc. 2d 394, 219 N.Y.S.2d 858, 1961 N.Y. Misc. LEXIS 2451 (N.Y. Sup. Ct. 1961).

A village board's rejection of an application for a peddler's license on the ground that it would not be "in the best interests of the village," was arbitrary and capricious. Supreme Industrial Catering Corp. v Fuerst, 30 Misc. 2d 394, 219 N.Y.S.2d 858, 1961 N.Y. Misc. LEXIS 2451 (N.Y. Sup. Ct. 1961).

Insofar as a village ordinance attempted to enlarge upon authority of the village trustees with respect to regulating peddling and itinerant vendors, by providing that they need not issue a license unless satisfied it would be in every way proper and not detrimental to the best interests of the village, the public, and property owners adjacent to the locality for which the license was desired, such ordinance was invalid as going beyond the powers conferred by subds. 48 and 52 of former § 89. Supreme Industrial Catering Corp. v Fuerst, 30 Misc. 2d 394, 219 N.Y.S.2d 858, 1961 N.Y. Misc. LEXIS 2451 (N.Y. Sup. Ct. 1961).

A village may properly require the licensing of hawkers, peddlers and solicitors. One who takes orders from customers while in the course of delivering merchandise to them is not a solicitor. 1960 Ops St Compt 423.

An ice cream vendor who receives orders for ice cream from village residents without active solicitation on his part therefor, is not required to have a license under an ordinance necessitating a license for vendors soliciting orders publicly or house to house. 1967 Ops St Compt File #524.

A village may not enact an ordinance requiring the licensing of persons who solicit orders of goods for future delivery from another state. 1968 Ops St Compt File #603.

In view of past court decisions, the legality of a village ordinance establishing a fee for a soliciting license at $100 is doubtful. 1968 Ops St Compt File #1021.

50. Cable television

Commercial closed-circuit television is subject to franchise and to license by a village. Federal government may preempt the field but has not yet acted. 1957 Ops St Compt 351.

A village may not enact an ordinance fixing a monthly service rate to subscribers of a privately-owned television cable. 1961 Ops St Compt 372.

A town or a village may not prescribe the rates to be charged by a television cable service company to which it grants a franchise. 1965 Ops St Compt File #531.

51. Construction of electric power lines

A village has power to regulate the construction of an electric transmission line. Long Island Lighting Co. v Simonson, 272 A.D. 943, 72 N.Y.S.2d 52, 1947 N.Y. App. Div. LEXIS 4316 (N.Y. App. Div. 1947).

Under Transportation Corporations Law § 11, subd. 3 and Village Law former § 89, subd. 39, a village has the right to impose as a condition upon the erection of an electrical transmission line in the highways that the same be placed underground. Long Island Lighting Co. v Shields, 274 A.D. 803, 79 N.Y.S.2d 657, 1948 N.Y. App. Div. LEXIS 3429 (N.Y. App. Div.), app. dismissed, 298 N.Y. 696, 82 N.E.2d 589, 298 N.Y. (N.Y.S.) 696, 1948 N.Y. LEXIS 1262 (N.Y. 1948), aff'd, 299 N.Y. 562, 85 N.E.2d 791, 299 N.Y. (N.Y.S.) 562, 1949 N.Y. LEXIS 1032 (N.Y. 1949).

Village may regulate or prohibit erection of antenna wires over village streets or it may grant franchises unless village merely holds an easement for highway or other purposes in which case consent of owner of fee must be obtained. 1954 Ops St Compt 92.

52. Gasoline

Village might have prevented erection of gasoline tank, for which zoning permit had been issued on ground that gasoline is explosive. Attica v Day, 236 N.Y.S. 607, 134 Misc. 882, 1929 N.Y. Misc. LEXIS 905 (N.Y. Sup. Ct. 1929), aff'd, 230 A.D. 776, 243 N.Y.S. 915, 1930 N.Y. App. Div. LEXIS 9249 (N.Y. App. Div. 1930).

53. Intoxicating liquors

Village board had power to enact ordinance barring manufacture, sale, furnishing or transportation of any intoxicating liquors within village under penalty of forfeiting $100 and in addition making any violation thereof disorderly conduct and any one violating it a disorderly person. People v Fenton, 259 N.Y.S. 913, 144 Misc. 710, 1932 N.Y. Misc. LEXIS 1286 (N.Y. County Ct. 1932).

A village may enact ordinance prohibiting within village, manufacture, sale, furnishing or transportation of intoxicating liquors. People v Coulides, 265 N.Y.S. 765, 148 Misc. 292, 1933 N.Y. Misc. LEXIS 1198 (N.Y. County Ct. 1933).

54. Signs

Since villages have the power under Village L former § 89, subd 47 to regulate advertising near streets and in public places, and may, under Village L former § 89, subd 59, adopt ordinances for purposes consistent with the exercise of the police power, an ordinance of a resort community limiting commercial sign size to 4 feet square, and imposing criminal sanctions for violation thereof, was a valid and permissible exercise of the police power in the interest of aesthetics. People v Goodman, 31 N.Y.2d 262, 338 N.Y.S.2d 97, 290 N.E.2d 139, 1972 N.Y. LEXIS 1628 (N.Y. 1972), reh'g denied, 32 N.Y.2d 705, 1973 N.Y. LEXIS 2046 (N.Y. 1973).

Former §§ 89, subd 48, and 90, authorize the adoption of an ordinance relating to all kinds of signs, and in fact prohibiting any and all types of vertical signs and other signs projecting from the face of any building over any sidewalk, street, highway or alley in the village and requiring the removal of all signs presently in existence which are violative of its provisions. Preferred Tires, Inc. v Hempstead, 19 N.Y.S.2d 374, 173 Misc. 1017, 1940 N.Y. Misc. LEXIS 1663 (N.Y. Sup. Ct. 1940).

An ordinance which absolutely prohibits the erection of billboards cannot be sustained under former § 89, where it prohibits them without any relation to whether they constitute fire or health hazards. Ruth v Colonie, 99 N.Y.S.2d 471, 198 Misc. 608, 1950 N.Y. Misc. LEXIS 1963 (N.Y. Sup. Ct. 1950).

Advertising signs in railroad passenger station and between railroad tracks were not in violation of zoning ordinance which purported to regulate sign boards in "public" places. People v New York C. R. Co., 5 Misc. 2d 232, 165 N.Y.S.2d 877, 1956 N.Y. Misc. LEXIS 1259 (N.Y. County Ct. 1956), aff'd, 3 N.Y.2d 825, 166 N.Y.S.2d 17, 144 N.E.2d 654, 1957 N.Y. LEXIS 924 (N.Y. 1957).

Aesthetic reasons, whether or not alone sufficient to warrant the provisions of a village ordinance regulating signs in residential areas, may, at least when coupled with the police power, be appropriately considered in enacting sign control regulations. Larchmont v Sutton, 30 Misc. 2d 245, 217 N.Y.S.2d 929, 1961 N.Y. Misc. LEXIS 2808 (N.Y. Sup. Ct. 1961).

The grant of power to a village to regulate or prohibit use of streets for signs and to regulate billboards and other advertising media, etc., sanctions a village ordinance prohibiting signs in residential districts except those customarily incident to churches, libraries, parks, etc., and professional name plates or name signs not exceeding a maximum area on the face of buildings, after a prescribed future date. Larchmont v Sutton, 30 Misc. 2d 245, 217 N.Y.S.2d 929, 1961 N.Y. Misc. LEXIS 2808 (N.Y. Sup. Ct. 1961).

A village ordinance regulating the size of signs and granting a 2 year period for the removal of nonconforming signs was validly enacted as a public benefit pursuant to the village's police power. People v Artrol Corp., 67 Misc. 2d 1087, 325 N.Y.S.2d 800, 1971 N.Y. Misc. LEXIS 1173 (N.Y. J. Ct. 1971), aff'd, 31 N.Y.2d 262, 338 N.Y.S.2d 97, 290 N.E.2d 139, 1972 N.Y. LEXIS 1628 (N.Y. 1972).

A 2 year period in a village ordinance for the removal of nonconforming signs was reasonable. People v Artrol Corp., 67 Misc. 2d 1087, 325 N.Y.S.2d 800, 1971 N.Y. Misc. LEXIS 1173 (N.Y. J. Ct. 1971), aff'd, 31 N.Y.2d 262, 338 N.Y.S.2d 97, 290 N.E.2d 139, 1972 N.Y. LEXIS 1628 (N.Y. 1972).

A village "sign" ordinance restricting signs on buildings in a retail business zone to those placed on the front or face of the building is permissible and is applicable to prohibit a sign which, though clearly visible to traffic on the street, is on the side of the building. Larchmont v Levine, 225 N.Y.S.2d 452, 1961 N.Y. Misc. LEXIS 3667 (N.Y. Sup. Ct. 1961).

A village ordinance prohibiting signs on buildings in a retail business district except on the front of the building bears reasonable relationship to the police power in the absence of sufficient evidence to the contrary. Larchmont v Levine, 225 N.Y.S.2d 452, 1961 N.Y. Misc. LEXIS 3667 (N.Y. Sup. Ct. 1961).

A village may not enact an ordinance wholly prohibiting billboards within village limits, but it may regulate them by ordinance for purposes of public safety and over-all community aesthetics. 1964 Ops St Compt File #650.

55. Trailers and trailer parks

Amendment of a basic zoning ordinance which was originally enacted in 1931 and contained no provisions relating to house trailers so as to deal in full with trailer parks and the parking of trailers disregarded the command of former § 176 requiring that all zoning regulations be uniform throughout the district and made in accordance with a comprehensive plan, and was accordingly invalid as constituting illegal spot zoning, but the preexisting provisions of the zoning ordinance remained in effect and enforceable by injunction. Jackson & Perkins Co. v Martin (1963) 12 NY2d 1082, 240 NYS2d 29, 190 NE2d 422, revg (4th Dept) 16 AD2d 1, 225 NYS2d 112, for reasons stated in the dissenting opinion thereto.

A comprehensive village ordinance regulating and licensing trailer parks is entitled to the strongest possible presumption of validity and must stand if there is any factual basis therefor, and one who attacks its validity has the burden of showing that it is not justified under the police power by any reasonable interpretation of the facts. Jackson & Perkins Co. v Martin, 16 A.D.2d 1, 225 N.Y.S.2d 112, 1962 N.Y. App. Div. LEXIS 11296 (N.Y. App. Div. 4th Dep't 1962), rev'd, 12 N.Y.2d 1082, 240 N.Y.S.2d 29, 190 N.E.2d 422, 1963 N.Y. LEXIS 1269 (N.Y. 1963).

Under subd. 59 of former § 89, giving a village the right to enact ordinances for protection of public welfare, a village ordinance regulating automobile trailers and requiring the obtaining of a permit for their maintenance within the village limits could properly be enacted even prior to enactment of former subd. 69. Harriman v Kabinoff, 40 Misc. 2d 387, 243 N.Y.S.2d 210, 1963 N.Y. Misc. LEXIS 1611 (N.Y. Sup. Ct. 1963).

A "mobile home" means a movable residence akin to a house trailer and, with respect to defendants attempting to maintain a trailer park without such permit as is required by village ordinance for "automobile trailers" maintained within the village limits, the ordinance requirements cannot be avoided by merely making an attempted distinction between mobile houses and automobile trailers. Harriman v Kabinoff, 40 Misc. 2d 387, 243 N.Y.S.2d 210, 1963 N.Y. Misc. LEXIS 1611 (N.Y. Sup. Ct. 1963).

Regulation of trailer camps by a village as a matter of public welfare is an exercise of legislative function which does not require the formulation of general standards where granting of licenses or permits is left up to majority vote of the Board of Trustees. Harriman v Kabinoff, 40 Misc. 2d 387, 243 N.Y.S.2d 210, 1963 N.Y. Misc. LEXIS 1611 (N.Y. Sup. Ct. 1963).

A village zoning ordinance may not arbitrarily bar use of trailers as dwellings on purely esthetic grounds or arbitrarily ban trailers from the village, but it may limit the duration of their stay outside of an established trailer camp. 1958 Ops St Compt 95.

A village may not, by ordinance, require a permit for the parking of a camper on the owner's property. 1968 Ops St Compt File #547.

No authority exists for a village to construct, operate or finance a house trailer camp. 1969 Ops St Compt File #168.

An ordinance which prohibits the parking or storing of an unoccupied trailer on one's own land, without a permit, is invalid. 1961 Ops St Compt 84.

A village may levy a real property tax on trailers and may, in addition, impose and collect a permit fee where they are used or occupied as living quarters outside of house trailer and tourist camps. 1963 Ops St Compt #589.

A village may not arbitrarily ban house trailers as permanent dwellings within the village either by trailer ordinance or zoning ordinance, but it may regulate and restrict them in the furtherance of a comprehensive plan for the benefit and welfare of the community. 1964 Ops Compt File #650.

56. Zoning regulations

The enactment of a requirement for 2-acre minimum lots in area, is in an appropriate case, a legitimate exercise of the police power. Levitt v Sands Point, 6 N.Y.2d 269, 189 N.Y.S.2d 212, 160 N.E.2d 501, 1959 N.Y. LEXIS 1143 (N.Y. 1959).

Legislature did not intend that zoning restrictions on property owners' rights should be haphazard, selecting one street or another from time to time. Regulation must be "in accordance with well considered plan" applying to entire village. Harris v Dobbs Ferry, 208 A.D. 853, 204 N.Y.S. 325, 1924 N.Y. App. Div. LEXIS 6594 (N.Y. App. Div. 1924).

Although privately owned, parking place conducted by store for convenience of its patrons is affected with public interest, and ordinance enacted under former § 89, subd. 52 requiring approval of board of zoning appeals on public parking areas applies as to it. Best & Co. v Garden City, 247 A.D. 893, 286 N.Y.S. 980, 1936 N.Y. App. Div. LEXIS 9296 (N.Y. App. Div. 1936), aff'd, 273 N.Y. 564, 7 N.E.2d 694, 273 N.Y. (N.Y.S.) 564, 1937 N.Y. LEXIS 1300 (N.Y. 1937).

The only authority for adoption of setback restriction by a village is found in former § 89, subd. 30 and art. VI-A of the Village Law, and on ordinance imposing setback restrictions, enacted without compliance with the procedural requirements of former § 178, is invalid. Kipp v Ardsley, 13 A.D.2d 1012, 216 N.Y.S.2d 893, 1961 N.Y. App. Div. LEXIS 10140 (N.Y. App. Div. 2d Dep't 1961).

"Burnap Plan" of city design is invalid because of its indefiniteness, its visionary character, its total failure to district and divide as required by statute as well as insufficiency of proof of requisite enactment. Granville v Krause, 228 N.Y.S. 204, 131 Misc. 752, 1928 N.Y. Misc. LEXIS 791 (N.Y. Sup. Ct. 1928).

Amendment to a zoning ordinance which, in effect, defines a residence district for the exclusion therefrom of general business, and provides for its extension for an additional 200 feet with respect to the particular business of undertaking establishments, is neither unreasonable nor void. Heimerle v Bronxville, 5 N.Y.S.2d 1002, 168 Misc. 783, 1938 N.Y. Misc. LEXIS 1769 (N.Y. Sup. Ct. 1938), aff'd, 256 A.D. 993, 11 N.Y.S.2d 367, 1939 N.Y. App. Div. LEXIS 5802 (N.Y. App. Div. 1939).

Former § 175 authorizing municipal regulations with respect to the size of buildings and former § 89 subdiv 30 authorizing action respecting the bulk of buildings by implication authorize zoning regulations treating with livable floor space in dwellings and an ordinance requiring 1,800 square feet of livable floor space was not unreasonable. Flower Hill Bldg. Corp. v Flower Hill, 100

N.Y.S.2d 903, 199 Misc. 344, 1950 N.Y. Misc. LEXIS 2202 (N.Y. Sup. Ct. 1950).

A village may acquire by purchase or condemnation substandard lot which owner cannot put to any practical use because of zoning restrictions. Long Island Land Research Bureau, Inc. v Young, 7 Misc. 2d 469, 159 N.Y.S.2d 414, 1957 N.Y. Misc. LEXIS 3720 (N.Y. Sup. Ct. 1957).

Where a village adopted a Building Code, pursuant to former §§ 89, 90, and 90-a of the Village Law, requiring a 10-foot front yard setback from the street line for any building erected upon property in an area where plaintiffs' property was located, plaintiffs were issued a building permit showing no setback, but served with a stop-work order after performing a substantial amount of work in erecting a building without a setback, and sought an injunction against enforcement of the stop-work order, it was held that the ordinance was void for failure to provide plaintiffs with any way to test reasonableness of the ordinance in relation to their property. Kipp v Ardsley, 205 N.Y.S.2d 917 (N.Y. Sup. Ct. 1960), aff'd, 13 A.D.2d 1012, 216 N.Y.S.2d 893, 1961 N.Y. App. Div. LEXIS 10140 (N.Y. App. Div. 2d Dep't 1961).

While a village may establish zoning districts for various classes of residential, business and industrial use, including the location of trailer camps, it may not enact an ordinance prohibiting the use of trailers as dwellings. 1953 Ops St Compt File #6211.

Where a village zoning ordinance neither expressly nor impliedly prohibits the keeping of horses in a residential district, the zoning ordinance could not be invoked against the owner, although he might possibly be in violation of certain general village ordinances, depending on the facts. 1967 Ops St Compt File #557.

57. Miscellaneous

Where consent to the operation of an omnibus line had been given by the trustees of a village after the hearing prescribed by Trans. Corps. Law, § 66, preceded by publication of notice thereof in official newspapers, as required by Vill. Law, former § 89, subd. 39, an action to enjoin the village from permitting operation of the bus line on the ground of failure to comply with provisions of a village ordinance imposing other conditions precedent to such hearing could not be maintained. De Matteis v Peekskill, 282 N.Y. 98, 25 N.E.2d 383, 282 N.Y. (N.Y.S.) 98, 1940 N.Y. LEXIS 1006 (N.Y. 1940).

Subd 7 of former § 89 does not evidence legislative intention that government buildings be required to comply with village building ordinances. County of Westchester v Mamaroneck, 22 A.D.2d 143, 255 N.Y.S.2d 290, 1964 N.Y. App. Div. LEXIS 2694 (N.Y. App. Div. 2d Dep't 1964), aff'd, 16 N.Y.2d 940, 264 N.Y.S.2d 925, 212 N.E.2d 442, 1965 N.Y. LEXIS 1101 (N.Y. 1965), disapproved, In re County of Monroe's Compliance with Certain Zoning & Permit Requirements, etc., 72 N.Y.2d 338, 533 N.Y.S.2d 702, 530 N.E.2d 202, 1988 N.Y. LEXIS 2697 (N.Y. 1988).

A village ordinance prohibiting the keeping of pigeons passed pursuant to former § 89 was not so clearly unreasonable that it could be declared void on a motion for judgment on the pleadings. Kraushaar v Zion, 63 N.Y.S.2d 359, 188 Misc. 851, 1946 N.Y. Misc. LEXIS 2394 (N.Y. Sup. Ct. 1946).

A village may enact an ordinance which prohibits unauthorized persons from dialing the unlisted number of the fire company at time of a fire call. 1961 Ops St Compt 185.

A village may not prohibit casual maintenance of abandoned or dismantled automobiles on one's own private property unless public health, safety, or general welfare of the community is adversely affected. 1963 Ops St Compt #267.

A village ordinance may impose reasonable regulations on railroads passing through the village, provided there is no unreasonable or undue burden on interstate commerce. 1964 Ops St Compt File #566.

General police powers are sufficient to authorize a village board to require the covering or filling of an excavation. 1964 Ops St Compt #798.

A village may not purchase a coin-operated photo-copying machine for placement in the village office and use by the general public. 1967 Ops St Compt File #374.

A town water district does not have to obtain a building permit from a village preliminary to the construction of a water tank on property owned by the district within the village. 1967 Ops St Compt File #737.

The right of a village to compel a farmer to abate the piling of manure and the resulting offensive odor ultimately depends upon whether the odor constitutes a public nuisance. 1969 Ops St Compt File #411.

C. Streets, Sidewalks, and Parking

58. Use of streets

Village of Sea Cliff, in Nassau county, although not village of first class, may, under former § 89, subds. 44 and 59 and former § 90 provide for traffic signal to be erected at intersection of county road and village street. People v Wolf, 275 N.Y.S. 434, 153 Misc. 230, 1934 N.Y. Misc. LEXIS 1801 (N.Y. County Ct. 1934).

Veh. and Traff. Law § 90 does not deprive village trustees of second class village of power granted under former § 89 to "regulate and prohibit coasting" on village streets. Lockwood v Hugo, 61 N.Y.S.2d 793, 187 Misc. 159, 1946 N.Y. Misc. LEXIS 2147 (N.Y. Sup. Ct. 1946).

While a village may regulate use of its streets, its powers in this respect are further subject to § 1640 of the Vehicle and Traffic Law, under which it cannot impose unreasonable controls or exclude the owner or operator of a vehicle from free use of a public highway. Merritt Manor Estates, Inc. v Elmsford, 30 Misc. 2d 935, 218 N.Y.S.2d 371, 1961 N.Y. Misc. LEXIS 2784 (N.Y. Sup. Ct. 1961).

Although a village has statutory authority under this section and § 1640 of the Vehicle and Traffic Law to enact an ordinance regulating use of its streets, a temporary injunction against enforcement of such an ordinance can properly be issued at the instance of a restaurant owner whose patrons are prevented thereby from parking near the restaurant in such manner as to be able to depart without taking a long circuitous route to get back again on a main highway, upon a showing that the ordinance is only enforced sporadically and in a discriminatory manner. Karl's Mariner's Inn, Inc. v Northport, 39 Misc. 2d 951, 242 N.Y.S.2d 297, 1963 N.Y. Misc. LEXIS 1770 (N.Y. Sup. Ct. 1963).

The village ordinance requiring the payment of an annual fee of $10 for each vehicle engaged in the business of transporting sand, stone, and gravel along the streets of the village, which provided that a violation of the ordinance constituted disorderly conduct was invalid as a violation of Vehicle & Traffic Law § 1604. McLain Dock & Stone Co. v Port Jefferson, 60 Misc. 2d 429, 303 N.Y.S.2d 411, 1969 N.Y. Misc. LEXIS 1319 (N.Y. Sup. Ct. 1969).

That part of a village ordinance prohibiting the spilling of certain materials upon the highways within the village was valid but a further portion of such ordinance requiring the use of metal or canvass coverings on certain vehicles to prevent such spillage was invalid as prescribing equipment, the authority to prescribe such a requirement never having been delegated to local subdivisions. New York Trap Rock Corp. v Roslyn, 66 Misc. 2d 334, 320 N.Y.S.2d 584, 1971 N.Y. Misc. LEXIS 1675 (N.Y. Sup. Ct. 1971).

Powers of municipalities in regulating the use of roads are limited to those powers delegated, by the Legislature, and there is no right to close a street which has become a public right of way under the guise of regulating it. Huntington v Foster, 219 N.Y.S.2d 220 (N.Y. Sup. Ct. 1961).

Village may not convey village street to a school district so school district may maintain and police it. 1955 Ops St Compt 278.

A village may not restrict vehicular traffic upon its streets to residents of such streets or persons having dealings with them. 1964 Ops St Compt #385.

A property owner may not place a barricade between the paved roadway of a village street and the sidewalk, where there is no curb, unless permitted to do so by the village board. 1968 Ops St Compt File #462.

59. Acceptance of dedication of streets

Under former § 89 board of trustees of a village is authorized to ratify dedication of a street to village and to agree to make reimbursement for sewers and water lines, subject to a permissive referendum. Scarborough Properties Corp. v Briarcliff

Manor, 278 N.Y. 370, 16 N.E.2d 369, 278 N.Y. (N.Y.S.) 370, 1938 N.Y. LEXIS 1311 (N.Y. 1938).

Where deed conveying streets to village contained covenant that they should not be renamed, covenant concerns matter which is within corporate powers of village and of city to which village was later annexed and is unenforcible. Belden v Niagara Falls, 230 A.D. 601, 245 N.Y.S. 510, 1930 N.Y. App. Div. LEXIS 8692 (N.Y. App. Div. 1930).

A village board may accept the dedication of a street which does not have sewers, water mains and hydrants therein, pursuant to the provisions of former § 144 of the Village Law. In such case, the permissive referendum provisions of subdivision 61 of former § 89 of the Village Law are not applicable. 1947 Ops St Compt 477.

Where developers of a subdivision have furnished plans and posted bonds as required by former § 179-l of the Village Law, but the village has not formally accepted dedication of the streets in such subdivision, the village may not furnish street lighting to such streets. 1956 Ops St Compt 104.

A village can accept a dedication of lands for public streets, but only upon condition that it reimburse the owners for sewers, water mains, and fire hydrants. 1960 Ops St Compt 164.

A village may legally reimburse an individual for the expense of constructing water and sewer lines in a street dedicated to the village as a street. A claim for such reimbursement, based on the dedication agreement, properly certified or verified, must be presented for audit. The resolution authorizing the village to enter into the agreement for reimbursement is subject to permissive referendum. 1960 Ops St Compt 274.

60. Regulation of speed

A village board may not exclude motorcycles from village streets, but may restrict their speed within the prescribed minimum speed limits. 1967 Ops St Compt File #727.

A village, upon the erection of proper warning signs along its streets may regulate the speed of traffic passing a public school. 1955 Ops St Compt 185.

61. Regulations relating to trees

Village could pass ordinance, pursuant to former § 90, prohibiting destruction of shade trees in streets or parks of village under penalty for each offense. Cattaraugus v Johnson, 249 N.Y.S. 327, 139 Misc. 368, 1931 N.Y. Misc. LEXIS 1224 (N.Y. County Ct.), aff'd, 233 A.D. 799, 250 N.Y.S. 945, 1931 N.Y. App. Div. LEXIS 12807 (N.Y. App. Div. 1931).

Board of trustees may, by ordinance, compel property owners to trim or remove trees. 1946 Ops St Compt 650.

For a discussion of the authority of a village to enact ordinance regulating the location and types of trees to be planted adjacent to streets and sidewalks, see 1953 Ops St Compt File #6115.

It is the responsibility of a village to remove a dangerous tree within a street line, irrespective of ownership; it may not assess cost of removing a tree within the street line against abutting land, but, by ordinance, may compel abutting owners to remove trees in the first instance. 1964 Ops St Compt #315.

A village ordinance may validly require private owners of dangerous trees within a street line to remove such trees. A village may not, by ordinance or otherwise, require abutting owners to remove such trees where they are owned by the village. 1964 Ops St Compt File #1046.

A village may plant trees along its streets at village expense or it may assess the cost therefor against the adjoining property owners. It may not contribute half the cost, with the remainder to be paid by and at the option of property owners. 1968 Ops St Compt File #946.

62. Repair and improvement of streets

Adjacent landowners are liable for special assessments for the erection of curbing to the extent and in the proportion fixed by the village board under appropriate procedure. 1954 Ops St Compt 214.

A village, upon petition by owners of real property abutting upon a private street, may improve such street at the expense of said owners, after converting said street to a public highway. 1971 Ops St Compt File #885.

63. Sidewalks

Former § 89 did not authorize a village to adopt an ordinance making an abutting property owner liable in tort by reason of omission, failure or negligence in constructing, maintaining or properly repairing a sidewalk abutting his premises. Holcomb v Wincuinas, 22 A.D.2d 715, 253 N.Y.S.2d 190, 1964 N.Y. App. Div. LEXIS 3071 (N.Y. App. Div. 3d Dep't 1964).

Various subdivisions of former § 89, including specifically subd. 46, give power to the trustees of a village to regulate use of sidewalks, and under this authority they may accordingly regulate sidewalks included in a street-widening resolution pursuant to former § 179-h, to the extent that the street is used by the public, although title in part of the sidewalk is not in the municipality. People v Lieberman, 32 Misc. 2d 741, 228 N.Y.S.2d 878, 1961 N.Y. Misc. LEXIS 2010 (N.Y. Spec. Sess. 1961).

There is no authority for the establishment of sidewalk districts in villages, although sidewalk improvements may be charged back by special assessment against benefited property. 1954 Ops St Compt 20.

A village of the second class may not obtain easements from private property owners whose property abuts on a state highway and build public sidewalks thereon. 1962 Ops St Compt 391.

Repair and replacing of village sidewalks are the responsibility of the village, which, by ordinance, may compel abutting owners to trim or remove dangerous trees within a street line or do the work itself and assess the cost of trimming, but not removing, against abutting land; but without an ordinance both the work and the cost must be borne by the village. 1964 Ops St Compt #422.

64. —Snow removal

A village may not remove snow or permit its machinery to be used for the removal of snow from private driveways. 1946 Ops St Compt 58.

65. Parking

Village may appoint special part-time police to police parking areas and serve summons in connection therewith. 1955 Ops St Compt 314.

The owners of a private street may restrict parking thereon to the owners and their invitees. 1965 Ops St Compt File #589.

The board of trustees of a village may enact an ordinance regulating parking on the driveways of a private hospital located in such village. 1967 Ops St Compt File #705.

A village may not charge taxicab or bus companies for the use of unmetered parking space on public streets. 1968 Ops St Compt File #184.

A village has no authority to ban the parking of trucks on private property in residential areas. The village may lease property for public parking purposes. 1968 Ops St Compt File #915.

66. —Parking lots

Former § 89 was not violated by a village ordinance making it unlawful for anyone other than a licensed village resident to park in a village owned off-street parking area. People v Gilbert, 307 N.Y. 773, 121 N.E.2d 615, 307 N.Y. (N.Y.S.) 773, 1954 N.Y. LEXIS 1481 (N.Y. 1954).

While villages have power to purchase property for the purpose of public parking, there is no authority for them to do so on the installment plan. Marine Midland Trust Co. v Waverly, 42 Misc. 2d 704, 248 N.Y.S.2d 729, 1963 N.Y. Misc. LEXIS 1722 (N.Y. Sup. Ct. 1963), aff'd, 21 A.D.2d 753, 251 N.Y.S.2d 937, 1964 N.Y. App. Div. LEXIS 5365 (N.Y. App. Div. 3d Dep't 1964).

A village ordinance might establish an off-street parking area on land purchased by it at the railroad station and limit its use to village residents. People ex rel. Larchmont v Gilbert, 137 N.Y.S.2d 389, 1954 N.Y. Misc. LEXIS 2549 (N.Y. County Ct. 1954).

A village ordinance establishing an off-street parking lot exclusively for village residents was not unconstitutional as an arbitrary or unreasonable classification or discrimination. People ex rel. Larchmont v Gilbert, 137 N.Y.S.2d 389, 1954 N.Y. Misc. LEXIS 2549 (N.Y. County Ct. 1954).

A village, in order to condemn land for public parking, was not required to proceed under subdivision 18-b of former § 89 and to comply with art 11, since the village had the power to condemn land for such purpose under art 14 prior to the enactment of subdivision 18-b of former § 89. There is nothing in subdivision 18-b to indicate the legislature intended to restrict the condemnation powers heretofore possessed. Baker v Marley, 182 N.Y.S.2d 278, 1958 N.Y. Misc. LEXIS 4114 (N.Y. Sup. Ct. 1958).

A village may lease land for a parking area and install meters under a rental agreement based on meter revenue. 1954 Ops St Compt 307.

Parking space in a village parking lot may not be set aside and designated for benefit of some users to the exclusion of others. 1962 Ops St Compt 479.

67. —Financing

A village has authority to establish parking lots and set fees for their use but an ordinance setting the fee at one rate for residents of the village and residents of two outside communities and charging a higher rate for residents of all other outside communities was invalid as discriminatory. People ex rel. Lawrence v Kraushaar, 89 N.Y.S.2d 685, 195 Misc. 487, 1949 N.Y. Misc. LEXIS 2320 (N.Y. Dist. Ct. 1949).

Village bond resolution for construction of public parking places with a provision that a portion of the cost of the improvement be chargeable to the real property benefited is not subject to permissive referendum. Application of Thilly, 125 N.Y.S.2d 64, 204 Misc. 628, 1953 N.Y. Misc. LEXIS 2279 (N.Y. Sup. Ct. 1953), aff'd, 283 A.D. 663, 126 N.Y.S.2d 691, 1954 N.Y. App. Div. LEXIS 4824 (N.Y. App. Div. 1954).

The 1953 amendment to former § 89 ended prohibition against charging rentals or fees for use of public parking places acquired in whole or in part on a benefit assessment basis, irrespective of date parking place acquired. 1953 Ops St Compt 212.

Where a village has established a parking field, the cost of which was borne by special assessments upon the area of benefit, the board of trustees may install parking meters and use the proceeds to pay the annual expense of operation and maintenance. No part of such proceeds may be refunded to the taxpayers who paid the special assessments. 1955 Ops St Compt 91.

A village operating a parking lot pursuant to the provisions of the Village Law may charge nonresidents a greater fee for the use thereof. Where the parking facility was established under the provisions of the General Municipal Law it is doubtful that a discriminatory charge may be levied against nonresidents. 1959 Ops St Compt 380.

A village may not include in the total project cost of a proposed public parking lot, cost or value of real property previously acquired and paid for by the village, for purpose of apportioning such total cost between the village at large and the area benefited. 1964 Ops St Compt File #388.

A village may not assess costs of operation and maintenance of an off-street public parking facility against the property deemed benefited by the improvement. 1972 Ops St Compt File #1111.

Where a special assessment district financed the original construction of parking lots, a village board could improve the municipal parking lot and make the cost of such improvement a general village charge. 1959 Ops St Compt 379.

D. Miscellaneous Powers

68. In general

Former § 89, subdivision 7-a of the Village Law is self-executing without a general ordinance having been enacted to implement its provisions. Jewett v Luau-Nyack Corp., 31 N.Y.2d 298, 338 N.Y.S.2d 874, 291 N.E.2d 123, 1972 N.Y. LEXIS 1003 (N.Y. 1972).

A village board of trustees had power to legislate in respect of the removal of sand and gravel from the ground as a matter of zoning and such power was not recalled by the addition of subdivision 67 to former § 89. This latter power is merely auxiliary to the former. Upper Brookville v Faraco, 282 A.D. 943, 125 N.Y.S.2d 214, 1953 N.Y. App. Div. LEXIS 5529 (N.Y. App. Div. 1953), aff'd, 307 N.Y. 642, 120 N.E.2d 835, 307 N.Y. (N.Y.S.) 642, 1954 N.Y. LEXIS 1395 (N.Y. 1954).

A village ordinance providing that a justifiable abortion shall be performed only in a hospital duly licensed and accredited by the New York State Department of Health and having equipment and facilities acceptable by the State Hospital Review and Planning Council was beyond the scope of the powers of the village. Robin v Hempstead, 38 A.D.2d 758, 329 N.Y.S.2d 678, 1972 N.Y. App. Div. LEXIS 5495 (N.Y. App. Div. 2d Dep't), aff'd, 30 N.Y.2d 347, 334 N.Y.S.2d 129, 285 N.E.2d 285, 1972 N.Y. LEXIS 1262 (N.Y. 1972).

A village has plenary authority under sec to pass measures for the promotion of the public welfare, but, as with the exercise of the police power, measures adopted pursuant thereto must satisfy the dictates of reasonable necessity, must not be unduly oppressive, and the means selected must have a substantial relation to the objection sought. Kraushaar v Zion, 63 N.Y.S.2d 359, 188 Misc. 851, 1946 N.Y. Misc. LEXIS 2394 (N.Y. Sup. Ct. 1946).

An ordinance which made it unlawful for a corporation, business or individual to set up or erect on private property for public use within the incorporated limits of the village, a campsite which was to be used as temporary residences of the transient public, although prohibitory in nature, was not an irrational or arbitrary exercise of police power. Friedland v Diamond, 67 Misc. 2d 642, 324 N.Y.S.2d 578, 1971 N.Y. Misc. LEXIS 1297 (N.Y. Sup. Ct. 1971).

Village of Castelton-on-Hudson has no responsibility or liability to incorporated fire companies which constitute fire department other than that imposed by statute. 1945 Ops St Compt 215.

Duty placed upon fire commissioners to keep fire equipment in good condition and repair. 1946 Ops St Compt 721.

Board of trustees have management and control of publicity. 1947 Ops St Compt 55.

Uniform system of numbering of village dwellings may be enforced by penalties prescribed in ordinance creating system. 1953 Ops St Compt 445.

It is not necessary that doing restoration work by a village be for the protection of public property. Protection of private property may be a public purpose. 1954 Ops St Compt 20.

A village board of trustees may issue special identification cards for registered owners of automobiles who are either paraplegics or otherwise physically disabled. 1955 Ops St Compt 579.

Subdivision 48 of former § 89 does not permit a village to license and regulate vending machines which are not located in public places, but in restaurants, stores, gas stations, taverns, or manufacturing plants. 1960 Ops St Compt File #799.

A village may place its insurance with a mutual company. 1963 Ops St Compt File #321.

A village may charge a fee of as much as $2.50 per $1,000 of estimated cost for a building permit, if reasonable under the circumstances. 1963 Ops St Compt File #743.

A village board may authorize the use of equipment of one village department by another such department, and may determine which department shall be responsible for damage to the equipment or injury to the operator. 1967 Ops St Compt File #1027.

Even though a village board has adopted a resolution which is subject to permissive referendum, it may, subsequently and upon its own motion, and prior to the expiration of thirty days, submit such resolution to referendum. 1968 Ops St Compt File #817.

A village may obtain an easement on property contiguous to the village for construction of a turnaround for use by village snow plows and fire trucks at the end of a village street which dead ends at the village boundary line. 1969 Ops St Compt File #958.

The mayor of a village subject to the provisions of the Village Law has no power to veto legislative acts of the board of trustees. 1967 Ops St Compt File #432.

An ordinance passed by the village board is a prerequisite before subdivisions (33) and (42) of former § 89 of the Village Law, requiring the cutting of grass by property owners, become operative. 1968 Ops St Compt File #692.

69. Relation to penal laws

A village may enact and enforce penal regulations which are in aid of or not in conflict with the penal laws of the state. People ex

rel. Travis v Thatcher, 73 N.Y.S.2d 655, 190 Misc. 494, 1947 N.Y. Misc. LEXIS 3093 (N.Y. County Ct. 1947).

A village may adopt ordinances not inconsistent with existing law, prohibiting and punishing acts also prohibited and punished by the general law of the state, where the legislature has not expressly provided that the general law shall be exclusive, and so may make certain acts punishable by fine of a grade less than a misdemeanor, although the same acts are the subject of Penal Law former §§ 722, 723 and 1851. Brewer v Watson, 77 N.Y.S.2d 97, 191 Misc. 117, 1947 N.Y. Misc. LEXIS 3668 (N.Y. Sup. Ct. 1947).

It is within the province of a village to define disorderly conduct and fix a punishment therefore "not inconsistent with existing law". Hence, where the penalties prescribed in a local ordinance were not as severe as those of the Penal law with respect to disorderly conduct and otherwise the general import of the Village Law was consistent with the Penal Law, the local ordinance was valid. People v Jerome, 8 Misc. 2d 883, 168 N.Y.S.2d 452, 1957 N.Y. Misc. LEXIS 2059 (N.Y. County Ct. 1957), aff'd, People v Bailey, 5 N.Y.2d 832, 181 N.Y.S.2d 506, 155 N.E.2d 402, 1958 N.Y. LEXIS 726 (N.Y. 1958).

No express authority has been given to municipalities to supersede the state law as set up in §§ 2140–2153 of the Penal Law as to what may, and may not, be done lawfully on the Sabbath. Sa-Bleu, Inc. v Port Chester, 42 Misc. 2d 360, 247 N.Y.S.2d 943, 1963 N.Y. Misc. LEXIS 1263 (N.Y. Sup. Ct. 1963).

70. Village attorney

When an action is prosecuted as an official duty rather than for personal motives, and the village attorney is disqualified from acting, the village may be held liable for payment of expenses incurred. Zablow v Freeport, 41 Misc. 2d 803, 246 N.Y.S.2d 434, 1964 N.Y. Misc. LEXIS 2184 (N.Y. Sup. Ct. 1964).

A public officer has implied authority to employ special counsel in the prosecution or defense of an action undertaken in the public interest and involving his official duties where the municipal attorney is disqualified from acting, as in the case of a dispute between two agencies or officers of the governmental body. Zablow v Freeport, 41 Misc. 2d 803, 246 N.Y.S.2d 434, 1964 N.Y. Misc. LEXIS 2184 (N.Y. Sup. Ct. 1964).

The board of trustees when necessary may employ an attorney other than the village attorney to perform special services and pay reasonable compensation therefor. Farmingdale v Karp, 54 Misc. 2d 714, 283 N.Y.S.2d 267, 1967 N.Y. Misc. LEXIS 1424 (N.Y. Sup. Ct. 1967).

A village attorney may not complete and be compensated for pending litigation and bond issues after qualifying as village trustee. 1953 Ops St Compt 159.

A village may pay a fee to a former village attorney for services rendered in conjunction with a bond issue, though the village attorney was also being paid on a salary basis, if such services were in addition to those contemplated to be performed by the village attorney at the time the village attorney was appointed. 1959 Ops St Compt 300.

A village may pay counsel fees legally incurred from 1954 through 1959, inclusive, if sufficient funds are currently available. 1960 Ops St Compt 255.

A municipal commission charged with the management of a village's electric and water departments may not engage an attorney but may request the village board of trustees to furnish legal assistance. 1967 Ops St Compt File #334.

A village clerk, who is also an attorney, may be retained by the village to render legal services, relating to the expansion of its sewage treatment facilities. 1967 Ops St Compt File #1009.

A law partner of the village attorney may substitute for him at meetings of the board of trustees, with the consent of the board. 1968 Ops St Compt File #544.

A non-resident may be appointed village attorney. 1953 Ops St Compt 160.

71. —Conflicts of interest

The mayor's relatives, if qualified, may legally be appointed as village attorney and village treasurer. 1955 Ops St Compt 320.

There is no statutory prohibition against a village attorney being employed by a town as counsel to the town attorney in preparation of a charter to be used upon formation of a city composed of the village and town. 1961 Ops St Compt #248.

While it is inadvisable for the same person to hold the office of town justice of the peace in a town of the second class and the position of village attorney of a village therein, the acceptance of the second position does not result in a vacancy in the first, assuming that the village attorney has not been designated an assistant district attorney. 1965 Ops St Compt File #949.

One person may serve as both village prosecuting attorney and member of a school board. 1967 Ops St Compt File #392.

There is no incompatibility, but there may be a conflict of duties, making it inadvisable for a town attorney to serve simultaneously as village attorney of a village located in the same town. 1967 Ops St Compt File #913.

A prohibited conflict of interest does not occur where a firm of lawyers, of which the village police justice is a member, is retained by the village to render legal services. 1968 Ops St Compt File #544.

The same person may be both village attorney and attorney for the town zoning board of appeals. 1968 Ops St Compt File #799.

There is no legal prohibition against the same individual being attorney for both a village and a school district which includes the village. However, due regard should be accorded Canon 6 of the Canons of Professional Ethics of the New York State Bar Association. 1968 Ops St Compt File #987.

A prohibited conflict of interest arises when a village trustee, an attorney employed by the village attorney, participates, in his capacity as such associate in any legal matters involving village affairs, on behalf of the village attorney. 1971 Ops St Compt File #909.

It is recommended that, where the same individual is attorney for both a town and village within the town, each should employ another attorney for representation in matters between the two municipalities. 1968 Ops St Compt File #1019.

72. Police

Local law which provided for retirement of police officers upon the attainment of age 62 was adopted pursuant to the general authority conferred by former § 89. Geary v Phillips, 53 Misc. 2d 337, 278 N.Y.S.2d 506, 1967 N.Y. Misc. LEXIS 1722 (N.Y. Sup. Ct. 1967).

Determination of village to aid defense of police officers charged with assault while in the performance of their duties was within the scope of the village's authority. Gaylord v North Collins, 57 Misc. 2d 803, 293 N.Y.S.2d 365, 1968 N.Y. Misc. LEXIS 1224 (N.Y. County Ct. 1968).

No power in town to contract for village police to render emergency service to town. Town executive may request and village may grant use of village police in town emergency. 1953 Ops St Compt 348.

A village may furnish an automobile for the official, but not the personal, use of the village police chief, and may authorize the official use of a privately owned vehicle with the payment of actual expenses or a mileage rate. A village-owned vehicle may not be used for personal purposes by the village police chief. 1967 Ops St Compt File #973.

Two villages of the second and third class, respectively, may extend police protection services to each other under a mutual assistance contract not exceeding five years. 1967 Ops St Compt File #1044.

73. Limitations as to trustees

Where a village planning board had advisory authority alone which made it equivalent to no planning board at all, the board of trustees of the village could act as a planning board but when it so acted, the provisions applying to planning boards applied to the board of trustees as well. Hilbol Realty, Inc. v Barnhart, 126 N.Y.S.2d 865, 205 Misc. 187, 1953 N.Y. Misc. LEXIS 2509 (N.Y. Sup. Ct. 1953).

The legality of the official acts of a village board of trustees is not affected by the fact that a member thereof violates the Alcoholic Beverage Law by being interested in the sale of alcoholic beverages. 1955 Ops St Compt 146.

A village trustee who applies for and receives a beer license commits a misdemeanor but does not forfeit his office. 1956 Ops St Compt 81.

In a village which has no separate board of fire commissioners and wherein the village board accordingly has the powers and duties of a separate board of fire commissioners, a member of the village board of trustees may not serve as an officer or director of a volunteer fire company located in the village. 1961 Ops St Compt 147.

A prohibited conflict of interest arises where a village purchases supplies and equipment from a hardware store operated by a corporation of which a village trustee is the principal stockholder. 1968 Ops St Compt File #323.

A chairman of a town zoning board of appeals may simultaneously hold office as a village trustee. 1968 Ops St Compt File #331.

A prohibited conflict of interest exists where a village purchases supplies from a business owned by a member of the board of trustees in excess of $100 during any one fiscal year. This Department has no authority to provide an exception to that statute. 1968 Ops St Compt File #536.

A village trustee may not legally hold the office of assistant engineer of the village fire department. 1969 Ops St Compt File #245.

A trustee of a village situate within a town may legally hold the office of finance director of such town. 1969 Ops St Compt File #515.

Village trustees may not, either individually or as a board, require the village clerk to leave books and files out in the office after office hours, but the trustees are entitled to unlimited access to those records and may, by resolution of the board, be given keys to the vault. 1970 Ops St Compt File #49.

74. Other employees

Power to appoint chief engineer of fire department of Dobbs Ferry, which has no board of fire commissioners, rests with board of trustees and not with counsel of fire department. People ex rel. Wallace v Carpenter, 135 N.Y.S. 593, 77 Misc. 244, 1912 N.Y. Misc. LEXIS 1144 (N.Y. Sup. Ct. 1912).

The power to employ an attorney rests solely with the Board of Trustees of a village and, as a general rule, a public official has no authority to engage independent counsel even though his services benefit the municipality. Zablow v Freeport, 41 Misc. 2d 803, 246 N.Y.S.2d 434, 1964 N.Y. Misc. LEXIS 2184 (N.Y. Sup. Ct. 1964).

A village board of trustees may establish the office of village auditor and appoint a qualified person to fill such office. The village auditor would possess the power to order paid only those bills against the village which he himself duly audited. A village trustee may not be appointed village auditor. 1953 Ops St Compt 302.

A public officer is required to keep himself reasonably available to perform the duties of his office. Village board of trustees may not regulate office hours of village police justice. 1957 Ops St Compt 321.

While a village has statutory authority to appoint a superintendent of public works, there appears to be no authority for it to enter into an employment contract for the performance of the services of that office. 1959 Ops St Compt 260.

A village board of trustees does not possess the power to fix the working hours of the village police justice or to require him to be available between certain hours of the day. 1960 Ops St Compt 407.

Discussion of right of village in Suffolk County to appoint a person to handle local health problems and programs. 1961 Ops St Compt 207.

A prohibited conflict of interest would occur if a village mayor should be hired as an independent contractor to work for the village. While no such conflict arises if he is employed by the village, his appointment to a position of employment by the board of trustees would be contrary to public policy. 1967 Ops St Compt File #1042.

Where a village official is called to testify before a grand jury regarding his official acts, the village may retain and pay a special counsel to represent such official. 1968 Ops St Compt File #5.

There is no legal prohibition against a village police justice representing clients in criminal courts other than the village police court. 1968 Ops St Compt File #544.

75. Animal control

A village may purchase and operate a "gas chamber" for extermination of stray cats, if it has provided by ordinance for seizure and impounding of such animals. 1955 Ops St Compt 62.

Stray dogs within village boundaries are of village and town although, in counties other than Nassau and Westchester, the power to license dogs resides in town and cities therein. 1959 Ops St Compt 72.

76. Drainage and flood control

Power conferred upon board of trustees of village by subd. 15 of former § 89 is not exclusive, nor is it adequate to meet every situation and condition that may arise or exist in village; and Drainage Act of 1869, as amended in 1896, which, in terms, is made applicable to incorporated villages, is neither hostile to nor inconsistent with In re Spring Valley Swamp, 123 N.Y.S. 269, 66 Misc. 206, 1910 N.Y. Misc. LEXIS 90 (N.Y. County Ct. 1910), aff'd, 145 A.D. 636, 129 N.Y.S. 918, 1911 N.Y. App. Div. LEXIS 4807 (N.Y. App. Div. 1911).

A village has no legal responsibility to dredge or otherwise improve streams so as to prevent erosion damage to privately owned property through which such streams flow. 1954 Ops St Compt File #6955.

Village may maintain and repair a drainage ditch in which it has an easement for drainage purposes. Village may not repair an archway over such drainage ditch, where the archway has been constructed by the owner, covered with asphalt and used as a gasoline station. 1955 Ops St Compt 296.

A common drainage system constructed as a joint project by a village and a town may not be financed by the issuance of bonds. Drainage facilities constructed individually may be so financed. 1956 Ops St Compt 97.

A village may not reimburse the owner of private property for cost of constructing a drain on the property. 1962 Ops St Compt 255.

A village may maintain a drainage ditch outside village limits for draining surface water from property located within the village, but only to arrest and prevent damage to such property resulting from floods or erosion. 1964 Ops St Compt #322.

A town is not authorized to contribute town moneys to a village for maintaining a dam and retaining walls owned by and located in the village. 1969 Ops St Compt File #995.

77. Nuisances and safety hazards

Village can regulate or prohibit noises which may affect public health or safety, but it cannot indiscriminately prohibit noise from one type machine when another of possibly greater intensity is not prohibited. Stoffel Seals Corp. v Tuckahoe, 134 N.Y.S.2d 114, 206 Misc. 597, 1954 N.Y. Misc. LEXIS 2487 (N.Y. Sup. Ct. 1954).

The failure of a municipal employee to recommend measures for preventing fire or to direct the removal of a defective stove did not, without more, impose liability on a village to occupants of an apartment for losses subsequently sustained as a result of a fire. Shaw v Hempstead, 15 Misc. 2d 72, 177 N.Y.S.2d 744, 1958 N.Y. Misc. LEXIS 3064 (N.Y. Sup. Ct. 1958), modified, 11 A.D.2d 789, 204 N.Y.S.2d 945, 1960 N.Y. App. Div. LEXIS 8727 (N.Y. App. Div. 2d Dep't 1960).

While a village has the legal right to acquire lands for a public dump and to provide for use of the dump for disposal of garbage, rubbish, etc., if it fails to operate and control use of the dump in such manner as to prevent it from becoming a nuisance to nearby property owners the latter are entitled to damages or to seek an injunction against the dump as a nuisance. Bloss v Canastota, 35 Misc. 2d 829, 232 N.Y.S.2d 166, 1962 N.Y. Misc. LEXIS 2676 (N.Y. Sup. Ct. 1962).

The provision in subd. 48-a of former § 89 which authorized the trustees of a village to prohibit "whistling, ringing of bells and other noises," was not an authorization to prohibit any sort of noise but, in referring to "other noises" limited to noises similar to or resembling shouting, blowing horns, and unnecessary sound-

ing of automobile signals, and a village ordinance prohibiting "unusual" noise will not be construed as intended to extend to the ordinary noise from ordinary operation of a factory. People v F. & M. Die Casting Corp., 201 N.Y.S.2d 305 (N.Y. J. Ct. 1960).

A village may bring an action to enjoin an adjacent municipality from causing residue from its rubbish fire to fall upon certain property within the village where such activity constitutes a public nuisance, and such a nuisance is likewise subject to control or abatement under the Air Pollution Control Act. 1963 Ops St Compt File #564.

Whether an electrically charged fence, designed to prevent the owner's horses from escaping, is a public safety hazard involves a question of fact. 1967 Ops St Compt File #557.

A local noise-abatement ordinance may be enacted, regulating the use of motorcycles on village streets and prohibiting excessive noise which disturbs the tranquillity of the residential area. 1967 Ops St Compt File #727.

78. Official newspaper for publication of notices

Even if no official paper is designated by the board of trustees, designation of a newspaper for publication of the report of the treasurer must necessarily be a paper published in the village. Roy v Murphy, 33 N.Y.S.2d 991, 1942 N.Y. Misc. LEXIS 1450 (N.Y. Sup. Ct. 1942).

The annual official statement does not have to be published in the same paper as the notice of annual election but must be published and posted in the same manner as the notice of annual election so that if there are two papers printed and published in the village the notice of election might be published in one and the annual financial statement in another but where there is but one paper published in the village both notices must then be published in the same paper. Roy v Murphy, 33 N.Y.S.2d 991, 1942 N.Y. Misc. LEXIS 1450 (N.Y. Sup. Ct. 1942).

A board of trustees of a village may not designate for publication of notices, resolutions and proceedings of said board, a newspaper owned by one of the trustees even though such newspaper is only one published in the village. 1945 Ops St Compt 104.

A village may not publish the minutes of its proceedings at village expense. 1955 Ops St Compt 187.

The board of trustees of a village may not legally designate as an official paper a mimeographed give-away publication of the "penny-saver type" for the publication of notice resolutions, ordinances and other matters required by law to be published. 1955 Ops St Compt 269.

Where only one newspaper is published in a village, it may be designated as the official newspaper of the village even though a member of the board of trustees is interested in said newspaper. 1956 Ops St Compt File #8057.

A mimeographed publication of the pennysaver type which is distributed through the mails to village residents may not be designated the official newspaper, notwithstanding its large circulation. 1960 Ops St Compt 377.

Where two newspapers are published in a village, only one may be designated as official newspaper although both are qualified for designation and legal notices and other matter required to be published may be published in both, regardless of the fact that one of them has not been designated as official newspaper. 1963 Ops St Compt #198.

A village may publish and distribute in the form of a newsletter information relating to official activities of village officers, employees and agencies. 1963 Ops St Compt #831.

A village may not designate a "pennysaver" publication as its official newspaper under the provisions of the Village Law, and grave doubt exists that it may do so by local law. 1967 Ops St Compt File #336.

The mere fact that a newspaper is owned by the village mayor would not prohibit the village from publishing notices, resolutions or proceedings in such newspaper. 1967 Ops St Compt File #925.

A village board of trustees may designate a newspaper owned by the mayor as the official village newspaper. 1967 Ops St Compt File #925.

Where there is only one newspaper published in the village and that newspaper is not designated as the official newspaper, such newspaper must, nevertheless, be used for the publication of notices, resolutions, ordinances or other proceedings of the village board. 1967 Ops St Compt File #925.

79. Operation of ferry

There is nothing in the general language of subdivisions 39 and 59 of former § 89 of the Village Law empowering a village to make an exclusive grant of a ferry privilege within the village. Ocean Beach Ferry Corp. v Ocean Beach, 298 N.Y. 30, 80 N.E.2d 137, 298 N.Y. (N.Y.S.) 30, 1948 N.Y. LEXIS 821 (N.Y. 1948).

A village has the right to acquire and maintain a ferry terminal and may lease such terminal. Ocean Beach Ferry Corp. v Ocean Beach, 92 N.Y.S.2d 275, 1949 N.Y. Misc. LEXIS 2811 (N.Y. Sup. Ct. 1949), aff'd, 276 A.D. 920, 94 N.Y.S.2d 826, 1950 N.Y. App. Div. LEXIS 5135 (N.Y. App. Div. 1950).

A village's leasing of a ferry terminal owned by it and occupying 200 feet of a 1700 foot shoreline to a single company did not constitute an illegal exclusive grant of ferry privileges. Ocean Beach Ferry Corp. v Ocean Beach, 92 N.Y.S.2d 275, 1949 N.Y. Misc. LEXIS 2811 (N.Y. Sup. Ct. 1949), aff'd, 276 A.D. 920, 94 N.Y.S.2d 826, 1950 N.Y. App. Div. LEXIS 5135 (N.Y. App. Div. 1950).

A village leasing a ferry terminal owned by it may require the use of a particular type of engine and may prescribe rates and schedules. Ocean Beach Ferry Corp. v Ocean Beach, 92 N.Y.S.2d 275, 1949 N.Y. Misc. LEXIS 2811 (N.Y. Sup. Ct. 1949), aff'd, 276 A.D. 920, 94 N.Y.S.2d 826, 1950 N.Y. App. Div. LEXIS 5135 (N.Y. App. Div. 1950).

A village has the power to operate its own ferry boats and establish its own schedules and rates without obtaining any license or consent of the county court. Ocean Beach Ferry Corp. v Ocean Beach, 92 N.Y.S.2d 275, 1949 N.Y. Misc. LEXIS 2811 (N.Y. Sup. Ct. 1949), aff'd, 276 A.D. 920, 94 N.Y.S.2d 826, 1950 N.Y. App. Div. LEXIS 5135 (N.Y. App. Div. 1950).

80. Recreational activities

A village may pay rent for premises in which it operates a youth center, and may compensate teachers and pay for supplies and equipment for its recreation and leisure-time activities which are conducted during the summer months in a schoolhouse and may prepare for use and equip a village owned and operated playground. 1946 Ops St Compt 363.

Village may conduct recreational activities; when village property is not required for village purposes, village may authorize temporary use of such property by organizations and groups for reasonable consideration, and may permit incorporated community center organization to conduct recreational and other activities on such property. 1947 Ops St Compt 392.

A village recreational commission, upon establishment by the board of trustees, shall have all of the powers granted under Article 13 of the General Municipal Law. Its use of these powers shall not be subject to ratification or approval by the village board. The budget of a village recreation commission must be adopted in the same manner as the budgets of other village departments. Commission funds are held and paid out by the village treasurer. The village board may dissolve the recreation commission by repealing the creative resolution. 1958 Ops St Compt 463.

A village may not expend funds for a children's day program, or for refreshments at the close of such program. 1967 Ops St Compt File #392.

81. Repair or removal of unsafe buildings

Under subd. 7-a of former § 89 and a local ordinance empowering the village board of trustees to provide for removal or repair of buildings dangerous or unsafe to the public, there being evidence that the building in question could be repaired so as to be made safe, it was error to direct its demolition without giving the owner an opportunity to make the necessary repairs. Application of Suffern, 12 A.D.2d 769, 209 N.Y.S.2d 599, 1961 N.Y. App. Div. LEXIS 13581 (N.Y. App. Div. 2d Dep't 1961).

Where county held deed to premises and its interest appeared in records of County Clerk and it was not given notice of proceeding, village's application to remove unsafe building was denied. In re Application of Hempstead, 135 N.Y.S.2d 291, 1954 N.Y. Misc. LEXIS 2928 (N.Y. Sup. Ct. 1954).

A village possesses powers adequate to eliminate a fire hazard which consists of a residential structure in poor repair. 1953 Ops St Compt 226.

A village board has the power to demolish a condemned building no longer required for public purposes and may erect a new one on the site. 1961 Ops St Compt File #202.

A village may, by ordinance, require a property owner to repair or remove buildings which create a health hazard and safety risk, or, under subd. 7-a of former § 89, the village itself may do the repairing or removal. 1963 Ops St Compt File #378.

A village is not liable on a contract made in the name or on behalf of the village if the contract is not authorized by law. A village is not authorized to repair or remove unsafe buildings unless it has enacted an ordinance in conformity with former § 89(7-a). 1965 Ops St Compt File #586.

The village may demolish unsafe buildings on its own lands. 1967 Ops St Compt File #280.

Where a county has acquired a tax title to certain lands within a village, upon which there are unsafe buildings and upon which the village owns unpaid tax liens, the village may acquire title from the county to demolish the buildings and protect its tax liens, and the extinguishment of such liens may represent all or part of the consideration passing from the village to the county, for such purchase. 1967 Ops St Compt File #280.

A building does not constitute a "fire hazard" justifying demolition thereof solely because it is vacant and unattended. 1967 Ops St Compt File #421.

In removing an unsafe building and assessing the cost of removal against the property benefited, a village should first enact an ordinance providing for such removal and assessment and should then follow the procedure set out in former §§ 6-616 and 6-618 of the Village Law in levying the assessment. 1967 Ops St Compt File #873.

A village has the power to enact ordinances under which it may provide for the removal or repair of dangerous and unsafe buildings. 1954 Ops St Compt 209.

82. Sewers or sewage systems

The power given to village trustees to lay out, establish, etc., sewage systems is no authority for the laying of sewer pipes on private property or converting a private drain into a public sewer subject to municipal maintenance. Marks v Lake Placid, 14 A.D.2d 934, 221 N.Y.S.2d 37, 1961 N.Y. App. Div. LEXIS 7867 (N.Y. App. Div. 3d Dep't 1961).

A village may repair a private sewer in order to protect public health. The cost of such repair is borne by the sewer owner. The repairs must not be for the mere convenience of the sewer owner but must be directly related to protection of public health. A village may engage a private firm to make lawful sewer repairs; the cost of such repairs are borne by the sewer owner. 1958 Ops St Compt 455.

Villages may not install septic tanks in private homes beyond boundaries of the municipal sewage system unless the public health is endangered. 1962 Ops St Compt 457.

Cost of repairs performed by a village to the main line of a private sewer system may be assessed against the land of all property owners served by that system. 1964 Ops St Compt File #275.

There is no authority for a village at public expense to lay water mains or sewer pipes on private property for the purpose of supplying water or sewer connections to that property or to property not fronting on a public street. 1964 Ops St Compt File #775.

A village may impose a flat fee to cover the reasonable expense for issuing a permit and for inspecting a sewer connection. 1968 Ops St Compt File #368.

83. Lighting systems

Lighting districts may be established within a village upon petition of property owners. 1954 Ops St Compt 20.

A portion or the cost of more expensive lighting in a village lighting district equal to the cost, per light, of other village lighting may be made a charge upon the entire village. 1967 Ops St Compt File #1045.

A village board of trustees may, under certain conditions, establish a special lighting district upon application by petition of residents of certain village streets for special lighting facilities. The cost of installing such special lighting facilities may be a charge upon the property owners in the special district or it may be apportioned between the owners within such district and the village at large. 1968 Ops St Compt File #276.

84. Waste disposal

The legislature obviously intended that special districts should render garbage collection services to areas outside of incorporated villages, and that villages should render such services within their territorial limits. Atlantic Beach v Kimmel, 18 N.Y.2d 485, 276 N.Y.S.2d 993, 223 N.E.2d 489, 1966 N.Y. LEXIS 920 (N.Y. 1966).

A village incorporated in territory which formerly was administered by a town sanitary district had the power to render garbage service within its territorial limits upon the expiration of the contract existing with the sanitary district at the time of incorporation. Atlantic Beach v Kimmel, 18 N.Y.2d 485, 276 N.Y.S.2d 993, 223 N.E.2d 489, 1966 N.Y. LEXIS 920 (N.Y. 1966).

A village, upon its incorporation, had control and jurisdiction over garbage removal within its territorial limits after the expiration of the contract which then controlled garbage removal in the area of the village. Atlantic Beach v Kimmel, 25 A.D.2d 531, 267 N.Y.S.2d 534, 1966 N.Y. App. Div. LEXIS 4996 (N.Y. App. Div. 2d Dep't), aff'd, 18 N.Y.2d 485, 276 N.Y.S.2d 993, 223 N.E.2d 489, 1966 N.Y. LEXIS 920 (N.Y. 1966).

Mere exercise by village of governmental function will not permit it to operate its garbage disposal plant in such manner as to annoy, disturb or materially interfere with enjoyment of property and render its ordinary use or occupation physically unfit or uncomfortable; any structure which is so operated may become a nuisance. Nicoll v President & Trustees of Ossining, 220 N.Y.S. 345, 128 Misc. 848, 1927 N.Y. Misc. LEXIS 831 (N.Y. Sup. Ct. 1927).

The provisions of subd 25(a) of former § 89 in regard to the powers of the board of village trustees over the disposition of garbage show that the legislature intended a village upon incorporation to have the final say with respect to garbage removal service within its territorial limits. And this intention is further evidenced by former § 3-356, subd 2, which provides that town improvement districts "shall cease to exist at the end of the fiscal year of the district next following the first day of June following the first day of January next succeeding the date of incorporation" where the improvement district is coterminous with the limits of or wholly included within the village boundaries. Atlantic Beach v Kimmel, 48 Misc. 2d 193, 264 N.Y.S.2d 562, 1965 N.Y. Misc. LEXIS 1369 (N.Y. Sup. Ct. 1965), aff'd, 25 A.D.2d 531, 267 N.Y.S.2d 534, 1966 N.Y. App. Div. LEXIS 4996 (N.Y. App. Div. 2d Dep't 1966).

Since subd 25 of former § 89 empowered a village to enter into a contract for garbage removal and disposal, in a dispute solely between a newly created village and a pre-existing sanitary district as to such services the village is a proper party to bring an action for a declaratory judgment establishing that it has the sole and exclusive power and jurisdiction to provide for the collection and removal of garbage within its territorial limits and for an injunction (1) to restrain such district from providing such services, (2) from levying taxes against the real property in the village for such services, and (3) to enjoin such district from entering into a garbage removal contract effective after a specified date. Atlantic Beach v Kimmel, 48 Misc. 2d 193, 264 N.Y.S.2d 562, 1965 N.Y. Misc. LEXIS 1369 (N.Y. Sup. Ct. 1965), aff'd, 25 A.D.2d 531, 267 N.Y.S.2d 534, 1966 N.Y. App. Div. LEXIS 4996 (N.Y. App. Div. 2d Dep't 1966).

Board of trustees may license and regulate collection of ashes and garbage. 1946 Ops St Compt 334.

Board of trustees may enact ordinances regulating dumping of garbage, ashes and other refuse within village whether or not village maintains public dump. 1953 Ops St Compt 342.

A village may not purchase and install in private homes garbage disposal units, the cost of each unit to be repaid to the

village by the property owners over a five year period. 1954 Ops St Compt 390.

The primary responsibility for determining what items may be disposed of in the public refuse disposal system as waste or rubbish rest with the municipality. 1966 Ops St Compt File #113.

A village has no authority to establish a special district for the collection and disposition of refuse and garbage. 1966 Ops St Compt File #1130.

A village may construct a sewage disposal plant on land entirely outside of the village. 1967 Ops St Compt File #920.

85. —Cost of collection

Village may assess part of cost of collection of garbage on ad valorem basis and the balance of cost billed upon basis of garbage collected over maximum amount. 1945 Ops St Compt 413.

The collection of service charges for removal and disposition of refuse and garbage in a village should be performed by a village employee or village officer. 1955 Ops St Compt 98.

A village may impose a service charge for refuse and garbage collection. 1955 Ops St Compt 238.

Village of over 5,000 inhabitants according to last federal census may adopt a local law relating to the collection of garbage and assess the cost on property benefited and provide that on failure to pay the unpaid assessment shall become a lien on real property. 1955 Ops St Compt 306.

A village may assess the cost of garbage collection as a general village expense, only against property benefited, or by a combination of both methods. 1960 Ops St Compt 13.

A village may not reduce the amount of garbage collection service furnished to business establishments when such service is paid for by the imposition of an ad valorem village-wide tax, but said village may establish a scale of charges for the service, assessing each recipient in proportion to the benefit he receives. 1967 Ops St Compt File #864.

When a village defrays the cost of its garbage collection service by means of an ad valorem levy it may not render service to and assess residential properties unless it does the same for store properties on an equal village-wide basis. 1968 Ops St Compt File #17.

When such cost is defrayed by means of a scale of charges, residential and store properties may be classified separately and charged different rates but all properties in the village must be given an equal opportunity to use the garbage collection service, paying only when they elect so to use it. 1968 Ops St Compt File #17.

A village board of trustees may provide for the cost of the collection of garbage by general village taxation or it may fix a scale of charges for the rendering of such services on a contractual basis. 1969 Ops St Compt File #365.

There is no requirement that village residents be charged for the use of the village landfill site before a schedule of fees for nonresidents of the village may be imposed. 1969 Ops St Compt File #607.

86. —Village dump

There is nothing in the Village Law or other law which prohibits the discontinuance of a village dump. 1959 Ops St Compt 419.

A village which maintains a dump on village property outside the village limits may not adopt an ordinance prohibiting use of the dump to persons outside the town in which such property is located and impose fines upon violators, but it may license scavengers collecting garbage in the village on a reasonable fee basis. No license can be imposed by a village for collecting garbage outside its limits, even though the garbage could be dumped in a village dump outside the limits. 1960 Ops St Compt 238.

A village, not of the first class, is not authorized to permit use of its garbage dump by a private garbage collector who operates outside the village. 1961 Ops St Compt 238.

A village dump, located in a town outside of the village, may not, by village ordinance, be limited to use by residents of the two municipalities, but the town may enact and enforce such an ordinance. 1964 Ops St Compt File #908.

A village dump, located in a town outside of the village, may not, by village ordinance, be limited to use by residents of the village, to the exclusion of town residents, but the village may employ a custodian and take such other measures to bar trespassers as could lawfully be employed by any private property owner. 1964 Ops St Compt File #952.

87. Water supply and water commissioners

A water district, servicing a town in which a village is carved out of territory embraced within the district does not have a vested, superior or exclusive right to furnish all of the water to be used within the district and a village may render such services within its territorial limits. Rinas v Duryea, 278 A.D. 419, 106 N.Y.S.2d 151, 1951 N.Y. App. Div. LEXIS 3827 (N.Y. App. Div. 1951), aff'd, 304 N.Y. 586, 107 N.E.2d 80, 304 N.Y. (N.Y.S.) 586, 1952 N.Y. LEXIS 835 (N.Y. 1952).

Where village does not have a separate board of water commissioners, the minutes of the actions of the board of trustees in water matters may be combined with the minutes of actions on general village matters. 1954 Ops St Compt 343.

Exercise of power of water commissioners is subject to approval of board of trustees. 1955 Ops St Compt 311.

A village, which had purchased certain lands for the construction of a well, could not agree in writing with the private owner of the adjoining premises (who also was a former owner of the land purchased by the village) to supply the latter with free water. The property was located outside the village limits. 1959 Ops St Compt 313.

A village is not required to hold a public hearing prior to authorizing fluoridation of its water supply. 1968 Ops St Compt File #245.

A village may defray the cost and expense of operating and maintaining a water system (a) by charging the consumers a fair and equitable water rental, (b) by a general tax levy, or (c) by a combination of both methods. 1969 Ops St Compt File #346.

IV. Under Former § 332-a

88. In general

The village board of trustees of a village could resolve to construct sidewalks at village expense, but could not let a contract therefor which involved an expenditure in excess of $2,500.00 without advertising for bids. 1953 Ops St Compt 76.

A construction contract for public works may be entered into by a village only after public bidding. Village may not take unit bids from one contractor and award work to another, who did not bid, at the unit rate. 1953 Ops St Compt File #6357.

Where the village trustee is an employee of the lowest bidder on a village purchase contract, such contract should not be awarded to the trustee's employer. 1955 Ops St Compt 440.

A municipality having rejected all bids on an advertised contract, may not thereafter accept the lowest bidder, but should readvertise for new bids. 1956 Ops St Compt 138.

A contract calling for expenditure by a village of $3,000 for uniforms for members of the village fire department must be awarded by public bidding. 1961 Ops St Compt 86.

A contract for garbage collection and disposal involving an expenditure of more than $2,500 is subject to competitive bidding. 1956 NY Ops Atty June 14 (informal).

V. Under Former § 333

89. In general

The cause of action under this section, where the debt has not been paid, is the putative village creditor. Where the money has been paid, the cause of action vests in the village. Joseph A. Cicci, Inc. v Allanson, 16 Misc. 2d 394, 187 N.Y.S.2d 911, 1959 N.Y. Misc. LEXIS 3985 (N.Y. Sup. Ct. 1959).

Corporation could not recover from mayor and members of village board under this section where it paid an assessment on a water main, though mayor had stated that village would construct main at no expense to the corporation. In the absence of a resolution by the board, there could be no personal liability of the defendants, since they were not required to register their dissent to a mere discussion. Joseph A. Cicci, Inc. v Allanson, 16 Misc. 2d 394, 187 N.Y.S.2d 911, 1959 N.Y. Misc. LEXIS 3985 (N.Y. Sup. Ct. 1959).

Village funds may not be used to pay a judgment rendered against a village trustee in his private capacity where the cause of action arises out of an act of the trustee which was not within his power or duty to perform for the village. 1953 Ops St Compt 258.

A village is not liable on a contract made in the name or on behalf of the village if the contract is not authorized by law. A village is not authorized to repair or remove unsafe buildings unless it has enacted an ordinance in conformity with former § 89(7-a). 1965 Ops St Compt File #586.

Under former § 333 it is a misdemeanor and grounds for removal for a village board member to allow illegal payment of village funds, imposing personal liability to repay the village. 1964 NY Ops Attys Gen Jan 7.

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I. In General

1. In general

A village may not enact a local law authorizing it to adopt ordinances. N.Y. Op. Att'y Gen. No. 83-48.

Quorum of village board of trustees must be present to conduct hearing on proposed local law. NY Ops Atty Gen 88-50 (Informal).

Mayor has responsibility for appointment of village officers and employees, subject to approval of board of trustees, and board of trustees is responsible for authorizing village to enter into all contracts. NY Ops Atty Gen 88-79 (Informal).

Subject to due process requirements, costs incurred by village for other than local improvements may be assessed against real property in manner provided by local law, not limited by provisions of Real Property Tax Law relative to omitted assessments. 8 Op. Counsel SBEA No. 99.

2. Creation of offices

A village may create the village offices of village plumbing inspector and village attorney either by resolution or by local law. 1974 NY Ops Atty Gen Dec 20.

Discussion of validity of village local law establishing architectural review board with power to review, and approve or disapprove, all applications for building permits and accompanying site plans except applications relating to single-family residential buildings. 1978 Op St Compt File #177.

A municipality may not create a code enforcement board with the power to adjudicate alleged violations of the municipal building code and to impose penalties for such violations. 1982 Op St Compt File #82-5.

3. Employment of village attorney

A law firm may not be appointed as the village attorney. However, a law firm may be retained to render legal services under an independent contract. 1979 Op St Compt File #95.

4. Hiring of other employees

5. —Residence requirement

A village board of trustees cannot mandate that officers and employees of the housing authority reside within the village. 1978 Op St Compt File #327.

A municipal housing authority serving a village may, by resolution, require, as a condition of employment, that all future employees of the authority, hired subsequent to the adoption thereof, reside within the village. 1978 Op St Compt File #327.

Village board may employ study manager and may determine compensation of employee; if board determines that it is in village's best interest to do so, it may by local law establish exception to common law rule of compatibility so that village trustee may be employed as study manager. 1998 NY Ops Atty Gen I 98-8.

A village may engage a tax consultant and compensate him either on a per diem basis or by annual retainer. Vouchers must be submitted. 1980 Op St Compt File #444.

6. Conflicts of interest

The same person may not hold the offices of village trustee and village justice due to the control which the former has over the amount of compensation to be paid to the latter. 1978 NY Ops Atty Gen March 14 (Informal).

Offices of deputy sheriff and member of village board of trustees are compatible. 1987 NY Ops Atty Gen No. 87-16 (informal).

Trustees with direct financial interest in proposed legislation before village board must recuse themselves from participating in deliberations and decision-making on legislation. 1993 NY Ops Atty Gen I 93-11.

A village attorney normally provides legal services for all village boards and agencies (such as the planning board and zoning board of appeals). Separate counsel would be necessary in situations involving an adversary relationship between the board of trustees and any such boards. 1980 Op St Compt File #675.

7. Conduct of meetings; hearings

The Mayor of the Village of Haverstraw does not have the authority to order each of the Trustees of the Village Board to sit in a particular seat at a reorganizational meeting or any other Board meeting unless so empowered by duly adopted rules of procedure of the Board of Trustees. 1976 NY Ops Atty Gen May 11 (informal).

Quorum of village board of trustees must be present to conduct hearing on proposed local law. NY Ops Atty Gen 88-50 (Informal).

It would appear that a village board of trustees can prohibit use of recording devices at its regular meetings. 1978 Op St Compt File #457.

The village board has discretion to determine the rules of its procedure including the method used to convene special meetings. It may also adopt a resolution calling for a special meeting. 1980 Op St Compt File #482.

When necessary in the public interest, meetings of village boards and commissions may be held in a facility situate outside of the territorial limits of the village. 1982 Op St Compt File #82-286.

Executive sessions of village board of trustees might properly have been conducted to consider topic of "safe houses" for battered women, since CLS Pub O § 105(a) applies in consideration of need to provide safety and security to battered, abused or threatened women and their children. Comm on Open Gov't OML-AO-3925.

8. Village contracts

A choice of law clause within a public contract would be permissible so long as there is authorization to enter into the underlying contract. 1983 Op St Compt File #83-178.

9. Liability insurance

A village may protect it's officers and employees against liability for claims either by purchasing liability insurance or becoming a self-insurer. 1978 Op St Compt File #996.

A private civic association may not be included as a additional named insured in a general liability policy purchased by a village, even if the association bears the additional cost. 1981 Op St Compt File #81-214.

10. Maintenance of private property

A village may enact an ordinance which would compel a person whose property line extends to the center of a village street to remove diseased and dangerous trees growing within the right-of-way at his own expense. In the event that such property owner fails or refuses to remove such trees, the village would be entitled to seek a penalty pursuant to Section 20-2010 of the Village Law and a judgment for the actual expense of their removal if permitted by a properly enacted local law. There is no authority permitting a village to enact an ordinance compelling a person, whose property abuts a street owned in fee by the village, to remove diseased or dangerous trees that are within the right-of-way and are the property of the village. 1974 NY Ops Atty Gen July 3 (informal).

A village may adopt a local law to remove unsafe or dangerous buildings constituting a nuisance, provided that the local law is consistent with constitutional due process requirements, as, for example, shown by Multiple Dwelling Law, § 309(1)(a) through (f), Multiple Residence Law, § 305(2) or General City Law, § 20(35). 1974 NY Ops Atty Gen Sept 25 (Informal), 1974 N.Y. AG LEXIS 153.

In order to further safety and general welfare of persons and property, village has authority to prohibit, by local law, parking on lawns of residences within village and to enforce such local law by issuing tickets. 1986 N.Y. Op. Att'y Gen. No. 86-10.

Village may enact local law providing for demolition and clean up of unsafe buildings and, in event owner fails to reimburse village costs, also providing for sale of property in order to effectuate its lien. 1998 NY Ops Atty Gen I 98-35.

Subject to due process guarantees, a village may remove obstructions within the village highway right-of-way and, by local law, may require that abutting property owners remove obstructions in the right-of-way placed there with their consent and/or that the cost of removal of such obstructions be charged back to the abutting owners. 1981 Op St Compt File #81-67.

11. Regulation of park land

Park use regulations may be established by local law or by a properly created park commission provided they are approved by the Village Board consistent with the procedures necessary in enacting a local law. 1980 NY Ops Atty Gen July 18 (Informal), 1980 N.Y. AG LEXIS 84.

12. Waste disposal

A village may not modify its garbage collection contract by increasing the compensation paid or reducing the number of days of pick-up without receiving additional consideration to support the modification, and any modification may not result in a material variance from the original bid specifications. 1981 Op St Compt File #81-41.

Where a village finances its refuse collection service through general taxation all properties within the village are entitled to the service, including those properties which are exempt from real property taxation. The village is not required to provide more service to a school district than to other similarly situated properties, but the village may enter a municipal cooperation agreement with the school district to provide additional service to the district for a fee. 1983 Op St Compt File #83-201.

13. Water and sewer services

A village may regulate swimming and, where not inconsistent with applicable Federal or State law, the operation, anchoring and mooring of vessels in navigable waters bounding the village to a distance of fifteen hundred feet from the shore. There is no authority for village regulation of fishing, shellfishing or the construction of piers and docks in such area. N.Y. Op. Att'y Gen. No. 83-56.

Discussion of responsibility of a village for maintenance and improvement of a sewer line located in the village in circumstances where it is not clear who owns the sewer line. 1978 Op St Compt File #704.

A village may share the cost of digging a well on private property to supply water to the village hall and the private property owner. 1980 Op St Compt File #68.

14. Zoning powers

A village by local law may prohibit the raising and grazing of livestock on private property in certain areas of the village where

warranted under the police power. In general, a village may not use its zoning power to prohibit the keeping of livestock on land presently being used for that purpose, but may provide for the discontinuance of such use within a reasonable period of time. 1982 NY Ops Atty Gen July 9 (informal).

A village board, or a town board of trustees, is not authorized to settle litigation so as to grant a variance application the zoning board of appeals denied. Such an action would usurp the power to grant or deny a variance vested exclusively in the board of appeals by Village Law, § 7-712(2)(c). While a town board or village board of trustees cannot compromise litigation contrary to a board of appeals determination, it can amend or repeal zoning regulations or timely commence an Article 78 proceeding to overturn denial of variance application. 1990 N.Y. Op. Att'y Gen. No. I90-45.

A member of the village board of trustees should recuse himself from participating in an application for a change of zoning that would benefit the industry for which he is employed. 1990 N.Y. Op. Att'y Gen. No. I90-57.

15. Use of village funds

The Village of Broadalbin may not, without adequate consideration, expend moneys to provide an office or home for a physician. 1978 NY Ops Atty Gen June 22.

The village may, after adopting a local law authorizing a publicity fund, expend moneys to advertise for a doctor in trade magazines, newspapers or other applicable places. 1978 NY Ops Atty Gen June 22.

Board of trustees has control of village funds and may establish reasonable rules to ensure that expenditures do not exceed budgeted amounts or available funds. 1994 NY Ops Atty Gen I 94-38.

A town and a village may agree to expend funds jointly to pay for the cost of publishing a coloring book commemorating the 300th anniversary of the area. 1978 Op St Compt File #264.

A village has neither the authority to donate funds to "The Family", a private organization that assists people in temporary emotional distress, nor to contract with such an organization. 1978 Op St Compt File #914.

A village may expend funds to hire consultants who will study the question of why 5 percent or more of the village dwellings are having serious problems with basement flooding. 1979 Op St Compt File #417.

A village may not make a gift of funds to a volunteer ambulance service but may contract with it for the rendering of ambulance service to the village. This assumes, of course, that the volunteer ambulance service possess a valid voluntary ambulance service statement of registration. 1979 Op St Compt No. 79-492.

The City of Saratoga Springs may expend moneys from its publicity fund to pay for actual and necessary expenses incurred in connection with a "Legislators' Day" held for the benefit of the members of the New York Legislature if such expenditures serve the purpose of promoting the general commercial and industrial welfare of the City. Whether an expenditure is for such a purpose is a question of fact to be determined in the first instance by local officials. To the extent Opns St Comp, 1965, No. 65-315, unreported, or other opinions of this Department are inconsistent with this opinion, they are superseded. 1979 Op St Compt No. 79-655, 1979, 1979 N.Y. Comp. LEXIS 164.

The Camillus Volunteer Fire Department may, without public bidding, purchase an ambulance with its own funds and then donate the ambulance to the village. But, any purchase made with village funds must meet the requirements of public bidding. 1979 Op St Compt No. 79–666.

A village may not expend moneys generated from a village recycling program for the cost of a Christmas party for village employees. 1980 Op St Compt File #186.

Village may not contribute village funds to a veterans' organization to help finance a Memorial Day celebration planned in the village by the organization. However, the village may authorize the organization to stage the event on behalf of village residents generally and reimburse it for proper expenses incurred. 1980 Op St Compt File #192.

A village may not contribute funds to a private association that holds a boat race, but may, by local law, authorize itself to establish a publicity fund from which expenditures to promote a privately sponsored boat race could be made if the village board determines that such race will publicize the village as a recreational or resort area. 1980 Op St Compt File # 739.

A village board may hold an annual dinner for unsalaried members of various village boards where only the meals of the members will be paid for by the village as a token of appreciation for the services rendered by such members to the village. 1981 Op St Compt File #80-775.

A village may authorize the appropriation of funds for the observance of Memorial Day by adoption of a local law or resolution. 1978 Op St Compt No. 78–854.

16. Payment and compromise of claims

Discussion of payment of claims under a contract for public relations work, including the preparation of a newsletter. 1978 Op St Compt File #559.

As a general rule, a village may not wholly or partially forgive an amount due from a water district arising from leaks in the supply lines located in the district. The village may compromise claims which the water district might have against the village with regard to the leaks. 1980 Op St Compt File #899.

17. Compensation of officers and employees

Discussion of extra compensation for village attorney. 1978 Op St Compt File #977.

A village board, by resolution, may determine to compensate a village attorney by a fixed annual amount for certain specified services and by a flat fee or on percentage basis for work in connection with real property tax collection by civil action. 1981 Op St Compt File #81-145.

A village justice may receive his salary quarterly and on the first day of every fourth month regardless of when other village employees are paid if the village board has so authorized by resolution. The mayor may also order that pay checks be issued early when the regular payday falls on a holiday if the village board has, by resolution, authorized him to do so. 1981 Op St Compt File #643.

A village board may, be resolution, determine to compensate a village attorney by a fixed annual amount, an hourly or a daily rate, or a combination thereof. Opn No. 75-942 and other prior opinions superseded to the extent inconsistent. 1981 Op St Compt File #80-792.

A village may not prorate the annual salaries of the mayor and trustees on a monthly basis and withhold payment of such prorated amounts for failure to attend a regular monthly meeting of the board of trustees. 1978 Op St Compt File #993.

18. Purchase or sale of property

Village seeking to acquire property in town for purposes of public utility service under CLS Gen Mun Art 14-A must use procedures set forth in Eminent Domain Procedure Law; CLS Vill § 4-412(3)(1) does not apply. 1999 NY Ops Atty Gen I 99-44.

The consideration for the sale of the hospital assets could properly include the promise by the private hospital to continue acute care hospital services at the village hospital site, continued employment of the village's hospital employees by the private hospital and a cash payment. 1978 Op St Compt File #932.

The village may accept the cash portion of the consideration on a deferred payment basis, if it adopts a local law authorizing it to take back a purchase money bond and mortgage for the cash consideration. 1978 Op St Compt File #932.

19. Lease of village property

Local government is not authorized to permit use of its property for private advertising. 1992 NY Ops Atty Gen I 92-56.

A village is authorized by Village Law § 4-412(1)(10) to lease air rights as provided therein. 1978 Op St Compt File #980.

A village may lease the air rights above a village parking facility for a period of 40 years, renewable for up to three 15 year periods, to a private developer who intends to build a shopping plaza above such parking facility. 1979 Op St Compt File #118.

The Village of Saranac Lake may, for adequate consideration, grant a license or concession to one or more individuals, partnerships or corporations to use a portion of a public park to sell food, beverages, souvenirs and other artifacts during the 1980 Winter Olympics. 1979 Op St Compt File #909.

20. Village fees or assessments

A village may charge a fee for permission to fish in a village-owned reservoir; discussion of the propriety of charging a larger fee to non-residents of the village. 1978 Op St Compt No. 78–898.

A village may establish a fee schedule for individuals using a beach parking area which differentiates between residents and nonresidents of the village, regardless of whether the parking area is owned by the village or leased to the village. 1979 Op St Compt File #139.

A village which finances its garbage and refuse collection service by means of a general tax may not exclude industrial property owners from use of such service. A village may establish a system of contractual charges for garbage and refuse collection to reflect the services rendered to each property owner. 1979 Op St Compt File #307.

Where a village is situate in Towns A and B, and garbage collected by its municipal collection service is deposited in a landfill located in, and operated by, town A, the village may impose a service charge on property owners situate in town B to pay the cost to the village, charged by town A, for disposal of garbage collected in town B. 1979 Op St Compt File #563.

Where a property owner in a village fails to connect to the public sewer system, the village may not collect sewer rents from the owner. But the village may have the connection made and assess the cost against the property or it may require connection by local law and if the property owner then fails to connect the village may impose a fine if the local law so provides. 1980 Op St Compt File #326.

A village which finances its refuse and garbage collection service with general tax revenues may not exclude certain types of property from such service. However, the village may operate its collection service on a contractual basis and may charge different types of property different rates based on the value of the services rendered. 1980 Op St Compt File #329.

The village board of trustees is empowered to fund garbage collection through the general village tax or as a special charge or assessment against the real property benefitted. 6 Op Counsel SBEA #23 (1977 May 20).

21. Practice and procedure

The standard practice of a village board of trustees over a period of years under which committee members and chairmen are appointed by the mayor subject to approval by the board of trustees constitutes a determination of the village board of the rules of its procedure and should be followed until changed by formal action of the board. Committee memberships and chairmanships are not public offices and no term of office attaches so there is no reason why a committee can not be abolished or its membership changed or the chairman changed during the official village year. A subsequent appointment of a new chairman by the mayor, approved by the board of trustees, removes the original chairman and replaces him with the new one. When the mayor states that he removes a committee chairman and a motion to override the action fails to receive a majority vote, it is an expression of the will of the board of trustees that the chairman is dismissed. 1977 Op Atty Gen Nov 23.

When refunding an overpayment after a claim is made, a village may not waive the defense of the statute of limitations. 1979 Op St Compt File #235.

Where a village board of trustees informally agreed to extend medical insurance benefits to village officers at a meeting in 1973, and did so but without formal resolution, village board may now ratify such action by adoption of resolution or local law. 1979 Op St Compt File #266.

22. Miscellaneous

A village may provide for general ambulance service either under General Municipal Law § 122-b(1) or Village Law § 4-412(3[9]). 1977 NY Ops Atty Gen Feb 3 (Informal).

The legislative body of a village may enact a local law to provide that a village police officer may remove a vehicle that is delinquent on six or more parking meter violation tickets. 1977 NY Ops Atty Gen Sept 21.

The village may not grant a property tax exemption for a doctor's office or home for a specified length of time. 1978 NY Ops Atty Gen June 22.

Village Law, § 4-412, Article 9, § 2(c) of the New York State Constitution and Municipal Home Rule Law, Article 2, § 10(1)(i), give a village the general power to adopt local laws relating to village business which are not inconsistent with the Constitution nor with the general laws of the State. While there is no specific authority for a village to establish a publicity fund, the village may, by adopting a local law, supply this authority. There is no monetary limit set by law on this fund. Similarly, a limit could be set by adoption of a local law. 1978 NY Ops Atty Gen Feb 28 (Informal).

The Town/Village of Harrison is only authorized to adopt the provisions of General Business Law, § 352-ee and is not authorized to adopt a local law which regulates the conversion of rental premises to cooperatives or condominiums. 1979 NY Ops Atty Gen Feb 1.

Town Law, § 64(11-a), Village Law, § 4-412(3)(1) and General Municipal Law, § 119-o are permissive statutes and impose no duty on the town or village to make repairs on privately owned streams within such municipalities. 1979 NY Ops Atty Gen Sept 14 (Informal).

A village may, by local law, prevent the operator of a tavern or bar from allowing persons to enter a bar once the occupancy limitations have been reached. 1980 NY Ops Atty Gen Sept 10 (informal).

A village board of trustees may enact a local law pursuant to its general police powers prohibiting parking on private property and providing for the removal of motor vehicles parked in violation of such an ordinance. 1980 NY Ops Atty Gen Sept 10 (informal).

A village ordinance regulating taxis may be suspended but only by a local law. 1980 NY Ops Atty Gen Sept 15 (informal).

Person may simultaneously hold offices of county treasurer and village trustee, village mayor or village budget officer. 1986 NY Ops Atty Gen No. 86-63 (informal).

Individual trustees have access to records of village that are not exempt from disclosure. 1994 NY Ops Atty Gen I 94-38.

Chief, deputy chief, and assistant chief of village fire department may not hold office of mayor or trustee of village. 1998 NY Ops Atty Gen I 98-33.

Village may use boat parking meters to collect fees for use of village-owned docks; village may not create traffic violations bureau to handle parking tickets issued as to use of its docks. 2000 NY Ops Atty Gen I 00-21.

Village may in its proprietary capacity prohibit a person who has an unrestricted license to carry a firearm from entering village hall carrying or possessing a firearm covered by the license, as although CLS Penal Law § 400.00(6) prohibits village from regulating the licensing of firearms, these provisions do not preclude village from acting in its proprietary capacity for safety of its property and persons present thereupon, and in its proprietary capacity village can prohibit persons from entering its property while possessing a firearm, even if he or she has an unrestricted license to carry such firearm. NY Ops Atty Gen 89-75 (informal).

A village may adopt a local law providing for the disposition by sale or otherwise of vehicles which are duly impounded by it and which are not considered as abandoned vehicles under Vehicle and Traffic Law, § 1224, provided principles of due process are served. 1978 Op St Compt File #756.

A village may not enact a local law providing for the prosecution of individuals engaging in conduct in violation of Education Law, § 265, and providing that such conduct is not a crime, but a violation, inasmuch as state legislature has declared such conduct to be criminal. 1978 Op St Compt File #947.

Village may enact local law prohibiting hunting or trapping in residental areas for purposes of public safety, even though the regulation of hunting or trapping has been pre-empted by State law. 1979 Op St Compt File #79.

A village lacks the authority to erect a community residential facility for the mentally ill. 1979 Op St Compt File #316.

A village may adopt a local law providing for the publication of a newsletter to be distributed to village residents. 1979 Op St Compt File #383.

A village may enact a local law providing for the publication of a list of tax-exempt properties which identifies the owners, the

basis for and the amounts of the exemptions. 1979 Op St Compt File #499.

Whether a village may legally adopt a local law creating a "quiet zone" in the area of a village-operated hospital depends upon the circumstances. 1979 Op St Compt No. 79-527, 1979 N.Y. Comp. LEXIS 157.

A village, by local law, may amend the penalty provisions of a 1964 housing code ordinance to fix minimum and maximum fines, but maximum may not exceed $250 unless the entire ordinance is repealed and reenacted as a local law. 1979 Op St Compt File #589.

A village may adopt a local law authorizing volunteer firemen to receive reimbursement for actual and necessary expenses or a mileage allowance for travel in their own automobiles on fire department business. 1979 Op St Compt File #722.

The board of trustees has the power to determine the location of all village offices within the village hall. The board of trustees may impose additional duties upon the justice court clerk without increasing the salary of that office. 1980 Op St Compt File #90.

The law is uncertain whether a village local law licensing taxi-cab owners may prohibit the transfer of a license. 1980 Op St Compt File #104.

In the absence of the village treasurer, the village board of trustees has the authority to delegate the duty of signing tax sale certificate redemptions, bond anticipation notes and other documents which would normally be signed by the treasurer or deputy treasurer, if any, to another village officer. 1980 Op St Compt File #131.

A village, in an agreement with a private operator for the use of the village stadium to stage stock car races, may require that all drivers of race cars be licensed drivers. In lieu of such an agreement, the validity of a local law to that effect depends upon the reasonableness thereof in light of constitutional principles. 1980 Op St Compt File #714.

A village may not adopt a local law requiring that all trucks and trailors transporting refuse capable of being windblown, be covered by a tarpaulin or other similar cover. 1981 Op St Compt File #81-189.

A village may amend its parking ordinance by local law to provide that if a parking violation fine is not paid within a specified period of time, the fine will be doubled, except that the total fine cannot exceed the maximum amount set forth in Vehicle and Traffic Law, § 1800. However, it is doubtful that local legislation can be enacted doubling a fine for vioaltion of a parking regulation for failure of the violator to appear on the return date specified in the appearance ticket. 1981 Op St Compt File #80-798.

A county or village may adopt a resolution which recognizes or "approves" the establishment of a not-for-profit corporation and the issuance of its obligations for a public purpose. Such resolution has no substantive effect under New York law in that the failure to adopt the resolution would not prohibit either the establishment of, or the issuance of obligations by, the corporation. The State Comptroller expresses no view with respect to whether such a resolution is sufficient to qualify the obligations to be issued by the corporation as being issued on behalf of a political subdivision under Revenue Ruling 63-20. 1982 Op St Compt File #82-19.

A village may adopt a local law providing that all existing ordinances containing no penalty provision be designated as violations and imposing as a penalty a fine not to exceed $250. The local law cannot denominate as public nuisances violations which do not as a matter of law constitute public nuisances. 1982 Op St Compt File #82-288.

Subject to constitutional considerations, a village may adopt a local law providing for the licensing and regulation of video game arcades. 1982 Op St Compt File #82-357.

A member of a village board of trustees may purchase and use stationary imprinted with the village logo or seal for correspondence related to his official duties. 1983 Op St Compt File #83-62.

If a village board of trustees determines that exclusion from village boundaries of an area of a fire district which has been annexed to the village will serve a village purpose, it may expend village moneys and utilize the village attorney's office to assist in preparing the petition for such exclusion. 1983 Op St Compt File #83-192.

The interest rate and redemption period provisions of sections 46 and 48 of the General Business Law, relating to collateral loan brokers, are preemptive. N.Y. Op. Att'y Gen. No. 2012-3, 2012 N.Y. AG LEXIS 3.

Discussion of certain procedures to abate dangerous conditions of abandoned buildings and to recoup costs of abatement. 2015 N.Y. Op. Att'y Gen. No. 2015-3, 2015 N.Y. AG LEXIS 2.

II. Under Former § 88

23. In general

Whenever required by a member of the board, the vote upon any question before the Post Chester Village Board of Trustees must be taken by ayes and noes and the names of the members present and their votes entered in the minutes of the meeting. 1955 NY Ops Atty Gen 110 (informal).

Where a village board of trustees consists of five members, three must vote in favor of a resolution before it can be properly adopted. 1957 NY Ops Atty Gen July 19 (informal).

A village trustee may not vote by proxy at a meeting of the village board. 1958 NY Ops Atty Gen Dec 30 (informal).

There is no legal provision which permits village trustees to vote by proxy. 1962 NY Ops Atty Gen June 22.

A resolution to appoint a member of the village planning and zoning board by a five member village board, all members being present at an organization meeting, said resolution being properly moved and seconded but receiving only two affirmative votes, one negative vote and two trustees voting "present," was defeated. 1966 NY Ops Atty Gen May 11.

While any official action of the board should be taken at a meeting open to the public, including the news media, a village board of trustees may adopt proper legislation by the affirmative vote of a majority of all its members prohibiting the use of tape recorders by the public during sessions of its board meetings. 1970 NY Ops Atty Gen March 18 (Informal), 1970 N.Y. AG LEXIS 50.

The Village Board of Trustees of the Village of Honeoye Falls is authorized to adopt a resolution by an affirmative vote of a majority of all its members prohibiting the use of a tape recorder by one of its members during sessions of its Board meetings if in its judgment the recording distracts from the true deliberative process of the Board. 1972 NY Ops Atty Gen Oct 27.

III. Under Former § 89

A. Financial and Contractual Powers

24. Banks of deposit

Federal savings and loan association, created pursuant to § 5 of Home Owners' Loan Act of 1933, is not a bank or trust company within meaning of provisions of former § 89 designating permissible depositories of village funds. 1939 N.Y. Op. Att'y Gen. No. 169, 1939 N.Y. AG LEXIS 141.

Where there is no bank in a village, a bank outside the village may not be designated as the village depository if a village trustee is vice president thereof. 1953 NY Ops Atty Gen 44 (informal).

A bank in which a village trustee is interested as a stockholder, officer or director may be designated as a depository of village moneys only when it is the only bank in the village. 1953 NY Ops Atty Gen 124 (informal).

Where village officers are officers or stockholders of the only two commercial banks in the village which might be designated as depositaries for village funds, either or both of such banks may be designated as depositaries for village funds. 1956 NY Ops Atty Gen Nov 30 (informal).

25. Village funds

A village board of trustees may by resolution establish a petty cash fund for the village clerk. 1954 NY Ops Atty Gen 72 (informal).

26. Use of village funds

There is no statutory authority for the expenditure of village funds to conduct a special census by the Federal Bureau of Census. 1953 NY Ops Atty Gen 127 (informal).

There appears to be no authority for the expenditure of village funds to pay a reward for information leading to the arrest of a criminal. 1953 NY Ops Atty Gen 144 (informal).

A village of the fourth class may not expend village moneys to buy and operate a bus for the convenience of residents of the village. 1957 NY Ops Atty Gen Jan 7 (informal).

Village funds may not be paid to a town to reimburse the town in part for the cost of a special population census. 1957 NY Ops Atty Gen Nov 18 (informal).

27. Employee benefits

Although a city is restricted to paying one-half the cost of accident and hospital insurance for its officers and employees, a village may pay the entire cost. 1961 NY Ops Atty Gen Sept 28.

A village may assume the entire cost of hospitalization, medical and surgical insurance covering its officers and employees. 1957 NY Ops Atty Gen Aug 12 (informal).

28. Private enterprises

There is no authority for a village to turn over village moneys to a veterans' organization to assist it in erecting a club house. 1954 NY Ops Atty Gen 88, (informal).

29. Publicity fund

The $1,500 limitation upon the amount of a publicity fund may not be increased. There is no authority for the submission of a proposition for this purpose. 1953 NY Ops Atty Gen 130 (informal).

30. Acquisition of property

31. —for parks

A village may not charge village residents for admission to a village-owned public park although it is possible that a charge could be made for the use of some special facilities in the park. 1953 NY Ops Atty Gen 56 (informal).

A village may lease, for a nominal consideration, municipal property not otherwise required for public use, for use as a playground or recreation area. 1953 NY Ops Atty Gen 80 (informal).

A town and a village may enter into a municipal cooperation agreement to establish and maintain a public park in such village. 1965 NY Ops Atty Gen Sept 7.

The Village of Kensington is not authorized to contract by lease or otherwise with private enterprise to conduct its parks, playground or recreation programs or portions thereof. 1969 NY Ops Atty Gen Oct 23 (informal).

32. —Personal property

A village Board of Trustees may acquire a motorboat for use of the police department to enforce provisions of the Penal Law, and may expend money for insurance premiums on such vessel. 1962 NY Ops Atty Gen Jan 12.

A village may obtain by condemnation property needed for the construction of a village garage. 1953 NY Ops Atty Gen 63 (informal).

Lands owned by a private business corporation and used by it in the operation of a private school may be acquired by a village for any municipal purpose by condemnation. 1953 NY Ops Atty Gen 76 (informal).

Village may purchase land for a public use, such as a park, subject to a condition for reversion or repurchase should the property cease to be used for the intended purpose. 1953 NY Ops Atty Gen 92 (informal).

While a village is not authorized to acquire property without the confines of the village for use as a village garage, a town may acquire such property outside of the town boundaries for such purpose. 1972 NY Ops Atty Gen Mar 2.

33. Lease of village property

34. —Docks

It is doubted that a village board of trustees may properly enter into a lease with a private person to use the village-owned dock for private purposes, even though the public is at all times permitted access to the dock. 1955 NY Ops Atty Gen 171 (informal).

Village may lease land not held or no longer required for public use but may not lease land held for public use. 1955 NY Ops Atty Gen 148 (informal).

35. Sale or transfer of property

36. —Park lands

Consent of the legislature is necessary for a village having home rule powers to sell village park property. 1953 NY Ops Atty Gen 138 (informal).

Generally speaking, real property held by a municipality for a public use may not be alienated without express legislative authority. 1953 NY Ops Atty Gen 98 (informal).

Village owned real property not held for a public use may be sold upon resolution of the board of trustees without submitting such resolution to permissive referendum. 1953 NY Ops Atty Gen 107 (informal).

Legislative consent is necessary for a village to sell property held for public use. 1954 NY Ops Atty Gen 74 (informal).

A village may sell its excess lands without either referendum or public bidding. 1958 NY Ops Atty Gen Oct 10 (informal).

A village-owned parking lot is held for "public use" and may not be sold or leased without legislative authority, but sale may be authorized by resolution when it has ceased to be so used and is no longer required for public purposes and conveyance is not subject to either a mandatory or permissive referendum. 1964 NY Ops Atty Gen May 25.

The Board of Trustees of a village may sell village real property not held for a public use upon resolution and no referendum is necessary. Said sale may be to a private individual at a private sale without public notice. 1965 NY Ops Atty Gen Feb 26.

A village board of trustees without public auction may by resolution for a proper consideration convey land or a properly discontinued street provided such land had not been deeded to the village to be held in trust by it for street purposes. 1967 NY Ops Atty Gen June 1.

A village that has acquired land by purchase to be used as a village dump may not sell such land while it is used for such purpose. 1967 NY Ops Atty Gen June 5.

The Village Board of Trustees of the Village of Munsey Park is authorized to sell surplus lands without public auction and use the proceeds therefrom to defray the costs for the erection of a village hall and police justice court. Authorization for such sale and construction by the Village Board of Trustees is not subject to permissive referendum. 1972 NY Ops Atty Gen Oct 19.

37. Assessments

Property of a charitable or religious corporation is subject to village benefit assessments for new sidewalk construction, garbage and refuse collection, but neither these corporations nor a school district are liable for an assessment for village fire protection. 1955 NY Ops Atty Gen 6 (informal).

38. Contract bid requirements

In the absence of fraud, the courts will not interfere with judgment of village board in awarding contract to bidder other than lowest bidder. 1960 NY Ops Atty Gen June 2 (informal).

39. Particular contracts

A Village Board of Trustees may not, in the absence of statutory authority therefor, enter into a contract to employ an individual which would run longer than the period of its own existence. 1955 NY Ops Atty Gen 116 (informal).

As between village and town fire districts there is no provision for, and there is a prohibition against, inclusion of territory of one in the territory of the other; but a contractual relationship may be entered into so as to accomplish the desired result. 1961 NY Ops Atty Gen Aug 30.

The air space above real property maintained by a village as a parking area up to the height to which it may reasonably be expected to be occupied may not be leased without specific legislative authority therefor. General Municipal Law § 72-j grants such authority as to real property acquired and disposed of in accordance therewith. 1966 NY Ops Atty Gen May 9 (Informal), 1966 N.Y. AG LEXIS 71.

Under the above sections, there exists authority whereby the Board of Trustees of the Village of Fishkill may designate a board of fire inspectors composed of volunteer firemen of a fire company whose performance of duties as such fire inspectors would be covered under the Volunteer Firemen's Benefit Law. 1970 NY Ops Atty Gen Feb 18.

A village may not enter into a contract to furnish fire protection to a person residing outside the corporate village limits. 1959 NY Ops Atty Gen Jan. 28 (informal).

Library building may be built by village on land held for park purposes and contract may be made with county library service. 1967 NY Ops Atty Gen Nov 20.

B. Regulatory Powers

40. Amusements

Village may let concessions for innocent amusements, under certain restrictions, but is not authorized to operate them itself. 1926 N.Y. Op. Att'y Gen. No. 232.

41. Bicycles

A village board of trustees may not establish a "Bicycle Court" nor may a village ordinance provide for the impounding of a bicycle because of the act of the rider thereof. 1953 NY Ops Atty Gen 41 (informal).

42. Boats and waterways

A village has certain powers to regulate, but not to prohibit the use of, motor powered boats on small bodies of water, such as Georgica Pond in Suffolk County. 1960 NY Ops Atty Gen July 26 (informal).

A town ordinance passed for the purpose of regulation of vessels is not effective in waters within or bounding an incorporated village to a distance of fifteen hundred feet from the shore of the village, whether or not a village has adopted regulations. There is no concurrent jurisdiction by the two types of municipalities. 1974 NY Ops Atty Gen Mar 28.

A town ordinance passed for the purpose of regulation of vessels is not effective in waters within or bounding an incorporated village to a distance of fifteen hundred feet from the shore of the village, whether or not a village has adopted regulations. There is no concurrent jurisdiction by the two types of municipalities. The Town of Huntington, which is in the Suffolk County Police District, and thus served by the Suffolk County Police Department, has transferred its police function to that department and the Town of Huntington may expect that the Suffolk County Police Department will enforce Town of Huntington ordinances to the same extent as another town, having its own police department, would expect its own police department to enforce its ordinances. 1974 NY Ops Atty Gen Mar 28 (informal).

A village may enact ordinances regulating speed and operation of boats on waters up to a distance of 1500 feet from the shore. 1963 NY Ops Atty Gen June 3.

43. Businesses

44. —Peddlers

A village Board of Trustees may require peddlers to register with village clerk, but may not prohibit all peddling in the village. 1962 NY Ops Atty Gen July 11.

A village may reasonably license and regulate (1) hawking and peddling; (2) soliciting orders for immediate delivery; and (3) under some circumstances, soliciting orders for future delivery. A municipality may not license or regulate persons licensed by the State Liquor Authority to solicit orders for the sale of alcoholic beverages. 1965 NY Ops Atty Gen Dec 13.

A village may not regulate the hours for barbering. 1953 NY Ops Atty Gen 102 (informal).

It is not believed that a village board of trustees may by ordinance license and otherwise regulate taxicabs which do not transport passengers from one point to another within the village or which transport passengers from the village to a location many miles from the village. 1954 NY Ops Atty Gen 75 (informal).

A village board of trustees may not regulate the hours during which bowling is permitted on Sunday, unless it finds that there is a serious interruption of the repose or religious liberty of the village. 1955 NY Ops Atty Gen 206 (informal).

45. Construction of electric power lines

Village Board of Trustees may grant permission to erect a coaxial cable over a village street following a hearing. 1955 NY Ops Atty Gen June 1 (informal).

Village may grant telephone company permission to install lines in village streets without public hearing. 1967 NY Ops Atty Gen May 23.

The Village of Westfield has the right to acquire by purchase or condemnation land in the Towns of Westfield and Portland to construct transmission lines which would connect its municipal electrical system with a transmission line of a private power corporation, provided proper procedural steps are followed. 1969 NY Ops Atty Gen Apr 23.

46. Gasoline

A village board may not enact an ordinance to require a fee of $500 or $1,000 for each pump connected to a gasoline tank which may be installed in a gasoline service station. 1958 NY Ops Atty Gen Apr 23 (informal).

A village may prohibit the use by a purchaser of gasoline dispensing equipment at a gasoline filling or service station. Such ordinance, if adopted, must apply to all gasoline service stations in the village. 1965 NY Ops Atty Gen Sept 1.

47. Signs

A village ordinance regulating signs must not be unreasonable or arbitrary. 1953 NY Ops Atty Gen 68 (informal).

48. Zoning regulations

A village is not authorized to adopt an amendment to its zoning ordinance restricting an area to apartment buildings that cannot be used or occupied by persons under fifty years of age and prohibiting children as occupants thereof. 1969 NY Ops Atty Gen May 6.

49. Miscellaneous

A village may properly enact an ordinance protecting its water supply against trespass even though the supply is located outside the village. 1957 NY Ops Atty Gen Aug 1 (informal).

A village board may enact ordinances prohibiting the discharge of firearms within the village limits. 1957 NY Ops Atty Gen Oct 10 (informal).

A village may not enact an ordinance or local law affecting the provisions of Labor Law § 204. 1968 NY Ops Atty Gen March 5.

In the absence of express legislative grant a municipality may not exercise its jurisdiction beyond its boundaries and may not, therefore, regulate by ordinance or local law the use of real property owned by it but located in another municipality. 1971 NY Ops Atty Gen May 11 (informal).

C. Streets, Sidewalks, and Parking

50. Use of streets

The subsurface area of real property acquired by a village for street and parking area purposes may not be sold or leased to a private owner of adjoining property for storage use without specific legislative authority. 1965 NY Ops Atty Gen Dec 8.

51. Acceptance of dedication of streets

A resolution of a village board of trustees, accepting a dedicated street containing sewer and water facilities, is subject to permissive referendum. 1953 NY Ops Atty Gen 4 (informal).

52. Sidewalks

53. —Snow removal

The village board of trustees may require the owner of land fronting on a sidewalk to keep it clear of snow and ice. 1953 NY Ops Atty Gen 103 (informal).

54. Parking

55. —Parking lots

Lands leased by a village for a parking space are held for public use and hence, a village board of trustees could not properly permit the village fire department to use temporarily a portion of such parking area for the fire department's annual fair. 1953 NY Ops Atty Gen 23 (informal).

In the absence of statutory authority so to do, there is no implied authority for a village board of trustees to regulate by ordinance, the fees which may be charged by the operators of private parking lots on privately owned property. 1956 NY Ops Atty Gen Dec 14 (informal).

56. —Financing

A bond resolution proposing maturity of more than five years to finance the cost of acquiring a parking area is subject to a permissive referendum or may be submitted to a referendum by the village board. 1957 NY Ops Atty Gen March 26 (informal).

Villages have right to prohibit parking on their public highways. 1935 N.Y. Op. Att'y Gen. No. 221.

A village board may not promulgate a rule, in any form, which would restrict parking of vehicles on certain portions of the public street so that only doctors' patients be permitted to park. 1965 NY Ops Atty Gen June 9.

A village may not install a no-parking sign on private property at the request of the landowner at village expense. 1971 NY Ops Atty Gen July 1 (informal).

Where the Village of Cedarhurst adopted a "No Parking 3 a.m.—5 a.m." ordinance pertaining to certain streets in the Village, it is not authorized to issue identification cards to residents of the Village which would exempt them from the provisions of the above-described ordinance as such action would be discriminatory. 1971 NY Ops Atty Gen Aug 18.

D. Miscellaneous Powers

57. In general

A town may only permit the use of its highway equipment by a village pursuant to the provisions of the Highway Law. 1955 NY Ops Atty Gen 199 (informal).

An ordinance enacted pursuant to subd. (7-a) of former § 89 may provide for entry upon adjoining property by a town building inspector in appropriate situations. 1963 NY Ops Atty Gen Nov 8.

The City of Rye may not adopt an ordinance or local law prohibiting hunting within the City Limits. However, an ordinance which prohibited the discharge of firearms except by law enforcement officers would likely constitute a reasonable exercise of the police power if its operation were restricted to certain densely populated areas or areas where the discharge of firearms would be hazardous to the general public or to nearby residents. 1972 NY Ops Atty Gen Sept 13 (Informal), 1972 N.Y. AG LEXIS 139.

Authority of a village to order owner of real property to cut, trim or remove brush, grass, rubbish or weeds, and if the owner fails or refuses to do so, the authority of a village to enter upon the private property and accomplish the same, either by its own employees or through contract. 1974 NY Ops Atty Gen Dec 12 (Informal), 1974 N.Y. AG LEXIS 193.

58. Village attorney

59. —Conflicts of interest

A village acting police justice may not at the same time serve as village attorney. 1955 NY Ops Atty Gen 68 (informal).

There appears to be no constitutional or statutory objection to a person simultaneously holding the offices of district attorney and village attorney. This opinion points out that former § 93 of the Village Law permits a village to pay a village attorney additional compensation for the additional work or prosecution if he is designated an assistant district attorney. In addition, the opinion states there does not appear to be any objection on the grounds of incompatibility to one person simultaneously holding these two offices providing the duties of one may be performed without neglecting the duties of either. 1959 NY Ops Atty Gen May 4 (informal).

A village attorney is not a village officer nor a public officer but a mere employee of the village. He is not required to be a resident of the village. 1953 NY Ops Atty Gen 36 (informal).

The powers of the Board of Trustees of a village should be strictly construed and accordingly the Board of Trustees is only empowered to hire one attorney. 1958 NY Ops Atty Gen May 21 (informal).

The services to be performed by a village attorney for his fixed compensation should be agreed upon by the board of trustees of the village and the attorney concerned. 1959 NY Ops Atty Gen Aug. 11 (informal).

The board also may, from time to time, employ such village attorney to attend to any other legal matters not included in the original compensation and pay him for such services and such compensation shall be in addition to the village attorney's annual compensation and shall be a legal charge against the village. 1959 NY Ops Atty Gen Aug. 11 (informal).

A Village Board may hire additional counsel for purposes expressed in subd. 59 of former § 89. 1961 NY Ops Atty Gen Dec 11.

A Village Board of Trustees may appoint a village attorney for a term no longer than the life of the Board itself. 1962 NY Ops Atty Gen Nov 29.

A village attorney is not a village officer, but is an employee and therefore need not reside within the village. 1965 NY Ops Atty Gen Dec 17.

60. Police

A village may not enact a local law forming a "police reserve" to supplement the work of an existing village police department. 1953 NY Ops Atty Gen 12 (informal).

The jurisdiction of the police officers of a village police department rendering protection to other villages pursuant to contract is thereby extended to include the territory of the contracting villages. 1966 NY Ops Atty Gen Dec 27.

61. Limitations as to trustees

A village trustee who is a stockholder, officer and director of an incorporated restaurant licensed to sell alcoholic beverages is within the contemplation of the Alcoholic Beverage Control Law provision prohibiting certain police officials from trafficking in alcoholic beverages. 1953 NY Ops Atty Gen Dec 14.

A village board of trustees may only submit a proposition to the village electors if authorized by statute. 1956 NY Ops Atty Gen Apr 6 (informal).

While generally a member of a village board of trustees may not resign that office and thereafter be appointed by the board to an office which it has the power to fill by appointment, it is suggested that such a practice might be authorized by local law in a village having home rule powers. 1960 NY Ops Atty Gen Nov. 23 (informal).

In a village having no separate board of fire commissioners, the village board of trustees acting as such board may appoint persons residing outside the village to the village fire department, if such persons reside in territory afforded fire protection by the department. 1953 NY Ops Atty Gen 10 (informal).

62. Other employees

A village may employ school crossing guards. 1954 NY Ops Atty Gen 117 (informal).

A town board may not compel an assessor to accept the designation as chairman of the board of assessors. An assessor so declining such a designation could not vacate his office or could he be removed from the office of assessor for that reason. 1959 NY Ops Atty Gen Apr. 9 (informal).

In the absence of creation of a Board of Water Commissioners, a village Board of Trustees may appoint the Superintendent of the Village Water System and fix his salary or compensation. 1961 NY Ops Atty Gen Nov 10.

The authority granted to a village to establish and maintain a pound and employ a keeper does not include authority to appoint a dog warden. 1963 NY Ops Atty Gen June 20.

Positions of employment may be created by a village board of trustees subject to Civil Service Law, section 22; payment of salaries thereof is subject to Civil Service Law, section 101; appointments to fill the positions are to be by the village mayor with the approval of the board of trustees. Except under unusual circumstances, appointment of Special Legal Counsel and Special Counsel to all other boards, instead of appointment of Village Attorney and Assistant Village Attorney, is to be made by the mayor with the approval of the Board of Trustees. 1974 NY Ops Atty Gen Aug 5 (informal).

63. Animal control

The authority conferred upon a village board of trustees to regulate and restrain the keeping within the village and running at large of animals "and to" take all measures deemed expedient or desirable for the protection of (the) health of its inhabitants, the protection of their property" is sufficient to enable the board to prohibit new swine or milk farms within the village. 1959 NY Ops Atty Gen Apr. 9 (informal).

Although villages have control over keeping of animals within their boundaries and over animals in their streets, they have no authority to appoint village dog wardens except in certain counties, as specified in § 119 of the Agriculture and Markets Law. 1961 NY Ops Atty Gen Apr 17.

64. Drainage and flood control

A town may clean and deepen a stream for flood control purposes flowing within a village in a town, as well as that portion of the stream located in the town outside the village. 1955 NY Ops Atty Gen 199 (informal).

A village has the duty to protect municipal property and the right to protect property within the village from damage by floods, and likewise the right to compel removal of health hazards. 1963 NY Ops Atty Gen Nov 13.

A village may construct and maintain surface water drainage ditch located outside its limits. 1964 NY Ops Atty Gen May 15.

A village may purchase and install a sluice pipe on and over the property of a private owner for the purpose of arresting and preventing damage to his property resulting from an overflow of the village reservoir. 1966 NY Ops Atty Gen July 22.

Under the common law, a village, as an upstream riparian owner, may not divert the flow of flood water from a stream in such manner as to unreasonably increase the flow of another stream without subjecting itself to legal action by a downstream owner of the stream in its original channel or the downstream owners on the new receiving waters. However, former Conservation Law, § 429-j might form the basis for a declaratory judgment against affected riparian owners or as a defense to an action by such owners if, as a matter of fact, it can be established that the diversion is "a harmless interference". 1968 NY Ops Atty Gen June 18.

A village flood control project, whether undertaken by the village alone, or in participation with a federal program of flood control, is not subject to permissive referendum. However, the method of financing same may be subject to such referendum. 1970 NY Ops Atty Gen July 21.

65. Enactment of curfew ordinance

While it is believed a village may enact a so-called "curfew ordinance" there is grave doubt that such an ordinance may impose a penalty or punishment on the parents of minor violators thereof. 1954 NY Ops Atty Gen 63 (informal). Same effect, 1961 NY Ops Atty Gen Mar 21.

A village may enact a constitutionally valid "curfew ordinance" if the necessary safeguards against arbitrary invasion of personal liberties are incorporated therein. 1967 NY Ops Atty Gen Oct 16.

66. Nuisances and safety hazards

Enforcement of responsibility for affording protection to public from hazards to their safety, security and welfare, resulting from exposed banks of a private hydraulic canal is generally a matter of local concern and Village of Herkimer is vested with adequate authority to accomplish this purpose. 1946 NY Ops Atty Gen Dec. 12.

Village may not adopt ordinance inconsistent with safety rules adopted by Public Service Commission governing gas corporations engaged in transmission or distribution of gas. 1955 NY Ops Atty Gen 56 (informal).

67. Official newspaper for publication of notices

A village board may not designate, as the official village newspaper, a paper for which no charge is made to the public. 1957 NY Ops Atty Gen May 14 (informal).

A Village board of trustees may authorize the printing, publication and distribution of the Village assessment roll and provide for payment of the cost thereof. However, the Mayor of a Village, acting alone, may not do so. Copies of the assessment roll may be mailed or delivered together with tax bills provided that the Village has adopted a local law authorizing same. 1970 NY Ops Atty Gen July 13.

It is not required that a village board of trustees designate any newspaper as an official newspaper of the village. 1971 NY Ops Atty Gen June 28.

The place of publication of a newspaper is the place where it is first issued to be delivered or sent by mail, or otherwise, to its subscribers. The publication occurs at the place of entry of the newspaper in the post office as second class matter. 1972 NY Ops Atty Gen June 29.

68. Recreational activities

A village Board of Trustees may authorize construction and operation of a skating rink or the licensing of one operated by a private individual or concern. 1963 NY Ops Atty Gen Jan 3.

The Board of Trustees of the Village of Depew is prohibited from donating a sum of money to a Little League organization to help defray its expenses in conducting Little League baseball and football programs. 1968 NY Ops Atty Gen March 15.

69. Repair or removal of unsafe buildings

A village board may provide for removal or repair of buildings in business, industrial or residential sections that are dangerous or unsafe, and may enact such ordinances as may be deemed necessary for protection of property or life from fire or health hazards. 1962 NY Ops Atty Gen Aug 16.

Inspection of buildings thought to be dangerous or unsafe to the public in the event entry is refused, must be by warrant. 1967 NY Ops Atty Gen Oct 4.

70. Lighting systems

Where a village operates a municipal lighting system, the granting of a franchise for the purpose of furnishing natural gas to residents of the village result in competition with the municipal service, subjecting such franchise to a permissive referendum. 1962 NY Ops Atty Gen Jan 30.

71. Waste disposal

72. —Village dump

It is not believed that a village may lease lands outside the corporate limits of the village for use as a village dump without the consent of the town board. 1956 NY Ops Atty Gen July 19 (informal).

73. Water supply and water commissioners

In a village having no separate board of water commissioners, the board of trustees may establish such a board in accordance with the procedure set out in former § 63. 1955 NY Ops Atty Gen 178 (informal).

IV. Under Former § 332-a

74. In general

A village may properly enter into a contract with a parking meter manufacturer whereby meters are installed in the village under an arrangement whereby the costs thereof will be paid from the proceeds of the meters. 1954 NY Ops Atty Gen 79 (informal).

A village is not liable under a public works contract in excess of $2500 let contrary to the law requiring advertisement for competitive bids. 1967 NY Ops Atty Gen Oct 18.

The Board of Trustees of the Village of New York Mills may take a reasonable time after receiving bids before awarding a contract to purchase a new fire truck. 1973 NY Ops Atty Gen Mar 5.

V. Under Former § 333

75. In general

Village is not liable upon contract under which work to be done is not for village purpose. 1911 N.Y. Op. Att'y Gen. No. 340.

A village is not liable under a public works contract in excess of $2500 let contrary to the law requiring advertisement for competitive bids. 1967 NY Ops Atty Gen Oct 18.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 7-710.

Separate boards of commissioners, § 3-308.

Duties of board in auditing claims in village which has no office of auditor, § 5-524.

Actions of board assuming control of bridge or entering agreement with town to construct or repair bridge subject to permissive referendum, § 6-606.

Power to regulate and restrict areas as historic landmarks § 7-700.

Establishment of police force, § 8-800.

Permissive referendum, §§ 9-900 et seq.

Contracts for purchase of water, § 11-1124.

Trustees as town board, § 17-1708.

Procedure for enactment of ordinances, § 20-2002.

Approval by board of trustees of rules, etc., adopted by separate board, § 20-2006.

Enactment of ordinances, §§ 20-2000 et seq.

Pounds and dog wardens in villages of Westchester, Nassau and Suffolk counties, CLS Agr & M § 119.

Contracts for seizing and impounding dogs, CLS Agr & M §§ 120, 120-a.

Establishment of department of markets and request for state aid for public market, CLS Agr & M § 268(11).

Village jails, CLS Correc § 46.

Contracts for support and maintenance of historical edifices, CLS Educ § 148.

Libraries and museums, CLS Educ §§ 253, 255–257, 259, 260, 268, 295.

Officials not to be interested in sales, leases, or contracts, CLS Educ § 410.

Village trustees to report trusts to commissioner of education, CLS Educ § 3703.

Use of voting machines, CLS Elec §§ 3-224, 7-200.

Resolution as to time of party nomination of candidates, CLS Elec §§ 6-102–6-110, 6-114, 6-116, 6-156, 6-160.

Adoption of voting machine, CLS Elec § 7-200.

Duties in regard to village elections generally, CLS Elec §§ 15-104, 15-106, 15-110–15-118, 15-130.

Solid waste management facilities, CLS ECL §§ 27-0501–27-0509, 27-0711.

Powers of municipalities with respect to planning for construction of solid waste management facilities, CLS ECL § 27-0507.

Restrictions on land use in Lake George Park; issuance of permits, CLS ECL § 43-0119; local laws prohibiting disposal of earth, soil, refuse, or other solid substance in streams, ponds, or lakes, CLS ECL § 11-0503(6); permit for building of structure in Lake George Park, CLS ECL § 43-0121.

Solid waste recovery and management, CLS ECL §§ 51-0901 et seq.

Adoption of higher standards for state building conservation and fire prevention rules and regulations at recommendation of village, CLS Exec § 394.

Jurisdiction, administration and enforcement of state building code, CLS Exec § 396.

Local ordinances permitting sports, recreation, shows, etc., on Sunday, CLS Gen Bus §§ 7, 15.

Exhibition or display of flag, standard, color, shield or ensign, CLS Gen Bus § 136.

Consent of local governing authority required for aircraft takeoff or landing on public street, CLS Gen Bus § 245.

Authorization of local governing body for establishment of privately-owned airport, CLS Gen Bus § 249.

Children attending skating rinks, CLS Gen Bus § 398-c.

Children attending public bowling alleys, CLS Gen Bus § 399-d.

Adjournments, CLS Gen Const § 13.

Quorum and majority, meaning of, CLS Gen Const § 41.

Construction and improvement of highways, CLS High §§ 47, 50, 51, 59, 117-a, 187, 196.

Contracts as to control of snow and ice conditions on county roads, CLS High § 135-a.

Power to provide funds for snow removal and snow fences, CLS High § 274-a.

Fire protection contracts between village and Seneca Nation, CLS Indian § 19.

Board as "finance board," CLS Loc Fin § 2.00(4d).

Temporary alternative methods of financing snow and ice removal expenses, CLS Loc Fin § 26.00.

Exclusion of certain indebtedness for sewage facilities in ascertaining power to contract indebtedness, CLS Loc Fin § 124.10.

Responsibility with state of developing plans, etc., to aid the mentally disabled, including alcoholics and narcotic addicts, CLS Men Hyg § 1.03.

Availability to local governments of laboratory services at facilities of department of mental hygiene, CLS Men Hyg § 9.23.

Enforcement, CLS Mult R § 303.

Procedure for adoption of local laws, CLS Mun H R §§ 20 et seq.

Regulations of vessels, CLS Nav § 46-a.

Ferry service, CLS Nav § 115-a.

Ferries and ferry terminal, CLS Nav § 115.

Submission of proposition to raise by taxation a sum for erecting a soldiers' monument, CLS N-PCL § 1405(c).

Applicability of Penal Law, CLS Penal § 55.00.

Classification and designation of misdemeanors, CLS Penal §§ 55.05(2), 55.10(2).

Payments in aid of lower income elderly persons, CLS Priv Hous Fin §§ 31(9), 85-a(7), 126, 577-a.

Contract which may be entered into without public letting, CLS Pub A § 1599-ggg.

Contracts for state aid for solid waste disposal, CLS Pub Health §§ 1380–1383.

"Local legislative body" as meaning village board of trustees, CLS Pub Hous § 3(7); CLS Retire & SS § 2(13).

Tax abatement for rent controlled property occupied by senior citizens, CLS Real P Tax § 467-b.

Duties with respect to sales of tax liens for taxes and assessments in villages in Westchester county, CLS Real P Tax § 1455.

Grants of powers to local governments, CLS Stat Loc Gov §§ 10 et seq.

Contracts for use of dumping facilities, CLS Town § 64(20-a).

Contracts for furnishing fire protection to fire alarm and fire protection districts, CLS Town §§ 183, 184.

Villages as towns, and village trustees as fence viewers for purpose of construing provisions as to strays, CLS Town § 325.

Traffic regulation, CLS Veh & Tr §§ 1604, 1624, 1640–1645.

Power to regulate traffic at shopping centers, CLS Veh & Tr § 1640-a.

Regulation of bingo, CLS Const Art 1 § 9.

Borrowing and financing, CLS Const Art 8 §§ 1–12.

Creation and organization of local governments, CLS Const Art 9 § 2(a).

Powers of villages to contract indebtedness in aid of low rent housing and slum clearance projects, CLS Const Art 18 § 4.

Acquisition of property for housing, CLS Const Art 18 § 9.

Duty to provide police, fire, sanitation, health protection and other services to State Urban Development and Research Corporation project, CLS Unconsol Ch 252-A § 8(4).

Contracts with board of park commissioners, CLS Unconsol Ch 205 § 10.

Powers of villages with respect to joint waterworks system, CLS Unconsol Ch 140 § 18.

Personal service of summons upon a village to any trustee, CLS CPLR 311.

Regulation of beaches, CLS Nav 45-b.

Jurisprudences:

25 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 124, 150—152, 186, 245, 250, 271, 303.

26 NY Jur 2d Counties, Towns, and Municipal Corporations § 772.

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1166—1168, 1327, 1414, 1453, 1500, 1524, 1544, 1562.

35C NY Jur 2d Criminal Law Substantive Principles and Offenses § 1849.

60 NY Jur 2d Food Drugs, Poisons, and Hazardous Substances §§ 7, 10, 18.

60 NY Jur 2d Franchises §§ 4, 6, 7.

66 NY Jur 2d Hotels, Motels, and Restaurants § 11.

109 NY Jur 2d Wharves §§ 18, 41, 64.

56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 155–157, 193–230, 423–470, 532–548.

Law Reviews:

Effect of First Amendment protection of commercial speech on municipal sign ordinances. 29 Syracuse L Rev, No. 3, p. 941, Summer, 1978.

CATV franchise fee: incentive for regulation, disincentive for innovation. 30 Syracuse L Rev, p. 741, Spring, 1979.

Annotations:

Authorization, prohibition, or regulation by municipality of the sale of merchandise on streets or highways, or their use for such purpose. 14 ALR3d 896.

Coverage and exclusions under liability policy issued to municipal corporation or similar governmental body. 23 ALR3d 1282.

Liability of owner or operator for injury to patron of fair carnival, or the like, from operation of sideshows, games, or similar concessions. 24 ALR3d 945.

Seller's liability for fraud in connection with contract for the sale of long-term dancing lessons. 28 ALR3d 1412.

Validity and construction of statute or ordinance prohibiting commercial exhibition of malformed or disfigured persons. 62 ALR3d 1237.

Validity, construction, and application of loitering statutes and ordinances. 72 ALR5th 1.

Matthew Bender's New York Practice Guides: 2 New York Practice Guide: Real Estate § 16.04.

Texts: Weinstein, Korn, Miller, CPLR Manual (Matthew Bender) § 27.05.

ARTICLE 5 Finances

Section

5-500. Definitions
5-506. Form and content of tentative budget
5-508. Adoption of budget
5-520. General budgetary controls
5-524. Audit and payment of claims

HISTORY:

Add, L 1972, ch 892, eff Sept 1, 1973.

§ 5-500. Definitions

For the purposes of this article the following terms shall be defined as follows:

1. "Administrative unit" shall mean an office, department, division, bureau, board, commission or other agency or specific activity of village government.

2. "Budget officer" shall mean the mayor or, in a village which has adopted the village manager plan, the village manager. The mayor or village manager, as the case may be, may designate any other village officer or employee to be budget officer, to serve at his pleasure.

3. "Character of expenditure" shall mean the classification of an expenditure as to periods of benefit as follows: a. current expenses, b. debt retirement or c. capital projects.

4. "Fiscal year" shall mean the period commencing on the first day of June in one calendar year and ending on the thirty-first day of May in the following calendar year, unless the board of trustees shall have established a different fiscal year pursuant to the provisions of former section one hundred seventeen of the village law as enacted by section fourteen of chapter eight hundred nine of the laws of nineteen hundred fifty-four or pursuant to section 5-510 of this article or section 17-1729 of article seventeen.

5. "Fund" shall mean a group of accounts set aside for the purpose of accounting for moneys or other resources of general functions or specific activities of water supply, capital projects or other activities of a village in accordance with a system of accounts.

6. "System of accounts" shall mean a system prescribed by the state comptroller. In the case of water utilities it shall also mean a system recommended by the public service commission or a system generally recognized as a national standard and provided either such alternate system has been approved by the state comptroller following receipt of an application and a certified copy of a resolution adopted by the board of trustees of a village authorizing the maintenance of such alternate accounting records for a water utility.

7. "Object of expenditure" shall mean the classification of an expenditure as to types of articles purchased or services rendered.

8. "Unappropriated unreserved fund balance" shall mean the difference between the total assets for a fund and the total liabilities, deferred revenues, encumbered appropriations, amounts appropriated for the ensuing fiscal year's budget, and amounts reserved for stated purposes pursuant to law, including reserve funds established pursuant to the general municipal law for the fund, as determined through application of the system of accounts prescribed by the state comptroller pursuant to section thirty-six of the general municipal law.

HISTORY:

Add, L 1972, ch 892, eff Sept 1, 1973; amd, L 1976, ch 218, § 2, eff May 25, 1976; L 2000, ch 528, § 15, eff Oct 4, 2000 (see 2000 note below).

Editor's Notes: Laws 2000, ch 528, § 19, eff Oct 4, 2000, provides as follows:

§ 19. This act shall take effect immediately and shall apply to budgets for fiscal years commencing on or after January 1, 2001.

Substance transferred from § 6–600.

Notes to Decisions

Analysis

1. In general
2. Under former Art. 6

1. In general

Board may not use its tap-in fee for the purpose of defraying a portion of the cost of maintaining and improving its water system; Board's permit fee is sustainable only as a regulatory measure and only where the amount charged is not greater than a sum reasonably necessary to cover costs of issuance, inspection, and enforcement. Torsoe Bros. Constr. Corp. v Board of Trustees, 49 A.D.2d 461, 375 N.Y.S.2d 612, 1975 N.Y. App. Div. LEXIS 11413 (N.Y. App. Div. 2d Dep't 1975).

Proper taxable status date for filing veteran's exemption from village taxes was January 1st where uncontroverted testimony established that village's fiscal year ran from June 1st through May 31st. Wibben v Incorporated Village of E. Williston, 180 Misc. 2d 186, 688 N.Y.S.2d 411, 1999 N.Y. Misc. LEXIS 119 (N.Y. Dist. Ct. 1999).

2. Under former Art. 6

New finance article for villages does not affect charter of villages insofar as charter and new finance article are inconsistent. 1954 Ops St Compt 385.

UNDER FORMER § 6-600

A trustee of a village of the first class may not receive extra compensation for acting as budget officer. His salary as trustee

may be increased by local law, but not retroactively. 1960 Ops St Compt 182.

Agency Opinions

1. In general

Person may simultaneously hold offices of county treasurer and village trustee, village mayor or village budget officer. 1986 NY Ops Atty Gen No. 86-63 (informal).

The salary of a village justice may be reduced by resolution during a term of office by being included in the annual budget at a lesser rate than that fixed for the preceding fiscal year and no mandatory referendum is required. 1983 Op St Compt File #83-127.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 5-502.

Fiscal year defined, CLS Loc Fin § 2.00(19).

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1545, 1577.

§ 5-506. Form and content of tentative budget

1. The tentative budget shall consist of the following schedules and statements:

a. A schedule of appropriations for all expenses authorized or required by law, other than expenses of operation of a municipal electric, gas or steam utility service, or a water utility for which an annual estimate is not filed pursuant to subdivision five of section 5-502 of this article, and also for all expenditures to be financed from special assessments and proceeds of obligations authorized by the local finance law. The appropriations shown on such schedule shall be classified by funds, administrative units, character and object of expenditure and shall be so arranged as to show in parallel columns the following comparative information:

(1) Expenditures for the last completed fiscal year;

(2) Appropriations for the current fiscal year reflecting supplemental appropriations to a date not more than forty-five days prior to the filing of the tentative budget with the village clerk; and

(3) The budget officer's recommended appropriations for the ensuing fiscal year. Such schedule may contain an amount recommended as necessary to be appropriated for contingencies, which amount shall not exceed ten per centum of the total of other appropriations excluding debt service and judgments. A statement of the amount recommended to be appropriated for a reserve for uncollected taxes may also be included, which amount shall be not less than the principal amount of taxes levied by the board of trustees for the last completed fiscal year and remaining uncollected at the end of such year, including the amount of such taxes sold to the village at tax sale and unredeemed at the end of such last completed fiscal year.

b. A schedule of estimated revenues to be received by the village during the ensuing fiscal year other than real estate taxes to be levied as stated in paragraph e of subdivision one of this section, income from operations of a municipal electric, gas or steam utility service or a water utility for which an annual estimate is not filed, pursuant to subdivision five of section 5-502 of this article, proceeds of special assessments for capital projects and proceeds of obligations authorized by the local finance law. The estimated revenues shown on such schedule shall be classified by funds and itemized as to sources and shall be so arranged as to show in parallel columns the following comparative information:

(1) revenues for the last completed fiscal year;

(2) estimated revenues for the current fiscal year reflecting modifications to a date not more than forth-five days prior to the filing of the tentative budget with the village clerk; and

(3) the budget officer's estimate of revenues for the ensuing fiscal year.

c. A schedule of fund balances estimated to be on hand at the close of the current fiscal year, classified by funds, together with a breakdown of such fund balance estimated for encumbrances, amounts appropriated for the ensuing fiscal year's budget, amounts reserved for stated purposes pursuant to law, including reserve funds established pursuant to the general municipal law, and the remaining unappropriated unreserved fund balance, provided that the remaining estimated unappropriated unreserved fund balance for each fund shall not exceed a reasonable amount, consistent with prudent budgeting practices, necessary to ensure the orderly operation of village government and the continued provision of services, taking into account factors including, but not limited to, the size of the fund, cash flows, the certainty with which the amounts of revenues and expenditures can be estimated, and the village's experience in prior fiscal years. Such schedule shall not include fund balance of any fund established as the result of issuance and sale of obligations pursuant to the provisions of the local finance law.

d. A schedule of each special reserve fund showing for each such fund the purpose for which established and by parallel columns the amount therein as of a date not more than forty-five days prior to the filing of the tentative budget, and the amount, if any, recommended to be spent therefrom to meet appropriations for the ensuing fiscal year. A requirement of law that an expenditure from any such reserve fund be subject to a permissive or mandatory referendum shall not prevent the inclusion of a recommendation for such expenditure in the tentative budget.

e. A schedule showing the computation of the amount to be levied on real estate which amount shall be equal to the difference between the total of all recommended appropriations as shown in the schedule required by paragraph a of subdivision one of this section and the total of estimates shown in the schedules required by paragraph [paragraphs]*

*Bracketed language inserted by the Publisher.

b through d of subdivision one of this section. Such schedule shall be so arranged as to show such recommendations and estimates by funds in parallel columns.

f. A schedule of wages and salaries to be paid which shall be subdivided by administrative units and shall show in parallel columns, for each office or position of employment, the title, the number of persons in the title, the recommended rate of compensation for the title and the total recommended appropriation for the title.

g. A statement of the estimated income and proposed expenditures of a municipal electric, gas or steam utility service or a water utility for which an annual estimate is not filed, pursuant to subdivision five of section 5-502 of this article which shall be in the form and detail prescribed in subdivision four of section 5-502 of this article.

2. The tentative budget shall include any other data which the board of trustees may, by resolution, require or which the budget officer shall deem advisable.

HISTORY:

Add, L 1972, ch 892, eff Sept 1, 1973; amd, L 2000, ch 528, § 16, eff Oct 4, 2000 (see 2000 note below).

Editor's Notes: Laws 2000, ch 528, § 19, eff Oct 4, 2000, provides as follows:

§ 19. This act shall take effect immediately and shall apply to budgets for fiscal years commencing on or after January 1, 2001.

Substance transferred from § 6–606.

Amendment Notes:

2000. Chapter 528, § 16 amended:

Sub 1, par c, by deleting "cash surpluses" and "after deducting claims, accounts and demands estimated to be payable therefrom" and "surplus".

Notes to Decisions

Analysis

1. In general
2. Under former § 6-606

1. In general

In Article 78 proceeding, court would annul village tax assessment which included "reserve charge" where reserve being set aside by village almost exactly matched sum for which village was being sued by county in action involving construction and use of sewer facilities owned by county; because villages' obligation to pay sum was dependent on outcome of suit, amount assessed by village was for contingency and was limited by CLS Vill § 5-506(1)(a)(3) to 10 percent of villages' total budget appropriations. Roslyn Plaza Assoc., Inc. v Roslyn, 184 A.D.2d 705, 585 N.Y.S.2d 447, 1992 N.Y. App. Div. LEXIS 8478 (N.Y. App. Div. 2d Dep't 1992).

The inclusion of an appropriation for a reserve for uncollected taxes in the annual village budget is within the discretion of the board of trustees; however, as a general rule, it is advisable to make such an appropriation. 1975 Ops St Compt File #402.

Village board may, by resolution, fix compensation of members of village zoning board of appeals on either per diem or annual basis. 1986 Op St Compt No. 86-70.

Village may not hold proceeds of sale of unneeded village real property in separate fund to be used over course of several fiscal years to fund annual appropriations to pay consideration under ambulance services agreements; village may not adopt local laws "changing, amending or superseding" statutory village budget process, or authorizing establishment of reserve funds not authorized by state statute. 2007 Op St Compt No. 07-3.

Salary appropriated for position of acting village justice, which position was never filled, cannot be paid to village justice in addition to village justice's own salary; however, salary of village justice may be increased during village justice's term, but not as retroactive compensation for services already performed. Ops St Compt 88-59.

2. Under former § 6-606

Probable revenue to be received by village from payment of interest and penalties on back taxes should be placed in budget. 1945 Ops St Compt 10.

An unexpended village balance may be used to reduce levy or establish reserve funds pursuant to §§ 6-c, 6-d and 6-e of the General Municipal Law. 1945 Ops St Compt 125.

Contingent fund may not be included in budget of village operating pursuant to Village Law. 1945 Ops St Compt 295.

Village should include in its budget the estimated revenues to be received by its several departments. 1946 Ops St Compt 193.

Annual estimate of village. 1947 Ops St Compt 74.

Subject to permissive referendum, village board may establish capital reserve fund for specific capital improvement and transfer to it moneys provided by direct budgetary appropriation for capital improvements since abandoned. Period of probable usefulness of new capital improvement must equal or exceed that of abandoned project. 1950 Ops St Compt 230.

Salary increases granted to village employees may be made effective as of the commencement of a payroll period rather than as of the commencement of a fiscal year. 1955 Ops St Compt 168.

A village should include a reserve for uncollected taxes in its budget where annual village taxes levied against a bankrupt railroad are unpaid and uncollectible. 1962 Ops St Compt 367.

Money received by a village under a contract for fire protection should be paid into the general fund. 1968 Ops St Compt File #31.

The village board may fix salaries at an amount less than that called for in the preliminary budget. 1968 Ops St Compt File #778.

Agency Opinions

1. In general

The same person may not hold the offices of village trustee and village justice due to the control which the former has over the amount of compensation to be paid to the latter. 1978 NY Ops Atty Gen March 14 (Informal).

A village trustee may decline to accept a salary increase. Discussion of the utilization by the village of moneys which are not accepted by the trustee. 1978 Op St Compt File #579.

A village may have a contingent fund. 1978 Op St Compt File #895.

Discussion of appropriate method of paying mayor's salary for the balance of the year where he requests and is granted a salary reduction retroactive to the beginning of the village fiscal year. 1978 Op St Compt File #901.

A village may not prorate the annual salaries of the mayor and trustees on a monthly basis and withhold payment of such prorated amounts for failure to attend a regular monthly meeting of the board of trustees. 1978 Op St Compt File #993.

The salary of a village assessor may be increased during the fiscal year to compensate him for his new responsibility of assessing property at 100 percent assessment pursuant to court order. 1979 Op St Compt File #413.

The village board of trustees may adopt a resolution to increase the salary of the village attorney during the fiscal year. 1979 Op St Compt File #615.

A village does not have to use a local law to increase the salary of a village justice during his term of office. 1981 Op St Compt File #81-86.

Municipal recipients of in lieu of tax payments required under a lease agreement between an industrial development agency and a lessee must include the payment as estimated revenue in the annual preparation of their budgets. 1982 Op St Compt File #82-174.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 5-508.

Raising money for charitable institutions, CLS Gen Mun § 87.

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations § 1577.

Law Reviews:

Municipalities: Validity of Subdivision Fees for Schools and Parks. 66 Columbia L Rev, p. 974, May, 1966.

Macchearola, Statutory and Judicial Restraints on Local Finance in New York State. 15 NYLF, p. 852, Winter, 1969.

§ 5-508. Adoption of budget

1. The village clerk shall present the tentative budget to the board of trustees at a regular or special meeting to be held on or before the thirty-first day of March or such other date as may be applicable pursuant to section 5-510 of this article or section 17-1729 of article seventeen. At such meeting the board of trustees shall review the tentative budget and make such changes, alterations and revisions as it shall consider advisable, provided that:

a. The statement of the amount estimated for any object or purpose for which an appropriation is required to be made by law shall not be reduced below the minimum so required.

b. The board of trustees shall enter in its minutes a statement of the basis for any increase in or addition to any statement of estimated revenues.

2. If the board of trustees shall make any changes in the tentative budget, such adjustments shall be made which are necessary so that the total estimated revenues, appropriated fund balance and appropriated reserves together with the amount of taxes to be levied shall equal the total estimated expenditures.

3. A public hearing shall be held upon the tentative budget, as changed, altered or revised, on or before the fifteenth day of April or such other date as may be applicable pursuant to section 5-510 of this article or section 17-1729 of article seventeen. Notice of such public hearing shall be published at least once in the official newspaper and in such other newspapers and for such other additional times as the board of trustees, by resolution, may direct. At least five days shall elapse between the date of the first publication of such notice in the official newspaper and the date specified for the hearing. The notice of hearing shall state the time when and place where such public hearing will be held, the purpose thereof and that a copy of the tentative budget is available at the office of the village clerk where it may be inspected by any interested person during office hours. The notice shall also state the compensation proposed to be paid to each member of the board of trustees. The hearing may be adjourned from day to day but not beyond the twentieth day of April or such other date as may be applicable pursuant to section 5-510 of this article or section 17-1729 of article seventeen.

4. After completion of the public hearing, the board of trustees may further change, alter and revise the tentative budget, subject, however, to the conditions and restrictions imposed by subdivision one of this section. Such budget, as so revised, shall be adopted by resolution not later than the first day of May, or such other date as may be applicable pursuant to section 5-510 of this article or section 17-1729 of article seventeen and such adoption of appropriations and the means of financing the same shall be indicated in each schedule and schedule in a column parallel to those required by section 5-506 of this article. Unless the resolution specifically sets forth the appropriations in greater detail, the appropriations shall be deemed to have been made for each administrative unit by the following objects of expenditure: personal services, equipment, other expenses and special objects of expenditure as may be prescribed in a uniform system of accounts by the state comptroller. Upon adoption of the resolution required by this section the amounts proposed to be appropriated shall thereupon be appropriated and the wages and salaries shown in the schedule thereof shall be fixed at the amounts shown therein. In the event that the board of trustees shall fail to adopt a budget on or before the first day of May or such other date as may be applicable pursuant to section 5-510 of this article or section 17-1729 of article seventeen, the tentative budget, with such changes, alterations and revisions as shall have been made by resolution of the board of trustees, shall constitute the budget for the ensuing fiscal year.

HISTORY:

Add, L 1972, ch 892, eff Sept 1, 1973; amd, L 1973, ch 976 § 14, eff Sept 1, 1973; L 2000, ch 528, § 17, eff Oct 4, 2000 (see 2000 note below).

Editor's Notes: Laws 2000, ch 528, § 19, eff Oct 4, 2000, provides as follows:

§ 19. This act shall take effect immediately and shall apply to budgets for fiscal years commencing on or after January 1, 2001.

Substance transferred from § 6–608; amd, L 1976, ch 218, § 5, eff May 25, 1976.

Amendment Notes:

2000. Chapter 528, § 17 amended:

Sub 2, by deleting "cash surplus".

Notes to Decisions

Analysis

1. In general
2. Under former § 6-608

1. In general

In a taxpayer's Article 78 proceeding to enjoin the implementation of a village budget, the trial court would refuse to declare the budget allegedly adopted by the village board of trustees null and void on the asserted ground that the budget was a revision of a tentative budget filed with the village clerk and submitted for comment at a public hearing, and had been adopted without any further public hearing, since, under Vill Law § 5-508(4), the board of trustees was permitted to change, alter, and revise the tentative budget after the hearing without any further hearing being required prior to such revision, and since the taxpayer failed to show that the mayor or board of trustees had engaged in unlawful or irregular conduct, that the mayor, by precluding any speakers from commenting on the revised budget and then

demanding a vote on the budget, had departed from any rule of procedure established by the board of trustees, or that the actions by the mayor and the board of trustees were otherwise arbitrary, capricious, or unreasonable, had resulted from improper conduct, or were based upon an erroneous conception of a rule of law. Puka v Greco, 119 Misc. 2d 696, 464 N.Y.S.2d 349, 1983 N.Y. Misc. LEXIS 3580 (N.Y. Sup. Ct. 1983), aff'd, 104 A.D.2d 362, 479 N.Y.S.2d 150, 1984 N.Y. App. Div. LEXIS 19832 (N.Y. App. Div. 2d Dep't 1984).

The salaries of village elective officers may be increased during their terms of office only by adoption of local laws subject to permissive referenda. 1974 Ops St Compt File #104.

The "compensation" proposed to be paid to members of a village board of trustees which must be published, pursuant to Village Law § 5-508, in the notice of public hearing on the tentative budget refers only to the salary, or fixed, periodic cash consideration, proposed to be paid, exclusive of the cost or value of fringe benefits. 1990 Op St Compt 90-44.

Salary appropriated for position of acting village justice, which position was never filled, cannot be paid to village justice in addition to village justice's own salary; however, salary of village justice may be increased during village justice's term, but not as retroactive compensation for services already performed. Ops St Compt 88-59.

2. Under former § 6-608

Village should include in its budget the estimated revenues to be received by its several departments. 1946 Ops St Compt 193.

Annual budget prepared and adopted pursuant to former § 111 of Village Law. 1947 Ops St Compt 74.

Where the fifteenth day of April falls on a Sunday, the public hearing on the tentative budget may be held on the following Monday. 1956 Ops St Compt 129.

A village board may not restrict participation at a public hearing on the village budget to only taxpayers of the village. 1965 Ops St Compt File #343.

The village board may fix salaries at an amount less than that called for in the preliminary budget. 1968 Ops St Compt File #778.

Agency Opinions

1. In general

The same person may not hold the offices of village trustee and village justice due to the control which the former has over the amount of compensation to be paid to the latter. 1978 NY Ops Atty Gen March 14 (Informal).

The mayor of a village appoints the village attorney subject to the approval of the board of trustees. Upon a failure to appoint a village attorney, the incumbent continues to carry out the duties of the position. N.Y. Op. Att'y Gen. No. 83-31.

Inasmuch as there is no express requirement that salaries of elective village officers be increased by local law, such increases may be brought about simply by including them in the regular village budget. 30 Op. State Compt. 22, 1974 (Op. State Compt. no. 74-104) superseded. 1978 Op St Compt File #592.

Discussion of appropriate method of paying mayor's salary for the balance of the year where he requests and is granted a salary reduction retroactive to the beginning of the village fiscal year. 1978 Op St Compt File #901.

A village may not prorate the annual salaries of the mayor and trustees on a monthly basis and withhold payment of such prorated amounts for failure to attend a regular monthly meeting of the board of trustees. 1978 Op St Compt File #993.

The salary of a village assessor may be increased during the fiscal year to compensate him for his new responsibility of assessing property at 100 percent assessment pursuant to court order. 1979 Op St Compt File #413.

The village board of trustees may adopt a resolution to increase the salary of the village attorney during the fiscal year. 1979 Op St Compt File #615.

(1) A village board of trustees may amend the tentative budget after it has been finally adopted but prior to publication of notice of the hearing on the budget. 1979 Op St Compt File #741.

(2) Notice of hearing on the tentative budget should state the compensation proposed to be paid to the mayor and the trustees, however, the effect of failure to do so is unclear. 1979 Op St Compt File #741.

When the salary of an elective village officer is fixed by inclusion in the budget rather than by local law, it need not be preceded by a public hearing nor is there a permissive referendum requirement. 1980 Op St Compt File #312.

A village does not have to use a local law to increase the salary of a village justice during his term of office. 1981 Op St Compt File #81-86.

Where a village has so designated two official newspapers, notice for the public hearing on the village budget must be published in both newspapers. 1982 Op St Compt File #82-173.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations § 1577.

§ 5-520. General budgetary controls

1. A separate account shall be kept for each appropriation. Each such account shall show the amount appropriated, the several amounts expended therefrom [therefrom][*] and the unexpended balance.

2. No expenditure shall be made, nor shall any contract which in any manner involves the expenditure of money or the incurring of any pecuniary liability be entered into, unless an amount has been appropriated for the particular purpose and is available therefor or has been authorized to be borrowed pursuant to the local finance law. Nothing in this subdivision shall prevent the making of a contract or lease for a term exceeding one year when authorized by law nor shall anything in this subdivision require a village which has entered into a contract or lease for a term exceeding one year to pay during the current fiscal year any amounts larger than those which become due and owing during that year under the terms of such lease or contract.

3. Whenever during a fiscal year it shall appear probable to the budget officer that the moneys available for such year will be insufficient to meet the amounts appropriated, he shall forthwith notify the board of trustees of such fact, stating the probable amount of such deficiency. The budget officer may include his recommendations as to the action which should be taken. The board of trustees may reduce any appropriation or appropriations by resolution so as to prevent the making of expenditures in excess of moneys available. An appropriation shall not be reduced below the minimum amount required by law to be appropriated, nor shall an appropriation be reduced by more than the balance therein less outstanding and unpaid claims chargeable to such appropriation.

4. The board of trustees, during a fiscal year, by resolution, may make additional appropriations or increase existing appropriations. Moneys therefor may be provided by transfer from the unexpended balance of an appropriation, from the appropriation for contingencies, from unappropriated unreserved

[*]Bracketed language inserted by the Publisher.

fund balance, or unanticipated revenues within a fund, or by borrowing pursuant to the local finance law. For the purposes of this subdivision, unappropriated unreserved fund balance or unanticipated revenues shall be available for transfer only to the extent that the total of all revenues of such fund recognized or reasonably expected to be recognized in the current fiscal year, including unappropriated unreserved fund balance, exceeds the total of all revenues of such fund as estimated in the budget, including appropriated fund balance.

5. Notwithstanding the provisions of subdivision four of this section, grants in aid from the state and federal governments, other gifts which are required to be expended for particular objects or purposes, and insurance proceeds for the loss, theft, damage or destruction of real or personal property, when proposed to be used or applied to repair or replace such property, may be appropriated by resolution of the board of trustees at any time for such objects and purposes.

HISTORY:

Add, L 1972, ch 892, eff Sept 1, 1973; amd, L 2000, ch 528, § 18, eff Oct 4, 2000 (see 2000 note below).

Editor's Notes: Laws 2000, ch 528, § 19, eff Oct 4, 2000, provides as follows:

§ 19. This act shall take effect immediately and shall apply to budgets for fiscal years commencing on or after January 1, 2001.

Substance transferred from § 6–630.

Amendment Notes:

2000. Chapter 528, § 18 amended:
Sub 4, by deleting "cash surplus".
2000. Chapter 528, § 18 amended:
Sub 5, by deleting "received".

Notes to Decisions

In an engineer's action against a village, alleging that the village failed to pay the engineer's claim for the design and planning of the village's sewage treatment facility, judgment for the engineer was proper where the village entered into an agreement with the engineer for the design and planning of the facility after the state health department ordered the village to submit plans for the facility, and where the village waived the affirmative defense of its failure to comply with Vill Law § 5-520(2) by its failure to plead this defense. Vrooman v Middleville, 91 A.D.2d 833, 458 N.Y.S.2d 424, 1982 N.Y. App. Div. LEXIS 19739 (N.Y. App. Div. 4th Dep't 1982), app. denied, 58 N.Y.2d 610, 462 N.Y.S.2d 1028, 449 N.E.2d 427, 1983 N.Y. LEXIS 3857 (N.Y. 1983).

In absence of any resolution by village board of trustees as to how village intended to pay or cost of using county sewage treatment facility, court properly determined that village was liable under theory of implied contract for damages in quantum meruit. Nassau County v Incorporated Village of Roslyn, 218 A.D.2d 688, 631 N.Y.S.2d 42, 1995 N.Y. App. Div. LEXIS 8714 (N.Y. App. Div. 2d Dep't 1995).

Village was not entitled to summary judgment on an action alleging breach of contract, because it was not entirely clear that a contract for demolition of a hotel violated N.Y. Village Law § 5-520, since it was not fully established what funds were available for that project, and the action was not time-barred pursuant to N.Y. C.P.L.R. 9802, as the action was brought within one year of the accrual of the cause of action. Bianchi Indus. Servs., LLC v Village of Malone, 41 A.D.3d 999, 838 N.Y.S.2d 240, 2007 N.Y. App. Div. LEXIS 7343 (N.Y. App. Div. 3d Dep't 2007).

A village from which an engineering firm sought to recover for services rendered in planning a sewage treatment system could not avoid its contractual liability to the firm by interposing Vill Law § 5-520(2), which prohibited a village's entering into a contract unless the village had appropriated funds or authorized borrowing for the particular purposes of the contract, where the village's answer had not pled such statute as an affirmative defense and where the village had passed a resolution authorizing the issuance of bonds for construction to which the firm's services had been preliminary; even if the contract were void on the basis of such statute, the firm could recover under the doctrine of quantum meruit since the firm had acted in good faith, rendered substantial services to the village and provided the village with an approved set of plans for the construction of sewers; nor was Env Conser L § 17-1901, which permitted any municipality to select a person or firm to perform necessary consulting engineering services with respect to a pure water program so long as the Commissioner of Health was a party to any contract between the municipality and the person or firm, a bar to the firm's action where the commissioner had directed the village to submit to the State Department of Health plans for a sewage treatment system, where the village's contract with the firm required the firm to formulate such plans, and where the commissioner had later approved the design and plans prepared by the firm. Vrooman v Middleville, 106 Misc. 2d 945, 436 N.Y.S.2d 662, 1981 N.Y. Misc. LEXIS 2035 (N.Y. Sup. Ct. 1981), aff'd, 91 A.D.2d 833, 458 N.Y.S.2d 424, 1982 N.Y. App. Div. LEXIS 19739 (N.Y. App. Div. 4th Dep't 1982).

A village justice cannot enter into a contract on behalf of the village for computer services in connection with the issuance of traffic tickets. 1973 Ops St Compt File #880.

Salary appropriated for position of acting village justice, which position was never filled, cannot be paid to village justice in addition to village justice's own salary; however, salary of village justice may be increased during village justice's term, but not as retroactive compensation for services already performed. Ops St Compt 88-59.

In village which has established office of village auditor, village board of trustees may not, by resolution or local law, authorize auditor to audit and order paid only certain claims; village board of trustees may not delegate its authority to make budget transfers between appropriations; village board of trustees may permit claims against village to be processed without either certification or verification by oath of claimant. Ops St Comp 90-9.

UNDER FORMER § 6-630

1. In general

Subdivision 2 of former § 6-630 makes exclusive application of the Local Finance Law to village financing abundantly clear. Marine Midland Trust Co. v Waverly, 42 Misc. 2d 704, 248 N.Y.S.2d 729, 1963 N.Y. Misc. LEXIS 1722 (N.Y. Sup. Ct. 1963), aff'd, 21 A.D.2d 753, 251 N.Y.S.2d 937, 1964 N.Y. App. Div. LEXIS 5365 (N.Y. App. Div. 3d Dep't 1964).

For a discussion of village public library funds, see 1953 Ops St Compt 126.

Proceeds from sale of village realty should be paid into village general fund. 1953 Ops St Compt 373.

The treasurer has no power to increase or decrease appropriations; such power is vested solely in the village board. 1968 Ops St Compt File #778.

2. Appropriations for purposes not in budget

If village budget made no provision for police officer and police justice, money may be secured from contingent fund, profits of municipal public utility, or notes. 1950 Ops St Compt File 238.

If a village has unappropriated cash surplus or unanticipated revenues, it may use such moneys to make a permanent street improvement although no appropriation therefor was made in the annual budget. 1955 Ops St Compt 265.

A village may appropriate money for a purpose which was not included in the village budget and provide the moneys required by transfer from an unexpended balance, the contingency item, unappropriated cash surplus, unanticipated revenues or by borrowing pursuant to the Local Finance Law. 1955 Ops St Compt 632.

3. Transfer of village funds

By resolution of the board of trustees, the purchase of land for a parking place for vehicles may be authorized; a portion of profits resulting from operation of electric public utility service of Freeport may be transferred to another appropriate village fund, theretofore appropriated for a specific and definite purpose in the fiscal year in question; and payment for such land may be made from such other village fund. 1945 Ops St Compt 602.

Discussion of transfers of village moneys to increase an item in village budget. 1947 Ops St Compt 64.

Discussion of transfer of village moneys. 1947 Ops St Compt 93; 1947 Ops St Compt 64; 1947 Ops St Compt 451; 1946 Ops St Compt 543.

Moneys of the electric fund may not be transferred to the general fund where there are outstanding obligations of the village issued on account of the electric fund. After September 1, 1955, unappropriated cash surplus, unanticipated revenues and unexpended balances of appropriations may be transferred. 1955 Ops St Compt 263.

Where a village has underestimated in the budget the amount of a probable unexpended balance at the end of the fiscal year, the excess may be used to increase an appropriation only to the extent that actual revenues received exceed the total revenues of the particular fund as estimated in the budget. 1955 Ops St Compt 483.

A village which has a paid fire department may employ temporary firemen, for services of less than one month's duration, for "important and urgent" reasons. The board of trustees may transfer moneys from the contingent fund to pay such temporary firemen, if the fire department budget is inadequate. 1960 Ops St Compt 325.

Village board may make transfers from unappropriated cash surplus, including moneys accumulated in an unauthorized reserve fund. 1964 Ops St Compt File #857.

Money may be transferred from fund to fund where a true surplus as defined by Village Law, former § 6-630(4) exists. Such transfer must be made by the village board. 1968 Ops St Compt File #778.

Where a true surplus exists in the village water department fund, the village board may, by resolution, transfer the surplus to the sewer fund. 1968 Ops St Compt File #829.

4. Expenses of officers and employees

Village may not reimburse policeman for loss of private car while engaged in performance of his duties. 1954 Ops St Compt 29.

Village officer may not be compensated for time lost attending meeting of PSC. 1954 Ops St Compt 29.

Village funds may be used to provide telephone service in homes of village police officers where telephones are used for official business only. 1954 Ops St Compt 212.

Up until September 1, 1955, a village clerk-treasurer may be reimbursed for travel expenses and mileage in taking village moneys to a bank in another city, if so authorized by the board of trustees. On and after September 1, 1955, prior authorization is not necessary. 1955 Ops St Compt 425.

5. Waterworks and equipment

A contract with an engineer for preparation of plans and supervision of construction of a water works for seven per cent of the cost of construction if the plan went through was a contract involving an expenditure within the meaning of former § 6-630. Potts v Haverstraw, 79 F.2d 102, 1935 U.S. App. LEXIS 4028 (2d Cir. N.Y. 1935).

An appropriation for miscellaneous expenses for the year was insufficient to authorize a contract with an engineer for supervision of construction of a water works for seven per cent of the cost. Potts v Haverstraw, 79 F.2d 102, 1935 U.S. App. LEXIS 4028 (2d Cir. N.Y. 1935).

On appeal from judgment dismissing amended complaint upon motion, in action in contract by civil engineer against village for services in construction of waterworks, defense that money for the project had not been provided as required by former § 6-630 cannot be considered, for defendant must plead it in confession and avoidance. Potts v Haverstraw, 93 F.2d 506, 1937 U.S. App. LEXIS 2848 (2d Cir. N.Y. 1937).

Pending the issuance of bonds or capital notes, a village may not use general fund moneys temporarily to pay for water meters delivered to the village. 1947 Ops St Compt 276.

Where change orders and extras raise total cost of waterworks construction above amount which was appropriated and which was approved by referendum, village has no authority to pay claim for the additional amount in the absence of litigation of a special act of the Legislature. 1965 Ops St Compt File #340.

6. Miscellaneous

Former § 6-630 did not prohibit the purchase of equipment for a lighting system under a conditional sales contract to be paid from the revenues of the system, for money is "otherwise available" within the meaning of such section where payment is to be made from specific revenues. Kelly v Merry, 262 N.Y. 151, 186 N.E. 425, 262 N.Y. (N.Y.S.) 151, 1933 N.Y. LEXIS 928 (N.Y. 1933).

The board of trustees may by resolution make an appropriation for the purpose of paying an attorney other than the village attorney employed to perform special service. Farmingdale v Karp, 54 Misc. 2d 714, 283 N.Y.S.2d 267, 1967 N.Y. Misc. LEXIS 1424 (N.Y. Sup. Ct. 1967).

Fire insurance money received by village as a result of destruction of village hall by fire should be placed in village general fund and may thereafter be expended for purchase of highway equipment provided there appears a budgetary item for this purpose in current budget. 1947 Ops St Compt 481.

For a discussion on the use of fire insurance proceeds where bonds issued to finance purchase of building destroyed by fire remain outstanding, see 1953 Ops St Compt 365, see former § 101-c.

Real property for village public library purposes should be acquired jointly by village and library trustees as tenants in common where village furnishes only a portion of the purchase price, the balance to be paid from a bequest to the library trustees. Moneys in contingent fund may be appropriated to pay village share of purchase price, where no item for this purpose was included in the current budget. 1953 Ops St Compt 142.

Except for an unforeseen emergency, a village may not pay bills incurred in a prior fiscal year. 1957 Ops St Compt 155.

A village may legally reimburse an individual for the expense of constructing water and sewer lines in a street dedicated to the village as a street. A claim for such reimbursement, based on the dedication agreement, properly certified or verified, must be presented for audit. The resolution authorizing the village to enter into the agreement for reimbursement is subject to permissive referendum. 1960 Ops St Compt 274.

The planning board of a village is not authorized to incur obligations for engineering service without an appropriation or issuance of obligations pursuant to the local Finance Law. 1961 Ops St Compt 275.

Even though additional moneys required under an employer-employee agreement are not available in the current budget, a village board may enter into the agreement with a recognized employee organization during the current fiscal year and such agreement may be effective during all or part of such year, so long as, prior to the closing of the agreement, the board makes the required additional appropriations. 1968 Ops St Compt File #565.

A village through the board of police commissioners may appoint an individual to the rank of captain in the village police force. The village board may obtain money to pay a salary for the newly created rank of captain and may increase the salary of the chief of police by obtaining money from an unexpended balance, from the contingency fund, from a true surplus or by borrowing pursuant to the Local Finance Law. 1968 Ops St Compt File #783.

A village may acquire land outside of its corporate limits for the purpose of preventing contamination of the village water supply, and may finance the purchase thereof with surplus water fund moneys. 1964 Ops St Compt File #1067.

Village may join State Health Plan during fiscal year although annual budget contained no provision for expense of participating. 1964 Ops St Compt File #1097.

Agency Opinions

Analysis

UNDER FORMER § 6-630
1. Transfer of village funds
2. Miscellaneous

UNDER FORMER § 6-630

1. Transfer of village funds

Surplus in light fund for any fiscal year, in excess of amount sufficient to pay obligations for which fund was provided, may be transferred to street fund and used for street purposes, without vote of electors. 1926 Ops Atty Gen 96.

2. Miscellaneous

The Village Board of Trustees of the Village of Munsey Park is authorized to sell surplus lands without public auction and use the proceeds therefrom to defray the costs for the erection of a village hall and police justice court. Authorization for such sale and construction by the Village Board of Trustees is not subject to permissive referendum. 1972 Ops Atty Gen Oct 19.

Board of trustees has control of village funds and may establish reasonable rules to ensure that expenditures do not exceed budgeted amounts or available funds. 1994 NY Ops Atty Gen I 94-38.

Discussion of use of proceeds from sale of obsolete village building to finance an increase in the cost of constructing a new village garage to an amount in excess of the amount specified in a bond resolution adopted for such project. 1978 Op St Compt File #655.

Surplus moneys in a village water fund may be accumulated and carried over from year to year. Ops. State Compt. Nos. 77-280 and 78-261 superseded. 1978 Op St Compt File #664.

Discussion of disposition of surplus proceeds from sale of bonds and also of transferring surplus moneys in a water fund to the general fund and then to a capital reserve fund. 1978 Op St Compt File #672.

Discussion of procedures for village to follow in purchasing a fire truck costing approximately $45,000 where it is necessary to borrow money to finance such purchase. 1979 Op St Compt File #52.

The salary of a village assessor may be increased during the fiscal year to compensate him for his new responsibility of assessing property at 100 percent assessment pursuant to court order. 1979 Op St Compt File #413.

The village board of trustees may adopt a resolution to increase the salary of the village attorney during the fiscal year. 1979 Op St Compt File #615.

A village may grant cost of living, merit and/or seniority salary increases to its employees provided such increases are prospective only and there are sufficient funds within the budget. 1980 Op St Compt File #24.

A village treasurer should not issue checks where it will result in an expenditure of funds in excess of the amount appropriated for a particular purpose. He should promptly notify the mayor and/or the board of trustees who must reduce or increase the appropriation and, if the appropriation is increased, provide for the transfer or borrowing of funds to meet the increase. 1981 Op St Compt File #81-15.

A village may not award a contract after competitive bidding unless an appropriation therefor has been made and moneys are available therefor or have been authorized to be borrowed. 1982 Op St Compt File #82-173.

The salary of a village justice may be reduced by resolution during a term of office by being included in the annual budget at a lesser rate than that fixed for the preceding fiscal year and no mandatory referendum is required. 1983 Op St Compt File #83-127.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Appropriation for metropolitan, regional or county planning boards, CLS Gen Mun § 239-c.

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1327, 1415.

84 NY Jur 2d Pleading § 144.

§ 5-524. Audit and payment of claims

1. The term "claim", as used in this section, shall include all bills, accounts and demands for the payment of money, of whatever nature, asserted against the village.

2. In a village which has not established the office of auditor, the board of trustees shall audit all claims against the village, except that it may, by resolution, authorize and empower a separate board of commissioners, a board possessing the powers of two more such boards or another board possessing like powers to audit and order paid all claims incurred by such board and payable out of the funds within its jurisdiction.

3. In a village which has established the office of auditor, the auditor shall audit and order paid all claims against the village. Such order shall be in the form prescribed in this chapter for similar orders of the village clerk. The auditor shall transmit such order directly to the village treasurer and shall retain a duplicate thereof in his office.

4. Except as hereinafter provided, no claim shall be ordered paid unless such claim is in writing and itemized and approved by the officer or employee whose action gave rise or origin to the claim. The board of trustees may determine, by resolution, that claims shall be certified or verified by oath of the claimant or his duly authorized agent.

5. Fixed salaries, debt service, amounts becoming due upon lawful contracts for periods exceeding one year and the compensation for services of employees or officers regularly engaged by the village at agreed wages by the hour, day, week, month or year may be paid without prior audit. All payrolls, or other claims for compensation, for personal services rendered to the village by any person other than an elective village officer shall be certified by the village officer or employee having direct supervision of the claimant to the effect that such services indicated on such payroll or claim were actually performed by the person or persons mentioned therein. If the rules of the state civil service commission, the county civil service commission or the county personnel officer, as the case may be, have been extended to apply to any such employees or officers, no claim for compensation shall be paid unless the payroll or claim shall have been certified by such commission or personnel officer to the effect that the appointment or employment of such officers and employees has been made in accordance with the civil service law and rules.

6. The board of trustees may be resolution authorize payment in advance of audit of claims for public utility services, postage, freight and express charges. All such claims shall be presented at the next regular meeting for audit, and the claimant and the officer incurring or approving the same shall be jointly and severally liable for any amount disallowed by the board of trustees.

As used in this subdivision, the term public utility services shall mean electric, gas, water, sewer and telephone services.

7. The actual and necessary expenses of all officers, employees, and, when authorized by the board of trustees, the actual and necessary expenses of the volunteer chief and assistant volunteer chiefs of the village fire department incurred in the performance of their official duties shall be a village charge. For the purposes of this subdivision "actual and necessary expenses", as it applies to a volunteer chief or assistant volunteer chief of the village fire department, means only such expenses incurred in the performance of their extra official duties as volunteer chief or assistant volunteer chief. The board of trustees of any village, in lieu of auditing and allowing the claim of a village officer, employee, or volunteer chief and assistant volunteer chiefs of the village fire department for actual and necessary expenses for travel, may determine by resolution to allow and pay such officer, employee, or volunteer chief and assistant volunteer chiefs of the village fire department a reasonable mileage allowance for use of his own automobile for each mile actually and necessarily traveled by him in the performance of the duties of his office or position, or in attending a convention, conference or school pursuant to section seventy-seven-b of the general municipal law. The actual and necessary expenses incurred by a police justice who does not also hold the office of town justice in attending a training school for justices provided by the education department or given within his county by the county magistrate's association shall be a charge against the village of which he is police justice. No such person, however, shall be allowed such expenses for attending a regional school unless his village shall be included within the area of such region as established by the education department.

8. Notwithstanding the provisions of subdivisions two, three and four of this section or of any other law, any village by vote of its board of trustees may enter into a mutual aid agreement with other villages or political subdivisions of the state, pursuant to the provisions of the New York state defense emergency act, and all acts amendatory thereof and supplemental thereto, for the purpose of civil defense as defined in said act and may raise money by tax to defray the expense of its participation in such mutual aid agreement. Such villages may also enter into a financial agreement or arrangement with such other participating villages or political subdivisions of the state, provided, however, that:

a. the treasurer of one such participating village shall be designated as treasurer of a joint mutual aid or civil defense fund;

b. each of such participating villages may from time to time advance and pay to such mutual aid or civil defense fund its proportionate share of an amount of money agreed upon by all such participating villages for the purpose of defraying the necessary and proper expenses of mutual civil defense aid;

c. the treasurer of such joint fund as herein provided shall make necessary and proper disbursements from said fund and shall account monthly to each village for such disbursements.

All moneys advanced or otherwise disbursed by each such village to carry out the provisions of this subdivision, shall be only from moneys appropriated for such purposes and included in the annual budget of said village.

9. Any officer of the village who shall knowingly audit, order paid or pay any claim contrary to the provisions of this section shall be guilty of a misdemeanor.

HISTORY:

Add, L 1972, ch 892, eff Sept 1, 1973; amd, L 1982, ch 9, § 2, eff Mar 2, 1982; L 1982, ch 222, § 1, eff June 15, 1982.

Editor's Notes: Substance transferred from § 6–634.

Notes to Decisions

Analysis

1. In general
2. Compensation of officers and employees
3. Payment for expenses of officers and employees
4. Accrual of cause of action

1. In general

Village can refund special franchise taxes levied against a cablevision corporation for past 2 fiscal years in amount equal to special franchise fees paid to village prior to levy of taxes, where corporation has received no credit for such fees against taxes as required by CLS Real Property Law § 626. 1985 Op St Compt No. 85-59.

Village board of trustees may not establish audit commission consisting of mayor and clerk-treasurer which would have authority to audit claims against village. 1987 Op St Compt No. 87-65.

A municipality may make a down payment on a fire truck where certain safeguards are taken to protect the municipality's interest. 1974 Ops St Compt File #1215.

In village which has established office of village auditor, village board of trustees may not, by resolution or local law, authorize auditor to audit and order paid only certain claims; village board of trustees may not delegate its authority to make budget transfers between appropriations; village board of trustees may permit claims against village to be processed without either certification or verification by oath of claimant. Ops St Comp 90-9.

2. Compensation of officers and employees

Municipal officers and employees are compensated by the payroll method. 1974 Ops St Compt File #1118.

Village board may, by resolution, fix compensation of members of village zoning board of appeals on either per diem or annual basis. 1986 Op St Compt No. 86-70.

Village trustee who is officer, employee and stockholder of construction corporation would have prohibited interest in any contract between corporation and village unless (a) his or her stock ownership amounts to less than 5 percent of outstanding stock and (b) is employee and officer of corporation, his or her duties do not involve procurement, preparation or performance of village contracts in his or her remuneration is not affected by such contract; there is no exception to conflict of interest provisions of CLS Gen Mun Art 18 for contracts entered into in emergency situations. 1988 Op St Compt No 88-23.

Compensation of appointive village officers and employees for services may be paid without prior audit by village board of trustees, upon certification of officer or employee having direct supervision, unless board determines to require such prior audit. Ops St Compt No. 89-33.

3. Payment for expenses of officers and employees

Where the same individual serves as an appointed town justice and as an elected village justice of a village within the town,

expenses incurred by him in attending a training school for justices should be paid by the town. 1975 Ops St Compt File #1148.

In absence of pre-existing authority under state statute, local law, or collective bargaining agreement provision, village may not pay legal expenses incurred by village police officers in connection with criminal proceedings; village may not pay as moral or equitable obligation legal expenses of village police officers arising out of allegations of misconduct. 2000 Op St Compt No. 00-1.

4. Accrual of cause of action

Although contractor had initially stated to village that it would have no recourse but to bring legal action if it did not receive payment within ten days, where village had not audited the vouchers or work orders and had not officially rejected the claim, contractor's cause of action against village did not accrue for statute of limitations purposes until the village was informed that the contractor would commence an action against the village within 30 days; upon expiration of that period without approval or payment, the contractor's claims were constructively rejected and its cause of action accrued. Memphis Constr., Inc. v Moravia, 59 A.D.2d 646, 398 N.Y.S.2d 386, 1977 N.Y. App. Div. LEXIS 13518 (N.Y. App. Div. 4th Dep't 1977).

Contractor's cause of action against village did not accrue until it possessed the legal right to be paid and to enforce the right to payment, which did not occur until the vouchers and work orders were audited and rejected by the village. Memphis Constr., Inc. v Moravia, 59 A.D.2d 646, 398 N.Y.S.2d 386, 1977 N.Y. App. Div. LEXIS 13518 (N.Y. App. Div. 4th Dep't 1977).

Municipality may not forever frustrate potential causes of action against it simply by failing to audit submitted claims; facts of every such case will determine whether there came a time when claimant should have viewed his claim as having been constructively rejected thus giving rise to accrual of a cause of action. Memphis Constr., Inc. v Moravia, 59 A.D.2d 646, 398 N.Y.S.2d 386, 1977 N.Y. App. Div. LEXIS 13518 (N.Y. App. Div. 4th Dep't 1977).

UNDER FORMER § 6-634

5. In general

The board of trustees may require verification rather than certification of claims by adopting a proper resolution therefor. 1956 Ops St Compt 216.

A village which contemplates establishment of the office of auditor may not limit his powers to audit of claims of a specified nature or size. 1962 Ops St Compt 411.

A village urban renewal agency which was established by special act of the legislature is not subject to former 128 of Village Law with respect to audit and payment of claims. 1965 Ops St Compt File #656.

Only the village treasurer need sign village payroll checks. 1967 Ops St Compt File #469.

Minutes of a village board must show the amounts allowed on bills and accounts audited by the board and the fund from which such amounts shall be paid. 1968 Ops St Compt File #600.

The minutes of the village board of trustees must show each individual claim audited and the fund from which it is to be paid. 1968 Ops St Compt File #778.

Only the village board audits and approves claims against the village. The board may form a committee to make recommendations regarding acceptance or rejection of claims. 1968 Ops St Compt File #778.

A village clerk may be appointed to the office of village auditor. 1968 Ops St Compt File #1042.

6. Claim form

The requirements as to form which a claim must satisfy before it may be audited by a village board of trustees apply regardless to the amount of the claim. The board of trustees should, by resolution, order the approved claims to be paid and such resolution must appear in the minutes. A majority of the members of the board of trustees must approve the resolution. 1955 Ops St Compt 644.

Suggested form for contract claim against village, see 1955 Ops St Compt File #7754.

A village must require a claim form to be executed by a seller in a contract of sale of real property to the village. 1957 Ops St Compt 338.

A village need not require a claim form to be executed by a claimant to whom an award has been granted in a final decree in a condemnation proceeding. 1957 Ops St Compt 338.

7. Compensation of officers and employees

A village treasurer should not pay a claim for overtime compensation of a village officer even though the claim has been audited and ordered paid by the village board of trustees. 1956 Ops St Compt 79.

A board of village trustees may not appoint and pay salary of a person as custodian of the village marina where he is already a full time member of the village police department. 1961 Ops St Compt 203.

A village may employ a tennis professional to operate its tennis courts and to give lessons thereon to village residents, as an independent contractor upon such terms and conditions as may be agreed upon. 1963 Ops St Compt File #387.

8. Payment of expenses of officers and employees

A village board may require receipts of actual expenditures to be submitted by volunteer firemen in order to receive reimbursement for expenses incurred in attending training schools and instruction courses. 1960 Ops St Compt 299.

While a village may, under certain circumstances, furnish meals for village officials and employees, it has no authority to furnish meals for state officials. 1961 Ops St Compt 95.

Expenses in connection with village employees taking a supervisory course in a community college would be a proper village charge. 1962 Ops St Compt 481.

A village may not pay the officers of the village fire department the amount of money budgeted for fire department purchases, so that such purchases may be made and paid for by such fire department. 1965 Ops St Compt File #190.

There is no authority whereby the expenses of village officers and employees, incurred in attending conventions, conferences and schools, may be paid from a petty cash fund. 1967 Ops St Compt File #335.

A claim for reimbursement by a village mayor who attended a conference should be detailed. Garage, miscellaneous expenses and entertainment expenses should not be reimbursed. 1967 Ops St Compt File #593.

A village treasurer may pay the educational expenses of a library employee taking courses related to the administration of the public library where such attendance is pursuant to an official request and authorization and thus part of her official duties. 1968 Ops St Compt File #985.

The expense actually and necessarily incurred by a village justice in taking his court fines to the bank is a village charge. Whether the use of a taxi for this purpose is necessary must be determined by the village board. 1969 Ops St Compt File #406.

9. Payments for use of car

Up until September 1, 1955, a village clerk-treasurer may be reimbursed for travel expenses and mileage in taking village moneys to a bank in another city, if so authorized by the board of trustees. On and after September 1, 1955, prior authorization is not necessary. 1955 Ops St Compt 425.

Where a village fixes a mileage rate for officers and employees for official travel a so-much-a-mile basis, the rate includes all actual and necessary expenses incurred in travel, including cost of tolls paid. 1961 Ops St Compt 22.

A village police chief, using his own car in village police work, may be paid necessary travel expense or a mileage allowance, if the Board of Trustees has first passed a resolution fixing such an allowance. 1961 Ops St Compt 68.

A village may purchase metal medallions to be placed on the private cars of the mayor and members of the board of trustees for the purpose of identifying such officers while on official business. 1967 Ops St Compt File #595.

A village may furnish an automobile for the official, but not the personal, use of the village police chief, and may authorize the

official use of a privately owned vehicle with the payment of actual expenses or a mileage rate. A village-owned vehicle may not be used for personal purposes by the village police chief. 1967 Ops St Compt File #973.

A village may not authorize a periodic lump sum personal automobile allowance to a village officer to cover the cost of operating his own automobile in the performance of his official duties. 1969 Ops St Compt File #317.

A village clerk may be reimbursed for expenses incurred in returning from his vacation in Florida, at the request of the village board, because of the death of the mayor. 1969 Ops St Compt File #379.

A village trustee who is a commissioner in charge of a village department may be paid mileage when he uses his own car to get emergency supplies from a place outside of the village. 1969 Ops St Compt File #448.

A village board of trustees may not legally authorize village employees to obtain gasoline and oil for their personal cars, to be used in official business, and have same charged directly to the village. 1960 Ops St Compt 389.

10. Payment of other particular claims

The village must pay over the amount prescribed in a garnishee execution against a village employee's salary without any demand that the officer execute and sign a voucher for such amount as a condition precedent to payment. 1956 Ops St Compt 76.

Discussion in regard to the obligations of a village where water rents have been increased pursuant to an invalid ordinance. 1957 Ops St Compt 331.

A village may make quarterly advance payments under a fire protection contract. 1959 Ops St Compt 198.

A village may legally reimburse an individual for the expense of constructing water and sewer lines in a street dedicated to the village as a street. A claim for such reimbursement, based on the dedication agreement, properly certified or verified, must be presented for audit. The resolution authorizing the village to enter into the agreement for reimbursement is subject to permissive referendum. 1960 Ops St Compt 274.

There is no authority for a village to pay a claim of a physician for services rendered an injured person, notwithstanding the injury was sustained in a motor vehicle accident and the physician was summoned by a village police officer, nor is there any authority for a village to pay a similar claim for services rendered to the victim of a stabbing. 1961 Ops St Compt 395.

A village participating in a state health insurance plan for the benefit of its employees may not require a certified claim before paying its share of administration expenses. 1962 Ops St Compt 40.

Disbursements made by a village in course of operating a day camp which has been turned over to it as a gift are to be recorded in the same manner as other village expenditures. 1963 Ops St Compt File #324.

Village board may not make a deposit of public moneys with a water corporation, or contract to make periodic payments in the future for materials or services to be furnished at this time; or pay now for materials and services to be furnished later. 1965 Ops St Compt File #175.

11. Conflicts of interest

A law firm in which the mayor of a village is a partner may not represent the village, even though the firm will receive no compensation but only reimbursement for actual disbursements made. 1956 Ops St Compt 256.

A village treasurer and insurance broker is barred from sharing commissions received by another broker for placing village insurance. 1958 Ops St Compt 409.

The chief engineer of a village fire department may not lawfully sell equipment, materials or supplies to the village. 1960 Ops St Compt 231.

Since, under other provisions of the Village Law, the chief engineer of the fire department is under the direction and control of the Board of Fire Commissioners, who must approve his nomination, an employer-employee relationship exists, whether or not the chief engineer receives any pay, precluding him from lawfully selling equipment, materials, or supplies to the village. 1960 Ops St Compt 231.

A prohibited conflict of interest would exist if a village trustee should perform services for the village as an electrician and receive compensation therefor. 1967 Ops St Compt File #668.

A prohibited conflict of interest would occur if a village mayor should be hired as an independent contractor to work for the village. While no such conflict arises if he is employed by the village, his appointment to a position of employment by the board of trustees would be contrary to public policy. 1967 Ops St Compt File #1042.

A prohibited conflict of interest exists where a village trustee is employed by an engineering firm retained to perform services for the village when the trustee's duties, as an employee of the firm, involve performance of some part of the firm-village contract. 1968 Ops St Compt File #80.

A prohibited conflict of interest arises where a village purchases supplies and equipment from a hardware store operated by a corporation of which a village trustee is the principal stockholder. 1968 Ops St Compt File #323.

A prohibited conflict of interest does not occur when a village board designates a bank as the depository of village funds, notwithstanding the membership of a trustee on the bank's advisory board. Disclosure, however, is necessary. 1968 Ops St Compt File #323.

A prohibited conflict of interest exists where a village purchases supplies from a business owned by a member of the board of trustees in excess of $100 during any one fiscal year. This Department has no authority to provide an exception to that statute. 1968 Ops St Compt File #536.

Where consideration of a contract is under $100, the contract is not prohibited by conflict of interest. 1969 Ops St Compt File #444.

A prohibited interest in contract arises where an insurance agency (corporation) by which the mayor of a village is employed sells insurance to the village, unless former § 802(1)(b) is applicable. 1968 Ops St Compt File #719.

Agency Opinions

Analysis

1. In general
2. Compensation of officers and employees
3. —Village attorney
4. Payment for expenses of officers and employees
5. Membership dues
6. Travel and mileage expenses

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7. Compensation of officers and employees
8. Payments for use of car
9. Conflicts of interest

1. In general

Discussion of payment of claims under a contract for public relations work, including the preparation of a newsletter. 1978 Op St Compt File #559.

A village must pay the gross amount of an electric bill, where the gross amount includes a charge for late payment, notwithstanding that the gross amount is due less than 30 days after the bill has been presented to the village for payment. 1978 Op St Compt File #943.

Discussion of payment of claim incurred in prior year for engineering services performed by the village water works and sewage disposal superintendent. Discussion of itemizing claims. 1978 Op St Compt File #994.

A claim submitted by a multi-purpose credit card company must be certified by the claimant or on behalf of the claimant by a duly authorized agent, and may not be certified by the municipal officer or employee who used the card. 1979 Op St Compt File #726.

A village may not pay a claim submitted by a low bidder for an amount in excess of the bid price where the bidder delivered a vehicle which contained additional equipment not called for in

the bid specifications nor requested or approved for purchase by the village board of trustees. 1979 Op St Compt File #842.

A village may not expend moneys generated from a village recycling program for the cost of a Christmas party for village employees. 1980 Op St Compt File #186.

Two members of a village board of trustees do not have prohibited conflicts of interest in insurance contracts between the village and an insurance company of which they are officers if, as employees of the company, they have nothing to do with the preparation, procurement or performance of the insurance contracts and their remuneration is not directly affected as a result of the contract. 1980 Op St Compt File #443.

Under certain circumstances, municipalities may make advance payment for the estimated amount of fuel oil to be received in a fiscal year. The question of the propriety of school districts making such advance payment should be referred to the Education Department. 1981 Op St Compt File #81-90.

A village mayor has no authority to unilaterally audit claims against the village and order that they be paid. Where a village has not established the office of auditor, the audit function must be exercised by the board of trustees. 1982 Op St Compt File #82-52.

The use of a landfill by a village does not constitute a public utility service for the purposes of section 5-524(6) of the Village Law and accordingly, a village is not authorized to make advance payments pursuant to that section for such a service. 1982 Op St Compt File #82-55.

2. Compensation of officers and employees

3. —Village attorney

A village may not seek reimbursement from the county for reasonable compensation paid to the Village Attorney as an Assistant District Attorney. 1977 NY Ops Atty Gen Dec 2 (Informal).

A Village Attorney (or other attorney) designated as an Assistant District Attorney is not entitled to such benefits as medical/hospital coverage, retirement rights, etc., which are now provided for county employees. 1977 NY Ops Atty Gen Dec 2 (Informal).

A village may engage a tax consultant and compensate him either on a per diem basis or by annual retainer. Vouchers must be submitted. 1980 Op St Compt File #444.

Volunteer workers may not be reimbursed for expenses incurred in connection with services performed unless such reimbursement is authorized by local law. Previous unauthorized payments may be ratified by adoption of appropriate local law. 1982 Op St Compt File #82-254.

4. Payment for expenses of officers and employees

Discussion of audit and payment of vouchers submitted by chief of village fire department for expenses incurred while on fire department business. 1978 Op St Compt File #1084.

In the absence of a local law authorizing reimbursement of a fire chief of a village volunteer fire department for expenses actually and necessarily incurred by him in the line of duty, a village would be prohibited from reimbursing him for those expenses. 1978 Op St Compt File #1084-A.

A village may not reimburse a police officer for legal fees incurred in connection with criminal charges arising from actions committed while the officer was off-duty. 1979 Op St Compt File #290.

A village may provide, in a collective bargaining agreement, that employees will be reimbursed for use of their personal tools on village business, and will either be reimbursed for a portion of the cost of repairs on their personal vehicle used on village business or have such repairs performed at village facilities. Subject to conflict of interest provisions, a village may rent personal vehicles and/or tools from its employees if deemed to be in the best interests of the village. 1982 Op St Compt File #82-32.

Meal expenses of village employees are reimbursable where the meal is included in a meeting on village business which began before the meal and continues through and after the meal if the food is sent in so that the meeting continues uninterrupted. Meal expenses of village employees are also reimbursable where a luncheon meeting is scheduled between two or more employees because it is the only time a meeting can be held before an important deadline and there is involved municipal business of an immediate nature. Meal expenses of village employees are not reimbursable where a meeting is schedled for 5 PM and runs to 8 PM and the employees take a meal after 8 PM, because meals are proper expenses only where they occur in conjunction with a business meeting. 1982 Op St Compt File #82-253.

5. Membership dues

A municipality may pay membership dues of its attorneys in national, state and local bar associations or sections thereof, if membership in such organizations or sections is determined by the municipality to be of benefit to the municipality. 1979 Op St Compt File #336.

A city, town or village may pay membership dues of its judges in the New York State Association of Magistrates. All prior inconsistent opinions are hereby superseded. 1979 Op St Compt No. 79–848.

A town or village may pay membership dues of its justice court clerks, or justices who do their own clerical work, in the New York State Association of Magistrates Court Clerks. 1980 Op St Compt File #380.

A municipality may, by resolution, authorize the payment of membership dues for its officers or employees in particular societies or associations if it determines that membership in such society or association will benefit the municipality. In making this determination, the municipality should be able to point to some reasonable connection between some or all of the activities of the particular society or association and the official duties of the officer or employee whose dues it intends to pay. 1980 Op St Compt File #501.

A municipality may pay the cost of dues and related expenses that result when an officer or employee becomes a member of a professional type society or association, provided it determines that membership will be beneficial to the municipality. 1981 Op St Compt File #81-136.

A village board, by resolution, may pay membership dues of the local historian in a historical society, provided the board determines that such membership is of benefit to the village and is significantly related to the historian's work. 1981 Op St Compt File #81-166.

A town or village may pay membership dues of its judges in the New York State Association of Magistrates. Opn. No. 79-848 modified. 1979 Op St Compt No. 79–848-A.

6. Travel and mileage expenses

It is within the discretion of the village board of trustees to fix the amount of a mileage allowance for the use of a village officer's personal car while on village business. 1978 Op St Compt File #272.

A village may adopt a local law authorizing volunteer firemen to receive reimbursement for actual and necessary expenses or a mileage allowance for travel in their own automobiles on fire department business. 1979 Op St Compt File #122.

A village officer who has been authorized to attend to conference of village officials in his own automobile may not be reimbursed for additional miles traveled as the result of getting lost while enroute to or from the conference. 1979 Op St Compt File #517.

The village board may by local law pay volunteer firemen a mileage allowance for use of their personal automobiles on fire department business. 1979 Op St Compt File #911.

Tips to bellboys or maids are a reimbursable travel expense for an officer or employee authorized by a municipality to attend a conference. However, tips to bellboys or maids should not be included on a voucher as part of mileage expenses. 1980 Op St Compt File #717.

A village may not pay the superintendent of public works a lump sum at the end of a fiscal year to cover the cost of driving his own vehicle although he may be paid either the automobile expenses actually and necessarily incurred in the performance of his duties or a mileage allowance for each mile actually and necessarily traveled in the course of his duties. 1982 Op St Compt File #82-49.

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7. Compensation of officers and employees

A member of the village Board of Trustees may not have his

monthly salary check paid directly to a public charity. 1961 Ops Atty Gen May 17.

8. Payments for use of car

A village special patrolman is entitled to travel expenses or mileage allowance. 1961 Ops Atty Gen May 4.

9. Conflicts of interest

A village clerk, while he holds that office, may not be appointed as a deputy treasurer and village auditor. Former § 43 provides only for combining the offices of deputy clerk and treasurer. However, in construing former § 81, which sets forth the duties of a village treasurer, and former § 128 which sets forth the duties of an auditor, it would appear that the duties of these two offices are in conflict one with the other since the auditor in some cases must audit the accounts of the treasurer. 1959 Ops Atty Gen May 15 (informal).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 4-408.

Expenses incurred in enforcement of municipal payments to state agencies, CLS Gen Mun § 70-a.

Expenses of officers or employees while attending convention or governmental school, CLS Gen Mun § 77-b.

Classification and designation of misdemeanors, CLS Penal §§ 55.00, 55.05(2), 55.10(2).

Designation of misdemeanors, CLS Penal § 55.10(2).

"Civil defense" defined, CLS Unconsol Ch 131 § 3(5).

Mutual aid agreements, CLS Unconsol Ch 131 § 28.

Local financial provisions, CLS Unconsol Ch 131 § 29.

New York state defense emergency act, CLS Unconsol Ch 131.

New York state defense emergency act, CLS Unconsol ch 131.

State defense emergency act, CLS Unconsol ch 131.

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1453—1457.

26 NY Jur 2d Counties, Towns, and Municipal Corporations § 623.

35B NY Jur 2d Criminal Law Substantive Principles and Offenses § 1313.

Law Reviews:

1978 Survey of New York Law: Local Government. 30 Syracuse L Rev, No. 1, p. 197, Winter, 1979.

Texts: Weinstein, Korn, Miller, CPLR Manual (Matthew Bender) § 27.05.

ARTICLE 9 Permissive Referendum

Section

9-912. Propositions–submission and special election

HISTORY:

Add, L 1972, ch 892, eff Sept 1, 1973.

§ 9-912. Propositions–submission and special election

1. The board of trustees may, upon its own motion, and shall, upon the petition of at least two hundred electors in villages containing a population of five thousand or more; by at least one hundred fifty electors in villages containing a population of at least three thousand and less than five thousand; and by at least one hundred electors in villages containing a population of one thousand and less than three thousand; and in villages containing a population of less than one thousand, by electors numbering at least ten percent of the number of voters registered for the last general village election, cause a proposition on any of the questions set forth in the following subdivision to be submitted at a regular or special village election as such elections are defined in the election law. If such petition request the holding of a referendum at a time other than at such regular or special village election, such petition must contain twice the number of signatures otherwise required. If such petition does not request the holding of such a referendum, such question shall be submitted at the next regular or special village election for officers, held not less than thirty days after the filing of such petition. If such petition requests the holding of a referendum at a time other than at such regular or special village election, such referendum shall be held no less than thirty, nor more than sixty, days after the filing of such petition.

2. The questions which may or shall be submitted as propositions upon petition or motion of the board of trustees, as hereinbefore provided, are:

(a) Whether or not the area of the village should be diminished.

(b) Whether or not the village should be reincorporated.

(c) Whether or not the name of the village should be changed.

(d) Whether or not the month of the general village election should be changed.

3. A special election for submission of a proposition shall be noticed, conducted, canvassed and otherwise held in the same manner as a general village election; provided, however, that a proposition for the consolidation or dissolution of a village shall be noticed, conducted, canvassed and otherwise held pursuant to, and in accordance with, the provisions of article seventeen-A of the general municipal law.

4. [Renumbered]

5. [Renumbered]

HISTORY:

Add, L 1972, ch 892, eff Sept 1, 1973; amd, L 1974, ch 230, eff Sept 1, 1974; L 1977, ch 434, eff July 12, 1977; L 2009, ch 74, § 13, eff March 21, 2010 (see 2009 note below).

Repeal Notes: [1977] Former subdivision four of section 9-912 of the village law, repealed by this act is superseded by the amendments effected herein to subdivision one of such section.

Editor's Note: Laws 2009, ch 74, §§ 1 and 18, eff March 21, 2010, provide as follows:

Section 1. Short Title. The act shall be known and may be cited as the "New N.Y. Government Reorganization and Citizen Empowerment Act".

§ 18. Savings clause. Notwithstanding the repeal or amendment of any law by this act, nothing in this act shall be construed to impair the consolidation or dissolution of any local government entity pursuant to any such repealed or amended law if there was commenced in or for such local government entity prior to the effective date of this act a consolidation or dissolution proceeding pursuant to such law, in which event the provisions of such former law shall govern such proceeding as though such former law had not been repealed hereby.

Editor's Notes: Substance transferred from § 4–438.

Notes to Decisions

Analysis

1. In general
2. Under former § 4-438

1. In general

Trial court properly dismissed a petition filed by citizens to compel various local government officials to place a referendum proposal on a general election ballot because the village clerk could not timely certify the proposal and forward a copy of the proposal to the county board of elections. Broda v Monahan, 309 A.D.2d 959, 767 N.Y.S.2d 111, 2003 N.Y. App. Div. LEXIS 11287 (N.Y. App. Div. 2d Dep't 2003).

Village board acted in excess of their jurisdiction in resolving to change date of village election by resolution without submitting proposition on such question in village election. Etelson v Jacaruso, 80 Misc. 2d 685, 364 N.Y.S.2d 103, 1975 N.Y. Misc. LEXIS 2238 (N.Y. Sup. Ct.), aff'd, 47 A.D.2d 715, 366 N.Y.S.2d 389, 1975 N.Y. App. Div. LEXIS 13136 (N.Y. App. Div. 2d Dep't 1975).

Authority of village board to change date of village election by resolution was not extended by election law provision to effect that village "may hereafter determine to elect its officers pursuant to a resolution, on a date other than the third Tuesday in March" since such provision could not be construed as extending authority of village board to determine by resolution a matter which village law required to be approved by the electorate. Etelson v Jacaruso, 80 Misc. 2d 685, 364 N.Y.S.2d 103, 1975 N.Y. Misc. LEXIS 2238 (N.Y. Sup. Ct.), aff'd, 47 A.D.2d 715, 366 N.Y.S.2d 389, 1975 N.Y. App. Div. LEXIS 13136 (N.Y. App. Div. 2d Dep't 1975).

CLS Vill § 9-912 authorizes village board, on its own motion, to hold referendum on proposition to change month of general village election at either general or special village election for village officers; village board, on its own motion, may not hold referendum on such proposition at any other time. 1993 Op St Compt No. 93-2.

Absent act of state legislature, village may not conduct advisory referendum on question of whether village should become city. 1996 Op St Compt No. 96-18, 1996 N.Y. Comp. LEXIS 15.

2. Under former § 4-438

On August 22, 1922, petition signed by more than twenty-five electors, in compliance with former § 4-438 requested trustees to call special election to vote on two propositions, one of which would be resubmitting proposition which had been adopted March 16, 1920, and other intent of which was to find use for money which had been raised pursuant to proposition already adopted. Motion for peremptory mandamus directing trustees to call special election will be denied. People ex rel. Osborn v Board of Trustees, 196 N.Y.S. 459, 119 Misc. 357, 1922 N.Y. Misc. LEXIS 1520 (N.Y. Sup. Ct. 1922).

Board of trustees of village is not required to submit at village election proposition for establishment of lighting system and power plant, where proposed proposition as presented to board in petition of one hundred electors of village of first class is incomplete and indefinite and requires that certain data with respect to availability of certain moneys be obtained before said proposition may properly be submitted to voters. Cosgrove v Smith, 288 N.Y.S. 481, 159 Misc. 583, 1936 N.Y. Misc. LEXIS 1183 (N.Y. Sup. Ct. 1936).

A petition to dissolve a village must be signed by the owners of one-third in value of the real property within the village as assessed upon the last preceding village assessment roll. A proposition to dissolve a village may be submitted, however, by the board of trustees upon its own motion. 1954 Ops St Compt 330.

Since former § 4-438 contained no provision for a referendum on a proposed low-rent public housing project, and the Public Housing Law does not require it, a village board may not direct a referendum on such a project. 1961 Ops St Compt 69.

There is no authority for a village to hold a referendum on petition or on its own motion regarding fluoridation of its water supply. 1963 Ops St Compt #497.

Property owners may not initiate a referendum by petition to the village board on a proposition to undertake removal of weeds from a private lake and there is no authority for a village to undertake such weed-removal for the sole benefit of private property owners. 1964 Ops St Compt #860.

A discussion of the effects of changing from a village of the fourth class to a village of the third class. 1967 Ops St Compt File #799.

A village may not conduct a referendum on the question of fluoridation of the village water supply. 1968 Ops St Compt File #283.

Agency Opinions

Analysis

1. In general
2. Under former § 4-438

1. In general

Under Loc Fin Law § 36.00; Vill Law §§ 9-908, 9-912, 9-914, when the Board of Trustees of a village, on its own motion, submits a bond resolution to a referendum and such resolution is defeated, such resolution may not again be resubmitted to a referendum until after the expiration of three months or until the next general village election, whichever shall be the later. 1974 NY Ops Atty Gen June 6 (informal).

A resolution creating the second office of village justice is subject to a permissive referendum and is not effective until after the referendum or after the time within which a referendum can be demanded. When the resolution becomes effective there is a vacancy in office which can be filled by appointment until the next date for conducting a regular or special village election. The term of the first elected second village justice will be for such time that thereafter one village justice will be elected each two years for a four-year term. 1975 NY Ops Atty Gen May 2.

A village board of trustees may pass a resolution to change the date of the general village election but such a resolution will be ineffective to make a change until a proposition on the question is submitted to the electors of the village and approved by them. Alternatively, if the board does not take any action to change the date of the general village election, and some of the village residents want such a change, 25 or more of them may, through the process of a petition, require that such a proposition be submitted to the voters of the village for their approval. Upon the approval of the proposition by the people of the village, and only upon such approval, the resolution becomes effective but the change of date of the general village election does not prolong or extend the terms of office of present office holders or change the dates of the next two general village elections. 1975 NY Ops Atty Gen Jan 6.

The timetable for conducting the referendum authorized by Village Law § 9-912 subd 3 to dissolve a village is contained in Village Law § 9-912 subd 1 as modified by Village Law § 19-1900 subd 1. 1978 NY Ops Atty Gen Dec 20.

It is not necessary that the petition for dissolution of a village submitted to the village board of trustees contain a plan for the disposition of village property, payment of obligations including the levy and collection of the necessary taxes and assessments therefor, and such other matters as may be necessary to wind up the village affairs; it is the duty of the village board of trustees to formulate that plan. 1978 NY Ops Atty Gen Dec 20.

A change in the Date of the general village election is effectuated by extending the terms of village officeholders. The term of a village justice is similarly extended. 1981 NY Ops Atty Gen Aug 19 (Informal).

Board of trustees under CLS Vill § 9-912 may submit proposition to referendum at general village election, special village election or another election. 1993 NY Ops Atty Gen I 93-25.

Village board of trustees is required to submit proposition for dissolution of village to referendum in accordance with requirements of petition that is filed by electors of village. 1996 NY Ops Atty Gen I 96-23.

Terms of elected village officers are extended in order to effect change in date of village election. 2000 NY Ops Atty Gen I 00-19.

In the event that a petition by village electors for dissolution of the village also calls for the abandonment of certain services, the board of trustees, in preparing a proposition for dissolution, is not required to call for the abandonment of such services. 1979 Op St Compt File #191.

If a petition for dissolution of a village does not specify any particular date for a referendum, the question will be on the ballot at the next regular or special election held not less than thirty days after the public hearing on the petition. 1980 Op St Compt File #800.

2. Under former § 4-438

A proposition to dissolve a village submitted at an annual village election need receive only the approval of a majority of the duly qualified village electors voting thereat to be adopted. 1953 NY Ops Atty Gen 22 (informal).

A village board of trustees may submit a proposition to dissolve a village on its own motion. 1954 NY Ops Atty Gen 26 (informal).

Since a special village election must be conducted and the result canvassed in the same manner as an annual election, a fewer number of polling places than are used at a general election may not be designated for a special village election at which a bingo proposition is submitted. Former Article 14-G of the General Municipal Law is silent with respect to any limitation of time for the submission of the mandatory proposition designed to legalize bingo, and the time limitation governing a village referendum on petition does not apply. 1958 NY Ops Atty Gen July 9 (informal).

A proposition to sell village electric light and power system may be submitted pursuant to former § 4-438. The proposition may be phrased to require sale or to authorize trustees to sell subject to specified conditions. 1958 NY Ops Atty Gen Jun 25 (informal).

Permissive referendums for purchase of land outside village limits for recreational and swimming purposes or annexation of adjoining lands for such purposes. 1960 NY Ops Atty Gen Nov 7 (informal).

Former § 4-438 provided for the manner of submitting the proposition where a proceeding to diminish boundaries of a village is brought under former § 349. 1960 NY Ops Atty Gen June 17 (informal).

Where a village is divided into election districts for general elections, village board may, by resolution adopted at least 30 days prior to a general village election, alter or abolish such districts. A special village election for submission of a proposition shall be noticed, conducted, canvassed and otherwise held in the same manner as a general village election. 1966 NY Ops Atty Gen Sept 21.

A proposition to dissolve a village must be submitted at either a general village election or a special village election but not at the general state-wide election held in November. 1971 NY Ops Atty Gen June 22.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 9-914, 19-1900.

Proposition for dissolution, § 19-1900.

Conduct of elections, generally, CLS Elec §§ 1-102, 3-102, 3-110, 7-120, 7-126, 8-100 to 8-104, 8-202, 8-300 to 8-316, 8-500 to 8-510, to 8-506, 9-100 to 9-128, 15-112.

Watchers and challengers at special elections, CLS Elec §§ 3-102, 8-500.

Certificates by village clerk as to offices to be filled, CLS Elec § 4-106.

Election supplies, furnishing by village clerk, CLS Elec § 4-128.

Expenses of special elections as a charge against village, CLS Elec § 4-136.

Nominations of candidates for village offices, how made, CLS Elec §§ 6-102, 6-104, 6-108, 6-114, 6-116, 6-138, 6-140, 6-142, 6-156, 6-160.

Form of ballot, CLS Elec § 7-110.

Canvass of votes in village elections, generally, CLS Elec § 15-126.

Local laws subject to referendum, CLS Mun H R §§ 23, 24.

Propositions for submission of local laws, CLS Mun H R § 25.

ARTICLE 10 Fire Department

Section

10-1000. General powers of the board of fire commissioners
10-1002. Rules and regulations
10-1004. Organization of companies
10-1006. Volunteer members of village fire companies
10-1008. Incorporation of fire department
10-1010. Election of company officers and delegates
10-1012. Chief and assistant chiefs
10-1014. Council of fire department
10-1016. Annual meeting of fire department
10-1018. Duties of chief and assistants
10-1020. Abolition of fire department; employment of paid firefighters.
10-1022. Fire inspection in contract areas

HISTORY:

Add, L 1972, ch 892, eff Sept 1, 1973.

§ 10-1000. General powers of the board of fire commissioners

The board of fire commissioners of a village, subject to the approval of the board of trustees:

1. Has the care, custody and control of all village property of the fire department.

2. May purchase such equipment as is suitable and necessary to prevent and extinguish fires within the village, or for the purposes of any emergency and first aid squad organized within the fire department, and uniforms for all active members of the fire department and keep the same in good condition and repair.

3. May erect and maintain suitable and necessary buildings for the fire department.

4. May construct and maintain reservoirs and cisterns and supply them with water for use at fires.

5. May adopt rules for the admission, suspension, removal and discipline of the members, officers and employees of the fire department, may prescribe their powers and duties, and fix their compensation not inconsistent with section 10-1018 of this article.

6. May adopt rules and regulations governing fire companies and fire departments, prescribing the duties of the members thereof, and may enforce discipline and provide for public drills, parades, funerals, inspections and reviews of the village fire department, or any company or unit thereof, within the village or at other places within the state, any adjoining state or in Canada. Such rules and regulations shall not authorize any member of the board of fire commissioners to interfere with the duties of the fire chief or the assistant fire chief at such times as the fire department or any company or squad thereof is on duty.

7. May appoint persons other than members or officers of the department to take charge of village property, and may fix their compensation.

8. May employ duty or "persons on call", to serve on a part-time basis when necessary, and fix their duties and compensation. Such part-time paid firefighters in the event of injury shall be entitled to the applicable benefits provided for such part-time paid firefighters under section two hundred seven-a of

the general municipal law and in the event of injury or death shall be entitled to the applicable benefits, if any, provided for such part-time paid firefighters under the retirement and social security law and the workers' compensation law. Persons who are volunteer members of the village fire department may be employed as such part-time paid firefighters, but in the event of injury, death, disease, or infection, resulting from services performed in line of duty as such part-time paid firefighters they shall not be entitled to any of the benefits provided for volunteer firefighters under the volunteer firefighters' benefit law, or under any policy of blanket accident insurance purchased by the village or purchased by the fire department to cover only volunteer members of such department.

9. May inquire into the cause and origin of fires occurring in the village and may take testimony in relation thereto.

10. [None]

11. Notwithstanding any other provisions of law to the contrary, a village may include as part of its budget an appropriation to fund an annual firefighters' inspection-dinner for each fire company within the village.

HISTORY:

Add, L 1972, ch 892, eff Sept 1, 1973; amd, L 1972, ch 894, eff Sept 1, 1973; L 1975, ch 838, eff Aug 9, 1975; L 1977, ch 320, eff June 21, 1977; amd, L 1980, ch 307, § 3, eff June 19, 1980; L 2018, ch 476, § 110, effective December 28, 2018.

Editor's Notes: Substance transferred from § 200.

Laws 1975, ch 838, § 1, provides as follows:

Section 1. Legislative declaration. The services provided by volunteer firemen in this state are invaluable. In the highest tradition of exemplary public service, these firemen serve their neighbors, their community and their state. In order to insure the continued availability of this irreplaceable work force, it is in the best interest of the people of our state to provide financial assistance for programs of local fire districts and villages which facilitate the recruitment, training and administration of new personnel who can contribute their loyalty and devotion in the interest of fire protection.

Amendment Notes The 2018 amendment by ch 476, § 110, in 8, substituted " 'persons on call' " for " 'call men' " in the first sentence, in the second sentence, substituted "firefighters" for "firemen" three times and "workers' compensation law" for "workmen's compensation law" and in the last sentence, substituted "firefighters" for "firemen" three times and "firefighters' benefit law" for "firemen's benefit law"; and substituted "annual firefighters' inspection" for "annual firemen's inspection" in 11.

Notes to Decisions

1. In general

In negligence action alleging that village firefighters prevented plaintiff from returning to burning building to rescue decedent (his wife) who was trapped inside burning room, evidence of plaintiff's contact with firefighters on behalf of decedent satisfied elements of special relationship sufficient to defeat summary judgment, where (1) firefighters forcefully restrained plaintiff from making any further attempts to rescue decedent, (2) firefighters were aware that decedent was trapped, (3) decedent did not make direct contact with firefighters, but plaintiff communicated urgency of her situation and need for firefighters' immediate assistance, which they allegedly failed to provide, and (4) plaintiff justifiably relied on firefighters' implied assurances that they would rescue decedent. Stata v Village of Waterford, 225 A.D.2d 163, 649 N.Y.S.2d 232, 1996 N.Y. App. Div. LEXIS 11449 (N.Y. App. Div. 3d Dep't 1996).

In negligence action alleging that village firefighters prevented plaintiff from returning to burning building to rescue decedent (his wife) who was trapped inside burning room, village defendants were entitled to dismissal of cause of action seeking recovery for plaintiff's injuries, as his severe burns were result of his own efforts to rescue his wife, and special relationship required to withstand summary judgment did not exist. Stata v Village of Waterford, 225 A.D.2d 163, 649 N.Y.S.2d 232, 1996 N.Y. App. Div. LEXIS 11449 (N.Y. App. Div. 3d Dep't 1996).

Village board of trustees lacked jurisdiction to prosecute village fireman on charges of vandalism of village property and neglect of duty where he had been suspended by council of village fire department in connection with same incident, since council has exclusive jurisdiction under CLS Vill Art 10 as to suspension and removal of village volunteer firemen. Price v Board of Trustees, 139 Misc. 2d 535, 527 N.Y.S.2d 701, 1988 N.Y. Misc. LEXIS 211 (N.Y. Sup. Ct. 1988).

In general, a board of fire commissioners, or if there is no board of fire commissioners, the village board of trustees and the council of the fire department, has control of the external affairs of a fire company within the village, and that the constitution and by-laws of the fire company regulate the internal affairs of the company. In addition, the by-laws of a fire company within the village should not be inconsistent with the rules and regulations enacted by the board of fire commissioners, or the village board of trustees and the council of the fire department. There is, however, no statutory requirement that the latter approve the by-laws of the fire company. 1990 Op St Compt 90-19.

Under Sections 10-1000 et seq. of the Village Law, a village fire department is a corporation consisting of members of all the fire, hose, protective and hook and ladder companies of a village; it is administered by a board of fire commissioners or, where no board of fire commissioners has been appointed, by the village board of trustees and the council of the fire department. Fire companies in a village are associations or corporations, which must operate in accordance with their certificates of incorporation, bylaws, and statutes; and, although fire companies are separate and distinct from the village, the statutes do permit village authorities to exercise a certain degree of control over their organization, incorporation, governance, and membership, including residency for membership. A fire company must consent to a contract for the provision of fire protection outside the village and the fire chief of the village fire department cannot consent on behalf of members of the company. 1990 Op St Compt 90-19.

A village can be held vicariously liable for Dram Shop Act violations committed by volunteer firefighters during fundraising events, but not for misconduct during social activities. 1990 Atty Ops Gen No. 90-64 (Informal), 1990 N.Y. Op. Att'y Gen. No. 90-64, 1990 N.Y. AG LEXIS 68.

UNDER FORMER § 200

2. In general

The term "fire district" as used in § 205-b of the General Municipal Law, referring to liability for negligence of fire district and volunteer firemen, has a specific meaning in law and does not include fire companies. Heifetz v Rockaway Point Volunteer Fire Dep't, 124 N.Y.S.2d 257, 1953 N.Y. Misc. LEXIS 2150 (N.Y. Sup. Ct.), aff'd, 282 A.D. 1062, 126 N.Y.S.2d 604, 1953 N.Y. App. Div. LEXIS 5825 (N.Y. App. Div. 1953).

Volunteer fire department which was organized pursuant to the provisions of the Membership Corporations Law was a publicly owned or governmental facility, and membership in said company could not be denied arbitrarily or discriminatorily based solely on the fact that the applicant was a Negro. Everett v Riverside Hose Co., 261 F. Supp. 463, 1966 U.S. Dist. LEXIS 10491 (S.D.N.Y. 1966).

Authorities having control of village volunteer fire department may organize all firemen thereof as emergency relief squad and not be liable for damage by fire within village while firemen are serving in squad. 1951 Ops St Compt 76.

For a discussion of village fire departments generally, see 1953 Ops St Compt 276.

Bylaws of the village fire department cannot amend, alter or supersede the provisions of former § 200, and any attempt to do so is ineffectual. 1963 Ops St Compt #724.

Money received by a village under a contract for fire protection should be paid into the general fund. 1968 Ops St Compt File #31.

3. Residence requirement

Residents of Pennsylvania are not eligible for membership in a village fire department and are not covered against injury or death while fighting fires by New York State law. 1954 Ops St Compt 266.

Persons residing in area protected by contract may subject to certain conditions, be admitted to membership in a village fire company and village apparatus and equipment may, subject to certain conditions, be housed in such area. 1955 Ops St Compt 60.

4. Service outside of village

An incorporated fire company located in a village is subject to the control of the village authorities irrespective of the fact it existed before incorporation of the village. Such fire company may not contract to furnish fire protection outside the village independently of the village board. 1953 Ops St Compt 353.

Both village and fire department or fire company should be parties to contract to furnish fire protection outside of village. Village may retain moneys received pursuant to such contract or pay over a portion to the fire department or fire company. 1954 Ops St Compt 240.

Where a village owns two fire trucks, the trustees may restrict outside service to use of one truck only, leaving the other for stand-by emergency service within the village. 1961 Ops St Compt 156.

5. Compensation of firemen

A village may not compensate members of its volunteer fire department but it may employ a number of call firemen and fix their compensation on a "per call" or "per hour" basis. 1956 Ops St Compt 258.

A village may not compensate members of its volunteer fire department for fighting fires. However, it may employ one or more paid firemen. 1958 Ops St Compt 200.

A village of the fourth class is not authorized to appoint or contract with "duty" or "call" firemen, but may employ one or more paid firemen and fix their salary. 1961 Ops St Compt 312.

A village may not pay firemen for the difference in cost between a party line telephone and a private telephone. 1963 Ops St Compt File #148.

The board of trustees of a village may pay an expenditure deemed to have been necessarily incurred to provide food and beverage to be consumed at the site of a serious fire for village volunteer firemen as well as outside firemen responding to a call for mutual aid. 1972 Ops St Compt File #88.

6. Construction or repair of fire house

Village funds may be expended to repair a firehouse owned by the village fire department but leased to the village. 1946 Ops St Compt 426.

A village may not contribute to a volunteer fire corporation a portion of the cost of erecting a fire training tower to be erected on a plot of land owned by the fire corporation. It may lease land and erect tower but lease should give village right to remove tower at expiration of term. 1953 Ops St Compt 103.

In the interest of public use, convenience and necessity, a village may acquire land outside of the village, owned by the village fire department, for the purpose of constructing a firehouse on such land, where such firehouse will mainly serve a village purpose. 1964 Ops St Compt File #1011.

A village may construct an addition to the village owned firehouse for the purpose of housing fire equipment, owned by the incorporated fire company and to be used outside of the village. Providing the arrangement is provident for the village, rental need not be charged the fire company for such use. 1965 Ops St Compt File #320.

7. Purchase of equipment

A village may purchase fire apparatus and equipment for the use of the village fire department. 1955 Ops St Compt 109.

Where a village board of trustees acts as Board of Fire Commissioners, it may appropriate the sum of $3,000 to purchase uniforms for all active members of the fire department without submitting the matter to a referendum, but the board must purchase the uniforms and the money may not simply be paid to the fire department for that purpose. 1961 Ops St Compt 86.

A fireman's bond is recreational in nature and village funds may not be used to provide uniforms for the band. 1964 Ops St Compt File #211.

A village may not pay the officers of the village fire department the amount of money budgeted for fire department purchases, so that such purchases may be made and paid for by such fire department. 1965 Ops St Compt File #190.

A village, while it may purchase fire equipment and apparatus, may not transfer such equipment to the volunteer fire department, but must hold the title to such equipment. 1967 Ops St Compt File #842.

8. Particular regulations

Subdivision 5 of former § 200 authorizes an incorporated village fire department, through its council and subject to approval of the board of trustees, to adopt a requirement that, in order to maintain membership in the department, a member must respond to a stated percentage of firemanic duty calls during a year; but an unincorporated fire company may not prescribe such a rule. 1960 Ops St Compt 398.

Villages, fire districts or cities may require that persons elected to membership in a volunteer fire company satisfactorily complete a physical examination. The cost of such a physical examination may be assumed by the respective municipality. 1969 Ops St Compt File #597.

9. Procedural matters

Rules of fire department, adopted by board of fire commissioners pursuant to subd. 5 of former § 200 did not require notice of charges or hearing thereon. Marks v Gombert, 225 A.D. 876, 233 N.Y.S. 47, 1929 N.Y. App. Div. LEXIS 12519 (N.Y. App. Div.), aff'd, 251 N.Y. 542, 168 N.E. 420, 251 N.Y. (N.Y.S.) 542, 1929 N.Y. LEXIS 793 (N.Y. 1929).

Section 209-l of the General Municipal Law is more extensive, as far as the required hearing is concerned, than subd. 5 of former § 200, and volunteer members of a fire department were not given a fair hearing on charges of misconduct by the board of fire wardens where no sworn testimony was taken to sustain the charges. Gardner v Ward, 199 N.Y.S.2d 953 (N.Y. Sup. Ct. 1960).

10. Miscellaneous

The council of a village fire department, in a village which has no separate board of fire commissioners may designate a member of the fire department to take charge of an emergency relief squad under the direction of the chief engineer. 1947 Ops St Compt 223.

Village fire apparatus used in providing outside service may be housed in the fire protection district. 1955 Ops St Compt 60.

The chief engineer of a village fire department may not lawfully sell equipment, materials or supplies to the village. 1960 Ops St Compt 231.

Although former § 200 gave the village board of fire commissioners care, custody and control over all property belonging to the village fire department, it is referring only to property owned by the village department as a corporation separate and distinct from volunteer fire corporations of the village. 1961 Ops St Compt File #266.

There is no authority for a village to permit a private factory to connect an alarm device to the fire department building so that it will alert the department if the factory furnace has been extinguished or the water in the boiler is too low. 1963 Ops St Compt #934.

A village may permit an automatic sprinkler alarm system from a private factory to be connected at expense of the owners to the village fire house but may not make an annual charge for such connection. 1963 Ops St Compt #934.

A village may not restrict a social room within the village firehouse for the exclusive use of the fire department, to the exclusion of all others. 1968 Ops St Compt File #423.

Agency Opinions

Analysis

1. In general
UNDER FORMER § 200
2. Residence requirement
3. Service outside of village
4. Compensation of firemen
5. Particular regulations
6. Miscellaneous

1. In general

If a village officer appointed by the mayor is not approved by the board of trustees pursuant to Village Law, § 3-301(3), the incumbent officer continues in office beyond the date of the expiration of his term. If the board of trustees fails to approve the officer's appointment, the board of trustees does not have independent authority to appoint a village officer. A local village law which transfers the power of appointment from the mayor to the board of trustees is subject to a mandatory referendum. Members of the village planning board are village officers appointed by the village board of trustees. If the board of trustees fails to approve appointments by the mayor to the board of fire commissioners pursuant to Village Law, § 3-308, the incumbent members continue in office beyond the date of the expiration of their term of office. 1974 NY Ops Atty Gen Apr 11.

The Village of Savannah may house all of its fire fighting equipment in a fire house owned and operated by a fire company within an adjacent fire protection district in which the Village furnishes fire protection. 1975 NY Ops Atty Gen Feb 4.

A village has no authority to establish fire or sewer districts within its boundaries. 1975 NY Ops Atty Gen March 25.

In the event the council of a village fire department refuses to authorize the fire chief to purchase a new or different design of decoration or shield to be worn on his fireman's hat the chief, even if he purchased one at his own expense, may not wear it at any time he is on duty. 1977 NY Ops Atty Gen Sept 13.

A village fire council has the power to require the presence of at least one fire chief within the village limits at all times. 1978 NY Ops Atty Gen July 20.

The village board of trustees, on the recommendation of the council of a fire department in a village having no board of fire commissioners, determines the style of uniforms and the type of equipment to be purchased for use by members of the fire department. The procedures for receiving calls for assistance and responding to such calls by participants in a county mutual aid plan would be those described in the plan. Section 10-1006(16) of the Village Law does not affect the limitation under section 10-1006(7) that not more than thirty percent of the members of a fire company may be non-residents of the village or of the area served by the fire department or a fire company. 1981 NY Ops Atty Gen March 5 (informal).

A volunteer fire department may not secede or separate itself from the village in which it is located. 1983 NY Ops Atty Gen No. 83–21, 1983 N.Y. AG LEXIS 78.

Chief, deputy chief, and assistant chief of village fire department may not hold office of mayor or trustee of village. 1998 NY Ops Atty Gen I 98-33.

There is no authority for a municipality to pay a portion of the cost of automobile insurance premiums of volunteer firemen who use their private automobiles in the course of fire-fighting activities. 1978 Op St Compt File #1023.

The Camillus Volunteer Fire Department may, without public bidding, purchase an ambulance with its own funds and then donate the ambulance to the village. But, any purchase made with village funds must meet the requirements of public bidding. 1979 Op St Compt No. 79–666.

The village may also purchase a car for the chief to be used on fire department business. 1979 Op St Compt File #911.

A village may not contract separately with a central school district to provide fire protection to two school buildings, one within the village and the other outside the village in a fire protection district. 1980 Op St Compt File #45.

When a volunteer fireman is removed from membership in a volunteer fire company by vote of the members themselves based on the company's constitution and bylaws, rather than by village fire authorities, then the village may not provide a legal defense to the fire department when sued by the discharged fireman for wrongful removal. 1980 Op St Compt File No. 80-366.

A village board is not compelled to follow the fire council's recommendation to purchase a new fire truck. 1981 Op St Compt File #81-30.

Fair rental value must be paid by a private organization for using a social room in a village firehouse, but such a room can be used without paying a fee by members of the fire department and their guests. 1979 Op St Compt File #610.

Non-residents of a village who live in an area which is furnished fire protection and ambulance service by the village fire department (i.e. a fire protection district) are eligible for membership in the emergency rescue and first aid squad of the village fire department and are entitled to volunteer firemen's benefits for injuries incurred in the line of duty. 1979 Op St Compt File #773.

The battalion chief of a village fire department cannot also serve as village mayor or village trustee. 2014 N.Y. Op. Att'y Gen. No. 2014-4, 2014 N.Y. AG LEXIS 83.

UNDER FORMER § 200

2. Residence requirement

In a village having no separate board of fire commissioners, the village board of trustees acting as such board may appoint persons residing outside the village to the village fire department, if such persons reside in territory afforded fire protection by the department. 1953 Ops Atty Gen 10 (informal).

3. Service outside of village

A village fire company, under the direction of the chief, may respond to emergency calls from outside the area regularly protected, until such outside service is restricted by action of the governing board of the village. 1957 Ops Atty Gen Oct 4 (informal).

4. Compensation of firemen

Volunteer firemen cannot be compensated for lost wages for time spent as witnesses in an action arising out of an accident involving their fire truck. 1963 Ops Atty Gen Nov 1.

Volunteer firemen who are also part-time paid firemen have status of paid firemen. 1963 Ops Atty Gen Feb 8.

5. Particular regulations

Nothing in the Village Law authorizes a fire department council to adopt a rule conditioning eligibility for fire department chiefs and engineers requiring ability to operate all fire equipment owned by the department and to instruct others fully in such operation. 1963 Ops Atty Gen June 11.

6. Miscellaneous

Property of a charitable or religious corporation is subject to village benefit assessments for new sidewalk construction, garbage and refuse collection, but neither these corporations nor a school district are liable for an assessment for village fire protection. 1955 Ops Atty Gen 6 (informal).

The amount paid under a contract for fire protection is solely a matter for negotiation between the parties. Since such a contract must specify a definite sum for services rendered under the contract, a provision whereby the village receiving fire protection services is to pay for the cost of certain materials used to provide the service and is to indemnify the village providing the service for unreimbursed loss or damage to the latter's equipment or unreimbursed damages due to injury to or death of its personnel is improper. 1982 Op St Compt File #82-355.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 10-1014.

Contracts for purchase of water, § 11-1124.

Rules and regulations of board take effect when approved by board of trustees, § 20-2006.

Arbitration of negotiation disputes between public employer and police or firefighters, CLS Civ S §§ 209, 210.

Mutual assistance by institutional and local fire fighting facilities, CLS Correc § 25.

Fire training programs, CLS County §§ 224(9), 225(1, g), 225-a; CLS Gen Mun §§ 72-g, 209-i, 209-j.

Fire fighting personnel standards and education commission, CLS Exec §§ 156–158.

Quorum, CLS Gen Const § 41.

Sale, lease, and transfer by board of fire commissioners to municipal corporations of real property owed by fire district, CLS Gen Mun § 72-h.

Firemen and fire companies, departments, and districts, CLS Gen Mun §§ 200–209-g, 209-i, 209-j, 209- *l*, 209-m, 209-p.

Fire mobilization and mutuel aid zones, CLS Gen Mun § 209-e.

Municipal liability for outside assistance, CLS Gen Mun § 209-g.

Completion of training program as prerequisite to permanent appointment of fire fighters, CLS Gen Mun § 209-w.

Use of town highway equipment, CLS High § 142-b(3, 4).

Fire district as a "district corporation" within finance provisions, CLS Loc Fin § 2.00(3, a).

Mutual aid for protection of state institutions, CLS Men Hyg § 9.19.

Retirement of certain firemen, CLS Retire & S S §§ 384–387.

Fire district commissioners, CLS Town § 176.

Joint fire districts in certain towns and villages, CLS Unconsol Ch 201, Ch 203 §§ 1–8.

Commissioners for joint fire districts in certain villages and towns, CLS Unconsol Ch 203 §§ 4–8.

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1143—1145, 1147, 1164.

Law Reviews:

Providing municipal services in New York State: the "private contract" alternative. 28 Buffalo L Rev, No. 3, p. 589, Summer, 1979.

Municipal Liability for Torts of Firemen. 31 Albany L Rev, p. 256, June, 1967.

Liability of Municipality for negligence operation of Private Vehicle Owned by Volunteer Fireman while engaged in Fireman Duties. 34 Albany L Rev, p. 725, Spring, 1970.

§ 10-1002. Rules and regulations

The board of fire commissioners may adopt rules and regulations for the following purposes:

(a) To protect and preserve the village property and apparatus of the fire department.

(b) To prevent danger from fires and to protect property exposed to destruction or injury by fire.

(c) To provide for pulling down, blowing up and the removal of buildings and property to arrest the progress of fires or extinguish the same.

(d) To provide for the installation of yard hydrant systems connected with the public water supply system in accessible locations on private property for the protection of multiple residences enumerated in the multiple residence law where the possibility of a serious fire hazard is determined by the board to exist.

HISTORY:

Add, L 1972, ch 892, eff Sept 1, 1973.

Editor's Notes: Substance transferred from § 201.

UNDER FORMER § 201

A village possesses powers adequate to eliminate a fire hazard which consists of a residential structure in poor repair. 1953 Ops St Compt 226.

A building does not constitute a "fire hazard" justifying demolition thereof solely because it is vacant and unattended. 1967 Ops St Compt File #421.

Agency Opinions

UNDER FORMER § 201

A village may prohibit the use by a purchaser of gasoline dispensing equipment at a gasoline filling or service station. Such ordinance, if adopted, must apply to all gasoline service stations in the village. 1965 NY Ops Atty Gen Sept 1.

There exists authority whereby the Board of Trustees of the Village of Fish-kill may designate a board of fire inspectors composed of volunteer firemen of a fire company whose performance of duties as such fire inspectors would be covered under the Volunteer Firemen's Benefit Law. 1970 NY Ops Atty Gen Feb 18.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Ordinances in districts coterminous with two or more villages, CLS Unconsol Ch 201 § 1.

Jurisprudences:

25 NY Jur 2d Counties, Towns, and Municipal Corporations § 273.

27 NY Jur 2d Counties, Towns, and Municipal Corporations § 1146.

§ 10-1004. Organization of companies

The board of fire commissioners, with the approval of the board of trustees, may organize and maintain fire, hose, protective and hook and ladder companies, whenever in its judgment the public interests require. The board of fire commissioners may, by resolution, with the approval of the board of trustees, consent to the incorporation of any of the companies so organized by them, or may, by like approval, consent to the incorporation or the organization without incorporation of as many companies voluntarily organized in said village as may be deemed necessary.

HISTORY:

Add, L 1972, ch 892, eff Sept 1, 1973.

Editor's Notes: Substance transferred from § 202.

Notes to Decisions

1. Under former § 202

Incorporation of a volunteer fire company of a village will not affect the control which the village exercises over the fire company. The making of a contract between the incorporated fire company and the village will not operate to make the fire company a paid fire company. Incorporation of a volunteer fire company will not affect the duties and liabilities of the village in regard to its volunteer firemen. An incorporated fire company of a village cannot contract to furnish fire protection outside of the village independently of the village board of trustees. 1947 Ops St Compt 414.

Village board of fire commissioners may not organize a fire company for territory outside the village but it may consent to membership in village fire company of residents of territory protected by contract. 1955 Ops St Compt 60.

Fire apparatus or equipment purchased with funds of a village fire company for use on a fire truck owned by the village ordinarily remains the property of the fire company; however, where by its nature it becomes an integral part of the truck, it would become the property of the village in the absence of any agreement to the contrary. 1955 Ops St Compt 285.

Moneys received by a village from fire protection contracts may not be paid over to the village volunteer fire company furnishing the fire protection unless such contracts so provide. 1968 Ops St Compt File #515.

An unincorporated fire company with its headquarters in a village may, with the consent of the village board, incorporate as a village fire company. The persons named in the certificate of incorporation should be residents of the village. 1968 Op St Compt No. 68–635.

Agency Opinions

1. In general

The village board of trustees, on the recommendation of the council of a fire department in a village having no board of fire commissioners, determines the style of uniforms and the type of equipment to be purchased for use by members of the fire department. The procedures for receiving calls for assistance and responding to such calls by participants in a county mutual aid plan would be those described in the the plan. Section 10-1006(16) of the Village Law does not affect the limitation under section 10-1006(7) that not more than thirty percent of the members of a fire company may be non-residents of the village or of the area served by the fire department or a fire company. 1981 NY Ops Atty Gen March 5 (informal).

A volunteer fire department may not secede or separate itself from the village in which it is located. 1983 NY Ops Atty Gen No. 83–21, 1983 N.Y. AG LEXIS 78.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Incorporation and powers of company, CLS N-PCL § 1402(c, d).

Tax exemption of real property of incorporated association of volunteer firemen, CLS Real P Tax § 464.

Power to take and hold property, CLS Gen Corp § 14.

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1149, 1150.

§ 10-1006. Volunteer members of village fire companies

1. The volunteer members of a fire company shall be elected and appointed as provided in this section.

2. The board of fire commissioners shall appoint residents of the village as the volunteer members of any newly organized fire company. Thereafter, the fire company may elect other eligible persons, including village officers, as volunteer members. The election shall be pursuant to the by-laws, if any, of the fire company; otherwise, by a three-fourths vote of the members of the fire company present and voting at a regular or special meeting thereof. The membership of any person so elected shall become effective when approved by resolution of the board of fire commissioners. Membership shall be deemed to have been approved pursuant to this subdivision in the event that no action is taken by the board of fire commissioners, either approving or disapproving, within forty days after servce [service]* of written notice of election to membership shall have been made by the secretary of the fire company upon the village clerk, either personally or by mail.

3. Any person elected to membership as a volunteer member as [of]* a fire company shall be a resident of the village or of territory outside the village which is afforded fire protection by the fire department of the village, or any fire company thereof, pursuant to a contract for fire protection, except as otherwise provided in subdivision six.

4. The membership of a volunteer member of a fire company shall terminate when he ceases to be a resident of the village or of any territory outside the village which is afforded fire protection but* the fire department of the village, or any fire company thereof, pursuant to a contract for fire protection, except as otherwise provided in subdivision five.

5. Any fire company may authorize the continued membership of any volunteer member where such member notifies the secretary of his or her fire company (a) that he or she plans to change his or her residence to territory which is not in the village and is not protected by the fire department of the village, or any fire company thereof, pursuant to a contract for fire protection, and (b) that by reason of his or her residence in the vicinity or his or her usual occupation he or she will be available to render active service as a volunteer firefighter in the village or in territory outside the village which is afforded fire protection pursuant to a contract for fire protection by the fire department of the village, or a fire company thereof. Such authorization shall be pursuant to the by-laws, if any, of the fire company of which he or she is a member, otherwise by a three-fourths vote of the members of such fire company present and voting at a regular or special meeting thereof. Such authorization shall not become effective unless approved by resolution of the board of fire commissioners. Such authorization shall be deemed to have been approved pursuant to this subdivision in the event that no action is taken by the board of fire commissioners, either approving or disapproving, within forty days after service of written notice of such authorization shall have been made by the secretary of the fire company upon the village clerk, either personally or by mail. Any membership continued pursuant to the provisions of this subdivision shall terminate when the member cannot meet either the requirements of this subdivision or the residence requirements of subdivision three of this section. In the case of a village which adjoins another state, the term "vicinity", as used in this subdivision, includes territory in this state and territory in the adjoining state.

6. A person who cannot meet the residence requirements of subdivision three of this section may be elected to membership as a volunteer member of any fire company of the fire department if by reason of his or her residence in the vicinity or his or her usual occupation he or she will be available to render active service as a volunteer firefighter in the village or in territory which is afforded fire protection pursuant to a contract for fire protection by the fire department of the village or a fire company thereof. Such election shall be pursuant to the by-laws, if any, of the fire company; otherwise by a three-fourths vote of the members of the fire com-

*Bracketed language inserted by the Publisher.
*Bracketed language inserted by the Publisher.
*So in original.

pany present and voting at a regular or special meeting thereof. The membership of any person so elected shall not become effective unless approved by resolution of the board of fire commissioners. Membership shall be deemed to have been approved pursuant to this subdivision in the event that no action is taken by the board of fire commissioners, either approving or disapproving, within seventy days after service of written notice of election to membership shall have been made by the secretary of the fire company upon the village clerk, either personally or by mail. The membership of any volunteer member elected pursuant to the provisions of this subdivision shall terminate when the member cannot meet either the requirements of this subdivision or the residence requirements of subdivision three of this section. In the case of a village which adjoins another state, the term "vicinity", as used in this subdivision, includes territory in this state and territory in the adjoining state.

7. The membership of any volunteer firefighter shall not be continued pursuant to subdivision five of this section, and persons shall not be elected to membership pursuant to subdivision six of this section, if, by so doing, the percentage of such non-resident members in the fire company would exceed forty-five per centum of the actual membership of the fire company, provided however, that the provisions of this subdivision shall not apply to the membership of the village of Blasdell volunteer fire department, provided however, that the provisions of this subdivision shall not apply to the membership of the village of Delanson volunteer fire company in the village of Delanson, county of Schenectady, provided however, that the provisions of this subdivision shall not apply to membership of the village of Port Dickinson Fire Department, within the village of Port Dickinson, Broome County.

8. The board of trustees, or the board of fire commissioners subject to approval of the board of trustees, by resolution may restrict the membership of volunteer members in any or all of the fire companies of the fire department to residents of the village. Any volunteer member who then resides in territory outside the village shall cease to be a member of any fire company to which the restriction is applicable unless the resolution provides that his membership shall continue during the existence of any contract for fire protection to such territory by his company or the fire department or during the period in which he may continue to meet the requirements of subdivision three, five or six.

9. Residents of outside territory protected pursuant to a contract for fire protection who have been elected to volunteer membership, and non-residents whose volunteer memberships have been continued or authorized pursuant to subdivision five or six of this section, shall have all the powers, duties, immunities, and privileges of resident volunteer members, except (1) non-residents of the state may not be appointed or elected to any office in the fire company or fire department, and (2) a non-resident of this state whose membership has been continued pursuant to subdivision five of this section, or a non-resident of this state who was elected to membership pursuant to subdivision six of this section, shall not be considered to be performing any firemanic duty, or to be engaged in any firemanic activity, as a member of the fire company while he or she is outside of this state unless and until he or she has first reported to the officer or firefighter in command of his or her fire department, or any company, squad or other unit thereof, engaged or to be engaged in rendering service outside this state, or has received orders or authorization from an officer of the fire department or fire company to participate in or attend authorized activities outside of this state in the same manner as resident members of the fire company.

10. A person shall not be eligible to volunteer membership in more than one fire company at one time.

11. The term "contract for fire protection" as used in this section means one under which a cash consideration is received by the village or by the fire department or a fire company thereof for the furnishing of fire protection to an area outside the village. Any such contract shall be deemed in full force and effect for the purposes of this section if negotiations are pending for the renewal thereof.

12. In a village where there is no board of fire commissioners, the board of trustees shall have the powers and perform the duties of such board which are prescribed in this section.

13. The provisions of this section shall not be deemed to authorize the election of any person as a member of a fire company or the continuance of membership in a fire company as herein provided if such election or continuance of membership shall be contrary to the by-laws, rules or regulations of the fire company or of the fire department of the village.

14. A village may not adopt a local law changing, amending or superseding this section.

15. Any person:

(1) who was recognized prior to the first day of July, nineteen hundred fifty-four, as a volunteer member of any fire company of a village subject to the provisions of this article by the board of trustees or board of fire commissioners of the village or by the officers and members of his fire company, and

(2) who rendered active service with such fire company prior to such date, and

(3) who was, at the time of his or her nomination for membership, a resident of the village or of territory outside of the village which was afforded fire protection by the fire department of the village, or any fire company thereof, pursuant to a contract for fire protection, shall for all purposes in law be considered to have been duly nominated and appointed to membership in such fire company as of the date of such appointment, if any, and, if none, then as of the date of such nomination; notwith-

standing that there may have been some legal defect in such nomination, or the proceedings precedent thereto, or a failure of the board of fire commissioners or board of trustees to appoint such member, as provided by law in force at the time of such nomination, and the status of such person as a volunteer firefighter as of the date of such appointment or nomination is hereby legalized, validated and confirmed. An election to membership in a fire company shall be deemed equivalent to a nomination for membership for the purposes of this subdivision in the event that a formal nomination for membership was never presented to a board of fire commissioners or board of trustees as provided by the law in force prior to the first day of July, nineteen hundred fifty-four, and, for the purposes of this subdivision, such election, and the proceedings precedent thereto, shall be considered to have been held and conducted in the manner required by law. This subdivision shall not apply to a person, if any, whose volunteer membership in a fire company was declared invalid by a court of competent jurisdiction prior to the first day of January, nineteen hundred fifty-five.

16. Any person:

(1) who was recognized on and after the first day of July, nineteen hundred fifty-four and prior to the first day of January, two thousand eleven, as a volunteer member of any fire company of a village subject to the provisions of this article by the board of trustees or board of fire commissioners of the village or by the officers and members of his fire company, and

(2) who rendered active service with such fire company between such dates, and

(3) who was, at the time of his or her election to membership, a resident of the village or of territory outside the village which was afforded fire protection by the fire department of the village, or any fire company thereof, pursuant to a contract for fire protection, or who was a non-resident who was elected to membership or who was continued as a member, pursuant to the provisions of subdivisions five or six of this section, shall for all purposes in law be considered to have been duly elected and approved, or continued, as a member in such fire company as of the date of such approval, if any, and, if none, then as of the date of such election or, in the case of a continuance, as of the date of the approval, if any, by the board of fire commissioners or the board of trustees, and, if none, as of the date of authorization of continuance by the fire company; notwithstanding that there may have been some legal defect in such election, or the proceedings precedent thereto, or a failure of the board of fire commissioners or board of trustees to approve such member, or approve the continuance of membership of such member, as provided by the law in force at the time of such election, or continuance, and the status of such person as a volunteer firefighter as of the date is hereby legalized, validated and confirmed. This subdivision shall not apply to a person, if any, whose volunteer membership in a fire company was disapproved by the board of trustees or board of fire commissioners or declared invalid by a court of competent jurisdiction prior to the first day of January, two thousand eleven.

17.

(a) It shall be an unlawful discriminatory practice for any volunteer fire department or fire company, through any member or members thereof, officers, board of fire commissioners or other body or office having power of appointment of volunteer firefighters in any fire department or fire company pursuant to this section, because of the race, creed, color, national origin, sex or marital status of any individual, to exclude or to expel from its volunteer membership such individual, or to discriminate against any of its members because of the race, creed, color, national origin, sex or marital status of such volunteer members.

(b) Any person claiming to be aggrieved by an unlawful discriminatory practice pursuant to this section may by himself or his attorney at law make, sign and file with the state division of human rights, a verified complaint which shall set forth the particulars of the alleged unlawful discriminatory practice and contain such other information as the division of human rights may require. The division shall thereupon cause to be made an investigation and disposition of the charges pursuant to the provisions of article fifteen of the executive law.

18. A person who has been convicted of arson in any degree shall not be eligible to be elected or appointed as a volunteer member of a fire company. The membership of any volunteer member of a fire company shall immediately terminate if he is convicted of arson in any degree while a member of a fire company.

19. Upon application by any person for membership in a fire company operating pursuant to this section, the fire chief shall cause the applicant's background to be checked pursuant to section eight hundred thirty-seven-o of the executive law for a criminal history involving a conviction for arson and conviction of a crime which requires the person to register as a sex offender under article six-C of the correction law. Where such criminal history information includes conviction of a crime which requires the person to register as a sex offender under article six-C of the correction law, a fire company shall determine whether or not such person shall be eligible to be elected or appointed as a volunteer member of such fire company. Such determination shall be made in accordance with the criteria established in sections seven hundred fifty-two and seven hundred fifty-three of the correction law.

HISTORY:

Add, L 1972, ch 892, eff Sept 1, 1973; amd, L1985, ch 719, § 8, eff Aug 1, 1985; L 1976, ch 273, eff June 3, 1976; L 1978, ch 215, eff Sept 1, 1978; L 1980, ch 133, § 2, eff May 16, 1980; L 1984, ch 185, § 4, eff June 5, 1984; L 1999, ch 423, § 4, eff April 1, 2000

(see 1999 note below); L 2003, ch 393, §§ 2, 3, eff Aug 19, 2003; L 2011, ch 373, §§ 2, 3, eff Aug 3, 2011; L 2014, ch 117, § 1, effective July 22, 2014; L 2014, ch 198, § 3, effective December 2, 2014; L 2014, ch 215, § 1, effective August 7, 2014; L 2018, ch 476, § 111, effective December 28, 2018; L 2020, ch 185, § 1, effective September 21, 2020.

Prior Law: Section 10-1106 derived from substance transferred from § 202-a.

Editor's Notes Laws 1999, ch 423, §§ 1, 6, eff April 1, 2000, provide:

Section 1. Legislative intent. The efforts of volunteer firefighters in New York state embody many of the values and traditions long respected and admired by our citizens. Volunteer firefighters devote many hours acquiring necessary training and then expend their energies to protect lives and property while placing their own lives and physical well being in jeopardy. They are heroes to our children, are trusted in our hour of need and provide role models for dedication and discipline.

Unfortunately, each year the public and members of the volunteer firefighting services are shocked to learn that a very few volunteers among the ranks have themselves been responsible for setting fires in their communities. These are the very individuals who have received specific training as firefighters in the arts and techniques of the arsonist. While observers may differ as to whether these fires are set by individuals who are fascinated by fire itself, or are set by those who seek to create opportunities in which they can be viewed as brave heroes by others, the results are the same: a serious erosion in public confidence in the volunteer firefighting services as a whole, and a loss of trust and morale within the volunteer companies themselves. This small number of individuals also places our communities and citizens at serious physical risk.

Mindful of these consequences, the legislature enacted chapter 719 of the laws of 1985, making an arson conviction in any degree an absolute bar to membership in a fire company. This law, however, relied too heavily upon an individual's willingness to admit an arson conviction and resigning as a volunteer or in refraining from applying in the first instance. It is the intent of this law to strengthen the ability of fire companies to police their own ranks by enabling fire chiefs to require new applicants for membership as volunteer firefighters, including transfers between fire companies, to undergo an arson conviction record check prior to acceptance as members. The authority afforded will enable the early identification of persons convicted of arson who may not serve.

§ 6. This act shall take effect April 1, 2000 except that the division of criminal justice services and the department of state are immediately authorized to promulgate such rules and regulations necessary to implement this act on or before such effective date.

Laws 2003, ch 393, § 1, eff Aug 19, 2003, provides as follows:

Section 1. Legislative intent. This legislation is designed to update certain provisions of the village law, the town law, the general city law and the not-for-profit corporation law relating to recognition of volunteer firefighters as duly elected or approved members of their respective fire companies. Periodically, these provisions of law should be updated to ensure that firefighters recently recognized as volunteers are considered to be duly elected and approved members in their respective fire companies, notwithstanding any legal defect in the election or approval process. This bill updates the relevant statutory provisions and ensures that more recently elected or approved volunteer members of fire companies are recognized as duly elected or approved for all purposes in law, including but not limited to coverage under the volunteer firefighters' benefit law.

Laws 2011, ch 373, § 1, eff Aug 3, 2011, provides as follows:

Section 1. Legislative intent. This legislation is designed to update certain provisions of the village law, the town law, the general city law and the not-for-profit corporation law relating to recognition of volunteer firefighters as duly elected or approved members of their respective fire companies. Periodically, these provisions of law should be updated to ensure that firefighters recently recognized as volunteers are considered to be duly elected and approved members in their respective fire companies, notwithstanding any legal defect in the election or approval process. This act updates the relevant statutory provisions and ensures that more recently elected or approved volunteer members of fire companies are recognized as duly elected or approved for all purposes in law, including but not limited to coverage under the volunteer firefighters' benefit law.

Amendment Notes 2011. Chapter 373, § 2 amended:

Sub 16, par (1) by deleting at fig 1 "two thousand three" and adding the matter in italics.

2011. Chapter 373, § 3 amended:

Sub 16, par (3) by deleting at fig 1 "two thousand three" and adding the matter in italics.

1999. Chapter 423, § 4 amended:

By adding sub 19.

1985. Chapter 719 5, § 8 amended:

By adding sub 18.

1984. Chapter 185, § 4 amended:

Sub 7 by deleting at fig 1 "thirty" and adding the matter in italics.

The 2014 amendment by ch 117, § 1added "provided however, that the provisions of this subdivision shall not apply to the membership of the village of Blasdell volunteer fi re department" in 7.

The 2014 amendment by ch 198, § 3, in 19, added "and conviction of a crime which requires the person to register as a sex offender under article six-C of the correction law" at the end of the first sentence and added the last two sentences.

The 2014 amendment by ch 215, § 1 added "provided however, that the provisions of this subdivision shall not apply to the membership of the village of Delanson volunteer fire company in the village of Delanson, county of Schenectady" in 7.

The 2018 amendment by ch 476, § 111, substituted "firefighter" for "fireman" or variants wherever it appears in 5, 6, 7, 9, 15(3), 16(3), and 17(a); added "of this section" at the end of the fifth sentence of 5 and 6; added "of this section" twice in 7; added "of this section" twice in 9; and made stylistic changes.

The 2020 amendment by ch 184, § 1, added "or incorporated into the construction of" in the first sentence of 3; substituted "means any improvement to real property, whether as a component of the new construction of a building or as the renovation or retrofitting of an existing" for "means and includes any renovation or retrofitting of a" in the first sentence of 4; added 6; and redesignated former 6 and 7 as 7 and 8.

Notes to Decisions

Analysis

1. In general
2. Membership

1. In general

In general, a board of fire commissioners, or if there is no board of fire commissioners, the village board of trustees and the council of the fire department, has control of the external affairs of a fire company within the village, and the constitution and by-laws of the fire company regulate the internal affairs of the company. In addition, the by-laws of a fire company within the village should not be inconsistent with the rules and regulations enacted by the board of fire commissioners, or the village board of trustees and the council of the fire department. There is, however, no statutory requirement that the latter approve the by-laws of the fire company. 1990 Op St Compt 90-19.

Under Sections 10-1000 et seq. of the Village Law, a village fire department is a corporation consisting of members of all the fire,

hose, protective and hook and ladder companies of a village; it is administered by a board of fire commissioners or, where no board of fire commissioners has been appointed, by the village board of trustees and the council of the fire department. Fire companies in a village are associations or corporations, which must operate in accordance with their certificates of incorporation, bylaws, and statutes; and, although fire companies are separate and distinct from the village, the statutes do permit village authorities to exercise a certain degree of control over their organization, incorporation, governance, and membership, including residency for membership. A fire company must consent to a contract for the provision of fire protection outside the village and the fire chief of the village fire department cannot consent on behalf of members of the company. 1990 Op St Compt 90-19.

2. Membership

Under Sections 10-1000 et seq. of the Village Law, a village fire department is a corporation consisting of members of all the fire, hose, protective and hook and ladder companies of a village; it is administered by a board of fire commissioners or, where no board of fire commissioners has been appointed, by the village board of trustees and the council of the fire department. Fire companies in a village are associations or corporations, which must operate in accordance with their certificates of incorporation, bylaws, and statutes; and, although fire companies are separate and distinct from the village, the statutes do permit village authorities to exercise a certain degree of control over their organization, incorporation, governance, and membership, including residency for membership. A fire company must consent to a contract for the provision of fire protection outside the village and the fire chief of the village fire department cannot consent on behalf of members of the company. 1990 Op St Compt 90-19.

A volunteer firefighter may not simultaneously be a member of 2 fire companies, regardless of whether the companies are part of the same fire department or different fire departments. 1991 Op St Compt No. 91-23.

There is no statutory prohibition on individual becoming member of fire company and member of volunteer ambulance corps at same time. 1997 Op St Compt No. 97-23.

UNDER FORMER § 202-a

3. In general

Rescue Hook and Ladder Company #1 of Roslyn is part of the fire department of the Village of Roslyn. 1954 Ops St Compt File #6848.

An unincorporated fire company with its headquarters in a village may, with the consent of the village board, incorporate as a village fire company. The persons named in the certificate of incorporation should be residents of the village. 1968 Ops St Compt File #635.

A village may not legally pay for the cost of a physical examination of a prospective volunteer fireman in the village fire department. 1969 Ops St Compt File #261.

4. Residence requirements

Persons residing in area protected by contract may, subject to certain conditions, be admitted to membership in a village fire company and village apparatus and equipment may, subject to certain conditions, be housed in such area. 1955 Ops St Compt File #7660.

Residence in the vicinity is a prerequisite for membership in a village fire department. 1961 Ops St Compt 352.

The Board of Trustees of a village may, by resolution, restrict membership of volunteer members in any or all fire companies of its fire department to residents of the village. 1962 Ops St Compt File #397.

Residents of a fire protection district protected by a volunteer fire company of a village pursuant to contract are eligible for membership in the fire company subject to the by-laws of the fire company and restrictions imposed by the board of fire commissioners of the village. 1954 Ops St Compt 126.

Village board of fire commissioners may not organize a fire company for territory outside the village but it may consent to membership in village fire company of residents of territory protected by contract. 1955 Ops St Compt 60.

5. Nonresident members

A fire company may not restrict the powers, duties, immunities and privileges of a non-resident member to a greater extent than is provided by the statute. 1954 Ops St Compt 126.

Residents of Pennsylvania are not eligible for membership in a village fire department and are not covered against injury or death while fighting fires by New York State law. 1954 Ops St Compt 266.

Whether or not a volunteer fireman who works and resides outside the village may be elected to membership in a volunteer fire company is a question of fact to be determined by the fire company. 1954 Ops St Compt 347.

For a general explanation of former Chapter 699 of Laws of 1954 in relation to non-resident members of volunteer fire departments, see 1955 Ops St Compt 39.

Admission of non-resident volunteer members in fire district fire department discussed. 1955 Ops St Compt 246.

A non-resident member of a village fire department may not hold the office of assistant engineer. 1956 Ops St Compt 76.

Nonresident members of a village fire department, though not electors of the village, are eligible for positions of chief and assistant chief engineer of the village fire department, provided they are residents of the State. 1961 Ops St Compt 156.

The Board of Trustees of a village may not provide that nonresident members of the village fire department are ineligible for election as chief engineer. 1962 Ops St Compt 432.

6. Other persons as members

A volunteer fireman is in "the public service" and a public servant, despite the fact that he receives no salary, in view of the fact that he is entitled to certain statutory benefits and exemptions, and an applicant to membership in a volunteer fire company may not be denied employment solely on racial grounds. Everett v Riverside Hose Co., 261 F. Supp. 463, 1966 U.S. Dist. LEXIS 10491 (S.D.N.Y. 1966).

Volunteer fire department which was organized pursuant to the provisions of the Membership Corporations Law was a publicly owned or governmental facility, and membership in said company could not be denied arbitrarily or discriminatorily based solely on the fact that the applicant was a Negro. Everett v Riverside Hose Co., 261 F. Supp. 463, 1966 U.S. Dist. LEXIS 10491 (S.D.N.Y. 1966).

Women may be elected to membership in an incorporated fire company, if the by-laws do not prohibit such membership and if their election is approved by the board of fire commissioners or town board. 1955 Ops St Compt 104.

While a village policeman may be elected to membership in the volunteer fire department of the village, if duly qualified, he might, if serving at a fire within the village, be deemed to be functioning as a policeman and thereby forfeit his right to benefits under the Volunteer Firemen's Benefit Law § 5, subd 2-d. 1959 Ops St Compt 4.

7. Membership in two companies

A volunteer fireman may not be a member of two volunteer fire companies on or after July 1, 1954. 1954 Ops St Compt 148.

A volunteer fireman may be a volunteer member of only one fire company at a time. 1969 Ops St Compt File #55.

Agency Opinions

Analysis

1. In general
2. Membership
3. Compensation
UNDER FORMER § 202-a
4. Residence requirements
5. Nonresident members
6. Membership in two companies

1. In general

Volunteer firemen of the Village of Port Chester who reside in Connecticut and hold a Connecticut driver's license may drive an

emergency vehicle owned by the Village of Port Chester. 1974 NY Ops Atty Gen July 26 (informal).

The Village of Savannah may house all of its fire fighting equipment in a fire house owned and operated by a fire company within an adjacent fire protection district in which the Village furnishes fire protection. 1975 NY Ops Atty Gen Feb 10.

The village board of trustees, on the recommendation of the council of a fire department in a village having no board of fire commissioners, determines the style of uniforms and the type of equipment to be purchased for use by members of the fire department. The procedures for receiving calls for assistance and responding to such calls by participants in a county mutual aid plan would be those described in the plan. Section 10-1006(16) of the Village Law does not affect the limitation under section 10-1006(7) that not more than thirty percent of the members of a fire company may be non-residents of the village or of the area served by the fire department or a fire company. 1981 NY Ops Atty Gen March 5 (informal).

The Village Law prohibits one person from becoming member of more than one fire company; member of company may assist another company or department in provision of emergency and general ambulance services. 1987 NY Ops Atty Gen No. 87-40 (informal).

The battalion chief of a village fire department cannot also serve as village mayor or village trustee. 2014 N.Y. Op. Att'y Gen. No. 2014-4, 2014 N.Y. AG LEXIS 83.

2. Membership

A nonresident of a village may be elected to membership, or his membership may be continued, in a village volunteer fire company if that person resides in an area outside of the village which is afforded fire protection by contract by the village fire department or a volunteer fire company thereof, unless the village authorities have restricted membership to persons actually living within the village. Such a member is a resident member. Nonresidents of the village or contract protected outside area may be continued as members of a village volunteer fire company or elected as members of such a company, if the by-laws of the fire company authorize it and if the village authorities consent to it. If the volunteer fire company has no by-laws, the consent can be given by a ¾ vote of the members present and voting at a regular or special meeting of the volunteer fire company. Such members are nonresident members. Nonresident memberships can not constitute more than 30% of the actual membership of the fire company. The by-laws of a village fire company may be more rigid than the statute concerning eligibility for membership and could provide, in spite of the provisions of Village Law § 10-1006 herein discussed, that election to membership or continuation of membership is dependent upon actual residence within the territorial confines of the village. A fire company by-law restricting membership to residents of the geographic territory of the village may be amended so as to extend membership rights to the extent and in accordance with the provisions of Village Law § 10-1006. 1976 NY Ops Atty Gen Feb 4 (informal).

By-law provisions for the admission of members of volunteer fire companies which provide that three negative votes or black balls will defeat election to membership appear to be valid but if they are used in a manner contrary to the Constitutions of the United States or of the State of New York or the anti-discrimination statutes of the state, such a by-law would be invalid. 1977 NY Ops Atty Gen May 9 (Informal), 1977 N.Y. AG LEXIS 114.

VILLAGE LAW, § 10-1006: Under the requirements prescribed by subdivisions (5) and (6) of this section, persons who are not residents of the village which controls a volunteer fire company or of the area outside the village which receives fire protection, can still remain or become members of the village volunteer fire company. 1981 NY Ops Atty Gen June 1 (informal).

Member of village board of trustees could also serve as volunteer member of village volunteer fire department and as vice-president of separate corporate entity acting in supportive capacity to volunteer fire department; however, trustee would be required to recuse himself from participating in approval of volunteer fire department's budget. 1996 NY Ops Atty Gen I 96-21.

Volunteer members of a village fire department or of a fire district fire company who are non-residents of the village, the fire district, or of the territory protected by a fire protection contract, may still be elected or appointed to a fire company or fire department office if they are residents of the state. 1982 Op St Compt File #82-67.

3. Compensation

A village may not pay volunteer firemen who are members of the ambulance squad for wages lost when they leave their factory to answer a call for ambulance service nor may it pay the factory for financial losses when the firemen leave the factory for such purpose. Volunteer Firemen's Benefit Law benefits may be affected by such payment. 1980 Op St Compt File #177.

When a volunteer fireman is removed from membership in a volunteer fire company by vote of the members themselves based on the company's constitution and bylaws, rather than by village fire authorities, then the village may not provide a legal defense to the fire department when sued by the discharged fireman for wrongful removal. 1980 Op St Compt File No. 80-366.

Volunteer firemen, including the chief and assistant chief or chiefs of a village fire department, may not be compensated for their services. 1980 Op St Compt File #544.

UNDER FORMER § 202-a

4. Residence requirements

The provisions of former § 202-a do not affect the status of volunteer firemen legally elected to membership prior to July 1, 1954. 1954 Ops Atty Gen 50 (informal).

A village department volunteer fireman who resides either within the village limits or within a territory afforded fire protection by the village fire department pursuant to a contract for fire protection is a resident member; all others are nonresident members. 1965 Ops Atty Gen Dec 1.

5. Nonresident members

Nonresidents of the village may not be appointed or elected to any office in a village fire department. 1963 Ops Atty Gen Dec 17.

Whether a non-resident is living or working in the vicinity of a fire district and is thus eligible for membership in a volunteer fire company in that district, is a matter of fact to be determined in each individual case by the fire company. 1970 Ops Atty Gen May 11.

6. Membership in two companies

A person may not be a volunteer member of more than one fire company at the same time unless he had more than one valid membership prior to July 1, 1954. Social and other related types of members of fire companies are not legal members of such companies. 1958 Ops Atty Gen Nov 19 (informal).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 200.

Human rights law, CLS Exec §§ 290 et seq.

Workmen's compensation reserve fund, CLS Gen Mun § 6-j.

Volunteer firemen, CLS Gen Mun §§ 200–205-b, 206-b, 209–209 *l*.

Volunteer firemen benefits, CLS Vol Fire Ben §§ 1 et seq.

§ 10-1008. Incorporation of fire department

The members of all the fire, hose, protective and hook and ladder companies of a village, organized and maintained in pursuance of law, constitute a corporation by the name of the "fire department of ...." The term, fire department of a village, as used in this chapter, refers to such a corporation.

HISTORY:

Add, L 1972, ch 892, eff Sept 1, 1973.

Editor's Notes: Substance transferred from § 203.

Notes to Decisions

1. In general

Village's board of trustees abolished a part of the fire department when it eliminated all paid firefighter positions, and its

action was subject to a permissive referendum. A fire department in a village can consist of both volunteer and paid firefighters. Matter of Pilla v Karnsomtob, 142 A.D.3d 1116, 39 N.Y.S.3d 174, 2016 N.Y. App. Div. LEXIS 6029 (N.Y. App. Div. 2d Dep't), app. denied, 28 N.Y.3d 904, 66 N.E.3d 1, 43 N.Y.S.3d 255, 2016 N.Y. LEXIS 3168 (N.Y. 2016).

Agency Opinions

Analysis

1. In general
2. Under former § 203

1. In general

By operation of law, mere existence of fire companies in village results in corporation known as village fire department. 1994 Op St Compt No. 94-18.

2. Under former § 203

So long as it is so authorized by the by-laws of a fire company incorporated under the village law or the membership corporations law, an active village fireman may receive compensation for his services as Secretary-Treasurer of the fire department. 1960 NY Ops Atty Gen July 25 (Informal), 1960 N.Y. AG LEXIS 145.

It is considered desirable to permit the village volunteer fire companies to incorporate under the Membership Corporation Law. 1962 NY Ops Atty Gen July 17 (Informal), 1962 N.Y. AG LEXIS 191.

Incorporation of a volunteer fire company of a village will not affect the control which the village exercises over the fire company. The making of a contract between the incorporated fire company and the village will not operate to make the fire company a paid fire company. Incorporation of a volunteer fire company will not affect the duties and liabilities of the village in regard to its volunteer firemen. An incorporated fire company of a village cannot contract to furnish fire protection outside of the village independently of the village board of trustees. 1947 Op St Compt No. 47-414.

Fire department of the villageof Bergen may operate outside of the village limits only if the village has authorized such operation. The town of Bergen may contract with the village of Bergen for the furnishing of fire protection outside of the village limits only if a fire protection or fire alarm district has been established. 1947 Op St Compt No. 47-441.

For a discussion re village fire departments generally, see 1953 Op St Compt No. 53-276.

An incorporated fire company located in a village is subject to the control of the village authorities irrespective of the fact it existed before incorporation of the village. Such fire company may not contract to furnish fire protection outside the village independently of the village board. 1953 Op St Compt No. 53-353.

Both village and fire department or fire company should be parties to contract to furnish fire protection outside of village. Village may retain moneys received pursuant to such contract or pay over a portion to the fire department or fire company. 1954 Op St Compt No. 54-240.

A village may purchase fire apparatus and equipment for the use of the village fire department. 1955 Op St Compt No. 55-109.

A village may not pay the secretary of the village fire department council an annual salary. Acceptance of such salary would cause the secretary to forfeit his position as secretary. 1955 Op St Compt No. 55-352.

A village fire department may convey for a consideration less than actual value a parcel of real estate purchased by it with its own funds. Such conveyance must be in accordance with applicable law and the by-laws of the department. 1955 Op St Compt No. 55-668.

A village may construct an addition to the village owned firehouse for the purpose of housing fire equipment owned by the incorporated fire company and to be used outside of the village. Providing the arrangement is provident for the village, rental need not be charged the fire company for such use. 1965 Op St Compt No. 65-320.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Certificate of incorporation of five corporation, CLS N-PCL § 404(f).

§ 10-1010. Election of company officers and delegates

Each of the several companies whose members constitute the fire department of the village shall hold an annual meeting on the first Tuesday in April in each year, except those fire companies constituting the fire department of the village of Fishkill, Dutchess county, which shall hold such annual meetings on the first Tuesday in December of each year. At such meeting the members of each company shall elect by ballot from their own number a captain and a lieutenant, and such further officers if any as may be provided for in the by-laws of the company, who must be approved by the board of fire commissioners, one warden and one delegate to the general convention of the fire department. The terms of office of the captain and lieutenant and such further officers if any, as are elected as herein provided, shall be one year, the wardens two years, and the delegates three years, respectively, and any vacancies occurring in any such offices shall be filled by election in like manner. At the first annual meeting after this act takes effect two wardens and three delegates shall be elected, the wardens to serve for one and two years, respectively, and the delegates for one, two and three years, respectively. Any person who has been convicted of arson in any degree shall not be eligible for election to the office of captain, lieutenant, warden, delegate and any other offices provided for in the by-laws of the company. Any captain, lieutenant, warden, delegate or other officer of the company who is convicted of arson in any degree during his term of office shall be disqualified from completing such term of office.

HISTORY:

Add, L 1972, ch 892, eff Sept 1, 1973; amd, L 1985, ch 719, § 9, eff Aug 1, 1985; L 2015, ch 481, § 1, effective November 20, 2015.

Editor's Notes: Substance transferred from § 204.

Amendment Notes: The 2015 amendment by ch 481, § 1, added "except those fire companies constituting the fire department of the village of Fishkill, Dutchess county, which shall hold such annual meetings on the first Tuesday in December of each year" in the first sentence.

Notes to Decisions

Analysis

1. In general
2. Under former § 204

1. In general

Under Sections 10-1000 et seq. of the Village Law, a village fire department is a corporation consisting of members of all the fire, hose, protective and hook and ladder companies of a village; it is administered by a board of fire commissioners or, where no board of fire commissioners has been appointed, by the village board of trustees and the council of the fire department. Fire companies in a village are associations or corporations, which must operate in accordance with their certificates of incorporation, bylaws, and statutes; and, although fire companies are separate and distinct from the village, the statutes do permit village authorities to exercise a certain degree of control over their organization, incorporation, governance, and membership, including residency for membership. A fire company must consent to a contract for the provision of fire protection outside the village and the fire chief of

the village fire department cannot consent on behalf of members of the company. 1990 Op St Compt 90-19.

2. Under former § 204

The chief engineer and assistant engineers of a village fire department may not be elected at a village election. 1963 Ops St Compt File #706.

Agency Opinions

Analysis

1. In general
2. Under former § 204

1. In general

Village may enact local law changing date of internal fire company elections specified in CLS Vill Law § 10-1010. NY Ops Atty Gen 90-19 (informal).

A member of a village board of fire commissioners or a single fire commissioner may not simultaneously hold any village fire company office except warden and delegate to the general convention of the fire department. 1976 NY Ops Atty Gen Nov 16 (informal).

If a village trustee is not a single fire district commissioner or a member of a village board of fire commissioners, that trustee may hold a fire company office but, because of the prohibition contained in Village Law § 10-1012, such trustee could not be chief engineer or assistant chief of the village fire department or hold a position which, upon occasion, would necessitate the trustee's performing the function of chief engineer. 1976 NY Ops Atty Gen Nov 16 (informal).

Under no circumstance may a chief engineer or assistant chief engineer of a village fire department (or any other individual who, in the absence of someone holding a higher position in a fire department would act as chief engineer of the fire department) simultaneously hold the office of village trustee. 1976 NY Ops Atty Gen Nov 16 (informal).

A fire company may adopt a bylaw providing that only firemen who attend at least 15% of all fire calls during the year may vote in an election of line officers of the fire company. 1982 NY Op. Att'y Gen. No. 82–17 (Informal), 1982 N.Y. AG LEXIS 92.

A village may enact a local law changing the date of internal fire company elections specified in the Village Law. 1990 N.Y. Op. Att'y Gen. No. I90-19.

The battalion chief of a village fire department cannot also serve as village mayor or village trustee. 2014 N.Y. Op. Att'y Gen. No. 2014-4, 2014 N.Y. AG LEXIS 83.

2. Under former § 204

Companies of a village fire department are mandated to elect a captain and assistant captain at their annual meeting. 1966 NY Ops Atty Gen Sept 15.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1154—1156.

§ 10-1012. Chief and assistant chiefs

1. The chief and the first and second assistant chiefs and such additional assistant chiefs, if any, as may be provided for in the by-laws of the fire department shall each be a member thereof and a resident of the state of New York. In addition, the board of trustees, or the board of fire commissioners subject to the approval of the board of trustees, may, by resolution, require that any or all of such fire department officers shall be residents of the village. The delegates elected to the general convention of the fire department shall meet at the council room thereof on the Thursday following the first Tuesday in April, except the elected delegates of the fire department of the village of Fishkill, Dutchess county, which shall meet on the first Tuesday in December, and nominate a person for each of such offices; but the fire commissioners of any village may adopt a rule requiring all such nominations to be made on the day of the meeting by a vote of the duly qualified members of the department, in which case the meeting of the delegates in general convention, as provided for in this section, shall be dispensed with. The person acting as secretary of such convention shall forthwith file in the office of the village clerk a certificate of such nominations. The board of fire commissioners at its next meeting shall consider the nominations and appoint such persons to the offices to which they are respectively nominated or, if a nomination is not approved the board shall reconvene the general convention, which shall submit a new nomination to take the place of any nomination not approved, which procedure shall continue until a full set of officers is approved. A person who has been convicted of arson in any degree shall not be eligible for nomination, election or appointment to the office of chief or assistant chief. Any fire chief or assistant chief who is convicted of arson in any degree during his term of office shall be disqualified from completing such term of office.

2. Notwithstanding the provisions of any general, special or local law inconsistent herewith any such chief or assistant chief of a village fire department need not be a resident of the village in order to serve as a member of the council of the fire department of the village pursuant to section 10-1014 of this article unless the board of trustees, or the board of fire commissioners subject to the approval of the board of trustees, has, by resolution, as provided in this section, required that any or all of such fire department officers shall be residents of the village. Except as otherwise provided pursuant to this subdivision, a person shall not hold the office of village mayor or village trustee and the office of chief or assistant chief of a village fire department at the same time. A village trustee who does not, either as an individual or as a member of a board, appoint or approve the appointment of the chief or assistant chief of a village fire department, may hold the office of chief or assistant chief at the same time. Notwithstanding any inconsistent provision of law, a person who is the chief or an assistant chief of a village fire department, if he is otherwise qualified, may be elected to the office of village mayor or village trustee or may be appointed to the office of village mayor or village trustee to fill a vacancy and, if he is so elected or appointed, his office as chief or assistant chief, as the case may be, shall become vacant upon his taking his oath of office as village mayor or village trustee.

HISTORY:

Add, L 1972, ch 892, eff Sept 1, 1973, substance having been transferred from § 205; amd, L 1972, ch 894, eff Sept 1, 1973; L 1980, ch 88, § 1, eff Apr 28, 1980; L 1985, ch 719, § 10, eff Aug 1,

1985; L 1991, ch 433, § 1, eff July 19, 1991; L 2015, ch 481, § 2, effective November 20, 2015.

Amendment Notes:

1991. Chapter 433, § 1 amended:

Par by deleting "A".

The 2015 amendment by ch 481, § 2, added the 1 and 2 designations; in the third sentence of 1, added "except the elected delegates of the fire department of the village of Fishkill, Dutchess county, which shall meet on the first Tuesday in December" and substituted "the day of the meeting" for "that day"; and substituted "subdivision" for "paragraph" in the second sentence of 2.

Notes to Decisions

Analysis

1. In general
2. Under former § 205

1. In general

Court did not err in dismissing village fire chief's Article 78 petition for reinstatement on ground that he had retired since petitioner's filing of application for retirement benefits from State Police and Fire Retirement System demonstrated clearly and convincingly that he intended to relinquish his position. Stork v Board of Trustees, 179 A.D.2d 1058, 579 N.Y.S.2d 797, 1992 N.Y. App. Div. LEXIS 2406 (N.Y. App. Div. 4th Dep't 1992).

Subject to certain limitations, there is no legal prohibition against a volunteer fireman of a village volunteer fire department serving as a member of the board of trustees. 1974 Ops St Compt File #379.

Under Sections 10-1000 et seq. of the Village Law, a village fire department is a corporation consisting of members of all the fire, hose, protective and hook and ladder companies of a village; it is administered by a board of fire commissioners or, where no board of fire commissioners has been appointed, by the village board of trustees and the council of the fire department. Fire companies in a village are associations or corporations, which must operate in accordance with their certificates of incorporation, bylaws, and statutes; and, although fire companies are separate and distinct from the village, the statutes do permit village authorities to exercise a certain degree of control over their organization, incorporation, governance, and membership, including residency for membership. A fire company must consent to a contract for the provision of fire protection outside the village and the fire chief of the village fire department cannot consent on behalf of members of the company. 1990 Op St Compt 90-19.

There is no statutory requirement that fire company officers, other than those specified by the Village Law, be designated by any particular titles. Consequently, in relation to a fire company within a fire district, a fire company may establish offices such as "fire company chief" in its by-laws. The designation of a fire company officer as a "chief", however, would not entitle the individual holding that office in the company to perform the duties and exercise the powers of the chief of the village fire department. 1990 Op St Compt 90-19.

Court erred in dismissing village fire chief's Article 78 petition for reinstatement on ground that he had retired, since petitioner, as holder of position within classified competitive civil service, was required by 4 NYCRR 5.3(a) to submit resignation in writing, and no such written resignation was ever tendered. Stork v Board of Trustees, 179 A.D.2d 1058, 579 N.Y.S.2d 797, 1992 N.Y. App. Div. LEXIS 2406 (N.Y. App. Div. 4th Dep't 1992).

If village board has rejected nominee submitted by village fire department for office of fire chief and department fails to submit new nomination, village board may not appoint new chief; in event of such impasse, incumbent chief continues to serve as chief or, if he or she resigns before new chief is appointed, assistant chief performs functions of chief until new appointment. 1992 Op St Compt No. 92-38.

2. Under former § 205

A non-resident member of a village fire department may not hold the office of assistant engineer. 1956 Ops St Compt 76.

The chief engineer of a village fire department may not lawfully sell equipment materials or supplies to the village. 1960 Ops St Compt 231.

Nonresident members of a village fire department, though not electors of the village, are eligible for positions of chief and assistant chief engineer of the village fire department, provided they are residents of the State. 1961 Ops St Compt 156.

After the village Board of Trustees, acting as a Board of Fire Commissioners, by resolution has declined to approve nomination of a person for chief engineer, the fire department convention may not resubmit the name of the same person for consideration at reconvening of the Board of Trustees for filling the position. 1961 Ops St Compt 197.

By restricting membership in all fire companies for volunteers to residents of the village, a village may effectively restrict eligibility to the positions of chief and assistant chief engineer to village residents; and this is the only method by which such eligibility may be so restricted. 1962 Ops St Compt 146.

Unless a village Board of Trustees has, by resolution, required that the chief engineer or any assistant chief be a resident of the village, a non-resident member of the village fire deparment is eligible for such appointments. 1963 Ops St Compt File #283.

A village trustee may not legally hold the office of assistant engineer of the village fire department. 1969 Ops St Compt File #245.

Agency Opinions

Analysis

1. In general
2. Under former § 205

1. In general

A member of a village board of fire commissioners or a single fire commissioner may not simultaneously hold any village fire company office except warden and delegate to the general convention of the fire department. 1976 NY Ops Atty Gen Nov 16 (informal).

If a village trustee is not a single fire district commissioner or a member of a village board of fire commissioners, that trustee may hold a fire company office but, because of the prohibition contained in Village Law § 10-1012, such trustee could not be chief engineer or assistant chief of the village fire department or hold a position which, upon occasion, would necessitate the trustee's performing the function of chief engineer. 1976 NY Ops Atty Gen Nov 16 (informal).

Under no circumstance may a chief engineer or assistant chief engineer of a village fire department (or any other individual who, in the absence of someone holding a higher position in a fire department would act as chief engineer of the fire department) simultaneously hold the office of village trustee. 1976 NY Ops Atty Gen Nov 16 (informal).

There is no incompatibility or conflict of interest which would prevent the superintendent of a village electric utility service from simultaneously holding the position of chief of the village fire department. 1981 NY Ops Atty Gen Feb 24 (informal).

Person may not simultaneously serve as village trustee and as chief or assistant chief of village fire department. 1988 NY Ops Atty Gen No. 88-17 (Informal).

A village governed by a charter may enact a local law to amend the charter regarding residency requirements for the fire chief. 1990 N.Y. Op. Att'y Gen. No. I90-44.

Chief, deputy chief, and assistant chief of village fire department may not hold office of mayor or trustee of village. 1998 NY Ops Atty Gen I 98-33.

A person may not simultaneously hold the positions of member of the board of trustees of a village and chief or assistant chief of the village fire department. N.Y. Op. Att'y Gen. No. 84-33.

Volunteer firemen, including the chief and assistant chief or chiefs of a village fire department, may not be compensated for their services. 1980 Op St Compt File #544.

Pursuant to section 10-1012 of the Village Law, the board of trustees, or the board of fire commissioners (if any) with the approval of the board of trustees, may, by resolution, require that

the chief and/or some or all of the assistant chiefs of the village fire department be residents of the village. However, the residency requirements of this section could be superseded by a local law pursuant to which a village could require the chief and assistant chiefs to reside in the village or the portion of the town in which the village is located to which the village provides fire protection pursuant to contract. 1980 Op St Compt File #746.

The battalion chief of a village fire department cannot also serve as village mayor or village trustee. 2014 N.Y. Op. Att'y Gen. No. 2014-4, 2014 N.Y. AG LEXIS 83.

2. Under former § 205

A person otherwise qualified may properly hold the post of engineer in the village fire department even though he does not own real property in the village. 1957 NY Ops Atty Gen April 9 (informal).

Incumbent engineers of a village fire department should hold over in those posts until their successors are chosen. 1957 NY Ops Atty Gen April 11 (informal).

A fire chief is eligible to be a candidate and to be elected to the office of village trustee. However, it would be inadvisable for a village trustee to serve at the same time as chief of the village fire department. 1959 NY Ops Atty Gen May 25 (informal).

A board of fire commissioners, if any, or a village board of trustees may require nominations for chief engineer and assistant engineers to be made by vote of the duly qualified members of the volunteer fire department. 1970 NY Ops Atty Gen Dec 28.

Where a village board of trustees, acting as a board of fire commissioners, declines to approve the nominations of chief engineer and assistant engineer made by delegates elected to the general convention of the fire department, the board shall reconvene the general convention, which shall submit new nominations to take the place of any nominations not approved, which procedure shall continue until a full set of officers is approved. 1971 NY Ops Atty Gen March 17 (informal).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Chief engineer in districts coterminous with two or more villages, CLS Unconsol Ch 201 § 1.

Jurisprudences:

26 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 498, 499.

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1157—1160.

§ 10-1014. Council of fire department

In a village in which separate fire commissioners are not appointed, the chief, the assistant, and the wardens of the several companies constitute the council of the fire department. The council shall meet on the third Tuesday in April in each year, except for the council of the fire department of the village of Fishkill, Dutchess county, which shall meet on the first Tuesday of December, and choose from its own number a secretary, a treasurer and a collector of the fire department, who shall hold their respective offices for one year unless sooner removed by the council. A vacancy in the office of secretary, treasurer or collector shall be filled by the council at its next meeting for the balance of the unexpired term. Such council shall have all the powers and be subject to all the liabilities and perform all the duties of a separate board of fire commissioners, as prescribed in section 10-1000 of this article, except subdivisions two, three, four and eight and the fixing of compensation under subdivisions five and seven of such section, and as to the provisions of such subdivisions such council shall only recommend to the board of trustees of the village. A majority of the members of such council constitute a quorum, and may make and prescribe by-laws for the proper management of the affairs and the disposition of the funds of the fire department, may call meetings of the members, and designate one or more days in each year for public exercise, inspection and review.

HISTORY:

Add, L 1972, ch 892, eff Sept 1, 1973, substance having been transferred from § 206; amd, L 1972, ch 894, eff Sept 1, 1973; L 2015, ch 481, § 3, effective November 20, 2015.

Amendment Notes: The 2015 amendment by ch 481, § 3, added "except for the council of the fire department of the village of Fishkill, Dutchess county, which shall meet on the first Tuesday of December" in the second sentence.

Notes to Decisions

Analysis

1. In general
2. Under former § 206

1. In general

Village board of trustees lacked jurisdiction to prosecute village fireman on charges of vandalism of village property and neglect of duty where he had been suspended by council of village fire department in connection with same incident, since council has exclusive jurisdiction under CLS Vill Art 10 as to suspension and removal of village volunteer firemen. Price v Board of Trustees, 139 Misc. 2d 535, 527 N.Y.S.2d 701, 1988 N.Y. Misc. LEXIS 211 (N.Y. Sup. Ct. 1988).

A statutory conflict of interest does not occur where a village volunteer fire department provides fire protection to a town fire protection district when a town councilman is also a village fire department fire warden. However, he should refrain from participation in any proceedings relating thereto, either as councilman or as fire warden. 1974 Ops St Compt File #507.

Under Sections 10-1000 et seq. of the Village Law, a village fire department is a corporation consisting of members of all the fire, hose, protective and hook and ladder companies of a village; it is administered by a board of fire commissioners or, where no board of fire commissioners has been appointed, by the village board of trustees and the council of the fire department. Fire companies in a village are associations or corporations, which must operate in accordance with their certificates of incorporation, bylaws, and statutes; and, although fire companies are separate and distinct from the village, the statutes do permit village authorities to exercise a certain degree of control over their organization, incorporation, governance, and membership, including residency for membership. A fire company must consent to a contract for the provision of fire protection outside the village and the fire chief of the village fire department cannot consent on behalf of members of the company. 1990 Op St Compt 90-19.

2. Under former § 206

Village board of trustees may not pay village moneys to village fire department to be expended. Village funds must be expended by village board of trustees through treasurer. 1945 Ops St Compt 212.

Village board of trustees may enter into a contract for fire protection with fire department of village. Consideration (partly a definite sum and partly an agreement to maintain fire department apparatus) when paid to the fire council, constitutes fire department funds and may be expended by the council. 1946 Ops St Compt 83.

Since secretary of fire council must be one of the officers described as making up council, if he were to be paid, he would no longer be a volunteer fireman and therefore could no longer be member of fire council. 1947 Ops St Compt 86.

The council of a village fire department, in a village which has no separate board of fire commissioners may designate a member of the fire department to take charge of an emergency relief squad under the direction of the chief engineer. 1947 Ops St Compt 223.

Village moneys must be expended by the village board of trustees through the village treasurer. Such moneys may not be paid over to the fire council for expenditure. 1954 Ops St Compt 240.

A village may not pay the secretary of the village fire department council an annual salary. Acceptance of such salary would cause the secretary to forfeit his position as secretary. 1955 Ops St Compt 532.

A village fire department may convey for a consideration less than actual value a parcel of real estate purchased by it with its own funds. Such conveyance must be in accordance with applicable law and the bylaws of the department. 1955 Ops St Compt 668.

A village may provide for public inspection of its fire department and pay expenditures for a dinner necessarily held in connection therewith for feeding the village firemen and inspecting officials. 1962 Ops St Compt #870.

A fire council cannot function in a village after appointment of a separate Board of Fire Commissioners. 1963 Ops St Compt File #279.

Agency Opinions

Analysis

1. In general
2. Under former § 206

1. In general

A village fire council has the power to require the presence of at least one fire chief within the village limits at all times. 1978 NY Ops Atty Gen July 20.

The village board of trustees, on the recommendation of the council of a fire department in a village having no board of fire commissioners, determines the style of uniforms and the type of equipment to be purchased for use by members of the fire department. The procedures for receiving calls for assistance and responding to such calls by participants in a county mutual aid plan would be those described in the plan. Section 10-1006(16) of the Village Law does not affect the limitation under section 10-1006(7) that not more than thirty percent of the members of a fire company may be non-residents of the village or of the area served by the fire department or a fire comapny. 1981 NY Ops Atty Gen March 5 (informal).

Town board members who are also members of village fire council do not have conflict of interest with respect to fire protection contract between village and town. 1980 Op St Compt File #101.

When a volunteer fireman is removed from membership in a volunteer fire company by vote of the members themselves based on the company's constitution and bylaws, rather than by village fire authorities, then the village may not provide a legal defense to the fire department when sued by the discharged fireman for wrongful removal. 1980 Op St Compt File No. 80-366.

A village board is not compelled to follow the fire council's recommendation to purchase a new fire truck. 1981 Op St Compt File #81-30.

The battalion chief of a village fire department cannot also serve as village mayor or village trustee. 2014 N.Y. Op. Att'y Gen. No. 2014-4, 2014 N.Y. AG LEXIS 83.

2. Under former § 206

Board of trustees has power to expend such sums as may be deemed proper and necessary for purpose of defraying expenses of village fire department. 1934 N.Y. Op. Att'y Gen. No. 149.

A village fire company, under the direction of the chief, may respond to emergency calls from outside the area regularly protected, until such outside service is restricted by action of the governing board of the village. 1957 NY Ops Atty Gen Oct 4 (Informal), 1957 N.Y. AG LEXIS 354.

Village fire department may not by provisions of its by-laws deprive council of fire department of its control over finances of department. 1958 NY Ops Atty Gen Dec 17 (informal).

A secretary and treasurer of a village fire department must be appointed by the council of a village fire department. 1965 NY Ops Atty Gen July 21 (Informal), 1965 N.Y. AG LEXIS 111.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 10-1012.

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1143, 1159, 1163, 1164.

§ 10-1016. Annual meeting of fire department

The members of the several companies constituting the fire department shall hold an annual meeting at such time and place as the council may direct.

HISTORY:

Add, L 1972, ch 892, eff Sept 1, 1973.

Derivation Notes: Derived from § 207; amd, L 1973, ch 976 § 19, eff Sept 1, 1973.

Notes to Decisions

Analysis

1. In general
2. Under former § 207

1. In general

Subject to certain limitations, there is no legal prohibition against a volunteer fireman of a village volunteer fire department serving as a member of the board of trustees. 1974 Ops St Compt File #379.

2. Under former § 207

Village may pay cost of printing, mailing, etc. of notices of meetings to members of village fire department. 1946 Ops St Compt 721.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations § 1165.

§ 10-1018. Duties of chief and assistants

The chief shall be president of the council and of the meetings of the fire department. He shall, under the direction of a separate board of fire commissioners, if any, have exclusive control of the members at all fires, inspections and reviews, the supervision of the engines, hose and other apparatus owned by the village for the prevention or extinguishment of fires, of all property owned by the fire department, and of all officers and employees thereof elected or employed by the council or by a separate board of fire commissioners, if any. He shall, whenever required by the board of fire commissioners, report to the board the condition of the property of the department and such other information respecting the department as may be required. He shall hold the members, officers and employees of the department strictly to account for neglect of duty, and may, in a village in which separate fire commissioners are not appointed, suspend or discharge them at any time, subject to the approval of two-thirds of the members of the council at the next meeting. He shall, upon application, and if authorized by the council, or a separate board of fire commissioners, if any, issue through the secretary of the fire department a certificate of the time of service of a member of the fire department, and shall give to each officer of the department immediately after his election a certificate thereof countersigned by the secretary. In case

of the inability or absence of the chief, the first assistant and in case of the absence or inability of both the chief and first assistant, the second assistant, and in the absence of the second assistant, the third assistant, if any, and in the absence of the third assistant, if any, the fourth assistant, if any, shall perform the duties and have all the powers of the chief.

HISTORY:

Add, L 1972, ch 892, eff Sept 1, 1973.

Editor's Notes: Substance transferred from § 208.

Notes to Decisions

Analysis

1. In general
2. Under former § 208

1. In general

Industrial Board of Appeals had rational basis to conclude that service of notice and order on village fire chief did not comply with service requirements of Public Employee Safety and Health Act (CLS Labor § 27-a) because fire chief was mere "employee" and there was no assurance that he would notify village officials, whereas direct notice to principal elected official of village would assure notification to accountable village officer who could enforce compliance; Labor Commissioner failed to prove that grant of authority to fire chief under CLS Vill § 10-1018 was broad enough to authorize fire chief to act on behalf of village, and that actual notice to fire chief constituted constructive notice to village. Hudacs v Village of Watkins Glen, 208 A.D.2d 181, 622 N.Y.S.2d 384, 1995 N.Y. App. Div. LEXIS 1389 (N.Y. App. Div. 3d Dep't 1995).

Driver violated N.Y. Veh. & Traf. Law § 1102 where he failed to yield to the directions of volunteer firefighters who were directing traffic at the scene of an automobile accident, as the firefighters had authority to act pursuant to the instructions given to them by their fire chief, who had properly delegated his authority to regulate traffic at such incidents pursuant to the emergency doctrine contained in N.Y. Veh. & Traf. Law § 1602; although the firefighters were not fire police officers, pursuant to N.Y. Gen. Mun. Law § 209-c, they were acting under the direction and control of their chief pursuant to N.Y. Village Law § 10-1018. People v Loren, 4 N.Y.3d 411, 796 N.Y.S.2d 26, 828 N.E.2d 983, 2005 N.Y. LEXIS 1039 (N.Y. 2005).

Under Sections 10-1000 et seq. of the Village Law, a village fire department is a corporation consisting of members of all the fire, hose, protective and hook and ladder companies of a village; it is administered by a board of fire commissioners or, where no board of fire commissioners has been appointed, by the village board of trustees and the council of the fire department. Fire companies in a village are associations or corporations, which must operate in accordance with their certificates of incorporation, bylaws, and statutes; and, although fire companies are separate and distinct from the village, the statutes do permit village authorities to exercise a certain degree of control over their organization, incorporation, governance, and membership, including residency for membership. A fire company must consent to a contract for the provision of fire protection outside the village and the fire chief of the village fire department cannot consent on behalf of members of the company. 1990 Op St Compt 90-19.

While there is no statute requiring fire company which constitutes village fire department to submit its books and records pertaining to receipt and expenditure of proceeds from fire protection contracts and fund raising to village board for audit, village board may make such requirement condition to entering into fire protection contracts for outside service or to allowing company to undertake fund raising activities; financial information concerning fire department may also be obtained under provisions of CLS Not-For-Profit Corporation Law and Freedom of Information Law; board of fire commissioners or, if there is no board of fire commissioners, board of trustees of village may require submission of report by chief of fire department. 1988 Op St Compt No. 88-55.

2. Under former § 208

The council of a village fire department, in a village which has no separate board of fire commissioners may designate a member of the fire department to take charge of an emergency relief squad under the direction of the chief engineer. 1947 Ops St Compt 223.

The chief engineer of a village fire department may not lawfully sell equipment, materials or supplies to the village. 1960 Ops St Compt 231.

A village trustee may not legally hold the office of assistant engineer of the village fire department. 1969 Ops St Compt File #245.

The offices of chief engineer of a village fire department and village fire inspector are incompatible. 1969 Ops St Compt File #640.

Agency Opinions

Analysis

1. In general
2. Under former § 208

1. In general

The same person cannot serve at the same time as chief of police of a village and chief of the village's volunteer fire department. 1975 NY Ops Atty Gen Oct 27 (informal).

A village chief or assistant chief may simultaneously serve on the town board of the town within which the village is located, notwithstanding that the village has a contract with the town to provide fire protection to the town. 1978 NY Ops Atty Gen Jan 17 (Informal).

A village fire council has the power to require the presence of at least one fire chief within the village limits at all times. 1978 NY Ops Atty Gen July 20.

A fire commissioner of a fire district may serve at the same time as an assistant chief of a village fire department with which the fire district in which he is a commissioner contracts for fire protection. 1978 NY Ops Atty Gen May 26.

In instances of concurrent police department and fire department jurisdiction, the determination as to which of the two has primary jurisdiction over the event in question is dependent upon the circumstances of the particular case. In general, a fire department is in absolute command at the scene of a fire emergency until such time as, in the judgment of the fire chief, the premises are free from immediate danger of fire or explosion and safe for occupancy. N.Y. Op. Att'y Gen. No. 83-67.

The battalion chief of a village fire department cannot also serve as village mayor or village trustee. 2014 N.Y. Op. Att'y Gen. No. 2014-4, 2014 N.Y. AG LEXIS 83.

2. Under former § 208

Assuming that the performance of the official duties of either office would not interfere with the other, the same person may at the same time hold the two public offices of Village Fire Chief and Town Superintendent of of Highways. 1971 NY Ops Atty Gen Dec 28.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 10-1000.

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1161, 1162.

§ 10-1020. Abolition of fire department; employment of paid firefighters.

The board of trustees of any village may, by resolution, abolish, in whole or in part, the fire department in such village, which action of the board of trustees shall be subject to a permissive referendum as defined in this chapter; if such fire department is abolished, all the money and property

of such department shall be turned over by the officers of such department or by the fire commissioners to the board of trustees within ten days after service of notice on such officers or commissioners of the action of the board of trustees. Or, the board of trustees may, by resolution, determine that one or more firefighters shall be employed to act with such voluntary department and may fix the salary of such firefighters; the board of trustees may also determine that such paid firefighters shall have charge of all apparatus and other equipment and that the voluntary department shall act under the orders of such paid firefighter or firefighters.

HISTORY:

Add, L 1972, ch 892, eff Sept 1, 1973; L 2018, ch 476, § 112, effective December 28, 2018.

Editor's Notes: Substance transferred from § 211.

Amendment Notes The 2018 amendment by ch 476, § 112, substituted "firefighters" for "firemen" in the section heading; and in the second sentence, substituted "firefighters" for "firemen" three times and "firefighter or firefighters" for "fireman or firemen."

Notes to Decisions

1. In general

Village's board of trustees abolished a part of the fire department when it eliminated all paid firefighter positions, and its action was subject to a permissive referendum. A fire department in a village can consist of both volunteer and paid firefighters. Matter of Pilla v Karnsomtob, 142 A.D.3d 1116, 39 N.Y.S.3d 174, 2016 N.Y. App. Div. LEXIS 6029 (N.Y. App. Div. 2d Dep't), app. denied, 28 N.Y.3d 904, 66 N.E.3d 1, 43 N.Y.S.3d 255, 2016 N.Y. LEXIS 3168 (N.Y. 2016).

Agency Opinions

1. Under former § 211

Salaries of village police constables and fire department drivers may be increased during fiscal year if funds are legally available therefor. 1947 Op St Compt No. 47–383.

A village may not compensate members of its volunteer fire department for fighting fires. However, it may employ one or more paid firemen. 1958 Op St Compt No. 58–200.

A village of the fourth class is not authorized to appoint for contract with "duty" or "call" firemen, but may employ one or more paid firemen and fix their salary. 1961 Op St Compt No. 61–312.

§ 10-1022. Fire inspection in contract areas

The chief officer of the fire department or fire company which is to furnish fire protection service to a village under a contract for fire protection may inspect (1) any public building and (2) with the consent of the owner, any privately-owned building, located within the village or the portion thereof required to be protected under such contract, for fire hazards, or such chief officer may delegate such power of inspection to an officer or member of such department or company.

The term "building," as used in this section does not include a multiple dwelling which may be inspected by such fire department or company under and pursuant to the provisions of subdivision four of section three hundred three of the multiple residence law.

The failure of any such officer or member to discover and properly report any such fire hazards or his or her neglect or omission to perform such duties shall not subject him or her, his or her fire department, fire company, or the city, village, fire district or town in which or of which he or she is a firefighter to any civil or other liability. Any such fire officer or member shall not be liable civilly for any act or acts done by him or her as a firefighter in the performance of such duties, except for wilful negligence or malfeasance, but the provisions of this section shall not relieve any such city, village, fire district, town, or fire company from liability, if any, for the negligent or wrongful acts of the officer or member in the actual performance of such duty.

HISTORY:

Add, L 1972, ch 892, eff Sept 1, 1973; L 2018, ch 476, § 113, effective December 28, 2018.

Editor's Notes: Substance transferred from § 214.

Amendment Notes The 2018 amendment by ch 476, § 113, substituted "firefighter" for "fireman" in the first and second sentences of the last paragraph; and made stylistic changes.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Inspection of school and college buildings, CLS Educ §§ 807-a, 807-b.

Enforcement, CLS Mult R § 303.

Jurisprudences:

62A NY Jur 2d Government Tort Liability § 93.

ARTICLE 11 Water

Section

11-1100. Contracts for water supply
11-1124. Contracts for purchase and sale of water

§ 11-1100. Contracts for water supply

The board of water commissioners may contract, in the name of the village, with an individual or corporation for supplying water to the village for extinguishing fires or for other public purposes; but such contracts shall not be made for a longer period than forty years. The amount of such contract shall be paid in installments in accordance with the resolution of the board authorizing same.

HISTORY:

Add, L 1972, ch 892, eff Sept 1, 1973.

Editor's Notes: Substance transferred from § 220; amd, L 1973, ch 976 § 20, eff Sept 1, 1973.

Notes to Decisions

1. Under former § 220

The parents' cause of action against the Water Department and the President of the Water Board were properly dismissed as the Water Board, charged with the operation and administration of the waterworks system acquired by the village, exists merely as an administrative arm of the village itself, exercising authority delegated by the village apart from which it has no independent existence upon which it may be sued which is reinforced by the scope of restrictions placed upon the board by statute. Rathbun v Waverly, 35 A.D.2d 227, 315 N.Y.S.2d 237, 1970 N.Y. App. Div. LEXIS 3501 (N.Y. App. Div. 3d Dep't 1970).

The Board of Water Commissioners is not a public benefit corporation nor de facto corporation possessing status as an independent entity allowing it to sue or be sued within the meaning of General Corporation Law § 3, subdivision 4, as no certificate of incorporation was ever drawn nor legislation en-

acted establishing the board as a corporation and since there is no authorization upon which the board could become a de jure corporation it could not be deemed even a de facto corporation. Rathbun v Waverly, 35 A.D.2d 227, 315 N.Y.S.2d 237, 1970 N.Y. App. Div. LEXIS 3501 (N.Y. App. Div. 3d Dep't 1970).

Former § 220 was not applicable to a village which owns its own water distribution system, but is applicable to villages which are served by a water system owned by an individual or another corporation, public or private. 1956 Ops St Compt 342.

A village, which had purchased certain lands for the construction of a well, could not agree in writing with the private owner of the adjoining premises (who also was a former owner of the land purchased by the village) to supply the latter with free water. The property was located outside the village limits. 1959 Ops St Compt 313.

The offices of village water commissioner and town councilman are not incompatible where village water supply is completely separate from that of any water district in the town. 1967 Ops St Compt File #722.

Agency Opinions

Analysis

1. In general
2. Under former § 220

1. In general

Water contracts between municipalities are limited to a maximum of 40 years. Absence of a provision as to length of time does not render the contract null and void. 1979 NY Ops Atty Gen July 20 (informal).

A village is not authorized to conduct a referendum on a proposed contract with a water company for the supply of water. 1990 N.Y. Op. Att'y Gen. No. I90-51.

It is unlikely that a village still has contractual obligations to supply water to another village under a supposed old written water supply contract which cannot be located and may have been entered into more than 50 years ago. The best solution is for the two villages to negotiate a new water supply contract. 1978 Op St Compt File #332.

The Village of Monroe may adopt a local law which authorizes a contract between the village and Niagara Mohawk for a term of years to be agreed upon under which the village would supply water to Niagara Mohawk buildings in the village in consideration of the availability to the village of water from the company's wells. 1979 Op St Compt File #607.

A village may share the cost of digging a well on private property to supply water to the village hall and the private property owner. 1980 Op St Compt File #68.

The Village of Tarrytown may adopt a local law pursuant to the provisions of Municipal Home Rule Law, § 10(1)(ii)(e)(3) superseding the provisions of Article 11 of the Village Law and authorizing the Village to establish a special assessment district for the purpose of charging certain properties, on a benefit basis, for the cost of a water line "loop" which is necessary to increase the water supply and pressure for the benefited properties for the purpose of fire protection. 1980 Op St Compt File #306.

2. Under former § 220

A member of a Village Board of Water Commissioners holds over in office after the expiration of his term and until a successor has been chosen. 1966 NY Ops Atty Gen June 17.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Contracts between municipalities for water supply, CLS Gen Mun §§ 111, 115; CLS Unconsol Ch 140 §§ 17-a, 22.

Contracts to develop supply of water for sale, CLS Gen Mun § 118-a.

Power to contract indebtedness, CLS Gen Mun § 119-o.

Municipal co-operation, CLS Gen Mun § 119-o.

Water purification contracts, CLS Gen Mun § 120.

Contract for joint water district, village and town, CLS Gen Mun § 120-t.

Emergency service by waterworks corporation, CLS Gen Mun § 120-u.

Interlocal agreements with governmental units of other states, CLS Gen Mun § 462(1, a).

Contracts for water supply by waterworks corporation, CLS Trans Corp §§ 42, 43, 46.

Power to contract indebtedness, CLS Const Art 8 § 2-a.

Joint waterworks system, CLS Unconsol Ch 140 §§ 1–24.

Jurisprudences:

Law Reviews:

Providing municipal services in New York State: the "private contract" alternative. 28 Buffalo L Rev, No. 3, p. 589, Summer, 1979.

§ 11-1124. Contracts for purchase and sale of water

1. The board of water commissioners may contract with the town board on behalf of the town or a water supply, fire alarm or fire protection district thereof, or with the board of trustees of a village or the board of fire commissioners of a fire district, respectively, to furnish water for the extinguishment of fires, including the furnishing, erection, maintenance, care and replacement of fire hydrants, the erection and maintenance of markers therefor, and the removal of snow and ice to provide access thereto, or for sanitary or other public purposes, for any period not exceeding ten years. The amount payable each year under such a contract shall be raised as a part of the expenses of such town or water supply, fire alarm or fire protection district thereof, village or fire district, and paid to the treasurer of the village owning such system of water works. Nothing herein contained shall be deemed to alter or remove any of the limitations, restrictions or procedural requirements provided in sections one hundred eighty-four-a and one hundred eighty-four-b of the town law.

2. The board of water commissioners of any village maintaining its own water distribution system may contract in the name of such village with any public corporation or improvement district which possesses the power to sell a supply of water, for the purpose of purchasing all or any portion of the water supply of such village from such public corporation or improvement district for such period as may be deemed necessary, but not in excess of forty years. The term "public corporation" as used in this subdivision shall mean a public corporation as defined in the general corporations law and also any joint water works corporation formed under the provisions of chapter six hundred fifty-four of the laws of nineteen hundred twenty-seven, as amended.

HISTORY:

Add, L 1972, ch 892, eff Sept 1, 1973.

Editor's Notes: Substance transferred from § 234.

Notes to Decisions

1. Under former § 234

The board of fire commissioners of a fire district may contract with a village for a term not to exceed five years for the erection and maintenance of hydrants on the village supply line running through the fire district. The cost of such contract would be a general district charge unless the district were zoned. A water supply district could be established to accomplish the same purpose as zoning of the fire district. 1953 Ops St Compt 204.

A village may connect its water system to the water system of another village and contract for a period not to exceed five years to purchase water from such other village. There is no limit upon the price which may be paid for water nor is a referendum required. 1956 Ops St Compt 342.

A fire protection district may contract for a supply of water and hydrant service with a village. The expense for such a contract must be assessed against all the property within the district. 1967 Ops St Compt File #363.

Agency Opinions

1. In general

Water contracts between municipalities are limited to a maximum of 40 years. Absence of a provision as to length of time does not render the contract null and void. 1979 NY Ops Atty Gen July 20 (informal).

A village is not authorized to conduct a referendum on a proposed contract with a water company for the supply of water. 1990 N.Y. Op. Att'y Gen. No. I90-51.

It is unlikely that a village still has contractual obligations to supply water to another village under a supposed old written water supply contract which cannot be located and may have been entered into more than 50 years ago. The best solution is for the two villages to negotiate a new water supply contract. 1978 Op St Compt File #332.

A fire district located outside the boundaries of a village may purchase water from the village for use at the firehouse. A village water works situate outside of the village and within a fire district is not exempt from fire district taxation. 1982 Op St Compt File #82-257.

A fire district located outside the boundaries of a village may purchase water from the village for use at the fire house. A village water works situate outside of the village and within a fire district may be exempted from fire district taxes by the town board. Notwithstanding the exemption, the village is entitled to receive consideration from the fire district for the water consumed by the district. Opns St Comp, No. 82-257 superseded to the extent it is inconsistent herewith. 1983 Op St Compt File #83-56.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Grant of right or franchise in competition with municipal system subject to permissive referendum, § 4-412(3)(6).

Contract for supply by other municipality out of common water supplies, CLS Gen Mun §§ 111, 115.

Sale of water, CLS Gen Mun § 115.

Water purification contract, CLS Gen Mun § 120.

Contract for supply of water by waterworks corporation, CLS Trans Corp §§ 42, 43, 46.

Joint waterworks system, CLS Unconsol Ch 140.

Jurisprudences:

Law Reviews:

Providing municipal services in New York State: the "private contract" alternative. 28 Buffalo L Rev, No. 3, p. 589, Summer, 1979.

ARTICLE 17 Provisions Applicable to a Village Embracing the Entire Territory of a Town

Section

17-1700. Application
17-1704. Succession of powers and duties
17-1720. Fire districts; preservation of fire districts, fire protection districts and fire alarm districts

HISTORY:

Add, L 1972, ch 892, eff Sept 1, 1973.

§ 17-1700. Application

This article shall apply to any village which has been or may hereafter be incorporated to embrace the entire territory of a town, to any village which has annexed or may hereinafter annex territory to embrace the entire territory of a town, and to any town which has been or may hereafter be created to be coterminous with any village.

HISTORY:

Add, L 1972, ch 892, eff Sept 1, 1973, with substance transferred from § 322; amd, L 1977, ch 960, § 2, eff Aug 11, 1977; L 2013, ch 30, § 3, eff May 22, 2013.

Editor's Notes: Laws 1977, ch 960, § 8, provides as follows:

§ 8. If any clause, sentence, paragraph, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section or part thereof directly involved.

Amendment Notes: 2013. Chapter 30, § 3 amended: Section by adding the matter in italics.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Common drainage facilities, CLS Gen Mun §§ 119-f to 119-*l*.

Joint police department for town and village, CLS Gen Mun § 121-a.

§ 17-1704. Succession of powers and duties

In every such village, all the powers and duties imposed by law upon the town board of the town or upon any officer of the town or commissioners or boards of any district in relation to any water district, or any lamp or street lighting district, or any sewer district, or any fire district, created or organized under the provisions of the town law, shall devolve and are hereby imposed upon the board of trustees of such village, and all contracts in relation to such districts or any improvements therein shall be performed and completed by the said board of trustees.

HISTORY:

Add, L 1972, ch 892, eff Sept 1, 1973.

Editor's Notes: Substance transferred from § 323.

Notes to Decisions

Coterminous town/village that operates principally as village may not establish, under CLS Town article 11-A, joint fire district that would encompass only area of coterminous town/village. 2003 Op St Compt No. 03-2.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 17-1720.

Jurisprudences:

26 NY Jur 2d Counties, Towns, and Municipal Corporations § 847.

25 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 10, 25.

§ 17-1720. Fire districts; preservation of fire districts, fire protection districts and fire alarm districts

1. In every such village any fire districts created or organized under the provisions of the county law, shall be merged in and consolidated with such village and shall become a part of such village for fire protection purposes and all buildings, engines, fire apparatus, and other property belonging to such

fire district shall be vested in such village and maintained and administered by it as a part of the fire protection system thereof. All the powers and duties of the commissioners of such fire district shall be and are hereby devolved upon and transferred to the board of trustees of such village. For the purpose of paying the principal and interest of any bonds of any such fire district which may be outstanding and unpaid at the date of the incorporation of any such village, the board of trustees of such village shall levy, assess and collect upon all the taxable property in such village, a tax sufficient to pay the interest thereof as the same accrues and sufficient also to provide for the payment of the principal of such bonds at maturity.

2. At any time after the date the report of incorporation is delivered to the secretary of state pursuant to section 2-232 of the village law, and prior to the first day of June following the first day of January next succeeding the date of incorporation, the board of trustees of any village in which a majority of the electors has approved a proposition submitted to the voters in accordance with subdivision three of section 17-1708 hereof, may adopt a local law providing that any fire district, fire protection district, fire alarm district or any district functioning pursuant to section one hundred eighty-six of the town law which is located wholly or partly within the boundaries of such village, shall continue to function in all respects whatsoever, and all officers and employees of such entity shall continue to hold their offices and exercise their powers and duties, as though such village were not incorporated.

3. In the event that the board of trustees adopts a local law pursuant to subdivision two of this section, then notwithstanding any provision of sections 2-252, 2-254, 2-256, 2-258, 17-1704, 17-1720 or 17-1726 of the village law, any such fire district, fire protection district, fire alarm district or any district functioning pursuant to section one hundred eighty-six of the town law which is located wholly or partly within the boundaries of such village, shall continue to function, in all respects whatsoever, and all officers and employees of such entity shall continue to hold their offices and exercise their powers and duties, as though such village were not incorporated.

HISTORY:

Add, L 1972, ch 892, eff Sept 1, 1973; amd, L 1976, ch 218, § 6, eff May 25, 1976.

Editor's Notes: Substance transferred from § 328.

Agency Opinions

A village has no authority to establish fire or sewer districts within its boundaries. 1975 NY Ops Atty Gen March 25.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Town fire districts, CLS Town §§ 170–179, 181–189.

Savings clause, CLS Town § 186.

Joint fire districts in villages, CLS Unconsol Ch 201 § 1.

ARTICLE 22-A Joint Fire Districts

Section

22-2210. Establishment of joint fire districts

22-2212. Operation of joint fire districts in towns

HISTORY:

Add, L 1988, ch 241, § 3, eff July 8, 1988.

§ 22-2210. Establishment of joint fire districts

The town board of a town or the town boards of more than one town, and the board of trustees of an incorporated village or the boards of trustees of more than one incorporated village located in said town or towns are hereby authorized to establish and/or extend in such town or towns and village or villages a joint fire district for the purposes stated and in the manner provided in article eleven-A of the town law, provided all of the territory in such joint fire district shall be contiguous.

HISTORY:

Add, L 1988, ch 241, § 3, eff July 8, 1988.

Notes to Decisions

The town board of a town and the board of trustees of a village located within the town are authorized to establish a joint fire district by resolution subject to permissive referendum. The members of the board of fire commissioners of a joint fire district may be appointed by the town board and village board of trustees or they may be elected pursuant to the provisions of Article 11 of the Town Law. 1990 Op St Compt 90-27.

Where there is proposed formation of joint fire district containing village located within 2 towns, both towns must participate in formation process. 2000 Op St Compt No. 2000-21.

Coterminous town/village that operates principally as village may not establish, under CLS Town article 11-A, joint fire district that would encompass only area of coterminous town/village. 2003 Op St Compt No. 03-2.

Agency Opinions

Positions of village mayor and fire commissioner of joint fire district established by that village are incompatible since statutory scheme governing joint fire districts gives towns and village boards substantial power to affect existence and structure of joint fire district. 2004 NY Ops Atty Gen I 04-6.

§ 22-2212. Operation of joint fire districts in towns

In all respects the provisions of article eleven-A of the town law shall apply to the establishment, extension, operation and management of any joint fire district provided for by this article.

HISTORY:

Add, L 1988, ch 241, § 3, eff July 8, 1988.

Notes to Decisions

Once the joint fire district has been established, the property and affairs of the district are under the management and control of a board of fire commissioners which may have from 3 to 7 members. The board of commissioners may be appointed by the town board and the village board of trustees in joint session or may be elected in a manner provided in Article 11 of the Town Law. The determination of whether the board of commissioners is appointed or elected is made by the town and village boards "by resolution adopted at the meeting of the establishment of the district in the same manner as a resolution for the establishment of the district is adopted." If the commissioners are appointed, § 189-e of the Town Law provides that where there is an even number of commissioners, village residents may not constitute more than half the board, and where there is an odd number of commissioners, the number of village residents on the board may not exceed the number of town residents by more than one. 1990 Op St Compt 90-27.

VOLUNTEER AMBULANCE WORKERS' BENEFIT LAW

Article
II. Coverage and Benefits
IV. Procedure

HISTORY:
Add, L 1988, ch 24, § 31, eff Jan 1, 1989.

ARTICLE II Coverage and Benefits

Section
5. Coverage
8. Permanent total disability benefits
11-c. Medical examination of volunteer ambulance workers to detect and identify the human immunodeficiency virus (HIV)

HISTORY:
Add, L 1988, ch 24, § 31, eff Jan 1, 1989.

§ 5. Coverage

1. The duties and activities in relation to which benefits shall be paid and provided pursuant to this chapter are:

a. Necessary travel to, working at, and necessary travel returning from an accident, alarm of accident, or other duty to which his ambulance department, ambulance company, or any unit thereof, either has responded or would be required or authorized to respond, including necessary travel during such work or incidental thereto.

b. While, within the state, personally assisting another ambulance department, ambulance company, or any unit thereof, including, after his services have been duly accepted, necessary travel to and returning from such work and necessary travel during such work or incidental thereto.

c. While, within the state and pursuant to orders or authorization, performing duties at the ambulance facility, or elsewhere, directly related to; (1) the prevention of accidents or other disasters, or (2) the delivery of emergency health care.

d. While, within this country or in Canada and pursuant to orders or authorization, instructing or being instructed in ambulance duties, attending a training school or course of instruction for ambulance workers, or attending or participating in any noncompetitive training program, including necessary travel directly connected therewith.

e. While, within the state, any adjoining state or in Canada and pursuant to orders or authorization, attending or participating in any drill, parade, funeral, inspection or review in which his ambulance department, ambulance company, or any unit thereof, is engaged, including necessary travel directly connected therewith.

f. While, within the state and pursuant to orders or authorization, attending or working at meetings of his ambulance department or ambulance company, or any organized unit thereof, at the ambulance facility or other regular or special headquarters of the department, company or unit, including necessary travel directly connected therewith other than travel to or returning from such meetings.

g. While, within the state and pursuant to orders or authorization, working in connection with the construction, testing, inspection, repair or maintenance of (1) the ambulance facility and the fixtures, furnishings and equipment thereof, and (2) the ambulance vehicles, ambulance apparatus and equipment used by the ambulance department, ambulance company, or other unit thereof, including necessary travel directly connected therewith other than travel to or returning from such work.

h. While, within the state, any adjoining state or in Canada and pursuant to orders or authorization, practicing for, or participating as a contestant or an official in, any competitive tournament, contest or public exhibition conducted for ambulance workers which is intended to promote the efficiency of the ambulance department, ambulance company or any unit thereof, including necessary travel directly connected therewith other than travel to and returning from such practice. The actual rendition of ambulance or other emergency service shall not be deemed "practicing" within the meaning of this paragraph.

i. While, pursuant to orders or authorization, engaged in the inspection of ambulance vehicles and ambulance apparatus prior to delivery under a contract of purchase, or performing duties in relation to the delivery thereof, including necessary travel directly connected therewith.

j. While, within this country or Canada and pursuant to orders or authorization, attending a convention or conference of ambulance workers or ambulance officers as the authorized delegate or representative of his ambulance department, ambulance company or any unit thereof, including necessary travel directly connected therewith.

k. While, within the state and pursuant to orders or authorization, working in connection with a fund raising activity of his ambulance company, including necessary travel directly connected therewith, but shall not include competitive events in which volunteer ambulance workers are competitors, such as baseball, basketball, football, bowling, tugs of war, donkey baseball, donkey basketball, boxing, wrestling, contests between bands or drum corps, or other competitive events in which volunteer ambulance workers are competitors and which involve physical exertion on the part of the competitors.

l. While, within the state, performing duties in an area other than his or her own related to the delivery of emergency health care prior to the arrival of the ambulance department, ambulance company, or any unit thereof that is responsible for the provision of such care in that area, provided that the

volunteer ambulance workers' municipality, ambulance department, ambulance company, or any unit thereof, adopts a resolution granting coverage for such duties. Upon the arrival of the ambulance department, ambulance company, or any unit thereof responsible for emergency health care in the area, such volunteer ambulance worker shall be entitled to benefits in the manner set forth in paragraph b of this subdivision.

2. Benefits shall not be paid and provided pursuant to this chapter in the following instances:

a. Work or service rendered by a volunteer ambulance worker while on a leave of absence pursuant to the general municipal law or pursuant to any other general, special or local law, charter or ordinance or pursuant to the constitution, by-laws, rules or regulations applicable to the ambulance company or ambulance department of which he is a member.

b. Practice for and participation in any recreational, social, or fund raising activity other than a fund raising activity for which coverage is provided under paragraph k of subdivision one of this section.

c. Work or service rendered by a volunteer ambulance worker while suspended from duty pursuant to any general, special or local law, charter or ordinance or pursuant to the constitution, by-laws, rules or regulations applicable to the ambulance company or ambulance department of which he is a member.

d. Work or service not rendered as a volunteer ambulance worker, but rendered as an officer, official or employee of a public corporation or any special district thereof, whether with or without remuneration, even though by law a requirement for such office, position or employment shall be that such officer, official or employee shall have been or must be a volunteer ambulance worker.

e. Work or service not rendered as a volunteer ambulance worker, but rendered in the course of his employment for a private employer.

f. Work, service or activities in which the volunteer ambulance worker has been ordered not to participate.

This subdivision shall not be deemed to enumerate all of the activities engaged in by volunteer ambulance workers for which mandatory coverage is not provided by this chapter, or to prohibit any of the activities described in this subdivision, or to prevent the securing of insurance pursuant to section four thousand two hundred thirty-seven of the insurance law to cover volunteer ambulance workers when engaged in activities other than those for which mandatory coverage is provided by this chapter.

HISTORY:

Add, L 1988, ch 24, § 31, eff Jan 1, 1989; L 2014, ch 496, § 2, effective June 15, 2015.

Amendment Notes: The 2014 amendment by ch 496, § 2 added par l of sub 1.

Notes to Decisions

Although the future liability accrued by a self-insurance plan was not a debt within the meaning of N.Y. Const. art. VIII, § 2, a county was not entitled to summary judgment as it failed to establish that certain employees were volunteer ambulance workers, within the scope of N.Y. Workers' Comp. Law § 63(3) and N.Y. Vol. Ambul. Workers' Ben. Law §§ 3, 5, and 30. Village of Ilion v County of Herkimer, 63 A.D.3d 1546, 879 N.Y.S.2d 875, 2009 N.Y. App. Div. LEXIS 4445 (N.Y. App. Div. 4th Dep't 2009).

§ 8. Permanent total disability benefits

In the case of total disability adjudged to be permanent the volunteer ambulance worker shall be paid six hundred dollars for each week during the continuance thereof. Permanent total disability, within the meaning of this section, shall exist only if the earning capacity of the volunteer ambulance worker has been lost permanently and totally as the result of the injury. The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or any two thereof, shall, in the absence of conclusive proof to the contrary, constitute permanent total disability, but in all other cases permanent total disability shall be determined in accordance with the facts. Notwithstanding any other provisions of this chapter, an injured volunteer ambulance worker disabled due to the loss or total loss of use of both eyes, or both hands, or both arms, or both feet, or both legs, or any two thereof shall not suffer any diminution of such weekly benefit by engaging in business or employment provided his or her weekly earnings or wages, when combined with his weekly benefit shall not be in excess of eight hundred dollars; and further provided that the application of this section shall not result in reduction of benefits which an injured volunteer ambulance worker who is disabled due to the loss or total loss of use of both eyes, or both hands, or both arms, or both feet, or both legs, or any two thereof would otherwise be entitled to under any other provisions of this article.

HISTORY:

Add, L 1988, ch 24, § 31, eff Jan 1, 1989; amd, L 1989, ch 604, § 3, eff July 21, 1989, deemed eff Jan 1, 1989 (see 1989 note below); L 1990, ch 924, § 30, eff July 31, 1990, deemed eff July 1, 1990; L 1998, ch 574, § 1, eff Jan 1, 1999 (see 1998 note below); L 2016, ch 401, § 2, effective July 1, 2016.

Editor's Notes: Laws 1989, ch 604, § 6, eff July 21, 1989, provides as follows:

§ 6. This act shall take effect immediately provided that sections one, two, three, four, and five of this act shall be deemed to have been in full force and effect on and after January 1, 1989 and shall apply to certain permanent partial disabilities, death and injuries in the line of duty occurring on or after such date.

Laws 1998, ch 574, § 3, eff Jan 1, 1999, provides as follows:

§ 3. This act shall take effect on the first day of January next succeeding the date on which it shall have become a law and shall apply by its terms to benefits paid for all weekly benefit periods which occur after its effective date.

Laws 2016, ch 401, § 3, eff July 1, 2016, provides:

§ 3. This act shall take effect on the same date and in the same manner as part GG of chapter 54 of the laws of 2016 takes effect and shall apply to weekly benefit periods that commence after January 1, 2017.

Amendment Notes:

1999. Chapter 574, § 1 amended:

Par by deleting "three hundred dollars for each week during the continuance thereof; provided, however, that the

volunteer ambulance worker is injured in the line of duty on or after the effective date of this chapter to June thirtieth, nineteen hundred ninety; provided further that when a volunteer ambulance worker is injured in the line of duty on or after July first, nineteen hundred ninety to June thirtieth, nineteen hundred ninety-one, such ambulance worker shall be paid three hundred forty dollars for each week during the continuance thereof; provided further that when a volunteer ambulance worker is injured in the line of duty on or after July first, nineteen hundred ninety-one to June thirtieth, nineteen hundred ninety-two, such ambulance worker shall be paid three hundred fifty dollars for each week during the continuance thereof; provided further that when a volunteer ambulance worker is injured in the line of duty on or after July first, nineteen hundred ninety-two such ambulance worker shall be paid" and "four hundred fifty dollars for the period beginning on or after the effective date of this chapter to June thirtieth, nineteen hundred ninety, five hundred ten dollars for the period beginning July first, nineteen hundred ninety to and including June thirtieth, nineteen hundred ninety-one, five hundred twenty-five dollars for the period beginning July first, nineteen hundred ninety-one to and including June thirtieth, nineteen hundred ninety-two," and "for the period beginning July first, nineteen hundred ninety-two".

The 2016 amendment by ch 401, § 2, substituted "six hundred dollars" for "four hundred dollars" in the first sentence.

Notes to Decisions

Medical evidence, which established that the volunteer ambulance employee suffered a permanent partial disability which precluded her from performing many of her job duties, including enforcement patrols, directing traffic, and standing for prolonged periods of time, supported the Workers' Compensation Board's determination that the employee suffered a causally related disability. Also, pursuant to N.Y. Vol. Ambul. Workers' Ben. Law §§ 3(8) and 10(1)(g), the benefits awarded were based on a loss of earning capacity, not actual reduced income. Carey v Medford Volunteer Ambulance Corp., 15 A.D.3d 709, 788 N.Y.S.2d 710, 2005 N.Y. App. Div. LEXIS 930 (N.Y. App. Div. 3d Dep't 2005).

§ 11-c. Medical examination of volunteer ambulance workers to detect and identify the human immunodeficiency virus (HIV)

1. Whenever a volunteer ambulance worker has been exposed to a significant risk of transmission of the human immunodeficiency virus (HIV) while performing services in the line of duty, the executive officer of the ambulance company of which the volunteer ambulance worker is a member shall authorize such volunteer ambulance worker to obtain an appropriate medical examination to determine if such volunteer ambulance worker has been exposed to or infected with the human immunodeficiency virus (HIV). Such medical examination of a volunteer ambulance worker shall be authorized within eight hours of notification to the executive officer of the ambulance company of which such volunteer ambulance worker is a member of an incident that has created an exposure risk to the volunteer ambulance worker.

2. Should it be determined by the examining physician or other attending health care worker that a significant risk of transmission has occurred, or should any medical examination conclude that a volunteer ambulance worker has been exposed to or infected with human immunodeficiency virus (HIV), then such volunteer ambulance worker shall be offered counseling and additional testing, as appropriate and consistent with treatment guidelines issued by the commissioner of health. Such counseling may include a discussion of the risk of the transmission of the human immunodeficiency virus (HIV) from the exposure the volunteer ambulance worker may have experienced and the spectrum of tests commercially available for the prompt and reliable diagnosis of such infection. Information from any such medical examination of a volunteer ambulance worker shall be confidential information pursuant to article twenty-seven-F of the public health law and shall not be made available to the ambulance company without the written authorization of the affected volunteer ambulance worker.

3. Payment for medical examinations, additional testing, treatment services, counseling services, and any other additional services provided pursuant to this section shall be a covered benefit under this chapter.

4. For the purposes of this section, the term "significant risk of transmission" means the alleged conduct or actions taken by a victim or patient or any other action, situation or event that occurs while a volunteer ambulance worker is performing services in the line of duty that has created a recognized and significant risk of infection of a volunteer ambulance worker with the human immunodeficiency virus (HIV), as determined by the commissioner of health, consistent with guidelines, protocols, and findings of the United States centers for disease control and prevention.

5. For purposes of this section, the term "medical examination" includes a physical examination or test performed by a physician or other appropriate health care worker to determine if a volunteer ambulance worker has been exposed to or infected by the human immunodeficiency virus (HIV). Tests may include, but not be limited to, the most accurate, sensitive, and timely tests available used for the early identification of the human immunodeficiency virus (HIV).

6. The commissioner of health shall issue guidelines to facilitate the identification of circumstances potentially exposing a volunteer ambulance worker to a significant risk of transmission of the human immunodeficiency virus (HIV). Such guidelines shall be consistent with criteria accepted by the federal centers for disease control and prevention. Such guidelines shall also provide information regarding related counseling and testing procedures available to such individuals.

7. Any information gathered pursuant to the provisions of this section which is deemed confidential under any other provision of law shall be treated in a confidential manner.

HISTORY:

Add, L 2006, ch 603, § 2, eff Feb 12, 2007 (see 2006 note below).

Editor's Notes: Laws 2006, ch 603, § 3, eff Feb 12, 2007, provides as follows:

§ 3. This act shall take effect on the one hundred eightieth day after it shall have become a law, provided, however, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date is authorized to be made and completed on or before such date.

ARTICLE IV Procedure

Section
51. Fund for reopened cases

HISTORY:
Add, L 1988, ch 24, § 31, eff Jan 1, 1989.

§ 51. Fund for reopened cases

1. The provisions of section twenty-five-a of the workers' compensation law shall be applicable as fully as if set forth in this chapter, except that, other than with respect to the annual assessment under such section, payments to an executor or administrator of the estate of a volunteer ambulance worker pursuant to subdivision two of section seven of this chapter shall not constitute payment of benefits for the purpose of determining the amount of the payment to the fund for reopened cases. Benefits paid to volunteer ambulance workers and other persons entitled to benefits under this chapter from the fund for reopened cases shall be in accordance with the provisions of this chapter.

2. The insurance carrier or entity responsible for payment of benefits paying such benefit increase shall claim for such benefit increase reimbursement from the special fund for reopened cases commencing one year from the date of the first such payment and annually thereafter while such payments continue, on a form prescribed by the chair.

3. The insurance carrier or entity responsible for paying the benefit increase provided in chapter two hundred thirty-three of the laws of two thousand four and the benefit increase provided in the chapter of the laws of two thousand five that added this subdivision shall claim for such benefit increase reimbursement from the special fund for reopened cases commencing one year from the date of the first such payment and annually thereafter while such payments continue, on a form prescribed by the chair.

4. All carriers shall pay benefits in conformance with rates set forth in section eight of this chapter without awaiting modification by the board of any prior inconsistent award.

HISTORY:
Add, L 1988, ch 24, § 31, eff Jan 1, 1989; amd, L 1999, ch 577, § 3, eff Nov 1, 1999 (see 1999 note below); L 2005, ch 212, § 5, eff July 12, 2005 (see 2005 note below).

Editor's Notes: Laws 1999, ch 577, § 5, eff Nov 1, 1999, provides as follows:

§ 5. This act shall take effect immediately and shall apply to all weekly benefit periods payable beginning on or after January 1, 1999.

Laws 2005, ch 212, § 7, eff July 12, 2005, provides as follows:

§ 7. This act shall take effect immediately and shall apply to weekly benefit periods which begin after January 1, 2006.

VOLUNTEER FIREFIGHTERS' BENEFIT LAW

Article

I. Short Title; Purpose; Definitions; Miscellaneous

II. Coverage and Benefits

III. Liability for Benefits; Insurance

IV. Procedure

HISTORY:

ARTICLE I Short Title; Purpose; Definitions; Miscellaneous

Section

2. Purpose.

3. Definitions

4. Removal of civil liability barriers

HISTORY:

Add, L 1956, ch 696, eff March 1, 1957; amd, L 2003, ch 41, § 2, eff May 15, 2003.

§ 2. Purpose.

One of the finest traditions of American community life is the service which people render to others without remuneration. Volunteer firefighters have long been in the forefront of this group. In recognition of the unselfish service by these volunteers, government has undertaken to provide for them and their families some measure of protection against loss from death or injuries in line of duty. Over the years there has developed a dual system of benefits when volunteer firefighters are killed or injured. The dual system has caused uncertainty and confusion. This law establishes a new single system of benefits for volunteer firefighters and provides for the administration of such system by the workers' compensation board and the chairman of such board.

It is hereby declared that this chapter is intended to effectuate the objects and purposes of section eighteen of article one of the state constitution and that the relationship between the political subdivision liable for benefits under this chapter and a volunteer firefighter entitled to such benefits is that of employer and employee within the meaning of such provision of the state constitution.

HISTORY:

Add, L 1956, ch 696; amd, L 1957, ch 751, § 1, eff Apr 19, 1957; L 2018, ch 476, § 263, effective December 28, 2018.

Amendment Notes The 2018 amendment by ch 476, § 263, substituted "firefighters" for "firemen" or variants in the second, third, and last sentences, and in the second paragraph; and substituted "workers'" for "workmen's" in the last sentence.

Notes to Decisions

Evidence which established, inter alia, that death of volunteer fire chief from myocardial infarction caused by coronary thrombosis which supervising assignment of fire truck to assist two other fire districts was caused by stress related to his duties was sufficient to sustain finding that death resulted from services in line of duty for purposes of Volunteer Firemen's Benefit Law. Rigali v Colonie, Verdoy Fire Dist., 47 A.D.2d 507, 367 N.Y.S.2d 570, 1975 N.Y. App. Div. LEXIS 9526 (N.Y. App. Div. 3d Dep't 1975).

The term "injury" as used in Volunteer Firemen's Benefit Law as a predicate to recovery of benefits requires only a disablement resulting from services "in line of duty" and not an "accidental injury arising out of and in the course of employment." Rigali v Colonie, Verdoy Fire Dist., 47 A.D.2d 507, 367 N.Y.S.2d 570, 1975 N.Y. App. Div. LEXIS 9526 (N.Y. App. Div. 3d Dep't 1975).

Although Workmen's Compensation Board did not specifically find ultimate fact of "injury" in regard to volunteer fireman's benefit claim, where sole issue litigated was causal relationship between volunteer fireman's death and his duties as district fire chief, a finding of injury was implicit in Board's finding that death was causally related to his duties. Rigali v Colonie, Verdoy Fire Dist., 47 A.D.2d 507, 367 N.Y.S.2d 570, 1975 N.Y. App. Div. LEXIS 9526 (N.Y. App. Div. 3d Dep't 1975).

The rights of a volunteer fireman injured in line of duty are now defined by this law, as amended, but it does not extend to injuries suffered by a volunteer fireman's wife by reason of a miscarriage resulting from shock upon learning of her husband's injury. Smith v Plandome, 28 Misc. 2d 793, 213 N.Y.S.2d 119, 1961 N.Y. Misc. LEXIS 3311 (N.Y. Sup. Ct. 1961).

A volunteer fireman is in "the public service" and a public servant, despite the fact that he receives no salary, in view of the fact that he is entitled to certain statutory benefits and exemptions, and an applicant to membership in a volunteer fire company may not be denied employment solely on racial grounds. Everett v Riverside Hose Co., 261 F. Supp. 463, 1966 U.S. Dist. LEXIS 10491 (S.D.N.Y. 1966).

UNDER FORMER GEN MUN L § 205

1. In general

This section is applicable where the decedent and negligent employee were members of same department performing governmental function. Ottmann v Rockville Centre, 248 A.D. 592, 287 N.Y.S. 367, 1936 N.Y. App. Div. LEXIS 6448 (N.Y. App. Div. 1936), aff'd, 273 N.Y. 205, 7 N.E.2d 102, 273 N.Y. (N.Y.S.) 205, 1937 N.Y. LEXIS 1193 (N.Y. 1937), modified, 275 N.Y. 270, 9 N.E.2d 862, 275 N.Y. (N.Y.S.) 270, 1937 N.Y. LEXIS 1426 (N.Y. 1937).

The fact that paid members of city fire department are members of state retirement system cannot be construed to mean that city is maintaining a pension fund contemplated by subd. 1, paragraph a. Raymond v North Tonawanda, 259 N.Y.S. 908, 145 Misc. 297, 1932 N.Y. Misc. LEXIS 1284 (N.Y. County Ct. 1932).

A village discharged its duty to a volunteer fireman where it provided the coverage required by this section and the applicable provisions of the Workmen's Compensation Law even though there would be no award of compensation since deceased had no surviving spouse, child or dependent parent. General Municipal Law § 50-a was not applicable. Poulakis v Freeport, 7 Misc. 2d 1005, 162 N.Y.S.2d 737, 1957 N.Y. Misc. LEXIS 3287 (N.Y. Sup. Ct. 1957).

2. Constitutionality

The section does not offend "due process of law" clause of constitution, and legislature in directing town to pay certain sum where fireman is injured or loses his life in subjugation of fire acted within its constitutional authority. In re Young's Estate, 266 N.Y.S. 532, 148 Misc. 431, 1933 N.Y. Misc. LEXIS 1298 (N.Y. County Ct. 1933), rev'd, 241 A.D. 188, 272 N.Y.S. 167, 1934 N.Y. App. Div. LEXIS 8204 (N.Y. App. Div. 1934).

3. Purpose

This section does not contemplate compensation for consequences of diseases or ailments which do not arise out of injury suffered at fire or in course of performance of duties as volunteer fireman. Trumm v Long Beach, 246 A.D. 747, 283 N.Y.S. 805,

1935 N.Y. App. Div. LEXIS 10029 (N.Y. App. Div. 1935), app. dismissed, 275 N.Y. 538, 11 N.E.2d 738, 275 N.Y. (N.Y.S.) 538, 1937 N.Y. LEXIS 1515 (N.Y. 1937).

The purpose of the section is remedial and it should be liberally construed. Petition of Lattrell, 136 N.Y.S.2d 836, 206 Misc. 766, 1954 N.Y. Misc. LEXIS 3529 (N.Y. County Ct. 1954), aff'd, 286 A.D. 937, 143 N.Y.S.2d 73, 1955 N.Y. App. Div. LEXIS 4545 (N.Y. App. Div. 1955).

4. Construction, generally

The charter of the city of Fulton, which was incorporated after the statute of 1895 was in effect, provides that call men connected with fire department shall be entitled to same privileges as are accorded by law to volunteer firemen. Upon examination and construction of statutes cited, the word "privileges" as used in the provision giving to call men "the same privileges and exemptions as are accorded by the laws of this state to volunteer firemen" is synonymous with the word "rights," and hence when plaintiff's intestate became one of call firemen there was read into his contract with city a provision of the statute providing for payment to him, if injured, sum specified by statute or to his representative in case of his death. Hammond v Fulton, 220 N.Y. 337, 115 N.E. 998, 220 N.Y. (N.Y.S.) 337, 1917 N.Y. LEXIS 974 (N.Y. 1917).

Words "within one year thereafter," should be construed as relating to time of death following injury and not time for payment by municipality following death. Turk v Canandaigua, 244 A.D. 600, 280 N.Y.S. 65, 1935 N.Y. App. Div. LEXIS 5885 (N.Y. App. Div. 1935).

While the word "call," as used in former § 205, subd. 4, must be construed liberally, still a fire district should not necessarily be assumed to have called all firemen of neighboring districts who happen to hear its fire alarm. Wieszczecinski v Sloan, 258 A.D. 858, 15 N.Y.S.2d 958 (N.Y. App. Div. 1939), reh'g denied, 258 A.D. 1033, 17 N.Y.S.2d 862, 1940 N.Y. App. Div. LEXIS 8711 (N.Y. App. Div. 1940).

The word "call," as used in subd. 4, means call made by any one in district or territory immediately in need of fire help. In re Brown, 211 N.Y.S. 807, 125 Misc. 600, 1925 N.Y. Misc. LEXIS 1037 (N.Y. County Ct. 1925).

This section, being remedial statute enacted for relief of volunteer firemen in recognition of their meritorious public service, should receive liberal rather than narrow and restricted construction. Smith v Sea Cliff, 263 N.Y.S. 679, 146 Misc. 685, 1933 N.Y. Misc. LEXIS 1073 (N.Y. County Ct. 1933).

5. Relation to other laws

This section is not an exclusive remedy, and plaintiff has right to maintain action on theory of negligence in operation of a fire truck under Highway Law § 282-g. Filing of claim by plaintiff is not an election of remedies. Ottmann v Rockville Center, 241 A.D. 843, 271 N.Y.S. 391, 1934 N.Y. App. Div. LEXIS 9984 (N.Y. App. Div. 1934).

That town charges are enumerated in Town Law, § 170, does not conflict with subd. 4 of this section making sum to be paid to fireman or his estate a town charge also. Re Young's Estate (1933) 148 Misc 431, 266 NYS 532, revd (1934) 241 App Div 188, 272 NYS 167.; Young v Kortright, 244 A.D. 45, 278 N.Y.S. 180, 1935 N.Y. App. Div. LEXIS 5753 (N.Y. App. Div.), aff'd, 268 N.Y. 676, 198 N.E. 553, 268 N.Y. (N.Y.S.) 676, 1935 N.Y. LEXIS 1144 (N.Y. 1935).

This section is in no way modified or changed by General Municipal Law § 209. In re Young's Estate, 266 N.Y.S. 532, 148 Misc. 431, 1933 N.Y. Misc. LEXIS 1298 (N.Y. County Ct. 1933), rev'd, 241 A.D. 188, 272 N.Y.S. 167, 1934 N.Y. App. Div. LEXIS 8204 (N.Y. App. Div. 1934).

The legislature in enacting Town Law, § 67, did not expressly alter or amend this section. In re Gilbert, 300 N.Y.S. 790, 165 Misc. 222, 1937 N.Y. Misc. LEXIS 1988 (N.Y. County Ct. 1937), app. dismissed, 254 A.D. 814, 4 N.Y.S.2d 753, 1938 N.Y. App. Div. LEXIS 7729 (N.Y. App. Div. 1938).

A fire district may not purchase insurance under Town Law, § 176(19), to protect persons who may not legally be members of the fire district fire department. 1953 Ops St Compt File #6074.

6. —To Worker's Compensation Law

A claim by the widow of a deceased volunteer fireman for the death benefits under Workmen's Compensation Act is dismissed where only death benefits she is entitled to were already paid under § 205. Wiltse v Owego, 288 N.Y. 519, 41 N.E.2d 928, 288 N.Y. (N.Y.S.) 519, 1942 N.Y. LEXIS 1372 (N.Y. 1942).

The determination of the Workmen's Compensation Board dismissing the claim of a volunteer fireman for compensation for injuries suffered while attending a parade and competitive drill were not a bar to a proceeding under this section where the Compensation Law does not make provisions for attending drills, parades or inspections and such provisions are made in this section. Weiss v Franklin Square & Munson Fire Dist., 309 N.Y. 52, 127 N.E.2d 804, 309 N.Y. (N.Y.S.) 52, 1955 N.Y. LEXIS 929 (N.Y. 1955).

Liability for workmen's compensation for the death or injury to volunteer firemen begins only where the special statutory liability provided in this section ends and no liability arose against the fire company or fire district for workmen's compensation benefits until these had exceeded the amount for which the town was liable under a judgment of the county court. Schraeder v Mendon Volunteer Fire Co., 278 A.D. 986, 105 N.Y.S.2d 895, 1951 N.Y. App. Div. LEXIS 5449 (N.Y. App. Div. 1951).

Payment of $3,000 death benefits under § 205 to the widow of a member of a volunteer fire department suspended payment of death benefits under the Workmen's Compensation Law, but did not relieve the employer of all liability. Grimes v Albion, 279 A.D. 486, 111 N.Y.S.2d 319, 1952 N.Y. App. Div. LEXIS 4702 (N.Y. App. Div. 1952).

The sum recovered by a volunteer fireman under this section, while attempting to answer a fire alarm, should be credited against an award for total disability benefits made under the Workmen's Compensation Law. Brundage v Westons Mills Volunteer Fire Dep't, 1 A.D.2d 854, 149 N.Y.S.2d 3, 1956 N.Y. App. Div. LEXIS 6290 (N.Y. App. Div. 3d Dep't 1956).

The benefits available to volunteer firemen are integrated under the General Municipal Law and the Workmen's Compensation Law. Municipal corporations in fire districts are empowered to procure insurance indemnifying against liability imposed under Workmen's Compensation Law, but such contracts of insurance must also indemnify against the liability imposed under the General Municipal Law. It would be anomalous if the benefits provided by one statute constituted a liability of the town while the benefits payable under the other constituted a liability of a fire district. Bauman v Irondequoit, 122 N.Y.S.2d 47, 204 Misc. 494, 1953 N.Y. Misc. LEXIS 1809 (N.Y. Sup. Ct.), aff'd, 282 A.D. 916, 125 N.Y.S.2d 250, 1953 N.Y. App. Div. LEXIS 5406 (N.Y. App. Div. 1953).

Members of a fire department emergency relief squad are covered by the provisions of this section and the Workmen's Compensation Law when performing services in case of fire, accident, public calamity or other emergency. 1955 Ops St Compt File #7303.

Volunteer firemen who are members of an emergency relief squad may respond to calls for assistance from territory outside the area regularly protected and such squads are covered by the provisions of this section and the Workmen's Compensation Law when performing services in case of fire, accident, public calamity or other emergency. 1956 Ops St Compt File #7846.

7. Entitlements to benefits, generally

Allowance of a claim for pension by the widow of a volunteer fireman, killed in performance of duty, was barred by subd. 1, par. a, where no pension system existed for the benefit of paid members of a city fire department, and volunteer firemen neither had pension system nor were members of state retirement system. Raymond v North Tonawanda, 259 N.Y.S. 908, 145 Misc. 297, 1932 N.Y. Misc. LEXIS 1284 (N.Y. County Ct. 1932).

The widow of a volunteer fireman killed in the performance of duty whose claim for pension was barred by subd. 1, par. a, is entitled to award of $2500 as prescribed in subd. 1, par b. Raymond v North Tonawanda, 259 N.Y.S. 908, 145 Misc. 297, 1932 N.Y. Misc. LEXIS 1284 (N.Y. County Ct. 1932).

Nonvisibility of the injury was not fatal to recovery under the section. Biegel v North Hills, 57 N.Y.S.2d 412, 185 Misc. 131, 1945 N.Y. Misc. LEXIS 2256 (N.Y. County Ct. 1945).

Claims against the village for benefits solely under this section may be determined by the village board of trustees. 1952 Ops St Compt File #5906.

A volunteer fireman injured in the performance of his duties as such is entitled to benefits from the first day of his disability. 1953 Ops St Compt File #6147.

An injured volunteer fireman who is also a village employee is entitled to benefits from the village under this section during his period of disability notwithstanding the fact that at the same time he is receiving full sick-leave pay as a village employee. 1955 Ops St Compt File #7535.

8. Active membership requirement

Where a claimant is not actually an "active" member of volunteer fire company, but is performing duties of an active member at time of his injury he is entitled to the benefits conferred by this section. In re Cole, 189 A.D. 306, 178 N.Y.S. 451, 1919 N.Y. App. Div. LEXIS 4651 (N.Y. App. Div. 1919).

In proceeding under this section, the defense that the decedent was not member of volunteer fire department because he was admitted to the department before he had reached age specified in by-laws thereof, and that his membership had been cancelled for failure to pay dues was not sustained when these conditions had been waived by the fire department and the town board. Urban v Pendleton, 236 N.Y.S. 383, 134 Misc. 782, 1929 N.Y. Misc. LEXIS 1229 (N.Y. County Ct. 1929).

Village of Castleton-on-Hudson has no responsibility or liability to incorporated fire companies which constitute fire department other than that imposed by statute. 1945 Ops St Compt 215.

Where person ceases to be member of volunteer fire company and there is no compliance with subdivision 24 of § 176, Town Law, he is not entitled to benefits provided by § 205, Gen. Mun. Law. 1947 Ops St Compt 317.

Volunteer fireman entitled to benefits even though membership dues are not paid up. 1950 Ops St Compt File #4707.

A fire district may not purchase insurance under Town Law, § 176(19), to protect persons who may not legally be members of the fire district fire department. 1953 Ops St Compt File #6074.

"Firemen" of unincorporated private group organized to fight fire in town outside villages and fire districts are not entitled to statutory financial benefits provided for volunteer firemen of duly organized volunteer fire companies. 1955 Ops St Compt File #7379.

All members of a volunteer fire company must be active members. The law does not recognize inactive classifications. 1955 Ops St Compt File #7510.

A fire district or municipality is not liable for payment of benefits to member of a ladies' auxiliary injured while attending a fire. 1956 Ops St Compt File #8028.

All members of a volunteer fire company must be active members in order to be entitled to benefits in the case of injury or death. 1956 Ops St Compt File #8070.

9. Performance of duty requirement

The right to compensation, of dependents of decedent fireman, is not destroyed because he was extinguishing fire in his own home. Hommel v Saugerties, 253 A.D. 84, 1 N.Y.S.2d 208, 1937 N.Y. App. Div. LEXIS 5114 (N.Y. App. Div. 1937), aff'd, 278 N.Y. 588, 16 N.E.2d 113, 278 N.Y. (N.Y.S.) 588, 1938 N.Y. LEXIS 1415 (N.Y. 1938).

A volunteer fireman who operated a service station with a grease pit and received burns resulting in death while assisting a neighbor from the pit, accidentally set afire by decedent, was not precluded from recovery because the fire was caused by decedent's own negligence, or that no fire alarm had been turned in, or that the decedent may have been actuated, in part, by the personal motive to save the life he had placed in peril. Sahr v North Tonawanda, 254 A.D. 645, 3 N.Y.S.2d 415, 1938 N.Y. App. Div. LEXIS 6861 (N.Y. App. Div.), aff'd, 278 N.Y. 595, 16 N.E.2d 116, 278 N.Y. (N.Y.S.) 595, 1938 N.Y. LEXIS 1419 (N.Y. 1938).

Petitioner, an active member of the volunteer fire department of respondent towns, is entitled to relief under § 205 for the injuries suffered while attending firemen's parade and inspection. Brown v Gates, 266 A.D. 640, 44 N.Y.S.2d 703, 1943 N.Y. App. Div. LEXIS 3638 (N.Y. App. Div. 1943), aff'd, 292 N.Y. 663, 56 N.E.2d 94, 292 N.Y. (N.Y.S.) 663, 1944 N.Y. LEXIS 1821 (N.Y. 1944).

Death from coronary thrombosis within approximately half an hour after the deceased fireman finished driving a fire truck to and from a fire, sustained a finding under this section, that he died from injuries incurred in the performance of his duties as a volunteer fireman. Jacobs v Mamaroneck, 274 A.D. 811, 79 N.Y.S.2d 793, 1948 N.Y. App. Div. LEXIS 3467 (N.Y. App. Div. 1948).

A volunteer fireman was within the coverage of this section where he was injured after he had participated in exercises, contests and a parade in a neighboring village and while on the way to assist the other village's department in putting out a fire in that village. Stevens v Smyrna, 281 A.D. 918, 119 N.Y.S.2d 807, 1953 N.Y. App. Div. LEXIS 3767 (N.Y. App. Div. 1953).

The decedent was not engaged in performance of the duties of fireman where he was killed while accompanying the chief of fire department to another town on fire apparatus for purpose of borrowing grappling hooks. Urban v Pendleton, 236 N.Y.S. 383, 134 Misc. 782, 1929 N.Y. Misc. LEXIS 1229 (N.Y. County Ct. 1929).

The death of a decedent must have occurred while he was engaged in performances of duties as fireman. Urban v Pendleton, 236 N.Y.S. 383, 134 Misc. 782, 1929 N.Y. Misc. LEXIS 1229 (N.Y. County Ct. 1929).

The decedent died as result of injuries incurred while in performance of his duty as volunteer fireman, where decedent must have received his burns either while actually trying to put out flames caused by his pouring kerosene over fire in stove in his kitchen or while trying to escape from the dangerous situation in which he had placed himself as result of his attempt to put out said flames, and mere fact that the fire was in his home and may have resulted from his negligence and that no alarm had been sounded, does not preclude recovery. Bennett v Wolcott, 29 N.Y.S.2d 365, 177 Misc. 768, 1941 N.Y. Misc. LEXIS 2076 (N.Y. County Ct. 1941), aff'd, 263 A.D. 932, 33 N.Y.S.2d 392, 1942 N.Y. App. Div. LEXIS 7416 (N.Y. App. Div. 1942).

Where a volunteer fireman was at the firehouse to procure gasoline ration necessary for his attending fires, and about a half hour after signing application was struck in eye by ping pong bat while watching game being played he was held to have received his injuries while performing duties as volunteer fireman. There was no obligation on his part to leave the firehouse immediately after signing such application. May v Mt. Vernon, 50 N.Y.S.2d 441, 182 Misc. 248, 1944 N.Y. Misc. LEXIS 2353 (N.Y. County Ct. 1944).

A volunteer fireman who was killed when he fell from a fire truck while it was on its way to participate in a parade in a neighboring town was clearly engaged in an act included within the purview of the protective provisions of subdivision 3 of this section, as amended by the laws of 1951. Hutter v Brookhaven, 127 N.Y.S.2d 8, 205 Misc. 1, 1954 N.Y. Misc. LEXIS 1927 (N.Y. County Ct. 1954).

Court held that participating in parades was not limited to parades in which firemen were ordered or compelled to participate, for purposes of statute providing for death payments. Hutter v Brookhaven, 133 N.Y.S.2d 170, 206 Misc. 345, 1954 N.Y. Misc. LEXIS 2141 (N.Y. County Ct. 1954).

Compensation should be made to the widow of a deceased volunteer fireman who died from burns received while in the performance of his duty even though he was fighting a fire in his own home. Petition of Lattrell, 136 N.Y.S.2d 836, 206 Misc. 766, 1954 N.Y. Misc. LEXIS 3529 (N.Y. County Ct. 1954), aff'd, 286 A.D. 937, 143 N.Y.S.2d 73, 1955 N.Y. App. Div. LEXIS 4545 (N.Y. App. Div. 1955).

Where injuries sustained by the petitioner, a volunteer fireman, were the direct and instantaneous result of initial explosion occasioned by an act of petitioner, there is no basis for recovery under § 205 in absence of convincing proof that he sustained injuries while in performance of his duties as a fireman. Demeo v Eastchester, 33 N.Y.S.2d 967, 1942 N.Y. Misc. LEXIS 1448 (N.Y. County Ct. 1942).

The negligence of claimant in causing the injuries to himself is not fatal to recovery, under subd. 3, if in fact he was injured while performing his duties as a fireman. Demeo v Eastchester, 33 N.Y.S.2d 967, 1942 N.Y. Misc. LEXIS 1448 (N.Y. County Ct. 1942).

If a volunteer fireman is injured while participating in an outing or clambake or while engaging in a sport as a member of a departmental athletic team, he is not protected by the provisions of this section and § 10 of the Workmen's Compensation Law. 1949 Ops St Compt File #4042.

Volunteer firemen, who respond to calls in a fire district "emergency vehicle" on occasions not involving fire, accident, public calamity or other emergency, will not be entitled to benefits provided by § 205 of the General Municipal Law or section 10 of the Workmen's Compensation Law, if they are, or should be, aware that the occasion is not one of those mentioned above. 1951 Ops St Compt File #5411.

Discussion re compensation coverage of volunteer firemen and others while participating in parade. 1951 Ops St Compt File #5485.

Members of a village fire department are protected through compensation for injuries or death while attending any drill or parade in which their department engages as a unit, within or without the state, providing such members have been ordered to attend. 1952 Ops St Compt File #5906.

The "home territory" of a volunteer fire company is liable for the payment of benefits, adjudged to be payable where a member of such company is injured or killed while attending a fire company meeting, a fire drill, a tournament or a parade and inspection when authorized to do so. 1954 Ops St Compt File #6714.

The conduct of fund-raising activities by volunteer firemen is within the purposes stated in the usual charter provisions of a volunteer fire corporation. 1955 Ops St Compt File #7124.

Volunteer fireman injured while participating as such in civil defense drill is performing a firemanic duty. Thus, insurance providing coverage in case of injury or death while performing firemanic duty, provides coverage during such drills. 1955 Ops St Compt File #7359.

Generally speaking, volunteer firemen are within the performance of their duties while going to or returning from authorized meetings for purposes of instructing or being instructed in fire duties. 1955 Ops St Compt File #7376.

A volunteer fireman is performing his firemanic duties at a fire until he returns to his point of departure regardless of whether he travels directly to and from the fire or goes and returns via a firehouse to assist with apparatus so long as there is no intervening deviation from his duty. 1955 Ops St Compt File #7558.

10. Injury requirement

Injuries suffered by a fireman during formation of a parade were suffered while attending "drill or inspection" so as to entitle him to relief under § 205. Brown v Gates, 292 N.Y. 663, 56 N.E.2d 94, 292 N.Y. (N.Y.S.) 663, 1944 N.Y. LEXIS 1821 (N.Y. 1944).

A volunteer fireman who was drenched with water while attending a fire did not suffer "injury" within the meaning of § 205. Trumm v Long Beach, 246 A.D. 747, 283 N.Y.S. 805, 1935 N.Y. App. Div. LEXIS 10029 (N.Y. App. Div. 1935), app. dismissed, 275 N.Y. 538, 11 N.E.2d 738, 275 N.Y. (N.Y.S.) 538, 1937 N.Y. LEXIS 1515 (N.Y. 1937).

Death from coronary thrombosis within approximately half an hour after the deceased fireman finished driving a fire truck to and from a fire, sustained a finding under this section, that he died from injuries incurred in the performance of his duties as a volunteer fireman. Jacobs v Mamaroneck, 274 A.D. 811, 79 N.Y.S.2d 793, 1948 N.Y. App. Div. LEXIS 3467 (N.Y. App. Div. 1948).

Volunteer fireman, injured while responding to a fire call in performance of his duty, is entitled to recover from an incorporated village for loss of wages and medical expenses arising from said injuries, where it appears that he was struck by the village fire apparatus while upon street after unsuccessful attempt to board another fire apparatus immediately ahead of it. Nash v Sea Cliff, 211 N.Y.S. 440, 125 Misc. 267, 1925 N.Y. Misc. LEXIS 934 (N.Y. County Ct. 1925).

Volunteer fireman suffered "injury," within meaning of this section, where it appears that when alarm sounded he ran at least two hundred feet from his residence to fire house; that he ascended driver's seat of automotive apparatus and drove to fire; and that after proceeding some distance it was found that he had died from acute dilation of heart. Although he had previously suffered from some sort of heart affliction, dilation of heart which caused his death resulted from exertion and excitement in running to fire house, getting out apparatus and operating it, all in line of his duty as active volunteer fireman. Smith v Sea Cliff, 263 N.Y.S. 679, 146 Misc. 685, 1933 N.Y. Misc. LEXIS 1073 (N.Y. County Ct. 1933).

Bronchial pneumonia and staphylococcus-septicemia, which resulted from the exposure of a volunteer fireman while attending a fire, constituted "injuries," within the meaning of § 205, subd. 4, as added by L 1941, c 724. Cunningham v New Hartford Oneida County, 36 N.Y.S.2d 9, 178 Misc. 432, 1942 N.Y. Misc. LEXIS 1722 (N.Y. County Ct.), aff'd, 265 A.D. 906, 38 N.Y.S.2d 571, 1942 N.Y. App. Div. LEXIS 6429 (N.Y. App. Div. 1942).

Although the deceased fireman was suffering from severe chronic heart disease, and injury received in performance of his duties aggravated it and hastened his death, his widow was entitled to recover since there was a direct causal connection between such injury and death. Biegel v North Hills, 57 N.Y.S.2d 412, 185 Misc. 131, 1945 N.Y. Misc. LEXIS 2256 (N.Y. County Ct. 1945).

The negligence of claimant in causing the injuries to himself is not fatal to recovery, under subd. 3, if in fact he was injured while performing his duties as a fireman. Demeo v Eastchester, 33 N.Y.S.2d 967, 1942 N.Y. Misc. LEXIS 1448 (N.Y. County Ct. 1942).

11. Residing requirement

Residents of territory outside of a fire district may be appointed members of the fire department of such district if such outside territory is afforded fire protection by the fire department of the fire district, and the board of fire commissioners of the fire district, by resolution, authorizes residents of the outside territory to become members and any such non-resident active member is protected by the provisions of § 205 of the General Municipal Law while going to or returning from a fire within the district. Whether or not the contract of insurance indemnifying the district against the liability imposed by § 205 covers non-resident members of the fire department depends upon the terms of the contract. 1945 Ops St Compt 126.

All of the members of a volunteer fire department of a fire district are entitled to the same privileges regardless of whether they reside within or without the district, including protection under the provisions of § 205 of the General Municipal Law and the provisions of the Workmen's Compensation Law. 1952 Ops St Compt File #5803.

For a discussion of problems involved when volunteer fireman moves from one fire district to an adjoining fire district, see 1953 Ops St Compt File #6207.

Where the qualifications for membership in the fire department of the City of Peekskill require that the member be a resident, membership is forfeited if the member ceases to be a resident of the city, and such person will no longer be protected by the provisions of this section. 1954 Ops St Compt File #6550.

12. Notice and claim requirement

Neither the written notes of a town clerk made from an oral report nor the written notice to an insurance carrier is a compliance with this section. In re Dussing's Estate, 278 A.D. 57, 103 N.Y.S.2d 805, 1951 N.Y. App. Div. LEXIS 3737 (N.Y. App. Div. 1951).

Town officers cannot waive the requirement of written notice. In re Dussing's Estate, 278 A.D. 57, 103 N.Y.S.2d 805, 1951 N.Y. App. Div. LEXIS 3737 (N.Y. App. Div. 1951).

In a proceeding under subd. 4 for determination of certain questions arising from injuries suffered by the members of the village fire department in answering a call in another town, written notice filed with clerk of village within thirty days will permit a recovery, notwithstanding clear intendment of subd. 3 that claim be filed with the clerk of municipality liable therefor.

In re Brown, 211 N.Y.S. 807, 125 Misc. 600, 1925 N.Y. Misc. LEXIS 1037 (N.Y. County Ct. 1925).

A written notice of claim by volunteer fireman injured while answering fire alarm which was served more than sixty days after injuries were received is insufficient notice under this section, on which to base allowance for medical treatment and loss of earnings. A communication mailed by secretary of fire company to town clerk stating that fireman had met with accident and had been injured was purely voluntary and without knowledge of claimant and not at his direction. Kibler v Alden, 272 N.Y.S. 692, 151 Misc. 915, 1934 N.Y. Misc. LEXIS 1418 (N.Y. County Ct. 1934).

It is unnecessary to serve notice of claim on a village to recover, under § 205, subd. 1, par. b, for the death of a volunteer fireman from injuries allegedly incurred while in performance of his duties. Bennett v Wolcott, 29 N.Y.S.2d 365, 177 Misc. 768, 1941 N.Y. Misc. LEXIS 2076 (N.Y. County Ct. 1941), aff'd, 263 A.D. 932, 33 N.Y.S.2d 392, 1942 N.Y. App. Div. LEXIS 7416 (N.Y. App. Div. 1942).

The defense that petitioner gave no notice of injury to comptroller of city as required by § 205 was properly sustained and recovery denied, although notice was prepared and given to corporation counsel. May v Mt. Vernon, 50 N.Y.S.2d 441, 182 Misc. 248, 1944 N.Y. Misc. LEXIS 2353 (N.Y. County Ct. 1944).

Procedure for giving notice of injury and filing claims discussed. 1954 Ops St Compt File #6624.

13. Who is liable

Under this section a call from some adult person having appreciation of perils involved and aid needed is sufficient to create obligation against town requesting assistance. Young v Kortright, 244 A.D. 45, 278 N.Y.S. 180, 1935 N.Y. App. Div. LEXIS 5753 (N.Y. App. Div.), aff'd, 268 N.Y. 676, 198 N.E. 553, 268 N.Y. (N.Y.S.) 676, 1935 N.Y. LEXIS 1144 (N.Y. 1935).

If a fireman is injured while fighting a fire on state or Federal property, the municipality within which such fire occurred is liable as provided in § 205 of the General Municipal Law. 1947 Ops St Compt 44.

Where fire district situated in two towns, both are liable for payment of benefits for death of firemen. Method of pro rating shares. 1947 Ops St Compt 207.

After June 30, 1953, the law is clear that fire districts, as such, are liable for firemanic benefits payable under this section and the Workmen's Compensation Law and that such districts, and not the town, must pay for contracts of insurance to protect against such liability. 1953 Ops St Compt File #6195.

The "home territory" of a volunteer fire company is liable for the payment of benefits, adjudged to be payable where a member of such company is injured or killed while attending a fire company meeting, a fire drill, a tournament or a parade and inspection when authorized to do so. 1954 Ops St Compt File #6714.

Where a village fireman is injured while rendering fire protection service to an area of a town outside of the village and outside of a fire district, the town must provide for the payment of benefits. If the town has not secured insurance by one of the prescribed methods, it must pay the benefits and charge the cost back upon the fire protection district, the fire alarm district or the unorganized territory in which the fire occurred. 1954 Ops St Compt File #6742.

Discussion re liabilities arising out of fire on New York State Thruway relative to (1) benefits to volunteer firemen, (2) damage to apparatus or equipment and (3) tort liability. 1955 Ops St Compt File #7593.

14. —For injuries beyond territorial limits

A volunteer fireman, who was captain of a village emergency relief squad, was injured while transporting a sick woman from her home to a hospital located outside the village. The request for this service came from a hospital located outside the village. Such requests were customarily honored, with the approval of the village trustees. Whether the accident happened within or without the village, plaintiff was entitled to disability benefits and medical expenses. In re Hanna, 3 A.D.2d 791, 160 N.Y.S.2d 319, 1957 N.Y. App. Div. LEXIS 6206 (N.Y. App. Div. 3d Dep't), app. denied, 3 N.Y.2d 705, 1957 N.Y. LEXIS 1320 (N.Y. 1957).

The town where fire company is located is not liable for any injuries suffered by the fireman in performance of his duty at a fire which his company was called to extinguish in neighboring town. In re Gilbert, 300 N.Y.S. 790, 165 Misc. 222, 1937 N.Y. Misc. LEXIS 1988 (N.Y. County Ct. 1937), app. dismissed, 254 A.D. 814, 4 N.Y.S.2d 753, 1938 N.Y. App. Div. LEXIS 7729 (N.Y. App. Div. 1938).

Where a volunteer fireman, while attending a volunteer fireman's convention in another village, was injured while attempting to volunteer his services on the occasion of a fire during the convention, since his services had not been accepted, he is not entitled to recovery from the latter village, but since he was attending the convention under the terms of § 205 of the General Municipal Law, his own village was liable for his compensation. Stevens v Smyrna, 93 N.Y.S.2d 775, 196 Misc. 944, 1949 N.Y. Misc. LEXIS 2991 (N.Y. County Ct. 1949), aff'd, 281 A.D. 918, 119 N.Y.S.2d 807, 1953 N.Y. App. Div. LEXIS 3767 (N.Y. App. Div. 1953).

Where a town volunteer fireman had been summoned to assist two men caught in a manhole in a fire district and suffered asphyxiation in his efforts to release the two men, the decedent at the time of his death was an employee of the fire district and not of the defendant town. Hence, his common law action against the fire district should be dismissed on the ground that the Workmen's Compensation Law was a complete bar to such an action but the motion to dismiss the complaint against the town should have been denied. Bauman v Irondequoit, 122 N.Y.S.2d 47, 204 Misc. 494, 1953 N.Y. Misc. LEXIS 1809 (N.Y. Sup. Ct.), aff'd, 282 A.D. 916, 125 N.Y.S.2d 250, 1953 N.Y. App. Div. LEXIS 5406 (N.Y. App. Div. 1953).

A town may pay a claim for loss, damage, expense or cost incurred by a fire department or fire company in rendering aid to territory of a town outside of a city, village, fire district, fire protection district or fire alarm district as provided by §§ 205 and 209 of the General Municipal Law. 1945 Ops St Compt 122.

Town may not pay volunteer fireman value of clothing damaged while answering a call for assistance in territory of the town outside of the fire district. 1946 Ops St Compt 187.

Volunteer fireman is entitled to the benefits of § 205 when injured while attending a fire outside of a fire district, even though no call for assistance has been made. 1946 Ops St Compt 336.

If a fireman of one district is injured while attending a fire in another fire district, he cannot recover workmen's compensation benefits covered by insurance carrier of such other district. 1947 Ops St Compt 44.

If a fireman of one district is injured while attending a fire in another district, he must look to such other district for the benefits prescribed by § 205 of the General Municipal Law. 1947 Ops St Compt 44.

Where volunteer firemen, members of an incorporated fire company, are participating in civil defense drills held outside the territory normally protected by them, the town in which the fire company is located is liable for injury to such firemen during such test drills. 1951 Ops St Compt File #5408.

Municipality or district issuing call for assistance is liable for benefits of firemen injured or killed and for equipment damaged and materials used. 1953 Ops St Compt #6285.

Village insurance does not cover its volunteer firemen engaged in protecting property in fire district pursuant to a contract. Fire district is liable in such case. Board of fire commissioners may not delegate to village board the power to purchase insurance to cover such liability. 1953 Ops St Compt File #6326.

Where the town board has not limited or restricted outside assistance by a volunteer fire company, a member thereof is protected by this section while fighting fires on an Indian reservation situated within the town. The town is liable for benefits in the first instance and may insure against such liability. 1953 Ops St Compt File #6396.

Unprotected area in town from which call for assistance is issued is liable for expense of fire department answering such call and for benefits payable to volunteer firemen under this section

and Workmen's Compensation Laws. 1953 Ops St Compt File #6403.

Where a village fireman is injured while rendering fire protection service to an area of a town outside of the village and outside of a fire district, the town must provide for the payment of benefits. If the town has not secured insurance by one of the prescribed methods, it must pay the benefits and charge the cost back upon the fire protection district, the fire alarm district or the unorganized territory in which the fire occurred. 1954 Ops St Compt File #6742.

Members of fire police squads are covered under this section and § 10 of the Workmen's Compensation Law and other sections related thereto when injured outside of the village while rendering services pursuant to a mutual aid arrangement or while rendering services pursuant to a contract between the fire protection district and the village of which their fire company and fire police squad is a part. 1955 Ops St Compt File #7238.

Village is not liable for injuries to its volunteer firemen while furnishing fire protection outside village. Town board may, at request of village, include village in a single policy of insurance indemnifying against liability for benefits. 1955 Ops St Compt File #7311.

The area which calls for assistance is liable for damages to the fire equipment and also cost of workmen's compensation for volunteer firemen injured at a fire. 1955 Ops St Compt File #7638.

Volunteer firemen who are members of an emergency relief squad may respond to calls for assistance from territory outside the area regularly protected and such squads are covered by the provisions of this section and the Workmen's Compensation Law when performing services in case of fire, accident, public calamity or other emergency. 1956 Ops St Compt File #7846.

15. Indemnification and subrogation

Where the widow of a volunteer fireman employed by a municipal corporation was awarded death benefits at the rate of $12.60 per week from the date of death, and the employer carried an insurance policy in the amount of $3,000, the action of the board in directing payment of the $3,000 into the aggregate trust fund was mandatory. Richter v Islip-Fire Dep't, 276 A.D. 42, 92 N.Y.S.2d 844, 1949 N.Y. App. Div. LEXIS 3108 (N.Y. App. Div. 3d Dep't), modified, 276 A.D. 806, 92 N.Y.S.2d 844, 1949 N.Y. App. Div. LEXIS 3377 (N.Y. App. Div. 3d Dep't 1949).

An insurance policy provided for in § 205 is not an indemnity contract. Employers' Liability Assurance Corp. v Daley, 51 N.Y.S.2d 567, 183 Misc. 975, 1944 N.Y. Misc. LEXIS 2575 (N.Y. Sup. Ct. 1944), aff'd, 271 A.D. 662, 67 N.Y.S.2d 233, 1947 N.Y. App. Div. LEXIS 5116 (N.Y. App. Div. 4th Dep't 1947).

Where a town secured policy of insurance from the plaintiff to cover payments required by § 205 to reimburse its volunteer firemen for medical expenses and time lost from their usual vocations, as result of injuries suffered in performance of their duties, the plaintiff insurance company and town were not entitled to subrogation to the rights of injures volunteer firemen who brought actions against third persons and received settlements, since loss insured against was not the same loss for which defendant firemen sought to recover. Employers' Liability Assurance Corp. v Daley, 51 N.Y.S.2d 567, 183 Misc. 975, 1944 N.Y. Misc. LEXIS 2575 (N.Y. Sup. Ct. 1944), aff'd, 271 A.D. 662, 67 N.Y.S.2d 233, 1947 N.Y. App. Div. LEXIS 5116 (N.Y. App. Div. 4th Dep't 1947).

Residents of territory outside of a fire district may be appointed members of the fire department of such district if such outside territory is afforded fire protection by the fire department of the fire district, and the board of fire commissioners of the fire district, by resolution, authorizes residents of the outside territory to become members and any such non-resident active member is protected by the provisions of § 205 of the General Municipal Law while going to or returning from a fire within the district. Whether or not the contract of insurance indemnifying the district against the liability imposed by § 205 covers non-resident members of the fire department depends upon the terms of the contract. 1945 Ops St Compt 126.

Where there is no fire district in a town and no tax for fire protection purposes is levied, the town board may not expend town funds for the purchase of public liability insurance upon a truck owned by and licensed in the name of an unincorporated volunteer fire company furnishing fire protection services in the town. The town board may, however, expend town funds for the purchase of insurance indemnifying the town against any loss by reason of the liability imposed by § 205 of the General Municipal Law. 1945 Ops St Compt 176.

Municipality or fire district, or insurance carrier thereof, has no right of subrogation against third party tortfeasor for amounts paid to volunteer firemen under this section, but does have such right in relation to "excess benefits" under Workmen's Compensation Law. 1955 Ops St Compt File #7198.

A town may use general town funds in the first instance to purchase insurance indemnifying a fire protection district against the liability for volunteer firemen's benefits. 1955 Ops St Compt File #7592.

16. What benefits are recoverable

Under this section an injured fireman may recover one-half of the amount payable to his widow or administrator but nothing of that payable to his widow for benefit of children. Henderson v Glen Cove, 274 N.Y. 575, 10 N.E.2d 559, 274 N.Y. (N.Y.S.) 575, 1937 N.Y. LEXIS 966 (N.Y. 1937).

Subdivision 3 of this section provides for reimbursement for medical attention and loss of wages occasioned by the injuries suffered by a voluntary fireman in the line of duty, irrespective of whether the injuries resulted in permanent or temporary disability. Accordingly, petitioner, permanently disabled volunteer fireman, is entitled to an order directing town of Brookhaven, to reimburse him for moneys expended for medical treatment and loss of earnings, though it appears that town has already paid him amount provided for in the second paragraph of subd. 3 of this section by reason of permanent disability. In re Westphal, 259 N.Y.S. 303, 144 Misc. 729, 1932 N.Y. Misc. LEXIS 1235 (N.Y. County Ct. 1932), aff'd, 240 A.D. 851, 266 N.Y.S. 1015, 1933 N.Y. App. Div. LEXIS 6698 (N.Y. App. Div. 1933).

Volunteer fireman was entitled to be reimbursed for expenses of replacing artificial leg broken while he was performing his duty. Ort v Yulan Fire Dep't, 3 Misc. 2d 613, 155 N.Y.S.2d 40, 1956 N.Y. Misc. LEXIS 1565 (N.Y. County Ct. 1956).

For method of computation of benefits under county mutual self-insurance plan, see 1953 Ops St Compt File #6188.

Agency Opinions

Analysis

UNDER FORMER GEN MUN L § 205
1. In general
2. Relation to other laws
3. —To Worker's Compensation Law
4. Entitlements to benefits, generally
5. Active membership requirement
6. Who is liable
7. —For injuries beyond territorial limits
8. Indemnification and subrogation

UNDER FORMER GEN MUN L § 205

1. In general

There is no statute which requires an employer to pay an employee for time during his regular work hours while he is performing the duties of a volunteer fireman. 1960 NY Ops Atty Gen Sept 13 (informal).

2. Relation to other laws

3. —To Worker's Compensation Law

The board of commissioners of a fire district established under the provisions of Town Law are authorized to insure volunteer firemen constituting members of department under provisions of Workmen's Compensation Law. 1935 N.Y. Op. Att'y Gen. No. 352.

Volunteer firemen, when participating in inter- or intra-county test runs, are performing required duty and enjoy the same rights, protections, immunities and privileges they have when

performing duty in their home territories. On such test runs, home territories are responsible for damage to their own equipment. If such test runs are ordered as part of civil defense plan, the broader privileges and immunities provided by the Defense Emergency Act would apply. 1951 NY Ops Atty Gen May 25.

4. Entitlements to benefits, generally

A statutory provision is made for the death and disability benefits for village volunteer firemen, where firemen are victims of accidents arising out of their service. 1926 N.Y. Op. Att'y Gen. No. 240.

5. Active membership requirement

Honorary, active, life members are not "volunteer members" of the fire department entitled to benefits under General Municipal Law, § 205, and under Workmen's Compensation Law, § 10. 1960 NY Ops Atty Gen May 2 (informal).

6. Who is liable

7. —For injuries beyond territorial limits

Volunteer firemen, when participating in inter- or intra-county test runs, are performing required duty and enjoy the same rights, protections, immunities and privileges they have when performing duty in their home territories. On such test runs, home territories are responsible for damage to their own equipment. If such test runs are ordered as part of civil defense plan, the broader privileges and immunities provided by the Defense Emergency Act would apply. 1951 NY Ops Atty Gen May 25.

8. Indemnification and subrogation

The moneys payable to injured volunteer firemen or their legal representatives are to be raised in the manner specified in act, and indemnity insurance is not authorized for this purpose. 1928 N.Y. Op. Att'y Gen. No. 139.

Volunteer firemen must perform their firemanic duties without remuneration and a town board is not authorized to compensate them for such. 1966 NY Ops Atty Gen Feb 14.

While temporary paid employment of a volunteer fireman for stand-by duties would disqualify him for benefits under this law if he were injured during such temporary service, his status as a member of a volunteer fire department or fire company would not be affected thereby. 1967 NY Ops Atty Gen May 15.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations § 1170.

Matthew Bender's New York Practice Guides: 4 New York Practice Guide: Business and Commercial § 25A.09.

§ 3. Definitions

As used in this chapter:

1. "Volunteer firefighter" means an active volunteer member of a fire company.

2. "Fire company" means:

a. A fire company of a county, city, town, village or fire district fire department, whether or not any such company has been incorporated under any general or special law,

b. A fire corporation incorporated under or subject to the provisions of article ten of the membership corporations law, which is not included within paragraph a above, if such corporation is by law under the general control of, or recognized as a fire corporation by, the governing board of a city, town, village or fire district, or

c. A fire corporation incorporated under, or established pursuant to the provision of, any general or special law, which is not included within paragraphs a and b above, if such corporation is by law under the general control of, or recognized as a fire corporation by, the governing board of a city, town, village or fire district or Indian reservation.

Any district corporation which has the general powers of and operates as a fire district shall be considered as a fire district for the purposes of this chapter. A "fire department" may be composed of one or more fire companies.

3. "Line of duty" means the performance by a volunteer firefighter as a volunteer firefighter of the duties and activities described in subdivision one of section five of this chapter and the same such duties and activities performed for a specialized team established pursuant to the provisions of section two hundred nine-bb of the general municipal law for which the volunteer firefighter does not receive any remuneration or a gratuity and shall be deemed to include any date of injury as determined by the workers' compensation board pursuant to the provisions of section forty-one of this chapter. The following shall not be deemed to be remuneration or a gratuity: reimbursement of expenses for meals, lodging and actual and necessary travel; the receipt of a mileage allowance in lieu of travel expense; reimbursement of expenses for registration and tuition fees payable under section seventy-two-g of the general municipal law, and the acceptance of transportation, food, drink, shelter, clothing and similar items while on duty or engaged in such activities.

4. "Injury" includes any disablement of a volunteer firefighter that results from services performed in line of duty and such disease or infection as may naturally and unavoidably result from an injury.

5. "Child" includes a posthumous child, a child legally adopted prior to the injury of the volunteer firefighter; and a step-child or acknowledged child born out of wedlock dependent upon the deceased volunteer firefighter.

6. "Surviving spouse" means the legal spouse of a deceased volunteer firefighter, but shall not include a spouse who has abandoned the deceased. The term "abandoned", as used in this subdivision, means such an abandonment as would be sufficient under section two hundred of the domestic relations law to sustain a judgment of separation on that ground.

7. "Dependent" includes a surviving spouse entitled to receive benefits under this chapter, whether or not actually dependent upon a volunteer firefighter, unless a contrary meaning is clearly intended.

8. "Earning capacity", except as herein provided, means:

a. The ability of a volunteer firefighter to perform on a five-day or six-day basis either the work usually and ordinarily performed by him or her in his or her remunerated employment or other work which for any such worker would be a reasonable substitute for the remunerated employment in which he or she was employed at the time of his or her injury, or

b. The ability of a volunteer firefighter to perform on a five-day or six-day basis either the work usually and ordinarily performed by him or her in the

practice of his or her profession or in the conduct of his or her trade or business, including farming, and from which he or she could derive earned income or other work which for any such person would be a reasonable substitute for the profession, trade or business in which he or she was engaged at the time of his or her injury.

Every volunteer firefighter shall be considered to have earning capacity and, if the provisions of paragraphs a and b above are not applicable in any given case, the workers' compensation board, in the interest of justice, shall determine the reasonable earning capacity of the volunteer firefighter with due regard to the provisions of such paragraphs and the work he or she reasonably could be expected to obtain and for which he or she is qualified by age, education, training and experience. The ability of a volunteer firefighter to perform the duties of a volunteer firefighter, or to engage in activities incidental thereto, may be considered in determining loss of earning capacity, but the inability of a volunteer firefighter to perform such duties or to engage in such activities shall not be a basis of determining loss of earning capacity.

9. "State" includes all territory within the boundaries of the state of New York, including territory which has been or may hereafter be ceded to the federal government or to the United Nations and territory within the boundaries of Indian reservations.

10. "Political subdivision" mean a county, city, town, village or fire district.

11. "State fund" means the state insurance fund provided for in article six of the workmen's compensation law.

12. "County plan of self-insurance" means a county plan of self-insurance under article five of the workmen's compensation law.

13. "Insurance carrier" means the state fund, the stock corporations, mutual corporations or reciprocal insurers described in subdivision nine of section thirty of this chapter, a county plan of self-insurance, or a self-insuring political subdivision. For purposes of this chapter, a nonprofit property/casualty insurance company which is licensed pursuant to subsection (b) of section six thousand seven hundred four of the insurance law shall be deemed a stock corporation and a nonprofit property/casualty insurance company which is licensed as a reciprocal insurer pursuant to subsection (c) of section six thousand seven hundred four of the insurance law shall be deemed a reciprocal insurer.

14. "Emergency" includes the search for persons and the search for, and attempts to recover or the recovery of, bodies of persons even though it is possible or is known that all hope of life is gone.

15. "Fund raising activity" means a method of raising funds to effectuate the lawful purposes of a fire company, but shall not include any method prohibited by the state constitution or the penal statutes of this state, public fireworks displays unless conducted in compliance with section 405.00 of the penal law. Such term "fund raising activity" shall not include drills, parades, inspections, reviews, competitive tournaments, contests or public exhibitions, described in paragraphs e and i of subdivision one of section five of this chapter, even though prizes are awarded at such events. Such fund raising activity must comply with all the requirements of section two hundred four-a of the general municipal law.

16. "Minor" or "infant" means a person who has not attained the age of eighteen years.

17. The "workers' compensation rating board" or the "New York workers' compensation rating board" shall have the meaning set forth in section two of the workers' compensation law.

HISTORY:

Add, L 1956, ch 696, eff March 1, 1957; amd, L 1956, ch 697, § 1, eff May 1, 1956; L 1957, ch 751, § 2, eff April 19, 1957; L 1958, ch 473, eff April 8, 1958; L 1960, ch 100, eff July 1, 1960; L 1961, ch 965, eff July 1, 1961; L 1969, ch 1022, eff May 26, 1969; L 1974, ch 933, eff Sept 1, 1974; L 1980, ch 795, § 1, eff June 30, 1980; L 1981, ch 67, § 4, eff April 8, 1981; L 1996, ch 458, § 1, eff Aug 8, 1996; L 2000, ch 598, § 9, eff Dec 20, 2000; L 2007, ch 6, § 49, eff March 13, 2007; L 2008, ch 11, § 5, eff Feb 1, 2008; L 2013, ch 57, § 28 (Part GG), eff March 29, 2013; L 2018, ch 476, § 264, effective December 28, 2018.

Editor's Notes: See notes to Art I.

[1960] This act was recommended by the Joint Legislative Committee on Fire Laws.

Laws 1974, ch 933, § 2, provides as follows:

§ 2. This act shall take effect on the first day of September, nineteen hundred seventy-four, but shall not be construed to alter, change, affect, impair or defeat any rights, obligations or interests heretofore accrued, incurred, or conferred prior to the effective date of this act.

Laws 2007, ch 6, § 80, eff March 13, 2007, provides as follows:

§ 80. The superintendent of insurance [superintendent of financial services], in consultation with the chair of the workers' compensation board, may promulgate regulations relating to the standards to be followed in the approval of forms and in the procedural requirements needed to implement the provisions of this act, and the chair of the workers' compensation board, in consultation with the superintendent of insurance [superintendent of financial services], may promulgate regulations relating to the procedural requirements needed to implement the provisions of this act.

Amendment Notes: 2013. Chapter 57, § 28 (Part GG) amended:

Sub 6 by deleting at fig 1 "wife of a deceased male volunteer fireman or the legal husband of a deceased female volunteer fireman, as the case may be,", at fig 2 "eleven hundred sixty-one of the civil practice act" and adding the matter in italics.

2008. Chapter 11, § 5 amended:

Sub 17 by deleting at fig 1 "mean the compensation insurance rating board until February first, two thousand eight, and thereafter such entity as is designated by law" and adding the matter in italics.

2000. Chapter 598, § 9 amended:

Sub 13 by adding the matter in italics.

1996. Chapter 458, § 1 amended:

Sub 3 by deleting at figs 1–3 "fireman", at fig 4 "workmen's" and adding the matter in italics.

The 2018 amendment by ch 476, § 264, substituted "firefighter" for "firemen" or variants wherever it appears in 1, 4, twice in 5, 7, 8a, and 8b; in 8a, added "or her" three times and added "or she"; and in 8b, in the first paragraph, added "or her" three times and added "or she" and in first

sentence of the second paragraph, substituted "workers' compensation" for "workmen's" and added "or she."

Notes to Decisions

Analysis

1. In general
2. Earning capacity
3. Fund raising activity
4. Injury
5. Line of duty
6. Political subdivision
7. Volunteer fireman

1. In general

There is no apparent incompatibility per se between the offices of town fire district fire company line officer and town fire prevention officer. 1968 Ops St Compt File #18.

2. Earning capacity

Since claimant's actual earnings after the accident exceeded those prior to the accident, he would not be entitled to benefits under the Workmen's Compensation Law, however, under the Volunteer Firemen's Benefit Law, neither the degree of disability nor the amount of benefits is dependent on loss of earnings; benefits being instead measured solely by loss of earning capacity, i.e., loss of ability of the injured fireman to perform the work usually performed by him or a reasonable substitute employment. Verrilli v Harrison, 34 A.D.2d 1074, 312 N.Y.S.2d 340, 1970 N.Y. App. Div. LEXIS 4253 (N.Y. App. Div. 3d Dep't 1970), aff'd, 28 N.Y.2d 882, 322 N.Y.S.2d 719, 271 N.E.2d 553, 1971 N.Y. LEXIS 1335 (N.Y. 1971).

Despite the absence of any loss of earnings, a volunteer fireman, whose remunerative employment was as a plumber-steamfitter and who was injured in line of duty as a volunteer fireman, resulting in permanent partial disability, was entitled to an award using the test of "loss of earning capacity," defined as a loss of ability to perform the work usually performed by him or a reasonable substitute employment. O'Brien v Central Islip Fire Dist., Volunteer Firemen's Co., 37 A.D.2d 890, 325 N.Y.S.2d 433, 1971 N.Y. App. Div. LEXIS 3181 (N.Y. App. Div. 3d Dep't 1971).

Workers' compensation claimant had earning capacity as defined by CLS Vol Fire Ben § 3(8) where, although he was 74 years old and retired at time of his injury, he was acting in his capacity as volunteer firefighter, and his expert medical witnesses substantiated finding that he was capable of gainful employment, both before and after accident, but that injuries sustained by him in line of duty severely limited type of work that he could perform. Ziegler v Chenango County Self-Insurance Plan, 242 A.D.2d 781, 661 N.Y.S.2d 867, 1997 N.Y. App. Div. LEXIS 8633 (N.Y. App. Div. 3d Dep't 1997).

Decision finding that claimant did not suffer loss of earning capacity was not supported by substantial evidence where it was unrefuted that, after his injury, claimant could work only fraction of number of hours per week he had previously devoted to his self-employment as attorney; Workers' Compensation Board erroneously relied on fact that claimant was currently earning more than he had at time of accident. Young v Moyers Corners Fire Dep't, 243 A.D.2d 883, 663 N.Y.S.2d 326, 1997 N.Y. App. Div. LEXIS 10131 (N.Y. App. Div. 3d Dep't 1997).

Court would affirm determination finding that claimant suffered permanent partial disability where evidence, including expert medical testimony, reports of physicians' examinations, and clinical records, showed that claimant was unable to resume his profession as skilled gunsmith following his injuries because he could no longer operate heavy machinery necessary to manufacture and repair firearms, compelling him to shift focus of his business from manufacture, sale, and repair of custom firearms to retail sale of firearms. Dentico v Village of Walworth, 254 A.D.2d 515, 677 N.Y.S.2d 831, 1998 N.Y. App. Div. LEXIS 9968 (N.Y. App. Div. 3d Dep't 1998).

Workers' Compensation Board, which classified claimant as having permanent partial disability, properly found that he did not suffer loss of earning capacity under CLS Vol Fire Ben § 3(8) where he returned to his regular job duties as electrician following both accidents, his chiropractor did not impose any restrictions on his work subsequent to first accident, at time of second accident, claimant had different employment entailing assembly of electrical components at work bench, which he stated did not require any heavy lifting, and it was not until about one year later when claimant's back condition was exacerbated that chiropractor imposed restrictions on lifting and bending; claimant's testimony that such limitations precluded him from applying for higher paying and more physically demanding positions was irrelevant as to whether he suffered loss of earning capacity under Volunteer Firefighters' Benefit Law. Griffo v Onondaga Hill Volunteer Fire Dep't, 256 A.D.2d 858, 681 N.Y.S.2d 835, 1998 N.Y. App. Div. LEXIS 13578 (N.Y. App. Div. 3d Dep't 1998).

Volunteer firefighter was entitled to disability benefits if he or she established a loss of earning capacity defined as the ability to perform on a five-day or six-day basis work usually and ordinarily performed in his or her remunerated employment or a reasonable substitute therefor; medical evidence, which established that an injured firefighter suffered a moderate partial disability, permanent in nature, precluding his return to any employment, including the trucking industry, together with the injured firefighter's testimony, constituted substantial evidence supporting the findings of a permanent partial disability with a 50 percent impairment in his earning capacity. Allen v Brentwood Fire Dist., 1 A.D.3d 657, 766 N.Y.S.2d 259, 2003 N.Y. App. Div. LEXIS 11575 (N.Y. App. Div. 3d Dep't 2003).

Workers' Compensation Board did not err in awarding benefits under N.Y. Vol. Fire. Ben. Law § 3(8), where the employee, a steamfitter for the past 35 years, was unlikely to receive clearance to return to work and was therefore entitled to disability benefits, and his treating physician testified that the injuries sustained to his right foot and left knee caused consequential injuries to his right knee and back, such that due to the labor-intensive nature of steamfitting, he was permanently disabled from resuming this type of employment. Donlin v W. Babylon Fire Dist., 1 A.D.3d 813, 767 N.Y.S.2d 305, 2003 N.Y. App. Div. LEXIS 12627 (N.Y. App. Div. 3d Dep't 2003).

3. Fund raising activity

A village can be held vicariously liable for Dram Shop Act violations committed by volunteer firefighters during fundraising events, but not for misconduct during social activities. 1990 Atty Ops Gen No. 90-64 (Informal), 1990 N.Y. Op. Att'y Gen. No. 90-64, 1990 N.Y. AG LEXIS 68.

4. Injury

Notwithstanding conflicting medical testimony as to casualty, there was sufficient evidence to sustain a finding of the Board that death of a volunteer fireman 53 years of age while driving a fire truck which was a 12-ton combination tanker and pumper and which he was unaccustomed to handling on icy roads, from a heart attack, was due to unaccustomed physical strain and tension. Post v Hughsonville Fire Dist., 16 A.D.2d 999, 229 N.Y.S.2d 554, 1962 N.Y. App. Div. LEXIS 9077 (N.Y. App. Div. 3d Dep't 1962).

Although Workmen's Compensation Board did not specifically find ultimate fact of "injury" in regard to volunteer fireman's benefit claim, where sole issue litigated was causal relationship between volunteer fireman's death and his duties as district fire chief, a finding of injury was implicit in Board's finding that death was causally related to his duties. Rigali v Colonie, Verdoy Fire Dist., 47 A.D.2d 507, 367 N.Y.S.2d 570, 1975 N.Y. App. Div. LEXIS 9526 (N.Y. App. Div. 3d Dep't 1975).

The term "injury" as used in Volunteer Firemen's Benefit Law as a predicate to recovery of benefits requires only a disablement resulting from services "in line of duty" and not an "accidental injury arising out of and in the course of employment." Rigali v Colonie, Verdoy Fire Dist., 47 A.D.2d 507, 367 N.Y.S.2d 570, 1975 N.Y. App. Div. LEXIS 9526 (N.Y. App. Div. 3d Dep't 1975).

Workers' Compensation Board properly determined that claimant, as 16-year-old member of junior corps of town fire department, became active member of department and was entitled to benefits provided by Volunteer Firefighters' Benefit Law following injury incurred while operating his vehicle in response to fire alarm, since members of junior corps were required to respond to

alarms once school day was completed, they were under direction and control of chief of department, and their duties at scene were consistent with those of active firefighter save for certain limitations such as not entering building that is scene of fire; furthermore, given these facts, junior corps is not youth program and thus its members are not excluded from benefits by operation of CLS Gen Mun § 204-b. Elander v Pleasantville Fire Dist., 124 A.D.2d 388, 507 N.Y.S.2d 334, 1986 N.Y. App. Div. LEXIS 61399 (N.Y. App. Div. 3d Dep't 1986), app. denied, 69 N.Y.2d 608, 516 N.Y.S.2d 1023, 509 N.E.2d 358, 1987 N.Y. LEXIS 16376 (N.Y. 1987).

Claim for a hip injury was barred as untimely under either N.Y. Workers' Comp. Law § 28 or N.Y. Vol. Fire. Ben. Law § 41 because the evidence showed that the hip condition was a direct injury from the claimant's August 2005 accident, and, although a claim for other injuries had been established, the claimant did not make a claim for the hip injury until April 2008 despite experiencing hip pain as early as November 2005. Matter of Hilbrandt v Village of Red Hook, 75 A.D.3d 1025, 906 N.Y.S.2d 183, 2010 N.Y. App. Div. LEXIS 6370 (N.Y. App. Div. 3d Dep't 2010).

Volunteer firemen who are members of an emergency rescue and first aid squad would seem to be covered under the Volunteer Firemen's Benefit Law where they contract a contagious disease while responding to a call for general ambulance service if the squad is authorized to furnish such service pursuant to § 209-b of the General Municipal Law. Disability benefits do not include full reimbursement for lost wages from the firemen's regular job, nor are members of the volunteer firemen's family covered. 1983 Op St Comp File #83-115.

5. Line of duty

The death of a volunteer fireman while marching in a Memorial Day parade was properly found to have occurred "in the line of duty", and consequently, his widow was properly awarded death benefits pursuant to provisions of the Volunteer Firemen's Benefit Law. Sullivan v Delphi Falls Fire Co., 29 A.D.2d 584, 285 N.Y.S.2d 682, 1967 N.Y. App. Div. LEXIS 2756 (N.Y. App. Div. 3d Dep't 1967).

Evidence which established, inter alia, that death of volunteer fire chief from myocardial infarction caused by coronary thrombosis which supervising assignment of fire truck to assist two other fire districts was caused by stress related to his duties was sufficient to sustain finding that death resulted from services in line of duty for purposes of Volunteer Firemen's Benefit Law. Rigali v Colonie, Verdoy Fire Dist., 47 A.D.2d 507, 367 N.Y.S.2d 570, 1975 N.Y. App. Div. LEXIS 9526 (N.Y. App. Div. 3d Dep't 1975).

Evidence which established, inter alia, that sole cause of volunteer fireman's collapse from heart seizure while participating in firemen's parade was an underlying arteriosclerotic heart disease and that occurrance of collapse during course of parade was only coincidental was sufficient to sustain finding that claimant did not sustain injury in the line of duty, within volunteer firemen's benefit law. De Witta v Bay Shore Fire Dist., 47 A.D.2d 981, 367 N.Y.S.2d 116, 1975 N.Y. App. Div. LEXIS 9466 (N.Y. App. Div. 3d Dep't 1975).

Volunteer firemen assigned to duty at a stock car race track for the purpose of providing fire protection and emergency services in case of accident are performing firemanic functions and within the protection of this law. 1961 Ops St Compt #317.

Volunteer firemen who are specially trained in scuba diving and under-water recovery work are covered by the Volunteer Firemen's Benefit Law when they are called out to assist neighboring volunteer fire companies in diving to recover the bodies of victims of drowning and similar incidents. 1966 Ops St Compt File #745.

6. Political subdivision

The fact that a fire district is defined as a political subdivision does not preclude it from also being defined as an agency within the intendment of Volunteer Firemen's Law § 19. Pollini v Fuller Road Fire Dep't, 39 A.D.2d 554, 331 N.Y.S.2d 732, 1972 N.Y. App. Div. LEXIS 4992 (N.Y. App. Div. 2d Dep't 1972), aff'd, 34 N.Y.2d 744, 357 N.Y.S.2d 502, 313 N.E.2d 793, 1974 N.Y. LEXIS 1594 (N.Y. 1974).

7. Volunteer fireman

A volunteer fireman belonging to a unit outside the territory protected, who was injured while rendering emergency service in helping the local unit fight a fire, has no right of action against the local unit or municipality, notwithstanding his injuries are caused by defective equipment, in view of § 209-i of the General Municipal Law, his exclusive remedy being under § 19 of this act. Smith v Plandome, 28 Misc. 2d 793, 213 N.Y.S.2d 119, 1961 N.Y. Misc. LEXIS 3311 (N.Y. Sup. Ct. 1961).

If the chief inspector of the bureau of fire prevention of a fire department of a first class village is paid a salary, he may be ineligible for benefits under this law as a paid fireman rather than a volunteer. 1960 Ops St Compt File #880.

An individual volunteer fireman who is summoned by a town supervisor to assist in extinguishing a forest fire is a town employee and not within the protection of the Volunteer Firemen's Benefit Law. 1961 Ops St Compt #326.

Unless a village has restricted outside service by volunteer firemen pursuant to §§ 209 or 209-b of the General Municipal Law, village volunteer firemen who are answering a call for assistance in rendering emergency relief squad service by ambulance outside the village are within the coverage of this section with respect to personal injuries sustained. 1961 Ops St Compt #576.

A fire corporation, if specifically so authorized by charter, may organize a junior fire department, but the members thereof would not be considered volunteer firemen and would not be entitled to benefits under this act. 1963 Ops St Compt #129.

Inactive membership in a volunteer fire company is not recognized by law. 1963 Ops St Compt #344.

Volunteer members of a fire district fire department who are compensated for service on stand-by duty during emergencies are not within the coverage of this law. 1963 Ops St Compt #588.

Whether firemen who have been designated "active honorary volunteer firemen", but not subject to fine or penalty for failure to respond to calls, are entitled to benefits under this law presents a question of fact depending upon whether they are to be deemed volunteer firemen; if not, they are not entitled to benefits. 1963 Ops St Compt #655.

The fact that a fire district secretary receives compensation for his services does not render him ineligible for compensation benefits under this law. 1964 Ops St Compt #533.

Volunteer firemen who are specially trained in scuba diving and under-water recovery work are covered by the Volunteer Firemen's Benefit Law when they are called out to assist neighboring volunteer fire companies in diving to recover the bodies of victims of drowning and similar incidents. 1966 Ops St Compt File #745.

If a volunteer fireman receives payment as a full or part-time dispatcher, and if such activity is firemanic, the fireman's power to act as a volunteer fireman is temporarily suspended. 1967 Ops St Compt File #465.

A volunteer fireman may be hired by the fire district as an independent contractor to provide painting, snow removal, grading, plumbing and other maintenance work without affecting his status as a volunteer fireman. 1967 Ops St Compt File #465.

Insurance coverage normally carried by a fire district includes protection for volunteer firemen and firefighting equipment while fighting fires on real property within the fire district which is not taxed for fire protection purposes. 1968 Ops St Compt File #1016.

Only an active volunteer fireman is entitled to benefits, pursuant to the Volunteer Firemen's Benefit Law, for injuries sustained in the performance of his prescribed duties. 1972 Ops St Compt File #279.

An auxiliary policeman who volunteers his services to the chief engineer of a fire district department at the scene of a fire, but is not himself a volunteer fireman, and sustains injuries, is not entitled to any benefits under this law or the Workmen's Compensation Law. 1963 Ops St Compt #329.

A volunteer fireman, who responds to a request for assistance outside the area regularly served by his department is entitled to volunteer firemen's benefits if his injury occurred after his assis-

tance was accepted by a department or company commander engaged in handling a fire. 1968 Ops St Compt File #665.

Agency Opinions

Analysis

1. In general
2. Fund raising activity
3. Line of duty
4. Volunteer fireman

1. In general

A county that administers a county self-insurance plan under Article 5 of the Workers' Compensation Law may not decline to cover an individual volunteer firefighter who has been duly approved for membership in a fire department. N.Y. Op. Att'y Gen. No. 84-62.

2. Fund raising activity

A fund raising activity conducted by a volunteer fire company must be under the "exclusive auspices" of such fire company to be a covered activity such as is contemplated in the Volunteer Firemen's Benefit Law and the General Municipal Law. 1979 NY Ops Atty Gen August 15 (informal).

3. Line of duty

A paid secretary of a volunteer fire company who is injured while attending one of the monthly fire company meetings is not injured "in line of duty" as defined in this section and not eligible for benefits. 1961 NY Ops Atty Gen Sept 5.

A "water ball fight" between fire companies is in the nature of a competitive training program or a recreational or social activity, and injury sustained by a volunteer fireman while participating therein is not covered by this law. 1962 NY Ops Atty Gen Sept 11.

4. Volunteer fireman

Volunteer "fireman" is an active volunteer member of a fire company who is subject to call for duty and who does not have the option of determining whether to place himself on duty. 1958 NY Ops Atty Gen Dec 16 (informal).

A village fire department may respond to a call for assistance from an Indian Reservation unless there is a resolution restricting such response. Volunteer firemen injured in the course of such response are covered under the Volunteer Firemen's Benefit Law. 1959 NY Ops Atty Gen Sept. 10 (informal).

There is no statutory restriction upon the appointment to volunteer fire companies of persons who are suffering from some physical disabilities; nor does the Volunteer Firemen's Benefit Law limit the coverage of such persons. 1960 NY Ops Atty Gen Jan 12 (informal).

Definition of active member. 1960 NY Ops Atty Gen Oct 13 (informal).

Active honorary members of a fire company must be subject to call for duty, without option of whether they will or will not place themselves on duty, in order to be eligible for benefits under this law. 1961 NY Ops Atty Gen Aug 2.

A volunteer fire company may answer calls for assistance outside the area regularly served and the members are covered under the Volunteer Firemen's Benefit Law while answering such calls. 1961 NY Ops Atty Gen Oct 20.

Only "active" volunteer members of a fire company are entitled to the benefits of this act, and a chaplain or physician may not be accorded its benefits by artificially designating him as an active fireman if he answers a specified percentage of firemanic calls. 1961 NY Ops Atty Gen May 23.

A member of a volunteer fire company who enters active duty in the Armed Forces is not covered by the Volunteer Firemen's Benefit Law. 1962 NY Ops Atty Gen June 4.

This law has no application to a volunteer fireman rendering aid to a peace officer in keeping peace and order or quelling a riot, and his remedy for loss or damage sustained, like that of any other person, is under § 1848 of the Penal Law. 1963 NY Ops Atty Gen Aug 26.

Volunteer firemen are covered by volunteer firemen's benefits while answering calls outside of areas regularly served by fire companies. Gratuities accepted by a fire company do not affect firemen's benefits. 1965 NY Ops Atty Gen Mar 8.

Volunteer firemen must perform their firemanic duties without remuneration and a town board is not authorized to compensate them for such. 1966 NY Ops Atty Gen Feb 14.

Youths of 16 to 18 years of age may be admitted to membership as volunteer firemen of an incorporated fire company if the bylaws or constitution of the company so provide and the board of fire commissioners of the fire district have taken no positive action to the contrary. Only as such volunteer firemen would they be covered by the Volunteer Firemen's Benefit Law. Though not prohibited by statute, Town police officers' duties may make their membership as volunteer firemen inadvisable. There is, however, no such conflict of duty in the case of Town Highway employees. 1970 NY Ops Atty Gen March 6.

The laws relating to volunteer firemen recognize only active volunteer members of fire companies and only such active volunteer members are protected in case of injury or death in the performance of firemanic duties and are accorded rights and privileges of volunteer firemen. 1970 NY Ops Atty Gen Nov 12.

Members of a rescue team organized within a volunteer fire department to conduct underwater rescue missions and to search for victims are covered by the New York State Volunteer Firemen's Benefit Law when acting in the performance of such duties. 1973 NY Ops Atty Gen Apr 5.

The law recognizes no classifications of membership of volunteer firemen. There is no authority for probationary or provisional appointment of a volunteer member of a volunteer fire company in a town fire district. Because a person elected to membership in a volunteer fire company is not a member until the election is approved by the board of fire commissioners, the person is not entitled to benefits under the Volunteer Firemen's Benefit Law and the person should not be allowed to perform any firemanic duties until the membership becomes effective. 1975 NY Ops Atty Gen Dec 18 (informal).

A minor over the age of sixteen years may serve as a volunteer with a volunteer fire department. A minor would be considered an active volunteer fireman pursuant to Volunteer Firemen's Benefit Law, § 3(1), even though said minor may be subject to compulsory school attendance pursuant to Education Law, §§ 3204–3206, provided that said minor was subject to call for duty and does not have an option of placing himself on duty while not in compulsory school attendance. 1977 NY Ops Atty Gen Apr 11.

The act of classifying a volunteer fireman as an "active member" of a fire company has no bearing on such fireman's entitlement to benefits under the Volunteer Fireman's Benefit Law; a fireman who is on restricted duty may, nevertheless, qualify as an "active member" of the company for the purpose of receiving benefits. 1978 Op St Compt File #1053.

A village may not pay volunteer firemen who are members of the ambulance squad for wages lost when they leave their factory to answer a call for ambulance service nor may it pay the factory for financial losses when the firemen leave the factory for such purpose. Volunteer Firemen's Benefit Law benefits may be affected by such payment. 1980 Op St Compt File #177.

Members of an emergency rescue and first aid squad of a volunteer fire company are covered by the Volunteer Firemen's Benefit Law when responding to calls for assistance outside of the fire protection district which the company serves pursuant to contract with a town, whether the call is pursuant to a mutual aid plan or otherwise. A town cannot contract with the company to provide ambulance service for the area of the town outside of the fire protection district. 1981 Op St Compt File #81-112.

Right of a fire chief to deputize bystanders. Coverage for benefits of persons drafted or volunteering for fire fighting duties. 1960 NY Ops Atty Gen Oct 24 (informal).

While temporary paid employment of a volunteer fireman for stand-by duties would disqualify him for benefits under this law if he were injured during such temporary service, his status as a member of a volunteer fire department or fire company would not be affected thereby. 1967 NY Ops Atty Gen May 15.

Non-residents of a village who live in an area which is furnished fire protection and ambulance service by the village fire department (i.e. a fire protection district) are eligible for mem-

bership in the emergency rescue and first aid squad of the village fire department and are entitled to volunteer firemen's benefits for injuries incurred in the line of duty. 1979 Op St Compt File #773.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 5; CLS St Fin § 54-e; Gen Mun § 209-i; Tax §§ 289-c, 504; Work Comp Law § 63.

County self-insurance plan, Work Comp Art 5.

State insurance fund, Work Comp Art 6.

Jurisprudences:

Law Reviews:

Solomons, Worker's Compensation for Occupational Disease Victims: Federal Standards and Threshold Problems. 41 Albany L Rev, p. 165, 1977.

Workmen's Compensation: A Vehicle for Compensating the Good Samaritan. 24 Buffalo L Rev, p. 857, Spring, 1975.

Workmen's Compensation—New York Court of Appeals Holds that Mental Injury Precipitated by Psychic Trauma Is Compensable. 44 Fordham L Rev, p. 204, October, 1975.

Matthew Bender's New York Practice Guides: 4 New York Practice Guide: Business and Commercial § 25A.09.

§ 4. Removal of civil liability barriers

1. (a) Liability protection. (1) A fire company or political subdivision, including a person acting as an agent thereof, that acts reasonably in donating qualified fire control or fire rescue equipment to a volunteer fire company shall not be liable in civil damages under any state law for personal injuries, property damage, or death proximately caused after the donation by a defect in the equipment.

(2) Any state or local agency, including a person acting as an agent of such an agency, that acts reasonably in administering the distribution of qualified fire control or fire rescue equipment to a volunteer fire company or political subdivision shall not be liable for civil damages under any state law for personal injuries, property damage, or death proximately caused after the distribution by a defect in the equipment.

(b) Exceptions to liability protection. Paragraph (a) of this subdivision shall not apply to a person or agency if:

(1) the defect that proximately causes the injury, damage, or loss resulted from an act or omission of the person or agency, that constitutes malice, gross negligence, recklessness, or intentional misconduct;

(2) the person or agency is the manufacturer of the qualified fire control or fire rescue equipment; or

(3) the person or agency modified or altered the equipment after it had been recertified by an authorized technician as meeting the manufacturer's specifications.

2. For the purposes of this section the following words and phrases shall have the following meanings:

(a) "Person" means any individual and any governmental or other entity.

(b) "Qualified fire control or rescue equipment" means fire control or fire rescue equipment that has been recertified by an authorized technician as meeting the manufacturer's specifications and has been distributed through a state or local agency to the volunteer fire company.

(c) "Authorized technician" means a technician that has been certified by the manufacturer of fire control or fire rescue equipment to inspect such equipment. The technician need not be employed by the state or local agency administering the distribution of the fire control or fire rescue equipment.

HISTORY:

Add, L 2003, ch 41, § 3, eff May 15, 2003 (see 2003 note below); amd, L 2004, ch 641, § 2, eff Oct 26, 2004, deemed eff on and after May 15, 2003.

Editor's Notes: Laws 2003, ch 41, §§ 1 and 4, eff May 15, 2003, provide as follows:

Section 1. This act shall be known and may be cited as the "good samaritan volunteer firefighters' assistance act".

§ 4. This act shall take effect on the thirtieth day after it shall have become a law and shall apply to any cause of action that occurs on or after such date.

Amendment Notes:

2003. Chapter 641, § 2 amended:

Sub 1, par (a), by deleting "department or district".

ARTICLE II Coverage and Benefits

Section

5. Coverage
6. Volunteer firefighters' benefits; general.
7. Lt. Michael E. Neuner/Timothy Goff memorial death benefit program
7-a. Date of death benefits.
8. Permanent total disability benefits
9. Temporary total disability benefits
10. Permanent partial disability benefits
11. Temporary partial disability benefits
11-a. Repair or replacement of prosthetic devices.
11-b. Hazardous exposures.
11-c. [There are two sections 11–c] Medical examination of volunteer firefighters to detect and identify the human immunodeficiency virus (HIV).
11-c. Volunteer firefighters; presumption in certain diseases.
12. Non-schedule adjustments
13. Reclassification of disabilities
14. Previous disability.
15. Expense for rehabilitating injured volunteer firefighters.
16. Treatment and care
17. Aliens
18. Disposition of accrued benefits upon death.
19. Exclusiveness of remedy.
20. Other remedies of volunteer firefighters; subrogation.
21. Assistance to other states, the Dominion of Canada, property ceded to the federal government and to Indian reservations.
22. Revenues and benefits from sources other than this chapter
23. Assignments, exemptions.
24. Waiver agreements
25. Limitation of time

HISTORY:

Add, L 1956, ch 696, eff March 1, 1957.

§ 5. Coverage

1. The duties and activities in relation to which benefits shall be paid and provided pursuant to this chapter are:

a. Necessary travel to, working at, and necessary travel returning from a fire, alarm of fire, hazardous

material incident or other emergency to which his fire department, fire company, or any unit thereof, either has responded or would be required or authorized to respond, including necessary travel during such work or incidental thereto.

b. While, within the state, personally assisting another fire department, fire company, or any unit thereof pursuant to the provisions of section two hundred nine-i of the general municipal law, including, after his services have been duly accepted, necessary travel to and returning from such work and necessary travel during such work or incidental thereto.

c. While, within the state and pursuant to orders or authorization, performing duties at the firehouse, or elsewhere, directly related to (1) the prevention of fires or other disasters, (2) the investigation of fires or other disasters, (3) the inspection of property for fire hazards or other dangerous conditions, including necessary travel directly connected therewith.

d. While, within this country or in Canada and pursuant to orders or authorization, instructing or being instructed in fire duties, attending a training school or course of instruction for firefighters, or attending or participating in any noncompetitive training program, including necessary travel directly connected therewith, as well as necessary travel to and necessary travel returning from such activity.

e. While, within this country or in Canada and pursuant to orders or authorization, attending or participating in any drill, parade, funeral, inspection or review in which his fire department, fire company, or any unit thereof, is engaged, including necessary travel directly connected therewith, as well as necessary travel to and necessary travel from such activity.

f. While, within the state and pursuant to orders or authorization, attending or working at meetings of his fire department or fire company, or any organized unit thereof, at the firehouse or other regular or special headquarters of the department, company or unit, including necessary travel directly connected therewith other than travel to or returning from such meetings.

g. While, within the state and pursuant to orders or authorization, working in connection with the construction, testing, inspection, repair or maintenance of (1) the firehouse and the fixtures, furnishings and equipment thereof, and (2) the fire fighting vehicles, fire apparatus and equipment used by the fire department, fire company, or other unit thereof, including necessary travel directly connected therewith other than travel to or returning from such work.

h. While, within the state and pursuant to orders or authorization, working in connection with the construction, testing, inspection, repair or maintenance of the fire alarm system, water supply system, fire well, fire cistern or fire suction pool, used by the fire department or fire company, including necessary travel directly connected therewith, as well as necessary travel to and necessary travel from such activity.

i. While, within this country or in Canada and pursuant to orders or authorization, practicing for, or participating as a contestant or an official in, any competitive tournament, contest or public exhibition conducted for firefighters which is intended to promote the efficiency of the fire department, fire company or any unit thereof, including necessary travel directly connected therewith other than travel to and returning from such practice. The actual rendition of fire or other emergency service shall not be deemed "practicing" within the meaning of this paragraph.

j. While, pursuant to orders or authorization, engaged in the inspection of fire fighting vehicles and fire apparatus prior to delivery under a contract of purchase, or performing duties in relation to the delivery thereof, including necessary travel directly connected therewith, as well as necessary travel to and necessary travel returning from such activity.

k. Necessary travel to, work in connection with, and necessary travel returning from a call for general ambulance service by a member of an emergency rescue and first aid squad which has been authorized to furnish such service pursuant to section two hundred nine-b of the general municipal law, including necessary travel during such work or incidental thereto.

l. While, within this country or Canada and pursuant to orders or authorization, attending a convention or conference of firefighters or fire officers or fire district officers as the authorized delegate or representative of his or her fire department, fire company or any unit thereof, including necessary travel directly connected therewith, as well as necessary travel to and necessary travel returning from such activity.

m. While, within the state and pursuant to orders or authorization, working in connection with a fund raising activity of his or her fire company, as defined in subdivision fifteen of section three of this chapter including necessary travel directly connected therewith, as well as necessary travel to and necessary travel returning from such activity, but shall not include competitive events in which volunteer firefighters are competitors, such as baseball, basketball, football, bowling, tugs of war, water-ball fights, donkey baseball, boxing, wrestling, contests between bands or drum corps, or other competitive events in which volunteer firefighters are competitors and which involve physical exertion on the part of the competitors.

n. While, within the state and pursuant to orders or authorization, performing work or service leading or directing a youth program established pursuant to section two hundred four-b of the general municipal law, including necessary travel directly connected therewith, as well as necessary travel to and necessary travel returning from such activity. This

paragraph shall not be interpreted as providing coverage for participants in such youth programs.

o. While, within the state and pursuant to orders or authorization, performing the duty of pumping out water or any other substance from the basement or other part of a building, including necessary travel directly connected therewith.

p. While, within the state and pursuant to orders or authorization, instructing, supervising, being instructed or participating in a supervised physical fitness class, group session or program for the purpose of promoting or maintaining the performance of their duties as firefighters, as well as necessary travel to and necessary travel from such activity, but shall not include competitive sporting events in which volunteer firefighters are competitors.

2. Benefits shall not be paid and provided pursuant to this chapter in the following instances:

a. Work or service rendered by a volunteer firefighter while on a leave of absence pursuant to either section two hundred-b or section two hundred-c of the general municipal law, unless such work or service is performed pursuant to subdivision one-a of section two hundred-b or subdivision one-a of section two hundred-c of the general municipal law, or pursuant to any other general, special or local law, charter or ordinance or pursuant to the constitution, by-laws, rules or regulations applicable to the fire company or fire department of which he or she is a member.

b. Practice for and participation in any recreational, social, or fund raising activity other than a fund raising activity for which coverage is provided under paragraph m of subdivision one of this section.

c. Work or service rendered by a volunteer firefighter while suspended from duty pursuant to section two hundred nine-l of the general municipal law, article eight of the village law or pursuant to any other general, special or local law, charter or ordinance or pursuant to the constitution, by-laws, rules or regulations applicable to the fire company or fire department of which he or she is a member.

d. Work or service not rendered as a volunteer firefighter, but rendered as an officer, official or employee of a public corporation or any special district thereof, whether with or without remuneration, even though by law a requirement for such office, position or employment shall be that such officer, official or employee shall have been or must be a volunteer firefighter.

e. Work or service not rendered as a volunteer firefighter, but rendered in the course of his or her employment for a private employer.

f. Work or service not rendered as a volunteer firefighter, but rendered as a civil defense volunteer.

g. Work, service or activities in which the volunteer firefighter has been ordered not to participate.

This subdivision shall not be deemed to enumerate all of the activities engaged in by volunteer firefighters for which mandatory coverage is not provided by this chapter, or to prohibit any of the activities described in this subdivision, or to prevent the securing of insurance pursuant to section four thousand two hundred thirty-seven of the insurance law to cover volunteer firefighters when engaged in activities other than those for which mandatory coverage is provided by this chapter.

3. [Repealed]

HISTORY:

Add, L 1956, ch 696, eff March 1, 1957; amd, L 1957, ch 47, eff Mar 11, 1957; L 1958, ch 976, eff May 1, 1958; L 1960, ch 100, eff July 1, 1960; L 1961, ch 965, eff July 1, 1961; L 1963, ch 313, eff Apr 16, 1963; amd, L 1963, ch 506, eff July 1, 1963; L 1965, ch 563; L 1967, ch 178, eff July 1, 1967; amd, L 1968, ch 58, eff Mar 19, 1968; L 1978, ch 386, eff Sept 1, 1978; L 1980, ch 307, § 1, eff June 19, 1980; L 1980, ch 795, § 2, eff June 30, 1980; L 1981, ch 509, § 1, eff Jan 1, 1982; L 1982, ch 745, § 1, eff July 27, 1982; L 1983, ch 161, § 1, eff May 31, 1983; L 1984, ch 735, § 1, eff Aug 3, 1984; L 1984, ch 805, § 89, eff Sept 1, 1984; L 1986, ch 614, § 1, eff July 26, 1986; L 1993, ch 116, § 1, eff June 21, 1993; L 1993, ch 485, § 1, eff July 26, 1993; L 2005, ch 341, § 3, eff Aug 25, 2005 (see 2005 note below); L 2018, ch 476, § 265, effective December 28, 2018.

Editor's Note: [1958] This act was recommended by the Joint Legislative Committee on Fire Laws. Section 1 provides mandatory coverage under the Volunteer Firemen's Benefit Law for volunteer firemen practicing or participating in competitive tournaments, contests and public exhibitions intended to promote the efficiency of a fire department, fire company or any unit thereof. Section 2 provides coverage under such law for volunteer firemen attending firemanic conventions as delegates or representatives. Paragraphs a and c of subdivision 2 of section 5 of such law formerly expressly excluded such coverage, except for first aid contests, and were, therefore, repealed by section 3 of this act as inconsistent with the amendments made by sections 1 and 2 of this act. Such first aid contests come within the broader provisions of this act. Subdivision 3 of section 5 of such law permitted tournament coverage on an optional basis and was, therefore, repealed by section 4 of this act. Section 5 of this act gives counties the "home rule" power to decide whether or not their county self-insurance plans will insure the participating political subdivisions against liabilities under the Volunteer Firemen's Benefit Law. If a "plan" does not cover such liabilities, volunteer firemen's benefit insurance would be purchased in the usual way from insurance carriers in the same manner as political subdivisions in 23 counties now secure such insurance.

Editor's Notes: See 1960 note under § 3, supra.

Laws 2005, ch 341, § 4, eff Aug 25, 2005, provides as follows:

§ 4. This act shall take effect on the thirtieth day after it shall have become a law and shall apply to volunteer firefighters who, on or after the effective date of this act, are on a leave of absence pursuant to section 200-b or 200-c of the general municipal law.

See notes to Art I.

Amendment Notes:

1993. Chapter 485, § 1 amended:

Sub 1, par e, by deleting "the state, any adjoining state".

1993. Chapter 485, § 1 amended:

Sub 1, par i, by deleting "the state, any adjoining state" and "firemen".

2005. Chapter 341, § 3 amended:

Sub 2, par a, by deleting "fireman".

1984. Chapter 805, § 89 amended:

Sub 2, by deleting "two hundred twenty-two".

The 2018 amendment by ch 476, § 265, substituted "firefighters" for "firemen" in 1d; in 1l, substituted "firefighters" for "firemen" and added "or her"; in 1m, added "or her" and substituted "firefighters" for "firemen" preceding "are

competitors" twice; added "or she" in 2a; in 2c, substituted "firefighter" for "fireman" and added "or she"; substituted "firefighter" for "fireman" twice in 2d; in 2e, substituted "firefighter" for "fireman" and added "or her"; substituted "firefighter" for "fireman" in 2f; substituted "firefighter" for "fireman" in 2g; and substituted "firefighters" for "firemen" twice in the closing paragraph of 2.

Notes to Decisions

Analysis

1. In general
2. Answering calls outside territory
3. Effect of salaried performance
4. Emergency relief teams
5. Fund raising activities
6. Insurance
7. Non-active members
8. —Ladies' auxiliary
9. Performance of non-firefighting duties
10. When coverage begins and ends

1. In general

It can be gleaned from the provisions of this section that this act was not intended to cover volunteer firemen under all circumstances. Hofmann v Hurley, 17 A.D.2d 181, 233 N.Y.S.2d 622, 1962 N.Y. App. Div. LEXIS 7120 (N.Y. App. Div. 3d Dep't 1962).

Workers' Compensation Board properly determined that claimant, as 16-year-old member of junior corps of town fire department, became active member of department and was entitled to benefits provided by Volunteer Firefighters' Benefit Law following injury incurred while operating his vehicle in response to fire alarm, since members of junior corps were required to respond to alarms once school day was completed, they were under direction and control of chief of department, and their duties at scene were consistent with those of active firefighter save for certain limitations such as not entering building that is scene of fire; furthermore, given these facts, junior corps is not youth program and thus its members are not excluded from benefits by operation of CLS Gen Mun § 204-b. Elander v Pleasantville Fire Dist., 124 A.D.2d 388, 507 N.Y.S.2d 334, 1986 N.Y. App. Div. LEXIS 61399 (N.Y. App. Div. 3d Dep't 1986), app. denied, 69 N.Y.2d 608, 516 N.Y.S.2d 1023, 509 N.E.2d 358, 1987 N.Y. LEXIS 16376 (N.Y. 1987).

It was neither arbitrary nor capricious for Workers' Compensation Board to conclude that volunteer firefighter's fatal heart attack was precipitated by his changing flat tire on fire district vehicle and marching in parade authorized by fire department, thus entitling his widow to benefits under CLS Vol Fire Ben § 5, since cargo area of vehicle had been modified to carry fire equipment which firefighter had to remove in order to extricate spare tire, causing him to return home later than usual and allowing him to rest only one hour prior to parade; although there was conflicting medical testimony as to whether his death was caused by underlying coronary artery disease rather than stress-related acute myocardial infarction, resolution of that issue was for board to decide. Dineen v Islip Fire Dist., 135 A.D.2d 969, 522 N.Y.S.2d 377, 1987 N.Y. App. Div. LEXIS 52868 (N.Y. App. Div. 3d Dep't 1987).

Workers' Compensation Board improperly ruled that employer was estopped from raising issue of coverage under Volunteer Firefighters' Benefit Law where substantial evidence did not support finding of Workers' Compensation Law Judge, which subsequently was affirmed by Board panel, that instant claim was properly established under Volunteer Firefighters' Benefit Law; further, even assuming that doctrine of laches could be applied, prejudice identified by Board panel—that claimant would be precluded from seeking benefits under Workers' Compensation Law due to expiration of relevant statute of limitations—was unavailing given concession by employer and carrier that claimant had valid claim under Workers' Compensation Law. Moynihan v Moyers Corners Fire Dep't, 254 A.D.2d 584, 681 N.Y.S.2d 93, 1998 N.Y. App. Div. LEXIS 11197 (N.Y. App. Div. 3d Dep't 1998).

Workers' Compensation Board, which classified claimant as having permanent partial disability, properly found that he did not suffer loss of earning capacity under CLS Vol Fire Ben § 3(8) where he returned to his regular job duties as electrician following both accidents, his chiropractor did not impose any restrictions on his work subsequent to first accident, at time of second accident, claimant had different employment entailing assembly of electrical components at work bench, which he stated did not require any heavy lifting, and it was not until about one year later when claimant's back condition was exacerbated that chiropractor imposed restrictions on lifting and bending; claimant's testimony that such limitations precluded him from applying for higher paying and more physically demanding positions was irrelevant as to whether he suffered loss of earning capacity under Volunteer Firefighters' Benefit Law. Griffo v Onondaga Hill Volunteer Fire Dep't, 256 A.D.2d 858, 681 N.Y.S.2d 835, 1998 N.Y. App. Div. LEXIS 13578 (N.Y. App. Div. 3d Dep't 1998).

Husband was acting in the course of the husbands' volunteer firefighting duties while burning scrap material for a training session at the time of the husband's death thus entitling the wife to benefits, as the death was a direct result of the fire department's training session even though the material was provided by the husband's employer. Van Wert v Schaghticoke Volunteer Fire Dep't, 301 A.D.2d 831, 754 N.Y.S.2d 90, 2003 N.Y. App. Div. LEXIS 269 (N.Y. App. Div. 3d Dep't 2003).

A volunteer fireman is always protected by coverage and the benefits that accrue thereunder in the event of an injury sustained by him in performance of a service authorized by § 5 of the Volunteer Firemen's Benefit Law, but responsibility for payment of the benefits is imposed in accordance with various other statutory provisions. 1960 Ops St Compt File #956.

2. Answering calls outside territory

The law provides for volunteer firemen's benefits and the payment of cost of damage to apparatus and equipment when volunteer firemen respond to a call for assistance for fire or other emergency on the New York State Thruway. 1962 Ops St Compt #986.

The law provides for volunteer firemen's benefits and payment of cost of damages to apparatus and equipment when volunteer firemen respond to a call for assistance for fire or other emergency in territory outside of of the area regularly served. 1962 Ops St Compt #1017.

3. Effect of salaried performance

If a volunteer fireman receives payment as a full or part-time dispatcher, and if such activity is firemanic, the fireman's power to act as a volunteer fireman is temporarily suspended. 1967 Ops St Compt File #465.

A volunteer fireman may be hired by the fire district as an independent contractor to provide painting, snow removal, grading, plumbing and other maintenance work without affecting his status as a volunteer fireman. 1967 Ops St Compt File #465.

4. Emergency relief teams

The proper procedure to be followed in establishing a general ambulance service in the fire district is set forth generally in § 209-b of the General Municipal Law. Volunteer firemen are covered for injuries they receive in rendering such service under the Volunteer Firemen's Benefit Law §§ 3 and 5. 1959 Ops St Compt File #38.

Volunteer firemen who are members of an emergency relief squad are entitled to the protection of this law where, at the direction or request of a police officer, they are transporting an injured or ill person to a hospital. 1960 Ops St Compt File #824.

Volunteer firemen are covered by the Volunteer Firemen's Benefit Law while on call as members of an emergency rescue and first aid squad. Unless members of the ladies auxiliary are also members of the volunteer fire department, they are not covered by the Volunteer Firemen's Benefit Law. 1967 Ops St Compt File #986.

Active member of volunteer fire department emergency first aid and rescue squad who has not received firefighting training is not precluded from receiving benefits under VFVL for injuries incurred while performing duty or activity enumerated in § 5 of Volunteer Firefighters' Benefit Law. 1987 Op St Compt No. 87-15.

5. Fund raising activities

Where a volunteer fireman was directed by his chief to attend a fund-raising parade, and, following the parade, he attended a block party held in conjunction with the parade and then went to a location across the street from the party, and 3 hours later, when on his way home, he sustained a head injury when he fell from the fire department truck, an award was upheld since the activities entered into by the claimant subsequent to the parade were all localized in the general area of the parade, and were participated in by numerous firemen present at the parade and were, in effect, part and parcel of the day's activities. Myslborski v Greenport Fire Dist., Volunteer Firemen's Co., 38 A.D.2d 646, 327 N.Y.S.2d 203, 1971 N.Y. App. Div. LEXIS 2678 (N.Y. App. Div. 3d Dep't 1971).

A village can be held vicariously liable for Dram Shop Act violations committed by volunteer firefighters during fundraising events, but not for misconduct during social activities. 1990 Atty Ops Gen No. 90-64 (Informal), 1990 N.Y. Op. Att'y Gen. No. 90-64, 1990 N.Y. AG LEXIS 68.

6. Insurance

Insurance coverage normally carried by a fire district includes protection for volunteer firemen and firefighting equipment while fighting fires on real property within the fire district which is not taxed for fire protection purposes. 1968 Ops St Compt File #1016.

7. Non-active members

Volunteer firemen on leaves of absence for military service, infants, and others, who may lend assistance to a fire department in fighting a fire, but are not themselves firemen, are not entitled to the benefits of this law. 1963 Ops St Compt #329.

A volunteer fireman who enters military service does not continue to be an active volunteer fireman and must be given leaves of absence from his company. 1963 Ops St Compt #329.

8. —Ladies' auxiliary

Members of a ladies auxiliary rendering aid to volunteer firemen who are fighting fires or rendering other emergency service are not entitled to volunteer firemen's benefits if injured or killed while so engaged. 1963 Ops St Compt #61.

Volunteer firemen are covered by the Volunteer Firemen's Benefit Law while on call as members of an emergency rescue and first aid squad. Unless members of the ladies auxiliary are also members of the volunteer fire department, they are not covered by the Volunteer Firemen's Benefit Law. 1967 Ops St Compt File #986.

9. Performance of non-firefighting duties

A volunteer fireman, injured while putting up Christmas decorations in the firehouse pursuant to custom of the district to decorate the firehouse inside and outside at that season, who was working under the direction, if not strictly pursuant to orders, of the chief, could properly be found to be within the coverage of this section, and could similarly have been found to be within the coverage thereof if placing flags or putting up bunting on a public building over a patriotic holiday. Paden v Dix Hills Fire Dist., 12 A.D.2d 202, 210 N.Y.S.2d 7, 1961 N.Y. App. Div. LEXIS 13018 (N.Y. App. Div. 3d Dep't 1961).

Annual installation dinner constitutes "inspection or review" within meaning of statute, and myocardial infarction sustained by firefighter during dinner is compensable; statute does not require that meeting must be held at firehouse in order to place firefighter in attendance within line of duty. Coburn v Hewlett Fire Dep't, 111 A.D.2d 1071, 490 N.Y.S.2d 644, 1985 N.Y. App. Div. LEXIS 50299 (N.Y. App. Div. 3d Dep't 1985).

Workers' Compensation Board properly ruled that volunteer firefighter was covered under CLS Vol Fire Ben § 5 after he collapsed and died from heart attack while marching in town Christmas parade as member of fire department's band since parade was specifically enumerated activity within coverage of statute, and despite fact that fire department never sought permission from fire district board of commissioners to march in parade, decision by department's membership to march therein was sufficient "authorization" under § 5. Dineen v Islip Fire Dist., 135 A.D.2d 969, 522 N.Y.S.2d 377, 1987 N.Y. App. Div. LEXIS 52868 (N.Y. App. Div. 3d Dep't 1987).

It was reasonable to find that action of volunteer firefighter in changing tire on fire district automobile was activity covered under CLS Vol Fire Ben § 5, which pertains to, inter alia, maintenance of firefighting vehicles, notwithstanding that tire change occurred outside geographical area of district, for in order to readily respond to fire emergencies, firefighter had been supplied with vehicle and permitted to use it for commuting between his home and train station, where he discovered flat tire on returning home from his regular job. Dineen v Islip Fire Dist., 135 A.D.2d 969, 522 N.Y.S.2d 377, 1987 N.Y. App. Div. LEXIS 52868 (N.Y. App. Div. 3d Dep't 1987).

Workers' Compensation Board properly determined that volunteer firefighter was acting within scope of his duties when he was injured while driving motorcycle with female passenger at 2:00 a.m. after having spent several hours drinking after firefighters' convention where firefighter had attended working session of convention that had lasted well into evening, he had gone to bar seeking meal, bar was no longer serving food, and accident occurred as firefighter and passenger sought nearest open restaurant in next town. Stewart v Chili, 146 A.D.2d 933, 536 N.Y.S.2d 970, 1989 N.Y. App. Div. LEXIS 484 (N.Y. App. Div. 3d Dep't 1989).

Volunteer fireman's claim for damages against the state for injuries sustained while attending a fire school conducted by state employee was barred, since the state was within the purview of § 19(3) which makes the statute the exclusive remedy of an injured volunteer fireman against any person or agency acting under governmental or statutory authority. Rosenberger v State, 46 Misc. 2d 194, 259 N.Y.S.2d 548, 1965 N.Y. Misc. LEXIS 1936 (N.Y. Ct. Cl. 1965).

Workers' compensation board properly determined that volunteer firefighter was a covered employee under N.Y. Vol. Fire. Ben. Law § 5(2)(e), because substantial evidence supported the finding that work the firefighter was performing on a fire truck when he was injured was done in his capacity as a volunteer firefighter rather than in the firefighter's capacity as a self-employed mechanic. Matter of Schuster v Village of Lake George Fire Dept., 34 A.D.3d 944, 823 N.Y.S.2d 619, 2006 N.Y. App. Div. LEXIS 13220 (N.Y. App. Div. 3d Dep't 2006).

In view of the definition of "emergency" and other provisions of this law, and likewise § 209-b of the General Municipal Law, a volunteer fireman rendering services as such to the sheriff to assist in recovering bodies of persons believed to be drowned is acting within the coverage of the Volunteer Firemen's Benefit Law. 1960 Ops St Compt File #663.

Coverage is not afforded to village firemen who are injured while drawing water for farmers to fill farm cisterns. 1961 Ops St Compt #286.

Where various civic organizations use a central school building for meetings and functions, and the village fire company has been requested to furnish members of its fire police squad to supervise activities with regard to smoking regulations and exits, squad members while rendering such service are "on duty" and have all the powers and duties of peace officers. 1961 Ops St Compt #311.

A volunteer fireman who is injured in course of furnishing floodlights for apprehension of burglars at the request of the police is not engaged in firemanic duties and is not entitled to benefits under this section. 1961 Ops St Compt #824.

Members of a fire police squad assigned to attend meetings or public assemblies for purposes of observing and reporting violations of safety requirements are acting as volunteer firemen not in the capacity of fire police, and, while so engaged, they are covered by the benefit provisions of this law. 1961 Ops St Compt #866.

This section confers the right to volunteer firemen's benefits on such firemen when injured while voluntarily engaged in remodeling a structure for use as a company firehouse pursuant to orders or authorization. 1962 Ops St Compt #413.

By-laws of volunteer fire department may provide for class of membership of volunteer firefighters to perform firemanic functions other than fighting fires, such as dispatching. 1987 Op St Compt No. 87-57.

10. When coverage begins and ends

Whether a volunteer fire department member was acting in line of duty in traveling home from a parade by his company at a neighboring town was for determination by the board, whose finding that he was not would not be overturned where it appeared that attendance was purely voluntary, that he remained over for social activities, and was killed as the result of an automobile accident while leisurely driving back. Sloper v Westport, 13 A.D.2d 566, 212 N.Y.S.2d 362, 1961 N.Y. App. Div. LEXIS 12195 (N.Y. App. Div. 3d Dep't 1961).

Death of a volunteer fireman could be considered as incurred in course of "necessary travel" in connection with firemanic duties where he was found dead in the highway in front of his home, due to apparently having been struck by a passing motorist after alighting from a car of a fellow fireman in which he was driven home following performance of assigned duty in keeping entrance of the firehouse clear from parked cars during a church social taking place next door to the firehouse, there being no witness to the accident. Hofmann v Hurley, 17 A.D.2d 181, 233 N.Y.S.2d 622, 1962 N.Y. App. Div. LEXIS 7120 (N.Y. App. Div. 3d Dep't 1962).

Where a volunteer fireman who was, by trade, a carpenter self-employed but was also a member of a volunteer ambulance unit affiliated with his fire department, was injured by a fall from a ladder after returning from an ambulance trip to retrieve tools and material on the roof of a building, the question of whether his work activity fell within the exclusion in par. e of subd. 2 of this section was one for evaluation by the board which could properly dismiss the claim. Rescigno v Eastchester, 21 A.D.2d 923, 251 N.Y.S.2d 102, 1964 N.Y. App. Div. LEXIS 3356 (N.Y. App. Div. 3d Dep't), app. denied, 14 N.Y.2d 489, 1964 N.Y. LEXIS 1907 (N.Y. 1964).

Paragraph a of subd. 1 of this section, providing for coverage of a volunteer fireman while necessarily engaged in traveling to or returning from an emergency, contemplates portal-to-portal coverage but ceases when he reaches the place of performance of his private work and becomes engaged in a phase of purely personal endeavor. Rescigno v Eastchester, 21 A.D.2d 923, 251 N.Y.S.2d 102, 1964 N.Y. App. Div. LEXIS 3356 (N.Y. App. Div. 3d Dep't), app. denied, 14 N.Y.2d 489, 1964 N.Y. LEXIS 1907 (N.Y. 1964).

Agency Opinions

Analysis

1. In general
2. Effect of salaried performance
3. Emergency relief teams
4. Fund raising activities
5. Insurance
6. Non-active members
7. —Ladies' auxiliary
8. Performance of non-firefighting duties

1. In general

Firemen should respond to call where danger of fire is imminent, as in case of a bomb scare, and should assist in evacuation of premises but should not attempt to search for, remove or neutralize a bomb unless specially trained therefor nor authorize re-entry until such search, removal or neutralization is accomplished by special demolition experts. 1964 NY Ops Atty Gen Apr 30.

A volunteer fireman's entitlement to V.F.B.L. benefits is not dependent upon whether or not the fire vehicle, on which he is responding to a call when injured, utilized a siren and/or red flashing lights. 1979 Op St Compt File #230.

A volunteer member of the emergency rescue and first aid squad of a fire company injured in the line of duty while responding to a call from a fire protection district which the company provides fire protection pursuant to contract would be entitled to coverage under the Volunteer Firemen's Benefit Law regardless of whether or not the contract required the company to provide emergency ambulance service. 1982 Op St Compt File #82-236.

A volunteer fireman acting in that capacity is covered by the VFBL while engaged in assisting in the containment of a spill of hazardous substances. The insurance carrier, of course, would make a determination of coverage in the first instance. 1982 Op St Compt File #82-266.

2. Effect of salaried performance

Volunteer firemen must perform their firemanic duties without remuneration and a town board is not authorized to compensate them for such. 1966 NY Ops Atty Gen Feb 14.

While temporary paid employment of a volunteer fireman for stand-by duties would disqualify him for benefits under this law if he were injured during such temporary service, his status as a member of a volunteer fire department or fire company would not be affected thereby. 1967 NY Ops Atty Gen May 15.

A chief engineer of a volunteer fire department, or other officer who may be called upon to be the acting chief of a volunteer fire department, may not be a paid employee of the department but a volunteer fireman of the fire department may be an employee of the fire department if, and only if, the duties for which he is paid are non-firemanic in nature. If he performs any firemanic duties as a paid employee, then he becomes a paid fireman and is not covered under the provisions of the Volunteer Firemen's Benefit Law. 1974 NY Ops Atty Gen Mar 15 (informal).

3. Emergency relief teams

The governing board of a fire district must conduct a public hearing before authorizing a general ambulance service and the district may furnish such service only if it has an emergency relief squad. Such service is restricted to assistance of disabled persons within the district or residents thereof and the area receiving assistance is liable for injury or death of the volunteer firemen. 1957 NY Ops Atty Gen Oct 7 (informal).

Members of a rescue team organized within a volunteer fire department to conduct underwater rescue missions and to search for victims are covered by the New York State Volunteer Firemen's Benefit Law when acting in the performance of such duties. 1973 NY Ops Atty Gen Apr 5.

Discussion of entitlement of volunteer members of an emergency rescue and first aid squad established prior to the enactment of General Municipal Law § 209-b(2)(e), and authorized to provide general ambulance service, to benefits under the Volunteer Firemen's Benefit Law. 1978 Op St Compt File #207.

Volunteer firemen who are members of an emergency rescue and first aid squad would seem to be covered under the Volunteer Firemen's Benefit Law where they contract a contagious disease while responding to a call for general ambulance service if the squad is authorized to furnish such service pursuant to § 209-b of the General Municipal Law. Disability benefits do not include full reimbursement for lost wages from the firemen's regular job, nor are members of the volunteer firemen's family covered. 1983 Op St Compt File #83-115.

4. Fund raising activities

A fund raising activity conducted by a volunteer fire company must be under the "exclusive auspices" of such fire company to be a covered activity such as is contemplated in the Volunteer Firemen's Benefit Law and the General Municipal Law. 1979 NY Ops Atty Gen August 15 (informal).

5. Insurance

Liability for tournament coverage under Volunteer Firemen's Benevolent Law § 5 must be covered by insurance obtained from the state fund, a stock corporation, a mutual corporation or a reciprocal insurer authorized to write volunteer firemen's benefit insurance. 1957 NY Ops Atty Gen June 11.

6. Non-active members

7. —Ladies' auxiliary

Women who are active members of a volunteer fire company, even though their duties are limited to answering phone calls, are protected by this statute. 1964 NY Ops Atty Gen June 23.

Discussion of coverage of a volunteer fireman after he has entered the Armed Forces. 1963 NY Ops Atty Gen Aug 7.

The act of classifying a volunteer fireman as an "active member" of a fire company has no bearing on such fireman's entitlement to benefits under the Volunteer Fireman's Benefit Law; a fireman who is on restricted duty may, nevertheless, qualify as an

"active member" of the company for the purpose of receiving benefits. 1978 Op St Compt File #1053.

8. Performance of non-firefighting duties

A "water ball fight" between fire companies is in the nature of a competitive training program or a recreational or social activity, and injury sustained by a volunteer fireman while participating therein is not covered by this law. 1962 NY Ops Atty Gen Sept 11.

Authorities having control of fire departments and fire companies may organize within such departments or companies fire police squads composed of their volunteer members and, if they are properly ordered to duty to direct traffic at fires, they are covered under Volunteer Firemen's Benefit Law while in performance of such. 1966 NY Ops Atty Gen Sept 15.

The training of Explorer Scouts by volunteer firemen would not seem to fall within volunteer firemen's benefits coverage. 1978 Op St Compt File #381.

Enclosure of Op. No. 77-878, relating to pumping out of cellars by volunteer firemen. 1978 Op St Compt File #410.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 3; Gen Mun § 204-a; Ins § 162; Town § 176-a; Work Comp § 61.

This section referred to in CLS Ins § 3221.

Youth programs, CLS Gen Mun § 204-b.

Jurisprudences:

26 NY Jur 2d Counties, Towns, and Municipal Corporations § 959.

Annotations:

Validity, construction, and application of regulation regarding outside employment or occupation of firemen. 88 ALR2d 1235.

§ 6. Volunteer firefighters' benefits; general.

If a volunteer firefighter dies from the effects of injury in line of duty, or if such a firefighter shall be injured in line of duty, benefits shall be paid and provided pursuant to this chapter, except that there shall be no liability for such benefits when the injury has been solely occasioned by intoxication of the volunteer firefighter while acting in line of duty or by the wilful intention of the volunteer firefighter to bring about the injury or death of himself or herself or another.

HISTORY:

Add, L 1956, ch 696; amd, L 1957, ch 751, § 3, eff April 19, 1957; L 2018, ch 476, § 266, effective December 28, 2018.

Editor's Notes: See 1956 notes to Art I.

Amendment Notes The 2018 amendment by ch 476, § 266, rewrote the section heading, which formerly read: "Volunteer firemen's benefits; general"; and substituted "firefighter" for "fireman" four times and added "or herself."

Notes to Decisions

The death of a volunteer fireman while marching in a Memorial Day parade was properly found to have occurred "in the line of duty", and consequently, his widow was properly awarded death benefits pursuant to provisions of the Volunteer Firemen's Benefit Law. Sullivan v Delphi Falls Fire Co., 29 A.D.2d 584, 285 N.Y.S.2d 682, 1967 N.Y. App. Div. LEXIS 2756 (N.Y. App. Div. 3d Dep't 1967).

Evidence which established, inter alia, that sole cause of volunteer fireman's collapse from heart seizure while participating in firemen's parade was an underlying arteriosclerotic heart disease and that occurance of collapse during course of parade was only coincidental was sufficient to sustain finding that claimant did not sustain injury in the line of duty, within volunteer firemen's benefit law. De Witta v Bay Shore Fire Dist., 47 A.D.2d 981, 367 N.Y.S.2d 116, 1975 N.Y. App. Div. LEXIS 9466 (N.Y. App. Div. 3d Dep't 1975).

Workers' Compensation Board was not required to consider volunteer firefighter's intoxication as basis for denying him benefits for injuries suffered in motorcycle accident where employer failed to prove that intoxication was sole cause of accident. Stewart v Chili, 146 A.D.2d 933, 536 N.Y.S.2d 970, 1989 N.Y. App. Div. LEXIS 484 (N.Y. App. Div. 3d Dep't 1989).

Decision finding that claimant did not suffer loss of earning capacity was not supported by substantial evidence where it was unrefuted that, after his injury, claimant could work only fraction of number of hours per week he had previously devoted to his self-employment as attorney; Workers' Compensation Board erroneously relied on fact that claimant was currently earning more than he had at time of accident. Young v Moyers Corners Fire Dep't, 243 A.D.2d 883, 663 N.Y.S.2d 326, 1997 N.Y. App. Div. LEXIS 10131 (N.Y. App. Div. 3d Dep't 1997).

Workers' Compensation Board, which classified claimant as having permanent partial disability, properly found that he did not suffer loss of earning capacity under CLS Vol Fire Ben § 3(8) where he returned to his regular job duties as electrician following both accidents, his chiropractor did not impose any restrictions on his work subsequent to first accident, at time of second accident, claimant had different employment entailing assembly of electrical components at work bench, which he stated did not require any heavy lifting, and it was not until about one year later when claimant's back condition was exacerbated that chiropractor imposed restrictions on lifting and bending; claimant's testimony that such limitations precluded him from applying for higher paying and more physically demanding positions was irrelevant as to whether he suffered loss of earning capacity under Volunteer Firefighters' Benefit Law. Griffo v Onondaga Hill Volunteer Fire Dep't, 256 A.D.2d 858, 681 N.Y.S.2d 835, 1998 N.Y. App. Div. LEXIS 13578 (N.Y. App. Div. 3d Dep't 1998).

Benefits paid under volunteer firemen's benfit law are benefits under workmen's compensation law or plan of state within meaning of applicable offset provision of Social Security Act (42 USCS § 405). Beesmer v Heckler, 744 F.2d 10, 1984 U.S. App. LEXIS 18680 (2d Cir. N.Y. 1984).

Although not prohibited by law, it is inadvisable for a volunteer fireman serving one fire district to accept employment as a paid fireman in another district, since, in certain situations, he may jeopardize his rights to benefits pursuant to the Volunteer Firemen's Benefit Law. 1960 Ops St Compt File #255.

It is doubtful that a person regularly employed as a paid fireman will be covered under the Volunteer Firemen's Benefit Law for injuries or death sustained while serving as a volunteer during off-duty periods. 1960 Ops St Compt File #947.

A volunteer fireman who is injured while engaged in firemanic activity for which benefits are provided under this act is not entitled to additional benefits because he is a minor. 1961 Ops St Compt #518.

Volunteer members of village fire companies 16 years of age are entitled to protection afforded by this act. 1963 Ops St Compt #217.

Where a volunteer fireman has entered upon military service but not been granted leave of absence because still available for fire fighting duty, he is covered by the provisions of this law if injured in line of duty while a member of the fire company. 1964 Ops St Compt #35.

There is no apparent incompatibility per se between the offices of town fire district fire company line officer and town fire prevention officer. 1968 Ops St Compt File #18.

UNDER FORMER WORK COMP L § 10

1. In general

Claimant, volunteer fireman, sustained accident in firehouse of fire district in 1952. Both town and fire district carried workmen's compensation insurance policy. Decision holding fire district's carrier solely liable for medical payments in excess of $500 affirmed. Doremus v Tallman Fire Dist., 5 A.D.2d 945, 172 N.Y.S.2d 285, 1958 N.Y. App. Div. LEXIS 6490 (N.Y. App. Div. 3d Dep't 1958).

Where a town volunteer fireman had been summoned to assist two men caught in a manhole in a fire district and suffered

asphyxiation in his efforts to release the two men, the decedent at the time of his death was an employee of the fire district and not of the defendant town. Hence, his common law action against the fire district should be dismissed on the ground that the Workmen's Compensation Law was a complete bar to such an action and a motion to dismiss the complaint against the town should have been denied. Bauman v Irondequoit, 122 N.Y.S.2d 47, 204 Misc. 494, 1953 N.Y. Misc. LEXIS 1809 (N.Y. Sup. Ct.), aff'd, 282 A.D. 916, 125 N.Y.S.2d 250, 1953 N.Y. App. Div. LEXIS 5406 (N.Y. App. Div. 1953).

A volunteer fireman injured in the performance of his duties as such is entitled to benefits from the first day of his disability. 1953 Ops St Compt File #6147.

2. Constitutionality

The amendment to this section covering volunteer firemen is constitutional. Bauman v Irondequoit, 122 N.Y.S.2d 47, 204 Misc. 494, 1953 N.Y. Misc. LEXIS 1809 (N.Y. Sup. Ct.), aff'd, 282 A.D. 916, 125 N.Y.S.2d 250, 1953 N.Y. App. Div. LEXIS 5406 (N.Y. App. Div. 1953).

3. Relation to other laws

General Municipal Law § 205 is broader than Workers Compensation Law § 10. Hence, a determination of the Workmen's Compensation Board dismissing a volunteer fireman's claim for injury suffered while attending a parade and drill was not a bar to a similar proceeding under the General Municipal Law. Weiss v Franklin Square & Munson Fire Dist., 309 N.Y. 52, 127 N.E.2d 804, 309 N.Y. (N.Y.S.) 52, 1955 N.Y. LEXIS 929 (N.Y. 1955).

A fire district may not purchase insurance under Town Law § 176(19) to protect persons who may not legally be members of the fire district fire department. 1953 Ops St Compt File #6074.

Members of fire police squads are covered under § 205 of the General Municipal Law and § 10 of the Workmen's Compensation Law and other sections related thereto when injured outside of the village while rendering services pursuant to a mutual aid arrangement or while rendering services pursuant to a contract between the fire protection district and the village of which their fire company and fire police squad is a part. 1955 Ops St Compt File #7238.

Members of a fire department emergency relief squad are covered by the provisions of § 205 of the General Municipal Law and the Workmen's Compensation Law when performing services in case of fire, accident, public calamity or other emergency. 1955 Ops St Compt File #7303.

Volunteer firemen who are members of an emergency relief squad may respond to calls for assistance from territory outside the area regularly protected and such squads are covered by the provisions of General Municipal Law § 205 and the Workmen's Compensation Law when performing services in case of fire, accident, public calamity or other emergency. 1956 Ops St Compt File #7846.

4. Active membership requirement

A "member at large" of a volunteer fire association who was not an "active" member but attended a fire and suffered a heart attack after assisting in fighting the fire was not an employee of the fire Commissioners of a fire district and was not covered by a policy covering employees. Smith v Laurelton Fire Dep't, 279 A.D. 291, 110 N.Y.S.2d 135, 1952 N.Y. App. Div. LEXIS 4658 (N.Y. App. Div. 1952).

Volunteer firemen are entitled to benefits even though membership dues are not paid up. 1950 Ops St Compt File #4707.

"Firemen" of unincorporated private group organized to fight fire in town outside villages and fire districts are not entitled to statutory financial benefits provided for volunteer firemen of duly organized volunteer fire companies. 1955 Ops St Compt File #7379.

All members of a volunteer fire company must be active members. The law does not recognize inactive classifications. 1955 Ops St Compt File #7510.

A fire district or municipality is not liable for payment of benefits to member of a ladies' auxiliary injured while attending a fire. 1956 Ops St Compt File #2028.

All members of a volunteer fire company must be active members in order to be entitled to benefits in the case of injury or death. 1956 Ops St Compt File #8070.

5. —Residency

For a discussion of problems involved when volunteer fireman moves from one fire district to an adjoining fire district, see 1953 Ops St Compt File #6207.

Where the qualifications for membership in the fire department of the City of Peekskill require that the member be a resident, membership is forfeited if the member ceases to be a resident of the city, and such person will no longer be protected by the provisions of this section. 1954 Ops St Compt File #6550.

6. Line of duty requirement

If a volunteer fireman is injured while participating in an outing or clambake or while engaging in a sport as a member of a departmental athletic team, he is not protected by the provisions of § 205 of the General Municipal Law and this section. 1949 Ops St Compt File #4042.

Volunteer firemen, who respond to calls in a fire district "emergency vehicle" on occasions not involving fire, accident, public calamity or other emergency, will not be entitled to benefits provided by § 205 of the General Municipal Law or this section if they are, or should be, aware that the occasion is not one of those mentioned above. 1951 Ops St Compt File #5411.

Compensation coverage of volunteer firemen participating in a parade. 1951 Ops St Compt File #5485.

Village is not liable for injuries to its volunteer firemen while furnishing fire protection outside village. Town board may, at request of village, include village in a single policy of insurance indemnifying against liability for benefits to volunteer firemen. 1955 Ops St Compt File #7311.

Volunteer fireman injured while participating as such in civil defense drill is performing a firemanic duty; thus, insurance providing coverage in case of injury or death while performing firemanic duty, provides coverage during such drills. 1955 Ops St Compt File #7359.

Generally speaking, volunteer firemen are within the performance of their duties while going to or returning from authorized meetings for purposes of instructing or being instructed in fire duties. 1955 Ops St Compt File #7376.

Whether or not volunteer firemen are covered under § 205 of the General Municipal Law and § 10 of the Workmen's Compensation Law when engaged in the rescue of cats or other animals from trees and roof depends upon whether or not a public emergency exists, which is a question of fact. 1955 Ops St Compt File #7419.

A volunteer fireman is performing his firemanic duties at a fire until he returns to his point of departure regardless of whether he travels directly to and from the fire or goes and returns via a firehouse to assist with apparatus so long as there is no intervening deviation from his duty. 1955 Ops St Compt File #7558.

Volunteer firemen who are members of an emergency relief squad may respond to calls for assistance from territory outside the area regularly protected and such squads are covered by the provisions of General Municipal Law § 205 and the Workmen's Compensation Law when performing services in case of fire, accident, public calamity or other emergency. 1956 Ops St Compt File #7846.

7. Coverage outside home area

An award was properly made where a volunteer fireman, attending a parade in another town because he was compelled to do so or be subjected to a fine, collapsed and died after the parade. However, he was not responding to a call for assistance from the town where the parade was held. Cottrell v Pleasantville Fire Dist., 279 A.D. 1124, 112 N.Y.S.2d 588, 1952 N.Y. App. Div. LEXIS 6040 (N.Y. App. Div. 1952).

The decedent, a volunteer fireman, answered a call for assistance from an adjacent fire district and after the fire in that district had been placed under control he returned to his own station. Later, the same fire spread into the district served by the decedent and, in fighting that fire, decedent was fatally injured. Liability was not imposed on the adjacent fire department be-

cause decedent lost his life in fighting a fire in his own district. Ames v Brentwood Fire Dep't, 1 A.D.2d 859, 148 N.Y.S.2d 897, 1956 N.Y. App. Div. LEXIS 6296 (N.Y. App. Div. 3d Dep't), reh'g denied, 1 A.D.2d 985, 151 N.Y.S.2d 359, 1956 N.Y. App. Div. LEXIS 5822 (N.Y. App. Div. 3d Dep't 1956), app. denied, 1 N.Y.2d 643, 1956 N.Y. LEXIS 1385 (N.Y. 1956), app. denied, 1 N.Y.2d 643, 1956 N.Y. LEXIS 1390 (N.Y. 1956).

This section contemplates only an emergency of a public nature. A volunteer fireman transporting a person who suffered a heart attack outside his own district upon a call from a hospital located outside the district did not make the outside district responsible for compensation benefits. Rocque v Waterford, 2 A.D.2d 716, 152 N.Y.S.2d 862, 1956 N.Y. App. Div. LEXIS 5013 (N.Y. App. Div. 3d Dep't 1956).

Claimant, volunteer fireman, was member of fire department of Village of Watkins Glen. In 1955, he was injured at Village of Odessa while participating in test fire drill held pursuant to county mutual aid plan. Held. Village of Watkins Glen was properly held liable to claimant and Village of Odessa properly relieved from liability. There was no call for assistance from Village of Odessa within the meaning of this section. Woodworth v Watkins Glen, 7 A.D.2d 694, 179 N.Y.S.2d 226, 1958 N.Y. App. Div. LEXIS 4351 (N.Y. App. Div. 3d Dep't 1958).

Volunteer firemen rendering mutual aid assistance to a municipality or area served by paid firemen are entitled to compensation coverage. 1951 Ops St Compt File #5456.

Municipality or district issuing call for assistance is liable for benefits to firemen injured or killed and for equipment damaged and materials used. 1953 Ops St Compt File #6285.

The "home territory" of a volunteer fire company is liable for the payment of benefits, adjudged to be payable where a member of such company is injured or killed while attending a fire company meeting, a fire drill, a tournament or a parade and inspection when authorized to do so. 1954 Ops St Compt File #6714.

Where a village fireman is injured while rendering fire protection service to an area of a town outside of the village and outside of a fire district, the town must provide for the payment of benefits. If the town has not secured insurance by one of the prescribed methods, it must pay the benefits and charge the cost back upon the fire protection district, the fire alarm district or the unorganized territory which the fire occurred. 1954 Ops St Compt File #6742.

Members of fire police squads are covered under § 205 of the General Municipal Law and § 10 of the Workmen's Compensation Law and other sections related thereto when injured outside of the village while rendering services pursuant to a mutual aid arrangement or while rendering services pursuant to a contract between the fire protection district and the village of which their fire company and fire police squad is a part. 1955 Ops St Compt File #7238.

Discussion re liabilities arising out of fire on New York State Thruway relative to (1) benefits to volunteer firemen, (2) damage to apparatus or equipment and (3) tort liability. 1955 Ops St Compt File #7593.

The area which calls for assistance is liable for damages to the fire equipment and also cost of workmen's compensation for volunteer firemen injured at a fire. 1955 Ops St Compt File #7638.

8. Insurance

The benefits available to volunteer firemen are integrated under the General Municipal Law and the Workmen's Compensation Law. Municipal corporations in fire districts are empowered to procure insurance indemnifying against liability imposed under Workmen's Compensation Law, but such contracts of insurance must also indemnify against the liability imposed under the General Municipal Law. It would be anomalous if the benefits provided by one statute constituted a liability of the town while the benefits payable under the other constituted a liability of a fire district. Bauman v Irondequoit, 122 N.Y.S.2d 47, 204 Misc. 494, 1953 N.Y. Misc. LEXIS 1809 (N.Y. Sup. Ct.), aff'd, 282 A.D. 916, 125 N.Y.S.2d 250, 1953 N.Y. App. Div. LEXIS 5406 (N.Y. App. Div. 1953).

A county mutual self-insurance plan gives participating village complete protection against the claims of volunteer firemen injured in the line of duty. The rates of compensation payable are not dependent upon the nature of the firemanic duty being performed. 1952 Ops St Compt File #5906.

A fire district may not purchase insurance under Town Law § 176(19) to protect persons who may not legally be members of the fire district fire department. 1953 Ops St Compt File #6074.

Village insurance does not cover its volunteer firemen engaged in protecting property in fire district pursuant to a contract. Fire district is liable in such case. Board of fire commissioners may not delegate to village board the power to purchase insurance to cover such liability. 1953 Ops St Compt File #6326.

Village is not liable for injuries to its volunteer firemen while furnishing fire protection outside village. Town board may, at request of village, include village in a single policy of insurance indemnifying against liability for benefits to volunteer firemen. 1955 Ops St Compt File #7311.

A town may use general town funds in the first instance to purchase insurance indemnifying a fire protection district against the liability for volunteer firemen's benefits. 1955 Ops St Compt File #7592.

Agency Opinions

Analysis

UNDER FORMER WORK COMP L § 10
1. Active membership requirement
2. Coverage outside home area
3. Insurance

UNDER FORMER WORK COMP L § 10

1. Active membership requirement

Honorary life members are not volunteer members of the fire department entitled to benefits under the General Municipal L § 205, and under Workmen's Compensation L § 10. 1960 NY Ops Atty Gen May 2 (informal).

2. Coverage outside home area

Paid or volunteer firemen are State employees while serving as instructors at county fire training schools and are entitled to the benefits of the Workmen's Compensation Law while engaged in the performance of such duties. 1949 NY Ops Atty Gen March 7.

Volunteer firemen answering a call to a federal reservation or installation are protected under the applicable provisions of the General Municipal Law and Workmen's Compensation Law. 1949 NY Ops Atty Gen March 7.

3. Insurance

Interstate compacts for reciprocal fire protection. 1948 NY Ops Atty Gen June 3.

An endorsement naming a fire department or company, fire commissioners and/or fire chiefs as additional insureds cannot be added to nor form a part of a fire district's Volunteer Firemen's Benefit Law insurance policy originally issued to take effect on or after March 1, 1962. A fire district may purchase liability insurance for the fire departments or companies, fire commissioners and fire chiefs serving the district. 1983 NY Ops Atty Gen April 14 (informal).

A volunteer fireman's entitlement to V.F.B.L. benefits is not dependent upon whether or not the fire vehicle, on which he is responding to a call when injured, utilized a siren and/or red flashing lights. 1979 Op St Compt File #230.

RESEARCH REFERENCES AND PRACTICE AIDS

Federal Aspects:

Old-age, survivors and disability insurance benefits, 42 USCS § 418.

Jurisprudences:

Law Reviews:

Wolff, Workmen's Compensation. 24 Syracuse L Rev, No. 1, p. 249, 1973.

Larson, Intoxication as a defense in Workmen's Compensation. 59 Cornell L Rev, p. 398, March, 1974.

Matthew Bender's New York Practice Guides: 4 New York Practice Guide: Business and Commercial § 25A.09.

§ 7. Lt. Michael E. Neuner/Timothy Goff memorial death benefit program

In the event of death the benefit shall be known as a death benefit and shall be paid as follows:

1. The reasonable funeral expenses of the deceased volunteer firefighter shall be paid in an amount not exceeding six thousand seven hundred dollars; provided however, that such six thousand dollar maximum shall not apply where a volunteer firefighter dies from injuries received in the line of duty as a direct result of firefighting. If such funeral expenses shall have been paid by a person entitled to benefits under this section or by others, the funeral expenses awarded shall be made payable to such beneficiary or others; otherwise they shall be payable to the undertaker who provided the burial. Funeral expenses shall be awarded in all death cases.

2. If there be a surviving spouse, to such spouse the lump sum of fifty-six thousand dollars, but if there be no surviving spouse, then to the executor or administrator of the estate of the volunteer firefighter, the lump sum of fifty-six thousand dollars. Such sum shall be in addition to any other benefits provided in this chapter and shall not be diminished by benefits paid to the volunteer firefighter during his or her lifetime. Any money paid to an executor or administrator pursuant to the provisions of this subdivision shall be distributed in the manner provided by the laws of this state for the distribution of the personal property of an intestate decedent. Provided, however, that nothing herein shall be construed as affording a greater benefit for those volunteer firefighters injured prior to the effective date of this act, however the spouse or estate of such firefighter shall continue to be eligible for a benefit in the sum of eleven thousand eighty-four dollars.

3. If there be a surviving spouse and no surviving child of the deceased under the age of eighteen years or under the age of twenty-five years who is enrolled as a full time student in any accredited educational institution and no surviving child of any age dependent blind or physically disabled, to such spouse one hundred thirty dollars for each week until remarried, and upon such remarriage the lump sum of thirteen thousand one hundred forty-two dollars.

4. If there be a surviving spouse and a surviving child or children of the deceased under the age of eighteen years or under the age of twenty-five years who is enrolled as a full time student in any accredited educational institution or a surviving child or children of any age dependent blind or physically disabled, to such spouse ninety-five dollars for each week until remarried, and upon such remarriage the lump sum of nine thousand eight hundred fifty-six dollars; and an additional amount of sixty-three dollars for each week for each such child until the age of eighteen years or under the age of twenty-five years who is enrolled as a full time student in any accredited educational institution or until the removal of the dependency of the blind or physically disabled child or children; in the case of the subsequent death or remarriage of such surviving spouse any surviving child of the deceased firefighter, at the time under eighteen years of age or under the age of twenty-five years who is enrolled as a full time student in any accredited educational institution or dependent through mental or physical infirmity, shall have his or her benefit increased to ninety-five dollars for each week, and the same shall be payable until he or she shall reach the age of eighteen years or twenty-five years, as the case may be, or until such dependent blind or physically disabled condition shall have been removed; provided that the total amount payable for each week under this subdivision shall in no case exceed two hundred fifty-three dollars per week. Upon statutory termination of payments to all such children, the payments to the surviving spouse shall be increased to one hundred thirty dollars for each week until such spouse remarries, and upon such remarriage, such spouse shall be paid the lump sum of twelve thousand thirty-three dollars.

5. If there be surviving child or children of the deceased under the age of eighteen years or under the age of twenty-five years who is enrolled as a full time student in any accredited educational institution or a dependent blind or physically disabled child or children of any age, but no surviving spouse, for the support of each such child until the age of eighteen years or twenty-five years as the case may be, or until the removal of the dependency of such blind or physically disabled child or children, ninety-five dollars for each week; provided that the total amount payable for each week under this subdivision shall not exceed two hundred fifty-three dollars per week.

6. If there be no surviving spouse, or child of the deceased under the age of eighteen years, or under the age of twenty-five years who is enrolled as a full time student in any accredited educational institution or dependent blind or physically disabled child of the deceased of any age, or if the amount payable for each week to the surviving spouse and to children under the age of eighteen years or under the age of twenty-five years who is enrolled as a full time student in any accredited educational institution or such dependent blind or physically disabled children shall be less in the aggregate than two hundred fifty-three dollars per week, for the support of grandchildren or brothers and sisters under the age of eighteen years, or under the age of twenty-five years who is enrolled as a full time student in any accredited educational institution if dependent upon the deceased at the time of the injury, seventy-nine dollars for each week for the support of each such person until the age of eighteen years or twenty-five years as the case may be, and for the support of each parent or grandparent, of the deceased if dependent upon him at the time of the injury one hundred

thirty dollars for each week during such dependency, but in no case shall the aggregate amount payable under this subdivision exceed the difference between two hundred fifty-three dollars and the amount payable for each week as hereinbefore provided to the surviving spouse or for the support of a surviving child or children.

7. If any person under the age of eighteen years is an inmate of any institution and a public charge upon the state or any political subdivision, the benefits allowed hereunder shall be payable to the state or political subdivision to the extent of the reasonable charges for care and maintenance, during the continuance as a public charge in such institution of such beneficiary and until he shall have attained the age of eighteen years. Any sum or sums remaining after such payments shall be distributed as provided in this section.

8. The term "dependent blind or physically disabled", as used in this section in relation to dependent children, means totally blind or physically disabled dependent children whose disablement is total and permanent.

9. All questions of dependency shall be determined as of the time of the injury.

10. The workers' compensation board may in its discretion require the appointment of a guardian for the purpose of receiving benefits payable to a minor child or a dependent blind or physically disabled child. In the absence of such a requirement by such board the appointment of a guardian for such purposes shall not be necessary.

11. In the case of a death of a volunteer firefighter, on or after January first, nineteen hundred seventy-eight and prior to July first, nineteen hundred seventy-eight, that results from services performed in the line of duty, if there be a surviving spouse and no surviving child of the deceased under the age of eighteen years or under the age of twenty-five years who is enrolled as a full time student in any accredited educational institution and no surviving child of any age dependent blind or physically disabled, to such spouse two hundred eighty-two dollars for each week until remarried, and upon such remarriage the lump sum of twenty-nine thousand three hundred fifty-four dollars.

12. In the case of a death of a volunteer firefighter, on or after January first, nineteen hundred seventy-eight and prior to July first, nineteen hundred seventy-eight, that results from services performed in the line of duty, if there be a surviving spouse and a surviving child or children of the deceased under the age of eighteen years or under the age of twenty-five years who is enrolled as a full time student in any accredited educational institution or a surviving child or children of any age dependent blind or physically disabled, to such spouse one hundred fifty-six dollars for each week until remarried, and the additional amount of one hundred thirty dollars for each week for such child or children, share and share alike, until the age of eighteen years or under the age of twenty-five years who is enrolled as a full time student in any accredited educational institution or until the removal of the dependency of the blind or physically disabled child or children. In the case of the death of such surviving spouse, the surviving child or children of the deceased firefighter, at the time under eighteen years of age or under the age of twenty-five years who is enrolled as a full time student in any accredited educational institution or dependent through mental or physical infirmity, shall have his or their benefit increased to two hundred eighty-two dollars for each week, share and share alike, and the same shall be payable until he or they shall reach the age of eighteen years or twenty-five years, as the case may be, or until such dependent blind or physically disabled condition shall have been removed. Upon the remarriage of such surviving spouse prior to the statutory termination of benefits to all such children, such spouse shall be paid the lump sum of sixteen thousand one hundred forty-five dollars; and the surviving child shall continue to receive weekly payments of one hundred thirty dollars; if there be two surviving children, each shall receive one hundred six dollars per week; and if there be more than two surviving children, they shall receive two hundred eighty-two dollars per week, share and share alike; and the same shall be payable until he or they shall reach the age of eighteen years or twenty-five years, as the case may be, or until such dependent blind or crippled condition shall have been removed. Upon statutory termination of payments to all children, the payments to the surviving spouse shall be increased to two hundred eighty-two dollars for each week until such spouse remarries, and upon such remarriage, such spouse shall be paid the lump sum of twenty-nine thousand three hundred fifty-four dollars. In no event shall the total amount payable for each week under this subdivision exceed two hundred eighty-two dollars.

13. In the case of a death of a volunteer firefighter, on or after January first, nineteen hundred seventy-eight and prior to July first, nineteen hundred seventy-eight, that results from services performed in the line of duty, if there be surviving a child or children of the deceased under the age of eighteen years or under the age of twenty-five years who is enrolled as a full time student in any accredited educational institution or a dependent blind or physically disabled child or children of any age, but no surviving spouse, for the support of such child or children until the age of eighteen years or twenty-five years, as the case may be, or until the removal of the dependency of such blind or physically disabled child or children, two hundred eighty-two dollars, share and share alike, for each week; provided that the total amount payable for each week under this subdivision shall not exceed two hundred eighty-two dollars per week.

14. In the case of a death of a volunteer firefighter, on or after January first, nineteen hundred

seventy-eight and prior to July first, nineteen hundred seventy-eight, that results from services performed in the line of duty, if there be no surviving spouse or child of the deceased under the age of eighteen years or under the age of twenty-five years who is enrolled as a full time student in any accredited educational institution or dependent blind or physically disabled child of the deceased of any age, then for the support of grandchildren or brothers and sisters under the age of eighteen years or under the age of twenty-five years who is enrolled as a full time student in any accredited educational institution, if dependent upon the deceased at the time of the injury, one hundred six dollars for each week for the support of each such person until the age of eighteen years or twenty-five years, as the case may be, and for the support of each parent or grandparent of the deceased, if dependent upon the deceased at the time of the injury, one hundred sixty-nine dollars for each week during such dependency, but in no case shall the aggregate amount payable under this subdivision exceed two hundred eighty-two dollars per week.

15. In the case of a death of a volunteer firefighter, on or after July first, nineteen hundred seventy-eight and prior to January first, nineteen hundred seventy-nine, that results from services performed in the line of duty, if there be a surviving spouse and no surviving child of the deceased under the age of eighteen years or under the age of twenty-five years who is enrolled as a full time student in any accredited educational institution and no surviving child of any age dependent blind or physically disabled, to such spouse four hundred six dollars for each week until remarried, and upon such remarriage the lump sum of forty-two thousand two hundred seventy dollars.

16. In the case of a death of a volunteer firefighter, on or after July first, nineteen hundred seventy-eight and prior to January first, nineteen hundred seventy-nine, that results from services performed in the line of duty, if there be a surviving spouse and a surviving child or children of the deceased under the age of eighteen years or under the age of twenty-five years who is enrolled as a full time student in any accredited educational institution or a surviving child or children of any age dependent blind or physically disabled, to such spouse two hundred twenty-four dollars for each week until remarried, and the additional amount of one hundred eighty-three dollars for each week for such child or children, share and share alike, until the age of eighteen years or under the age of twenty-five years who is enrolled as a full time student in any accredited educational institution or until the removal of the dependency of the blind or physically disabled child or children. In the case of the death of such surviving spouse, the surviving child or children of the deceased firefighter, at the time under eighteen years of age or under the age of twenty-five years who is enrolled as a full time student in any accredited educational institution or dependent through mental or physical infirmity, shall have his or their benefit increased to four hundred six dollars for each week, share and share alike, and the same shall be payable until he or they shall reach the age of eighteen years or twenty-five years, as the case may be, or until such dependent blind or physically disabled condition shall have been removed. Upon the remarriage of such surviving spouse prior to the statutory termination of benefits to all such children, such spouse shall be paid the lump sum of twenty three thousand two hundred forty-eight dollars; and the surviving child shall continue to receive weekly payments of one hundred eighty-three dollars; if there be two surviving children, each shall receive one hundred fifty-two dollars per week; and if there be more than two surviving children, they shall receive four hundred six dollars per week, share and share alike; and the same shall be payable until he or they shall reach the age of eighteen years or twenty-five years, as the case may be, or until such dependent blind or crippled conditions shall have been removed. Upon statutory termination of payments to all such children, the payments to the surviving spouse shall be increased to four hundred six dollars for each week until such spouse remarries, and upon such remarriage, such spouse shall be paid the lump sum of forty-two thousand two hundred seventy dollars. In no event shall the total amount payable for each week under this subdivision exceed four hundred six dollars.

17. In the case of a death of a volunteer firefighter, on or after July first, nineteen hundred seventy-eight and prior to January first, nineteen hundred seventy-nine, that results from services performed in the line of duty, if there be surviving a child or children of the deceased under the age of eighteen years or under the age of twenty-five years who is enrolled as a full time student in any accredited educational institution or a dependent blind or physically disabled child or children of any age, but no surviving spouse, for the support of such child or children until the age of eighteen years or twenty-five years as the case may be, or until the removal of the dependency of such blind or physically disabled child or children, four hundred six dollars, share and share alike, for each week; provided that the total amount payable for each week under this subdivision shall not exceed four hundred six dollars per week.

18. In the case of a death of a volunteer firefighter, on or after July first, nineteen hundred seventy-eight and prior to January first, nineteen hundred seventy-nine, that results from service performed in the line of duty, if there be no surviving spouse or child of the deceased under the age of eighteen years or under the age of twenty-five years who is enrolled as a full time student in any accredited educational institution or dependent blind or physically disabled child of the deceased of any age, then for the support of grandchildren or brothers

and sisters under the age of eighteen years or under the age of twenty-five years who is enrolled as a full time student in any accredited educational institution, if dependent upon the deceased at the time of the injury, one hundred fifty-two dollars for each week for the support of each such person until the age of eighteen years or twenty-five years as the case may be, and for the support of each parent or grandparent of the deceased, if dependent upon the deceased at the time of the injury, two hundred forty-four dollars for each week during such dependency, but in no case shall the aggregate amount payable under this subdivision exceed four hundred six dollars per week.

19. In the case of a death of a volunteer firefighter, on or after January first, nineteen hundred seventy-nine, that results from services performed in the line of duty, if there be a surviving spouse and no surviving child of the deceased under the age of eighteen years or under the age of twenty-five years who is enrolled as a full time student in any accredited educational institution and no surviving child of any age dependent blind or physically disabled, to such spouse four hundred seventy-seven dollars for each week until remarried, and upon such remarriage the lump sum of forty-nine thousand five hundred sixty-eight dollars.

20. In the case of a death of a volunteer firefighter, on or after January first, nineteen hundred seventy-nine, that results from services performed in the line of duty, if there be a surviving spouse and a surviving child or children of the deceased under the age of eighteen years or under the age of twenty-five years who is enrolled as a full time student in any accredited educational institution or a surviving child or children of any age dependent blind or physically disabled, to such spouse two hundred sixty-three dollars for each week until remarried, and the additional amount of two hundred fourteen dollars and fifty cents for each week for such child or children, share and share alike, until the age of eighteen years or under the age of twenty-five years who is enrolled as a full time student in any accredited educational institution or until the removal of the dependency of the blind or physically disabled child or children. In the case of the death of such surviving spouse, the surviving child or children of the deceased firefighter, at the time under eighteen years of age or under the age of twenty-five years who is enrolled as a full time student in any accredited educational institution or dependent through mental or physical infirmity, shall have his or their benefit increased to four hundred seventy-seven dollars for each week, share and share alike, and the same shall be payable until he or they shall reach the age of eighteen years or twenty-five years, as the case may be, or until such dependent blind or physically disabled condition shall have been removed. Upon the remarriage of such surviving spouse prior to the statutory termination of benefits to all such children, such spouse shall be paid the lump sum of twenty-seven thousand two hundred fifty-one dollars; and the surviving child shall continue to receive weekly payments of two hundred fourteen dollars and fifty cents; if there be two surviving children, each shall receive one hundred seventy-eight dollars and seventy-four cents per week; and if there be more than two surviving children, they shall receive four hundred seventy-seven dollars per week, share and share alike; and the same shall be payable until he or they shall reach the age of eighteen years or twenty-five years, as the case may be, or until such dependent blind or crippled condition shall have been removed. Upon statutory termination of payments to all such children, the payments to the surviving spouse shall be increased to four hundred seventy-seven dollars for each week until such spouse remarries, and upon such remarriage, such spouse shall be paid the lump sum of forty-nine thousand five hundred sixty-eight dollars. In no event shall the total amount payable for each week under this subdivision exceed four hundred seventy-seven dollars.

21. In the case of a death of a volunteer firefighter, on or after January first, nineteen hundred seventy-nine, that results from services performed in the line of duty, if there be surviving a child or children of the deceased under the age of eighteen years or under the age of twenty-five years who is enrolled as a full time student in any accredited educational institution or a dependent blind or physically disabled child or children of any age, but no surviving spouse, for the support of such child or children until the age of eighteen years or twenty-five years as the case may be, or until the removal of the dependency of such blind or physically disabled child or children, four hundred seventy-seven dollars, share and share alike, for each week; provided that the total amount payable for each week under this subdivision shall not exceed four hundred seventy-seven dollars per week.

22. In the case of a death of a volunteer firefighter, on or after January first, nineteen hundred seventy-nine, that results from services performed in the line of duty, if there be no surviving spouse or child of the deceased under the age of eighteen years or under the age of twenty-five years who is enrolled as a full time student in any accredited educational institution or dependent blind or physically disabled child of the deceased of any age, then for the support of grandchildren or brothers and sisters under the age of eighteen years or under the age of twenty-five years who is enrolled as a full time student in any accredited educational institution if dependent upon the deceased at the time of the injury, one hundred seventy-eight dollars and seventy-four cents for each week for the support of each such person until the age of eighteen years or twenty-five years as the case may be, and for the support of each parent or grandparent of the deceased, if dependent upon the deceased at the time of the injury, two hundred eighty-six dollars for each week during such depen-

dency, but in no case shall the aggregate amount payable under this subdivision exceed four hundred seventy-seven dollars per week.

23–30. [Repealed]

31. In the case of a death of a volunteer firefighter on or after July first, nineteen hundred eighty-five, that results from services performed in the line of duty, if there be a surviving spouse and no surviving child of the deceased under the age of eighteen years or under the age of twenty-five years who is enrolled as a full time student in any accredited educational institution and no surviving child of any age dependent blind or physically disabled to such spouse six hundred sixty-five dollars for each week until remarried and upon such remarriage the lump sum of sixty-nine thousand one hundred sixty-four dollars.

32. In the case of a death of a volunteer firefighter on or after July first, nineteen hundred eighty-five, that results from services performed in the line of duty, if there be a surviving spouse and a surviving child or children of the deceased under the age of eighteen years or under the age of twenty-five years who is enrolled as a full time student in any accredited educational institution or a surviving child or children of any age dependent blind or physically disabled, to such spouse three hundred sixty-six dollars for each week until remarried, and the additional amount of three hundred dollars for each week for such child or children, share and share alike, until the age of eighteen years or under the age of twenty-five years who is enrolled as a full time student in any accredited educational institution or until the removal of the dependency of the blind or physically disabled child or children. In the case of the death of such surviving spouse, the surviving child or children of the deceased firefighter, at the time under eighteen years of age or under the age of twenty-five years who is enrolled as a full time student in any accredited educational institution or dependent through mental or physical infirmity, shall have his or her benefit increased to six hundred sixty-five dollars, for each week, share and share alike, and the same shall be payable until he or she or they shall reach the age of eighteen years or twenty-five years as the case may be, or until such dependent blind or physically disabled condition shall have been removed. Upon the remarriage of such surviving spouse prior to the statutory termination of benefit to all such children, such spouse shall be paid the lump sum of thirty-eight thousand forty dollars and the surviving child shall continue to receive weekly payments of three hundred dollars; if there be two surviving children, each shall receive two hundred fifty dollars per week; and if there be more than two surviving children, they shall receive six hundred sixty-five dollars per week, share and share alike; and the same shall be payable until he or she or they shall reach the age of eighteen years or twenty-five years, as the case may be, or until such dependent blind or physically disabled condition shall have been removed. Upon statutory termination of payments to all such children, the payments to the surviving spouse shall be increased to six hundred sixty-five dollars for each week until such spouse remarries and upon such remarriage such spouse shall be paid the lump sum of sixty-nine thousand one hundred sixty-four dollars. In no event shall the total amount payable for each week under this subdivision exceed six hundred sixty-five dollars.

33. In the case of a death of a volunteer firefighter on or after July first, nineteen hundred eighty-five, that results from services performed in the line of duty, if there be surviving a child or children of the deceased under the age of eighteen years or under the age of twenty-five years who is enrolled as a full time student in any accredited educational institution or a dependent child or physically disabled child or children of any age, but no surviving spouse, for support of such child or children until the age of eighteen years or twenty-five years as the case may be, or until removal of the dependency of such blind or physically disabled child or children, six hundred sixty-five dollars share and share alike, for each week; provided that the total amount payable for each week under this subdivision shall not exceed six hundred sixty-five dollars per week.

34. In the case of a death of a volunteer firefighter on or after July first, nineteen hundred eighty-five, that results from services performed in the line of duty, if there be no surviving spouse or child of the deceased under the age of eighteen years or under the age of twenty-five years who is enrolled as a full time student in any accredited educational institution, or dependent blind or physically disabled child of the deceased of any age, then for the support of grandchildren or brothers and sisters under the age of eighteen years or under the age of twenty-five years who is enrolled as a full time student in any accredited educational institution if dependent upon the deceased at the time of the injury, two hundred fifty dollars for each week for the support of each such person until the age of eighteen years or twenty-five years as the case may be, and for the support of each parent or grandparent of the deceased if dependent upon the deceased at the time of the injury, four hundred dollars for each week during such dependency but in no case shall the aggregate amount payable under this subdivision exceed six hundred sixty-five dollars per week.

35–42. [Repealed]

43. In the case of a death of a volunteer firefighter on or after July first, nineteen hundred ninety-two, that results from services performed in the line of duty, if there be a surviving spouse and no surviving child of the deceased under the age of eighteen or under the age of twenty-five years who is enrolled as a full time student in any accredited educational institution and no surviving child of any age dependent blind or physically disabled, to such spouse eight hundred eighty-seven dollars for each week until remarried and upon such remarriage the lump

sum of ninety-two thousand two hundred nineteen dollars.

44. In the case of a death of a volunteer firefighter on or after July first, nineteen hundred ninety-two, that results from services performed in the line of duty, if there be a surviving spouse and a surviving child or children of the deceased under the age of eighteen years or under the age of twenty-five years who is enrolled as a full time student in any accredited educational institution or a surviving child or children of any age dependent blind or physically disabled, to such spouse four hundred eighty-eight dollars for each week until remarried, and the additional amount of four hundred dollars for each week for such child or children, share and share alike, until the age of eighteen years or under the age of twenty-five years who is enrolled as a full time student in any accredited educational institution or until the removal of the dependency of the blind or physically disabled child or children. In the case of the death of such surviving spouse, the surviving child or children of the deceased firefighter, at the time under eighteen years of age or under the age of twenty-five years who is enrolled as a full time student in any accredited educational institution or dependent through mental or physical infirmity, shall have his or her benefit increased to eight hundred eighty-seven dollars, for each week, share and share alike, and the same shall be payable until he or she or they shall reach the age of eighteen years or twenty-five years as the case may be, or until such dependent blind or physically disabled condition shall have been removed. Upon the remarriage of such surviving spouse prior to the statutory termination of benefit to all such children, such spouse shall be paid the lump sum of fifty thousand seven hundred twenty dollars and the surviving child shall continue to receive weekly payments of four hundred dollars; if there be two surviving children, each shall receive three hundred thirty-three dollars per week; and if there be more than two surviving children, they shall receive eight hundred eighty-seven dollars per week, share and share alike; and the same shall be payable until he or she or they shall reach the age of eighteen years or twenty-five years, as the case may be, or until such dependent blind or physically disabled condition shall have been removed. Upon statutory termination of payments to all such children, the payments to the surviving spouse shall be increased to eight hundred eighty-seven dollars for each week until such spouse remarries and upon such remarriage such spouse shall be paid the lump sum of ninety-two thousand two hundred nineteen dollars. In no event shall the total amount payable for each week under this subdivision exceed eight hundred eighty-seven dollars.

45. In the case of a death of a volunteer firefighter on or after July first, nineteen hundred ninety-two, that results from services performed in the line of duty, if there be surviving a child or children of the deceased under the age of eighteen years or under the age of twenty-five years who is enrolled as a full time student in any accredited educational institution or a dependent child or physically disabled child or children of any age, but no surviving spouse, for support of such child or children until the age of eighteen years or twenty-five years as the case may be, or until removal of the dependency of such blind or physically disabled child or children, eight hundred eighty-seven dollars share and share alike, for each week; provided that the total amount payable for each week under this subdivision shall not exceed eight hundred eighty-seven dollars per week.

46. In the case of a death of a volunteer firefighter on or after July first, nineteen hundred ninety-two, that results from services performed in the line of duty, if there be no surviving spouse or child of the deceased under the age of eighteen years or under the age of twenty-five years who is enrolled as a full time student in any accredited educational institution, or dependent blind or physically disabled child of the deceased of any age, then for the support of grandchildren or brothers and sisters under the age of eighteen years or under the age of twenty-five years who is enrolled as a full time student in any accredited educational institution if dependent upon the deceased at the time of the injury, three hundred thirty-three dollars for each week for the support of each such person until the age of eighteen years or twenty-five years as the case may be, and for the support of each parent or grandparent of the deceased if dependent upon the deceased at the time of the injury, five hundred thirty-two dollars for each week during such dependency but in no case shall the aggregate amount payable under this subdivision exceed eight hundred eighty-seven dollars per week.

HISTORY:

Add, L 1956, ch 696, eff March 1, 1957; amd, L 1959, ch 502; L 1960, ch 781; L 1962, ch 175; L 1965, ch 311; L 1968, ch 833; L 1969, ch 24; L 1970, ch 283; L 1974, ch 584; L 1975, ch 694; L 1975, ch 695; L 1975, ch 697; L 1977, ch 675, § 81; amd, L 1978, ch 550, § 57; reenacted without change, L 1978, ch 550, § 57, eff July 24, 1978. (L 1976, ch 284, § 1, changed the eff date of L 1975, ch 695, from July 1, 1976 to September 1, 1975. Section 2 of such act repealed, in relation to its effective date, ch 696, L 1975, effective immediately and the provisions thereof shall be retroactive to the first day of September, nineteen hundred seventy–five.); reenacted without change, L 1978, ch 550, § 57, eff July 24, 1978. (L 1976, ch 285, § 1, changed the eff date of L 1975, ch 697, from July 1, 1976 to September 1, 1975. Section 2 of such act repealed, in relation to its effective date, ch 698, L 1975, effective immediately and its provisions shall be retroactive to the first day of September, nineteen hundred seventy–five.); L 1978, ch 550, 57, eff July 24, 1978; L 1978, ch 597, both eff July 24, 1978; Amd, L 1981, ch 364, § 1, eff June 29, 1981; L 1983, ch 654, § 1, eff July 25, 1983; L 1983, ch 801, § 1, eff Aug 29, 1983; L 1984, ch 268, § 2, eff June 25, 1984, and applicable to injuries in the line of duty and deaths occurring on or after July 1, 1983; L 1987, ch 664, § 1, eff Aug 5, 1987; L 1988, ch 202, § 2, eff July 1, 1988, and applicable to deaths occurring on or after such date; L 1989, ch 345, § 2, eff Nov 1, 1989 (see 1989 note below); L 1990, ch 924, § 21, eff July 31, 1990, deemed eff July 1, 1990; L 1998, ch 415, §§ 1–7, eff Jan 1, 1999; L 1999, ch 577, § 1, eff Nov 1, 1999; L 2001, ch 285, §§ 1, 2, eff Sept 5, 2001, deemed eff on and after Jan

1, 1999; L 2005, ch 212, §§ 2–4, eff July 12, 2005; L 2006, ch 246, § 1, eff July 26, 2006, deemed eff on and after Jan 1, 2006; L 2018, ch 476, § 267, effective December 28, 2018.

Editor's Notes: [1962] In the Message of Governor Nelson A. Rockefeller to the Legislature, January 3, 1962 (Leg. Doc. (1962) No. 1, page 12) an increase in workmen's compensation benefits was recommended. Any such increase would be applicable to the paid officers and employees of the State, most of the paid officers and employees of the local governments in the State, as well as those who are employed in industry, and by other employers, and who have coverage under the Workmen's Compensation Law.

The public policy of this State has been to keep the amounts of certain death and disability benefits for volunteer firemen the same as the maximum amounts of the comparable death and disability benefits payable under the Workmen's Compensation Law when paid officers and employees of counties, cities, towns, villages and fire districts are killed or injured in the course of their employment. This policy has been expressed in the Volunteer Firemen's Benefit Law, enacted by the Legislature in 1956 and prior thereto by various amendments to the Workmen's Compensation Law and the General Municipal Law. Such public policy has also been expressed in amendments to the Volunteer Firemen's Benefit Law, §§ 7, 8, 9, 10, and 11. This act, in conformity with and continuance of such public policy, makes appropriate amendments to the Volunteer Firemen's Benefit Law if the increases in benefits under the Workmen's Compensation Law, as recommended by Governor Rockefeller, are enacted as law. The passage and approval of this act should depend upon the enactment of comparable increases in the Workmen's Compensation Law such as are contained in L 1962, ch 55.

Laws 1959, ch 502, § 10, provides:

§ 10. Any increase in the amount of benefits afforded by this act shall apply to any volunteer fireman injured in line of duty on or after the first day of April, nineteen hundred fifty-nine, or to the dependents of a volunteer fireman who dies from an injury received in line of duty on or after the first day of April, nineteen hundred fifty-nine.

Laws 1960, ch 781, § 7, provides:

§ 7. Any increase in the amount of benefits afforded by this act shall apply to any volunteer fireman injured in line of duty on or after the first day of July, nineteen hundred sixty, or to his dependents in the event he died on or after the first day of July, nineteen hundred sixty, from injury in line of duty.

Laws 1962, ch 175, § 6, provides:

§ 6. The increase in the amount of benefits afforded by this act shall apply to any volunteer fireman injured in line of duty on or after the first day of July, nineteen hundred sixty-two or to his dependents in the event he dies on or after the first day of July, nineteen hundred sixty-two, from injury in line of duty.

Laws 1965, ch 311, § 7, provides:

§ 7. The increase in the amount of benefits afforded by this act shall apply to any volunteer fireman injured in line of duty on or after the first day of July, nineteen hundred sixty-five or to his dependents in the event he dies on or after the first day of July, nineteen hundred sixty-five, from injury in line of duty.

Laws 1968, ch 833, § 7, provides as follows:

§ 7. The increase in the amount of benefits afforded by this act shall apply to any volunteer fireman injured in line of duty on or after the first day of July, nineteen hundred sixty-eight or to his dependents in the event he dies on or after the first day of July, nineteen hundred sixty-eight, from injury in line of duty.

Laws 1970, ch 283, § 7, provides as follows:

§ 7. The increase in the amount of benefits afforded by this act shall apply to any volunteer fireman injured in line of duty on or after the first day of July, nineteen hundred seventy, or to his dependents in the event he dies on or after the first day of July, nineteen hundred seventy, from injury in line of duty.

Laws 1974, ch 584, § 7, provides:

§ 7. The increase in the amount of benefits afforded by this act shall apply to any volunteer fireman injured in line of duty on or after the first day of July, nineteen hundred seventy-four, or to his dependents in the event he dies on or after the first day of July, nineteen hundred seventy-four, from injury in line of duty.

Laws 1975, ch 694, § 2, provides as follows:

§ 2. The increase in the amount of benefits afforded by this act shall apply in relation to the surviving child of any volunteer fireman who dies from the effects of injury in the line of duty on or after the effective date of this act.

Laws 1977, ch 675, §§ 43, 85-a, eff Aug 3, 1977, provides as follows:

§ 43. a. There is hereby created a joint labor-management committee to make a thorough study examination and review of:

(i) the current system of experience rating and alternative systems of rate making, including a flat uniform rate;.

(ii) the present rates of contribution to the unemployment insurance fund;.

(iii) benefits for total and partial disabilities provided pursuant to the state workmen's compensation law;.

(iv) the question of an employer's liability under sections ten and eleven of the workmen's compensation law and the effect of court decisions relative thereto, and to prepare and submit to the 1978 session of the legislature necessary amendments to clarify and restore the exclusivity of the employer's liability under such law;.

(v) the question of rising product liability insurance premiums and make recommendations for legislation to the nineteen hundred seventy-eight session of the legislature for controlling such costs;.

(vi) the economic impact of the various tax incentives provided under articles nine-a, nine-b, nine-c, twenty-two, twenty-three, thirty-two and thirty-three of the tax law and the various other tax incentives provided to business by the several other states of the United States; and.

(vii) the investment tax credit, the allocation formulae provided under subdivision three of section two hundred ten of the tax law, the alternative taxes provided under paragraphs (a) and (b) of subdivision one of section two hundred ten of the tax law, the employment incentive credit provided under articles nine-a, twenty-three of the tax law; and the rates of tax imposed under the various articles of the tax law cited above. Such study shall consider the benefit and associated costs of such tax incentives currently provided under the tax law and the potential benefit to be provided and associated costs to be incurred by adoption of one or several alternative tax incentives.

b. Such committee shall consist of nine members appointed by the governor, one of whom shall be appointed upon the recommendation of the temporary president of the senate, one of whom shall be appointed upon the recommendation of the speaker of the assembly, one of whom shall be appointed by the minority leader of the senate and one of whom shall be appointed by the minority leader of the assembly. Of the members, four shall be representative of business and management, and four shall be representative of labor and the ninth member shall be an impartial chairman, designated by the governor, who shall represent the public interest. The industrial commissioner and the chairman of the workmen's compensation board shall serve as ex-officio members of the committee.

c. For the accomplishment of its purposes, the committee shall be authorized and empowered to undertake any studies, inquiries, surveys or analyses it may deem relevant through its own personnel, or in cooperation with any public or private agencies including educational, civic and research organizations, colleges, universities, institutes or foundations.

d. The committee may employ and at pleasure remove such personnel as it may deem necessary for the performance of its

functions and fix their compensation within the amounts made available by appropriation therefor. The committee may meet within and without the state and shall have all the powers of a legislative committee under the legislative law.

e. No member of the committee shall be disqualified from holding any other public office or employment including that as a member of the legislature nor shall he forfeit any such office or employment by reason of his appointment hereunder notwithstanding the provisions of any general, special or local law to the contrary.

f. The members of the committee shall receive no compensation for their services but shall be allowed their actual and necessary expenses incurred in the performance of their duties hereunder.

g. The committee may request and shall receive from any department, division, board, bureau, commission or other agency of the state or any municipal corporation or institution of higher education chartered by the regents of the state of New York, such assistance and data as will enable it to properly carry out its powers and duties hereunder.

h. The committee is hereby authorized and empowered to make and sign any agreements, and to do and perform any acts that may be necessary, desirable or proper to carry out the purposes and objectives of this act.

i. The committee shall make recommendations on items (iv) and (v) by March first, nineteen hundred seventy-eight and make a preliminary report of its activities hereunder to the governor and the legislature on or before October fifteenth, nineteen hundred seventy-eight; and a final report on or before September fifteenth, nineteen hundred eighty. The committee shall also make recommendations for any changes in law it may deem necessary or desirable.

j. [Appropriation].

§ 85-a. If any clause, sentence, paragraph or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

Laws 1989, ch 345, § 5, eff Nov 1, 1989, provides as follows:

§ 5. This act shall take effect on the first day of November next succeeding the date on which its shall have become a law and shall apply to all individuals who die in the line of duty on or after that date, except that the provisions of section one shall apply to claims based on crimes committed after March 1, 1967 (Amd, L 1992, ch 409, § 1, eff Jan 1, 1993).

Laws 1998, ch 415, § 8, eff Jan 1, 1999, provides as follows:

§ 8. This act shall take effect January 1, 1999 and shall apply to weekly benefit periods which occur after such effective date; and the provisions of subdivision 2 of section 7 of the volunteer firefighters' benefit law, as amended by section three of this act, shall be deemed to have been in full force and effect on and after May 9, 1998. (Amd, L 1999, ch 577, § 4, eff Nov 1, 1999, amd, L 2002, ch 139, § 1, eff July 23, 2002.).

Laws 1999, ch 577, § 5, eff Nov 1, 1999, provides as follows:

§ 5. This act shall take effect immediately and shall apply to all weekly benefit periods payable beginning on or after January 1, 1999.

Laws 2005, ch 212, § 7, eff July 12, 2005, provides as follows:

§ 7. This act shall take effect immediately and shall apply to weekly benefit periods which begin after January 1, 2006.

Laws 2006, ch 246, § 3, eff July 26, 2006, deemed eff on and sfter Jan 1, 2006, provides as follows:

§ 3. This act shall take effect immediately, and shall be deemed to have been in full force and effect on and after January 1, 2006 and shall apply to weekly benefit periods that began after such date.

See notes to Art I.

Amendment Notes The 2018 amendment by ch 476, § 267, in 2, substituted "firefighter" for "firemen" or variants in the first, second, and twice in the last sentences and added "or her" in the second sentence; in the first sentence of 4, substituted "firefighter" for "firemen" and added "or her" and "or she"; substituted "firefighter" for "firemen" in 19, 21, 22, 31, in the first and second sentences of 32, in 33, and in 34; and added "or she" in the second and third sentences of 32.

Repeal Notes: [1976] Chapter six hundred ninety-six of the laws of nineteen hundred seventy-five repealed by this act provided that the effective date of chapter six hundred ninety-five of the laws of nineteen hundred seventy-five be amended to be effective on September first, nineteen hundred seventy-five, however, its effective date was made to be the same as that of chapter six hundred ninety-five of the laws of nineteen hundred seventy-five, rendering chapter six hundred ninety-six of the laws of nineteen hundred seventy-five a nullity.

Chapter six hundred ninety-eight of the laws of nineteen hundred seventy-five, proposed to be repealed by this act, provided that the effective date of chapter six hundred ninety-seven of the laws of nineteen hundred seventy-five be amended to be effective on September first, nineteen hundred seventy-five, however its effective date was made to be the same as that of chapter six hundred ninety-seven of the laws of nineteen hundred seventy-five rendering chapter six hundred ninety-eight of the laws of nineteen hundred seventy-five a nullity.

Notes to Decisions

Widow of a volunteer firefighter, who died in 2002 as a result of the effects of a work-related myocardial infarction in 1987, was only entitled to $10,000 in death benefits under former N.Y. Vol. Fire. Ben. Law § 7(2), rather than $50,000, because the injury occurred prior to the law's May 9, 1998, effective date. Matter of Lustyik v Village of Tarrytown, 41 A.D.3d 1066, 839 N.Y.S.2d 281, 2007 N.Y. App. Div. LEXIS 7612 (N.Y. App. Div. 3d Dep't), app. denied, 9 N.Y.3d 809, 844 N.Y.S.2d 785, 876 N.E.2d 514, 2007 N.Y. LEXIS 2802 (N.Y. 2007).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 15, 49, 51.

Rights of beneficiaries of pension, retirement, and death benefit plans, EPTL § 13-3.2.

Jurisprudences:

Law Reviews:

Wolff, Workmen's Compensation. 24 Syracuse L Rev, No. 1, p. 249, 1973.

Matthew Bender's New York Practice Guides: 4 New York Practice Guide: Business and Commercial § 25A.09.

§ 7-a. Date of death benefits.

All weekly benefits payable under section seven of this article shall accrue as of the date of death of the volunteer firefighter. In the event that a person or persons entitled to weekly benefits shall die before a determination is made on the merits of their claim, and such determination on the merits is ultimately in their favor, then all weekly benefits due from the date of death of the volunteer firefighter up to the date of death of the person or persons entitled to such weekly benefits shall be paid to the executor or administrator of the estate of such person or persons.

HISTORY:

Add, L 1984, ch 268, § 3, eff June 25, 1984, and applicable to injuries in the line of duty and deaths occurring on or after July 1, 1983; L 2018, ch 476, § 268, effective December 28, 2018.

Amendment Notes The 2018 amendment by ch 476, § 268, substituted "firefighter" for "fireman" in the first and second sentences.

§ 8. Permanent total disability benefits

In the case of total disability adjudged to be permanent the volunteer firefighter shall be paid six hundred dollars for each week during the continuance thereof. Permanent total disability, within the meaning of this section, shall exist only if the earning capacity of the volunteer firefighter has been lost permanently and totally as the result of the injury. The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or any two thereof, shall, in the absence of conclusive proof to the contrary, constitute permanent total disability, but in all other cases permanent total disability shall be determined in accordance with the facts. Notwithstanding any other provisions of this chapter, an injured volunteer firefighter disabled due to the loss or total loss of use of both eyes, or both hands, or both arms, or both feet, or both legs, or any two thereof shall not suffer any diminution of such weekly benefit by engaging in business or employment provided his or her weekly earnings or wages, when combined with his or her weekly benefit shall not be in excess of eight hundred dollars; and further provided that the application of this section shall not result in reduction of benefits which an injured volunteer firefighter who is disabled due to the loss or total loss of use of both eyes, or both hands, or both arms, or both feet, or both legs, or any two thereof would otherwise be entitled to under any other provisions of this article.

HISTORY:

Add, L 1956, ch 696; Last sentence, amd, L 1957, ch 1042, § 3, eff Apr 28, 1957; amd, L 1959, ch 502; L 1960, ch 781; L 1962, ch 175, eff July 1, 1962; L 1965, ch 311; L 1968, ch 833; L 1970, ch 283; L 1974, ch 584; L 1977, ch 675, § 82; L 1978, ch 597, eff July 24, 1978; L 1983, ch 654, § 2, eff July 25, 1983; L 1990, ch 924, § 22, eff July 31, 1990, deemed eff July 1, 1990; L 1991, ch 21, § 3, eff March 15, 1991, deemed eff July 1, 1990; L 1998, ch 574, § 2, eff Jan 1, 1999 (see 1998 note below); L 2016, ch 54, § 1 (Part GG), effective July 1, 2016; L 2016, ch 401, § 1, effective July 1, 2016.

Editor's Notes: Laws 1998, ch 574, § 3, eff Jan 1, 1999, provides as follows:

§ 3. This act shall take effect on the first day of January next succeeding the date on which it shall have become a law and shall apply by its terms to benefits paid for all weekly benefit periods which occur after its effective date.

See 1956 notes to Art I, and see 1959, 1960 and 1962 notes under § 7.

See 1965, 1968, 1970 1974 and 1977 notes under § 7.

Laws 2016, ch 401, § 3, eff July 1, 2016, provides:

§ 3. This act shall take effect on the same date and in the same manner as part GG of chapter 54 of the laws of 2016 takes effect and shall apply to weekly benefit periods that commence after January 1, 2017.

Amendment Notes:

1999. Chapter 574, § 2 amended:

Par by deleting "ninety-five dollars for each week during the continuance thereof; provided, however, that when the volunteer fire and "one hundred forty-two dollars and fifty cents per week for the period ending December thirty-first, nineteen hundred seventy-seven, one hundred eighty-seven dollars and fifty cents for the period January first, nineteen hundred seventy-eight to and including June thirtieth, nineteen hundred seventy-eight, two hundred seventy dollars, for the period July first, nineteen hundred seventy-eight to and including December thirty-first, nineteen hundred seventy-eight and three hundred twenty-two dollars and fifty cents for the period beginning January first, nineteen hundred seventy-nine to and including June thirtieth, nineteen hundred eighty-three, three hundred eighty-two dollars and fifty cents for the period July first, nineteen hundred eighty-three to and including June thirtieth, nineteen hundred eighty-four, four hundred twelve dollars and fifty cents for the period July first, nineteen hundred eighty-four to and including June thirtieth, nineteen hundred eighty-five, four hundred fifty dollars for the period beginning July first, nineteen hundred eighty-five to and including June thirtieth, nineteen hundred ninety, five hundred ten dollars and five cents for the period beginning July first, nineteen hundred ninety to and including June thirtieth, nineteen hundred ninety-one, five hundred twenty-five dollars for the period beginning July first, nineteen hundred ninety-one to and including June thirtieth, nineteen hundred ninety-two, six hundred dollars for the period beginning July first, nineteen hundred ninety-two; and further provided that if such combination exceeds one hundred forty-two dollars and fifty cents per week for the period ending December thirty-first, nineteen hundred seventy-seven, one hundred eighty-seven dollars and fifty cents, for the period January first, nineteen hundred seventy-eight to and including June thirtieth, nineteen hundred seventy-eight, two hundred seventy dollars, for the period July first, nineteen hundred seventy-eight to and including December thirty-first, nineteen hundred seventy-eight and three hundred twenty-two dollars and fifty cents for the period beginning January first, nineteen hundred seventy-nine to and including June thirtieth, nineteen hundred eighty-three, three hundred eighty-two dollars and fifty cents for the period beginning July first, nineteen hundred eighty-three to and including June thirtieth, nineteen hundred eighty-four, four hundred twelve dollars and fifty cents for the period July first, nineteen hundred eighty-four to and including June thirtieth, nineteen hundred eighty-five, four hundred fifty dollars for the period beginning July first, nineteen hundred eighty-five to and including June thirtieth, nineteen hundred ninety, five hundred ten dollars and five cents for the period beginning July first, nineteen hundred ninety to and including June thirtieth, nineteen hundred ninety-one, five hundred twenty-five dollars for the period beginning July first, nineteen hundred ninety-one to and including June thirtieth, nineteen hundred ninety-two, six hundred dollars for the period beginning July first, nineteen hundred ninety-two, such weekly benefit shall be diminished to an amount which, together with his or her earnings or wages, shall equal one hundred forty-two dollars and fifty cents per week for the period ending December thirty-first, nineteen hundred seventy-seven, one hundred eighty-seven dollars and fifty cents for the period January first, nineteen hundred seventy-eight to and including June thirtieth, nineteen hundred seventy-eight, two hundred seventy dollars, for the period July first, nineteen hundred seventy-eight to and including December thirty-first, nineteen hundred seventy-eight and three hundred twenty-two dollars and fifty cents for the period beginning January first, nineteen hundred seventy-nine to and including June thirtieth, nineteen hundred eighty-three, three hundred eighty-two dollars and fifty cents for the period beginning July first, nineteen hundred eighty-three to and including June thirtieth, nineteen hundred eighty-four, four hundred twelve dollars and fifty cents for the period beginning July first, nineteen hundred eighty-four to and including June thirtieth, nineteen hundred eighty-five, four hundred fifty dollars for the period beginning July first, nineteen hundred eighty-five to and including June thirtieth, nineteen hundred ninety, five hundred ten dollars and five cents for the period beginning July first, nineteen hundred ninety to and including June thirtieth, nineteen hundred ninety-one, five hundred twenty-five dollars for the period beginning July first, nineteen hundred ninety-one to and including June thirtieth, nineteen hundred ninety-two," and "for the period beginning July first, nineteen hundred ninety-two".

The 2016 amendment by ch 54, § 1 (Part GG), substituted "eight hundred dollars" for "six hundred dollars" in the last sentence.

The 2016 amendment by ch 401, § 1, substituted "six hundred dollars" for "four hundred dollars" in the first sentence.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 11-a, 14.

Jurisprudences:

Matthew Bender's New York Practice Guides: 4 New York Practice Guide: Business and Commercial § 25A.09.

§ 9. Temporary total disability benefits

In the case of temporary total disability the volunteer firefighter shall be paid one hundred twenty-five dollars for each week during the continuance thereof; provided, however, that when the volunteer firefighter is injured in the line of duty on or after July first, nineteen hundred seventy-eight to December thirty-first, nineteen hundred seventy-eight, said firefighter shall receive one hundred eighty dollars per week during the continuance thereof; and further provided, that when the volunteer firefighter is injured in the line of duty on or after January first, nineteen hundred seventy-nine to June thirtieth, nineteen hundred eighty-three, said firefighter shall receive two hundred fifteen dollars per week during the continuance thereof; and further provided, that when the volunteer firefighter is injured in the line of duty on or after July first, nineteen hundred eighty-three to June thirtieth, nineteen hundred eighty-four, said firefighter shall receive two hundred fifty-five dollars per week during the continuance thereof; and further provided, that when the volunteer firefighter is injured in the line of duty on or after July first, nineteen hundred eighty-four to June thirtieth, nineteen hundred eighty-five, said firefighter shall receive two hundred seventy-five dollars per week during the continuance thereof; and further provided, that when the volunteer firefighter is injured in the line of duty on or after July first, nineteen hundred eighty-five to June thirtieth, nineteen hundred ninety, said firefighter shall receive three hundred dollars per week during the continuance thereof; and further provided, that when the volunteer firefighter is injured in the line of duty on or after July first, nineteen hundred ninety to June thirtieth, nineteen hundred ninety-one, said firefighter shall receive three hundred forty dollars per week during the continuance thereof; and further provided, that when a volunteer firefighter is injured in the line of duty on or after July first, nineteen hundred ninety-one to June thirtieth, nineteen hundred ninety-two, said firefighter shall receive three hundred fifty dollars per week during the continuance thereof; and further provided, that when a volunteer firefighter is injured in the line of duty on or after July first, nineteen hundred ninety-two, said firefighter shall receive four hundred dollars per week during the continuance thereof. Temporary total disability, within the meaning of this section, shall exist only if the earning capacity of the volunteer firefighter has been lost temporarily and totally as the result of the injury. In case of temporary total disability and permanent partial disability both resulting from the same injury, if the temporary total disability continues for a longer period than the number of weeks set forth in the following schedule, the period of temporary total disability in excess of such number of weeks shall be added to the period provided in section ten of this article: arm, thirty-two weeks; leg, forty weeks; hand, thirty-two weeks; foot, thirty-two weeks; ear, twenty-five weeks; eye, twenty weeks; thumb, twenty-four weeks; first finger, eighteen weeks; great toe, twelve weeks; second finger, twelve weeks; third finger, eight weeks; fourth finger, eight weeks; toe other than great toe, eight weeks. In any case resulting in loss or partial loss of use of arm, leg, hand, foot, ear, eye, thumb, finger or toe, where the temporary total disability does not extend beyond the periods above mentioned for such injury, benefits shall be limited to the schedule contained in section ten of this article.

HISTORY:

Add, L 1956, ch 696; amd, L 1959, ch 502; L 1960, ch 781; L 1962, ch 175, eff July 1, 1962; L 1964, ch 584; L 1965, ch 311; L 1968, ch 833; L 1970, ch 283; L 1977, ch 675, § 83; L 1978, ch 597, eff July 24, 1978; L 1983, ch 654, § 3, eff July 25, 1983; L 1990, ch 924, § 23, eff July 31, 1990, deemed eff July 1, 1990.

Editor's Notes: See 1956 notes to Art I, and see 1959, 1960 and 1962 notes under § 7.

See 1965, 1968, 1970, 1974 and 1977 notes under § 7.

Amendment Notes:

1990. Chapter 924, § 23 amended:
Par by deleting "fireman" and "chapter" and "chapter".

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 11-a.

Jurisprudences:

Law Reviews:

Wolff, Workmen's Compensation. 24 Syracuse L Rev, No. 1, p. 249, 1973.

Matthew Bender's New York Practice Guides: 4 New York Practice Guide: Business and Commercial § 25A.09.

§ 10. Permanent partial disability benefits

1. In the case of disability partial in character, but permanent in quality, the volunteer firefighter shall be paid ninety-five dollars for each week for the period specified in this subdivision, provided, however, that when the volunteer firefighter is injured in the line of duty on or after January first, nineteen hundred seventy-eight to June thirtieth, nineteen hundred eighty-three, such payment shall be one hundred five dollars for each week, and further provided that when a volunteer firefighter is injured in the line of duty on or after July first, nineteen hundred eighty-three to and including June thirtieth, nineteen hundred eighty-four, such payments shall be one hundred twenty-five dollars for each week and provided further that when the volunteer firefighter is injured in the line of duty on or after July first, nineteen hundred eighty-four to and including June thirtieth, nineteen hundred eighty-five

such payments shall be one hundred thirty-five dollars for each week and provided further that when the volunteer firefighter is injured in the line of duty on or after July first, nineteen hundred eighty-five to and including June thirtieth, nineteen hundred ninety such payments shall be one hundred fifty dollars for each week, and provided further that when the volunteer firefighter is injured in the line of duty on or after July first, nineteen hundred ninety to and including June thirtieth, nineteen hundred ninety-one such payments shall be two hundred eighty dollars for each week, and provided further that when the volunteer firefighter is injured in the line of duty on or after July first, nineteen hundred ninety-one to and including June thirtieth, nineteen hundred ninety-two such payments shall be three hundred fifty dollars for each week, and provided further that when the volunteer firefighter is injured in the line of duty on or after July first, nineteen hundred ninety-two such payments shall be four hundred dollars for each week, as follows:

(a) Loss of member.

Member lost	Number of weeks
Arm	312
Leg	288
Hand	244
Foot	205
Eye	160
Thumb	75
First finger	46
Great toe	38
Second finger	30
Third finger	25
Toe other than great toe	16
Fourth finger	15

If more than one phalange of a digit shall be lost, the period shall be the same as for the loss of the entire digit. If only the first phalange shall be lost, the period shall be one-half the period for loss of the entire digit. The period for loss or loss of use of two or more digits, or one or more phalanges of two or more digits, of a hand or foot, may be proportioned to the period for the loss of use of the hand or foot occasioned thereby, but shall not exceed the period for the loss of a hand or foot. If an arm or leg shall be amputated at or above the wrist or ankle, the period for such loss shall be in proportion to the period for the loss of the arm or leg. In the case of loss of binocular vision or of eighty per centum or more of the vision of an eye, the period shall be the same as for the loss of the eye.

(b) Loss of hearing. In the case of the complete loss of the hearing of one ear, sixty weeks; for the loss of hearing of both ears, one hundred fifty weeks.

(c) Total loss of use. In the case of permanent total loss of use of a member, the period shall be the same as for the loss of the member.

(d) Partial loss or partial loss of use. Except as above provided in this subdivision, in the case of permanent partial loss or loss of use of a member, the period shall be for the proportionate loss or loss of use of the member. Compensation for permanent partial loss of use of an eye shall be awarded on the basis of uncorrected loss of vision or corrected loss of vision resulting from an injury whichever is the greater.

(e) Disfigurement. In the case of serious facial or head disfigurement, including a disfigurement continuous in length which is partly in the facial area and also extends into the neck region as described in this paragraph, the volunteer firefighter shall be paid in a lump sum a proper and equitable amount, which shall be determined by the workers' compensation board. If the earning capacity of the volunteer firefighter shall have been impaired, or may in the future be impaired, by any serious disfigurement in the region above the sterno clavicular articulations anterior to and including the region of the sterno cleido mastoid muscles on either side, the volunteer firefighter shall be paid in a lump sum a proper and equitable amount which shall be determined by such board. Two or more serious disfigurements, not continuous in length, resulting from the same injury, if partially in the facial area and partially in such neck region, shall be deemed to be a facial disfigurement. An award, or the aggregate of the awards, to a volunteer firefighter under this paragraph shall not exceed twenty thousand dollars.

(f) Total or partial loss or loss of use of more than one member. In any case in which there shall be a loss or loss of use of more than one member or parts of more than one member set forth above in paragraphs a to e, both inclusive, of this subdivision, but not amounting to permanent total disability, the periods for loss or loss of use of each such member or part thereof shall run consecutively.

(g) Other cases. In all other cases of permanent partial disability the volunteer firefighter shall be paid for each week during the continuance thereof, as follows:

1. If the percentage of loss of earning capacity is seventy-five per centum, or greater, he or she shall be paid ninety-five dollars for each week, provided, however, that when the volunteer firefighter is injured in the line of duty on or after January first, nineteen hundred seventy-eight to and including June thirtieth, nineteen hundred eighty-three, such payment shall be one hundred five dollars for each week provided, however, that when the volunteer firefighter is injured in the line of duty on or after July first, nineteen hundred eighty-three to and including June thirtieth, nineteen hundred eighty-four, such payment shall be one hundred twenty-five dollars for each week provided, however, that when the volunteer firefighter is injured in the line of duty on or after July first, nineteen hundred eighty-four to and including June thirtieth, nineteen hundred eighty-five such payment shall be one hundred thirty-five dollars for each week, provided, however, that when the volunteer firefighter is injured in the line of duty on or after July first, nineteen hundred eighty-five to and including June thirtieth, nineteen hundred ninety such payment shall be one hundred

fifty dollars for each week, provided, however, that when the volunteer firefighter is injured in the line of duty on or after July first, nineteen hundred ninety to and including June thirtieth, nineteen hundred ninety-one such payment shall be two hundred eighty dollars for each week, and provided further that when the volunteer firefighter is injured in the line of duty on or after July first, nineteen hundred ninety-one to and including June thirtieth, nineteen hundred ninety-two such payment shall be three hundred fifty dollars for each week, and provided further that when the volunteer firefighter is injured in the line of duty on or after July first, nineteen hundred ninety-two such payment shall be four hundred dollars for each week;

2. If the percentage of loss of earning capacity is fifty per centum, or greater, but less than seventy-five per centum, he or she shall be paid sixty-three dollars and thirty-three cents for each week, provided, however, that when the volunteer firefighter is injured in the line of duty on or after January first, nineteen hundred seventy-eight to and including June thirtieth, nineteen hundred eighty-three, such payment shall be seventy dollars for each week, provided, however, that when the volunteer firefighter is injured in the line of duty on or after July first, nineteen hundred eighty-three to and including June thirtieth, nineteen hundred eighty-four such payment shall be eighty-three dollars and thirty-three cents for each week, provided, however, that when the volunteer firefighter is injured in the line of duty on or after July first, nineteen hundred eighty-four, to and including June thirtieth, nineteen hundred eighty-five, such payment shall be ninety dollars for each week, provided, however, that when the volunteer firefighter is injured in the line of duty on or after July first, nineteen hundred eighty-five to and including June thirtieth, nineteen hundred ninety such payment shall be one hundred dollars for each week, provided, however, that when the volunteer firefighter is injured in the line of duty on or after July first, nineteen hundred ninety to and including June thirtieth, nineteen hundred ninety-one such payment shall be one hundred eighty-six dollars and seventy-six cents for each week, provided, however, that when the volunteer firefighter is injured in the line of duty on or after July first, nineteen hundred ninety-one to and including June thirtieth, nineteen hundred ninety-two such payment shall be two hundred thirty-four dollars and fifty cents for each week, provided, however, that when the volunteer firefighter is injured in the line of duty on or after July first, nineteen hundred ninety-two such payment shall be two hundred sixty-eight dollars for each week;

3. If the percentage of loss of earning capacity is twenty-five per centum, or greater, but less than fifty per centum, he shall be paid thirty dollars for each week;

4. If the percentage of loss of earning capacity is less than twenty-five per centum, he or she shall not be paid any weekly benefit. Permanent partial disability, within the meaning of this paragraph, shall exist only if the earning capacity of the volunteer firefighter has been permanently and partially lost as the result of the injury. The workers' compensation board shall determine the degree of such disability and such board may reconsider such degree on its own motion or upon application of any party in interest.

2. An award made to a claimant under this section shall in case of death arising from causes other than the injury be payable to and for the benefit of the persons following:

(a) If there be a surviving spouse and no child of the deceased under the age of eighteen years, to such spouse.

(b) If there be a surviving spouse and surviving child or children of the deceased under the age of eighteen years, one-half shall be payable to the surviving spouse and the other half to the surviving child or children.

(c) If there be a surviving child or children of the deceased under the age of eighteen years, but no surviving spouse, then to such child or children.

(d) If there be no surviving spouse and no surviving child or children of the deceased under the age of eighteen years, then to such dependent or dependents as defined in section seven of this chapter, as directed by the workmen's compensation board; and if there shall be no such dependents, then to the estate of such deceased in an amount not exceeding reasonable funeral expenses as provided in subdivision one of section seven of this chapter, or, if there be no estate, to the person or persons paying the funeral expenses of such deceased in an amount not exceeding reasonable funeral expenses as provided in such subdivision one.

3. An award for disability may be made after the death of the volunteer firefighter.

HISTORY:

Add, L 1956, ch 696, eff Mar 1, 1957; amd, L 1956, ch 697, § 2, eff May 1, 1956,3, eff May 1, 1956; L 1958, ch 9; L 1959, ch 502; L 1960, ch 781; L 1962, ch 175, eff July 1, 1962; L 1965, ch 311; L 1968, ch 833; L 1970, ch 283; L 1974, ch 584, eff July 1, 1974; L 1977, ch 675, § 84,85; L 1978, ch 597, eff July 24, 1978; L 1982, ch 346, § 2, eff June 21, 1982, and applicable to all serious facial or head disfigurements resulting from accidents occurring on and after such date; L 1983, ch 654, § 4, eff July 25, 1983,5, eff July 25, 1983; L 1989, ch 604, § 1, eff July 21, 1989, deemed eff Jan 1, 1989 (see 1989 note below); L 1990, ch 924, § 24, eff July 31, 1990, deemed eff July 1, 1990,25, eff July 31, 1990, deemed eff July 1, 1990,26, eff July 31, 1990, deemed eff July 1, 1990; L 1991, ch 21, § 4, eff March 15, 1991, deemed eff July 1, 1990; L 2018, ch 476, § 269, effective December 28, 2018.

Editor's Notes: Laws 1958, ch 9, § 4, provided: "The increase in the maximum amount of an award or awards under paragraph (e) of subdivision one of section ten of the volunteer firemen's benefit law, as amended by section two of this act, shall apply in relation to volunteer firemen injured in line of duty on or after the first day of March, nineteen hundred fifty-eight."

Laws 1989, ch 604, § 6, eff July 21, 1989, provides as follows:

§ 6. This act shall take effect immediately provided that sections one, two, three, four, and five of this act shall be

deemed to have been in full force and effect on and after January 1, 1989 and shall apply to certain permanent partial disabilities, death and injuries in the line of duty occurring on or after such date.

See notes to Art I.

See 1959, 1960 and 1962 notes under § 7.

See 1965, 1968, 1970, 1974 and 1977 notes under § 7.

Amendment Notes:

1990. Chapter 21, § 4 amended:

Sub 1, by deleting "than".

1990. Chapter 924, § 25 amended:

Sub 1, par (e), by deleting "fireman" and "ten".

1990. Chapter 924, § 26 amended:

Sub 1, par (g), by deleting "fireman".

The 2018 amendment by ch 476, § 269, substituted "firefighter" for "fireman" in the introductory language of 1(g); in 1(g)4, in the first sentence, added "or she" and substituted "firefighter" for "fireman" and substituted "workers'" for "workmen's" in the second sentence; and substituted "firefighter" for "fireman" in 3.

Notes to Decisions

Court would affirm determination finding that claimant suffered permanent partial disability where evidence, including expert medical testimony, reports of physicians' examinations, and clinical records, showed that claimant was unable to resume his profession as skilled gunsmith following his injuries because he could no longer operate heavy machinery necessary to manufacture and repair firearms, compelling him to shift focus of his business from manufacture, sale, and repair of custom firearms to retail sale of firearms. Dentico v Village of Walworth, 254 A.D.2d 515, 677 N.Y.S.2d 831, 1998 N.Y. App. Div. LEXIS 9968 (N.Y. App. Div. 3d Dep't 1998).

N.Y. Workers' Comp. Law § 114-a may not be applied to benefits received under N.Y. Vol. Fire. Ben. Law § 10. Matter of Giello v Providence Fire Dist., 57 A.D.3d 1294, 869 N.Y.S.2d 676, 2008 N.Y. App. Div. LEXIS 9819 (N.Y. App. Div. 3d Dep't 2008).

Claimant, a volunteer firefighter, could not be disqualified from receiving benefits under N.Y. Vol. Fire. Ben. Law § 10 for allegedly making false representations as to her alleged physical limitations because the plain and unambiguous language of N.Y. Workers' Comp. Law § 114-a limited its application to claims for benefits under N.Y. Workers' Comp. Law § 15; thus, the civil penalties of § 114-a did not apply to wage replacement benefits, and only criminal penalties were provided for in N.Y. Workers' Comp. Law § 114 and N.Y. Vol. Fire. Ben. Law § 55. Matter of Giello v Providence Fire Dist., 57 A.D.3d 1294, 869 N.Y.S.2d 676, 2008 N.Y. App. Div. LEXIS 9819 (N.Y. App. Div. 3d Dep't 2008).

New York Workers' Compensation Board's decision that a claimant had sustained a causally related loss of earning capacity and was entitled to benefits under Vol. Fire. Ben. Law § 10 was affirmed; there was substantial evidence from a neurosurgeon's report that the claimant's injury resulted in a 50% reduction in earning capacity. The neurosurgeon also acknowledged a correspondence from the claimant's employer estimating that the claimant's average work hours had been lowered from 60 hours per week to 25 hours per week. Matter of Weinstein v Somers Fire Dist., 37 A.D.3d 917, 829 N.Y.S.2d 726, 2007 N.Y. App. Div. LEXIS 1431 (N.Y. App. Div. 3d Dep't 2007).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 9, 11-a, 12, 18.

Jurisprudences:

Law Reviews:

Wolff, Workmen's Compensation. 24 Syracuse L Rev, No. 1, p. 249, 1973.

Matthew Bender's New York Practice Guides: 4 New York Practice Guide: Business and Commercial § 25A.09.

§ 11. Temporary partial disability benefits

In the case of temporary partial disability the volunteer firefighter shall be paid for each week during the continuance thereof, as follows:

1. If the percentage of loss of earning capacity is seventy-five per centum, or greater, he or she shall be paid ninety-five dollars for each week, provided, however, that when the volunteer firefighter is injured in the line of duty on or after January first, nineteen hundred seventy-eight to and including June thirtieth, nineteen hundred eighty-three, such payment shall be one hundred five dollars for each week, provided, however, that when the volunteer firefighter is injured in the line of duty on or after July first, nineteen hundred eighty-three to and including June thirtieth, nineteen hundred eighty-four, such payment shall be one hundred twenty-five dollars for each week, provided, however, that when the volunteer firefighter is injured in the line of duty on or after July first, nineteen hundred eighty-four to and including June thirtieth, nineteen hundred eighty-five, such payment shall be one hundred thirty-five dollars for each week, provided, however, that when the volunteer firefighter is injured in the line of duty on or after July first, nineteen hundred eighty-five to and including June thirtieth, nineteen hundred ninety such payment shall be one hundred fifty dollars for each week, provided, however, that when the volunteer firefighter is injured in the line of duty on or after July first, nineteen hundred ninety to and including June thirtieth, nineteen hundred ninety-one such payment shall be two hundred eighty dollars for each week, provided, however, that when the volunteer firefighter is injured in the line of duty on or after July first, nineteen hundred ninety-one to and including June thirtieth, nineteen hundred ninety-two such payment shall be three hundred fifty dollars for each week, provided, however, that when the volunteer firefighter is injured in the line of duty on or after July first, nineteen hundred ninety-two such payment shall be four hundred dollars for each week;

2. If the percentage of loss of earning capacity is fifty per centum, or greater, but less than seventy-five per centum, he or she shall be paid sixty-three dollars and thirty-three cents for each week, provided, however, that when the volunteer firefighter is injured in the line of duty on or after January first, nineteen hundred seventy-eight to and including June thirtieth, nineteen hundred eighty-three, such payment shall be seventy dollars for each week, provided, however, that when the volunteer firefighter is injured in the line of duty on or after July first, nineteen hundred eighty-three to and including June thirtieth, nineteen hundred eighty-four, such payment shall be eighty-three dollars and thirty-three cents for each week, provided, however, that when the volunteer firefighter is injured in the line of duty on or after July first, nineteen hundred eighty-four to and including June thirtieth, nineteen hundred eighty-five, such payment shall be ninety dollars for each week, provided, however, that when the volunteer firefighter is injured in the line of duty on or after July first, nineteen hundred eighty-five to and including June thirtieth, nineteen hundred

ninety such payment shall be one hundred dollars for each week, provided, however, that when the volunteer firefighter is injured in the line of duty on or after July first, nineteen hundred ninety to and including June thirtieth, nineteen hundred ninety-one such payment shall be one hundred eighty-six dollars and seventy-six cents for each week, provided, however, that when the volunteer firefighter is injured in the line of duty on or after July first, nineteen hundred ninety-one to and including June thirtieth, nineteen hundred ninety-two such payment shall be two hundred thirty-four dollars and fifty cents for each week, provided, however, that when the volunteer firefighter is injured in the line of duty on or after July first, nineteen hundred ninety-two such payment shall be two hundred sixty-eight dollars for each week;

3. If the percentage of loss of earning capacity is twenty-five per centum, or greater, but less than fifty per centum, he shall be paid thirty dollars for each week;

4. If the percentage of loss of earning capacity is less than twenty-five per centum, he or she shall not be paid any weekly benefit. Temporary partial disability, within the meaning of this section, shall exist only if the earning capacity of the volunteer firefighter has been temporarily and partially lost as the result of the injury. The workers' compensation board shall determine the degree of such disability and such board may reconsider such degree on its own motion or upon application of any party in interest.

HISTORY:

Add, L 1956, ch 696; amd, L 1959, ch 502; L 1960, ch 781; L 1962, ch 175, eff July 1, 1962; L 1965, ch 311; L 1968, ch 833; L 1970, ch 283; L 1974, ch 584, eff July 1, 1974; L 1978, Ch 597, eff July 24, 1978, L 1983, ch 654, § 6, eff July 25, 1983; L 1978, ch 597, eff July 24, 1978; L 1983, ch 654, § 6, eff July 25, 1983; L 1990, ch 924, § 27, eff July 31, 1990, deemed eff July 1, 1990; L 2018, ch 476, § 270, effective December 28, 2018.

Editor's Notes: See 1965, 1968, 1970 and 1974 notes under § 7.

See 1956 notes to Art I, and see 1959, 1960 and 1962 notes under § 7.

Amendment Notes The 2018 amendment by ch 476, § 270, substituted "firefighter" for fireman" in the introductory language; and in 4, added "or she" in the first sentence, substituted "firefighter" for "fireman" in the second sentence, and substituted "workers'" for "workmen's" in the last sentence.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 11-a, 12.

Jurisprudences:

Matthew Bender's New York Practice Guides: 4 New York Practice Guide: Business and Commercial § 25A.09.

§ 11-a. Repair or replacement of prosthetic devices.

If, as a result of services performed in line of duty, a volunteer firefighter damages or loses any prosthetic devices required to be worn or used by him or her, whether or not he or she is injured, such prosthetic device shall be repaired, or replaced in the discretion of the workers' compensation board, and necessary medical, surgical or other attendance or treatment, nurse and hospital service, in connection therewith shall be furnished, in the same manner as a prosthetic device would be furnished, replaced or repaired and treatment and care provided under the provisions of section sixteen of this chapter. Damage to or loss of a prosthetic device shall be deemed an injury, except that no disability benefits shall be payable with respect to such injury under sections eight, nine, ten and eleven of this chapter. The term "prosthetic device" as used in this section includes an artificial limb, artificial eye, eyeglasses, contact lens, hearing aid, denture or dental appliance or any surgical appliance required to be worn or used by the volunteer firefighter, but shall not include shoes or any other article considered as ordinary wearing apparel, whether or not specially constructed.

HISTORY:

Add, L 1957, ch 591, eff Apr 16, 1957; L 2018, ch 476, § 271, effective December 28, 2018.

Amendment Notes The 2018 amendment by ch 476, § 271, in the first sentence, substituted "firefighter" for "firemen," added "or her" and "or she," and substituted "workers'" for "workmen's"; and substituted "firefighter" for "fireman" in the last sentence.

Agency Opinions

While, under this section, a fire district is liable for damage or loss of a volunteer fireman's false teeth or eye-glasses, it is not liable for loss of other items of personal property such as clothes, wallet, etc. in course of duty. 1963 NY Ops Atty Gen Aug 7.

§ 11-b. Hazardous exposures.

If, as a result of services performed in line of duty, a volunteer firefighter is exposed to or comes in contact with any poisons, gases, x-rays, radium, radio-active materials or other potentially harmful substances or matter, the chief engineer or other executive officer of the fire department or fire company of which he or she is a member may authorize the volunteer firefighter to obtain such examinations, tests, treatment and care as are immediately necessary to determine whether he or she is injured. Any such authorization may be granted prior to the giving of a notice of injury under this chapter. In any such case, the volunteer firefighter shall be deemed to have been injured and shall be entitled to treatment and care and disability benefits as provided in this chapter.

HISTORY:

Add, L 1957, ch 337, eff Apr 11, 1957; L 2018, ch 476, § 272, effective December 28, 2018.

Amendment Notes The 2018 amendment by ch 476, § 272, in the first sentence, substituted "firefighter" for "fireman" twice and added "or she" twice; and substituted "firefighter" for "fireman" in the last sentence.

§ 11-c. [There are two sections 11–c] Medical examination of volunteer firefighters to detect and identify the human immunodeficiency virus (HIV).

1. Whenever a volunteer firefighter has been exposed to a significant risk of transmission of the

human immunodeficiency virus (HIV) while performing services in the line of duty, the executive officer of the fire company of which the volunteer firefighter is a member shall authorize such volunteer firefighter to obtain an appropriate medical examination to determine if such volunteer firefighter has been exposed to or infected with the human immunodeficiency virus (HIV). Such medical examination of a volunteer firefighter shall be authorized within eight hours of notification to the executive officer of the fire company of which such volunteer firefighter is a member of an incident that has created an exposure risk to the volunteer firefighter.

2. Should it be determined by the examining physician or other attending health care worker that a significant risk of transmission has occurred, or should any medical examination conclude that a volunteer firefighter has been exposed to or infected with human immunodeficiency virus (HIV), then such volunteer firefighter shall be offered counseling and additional testing, as appropriate and consistent with treatment guidelines issued by the commissioner of health. Such counseling may include a discussion of the risk of the transmission of the human immunodeficiency virus (HIV) from the exposure the volunteer firefighter may have experienced and the spectrum of tests commercially available for the prompt and reliable diagnosis of such infection. Information from any such medical examination of a volunteer firefighter shall be confidential information pursuant to article twenty-seven-F of the public health law and shall not be made available to the fire company without the written authorization of the affected volunteer firefighter.

3. Payment for medical examinations, additional testing, treatment services, counseling services, and any other additional services provided pursuant to this section shall be a covered benefit under this chapter.

4. For the purposes of this section, the term "significant risk of transmission" means the alleged conduct or actions taken by a victim or patient or any other action, situation or event that occurs while a volunteer firefighter is performing services in the line of duty that has created a recognized and significant risk of infection of a volunteer firefighter with the human immunodeficiency virus (HIV), as determined by the commissioner of health, consistent with guidelines, protocols, and findings of the United States centers for disease control and prevention.

5. For purposes of this section, the term "medical examination" includes a physical examination or test performed by a physician or other appropriate health care worker to determine if a volunteer firefighter has been exposed to or infected by the human immunodeficiency virus (HIV). Tests may include, but not be limited to, the most accurate, sensitive, and timely tests available used for the early identification of the human immunodeficiency virus (HIV).

6. The commissioner of health shall issue guidelines to facilitate the identification of circumstances potentially exposing a volunteer firefighter to a significant risk of transmission of the human immunodeficiency virus (HIV). Such guidelines shall be consistent with criteria accepted by the federal centers for disease control and prevention. Such guidelines shall also provide information regarding related counseling and testing procedures available to such individuals.

7. Any information gathered pursuant to the provisions of this section which is deemed confidential under any other provision of law shall be treated in a confidential manner.

HISTORY:

Add, L 2006, ch 603, § 1, eff Feb 12, 2007.

Editor's Notes: Laws 2006, ch 603, § 3, eff Feb 12, 2007, provides as follows:

§ 3. This act shall take effect on the one hundred eightieth day after it shall have become a law, provided, however, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date is authorized to be made and completed on or before such date.

§ 11-c. [There are two sections 11–c; expires and repealed June 30, 2025] Volunteer firefighters; presumption in certain. diseases

Notwithstanding any provision of this chapter or of any general, special or local law to the contrary, and for the purposes of this chapter, any condition of impairment of health caused by diseases of the lung, resulting in total or partial disability or death to a volunteer firefighter, where such volunteer firefighter successfully passed a physical examination on entry into such service or subsequent thereto, which examination failed to reveal any evidence of such conditions, shall be presumptive evidence that such disability or death (a) was caused by the natural and proximate result of an accident, not caused by such firefighter's own negligence and (b) was incurred in the performance and discharge of duty, unless the contrary be proven by competent evidence.

HISTORY:

Add, L 2006, ch 606, § 1, eff Aug 16, 2006.

Editor's Notes: Laws 2006, ch 606, § 2, eff Aug 16, 2006, provides as follows:

§ 2. This act shall take effect immediately and shall expire and be deemed repealed June 30, 2025 (Amd, L 2008, ch 120, § 1, eff June 30, 2008; L 2010, ch 282, § 1, eff July 30, 2010; L 2015, ch 25, § 1, eff June 30, 2015; L 2020, ch 58, § 1 (Part XXX, Subpart B, Item BB), eff April 3, 2020).

§ 12. Non-schedule adjustments

Notwithstanding any other provision of this chapter, in any case coming within the provisions of sections ten and eleven of this chapter, in which the right to benefits has been established and benefits have been paid for not less than three months, in which the continuance of disability cannot be ascertained with reasonable certainty, the workmen's compensation board may, in the interest of justice,

approve a non-schedule adjustment agreed to between the claimant and the political subdivision liable for the payment of benefits or its insurance carrier. The provisions of subdivision five-b of section fifteen of the workmen's compensation law shall apply in any such case.

HISTORY:

Add, L 1956, ch 696, eff March 1, 1957; amd, L 1956, ch 697, § 4, eff May 1, 1956.

Editor's Notes: See notes to Art I.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Schedule in case of disability, CLS Work Comp § 15.

§ 13. Reclassification of disabilities

Subject to the limitations in section fifty-one of this chapter and in section one hundred twenty-three of the workmen's compensation law as made applicable to this chapter by section fifty-seven of this chapter, the workmen's compensation board may at any time, without regard to the date of the injury, upon its own motion, or on application of any party in interest, reclassify a disability upon proof that there has been a change in condition, or that the previous classification was erroneous and not in the interest of justice.

HISTORY:

Add, L 1956, ch 696, eff March 1, 1957.

Editor's Notes: See notes to Art I.

§ 14. Previous disability.

The fact that a volunteer firefighter has suffered previous disability or received benefits therefor as provided in section two hundred five of the general municipal law, the workers' compensation law, or this chapter shall not preclude him or her from benefits for a later injury nor preclude death benefits for death resulting therefrom; provided, however, that a volunteer firefighter who is suffering from a previous disability shall not receive benefits for a later injury in excess of the benefits allowed for such injury when considered by itself and not in conjunction with the previous disability. Notwithstanding the foregoing provisions of this section, if a volunteer firefighter has previously incurred permanent partial disability through the loss or loss of use of one hand, one arm, one foot, one leg, or one eye, and suffers the loss or loss of use of another such major member or eye, he or she may be adjudged permanently totally disabled and receive benefits for permanent total disability as provided in section eight of this chapter.

HISTORY:

Add, L 1956, ch 696, eff March 1, 1957; L 2018, ch 476, § 273, effective December 28, 2018.

Editor's Notes: See notes to Art I.

Amendment Notes The 2018 amendment by ch 476, § 273, in the first sentence, substituted "firefighter" for "fireman" twice, substituted "workers'" for "workmen's" and added "or her"; and in the second sentence, substituted "firefighter" for "fireman" and added "or she."

§ 15. Expense for rehabilitating injured volunteer firefighters.

A volunteer firefighter, who as a result of injury is or may be expected to be totally or partially incapacitated for a remunerative occupation and who, under the direction of the state education department is being rendered fit to engage in a remunerative occupation, may receive such additional financial benefit necessary for his or her rehabilitation as the workers' compensation board shall determine. Not more than thirty dollars per week of such additional amount shall be expended for maintenance. Such expense and such of the administrative expenses of the state education department as are properly assignable to the expenses of rehabilitating such volunteer firefighters shall be paid out of the vocational rehabilitation fund created pursuant to subdivision nine of section fifteen of the workers' compensation law. Any such volunteer firefighter for the purposes of such fund shall be considered an employee of the political subdivision liable for the payment of benefits to such volunteer firefighter under this chapter and such "employer" or its insurance carrier, as the case may be, shall make the same financial contribution to such fund as required by such subdivision nine in every case of injury causing death of a volunteer firefighter in which there are no persons entitled to financial benefits under this chapter other than (1) funeral expenses and (2) the death benefit provided in subdivision two of section seven of this chapter.

HISTORY:

Add, L 1956, ch 696; amd, L 1956, ch 697, § 5; L 1959, ch 502, eff Apr 1, 1959; L 2018, ch 476, § 274, effective December 28, 2018.

Editor's Notes: See 1959 note under § 7.
See notes to Art I.

Amendment Notes The 2018 amendment by ch 476, § 274, substituted "firefighters" for "firemen" in the section heading; in the first sentence, substituted "firefighter" for "fireman" and substituted "his or her rehabilitation as the workers' compensation" for "his rehabilitation as the workmen's compensation"; in the third sentence, substituted "firefighters" for "firemen" and workers'" for "workmen's"; and in the last sentence, substituted "firefighter" for "fireman" three times.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Schedule in case of disability, CLS Work Comp § 15.

§ 16. Treatment and care

A volunteer firefighter injured in line of duty shall be entitled to receive medical, surgical, podiatric, chiropractic, psychological and other attendance and treatment, nurse and hospital service, medicine, crutches, artificial members, devices, appliances, and apparatus, including the replacement and repair thereof, for such period as the nature of the injury or the process of recovery may require and the political subdivision liable for the payment of benefits to the volunteer firefighter under this chapter because of such injury shall be liable therefor and the cost thereof shall be audited, raised and paid as

provided in section thirty of this chapter. The provisions of sections thirteen to thirteen-m, both inclusive, and sections nineteen to nineteen-b, both inclusive, of the workers' compensation law, to the extent that such provisions are not inconsistent with this chapter, shall be applicable in relation to any injured volunteer firefighter, political subdivision and third persons as fully as if set forth in this chapter.

HISTORY:

Add, L 1956, ch 696, eff March 1, 1957; amd, L 1973, ch 940, eff May 1, 1974; L 1990, ch 353, § 4, eff July 2, 1990.

Editor's Notes: See notes to Art I.

Amendment Notes:

1990. Chapter 353, § 4 amended:

Par by deleting "fireman" and "thirteen-l" and "workmen's".

Agency Opinions

A conflict of interest does not occur where a fire district commissioner, who is a physician, is paid fees for providing medical services to volunteer firemen under the Volunteer Firemen's Benefit Law, when the payments are made by an insurance carrier pursuant to a contract with the district. 1979 Op St Compt File #537.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 11-a.

Selection of authorized physician by employees, Work Comp § 13-a.

Authorization of physicians, medical bureaus and laboratories by chairman, Work Comp § 13-b.

Licensing of compensation medical bureaus and laboratories, Work Comp § 13-c.

Removal of physicians from lists of those authorized to render medical care, Work Comp § 13-d.

Revocation of licenses of compensation medical bureaus and laboratories, Work Comp § 13-e.

Payment of medical fees, Work Comp § 13-f.

Payment of bills for medical care, Work Comp § 13-g.

Medical treatment by hospitals, Work Comp § 13-h.

Solicitation prohibited, Work Comp § 13-i.

Medical or surgical treatment by insurance carriers and employers, Work Comp § 13-j.

Care and treatment of injured employees by duly licensed podiatrists, Work Comp § 13-k.

Care and treatment of injured employees by duly licensed chiropractors, Work Comp § 13-l.Medical appeals unit, Work Comp § 13-aa.Physical examination, Work Comp § 19.Physicians not to accept fees from carriers, Work Comp § 19-a.Treatment by physicians in employ of board, Work Comp § 19-b.

Treatment and care of injured employees, Work Comp § 13.

Codes, Rules and Regulations:

Workers' compensation board: payment of bills for medical treatment or services performed on or after October 1, 1994. 12 NYCRR § 325-1.24.

Workers' compensation board: health insurer's request for reimbursement. 12 NYCRR § 325-5.10.

Workers' compensation board: ambulatory surgery services fee schedule. 12 NYCRR §§ 329.4, 329.5, 401.7, 411.7.

Workers' compensation board: authorization of special services performed by podiatrists and licensed therapists. 12 NYCRR §§ 341.4, 349-1.3.

Application of Workers' Compensation rules and regulations. 12 NYCRR § 400.1 et seq.

Workers' compensation board: health insurers' computer match. 12 NYCRR Subpart 325–5.

Workers' compensation board: arbitration of disputed reimbursement claims. 12 NYCRR Subpart 325-6.

Jurisprudences:

Matthew Bender's New York Practice Guides: 4 New York Practice Guide: Business and Commercial § 25A.09.

§ 17. Aliens

Financial benefits payable under this chapter to aliens not residents or about to become nonresidents of the United States or Canada shall be in the same amount as provided for residents, except that dependents in any foreign country shall be limited to surviving spouse and child or children, or, if there be no surviving spouse or child or children, to the surviving father or mother whom the volunteer firefighter has supported, either wholly or in part, for a period of one year prior to the date of the injury.

HISTORY:

Add, L 1956, ch 696, eff March 1, 1957; amd, L 1976, ch 88, eff Sept 1, 1976, but not applicable to rights, obligations or interests arising from deaths occurring prior to the effective date of this act; L 1988, ch 621, § 1, eff Jan 1, 1989 (see 1988 note below).

Editor's Notes: Laws 1988, ch 621, § 3, eff Jan 1, 1989, provides as follows:

§ 3. This act shall take effect on the first day of January next succeeding the date on which it shall have become a law and shall apply to all hearings continued or adjourned after such date and all injuries or deaths to alien volunteer firefighters occurring after such date.

See notes to Art I.

Amendment Notes:

1988. Chapter 621, § 1 amended:

Par by deleting "fireman" and ", and except that the workmen's compensation board may at its option, or upon the application of the political subdivision or its insurance carrier shall, commute as of the date of death all financial benefits to be paid to such aliens, by paying or causing to be paid to them one-half of the commuted amount of such financial benefits as determined by such board. In the case of a resident alien about to become a nonresident the future payments of such benefits shall be commuted as of the date of nonresidence".

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

Law Reviews:

Wolff, Workmen's Compensation. 24 Syracuse L Rev, No. 1, p. 249, 1973.

§ 18. Disposition of accrued benefits upon death.

Except as otherwise provided in section ten of this chapter, in the case of the death of an injured volunteer firefighter to whom there was due at the time of his or her death any benefits under the provisions of this chapter, the amount of such benefits shall be payable to the surviving spouse, if there be one, or, if none, to the surviving child or children of the deceased under the age of eighteen years, and if there be no surviving spouse or children, then to the dependents of such deceased or to any of them as the workers' compensation board may direct, and if there be no surviving spouse, children or dependents of such deceased, then to his or her estate. An award for disability may be made after the death of an injured volunteer firefighter.

HISTORY:

Add, L 1956, ch 696, eff March 1, 1957; L 2018, ch 476, § 275, effective December 28, 2018.

Editor's Notes: See notes to Art I.

Amendment Notes The 2018 amendment by ch 476, § 275, in the first sentence, substituted "firefighter" for "fireman," added "or her" twice, and substituted "workers'" for "workmen's; and substituted "firefighter" for "fireman" in the second sentence.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

Law Reviews:

Wolff, Workmen's Compensation. 24 Syracuse L Rev, No. 1, p. 249, 1973.

§ 19. Exclusiveness of remedy.

The benefits provided by this chapter shall be the exclusive remedy of a volunteer firefighter, or his or her spouse, parents, dependents, next of kin, executor or administrator, or anyone otherwise entitled to recover damages, at common law or otherwise, for or on account of an injury to a volunteer firefighter in line of duty or death resulting from an injury to a volunteer firefighter in line of duty, as against (1) the political subdivision liable for the payment of such benefits, (2) the political subdivision regularly served by the fire company of which the volunteer firefighter is a member, whether or not pursuant to a contract for fire protection, even though any such political subdivision is not liable for the payment of such benefits in the circumstances, and (3) any person or agency acting under governmental or statutory authority in furtherance of the duties or activities in relation to which any such injury resulted; provided, however, that the benefits provided by this chapter shall not be the exclusive remedy as against persons who, in the furtherance of the same duties or activities, are not similarly barred from recourse against the volunteer firefighter, or his or her executor or administrator.

HISTORY:

Add, L 1956, ch 696; amd, L 1957, ch 751, § 3, eff Apr 19, 1957; L 2018, ch 476, § 276, effective December 28, 2018.

Editor's Notes: See notes to Art I.

Amendment Notes The 2018 amendment by ch 476, § 276, substituted "firefighter" for "fireman" five times and added "or her" twice.

Notes to Decisions

The 3 immunization subdivisions of CLS Vol Fire Ben § 19 are designed to provide protection from suit to different categories of persons and entities defined by their relationship to the injured firefighter; the one common thread is an employer-employee-like relationship. Lima v State, 74 N.Y.2d 694, 543 N.Y.S.2d 378, 541 N.E.2d 407, 1989 N.Y. LEXIS 656 (N.Y. 1989).

Volunteer Firefighters' Benefit Law benefits are intended to be exclusive remedy against state when it is acting as employer. Lima v State, 74 N.Y.2d 694, 543 N.Y.S.2d 378, 541 N.E.2d 407, 1989 N.Y. LEXIS 656 (N.Y. 1989).

To be protected from suit by provisions of CLS Vol Fire Ben § 19(3), person or agency acting under governmental or statutory authority must be found to have employer-employee-like relationship with injured firefighter, and to have responsibility for firefighter's performance or training. Lima v State, 74 N.Y.2d 694, 543 N.Y.S.2d 378, 541 N.E.2d 407, 1989 N.Y. LEXIS 656 (N.Y. 1989).

State was immune from suit under CLS Vol Fire Ben § 19(3), and thus entitled to summary judgment in negligence action premised on respondeat superior and seeking damages for injuries to member of village volunteer fire department who fell while participating in fire training program sponsored by Department of State and supervised by instructor retained by state; state qualified for immunity because it was carrying out its statutory duty under CLS Exec § 156 to plan, coordinate and provide training for volunteer firefighters. Lima v State, 74 N.Y.2d 694, 543 N.Y.S.2d 378, 541 N.E.2d 407, 1989 N.Y. LEXIS 656 (N.Y. 1989).

This section prescribes the exclusive remedy of volunteer firemen against municipal entities enumerated therein. Gresis v Garth Manor Corp., 20 A.D.2d 726, 248 N.Y.S.2d 118, 1964 N.Y. App. Div. LEXIS 4331 (N.Y. App. Div. 2d Dep't), app. denied, 14 N.Y.2d 488, 1964 N.Y. LEXIS 1868 (N.Y. 1964).

Section 19 of the Volunteer Firemen's Benefit Law did not bar a suit in common law negligence against the town which maintained a fire hydrant, the cap of which blew off as plaintiff and other members of his volunteer company from a nearby town, were attaching a fire hose to it, where the record contained no evidence to indicate the defendant town was a political subdivision regularly served by plaintiff's fire company. Giuliano v Brunswick, 32 A.D.2d 705, 300 N.Y.S.2d 27, 1969 N.Y. App. Div. LEXIS 3975 (N.Y. App. Div. 3d Dep't), app. dismissed, 25 N.Y.2d 740, 1969 N.Y. LEXIS 1828 (N.Y. 1969).

Under evidence that the plaintiff was a volunteer fireman and after responding to an alarm was directing traffic in front of the firehouse when he was struck by the defendant's automobile, and that the defendant also was a volunteer fireman and was responding to an alarm when he struck the plaintiff, the plaintiff's exclusive remedy was governed by § 19 of the Volunteer Fireman's Benefit Law. Lamalfa v Denny, 34 A.D.2d 709, 309 N.Y.S.2d 852, 1970 N.Y. App. Div. LEXIS 5037 (N.Y. App. Div. 3d Dep't 1970).

The fact that a fire district is defined as a political subdivision does not preclude it from also being defined as an agency within the intendment of Volunteer Firemen's Law § 19. Pollini v Fuller Road Fire Dep't, 39 A.D.2d 554, 331 N.Y.S.2d 732, 1972 N.Y. App. Div. LEXIS 4992 (N.Y. App. Div. 2d Dep't 1972), aff'd, 34 N.Y.2d 744, 357 N.Y.S.2d 502, 313 N.E.2d 793, 1974 N.Y. LEXIS 1594 (N.Y. 1974).

In an action brought by a volunteer fireman seeking damages for personal injuries, and by his wife for loss of consortium, the complaint would be dismissed where the exclusive remedy would be a form of workers' compensation inasmuch as the fireman had been injured in the line of duty when his car collided with the car of another volunteer fireman while both had been independently proceeding to the firehouse in response to an alarm. Malone v Jacobs, 88 A.D.2d 927, 450 N.Y.S.2d 885, 1982 N.Y. App. Div. LEXIS 17271 (N.Y. App. Div. 2d Dep't 1982).

County was not entitled to summary judgment in village volunteer fireman's negligence action which arose from personal injuries sustained at county training facility, despite exclusive remedy provisions of CLS Vol Fire Ben § 19, where village did not "regularly serve" county given facts that mutual aid program authorized under CLS County § 225-a was voluntary program which allowed village to opt out and rejoin at will, assistance was rendered on irregular emergency basis, and less than 5 percent of village's responses during fireman's tenure were to calls for mutual aid. Lima v County of Rockland, 133 A.D.2d 740, 520 N.Y.S.2d 161, 1987 N.Y. App. Div. LEXIS 51783 (N.Y. App. Div. 2d Dep't 1987).

State was entitled to summary judgment dismissing claim for injuries suffered by volunteer firefighter during training course conducted by state employee since firefighter had applied for and received benefits under CLS Vol Fire Ben § 19, which provides exclusive remedy to volunteer firemen and applies to state as government in authority. Lima v State, 139 A.D.2d 701, 527 N.Y.S.2d 457, 1988 N.Y. App. Div. LEXIS 4506 (N.Y. App. Div. 2d Dep't 1988), aff'd, 74 N.Y.2d 694, 543 N.Y.S.2d 378, 541 N.E.2d 407, 1989 N.Y. LEXIS 656 (N.Y. 1989).

Court properly held that county was not "person or agency" under CLS Vol Fire Ben § 19(3). Pedone v County of Nassau, 262 A.D.2d 540, 692 N.Y.S.2d 662, 1999 N.Y. App. Div. LEXIS 7052 (N.Y. App. Div. 2d Dep't 1999).

Widow's claims against a village and a fire department to recover for the death of her husband, a volunteer firefighter, were

barred by N.Y. Vol. Fire. Ben. Law § 19 because the widow sought to recover both as the estate administrator and in her individual capacity, and the village and the fire department were among the respondents enumerated in the statute; N.Y. Gen. Mun. Law § 205-a did not provide for a recovery in addition to that provided by the various provisions of the Volunteer Firefighters' Benefit Law. Brady v Village of Malverne, 76 A.D.3d 691, 907 N.Y.S.2d 68, 2010 N.Y. App. Div. LEXIS 6621 (N.Y. App. Div. 2d Dep't 2010).

The Volunteer Firemen's Benefit Law afforded the exclusive remedy against political subdivisions for injuries sustained by a volunteer fireman when a fire truck collided with another vehicle. Hausman v Miller, 14 Misc. 2d 93, 178 N.Y.S.2d 566, 1958 N.Y. Misc. LEXIS 2577 (N.Y. Sup. Ct. 1958).

The remedy of an outside fireman, injured while giving emergency aid to a local unit, of which he is not a member, is exclusively under this act, notwithstanding the injury is caused by defective equipment of the local unit. Smith v Plandome, 28 Misc. 2d 793, 213 N.Y.S.2d 119, 1961 N.Y. Misc. LEXIS 3311 (N.Y. Sup. Ct. 1961).

Volunteer fireman's claim for damages against the state for injuries sustained while attending a fire school conducted by state employee was barred, since the state was within the purview of § 19(3) which makes the statute the exclusive remedy of an injured volunteer fireman against any person or agency acting under governmental or statutory authority. Rosenberger v State, 46 Misc. 2d 194, 259 N.Y.S.2d 548, 1965 N.Y. Misc. LEXIS 1936 (N.Y. Ct. Cl. 1965).

Volunteer Firemen's Benefit Law bars an action both against the political subdivision and the town superintendent of highways for injuries sustained by volunteer firemen when the shoulder of a highway collapsed while the firemen were answering a call. Holland v Baker, 61 Misc. 2d 201, 305 N.Y.S.2d 6, 1968 N.Y. Misc. LEXIS 1087 (N.Y. Sup. Ct. 1968), aff'd, 33 A.D.2d 626, 305 N.Y.S.2d 9, 1969 N.Y. App. Div. LEXIS 2985 (N.Y. App. Div. 3d Dep't 1969).

Where various fire organizations were engaged in a common or joint training exercise, the members of the participating units were precluded by Volunteer Firemen's Benefit Law § 19 from seeking any other remedy than that provided by said statute, when one of the firemen was injured during such exercise. Pollini v Fuller Road Fire Dep't, 66 Misc. 2d 523, 321 N.Y.S.2d 411, 1971 N.Y. Misc. LEXIS 1661 (N.Y. Sup. Ct. 1971), aff'd, 39 A.D.2d 554, 331 N.Y.S.2d 732, 1972 N.Y. App. Div. LEXIS 4992 (N.Y. App. Div. 2d Dep't 1972).

Village volunteer fireman injured as result of fall while participating in training operations at fire training center owned and operated by county is not precluded from bringing common-law tort action against county where, although fireman's volunteer fire company participates in mutual aid and assistance program coordinated by county, fireman's company does not regularly service county within meaning of § 19. Lima v County of Rockland, 132 Misc. 2d 447, 503 N.Y.S.2d 964, 1986 N.Y. Misc. LEXIS 2716 (N.Y. Sup. Ct. 1986), aff'd, 133 A.D.2d 740, 520 N.Y.S.2d 161, 1987 N.Y. App. Div. LEXIS 51783 (N.Y. App. Div. 2d Dep't 1987).

Where plaintiff, a volunteer firefighter, suffered injuries in a traffic accident on the way to a structure fire, his complaint against the driver (another volunteer firefighter) was dismissed, as he failed to demonstrate a triable issue as to whether the conduct of the driver constituted willful negligence or malfeasance, as his driving did not bespeak conscious indifference to a highly probable risk that calamity would ensue. Plaintiff's claims against the town were dismissed, as the benefits of Vehicle and Traffic Law § 19 were the exclusive remedy of a volunteer firefighter for a line of duty injury as against the town. Lee v Verstraete, 65 Misc. 3d 531, 109 N.Y.S.3d 594, 2019 N.Y. Misc. LEXIS 4781 (N.Y. Sup. Ct. 2019).

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

Matthew Bender's New York Practice Guides: 4 New York Practice Guide: Business and Commercial § 25A.09.

§ 20. Other remedies of volunteer firefighters; subrogation.

The provisions of section twenty-nine of the workers' compensation law to the extent that such provisions are not inconsistent with the provisions of this chapter, shall be applicable as fully as if set forth in this chapter.

HISTORY:

Add, L 1956, ch 696, eff March 1, 1957; L 2018, ch 476, § 277, effective December 28, 2018.

Editor's Notes: See notes to Art I.

Amendment Notes The 2018 amendment by ch 476, § 277, substituted "firefighters" for "firemen" in the section heading; and substituted "workers' " for "workmen's."

Notes to Decisions

Where there is inconsistency between the Workmen's Compensation Law and the Volunteer Firemen's Benefit Law, the latter controls. Smith v Plandome, 28 Misc. 2d 793, 213 N.Y.S.2d 119, 1961 N.Y. Misc. LEXIS 3311 (N.Y. Sup. Ct. 1961).

Agency Opinions

An endorsement naming a fire department or company, fire commissioners and/or fire chiefs as additional insureds cannot be added to nor form a part of a fire district's Volunteer Firemen's Benefit Law insurance policy originally issued to take effect on or after March 1, 1962. A fire district may purchase liability insurance for the fire departments or companies, fire commissioners and fire chiefs serving the district. 1983 NY Ops Atty Gen April 14 (informal).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in Town § 176.

Jurisprudences:

Law Reviews:

1976 Survey of New York Law: Civil Practice. 28 Syracuse L Rev, p. 379, Winter, 1977.

1978 Survey of New York Law: Insurance Law. 30 Syracuse L Rev, p. 313, Winter, 1979.

§ 21. Assistance to other states, the Dominion of Canada, property ceded to the federal government and to Indian reservations.

1. Whenever a fire company or fire department in this state shall answer a call to furnish assistance to any political subdivision or territory of another state of the United States or of the Dominion of Canada, or property ceded to the federal government, the provisions of this chapter shall apply with respect to the volunteer firefighters of such fire company or department, while such assistance is being rendered or while going to or returning from the place from where the assistance is to be or was rendered, to the same extent and in the same manner as if such service had been rendered in or for the area regularly served by such volunteer firefighters; provided, however, that there shall be deducted from any amounts payable under this chapter any amounts recoverable by or payable to any such volunteer firefighter under the laws applicable in the political subdivision or territory for which the call for assistance was made.

2. The provisions of this chapter shall apply with respect to volunteer firefighters of fire departments and fire companies of other states of the United States and of the Dominion of Canada who render service in this state in answer to a call for assistance to the territory regularly served by a fire department or fire company described in subdivisions one to five, inclusive, of section thirty of this chapter

and, for the purposes of determining liability for benefits under this chapter, any such volunteer firefighter shall be considered as a volunteer member of the fire department or fire company of the territory for which service has been rendered in this state pursuant to a call for assistance; provided that the laws of the state served by such volunteer firefighters, fire departments or fire companies, or of the Dominion of Canada, as the case may be, contain provisions under which benefits are granted in relation to volunteer firefighters of this state who are killed or injured when rendering service in such other states, or the Dominion of Canada, as the case may be, in answer to a call for assistance; provided, however, that there shall be deducted from any amounts payable under the provisions of this chapter to a volunteer firefighter of such other states or of the Dominion of Canada, any amounts recoverable by or payable to such volunteer firefighter under the laws of the state served by such volunteer firefighter or of the Dominion of Canada, as the case may be.

3. Whenever a fire company or fire department in this state shall answer a call for assistance to be rendered to any part of an Indian reservation the provisions of this chapter shall apply with respect to the volunteer firefighters of such fire company or department, while such assistance is being rendered or while going to or returning from the place from where the assistance is to be or was rendered, to the same extent and in the same manner as if such service had been rendered in or for the area regularly served by such volunteer firefighters.

HISTORY:

Add, L 1956, ch 696, eff March 1, 1957; amd, L 1963, ch 309, ch 322, eff April 16, 1963; L 1963, ch 1004, eff March 1, 1964; L 1964, ch 270, eff March 1, 1964; L 2018, ch 476, § 278, effective December 28, 2018.

Editor's Notes: See notes to Art I.

Amendment Notes The 2018 amendment by ch 476, § 278, substituted "firefighters" for "firemen" or variants wherever it appears in 1, 2, and 3.

Notes to Decisions

A volunteer fireman providing service outside the State pursuant to a fire protection contract is covered by volunteer firemen's benefits payable by his "home area". 1975 Ops St Compt File #160.

Agency Opinions

A city may contract for fire protection with a municipality of another state where firemen from this state are entitled to benefits under the laws of such other state in the manner required by this section. 1962 NY Ops Atty Gen Dec 4.

This section provides for coverage of the members of a fire district which contracts for fire protection with a public agency of a neighboring state. 1964 NY Ops Atty Gen Mar 2.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 30.

Jurisprudences:

Law Reviews:

Workmen's Compensation and Conflicts of Laws in New York. 53 Cornell L Rev, p. 151, November, 1967.

§ 22. Revenues and benefits from sources other than this chapter

1. Benefits, savings or insurance of the injured or deceased volunteer firefighter, or insurance carried for his benefit under subsection (a) of section four thousand two hundred thirty-seven of the insurance law, shall not be considered in determining the benefits to be paid and provided under this chapter, nor shall such benefits be diminished or reduced by reason of the payment to an injured volunteer firefighter of salary, wages or other remuneration by any political subdivision liable for the payment of such benefits.

2. Benefits received from any political subdivision pursuant to service award payments authorized by article eleven-A of the general municipal law shall not be considered in determining the benefits to be paid and provided under this chapter.

HISTORY:

Add, L 1956, ch 696, eff March 1, 1957; amd, L 1984, ch 805, § 90, eff Sept 1, 1984; L 1988, ch 775, § 3, eff Sept 1, 1989.

Editor's Notes: See notes to Art I.

Amendment Notes:

1988. Chapter 775, § 3 amended:
Sub 1, by deleting "fireman".

Agency Opinions

The Centerport Volunteer Exempt Firemen's Benevolent Association may not expend foreign fire insurance tax moneys to compensate two paid dispatchers for loss of salary incurred while the dispatchers are attending a social affair held by the benevolent association. 1979 Op St Compt File #697.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Blanket accident and health insurance, CLS Ins § 4235.

Federal Aspects:

Old-age, survivors and disability insurance benefits, 42 USCS § 418.

§ 23. Assignments, exemptions.

Benefits payable under this article shall not be assigned, released or commuted, except as provided by this chapter, and shall be exempt from all claims of creditors and from levy, execution and attachment or other remedy for recovery or collection of a debt, which exemption may not be waived. Such benefits shall be paid only to volunteer firefighters or their dependents except as otherwise provided in this chapter.

HISTORY:

Add, L 1956, ch 696, eff March 1, 1957; L 2018, ch 476, § 279, effective December 28, 2018.

Editor's Notes: See notes to Art I.

Amendment Notes The 2018 amendment by ch 476, § 279, substituted "firefighters" for "firemen."

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in Work Comp § 206.

Jurisprudences:

19A NY Jur 2d Compromise, Accord, and Release § 113.

§ 24. Waiver agreements

No agreement or release by a volunteer firefighter, or, in the case of death, the dependents of a deceased volunteer firefighter, to waive his or her right to benefits under this chapter shall be valid, except as

provided in section thirty-two of the workers' compensation law or otherwise in this chapter.

HISTORY:
Add, L 1956, ch 696, eff March 1, 1957; amd, L 2004, ch 315, § 1, eff Aug 10, 2004.

Editor's Notes: See notes to Art I.

Amendment Notes:

2004. Chapter 315, § 1 amended:
Par by deleting "fireman".

§ 25. Limitation of time

No limitation of time provided in this chapter shall run as against any person who is mentally incompetent or a minor so long as he has no committee or guardian.

HISTORY:
Add, L 1956, ch 696, eff March 1, 1957.

Editor's Notes: See notes to Art I.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

Law Reviews:

Wolff, Workmen's Compensation. 24 Syracuse L Rev, No. 1, p. 249, 1973.

ARTICLE III Liability for Benefits; Insurance

Section

30. Liability for and payment of benefits
32. Group insurance

HISTORY:
Add, L 1956, ch 696, eff March 1, 1957.

§ 30. Liability for and payment of benefits

Except as otherwise provided in article five of the workers' compensation law, in section two hundred nine-i of the general municipal law and in section twenty-one of this chapter:

1. If at the time of injury the volunteer firefighter was a member of a fire company of a county, city, town, village or fire district fire department, any benefit under this chapter shall be a county, city, town, village or fire district charge, as the case may be, and any claim therefor shall be audited in the same manner as other claims against the county, city, town, village or fire district and the amount thereof shall be raised and paid in the same manner as other county, city, town, village or fire district charges.

2. If at the time of injury the volunteer firefighter was a member of a fire company incorporated under the membership corporations law, or any other law, and located in a city, village, or fire district, protected under a contract by the fire department or fire company of which the volunteer firefighter was a member, any benefit under this chapter shall be a city, village or fire district charge, as the case may be, and any claim therefor shall be audited in the same manner as other claims against the city, village or fire district and the amount thereof shall be raised and paid in the same manner as other city, village or fire district charges.

3. If at the time of injury the volunteer firefighter was a member of a fire company incorporated under the membership corporations law, or any other law, and located in a fire protection district, or fire alarm district, protected under a contract by such fire company, any benefit under this chapter shall be a town charge and any claim therefor shall be audited and paid in the same manner as town charges and the amount thereof shall be raised upon the property liable to taxation in the fire protection district or fire alarm district in the same manner as town charges therein are raised.

4. If at the time of injury the volunteer firefighter was a member of a fire company incorporated under the membership corporations law, or any other law, and located outside of a city, village, fire district, fire protection district or fire alarm district, any benefit under this chapter shall be a town charge and any claim therefor shall be audited and paid in the same manner as town charges and the amount thereof raised upon the property liable to taxation in such outside territory protected by such fire company in the same manner as town charges therein are raised.

5. If at the time of injury the volunteer firefighter was a member of a fire company or fire department operating in, or maintained jointly by two or more villages, or two or more towns, or two or more fire districts, any benefit under this chapter shall be a charge against such villages, towns or fire districts, in the proportion that the full valuation of taxable real estate in each bears to the aggregate full valuation of the taxable real estate of all such villages, towns or fire districts and the amount thereof shall be audited, raised and paid in the same manner as other village, town or fire district charges. Full valuation shall be determined by dividing the assessed valuations of taxable real estate of each such village, town or fire district as shown by the latest completed assessment roll of the village, town or fire district by the equalization rate established by the authorized state agency or officer for such roll; provided, however, in a county having a county department of assessment the full valuation in towns and fire districts shall be determined by applying the state equalization rate established for the town, or the town in which the fire district is located, to the appropriate portion of the last completed county roll.

6. The provisions of subdivisions one to five, inclusive, of this section shall not apply if the injury results from services performed when assistance is being rendered to:

a. Another city, town which has a town fire department, village or fire district, including one protected under a contract by the fire department or fire company of which the volunteer firefighter is a member,

b. A fire protection district or fire alarm district, including one protected under a contract by the fire

department or fire company of which the volunteer firefighter is a member,

c. The area of a town protected by a fire company incorporated under the membership corporations law, or any other law, and located outside of a city, village, fire district, fire protection district, or fire alarm district,

d. The unorganized area of a town (outside of a city, village, fire district, fire protection district, fire alarm district, and also outside the area protected by a fire company incorporated under the membership corporations law, or any other law, and located outside of a city, village, fire district, fire protection district or fire alarm district),

e. The joint area protected by a fire company or fire department operating in, or maintained jointly by two or more villages, or two or more towns, or two or more fire districts,

f. A fire department of a county which has a fire department, or

g. A county which has requested fire aid pursuant to section two hundred nine-e of the general municipal law,

pursuant to a call to furnish assistance to any such municipal corporation, district or area in cases of fire or other emergencies, or for other authorized purposes, or while going to or returning from the place where the assistance is to be or was rendered, or if death shall result from the effects of any such injury, and in any such case any such benefit shall be a charge against such aided municipal corporation, district or area and after audit shall be paid and the amount thereof shall be raised upon the property liable to taxation in such municipal corporation, district or area, in the same manner as other charges against the same are raised, except that in the cases described at paragraphs b, c and d of this subdivision, the town in which the district or area is located shall be primarily liable for such payment. If there is no property liable to taxation in any area described in paragraph d, the benefit shall be a town charge and any claim therefor shall be audited and paid in the same manner as town charges and the amount thereof shall be raised upon the taxable real property in the town in the same manner as town charges therein are raised.

In the case of a false call for assistance, any such benefit shall be audited, raised and paid in the manner provided in subdivisions one to five, inclusive, of this section, as the case may be.

The term "assistance", as used in this section, includes the services of firefighting forces, fire police squads, emergency rescue and first aid squads rendered in case of a fire or other emergency, including stand-by service, to aid (1) a fire department, fire company, or any unit thereof, other than that of which the volunteer firefighter is a member and (2) owners or occupants of property, and other persons, whether or not such owners, occupants or persons are receiving fire or other emergency service from a fire department, fire company, or any unit thereof, other than that of which the volunteer firefighter is a member.

Except as otherwise provided by law in the case of natural disaster emergencies, a call to furnish assistance may be made by any person aware of the peril involved and the need for assistance or pursuant to any legally authorized or recognized plan for the furnishing of mutual aid in cases of fire or other emergency. The call need not originate in the municipal corporation, district or area ultimately liable for benefits under this section and may be relayed through one or more persons or mediums of communication.

The provisions of this subdivision shall not apply if the injury results from services performed by the volunteer firefighter in a natural disaster emergency and he or she was serving as part of the civil defense forces activated, and when assistance is being so rendered the benefits to be paid and provided under this chapter shall be paid and provided by the political subdivisions which would be liable under subdivisions one to five, inclusive, of this section.

If death or injury results from the performance of duty by a volunteer firefighter serving as fire chief while inspecting a public or private school pursuant to paragraph c of subdivision seven of section eight hundred seven-a of the education law for fire prevention and protection purposes in a fire district, fire protection district or fire alarm district furnished fire protection pursuant to a contract by his or her fire department or fire company, or from necessary travel directly connected with any such duty, then the benefits to be paid and provided under this chapter shall be a charge against such fire district, fire protection district or fire alarm district so protected pursuant to contract and after audit shall be paid and the amount thereof shall be raised upon the property liable to taxation in any such district in the same manner as other charges against the same are raised, except that in the case of a fire protection district or fire alarm district, the town in which the district is located shall be primarily liable for such payment.

If death or injury results from the performance of duty under subdivision four of section three hundred three of the multiple residence law, or from necessary travel directly connected with any such assignment, and the building or property inspected or to be inspected is not located in the area regularly served and protected by the fire department or fire company of which the volunteer firefighter is a member, but is located in a city, town which has a fire department, village, fire district, fire protection district or fire alarm district served and protected pursuant to a contract for fire protection by the fire department or fire company of which the volunteer firefighter is a member, then the benefits to be paid and provided under this chapter shall be a charge against such political subdivision, fire protection district or fire alarm district so protected pursuant to contract and after audit shall be paid and the amount thereof

shall be raised upon the property liable to taxation in such political subdivision or district in the same manner as other charges against the same are raised, except that in the case of a fire protection district or fire alarm district, the town in which the district is located shall be primarily liable for such payment.

If death or injury results from the performance of duty by a volunteer firefighter while inspecting buildings for fire hazards in a city, village, fire district, fire protection district or fire alarm district furnished fire protection pursuant to a contract by his or her fire department or fire company, or from necessary travel directly connected with any such duty, then the benefits to be paid and provided under this chapter shall be a charge against such city, village, fire district, fire protection district or fire alarm district so protected pursuant to contract and after audit shall be paid and the amount thereof shall be raised upon the property liable to taxation in any such city, village or district in the same manner as other charges against the same are raised, except that in the case of a fire protection district or fire alarm district, the town in which the district is located shall be primarily liable for such payment. This paragraph shall not be applicable in any city, however, unless a city charter or other law under which the city operates, or a local law adopted by the city, authorizes such an inspection in areas of the city receiving fire protection pursuant to a contract. The term "building," as used in this paragraph, does not include a multiple dwelling which may be inspected by such fire department or company under and pursuant to the provisions of subdivision four of section three hundred three of the multiple residence law.

The foregoing provisions of this subdivision shall apply only in cases where volunteer firefighters are injured in line of duty prior to the first day of March, nineteen hundred sixty-four; and in death cases where death results from injuries sustained prior to such date. Where volunteer firefighters are injured in line of duty on or after the first day of March, nineteen hundred sixty-four, and in death cases where death results from injuries sustained on or after such date, the liability for benefits under this chapter shall be determined pursuant to subdivisions one to five, inclusive, of this section, except as otherwise provided in article five of the workers' compensation law, section two hundred nine-i of the general municipal law and in section twenty-one of this chapter.

6-a. The provisions of subdivisions one to six, inclusive, of this section shall not apply if the injury results from services performed when general ambulance service is furnished under a fire protection contract pursuant to section two hundred nine-b of the general municipal law for (1) another city, village or fire district, protected under a contract by the fire department or fire company of which the volunteer firefighter is a member or (2) a fire protection district or fire alarm district, protected under a contract by the fire department or fire company of which the volunteer firefighter is a member, pursuant to a call to furnish such service in any such municipal corporation or district, or while going to or returning from the place where the service is to be or was furnished, or if death shall result from the effects of any such injury, and in any such case any such benefit shall be a charge against such municipal corporation or district and after audit shall be paid and the amount thereof shall be raised upon the property liable to taxation in such municipal corporation or district, in the same manner as other charges against the same are raised, except that in the case of a fire protection district or fire alarm district the town in which the district is located shall be primarily liable for such payment.

The foregoing provisions of this subdivision shall apply only in cases where volunteer firefighters are injured in line of such general ambulance service duty prior to the first day of March, nineteen hundred sixty-four, and in death cases where death results from injuries sustained prior to such date. Where volunteer firefighters are injured in line of such general ambulance service duty on or after the first day of March, nineteen hundred sixty-four, and in death cases where death results from injuries sustained on or after such date, the liability for benefits under this chapter shall be determined pursuant to subdivisions one to five, inclusive, of this section, except as otherwise provided in article five of the workers' compensation law, section two hundred nine-i of the general municipal law and section twenty-one of this chapter.

7. Any political subdivision may finance the payment of any benefits to be paid and provided under this chapter by the issuance of serial bonds or capital notes pursuant to the local finance law unless it is required by some law, other than this chapter, to pay such benefits from current funds.

8. Any political subdivision may contract for insurance indemnifying against the liability imposed by this chapter and the cost of such insurance shall be audited, raised and paid in the same manner as benefits are required to be audited, raised and paid in this section.

9. Insurance authorized to be purchased pursuant to subdivision eight of this section may be secured from the state fund or any stock corporation, mutual corporation or reciprocal insurer authorized to transact the business of workers' compensation in this state. If such insurance is not secured, the political subdivision liable shall be deemed to have elected to be a self-insurer unless it is a participant in a county plan of self-insurance or its liability for benefits under this chapter is covered by a town's participation in a county plan of self-insurance as provided in subdivision three of section sixty-three of the workers' compensation law. Every such self-insurer shall file with the chair of the workers' compensation board a notice of such election pre-

scribed in form by such chair. For failure to file such notice within ten days after such election is made, the treasurer or other fiscal officer of such political subdivision shall be liable to pay to the chair of the workers' compensation board the sum of one hundred dollars as a penalty, to be transferred to the state treasury. A notice of election to be a self-insurer for compensation and benefits to volunteer firefighters under the provisions of the workers' compensation law and the general municipal law in effect prior to March first, nineteen hundred fifty-seven, which was filed prior to such date pursuant to the provisions of subdivision four of section fifty of the workers' compensation law as in effect prior to such date shall be deemed to be a notice of election filed under this section unless the chair of the workers' compensation board is notified to the contrary. The provisions of subdivision five of section fifty of the workers' compensation law shall be applicable to such self-insurers.

10. The governing board of a political subdivision liable for the payment of such benefits may authorize the treasurer or other fiscal officer thereof to pay the financial benefits provided for in this chapter to the person entitled thereto without waiting for an award in any case in the manner provided in section forty-nine of this chapter. The amount payable prior to an award pursuant to such authorization shall constitute a settled claim within the meaning of the local finance law.

11. A contract for fire protection, for the purposes of this section, shall be deemed in full force and effect if negotiations are pending for the renewal thereof.

12. Where a city, village, fire district or town on behalf of a fire protection district or fire alarm district is furnished service by a fire company, fire department, or any unit thereof pursuant to a contract with another city, village, fire district, or an incorporated fire company having its headquarters outside the city, village, fire district, fire protection district or fire alarm district receiving such service and the liability for benefits under this chapter in relation to volunteer firefighters rendering such service pursuant to such contract is not covered pursuant to a county self-insurance plan pursuant to section sixty-three of the workers' compensation law, such contract shall provide for payment to the city, village, fire district or town in which such incorporated fire company has its headquarters, of a sum in addition to the amount to be paid for such service pursuant to the contract, to provide for any increase in cost, or any new or added cost for insurance coverage for the liability for benefits under this chapter by reason of the service rendered pursuant to such contract, unless such additional sum has been specifically included in the contract amount for such service. Any such additional sum so paid shall not be subject to division with a volunteer fire company as otherwise provided by law in the case of contracts for such service.

HISTORY:

Add, L 1956, ch 696, eff March 1, 1957; amd, L 1957, ch 626, eff Apr 17, 1957; L 1957, ch 663, §§ 1–3, eff Apr 18, 1957; L 1957, ch 668, eff Apr 18, 1957; L 1957, ch 679, eff Apr 18, 1957; L 1957, ch 751, § 4, eff Apr 19, 1957; L 1957, ch 849, eff May 1, 1957; L 1958, ch 123, eff Mar 6, 1958; L 1958, ch 368, eff July 1, 1958; L 1958, ch 762; amd, L 1959, ch 694, eff Apr 22, 1959; L 1963, ch 1004, eff May 3, 1963; L 1964, ch 520, § 4, eff Apr 10, 1964; L 1984, ch 372, § 1, eff Jan 1, 1985, and applicable only to contracts entered into or renewed on or after the effective date of this act; L 1989, ch 61, § 218, eff April 19, 1989 and deemed eff April 1, 1989; L 2018, ch 476, § 280, effective December 28, 2018.

Editor's Notes: See notes to Art I.

Amendment Notes The 2018 amendment by ch 476, § 280, substituted "workers' " for "workmen's" in the introductory language; substituted "firefighter" for "fireman" in 1, twice in 2, in 3, 4, 5, 6a, and 6b; in 6g, substituted "firefighter" for "fireman" in the third paragraph, rewrote the fifth paragraph, in the sixth paragraph, substituted "firefighter" for "fireman" and added "or her," substituted "firefighter" for "firemen" twice in the seventh paragraph, in the first sentence of the eighth paragraph, substituted "firefighter" for "fireman" and added "or her," and in the last paragraph, in the first sentence, deleted "six" following "subdivision" and substituted "firefighters" for "firemen" and in the second sentence, substituted "firefighters" for "firemen" and "workers' " for "workmen's"; in 6-a, in the first paragraph, substituted "firefighter" for "fireman" preceding "is a member" twice and in the second paragraph, in the first sentence, deleted "six a" following "subdivision," substituted "firefighters" for "firemen" and in the second sentence, substituted "firefighters" for "firemen" and workers' " for "workmen's."

Notes to Decisions

Analysis

1. In general
2. Construction, generally
3. —"Home area" rule
4. Assessments and charges
5. Coverage outside territory
6. Insurance

1. In general

Fire district which, under CLS Gen Mun § 209-i(1-a), accepts services of volunteer firefighter who is member of fire company in bordering area, is liable for Volunteer Firefighters' Benefit Law benefits accruing to volunteer firefighter injured during time such services are rendered. 1998 Op St Compt No. 98-24.

2. Construction, generally

Under subd. 6 of this section, all that seems to be necessary to constitute a "call for assistance" is that there be a "peril" and that "need" for assistance is communicated by someone to the other district. Fancher v Canastota, 16 A.D.2d 847, 227 N.Y.S.2d 627, 1962 N.Y. App. Div. LEXIS 9975 (N.Y. App. Div. 3d Dep't), app. denied, 12 N.Y.2d 641, 1962 N.Y. LEXIS 1535 (N.Y. 1962).

Subdivision 6 of this section places responsibility for death or injuries of a volunteer fireman responding to a call for assistance emanating from another fire district upon the latter district as long as the call for assistance comes from a person aware of the peril involved, and that district is responsible notwithstanding it refuses to accept assistance from the responding fire department. Gilewski v Mastic Beach Fire Dist., 19 A.D.2d 299, 241 N.Y.S.2d 874, 1963 N.Y. App. Div. LEXIS 3264 (N.Y. App. Div. 3d Dep't 1963), aff'd, 14 N.Y.2d 595, 248 N.Y.S.2d 884, 198 N.E.2d 262, 1964 N.Y. LEXIS 1268 (N.Y. 1964).

3. —"Home area" rule

Where a volunteer fire company is located in a town and is not within a fire district, fire protection or fire alarm district, thc "home area" responsible for volunteer firemen's benefits is the town in which the company is located. The town board may by resolution restrict the company from entering into new contracts to provide services outside the "home area" town. 1967 Ops St Compt File #420.

Where the entire unincorporated area of a town is a fire protection district receiving protection under a fire protection contract with a volunteer fire company located within the said unincorporated area of the town, the town is the "home area" liable for volunteer firemen's benefits for members of the fire company. 1967 Ops St Compt File #477.

Where an incorporated fire company is located in a town outside of a fire district, fire protection district or fire alarm district, and provides fire protection under contract to municipalities and districts outside of the town, the recipient municipality or district is required to pay to such town the amount of the additional cost to such town for insurance coverage occasioned by the "home area" rule of liability for volunteer firemen's benefits. 1967 Ops St Compt File #420A.

When an incorporated fire company is located in a fire protection district in a town and provides fire protection under contract to that district and a fire protection district in an adjacent town, the recipient adjacent town is required to pay an additional sum to the "home area" town, to cover increased cost of insurance coverage for firemen's benefits. 1974 Ops St Compt File #960.

Any loss or damage to, or expenses incurred in operation of, equipment used in answering call for assistance to fire protection district is charge against and paid by fire protection district, however, "home area" is responsible for Volunteer Firefighters' Benefit Law coverage under those circumstances. Ops St Compt 89-15.

4. Assessments and charges

A clause in a fire protection contract may not relieve taxable property in the fire protection district of liability for assessment of costs of volunteer firemen's benefits. 1961 Ops St Compt #836.

Cost of volunteer firemen's benefits arising from service in a fire protection district is charged against the district, but the town in which the district is located is primarily liable for payment. 1962 Ops St Compt #186.

5. Coverage outside territory

A volunteer fireman was answering a "call for assistance" from another district, and accordingly within the coverage of this section, where he suffered a heart attack while assisting in a search for a child lost in the woods of a neighboring fire district, pursuant to the request of the chief of such other district to the chief of his own department. Fancher v Canastota, 16 A.D.2d 847, 227 N.Y.S.2d 627, 1962 N.Y. App. Div. LEXIS 9975 (N.Y. App. Div. 3d Dep't), app. denied, 12 N.Y.2d 641, 1962 N.Y. LEXIS 1535 (N.Y. 1962).

Where, at time of injury, a volunteer fireman was responding to a call from his own fire company made by a person aware of the peril involved and need for assistance at a site in an adjoining fire district, the adjoining district was liable for death benefits notwithstanding its chief refused assistance from decedent's fire company upon its arrival. Gilewski v Mastic Beach Fire Dist., 19 A.D.2d 299, 241 N.Y.S.2d 874, 1963 N.Y. App. Div. LEXIS 3264 (N.Y. App. Div. 3d Dep't 1963), aff'd, 14 N.Y.2d 595, 248 N.Y.S.2d 884, 198 N.E.2d 262, 1964 N.Y. LEXIS 1268 (N.Y. 1964).

A volunteer fireman providing service outside the State pursuant to a fire protection contract is covered by volunteer firemen's benefits payable by his "home area". 1975 Ops St Compt File #160.

A town which has a fire district located within its boundaries is not responsible for paying any portion of the premiums for insurance covering volunteer firemen's benefits for volunteer members of that fire district such expense is a fire district charge. 1982 Op St. Compt File #82-3.

6. Insurance

Deceased fire chief of a volunteer fire company was properly found to have been a covered employee under the N.Y. Vol. Fire. Ben. Law § 30(2) where he suffered a fatal heart attack at the scene of a fire, as an implied in fact contract existed between the city and the volunteer fire company; the New York Workers' Compensation Board properly drew negative inferences from the fact that the city failed to produce an employee who was familiar with the relationship between the volunteer fire company and the New York Fire Department, as there was evidence that the company had been in existence for a number of years, had rendered assistance to the Department, and that no objections had ever been made regarding the company's participation. Pache v Aviation Volunteer Fire Co., 20 A.D.3d 731, 800 N.Y.S.2d 228, 2005 N.Y. App. Div. LEXIS 7803 (N.Y. App. Div. 3d Dep't 2005), app. denied, 6 N.Y.3d 705, 812 N.Y.S.2d 34, 845 N.E.2d 466, 2006 N.Y. LEXIS 127 (N.Y. 2006).

Where a town, on behalf of a fire protection district, contracts with a village fire department and the village itself, for fire protection, but does not agree to pay for volunteer firemen's benefits, or insurance coverage therefor, for the village firemen, the town has no liability for such payments. 1967 Ops St Compt File # 561.

Where county mutual self-insurance plan does not include coverage of volunteer firemen, village may, but is not required to, purchase insurance to protect against liability. 1968 Ops St Compt File #235.

When an incorporated fire company is located in a fire protection district in a town and provides fire protection under contract to that district and a fire protection district in an adjacent town, the recipient adjacent town is required to pay an additional sum to the "home area" town, to cover increased cost of insurance coverage for firemen's benefits. 1974 Ops St Compt File #960.

A town which has a fire district located within its boundaries is not responsible for paying any portion of the premiums for insurance covering volunteer firemen's benefits for volunteer members of that fire district such expense is a fire district charge. 1982 Op St. Compt File #82-3.

Agency Opinions

Analysis

1. In general
2. Construction, generally
3. Assessments and charges
4. Coverage outside territory
5. Insurance

1. In general

The Medina Firemen's Benevolent Association may not use moneys paid to it from the tax on foreign fire insurance premiums to defray the cost of arbitration or the legal fees related to arbitration proceedings between the village and its paid firemen. Opn No. 79-238 superseded. 1979 Op St Compt File #238-A.

A conflict of interest does not occur where a fire district commissioner, who is a physician, is paid fees for providing medical services to volunteer firemen under the Volunteer Firemen's Benefit Law, when the payments are made by an insurance carrier pursuant to a contract with the district. 1979 Op St Compt File #537.

2. Construction, generally

Fire company is "located" under statute, in fire protection district where headquarters have been since 1905 even though it has additional real property and equipment in a village with which it has a contract for fire protection. 1965 NY Ops Atty Gen Jan 7.

An endorsement naming a fire department or company, fire commissioners and/or fire chiefs as additional insureds cannot be added to nor form a part of a fire district's Volunteer Firemen's Benefit Law insurance policy originally issued to take effect on or after March 1, 1962. A fire district may purchase liability insurance for the fire departments or companies, fire commissioners and fire chiefs serving the district. 1983 NY Ops Atty Gen April 14 (informal).

3. Assessments and charges

Where a volunteer fireman, at time of injury, is a member of a fire department operating in two villages, one fire district, and one fire protection district, benefits payable under this law to him are a charge to be distributed proportionately among the villages, the fire district, and the fire protection district served by the department. 1962 NY Ops Atty Gen Sept 28.

Where a town, on behalf of a fire protection district, contracts with a fire company located within such district for fire protec-

tion, the town is liable for injuries or death of firemen occurring in the performance of their duties. 1978 Op St Compt File #641.

Where volunteer firemen are covered by a county self-insurance plan, they are entitled to benefits if injured while responding to a call for assistance from outside the fire district notwithstanding that the request for assistance is not a mutual aid call. 1981 Op St Compt File #81-77.

A town which is a participant in a county mutual self-insurance plan may not charge back to a fire district within the town that portion of the town's annual contribution to the plan which can be directly attributed to losses incurred by the fire district. 1981 Op St Compt File #771.

Where a town has improperly paid premiums for insurance covering volunteer firemen's benefits for a fire district within the town, the amount of such premiums raised from real property located outside the boundaries of the fire district should be refunded to the town subject to a six year statute of limitations. 1982 Op St Compt File #82-248.

4. Coverage outside territory

Volunteer firemen en route to and attending a fire outside of the fire district, pursuant to an actual call for assistance are covered by the Volunteer Firemen's Disability Benefits Law and amendments to the General Municipal Law dealing with the liability of the municipality for damages due to negligence of volunteer firemen. 1959 NY Ops Atty Gen Apr. 9 (informal).

A village fire department may respond to a call for assistance from an Indian Reservation unless there is a resolution restricting such response. Volunteer firemen injured in the course of such response are covered under the Volunteer Firemen's Benefit Law. 1959 NY Ops Atty Gen Sept. 10 (informal).

Where a town, on behalf of a fire protection district, contracts with a fire company located within such district for fire protection, the town is liable for injuries or death of firemen occurring in the performance of their duties. 1978 Op St Compt File #641.

The Town of Chenango is responsible for providing VFBL benefits to a member of the Chenango Forks Volunteer Fire Company who is injured while fighting a fire in a fire district in the Town of Greene. 1980 Op St Compt File #449.

5. Insurance

The Medina Firemen's Benevolent Association may not use moneys paid to it from the tax on foreign fire insurance premiums to defray the cost of arbitration or the legal fees related to arbitration proceedings between the village and its paid firemen. Opn No. 79-238 superseded. 1979 Op St Compt File #238-A.

Compensation coverage of volunteer firemen located with towns which have withdrawn from county self-insurance plan is governed by Volunteer Firemen's Benefit Law § 30 if the villages or fire districts within the towns do not elect to become participants in the plan. 1968 NY Ops Atty Gen March 14.

A conflict of interest does not occur where a fire district commissioner, who is a physician, is paid fees for providing medical services to volunteer firemen under the Volunteer Firemen's Benefit Law, when the payments are made by an insurance carrier pursuant to a contract with the district. 1979 Op St Compt File #537.

A fire protection contract pursuant to which a fire district fire department provides fire protection to a fire protection district or a village may provide that the fire protection district or the village shall be responsible for paying any increases in the cost of Volunteer Firemen's Benefit Law insurance attributable to the protected area which occur during the contract term. 1979 Op St Compt File #541.

Enclosure of Opns St Comp, 1977, No. 77-354 to the effect that, where a village provides fire protection to a fire protection district, the fire protection contract may not require the town, on behalf of the district, to pay for, or provide insurance for volunteer firemen's benefits. However, the additional cost to the village of providing insurance for benefits could be reflected in the contract. 1979 Op St Compt File #858.

While there is no provision of law authorizing or requiring the addition of the fire company or department which serves a municipality, fire district or fire protection district as an additional named insured under the employer's liability portion of a VFBL insurance policy (coverage B), it would seem that, purely as a matter of contract, the insurance company providing the policy could agree to do so. 1980 Op St Compt File #529.

A town, on behalf of a fire protection district for which it has entered into a contract with a fire district for fire protection after March 1, 1964, is not required to pay the fire district for any increase in the premium for VFBL insurance attributable to the contract area and occurring during the contract term unless the contract expressly provides for such payments or unless the town agrees to amend the contract pursuant to the provisions of section 184(8) of the Town Law. 23 Opns St Comp, 1967, p 371 and Opns St Comp, 1979, No. 79-541 superseded to the extent they are inconsistent. 1980 Op St Compt File #635.

Where volunteer firemen are covered by a county self-insurance plan, they are entitled to benefits if injured while responding to a call for assistance from outside the fire district notwithstanding that the request for assistance is not a mutual aid call. 1981 Op St Compt File #81-77.

A town which is a participant in a county mutual self-insurance plan may not charge back to a fire district within the town that portion of the town's annual contribution to the plan which can be directly attributed to losses incurred by the fire district. 1981 Op St Compt File #771.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 3, 16, 21, 32, 57, 60; CLS Gen Mun §§ 6-j, 209-i; CLS Work Comp § 157.

Use of civil defense forces in emergency, CLS County § 656-a; Enforcement, CLS Mult R § 303.

Security for payment of compensation, Work Comp § 50; liability of county, CLS Work Comp § 63.

County self-insurance plan, CLS Work Comp Art 5.

This section referred to in.

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations § 1176.

Matthew Bender's New York Practice Guides: 4 New York Practice Guide: Business and Commercial § 25A.09.

§ 32. Group insurance

1. Notwithstanding any provision of section thirty of this chapter, any town may contract for a single policy of insurance indemnifying (1) all fire protection districts and fire alarm districts wholly within such town which are liable for the payment of benefits under this chapter, (2) all territory within such town outside cities, villages, fire districts, fire protection districts and fire alarm districts which is liable for the payment of benefits under this chapter, and (3) the town in relation to such fire protection districts, fire alarm districts and outside territory, against liability imposed by this chapter. If a town has any such liability and contracts for such a single policy, then and in that event only any such policy, if requested by the board of trustees of any village wholly within the town, or by the board of fire commissioners of any fire district wholly within the town, shall also indemnify such village or fire district against such liability. The cost of such insurance shall be a town charge and shall be levied and collected in the same manner as other town charges only in the territory of such town which is liable for the payment of benefits under this chapter and which is outside of any village and fire districts not covered by such a policy. Nothing in this section contained shall impose any additional liability on any town for any benefit payments in relation to volunteer firefighters.

2. Notwithstanding any other provision of section thirty of this chapter, any group of cities, villages, fire districts or town boards acting for and on behalf of fire protection districts, fire alarm districts or territories outside any such municipal corporations or districts which are liable for the payment of benefits under this chapter, all of which cities, villages, districts and territories are located in whole or in part within one county, may elect by resolution of the governing board of each member of the group to be insured against liability imposed by this chapter, as a group under a single policy. Such resolutions shall be filed with the chairman of the board of supervisors. The group shall file with the chairman of the board of supervisors an agreement, signed by the officer of the governing body designated by such resolution, agreeing to the effective date of such policy and to the population of each such city, village, fire district, fire protection district, fire alarm district and such territory outside any such municipal corporation or district, and, if any such fire protection district or fire alarm district lies wholly or partly within two or more towns, the population of the district within each such town. The population shall be that which is shown by the latest federal census, or, if not shown by such census, then as estimated. The estimate used for any village, district or other area in a town plus the estimated or actual population of all other villages, districts and areas in such town shall not exceed the population of such town as shown by the latest federal census. It shall be the duty of the chairman of the board of supervisors of the county, upon the filing of such resolutions and agreement, promptly to contract for insurance indemnifying against the liability imposed by this chapter in the manner provided in section thirty of this chapter. Except by mutual consent of the participating members, a member may withdraw from such a group only upon the anniversary date of the policy, and then only upon thirty days' notice of withdrawal by mail to the chairman of the board of supervisors. The costs of such insurance shall be apportioned by the clerk of the board of supervisors of the county to each such city, village, fire district, fire protection district, fire alarm district, and such territory outside such municipal corporations and districts, in the proportion that the agreed population bears to the entire population of the group. Refunds, dividends and discounts in relation to such insurance shall be distributed or credited according to the same apportionment. Upon notification by the clerk of the board of supervisors, the chief fiscal officer of each such city, village or fire district shall pay to the county treasurer, from moneys available or made available, the amount apportioned to such city, village or district. Upon like notification, the supervisor of each town in which such a fire protection district or fire alarm district is located in whole or in part, or in which such outside territory is located, shall pay to the county treasurer the amount apportioned for such district, in whole or in part, or territory, as the case may be, using moneys raised or made available for the purposes of fire protection in such district or outside territory, or if there be no such moneys or insufficient moneys, using funds of the town available or made available, which funds shall be a charge upon such district or territory for which the town shall be reimbursed. The county treasurer shall pay the cost of such insurance with such moneys, or if any apportioned share has not been paid, the county treasurer shall advance the amount necessary from moneys of the general fund upon resolution of the board of supervisors. Any such advance shall be repaid as soon as moneys are available therefor. If any apportioned share remains unpaid, the county may recover the same by action at law. If any member of the group shall fail to pay its apportioned share within thirty days after notice that such amount has become due and payable, the chairman of the board of supervisors may terminate the participation of such member in the group by notice by mail to such member on a date specified in the notice, and a copy of such notice shall be filed by the chairman of the board of supervisors with the insurance carrier, who shall notify the chairman of the workmen's compensation board of the termination of coverage in the same manner as provided for cancellation of policy under subdivision five of section fifty-four of the workmen's compensation law. If any village or fire district is located in two or more counties, it may elect to join such a group in one of such counties. If any fire protection district or fire alarm district includes territory in more than one county, it shall become a participant only if all the town boards acting for and on behalf of such district shall have elected that such district shall become a participant in such a group, and in such case such town boards shall elect as to which county group it shall join. If any participating fire protection district or fire alarm district includes territory in more than one town, whether or not in more than one county, the amount of cost of insurance, refund, dividend or discount apportioned to such district shall be apportioned in the proportion that the population of the district within each such town bears to the population of the entire district. The figure used for population in such case shall be the one stated in the agreement. If the boundaries of any city, village, fire district, fire protection district, fire alarm district or such outside territory in the group shall be changed during the effective period of any such insurance policy, or if there are changes in the membership of the group, the agreement heretofore mentioned concerning population shall be appropriately amended by a supplementary agreement to be executed and filed in the same manner as the original agreement, in which case the coverage of the policy and the apportionment of the cost thereof shall be changed accordingly.

3. Each policy issued pursuant to subdivisions one and two of this section shall identify clearly each

city, town, village, fire district, fire protection district, fire alarm district and outside territory covered thereby.

HISTORY:

Add, L 1956, ch 696, eff March 1, 1957; amd, L 1960, ch 439, eff March 1, 1961; L 1963, ch 1004, eff March 1, 1964; L 1968, ch 121, eff April 2, 1968; L 2018, ch 476, § 282, effective December 28, 2018.

Editor's Notes: See notes to Art I.

Amendment Notes The 2018 amendment by ch 476, § 282, substituted "firefighters" for "firemen" at the end of 1.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 31. The insurance contract, Work Comp § 54.

Jurisprudences:

Matthew Bender's New York Practice Guides: 4 New York Practice Guide: Business and Commercial § 25A.09.

ARTICLE IV Procedure

Section

40. Notice of injury or death.
41. Claim for benefits.
42. Reports of injuries, claims and proceedings
43. Determination of claims for benefits
44. Presumptions
45. Modification of awards, decisions or orders
46. Appeals
47. Costs and fees.
48. Representation before the workmen's compensation board
49. Benefits; how payable
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51. Fund for reopened cases
55. Penalty for false representation
56. Non-duplication of benefits.
59. Liberal construction
61. Death or disability due to disease or malfunction of heart or coronary arteries; claims and procedures. [Expires and repealed June 30, 2025]

HISTORY:

Add, L 1956, ch 696, eff March 1, 1957.

§ 40. Notice of injury or death.

Notice of an injury or death for which benefits are to be paid or provided under this chapter shall be given to the political subdivision liable for the payment thereof within ninety days after such injury or death except that such notice need not be given if a claim is filed pursuant to section forty-one of this chapter within ninety days after such injury or death. Either such notice may be given by any person claiming to be entitled to such benefits or by someone in his or her behalf. The notice shall be in writing, shall contain the name and address of the volunteer firefighter, and state in ordinary language the time, place, nature and cause of the injury and shall be signed by him or her or by a person on his or her behalf or, in case of death, by any one or more of his or her dependents, or by a person on their behalf. The notice shall be given to the clerk of the board of supervisors of the county, the comptroller or chief financial officer of the city, the town clerk of the town, the clerk of the village or the secretary of the fire district, as the case may be, by delivering it to such officer or by registered letter properly addressed to such officer. The failure to give notice of injury or notice of death shall be a bar to any claim under this chapter unless such failure is excused by the workers' compensation board on any of the following grounds, (1) that for some sufficient reason the notice could not have been given, (2) that a member of a body in charge of, or any officer of, the fire department or fire company had knowledge within such ninety-day period of the injuries or death, (3) that the political subdivision, or its insurance carrier had not been prejudiced by a delay in giving such notice, or (4) that the cause of disablement or death was not known to be the result of service performed in line of duty as a volunteer firefighter in sufficient time to comply with the provisions of this section.

HISTORY:

Add, L 1956, ch 696; amd, L 1957, ch 544, eff Apr 15, 1957; L 2018, ch 476, § 283, effective December 28, 2018.

Editor's Notes: See notes to Art I.

Amendment Notes The 2018 amendment by ch 476, § 283, added "or her" in the second sentence; in the third sentence, substituted "firefighter" for "fireman" and added "or her" three times; and in the last sentence, substituted "workers' compensation" for "workmen's compensation" and "firefighter" for "fireman."

Notes to Decisions

While the legislature has authorized the court to exercise its discretion under certain prescribed circumstances, to permit service of the notice of claim required as a condition precedent to the commencement of a court action against a public corporation within a reasonable time after the expiration of the 90-day period, or to amend such notice in order to cure a mistake, omission, irregularity or defect therein made in good faith, there is no authority to transform a notice of claim served under § 40 of the Volunteer Firemen's Benefit Law into a notice of claim grounded in tort, which is the prerequisite to the commencement of an action against a public corporation as prescribed by § 50-e of the General Municipal Law. Raynor v Westhampton Beach, 58 Misc. 2d 1082, 296 N.Y.S.2d 704, 1969 N.Y. Misc. LEXIS 1856 (N.Y. Sup. Ct. 1969).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in § 41.

Jurisprudences:

Law Reviews:

Wolff, Workmen's Compensation. 24 Syracuse L. Rev. 249.

Matthew Bender's New York Practice Guides: 4 New York Practice Guide: Business and Commercial § 25A.09.

§ 41. Claim for benefits.

The right to claim benefits under this chapter shall be barred, except as hereinafter provided, unless within two years after the injury, or, if death results therefrom, within two years after such death, a claim for the benefits under this chapter shall be filed with the chairperson of the workers' compensation board and a copy of such claim shall be filed with the same officer to whom a notice of injury must be given under section forty of this chapter. The right of a volunteer firefighter or his or her dependents to claim benefits under this chapter

for disablement or death, as the case may be, caused by disease shall not be barred by the failure of the volunteer firefighter or his or her dependents to file a claim within either such period of two years, provided such claim shall be filed after either such period of two years and within ninety days after disablement or ninety days after knowledge that the disease is or was due to service as a volunteer firefighter, whichever is the later date. The claim shall be in substantially the same form and shall give substantially the same information as is required to be given in a claim under the provisions of section twenty-eight of the workers' compensation law. Notwithstanding the provisions of any other law, any such claim need not be sworn to, verified or acknowledged. No case in which an advance payment is made to a volunteer firefighter or to his or her dependents in case of death shall be barred by the failure of the volunteer firefighter or his or her dependents to file a claim, and the workers' compensation board may at any time order a hearing on any such case in the same manner as though a claim for benefits had been filed.

The date of injury caused by disease shall be the date of contracture of such disease as determined by the workers' compensation board on the hearing of the claim and the responsibility of the political subdivision liable for the payment of benefits and its insurance carrier shall be fixed by the date of injury as so determined.

HISTORY:

Add, L 1956, ch 696; amd, L 1957, ch 751, § 3; L 1958, ch 936, eff April 23, 1958; L 2018, ch 476, § 284, effective December 28, 2018.

Editor's Notes: See 1956 notes to Art I.

Amendment Notes The 2018 amendment by ch 476, § 284, substituted "workers' compensation" for "workmen's compensation" and "firefighter" for "fireman" wherever it appears; added "or her" four times; and substituted "chairperson" for "chairman" in the first sentence.

Notes to Decisions

Claim for a hip injury was barred as untimely under either N.Y. Workers' Comp. Law § 28 or N.Y. Vol. Fire. Ben. Law § 41 because the evidence showed that the hip condition was a direct injury from the claimant's August 2005 accident, and, although a claim for other injuries had been established, the claimant did not make a claim for the hip injury until April 2008 despite experiencing hip pain as early as November 2005. Matter of Hilbrandt v Village of Red Hook, 75 A.D.3d 1025, 906 N.Y.S.2d 183, 2010 N.Y. App. Div. LEXIS 6370 (N.Y. App. Div. 3d Dep't 2010).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 3, 40, 44, 61.

Limitation of right to compensation, CLS Work Comp § 28.

Jurisprudences:

Matthew Bender's New York Practice Guides: 4 New York Practice Guide: Business and Commercial § 25A.09.

§ 42. Reports of injuries, claims and proceedings

If an injury is one for which an insurance carrier might be liable under a contract of insurance or a county plan of self-insurance might be required to pay, the officer to whom a notice of injury is required to be delivered or mailed and with whom the claim in relation to such injury is required to be filed under the provisions of this chapter shall send a copy of such notice and claim and a copy of any notice of a proceeding relating to an injury or claim to such insurance carrier or county plan of self-insurance, as the case may be, promptly after receiving the same. The political subdivision liable for the payment of benefits under this chapter shall keep such records and make such reports to the chairman of the workmen's compensation board as required by section one hundred ten of the workmen's compensation law, which by section fifty-seven of this chapter is made applicable to this chapter. Failure to comply with the provisions of this section shall not relieve such an insurance carrier of liability or a county plan of self-insurance from its obligation to pay.

HISTORY:

Add, L 1956, ch 696, eff March 1, 1957.

Editor's Notes: See notes to Art I.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

66 NY Jur, CLS Workmen's Compensation § 486.

Jurisprudences:

Matthew Bender's New York Practice Guides: 4 New York Practice Guide: Business and Commercial § 25A.09.

§ 43. Determination of claims for benefits

The provisions of section twenty of the workmen's compensation law shall be applicable as fully as if set forth in this chapter, except that the waiting period of seven days for the presentation of claims for benefits shall not apply to the presentation of claims for benefits under this chapter.

HISTORY:

Add, L 1956, ch 696; amd, L 1957, ch 336, eff Apr 11, 1957.

Editor's Notes: See 1956 notes to Art I.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Determination of claims for compensation, CLS Work Comp § 20.

§ 44. Presumptions

If a claim for benefits is filed within two years after the injury, or, if death results therefrom, is filed within two years after such death, as provided in section forty-one of this chapter, then in any proceeding for the enforcement of such claim, it shall be presumed in the absence of substantial evidence to the contrary:

1. That the claim comes within the provisions of this chapter;

2. That sufficient notice thereof was given;

3. That the injury was not occasioned by the wilful intention of the injured volunteer firefighter to bring about the injury or death of himself or herself or another;

4. That the injury did not result solely from the intoxication of the injured volunteer firefighter while acting in line of duty;

5. That the contents of medical and surgical reports introduced in evidence by claimants for ben-

efits shall constitute prima facie evidence of fact as to the matter contained therein.

HISTORY:
Add, L 1956, ch 696; amd, L 1957, ch 751, § 3, eff Apr 19, 1957; L 2018, ch 476, § 285, effective December 28, 2018.

Editor's Notes: See 1956 notes to Art I.

Amendment Notes The 2018 amendment by ch 476, § 285, substituted "firefighter" for "fireman" in 3 and 4; and added "or herself" in 3.

Notes to Decisions

There being no witnesses to how it happened that a volunteer fireman was found dead in the highway in front of his home, by a passing motorist, after alighting from a car driven by a fellow fireman after performing, as ordered, firemanic duty in keeping the entrance to the firehouse free of parked cars during a social event next door, it could be presumed that the claim for death benefits came within the coverage of this law. Hofmann v Hurley, 17 A.D.2d 181, 233 N.Y.S.2d 622, 1962 N.Y. App. Div. LEXIS 7120 (N.Y. App. Div. 3d Dep't 1962).

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

Matthew Bender's New York Practice Guides: 4 New York Practice Guide: Business and Commercial § 25A.09.

§ 45. Modification of awards, decisions or orders

The provisions of section twenty-two of the workmen's compensation law shall be applicable as fully as if set forth in this chapter.

HISTORY:
Add, L 1956, ch 696, eff March 1, 1957.

Editor's Notes: See notes to Art I.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:
Modification of awards, decisions or orders, CLS Work Comp § 22.

Jurisprudences:
111 New York Jur 2d, Workers' Compensation §§ 736, 743, 744, 755, 757, 759.

§ 46. Appeals

The provisions of section twenty-three of the workmen's compensation law shall be applicable as fully as if set forth in this chapter except that reimbursement following modification or rescission upon appeal shall be paid from administration expenses as provided by section sixty of this chapter.

HISTORY:
Add, L 1956, ch 696, eff March 1, 1957; amd, L 1973, ch 734, eff June 11, 1973.

Editor's Notes: See notes to Art I.

Notes to Decisions

This section incorporates completely § 23 of the Workmen's Compensation Law, including amendment thereto that an appeal to the Appellate Division or Court of Appeals from an award of the Workmen's Compensation Board shall not operate to stay payments of compensation required by such award. O'Brien v Central Islip Fire Dist., Volunteer Firemen's Co., 37 A.D.2d 890, 325 N.Y.S.2d 433, 1971 N.Y. App. Div. LEXIS 3181 (N.Y. App. Div. 3d Dep't 1971).

Failure of appellant to raise issue that award of death benefits under Volunteer Firemen's Benefit Law should be against aided fire district precluded review of contention on appeal. Rigali v Colonie, Verdoy Fire Dist., 47 A.D.2d 507, 367 N.Y.S.2d 570, 1975 N.Y. App. Div. LEXIS 9526 (N.Y. App. Div. 3d Dep't 1975).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:
Appeals, CLS Work Comp § 23.

Jurisprudences:
111 New York Jur 2d, Workers' Compensation §§ 713, 719, 731, 734, 760–765, 767, 769, 803–807, 812, 815–817, 923.

Matthew Bender's New York Practice Guides: 4 New York Practice Guide: Business and Commercial § 25A.09.

§ 47. Costs and fees.

The provisions of section twenty-four of the workmen's compensation law shall be applicable as fully as if set forth in this chapter.

HISTORY:
Add, L 1956, ch 696, eff March 1, 1957.

Editor's Notes See notes to Art I.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:
Costs and fees, CLS Work Comp § 24.

Jurisprudences:
111 New York Jur 2d, Workers' Compensation §§ 715, 821, 822, 824, 825.

§ 48. Representation before the workmen's compensation board

The provisions of section twenty-four-a of the workmen's compensation law which are not inconsistent with the provisions of this chapter shall be applicable as fully as if set forth in this chapter.

HISTORY:
Add, L 1956, ch 696, eff March 1, 1957.

Editor's Notes: See notes to Art I.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:
Representation before the workmen's compensation board, CLS Work Comp § 24-a.

Jurisprudences:
111 New York Jur 2d, Workers' Compensation § 826.

§ 49. Benefits; how payable

Except as otherwise provided in subdivisions one and two of section seven of this chapter, benefits under this chapter shall be paid in the manner provided in section twenty-five of the workmen's compensation law. The provisions of such section twenty-five, other than those relating to welfare, pension or benefit plans, agreements and trusts, shall be applicable as fully as if set forth in this chapter.

HISTORY:
Add, L 1956, ch 696, eff March 1, 1957.

Editor's Notes: See notes to Art I.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:
This section referred to in § 30.
Compensation, how payable, CLS Work Comp § 25.

Codes, Rules and Regulations:
Workers' compensation board: prehearing conferences. 12 NYCRR § 300.33.
Workers' compensation board: expedited hearings. 12 NYCRR § 300.34.
Workers' compensation board: conciliation processing. 12 NYCRR §§ 312.1 et seq.
Workers' compensation board: motion calendar processing. 12 NYCRR §§ 313.1 et seq.

Workers' compensation board: administrative determination proceeding. 12 NYCRR Part 313.

Jurisprudences:

111 New York Jur 2d, Workers' Compensation §§ 713, 912, 913, 921, 922, 925, 929, 931, 932, 937, 938, 940, 1117, 1118, 1120–1122.

§ 50. Payments pending controversies.

In order that the benefits to be paid and provided under this chapter shall be paid promptly where such benefits are conceded to be due to any person because of the death of or injuries to a volunteer firefighter, but controversy exists as to which political subdivision is liable for the payment thereof, the municipal corporations and fire districts involved in such controversy and their insurance carriers, if any, may agree that any one or more of such municipal corporations or fire districts or its insurance carrier shall pay or provide the benefits to, or in relation to, the person conceded to be entitled to such benefits without waiting for a final determination of the controversy, and may carry out the provisions of such an agreement. Notwithstanding any such payment, any party to the agreement may seek a final determination of the controversy in the same manner as if such benefits had not been paid or provided and any such payment or provision of benefits shall not prejudice any rights of the political subdivision or its insurance carrier paying or providing the same, nor be taken as an admission against interest. After a final determination the parties to the agreement shall make any necessary and proper reimbursement to conform to the determination.

HISTORY:

Add, L 1956, ch 696, eff March 1, 1957; L 2018, ch 476, § 286, effective December 28, 2018.

Editor's Notes: See notes to Art I.

Amendment Notes The 2018 amendment by ch 476, § 286, in the first sentence, substituted "firefighter" for "fireman" and "municipal corporations" for "municipal corporations."

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

111 New York Jur 2d, Workers' Compensation § 922.

§ 51. Fund for reopened cases

1. The provisions of section twenty- five-a of the workers' compensation law shall be applicable as fully as if set forth in this chapter, except that, other than with respect to the annual assessment under such section twenty-five-a, payments to an executor or administrator of the estate of a volunteer firefighter pursuant to subdivision two of section seven of this chapter shall not constitute payment of benefits for the purpose of determining the amount of the payment to the fund for reopened cases. Benefits paid to volunteer firefighters and other persons entitled to benefits under this chapter from the fund for reopened cases shall be in accordance with the provisions of this chapter.

2. The insurance carrier or entity responsible for payment of benefits paying such benefit increase shall claim for such benefit increase reimbursement from the special fund for reopened cases commencing one year from the date of the first such payment and annually thereafter while such payments continue, on a form prescribed by the chair.

3. The insurance carrier or entity responsible for paying the benefit increase provided in the chapter of two thousand five that added this subdivision shall claim for such benefit increase reimbursement from the special fund for reopened cases commencing one year from the date of the first such payment and annually thereafter while such payments continue, on a form prescribed by the chair.

4. The insurance carrier or entity responsible for paying the benefit increase provided in the chapter of two thousand six that added this subdivision shall claim for such benefit increase reimbursement from the special fund for reopened cases commencing one year from the date of the first such payment and annually thereafter while such payments continue, on a form prescribed by the chair.

5. All carriers shall pay benefits in conformance with rates set forth in section eight of this chapter without awaiting modification by the board of any prior inconsistent award.

HISTORY:

Add, L 1956, ch 696, eff March 1, 1957; amd, L 1956, ch 697, § 6, eff May 1, 1956; L 1999, ch 577, § 2, eff Nov 1, 1999 (see 1999 note below); L 2005, ch 212, § 6, eff July 12, 2005 (see 2005 note below); L 2006, ch 246, § 2, eff July 26, 2006, deemed eff on and after Jan 1, 2006 (see 2006 note below).

Editor's Notes: Laws 1999, ch 577, § 5, eff Nov 1, 1999, provides as follows:

§ 5. This act shall take effect immediately and shall apply to all weekly benefit periods payable beginning on or after January 1, 1999.

Laws 2005, ch 212, § 7, eff July 12, 2005, provides as follows:

§ 7. This act shall take effect immediately and shall apply to weekly benefit periods which begin after January 1, 2006.

Laws 2006, ch 246, § 3, eff July 26, 2006, deemed eff on and sfter Jan 1, 2006, provides as follows:

§ 3. This act shall take effect immediately, and shall be deemed to have been in full force and effect on and after January 1, 2006 and shall apply to weekly benefit periods that began after such date.

See notes to Art I.

Amendment Notes:

1999. Chapter 577, § 2 amended:

Sub 1, by deleting "workmen's", at and "fireman" and "firemen".

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 13, 57, 60.

Procedure and payment of compensation in certain claims; limitation of right to compensation, CLS Work Comp § 25-a.

Jurisprudences:

111 New York Jur 2d, Workers' Compensation §§ 745–751, 753, 756, 759, 971, 1064.

§ 55. Penalty for false representation

If for the purpose of obtaining any benefit or payment under the provisions of this chapter, or for the purpose of influencing any determination regarding any benefit or payment under the provisions of this chapter, either for himself or for any other person, any person wilfully makes a false statement

or representation, he shall be guilty of a misdemeanor.

HISTORY:
Add, L 1956, ch 696, eff March 1, 1957.

Editor's Notes: See notes to Art I.

Notes to Decisions

Claimant, a volunteer firefighter, could not be disqualified from receiving benefits under N.Y. Vol. Fire. Ben. Law § 10 for allegedly making false representations as to her alleged physical limitations because the plain and unambiguous language of N.Y. Workers' Comp. Law § 114-a limited its application to claims for benefits under N.Y. Workers' Comp. Law § 15; thus, the civil penalties of § 114-a did not apply to wage replacement benefits, and only criminal penalties were provided for in N.Y. Workers' Comp. Law § 114 and N.Y. Vol. Fire. Ben. Law § 55. Matter of Giello v Providence Fire Dist., 57 A.D.3d 1294, 869 N.Y.S.2d 676, 2008 N.Y. App. Div. LEXIS 9819 (N.Y. App. Div. 3d Dep't 2008).

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:
111 New York Jur 2d, Workers' Compensation § 1114.

§ 56. Non-duplication of benefits.

If benefits are required to be paid under this chapter in the event of injury to or death of a volunteer firefighter, the volunteer firefighter or other persons entitled to such benefits shall not receive workers' compensation under the provisions of the workers' compensation law in relation to such injury or death.

HISTORY:
Add, L 1956, ch 696, eff March 1, 1957; L 2018, ch 476, § 287, effective December 28, 2018.

Editor's Notes: See notes to Art I.

Amendment Notes The 2018 amendment by ch 476, § 287, substituted "firefighter" for "firemen" twice and "workers' compensation" for "workmen's compensation" twice.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:
111 New York Jur 2d, Workers' Compensation § 831.

Matthew Bender's New York Practice Guides: 4 New York Practice Guide: Business and Commercial § 25A.09.

§ 59. Liberal construction

The provisions of this article relating to giving notice of injury and filing of claim, and to the contents of any such notice or claim, shall be construed liberally in order to effectuate the objects and purposes of this chapter.

HISTORY:
Add, L 1956, ch 696, eff March 1, 1957.

Editor's Notes: See notes to Art I.

§ 61. Death or disability due to disease or malfunction of heart or coronary arteries; claims and procedures. [Expires and repealed June 30, 2025]

1. A claim for benefits for the death or disability of a volunteer firefighter due to disease or malfunction of the heart or of one or more coronary arteries filed in accordance with section forty-one of this chapter, shall not be denied provided the claimant introduces evidence which establishes that a volunteer firefighter suffered disease or malfunction of the heart or of one or more coronary arteries which caused the disablement or death of the volunteer firefighter, and that such disease or malfunction resulted from the duties and activities in which the volunteer firefighter was engaged as set forth in section five of this chapter for which benefits shall be paid, unless it can be shown by substantial evidence to the contrary that the duties and activities of the volunteer firefighter in which the volunteer firefighter was engaged at the time of such disease or malfunction did not cause or precipitate such disease or malfunction; and further provided that the injury did not result solely from the intoxication of the volunteer firefighter while acting in line of duty or was not occasioned by the wilful intention of the volunteer firefighter to bring about the injury or death of himself or herself or another.

2. The chairman of the workers' compensation board shall promulgate rules and regulations providing a priority for controverted claims for benefits filed as provided in subdivision one of this section provided, however, that the claim must be decided within ninety days measured from the date of the receipt of a completed claim from the volunteer firefighter or his representative. Such rules and regulations shall also prescribe a form to be used for making claims for such benefits. Such form shall specifically request the information necessary in order to receive an award of benefits.

3. This section shall not be construed to repeal by implication any existing provision of law.

HISTORY:
Add, L 1977, ch 668, § 2, eff Aug 1, 1977; amd, L 1994, ch 272, § 1, eff July 6, 1994; L 2018, ch 476, § 288, effective December 28, 2018.

Editor's Notes: Laws 1977, ch 668, §§ 1, 3 and 5, eff Aug 1, 1977, provide as follows:

Section 1. Statement of legislative findings. One of the most valuable assets of New York state is the service rendered by its volunteer firemen. The state legislature has already recognized the unusual risks to which volunteer firemen are subjected, and has provided a system of benefits through the volunteer firemen's benefit law for volunteer firemen who die from the effects of injury in line of duty or who are disabled in line of duty. One of the risks to which volunteer firemen are subjected is the risk of death or disablement resulting from the injury of heart attack. Studies have shown that the duties of a volunteer fireman produce a stress and strain beyond the ordinary wear and tear of life, thereby increasing the risk of heart attack. In addition, the exposure to carbon monoxide has been shown to increase the risk of heart attack. When a volunteer fireman suffers death or disablement due to the injury of heart attack resulting from services performed in line of duty, an award of benefits should be promptly made pursuant to the volunteer firemen's benefit law.

When a volunteer fireman suffers the injury of heart attack in line of duty, the claimant has been required to prove that the injury resulted from services performed in line of duty. As a result, claims are frequently controverted leading to long delays in the receipt of benefits where the claim is sustained. This delay has proved most onerous, particularly when a family has suffered the loss of its primary wage earner.

The legislature hereby intends to (1) clarify the law regarding benefits payable when a volunteer fireman suffers the injury of heart attack in line of duty by codifying the

principles enunciated by the courts of this state applying thereto and, (2) to establish a procedure for the special handling of such claims.

§ 3. The chairman of the workers' compensation board shall maintain a record of each claim for benefits under this chapter in which it is alleged that death or disability was caused by disease or malfunction of the heart or of one or more coronary arteries. The chairman of the workers' compensation board shall prepare, by the first day of July in every year, a summary of such records and report on such summary to the governor and the legislature by the first day of July in every year. The summary and report shall indicate the number of claims for benefits made under this chapter in which it was alleged that death or disability resulted from a disease or malfunction of the heart or of one or more coronary arteries, the number of such claims in which the claimant was granted benefits, the number of such claims in which the claimant was denied benefits. (Amd, L 1990, ch 348, § 1, eff July 2, 1990).

§ 5. This act shall take effect on the first day of July next succeeding the date on which it shall have become a law, or if signed after the first day of July, nineteen hundred seventy-seven, shall take effect immediately, and shall apply only in cases where the injury causing death or disability occurred on or after such date of taking effect.

Laws 1977, ch 668, § **4,** eff Aug 1, 1977, provides as follows:

§ 4. The provisions of section two of this act shall remain in full force and effect to and including the thirtieth day of June, 2025 (Amd, L 1979, ch 321, § 12, eff June 29, 1979; L 1981, ch 381, § 12, eff June 20, 1981; L 1983, ch 413, § 10, eff June 30, 1983; L 1985, ch 278, § 1, eff June 30, 1985; L 1987, ch 207, § 1, eff June 30, 1987; L 1989, ch 233, § 1, eff July 1, 1989, L 1991, ch 435, § 1, eff July 19, 1991; L 1993, ch 115, § 1, eff June 21, 1993; L 1995, ch 137, § 1, eff July 7, 1995, L 1997, ch 218, § 1, eff July 18, 1997; L 1999, ch 111, § 1, eff June 22, 1999; L 2001, ch 67, § 1, eff June 27, 2001; L 2003, ch 89, § 1, eff July 1, 2003; L 2005, ch 138, § 1, eff June 30, 2005; L 2010, ch 383, § 1, eff Aug 13, 2010; L 2015, ch 26, § 1, eff June 30, 2015; L 2020, ch 58, § 1 (Part XXX, Subpart B, Item CC), eff April 3, 2020).

Laws 1994, ch 272, § **2,** eff July 6, 1994, provides as follows:

§ 2. This act shall take effect immediately, provided however that any rule or regulation necessary for the implementation of the provisions of this act are authorized to be completed within 180 days of such date and provided further that the amendments made to subdivision 2 of section 61 of the volunteer firefighters' benefit law by section one of this act shall not affect the expiration of and shall expire at the same time as such section expires as provided by section 4 of chapter 668 of the laws of 1977 as amended.

Laws 2018, ch 476, § **292,** eff December 28, 2018, provides:

§ 292. This act shall take effect immediately, provided, however, that:

a. the amendments to section 30 of the workers' compensation law made by section thirteen of this act, the amendments to subdivisions 1, 4 and 6 of section 207-c of the general municipal law made by section fifty-six of this act, and the amendments to paragraph 1 of subdivision c of section 340 of the retirement and social security law made by section one hundred eighty-two of this act shall take effect on the same date and same manner as chapter 628 of the laws of 1991, take effect; and

b. the amendments to subdivision 1 of section 61 of the volunteer firefighters' benefit law made by section two hundred eighty-eight of this act shall not affect the repeal of such section and shall be deemed to repeal therewith.

Amendment Notes: 1994. Chapter 272, § 1 amended:

Sub 2 by deleting at fig 1 "workmen's" and adding the matter in italics.

The 2018 amendment by ch 476, § **288,** substituted "firefighter" for "firemen" wherever it appears in 1.

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

Workers' compensation board: controverted claims by volunteer firefighters. 12 NYCRR Part 403.

WORKERS' COMPENSATION LAW

Article
1. Short Title; Definitions; Application
2. Compensation
5. County Self-Insurance Plan
6. State Insurance Fund
7. Miscellaneous Provisions
8. Administration
10. Workmen's Compensation Act for Civil Defense Volunteers

1 Short Title; Definitions; Application

Section
1. Short title
2. Definitions
3. Application

HISTORY:
Add, L 1913, ch 816; amd, L 1922, ch 615.

§ 1. Short title

a. This chapter shall be known as the "workers' compensation law."

b. Reference in this chapter or in any other law to the workmen's compensation law shall be deemed to mean and refer to the workers' compensation law. The terms "workman" or "workmen" appearing in this chapter shall be deemed to mean "worker" or "workers", respectively. The terms "he," "his," or "him," appearing in this chapter shall be deemed to mean "he or she," "his or her," and "him or her."

HISTORY:
Add, L 1913, ch 816; amd, L 1914, ch 41; L 1922, ch 615; L 1978, ch 79, § 1, eff April 18, 1978; L 1984, ch 158, § 1, eff May 29, 1984.

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1. In general; constitutionality

There can be no question of the power of the legislature to take away the statutory remedy for a death claim and substitute therefor another remedy. Culhane v Economical Garage, Inc., 195 A.D. 108, 186 N.Y.S. 454, 1921 N.Y. App. Div. LEXIS 4705 (N.Y. App. Div. 1921).

The state constitution, article 1, § 18, removes all limitations on the power of the legislature to enact laws dealing with workmen's compensation. Schmidt v Wolf Contracting Co., 269 A.D. 201, 55 N.Y.S.2d 162, 1945 N.Y. App. Div. LEXIS 2952 (N.Y. App. Div. 1945), aff'd, 295 N.Y. 748, 65 N.E.2d 568, 295 N.Y. (N.Y.S.) 748, 1946 N.Y. LEXIS 928 (N.Y. 1946).

A workmen's compensation law is not guaranteed by the state constitution; the legislature is merely empowered to pass such an act and the regulation thereof is wholly within the scope of legislative authority. Sager v General Electric Co., 269 A.D. 801, 55 N.Y.S.2d 138, 1945 N.Y. App. Div. LEXIS 3910 (N.Y. App. Div. 1945), app. dismissed, 298 N.Y. 752, 83 N.E.2d 152, 298 N.Y. (N.Y.S.) 752, 1948 N.Y. LEXIS 1299 (N.Y. 1948).

Omnibus Workers' Compensation Reform Act of 1996 (L 1996, ch 635), which forbids third-party actions against employers for contribution except in cases where employee sustained grave injury, is prospective only to accidents occurring subsequent to effective date of statute. Knapp v CONRAIL, 171 Misc. 2d 597, 655 N.Y.S.2d 732, 1997 N.Y. Misc. LEXIS 34 (N.Y. Sup. Ct. 1997).

Neither in rendering an employer liable irrespective of doctrines of negligence, contributory negligence, assumption of risk and negligence of fellow servants, nor in depriving an employee, or his dependents, of higher damages which, in some cases, might be recovered under those doctrines, can the Workmen's Compensation Law be said to violate due process. New York C. R. Co. v White, 243 U.S. 188, 37 S. Ct. 247, 61 L. Ed. 667, 1917 U.S. LEXIS 2105 (U.S. 1917).

Viewed from the standpoint of natural justice, the system provided by the Work. Comp. Law in lieu of former rules is neither arbitrary nor unreasonable. New York C. R. Co. v White, 243 U.S. 188, 37 S. Ct. 247, 61 L. Ed. 667, 1917 U.S. LEXIS 2105 (U.S. 1917).

Rights of employers under the 14th amendment are not violated by the extension of the workmen's compensation law to all employment in which four or more workmen (farm laborers and domestic servants excepted) are employed, which is construed by the state courts as including all other employees of the same employer and employed in the same business with such workmen and operatives, though at places remote from their work. Ward & Gow v Krinsky, 259 U.S. 503, 42 S. Ct. 529, 66 L. Ed. 1033, 1922 U.S. LEXIS 2495 (U.S. 1922).

2. Relation to other laws

Determination by Workers' Compensation Board that injury was work-related does not, by operation of collateral estoppel, automatically entitle injured employee to CLS Gen Mun § 207-c benefits, because no identity of issues inheres in determinations regarding these 2 types of benefits. Balcerak v County of Nassau, 94 N.Y.2d 253, 701 N.Y.S.2d 700, 723 N.E.2d 555, 1999 N.Y. LEXIS 3927 (N.Y. 1999).

The Work. Comp. Law and the Federal Employers' Liability Act should be given a reasonable construction and harmonized when possible, although the state law must give way to the federal law where they are antagonistic. Parsons v Delaware & Hudson Co., 167 A.D. 536, 153 N.Y.S. 179, 1915 N.Y. App. Div. LEXIS 8225 (N.Y. App. Div.), app. dismissed, 216 N.Y. 710, 111 N.E. 1093, 216 N.Y. (N.Y.S.) 710, 1915 N.Y. LEXIS 930 (N.Y. 1915).

A state workmen's compensation law is ineffectual against the federal government without the consent of Congress. Snow v United States Railroad Administration, 209 A.D. 308, 204 N.Y.S. 514, 1924 N.Y. App. Div. LEXIS 8616 (N.Y. App. Div.), aff'd, 239 N.Y. 528, 147 N.E. 181, 239 N.Y. (N.Y.S.) 528, 1924 N.Y. LEXIS 538 (N.Y. 1924).

A proceeding under the Workmen's Compensation Law is not an action or a special proceeding under the Civil Practice Act but a statutory proceeding having its own rules as to limitations. Hence, the provisions of the Civil Practice Act do not apply to proceedings under the Workmen's Compensation Law unless there is direct statutory authority therefor. Luoma v Spearin, Preston & Burrows, Inc., 282 A.D. 612, 126 N.Y.S.2d 543, 1953 N.Y. App. Div. LEXIS 4537 (N.Y. App. Div. 1953), aff'd, 307 N.Y. 728, 121 N.E.2d 544, 307 N.Y. (N.Y.S.) 728, 1954 N.Y. LEXIS 1458 (N.Y. 1954).

The provision in the Motor Vehicle Accident Indemnification Corporation indorsement providing that any amount awarded thereunder should be reduced by the amount paid under any

workmen's compensation law requires that the award be so reduced. Cruzado v Motor Vehicle Accident Indemnification Corp., 24 A.D.2d 743, 263 N.Y.S.2d 484, 1965 N.Y. App. Div. LEXIS 3312 (N.Y. App. Div. 1st Dep't 1965).

In action by New York truck driver who was injured in New Hampshire while unloading cargo obtained from New York warehouse owned by foreign corporation, provision of New Hampshire's Workers' Compensation Law which prohibited contribution claims against employers barred third-party contribution claim asserted by foreign corporation against plaintiff's corporate employer domiciled in Kentucky; it would be undesirable to impose New York's Workers' Compensation Law on Kentucky employer with respect to injury that occurred in New Hampshire. Gleason v Holman Contract Warehouse, 250 A.D.2d 339, 681 N.Y.S.2d 664, 1998 N.Y. App. Div. LEXIS 13547 (N.Y. App. Div. 3d Dep't 1998).

Workers' Compensation Board, which classified claimant as having permanent partial disability, properly found that he did not suffer loss of earning capacity under CLS Vol Fire Ben § 3(8) where he returned to his regular job duties as electrician following both accidents, his chiropractor did not impose any restrictions on his work subsequent to first accident, at time of second accident, claimant had different employment entailing assembly of electrical components at work bench, which he stated did not require any heavy lifting, and it was not until about one year later when claimant's back condition was exacerbated that chiropractor imposed restrictions on lifting and bending; claimant's testimony that such limitations precluded him from applying for higher paying and more physically demanding positions was irrelevant as to whether he suffered loss of earning capacity under Volunteer Firefighters' Benefit Law. Griffo v Onondaga Hill Volunteer Fire Dep't, 256 A.D.2d 858, 681 N.Y.S.2d 835, 1998 N.Y. App. Div. LEXIS 13578 (N.Y. App. Div. 3d Dep't 1998).

Even if the New York Workers' Compensation Board concluded that a union was not an employer, its determination under one statute was not binding on the New York Unemployment Insurance Appeal Board when the same question arose under a different statute. In re Local 54 United Paperworkers Int'l Union, 301 A.D.2d 922, 754 N.Y.S.2d 439, 2003 N.Y. App. Div. LEXIS 374 (N.Y. App. Div. 3d Dep't 2003).

Where the defendant in an action for damages brought against him as owner of a motor vehicle known as a hi-lo desires to raise the point that negligence of the operator of the vehicle was the cause of injuries to plaintiff and that the operator was a coemployee of plaintiff, wherefore plaintiff's cause of action or rights are solely under this act, he should be permitted, on motion, to amend his answer to assert such a defense. Bonsignore v L & D Carriers, Inc., 24 Misc. 2d 500, 201 N.Y.S.2d 944, 1960 N.Y. Misc. LEXIS 3166 (N.Y. Sup. Ct. 1960).

The application to an injury sustained by a longshoreman while unloading in a New York port, an ocean going steamship owned by a nonresident corporation, of the provisions of the New York Workmen's Compensation Act renders the statute, to that extent, invalid as conflicting with Art 3 § 2, of the United States Constitution which extends the judicial power of United States to all cases of admiralty and maritime jurisdiction, and with Art 1 § 8 giving Congress power to make all laws necessary and proper to carry into execution the powers vested in the federal government. Southern Pacific Co. v Jensen, 244 U.S. 205, 37 S. Ct. 524, 61 L. Ed. 1086, 1917 U.S. LEXIS 1628 (U.S. 1917).

It was not error in an action by longshoremen under the Jones Act, not to charge the jury that the plaintiff was being compensated under the New York Workmen's Compensation Law, as the plaintiff's rights under that law were irrelevant to a determination of his damages. Maccarone v A/S Inger, 262 F.2d 569, 1959 U.S. App. LEXIS 5143 (2d Cir. N.Y. 1959).

3. Construction

The workmen's compensation law should be liberally construed. In re Petrie, 215 N.Y. 335, 109 N.E. 549, 215 N.Y. (N.Y.S.) 335, 1915 N.Y. LEXIS 1004 (N.Y. 1915).; Costello v Taylor, 217 N.Y. 179, 111 N.E. 755, 217 N.Y. (N.Y.S.) 179, 1916 N.Y. LEXIS 1298 (N.Y. 1916).; Esterow v Schimel, Son & Lustig, 274 A.D. 325, 83 N.Y.S.2d 735, 1948 N.Y. App. Div. LEXIS 3074 (N.Y. App. Div. 1948).; Schmidt v Wolf Contracting Co., 269 A.D. 201, 55 N.Y.S.2d 162, 1945 N.Y. App. Div. LEXIS 2952 (N.Y. App. Div. 1945), aff'd, 295 N.Y. 748, 65 N.E.2d 568, 295 N.Y. (N.Y.S.) 748, 1946 N.Y. LEXIS 928 (N.Y. 1946).; Commissioner of Taxation & Finance v Riger Bldg. Corp., 260 A.D. 358, 22 N.Y.S.2d 378, 1940 N.Y. App. Div. LEXIS 4592 (N.Y. App. Div. 1940), rev'd, 285 N.Y. 217, 33 N.E.2d 529, 285 N.Y. (N.Y.S.) 217, 1941 N.Y. LEXIS 1506 (N.Y. 1941).; In re Rheinwald, 168 A.D. 425, 153 N.Y.S. 598, 1915 N.Y. App. Div. LEXIS 8298 (N.Y. App. Div. 1915), limited, Kackel v Serviss, 180 A.D. 54, 167 N.Y.S. 348, 1917 N.Y. App. Div. LEXIS 8073 (N.Y. App. Div. 1917).

While this statute is to be liberally construed to serve the underlying social need, it may not be stretched beyond the limits established by the legislature, even in cases of hardship. Di Donato v Rosenberg, 263 N.Y. 486, 189 N.E. 560, 263 N.Y. (N.Y.S.) 486, 1934 N.Y. LEXIS 1301 (N.Y. 1934).

A claim by a workman, injured in the course of his employment, for compensation under the Work. Comp. Law, may not be construed as a demand for damages for a wrong alleged to have been done by the employer. Recovery is sought in consequence of injuries received for which statute, read into contract of employment, gives right to compensation. Heaney v P. J. Carlin Const. Co., 269 N.Y. 93, 199 N.E. 16, 269 N.Y. (N.Y.S.) 93, 1935 N.Y. LEXIS 792 (N.Y. 1935), aff'd, 299 U.S. 41, 57 S. Ct. 75, 81 L. Ed. 27, 1936 U.S. LEXIS 6 (U.S. 1936).

The Workmen's Compensation Law is properly construed broadly to embrace all activities which can, in any reasonable sense, be included within its coverage. Wilson v General Motors Corp., 298 N.Y. 468, 84 N.E.2d 781, 298 N.Y. (N.Y.S.) 468, 1949 N.Y. LEXIS 1006 (N.Y. 1949).

The workmen's compensation law must be construed with the greatest liberality in favor of workmen and their dependents. Tate v Dickens' Estate, 276 A.D. 94, 93 N.Y.S.2d 504, 1949 N.Y. App. Div. LEXIS 3119 (N.Y. App. Div. 1949).

An employee is entitled to a liberal construction of the workmen's compensation law to enable him to obtain compensation for injuries sustained in the course of the employment in border line cases; and he is also entitled to a liberal construction such as will sustain a recovery in a negligence action in excess of that which could be awarded under the workmen's compensation law. Jones v Herbert Equities, Inc., 60 N.Y.S.2d 88, 186 Misc. 163, 1946 N.Y. Misc. LEXIS 1826 (N.Y. App. Term), aff'd, 270 A.D. 922, 62 N.Y.S.2d 612, 1946 N.Y. App. Div. LEXIS 4653 (N.Y. App. Div. 1946).

4. Purpose

The workmen's compensation law was adopted in deference to a widespread belief and demand that compensation should be awarded to workmen who were injured and disabled in the course of their employment, even though sometimes the accident might occur under such circumstances as would not permit a recovery in an ordinary action at law; the underlying thought was that such a system of compensation would be in the interest of the general welfare by preventing a workman from being deprived of means of support as the result of an injury received in the course of his employment. In re Petrie, 215 N.Y. 335, 109 N.E. 549, 215 N.Y. (N.Y.S.) 335, 1915 N.Y. LEXIS 1004 (N.Y. 1915).; Schmidt v Wolf Contracting Co., 269 A.D. 201, 55 N.Y.S.2d 162, 1945 N.Y. App. Div. LEXIS 2952 (N.Y. App. Div. 1945), aff'd, 295 N.Y. 748, 65 N.E.2d 568, 295 N.Y. (N.Y.S.) 748, 1946 N.Y. LEXIS 928 (N.Y. 1946).

The theory of the Work. Comp. Law is not indemnity for the loss of a member or physical impairment, as such, but compensation for disability to work made on the basis of average weekly wages. Marhoffer v Marhoffer, 220 N.Y. 543, 116 N.E. 379, 220 N.Y. (N.Y.S.) 543, 1917 N.Y. LEXIS 1001 (N.Y. 1917).

One purpose of the workmen's compensation law is to spread the loss by injuries to or death of employees so that the entire loss should not fall upon unfortunate employees suffering injuries or, in the case of death, upon their dependents. Goldstein v State, 281 N.Y. 396, 24 N.E.2d 97, 281 N.Y. (N.Y.S.) 396, 1939 N.Y. LEXIS 1024 (N.Y. 1939)..See also Gardener v Horseheads Const. Co., 171 A.D. 66, 156 N.Y.S. 899, 1916 N.Y. App. Div. LEXIS 9449 (N.Y. App. Div. 1916).; Jones v Herbert Equities, Inc., 60 N.Y.S.2d 88, 186 Misc. 163, 1946 N.Y. Misc. LEXIS 1826 (N.Y. App. Term),

aff'd, 270 A.D. 922, 62 N.Y.S.2d 612, 1946 N.Y. App. Div. LEXIS 4653 (N.Y. App. Div. 1946).

The purpose of the Work. Comp. Law is to provide compensation for industrial accidents inherent in the modern system of production, and not for the pensioning of those who suffer from disease not caused by such accidents. Donovan v Alliance Electric Co., 195 A.D. 678, 186 N.Y.S. 813, 1921 N.Y. App. Div. LEXIS 4818 (N.Y. App. Div. 1921).

The Workmen's Compensation Law secures to dependents speedy, certain and adequate provision for their support; it affords a means of protecting workmen and their dependents with an effective relief from want, when an employee is injured. Skakandy v Wreckers & Excavators, Inc. (1948) 274 App Div 220, 81 NYS2d 841, affd (1949) 298 NY 888, 84 NE2d 805.. See also Skakandy v State, 66 N.Y.S.2d 99, 188 Misc. 214, 1946 N.Y. Misc. LEXIS 2996 (N.Y. Ct. Cl. 1946), aff'd, 274 A.D. 153, 80 N.Y.S.2d 849, 1948 N.Y. App. Div. LEXIS 3031 (N.Y. App. Div. 1948).

Workmen's Compensation Law is intended to secure speedy, certain and adequate provision for support of dependents and to give every workman in specified trades compensation for injury received while in course of his employment. Grello v Daszykowski, 58 A.D.2d 412, 397 N.Y.S.2d 396, 1977 N.Y. App. Div. LEXIS 12424 (N.Y. App. Div. 2d Dep't 1977), rev'd, 44 N.Y.2d 894, 407 N.Y.S.2d 633, 379 N.E.2d 161, 1978 N.Y. LEXIS 2081 (N.Y. 1978).

The purpose of the workmen's compensation law is to regulate the relation between employer and employee, not between employee and the world at large. Employers Mut. Liability Ins. Co. v Refined Syrups Sales Corp., 53 N.Y.S.2d 835, 184 Misc. 941, 1945 N.Y. Misc. LEXIS 1591 (N.Y. Sup. Ct.), aff'd, 269 A.D. 931, 58 N.Y.S.2d 216, 1945 N.Y. App. Div. LEXIS 4560 (N.Y. App. Div. 1945).

5. —Elimination of injuries

The legislature intended that a claimant is to be protected against his own improvidence or folly. Sackolwitz v Charles Hamburg & Co., 295 N.Y. 264, 67 N.E.2d 152, 295 N.Y. (N.Y.S.) 264, 1946 N.Y. LEXIS 829 (N.Y. 1946).

The workmen's compensation law was designed to assure to the workingman a protection against lost earning power through injury sustained in his employment, irrespective of how that injury occurred or what brought it about. Williams v Hartshorn, 296 N.Y. 49, 69 N.E.2d 557, 296 N.Y. (N.Y.S.) 49, 1946 N.Y. LEXIS 787 (N.Y. 1946).. See also Cardinal v State, 102 N.Y.S.2d 895, 200 Misc. 574, 1951 N.Y. Misc. LEXIS 1566 (N.Y. Ct. Cl. 1951), modified, 279 A.D. 326, 109 N.Y.S.2d 818, 1952 N.Y. App. Div. LEXIS 4667 (N.Y. App. Div. 1952).

Workmen's compensation was created to prevent injured workmen from becoming objects of charity and to make reasonable compensation for injuries and death caused by job related activities regardless of fault. Lundberg v State, 25 N.Y.2d 467, 306 N.Y.S.2d 947, 255 N.E.2d 177, 1969 N.Y. LEXIS 938 (N.Y. 1969), reh'g denied, 26 N.Y.2d 883, 309 N.Y.S.2d 1032, 258 N.E.2d 223, 1970 N.Y. LEXIS 1897 (N.Y. 1970).

Workmen's compensation is designed to shift risk of loss of earning capacity caused by industrial accidents to industry and ultimately the consumer, regardless of fault. (Per Margett, J., with one Judge concurring and one Judge concurring in result.) Grello v Daszykowski, 58 A.D.2d 412, 397 N.Y.S.2d 396, 1977 N.Y. App. Div. LEXIS 12424 (N.Y. App. Div. 2d Dep't 1977), rev'd, 44 N.Y.2d 894, 407 N.Y.S.2d 633, 379 N.E.2d 161, 1978 N.Y. LEXIS 2081 (N.Y. 1978).

Workmen's Compensation Law is social legislation designed to secure to workers and their dependents compensation when they are injured or killed in course of their employment, without regard to fault. Brezickyj v Eastern Railroad Builders, Inc., 59 A.D.2d 578, 397 N.Y.S.2d 452, 1977 N.Y. App. Div. LEXIS 13377 (N.Y. App. Div. 3d Dep't 1977).

6. Compensability of injuries; scope of coverage

An award of workers' compensation benefits to a claimant who suffered from a work-related permanent partial disability would be continued during the period that he or she was confined to a psychiatric ward for the criminally insane, since to penalize a worker who had suffered a permanent disability solely because he or she had subsequently been afflicted by mental illness would in no way further the goals behind the Workers' Compensation Law, suspending benefits during periods of institutionalization for treatment of mental illness would only compound the hardship created by the illness itself and, in addition, by discouraging recipients from seeking treatment for mental problems, the suspension of benefits might be counterproductive to the health of such injured workers. Tallini v Martino & Son, 58 N.Y.2d 392, 461 N.Y.S.2d 754, 448 N.E.2d 421, 1983 N.Y. LEXIS 2932 (N.Y. 1983).

Mental injury solely from mental cause is not compensable under the Workmen's Compensation Law. Wolfe v Sibley, Lindsay & Curr Co., 44 A.D.2d 739, 354 N.Y.S.2d 470, 1974 N.Y. App. Div. LEXIS 5235 (N.Y. App. Div. 3d Dep't 1974), rev'd, 36 N.Y.2d 505, 369 N.Y.S.2d 637, 330 N.E.2d 603, 1975 N.Y. LEXIS 1847 (N.Y. 1975).

Where sufficient factual relationship can be found between strain of work done and employee's death and such a conclusion is supported by medical proof, the resultant death may be deemed an accident within the scope of Workmen's Compensation Law. Strzelecki v Almor Corp., 46 A.D.2d 704, 359 N.Y.S.2d 916, 1974 N.Y. App. Div. LEXIS 3862 (N.Y. App. Div. 3d Dep't 1974).

The Workmen's Compensation Law does not require that there be an accidental injury arising out of and in the course of the employment in order to recover, but only that there be a disablement of the employee which resulted from services in the line of duty. Hoff v Williston Park, 50 A.D.2d 631, 374 N.Y.S.2d 756, 1975 N.Y. App. Div. LEXIS 12443 (N.Y. App. Div. 3d Dep't 1975).

The fact that an employee is illegally employed does not ipso facto render the workmen's compensation law inapplicable, and accordingly the statute may be applied where the employee suffering injury was under 18 years of age. Monteleone v Center Storage Warehouses, Inc., 68 N.Y.S.2d 369, 1946 N.Y. Misc. LEXIS 3367 (N.Y. Sup. Ct. 1946).

7. —Particular injuries

Where a workman claims compensation for an injury suffered by reason of the negligence of defendant for which his employer was temporarily rendering service the Work. Comp. Law does not apply. Mirabile v Bartlett-Hayward Co., 249 A.D. 667, 291 N.Y.S. 285, 1936 N.Y. App. Div. LEXIS 5455 (N.Y. App. Div. 1936).

A complaint by one employee against another for damages sustained by plaintiff while walking across the employer's parking lot, due to being struck by defendant's automobile as defendant drove into the lot, was not sustainable as against objection that plaintiff's exclusive remedy was under the Workmen's Compensation Law. Kunze v Jones, 6 A.D.2d 888, 177 N.Y.S.2d 579, 1958 N.Y. App. Div. LEXIS 5089 (N.Y. App. Div. 2d Dep't 1958), app. dismissed, 6 N.Y.2d 841, 188 N.Y.S.2d 547, 160 N.E.2d 83, 1959 N.Y. LEXIS 1326 (N.Y. 1959), aff'd, 8 N.Y.2d 1152, 209 N.Y.S.2d 833, 171 N.E.2d 906, 1960 N.Y. LEXIS 844 (N.Y. 1960).

Claimant, whose immediate supervisor had committed suicide by self-inflicted gunshot wound at his office, who was first to discover body and who thereafter became mentally disturbed and depressed and had acute depressive reaction, who was admitted to hospital and given shock treatments and who did not recover sufficiently to return to work until some six months after the incident, was not entitled to workmen's compensation disability benefits. Wolfe v Sibley, Lindsay & Curr Co., 44 A.D.2d 739, 354 N.Y.S.2d 470, 1974 N.Y. App. Div. LEXIS 5235 (N.Y. App. Div. 3d Dep't 1974), rev'd, 36 N.Y.2d 505, 369 N.Y.S.2d 637, 330 N.E.2d 603, 1975 N.Y. LEXIS 1847 (N.Y. 1975).

Corporate owner of garbage truck on which minor worked was insulated by Workmen's Compensation Law from tort liability for injuries sustained by minor when the garbage truck ran over him while being operated by fellow employee where owner was engaged in joint venture with minor's corporate employer, where corporations had common ownership and management. Felder v Old Falls Sanitation Co., 47 A.D.2d 977, 366 N.Y.S.2d 687, 1975 N.Y. App. Div. LEXIS 9458 (N.Y. App. Div. 3d Dep't 1975), aff'd, 39 N.Y.2d 855, 386 N.Y.S.2d 214, 352 N.E.2d 131, 1976 N.Y. LEXIS 2804 (N.Y. 1976).

Injured pedestrian's right of recovery was restricted to the employer under Workmen's Compensation Law, where he was struck by a car operated by a fellow employee while on the

employer's premises. Klein v Coletta, 3 Misc. 2d 26, 150 N.Y.S.2d 662, 1956 N.Y. Misc. LEXIS 2117 (N.Y. Sup. Ct. 1956).

Plaintiff was a member of a dance band of five, one of whom was defendant who ran the band. Plaintiff was injured while on the way to a rehearsal in an automobile owned and operated by the defendant. Held: plaintiff was neither engaged in a hazardous employment nor in a business in which four or more employees were engaged in a hazardous employment and hence, was not covered by this law. McDougle v Wilson, 9 Misc. 2d 820, 170 N.Y.S.2d 859, 1958 N.Y. Misc. LEXIS 3832 (N.Y. Sup. Ct. 1958).

A porter who was employed by defendant-corporation, and was allegedly violently assaulted by its president, acting within the scope of his authority, could sue at common law for the wilful tortious acts of the employer and was not relegated solely to Workmen's Compensation. Garcia v Gusmack Restaurant Corp., 150 N.Y.S.2d 232 (N.Y. City Ct. 1954).

8. Exclusiveness of injuries

Where an employer agreed with a railroad to release, indemnify and save harmless the railroad against any and all claims including those by employees of the employer resulting from the use of the premises by the employer's employees, an agreement, as a condition precedent to his employment by the employer, signed by the employee to the effect that in case of an injury in the course of his employment while traveling or being on the premises of the railroad, that he should look for compensation solely to the employer's relief plan or to workmen's compensation law, is void as against public policy. Western Union Tel. Co. v Cochran, 277 A.D. 625, 102 N.Y.S.2d 65, 1951 N.Y. App. Div. LEXIS 5651 (N.Y. App. Div.), aff'd, 302 N.Y. 545, 99 N.E.2d 882, 302 N.Y. (N.Y.S.) 545, 1951 N.Y. LEXIS 706 (N.Y. 1951).

Intentional tort can give rise to cause of action outside purview of Workers' Compensation Law only if facts demonstrate intentional or deliberate act by employer or coemployee directed at causing harm to complaining employee. Bulis v Di Lorenzo, 142 A.D.2d 707, 531 N.Y.S.2d 107, 1988 N.Y. App. Div. LEXIS 7993 (N.Y. App. Div. 2d Dep't 1988).

Court erred in granting defendants' motion to dismiss complaint on ground that plaintiff was "special employee" and that her exclusive remedy was Workers' Compensation since plaintiff had never made claim for Workers' Compensation Benefits for injuries arising from accident; case should have been referred to Workers' Compensation Board for factual determination as to whether plaintiff had valid claim for damages or whether she was relegated to benefits under Workers' Compensation Law. Manetta v Town of Hempstead Day Care Ctr., 248 A.D.2d 517, 669 N.Y.S.2d 901, 1998 N.Y. App. Div. LEXIS 2552 (N.Y. App. Div. 2d Dep't 1998).

The Work. Comp. Law is constitutional, and the remedy thereby provided for an employee engaged in the employments enumerated therein is exclusive and in full substitution for any action for damages. Connors v Semet-Solvay Co., 159 N.Y.S. 431, 94 Misc. 405, 1916 N.Y. Misc. LEXIS 1092 (N.Y. Sup. Ct. 1916).

The workmen's compensation law destroys the right of action of the employee and his personal representatives against his employer, substituting therefor benefits which are not subject to the vagaries and uncertainties of litigation and the defenses incident to and which arise from such relations; it leaves unaffected the liabilities of third persons. Employers Mut. Liability Ins. Co. v Refined Syrups Sales Corp., 53 N.Y.S.2d 835, 184 Misc. 941, 1945 N.Y. Misc. LEXIS 1591 (N.Y. Sup. Ct.), aff'd, 269 A.D. 931, 58 N.Y.S.2d 216, 1945 N.Y. App. Div. LEXIS 4560 (N.Y. App. Div. 1945).

Within the scope of its coverage the workman's compensation law is conclusive. Monti v Gimbel Bros., Inc., 82 N.Y.S.2d 781, 192 Misc. 811, 1948 N.Y. Misc. LEXIS 3224 (N.Y. Sup. Ct. 1948), aff'd, 275 A.D. 845, 89 N.Y.S.2d 238, 1949 N.Y. App. Div. LEXIS 4740 (N.Y. App. Div. 1949).

When an employee is accidentally injured in course of employment, the Workmen's Compensation Act is a complete substitute for any and all rights, remedies, obligations, and liabilities existing at common law between employer and employee. Schnall v 1918 Harmon St. Corp., 26 Misc. 2d 287, 207 N.Y.S.2d 375, 1960 N.Y. Misc. LEXIS 3643 (N.Y. Sup. Ct. 1960).

9. —Defense or bar to other actions

Where claimant filed a compensation claim and subsequently commenced a personal injury action against his employer, and the compensation case was closed pending outcome of the action, which was settled for $7,500, further proceedings in the compensation case were precluded by successful settlement of the personal injury action. Martin v C. A. Productions Co., 8 N.Y.2d 226, 203 N.Y.S.2d 845, 168 N.E.2d 666, 1960 N.Y. LEXIS 1070 (N.Y. 1960).

An action brought by an employee against his corporate employer and a fellow employee to recover damages for an alleged assault by the fellow employee could not be maintained where there was already an outstanding award of workmen's compensation to plaintiff under which he had been accepting payments. Schmidt v Carrara, 11 A.D.2d 788, 204 N.Y.S.2d 942, 1960 N.Y. App. Div. LEXIS 8726 (N.Y. App. Div. 2d Dep't 1960).

The Workmen's Compensation Board was not precluded from considering and making an award in connection with a claim filed in 1959 for occupational loss of hearing by claimant who had worked for the same employer for 48 years in the employer's shipyard and repairing of ships in New York Harbor because a similar claim had been rejected by the Longshoremen's and Harbor Workers' Compensation Board in 1950, with medical proof of loss of 40% hearing at that time, claimant thereafter having been employed for five years as a "snapper" in the employer's plate shop on shipyard premises in an environment of constant stridence, such a claim falling within the "twilight zone" rule, since claimant's employment related both to shore and navigable waters and the federal claim having been rejected on procedural grounds rather than on the merits. Bryce v Todd Shipyard, 17 A.D.2d 666, 229 N.Y.S.2d 993, 1962 N.Y. App. Div. LEXIS 8713 (N.Y. App. Div. 3d Dep't 1962), app. denied, 12 N.Y.2d 646, 1963 N.Y. LEXIS 1550 (N.Y. 1963).

Though plaintiff claimed that he was injured while performing duties for defendant on account of latter's alleged negligence and violation of Labor Law, where defendant was not only covered by Workmen's Compensation Law, but plaintiff applied for and was receiving workmen's compensation benefits, no action at law could be maintained against defendant as plaintiff's employer. Ramos v Broadway Maintenance Corp., 51 A.D.2d 911, 381 N.Y.S.2d 62, 1976 N.Y. App. Div. LEXIS 11576 (N.Y. App. Div. 1st Dep't 1976).

Employer could not be sued directly for death of employee as result of car-truck accident because of bar of Workmen's Compensation Law. Cimino v New York, 54 A.D.2d 843, 388 N.Y.S.2d 276, 1976 N.Y. App. Div. LEXIS 14595 (N.Y. App. Div. 1st Dep't 1976), aff'd, 43 N.Y.2d 966, 404 N.Y.S.2d 595, 375 N.E.2d 775, 1978 N.Y. LEXIS 1865 (N.Y. 1978).

The separate tort actions of a husband and wife who allegedly sustained injuries when they were assaulted by two trespassers in a building owned by the defendant would be dismissed pursuant to defendant's motion for summary judgment, where the wife failed to fulfill her burden to plead and prove lack of workmen's compensation coverage by the defendant who was also her employer, and where there was a factual issue as to whether or not the husband was an employee of defendant which needed to be decided by the workmen's compensation appeals board. Kimbrough v C. F. L. Development Corp., 80 A.D.2d 737, 437 N.Y.S.2d 167, 1981 N.Y. App. Div. LEXIS 10465 (N.Y. App. Div. 4th Dep't 1981).

Decedent's widow was barred from seeking workers' compensation benefits by prior settlement of wrongful death action against employer, despite widow's assertion that parties to wrongful death action were "the Widow and the Estate" while parties to claim for death benefits were "the Widow and children," since wrongful death action is not brought on behalf of estate, but on behalf of decedent's distributees, which includes children. Green v Kamalian, 141 A.D.2d 936, 530 N.Y.S.2d 288, 1988 N.Y. App. Div. LEXIS 6799 (N.Y. App. Div. 3d Dep't 1988).

Defendants, plaintiff's employer and nurse employed by plaintiff's employer, were properly granted summary judgment in action alleging malpractice on part of nurse and negligence on part of employer in failing to provide competent medical care for employees injured on job since medical services in question were

not available generally to members of public, and plaintiff received medical treatment not as member of public but only as consequence of his employment; action fell within scope of CLS Work Comp § 29(6). Cronin v Perry, 244 A.D.2d 448, 664 N.Y.S.2d 123, 1997 N.Y. App. Div. LEXIS 11576 (N.Y. App. Div. 2d Dep't 1997).

Defendants, Catholic high school and Roman Catholic Diocese, were entitled to summary judgment where plaintiff had previously submitted claim for and received workers' compensation benefits based on same incident, and plaintiff's employer and high school function as administrative divisions of diocese, and diocese had complete control over plaintiff's employer and high school. Smith v Roman Catholic Diocese, 252 A.D.2d 805, 677 N.Y.S.2d 183, 1998 N.Y. App. Div. LEXIS 8319 (N.Y. App. Div. 3d Dep't 1998).

Court improperly denied defendants' summary judgment motion in action for injuries sustained when plaintiff tripped and fell in employee parking lot as she went to her car during her lunch break; court should have referred case to Workers' Compensation Board for factual hearing on which Board could make reasoned factual determination as to whether plaintiff had valid claim for damages or whether she was relegated to benefits under workers' compensation law. Hofrichter v North Shore Univ. Hosp., 271 A.D.2d 649, 707 N.Y.S.2d 639, 2000 N.Y. App. Div. LEXIS 4507 (N.Y. App. Div. 2d Dep't 2000).

Defendant was properly granted summary judgment where affidavits from its president, building superintendent, and managing agent, all based on personal knowledge, stated that plaintiff was defendant's employee when he sustained his injury, and that defendant hired plaintiff, had exclusive authority to fire him, supervised and controlled his work, and paid him, and plaintiff merely offered unsworn documents as to whether defendant was his employer. Karczewicz v 473 Owners Corp., 272 A.D.2d 137, 708 N.Y.S.2d 10, 2000 N.Y. App. Div. LEXIS 5420 (N.Y. App. Div. 1st Dep't 2000).

Court improperly granted defendants' summary judgment motion on ground that award of Workers' Compensation benefits barred instant claim for sexual discrimination by plaintiff against her employers where workers' compensation award resulted solely from attempted videotaping of plaintiff by co-worker while she was in company locker room, and did not implicate alleged, intentional activities of company officer in subjecting her to hostile work environment by directing inappropriate sexual remarks and jokes toward her, and making demands on her for sexual relations in exchange for forgiving loan. Hanford v Plaza Packaging Corp., 284 A.D.2d 179, 727 N.Y.S.2d 407, 2001 N.Y. App. Div. LEXIS 6182 (N.Y. App. Div. 1st Dep't 2001), app. denied, 2001 N.Y. App. Div. LEXIS 9220 (N.Y. App. Div. 1st Dep't Sept. 25, 2001).

There is no indication that there was any purpose to require or permit the establishment of a state fund to protect employers against the risk of liabilities in excess of the prescribed compensation, and as to any subsisting common law liability, employer's liability remained the same. Cardinal v State, 102 N.Y.S.2d 895, 200 Misc. 574, 1951 N.Y. Misc. LEXIS 1566 (N.Y. Ct. Cl. 1951), modified, 279 A.D. 326, 109 N.Y.S.2d 818, 1952 N.Y. App. Div. LEXIS 4667 (N.Y. App. Div. 1952).

An employee who sustained injury when eating a sandwich at a counter maintained by her employer brought an action based on a breach of warranty and her husband also made a claim for loss of services. Held: where the employer gave notice of the accident to its insurance carrier and notice of a hearing before the compensation board was given to the plaintiff who failed to appear, the board acquired jurisdiction and the breach of warranty action could not be maintained. Montross v Walgreen Co. of New York, Inc., 9 Misc. 2d 318, 169 N.Y.S.2d 481, 1957 N.Y. Misc. LEXIS 1873 (N.Y. City Ct. 1957).

In an action against Cornell University seeking damages for injuries sustained by plaintiff, who had received workers' compensation benefits as an employee of the university, defendant's motion for summary judgment dismissing the complaint would be granted where the institution which had paid the plaintiff was part of Cornell University and not a State agency and therefore plaintiff would be deemed an employee of the university and the instant action would be barred by Workers' Compensation Law. Neish v John Deere Co., 118 Misc. 2d 459, 460 N.Y.S.2d 861, 1983 N.Y. Misc. LEXIS 3337 (N.Y. Sup. Ct. 1983).

10. — —Special employment relationship

Defendant, property manager, should have been granted summary judgment where plaintiff admitted that his "general employer" was either property owner or payroll corporation which paid him Workers' Compensation benefits for his claimed disability following accident, and defendant was plaintiff's "special employer," having hired him, having ultimate responsibility for maintaining building where he was "maintenance man," and having authority to terminate his employment. Gubitosi v National Realty Co., 247 A.D.2d 512, 669 N.Y.S.2d 321, 1998 N.Y. App. Div. LEXIS 1490 (N.Y. App. Div. 2d Dep't), app. dismissed, 92 N.Y.2d 843, 677 N.Y.S.2d 69, 699 N.E.2d 428, 1998 N.Y. LEXIS 1802 (N.Y. 1998).

Plaintiff was special employee of defendant as matter of law, and thus court should have dismissed action as barred by exclusive remedy provisions of Workers' Compensation Law where plaintiff was general employee of employee leasing firm, which assigned him to work for defendant, leasing firm surrendered complete control and supervision over plaintiff's work to defendant, and defendant directed plaintiff to work site, directed and supervised plaintiff's work activities, and provided him with all his tools and equipment for job; fact that leasing firm paid plaintiff's wages and plaintiff received workers' compensation benefits from leasing firm's insurance carrier was not dispositive. Davis v Butler, 262 A.D.2d 1039, 691 N.Y.S.2d 845, 1999 N.Y. App. Div. LEXIS 7268 (N.Y. App. Div. 4th Dep't 1999).

Defendant should have been granted summary judgment in action under CLS Labor § 240(1) on ground that plaintiff was "special employee" of defendant at time of his injury, thus making his exclusive remedy under Workers' Compensation Law, where defendant entered into hourly agreement with plaintiff's employer as a successful bidder to provide manpower, service truck, and certain tools, and once plaintiff's employer's employees were assigned to defendant, defendant was solely responsible for placing those employees on particular project and, on daily basis, directing what work would be performed, when it would be performed, and manner in which it would be performed, notwithstanding that plaintiff's employer's employees went directly to job site without first reporting to barn as defendant's employees did, or that plaintiff's employer retained authority to replace employees at defendant's projects with other employees without consultation with defendant. Jaynes v County of Chemung, 271 A.D.2d 928, 707 N.Y.S.2d 516, 2000 N.Y. App. Div. LEXIS 4671 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 762, 715 N.Y.S.2d 215, 738 N.E.2d 363, 2000 N.Y. LEXIS 2327 (N.Y. 2000).

11. — —Affirmative defense

A motion dismissing an affirmative defense that plaintiff's exclusive remedy was under the Workmen's Compensation Law was denied as the proper method of determining the issue of whether plaintiff was an employee at the time of the accident was by plenary trial according to the statute. Duboff v Board of Higher Education, 34 A.D.2d 824, 312 N.Y.S.2d 726, 1970 N.Y. App. Div. LEXIS 4699 (N.Y. App. Div. 2d Dep't 1970).

Since defendants were not parties to proceedings before Workmen's Compensation Board regarding compensation claim, a determination of the board is not binding on them and since there exists genuine fact questions as to whether the infant plaintiff's injuries were sustained during the course of employment and that he may have deviated from his regular work activity at the time of the accident, defendants ought to be afforded an opportunity to establish the affirmative defense that a claim for Workmen's Compensation is plaintiff's exclusive remedy. Robbins v Master Diesel Corp., 34 A.D.2d 1021, 312 N.Y.S.2d 785, 1970 N.Y. App. Div. LEXIS 4319 (N.Y. App. Div. 2d Dep't 1970).

In action seeking declaration that automobile liability insurer was required to make no-fault payments to insured without any offset for workers' compensation, it was error to deny insurer's motion for summary judgment and to grant insured's motion to strike affirmative defense asserting exclusivity of workers' compensation board as forum to resolve issue of insured's employ-

ment status, since matter should have been remanded to board to determine threshold issue of whether insured was employee or independent contractor, and insurer, by stressing factors that are traditionally considered in determining whether employment relationship existed, presented issue involving mixed question of fact and law, over which board had primary jurisdiction. Arvatz v Empire Mut. Ins. Co., 171 A.D.2d 262, 575 N.Y.S.2d 836, 1991 N.Y. App. Div. LEXIS 14161 (N.Y. App. Div. 1st Dep't 1991).

Court erred in denying defendant's motion for leave to amend answer to include affirmative defense of Workers' Compensation Law, even though motion was first raised in response to plaintiffs' motion to reinstate note of issue and to restore case to trial calendar, since plaintiff was aware of his employment status and had already received workers' compensation benefits prior to date on which motion was made, and there were fact issues as to whether plaintiff and defendant were coemployees at time of accident and whether plaintiff's injuries arose out of course of his employment. Singh v Shafi, 252 A.D.2d 494, 675 N.Y.S.2d 614, 1998 N.Y. App. Div. LEXIS 8014 (N.Y. App. Div. 2d Dep't 1998).

12. — —Exceptions

In an action brought against a hospital and hospital supervisor by plaintiff to recover damages for defamation, intentional infliction of emotional distress and negligence in which plaintiff alleged that his supervisor made a statement to plaintiff's shop steward accusing plaintiff of being a thief, the defense of workers' compensation was properly stricken as to all causes of action against plaintiff's supervisor inasmuch as an intentional tort committed by an employee against a coemployee cannot give the perpetrator of the act immunity under the Workers' Compensation Law; however, liability imputed to the hospital-employer through respondeat superior would not include the employer's participation in the intentional tort and a common law action pleading respondeat superior would be barred by the Compensation Law since, although the plaintiff sought recovery for injuries, which had not yet been recognized as compensable (loss of reputation, humiliation and embarrassment), benefits would still be available for psychological injuries such as depression, anxiety or psychotic reactions as well as physical injuries, under Work Comp Law § 2(7). Thompson v Maimonides Medical Ctr., 86 A.D.2d 867, 447 N.Y.S.2d 308, 1982 N.Y. App. Div. LEXIS 15500 (N.Y. App. Div. 2d Dep't 1982).

Workers' compensation claim could not be withdrawn by claimant, widow of state correctional employee who was killed when State Police retook Attica Correctional Facility during prison uprising, where claimant had accepted workers' compensation benefits, as claimant was not misled by state into applying for and accepting benefits, and she forfeited her rights to pursue alternative remedy for intentional tort by her acceptance of benefits. Hardie v New York State Attica Correctional Facility, 144 A.D.2d 164, 534 N.Y.S.2d 492, 1988 N.Y. App. Div. LEXIS 10146 (N.Y. App. Div. 3d Dep't 1988), app. dismissed, 73 N.Y.2d 918, 539 N.Y.S.2d 301, 536 N.E.2d 630, 1989 N.Y. LEXIS 173 (N.Y. 1989), app. denied, 76 N.Y.2d 708, 560 N.Y.S.2d 990, 561 N.E.2d 890, 1990 N.Y. LEXIS 3142 (N.Y. 1990).

Allegation that defendant employer's negligence caused plaintiff's injuries by allowing him and other employees to be exposed to toxic and injurious chemicals in course of their employment at defendant's facility did not bring them within limited exceptions to general bar of Workers' Compensation Law. Tompkins v IBM, 247 A.D.2d 465, 668 N.Y.S.2d 673, 1998 N.Y. App. Div. LEXIS 1020 (N.Y. App. Div. 2d Dep't 1998).

13. —Out-of-state residents or claims

The Work. Comp. Law involves the exercise of the police power of the state, and does not attempt to regulate the duty of foreign employers in the conduct of their business within foreign jurisdictions. Smith v Heine Safety Boiler Co., 224 N.Y. 9, 119 N.E. 878, 224 N.Y. (N.Y.S.) 9, 1918 N.Y. LEXIS 850 (N.Y. 1918).

Where employer was first insured under the Workmen's Compensation Law of Minnesota and later insured by another company under the Workmen's Compensation Law of New York, and the claimant, although working in Minnesota, was engaged in employment so closely related to New York as to be governed by the New York Workmen's Compensation Law and within the jurisdiction of the New York Workmen's Compensation Board, the first insurer was, neither by its direct coverage nor by its all States' indorsement, liable for any part of a claim under the New York compensation statute, and the entire risk must be assumed by the company which insured the employer under the Workmen's Compensation Law of New York. Kohl v Picoult, 18 N.Y.2d 312, 274 N.Y.S.2d 867, 221 N.E.2d 536, 1966 N.Y. LEXIS 1045 (N.Y. 1966).

North Carolina is not bound to follow a decision of the New York Workmen's Compensation Board under the full faith and credit clause of the United States Constitution. Yoshi Ogino v Black, 278 A.D. 146, 104 N.Y.S.2d 82, 1951 N.Y. App. Div. LEXIS 3763 (N.Y. App. Div. 1951), aff'd in part, 304 N.Y. 872, 109 N.E.2d 884, 304 N.Y. (N.Y.S.) 872, 1952 N.Y. LEXIS 1038 (N.Y. 1952).

Denial of a claim in one state does not necessarily bar a plaintiff from proceeding under the Workmen's Compensation Law of another, and even after receipt of benefits pursuant to an award in one state, an injured employee may still be permitted to file his claim in a second state where greater benefits are possible. Yoshi Ogino v Black, 278 A.D. 146, 104 N.Y.S.2d 82, 1951 N.Y. App. Div. LEXIS 3763 (N.Y. App. Div. 1951), aff'd in part, 304 N.Y. 872, 109 N.E.2d 884, 304 N.Y. (N.Y.S.) 872, 1952 N.Y. LEXIS 1038 (N.Y. 1952).

The New York Workmen's Compensation Commission has jurisdiction over claims against a New York employer by one employee who was a resident of Pennsylvania acting as a saleman in certain New Jersey territory, claimant having been hired by an official from the New York office and his employment being transitory in nature and not at a "fixed place," notwithstanding the accident causing injury occurred in New Jersey. Levin v Eutectic Welding Alloys Corp., 21 A.D.2d 925, 251 N.Y.S.2d 127, 1964 N.Y. App. Div. LEXIS 3358 (N.Y. App. Div. 3d Dep't), app. denied, 14 N.Y.2d 488, 1964 N.Y. LEXIS 1878 (N.Y. 1964).

The New York Compensation Board properly found that it had jurisdiction of a claim allegedly based upon injury sustained by claimant while working as an apartment house superintendent in New York City notwithstanding delay in presenting the claim and removal of claimant and his wife to Germany. Eberhardt v Sonsade Realty Corp., 21 A.D.2d 951, 251 N.Y.S.2d 264, 1964 N.Y. App. Div. LEXIS 3235 (N.Y. App. Div. 3d Dep't 1964).

In light of express provision in compensation policy with employer limiting coverage to workmen's compensation law and any occupational disease law of state of New Jersey, insurer could not as a matter of law be held responsible for payment of New York compensation award to employee injured on job in New Jersey. Costanzo v Security Mut. Ins. Co., 44 A.D.2d 626, 353 N.Y.S.2d 566, 1974 N.Y. App. Div. LEXIS 5428 (N.Y. App. Div. 3d Dep't 1974).

In a workers' compensation case involving a mechanical engineer who was a resident of Texas and who was injured in Saudi Arabia while working for a New York company, the New York Workers' Compensation Board properly exercised jurisdiction over the claim where the engineer was hired in New York, where his salary was paid with checks drawn on a New York bank, and where the engineer reported to the New York office for instructions regarding on-site construction problems. Hartham v George A. Fuller Co., 89 A.D.2d 720, 453 N.Y.S.2d 843, 1982 N.Y. App. Div. LEXIS 17847 (N.Y. App. Div. 3d Dep't 1982).

Pennsylvania's worker's compensation law applied to action arising from work-related injury to New York resident employed by Pennsylvania subcontractor performing work in Pennsylvania, even though general contractor was New York corporation and choice-of-law issue involved loss-allocating rule which would favor application of New York law, since (1) subcontractor contracted with general contractor to perform work in Pennsylvania and hired plaintiff from Pennsylvania local union hall, (2) relevant collective bargaining agreement provided that employer was to provide workers' compensation insurance in Pennsylvania, (3) plaintiff applied for and received benefits under Pennsylvania law, (4) Pennsylvania legislature had clearly expressed its interest in having its workers' compensation law apply to all industrial accidents occurring within its state, (5) New York's interests in seeing that its injured resident receive benefits was satisfied, and (6) Pennsylvania law was neither anachronistic nor unfair. Roach

v McGuire & Bennett, Inc., 146 A.D.2d 89, 539 N.Y.S.2d 138, 1989 N.Y. App. Div. LEXIS 2823 (N.Y. App. Div. 3d Dep't 1989).

Where a policy was issued to cover only claims filed under the Workmen's Compensation Laws of the State of New York and employee's injuries arose in New Jersey out of an occurrence which was within the scope of the Workmen's Compensation Act of New Jersey, the insurer was not liable under the terms of the policy to pay the award granted to the employee. Rood v Nelson, 14 Misc. 2d 859, 178 N.Y.S.2d 969, 1958 N.Y. Misc. LEXIS 2989 (N.Y. Sup. Ct. 1958).

RESEARCH REFERENCES AND PRACTICE AIDS

Federal Aspects:

Workers' compensation for federal employees. 5 USCS §§ 8101 et seq.

Longshoremen's and Harbor Workers' Compensation Act, generally. 33 USCS §§ 901 et seq.

Railroads: liability for injuries to employees, generally. 45 USCS §§ 51 et seq.

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1147, 1364.

68 NY Jur 2d Insurance § 338.

109 NY Jur 2d Workers' Compensation §§ 1, 4, 66.

Appleman on Insurance:

New Appleman New York Insurance Law §§ 25.01 et seq.

Annotations:

Employer's liability for additional compensation for overdue installment payments under 33 USCS § 914(e) of the Longshoremen's and Harbor Workers' Compensation Act (33 USCS §§ 901 et seq.). 49 ALR Fed 425.

Matthew Bender's New York Practice Guides: 4 New York Practice Guide: Business and Commercial § 25.02.

§ 2. Definitions

As used in this chapter,

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9. "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident, including the reasonable value of board, rent, housing, lodging or similar advantage received from the employer, or in the case of (a) a civil defense volunteer, (b) a volunteer worker in a state department as provided in group sixteen of subdivision one of section three of this chapter, (c) a volunteer worker for a social services district as provided in group seventeen of subdivision one of section three of this chapter, (d) a county fire coordinator, a deputy county fire coordinator or a comparable county official to whom the provisions of group fifteen-a of subdivision one of section three of this chapter are applicable, who is also a volunteer firefighter or ambulance worker, (e) a fire district officer whether elective or appointive and whether or not he or she is compensated for his or her services or a paid fire or ambulance district employee, (f) a state fire instructor whose compensation is paid in whole or in part by the state, (g) an enrolled member of a fire company who, is not a volunteer firefighter, receives compensation for his or her services and is not a full-time firefighter, known as a "call firefighter", (h) persons who are performing services for a public or not-for-profit corporation, association, institution or agency organized as an unincorporated association or duly incorporated under the laws of this state in fulfillment of a sentence of probation or of conditional discharge, or persons performing such services pursuant to the provisions of section 170.55 or 170.56 of the criminal procedure law, (i) an auxiliary police officer in a municipal corporation which elected to include such persons within the definition of "employee" as authorized by subdivision four of this section, or (j) a duly appointed member of a regional hazardous materials incidents team recognized under section two hundred nine-y of the general municipal law, such money rate applying in his or her regular vocation or the amount of the regular earnings of such volunteer, coordinator, instructor, or comparable officer, fire or ambulance district officer or employee or call firefighter, or team member as the case may be, in his or her regular vocation, plus any amount earned as such a coordinator, instructor or comparable officer, or as such a fire or ambulance district officer or employee or call firefighter or team member, provided, however, that in no event shall the average weekly wage be fixed at less than thirty dollars regardless of whether or not such volunteer, coordinator, instructor or comparable officer or fire or ambulance district officer or employee or call firefighter or team member had gainful employment elsewhere at the time of the injury.

* * * * *

HISTORY:

Add, L 1913, ch 816; amd, L1961, ch 233, § 1; L 1914, ch 41, § 1; L 1914, ch 316, § 1, eff April 14, 1914; L 1916, ch 622, § 2; L 1917, ch 705, § 1; L 1918, ch 249, § 1, eff April 17, 1918; L 1918, ch 633, § 1, eff May 13, 1918; L 1918, ch 634, §§ 1, 2, eff May 13, 1918; L 1918, ch 635; L 1920, ch 356, § 1, eff May 5, 1920; L 1921, ch 60, § 1. eff March 9, 1921; L 1922, ch 615, eff July 1, 1922; L 1935, ch 384, §§ 1–3, eff April 11, 1935; L 1938, ch 585, § 16; L 1939, ch 271, §§ 1, 2; L 1940, ch 225, § 1; L 1941, ch 639, § 3; L 1941, ch 875, § 3; L 1943, ch 309, § 1; L 1945, ch 74, § 17; L 1946, ch 113, § 1, eff March 14, 1946; L 1946, ch 311, §§ 1, 2; L 1946, ch 605, § 1; L 1947, ch 794, §§ 1–3; L 1951, ch 788; L 1953, ch 575, §§ 3, 5, 6; L 1954, ch 496, § 2; L 1956, ch 67; L 1956, ch 699, §§ 9–12; L 1956, ch 700; L 1957, ch 418; L 1957, ch 967, § 1; L 1959, ch 642, § 4; L 1962, ch 456; L 1963, ch 369, §§ 1, 2; L 1964, ch 539, § 1; L 1966, ch 391, § 2; L 1966, ch 646, § 1; L 1966, ch 895, § 1, eff Aug 1, 1966; L 1966, ch 896, § 1, eff Aug 1, 1966; L 1966, ch 972; L 1969, ch 1048; L 1971, ch 500, § 2, eff June 17, 1971; L 1973, ch 49, §§ 1–3, eff March 6, 1973; L 1974, ch 934, §§ 1, 2, eff Sept 1, 1974; L 1974, ch 1053, § 4, eff April 1, 1975; L 1976, ch 882, § 6, eff April 1, 1977; L 1981, ch 67, § 5, eff April 8, 1981; L 1982, ch 396, § 1, eff June 28, 1982; L 1982, ch 920, § 55, eff July 1, 1983; L 1983, ch 38, § 1, eff Sept 1, 1983; L 1983, ch 113, § 1, eff May 17, 1983; L 1983, ch 147, § 1, eff May 23, 1983; L 1983, ch 438, § 1, eff Jan 1, 1984; L 1984, ch 489, § 1, eff Jan 1, 1985; L 1984, ch 659, § 1, eff Jan 1, 1985; L 1985, ch 858, § 1, eff Oct 31, 1985; L 1986, ch 446, § 1, eff Jan 1, 1987; L 1986, ch 470, § 1, eff Sept 19, 1986; L 1986, ch 760, § 1, eff Oct 1, 1986; L 1986, ch 903, §§ 3–5, eff Oct 4, 1986; L 1987, ch 827, § 6, eff Aug 7, 1987; L 1988, ch 24, § 19, eff Jan 1, 1989; L 1990, ch 346, §§ 4–6, eff Jan 1, 1991; L 1990, ch 924, § 1, eff July 31, 1990; L 1992, ch 668, § 2, eff Aug 30, 1992; L 1993, ch 205, § 1, eff Jan 1, 1994; L 1999, ch 49, §§ 1–3, eff June 24, 1999; L 2000, ch 598, § 10, eff Dec 20, 2000; L 2002, ch 574, §§ 2, 3, eff Nov 23, 2002; L 2006, ch 572, §§ 1, 2, eff Jan 1, 2007; L 2007, ch 6, § 1, eff March 13, 2007; L 2007, ch 169, §§ 2–4, eff July 3, 2007; L 2008, ch 11, § 1, eff Feb 1, 2008; L 2008, ch 392, §§ 3–6, 8, eff Jan 1, 2009; L 2010, ch 418, § 3, eff Oct 26, 2010; L 2011, ch 62, § 104 (Part A), eff Oct 3, 2011; L 2013, ch 57, § 1 (Part GG), eff March 29, 2013; L 2013, ch 558, § 3, eff April 10, 2014; L 2016, ch 503, §§ 4–6, effective November 28, 2016; L 2017, ch 59, §§ 4-7 (Part

SS), effective April 10, 2017; L 2018, ch 476, § 9, effective December 28, 2018.

Editor's Notes: Laws 1975, ch 1054 amended the effective date of L 1974, ch 1053 from September 1, 1974 to April 1, 1975.

Laws 2007, ch 6, § 80, eff March 13, 2007, provides as follows:

§ 80. The superintendent of insurance [superintendent of financial services], in consultation with the chair of the workers' compensation board, may promulgate regulations relating to the standards to be followed in the approval of forms and in the procedural requirements needed to implement the provisions of this act, and the chair of the workers' compensation board, in consultation with the superintendent of insurance [superintendent of financial services], may promulgate regulations relating to the procedural requirements needed to implement the provisions of this act.

Laws 2014, ch 7, § 2, amended, L 2013, ch 558, § 5, so as to change the effective date from March 11, 2014 to April 10, 2014, applicable to the amendment of subdivison 4, opening par.

Derivation Notes: Substance transferred from § 3 which was derived from Labor Law § 216, add, L 1910, ch 674.

Substance of former § 2 transferred to § 3.

Amendment Notes: The 2016 amendments by ch 503, §§ 4-6, added "but shall not include delivering newspapers or shopping news to the consumer (including any services directly related to such trade or business) by a person who is not performing commercial goods transportation services for a commercial goods transportation contractor within the meaning of article twenty-five-C of the labor law" in the second sentence of the opening paragraph of 3; added "but shall not include delivery of newspapers or shopping news to the consumer (including any services directly related to such trade or business) by a person who is not performing commercial goods transportation services for a commercial goods transportation contractor within the meaning of article twenty-five-C of the labor law" in the first sentence of the opening paragraph of 4 and in the second to the last sentence of the opening paragraph of 5; and added "of this article" twice in the first sentence of the opening paragraph of 5.

2013. Chapter 57, § 1 (Part GG) amended:

By repealing sub 18.

2013. Chapter 558, § 3 amended:

Sub 4, opening par by adding the matter in italics.

2011. Chapter 62, § 104 (Part A) amended:

Sub 16 at fig 1 by substituting "superintendent of financial services" for "superintendent of insurance".

Sub 21 at figs 1 and 2 by substituting "superintendent of financial services" for "superintendent of insurance".

Sub 23 at fig 1 by substituting "superintendent of financial services" for "superintendent of insurance".

The 2017 amendment by ch 59, §§ 4-7 (Part SS), in the second paragraph of 3, fifth paragraph of 4, and third paragraph of 5, added "and at the election of the New York Jockey Injury Compensation Fund, Inc., with the approval of the New York state gaming commission, employees of licensed trainers or owners," substituted "gaming commission" for "racing and wagering board," and added "or, if approved by the New York state gaming commission, employee of a licensed trainer or owner"; added 24; and made related changes.

The 2018 amendment by ch 476, § 9, substituted "police officers" for "policemen" in the third sentence of the introductory paragraph of 5; in the first paragraph of 9, substituted "firefighter" for "fireman" wherever it appears in (g) and (j) and substituted "police officer" for "policeman" in (i); and made stylistic changes.

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I. In General

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In determining whether particular persons or classes are covered it is necessary to consider the statute as a whole and the purposes embodied in its enactment. Goldstein v State, 281 N.Y.

396, 24 N.E.2d 97, 281 N.Y. (N.Y.S.) 396, 1939 N.Y. LEXIS 1024 (N.Y. 1939).

A contractual relationship or act of hiring is necessary for the operation of the Workmen's Compensation Law, and this jurisdictional fact must be established by due process of law. Skeels v Paul Smith's Hotel Co., 195 A.D. 39, 185 N.Y.S. 665, 1921 N.Y. App. Div. LEXIS 4692 (N.Y. App. Div. 1921).

Workers' Compensation Board did not err in concluding that electrician's discharge was product of lawful personnel decision undertaken in good faith, within meaning of CLS Work Comp § 2(7), where 2 supervisors testified that he had received 3 prior disciplinary warnings before incident in which he failed to follow their instructions regarding diagramming of electrical panel. Dockum v Syroco Inc., 260 A.D.2d 688, 687 N.Y.S.2d 759, 1999 N.Y. App. Div. LEXIS 3294 (N.Y. App. Div. 3d Dep't), app. denied, 93 N.Y.2d 811, 695 N.Y.S.2d 540, 717 N.E.2d 699, 1999 N.Y. LEXIS 1902 (N.Y. 1999).

2. Construction

A plain language reading of N.Y. Workers' Comp. Law § 137(3)(a) supports the conclusion that "board certified" means certification by a medical specialty board. The phrase "board certified" is a term of art, typically understood to refer to approval by a designated group of professionals. This is especially true when the phrase is used to describe physicians, who are commonly referred to as board certified. Belmonte v Snashall, 2 N.Y.3d 560, 780 N.Y.S.2d 541, 813 N.E.2d 621, 2004 N.Y. LEXIS 1540 (N.Y. 2004).

Definition of "compensation" in N.Y. Workers' Comp. Law § 2(6) as the money allowance payable to an employee or to his dependents" is not applicable to the use of "compensation" in N.Y. Workers' Comp. Law § 120 pertaining to awards for retaliatory discharge; if that definition is read into § 120, it does not make sense. Matter of Greenberg v New York City Tr. Auth., 7 N.Y.3d 139, 818 N.Y.S.2d 784, 851 N.E.2d 1135, 2006 N.Y. LEXIS 1174 (N.Y. 2006).

The phrase "hazardous employment" is used in subdivision 4 of this section in a sense different from that implied by the use of the phrase in Workmen's Compensation Law § 3 subd 1. Chilk v New York, 26 A.D.2d 425, 275 N.Y.S.2d 167, 1966 N.Y. App. Div. LEXIS 2982 (N.Y. App. Div. 3d Dep't 1966), aff'd, 22 N.Y.2d 661, 291 N.Y.S.2d 358, 238 N.E.2d 748, 1968 N.Y. LEXIS 1404 (N.Y. 1968).

In the Workmen's Compensation Law § 2, subd 4, where "employee" is defined as a "person", and in subd 3, "employer" is defined as a "person, partnership, association, corporation . . .," subsidiary corporations may not be considered as the parent corporation's "employees" and hence, "fellow employees" of plaintiffs "in the same employ". Thomas v Maigo Corp., 37 A.D.2d 754, 323 N.Y.S.2d 106, 1971 N.Y. App. Div. LEXIS 3587 (N.Y. App. Div. 4th Dep't 1971).

Although issue of reasonableness is ordinarily question of fact for Workers' Compensation Board, court may decide issue as matter of law when record is devoid of evidence to support finding of reasonableness. Langford v William Rogers, Inc., 144 A.D.2d 785, 534 N.Y.S.2d 761, 1988 N.Y. App. Div. LEXIS 10986 (N.Y. App. Div. 3d Dep't 1988).

Injuries to 15-year-old junior lifeguard when he dived into shallow lake at summer camp arose out of and in course of his employment, rather than in off-duty athletic activity, for purposes of his entitlement to workers' compensation benefits, where (1) he attended lifesaving class, along with other lifeguards and some campers, just before accident, (2) class was taught by head lifeguard (his uncle) and included instruction in shallow-water diving, (3) although junior lifeguard was not required to attend class, head lifeguard invited him to do so, and (4) after class ended, head lifeguard left area, but other lifeguards remained. Kobre v Camp Mogen Avraham, 255 A.D.2d 636, 679 N.Y.S.2d 753, 1998 N.Y. App. Div. LEXIS 11684 (N.Y. App. Div. 3d Dep't 1998).

3. Effect on availability of other actions, generally

Where an employee proceeds under the Workmen's Compensation Law seeking compensation for disability arising from aggravation of a disease not occupational in nature, and is eventually denied compensation because later decisions of the Court of Appeals have held that such a disability is not compensable, he is not barred by lapse of time under § 23 of the Civil Practice Act, as amended, from commencing an ordinary action for damages after adverse termination of the compensation proceedings. Hotaling v General Elec. Co., 12 N.Y.2d 310, 239 N.Y.S.2d 344, 189 N.E.2d 698, 1963 N.Y. LEXIS 1301 (N.Y. 1963).

An employer was entitled to summary judgment in an action by a painter-employee for wilful assault where it was alleged scaffold rope gave way causing employee to fall and where employee who was indisputably injured in his employment, had made claim for compensation and accepted and retained benefits therefrom. Assuming that employee had cause of action for wilful assault, he lost that remedy when he elected to take compensation. But court refused to hold, in the absence of controlling authority that an employee could not maintain common-law action against his insured employer for wilful assault when it occurred during the course of and within scope of employment. Legault v Brown, 283 A.D. 303, 127 N.Y.S.2d 601, 1954 N.Y. App. Div. LEXIS 4669 (N.Y. App. Div. 1954).

After the Compensation Board had assumed jurisdiction of a claim for compensation and the injured employee had testified that he was injured while riding with a co-employee on the employer's business, the claimant could not waive his right to compensation and thereby place himself in a position to maintain a third-party action against the co-employee on theory that he was not engaged in the course of his employment at the time of the accident. Traynor v Plattsburgh Coop. G. L. F. Service, 2 A.D.2d 617, 151 N.Y.S.2d 854, 1956 N.Y. App. Div. LEXIS 5463 (N.Y. App. Div. 3d Dep't), app. denied, 2 A.D.2d 795, 154 N.Y.S.2d 432, 1956 N.Y. App. Div. LEXIS 4683 (N.Y. App. Div. 3d Dep't 1956).

An employee of joint venturers could not maintain an action against one of them for negligence based upon the supplying of an inadequate scaffold, but was relegated to his remedy under the Workmen's Compensation Law. Fallone v Misericordia Hospital, 23 A.D.2d 222, 259 N.Y.S.2d 947, 1965 N.Y. App. Div. LEXIS 4150 (N.Y. App. Div. 1st Dep't 1965), aff'd, 17 N.Y.2d 648, 269 N.Y.S.2d 431, 216 N.E.2d 594, 1966 N.Y. LEXIS 1517 (N.Y. 1966).

In an action brought against an employer, seeking damages for assault, false imprisonment, false arrest, and malicious prosecution, summary judgment was properly denied to the employer on the basis that the employee-plaintiff alleged that he was assaulted by other employees in the parking lot after work and that the employer actively directed and encouraged the assault, where the Workers' Compensation Law was not the employee's exclusive remedy in that the employer was alleged to have instigated the assault. Deutsch v Great Atlantic & Pacific Tea Co., 89 A.D.2d 597, 452 N.Y.S.2d 469, 1982 N.Y. App. Div. LEXIS 17678 (N.Y. App. Div. 2d Dep't 1982).

Owner of taxi, owner of garage, and plaintiff's fellow mechanics at garage could not be held vicariously liable under CLS Veh & Tr § 388 for their alleged negligence in using taxi, even though plaintiff was burned when fellow mechanic spilled gasoline on him as consequence of attempting to start taxi during repair, since fellow mechanic, as plaintiff's coemployee, was immune from suit under Workers' Compensation Law, under which plaintiff had previously received compensation. Ulysse v Nelsk Taxi, Inc., 135 A.D.2d 528, 522 N.Y.S.2d 162, 1987 N.Y. App. Div. LEXIS 52481 (N.Y. App. Div. 2d Dep't 1987), app. denied, 73 N.Y.2d 702, 536 N.Y.S.2d 743, 533 N.E.2d 673, 1988 N.Y. LEXIS 3435 (N.Y. 1988).

Workers' compensation claim could not be withdrawn by claimant, widow of state correctional employee who was killed when State Police retook Attica Correctional Facility during prison uprising, where claimant had accepted workers' compensation benefits, as claimant was not misled by state into applying for and accepting benefits, and she forfeited her rights to pursue alternative remedy for intentional tort by her acceptance of benefits. Hardie v New York State Attica Correctional Facility, 144 A.D.2d 164, 534 N.Y.S.2d 492, 1988 N.Y. App. Div. LEXIS 10146 (N.Y. App. Div. 3d Dep't 1988), app. dismissed, 73 N.Y.2d 918, 539 N.Y.S.2d 301, 536 N.E.2d 630, 1989 N.Y. LEXIS 173 (N.Y. 1989), app. denied, 76 N.Y.2d 708, 560 N.Y.S.2d 990, 561 N.E.2d 890, 1990 N.Y. LEXIS 3142 (N.Y. 1990).

In negligence action against city by city attorney who tripped and fell on defective public sidewalk during her lunch hour, Supreme Court, in granting attorney's motion to dismiss affirmative defense that workers' compensation was her exclusive remedy, and in denying city's cross motion for summary judgment dismissing action, encroached on primary jurisdiction of Workers' Compensation Board where court decided primary jurisdictional issue of whether attorney was acting within scope of her employment in traveling between 2 separate offices of her employer. Spector v City of New York, 245 A.D.2d 68, 666 N.Y.S.2d 122, 1997 N.Y. App. Div. LEXIS 12852 (N.Y. App. Div. 1st Dep't 1997).

Attorney and his law firm were entitled to summary judgment dismissing malpractice action alleging negligent failure to commence underlying intentional tort action (against plaintiff's employer for kicking plaintiff in buttocks at work) within one-year statute of limitations where, despite attorney's advice that plaintiff's acceptance of workers' compensation benefits would preclude him from bringing lawsuit against his employer and that plaintiff should notify workers' compensation board that he was electing not to collect such benefits, plaintiff forfeited his right to sue by continuing to accept such benefits. Wilson v Gerstenzang, Wiener & Gerstenzang, 245 A.D.2d 859, 666 N.Y.S.2d 332, 1997 N.Y. App. Div. LEXIS 13178 (N.Y. App. Div. 3d Dep't 1997).

While the record established that his symptoms were longstanding, predating work-related changes and, thus, were not a direct consequence of any personnel decision so as to trigger this exclusion Workers' Comp. Law § 2(7), the Workers' Compensation Board's alternate basis for the denial of the underlying claim, that the pressures encountered by the injured worker, while considerable, were not greater than those experienced by his peers, was supported by substantial evidence; thus, the Board's determination to deny his claim on that ground was not disturbed Pinto v Southport Corr. Facility, 19 A.D.3d 948, 798 N.Y.S.2d 750, 2005 N.Y. App. Div. LEXIS 7225 (N.Y. App. Div. 3d Dep't 2005).

Where plaintiff was allegedly assaulted by a fellow employee in course of employment, the employer notified its compensation carrier, which made payments accepted by plaintiff, who failed to heed a notice to attend a compensation hearing and was awarded compensation by the board in the amount paid and accepted by her, jurisdiction of the board became exclusive and plaintiff lost any right she might have had to maintain a common-law action for assault. Burgess v Tryde Mfg. Co., 20 Misc. 2d 875, 195 N.Y.S.2d 519, 1960 N.Y. Misc. LEXIS 3827 (N.Y. Sup. Ct. 1960).

4. —Collateral estoppel; res judicata

Determination by Workers' Compensation Board that injury was work-related does not, by operation of collateral estoppel, automatically entitle injured employee to CLS Gen Mun § 207-c benefits, because no identity of issues inheres in determinations regarding these 2 types of benefits. Balcerak v County of Nassau, 94 N.Y.2d 253, 701 N.Y.S.2d 700, 723 N.E.2d 555, 1999 N.Y. LEXIS 3927 (N.Y. 1999).

Judgment against claimant in a common-law action against his employer for damages sustained in falling down a flight of stairs, did not preclude him from succeeding on a subsequent compensation claim, where there was no finding in the unsuccessful suit which would negate an employer-employee relationship, and the employer and its insurance carrier had recognized liability by paying hospital and doctor bills and tendering compensation payments. Bode v O. & W. Restaurant, 9 A.D.2d 969, 193 N.Y.S.2d 845, 1959 N.Y. App. Div. LEXIS 5653 (N.Y. App. Div. 3d Dep't 1959).

Worker whose injury had been determined to be compensable by Workers' Compensation Board was barred by res judicata from maintaining that he was not employee of defendant, and thus could not bring direct action for intentional tort against defendant, where worker did not appeal from, or move to vacate, that determination and instead accepted workers' compensation benefits. Martin v Casagrande, 159 A.D.2d 26, 559 N.Y.S.2d 68, 1990 N.Y. App. Div. LEXIS 9509 (N.Y. App. Div. 4th Dep't), app. dismissed, 76 N.Y.2d 1018, 565 N.Y.S.2d 767, 566 N.E.2d 1172, 1990 N.Y. LEXIS 4461 (N.Y. 1990).

Notwithstanding parties' sharply conflicting evidentiary submissions, defendant homeowners were entitled to summary judgment in action under CLS Labor §§ 240(1) and 241(6) by plaintiff who was injured while securing worksite at request of contractor who had been injured while repairing homeowners' roof, as preclusive effect was given to prior determination of Workers' Compensation Board which denied plaintiff benefits based on board's ultimate finding that there was no employee-employer relationship between plaintiff and contractor. Lee v Jones, 230 A.D.2d 435, 659 N.Y.S.2d 549, 1997 N.Y. App. Div. LEXIS 6976 (N.Y. App. Div. 3d Dep't), app. denied, 91 N.Y.2d 802, 666 N.Y.S.2d 564, 689 N.E.2d 534, 1997 N.Y. LEXIS 4160 (N.Y. 1997).

Where plaintiff in an action for damages against one who is both her landlord and employer has previously filed a claim for workmen's compensation in connection with which the Board has found that plaintiff sustained her injuries in course of employment and awarded her certain compensation as an employee, the doctrine of collateral estoppel by such finding precludes her from recovering in the subsequent action for damages. Harris v Tarlow, 33 Misc. 2d 933, 227 N.Y.S.2d 116, 1962 N.Y. Misc. LEXIS 3512 (N.Y. Sup. Ct.), reh'g denied, 228 N.Y.S.2d 939 (N.Y. Sup. Ct. 1962).

Plaintiff's claim that she was entitled to summary judgment as to liability on her Uniform Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C.S. § 4301 et seq., claim under collateral estoppel principles failed as the USERRA required application of a two-pronged burden-shifting analysis, and the New York State Workers' Compensation Board did not accord defendant the opportunity to present an affirmative defense that it would have made the same decision without regard to her military status and did not apply the burden shifting analysis in determining that plaintiff suffered stress, depression and anxiety as a direct consequence of a lawful personnel decision involving a disciplinary action, work evaluation, job transfer, demotion, or termination taken in good faith by defendant under N.Y. Workers' Comp. Law § 2(7). Wang v New York State Dept. of Health, 966 N.Y.S.2d 327, 40 Misc. 3d 747, 2013 N.Y. Misc. LEXIS 1822 (N.Y. Sup. Ct. 2013).

5. —Intentional tort exception to exclusivity

In an action brought against a hospital and hospital supervisor by plaintiff to recover damages for defamation, intentional infliction of emotional distress and negligence in which plaintiff alleged that his supervisor made a statement to plaintiff's shop steward accusing plaintiff of being a thief, the defense of workers' compensation was properly stricken as to all causes of action against plaintiff's supervisor inasmuch as an intentional tort committed by an employee against a coemployee cannot give the perpetrator of the act immunity under the Workers' Compensation Law; however, liability imputed to the hospital-employer through respondeat superior would not include the employer's participation in the intentional tort and a common law action pleading respondeat superior would be barred by the Compensation Law since, although the plaintiff sought recovery for injuries, which had not yet been recognized as compensable (loss of reputation, humiliation and embarrassment), benefits would still be available for psychological injuries such as depression, anxiety or psychotic reactions as well as physical injuries, under Work Comp Law § 2(7). Thompson v Maimonides Medical Ctr., 86 A.D.2d 867, 447 N.Y.S.2d 308, 1982 N.Y. App. Div. LEXIS 15500 (N.Y. App. Div. 2d Dep't 1982).

Personal injury actions against plaintiffs' employer and certain of their coemployees alleging that defendants "intentionally ignored" the known hazard of an explosion in connection with the design and operation of a manufacturing process that was being carried on when the explosion occurred at their place of employment, injuring plaintiffs, were properly dismissed, where plaintiffs had been awarded and had accepted workers' compensation benefits, in that allegations of the complaint did not specify acts directed at causing harm to particular employees as required to bring the actions within the intentional tort exception to the exclusivity provisions of Work Comp Law § 11. Furthermore, even if plaintiffs had alleged sufficient acts on the part of defendants to bring themselves within said exception, they would be barred from maintaining these causes of action against their employer, since they constitute an impermissible collateral attack upon the findings of accidental injury implicit in the board's determinations authorizing payment of workers' compensation

benefits. Orzechowski v Warner-Lambert Co., 92 A.D.2d 110, 460 N.Y.S.2d 64, 1983 N.Y. App. Div. LEXIS 16598 (N.Y. App. Div. 2d Dep't 1983).

Intentional tort can give rise to cause of action outside purview of Workers' Compensation Law only if facts demonstrate intentional or deliberate act by employer or coemployee directed at causing harm to complaining employee. Bulis v Di Lorenzo, 142 A.D.2d 707, 531 N.Y.S.2d 107, 1988 N.Y. App. Div. LEXIS 7993 (N.Y. App. Div. 2d Dep't 1988).

Employee was not barred by Workers' Compensation Law from receiving lost wages under State Division of Human Rights' decision that employer was liable for age and sex discrimination where employee's monetary recovery for intentional acts of discrimination in human rights proceeding was offset by amount of workers' compensation benefits paid to her, and thus CLS Work Comp § 29, which was designed to prevent double recovery, was not frustrated. Grand Union Co. v Mercado, 263 A.D.2d 923, 694 N.Y.S.2d 524, 1999 N.Y. App. Div. LEXIS 8451 (N.Y. App. Div. 3d Dep't 1999).

6. Other matters

Where an employer was bound by contract to furnish transportation to an employee and a third party to Florida when their jobs were to begin and the employee was injured in an automobile accident on the way to Florida in the car of the third person, there is no relation of fellow servant and the workmen's compensation law does not apply. Dunseath v Starrett Bros. & Eken, Inc., 288 N.Y. 174, 42 N.E.2d 474, 288 N.Y. (N.Y.S.) 174, 1942 N.Y. LEXIS 1024 (N.Y.), reh'g denied, 288 N.Y. 734, 43 N.E.2d 355, 288 N.Y. (N.Y.S.) 734, 1942 N.Y. LEXIS 1567 (N.Y. 1942).

Decedent, an elevator operator employed by a multiple dwelling owner, was killed when he fell down an elevator shaft. In a third party action brought by the widow against the managing agent of the dwelling on the theory that the death was caused through the affirmative negligence of the agent's employee, the superintendent of the building, the complaint was dismissed upon the ground that the superintendent was an employee of the owner and that, because decedent and superintendent were fellow servants, workmen's compensation was exclusive remedy. Cunningham v Mark Rafalsky & Co., 306 N.Y. 712, 117 N.E.2d 903, 306 N.Y. (N.Y.S.) 712, 1954 N.Y. LEXIS 1072 (N.Y. 1954).

Fact that newspaper's employment of ten-year-old as newspaper carrier was illegal did not remove ten-year-old from scope of Workmen's Compensation Law, but rather illegality could result in double award. O'Rourke v Long, 41 N.Y.2d 219, 391 N.Y.S.2d 553, 359 N.E.2d 1347, 1976 N.Y. LEXIS 3147 (N.Y. 1976).

Where complaint in personal injuries action specifically alleged that plaintiff was not an employee of defendant and did not disclose a state of facts bringing the matter within the purview of the Workmen's Compensation Law, it was error to dismiss the complaint in the absence of proof that defendant had secured compensation insurance covering plaintiff's employment, as the burden of proof of such matter was on defendant. Flatau v Fairchild Camera & Instrument Corp., 40 A.D.2d 990, 338 N.Y.S.2d 663, 1972 N.Y. App. Div. LEXIS 3140 (N.Y. App. Div. 2d Dep't 1972).

In action by State Insurance Fund commissioners to recover unpaid workers' compensation policy premiums, insured employer was foreclosed from raising issue of its proper rating classification where commissioners' rule required that any challenge to insurance classification be lodged within 12 months after expiration of rating term, and although that rule was not as readily available as it might have been, employer was put on general notice of its existence, and nothing further was required. Commissioners of the State Ins. Fund v Netti Wholesale Bev. Co., 245 A.D.2d 48, 665 N.Y.S.2d 84, 1997 N.Y. App. Div. LEXIS 12850 (N.Y. App. Div. 1st Dep't 1997).

In action by State Insurance Fund commissioners to recover unpaid workers' compensation policy premiums, insured employer had sufficient opportunity to challenge its rating classification where commissioners' rule required that any challenge to insurance classification be lodged within 12 months after expiration of rating term, and employer's rating term expired in April 1990. Commissioners of the State Ins. Fund v Netti Wholesale Bev. Co., 245 A.D.2d 48, 665 N.Y.S.2d 84, 1997 N.Y. App. Div. LEXIS 12850 (N.Y. App. Div. 1st Dep't 1997).

Workers' compensation claimant did not voluntarily withdraw from labor market, and thus was not disqualified from receiving benefits, where (1) he had unsuccessfully applied to 36 companies for employment, (2) through vocational rehabilitation, he had completed course in photographic techniques and was currently employed by his wife's modeling agency, and (3) his limited education and learning disability might have rendered him unqualified for many job prospects supplied to him by Comprehensive Rehabilitation Association. Oken v Stanmorer Liquor Co., 251 A.D.2d 719, 674 N.Y.S.2d 784, 1998 N.Y. App. Div. LEXIS 6479 (N.Y. App. Div. 3d Dep't 1998).

Injury that occurred in employer's parking lot as claimant tried to help co-worker start motorcycle was sufficiently similar to previous case involving claimant who injured back while turning off lights of car in employer's parking lot, thus requiring Workers' Compensation Board to either follow precedent of previous case or provide explanation for its failure to do so. Vogel v Anheuser-Busch, 265 A.D.2d 705, 696 N.Y.S.2d 571, 1999 N.Y. App. Div. LEXIS 10710 (N.Y. App. Div. 3d Dep't 1999).

Claim was properly denied on finding that claimant voluntarily withdrew from labor market where his treating chiropractor reported no disability prior to his retirement, he had lost no time from work, he had not complained to his supervisor or requested change in his working conditions, and he did not tell his supervisor that he was retiring due to injury. Baumgarten v New York State Banking Dep't, 279 A.D.2d 741, 718 N.Y.S.2d 480, 2001 N.Y. App. Div. LEXIS 291 (N.Y. App. Div. 3d Dep't 2001).

Appeal by employer and its workers' compensation carrier from decision of Workers' Compensation Board was not premature where appellants' argument that claimant was ineligible for benefits as result of his loss of employment for misconduct unrelated to his disability involved threshold legal issue that might be dispositive of claim against one or more parties. Katsaris v Lockheed Martin Fed. Sys., 281 A.D.2d 744, 721 N.Y.S.2d 298, 2001 N.Y. App. Div. LEXIS 2310 (N.Y. App. Div. 3d Dep't 2001).

Workers' compensation claimant's loss of employment for misconduct unrelated to his disability did not preclude his claim; his discharge merely defeated inference that his loss of wages was attributable to physical limitations that resulted from his work-related injury, thus imposing on him burden of proving that limitations on his employment due to his disability caused his later inability to obtain employment. Katsaris v Lockheed Martin Fed. Sys., 281 A.D.2d 744, 721 N.Y.S.2d 298, 2001 N.Y. App. Div. LEXIS 2310 (N.Y. App. Div. 3d Dep't 2001).

Workers' compensation law judge (WCLJ) properly disapproved an agreement resolving a Workers' Compensation Law § 120 retaliatory discharge and discrimination claim because the board had continuing jurisdiction over the claim, under Workers' Compensation Law, § 32, board approval was required for the settlement of such a claim, the WCLJ initially found that the agreement failed to comport with the statutory requirements of § 32, and, under § 32(b)(3), the worker was allowed to later withdraw approval of the agreement. Matter of Coleman v Compass Group USA, Inc./ Chartwells, 105 A.D.3d 129, 960 N.Y.S.2d 532, 2013 N.Y. App. Div. LEXIS 1292 (N.Y. App. Div. 3d Dep't 2013).

Workers' Compensation is not directly affected by Health Insurance Portability and Accountability Act (HIPAA) (Pub. L. 104-191 (1996)) privacy requirements; while release of protected health information under No-Fault may be covered by HIPAA privacy regulation, under existing New York requirements transfer of health information for purpose of payment of No-Fault claims is in compliance with HIPAA privacy requirements. Insurance Department, Opinions of General Counsel, Opinion Number 03-07-10.

II. Employer

7. In general

Before classifying a person as an employer it must first be determined whether or not he was an employer at the time of the injury. Dahoda v Simmons, 11 A.D.2d 842, 203 N.Y.S.2d 167, 1960 N.Y. App. Div. LEXIS 8516 (N.Y. App. Div. 3d Dep't 1960).

The fact that work is being done upon premises owned by the alleged employer does not necessarily establish that he was, at the time of injury sustained by claimant, the claimant's employer. Dahoda v Simmons, 11 A.D.2d 842, 203 N.Y.S.2d 167, 1960 N.Y. App. Div. LEXIS 8516 (N.Y. App. Div. 3d Dep't 1960).

An agreement by one person to supply workmen's compensation liability insurance for the benefit of another may be given "evidentiary effect" on an issue of employer-employee relationship between them, but it cannot create an employment status where none would otherwise exist. Green v W. O. Nannen & Sons, 20 A.D.2d 139, 245 N.Y.S.2d 108, 1963 N.Y. App. Div. LEXIS 2662 (N.Y. App. Div. 3d Dep't 1963).

A joint venture, though not specifically referred to in this section, is an employer as defined herein. Fallone v Misericordia Hospital, 23 A.D.2d 222, 259 N.Y.S.2d 947, 1965 N.Y. App. Div. LEXIS 4150 (N.Y. App. Div. 1st Dep't 1965), aff'd, 17 N.Y.2d 648, 269 N.Y.S.2d 431, 216 N.E.2d 594, 1966 N.Y. LEXIS 1517 (N.Y. 1966).

Workers' Compensation Board properly ruled that claimant, who was employed as taxicab operator pursuant to lease agreement with respondent, was respondent's employee, not employee of employee leasing service from which respondent leased its various other employees (e.g., president, treasurer, dispatchers, mechanics and clerical staff) where claimant was never reported as employee of leasing company or any corporation with which leasing company entered into employee leasing agreement, and hearing testimony confirmed that neither respondent nor leasing company intended for taxicab operators to be employees of leasing company. Teal v Albany Capitaland Enters. Inc., 259 A.D.2d 859, 687 N.Y.S.2d 451, 1999 N.Y. App. Div. LEXIS 2360 (N.Y. App. Div. 3d Dep't), app. dismissed, 93 N.Y.2d 1041, 697 N.Y.S.2d 569, 719 N.E.2d 930, 1999 N.Y. LEXIS 2887 (N.Y. 1999).

Personal injury plaintiff was not entitled to have stricken defendant corporation's affirmative defense based on exclusive remedy provisions of Workers' Compensation Law where there was triable issue of fact as to whether defendant was alter ego of plaintiff's employer. Roche v T.G. Realty, Inc., 266 A.D.2d 367, 697 N.Y.S.2d 520, 1999 N.Y. App. Div. LEXIS 11530 (N.Y. App. Div. 2d Dep't 1999).

Under the Workmen's Compensation Act an employee may have more than one employer. United States Fidelity & Guaranty Co. v R. H. Macy & Co., 156 F.2d 204, 1946 U.S. App. LEXIS 2556 (2d Cir. N.Y. 1946).

A county or other municipality may not elect to provide workers' compensation coverage under a county self-insurance plan to persons sentenced to perform public service under an alternative sentencing program. 1984 Op St Comp File #84-29.

8. Particular persons or entities as employers

For purposes of compensation, a municipal corporation is an employer and when its employees are injured in a hazardous occupation, it is liable for compensation. Hence, a town superintendent of highways sustained a compensable injury while using town equipment in blasting work on privately owned land for which the town collected a fee. Perry v Cherry Valley, 307 N.Y. 427, 121 N.E.2d 402, 307 N.Y. (N.Y.S.) 427, 1954 N.Y. LEXIS 973 (N.Y. 1954).

A railroad company, having operated its cars under the federal act without objection, is an "employer" within the meaning of the Work. Bryant v Pullman Co., 188 A.D. 311, 177 N.Y.S. 488, 1919 N.Y. App. Div. LEXIS 7837 (N.Y. App. Div. 1919), aff'd, 228 N.Y. 579, 127 N.E. 909, 228 N.Y. (N.Y.S.) 579, 1920 N.Y. LEXIS 1046 (N.Y. 1920).

A school district is an employer within the meaning of subd. Bailey v School Dist., 204 A.D. 125, 198 N.Y.S. 247, 1923 N.Y. App. Div. LEXIS 9428 (N.Y. App. Div. 1923).

An employer under twenty-one years of age is liable for compensation. Rahman v Bethel, 236 A.D. 182, 258 N.Y.S. 286, 1932 N.Y. App. Div. LEXIS 5926 (N.Y. App. Div. 1932).

An infant may disaffirm his contract as employer but he cannot avoid his statutory liability as to compensation where an accident happens prior to a valid disaffirmance of his contract. Rahman v Bethel, 236 A.D. 182, 258 N.Y.S. 286, 1932 N.Y. App. Div. LEXIS 5926 (N.Y. App. Div. 1932).

A nurses' registry employment agency was properly determined to be the general employer of a nursing assistant who was injured when she slipped and fell on a wet floor while attending a hospital patient as a companion on assignment from the registry, where the registry profited by the claimant's work in that it received 10 percent of the wages she earned as a patient's companion, where the registry also determined when, where, and for whom the claimant could work based on its evaluation of the claimant's suitability, where the claimant needed the registry's approval to voluntarily leave her assigned employment, and where the claimant was paid by the registry on a time basis rather than a lump-sum basis; additionally, the hospital at which the claimant was employed at the time of her accident was properly determined to be the claimant's special employer where the hospital had the right to control the claimant's activities, the claimant's work in the hospital was integral to and beneficial to the hospital, and the hospital had the exclusive right to control the claimant's behavior on her assignment as to such matters as her dress and movements. Abramson v Long Beach Memorial Hospital, 103 A.D.2d 866, 478 N.Y.S.2d 105, 1984 N.Y. App. Div. LEXIS 19529 (N.Y. App. Div. 3d Dep't 1984).

Fifty percent shareholder of corporation for which legal malpractice plaintiff worked was plaintiff's "employer," for purposes of whether plaintiff's underlying intentional tort action against him (for kicking plaintiff in buttocks at work) was barred by plaintiff's acceptance of workers' compensation benefits, where complaint referred to him as plaintiff's "employer" and showed that he had identity indistinguishable from that of corporation. Wilson v Gerstenzang, Wiener & Gerstenzang, 245 A.D.2d 859, 666 N.Y.S.2d 332, 1997 N.Y. App. Div. LEXIS 13178 (N.Y. App. Div. 3d Dep't 1997).

County was liable for payment of Workers' Compensation benefits, even though county economic opportunity program (CEOP) supervised claimant's day-to-day activities, where claimant received no wages from CEOP and instead received public assistance benefits, reimbursement for work-related expenses, and lunch allowance from county, number of hours claimant worked was dependent on size of her public assistance grant, county required claimant to complete time sheets and submit other related paperwork, only county could determine whether proffered excuse by claimant for work absence was acceptable, and county retained power to monitor and evaluate worksite. Hughes v Steuben County Self-Insurance Plan, 248 A.D.2d 757, 669 N.Y.S.2d 716, 1998 N.Y. App. Div. LEXIS 2218 (N.Y. App. Div. 3d Dep't 1998).

Workers' Compensation Board properly determined that no employer-employee relationship existed between decedent and company that employed passenger decedent was carrying when plane he was piloting crashed, where president of company testified that company did not hire decedent and that decedent had offered to provide flight as favor, and claimant had stated in her application for insurance benefits that decedent was not in course of his employment at time of accident. Limpert v Kay-R Elec., 250 A.D.2d 1005, 673 N.Y.S.2d 762, 1998 N.Y. App. Div. LEXIS 5921 (N.Y. App. Div. 3d Dep't 1998).

In a workers' compensation claim brought by a limousine lessee-driver, control-related factors were relevant only when the vehicle lessor-owner drove the vehicle 40 or more hours per week; where the vehicle lessor-owner did not drive the vehicle 40 or more hours per week, the lessee-driver was an employee of the lessor-owner. Mihalaris v UTOG 2-Way Radio, Inc., 299 A.D.2d 677, 749 N.Y.S.2d 599, 2002 N.Y. App. Div. LEXIS 10778 (N.Y. App. Div. 3d Dep't 2002).

As a dispatch company leased a vehicle to a workers' compensation claimant who had a hack license and used the vehicle to pick up passengers for compensation, and the vehicle had New York City Taxi and Limousine Commission license plates registered to the company, the vehicle was a "taxicab" as defined by N.Y. Veh. & Traf. Law § 148-a. Therefore, the company and claimant were employer and employee under N.Y. Workers' Comp. Law § 2. Matter of Nkrumah v Thomas, 61 A.D.3d 1325, 877 N.Y.S.2d 515, 2009 N.Y. App. Div. LEXIS 3312 (N.Y. App. Div. 3d Dep't 2009).

Workers' compensation claimant's violations of New York City Taxi and Limousine Commission regulations by picking up street hails in a livery cab did not alter his status as an employee or the vehicle's status as a taxicab under N.Y. Veh. & Traf. Law § 148-a. Matter of Nkrumah v Thomas, 61 A.D.3d 1325, 877 N.Y.S.2d 515, 2009 N.Y. App. Div. LEXIS 3312 (N.Y. App. Div. 3d Dep't 2009).

Defendant contractor's motion for summary judgment against its subcontractor's injured employee on the asserted grounds that federal regulations preempt New York State Labor Law, that the company was not an owner or general contractor upon which the Labor Law imposed a duty, and that the New York State Worker's Compensation Law afforded plaintiffs their sole and exclusive remedy, would be denied, where there was no proof that defendant hired plaintiff or had any control over plaintiff in the performance of his job, where federal statutes which permitted the United States Government, the owner of the site, to delegate control over the worksite are not irreconcilable with and do not preempt State Labor Law §§ 240 and 241, which impose a nondelegable duty on the owner and general contractor, and where the Workers' Compensation Law does not preclude an injured employee of a subcontractor from maintaining a suit based on common-law theories of negligence against defendant contractor; accordingly, defendant's attempt to divest itself of safety responsibility pursuant to its subcontract with plaintiff's employer was impermissible. Yarter v General Electric Co., 123 Misc. 2d 736, 474 N.Y.S.2d 390, 1984 N.Y. Misc. LEXIS 3071 (N.Y. Sup. Ct. 1984), modified, People v Jennings, 111 A.D.2d 678, 490 N.Y.S.2d 496, 1985 N.Y. App. Div. LEXIS 49943 (N.Y. App. Div. 1st Dep't 1985).

Defendant was entitled to the stay of plaintiff provider's action to recover assigned first-party no-fault benefits because the fact that the cab company owned the vehicle involved in the accident and was named as the insured on its automobile policy showed potential merit that the cab company was not an independent livery base and that the assignor therefore would be covered under Workers Compensation Law § 2(3). Chiropractic Testing Servs. of N.Y., P.C. v American Tr. Ins. Co., 59 Misc. 3d 250, 71 N.Y.S.3d 802, 2018 N.Y. Misc. LEXIS 620 (N.Y. Civ. Ct. 2018).

9. Unions, associations and employee groups

Where a group of ten railroads jointly maintained an employment bureau and a school for the instruction of conductors and motormen, and employee of one of the companies is not precluded from maintaining a negligence action against one of the other companies on the ground that the workmen's compensation law provided the only remedy available. Doran v New York C. I. R. Co., 239 N.Y. 448, 147 N.E. 62, 239 N.Y. (N.Y.S.) 448, 1925 N.Y. LEXIS 986 (N.Y. 1925).

A labor union which furnishes union members for jobs, acting as their spokesman and paying them, may be an independent contractor and liable for compensation. Hines v Henry I. Stetler, Inc., 196 A.D. 622, 188 N.Y.S. 73, 1921 N.Y. App. Div. LEXIS 5578 (N.Y. App. Div. 1921).

10. —Employment

A business engaged in supplying temporary office help was the employer of a vault custodian where employee had signed a contract that agency was his sole employer and bank paid wages to agency which in turn paid employee. The bank at no time considered claimant one of its employes. Meyer v Tops Temporary Personnel, 286 A.D. 1048, 144 N.Y.S.2d 775, 1955 N.Y. App. Div. LEXIS 5108 (N.Y. App. Div.), amended, 286 A.D. 1123, 146 N.Y.S.2d 685, 1955 N.Y. App. Div. LEXIS 5380 (N.Y. App. Div. 1955).

Where an employee was furnished to a corporation by an agency engaged in the business of furnishing temporary workers which paid all wages, made all tax, etc. deductions, provided workmen's compensation insurance, and reserved the right to discharge or transfer and to control persons furnished, customers agreeing not to appropriate to their own employment persons so furnished, the agency was properly found to be the employer of a worker supplied for temporary work, rather than the corporation to whom the worker was furnished. Ettlinger v State Ins. Fund, 12 A.D.2d 568, 206 N.Y.S.2d 739, 1960 N.Y. App. Div. LEXIS 7273 (N.Y. App. Div. 3d Dep't 1960).

With respect to a claim for death benefits by a widow whose husband had been employed in two capacities, as business agent for a local union and as a delegate to the district council from the local, who had received a salary from both employers together with annuities, pension, and medical benefits from the district council, and who was killed while pursuing required work duties for the district council, the decision of the Workers' Compensation Board to award death benefits solely against the district council was supported by substantial evidence. Evangelista v N.Y.C. Dist. Council of Carpenters, 79 A.D.2d 795, 435 N.Y.S.2d 117, 1980 N.Y. App. Div. LEXIS 14200 (N.Y. App. Div. 3d Dep't 1980).

11. Dual, multiple or joint employers, generally

Employees may look to either their general employer or their special employer or to both, for compensation for injuries due to occupational hazards. De Noyer v Cavanaugh, 221 N.Y. 273, 116 N.E. 992, 221 N.Y. (N.Y.S.) 273, 1917 N.Y. LEXIS 1300 (N.Y. 1917).; Schweitzer v Thompson & Norris Co., 229 N.Y. 97, 127 N.E. 904, 229 N.Y. (N.Y.S.) 97, 1920 N.Y. LEXIS 660 (N.Y. 1920).; Dennison v Peckham Road Corp., 295 N.Y. 457, 68 N.E.2d 440, 295 N.Y. (N.Y.S.) 457, 1946 N.Y. LEXIS 801 (N.Y. 1946).; Dale v Saunders Bros., 171 A.D. 528, 157 N.Y.S. 1062, 1916 N.Y. App. Div. LEXIS 5376, 1916 N.Y. App. Div. LEXIS 9736 (N.Y. App. Div.), aff'd, 218 N.Y. 59, 112 N.E. 571, 218 N.Y. (N.Y.S.) 59, 1916 N.Y. LEXIS 1042 (N.Y. 1916).; Piester v Traver, 24 A.D.2d 688, 261 N.Y.S.2d 333, 1965 N.Y. App. Div. LEXIS 3556 (N.Y. App. Div. 3d Dep't 1965).

Where an employee works for two different employers, the test of whose employment he was working in when injured is whether the duties were so separate and distinct in time or place that the employment is capable of identification as that of only one employer. Goldstein v House of Schrager, Inc., 19 A.D.2d 759, 241 N.Y.S.2d 925, 1963 N.Y. App. Div. LEXIS 3278 (N.Y. App. Div. 3d Dep't 1963).

In an action brought by an injured forklift operator against the subsidiary of the company that carried the applicable workers' compensation insurance policy, summary judgment was properly denied to the subsidiary where summary judgment was sought on the ground that the forklift operator's exclusive remedy was under the Workers' Compensation Law, where the workers' compensation board's listing of both the subsidiary and the carrier of the insurance policy as employers was only a procedural step and not a determination, and where a limited factual issue remained as to whether one or both of the companies employed the forklift operator. Jensen v Illinois Glove Co., 88 A.D.2d 1067, 452 N.Y.S.2d 738, 1982 N.Y. App. Div. LEXIS 17486 (N.Y. App. Div. 3d Dep't 1982).

Defendant was not entitled to summary judgment dismissing personal injury action on ground that action was barred by CLS Work Comp § 11, as matter of law, because defendant was operating as joint venture with plaintiff's employer during time in question, thus making plaintiff their joint employee, since evidence suggested that defendant and plaintiff's employer were not in fact one enterprise where (1) joint financial statement of defendant and plaintiff's employer set out assets of companies separately, (3) plaintiff's employer was guarantor of defendant's debts, and (3) plaintiff's employer paid rent to defendant for building occupied by it during time in question. Gurga v Carville Leather Co., 145 A.D.2d 712, 534 N.Y.S.2d 837, 1988 N.Y. App. Div. LEXIS 12331 (N.Y. App. Div. 3d Dep't 1988).

General contractor was not entitled, on basis of workers' compensation defense, to summary judgment dismissing causes of action for common-law negligence and violation of CLS Labor §§ 200, 240(1), and 241(6) where (1) defense was based on proof of general contractor's joint venture agreement with cocontractor, and (2) under that agreement, employees who were loaned by cocontractor to work on subject project, such as injured plaintiff, remained in employment of cocontractor and were not employees of joint venture. Luckern v Lyonsdale Energy Ltd. P'ship, 281 A.D.2d 884, 722 N.Y.S.2d 632, 2001 N.Y. App. Div. LEXIS 2761 (N.Y. App. Div. 4th Dep't 2001).

The fact that one employer paid the main part of an employee's compensation does not preclude the latter from being also in the employ of a second employer, who paid a lesser part of the compensation. United States Fidelity & Guaranty Co. v R. H.

Macy & Co., 156 F.2d 204, 1946 U.S. App. LEXIS 2556 (2d Cir. N.Y. 1946).

12. —Salesmen

A commission salesman representing two firms may be awarded compensation against both. Jacobi v Supreme Junior Coat Co., 268 N.Y. 654, 198 N.E. 541, 268 N.Y. (N.Y.S.) 654, 1935 N.Y. LEXIS 1121 (N.Y. 1935).

A full-time salesman for a siding company in the South who undertook to sell brushes on a part-time basis for a N. Y. brush company was not an employee of the N. Y. concern for the purposes of workmen's compensation for the casual and sporadic nature of his work met neither the "right to control" test nor the "relative nature of the work" test. Paly v Lane Brush Co., 6 A.D.2d 50, 174 N.Y.S.2d 205, 1958 N.Y. App. Div. LEXIS 5780 (N.Y. App. Div. 3d Dep't 1958).

Claimant, a traveling salesman, was injured in an automobile accident. He notified appellant company and identified the appellant as employer in a notice of claim. Appellant filed employer's report of injury in which claimant was identified as its salesman. Subsequent reports carried the same information. Thereafter, manager of appellant notified board that a mistake had been made and that the claimant was the employee of respondent. Both companies had same office in New York from which claimant was employed. Claimant testified that he was employee of the appellant but he did not know how he was listed on the books. Held: finding of board that claimant was employee of appellant was sustained. Kerner v Croyden Leather Products, Inc., 8 A.D.2d 882, 186 N.Y.S.2d 1008, 1959 N.Y. App. Div. LEXIS 8290 (N.Y. App. Div. 3d Dep't 1959).

A deceased employee who acted as salesman for two different companies but with somewhat different territories for each could not be considered as working in the employment of both where he was killed in an automobile accident while attempting to collect an account for one only outside of territory assigned to him by the other, and responsibility for death benefits accordingly rested entirely upon the employer at whose request he was making the special trip. Goldstein v House of Schrager, Inc., 19 A.D.2d 759, 241 N.Y.S.2d 925, 1963 N.Y. App. Div. LEXIS 3278 (N.Y. App. Div. 3d Dep't 1963).

13. —Retailor department store demonstrators

A demonstrator for cosmetics assigned to a department store where she worked under its supervision selling its products as well as her own is not entitled to recover against the store for injuries in the course of her employment there, where both companies agreed that the demonstrator should be deemed the employee of the cosmetic company. Knox v Gimbel Bros, 258 A.D. 1013, 16 N.Y.S.2d 964, 1940 N.Y. App. Div. LEXIS 8644 (N.Y. App. Div. 1940).

Where claimant was employed to demonstrate the products of a cosmetic manufacturer in a retail store and contracted an occupational disease when she broke a bottle of the cosmetics, and was covered by workmen's compensation insurance carried by the manufacturer, who paid her and exerted some control over her work, the board's conclusion that she was an employee of the manufacturer was well founded, notwithstanding the manufacturer's claim that she was an employee of the store and that such action as the manufacturer had taken was only on behalf of the store. Janesch v Saks 34th Street, 10 A.D.2d 749, 198 N.Y.S.2d 3, 1960 N.Y. App. Div. LEXIS 11191 (N.Y. App. Div. 3d Dep't 1960).

A sales clerk, hired by a department store to sell only products of a particular manufacturer at a counter in that store, subject to the same rules as other employees of the store as to working hours, etc., except that she could not be shifted to a different counter or to sale of different goods, must be considered an employee of the store for purposes of the store's liability for injuries sustained by her on the premises, notwithstanding the manufacturing firm eventually paid all her wages. Janikowski v Yardley's of London, Inc., 11 A.D.2d 577, 201 N.Y.S.2d 157, 1960 N.Y. App. Div. LEXIS 9926 (N.Y. App. Div. 3d Dep't 1960).

One employed by a manufacturer to demonstrate its products in a department store under an arrangement with the store whereby the manufacturer would select a demonstrator, place her in the department store and pay her wages while she worked there, but with the agreement that the demonstrator would be subject to the hours and rules of the store's own employees, is an employee of the department store as well as the manufacturer, where the demonstrator helped the sales girls in making sales of other articles and was paid a commission by the department store. United States Fidelity & Guaranty Co. v R. H. Macy & Co., 156 F.2d 204, 1946 U.S. App. LEXIS 2556 (2d Cir. N.Y. 1946).

14. —Employers under common control or shared premises

Where the employees of a corporation and a partnership occupied portions of the same premises and moved freely from one part of the premises to the other in connection with the businesses of both, an employee of the partnership, who was injured while working the portion of the premises used by the corporation, will be granted an award of compensation solely against the partnership. Patterson v Bell & Hooks, 276 A.D. 801, 93 N.Y.S.2d 361, 1949 N.Y. App. Div. LEXIS 3362 (N.Y. App. Div.), amended, 276 A.D. 880, 94 N.Y.S.2d 185, 1949 N.Y. App. Div. LEXIS 3668 (N.Y. App. Div. 1949).

Where claimant was employed as an elevator operator during the day but after hours performed work for a tenant in the building and was injured after his regular working hours and while performing work for the tenant, he was in the sole employ of the tenant. Mallon v Adolph Lewisohn & Sons, Inc., 282 A.D. 784, 122 N.Y.S.2d 490, 1953 N.Y. App. Div. LEXIS 4956 (N.Y. App. Div. 1953).

Where a claimant was employed by two corporations whose affairs were somewhat interwoven, an award against one of them was proper where he was paid by it and was in the course of his duties as a sales manager for it when injured. Lowey v Acme Chemical Co., 283 A.D. 900, 130 N.Y.S.2d 89, 1954 N.Y. App. Div. LEXIS 5692 (N.Y. App. Div. 3d Dep't), modified, 283 A.D. 976, 130 N.Y.S.2d 89, 1954 N.Y. App. Div. LEXIS 5982 (N.Y. App. Div. 3d Dep't 1954).

Two corporations, appellant and another, were controlled by same owners. Claimant had formerly been employed by one but at time of accident he was employed by appellant, although he was sometimes directed by appellant to perform services for former employer. He was injured while on former employer's truck at appellant's direction. Held, there was no joint employment and claimant was employed by appellant. Sirico v Mastro Transit Mix Corp., 6 A.D.2d 935, 175 N.Y.S.2d 786, 1958 N.Y. App. Div. LEXIS 5256 (N.Y. App. Div. 3d Dep't), app. dismissed, 5 N.Y.2d 708, 1958 N.Y. LEXIS 1637 (N.Y. 1958), app. dismissed, 5 N.Y.2d 785, 180 N.Y.S.2d 312, 154 N.E.2d 566, 1958 N.Y. LEXIS 786 (N.Y. 1958).

The board should not apportion compensation between two firms operating businesses on the same premises where the claimant had filed a compensation claim against one firm and a common law suit for damages against the other, even though she was unsuccessful in the damage suit. Falkenstein v Victory Stationery Co., 9 A.D.2d 977, 193 N.Y.S.2d 747, 1959 N.Y. App. Div. LEXIS 5669 (N.Y. App. Div. 3d Dep't 1959).

Where it was conceded that the injured workman was an employee of someone at the time of injury, there was sufficient evidence to sustain a finding by the Board that he was a direct employee of the developer of a certain tract of land rather than of a subcontractor doing carpenter work in erection of dwellings on said property, in view of evidence of cessation of the subcontractor relationship between claimant's original employer and the developer and assumption of direct control over the work by the developer. Lewandowski v Baldwin Droms, Inc., 18 A.D.2d 1118, 239 N.Y.S.2d 5, 1963 N.Y. App. Div. LEXIS 4021 (N.Y. App. Div. 3d Dep't 1963).

15. —General contractors and subcontractors

A workman injured while working on a lumber job is the employee of the general contractor, who has a contract to clear a tract of pulp wood, rather than alleged subcontractors where it was the custom in the industry that a tract to be cleared should be subdivided among small groups of men where such subdivisions do not amount to the creation of sub-contractors, and the general contractor was the only one who had taken out insurance. Sullivan v Preston, 177 A.D. 110, 163 N.Y.S. 692, 1917 N.Y. App. Div. LEXIS 5184 (N.Y. App. Div. 1917).

An award may be given against a contractor and subcontractor jointly. Dunbar v Mackenzie (1921) 198 App Div 946, 189 NYS 233, affd (1921) 232 NY 556, 134 NE 570.See also Clark v Monarch Engineering Co., 248 N.Y. 107, 161 N.E. 436, 248 N.Y. (N.Y.S.) 107, 1928 N.Y. LEXIS 1230 (N.Y. 1928).

An employee of a structural steel contractor who finished the structural steel work and then undertook to lay wire mesh for another contractor on the same project, is then the employee of the general contractor rather than the structural steel contractor. Schieve v Border Bldg. Co., 260 A.D. 970, 23 N.Y.S.2d 345, 1940 N.Y. App. Div. LEXIS 5644 (N.Y. App. Div. 1940).

A subcontractor rather than a general contractor is the employer of a claimant, originally employed by the general contractor but who was employed by the subcontractor and during the period in which the employee was injured, the subcontractor paid the employee's wages, his social security obligations and workmen's compensation insurance covering him made the first report of injury and notified the Industrial Commissioner that it had commenced payment of compensation. Moore v Colonial Sand & Stone Co., 261 A.D. 857, 24 N.Y.S.2d 751, 1941 N.Y. App. Div. LEXIS 7791 (N.Y. App. Div. 1941).

General employee of elevator company was not, as matter of law, special employee of company's sub-contractor at time of injury, barring him from bringing suit against sub-contractor, where employee had been assigned by company to work with sub-contractor in drilling hole at construction site, utilizing company blueprints and specifications; notwithstanding that employee testified before trial that it was his job to assist sub-contractor in all work, question of fact remained as to whether company relinquished to sub-contractor right to direct and control employee in performance of work. Kinney v Kuhn, 122 A.D.2d 569, 504 N.Y.S.2d 948, 1986 N.Y. App. Div. LEXIS 59851 (N.Y. App. Div. 4th Dep't 1986).

Workers' Compensation Board's decision that injured claimant was employed by contractor rather than subcontractor on date of injury was supported by substantial evidence where (1) contractor testified that subcontractor worked in dual capacity for him, at times as employee and at times as independent subcontractor, (2) contractor provided material for project, including scaffolding from which claimant fell, and (3) on date of injury, contractor paid claimant, and contractor's employee was teaching him to apply siding. Schaff v William C. Maunz Co., 144 A.D.2d 109, 534 N.Y.S.2d 447, 1988 N.Y. App. Div. LEXIS 10110 (N.Y. App. Div. 3d Dep't 1988).

Evidence sustained determination that general contractor on highway project was solely liable for workers' compensation benefits paid to claimant although general contractor argued that claimant, who was working on loan to subcontractor on project at time of his heart attack, was subcontractor's "special employee," where general contractor paid claimant's salary, assigned him to operate subcontractor's hydrodemolition machinery, retained right to discharge him, set standards and timetable for completion of various stages of project, and hired union worker who took claimant's place operating subcontractor's hydrodemolition machinery. Hutchinson v Fahs-Rolston Paving Co., 287 A.D.2d 936, 732 N.Y.S.2d 116, 2001 N.Y. App. Div. LEXIS 9957 (N.Y. App. Div. 3d Dep't 2001).

16. —General and special employers, in general

General employee of one employer may also be in special employ of another, notwithstanding general employer's responsibility for payment of wages and for maintaining workers' compensation and other employee benefits. Thompson v Grumman Aerospace Corp., 78 N.Y.2d 553, 578 N.Y.S.2d 106, 585 N.E.2d 355, 1991 N.Y. LEXIS 4925 (N.Y. 1991).

Injury sustained by claimant, who assisted mechanics in garage and drove special taxicab containing equipment and supplies on road calls to assist disabled taxicabs owned and operated by employer and who had taken regular taxicab and was on his lunch hour and performing no duties for employer at time of accident, when taxicab struck pole did not arise out of and in course of employment. Bennerson v Checker Garage Service Corp., 54 A.D.2d 1042, 388 N.Y.S.2d 374, 1976 N.Y. App. Div. LEXIS 15006 (N.Y. App. Div. 3d Dep't 1976).

Evidence supported determination that construction company was decedent's sole employer at time of his work-related death and that waterproofing company was not decedent's special employer where construction company only hired nonunion employees, waterproofing company hired only union employees, and as nonunion employee, decedent could only work for construction company, which paid decedent's wages. Estate of Harrison v Jerrick Waterproofing Co., 210 A.D.2d 711, 620 N.Y.S.2d 172, 1994 N.Y. App. Div. LEXIS 12735 (N.Y. App. Div. 3d Dep't 1994).

Defendant, property manager, should have been granted summary judgment where plaintiff admitted that his "general employer" was either property owner or payroll corporation which paid him Workers' Compensation benefits for his claimed disability following accident, and defendant was plaintiff's "special employer," having hired him, having ultimate responsibility for maintaining building where he was "maintenance man," and having authority to terminate his employment. Gubitosi v National Realty Co., 247 A.D.2d 512, 669 N.Y.S.2d 321, 1998 N.Y. App. Div. LEXIS 1490 (N.Y. App. Div. 2d Dep't), app. dismissed, 92 N.Y.2d 843, 677 N.Y.S.2d 69, 699 N.E.2d 428, 1998 N.Y. LEXIS 1802 (N.Y. 1998).

Defendants in personal injury action were entitled to summary judgment on ground that workers' compensation was plaintiff's exclusive remedy where plaintiff was both general employee of defendant owner of subject premises and special employee of second defendant, who was agent retained by owner to manage premises. Gjelaj v Dwelling Managers, Inc., 251 A.D.2d 4, 672 N.Y.S.2d 713, 1998 N.Y. App. Div. LEXIS 6372 (N.Y. App. Div. 1st Dep't 1998).

County Department of Social Services, which sponsored workfare program, was properly found to be claimant's proper employer and solely responsible for paying her benefits where written agreement between County and owner of facility where claimant was injured showed that County selected claimant, recipient of public assistance, for placement at workfare program facility and exercised significant control over terms of her work, including method of payment, hours worked, and duties performed, and County established standards governing type and location of work to be performed and conducted regular performance reviews with assistance of facility's representative. Adams v Otsego County Dep't of Soc. Servs., 269 A.D.2d 626, 702 N.Y.S.2d 698, 2000 N.Y. App. Div. LEXIS 1088 (N.Y. App. Div. 3d Dep't 2000).

Wholly owned subsidiary of company that hired plaintiff to work on highway construction project failed to establish that it was plaintiff's special employer where plaintiff worked at site for only 3 days before accident, there was no evidence that she was aware of possible employment relationship with any entity other than company that hired her, and thus there was no basis for finding her implied consent to special employment relationship. Shelley v Flow Int'l Corp., 283 A.D.2d 958, 724 N.Y.S.2d 244, 2001 N.Y. App. Div. LEXIS 4429 (N.Y. App. Div. 4th Dep't), app. denied, 96 N.Y.2d 937, 733 N.Y.S.2d 375, 759 N.E.2d 374, 2001 N.Y. LEXIS 3080 (N.Y. 2001).

Whether an injured worker's status was that of a special employee limited to workers' compensation remedies was a question of fact; an earlier denial of summary judgment on the issue of whether the property owner and the worker's employer were separate entities did not preclude further consideration of the issue of special versus general employment status. D'Amato v Access Mfg., Inc., 305 A.D.2d 447, 762 N.Y.S.2d 393, 2003 N.Y. App. Div. LEXIS 5365 (N.Y. App. Div. 2d Dep't 2003).

17. — —Presumption of continued general employment

General employment is presumed to continue, but presumption is overcome on clear demonstration of surrender of control by general employer and assumption of control by special employer. Thompson v Grumman Aerospace Corp., 78 N.Y.2d 553, 578 N.Y.S.2d 106, 585 N.E.2d 355, 1991 N.Y. LEXIS 4925 (N.Y. 1991).

In action by plaintiff who was injured due to alleged negligence of coworker assigned to work for his employer by defendant temporary employment agency, defendant was entitled to summary judgment on ground that allegedly negligent employee was special employee of plaintiff's employer as matter of law and therefore complaint was barred by exclusive remedy provision of

CLS Work Comp § 29(6), as presumption of continued general employment with defendant was rebutted by evidence that plaintiff's employer provided specific training and supervision for temporary employees supplied by defendant, was solely responsible for their job assignments and hours of work, and supplied all necessary tools and equipment. Gadway v Tri-City Manpower Inc., 270 A.D.2d 616, 704 N.Y.S.2d 347, 2000 N.Y. App. Div. LEXIS 2631 (N.Y. App. Div. 3d Dep't 2000).

18. — —Hallmarks of special employment relationship

Special employee is one who is transferred for limited time of whatever duration to service of another. Thompson v Grumman Aerospace Corp., 78 N.Y.2d 553, 578 N.Y.S.2d 106, 585 N.E.2d 355, 1991 N.Y. LEXIS 4925 (N.Y. 1991).

Although person's categorization as special employee is usually question of fact, determination of special employment status may be made as matter of law where undisputed facts establish that general employer was performing no work for special employer and general employer did not retain control over special employee. Thompson v Grumman Aerospace Corp., 78 N.Y.2d 553, 578 N.Y.S.2d 106, 585 N.E.2d 355, 1991 N.Y. LEXIS 4925 (N.Y. 1991).

A harbor master hired by a general agent of war shipping administration having charge of operations connected with loading and unloading of vessels, from stevedores employed by a contract stevedore, and placed under sole supervision of the dock boss of the general agent is a special employee of the agent and award of 50 percent of death benefits is properly made against the agent and its carrier. Johnston v International Freighting Corp., 274 A.D. 728, 87 N.Y.S.2d 297, 1949 N.Y. App. Div. LEXIS 5878 (N.Y. App. Div.), reh'g denied, 275 A.D. 865, 89 N.Y.S.2d 523, 1949 N.Y. App. Div. LEXIS 4818 (N.Y. App. Div. 1949).

A special employer-employee relationship between appellant, a chimney construction corporation undertaking to erect the chimney for a power house in connection with which a different corporation had the general construction contract, and a high lift operator who was an employee of the latter corporation but taken over by the former for the temporary task of filling the chimney with gravel, existed where appellant was, in fact, paying the wages of the high lift operator while engaged in this work and he was doing the work under the general supervision of appellant's supervisor. Goodman v Stone & Webster Engineering Corp., 11 A.D.2d 558, 199 N.Y.S.2d 770, 1960 N.Y. App. Div. LEXIS 10192 (N.Y. App. Div. 3d Dep't 1960).

Where defendant Chamber of Commerce agreed to pay specified amount to volunteer fire company for erecting and removing Christmas decorations on street and claimant, a volunteer fireman, was injured while removing same, defendant was not liable under the definitions of "employer" (subd 3) and "employee" (subd 4) of above statute since it was not found that volunteer fire company as general employer had surrendered control of claimant to defendant which is necessary for the creation of employer-employee relationship under statute. Martell v Whitehall Chamber of Commerce, 23 A.D.2d 511, 255 N.Y.S.2d 148, 1965 N.Y. App. Div. LEXIS 5110 (N.Y. App. Div. 3d Dep't 1965).

The Workmen's Compensation Board's determination of special employment was supported by substantial evidence where claimant was engaged in the supervision of construction and the finishing of houses as opposed to his usual work of carpenter supervisor, the absence of payment by his general employer for the day of the accident, and the method of payment for work previously done by the claimant for his special employer. Kreisler v Dennis Bridgehampton Constr. Corp., 37 A.D.2d 891, 325 N.Y.S.2d 301, 1971 N.Y. App. Div. LEXIS 3183 (N.Y. App. Div. 3d Dep't 1971).

Evidence that injured workman was employed by general employer which was in the business of supplying labor on a day-to-day basis and that company for whom workman was working at the time that he was injured had signed a contract with the general employer which provided that the general employer was not an employment agency and provided workmen's compensation and unemployment insurance for the workers whom it employed and furnished to others sustained determination that company for whom the injured employee was working at the time of injury had not become a special employer so that the employee was not restricted to workmen's compensation recovery. Hill v Erdle Perforating Co., 53 A.D.2d 1008, 386 N.Y.S.2d 265, 1976 N.Y. App. Div. LEXIS 15806 (N.Y. App. Div. 4th Dep't 1976).

The Workers' Compensation Board properly determined that the landlord of the premises at which claimant worked as a security guard was a special employer and thus liable to claimant in such capacity, where the landlord had exercised sufficient control and direction over their placement, dress and use of security guards hired by claimant's general employer to establish a special employment relationship with the claimant. Alli v Mandel Sec. Bureau, Inc., 86 A.D.2d 911, 448 N.Y.S.2d 256, 1982 N.Y. App. Div. LEXIS 15584 (N.Y. App. Div. 3d Dep't 1982).

Plaintiff was "special employee" of defendant where he was hired by company supplying professional help to various companies for work at premises owned by defendant, he worked at premises from inception of his employment until date of accident, and defendant exercised exclusive direction and control over his daily activities. Schulze v Associated Univs., 212 A.D.2d 588, 622 N.Y.S.2d 570, 1995 N.Y. App. Div. LEXIS 1542 (N.Y. App. Div. 1st Dep't 1995).

Defendants established that plaintiff truck driver was their special employee as matter of law, entitling them to summary judgment based on defense of workers' compensation, where plaintiff's general employer had been incorporated by defendants' principals to provide workers to defendants and another related entity, general employer had no other business or clients and thus served merely as in-house employment agency through which defendants paid salaries and provided benefits to workers, plaintiff reported for work and picked up his paychecks at defendants' facilities, all essential details of manner and outcome of his services were directed by defendants, and plaintiffs' contrary contentions were belied by his repeated references (during his examination before trial and in his affidavit) to being employed by defendants. Rotoli v Domtar, Inc., 229 A.D.2d 934, 645 N.Y.S.2d 367, 1996 N.Y. App. Div. LEXIS 8960 (N.Y. App. Div. 4th Dep't 1996).

Defendant was entitled to summary judgment on ground that action was barred by exclusive remedy of workers' compensation benefits where (1) plaintiff reported to work each day at defendant's distribution center, punched in time clock, was supervised by defendant's employees, and performed work for benefit of defendant, and (2) plaintiff's general employer was not present at work site and did not have right to supervise or control plaintiff's work. Eagen v Harlequin Books, 229 A.D.2d 935, 645 N.Y.S.2d 226, 1996 N.Y. App. Div. LEXIS 8962 (N.Y. App. Div. 4th Dep't 1996).

Plaintiff was, at least, "special employee" of defendant at time of accident in light of undisputed evidence that defendant issued and was listed on plaintiff's W-2s as plaintiff's employer, that defendant paid plaintiff's wages, benefits, and workers' compensation insurance, and that plaintiff was injured while making repairs to defendant's building. Crean v Queens Blvd. Tenants Corp., 252 A.D.2d 352, 675 N.Y.S.2d 533, 1998 N.Y. App. Div. LEXIS 7899 (N.Y. App. Div. 1st Dep't 1998), app. denied, 93 N.Y.2d 809, 694 N.Y.S.2d 631, 716 N.E.2d 696, 1999 N.Y. LEXIS 1341 (N.Y. 1999).

Driver for truck delivery service was properly found by Workers' Compensation Board to be special employee of company for which he was making deliveries where that company controlled scheduling and location of deliveries, required drivers to work on specified days and had authority to impose rules as to their personal appearance, drivers stored their trucks in company warehouse, and drivers gained access to warehouse using identification cards bearing name of company's subsidiary. Tunison v P.C. Richards & Son, 257 A.D.2d 856, 684 N.Y.S.2d 311, 1999 N.Y. App. Div. LEXIS 524 (N.Y. App. Div. 3d Dep't 1999).

Plaintiff employed by temporary agency for construction workers, who was injured while working at defendant's job site, was defendants' special employee as matter of law, entitling defendant to dismissal of personal injury action as barred by Workers' Compensation Law, where (1) his deposition stated that defendant's foreman would assign work to him, instruct him how to do it, provide tools, tell him when to go to next job, and tell him when

to arrive and leave job site, and (2) he failed to explain why his affidavit opposing summary judgment motion, prepared 9 months after his deposition, contradicted his deposition. Zylinski v Garito Contr., 268 A.D.2d 427, 702 N.Y.S.2d 86, 2000 N.Y. App. Div. LEXIS 198 (N.Y. App. Div. 2d Dep't 2000).

Defendant was plaintiff's special employer and should have been granted summary judgment dismissing complaint where defendant had exclusive right to control and direct manner, details, and ultimate result of plaintiff's work on date of subject accident, and plaintiff had received Workers' Compensation benefits from its general employer. Martin v Baldwin Union Free Sch. Dist., 271 A.D.2d 579, 706 N.Y.S.2d 712, 2000 N.Y. App. Div. LEXIS 4336 (N.Y. App. Div. 2d Dep't 2000).

Building maintenance worker was building tenant's special employee, although building owner paid his salary and workers' compensation benefits, where his duties were directed and controlled by tenant, whose employees he considered to be his supervisors with influence effectively amounting to authority to fire him. Evans v Citicorp, N.A., 276 A.D.2d 370, 714 N.Y.S.2d 473, 2000 N.Y. App. Div. LEXIS 10645 (N.Y. App. Div. 1st Dep't 2000).

Plaintiff was special employee of defendant, and thus his action for personal injuries incurred on defendant's premises was barred by Workers' Compensation Law, where defendant's only 2 officers were sole owners of plaintiff's general employer, defendant directed manner, details, and result of plaintiff's work, and plaintiff was paid directly by check from defendant. Syku v La Barranca Realty Corp., 282 A.D.2d 600, 723 N.Y.S.2d 379, 2001 N.Y. App. Div. LEXIS 3789 (N.Y. App. Div. 2d Dep't), app. denied, 97 N.Y.2d 607, 738 N.Y.S.2d 290, 764 N.E.2d 394, 2001 N.Y. LEXIS 3840 (N.Y. 2001), app. denied, 97 N.Y.2d 607, 738 N.Y.S.2d 290, 764 N.E.2d 394, 2001 N.Y. LEXIS 3843 (N.Y. 2001).

Plaintiff was properly found to be defendant city's special employee as matter of law where city, through its department of housing preservation and development (HPD), exclusively controlled hiring, firing, discipline, promotion, work performed, sick leave, vacations, and every other aspect of plaintiff's employment, with exception of payroll services, which were provided by plaintiff's general employer; it was immaterial that plaintiff reported directly to lead mechanic in employ of general employer where lead mechanic, like plaintiff, was controlled and supervised by HPD. Brunetti v City of New York, 286 A.D.2d 253, 728 N.Y.S.2d 665, 2001 N.Y. App. Div. LEXIS 8053 (N.Y. App. Div. 1st Dep't 2001).

19. — —Allocation of award

An employee of a general employer had been working for a special employer for more than a month, and was directed by the latter's servant to haul a load of lumber already loaded on a truck, to which he transferred his general employer's horses, and was injured by the negligence of one of the special employer's servants. It was held that the employee's exclusive remedy was the workmen's compensation law, against either the general or special employer, or both. Lee v Cranford Co., 182 A.D. 191, 169 N.Y.S. 370, 1918 N.Y. App. Div. LEXIS 7848 (N.Y. App. Div. 1918), aff'd, 230 N.Y. 618, 130 N.E. 917, 230 N.Y. (N.Y.S.) 618, 1921 N.Y. LEXIS 896 (N.Y. 1921).

A student nurse, starting her vacation 2 days early, who was injured while in her father's automobile while enroute to the general employer from the special employer pursuant to instructions and the rules of the institution to report "and sign out" for vacation, before being released from duty, was entitled to an award, entirely assessed against the general employer hospital. Kwitkowski v Charles E. Wilson Memorial Hospital, 277 A.D. 802, 96 N.Y.S.2d 871, 1950 N.Y. App. Div. LEXIS 3376 (N.Y. App. Div. 1950).

The rule is well established that if there is both a general and special employer the board can make an award against both or either as it sees fit, and that appellate courts have no power to impose a uniform or consistent rule upon the board in such matters, irrespective of the facts of the particular case. Goodman v Stone & Webster Engineering Corp., 11 A.D.2d 558, 199 N.Y.S.2d 770, 1960 N.Y. App. Div. LEXIS 10192 (N.Y. App. Div. 3d Dep't 1960).

There was sufficient evidence to sustain a finding that both a general and special employer-employee relationship existed, sustaining a 50–50 apportionment of an award against the general employer, where it appeared that appellant, a funeral director, regularly employed claimant to drive a hearse and ambulance and to perform general work at a weekly wage of $60 regardless of whether business was slack or active, except as claimant was employed at like wages driving a truck for appellant's son in the construction business, and that appellant had first call on claimant's services whenever required in the undertaking business. Hogan v Mahar, 12 A.D.2d 570, 206 N.Y.S.2d 907, 1960 N.Y. App. Div. LEXIS 7280 (N.Y. App. Div. 3d Dep't 1960), app. denied, 9 N.Y.2d 610, 1961 N.Y. LEXIS 1652 (N.Y. 1961).

Testimony as to a custom or usage in the trucking business for the lessor of a truck supplying the truck and driver for operations conducted under the Interstate Commerce Commission permit of a lessee truck line, either to provide the Workmen's Compensation Insurance coverage or to be charged therefor by deduction of the premium from the contract price, will not, in the absence of a showing of such an arrangement in connection with a particular truck, preclude a compensation award for death of the driver as the result of an accident in driving the truck from being charged against both the lessor of the truck, as general employer, and the truck line, as special employer. Donoghue v De Carolis, 15 A.D.2d 602, 222 N.Y.S.2d 398, 1961 N.Y. App. Div. LEXIS 6978 (N.Y. App. Div. 3d Dep't 1961).

20. —Responsible employer in situations involving lease of premises or equipment

Where the defendant corporation had an arrangement with the Western Union Telegraph Company, whereby the latter agreed to furnish wires and necessary paraphernalia for a telegraph office, receive messages and transmit them to their destination and to pay a commission of fifty per cent of the proceeds to the defendant corporation, from which it agreed to pay the wages of employees, a messenger injured in the course of his employment is properly granted an award against the defendant corporation as employer rather than the Western Union Company. Sharp v Queensboro Corp., 252 N.Y. 622, 170 N.E. 167, 252 N.Y. (N.Y.S.) 622, 1930 N.Y. LEXIS 695 (N.Y. 1930).

A corporation managing a building was a third party in relation to a cleaner of building's windows who fell and lost his life, corporation owning the building being the cleaner's employer. Kindga v Charles F. Noyes Co., 260 N.Y. 521, 184 N.E. 76, 260 N.Y. (N.Y.S.) 521, 1932 N.Y. LEXIS 711 (N.Y. 1932).

Where New York city contracted with the owner for the use of his team and a driver and the driver having finished his day's work was killed while returning to his employer when a wheel came off the wagon, an award against the city is not justified. Mackey v New York, 193 A.D. 535, 184 N.Y.S. 495, 1920 N.Y. App. Div. LEXIS 5590 (N.Y. App. Div. 1920).

The lessor of a mill is not liable as an employer for the death of one of the lessees working in the mill where, under the lease the lessees were to have entire charge of operating and running the mill, and assumed liability for injury, damage or accident arising from the operation of the mill, and the lessor had no control over working hours and the manner of performing work. Manning v Whalen, 259 A.D. 490, 20 N.Y.S.2d 364, 1940 N.Y. App. Div. LEXIS 6180 (N.Y. App. Div. 1940).

Where a contractor engaged in excavating leased a power shovel from a corporation not connected with either the contractor or the owner, one regularly employed by the corporation but was engaged by the contractor to assist in operating the shovel, receiving his wages from the contractor, is the contractor's employee for purposes of workmen's compensation. Dennison v Peckham Road Corp., 269 A.D. 800, 55 N.Y.S.2d 137, 1945 N.Y. App. Div. LEXIS 3907 (N.Y. App. Div. 3d Dep't), superseded, 269 A.D. 803, 269 A.D. 800, 55 N.Y.S.2d 137, 1945 N.Y. App. Div. LEXIS 3920, 1945 N.Y. App. Div. LEXIS 3907 (N.Y. App. Div. 1945).

Where trailer-tractor operator was killed while driving a tractor while it was under lease by a partnership whose principal business was to lease trailer-tractors to corporate lessees, an award was proper against the lessor-partnership. Hamilton v M

& M Leasing Co., 283 A.D. 904, 130 N.Y.S.2d 1, 1954 N.Y. App. Div. LEXIS 5699 (N.Y. App. Div. 1954).

With respect to equipment leased to an interstate trucking outfit, for operation of the latter under an ICC permit held by the lessee, driver to be furnished by the owner-lessor, there is no conclusive presumption from operation of the truck under the ICC permit that the driver is an employee of the trucking outfit rather than of the owner of the equipment, and the driver's employment status is determinable as a matter of fact according to the conventional tests and factors. Williams v Solomon, 13 A.D.2d 159, 214 N.Y.S.2d 928, 1961 N.Y. App. Div. LEXIS 11017 (N.Y. App. Div. 3d Dep't 1961).

Where an individual truck owner for several years, and up to the time of the accident resulting in death of the driver, had leased his truck to an interstate trucking corporation to haul merchandise under the corporation's ICC permit, but driver to be furnished by lessor, and the lessor paid the driver's wages, obtained shipments for him to haul, helped the driver in loading them, etc., received payments from shippers, and there was no sufficient evidence to show any direction or control over the driver by the corporation, there was sufficient evidence to sustain a finding that the owner-lessor of the truck was the "sole" employer of the driver and solely responsible in liability under the Workmen's Compensation Law for death benefits. Williams v Solomon, 13 A.D.2d 159, 214 N.Y.S.2d 928, 1961 N.Y. App. Div. LEXIS 11017 (N.Y. App. Div. 3d Dep't 1961).

With respect to workmen's compensation insurance coverage of a truck driver, found to have been solely employed by the owner of the truck notwithstanding a lease arrangement with an interstate trucking corporation for operation of the truck under the corporation's ICC permit, where the corporation's compensation insurance policy expressly covered only that corporation's liability under the Workmen's Compensation Act the insurance carrier could not be held liable for death benefits. Williams v Solomon, 13 A.D.2d 159, 214 N.Y.S.2d 928, 1961 N.Y. App. Div. LEXIS 11017 (N.Y. App. Div. 3d Dep't 1961).

The evidence was insufficient to show that claimants, employed by a service station operator, were employees of the oil company from which the station was leased by the operator, where the lease called for monthly rent payments, evidenced no retention of control by lessor, lessor did not furnish the equipment used by claimants who were hired to do repair work for the operator as an independent source of his income, and lessor had no right to discharge lessee or his employees but only the right to terminate the lease. Grant v Frontier Oil Refining Co., 20 A.D.2d 493, 247 N.Y.S.2d 731, 1964 N.Y. App. Div. LEXIS 4190 (N.Y. App. Div. 3d Dep't 1964).

Amendment to CLS Work Comp § 2(3), defining employer as person or entity which leases or contracts with operator or lessee for purpose of driving, operating or leasing taxicab, was reasonably interpreted by Workers' Compensation Board and State Insurance Fund to require livery car base owners to pay workers' compensation premiums on behalf of independent owner-operators, and is constitutional on its face and as so enforced. Livery Owners Coalition v State Ins. Fund, 152 Misc. 2d 905, 581 N.Y.S.2d 577, 1992 N.Y. Misc. LEXIS 90 (N.Y. Sup. Ct. 1992).

21. —Other incidents of dual control

An award lies against a golf club for injury to a caddy paid solely by players' tips. Meyer v North Hills Golf Club, 238 A.D. 752, 261 N.Y.S. 1021, 1933 N.Y. App. Div. LEXIS 9625 (N.Y. App. Div. 1933).See also Rose v Rex Concrete Const. Co., 245 A.D. 888, 282 N.Y.S. 289, 1935 N.Y. App. Div. LEXIS 11401 (N.Y. App. Div. 1935).

Evidence sustained the finding that the claimant employed in theatrical work was employed by the theatre owner who paid claimant's wages and carried a workmen's compensation policy protecting him rather than by the producers of the show. Miller v Trebuhs Realty Co., 4 A.D.2d 724, 163 N.Y.S.2d 816, 1957 N.Y. App. Div. LEXIS 5136 (N.Y. App. Div. 3d Dep't 1957).

Decedent was employed, for the purposes of death benefits, by an actor and night club entertainer, where decedent was hired for an engagement in Las Vegas by a corporation of which the actor was sole stockholder, where the employment was personally negotiated by the actor either in the name of the corporation or in the actor's name, and expense checks were drawn on the corporate account or the actor's account, without regard to the name used as employer in the particular instance, and the decedent was a part of the actor's personal "act". Maisel v Berle, 11 A.D.2d 831, 202 N.Y.S.2d 562, 1960 N.Y. App. Div. LEXIS 8500 (N.Y. App. Div. 3d Dep't), reh'g denied, 11 A.D.2d 961, 206 N.Y.S.2d 568, 1960 N.Y. App. Div. LEXIS 8118 (N.Y. App. Div. 3d Dep't 1960).

There was sufficient evidence to sustain a finding that claimant, a jockey and exercise boy, was in the employ of appellant, a public trainer of race horses who was permitted to select and had control over jockeys riding some of the horses trained by him, when injured while riding in a race on a jockey assignment made by appellant. Clingman v Cushman, 12 A.D.2d 671, 207 N.Y.S.2d 732, 1960 N.Y. App. Div. LEXIS 6730 (N.Y. App. Div. 3d Dep't 1960).

Where claimant, although not at the time regularly employed by the hospital, had at an earlier time been so employed as a practical nurse and was called by the hospital to act as an attendant for a particular patient whose son had requested that someone be in constant attendance during the night, and sustained injury inflicted by the patient while so in attendance, the evidence would sustain a finding that claimant was an employee of the hospital when injured, rather than an employee of the patient's son who requested the service and paid the bill. La Barge v Mercy General Hospital, 12 A.D.2d 689, 208 N.Y.S.2d 340 (N.Y. App. Div. 3d Dep't 1960), app. denied, 9 N.Y.2d 610, 1961 N.Y. LEXIS 1663 (N.Y. 1961).

Where an employer was in the business of installing and servicing printing presses, which work required the use of riggers which it could not hire because of lack of any contract with the riggers' union and accordingly made an arrangement with a rigging corporation to carry certain riggers, originally employed by the first corporation, on the latter's payroll, the first employer was the actual employer of such employees where they reported directly to it for daily assignments and at all times remained under its direction and control. Miceli v Tracy-Smith Co., 17 A.D.2d 1021, 234 N.Y.S.2d 569, 1962 N.Y. App. Div. LEXIS 6728 (N.Y. App. Div. 3d Dep't 1962).

Workmen's recovery for personal injuries sustained when he was pinned against loading platform by truck was barred, as against driver of truck and that driver's primary employer, where, at time of accident, driver was under control of plaintiff's employer as a loaned employee; exclusive remedy was for workmen's compensation. Pichardo v Kreger Truck Renting Co., 57 A.D.2d 177, 394 N.Y.S.2d 189, 1977 N.Y. App. Div. LEXIS 10462 (N.Y. App. Div. 1st Dep't 1977).

Workers' Compensation Board's finding of dual and similar employment between injured worker's regular full-time job as legal secretary and office manager and part-time job as chairperson of election inspectors at polling place at which she was injured was sufficiently supported by board's conclusion that her duties in both positions were clerical in nature, involving tallying, filing and record keeping, despite full-time employer's contention that worker's duties as legal secretary involved great deal more skill and responsibility than her purely clerical duties as election inspector. Ribar v County of Suffolk, 125 A.D.2d 801, 510 N.Y.S.2d 25, 1986 N.Y. App. Div. LEXIS 63012 (N.Y. App. Div. 3d Dep't 1986).

Although parent corporation may be deemed to be employer of employee of subsidiary corporation for purposes of Workers' Compensation Law if subsidiary functions merely as alter ego of parent, parent must exercise complete domination and control over subsidiary's everyday operations. Allen v Oberdorfer Foundries, 192 A.D.2d 1077, 595 N.Y.S.2d 995, 1993 N.Y. App. Div. LEXIS 4080 (N.Y. App. Div. 4th Dep't 1993).

Finding that claimant worked for dual employers, who were brothers, was supported by evidence that she was on first brother's payroll while she worked as horse groomer at second brother's farm, at which both brothers owned horses, that she received her paychecks from first brother, although second brother provided equipment and supervised her day-to-day activities, and that she considered herself answerable to both. Ayers

v Hakes, 260 A.D.2d 975, 689 N.Y.S.2d 281, 1999 N.Y. App. Div. LEXIS 4447 (N.Y. App. Div. 3d Dep't 1999).

22. Employer of persons engaged by agents or coworkers

The employer's insurance carrier is liable for the death of an employee who died from injuries received while doing carpenter work at the house of the employee's manager by direction of its foreman under an arrangement, to which the employee was not a party, that the manager should pay the employee while he was at work upon the place, the employee having been off the employer's payroll for a portion of the time that he was so engaged, but at the time of the injury had been back on the payroll for about a week. Jaabeck v Theodore A. Crane's Sons Co., 238 N.Y. 314, 144 N.E. 625, 238 N.Y. (N.Y.S.) 314, 1924 N.Y. LEXIS 683 (N.Y. 1924).

An intermediary acting as an agent hiring an employee is not liable for compensation; such intermediary is liable only if an independent contractor or a subcontractor. Kackel v Serviss, 180 A.D. 54, 167 N.Y.S. 348, 1917 N.Y. App. Div. LEXIS 8073 (N.Y. App. Div. 1917).; Tsangournos v Smith, 183 A.D. 751, 171 N.Y.S. 256, 1918 N.Y. App. Div. LEXIS 6014 (N.Y. App. Div. 1918).; Brown v St. Vincent's Hospital, 222 A.D. 402, 226 N.Y.S. 317, 1928 N.Y. App. Div. LEXIS 8075 (N.Y. App. Div. 1928).

Claimant, although hired by the superintendent of highways, is the employee of a town and is covered by its compensation policy, in view of subd. 3 and § 50, subd. 4-a and High. Law, § 47, subds. 1 and 4 where hiring was originally done by superintendent of highways, but was approved by town board. Kittle v Kinderhook (1925) 214 App Div 345, 212 NYS 410, appeal after remand (1926) 217 App Div 809, 217 NYS 919, affd (1927) 244 NY 612, 155 NE 919.A corporation employer is liable to a roofer taken by his foreman to perform a roofing job for friend of the foreman. Griffin v Becker Roofing Co., 224 A.D. 684, 229 N.Y.S. 864, 1928 N.Y. App. Div. LEXIS 10369 (N.Y. App. Div.), aff'd, 249 N.Y. 523, 164 N.E. 569, 249 N.Y. (N.Y.S.) 523, 1928 N.Y. LEXIS 859 (N.Y. 1928).

An employer may be held liable as such where the employee was hired by the employer's agent having apparent authority to hire in behalf of the employer. Enright v Asplundh Tree Expert Co., 271 A.D. 847, 65 N.Y.S.2d 871, 1946 N.Y. App. Div. LEXIS 3387 (N.Y. App. Div. 1946), aff'd, 297 N.Y. 452, 74 N.E.2d 170, 297 N.Y. (N.Y.S.) 452, 1947 N.Y. LEXIS 965 (N.Y. 1947).

When testimony respecting agency and employment is conflicting, a question of fact is presented and the court may not weigh such testimony, but is bound by the decision of the Board. Coppola v Tilyou, 271 A.D. 848, 65 N.Y.S.2d 619, 1946 N.Y. App. Div. LEXIS 3388 (N.Y. App. Div. 1946), aff'd, 297 N.Y. 656, 76 N.E.2d 322, 297 N.Y. (N.Y.S.) 656, 1947 N.Y. LEXIS 1131 (N.Y. 1947).

As to whether an injured minor, engaged in helping a milk route deliveryman, was an employee of the dairy farm engaged in the retail milk business or of the deliveryman, on the theory that the latter was an independent contractor, the board was entitled to go behind the written contract between the dairy farm and the routeman to ascertain the real relationship, and there was sufficient evidence to sustain a finding that the injured minor was an employee of the dairy farm where it appeared that, following execution of the contract, the routeman continued to operate substantially the same as prior thereto, when he was concededly an employee, with the dairy farm exercising considerable control over his activities such as to indicate an employer-employee relationship. Wheeler v Blake, 13 A.D.2d 602, 212 N.Y.S.2d 292, 1961 N.Y. App. Div. LEXIS 11968 (N.Y. App. Div. 3d Dep't 1961).

A finding that claimant, at the time of the accident in question, was employed by a landscaping service operating as a partnership between two brothers which carried compensation insurance, was sustained by substantial evidence where claimant had been hired by one of the brothers to maintain and cut lawns, plant trees, and other incidental work, and, at the time of injury, was assisting at a combination job of tree removal and landscaping contracted for by the partnership. Prinz v Fey, 14 A.D.2d 606, 218 N.Y.S.2d 445, 1961 N.Y. App. Div. LEXIS 9381 (N.Y. App. Div. 3d Dep't 1961), aff'd, 12 N.Y.2d 986, 238 N.Y.S.2d 971, 189 N.E.2d 503, 1963 N.Y. LEXIS 1403 (N.Y. 1963).

Apartment complex owner was building manager's employer under Workers' Compensation Law, despite fact that complex's operator provided manager with equipment, tools, and supplies, delivered him his paycheck, and notified him of his termination, where operator was owner's managing agent, owner was listed as manager's employer on his W-2 form, and owner's board of directors maintained ultimate authority and control over important aspects of manager's employment, including his hiring, salary, and termination. Clifford v Mark Greenberg Real Estate, 219 A.D.2d 753, 631 N.Y.S.2d 98, 1995 N.Y. App. Div. LEXIS 9154 (N.Y. App. Div. 3d Dep't 1995).

County was properly held responsible for payment of workers' compensation benefits for Salvation Army kitchen aide because, although Salvation Army had virtually complete control over aide's day-to-day activities, county retained sufficient overall control over important aspects of aide's work to be deemed her general employer, where, under arrangement between county and Salvation Army, county continued to provide public assistance benefits to aide and other participants in workfare program, number of hours worked was based on size of public assistance grant, participants were required to complete time sheets that were given to county, decisions regarding type of work performed were made jointly by county and Salvation Army, and county retained right to monitor work site and to remove participant from placement in event of improper supervision. Quick v Steuben County Self-Insurance Plan, 242 A.D.2d 833, 242 A.D.2d 883, 662 N.Y.S.2d 608, 1997 N.Y. App. Div. LEXIS 8822 (N.Y. App. Div. 3d Dep't), app. dismissed, 91 N.Y.2d 866, 668 N.Y.S.2d 561, 691 N.E.2d 633, 1997 N.Y. LEXIS 4193 (N.Y. 1997).

Building superintendent was special employee of building owner, and thus superintendent's action against owner for Labor Law violations and common-law negligence was barred by exclusivity of remedy afforded by award of workers' compensation benefits, where owner was in partnership with building manager who supervised and directed superintendent's work, building manager and superintendent were coemployees of real estate management corporation engaged by owner to maintain premises, and result barring action was consistent with state's rejection of dual capacity doctrine and with statutory inclusion within ambit of term "owner" of "agent, or any other person, firm or corporation, directly or indirectly in control of a dwelling." Gonzalez v RHQ Assocs., 263 A.D.2d 413, 693 N.Y.S.2d 580, 1999 N.Y. App. Div. LEXIS 8238 (N.Y. App. Div. 1st Dep't 1999).

23. Effect of transfer of employment contract, premises on which work is performed or the like

A bank having taken possession of a building for the purpose of collecting rents for a mortgagor is liable for subsequent injury to a janitor of the building. Wenks v Dry Dock Sav. Inst., 253 A.D. 851, 1 N.Y.S.2d 487, 1938 N.Y. App. Div. LEXIS 8895 (N.Y. App. Div. 1938).

One who originally hired an employee remains liable as employer for compensation after an assignment of the contract under which the work was to be done, where such assignment occurred in another state, without the employee's knowledge. Noel v Morrison, 260 A.D. 377, 22 N.Y.S.2d 649, 1940 N.Y. App. Div. LEXIS 4598 (N.Y. App. Div.), reh'g denied, 260 A.D. 896, 23 N.Y.S.2d 832, 1940 N.Y. App. Div. LEXIS 5265 (N.Y. App. Div. 1940).

No private arrangement can avoid an employer's responsibility for compensation fixed by law. Thus, where claimant, superintendent of an apartment house, was injured on January 6, after the owner of the apartment had entered into a sale contract to be closed January 7, a provision in the contract as then closed vesting title in purchaser as of January 1 and making repairs from that date on the responsibility of the new owner had no effect on the seller's liability, as employer, for compensation payments. Tuohy v Barbarich, 9 A.D.2d 814, 192 N.Y.S.2d 511, 1959 N.Y. App. Div. LEXIS 6164 (N.Y. App. Div. 3d Dep't 1959), app. denied, 7 N.Y.2d 709, 1960 N.Y. LEXIS 1599 (N.Y. 1960).

There was substantial evidence to sustain a finding that, although claimant was originally employed as a plasterer by one corporation, which had a contract with another, following a dispute between the two corporations in course of which claimant's job was discontinued, upon taking over the work by the second corporation claimant became its employee and was such when injured. La Porta v Wakefield Realty Corp., 11 A.D.2d 882,

203 N.Y.S.2d 209, 1960 N.Y. App. Div. LEXIS 8416 (N.Y. App. Div. 3d Dep't 1960).

First corporation's comprehensive daily control of employee's work and absence of any control by second corporation established that he was special employee of first corporation, and thus first corporation was entitled to summary judgment in employee's action to recover for injuries sustained while he was working at first corporation's factory on basis of employee's acceptance of workers' compensation benefits through his employment with second corporation, even though terms of contract between corporations stated that employee was employee of second, not first corporation, where (1) employee was assigned to work at first corporation's factory under contract, (2) first corporation had authority to fire employee, and (3) employee testified at deposition that he commenced working at first corporation's factory immediately on being hired by second corporation, that he worked there exclusively until he was injured, that he acknowledged his foreman at factory as his supervisor, and that foreman oversaw his day-to-day work. Thompson v Grumman Aerospace Corp., 166 A.D.2d 578, 560 N.Y.S.2d 864, 1990 N.Y. App. Div. LEXIS 12717 (N.Y. App. Div. 2d Dep't 1990), aff'd, 78 N.Y.2d 553, 578 N.Y.S.2d 106, 585 N.E.2d 355, 1991 N.Y. LEXIS 4925 (N.Y. 1991).

24. Apportionment of award between multiple employers, generally

The board is not required to apportion compensation on an equal basis where a claimant is employed by two or more employers jointly, and the Appellate Division will not disturb the apportionment as long as it is fair and equitable under all the circumstances. Berkman v Billig Mfg. Co., 9 A.D.2d 810, 192 N.Y.S.2d 852, 1959 N.Y. App. Div. LEXIS 6155 (N.Y. App. Div. 3d Dep't 1959).

Where there is a dual employer situation, the board can properly make the award against either or both employers. Janikowski v Yardley's of London, Inc., 11 A.D.2d 577, 201 N.Y.S.2d 157, 1960 N.Y. App. Div. LEXIS 9926 (N.Y. App. Div. 3d Dep't 1960).

It was error for board to impose joint and several liability on uninsured dual employers where evidence was insufficient to show that they participated in joint venture; matter would be remitted for board to determine whether joint venture existed, and if not, board should apportion liability between employers. Ayers v Hakes, 260 A.D.2d 975, 689 N.Y.S.2d 281, 1999 N.Y. App. Div. LEXIS 4447 (N.Y. App. Div. 3d Dep't 1999).

25. —Particular applications

Where a watchman sustained injuries while guarding the premises of separate property owners, an award will be imposed against the owner whose property he was guarding at the time of the accident. Moochler v A. H. Herrick & Son, 272 N.Y. 545, 4 N.E.2d 729, 272 N.Y. (N.Y.S.) 545, 1936 N.Y. LEXIS 1040 (N.Y. 1936).

The claimant was jointly employed by the owners of two adjacent housing developments as a night watchman and while on the property of one of the employers, he was assaulted in the course of his employment. Held: although both employers were liable, they were only liable for compensation to claimant in proportion to the remuneration paid by each. Hunt v Regent Development Corp., 3 N.Y.2d 133, 164 N.Y.S.2d 694, 143 N.E.2d 892, 1957 N.Y. LEXIS 869 (N.Y. 1957).

Where a truck renting corporation and a motor haulage corporation employed the same mechanic, an award against the rental corporation alone is proper where on the day of the injury he was in the employ solely of the rental corporation. Antonini v Young Rental Corp., 263 A.D. 1032, 33 N.Y.S.2d 466, 1942 N.Y. App. Div. LEXIS 7961 (N.Y. App. Div. 1942).

Where a nurse who had been employed at two hospitals is exposed to patients suffering from active tuberculosis during a tour of duty at one of the hospitals, resulting in an reactivation of a pre-existing tuberculosis condition, she is entitled to an award of compensation apportioned between both hospitals. Nyulassey v New York, 270 A.D. 970, 62 N.Y.S.2d 110, 1946 N.Y. App. Div. LEXIS 4892 (N.Y. App. Div. 1946).. See also Commissioner of Taxation & Finance v Willard Parker Hospital, 256 A.D. 1018, 10 N.Y.S.2d 487, 1939 N.Y. App. Div. LEXIS 5901 (N.Y. App. Div. 1939).; McDonald v New York, 265 A.D. 1026, 39 N.Y.S.2d 2, 1943 N.Y. App. Div. LEXIS 6674 (N.Y. App. Div. 1943).; Nosowich v Central Islip State Hospital, 274 A.D. 1080, 85 N.Y.S.2d 674, 1949 N.Y. App. Div. LEXIS 6143 (N.Y. App. Div. 1949).

Where a claimant, hired by two corporations as a nightwatchman to keep simultaneous watch over adjacent home building projects of each employer, with each paying half of his wages, was injured in attempting to close the windows on the premises of one employer after leaving the premises of another, the award against both of them to be paid in equal amounts was proper since the employment was joint. Cyrus v Modart Const. Co., 283 A.D. 368, 128 N.Y.S.2d 115, 1954 N.Y. App. Div. LEXIS 4683 (N.Y. App. Div. 1954).

Allocation of an award between two employers was proper where claimant suffered a sacroiliac strain in 1944 while in the employ of one of them and then in 1951 sustained some sort of shock to his back while carrying cinder blocks for the second employer. Stein v Arthur Venneri Co., 283 A.D. 902, 130 N.Y.S.2d 127, 1954 N.Y. App. Div. LEXIS 5695 (N.Y. App. Div. 1954).

Where claimant originally suffered back injuries while employed by a certain corporation in 1944 and later sustained further accidental injuries to his back on two occasions in 1949 while employed by appellant, it was not error for the board to apportion compensation as between the corporation and the appellant without apportioning any part of it against a city for whom claimant worked in 1946 and 1947, it appearing that claimant made no claim of having sustained accidental injuries while employed by the city although on several occasions, during that time, he had felt pains in his back. Rizzo v Ilacqua, 11 A.D.2d 583, 200 N.Y.S.2d 766, 1960 N.Y. App. Div. LEXIS 9935 (N.Y. App. Div. 3d Dep't 1960).

Recipient of public assistance who was injured while participating in workfare program sponsored by county, when working as mechanic at city public works department garage, was general employee of county and special employee of city for purposes of apportioning his workers' compensation claim equally between county and city. Kemp v City of Hornell, 250 A.D.2d 950, 672 N.Y.S.2d 537, 1998 N.Y. App. Div. LEXIS 5678 (N.Y. App. Div. 3d Dep't 1998).

26. Judicial review

A claim involved the question of coverage of the claimant arising from the operation of two corporations. The award was reversed and the matter remitted where the record was inadequate to show whether the claimant was an employee of the appellant corporation or the other corporation at the time he was injured. Casey v Martin Contracting Co., 8 A.D.2d 877, 186 N.Y.S.2d 704, 1959 N.Y. App. Div. LEXIS 8283 (N.Y. App. Div. 3d Dep't 1959).

Where a decision as to who was the employer of claimant at the time injuries were sustained rests on credibility of witnesses, the board's determination should not be disturbed. Castrovilla v Di Corrado, 12 A.D.2d 565, 206 N.Y.S.2d 619, 1960 N.Y. App. Div. LEXIS 7268 (N.Y. App. Div. 3d Dep't 1960).

Where conflicting inferences arise from the evidence as to whether the person employing the injured compensation claimant was an independent contractor or a mere employee, himself, of another, resolution of the question is solely within the province of the board. Wheeler v Blake, 13 A.D.2d 602, 212 N.Y.S.2d 292, 1961 N.Y. App. Div. LEXIS 11968 (N.Y. App. Div. 3d Dep't 1961).

Determination that claimant was employee and not independent contractor was interlocutory and not appealable to court. Karam v Exec. Charge/Love Taxi, 284 A.D.2d 599, 725 N.Y.S.2d 577, 2001 N.Y. App. Div. LEXIS 6000 (N.Y. App. Div. 3d Dep't 2001).

Court upheld board's factual determination that respondent electrical contractor was sole employer of claimant who was injured while performing electrical maintenance and repairs at manufacturing plant owned and operated by alleged special employer, where claimant remained on respondent's payroll, respondent retained right to discharge him, respondent provided foreperson at manufacturing plant whom claimant considered to be his supervisor and, while claimant also worked with plant

employee on projects designated by plant, there was no evidence that plant assumed any control over manner, details or ultimate result of his work. Oppedisano v Randall Elec., 285 A.D.2d 759, 728 N.Y.S.2d 570, 2001 N.Y. App. Div. LEXIS 7377 (N.Y. App. Div. 3d Dep't 2001).

III. Employee

27. In general

The definition of "employee" in the Workmen's Compensation Law does not disturb common law distinctions between a servant or employee and an independent contractor, and its rules are operative in consideration of claims under this act. Litts v Risley Lumber Co., 224 N.Y. 321, 120 N.E. 730, 224 N.Y. (N.Y.S.) 321, 1918 N.Y. LEXIS 883 (N.Y. 1918).

The issue of an employer-employee relationship is generally one of fact for the board. Gregg v Dallas & Mavis Forwarding Co., 32 A.D.2d 678, 299 N.Y.S.2d 499, 1969 N.Y. App. Div. LEXIS 4079 (N.Y. App. Div. 3d Dep't 1969), aff'd, 26 N.Y.2d 906, 309 N.Y.S.2d 941, 258 N.E.2d 222, 1970 N.Y. LEXIS 1454 (N.Y. 1970).

Contention that claimant was not an employee at time of accident could not be raised for first time on appeal by employer where such contention was not raised before or considered by Workmen's Compensation Board. Daly v Opportunities for Broome, Inc., 48 A.D.2d 99, 367 N.Y.S.2d 851, 1975 N.Y. App. Div. LEXIS 9554 (N.Y. App. Div. 3d Dep't 1975), rev'd, 39 N.Y.2d 862, 386 N.Y.S.2d 216, 352 N.E.2d 133, 1976 N.Y. LEXIS 2809 (N.Y. 1976).

Factors to be considered in Workers' Compensation Board's determination as to whether claimant is "special employee" include putative employer's right to control, method of payment, furnishing of equipment, right to discharge, and "relative nature of the work"; no factor is controlling and board's decision may be based on one or more factors. Vinciguerra v Carvel Corp., 127 A.D.2d 915, 512 N.Y.S.2d 274, 1987 N.Y. App. Div. LEXIS 43412 (N.Y. App. Div. 3d Dep't 1987).

Existence of employer-employee relationship is question of fact and finding of such relationship by Workers' Compensation Board will be affirmed if supported by substantial evidence, even if evidence to support contrary finding is also substantial. Davison v Holder, 137 A.D.2d 899, 524 N.Y.S.2d 871, 1988 N.Y. App. Div. LEXIS 1642 (N.Y. App. Div. 3d Dep't 1988).

Evidence supported board's determination that claimant was newspaper's employee, not independent contractor, where claimant had written contract to operate as newspaper carrier within specified territory, he was provided with confidential subscribers' list, he had contractual duty to act promptly on subscribers' complaints and to promote circulation, he was required to deliver papers by certain time and to give newspaper advance notice of any additional help he might use, and his relationship with newspaper could be terminated if he failed to meet his obligations. Pittman v Poughkeepsie Journal, 140 A.D.2d 779, 527 N.Y.S.2d 658, 1988 N.Y. App. Div. LEXIS 4666 (N.Y. App. Div. 3d Dep't 1988).

Negligence action to recover damages for personal injuries was barred by plaintiff's recovery of workers' compensation benefits where evidence that defendant exercised control and supervision over plaintiff supported conclusion that plaintiff was special employee of defendant as matter of law. Vargas v Tufaro Bus Co., 245 A.D.2d 366, 666 N.Y.S.2d 437, 1997 N.Y. App. Div. LEXIS 12771 (N.Y. App. Div. 2d Dep't 1997).

Physician was outside employee of professional corporation and was acting in course of her employment at time of her death, for purposes of her husband's entitlement to workers' compensation death benefits, where she was fatally injured in car accident on way to hospital at which she was scheduled to be on call during 24-hour shift, corporation required her to treat patients at its offices on certain days and between certain hours and to be on call during shift at hospital once every 7 days, and it was physician's practice to be physically present at hospital during her on-call duty, although she was not so required. Egloff v Ob-Gyn Assocs., 245 A.D.2d 965, 667 N.Y.S.2d 116, 1997 N.Y. App. Div. LEXIS 13637 (N.Y. App. Div. 3d Dep't 1997).

Personal injury action was barred by plaintiff's recovery of workers' compensation benefits where defendants exercised direction and control over plaintiff, who thus was their special employee. Adams v Virco Mfg. Corp., 251 A.D.2d 608, 675 N.Y.S.2d 550, 1998 N.Y. App. Div. LEXIS 7918 (N.Y. App. Div. 2d Dep't 1998).

A stenographer or a secretary is not an employee entitled to compensation for injuries received in her employment under the workmen's compensation law. Arnold v Wright, 79 N.Y.S.2d 720, 1948 N.Y. Misc. LEXIS 2460 (N.Y. Sup. Ct. 1948).

28. Factors to consider

Source of a claimant's remuneration for services rendered is not solely controlling in determining employer-employee relationship. O'Brien v Oneida City Hospital, 15 A.D.2d 705, 223 N.Y.S.2d 730, 1962 N.Y. App. Div. LEXIS 12029 (N.Y. App. Div. 3d Dep't 1962).

The Workers'Compensation Board properly found an employer-employee relationship, where the claimant worked as a sales manager at the employer's premises in return for a fixed weekly salary, labored exclusively for the employer, was prohibited from working for a competitor, and the employer retain the privilege of discharging the claimant for cause. Dubnoff v Feathers Sportswear, Inc., 90 A.D.2d 607, 456 N.Y.S.2d 177, 1982 N.Y. App. Div. LEXIS 18672 (N.Y. App. Div. 3d Dep't 1982).

Two tests are used to determine whether employer-employee relationship exists for workers' compensation purposes: control test and relative nature of work test. Davison v Holder, 137 A.D.2d 899, 524 N.Y.S.2d 871, 1988 N.Y. App. Div. LEXIS 1642 (N.Y. App. Div. 3d Dep't 1988).

Among factors to be considered by Workers' Compensation Board in determining whether employer-employee relationship exists are employer's right to control work, method of payment, which party furnishes necessary equipment, right to discharge, and nature of work; decision may be based on any one or combination of factors, since no one factor is deemed dispositive. Gregg v Randazzo, 216 A.D.2d 747, 628 N.Y.S.2d 434, 1995 N.Y. App. Div. LEXIS 6588 (N.Y. App. Div. 3d Dep't 1995).

29. Determination by other agency or finding by court

In determining who is an "employee" within the meaning of the Workmen's Compensation Law, only decisions under this or similar laws, can be recognized as controlling. In re Rheinwald, 168 A.D. 425, 153 N.Y.S. 598, 1915 N.Y. App. Div. LEXIS 8298 (N.Y. App. Div. 1915), limited, Kackel v Serviss, 180 A.D. 54, 167 N.Y.S. 348, 1917 N.Y. App. Div. LEXIS 8073 (N.Y. App. Div. 1917).

Claimant was properly found not to be "employee" entitled to workers' compensation benefits, despite Unemployment Insurance Appeal Board's finding that he was "employee" for purpose of collecting unemployment insurance benefits, where administrative determination under one statute is not binding on another agency when same question arises under another statute. Simonelli v Adams Bakery Corp., 286 A.D.2d 805, 730 N.Y.S.2d 358, 2001 N.Y. App. Div. LEXIS 8631 (N.Y. App. Div. 3d Dep't 2001).

There is no single test that may be applied to determine whether or not a certain individual is an employee within the meaning of the workmen's compensation law; one may be an employee under this law and not an employee within the meaning of the law of negligence. Miller v Garford Laboratories, Inc., 16 N.Y.S.2d 279, 172 Misc. 567, 1939 N.Y. Misc. LEXIS 2527 (N.Y. Mun. Ct. 1939), aff'd, 262 A.D. 838, 29 N.Y.S.2d 507, 1941 N.Y. App. Div. LEXIS 6155 (N.Y. App. Div. 1941).

Individual can be "employee" for purpose of group insurance, as in CLS Ins § 4235(d), while not be considered "employee" for another purpose, such as for workers' compensation benefits under definition in CLS Work Comp § 2(4). Insurance Department, Opinions of General Counsel, Opinion Number 05-11-17.

30. Necessity of contract of employment

The words "employer" and "employee" as used in the common law understanding of those words denote a contractual relation, not a mere casual voluntary rendition of a slight service or favor rewarded by a gratuity. Ferro v Leopold Sinsheimer Estate, Inc., 256 N.Y. 398, 176 N.E. 817, 256 N.Y. (N.Y.S.) 398, 1931 N.Y. LEXIS 1073 (N.Y. 1931).

A contract of employment is essential, and due process of law requires that such fact be determined judicially under the rules applicable to contracts generally. Evidence of agency must be

clear and explicit. Kackel v Serviss, 180 A.D. 54, 167 N.Y.S. 348, 1917 N.Y. App. Div. LEXIS 8073 (N.Y. App. Div. 1917).

The provisions of the contract of employment are not conclusive so as to preclude an examination to determine whether the actual relationship between the parties is such as to bring them within the relationship of employer and employee. Gordon v New York Life Ins. Co., 275 A.D. 135, 89 N.Y.S.2d 83, 1949 N.Y. App. Div. LEXIS 3726 (N.Y. App. Div. 1949), rev'd, 300 N.Y. 652, 90 N.E.2d 898, 300 N.Y. (N.Y.S.) 652, 1950 N.Y. LEXIS 1446 (N.Y. 1950).

An expert bulldozer operator who, without any specific words of hiring or rate of pay went out to work for his brother, a contractor, on a job for which his brother received pay, is the employee even in the absence of a specific contract of employment. Cecere v Cecere, 276 A.D. 798, 93 N.Y.S.2d 161, 1949 N.Y. App. Div. LEXIS 3356 (N.Y. App. Div. 1949).

31. Owners, stockholders and executives as employees

The principal executive officer of a corporation which employs workmen in carrying on a hazardous occupation is not entitled to the benefits of the Work. Bowne v S. W. Bowne Co., 221 N.Y. 28, 116 N.E. 364, 221 N.Y. (N.Y.S.) 28, 1917 N.Y. LEXIS 1264 (N.Y. 1917).

The words of former § 3 defining "employer" and "employee" were not clear, but they did not justify the conclusion that the distinction between higher executive officers of corporation and its workmen was obliterated. Workman in broad sense is one who works in any department of physical or mental labor, but, in common speech, is one who is employed in manual labor, such as artificer, mechanic or artisan, while employee in broad sense is one who receives salary or wages or other compensation from another, but in common speech is usually applied to clerks, laborers, etc., and not to higher officers of corporation. Bowne v S. W. Bowne Co., 221 N.Y. 28, 116 N.E. 364, 221 N.Y. (N.Y.S.) 28, 1917 N.Y. LEXIS 1264 (N.Y. 1917).

An executive officer of a fraternal organization was properly found to have been an employee when he was injured while washing the walls of the clubroom. He had not excluded himself from compensation coverage. Benz v Knights of St. John Club, 304 N.Y. 802, 109 N.E.2d 343, 304 N.Y. (N.Y.S.) 802, 1952 N.Y. LEXIS 994 (N.Y. 1952).

Although workmen's compensation claimant, as a union member, had been elected by other union members to a position on union executive board, he was not an employee of the union at the time of disabling incident, where he received no compensation or salary for his functions as a board member other than a minimal stipend, ordered by the union's bylaws, as reimbursement for expenses in connection with the board's monthly meetings, where his other services were gratuitous, where there was no employment agreement between him and the union, and where the union did not control his activities or have a right to discharge him. Nallan v Motion Picture Studio Mechanics Union, 40 N.Y.2d 1042, 391 N.Y.S.2d 853, 360 N.E.2d 353, 1976 N.Y. LEXIS 3229 (N.Y. 1976).

The superintendent or manager of a plant injured while in the discharge of his duties, is entitled to an award although he was the treasurer of the company and was paid a salary; it is the character of the employment which determines the right to relief under the workmen's compensation law and not the fact that the claimant is a stockholder and an officer of the employer. Berman v Reliance Metal Spinning & Stamping Co., 187 A.D. 816, 175 N.Y.S. 838, 1919 N.Y. App. Div. LEXIS 6525 (N.Y. App. Div. 1919).

Evidence that mother had inherited a taxi business from her husband and taxi was operated by her son, together with other facts indicative of ownership by the mother, although there was evidence that the operation of the cab was on partnership basis, was sufficient to support the decision of the Workmen's Compensation Board. Piccinetti v Hirsch, 23 A.D.2d 924, 259 N.Y.S.2d 363, 1965 N.Y. App. Div. LEXIS 4290 (N.Y. App. Div. 3d Dep't 1965).

Amendments to CLS Work Comp §§ 2(4) and 54(6), which excluded workers' compensation coverage for employee who is sole shareholder and executive officer of corporate employer unless employer affirmatively elects such coverage, are not applicable to workers' compensation insurance policies issued prior to effective date of amendments; prospective application of amendments was appropriate since amendments restricted right of employee who is sole shareholder and officer by requiring affirmative election for coverage. Lusardi v Lusardi, 167 A.D.2d 3, 570 N.Y.S.2d 376, 1991 N.Y. App. Div. LEXIS 7222 (N.Y. App. Div. 3d Dep't 1991).

Shareholder and participating limousine driver in corporation providing dispatched car service was properly found to be employee of corporation, and thus was eligible for workers' compensation benefits. Savino v UTOG 2-Way Radio, 215 A.D.2d 964, 627 N.Y.S.2d 162, 1995 N.Y. App. Div. LEXIS 5605 (N.Y. App. Div. 3d Dep't 1995).

Sole proprietor of company that employed 3 to 12 workers was "self-employed employer" and not "employee" under workers compensation insurance policy where he had never elected to be included as employee for purposes of policy. Continental Ins. Co. v Estate of Benton, 896 F. Supp. 272, 1995 U.S. Dist. LEXIS 12681 (N.D.N.Y. 1995).

32. Partners, joint ventures and other business associates as employees

A partner is not an employee and entitled to compensation under the Work. Comp. Law though he draws a weekly allowance in payment for general work of the partnership in addition to his share of the profits. Le Clear v Smith, 207 A.D. 71, 202 N.Y.S. 514, 1923 N.Y. App. Div. LEXIS 5899 (N.Y. App. Div. 1923).

A partnership created for the purpose of evading the workmen's compensation law is ineffective to prevent an actual employee from being treated as such for purposes of compensation. Sachkowsky v Gombert, 256 A.D. 1018, 11 N.Y.S.2d 244, 1939 N.Y. App. Div. LEXIS 5903 (N.Y. App. Div. 1939).; People ex rel. Fein v Beatty, 14 N.Y.S.2d 260, 171 Misc. 1004, 1939 N.Y. Misc. LEXIS 2204 (N.Y. Magis. Ct. 1939).

A claimant who worked for the city under a rule (extra statutory) that a recipient of home relief should after receiving such charitable aid be required to work out the relief at the rate of one day for each five dollars received, is an employee of the city and entitled to compensation. Maiceo v Yonkers, 263 A.D. 914, 32 N.Y.S.2d 349, 1942 N.Y. App. Div. LEXIS 7347 (N.Y. App. Div.), aff'd, 288 N.Y. 689, 43 N.E.2d 84, 288 N.Y. (N.Y.S.) 689, 1942 N.Y. LEXIS 1532 (N.Y. 1942).

No relation of employer and employee existed where claimant was an automobile body repairman who entered into an arrangement with the owner of a welding shop with a division of the net profits on a basis of 60–40 percent and where the claimant furnished his own tools, purchased his own materials, had no regular hours and worked when and as he pleased. Geraci v Laloggia, 283 A.D. 1127, 131 N.Y.S.2d 666 (N.Y. App. Div. 1954).

Agreement between a corporation and two individuals to share profits and absorb losses did not affect the employer-employee relationship, where from the record it was clear that the corporation in carrying out its agreement with a general contractor needed additional heavy equipment and agreed with the two individuals to supply it, together with the necessary manpower, under the control and direction of the corporation. It was held that the evidence was abundantly clear that the corporation intended and in fact did retain control, supervision, and direction of the claimant and was in reality his employer. Johnson v Watson Bros. Gravel Bed, Inc., 23 A.D.2d 927, 259 N.Y.S.2d 269, 1965 N.Y. App. Div. LEXIS 4295 (N.Y. App. Div. 3d Dep't 1965).

Granting of defendant taxi company's motion for a summary judgment on the issue of whether its drivers were employees or independent contractors was error where the factors under the common-law "control" test and the "relative nature of the work" test were not analyzed, and the action would be remanded for a full exploration of all facets of the employers' relationship to their drivers. Commissioners of State Ins. Fund v Lindenhurst Green & White Corp., 101 A.D.2d 730, 475 N.Y.S.2d 42, 1984 N.Y. App. Div. LEXIS 18356 (N.Y. App. Div. 1st Dep't 1984).

Workers' Compensation Board's decision that claimant was partner of third party and not his employee was supported by third party's testimony that their business agreement was for their mutual benefit, claimant's testimony that he supplied trucks to be used in enterprise which were thereafter leased to

third party, evidence that claimant and third party jointly rented trailers as needed for their business, claimant's testimony that when other workers were hired to drive, he was also paid, and claimant's testimony that he was not prohibited from working elsewhere. Gregg v Randazzo, 216 A.D.2d 747, 628 N.Y.S.2d 434, 1995 N.Y. App. Div. LEXIS 6588 (N.Y. App. Div. 3d Dep't 1995).

For purposes of recovering workmen's compensation, a person cannot claim to be both employer and employee and a member of an employing partnership cannot be considered an employee of the firm. Graphic Arts Mut. Ins. Co. v Monello, 41 Misc. 2d 943, 246 N.Y.S.2d 645, 1963 N.Y. Misc. LEXIS 1776 (N.Y. Civ. Ct. 1963), rev'd, 44 Misc. 2d 588, 254 N.Y.S.2d 351, 1964 N.Y. Misc. LEXIS 1326 (N.Y. App. Term 1964).

33. Entertainers, performers and the like

A hotel having contracted with a social director for summer entertainment is liable for compensation to a dancer hired by the latter. Fishbane v Congress Operating Corp., 255 A.D. 738, 6 N.Y.S.2d 882, 1938 N.Y. App. Div. LEXIS 4968 (N.Y. App. Div. 1938), aff'd, 280 N.Y. 611, 20 N.E.2d 560, 280 N.Y. (N.Y.S.) 611, 1939 N.Y. LEXIS 1441 (N.Y. 1939).

Entertainers employed by the applicant through a booking agency and receiving lump sum weekly payments through their leader or agent from appellant, where each group of entertainers is employed for a week or possibly two weeks, are not employees of the defendant. In re Lansdowne Service, 263 A.D. 916, 32 N.Y.S.2d 175, 1942 N.Y. App. Div. LEXIS 7354 (N.Y. App. Div. 1942).

An aerialist in a circus is an employee rather than an independent contractor. Torrence v Ringling Bros., Barnum & Bailey, 272 A.D. 986, 73 N.Y.S.2d 19, 1947 N.Y. App. Div. LEXIS 4511 (N.Y. App. Div. 1947).

There is sufficient evidence to sustain an award of compensation, where a ballet dancer was injured while performing in a floor show at her employer's night club and there was evidence of the employer's supervision and control over the claimant as to the time and place of her presentation and in co-operating with its musical accompaniment. Berman v Barone, 275 A.D. 867, 88 N.Y.S.2d 327, 1949 N.Y. App. Div. LEXIS 4829 (N.Y. App. Div. 1949).

A circus clown under some degree of supervision and control is an employee rather than an independent contractor, even though he was described as an independent contractor in the contract under which he was employed. Challis v National Producing Co., 275 A.D. 877, 88 N.Y.S.2d 731, 1949 N.Y. App. Div. LEXIS 4858 (N.Y. App. Div. 1949).

Claimant, a professional model, was employed through employment agency. Agency exercised no control over her place or manner of work. However, her employer, who hired her to pose for pictures, had full direction and control of her services. Finding that claimant was employee sustained. Reyes v Cowles Magazine, Inc., 5 A.D.2d 708, 168 N.Y.S.2d 660, 1957 N.Y. App. Div. LEXIS 3500 (N.Y. App. Div. 3d Dep't 1957), app. denied, 4 N.Y.2d 675, 1958 N.Y. LEXIS 1390 (N.Y. 1958).

Substantial evidence supported determination of Workers' Compensation Board that violinist was employee of opera company where violinist was on payroll of company, usual withholding taxes were deducted from her earnings, company had obligated itself to provide workers' compensation insurance for orchestra members, and company exercised significant control over violinist's hours and manner in which she was to perform. Mintiks v Metropolitan Opera Asso., 153 A.D.2d 133, 550 N.Y.S.2d 143, 1990 N.Y. App. Div. LEXIS 51 (N.Y. App. Div. 3d Dep't), app. dismissed, 75 N.Y.2d 1005, 557 N.Y.S.2d 311, 556 N.E.2d 1118, 1990 N.Y. LEXIS 1008 (N.Y. 1990).

Supreme court properly denied an opera house's motion to dismiss an opera singer's action to recover damages for injuries she sustained when she fell from an elevated platform while performing at the opera house because the singer was not the opera house's "employee"; the singer was stipulated to be an employee of another employer because her services were provided to the opera house pursuant to a per-performance contractor's agreement entered into between her corporation and the opera house. White v Metropolitan Opera Assn., Inc., 148 A.D.3d 13, 44 N.Y.S.3d 412, 2017 N.Y. App. Div. LEXIS 90 (N.Y. App. Div. 1st Dep't 2017), dismissed, in part, 2019 N.Y. Misc. LEXIS 2404 (N.Y. Sup. Ct. May 10, 2019).

Legislative history indicates that the statutory definition of employees was intended to protect the vast majority of performers, who are not "stars," and that the statutory exception was designed to exclude those performers with the clout to negotiate the terms of their own engagements. White v Metropolitan Opera Assn., Inc., 148 A.D.3d 13, 44 N.Y.S.3d 412, 2017 N.Y. App. Div. LEXIS 90 (N.Y. App. Div. 1st Dep't 2017), dismissed, in part, 2019 N.Y. Misc. LEXIS 2404 (N.Y. Sup. Ct. May 10, 2019).

Plaintiff opera singer was an "employee" for purposes of the New York State Workers' Compensation Law; the singer was providing services in the performing arts at an opera house, he was not employed by any other employer covered by the statute, and the legislative history demonstrated that the New York State legislature intended to cover professional musicians and performing artists without regard to whether they were employees or independent contractors. Fouchecourt v Metro. Opera Ass'n, 537 F. Supp. 2d 629, 2008 U.S. Dist. LEXIS 25000 (S.D.N.Y. 2008).

34. Applicant for employment

An employee who had worked at the coal chutes of a railroad in a foreign state and who gave up his employment and was paid in full upon his statement that he desired to work for the railroad in this state, and who, having traveled upon a pass into this state, delayed for two days before applying for work here and was then told to report out the following morning to find out whether there was work for him, is not in the employment of the railroad although he is allowed to have supper and breakfast at the railroad boarding car so that when he is subsequently injured when returning to the boarding car for an unauthorized noonday meal, his injuries are not compensable. Brassard v Delaware & H. Co., 186 A.D. 647, 175 N.Y.S. 359, 1919 N.Y. App. Div. LEXIS 6460 (N.Y. App. Div. 1919).

An applicant for work, claiming to be a machine operator, who was injured while adjusting a machine to do the work assigned to test his qualifications, was not an employee at the time of injury. Lederson v Cassidy & Dorfman, 195 A.D. 613, 187 N.Y.S. 50, 1921 N.Y. App. Div. LEXIS 4804 (N.Y. App. Div. 1921).

Claimant was entitled to an award against the city where he answered the radio appeal of the city for men to shovel snow, was selected from the group of applicants and, in order to obtain a shovel, was taken into a firehouse where he fell through a hole in the floor. Ceo v Rochester, 268 A.D. 601, 52 N.Y.S.2d 98, 1944 N.Y. App. Div. LEXIS 3223 (N.Y. App. Div. 1944).

There is sufficient evidence from which the board might draw the inference of employment where decedent had been given an opportunity to demonstrate whether he could operate a machine known as a digger. Domino v Madison County Constr. Co., 268 A.D. 840, 50 N.Y.S.2d 471, 1944 N.Y. App. Div. LEXIS 3708 (N.Y. App. Div. 1944).

Claimant was properly awarded compensation where, having applied for a job, he was injured while polishing a lamp in a trial test. Smith v Venezian Lamp Co., 5 A.D.2d 12, 168 N.Y.S.2d 764, 1957 N.Y. App. Div. LEXIS 3479 (N.Y. App. Div. 3d Dep't 1957).

An individual who is required to undergo a preemployment physical examination should not be considered an employee within the meaning of the Workers' Compensation Law with respect to injuries arising out of the preemployment physical examination. Rastaetter v Charles S. Wilson Memorial Hospital, 80 A.D.2d 608, 436 N.Y.S.2d 47, 1981 N.Y. App. Div. LEXIS 10296 (N.Y. App. Div. 2d Dep't 1981).

35. Municipal and other government employees

A private of the state militia engaged in active service, is not an employee of the state within the workmen's compensation law. Goldstein v State, 281 N.Y. 396, 24 N.E.2d 97, 281 N.Y. (N.Y.S.) 396, 1939 N.Y. LEXIS 1024 (N.Y. 1939).

A justice of the peace who is also a member of the town board, injured while working on a highway for the town, is not entitled to workmen's compensation inasmuch as his employment on the highway was illegal. Clarke v Russia, 283 N.Y. 272, 28 N.E.2d 833, 283 N.Y. (N.Y.S.) 272, 1940 N.Y. LEXIS 872 (N.Y. 1940).

The contention that the Workmen's Compensation Law covers only those municipal employees actually engaged in hazardous employments and not those whose work is found to be incidental to such an employment, cannot be upheld, because by subd. 4 of this section, all of the employees in the service of an employer whose principal business is that of conducting a hazardous employment are brought within the protection of the statute and by § 3, subd. 1. gr. 17, such protection was extended to employees of a municipal corporation or other subdivision of the state. Leahy v New York, 285 N.Y. 443, 35 N.E.2d 34, 285 N.Y. (N.Y.S.) 443, 1941 N.Y. LEXIS 1483 (N.Y. 1941).

Contra that a town superintendent of highways is not an employee of the town and not within the coverage of the Workmen's Compensation Law, see Youngman v Oneonta, 204 A.D. 96, 198 N.Y.S. 217, 1923 N.Y. App. Div. LEXIS 9424 (N.Y. App. Div.), aff'd, 236 N.Y. 521, 142 N.E. 267, 236 N.Y. (N.Y.S.) 521, 1923 N.Y. LEXIS 939 (N.Y. 1923).

An award to an elected superintendent of highways against a selfinsuring town, a member of a mutual insurance plan, is proper where the latter consented to bring the superintendent within the law. Clemens v Osceola, 257 A.D. 884, 12 N.Y.S.2d 97, 1939 N.Y. App. Div. LEXIS 8283 (N.Y. App. Div. 1939).

An elective town superintendent of highways is an executive officer of a municipal corporation and is covered by the workmen's compensation law. Van Buren v Richmondville, 257 A.D. 1089, 14 N.Y.S.2d 697, 1939 N.Y. App. Div. LEXIS 9209 (N.Y. App. Div. 1939).

A municipal employee is not made eligible for workmen's compensation under this section as the employee of one whose principal business is the carrying on of a hazardous employment merely because an incidental function of the bureau in which she is employed is storage and warehousing described as a hazardous occupation in group 13 of sub 1 of § 3 of the Workmen's Compensation Law. Clyde v New York, 275 A.D. 161, 89 N.Y.S.2d 105, 1949 N.Y. App. Div. LEXIS 3733 (N.Y. App. Div. 1949).

Workers' Compensation Board properly determined that New York City Department of Housing Preservation and Development (HPD) was employer of claimant who was injured in fall while working as superintendent of apartment house, and was thus responsible for payment of his workers' compensation award, where claimant was hired by administrator appointed by court under CLS RPAPL Art 7-A after special proceeding commenced by HPD. Valverde v New York City Dep't of Housing Preservation & Dev., 154 A.D.2d 756, 546 N.Y.S.2d 203, 1989 N.Y. App. Div. LEXIS 12409 (N.Y. App. Div. 3d Dep't 1989), app. dismissed, 77 N.Y.2d 833, 566 N.Y.S.2d 585, 567 N.E.2d 979, 1991 N.Y. LEXIS 87 (N.Y. 1991).

Public assistance recipient, assigned to work for New York City Sanitation Department as condition of continued receipt of such assistance under CLS Soc Serv § 164 and 18 NYCRR 385.12, was employee of city for purposes of Workers' Compensation Law and was thus barred from suing city for injuries sustained in fall from sanitation truck. Allen v New York, 147 Misc. 2d 62, 554 N.Y.S.2d 789, 1990 N.Y. Misc. LEXIS 191 (N.Y. Sup. Ct. 1990).

36. —Firefighters

A uniformed city fireman of New York city is not an "employee" of the city within former § 3, subds. 4 and 5. Krug v New York, 196 A.D. 226, 186 N.Y.S. 727, 1921 N.Y. App. Div. LEXIS 5506 (N.Y. App. Div. 1921), disapproved, Buckley v New York, 56 N.Y.2d 300, 452 N.Y.S.2d 331, 437 N.E.2d 1088, 1982 N.Y. LEXIS 3423 (N.Y. 1982).

Substantial evidence supported Workmen's Compensation Board's finding of employer-employee relationship between fair society and claimant, who was volunteer fireman, and who, inter alia, had been selected as chairman of fair's firemen's day activities and designated as fair society's superintendent for drum corps and music and for fire department activities for which he was paid $60, at time of his heart attack. McMorris v Montgomery County Agricultural Soc., 50 A.D.2d 644, 374 N.Y.S.2d 440, 1975 N.Y. App. Div. LEXIS 12466 (N.Y. App. Div. 3d Dep't 1975).

Workers' Compensation Board properly determined that claimant, as 16-year-old member of junior corps of town fire department, became active member of department and was entitled to benefits provided by Volunteer Firefighters' Benefit Law following injury incurred while operating his vehicle in response to fire alarm, since members of junior corps were required to respond to alarms once school day was completed, they were under direction and control of chief of department, and their duties at scene were consistent with those of active firefighter save for certain limitations such as not entering building that is scene of fire; furthermore, given these facts, junior corps is not youth program and thus its members are not excluded from benefits by operation of CLS Gen Mun § 204-b. Elander v Pleasantville Fire Dist., 124 A.D.2d 388, 507 N.Y.S.2d 334, 1986 N.Y. App. Div. LEXIS 61399 (N.Y. App. Div. 3d Dep't 1986), app. denied, 69 N.Y.2d 608, 516 N.Y.S.2d 1023, 509 N.E.2d 358, 1987 N.Y. LEXIS 16376 (N.Y. 1987).

A citizen summoned by a state fire warden to fight a forest fire and who sustained injuries while riding to the fire in the warden's automobile is an employee since in this situation the Conservation Law creates by operation of law a contract of employment. Jones v State, 50 N.Y.S.2d 877, 183 Misc. 239, 1944 N.Y. Misc. LEXIS 2430 (N.Y. Ct. Cl. 1944), aff'd, 269 A.D. 920, 57 N.Y.S.2d 582, 1945 N.Y. App. Div. LEXIS 4473 (N.Y. App. Div. 1945).

37. Minors

A boy thirteen or fourteen years old who runs occasional errands for the superintendent of a loft building for which he is given small gratuities out of the superintendent's own money is not an employee of the superintendent's employer. Ferro v Leopold Sinsheimer Estate, Inc., 256 N.Y. 398, 176 N.E. 817, 256 N.Y. (N.Y.S.) 398, 1931 N.Y. LEXIS 1073 (N.Y. 1931).

A school boy engaged by the N. Y. A., injured while working on the school building is not an employee of the Board of Education, but rather is an employee of the N. Y. A. Sweet v Board of Education, 290 N.Y. 73, 48 N.E.2d 266, 290 N.Y. (N.Y.S.) 73, 1943 N.Y. LEXIS 1140 (N.Y. 1943).

A six year old child whom the mother brought with her, when picking peas for the employer and who occasionally and for brief periods picked peas and put them in his mother's basket is not an employee. Craciola v Lewis, 233 A.D. 437, 253 N.Y.S. 752, 1931 N.Y. App. Div. LEXIS 11319 (N.Y. App. Div. 1931).

A ten year old child who helped his mother pick beans for a cannery and who incurred an injury while being transported in a truck to another field is an employee for purposes of compensation. Moreno v Halstead Canning Co., 258 A.D. 832, 15 N.Y.S.2d 765, 1939 N.Y. App. Div. LEXIS 7150 (N.Y. App. Div. 1939), reh'g denied, 258 A.D. 1002, 17 N.Y.S.2d 859, 1940 N.Y. App. Div. LEXIS 8609 (N.Y. App. Div. 1940).

Finding that claimant, who was injured while helping launch large raft at YMCA summer camp, was YMCA employee and that her injury was accident within meaning of Workers' Compensation Law, was supported by evidence that she received reduction in camp tuition and free room and board in exchange for participating in counselor aide training program, her duties included helping counselors and supervising campers with whom she shared cabin, she was required to obtain working papers, YMCA provided her with all necessary equipment, and YMCA retained right to ask her to leave camp if her conduct became undesirable. Long v Schenectady County YMCA, 227 A.D.2d 723, 642 N.Y.S.2d 96, 1996 N.Y. App. Div. LEXIS 5035 (N.Y. App. Div. 3d Dep't 1996).

38. Volunteer workers

Claimant, who voluntarily interjected himself into dangerous situation and began assisting fire fighters without any request on their part that he do so and only thereafter was given instructions by fire officials at scene and subsequently fell from roof and was injured, was purely a volunteer and not an employee entitled to workmen's compensation benefits, particularly where claimant had frequently in past come to aid of fire fighters without expectation or receipt of payment and fire chief on three occasions had ordered all nonmembers of department to leave fire limits and not to assist. Glamm v Amsterdam, Fire Dep't, 54 A.D.2d 996, 388 N.Y.S.2d 55, 1976 N.Y. App. Div. LEXIS 14956 (N.Y. App. Div. 3d Dep't 1976), aff'd, 42 N.Y.2d 1026, 398 N.Y.S.2d 1011, 369 N.E.2d 10, 1977 N.Y. LEXIS 2364 (N.Y. 1977).

Testimony of 15-year-old horse groom was sufficient to establish employer-employee relationship and to support award of workers' compensation following injury caused by stable owner's horse, despite owner's denial that he ever paid groom for services and his contention that groom was volunteer learning trade, where groom testified that he was initially given room and board for his work, he later received salary during racing season, he either lived with owner or was transported to stable by owner, he worked 4 to 6 hours per day, and he used owner's equipment under his direction. Le Myre v La Belle, 127 A.D.2d 955, 512 N.Y.S.2d 560, 1987 N.Y. App. Div. LEXIS 53419 (N.Y. App. Div. 3d Dep't 1987).

Fact that coverage was never contested in New York Workers' Compensation Board hearings did not resolve the question of whether a claimant was a volunteer, and thus eligible to receive an average weekly wage based on his engineering practice, or an employee of the New York State Olympic Regional Development Authority, and therefore only entitled to the actual value of the remuneration he received as a member of the ski patrol, N.Y. Workers' Comp. Law §§ 2(9), 14(6) (or, if not paid, the N.Y. Workers' Comp. Law § 15(6) statutory minimum. Fina v N.Y. State Olympic Reg'l Dev. Auth., 7 A.D.3d 939, 777 N.Y.S.2d 530, 2004 N.Y. App. Div. LEXIS 7079 (N.Y. App. Div. 3d Dep't 2004).

39. Assistants engaged by employee or agent or employer

An independent contractor on a construction job, requested by a fellow contractor to assist him with the use of a derrick, is not the employee of his fellow contractor so as to permit him to claim workmen's compensation. Mandatto v Hudson Shoring Co., 229 N.Y. 624, 129 N.E. 933, 229 N.Y. (N.Y.S.) 624, 1920 N.Y. LEXIS 828 (N.Y. 1920).

A claimant is the employee of the owner of an apartment house where the superintendent, who was requested by a tenant to take some trunks down to the cellar called upon the claimant to help him perform this work. Mosley v Estate of Moritz H. Rosenstein, Inc., 264 N.Y. 497, 191 N.E. 533, 264 N.Y. (N.Y.S.) 497, 1934 N.Y. LEXIS 1541 (N.Y. 1934).

A corporation employer is liable to a niece helping her janitor uncle by running the elevator of the plant. Russell v 231 Lexington Ave. Corp., 266 N.Y. 391, 195 N.E. 23, 266 N.Y. (N.Y.S.) 391, 1935 N.Y. LEXIS 1387 (N.Y. 1935).

A city having contracted with the owner of a team of horses to collect ashes at a fixed daily sum is liable for compensation to the latter's employee injured while substituting for him. Meyers v Rochester, 253 A.D. 852, 1 N.Y.S.2d 488, 1938 N.Y. App. Div. LEXIS 8898 (N.Y. App. Div. 1938).

A claimant employed by a branch office of a manufacturing concern to canvass a certain district, the branch office manager being an employee of the concern and the claimant being paid directly from the head office, is an employee of the concern. In re Doyle, 263 A.D. 1036, 33 N.Y.S.2d 468, 1942 N.Y. App. Div. LEXIS 7972 (N.Y. App. Div. 1942).

Where an employer engaged a carpenter and authorized him to obtain a helper, the latter is the employee of the employer rather than the carpenter where the latter was given detailed instructions from day to day as to the work to be done and on different occasions was assigned to various other jobs in addition to that for which he was originally engaged. Okun v Southern Bedding Accessories, Inc., 266 A.D. 929, 43 N.Y.S.2d 875, 1943 N.Y. App. Div. LEXIS 5267 (N.Y. App. Div. 1943).

Claimant was an employee of defendant where defendant's lawyer-agent authorized another person to take charge of and operate a cab for the defendant and claimant was hired by that other person to drive the cab. Also there was proof that defendant filed federal forms showing wages and deductions made for claimant. Moskowitz v Granata, 9 A.D.2d 310, 193 N.Y.S.2d 744, 1959 N.Y. App. Div. LEXIS 5597 (N.Y. App. Div. 3d Dep't 1959), reh'g denied, 10 A.D.2d 776, 200 N.Y.S.2d 366, 1960 N.Y. App. Div. LEXIS 11016 (N.Y. App. Div. 3d Dep't 1960), app. denied, 8 N.Y.2d 705, 1960 N.Y. LEXIS 1759 (N.Y. 1960).

Where the compensation claimant, at the time of injury, was apparently exchanging services with a building janitor employed by respondents under a private agreement between the two janitors, and there was sufficient in the record to sustain a finding that he was not an employee of respondents, on the basis of which denial of an award could be affirmed, denial of compensation was nevertheless reversed because of a statement by the board found in the record, considered to be without foundation, as to the existence of such an arrangement between the two building superintendents. Lawn v Sheran, 11 A.D.2d 562, 199 N.Y.S.2d 739, 1960 N.Y. App. Div. LEXIS 10195 (N.Y. App. Div. 3d Dep't 1960).

There was sufficient evidence to sustain a board finding that claimant was not an employee of a certain sales company but merely in the employ of its manager as a domestic worker hired as substitute for his regular housekeeper, notwithstanding claimant's testimony that she sometimes answered office calls and attended to certain other details of company business. Moore v Wassaic Sales, 19 A.D.2d 565, 239 N.Y.S.2d 745, 1963 N.Y. App. Div. LEXIS 3815 (N.Y. App. Div. 3d Dep't 1963).

Where the superintendent of premises for his own convenience, employs his son as a substitute for him in the performance of his duties, the son is not an emergency employee of his father's employer, and is not relegated to relief under the workmen's compensation law, where he is injured while performing such duties. Paul v Mosberg Realty Corp., 37 N.Y.S.2d 766, 1942 N.Y. Misc. LEXIS 2096 (N.Y. City Ct. 1942).

Where an employer charges his employee with the performance of a certain duty and the force available therefor is not sufficient, or an emergency occurs which requires assistants the employee is impliedly authorized to call on others to assist him and they thereby become employees of the original employer. Paul v Mosberg Realty Corp., 37 N.Y.S.2d 766, 1942 N.Y. Misc. LEXIS 2096 (N.Y. City Ct. 1942).

40. Persons performing odd jobs or incidental services

An inmate of a charitable institution under no duty to work, but permitted to do odd jobs for small gratuities is not an employee within the meaning of the workmen's compensation law. Seymour v Odd Fellows' Home, 267 N.Y. 354, 196 N.E. 287, 267 N.Y. (N.Y.S.) 354, 1935 N.Y. LEXIS 1224 (N.Y. 1935).

An inmate of the industrial home of the salvation army, employed at a compensation of three dollars per week, besides his board and lodging, and assigned to light work, which included sweeping, making beds and general porter work, and serving meals, is covered by subd. Hall v Salvation Army, 236 A.D. 199, 258 N.Y.S. 269, 1932 N.Y. App. Div. LEXIS 5931 (N.Y. App. Div. 1932), aff'd, 261 N.Y. 110, 184 N.E. 691, 261 N.Y. (N.Y.S.) 110, 1933 N.Y. LEXIS 1262 (N.Y. 1933).

Evidence that a handyman brought up bottles, tapped beer, helped in the kitchen, waited on tables and made himself generally useful, for which he received board, lodging, clothing and occasional money, justified a finding that an employer-employee relation existed. Goetz v Bleimeister Grill, 278 A.D. 882, 104 N.Y.S.2d 449, 1951 N.Y. App. Div. LEXIS 5048 (N.Y. App. Div. 1951).

Purposes of N.Y. Workers' Comp. Law §§ 2(4), (5), and 50(8) and N.Y. Rac. Pari-Mut. Wag. & Breed. Law § 213-a, were served by requiring coverage by the New York Jockey Injury Compensation Fund of an exercise person, who was permitted full access to racing facilities based on his expired license, was entitled to be licensed, and was required to be licensed; the exercise person had attempted to apply for a license, but the licensing processes had been delayed due to a software problem. Adames v N.Y. Jockey Injury Comp. Fund, Inc., 15 A.D.3d 696, 788 N.Y.S.2d 726, 2005 N.Y. App. Div. LEXIS 909 (N.Y. App. Div. 3d Dep't 2005).

41. Watchmen, guards and the like

One merely engaged as a watchman and in no way exposed to hazards of his employer's business was not an "employee" within the contemplation of former § 3, subd. 4. Kehoe v Consolidated Tel. & Electrical Subway Co., 176 A.D. 84, 162 N.Y.S. 481, 1916 N.Y. App. Div. LEXIS 9009 (N.Y. App. Div. 1916).

A night watchman, whose duties were to guard the premises against fire or depredations, to keep furnaces supplied with coal and to pour glue into vats, is an "employee" within the meaning of former § 3, sub 4, and when assaulted and injured while endeavoring to protect the plant, is entitled to an award. Hellman v Manning Sand Paper Co., 176 A.D. 127, 162 N.Y.S. 335, 1916 N.Y.

App. Div. LEXIS 8978 (N.Y. App. Div. 1916), aff'd, 221 N.Y. 492, 116 N.E. 1051, 221 N.Y. (N.Y.S.) 492, 1917 N.Y. LEXIS 1339 (N.Y. 1917).

42. Persons performing part time or short term services

School bus operators employed by an operator of a garage and gasoline station who employed drivers on part-time basis to drive busses transporting school children pursuant to an agreement with a public school district were employees subject to unemployment insurance even though they worked only part-time and most of them had other full time jobs or were self-employed. In re Stotz, 281 A.D. 726, 117 N.Y.S.2d 767, 1952 N.Y. App. Div. LEXIS 3358 (N.Y. App. Div. 1952).

Existence of an employer-employee relationship could be found from the hiring of claimant to "do a couple of days work" as paper hanger at $1.25 per roll of paper, the employer supplying the paste and paper and a ladder and claimant supplying his own brush and scissors. Alpern v Sunny Croft Colony, Inc., 12 A.D.2d 828, 209 N.Y.S.2d 341, 1961 N.Y. App. Div. LEXIS 13373 (N.Y. App. Div. 3d Dep't 1961).

The evidence was sufficient to sustain a finding of employer-employee relationship where it appeared that claimant, a carpenter, had at previous times worked for the employer, a building contractor, off and on over a three-year period for $18 per day and, at the time of the accident, was employed for two or three days repairing some arches and floors when the employer requested him to install a cabinet, to be obtained from a certain factory, claimant being authorized to hire a helper in handling the cabinet. Kaplan v Yudin, 12 A.D.2d 828, 209 N.Y.S.2d 342, 1961 N.Y. App. Div. LEXIS 13372 (N.Y. App. Div. 3d Dep't), app. denied, 9 N.Y.2d 611, 1961 N.Y. LEXIS 1683 (N.Y. 1961).

Defendant, general contractor, was properly granted summary judgment in action under CLS Labor § 240(1) on ground that plaintiff was defendant's special employee and that action was barred by exclusive remedy provisions of CLS Workers' Compensation Law where plaintiff was general employee of temporary agency that had placed him with defendant, he reported to defendant's superintendent each day at construction site, superintendent directed, supervised, and controlled plaintiff's work, plaintiff's work was for benefit of defendant, temporary agency had no representative or employee present at work site and had no right to direct, supervise, or control plaintiff's work, and defendant had power to fire plaintiff and, except for plaintiff's personal tools, provided him with equipment he used. Adams v North-Star Constr. Co., 249 A.D.2d 1001, 672 N.Y.S.2d 166, 1998 N.Y. App. Div. LEXIS 5179 (N.Y. App. Div. 4th Dep't 1998).

Employer-employee relationship existed, for workers' compensation purposes, between summer camp and its 15-year-old junior lifeguard where they entered into written contract for him to be paid $125 for summer in addition to food, lodging, transportation, and laundry services, he was listed in camp directory as member of waterfront staff and shared room with another staff member, he was supervised by head lifeguard (his uncle) and had responsibility for cleaning up waterfront and stacking and putting away lifejackets and equipment, and occasionally he was supervised while standing in shallow water with pole to assist persons who needed help. Kobre v Camp Mogen Avraham, 255 A.D.2d 636, 679 N.Y.S.2d 753, 1998 N.Y. App. Div. LEXIS 11684 (N.Y. App. Div. 3d Dep't 1998).

Claimant injured while cutting firewood was not full-time employee entitled to workers' compensation benefits where alleged employer overcame presumption of compensability by testifying that claimant worked for him only occasionally as laborer, not cutter, and that on day of accident claimant asked him for free cords of wood and loan of chainsaw so that he could cut wood and sell it for his own profit, and claimant produced no pay stubs or tax forms to corroborate his claim of full-time employment. Walk v Glomann, 263 A.D.2d 757, 694 N.Y.S.2d 196, 1999 N.Y. App. Div. LEXIS 8011 (N.Y. App. Div. 3d Dep't 1999).

43. Students, interns and the like

A hospital interne is an employee of the hospital under whose orders he acts, although he receives only lodging, board and uniforms for his services, and is entitled to compensation where he is injured in the performance of an autopsy in the ordinary course of administrative routine. Bernstein v Beth Israel Hospital, 236 N.Y. 268, 140 N.E. 694, 236 N.Y. (N.Y.S.) 268, 1923 N.Y. LEXIS 881 (N.Y. 1923).

Employer-employee relationship existed when claimant, student at academy operated by employer, was injured while working on employer's farm where claimant, while working on farm, took orders from his supervisor who, in turn, had right to fire him, employer furnished necessary equipment, claimant kept track of his hours by punching time clock, he earned hourly wage that was paid as credit against his tuition, and he was eligible to receive cash bonus if he worked in excess of specified number of hours. La Celle v New York Conf. of Seventh-Day Adventists, 235 A.D.2d 694, 652 N.Y.S.2d 352, 1997 N.Y. App. Div. LEXIS 90 (N.Y. App. Div. 3d Dep't), app. dismissed, 89 N.Y.2d 1085, 659 N.Y.S.2d 859, 681 N.E.2d 1306, 1997 N.Y. LEXIS 795 (N.Y. 1997), app. denied, 96 N.Y.2d 713, 729 N.Y.S.2d 440, 754 N.E.2d 200, 2001 N.Y. LEXIS 1402 (N.Y. 2001).

Claimant who continued to work part time as sales clerk while attending college was sufficiently connected to labor market to justify award of workers' compensation benefits. Prior v Wegmans Food Mkts., 246 A.D.2d 951, 667 N.Y.S.2d 852, 1998 N.Y. App. Div. LEXIS 736 (N.Y. App. Div. 3d Dep't 1998).

Part-time sales clerk's decision to remain in college rather than accept offer of full-time employment was reasonable and not tantamount to voluntary withdrawal from labor market. Prior v Wegmans Food Mkts., 246 A.D.2d 951, 667 N.Y.S.2d 852, 1998 N.Y. App. Div. LEXIS 736 (N.Y. App. Div. 3d Dep't 1998).

Workers' Compensation Board properly found that employer-employee relationship existed between claimant, doctoral candidate, and university, where claimant received full tuition waiver, biweekly stipend from which federal and state income taxes were withheld, and free health insurance coverage in exchange for her work as research assistant, and she testified that she performed her duties using equipment provided by university for at least 8 hours per day, including many weekends, under auspices of department faculty member who controlled type of experiments that claimant performed and could recommend that claimant be transferred from her position for unsatisfactory performance. Semus v University of Rochester, 272 A.D.2d 836, 710 N.Y.S.2d 128, 2000 N.Y. App. Div. LEXIS 5948 (N.Y. App. Div. 3d Dep't 2000).

When a student was injured while acting as a student teacher at one of a school district's schools, and sued the district for personal injuries, the law was not so clear, under N.Y. Workers' Comp. Law §§ 2(4), 3(1) (Group 20-a) (Group 22), as to allow the trial court to determine, as a matter of law, that the student's suit was barred by workers' compensation immunity, under N.Y. Workers' Comp. Law §§ 11, 29(6), and such a decision should have awaited a determination by the Workers' Compensation Board. Santigate v Linsalata, 304 A.D.2d 639, 759 N.Y.S.2d 100, 2003 N.Y. App. Div. LEXIS 3976 (N.Y. App. Div. 2d Dep't 2003).

Students of beauty culture during the period in which they practice upon the public, their customers paying a fee lower than that customarily charged by beauticians, are employees of the school within the meaning of this section. Miller v Garford Laboratories, Inc., 16 N.Y.S.2d 279, 172 Misc. 567, 1939 N.Y. Misc. LEXIS 2527 (N.Y. Mun. Ct. 1939), aff'd, 262 A.D. 838, 29 N.Y.S.2d 507, 1941 N.Y. App. Div. LEXIS 6155 (N.Y. App. Div. 1941).

44. Persons subject to dual direction or control

A football referee was not an employee of the schools participating in the football game where he had been assigned as a referee by an association of football officials which worked with the association of schools. The claimant brought his own equipment and was paid an agreed fee out of gate receipts. The schools exercise no control over the manner in which the claimant performed his work and had no right to discharge him. O'Neil v Blasdell High School, 1 A.D.2d 854, 148 N.Y.S.2d 792, 1956 N.Y. App. Div. LEXIS 6289 (N.Y. App. Div. 3d Dep't 1956).

There was substantial evidence to sustain a finding that the claimant, injured when she fell into the water from a diving board in a private lake on the hotel grounds was employed in connection with the operation of the hotel where it was found that she was

employed as a governess to care for the children of the guests of the hotel as well as the children of the hotel owner. Moon v Greenberg, 4 A.D.2d 903, 166 N.Y.S.2d 875, 1957 N.Y. App. Div. LEXIS 4293 (N.Y. App. Div. 3d Dep't 1957).

Where a truck driver was killed while driving a truck leased by a truck line which held an Interstate Commerce Commission permit, but which was individually owned by another who was the general employer of the driver, there was substantial evidence to support a finding that the driver was a special employee of the truck line as well as an employee of the lessor at the time of the fatal accident and to sustain charging an award of death benefits against both employers and their respective carriers. Donoghue v De Carolis, 15 A.D.2d 602, 222 N.Y.S.2d 398, 1961 N.Y. App. Div. LEXIS 6978 (N.Y. App. Div. 3d Dep't 1961).

There was sufficient evidence to sustain a finding that claimant was an employee of appellant hospital where she sought and obtained registration with the hospital as an approved "patient-sitter," subject to call by the hospital when such work was available, paid on a per-hour basis either by the patient or the hospital while attending a patient, and the hospital exercised control over her activities and apparently reserved the right to terminate her employment by cancellation of registration. O'Brien v Oneida City Hospital, 15 A.D.2d 705, 223 N.Y.S.2d 730, 1962 N.Y. App. Div. LEXIS 12029 (N.Y. App. Div. 3d Dep't 1962).

The Board could reasonably find that an injured stagehand was an employee of the theatre corporation, which was solely responsible for compensation payments, and not a joint or likewise a special employee of a producer who had leased the theatre for a term to begin a week later, and whose special equipment was being installed and placed by arrangement with the theatre owner, the injured workman having been hired by the theatre corporation to assist in this process. Donaldson v Select Theatre Corp., 16 A.D.2d 843, 227 N.Y.S.2d 501, 1962 N.Y. App. Div. LEXIS 9969 (N.Y. App. Div. 3d Dep't 1962).

With respect to whether a heart attack suffered by a taxi drive arose out of and in course of his employment, where it occurred while he was helping a woman passenger who had flagged him down move from one apartment to another, involving a taxi fare charge of 65 cents but various trips up and down flights of stairs helping her to move articles of furniture and equipment for which she paid him an additional four dollars gratuity, a board finding that he was not in employ of the taxi company while engaged in this moving because he had left his vehicle unattended in violation of police regulations could not be sustained on the basis of evidence submitted. Brandmark v Frenat Service Corp., 17 A.D.2d 878, 233 N.Y.S.2d 289, 1962 N.Y. App. Div. LEXIS 7311 (N.Y. App. Div. 3d Dep't 1962).

A workman was found to be an employee of a dairy company at the time of his death where, after being temporarily relieved from his regular delivery route, he was directed by his employer to substitute for another deliveryman whose business was licensed by the employer, but who owned his own truck and serviced his own customers. Campos v Imperial Farms, 39 A.D.2d 997, 333 N.Y.S.2d 579, 1972 N.Y. App. Div. LEXIS 4148 (N.Y. App. Div. 3d Dep't 1972).

Where cab company controlled the activities and the cab company's business activity was directly benefitted by the work of the cab driver, driver was employee of the cab company even though he was driving a cab of an independent cab operator who leased space and hired services from the cab company. King v Kelley, 41 A.D.2d 798, 341 N.Y.S.2d 670, 1973 N.Y. App. Div. LEXIS 4874 (N.Y. App. Div. 3d Dep't 1973).

Workers' Compensation Board's finding of dual and similar employment between injured worker's regular full-time job as legal secretary and office manager and part-time job as chairperson of election inspectors at polling place at which she was injured was sufficiently supported by board's conclusion that her duties in both positions were clerical in nature, involving tallying, filing and record keeping, despite full-time employer's contention that worker's duties as legal secretary involved great deal more skill and responsibility than her purely clerical duties as election inspector. Ribar v County of Suffolk, 125 A.D.2d 801, 510 N.Y.S.2d 25, 1986 N.Y. App. Div. LEXIS 63012 (N.Y. App. Div. 3d Dep't 1986).

Claimant was properly determined to be "special employee" of cake delivery service by Workers' Compensation Board where delivery service, not franchise owner of service's retail store which supplied cakes and delivery people on call to service, was responsible for payment of costs of cake delivered, and delivery was essential element of service's business. Vinciguerra v Carvel Corp., 127 A.D.2d 915, 512 N.Y.S.2d 274, 1987 N.Y. App. Div. LEXIS 43412 (N.Y. App. Div. 3d Dep't 1987).

45. Effect of time of injury on status as employee

A traveling salesman is injured in the course of his employment where he was injured while returning from Bridgeport to his home in Brooklyn and there is evidence that he went to Bridgeport intending to meet a customer. Fleur v Pilgrim Knitwear, Inc., 262 A.D. 787, 27 N.Y.S.2d 347, 1941 N.Y. App. Div. LEXIS 5855 (N.Y. App. Div. 1941).

A casual porter is still an employee at the time of an accident even though it occurred after his regular hours of employment had terminated, where he often performed some services after hours and received remuneration therefor by way of refreshments. Boehm v D. A. Sokol Hall Holding Corp., 274 A.D. 954, 83 N.Y.S.2d 729, 1948 N.Y. App. Div. LEXIS 4235 (N.Y. App. Div. 1948).

Where an employee is notified that his services are to be terminated at midnight the fact that an injury occurred some time after that hour when he was returning to his employment and on the employer's premises does not prevent an award of compensation where it appears that it was a common and well known practice for employees on the night shift to leave the premises during working hours on personal errands. Mesmer v Associated Colleges of Upper New York State, 277 A.D. 1082, 100 N.Y.S.2d 803, 1950 N.Y. App. Div. LEXIS 4545 (N.Y. App. Div. 1950).

A death award was affirmed where decedent, a night watchman, was seen sitting alone in the basement of an unfinished building on employer's premises one and one-half hours after the end of his tour of duty and was found a few minutes later dead of a fractured skull. Proof that decedent was intoxicated did not foreclose possibility of another proximate cause of death. Malloy v Cauldwell Wingate Co., 284 A.D. 798, 135 N.Y.S.2d 445, 1954 N.Y. App. Div. LEXIS 3502 (N.Y. App. Div. 1954), aff'd, 308 N.Y. 1031, 127 N.E.2d 867, 308 N.Y. (N.Y.S.) 1031, 1955 N.Y. LEXIS 1257 (N.Y. 1955).

The evidence would sustain a finding that decedent's fatal accident arose out of and in course of his employment as a salesman and collector, rather than by reason of his purely personal action in driving his car home from work as a policeman employed by New York City, where it appeared that his police duties consisted in serving as guard at a dam outside the city limits on a 4:00 P.M. to midnight shift, but he was likewise employed by respondent on a commission basis to sell household articles and jewelry in his spare time at which work he was successful enough to make approximately $7,900 a year using his own car and operating from his own home, and the fatal accident occurred at 3:30 A.M. while he was driving toward home after making a business call. Carney v Senak New York Corp., 17 A.D.2d 170, 233 N.Y.S.2d 316, 1962 N.Y. App. Div. LEXIS 7280 (N.Y. App. Div. 3d Dep't 1962).

A board decision that claimant was not an employee of respondent corporation at time he was injured while doing some electric work in the private residence of the corporation's president could not be based on its finding that he was performing a personal task at the time of injury, as it did not necessarily follow that employment status terminated when the corporation's president directed claimant to leave his work at the plant and take care of wiring the president's home, and the case must be remitted to the board for adequate findings. Carroll v Trans-Dyne Corp., 22 A.D.2d 739, 253 N.Y.S.2d 449, 1964 N.Y. App. Div. LEXIS 2934 (N.Y. App. Div. 3d Dep't 1964).

Workers' compensation claimant was still employee of hotel, at which she was both floor supervisor and union delegate, when she was injured on January 26 where her employee card reflected termination date of January 31, her time cards and payroll records were maintained through January 28, she received paycheck dated February 1, and collective bargaining agreement

provided that terminated union delegate would remain in employment status until date of hearing held to determine whether termination would be upheld. Wint v Hotel Waldorf Astoria, 251 A.D.2d 696, 674 N.Y.S.2d 146, 1998 N.Y. App. Div. LEXIS 6458 (N.Y. App. Div. 3d Dep't 1998).

Pursuant to N.Y. Workers' Comp. Law §§ 2(3), (4), (5) and 50(8) and N.Y. Rac. Pari-Mut. Wag. & Breed. Law § 213-a, an exercise rider who injured his pelvis while working out a horse was a covered employee of the New York Jockey Injury Compensation Fund even though his license as an exercise rider had expired prior to the accident. Matter of McKenzie v New York Jockey Injury Compensation Fund, 27 A.D.3d 1003, 811 N.Y.S.2d 226, 2006 N.Y. App. Div. LEXIS 3553 (N.Y. App. Div. 3d Dep't 2006).

46. Independent contractors, generally

An independent contractor may abandon his legal position temporarily and become an employee, and where he is injured in the course of such latter employment, he may receive compensation under this section. Powley v Vivian & Co., 169 A.D. 170, 154 N.Y.S. 426, 1915 N.Y. App. Div. LEXIS 9000 (N.Y. App. Div. 1915).

The common law definition of an independent contractor applies to cases arising under this act. Duffy v Kedenburg, 278 A.D. 31, 103 N.Y.S.2d 457, 1951 N.Y. App. Div. LEXIS 3729 (N.Y. App. Div. 1951).

In compensation cases, the principal factors to be considered in determining relationship as that of employee or independent contractor, are right to control, method of payment, furnishing of equipment, right to discharge, and the so-called relative nature of the work test. Grigoli v Nito, 11 A.D.2d 581, 200 N.Y.S.2d 511, 1960 N.Y. App. Div. LEXIS 9932 (N.Y. App. Div. 3d Dep't 1960).

It is not fatal to the employer-employee relationship that the alleged employer withheld no income tax or social security payments from monies paid claimant and that some, and perhaps most, of the services rendered by claimant were professional in nature, she being a registered nurse. Kupfer v Du Pont, 19 A.D.2d 923, 243 N.Y.S.2d 863, 1963 N.Y. App. Div. LEXIS 2975 (N.Y. App. Div. 3d Dep't 1963).

Evidence that employee was paid on an hourly basis in the same manner as other employees, that he utilized employer's lumber and tools and that his work assignments and activities while on the job were directed and controlled by the employer, established an employer-employee relationship despite the fact that no withholding or Social Security were taken from claimant's pay, no fringe benefits were accorded him, no set working hours were prescribed, and his tax returns indicated that he was "self-employed." Worth v C. T. Hubbell Lumber Corp., 29 A.D.2d 1025, 289 N.Y.S.2d 519, 1968 N.Y. App. Div. LEXIS 4152 (N.Y. App. Div. 3d Dep't 1968).

Evidence in proceedings on petitions for workmen's compensation benefits was sufficient to support conclusions of Workmen's Compensation Board that limousine corporation, which granted limousine operators renewable franchise for term of two years in consideration of payment of nonrefundable sum of money, and which agreed to use its best efforts to provide 250 hours of business to operator each month, to handle reservations and dispatching, to provide uniforms, operations manuals, and in-service training, and to assist operators in obtaining and maintaining suitable limousines, exercised sufficient control over limousine operators to establish employer-employee relationship. Wittenstein v Fugazy Continental Corp., 59 A.D.2d 249, 399 N.Y.S.2d 314, 1977 N.Y. App. Div. LEXIS 13554 (N.Y. App. Div. 3d Dep't 1977), app. denied, 43 N.Y.2d 648, 403 N.Y.S.2d 1026, 1978 N.Y. LEXIS 2614 (N.Y. 1978), app. denied, 43 N.Y.2d 647, 1978 N.Y. LEXIS 2610 (N.Y. 1978), app. denied, 43 N.Y.2d 647, 1978 N.Y. LEXIS 2594 (N.Y. 1978).

While principal factors to be considered by Workmen's Compensation Board in resolving factual issue of whether employer-employee relationship exists are right to control, method of payment, who furnishes equipment, right to discharge, and so-called "relative nature of the work" test, no single factor is conclusive and result can often turn on basis of any one or combination of the factors. Wittenstein v Fugazy Continental Corp., 59 A.D.2d 249, 399 N.Y.S.2d 314, 1977 N.Y. App. Div. LEXIS 13554 (N.Y. App. Div. 3d Dep't 1977), app. denied, 43 N.Y.2d 648, 403 N.Y.S.2d 1026, 1978 N.Y. LEXIS 2614 (N.Y. 1978), app. denied, 43 N.Y.2d 647, 1978 N.Y. LEXIS 2610 (N.Y. 1978), app. denied, 43 N.Y.2d 647, 1978 N.Y. LEXIS 2594 (N.Y. 1978).

In workmen's compensation cases, the employment relation may be grounded upon proof of any one factor, such as right to control, method of payment, furnishing of equipment, right to discharge and the so-called relative nature of the work test; on the other hand, the status of independent contractor is established only by the convincing evidence that many indicia exist. Commissioners of State Ins. Fund v Kaplan, 89 Misc. 2d 610, 392 N.Y.S.2d 971, 1977 N.Y. Misc. LEXIS 1903 (N.Y. Civ. Ct. 1977).

The "relative nature of the work" test, in respect to determining whether a relationship is one of employment or independent contract, consists of an analysis of the facts to establish the character of the person's work, the extent to which the worker is engaged in a separate calling, how continuous or intermittent the work is, whether it is temporary or permanent, the importance of it to the employer's business, and the character of the relation to determine whether the particular employment should carry its own accident burden. Commissioners of State Ins. Fund v Kaplan, 89 Misc. 2d 610, 392 N.Y.S.2d 971, 1977 N.Y. Misc. LEXIS 1903 (N.Y. Civ. Ct. 1977).

47. —Control or supervision test generally

The fact that an independent contractor tolerates interference by the alleged employer with the conduct of the work and the labor provided by the contractor, does not transform his status to that of an employee. Dutcher v Victoria Paper Mills, 219 A.D. 541, 220 N.Y.S. 625, 1927 N.Y. App. Div. LEXIS 10963 (N.Y. App. Div. 1927).

The control of the work which effects a master-servant relationship is control of the means and manner of performance as well as of the result; an independent contractor relationship exists where the person doing the work is subject to the will of the employer only as to the result, but not as to the means or manner of accomplishment. Mace v Morrison & Fleming, 267 A.D. 29, 44 N.Y.S.2d 672, 1943 N.Y. App. Div. LEXIS 5961 (N.Y. App. Div. 1943), aff'd, 293 N.Y. 844, 59 N.E.2d 438, 293 N.Y. (N.Y.S.) 844, 1944 N.Y. LEXIS 2262 (N.Y. 1944).

Where the employer may prescribe what may be done but not the time, place or manner in which it may be done, the person doing this work is an independent contractor and not an employee. Gordon v New York Life Ins. Co., 275 A.D. 135, 89 N.Y.S.2d 83, 1949 N.Y. App. Div. LEXIS 3726 (N.Y. App. Div. 1949), rev'd, 300 N.Y. 652, 90 N.E.2d 898, 300 N.Y. (N.Y.S.) 652, 1950 N.Y. LEXIS 1446 (N.Y. 1950).

Where an alleged employer has furnished equipment in furtherance of its business and exercised some supervision and control over the alleged employee, sharing in the profits, the question of existence of an employer-employee relationship is factual and its determination by the Board is final. Saitta v Namar, Inc., 14 A.D.2d 951, 221 N.Y.S.2d 147, 1961 N.Y. App. Div. LEXIS 7891 (N.Y. App. Div. 3d Dep't 1961).

For a person to be held to be an employee rather than independent contractor under the above statute, some evidence of direction is sufficient but supervision is not an important element where the work is simple such as plowing a field or digging a grave. Piester v Traver, 24 A.D.2d 688, 261 N.Y.S.2d 333, 1965 N.Y. App. Div. LEXIS 3556 (N.Y. App. Div. 3d Dep't 1965).

In the absence of conclusive evidence of hiring as an employee, there is no basis for a presumption that continual utilization of a professional person as a consultant destroys an original independent contractor status; accordingly, a decision by the Workers' Compensation Board that a psychiatrist employed as a consultant was an independent contractor and not an employee, was supported by substantial evidence in the record where the psychiatrist could control the number of hours which she would devote to treating referrals by the employer, where she knew she was not subjected to ordinary payroll tax withholdings, and where she had to submit vouchers for payments detailing her hours expended on behalf of the county. Mailepors v Dutchess County Dep't of Mental Hygiene, 85 A.D.2d 844, 446 N.Y.S.2d

476, 1981 N.Y. App. Div. LEXIS 16672 (N.Y. App. Div. 3d Dep't 1981).

General employee of elevator company was not, as matter of law, special employee of company's sub-contractor at time of injury, barring him from bringing suit against sub-contractor, where employee had been assigned by company to work with sub-contractor in drilling hole at construction site, utilizing company blueprints and specifications; notwithstanding that employee testified before trial that it was his job to assist sub-contractor in all work, question of fact remained as to whether company relinquished to sub-contractor right to direct and control employee in performance of work. Kinney v Kuhn, 122 A.D.2d 569, 504 N.Y.S.2d 948, 1986 N.Y. App. Div. LEXIS 59851 (N.Y. App. Div. 4th Dep't 1986).

Workers' Compensation Board properly ruled that claimants, who were injured while performing duties as adult newspaper carriers, were employees rather than independent contractors where, inter alia, employer required claimants to deliver newspapers by set hour each morning, employer fixed claimants' territories and provided them with route list containing specific instructions as to how to deliver newspapers to certain customers, employer handled customer complaints, and employer provided plastic bags and elastic bands for use in distribution process. Paolucci v Capital Newspapers, 229 A.D.2d 751, 645 N.Y.S.2d 603, 1996 N.Y. App. Div. LEXIS 7844 (N.Y. App. Div. 3d Dep't 1996).

Workers' Compensation Board properly found that employer-employee relationship existed between member of ski patrol and ski resort where, inter alia, resort paid cost of operating ski patrol, provided workers' compensation coverage for ski patrol members, vaccinated members of patrol against Hepatitis-B at its own expense, retained right to discharge and discipline any member of patrol, and designated times that patrol inspected slopes, and although not paid salary per se, patrol members were given free skiing privileges for season and other benefits in exchange for their participation in patrolling slopes. Fitzpatrick v Holimont, Inc., 247 A.D.2d 715, 669 N.Y.S.2d 88, 1998 N.Y. App. Div. LEXIS 1578 (N.Y. App. Div. 3d Dep't), app. dismissed, 92 N.Y.2d 888, 678 N.Y.S.2d 587, 700 N.E.2d 1224, 1998 N.Y. LEXIS 2850 (N.Y. 1998), app. denied, 94 N.Y.2d 755, 701 N.Y.S.2d 711, 723 N.E.2d 566, 1999 N.Y. LEXIS 3904 (N.Y. 1999).

48. —Effect of contract terminlogy

Decedent had been employed for many years as custodian of a fire house. Thereafter, to permit decedent to draw a pension it was agreed that he would work as an independent contractor. Held: the formal terminology used by the parties was not controlling and decedent was an employee entitled to compensation. Dodd v North Patchogue Fire Dist., 286 A.D. 904, 142 N.Y.S.2d 153, 1955 N.Y. App. Div. LEXIS 4473 (N.Y. App. Div. 1955).

Plaintiff was not defendant's special employee or coemployee, despite defendant's contention that its contract with property owner showed that it was responsible for hiring and firing of employees, since contract, as well as affidavit from defendant's general manager, indicated that defendant's authority was conditioned on approval from owner. Gonzalez v John B. Lovett Assoc., 228 A.D.2d 342, 644 N.Y.S.2d 249, 1996 N.Y. App. Div. LEXIS 7267 (N.Y. App. Div. 1st Dep't 1996).

49. —Effect of mode of payment

Payment based upon the quantity of work done is not necessarily the test of an independent contract. Rogers v Bissell Lumber & Supply Co., 275 A.D. 1015, 91 N.Y.S.2d 708, 1949 N.Y. App. Div. LEXIS 5494 (N.Y. App. Div. 1949).

Exchanges in which part of workers' compensation claimant's "wages" were paid by giving him goods and paying his truck registration fee would be considered wages as long as they were received with understanding that they were equivalent to wages; moreover, Workers' Compensation Board was free to credit testimony of claimant's wife that exchanges were wages despite putative employer's claim that they were loans. Davison v Holder, 137 A.D.2d 899, 524 N.Y.S.2d 871, 1988 N.Y. App. Div. LEXIS 1642 (N.Y. App. Div. 3d Dep't 1988).

50. Independent contractors; particular applications, in general

Where a contractor remained after his contract had been completed, at the request of the officers of the company to assist in installing an engine under the direction of the engineer sent by the manufacturers to superintend its installation, he became a temporary employee, and the fact he brought two of his own men with him for whose services the company paid is immaterial. McNally v Diamond Mills Paper Co., 223 N.Y. 83, 119 N.E. 242, 223 N.Y. (N.Y.S.) 83, 1918 N.Y. LEXIS 1159 (N.Y. 1918).. See also Bargey v Massaro Macaroni Co., 218 N.Y. 410, 113 N.E. 407, 218 N.Y. (N.Y.S.) 410, 1916 N.Y. LEXIS 1081 (N.Y. 1916).; In re Larsen, 218 N.Y. 252, 112 N.E. 725, 218 N.Y. (N.Y.S.) 252, 1916 N.Y. LEXIS 1064 (N.Y. 1916).; Pfeiffer v Nathan Schweitzer Co., 246 N.Y. 545, 159 N.E. 645, 246 N.Y. (N.Y.S.) 545, 1927 N.Y. LEXIS 933 (N.Y. 1927).

A helper for the installation of a factory engine is not an independent contractor. McNally v Diamond Mills Paper Co., 223 N.Y. 83, 119 N.E. 242, 223 N.Y. (N.Y.S.) 83, 1918 N.Y. LEXIS 1159 (N.Y. 1918).. See also Huetten v Niagara Box Co., 256 N.Y. 562, 177 N.E. 141, 256 N.Y. (N.Y.S.) 562, 1931 N.Y. LEXIS 1140 (N.Y. 1931).

One who contracts to drive the owner's horses in races at a stipulated price per race, but who in respect to the method to be pursued in making races and handling the horses, is subject to the orders of the owner, is an employee although he was to receive a lump sum price for each race. Pierce v Bowen, 247 N.Y. 305, 160 N.E. 379, 247 N.Y. (N.Y.S.) 305, 1928 N.Y. LEXIS 1072 (N.Y. 1928).See also Rice v Stoneham, 254 N.Y. 531, 173 N.E. 853, 254 N.Y. (N.Y.S.) 531, 1930 N.Y. LEXIS 1115 (N.Y. 1930).

An embalmer is not an independent contractor. Link v Kennedy, 256 N.Y. 565, 177 N.E. 142, 256 N.Y. (N.Y.S.) 565, 1931 N.Y. LEXIS 1143 (N.Y. 1931).

An apartment house manager who was entitled to receive three percent of the gross rents and ten per cent of all service contracts is nevertheless an employee rather than an independent contractor. Morse v Miltwess Realty Co., 257 A.D. 882, 11 N.Y.S.2d 887, 1939 N.Y. App. Div. LEXIS 8266 (N.Y. App. Div. 1939).

Where claimant was employed by the pastor of a church to fix the chimney of the church, and he agreed to do the work on a basis of $12 a day, but gave no definite price for the job, and the cement and stone were provided by the church, claimant was an employee and not an independent contractor. Notaro v Holy Cross Roman Catholic Church Soc., 260 A.D. 968, 23 N.Y.S.2d 301, 1940 N.Y. App. Div. LEXIS 5637 (N.Y. App. Div. 1940).

An award of compensation is proper to one injured while posting bills for advertising entertainment for a theatre, where the claimant was paid by the day, and in some instances he was given instructions from the manager, who went with the claimant to the hospital after the injury. Murray v Kingsbridge Theatre, 269 A.D. 716, 53 N.Y.S.2d 543, 1945 N.Y. App. Div. LEXIS 3428 (N.Y. App. Div. 3d Dep't 1945).See also Hamilton v Landau Amusement Corp., 262 A.D. 787, 27 N.Y.S.2d 1010, 1941 N.Y. App. Div. LEXIS 5853 (N.Y. App. Div.), aff'd, 287 N.Y. 585, 38 N.E.2d 385, 287 N.Y. (N.Y.S.) 585, 1941 N.Y. LEXIS 2469 (N.Y. 1941).

The board may properly find that an artist who produced sketches and illustrations used by the alleged employer in the conduct of its commercial art business is an employee rather than an independent contractor. De Saravi v Troeger-Phillips, Inc., 278 A.D. 877, 104 N.Y.S.2d 317, 1951 N.Y. App. Div. LEXIS 5036 (N.Y. App. Div. 1951).

The Board could find that decedent was not an employee and not covered by workmen's compensation on evidence that he was a diamond expert buying diamonds for his "employer" all around the world with expenses paid by the employer and receiving $500 a month, with right in the employer to fire him but at the same time loaning the employer substantial sums of money refused to be listed as an employee or sustain tax withholdings and social security deductions, etc. Malek v Leon Tempelsman & Sons, 20 A.D.2d 737, 246 N.Y.S.2d 983, 1964 N.Y. App. Div. LEXIS 4383 (N.Y. App. Div. 3d Dep't 1964).

Workers' Compensation Board properly awarded death benefits to deceased flight instructor's survivors based on existence of employer-employee relationship between instructor and air field where instructor was paid at fixed rate for actual time he gave lessons, students leased aircraft from air field, students paid air field for their instruction, air field controlled scheduling of in-

structor's test flights, air field furnished instructor office space and stenographic help, and air field retained right to discharge instructor. Richter v Buffalo Air Park, Inc., 125 A.D.2d 809, 509 N.Y.S.2d 914, 1986 N.Y. App. Div. LEXIS 63017 (N.Y. App. Div. 3d Dep't 1986).

In action for injuries sustained by plaintiff when he fell from roof of private residence under construction, defendant was entitled to summary judgment since evidence established that plaintiff was special employee of defendant at time and place of injury where it was uncontroverted that plaintiff reported to defendant on days and times directed by defendant's foreman, that foreman signed plaintiff's time sheets, that foreman told plaintiff what work to perform, that defendant supplied equipment and tools for work by plaintiff, and that defendant had sole right to control plaintiff's work at site. Jeffords v Professional Builders/Remodelers Group, Inc., Div. of Avmal Constr. Corp., 186 A.D.2d 989, 588 N.Y.S.2d 452, 1992 N.Y. App. Div. LEXIS 11513 (N.Y. App. Div. 4th Dep't 1992).

Defendant, against whom the Commissioners of the State Insurance Fund brought suit for premiums under a policy of workmen's compensation insurance, exercised sufficient control over his so-called "buyers" to make them employees for purposes of workmen's compensation, where, inter alia, defendant solicited maintenance service accounts, negotiated a price for the work to be done, billed his customers, and serviced them through his regular employees until the accounts were "sold," and where, after the "sale," defendant continued to bill in his own name on his billhead, holding himself out to his accounts as an employer; moreover, the same result was mandated by the "relative nature of the work" test. Commissioners of State Ins. Fund v Kaplan, 89 Misc. 2d 610, 392 N.Y.S.2d 971, 1977 N.Y. Misc. LEXIS 1903 (N.Y. Civ. Ct. 1977).

51. —General laborer

A claimant employed as a laborer who also did blasting is an employee rather than an independent contractor where the employer furnished the tools and materials directed the claimant as to his duties and instructed him as to the work which was to be done. Thye v R. W. S. Corp., 253 A.D. 853, 1 N.Y.S.2d 498, 1938 N.Y. App. Div. LEXIS 8901 (N.Y. App. Div. 1938).

There was sufficient evidence to sustain a board finding that decedent was a town employee, rather than an independent contractor, in tearing down a certain shed under an arrangement with the town Superintendent of Highways that he was to receive $50 for tearing it down, though he was a mere laborer usually employed as a grave digger, not carried on the town payroll as an employee, and the town did not furnish him with any tools or exercise any particular degree of control over this special job. Tait v Delhi, 17 A.D.2d 667, 230 N.Y.S.2d 82, 1962 N.Y. App. Div. LEXIS 8716 (N.Y. App. Div. 3d Dep't 1962), aff'd, 13 N.Y.2d 656, 240 N.Y.S.2d 988, 191 N.E.2d 466, 1963 N.Y. LEXIS 1193 (N.Y. 1963).

52. —Piece workers

Home workers making clothing, artificial flowers, etc., and paid by the piece are employees and not independent contractors; accidents to them are compensable. People ex rel. New York Lodge, B. P. O. E. v Purdy, 224 N.Y. 710, 121 N.E. 885, 224 N.Y. (N.Y.S.) 710, 1918 N.Y. LEXIS 1117 (N.Y. 1918).See also Allied Mut. Liability Ins. Co. v De Jong, 209 A.D. 505, 205 N.Y.S. 165, 1924 N.Y. App. Div. LEXIS 8667 (N.Y. App. Div. 1924).

Where claimant, having been employed by a manufacturer of awnings and having worked by the day the greater part of the time at piece work, was engaged by the owner of apartment houses to remove awnings, said owner retaining the right to discharge him and to control and direct the method of performing his work, said claimant was properly held to be an employee of the owner and not an independent contractor. Abromowitz v Hudson View Const. Co., 188 A.D. 356, 177 N.Y.S. 187, 1919 N.Y. App. Div. LEXIS 7781 (N.Y. App. Div. 1919), aff'd, 228 N.Y. 509, 126 N.E. 898, 228 N.Y. (N.Y.S.) 509, 1920 N.Y. LEXIS 959 (N.Y. 1920).

Appellant entered into an agreement with respondent to turn out certain material on a lathe at so much per piece. Appellant hired claimant to perform work at so much per piece. In the course of the work, claimant injured his eye. Appellant controlled the claimant, furnished equipment and had the power to discharge him. Held: the Board properly found that claimant was an employee of the appellee and that the appellant was not a subcontractor under § 56. On the latter issue, the Board found that the articles manufactured by the appellant were also being manufactured by the respondent. But the respondent was not manufacturing them pursuant to a contract with someone else but was manufacturing them and placing them on the market. So, an award against the appellant, an uninsured employer, was affirmed. Sutera v Horowitz, 9 A.D.2d 595, 189 N.Y.S.2d 262, 1959 N.Y. App. Div. LEXIS 7467 (N.Y. App. Div. 3d Dep't 1959).

There is evidence to sustain a finding that an injured person was an employee rather than an independent contractor, where he was paid on a piecework basis, the materials and scaffolding used by him were furnished by the alleged employer who told him what to do, especially when taken with a statement by the employer that the injured employee was working for him, even though the employee was to be paid in a lump sum on the completion of the job. People v Manzo, 26 N.Y.S.2d 566, 1941 N.Y. Misc. LEXIS 1595 (N.Y. County Ct. 1941).

53. —Flooring workers

A linoleum layer employed by a dealer in floor coverings separately for each job and was paid a fixed price per yard for the linoleum laid, the dealer charging his customer the price of linoleum plus the cost of laying, is an independent contractor and no death benefits may be paid to the dependents of the linoleum layer where he was struck by an automobile while going from the job to the dealer's office. Lichtenager v Silverman, 260 N.Y. 667, 184 N.E. 138, 260 N.Y. (N.Y.S.) 667, 1932 N.Y. LEXIS 862 (N.Y. 1932).See also Diester v Wolpert Realty Co., 256 N.Y. 650, 177 N.E. 178, 256 N.Y. (N.Y.S.) 650, 1931 N.Y. LEXIS 1247 (N.Y. 1931).and Boardway v Kellas, 258 N.Y. 545, 180 N.E. 326, 258 N.Y. (N.Y.S.) 545, 1931 N.Y. LEXIS 801 (N.Y. 1931).

Although there were certain factors which might indicate that carpet installer, over whom little supervision was exercised and who used his own tools and truck and hired help for himself when necessary was an independent contractor, there was substantial evidence to support finding that there was an employer-employee relationship between the alleged employer and the workmen's compensation claimant who did not hold himself out to the public as performing an independent service and who regularly devoted most if not all of his time to alleged employer's business. Reichenbach v Myrtle Floor Covering, Inc., 46 A.D.2d 714, 360 N.Y.S.2d 306, 1974 N.Y. App. Div. LEXIS 3773 (N.Y. App. Div. 3d Dep't 1974).

54. —Window cleaners and installers

Claimant, a window washer, was injured when he fell while washing windows for a bar and grill. The Workmen's Compensation Board properly found that he was an employee of the grill owner and not an independent contractor where he was regularly employed by a window cleaning company but was injured on a holiday (Labor Day) while cleaning the windows of the bar and grill. Lukianchuk v M. Garz Restaurant, 305 N.Y. 769, 113 N.E.2d 156, 305 N.Y. (N.Y.S.) 769, 1953 N.Y. LEXIS 1286 (N.Y. 1953).

The record sustained a finding of an employer-employee relationship as against a contention of the status of independent contractor of an installer of storm windows and screens. Zinserling v State Storm Window Co., 280 A.D. 1007, 116 N.Y.S.2d 797, 1952 N.Y. App. Div. LEXIS 4554 (N.Y. App. Div. 1952).

55. —Heating and plumbing workers

A mechanic who repaired engines for water systems installed by a heating and plumbing contractor, and automobile trucks used by the firm, who handed in his bill for the gross amount without itemizing it and was paid at a rate per hour depending on the particular kind of service rendered, is an employee and not an independent contractor. Peck v Tassell & Fairbanks, 193 A.D. 604, 184 N.Y.S. 426, 1920 N.Y. App. Div. LEXIS 5614 (N.Y. App. Div. 1920).

Decedent who was killed while engaged in repairing a boiler in an apartment house is an independent contractor and not an employee, where such decedent, although a steamfitter, was a steadily employed W.P.A. worker, and had never performed any

work of any kind for the apartment house owner, and had agreed to repair the boiler for a specified lump sum. McCarthy v 2009 Lafontaine Ave. Corp., 259 A.D. 947, 529 A.D. 947, 19 N.Y.S.2d 809, 1940 N.Y. App. Div. LEXIS 7392 (N.Y. App. Div. 1940).

56. —Auto mechanics

Substantial evidence supported determination of Workers' Compensation Board that worker was independent contractor rather than employee of used car dealer where worker had been engaged to perform specialized repair work on one automobile in his time off from full-time job with different employer, dealer did not know how to do work so he could not supervise or exercise control, no payment was due until repairs were completed, there was no withholding of wages for any purpose, worker was not listed by dealer as employee, worker furnished his own tools and worked when his time and work schedule permitted, there was no evidence of any right to discharge, and in event of disagreement relief could have been sought only through contract action; even if conflicting inferences could be drawn from evidence, findings of board would prevail. Estate of Scott v R. M. Stevenson Motors, Inc., 127 A.D.2d 953, 512 N.Y.S.2d 557, 1987 N.Y. App. Div. LEXIS 43437 (N.Y. App. Div. 3d Dep't 1987).

57. —Excavation and demolition

A contractor who agrees to excavate rock in a mill race under a mill to be paid by the mill operators at the rate of 10 per cent of the entire job, the contractor to furnish all labor, either by using men already in his employment, to take men from the employer's mill, or to hire others, and to furnish material is an independent contractor rather than an employee. Dutcher v Victoria Paper Mills, 219 A.D. 541, 220 N.Y.S. 625, 1927 N.Y. App. Div. LEXIS 10963 (N.Y. App. Div. 1927).

One who is employed by an employer engaged in dismantling a power plant to cut away a portion of an electric generator with an acetylene torch under the direction of the employer, who designated the place where the cut should be made, is an employee rather than an independent contractor within the meaning of this section. Thompson v A. Mills Scrap Metals, 266 A.D. 806, 41 N.Y.S.2d 288, 1943 N.Y. App. Div. LEXIS 4554 (N.Y. App. Div. 1943).

58. —Carpenter

Where a carpenter was employed by the pastor over two year period to do carpenter work around a church, the pastor supplying all the materials used except small items, and where the carpenter was employed by hour, he was an "employee" and not an independent contractor. Zeh v St. Francis De Sales R. C. Church, 288 N.Y. 511, 41 N.E.2d 926, 288 N.Y. (N.Y.S.) 511, 1942 N.Y. LEXIS 1367 (N.Y. 1942).

An award for a carpenter was affirmed where claimant was injured while working at home of employer, the title to which was in his wife's name, over claims that carpenter was an independent contractor and that employer was not engaged in activity for "pecuniary gain". Reid v Rose, 306 N.Y. 880, 119 N.E.2d 588, 306 N.Y. (N.Y.S.) 880, 1954 N.Y. LEXIS 1201 (N.Y. 1954).

A carpenter engaged to repair roofs and a veranda at odd times during evenings and Saturdays, who furnished part of the material and who received no directions from the owner before the work began or during the progress thereof except as to the roofs to be patched and places upon the veranda to be repaired, is an independent contractor and not an employee of the owner. Ball v Bertelle's Estate, 201 A.D. 768, 195 N.Y.S. 150, 1922 N.Y. App. Div. LEXIS 6413 (N.Y. App. Div. 1922).

A carpenter engaged in business on his own account, employed to make alterations, who furnished from three to five men and material on both of which he received a profit, is an independent contractor, although on particular occasions, in his absence, directions were given by representatives of the owner as to particular places where he desired work to progress and the particular kind of work to be done. Bache v Salvation Army, 202 A.D. 17, 195 N.Y.S. 151, 1922 N.Y. App. Div. LEXIS 4842 (N.Y. App. Div. 1922).

There is evidence to support a finding that a claimant is an employee, where he was engaged as a general handy man to do rough carpentry and tree trimming at a fixed amount per day, there being no estimated contract price for one particular job, and the employer furnished some tools which were unsatisfactory, whereupon the claimant used his own tools. Biatolbzski v Smith, 262 A.D. 1051, 30 N.Y.S.2d 254, 1941 N.Y. App. Div. LEXIS 7187 (N.Y. App. Div. 1941).

A carpenter employed to apply shingles sold by a dealer and paid at a fixed rate per hundred feet may be found to be an employee rather than an independent contractor where there is an admission in the employer's first report of injury that the carpenter was an employee, even though the carpenter furnished his own car and equipment. Strawway v Stickler, 268 A.D. 944, 51 N.Y.S.2d 348, 1944 N.Y. App. Div. LEXIS 4332 (N.Y. App. Div. 1944).

A carpenter, one of two engaged by the alleged employer to perform carpentry and some painting in the construction of living quarter additions to his place of business, there being no partnership agreement between the carpenters, is an employee rather than an independent contractor, where there is evidence of a reservation of control and there was no evidence that the carpenter was not subject to discharge at any time. Norris v Kaempfer, 274 A.D. 857, 81 N.Y.S.2d 808, 1948 N.Y. App. Div. LEXIS 3697 (N.Y. App. Div. 1948).

Carpenter who had small cabinet-making business was employed from time to time by a general contractor and was asked by the latter to install some cabinets in the home of contractor's mother. No payment was to be made in cash but the contractor agreed to repair the foundation of a building on which the carpenter was working. Cabinetmaker's death in an automobile accident while contractor was driving him from site of work was an accident within the course of his employment. Wages may be paid by some special service and it was immaterial whether or not the employer's mother paid. Johansen v Gray, 283 A.D. 647, 130 N.Y.S.2d 35, 1954 N.Y. App. Div. LEXIS 4753 (N.Y. App. Div. 1954).

Claimant was injured while working as a carpenter. He had entered into an agreement with contractor for a lump sum for performing certain work. He was designated therein as subcontractor. Claimant testified that he had been told that he would be covered by compensation. However, contractor's bookkeeper had not done so because he understood that claimant was covered. Contractor supplied materials, and had the right of control of manner of performance of claimant's work. There was some testimony that claimant could be dismissed. Held: on evidence, board properly determined that claimant was employee and not independent contractor. Klein v Sunrise Bldg. Co., 7 A.D.2d 805, 180 N.Y.S.2d 885, 1958 N.Y. App. Div. LEXIS 3733 (N.Y. App. Div. 3d Dep't 1958), app. denied, 5 N.Y.2d 711, 1959 N.Y. LEXIS 2026 (N.Y. 1959).

A land company entered into a contract with an independent contractor for a specified price to do the carpentry work on a home which it was building on it's own land for the use of its superintendent. A carpenter employed on the project was killed. The widow was entitled to recover death benefits from the land company, since there was evidence that the superintendent for whom the house was being built directed the carpentry work in detail. Commissioner of Taxation & Finance v Ramapo Land Co., 9 A.D.2d 800, 192 N.Y.S.2d 834, 1959 N.Y. App. Div. LEXIS 6139 (N.Y. App. Div. 3d Dep't 1959).

Claimant must be considered an independent contractor rather than an employee where it appeared that he was a carpenter by trade and his injuries were sustained by a fall from a scaffolding while working upon a house which he had contracted to purchase from respondent, part of the down payment on the purchase price to be made up of doing certain work in finishing the house at a specified price for each portion of such work, defendant furnishing the materials and some of the tools and claimant furnishing the remainder, there being no indication defendant exercised any control over the work or could have discharged claimant had it deemed fit. Biktjorn v Worley Homes, Inc., 12 A.D.2d 540, 206 N.Y.S.2d 744, 1960 N.Y. App. Div. LEXIS 7236 (N.Y. App. Div. 3d Dep't 1960).

Decision of board affirmed that claimant was not employee of defendant where partnership of which claimant was member entered into contracts with defendant to do carpentry work for him on houses being constructed, each house being subject of a

separate contract and agreed price being payable on a weekly basis, the claimant furnishing his own tools and making his own Social Security and income tax payments. Lawrence v Wheeler, 22 A.D.2d 983, 254 N.Y.S.2d 727, 1964 N.Y. App. Div. LEXIS 2499 (N.Y. App. Div. 3d Dep't 1964).

The claimant was held to be an employee rather than an independent contractor under evidence that he severed a portion of one finger on a power saw while making cabinet covers for his employer in the basement of the claimant's house; that he was hired to make cabinet covers in his spare time for a specified sum; that he purchased the materials and did the work in his home with the exception of the preliminary measurement and the installation, and there was evidence that the employer's president directed the design and specifications of the work, the type of materials to be used and the means of installation of the covers. Wheeler v Victor Kayfetz Productions, 38 A.D.2d 667, 327 N.Y.S.2d 181, 1971 N.Y. App. Div. LEXIS 2621 (N.Y. App. Div. 3d Dep't 1971).

Carpenter's employee, who had been hired to renovate building owned by real estate partnership, of which 2 partners were sole partners in law firm, was employee of law firm and thus covered by its workers' compensation policy where, inter alia, (1) real estate partnership was established for sole purpose of owning properties housing law firm's old and new offices, (2) other 2 partners in real estate partnership were merely names on deed to building, (3) law firm partners provided architectural plans and supplies for renovation project, and (4) claimant was paid by check prepared by law firm's secretary and signed by one of firm's partners. Rosenbaum v Lichtenstein, 168 A.D.2d 873, 564 N.Y.S.2d 543, 1990 N.Y. App. Div. LEXIS 15751 (N.Y. App. Div. 3d Dep't 1990).

59. —Driver, hauler or trucker

There was no employer-employee relationship between a farmer and a roofing contractor where the farmer agreed to haul logs with his own horses and tools for a fixed price and contractor, although he worked with farmer, did not direct the operations. Neff v Franklinville Roofing Co., 308 N.Y. 946, 127 N.E.2d 94, 308 N.Y. (N.Y.S.) 946, 1955 N.Y. LEXIS 1182 (N.Y. 1955).

The owner of a truck is an employee rather than an independent contractor where he was retained to haul freight for the employer, the latter reserving the right of discharge at any time, and the employer mapped out the delivery routes, directed the trucker's movements and maintained close supervision over him, but allowed the trucker to carry freight for others only when he did not keep him busy, and where the employer took a certain percentage of the earnings of the truck and credited the trucker with the balance. Carriere v Syracuse Freight & Forwarding Co., 259 A.D. 764, 18 N.Y.S.2d 263, 1940 N.Y. App. Div. LEXIS 6577 (N.Y. App. Div. 1940).

Midget auto race drivers competing for prizes are independent contractors rather than employees of the promoter. Duffy v Kedenburg, 278 A.D. 31, 103 N.Y.S.2d 457, 1951 N.Y. App. Div. LEXIS 3729 (N.Y. App. Div. 1951).

Even under the common law test, a part-time helper working under the immediate direction and supervision of a truck driver would be regarded as an employee of the truck driver's employer. Hence, a part-time truck loader who worked from time to time over a period of two and a half years helping to load an employer's truck was not an independent contractor although he worked for others, was employed intermittently and was paid so much per load. Stone v Cohen Bros. & Sons, 282 A.D. 900, 124 N.Y.S.2d 822, 1953 N.Y. App. Div. LEXIS 5369 (N.Y. App. Div.), amended, 282 A.D. 1080, 126 N.Y.S.2d 923, 1953 N.Y. App. Div. LEXIS 5870 (N.Y. App. Div. 1953).

"Agent drivers" of laundry were employees and entitled to Workmen's Compensation where, although they furnished their own vehicle, the laundry fixed the prices charged customers took all money received and paid a commission therefrom and supervised the work and fixed the hours of the drivers. Schaimberg v Starbright Laundry, 285 A.D. 359, 137 N.Y.S.2d 516, 1955 N.Y. App. Div. LEXIS 5485 (N.Y. App. Div. 1955).

Claimant's duties were to pick up and deliver cars purchased and sold by appellant. For pick up and delivery he was paid a flat fee. Each week he was paid a total of fees less withholding tax and social security contributions. While en route to deliver car to Virginia purchaser, from whom he was to collect amount of invoice plus driving charges, he sustained accidental injuries. There was no direct communication between the claimant and purchaser. All instructions were given to him by appellant, including instruction that, if he failed to collect amount of invoice, he was to return car in which event driving charges were to be paid by appellant. Held: there was ample evidence to support conclusion that claimant was an employee of the appellant. Kaufman v Car Wholesalers, Inc., 8 A.D.2d 562, 183 N.Y.S.2d 509, 1959 N.Y. App. Div. LEXIS 9647 (N.Y. App. Div. 3d Dep't 1959).

Appellant was the owner of a highway tractor used principally for hauling loaded trailers for respondent. Pursuant to oral agreement, claimant operated the tractor and received 25 percent of gross receipts. Claimant would obtain check from respondent payable to the appellant and deliver it to the appellant. Claimant paid only his personal expenses on the road. Appellant had the absolute right to terminate claimant's services as a driver by withholding the vehicle from highways. Held: the board properly found that claimant was an employee of the appellant. Mead v Cole, 8 A.D.2d 904, 186 N.Y.S.2d 969, 1959 N.Y. App. Div. LEXIS 8324 (N.Y. App. Div. 3d Dep't 1959).

Although claimant was regularly employed by one M., where, because of the odd and irregular hours of his employment he was able to do extra work for another, delivering grapes for the latter at a fixed price per box by using the truck of M. and paying the latter for gas, oil, and incidental expense, and delivered the grapes for the second employer according to names and addresses furnished by the latter, sometimes collecting money at the time of the delivery and being furnished with a helper by the second employer part of the time, it was not improper to consider him an employee of the latter and not an independent contractor with respect to injuries sustained while delivering grapes. Grigoli v Nito, 11 A.D.2d 581, 200 N.Y.S.2d 511, 1960 N.Y. App. Div. LEXIS 9932 (N.Y. App. Div. 3d Dep't 1960).

Where deliverymen were paid according to number of deliveries per week and alleged employer testified with respect to discharge of former deliveryman that he did not deliver packages the way employer wanted them taken care of, sufficient direction and control over deliverymen was shown to establish employer-employee relationship. Lindboe v Tenenbaum's Meat Market, 24 A.D.2d 796, 263 N.Y.S.2d 787, 1965 N.Y. App. Div. LEXIS 3232 (N.Y. App. Div. 3d Dep't 1965).

Board's decision determining claimant was an employee of appellant-employer and found that corporation had sufficient supervision and control over claimant to warrant establishing employer-employee relationship and under terms of the agreement, the corporation specified and retained control over the claimant's route, required that its name be affixed to the door panels of the tractor and did not permit claimant to accept other jobs without first consulting the corporation was supported by the evidence. Freeman v Custom Bilt Body, Inc., 35 A.D.2d 857, 315 N.Y.S.2d 213, 1970 N.Y. App. Div. LEXIS 3576 (N.Y. App. Div. 3d Dep't 1970).

In a workers' compensation proceeding, evidence supported the finding of Workers' Compensation Board that an employer-employee relationship existed between a claimant cab driver and an owner of a licensed radio dispatching service that monitored and dispatched phone calls for independent cab owners, where the evidence indicated that the owner controlled the activities and work of the driver, maintained age standards for drivers receiving the service, and benefited from the driver's work. Ziegler v Fillmore Car Service, Inc., 83 A.D.2d 692, 442 N.Y.S.2d 276, 1981 N.Y. App. Div. LEXIS 15005 (N.Y. App. Div. 3d Dep't), app. denied, 54 N.Y.2d 609, 1981 N.Y. LEXIS 4560 (N.Y. 1981).

Substantial evidence supported finding, under workers' compensation "control" test, of employer-employee relationship between garage owner and driver of wrecking truck where equipment used at time of accident (tow truck) was garage owner's, owner had provided driver with shirts with driver's name and owner's business name on them, and owner had agreed to pay driver certain set wage which (as driver's wife testified) included giving driver goods and paying driver's truck registration fee; moreover, under "relative nature of the work" test, towing or

assisting disabled vehicles was important part of driver's work and was inseparable from it, and could not be considered type of work for which person would carry his own insurance. Davison v Holder, 137 A.D.2d 899, 524 N.Y.S.2d 871, 1988 N.Y. App. Div. LEXIS 1642 (N.Y. App. Div. 3d Dep't 1988).

Evidence supported determination by Workers' Compensation Board that employer-employee relationship existed between corporation which operated radio dispatched limousine service and driver who leased limousine from its owner pursuant to arrangement whereby limousine owners purchased shares of stock in limousine service, entitling them to installation of corporate-owned dispatch radio and share of transportation calls, since limousine service controlled almost every aspect of driver's job, including screening and training drivers, enforcing minimum job standards, paying drivers' wages, and setting fares. Kurzyna v Communicar, Inc., 182 A.D.2d 924, 582 N.Y.S.2d 295, 1992 N.Y. App. Div. LEXIS 5940 (N.Y. App. Div. 3d Dep't), app. denied, 80 N.Y.2d 754, 587 N.Y.S.2d 906, 600 N.E.2d 633, 1992 N.Y. LEXIS 1807 (N.Y. 1992).

Evidence supported determination finding employer-employee relationship between participating limousine driver and corporation providing solicitation and dispatch service, even though driver was required to own his limousine and independently pay for insurance, gas, oil, and maintenance, where (1) pursuant to voucher system, if dispatcher assigned driver to voucher fare—as opposed to cash fare—driver was required to accept it or face monetary penalty, (2) driver was paid set percentage payment for such fares, and (3) corporation had complete control over solicitation and scheduling of voucher fares, as well as handling and processing of voucher payment system. Weingarten v XYZ Two Way Radio Service, Inc., 183 A.D.2d 964, 583 N.Y.S.2d 316, 1992 N.Y. App. Div. LEXIS 6652 (N.Y. App. Div. 3d Dep't), app. dismissed, 80 N.Y.2d 924, 589 N.Y.S.2d 311, 602 N.E.2d 1127, 1992 N.Y. LEXIS 3218 (N.Y. 1992).

Evidence that corporation providing dispatched car service had control over workday of limousine drivers was sufficient to justify determination that employer-employee relationship existed between claimant and corporation, and claimant was thus eligible for workers' compensation benefits. Banful v Skyline Credit Ride, 222 A.D.2d 871, 635 N.Y.S.2d 730, 1995 N.Y. App. Div. LEXIS 12901 (N.Y. App. Div. 3d Dep't 1995).

Workers' Compensation Board properly concluded that employer-employee relationship existed where corporation's principal applied for taxicab license for vehicle that claimant was driving at time of his accident, corporation did business as entity that provided claimant with cab and dispatched him to pick up his fares, and principal failed to appear and offer any evidence. Fisher v SDAM Mgmt. Inc., 284 A.D.2d 845, 727 N.Y.S.2d 724, 2001 N.Y. App. Div. LEXIS 6743 (N.Y. App. Div. 3d Dep't 2001).

Bread deliverer was independent contractor rather than employee of wholesale bread company, and thus was not entitled to workers' compensation benefits, where (1) he responded to newspaper ad for distributor, (2) he complied with company's requirements that he be incorporated and that he provide van for deliveries, (3) his limited training consisted of being shown 2 bread delivery routes, (4) time for deliveries was fixed primarily by customers' schedules, (5) he did not display company logo on his clothing or van, (6) although he contacted company to adjust bread orders, his daily activities were not supervised, (7) he was free to expand his bread delivery routes, deliver other products, and hire associate as his own expense, (8) payments were made to his own corporation, and (9) his tax return indicated that he was self-employed. Simonelli v Adams Bakery Corp., 286 A.D.2d 805, 730 N.Y.S.2d 358, 2001 N.Y. App. Div. LEXIS 8631 (N.Y. App. Div. 3d Dep't 2001).

In action to recover balance due for premiums on workmen's compensation policy issued by plaintiff to defendant-trucker, defendant was entitled to trial upon issue that owner-operators of trucks were independent contractors not covered by Workmen's Compensation Law. Employers Mut. Liability Ins. Co. v Bromley, 4 Misc. 2d 702, 158 N.Y.S.2d 669, 1957 N.Y. Misc. LEXIS 3643 (N.Y. Sup. Ct. 1957).

60. —Nurse

A trained nurse, engaged to render services to an injured employee in the hospital, under the general direction of the company's physician in charge of the case, is not an employee within the meaning of this section. In re Renouf, 254 N.Y. 349, 173 N.E. 218, 254 N.Y. (N.Y.S.) 349, 1930 N.Y. LEXIS 1048 (N.Y. 1930).See also Beach v Velzy, 238 N.Y. 100, 143 N.E. 805, 238 N.Y. (N.Y.S.) 100, 1924 N.Y. LEXIS 653 (N.Y. 1924),., and Litts v Risley Lumber Co., 224 N.Y. 321, 120 N.E. 730, 224 N.Y. (N.Y.S.) 321, 1918 N.Y. LEXIS 883 (N.Y. 1918).

A practical nurse is not excluded from workmen's compensation on the ground that she was not an employee but rather was acting in a professional capacity, where she was required to be on duty twenty four hours a day seven days a week, to perform domestic services and act as a companion to her employer. Windishar v Warmack, 271 A.D. 855, 65 N.Y.S.2d 849, 1946 N.Y. App. Div. LEXIS 3417 (N.Y. App. Div. 1946).

Claimant, a registered nurse, was held to be an employee rather than an independent contractor where her relationship with the alleged employer arose when she went home from a hospital where she worked with the latter to take care of her, at first being employed by the day but later became part of the household on a salary basis, performing duties other than nursing as well as taking care of the employer. Kupfer v Du Pont, 19 A.D.2d 923, 243 N.Y.S.2d 863, 1963 N.Y. App. Div. LEXIS 2975 (N.Y. App. Div. 3d Dep't 1963).

A registered nurse and professor of nursing was properly held to be an employee within the meaning of the Workers' Compensation Law, where she spent approximately 15 hours per week teaching her nursing students, two-thirds of which were spent in a hospital engaged in nursing activities, and where she spent the bulk of her teaching hours demonstrating or actually doing nursing work in a hospital. Kessler v Board of Higher Education, 86 A.D.2d 908, 448 N.Y.S.2d 538, 1982 N.Y. App. Div. LEXIS 15579 (N.Y. App. Div. 3d Dep't 1982).

A licensed practical nurse, employed as such, was employed as a professional person to exercise her calling to the best of her ability according to her own discretion and had no right of action against her employer for failure to see that she was covered by workmen's compensation insurance against injuries sustained by a fall on an allegedly defective bathroom floor. *McCrory v Thomas, 40 Misc. 2d 904, 244 N.Y.S.2d 111, 1963 N.Y. Misc. LEXIS 1466 (N.Y. Sup. Ct. 1963), aff'd, 21 A.D.2d 753, 252 N.Y.S.2d 27, 1964 N.Y. App. Div. LEXIS 5406 (N.Y. App. Div. 2d Dep't 1964).

61. —Painter

A painter who agreed to paint smoke stacks for a named amount, and to furnish the ropes, tackle, scaffolding, and implements is an independent contractor even though the alleged employer supplied the paint and an assistant, where the painter was free to proceed in the execution of the job entirely in accordance with his own ideas. Litts v Risley Lumber Co., 224 N.Y. 321, 120 N.E. 730, 224 N.Y. (N.Y.S.) 321, 1918 N.Y. LEXIS 883 (N.Y. 1918).

Plaintiff, a painter, who had worked several years for a bank and was usually paid by the day or by the job and was subject to supervision of the bank, is not an independent contractor, and award of disability compensation should be made, where he sustained accidental injuries as a result of a fall from a ladder while engaged in painting a house owned by the bank. Knudstad v Emigrant Industrial Sav. Bank, 278 N.Y. 610, 16 N.E.2d 122, 278 N.Y. (N.Y.S.) 610, 1938 N.Y. LEXIS 1433 (N.Y. 1938).

A painter employed to repaint a sign which he had previously painted and which had been used by the employer in advertising its business, will be deemed to be an employee rather than an independent contractor, where he had no employees, made no sub-contracts and did the work personally and it did not appear but that the employer retained control over the work. In re Rheinwald, 168 A.D. 425, 153 N.Y.S. 598, 1915 N.Y. App. Div. LEXIS 8298 (N.Y. App. Div. 1915), limited, Kackel v Serviss, 180 A.D. 54, 167 N.Y.S. 348, 1917 N.Y. App. Div. LEXIS 8073 (N.Y. App. Div. 1917).

One who agreed to paint a dwelling house for a fixed amount per hour is an independent contractor where he controlled his own time and work which was done at odd times, furnished ladders and brushes, and except for trifling directions, the home-

owner exercised no supervision over the work. Empie v Cossart, 259 A.D. 941, 20 N.Y.S.2d 3, 1940 N.Y. App. Div. LEXIS 7372 (N.Y. App. Div. 1940).See also Prince v Schwartz, 190 A.D. 820, 180 N.Y.S. 703, 1920 N.Y. App. Div. LEXIS 4262 (N.Y. App. Div. 1920).

Where, for over 25 years, claimant had engaged in the business of washing and painting houses with compensation usually based on an hourly rate, the owner of the house furnishing the paint and the claimant furnishing his own equipment including ladders and brushes, the evidence established that claimant was an independent contractor. The fact that he computed his charge on an hourly basis did not conclusively establish an employment relationship. Vanderpool v Payne, 283 A.D. 829, 128 N.Y.S.2d 676, 1954 N.Y. App. Div. LEXIS 5447 (N.Y. App. Div. 1954).

Where the decedent was a regular employee who undertook to do some work outside of his ordinary working hours for the purpose of painting the employer's premises, where, in furtherance of that project, the employee and another person signed an agreement with the employer to do the work at a stated lump sum price and to furnish their own equipment, and where, in the course of the project, the decedent suffered fatal injuries by reason of coming into contact with high voltage electrical wires, the decedent was an employee, not an independent contractor, at the time of the injury. Gannon v New York Wire Mills Corp., 53 A.D.2d 719, 384 N.Y.S.2d 57, 1976 N.Y. App. Div. LEXIS 13488 (N.Y. App. Div. 3d Dep't 1976).

62. —Plumber

A plumber, although the regular employee of a plumbing contractor for forty hours per week, who agreed to install a gas pipe line during his spare time may be found to be an independent contractor, where the employer merely outlined the nature of the job to be done and agreed to pay therefor the prevailing rate for such work in the vicinity. Slawson v Trustees of School Dist., 278 A.D. 879, 104 N.Y.S.2d 535, 1951 N.Y. App. Div. LEXIS 5043 (N.Y. App. Div. 1951).

There was sufficient evidence to sustain a finding by the board that decedent, a plumber, was working as an employee at the time he received the injury resulting in his death, not as an independent contractor, where, although he had originally been operating as an independent contractor, for four months prior to his death he had been treated and regarded as subject to direction and control of the "employer", with full access to his tools and supplies and with authority to call upon other employees for assistance, notwithstanding deceased still owned a truck bearing his own name, had his own billheads, and was not carried on appellant's books as an employee. Webster v Mason, 13 A.D.2d 355, 217 N.Y.S.2d 290, 1961 N.Y. App. Div. LEXIS 9778 (N.Y. App. Div. 3d Dep't 1961).

63. —Salesperson

An authorized milk salesman operating on a designated route for a stated period terminable upon notice by the salesman and at will by the company is a servant of the company, and within the workmen's compensation law. Glielmi v Netherland Dairy Co., 254 N.Y. 60, 171 N.E. 906, 254 N.Y. (N.Y.S.) 60, 1930 N.Y. LEXIS 1004 (N.Y. 1930).See also Dirisio v Caterino, 264 N.Y. 619, 191 N.E. 594, 264 N.Y. (N.Y.S.) 619, 1934 N.Y. LEXIS 1651 (N.Y. 1934)., and Pierce v Bowen, 247 N.Y. 305, 160 N.E. 379, 247 N.Y. (N.Y.S.) 305, 1928 N.Y. LEXIS 1072 (N.Y. 1928).

Salesmen paid solely by commission are employees. Bettinger v Federal Concrete Co., 268 N.Y. 655, 198 N.E. 542, 268 N.Y. (N.Y.S.) 655, 1935 N.Y. LEXIS 1122 (N.Y. 1935).See also Jacobi v Supreme Junior Coat Co., 268 N.Y. 654, 198 N.E. 541, 268 N.Y. (N.Y.S.) 654, 1935 N.Y. LEXIS 1121 (N.Y. 1935).

A claimant is an employee rather than an independent contractor where he was engaged to sell meat cutting machines, and although he worked on a commission, he drew against his commission weekly and the employer gave him lists of customers and contract forms and notices to post in the customers' places of business, so that they could get service and repairs from the employer, and further the purchasers' checks were made payable to the employer, the claimant reported to the employer each Saturday and made a written report of customers visited in addition to the fact that the claimant was given the prices at which the machines were to be sold and had no place of business of his own. Sanchez v Ross, 266 A.D. 930, 43 N.Y.S.2d 883, 1943 N.Y. App. Div. LEXIS 5272 (N.Y. App. Div. 1943).

An automobile salesman on a commission basis is an independent contractor rather than the employee of the agency where he was paid no salary and his name was not carried on the payroll, he had no drawing account, received no allowance for expenses, was assigned to no particular territory, was free to sell cars wherever he pleased, and was not required to work on any particular day. Mace v Morrison & Fleming, 267 A.D. 29, 44 N.Y.S.2d 672, 1943 N.Y. App. Div. LEXIS 5961 (N.Y. App. Div. 1943), aff'd, 293 N.Y. 844, 59 N.E.2d 438, 293 N.Y. (N.Y.S.) 844, 1944 N.Y. LEXIS 2262 (N.Y. 1944).

A pushcart vendor is an employee rather than an independent contractor where the manufacturer of the products which he sold furnished the pushcart, prescribed the area in which he could operate, required that he sell at least $5 worth of products each day and that he pay for his products within twelve hours. Florio v Assael, 274 A.D. 1082, 85 N.Y.S.2d 624, 1949 N.Y. App. Div. LEXIS 6148 (N.Y. App. Div. 1949).

After 18 years of being considered an employee, claimant's commissions schedule as a salesman was changed, he lost his desk space in employer's office, deductions for social security and income tax were discontinued and, after his injury, the employer claimed him to be an independent contractor. On the facts, the Board could properly find him to be an employee where he still used the company stationery, signed the employer's name with his own to letters, represented no other company, continued to have secretarial services, received his mail there and was injured while on his way to see about a new design for his employer. Waterbury v Dieges & Clust, 284 A.D. 912, 134 N.Y.S.2d 300, 1954 N.Y. App. Div. LEXIS 4043 (N.Y. App. Div. 1954).

Claimant was the operator of a small garage and sold used automobiles for a sales agency located in an adjacent town. He received a commission of $50.00 for each car he sold which included his services in transporting the car. While transporting a car he was injured in an automobile accident. Held: claimant was an employee rather than an independent contractor. Williams v Nobbs & Williams, 286 A.D. 897, 141 N.Y.S.2d 901, 1955 N.Y. App. Div. LEXIS 4462 (N.Y. App. Div. 1955).

A determination that claimant was an employee of the employer would not be overturned where it appeared that the alleged employer furnished him with a cart, together with ice cream, dry ice, and other supplies for selling ice cream products in New York City under an arrangement whereby the claimant could work at his pleasure and without limitation to any particular route or territory, except to return the cart and unsold ice cream at the end of each day and pay the employer 50 percent of the receipts, claimant having been injured by a third person's automobile in course of his business activities. Saitta v Namar, Inc., 14 A.D.2d 951, 221 N.Y.S.2d 147, 1961 N.Y. App. Div. LEXIS 7891 (N.Y. App. Div. 3d Dep't 1961).

Temporary employee was "special employee" of defendant company with which she was placed by temporary employment agency where defendant's employees exclusively controlled and directed manner, details, and ultimate result of her work while she was on defendant's premises; thus, temporary employee's personal injury action was barred by Workers' Compensation Law. Causewell v Barnes & Noble Bookstores, 238 A.D.2d 536, 657 N.Y.S.2d 87, 1997 N.Y. App. Div. LEXIS 4429 (N.Y. App. Div. 2d Dep't 1997).

Ice cream street vendors were independent contractors, and thus owner of ice cream trucks leased to them was not liable for workers' compensation premiums for them, where (1) owner's overall control of vendors' activities and owner's control over trucks were both minimal, (2) vendors had to obtain their own state or local business licenses, (3) vendors were free to buy supplies from any source, to sell to general public during any hours of their choice, and to develop and define their own sales territories, (4) they had to reconcile their sales independently with Internal Revenue Service, (5) they were responsible for daily operational upkeep of trucks, (6) method of compensation was left to vendors and their customers, and (7) owner and vendors had mutual power to terminate weekly leases. State Ins. Fund v

Circus Man Ice Cream Corp., 186 Misc. 2d 907, 721 N.Y.S.2d 717, 2001 N.Y. Misc. LEXIS 25 (N.Y. Sup. Ct. 2001).

64. —Taxicab driver

In view of apparent legislative intent to insure that taxicab drivers have workers' compensation coverage, Workers' Compensation Board fairly interpreted CLS Work Comp § 2(3) as including corporations in business of leasing taxicab medallions. In re Clumber Transp. Corp., 160 A.D.2d 1186, 555 N.Y.S.2d 196, 1990 N.Y. App. Div. LEXIS 4704 (N.Y. App. Div. 3d Dep't 1990).

Evidence supported conclusion of Workers' Compensation Board that taxi cab driver was employee of company that provided radio dispatch services to taxi operators where he testified that he was hired by company officer at company's offices, it was agreed that he would receive 40 percent of total of his daily bookings with remainder to be turned over to company dispatcher, company dispatcher told him what hours he would work and kept track of his movements at all times, he was told that he could not refuse jobs or turn off radio unless company directed him to do so, and company could fire him if he disobeyed. Scott v Manzi Taxi & Transp. Co., 179 A.D.2d 949, 579 N.Y.S.2d 225, 1992 N.Y. App. Div. LEXIS 847 (N.Y. App. Div. 3d Dep't), app. denied, 80 N.Y.2d 752, 587 N.Y.S.2d 288, 599 N.E.2d 692 (N.Y. 1992).

State Insurance Fund lacked rational basis for its determination that doctors who utilized petitioner's facilities were petitioner's employees, and thus were potentially covered beneficiaries under petitioner's workers' compensation insurance policy, where (1) doctors had complete control over all aspects of their work except for their use of petitioner's offices, secretarial staff, and equipment, for which petitioner retained portion of their fees, (2) petitioner did not hire or fire doctors, supervise their work, dictate office hours, set billing rates, preclude outside practice, provide malpractice insurance, or pay unemployment insurance premiums or social security taxes for them, and (3) petitioner never received any workers' compensation, unemployment, or other employment claim from any doctor. For-Med Medical Group v New York State Ins. Fund, 207 A.D.2d 300, 615 N.Y.S.2d 399, 1994 N.Y. App. Div. LEXIS 8372 (N.Y. App. Div. 1st Dep't 1994), app. denied, 85 N.Y.2d 802, 624 N.Y.S.2d 372, 648 N.E.2d 792, 1995 N.Y. LEXIS 210 (N.Y. 1995).

Neither the statutory language of N.Y. Workers' Comp. Law § 2(3)-(5), as amended by 1986 N.Y. Laws ch. 903, nor the legislative history of the amendment suggest, much less compel, the conclusion that the isolated leasing of a single taxi medallion by one taxi driver to another by itself automatically creates a statutory or common-law employer-employee relationship; thus a taxicab driver's leasing of a single taxi medallion to the claimant, who was also a taxicab driver, did not create a statutory or common-law employer-employee relationship within the meaning of N.Y. Workers' Comp. Law § 2(3)-(5), as amended by 1986 N.Y. Laws ch. 903, especially where the other taxicab driver did not control, direct, supervise, or have the power to terminate or hire the claimant. Singleton v Angora, 299 A.D.2d 620, 750 N.Y.S.2d 339, 2002 N.Y. App. Div. LEXIS 10580 (N.Y. App. Div. 3d Dep't 2002).

65. —Woodsmen, gardner and the like

Woodsmen paid by the tract or cord are employees and not independent contractors and hence accidents to them are compensable. *Fancher v Boston Excelsior Co., 235 N.Y. 272, 139 N.E. 265, 235 N.Y. (N.Y.S.) 272, 1923 N.Y. LEXIS 1176 (N.Y. 1923).See also Tsangournos v Smith, 183 A.D. 751, 171 N.Y.S. 256, 1918 N.Y. App. Div. LEXIS 6014 (N.Y. App. Div. 1918).

The industrial board properly determined that decedent was an employee in spite of his description in his contract as an independent contractor, where he agreed to cut an unspecified amount of timber at four dollars a thousand feet and where the places and the trees were to be selected by the alleged employer. Vroman v Van Alstyne, 293 N.Y. 837, 59 N.E.2d 435, 293 N.Y. (N.Y.S.) 837, 1944 N.Y. LEXIS 2257 (N.Y. 1944).

A gardner hired to care for a lawn and shrubbery and paid $140 per month to work two days a week on the property is an employee rather than an independent contractor where he used the tools of the property owner except for a lawn mower and the property owner regarded him as an employee, even though she gave no specific instructions about the work. Altieri v Morris, 275 A.D. 1009, 91 N.Y.S.2d 674, 1949 N.Y. App. Div. LEXIS 5476 (N.Y. App. Div. 1949), aff'd, 301 N.Y. 522, 93 N.E.2d 77, 301 N.Y. (N.Y.S.) 522, 1950 N.Y. LEXIS 876 (N.Y. 1950).

Claimant, regularly employed as a stock handler, owned a chain saw and cut and trimmed trees for others. A boat owner had pointed out to plaintiff trees that he wanted trimmed and directed claimant to do so. Claimant worked at an agreed hourly rate. Appellant had the right to discharge claimant at any time. Under circumstances, Board properly made award to claimant as employee. Eastman v Cottman, 7 A.D.2d 794, 180 N.Y.S.2d 785, 1958 N.Y. App. Div. LEXIS 3718 (N.Y. App. Div. 3d Dep't 1958).

Substantial evidence supported determination of Workers' Compensation Board that claimant logger, who was severely injured when tree fell on him while he was cutting wood for timber company, was company's employee rather than independent contractor, where record demonstrated that claimant was supplied with bulldozer where necessary, was directed as to what type and size of trees to cut, and was subject to being discharged by company if his work was found unsatisfactory. Harvey v Allegany Timber & Land Co., 162 A.D.2d 775, 557 N.Y.S.2d 687, 1990 N.Y. App. Div. LEXIS 7202 (N.Y. App. Div. 3d Dep't 1990).

66. Farm laborers, generally

Labor incidental to the operation of a farm is not a hazardous employment under the workmen's compensation law. Baum v Welden (1944) 267 App Div 1020, 267 App Div 1032, 48 NYS2d 305, revd on other grounds (1945) 294 NY 464, 63 NE2d 59.. See also Ackert v Delano, 246 A.D. 751, 283 N.Y.S. 957, 1935 N.Y. App. Div. LEXIS 10056 (N.Y. App. Div. 1935), aff'd, 271 N.Y. 584, 3 N.E.2d 196, 271 N.Y. (N.Y.S.) 584, 1936 N.Y. LEXIS 1308 (N.Y. 1936).

Claimant was injured while picking cherries at appellant's farm. Respondent had brought laborers, including claimant, to farm and he paid them and provided transportation. Appellant had agreed to pay compensation premium and his foreman provided ladders and pails, directed work and had right to discharge. Appellant never required any evidence from respondent of policy and never paid premium. Held: on facts, Board properly determined that employer-employee status existed between claimant and appellant. Kamenos v Masco, 6 A.D.2d 919, 175 N.Y.S.2d 679, 1958 N.Y. App. Div. LEXIS 5229 (N.Y. App. Div. 3d Dep't 1958).

When an hourly laborer is employed by a genuine farmer, carrying on actual productive farming, to perform labor of any kind necessary for continued operation of the farm, and the labor is performed on the farm, he is a "farm laborer" and not within the coverage of the Workmen's Compensation Law. Allstate Ins. Co. v Kabes, 17 A.D.2d 1015, 233 N.Y.S.2d 806, 1962 N.Y. App. Div. LEXIS 7000 (N.Y. App. Div. 3d Dep't 1962).

Claimant was not entitled to workers' compensation benefits, because deceased postmaster and chicken farmer was independent contractor, not employee, of farmers' cooperative with which he contracted to raise chickens owned by cooperative on his property, even though cooperative's service manager provided recommendations on how to care for chicks and often inspected chicken coops, where, inter alia, decedent owned and supplied building and equipment for raising chickens, insured premises against fire, at times had others help him raise chickens, received payment after flock was fully raised, which took about 12 weeks, and reported payments as farm income rather than wages or salary, and under contract cooperative had no right to fire him. Winglovitz v Agway, Inc., 246 A.D.2d 684, 667 N.Y.S.2d 509, 1998 N.Y. App. Div. LEXIS 107 (N.Y. App. Div. 3d Dep't 1998).

In an action against defendants as owners and operators of a farm for damages sustained by an infant as a farm laborer, plaintiff was clearly not in the class of employees required to be covered by workmen's compensation insurance and it was accordingly unnecessary to allege in the complaint that defendants did not carry such insurance. Empie v Entwhistle, 35 Misc. 2d 674, 230 N.Y.S.2d 648, 1962 N.Y. Misc. LEXIS 2870 (N.Y. Sup. Ct. 1962).

The exclusion of farm laborers and domestic servants from the scheme of the Work. Comp. Law may not be judicially declared an

arbitrary classification, violating equal protection of the law. New York C. R. Co. v White, 243 U.S. 188, 37 S. Ct. 247, 61 L. Ed. 667, 1917 U.S. LEXIS 2105 (U.S. 1917).

67. Particular activities as farm labor

A claimant hired to do farm work, injured while driving a tractor which was operating a machine that removed tops from beets piled on the ground, was a farm laborer regardless of whether he was working for the farmer or a canning company for whose ultimate use the beets were grown. Pestlin v Haxton Canning Co., 299 N.Y. 477, 87 N.E.2d 522, 299 N.Y. (N.Y.S.) 477, 1949 N.Y. LEXIS 959 (N.Y. 1949).

Cutting and storing ice for farm use is farm labor. Mullen v Little, 186 A.D. 169, 173 N.Y.S. 578, 1919 N.Y. App. Div. LEXIS 5543 (N.Y. App. Div. 1919).

The owner of an automobile truck who received from a stock farmer twenty-five dollars a day for the use of the truck to bring garbage to the farmer's premises to feed hogs and who was injured while unloading truck, was at the time engaged in farm labor and is not entitled to award under Workmen's Compensation Law. Halletz v Wiseman, 193 A.D. 4, 183 N.Y.S. 112, 1920 N.Y. App. Div. LEXIS 5499 (N.Y. App. Div. 1920).

Maintenance of a 19 acre city estate on which the owner raised chickens and cultivated a garden and sold broilers, surplus eggs and vegetables is not farm labor. Adams v Ross, 230 A.D. 216, 243 N.Y.S. 464, 1930 N.Y. App. Div. LEXIS 8582 (N.Y. App. Div. 1930).

Care of poultry on a farm devoted to agriculture, stock raising and dairy produce, operated by a corporation conducting retail stores, is farm labor. Bennett v Stoneleigh Farms, Inc., 254 A.D. 790, 4 N.Y.S.2d 255, 1938 N.Y. App. Div. LEXIS 7625 (N.Y. App. Div.), reh'g denied, 254 A.D. 914, 6 N.Y.S.2d 358, 1938 N.Y. App. Div. LEXIS 8278 (N.Y. App. Div. 1938).

A claimant who suffers an injury while carrying ensilage to feed cows on a farm which had a large herd of cattle and on which the owner produced, pasteurized and sold milk is not entitled to compensation inasmuch as he is engaged in farm labor. Laduke v Martin, 261 A.D. 344, 25 N.Y.S.2d 622, 1941 N.Y. App. Div. LEXIS 7323 (N.Y. App. Div.), aff'd, 287 N.Y. 546, 38 N.E.2d 221, 287 N.Y. (N.Y.S.) 546, 1941 N.Y. LEXIS 2443 (N.Y. 1941).

One, injured in unloading hay into a hay pressing machine, is within the category of a "farm laborer", as well as within the category of "hazardous employment". Hadlock v Beers, 278 A.D. 1032, 106 N.Y.S.2d 806, 1951 N.Y. App. Div. LEXIS 5605 (N.Y. App. Div. 1951).

The claimant had been working as an independent contractor filling silos in a certain neighborhood when he was approached by the foreman of the alleged employer and asked to fill the silos of his farm. During the course of this work, the claimant suffered an accident and since there was proof of supervision and control of the claimant by the foreman, the alleged employer was held liable for claimant's accident. Bemis v Friedman, 1 A.D.2d 860, 148 N.Y.S.2d 740, 1956 N.Y. App. Div. LEXIS 6298 (N.Y. App. Div. 3d Dep't 1956).

Running a "mink farm" on 5 of 25 acres of land with only one of the remaining acres being used for agricultural purposes did not constitute the operation of a farm for the exclusion from coverage of the Workmen's Compensation Law. Vande v Mattison, 4 A.D.2d 910, 167 N.Y.S.2d 67, 1957 N.Y. App. Div. LEXIS 4306 (N.Y. App. Div. 3d Dep't 1957).

68. —Maintenance and repair of farm buildings

There is sufficient evidence to support a finding that an employee was not a farm laborer and excluded from benefits under the workmen's compensation law where the employee was employed to remove metal sheeting from the roof of an obsolete building which the employer intended to put on buildings on his farm and the employer was engaged in the business of dealing in hay and operating a hay baling machine for pecuniary gain. Baum v Welden, 294 N.Y. 464, 63 N.E.2d 59, 294 N.Y. (N.Y.S.) 464, 1945 N.Y. LEXIS 770 (N.Y. 1945).

Keeping farm machinery and buildings in repair is farm labor. Coleman v Bartholomew, 175 A.D. 122, 161 N.Y.S. 560, 1916 N.Y. App. Div. LEXIS 8265 (N.Y. App. Div. 1916).

Slating of a barn roof by one customarily employed as a farm laborer is farm labor. Coleman v Bartholomew, 175 A.D. 122, 161 N.Y.S. 560, 1916 N.Y. App. Div. LEXIS 8265 (N.Y. App. Div. 1916).

Where a farmer employed a neighbor to make repairs to his barn and the latter was injured by the collapse of staging used while placing slate on the roof, the employer was not at the time of the injury engaged in a hazardous employment, because, first, the employer was not engaged in structural carpentry, roofing or construction and repair of buildings for pecuniary gain, and, second, the employee was a farm laborer. Coleman v Bartholomew, 175 A.D. 122, 161 N.Y.S. 560, 1916 N.Y. App. Div. LEXIS 8265 (N.Y. App. Div. 1916).

Where a farmer employed a neighbor who did occasional work as a carpenter to work by the hour in constructing a barn to replace a prior barn on the employer's farm which had been destroyed by fire, and the neighboring farmer was injured by a fall during the course of this work, he must be considered as working as a "farm laborer" at time of injury and not within the coverage of this Act. Allstate Ins. Co. v Kabes, 17 A.D.2d 1015, 233 N.Y.S.2d 806, 1962 N.Y. App. Div. LEXIS 7000 (N.Y. App. Div. 3d Dep't 1962).

69. —Plowing

Appellants were farmers and neighbors of claimant who was also a farmer. Claimant, owner of rototiller, was hired by appellants to rototill a cornfield at $15.00 per hour. There was some evidence of direction of appellants although supervision could hardly be considered important in simple labor of plowing field. In course of work claimant was severely injured. The Board properly found that claimant was an employee and not an independent contractor. Denman v Many, 8 A.D.2d 576, 183 N.Y.S.2d 324, 1959 N.Y. App. Div. LEXIS 9668 (N.Y. App. Div. 3d Dep't 1959), aff'd, 8 N.Y.2d 799, 202 N.Y.S.2d 16, 168 N.E.2d 250, 1960 N.Y. LEXIS 1283 (N.Y. 1960).

A workmen's compensation claimant who owned a rototiller which he used to cultivate land on his own dairy farm and also, from time to time, on other farms at a standard rate per hour or per acre, and who was injured while operating the machine on the farm of another under such an arrangement, was considered an employee while so operating the machine on the farm of another where such other told him where to work and in what order the fields should be handled, although not otherwise exercising any control over the manner of operating the machine. Denman v Many, 8 A.D.2d 576, 183 N.Y.S.2d 324, 1959 N.Y. App. Div. LEXIS 9668 (N.Y. App. Div. 3d Dep't 1959), aff'd, 8 N.Y.2d 799, 202 N.Y.S.2d 16, 168 N.E.2d 250, 1960 N.Y. LEXIS 1283 (N.Y. 1960).

70. —Lumbering, logging and woodcutting

An employee, although his general occupation is that of a farm laborer, is engaged in a hazardous occupation, justifying an award under the Workmen's Compensation Law, in case of an accident where the principal business of the employer is that of farming, but he is also engaged in the business of milling for the purpose of pecuniary gain, and is the owner of a power driven milling machine. Hamilla v Gade, 278 N.Y. 502, 15 N.E.2d 438, 278 N.Y. (N.Y.S.) 502, 1938 N.Y. LEXIS 1358 (N.Y. 1938).

An employee injured while cutting fire wood for domestic use from a farm that the employer was operating on shares is entitled to an award of compensation. Butterfield v Brown, 287 N.Y. 623, 39 N.E.2d 264, 287 N.Y. (N.Y.S.) 623, 1941 N.Y. LEXIS 2494 (N.Y. 1941).

Exclusion as a farm laborer has been held to apply to an employee logging on a farm. Brockett v Mietz, 184 A.D. 342, 171 N.Y.S. 412, 1918 N.Y. App. Div. LEXIS 6032 (N.Y. App. Div. 1918).

Employment as a chore and stable boy in a lumber camp is not farm labor. Posey v Moynehan, 195 A.D. 440, 186 N.Y.S. 753, 1921 N.Y. App. Div. LEXIS 4772 (N.Y. App. Div. 1921).

Buzz sawing kindling wood for farm use is farm labor. King v Burlingame, 242 A.D. 499, 275 N.Y.S. 106, 1934 N.Y. App. Div. LEXIS 6104 (N.Y. App. Div. 1934).

There is evidence to sustain a finding by the board that an employee was not a farm laborer, where the claimant was employed as a truck driver, mechanic and laborer and was injured in drawing logs from the premises of a third party to the employer's saw mill, and it further appears that the employer was engaged in several activities other than farming. Miles v Colegrove, 258 A.D. 1014, 16 N.Y.S.2d 988, 1940 N.Y. App. Div. LEXIS

8647 (N.Y. App. Div.), aff'd, 284 N.Y. 609, 29 N.E.2d 929, 284 N.Y. (N.Y.S.) 609, 1940 N.Y. LEXIS 1255 (N.Y. 1940).

The status of claimant employed to do general farm work is not altered by his cutting wood for kindling. Davis v Ryan, 262 A.D. 982, 30 N.Y.S.2d 17, 1941 N.Y. App. Div. LEXIS 6775 (N.Y. App. Div. 1941), aff'd, 287 N.Y. 778, 40 N.E.2d 646, 287 N.Y. (N.Y.S.) 778, 1942 N.Y. LEXIS 1794 (N.Y. 1942).

A claimant, who is not a regular farm hand, is not engaged in farm labor where his employer, although a farmer was engaged in a lumbering operation on land which he neither owned nor rented. Jorgensen v Beach, 277 A.D. 960, 99 N.Y.S.2d 669, 1950 N.Y. App. Div. LEXIS 3995 (N.Y. App. Div. 1950).

71. —Threshing and milling

Threshing grain is not farming. White v Loades, 178 A.D. 236, 164 N.Y.S. 1023, 1917 N.Y. App. Div. LEXIS 5842 (N.Y. App. Div. 1917).

A person, whose sole duty to his employers is feeding bundles of rye into a combined thresher and cleaner is not a farm laborer, within the meaning of former § 3, subd. 4, nor is he employed in "milling," within meaning of former § 2, group 29, where his employer's interest and conduct of milling business is confined solely to operation of thresher and cleaner. Vincent v Taylor Bros., 180 A.D. 818, 168 N.Y.S. 287, 1917 N.Y. App. Div. LEXIS 9112 (N.Y. App. Div. 1917).

72. —Improvements on abandoned farms prior to development or sale

A claimant injured while pruning an apple tree on a deserted farm purchased by a contractor for the purpose of improving the place and eventually making a sale of the farm at a profit is not engaged in farm labor. O'Dell v Bowman, 189 A.D. 386, 179 N.Y.S. 592, 1919 N.Y. App. Div. LEXIS 4675 (N.Y. App. Div. 1919).

A carpenter hired to do work on an abandoned farm which the employer intended to use as a summer home, a permanent home or as a real estate development is eligible for workmen's compensation. Dolan v Erdmann, 265 A.D. 895, 37 N.Y.S.2d 864, 1942 N.Y. App. Div. LEXIS 6374 (N.Y. App. Div. 1942).

73. —Pasturization of milk

Claimant working on the farm of a milk pasteurizing firm and injured while cutting fire wood was not engaged in work incidental to the pasteurization and bottling business and hence is a farm laborer within subd. 4 of this section. In re Davis, 287 N.Y. 778, 40 N.E.2d 646, 287 N.Y. (N.Y.S.) 778, 1942 N.Y. LEXIS 1794 (N.Y. 1942).

Pasteurization of milk by dairy farmers on their own farms is part of the preparation of their milk for market and is farm labor. Laduke v Martin, 261 A.D. 344, 25 N.Y.S.2d 622, 1941 N.Y. App. Div. LEXIS 7323 (N.Y. App. Div.), aff'd, 287 N.Y. 546, 38 N.E.2d 221, 287 N.Y. (N.Y.S.) 546, 1941 N.Y. LEXIS 2443 (N.Y. 1941).

General farm work performed on a farm maintained in connection with the employer's milk pasteurizing and bottling plant in an adjacent city is farm labor. Davis v Ryan, 262 A.D. 982, 30 N.Y.S.2d 17, 1941 N.Y. App. Div. LEXIS 6775 (N.Y. App. Div. 1941), aff'd, 287 N.Y. 778, 40 N.E.2d 646, 287 N.Y. (N.Y.S.) 778, 1942 N.Y. LEXIS 1794 (N.Y. 1942).

74. Domestic servants

A chauffeur repairing his employer's family touring car has domestic servant status, although he also operates his employer's business truck. Wincheski v Morris, 179 A.D. 600, 166 N.Y.S. 873, 1917 N.Y. App. Div. LEXIS 7430 (N.Y. App. Div. 1917).

Domestic servants may by action of the employer under group 19 of § 3, and under § 50 be brought under the Act. Fostner v Morawitz, 215 A.D. 176, 213 N.Y.S. 202, 1926 N.Y. App. Div. LEXIS 10932 (N.Y. App. Div. 1926).

Unless there is something more shown than a mere approval of selection and direction as to what a servant does in the domestic service of a husband and wife, there is no joint or individual responsibility on the part of a wife as an employer under the statute. Hence, merely because a wife was an active factor in the selection or management of a domestic servant did not mean when the domestic was injured in the course of her employment that she was an employee of the wife as well as the husband. North v Richards, 283 A.D. 21, 126 N.Y.S.2d 241, 1953 N.Y. App. Div. LEXIS 2969 (N.Y. App. Div. 1953).

There was substantial evidence that claimant, a domestic, was an employee of corporation rather than of individual appellant at time of accident. Claimant went to work in appellant's home with knowledge and consent of corporation to care for president of corporation, who was disabled, and to permit appellant wife to take charge of operation of corporation for which she received no compensation. Insurance carrier had made audit of corporate books where claimant's name appeared as employee and had collected premiums based on her salary. Sabre v Marie Sheridan, Inc., 6 A.D.2d 953, 176 N.Y.S.2d 419, 1958 N.Y. App. Div. LEXIS 5018 (N.Y. App. Div. 3d Dep't 1958).

Workers' Compensation Board properly found that employee had been in covered employment where (1) employee responded through agency to employer's advertisement for full-time live-in domestic, (2) employee testified that she was hired for advertised position and injured herself on her third day, (3) employer testified that employee was hired only for single evening of babysitting, and (4) employment agency personnel testified that employee was hired to fill advertised position until someone more suitable could be found; board could reasonably infer that full-time live-in arrangement contemplated by employer involved 40 or more hours of work per week. Williams v Geddes, 125 A.D.2d 796, 510 N.Y.S.2d 204, 1986 N.Y. App. Div. LEXIS 63009 (N.Y. App. Div. 3d Dep't 1986).

Workers' compensation claimant, who performed domestic services for corporation president at his home and injured her back while packing boxes for his move to another residence, was employee of corporation and was not engaged in dual employment for both corporation and president where she was paid and supplied with W-2 forms by corporation, and her responsibilities included provision of domestic services to president, notwithstanding facts that claimant began working at president's request and was paid in cash by president for several years before corporation began to pay her. Daughtrey v Enertex Computer Concepts, Inc., 149 A.D.2d 872, 540 N.Y.S.2d 560, 1989 N.Y. App. Div. LEXIS 5020 (N.Y. App. Div. 3d Dep't 1989).

Workers' compensation claimant, who performed domestic services for corporation president at his home and injured her back while packing boxes for his move to another residence, was employee covered under corporation's insurance contract with its carrier where Workers' Compensation Board determined that she was employee of corporation and neither corporation nor insurance carrier came forward with effective exclusion for employees such as claimant. Daughtrey v Enertex Computer Concepts, Inc., 149 A.D.2d 872, 540 N.Y.S.2d 560, 1989 N.Y. App. Div. LEXIS 5020 (N.Y. App. Div. 3d Dep't 1989).

A housewife who supplemented family income by working weekends serving at social affairs was within the definition of "employee" in subd. 4 of this section, as amended, where, although she was employed in the particular household on only one occasion and for a particular event, her employer took the precaution of taking out a special compensation liability insurance policy covering "in servants" for which he paid a special premium. Weiss v Laffman, 43 Misc. 2d 653, 251 N.Y.S.2d 833, 1964 N.Y. Misc. LEXIS 1568 (N.Y. Civ. Ct. 1964).

In insureds' action seeking coverage for liability for workers' compensation benefits to their live-in housekeeper who was injured in course of her employment, wherein insureds maintained that they voluntarily elected to cover housekeeper and thus brought her within class of workers covered by Workers' Compensation Law for purposes of endorsement provided for in their homeowners' insurance policy, ambiguity in endorsement arose because it was unclear whether second condition of endorsement (whether insured's employee was one for whom workers' compensation benefits "must be provided") was satisfied by existence of endorsement itself. Haber v St. Paul Guardian Ins. Co., 137 F.3d 691, 1998 U.S. App. LEXIS 2416 (2d Cir. N.Y. 1998).

New York State Insurance Law does not require insurance policy, which provides comprehensive personal liability insurance on one, 2-, 3-, or 4-family owner-occupied dwelling, to include workers' compensation coverage for domestic worker who works fewer than 40 hours per week for same policyholder. Insurance

Department, Opinions of General Counsel, Opinion Number 03-05-22.

Policyholder under comprehensive personal liability insurance for one, 2-, 3-, or 4-family owner-occupied dwelling may obtain workers' compensation coverage for domestic worker if policyholder elects to secure compensation to such employee by (1) "insuring and keeping insured the payment of such compensation in the state fund," or (2) "insuring and keeping insured the payment of such compensation with any stock corporation, mutual corporation or reciprocal insurer authorized to transact the business of workmen's compensation insurance in the state." Insurance Department, Opinions of General Counsel, Opinion Number 03-05-22.

75. Casual employment in and about one family owner occupied residence

An order of Appellate Division reversing the decision of the Workers' Compensation Board awarding benefits to claimant, would be reversed and the decision of the Board reinstated where there was substantial evidence before the Board upon which it could base its finding that claimant was not working in a "one family owner-occupied residence" even though it was the owner's intention to convert the house to a one-family residence, since the Board could conclude that the conversion process had not yet been completed when claimant was injured. Hill v Thompson, 61 N.Y.2d 1018, 475 N.Y.S.2d 373, 463 N.E.2d 1225, 1984 N.Y. LEXIS 4234 (N.Y. 1984).

There was substantial evidence to sustain a decision of the Board as to existence of an employer-employee relationship and that employment of claimant was in connection with business conducted by the employer for pecuniary gain where it appeared that the employer owned 16 acres of land purchased originally as a summer residence for her family but on which, as well as a large residence, there was a small cottage and living quarters in a garage which were rented out or offered for rent from time to time, and that claimant was employed as handyman or caretaker at $1.50 an hour and injured while helping to move furniture from the garage to the large house. Gallo v Scofield, 18 A.D.2d 1039, 238 N.Y.S.2d 459, 1963 N.Y. App. Div. LEXIS 4180 (N.Y. App. Div. 3d Dep't 1963).

New York Workers' Compensation Board's finding that there was an employment relationship between a workers' compensation claimant and an employer was affirmed where the claimant was hired by the employer to perform tree removal and driveway work, the employer negotiated the job with the homeowner and was paid by the homeowner, the employer provided some of the equipment and materials for the job, and the employer paid the claimant. Marques v Salgado, 12 A.D.3d 817, 784 N.Y.S.2d 241, 2004 N.Y. App. Div. LEXIS 13259 (N.Y. App. Div. 3d Dep't 2004).

The 1962 amendment of the definition of "employee" in subd. 4 of this section to exclude persons engaged in casual employment at yard work, household chores, etc., in and about a one family owner-occupied residence was designed to preclude claims for compensation by journeymen working around private homes, and the additional term "household chores" in this amendment, while seemingly broad enough to cover domestic services, when taken in full context does not exclude servants rendering such services from voluntary coverage. Weiss v Laffman, 43 Misc. 2d 653, 251 N.Y.S.2d 833, 1964 N.Y. Misc. LEXIS 1568 (N.Y. Civ. Ct. 1964).

IV. Employment

76. In general

The Work. Comp. Law applies only in case a workman is engaged in an employment carried on by an employer for pecuniary gain or in connection therewith. Dillon v Trustees of St. Patrick's Cathedral, 234 N.Y. 225, 137 N.E. 311, 234 N.Y. (N.Y.S.) 225, 1922 N.Y. LEXIS 639 (N.Y. 1922).

For purposes of compensation, the law makes no distinction between a public and private employment. An employer's liability to pay compensation depends upon the employment and the right to payment depends on a work-connected injury. Perry v Cherry Valley, 307 N.Y. 427, 121 N.E.2d 402, 307 N.Y. (N.Y.S.) 427, 1954 N.Y. LEXIS 973 (N.Y. 1954).

Workers' compensation insurance carrier would not be relieved of liability, even though garage owner's employment of wrecking truck driver might have violated tax laws and other statutes due to fact that no taxes were withheld from driver's wages and wages paid might have been below minimum wage, since any illegality did not inhere to work itself. Davison v Holder, 137 A.D.2d 899, 524 N.Y.S.2d 871, 1988 N.Y. App. Div. LEXIS 1642 (N.Y. App. Div. 3d Dep't 1988).

77. Particular activities as trade or business carried on for pecuniary gain

Injuries to the chauffeur of a department store delivery truck, while repairing the pleasure car of his employer, are not received while engaged in a hazardous employment conducted for pecuniary gain. Wincheski v Morris, 179 A.D. 600, 166 N.Y.S. 873, 1917 N.Y. App. Div. LEXIS 7430 (N.Y. App. Div. 1917).

The owners of dwelling house who boarded the local school teacher and accepted tourists as paying guests are not engaged in a trade of business for pecuniary gain within the meaning of the law. Empie v Cossart, 259 A.D. 941, 20 N.Y.S.2d 3, 1940 N.Y. App. Div. LEXIS 7372 (N.Y. App. Div. 1940).

78. —Building maintenance, repair or construction

Where the employer's son was injured while on his way to procure painting materials to be used about a building owned by a corporation whose stock was owned entirely by the employer and his family, the building being used as a residence by the employer's family, an award of compensation cannot be sustained since the employer was not engaged in the repair of the building for pecuniary gain. Goldberger v Goldberger, 200 A.D. 190, 192 N.Y.S. 727, 1922 N.Y. App. Div. LEXIS 8153 (N.Y. App. Div. 1922).

Claimant was an employee and was injured in work performed in a "business" carried on by the employer for a pecuniary gain where he was injured while repairing a ceiling in a bathroom occupied by the employer in a two-story dwelling which was connected by an open-air eating stand to the employer's restaurant. Smith v White, 3 A.D.2d 869, 161 N.Y.S.2d 440, 1957 N.Y. App. Div. LEXIS 5888 (N.Y. App. Div. 3d Dep't 1957).

79. —Demolition and salvaging operations

A religious corporation which owns and carries on a cemetery, selling burial privileges and using the proceeds in supporting the cemetery, including salaries of employees, and any balance remaining for educational, religious and charitable purposes, is not engaged in a trade, business or occupation carried on for pecuniary gain within the meaning of former § 3, subd. 5. Dillon v Trustees of St. Patrick's Cathedral, 234 N.Y. 225, 137 N.E. 311, 234 N.Y. (N.Y.S.) 225, 1922 N.Y. LEXIS 639 (N.Y. 1922).

A farm owner is not engaged in business for pecuniary gain in tearing down an old barn on the premises and salvaging the material, where it appears that this was being done to put the farm in condition for farming for a new tenant whose lease was about to begin. Millard v Townsend, 204 A.D. 132, 197 N.Y.S. 702, 1923 N.Y. App. Div. LEXIS 9429 (N.Y. App. Div. 1923).

Where an employee was injured in the demolition of a bungalow, the fact that the ground upon which the bungalow stood was leveled off and used as a parking space within 6 months after the accident justifies the inference that the demolition was preparatory to devoting the space to a parking lot. Coppola v Tilyou, 271 A.D. 848, 65 N.Y.S.2d 619, 1946 N.Y. App. Div. LEXIS 3388 (N.Y. App. Div. 1946), aff'd, 297 N.Y. 656, 76 N.E.2d 322, 297 N.Y. (N.Y.S.) 656, 1947 N.Y. LEXIS 1131 (N.Y. 1947).

A city may not require as a condition to the issuance of a demolition permit, that each person engaged in such work be covered by accident insurance providing a stated weekly benefit if such persons are not covered by the Workmen's Compensation Law. 1965 Op St Compt No. 65–776.

80. —Operations not primiarily created to yield profit

A golf club incorporated under the Mem. Corp. Law, maintained exclusively for social purposes, and which distributes no dividends to its members, is not carrying on business for pecuniary gain within meaning of former § 3, subd. 5, and is not liable for the death of a cook in the kitchen of its restaurant. Francisco v Oakland Golf Club, 193 A.D. 573, 185 N.Y.S. 97, 1920 N.Y. App. Div. LEXIS 5602 (N.Y. App. Div. 1920).

When an organization not primarily created for business engages in a profit yielding enterprise, the profits will be pecuniary gain or not, depending on the disposition made of them. Rugg v

Norwich Hospital Ass'n, 205 A.D. 174, 199 N.Y.S. 735, 1923 N.Y. App. Div. LEXIS 4975 (N.Y. App. Div. 1923).

The workmen's compensation law is applicable notwithstanding the employer is a charitable corporation if it has elected voluntarily to bring the employment within the coverage of the law. Monteleone v Center Storage Warehouses, Inc., 68 N.Y.S.2d 369, 1946 N.Y. Misc. LEXIS 3367 (N.Y. Sup. Ct. 1946).See also Posey v Moynehan, 195 A.D. 440, 186 N.Y.S. 753, 1921 N.Y. App. Div. LEXIS 4772 (N.Y. App. Div. 1921).

V. Compensation

81. In general

The term "compensation" as defined by subd. 6, and as used in § 28, as amended by L 1928 ch 754, means "the money allowance payable to an employee or to his dependents," and includes an allowance for death benefits. Davis v Rust, 231 A.D. 336, 247 N.Y.S. 309, 1931 N.Y. App. Div. LEXIS 16051 (N.Y. App. Div. 1931).

An award of compensation may not be made subsequent to the conviction of the employee of second degree murder and his sentence to life imprisonment, since the employee is then civilly dead. Pallas v Misericordia Hospital, 264 A.D. 1, 34 N.Y.S.2d 881, 1942 N.Y. App. Div. LEXIS 4052 (N.Y. App. Div. 1942), aff'd, 291 N.Y. 692, 52 N.E.2d 590, 291 N.Y. (N.Y.S.) 692, 1943 N.Y. LEXIS 1794 (N.Y. 1943).

"Compensation" as defined in this section means the money allowance payable to an employee. It does not include wages paid for value received. If any part of wages are to be deemed an advance payment, such part must necessarily be found gratuitous. If an injured employee returns to work and fully earns his hire there is nothing gratuitous to such an arrangement. In that case the employer gives him nothing; he merely pays for the worth of the services performed. The test is whether the employer paid for something he did not get in the way of service. Baker v Standard Rolling Mills, Inc., 284 A.D. 433, 131 N.Y.S.2d 739, 1954 N.Y. App. Div. LEXIS 3420 (N.Y. App. Div. 1954).

Where the estate representative of the former owner of a supermarket had permitted the deceased husband of the benefits claimant to manage the business and had paid him for his services and business expenses, an employment relationship was created and maintained until the employee's accidental death, and having accepted the benefits of decedent's efforts, the estate was estopped from denying the existence of an employment relationship. Jimenez v Estate of Jimenez, 79 A.D.2d 798, 435 N.Y.S.2d 113, 1980 N.Y. App. Div. LEXIS 14204 (N.Y. App. Div. 3d Dep't 1980).

Substantial evidence supported Board's finding that claimant was an employee at the time of the accident where at the hearing claimant produced payroll stubs from the employer, a payroll check from the employer, a photostat of the check from the employer mailed to claimant showing Social Security withholdings, and where although being advised of hearing, employer did not appear. Kosak v Dana Group, Inc., 84 A.D.2d 631, 444 N.Y.S.2d 277, 1981 N.Y. App. Div. LEXIS 15746 (N.Y. App. Div. 3d Dep't 1981).

Definition of "advance payment of compensation" for purposes of CLS Work Comp § 25-a is no different than for CLS Work Comp § 28, since informal claims are treated same as formal awards under Workers' Compensation Law. Loiacono v Sears Roebuck & Co., 230 A.D.2d 351, 654 N.Y.S.2d 463, 1997 N.Y. App. Div. LEXIS 2227 (N.Y. App. Div. 3d Dep't 1997).

82. Medical expenses

Medical expenses required by § 13 of this law to be furnished by the employer are not compensation within the meaning of subdivision 6 of this section. Friedman v Simon, 267 A.D. 17, 45 N.Y.S.2d 89, 1943 N.Y. App. Div. LEXIS 5957 (N.Y. App. Div. 1943), aff'd, 293 N.Y. 720, 56 N.E.2d 732, 293 N.Y. (N.Y.S.) 720, 1944 N.Y. LEXIS 2141 (N.Y. 1944).

Payments for drugs and medicines constitute payments of compensation. Cook v New York C. R., 270 A.D. 869, 60 N.Y.S.2d 342, 1946 N.Y. App. Div. LEXIS 4370 (N.Y. App. Div.), aff'd, 296 N.Y. 576, 68 N.E.2d 872, 296 N.Y. (N.Y.S.) 576, 1946 N.Y. LEXIS 1171 (N.Y. 1946).

Although medical expenses do not fit into definition of "compensation" under CLS Work Comp § 2(6), other provisions of Workers' Compensation Law refer to medical benefits as compensation, and thus medical expenses are included within concept of compensation for settlements reached under CLS Work Comp § 15(5-b). Cordell v Oneida Youth Div., 146 A.D.2d 362, 540 N.Y.S.2d 921, 1989 N.Y. App. Div. LEXIS 6204 (N.Y. App. Div. 3d Dep't), app. denied, 74 N.Y.2d 614, 547 N.Y.S.2d 848, 547 N.E.2d 103, 1989 N.Y. LEXIS 3160 (N.Y. 1989).

Payment of claimant's medical expenses was not "payment of compensation" for purposes of determining applicability of CLS Work Comp § 25-a. McQueen v New York State Div. of Parole, 245 A.D.2d 851, 666 N.Y.S.2d 317, 1997 N.Y. App. Div. LEXIS 13193 (N.Y. App. Div. 3d Dep't 1997), app. denied, 92 N.Y.2d 802, 677 N.Y.S.2d 72, 699 N.E.2d 432, 1998 N.Y. LEXIS 1767 (N.Y. 1998).

Liability of employer's workers' compensation carrier for injured employee's future medical payments would be discharged, and liability would be transferred to Special Fund for Reopened Cases under CLS Work Comp § 25-a, where (1) accident occurred on October 18, 1984, last payment of compensation was made on November 19, 1984, and thus criterion of requisite passage of time was met, and (2) chiropractor's reports did not indicate change in claimant's condition, and thus did not constitute reopening of case so as to remove it from purview of statute. McQueen v New York State Div. of Parole, 245 A.D.2d 851, 666 N.Y.S.2d 317, 1997 N.Y. App. Div. LEXIS 13193 (N.Y. App. Div. 3d Dep't 1997), app. denied, 92 N.Y.2d 802, 677 N.Y.S.2d 72, 699 N.E.2d 432, 1998 N.Y. LEXIS 1767 (N.Y. 1998).

Payment of medical expenses is not compensation, as compensation is defined by CLS Work Comp § 2(6). Hill v Eastman Kodak Co., 258 A.D.2d 861, 686 N.Y.S.2d 141, 1999 N.Y. App. Div. LEXIS 1961 (N.Y. App. Div. 3d Dep't 1999).

Award of counsel fees may only be paid from lost wages, not from or as result of medical benefits award, as counsel fees must be paid from "compensation," which is defined in CLS Work Comp § 2(6) as "the money allowance payable to an employee or to his dependents." Cummins v N. Med. Family Physicians, 283 A.D.2d 861, 726 N.Y.S.2d 163, 2001 N.Y. App. Div. LEXIS 5420 (N.Y. App. Div. 3d Dep't), app. denied, 96 N.Y.2d 720, 733 N.Y.S.2d 372, 759 N.E.2d 371, 2001 N.Y. LEXIS 3088 (N.Y. 2001), limited, Matter of Shea v Icelandair, 63 A.D.3d 30, 876 N.Y.S.2d 225, 2009 N.Y. App. Div. LEXIS 2484 (N.Y. App. Div. 3d Dep't 2009).

Under N.Y. Workers' Comp. Law § 2(9), the claimant's workers' compensation benefits were based on his actual wage without inclusion of health insurance payments that the employer made for his benefit. Kellish v Kellish Tire Sales, Inc., 12 A.D.3d 804, 784 N.Y.S.2d 238, 2004 N.Y. App. Div. LEXIS 13280 (N.Y. App. Div. 3d Dep't 2004).

Workers' Compensation Board erred when it denied an award of counsel fees in a settlement under N.Y. Workers' Comp. Law § 32 that awarded an employee medical and travel expenses, as such constituted "compensation" under N.Y. Workers' Comp. Law §§ 24 and 2(6) under a liberal interpretation of that term. Matter of Shea v Icelandair, 63 A.D.3d 30, 876 N.Y.S.2d 225, 2009 N.Y. App. Div. LEXIS 2484 (N.Y. App. Div. 3d Dep't 2009).

Compensation includes medical expenses incurred by the injured employee. Semmen v Butterick Pub. Co., 166 N.Y.S. 993, 101 Misc. 285, 1917 N.Y. Misc. LEXIS 644 (N.Y. App. Term 1917).; Goldflam v Kazemier & Uhl, Inc., 181 A.D. 140, 168 N.Y.S. 87, 1917 N.Y. App. Div. LEXIS 9057 (N.Y. App. Div. 1917).

Payment of a doctor's bill is not within the definition of "compensation." Employers Liability Assurance Corp. v Fisher, 13 N.Y.S.2d 902, 1939 N.Y. Misc. LEXIS 2123 (N.Y. City Ct. 1939).

83. Other payments

Payments to statutory special funds where a deceased employee leaves no person legally entitled to compensation, does not constitute compensation within the meaning of the workmen's compensation law. Industrial Comm'r v McCarthy, 295 N.Y. 443, 68 N.E.2d 434, 295 N.Y. (N.Y.S.) 443, 1946 N.Y. LEXIS 799 (N.Y. 1946).

Funeral expenses are included within the term "compensation" under subd. 6, and they are death benefits under § 16, subd. 1.

Donoho v Atlantic Basin Iron Works, 210 A.D. 535, 206 N.Y.S. 494, 1924 N.Y. App. Div. LEXIS 6784 (N.Y. App. Div. 1924).

An award for serious facial disfigurement is compensation within the meaning of subdivision 6 of this section. Ulman v Jerome Glass & Shade Co., 266 A.D. 643, 44 N.Y.S.2d 641, 1943 N.Y. App. Div. LEXIS 3639 (N.Y. App. Div. 1943).

Payment of compensation, under § 25 of the Workmen's Compensation Law, in anticipation of an award, although no award is made, constitutes a taking of compensation within § 29 of the Act, subd. 1, and 2 in accordance with the interpretation placed upon the term "compensation" by § 2, subd. 6, and § 25 of the Act, and so a third party action must be commenced before the expiration of one year from the date the action accrues to avoid an automatic assignment under § 29 subd. 1. Hatch v Cherry-Burrell Corp., 274 A.D. 234, 82 N.Y.S.2d 322, 1948 N.Y. App. Div. LEXIS 3048 (N.Y. App. Div.), app. denied, 274 A.D. 869, 83 N.Y.S.2d 219, 1948 N.Y. App. Div. LEXIS 3740 (N.Y. App. Div. 1948).

Schedule allowances should not be deemed exclusive when issue is treatment of smaller member as percentage loss of larger. Pedro v Liberty Lines Express, 246 A.D.2d 945, 667 N.Y.S.2d 859, 1998 N.Y. App. Div. LEXIS 751 (N.Y. App. Div. 3d Dep't 1998).

Substantial evidence supported Workers' Compensation Board's finding of 50 percent schedule loss of use of claimant's hand where board's medical examiner testified that although injury was directly sustained by claimant's thumb, resulting damage obviously diminished prehensile function of entire hand, and claimant was no longer able to grip objects with his hand. Pedro v Liberty Lines Express, 246 A.D.2d 945, 667 N.Y.S.2d 859, 1998 N.Y. App. Div. LEXIS 751 (N.Y. App. Div. 3d Dep't 1998).

CLS Gen Mun § 207-c benefits, which are in nature of disability benefits paid under statutory compulsion to compensate certain municipal employees for injuries incurred in performance of special work related to heightened risks and duties, are not "wages" within purview of CLS Work Comp § 15(3)(w) which pertains to nonschedule award for permanent partial disability, or CLS Work Comp § 15(5) which pertains to award for temporary partial disability. Lynch v South Nyack/Grand View Police Dep't, 276 A.D.2d 63, 716 N.Y.S.2d 732, 2000 N.Y. App. Div. LEXIS 12251 (N.Y. App. Div. 3d Dep't 2000).

Findings that housing provided by an employer was not remuneration for an employee's services, but was intended to prevent the employee from having to incur extra living expenses while working away from his primary residences, and, thus, the housing was not included in the employee's wage under N.Y. Workers' Comp. Law § 2(9) were supported by substantial evidence; the evidence showed that the employer only furnished housing when the employee was away from his own residence, there was no evidence that workers who were not provided housing received higher salaries than those who did, and the employee admitted that he did not claim the value of the housing as income on his tax returns. Matter of Tangora v Volume Servs. Am., 32 A.D.3d 604, 820 N.Y.S.2d 158, 2006 N.Y. App. Div. LEXIS 9831 (N.Y. App. Div. 3d Dep't 2006).

VI. Accidental Injury Generally

84. In general

The Work Comp Law does not afford compensation for injuries or misfortunes which merely are contemporaneous or coincident with the employment or collateral to it. Personal injury must be the result of the employment and flow from it as the inducing proximate cause. Alpert v Powers, 223 N.Y. 97, 119 N.E. 229, 223 N.Y. (N.Y.S.) 97, 1918 N.Y. LEXIS 1162 (N.Y. 1918).

The wording of subdivision 7 does not warrant the argument that an infection is coupled with disease as something other than an accident or injury, though a possible concomitant; the intention was by the addition of these words to enlarge and not to narrow. Connelly v Hunt Furniture Co., 240 N.Y. 83, 147 N.E. 366, 240 N.Y. (N.Y.S.) 83, 1925 N.Y. LEXIS 703 (N.Y. 1925).

It is necessary for an employee seeking to obtain compensation benefits to establish only that his injury was caused by an activity related to his job, whereas the doctrine of respondeat superior has clearly not received such wide application because of the requirement that the employee be under the control of the employer at the time of the injury. Lundberg v State, 25 N.Y.2d 467, 306 N.Y.S.2d 947, 255 N.E.2d 177, 1969 N.Y. LEXIS 938 (N.Y. 1969), reh'g denied, 26 N.Y.2d 883, 309 N.Y.S.2d 1032, 258 N.E.2d 223, 1970 N.Y. LEXIS 1897 (N.Y. 1970).

Whether particular event is accidental injury under Workmen's Compensation Law is to be determined, not by any legal definition, but by commonsense viewpoint of average man. Middleton v Coxsackie Correctional Facility, 38 N.Y.2d 130, 379 N.Y.S.2d 3, 341 N.E.2d 527, 1975 N.Y. LEXIS 2297 (N.Y. 1975).

An injury to be within protection of the Work. Comp. Law must be received while the workman is doing the duty he is employed to perform, and it must be one of the risks connected with the employment flowing therefrom as a natural consequence and directly connected with the work. In re Lauterbach, 189 A.D. 303, 178 N.Y.S. 480, 1919 N.Y. App. Div. LEXIS 4650 (N.Y. App. Div. 1919).See also Magill v Cunard White Star, Ltd., 275 N.Y. 568, 11 N.E.2d 757, 275 N.Y. (N.Y.S.) 568, 1937 N.Y. LEXIS 1549 (N.Y. 1937).

Injury and personal injury mean only accidental injuries as set forth in former § 3, subd. 7, and until it is shown that there has been an accident, something which is apart from the natural and inevitable results of proper performance of the duties of the employment, there is no foundation for the application of the statute. Scoville v Tolhurst Mach. Works, 193 A.D. 606, 184 N.Y.S. 608, 1920 N.Y. App. Div. LEXIS 5615 (N.Y. App. Div. 1920), aff'd, 231 N.Y. 510, 132 N.E. 867, 231 N.Y. (N.Y.S.) 510, 1921 N.Y. LEXIS 661 (N.Y. 1921).

Precedents are of little value in determining whether or not an injury arises out of and in the course of the employment. McGrinder v Sullivan, 264 A.D. 640, 37 N.Y.S.2d 1, 1942 N.Y. App. Div. LEXIS 4223 (N.Y. App. Div. 1942), rev'd, 290 N.Y. 11, 47 N.E.2d 421, 290 N.Y. (N.Y.S.) 11, 1943 N.Y. LEXIS 1131 (N.Y. 1943).

In a workmen's compensation case, the burden of proof is upon claimant to establish that there was an accidental injury connected with the employment. Finn v Merritt, Chapman & Scott, 20 A.D.2d 731, 246 N.Y.S.2d 839, 1964 N.Y. App. Div. LEXIS 4371 (N.Y. App. Div. 3d Dep't 1964).

The board in its capacity as the arbiter of factual issues is to decide if a given incident constitutes an accident within the meaning of the Workmen's Compensation Law, and its determinations must be sustained if supported by substantial evidence. Connors v Secon Secur., Inc., 24 A.D.2d 674, 261 N.Y.S.2d 136, 1965 N.Y. App. Div. LEXIS 3675 (N.Y. App. Div. 3d Dep't), app. denied, 16 N.Y.2d 486, 1965 N.Y. LEXIS 2201 (N.Y. 1965).

To bring an accident with the exclusive jurisdiction of the Workmen's Compensation Law, it is sufficient if the accident arises logically out of the employment and the hazards of the way in and out are part of the employment. Sicktish v Vulcan Industries of Buffalo, Inc., 33 A.D.2d 975, 307 N.Y.S.2d 385, 1970 N.Y. App. Div. LEXIS 5731 (N.Y. App. Div. 4th Dep't 1970).

The Workmen's Compensation Law does not require that there be an accidental injury arising out of and in the course of the employment in order to recover, but only that there be a disablement of the employee which resulted from services in the line of duty. Hoff v Williston Park, 50 A.D.2d 631, 374 N.Y.S.2d 756, 1975 N.Y. App. Div. LEXIS 12443 (N.Y. App. Div. 3d Dep't 1975).

Workers' Compensation Board properly ruled that claimant's injuries were result of her deliberate intention to injure herself where, inter alia, accident occurred on straight section of road on clear and sunny day, road was dry, there was no evidence that claimant's automobile malfunctioned, and there were no skid marks to indicate she took evasive action, carrier's accident reconstructionist concluded that accident was not result of avoidance maneuver, there were reports and testimony of 2 psychiatrists, one of whom examined claimant and both of whom reviewed her psychiatric records—including her hospitalization for which she was discharged just 15 days prior to accident—reflecting that she suffered serious psychotic illness, characterized by paranoid delusions along with depressive symptoms, claimant had history of medication noncompliance and continued to have psychotic thoughts following her recent discharge, and both psychiatrists opined that patients with claimant's psychiatric illnesses were known to be suicidal and were of view that her

accident was deliberate and nonaccidental, result of delusional and suicidal thinking. Mackenzie v Management Recruiters, 271 A.D.2d 822, 706 N.Y.S.2d 247, 2000 N.Y. App. Div. LEXIS 4445 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 768, 721 N.Y.S.2d 605, 744 N.E.2d 141, 2000 N.Y. LEXIS 3586 (N.Y. 2000).

Workers' Compensation Board's denial of claim, concluding that claimant's development of consequential anxiety disorder as result of noncompensable asbestosis did not constitute accident or occupational disease, would be reversed and matter remitted for further proceedings since claimant's entitlement to compensation depended not on compensability of asbestosis alone but whether claimant was totally disabled by 2 inseparable causative agents, one of which was asbestosis, and Board did not determine extent of claimant's disability or inseparability of asbestosis and anxiety disorder. Fonda v Cambridge Filter Corp., 272 A.D.2d 787, 708 N.Y.S.2d 514, 2000 N.Y. App. Div. LEXIS 5946 (N.Y. App. Div. 3d Dep't 2000).

Workers' Compensation Board improperly found that file clerk sustained accidental injury as result of repeated trauma from bending and kneeling involved in filing documents in bottom 2 rows of filing cabinet drawers since physical placement of file cabinets did not subject claimant to seriously adverse environmental condition, and her repeated act of kneeling to reach lower file cabinet drawers was not unexpected or unusual. Demir v Taxi & Limousine Comm'n, 272 A.D.2d 789, 708 N.Y.S.2d 731, 2000 N.Y. App. Div. LEXIS 5938 (N.Y. App. Div. 3d Dep't 2000).

The whole field of damages for injuries caused by negligence outside of the employment is left untouched by the Work. Comp. Law excepting only where an employee is injured in the course of his employment, by one other than his employer. Royal Indem. Co. v J. G. White Engineering Corp., 198 N.Y.S. 264, 120 Misc. 332, 1923 N.Y. Misc. LEXIS 1542 (N.Y. Sup. Ct. 1923), aff'd, 208 A.D. 759, 202 N.Y.S. 950, 1924 N.Y. App. Div. LEXIS 5455 (N.Y. App. Div. 1924).

85. "Accident" or "accidental" defined

The approved definition of an accident is "an unlooked for mishap or an untoward event which is not expected or designed" being limited so that "an act done deliberately and wilfully by a third party may be an accident from the viewpoint of the employer and employee." In re Heitz, 218 N.Y. 148, 112 N.E. 750, 218 N.Y. (N.Y.S.) 148, 1916 N.Y. LEXIS 1054 (N.Y.), reh'g denied, 218 N.Y. 702, 113 N.E. 1057, 218 N.Y. (N.Y.S.) 702, 1916 N.Y. LEXIS 1211 (N.Y. 1916).

An accidental event takes place without one's foresight or expectation and proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected. Woodruff v R. H. Howes Const. Co., 228 N.Y. 276, 127 N.E. 270, 228 N.Y. (N.Y.S.) 276, 1920 N.Y. LEXIS 934 (N.Y. 1920).

An injury caused deliberately and willfully by a third party may be an "accidental injury" within the meaning of the statute from the viewpoint of the employer and employee. Spang v Broadway Brewing & Malting Co., 182 A.D. 443, 169 N.Y.S. 574, 1918 N.Y. App. Div. LEXIS 7882 (N.Y. App. Div. 1918).

In determining whether a decision of the Board that death resulted from accidental injuries arising out of and in the course of employment is proper, the court will not use a legal definition; if the facts and circumstances, upon any reasonable hypothesis, sustain the conclusion that an average man would view the event as accidental, then the determination of the Board is final. Broderick v Liebmann Breweries, 277 A.D. 422, 100 N.Y.S.2d 837, 1950 N.Y. App. Div. LEXIS 3076 (N.Y. App. Div. 1950).

An intentional, willful, wanton and malicious assault by an employer upon his employee during the course of the employment may not be an "accidental injury" over which the Workmen's Compensation Law has exclusive jurisdiction. Legault v Brown, 283 A.D. 303, 127 N.Y.S.2d 601, 1954 N.Y. App. Div. LEXIS 4669 (N.Y. App. Div. 1954).

A firefighter's anxiety neurosis, that he believed he was a perfectionist who could not "roll with the punches," he felt that some of his fellow fire fighters were laughing at him because he was such a conscientious worker, and, most significant, he felt he was blamed for the death of an occupant of a burning house even though he was without fault, was an occupational disease under Work Comp Law § 3(2) but, if related to his occupation in general terms, the disorder might be accidental as defined in Work Comp Law § 2(7) and Work Comp Law § 10. Hennige v Fairview Fire Dist., 99 A.D.2d 158, 472 N.Y.S.2d 204, 1984 N.Y. App. Div. LEXIS 16534 (N.Y. App. Div. 3d Dep't 1984).

Term "accident" includes situations where mental injury is caused not by discrete, identifiable psychic trauma but by emotional distress over extended period of time, notwithstanding that job stress may have only been contributing cause of precipitation of claimant's preexisting mental condition. Cerami v City of Rochester Sch. Dist., 187 A.D.2d 763, 589 N.Y.S.2d 939, 590 N.Y.S.2d 306, 1992 N.Y. App. Div. LEXIS 12629 (N.Y. App. Div. 3d Dep't 1992), rev'd, 82 N.Y.2d 809, 604 N.Y.S.2d 543, 624 N.E.2d 680, 1993 N.Y. LEXIS 3263 (N.Y. 1993).

Injuries resulting from a wanton and wilful assault by an employer upon his employee are not accidental injuries within the meaning of subdivision 7 of this section. Le Pochat v Pendleton (1946) 187 Misc 296, 63 NYS2d 313, affd (1947) 271 App Div 964, 68 NYS2d 594.See also Loftus v Columbia Ribbon & Carbon Mfg. Co., 61 N.Y.S.2d 102, 1945 N.Y. Misc. LEXIS 2719 (N.Y. Sup. Ct. 1945).

86. Definite time requirement; suddenness of cause or result

To establish time definiteness required of compensable accident under Workmen's Compensation Law, it is not decisive that claimant is unable to pinpoint exact date on which incident occurred. Middleton v Coxsackie Correctional Facility, 38 N.Y.2d 130, 379 N.Y.S.2d 3, 341 N.E.2d 527, 1975 N.Y. LEXIS 2297 (N.Y. 1975).

Concept of time definiteness required to establish accidental injury under Workmen's Compensation Law can apply to either cause or result, so that there can be accident where there is exposure to condition over protracted period during which victim succumbs to disease culminating in relatively sudden collapse. Middleton v Coxsackie Correctional Facility, 38 N.Y.2d 130, 379 N.Y.S.2d 3, 341 N.E.2d 527, 1975 N.Y. LEXIS 2297 (N.Y. 1975).

The element of suddenness, frequently regarded as essential to occurrence of an industrial accident, may be found in either the cause or result. Greensmith v Franklin Nat'l Bank, 21 A.D.2d 576, 251 N.Y.S.2d 875, 1964 N.Y. App. Div. LEXIS 3215 (N.Y. App. Div. 3d Dep't 1964), aff'd, 16 N.Y.2d 973, 265 N.Y.S.2d 288, 212 N.E.2d 774, 1965 N.Y. LEXIS 1047 (N.Y. 1965).

The definite time requirement essential to proof of accidental injury within the meaning of the Workmen's Compensation Law may be satisfied by suddenness of either cause or result, and it is not decisive that a claimant is unable to specify the exact date on which the incident occurred. Stein v Schneider, 34 A.D.2d 1062, 312 N.Y.S.2d 95, 1970 N.Y. App. Div. LEXIS 4231 (N.Y. App. Div. 3d Dep't 1970).

The definite time requirement essential to establish an accidental injury may be satisfied by suddenness of either cause or result. Suber v Hope's Windows, Inc., 38 A.D.2d 656, 327 N.Y.S.2d 294, 1971 N.Y. App. Div. LEXIS 2611 (N.Y. App. Div. 3d Dep't 1971).

87. —Particular applications

The interpretation of what constitutes an accident should not be extended to fringe cases where there is no single incident which would be regarded as an accident by the common man. There must be some element of suddenness and some incident immediately noticeable. Hence, an acting village police chief sustained no compensable injury when he three days after directing traffic on a cold, sleety day, noticed that his fingers were stiffening but received no medical treatment until 13 days later when he was treated for an arthritic condition. Deyo v Piermont, Inc., 283 A.D. 67, 126 N.Y.S.2d 523, 1953 N.Y. App. Div. LEXIS 2980 (N.Y. App. Div. 1953), modified, 283 A.D. 678, 127 N.Y.S.2d 856, 1954 N.Y. App. Div. LEXIS 4880 (N.Y. App. Div. 1954).

Duties of claimant nurse employed by hospital, involved twisting, turning, pulling and pushing of right hand. Record disclosed nothing unusual on the day on which the Board established the happening of an accident resulting in epicondylitis and tendonitis. There must be some element of suddenness—something catastrophic—and some incident immediately noticeable. Award

reversed and claim dismissed. Flynn v Memorial Hospital Center, 8 A.D.2d 926, 187 N.Y.S.2d 486, 1959 N.Y. App. Div. LEXIS 8035 (N.Y. App. Div. 3d Dep't 1959).

A finding of accidental injury could not be sustained where it merely appeared that claimant, a tractor-trailer driver for 17 years, developed a chronic back pain allegedly as the result of bad springs on the truck and driving over rough roads, as there was no element of suddenness or any incident which could be regarded as an accident by the common man to which the condition could be attributed. Steindel v Gordon Baking Co., 9 A.D.2d 798, 192 N.Y.S.2d 909, 1959 N.Y. App. Div. LEXIS 6136 (N.Y. App. Div. 3d Dep't 1959).

Workers' Compensation Board could properly find that employee suffered compensable accidental injury on basis of evidence that employee, who had preexisting arthritic condition resulting in loss of only 5 work days in preceding 2 ½ years, was subjected to seriously adverse climatic conditions which caused recurrent, totally disabling episodes of arthritis as result of accumulation of water in her workplace during one month and exposure to unseasonable cold during another; repeated trauma of exposure and onsets of severe aggravation were sufficiently time-definite to satisfy requirements of concept of accident. Lynch v Rockland County Dep't of Social Services, 124 A.D.2d 430, 507 N.Y.S.2d 529, 1986 N.Y. App. Div. LEXIS 61422 (N.Y. App. Div. 3d Dep't 1986).

Workers' Compensation Board properly found that claimant did not sustain accidental injury where her own testimony showed that she had been experiencing fatigue and other related symptoms for some 16 years, beginning one year after she began working at school, and she failed to show that she suffered any extraordinary event or injury on dates specified in her application for benefits. Knapp v Vestal Cent. Sch. Dist., 247 A.D.2d 667, 668 N.Y.S.2d 718, 1998 N.Y. App. Div. LEXIS 947 (N.Y. App. Div. 3d Dep't 1998).

Workers' Compensation Board properly ruled that claimant did not sustain accident where her alleged multiple chemical sensitivity condition developed gradually over period of time, there was no evidence to show existence of unusual environmental factor which caused her condition, and her own testimony and medical records showed significant history of allergies, sinus problems, and other ailments, all of which predated her employment. Marks v County of Tompkins, 274 A.D.2d 764, 711 N.Y.S.2d 554, 2000 N.Y. App. Div. LEXIS 8102 (N.Y. App. Div. 3d Dep't 2000).

Director of research and publications, whose job required him to spend his work day sitting in work station at computer keyboard and monitor, sustained accidental injury in course of his employment where (1) by end of his first month on job, he had begun to experience pain in his neck and shoulders that radiated down to his arms and hands, (2) although his employer's president had promised that new computer with larger screen and ergonomically designed work station would be installed before start of his employment, they never were installed, (3) when claimant's condition did not improve with medical treatment, he left his employment after about 2 months. Farcasin v PDG Inc., 286 A.D.2d 840, 731 N.Y.S.2d 85, 2001 N.Y. App. Div. LEXIS 8857 (N.Y. App. Div. 3d Dep't 2001).

Workers' Compensation Board's finding that the claim of the claimant involved an accidental injury that arose out of and in the course of employment was supported by substantial evidence in the form of the narrative report submitted by the insurance carrier's medical expert that part of the claimant's injury was attributable to stress-related problems at the claimant's job and the claimant's own testimony that highlighted that his stress emanated from his multiple job responsibilities. Matter of Tames v New York Med. Coll, 27 A.D.3d 917, 811 N.Y.S.2d 192, 2006 N.Y. App. Div. LEXIS 2846 (N.Y. App. Div. 3d Dep't 2006).

88. Compensation for disease distinguished

The legislature did not intend to make compensation benefits for diseases as inclusive or as broad as those for accidental injuries; accordingly if a workman is disabled by disease, he must allege and prove that his disablement was the result of an "occupational" disease. Harman v Republic Aviation Corp., 298 N.Y. 285, 82 N.E.2d 785, 298 N.Y. (N.Y.S.) 285, 1948 N.Y. LEXIS 795 (N.Y. 1948).

When a claimant alleged that the claimant developed prostate cancer as a result of exposure to toxins at a facility in Albany, New York while cleaning police vehicles involved in the World Trade Center clean-up operations, the New York Workers' Compensation Board erred in rejecting the claim on the basis that the claimant was exposed to toxins that were not a normal attribute of the claimant's work because the claimant's exposure to the toxins derived from the nature of the claimant's work, not from an environmental condition of the workplace. Matter of Renko v New York State Police, 185 A.D.3d 1198, 127 N.Y.S.3d 608, 2020 N.Y. App. Div. LEXIS 3918 (N.Y. App. Div. 3d Dep't 2020).

89. —Disease as accidental injury; generally

A nonoccupational disease can be treated as an accidental injury for the purpose of an award only when an inception of the disease is assignable to a determinate or single act indentified in space or time, and is something catastrophic or extraordinary. Lerner v Rump Bros., 241 N.Y. 153, 149 N.E. 334, 241 N.Y. (N.Y.S.) 153, 1925 N.Y. LEXIS 532 (N.Y. 1925).; Schwartz v Queensboro Farm Products, Inc., 78 N.Y.S.2d 863, 191 Misc. 778, 1948 N.Y. Misc. LEXIS 2337 (N.Y. Sup. Ct. 1948).

Nothing in Workmen's Compensation Law provision dealing with occupational diseases affects rights of employee to recover compensation with respect to disease to which said provision does not apply if the disease is accidental personal injury under said Law. Middleton v Coxsackie Correctional Facility, 38 N.Y.2d 130, 379 N.Y.S.2d 3, 341 N.E.2d 527, 1975 N.Y. LEXIS 2297 (N.Y. 1975).

The Work. Comp. Law does not insure against disease except where the disease or infection naturally and unavoidably results from an injury. Borgsted v Shults Bread Co., 180 A.D. 229, 167 N.Y.S. 647, 1917 N.Y. App. Div. LEXIS 8139 (N.Y. App. Div. 1917).; Cavalier v Chevrolet Motor Co., 189 A.D. 412, 178 N.Y.S. 489, 1919 N.Y. App. Div. LEXIS 4684 (N.Y. App. Div. 1919).

The contraction of a disease can be an accidental injury. Drew v Beyer, 33 A.D.2d 24, 304 N.Y.S.2d 788, 1969 N.Y. App. Div. LEXIS 2885 (N.Y. App. Div. 3d Dep't 1969).

Teacher's allergy-related condition due to air problems in the building did not constitute an "occupational disease" within the meaning of N.Y. Workers' Comp. Law § 2(15) in that the teacher's disability did not arise from some distinctive feature of the teacher's employment, however the workers' compensation board needed to determine whether it was an accidental injury. Martin v Fulton City Sch. Dist., 300 A.D.2d 901, 754 N.Y.S.2d 676, 2002 N.Y. App. Div. LEXIS 12425 (N.Y. App. Div. 3d Dep't 2002).

Workers' Compensation Law Judge finding that a worker, a seamstress, sustained a causally related occupational disease was supported by substantial evidence where the worker testified that she worked 40 hours per week sewing liners into baseball caps at an average rate of 16 boxes per day, each of which contained up to 72 caps, and that, although the majority of her day was spent seated at a sewing machine, after her work was completed on the caps, she was also required to lift and carry the boxes; the worker's treating physician testified that her injuries were attributable to extended periods of sitting, the repetitive motions of bending to retrieve the caps from the boxes located next to her, operating the sewing machine by foot pedal, as well as lifting and carrying the boxes. Ball v New Era Cap Co., 21 A.D.3d 618, 799 N.Y.S.2d 334, 2005 N.Y. App. Div. LEXIS 8278 (N.Y. App. Div. 3d Dep't 2005).

90. Effect of preexisting condition making accident more likely or making results worse

When under former § 3, subd. 7, an employee having a disease receives an injury "arising out of and in the course of his employment" which accelerated disease and causes his death, the right to compensation is secured. Van Keuren v Dwight Divine & Sons, 179 A.D. 509, 165 N.Y.S. 1049, 1917 N.Y. App. Div. LEXIS 6588 (N.Y. App. Div. 1917), aff'd, 222 N.Y. 648, 119 N.E. 1083, 222 N.Y. (N.Y.S.) 648, 1918 N.Y. LEXIS 1534 (N.Y. 1918).

Mere physical aggravation of pre-existing condition caused by general activity is not an accident. Hence, where claimant suffered a bursitis condition in 1946 and aggravated this condition in

1948 by shoveling coal in the course of his employment, the 1948 incident could not be classified as an accident. Meyer v A. Hollander & Son, Inc., 285 A.D. 195, 136 N.Y.S.2d 326, 1954 N.Y. App. Div. LEXIS 3308 (N.Y. App. Div. 1954).

The concept of industrial accident is distinct from that of occupational disease, an accident being a particular and unexpected event causing a specific physical consequence, though it is nonetheless an accident if the person who suffers the physical consequences has a physical weakness or disability which either makes the accident more likely to occur, or, if it occurs, makes the physical consequences worse. Walters v U. S. Vitamin Corp., 11 A.D.2d 280, 203 N.Y.S.2d 401, 1960 N.Y. App. Div. LEXIS 8393 (N.Y. App. Div. 3d Dep't 1960), aff'd, 10 N.Y.2d 924, 223 N.Y.S.2d 874, 179 N.E.2d 713, 1961 N.Y. LEXIS 946 (N.Y. 1961).

In a workers' compensation action by an employee who had acute pharyngitis and bronchitis before his employer changed its manufacturing process, and who developed chronic bronchitis after the process was changed, the Workers' Compensation Board's determination that claimant had a continuing partial disability resulting from his employment was supported by substantial evidence and would be affirmed, notwithstanding the contention of the employer and its carrier that an occupational aggravation of a previously nonoccupational disease is not compensable, since the ultimate test is not initiation or precipitation of the disease itself, but whether the employment acts upon that disease so as to cause a disability that did not previously exist. Lemery v Flintkote Co., 105 A.D.2d 538, 481 N.Y.S.2d 482, 1984 N.Y. App. Div. LEXIS 20564 (N.Y. App. Div. 3d Dep't 1984).

Workers' Compensation Board's decision that employee's second injury was unrelated to first, and thus was time-barred due to filing of second claim more than 2 years after initial accident, was not supported by substantial evidence where no medical proof was offered in opposition to employee's medical proof that initial injury was competent producing cause of second injury. Emerson v American Broadcasting Co., 124 A.D.2d 377, 507 N.Y.S.2d 322, 1986 N.Y. App. Div. LEXIS 61391 (N.Y. App. Div. 3d Dep't 1986).

91. Nature of harm or mishap constituting accidental injury for statutory purposes

An injury caused by emotional stress or strain may be found to be accidental within the purview of the Workmen's Compensation Law. Eckhaus v Adeck Stores, Inc., 11 N.Y.2d 862, 227 N.Y.S.2d 680, 182 N.E.2d 287, 1962 N.Y. LEXIS 1275 (N.Y. 1962).

The injury, in order to be compensable, need not present a visible or external sign. Fowler v Risedorph Bottling Co., 175 A.D. 224, 161 N.Y.S. 535, 1916 N.Y. App. Div. LEXIS 8257 (N.Y. App. Div. 1916).

To establish the fact of an accidental injury under the statute, in the absence of actual contusion, it is necessary to show that the initial cause, that is, the accident, naturally and unavoidably produced the results for which claim is made. Pinto v Chelsea Fibre Mills, 196 A.D. 221, 186 N.Y.S. 748, 1921 N.Y. App. Div. LEXIS 5505 (N.Y. App. Div. 1921).

A heart attack may be the result of an accident within the meaning of this section without evidence of external trauma. Volinsky v Reliable Waste & Rag Co., 263 A.D. 221, 32 N.Y.S.2d 513, 1942 N.Y. App. Div. LEXIS 6850 (N.Y. App. Div. 1942).

A compensable disability may be found to exist solely on the basis of a finding of psychic trauma causative of physical injury, without regard to whether there was any physical trauma at the time of the incident relied upon as an accident arising out of and in course of employment. Schwartz v Hampton House Management Corp., 14 A.D.2d 936, 221 N.Y.S.2d 286, 1961 N.Y. App. Div. LEXIS 7870 (N.Y. App. Div. 3d Dep't 1961).

An accident is not compensable unless the employee suffers a physical bodily injury and injury solely to a medical device does not constitute a bodily injury, so that where an employee bumped his forehead and broke a lens in his eye glasses, but suffered no injury, the employer or carrier was not liable to replace the broken lens. Geiger v Bell Aerosystems Co. Div., 28 A.D.2d 178, 283 N.Y.S.2d 906, 1967 N.Y. App. Div. LEXIS 3107 (N.Y. App. Div. 3d Dep't 1967).

Substantial evidence supported determination of Workers' Compensation Board that sexual discrimination and harassment against claimant at work precipitated anxiety neurosis disorder, constituting accidental injury, where (1) claimant, who was qualified motor vehicle operator but employed only as flagger, testified that she was only woman on job and was frequent target of ridicule and belittlement, and that coworkers had exposed themselves to her, used crude language and obscene gestures, stole her property, and tampered with her food and beverages, and (2) claimant's treating physician testified that she suffered from anxiety neurosis with physical manifestations, and both he and workers' compensation physician opined that her impairment was causally related to her employment. Smith v Steuben County Highway Dep't, 199 A.D.2d 590, 604 N.Y.S.2d 352, 1993 N.Y. App. Div. LEXIS 11201 (N.Y. App. Div. 3d Dep't 1993).

Assembly-line worker who experienced severe chest pain in course of her employment and was transported to hospital emergency room was injured as result of accident, rather than occupational disease, even though she was later diagnosed as having chronic pain syndrome and costochondritis, and thus her claim for workers' compensation benefits was untimely under CLS Work Comp § 28, where her claim form referenced accident and described sudden and severe pain resulting from it, physicians' reports consistently related her injuries to accident, she never challenged finding of accident as cause, and there was no medical testimony as to whether her injuries were attributable to occupational disease. Aldridge v AC Rochester Prods., 251 A.D.2d 706, 674 N.Y.S.2d 444, 1998 N.Y. App. Div. LEXIS 6455 (N.Y. App. Div. 3d Dep't 1998).

Workers' Compensation Board properly ruled that claimant did not sustain accidental injury in course of her employment where, after she registered complaints as to tobacco smoke, pipe-smoking coemployee was permitted to smoke only in his office with door closed, claimant was allowed to do her work in supervisor's office and was given flexible work hours enabling her to be an office when pipe-smoker was not there, physician specializing in fields of allergies and immunology testified that his examination of claimant disclosed that her physical complaints were entirely subjective in nature, eluding any objective methods of evaluation, and he further noted that while he was unable to determine cause of claimant's malady, he deemed her resulting disability "relatively mild" and suggested that slight obstructive pulmonary impairment from which she suffered, as well as her sensitivity to tobacco smoke, could be explained by her own 6-year history of smoking 2 packs of cigarettes per week. Keck v New York State Div. of Substance Abuse Servs., 252 A.D.2d 730, 675 N.Y.S.2d 400, 1998 N.Y. App. Div. LEXIS 8142 (N.Y. App. Div. 3d Dep't 1998).

Ruling that grocery store manager sustained accidental injury was supported by evidence that he developed psychiatric disorder from working prolonged hours and taking on additional responsibilities, and by medical evidence that his condition was caused by job-related stress and not by personnel decision that threatened his job status. De Paoli v A&P, 257 A.D.2d 912, 684 N.Y.S.2d 47, 1999 N.Y. App. Div. LEXIS 487 (N.Y. App. Div. 3d Dep't), app. dismissed, 93 N.Y.2d 920, 691 N.Y.S.2d 384, 713 N.E.2d 419, 1999 N.Y. LEXIS 1154 (N.Y. 1999), aff'd, 94 N.Y.2d 377, 704 N.Y.S.2d 527, 725 N.E.2d 1089, 2000 N.Y. LEXIS 81 (N.Y. 2000).

Workers' Compensation Board properly found that claimant, who twisted his back as he stood up and attempted to leave crowded meeting, aggravated his pre-existing back condition which constituted accident arising out of and in course of his employment as environmental service worker where pre-existing back condition did not cause him to seek medical treatment or to lose any significant time from work, and medical evidence indicated that he suffered acute change in his condition following accident in question. Sidaris v Brookhaven Mem'l Hosp., 271 A.D.2d 884, 706 N.Y.S.2d 775, 2000 N.Y. App. Div. LEXIS 4656 (N.Y. App. Div. 3d Dep't 2000).

Accountant's undisputed testimony of harassment from supervisors and co-workers because of his whistle-blowing activities, lasting for 6 years, combined with medical testimony that his psychic condition was caused by work-related accidental injury, supported decision that he sustained compensable, accidental injury, notwithstanding conflicting medical testimony. Abdallah v New York City DOT, 279 A.D.2d 723, 719 N.Y.S.2d 198, 2001 N.Y. App. Div. LEXIS 248 (N.Y. App. Div. 3d Dep't 2001).

As there was evidence that a paramedic and similarly situated workers were routinely exposed to traumatic events, the New York Workers' Compensation Board's determination denying the paramedic benefits for an accidental injury under N.Y. Workers' Comp. Law § 2(7) was not disturbed. The paramedic developed post-traumatic stress disorder after the paramedic was the first to respond to an accident scene in which a man had been run over by a trash compactor truck at a landfill. Matter of Guess v Finger Lakes Ambulance, 28 A.D.3d 996, 812 N.Y.S.2d 393, 2006 N.Y. App. Div. LEXIS 4535 (N.Y. App. Div. 3d Dep't), app. denied, 7 N.Y.3d 707, 821 N.Y.S.2d 812, 854 N.E.2d 1276, 2006 N.Y. LEXIS 2478 (N.Y. 2006).

VII. Injury Arising out of or in the Course of Employment

92. In general

The words "arising out of and in the course of the employment" have a clear and definite meaning and an award can be made under the statute only when injuries arise out of both. Clark v Voorhees, 231 N.Y. 14, 131 N.E. 553, 231 N.Y. (N.Y.S.) 14, 1921 N.Y. LEXIS 603 (N.Y. 1921).; Pierson v Interborough Rapid Transit Co., 184 A.D. 678, 172 N.Y.S. 492, 1918 N.Y. App. Div. LEXIS 6636 (N.Y. App. Div. 1918), aff'd, 227 N.Y. 666, 126 N.E. 920, 227 N.Y. (N.Y.S.) 666, 1920 N.Y. LEXIS 891 (N.Y. 1920).; Harris v Henry Cheney Hammer Corp., 221 A.D. 199, 223 N.Y.S. 738, 1927 N.Y. App. Div. LEXIS 6407 (N.Y. App. Div. 1927).

An injury can rise "out of" employment only when it is related to the employment. The injury must be received while the workman is doing the duty he is employed to perform, and also as a natural incident of the work. Connelly v Samaritan Hospital, 259 N.Y. 137, 181 N.E. 76, 259 N.Y. (N.Y.S.) 137, 1932 N.Y. LEXIS 917 (N.Y. 1932).

The words "arising out of and in the course of the employment" should be given a broad and liberal interpretation. McGrinder v Sullivan, 264 A.D. 640, 37 N.Y.S.2d 1, 1942 N.Y. App. Div. LEXIS 4223 (N.Y. App. Div. 1942), rev'd, 290 N.Y. 11, 47 N.E.2d 421, 290 N.Y. (N.Y.S.) 11, 1943 N.Y. LEXIS 1131 (N.Y. 1943).

The test of whether an injury arose out of claimant's employment is whether it arose as "a natural incident of the work," or was one of the risks connected with the employment flowing therefrom as a natural consequence and directly connected with the work. Slater v Pilch, 17 A.D.2d 340, 234 N.Y.S.2d 513, 1962 N.Y. App. Div. LEXIS 6536 (N.Y. App. Div. 3d Dep't 1962).

An injury to be compensable must arise out of as well as in the course of employment. Hancock v Ingersoll-Rand Co., 21 A.D.2d 703, 249 N.Y.S.2d 243, 1964 N.Y. App. Div. LEXIS 3864 (N.Y. App. Div. 3d Dep't 1964).

The course of employment is not limited to the actual production of goods or the running of machines nor is it confined to the exact hours of work. Sicktish v Vulcan Industries of Buffalo, Inc., 33 A.D.2d 975, 307 N.Y.S.2d 385, 1970 N.Y. App. Div. LEXIS 5731 (N.Y. App. Div. 4th Dep't 1970).

Employee's injury while preparing for Christmas party at site off premises of employment is not in course of employment where employer has not given financial support for party, does not exercise control over event, cannot halt holding of party, and where only condition laid down by employer is that employee attending party must first check out and separate self from employment. Still v County of Dutchess, Dep't of Parole, 117 A.D.2d 844, 498 N.Y.S.2d 544, 1986 N.Y. App. Div. LEXIS 53119 (N.Y. App. Div. 3d Dep't 1986).

In ruling that unwitnessed death of claimant's decedent (apparently caused by arrhythmia due to multifocal coronary atherosclerosis) arose out of and in course of his employment as solid waste transfer station attendant, Workers' Compensation Board had rational basis for finding that employer did not overcome presumption of compensability (CLS Work Comp § 21) where proof on issue of whether decedent's job could be considered sedentary in nature included testimony that he sometimes had to walk up and down 40 to 50 steps to sweep up spilled material 2 to 3 times per day. Onody v County of Oswego, Dep't of Pub. Works, 223 A.D.2d 813, 636 N.Y.S.2d 180, 1996 N.Y. App. Div. LEXIS 69 (N.Y. App. Div. 3d Dep't 1996).

Workers' Compensation Board's finding that firefighter's injury was causally related to his employment did not automatically make firefighter eligible for future CLS Gen Mun § 207-a benefits. Lewis v City of Gloversville, 246 A.D.2d 804, 667 N.Y.S.2d 796, 1998 N.Y. App. Div. LEXIS 298 (N.Y. App. Div. 3d Dep't 1998).

Claimant was entitled to presumption that injury that occurred in course of his employment also arose out of that employment, and presumption could be rebutted only by substantial evidence to contrary. Vogel v Anheuser-Busch, 265 A.D.2d 705, 696 N.Y.S.2d 571, 1999 N.Y. App. Div. LEXIS 10710 (N.Y. App. Div. 3d Dep't 1999).

There was lack of substantial evidence to support finding that iron worker sustained accidental injury in course of his employment so as to be entitled to workers' compensations benefits where there was conflict between worker's claim and his testimony, medical reports did not provide detail concerning circumstances of accident, and thus it was not clear how worker injured himself or on what date and at what job site injury occurred. Boone v Orange Steel Erectors Inc., 273 A.D.2d 629, 711 N.Y.S.2d 355, 2000 N.Y. App. Div. LEXIS 7221 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 769, 722 N.Y.S.2d 472, 745 N.E.2d 392, 2000 N.Y. LEXIS 3820 (N.Y. 2000).

93. Injury in course of employment; employees on call or in residence

If a domestic servant lives and sleeps in the home of the master, accidental injuries incurred within the home, except under extraordinary circumstances, may fairly be said to arise out of and in the course of the employment, whether the servant is engaged in getting dressed or in any other personal activity which is necessary to performance of her duties. Martin v Plaut, 293 N.Y. 617, 59 N.E.2d 429, 293 N.Y. (N.Y.S.) 617, 1944 N.Y. LEXIS 1271 (N.Y. 1944).

An employee, who as part of the contract of employment occupies a room on the premises, remains in the course of such employment while on premises, even though not at the moment performing any particular service to employer. Culver v Sevilla Home for Children, 262 A.D. 620, 30 N.Y.S.2d 917, 1941 N.Y. App. Div. LEXIS 5440 (N.Y. App. Div. 1941).

If employee is required to live on premises by virtue of his contract or by reason of nature of his employment, any injury resulting from normal activities on premises is compensable. And where employee receives room and board as part pay under terms of employment contract and lives in quarters provided by practical matter is required. Galvez v Gold Coast Enterprises, Ltd., 23 A.D.2d 600, 256 N.Y.S.2d 436, 1965 N.Y. App. Div. LEXIS 4869 (N.Y. App. Div. 3d Dep't 1965).

The death of a resident farm worker who was stabbed to death on his employer's premises following an altercation relating to the living quarters that were provided to decedent by his employer was properly determined to have been the result of an industrial accident that arose out of and in the course of decedent's employment, since, when an employer supplies living accommodations as part of wages, an employee's residence at the place provided by the employer is required, and any accident that befalls an employee on such premises will thus be presumed to have arisen out of and in the course of employment. Torres v Laurel Hill Nursery, 98 A.D.2d 904, 470 N.Y.S.2d 897, 1983 N.Y. App. Div. LEXIS 21225 (N.Y. App. Div. 3d Dep't 1983), aff'd, 64 N.Y.2d 895, 487 N.Y.S.2d 560, 476 N.E.2d 1005, 1985 N.Y. LEXIS 14139 (N.Y. 1985).

Evidence supported determination that unwitnessed one-car accident occurred in course of decedent's employment overseeing 5,000-acre tract of land and presumptively arose out of that employment, although decedent also operated contracting business that was located off of employer's premises, where decedent lived on employer's premises as part of his job responsibilities and was on call 24 hours/7 days per week, and accident occurred on employer's premises after he returned from contracting job to discuss property maintenance issues with employer's tenant. Blanchard v Eagle Nest Tenancy in Common, 285 A.D.2d 856, 728 N.Y.S.2d 296, 2001 N.Y. App. Div. LEXIS 7548 (N.Y. App. Div. 3d Dep't 2001).

94. —Employees not required by employer to live in

The decedent, employed to clean up a restaurant during specified hours and permitted to sleep in a room over a restaurant, did

not sustain a compensable accident when he fell at night while climbing the stairs to his room. The decedent slept in the attic for his own convenience and was not rendering any service to his employer at the time of his injury. Groff v Uzzilia, 1 A.D.2d 273, 149 N.Y.S.2d 651, 1956 N.Y. App. Div. LEXIS 5929 (N.Y. App. Div. 3d Dep't 1956), aff'd, 2 N.Y.2d 840, 159 N.Y.S.2d 980, 140 N.E.2d 873, 1957 N.Y. LEXIS 1238 (N.Y. 1957).

Death of a former owner of bowling alleys, as the result of sleeping on a cot at the alleys, was not compensable where it was found upon sufficient evidence that there was no necessity for his sleeping on the premises and was not engaged in business for his employer while doing so, but acting for his own convenience. Charlton v Strand Recreation, Inc., 9 A.D.2d 809, 192 N.Y.S.2d 690, 1959 N.Y. App. Div. LEXIS 6154 (N.Y. App. Div. 3d Dep't 1959).

If an employee is required to live on his employer's premises either by virtue of his contract of employment or by reason of the nature of the employment, any injury resulting from normal activities on the premises is compensable, but if he is on the premises solely out of kindness of the employer, such injuries are not compensable. Chapman v Kiamesha Concord, Inc., 15 A.D.2d 618, 222 N.Y.S.2d 435, 1961 N.Y. App. Div. LEXIS 6839 (N.Y. App. Div. 3d Dep't 1961).

An award of compensation for injury sustained by a nurse was affirmed where it appeared that she lived on the employer's premises and was injured by a fall while en route to her room after visiting a co-employee who also lived on the premises, it appearing that she was in charge of the building all night four nights a week and, though not required to live on the premises, did so because she was frequently called during off hours to make reports, aid in emergencies, and perform various other duties. Carl v West Hill Sanitarium, 15 A.D.2d 703, 223 N.Y.S.2d 446, 1962 N.Y. App. Div. LEXIS 12025 (N.Y. App. Div. 3d Dep't 1962).

Fatal automobile accident on grounds of employer's hospital did not arise out of and in course of decedent's employment where the accident occurred at 3:00 a.m. on day decedent was not on duty, and there was uncontradicted proof that the decedent-employee was not required to live on the premises but had voluntarily chosen to do so, and his duties were no different from those of similar employees living of the premises. Brooks v New York State Dep't of Correction Matteawan State Hospital, 26 A.D.2d 850, 273 N.Y.S.2d 1001, 1966 N.Y. App. Div. LEXIS 3343 (N.Y. App. Div. 3d Dep't 1966).

95. —Injuries sustained during off-duty hours

An employee sustained injuries arising out of and in the course of his employment, where he was struck by an automobile as he was walking on a public highway between two buildings of his employer, one of which he slept in and in the other he performed his active duties, since the inference may be drawn that the decedent was within the precinct of his employment when the accident occurred. Meissner v Good Samaritan Hospital, 271 A.D. 1041, 68 N.Y.S.2d 506, 1947 N.Y. App. Div. LEXIS 5757 (N.Y. App. Div.), app. dismissed, 296 N.Y. 1001, 73 N.E.2d 577, 296 N.Y. (N.Y.S.) 1001, 1947 N.Y. LEXIS 1746 (N.Y. 1947).

Death benefits are properly payable where a porter, who was furnished room, board and laundry, as part of his compensation, fell in the bath tub in the building where he roomed. Madigan v United Hospital, 274 A.D. 1077, 85 N.Y.S.2d 475, 1949 N.Y. App. Div. LEXIS 6135 (N.Y. App. Div. 1949).

An award of death benefits was upheld where the deceased employee worked for a sanitarium, receiving a salary plus board and room, and was fatally injured when he fell down the stairs while visiting a co-employee at night during a period when he was off duty. Lewis v River Crest Sanitarium Co., 277 A.D. 914, 99 N.Y.S.2d 65, 1950 N.Y. App. Div. LEXIS 3830 (N.Y. App. Div. 1950), aff'd, 302 N.Y. 655, 98 N.E.2d 474, 302 N.Y. (N.Y.S.) 655, 1951 N.Y. LEXIS 833 (N.Y. 1951).

Where claimant was the son of employer and employed as a chauffeur and companion subject to call 24 hours a day and obliged to live in employer's home, injuries suffered when he fell down stairs at employer's home at 4 o'clock in the morning after terminating a conversation with his father and intending to return to speak to his sister was sustained in the course of employment. Wiarda v Wiarda, 281 A.D. 999, 120 N.Y.S.2d 509, 1953 N.Y. App. Div. LEXIS 4048 (N.Y. App. Div. 1953).

Decedent, a porter in a hospital, was furnished a room on the hospital premises and worked from 7:30 A.M. to 4:30 P.M. and he died as a result of a fall down the hospital stairway after coming in staggering drunk at 3:00 A.M. Held: decedent was not engaged in the regular course of his employment when he fell down the stairway since he fell, not while doing work, or on call of duty, but while off duty and because he was intoxicated. Commissioner of Taxation & Finance v Victory Memorial Hospital, 4 A.D.2d 895, 167 N.Y.S.2d 61, 1957 N.Y. App. Div. LEXIS 4283 (N.Y. App. Div. 3d Dep't 1957).

Claimant, employed as week-end waiter at inn, was furnished meals and sleeping quarters. While returning from walk at night after work, he was injured on employer's premises in attempt to gain ingress to his quarters. Held: injury was compensable. Eixman v Rothman's East Norwich Inn, 6 A.D.2d 911, 175 N.Y.S.2d 675, 1958 N.Y. App. Div. LEXIS 5218 (N.Y. App. Div. 3d Dep't 1958).

Award to resident employee is not necessarily barred because he was injured while performing a personal act on his day off or when not subject to call (restaurant pantryman and dishwasher partly paid by room and board on employer's premises injured by fall on stairway to kitchen to which he was going to prepare food for himself on day off). Galvez v Gold Coast Enterprises, Ltd., 23 A.D.2d 600, 256 N.Y.S.2d 436, 1965 N.Y. App. Div. LEXIS 4869 (N.Y. App. Div. 3d Dep't 1965).

Where an employee who resided on his employer's premises slipped and caught his right arm between an elevator cable and car sustaining injuries resulting in amputation of his arm while attempting to retrieve money which he had secreted behind the elevator in the basement, it was properly held his injury was compensable. Clark v J. S. S. Realty Co., 26 A.D.2d 877, 276 N.Y.S.2d 39, 1966 N.Y. App. Div. LEXIS 3303 (N.Y. App. Div. 3d Dep't 1966).

Vending route driver's injury did not arise out of and in course of his employment, and thus he was not entitled to workers' compensation benefits, where employer specifically instructed driver not to work on Saturdays and did not compensate him for Saturday overtime, driver still reported to work on Saturday and was injured during mugging while he was trying to enter company truck in employer's parking lot, and thus driver was working on his own personal time when he was mugged. Hall v All Seasons Servs., Inc., 255 A.D.2d 680, 679 N.Y.S.2d 456, 1998 N.Y. App. Div. LEXIS 11698 (N.Y. App. Div. 3d Dep't 1998).

Although a hospital was aware that employees sometimes slept in the X-ray rooms between shifts, it was only an accommodation; therefore, the workers' compensation board properly ruled that a radiology associate, who was raped while sleeping in the X-ray room between shifts, did not sustain an accident arising out of and in the course of the associate's employment. Matter of Mattaldi v Beth Israel Med. Ctr., 29 A.D.3d 1192, 814 N.Y.S.2d 808, 2006 N.Y. App. Div. LEXIS 6572 (N.Y. App. Div. 3d Dep't 2006).

A cleaning lady at a state hospital was not injured in the course of her employment when, while praying at Mass on Sunday (her day off), an inmate threw herself at claimant causing the injuries complained of. Johnstone v State, 122 N.Y.S.2d 734, 204 Misc. 239, 1952 N.Y. Misc. LEXIS 2309 (N.Y. Ct. Cl. 1952).

96. —Injuries sustained during off-duty hours; injuries in living quarters

An award is proper for the death of a chef employed for a definite term at a weekly wage together with room and board where at the end of the days work, he retired to a room provided for him and was suffocated by a fire occurring in the hotel. Giliotti v Hoffman Catering Co., 246 N.Y. 279, 158 N.E. 621, 246 N.Y. (N.Y.S.) 279, 1927 N.Y. LEXIS 874 (N.Y. 1927).See also Ziolkowski v American Radiator Co., 247 N.Y. 513, 161 N.E. 164, 247 N.Y. (N.Y.S.) 513, 1928 N.Y. LEXIS 1101 (N.Y. 1928).; Marino v Bormann, 248 N.Y. 512, 162 N.E. 505, 248 N.Y. (N.Y.S.) 512, 1928 N.Y. LEXIS 1303 (N.Y. 1928).; Underhill v Keener, 258 N.Y. 543, 180 N.E. 325, 258 N.Y. (N.Y.S.) 543, 1931 N.Y. LEXIS 799

(N.Y. 1931).; Fraher v Hotel McAlpin, 210 A.D. 817, 206 N.Y.S. 904, 1924 N.Y. App. Div. LEXIS 7058 (N.Y. App. Div. 1924).

Injury incurred by a cook in domestic service who, under the terms of her employment, slept and had her breakfast in the house where she was employed, while dressing in the bedroom furnished for her use, is compensable. Martin v Plaut, 293 N.Y. 617, 59 N.E.2d 429, 293 N.Y. (N.Y.S.) 617, 1944 N.Y. LEXIS 1271 (N.Y. 1944).. See also Mattison v Jenks, 268 A.D. 946, 51 N.Y.S.2d 430, 1944 N.Y. App. Div. LEXIS 4342 (N.Y. App. Div. 1944).

Injuries to a clerk, receiving a salary and maintenance at state hospital, and subject to 24-hour call, in getting out of the tub in his room, arise out of and in course of his employment, even though he had finished his duties for the day and had retired to his room. Wood's Estate v Kings Park State Hospital, 293 N.Y. 919, 60 N.E.2d 129, 293 N.Y. (N.Y.S.) 919, 1944 N.Y. LEXIS 2327 (N.Y. 1944).

An award cannot be made to the janitress of an apartment house, who resided in one of apartments, for injuries received from plaster falling on her when at time of injury she was doing nothing for her employers nor anything incidental to her employment, but was serving, exclusively, her own purposes. In re Lauterbach, 189 A.D. 303, 178 N.Y.S. 480, 1919 N.Y. App. Div. LEXIS 4650 (N.Y. App. Div. 1919).

An attendant in a home for children receiving a cash salary and room and board at the home suffers an injury arising out of and in the course of her employment where, after she had finished her day's work and retired for the night, she got out of bed to open a window, slipped on an oiled hardwood floor and fell and was injured. Culver v Sevilla Home for Children, 262 A.D. 620, 30 N.Y.S.2d 917, 1941 N.Y. App. Div. LEXIS 5440 (N.Y. App. Div. 1941).See also Smith v New York, 261 A.D. 860, 24 N.Y.S.2d 750, 1941 N.Y. App. Div. LEXIS 7799 (N.Y. App. Div.), aff'd, 285 N.Y. 646, 33 N.E.2d 561, 285 N.Y. (N.Y.S.) 646, 1941 N.Y. LEXIS 1663 (N.Y. 1941).

A claimant, who along with her husband was employed jointly as superintendent of a roominghouse, which employment required her to be on duty at all times, is injured in the course of her employment when she sustained burns while asleep in her bed in the apartment. Kozol v Hasenohrl, 271 A.D. 853, 66 N.Y.S.2d 64, 1946 N.Y. App. Div. LEXIS 3409 (N.Y. App. Div. 3d Dep't 1946), modified, 271 A.D. 939, 66 N.Y.S.2d 64, 1947 N.Y. App. Div. LEXIS 5292 (N.Y. App. Div. 3d Dep't 1947).. See also Coulter v Nassau-Suffolk B & M Corp., 259 A.D. 942, 19 N.Y.S.2d 811, 1940 N.Y. App. Div. LEXIS 7373 (N.Y. App. Div. 1940).

One employed along with her husband as superintendent of an apartment suffers injuries in and out of the course of her employment when injured while attempting to close a window in the bedroom of her own apartment and there is evidence that the bedroom was used for office purposes in connection with the administration of the building. Berck v Postal, 271 A.D. 940, 67 N.Y.S.2d 371, 1947 N.Y. App. Div. LEXIS 5302 (N.Y. App. Div. 1947).

A maid who lived in a separate hotel room across the hall from her employer, being subject to call by the employer, is injured in the course of her employment where she fell while preparing for bed. Watson v Lapp, 278 A.D. 877, 104 N.Y.S.2d 398, 1951 N.Y. App. Div. LEXIS 5037 (N.Y. App. Div. 1951).

Where an employee was injured in her room which was furnished by the employer, and was required to be in her room at such time being subject to call day or night, a finding that the injury occurred in the course of her employment was proper. Watson v Lapp, 278 A.D. 877, 104 N.Y.S.2d 398, 1951 N.Y. App. Div. LEXIS 5037 (N.Y. App. Div. 1951).

Claimant, a cook and dishwasher, worked 6 days per week between 9:00 A.M. and 9:00 or 10:00 P.M. in employer's restaurant. He was paid salary and was furnished room and board. He slept on premises. After retiring, he got up in night, fell on floor and sustained fracture of hip. Employer in answer in negligence action by claimant alleged that claimant's injuries arose out of and in course of employment and that employer had secured workmen's compensation for employees. Held: claimant's testimony as to contract of employment, employer's interpretation of such contract in answer in negligence action and fact of late hours of employment constituted substantial evidence that claimant's residence on premises was part of service and of benefit to employer. Award affirmed. Walker v Narolewski, 6 A.D.2d 735, 174 N.Y.S.2d 411, 1958 N.Y. App. Div. LEXIS 5807 (N.Y. App. Div. 3d Dep't 1958), aff'd, 7 N.Y.2d 835, 196 N.Y.S.2d 709, 164 N.E.2d 726, 1959 N.Y. LEXIS 925 (N.Y. 1959).

Where a servant lives in her employer's household, certain personal activities are incident to the performance of her duties. Thus, where the maid and companion of an ailing employer was subject to call at all times and required to sleep in her employer's apartment, injuries which she sustained one night "while suffering from a heavy cold," when she "collapsed" upon arising from her bed, arose in course of her employment, even though she was only arising to take care of her cold. Outlaw v Parker, 9 A.D.2d 797, 192 N.Y.S.2d 692, 1959 N.Y. App. Div. LEXIS 6133 (N.Y. App. Div. 3d Dep't 1959), app. denied, 7 N.Y.2d 709, 1960 N.Y. LEXIS 1610 (N.Y. 1960).

The accident from which injuries were sustained involved a risk so closely associated with employment as to be compensable where it appeared that claimant and her husband were jointly hired as janitors of a 12-family tenement house, receiving a rent free apartment as compensation for their services, living on the premises, subject to call 24 hours a day, there was no central heating and each tenant had to supply his own heat by means of a coal stove, and the injuries were sustained when claimant and her husband were cleaning their stove with liquid polish which exploded. Kosma v Blau, 12 A.D.2d 542, 206 N.Y.S.2d 751, 1960 N.Y. App. Div. LEXIS 7239 (N.Y. App. Div. 3d Dep't 1960).

Where claimant was employed by his employer as a glass washer at $4.00 per day, plus room and board valued at $7.50 per week, with working hours from 6 p.m. to 2 a.m. six days a week, and not subject to call at other times, and sustained injuries while off duty by slipping on a melon rind in his basement quarters, his residency was for the employer's benefit as well as his own since his hours were long and his room and board were part of his pay, and his injury was compensable. Chapman v Kiamesha Concord, Inc., 15 A.D.2d 618, 222 N.Y.S.2d 435, 1961 N.Y. App. Div. LEXIS 6839 (N.Y. App. Div. 3d Dep't 1961).

Where migrant worker was brought to New York from Puerto Rico to work on nursery premises under contract expressly requiring employer to provide housing, injuries suffered by worker when he fell down stairs in such housing on his day off arose out of and in course of his employment, inasmuch as provision of residence was part of consideration supporting worker's obligation to work. Feliciano v Woodlea Nursery, 57 A.D.2d 979, 394 N.Y.S.2d 109, 1977 N.Y. App. Div. LEXIS 12272 (N.Y. App. Div. 3d Dep't 1977).

Where a janitress, as part of her compensation, was accorded free use of the basement of the premises as her home, and on returning home from shopping she fell into open hatchway in the basement, she suffered injuries out of and in the course of her employment. Shapiro v Employers' Liability Assurance Corp., 248 N.Y.S. 587, 139 Misc. 454, 1931 N.Y. Misc. LEXIS 1155 (N.Y. Sup. Ct. 1931).

97. —Injuries sustained during off-duty hours; injuries away from employer's premises

Where claimant was injured while returning from home, at the end of a rest period, to the hospital, she is not entitled to compensation for her injuries, notwithstanding that she was subject to call at any time while home, in case of emergency. Smith v Parkchester General Hospital, 293 N.Y. 824, 59 N.E.2d 182, 293 N.Y. (N.Y.S.) 824, 1944 N.Y. LEXIS 2247 (N.Y. 1944).

Injury to the claimant's knee doing gymnastics did arise out of or in the course of his employment as a waiter at a summer camp who was required to live on the premises, where, during a 3-day break in the camp's program, he visited a neighboring camp's recreation hall where the injury occurred and award was proper. Di Perri v Boys Brotherhood Republic, Inc., 31 N.Y.2d 215, 335 N.Y.S.2d 405, 286 N.E.2d 897, 1972 N.Y. LEXIS 1133 (N.Y. 1972).

A resident employee of a boy's summer camp suffered a compensable injury when hurt in off-duty hours while using a recreation facility of an adjacent camp with the employer's knowledge and acquiescence, on grounds that the use of the facility on a regular basis by several boys' camp employees,

including the claimant, carried the implied approval of the employer and was in fact an incidental adjunct to the employer's own facilities because of the habitual permitted use of the non-owned facility. Di Perri v Boys Brotherhood Republic, Inc., 31 N.Y.2d 215, 335 N.Y.S.2d 405, 286 N.E.2d 897, 1972 N.Y. LEXIS 1133 (N.Y. 1972).

Widow was not entitled to Workers' Compensation Board after her husband, who worked as accountant for private firm, suffered fatal heart attack while bowling for team sponsored by client of firm because, even if her husband's participation on bowling team inured to substantial benefit of his employer, there was no evidence of overt encouragement by employer. Dorosz v Green & Seifter, 92 N.Y.2d 672, 685 N.Y.S.2d 406, 708 N.E.2d 162, 1999 N.Y. LEXIS 35 (N.Y. 1999).

Death of a chauffeur who, while waiting for his employer, used his automobile for his own purposes with the consent of the employer and received injuries resulting in his death, though the employer testified that the decedent was in his employ all the time, day and night, is not compensable. Lansing v Hayes, 196 A.D. 671, 188 N.Y.S. 329, 1921 N.Y. App. Div. LEXIS 5589 (N.Y. App. Div. 1921), aff'd, 233 N.Y. 614, 135 N.E. 940, 233 N.Y. (N.Y.S.) 614, 1922 N.Y. LEXIS 1034 (N.Y. 1922).

Where the claimant was a nurse in charge of the child of her employer and was injured by a fall from her employer's bicycle while in Bermuda and the evidence is to the effect that she was on twenty-four hours a day duty and, therefore, remained in course of her employment, and that she had been urged by her employer "to get away for a while," an award lies. Clapham v David, 232 A.D. 458, 251 N.Y.S. 245, 1931 N.Y. App. Div. LEXIS 13844 (N.Y. App. Div. 1931).

A pastry cook in a summer resort hotel who fell while returning a book to a fellow employee on the premises during her rest period during which she was on call is injured in the course of her employment. Caney v Straight, 274 A.D. 1077, 85 N.Y.S.2d 626, 1949 N.Y. App. Div. LEXIS 6136 (N.Y. App. Div. 1949).

A chauffeur who drove his employer to his office at 4:30 in the afternoon and was instructed to return for him at 1 a.m., being free in the interim to follow his own devices, is injured in the course of his employment where he went to the house of a relative with the understanding that the employer would call him there earlier than 1 a.m. if he wanted him, and fell on the street near the relative's house. Duffy v Levine, 275 A.D. 735, 87 N.Y.S.2d 134, 1949 N.Y. App. Div. LEXIS 4246 (N.Y. App. Div. 1949).

Decedent, employed as a chauffeur, caretaker and general handyman on twenty-four-hour call was struck by a car while crossing the street to mail a letter. The record sustains a finding that this was an incident of his employment. Collins v Archer Motor Co., 279 A.D. 1123, 112 N.Y.S.2d 522, 1952 N.Y. App. Div. LEXIS 6037 (N.Y. App. Div. 1952), aff'd, 305 N.Y. 646, 112 N.E.2d 286, 305 N.Y. (N.Y.S.) 646, 1953 N.Y. LEXIS 1207 (N.Y. 1953).

An employee at a cosmic ray study project in the Rocky Mountains had not separated himself from the course of his employment where he usually worked from early morning until late at night and lived in a dormitory miles from the nearest village. The employee, during a lull in the experiments, was injured while taking a hike. Rizzo v Syracuse University, 2 A.D.2d 644, 151 N.Y.S.2d 724, 1956 N.Y. App. Div. LEXIS 5322 (N.Y. App. Div. 3d Dep't 1956).

The Workers' Compensation Board properly determined that the death of a claimant's decedent, who had been a tavern manager, had not arisen out of and in the course of his employment where, though the decedent had left the tavern at the end of his work day with the business's books, ostensibly so that he could work on them at home, his death had occurred when he was struck by a car approximately one hour after he left the business at a location that was remote from the tavern, from decedent's home, and from any branch of the tavern's bank, and that was not located on any direct route between such points, where the claimant's conjecture that decedent had been on a round- about route to the tavern's bank's night depository was negated by the proximity of a bank branch one half block from the tavern as well as by the testimony of a vice president at the tavern's bank who stated that the bank had no record of decedent's ever having made night deposits, where the claimant's further conjecture that decedent had been kidnapped by robbers and beaten on route to the bank and that he had then wandered into traffic was refuted by medical evidence which showed that decedent's injuries were limited to those he had sustained when he was struck by the car, and where, though a decedent who was last seen working is assumed to have continued such status to the time of a later fatal accident in the absence of countervailing evidence, and though claims are presumed to be compensible "in the absence of substantial evidence to the contrary" pursuant to Work Comp Law § 21(1), such presumptions were inapplicable in that decedent had not been working when he was last seen alive by the motorist who had hit him, and in that the presumption embodied in Work Comp Law § 21(1) does not totally relieve claimants from their burden of showing that injuries for which claims are made were sustained in the course of and arose out of the injured person's employment. Ryan v Trojan Bar & Grill, 98 A.D.2d 889, 470 N.Y.S.2d 877, 1983 N.Y. App. Div. LEXIS 21204 (N.Y. App. Div. 3d Dep't 1983), app. denied, 62 N.Y.2d 603, 1984 N.Y. LEXIS 7684 (N.Y. 1984).

98. Injury in course of employment; employees having no fixed place of employment

Claimant, a delivery boy, customarily picked up his papers at 12:30. On the day in question he started for his employer's place of business, taking his usual route. On the way he suffered an accident. Claimant was not entitled to compensation since he was not an "outside worker" and was not within the ambit of his employment until he picked up his papers for delivery. Taber v Abraham, 3 A.D.2d 776, 160 N.Y.S.2d 56, 1957 N.Y. App. Div. LEXIS 6183 (N.Y. App. Div. 3d Dep't 1957).

Board properly ruled that injury sustained by claimant in fall down stairs at her home arose out of and in course of her employment as real estate salesperson, although "outside employees" are usually covered only from time they leave home until time they return, where claimant and other members of employer's sales force operated out of their own homes and cars, there was no requirement that they report to office before starting work, they were on call 24 hours per day for most part, and accident occurred as claimant was leaving her home to remove "lockbox" from piece of property that had been sold following business meeting at her home with carpet installer who performed assignments for her employer. McRae v Eagan Real Estate, 170 A.D.2d 900, 567 N.Y.S.2d 183, 1991 N.Y. App. Div. LEXIS 2443 (N.Y. App. Div. 3d Dep't 1991).

Claimant was properly found to have sustained injury arising out of and in course of his employment while walking to job site where he was scheduled to commence asbestos removal project when he was struck by car since his employment consisted of traveling to various job sites to perform asbestos removal work for periods lasting anywhere from one day to several months, he was required to report to employer's main office in New Jersey once every month at most, and he contacted office by telephone only for purpose of receiving new work assignments. Carpio v R & J Insulation Co., 269 A.D.2d 678, 702 N.Y.S.2d 473, 2000 N.Y. App. Div. LEXIS 1286 (N.Y. App. Div. 3d Dep't), app. dismissed, 95 N.Y.2d 791, 711 N.Y.S.2d 157, 733 N.E.2d 229, 2000 N.Y. LEXIS 1064 (N.Y. 2000).

Workers' Compensation Board properly ruled that claimant's decedent was "outside employee" who was in course of his employment as plumbing supervisor at time of fatal accident, where he did not work at employer's premises but was assigned to work at various locations to which he reported to work each day, and fact that he had been assigned to same location for several months at time of accident did not require contrary conclusion. Estate of DeRosa v Evans Plumbing & Heating Co., 277 A.D.2d 619, 715 N.Y.S.2d 114, 2000 N.Y. App. Div. LEXIS 11320 (N.Y. App. Div. 3d Dep't 2000), app. denied, 96 N.Y.2d 792, 725 N.Y.S.2d 642, 749 N.E.2d 211, 2001 N.Y. LEXIS 683 (N.Y. 2001), app. denied, 98 N.Y.2d 643, 744 N.Y.S.2d 758, 771 N.E.2d 830, 2002 N.Y. LEXIS 1029 (N.Y. 2002).

Claimant, truck driver, was properly awarded workers' compensation benefits as result of being injured when struck by car while crossing street from hotel on way to restaurant before commencing next trip since he was traveling employee with no fixed work site, it was reasonable and customary for him to have

obtained meal prior to commencing new assignment, and he did not cross street in such reckless and unreasonable manner as to constitute deviation from employment. Hamm v USF Red Star, 284 A.D.2d 793, 727 N.Y.S.2d 714, 2001 N.Y. App. Div. LEXIS 6603 (N.Y. App. Div. 3d Dep't), app. denied, 97 N.Y.2d 602, 735 N.Y.S.2d 491, 760 N.E.2d 1287, 2001 N.Y. LEXIS 3283 (N.Y. 2001).

99. —Injuries sustained during preparation for work

One employed as supervisor of workmen on a real estate development, and required to use his own automobile which he kept in his own garage during the night, is not entitled to compensation for injuries incurred while cranking the automobile in preparation to go to his employer's property to commence his day's work. Grathwohl v Nassau Point Club Properties, Inc., 216 A.D. 107, 214 N.Y.S. 496, 1926 N.Y. App. Div. LEXIS 9166 (N.Y. App. Div.), aff'd, 243 N.Y. 567, 154 N.E. 608, 243 N.Y. (N.Y.S.) 567, 1926 N.Y. LEXIS 841 (N.Y. 1926).. See also Decicco v Rubel Corp., 275 N.Y. 576, 11 N.E.2d 761, 275 N.Y. (N.Y.S.) 576, 1937 N.Y. LEXIS 1556 (N.Y. 1937).; Knickman v Zurich General Acci. & Liability Ins. Co., 215 A.D. 56, 213 N.Y.S. 196, 1926 N.Y. App. Div. LEXIS 10914 (N.Y. App. Div. 1926).

Workers' Compensation Board did not act arbitrarily or capriciously in finding no compensable injury arising out of or in course of employment where claimant's deceased suffered fatal heart attack while shoveling snow prior to commencing journey to work and where testimony of supervisor and coworker contradicted claimant's assertion that decedent was preparing to leave for outside breakfast meeting with client, and instead showed that decedent had prepared breakfast at home before attending office meeting at normal start of business day; board was not required to explain result that was different from prior case where prior case was not substantially similar. Maisel v Pepsi-Cola Bottling Co., 124 A.D.2d 332, 508 N.Y.S.2d 292, 1986 N.Y. App. Div. LEXIS 61360 (N.Y. App. Div. 3d Dep't 1986).

100. —Injuries sustained enroute to employers' place of business

A salesmanager who had charge of his employer's showroom and was charged with the duty of checking the cash at the end of closing hours each day, and who was furnished an automobile by his employer which was stored in the employee's garage, suffers injuries arising out of and in the course of his employment where upon leaving his residence to go to the employer's place of business to close for the day, he slipped in the driveway of his own premises and sustained injuries. Eaton v Webster Motors of Glens Falls, Inc., 265 A.D. 1025, 39 N.Y.S.2d 32, 1943 N.Y. App. Div. LEXIS 6672 (N.Y. App. Div.), aff'd, 291 N.Y. 699, 52 N.E.2d 592, 291 N.Y. (N.Y.S.) 699, 1943 N.Y. LEXIS 1799 (N.Y. 1943).

There was substantial evidence to sustain determination of the board that the decedent, an outside worker, had actually appeared at the store where he had been working on the day he was involved in an automobile accident and was traveling his customary route home. Bailey v Interstate Dep't Stores, 34 A.D.2d 1062, 312 N.Y.S.2d 469, 1970 N.Y. App. Div. LEXIS 4230 (N.Y. App. Div. 3d Dep't 1970).

Workers' compensation benefits were properly awarded to claimant who at time of back injury was en route to work carrying materials which were required in her job, but for which no storage was provided at place of employment. Pistor v Pan American Airways, 165 A.D.2d 917, 560 N.Y.S.2d 527, 1990 N.Y. App. Div. LEXIS 11055 (N.Y. App. Div. 3d Dep't 1990).

Workers' Compensation Board did not err in determining that claimant, casual truck driver whose union contract required him to report to employer's terminal facility within 2 hours after call indicating he was needed, sustained injuries arising out of and in course of employment in motor vehicle accident en route to terminal after call from employer's dock supervisor asking him to come as soon as possible due to manpower shortage, since claimant was engaged in special service involving undertaking of travel not associated with his normal work hours. Gray v Lyons Transp., 179 A.D.2d 985, 579 N.Y.S.2d 213, 1992 N.Y. App. Div. LEXIS 861 (N.Y. App. Div. 3d Dep't 1992).

Police officer, who was injured in car accident while driving to work, sustained compensable injury and was properly awarded workers' compensation benefits where he testified that he was en route to police station to begin his shift when he encountered "staggering" pedestrian who appeared intoxicated, officer told pedestrian to wait and that officer would send police car to assist him when he reached station, which was about one mile away, and officer then continued to station and was injured approximately 0.2 miles beyond encounter with pedestrian; since police officers are required to aid persons in danger even when off duty, officer would have driven to station to seek help even had he not been commuting. Callanan v Clarkstown, 191 A.D.2d 861, 594 N.Y.S.2d 859, 1993 N.Y. App. Div. LEXIS 2359 (N.Y. App. Div. 3d Dep't 1993).

101. —Injuries during travel between living quarters and job site or sales call, in general

Decedent was in the course of his employment when, after being authorized to drive his car to an out-of-town garage for repairs, he spent the day visiting bars where he took orders for employer's products and later, while driving in the direction of the brewery but at a time when brewery was closed was killed in an automobile accident. Clynes v Dobler Brewing Co., 308 N.Y. 1022, 127 N.E.2d 863, 308 N.Y. (N.Y.S.) 1022, 1955 N.Y. LEXIS 1252 (N.Y. 1955).

Evidence supported decision of Workers' Compensation Board that employee had a known and ratified second workplace in his dwelling so that injuries sustained while travelling home from his primary work place were compensable where employee was engineer laboratory technician who had suffered 2 prior heart attacks and had then set up work area at home to enable him to complete assignments on time, and where his supervisor testified that employee's work done at home benefited employer and was done with supervisor's permission. Fine v S.M.C. Microsystems Corp., 75 N.Y.2d 912, 554 N.Y.S.2d 827, 553 N.E.2d 1337, 1990 N.Y. LEXIS 645 (N.Y. 1990).

An outside man employed by a printing corporation in New York city sustained an injury arising out of and in the course of his employment, where he was injured by the so-called "Wall Street explosion" while on his way to call on a patron of his employer. Roberts v J. F. Newcomb & Co., 201 A.D. 759, 195 N.Y.S. 405, 1922 N.Y. App. Div. LEXIS 6410 (N.Y. App. Div.), aff'd, 234 N.Y. 553, 138 N.E. 443, 234 N.Y. (N.Y.S.) 553, 1922 N.Y. LEXIS 734 (N.Y. 1922).

A widow is entitled to compensation for the death of her husband who was an engineer and chief estimator employed by a construction company, where the decedent met his death while riding in his own car on his way from his home to his job. Williams v Arthur Gallow, Inc., 261 A.D. 765, 27 N.Y.S.2d 599, 1941 N.Y. App. Div. LEXIS 7434 (N.Y. App. Div. 1941).

A traveling salesman, required to use his own automobile, and being entitled to reimbursement for its use in covering his territory, is entitled to compensation where, after having made arrangements to meet a customer, was injured in attempting to crank the automobile. Madelung v Dale Radio Co., 262 A.D. 784, 27 N.Y.S.2d 395, 1941 N.Y. App. Div. LEXIS 5845 (N.Y. App. Div.), aff'd, 287 N.Y. 556, 38 N.E.2d 225, 287 N.Y. (N.Y.S.) 556, 1941 N.Y. LEXIS 2450 (N.Y. 1941).

A foreman on a construction job is injured in the course of his employment where, the accident occurred when he was driving his own truck en route to the construction job and was carrying materials for use of his employer. Graf v Niels Iverson Lumber Co., 262 A.D. 787, 27 N.Y.S.2d 280, 1941 N.Y. App. Div. LEXIS 5854 (N.Y. App. Div. 1941).

A salesman of automatic phonographs having no regular hours of employment is injured in the course of his employment where, after visiting a restaurant on a Sunday for the main purpose of inducing the proprietor to purchase a phonograph, he was struck on his way home by an automobile and injured. Mendelson v Modern Vending Co., 264 A.D. 966, 37 N.Y.S.2d 103, 1942 N.Y. App. Div. LEXIS 5568 (N.Y. App. Div. 1942).See also Bollard v Engel, 278 N.Y. 463, 17 N.E.2d 130, 278 N.Y. (N.Y.S.) 463, 1938 N.Y. LEXIS 1327 (N.Y. 1938).; Snyder v Grosby Press, Inc., 263 A.D. 913, 32 N.Y.S.2d 151, 1942 N.Y. App. Div. LEXIS 7343 (N.Y. App. Div. 1942).

A salesman killed on Monday morning en route from his home in Penn Yan to his employer's Binghamton office to turn in

collections and to secure route cards for the week is injured in the course of his employment. Gottshall v United Utilities Specialty Co., 275 A.D. 736, 87 N.Y.S.2d 104, 1949 N.Y. App. Div. LEXIS 4248 (N.Y. App. Div. 1949).See also Chetney v H. A. Manning Co., 273 N.Y. 82, 6 N.E.2d 105, 273 N.Y. (N.Y.S.) 82, 1937 N.Y. LEXIS 1175 (N.Y. 1937).

Substantial evidence supported a finding that the decedent was an outside worker whose family was entitled to a death award where decedent was killed while driving his employer's car home to Lockport and where he had been engaged as a sales engineer travelling through western New York selling steam specialties. Williamson v W. J. Sommers Co., 283 A.D. 1131, 131 N.Y.S.2d 574, 1954 N.Y. App. Div. LEXIS 6503 (N.Y. App. Div. 1954).

Employer, with its principal office in New York City, operated a large business with plants in many states. Decedent was hired in New York, was paid from New York office by checks drawn on New York bank and at time of accident was temporarily assigned for training to Virginia. He was required to live near his work and was paid an allowance toward expenses in addition to his salary. He was subject to reassignment from New York. Held: the Board properly assumed jurisdiction. And where decedent died as a result of injuries received in an automobile accident while on the way from temporary living quarters to his job site his injuries, resulting in death, arose out of and in the course of employment. Houghton v Babcock & Wilcox Co., 9 A.D.2d 575, 189 N.Y.S.2d 436, 1959 N.Y. App. Div. LEXIS 7433 (N.Y. App. Div. 3d Dep't), app. denied, 7 N.Y.2d 705, 1959 N.Y. LEXIS 1835 (N.Y. 1959).

Decedent was held to have been killed as the result of an accident arising out of and in course of his employment as an outside worker, and not as the result of intoxication, where he was a repairer of oil burners, furnished by his employer with a truck which he took home each night, and advised of his work assignments by telephone calls received at his home, checked out from a job at 5:35 P.M., and was killed at 7:05 P.M. on a direct route from the particular job to his home, which was about a 50-55 minute drive away, when his car struck a telephone pole. Fonze v Stuyvesant Oil Burner Corp., 10 A.D.2d 761, 197 N.Y.S.2d 496, 1960 N.Y. App. Div. LEXIS 11206 (N.Y. App. Div. 3d Dep't 1960).

Award based on findings that bicycle was necessary part of employment of newsboy, because of distance to be travelled between route and place he had to pick up papers, and the height and weight of papers to be carried, and that injury to boy while riding bicycle from home to place where he picked up papers arose out of employment, was affirmed. Flynn v Newsday, Inc., 28 A.D.2d 1053, 284 N.Y.S.2d 112, 1967 N.Y. App. Div. LEXIS 3188 (N.Y. App. Div. 3d Dep't 1967).

In an action arising from an automobile accident occurring at about 11:30 p.m. in the vicinity of a place where they were to instal electrical equipment, considering the relatively early hour at which the accident took place, the lack of evidence of intoxication, the fact that the two parties were returning to their motel when the accident occurred, and the fact that they were within a reasonable distance from the place where they were required to work, the board's finding that the employees were indulged in reasonable activity which could be considered an incident of the employment was supported by substantial evidence. Robards v New York Div. Electric Products, Inc., 33 A.D.2d 1067, 307 N.Y.S.2d 599, 1970 N.Y. App. Div. LEXIS 5523 (N.Y. App. Div. 3d Dep't 1970).

Employee of landscaping and gardening business who was picked up on a particular corner each morning by the employer's truck and returned to that corner each evening was within the scope of his employment when he was struck and killed by an automobile immediately after disembarking from the truck where the only means of disembarking from such truck was by way of a ladder on the street side thereof. Devito v Imbriano, 39 A.D.2d 796, 332 N.Y.S.2d 577, 1972 N.Y. App. Div. LEXIS 4573 (N.Y. App. Div. 3d Dep't 1972), aff'd, 33 N.Y.2d 757, 350 N.Y.S.2d 406, 305 N.E.2d 487, 1973 N.Y. LEXIS 978 (N.Y. 1973).

Finding that decedent was acting within the course of his employment when he was killed in the early morning hours in an automobile accident which occurred shortly after he left a client's home was substantiated by evidence that his job was to solicit automobile franchise dealers and salesmen to finance cars through his employer and to service existing accounts and that he was paid a salary but had an expense account for a company car and for entertaining clients. Heeb v Chrysler Credit Corp., 39 A.D.2d 987, 333 N.Y.S.2d 185, 1972 N.Y. App. Div. LEXIS 4231 (N.Y. App. Div. 3d Dep't 1972).

102. — —Injured during personal trip home

Death of an engineer employed for 12 years as a job superintendent taking care of electrical installations at various places, as the result of the injuries sustained in an automobile accident while returning to work at a job at Dover, Delaware, following an all night visit to his home in Philadelphia, was not compensable, notwithstanding his employer knew that it was the engineer's practice to drive home to Philadelphia on a certain night each week and return to the job on the following morning, the trip being purely personal. Benjamin v Kaplan Electric Co., 9 N.Y.2d 801, 215 N.Y.S.2d 512, 175 N.E.2d 169, 1961 N.Y. LEXIS 1379 (N.Y. 1961).

Injuries of encyclopedia salesmen sustained in car accident while returning from a week-end trip to their homes in New York City to the area of their employment in upstate New York were compensable where week-end visits to homes were authorized by employer. Newman v Public Distributors, Inc., 282 A.D. 1086, 126 N.Y.S.2d 124, 1953 N.Y. App. Div. LEXIS 5882 (N.Y. App. Div. 1953).

Decedent, an engineer for an electrical company, worked on various job sites. With the consent of its employer he was in the habit of going home on Wednesday night and returning Thursday morning. He was killed one Thursday morning while driving to the job site. Held: even though the decedent might be classified as an "outside worker" the trips home were personal. So, the accident did not arise out of and in the course of employment. Benjamin v Kaplan Electric Co., 8 A.D.2d 239, 187 N.Y.S.2d 310, 1959 N.Y. App. Div. LEXIS 8001 (N.Y. App. Div. 3d Dep't 1959), aff'd, 9 N.Y.2d 801, 215 N.Y.S.2d 512, 175 N.E.2d 169, 1961 N.Y. LEXIS 1379 (N.Y. 1961).

103. — —Traveling home at employer?s expense

Where a salesman was driving on his way home outside his territory but sustained an automobile accident resulting in his death while still within his territory. There was proof that expenses to his home were paid by his employer, that he had materials belonging to the employer with him and that he prepared reports of sales at his home. Townsend v General Aniline & Film Corp., 284 A.D. 919, 134 N.Y.S.2d 415, 1954 N.Y. App. Div. LEXIS 4056 (N.Y. App. Div. 1954).

Decedent's death arose in the course of his employment when he was killed on his way home from work where there was an agreement between the employer and the decedent's union that the employer would pay to each employee a flat rate of compensation for travelling expenses in order to get its employees to work outside the city. Croessman v R. J. Moran & Sons, Inc., 4 A.D.2d 712, 163 N.Y.S.2d 546, 1957 N.Y. App. Div. LEXIS 5122 (N.Y. App. Div. 3d Dep't 1957).

Where the employee's death occurred while returning from his place of employment at his employer's expense, the accident arose out of and incident to his employment. It is not important that the workman was under no compulsion to use the afforded transportation or that he was not paid for the time when he was being transported. The important point is that the employee was returning from the place of work at the employer's expense. Michigan Mut. Liability Co. v State, 31 A.D.2d 780, 297 N.Y.S.2d 80, 1969 N.Y. App. Div. LEXIS 4760 (N.Y. App. Div. 4th Dep't), aff'd, 25 N.Y.2d 647, 306 N.Y.S.2d 463, 254 N.E.2d 765, 1969 N.Y. LEXIS 964 (N.Y. 1969).

104. — —Travel between home and source of transit for work purposes

The death of a traveling salesman arises out of and in the course of his employment where it occurs while he is on his way from his home to take a train for the purpose of visiting customers. Harby v Marwell Bros., 203 A.D. 525, 196 N.Y.S. 729, 1922 N.Y. App. Div. LEXIS 7238 (N.Y. App. Div. 1922), aff'd, 235 N.Y. 504, 139 N.E. 711, 235 N.Y. (N.Y.S.) 504, 1923 N.Y. LEXIS 1211 (N.Y. 1923).

A door to door saleswoman is injured in the course of her employment, where she fell on an icy sidewalk between her home and the point where she expected to meet other canvassers and the "crew manager", who used an automobile to carry canvassers to work in a remote part of the city. Barbaric v Emulso Corp., 260 A.D. 819, 22 N.Y.S.2d 447, 1940 N.Y. App. Div. LEXIS 4831 (N.Y. App. Div. 1940).

Claimant suffered injuries arising out of and in the course of her employment as organizer and sales representative of a concern engaged in the sale of encyclopedias, where she was injured in the vicinity of her residence while boarding a street car which would take her to a scheduled meeting of employees. Teshnor v F. E. Compton & Co., 263 A.D. 160, 32 N.Y.S.2d 266, 1942 N.Y. App. Div. LEXIS 6833 (N.Y. App. Div. 3d Dep't), modified, 263 A.D. 1028, 1942 N.Y. App. Div. LEXIS 7947 (N.Y. App. Div. 3d Dep't 1942).

105. —Injuries during travel between living quarters and job site or sales call; effect of intervening stops or activities

Claimant, salesman, was entitled to compensation for injuries sustained in an automobile accident where he left his home in Rochester to go to Nashua, New Hampshire to pick up a new car he had purchased and while there, he received a call from his employer asking him to go to Natick, Massachusetts to transact some company business, which he did and was injured while on his way back to Rochester the following day. Mahoney v Michaels Stern & Co., 9 N.Y.2d 931, 217 N.Y.S.2d 97, 176 N.E.2d 104, 1961 N.Y. LEXIS 1240 (N.Y. 1961).

An outside salesman sustained a compensable injury when he, after staying at his mother's house overnight, backed car out into street, stopped it to clean the windshield and when he got out, stepped on a cat and fell. Schneider v Samuel Kaplan & Son, 284 A.D. 920, 134 N.Y.S.2d 372, 1954 N.Y. App. Div. LEXIS 4059 (N.Y. App. Div. 1954).

Decedent was employed as an outside salesman engaged in a house to house selling. On the morning of the day of his accident he went with a co-employee to another town where he worked until afternoon and after stopping at a tavern was killed on the direct route to his home. Smith v United Utilities & Specialty Corp., 285 A.D. 1100, 139 N.Y.S.2d 343, 1955 N.Y. App. Div. LEXIS 6768 (N.Y. App. Div. 1955).

A travelling trainee consultant who, after going to Hartford, Conn., checked in at a hotel, went to a restaurant for dinner and on her way back to the hotel to make out her daily reports, slipped on an icy sidewalk and was injured. Held: was in the course of her employment. Schreiber v Revlon Products Corp., 5 A.D.2d 207, 171 N.Y.S.2d 122, 1958 N.Y. App. Div. LEXIS 6695 (N.Y. App. Div. 3d Dep't 1958).

Decedent was president and salesman for employer. Employer had account with retail store which bought through mail advertising. No salesman covered territory. During August, decedent's family was staying at hotel not far from village where store was located. On a Thursday he left New York and Board could find he intended to visit retail account of employer. When he reached village he was swept away by flash flood and drowned. When decedent usually visited his family on week-ends, he normally left New York on Friday. Perlmutter v Duchess Hosiery Corp., 5 A.D.2d 912, 171 N.Y.S.2d 170, 1958 N.Y. App. Div. LEXIS 6733 (N.Y. App. Div. 3d Dep't), app. denied, 4 N.Y.2d 677, 1958 N.Y. LEXIS 1456 (N.Y. 1958).

Where deceased was a salesman covering large territory to solicit customers for his employer's business, made at least one business call on the day of the fatal accident, thereafter stopped to see one relative and had dinner with his father and mother, leaving their home about 10:00 p.m. to return to his own home, and died within 10 miles of the latter at about 1:20 p.m. on a portion of highway he customarily used in returning to his home, having apparently fallen asleep at the wheel, the accident was deemed to have arisen out of and in the course of his employment. Lowery v Riss & Co., 10 A.D.2d 489, 200 N.Y.S.2d 679, 1960 N.Y. App. Div. LEXIS 9912 (N.Y. App. Div. 3d Dep't), app. denied, 8 N.Y.2d 707, 1960 N.Y. LEXIS 1801 (N.Y. 1960).

A disability award for injuries sustained when a station wagon, owned by claimant's employer and which claimant was driving, struck a utility pole, was sustained where it appeared that claimant was employed as chauffeur to make deliveries for his employer at any time and place either by truck or use of the station wagon, completed making deliveries with the station wagon at 6 p.m. on the day in question, stopped at a wayside restaurant for food, then took a nap in the station wagon beside the highway en route to the garage where the station wagon was kept, and the accident occurred at 11 p.m. or later, no substantial deviation from course of employment being shown or intoxication established. Sosnovich v Trefflich Bird & Animal Corp., 12 A.D.2d 538, 206 N.Y.S.2d 845, 1960 N.Y. App. Div. LEXIS 7233 (N.Y. App. Div. 3d Dep't 1960), app. denied, 9 N.Y.2d 609, 1961 N.Y. LEXIS 1644 (N.Y. 1961).

Where an outside salesman for a wholesale drug concern worked out of his home with no fixed hours and was killed as the result of a car accident within a few blocks of his home shortly after midnight while on the direct route toward home, an award of death benefits was sustained notwithstanding he had done considerable drinking during the evening. O'Connor v Johnson & Johnson, 12 A.D.2d 846, 211 N.Y.S.2d 1, 1961 N.Y. App. Div. LEXIS 13204 (N.Y. App. Div. 3d Dep't), app. denied, 9 N.Y.2d 611, 1961 N.Y. LEXIS 1708 (N.Y. 1961).

The evidence was sufficient to sustain an award of death benefits for death of an automobile salesman where he was furnished with a demonstrator car which he kept at his home and used for business and personal purposes, left home intending to meet a prospective customer at employer's place of business and also to perform a personal errand, and, after performing both missions and while on his way home, suffered a coronary attack, lost control of the car, and sustained fatal injuries. Westlake v Emmick, 16 A.D.2d 726, 226 N.Y.S.2d 774, 1962 N.Y. App. Div. LEXIS 10342 (N.Y. App. Div. 3d Dep't 1962).

There was substantial evidence from which the Board could find that death of an outside salesman for a manufacturer of chemicals and associated products in an automobile accident arose out of his employment where it appeared that he was allowed wide latitude in performance of his duties and, at the time of death, at 9:00 p.m. had been engaged most of the afternoon in a conference largely devoted to company advertising in a trade publication while simultaneously watching a baseball game on TV and doing some casual drinking with others present, and, at the time of death, was bound for a dinner engagement with the president of the publishing company. Post v Tennessee Products & Chemical Corp., 19 A.D.2d 484, 244 N.Y.S.2d 389, 1963 N.Y. App. Div. LEXIS 2818 (N.Y. App. Div. 3d Dep't 1963), aff'd, 14 N.Y.2d 796, 251 N.Y.S.2d 32, 200 N.E.2d 213, 1964 N.Y. LEXIS 1094 (N.Y. 1964).

Where an employee's social activities are in connection with and incidental to his employer's business, such activities become part of his employment; thus, beneficiaries of district sales manager for insurance company who was killed in automobile accident on the way home from conducting a sales meeting were entitled to benefits despite fact that he and several salesmen had stopped off at several bars after the meeting. McGee v Allstate Ins. Co., 41 A.D.2d 866, 342 N.Y.S.2d 685, 1973 N.Y. App. Div. LEXIS 4686 (N.Y. App. Div. 3d Dep't 1973).

Evidence supported finding that decedent's activities as he traveled to his employer's gas station were for employer's benefit and were within course of his employment, and therefore fatal bee sting that he received while driving his car was compensable, where he was responding to incident at employer's station when incident occurred and, in addition to responding to problems at employer's station, employer required him to conduct price surveys at competitors' stations almost daily, which task was regularly performed while he traveled between his home and station. Schuhl v Mobil Oil Corp., 268 A.D.2d 905, 702 N.Y.S.2d 436, 2000 N.Y. App. Div. LEXIS 847 (N.Y. App. Div. 3d Dep't 2000).

106. —Injuries sustained during break for meals or social gatherings

An employee, traveling on the business of his employer, who could select his own time for lunch and would be reimbursed for its expense is not entitled to compensation for a disability incurred while eating lunch. Johnson v Smith, 263 N.Y. 10, 188 N.E. 140, 263 N.Y. (N.Y.S.) 10, 1933 N.Y. LEXIS 789 (N.Y. 1933)..

See also McDonald v Belle Terre Lodge, 268 N.Y. 663, 198 N.E. 546, 268 N.Y. (N.Y.S.) 663, 1935 N.Y. LEXIS 1129 (N.Y. 1935).

In the absence of evidence of infection in the course of his employment, no award of compensation may be given to a salesman infected by a typhoid fever carrier serving him in a restaurant. Johnson v Smith, 263 N.Y. 10, 188 N.E. 140, 263 N.Y. (N.Y.S.) 10, 1933 N.Y. LEXIS 789 (N.Y. 1933).

Injury to an outside saleslady, who furnished her own lunch, which she obtained whenever she desired, occurring about noon, after she had made a call, and was proceeding to a nearby drug store to rest, and to get lunch, arises out of and in the course of her employment and is compensable. Laubeck v Toc's Products Co., 260 A.D. 966, 23 N.Y.S.2d 280, 1940 N.Y. App. Div. LEXIS 5632 (N.Y. App. Div. 1940), aff'd, 286 N.Y. 577, 35 N.E.2d 927, 286 N.Y. (N.Y.S.) 577, 1941 N.Y. LEXIS 2119 (N.Y. 1941).

A traveling salesman is not injured in the course of his employment when a chicken bone became lodged in his throat during a meal at a public restaurant. Baron v W. W. Norton & Co., 264 A.D. 802, 34 N.Y.S.2d 740, 1942 N.Y. App. Div. LEXIS 4789 (N.Y. App. Div. 1942).

Decedent was employed by New York corporation engaged in renting construction machinery. Employer furnished decedent with automobile and paid his expenses. Employer had rented machinery to lessee in Florida and had sent decedent to supervise use thereof. While there, decedent had gone to restaurant for dinner with acquaintances and, while returning to lodgings, accident occurred resulting in decedent's death. Board properly found death did not arise out of and in course of employment. O'Connor v Complete Machinery & Equipment Co., 5 A.D.2d 741, 168 N.Y.S.2d 702, 1957 N.Y. App. Div. LEXIS 3552 (N.Y. App. Div. 3d Dep't 1957), reh'g denied, 5 A.D.2d 797, 170 N.Y.S.2d 315, 1958 N.Y. App. Div. LEXIS 7089 (N.Y. App. Div. 3d Dep't 1958), app. denied, 4 N.Y.2d 675, 1958 N.Y. LEXIS 1402 (N.Y. 1958).

While in Chicago in connection with promotion of employer's products, decedent went to Springfield to visit nightclub and, while returning to Chicago, was killed in automobile accident. On testimony of decedent's widow and woman who accompanied him to nightclub, board was warranted in finding that visit to nightclub was for purpose of advertising employer's product on radio interview on which it was customary to permit reference to patron's business. Award affirmed. On cross examination decedent's woman companion testified as to facts of radio broadcasts but declined to answer personal questions. Under circumstances, appellant not deprived of fair trial. Opportunity to cross-examine must be given on quasi-judicial hearing before administrative tribunal but not to more than a reasonable extent. Epstein v Cort Watch Co., 7 A.D.2d 663, 179 N.Y.S.2d 620, 1958 N.Y. App. Div. LEXIS 4305 (N.Y. App. Div. 3d Dep't 1958), app. denied, 5 N.Y.2d 709, 1959 N.Y. LEXIS 1967 (N.Y. 1959).

Claimant, a salesman, was injured in a restaurant where he was having lunch. He had been assigned to drive sales manager to place of business of customers. And, while manager was waiting for customer, manager had directed claimant to go out for lunch. Board properly held accident arose out of and in the course of employment. Grosack v Hermann & Jacobs Corp., 8 A.D.2d 572, 183 N.Y.S.2d 507, 1959 N.Y. App. Div. LEXIS 9662 (N.Y. App. Div. 3d Dep't 1959).

Decedent was sent to another city to demonstrate employer's products at a field day. His expenses were reimbursable by the employer. After working late, he undertook a journey to a restaurant some 10 miles from the motel where he was staying. Before reaching his destination, the automobile in which he was riding was in an accident which caused his death. Held: his death arose out of and in the course of employment. Kohl v International Harvester Co., 9 A.D.2d 597, 189 N.Y.S.2d 361, 1959 N.Y. App. Div. LEXIS 7471 (N.Y. App. Div. 3d Dep't 1959).

Injuries sustained by outside salesman by tripping on a wire in entering a cafeteria to pick up a quick lunch before calling on his next customer was sufficiently closely related to time and place of work and promotion of the employer's business to be compensable. Haufler v Cambrook Fabrics Co., 20 A.D.2d 946, 249 N.Y.S.2d 109, 1964 N.Y. App. Div. LEXIS 3931 (N.Y. App. Div. 3d Dep't 1964).

Where employee is killed while crossing street in bringing back his lunch so that he may continue working through lunch hour accident is in course of employment. Markowitz v Mack Markowitz, Inc., 22 A.D.2d 1001, 255 N.Y.S.2d 28, 1964 N.Y. App. Div. LEXIS 2415 (N.Y. App. Div. 3d Dep't 1964).

Evidence sustained the Board's decision that claimant's deceased husband was killed within the scope of his employment in an automobile accident which occurred at 3:55 a.m. as the deceased was evidently on his way home after attending a party held at a restaurant in honor of two transferred co-employees, since the Board found the decedent was an outside worker and entitled to coverage until he returned home. Mansfield v General Adjustment Bureau, 27 A.D.2d 783, 277 N.Y.S.2d 224, 1967 N.Y. App. Div. LEXIS 4864 (N.Y. App. Div. 3d Dep't), aff'd, 20 N.Y.2d 881, 285 N.Y.S.2d 854, 232 N.E.2d 852, 1967 N.Y. LEXIS 1144 (N.Y. 1967).

An investment advisor and underwriter for mutual funds activities encompassing visiting persons at their offices and promoting good will which entailed social ventures to cocktail lounges and supper clubs and death as a result of automobile accident after returning from activities arose from his employment activities. Dunn v Supervised Investors Services, Inc., 34 A.D.2d 1067, 312 N.Y.S.2d 270, 1970 N.Y. App. Div. LEXIS 4242 (N.Y. App. Div. 3d Dep't), app. denied, 27 N.Y.2d 485, 1970 N.Y. LEXIS 2070 (N.Y. 1970).

Evidence including testimony that worker was employed as assistant superintendent at jobsite and, for duration of job, stayed at motel nearby where he frequently did bookkeeping, payroll and other paper work incidental to job during evenings, that worker and job superintendent drove in company truck to nearby tavern where they had something to eat and drink and that worker was killed in auto accident which occurred while they were proceeding in direction of motel permitted finding that worker met his death in accident which arose out of and in course of employment. Ahart v Preload Co., 57 A.D.2d 976, 394 N.Y.S.2d 104, 1977 N.Y. App. Div. LEXIS 12267 (N.Y. App. Div. 3d Dep't 1977).

Evidence sustained a determination of the Workers' Compensation Board that an employee who died after jogging during his lunch hour on his employer's premises suffered a death that was causally related to and arose out of strenuous exertion engaged in while in the course of employment, where the record revealed that the employer furnished its employees with an athletic facility consisting of a gym, locker room, and showers, that membership in the club was voluntary and open to all employees, that the club's functions were controlled by its members, that the employer engaged a general overseer for the club, and that the employer acquiesced to the use of its names on shirts worn by club members and participated in an annual awards dinner for which it provided trophies. Vaccaro v Sperry Rand Corp., 83 A.D.2d 678, 442 N.Y.S.2d 243, 1981 N.Y. App. Div. LEXIS 14985 (N.Y. App. Div. 3d Dep't 1981).

A decision of the Workers' Compensation Board that claimant's injuries, sustained when she fell on the sidewalk after exiting her employer's premises on her way to lunch, arose out of and in the course of her employment would be affirmed since the fact that claimant's lunch hour had begun and she was exiting the premises in order to obtain her lunch did not necessarily remove her from the Workers' Compensation Law where claimant was only six steps away from the property line and along the normal route of ingress and egress at the time of her fall. Borelli v New York Tel. Co., 93 A.D.2d 940, 462 N.Y.S.2d 305, 1983 N.Y. App. Div. LEXIS 17834 (N.Y. App. Div. 3d Dep't 1983).

Employee sustained compensable injury when, after entering premises of his employer shortly before he was scheduled to report for work, he joined other employees in area containing picnic tables and grassy knoll which was provided by employer and sat cross-legged on grass for several minutes, and when he stood up to report for his shift, his left knee popped out of joint, since employee's injury occurred while he was on employer's premises, immediately prior to time he was required to commence work and while he was getting up to report for duty, such that employee was in course of his employment when injury occurred. Torio v Fisher Body Division-General Motors Corp., 119 A.D.2d

955, 501 N.Y.S.2d 485, 1986 N.Y. App. Div. LEXIS 55883 (N.Y. App. Div. 3d Dep't 1986).

Employer failed to meet "heavy burden" of rebuttal imposed by CLS Work Comp § 21, requiring employer to present substantial evidence that unwitnessed or unexplained accidents occurring in course of employment did not arise out of employment, where Workers' Compensation Board could reasonably infer that employee was eating her lunch in place provided by employer for that purpose, employee's smoking cigarette was activity consistent with purpose of eating area, and sudden bursting of her dress into flames was not caused by cigarette ash alone but was instead of unknown cause sufficient to establish risk incidental to employment. Iacovelli v New York Times Co., 124 A.D.2d 324, 507 N.Y.S.2d 922, 1986 N.Y. App. Div. LEXIS 61355 (N.Y. App. Div. 3d Dep't 1986).

Claimants' injuries in off-duty softball game arose in course of their employment where, inter alia, team members were required to wear uniforms paid for by entity formed at employer's initiative to promote employer's goals, hats supplied to players bore employer's logo, uniforms remained employer's property and had to be returned after player resigned from team, and practice schedules and printed materials encouraging employees to "play (employer) softball" were displayed on bulletin boards and in lounge areas at employer's premises. Eddy v Rochester-Genesee Reg'l Transp. Auth., 248 A.D.2d 769, 669 N.Y.S.2d 699, 1998 N.Y. App. Div. LEXIS 2207 (N.Y. App. Div. 3d Dep't 1998).

107. —Injuries sustained in connection with maintenance or demonstration of employer's product

But an accident does not arise out of and in the course of the employment where an automobile salesman after demonstrating an automobile which he sold, then proceeded to a speak-easy and after drinking there took a friend for a ride for the purpose of demonstrating the same car. Pflug v Roesch & Klinck, Inc., 229 A.D. 54, 240 N.Y.S. 740, 1930 N.Y. App. Div. LEXIS 10308 (N.Y. App. Div. 1930), aff'd, 256 N.Y. 564, 177 N.E. 142, 256 N.Y. (N.Y.S.) 564, 1931 N.Y. LEXIS 1142 (N.Y. 1931).

An automobile salesman sustains injuries arising in and out of the course of his employment where an accident occurs while the salesman is teaching a customer to drive the automobile he had sold on behalf of the employer. Virrill v Derks Buick Co., 265 A.D. 895, 37 N.Y.S.2d 924, 1942 N.Y. App. Div. LEXIS 6373 (N.Y. App. Div. 1942).

An award was properly made to the widow and minor children of an automobile salesman who sustained injuries which caused his death while demonstrating an automobile on a public highway. Hoyt v Nicholson Motors, 276 A.D. 1045, 95 N.Y.S.2d 614, 1950 N.Y. App. Div. LEXIS 5665 (N.Y. App. Div. 1950).

A vacuum cleaner salesman was in the course of his employment when he was injured while cleaning the dust bag of the demonstration cleaner in his backyard. Avis v Electrolux Corp., 2 A.D.2d 717, 151 N.Y.S.2d 542, 1956 N.Y. App. Div. LEXIS 5014 (N.Y. App. Div. 3d Dep't), app. denied, 2 N.Y.2d 705, 1956 N.Y. LEXIS 1175 (N.Y. 1956).

108. —Injuries sustained in lodgings or home

No compensation is awardable to a traveling saleswoman for an injury while in a hotel where she was staying. Turner v Cathedral Pub. Co., 268 N.Y. 656, 198 N.E. 542, 268 N.Y. (N.Y.S.) 656, 1935 N.Y. LEXIS 1123 (N.Y. 1935).

Claimant, a traveling salesman who was in a motel in Chicago in the course of his employment, while dressing hurriedly so that he could begin his drive to another city to which his duties took him, fell and sustained a back injury for which he was not entitled to compensation benefits; for his accident was attributable solely to his personal acts, and could not be attributed in any way to the environment into which he had been brought by his employment. Kaplan v Zodiac Watch Co., 20 N.Y.2d 537, 285 N.Y.S.2d 585, 232 N.E.2d 625, 1967 N.Y. LEXIS 1092 (N.Y. 1967).

The death of a traveling salesman does not arise in the course of his employment where he was killed in a hotel by gas escaping from a jet in his room. Kass v Hirschberg, Schutz & Co., 191 A.D. 300, 181 N.Y.S. 35, 1920 N.Y. App. Div. LEXIS 4706 (N.Y. App. Div. 1920).

A truck driver engaged in long distance hauling is within the course of his employment at the time of his death where he rented a tourist cabin while engaged in a trip which required more than one day, and was asphyxiated by a defective heating apparatus in the tourist cabin. McLelland v International Paper Co., 269 A.D. 800, 55 N.Y.S.2d 56, 1945 N.Y. App. Div. LEXIS 3905 (N.Y. App. Div.), app. dismissed, 294 N.Y. 967, 63 N.E.2d 597, 294 N.Y. (N.Y.S.) 967, 1945 N.Y. LEXIS 1135 (N.Y. 1945).

A field worker and admissions counselor for a secretarial school whose duties required visits to various schools and colleges for the purpose of soliciting enrollments for the secretarial school which made arrangements with the different educational institutions for such visits, paying the employee's expenses, and undertaking to obtain hotel reservations, suffers injuries arising out of and in the course of her employment, where she died in a hotel fire, even though in that particular instance the employer had endeavored to obtain a hotel reservation but was unsuccessful and directed the employee to make her own arrangements. In re Buck's Estate, 277 A.D. 126, 98 N.Y.S.2d 734, 1950 N.Y. App. Div. LEXIS 3011 (N.Y. App. Div. 1950).

An award for death of employee, in a hotel fire in Vermont, is proper where the decedent was required to make a call at his employer's store there the following morning, and usually made out reports to his employer at night, and there was no proof that decedent was engaged in his own pursuits at the time of the fire. Blake v Grand Union Co., 277 A.D. 914, 98 N.Y.S.2d 738, 1950 N.Y. App. Div. LEXIS 3829 (N.Y. App. Div. 1950).

An award was properly made under a policy giving the location of business operations of the insured at the address of his shop and "elsewhere in N. Y. State" where an employee of a plumbing shop had been directed by his employer to wash the employer's car at his home and while pulling down the window for the employer's daughter in the home, the employee was injured. Walker v Cooper, 279 A.D. 946, 110 N.Y.S.2d 821, 1952 N.Y. App. Div. LEXIS 5392 (N.Y. App. Div. 1952).

Claimant, sales representative for employer, had gone on business trip. On arrival at destination, he consulted physician who gave him sedative drug to alleviate nervous condition. Following day he made some business calls but on the day thereafter he did no work whatever and next morming he was found on floor of hotel room with fractured leg. There was medical evidence that he suffered from toxic psychosis due to use of sedative. Claimant must have slipped and fallen in room but fall was caused by effect of drug. Decision disallowing claim affirmed. Snowden v Devoe & Reynolds Co., 5 A.D.2d 1035, 173 N.Y.S.2d 140, 1958 N.Y. App. Div. LEXIS 6193 (N.Y. App. Div. 3d Dep't 1958).

Injury sustained by a food demonstrator was compensable where the employer sent her 90 miles away to put on a food demonstration in a store for two days, reimbursing her for expenses, including lodging overnight, and she was injured by slipping on a highly waxed floor in a room which she engaged for the night, after completing her work for the first day. Regan v Food Store Demonstration, Inc., 12 A.D.2d 852, 209 N.Y.S.2d 962, 1961 N.Y. App. Div. LEXIS 13213 (N.Y. App. Div. 3d Dep't 1961).

There was substantial evidence to sustain the Workers' Compensation Board's decision that the death of a wife of a president of a closely held corporation, who acted as the secretary and treasurer of the corporation and who worked in a room set aside for that purpose at the couple's home, arose out of and in the course of her employment, where the wife was killed when two men entered the home and raped and murdered her and another woman present, and when arrested, the assailants had three corporate checks signed by the decedent, and where the husband testified that his wife had telephoned the office concerning the payment of a corporate bill at about noon on the day of her death and that she had prepared a check on that day. Watson v Graphic Management Systems, 96 A.D.2d 619, 464 N.Y.S.2d 590, 1983 N.Y. App. Div. LEXIS 19165 (N.Y. App. Div. 3d Dep't 1983).

109. —Injuries sustained at or near job site or location of sales call

An employee was found to be in course of employment though he never filed a claim, never appeared before a board but accepted compensation for injuries sustained when, after finishing work

for day, he left employer's premises and, while on property of another, was run down by a truck operated by his employer. Doca v Federal Stevedoring Co., 308 N.Y. 44, 123 N.E.2d 632, 308 N.Y. (N.Y.S.) 44, 1954 N.Y. LEXIS 942 (N.Y. 1954), reh'g denied, 308 N.Y. 744, 125 N.E.2d 102, 308 N.Y. (N.Y.S.) 744, 1955 N.Y. LEXIS 1017 (N.Y. 1955).

The place where an employer's contract is being performed is deemed the employer's plant and it is to be treated in its facilities for ingress and egress as would such facilities of the employer while the work is in progress. Downey v Vanderlinde Electric Corp., 276 A.D. 1044, 95 N.Y.S.2d 685, 1950 N.Y. App. Div. LEXIS 5663 (N.Y. App. Div. 1950).

An employee was in the course of his employment when he was involved in an automobile collision at 2:40 A.M. where a record showed he had been making grocery deliveries to summer resorts and had called employer at 9:00 P.M. for instructions and was told to sleep in the car and resume deliveries in the morning. Although there was proof that employee had been in a drunken condition before accident, he was not positively identified and there was no other proof that he had been drinking. Moss v P. A. Trucking Co., 284 A.D. 675, 134 N.Y.S.2d 393, 1954 N.Y. App. Div. LEXIS 3465 (N.Y. App. Div. 1954).

110. —Injuries sustained while being transported by employer or co-worker

The employer's report of the accident, together with the medical and surgical reports and the presumptions prescribed by § 21 are sufficient to support a finding that the claimant's injuries arose out of or in the course of his employment where the claimant, an insurance agent, was injured while riding in an automobile driven by another agent of his employer. Campana v Prudential Ins. Co., 267 A.D. 1007, 47 N.Y.S.2d 848, 1944 N.Y. App. Div. LEXIS 6031 (N.Y. App. Div. 1944).

A claimant employed by an electrical construction contractor is entitled to compensation for injuries sustained in getting into a car made available to him by a fellow employee for the purpose of leaving the premises of a third party for which the employer was doing electrical work under contract. Downey v Vanderlinde Electric Corp., 276 A.D. 1044, 95 N.Y.S.2d 685, 1950 N.Y. App. Div. LEXIS 5663 (N.Y. App. Div. 1950).

Employee of landscaping and gardening business who worked at different places each day according to where his employer had jobs and who was picked up in his employer's truck on a certain corner each day and dropped off at the same corner each evening was an outside employee and within the course of his employment when struck and killed by an automobile upon disembarking from his employer's truck at the end of the day. Devito v Imbriano, 39 A.D.2d 796, 332 N.Y.S.2d 577, 1972 N.Y. App. Div. LEXIS 4573 (N.Y. App. Div. 3d Dep't 1972), aff'd, 33 N.Y.2d 757, 350 N.Y.S.2d 406, 305 N.E.2d 487, 1973 N.Y. LEXIS 978 (N.Y. 1973).

111. —U.S.O. personnel

An entertainer, engaged in touring camps in the United States Occupation Zone in Germany, who had been on a vacation accorded by the terms of her contract and while returning pursuant to an order from the manager of her unit to rejoin the rest of the troup, was injured when the automobile in which she was riding ran off the highway and struck a tree was found to have been injured after return to her employment and in the course thereof. Scott v U. S. O. Camp Shows, Inc., 298 N.Y. 896, 84 N.E.2d 808, 298 N.Y. (N.Y.S.) 896, 1949 N.Y. LEXIS 1745 (N.Y. 1949).; Lyons v U. S. O. Camp Shows, Inc., 298 N.Y. 897, 84 N.E.2d 808, 298 N.Y. (N.Y.S.) 897, 1949 N.Y. LEXIS 1746 (N.Y. 1949).

A theatrical manager for camp shows, who suffers an injury while on the way to a barber shop for a hair cut and shave while awaiting transportation back to an army camp after completing his business mission in a nearby town, is entitled to compensation. Block v Camp Shows, Inc., 272 A.D. 980, 72 N.Y.S.2d 681, 1947 N.Y. App. Div. LEXIS 4487 (N.Y. App. Div. 1947).

An employee of one producing shows and arranging entertainment for troops overseas, among whose duties was to keep stage clothing and stage laundry cleaned and pressed, is injured in the course of his employment where he was injured in an automobile accident while travelling in an army truck to pick up laundry which it was necessary to have done by native housewives. Gianniny v Camp Shows, Inc., 272 A.D. 1089, 74 N.Y.S.2d 537, 1947 N.Y. App. Div. LEXIS 5051 (N.Y. App. Div. 1947).

A member of a U.S.O. concert unit awaiting transportation back to the United States and injured while returning from a Red Cross club where he had performed, as the result of a fall into a shell hole while attempting to get out of the path of an oncoming automobile, suffers injuries arising out of and in the course of his employment. Polsky v U. S. O. Camp Shows, Inc., 272 A.D. 1094, 74 N.Y.S.2d 667 (N.Y. App. Div. 1947).

A musician in an U.S.O. troop organized in New York city and en route to the Pacific theatre is injured in the course of his employment when struck by an automobile while returning from a hotel where he had intended to see a fellow musician, while the troop was in San Francisco awaiting transportation, during which stay, the claimant was billeted at a hotel provided by the army, was required to be in uniform at all times, and to respect army regulations, and the members of the troop were encouraged to go sight-seeing and to keep posted on current events to be used for entertainment material, and further there was some evidence that the purpose of the employee's visit was to acquire music to be used in connection with the troop's entertainment. De Santis v U. S. O. Camp Shows, Inc., 275 A.D. 880, 88 N.Y.S.2d 732, 1949 N.Y. App. Div. LEXIS 4867 (N.Y. App. Div. 1949).

112. Injury in course of employment; inside employee injured going to or from work

When employee advances to place where he is engaging in an act or series of acts which are part and parcel of entrance into employment premises, test of compensability is whether there is such relationship existing between accident and employment as to bring former within the range of latter or, stated differently, whether accident happened as an incident and risk of employment. Husted v Seneca Steel Service, Inc., 41 N.Y.2d 140, 391 N.Y.S.2d 78, 359 N.E.2d 673, 1976 N.Y. LEXIS 3212 (N.Y. 1976).

Work. Comp. Law makes distinction between injuries received at the plant or upon the premises of the employer and those received elsewhere. Etherton v Johnstown Knitting Mills Co., 184 A.D. 820, 172 N.Y.S. 724, 1918 N.Y. App. Div. LEXIS 6692 (N.Y. App. Div. 1918).

The hazards of the way in and out of an employer's plant are part of the employment, and an accident caused thereby arises out of and in the course of the employment. Leatham v Thurston & Braidich, 264 A.D. 449, 35 N.Y.S.2d 887, 1942 N.Y. App. Div. LEXIS 4179 (N.Y. App. Div. 1942), aff'd, 289 N.Y. 804, 47 N.E.2d 51, 289 N.Y. (N.Y.S.) 804, 1943 N.Y. LEXIS 1202 (N.Y. 1943).

Employment is not limited to the exact moment when the workman reaches the place where he begins his work or to the moment when he ceases that work; it necessarily includes a reasonable amount of time and space before and after ceasing actual employment. Leatham v Thurston & Braidich, 264 A.D. 449, 35 N.Y.S.2d 887, 1942 N.Y. App. Div. LEXIS 4179 (N.Y. App. Div. 1942), aff'd, 289 N.Y. 804, 47 N.E.2d 51, 289 N.Y. (N.Y.S.) 804, 1943 N.Y. LEXIS 1202 (N.Y. 1943).

While the general rule is that risks of travel to and from work are not risks of employment, there are exceptions. Borders v E. H. Scull Co., 33 A.D.2d 870, 306 N.Y.S.2d 78, 1969 N.Y. App. Div. LEXIS 2547 (N.Y. App. Div. 3d Dep't 1969).

While on the employer's premises, going to or coming from work, is generally considered an incident of the employment. Sicktish v Vulcan Industries of Buffalo, Inc., 33 A.D.2d 975, 307 N.Y.S.2d 385, 1970 N.Y. App. Div. LEXIS 5731 (N.Y. App. Div. 4th Dep't 1970).

It is the general rule, although there are exceptions, that an employee does not enter into the course of his employment until he reaches the premises of his employer. Freebern v North Rockland CDA, 64 A.D.2d 300, 410 N.Y.S.2d 371, 1978 N.Y. App. Div. LEXIS 12733 (N.Y. App. Div. 3d Dep't 1978).

Where claimant was injured on stairway used by employees as the sole method of ingress and egress between the place of employment and street level, claimant was entitled to benefits for injuries suffered in a stairway accident. Diaz v Plaza Hotel, 79 A.D.2d 804, 435 N.Y.S.2d 102, 1980 N.Y. App. Div. LEXIS 14213 (N.Y. App. Div. 3d Dep't 1980).

Accident which occurred while claimant was leaving work on employer's private roadway arose out of and in course of employment, despite employer's assertion that accident occurred on segment of roadway recently paved by county and ostensibly under municipal control, since roadway was sole route of ingress and egress from employer's parking lot. Maloney v Reynolds Metal, 141 A.D.2d 948, 530 N.Y.S.2d 294, 1988 N.Y. App. Div. LEXIS 6724 (N.Y. App. Div. 3d Dep't 1988).

Evidence supported conclusion of Workers' Compensation Board that claimant's injury was not work related where he had been told by his employer that he would not be permitted to work if he wore certain shirt with offending language on it, he was given options of turning shirt inside out, covering it, purchasing another shirt, or going home to change shirt, and injury occurred en route back to work after he chose to go home to change shirt. Stagliano v New York Tel. Co., 172 A.D.2d 887, 568 N.Y.S.2d 476, 1991 N.Y. App. Div. LEXIS 4207 (N.Y. App. Div. 3d Dep't 1991).

Workers' Compensation claimant's admission that accident occurred outside employer's premises and after working hours constituted substantial evidence supporting finding of Workers' Compensation Board that accident did not arise out of or in course of employment, since risk of travel to and from workplace is generally not in course of employment itself, and injuries occurring during such commuting are not compensable. Gibson v Creedmoor State Hosp., 190 A.D.2d 950, 593 N.Y.S.2d 601, 1993 N.Y. App. Div. LEXIS 1092 (N.Y. App. Div. 3d Dep't), app. denied, 82 N.Y.2d 655, 602 N.Y.S.2d 804, 622 N.E.2d 305, 1993 N.Y. LEXIS 3161 (N.Y. 1993).

Course of employment is not limited to exact time when employee commences his duties, but rather encompasses reasonable amount of time for employee to enter his place of employment prior to beginning of his shift. Rosen v First Manhattan Bank, 202 A.D.2d 864, 609 N.Y.S.2d 436, 1994 N.Y. App. Div. LEXIS 2787 (N.Y. App. Div. 3d Dep't), aff'd, 84 N.Y.2d 856, 617 N.Y.S.2d 455, 641 N.E.2d 1073, 1994 N.Y. LEXIS 2774 (N.Y. 1994).

Physician was outside employee of professional corporation and was acting in course of her employment at time of her death, for purposes of her husband's entitlement to workers' compensation death benefits, where she was fatally injured in car accident on way to hospital at which she was scheduled to be on call during 24-hour shift, corporation required her to treat patients at its offices on certain days and between certain hours and to be on call during shift at hospital once every 7 days, and it was physician's practice to be physically present at hospital during her on-call duty, although she was not so required. Egloff v Ob-Gyn Assocs., 245 A.D.2d 965, 667 N.Y.S.2d 116, 1997 N.Y. App. Div. LEXIS 13637 (N.Y. App. Div. 3d Dep't 1997).

An employee is entitled to compensation, where he sustains injuries on his employer's premises while going to or leaving work. Pantolo v Lane, 56 N.Y.S.2d 227, 185 Misc. 221, 1945 N.Y. Misc. LEXIS 1990 (N.Y. Sup. Ct. 1945).

113. —Injuries in doorways, corridors, elevators or walkways maintained by employer

A workman, employed by the day for about eight months, who was excused from work by the superintendent because he had been drinking and tripped and fell as he started to leave, is injured within course of his employment. Kiernan v Friestedt Underpinning Co., 171 A.D. 539, 157 N.Y.S. 900, 1916 N.Y. App. Div. LEXIS 9722 (N.Y. App. Div. 3d Dep't 1916).

A finding of an injury in the course of employment is justified where the claimant reached the door of his employer's premises and while holding the door knob for the purpose of opening the door, slipped and fell receiving injuries. Schiff v Bow-Made Coat Co., 264 A.D. 966, 37 N.Y.S.2d 58, 1942 N.Y. App. Div. LEXIS 5566 (N.Y. App. Div. 1942).

An employee is injured in the course of her employment when, on the way to work, after turning from the sidewalk to mount the steps leading into her place of employment she slips and falls, thereby suffering injury. Cohn v Morningstar Nicol, Inc., 265 A.D. 579, 41 N.Y.S.2d 466, 1943 N.Y. App. Div. LEXIS 6360 (N.Y. App. Div. 1943).

A laundress in a hospital who was injured when she slipped and fell as she left the hospital building through the employee's entrance which led to the public street, is injured in the course of her employment. Boettcher v University of Rochester, 266 A.D. 931, 43 N.Y.S.2d 956, 1943 N.Y. App. Div. LEXIS 5275 (N.Y. App. Div. 1943).

An employee who attempted to enter the building where she was employed but found that the front door was locked and was injured when she slipped and fell on an icy sidewalk in proceeding to the rear entrance suffers injuries arising out of and in the course of her employment. Flanagan v Ward Leonard Electric Co., 274 A.D. 1081, 85 N.Y.S.2d 649, 1949 N.Y. App. Div. LEXIS 6147 (N.Y. App. Div. 1949).

A claim for death benefits was not established by proof that decedent, employed on the fourth floor, was found on the stairs between the third and fourth floors about 10 minutes before his day's work was to begin. Finkelstein v Luna Clothing Co., 283 A.D. 1125, 129 N.Y.S.2d 506 (N.Y. App. Div. 1954).

Plaintiff who slipped and fell on steps as she was exiting building in which she worked at end of work day was still within course of her employment, for purposes of preclusion of her personal injury action by Workers' Compensation Law. Parrinello v Mancuso, 251 A.D.2d 856, 674 N.Y.S.2d 484, 1998 N.Y. App. Div. LEXIS 7348 (N.Y. App. Div. 3d Dep't 1998).

Security guard, who injured his ankle while demonstrating boxing maneuver to co-worker while waiting for elevator to arrive after completing his scheduled employment shift and punching out on employer's time clock, was properly denied Workers' Compensation benefits where his own testimony showed that no further work was contemplated on day of accident, his boxing demonstration had no work-related purpose, and his injury was not caused by employer's failure to provide safe means of egress from place of employment. Bigley v J & R Music Elecs., 269 A.D.2d 667, 702 N.Y.S.2d 474, 2000 N.Y. App. Div. LEXIS 1277 (N.Y. App. Div. 3d Dep't 2000).

114. —Injuries on other grounds owned by employer

The word the "premises" in this connection means, not any lands which the employer may own, but rather the immediate premises or grounds upon which the plant is located. Murphy v Ludlum Steel Co., 182 A.D. 139, 169 N.Y.S. 781, 1918 N.Y. App. Div. LEXIS 7845 (N.Y. App. Div. 1918), aff'd, 227 N.Y. 634, 126 N.E. 915, 227 N.Y. (N.Y.S.) 634, 1919 N.Y. LEXIS 809 (N.Y. 1919).

An employee's injury arose out of and in the course of employment when in order to return employer's tools he left work before quitting time and was struck by an automobile away from his area of work. Fishbane v Congress Operating Corp., 255 A.D. 738, 6 N.Y.S.2d 882, 1938 N.Y. App. Div. LEXIS 4968 (N.Y. App. Div. 1938), aff'd, 280 N.Y. 611, 20 N.E.2d 560, 280 N.Y. (N.Y.S.) 611, 1939 N.Y. LEXIS 1441 (N.Y. 1939).

Where a chemist, on his way to work, attempted to climb between the driver's cab and the body of a truck backed against a loading platform in front of the employer's building, the resulting injuries arose out of and in the course of his employment. Leatham v Thurston & Braidich, 264 A.D. 449, 35 N.Y.S.2d 887, 1942 N.Y. App. Div. LEXIS 4179 (N.Y. App. Div. 1942), aff'd, 289 N.Y. 804, 47 N.E.2d 51, 289 N.Y. (N.Y.S.) 804, 1943 N.Y. LEXIS 1202 (N.Y. 1943).

An employee is injured in the course of her employment where struck by an automobile while on her way to work and on the premises of the employer. Freshler v Grumman Aircraft Engineering Corp., 270 A.D. 967, 62 N.Y.S.2d 58, 1946 N.Y. App. Div. LEXIS 4884 (N.Y. App. Div. 1946).

An employee who was struck and killed by lightning while on his employer's premises and en route to his place of work is injured in the course of his employment. Deziley v Semet-Solvay Co., 272 A.D. 985, 72 N.Y.S.2d 809, 1947 N.Y. App. Div. LEXIS 4504 (N.Y. App. Div. 1947).

A subway train dispatcher was injured in the course of employment where, at the end of his tour of duty, he left his office to catch a subway train and slipped and fell eighteen feet from the office. Harrigan v New York City Transit Authority, 1 A.D.2d 635, 153 N.Y.S.2d 416, 1956 N.Y. App. Div. LEXIS 4992 (N.Y. App. Div. 3d

Dep't), amended, 2 A.D.2d 795, 154 N.Y.S.2d 432, 1956 N.Y. App. Div. LEXIS 4686 (N.Y. App. Div. 3d Dep't 1956).

Evidence sustained a finding that claimant's injury arose out of and in the course of his employment where he was injured when he fell upon ice on employer's premises, while enroute to exit gate, approximately 5 minutes after he had left his shift of employment notwithstanding the fact that he had gone to a salvage pile on employer's premises after leaving his job to pick up bundles of wood which he was carrying towards exist gate, and intending to leave same there until the following day when he could get permission to take same home. Gabriy v Iroquois Gas Corp., 3 A.D.2d 618, 157 N.Y.S.2d 991, 1956 N.Y. App. Div. LEXIS 3431 (N.Y. App. Div. 3d Dep't 1956).

Claimant had not separated from his employment and was injured in the course of his employment when he left his watchman's job 20 minutes early when the relief man appeared, started for home, progressed only a short distance from his watchman's post, discovered that he had the keys to the watchman's shanty, started to return to give the relief man the keys and was struck by an automobile. McDermott v S. A. Healy Co., 4 A.D.2d 903, 166 N.Y.S.2d 869, 1957 N.Y. App. Div. LEXIS 4295 (N.Y. App. Div. 3d Dep't 1957).

Injuries received in an automobile accident on premises owned by an employer between co-employees who are going to or from work have been deemed to arise out of and in the course of employment. Petrozzi v Passamonte, 32 A.D.2d 716, 300 N.Y.S.2d 183, 1969 N.Y. App. Div. LEXIS 3926 (N.Y. App. Div. 3d Dep't 1969).

Award upheld under testimony that the claimant's automobile was parked in a parking lot provided for by the employer for its employees adjacent to its plant and, upon finishing work, the claimant left the building by the front door and was struck by a car while walking along a route she was compelled to follow in order to avoid other vehicles being driven and picking up other workers in front of the employer's factory, even though there was uncertainty as to whether the claimant was on the edge of parking lot or on the public sidewalk when struck. Lugo v Pelican Sportswear, Inc., 38 A.D.2d 632, 327 N.Y.S.2d 288, 1971 N.Y. App. Div. LEXIS 2698 (N.Y. App. Div. 3d Dep't 1971).

Employer's instruction of employees to enter and leave employer's premises by way of doorway opening onto alleyway owned in part by employer and in part by owner of adjacent property caused the alleyway where injury occurred to become part of the employer's precincts under these circumstances. Schultz v Dermik Laboratories, 39 A.D.2d 989, 333 N.Y.S.2d 326, 1972 N.Y. App. Div. LEXIS 4236 (N.Y. App. Div. 3d Dep't 1972).

Workers' Compensation Board did not err in finding that accident constituted incident and risk of employment where police station receptionist went out to front stoop of station in response to sound of outside explosion and was injured as result of smoke, fire, and vapor shooting out of manhole, since effort to flee building is reasonable reaction to nearby explosion. Mendez v New York, 154 A.D.2d 814, 546 N.Y.S.2d 478, 1989 N.Y. App. Div. LEXIS 12721 (N.Y. App. Div. 3d Dep't 1989).

115. —Injuries in parking lots

A schoolteacher who, with permission of a fraternal organization and the principal of her school, parked her car in the fraternal organization's parking lot across the street from the school when she could not find a parking place on the street was entitled to workmen's compensation benefits when she slipped and fell in the parking lot and was injured, upon evidence she had parked in the lot for a period of four years prior to the accident and that the practice of parking in that lot was followed by other teachers, was known to her employer, and was of benefit to the employer. Elwood v Herkimer Cent. School, 20 N.Y.2d 869, 285 N.Y.S.2d 614, 232 N.E.2d 646, 1967 N.Y. LEXIS 1133 (N.Y. 1967).

Where, at the end of a day's work, plaintiff went to his employer's parking lot and entered the car of a co-employee who was to drive him home, he was thus within the precincts of the employment and exposed to the hazards when injured in the collision of an automobile operated by his co-employee, and the fact that a concurring purpose of the homeward trip was to enable the driver to pick up a motor which plaintiff had given him did not affect compensability. In such case the plaintiff's sole remedy is under the Workmen's Compensation Law. Doyle v Jennings, 26 N.Y.2d 957, 310 N.Y.S.2d 512, 258 N.E.2d 924, 1970 N.Y. LEXIS 1416 (N.Y. 1970).

Where employee in reporting to work made left turn on highway to enter plant parking lot and was struck by automobile going in opposite direction about a foot from driveway apron and the collision propelled automobile into parking lot where it struck a parked vehicle causing employee's automobile to overturn with resulting disabling injuries to employee, the left-hand turn was necessary to gain entrance to lot and Workmen's Compensation Board could find that accident arose out of and in the course of employment. Husted v Seneca Steel Service, Inc., 41 N.Y.2d 140, 391 N.Y.S.2d 78, 359 N.E.2d 673, 1976 N.Y. LEXIS 3212 (N.Y. 1976).

Injuries sustained by employee when, after leaving work and going to parking lot maintained by employer for benefit of employees and approximately 140 feet from plant exit, were sustained within the course of employment. Kwapich v Aluminum Co., 282 A.D. 972, 125 N.Y.S.2d 673, 1953 N.Y. App. Div. LEXIS 5599 (N.Y. App. Div. 1953).

Injury sustained by an employee while walking along the margin of a parking lot maintained and kept up by her employer for accommodation of employees' cars are nonetheless to be considered as arising upon the employer's premises although the parking area is not owned by the employer but is actually part of a public street. Chadwick v Clark, 19 A.D.2d 679, 241 N.Y.S.2d 756, 1963 N.Y. App. Div. LEXIS 3489 (N.Y. App. Div. 3d Dep't 1963).

Parking lot was a precinct of employment and injury sustained by county employee when she fell in the parking lot upon leaving work for the day arose out of and in the course of her employment even though lot was operated by city where the lot was operated particularly for employees of county and city and county encouraged its employees to use the lot by affirmative action. Van Deusen v County of Onondaga, 45 A.D.2d 793, 357 N.Y.S.2d 155, 1974 N.Y. App. Div. LEXIS 4631 (N.Y. App. Div. 3d Dep't 1974).

Even though workmen's compensation claimant lost control of his vehicle after first collision in public street, subsequently colliding with vehicle in employer's parking lot, accident upon the employer's premises was not a purely personal act on the claimant's behalf, and thus award of benefits and finding that accident occurred in the course of employment were not precluded. Husted v Seneca Steel Service, Inc., 50 A.D.2d 76, 375 N.Y.S.2d 911, 1975 N.Y. App. Div. LEXIS 11441 (N.Y. App. Div. 3d Dep't 1975), aff'd, 41 N.Y.2d 140, 391 N.Y.S.2d 78, 359 N.E.2d 673, 1976 N.Y. LEXIS 3212 (N.Y. 1976).

Where plaintiff collided with car owned by one defendant and driven by the other and both drivers were employees of aerospace corporation and accident occurred on parking lot maintained by such corporation for its employees, and at time of accident both drivers were leaving to have lunch off premises, plaintiff's exclusive remedy was workmen's compensation. Kanal v Missbach, 50 A.D.2d 528, 374 N.Y.S.2d 646, 1975 N.Y. App. Div. LEXIS 12232 (N.Y. App. Div. 1st Dep't 1975).

Claimant's accident was properly held to have arisen out of and in the course of her employment and compensable where she slipped on snow while stepping out of a coworker's car that was parked in a privately owned lot adjacent to the employer's premises, inasmuch as claimant had arrived to commence her workday and was in the process of entering the employment premises when injured. Brooks v New York Tel. Co., 87 A.D.2d 701, 448 N.Y.S.2d 859, 1982 N.Y. App. Div. LEXIS 16036 (N.Y. App. Div. 3d Dep't), aff'd, 57 N.Y.2d 643, 454 N.Y.S.2d 73, 439 N.E.2d 882, 1982 N.Y. LEXIS 3595 (N.Y. 1982).

Workers' Compensation Board's determination that employee's accident arose out of and in course of her employment was supported by fact that while walking through employer's parking lot on way to work she opened door of truck that was parked with its lights on and, after turning lights off, she closed door and experienced sharp lower-back pain, which was diagnosed as "right lateral disc lesion" that totally disabled her from work for 2 months. Purdy v Savin Corp., 135 A.D.2d 975, 522 N.Y.S.2d 700, 1987 N.Y. App. Div. LEXIS 52872 (N.Y. App. Div. 3d Dep't 1987).

Parking lot maintained by employer constitutes precincts of employment, and course of employment encompasses reasonable amount of time for employee to enter his place of employment prior to beginning of his shift. Lawton v Eastman Kodak Co., 206 A.D.2d 813, 616 N.Y.S.2d 412, 1994 N.Y. App. Div. LEXIS 7984 (N.Y. App. Div. 3d Dep't 1994).

Claimant's accident in employer's parking lot arose out of and in course of his employment, even though claimant had been walking to lot's exit to eat at nearby restaurant before beginning work, since his right to park at lot arose exclusively as result of his employment, not because he was patron at restaurant. Lawton v Eastman Kodak Co., 206 A.D.2d 813, 616 N.Y.S.2d 412, 1994 N.Y. App. Div. LEXIS 7984 (N.Y. App. Div. 3d Dep't 1994).

Medical secretary sustained compensable injury when stranger threw acid in her face as she was leaving her place of employment en route to parking garage in which she normally parked her car where her route was usual means of ingress and egress for employees, and employer failed to adduce adequate proof of personal motive for attack on secretary. Boston v Medical Servs. for Women, 215 A.D.2d 845, 626 N.Y.S.2d 320, 1995 N.Y. App. Div. LEXIS 4982 (N.Y. App. Div. 3d Dep't), app. denied, 86 N.Y.2d 706, 632 N.Y.S.2d 499, 656 N.E.2d 598, 1995 N.Y. LEXIS 3457 (N.Y. 1995).

Claimant, inside employee, did not sustain causally related disability when he was injured in accident while walking in shopping center's parking lot after he stopped on his way home to purchase pen since there was no proof that he maintained home office or that he had work equipment in his home, his supervisor testified that he encouraged his employees to perform their work in office as much as possible, and employee provided pens to claimant. Bobinis v State Ins. Fund, 235 A.D.2d 955, 653 N.Y.S.2d 408, 1997 N.Y. App. Div. LEXIS 758 (N.Y. App. Div. 3d Dep't 1997).

Claimant's accident was properly found to be occurring within course of her employment when she slipped in parking garage floor en route to her job as certified surgical technician at hospital since hospital affirmatively encouraged its employees to park in facility where claimant was injured, parking was available at facility at reduced rate for hospital employees and payment of parking fees was deducted directly from employee paychecks, alternate parking could be accessed by permit only, for which there was waiting list, or was located at some distance from hospital, and facility where claimant was injured was located next door to hospital and was internally connected to hospital building. Thatcher v Crouse-Irving Mem'l Hosp., 253 A.D.2d 990, 678 N.Y.S.2d 161, 1998 N.Y. App. Div. LEXIS 9749 (N.Y. App. Div. 3d Dep't 1998).

Parking lot maintained by claimant's employer constituted precincts of his employment, and course of his employment encompassed reasonable time for him to leave his place of employment. Vogel v Anheuser-Busch, 265 A.D.2d 705, 696 N.Y.S.2d 571, 1999 N.Y. App. Div. LEXIS 10710 (N.Y. App. Div. 3d Dep't 1999).

An employee, injured through the negligence of a co-employee on the parking lot which the company maintained for its employees while both were arriving for work, is entitled to compensation. Pantolo v Lane, 56 N.Y.S.2d 227, 185 Misc. 221, 1945 N.Y. Misc. LEXIS 1990 (N.Y. Sup. Ct. 1945).

116. —Injuries in public streets, sidewalks and the like, in general

An award is not justified for the death of an employee from injuries received in the street on way from his place of employment to a restaurant. Clark v Voorhees, 231 N.Y. 14, 131 N.E. 553, 231 N.Y. (N.Y.S.) 14, 1921 N.Y. LEXIS 603 (N.Y. 1921).

An employee is injured in the course of employment where, while entering the lower hall of the building she slipped and fell, even though the employer's plant was in a large building and the hallway in which the injury occurred was a public one. Ross v Howieson, 232 N.Y. 604, 134 N.E. 589, 232 N.Y. (N.Y.S.) 604, 1922 N.Y. LEXIS 1189 (N.Y. 1922).

An award for a state worker, who fell while hurrying back from lunch, should not have been sustained where there was nothing to take the case out of the settled rule that an employee, injured while away from his employer's premises and while going to and from lunch, is not entitled to compensation except in special circumstances. Proof also failed to show sidewalk belonged to state. Jamison v New York State Temporary Com. on Agriculture, 308 N.Y. 683, 124 N.E.2d 321, 308 N.Y. (N.Y.S.) 683, 1954 N.Y. LEXIS 1795 (N.Y. 1954).

While general rule is that accidents occurring on public highway away from place of employment and outside regular working hours do not arise out of and in the course of employment, as employee comes in closer proximity with employment situs there develops a gray area where risks of street travel merge with risks attendant with employment and where mere fact that accident took place on public road or sidewalk may not ipso facto negate right to compensation. Husted v Seneca Steel Service, Inc., 41 N.Y.2d 140, 391 N.Y.S.2d 78, 359 N.E.2d 673, 1976 N.Y. LEXIS 3212 (N.Y. 1976).

An employee who is injured by an accident in the street, while actually performing the services he is employed to perform, is covered by the Work. Comp. Law. Roberts v J. F. Newcomb & Co., 201 A.D. 759, 195 N.Y.S. 405, 1922 N.Y. App. Div. LEXIS 6410 (N.Y. App. Div.), aff'd, 234 N.Y. 553, 138 N.E. 443, 234 N.Y. (N.Y.S.) 553, 1922 N.Y. LEXIS 734 (N.Y. 1922).

An employee who is accidentally injured on the public street on his way to plant where he works is not in course of his employment under former § 3, subd. 4. Traynor v Buffalo, 208 A.D. 216, 203 N.Y.S. 590, 1924 N.Y. App. Div. LEXIS 5015 (N.Y. App. Div. 1924).. See also Keller v Reis & Donovan, Inc., 195 A.D. 45, 185 N.Y.S. 741, 1921 N.Y. App. Div. LEXIS 4693 (N.Y. App. Div. 1921), limited, MacClelland v Dodge Bros., 233 A.D. 504, 253 N.Y.S. 773, 1931 N.Y. App. Div. LEXIS 11345 (N.Y. App. Div. 1931).

An injury does not occur in the course of employment where a night watchman was required, in going to and from his work, to pass over a railroad crossing and at the time of the accident, the railroad gates were down, but he entered the crossing and was killed. Harris v Henry Cheney Hammer Corp., 221 A.D. 199, 223 N.Y.S. 738, 1927 N.Y. App. Div. LEXIS 6407 (N.Y. App. Div. 1927).. See also McMahon v B. T. & J. J. Mack, Inc., 220 A.D. 375, 222 N.Y.S. 79, 1927 N.Y. App. Div. LEXIS 9310 (N.Y. App. Div. 1927).

An employee is not injured in the course of his employment where he fell five minutes after quitting time while attempting to board a truck owned by his employer while on his way home and in a public street a short distance from his employer's premises, the employer having forbidden the driver of the truck to carry passengers. Parisi v Whitmore, Rauber & Vicinus, 230 A.D. 140, 243 N.Y.S. 622, 1930 N.Y. App. Div. LEXIS 8565 (N.Y. App. Div. 1930).

A hospital employee who was fatally injured on a public highway while en route to work at the hospital from the hospital annex where he was quartered is injured in the course of his employment. Meissner v Good Samaritan Hospital, 271 A.D. 1041, 68 N.Y.S.2d 506, 1947 N.Y. App. Div. LEXIS 5757 (N.Y. App. Div.), app. dismissed, 296 N.Y. 1001, 73 N.E.2d 577, 296 N.Y. (N.Y.S.) 1001, 1947 N.Y. LEXIS 1746 (N.Y. 1947).

An award was denied where the evidence sustained a finding that the claimant did not sustain an accident in the course of his employment when claimant was struck by another vehicle on the street outside of his employer's taxicab garage after claimant had parked his own automobile. Leandro v Key Maintenance Corp., 4 A.D.2d 730, 163 N.Y.S.2d 518, 1957 N.Y. App. Div. LEXIS 5142 (N.Y. App. Div. 3d Dep't 1957).

The fact that an accident to an employee occurs on a sidewalk or public road should not per se negate his right to compensation. Brienza v Le Chase Constr. Co., 17 A.D.2d 83, 230 N.Y.S.2d 362, 1962 N.Y. App. Div. LEXIS 8467 (N.Y. App. Div. 3d Dep't 1962).

As an employee reaches closer proximity to his place of employment a gray area develops where the risks of street travel merge with those of his employment, and, while the fact that the accident then takes place on a public road or sidewalk does not ipso facto negate compensability, it calls for exercise of fact-finding powers of the board in the light of circumstances of the particular case. Patti v Republic Aviation Corp., 20 A.D.2d 939, 248 N.Y.S.2d 978, 1964 N.Y. App. Div. LEXIS 3919 (N.Y. App. Div. 3d Dep't), app. denied, 14 N.Y.2d 488, 1964 N.Y. LEXIS 1888 (N.Y. 1964).

The general rule is that accidents occurring on the public highway, away from the place of employment and outside regular working hours, do not arise out of and in course of employment. Patti v Republic Aviation Corp., 20 A.D.2d 939, 248 N.Y.S.2d 978, 1964 N.Y. App. Div. LEXIS 3919 (N.Y. App. Div. 3d Dep't), app. denied, 14 N.Y.2d 488, 1964 N.Y. LEXIS 1888 (N.Y. 1964).

Injuries suffered by employee of an airline when he drove his automobile out of the parking lot and while traveling on "exit road", was in a collision, were not compensable under evidence that the road was owned, controlled and maintained by the New York Port Authority, that the airline exercised no domain over the road where the accident happened, and such road was used for access to the premises of the airline in common with the general public. Williams v Seaboard World Airlines, 33 A.D.2d 714, 305 N.Y.S.2d 30, 1969 N.Y. App. Div. LEXIS 2872 (N.Y. App. Div. 3d Dep't 1969), app. denied, 27 N.Y.2d 484, 1970 N.Y. LEXIS 2052 (N.Y. 1970).

Accident did not arise out of and in course of employment where employee, when he left work, observed that coemployee was having trouble starting his car in vacant lot across street from employer's premises, lot was neither owned by nor controlled by employer, signs had been posted by employer in its warehouse advising employees not to park there, and where employee, together with other employees, helped push the disabled car into the street and then pushed it some distance up the street where employee was fatally injured by passing vehicle. Batorski v Great Atlantic & Pacific Tea Co., 48 A.D.2d 718, 367 N.Y.S.2d 340, 1975 N.Y. App. Div. LEXIS 9783 (N.Y. App. Div. 3d Dep't), app. denied, 37 N.Y.2d 708, 1975 N.Y. LEXIS 2868 (N.Y. 1975).

In a workers' compensation case, the president of a retail liquor store corporation, who sustained head injuries when he fell down the stairs leading to a subway station near his home, was properly awarded benefits where he had an appointment with a customer on the morning in question. Weinstein v 16 East 58th Street Corp., 92 A.D.2d 678, 460 N.Y.S.2d 201, 1983 N.Y. App. Div. LEXIS 16953 (N.Y. App. Div. 3d Dep't 1983).

Plaintiff's injuries arose out of course of her employment, as matter of law, so that her sole remedy was under Workers' Compensation Law where (1) she was injured in accident which occurred while she was riding home from work as passenger in van owned by employer and operated by co-employee, (2) employer had formed van pool for monthly fee to assist its employees in transportation to and from work, (3) although driver was labeled independent contractor, terms of agreement established that he was under control of employer, and (4) driver had already applied for and received workers' compensation benefits in connection with accident. Schauder v Pfeifer, 173 A.D.2d 598, 570 N.Y.S.2d 179, 1991 N.Y. App. Div. LEXIS 7648 (N.Y. App. Div. 2d Dep't 1991).

Substantial evidence supported determination that police officer did not sustain accidental injury in course of his employment where (1) officer was scheduled to work from 8:00 a.m. until 4:00 p.m., (2) officer's regular assignment was to work inside police station, although he might work outside station under certain circumstances, (3) officer was injured in motor vehicle accident while driving his own car to work at 7:30 a.m., and (4) accident occurred within geographic area where he worked as officer. Stead v Rockland County, 195 A.D.2d 668, 599 N.Y.S.2d 710, 1993 N.Y. App. Div. LEXIS 6891 (N.Y. App. Div. 3d Dep't 1993).

117. — —Exception to general rule

General rule that employees do not enter into course of employment until they reach the premises or entrance to premises of their employer is subject to certain well-recognized exceptions, including those situations in which off-premises point at which injury occurs lies on only route, or at least normal route, employees must traverse to reach plant and therefore special hazards of that route becomes hazards of employment. Husted v Seneca Steel Service, Inc., 41 N.Y.2d 140, 391 N.Y.S.2d 78, 359 N.E.2d 673, 1976 N.Y. LEXIS 3212 (N.Y. 1976).

In a workers' compensation case, involving a 13-year-old newspaper carrier who was struck in the eye by a stone that was propelled by an automobile tire prior to picking up his newspapers at a box that was located at a certain street, the claim was properly disallowed where the carrier did not arrive at the fixed location to pick up his newspapers at the time of the accident, where the general rule was that employees are not within the scope of their employment while traveling to work, where the exception to the general rule, in the case of outside workers who have no fixed place of employment, was not applicable to a worker who is required to report to a fixed location before commencing work, and where, in any event, newspaper delivery boys are not outside workers. Barnard v Lockport Union Sun & Journal, Inc., 92 A.D.2d 663, 460 N.Y.S.2d 373, 1983 N.Y. App. Div. LEXIS 16931 (N.Y. App. Div. 3d Dep't), app. denied, 60 N.Y.2d 552 (N.Y. 1983).

An inside employee in a printing plant who was injured when he was struck by an automobile immediately outside of the plant as he was proceeding to a parking area immediately after his work shift ended was properly determined to be entitled to workers' compensation benefits for his injuries where, though accidents occurring on public highways away from a place of employment and outside regular working hours are generally not considered to have arisen out of and in the course of employment, the accident nonetheless happened as an incident and risk of employment in that the claimant was exiting the plant premises along a normal route when the accident occurred, in that such normal route was marked by a special hazard as evidenced by the employer having obtained permission from the town in which the plant was located to erect and maintain a traffic light at such exit to protect its employees from the heavy vehicular traffic that traveled on the street passing in front of the plant, and in that the exit route was closely associated with the employer's premises. Buechi v Arcata Graphics, 97 A.D.2d 579, 468 N.Y.S.2d 65, 1983 N.Y. App. Div. LEXIS 20194 (N.Y. App. Div. 3d Dep't 1983).

The Workers' Compensation Board properly held that claimant's injury did not arise out of or in the course of his employment and properly denied benefits where, although claimant was required to bring his two-ton pickup truck to work for use on the job, the exception to the general rule that accidents which occur while an employee is on his way to or from work do not arise out of or in the course of his employment when an employee is required to bring his own vehicle to work for use during the work day did not apply inasmuch as claimant was engaged in completing a personal errand, driving his co-worker to pick up his car as a personal favor rather than commuting directly to work, and where the record lacked evidence that claimant's truck was, in fact, to be used on the job on the day he was injured. Stone v A.L.S. Constr. Co., 108 A.D.2d 1036, 485 N.Y.S.2d 605, 1985 N.Y. App. Div. LEXIS 43358 (N.Y. App. Div. 3d Dep't), app. denied, 65 N.Y.2d 605, 493 N.Y.S.2d 1027, 482 N.E.2d 1229, 1985 N.Y. LEXIS 15768 (N.Y. 1985).

Workers' Compensation Board properly ruled that claimant, correction officer, sustained causally related injury when he slipped and fell on curb in front of main entrance to facility while en route to pickup his paycheck on his day off, especially since employer's document entitled "Paycheck Distribution Procedures" indicated that while arrangements could be made for employer to mail paychecks to employee's residence, expected procedure was for employees to pickup their paychecks in person. Dandola v New York City Dep't of Correction, 244 A.D.2d 729, 664 N.Y.S.2d 392, 1997 N.Y. App. Div. LEXIS 11762 (N.Y. App. Div. 3d Dep't 1997).

Workers' compensation board properly determined that a worker sustained a compensable injury pursuant to N.Y. Workers' Comp. Law §§ 2(7) and 10, and awarded workers' compensation benefits; the worker was injured near his office in the World Trade Center during the September 11, 2001 terrorist attack, and the worker was in a "gray area" where the risks of travel to work merged with the risks of employment. Tompkins v Morgan Stanley Dean Witter, 1 A.D.3d 695, 766 N.Y.S.2d 923, 2003 N.Y. App. Div. LEXIS 11603 (N.Y. App. Div. 3d Dep't 2003).

As an employee's accident was totally coincidental and not a work-related hazard, substantial evidence supported the New York Workers' Compensation Board's finding that the injuries and resulting death from being struck by a truck did not arise out of and in the course of the employee's employment, N.Y. Workers' Comp. Law §§ 2(7), (8); 10(1). There was no evidence that a special hazard existed at the off-premises location where the

employee was struck; rather, the risk of being struck by vehicular traffic in this location was shared by the public in general and was not specific to this place of employment. Matter of Fiero v New York City Dept. of Hous. Preserv. & Dev., 34 A.D.3d 911, 823 N.Y.S.2d 290, 2006 N.Y. App. Div. LEXIS 13025 (N.Y. App. Div. 3d Dep't 2006).

118. — —Within a certain distance of employer?s premises or entrance thereto

An employee who while on her way to work slips on snow and falls to the sidewalk, at a point three or four steps away from the front door of the employer's premises, does not suffer injuries arising out of and in the course of her employment. Amento v Bond Stores, Inc., 274 A.D. 863, 82 N.Y.S.2d 1, 1948 N.Y. App. Div. LEXIS 3716 (N.Y. App. Div. 1948).

An inside worker, who fell while walking alongside the building of his employer while on the way to work but upon an areaway within the right-of-way of a city street, some 200 feet from the gateway through which he intended to enter his employer's premises, was not injured in the course of his employment. Pomakoy v American Locomotive Co., 277 A.D. 823, 97 N.Y.S.2d 354, 1950 N.Y. App. Div. LEXIS 3429 (N.Y. App. Div. 1950).

Where a school crossing guard who worked only three short shifts daily and was customarily picked up by a police car at a particular intersection for transportation to the crossing to which she was regularly assigned was injured on her way from home to her second shift while walking toward her assigned crossing, but still some distance therefrom, the board was entitled to find that, when injured, she had not yet arrived where her employment began and accordingly not entitled to workmen's compensation. Nole v Trustees of Tuckahoe, 22 A.D.2d 716, 253 N.Y.S.2d 415, 1964 N.Y. App. Div. LEXIS 3051 (N.Y. App. Div. 3d Dep't 1964), app. denied, 15 N.Y.2d 483, 1965 N.Y. LEXIS 1775 (N.Y. 1965).

Where employee of board of education was injured when, while driving to his place of his employment, his car was struck in rear by bus owned by the board and operated by board's employee, but collision occurred on public highway before plaintiff reached point where he was going to turn into board's premises, the Workmen's Compensation Law was not applicable. Martin v Board of Education, 50 A.D.2d 655, 374 N.Y.S.2d 817, 1975 N.Y. App. Div. LEXIS 12483 (N.Y. App. Div. 3d Dep't 1975).

Assaults upon clerical employee in public stairway over which employer had no direct control were still compensable as occurring "within the concept of the precincts of employment" where first attack occurred within 20 feet of entrance to building in which she was employed and second attack occurred while she was proceeding to her office from railway platform located within complex in which she worked, and where route she chose to reach work site was normal and reasonable avenue of approach. Marquette v New York Tel. Co., 122 A.D.2d 479, 504 N.Y.S.2d 869, 1986 N.Y. App. Div. LEXIS 59764 (N.Y. App. Div. 3d Dep't 1986).

Workers' compensation claimant's injury arose out of or in course of her employment where she finished working at about 4:00 p.m., left building by main entrance, walked under canopy, turned left, and then fell as she walked along sidewalk in from of employer's building. Arana v Hillside Manor-Nursing Ctr., 251 A.D.2d 715, 674 N.Y.S.2d 445, 1998 N.Y. App. Div. LEXIS 6473 (N.Y. App. Div. 3d Dep't 1998).

119. — —?Part and parcel? of employer?s entrance

Claimant, injured when she slipped and fell while crossing an alleyway adjacent to her place of employment, was entitled to benefits, notwithstanding that the alleyway was not owned by the employer nor was the employer under any duty to maintain the alleyway since a "gray" area exists where risks of street travel merge with the risks attendant with employment and when employee advances to the point where he is engaged in an act which is part and parcel of the entrance into the employee premises, the test is whether the accident happened as an incident and risk of employment. Neely v G. W. Morrison, Inc., 79 A.D.2d 803, 435 N.Y.S.2d 103, 1980 N.Y. App. Div. LEXIS 14212 (N.Y. App. Div. 3d Dep't 1980).

Court would reverse determination finding that claimant, office cleaner, did not sustain accidental injury arising out of and in course of her employment where she slipped on concourse floor in building while on her way to work on fourth floor, and there was no substantial evidence to support determination that she was not injured "in close proximity to her worksite" and that location of her fall "cannot be considered 'part and parcel' of entrance to the employer's premises." Moore v Ogden Allied, 284 A.D.2d 624, 726 N.Y.S.2d 752, 2001 N.Y. App. Div. LEXIS 5985 (N.Y. App. Div. 3d Dep't 2001).

120. — —Between employer?s premises and parking lot

After claimant left employer's plant on way to employer's parking lot, located 2 blocks away and while on public sidewalk, he slipped and fell on broken glass which had fallen from window of plant. Award affirmed. Gaik v National Aniline Div., Allied Chemical & Dye Corp., 5 A.D.2d 1039, 173 N.Y.S.2d 409, 1958 N.Y. App. Div. LEXIS 6202 (N.Y. App. Div. 3d Dep't 1958), app. denied, 7 A.D.2d 956, 182 N.Y.S.2d 1023, 1959 N.Y. App. Div. LEXIS 9931 (N.Y. App. Div. 3d Dep't 1959), app. denied, 6 N.Y.2d 706, 1959 N.Y. LEXIS 1710 (N.Y. 1959).

Where decedent was presumably struck by an automobile and fatally injured as he crossed the street from a parking lot where he had left his car to report to his employment at a liquor store, death benefits were properly denied where the record disclosed that decedent used his car to drive to work for personal reasons and that he was not specifically instructed or required by his employer to bring his car to work. Hampton v Kelly, 33 A.D.2d 856, 305 N.Y.S.2d 895, 1969 N.Y. App. Div. LEXIS 2616 (N.Y. App. Div. 3d Dep't 1969).

In Workers' Compensation proceeding, fact that claimant had crossed street to purchase lunch after leaving employer's office and then recrossed street on way to parking lot had no bearing on issue of whether he was proceeding on "normal" route between employer's office and parking lot since he was in fact on sidewalk between office and parking lot at time accident occurred. Jacobs v Dellwood Foods, 130 A.D.2d 848, 515 N.Y.S.2d 916, 1987 N.Y. App. Div. LEXIS 46857 (N.Y. App. Div. 3d Dep't), app. denied, 70 N.Y.2d 608, 521 N.Y.S.2d 225, 515 N.E.2d 910, 1987 N.Y. LEXIS 18939 (N.Y. 1987).

Injury sustained by claimant when employer's truck ran over his foot occurred in course of employment, although accident occurred after work hours on public sidewalk, since presence of truck parked partly on sidewalk constituted special hazard, and claimant was proceeding between employer's office and parking lot at time; thus Workers' Compensation Board erred by reversing its prior decision granting claim. Jacobs v Dellwood Foods, 130 A.D.2d 848, 515 N.Y.S.2d 916, 1987 N.Y. App. Div. LEXIS 46857 (N.Y. App. Div. 3d Dep't), app. denied, 70 N.Y.2d 608, 521 N.Y.S.2d 225, 515 N.E.2d 910, 1987 N.Y. LEXIS 18939 (N.Y. 1987).

121. — —After employee is completely separated from employment

The board properly found that an employee who was killed on his way home in his own car about eight o'clock in the evening had completely separated himself from his employment. Williams v Saratoga County Highway Dep't, 279 A.D. 962, 111 N.Y.S.2d 28, 1952 N.Y. App. Div. LEXIS 5430 (N.Y. App. Div.), aff'd, 304 N.Y. 632, 107 N.E.2d 162, 304 N.Y. (N.Y.S.) 632, 1952 N.Y. LEXIS 869 (N.Y. 1952).

Where a mentally deranged tenant of the apartment building in which employee worked as a caretaker deliberately ran down the employee on a public sidewalk adjacent to the apartment building while the employee was on his way to work and the employer had prior knowledge of a previous assault by the same person upon the employee, the unprovoked attack on the employee was not governed by the precinct of employment rule alone, and was found to have occurred in the course of employment. Harrison v N. Y. C. Housing Authority, 39 A.D.2d 1007, 333 N.Y.S.2d 714, 1972 N.Y. App. Div. LEXIS 4166 (N.Y. App. Div. 3d Dep't 1972), aff'd, 32 N.Y.2d 754, 344 N.Y.S.2d 950, 298 N.E.2d 114, 1973 N.Y. LEXIS 1337 (N.Y. 1973).

Defendant was not acting in scope of her employment where she left her place of employment in downtown area of city at end of her workday and took shuttlebus to parking lot on outskirts of city, where she regularly packed her car, and accident occurred after she had exited parking lot and was traveling on ramp which connected perimeter road to main avenue. Jacobsen v Amedio,

218 A.D.2d 872, 629 N.Y.S.2d 863, 1995 N.Y. App. Div. LEXIS 8268 (N.Y. App. Div. 3d Dep't 1995).

Workers' compensation board properly found that a worker did not sustain an accidental injury arising out of and in the course of his employment as defined by N.Y. Workers' Comp. Law § 2; the worker was not fulfilling his duties as a security officer when he was hit by falling debris, as the worker had ended his shift and was leaving the premises, and the debris fell from a neighboring building. Anowai v Holiday Inn, 2 A.D.3d 994, 768 N.Y.S.2d 399, 2003 N.Y. App. Div. LEXIS 13138 (N.Y. App. Div. 3d Dep't 2003).

122. —Injuries in public streets, sidewalks controlled or maintained by employer

A helper in a city hospital situated on an island owned by the city and occupied entirely by the institution, who, after completing her work for the day, prepared to leave the island to go to the city and while on her way from the nurses' home, fell and received injuries, due to the fact that snow had not been cleared off the sidewalk, is entitled to workmen's compensation law. Lynch v New York, 242 N.Y. 115, 151 N.E. 149, 242 N.Y. (N.Y.S.) 115, 1926 N.Y. LEXIS 966 (N.Y. 1926).. See also Gillette v Rochester Vulcanite Paving Co., 249 N.Y. 608, 164 N.E. 602, 249 N.Y. (N.Y.S.) 608, 1928 N.Y. LEXIS 967 (N.Y. 1928).

Where a state employee was injured on her way to work when she fell on the sidewalk in front of the state office building where she was employed, and it could not be said that responsibility for maintenance of the street rested upon someone other than the state, her injury occurred "within that reasonable distance" of her actual work required by law. Manville v New York State Dep't of Labor, 294 N.Y. 1, 59 N.E.2d 780, 294 N.Y. (N.Y.S.) 1, 1944 N.Y. LEXIS 1258 (N.Y. 1944).

Where claimant was injured on her way to work and outside the employer's premises, she was nevertheless entitled to a compensation award upon a showing that the employer's premises were located on a little used access street, which, though it was a public street, was plowed out during snowstorms by the employer, with the consent of city authorities, to enable employees to get to work, and that claimant, on the date of injury, was driven to work by her husband in their car but had to alight and walk some distance to the entrance of the plant as the result of various cars being stuck in the snow, in course of which she sustained the injuries in question. Spennacchio v Delco Applicance Div., 11 A.D.2d 857, 202 N.Y.S.2d 912, 1960 N.Y. App. Div. LEXIS 8537 (N.Y. App. Div. 3d Dep't 1960).

Where claimant was injured while waiting in what was substantially an alley, but had been dedicated and accepted as a public street, for the gates of his employer's place of business to be unlocked for entry of employees, his injuries were compensable as arising out of and in course of employment, there being no other means of ingress and egress to the employer's premises and the "street" being unimproved and generally used by the employer and others for storage of equipment, material, and debris to such extent as to be almost impassable. Brienza v Le Chase Constr. Co., 17 A.D.2d 83, 230 N.Y.S.2d 362, 1962 N.Y. App. Div. LEXIS 8467 (N.Y. App. Div. 3d Dep't 1962).

Injuries sustained by a domestic servant in falling on an icy spot on a walk leading from her employer's premises to a public sidewalk could be found to be within the scope of her employment, although the employer did not have legal title to the property at the exact spot where the fall took place, he having exercised sufficient dominion over it as a route of access to his property by trying to keep it clear of ice and snow. Camaro v Starbuck, 19 A.D.2d 927, 244 N.Y.S.2d 42, 1963 N.Y. App. Div. LEXIS 2982 (N.Y. App. Div. 3d Dep't 1963).

Injury to claimant, who worked inside employer's premises, occurring when claimant slipped and fell on snow and ice on the public sidewalk near the door of the employer's premises arose out of and in the course of her employment, where the employer was the sole tenant of the building, the building occupied the entire city block completely surrounded by sidewalks, and the employer was charged under its lease with maintaining the sidewalks adjacent to the building and removing the ice and snow therefrom. Reid v Coastal Abrasive & Tool Co., 26 A.D.2d 862, 273 N.Y.S.2d 954, 1966 N.Y. App. Div. LEXIS 3363 (N.Y. App. Div. 3d Dep't 1966).

Where employee fell on a sidewalk owned by the city after her employment had ended for the day at a spot beyond the parking lot driveway, her claim was disallowed even though the employer's maintenance staff kept the sidewalk free of ice and snow during the winter as mandated by local law. Foss v Joseph P. Conroy, Inc., 38 A.D.2d 638, 327 N.Y.S.2d 235, 1971 N.Y. App. Div. LEXIS 2664 (N.Y. App. Div. 3d Dep't 1971), app. denied, 30 N.Y.2d 481, 1972 N.Y. LEXIS 1890 (N.Y. 1972).

Injuries sustained by state employee who left her office when her workday had terminated, who walked to parking lot and entered her automobile, who exited from lot into circular road which surrounded the state campus complex of office buildings, and whose vehicle was struck by a vehicle driven by a coemployee about one mile from place of employment, did not arise out of and in course of state employee's employment, where state employees used roads within state campus in common with general public; and thus state employee's exclusive remedy was not under Workmen's Compensation Law and she could properly maintain personal injury action against coemployee. Groark v Miller, 48 A.D.2d 539, 371 N.Y.S.2d 503, 1975 N.Y. App. Div. LEXIS 9937 (N.Y. App. Div. 3d Dep't 1975).

Thruway toll collector's death while he was traveling on thruway to report for work at his collection station did not arise out of, and did not occur in course of, his employment despite fact that collector was in uniform and possessed, as fringe benefit of his employment, a toll-free pass. Wojnar v New York State Thruway Authority, 56 A.D.2d 947, 392 N.Y.S.2d 511, 1977 N.Y. App. Div. LEXIS 11356 (N.Y. App. Div. 3d Dep't 1977).

123. —Injuries sustained during arrival or departure outside normal working hours

A person employed as a conductor on a street surface railroad who, while returning to report for duty twelve minutes ahead of time, was struck and killed by a car of his employer when he alighted from another car on which he was returning to his work, was not at the time engaged in a hazardous employment and his dependents are not entitled to award. McCabe v Brooklyn H. R. Co., 177 A.D. 107, 162 N.Y.S. 741, 1917 N.Y. App. Div. LEXIS 4707 (N.Y. App. Div. 1917).

A comptometer operator following a surgical operation unrelated to her employment had difficulty in walking and for that reason customarily remained at her desk when her working day ended for about one hour until her husband arrived to escort her home. Held: an award for injuries sustained was affirmed where claimant left her desk approximately one hour after the closing of working day and fell when she tripped over a loose wire displaced when the office was cleaned a few minutes earlier since the accident occurred as the employee was leaving her employer's premises with reasonable dispatch. Babkees v Electrolux Corp., 4 A.D.2d 710, 163 N.Y.S.2d 809, 1957 N.Y. App. Div. LEXIS 5120 (N.Y. App. Div. 3d Dep't), reh'g denied, 4 A.D.2d 842, 169 N.Y.S.2d 892, 1957 N.Y. App. Div. LEXIS 4598 (N.Y. App. Div. 3d Dep't 1957), app. denied, 3 N.Y.2d 708, 1957 N.Y. LEXIS 1435 (N.Y. 1957).

Decedent, a truck driver for express agency, was employed at railroad yard. He was found on track where apparently, he had come into contact with third rail and died from electrocution. Although he had checked out by punching time clock, he had not completed his duties since he was required to leave his settlement papers at prescribed place before completing duties. Award affirmed. Roth v Railway Express Agency, Inc., 7 A.D.2d 664, 179 N.Y.S.2d 181, 1958 N.Y. App. Div. LEXIS 4306 (N.Y. App. Div. 3d Dep't 1958), app. denied, 7 N.Y.2d 709, 1960 N.Y. LEXIS 1604 (N.Y. 1960).

Claimant's work as elevator operator started at 8:00 a.m. He customarily came to work earlier and changed into his uniform. He was not required to be on the premises until 8 and was not paid for the time prior to that hour. He had arrived at 7:30 a.m., changed into his uniform and left at once on personal errands. On the way back, a sign fell from the building and struck him. Held: injury did not occur in the course of or arise out of employment. Solomon v David Kay Corp., 7 A.D.2d 811, 180 N.Y.S.2d 888, 1958 N.Y. App. Div. LEXIS 3744 (N.Y. App. Div. 3d Dep't 1958).

A cleaning lady regularly employed from 3 to 7 P.M. by a school district who fell on ice when she returned to the school at 8 A.M.

the next morning to return a package she had mistakenly taken from the building was injured out of and in the course of her employment. Scheper v Board of Education, 27 A.D.2d 612, 275 N.Y.S.2d 627, 1966 N.Y. App. Div. LEXIS 2753 (N.Y. App. Div. 3d Dep't 1966).

Lifeguard, injured on way home in automobile, after being permitted to leave beach on account of rain and who was paid regular wages for day and was required to remain on standby duty in case of weather change, arose out of and in course of employment and was compensable. Donnell v Waccabuc Country Club, 29 A.D.2d 1022, 289 N.Y.S.2d 534, 1968 N.Y. App. Div. LEXIS 4148 (N.Y. App. Div. 3d Dep't 1968).

Claimant's accident did not arise out of and in course of her employment where she was returning to work from personal errand on unpaid lunch hour at time of accident, and she was not subject to call at that time. Meyer v Wyoming County Health Dep't, 203 A.D.2d 876, 611 N.Y.S.2d 320, 1994 N.Y. App. Div. LEXIS 4371 (N.Y. App. Div. 3d Dep't 1994).

124. Employer liability for risks of travel, generally

In determining whether risks of travel are also risks of the employment, the decisive test is whether it is the employment or something else that has sent the traveler forth upon the journey or brought exposure to its perils. Marks' Dependents v Gray (1929) 251 NY 90, 167 NE 181 questioned in Swartz v McDonald's Corp. (2001, Fla) 788 So 2d 937, 26 FLW S 350 and questioned in Gilbert v Publix Supermarkets (2001, Fla) 790 So 2d 1057, 26 FLW S 479).; Lepow v Lepow Knitting Mills, Inc., 288 N.Y. 377, 43 N.E.2d 450, 288 N.Y. (N.Y.S.) 377, 1942 N.Y. LEXIS 1000 (N.Y. 1942).

The trend of decisions is to sustain an employee's claim for compensation where his employment sends him upon a journey which exposes him to the risks and perils incident thereto; under such circumstances lodging in a hotel is a contractual incident of the traveler's employment and he is protected from fire and other hazards which are risks incidental to his itinerary. In re Buck's Estate, 277 A.D. 126, 98 N.Y.S.2d 734, 1950 N.Y. App. Div. LEXIS 3011 (N.Y. App. Div. 1950).

The decedent was killed in an accident arising out of and in the course of his employment, when the fatal automobile accident occurred while decedent was riding from temporary living quarters four or five miles away to the job site, while on temporary assignment away from his permanent place of residence. Lane v Ft. Neck Dredging Co., 28 A.D.2d 949, 281 N.Y.S.2d 622, 1967 N.Y. App. Div. LEXIS 3474 (N.Y. App. Div. 3d Dep't 1967), aff'd, 22 N.Y.2d 965, 295 N.Y.S.2d 333, 242 N.E.2d 485, 1968 N.Y. LEXIS 1077 (N.Y. 1968).

Newspaper boy who was injured when he fell from his bicycle while en route from his home to pick up his newspapers for delivery on a rainy day was injured in the course of his employment where, although he was not required to use the bicycle in the performance of his duties, his employer knew that he did so and had instructed him that deliveries should be completed by 6:00 p.m. Birdsall v Peters, 46 A.D.2d 11, 361 N.Y.S.2d 64, 1974 N.Y. App. Div. LEXIS 3625 (N.Y. App. Div. 3d Dep't 1974).

If an employee is required to have an automobile at the employment premises, an accident involving the use of it to reach those premises would be in the course of employment. Freebern v North Rockland CDA, 64 A.D.2d 300, 410 N.Y.S.2d 371, 1978 N.Y. App. Div. LEXIS 12733 (N.Y. App. Div. 3d Dep't 1978).

Injury sustained by college lecturer while commuting between home and college is not in course of employment merely because at time of injury lecturer has briefcase containing published material which lecturer intends to use during commute in preparation for giving lecture at later date where lecturer's decision to work on lecture away from place of employment is matter of personal choice. Broich v New York State Union College of Optometry, 117 A.D.2d 868, 498 N.Y.S.2d 583, 1986 N.Y. App. Div. LEXIS 53141 (N.Y. App. Div. 3d Dep't 1986).

Workers' Compensation Board properly determined that claimant did not sustain accidental injury in course of his employment as service technician and salesperson, since his travel was purely personal and unrelated to his employment where he was involved in one-car accident while driving away from city in which his office and his apartment were situated, he had no customer appointments that evening but rather was scheduled to meet his supervisor either at his apartment or at his office, and he had blood alcohol level of .235 percent when accident occurred. Estate of Moritz v Ascar, Inc., 179 A.D.2d 909, 579 N.Y.S.2d 462, 1992 N.Y. App. Div. LEXIS 650 (N.Y. App. Div. 3d Dep't 1992).

Workers' Compensation Board properly determined that limousine driver's death occurred during course of his employment where he was shot to death while picking up limousine at repair shop pursuant to direction of its owner, instead of picking it up at owner's home as he usually did. Kurzyna v Communicar, Inc., 182 A.D.2d 924, 582 N.Y.S.2d 295, 1992 N.Y. App. Div. LEXIS 5940 (N.Y. App. Div. 3d Dep't), app. denied, 80 N.Y.2d 754, 587 N.Y.S.2d 906, 600 N.E.2d 633, 1992 N.Y. LEXIS 1807 (N.Y. 1992).

Claimant was not even tangentially engaged in employer's business of selling automobiles when he was injured in accident while driving to grocery store on Memorial Day holiday, although he was driving demonstrator vehicle provided to him by employer as incident of employment when accident occurred, where no benefit inured to employer which transformed claimant's purely personal use of vehicle into dual personal and business use for purposes of Workers' Compensation Law. Clark v R.I. Suresky & Sons, 236 A.D.2d 673, 653 N.Y.S.2d 441, 1997 N.Y. App. Div. LEXIS 965 (N.Y. App. Div. 3d Dep't 1997).

125. —Injury to employees performing work at home

Where an employee was injured while alighting in front of her home, from an automobile owned and operated by a friend, compensation will be denied even though she contended that she was taking one of the other occupants, an attorney, to her home in connection with her employer's business to show him a sample printed court record and brief. Crumpacker v Batavia Times Publishing Co., 290 N.Y. 679, 49 N.E.2d 628, 290 N.Y. (N.Y.S.) 679, 1943 N.Y. LEXIS 1322 (N.Y. 1943).

The death of the president of a recording company, which occurred in an automobile accident while on his way home from a recording session, was compensable under evidence that the decedent used his home as a "place of employment", that he regularly took tapes home and there worked on them, that he had work equipment at his home in the form of a recorder owned by the corporation, and it was necessary and beneficial to the employer for him to perform work at home in view well as the custom in the trade. Hille v Gerald Records, 23 N.Y.2d 135, 295 N.Y.S.2d 645, 242 N.E.2d 816, 1968 N.Y. LEXIS 1055 (N.Y. 1968).

An injury is not compensable and does not arise in the course of employment where it appears that the employee, with the knowledge of but not by direction of his employer, took work to his house when he went home to his lunch and worked thereon while at home and that on his way back to his place of employment he fell in the street and received the injury for which he claims compensation. Scanlon v Herald Co., 201 A.D. 173, 194 N.Y.S. 663, 1922 N.Y. App. Div. LEXIS 6280 (N.Y. App. Div. 1922).

Testimony by an office manager that due to the heavy volume of work it was necessary for her to take portions of it home, corroborated by an officer of the employer, does not oblige the board as a matter of law to find an extension of employment beyond the office and beyond office hours where the employee slipped on ice in the street while en route to her employment with a leather case containing material on which she had been working for the employer at home. Rothstein v Supply Mfg. Co., 277 A.D. 821, 97 N.Y.S.2d 56, 1950 N.Y. App. Div. LEXIS 3422 (N.Y. App. Div. 1950).

An employee is injured in the course of his employment where he did considerable work at home and on the morning of a fatal heart attack he was required to use a stairway leading from a subway to the street. Kehoe v London Guarantee & Acci. Ins. Co., 278 A.D. 731, 103 N.Y.S.2d 72, 1951 N.Y. App. Div. LEXIS 4508 (N.Y. App. Div. 1951), aff'd, 303 N.Y. 973, 106 N.E.2d 59, 303 N.Y. (N.Y.S.) 973, 1952 N.Y. LEXIS 1404 (N.Y. 1952).

The general rule is that risks of travel to and from work are not risks of employment, and unless the employee's home is truly a second employment location in that more than occasional employment services are required to be rendered there, travel between work and home is not a risk of employment. Trent v Collin S.

Tuttle & Co., 20 A.D.2d 948, 249 N.Y.S.2d 140, 1964 N.Y. App. Div. LEXIS 3933 (N.Y. App. Div. 3d Dep't 1964).

An exception to the rule that risks of travel to and from work are not risks of employment may exist where the employee performs work both in the office and at home. To come within such an exception, however, it must appear that the work was a special assignment for employer's benefit or there existed a pattern of taking work home with employer's knowledge. Borders v E. H. Scull Co., 33 A.D.2d 870, 306 N.Y.S.2d 78, 1969 N.Y. App. Div. LEXIS 2547 (N.Y. App. Div. 3d Dep't 1969).

Where employee was injured while on his way home from work and later died as a result of such injury, award upheld under evidence that the project on which decedent was working was a substantial one and a deadline existed; that there were no set hours of work and that it was the accepted practice to take work home to complete it; and that this circumstance existed on the evening decedent was injured. Borders v E. H. Scull Co., 33 A.D.2d 870, 306 N.Y.S.2d 78, 1969 N.Y. App. Div. LEXIS 2547 (N.Y. App. Div. 3d Dep't 1969).

Decedent's tailoring services at home for his employer were performed as an employee and his death while on his way home arose out of and in the course of that employment so that travel between work and home was, therefore, within the course of employment and an accident occurring therein is compensable. Gennarelli v Spruce-Up Cleaners, Inc., 34 A.D.2d 1075, 312 N.Y.S.2d 336, 1970 N.Y. App. Div. LEXIS 4255 (N.Y. App. Div. 3d Dep't 1970).

For the purpose of determining whether an accident is within the coverage provided by workers' compensation, the mere fact that an employee performs work at home is not sufficient to engender coverage for travel between home and office; there must be evidence that the home is truly a place of employment. Freebern v North Rockland CDA, 64 A.D.2d 300, 410 N.Y.S.2d 371, 1978 N.Y. App. Div. LEXIS 12733 (N.Y. App. Div. 3d Dep't 1978).

126. —Injury to employees making stops or performing errands at employer's direction

A motorman of a street railway, who had finished his work for the day, and was hurrying to catch a street car to go to an adjoining town to have his watch tested, as required by the rules of the employer when struck and killed by an automobile in the course of his employment. De Voe v New York S. Rys., 218 N.Y. 318, 113 N.E. 256, 218 N.Y. (N.Y.S.) 318, 1916 N.Y. LEXIS 1074 (N.Y. 1916).. See also Kowalek v New York C. R. Co., 229 N.Y. 489, 128 N.E. 888, 229 N.Y. (N.Y.S.) 489, 1920 N.Y. LEXIS 704 (N.Y. 1920).

A plumber's helper injured on the way to a neighboring village where he had promised to pick up his wife after his day's work is not entitled to compensation although his employer had requested him to take his tools along and do a trifling job in the village, which would not have been done at the cost of a special journey. Marks' Dependents v Gray, 251 N.Y. 90, 167 N.E. 181, 251 N.Y. (N.Y.S.) 90, 1929 N.Y. LEXIS 692 (N.Y. 1929).

Where an employee on his way to his place of employment, after lunching at home, went to a store a short distance off his usual route and bought materials which his employer had directed him to procure to repair a machine at which he worked, and with them in his possession retraced his steps and, after regaining the route he was accustomed to take between his house and his place of work, fell and was injured, an award of compensation was improperly reversed. Schwimmer v Kammerman & Kaminsky, 262 N.Y. 104, 186 N.E. 409, 262 N.Y. (N.Y.S.) 104, 1933 N.Y. LEXIS 920 (N.Y. 1933).. See also Crippen v Press Co., 254 N.Y. 535, 173 N.E. 854, 254 N.Y. (N.Y.S.) 535, 1930 N.Y. LEXIS 1119 (N.Y. 1930).

A domestic servant who had been requested by her employer to stop at a store on her way to work receives injuries arising out of and in the course of her employment where the accident occurred while she was going to work and before she had deviated from her usual route to make the aforesaid stop. Kristianson v Lehman, 287 N.Y. 569, 38 N.E.2d 230, 287 N.Y. (N.Y.S.) 569, 1941 N.Y. LEXIS 2459 (N.Y. 1941).. See also Goldman v Palmer & Oliver, Inc. (1950) 277 App Div 194, 98 NYS2d 793, reh and app den (1950) 277 App Div 953, 99 NYS2d 615., and Skolnick v Elgin Chair, Inc., 273 A.D. 833, 75 N.Y.S.2d 840, 1948 N.Y. App. Div. LEXIS 4838 (N.Y. App. Div. 1948).

An injury does not arise in the course of employment where an employee of a confectionery store was sent by his employer to the police station to arrange for bail for a customer who was arrested in the saloon next door in which the employer had an interest, and was injured at the police station. Sabatelli v De Robertis, 192 A.D. 873, 183 N.Y.S. 796, 1920 N.Y. App. Div. LEXIS 7574 (N.Y. App. Div. 1920), aff'd, 230 N.Y. 592, 130 N.E. 906, 230 N.Y. (N.Y.S.) 592, 1921 N.Y. LEXIS 871 (N.Y. 1921).

One employed as a truck driver during the week and to guard the employer's premises on Sundays, who used an automobile of his own on Sunday to get spark plugs necessary for the operation of the truck and was injured in cranking his own motor, was held entitled to an award of compensation. Martin v Henry Card & Co., 193 A.D. 6, 183 N.Y.S. 88, 1920 N.Y. App. Div. LEXIS 5500 (N.Y. App. Div. 1920).

Where a business agent collided with a tree while driving an automobile for the purpose of collecting dues, the injuries suffered in such collision arose out of and in the course of his employment. Wunch v Upper New York Movers Ass'n, 263 A.D. 768, 30 N.Y.S.2d 862, 1941 N.Y. App. Div. LEXIS 4866 (N.Y. App. Div. 1941).

An employee whose duties included making calls outside the plant where he worked suffers injuries arising out of and in the course of his employment where he was injured while on his way to make such a call even though he was on the route which he customarily followed from his home to his place of employment. Goldman v Palmer & Oliver, Inc., 277 A.D. 194, 98 N.Y.S.2d 793, 1950 N.Y. App. Div. LEXIS 3022 (N.Y. App. Div.), reh'g denied, 277 A.D. 953, 99 N.Y.S.2d 615, 1950 N.Y. App. Div. LEXIS 3970 (N.Y. App. Div. 1950).

After leaving his home in the morning, the claimant was struck with a motor vehicle while crossing a street. He testified that by previous arrangement he was to meet a salesman of the employer and, in this respect, was corroborated by the salesman. Although there was evidence that the witnesses had made previous statements to the effect that the meeting place was to be the office of the employer and claimant had not deviated from his usual route to the office, an award was affirmed because credibility of witnesses is a matter for the Board to determine. Mayer v All Electronics, Inc., 1 A.D.2d 715, 146 N.Y.S.2d 793, 1955 N.Y. App. Div. LEXIS 3732 (N.Y. App. Div. 3d Dep't 1955).

It being within the power of the board to accept or reject testimony and to determine credibility of witnesses, a finding of the board that claimant was not on a mission for his employer, a law firm, at the time he was injured in an automobile accident, would not be overturned, notwithstanding claimant's testimony that at the time of the accident he was on his way to keep an appointment at a residence near the place of the accident with a client of the firm on a matter of business, and the client's testimony that he was expecting someone from the firm to keep such an appointment, it appearing that claimant, at the time of the accident, had a woman with him in the car whom he had taken out to dinner and who was also supposed to be a client of the firm seeking advice from claimant. Gordon v Gordon, 11 A.D.2d 833, 202 N.Y.S.2d 566, 1960 N.Y. App. Div. LEXIS 8503 (N.Y. App. Div. 3d Dep't), app. denied, 8 N.Y.2d 710, 1960 N.Y. LEXIS 1894 (N.Y. 1960).

A finding that death did not arise out of and in course of employment was affirmed where it appeared that decedent, in making a swift business trip in his own car in his employer's interest, expecting to return home the same night, lingered at two or three points along the way home for food, drink, and conversations with friends, relationship of which to the employer's business was doubtful, and was killed between 2:30 and 4:00 a.m. when his car crashed over an unguarded embankment some four miles after his last stop and nine miles short of his home. Owen v Oneida, Ltd., 16 A.D.2d 1005, 229 N.Y.S.2d 325, 1962 N.Y. App. Div. LEXIS 9087 (N.Y. App. Div. 3d Dep't 1962).

There was substantial evidence to support a finding that death of an employee in an automobile crash on his way home from his place of employment and while driving his own car was not in

course of employment, although he sometimes did homework on records and papers of his employer and had some such papers with him at the time, and had been also requested by the general manager to pick up some air line tickets at the city airport, and the route on which the accident occurred intersected a street which could have taken him either to his home or the airport. Winters v Valley Farm Food Sales, 16 A.D.2d 1010, 229 N.Y.S.2d 501, 1962 N.Y. App. Div. LEXIS 9094 (N.Y. App. Div. 3d Dep't 1962).

Death of an employee by drowning when he fell off a public dock could properly be considered as arising out of his employment where it appeared that he was employed as a laborer at a hotel on an isolated island at $50 a week plus room and board and was returning from a trip over to Long Island in the manager's motor boat to do some shopping and was attempting to help another employee moor the boat to the dock when he fell off and drowned. Roher v Cherry Grove Hotel & Restaurant, 20 A.D.2d 593, 245 N.Y.S.2d 173, 1963 N.Y. App. Div. LEXIS 2651 (N.Y. App. Div. 3d Dep't 1963), app. denied, 14 N.Y.2d 485, 1964 N.Y. LEXIS 1775 (N.Y. 1964).

Although claimant, an executive secretary, was informed by an officer of her employer that he needed a certain report by 9:15 A.M. the following day "regardless of what she had to do to get it in," and, as a result, she worked on the report after quitting time until 10:45 P.M. and left home for the office 30 to 40 minutes earlier than usual next morning, a fall sustained when alighting from a bus on her way to the office could not be considered as compensable as a logical extension of the "special errand rule." Trent v Collin S. Tuttle & Co., 20 A.D.2d 948, 249 N.Y.S.2d 140, 1964 N.Y. App. Div. LEXIS 3933 (N.Y. App. Div. 3d Dep't 1964).

Where an employee has been specifically directed by his employer to proceed on an errand for the employer rather than come to the place of employment in the morning, if the employee falls in his apartment before leaving it or if he falls on the steps leading from the inner lobby of the apartment house to an outer lobby from which the inner lobby is shut off by a door which is kept locked, such accident is not compensable since it occurred before the employee left his home and began his employment. Charak v Leddy, 23 A.D.2d 437, 261 N.Y.S.2d 486, 1965 N.Y. App. Div. LEXIS 3525 (N.Y. App. Div. 3d Dep't 1965).

An inside and outside employee who was injured in explosion of restaurant where he was eating just prior to going to bank as instructed by employer to obtain cashier's checks for payment of parking fines incurred by claimant while using company car on company business was injured in an accident arising out of and in course of employment. Dolan v Crawford & Co., 41 A.D.2d 870, 342 N.Y.S.2d 859, 1973 N.Y. App. Div. LEXIS 4693 (N.Y. App. Div. 3d Dep't 1973).

A Workmen's Compensation Board's finding that the death of decedent, who suffered a fatal heart attack while shoveling snow to get his car out of the driveway in order to travel to an audit that he was required to attend, arose out of and in the course of his employment was supported by substantial evidence where decedent was attempting to comply with a special direction of his superior to attend the crucial appointment despite hazardous weather conditions, where decedent would have remained home absent the special direction, and where employer would benefit from the special errand. Junium v A. L. Bazzini Co., 86 A.D.2d 690, 446 N.Y.S.2d 520, 1982 N.Y. App. Div. LEXIS 15236 (N.Y. App. Div. 3d Dep't 1982).

Claimant's accident occurred in course of her employment as home aide where she was asked by woman she normally worked for to clean home of woman's daughter without additional pay, and she was injured in vehicle accident during normal working hours while on way to daughter's home; even where activity is for private benefit of supervisor, injury sustained in course of that work may be compensable. Marthorne v Home Attendant Serv., 207 A.D.2d 939, 616 N.Y.S.2d 818, 1994 N.Y. App. Div. LEXIS 8993 (N.Y. App. Div. 3d Dep't 1994).

Evidence established that claimant was injured while on special errand for employer, and thus was entitled to worker's compensation benefits, where employer enforced dress code and derived benefit from professional appearance of its employees, claimant arrived at work wearing denim suit and—although she had worn same suit previously without incident—she was instructed to change her clothes before she could continue her work, and she was injured in motor vehicle accident while returning home to change. Jennette v MCS Cannon, 211 A.D.2d 943, 621 N.Y.S.2d 229, 1995 N.Y. App. Div. LEXIS 251 (N.Y. App. Div. 3d Dep't 1995).

127. —Injury to employees carrying employer's equipment or property

An injury to an employee carrying the employer's money while performing errand for employer while on route to or from the premises of employment outside regular work hours is compensable. Wilber v Fonda, J. & G. R. Co., 208 A.D. 249, 203 N.Y.S. 336, 1924 N.Y. App. Div. LEXIS 5024 (N.Y. App. Div. 1924).. See also Grieb v Hammerle, 222 N.Y. 382, 118 N.E. 805, 222 N.Y. (N.Y.S.) 382, 1918 N.Y. LEXIS 1468 (N.Y. 1918)., and McCarthy v Walsh Constr. Co., 254 N.Y. 608, 173 N.E. 887, 254 N.Y. (N.Y.S.) 608, 1930 N.Y. LEXIS 1218 (N.Y. 1930).

An injury does not occur in the course of employment merely because the injured employee was carrying the day's cash receipts which he was required to take home every night and to deliver to his employer the following morning. Torres v Criterion Concessions, Inc., 259 A.D. 770, 18 N.Y.S.2d 402, 1940 N.Y. App. Div. LEXIS 6589 (N.Y. App. Div.), aff'd, 284 N.Y. 615, 29 N.E.2d 932, 284 N.Y. (N.Y.S.) 615, 1940 N.Y. LEXIS 1260 (N.Y. 1940).

An employee is not injured in the course of his employment where, having received the pay envelopes of all the employees he distributed all but one, which he attempted to leave at the employee's residence, but failing to find the employee at home, continued on to his home for the weekend in another city, intended to return and deliver the check on his way to work the following Monday morning, and he sustained injuries on the return trip. O'Keefe v A. Friederich & Son, 260 A.D. 818, 22 N.Y.S.2d 402, 1940 N.Y. App. Div. LEXIS 4826 (N.Y. App. Div. 1940).. See also Chetney v H. A. Manning Co., 273 N.Y. 82, 6 N.E.2d 105, 273 N.Y. (N.Y.S.) 82, 1937 N.Y. LEXIS 1175 (N.Y. 1937).

Where claimant was en route to pick up his employer's mail at the post office and from there he intended to proceed to his employer's office, the industrial board properly found that since he left his home on this mission he must be considered to be in the course of his employment. Worrall v Forest Hills Material Co., 267 A.D. 1021, 47 N.Y.S.2d 949, 1944 N.Y. App. Div. LEXIS 6064 (N.Y. App. Div. 1944).

Award for injuries suffered by claimant while driving his personal automobile, with the company treasurer as a passenger, upheld on evidence of a concurrent business motive in the trip. Thompson v Tomivill Cleaners, Inc., 30 A.D.2d 1008, 294 N.Y.S.2d 184, 1968 N.Y. App. Div. LEXIS 3123 (N.Y. App. Div. 3d Dep't 1968).

Claimant, a school librarian required to work at two different schools, is not entitled to workers' compensation benefits for injuries sustained when she fell on ice in her own driveway as she prepared to drive to work on a day when she was scheduled to spend a full day at one of the schools; the use of the automobile was not a requirement or condition of employment on the day in question, there is lack of substantial evidence that the school materials in claimant's automobile at the time of the accident would transform the use of the automobile into a special errand or an extension of the employment, and there was no connection established between the homework part of claimant's duties and the employment for the purpose of coverage. Freebern v North Rockland CDA, 64 A.D.2d 300, 410 N.Y.S.2d 371, 1978 N.Y. App. Div. LEXIS 12733 (N.Y. App. Div. 3d Dep't 1978).

Workers' Compensation Board's conclusion that death occurred in course of employment was supported by evidence that truck driver was killed when his motorcycle was struck by van as he was routinely returning set of truck keys to his boss. Tunison v P.C. Richards & Son, 257 A.D.2d 856, 684 N.Y.S.2d 311, 1999 N.Y. App. Div. LEXIS 524 (N.Y. App. Div. 3d Dep't 1999).

128. —Injury to employees attending employer authorized classes, meetings or other functions

Where a store detective attended court for her employer and was injured on the way home from court, she suffered an injury in

the course of her employment. Gibbs v R. H. Macy & Co., 214 A.D. 335, 212 N.Y.S. 428, 1925 N.Y. App. Div. LEXIS 10513 (N.Y. App. Div. 1925), aff'd, 242 N.Y. 551, 152 N.E. 423, 242 N.Y. (N.Y.S.) 551, 1926 N.Y. LEXIS 1078 (N.Y. 1926).

A student nurse, who had completed a special course in an affiliate hospital 2 days early by virtue of working overtime and was injured while en route from the affiliate hospital to her general hospital for the purpose of reporting and signing up for her vacation is injured in the course of her employment. Kwitkowski v Charles E. Wilson Memorial Hospital, 277 A.D. 802, 96 N.Y.S.2d 871, 1950 N.Y. App. Div. LEXIS 3376 (N.Y. App. Div. 1950).

A claimant, employed as an assistant pressman, who sustained accidental injuries while attending trade school was entitled to an award where a union agreement required that apprentices attend the printing school during a stipulated period each week. Correll v Tutrone Printing Co., 277 A.D. 817, 97 N.Y.S.2d 106, 1950 N.Y. App. Div. LEXIS 3410 (N.Y. App. Div. 1950).

Claimant, a tree surgery foreman, was required to attend a convention with all expenses paid by his employer. At an afternoon field session, claimant became hot and dirty and, before the evening session, he took a bath in his hotel and was injured in a fall in the tub. The board dismissed his claim on the ground that bathing was a purely personal act. But the court reversed. The two aspects of the work were in continuity, one exposing claimant to becoming physically dirty and the other requiring him to be neat in appearance. The employer provided the bath tub, and he used it in the course of employment. Miller v F. A. Bartlett Tree Expert Co., 3 A.D.2d 777, 160 N.Y.S.2d 308, 1957 N.Y. App. Div. LEXIS 6184 (N.Y. App. Div. 3d Dep't 1957), aff'd, 3 N.Y.2d 654, 171 N.Y.S.2d 77, 148 N.E.2d 296, 1958 N.Y. LEXIS 1243 (N.Y. 1958).

Where a schoolteacher was injured while alighting from a motor vehicle in which she had been driven, by a coteacher, to a church where funeral services for a retired city Superintendent of Schools were to be conducted, testimony that it was the custom of the school district to permit the School Superintendent to delegate various teachers to attend such functions, where they occurred during school hours, and that claimant had been delegated, among others, to attend this one, was sufficient to establish that the accident arose out of and in the course of her employment. O'Donnell v Board of Education, 15 A.D.2d 600, 222 N.Y.S.2d 400, 1961 N.Y. App. Div. LEXIS 6976 (N.Y. App. Div. 3d Dep't 1961).

That an employer, who does not sponsor or encourage a trip or consider it a business activity, receives some benefit from the trip, is insufficient to bring the trip within the scope of employment. Holding that trip of company vice-president to informal businessmen's meeting was not within the scope of employment. Tally v J. J. Newberry Co., 30 A.D.2d 898, 291 N.Y.S.2d 950, 1968 N.Y. App. Div. LEXIS 3381 (N.Y. App. Div. 3d Dep't 1968), aff'd, 25 N.Y.2d 945, 305 N.Y.S.2d 156, 252 N.E.2d 634, 1969 N.Y. LEXIS 1050 (N.Y. 1969).

Award denied under evidence that claimant, employed as a clerk by the Workmen's Compensation Board, was injured on a Saturday morning when he slipped and fell on a sidewalk adjacent to the school building while on his way to the school for the purpose of taking an interdepartmental promotional examination scheduled by the Department of Civil Service even though the claimant's supervisor had asked claimant to take the examination. Costa v New York State Workmen's Compensation Board, 34 A.D.2d 585, 308 N.Y.S.2d 93, 1970 N.Y. App. Div. LEXIS 5412 (N.Y. App. Div. 3d Dep't 1970).

Attendance at the particular place and incidental travel does not remove an employee from the employment even if voluntary, if such attendance was incidental to the ordinary employment and was undertaken at the employer's request. Bump v Central School Dist., 40 A.D.2d 243, 338 N.Y.S.2d 998, 1972 N.Y. App. Div. LEXIS 2979 (N.Y. App. Div. 3d Dep't 1972).

Teacher killed in automobile accident when returning home from college course in which he enrolled voluntarily but with the approval and for the benefit of the school district was acting within the course of his employment for purposes of receiving death benefits. Bump v Central School Dist., 40 A.D.2d 243, 338 N.Y.S.2d 998, 1972 N.Y. App. Div. LEXIS 2979 (N.Y. App. Div. 3d Dep't 1972).

Claimant, a hospital attendant in a state hospital who was injured in an automobile accident while driving to a practical nursing school at a time when she was on a one year fully paid educational leave of absence from her job came within "special errand" exception to rule that injuries incurred while traveling to and from work are not risks of employment where leave of absence was for mutual benefit, was encouraged by employer, claimant was required to return to work during vacations from school lasting more than 2 weeks, claimant had to maintain a specified grade level to remain in the program, and claimant could only train in the area in which she was engaged. Love v N. Y. S. Craig School, 42 A.D.2d 796, 345 N.Y.S.2d 710, 1973 N.Y. App. Div. LEXIS 3780 (N.Y. App. Div. 2d Dep't 1973), aff'd, 34 N.Y.2d 680, 356 N.Y.S.2d 292, 312 N.E.2d 476, 1974 N.Y. LEXIS 1646 (N.Y. 1974).

Where employee was assigned to teach class at hospital away from his regular location of employment and was injured while en route home from teaching class at hospital, he was an outside employee for purposes of traveling to and from the hospital and thus his injury was compensable. Marciniak v Berlitz School of Languages, 43 A.D.2d 509, 353 N.Y.S.2d 536, 1974 N.Y. App. Div. LEXIS 5546 (N.Y. App. Div. 3d Dep't), app. dismissed, 34 N.Y.2d 843, 359 N.Y.S.2d 64, 316 N.E.2d 345, 1974 N.Y. LEXIS 1505 (N.Y. 1974).

Employee, who was vice president of employer corporation and who was en route to his home in a rental automobile furnished by his employer to pick up papers for business meeting later that evening when he was killed in automobile accident, was in course of his employment, and claimant was thus entitled to death benefits. Averick v Standard Industries, 46 A.D.2d 715, 360 N.Y.S.2d 302, 1974 N.Y. App. Div. LEXIS 3775 (N.Y. App. Div. 3d Dep't), app. denied, 35 N.Y.2d 645, 1974 N.Y. LEXIS 2388 (N.Y. 1974).

Where claimant was a county legislator and supervisor of the town of French Creek, where he received notice of a meeting of a legislative committee of which he was a member to be held at a specified time in a restaurant in the city of Jamestown, where he arrived at the time and place designated and, about an hour later, ascertained that the meeting had been cancelled, where he was reimbursed for travel expenses from his home to the would-be meeting site, where he elected to remain there for dinner, during the course of which he engaged in conversations with local businessmen relating to town and county affairs, and where he was subsequently injured in an automobile accident en route home, the accident suffered by claimant, an outside employee, arose in and out of the course of his employment as a county legislator. Lepkowski v Chautauqua County Legislature, 58 A.D.2d 704, 396 N.Y.S.2d 101, 1977 N.Y. App. Div. LEXIS 12810 (N.Y. App. Div. 3d Dep't 1977).

Injuries sustained by a claimant in an automobile accident while the claimant, an employee of the State of New York, was returning to his home from a medical examination required by the State Employees Retirement System in connection with his application for accidental disability retirement benefits, arose out of and in the course of his employment; the claimant was responding to a direct order by a department of his employer and the medical examination was for the benefit of the State as evidentiary material. Augustine v New York State Elmira Correctional Facility, 64 A.D.2d 340, 410 N.Y.S.2d 141, 1978 N.Y. App. Div. LEXIS 12742 (N.Y. App. Div. 3d Dep't 1978).

In a workers' compensation case, the sales manager of a retail store was properly determined to have sustained a compensable injury arising out of and in the course of his employment where he was involved in a one-car accident while driving on a direct route from his employer's dinner meeting, which he was required to attend, to his home, despite the fact that on his direct route home he made two stops to drop off fellow employees. Hernandez v Carpet, 91 A.D.2d 775, 457 N.Y.S.2d 1020, 1982 N.Y. App. Div. LEXIS 19669 (N.Y. App. Div. 3d Dep't 1982).

129. —Injury to employees traveling between various premises or facilities controlled by employer

Where a workman, employed in a factory, was sent by his employers to do some work in another factory across the street,

which was under the management of the same firm, and while returning, after finishing work, slipped and fell on ice or snow in street, his injury arose out of and in the course of his employment. Grieb v Hammerle, 222 N.Y. 382, 118 N.E. 805, 222 N.Y. (N.Y.S.) 382, 1918 N.Y. LEXIS 1468 (N.Y. 1918).; Redner v H. C. Faber & Son Co., 223 N.Y. 379, 119 N.E. 842, 223 N.Y. (N.Y.S.) 379, 1918 N.Y. LEXIS 1194 (N.Y. 1918).

Injury sustained by employee while driving from business location to employee's home, which is second business location, is compensable where employee is driving on direct route to home office and briefcase in car contains material relating to business on which employee is planning to work. Weimer v Wei-Munch, Ltd., 117 A.D.2d 846, 498 N.Y.S.2d 547, 1986 N.Y. App. Div. LEXIS 53121 (N.Y. App. Div. 3d Dep't 1986).

Workers' Compensation Board properly determined that injury arose in course of claimant's employment as New York City transit police officer where claimant became ill while on duty, he told his supervisor and was directed to go home and report to transit authority clinic on following morning, and he was injured in automobile accident while driving his own vehicle to clinic; risk of travel to and from clinic was incident of employment since medical examination benefited employer by insuring that employees did not leave work due to frivolous or false claims of illness and that employees who were ill did not continue to work, thus endangering themselves and others. Pearson v New York City Transit Auth., 146 A.D.2d 849, 536 N.Y.S.2d 255, 1989 N.Y. App. Div. LEXIS 16863 (N.Y. App. Div. 3d Dep't 1989).

130. —Injury to employees performing job away from ordinary work place

An award is properly made to an employee who served as correspondent and general European news manager for United Press where he was injured in a fall from a train while on his way from London to Cobham and it appears that his work required him to be on duty twenty four hours a day, that on the day of his injury he had been ordered from London to Rome, Italy, and that he was on his way to his temporary home in Cobham where he kept a typewriter and portable radio in connection with his work. Miller v United Press Ass'ns, 263 A.D. 1034, 33 N.Y.S.2d 474, 1942 N.Y. App. Div. LEXIS 7966 (N.Y. App. Div. 1942).

A serviceman, who volunteered to perform some emergency repair work during the Thanksgiving vacation period and was killed while returning home, was an outside worker at the time of his death, since the work performed on said day was beneficial to his employer. Monahan v Remington Rand, Inc., 9 A.D.2d 810, 192 N.Y.S.2d 900, 1959 N.Y. App. Div. LEXIS 6157 (N.Y. App. Div. 3d Dep't 1959), app. denied, 7 N.Y.2d 709, 1960 N.Y. LEXIS 1593 (N.Y. 1960).

A claimant who was employed as a lawyer and office manager in a real estate management business who usually proceeded directly from his home to his employer's office but who on the morning in question was by his employer's specific direction going directly to a municipal office to perform some work there in preparation for a pending court proceeding, would be covered by the Workmen's Compensation Law from the time he left home until he returned. Charak v Leddy, 23 A.D.2d 437, 261 N.Y.S.2d 486, 1965 N.Y. App. Div. LEXIS 3525 (N.Y. App. Div. 3d Dep't 1965).

The Board could reasonably find that the decedent's fatal automobile accident was employment-connected, where the decedent, as president and active manager of the entire operation of the employer corporation, which was engaged in the business of supplying meat products to restaurants, was killed while returning from a late appointment with the manager of a restaurant with whom the deceased had an appointment to arrange for the payment or part payment of a bill overdue to the employer corporation. Naples v Viandvende Corp., 27 A.D.2d 772, 277 N.Y.S.2d 182, 1967 N.Y. App. Div. LEXIS 4891 (N.Y. App. Div. 3d Dep't 1967).

Award upheld for death by corporation's president in hotel suite in which decedent had been conducting business meetings for corporation. Burton v Broadcast Music Inc., 31 A.D.2d 557, 294 N.Y.S.2d 406, 1968 N.Y. App. Div. LEXIS 2987 (N.Y. App. Div. 3d Dep't 1968), aff'd, 24 N.Y.2d 1016, 302 N.Y.S.2d 839, 250 N.E.2d 243, 1969 N.Y. LEXIS 1242 (N.Y. 1969).

Although a New York state police sergeant had spent two hours in a restaurant on his way home after discussing cases with a police magistrate, where there was no evidence of intoxication or of any drinking or other personal pursuits adding to the ordinary risk of travel, the mere lapse of time did not require the board to find a deviation from employment causative of the accident, and benefits because of the death of the sergeant as the result of injuries sustained when the automobile he was driving collided with a truck were properly paid. Pallas v New York State Police, 33 A.D.2d 528, 303 N.Y.S.2d 713, 1969 N.Y. App. Div. LEXIS 3248 (N.Y. App. Div. 3d Dep't 1969).

A determination that an accident, resulting in the death of the employee, arose out of and in the course of the deceased's employment was upheld under evidence that, after completing a training program, he was ordered to report for work at a place some 80 miles away, and while en route to such place, he was killed in an automobile accident. Fish v Torrington Constr. Co., 38 A.D.2d 640, 327 N.Y.S.2d 195, 1971 N.Y. App. Div. LEXIS 2669 (N.Y. App. Div. 3d Dep't 1971).

Finding that car salesman was injured in course of employment was supported by evidence that, in accordance with employer's policy and past practice, he drove car to home of his brother-in-law, who placed deposit on it, and that accident occurred as salesman was driving car back to dealership next morning to complete paperwork on sale; although salesman failed to produce documentary proof of brother-in-law's deposit, there was evidence that he had sold numerous vehicles to brother-in-law and other relatives in past. D'Accordo v Spare Wheels & Car Shoppe, 257 A.D.2d 966, 684 N.Y.S.2d 343, 1999 N.Y. App. Div. LEXIS 765 (N.Y. App. Div. 3d Dep't 1999).

An employee of an automobile sales and service agency who takes a car which the agency has serviced out on a road test, which could be made on any street or highway, and picks up a young lady along the way whom he intended to transport to a department store, is injured in the course of his employment upon being involved in an accident on the way to the department store. Travelers Ins. Co. v Stieglitz, 40 N.Y.S.2d 459, 1943 N.Y. Misc. LEXIS 1681 (N.Y. Sup. Ct. 1943).

131. —Injury to employees traveling at employer's expense or receiving travel allowance

An employee of a rapid transit company, given a pass entitling him to ride on the employer's trains in going to and from his work, is not injured out of and in the course of his employment where he is killed in a train collision while on his way to report for work. Tallon v Interborough Rapid Transit Co., 232 N.Y. 410, 134 N.E. 327, 232 N.Y. (N.Y.S.) 410, 1922 N.Y. LEXIS 1135 (N.Y. 1922).

Employee of New York City Transit Authority who was injured at employer's station on return home from work did not sustain compensable injury under Workers' Compensation Law, even though she had been issued transportation pass entitling her to free travel on employer's subways, where injury occurred over one hour after she signed off work at different station, employer had not assumed any obligation to facilitate her travel to and from work, and employer did not derive any benefit from fact that employee used pass to travel to and from work. Lemon v New York City Transit Authority, 72 N.Y.2d 324, 532 N.Y.S.2d 732, 528 N.E.2d 1205, 1988 N.Y. LEXIS 1687 (N.Y. 1988).

Claimant, a carpenter, was employed from 8:00 A.M. to 4:30 P.M. and, in addition to his hourly wage, was paid expenses of 8¢ per mile for travel beyond certain territory in and about Buffalo. Having finished work and while driving on direct route to Buffalo at about 4:45 P.M. he sustained injuries in automobile accident within mileage zone. Board properly found that accident arose out of and in course of employment. De Pasquale v John W. Cowper Co., 6 A.D.2d 909, 175 N.Y.S.2d 833, 1958 N.Y. App. Div. LEXIS 5215 (N.Y. App. Div. 3d Dep't), app. denied, 5 N.Y.2d 707, 1958 N.Y. LEXIS 1607 (N.Y. 1958).

There was no merit in a contention that an accident did not arise out of and in the course of decedent's employment as musician where decedent, when killed in a car accident in Pennsylvania, was on his way from New York to Las Vegas under orders to report there by a specified date and was permitted to use his car to drive to an engagement even though his expenses were paid for travel by plane. Maisel v Berle, 11 A.D.2d 831, 202

N.Y.S.2d 562, 1960 N.Y. App. Div. LEXIS 8500 (N.Y. App. Div. 3d Dep't), reh'g denied, 11 A.D.2d 961, 206 N.Y.S.2d 568, 1960 N.Y. App. Div. LEXIS 8118 (N.Y. App. Div. 3d Dep't 1960).

With respect to injuries sustained by claimant, a carpenter, while changing a tire on his own automobile some miles away from the job location where he was employed, a finding that the injury arose in course of his employment was justified where it appeared that, in addition to regular wages, he was paid one dollar per day for transportation from his home to the place of work, some 35 to 40 miles distant, not as a gratuity, but as an inducement to obtain his help. Macaluso v Alexander, Shumway & Utz Co., 11 A.D.2d 838, 203 N.Y.S.2d 106, 1960 N.Y. App. Div. LEXIS 8509 (N.Y. App. Div. 3d Dep't), app. denied, 8 N.Y.2d 708, 1960 N.Y. LEXIS 1850 (N.Y. 1960).

"Travel pay" regularly given each week to supervisory employees who are required to live away from home while working on a project at some distance from the employer's main office could be considered as making their travel to and from home over week ends incidental to their employment, rendering their accidental death in an automobile accident while returning to the job after a week end at home compensable. Frick v John W. Rouse Constr. Corp., 19 A.D.2d 685, 240 N.Y.S.2d 1017, 1963 N.Y. App. Div. LEXIS 3501 (N.Y. App. Div. 3d Dep't 1963).

The survivors of an employee killed in an automobile accident while returning from a job site 120 miles from where he customarily worked was entitled to compensation, since the death occurred in an automobile driven by a fellow employee who furnished transportation to the decedent with the employer's knowledge and consent and all the employees were compensated for their travel time. Cornelius v Brock, 27 A.D.2d 604, 275 N.Y.S.2d 632, 1966 N.Y. App. Div. LEXIS 2771 (N.Y. App. Div. 3d Dep't 1966).

Evidence sustained an award to an employee who checked service stations, where the employee had no fixed hours of employment but was paid mileage by his employer from the time he left home until he returned thereto, when the claimant was injured in an accident at 3:55 a.m. when he fell asleep while driving home, notwithstanding that claimant had called on the last service station at about 8:45 p.m., had a few drinks with friends, and had apparently pulled his car off the road and slept for a while, and then continued homeward. Durkee v Atlantic Refining Co., 27 A.D.2d 773, 277 N.Y.S.2d 184, 1967 N.Y. App. Div. LEXIS 4893 (N.Y. App. Div. 3d Dep't 1967).

Where employees working at a construction site distant from their homes were given an additional per diem allowance in the form of a travel allowance, the act of traveling to and from the job site was brought within the employment, and therefore heirs of employee who was killed while returning from his home to the job site on a weekend were entitled to death benefits, since where travel is financed at least indirectly by the employer, the accident arises out of and in the course of the employment. Fisher v Otis Elevator Co., 28 A.D.2d 598, 279 N.Y.S.2d 769, 1967 N.Y. App. Div. LEXIS 4166 (N.Y. App. Div. 3d Dep't 1967), aff'd, 22 N.Y.2d 665, 291 N.Y.S.2d 361, 238 N.E.2d 750, 1968 N.Y. LEXIS 1407 (N.Y. 1968).

An employee injured while following his employer's truck at the direction of his foreman in order to leave his baggage at the foreman's trailer for the night with intention of traveling to a new job site the following morning was injured in an accident which arose out of and in the course of his employment where the employer had furnished gasoline and dinner for the employee. Baldassare v Congel-Hazard, Inc., 33 A.D.2d 527, 303 N.Y.S.2d 603, 1969 N.Y. App. Div. LEXIS 3247 (N.Y. App. Div. 3d Dep't 1969).

Award for death benefits affirmed under evidence that decedent was employed at a work site away from the headquarters of his employer, that he was killed while driving his own automobile from such job site towards home, that an expense allowance was provided when on job assignment far away from home and entailing considerable travel, and no accounting was required as to how the money was expended. Hubbell v Motif, Inc., 33 A.D.2d 854, 305 N.Y.S.2d 845, 1969 N.Y. App. Div. LEXIS 2613 (N.Y. App. Div. 3d Dep't 1969).

Company vice-president's death from bacterial endocarditis, which is rare and deadly heart infection, was not proved to have been work related, for purposes of his widow's workers' compensation claim, even though he became ill while on business trip to England, lost consciousness during return flight, and died in hospital to which he was taken from airport, where (1) medical experts agreed that decedent's infection was caused by staphylococci bacteria, which are common both in United States and England, and (2) expert testimony was in conflict as to whether decedent contracted infection before or during his trip or on flight home from England. Spoerl v Armstrong Pumps, Inc., 251 A.D.2d 915, 674 N.Y.S.2d 833, 1998 N.Y. App. Div. LEXIS 7753 (N.Y. App. Div. 3d Dep't 1998), app. denied, 92 N.Y.2d 820, 685 N.Y.S.2d 421, 708 N.E.2d 178, 1999 N.Y. LEXIS 2099 (N.Y. 1999).

Workers' Compensation Board did not fail to address issue of whether lack of proper medical care occasioned by company vice-president's business trip to England was compensable injury, regardless of whether he contracted lethal heart infection before or during his trip, where board concluded that decedent's initial symptoms were not consistent with diagnosis of bacterial endocarditis, thus rejecting widow's claim that lack of treatment for endocarditis was compensable injury. Spoerl v Armstrong Pumps, Inc., 251 A.D.2d 915, 674 N.Y.S.2d 833, 1998 N.Y. App. Div. LEXIS 7753 (N.Y. App. Div. 3d Dep't 1998), app. denied, 92 N.Y.2d 820, 685 N.Y.S.2d 421, 708 N.E.2d 178, 1999 N.Y. LEXIS 2099 (N.Y. 1999).

132. —Injury to employees being transported by employer

Where a bricklayer was injured in an accident to an automobile truck which was furnished by his employer to carry him and other workmen from the house, which they were building, to and from the railroad station, the injury arose out of and in course of his employment. Littler v George A. Fuller Co., 223 N.Y. 369, 119 N.E. 554, 223 N.Y. (N.Y.S.) 369, 1918 N.Y. LEXIS 1192 (N.Y. 1918).

Where an employee failed to report for work and the employer's son, with the father's consent, took his employer's automobile to get the employee and the latter was killed in driving back to the plant, the accident arose out of and in the course of the employment. Van Gee v Korts, 252 N.Y. 241, 169 N.E. 370, 252 N.Y. (N.Y.S.) 241, 1929 N.Y. LEXIS 554 (N.Y. 1929).

Compensation will be awarded for injuries to an employee travelling to work in a conveyance furnished by the employer if the employer is bound by contract, express or implied, to furnish transportation. Van Gee v Korts, 252 N.Y. 241, 169 N.E. 370, 252 N.Y. (N.Y.S.) 241, 1929 N.Y. LEXIS 554 (N.Y. 1929).. See also Distefano v Standard Shipbuilding Corp., 203 A.D. 145, 196 N.Y.S. 452, 1922 N.Y. App. Div. LEXIS 7147 (N.Y. App. Div. 1922).

Where the employer's foreman requested a painter to work overtime to finish a job and agreed to take the painter home, the latter suffers injuries arising out of and in the course of his employment where he was injured while crossing the street after alighting from the foreman's car. Sihler v Lincoln-Alliance Bank & Trust Co., 280 N.Y. 173, 19 N.E.2d 1008, 280 N.Y. (N.Y.S.) 173, 1939 N.Y. LEXIS 1304 (N.Y. 1939).

The issue of whether a custom is sufficiently established to render the transportation by an employer of employees to their place of work an incident of the employment is a question of fact for the Workmen's Compensation Board and the scope of review of the Court of Appeals is limited to whether there is substantial evidence in the record as a whole to support the determination. Holcomb v Daily News, 45 N.Y.2d 602, 412 N.Y.S.2d 118, 384 N.E.2d 665, 1978 N.Y. LEXIS 2364 (N.Y. 1978).

While transportation provided by an employer in isolated cases or on an infrequent basis may not be deemed to be an incident of employment, a frequent and regular practice of providing transportation indicates that the employer has implicitly assumed the responsibility of transporting his employees to work and at some point that practice may become so common and so associated with the employment that it must be seen as incidental to it; once that point is reached there is no meaningful distinction between transportation furnished by custom and that provided by contractual obligation and when accidents occur while employees are traveling to work, an employer who assumes the responsibility to transport his employees must likewise bear the responsibility for

the risks encountered in connection with the transportation, especially when the employer is in exclusive control of the conveyance. Holcomb v Daily News, 45 N.Y.2d 602, 412 N.Y.S.2d 118, 384 N.E.2d 665, 1978 N.Y. LEXIS 2364 (N.Y. 1978).

Fatal injuries sustained by an employee who, while on his way to work, hailed a passing truck owned by his employer and during the ride to the employer's plant, accidentally fell from the truck, were compensable. Although the employer was not obligated by contract to furnish transportation to its employees, the Workmen's Compensation Board found that it was a common practice of the employer to transport its employees to and from work and that the practice was advantageous to the employer; those findings are supported by substantial evidence and are a sufficient basis for an award of compensation benefits. Holcomb v Daily News, 45 N.Y.2d 602, 412 N.Y.S.2d 118, 384 N.E.2d 665, 1978 N.Y. LEXIS 2364 (N.Y. 1978).

A person injured while riding on her employer's bus is not compelled to seek compensation under the Work. Comp. Law where said person was employed as a waitress in defendant's hotel, and as part of her pay had the right to ride on defendant's bus to and from an adjoining village, and was so injured while off duty. Roth v Adirondack Co., 193 A.D. 303, 183 N.Y.S. 717, 1920 N.Y. App. Div. LEXIS 5545 (N.Y. App. Div. 1920).

An employee is injured in the course of his employment while riding on a bus owned by the employer which was used to transport employees for fare to and from the plant, it appearing that transportation of workers was necessary to keep the plant in operation. Peterson v Acme Electric Corp., 277 A.D. 820, 97 N.Y.S.2d 98, 1950 N.Y. App. Div. LEXIS 3418 (N.Y. App. Div. 1950).

Decedent was laborer and union shop steward. In the latter capacity, he had considerable authority as to employees working on highway construction job. While enroute for purpose of getting man, who had no automobile, to work on job, decedent was killed in automobile accident. Held: the accident arose out of and in the course of employment. Bruno v John Arborio, Inc., 7 A.D.2d 824, 180 N.Y.S.2d 896, 1958 N.Y. App. Div. LEXIS 3761 (N.Y. App. Div. 3d Dep't 1958).

The Board's decision that injury suffered by claimant, a chambermaid and waitress, did not arise out of and in course of employment, was supported by substantial evidence, where she claimed that her employer required her to leave the employer's premises on her day off and accordingly had employer's chauffeur take her in employer's car to another town where the chauffeur was to pick her up at a later hour, and, while there, she had difficulty in locating a ladies' room that was open and sustained a fall while searching for a private place in the darkness which would serve her purposes, the fact that the employer contributed transportation being purely voluntary. Bauman v Baltz, 20 A.D.2d 934, 248 N.Y.S.2d 941, 1964 N.Y. App. Div. LEXIS 3911 (N.Y. App. Div. 3d Dep't 1964), aff'd, 17 N.Y.2d 493, 267 N.Y.S.2d 214, 214 N.E.2d 376, 1966 N.Y. LEXIS 1639 (N.Y. 1966).

Where by express or implied contract employer agrees to furnish transportation to or from work to employee who is injured during such transportation, compensation is warranted on ground that employment continues through time of injury. And in case at bar it was held that the finding of the Workmen's Compensation Board that transportation to and from work was consideration of employment contract was supported by substantial evidence. Brothers v Manhattanville Food Shop, Inc., 23 A.D.2d 605, 256 N.Y.S.2d 487, 1965 N.Y. App. Div. LEXIS 4878 (N.Y. App. Div. 3d Dep't 1965).

Evidence in wife's claim to recover damages for wrongful death of her husband supported determination that husband, who was a state employee, who was riding as passenger in a truck which was owned by the State Department of Correction and which was being driven by fellow state employee, with mishap allegedly occurring during attempted delivery of tobacco to Clinton Diagnostic and Treatment Center, was acting in course of his employment when killed and, therefore, that wife's exclusive remedy was under Workmen's Compensation Law. Mohan v State, 46 A.D.2d 717, 360 N.Y.S.2d 298, 1974 N.Y. App. Div. LEXIS 3777 (N.Y. App. Div. 3d Dep't 1974).

Where sergeant and three other policemen had use of county police department's car for their convenience to drive to their homes and back again, sergeant, on occasions, was assigned to work in field and drove directly from home to assignment area, all police department members were subject to recall when off duty and sergeant had the vehicle available for use in case of recall, injury sustained by officer while traveling home in police car after completing his tour of duty arose out of and in course of his employment for workmen's compensation purposes. Collier v County of Nassau, 46 A.D.2d 970, 362 N.Y.S.2d 52, 1974 N.Y. App. Div. LEXIS 3321 (N.Y. App. Div. 3d Dep't 1974).

Since janitor service regularly provided its employees with transportation to worksites, service's employee was entitled to workers' compensation for injuries sustained while being transported even though he was not paid for time spent in transit and there was no contractual agreement requiring employer to provide transportation. Gay v American Janitor Service, 122 A.D.2d 402, 504 N.Y.S.2d 808, 1986 N.Y. App. Div. LEXIS 59716 (N.Y. App. Div. 3d Dep't 1986).

133. —Injury during travel motivated by both business and personal considerations

Where a General Electric employee was sent by his employer to attend on international conference in Paris, taking his wife with him, with permission for the two of them to take a week's vacation after the conference concluded, and was killed in a plane crash at the end of their vacation in Italy while flying from Milan to Paris, to pick up another plane scheduled to leave Paris for New York five hours after arrival of the plane which crashed, the Board could find that death was in course of returning to his employment and compensable rather than merely incidental to his vacation. Markoholz v General Electric Co., 13 N.Y.2d 163, 243 N.Y.S.2d 853, 193 N.E.2d 637, 1963 N.Y. LEXIS 954 (N.Y. 1963).

Claimant, employed by New York City accounting firm, was injured in the course of his employment when he left his assigned job in Binghamton on a weekend, went to New York, did not go home, but then decided to return to Binghamton and was on the direct way there when accident occurred. Neville v Arthur Andersen & Co., 284 A.D. 994, 135 N.Y.S.2d 349, 1954 N.Y. App. Div. LEXIS 4351 (N.Y. App. Div. 1954).

Death of a salesman was compensable as within course of his employment where it occurred in an automobile accident while he was driving home to Kingston from a weekend trip to Albany, where his employer's plant was located, the purpose of the trip having been partly to take his wife to Albany for hospitalization because she was expecting a baby and partly to deliver to his employer certain collections which he had made from customers as part of his duties. Skinner v Tobin Packing Co., 17 A.D.2d 999, 233 N.Y.S.2d 900, 1962 N.Y. App. Div. LEXIS 6975 (N.Y. App. Div. 3d Dep't 1962).

It is now settled that if a business motive concurs with a personal motive in causing a trip to be made, that trip is to be considered as within the course of employment. Skinner v Tobin Packing Co., 17 A.D.2d 999, 233 N.Y.S.2d 900, 1962 N.Y. App. Div. LEXIS 6975 (N.Y. App. Div. 3d Dep't 1962).

Entertainment by decedent of collateral personal purpose in making boat trip across Hudson River would not bar an award if a business motive was a concurrent cause of the trip. Connor v A. M. F. Pinspotters, Inc., 24 A.D.2d 815, 263 N.Y.S.2d 834, 1965 N.Y. App. Div. LEXIS 3130 (N.Y. App. Div. 3d Dep't 1965).

Decedent, who was employed by a foreign shipping company as a landing agent in New York, but was given a temporary assignment as tour leader of a Christmas excursion to Sweden, and while there visited his mother and was killed in an automobile accident which occurred after he had ended his holiday at his mother's home, and while he, his wife, and child were returning to Gothenburg, where he had work to do at the employer's office, was killed in the course of his employment, and the widow was entitled to an award of benefits for accidental death. Silfvernagel v Swedish American Line Agency, Inc., 26 A.D.2d 858, 274 N.Y.S.2d 447, 1966 N.Y. App. Div. LEXIS 3357 (N.Y. App. Div. 3d Dep't 1966).

Workers' Compensation Board properly determined that claimant was within course of his employment as traveling sales

manager at time of accident which occurred while he was en route to install snow tires on his wife's car since (1) he sometimes used his wife's car in his business travels and thus it was necessary to maintain her car so that it would remain available for his business use, and (2) it was undisputed that he was to continue on to work-related appointment after he had snow tires installed. Ferber v Des. L. Packaging Corp., 158 A.D.2d 826, 551 N.Y.S.2d 411, 1990 N.Y. App. Div. LEXIS 1720 (N.Y. App. Div. 3d Dep't 1990).

134. —Injury in the course of personal or recreational activities during business travel, in general

An employee who went to South Africa on a mission for his employer and there died from malignant tertian malaria as the result of being bitten by a mosquito sustains a fatal accident arising out of and in the course of his employment, regardless of whether he was bitten during business hours. Lepow v Lepow Knitting Mills, Inc., 288 N.Y. 377, 43 N.E.2d 450, 288 N.Y. (N.Y.S.) 377, 1942 N.Y. LEXIS 1000 (N.Y. 1942).

A writer and science editor for a magazine who was drowned while swimming to relieve his fatigue on a cross country automobile tour to gather material and write articles may have lost his life in an accident in the course of his employment but it did not arise out of the employment. Davis v Newsweek Magazine, 305 N.Y. 20, 110 N.E.2d 406, 305 N.Y. (N.Y.S.) 20, 1953 N.Y. LEXIS 846 (N.Y. 1953).

A state senior compensation's claim examiner was killed in an accident arising out of and in course of his employment when he left a conference at the Plattsburg Elks Club at 1:00 A.M. and then "to get some air" on a hot night went for an auto ride which ended in a fatal collision with a telephone pole at 1:40 A.M. Daly v State Ins. Fund, 284 A.D. 174, 130 N.Y.S.2d 440, 1954 N.Y. App. Div. LEXIS 3367 (N.Y. App. Div. 1954).

Claim for death benefit was disallowed where a factory superintendent visited the residence of the treasurer of his employer and was involved in an automobile accident thereafter. Evidence was strong that visit was purely social. Leigh v J. J. Dix, Inc., 284 A.D. 919, 134 N.Y.S.2d 494, 1954 N.Y. App. Div. LEXIS 4055 (N.Y. App. Div. 1954).

Decision of Board disallowing death claim was reversed and matter remitted for further consideration where tax consultant, on trip to Miami arranged by employer, went for a short boat trip on a Sunday morning and drowned when the boat capsized. Schneider v United Whelan Drug Stores, 284 A.D. 1072, 135 N.Y.S.2d 875, 1954 N.Y. App. Div. LEXIS 4602 (N.Y. App. Div. 1954).

Claimant, employed to drive truck for florist, was permitted to take truck home on Saturday nights if he had to work on Sunday. On way home he stopped at restaurant and, after 2 ½ hours, he left to drive back to employer's garage because he thought there would be no place to park near his house. While driving to garage he was in an accident. Claimant at time was in course of employment. Vafiades v Wenzel Florist, Inc., 5 A.D.2d 903, 171 N.Y.S.2d 54, 1958 N.Y. App. Div. LEXIS 6715 (N.Y. App. Div. 3d Dep't 1958).

The Board could properly find that death of an employee arose out of and in the course of his employment, notwithstanding it occurred at about 2:00 a.m. in an automobile accident while he was returning from a round of taverns and night spots in an Ohio city, in the car of a fellow engineer, decedent having been specially sent to the locality by his New York employer and instructed to stay there until construction difficulties in connection with a new plant could be ironed out, and these difficulties having been under discussion throughout the entire day and evening. Meredith v United States Industrial Chemicals Co., 14 A.D.2d 955, 221 N.Y.S.2d 113, 1961 N.Y. App. Div. LEXIS 7898 (N.Y. App. Div. 3d Dep't 1961).

Where an employer sends an employee away from home, the test as to whether specific activities are considered to be within the scope of employment or purely personal is their reasonableness, and it is not unreasonable for an employee to satisfy physical needs, including relaxation. Fleer v Glens Falls Ins. Co., 16 A.D.2d 186, 226 N.Y.S.2d 918, 1962 N.Y. App. Div. LEXIS 10307 (N.Y. App. Div. 3d Dep't 1962).

Activities which are purely personal are not within the scope of employment, and the test as to whether a given activity engaged in by an employee sent away from home by his employer is within the risk of employment is reasonableness of such activity. Owen v Oneida, Ltd., 16 A.D.2d 1005, 229 N.Y.S.2d 325, 1962 N.Y. App. Div. LEXIS 9087 (N.Y. App. Div. 3d Dep't 1962).

Although an employee, sent away from home on his employer's business, may indulge in any reasonable activity at the place to which he is sent with inherent risk considered an incident of his employment, injuries resulting from purely personal activities not related to employment are not compensable. Friedwald v New York State Ins. Dep't, 17 A.D.2d 670, 230 N.Y.S.2d 48, 1962 N.Y. App. Div. LEXIS 8721 (N.Y. App. Div. 3d Dep't 1962).

Board's denial of death benefit affirmed where there was substantial evidence to sustain a finding that if decedent had gone to another community in order to inspect bridge for his employer, thereafter bowled in tournament there which was in no way associated with employment, and later after stopping at tavern, was returning to his home community to attend banquet also unconnected with employment and while he was en route, fatal accident occurred. Roberts v Star Landscape, Inc., 23 A.D.2d 610, 256 N.Y.S.2d 531, 1965 N.Y. App. Div. LEXIS 4821 (N.Y. App. Div. 3d Dep't 1965).

Claimant, who was injured while in an automobile accident in San Juan, was entitled to compensation, where claimant was employed as an aircraft dispatcher at Idlewild International Airport and had taken the flight to Puerto Rico to become acquainted with actual flying conditions such as weather, communications, crew and aircraft performance, and sustained the injuries while taking a drive in an automobile with the pilot of the crew. Thurot v Trans Caribbean Airways, 29 A.D.2d 797, 287 N.Y.S.2d 588, 1968 N.Y. App. Div. LEXIS 4628 (N.Y. App. Div. 3d Dep't 1968).

When employment takes employee far from home and excursions to nearby places are available and expected, then employment itself exposes employee to risk, and an accident under such circumstances is compensable. Young v Henry M. Young, Inc., 56 A.D.2d 941, 392 N.Y.S.2d 502, 1977 N.Y. App. Div. LEXIS 11350 (N.Y. App. Div. 3d Dep't 1977).

135. — —Reasonableness of activity as related to employment

An engineer who was employed by a corporation with its principal office in New York City, to advise Israeli Government and who was shot and killed by an Arab while traveling in Palestine on a sightseeing tour was engaged in New York employment within the Workmen's Compensation Law. His tour was not unrelated to his employment. Lewis v Knappen Tippetts Abbett Engineering Co., 304 N.Y. 461, 108 N.E.2d 609, 304 N.Y. (N.Y.S.) 461, 1952 N.Y. LEXIS 730 (N.Y. 1952).

An employee who upon completion of his work apparently had stopped at a bar and consumed large quantities of alcohol had so deviated from his employment that the Board might properly find his survivors were not entitled to death benefits allegedly arising out of an accident which took place when decedent's car left the road and struck a parking meter and telephone pole. Robinson v Greenport, 27 A.D.2d 599, 275 N.Y.S.2d 885, 1966 N.Y. App. Div. LEXIS 2764 (N.Y. App. Div. 3d Dep't 1966).

Where an engineer working on an assignment for an indefinite period of time in Japan slipped and fell on an unlighted street as he and his wife were returning from shopping for American food, which was unobtainable in their neighborhood, the injury occurred within the scope of his employment since the injury occurred in a normal activity away from home. Matthews v Marine Transport Lines, Inc., 28 A.D.2d 195, 283 N.Y.S.2d 952, 1967 N.Y. App. Div. LEXIS 3114 (N.Y. App. Div. 3d Dep't 1967), app. denied, 21 N.Y.2d 642, 1968 N.Y. LEXIS 1728 (N.Y. 1968).

Even if claimant's decedent, who was state employee and who was killed while riding as passenger in a state-owned truck, which was operated by a fellow employee, was out for an evening of relaxation at time of fatal accident his wife's remedy was under Workmen's Compensation Law since he was traveling on state business requiring his absence from home for two or three days and there was no showing of any unreasonable activity on his

part. Mohan v State, 46 A.D.2d 717, 360 N.Y.S.2d 298, 1974 N.Y. App. Div. LEXIS 3777 (N.Y. App. Div. 3d Dep't 1974).

Disallowance of claim on ground that accident did not arise out of and in course of employment was supported by evidence that claimant, while staying at hotel on employer's business, consumed number of alcoholic drinks, then scaled fence of padlocked pool and dove into partially-drained shallow end, breaking his neck. Grady v Dun & Bradstreet, 265 A.D.2d 643, 696 N.Y.S.2d 258, 1999 N.Y. App. Div. LEXIS 10307 (N.Y. App. Div. 3d Dep't 1999).

136. — —Purely personal act

Claimant, a volunteer fireman attending fireman's convention as delegate, was injured while taking shower sometime prior to morning session. Claim for benefits properly disallowed, Board having found that claimant was engaged in purely a personal act. Seaman v Hewlett Fire Dep't, 8 A.D.2d 573, 183 N.Y.S.2d 408, 1959 N.Y. App. Div. LEXIS 9664 (N.Y. App. Div. 3d Dep't 1959).

Injuries sustained by an employee while on an out-of-town assignment in taking a bath are not ordinarily considered as arising out of and in course of his employment, and the Board could properly find that injuries sustained by such an employee while taking a shower by slipping and falling in the tub were not compensable, notwithstanding his contention that he took the shower because his hands and face had become somewhat smeared by carbon paper used in making out his reports. Friedwald v New York State Ins. Dep't, 17 A.D.2d 670, 230 N.Y.S.2d 48, 1962 N.Y. App. Div. LEXIS 8721 (N.Y. App. Div. 3d Dep't 1962).

137. —Effect of mode of travel and selection of route

An employee of an advertising agency who was injured while returning from a luncheon with two other employees the object of which was a discussion of the employer's business is injured in the course of her employment, even though she deviated from the route of her return a distance of one block to attend to an item of personal banking, as a result of which she was on the opposite side of the street at the time of her injury than she would have been had she proceeded directly back to the office. Oram v Byron G. Moon Co., 285 N.Y. 42, 32 N.E.2d 785, 285 N.Y. (N.Y.S.) 42, 1941 N.Y. LEXIS 1527 (N.Y. 1941).

The failure of an employee to adopt the wisest course in furthering his employer's interest by remaining in a given city will not defeat his right to compensation where he is injured on a trip to an adjoining city while attempting to serve the employer's interest. Wolff v Miller Corsets, Inc., 266 A.D. 930, 43 N.Y.S.2d 957, 1943 N.Y. App. Div. LEXIS 5270 (N.Y. App. Div. 1943).

Where a truck driver was making a trip for his employer from Buffalo to Sioux City, Iowa, and was killed when his truck ran off a road slightly off the regular route of travel between such points, but moving in the same direction, and his instructions did not require him to follow any special route, the accident was within the scope of employment. Hilliker v North American Van Lines, Inc., 12 A.D.2d 677, 207 N.Y.S.2d 753, 1960 N.Y. App. Div. LEXIS 6743 (N.Y. App. Div. 3d Dep't 1960).

It does not matter that a claimant is not taking the best route to his business destination at the time of sustaining an injury, as long as he is heading in the general direction. Armstrong v Aero Mayflower Transit Co., 14 A.D.2d 958, 221 N.Y.S.2d 225, 1961 N.Y. App. Div. LEXIS 7903 (N.Y. App. Div. 3d Dep't 1961).

Death of the piano player for an orchestra by drowning in a hotel bathtub while taking a bath was properly found to have been occasioned by his purely personal act, bearing no relationship to his employment as a musician, notwithstanding, at the time, the orchestra was on tour and stopping at hotels selected by its employer, the drowning having occurred somewhere between 7:30 and 9:30 a.m. and an analysis of decedent's blood showing a high alcohol content. Orpin v D. P. Bro. & Co., 15 A.D.2d 282, 223 N.Y.S.2d 366, 1962 N.Y. App. Div. LEXIS 11990 (N.Y. App. Div. 3d Dep't), aff'd, 12 N.Y.2d 749, 234 N.Y.S.2d 223, 186 N.E.2d 419, 1962 N.Y. LEXIS 938 (N.Y. 1962).

Use of 15 foot boat to cross Hudson River so as to avoid traffic was not bizarre and dangerous so as to avoid claim for death benefits arising out of decedent's drowning during boat trip. Connor v A. M. F. Pinspotters, Inc., 24 A.D.2d 815, 263 N.Y.S.2d 834, 1965 N.Y. App. Div. LEXIS 3130 (N.Y. App. Div. 3d Dep't 1965).

138. Employer liability for injuries sustained during breaks, rest periods or meal times

Injuries sustained on entering or leaving employer's premises are compensable as incident to employment, and leaving for or returning from lunch falls into same category. Kanal v Missbach, 50 A.D.2d 528, 374 N.Y.S.2d 646, 1975 N.Y. App. Div. LEXIS 12232 (N.Y. App. Div. 1st Dep't 1975).

Claimant, truck driver, was properly awarded workers' compensation benefits as result of being injured when struck by car while crossing street from hotel on way to restaurant before commencing next trip since he was traveling employee with no fixed work site, it was reasonable and customary for him to have obtained meal prior to commencing new assignment, and he did not cross street in such reckless and unreasonable manner as to constitute deviation from employment. Hamm v USF Red Star, 284 A.D.2d 793, 727 N.Y.S.2d 714, 2001 N.Y. App. Div. LEXIS 6603 (N.Y. App. Div. 3d Dep't), app. denied, 97 N.Y.2d 602, 735 N.Y.S.2d 491, 760 N.E.2d 1287, 2001 N.Y. LEXIS 3283 (N.Y. 2001).

In an action by an employee for breach of warranty as to wholesomeness of food eaten in his employer's restaurant, which food represented part of compensation for his services, it is a defense that the employment came within the Workmen's Compensation Law. Elson v Morhen Inn, Inc., 269 N.Y.S. 645, 150 Misc. 540, 1933 N.Y. Misc. LEXIS 1784 (N.Y. City Ct. 1933).. See also McKee v New York, 262 A.D. 983, 30 N.Y.S.2d 71, 1941 N.Y. App. Div. LEXIS 6780 (N.Y. App. Div. 1941).

139. —Injuries during meal breaks

An award lies where a workman was injured by an automobile while sitting in the doorway of a factory during lunch hour. Domres v Syracuse Safe Co., 240 N.Y. 611, 148 N.E. 727, 240 N.Y. (N.Y.S.) 611, 1925 N.Y. LEXIS 842 (N.Y. 1925).. See also Tannenbaum v Perfect Tailoring Co.', 243 N.Y. 577, 154 N.E. 612, 243 N.Y. (N.Y.S.) 577, 1926 N.Y. LEXIS 853 (N.Y. 1926)., and Manor v Pennington, 180 A.D. 130, 167 N.Y.S. 424, 1917 N.Y. App. Div. LEXIS 8089 (N.Y. App. Div. 1917).

Where an employee who, in order to reach the boarding house where he took his meals, was required to cross over 2,000 feet of land of his employer and also to cross railroad tracks on his employer's land, was struck and killed by a backing switch engine while crossing tracks on his way to his noonday meal, his death was accidental, and also arose out of and in the course of his employment. Bylow v St. Regis Paper Co., 179 A.D. 555, 166 N.Y.S. 874, 1917 N.Y. App. Div. LEXIS 7431 (N.Y. App. Div. 1917).

A helper on a motor truck who was injured by an automobile when returning to the truck from a restaurant with food for himself and driver is injured in the course of his employment since he is aided by the presumption in § 21. Sztorc v James H. Stansbury, Inc., 189 A.D. 388, 179 N.Y.S. 586, 1919 N.Y. App. Div. LEXIS 4676 (N.Y. App. Div. 1919).

An employee in a fall while weighing herself upon returning from lunch eaten on the employer's premises, and before resuming work, is injured in the course and as an incident of her employment. Reynolds v Oswego Falls Corp., 264 A.D. 965, 37 N.Y.S.2d 167, 1942 N.Y. App. Div. LEXIS 5563 (N.Y. App. Div. 1942).

Injuries sustained by claimant when she struck her eye while combing her hair, preparatory to going to lunch are not compensable. Where the injury arises from the personal carelessness or negligence of the claimant in the performance of a personal act wholly disassociated from the employment and where the danger or risk involved is in no way connected with the place of employment or claimant's presence there, the injury does not arise out of the employment within the intent and purpose of this law. Shultz v Nation Associates, Inc., 281 A.D. 915, 119 N.Y.S.2d 673, 1953 N.Y. App. Div. LEXIS 3762 (N.Y. App. Div. 1953).

With respect to a truck driver's death from carbon monoxide poisoning resulting from his use of a charcoal burning heater, improvised from two cans, while resting in the truck during his lunch hour, the fact that the incident occurred during the lunch hour and while the employee was resting would not prevent it

from being considered as arising out of his employment where he was regularly permitted to eat and rest in the truck during the usual lunch hour, and this practice was beneficial to the employer. Barrett v Al Charyn, Inc., 13 A.D.2d 863, 214 N.Y.S.2d 533, 1961 N.Y. App. Div. LEXIS 11065 (N.Y. App. Div. 3d Dep't 1961), aff'd, 11 N.Y.2d 849, 227 N.Y.S.2d 673, 182 N.E.2d 282, 1962 N.Y. LEXIS 1267 (N.Y. 1962).

Injuries sustained by employee as a result of attempt to execute a dance step on self-service elevator while returning from company cafeteria were compensable. Bletter v Harcourt, Brace & World, Inc., 30 A.D.2d 601, 290 N.Y.S.2d 59, 1968 N.Y. App. Div. LEXIS 3919 (N.Y. App. Div. 3d Dep't 1968), aff'd, 25 N.Y.2d 755, 303 N.Y.S.2d 510, 250 N.E.2d 572, 1969 N.Y. LEXIS 1215 (N.Y. 1969).

Decision of Board denying compensation solely on finding that decedent was off employer's premises was inadequate for judicial review where it appeared that employee had been left alone on premises during lunch period, with understanding that he would remain in charge but that he was free to leave, and that it was customary for employees to cross street where fatal injury occurred. Wood v New York State Dep't of Environmental Conservation, 46 A.D.2d 961, 361 N.Y.S.2d 751, 1974 N.Y. App. Div. LEXIS 3309 (N.Y. App. Div. 3d Dep't 1974).

Inside employees having fixed period of time for lunch are not in course of employment while off employment premises for purpose of eating or otherwise during lunch period but where otherwise inside employee is on duty during lunch hour period, mere fact that he is off premises at time of injury is not controlling. Wood v New York State Dep't of Environmental Conservation, 46 A.D.2d 961, 361 N.Y.S.2d 751, 1974 N.Y. App. Div. LEXIS 3309 (N.Y. App. Div. 3d Dep't 1974).

Since it was in employer's interest to provide kitchen facilities within fire station, altercation over seating arrangements in the station kitchen must be deemed to have occurred in course of fireman's employment. Macinski v Johnson City, 57 A.D.2d 974, 394 N.Y.S.2d 101, 1977 N.Y. App. Div. LEXIS 12264 (N.Y. App. Div. 3d Dep't 1977).

Evidence supported finding by Workers' Compensation Board that claimant hit by car in front of workplace during her lunch break was injured during course of employment where record showed that decedent did not have fixed lunch period but went to lunch when it was convenient and was paid set weekly wage without reference to her lunch schedule, since it could be inferred that decedent's lunch break was defined by requirements of her sales position and was thus premised on employer's convenience. Harford v Widensky's, Inc., 154 A.D.2d 821, 546 N.Y.S.2d 485, 1989 N.Y. App. Div. LEXIS 12699 (N.Y. App. Div. 3d Dep't 1989).

Evidence supported determination of Workers' Compensation Board that claimant's injury, which occurred when she tripped in pothole while walking on public street on her unpaid lunch hour, resulted from personal act unrelated to her employment although accident occurred in close proximity to her workplace, where she left employer's premises to smoke cigarette because employer had strict policy against smoking on premises. Roggero v Frontier Ins. Group, 250 A.D.2d 1011, 673 N.Y.S.2d 260, 1998 N.Y. App. Div. LEXIS 5931 (N.Y. App. Div. 3d Dep't 1998).

Lunch time injuries generally occur beyond scope of employment unless employer continues to exercise authority over employee during lunch break. Smith v City of Rochester, 255 A.D.2d 863, 681 N.Y.S.2d 371, 1998 N.Y. App. Div. LEXIS 12815 (N.Y. App. Div. 3d Dep't 1998).

140. —Injuries during meal breaks; travel between employer's premises and other sites

Death of an employee was not compensable where it occurred while he was employed on a construction project a considerable distance from his home and furnished with a house to live in on the work site, at which he, and other employees, cooked their own meals for a time but finally decided to take their meals at a restaurant about two miles away, and death resulted when the deceased employee accidentally fell from a jeep owned by the employer while returning from lunch at the restaurant. Guido v Terrarube Const. Corp., 10 N.Y.2d 858, 222 N.Y.S.2d 690, 178 N.E.2d 913, 1961 N.Y. LEXIS 994 (N.Y. 1961).

Claimant who was let out of a village truck by his immediate superior at a street corner at 11:45 A.M., and told that he would be picked up after lunch at that corner, and who, while proceeding across the street to the corner in question, was struck by an automobile was on his master's business, and acting in his employer's interest when the accident happened. Sheehan v Board of Trustees, 256 A.D. 148, 9 N.Y.S.2d 235, 1939 N.Y. App. Div. LEXIS 4660 (N.Y. App. Div.), app. dismissed, 281 N.Y. 613, 22 N.E.2d 175, 281 N.Y. (N.Y.S.) 613, 1939 N.Y. LEXIS 1076 (N.Y. 1939).

A janitor who resided across the street from his place of employment is not injured in the course of his employment where he was struck by an automobile while returning to the apartment to look after the fires after having previously gone home for supper. Wischman v Berrick-Meyer, 259 A.D. 941, 18 N.Y.S.2d 301, 1940 N.Y. App. Div. LEXIS 7370 (N.Y. App. Div. 3d Dep't 1940).

Where a retail furniture salesman who worked on commission, according to custom and with his employer's permission left his employer's store at about four P.M., and walked about one block to a tavern where he had some lunch, and while returning to the store, shortly after five P.M., slipped on the ice, fell and was injured, such accident did not arise out of and in the course of his employment. Layton v Spear & Co., 261 A.D. 856, 24 N.Y.S.2d 793, 1941 N.Y. App. Div. LEXIS 7786 (N.Y. App. Div.), modified, 261 A.D. 1010, 26 N.Y.S.2d 608, 1941 N.Y. App. Div. LEXIS 8536 (N.Y. App. Div. 1941).

Where the captain of a barge left home to return to the barge and his body was found in the water several weeks later without his having returned to the barge, his death was not compensable. Swanson v Val Line, Inc., 262 A.D. 788, 27 N.Y.S.2d 354, 1941 N.Y. App. Div. LEXIS 5856 (N.Y. App. Div. 1941), aff'd, 289 N.Y. 544, 43 N.E.2d 526, 289 N.Y. (N.Y.S.) 544, 1942 N.Y. LEXIS 1122 (N.Y. 1942).

An injury to a grocery clerk, going home for supper during regular working hours at the direction of the employer who ordered overtime work, by a fall in front of her home is in the course of her employment. Ross v Sunrise Food Exchange, 273 A.D. 833, 75 N.Y.S.2d 897, 1948 N.Y. App. Div. LEXIS 4837 (N.Y. App. Div. 1948).

Boiler firemen who, following a well known practice for night shift employees, left their employment and journeyed to the village to take refreshments are injured in the course of their employment where, after they entered their employer's premises, their car went into a ditch resulting in injuries to both employees. Mesmer v Associated Colleges of Upper New York State, 277 A.D. 1082, 100 N.Y.S.2d 803, 1950 N.Y. App. Div. LEXIS 4545 (N.Y. App. Div. 1950).

Claimant, a chief of police, customarily drove his police car home to lunch. He was injured in a fall in his back yard while he was on his way to the car to return to work. There was conflicting evidence that he was playing ball when he was injured. The board merely found that the history of the accident was in conflict and that it did not arise out of claimant's employment. The matter was remanded to make proper findings. McCaffrey v Pelham Manor Police Dep't, 3 A.D.2d 772, 160 N.Y.S.2d 259, 1957 N.Y. App. Div. LEXIS 6177 (N.Y. App. Div. 3d Dep't 1957).

Employer's premises consisted of 2 buildings separated by a brook over which bridge was built as continuation of sidewalk. Claimant left one of employer's buildings to go to lunch and, while walking to her car, she crossed sidewalk over bridge and fell on ice and snow. Title to property was not in employer. City maintained bridge. Board properly found that claimant did not sustain injury arising out of and in course of her employment as risk of public sidewalk was risk to which all pedestrians were exposed. Diviyak v Leon F. Swears, Inc., 6 A.D.2d 943, 175 N.Y.S.2d 805, 1958 N.Y. App. Div. LEXIS 5266 (N.Y. App. Div. 3d Dep't 1958).

Claimant, a janitor, had completed his work at employer's branch office and had left to go home for lunch before returning to main office. While traveling on Route between employer's offices he was injured. Board found that claimant was not outside worker and that accident occurred during his lunch hour when he was not engaged in performance of service for employer. Williams

v Edgewater Sav. & Loan Asso., 7 A.D.2d 678, 179 N.Y.S.2d 308, 1958 N.Y. App. Div. LEXIS 4328 (N.Y. App. Div. 3d Dep't 1958).

Decedent was employed as a laborer and was furnished a house on the construction site by his employer. He ate no meals in the house. With permission of his employer, he used its jeep to travel to a nearby restaurant off the construction site. On returning from lunch, he fell out of the jeep and fractured his skull and died. Held: the accident did not arise out of and in the course of employment. Decedent paid for his own meals, could eat where he pleased and his lunch time was his own. The permission to use the jeep was not a part of the employment. Guido v Terra-Rube Const. Corp., 7 A.D.2d 554, 184 N.Y.S.2d 962, 1959 N.Y. App. Div. LEXIS 8959 (N.Y. App. Div. 3d Dep't 1959), aff'd, 10 N.Y.2d 858, 222 N.Y.S.2d 690, 178 N.E.2d 913, 1961 N.Y. LEXIS 994 (N.Y. 1961).

The evidence was considered insufficient to show that a department store buyer's death, due to being struck by a hit-and-run driver while crossing back to the store from a nearby restaurant where he had just had his dinner to put in his usual one day a week evening's work as a store executive, arose out of and in course of his employment. Purcell v Hearn's Dep't Store, 17 A.D.2d 886, 233 N.Y.S.2d 375, 1962 N.Y. App. Div. LEXIS 7324 (N.Y. App. Div. 3d Dep't 1962).

Where a taxi driver had a work schedule from 3 P. M. to 1 A. M. daily and usually ate dinner about 7 o'clock at some eating place near his last place of call, injuries sustained by him by slipping on a piece of butter on a cafeteria floor near the place of destination of his last passenger could be considered as work-connected and compensable because of the mobile nature of his work and the necessity of stopping occasionally to eat or answer calls of nature. Relkin v National Transp. Co., 18 A.D.2d 137, 238 N.Y.S.2d 575, 1963 N.Y. App. Div. LEXIS 4166 (N.Y. App. Div. 3d Dep't), app. denied, 13 N.Y.2d 593, 1963 N.Y. LEXIS 1871 (N.Y. 1963).

Injury sustained by claimant, an office worker, from a fall in the street while returning to the employer's premises from lunch at a restaurant two blocks away at which most of the employees habitually lunched because they had only a half-hour lunch period and the employer paid the restaurant's bills for lunches supplied to them, could be regarded as arising out of and in course of her employment where it appeared that this arrangement was in the employer's interest in cutting down interruptions of employment. Goldberg v Gold Medal Farms, Inc., 18 A.D.2d 951, 237 N.Y.S.2d 656, 1963 N.Y. App. Div. LEXIS 4443 (N.Y. App. Div. 3d Dep't 1963).

Where decedent was killed when his car collided with a train at a railroad crossing near the plant where he worked as he was returning, with two co-employees, from having "lunch" at a nearby restaurant, according to custom permitted by his employer, it was within the fact-finding powers of the Board to find that death did not arise from a risk attendant upon his employment where he could have parked his car in either of two parking places near the plant without necessity of crossing the railroad tracks. Patti v Republic Aviation Corp., 20 A.D.2d 939, 248 N.Y.S.2d 978, 1964 N.Y. App. Div. LEXIS 3919 (N.Y. App. Div. 3d Dep't), app. denied, 14 N.Y.2d 488, 1964 N.Y. LEXIS 1888 (N.Y. 1964).

The Board could properly find that wrist injuries sustained by claimant in a fall when alighting from her car in the parking lot of the shopping center where she worked, upon return to work after having supper at home, arose out of and in course of her employment, the parking lot being essentially part of the employer's premises because employees as well as customers were permitted to park there without charge, though claimant's employer had no ownership or control over the area. Berry v B. Gertz, Inc., 21 A.D.2d 708, 249 N.Y.S.2d 285, 1964 N.Y. App. Div. LEXIS 3871 (N.Y. App. Div. 3d Dep't 1964).

Where after a payroll robbery an employer began to pay his employees' wages by checks over the strenuous objection of their labor union on the ground of the inconvenience involved and the employer agreed with the union that employees taking their checks to a bank would have slight tardiness after their lunch hours on payday overlooked, an employee who was injured on a payday while crossing a street in returning from the bank where he had cashed his check was held to be engaged in an activity sufficiently related to the employment to entitle him to workmen's compensation. Watson v American Can Co., 23 A.D.2d 423, 261 N.Y.S.2d 306, 1965 N.Y. App. Div. LEXIS 3522 (N.Y. App. Div. 3d Dep't 1965), aff'd, 18 N.Y.2d 758, 274 N.Y.S.2d 683, 221 N.E.2d 463, 1966 N.Y. LEXIS 1072 (N.Y. 1966).

Correction officer's injury in traffic accident while driving his own vehicle to work and after stopping at restaurant for lunch was not incurred in course of his employment, and thus he was properly denied workers' compensation benefits, even though accident occurred only about one mile from correction facility entrance, where his employer neither encouraged him to buy his lunch at restaurant in question nor derived any benefit therefrom, officer was not engaged in special errand at time of accident, and trip to restaurant did not serve dual purpose in absence of proof that it was necessary to carry out function of employment. Coningsby v New York State Dep't of Corrections, 245 A.D.2d 1009, 667 N.Y.S.2d 101, 1997 N.Y. App. Div. LEXIS 13569 (N.Y. App. Div. 3d Dep't 1997).

Parking monitor's fall on wet floor in front of elevator leading out of restaurant from which she was returning to work during unpaid lunch break occurred beyond scope of her employment where she had discretion over timing and location of her lunch breaks, and her employer neither suggested that she buy lunch at that particular restaurant nor derived any benefit from her decision to do so. Smith v City of Rochester, 255 A.D.2d 863, 681 N.Y.S.2d 371, 1998 N.Y. App. Div. LEXIS 12815 (N.Y. App. Div. 3d Dep't 1998).

141. —Injuries in the course of personal errands on employer's premises

An employee who, in performance of his duties, carried certain articles from one room to another and on his way back stepped a few feet out of his direct course to ask a fellow-employee for a chew of tobacco, and, on leaving, slipped on a greasy floor, fell and received injuries, is entitled to compensation, where no objection had been made by the employer to employees chewing while at work. Wickham v Glenside Woolen Mills, 252 N.Y. 11, 168 N.E. 446, 252 N.Y. (N.Y.S.) 11, 1929 N.Y. LEXIS 521 (N.Y. 1929).

An employee who, during working hours, went to the basement of the plant to set a bottle of tea upon a boiler to keep it hot for the mid-day meal, and, while on her way back, slipped and fell, is injured in the course of and through an accident arising out of her employment. Etherton v Johnstown Knitting Mills Co., 184 A.D. 820, 172 N.Y.S. 724, 1918 N.Y. App. Div. LEXIS 6692 (N.Y. App. Div. 1918).

An employee sustained an injury arising out of and in the course of her employment, when during her luncheon hour she went down on one of the employer's passenger elevators from the floor on which she worked, on a personal errand, and was injured by reason of the operator's negligence as she was about to leave the elevator. Martin v Metropolitan Life Ins. Co. (1921) 197 App Div 382, 189 NYS 467, affd (1922) 233 NY 653, 135 NE 956.. See also Ross v Howieson, 232 N.Y. 604, 134 N.E. 589, 232 N.Y. (N.Y.S.) 604, 1922 N.Y. LEXIS 1189 (N.Y. 1922).

One employed as a millinery trimmer injured while attempting to open a bottle of soft drink is injured in the course of her employment, where it is customary for employees to drink beverages during working hours and the employer recognized and permitted this custom. Moldove v Rosenhien Co., 266 A.D. 931, 43 N.Y.S.2d 888, 1943 N.Y. App. Div. LEXIS 5273 (N.Y. App. Div. 1943).

Finding that worker had not deviated from course of his employment was supported by substantial evidence and was thus conclusive where worker, leaving on personal errand 3 ½ hours before end of his shift, found his normal exit route locked and unattended, decided to climb over fence because plant's front gate was too far away, and injured himself while climbing fence; accident occurred on employer's property, and "course of employment" includes reasonable amount of time for employees to leave premises after ceasing work. Voight v Rochester Products Div., GMC, 125 A.D.2d 799, 509 N.Y.S.2d 908, 1986 N.Y. App. Div. LEXIS 63011 (N.Y. App. Div. 3d Dep't 1986).

Evidence supported decision of Workers' Compensation Board that claimant sustained accidental injury arising out of and in

course of his employment where it was shown that (1) while waiting for co-worker so that he could begin new work assignment, claimant was injured when he attempted to clean his own chainsaw on employer's wire wheel grinder, (2) claimant stated that he had borrowed employer's chainsaw and was asked to clean and return it, and that he decided that he could clean both employer's and his own chainsaw during slack time, and (3) claimant further stated that it was common practice to borrow employer's equipment for personal use and to use employer's on-premises equipment without permission. Smith v Paul Smith's College, 186 A.D.2d 320, 587 N.Y.S.2d 802, 1992 N.Y. App. Div. LEXIS 10807 (N.Y. App. Div. 3d Dep't 1992).

142. —Injuries in the course of personal errands away from the employer's premises during working hours

An employee engaged in cleaning and repairing scales on the employer's premises is not injured in the course of his employment when struck by a car while returning to the employer's premises after going across the street for cigarettes for his own use. Johnson v Sanitary Scale Co., 278 A.D. 878, 104 N.Y.S.2d 274, 1951 N.Y. App. Div. LEXIS 5040 (N.Y. App. Div. 1951).. See also Richards v Creamer, 267 A.D. 928, 46 N.Y.S.2d 769, 1944 N.Y. App. Div. LEXIS 5554 (N.Y. App. Div. 1944).

Claimant was employed as a patrolman on a housing project between the hours of 3:00 p.m. to 11:00 p.m. At about 6:00 p.m. on the day of the accident he crossed a public street adjacent to the premises of his employer to get a newspaper, and while returning he was struck by an automobile. Claimant had been accustomed to getting newspapers daily from the same source across the street, and this custom was known to the employer. Held: claimant sustained an accidental injury arising out of and in the course of his employment. Redfield v Boulevard Gardens Housing Corp., 4 A.D.2d 906, 167 N.Y.S.2d 59, 1957 N.Y. App. Div. LEXIS 4300 (N.Y. App. Div. 3d Dep't), app. denied, 3 N.Y.2d 710, 1957 N.Y. LEXIS 1485 (N.Y. 1957).

Accident arose in the course of employment under evidence that claimant received permission from his foreman to cross the street and use a telephone, there being no telephone facilities at the site of the work; that it was the custom to permit employees to use the telephone across the street when authorization had been granted; and the claimant was struck and injured while crossing the street after making the telephone call. Strohmeyer v B. S. & W. Builders, Inc., 33 A.D.2d 1070, 307 N.Y.S.2d 525, 1970 N.Y. App. Div. LEXIS 5527 (N.Y. App. Div. 3d Dep't 1970).

There was no causal connection between fatal motor vehicle accident and worker's employment where worker had been assigned to complex of apartment buildings, he did not have to use vehicle or go outside fenced-in area surrounding all 3 buildings in performance of his job, he was killed during working hours while traveling away from complex in vehicle about one block from site, and no reason was given for his presence off site. McCoy v New York City Hous. Auth., 205 A.D.2d 902, 613 N.Y.S.2d 476, 1994 N.Y. App. Div. LEXIS 6268 (N.Y. App. Div. 3d Dep't 1994).

143. —Injuries during rest periods or breaks while away from employer's premises

Where the claimant was employed as night man in a garage and was obliged to work twelve consecutive hours without relief, and it was his custom to leave the garage and go to a nearby restaurant for coffee, which privilege was permitted by his employer, and while on his way to obtain coffee, the car driven by him came in collision with another car, resulting in injuries, such injuries did not arise out of and in course of his employment. Lovett v Buck, 285 N.Y. 526, 32 N.E.2d 824, 285 N.Y. (N.Y.S.) 526, 1941 N.Y. LEXIS 1563 (N.Y. 1941).

Where an employee of an elevated railroad company during a two-hour period off duty was injured by the collision of two trains, while on his way from the terminal, where he had just finished his tour of duty, to his dentist's, injury did not arise "out of and in the course of" his employment, as provided under Work. Pierson v Interborough Rapid Transit Co., 184 A.D. 678, 172 N.Y.S. 492, 1918 N.Y. App. Div. LEXIS 6636 (N.Y. App. Div. 1918), aff'd, 227 N.Y. 666, 126 N.E. 920, 227 N.Y. (N.Y.S.) 666, 1920 N.Y. LEXIS 891 (N.Y. 1920).

A man employed to carry a sign in the vicinity of the employer's store is injured in the course of his employment where he sustained injury on the sidewalk in front of his employer's premises while about to go across the street to an open air restaurant for coffee as was his custom each morning with the consent of the employer. Karl v Fair Shoe Repair, Inc., 269 A.D. 800, 55 N.Y.S.2d 1, 1945 N.Y. App. Div. LEXIS 3908 (N.Y. App. Div. 1945).

An elevator operator is entitled to an award of compensation where she was injured during a rest period for which she was paid and during which she was permitted to leave the employer's premises when hit by a motor bus while crossing the street outside the employer's premises. Sullivan's Estate v Motor Realty Corp., 272 A.D. 986, 73 N.Y.S.2d 276, 1947 N.Y. App. Div. LEXIS 4510 (N.Y. App. Div. 1947).. See also Rucker v Massau-Beekman Realty Corp., 272 A.D. 982, 73 N.Y.S.2d 275, 1947 N.Y. App. Div. LEXIS 4492 (N.Y. App. Div. 1947).

A closely supervised "coffee break" is not an interruption of employment. A secretary was properly awarded compensation where, in the middle of the afternoon, she went across the street for coffee and while returning to work tripped and suffered injuries. Caporale v Department of Taxation & Finance, 2 A.D.2d 91, 153 N.Y.S.2d 738, 1956 N.Y. App. Div. LEXIS 4692 (N.Y. App. Div. 3d Dep't 1956), aff'd, 2 N.Y.2d 946, 162 N.Y.S.2d 40, 142 N.E.2d 213, 1957 N.Y. LEXIS 1123 (N.Y. 1957), limited, Balsam v New York State Div. of Employment, 24 A.D.2d 802, 263 N.Y.S.2d 849, 1965 N.Y. App. Div. LEXIS 3241 (N.Y. App. Div. 3d Dep't 1965).

Injury received while returning from permitted coffee break outside employer's building was compensable. Bodensky v Royaltone, Inc., 5 A.D.2d 733, 168 N.Y.S.2d 908, 1957 N.Y. App. Div. LEXIS 3538 (N.Y. App. Div. 3d Dep't 1957).

A compensation award was sustained, although the case was a close one, as to which, it was said, reasonable minds could differ, where a night watchman, who had permission to go to a restaurant to get coffee, was assaulted and injured on the way back from an attempt to get some coffee at a tavern across from the restaurant, where he drank a coke, coffee not being obtainable there. Kapuscinski v John P. Picone, Inc., 9 A.D.2d 994, 194 N.Y.S.2d 571, 1959 N.Y. App. Div. LEXIS 5314 (N.Y. App. Div. 3d Dep't 1959), app. denied, 7 N.Y.2d 710, 1960 N.Y. LEXIS 1644 (N.Y. 1960).

Coffee break rule which rests essentially on theory of constructive control of employee by employer during off-premises activity should not be extended to case where stenographer departed from premises during coffee break but went to bank to cash personal check and fell on bank's floor. Balsam v New York State Div. of Employment, 24 A.D.2d 802, 263 N.Y.S.2d 849, 1965 N.Y. App. Div. LEXIS 3241 (N.Y. App. Div. 3d Dep't 1965).

Death of employee in automobile accident, during working hours, about 2 ½ miles from place of employment, was compensable where there was ample evidence from which the board could find that decedent was on his coffee break, (there was no coffee at his place of employment) which, although not an everyday occurrence, was an accepted practice known and acquiesced in by his employer and during which time decedent was paid, for which permission to leave the grounds was consistently granted, and the absence of any duration was reported to his supervisor. Walker v New York, 31 A.D.2d 703, 295 N.Y.S.2d 828, 1968 N.Y. App. Div. LEXIS 2576 (N.Y. App. Div. 3d Dep't 1968).

Death arose in course of decedent's employment, and thus his mother was not entitled to workers' compensation death benefits, where (1) decedent took short break from work and went from his employer's rented third floor to roof of 4-story building with coworker, who smoked cigarette, (2) decedent's fall from roof on very windy day was unwitnessed, (3) employer testified that employees could take their breaks anywhere inside or outside building, although they had to smoke outside, (4) employer neither expressly authorized nor expressly prohibited use of roof, and (5) although locked door might have justified inference that access to roof was prohibited by someone while door remained locked, it was not reasonable to infer that prohibition continued after door was unlocked, as it was before decedent's fall, or that employer had ever imposed such prohibition. Kouvatsos v Line

Masters, Inc., 281 A.D.2d 769, 722 N.Y.S.2d 118, 2001 N.Y. App. Div. LEXIS 2920 (N.Y. App. Div. 3d Dep't 2001).

144. —Injuries during rest periods or breaks while on employer's premises

Where a workman was killed during a temporary cessation of work, the assumption arises that he was killed by an accident arising out of and in course of employment. Norris v New York C. R. Co., 246 N.Y. 307, 158 N.E. 879, 246 N.Y. (N.Y.S.) 307, 1927 N.Y. LEXIS 878 (N.Y. 1927).. See also Corrina v De Barbieri, 247 N.Y. 357, 160 N.E. 397, 247 N.Y. (N.Y.S.) 357, 1928 N.Y. LEXIS 1079 (N.Y. 1928).

A stableman while seeking fresh air received injuries which were incidental to his employment and hence compensable. Montgomery v Bartholomay Milk Co., 260 N.Y. 664, 184 N.E. 137, 260 N.Y. (N.Y.S.) 664, 1932 N.Y. LEXIS 860 (N.Y. 1932).

An award is proper where an employee falls from a roof upon which he had gone for air and a smoke. McLelland v International Paper Co. (1945) 269 App Div 800, 55 NYS2d 56, app dismd (1945) 294 NY 967, 63 NE2d 597.. See also Fischer v R. Hoe & Co., 224 A.D. 335, 230 N.Y.S. 755, 1928 N.Y. App. Div. LEXIS 10000 (N.Y. App. Div. 1928).

Employee sustained compensable injury when, after entering premises of his employer shortly before he was scheduled to report for work, he joined other employees in area containing picnic tables and grassy knoll which was provided by employer and sat cross-legged on grass for several minutes, and when he stood up to report for his shift, his left knee popped out of joint, since employee's injury occurred while he was on employer's premises, immediately prior to time he was required to commence work and while he was getting up to report for duty, such that employee was in course of his employment when injury occurred. Torio v Fisher Body Division-General Motors Corp., 119 A.D.2d 955, 501 N.Y.S.2d 485, 1986 N.Y. App. Div. LEXIS 55883 (N.Y. App. Div. 3d Dep't 1986).

145. —Employer liability for injuries during recreational or social activities

Recreation may be so bound up with employment that a resulting injury will be deemed compensable as one arising out of and in course of employment. Wilson, 298 N.Y. 468, 84 N.E.2d 781, 298 N.Y. (N.Y.S.) 468, 1949 N.Y. LEXIS 1006 (N.Y. 1949).. See also 1949 Ops St Compt, File #4042.

A chief of police who, while engaged in the investigation of a burglary, went to the barracks of the state police in order to get a state trooper to assist him, and while waiting for the trooper, participated in a soft ball game in which he was injured, does not sustain injuries arising out of and in the course of his employment. Donnelly v Smithtown, 260 A.D. 819, 22 N.Y.S.2d 332, 1940 N.Y. App. Div. LEXIS 4830 (N.Y. App. Div. 1940).

A town superintendent of highways killed when he accidentally fired a shot gun which he was carrying while crossing a fence into a cemetery was in the course of his employment where town attorney had recently advised that cemetery was abandoned and was in the care of the town and highway department had the equipment necessary to maintain the cemetery. McConnell v Whitestown, 285 A.D. 1098, 139 N.Y.S.2d 305, 1955 N.Y. App. Div. LEXIS 6765 (N.Y. App. Div.), reh'g denied, 285 A.D. 1209, 141 N.Y.S.2d 920, 1955 N.Y. App. Div. LEXIS 7171 (N.Y. App. Div. 1955).

With respect to injury sustained by claimant in a fall while descending the stairway of his brother-in-law's summer home on a Saturday evening, although it was claimed that claimant was there, as chartering manager of a steamship corporation, of which his brother-in-law was president, on business, a Board finding that he was present merely as a social guest and not in course of employment rested upon credibility of the testimony and would not be disturbed. Manolakis v Edison S. S. Corp., 15 A.D.2d 845, 224 N.Y.S.2d 519, 1962 N.Y. App. Div. LEXIS 11418 (N.Y. App. Div. 3d Dep't 1962).

The death of claimant, a hockey coach, while he was jogging near his home after he had worked out by lifting weights, did not arise out of and in the course of his employment, even though claimant's employer might have preferred a coach in good physical shape, where excellent physical condition was not a condition of employment, and where there was no suggestion that the contract of employment would have been terminated had claimant reported to work without having engaged in strenuous physical exercise while awaiting the opening of training camp; how an individual maintains his health, apart from a contractual obligation to engage in certain exercises intended to better prepare himself for his employment obligation, is a noncompensable personal act. Wilson v Detroit Hockey Club, Inc., 104 A.D.2d 168, 483 N.Y.S.2d 819, 1984 N.Y. App. Div. LEXIS 20609 (N.Y. App. Div. 3d Dep't 1984), aff'd, 66 N.Y.2d 848, 498 N.Y.S.2d 365, 489 N.E.2d 252, 1985 N.Y. LEXIS 18301 (N.Y. 1985).

Workers' Compensation Board properly rejected claimant's argument that injuries sustained by her while rollerskating during her lunch hour arose out of her employment because she had been encouraged to engage in physical activity during her lunch hour as part of smoking cessation program sponsored by her employer, where evidence showed that claimant voluntarily decided to go rollerskating on day of accident, she used her own skates and had skated regularly prior to joining smoking cessation program, and smoking cessation program merely suggested that participants engage in some activity of their own choosing as alternative to smoking. Williams v New York State Dep't of Health, 145 A.D.2d 882, 536 N.Y.S.2d 218, 1988 N.Y. App. Div. LEXIS 13771 (N.Y. App. Div. 3d Dep't 1988).

Substantial evidence supported determination of Workers' Compensation Board that death of employee who was killed in crash of employer-owned helicopter following golf outing did not arise out of or in course of employment where employee (president and board chairman of employer) used helicopter for personal use, golf outing was for personal recreation of group of golfers who were friends, no business was transacted or discussed during outing, and employee had personally paid bills for outing. Peckham v Peckham Materials Corp., 146 A.D.2d 893, 536 N.Y.S.2d 873, 1989 N.Y. App. Div. LEXIS 94 (N.Y. App. Div. 3d Dep't 1989).

Evidence supported determination that female teacher's injury in donkey basketball game was accidental injury in course of her employment, even though teacher was not required to participate in game and was not compensated therefor, where teacher agreed to play after principal expressed his concern that game might be canceled due to insufficient number of volunteers, he encouraged teachers in general (and female teachers in particular) to volunteer, and teacher volunteered believing that her participation would be beneficial at such time as she sought tenure; principal's conduct was neither passive or incidental, but was overt encouragement sufficient for Workers' Compensation Board to conclude that school sponsored game. Midley v Romulus Cent. School Dist., 184 A.D.2d 925, 584 N.Y.S.2d 948, 1992 N.Y. App. Div. LEXIS 8198 (N.Y. App. Div. 3d Dep't 1992).

Claimant was not entitled to workers' compensation benefits for injury sustained while participating in basketball game during picnic which was organized by coffee club made up of claimant's co-workers since (1) employer's acquiescence in use of its stationery and telephone lines to organize picnic was insufficient to establish employer sponsorship, (2) employer required that employees take leave to participate in picnic, (3) employer's acquiescence in existence of coffee club did not serve as basis for compensability given that employer did not also encourage club's organization of picnic, and (4) fact that employer gained some general benefit from picnic in form of increased morale and efficiency was not basis for finding of compensability. Farnan v New York State Dep't of Social Servs., 187 A.D.2d 864, 589 N.Y.S.2d 713, 1992 N.Y. App. Div. LEXIS 12880 (N.Y. App. Div. 3d Dep't 1992).

146. —Injuries in the course of participation in employer sponsered games, leagues and the like

The Compensation Law does not cover employees who organized a baseball league without suggestion or encouragement from the management, played games on their own time at a public park distant from the plant, provided their own transportation, and were subject to wage deduction if late for work after playing or practicing, it further appearing that all organizational details and arrangements affecting the games were handled by employees, and that they procured the equipment, even though

the employer paid for the equipment and permitted conferences relating to the contests on company time. Wilson v General Motors Corp., 298 N.Y. 468, 84 N.E.2d 781, 298 N.Y. (N.Y.S.) 468, 1949 N.Y. LEXIS 1006 (N.Y. 1949).

An injury occurring during a game played on the employer's premises under the employer's supervision during the employees' lunch hour is compensable. Brown v United Services for Air, Inc., 298 N.Y. 901, 84 N.E.2d 810, 298 N.Y. (N.Y.S.) 901, 1949 N.Y. LEXIS 1749 (N.Y. 1949).

Injuries sustained in a soft ball game by a member of an athletic association open only to employees arose out of the course of employment where all of the activities of the association, which were conducted on the employer's property, were obviously carried out with the sole purpose of providing an integrated plan of recreational activity in which the employer was dominant, and however beneficient to the employees such plan may have been, its primary motivation was the furtherance of employee relations and the building of an esprit de corps and good will redounding to the employer's benefit. Tedesco v General Electric Co., 305 N.Y. 544, 114 N.E.2d 33, 305 N.Y. (N.Y.S.) 544, 1953 N.Y. LEXIS 798 (N.Y. 1953).

An employee of the General Electric Company and a member of the G. E. Athletic Association (a membership corporation) was entitled to compensation from his employer for a broken ankle received in a soft-ball game held on the company property but under the auspices of the membership corporation. Matter of Wilson, 298 N.Y. 468, 84 N.E.2d 781, 298 N.Y. (N.Y.S.) 468, 1949 N.Y. LEXIS 1006 (N.Y. 1949)) was distinguished on the ground that the activities were on the premises, the financial support was substantial, the employer's control was dominant, the employer was benefited and could stop the program. Tedesco v General Electric Co., 305 N.Y. 544, 114 N.E.2d 33, 305 N.Y. (N.Y.S.) 544, 1953 N.Y. LEXIS 798 (N.Y. 1953).

An employee injured while playing baseball on the factory team in a public park after working hours is injured in the course of his employment where the employer furnished uniforms and equipment, permitted team members to practice on working time, scheduled games against other factory teams, and placed his name on the player's uniforms. Fishman v Lafayette Radio Corp., 275 A.D. 876, 89 N.Y.S.2d 563, 1949 N.Y. App. Div. LEXIS 4855 (N.Y. App. Div. 1949).. See also Holst v New York Stock Exchange, 252 A.D. 233, 299 N.Y.S. 255, 1937 N.Y. App. Div. LEXIS 5615 (N.Y. App. Div. 1937).

Employer, engaged in selling aluminum storm windows and doors, sponsored a baseball team made up of its employees for advertising purposes. Injuries of salesman sustained while playing on such baseball team were compensable. Tobias v Stormco Co., Inc., 282 A.D. 1087, 126 N.Y.S.2d 120, 1953 N.Y. App. Div. LEXIS 5884 (N.Y. App. Div. 1953).

The claimant was in the course of his employment when he was injured while playing softball in an interdepartmental league game. He had finished his work, gone home and then returned to play in the game. The game was held on premises owned by the employer, the employer gave the league substantial financial support and could halt the program at any time. Sorino v Remington Rand, Inc., 1 A.D.2d 720, 147 N.Y.S.2d 34, 1955 N.Y. App. Div. LEXIS 3738 (N.Y. App. Div. 3d Dep't 1955).

Injuries sustained by an employee while playing on a company sponsored baseball team were compensable where the team was entirely composed of employees, the employer supplied the equipment and paid expenses, and the team was named after the employer company, sponsored by it, and the employer's name likewise appeared on uniforms and jackets. McCarty v Dahlstrom Metallic Door Co., 12 A.D.2d 673, 207 N.Y.S.2d 713, 1960 N.Y. App. Div. LEXIS 6735 (N.Y. App. Div. 3d Dep't 1960).

Claimant's breaking of an ankle while playing softball as a member of an interdepartmental softball league organized and encouraged by his employer arose out of and in course of employment, where it appeared that the employer contributed large sums to this and other activities programs for employees and directed and encouraged such activities, including the obtaining of permits for use of ball fields. Nahabedian v Equitable Life Ins. Co., 16 A.D.2d 713, 226 N.Y.S.2d 881, 1962 N.Y. App. Div. LEXIS 10320 (N.Y. App. Div. 3d Dep't 1962).

Injuries sustained by claimant while playing softball in an industrial softball league did not arise out of his employment where it was undisputed that the employer's personnel manager, upon being asked for assistance by a couple of employees in setting up a softball team, told them that the employer would do nothing more than to give initial financial assistance, that the employees must assume full responsibility for the team's activities, and that no contribution was made by the employer except a small amount for uniforms and equipment without any gain or business advantage sought through the softball activities of the employees. Iacovino v National Biscuit Co., 18 A.D.2d 741, 235 N.Y.S.2d 511, 1962 N.Y. App. Div. LEXIS 6178 (N.Y. App. Div. 3d Dep't 1962).

There was substantial evidence to sustain a board finding that injuries sustained were in course of employment, notwithstanding the accident occurred in course of a Saturday softball game being played in a public park, where claimant was an outside salesman for his employer and employed on a six-day week basis and the softball game was part of a recreational activity sponsored and controlled by the employer in connection with sales promotion efforts. Sargeant v Tilo Roofing Co., 18 A.D.2d 1037, 238 N.Y.S.2d 645, 1963 N.Y. App. Div. LEXIS 4176 (N.Y. App. Div. 3d Dep't 1963).

Claimant was injured in course of employment where the injury occurred while he was playing on an employee's baseball team sponsored by the employer, the league dues for which were paid by employer, who likewise supplied uniforms bearing identifying initials, and the players were recruited on company time and employees were sometimes excused early to take part in games witnessed by other employees. Rafti v Merrill Lynch, Pierce, Fenner & Smith, Inc., 20 A.D.2d 592, 245 N.Y.S.2d 223, 1963 N.Y. App. Div. LEXIS 2649 (N.Y. App. Div. 3d Dep't 1963), aff'd, 15 N.Y.2d 497, 254 N.Y.S.2d 109, 202 N.E.2d 556, 1964 N.Y. LEXIS 890 (N.Y. 1964).

Death of an employee in a one-car accident while en route to a bowling match did not arise in course of employment although the bowling match which he intended to take part in was part of bowling league activities encouraged by decedent's employer, which furnished shirts with special insignia for participating employees, where the employer did not otherwise contribute to costs, control activities, all matches were played after hours and off the premises, and team members were not all employees of the employer. Jablonski v General Motors Acceptance Corp., 22 A.D.2d 724, 254 N.Y.S.2d 168, 1964 N.Y. App. Div. LEXIS 2985 (N.Y. App. Div. 3d Dep't 1964).

Affirming an award to a claimant injured while participating in a county softball league, the court rejected the contention that in sponsoring the league there was no business advantage of benefit to the employer by stating that this is not the sole test as to whether the sport has such a connection with employment as to support an award of compensation. Sillitto v E. J. Meyer Memorial Hospital, 29 A.D.2d 822, 287 N.Y.S.2d 335, 1968 N.Y. App. Div. LEXIS 4605 (N.Y. App. Div. 3d Dep't), app. denied, 21 N.Y.2d 646, 1968 N.Y. LEXIS 1840 (N.Y. 1968).

Injury sustained while playing in a regularly scheduled softball game of a softball league sponsored and encouraged by the employer was sustained in the course of his employment and thus compensable. Esposito v Western Electric Co., 30 A.D.2d 750, 291 N.Y.S.2d 378, 1968 N.Y. App. Div. LEXIS 3608 (N.Y. App. Div. 3d Dep't 1968).

A claim for benefits by a town policeman who chose to participate in a public recreational activity, which general activity was sponsored by his employer, was dismissed against the municipality and the court did not find support for any employer-employee relationship as to the softball league or as to the particular team to which the policeman belonged and his employment was entirely unrelated with the creation of the activity or his particular participation in it. Carpenter v New Castle, 35 A.D.2d 16, 312 N.Y.S.2d 650, 1970 N.Y. App. Div. LEXIS 4099 (N.Y. App. Div. 3d Dep't 1970), aff'd, 29 N.Y.2d 760, 326 N.Y.S.2d 561, 276 N.E.2d 623, 1971 N.Y. LEXIS 975 (N.Y. 1971).

Evidence supported board's finding that injury sustained by claimant in evening softball game played in public park was compensable because his participation was sponsored by his

employer, where claimant was employed by insurance company and was playing in league composed entirely of insurance company employees at urging of his employer, who deemed such peer-group activities as good for business; fact that claimant's employer was small family enterprise increased significance of fact that it had purchased claimant's softball uniform featuring its logo on back, and diminished relevance of fact that injury occurred off premises and after hours. Diem v Diem & Buerger Ins. Co., 146 A.D.2d 840, 536 N.Y.S.2d 246, 1989 N.Y. App. Div. LEXIS 20 (N.Y. App. Div. 3d Dep't 1989).

147. —Injuries during lunch-hour games conducted with employer's knowledge

The fracture of an ankle when the claimant slipped and fell on his employer's premises while playing volley ball during the lunch period where it was customary for claimant and other employees to play the game each day and it was done with the knowledge and consent of the employer and an official participated is an incident of the employment so as to justify an award of compensation. Brown v United Services for Air, Inc., 298 N.Y. 901, 84 N.E.2d 810, 298 N.Y. (N.Y.S.) 901, 1949 N.Y. LEXIS 1749 (N.Y. 1949).

A fifteen-year-old high school student who was employed with other students to pick apples on the employer's farm suffers an injury arising out of and in the course of his employment where he was injured while playing in a hayloft during his lunch hour and it was known to the employer that such play was customary among the students. Hinkley v Kuchler, 272 A.D. 986, 72 N.Y.S.2d 741, 1947 N.Y. App. Div. LEXIS 4508 (N.Y. App. Div. 1947).

Where claimant while engaged in playing touch football during his lunch hour with other employees outside employer's plant tripped as he tried to catch pass and injured his right hand when it went through plate glass window, held that there was substantial evidence to sustain board's determination that the accident did not arise out of the employment since the athletic activity was strictly voluntary, the claimant being free to do as he pleased during lunch hour. Beiring v Niagara Frontier Transit System, Inc., 23 A.D.2d 611, 256 N.Y.S.2d 365, 1965 N.Y. App. Div. LEXIS 4823 (N.Y. App. Div. 3d Dep't), app. denied, 15 N.Y.2d 485, 1965 N.Y. LEXIS 1861 (N.Y. 1965).

The employer's contention that claimant's accidental injury when he slipped and fell against the factory wall while playing handball with coemployees, including his foreman, during their lunch period did not arise out of and in the course of his employment was without merit, where there was evidence the employees played regularly and the plant manager testified that although ball playing had been forbidden by a prohibitors sign, the company knew the men continued to play during their lunch hour. Ruiz v Deldan Design, Inc., 27 A.D.2d 774, 277 N.Y.S.2d 90, 1967 N.Y. App. Div. LEXIS 4895 (N.Y. App. Div. 3d Dep't 1967).

148. —Injuries in connection with use of employer's recreational facilities or equipment

A claimant sustained a non-compensable injury when he hurt himself while diving into a fenced off swimming pool maintained in the rear of the employer's combination business and residential premises. The employer let his employees use the pool during their lunch hours and after work. Claimant sustained his injuries at 5:30 P.M., after working hours. Employer derived no substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale which is common to all kinds of recreation and social life. Congdon v Klett, 307 N.Y. 218, 120 N.E.2d 796, 307 N.Y. (N.Y.S.) 218, 1954 N.Y. LEXIS 983 (N.Y. 1954).

Death benefits were properly allowed where a laborer drowned in a lake on his day off, the lake being entirely surrounded by the camp at which deceased was employed and part of the employer's premises. Leonard v Peoples Camp Corp., 9 N.Y.2d 652, 212 N.Y.S.2d 69, 173 N.E.2d 46, 1961 N.Y. LEXIS 1537 (N.Y. 1961).

A golf caddy injured during a practice game with other caddies suffers injuries arising out of and in the course of his employment where, though not required to play, he and the other caddies were encouraged to play one morning a week and at the time of the injury, the caddies were under the rule and supervision of the caddy master. Piusinski v Transit Valley Country Club, 259 A.D. 765, 18 N.Y.S.2d 316, 1940 N.Y. App. Div. LEXIS 6579 (N.Y. App. Div.), aff'd, 283 N.Y. 674, 28 N.E.2d 401, 283 N.Y. (N.Y.S.) 674, 1940 N.Y. LEXIS 1113 (N.Y. 1940).

A locker boy, having the permission to use a swimming pool maintained upon the premises during his lunch hour and after working hours, is entitled to compensation for injuries suffered during his recreation hour when he slipped from a ladder leading to the diving board. Dowen v Saratoga Springs Com., 267 A.D. 928, 46 N.Y.S.2d 822, 1944 N.Y. App. Div. LEXIS 5556 (N.Y. App. Div. 1944).

Claimant was in the course of his employment when, during off-duty period, he used one of employer's canoes for recreational purposes and the canoe capsized and he was drowned. Simons v Hedges, 286 A.D. 1044, 144 N.Y.S.2d 828, 1955 N.Y. App. Div. LEXIS 5103 (N.Y. App. Div. 1955).

Death by drowning of an employee who fell off a dam being constructed by his employer into the St. Lawrence River while fishing after working hours did not arise out of and in the course of his employment where his work day had already ended and such recreational privileges as fishing off the dam were not held out to induce his employment or as part of the employment arrangement. Petrie v Kiewit-Johnson & Johnson, 15 A.D.2d 696, 223 N.Y.S.2d 256, 1962 N.Y. App. Div. LEXIS 12014 (N.Y. App. Div. 3d Dep't 1962).

Where decedent was doing job for employer at camp on island and employer gave him permission to stay on the island and to use a boat that was there, it was held that fishing and boating were a reasonable recreational activity for decedent under the circumstances and that death of decedent by drowning during such activity was compensable. Dow v Collins, 22 A.D.2d 250, 254 N.Y.S.2d 554, 1964 N.Y. App. Div. LEXIS 2496 (N.Y. App. Div. 3d Dep't 1964), app. denied, 15 N.Y.2d 487, 1965 N.Y. LEXIS 1918 (N.Y. 1965).

149. —Injuries in the course of employer sponsered picnics, parties or other social events

Employer's dinner dance intended to promote salesmen motivation is deemed to be part of the employment; therefore widow of employee who became ill while dancing at party and died at home later that night of a coronary occlusion was entitled to workmen's compensation benefits. Chorley v Koerner Ford, Inc., 19 N.Y.2d 242, 279 N.Y.S.2d 4, 225 N.E.2d 737, 1967 N.Y. LEXIS 1662 (N.Y. 1967).

A newsboy drowned at a picnic for carrier boys arranged by his employer was in the course of his employment at his death, inasmuch as it was apparent that the picnic was maintained for the purpose of developing better service and greater interest on the part of the newspaper carriers. Fagen v Albany Evening Union Co., 261 A.D. 861, 24 N.Y.S.2d 779, 1941 N.Y. App. Div. LEXIS 7801 (N.Y. App. Div. 1941).. See also 1949 Ops St Compt, File #4042.

An award was proper where an employee was injured while returning from an annual picnic sponsored and paid for by the employer to promote better employer-employee relationships. Dodge v Wm. J. Keller, Inc., 279 A.D. 959, 111 N.Y.S.2d 27, 1952 N.Y. App. Div. LEXIS 5422 (N.Y. App. Div.), aff'd, 304 N.Y. 792, 109 N.E.2d 85, 304 N.Y. (N.Y.S.) 792, 1952 N.Y. LEXIS 985 (N.Y. 1952).

Decedent was killed in automobile accident on way home from party given by association of fellow employees. Legault v Kraft Foods Co., 5 A.D.2d 712, 168 N.Y.S.2d 626, 169 N.Y.S.2d 736, 1957 N.Y. App. Div. LEXIS 3505 (N.Y. App. Div. 3d Dep't 1957).

At a party given by his employer, decedent engaged in a contest in which intoxicating liquors, furnished by the employer, were drunk by the cupfull. Shortly after he was taken home, decedent was found dead due to pulmonary edema and acute alcoholism. While occurrence took place on the premises of employer, there was no basis for finding for claimant, since decedent's intoxication was the result of excessive personal use of alcohol which departed from any rational relationship to his work. Herman v Greenpoint Barrel & Drum Reconditioning Co., 9 A.D.2d 572, 189 N.Y.S.2d 353, 1959 N.Y. App. Div. LEXIS 7427 (N.Y. App. Div. 3d Dep't 1959), aff'd, 8 N.Y.2d 880, 203 N.Y.S.2d 922, 168 N.E.2d 721, 1960 N.Y. LEXIS 1159 (N.Y. 1960).

Where an employee died after entering into a drinking competition with a coemployee at a holiday party given by their employer on his premises, for which the employer furnished quantities of intoxicating liquor and food, and the Compensation Board found that decedent died as the result of large quantities of liquor consumed, the Appellate Division's finding that intoxication was the result of excessive personal use of alcohol and had no rational relationship to the employment was upheld. Herman v Greenpoint Barrel & Drum Reconditioning Co., 9 A.D.2d 572, 189 N.Y.S.2d 353, 1959 N.Y. App. Div. LEXIS 7427 (N.Y. App. Div. 3d Dep't 1959), aff'd, 8 N.Y.2d 880, 203 N.Y.S.2d 922, 168 N.E.2d 721, 1960 N.Y. LEXIS 1159 (N.Y. 1960).

Where an employer organizes and finances a picnic for employees, designed to promote their good will, an employee who is injured while attending the picnic can be considered as injured in course of employment, notwithstanding the picnic is held on a Sunday and of the employer's premises with the employees furnishing their own transportation. Mack v State Street Mill Bargain Center, Inc., 17 A.D.2d 1006, 233 N.Y.S.2d 810, 1962 N.Y. App. Div. LEXIS 6985 (N.Y. App. Div. 3d Dep't 1962).

Where decedent's death was result of fall down elevator shaft during course of altercation at his employer's Christmas party, holding of Workmen's Compensation Board panel that "although the accidental death may have arisen in the course of employment, it did not arise out of the employment" held to have been supported by substantial evidence and not to be erroneous as a matter of law. Rodriguez v Paris Queen Bags, Inc., 23 A.D.2d 606, 256 N.Y.S.2d 398, 1965 N.Y. App. Div. LEXIS 4817 (N.Y. App. Div. 3d Dep't 1965).

Where a town supervisor while acting as host at a picnic and party at a camp of the town clerk, fell from a boat and was drowned, it was held that the decedent did not arrange the outing in his capacity as supervisor, and that since he was an elected municipal official the reasons which make an accident at a picnic sponsored by a business corporation compensable do not apply to this case. De Carlo v Lowville, 24 A.D.2d 678, 261 N.Y.S.2d 163, 1965 N.Y. App. Div. LEXIS 3622 (N.Y. App. Div. 3d Dep't 1965), aff'd, 21 N.Y.2d 872, 289 N.Y.S.2d 215, 236 N.E.2d 488, 1968 N.Y. LEXIS 1558 (N.Y. 1968).

Decedent's fatal automobile accident did not arise out of and in the course of his employment, where his attendance at a picnic conducted by the teachers' association was voluntary and there was no showing of any sponsorship, participation, or contribution by the employer. Gillard v North Syracuse Cent. School, 28 A.D.2d 1022, 283 N.Y.S.2d 687, 1967 N.Y. App. Div. LEXIS 3264 (N.Y. App. Div. 3d Dep't 1967).

Employee's death arose out of and in course of employment where the death was causally related to his participation in ball game at annual management club picnic, and where employer, while not dominating management club, encouraged it by financial contributions, and clearly benefitted from opportunity to address the annual meeting on past performance and future expectancy and from the regular monthly meetings of the management club, by an educational program and discussion of company problems. Gore v New York Air Brake Co., 33 A.D.2d 851, 305 N.Y.S.2d 814, 1969 N.Y. App. Div. LEXIS 2608 (N.Y. App. Div. 3d Dep't 1969).

Death of employee in attendance at retirement dinner for coworker was within the course of his employment where function was paid for by employer, out of town coworkers attended and were reimbursed for their expenses by the employer, and company officials associated with retiree were present at the dinner. McNamara v Kidder Peabody & Co., 42 A.D.2d 183, 346 N.Y.S.2d 37, 1973 N.Y. App. Div. LEXIS 3771 (N.Y. App. Div. 3d Dep't 1973).

Where employees of state liquor authority used office time and facilities for preparation and posting of notices, and for sale of tickets, with respect to annual picnic planned by employees and held after working hours, such evidence of employer participation in picnic was inadequate to be substantial evidence supporting finding that accident to office employee at picnic arose out of and in course of employment, despite fact that deputy commissioner and some other executive officers had donated sum of $10 each to cost of picnic while male employees were permitted to purchase tickets at sum of only $4 each and female employees were permitted to pay only sum of $3 each. Dapp v New York State Liquor Authority, 50 A.D.2d 250, 377 N.Y.S.2d 677, 1975 N.Y. App. Div. LEXIS 11489 (N.Y. App. Div. 3d Dep't 1975).

Evidence supported decision of Workers' Compensation Board that claimant's injury constituted accident arising out of and in course of employment where it was shown that claimant was injured while participating in "tug of war" contest at employer's annual picnic, that picnic was organized during business hours, and that employee participation therein was overtly encouraged by supervisor to promote morale and esprit de corps. Briand v New York State Dep't of Environmental Conservation, 186 A.D.2d 308, 587 N.Y.S.2d 458, 1992 N.Y. App. Div. LEXIS 10600 (N.Y. App. Div. 3d Dep't 1992).

150. Employee injuries caused by horseplay or pranks; generally

To be victimized by a prank perpetrated by a co-employee is an incident of the employment, as something reasonably to be expected, and an employee so injured is entitled to compensation benefits if the board is satisfied that the acts were incidental to the employment. Burns v Merritt Engineering Co., 302 N.Y. 131, 96 N.E.2d 739, 302 N.Y. (N.Y.S.) 131, 1951 N.Y. LEXIS 758 (N.Y. 1951).

An award of compensation in horseplay cases should not depend upon evidence of foreseeability. Burns v Merritt Engineering Co., 302 N.Y. 131, 96 N.E.2d 739, 302 N.Y. (N.Y.S.) 131, 1951 N.Y. LEXIS 758 (N.Y. 1951).

The risk of liability for compensation of the employer does not necessarily stop with a warning to cease horseplay. Montpetit v Standard Shade Roller Corp., 277 A.D. 1066, 100 N.Y.S.2d 640, 1950 N.Y. App. Div. LEXIS 4511 (N.Y. App. Div. 1950).

It is reasonable and natural for workers to indulge in momentary diversions to play a prank, and, when this occurs on the employer's premises, with a tempting instrumentality furnished by the employer and readily available, it becomes a risk of the employment and part and parcel thereof. Piatek v Plymouth Rock Provision Co., 15 A.D.2d 405, 224 N.Y.S.2d 634, 1962 N.Y. App. Div. LEXIS 11372 (N.Y. App. Div. 3d Dep't 1962).

Newly appointed deputy sheriff was not acting within course of his employment when he killed himself during game of Russian Roulette, and therefore his estate was not entitled to workers' compensation benefits, notwithstanding fact that he had been called to duty before final day of firing range training, since (1) earlier training had specifically covered information as to direction in which gun chamber rotated, and (2) conduct in playing game was highly dangerous and could not be dismissed as merely common, playful prank or trifling act of foolery. Gibbs v Orange County Sheriff's Dep't, 149 A.D.2d 845, 540 N.Y.S.2d 35, 1989 N.Y. App. Div. LEXIS 4876 (N.Y. App. Div. 3d Dep't 1989).

151. —Injury to employee who instigates horseplay

An employee who initiates or instigates a particular bit of horseplay is not entitled to the protection of the statute unless the prankish act has long been a part of the employment. Ognibene v Rochester Mfg. Co., 298 N.Y. 85, 80 N.E.2d 749, 298 N.Y. (N.Y.S.) 85, 1948 N.Y. LEXIS 804 (N.Y. 1948).. See also Industrial Comm'r v McCarthy, 295 N.Y. 443, 68 N.E.2d 434, 295 N.Y. (N.Y.S.) 443, 1946 N.Y. LEXIS 799 (N.Y. 1946).

A 16-year-old employed as a "gas jockey" at a service station was entitled to workers' compensation for injuries he sustained at work when he tossed a lighted match into a bucket containing a residue of oil, gasoline, and grease in order to demonstrate to a friend a "trick" he had learned from a fellow employee, since injuries or deaths arising from employee horseplay are compensable under the Workers' Compensation Law if they result from conduct which may reasonably be regarded as an incident of employment; given claimant's age and the fact that the injury occurred during an idle period and resulted from curiosity about materials related to his work, the Workers' Compensation Board was warranted in concluding that the incident which caused claimant's injuries was employment-related. Moreover, where there was testimony that at least two other workers at the station had previously engaged in the same conduct, the Board's determination that it was cumulative horseplay, and not an isolated

incident, was supported by substantial evidence. Lubrano v Malinet, 65 N.Y.2d 616, 491 N.Y.S.2d 148, 480 N.E.2d 737, 1985 N.Y. LEXIS 14695 (N.Y. 1985).

The fact that an employee initiated or took part in the initiation of horseplay does not bar him from an award where the horseplay subsequently results in injury to him. Montpetit v Standard Shade Roller Corp., 277 A.D. 1066, 100 N.Y.S.2d 640, 1950 N.Y. App. Div. LEXIS 4511 (N.Y. App. Div. 1950).

152. —Injury resulting from pranks during slack periods or near quitting time

Where a claimant, while engaged in the performance of his duties in his employer's factory was struck in the eye by an apple which one of his fellow servants, a boy, threw at another boy, in consequence of which the claimant lost the better part of the sight of the eye, he is entitled to compensation as the accident was one arising out of and in the course of the employment. Leonbruno v Champlain Silk Mills, 229 N.Y. 470, 128 N.E. 711, 229 N.Y. (N.Y.S.) 470, 1920 N.Y. LEXIS 702 (N.Y. 1920).. See also Verschleiser v Joseph Stern Son, Inc., 229 N.Y. 192, 128 N.E. 126, 229 N.Y. (N.Y.S.) 192, 1920 N.Y. LEXIS 674 (N.Y. 1920).

An employee who was engaged in piling lumber adjacent to a river is not injured in the course of his employment where he interrupts his work to participate in the prank of pushing an old wagon over the river bank into the river, in the course of which his clothing became entangled with the wagon and he was thrown into the river and drowned. Gaurin v Bagley & Sewall Co., 298 N.Y. 511, 80 N.E.2d 660, 298 N.Y. (N.Y.S.) 511, 1948 N.Y. LEXIS 1110 (N.Y.), reh'g denied, 298 N.Y. 619, 81 N.E.2d 355, 298 N.Y. (N.Y.S.) 619, 1948 N.Y. LEXIS 1188 (N.Y. 1948).

A claimant does not receive an injury in the course of his employment where he playfully pulled the cap over another employee's eyes and a file held in the hand of another employee flew from its handle when he readjusted his cap and struck the claimant in the eye. Frost v H. H. Franklin Mfg. Co., 204 A.D. 700, 198 N.Y.S. 521, 1923 N.Y. App. Div. LEXIS 9555 (N.Y. App. Div.), aff'd, 236 N.Y. 649, 142 N.E. 319, 236 N.Y. (N.Y.S.) 649, 1923 N.Y. LEXIS 1104 (N.Y. 1923).. See also Nolan v Cranford Co., 219 N.Y. 581, 114 N.E. 1074, 219 N.Y. (N.Y.S.) 581, 1916 N.Y. LEXIS 907 (N.Y. 1916).; Levy v World-Telegram, 255 A.D. 237, 7 N.Y.S.2d 546, 1938 N.Y. App. Div. LEXIS 4700 (N.Y. App. Div. 1938), app. dismissed, 280 N.Y. 680, 21 N.E.2d 193, 280 N.Y. (N.Y.S.) 680, 1939 N.Y. LEXIS 1488 (N.Y. 1939).; De Filippis v Falkenberg, 170 A.D. 153, 155 N.Y.S. 761, 1915 N.Y. App. Div. LEXIS 5069 (N.Y. App. Div. 1915), aff'd, 219 N.Y. 581, 114 N.E. 1064, 219 N.Y. (N.Y.S.) 581, 1916 N.Y. LEXIS 908 (N.Y. 1916).

An employee whose death resulted from drinking carbon tetrachloride from a bottle labeled whisky is injured in the course of his employment where, the occurrence took place in the employer's plant during the decedent's working hours apparently as a practical joke, near the end of the work day in a holiday period. McCarthy v Remington Rand, Inc., 275 A.D. 866, 88 N.Y.S.2d 456, 1949 N.Y. App. Div. LEXIS 4827 (N.Y. App. Div. 1949), aff'd, 300 N.Y. 715, 92 N.E.2d 58, 300 N.Y. (N.Y.S.) 715, 1950 N.Y. LEXIS 1496 (N.Y. 1950).

An employee, a young man of twenty-two years of age, who was injured while engaged in a hand pushing game known as Chinese wrestling, is injured in the course of his employment where at the time of the accident which occurred approximately one half hour before quitting time, there was no work to be done immediately and there was evidence that the employer knew of the game and there was no rule against it. Zeller v Wohlfahrt Studios, 278 A.D. 882, 104 N.Y.S.2d 328, 1951 N.Y. App. Div. LEXIS 5049 (N.Y. App. Div. 1951).. See also Industrial Comm'r v McCarthy, 295 N.Y. 443, 68 N.E.2d 434, 295 N.Y. (N.Y.S.) 443, 1946 N.Y. LEXIS 799 (N.Y. 1946).

Young lads whose jobs call for expenditure of physical energy cannot be expected during slack periods, to sit in idleness but the employer must expect that they will engage in some form of activity. A seventeen-year-old boy working with a group of employees of his own age suffered a compensable accident when, during a slack period, he was attempting to show his strength by bending a steel bar which struck him in the eye. Meigel v General Foods Corp., 2 A.D.2d 945, 156 N.Y.S.2d 420, 1956 N.Y. App. Div. LEXIS 3978 (N.Y. App. Div. 3d Dep't 1956), reh'g denied, 3 A.D.2d 685, 159 N.Y.S.2d 956, 1957 N.Y. App. Div. LEXIS 6639 (N.Y. App. Div. 3d Dep't 1957), app. denied, 2 N.Y.2d 710, 1957 N.Y. LEXIS 1619 (N.Y. 1957).

153. —Injuries from other particular incidents of horseplay

One employed as a handyman, janitor and carpenter while working under the employer's orders in a house who suffered an injury when he saw and lighted a firecracker is entitled to an award of compensation. Pedersen v Nelson, 267 A.D. 843, 45 N.Y.S.2d 784, 1944 N.Y. App. Div. LEXIS 5069 (N.Y. App. Div. 1944).

An award of compensation is improper where the employee suffered a heart attack due to anger and excitement resulting from jokes played upon him including the tying of his sweater into knots, and where the jokes were no part of the employment and there was no proof of any violence. Price v O'Connell Electric Co., 271 A.D. 852, 65 N.Y.S.2d 836, 1946 N.Y. App. Div. LEXIS 3407 (N.Y. App. Div. 1946).

A seventeen-year-old-office boy killed by a co-worker of the same age suffers fatal injuries arising out of and in the course of his employment where both boys were playing with a loaded revolver during the period when one of them was acting as a receptionist and several such revolvers were kept in an unlocked drawer in the receptionist's desk to be used by the receptionist if the occasion required. Lang v Franklin R. S. Co., 272 A.D. 988, 73 N.Y.S.2d 1, 1947 N.Y. App. Div. LEXIS 4516 (N.Y. App. Div. 1947).. But see Culhane v Economical Garage Co., 188 A.D. 1, 176 N.Y.S. 508, 1919 N.Y. App. Div. LEXIS 7127 (N.Y. App. Div. 1919).

An injury is incidental to and arises out of and in the course of employment where the claimant was injured by slipping and falling on a slippery floor while engaged in a playful "tussle" with a fellow employee. Sewell v Henry Johnson Auto Body Shop, 274 A.D. 657, 274 A.D. 957, 83 N.Y.S.2d 795, 1948 N.Y. App. Div. LEXIS 4246 (N.Y. App. Div. 1948).

An award of compensation is proper where an employee was injured when a fellow employee threw gasoline upon him which he mistook for water and the gasoline ignited. Montpetit v Standard Shade Roller Corp., 277 A.D. 1066, 100 N.Y.S.2d 640, 1950 N.Y. App. Div. LEXIS 4511 (N.Y. App. Div. 1950).

Claimant had suffered 2 prior accidents resulting in injuries to his back. Thereafter, while claimant was on employer's premises on way to lunch, fellow employee slapped him on back. Period of disability began on that day and said blow precipitated disability. Finding that accident did not arise out of and in course of employment was not supported by substantial evidence. Decision dismissing last claim and charging all disability to the 2 prior accidents reversed. Kratochvil v Delta Jewelry Corp., 5 A.D.2d 1044, 173 N.Y.S.2d 329, 1958 N.Y. App. Div. LEXIS 6208 (N.Y. App. Div. 3d Dep't 1958).

Injuries to claimant, 17, who was employed as messenger, which injuries were sustained when he was struck in eye by metal paper clip which he was attempting to shoot out of window by means of rubber band, were compensable. The accident arose out of and in the course of employment. Johnson v Loew's, Inc., 7 A.D.2d 795, 180 N.Y.S.2d 826, 1958 N.Y. App. Div. LEXIS 3719 (N.Y. App. Div. 3d Dep't 1958), aff'd, 8 N.Y.2d 757, 201 N.Y.S.2d 775, 168 N.E.2d 111, 1960 N.Y. LEXIS 1291 (N.Y. 1960).

The Board was justified in finding that death of an employee in a meat processing plant was compensable where it resulted from a burst bowel caused by a fellow employee's application of a compressed air hose to decedent's anus during a lunch break period on the employer's premises where the air hose was used for cleaning purposes, and the fact that, shortly prior to this fatal accident, decedent had playfully aimed the same air hose at the co-employee's stomach as a bit of "horseplay" was immaterial decedent having ceased his part in the horseplay before his co-employee resumed it in the more dangerous fashion. Piatek v Plymouth Rock Provision Co., 15 A.D.2d 405, 224 N.Y.S.2d 634, 1962 N.Y. App. Div. LEXIS 11372 (N.Y. App. Div. 3d Dep't 1962).

Plaintiff's behavior was outside scope of Workers' Compensation Law, even if his supervisor continued to exercise authority over him during lunch break and ensuing ride in supervisor's van, co-worker performed stunt involving his leaning backward out-

side van door while vehicle was moving, co-worker then returned to his seat and switched places with plaintiff, who attempted same stunt, whereupon he lost his balance, fell outside van, and was injured. Gladwell v C & S Communs., 224 A.D.2d 775, 637 N.Y.S.2d 502, 1996 N.Y. App. Div. LEXIS 763 (N.Y. App. Div. 3d Dep't 1996).

154. Employer liability for injuries to employees by persons other than fellow employees

Assaults are accidents arising out of the employment within the meaning of the Work. Muller v H. & A. Cohen, Inc., 186 A.D. 845, 174 N.Y.S. 736, 1919 N.Y. App. Div. LEXIS 5887 (N.Y. App. Div. 1919).

Workers' Compensation Board's decision that shooting of decedent by his former friend and attorney, who was not fellow employee, in his employer's parking lot arose in course of his employment was arbitrary and would be annulled for lack of supporting evidence where board relied on hearsay testimony by interested party who lacked any personal knowledge of matter and rejected detailed, consistent, first-hand testimony by witnesses with no motive to prevaricate, and subject matter of conversation that led to shooting was decedent's personal bankruptcy, which had no discernible connection with his employer. Russo v HRT, Inc., 246 A.D.2d 933, 667 N.Y.S.2d 854, 1998 N.Y. App. Div. LEXIS 761 (N.Y. App. Div. 3d Dep't), app. denied, 91 N.Y.2d 815, 676 N.Y.S.2d 128, 698 N.E.2d 957, 1998 N.Y. LEXIS 1365 (N.Y. 1998).

155. —Bar and restaurant personnel

Whether a bartender, who was assaulted on his way home after work by a person with whom he had an altercation in attempting to maintain order in the bar, is injured in the course of his employment within the meaning of subdivision 4 of this section is a debatable matter of fact and the court of appeals cannot upon appeal direct the conclusion contrary to that reached by the board as a matter of law. McGrinder v Sullivan, 290 N.Y. 11, 47 N.E.2d 421, 290 N.Y. (N.Y.S.) 11, 1943 N.Y. LEXIS 1131 (N.Y. 1943).

A claim by a restaurant dishwasher-counterman for compensation for head injuries sustained when assaulted by patrons of the restaurant on a certain date aggravating a pre-existing cerebral pathology and precipitating epilepsy, was supported by substantial evidence as to occurrence of the incident where not only did the claimant testify to it but the employer admitted that it had happened and a police report showed that claimant was taken to the hospital. Corso v Bruckner Diner, Inc., 20 A.D.2d 944, 248 N.Y.S.2d 1010, 1964 N.Y. App. Div. LEXIS 3928 (N.Y. App. Div. 3d Dep't 1964).

156. —Cab drivers and other transportation employees

A checker in the business of freight transportation, who was shot and killed by an unidentified stranger while engaged in the regular course of his employment, is injured in the course of his employment. Moran v Moran Transp. Lines, 264 A.D. 966, 37 N.Y.S.2d 142, 1942 N.Y. App. Div. LEXIS 5567 (N.Y. App. Div. 1942), modified, 266 A.D. 763, 41 N.Y.S.2d 957, 1943 N.Y. App. Div. LEXIS 4308 (N.Y. App. Div. 1943).

A taxi driver shot and killed by a passenger who bore the decedent a personal grudge is not entitled to an award of compensation because the accident did not arise out of his employment. Ramos v Taxi Transit Co., 276 A.D. 101, 92 N.Y.S.2d 744, 1949 N.Y. App. Div. LEXIS 3120 (N.Y. App. Div. 1949), aff'd, 301 N.Y. 749, 95 N.E.2d 625, 301 N.Y. (N.Y.S.) 749, 1950 N.Y. LEXIS 1042 (N.Y. 1950).

A cab driver struck and severely injured by a passenger in an argument over the amount of the fare had been accidentally injured in the course of his employment. Torosian v Nash Cab, Inc., 27 A.D.2d 767, 277 N.Y.S.2d 112, 1967 N.Y. App. Div. LEXIS 4883 (N.Y. App. Div. 3d Dep't 1967).

Injury sustained as a result of slipping while emerging from tub shower to mat on the bathroom floor was not sustained in the course of employment although claimant, a deputy court clerk, testified that prior thereto he had made some necessary adjustments to his stenotype machine, changing the ink ribbon thereof, as a result of which he got ink on his hands and arms and "probably" on his face and body, this being the reason for taking a bath. Covel v New York State Court of Claims, 30 A.D.2d 736, 291 N.Y.S.2d 384, 1968 N.Y. App. Div. LEXIS 3585 (N.Y. App. Div. 3d Dep't 1968).

157. —Janitors and building managers

An award lies to the dependents of a janitor killed by a gangster's stray bullets while out sweeping the stoop in front of the premises where he was employed. Greenberg v Voit, 250 N.Y. 543, 166 N.E. 318, 250 N.Y. (N.Y.S.) 543, 1929 N.Y. LEXIS 926 (N.Y. 1929).. See also Santos v Guemes, 270 A.D. 1057, 63 N.Y.S.2d 61, 1946 N.Y. App. Div. LEXIS 5300 (N.Y. App. Div. 1946).; Lebeda v Pongracz, 230 A.D. 606, 246 N.Y.S. 293, 1930 N.Y. App. Div. LEXIS 8694 (N.Y. App. Div. 1930), aff'd, 256 N.Y. 560, 177 N.E. 140, 256 N.Y. (N.Y.S.) 560, 1931 N.Y. LEXIS 1138 (N.Y. 1931).

A janitor suffers fatal injuries arising out of and in the course of his employment where he chased a negro, who had entered the basement where the decedent was working, out of the apartment house and was stabbed and killed. Pendl v Haenel, 229 A.D. 52, 241 N.Y.S. 59, 1930 N.Y. App. Div. LEXIS 10307 (N.Y. App. Div.), app. dismissed, 254 N.Y. 606, 173 N.E. 886, 254 N.Y. (N.Y.S.) 606, 1930 N.Y. LEXIS 1216 (N.Y. 1930).See also Ruppert v Plattdeutsche Volksfest Verein, 263 N.Y. 338, 189 N.E. 240, 263 N.Y. (N.Y.S.) 338, 1934 N.Y. LEXIS 1280 (N.Y. 1934).; Martucci v Hills Bros. Co., 171 A.D. 370, 156 N.Y.S. 833, 1916 N.Y. App. Div. LEXIS 9428 (N.Y. App. Div. 1916).; O'Brien v Shore Road Hospital, 275 N.Y. 570, 11 N.E.2d 758, 275 N.Y. (N.Y.S.) 570, 1937 N.Y. LEXIS 1551 (N.Y. 1937).

One employed as a manager of a building used as a rooming house, which was frequented by unsavory characters, is entitled to compensation when assaulted in front of the building as he was about to depart on an errand in connection with his employment and there was evidence from which it might be inferred that the assault arose out of management of the property. Israel v Ramble Properties, Inc., 269 A.D. 1006, 58 N.Y.S.2d 388, 1945 N.Y. App. Div. LEXIS 5009 (N.Y. App. Div. 1945).

Decedent's death arose out of and in the course of his employment where decedent, a manager of his employer's hotel had an argument with one of the guests over the use of an electric fan in the guest's room which finally resulted in his death from a knife stab. Tivoli v 141 West 110th Street Corp., 4 A.D.2d 915, 166 N.Y.S.2d 873, 1957 N.Y. App. Div. LEXIS 4316 (N.Y. App. Div. 3d Dep't 1957), app. denied, 4 N.Y.2d 674, 1958 N.Y. LEXIS 1355 (N.Y. 1958).

Even though the motive for an assault resulting in death of an apartment house superintendent might have been robbery rather than anything to do with his employment, where he was subject to call 24 hours a day and his duties often required him to travel through an intervening courtyard to some extent removed from public view, assault by a footpad was one of the perils of his employment, and a decision of the Board denying death benefits on the ground that the assault did not arise out of his employment could not be sustained. Toro v 1700 First Ave. Corp., 16 A.D.2d 852, 227 N.Y.S.2d 605, 1962 N.Y. App. Div. LEXIS 9983 (N.Y. App. Div. 3d Dep't 1962), aff'd, 12 N.Y.2d 1001, 239 N.Y.S.2d 130, 189 N.E.2d 625, 1963 N.Y. LEXIS 1358 (N.Y. 1963).

158. —Watchmen, guards and the like

A night watchman employed by a corporation engaged in the business of furnishing its subscribers with protection against burglary, whose duty it was to patrol the streets in a given section of the city, try doors and keep watch until relieved, and who, while engaged in this work, was killed by a shot fired by a police officer then in pursuit of burglars dies in the performance of his duty and from a peril arising out of and in the course of his employment. Heidemann v American Dist. Tel. Co., 230 N.Y. 305, 130 N.E. 302, 230 N.Y. (N.Y.S.) 305, 1921 N.Y. LEXIS 836 (N.Y. 1921).

An accidental injury arising out of and in the course of employment occurs where a night watchman, was found murdered on the employer's premises and robbery of his wages was the apparent motive. Lanni v Amsterdam Bldg. Co. (1926) 217 App Div 278, 216 NYS 763, appeal after remand (1927) 221 App Div 824, 224 NYS 840.. See also Rosmuth v American Radiator Co., 201 A.D. 207, 193 N.Y.S. 769, 1922 N.Y. App. Div. LEXIS 6287 (N.Y. App. Div. 1922).

A watchman at a garage among whose duties was that of keeping boys out of and away from the garage suffers injuries arising in and out of the course of his employment where he was fatally stabbed by a youth who had been loitering near the garage, even though the altercation giving rise to the incident arose over matters unrelated to the employment, where the assault was precipitated when the decedent ordered his assailant to leave the garage premises. Corbett v Biewener, 270 A.D. 782, 59 N.Y.S.2d 359, 1946 N.Y. App. Div. LEXIS 3912 (N.Y. App. Div. 1946).

An employee on a large estate who served as a superintendent during the day and a watchman during the night, living on the premises, suffers injuries arising out of and in the course of his employment where he was assaulted upon returning to the premises from an errand when he was about to enter the cottage where he lived, the apparent motive of the assault being the furtherance of a robbery. Riedel v Havemeyer, 277 A.D. 957, 99 N.Y.S.2d 628, 1950 N.Y. App. Div. LEXIS 3986 (N.Y. App. Div. 1950).

Claimant injured while assigned by circus employer to guard back lot and who was stabbed by two assailants seeking to gain entrance thereto was doing his assigned task. Rutledge v Al. G. Kelly & Miller Bros. Circus, 24 A.D.2d 521, 260 N.Y.S.2d 136, 1965 N.Y. App. Div. LEXIS 4007 (N.Y. App. Div. 3d Dep't 1965), aff'd, 18 N.Y.2d 464, 276 N.Y.S.2d 873, 223 N.E.2d 334, 1966 N.Y. LEXIS 949 (N.Y. 1966).

159. —Other particular employees

Award denied where altercation in which decedent participated prior to his collapse did not involve stresses or strains greater than ordinary wear and tear of life. Weinstein v Apex Dress Co., 25 N.Y.2d 947, 305 N.Y.S.2d 157, 252 N.E.2d 634, 1969 N.Y. LEXIS 1051 (N.Y. 1969).

Where a collector, employed as such by a manufacturer of malt liquors while in the performance of his duties in a saloon away from the plant of his employer, was intentionally shot and killed for the purpose of securing money which he had belonging to his employer, his dependents are entitled to award. Spang v Broadway Brewing & Malting Co., 182 A.D. 443, 169 N.Y.S. 574, 1918 N.Y. App. Div. LEXIS 7882 (N.Y. App. Div. 1918).

A building construction employee who became involved in an altercation with employees of another contractor working on the same building and was assaulted, is entitled to an award against his own employer. Mariano v Krasnoger Bros., 190 A.D. 65, 179 N.Y.S. 314, 1919 N.Y. App. Div. LEXIS 4069 (N.Y. App. Div. 1919), modified, 228 N.Y. 609, 127 N.E. 916, 228 N.Y. (N.Y.S.) 609, 1920 N.Y. LEXIS 1085 (N.Y. 1920).

A salesman, whose employment required him to interview patrons of his employer at times and places designated by them, who was shot and fatally injured by an unknown man while waiting in a tavern for a customer, suffers an injury arising out of and in the course of his employment. Christiansen v Hill Reproduction Co., 262 A.D. 379, 29 N.Y.S.2d 24, 1941 N.Y. App. Div. LEXIS 5372 (N.Y. App. Div. 1941), aff'd, 287 N.Y. 690, 39 N.E.2d 300, 287 N.Y. (N.Y.S.) 690, 1942 N.Y. LEXIS 1717 (N.Y. 1942).

An employee who lived on the premises of his employer, a junk yard operator, and who was accidentally shot while at work, by a police officer who entered the premises to solicit the sale of tickets for a police benefit is entitled to an award of compensation. Hall v P. Feldman & Sons, 262 A.D. 979, 30 N.Y.S.2d 70, 1941 N.Y. App. Div. LEXIS 6769 (N.Y. App. Div. 1941).

An employee is injured in the course of his employment when he was assaulted where such assault was a continuation of and directly related to an altercation which had taken place in the employee's place of employment a short time before and the employee was not the aggressor. Longoria v Langner, 271 A.D. 762, 64 N.Y.S.2d 509, 1946 N.Y. App. Div. LEXIS 2890 (N.Y. App. Div. 1946).

An employee who was accidentally shot by a third party while on the employer's premises during the lunch period suffers accidental injuries arising out of and in the course of the employment. Groppe v J. C. Penney Co., 272 A.D. 851, 70 N.Y.S.2d 173, 1947 N.Y. App. Div. LEXIS 3899 (N.Y. App. Div. 1947).

No industrial accident was sustained by claimant who, while an employee of summer hotel, awoke one night with an extensive laceration of her nose. Claimant's dog was in room with her and claimant testified that either dog had bitten her or an unknown person had assaulted her. Physician said injury was not caused by dog bite. There was no evidence of assault. Reed v Loon Lake Hotel, 283 A.D. 763, 128 N.Y.S.2d 112, 1954 N.Y. App. Div. LEXIS 5176 (N.Y. App. Div. 1954).

Claimant, a dancer in a musical play, was invited by his employer to a party for the cast on the night of the play's final performance to be held on the stage after the curtain had rung down. At the party, the claimant was unjustifiably assaulted by a drunken guest who had been invited by the employer and whose condition was known to the employer. Held: claimant's injuries arose out of and in the course of employment. Claim of Claim of Martin v C. A. Productions Co., 9 A.D.2d 550, 189 N.Y.S.2d 528, 1959 N.Y. App. Div. LEXIS 7393 (N.Y. App. Div. 3d Dep't 1959), rev'd, 8 N.Y.2d 226, 203 N.Y.S.2d 845, 168 N.E.2d 666, 1960 N.Y. LEXIS 1070 (N.Y. 1960).

There was no basis for a finding that the cause of injury to claimant was the direct result of a work-connected quarrel with a fellow employee where it appeared that claimant was employed as a truck driver delivering and picking up beer cases, and, on the occasion in question, had an argument with his helper over the manner in which the cases were loaded on the truck; that claimant struck the helper twice and they then agreed to go to a quiet spot in a park some blocks away and settle the matter by a fist fight; that several people congregated as the result of the fray and a police officer then in plain clothes attempted to break it up; and that claimant was shot by the police officer in the resultant melee. Schneck v Piel's Brewery, 11 A.D.2d 826, 202 N.Y.S.2d 569, 1960 N.Y. App. Div. LEXIS 8492 (N.Y. App. Div. 3d Dep't 1960).

Board's finding that claimant's injury did not arise out of and in course of his employment could not be disturbed where it appeared that it resulted from a tussle between him and a free lance workman who was not a coemployee, following months of growing animosity between them, after which claimant had threatened to "get" his assailant, during a knife fight after an exchange of angry words and epithets. Jiminez v Egenhauser, 16 A.D.2d 720, 229 N.Y.S.2d 206, 1962 N.Y. App. Div. LEXIS 10331 (N.Y. App. Div. 3d Dep't 1962).

The activities of a milkman in taking a friend on his route so the two of them could test their guns by shooting at crows were not "an incident of his employment" and "did not arise out of employment"; and the milkman was properly denied benefits for injuries sustained when his friend's gun accidentally discharged as the men rode in the truck. Tyler v Gilbert, 29 A.D.2d 591, 285 N.Y.S.2d 452, 1967 N.Y. App. Div. LEXIS 2766 (N.Y. App. Div. 3d Dep't 1967).

Import manager was in the course of his employment when he was shot in head by unknown assailant in his apartment building, where import manager was journeying home at conclusion of his business meeting to call supervisor and to do additional work until end of working day and employer knew that import manager regularly worked at home and approved of his practice of working at home when returning to office after an outside trip would be impractical. Levi v Interstate Photo Supply Corp., 46 A.D.2d 951, 362 N.Y.S.2d 70, 1974 N.Y. App. Div. LEXIS 3298 (N.Y. App. Div. 3d Dep't 1974).

The Workers' Compensation Board properly determined that the death of a mental health technician who was stabbed on a public street by a former mental patient with whom the technician had worked arose out of and in the course of decedent's employment where the mental patient, while being subdued after a violent episode, had threatened to kill decedent, where, though the actual killing took place three years after the original threat, the mental patient had in the interim openly harassed decedent and his family on several occasions and had repeated his threat to kill him, and where, though the ultimate attack did not occur on or near the employer's premises, the board's finding that the fatal assault had its genesis at the place of employment and was merely consummated later was supported by substantial evidence and not merely by conjecture. Masek v St. Vincent's

Medical Center, 97 A.D.2d 580, 467 N.Y.S.2d 925, 1983 N.Y. App. Div. LEXIS 20195 (N.Y. App. Div. 3d Dep't 1983).

Workers' Compensation Board properly determined that disabling wound sustained by claimant was intentionally inflicted by his wife, and arose from their purely personal differences without any nexus to his employment as police officer or performance of his job duties, even though claimant was on duty at time of incident, where claimant's wife shot him with his service revolver during domestic dispute that erupted during their lunch together. Robinson v Village of Catskill Police Dep't, 209 A.D.2d 748, 617 N.Y.S.2d 975, 1994 N.Y. App. Div. LEXIS 10832 (N.Y. App. Div. 3d Dep't 1994), app. denied, 85 N.Y.2d 810, 628 N.Y.S.2d 53, 651 N.E.2d 921, 1995 N.Y. LEXIS 1460 (N.Y. 1995).

Medical secretary sustained compensable injury when stranger threw acid in her face as she was leaving her place of employment en route to parking garage in which she normally parked her car where her route was usual means of ingress and egress for employees, and employer failed to adduce adequate proof of personal motive for attack on secretary. Boston v Medical Servs. for Women, 215 A.D.2d 845, 626 N.Y.S.2d 320, 1995 N.Y. App. Div. LEXIS 4982 (N.Y. App. Div. 3d Dep't), app. denied, 86 N.Y.2d 706, 632 N.Y.S.2d 499, 656 N.E.2d 598, 1995 N.Y. LEXIS 3457 (N.Y. 1995).

Workers' Compensation Board improperly ruled that claimant's injury arose out of and in course of her employment as podiatrist's assistant where undisputed evidence showed that claimant was on break at her place of employment when her sister entered room and repeatedly struck her with hammer, such assault stemmed from purely personal differences between claimant and her sister and was unrelated to claimant's work or performance of her job duties, and there were no previous violent incidents. McMillan v Dodsworth, 254 A.D.2d 619, 679 N.Y.S.2d 722, 1998 N.Y. App. Div. LEXIS 11212 (N.Y. App. Div. 3d Dep't 1998).

Even if plaintiff were special employee of defendant, defendant was entitled to summary judgment dismissing complaint based on defendant's failure to protect plaintiff from assailant where plaintiff had received workers' compensation benefits for his injuries. Walls v Krasdale Foods, Inc., 266 A.D.2d 5, 697 N.Y.S.2d 612, 1999 N.Y. App. Div. LEXIS 11154 (N.Y. App. Div. 1st Dep't 1999).

160. Employer liability for assaults and injuries inflicted by fellow employees

An award is justified where employee is injured unintentionally by a co-employee where the injury arose out of and in the course of his employment. In re Heitz, 218 N.Y. 148, 112 N.E. 750, 218 N.Y. (N.Y.S.) 148, 1916 N.Y. LEXIS 1054 (N.Y.), reh'g denied, 218 N.Y. 702, 113 N.E. 1057, 218 N.Y. (N.Y.S.) 702, 1916 N.Y. LEXIS 1211 (N.Y. 1916).

Workers' Compensation Board was within its fact-finding province to reject testimony of co-worker who attacked decedent as to his personal motive for homicide, and to conclude that police investigator's testimony that assault was motivated by robbery was insufficient to overcome statutory presumption that dispute was work-related (CLS Work Comp § 21), in light of record evidence that decedent and co-worker had no social ties outside of work, and may have been engaged in dispute over loan of money (which practice was condoned by their employer). Rosen v First Manhattan Bank, 84 N.Y.2d 856, 617 N.Y.S.2d 455, 641 N.E.2d 1073, 1994 N.Y. LEXIS 2774 (N.Y. 1994).

An employee who was, without provocation, assaulted while engaged in his regular work by a co-employee is injured in the course of his employment. Labozetta v Elite Laundry, Inc., 265 A.D. 900, 38 N.Y.S.2d 5, 1942 N.Y. App. Div. LEXIS 6394 (N.Y. App. Div. 1942).; Meimroth v Elk Transp. Co., 263 A.D. 917, 32 N.Y.S.2d 168, 33 N.Y.S.2d 387, 1942 N.Y. App. Div. LEXIS 7356 (N.Y. App. Div.), aff'd, 288 N.Y. 716, 43 N.E.2d 95, 288 N.Y. (N.Y.S.) 716, 1942 N.Y. LEXIS 1551 (N.Y. 1942).; Levy v World-Telegram, 259 A.D. 943, 19 N.Y.S.2d 890, 1940 N.Y. App. Div. LEXIS 7380 (N.Y. App. Div. 1940), aff'd, 285 N.Y. 533, 32 N.E.2d 827, 285 N.Y. (N.Y.S.) 533, 1941 N.Y. LEXIS 1569 (N.Y. 1941).; Burke v Towner Bros., 203 A.D. 384, 196 N.Y.S. 783, 1922 N.Y. App. Div. LEXIS 7205 (N.Y. App. Div. 1922).

Injuries sustained as a result of an unprovoked or an unjustifiable assault by a fellow worker are compensable where the assault stems from a quarrel relating to the employer's business; but where the altercation is an independent affair or a private dispute having no connection with the master's business, or if the injured employee is the aggressor and initiates the quarrel, his injuries are not compensable as an industrial accident. Mazarredo v Levine, 274 A.D. 122, 80 N.Y.S.2d 237, 1948 N.Y. App. Div. LEXIS 3023 (N.Y. App. Div. 1948).

Substantial evidence supported Board's finding that decedent's death was incidental to his employment where the fatal assault upon decedent occurred while decedent was attempting to report to work, and where there was no evidence of any wilful intent on decedent's part. Isaacson v Samson Window Corp., 84 A.D.2d 643, 444 N.Y.S.2d 293, 1981 N.Y. App. Div. LEXIS 15766 (N.Y. App. Div. 3d Dep't 1981).

An employee may bring an action against the employer for personal injuries sustained as a result of a wilful assault committed by a fellow employee, such action not being barred by the Workman's Compensation Act, which covers accidental injury. Quinn v S. A. Healy Co., 140 N.Y.S.2d 925, 1955 N.Y. Misc. LEXIS 2458 (N.Y. Sup. Ct. 1955).

161. —Compensation to aggressors or instigators

Where the claimant, who remained at work for his employer while other employees were on strike, was assaulted and injured by striker while in the street on his way to work, he is not entitled to an award, since injury did not happen in course of his employment. Redner v H. C. Faber & Son Co., 223 N.Y. 379, 119 N.E. 842, 223 N.Y. (N.Y.S.) 379, 1918 N.Y. LEXIS 1194 (N.Y. 1918).; Littler v George A. Fuller Co., 223 N.Y. 369, 119 N.E. 554, 223 N.Y. (N.Y.S.) 369, 1918 N.Y. LEXIS 1192 (N.Y. 1918).; Lampert v Siemons, 235 N.Y. 311, 139 N.E. 278, 235 N.Y. (N.Y.S.) 311, 1923 N.Y. LEXIS 1183 (N.Y. 1923).; See also Douglas v Kenn-Well Contracting Co., 249 N.Y. 609, 164 N.E. 603, 249 N.Y. (N.Y.S.) 609, 1928 N.Y. LEXIS 968 (N.Y. 1928).

Where an employee in a lumber mill was accidentally struck by a rail which was being handled by a fellow servant which caused the claimant to become angry whereupon he kicked the co-employee who in turn retaliated, inflicting physical injuries upon the claimant, an award of compensation will be denied. Griffin v A. Roberson & Son, 176 A.D. 6, 162 N.Y.S. 313, 1916 N.Y. App. Div. LEXIS 8975 (N.Y. App. Div. 1916).. See also Stein v Williams Printing Co., 195 A.D. 336, 186 N.Y.S. 705, 1921 N.Y. App. Div. LEXIS 4743 (N.Y. App. Div. 1921).

Where death or injury is a by-product of associating men in close contacts, compensation awards are proper even to aggressors. Commissioner of Taxation & Finance v Bronx Hospital, 276 A.D. 708, 97 N.Y.S.2d 120, 1950 N.Y. App. Div. LEXIS 4950 (N.Y. App. Div. 1950).

The workmen's compensation law contains no defense that an aggressor or participant is to be denied recovery in horse play cases or in those of malicious assaults; its insertion is purely judicial and sustained only by the court's conclusion that culpable persons should not benefit by their own wrong—the very defense that the compensation act rejects. Commissioner of Taxation & Finance v Bronx Hospital, 276 A.D. 708, 97 N.Y.S.2d 120, 1950 N.Y. App. Div. LEXIS 4950 (N.Y. App. Div. 1950).

Decedent did not sustain an accident arising out of and in the course of his employment where he died as a result of a stab wound inflicted by a coworker on the employer's premises where proof showed that decedent had been drinking whiskey at the plant prior to the incident and thereafter began to abuse the assailant. Zimmerman v Comet Container Corp., 4 A.D.2d 724, 163 N.Y.S.2d 433, 1957 N.Y. App. Div. LEXIS 5135 (N.Y. App. Div. 3d Dep't 1957).

162. —Injuries inflicted by striking or picketing employees

An injury by a striker or strike sympathizer to a strike breaker off of the employer's premises is compensable where the injured employee is subject to call at all hours. Crippen v Press Co., 254 N.Y. 535, 173 N.E. 854, 254 N.Y. (N.Y.S.) 535, 1930 N.Y. LEXIS 1119 (N.Y. 1930).

An employee is injured in the regular course of his employment where, as he was about to enter a motor vehicle provided by his employer to transport him to work, he was assaulted by 4

strikers. Desmarais v M. F. C. Shoring & Foundation Co., 264 A.D. 964, 37 N.Y.S.2d 170, 1942 N.Y. App. Div. LEXIS 5557 (N.Y. App. Div. 1942).

An employee who is assaulted by strikers is not entitled to compensation where it appears that the employee's status as an employee had been terminated when he left the employer's premises. Walsh v Russeks Fifth Ave., 266 A.D. 760, 41 N.Y.S.2d 145, 1943 N.Y. App. Div. LEXIS 4297 (N.Y. App. Div. 1943).

Injuries received by an employee who, while leaving employer's building, was assaulted by other employees picketing the building, were compensable. Cutie v Doge Co., 1 A.D.2d 857, 148 N.Y.S.2d 735, 1956 N.Y. App. Div. LEXIS 6294 (N.Y. App. Div. 3d Dep't), app. denied, 1 N.Y.2d 642, 1956 N.Y. LEXIS 1368 (N.Y. 1956).

163. —Injuries inflicted by employees known to be disruptive; intoxicated or the like

An employee was shot by the fireman in charge of the employer's boiler room as the result of an altercation regarding the leaving of pop bottles in the boiler room where the employees customarily ate their lunch, suffers an injury arising out of and in the course of his employment, where the fireman had threatened to resign unless the superintendent discharged the claimant. Humphrey v Tietjen & Steffin Milk Co., 235 A.D. 470, 257 N.Y.S. 768, 1932 N.Y. App. Div. LEXIS 7991 (N.Y. App. Div. 1932), aff'd, 261 N.Y. 549, 185 N.E. 733, 261 N.Y. (N.Y.S.) 549, 1933 N.Y. LEXIS 1363 (N.Y. 1933).

An award of compensation is proper to the dependents of an employee who died as a result of an assault committed upon him by a co-employee who had been convicted of murder second degree, where the altercation arose out of and in the course of the employment and the co-employee was the aggressor. Fasulo v Denning's Point Brick Works, 262 A.D. 787, 27 N.Y.S.2d 347, 1941 N.Y. App. Div. LEXIS 5852 (N.Y. App. Div. 1941).

Where the claimant was injured in a wash room on the employer's premises during a fight with a coemployee and the evidence showed that the claimant previously had trouble with other employees and threats were directed against him because of turning out more work than they did the evidence was held to sustain the board's finding that the acts of the claimant at the time of the fight were incident to and a risk of employment, and that his injuries arose out of and in the course of employment (he not having initiated or instituted the assault). Vesper v Colonial Radio Corp., 274 A.D. 859, 81 N.Y.S.2d 794, 1948 N.Y. App. Div. LEXIS 3702 (N.Y. App. Div. 1948).

Employee suffered accident when he was assaulted by co-employee who hit him on head, knocked him down and kicked him in the head. Held: there was ample evidence to support finding of causal relation between accident and employee's mental illness. Chicklowski v Hotel Syracuse, Inc., 5 A.D.2d 704, 168 N.Y.S.2d 641, 1957 N.Y. App. Div. LEXIS 3493 (N.Y. App. Div. 3d Dep't 1957).

Claimant, who had been hospitalized for mental illness on 3 occasions and who frequently annoyed fellow workers, used insulting language to fellow employees who thereupon assaulted claimant. Held: assault arose out of and in the course of employment. The employer had notice that mental peculiarity of claimant was having effect on employees and thus it became condition of employment. Bennett v Dreier Structural Steel Co., 8 A.D.2d 178, 186 N.Y.S.2d 776, 1959 N.Y. App. Div. LEXIS 8209 (N.Y. App. Div. 3d Dep't 1959), aff'd, 9 N.Y.2d 668, 212 N.Y.S.2d 79, 173 N.E.2d 53, 1961 N.Y. LEXIS 1548 (N.Y. 1961).

164. —Off premises injuries as continuation of work related conflicts

Where the death of a superintendent occurs through the blow of a discharged employee as he left the building after the close of work, the injury arises out of and in the course of the employment where the quarrel outside the mill was merely a continuation of one begun within. Field v Charmette Knitted Fabric Co., 245 N.Y. 139, 156 N.E. 642, 245 N.Y. (N.Y.S.) 139, 1927 N.Y. LEXIS 600 (N.Y. 1927).

In workers' compensation proceeding, evidence supported conclusion that assault occurred in course of decedent's employment, although his death actually occurred in 18th floor stairwell that was not technically part of employer's premises, where decedent was approached by his attacker (who was his co-worker) in lobby of building where employer's offices were located on arriving for his scheduled tour of duty, and decedent and co-worker rode together on elevator, which was customary route to employer's 17th floor offices. Rosen v First Manhattan Bank, 84 N.Y.2d 856, 617 N.Y.S.2d 455, 641 N.E.2d 1073, 1994 N.Y. LEXIS 2774 (N.Y. 1994).

An award for injuries resulting from an assault by a fellow employee is proper where the quarrel first began in the plant, and the assault outside was a continuance of the early difficulty. Collins v Arobol Mfg. Co., 269 A.D. 915, 57 N.Y.S.2d 504, 1945 N.Y. App. Div. LEXIS 4451 (N.Y. App. Div. 1945).

An assault instigated by a discussion of union matters on the employer's premises during working hours where such matters had previously been discussed with the knowledge and acquiescence of the employer was not, as a matter of law, a purely personal attack and the Board could validly find the assault arose out of and during the course of employment. Williams v Leonard Electric Co., 27 A.D.2d 780, 277 N.Y.S.2d 228, 1967 N.Y. App. Div. LEXIS 4858 (N.Y. App. Div. 3d Dep't 1967).

A claimant injured when a co-employee threw a chemical solution in his eyes after they had finished their day's work and had walked outside some 20 feet to the curb of the sidewalk was properly awarded compensation benefits for disability, upon evidence of a prior argument between the employees during working hours at which time the co-employee threatened claimant. The court held no reasonable opportunity had been offered for the assaulted man to separate himself from the job site with its animosities and dangers. De Boer v Looney, 60 Misc. 2d 673, 303 N.Y.S.2d 607, 1969 N.Y. Misc. LEXIS 1323 (N.Y. Sup. Ct. 1969), aff'd, 34 A.D.2d 674, 311 N.Y.S.2d 832, 1970 N.Y. App. Div. LEXIS 5065 (N.Y. App. Div. 2d Dep't 1970).

165. —Injuries resulting from long-standing animosities

Decedent and another were officers of corporation organized by them. After some time, during which venture had great success, differences developed between them which culminated in killing of decedent by his fellow officer who thereafter killed himself. Board properly found that decedent's death was result of his employment, incident having happened on employer's premises between employees involving business relationship. Muscott v Janice Stores Corp., 6 A.D.2d 921, 175 N.Y.S.2d 746, 1958 N.Y. App. Div. LEXIS 5233 (N.Y. App. Div. 3d Dep't 1958).

Where on the morning following an altercation between co-employees, claimant's decedent was shot by a fellow employee on his employer's premises, and evidence revealed there had been a continually increasing animosity between these co-workers for nearly two years, claimant widow was awarded death benefits upon a finding that the death was accidental and arose out of and in the course of employment, notwithstanding the employer's assertion that the award was not sustainable under the so-called "cooling off period" doctrine. Ward v Typhoon Air Conditioning Co., 27 A.D.2d 785, 277 N.Y.S.2d 315, 1967 N.Y. App. Div. LEXIS 4835 (N.Y. App. Div. 3d Dep't 1967).

Issue of whether concert violinist's death "arose out of" her employment would be remitted to Workers' Compensation Board where (1) violinist was sexually assaulted and murdered during break in performance at concert hall by stagehand employed by hall, (2) board, having determined that assault occurred "in the course of" her employment, relied on presumption in favor of compensability as basis for its decision that violinist's death also "arose out of" her employment, and (3) circumstances of attempted rape and murder, as well as fact that violinist had never met stagehand, supported inference that motivation for attack was unrelated to either stagehand's or violinist's employment, and that stagehand chose his victim arbitrarily. Mintiks v Metropolitan Opera Asso., 153 A.D.2d 133, 550 N.Y.S.2d 143, 1990 N.Y. App. Div. LEXIS 51 (N.Y. App. Div. 3d Dep't), app. dismissed, 75 N.Y.2d 1005, 557 N.Y.S.2d 311, 556 N.E.2d 1118, 1990 N.Y. LEXIS 1008 (N.Y. 1990).

166. —Injuries arising out of jealousy or social matters

Where a waitress employed by a lunch company was shot and killed by a negro employed by the same company because she

refused invitations to go out with him, the murder, while it arose during the course of the employment does not arise out of it. Scholtzhauer v C. & L. Lunch Co., 233 N.Y. 12, 134 N.E. 701, 233 N.Y. (N.Y.S.) 12, 1922 N.Y. LEXIS 832 (N.Y. 1922).. See also Schlener v American News Co., 240 N.Y. 622, 148 N.E. 732, 240 N.Y. (N.Y.S.) 622, 1925 N.Y. LEXIS 850 (N.Y. 1925)., and Chaloux v Royal Knitting Co., 256 N.Y. 567, 177 N.E. 143, 256 N.Y. (N.Y.S.) 567, 1931 N.Y. LEXIS 1147 (N.Y. 1931).

It cannot reasonably be said that an injury arose out of and in the course of employment where claimant, a waitress, was assaulted without cause or provocation by a former fellow employee who had been discharged for reasons not related to the improper advances he had made to claimant while at work, which she refused, threatening to report him to their employer, the assault occurring when he visited the place of employment after having returned earlier and threatened claimant if she told on him. Pryor v Presbyterian Home for Aged Women, 9 N.Y.2d 869, 216 N.Y.S.2d 691, 175 N.E.2d 823, 1961 N.Y. LEXIS 1291 (N.Y. 1961).

Injuries sustained by a female employee when attacked by a co-employee who apparently was jealous of attentions paid to the claimant by a third co-employee of the opposite sex, arise out of and in the course of the employment. Katz v Reissman Rothman Corp., 261 A.D. 862, 24 N.Y.S.2d 807, 1941 N.Y. App. Div. LEXIS 7804 (N.Y. App. Div. 1941).

With respect to an assault and stabbing occurring at a Christmas party given by an employer for all his employees as a regular annual affair, there was held to be sufficient connection between the occurrence and the injuries sustained by claimant to sustain an award where it appeared that there was considerable drinking and dancing at the party by all employees and the stabbing took place because a fellow employee became jealous of claimant for dancing too much with one of the female employees. Torres v Triangle Handbag Mfg. Co., 13 A.D.2d 559, 211 N.Y.S.2d 992, 1961 N.Y. App. Div. LEXIS 12181 (N.Y. App. Div. 3d Dep't 1961).

Evidence supported determination of Workers' Compensation Board that claimant's injury was not compensable where claimant testified that she fell and injured her knee when co-worker grabbed her by her collar during discussion of co-worker's daughter, and co-worker testified that injury occurred as result of discussion with claimant over co-worker's "personal business." Closson v Dutchess County Sheriff's Dep't, 179 A.D.2d 861, 577 N.Y.S.2d 976, 1992 N.Y. App. Div. LEXIS 71 (N.Y. App. Div. 3d Dep't 1992).

167. —Other injuries inflicted by co-workers in the course of employment

Where an oiler of machinery, when accused by his foreman of supplying too much oil to a machine, called the foreman a liar, whereupon the foreman struck him in the face, shattering his glasses and injuring his eye so that he lost the sight thereof, the injury is an accidental one arising out of and in the course of employment. Knocks v Metal Package Corp., 231 N.Y. 78, 131 N.E. 741, 231 N.Y. (N.Y.S.) 78, 1921 N.Y. LEXIS 611 (N.Y. 1921).

A busboy was in the course of his employment when, after arguing with another busboy about working conditions, he told his superior he was quitting, removed apron and left the premises but came back, resumed argument and during ensuing fight, fell down a flight of stairs. Lee Loh Young v Famous Trading Corp., 307 N.Y. 901, 123 N.E.2d 254, 307 N.Y. (N.Y.S.) 901, 1954 N.Y. LEXIS 1581 (N.Y. 1954).

Death of decedent arose out of the employment where he was shot by a co-employee with whom decedent had argued the day before the shooting relative to an argument the co-employee had had with female employees. Seymour v Rivera Appliances Corp., 28 N.Y.2d 406, 322 N.Y.S.2d 243, 271 N.E.2d 224, 1971 N.Y. LEXIS 1248 (N.Y. 1971).

A claimant was injured in the course of his employment where he was assaulted by a fellow-workman while preparing to begin work. Janschewsky v E. W. Bliss Co., 198 A.D. 8, 189 N.Y.S. 154, 1921 N.Y. App. Div. LEXIS 8030 (N.Y. App. Div. 1921).

An employee, assigned to the projection booth in a theater with another to operate the projection machine, will be deemed to have been injured in the course of his employment, where apparently he was killed by the co-employee during the course of the performance, being found dead in the booth by a police officer who also found the co-worker operating the projection machine. Klein v Queens Theatre, 261 A.D. 1024, 25 N.Y.S.2d 826, 1941 N.Y. App. Div. LEXIS 8588 (N.Y. App. Div. 1941).

An employee who, while engaged in his regular employment, is injured in a fight with a fellow employee arising over a dispute concerning the work, is entitled to compensation where there is evidence that the claimant was not the aggressor. Wilson v American Valve Co., 268 A.D. 841, 50 N.Y.S.2d 356, 1944 N.Y. App. Div. LEXIS 3712 (N.Y. App. Div.), reh'g denied, 268 A.D. 935, 51 N.Y.S.2d 747, 1944 N.Y. App. Div. LEXIS 4309 (N.Y. App. Div. 1944).

A Western Union messenger boy, newly hired as such, who is injured in a fight with another messenger boy suffers injuries arising out of and in the course of his employment where it appears that a difference in opinion of the boys as to their relative pugilistic ability, and the desire for dominance and respect within the ranks of their fellow employees apparently led to the contest rather than reasons personal to them. Chanin v Western Union Tel. Co., 271 A.D. 763, 64 N.Y.S.2d 670, 1946 N.Y. App. Div. LEXIS 2896 (N.Y. App. Div. 1946).

Death benefits and funeral expenses were properly awarded where within a few seconds after a fist fight in an argument with a fellow employee, over the work of an assistant, the decedent collapsed and died of an emotional trauma of the heart. Commissioner of Taxation & Finance v Bronx Hospital, 276 A.D. 708, 97 N.Y.S.2d 120, 1950 N.Y. App. Div. LEXIS 4950 (N.Y. App. Div. 1950).

An award of death benefits for a seventy year old hotel cook who died from a heart attack due to shock and emotional strain following an assault upon his assistant and himself by a co-worker whom they refused to provide with food after the supper hour, is proper even though the decedent had suffered a pre-existing heart condition. Krawczyk v Jefferson Hotel, 278 A.D. 731, 103 N.Y.S.2d 40, 1951 N.Y. App. Div. LEXIS 4509 (N.Y. App. Div. 1951).

Award upheld under evidence that the incident arose out of conversation between workers during some idle moments near the end of the work day, a natural diversion for employees whose field assignments have been completed; and that the claimant was injured when a fellow-employee became irritated at a statement claimant had made and threw a pack of cards, striking claimant in the eye resulting in the injury. Greisman v New York State Department of Transp., 33 A.D.2d 1086, 307 N.Y.S.2d 733, 1970 N.Y. App. Div. LEXIS 5479 (N.Y. App. Div. 3d Dep't), app. denied, 26 N.Y.2d 612, 1970 N.Y. LEXIS 1791 (N.Y. 1970).

Court would affirm determination awarding claimant workers' compensation benefits as result of anxiety depression precipitated by co-worker's disparaging racial remarks and taunts concerning claimant's infertility; such remarks constituted more than usual irritations and differences to which all workers are occasionally subject, and fact that claimant was particularly sensitive about her infertility did not undermine award of benefits. Kaliski v Fairchild Republic Co., 151 A.D.2d 867, 542 N.Y.S.2d 841, 1989 N.Y. App. Div. LEXIS 7513 (N.Y. App. Div. 3d Dep't), app. dismissed, 75 N.Y.2d 765, 551 N.Y.S.2d 907, 551 N.E.2d 108, 1989 N.Y. LEXIS 4433 (N.Y. 1989), aff'd, 76 N.Y.2d 1002, 564 N.Y.S.2d 714, 565 N.E.2d 1265, 1990 N.Y. LEXIS 4507 (N.Y. 1990).

Evidence sustained determination of Workers' Compensation Board as to nexus and compensability of injury sustained by claimant in assault by co-employee, despite employer's contention that assault was motivated by long-standing animosity between claimant and co-employee arising outside scope of employment, where claimant was assaulted by co-employee because he supposedly spoke rudely to 2 friends of co-employee, who had approached claimant because of his office position and asked to speak to co-employee. Privatera v Yellow Cab Co., 158 A.D.2d 835, 551 N.Y.S.2d 419, 1990 N.Y. App. Div. LEXIS 1824 (N.Y. App. Div. 3d Dep't 1990).

Employee's death occurred within course of his employment where (1) on arrival at office building at which he worked, employee was approached by coemployee, (2) instead of going to

17th floor, on which his office was located, employee and coemployee rode elevator to 18th floor and then went to stairwell, (3) coemployee asked employee for $200 loan, but employee refused, (4) coemployee became infuriated and murdered employee, and (5) there was no evidence of personal animosity. Rosen v First Manhattan Bank, 202 A.D.2d 864, 609 N.Y.S.2d 436, 1994 N.Y. App. Div. LEXIS 2787 (N.Y. App. Div. 3d Dep't), aff'd, 84 N.Y.2d 856, 617 N.Y.S.2d 455, 641 N.E.2d 1073, 1994 N.Y. LEXIS 2774 (N.Y. 1994).

168. —Other injuries

Where a person employed to drive a truck and to unload same made an attack upon another employee similarly engaged, owing to quarrel in respect to priority in unloading, and was killed as a result of a blow inflicted by his fellow employee, his death is not compensable. Stillwagon v Callan Bros., Inc., 183 A.D. 141, 170 N.Y.S. 677, 1918 N.Y. App. Div. LEXIS 5086 (N.Y. App. Div.), aff'd, 224 N.Y. 714, 121 N.E. 893, 224 N.Y. (N.Y.S.) 714, 1918 N.Y. LEXIS 1122 (N.Y. 1918).

Where death resulted from an assault by co-employees on decedent following an altercation between them concerning stakes held by decedent on a bet, it arose out of a personal matter and had no relationship to the employment. Pecoraro v Russell-Miller Milling Co., 9 A.D.2d 992, 194 N.Y.S.2d 594, 1959 N.Y. App. Div. LEXIS 5312 (N.Y. App. Div. 3d Dep't 1959).

In personal injury action between park employees, defendant was not entitled to summary judgment, on ground that accident occurred within course of his employment and, thus, that workers' compensation was plaintiff's sole remedy, where defendant's vehicle struck plaintiff's bicycle just outside park entrance as plaintiff was leaving park for lunch-hour ride and defendant was turning into park on returning from lunch, park was open to the public, all park visitors used entrance road in same manner, and thus defendant failed to show that accident was causally related to special risk of employment not shared by the public. Geiss v Mitchell, 251 A.D.2d 1067, 674 N.Y.S.2d 220, 1998 N.Y. App. Div. LEXIS 7169 (N.Y. App. Div. 4th Dep't 1998).

169. Injuries in the course of employment; abandonment of employment

Disregard for the precise terms of employment does not necessarily constitute abandonment thereof. Burns v Merritt Engineering Co., 302 N.Y. 131, 96 N.E.2d 739, 302 N.Y. (N.Y.S.) 131, 1951 N.Y. LEXIS 758 (N.Y. 1951).. See also Martucci v Hills Bros. Co., 171 A.D. 370, 156 N.Y.S. 833, 1916 N.Y. App. Div. LEXIS 9428 (N.Y. App. Div. 1916).

Where an employee when last seen prior to his death was in the course of his employment, the burden of showing a deviation from the employment is cast upon those who assert it. Tushinsky v National Broadcasting Co., 265 A.D. 301, 38 N.Y.S.2d 608, 1942 N.Y. App. Div. LEXIS 5739 (N.Y. App. Div. 1942), reh'g denied, 266 A.D. 700, 41 N.Y.S.2d 222, 1943 N.Y. App. Div. LEXIS 3939 (N.Y. App. Div. 1943), app. dismissed, 292 N.Y. 595, 55 N.E.2d 369, 292 N.Y. (N.Y.S.) 595, 1944 N.Y. LEXIS 1754 (N.Y. 1944).

A slight and momentary deviation from claimant's work routine may be acceptable if for an accustomed and accepted purpose, but purely personal activity is not within the statute even though it incidentally benefits the employer. Hancock v Ingersoll-Rand Co., 21 A.D.2d 703, 249 N.Y.S.2d 243, 1964 N.Y. App. Div. LEXIS 3864 (N.Y. App. Div. 3d Dep't 1964).

There was no deviation from employment where decedent, who conducted his work as an insurance agent both at his home and at his office, was killed in an automobile accident while on his way from his office to his home for the purpose of continuing work begun at his office. O'Brien v Metropolitan Life Ins. Co., 39 A.D.2d 990, 333 N.Y.S.2d 450, 1972 N.Y. App. Div. LEXIS 4238 (N.Y. App. Div. 3d Dep't 1972).

Workers' Compensation Board properly determined that claimant employed as police station receptionist had not abandoned or deviated from her employment when, in response to sound of outside explosion, she went out to front stoop of station and was injured as result of smoke, fire, and vapor shooting out of manhole, where claimant stated that she "wanted to see what was happening" and "went to investigate," did not take her coat with her, and returned to her work station after standing on stoop for only one minute. Mendez v New York, 154 A.D.2d 814, 546 N.Y.S.2d 478, 1989 N.Y. App. Div. LEXIS 12721 (N.Y. App. Div. 3d Dep't 1989).

170. —Deviation from route of employment travel for personal purposes

Departure from the course of an employment does not always depend entirely on whether an employee, in making a business trip, was on the route to or from the place where the business was to be transacted. It may also consist of a deviation from the procedure which would normally be followed in accomplishing the business errand, where the death or disability has been the consequence of the deviation. So, a workmen's compensation death claim was dismissed where a bookkeeper was sent out of town, finished his work, started back home, stopped at a relative's for dinner, went to a tavern, returned to the relative's for cards and then was killed at 5:30 A.M. driving home. Pasquel v Coverly, 4 N.Y.2d 28, 171 N.Y.S.2d 848, 148 N.E.2d 899, 1958 N.Y. LEXIS 1155 (N.Y. 1958).

A musician traveling on a good will tour is injured within the scope of his employment even though he may have been purchasing gifts for his personal use; such a slight deviation does not alter the general course of the journey. Tushinsky v National Broadcasting Co., 265 A.D. 301, 38 N.Y.S.2d 608, 1942 N.Y. App. Div. LEXIS 5739 (N.Y. App. Div. 1942), reh'g denied, 266 A.D. 700, 41 N.Y.S.2d 222, 1943 N.Y. App. Div. LEXIS 3939 (N.Y. App. Div. 1943), app. dismissed, 292 N.Y. 595, 55 N.E.2d 369, 292 N.Y. (N.Y.S.) 595, 1944 N.Y. LEXIS 1754 (N.Y. 1944).

A state employee sustains injuries in the course of his employment where he was injured while returning to his home at Kirkwood, New York, in a car engaged by state authorities for the purpose of taking him from his home to Binghamton to sign the payroll and receive his wages, even though after receiving his wages, he engaged in personal matters for a period in excess of that for which the state paid. Callan v State Highway Dep't, 266 A.D. 927, 44 N.Y.S.2d 174, 1943 N.Y. App. Div. LEXIS 5260 (N.Y. App. Div. 1943), aff'd, 293 N.Y. 743, 56 N.E.2d 742, 293 N.Y. (N.Y.S.) 743, 1944 N.Y. LEXIS 2156 (N.Y. 1944).

An insurance adjuster who was injured at 3 a.m. while driving a company truck which he was permitted to use for his own private purposes after he had visited his niece after having made his last business call between 7 and 8 p.m. the preceding evening does not suffer injuries arising out of and in the course of his employment. Applegate v Accident & Casualty Ins. Co., 277 A.D. 1073, 100 N.Y.S.2d 636, 1950 N.Y. App. Div. LEXIS 4523 (N.Y. App. Div. 1950).

The manager of a golf club was not in the course of his employment when he left the clubhouse in his own car, went to a bank, then visited his wife's parents, and injured his hand while changing a tire on his way home. Weaver v Knollwood Country Club, 283 A.D. 1124, 131 N.Y.S.2d 482, 1954 N.Y. App. Div. LEXIS 6492 (N.Y. App. Div. 1954).

Where decedent, employed on a poultry farm for various duties, was killed one evening when the farm station wagon operated by him left the highway after he had delivered eggs to certain customers and was on a direct route back to the farm, his death was nonetheless in course of his employment even though at one stage he had deviated from the direct route to inquire about progress of repairs on his own automobile, which he sometimes likewise used in delivering eggs for the farm. Sullivan v L'Heureux, 18 A.D.2d 1116, 239 N.Y.S.2d 56, 1963 N.Y. App. Div. LEXIS 4017 (N.Y. App. Div. 3d Dep't), app. denied, 13 N.Y.2d 595, 1963 N.Y. LEXIS 1943 (N.Y. 1963).

Injury sustained by claimant, a maintenance man, in an automobile accident, could be found to have been sustained in course of his employment where he was using a company car to take mail from the plant to the post office some three miles away, had general permission to use the car for his private purposes when he saw fit, and the accident occurred while he was on his way to his home from the post office to deliver a loaf of bread, following which he returned to the plant. Murano v Chrysler Corp., 19 A.D.2d 942, 244 N.Y.S.2d 464, 1963 N.Y. App. Div. LEXIS 2845 (N.Y. App. Div. 3d Dep't 1963).

Inside employee was not in scope of his employment where, on his way home from "special errand" for his employer, he deviated

from his course to meet individual with whom he had sexual relations prior to being murdered by that individual. Oehley v Syracuse Boys Club, 151 A.D.2d 825, 542 N.Y.S.2d 799, 1989 N.Y. App. Div. LEXIS 7534 (N.Y. App. Div. 3d Dep't 1989).

171. —Abandonment of site of employment

A special policeman employed to maintain order at a picnic grounds, including the arrest of disturbers of the peace, does not abandon or interrupt his employment by pursuing disorderly patrons who, after causing a disturbance on the grounds, left in an automobile. Where he was killed in attempting to halt the car, his death arose out of and in the course of his employment within the meaning of this chapter. Ruppert v Plattdeutsche Volksfest Verein, 263 N.Y. 338, 189 N.E. 240, 263 N.Y. (N.Y.S.) 338, 1934 N.Y. LEXIS 1280 (N.Y. 1934).

A night watchman, employed to guard a dock which is being repaired, who leaves the dock to visit the owner of a boat fastened nearby, and, while attempting to return, is injured voluntarily abandons his employment and is not injured as a natural incident of his work. King v State Ins. Fund, 184 A.D. 453, 171 N.Y.S. 1032, 1918 N.Y. App. Div. LEXIS 6134 (N.Y. App. Div. 1918).. See also Berg v Great Lakes Dredge & Dock Co., 173 A.D. 82, 158 N.Y.S. 718, 1916 N.Y. App. Div. LEXIS 10382 (N.Y. App. Div. 1916).

Evidence supported determination that claimant's decedent had sustained accidental injury in course of employment where supervisor directed decedent to leave his place of employment with several co-workers to perform an activity for private benefit of supervisor, which was done with knowledge of employer, and he died as result of injury sustained while using employer's equipment. Davis v Alpha Apple, Inc., 184 A.D.2d 893, 585 N.Y.S.2d 550, 1992 N.Y. App. Div. LEXIS 7964 (N.Y. App. Div. 3d Dep't 1992).

Claimant's actions did not constitute deviation from employment, and instead arose out of and in course of his employment for workers' compensation purposes, where he was employed as security guard, and he was injured when he slipped while moving his vehicle in parking lot of department store to which he had been assigned. Fullone v Borg-Warner Corp., 207 A.D.2d 931, 616 N.Y.S.2d 558, 1994 N.Y. App. Div. LEXIS 8814 (N.Y. App. Div. 3d Dep't 1994).

172. —Abandonment of duties of employment

Where a bartender at a fraternal lodge of which he was also a member was injured while dancing with a woman guest, claimant stepped out of his employment and became a member of lodge when he started to dance and claim properly disallowed. Huhn v Freeport Lodge B. P. O. E., 266 A.D. 55, 41 N.Y.S.2d 231, 1943 N.Y. App. Div. LEXIS 3490 (N.Y. App. Div. 1943).

An award for the death of a garage employee killed while driving a customer's car a mile away from the garage must be reversed where it appeared that the employer furnished no pick-up or delivery service and the employee's sole duties were to park and move automobiles inside the garage. Wydth v Shapiro, 277 A.D. 913, 98 N.Y.S.2d 543, 1950 N.Y. App. Div. LEXIS 3828 (N.Y. App. Div. 1950).

There was sufficient evidence to sustain a board finding that a taxicab driver, who sustained injuries in course of a physical altercation with another cab driver, had abandoned his employment when he left his cab standing at the curb with a passenger in it and got out to pursue the argument with the other driver, warranting a denial of a compensation award. Adelstein v Bellride Transp. Corp., 15 A.D.2d 690, 223 N.Y.S.2d 554, 1962 N.Y. App. Div. LEXIS 12004 (N.Y. App. Div. 3d Dep't 1962).

Substantial evidence supported the board's finding that a workman had left his employment without just cause where, due to illness of his wife, not proved by medical evidence, he failed to work one evening a week as required by his employer, and was thus discharged. Rosenberg v Levine, 39 A.D.2d 1004, 333 N.Y.S.2d 597, 1972 N.Y. App. Div. LEXIS 4162 (N.Y. App. Div. 3d Dep't 1972).

Decedent had not deviated from employment at time of accident where decedent engaged in theft of copper downspout from building's exterior while waiting while necessary work material to arrive; board is accorded wide latitude in construing what constitutes reasonable activities of outside workers and, although conduct in removing copper downspout may be criminal, activity is reasonable where employer's foreman confirms that removal of items is common practice in industry and that employees were not fired for engaging in such activities. Richardson v Fiedler Roofing, Inc., 112 A.D.2d 551, 491 N.Y.S.2d 489, 1985 N.Y. App. Div. LEXIS 55909 (N.Y. App. Div. 3d Dep't 1985), aff'd, 67 N.Y.2d 246, 502 N.Y.S.2d 125, 493 N.E.2d 228, 1986 N.Y. LEXIS 18049 (N.Y. 1986).

Since a widow conceded that her husband was found dead in his vehicle after he left a meeting with a client to move the vehicle from a no-parking area, substantial evidence supported the workers' compensation board's decision that the husband was engaged in a personal activity when he died, thereby rebutting the N.Y. Workers' Comp. Law § 21(1) presumption that his death arose out of his employment, thereby defeating the causation required for an award of workers' compensation death benefits under N.Y. Workers' Comp. Law § 2(7). Even though the employer had appealed a workers' compensation law judge's decision to award benefits on the argument that it was improperly denied the opportunity to acquire the husband's medical records and to obtain a medical opinion as to the issue of causality, the board was not restricted to deciding only that evidentiary issue and it properly disallowed the claim on the basis of a lack of causality because the board had continuing jurisdiction under N.Y. Workers' Comp. Law § 123 from prior administrative appeals by the widow to challenge denials of her claim; that continuing jurisdiction allowed the board to disallow the widow's claim since the widow's prior appeals challenged the workers' compensation judge's decisions that causation was lacking. Matter of Nwoko v City of New York, 29 A.D.3d 1070, 814 N.Y.S.2d 386, 2006 N.Y. App. Div. LEXIS 5889 (N.Y. App. Div. 3d Dep't 2006).

173. Employer liability for injury to employees rendering emergency aid

A death benefit award was sustained where decedent, suffering from a severely diseased heart, died while attempting to fix a faulty steampipe. Proof showed that death was caused by strain produced by the emergency. Sleator v National City Bank, 309 N.Y. 708, 128 N.E.2d 415, 309 N.Y. (N.Y.S.) 708, 1955 N.Y. LEXIS 1443 (N.Y. 1955).

A taxi driver is injured in the course of his employment where he is injured attempting to stop a runaway horse, inasmuch as the runaway was a potential menace to the employer's property. Bernadine v National Transp. Co., 266 A.D. 927, 43 N.Y.S.2d 866, 1943 N.Y. App. Div. LEXIS 5261 (N.Y. App. Div. 1943).

174. —Emergency involving co-worker

Where a construction employee went to the assistance of an endangered employee and was injured while attempting to release him, the accident arose out of and in the course of the employment. Waters v William J. Taylor Co., 218 N.Y. 248, 112 N.E. 727, 218 N.Y. (N.Y.S.) 248, 1916 N.Y. LEXIS 1063 (N.Y. 1916).. See also Sassano v Paino, 226 N.Y. 699, 123 N.E. 888, 226 N.Y. (N.Y.S.) 699, 1919 N.Y. LEXIS 1079 (N.Y. 1919).; Mariano v Krasnoger Bros., 228 N.Y. 609, 127 N.E. 916, 228 N.Y. (N.Y.S.) 609, 1920 N.Y. LEXIS 1085 (N.Y. 1920).

Truckmen, employed by a dealer in gasoline and oil to transport these products to local retail stations, are killed in the course of their employment where one of the truckmen had gone to the top of a tank and fell into a manhole located on the tank top and the second truckman went to his assistance, both men being asphyxiated. Dunn v Hambleton Terminal Corp., 257 A.D. 1095, 14 N.Y.S.2d 671, 1939 N.Y. App. Div. LEXIS 9228 (N.Y. App. Div. 1939).

An employee injured while crossing the highway is injured in the course of his employment as a truck driver, where on seeing another truck belonging to his employer parked at a filling station, he stopped on the opposite side of the highway, intending to inquire if the other driver needed assistance, but before crossing had learned there was no need for his aid, and then started to cross in response to an invitation from the other driver, to have a drink. Van Buren v M. Vener Trucking Corp., 258 A.D. 1016, 16 N.Y.S.2d 884, 1940 N.Y. App. Div. LEXIS 8653 (N.Y. App. Div. 1940).

175. —Emergency involving others

Where a chauffeur was killed in a collision while chasing an escaping criminal by order of a policeman, the danger was incidental to the management of the car and the pursuit is a risk of the employment covered by the Workmen's Compensation Law. Babington v Yellow Taxi Corp., 250 N.Y. 14, 164 N.E. 726, 250 N.Y. (N.Y.S.) 14, 1928 N.Y. LEXIS 983 (N.Y. 1928).. See also Heidemann v American Dist. Tel. Co., 230 N.Y. 305, 130 N.E. 302, 230 N.Y. (N.Y.S.) 305, 1921 N.Y. LEXIS 836 (N.Y. 1921)., and Greenberg v Voit, 250 N.Y. 543, 166 N.E. 318, 250 N.Y. (N.Y.S.) 543, 1929 N.Y. LEXIS 926 (N.Y. 1929).

An assistant mill foreman who died from overexertion while running from the plant to his home which he believed to be on fire suffered an accident arising out of and in the course of his employment, where the employer owned all the residences in the hamlet where the plant was located. Andrews v Emporium Forestry Co., 250 N.Y. 592, 166 N.E. 336, 250 N.Y. (N.Y.S.) 592, 1929 N.Y. LEXIS 986 (N.Y. 1929).

Where a flagman at a place where a highway crossed his employer's railroad was killed on another railroad, which paralleled that of his employer, in an attempt to rescue children on said tracks of the latter railroad, the accident did not arise out of and in the course of his employment, where the tracks on which he was killed were protected by another flagman and gateman. Priglise v Fonda, J. & G. R. Co., 192 A.D. 776, 183 N.Y.S. 414, 1920 N.Y. App. Div. LEXIS 7552 (N.Y. App. Div. 1920).

The manager of a restaurant sustained an accident arising out of and in the course of his employment, where in seeking to quell a disturbance he was instructed by a superior to seize a certain person and hold him for the police, and in attempting to do so chased the man out on the sidewalk and in an attempt to catch him climbed on top of a car parked near curb, jumped down, and was injured. Rasmusser v Diplomat Bar & Grill, Inc., 260 A.D. 965, 23 N.Y.S.2d 209, 1940 N.Y. App. Div. LEXIS 5629 (N.Y. App. Div. 1940).

Claimant, a bakery sales manager, who, while returning in a bakery uniform from work in one city to his place of employment in another, was flagged down, stopped to help a motorist with a disabled car, was hit by another car while standing off the road near disabled car. Employer had stressed good public relations. Held: award affirmed. Morningstar v Corning Baking Co., 6 A.D.2d 128, 176 N.Y.S.2d 388, 1958 N.Y. App. Div. LEXIS 5197 (N.Y. App. Div. 3d Dep't), app. denied, 5 N.Y.2d 707, 1958 N.Y. LEXIS 1619 (N.Y. 1958).

176. —Fire fighting activities

A thirteen-year-old helper on a truck who was burned while attempting to extinguish a gutter fire which he thought was menacing his employer's truck is entitled to an award of compensation. Todzia v Marzocca, 272 A.D. 1089, 74 N.Y.S.2d 582, 1947 N.Y. App. Div. LEXIS 5049 (N.Y. App. Div. 1947).

An award to a paper mill employee who, in addition to his regular duties, was chief of the fire brigade of the employer's plant, will be sustained, where the claimant was injured while fighting a fire at the plant even though he was a member of a municipal volunteer fire company and the employer claimed at the time of his injury he was acting in that capacity. Zgrodek v National Gypsum Co., 275 A.D. 1014, 91 N.Y.S.2d 676, 1949 N.Y. App. Div. LEXIS 5491 (N.Y. App. Div. 1949).

A town which is neither a "fire town" nor a "fire district", both as defined by the Conservation Law, is responsible for workmen's compensation benefits payable for injuries occasioned to persons employed by the town supervisor to fight forest or muck fires. 1960 Ops St Compt File #437.

177. —Fire fighting activities; volunteer firemen

Death of a member of a local volunteer fire department killed in extinguishing fire on his employer's premises not during his regular working hours was not compensable. In re Cole, 189 A.D. 306, 178 N.Y.S. 451, 1919 N.Y. App. Div. LEXIS 4651 (N.Y. App. Div. 1919).

All of the members of a volunteer fire department of a fire district are entitled to the same privileges regardless of whether they reside within or without the district, including protection under the provisions of § 205 of the General Municipal Law and the provisions of the Workmen's Compensation Law. 1952 Ops St Compt File #5803.

A village employee, injured in performance of his duty as a volunteer fireman, is not entitled to the excess benefits provided for volunteer firemen under this law when he is receiving full pay as a village employee by reason of sick leave. 1955 Ops St Compt File #7703.

178. Other particular injuries as incurred in course of employment

A resident employee of a boys' summer camp suffered a compensable injury when hurt in off-duty hours while using a recreational facility of an adjacent camp with the employer's knowledge and acquiescence, on grounds that the use of the facility on a regular basis by several boys' camp employees, including the claimant, carried the implied approval of the employer and was in fact an incidental adjunct to the employer's own facilities because of the habitual permitted use of the non-owned facility. Di Perri v Boys Brotherhood Republic, Inc., 31 N.Y.2d 215, 335 N.Y.S.2d 405, 286 N.E.2d 897, 1972 N.Y. LEXIS 1133 (N.Y. 1972).

One employed as a handy man, chauffeur and manager of the employer's apartment building is injured in the course of his employment where, while proceeding to his employer's home after performing duties at the apartment building and collecting rents, he fell on the stairs of a porch of the employer's private home. Lynch v Chilvers, 272 A.D. 1091, 74 N.Y.S.2d 540, 1947 N.Y. App. Div. LEXIS 5060 (N.Y. App. Div. 1947).

Claimant sustained compensable injury within course of her employment when, during her vacation, she slipped and fell on stairs at employer's district office while she was picking up her paycheck since it was mandatory that employees, or authorized person, pick up their paychecks, even if employee was on vacation, and it was employer's policy that paychecks could not be mailed. Berry v New York City Bd. of Educ., 239 A.D.2d 637, 657 N.Y.S.2d 786, 1997 N.Y. App. Div. LEXIS 4528 (N.Y. App. Div. 3d Dep't 1997).

Workers' Compensation Board properly ruled that claimant did not sustain causally related disability, despite his contention that he was injured as a result of fall at work, where he had requested reimbursement from Crime Victims Board for treatment of his injuries, his physician had noted in claimant's medical history that claimant had been injured when he was assaulted and "struck with a bat in the knee," and claimant did not mention his injuries to his employer or co-workers at time they were allegedly sustained and did not request his employer to prepare accident report. Hildenbrandt v Transportation Mfg. Co., 244 A.D.2d 658, 664 N.Y.S.2d 174, 1997 N.Y. App. Div. LEXIS 11485 (N.Y. App. Div. 3d Dep't 1997).

Workers' Compensation Board properly ruled that death of claimant's decedent from overdose of narcotic drug did not arise out of and in course of his employment as medical resident in program for anesthesiology, even though decedent was referred to assessment program for treatment of suspected drug and alcohol abuse, where documentary evidence as to such treatment provided no detail regarding history or nature of decedent's alleged addiction, decedent and claimant both steadfastly denied that decedent had drug or alcohol problem, and there was no medical evidence or testimony by treating physician as to decedent's apparent illness. Gedon v University Med. Residents Servs. P.C., 252 A.D.2d 744, 677 N.Y.S.2d 397, 1998 N.Y. App. Div. LEXIS 8309 (N.Y. App. Div. 3d Dep't), app. denied, 92 N.Y.2d 817, 684 N.Y.S.2d 488, 707 N.E.2d 443, 1998 N.Y. LEXIS 4293 (N.Y. 1998).

Finding that the claimant in a workers' compensation action was permanently partially disabled was improper where he did not demonstrate that his lung condition was attributable to a distinctive feature of his job as a delivery truck driver; rather, his affliction appeared to have been a result of the specific environment in which he worked. Engler v UPS, 1 A.D.3d 854, 767 N.Y.S.2d 496, 2003 N.Y. App. Div. LEXIS 12602 (N.Y. App. Div. 3d Dep't 2003).

Appeals court's prior decisions did not foreclose workers' compensation board from considering other compensable scenarios where compelling factual circumstances warranted. Palmer v

N.Y. State Div. for Youth, 2 A.D.3d 1123, 768 N.Y.S.2d 694, 2003 N.Y. App. Div. LEXIS 13524 (N.Y. App. Div. 3d Dep't 2003), app. denied, 2 N.Y.3d 705, 780 N.Y.S.2d 310, 812 N.E.2d 1260, 2004 N.Y. LEXIS 932 (N.Y. 2004).

Workers' compensation board's decision to award benefits for an injury an employee suffered going to an insurer's routine review (that was not for medical treatment) of a prior workers' compensation claim was proper; the appeals court agreed that the injury was a work-related consequential injury even though the injury did not occur while en route to obtaining causally related medical treatment because (1) the employee's purpose for traveling to the meeting was wholly related to the employee's prior claim, (2) the meeting was scheduled at the insurer's request and for the insurer's sole benefit, and (3) the employee would not have incurred the injuries had the insurer not requested the meeting. Palmer v N.Y. State Div. for Youth, 2 A.D.3d 1123, 768 N.Y.S.2d 694, 2003 N.Y. App. Div. LEXIS 13524 (N.Y. App. Div. 3d Dep't 2003), app. denied, 2 N.Y.3d 705, 780 N.Y.S.2d 310, 812 N.E.2d 1260, 2004 N.Y. LEXIS 932 (N.Y. 2004).

179. —Injuries caused by fires, stoves and other heating or cooking apparatus

An award does not lie where a night watchman was found dead on the premises in a bed furnished for his use by the employer and death was caused by gas escaping from a stove used by him in preparing his food. Commissioner of Taxation & Finance v Fure, 264 N.Y. 678, 191 N.E. 623, 264 N.Y. (N.Y.S.) 678, 1934 N.Y. LEXIS 1720 (N.Y. 1934).

Loss of an eye through a spark from a fire which the employee had kindled to warm himself and his fellow-workers on a cold day, is from an injury arising out of and in the course of employment. Malandrino v Southern N. Y. P. & R. Corp., 190 A.D. 780, 180 N.Y.S. 735, 1920 N.Y. App. Div. LEXIS 4248 (N.Y. App. Div. 1920).

It cannot be said as a matter of law that injuries caused as the result of a fire which the employee built in a mortar tub to warm himself while working upon a scaffold did not arise from the employee's employment. Strand v Harris Structural Steel Co., 260 A.D. 516, 23 N.Y.S.2d 630, 1940 N.Y. App. Div. LEXIS 4643 (N.Y. App. Div. 1940), amended, 261 A.D. 847, 25 N.Y.S.2d 1009, 1941 N.Y. App. Div. LEXIS 7749 (N.Y. App. Div. 1941).

180. —Injuries caused by falling objects

A workman, engaged in excavating beside a building and injured by a falling piece of cornice therefrom, is entitled to compensation. Filitti v Lerode Homes Corp., 244 N.Y. 291, 155 N.E. 579, 244 N.Y. (N.Y.S.) 291, 1927 N.Y. LEXIS 1056 (N.Y. 1927).. See also McCarter v La Rock, 240 N.Y. 282, 148 N.E. 523, 240 N.Y. (N.Y.S.) 282, 1925 N.Y. LEXIS 730 (N.Y. 1925), limited, De Angelis v Garfinkel Painting Co., 20 A.D.2d 162, 245 N.Y.S.2d 485, 1963 N.Y. App. Div. LEXIS 2576 (N.Y. App. Div. 3d Dep't 1963).

A death benefit award was sustained where pipefitter sustained an accident in 1950 when a plank from an overhead beam fell on his head and a month later, due to the nature of heavy and awkward work he performed on that day, died from a rupture of the aneurysm of the middle cerebral artery. Edwards v Carborundum Co., 284 A.D. 1076, 136 N.Y.S.2d 19, 1954 N.Y. App. Div. LEXIS 4608 (N.Y. App. Div. 1954), reh'g denied, 285 A.D. 987, 139 N.Y.S.2d 285, 1955 N.Y. App. Div. LEXIS 6384 (N.Y. App. Div. 1955).

It was proper to rule that claimant did not sustain accident arising out of and in course of employment where he conceded that when incident occurred, he did not complain of any injury to his supervisor, who was nearby, claimant continued to work until he was laid off and did not seek medical treatment or report injury to employer until several weeks later, and employer's project superintendent, who conducted investigation after claimant reported injury, found no one present at time of incident who could substantiate claimant's claim that shower stall he was carrying fell on his leg and injured his knee. Marshall v Murnane Assocs., 267 A.D.2d 639, 699 N.Y.S.2d 585, 1999 N.Y. App. Div. LEXIS 12761 (N.Y. App. Div. 3d Dep't 1999), app. denied, 94 N.Y.2d 762, 707 N.Y.S.2d 622, 729 N.E.2d 341, 2000 N.Y. LEXIS 825 (N.Y. 2000).

181. —Injuries caused by falling objects; objects from premises outside employer's control

An injury to a workman, while at work on a building being erected by his employer, from flying fragments of a shell which had been preserved on adjoining premises as a war souvenir, and exploded, is not an accidental injury "arising out of . . . employment" within the meaning of this section. Statute requires that there shall be some causal connection between employment and accident causing injuries. McCarter v La Rock, 240 N.Y. 282, 148 N.E. 523, 240 N.Y. (N.Y.S.) 282, 1925 N.Y. LEXIS 730 (N.Y. 1925), limited, De Angelis v Garfinkel Painting Co., 20 A.D.2d 162, 245 N.Y.S.2d 485, 1963 N.Y. App. Div. LEXIS 2576 (N.Y. App. Div. 3d Dep't 1963).

Where an object falls from adjoining premises and injury results, the injury arises "out of and in the course of the employment." Filitti v Lerode Homes Corp., 244 N.Y. 291, 155 N.E. 579, 244 N.Y. (N.Y.S.) 291, 1927 N.Y. LEXIS 1056 (N.Y. 1927).. See also State Industrial Comm'r v Leff, 265 N.Y. 533, 193 N.E. 307, 265 N.Y. (N.Y.S.) 533, 1934 N.Y. LEXIS 1147 (N.Y. 1934).

An injury arises out of and in the course of employment where an iron pipe full of hot emery dropped from the eighth floor of the building in which the employer occupied a lower floor, and set fire to the employee's clothing even though the pipe fell from the place of business of a third person which had no connection with or relation to the employer's business. Bandassi v Molla, 200 A.D. 266, 192 N.Y.S. 776, 1922 N.Y. App. Div. LEXIS 8166 (N.Y. App. Div.), aff'd, 234 N.Y. 554, 138 N.E. 444, 234 N.Y. (N.Y.S.) 554, 1922 N.Y. LEXIS 735 (N.Y. 1922).

182. —Injuries sustained during cleaning up activities

A carpenter who had been handling chalk in the course of his employment and who went to the washroom before the closing of the days work to wash his hands, was at that time in the discharge of his duties and in the course of his employment. Mariano v Krasnoger Bros. (1919) 190 App Div 65, 179 NYS 314, mod (1920) 228 NY 609, 127 NE 916.. See also Sexton v Public Service Com., 180 A.D. 111, 167 N.Y.S. 493, 1917 N.Y. App. Div. LEXIS 8109 (N.Y. App. Div. 1917).

Where member of Workmen's Compensation Board fell in bathtub after day's session was ended, disability occurred as a result of a personal act and was noncompensable. Paduano v New York State Workmen's Compensation Bd., 30 A.D.2d 1009, 294 N.Y.S.2d 318, 1968 N.Y. App. Div. LEXIS 3124 (N.Y. App. Div. 3d Dep't 1968), aff'd, 25 N.Y.2d 669, 306 N.Y.S.2d 476, 254 N.E.2d 776, 1969 N.Y. LEXIS 976 (N.Y. 1969).

183. —Injuries sustained during waiting periods

Claimant was in the course of his employment where, after reporting to work, he was told to wait until another operation had been completed, and while waiting was injured when he attempted to repair the car of a fellow employee. Ingraham v Lane Constr. Corp., 309 N.Y. 899, 131 N.E.2d 577, 309 N.Y. (N.Y.S.) 899, 1955 N.Y. LEXIS 1638 (N.Y. 1955).

Where a livery stable employee who was thrown from his vehicle as he returned from a trip wrapped a robe about himself, sat down to await a passing conveyance and fell asleep suffering as a result of the exposure incident thereto a frozen foot, the injury arose out of and in the course of the employment. Cleveland v Rice, 209 A.D. 257, 204 N.Y.S. 423, 1924 N.Y. App. Div. LEXIS 8602 (N.Y. App. Div.), aff'd, 239 N.Y. 530, 147 N.E. 182, 239 N.Y. (N.Y.S.) 530, 1924 N.Y. LEXIS 540 (N.Y. 1924).. See also Phonville v New York & Cuba Mail S.S. Co., 226 N.Y. 622, 123 N.E. 258, 123 N.E. 885, 226 N.Y. (N.Y.S.) 622, 1919 N.Y. LEXIS 984 (N.Y. 1919).; Quick v Fred E. Illston Ice Co., 195 A.D. 676, 186 N.Y.S. 690, 1921 N.Y. App. Div. LEXIS 4817 (N.Y. App. Div. 1921).

Decedent, driver of tractor-trailers, died of carbon monoxide poisoning while sleeping in his own car on employer's lot waiting for opportunity and proper seniority to get assignment of work. He had traveled from home in New Jersey to Detroit and then to Buffalo at direction of employer. Death arose out of and in the course of employment. Alwine v Haines Car-Riers, Inc., 5 A.D.2d 892, 171 N.Y.S.2d 124, 1958 N.Y. App. Div. LEXIS 6700 (N.Y. App. Div. 3d Dep't), app. denied, 4 N.Y.2d 676, 174 N.Y.S.2d 1025, 1958 N.Y. LEXIS 1427 (N.Y. 1958).

Where an employee, as part of his duties, is directed to remain in a particular place or locality until directed otherwise or for a specified length of time, the rule applied is simply that the employee is not expected to wait immobile, but may indulge in any reasonable activity at that place, and if he does so the risk inherent in such activity is an incident of his employment. Robards v New York Div. Electric Products, Inc., 33 A.D.2d 1067, 307 N.Y.S.2d 599, 1970 N.Y. App. Div. LEXIS 5523 (N.Y. App. Div. 3d Dep't 1970).

Workers' Compensation Board properly determined that concert violinist's death occurred "in course of" her employment where she was sexually assaulted and murdered during break in performance of ballet in which she was member of orchestra; violinist's activity in leaving orchestra pit to locate dancer-choreographer during break between performances was reasonable and did not constitute deviation from her employment. Mintiks v Metropolitan Opera Asso., 153 A.D.2d 133, 550 N.Y.S.2d 143, 1990 N.Y. App. Div. LEXIS 51 (N.Y. App. Div. 3d Dep't), app. dismissed, 75 N.Y.2d 1005, 557 N.Y.S.2d 311, 556 N.E.2d 1118, 1990 N.Y. LEXIS 1008 (N.Y. 1990).

184. —Injuries sustained during return to workplace outside regular duty hours

Death of a taxicab driver killed on the way back to his cab after having gone to the garage to collect his pay check after taking his cab from the garage and parking it, occurs in the course of and out of his employment. Younger v Motor Cab Transp. Co., 260 N.Y. 396, 183 N.E. 863, 260 N.Y. (N.Y.S.) 396, 1933 N.Y. LEXIS 768 (N.Y. 1933).. See also Cunningham v Hunterspoint Lumber & Supply Co., 256 N.Y. 574, 177 N.E. 146, 256 N.Y. (N.Y.S.) 574, 1931 N.Y. LEXIS 1154 (N.Y. 1931).; Commissioner of Taxation & Finance v Bergin, 262 N.Y. 673, 188 N.E. 115, 262 N.Y. (N.Y.S.) 673, 1933 N.Y. LEXIS 1204 (N.Y. 1933).

Injuries sustained by one who had worked for his employer for several years but who was laid off when work was slack, his tools, however, remaining at the place of work during the period of his layoff, and who while going to the place of work following instructions by the foreman to return for work in a few days was drowned as the result of an explosion on the steamboat on which he was traveling, were accidental injuries arising out of and in the course of his employment. Buchignani v Ronald Taylor Co., 281 N.Y. 707, 23 N.E.2d 540, 281 N.Y. (N.Y.S.) 707, 1939 N.Y. LEXIS 1155 (N.Y. 1939).

Where a yard engineman after turning in his engine and his slip showing that his run had been completed walks along the tracks for a distance and enters on a right of way of an elevated railroad conducted by his employer, for the purpose of catching a passing freight train in order to arrive at a certain place to collect his pay, and is struck and killed by such train, his injuries do not arise out of and in the course of his employment since he was not employed on the line where the accident happened. Ames v New York C. R. Co., 178 A.D. 324, 165 N.Y.S. 84, 1917 N.Y. App. Div. LEXIS 6448 (N.Y. App. Div. 1917).

Where a clerk in a wholesale hardware establishment had departed at five thirty-five, his quitting time being five-thirty, but, remembering that companions with whom he usually went home were still in the building, returned, and while in search of them was killed the accident did not arise out of his employment, as his act of returning and other acts thereafter were voluntary, and therefore not compensable. Urban v Topping Bros., 184 A.D. 633, 172 N.Y.S. 432, 1918 N.Y. App. Div. LEXIS 6618 (N.Y. App. Div. 1918).

A chamber maid who several days after quitting work returned to the defendant's hotel to collect wages due was not an employee at that time and an injury then suffered when she fell down stairs does not arise in the course of her employment. Olson v Hulbert-Sherman Hotel Co., 210 A.D. 537, 206 N.Y.S. 427, 1924 N.Y. App. Div. LEXIS 6785 (N.Y. App. Div. 1924).

Injuries received after working hours while the employee was en route from the office of the employer, located about three blocks from the place of employment, where he had gone to obtain his pay check are not compensable. Fisher v Burns Bros. Coal Co., 264 A.D. 964, 37 N.Y.S.2d 168, 1942 N.Y. App. Div. LEXIS 5559 (N.Y. App. Div. 1942).

An employee having no duties requiring presence on the public streets, who after leaving the employer's plant for home decided to return to determine whether the public address system which she was supposed to look after had been turned off was held as a matter of law not entitled to compensation for injuries sustained in falling as she turned around. Milberg v Behr-Manning Corp., 274 A.D. 862, 82 N.Y.S.2d 16, 1948 N.Y. App. Div. LEXIS 3714 (N.Y. App. Div. 1948).

A butcher who went to his employer's plant, which was closed because of the meat shortage to obtain his previous week's pay and then waited an hour to see his employer about returning to work the next week, does not suffer injuries arising in the course of and out of his employment where he fell after having talked to his employer and having gone to the men's room. Piekut v Philip Fleischer, Inc., 276 A.D. 702, 97 N.Y.S.2d 767, 1950 N.Y. App. Div. LEXIS 4949 (N.Y. App. Div. 1950).

The evidence was sufficient to sustain a finding that claimant's accident arose out of and in course of his employment, although he had not worked for his employer for two and one-half working days prior to its occurrence, because of illness, where the accident occurred while he was looking around the premises on which he had been employed in order to advise the foreman that he would need a few weeks of rest before returning to work, having previously been advised by his employer to return to work as soon as he was able, and the accident consisted of falling over a ladder in the boiler room area of the premises while still looking for the foreman to explain his inability to return to work earlier. Bardes v East River Housing Corp., 14 A.D.2d 939, 221 N.Y.S.2d 51, 1961 N.Y. App. Div. LEXIS 7874 (N.Y. App. Div. 3d Dep't 1961).

Where a claimant, seeking compensation for injuries sustained when struck by an automobile on a public street on his way home from his place of employment, contends that he was going home to get keys with which to return to the employer's premises and lock up certain valuables, he has the burden of proving that such was the reason for the trip, and whether it was rests within the fact-finding power of the Board, whose disbelief in his contention in the absence of supporting evidence would not be overturned. Rothschild v Flatbush Jewish Center, 18 A.D.2d 1045, 238 N.Y.S.2d 581, 1963 N.Y. App. Div. LEXIS 4189 (N.Y. App. Div. 3d Dep't 1963).

Workers' Compensation Board properly ruled that claimant, correction officer, sustained causally related injury when he slipped and fell on curb in front of main entrance to facility while en route to pickup is paycheck on his day off, especially since employer's document entitled "Paycheck Distribution Procedures" indicated that while arrangements could be made for employer to mail paychecks to employee's residence, expected procedure was for employees to pickup their paychecks in person. Dandola v New York City Dep't of Correction, 244 A.D.2d 729, 664 N.Y.S.2d 392, 1997 N.Y. App. Div. LEXIS 11762 (N.Y. App. Div. 3d Dep't 1997).

A waitress who after changing to street clothes was on her way out at the end of her working day was injured upon returning to the dressing room for the purpose of borrowing money from a fellow employee is not injured within the course of her employment, so as to prevent her from maintaining a negligence action against the employer. Jones v Herbert Equities, Inc., 60 N.Y.S.2d 88, 186 Misc. 163, 1946 N.Y. Misc. LEXIS 1826 (N.Y. App. Term), aff'd, 270 A.D. 922, 62 N.Y.S.2d 612, 1946 N.Y. App. Div. LEXIS 4653 (N.Y. App. Div. 1946).

185. —Injuries sustained in the course of activities performed outside usual working hours

Where an employee, at the request of his employer and after his regular working hours, renders service which, if it had been performed during working hours, would have been incidental to his employment, such service is part of his employment within the meaning of the Work. Comp. Law. Grieb v Hammerle, 222 N.Y. 382, 118 N.E. 805, 222 N.Y. (N.Y.S.) 382, 1918 N.Y. LEXIS 1468 (N.Y. 1918).. See also Jessup v Wrigley, 250 N.Y. 563, 166 N.E. 325, 250 N.Y. (N.Y.S.) 563, 1929 N.Y. LEXIS 951 (N.Y. 1929).; Clow v B. F. Keith's Fordham Theater, 247 N.Y. 583, 161 N.E. 191, 247 N.Y. (N.Y.S.) 583, 1928 N.Y. LEXIS 1184 (N.Y. 1928).

The claimant was not injured in the course of her employment where, employed as a laundress, she was given privilege, as part

compensation for her work, of using plant of employer after hours to do her own laundry, and while so engaged she injured her wrist. Daly v Bates & Roberts, 224 N.Y. 126, 120 N.E. 118, 224 N.Y. (N.Y.S.) 126, 1918 N.Y. LEXIS 864 (N.Y. 1918).

A watchman at a canal terminal is injured in the course of his employment where a taxicab in which he was riding on his way home was accidentally driven into the canal before leaving the premises of the terminal resulting in the death of the watchman, even though after finishing his work before calling the cab, the employee changed his clothes, washed up and sat down for awhile. Schwartz v State, 251 A.D. 634, 297 N.Y.S. 815, 1937 N.Y. App. Div. LEXIS 7013 (N.Y. App. Div. 1937), aff'd, 277 N.Y. 567, 13 N.E.2d 476, 277 N.Y. (N.Y.S.) 567, 1938 N.Y. LEXIS 1051 (N.Y. 1938).

A brewery worker employed as an all around man is entitled to compensation where, while engaged in his regular occupation within the premises of the employer he tripped and fell on stairs leading to the washroom, even though he ordinarily would have finished his work before the accident happened. O'Grady v Fidelio Brewery, Inc., 257 A.D. 880, 11 N.Y.S.2d 996, 1939 N.Y. App. Div. LEXIS 8258 (N.Y. App. Div. 1939).

A truck driver is injured in the course of his employment where his injury occurred on the route from his employer's premises where he had unloaded to the garage where the truck was kept at the end of the day, even though the accident occurred sometime later than the period required to return to the garage and an examination after the truck driver's death revealed alcohol in his brain, a witness having testified that the truck was being driven in a proper manner just before the accident. Grabusch v Western Beer Corp., 263 A.D. 1027, 33 N.Y.S.2d 463, 1942 N.Y. App. Div. LEXIS 7946 (N.Y. App. Div. 1942).

One employed by a hospital as a seamstress who, along with other employees, was permitted to use the laundry facilities of the hospital during lunch hour, is not injured in the course of her employment when, while using such facilities, she burns her right arm, even though there was evidence that the article the claimant was ironing at the time of her injury was not her personal laundry. Mermelstein v Beth Israel Hospital, 270 A.D. 968, 62 N.Y.S.2d 53, 1946 N.Y. App. Div. LEXIS 4887 (N.Y. App. Div. 1946).

An award of compensation for death of a carpenter who worked regularly on the day shift and died from burns suffered in a fire at the plant at 3:30 a.m., where in addition to decedent's hearsay statements that he was returning to work, there was proof that he received a telephone call before his statement to a member of his family that he had to go to work, that he was seen in the plant with his lunch and in his work clothes, that he had worked some hours on the day before the accident in the department in which he said he was going to work, and on at least one previous occasion he had checked in for work at 5:42 a.m. Jones v Acme Steel Corp., 278 A.D. 595, 101 N.Y.S.2d 785, 1951 N.Y. App. Div. LEXIS 4060 (N.Y. App. Div. 1951).. See also Van Riper v Newman, 250 A.D. 801, 294 N.Y.S. 130, 1937 N.Y. App. Div. LEXIS 9054 (N.Y. App. Div. 1937).

Decedent, porter in employer's bar and restaurant, fell down stairs and died. Decedent's ordinary work was finished at time of fall but there was testimony by employer that decedent frequently stayed around and made himself useful. Testimony was sufficient to sustain finding that decedent's activity at time of death was reasonably incidental to employment. Kier v Baugh, 5 A.D.2d 1023, 173 N.Y.S.2d 325, 1958 N.Y. App. Div. LEXIS 6177 (N.Y. App. Div. 3d Dep't), reh'g denied, 6 A.D.2d 947, 176 N.Y.S.2d 250, 1958 N.Y. App. Div. LEXIS 5273 (N.Y. App. Div. 3d Dep't 1958), app. denied, 5 N.Y.2d 707, 1958 N.Y. LEXIS 1614 (N.Y. 1958).

A cab driver who, after checking in his cab at the employer's garage, found that he had forgotten his photograph, and, being told that the cab was in the alley, slipped and fell on the driveway crossing, which was part of the garage facilities, sustaining injuries, in attempting to locate the cab and get his photograph, was injured in course of employment. Moskowitz v Granata, 9 A.D.2d 310, 193 N.Y.S.2d 744, 1959 N.Y. App. Div. LEXIS 5597 (N.Y. App. Div. 3d Dep't 1959), reh'g denied, 10 A.D.2d 776, 200 N.Y.S.2d 366, 1960 N.Y. App. Div. LEXIS 11016 (N.Y. App. Div. 3d Dep't 1960), app. denied, 8 N.Y.2d 705, 1960 N.Y. LEXIS 1759 (N.Y. 1960).

Where an employer authorizes an employee to do certain repair work for the benefit of a fellow employee, it may be implied that the authorization extends to doing the work properly, even though this requires work beyond the usual working hours, so that injuries sustained in course of continuing the particular work after hours may be considered within the scope of employment. Lippman v Biennier Transp. Co., 12 A.D.2d 681, 207 N.Y.S.2d 867, 1960 N.Y. App. Div. LEXIS 6755 (N.Y. App. Div. 3d Dep't 1960), aff'd, 10 N.Y.2d 757, 219 N.Y.S.2d 608, 177 N.E.2d 50, 1961 N.Y. LEXIS 1113 (N.Y. 1961).

Where claimant was employed on a day-to-day basis, and on the day in question, was told that there was no work and, as he was leaving his ordinary place of employment he saw another employee working and volunteered to assist him at which time the injury was sustained, an award was upheld as the board could reasonably find that the injury was sustained in the course of employment. Laird v Springer, 31 A.D.2d 682, 295 N.Y.S.2d 872, 1968 N.Y. App. Div. LEXIS 2609 (N.Y. App. Div. 3d Dep't 1968).

In a workers' compensation case involving an employee who was injured at a picnic organized by several coemployees, the board properly found that the injuries arose out of and in the course of employment where arrangements for the picnic were initiated by the employer's manager in order to boost morale, where the employer contributed toward the picnic, and where announcements of the picnic were made over the employer's public address system. Lingyak v J. C. Penney Co., 89 A.D.2d 655, 453 N.Y.S.2d 264, 1982 N.Y. App. Div. LEXIS 17772 (N.Y. App. Div. 3d Dep't 1982).

While employer may have indirectly benefited from accountant's voluntary membership on weekly bowling team sponsored by one of his clients, Workers' Compensation Board correctly concluded that his fatal heart attack resulted from voluntary participation in off-duty athletic activity. Dorosz v Green & Seifter, 250 A.D.2d 931, 672 N.Y.S.2d 948, 1998 N.Y. App. Div. LEXIS 5681 (N.Y. App. Div. 3d Dep't 1998), aff'd, 92 N.Y.2d 672, 685 N.Y.S.2d 406, 708 N.E.2d 162, 1999 N.Y. LEXIS 35 (N.Y. 1999).

Claimant's knee injury while playing basketball with co-workers at gym on his employer's premises after his shift had ended was properly found to have arisen out of and in course of his employment where employer provided all equipment and employed coordinator who managed gym and employer's programs, employer offered incentives for using gym whereby employees could earn points toward gift certificates, movie tickets, and other benefits, employer also distributed flyers promoting use of gym, and claimant testified that one of those flyers referred to basketball. Baker v Sentry Group, 269 A.D.2d 668, 703 N.Y.S.2d 299, 2000 N.Y. App. Div. LEXIS 1278 (N.Y. App. Div. 3d Dep't 2000).

186. —Injuries sustained in the course of activities performed outside usual working hours; off-duty law enforcement personnel

A city policeman who checked in and out of the station house at start and end of the day and who was responsible for keeping order even when off duty was not entitled to compensation when he broke his leg after tripping on a curb in getting out of the car of a friend who had driven him home after he checked out. Blackley v Niagara Falls, 284 A.D. 51, 130 N.Y.S.2d 77, 1954 N.Y. App. Div. LEXIS 3337 (N.Y. App. Div. 1954).

Road laborer who was injured while attempting to wash himself in stream while waiting for truck to pick up road crew at end of day was injured in manner reasonably incidental to his employment. Putnam v New York State Dep't of Public Works, 24 A.D.2d 801, 263 N.Y.S.2d 796, 1965 N.Y. App. Div. LEXIS 3239 (N.Y. App. Div. 3d Dep't 1965).

Injury was compensable under evidence that an off-duty patrolman, employed by a housing authority, saw two men stealing tires from a parked automobile and was injured while attempting to apprehend them. Washington v New York City Hous. Auth., 31 A.D.2d 700, 295 N.Y.S.2d 845, 1968 N.Y. App. Div. LEXIS 2574 (N.Y. App. Div. 3d Dep't 1968), aff'd, 24 N.Y.2d 912, 301 N.Y.S.2d 642, 249 N.E.2d 481, 1969 N.Y. LEXIS 1335 (N.Y. 1969).

Where city correction officer was injured while off duty in attempting to pursue thieves he observed robbing a cash register, such injuries were compensable. Quinlan v New York, 33 A.D.2d 714, 305 N.Y.S.2d 4, 1969 N.Y. App. Div. LEXIS 2871 (N.Y. App. Div. 3d Dep't 1969).

Whether or not off-duty police officer, who, upon hearing noise at his front door while resting at home, ran out of house and, upon discovering that his door had been vandalized, chased two boys standing outside and fell and injured himself, had "probable cause" to arrest boys would go only to legality of arrest and would not be conclusive as to whether or not policeman was in course of his employment when he acted, for purposes of recovering workmen's compensation. Kelly v County of Nassau, 58 A.D.2d 681, 395 N.Y.S.2d 733, 1977 N.Y. App. Div. LEXIS 12783 (N.Y. App. Div. 3d Dep't 1977).

Workmen's Compensation Board's decision that claimant, who was not on active duty at time, was nonetheless acting as policeman at time he sustained injuries in fall while chasing boys standing outside his house after front door to house was vandalized was supported by substantial evidence. Kelly v County of Nassau, 58 A.D.2d 681, 395 N.Y.S.2d 733, 1977 N.Y. App. Div. LEXIS 12783 (N.Y. App. Div. 3d Dep't 1977).

Issue of whether workmen's compensation claimant, a police officer, was involved in personal activity at time of accident, which occurred when he, upon hearing noise at his front door while resting at home while off active duty, ran out of house and, upon discovering that his door had been vandalized, chased two boys standing outside and fell and injured himself, was factual and Workmen's Compensation Board's decision that claimant was acting as policeman at time was conclusive. Kelly v County of Nassau, 58 A.D.2d 681, 395 N.Y.S.2d 733, 1977 N.Y. App. Div. LEXIS 12783 (N.Y. App. Div. 3d Dep't 1977).

187. —Injuries sustained in connection with seeking or receiving first aid or medical treatment

Where an employee had a dispute with her boss with regard to her work and as a result fainted, she is not entitled to compensation for injuries when ammonia was thrown in her face by a co-employee to revive her, since although the injuries arose in the course of her employment, they did not rise out of such employment. Saenger v Locke, 220 N.Y. 556, 116 N.E. 367, 220 N.Y. (N.Y.S.) 556, 1917 N.Y. LEXIS 1003 (N.Y. 1917).. See also Culhane v Economical Garage, Inc., 195 A.D. 108, 186 N.Y.S. 454, 1921 N.Y. App. Div. LEXIS 4705 (N.Y. App. Div. 1921).

Where a nurse employed in a hospital operated by New York city at a fixed salary "with board and maintenance and proper medical and surgical attention," became ill and entered the nurses' infirmary where she was given injections of a morphine solution which had been pronounced by a supervisor to be unfit for use, and through an infection resulting from the injections of the impure solution practically lost the use of an arm, the risk of such an injury was not incidental to a nurses' employment, and consequently, the injury did not arise out of and in the course of her employment. Volk v New York, 284 N.Y. 279, 30 N.E.2d 596, 284 N.Y. (N.Y.S.) 279, 1940 N.Y. LEXIS 835 (N.Y. 1940), limited, Garcia v Iserson, 42 A.D.2d 776, 346 N.Y.S.2d 572, 1973 N.Y. App. Div. LEXIS 3696 (N.Y. App. Div. 2d Dep't 1973), overruled, Garcia v Iserson, 33 N.Y.2d 421, 353 N.Y.S.2d 955, 309 N.E.2d 420, 1974 N.Y. LEXIS 1700 (N.Y. 1974).

The death of an employee caused by his mistakenly swallowing a poison tablet instead of one containing a mild sedative prescribed by his physician after an operation, made necessary by an injury received in the course of and growing out of his employment, cannot be held to be one of the risks connected with the employment, flowing therefrom as a natural consequence and directly connected with the work, in the absence of evidence that the accident which befell the decedent and the amputation which followed were sufficient to derange his mind or to affect his eyesight. Brown v New York State Training School for Girls, 285 N.Y. 37, 32 N.E.2d 783, 285 N.Y. (N.Y.S.) 37, 1941 N.Y. LEXIS 1526 (N.Y. 1941).

A reaction to an injection of antitoxin made by the employer's physician on the employer's premises and suffered by the claimant under the employer's direction is an injury arising out of and in the course of the employment. Sanders v Children's Aid Soc., 238 A.D. 746, 265 N.Y.S. 698, 1933 N.Y. App. Div. LEXIS 9609 (N.Y. App. Div.), aff'd, 262 N.Y. 655, 188 N.E. 107, 262 N.Y. (N.Y.S.) 655, 1933 N.Y. LEXIS 1184 (N.Y. 1933).

Where the decedent, while returning to his home from the office of the company doctor, where he was receiving medical treatment for injuries sustained in the course of his employment, sustained accidental injuries in an automobile accident which resulted in his death, the board properly found that the death of the decedent was in consequence of his accident in the course of his employment. John v Fairmont Creamery Co., 268 A.D. 840, 50 N.Y.S.2d 253, 1944 N.Y. App. Div. LEXIS 3711 (N.Y. App. Div. 1944).

The death of a worker as a result of injection with "improper flu ingredients" during a swine flu program at the employer's plant did not arise out of and in the course of her employment, since the program was voluntary and had been made available to the public at no charge. Stabel v Westinghouse Electric Corp., 79 A.D.2d 842, 435 N.Y.S.2d 549, 1980 N.Y. App. Div. LEXIS 14241 (N.Y. App. Div. 3d Dep't 1980).

Although both physician and patient were employed by same company, neither was acting within scope of his employment at time of treatment for purpose of determining whether exclusive remedy provision of Workers' Compensation Law barred medical malpractice action where (1) treatment occurred in hospital emergency room serving general public, (2) physician was not required as part of his employment to treat employees off company premises or to personally oversee employees' treatment by other doctors or hospitals, (3) physician was not required to go to hospital and had no intention of doing so until he was called by hospital to treat patient as specialist, (4) after treating patient, physician wrote prescription on pad bearing address and telephone number of his private medical practice and instructed patient to see him at his "office," meaning either his office at company's plant or his private office, whichever was more convenient to patient, and (5) hospital record reflected that patient was to follow up with physician as his "PMD," meaning personal or private medical doctor. Litwak v Our Lady of Victory Hosp., 238 A.D.2d 879, 660 N.Y.S.2d 912, 1997 N.Y. App. Div. LEXIS 4664 (N.Y. App. Div. 4th Dep't 1997).

Medical malpractice action was not barred by Workers' Compensation Law as exclusive remedy, even though both physician and patient were employed by same company, where neither was acting within scope of his employment at time of treatment. Litwak v Our Lady of Victory Hosp., 238 A.D.2d 879, 660 N.Y.S.2d 912, 1997 N.Y. App. Div. LEXIS 4664 (N.Y. App. Div. 4th Dep't 1997).

The failure of plaintiff's former employer, a medical clinic, to diagnose plaintiff's lung cancer from X-rays taken during routine medical examinations conducted by the clinic as part of plaintiff's employment, which failure to act allegedly aggravated plaintiff's condition, caused an "accidental injury" arising solely from the employment relationship, for which the Workers' Compensation Law provided the exclusive remedy. Le Savoy v Harnes, 127 Misc. 2d 9, 484 N.Y.S.2d 988, 1984 N.Y. Misc. LEXIS 3720 (N.Y. Sup. Ct. 1984).

188. —Injuries due to falls

Where a teamster while driving over smooth pavement fell from his seat and was killed as a result of the wheels passing over his body and there is no evidence of intoxication or that the fall was intentional, an award under the Workmen's Compensation Law is proper. Daly v United States Trucking Co., 248 N.Y. 515, 162 N.E. 506, 248 N.Y. (N.Y.S.) 515, 1928 N.Y. LEXIS 1306 (N.Y. 1928).

An apartment owner's relief elevator operator who acted as an emergency operator during a strike and was paid therefor by a union, was killed when he fell down an elevator shaft. An award against the apartment house owner was proper. Coburn v Lenfin Realty Corp., 305 N.Y. 669, 112 N.E.2d 765, 305 N.Y. (N.Y.S.) 669, 1953 N.Y. LEXIS 1220 (N.Y. 1953).

The death of a foreman of motor trucks caused by a fall while the truck was in motion arises out of and in the course of his employment where he and another driver were taking a loaded truck from one point to another and the decedent, who was dozing at the time, was thrown from the truck as the driver made a

sudden turn. McCloskey v Richard Hellman, Inc., 196 A.D. 674, 187 N.Y.S. 834, 1921 N.Y. App. Div. LEXIS 5590 (N.Y. App. Div. 1921).

Where a foreman painter while working on a pier was asked the whereabouts of another workman, and as he motioned with his hand he took a step backward, fell and struck his head on a propeller which was lying on the pier and subsequently died from such fall, such person died as a result of an accidental injury arising out of and in the course of his employment. Aanonsen v Jakobson & Peterson, Inc., 260 A.D. 967, 23 N.Y.S.2d 482, 1940 N.Y. App. Div. LEXIS 5635 (N.Y. App. Div. 1940).

A schoolteacher is entitled to compensation for a fall occasioned by collision with a dog running on the school grounds, the accident having occurred approximately three feet from the school door. Taylor v Board of Education, 263 A.D. 1033, 33 N.Y.S.2d 724, 1942 N.Y. App. Div. LEXIS 7964 (N.Y. App. Div. 1942).

A carpenter who accidentally fell into a well hole on the premises of a building operation while receiving instructions from his employer is injured in the course of his employment where it appears that the employee could not have performed the required service for his employer unless he received such instructions. West v Wood, 266 A.D. 705, 40 N.Y.S.2d 156, 1943 N.Y. App. Div. LEXIS 3961 (N.Y. App. Div. 1943).

Where a new employee, handling heavy tar paper in a hot warehouse, where tar was melting and the fan was not working, collapsed and fell to a concrete floor, fracturing his skull, and there was no evidence of casual illness, it is error to deny him compensation because he did not fall from a height or strike an obstacle in falling and because the injury therefore did not arise out of the employment. Zygmont v Certain-Teed Products Corp., 269 A.D. 15, 53 N.Y.S.2d 771, 1945 N.Y. App. Div. LEXIS 2908 (N.Y. App. Div. 1945).

Claimant was injured in the course of her employment when she fell while turning in washroom to speak to co-worker while washing her hands which had become dirtied in her employment. Williams v Endicott Johnson Corp., 284 A.D. 920, 134 N.Y.S.2d 419, 1954 N.Y. App. Div. LEXIS 4058 (N.Y. App. Div. 1954).

Award for death benefits was affirmed where employee fell from a ladder and died from a ruptured aneurysm of the brain. Baker v Gorden, 1 A.D.2d 708, 146 N.Y.S.2d 829, 1955 N.Y. App. Div. LEXIS 3718 (N.Y. App. Div. 3d Dep't 1955).

A death claim was dismissed where evidence showed only that decedent was sitting on a water main doing construction work and was next seen on the ground below the main suffering from a ruptured aneurysm. The only evidence that decedent had slipped and suffered the aneurysm when he hit the ground was belated and interested hearsay testimony. Bonomi v Poirier & McLane Corp., 1 A.D.2d 302, 149 N.Y.S.2d 616, 1956 N.Y. App. Div. LEXIS 5936 (N.Y. App. Div. 3d Dep't 1956).

Decedent had been assigned to job on roof of plant by foreman. Short time later he left job site and several hours later he was found unconscious lying on floor of plant below opened window on roof. It was common for workmen to go to maintenance shop for material or tools. Accident being unwitnessed, statutory presumptions must be given consideration. Evidence permitted inference that decedent fell from cat walk through opened window while within employment and only short distance from job, hazard was on premises and decedent sustained injuries within hours of his regular employment. Barker v General Motors Corp., 5 A.D.2d 1031, 173 N.Y.S.2d 42, 1958 N.Y. App. Div. LEXIS 6188 (N.Y. App. Div. 3d Dep't 1958).

The board was not required to accept testimony of claimant that he sustained injuries as the result of a fall in course of his employment, where he told three conflicting stories as to how the alleged fall happened. Amado v Torres, 9 A.D.2d 832, 192 N.Y.S.2d 689, 1959 N.Y. App. Div. LEXIS 6194 (N.Y. App. Div. 3d Dep't 1959).

Although an autopsy on the deceased disclosed .21 percent by weight of alcohol in his blood, which is a percentage medically considered sufficient to cause intoxication, the Board could find his death to have arisen out of his employment rather than by reason of intoxication where he was a milk delivery man driving a delivery truck which had to be operated standing up next to an open door and death was caused by falling through the door and onto the highway on a straight level stretch of highway. Van De Water v Emmadine Farms, Inc., 18 A.D.2d 1119, 239 N.Y.S.2d 182, 1963 N.Y. App. Div. LEXIS 4022 (N.Y. App. Div. 3d Dep't 1963).

Finding that injury occurred in course of employment was supported by claimant's testimony that, as he entered his office in morning, he tripped over waste basket, struck his head on desk or table, lost consciousness, and had no memory of rest of day until late afternoon; claimant's lack of memory did not constitute inconsistency in his testimony, and employer presented no testimony from any employee who recalled seeing claimant during relevant time period. Watson v Ebasco Services, 140 A.D.2d 747, 527 N.Y.S.2d 628, 1988 N.Y. App. Div. LEXIS 4727 (N.Y. App. Div. 3d Dep't 1988).

Hotel floor supervisor's claim for workers' compensation benefits would not be disallowed under CLS Work Comp § 10 where (1) her injury occurred one week after altercation with another employee that led to supervisor's termination, and (2) relationship between altercation and injury, which occurred when she returned to pick up her paycheck and slipped and fell on stairs, was tenuous at best. Wint v Hotel Waldorf Astoria, 251 A.D.2d 696, 674 N.Y.S.2d 146, 1998 N.Y. App. Div. LEXIS 6458 (N.Y. App. Div. 3d Dep't 1998).

Death arose in course of decedent's employment, and thus his mother was not entitled to workers' compensation death benefits, where (1) decedent took short break from work and went from his employer's rented third floor to roof of 4-story building with coworker, who smoked cigarette, (2) decedent's fall from roof on very windy day was unwitnessed, (3) employer testified that employees could take their breaks anywhere inside or outside building, although they had to smoke outside, (4) employer neither expressly authorized nor expressly prohibited use of roof, and (5) although locked door might have justified inference that access to roof was prohibited by someone while door remained locked, it was not reasonable to infer that prohibition continued after door was unlocked, as it was before decedent's fall, or that employer had ever imposed such prohibition. Kouvatsos v Line Masters, Inc., 281 A.D.2d 769, 722 N.Y.S.2d 118, 2001 N.Y. App. Div. LEXIS 2920 (N.Y. App. Div. 3d Dep't 2001).

189. —Injuries due to falls; fall caused by disease

In order to have an accident which occurs by reason of a fall caused by disease, compensable, there must be something in the position or surroundings of employee, some risk specially assignable to employment. Andrews v L. & S. Amusement Corp., 253 N.Y. 97, 170 N.E. 506, 253 N.Y. (N.Y.S.) 97, 1930 N.Y. LEXIS 805 (N.Y. 1930).; Frankel v National 5, 10 & 25 Cent Stores, 268 N.Y. 509, 198 N.E. 378, 268 N.Y. (N.Y.S.) 509, 1935 N.Y. LEXIS 985 (N.Y. 1935).; Connelly v Samaritan Hospital, 259 N.Y. 137, 181 N.E. 76, 259 N.Y. (N.Y.S.) 137, 1932 N.Y. LEXIS 917 (N.Y. 1932).

An employee in a laundry, who, due to a cardiac condition, fell while doing her work and in falling struck a table which was part of the equipment of the laundry, sustaining injuries, is entitled to compensation. Her injuries arose "out of" her employment. Connelly v Samaritan Hospital, 259 N.Y. 137, 181 N.E. 76, 259 N.Y. (N.Y.S.) 137, 1932 N.Y. LEXIS 917 (N.Y. 1932).

Death does not occur from an accident in the course of the employment where the decedent, working on the bank of a stream, was sent upstream a short distance for a purpose incidental to his employment and was found drowned in five feet of water where there was no embankment, it having been no part of his job to enter the water and the evidence showed that he was subject to fits and had suffered one a short time before his death. Minerly v Kingsbury Const. Co., 191 A.D. 618, 181 N.Y.S. 901, 1920 N.Y. App. Div. LEXIS 4769 (N.Y. App. Div. 1920).

Person employed as carpenter who, during his meal hour, was injured by burning his hand on a stove on his employer's premises owing to the fact that he was seized with a spell of dizziness to which malady he had been subject for two years, is not entitled to an award. There was nothing in environment or nature of work which caused the accident but claimant's malady overtook him without reference to his employment. Neuberger v Third A. R. Co., 192 A.D. 781, 183 N.Y.S. 348, 1920 N.Y. App. Div. LEXIS 7553

(N.Y. App. Div. 1920).; Manor v Pennington, 180 A.D. 130, 167 N.Y.S. 424, 1917 N.Y. App. Div. LEXIS 8089 (N.Y. App. Div. 1917).

Where claimant, a laborer, was employed in a shanty checking the weight of trucks on a scale outside the shanty fell while sitting on a bench warming his feet on an electric heater, to a concrete floor covered in part with corrugated paper, there was no basis for an award in the light of medical proof that claimant suffered from generalized arteriosclerosis of a nonoccupational origin which caused him to lose consciousness and fall. Montanari v Lehigh Portland Cement Co., 282 A.D. 1082, 126 N.Y.S.2d 180, 1953 N.Y. App. Div. LEXIS 5873 (N.Y. App. Div. 1953).

Two weeks after a part-time luncheonette counter man was discharged from a hospital after a fall in his employment, he collapsed in a subway and later died from an epidural hemorrhage. But the Board failed to find in granting death award that first fall was an accident or whether it came about as a result of a fainting spell induced by internal causes. Matters remitted to Board. McCann v Hyal Luncheonette Co., 284 A.D. 1079, 135 N.Y.S.2d 823, 1954 N.Y. App. Div. LEXIS 4614 (N.Y. App. Div. 1954).

The head keeper of a county penitentiary was not entitled to a compensation award on the theory that when his left knee unexplainedly "went down", it was the result of traumatic arthritis arising in the course of his employment. There was no basis for finding that keeper's employment was such as to produce disease as a natural incident thereof. Newton v County of Erie, 7 A.D.2d 29, 180 N.Y.S.2d 163, 1958 N.Y. App. Div. LEXIS 4034 (N.Y. App. Div. 3d Dep't 1958).

Workers' compensation death benefits claimant was not entitled to rely on the presumption of compensability under N.Y. Workers' Comp. Law § 21(1) because her decedent's death was not unexplained or unwitnessed, in that an individual saw the decedent collapse to the ground, the death certificate listed the cause of death as arteriosclerotic heart disease, an autopsy also revealed that the decedent died of heart disease, and the independent report of a heart disease expert opined that the decedent's death was not work related and was likely caused by severe coronary atherosclerosis. Thus, the Workers' Compensation Board's denial of the underlying claim in the absence of any prima facie proof that the decedent's death arose out of and in the course of employment, as required by N.Y. Workers' Comp. Law §§ 2(7) and 10(1), was supported by substantial evidence. Matter of Crapo v City of Buffalo, 24 A.D.3d 838, 805 N.Y.S.2d 180, 2005 N.Y. App. Div. LEXIS 13555 (N.Y. App. Div. 3d Dep't 2005).

190. Injuries due to clothing, etc.

An injury arises out of and in the course of employment where an iron pipe full of hot emery dropped from the eighth floor of the building in which the employer occupied a lower floor, and set fire to the employee's clothing even though the pipe fell from the place of business of a third person which had no connection with or relation to the employer's business. Bandassi v Molla, 200 A.D. 266, 192 N.Y.S. 776, 1922 N.Y. App. Div. LEXIS 8166 (N.Y. App. Div.), aff'd, 234 N.Y. 554, 138 N.E. 444, 234 N.Y. (N.Y.S.) 554, 1922 N.Y. LEXIS 735 (N.Y. 1922).

The finding that burns suffered by decedent when his clothing caught fire from welding spark in course of employment set up infection which was transmitted to kidneys, and that diseased condition of kidneys was factor in causation of employee's death was supported by substantial medical evidence. And it was proper for impartial specialist to report to Board that there was direct causal relationship between accident which caused burn and employee's death, where employer had adequate opportunity to cross-examine specialist. Garner v Allegheny Ludlum Steel Corp., 6 A.D.2d 363, 176 N.Y.S.2d 734, 1958 N.Y. App. Div. LEXIS 5004 (N.Y. App. Div. 3d Dep't 1958).

Where employye worked in a wet area and his shoes became wet and stiff and the following day he felt an irritation and burning sensation on his left fourth toe as the result of the wet, tight and pinching shoes, which condition worsened and resulted in amputation of left leg below the knee due to gangrene, finding that claimant sustained an accidental injury arising out of and in the course of employment was sustained although claimant had a preexisting vascular disease. Bumpus v Eastern Greyhound Bus Corp., 30 A.D.2d 733, 291 N.Y.S.2d 540, 1968 N.Y. App. Div. LEXIS 3580 (N.Y. App. Div. 3d Dep't 1968).

Claimant did not sustain causally related disability when she injured her lower back while bending over to tie her shoe during break from work as social welfare client examiner. Williams v Schenectady County Dep't of Social Servs., 232 A.D.2d 677, 648 N.Y.S.2d 180, 1996 N.Y. App. Div. LEXIS 10019 (N.Y. App. Div. 3d Dep't 1996), overruled in part, Camino v Chappaqua Transp., 19 A.D.3d 856, 796 N.Y.S.2d 736, 2005 N.Y. App. Div. LEXIS 6735 (N.Y. App. Div. 3d Dep't 2005).

191. —Injuries incurred while pursuing personal projects during working hours

An injury to an employee through some act of his own, not incident to his employment, and not authorized or induced by his employer in connection with his employment, does not arise out of and in the course of his employment. Gifford v T. G. Patterson, Inc., 222 N.Y. 4, 117 N.E. 946, 222 N.Y. (N.Y.S.) 4, 1917 N.Y. LEXIS 805 (N.Y. 1917).

A person employed at a weekly wage to operate a gas filling station with permission to operate service station in connection therewith for his own profit, is not entitled, under the Workmen's Compensation Law to compensation for injuries received as a result of an explosion of an air-compressor tank installed by himself for use in servicing cars. Johnson v Roosevelt Memorial Asso., 259 N.Y. 641, 182 N.E. 216, 259 N.Y. (N.Y.S.) 641, 1932 N.Y. LEXIS 1124 (N.Y. 1932).; Dunn v University of Rochester, 266 N.Y. 362, 194 N.E. 856, 266 N.Y. (N.Y.S.) 362, 1935 N.Y. LEXIS 1382 (N.Y. 1935).; Bederman v McNamara, 268 N.Y. 510, 198 N.E. 379, 268 N.Y. (N.Y.S.) 510, 1935 N.Y. LEXIS 986 (N.Y. 1935).

Personal activities of employees unrelated to employment, remote from the place of work and its risks, yielding neither advantage or benefit to the employer are not within the compensation law though the employer may acquiesce therein or contribute financial aid thereto. Wilson v General Motors Corp., 298 N.Y. 468, 84 N.E.2d 781, 298 N.Y. (N.Y.S.) 468, 1949 N.Y. LEXIS 1006 (N.Y. 1949).

A "handyman" employed in an automobile machine shop was injured in the course of his employment when he was hit in the eye by a spring steel clip which he was fashioning for his own car during slack time before quitting time. Proof showed that employer permitted use of tools on personal projects during slack hours, supplied parts therefor, and required employee to remain until quitting time. Penzara v Maffia Bros., 307 N.Y. 15, 119 N.E.2d 570, 307 N.Y. (N.Y.S.) 15, 1954 N.Y. LEXIS 1006 (N.Y. 1954).

A claimant employed as owner and driver of a truck under an agreement whereby all repairs to the truck were to be made on the time of the employee at his expense and that he was not to be paid for his personal services unless he was actually employed and then by the hour, is not injured in the course of his employment where, while repairing a hoist on the dump truck, some part of the hoisting apparatus broke, causing the body of the truck to fall on the claimant resulting in injury to him. Clawson v Cleghorn, 264 A.D. 965, 37 N.Y.S.2d 105, 1942 N.Y. App. Div. LEXIS 5562 (N.Y. App. Div. 1942).; Kingsley v Donovan, 169 A.D. 828, 155 N.Y.S. 801, 1915 N.Y. App. Div. LEXIS 5083 (N.Y. App. Div. 1915).

A hospital waiter and assistant cook amputated two fingers while allegedly cutting a lemon with a cleaver. Held: the evidence disclosed that the injury did not arise out of and in the course of employment but rather resulted from a personal act which was performed solely for the waiter's benefit and which was unrelated to any service for the hospital. Medina v Shore Road Hospital, 4 A.D.2d 974, 167 N.Y.S.2d 637, 1957 N.Y. App. Div. LEXIS 3912 (N.Y. App. Div. 3d Dep't 1957).

A gunshot wound suffered by a farm laborer did not arise "out of" his work in spreading manure with a tractor where the shot came from a rifle which he was carrying along on the tractor, without his employer's knowledge or consent, for the purpose of shooting woodchucks, the rifle having been accidentally discharged when it fell off the tractor and struck the ground. Slater v Pilch, 17 A.D.2d 340, 234 N.Y.S.2d 513, 1962 N.Y. App. Div. LEXIS 6536 (N.Y. App. Div. 3d Dep't 1962).

The claimant's decision to wear a jacket for warmth and in particular to take one readily available instead of asking his employer for one does not remove him from employment and the act does arise out of the employment. Himes v Tobin Packing Co., 30 A.D.2d 1030, 294 N.Y.S.2d 261, 1968 N.Y. App. Div. LEXIS 3062 (N.Y. App. Div. 3d Dep't 1968), app. denied, 23 N.Y.2d 644, 1969 N.Y. LEXIS 2097 (N.Y. 1969).

Change of claimant from personal shoes to special work shoes, during which change claimant felt a sharp pain down his left leg, was not attributable solely to personal act of claimant and arose out of and in the course of his employment where such a change was a reasonable incident of employment of claimant as a machine operator, and bore a direct relation to it. Mazur v New Process Gear Div., Chrysler Corp., 45 A.D.2d 784, 356 N.Y.S.2d 728, 1974 N.Y. App. Div. LEXIS 4685 (N.Y. App. Div. 3d Dep't 1974).

192. —Injuries incurred while removing property from employer's premises

An employee is injured in the course of his employment while moving furniture from a storeroom, even though the particular piece involved had been given to him. Burton v Mallouk, 268 A.D. 935, 51 N.Y.S.2d 131, 1944 N.Y. App. Div. LEXIS 4310 (N.Y. App. Div. 1944).

An injury suffered by an employee when, at the close of his days work, he entered a cellarway to clean refuse wood which he contemplated taking home for fuel, is in the course of his employment, where this was done with the knowledge and at the request of the employer. Frederickson v Ledkote Products Co., 270 A.D. 970, 62 N.Y.S.2d 134, 1946 N.Y. App. Div. LEXIS 4893 (N.Y. App. Div. 1946).

Evidence sustained the board's finding that claimant's injuries arose out of and in the course of his employment where he was injured, while packing his household goods for removal from house, provided by his employer for his residence while employed as assistant manager of employer's nearby dog kennels, on the last day of such employment even though his actual work at the kennels was terminated before his injuries. Maley v Chisholm, 3 A.D.2d 615, 158 N.Y.S.2d 41, 1956 N.Y. App. Div. LEXIS 3427 (N.Y. App. Div. 3d Dep't 1956), app. denied, 2 N.Y.2d 709, 1957 N.Y. LEXIS 1594 (N.Y. 1957).

193. —Injuries in the course of work performed at private residence or other premises of employer, supervisor or the like

The insurance carrier is liable for injury to a business employee detailed to a job at a private residence. Jaabeck v Theodore A. Crane's Sons Co., 238 N.Y. 314, 144 N.E. 625, 238 N.Y. (N.Y.S.) 314, 1924 N.Y. LEXIS 683 (N.Y. 1924).

Where an employee was injured while cranking an automobile by direction of the master at the latter's home, an award is proper. MacDonald v Grand Battery & Ignition Service, 254 N.Y. 605, 173 N.E. 886, 254 N.Y. (N.Y.S.) 605, 1930 N.Y. LEXIS 1215 (N.Y. 1930).; Jaabeck v Theodore A. Crane's Sons Co., 238 N.Y. 314, 144 N.E. 625, 238 N.Y. (N.Y.S.) 314, 1924 N.Y. LEXIS 683 (N.Y. 1924).

Where a claimant, employed by a partnership, was injured while working at the residence of one of the partners, the accident does not arise out of his employment. Reed v Mapstone Bros., 205 A.D. 767, 200 N.Y.S. 304, 1923 N.Y. App. Div. LEXIS 5137 (N.Y. App. Div. 1923).; See also Collier v Dangard, 256 N.Y. 561, 177 N.E. 141, 256 N.Y. (N.Y.S.) 561, 1931 N.Y. LEXIS 1139 (N.Y. 1931).

An uninsured theater owner is not liable for injury to a stage mechanic while doing carpentry work at the home of the theater's manager. Twitchell v Wagner Productions, Inc., 228 A.D. 870, 240 N.Y.S. 926, 1930 N.Y. App. Div. LEXIS 13818 (N.Y. App. Div. 1930), aff'd, 255 N.Y. 612, 175 N.E. 335, 255 N.Y. (N.Y.S.) 612, 1931 N.Y. LEXIS 745 (N.Y. 1931).

Two sisters, owners of a building, are liable for compensation to their janitor injured while working in an antique shop conducted by one of them. CHURCH v MITTELSTAEDT, 255 A.D. 903, 255 A.D. 904, 7 N.Y.S.2d 749, 1938 N.Y. App. Div. LEXIS 5821 (N.Y. App. Div. 3d Dep't 1938), aff'd, 280 N.Y. 613, 20 N.E.2d 560, 280 N.Y. (N.Y.S.) 613, 1939 N.Y. LEXIS 1442 (N.Y. 1939).

One employed as handy man, chauffeur and manager of the employer's apartment building is injured in the course of his employment where, while proceeding to his employer's home after performing duties at the apartment building and collecting the rents, he fell on the stairs of a porch of the employer's private home. Lynch v Chilvers, 272 A.D. 1091, 74 N.Y.S.2d 540, 1947 N.Y. App. Div. LEXIS 5060 (N.Y. App. Div. 1947).

An award was proper where decedent was drowned while fishing in the employer's private pond on behalf of and pursuant to the orders and instructions of his employer to catch fish for the employer's family. Gregor v Cooper, 279 A.D. 960, 111 N.Y.S.2d 190, 1952 N.Y. App. Div. LEXIS 5426 (N.Y. App. Div. 1952).

Where claimant was regularly employed as a maintenance man on a weekly salary basis for a 40-hour week by a real estate corporation leasing out property to manufacturing and commercial tenants, but his injuries were sustained while helping another employee working for one of the tenants with some Sunday remodeling work at $2 an hour, under an agreement with such other employee, and the real estate corporation had no obligation to maintain the particular premises or perform such work in connection with them, he could not be considered an employee of the real estate corporation in doing such work. Dahoda v Simmons, 11 A.D.2d 842, 203 N.Y.S.2d 167, 1960 N.Y. App. Div. LEXIS 8516 (N.Y. App. Div. 3d Dep't 1960).

A claimant employed as bartender and waitress in a hotel in a small community, who was injured while taking care of one of her employer's horses kept on his farm and sometimes used by guests, was injured in course of employment where the employer himself conceded that her injuries were sustained in course of employment. Hartwell v Whitman, 15 A.D.2d 971, 225 N.Y.S.2d 598, 1962 N.Y. App. Div. LEXIS 10990 (N.Y. App. Div. 3d Dep't 1962).

Upon appeal by an employer and its insurance carrier from a decision holding that claimant sustained an accidental injury within the scope of his employment, the board's decision was reversed, upon evidence that the claimant, a general handyman at a varnish company's plant, was injured as he was cutting tree branches at the personal dwelling of the president of the company on a Saturday. McDermott v Giles Varnish Co., 27 A.D.2d 781, 277 N.Y.S.2d 181, 1967 N.Y. App. Div. LEXIS 4860 (N.Y. App. Div. 3d Dep't 1967).

194. —Injuries in the course of seeking additional employees for employer

Where a town highway foreman sustained injuries resulting in his death while riding with the town superintendent of highways, and in assisting the superintendent in procuring men and material for the performance of the work was incidental to his employment as foreman, and an award of compensation is proper. Lanigan v Saugerties, 180 A.D. 227, 167 N.Y.S. 654, 1917 N.Y. App. Div. LEXIS 8141 (N.Y. App. Div. 1917), aff'd, 223 N.Y. 685, 119 N.E. 1053, 223 N.Y. (N.Y.S.) 685, 1918 N.Y. LEXIS 1396 (N.Y. 1918).

A head bartender is injured in the course of his employment where at the time he was proceeding to another city to take the preliminary steps necessary to engage a bartender for his employer. Cavallaro v Elmira Hotel Operating Corp., 271 A.D. 941, 67 N.Y.S.2d 280, 1947 N.Y. App. Div. LEXIS 5306 (N.Y. App. Div. 1947).

195. —Injuries due to explosions

Where the claimant, while walking along a railroad track in the regular course of his employment, struck with a hammer which he was carrying, a torpedo on the track, which exploded causing a piece of the metal to enter his eye, suffers accidental injuries arising out of and in the course of his employment. Miles v Gibbs & Hill, Inc., 250 N.Y. 590, 166 N.E. 335, 250 N.Y. (N.Y.S.) 590, 1929 N.Y. LEXIS 984 (N.Y. 1929).

A person employed as a chauffeur who was injured by the explosion of a percussion cap which a fellow servant brought upon the premises and with which he was experimenting, is not entitled to an award under the workmen's compensation law. Laurino v Donovan, 183 A.D. 168, 170 N.Y.S. 340, 1918 N.Y. App. Div. LEXIS 5030 (N.Y. App. Div. 1918).; De Filippis v Falkenberg (1915) 170 App Div 153, 155 NYS 761, affd (1916) 219 NY 581, 114

NE 1064.; See also Laurino v Donovan (1919) 186 App Div 387, 173 NYS 619, affd (1919) 226 NY 700, 123 NE 875., and Fischer v R. Hoe & Co., 224 A.D. 335, 230 N.Y.S. 755, 1928 N.Y. App. Div. LEXIS 10000 (N.Y. App. Div. 1928).

An award of death benefits is properly made where claimant's husband was a policeman and was killed while lighting a bomb under the direction of the chief of police during an air raid warning. Williams v Granville, 268 A.D. 944, 51 N.Y.S.2d 728, 1944 N.Y. App. Div. LEXIS 4333 (N.Y. App. Div. 1944).

A farmhand, who, while sweeping up the floor of a cow barn, noticed an object which turned out to be a dynamite cap on the floor which he picked up and which exploded, injuring him, suffers injuries arising out of and in the course of his employment. Franck v Allen, 270 A.D. 960, 61 N.Y.S.2d 728, 1946 N.Y. App. Div. LEXIS 4859 (N.Y. App. Div. 1946).

196. —Injuries resulting from storms and other natural conditions

Where an employee engaged in working upon a parkway was directed by the foreman to remain during a thunderstorm and was killed by lightning while standing under a tree for shelter from the storm, such accident was a result of special risk incidental to the employment of decedent and arose "out of" his employment. Madura v New York, 238 N.Y. 214, 144 N.E. 505, 238 N.Y. (N.Y.S.) 214, 1924 N.Y. LEXIS 670 (N.Y. 1924).; See also People v One Box Containing 15 Bottles of G. R. Whisky, 238 N.Y. 556, 144 N.E. 889, 238 N.Y. (N.Y.S.) 556, 1924 N.Y. LEXIS 727 (N.Y. 1924).; Many v Bradford, 266 N.Y. 558, 195 N.E. 199, 266 N.Y. (N.Y.S.) 558, 1935 N.Y. LEXIS 1445 (N.Y. 1935)., and Giovine v United Hebrew Cemetery, 263 A.D. 772, 30 N.Y.S.2d 929, 1941 N.Y. App. Div. LEXIS 4880 (N.Y. App. Div. 1941).

Where a husband and his wife jointly employed as butler and housekeeper at their employer's summer home were drowned in an attempt to get to the mainland during a hurricane, the board properly found that their deaths were primarily due to their being placed in a zone of danger by virtue of their employment location. Commissioner of Taxation & Finance v Burghard, 262 A.D. 783, 27 N.Y.S.2d 401, 1941 N.Y. App. Div. LEXIS 5841 (N.Y. App. Div. 1941).

197. —Injuries due to burns

An award of compensation will not be set aside on the ground that fatal burns were not sustained in the course of employment where the employee, a night watchman, worked in a shanty and his body was discovered on the floor about 6 feet from a cot which he occupied the decedent having suffered a slight burn on his right wrist, and the whole center of the mattress on the cot was burned and charred, the floor was littered with cigarette butts, there was evidence that the decedent's death resulted from carbon monoxide poisoning and there were traces of grain alcohol in the decedent's liver. McKenna v Atlas Contractors Equipment Corp., 300 N.Y. 317, 90 N.E.2d 479, 300 N.Y. (N.Y.S.) 317, 1950 N.Y. LEXIS 861 (N.Y. 1950).. See also Commissioner of Taxation & Finance v Brookshire Constr. Co., 275 N.Y. 578, 11 N.E.2d 762, 275 N.Y. (N.Y.S.) 578, 1937 N.Y. LEXIS 1558 (N.Y. 1937).

Where an employee in an oil refinery went to a dressing room furnished for the use of workmen and met his death by fire communicated to his shirt which was saturated with inflammable oil, apparently by a lighted Bunsen burner occasionally used for heating oil or glue, an award under Workmen's Compensation Law is justified. Chludzinski v Standard Oil Co., 176 A.D. 87, 162 N.Y.S. 225, 1916 N.Y. App. Div. LEXIS 8964 (N.Y. App. Div. 1916).

Claimant, who suffered burns when his eye shade ignited when he was lighting his cigar suffered an injury arising out of his employment because the claimant had to work under artificial light, wore an eye shade on doctor's advice and was permitted to smoke while working. Petrie v Crucible Steel Co., 4 A.D.2d 905, 166 N.Y.S.2d 780, 1957 N.Y. App. Div. LEXIS 4298 (N.Y. App. Div. 3d Dep't), app. denied, 4 A.D.2d 991, 167 N.Y.S.2d 1020, 1957 N.Y. App. Div. LEXIS 3862 (N.Y. App. Div. 3d Dep't 1957), app. denied, 4 N.Y.2d 674, 1958 N.Y. LEXIS 1351 (N.Y. 1958).

198. —Miscellaneous injuries incurred while moving about employer's premises

Where a room in a building occupied by a workman employed by the owner is rendered dangerous by some act or condition due to his occupancy and not inherent in the place itself, injury or death, occasioned thereby, does not come within the intent or purpose of the workmen's compensation law. Pisko v Mintz, 262 N.Y. 176, 186 N.E. 434, 262 N.Y. (N.Y.S.) 176, 1933 N.Y. LEXIS 931 (N.Y. 1933).; Kowalek v New York C. R. Co., 229 N.Y. 489, 128 N.E. 888, 229 N.Y. (N.Y.S.) 489, 1920 N.Y. LEXIS 704 (N.Y. 1920).; and see also Briskin v Hyman, 236 N.Y. 522, 142 N.E. 268, 236 N.Y. (N.Y.S.) 522, 1923 N.Y. LEXIS 941 (N.Y. 1923).

A finding that injuries suffered by a teacher attending a meeting of the local teachers' association in an auditorium in one of the school buildings, did not occur in the course of her employment, cannot be set aside upon review where there is substantial evidence to support the board's finding of facts. Dearing v Union Free School, 297 N.Y. 886, 79 N.E.2d 280, 297 N.Y. (N.Y.S.) 886, 1948 N.Y. LEXIS 986 (N.Y. 1948).

Claimant, who while working for his employer and making his rounds on the different floors of the employer's premises for the purpose of distributing towels, picked up a metal tag and attempted to hand it to a coemployee who was on an elevator, and in doing so claimant's right arm was caught in the elevator gate and injured, is injured in course of his employment. Schneider v Masback Hardware Co., 260 A.D. 823, 22 N.Y.S.2d 404, 1940 N.Y. App. Div. LEXIS 4840 (N.Y. App. Div. 1940).

An injury suffered by one employed to repair aircraft and aircraft engines for an employer engaged in the business of giving flying lessons and conducting a welding school arises out of and in the course of the employee's employment, where when injured, the employee was helping a student start his car on the premises of the employer and it was customary for such assistance to be rendered. Pawela v Niagara from The Air, Inc., 264 A.D. 962, 37 N.Y.S.2d 66, 1942 N.Y. App. Div. LEXIS 5551 (N.Y. App. Div. 1942).

An employee of an employer interested in establishing a flying school and who was the lessee of a flying field, is injured in the course of his employment where, having been sent by his employer to paint two doors on a hanger located on the flying field was struck by an aeroplane while on the run-way. Conant v Rodger, 266 A.D. 759, 41 N.Y.S.2d 71, 1943 N.Y. App. Div. LEXIS 4294 (N.Y. App. Div. 1943).

A claimant is injured in the regular course of her employment where, while on her way to punch a time clock, she walked upon a conveyor and a co-worker pulled a switch starting it in motion which resulted in injuries to the claimant. Di Sapio v Burdsall, 272 A.D. 981, 72 N.Y.S.2d 742, 1947 N.Y. App. Div. LEXIS 4491 (N.Y. App. Div. 1947).

199. —Miscellaneous injuries

Where a driver of a delivery wagon, whose duties consisted of assisting in the delivery of goods when necessary, does not suffer injuries arising out of or in the course of his employment where he fell from a ladder while assisting in adjusting a window box in a house. Glatzl v Stumpp, 220 N.Y. 71, 114 N.E. 1053, 220 N.Y. (N.Y.S.) 71, 1917 N.Y. LEXIS 941 (N.Y. 1917).

Injuries received by one in charge of a horse drawn truck in the course of loading and unloading, hitching and unhitching the horse, feeding and caring for the horse as well as injuries suffered when the horse is moving or the employee is upon the truck, are compensable. Smith v Price, 168 A.D. 421, 153 N.Y.S. 221, 1915 N.Y. App. Div. LEXIS 8233 (N.Y. App. Div. 1915).

Death of a "helper" on a delivery truck killed by a fall when he jumped off the truck in order to drive off boys who were hanging to the rear of the vehicle arose out of and in the course of his employment. Hendricks v Seeman Bros., 170 A.D. 133, 155 N.Y.S. 638, 1915 N.Y. App. Div. LEXIS 5029 (N.Y. App. Div. 1915).

A restaurant counterman suffers fatal injuries arising in the course of and out of his employment where his employer directed him to stay in the restaurant after closing time while the employer went to get him a room for the night in a nearby hotel and it appears that the decedent was a competent counterman and there was a scarcity of such workmen and the employer was interested in securing lodgings for the deceased so that he would be in shape to work the next morning. Turner v Papadan, 275 A.D. 734, 87 N.Y.S.2d 184, 1949 N.Y. App. Div. LEXIS 4242 (N.Y. App. Div. 1949).

A farmhand who drank bottled airplane fuel under the impression it was wine left in the cab of the truck used to convey him to and from his employer's farm is entitled to compensation where it appears that the presence of wine on or about the farm for the refreshment of farm laborers was customary. Jakubowski v Youngs, 278 A.D. 598, 101 N.Y.S.2d 771, 1951 N.Y. App. Div. LEXIS 4067 (N.Y. App. Div. 1951).

Deceased employer was court clerk but he also rented summer bungalows. Claimant, employed before and after renting season as handy man, was injured in course of work which consisted of making repairs and painting. Insurance policy did not expressly limit itself to domestic help. Although, employer's business was stated to be court clerk, policy included all business operations conducted from beach residence of employer. Therefore, painting work in connection with employer's business must be deemed covered. Handyman was intended to be included in "outservant". And handyman working in care of building is in hazardous occupation and, if work was being done in employer's place, it is deemed covered. Spazianto v Estate of Bruno, 7 A.D.2d 671, 179 N.Y.S.2d 183, 1958 N.Y. App. Div. LEXIS 4317 (N.Y. App. Div. 3d Dep't 1958), app. denied, 5 N.Y.2d 711, 1959 N.Y. LEXIS 2017 (N.Y. 1959).

Injuries sustained by claimant arose out of and in the course of his employment, although they were not sustained upon the premises of the employer, where claimant was standing by at the time watching the loading of a tractor upon a truck to be taken to a wood lot for cutting of timber under contract for his alleged employer, and claimant had been assigned to go along and help with the work. Hudson v Reynolds Lumber Co., 12 A.D.2d 541, 206 N.Y.S.2d 630, 1960 N.Y. App. Div. LEXIS 7237 (N.Y. App. Div. 3d Dep't 1960).

Claimant's injury was not sustained in course of his employment where his employment was as business agent for a small union, he had his office in his home, and the injury was sustained when he was called to the house from some yard work he was doing outside for his own benefit to answer an after-dinner phone call relating to union business and hurt his ankle on stepping down from the house to the lawn to resume his work there. Johnson v Tile & Marble Helpers, 18 A.D.2d 955, 237 N.Y.S.2d 814, 1963 N.Y. App. Div. LEXIS 4385 (N.Y. App. Div. 3d Dep't 1963).

Claimant's myocardial infarction which, according to medical testimony, was brought on by emotional stress during an extended hearing of charges against him brought by the labor union of which he was an officer and arising out of his support of an unauthorized wildcat strike clearly arose out of his employment as vice-president of the union, notwithstanding he was suspended pending trial from performance of duties, where he had not been removed from the payroll nor separated from his employment. Hamilton v Transport Workers Union, 21 A.D.2d 434, 251 N.Y.S.2d 104, 1964 N.Y. App. Div. LEXIS 3322 (N.Y. App. Div. 3d Dep't 1964), aff'd, 16 N.Y.2d 696, 261 N.Y.S.2d 892, 209 N.E.2d 550, 1965 N.Y. LEXIS 1292 (N.Y. 1965).

An injury sustained by the chief engineer, chief physicist, and chief scientist of an employer which built instruments connected with the undercarriage of jet aircrafts arose out of and in the course of his employment, when he was injured as technical curiosity prompted him to stoop to inspect the undercarriage of a passing jet aircraft while at an airport awaiting his return flight from a technical symposium. The board's finding that claimant's act was a reasonable incident of his employment was said to be a question of fact. Dreyfus v Philips Laboratories, 28 A.D.2d 1033, 283 N.Y.S.2d 765, 1967 N.Y. App. Div. LEXIS 3282 (N.Y. App. Div. 3d Dep't 1967).

Award in heart case upheld where there was evidence of strenuous exertion. Posik v William Isherwood, Inc., 32 A.D.2d 867, 302 N.Y.S.2d 92, 1969 N.Y. App. Div. LEXIS 3633 (N.Y. App. Div. 3d Dep't 1969).

The court affirmed the Workmen's Compensation Board determination that claimant, a nurse, contracted tuberculosis in the course of her employment and thus was entitled to benefits where, although the claimant could not identify a specific contact with a tubercular patient and the hospital records did not reveal any such contact, the claimant testified that in the course of her duties she worked in every room in the hospital and was in contact with tuberculosis patients. The court commented that there were unquestionably tuberculosis patients in the hospital during the period of the claimant's employment with whom she could have had contact. Shepard v Tioga General Hospital, 35 A.D.2d 764, 314 N.Y.S.2d 863, 1970 N.Y. App. Div. LEXIS 3660 (N.Y. App. Div. 3d Dep't 1970).

Workers' Compensation Board properly ruled that the employee sustained a causally-related occupational disease that was not time-barred because the record established that the employee's non-disabling back condition was aggravated by the repetitive nature of her job duties, a distinctive feature of her work that she performed over the course of many years, and given that the employee was not incapacitated by the injury to her lower back that occurred during the subject incident and continued working thereafter, the Board could reasonably conclude that she did not sustain an accidental injury within the meaning of the Workers' Compensation Law at such time. Matter of Scott v Bimbo Bakeries USA, Inc., 171 A.D.3d 1421, 96 N.Y.S.3d 769, 2019 N.Y. App. Div. LEXIS 3127 (N.Y. App. Div. 3d Dep't 2019).

Member of the New York Army National Guard who sustained personal injuries while attending a regularly scheduled drill of his unit at a state armory, was in the employ of the State of New York at the time of his injury, and his compensation for alleged injuries could be sought only as provided for by the Workmen's Compensation Laws or whatever provisions are otherwise provided under the military law of the state, and he was not free to sue the state in a tort action. Sadowski v State, 51 Misc. 2d 832, 274 N.Y.S.2d 368, 1966 N.Y. Misc. LEXIS 1393 (N.Y. Ct. Cl. 1966).

200. Injuries in the course of employment; effect of violation of employer's rules or instructions

Violation of a rule not promulgated but which under the circumstances might reasonably be implied does not bar compensation benefits on the ground of abandonment of employment. Burns v Merritt Engineering Co., 302 N.Y. 131, 96 N.E.2d 739, 302 N.Y. (N.Y.S.) 131, 1951 N.Y. LEXIS 758 (N.Y. 1951).

Disregard of the precise rules of employment does not necessarily constitute an abandonment thereof nor does violation of a rule not promulgated but which under the circumstances might reasonably be implied bar compensation benefits. Burns v Merritt Engineering Co., 302 N.Y. 131, 96 N.E.2d 739, 302 N.Y. (N.Y.S.) 131, 1951 N.Y. LEXIS 758 (N.Y. 1951).; See also Jenczewski v Aluminum Co. of America, 199 A.D. 156, 191 N.Y.S. 392, 1921 N.Y. App. Div. LEXIS 6628 (N.Y. App. Div. 1921).

The existence of general rules restricting the scope of employees' activities without special permission, is no bar to a compensation award for injuries sustained in other activities without special permission, along the line of the regular activities of the particular employee, where such rules have been habitually disregarded with the employer's knowledge and acquiescence. Mason v Lit Realty Co., 16 A.D.2d 715, 226 N.Y.S.2d 895, 1962 N.Y. App. Div. LEXIS 10323 (N.Y. App. Div. 3d Dep't 1962).

Inasmuch as an employee violated an employer's rules against political activity in the workplace, the employee's demotion was a lawful personnel decision undertaken in good faith; therefore, pursuant to N.Y. Workers' Comp. Law § 2(7), the employee was not entitled to workers' compensation benefits. Pitchford v N.Y. State Dep't of Corr. Servs., 305 A.D.2d 821, 758 N.Y.S.2d 545, 2003 N.Y. App. Div. LEXIS 5522 (N.Y. App. Div. 3d Dep't 2003).

201. —Violation of public statute, ordinance or the like

The Workmen's Compensation Law does not deprive an employee or his dependents of its benefits because the acts of the employee in causing the injury may be in violation of a public statute, ordinance or regulation. A death claim was proper where the employee was killed in a collision after driving employer's car too fast around a curve and partly in the wrong traffic lane. Chaffee v Effron, 1 A.D.2d 197, 149 N.Y.S.2d 115, 1956 N.Y. App. Div. LEXIS 6261 (N.Y. App. Div. 3d Dep't 1956).

Decedent had not deviated from employment at time of accident where decedent engaged in theft of copper downspout from building's exterior while waiting for necessary work material to arrive; board is accorded wide latitude in construing what constitutes reasonable activities of outside workers and, although

conduct in removing copper downspout may be criminal, activity is reasonable where employer's foreman confirms that removal of items is common practice in industry and that employees were not fired for engaging in such activities. Richardson v Fiedler Roofing, Inc., 112 A.D.2d 551, 491 N.Y.S.2d 489, 1985 N.Y. App. Div. LEXIS 55909 (N.Y. App. Div. 3d Dep't 1985), aff'd, 67 N.Y.2d 246, 502 N.Y.S.2d 125, 493 N.E.2d 228, 1986 N.Y. LEXIS 18049 (N.Y. 1986).

New York Uninsured Employers' Fund asserted that a claimant's illegal activity in picking up street hails removed his actions from the scope of his employment as a taxicab driver. As the uninsured dispatch company that employed him knew of and at least tolerated this violation of the New York City Taxi and Limousine Commission rules, it would not be heard to argue that the claimant's conduct was outside the scope of employment, thus precluding him from receiving workers' compensation benefits Matter of Nkrumah v Thomas, 61 A.D.3d 1325, 877 N.Y.S.2d 515, 2009 N.Y. App. Div. LEXIS 3312 (N.Y. App. Div. 3d Dep't 2009).

202. —Violation of rule against smoking

An injury arose out of and in the course of employment where the decedent met death while smoking in violation of the orders of the employer while using inflammable paint remover. State Treasurer v Ulysses Apartments, Inc., 232 A.D. 393, 250 N.Y.S. 190, 1931 N.Y. App. Div. LEXIS 13822 (N.Y. App. Div. 1931).; See also MacEchko v Bowen Mfg. Co., 179 A.D. 573, 166 N.Y.S. 822, 1917 N.Y. App. Div. LEXIS 7424 (N.Y. App. Div. 1917)., and Chila v New York C. R. Co., 251 A.D. 575, 297 N.Y.S. 850, 1937 N.Y. App. Div. LEXIS 7000 (N.Y. App. Div.), aff'd, 275 N.Y. 585, 11 N.E.2d 766, 275 N.Y. (N.Y.S.) 585, 1937 N.Y. LEXIS 1565 (N.Y. 1937).

Claimant's injuries did not arise out of and in the course of his employment, and were not compensable, where occasioned by his violation of employer's strict "no-smoking" rule. Boggan v Abby Finishing Co., 11 A.D.2d 591, 200 N.Y.S.2d 488, 1960 N.Y. App. Div. LEXIS 9948 (N.Y. App. Div. 3d Dep't 1960).

203. —Violation of rule against drinking liquor

A violation of an employer's no drinking rule under penalty of dismissal may not be treated any differently for purposes of compensation than the violation of any other rule designed to improve plant efficiency and to safeguard employees. Burns v Merritt Engineering Co., 302 N.Y. 131, 96 N.E.2d 739, 302 N.Y. (N.Y.S.) 131, 1951 N.Y. LEXIS 758 (N.Y. 1951).

An employee suffers an injury arising in the course of and out of his employment where, five minutes before closing time, he drank carbon tetrachloride from a bottle labeled gin at the invitation of a co-employee as a practical joke, even though the employer's contract with the employee's union provided that possession of liquor was forbidden and constituted cause for dismissal. Burns v Merritt Engineering Co., 302 N.Y. 131, 96 N.E.2d 739, 302 N.Y. (N.Y.S.) 131, 1951 N.Y. LEXIS 758 (N.Y. 1951).

204. —Violation of rule regarding leaving work site or post

A uniformed guard was injured in the course of his employment when, after leaving his post against rules to go to a restaurant, his immediate superior came after him, ordered him back to the job and while both were returning to employer's premises, guard was assaulted by his superior in a quarrel relating to the employer's business. Gray v Daily News, 284 A.D. 911, 134 N.Y.S.2d 448, 1954 N.Y. App. Div. LEXIS 4041 (N.Y. App. Div. 1954).

A rule of employer that elevator operators could not leave their cars without obtaining permission from the supervisor was interpreted as relating only to the procedure to be followed by an employee in leaving his car and the fact that an elevator operator had left his car unattended at the time of the accident did not show a deviation from employment. Commissioner of Taxation & Finance v Hotel Waldorf Astoria Corp., 1 A.D.2d 858, 148 N.Y.S.2d 720, 1956 N.Y. App. Div. LEXIS 6295 (N.Y. App. Div. 3d Dep't 1956).

Where an employee at a subway newsstand, upon being advised that there was a fire, left the stand and walked to the edge of the platform and was struck and instantly killed by a subway train while looking down the track, a finding of the Board denying death benefits because deceased allegedly violated a rule against leaving the stand and was only seeking to satisfy his own curiosity, could not be sustained, there being no clear evidence that there was such a rule, or, that if there were, decedent was advised of it. Feldman v A. B. C. Vending Corp., 16 A.D.2d 189, 226 N.Y.S.2d 892, 1962 N.Y. App. Div. LEXIS 10308 (N.Y. App. Div. 3d Dep't 1962), aff'd, 12 N.Y.2d 223, 238 N.Y.S.2d 667, 188 N.E.2d 905, 1963 N.Y. LEXIS 1378 (N.Y. 1963).

205. —Violation of other rules or instructions

Where death benefits were claimed for death of a truck driver due to carbon monoxide asphyxia from using an improvised charcoal burner in the truck made out of two cans, wherein the defense was that decedent had been prohibited to use such heater, an award was affirmed on the ground that the rule had been habitually disregarded with the employer's knowledge and acquiescence. Barrett v Al Charyn, Inc., 11 N.Y.2d 849, 227 N.Y.S.2d 673, 182 N.E.2d 282, 1962 N.Y. LEXIS 1267 (N.Y. 1962).

An employee who was injured while disobeying the instructions of his superiors because of the fact that due to his deafness he misunderstood said instructions, but proceeded to act in good faith with intent to benefit his employer, is entitled to compensation. Greeney v Haberle-Crystal Spring Brewing Co., 190 A.D. 785, 180 N.Y.S. 648, 1920 N.Y. App. Div. LEXIS 4250 (N.Y. App. Div. 1920).

An injury resulting in the death of a 15-year-old employee does not arise out of and in the course of her employment within the meaning of former subdivision 7 of § 3, where she met her death while operating a freight elevator contrary to orders, solely to save the effort of climbing stairs to reach the fourth floor of the building where she worked. Hamberg v Flower City Specialty Co., 202 A.D. 113, 195 N.Y.S. 170, 1922 N.Y. App. Div. LEXIS 4864 (N.Y. App. Div. 1922).

Where an employee collected stones and placed them in a wagon attached to a tractor and, in violation of the orders of his employer, started to drive the tractor to dump the stones, and the tractor overturned injuring the employee, an award of compensation is proper since the use of the tractor was but an incident of the principal job of removing and carting away the stones so that the claimant performed his work in a forbidden manner, rather than performing work which had been forbidden. Ricci v Katz, 267 A.D. 928, 46 N.Y.S.2d 781, 1944 N.Y. App. Div. LEXIS 5553 (N.Y. App. Div. 1944).

206. Overexertion, excitement or stress as accidental injury

A heart injury such as coronary occlusion or thrombosis when brought on by overexertion or strain in the course of daily work is compensable, although a pre-existing pathology may have been contributing factor. Masse v James H. Robinson Co. (1950) 301 NY 34, 92 NE2d 56 criticized in Fagan v Dell'Isola (2006, Guam) 2006 Guam 11, 2006 Guam LEXIS 12).; Gioia v A. J. Courtmel Co., 283 A.D. 40, 126 N.Y.S.2d 94, 1953 N.Y. App. Div. LEXIS 2975 (N.Y. App. Div. 1953), reh'g denied, 283 A.D. 677, 127 N.Y.S.2d 808, 1954 N.Y. App. Div. LEXIS 4878 (N.Y. App. Div. 1954).

A heart attack may be a compensable accident even though it is caused by a strain which is imposed by the usual nature of the employee's work. However, the regular job activity of the employee must entail a greater exertion than the ordinary wear and tear of life. Hence, an award for death benefits was reversed where the employee had a chronic rheumatic heart condition and died of heart failure when placing some tools on a truck. The medical opinion did not connect any unusual strain occurred in placing the tools on the truck with the death. Burris v Lewis, 2 N.Y.2d 323, 160 N.Y.S.2d 853, 141 N.E.2d 424, 1957 N.Y. LEXIS 1207 (N.Y. 1957).

Heart cases where it is usually required to show some special effort as a precipitating cause of the attack stand in a class by themselves, but they do so because their generalized nature makes it difficult actually to attribute the attack to the work; this rule therefor does not apply where the usual effort is shown to have caused a specific failure in a specific artery. Kayser v Erie County Highway Dep't, 276 A.D. 789, 92 N.Y.S.2d 612, 1949 N.Y. App. Div. LEXIS 3332 (N.Y. App. Div. 1949).

When a compensation award in a heart case is based on unusual strain or exertion in a regular activity, it must nevertheless be shown that the activity was more than ordinary wear and tear of life and that the heart attack was caused by such unusually hard work. Stang v J. Pechman & Co., 7 A.D.2d 245, 181 N.Y.S.2d 952, 1959 N.Y. App. Div. LEXIS 9976 (N.Y. App. Div. 3d Dep't), amended, 8 A.D.2d 665, 185 N.Y.S.2d 773, 1959 N.Y. App. Div. LEXIS 9049 (N.Y. App. Div. 3d Dep't 1959).

Ordinary strenuous work is sufficient to constitute a heart accident. Stengel v Great Atlantic & Pacific Tea Co., 14 A.D.2d 949, 221 N.Y.S.2d 157, 1961 N.Y. App. Div. LEXIS 7890 (N.Y. App. Div. 3d Dep't 1961).

A heart injury due to unusual effort over a period of several days may be found to be accidental. Murphy v Howard & Schaffer, Inc., 17 A.D.2d 882, 233 N.Y.S.2d 339, 1962 N.Y. App. Div. LEXIS 7317 (N.Y. App. Div. 3d Dep't 1962).

An award of death benefits cannot be predicated on a mere finding that decedent's work contributed to his death from a coronary attack because the work he was doing was too heavy for him. Bosted v Larsen Baking Co., 19 A.D.2d 924, 244 N.Y.S.2d 3, 1963 N.Y. App. Div. LEXIS 2977 (N.Y. App. Div. 3d Dep't 1963).

It is settled that an injury caused by emotional stress or strain may be found to be accidental within the contemplation of this law. Lobman v Bernhard Altmann Corp., 19 A.D.2d 931, 244 N.Y.S.2d 425, 1963 N.Y. App. Div. LEXIS 2882 (N.Y. App. Div. 3d Dep't 1963), aff'd, 15 N.Y.2d 506, 254 N.Y.S.2d 113, 202 N.E.2d 559, 1964 N.Y. LEXIS 896 (N.Y. 1964).

Whether or not there was excessive work activity resulting in the death of the employee was for the board to decide and the court has no alternative but to affirm. Bosted v Larsen Baking Co., 32 A.D.2d 870, 301 N.Y.S.2d 227, 1969 N.Y. App. Div. LEXIS 3638 (N.Y. App. Div. 3d Dep't 1969).

An accident may be the result of continuous strenuous physical effort which contributes to the ultimate, and subsequent, heart injury and overt symptoms are not a prerequisite to the recovery of benefits. Jamroz v Refined Syrups & Sugars, Inc., 33 A.D.2d 859, 305 N.Y.S.2d 916, 1969 N.Y. App. Div. LEXIS 2620 (N.Y. App. Div. 3d Dep't 1969).

There was substantial evidence in record to support finding of Workmen's Compensation Board that, although decedent's work activities may have been routine at times and not precipitous of excessive strain, activities of decedent on day in question involved undue stress and strain that went beyond ordinary wear and tear of life and aggravated claimant's preexisting coronary condition so as to cause death and allow recovery on basis of an accident arising out of and in course of employment. Lagona v Starpoint Cent. School, 50 A.D.2d 236, 377 N.Y.S.2d 680, 1975 N.Y. App. Div. LEXIS 11485 (N.Y. App. Div. 3d Dep't 1975), aff'd, 40 N.Y.2d 1034, 391 N.Y.S.2d 855, 360 N.E.2d 355, 1976 N.Y. LEXIS 3221 (N.Y. 1976).

Even in case of a man with an insufficient cardiac reserve, if actual work done is found by substantial evidence to have precipitated a cardiac event which caused death, a sufficient factual relationship may be found between strain of work and result to be deemed an accident within scope of compensation laws. Lagona v Starpoint Cent. School, 50 A.D.2d 236, 377 N.Y.S.2d 680, 1975 N.Y. App. Div. LEXIS 11485 (N.Y. App. Div. 3d Dep't 1975), aff'd, 40 N.Y.2d 1034, 391 N.Y.S.2d 855, 360 N.E.2d 355, 1976 N.Y. LEXIS 3221 (N.Y. 1976).

Even if personnel decision involving promotion for which claimant volunteered fell within meaning of CLS Work Comp § 2(7), Workers' Compensation Board properly applied standard generally applicable in determining claims for mental injury based on work-related stress, and thus claimant was properly awarded workers' compensation benefits since personnel decision contributed only indirectly by requiring him to take on increased responsibilities that ultimately created stress. Brickner v N.Y. State DOT, 284 A.D.2d 829, 727 N.Y.S.2d 523, 2001 N.Y. App. Div. LEXIS 6871 (N.Y. App. Div. 3d Dep't 2001), app. denied, 98 N.Y.2d 601, 744 N.Y.S.2d 761, 771 N.E.2d 834, 2002 N.Y. LEXIS 955 (N.Y. 2002).

207. —Usual work test; greater exertion than ordinary wear and tear of life generally

In heart cases, the "usual work" test has lost most if not all its former significance and has gradually been discarded by an increasing line of cases ending with Masse v James H. Robinson Co., 301 N.Y. 34, 92 N.E.2d 56, 301 N.Y. (N.Y.S.) 34, 1950 N.Y. LEXIS 839 (N.Y. 1950).

Where decedent died from a heart attack brought on by unusual effort and activity while engaged in his employment, his death was caused by an accidental injury which arose out of and in the course of his employment. Weiss v Buffalo Scale Co., 262 A.D. 979, 30 N.Y.S.2d 24, 1941 N.Y. App. Div. LEXIS 6767 (N.Y. App. Div. 1941).

The fact of "unusual work" is no longer decisive in cases where employees sustained heart attacks. Strain or unusual effort may be found even though the work, generally considered, is no different from that which the claimant has been doing over some period of time. The element of over-exertion or strain is one of fact to be determined, not by any catch phrase, but by the peculiar circumstances of the individual case. Gioia v A. J. Courtmel Co., 283 A.D. 40, 126 N.Y.S.2d 94, 1953 N.Y. App. Div. LEXIS 2975 (N.Y. App. Div. 1953), reh'g denied, 283 A.D. 677, 127 N.Y.S.2d 808, 1954 N.Y. App. Div. LEXIS 4878 (N.Y. App. Div. 1954).

The finding of extraordinary effort is not needed to establish an "accident" in the case of an actual rupture of blood vessels. Reed v Brookhiser, 8 A.D.2d 895, 186 N.Y.S.2d 815, 1959 N.Y. App. Div. LEXIS 8311 (N.Y. App. Div. 3d Dep't 1959).

In a heart case, the test of relationship to employment is not whether the strain to which the heart attack is attributed was unusual compared to that normally present in the claimant's regular tasks, and it is sufficient if the performance of the work in question involved exceptional strain so great as to affect the heart. Sczesniak v Whitney, 12 A.D.2d 366, 211 N.Y.S.2d 581, 1961 N.Y. App. Div. LEXIS 12273 (N.Y. App. Div. 3d Dep't 1961).

A board finding in connection with a death benefits award in a heart case merely that decedent was doing work sufficiently exerting to bring on the attack and that his heart condition had already reached a stage at which his usual work was difficult for him was reversed and remanded for failure of the Board to apply the proper test of whether his work at the time was sufficiently strenuous to require more than normal exertion. Traversone v Lee Bros. Storage, Inc., 17 A.D.2d 175, 233 N.Y.S.2d 328, 1962 N.Y. App. Div. LEXIS 7282 (N.Y. App. Div. 3d Dep't 1962).

While it is true that the "usual work" test of accidental injury has lost most, if not all, of its former significance, there still remains a question as to whether the regular job activity itself entails greater exertion than ordinary wear and tear of life. Lerner v Terrycab Co., 20 A.D.2d 615, 245 N.Y.S.2d 565, 1963 N.Y. App. Div. LEXIS 2612 (N.Y. App. Div. 3d Dep't 1963).

Where board could properly find that decedent's activities on day upon which he suffered heart attack constituted arduous work, fact that he was performing his usual activities is not controlling as to the question of whether his resulting death is compensable. Post v Wallauer Paint Co., 22 A.D.2d 981, 254 N.Y.S.2d 720, 1964 N.Y. App. Div. LEXIS 2541 (N.Y. App. Div. 3d Dep't 1964).

A heart attack brought on by overexertion or strain and suffered in the course of employment, is compensable only if the regular job activity shall entail greater exertion than the ordinary wear and tear of life, and the heart attack shall have been produced by the "unusually hard" work thus demanded. Schuren v Wolfson, 33 A.D.2d 601, 304 N.Y.S.2d 510, 1969 N.Y. App. Div. LEXIS 3021 (N.Y. App. Div. 3d Dep't 1969), rev'd, 30 N.Y.2d 90, 330 N.Y.S.2d 368, 281 N.E.2d 169, 1972 N.Y. LEXIS 1483 (N.Y. 1972).

To constitute "strenuous work" so as to sustain an award for death resulting from a heart attack, the activities involved must from the standpoint of the average man be sufficiently arduous to entail "greater exertion than the ordinary wear and tear of life." McCormick v Green Bus Lines, Inc., 33 A.D.2d 630, 304 N.Y.S.2d 807, 1969 N.Y. App. Div. LEXIS 2992 (N.Y. App. Div. 3d Dep't 1969), rev'd, 29 N.Y.2d 246, 326 N.Y.S.2d 557, 276 N.E.2d 619, 1971 N.Y. LEXIS 965 (N.Y. 1971).

Substantial medical evidence supported Board's determination that claimant's myocardial infarction, which occurred while claimant was performing his job duties as an automobile parts delivery man, was not causally related to claimant's work since

Board is not required to find compensability or hold that strenuous effort is a proximate cause of subsequent cardiac events merely because such an event occurs during work duties. Fitch v Jake Nussbaum Auto Parts, Inc., 84 A.D.2d 639, 444 N.Y.S.2d 287, 1981 N.Y. App. Div. LEXIS 15759 (N.Y. App. Div. 3d Dep't 1981).

208. —Assuming new duties requiring greater effort

Two weeks after a cloth cutter began to do heavier work which required greater effort and exertion, during which period he worked at least one hour overtime each day, he suffered a coronary infarction which medical testimony showed was causally related to his employment. Award for death benefits affirmed. Hochman v Salable Coat Co., 2 A.D.2d 623, 151 N.Y.S.2d 806, 1956 N.Y. App. Div. LEXIS 5473 (N.Y. App. Div. 3d Dep't 1956).

Claimant, who had been engaged in a sedentary occupation, took a job as material handler. On the fourth day he died of a heart attack. In view of the heavier work and medical proof to indicate that it contributed to his death, the award was confirmed. Valente v Ford Motor Co., 3 A.D.2d 801, 160 N.Y.S.2d 199, 1957 N.Y. App. Div. LEXIS 6085 (N.Y. App. Div. 3d Dep't), app. denied, 3 N.Y.2d 705, 1957 N.Y. LEXIS 1333 (N.Y. 1957).

There was sufficient evidence to sustain a finding that an employee's death was due to heart attack occasioned by an "accident" in course of employment where it appeared that, prior to his death, he had been operating a very heavy and powerful bulldozer on construction operations as a "push cat" operator for only two weeks, following previous work as an oiler, that he began to develop cardiac symptoms shortly after he started as a push cat operator and finally, on a day when special difficulties were encountered because of wet soil complained of illness at the end of the day's work and died within a few hours thereafter. Hudson v Waddington Constr., 14 A.D.2d 463, 217 N.Y.S.2d 130, 1961 N.Y. App. Div. LEXIS 10158 (N.Y. App. Div. 3d Dep't 1961).

Evidence that, on the day of the alleged accident causing a back injury, plaintiff was using a chip hammer which weighed about 35 pounds and had to be picked up and down, the hammer being of a different and heavier type than customarily used by him and requiring different handling, and had to quit work and go to the hospital because he was suffering such pains in his back, was sufficient to sustain a disability award for the back injury. Chadburn v Drachman Demolition Co., 17 A.D.2d 1008, 233 N.Y.S.2d 902, 1962 N.Y. App. Div. LEXIS 6990 (N.Y. App. Div. 3d Dep't 1962).

Evidence support conclusion that decedent's fatal heart attack was causally related to his employment with county sheriff's department as Operations Lieutenant at local jail, despite existence of other contributing conditions, where several witnesses testified to stressful working conditions under which decedent was required to function and how those conditions, coupled with shift change, manifested in physical symptoms, and medical testimony from decedent's attending physician and impartial cardiologist unequivocally supported those observations, resulting in their conclusion that change in shift after 11 years was stressful and that such stress was significant contributing cause of decedent's heart attack. Joslyn v Oneida County Sheriff's Dep't, 267 A.D.2d 891, 700 N.Y.S.2d 548, 1999 N.Y. App. Div. LEXIS 13610 (N.Y. App. Div. 3d Dep't 1999).

Claimant, grade C business development officer required to bring in commercial loans, was properly found not to have sustained compensable injury based on work-related stress, anxiety, and depression where his supervisor testified that as result of claimant's lack of accounting background, she initially viewed standard goal for grade C business development officers as unrealistic for claimant and thus set significantly lower goal for him for 1995 in order to provide him with period to adjust or complete additional course work, and supervisor, after realizing that she did not have discretion to depart from standard goals set by employer, advised claimant in September 1995 that he would be expected to meet standard goal for position in question beginning in 1996. Chaousy v Marine Midland Bank, 269 A.D.2d 625, 702 N.Y.S.2d 703, 2000 N.Y. App. Div. LEXIS 1106 (N.Y. App. Div. 3d Dep't 2000).

209. —Climbing ladders or stairs

A blacksmith with a pre-existing heart condition who regularly climbed 3 flights of stairs in the course of his employment and suffered a fatal heart attack while climbing them at quitting time does not sustain an accidental injury under this section. Arberger v International Hydro-Electric Corp., 256 A.D. 1019, 10 N.Y.S.2d 490, 1939 N.Y. App. Div. LEXIS 5904 (N.Y. App. Div. 1939).

A janitress who climbed four flights of stairs three times within a twenty minute interval and suffered a coronary occlusion, sustains an accidental injury under this section. McCormack v Wood Harmon Warranty Corp., 263 A.D. 914, 32 N.Y.S.2d 145, 1942 N.Y. App. Div. LEXIS 7346 (N.Y. App. Div.), aff'd, 288 N.Y. 614, 42 N.E.2d 613, 288 N.Y. (N.Y.S.) 614, 1942 N.Y. LEXIS 1459 (N.Y. 1942).

A waiter employed to serve drinks at a party requiring that he descend about fifteen to twenty steps to the bar and to climb the same steps after the order was filled suffers an accidental injury where he sustained a fatal heart condition and it appears that his ordinary occupation was not strenuous but that on the night in question he was subjected to an unusual and excessive expenditure of effort. Mark v Myrod Amusement Corp., 267 A.D. 844, 45 N.Y.S.2d 748, 1944 N.Y. App. Div. LEXIS 5074 (N.Y. App. Div. 1944).

The activities of a 64-year old plumber with existing arteriosclerosis in walking to the top of a 6-floor building with 55 lbs of equipment on a hot day and there working with a burning torch causing an acute left ventricular failure was an accident within the meaning of this law. Gillar v Jarcho Bros., Inc., 282 A.D. 968, 125 N.Y.S.2d 465, 1953 N.Y. App. Div. LEXIS 5595 (N.Y. App. Div. 1953).

After making several trips from the main level of a building to the basement, a housing project building superintendent with a pre-existing cardiac condition collapsed and died. Award for death benefits affirmed. Snyder v New York State Vererans Emergency Housing Project, 1 A.D.2d 712, 146 N.Y.S.2d 781, 1955 N.Y. App. Div. LEXIS 3727 (N.Y. App. Div. 3d Dep't 1955).

An employee who suffered a heart attack while doing his regular work could be found to have sustained a compensable accident where the work entailed a heavy physical strain. The employee was making 15 or 20 trips daily up and down the fourteen stories of a building he was working in. Fisher v Buffalo Electric Co., 2 A.D.2d 612, 151 N.Y.S.2d 959, 1956 N.Y. App. Div. LEXIS 5455 (N.Y. App. Div. 3d Dep't 1956).

Decedent, employed as inspector of buildings, was required to climb several flights of stairs in course of duties. He suffered a coronary occlusion and died. Board properly found that occurrence of accidental injury had not been established. Cunningham v New York City Housing Administration, 5 A.D.2d 1032, 173 N.Y.S.2d 168, 1958 N.Y. App. Div. LEXIS 7347 (N.Y. App. Div. 3d Dep't 1958).

There was ample evidence to show that death was attributable to a heart condition induced by exertion, with nothing to indicate that ingestion of alcohol had any significant effect, where it appeared that deceased, a construction laborer, carried tools up 13 flights of stairs twice on the same day because of inability to use the elevator, the temperature on that day was over 92 degrees, and was observed to be "sick and white" before he went home to rest, then went to the hospital after imbibing 12 drinks of gin. Corso v Tandy & Allen Associates, 10 A.D.2d 741, 197 N.Y.S.2d 510, 1960 N.Y. App. Div. LEXIS 11180 (N.Y. App. Div. 3d Dep't 1960).

There was substantial evidence to support a death benefit award where it appeared that, since December 30, 1953, decedent had been suffering from heart disease but nevertheless continued to work as night watchman in a carpet mill, which work required him to climb a number of flights of stairs each hour and walk a half mile to punch time clocks at 10 different stations and that, at the time he suffered the heart attack, he was climbing stairs on the third trip, having climbed 22 flights in the previous two and a quarter hours, suffered a heart attack, fell down stairs, and struck his head. Brandes v Mohawk Carpet Mills, Inc., 11 A.D.2d 878, 202 N.Y.S.2d 580, 1960 N.Y. App. Div. LEXIS 8410 (N.Y. App. Div. 3d Dep't 1960).

An award of death benefits was reversed, as not based on any showing of undue strain in course of employment, where it merely appeared that decedent, a carpenter working on a construction job, after climbing a flight of steps carrying his tools, which

weighed six to seven pounds, went back to his car and collapsed and died while reparking it. Bloom v Israel Cohen & Son, 16 A.D.2d 841, 227 N.Y.S.2d 747, 1962 N.Y. App. Div. LEXIS 9965 (N.Y. App. Div. 3d Dep't 1962).

On the basis of conflicting medical testimony, the Board could find that decedent's death from a myocardial infarction on July 15, 1960, was causally related to overexertion on June 24 while inspecting, in course of employment, on a brisk day, a certain power project over a two and one-half hour period which involved climbing and descending ladders and negotiating rough and uneven terrain. Maurin v N. Y. S. Dep't of Labor, 17 A.D.2d 880, 233 N.Y.S.2d 336, 1962 N.Y. App. Div. LEXIS 7314 (N.Y. App. Div. 3d Dep't 1962), app. denied, 12 N.Y.2d 645, 1963 N.Y. LEXIS 1513 (N.Y. 1963).

A fatal heart attack sustained by a 35-year-old employee after ascending a 50-foot ladder following work with a three-man crew raising 35-pound galvanized sheets to a scaffold by means of a pulley could properly be found to be compensable. Pickhardt v C. H. Heist Ohio Corp., 20 A.D.2d 737, 246 N.Y.S.2d 850, 1964 N.Y. App. Div. LEXIS 4382 (N.Y. App. Div. 3d Dep't), app. denied, 14 N.Y.2d 484, 1964 N.Y. LEXIS 1739 (N.Y. 1964).

Where it appeared that deceased had been under medical care for a heart condition since 1956 and had suffered a coronary occlusion on January 31, 1958 requiring hospitalization for four weeks, the Board could find that claimant had not sustained an industrial accident but that his subsequent fatal heart attack was due to natural progression of an underlying coronary disease, notwithstanding contention that he suffered extraordinary strain in climbing subway stairs in getting to work on the day of his death. Schwarz v Benedict & Benedict, 21 A.D.2d 921, 251 N.Y.S.2d 175, 1964 N.Y. App. Div. LEXIS 3353 (N.Y. App. Div. 3d Dep't 1964).

Where death occurred very shortly after pipefitter ascended ladder with 5 pound pipe wrench, and claimant's medical consultant testified that activities just prior to death entailed more than ordinary exertion, although carrier's medical witness testified to contrary, board's finding that there was a causal relation between death and work performed by decedent was supported by substantial evidence. Viola v Macander Corp., 28 A.D.2d 1025, 284 N.Y.S.2d 109, 1967 N.Y. App. Div. LEXIS 3270 (N.Y. App. Div. 3d Dep't), app. denied, 21 N.Y.2d 641, 1967 N.Y. LEXIS 1845 (N.Y. 1967).

Evidence that door-to-door solicitor collapsed and died after climbing four flights of stairs while carrying an 11-pound fibreboard case to deliver certain merchandise previously ordered by a customer sustains finding of board that such activity constituted an "unusual strain and exertion" and was "arduous and of sufficient effect to precipitate the vascular demise" and that accordingly "claimant sustained an accidental injury arising out of and in the course of his employment." Rothstein v Fuller Brush Co., 30 A.D.2d 748, 291 N.Y.S.2d 245, 1968 N.Y. App. Div. LEXIS 3605 (N.Y. App. Div. 3d Dep't 1968).

Death benefits were properly paid to survivors of a plumber who died at home on a Sunday following a heart attack, where evidence revealed that the previous Friday decedent had performed strenuous work involving climbing 14 to 16 flights of stairs three times carrying tool and pipe which weighed from 2 to 70 pounds. The court rejected the argument that recovery could not be had in heart attack cases unless the attack followed as an "immediate result" of the exertion, holding that immediate result had never been a prerequisite to recovery. Wynn v Paramount Plumbing Co., 33 A.D.2d 529, 303 N.Y.S.2d 820, 1969 N.Y. App. Div. LEXIS 3249 (N.Y. App. Div. 3d Dep't 1969).

210. —Delivery work

A truck driver who exerted himself carrying a trunk up three flights of stairs and as the result of which suffered a lung hemorrhage and aggravated a pre-existing pulmonary tuberculosis sustains an accidental injury under this section. Jacques v Railway Express Agency, Inc., 272 A.D. 987, 72 N.Y.S.2d 710, 1947 N.Y. App. Div. LEXIS 4514 (N.Y. App. Div. 1947).

A delivery truck helper who carried a case of beer weighing 60 pounds over a snow and ice covered driveway, as the result of which he suffered a fatal coronary occlusion sustains an accidental injury. Serie v F. & M. Schaefer Brewing Co., 273 A.D. 833, 76 N.Y.S.2d 50, 1948 N.Y. App. Div. LEXIS 4839 (N.Y. App. Div. 1948).

Proof that the heat of the sun and the effort involved in delivering loads of brick contributed to a death caused by heart disease was sufficient to sustain an award. Murphy v General Builders Supply Corp., 282 A.D. 898, 125 N.Y.S.2d 66, 1953 N.Y. App. Div. LEXIS 5366 (N.Y. App. Div. 1953).

Evidence that an employee worked fourteen hours delivering cases of beer, suffered a coughing spell during the course of this employment and died of a coronary infarction shortly after arriving home was sufficient to sustain award for death benefits. Cafiero v P. Ballantine & Sons, 1 A.D.2d 527, 151 N.Y.S.2d 862, 1956 N.Y. App. Div. LEXIS 5422 (N.Y. App. Div. 3d Dep't), app. denied, 2 N.Y.2d 705, 1956 N.Y. LEXIS 1178 (N.Y. 1956).

A drug store clerk was fully able to work, despite a heart condition. One day he was called upon to deliver some medicine in a hurry and ran up five flights of stairs to do so. Award for heart attack affirmed. Unger v Reid & Snyder, Inc., 3 A.D.2d 780, 160 N.Y.S.2d 400, 1957 N.Y. App. Div. LEXIS 6188 (N.Y. App. Div. 3d Dep't 1957).

Claimant, who operated a milk route, was put to unusual strain and effort because of manner in which truck was loaded and while working felt choking and had sensation in substernal area. Subsequent examination by doctor found him to be suffering from heart failure. Award affirmed. Sanders v Samuel Adler, Inc., 5 A.D.2d 1028, 173 N.Y.S.2d 322, 1958 N.Y. App. Div. LEXIS 6183 (N.Y. App. Div. 3d Dep't 1958).

Where claimant, regularly assigned to clerical work for his employer in the hardware supply business, also made deliveries of materials when the employer was short of help, and suffered an acute heart attack on a hot day while delivering 30 cases of tile to a customer, each weighing 75 pounds, the facts presented a "classic" case of industrial accident heart attack for which the Workmen's Compensation Board could properly award compensation, notwithstanding some inconsistencies and vagaries in testimony of medical witnesses. Marinaro v Shapiro, 10 A.D.2d 462, 200 N.Y.S.2d 687, 1960 N.Y. App. Div. LEXIS 9908 (N.Y. App. Div. 3d Dep't 1960), aff'd, 10 N.Y.2d 910, 223 N.Y.S.2d 520, 179 N.E.2d 520, 1961 N.Y. LEXIS 938 (N.Y. 1961).

An employee who had suffered for years from a static heart condition developed acute cardiac symptoms after struggling with the tail gate of a truck in which he was delivering merchandise. He died within a month. The episode of the truck constituted an accident and was causally related to his death. Feenberg v Cit Ro Mfg. Co., 10 A.D.2d 741, 198 N.Y.S.2d 631, 1960 N.Y. App. Div. LEXIS 11179 (N.Y. App. Div. 3d Dep't 1960).

The evidence was considered sufficient to show a causal relationship between death of decedent, who had a pre-existing heart condition, on the night following an extra hard day of work as routeman on a laundry truck, the day in question having been the busiest day of the week for him including delivery of laundry to a large chemical factory and reloading the truck again for the next day's deliveries with 65 to 70 bundles of clothes weighing about 30 pounds apiece, there being some medical testimony to support the conclusion that the heart attack resulted from the extra heavy work burden. Domash v Standard Coat, Apron & Linen Service, 11 A.D.2d 575, 201 N.Y.S.2d 142, 1960 N.Y. App. Div. LEXIS 9925 (N.Y. App. Div. 3d Dep't 1960), aff'd, 9 N.Y.2d 889, 216 N.Y.S.2d 702, 175 N.E.2d 831, 1961 N.Y. LEXIS 1302 (N.Y. 1961).

Death was clearly compensable where an employee employed as a truck driver and delivery man suffered a coronary occlusion and died immediately after carrying cases of canned goods and three 100 pound bags of sugar from a truck down a flight of eight steps to make a delivery. Geoghan v Francis Leggett Premier Food, 12 A.D.2d 669, 207 N.Y.S.2d 688, 1960 N.Y. App. Div. LEXIS 6727 (N.Y. App. Div. 3d Dep't 1960).

Where a routeman delivering dairy products started work an hour ahead of the usual time on the day before a holiday, because many more packages had to be delivered than usual, and experienced pain across his chest while lifting a 71 pound crate of cheese, which persisted the following day until he was hospitalized and diagnosed as suffering from a myocardial infarction, the evidence was sufficient to sustain a finding of causal relationship

between his work and the infarction. Deutsch v H. & S. Dairy Products, Inc., 12 A.D.2d 845, 209 N.Y.S.2d 570, 1961 N.Y. App. Div. LEXIS 13203 (N.Y. App. Div. 3d Dep't 1961).

The evidence was sufficient to show causal relationship between a heart attack suffered by claimant and his employment where it appeared that on the day in question he was delivering and picking up bundles of laundry weighing from 40 to 50 pounds, it was a hot day, the heater of the truck with which he was working had become stuck and could not be turned off, and that, after continuing to work for awhile notwithstanding pains in his chest, he finally collapsed and was taken to a hospital. Greenberg v Standard Overall Co., 13 A.D.2d 565, 212 N.Y.S.2d 1, 1961 N.Y. App. Div. LEXIS 12193 (N.Y. App. Div. 3d Dep't 1961).

A finding that decedent's fatal coronary occlusion was attributable to his work activities was based on sufficient evidence where it appeared that his work day commenced at 8:00 a.m., the work consisted of home delivery of cases of beverages weighing about 40 pounds apiece and unloading empty cases on return of the truck to the warehouse, he complained of a pain in the back at about 3:00 p.m. and appeared pale and perspiring while unloading empty cases at about 5:00 p.m. Friedman v Famous Beverages, Inc., 16 A.D.2d 995, 229 N.Y.S.2d 302, 1962 N.Y. App. Div. LEXIS 9070 (N.Y. App. Div. 3d Dep't 1962).

With respect to death of a delivery man from heart attack immediately following alleged transfer of four 50 pound cartons from one truck to another, although there was no direct evidence that anyone saw decedent actually transfer the cartons an award of death benefits could be sustained on the basis of evidence that decedent frequently performed such work, was instructed to do so shortly prior to his death, and reported that he had "done it," shortly prior to his death. Wilkenfeld v Interstate Office Supply Co., 18 A.D.2d 740, 235 N.Y.S.2d 480, 1962 N.Y. App. Div. LEXIS 6176 (N.Y. App. Div. 3d Dep't 1962).

Award held proper where decedent collapsed from acute heart failure immediately after trying to negotiate bulky carton through small doorway after carrying it on his shoulder from parking lot, where such collapse was from cumulative effect of exertion on that day beginning at 4 or 5 o'clock in the morning when decedent, a route salesman for wholesale bakers, began to pack bakery products to an aggregate of 250 pounds in weight into individual containers which he then loaded in to truck from which he made deliveries at some 30 stops on his assigned route, and his death occurred 3 days later when he returned to work for a brief time packaging his orders and loading the truck when he collapsed and died. Mandelblatt v Gold Star Baking Corp., 22 A.D.2d 966, 254 N.Y.S.2d 432, 1964 N.Y. App. Div. LEXIS 2585 (N.Y. App. Div. 3d Dep't 1964), aff'd, 16 N.Y.2d 974, 265 N.Y.S.2d 289, 212 N.E.2d 775, 1965 N.Y. LEXIS 1048 (N.Y. 1965).

Where claimant's decedent collapsed and died while pushing a hand truck loaded with approximately 300 pounds of fish and the record indicated that he had made approximately from 7 to 10 similar deliveries in the half hour prior to his death, his work also entailing lifting and handling heavy boxes, the court could not say that the board could not find this work to be strenuous and arduous. And where there was medical testimony that this effort was causally related to such death there was sufficient evidence on which the board could determine that an industrial accident was involved. Drews v Blue Ribbon Fish Co., 23 A.D.2d 927, 258 N.Y.S.2d 868, 1965 N.Y. App. Div. LEXIS 4296 (N.Y. App. Div. 3d Dep't 1965).

211. —Digging, excavating or shoveling

A laborer who worked at an excavation shoveling dirt into a truck and falls dead from acute dilation of the heart sustains an accidental injury under this section. Drake v Tillingham-Moyer Co., 255 A.D. 730, 6 N.Y.S.2d 819, 1938 N.Y. App. Div. LEXIS 4936 (N.Y. App. Div. 1938).

Where claimant's intestate, a highway superintendent, died immediately after having shoveled mire away from the wheels of truck but where he had an incurable heart condition for five years prior to the incident, the evidence did not show that an accident in the form of severe or unusual strain, or of a catastrophic or extraordinary occurrence. Beaver v Collins, 263 A.D. 1033, 33 N.Y.S.2d 413, 1942 N.Y. App. Div. LEXIS 7965 (N.Y. App. Div. 1942).

There is sufficient evidence of an accidental injury to sustain an award where the assistant janitor in an apartment house after throwing about a dozen shovels full of coal into the furnace, each weighing between 35 and 40 pounds, suffered a brain hemorrhage where there is medical testimony that the rupture of a blood vessel in claimant's brain was due to the extreme exertion he was engaged in. Bohm v L. R. S. & B. Realty Co., 264 A.D. 962, 37 N.Y.S.2d 173, 1942 N.Y. App. Div. LEXIS 5553 (N.Y. App. Div. 1942), aff'd, 289 N.Y. 808, 47 N.E.2d 52, 289 N.Y. (N.Y.S.) 808, 1943 N.Y. LEXIS 1204 (N.Y. 1943).

A laborer who works all day with a pick and shovel in a crouched and awkward position digging in an unfinished cellar requiring him to use extra exertion and who suffers a cerebral hemorrhage sustains an accidental injury under this section. Sepos v Van Epps Const. Co., 265 A.D. 1025, 38 N.Y.S.2d 939, 1943 N.Y. App. Div. LEXIS 6673 (N.Y. App. Div. 1943).

Decedent suffering from existing hypertension, high blood pressure and cerebral arteriosclerosis, met his death as a result of an "accident" when while working as a shovel laborer digging a trench he suffered a cerebral hemorrhage. Claimant's regular work was common labor. Brancato v John W. Cowper Co., 282 A.D. 752, 121 N.Y.S.2d 813, 1953 N.Y. App. Div. LEXIS 4875 (N.Y. App. Div. 1953).

A building janitor was found dead from a coronary occlusion in the basement of his building. There was no evidence of his activities prior to his death but there was evidence that about the time of his death, the decedent customarily stoked his furnace and that this was arduous labor. Award affirmed. Waskewicz v Diamond, 1 A.D.2d 861, 149 N.Y.S.2d 29, 1956 N.Y. App. Div. LEXIS 6301 (N.Y. App. Div. 3d Dep't 1956).

Death award was proper where decedent's widow introduced hearsay testimony that decedent, while shoveling coal, felt a sharp pain, tried to get to another part of the plant but then fainted and minutes later was found lying on the floor. Even though decedent's work at the time of the accident was usual it could be a contributing or aggravating factor in his death. Hannes v U. S. Corrugated Fibre Box Co., 2 A.D.2d 615, 151 N.Y.S.2d 808, 1956 N.Y. App. Div. LEXIS 5459 (N.Y. App. Div. 3d Dep't 1956).

Decedent, who had pre-existing heart disease was employed by country club on the golf course maintenance group. While pitching forkfuls of damp leaves onto a truck, which work was done in a short period of time, decedent collapsed and died. Such work was somewhat unusual as regarding his ordinary duties. Claimant's medical experts testified, not that any exertion would have been too much for decedent, but that specific work constituted overexertion. Finding of accident sustained. Gibalski v Elmira Country Club, 8 A.D.2d 883, 187 N.Y.S.2d 159, 1959 N.Y. App. Div. LEXIS 8291 (N.Y. App. Div. 3d Dep't 1959).

Death of a night watchman as a result of an unwitnessed heart attack was compensable where the board found that, immediately prior to his death, the decedent had shoveled 150 to 200 pounds of coal to get up steam and moved a water pump weighing about 80 lbs. Oksman v Henry Quist Constr. Co., 9 A.D.2d 972, 193 N.Y.S.2d 718, 1959 N.Y. App. Div. LEXIS 5658 (N.Y. App. Div. 3d Dep't 1959).

There was sufficient evidence to sustain a finding of the board that a coronary thrombosis and myocardial infarction were attributable to use of "an excessive amount of strength" by claimant in attempting to dislodge a pick which had stuck in frozen ground in which he was digging. Deutsch v Garey, 12 A.D.2d 830, 209 N.Y.S.2d 420, 1961 N.Y. App. Div. LEXIS 13375 (N.Y. App. Div. 3d Dep't 1961).

Substantial evidence supported award of death benefits where decedent who had a history of a previous dissecting aneurysm and died of same complaint after working at shoveling sand into concrete mixer since a prior underlying physical condition does not preclude an award where there is substantial evidence that the work activities impinged on said condition. Dodson v Frank Vanecek & Son, 24 A.D.2d 787, 263 N.Y.S.2d 774, 1965 N.Y. App. Div. LEXIS 3222 (N.Y. App. Div. 3d Dep't 1965).

Substantial evidence supported finding of Workers' Compensation Board that claimant town laborer suffered accidental injury arising out of and in course of employment where record showed that while raking and shoveling black top and operating roller at

work, claimant experienced chest and arm pain, nausea and headaches, that he continued to experience discomfort during ensuing weekend, and that on Sunday of that weekend he was diagnosed as having suffered myocardial infarction, and claimant's physician testified that although 2-day delay between his work activity and apparent time of infarction was unusual, he was of opinion that claimant's work experience precipitated infarction. Hannold v Town of Fallsburg, 190 A.D.2d 914, 593 N.Y.S.2d 379, 1993 N.Y. App. Div. LEXIS 1081 (N.Y. App. Div. 3d Dep't 1993).

212. —Emotional stress, generally

Undue anxiety, strain, and mental stress from work are frequently more devastating than a mere physical injury, and a compensation award may be sustained on the basis of mental strain arising in the course of, and out of, the employment and resulting in death from heart attack, without any physical impact. Klimas v Trans Caribbean Airways, Inc., 10 N.Y.2d 209, 219 N.Y.S.2d 14, 176 N.E.2d 714, 1961 N.Y. LEXIS 1089 (N.Y. 1961), vacated, Incres S.S. Co. v International Maritime Workers Union, 372 U.S. 24, 83 S. Ct. 611, 9 L. Ed. 2d 557, 1963 U.S. LEXIS 2396 (U.S. 1963).

A factory superintendent who suffered a fatal cerebral hemorrhage at home as the result of confusion, nervousness and concern for the property of his employer and for his own safety as the result of an attempt to salvage his employer's property during a flood suffers an accidental injury. Roberts v Kennedy Valve Mfg. Co., 274 A.D. 866, 82 N.Y.S.2d 195, 1948 N.Y. App. Div. LEXIS 3729 (N.Y. App. Div. 1948).

There was ample evidence to sustain disability and death awards where it was shown that decedent, aged 39, was employed in conjunction with her husband as an apartment house superintendent when part of the coping along the roof of the building fell into the street, causing considerable commotion, whereupon deceased ran into the street and hurried around the area warning persons to stay away, becoming so alarmed and nervous in the process that she collapsed and was taken to a hospital, where her condition was diagnosed as hemiplegia, though she had no history of prior heart trouble, and died shortly thereafter following complications. Micallef v Harry Krischer-Blanner Realty Co., 10 A.D.2d 743, 197 N.Y.S.2d 545, 1960 N.Y. App. Div. LEXIS 11183 (N.Y. App. Div. 3d Dep't 1960).

The disability claim of a hotel elevator operator who continued to operate his elevator for two or three hours while the building was filled with smoke as the result of a fire, "under conditions of great tenseness and danger to his life," could properly be allowed on the basis of medical testimony that the hazards involved caused a psychic trauma resulting in massive hemorrhage from an ulcer. Schwartz v Hampton House Management Corp., 14 A.D.2d 936, 221 N.Y.S.2d 286, 1961 N.Y. App. Div. LEXIS 7870 (N.Y. App. Div. 3d Dep't 1961).

A sudden emotional experience resulting in physical disability can constitute an "accident" in course of employment, where fright and impulsive reactions are involved. Antonini v Progressive Electronics, 15 A.D.2d 842, 224 N.Y.S.2d 481, 1962 N.Y. App. Div. LEXIS 11413 (N.Y. App. Div. 3d Dep't 1962).

A heart attack sustained by a 32 year old truck driver was held to have resulted from an "accident" in course of employment where it followed fright sustained when he was dozing, with a co-employee driving the truck, and an electrical fire started under the dashboard of the truck causing flames, sparks and considerable smoke, in course of which claimant woke up and attempted to jump from the truck while it was traveling at 50 miles per hour, did not jump because he could not get the door open, then helped to extinguish the fire, and shortly thereafter sustained pains in his chest and difficulty in breathing. Antonini v Progressive Electronics, 15 A.D.2d 842, 224 N.Y.S.2d 481, 1962 N.Y. App. Div. LEXIS 11413 (N.Y. App. Div. 3d Dep't 1962).

The evidence was insufficient to sustain findings of the Board that death of the cantor of a synagogue from acute myocardial infarction, was caused by tension and emotional stress in course of his employment where it merely appeared that, prior to the heart attack, he had been conducting the choir for about two hours in preparation for a relgious service under strong lights and in an atmosphere somewhat oppressive because of absence of the usual air conditioning, and had some slight exchange of words with a member of the choir at one stage of the rehearsal. Gordon v Temple Beth El, 18 A.D.2d 855, 236 N.Y.S.2d 101, 1963 N.Y. App. Div. LEXIS 4871 (N.Y. App. Div. 3d Dep't 1963), aff'd, 14 N.Y.2d 742, 250 N.Y.S.2d 429, 199 N.E.2d 508, 1964 N.Y. LEXIS 1163 (N.Y. 1964).

Death of a night watchman on a construction site caused by cardiac hypertrophy could be found to be due to excessive anxiety and strain in course of his employment where it occurred on a very cold and blustery night during which better than 12 inches of snow fell and it appeared that he was found dead in the snow next morning after seeking police assistance because of presence of suspected marauders on the premises. Albarella v Glick Development, Inc., 19 A.D.2d 920, 244 N.Y.S.2d 107, 1963 N.Y. App. Div. LEXIS 2969 (N.Y. App. Div. 3d Dep't 1963).

While record in case where waiter suffered heart attack after a customer collapsed and died was sufficient to sustain an award of death benefits, the award could not be predicated upon board's finding of "emotional experience" without something more definitive than "weakness and inability to work" which did not meet the test of an emotional reaction sufficient to sustain award of death benefits. Nutik v Bienstock & Pollack, Inc., 24 A.D.2d 783, 263 N.Y.S.2d 740, 1965 N.Y. App. Div. LEXIS 3215 (N.Y. App. Div. 3d Dep't 1965).

A decision of the Workers' Compensation Board that claimant's decedent work related events were of a sufficient stressful nature to have directly precipitated the cardiovascular arrest from which he died would be upheld where there was substantial evidence to support the findings on the record which revealed that defendant had two previous heart attacks, he left early in the morning to travel to make a presentation and that he was concerned with the plan he was to present as he disagreed with it. Schwartz v Howard, Needles, Tannen & Bergendorf, 93 A.D.2d 930, 462 N.Y.S.2d 322, 1983 N.Y. App. Div. LEXIS 17823 (N.Y. App. Div. 3d Dep't 1983).

Substantial evidence supported determination of Workers' Compensation Board that claimant, who was fired as correction officer after having physical confrontation with inmate who had threatened to sodomize his son (who was then incarcerated at facility where claimant worked), suffered from adjustment disorder with anxiety and depression which arose out of and in course of his employment, despite evidence that claimant had longstanding history of alcohol abuse and depression, as well as marital problems, where treating psychiatrist testified that claimant's adjustment disorder developed because he was angry, depressed and guilt-ridden about being his son's jailer and that neither claimant's alcohol abuse nor his marital problems were primary cause of his disability, and another psychiatrist testified that being his son's jailer contributed to claimant's depression and drinking, pointing out that prior to incident in question claimant had managed to function adequately despite his other problems. Beames v Warren County Sheriff's Dep't, 190 A.D.2d 877, 593 N.Y.S.2d 127, 1993 N.Y. App. Div. LEXIS 915 (N.Y. App. Div. 3d Dep't 1993).

213. —Emotional stress not found

Where a former 911 operator filed a claim for workers' compensation benefits alleging that work-related stress caused her to suffer depression and ultimately leave her job, and where the Workers' Compensation Board determined that the worker did not sustain an accidental work-related injury because the stress she was exposed to as a result of the rotating-shift schedule was not more than that normally encountered in the workplace, the Board's determination is supported by substantial evidence and is therefore binding on the courts. Leggio v Suffolk County Police Dep't, 96 N.Y.2d 846, 729 N.Y.S.2d 664, 754 N.E.2d 766, 2001 N.Y. LEXIS 1498 (N.Y. 2001).

Evidence was insufficient to sustain an award in favor of a widow where the decedent died of a fatal heart attack while standing in line to make a bank deposit for his employer. Decedent was performing his usual duties and hospital records indicated that he had attacks of precardial pain for three months immediately preceding the fatal attack and that such attacks were usually brought on by tenseness and had no relation to physical exertion. Ledwith v Henry Birgel & Sons, Inc., 3 A.D.2d

877, 161 N.Y.S.2d 384, 1957 N.Y. App. Div. LEXIS 5900 (N.Y. App. Div. 3d Dep't 1957).

Decedent, wardrobe mistress in a cafe, suffered a ruptured blood vessel in her brain. She had sewed a zipper in a costume of a showgirl in a hurry and under alleged tense circumstances and thereafter blacked out. She was totally disabled until her death. But there was no evidence of unusual physical exertion. And similar occurrences were common. So, the evidence did not establish an accident. Claim dismissed. Tillander v Latin Quarter Cafe, Inc., 9 A.D.2d 590, 189 N.Y.S.2d 239, 1959 N.Y. App. Div. LEXIS 7457 (N.Y. App. Div. 3d Dep't 1959).

Findings of the Board in a heart case were inadequate and were based upon insufficient evidence to indicate that decedent, a deputy sheriff, had been undergoing extra exertion or more excitement than anyone else present at an accident scene when he collapsed and died of a heart attack while directing traffic. Woodworth v County of Onondaga-Sheriff's Dep't, 18 A.D.2d 729, 235 N.Y.S.2d 69, 1962 N.Y. App. Div. LEXIS 6579 (N.Y. App. Div. 3d Dep't 1962).

Decedent's job activities did not require greater exertion than the ordinary wear and tear of life, although his duties as general office manager entailed considerable responsibility and his job entailed nervous tension because a superior was an "exacting man" and he had to climb a steep flight of 18 steps twice or more a day to get to his office, hence the evidence was insufficient to sustain an award of death benefits for death by heart attack. Maher v Agawan Aircraft Products, 22 A.D.2d 742, 253 N.Y.S.2d 395, 1964 N.Y. App. Div. LEXIS 2942 (N.Y. App. Div. 3d Dep't 1964), aff'd, 18 N.Y.2d 807, 275 N.Y.S.2d 388, 221 N.E.2d 917, 1966 N.Y. LEXIS 1049 (N.Y. 1966).

The board's determination that no "accident" within the meaning of the Workmen's Compensation Law occurred is supportable by substantial evidence and must be sustained where the decedent expired from coronary arteriosclerosis and congenital hypoplasia allegedly arising from emotional stress over anticipation of an experimental meeting and dilemma over important materials from inventory stockpile as the tension to which decedent was subjected falls visibly short of the standard that the emotional strain be greater than that no which all workers are occasionally subjected without untoward result and the strain involved no more stress and strain than that experienced in the ordinary wear and tear of life. Mulholland v New York State Dep't of Public Works, 34 A.D.2d 1083, 312 N.Y.S.2d 687, 1970 N.Y. App. Div. LEXIS 4268 (N.Y. App. Div. 3d Dep't 1970), overruled, Rackley v County of Rensselaer, 141 A.D.2d 232, 535 N.Y.S.2d 137, 1988 N.Y. App. Div. LEXIS 10905 (N.Y. App. Div. 3d Dep't 1988).

The board's finding was supportable that an injury caused by emotional stress or strain may be found to be accidental within the purview of the Workmen's Compensation Law; its determination that the experience of the decedent imposed upon him great emotional stress and strain, far in excess of the usual wear and tear of life, that it resulted almost immediately in a ventricular fibrillation culminating in his demise, and that the work activity and fatal fibrillation constituted an accidental injury within the meaning of the Workmen's Compensation Law. Quill v Transport Workers Union, 35 A.D.2d 860, 315 N.Y.S.2d 254, 1970 N.Y. App. Div. LEXIS 3585 (N.Y. App. Div. 3d Dep't 1970), app. denied, 28 N.Y.2d 482, 1971 N.Y. LEXIS 1728 (N.Y. 1971).

In proceeding for workmen's compensation death benefits, the evidence established that the emotional stress and strain to which the decedent, a 64-year-old license clerk whose clerical duties required him to work behind a counter reviewing automobile registrations and renewals, was subjected on the day he suffered heart attack was outside the regular routine of his clerical job and exceeded ordinary stress and strain to a degree that it went beyond a transient emotional experience and, in fact, constituted an industrial accident. Goldstone v New York State Dep't of Motor Vehicles, 57 A.D.2d 973, 394 N.Y.S.2d 99, 1977 N.Y. App. Div. LEXIS 12263 (N.Y. App. Div. 3d Dep't 1977).

A decision of the Workers' Compensation Board that the problems encountered by claimant on the day he suffered his heart attack during work, created a situation of emotional tension which was too stressful for claimant at that time, thereby precipitating an acute myocardial infarction would be reversed where there was nothing in the record demonstrating that claimant experienced extreme unusual stress, claimant described his work on that morning as routine duties and the employer produced a doctor who testified that claimant's condition was not work related but due to obesity, hypertension, and smoking. Gates v McBride Transp., Inc., 93 A.D.2d 938, 462 N.Y.S.2d 309, 1983 N.Y. App. Div. LEXIS 17832 (N.Y. App. Div. 3d Dep't), rev'd, 60 N.Y.2d 670, 468 N.Y.S.2d 101, 455 N.E.2d 660, 1983 N.Y. LEXIS 3373 (N.Y. 1983).

Evidence supported finding by Workers' Compensation Board that stress created by claimant's job transfer was no more than that normally encountered in work environment, and thus was not compensable, where claimant, who was employed as showroom assistant for fabric and wall covering jobber, allegedly developed acute depression as result of his transfer from back showroom of employer to front showroom, where he had to deal with less knowledgeable retail customers. Block v Stroheim & Romann, 203 A.D.2d 833, 611 N.Y.S.2d 355, 1994 N.Y. App. Div. LEXIS 4436 (N.Y. App. Div. 3d Dep't), app. denied, 84 N.Y.2d 804, 617 N.Y.S.2d 138, 641 N.E.2d 159, 1994 N.Y. LEXIS 2715 (N.Y. 1994).

Substantial evidence supported the Workers' Compensation Board's finding that the claimant did not suffer an accidental injury arising out of and in the course of her employment because the claimant's work-related stress that led to her anxiety, post-traumatic stress disorder, and depression did not exceed that which could be expected by a supervisor in a normal work environment. Matter of Cuva v State Ins. Fund, 144 A.D.3d 1362, 41 N.Y.S.3d 324, 2016 N.Y. App. Div. LEXIS 7590 (N.Y. App. Div. 3d Dep't 2016).

214. —Severe emotional stress

The board's determination that claimant's coronary was causally related to her employment was supported by substantial evidence in all respects where there was medical evidence that claimant was subjected to severe emotional and psychic stress while employed by her employer and where the board also found that the stress claimant underwent culminated in a disabling coronary condition which constituted an accidental injury arising out of the course of her employment. Mekeel v Chester Nat'l Bank, 85 A.D.2d 806, 445 N.Y.S.2d 642, 1981 N.Y. App. Div. LEXIS 16622 (N.Y. App. Div. 3d Dep't 1981), app. denied, 56 N.Y.2d 507, 1982 N.Y. LEXIS 5414 (N.Y. 1982).

Evidence supported board's decision that claimant did not suffer work-related accident or occupational disease and accordingly was not entitled to receive workers' compensation benefits, where she had significant history of childhood physical, sexual and emotional abuse, and experts disagreed as to what event or events (work-related or otherwise) caused her to fail to properly perform her work-related functions. Gullo v Southern Erie Clinical Servs., 258 A.D.2d 689, 687 N.Y.S.2d 440, 1999 N.Y. App. Div. LEXIS 957 (N.Y. App. Div. 3d Dep't 1999).

In absence of contrary testimony, Workers' Compensation Board could not reject testimony of claimant's expert and fashion expert opinion of its own to conclude that claimant's stroke was not caused by work-related stress, but board could rule against claimant on causal relationship issue by finding that stress actually experienced at work was less that that assumed by his expert. Loftus v New York News, 279 A.D.2d 657, 719 N.Y.S.2d 314, 2001 N.Y. App. Div. LEXIS 62 (N.Y. App. Div. 3d Dep't 2001).

Workers' compensation board properly denied a worker's claim for workers' compensation benefits; the evidence did not support the worker's claim that she sustained a psychiatric disability as a result of sexual harassment by a co-worker, and therefore did not sustain an accidental injury in the course of her employment as defined by N.Y. Workers' Comp. Law § 2. Curley v Allstate Ins. Co., 2 A.D.3d 995, 768 N.Y.S.2d 400, 2003 N.Y. App. Div. LEXIS 13140 (N.Y. App. Div. 3d Dep't 2003).

215. —Preexisting condition

The Board could properly disallow a claim for death benefits where proof showed that employee, while at work as a milk route salesman, died of a coronary thrombosis. The employee had put in long hours of labor and there was proof of mental and physical stress occasioned by circumstances attending the termination of a

strike and medical proof was conflicting. Wade v Woodside Farms, Inc., 2 A.D.2d 625, 151 N.Y.S.2d 761, 1956 N.Y. App. Div. LEXIS 5476 (N.Y. App. Div. 3d Dep't 1956).

Death of claimant's husband from heart attack was due to serious preexisting heart condition and was unrelated to his employment, and thus claimant was not entitled to workers' compensation benefits, where decedent had been previously diagnosed as suffering from congestive heart failure, his consulting cardiologist reported that he had short life expectancy and could die suddenly within next 2 months, his personal physician agreed and added that death could have occurred regardless of stress encountered by decedent during his employment, and another cardiologist opined that death resulted from advanced cardiomyopathy and ischemic heart disease, "most likely" sudden arrhythmia due to cardiomyopathy due to ischemia, and that, short of mental stress so severe as to have rendered decedent unable to perform his job (which was not shown), there was no causal connection between decedent's job stress and heart attack suffered at home on Saturday morning. Daniels v Wallach's Mens Store, 263 A.D.2d 909, 694 N.Y.S.2d 800, 1999 N.Y. App. Div. LEXIS 8459 (N.Y. App. Div. 3d Dep't 1999).

216. —Personnel decisions not sufficient

Workers' Compensation Board properly ruled that claimant did not sustain compensable injury for work-related stress stemming from her demotion and corresponding reassignment at her place of employment where she conceded that she could be "bumped back by the incumbent" to her former position, and although employer handled her demotion poorly, its actions did not rise to level of bad faith. Miles v State Ins. Fund, 267 A.D.2d 511, 698 N.Y.S.2d 561, 1999 N.Y. App. Div. LEXIS 12483 (N.Y. App. Div. 3d Dep't 1999).

Workers' compensation board properly denied a worker's claim for workers' compensation benefits; the evidence supported a finding that the workers' psychiatric injury was a consequence of a lawful personnel decision involving the worker, and therefore the claim was barred by N.Y. Workers' Comp. Law § 2(7). Aubel v Price Chopper, 307 A.D.2d 691, 762 N.Y.S.2d 837, 2003 N.Y. App. Div. LEXIS 8518 (N.Y. App. Div. 3d Dep't 2003).

Based on the testimony presented, in was evident that the Workers' Compensation Board considered a defense posed by the employer's insurer, that decedent began exhibiting a pattern of mental deterioration long before several lawful personnel decisions were made, including his reassignment as a truck driver, and rejected the same. Potter v Curtis Lumber Co., 10 A.D.3d 819, 782 N.Y.S.2d 170, 2004 N.Y. App. Div. LEXIS 11178 (N.Y. App. Div. 3d Dep't 2004).

217. —Mental illness

Evidence supported finding of Workers' Compensation Board that work stress caused claimant's underlying personality disorder to manifest itself, thereby disabling him, and that this was accidental injury arising in course of his employment, where claimant purchased debt-ridden company, he had to borrow heavily and use his personal funds to support business, his circumstances did not improve and he began having trouble coping, he was diagnosed as having anxiety and emerging reactive depression, he later attempted suicide, and his physician testified that his business problems led to his mental illness. La Mendola v Butler, 179 A.D.2d 862, 578 N.Y.S.2d 280, 1992 N.Y. App. Div. LEXIS 70 (N.Y. App. Div. 3d Dep't 1992).

Substantial evidence supported determination that claimant's myocardial infarction arose out of and in course of his employment, and that he was therefore entitled to workmen's compensation benefits, where testimony indicated that stress was placed on claimant due to nature of his job, as well as decrease in business engendered by stock market crash in October 1987 and subsequent rumors that his employer might merge with another company, necessitating layoffs, and claimant's medical expert testified that infarction was caused in part by stress of employment. Greenbaum v MKI Sec., 189 A.D.2d 986, 592 N.Y.S.2d 841, 1993 N.Y. App. Div. LEXIS 79 (N.Y. App. Div. 3d Dep't 1993).

Evidence supported Workers' Compensation Board's finding that psychiatric problems of assistant to executive director of not-for-profit service agency providing educational services to developmentally disabled persons was compensable injury due to abnormal work-related stress where assistant's involvement in agency's expansion caused extremely tense situation as its financial difficulties mounted, assistant also had acrimonious relationship with his superiors regarding agency's operations, which caused him to be depressed and anxious, he was very troubled by deaths of 2 children in agency's care, and his 2 treating psychiatrists testified that he suffered from extreme anxiety, panic attacks, morbid thoughts, and preoccupation with death and that his psychiatric condition was causally related to his employment. Marillo v Cantalician Ctr. for Learning, 263 A.D.2d 719, 693 N.Y.S.2d 687, 1999 N.Y. App. Div. LEXIS 8031 (N.Y. App. Div. 3d Dep't 1999).

Substantial evidence supported the Workers' Compensation Board's factual determination that the claimant's depressive condition was not compensable because the claimant's supervisors described normal oversight and monitoring practices undertaken to assist her in correcting deficiencies in and improving her performance, and the claimant failed to identify any unusual stressors or conduct that constituted harassment or bullying as alleged in her claim for benefits. Matter of Lanese v Anthem Health Servs., 165 A.D.3d 1373, 85 N.Y.S.3d 262, 2018 N.Y. App. Div. LEXIS 6751 (N.Y. App. Div. 3d Dep't 2018).

218. —Emotional stress sufficient

Emotional stress sustained by a labor union vice-president, due to having to defend himself against charges of calling an unauthorized wildcat strike, without benefit of counsel during a hearing which lasted about 12 hours even after sustaining an attack several hours before the end of the hearing as the result of which he asked for, but was denied, a continuance, constituted an industrial accident in the light of medical testimony produced before the Board. Hamilton v Transport Workers Union, 21 A.D.2d 434, 251 N.Y.S.2d 104, 1964 N.Y. App. Div. LEXIS 3322 (N.Y. App. Div. 3d Dep't 1964), aff'd, 16 N.Y.2d 696, 261 N.Y.S.2d 892, 209 N.E.2d 550, 1965 N.Y. LEXIS 1292 (N.Y. 1965).

A board finding that pre-existing cardiac pathology and the strain and tension of being investigated and interrogated concerning alleged misconduct subjected decedent to such severe and undue emotional stress as to precipitate his fatal heart attack was insufficient to sustain an award of death benefits and the case must be remanded for further findings stating which of the alleged facts in evidence the board accepted as true. Ferreri v General Auto Driving School, Inc., 22 A.D.2d 718, 253 N.Y.S.2d 314, 1964 N.Y. App. Div. LEXIS 3056 (N.Y. App. Div. 3d Dep't 1964).

219. —Emotional stress; arguments

Death benefits could not properly be awarded in connection with death of an elevator operator who had suffered from heart disease and bronchial asthma for several years and died of a heart attack following an argument with the building superintendent as to operation of his elevator, such argument having involved no greater emotional strain or tension than workers generally are occasionally subjected to. Santacroce v 40 W. 20th Street, Inc., 10 N.Y.2d 855, 222 N.Y.S.2d 689, 178 N.E.2d 912, 1961 N.Y. LEXIS 992 (N.Y. 1961).

An award of disability benefits for a heart attack sustained by claimant while having a 20-minute argument with his supervisor over failure to receive overtime pay was reversed for absence of sufficient evidence to show that emotional upset involved in the argument was such an occurrence as to amount to an "accident." Cramer v Barney's Clothing Store, 15 A.D.2d 329, 223 N.Y.S.2d 813, 1962 N.Y. App. Div. LEXIS 11783 (N.Y. App. Div. 3d Dep't 1962), aff'd, 13 N.Y.2d 711, 241 N.Y.S.2d 844, 191 N.E.2d 901, 1963 N.Y. LEXIS 1152 (N.Y. 1963).

There was no basis for a board finding of "accidental" injury where it appeared that claimant was a sewing machine operator working on a piece basis and suffered a cerebral vascular disablement following a short argument with the shop foreman, which involved no physical violence, over his work assignment for the day, such arguments being common in that type of work. Zygler v Tenzer Coat Co., 19 A.D.2d 660, 240 N.Y.S.2d 543, 1963 N.Y. App. Div. LEXIS 3650 (N.Y. App. Div. 3d Dep't 1963), aff'd, 15 N.Y.2d

562, 254 N.Y.S.2d 537, 203 N.E.2d 217, 1964 N.Y. LEXIS 838 (N.Y. 1964).

There was substantial evidence to sustain a finding of the Board that death of an employee was not due to accidental injury where, although decedent had a pre-existing heart condition at the time of being involved in an argument to which death was attributed, nothing indicated that the argument was either loud or excitable. Unterberg v New York State Dep't of Labor, 19 A.D.2d 668, 242 N.Y.S.2d 256, 1963 N.Y. App. Div. LEXIS 3469 (N.Y. App. Div. 3d Dep't 1963).

Although claimant had a pre-existing heart condition, the Board could find from the evidence that his total disability resulted from stress of strain during an altercation with a customer whom he thought was guilty of robbing the cash register of the store in which he worked and a later argument with his employer over the occurrence which lasted for several days. Chavkin v Rotter, 20 A.D.2d 158, 245 N.Y.S.2d 435, 1963 N.Y. App. Div. LEXIS 2574 (N.Y. App. Div. 3d Dep't 1963).

A conversation by claimant with his foreman which wound up in an "argument" following which claimant suffered a heart attack by virtue, as alleged, of the strain and excitement involved, did not amount to an accident in course of employment. Samolin v Trans World Airlines, Inc., 20 A.D.2d 160, 245 N.Y.S.2d 628, 1963 N.Y. App. Div. LEXIS 2575 (N.Y. App. Div. 3d Dep't 1963).

Where a shirt factory foreman died from a myocardial infarction June 19, 1967 and no claim asserting accidental injury was filed until two years later, then alleging that death was due to unusual exertion and severe emotional upset the day preceding the death supposed to have emanated from an alleged argument on that date, but the testimony was contradictory, questions as to whether the argument in question occurred and its nature and extent were within the exclusive province of the Board whose finding of no accidental injury could not be overturned. Rosenthal v Jac Sportswear, 20 A.D.2d 734, 246 N.Y.S.2d 888, 1964 N.Y. App. Div. LEXIS 4375 (N.Y. App. Div. 3d Dep't 1964).

Where a stroke suffered by a 61-year-old civil engineer who had a history of hypertension and cardiovascular problems while working on a railroad construction job in remote territory was allegedly brought on by an hour-long altercation over a radio phone concerning certain bridge settlement readings, and there was conflicting evidence as to intensity of the argument and as to causal relationship, determination of causal relationship was for the board as a question of fact, and its determination that insufficient causal relationship was shown should not be disturbed. Wilson v Tippetts-Abbott-McCarthy-Stratton, 22 A.D.2d 720, 253 N.Y.S.2d 149, 1964 N.Y. App. Div. LEXIS 3059 (N.Y. App. Div. 3d Dep't 1964).

While the board is justified in finding an accident where there is evidence of an aggravated and prolonged situation of emotional tension, it would not be justified in doing so in the case of an argument occurring in the course of the employment where such argument would be regarded by the average man as neither involving nor inducing emotional strain or tension greater than the countless differences and irritations to which all workers are occasionally subjected without untoward results. And in accordance with this principle a determination of the board that a heart attack suffered by the plaintiff's decedent, a private investigator, was not an industrial accident, was upheld by the Appellate Division. Connors v Secon Secur., Inc., 24 A.D.2d 674, 261 N.Y.S.2d 136, 1965 N.Y. App. Div. LEXIS 3675 (N.Y. App. Div. 3d Dep't), app. denied, 16 N.Y.2d 486, 1965 N.Y. LEXIS 2201 (N.Y. 1965).

Finding of no causal relationship between work-induced argument and subsequent disabling coronary and neuropyschiatric conditions was supported by substantial evidence. Pinkus v Hod Carmel Kosher Provision Co., 24 A.D.2d 782, 263 N.Y.S.2d 853, 1965 N.Y. App. Div. LEXIS 3211 (N.Y. App. Div. 3d Dep't 1965).

Finding that heart attack allegedly caused by work-induced argument with foreman did not constitute an accidental injury in that the episode did not involve emotional strain or tension greater than countless differences to which all workers are occasionally subjected, was supported by substantial evidence. Pinkus v Hod Carmel Kosher Provision Co., 24 A.D.2d 782, 263 N.Y.S.2d 853, 1965 N.Y. App. Div. LEXIS 3211 (N.Y. App. Div. 3d Dep't 1965).

Stair climbing and altercation in the course of employment in fire station went beyond "irritations" usually associated with employment and constituted emotional stress and strain with respect to fireman that had to be equated with an industrial "accident" in determining compensability for subsequent cardiac disablement. Macinski v Johnson City, 57 A.D.2d 974, 394 N.Y.S.2d 101, 1977 N.Y. App. Div. LEXIS 12264 (N.Y. App. Div. 3d Dep't 1977).

Workers' Compensation Board properly determined that claimant sustained compensable injury where claimant, 56-year-old plumbing contractor with moderate degree of arteriosclerotic heart disease suffered acute coronary occlusion and myocardial infarction as consequence of his involvement in fierce telephone argument with competitor regarding recently acquired and important plumbing contract claimant had successfully bid on, which lasted 25 to 30 minutes, during which claimant screamed and swore, became infuriated, threw cast iron pipe and fittings about and complained of experiencing pain in chest and left arm, and where claimant looked pale and was highly nervous and perspiring, and where he was admitted to coronary care unit of hospital the following day and his cardiologist testified that severe emotional disturbance occasioned by argument precipitated myocardial infarction. Leone v Patrick Leone & Sons Plumbing & Heating, 119 A.D.2d 950, 501 N.Y.S.2d 221, 1986 N.Y. App. Div. LEXIS 55880 (N.Y. App. Div. 3d Dep't 1986).

Workers' Compensation Board was free to accept employee's proof on disputed issues as to what actually transpired between employee's supervisor and employee on particular day, whether day's events constituted harassment and threats toward employee, and whether those events caused employee's stress, mental depression and nervousness to point of collapse, where employee and supervisor were only witnesses to incident, and each presented different account; employee's version supported board's finding of harassment and ruling that employee had suffered compensable mental injury precipitated by psychic trauma. Levine v United Parcel Service, 124 A.D.2d 381, 507 N.Y.S.2d 327, 1986 N.Y. App. Div. LEXIS 61395 (N.Y. App. Div. 3d Dep't 1986).

Substantial evidence supported determination of Workers' Compensation Board that agitation and strenuous emotional experience which underlay heart attack suffered by claimant's decedent (union official) was work- related where it was acknowledged within union that decedent had been "carrying the load" for aging union local president, decedent had been promised promotion to presidency by head of union's international, and heart attack occurred after argument when decedent learned that head had failed to ask president to step down as planned. Fialkoff v Local 1102-RWDSU-AFL-CIO, 146 A.D.2d 891, 536 N.Y.S.2d 277, 1989 N.Y. App. Div. LEXIS 92 (N.Y. App. Div. 3d Dep't 1989).

220. —Emotional stress; reprimand or criticism by employer

Where the Director of Maintenance and Engineering of an airline, then 33 years of age and with no prior known history of heart disease, died of a myocardial infarction following a period of unusual strain and emotional upset after being blamed by company officers for the condition of a plane which he was making extraordinary efforts to repair and get back into operation, including arguments over repair bills and threats of discharge, there was sufficient evidence to sustain an award of death benefits notwithstanding the lack of any incident in which physical injury was sustained. Klimas v Trans Caribbean Airways, Inc., 10 N.Y.2d 209, 219 N.Y.S.2d 14, 176 N.E.2d 714, 1961 N.Y. LEXIS 1089 (N.Y. 1961), vacated, Incres S.S. Co. v International Maritime Workers Union, 372 U.S. 24, 83 S. Ct. 611, 9 L. Ed. 2d 557, 1963 U.S. LEXIS 2396 (U.S. 1963).

An award for death benefits for heart failure could not be sustained on the basis of an emotional strain resulting from an "emotional episode" (decedent's attention had been called to errors which he would have to correct and which, it was said, "upset" him). Stang v J. Pechman & Co., 7 A.D.2d 245, 181 N.Y.S.2d 952, 1959 N.Y. App. Div. LEXIS 9976 (N.Y. App. Div. 3d Dep't), amended, 8 A.D.2d 665, 185 N.Y.S.2d 773, 1959 N.Y. App. Div. LEXIS 9049 (N.Y. App. Div. 3d Dep't 1959).

The evidence would not sustain a finding of the board that a mild cardial infarction on the part of claimant, a proofreader, was precipitated by heated arguments between him and his foreman relating to responsibility for uncorrected errors in certain proofs, where the testimony showed only two arguments, without use of inflammatory language, or anything amounting to shouting or threatening conduct on the part of the foreman. Coleman v Guide-Kalkhoff-Burr, Inc., 12 A.D.2d 554, 206 N.Y.S.2d 714, 1960 N.Y. App. Div. LEXIS 7252 (N.Y. App. Div. 3d Dep't 1960), aff'd, 10 N.Y.2d 857, 222 N.Y.S.2d 689, 178 N.E.2d 912, 1961 N.Y. LEXIS 993 (N.Y. 1961).

Record supported finding by Workers' Compensation Board that employee's accident arose out of and in course of employment where (1) employee testified that he was "totally devastated" by distribution of memorandum critical of his job performance, that he felt he was subjected to public ridicule and lost credibility as supervisor, and that he underwent psychiatric treatment, and (2) his psychiatrist testified that he was suffering from adjustment disorder in reaction to memorandum. Greene v Charles Freihofer Baking Co., 180 A.D.2d 980, 580 N.Y.S.2d 808, 1992 N.Y. App. Div. LEXIS 2890 (N.Y. App. Div. 3d Dep't 1992).

Claim arising from employer's alleged negligence in failing to follow its own policies and procedures in resolving sexual harassment complaints against plaintiff was not exempt from workers' compensation coverage under CLS Work Comp § 2(7) where plaintiff's injuries were not "solely mental," but included loss of income, injury to reputation and defense costs. Maas v Cornell Univ., 253 A.D.2d 1, 683 N.Y.S.2d 634, 1999 N.Y. App. Div. LEXIS 96 (N.Y. App. Div. 3d Dep't), aff'd, 94 N.Y.2d 87, 699 N.Y.S.2d 716, 721 N.E.2d 966, 1999 N.Y. LEXIS 3737 (N.Y. 1999).

Workers' Compensation Law Judge properly dismissed claimant's application for benefits arising out of his alleged psychiatric injury during his employment as projectionist at movie theater where his employer testified that he had no contact whatsoever with claimant during 2 days of his employment, his supervisor testified that he did not harass claimant although he did chide him for leaving projection booth during film showings and for drinking alcoholic beverages on job, and claimant's psychiatrist testified that he had been treated for psychiatric problems prior to employment in question. Kessler v Fairmont Theatre Inc., 262 A.D.2d 888, 692 N.Y.S.2d 500, 1999 N.Y. App. Div. LEXIS 7477 (N.Y. App. Div. 3d Dep't), app. dismissed, 93 N.Y.2d 1039, 697 N.Y.S.2d 567, 719 N.E.2d 928, 1999 N.Y. LEXIS 2860 (N.Y. 1999), app. denied, 94 N.Y.2d 756, 703 N.Y.S.2d 73, 724 N.E.2d 769, 1999 N.Y. LEXIS 3959 (N.Y. 1999).

Death could not be considered accidental where it was caused by a heart condition of long standing, merely because it ensued on the night following an argument between decedent, an elevator operator, and a superintendent who told decedent he did not know how to take care of his car, although deceased suffered chest pains a few minutes after the argument, as there was nothing about the argument, according to the only witness, to cause greater strain or tension than workers are generally subjected to. Santacroce v 40 W. 20th Street, Inc., 9 A.D.2d 985, 194 N.Y.S.2d 541, 1959 N.Y. App. Div. LEXIS 5302 (N.Y. App. Div. 3d Dep't 1959), aff'd, 10 N.Y.2d 855, 222 N.Y.S.2d 689, 178 N.E.2d 912, 1961 N.Y. LEXIS 992 (N.Y. 1961).

Claimant, staff nurse in hospital pediatric unit, was properly denied workers' compensation benefits for posttraumatic stress disorder after she was admonished by her supervisor for failing to document her intervention with patient on patient's chart since claimant's psychic injury was direct consequence of evaluation of her work by her supervisor, who acted in good faith; moreover, stress created by lack of sufficient staff and incident in question was no greater than that which other similarly situated workers experienced in normal job environment. Grace v Bronx Mun. Hosp. Ctr., 272 A.D.2d 799, 708 N.Y.S.2d 728, 2000 N.Y. App. Div. LEXIS 5963 (N.Y. App. Div. 3d Dep't 2000).

Claimant was properly granted workers' compensation benefits based on psychic injury caused by work-related stress from additional work she was given and her supervisor's continued harassment. Keane v New York State Elec. & Gas Co., 272 A.D.2d 802, 708 N.Y.S.2d 726, 2000 N.Y. App. Div. LEXIS 5972 (N.Y. App. Div. 3d Dep't 2000).

Workers' compensation board properly denied an employee's claim for benefits; the employee failed to give notice of an alleged compensable psychological injury to the employer as required by N.Y. Workers' Comp. Law § 18, and there was no indication that the employer had actual knowledge that the employee suffered a psychological injury based on an altercation with his supervisor which led to the employee's termination, and because it was significant that the terms "injury" and "personal injury" did not include an injury which was solely mental and was based on work related stress if such mental injury was a direct consequence of a lawful personnel decision involving a disciplinary action, work evaluation, job transfer, demotion, or termination taken in good faith by the employer, N.Y. Workers' Comp. Law § 2(7). Oberson v Bureau of Ferry Aviation & Transp., 303 A.D.2d 795, 756 N.Y.S.2d 333, 2003 N.Y. App. Div. LEXIS 2198 (N.Y. App. Div. 3d Dep't), app. denied, 100 N.Y.2d 507, 763 N.Y.S.2d 813, 795 N.E.2d 39, 2003 N.Y. LEXIS 1705 (N.Y. 2003), cert. denied, 540 U.S. 1151, 124 S. Ct. 1148, 157 L. Ed. 2d 1045, 2004 U.S. LEXIS 706 (U.S. 2004).

221. —Employer caused stress sufficient

Uncontradicted evidence from an employee's psychiatrist that his severely disabled mental condition was the result of his viewing a newspaper account of his old conviction for robbery in his employer's personnel records, and was not related to a previous psychological problem, was sufficient to support the board's award of accidental disability benefits to the employee. Haydel v Sears, Roebuck & Co., 106 A.D.2d 759, 483 N.Y.S.2d 792, 1984 N.Y. App. Div. LEXIS 21690 (N.Y. App. Div. 3d Dep't 1984).

Employer's action of informing State Insurance Department of claimant's prior arrest for drug possession, against claimant's wishes, constituted lawful personnel decision undertaken in good faith where obtaining license from department was necessary requirement of claimant's employment, and failure to disclose relevant information to department could potentially jeopardize employer's own license; thus, workers' compensation claim predicated on stress associated with employer's decision was barred by CLS Work Comp § 2(7). Kinney v Prudential Ins. Co., 270 A.D.2d 781, 705 N.Y.S.2d 137, 2000 N.Y. App. Div. LEXIS 3348 (N.Y. App. Div. 3d Dep't 2000).

222. —Worry over job not sufficient

No compensable accident was sustained when a corporate executive suffered a heart attack at a horse race in California while there on employer's business. Claimant maintained that the decedent was under constant pressure to reduce cost of employer's business and was required to work long hours and do extensive traveling but no stress was shown to have occurred at the race track. Lesnik v National Carloading Corp., 309 N.Y. 958, 132 N.E.2d 326, 309 N.Y. (N.Y.S.) 958, 1956 N.Y. LEXIS 1083 (N.Y. 1956).

Worry and anxiety resulting from one's work over a period of time are questionable bases for a compensation award. Garmissie v Pelham Painting Co., 12 A.D.2d 839, 209 N.Y.S.2d 578, 1961 N.Y. App. Div. LEXIS 13197 (N.Y. App. Div. 3d Dep't 1961).

Where the foreman in charge of a painting job had been considerably concerned for a couple of months over the quality of paint being used on the job, and, in course of a tour of apartments painted with his immediate superior and a representative of the paint company and the general contractor, after climbing a number of flights of stairs, slumped and collapsed against a wall with indications that he might have become unconscious, was hospitalized, and died on the day following discovery of a laceration of the brain, the evidence was insufficient to sustain either that he died or that his condition was caused by the fall or by worry and anxiety about the job. Garmissie v Pelham Painting Co., 12 A.D.2d 839, 209 N.Y.S.2d 578, 1961 N.Y. App. Div. LEXIS 13197 (N.Y. App. Div. 3d Dep't 1961).

State trooper's work-related stress did not rise to level of compensable accident, and thus he was not entitled to workers' compensation benefits, where (1) he claimed that he was subjected to prolonged and unusual stress as result of his investigation of 3 gruesome traffic fatalities between 1983 and 1985, his perceptions of harassment and racial discrimination by his su-

pervisors, job transfers in 1986 and 1992, rumored allegations of sexual harassment resulting in 1992 job transfer, and final incident in 1996 in which 2 other troopers allegedly laughed at him during routine traffic stop of their unmarked vehicle, (2) absent evidence of discrimination or harassment, trooper's perceptions of same were unfounded, (3) traffic fatalities and job transfers were nothing more than what would normally be experienced by state trooper during 15-year period, and (4) final incident was nothing more than usual irritation to which all employees occasionally are exposed. Charlotten v N.Y. State Police, 286 A.D.2d 849, 730 N.Y.S.2d 377, 2001 N.Y. App. Div. LEXIS 8862 (N.Y. App. Div. 3d Dep't 2001).

223. —Physical injury not found

Where a claimant suffered no physical injury in course of his employment, the Board could properly find that there was no basis for making an award of disability benefits by reason of a year's mental disability following emotional strain or stress suffered on an occasion when he was directed, by his employer, to take a fellow employee and friend to a hospital in a taxicab. Straws v Fail, 17 A.D.2d 998, 233 N.Y.S.2d 893, 1962 N.Y. App. Div. LEXIS 6971 (N.Y. App. Div. 3d Dep't 1962), app. denied, 12 N.Y.2d 647, 1963 N.Y. LEXIS 1566 (N.Y. 1963).

A claimant who became incapcitated due to a mental condition causally related to his observation of a bloody bandage on the hand of a co-worker, who had injured his hand off the job site, did not sustain an industrial accident within the meaning of the Workers' Compensation Law. Claimant was not an active participant in the events which caused the injury, nor did he observe such events; claimant did not even see the injury itself. The mere fact that the mental injury was incurred by claimant while on the job did not render the injury compensable. Everett v A.S. Steel Rule Die Corp., 106 A.D.2d 181, 484 N.Y.S.2d 972, 1985 N.Y. App. Div. LEXIS 48397 (N.Y. App. Div. 3d Dep't), aff'd, 66 N.Y.2d 683, 496 N.Y.S.2d 423, 487 N.E.2d 280, 1985 N.Y. LEXIS 17237 (N.Y. 1985).

224. —Emotional stress; driving or traffic conditions

An award for disability due to heart attack was properly made and should be reinstated on the basis of substantial evidence to show that the injury was caused by emotional stress or strain, it appearing that claimant, who had a medical history of arteriosclerosis and diabetes, was returning home in his own car from a business mission and had to apply his brakes suddenly to avoid a collision with a car which suddenly entered the highway in front of him. Eckhaus v Adeck Stores, Inc., 11 N.Y.2d 862, 227 N.Y.S.2d 680, 182 N.E.2d 287, 1962 N.Y. LEXIS 1275 (N.Y. 1962).

School bus driver suffered her own "accidental injuries" as "active participant" within meaning of Workmen's Compensation Law when, while driving her bus, she came on automobile accident in which 2 school children known to her were killed, she remained at scene with her busload of children until emergency assistance arrived, and she later developed symptoms of post-traumatic stress disorder due to having witnessed aftermath of accident. Wood v Laidlaw Transit, Inc., 77 N.Y.2d 79, 564 N.Y.S.2d 704, 565 N.E.2d 1255, 1990 N.Y. LEXIS 4419 (N.Y. 1990).

An award was sustained on proof that a taxicab driver had suffered a heart attack as a result of strain and emotional excitement caused by his efforts to avoid a collision with another cab. Wiltcher v National Transp. Co., 283 A.D. 977, 130 N.Y.S.2d 586, 1954 N.Y. App. Div. LEXIS 5985 (N.Y. App. Div.), app. dismissed, 308 N.Y. 674, 124 N.E.2d 317, 308 N.Y. (N.Y.S.) 674, 1954 N.Y. LEXIS 1790 (N.Y. 1954).

A heart attack, sustained by a truck driver, was compensable where it was shown that, on the day of the attack, the road was slick with ice and decedent had to exert considerable physical effort to keep the truck from skidding. Napolitano v Fusco, 9 A.D.2d 802, 192 N.Y.S.2d 520, 1959 N.Y. App. Div. LEXIS 6141 (N.Y. App. Div. 3d Dep't 1959).

Auto accident was sufficient to cause ventricular fibrillation and death as an autopsy showed no other competent cause of death and an injury caused by emotional stress and strain without presence of physical impact to the body may be found to be accidental within the purview of the Workmen's Compensation Law. Seymour v Sokolneck, 34 A.D.2d 1073, 312 N.Y.S.2d 323, 1970 N.Y. App. Div. LEXIS 4251 (N.Y. App. Div. 3d Dep't 1970).

Conclusion of Workers' Compensation Board that death of claimant's decedent was causally related to his work was supported by evidence in record, which included testimony showing that when door locks on his car jammed, decedent, extremely upset that he might miss business appointment, drove away holding driver's side door shut and was found shortly thereafter slumped over wheel, expert medical testimony indicating that stress caused by door lock problem was direct cause of decedent's death. Biller v State Ins. Fund, 186 A.D.2d 300, 587 N.Y.S.2d 793, 1992 N.Y. App. Div. LEXIS 10602 (N.Y. App. Div. 3d Dep't 1992).

225. —Firefighting activities

A gardener and farmer who in the course of putting out a brush fire on his employer's premises became exhausted from inhaling smoke and from the exertion, aggravating a dormant heart condition which resulted in his death some six months later suffers an accidental injury. Easer v Pratt, 261 N.Y. 628, 185 N.E. 767, 261 N.Y. (N.Y.S.) 628, 1933 N.Y. LEXIS 1439 (N.Y. 1933).; See also Andrews v Emporium Forestry Co., 250 N.Y. 592, 166 N.E. 336, 250 N.Y. (N.Y.S.) 592, 1929 N.Y. LEXIS 986 (N.Y. 1929).

The janitor of a school building suffered an accidental injury resulting in his death, where it appears that as a part of his duties he was required to go to the schoolhouse in case a fire alarm was sounded; that a fire alarm was sounded though in fact there was no fire, and the intestate was taken to the schoolhouse in an automobile; that, at the time, the intestate was suffering from chronic myocarditis; that he became greatly excited after reaching the school building, and, after walking about the building for a few minutes, dropped dead. Thompson v Binghamton, 218 A.D. 451, 218 N.Y.S. 355, 1926 N.Y. App. Div. LEXIS 5957 (N.Y. App. Div. 1926).

The board could reasonably draw the inference that decedent died as the result of an accidental injury where he was employed as fire guard and died as the result of a cardiac attack after responding to a fire call. Godsman v Grumman Aircraft Engineering Corp., 268 A.D. 945, 51 N.Y.S.2d 368, 1944 N.Y. App. Div. LEXIS 4339 (N.Y. App. Div. 1944), aff'd, 295 N.Y. 708, 65 N.E.2d 339, 295 N.Y. (N.Y.S.) 708, 1946 N.Y. LEXIS 899 (N.Y. 1946).

A fire guard who died as the result of a cardiac attack after responding to a fire call resulting in unusual exertion and excitement, died as the result of an accidental injury. Godsman v Grumman Aircraft Engineering Corp., 268 A.D. 945, 51 N.Y.S.2d 368, 1944 N.Y. App. Div. LEXIS 4339 (N.Y. App. Div. 1944), aff'd, 295 N.Y. 708, 65 N.E.2d 339, 295 N.Y. (N.Y.S.) 708, 1946 N.Y. LEXIS 899 (N.Y. 1946).

The fact that no autopsy is held following a death allegedly due to a heart condition, and that decedent was only 39 years of age and had apparently been in prior good health, does not preclude a death benefit award upon a showing that, on the day of death, decedent while helping as a volunteer fireman, collapsed after running back and forth on various errands associated with fighting a fire and was pronounced dead upon arrival at a hospital. Fish v Smithville Volunteer Fire Co., 12 A.D.2d 573, 206 N.Y.S.2d 822, 1960 N.Y. App. Div. LEXIS 7283 (N.Y. App. Div. 3d Dep't 1960).

There was substantial evidence to sustain a finding of the board that disability and subsequent death of a volunteer fireman, 36 years of age, was causally related to accidental injury in course of his duties, where it appeared that he collapsed while fighting a fire in the hayloft of a barn and helping to hold a fire hose in smoke filled atmosphere, under conditions of unusual exertion, thereby bringing on a rupture of a pre-existing aneurysm of arteries at the base of his brain, which contributed to his death. Morrison v Canterbury Fire Dist., 13 A.D.2d 861, 214 N.Y.S.2d 518, 1961 N.Y. App. Div. LEXIS 11061 (N.Y. App. Div. 3d Dep't 1961).

Where volunteer fireman suffered myocardial infarction caused by coronary thrombosis while responding to a fire, and where there was testimony that normal activities would not have caused fireman's death and that death was causally related to his activities as volunteer fireman, Workmen's Compensation Board was justified in finding that fireman was entitled to award of

benefits for death which resulted in the line of duty. Hoff v Williston Park, 50 A.D.2d 631, 374 N.Y.S.2d 756, 1975 N.Y. App. Div. LEXIS 12443 (N.Y. App. Div. 3d Dep't 1975).

226. —Increased work load or tension

Claimant, a trial attorney for the State Insurance Fund, was entitled to compensation for heart attack, where report of impartial medical expert assigned by the Board, and the claimant's own expert, established that heart attack was directly related to unusual exertion and strain, undergone by the claimant for 7 weeks prior thereto, to wit, the unusual exertion of the increased activity as trial counsel. Schechter v State Ins. Fund, 6 N.Y.2d 506, 190 N.Y.S.2d 656, 160 N.E.2d 901, 1959 N.Y. LEXIS 1175 (N.Y. 1959).

Supermarket manager was not barred by exclusionary language of CLS Work Comp § 2(7) from receiving workers' compensation benefits on ground that his panic disorder was direct consequence of good faith personnel decisions inasmuch as employer's personnel decisions did not target him directly, but only contributed indirectly to his work-related stress by forcing him to work longer hours, take more responsibility, and manage store that was not performing well. DePaoli v Great A & P Tea Co., 94 N.Y.2d 377, 704 N.Y.S.2d 527, 725 N.E.2d 1089, 2000 N.Y. LEXIS 81 (N.Y. 2000).

A claimant whose work load was increased in the month previous to his illness suffers an accidental injury, where while in the course of his work he experienced a pain in his chest, but after resting, he continued his work the remainder of the day and the following day at his home suffered coronary thrombosis. Carlin v Colgate Aircraft Corp., 276 A.D. 881, 93 N.Y.S.2d 791, 1949 N.Y. App. Div. LEXIS 3671 (N.Y. App. Div. 1949), aff'd, 301 N.Y. 754, 95 N.E.2d 626, 301 N.Y. (N.Y.S.) 754, 1950 N.Y. LEXIS 1045 (N.Y. 1950).

An increase in an executives work load immediately preceding his death cannot be made grounds for a claim for death benefits where the decedent, as a result of the increased work pressure, died of a coronary thrombosis while on vacation. O'Rourke v State Ins. Fund, 2 A.D.2d 616, 151 N.Y.S.2d 756, 1956 N.Y. App. Div. LEXIS 5461 (N.Y. App. Div. 3d Dep't 1956).

After an unusually hard day at the office, the manager of an unemployment field office felt emotionally upset and there was evidence that this upset brought about a heart attack. The court held that an increase in the tension of claimant's administrative work did not constitute an accident and reversed an award granting benefits. Ehrensal v New York State Div. of Employment, 2 A.D.2d 944, 156 N.Y.S.2d 472, 1956 N.Y. App. Div. LEXIS 3977 (N.Y. App. Div. 3d Dep't 1956).

Decedent, employed as an afternoon chef in restaurant, substituted for morning chef and, while performing such duties, fell over and died of a coronary occlusion. The duties of morning chef were more strenuous than those of afternoon chef and shortly before his death decedent had become excited when customer rejected food. Award affirmed. Gonella v Eddie's Chop House, 5 A.D.2d 707, 168 N.Y.S.2d 666, 1957 N.Y. App. Div. LEXIS 3497 (N.Y. App. Div. 3d Dep't 1957).

For three weeks prior to his fatal seizure, decedent's work as manager of farm produce plant had been heavier than before and he performed more manual labor than his managerial duties had previously required. On day of heart attack, he had helped stack 100-pound bags of beans until he left in morning to go to post office. He became ill in restaurant while out. Medical experts testified that strenuous work aggravated underlying pathology and caused death. Work was sufficiently strenuous to require more than normal exertion. Evidence warranted finding of accidental causation. Everett v George W. Haxton & Son, Inc., 6 A.D.2d 927, 176 N.Y.S.2d 74, 1958 N.Y. App. Div. LEXIS 5243 (N.Y. App. Div. 3d Dep't 1958).

In the morning, decedent had helped to unload 50 to 60 steel drums weighing from 50 to 52 lbs. each. Then he had removed concrete flooring and excavated a hole into which he had helped move heavy machinery. After lunch, he loaded the broken concrete into a wheel barrel and, shortly after he had wheeled it away, he collapsed and died. On that day, he had a physical examination and had been found to be in good condition by the employer's doctor. Board properly found that, due to unusual exertion of his work, decedent had sustained a heart attack, which superimposed on a pre-existing heart disease, caused his death. Award affirmed. Moses v Steel Drum Co., 8 A.D.2d 864, 186 N.Y.S.2d 953, 1959 N.Y. App. Div. LEXIS 8261 (N.Y. App. Div. 3d Dep't 1959).

Decedent, powerhouse engineer, because of inexperienced and unreliable fireman, was required to do unusual and extra work. Four days later he suffered a coronary occlusion which resulted in his death. Held: from the testimony of his widow and the union representative together with the medical evidence, the happening of an accident was established and also a causal relation between the accident and death. Hutton v Ford Motor Co., 9 A.D.2d 589, 189 N.Y.S.2d 448, 1959 N.Y. App. Div. LEXIS 7454 (N.Y. App. Div. 3d Dep't), app. denied, 7 N.Y.2d 705, 1959 N.Y. LEXIS 1837 (N.Y. 1959).

The Board could properly find that claimant, who was one of its own referees, sustained an industrial accident when he suffered a stroke which left him partially paralyzed and had a prior history of ulcers and hypertension, on the basis of evidence that he was subjected to an emotional episode in a long argument with a crying woman at one hearing in the morning and then took over another referee's calendar which required him to walk fast from one hearing room to another, about a block apart, several times the same day, these two things occurring on the same day amounting to "unusual or excessive strain" in course of duty. Goodwin v New York State Workmen's Compensation Board, 20 A.D.2d 951, 249 N.Y.S.2d 63, 1964 N.Y. App. Div. LEXIS 3937 (N.Y. App. Div. 3d Dep't), aff'd, 15 N.Y.2d 508, 254 N.Y.S.2d 114, 202 N.E.2d 560, 1964 N.Y. LEXIS 897 (N.Y. 1964).

Evidence that, towards the end of June 1972, supervisory employee was engaged in a variety of physical activities for a period of two and one-half weeks while cleaning up store which had been damaged by flood and that he was under extraordinary mental strain during that period, that he thereafter complained of chest pains and was tired, pale and had no appetite, all contrary to his usual demeanor, that, in August 1974, while attending a conference required by his employer, he was found dead, that the cause of death was myocardial infarction and emphysema, and testimony that the myocardial infarction was the result of the strenuous work in June of 1972 was sufficient to sustain award of workmen's compensation benefits to employee's widow. Marincel v Goodyear Tire & Rubber Co., 50 A.D.2d 630, 374 N.Y.S.2d 753, 1975 N.Y. App. Div. LEXIS 12440 (N.Y. App. Div. 3d Dep't 1975), aff'd, 40 N.Y.2d 1032, 391 N.Y.S.2d 574, 359 N.E.2d 1368, 1976 N.Y. LEXIS 3157 (N.Y. 1976).

Claimant, agency services representative with Department of Labor, was properly denied Workers' Compensation benefits where it was undisputed that event triggering her psychic injury was new manager's reassignment of claimant to particularly stressful work position, Workers' Compensation Board properly concluded that "no evidence (was) submitted that the actions taken by the employer were taken in bad faith," and claimant acknowledged that new manager had no ill feelings toward her and that employer did not "set out to harm or injure any of its employees." Mattoon v N.Y. State DOL, 284 A.D.2d 667, 727 N.Y.S.2d 702, 2001 N.Y. App. Div. LEXIS 6237 (N.Y. App. Div. 3d Dep't 2001).

Issue on appeal involved statutory construction and was not limited to substantial evidence where employer did not dispute Workers' Compensation Board's finding that claimant's mental injury was causally related to stress experienced in his new position, stress which was greater than that experienced in normal work environment, but rather employer contended that claimant's mental injury was results of his promotion to new position, which constituted lawful personnel decision under CLS Work Comp § 2(7). Brickner v N.Y. State DOT, 284 A.D.2d 829, 727 N.Y.S.2d 523, 2001 N.Y. App. Div. LEXIS 6871 (N.Y. App. Div. 3d Dep't 2001), app. denied, 98 N.Y.2d 601, 744 N.Y.S.2d 761, 771 N.E.2d 834, 2002 N.Y. LEXIS 955 (N.Y. 2002).

227. —Lifting or carrying

An award will be allowed to the beneficiary of a decedent who died of acute cardiac dilatation caused from a blow on the chest and the strain of lifting thereafter, where the evidence shows that

the decedent was injured in his regular employment. Kissell v Brink's Express Co., 244 A.D. 859, 279 N.Y.S. 756, 1935 N.Y. App. Div. LEXIS 6851 (N.Y. App. Div. 1935).

An employee is entitled to compensation where he suffered an acute cardiac condition resulting from the unusual strain in lifting pails of hot tar in the regular course of his employment, where it appears that he was performing work of a more strenuous nature than for many years prior thereto and had never performed work of that nature before. Whittaker v A. Ratner & Co., 264 A.D. 969, 37 N.Y.S.2d 104, 1942 N.Y. App. Div. LEXIS 5576 (N.Y. App. Div. 1942).

An employee suffers an accidental injury where he dies suddenly on returning to floor level after having assisted in lifting four by four timbers working on top of a boiler under which a fire was burning, even though there was evidence that on two previous occasions the employee had suffered attacks but called no physician. Mashaw v Fex, 266 A.D. 703, 40 N.Y.S.2d 153, 1943 N.Y. App. Div. LEXIS 3951 (N.Y. App. Div. 3d Dep't 1943), aff'd, 292 N.Y. 541, 54 N.E.2d 385, 292 N.Y. (N.Y.S.) 541, 1944 N.Y. LEXIS 1698 (N.Y. 1944).

A superintendent or farm manager suffers an accidental injury where, while pitching hay, in the course of his employment, he over exerted himself and was caused to suffer a strain and tearing pain in the chest resulting in his death. Crofts v Ledyard, 271 A.D. 1042, 68 N.Y.S.2d 603, 1947 N.Y. App. Div. LEXIS 5758 (N.Y. App. Div.), app. dismissed, 296 N.Y. 999, 73 N.E.2d 575, 296 N.Y. (N.Y.S.) 999, 1947 N.Y. LEXIS 1743 (N.Y. 1947).

A plant worker who "upended" a 480 pound drum of liquid soap and collapsed due to a heart attack suffers an accidental injury. Yager v Bennett Chemical Co., 272 A.D. 1090, 74 N.Y.S.2d 577, 1947 N.Y. App. Div. LEXIS 5056 (N.Y. App. Div. 1947).

An award for reduced earning capacity was not supported by substantial evidence where the opinion of claimant's physician was vague and dislocated in reference to the findings of heart specialist. Hayes v S. Stroock & Co., 283 A.D. 578, 129 N.Y.S.2d 3, 1954 N.Y. App. Div. LEXIS 4735 (N.Y. App. Div. 1954).

A death award was affirmed where a motion picture operator sustained pain in his chest from lifting motion picture film and died from a coronary occlusion. Proof showed that lifting of cans of film was not regular work. Sabasowitz v Gold Theatre, 283 A.D. 899, 130 N.Y.S.2d 121, 1954 N.Y. App. Div. LEXIS 5690 (N.Y. App. Div. 1954).

While lifting some heavy objects to lay a carpet, a carpet layer felt acute pain in his stomach which developed into a perforated gastric ulcer requiring surgery. Substantial evidence supported Board finding that injury was accidental. Jennings v Simon Manges & Sons, Inc., 284 A.D. 1071, 136 N.Y.S.2d 15, 1954 N.Y. App. Div. LEXIS 4600 (N.Y. App. Div. 3d Dep't 1954).

Award was improper where Compensation Board found that decedent was obliged to carry three one-pound bags on his shoulder thus causing a heart attack and immediate death but there was no evidence to support this finding as to necessity. Geoghan v Francis Leggett Premier Food, 285 A.D. 911, 137 N.Y.S.2d 506, 1955 N.Y. App. Div. LEXIS 6092 (N.Y. App. Div. 1955).

A picture frame cutter with a pre-existing arteriosclerosis felt a pain near his heart while lifting a bulky 15 pound picture frame in the usual course of his work. Three days thereafter he was found suffering from a coronary occlusion. Held: compensation award affirmed. Bahn v S. Wolfensohn, Inc., 286 A.D. 902, 142 N.Y.S.2d 2, 1955 N.Y. App. Div. LEXIS 4469 (N.Y. App. Div. 1955).

While an award for death allegedly due to rupture of the abdominal aorta from lifting heavy bundles in course of decedent's regular work could not be sustained on the basis of his widow's hearsay testimony as to the nature of his work and the effort involved, or because the injury was a rupture, the case was remanded for additional evidence. Platt v Lee Dyeing Co., 9 A.D.2d 799, 192 N.Y.S.2d 550, 1959 N.Y. App. Div. LEXIS 6137 (N.Y. App. Div. 3d Dep't 1959).

A heart attack was compensable where it was shown that the manager, though not normally doing manual labor, just prior to the attack carried cartons, weighing approximately 50 to 65 pounds, helped lift wooden crates weighing about 200 pounds, and engaged in a dispute with his employer over an inventory. Schwartz v Robin Hats, Inc., 9 A.D.2d 972, 193 N.Y.S.2d 689, 1959 N.Y. App. Div. LEXIS 5659 (N.Y. App. Div. 3d Dep't 1959).

There was sufficient evidence to sustain a board finding that death of an employee was causally related to an incident in course of his employment whereby, during heavy lifting, he experienced severe pain in the groin which was diagnosed on medical examination as traumatic orchitis of a testicle, thereafter returned to work, after being discharged by a specialist as apparently recovered, finally resumed heavy lifting, and shortly thereafter suddenly died, an autopsy disclosing that death was due either to a coronary or pulmonary embolism. Gordon v Theodore Ficke, Inc., 15 A.D.2d 849, 224 N.Y.S.2d 596, 1962 N.Y. App. Div. LEXIS 11423 (N.Y. App. Div. 3d Dep't 1962).

With respect to an award made following death of an employee who was a compositor in a small printing shop as the postoperative effect of an operation for strangulated hernia, hearsay testimony of decedent's wife and doctor to the occurrence of an "accident" causing the hernia condition to reach proportions requiring the operation, as to decedent's having lifted something heavy and felt a sharp pain, was sufficiently corroborated by independent proof that decedent's job required lifting of heavy objects. Raskind v Speed Printing Co., 15 A.D.2d 975, 225 N.Y.S.2d 546, 1962 N.Y. App. Div. LEXIS 10994 (N.Y. App. Div. 3d Dep't 1962).

Office manager's injury arose in course of her employment, and thus she was entitled to workers' compensation benefits, where delivery of computer equipment arrived at office at 5:15 p.m. in December, she offered to bring delivery man's 18-month-old son upstairs and give him cookie in office, rather than allow boy to be left alone in delivery van after dark, and she injured her back while carrying boy up stairs. Knaub v Realtime Bus. Sys., 251 A.D.2d 840, 674 N.Y.S.2d 799, 1998 N.Y. App. Div. LEXIS 7355 (N.Y. App. Div. 3d Dep't 1998).

228. —Lifting or carrying; arranging stock or merchandise

A saleswoman who was carrying boxes weighing about thirty pounds upstairs from the stockroom and experienced a sudden loss of vision in the left eye due to a tear of the eye's retina and choroid, suffers an accidental injury under this section. Rosch v M. Rappaport & Son, 269 A.D. 914, 57 N.Y.S.2d 580, 1945 N.Y. App. Div. LEXIS 4447 (N.Y. App. Div. 1945).

A salesman in an antique shop, not accustomed to lifting and with a pre-existing heart condition, lifted a 200 pound piece of furniture and felt a pain in his chest which was thereafter diagnosed as a coronary infarction. Board's decision of a compensable accident affirmed. Greenfield v Antique Market, Ltd., 2 A.D.2d 618, 151 N.Y.S.2d 773, 1956 N.Y. App. Div. LEXIS 5464 (N.Y. App. Div. 3d Dep't 1956).

Claimant was salesman of convertible beds. It was necessary for him to open and close beds and to pick up pillows weighing 20 lbs. each. For 2 days he had not been feeling well. On day he suffered coronary occlusion, claimant helped move piece of furniture weighing 200–250 lbs., unusual work for him, and on way home he had difficulty parking car. Held: there was substantial medical evidence to sustain finding of accident and causal relation. Eisenberg v Castro Convertibles, Inc., 5 A.D.2d 1022, 173 N.Y.S.2d 400, 1958 N.Y. App. Div. LEXIS 6175 (N.Y. App. Div. 3d Dep't 1958).

While lifting boxes of merchandise, claimant sustained a myocardial infarction with pains in chest. Board found that he had suffered aggravation due to unusual strain and exertion in moving boxes unassisted and that such exertion was an accident. Spector v Grossman, 6 A.D.2d 913, 175 N.Y.S.2d 597, 1958 N.Y. App. Div. LEXIS 5220 (N.Y. App. Div. 3d Dep't 1958).

A sales clerk employed in a retail variety store, who had a history of pre-existing back trouble, was not entitled to compensation on the ground that her duties required her to restock counters and arrange merchandise displays, where there was no evidence of any incident which could be regarded as an accident by the average man. Cunningham v Neisner Bros., Inc., 9 A.D.2d 965, 193 N.Y.S.2d 586, 1959 N.Y. App. Div. LEXIS 5646 (N.Y. App. Div. 3d Dep't 1959).

The evidence justified a compensation award where claimant, employed as a salesman, likewise had the duty of inspecting goods for shipment, such goods normally being brought in and suspended from a six-foot rack by other employees, but felt ill, and was diagnosed as having suffered an acute coronary thrombosis and myocardial infarction, after having helped lift the goods to the rack on a day when help was relatively short. Gordon v Cenu Fibres, 10 A.D.2d 655, 196 N.Y.S.2d 349, 1960 N.Y. App. Div. LEXIS 11694 (N.Y. App. Div. 3d Dep't 1960).

A death benefit award was upheld upon evidence that the deceased died as the result of a heart attack, having a previous heart condition, while engaged in taking inventory of a stock of heavy materials, including nail kegs weighing up to 100 pounds, cans of paint weighing from 10 to 20 pounds, and various hardware and lumber. Benowitz v Jacob Benowitz, Inc., 11 A.D.2d 593, 200 N.Y.S.2d 527, 1960 N.Y. App. Div. LEXIS 9951 (N.Y. App. Div. 3d Dep't 1960).

There was sufficient evidence to relate death of an employee to aggravation of a heart condition by overexertion in course of his employment where it appeared that decedent was a shoe salesman, and, business being slow on the day in question, spent most of the day shifting shoe boxes to various locations, ate very little and went to bed early upon returning home from work, collapsed while at work the next day, and an autopsy performed following his death established that the infarct related back to about the time of his overexertion. Farber v Harbor Shoes Co., 12 A.D.2d 578, 206 N.Y.S.2d 1011, 1960 N.Y. App. Div. LEXIS 7319 (N.Y. App. Div. 3d Dep't 1960), rev'd, 10 N.Y.2d 875, 223 N.Y.S.2d 503, 179 N.E.2d 508, 1961 N.Y. LEXIS 1003 (N.Y. 1961).

An award of death benefits was sustained for death of a 36 year old employee from occlusive coronary arteriosclerosis, whose duties were primarily clerical, on the day following unusual exertion in preparing an order for shipment in pulling down a case containing stuffed toys weighing between 40 and 50 pounds and four feet by four feet in size from atop another case of the same size, on which occasion he felt a pain in his chest, stopped work, and sat down for awhile. Geschwer v Tee Jay Toys, Inc., 15 A.D.2d 615, 222 N.Y.S.2d 771, 1961 N.Y. App. Div. LEXIS 6835 (N.Y. App. Div. 3d Dep't 1961).

There was sufficient evidence to show causal relationship between the occasion when claimant, a saleslady, suffered a "horrible pain" while picking up a box from the basement floor of the employer's premises, which was immediately reported to her superior, was examined by a doctor the same night, and underwent surgery about a month later in course of which a herniated disc was removed from her spine. Messer v Leading Youth Center, Inc., 15 A.D.2d 841, 224 N.Y.S.2d 601, 1962 N.Y. App. Div. LEXIS 11411 (N.Y. App. Div. 3d Dep't 1962).

With respect to a fatal heart attack suffered by a store employee, the Board could find that it was not caused by an accident in course of his employment where the only testimony as to what he was doing at end before occurrence of the attack was that he was in the basement of the store "straightening up some stuff." Glass v Square Music & Sport Shop, 17 A.D.2d 1025, 234 N.Y.S.2d 475, 1962 N.Y. App. Div. LEXIS 6734 (N.Y. App. Div. 3d Dep't 1962).

An award will be denied claimant, where decedent after working for several hours unpacking merchandise suffered a seizure and shortly died of angina pectoris, and a physician testified that the work of unpacking the merchandise "could have" produced the angina. Frankel v National 5, 10 & 25 Cent Stores, 243 A.D. 841, 278 N.Y.S. 450, 1935 N.Y. App. Div. LEXIS 8531 (N.Y. App. Div.), aff'd, 268 N.Y. 509, 198 N.E. 378, 268 N.Y. (N.Y.S.) 509, 1935 N.Y. LEXIS 985 (N.Y. 1935).

229. —Lifting or carrying; loading or unloading

On conflicting medical testimony, death at age 28 of a warehouse helper from coronary sclerosis about one and one-half hours after starting to load a van with furniture some of which weighed up to 150 pounds with the help of another employee, almost immediately, could be related to the work he was doing and found compensable, notwithstanding an admitted prior bad heart condition, claimant's medical expert having testified that while something other than strenuous work might have caused the death he was reasonably certain that it was due to the work then being done. Carrasquillo v Santini Brothers-The Original, 13 N.Y.2d 245, 246 N.Y.S.2d 392, 196 N.E.2d 52, 1963 N.Y. LEXIS 804 (N.Y. 1963).

Where claimant as chauffeur to an employer engaged in the trucking business was ordered to proceed to a pier and pick up freight for shipment and while engaged in this work handling a case weighing 1,100 pounds he felt unusual sensation in his chest, there was evidence to find that this unusual exertion caused a coronary occlusion which was compensable. Dugan v Hasman & Baxt, Inc., 263 A.D. 1031, 33 N.Y.S.2d 619, 1942 N.Y. App. Div. LEXIS 7959 (N.Y. App. Div.), aff'd, 288 N.Y. 699, 43 N.E.2d 88, 288 N.Y. (N.Y.S.) 699, 1942 N.Y. LEXIS 1539 (N.Y. 1942).

A truck driver who loaded his truck with cases of beer weighing from 36 to 50 pounds and while doing so felt a pain in his chest, whereupon he stopped and rested, and then resumed the loading, but collapsed and died from a coronary thrombosis while driving away from the brewery suffers an accidental injury, even though the work was the usual work of the employee. Weitz v Schreiber Brewing Co., 275 A.D. 973, 90 N.Y.S.2d 235, 1949 N.Y. App. Div. LEXIS 5300 (N.Y. App. Div. 1949).

A well driller who died from a coronary occlusion shortly after loading heavy equipment on a truck, expending thereby an unusual amount of effort as compared with his regular duties, suffers accidental injuries. Lawrence v Howard Cranston & Son, 276 A.D. 789, 92 N.Y.S.2d 603, 1949 N.Y. App. Div. LEXIS 3334 (N.Y. App. Div. 1949).

An employee who while engaged in the regular course of his employment, was caused to use unusual exertion while lifting milk boxes onto a truck which caused him to suffer a heart attack resulting in his death, sustains accidental injuries. Hauser v Sheffield Farms Co., 276 A.D. 800, 93 N.Y.S.2d 112, 1949 N.Y. App. Div. LEXIS 3361 (N.Y. App. Div. 1949).

Claimant, employee of electrical contractor, carried several boxes of material weighing from 25 to 50 lbs. to his car to a plank leading to entrance of the house. He then became ill with a coronary thrombosis. Medical evidence supported finding that exertion of claimant's work brought on the attack. Stapleton v J. E. Hanson, Inc., 282 A.D. 1088, 126 N.Y.S.2d 73, 1953 N.Y. App. Div. LEXIS 5885 (N.Y. App. Div. 1953).

Where a truck driver, contrary to his usual practice, helped load a truck with metal forms and then died as a result of his unusual physical work, his death was compensable. Kraus v Marcus Decorating Co., 284 A.D. 914, 134 N.Y.S.2d 411, 1954 N.Y. App. Div. LEXIS 4046 (N.Y. App. Div.), modified, 284 A.D. 994, 136 N.Y.S.2d 377, 1954 N.Y. App. Div. LEXIS 4349 (N.Y. App. Div. 1954).

A death award was sustained where a general worker on a private estate died from cerebral hemorrhage after attack while unloading a truck of metal fence posts in the heat of the summer. Saari v Crawford, 284 A.D. 1079, 135 N.Y.S.2d 913, 1954 N.Y. App. Div. LEXIS 4615 (N.Y. App. Div. 1954).

On day of death, decedent and another loaded 125 packages weighing 64 lbs. each, which work was usually performed by 3 or 4 men. Few minutes after completing job, decedent collapsed and died. Decedent had pre-existing heart condition. Autopsy showed recent occlusion. Award affirmed. Kelpin v Watts & Sons, 5 A.D.2d 722, 168 N.Y.S.2d 673, 1957 N.Y. App. Div. LEXIS 3522 (N.Y. App. Div. 3d Dep't 1957), app. denied, 4 N.Y.2d 675, 1958 N.Y. LEXIS 1377 (N.Y. 1958).

Decedent, employed as a longshoreman, had helped unload truck cargo consisting of bags of flour, sugar and heavy boxes of canned goods, usual rollers for work not being available. Coppolino v American Stevedores, Inc., 7 A.D.2d 668, 179 N.Y.S.2d 510, 1958 N.Y. App. Div. LEXIS 4314 (N.Y. App. Div. 3d Dep't 1958).

Claimant, a landscape gardener, helped to load and unload 100-lb. bags of seed, 250-lb. bails of fertilizer and 200 to 300 lb. bails of peat moss and, thereafter, while using hand tools to loosen frozen soil, he sustained injuries including epidural hemorrhage. On operation, blood clot pressing on spinal cord was removed. Held: there was ample medical proof that claimant's work caused rupture of the blood vessel. An accident was properly

found. An extraordinary effort need not be found to establish an accident in case of a natural rupture. Reed v Brookhiser, 8 A.D.2d 895, 186 N.Y.S.2d 815, 1959 N.Y. App. Div. LEXIS 8311 (N.Y. App. Div. 3d Dep't 1959).

Death benefits were properly allowed where decedent, a meat truck driver, complained of inability to breathe and not feeling well while unloading quarters of beef and lamb from the truck and carrying them to a store 60 feet distant, sustaining a fatal heart attack a few hours later, as the work, though part of the job, was such as to involve more strain and exertion than the ordinary wear and tear of life. Johnson v Swift & Co., 10 A.D.2d 656, 196 N.Y.S.2d 330, 1960 N.Y. App. Div. LEXIS 11697 (N.Y. App. Div. 3d Dep't 1960).

Unusual exertion constituting an accident justifying an award was found to exist where decedent, age 69, had for years been engaged in loading bundles of newspapers, weighing from 45 to 60 lbs., onto trains in railroad stations, which were normally transported along the train platform by means of an electric truck, but, on the date of his death, was carrying bundles up long flights of stairs and across a bridge and down another flight of stairs to reach trains on a different platform, in course of which he collapsed and died. Claim of Burke v New York World Tel. & Sun, 10 A.D.2d 742, 198 N.Y.S.2d 108, 1960 N.Y. App. Div. LEXIS 11181 (N.Y. App. Div. 3d Dep't 1960).

Although the only thing exceptional about the work being done by a claimant at the time he suffered a heart attack, aside from his usual work in loading and unloading ice trucks and pushing around large cakes of ice, was that, just prior to the attack, he started lifting two 50-pound bags of crushed ice at the same time, a finding was warranted that the attack was compensable on the basis of extra exertion then engaged in. Wagner v City Products Corp., 11 A.D.2d 551, 199 N.Y.S.2d 807, 1960 N.Y. App. Div. LEXIS 10183 (N.Y. App. Div. 3d Dep't), app. denied, 11 A.D.2d 864, 205 N.Y.S.2d 1001, 1960 N.Y. App. Div. LEXIS 8551 (N.Y. App. Div. 3d Dep't 1960).

There being ample evidence that while decedent was engaged in his usual work of bundling, handling, and carrying newspapers in bundles weighing 55 pounds or better, he collapsed after carrying a bundle from his truck for some 150 feet, and that, on the following day, he was diagnosed as having an acute posterior wall myocardial infarct and coronary occlusion, from which he died some days later, it was proper to award compensation under the Act. Goodman v Egelhofer, 11 A.D.2d 832, 202 N.Y.S.2d 842, 1960 N.Y. App. Div. LEXIS 8501 (N.Y. App. Div. 3d Dep't 1960).

Where the deceased employee worked as a warehouse foreman and it was not unusual for him to help load trucks, and there was evidence that he complained of being sick one morning after 15 minutes of loading bundles weighing 60 or 70 pounds, told his wife and son that he had gotten a pain in his chest from lifting at work, and died the same day as the result of a heart condition, medical testimony to causal relationship between his lifting and his death was sufficient to sustain an award of death benefits. Stefaniak v Chudy Paper Co., 12 A.D.2d 533, 206 N.Y.S.2d 704, 1960 N.Y. App. Div. LEXIS 7226 (N.Y. App. Div. 3d Dep't 1960).

The evidence was sufficient to sustain a finding by the board of causal relationship between a heart attack suffered by claimant, a carpenter, while helping to unload lumber from a truck, and his employment, where there was testimony that he suffered a pain in his arm and chest while helping with the unloading, although he continued with the work notwithstanding the pain. Katz v Greenberg Flooring, Inc., 13 A.D.2d 561, 211 N.Y.S.2d 922, 1961 N.Y. App. Div. LEXIS 12186 (N.Y. App. Div. 3d Dep't 1961).

Where a truck driver suffered a fatal heart attack after lifting 16 rolls of plastic quilting weighing 55 to 60 pounds from a fork lift and stacking them in his truck, and an autopsy showed that death was due to acute coronary thrombosis and coronary sclerosis, on conflicting medical opinions the Board was justified in finding that death arose out of his employment. Wooster v Spector Mid States Freight System, 17 A.D.2d 884, 233 N.Y.S.2d 278, 1962 N.Y. App. Div. LEXIS 7320 (N.Y. App. Div. 3d Dep't 1962).

230. —Lifting or carrying; moving food, beverages, cooking supplies and the like

A bartender who pulls and lifts a heavy piece of ice and suffers a ruptured blood vessel followed by a cerebral hemorrhage and paralysis is accidentally injured. Lauer v Meenan, 255 A.D. 738, 6 N.Y.S.2d 873, 1938 N.Y. App. Div. LEXIS 4967 (N.Y. App. Div. 1938).

An employee who was subjected to strain and exertion while lifting a large five gallon bottle of water weighing about sixty pounds for the purpose of placing it in a water cooler resulting in a cerebral vascular condition which ultimately caused his death suffers an industrial accident. Barnes v New York World's Fair 1939, 277 A.D. 819, 97 N.Y.S.2d 355, 1950 N.Y. App. Div. LEXIS 3414 (N.Y. App. Div. 1950).

An employee suffers an accidental injury where the exertion of lifting milk bottles in the course of his regular occupation caused an ulcer to break open, necessitating an operation as a result of which the employee died. Feinberg v Sheffield Farms Co., 264 A.D. 967, 37 N.Y.S.2d 107, 1942 N.Y. App. Div. LEXIS 5570 (N.Y. App. Div. 1942).

A baker sustains accidental injuries arising out of and in the course of his employment where he aggravates an underlying but unknown tubercular pathology by lifting a heavy box containing dough weighing over 100 pounds. Schroeder v F. G. Shattuck Co., 268 A.D. 944, 51 N.Y.S.2d 367, 1944 N.Y. App. Div. LEXIS 4334 (N.Y. App. Div. 1944).

A stockroom clerk who ruptured a chronic ulcer while lifting a 100 pound bag of sugar while taking inventory suffers an accidental injury. Carney v General Cable Corp., 278 A.D. 868, 104 N.Y.S.2d 204, 1951 N.Y. App. Div. LEXIS 5014 (N.Y. App. Div. 1951), aff'd, 303 N.Y. 885, 105 N.E.2d 108, 303 N.Y. (N.Y.S.) 885, 1952 N.Y. LEXIS 1343 (N.Y. 1952).

A death award was proper where a fish cleaner at a retail fish counter helped move 15 boxes of fish the day before he died, was sick the next morning, but refused to stay home and then died the next morning. Raifer v Bankofsky, 283 A.D. 1126, 131 N.Y.S.2d 508, 1954 N.Y. App. Div. LEXIS 6495 (N.Y. App. Div. 1954).

Evidence that claimant did some "additional work" due to the absence of another employee and that, after carrying a case of champagne in his restaurant and hotel employment felt severe pains and was ill was insufficient to establish a reactivation of a former dormant tubercular condition where no proof suggested the nature of the "strain" or how it could be related in physiological causation to tuberculosis of the lung. Schorr v Commodore Catering, Inc., 284 A.D. 1009, 135 N.Y.S.2d 497, 1954 N.Y. App. Div. LEXIS 4380 (N.Y. App. Div. 1954).

Medical evidence constituted adequate proof of causal relationship between death of a waiter, following his collapse while serving a large wedding party, and the moving of various tables and carrying of heavy trays of food, some of them weighing between 45 and 50 pounds. Colone v Tavern on the Green, 21 A.D.2d 930, 251 N.Y.S.2d 129, 1964 N.Y. App. Div. LEXIS 3367 (N.Y. App. Div. 3d Dep't), app. denied, 14 N.Y.2d 487, 1964 N.Y. LEXIS 1853 (N.Y. 1964).

231. — —Causing heart condition

An award of death benefits to a widow and minor children will be affirmed where the husband, while assisting some of the employees and while lifting a bag of nuts weighing about 110 pounds, which was not his regular work, he strained himself and immediately collapsed and died two days later from coronary thrombosis. Bacher v Herschkowitz Bros., 245 A.D. 876, 282 N.Y.S. 172, 1935 N.Y. App. Div. LEXIS 11349 (N.Y. App. Div. 1935).

An employee does not sustain an accident, where it was alleged that while carrying a case of eggs he suffered a heart attack, fell, and death resulted. Singer v Denman & Hernes, Inc., 249 A.D. 898, 292 N.Y.S. 564, 1937 N.Y. App. Div. LEXIS 10097 (N.Y. App. Div. 1937).

A milkman who was compelled to lift a can of milk weighing about a hundred and thirty pounds into an ice box instead of swinging it in as was his usual practice and suffers a coronary thrombosis, sustains an accidental injury under this section. Anspach v Trieagle Dairies, Inc., 266 A.D. 703, 40 N.Y.S.2d 152, 1943 N.Y. App. Div. LEXIS 3950 (N.Y. App. Div. 1943).

A baker who lifted a heavy box of dough and sustained a coronary occlusion suffers an accidental injury. Eizenman v

Newman, 275 A.D. 736, 87 N.Y.S.2d 154, 1949 N.Y. App. Div. LEXIS 4249 (N.Y. App. Div. 1949).

A manager of a pickle and sauerkraut business, whose duties normally called for no heavy work, but who was required by an unusual situation in the business to lift a basket of cucumbers weighing from fifty to fifty-five pounds suffers an accidental injury where he felt a stabbing pain in his chest at the time and died some six weeks later as the result of a coronary thrombosis which was associated with the lifting incident. Rose v Block & Guggenheimer, Inc., 277 A.D. 818, 97 N.Y.S.2d 357, 1950 N.Y. App. Div. LEXIS 3412 (N.Y. App. Div. 1950).

Evidence sustained award for butcher who suffered a heart attack after lifting a hundred pound quarter of beef where his regular duties required him to wait on customers and to cut and sell portions of meat as ordered. Brilli v Brilli, 283 A.D. 905, 130 N.Y.S.2d 142, 1954 N.Y. App. Div. LEXIS 5701 (N.Y. App. Div. 1954).

Claimant, a 55-year-old chef, suffered a sharp pain in his chest on Thanksgiving Day when he carried a 50-lb. pan of turkey. He suffered a similar pain the next day when he lifted a sack of potatoes. On Sunday the pain recurred and he was hospitalized. Two months later he suffered a severe heart attack. Since there was ample evidence that claimant sustained a coronary thrombosis on Thanksgiving Day the award was sustained. Kostanek v Hotel Piccadilly Operating Co., 3 A.D.2d 785, 160 N.Y.S.2d 371, 1957 N.Y. App. Div. LEXIS 6196 (N.Y. App. Div. 3d Dep't 1957).

Claimant, aged 64, was a counterman in a delicatessen store. When he carried a case of beer weighing about 35 lbs., he felt a sharp pain in his chest. Four days later he had a heart attack. Despite conflict in the medical testimony, there was substantial evidence to justify the award. Kass v Sixth Ave. Delicatessen, 3 A.D.2d 801, 160 N.Y.S.2d 138, 1957 N.Y. App. Div. LEXIS 6086 (N.Y. App. Div. 3d Dep't 1957).

Board properly found that decedent, a wine steward, while lifting heavy cases of liquor and soda, experienced pains and other symptoms of cardiac distress and that these work activities caused unusual strain on heart, already weakened by pre-existing disease, resulting in acute myocardial infarction and death four days later. Evidence warranted conclusion, that although work might have been no more arduous than usual, it was sufficiently strenuous to require more than normal exertion. Pauson v Manger Vanderbilt Hotel, 7 A.D.2d 686, 179 N.Y.S.2d 252, 1958 N.Y. App. Div. LEXIS 4340 (N.Y. App. Div. 3d Dep't 1958), app. denied, 5 N.Y.2d 710, 1959 N.Y. LEXIS 2006 (N.Y. 1959).

Claimant, an executive and part owner of defendant bakery, was entitled to compensation for a heart attack incurred from lifting two 100-pound bags of flour, pouring the flour into a tub, and then lifting the tub, which weighed about 40 pounds. Erde v Morris Erde, Inc., 9 A.D.2d 797, 192 N.Y.S.2d 784, 1959 N.Y. App. Div. LEXIS 6134 (N.Y. App. Div. 3d Dep't 1959).

Where claimant a waiter in a restaurant, had to descend a stairway to a dressing room in the cellar, which involved lifting a trap door, requiring extra effort and exertion because the trap door was stuck, and was taken with severe pains in his chest and arms while holding up the trap door, on the basis of medical testimony that he suffered a heart attack a compensation award was justified. Basadonna v Maria Restaurant, 9 A.D.2d 798, 192 N.Y.S.2d 898, 1959 N.Y. App. Div. LEXIS 6135 (N.Y. App. Div. 3d Dep't 1959).

The evidence was sufficient to find accidental death due to heart attack precipitated by strenuous efforts of decedent's work as a baker on the day of his death, where these duties included preparation of dough in large mixing kettles which had to be carried by decedent and a helper about 15 feet and lifted to a table about 33 inches high, some of the kettles weighing as much as 105 pounds. Gostinsky v Diamond Bake Shop, 11 A.D.2d 847, 203 N.Y.S.2d 160, 1960 N.Y. App. Div. LEXIS 8523 (N.Y. App. Div. 3d Dep't 1960).

Causal relationship between a fatal heart attack and employment was sufficiently established by evidence that deceased was a meat cutter whose work did not ordinarily involve heavy lifting, and, on the day in question, lifted a 150-pound quarter of beef from a hook and carried it elsewhere, following which a coworker found him sitting down in a back room, looking pale and moving slowly, to whom deceased stated he did not feel good and had eaten no lunch. Warga v H. C. Bohack Co., 12 A.D.2d 558, 206 N.Y.S.2d 740, 1960 N.Y. App. Div. LEXIS 7258 (N.Y. App. Div. 3d Dep't 1960).

Where death resulted from a heart attack, there was sufficient evidence to sustain an award of death benefits where it appeared that, on the morning of the day in question, decedent, who worked in a liquor warehouse, was engaged in filling rush orders, requiring the handling and lifting of 15 to 20 cases of liquor weighing from 35 to 45 pounds each, and there was medical testimony that this precipitated the heart attack. Romanelli v Hueblein Liquor Co., 14 A.D.2d 980, 221 N.Y.S.2d 408, 1961 N.Y. App. Div. LEXIS 7724 (N.Y. App. Div. 3d Dep't 1961).

There was adequate testimony to support an award of death benefits where claimant's husband was a meat lugger in a packing plant and died three days after being sent to a hospital as the result of a heart attack and suffering pains while handling meat weighing from 150 to 300 pounds per piece in the absence of his helper. Kunkel v National Packing Co., 15 A.D.2d 695, 223 N.Y.S.2d 262, 1962 N.Y. App. Div. LEXIS 12012 (N.Y. App. Div. 3d Dep't 1962).

There was sufficient evidence to sustain an award of death benefits in a heart case where it appeared that decedent was employed in a restaurant, the supplies of which were kept in a basement accessible by a narrow stairway with a low ceiling, complaint of a pain in his chest after moving some barrels around in the basement to get at a case of ketchup which he then carried up the steps, looked ill, and was perspiring freely, and died within three weeks later of an acute myocardial infarction. Nutis v Saloway's Restaurant, 16 A.D.2d 846, 227 N.Y.S.2d 591, 1962 N.Y. App. Div. LEXIS 9974 (N.Y. App. Div. 3d Dep't 1962).

The evidence was sufficient to sustain an award of benefits in a heart case where claimant testified to sustaining severe chest pains after removing a 100-pound bag of potatoes from the top of a five-foot stack and stumbling over another bag while attempting to place it on a hand truck, which incident was immediately reported to his foreman, notwithstanding he continued to work for better than a week longer before seeing a doctor. Barnett v Eber Bros. & Co., 17 A.D.2d 1001, 233 N.Y.S.2d 786, 1962 N.Y. App. Div. LEXIS 6977 (N.Y. App. Div. 3d Dep't 1962).

There was substantial evidence to sustain a finding of the Board that a myocardial infarction was brought on by claimant's strenuous activity in carrying a heavy pot of ice up the basement stairs of the restaurant in which he worked which brought on a pain in his chest and a dizzy spell. Uletas v Elliott, 18 A.D.2d 849, 236 N.Y.S.2d 487, 1963 N.Y. App. Div. LEXIS 4862 (N.Y. App. Div. 3d Dep't 1963).

232. —Lifting or carrying; moving machinery or equipment

With a pre-existing coronary sclerosis decedent, in October, 1946, held up a 500 pound shelf in the course of his employment for about 5 minutes and thereafter suffered a coronary occlusion. He returned to work in January, 1947, but suffered another attack in September, 1948. Yarkum v Rosenblum & Weller, 308 N.Y. 842, 126 N.E.2d 179, 308 N.Y. (N.Y.S.) 842, 1955 N.Y. LEXIS 1099 (N.Y. 1955).

A superintendent who lifted a heavy oil burner and suffered abdominal pains which necessitated an operation suffers an accidental injury under this section. Kuehnen v Singer Arms Realty Corp., 255 A.D. 739, 6 N.Y.S.2d 865, 1938 N.Y. App. Div. LEXIS 4969 (N.Y. App. Div. 1938).

A mechanic who lifted an electric chair weighing 200 pounds for the purpose of repairing it and felt a pain in his chest and subsequently develops symptoms of heart disease suffers an accidental injury where there is evidence that the strain was not customary in connection with the claimant's usual duties. Fitkalo v American Express Concessions, Inc., 261 A.D. 1023, 25 N.Y.S.2d 982, 1941 N.Y. App. Div. LEXIS 8586 (N.Y. App. Div. 1941).

A shop foreman who lifts and moves a heavy die weighing about 150 pounds and suffers a rupture of a blood vessel in his brain sustains an accidental injury under the workmen's compensation

law. Russell v James Ackroyd & Sons, 263 A.D. 771, 30 N.Y.S.2d 922, 1941 N.Y. App. Div. LEXIS 4878 (N.Y. App. Div. 1941).

An award of workmen's compensation is proper where the claimant suffered a coronary thrombosis while lifting a case of material weighing from sixty to seventy pounds at the request of the foreman, which work he was not accustomed to performing and which subjected him to an unusual effort. Sheiner v Sheiner & Blum, Inc., 268 A.D. 841, 50 N.Y.S.2d 282, 1944 N.Y. App. Div. LEXIS 3714 (N.Y. App. Div. 1944).

There is evidence sufficient to sustain an award where an employee was injured while lifting a heavy die and as a result of the strain suffered a ruptured ulcer of the stomach which necessitated an operation from which death resulted due to peritonitis. Bednarz v Buffalo Brake Beam Co., 268 A.D. 1074, 52 N.Y.S.2d 318, 1945 N.Y. App. Div. LEXIS 5553 (N.Y. App. Div. 1945).

A tool grinder suffering from a pre-existing cardiac disease who lifted a machine fixture weighing 100 pounds and suffered an anginal attack is entitled to an award of compensation. Kaufman v Fairchild Engine & Airplane Corp., 272 A.D. 854, 70 N.Y.S.2d 417, 1947 N.Y. App. Div. LEXIS 3913 (N.Y. App. Div. 1947).

A machine operator who in the course of his daily duties was required to lift 7 machines, each weighing about 100 pounds, suffers an accidental injury where while engaged in lifting the 6th machine, he felt a slight pain in his chest but continued to work until he had completed his quota, and retired to the washroom when the pain in his chest continued where the claimant was rendered unconscious from a condition diagnosed subsequently as coronary thrombosis. Rivers v Malone Bronze Powder Works, Inc., 277 A.D. 1071, 100 N.Y.S.2d 575, 1950 N.Y. App. Div. LEXIS 4520 (N.Y. App. Div. 1950).

An award of death benefits was affirmed where an employee with a pre-existing coronary condition died as the result of a sclerosis suffered after he had been engaged in handling 50 pound pails while working on a step-ladder and medical proof showed a causal relationship between the work and the death. Olmstead v Perland Realty Corp., 1 A.D.2d 709, 146 N.Y.S.2d 894, 1955 N.Y. App. Div. LEXIS 3720 (N.Y. App. Div. 4th Dep't 1955).

Board properly found that claimant, while packing electrical supplies weighing from 60 to 140 lbs., sustained accidental injuries in nature of myocardial infarction when he lifted exceptionally heavy box and felt severe pain in his chest. Board properly accepted medical testimony in report supporting causal relation. Frost v U. S. Electrical Supply Co., 8 A.D.2d 875, 186 N.Y.S.2d 904, 1959 N.Y. App. Div. LEXIS 8279 (N.Y. App. Div. 3d Dep't 1959).

Decedent, who prepared dies while sitting at a machine, was directed to carry 12 dies, each weighing 17 pounds, through an aisle, which was 30-35 feet long. Dies had been heated to 1800 degrees and were carried with tongs held away from body. Work was unusual for claimant. Medical proof was that it subjected him to a strain which precipitated myocardial infarction from which he died. Award affirmed. Wheaton v Chevrolet-Buffalo Div. of General Motors Corp., 9 A.D.2d 591, 189 N.Y.S.2d 419, 1959 N.Y. App. Div. LEXIS 7459 (N.Y. App. Div. 3d Dep't), app. denied, 7 N.Y.2d 706, 1959 N.Y. LEXIS 1854 (N.Y. 1959).

There was substantial evidence to sustain a board finding that claimant's coronary occlusion had causal relationship to his work as a cook in lifting some 50–60 pound kettles or pots on the day in question, following suffering of chest pains when he first reported to work that day. Kaufman v Jewish Memorial Hospital, 18 A.D.2d 726, 234 N.Y.S.2d 456, 1962 N.Y. App. Div. LEXIS 6576 (N.Y. App. Div. 3d Dep't 1962).

There was substantial evidence to sustain a board finding that claimant's myocardial infarction was causally related to his lifting metal forms of type for use in color printing, weighting about 40 pounds each, some 25 times in the course of a ten and one-half hour work shift. Brecher v Bigger Press, Inc., 18 A.D.2d 739, 235 N.Y.S.2d 671, 1962 N.Y. App. Div. LEXIS 6172 (N.Y. App. Div. 3d Dep't 1962).

Evidence that decedent was engaged in moving 16 pound phonograph chassis at the rate of 121 per hour and placing them into cabinet sustained finding that death of decedent who suddenly collapsed and died of a coronary thrombosis after about one hour of such operation was compensable. Dalton v Olympic Radio, 30 A.D.2d 739, 291 N.Y.S.2d 524, 1968 N.Y. App. Div. LEXIS 3590 (N.Y. App. Div. 3d Dep't), app. denied, 22 N.Y.2d 644, 1968 N.Y. LEXIS 2061 (N.Y. 1968).

Death resulting from myocardial infarction precipitated by operation of punch machine, carrying 60 pounds of iron, and placement of 100 pound cutting machine on roof, all of which caused more than normal wear and tear of life, was compensable. Brown v Highways Displays Inc., 30 A.D.2d 892, 291 N.Y.S.2d 856, 1968 N.Y. App. Div. LEXIS 3422 (N.Y. App. Div. 3d Dep't 1968), aff'd, 24 N.Y.2d 943, 302 N.Y.S.2d 580, 250 N.E.2d 68, 1969 N.Y. LEXIS 1271 (N.Y. 1969).

Where the claimant, who worked as a mechanic repairing time clocks and recorders, lifted a time clock weighing about 40 pounds off a wall, and in order to do so he had to stand about 18 inches from the wall and stretch out his arms to reach the clock, and suffered a heart attack, the evidence sustained the board's finding that the lifting of the clock while reaching over cartons involved more than normal exertion, created greater than the ordinary wear and tear of life, and precipitated the fatal cardiac episode and death. Weberman v Advance Time Recorder Co., 38 A.D.2d 636, 327 N.Y.S.2d 289, 1971 N.Y. App. Div. LEXIS 2705 (N.Y. App. Div. 3d Dep't 1971).

233. —Lifting or carrying; removing trash, refuse and the like

There is proof sufficient to support a finding of an accidental injury where the claimant, a building service mechanic sustained injuries which aggravated a pre-existing heart condition while engaged in his regular employment and while lifting a heavy can of ashes, where there is direct medical testimony that the claimant's disability was the result of straining and exertion employed in the work in which he was engaged. Swanson v Harbold Realty Co., 262 A.D. 979, 30 N.Y.S.2d 1, 1941 N.Y. App. Div. LEXIS 6766 (N.Y. App. Div. 1941).

A house superintendent who carried garbage baskets weighing from sixty to seventy pounds down stairs to the incinerator, and who on his last trip felt a burning sensation in his chest and cold perspiration and was found upon examination by a physician to be suffering from an acute coronary occlusion does not sustain an accident arising out of and in the course of his employment. Chiara v Villa Charlotte Bronte, Inc., 273 A.D. 834, 76 N.Y.S.2d 59, 1948 N.Y. App. Div. LEXIS 4840 (N.Y. App. Div.), aff'd, 298 N.Y. 604, 81 N.E.2d 332, 298 N.Y. (N.Y.S.) 604, 1948 N.Y. LEXIS 1175 (N.Y. 1948).

Claimant, a 71-year old man, was employed to clean employer's grounds. On a rainy day he bundled 90 to 100 pounds of refuse together and carried it 700 feet. Upon completing this task he felt shaky and weak and thereafter suffered a cerebral hemorrhage. Award affirmed. Lipiarz v International Milling Co., 285 A.D. 1092, 139 N.Y.S.2d 399, 1955 N.Y. App. Div. LEXIS 6755 (N.Y. App. Div. 1955).

Claimant, superintendent of apartment building, felt sharp chest pain after taking 10 to 12 cans of refuse and 3 sacks of paper and boxes from basement up 11 steps to street level. Board properly found that weight of evidence indicated claimant sustained accident. Syvertson v Estate of Freudenberg, 7 A.D.2d 796, 181 N.Y.S.2d 56, 1958 N.Y. App. Div. LEXIS 3720 (N.Y. App. Div. 3d Dep't 1958).

The board could properly find accidental injury from evidence that claimant sustained a heart attack after moving eight barrels of ashes, each weighing 120 to 130 pounds, by rolling them to a flight of stairs and lifting each of them up eight steps, notwithstanding this was part of his regular work, as the strenuous exertion was immediately associated with the heart symptoms. Holly v Queensboro Corp., 9 A.D.2d 819, 192 N.Y.S.2d 664, 1959 N.Y. App. Div. LEXIS 6172 (N.Y. App. Div. 3d Dep't 1959), app. denied, 7 N.Y.2d 709, 1960 N.Y. LEXIS 1605 (N.Y. 1960).

An award of death benefits was sustained on the basis of testimony that decedent, a building superintendent, on the day preceding his death from a heart attack was engaged in carrying cans of old bricks up a flight of stairs and putting them on the sidewalk, in course of cleaning out an incinerator, and complained of not feeling well and having sharp pains in his chest. Stewart v

Devon Realty Corp., 15 A.D.2d 693, 223 N.Y.S.2d 332, 1962 N.Y. App. Div. LEXIS 12009 (N.Y. App. Div. 3d Dep't 1962), aff'd, 12 N.Y.2d 1005, 239 N.Y.S.2d 132, 189 N.E.2d 626, 1963 N.Y. LEXIS 1361 (N.Y. 1963).

234. —Lifting or carrying; building materials, supplies and the like.

An express messenger with a pre-existing heart ailment who lifted a plank weighing about 150 pounds and suffered a fatal heart collapse three minutes later suffers an accidental injury. Golden v Railway Express Agency, Inc., 255 A.D. 735, 6 N.Y.S.2d 822, 1938 N.Y. App. Div. LEXIS 4954 (N.Y. App. Div. 1938).

A metal lather who lifted an 80 pound plank overhead while erecting a scaffold and suffers a coronary attack sustains an accidental injury. Murphy v Seitz & Mader, 278 A.D. 622, 101 N.Y.S.2d 875, 1951 N.Y. App. Div. LEXIS 4115 (N.Y. App. Div. 1951).

A truck driver who, being unsatisfied with the way the load of bricks he was carrying were arranged, participated in rearranging part of the load, moving 1000 to 1200 bricks weighing approximately five pounds each and who immediately thereafter was taken with a sudden pain over his heart and became unconscious suffering acute myocarditis suffers an accident arising in and out of the course of his employment. Seebold v Quaker Ridge Fuel & Supply Corp., 278 A.D. 730, 103 N.Y.S.2d 37, 1951 N.Y. App. Div. LEXIS 4507 (N.Y. App. Div. 1951).

Work of building construction employee in carrying wooden planks over rough terrain and up and down a ramp, superimposed upon a pre-existing coronary insufficiency, subjected him to an unusual strain resulting in his death in the course of his employment. Luongo v Caristo Constr. Corp., 284 A.D. 1078, 135 N.Y.S.2d 821, 1954 N.Y. App. Div. LEXIS 4613 (N.Y. App. Div. 1954).

A 62-year old laborer while carrying two or three bags of cement in a wheelbarrow felt a sharp pain in his chest. That evening his physician diagnosed decedent's condition as a coronary spasm and shortly thereafter decedent died of coronary thrombosis. Death benefits award sustained. Costa v Lustbader Co., 286 A.D. 1056, 144 N.Y.S.2d 860, 1955 N.Y. App. Div. LEXIS 5120 (N.Y. App. Div. 1955).

On day decedent suffered fatal heart attack, he had been laying cinder blocks weighing 40 to 45 lbs. Work was strenuous and entailed greater exertion than ordinary wear and tear of life. There was evidence of acute infarction precipitated by strain of work on day of attack. Held: finding of accident sustained. Farrell v L. B. Constr. Corp., 5 A.D.2d 705, 168 N.Y.S.2d 725, 1957 N.Y. App. Div. LEXIS 3494 (N.Y. App. Div. 3d Dep't 1957).

Decedent, an electrician, had pre-existing heart condition. Board properly found that, while engaged in installation of wall receptacles, which included lifting and bending heavy pipes, and due to unusual strain and exertion of working in cold, unheated barn with heavy dust and air, decedent sustained aggravation of heart condition resulting in death. Mathiez v Meyer, 6 A.D.2d 741, 174 N.Y.S.2d 340, 1958 N.Y. App. Div. LEXIS 5813 (N.Y. App. Div. 3d Dep't), app. denied, 5 N.Y.2d 705, 1958 N.Y. LEXIS 1567 (N.Y. 1958).

Decedent attempted to lift barrel of sand weighing over 300 pounds. There was substantial evidence to support finding that unusual strain, superimposed on pre-existing sclerotic condition of coronary arteries, caused injuries to his back, coronary strain and insufficiency which brought on his death. Held: Death was causally related to accident. Sutkowski v Prosperity Co., 7 A.D.2d 660, 179 N.Y.S.2d 166, 1958 N.Y. App. Div. LEXIS 4299 (N.Y. App. Div. 3d Dep't 1958).

There was substantial evidence to sustain a finding of accident and causal relation between death of an employee from a heart condition and some heavy lifting done by the employee in course of his work where it appeared that decedent, while employed as an apartment house superintendent, fell down stairs and fractured two ribs on December 22, 1955, thereafter required assistance from his son on the work, and on April 25, 1956, had occasion to move certain doors weighing 30 to 60 pounds to make a plumbing repair in course of which he dropped one of the doors and his son observed that he was red in the face and gasping for breath. Janitz v Evelyn Realty Co., 11 A.D.2d 822, 202 N.Y.S.2d 559, 1960 N.Y. App. Div. LEXIS 8486 (N.Y. App. Div. 3d Dep't 1960).

Where claimant, after working for an hour and a half lifting rubber slabs weighing about 15 pounds each from a shoulder high platform and placing them on a scale four inches from the floor, at a speed varying from three to ten seconds each, suffered a pain in the chest, began to sweat, and became dizzy, which condition was diagnosed as due to an acute coronary thrombosis, the evidence was sufficient to show causal relation between the arduous nature of the work and the heart attack. Puccio v General Cable Corp., 13 A.D.2d 558, 211 N.Y.S.2d 966, 1961 N.Y. App. Div. LEXIS 12178 (N.Y. App. Div. 3d Dep't 1961).

There was sufficient evidence to sustain an award of death benefits where decedent died on the job from an acute heart attack after transferring steel billets from one hot furnace to another, the billets weighing about 20 pounds apiece and transported by tongs 18 inches long holding it away from the body at arms' length because of its heat while being carried from 15 to 20 feet between furnaces. Evans v Allegheny Ludlum Steel Corp., 22 A.D.2d 838, 253 N.Y.S.2d 853, 1964 N.Y. App. Div. LEXIS 2788 (N.Y. App. Div. 3d Dep't 1964).

Workers' Compensation Board properly ruled, on millhand's motion for reargument, that even though he had been working since October 1992 under 20-pound lifting restriction due to severe arthritic spinal condition, he was able to effectively perform his job until June 1994 injury to his back from lifting aluminum pipes rendered him totally disabled; thus, apportionment did not apply. Peziol v VAW of Am., 245 A.D.2d 877, 667 N.Y.S.2d 70, 1997 N.Y. App. Div. LEXIS 13402 (N.Y. App. Div. 3d Dep't 1997).

235. —Lifting or carrying; home furniture, appliances and the like

Decedent had pre-existing arteriosclerosis. His employment included moving furniture. Five days before his death while moving furniture, including a large refrigerator and studio couch, he became ill, short of breath and complained of chest pains. Held: evidence supported finding that undue and extra effort brought on fatal heart attack. Riley v Dean of Ithaca, Inc., 5 A.D.2d 913, 170 N.Y.S.2d 901, 1958 N.Y. App. Div. LEXIS 6735 (N.Y. App. Div. 3d Dep't), app. denied, 5 A.D.2d 1019, 172 N.Y.S.2d 793, 1958 N.Y. App. Div. LEXIS 6373 (N.Y. App. Div. 3d Dep't 1958), app. denied, 4 N.Y.2d 677, 1958 N.Y. LEXIS 1460 (N.Y. 1958).

With respect to a condition diagnosed as a cerebrovascular accident, the evidence was considered sufficient to sustain an award where it appeared that on the preceding day claimant had been moving household furniture, much of which was very heavy, as a truck driver and mover from one residence to another when "his arm went to sleep on him" and finally "gave out," there being medical testimony that the heavy lifting would be sufficient to bring on the attack. Grear v P. J. Garvey Carting & Storage, Inc., 11 A.D.2d 582, 200 N.Y.S.2d 684, 1960 N.Y. App. Div. LEXIS 9934 (N.Y. App. Div. 3d Dep't 1960).

A question of fact was presented and there was sufficient evidence to sustain a finding of the Board that, notwithstanding a pre-existing cardiac condition, death of an employee 51 years of age was due to the strenuous nature of the work which he was doing where, after moving or helping to move some lamps, tables, and other furniture, he complained of pain and shortly thereafter collapsed and died. Connolly v Waldorf Astoria Corp., 12 A.D.2d 712, 208 N.Y.S.2d 758, 1960 N.Y. App. Div. LEXIS 6257 (N.Y. App. Div. 3d Dep't 1960), app. denied, 9 N.Y.2d 610, 1961 N.Y. LEXIS 1673 (N.Y. 1961).

There was substantial evidence to sustain a finding of the Board that claimant's myocardial infarction was causally related to an industrial accident about a week before he actually quit working when his work required him to move a 300 pound piece of furniture about four feet after ascending four flights of stairs while carrying a 30 pound bundle, at which time he broke into a cold sweat and experienced chest pains. Alterowitz v Alba-De Luxe Upholstering Corp., 17 A.D.2d 1021, 234 N.Y.S.2d 389, 1962 N.Y. App. Div. LEXIS 6727 (N.Y. App. Div. 3d Dep't 1962).

The evidence was sufficient to sustain an award of death benefits with respect to an apartment house maintenance superintendent, 56 years of age, where it showed that on the day in question he was engaged in removing a refrigerator weighing between 100 and 200 pounds through crowded halls and down steps, which was not part of his regular duties, suffered chest pains, and died two days later. Bradshaw v Butler, 18 A.D.2d 853, 236 N.Y.S.2d 157, 1963 N.Y. App. Div. LEXIS 4867 (N.Y. App. Div. 3d Dep't 1963).

236. —Lifting or carrying; cases, boxes

An employee who on February 25th felt a pain in his back while lifting eighty pound boxes and had difficulty in breathing, having to stop work, but returned to work without having seen a doctor and continued to work until March 18th when he collapsed as he was pushing out a rack of meat, does not suffer an accidental injury where this activity did not require unusual exertion for him, and at the time he had an advanced pre-existing coronary arteriosclerosis and a myocardial infarct. Dworak v E. Greenbaum Co., 261 A.D. 1022, 25 N.Y.S.2d 829, 1941 N.Y. App. Div. LEXIS 8581 (N.Y. App. Div.), aff'd, 287 N.Y. 555, 38 N.E.2d 224, 287 N.Y. (N.Y.S.) 555, 1941 N.Y. LEXIS 2449 (N.Y. 1941).

Where a handyman, who had suffered no previous illness, was directed to pick up a box weighing from seventy-five to one hundred pounds, whereupon he immediately suffered a coronary occlusion, he suffers an accidental injury within the meaning of this section. Fine v Pioneer Sportswear Co., 262 A.D. 782, 27 N.Y.S.2d 397, 1941 N.Y. App. Div. LEXIS 5839 (N.Y. App. Div. 1941).

An employee who suffers a coronary thrombosis as the result of lifting cases in the regular course of his employment sustains accidental injuries. Lowensberg v J. Gerber & Co., 272 A.D. 981, 72 N.Y.S.2d 845, 1947 N.Y. App. Div. LEXIS 4489 (N.Y. App. Div. 1947).

Claimant, having a preexisting coronary sclerosis was entitled to compensation upon proof that while in the course of his employment and on a certain day he felt a pain in his chest which continued during the week and later on in the week upon lifting up a case there was sudden increase in the pain in his chest. Katz v Francis H. Leggett & Co., 282 A.D. 753, 121 N.Y.S.2d 824, 1953 N.Y. App. Div. LEXIS 4877 (N.Y. App. Div. 1953).

Proof of over-exertion resulting in a coronary thrombosis was not sufficient where it was based on the testimony of a single witness who, although answering affirmatively a question as to whether decedent had told him in substance that he had strained himself lifting a box, had previously admitted being confused and remembering only that decedent had complained of pain. Juda v Bond Clothes, Inc., 284 A.D. 4, 130 N.Y.S.2d 141, 1954 N.Y. App. Div. LEXIS 3326 (N.Y. App. Div. 1954).

Substantial evidence supported Workers' Compensation Board's decision that claimant's disability was caused entirely by 1988 back sprain from lifting boxes, rather than 50 percent by it and 50 percent by 1976 back injury from assault, where claimant was asymptomatic and actively and continuously employed for 11 years after 1976 injury, her position as shipping and receiving clerk required her to lift boxes weighing 50 pounds or more for 8 to 10 hours per day, she accomplished that task without incident until 1988, and physician who treated both 1976 and 1988 injuries rejected any connection between claimant's 1976 injury and her 1988 disability. August v Chromalloy R & T, 240 A.D.2d 966, 659 N.Y.S.2d 538, 1997 N.Y. App. Div. LEXIS 6990 (N.Y. App. Div. 3d Dep't), app. dismissed, 90 N.Y.2d 1007, 666 N.Y.S.2d 102, 688 N.E.2d 1384, 1997 N.Y. LEXIS 3637 (N.Y. 1997).

237. —Lifting or carrying; cloth, textiles and the like

A decision denying benefits to claimant who suffered a coronary occlusion was affirmed where claimant testified that he first felt a chest pain while lifting a 75 pound bolt of cloth but co-worker did not see this accident and said there was no reason for claimant to pick up any cloth. Hospital records disclosed that claimant had stated to physician that he felt a dull pain two days prior to the alleged accident. Plafker v P. & J. Lewis, Inc., 1 A.D.2d 711, 146 N.Y.S.2d 739, 1955 N.Y. App. Div. LEXIS 3725 (N.Y. App. Div. 3d Dep't 1955).

Decedent, foreman in laundry, developed symptoms of heart attack during the afternoon. He died 2 weeks later from coronary condition and myocardial infarction. There were hearsay declarations by decedent to effect that, when he was lifting bag of wash, he felt sharp chest pains. There was testimony by co-employee that decedent lifted bundles of wet wash weighing 50 to 60 pounds nearly every day. That was some corroboration of the hearsay declaration. And there was medical testimony to sustain causal relation. Award affirmed. Svigals v Blue Diamond Laundry No. 1, Inc., 7 A.D.2d 800, 180 N.Y.S.2d 783, 1958 N.Y. App. Div. LEXIS 3724 (N.Y. App. Div. 3d Dep't 1958).

Claimant, 62 years of age, and employed for many years as a supervising executive and foreman in a clothing factory, was entitled to compensation for a heart attack where, just prior thereto, he lifted several bundles of sleeves, each containing 40 to 45 sleeves, one at a time, carried them about nine feet to a table, and pushed the bundles along the table. Silverman v Calvert Coat Mfg. Co., 9 A.D.2d 973, 193 N.Y.S.2d 681, 1959 N.Y. App. Div. LEXIS 5660 (N.Y. App. Div. 3d Dep't 1959).

238. —Lifting or carrying; books, paper

The testimony of the president of the employer, disabled from a coronary occlusion, that he suffered a chest pain while moving two heavy rolls of paper in the course of his work could be disregarded by the Board as lacking credibility where, after the alleged accident, the claimant drove 120 miles, didn't see a physician until the following day, gave physician a history of "pain after dinner," the physician did not report until two months later, and employer's report was not filed until more than one month after the alleged accident. Zellner v Ulster Tissue Mills, Inc., 1 A.D.2d 710, 146 N.Y.S.2d 762, 1955 N.Y. App. Div. LEXIS 3723 (N.Y. App. Div. 3d Dep't 1955), app. denied, 1 A.D.2d 793, 149 N.Y.S.2d 236, 1956 N.Y. App. Div. LEXIS 6563 (N.Y. App. Div. 3d Dep't 1956), app. denied, 1 N.Y.2d 641, 1956 N.Y. LEXIS 1339 (N.Y. 1956).

Claimant was employed as a hat packer and suffered an acute heart attack while working. Held: his testimony that in order to get at and remove a bundle of tissue paper which he described as having been broken or damaged, it was necessary to lift up 2 other bundles of tissue weighing about 150 pounds and as he did that he felt a pain in his chest and thereupon became acutely ill was not so incredible as to hold as a matter of law that there was no substantial evidence to sustain an award. Kaminsky v Oriole Hat Co., 4 A.D.2d 900, 166 N.Y.S.2d 801, 1957 N.Y. App. Div. LEXIS 4289 (N.Y. App. Div. 3d Dep't 1957).

Board properly found that on November 19, 1954 decedent was subjected to unusual strain while lifting heavy inventory books causing him to suffer acute myocardial infarction. He was totally disabled until his death on April 9, 1955. Medical evidence adequately established causal relation between accident and death. Wasserman v Covington Fabrics Corp., 9 A.D.2d 554, 189 N.Y.S.2d 503, 1959 N.Y. App. Div. LEXIS 7399 (N.Y. App. Div. 3d Dep't 1959).

Notwithstanding conflicts in testimony, there was sufficient medical testimony to sustain the Board's determination that augmentation of an existing heart condition was due to an accident in course of employment of claimant as a traveling auditor when he suffered sharp pains across his chest and quit work for the time being after carrying books of a client which weighed approximately 64 pounds from the basement to where he was working. Witten v Sargoy & Stein, 15 A.D.2d 617, 222 N.Y.S.2d 369, 1961 N.Y. App. Div. LEXIS 6838 (N.Y. App. Div. 3d Dep't 1961).

239. —Lifting or carrying; advertising materials

Perforation of a gastric ulcer, which the employee had had many years prior to the accident, by the strain of lifting a billboard is an accident. Clifford v R. K. O. Corp., 263 A.D. 914, 32 N.Y.S.2d 206, 1942 N.Y. App. Div. LEXIS 7348 (N.Y. App. Div. 1942).

A salesman with high blood pressure suffered a compensable accident where, in the course of his employment, he did extensive traveling, lifted advertising bundles several times, suffered sharp pains during the day and died that night of a coronary occlusion.

Cramer v Sunshine Biscuits, Inc., 2 A.D.2d 719, 152 N.Y.S.2d 375, 1956 N.Y. App. Div. LEXIS 5017 (N.Y. App. Div. 3d Dep't 1956).

240. —Lifting or carrying; trunks, luggage, and the like

Where a deceased employee, about 68 years of age, employed as a messenger, was already suffering from a pre-existing heart condition when he slumped over dead while carrying a brief case containing documents weighing four to six pounds to a bank for delivery, the evidence was insufficient to show any accident to which death could be attributed and a compensation award was properly denied. Goldman v White & Case, 9 N.Y.2d 763, 215 N.Y.S.2d 71, 174 N.E.2d 744, 1961 N.Y. LEXIS 1411 (N.Y. 1961).

Evidence was sufficient to sustain death award for heart attack where private chauffeur, who had been under treatment for a heart condition for several years, was assisting a housekeeper in carrying an overseas case weighing between 70 and 75 pounds, a "few feet" to the trunk of an automobile, as a result of which he collapsed and died. Schuren v Wolfson, 30 N.Y.2d 90, 330 N.Y.S.2d 368, 281 N.E.2d 169, 1972 N.Y. LEXIS 1483 (N.Y. 1972).

Compensation is properly payable to a truckman who carried a heavy trunk up three flights of stairs and suffered a pneumothorax which activated a pre-existing pulmonary tuberculosis. De Simone v Railway Express Agency, Inc., 272 A.D. 987, 72 N.Y.S.2d 707, 1947 N.Y. App. Div. LEXIS 4513 (N.Y. App. Div. 1947).

241. —Long work hours

A pipe threader suffering from arteriosclerosis who worked overtime on a rush job and was stricken with a heart attack sustains an accidental injury under this section. Kusel v Eastern Bridle Iron & Steel Corp., 258 A.D. 831, 115 N.Y.S.2d 569, 15 N.Y.S.2d 569, 1939 N.Y. App. Div. LEXIS 7148 (N.Y. App. Div. 1939), aff'd, 283 N.Y. 671, 28 N.E.2d 400, 283 N.Y. (N.Y.S.) 671, 1940 N.Y. LEXIS 1111 (N.Y. 1940).

An employee suffers an accidental injury where he suffers a heart attack brought on by working seven days a week from twelve to fourteen hours per day. Furtardo v American Export Airlines, Inc., 274 A.D. 954, 83 N.Y.S.2d 745, 1948 N.Y. App. Div. LEXIS 4234 (N.Y. App. Div. 1948).

Decedent, laundry supervisor, had performed supervisory duties during maintenance work on Saturday. There was no proof that he lifted or moved any object. He left premises in early afternoon. When he arrived home in early evening, witness testified decedent said he didn't feel good, that he had picked up heavy basket and hurt himself. He died following day of heart attack. Claim dismissed. Ohriner v Jamaice Wet Wash Laundry Co., 5 A.D.2d 901, 170 N.Y.S.2d 931, 171 N.Y.S.2d 129, 1958 N.Y. App. Div. LEXIS 6712 (N.Y. App. Div. 3d Dep't 1958).

Decedent, hearing reporter for Workmen's Compensation Board, had suffered from chronic rheumatic heart disease from age 7. Because of condition, employer permitted him to cease work early. On the day of alleged accident he worked longer than usual, felt "heart palpitations" during late afternoon and was tired when he finished. He continued to work for over 1 month and died during operation the following year. Decision denying death benefits affirmed. Slave v New York State Workmen's Compensation Board, 5 A.D.2d 905, 171 N.Y.S.2d 135, 1958 N.Y. App. Div. LEXIS 6722 (N.Y. App. Div. 3d Dep't), app. denied, 4 N.Y.2d 676, 174 N.Y.S.2d 1025, 1958 N.Y. LEXIS 1438 (N.Y. 1958).

Award in heart case affirmed where there was ample medical evidence that the injury was due to the strain of continuous work without sleep. Warner v R. K. David Moving & Storage, 32 A.D.2d 982, 302 N.Y.S.2d 169, 1969 N.Y. App. Div. LEXIS 3523 (N.Y. App. Div. 3d Dep't 1969).

Substantial evidence supported the Workmen's Compensation Board's finding that activities of the claimant had been strenuous and arduous where claimant, from early March to 3 June 1968, had performed strenuous work in getting the business operational, working long hours with no day off, and that on 2 June, while carrying a basket of balls he experienced chest pains but continued at work with recurring pain, and visited a doctor the following day only after experiencing severe pain while cutting grass. Lowy v Auto Baseball, Inc., 37 A.D.2d 1014, 325 N.Y.S.2d 376, 1971 N.Y. App. Div. LEXIS 3096 (N.Y. App. Div. 3d Dep't 1971).

An employer who forced his employee to drive trucks for long hours with little sleep was liable as a self-insurer for the heart condition of the truck driver aggravated by working conditions which placed undue strain on the employee beyond the ordinary wear and tear of life. Ellis v Associated Transport, Inc., 39 A.D.2d 1002, 333 N.Y.S.2d 612, 1972 N.Y. App. Div. LEXIS 4159 (N.Y. App. Div. 3d Dep't 1972).

242. —Operation of machinery or mechanical devices

Death benefit was properly awarded for death of a metal molder in a radiator factory who manipulated ladles with hard-turning handles and then died of myocardial infarction, coronary thrombosis and arteriosclerosis. Krupinski v U. S. Radiator Corp., 305 N.Y. 732, 112 N.E.2d 848, 305 N.Y. (N.Y.S.) 732, 1953 N.Y. LEXIS 1263 (N.Y. 1953).

An award of disability and death benefits arising out of death of a garage employee was affirmed upon findings of the Board that his pre-existing rheumatic heart condition was aggravated by two to two and one-half hours' continuous work lubricating automobiles with a five-pound grease gun. Jessup v Jessup & Stevens Garage, 10 N.Y.2d 854, 221 N.Y.S.2d 736, 178 N.E.2d 437, 1961 N.Y. LEXIS 991 (N.Y. 1961).

A bakery foreman who strained himself repairing a dough mixer and three days later suffered a coronary occlusion sustains an accidental injury. Leventhal v W. B. & V. Rye Bread Corp., 278 A.D. 622, 101 N.Y.S.2d 800, 1951 N.Y. App. Div. LEXIS 4114 (N.Y. App. Div. 1951).

An employee suffering a coronary occlusion while engaged in operating the foot lever of a machine requiring 100 lbs of dead weight to depress suffered an accident within the meaning of this law where the operation of the machine was not a regular and continuous part of his work but used by him only 2 or 3 hours a day every 3rd or 4th week. Clayback v Globe Woven Belting Co., 282 A.D. 973, 125 N.Y.S.2d 493, 1953 N.Y. App. Div. LEXIS 5602 (N.Y. App. Div. 1953).

An award was proper where a claimant, operating a cement smoothing machine, suffered a pain in his chest early in the morning but continued to work and was later found to have suffered a spontaneous pneumothorax. Mascali v Edison Concrete Corp., 283 A.D. 905, 130 N.Y.S.2d 11, 1954 N.Y. App. Div. LEXIS 5700 (N.Y. App. Div. 1954).

A handyman was seen mowing employer's lawn with an old and heavy mower and shortly thereafter was found dead from a heart attack. There was evidence that the ground where the decedent was found was bumpy and rough and that with strain of pushing a mower over this ground was a causative factor of death. Award affirmed. Houghton v Robinson, 286 A.D. 904, 141 N.Y.S.2d 890, 1955 N.Y. App. Div. LEXIS 4472 (N.Y. App. Div. 1955).

Claimant, who suffered from high blood pressure, was assigned to repair a machine, which necessitated his assuming a kneeling position. He collapsed and died shortly after. While the medical testimony was conflicting, there was substantial evidence that claimant's work caused a rise in his already high blood pressure, which resulted in a brain hemorrhage. Fisher v National Biscuit Co., 3 A.D.2d 786, 160 N.Y.S.2d 314, 1957 N.Y. App. Div. LEXIS 6198 (N.Y. App. Div. 3d Dep't), reh'g denied, 3 A.D.2d 960, 163 N.Y.S.2d 936, 1957 N.Y. App. Div. LEXIS 5457 (N.Y. App. Div. 3d Dep't 1957), app. denied, 3 N.Y.2d 706 (N.Y. 1957).

Decedent, a utility lineman, had climbed transmission tower of fifty feet in height. After using tenpound bolt cutter to sever wires, he suffered heart attack. Board found that due to unusual strain and arduous work together with underlying coronary condition, decedent had suffered coronary sclerosis with occlusion causing his death. Award affirmed. Bush v Empire Utility Constr., Inc., 7 A.D.2d 681, 179 N.Y.S.2d 246, 1958 N.Y. App. Div. LEXIS 4331 (N.Y. App. Div. 3d Dep't 1958).

Where claimant had suffered a compensable back injury resulting in tearing of the annulus or cartilage in 1945, and thereafter, while in the armed services and later working for different employers, had further trouble with his back resulting in subsequent compensation claims, some of which were still pending and undetermined, a claim against a particular employer based upon his sudden feeling of a severe pain in his back and legs while operating a bulldozer, and merely sitting in the seat and driving

the machine in the usual manner, failed to show anything in the nature of an accident upon which such a claim could be based. Hogan v Weldmaster Co., 11 A.D.2d 557, 199 N.Y.S.2d 873, 1960 N.Y. App. Div. LEXIS 10191 (N.Y. App. Div. 3d Dep't 1960).

To establish relationship of a heart attack to employment of a deceased employee, it is sufficient to show that he was the caretaker of a building and suffered the attack after polishing three floors of the building with an electric polisher weighing about 90 pounds without establishing that he showed evidence of pain at the exact moment he was lifting the machine. Webb v Twelve Pine Street, Inc., 12 A.D.2d 555, 206 N.Y.S.2d 1015, 1960 N.Y. App. Div. LEXIS 7254 (N.Y. App. Div. 3d Dep't 1960).

There was sufficient evidence to sustain an award of death benefits in a heart case where the attack came on shortly after decedent reported for duty as reliefman on a manually operated "hand soaker" and worked for an hour and a half, as against the normal shift of only one-half hour on that job, lifting about 24 bottles every minute and a half from a conveyor belt and placing them on a table where a chain pulled them into the soaker. Miller v F & M Schaefer Brewing Co., 16 A.D.2d 718, 226 N.Y.S.2d 927, 1962 N.Y. App. Div. LEXIS 10328 (N.Y. App. Div. 3d Dep't 1962).

A finding was proper that the claimant while engaged in operating a 60 or 70 pound floor buffing machine experienced chest pains, that such arduous effort was more than ordinary wear and tear of life causing claimant to suffer a myocardial infarction and this constituted an accidental injury within the meaning of the law and the resulting disability was causally related to such accidental injury. Suarez v Owners Maintenance Corp., 35 A.D.2d 861, 315 N.Y.S.2d 219, 1970 N.Y. App. Div. LEXIS 3590 (N.Y. App. Div. 3d Dep't 1970).

Employee, who died from occlusive coronary artery sclerosis, did not die due to an accident arising out of and in the course of his employment on theory that the physical effort of his job requiring mopping and waxing hallways and elevators and polishing brass work was too strenuous, where decedent's work efforts did not involve excessive strain or unusual exertion, where any work activity was strenuous for decedent, and where death was caused by heart condition from which decedent had been suffering since 1955. Wallace v Rockefeller Constr. Ctr., 46 A.D.2d 956, 362 N.Y.S.2d 64, 1974 N.Y. App. Div. LEXIS 3303 (N.Y. App. Div. 3d Dep't 1974), app. denied, 36 N.Y.2d 643, 1975 N.Y. LEXIS 2486 (N.Y. 1975).

Claimant proved that his psoriasis was causally related to his employment as heavy construction worker where (1) during such work, he sustained small burn to his hand that did not heal and was diagnosed as psoriasis, which ultimately affected his feet, knees, and elbows as well as his hands, (2) his treating dermatologist reported that pressure on claimant's extremities created by use of heavy tools and by other heavy work aggravated psoriasis and that condition was causally related to employment, (3) although employer's expert noted that psoriasis was genetic, that claimant was predisposed to that condition, and that it was difficult to determine causal relationship to claimant's work, same expert also noted that burn to claimant's hand might have started process, that working conditions might have aggravated it and caused it to persist, and that claimant never had psoriasis before he sustained burn while on job, and (4) thus, claimant's use of heavy tools was required distinctive feature of his employment that acted on his predisposition for psoriasis to cause disability that did not previously exist. McDonald v Danforth, 286 A.D.2d 845, 730 N.Y.S.2d 571, 2001 N.Y. App. Div. LEXIS 8853 (N.Y. App. Div. 3d Dep't 2001).

243. —Pushing or pulling, in general

An award of compensation was properly made where decedent employed to clean sewers had customarily operated a machine with which he removed sludge in buckets having a weight of 30 lbs. but while engaged in pulling an unusual weight of about 100 lbs. he suffered injuries and died therefrom. Bealer v Amherst, 303 N.Y. 963, 106 N.E.2d 55, 303 N.Y. (N.Y.S.) 963, 1952 N.Y. LEXIS 1398 (N.Y. 1952).

There is an accidental injury where a shipping clerk suffers a coronary occlusion and myocardial infarction when attempting to move a steam boiler weighing seventeen hundred pounds in order to load other items on a truck. Goldstein v Bleiberg Plumbing Supplies, Inc., 265 A.D. 1024, 38 N.Y.S.2d 1007, 1943 N.Y. App. Div. LEXIS 6671 (N.Y. App. Div. 1943).

An employee who collapsed and died shortly after pushing a hand truck weighing between 2000 and 2500 pounds in a room with a temperature of between 90 and 95 degrees is engaged in work which requires unusual effort and unusual strain and the employee's death was a natural result of accidental injuries which he sustained. Toole v Carborundum, 272 A.D. 850, 70 N.Y.S.2d 179, 1947 N.Y. App. Div. LEXIS 3894 (N.Y. App. Div. 1947).

Heart attack sustained by a shoemaker who was engaged in pulling shoes from a wooden last was sustainable on proof that unusual strain was involved because the last had not been waxed for some time and therefore required greater than usual physical effort to remove. Rapisardi v Rialto Shoe Co., 282 A.D. 972, 125 N.Y.S.2d 617, 1953 N.Y. App. Div. LEXIS 5600 (N.Y. App. Div. 1953).

An accident was associated as the cause of the claimant's disability where he, an auto mechanic, sustained a pain in his chest while trying to pull a tire off a truck notwithstanding proof that his heart condition was of long standing and he said nothing to the doctor when first treated for a coronary occlusion. Hurt v Burns Bros., 283 A.D. 907, 129 N.Y.S.2d 878, 1954 N.Y. App. Div. LEXIS 5703 (N.Y. App. Div. 1954).

Decedent with a pre-existing heart condition suffered a compensable accident when, while pushing a one thousand pound hand truck which caught in the crack of a floor he collapsed and the next day died of acute myocardial infarction. Handaly v Alfred Blayer & Co., 286 A.D. 1050, 144 N.Y.S.2d 831, 1955 N.Y. App. Div. LEXIS 5111 (N.Y. App. Div. 1955), reh'g denied, 1 A.D.2d 792, 149 N.Y.S.2d 234, 1956 N.Y. App. Div. LEXIS 6555 (N.Y. App. Div. 3d Dep't 1956), app. denied, 1 N.Y.2d 641, 1956 N.Y. LEXIS 1330 (N.Y. 1956).

The uncorroborated testimony of a physician that decedent had told him that he had pushed a table containing a teletype machine away from his desk and felt a sharp chest pain which later developed into a fatal myocardial infarction was not sufficient to sustain an award. Aaron v Burnham & Co., 2 A.D.2d 93, 154 N.Y.S.2d 652, 1956 N.Y. App. Div. LEXIS 4693 (N.Y. App. Div. 3d Dep't 1956).

After moving a six hundred pound boiler, the decedent complained of chest pains and, two days later, while doing lighter work, died of a heart attack. Although the medical testimony was in conflict an award for death was affirmed. Rowan v O. G. Jenks Heating Co., 2 A.D.2d 738, 152 N.Y.S.2d 333, 1956 N.Y. App. Div. LEXIS 5045 (N.Y. App. Div. 3d Dep't), app. denied, 2 N.Y.2d 705, 1956 N.Y. LEXIS 1202 (N.Y. 1956).

Claimant suffered a myocardial infarction when he pulled a cart containing boxes weighing about 200 pounds, from a concrete floor to an elevated wooden floor. The cart ran on metal wheels and the testimony was that some of the wheels "stuck" as the claimant pulled it. Held: even though it was his usual work to pull the truck to the bench on the elevated wooden floor where he worked, evidence supported a finding that the strain imposed a heavier than usual physical task; that the wheels "stuck"; and that this was part of effort of getting the cart up to the level of the wooden floor and there was also sufficient medical evidence to associate the physical condition with this specific event as well as to justify a holding that the physical condition was so recent as to have been precipitated by that event. Kamiel v Orwasher Bakery, Inc., 4 A.D.2d 899, 166 N.Y.S.2d 828, 1957 N.Y. App. Div. LEXIS 4288 (N.Y. App. Div. 3d Dep't), reh'g denied, 5 A.D.2d 708, 168 N.Y.S.2d 942, 1957 N.Y. App. Div. LEXIS 3499 (N.Y. App. Div. 3d Dep't 1957).

On day of his death, decedent moved hand truck containing material weighing 300 to 350 lbs. across street and on return trip to employer's premises, while attempting to get hand truck onto sidewalk, he collapsed and died of a heart attack. Award affirmed. Fiedler v Grand Textile Corp., 5 A.D.2d 706, 168 N.Y.S.2d 625, 1957 N.Y. App. Div. LEXIS 3495 (N.Y. App. Div. 3d Dep't 1957).

Decedent had stated to his physician that he had pushed teletype machine weighing 150 pounds shortly before he suffered a heart attack. Fellow employee testified that decedent moved machine on average of once per day, that moving it was severe effort and that sudden demands for machine required fast move-

ment. That was sufficient proof of circumstances and other evidence in corroboration of hearsay statement. Award Affirmed. Aaron v Burnham & Co., 8 A.D.2d 891, 186 N.Y.S.2d 958, 1959 N.Y. App. Div. LEXIS 8304 (N.Y. App. Div. 3d Dep't), app. denied, 9 A.D.2d 601, 189 N.Y.S.2d 122, 1959 N.Y. App. Div. LEXIS 10590 (N.Y. App. Div. 3d Dep't 1959), app. denied, 7 N.Y.2d 705, 1959 N.Y. LEXIS 1815 (N.Y. 1959).

The evidence was sufficient to sustain a finding that a myocardial infarction was due to the tipping over of a heavy filing case with the top drawer falling upon claimant, a secretary, such drawer weighing 70 to 80 pounds, and striking her on the chest, causing unusual effort to heave and push the drawer and cabinet back into place. Wood v John C. Monroe, Inc., 12 A.D.2d 829, 209 N.Y.S.2d 339, 1961 N.Y. App. Div. LEXIS 13374 (N.Y. App. Div. 3d Dep't 1961).

The evidence was sufficient to show causal relationship between a heart attack causing disability six days after decedent pulled a dolly truck weighing 70 to 80 pounds up six steps and felt a pain in his chest, began to perspire, and had difficulty in breathing, which forced him to stop working. Fisher v Merrill Ann Creations, 13 A.D.2d 562, 212 N.Y.S.2d 18, 1961 N.Y. App. Div. LEXIS 12187 (N.Y. App. Div. 3d Dep't 1961).

A board finding was sustained that claimant's heart condition was aggravated by an "accident" in course of employment when, at age 51 and while employed as a waitress, with the duty of removing dirty dishes from tables and depositing them in a large plastic container beneath the counter, she experienced a "hurting sensation" in her chest in attempting to pull out the container, then full of dirty dishes, following a busy lunch period, and was later hospitalized and diagnosed as having a heart condition. Burke v Chef's Hat Restaurant, 16 A.D.2d 712, 226 N.Y.S.2d 955, 1962 N.Y. App. Div. LEXIS 10317 (N.Y. App. Div. 3d Dep't 1962).

An award of death benefits was sustained upon the finding that decedent's fatal cerebral hemorrhage was caused by exertion of pushing a heavy floor-washing machine upon an elevator, there being credible evidence to sustain such a finding. Vickers v Bryant Park Bldg., 16 A.D.2d 714, 226 N.Y.S.2d 860, 1962 N.Y. App. Div. LEXIS 10322 (N.Y. App. Div. 3d Dep't 1962).

Question of causal relationship between an incident when claimant, a salesman of lighting equipment, on one occasion when testing some equipment for a customer moved a ladder weighing 40 to 50 pounds from one room to another and pushed a desk weighing 150 pounds three or four feet was one of credibility, and the Board's conclusion that claimant's testimony was an afterthought amounted to a finding that he did not suffer an accidental injury, which could not be overturned. Karp v Lustra Corp. of America, 17 A.D.2d 1014, 233 N.Y.S.2d 845, 1962 N.Y. App. Div. LEXIS 6999 (N.Y. App. Div. 3d Dep't 1962).

Where the deceased was involved in pushing a vehicle known as a "concrete buggy" which weighed about 900 pounds up an incline when he suffered acute heart failure, such evidence obviously supported a finding of "excessive strain" and that decedent had suffered an accidental injury. Robinson v De Silva Contracting Corp., 32 A.D.2d 683, 299 N.Y.S.2d 658, 1969 N.Y. App. Div. LEXIS 4085 (N.Y. App. Div. 3d Dep't 1969).

244. —Pushing or pulling; automobile or automobile parts

One employed as a chauffeur, butler and houseman who pushed an automobile from the street into a driveway, up an incline and into a garage on his employer's premises and three to five minutes afterwards, suffering a coronary thrombosis, is entitled to an award of compensation although he had a pre-existing coronary disease. Herriott v Phillips, 254 A.D. 609, 2 N.Y.S.2d 844, 1938 N.Y. App. Div. LEXIS 6724 (N.Y. App. Div. 1938).

An award is correctly granted where claimant suffered a cardiac injury while pushing an automobile from the path of another which was driven into the garage where he worked. Shaw v Browers Garage, Inc., 268 A.D. 946, 51 N.Y.S.2d 429, 1944 N.Y. App. Div. LEXIS 4344 (N.Y. App. Div. 1944), aff'd, 295 N.Y. 709, 65 N.E.2d 339, 295 N.Y. (N.Y.S.) 709, 1946 N.Y. LEXIS 900 (N.Y. 1946).

Claimant was entitled to recover compensation for a heart attack where the evidence showed that he was required to push and pull a damaged automobile for about one hour and a half under rush conditions and to pound out dents in a badly damaged fender with a 3-pound hammer from an awkward position. Strickland v Justice Motors, Inc., 9 A.D.2d 805, 192 N.Y.S.2d 517, 1959 N.Y. App. Div. LEXIS 6148 (N.Y. App. Div. 3d Dep't 1959), app. denied, 7 N.Y.2d 710, 1960 N.Y. LEXIS 1624 (N.Y. 1960).

On the basis of medical testimony and evidence that claimant, suffering from a heart condition, underwent unusual strain in tugging and pulling on a snagged automobile bumper following which he experienced severe chest pains, causal relationship between claimant's heart attack and the incident was sufficiently established. Williams v Bumper & Auto Plating, Inc., 16 A.D.2d 997, 229 N.Y.S.2d 731, 1962 N.Y. App. Div. LEXIS 9073 (N.Y. App. Div. 3d Dep't 1962).

245. —Reaching or stretching

An employee while painting a wall and ceiling in a hotel from a ladder stretched his right arm "all the way out" to reach a corner and suffered a disabling heart attack. A finding that injury was accidental due to unusual work and exertion is proper despite the arguments that there was no evidence to support findings of accidental injuries arising out of course of employment within meaning of subd 7 of this section. Ruby v Lustig, 299 N.Y. 759, 87 N.E.2d 672, 299 N.Y. (N.Y.S.) 759, 1949 N.Y. LEXIS 1182 (N.Y. 1949).

Claimant, a field manager and supervisor in home construction business, removed metal arch and closed archway in house under construction. Although metal was light, claimant had to break plaster around arch with hammer and pull it out while reaching overhead with both hands. While so engaged he felt pain and subsequently was found to have sustained acute myocardial infarction which was related to stress of work by medical evidence. Award affirmed. Carr v Sturdy Built Homes, Inc., 6 A.D.2d 914, 176 N.Y.S.2d 19, 1958 N.Y. App. Div. LEXIS 5222 (N.Y. App. Div. 3d Dep't 1958).

Disallowance of death benefits, claimed on the basis of death from coronary occlusion due to "overexertion" in course of work as an acting county attorney, was upheld, where the alleged overexertion consisted of climbing flights of stairs and reaching for books on high shelves allegedly precipitating a series of heart attacks, but no one accident or event could be singled out as the cause of the ultimate condition resulting in death. Gallagher v County of Oswego, 14 A.D.2d 463, 216 N.Y.S.2d 134, 1961 N.Y. App. Div. LEXIS 10156 (N.Y. App. Div. 3d Dep't 1961).

With respect to a heart attack suffered by claimant, employed as a sponger and presser, allegedly as the result of attempting to remove some 15 topcoats weighing about 60 pounds from an overhead rack and straining up to untangle them when the hangers caught, there was sufficient evidence to sustain the board's determination that claimant's heart condition was not due to an accident sustained in course of employment, the evidence being in conflict as to whether claimant worked at all on the day in question and that a sponger and presser did not handle more than one garment at a time, and these weighed only slightly more than one pound apiece. Dicasoli v Harry Irwin, Inc., 14 A.D.2d 477, 217 N.Y.S.2d 250, 1961 N.Y. App. Div. LEXIS 9814 (N.Y. App. Div. 3d Dep't), app. denied, 10 N.Y.2d 708, 1961 N.Y. LEXIS 2137 (N.Y. 1961).

An award of death benefits in a heart case could be sustained on the basis of causal relationship to work done in course of employment as an apartment house superintendent in plastering a hole in the ceiling, which work required him to work standing on a step ladder with arms outstretched overhead and, after a short time, decedent complained of pains in his chest, but nevertheless returned to work to finish the job, and medical evidence that such work could have impaired his flow of blood and caused a myocardial anoxia. Cronberg v Lenmar Holding Corp., 17 A.D.2d 885, 233 N.Y.S.2d 370, 1962 N.Y. App. Div. LEXIS 7322 (N.Y. App. Div. 3d Dep't 1962).

Award by board of death benefits upheld under evidence that decedent's employment activities on the date of his death which required him to manually operate an air hose with his arms either raised or at his side for a period of some 10 or 15 minutes, while on his back, in limited space underneath a still-warm ironer, were strenuous, required the expenditure of more than normal exertion and were a contributing factor in his death.

Guidera v Abelove's Laundry, 33 A.D.2d 1070, 307 N.Y.S.2d 501, 1970 N.Y. App. Div. LEXIS 5528 (N.Y. App. Div. 3d Dep't 1970).

An award was properly upheld where the claimant performed strenuous plastering work while standing on a scaffold and reaching overhead, which was unusual physical exertion more than the ordinary wear and tear of life, and which precipitated the congestive heart failure and constituted an accidental injury arising out of and in the course of employment. Farda v McKeown Plastering Co., 35 A.D.2d 863, 315 N.Y.S.2d 261, 1970 N.Y. App. Div. LEXIS 3594 (N.Y. App. Div. 3d Dep't 1970).

246. —Repair work

An apartment house superintendent, suffering from a preexisting heart condition, sustained an industrial accident when he suffered an occlusion after he had worked all afternoon attempting to fix a clogged drain which he had previously described as the worst obstruction he had ever seen. Tukschin v Sirata, 2 A.D.2d 717, 152 N.Y.S.2d 497, 1956 N.Y. App. Div. LEXIS 5015 (N.Y. App. Div. 3d Dep't 1956).

Decedent, an oil burner serviceman and mechanic, was engaged in joining lengths of pipe which had previously been strung on basement ceiling when he suffered sudden chest pain. He continued his overhead work until found unconscious. He died from coronary insufficiency secondary to coronary sclerosis and stenosis. Record supported conclusions that work was sufficiently strenuous to require more than normal exertion. There was medical evidence that work precipitated his death. Award affirmed. Cuvelier v Fairbanks & Walvoord, 6 A.D.2d 920, 175 N.Y.S.2d 677, 1958 N.Y. App. Div. LEXIS 5232 (N.Y. App. Div. 3d Dep't 1958).

Decedent, plumber, was working in tight corner on air conditioner and in so doing he exerted unusual strain and effort. Board properly found that his death that same afternoon was due to said unusual strain superimposed on pre-existing arteriosclerosis causing coronary occlusion. Award affirmed. Molinari v Dodge Plumbing Co., 7 A.D.2d 792, 181 N.Y.S.2d 1, 1958 N.Y. App. Div. LEXIS 3715 (N.Y. App. Div. 3d Dep't 1958).

Award of death benefits in a heart case was sustained where it appeared that decedent was employed as a machinist foreman in a shop for repair of heavy machinery and died with a heart attack on the day following heavy and arduous work in reinstalling repaired parts of a ship's engine. Hochmuth v Dryden Machine Corp., 15 A.D.2d 691, 223 N.Y.S.2d 581, 1962 N.Y. App. Div. LEXIS 12006 (N.Y. App. Div. 3d Dep't 1962).

247. —Snow removal

A superintendent of an apartment house who complained of a pain in his chest while shoveling snow and died of heart disease sustains an accidental injury within this section. Kuchta v R. G. G. Corp., 269 A.D. 1007, 58 N.Y.S.2d 482, 1945 N.Y. App. Div. LEXIS 5012 (N.Y. App. Div. 1945).

The fact that a church caretaker, while shoveling snow, was engaged in his customary duties did not exclude a finding that he was subjected to unusual strain on a particular occasion where the snow was exceptionally deep and had been packed and frozen and had to be thrown in chunks over high snow piles. Kneen v Vestal Methodist Church, 2 A.D.2d 614, 151 N.Y.S.2d 838, 1956 N.Y. App. Div. LEXIS 5458 (N.Y. App. Div. 3d Dep't 1956).

Evidence that decedent, a gas station attendant, undertook on the day of his death to remove ice from in front of the station, used a snow shovel for chopping up ice and that his body was found near a drain cover from which was protruding a screw driver from which an inference could be drawn that the decedent was attempting to pry open a drain at the time of his fatal heart attack sustained a board's finding that the deceased sustained an industrial accident. Kozlowski v Rogers, 3 A.D.2d 873, 161 N.Y.S.2d 181, 1957 N.Y. App. Div. LEXIS 5892 (N.Y. App. Div. 3d Dep't 1957).

Claimant, carpenter's helper, shoveled snow for employer for 2 days. He felt unusually tired after first day and next day felt pain on left side of back under his shoulder blade. On subsequent examination, it was concluded that he had spontaneous pneumothorax with collapse of lung. There was medical opinion that condition began when he was shoveling snow. Award affirmed. Los v Kidd-Kott Constr. Co., 7 A.D.2d 804, 181 N.Y.S.2d 62, 1958 N.Y. App. Div. LEXIS 3732 (N.Y. App. Div. 3d Dep't 1958).

Relationship of a heart attack to employment was sufficiently established by evidence that claimant was a janitor among whose duties was the operation of a gasoline driven snow plow weighing about 610 pounds which was hand controlled and had to be turned around at the end of the parking lot, and, on the day he suffered the attack, had gone to work at six o'clock in the morning because of a snow storm which required the removal of eight to ten inches of wet snow. Jackson v Board of Education, 12 A.D.2d 542, 206 N.Y.S.2d 737, 1960 N.Y. App. Div. LEXIS 7238 (N.Y. App. Div. 3d Dep't 1960).

A heart specialist's testimony that claimant's physical effort in shoveling snow from a parking lot operated by him individually and as an officer and principal stockholder of a corporation, during which he felt drawing pains in his shoulders and his later efforts in moving around an old car, the steering wheel of which was hard to turn, during which he felt a pain in the chest and shoulders, was sufficient basis for a finding of relationship between a cardiac infarction and his employment. Grodsky v Front Street Parking, Inc., 13 A.D.2d 586, 212 N.Y.S.2d 212, 1961 N.Y. App. Div. LEXIS 11949 (N.Y. App. Div. 3d Dep't 1961).

There was sufficient evidence to sustain an award of death benefits with respect to death of a building superintendent, 50 years of age, following several days of heavy snow shoveling to keep the sidewalks and entrances of the building clear from snow during a succession of snowstorms. Bleich v 63rd Bldg. Corp., 15 A.D.2d 584, 221 N.Y.S.2d 806, 1961 N.Y. App. Div. LEXIS 7266 (N.Y. App. Div. 3d Dep't 1961).

Claim for workers' compensation benefits was properly denied where testimony by 2 physicians who examined claimant was sufficient to support finding that there was no nexus between his 1990 work-related back injury and his 1993 back injury incurred while shoveling snow at his residence. Baskerville v J.J. Keenan Constr. Corp., 245 A.D.2d 906, 666 N.Y.S.2d 848, 1997 N.Y. App. Div. LEXIS 13582 (N.Y. App. Div. 3d Dep't 1997).

248. —Standing, walking, running and the like

Decedent sustained no accidental injury and his death is not the result of such an injury, where decedent was a bellhop, and while standing with a bag and package in his hands waiting for an elevator, collapsed and died on the same day of coronary thrombosis and arteriosclerosis. Hyshiver v Hotel Laurelton, 246 A.D. 660, 283 N.Y.S. 285, 1935 N.Y. App. Div. LEXIS 9604 (N.Y. App. Div. 1935).

An award is proper for death of an employee who suffered a fatal coronary occlusion while in the employer's business as the result of over exertion and strain caused by running several hundred feet while carrying a suitcase in order to catch a departing boat. Aldor v Atlas Commissary Co., 266 A.D. 928, 43 N.Y.S.2d 865, 1943 N.Y. App. Div. LEXIS 5265 (N.Y. App. Div. 1943).

A carpet mill laborer who sustained a perforation of a preexisting gastric ulcer due to pushing a hand truck suffers an accidental injury. Ostrowski v Mohawk Carpet Mills, Inc., 275 A.D. 874, 88 N.Y.S.2d 865, 1949 N.Y. App. Div. LEXIS 4849 (N.Y. App. Div. 1949).

Decedent was employed as bus driver. His bus broke down and he issued transfers to passengers. Decedent thereafter collapsed while walking on nearby gas station lot apparently to find telephone. There was no proof of any physical exertion or emotional strain. Held: finding of accidental causation was without support. McDaniel v Niagara Frontier Transit Co., 7 A.D.2d 682, 179 N.Y.S.2d 254, 1958 N.Y. App. Div. LEXIS 4333 (N.Y. App. Div. 3d Dep't 1958).

249. —Driving

Aggravation of the decedent's chronic heart condition by the strain of driving a bus and further aggravation, after an acute attack, from driving the relief bus back to the garage, constituted an accident. Verno v Schenectady R. Co., 283 A.D. 1128, 131 N.Y.S.2d 862, 1954 N.Y. App. Div. LEXIS 6499 (N.Y. App. Div. 1954).

Claimant, a taxicab driver, collapsed while on duty. His condition was diagnosed as coronary occlusion and myocardial infarc-

tion. His credibility was involved as to whether his work before attack was more arduous than usual. Medical testimony negated causal relation. Feldman v National Transp., 5 A.D.2d 1034, 173 N.Y.S.2d 343, 1958 N.Y. App. Div. LEXIS 6190 (N.Y. App. Div. 3d Dep't 1958).

250. —Telephoning

There is no accident where an employee whose duties were to observe fluctuations on the electrical indicators of his employer and to telephone necessary orders in the case of break-downs, where, nearly one hour after a break-down, the deceased while telephoning orders, fell back in his chair and died within a few minutes and it appeared upon a post mortem examination that his heart was twice the normal weight and that he had suffered from heart trouble for many years. O'Connell v Adirondack Electric Power Corp., 193 A.D. 582, 185 N.Y.S. 455, 1920 N.Y. App. Div. LEXIS 5606 (N.Y. App. Div. 1920).

Evidence supported determination of Workers' Compensation Board that claimant was injured in course of her employment as collection assistant, where her work involved making phone calls and entering information into her computer, she twisted her body when she got up from her desk and her chair went sideways, and she was diagnosed as having acute sprain of her lower back that resulted in mild partial disability. Lehsten v NACM-Upstate NY, 236 A.D.2d 1, 663 N.Y.S.2d 687, 1997 N.Y. App. Div. LEXIS 10890 (N.Y. App. Div. 3d Dep't 1997), rev'd, 93 N.Y.2d 368, 690 N.Y.S.2d 506, 712 N.E.2d 673, 1999 N.Y. LEXIS 818 (N.Y. 1999).

251. —Janitorial or handyman work

A janitor with pre-existing arteriosclerosis who washed smoke damaged walls and suffered a dizzy spell followed by hemiplegia suffers an accidental injury within the meaning of the workmen's compensation law. Rivenburg v Morris' Estate, 256 A.D. 869, 9 N.Y.S.2d 102, 1939 N.Y. App. Div. LEXIS 5182 (N.Y. App. Div. 1939).

A janitor who lived on the premises and who was summoned home by telephone to attend to a flood and suffered a heart attack upon reaching the premises suffers an accidental injury. Boest v 1318 Kings Highway Corp., 268 A.D. 943, 51 N.Y.S.2d 353, 1944 N.Y. App. Div. LEXIS 4330 (N.Y. App. Div. 1944).

There was sufficient substantial evidence to support a finding of causal relationship between death by heart disease and the work done by the employee shortly before where it appeared that, for two years prior to death, he was superintendent of a 62-family apartment house with a multitude of duties and for five or six months prior to his death he had no help, although he had requested it, and therefore was arising at 5 o'clock in the morning to take care of the boiler, clean and wax floors, and frequently complained to his wife of pains in his shoulders, arms and chest. Shefick v Lefrak, 11 A.D.2d 828, 202 N.Y.S.2d 410, 1960 N.Y. App. Div. LEXIS 8495 (N.Y. App. Div. 3d Dep't 1960).

252. —Working with ladders

There is no accidental injury within the meaning of this section where the only evidence is that the employer, while moving ladders felt something in his eye which he rubbed, about four hours later, while working on a scaffold, he felt a sharp pain in his eye, and after working a few days thereafter, the employee went to a hospital and was operated upon for a detachment of the retina, and further the employee's eye was originally myopic, there was proof that the myopia was a contributing cause of the detachment, and there was no proof that the employee fell or struck himself. Dengler v Doudera Decorating Co., 264 A.D. 982, 33 N.Y.S.2d 725, 1942 N.Y. App. Div. LEXIS 5613 (N.Y. App. Div. 3d Dep't 1942).

On the basis of conflicting evidence as to casual relationship between an incident on November 12 when the employee suffered unusual exertion in attempting to keep an extension ladder from falling when it was caught in a gust of wind, his medical diagnosis as suffering coronary infarction made November 12, and ultimate death, an award of death benefits must be affirmed. De Carlo v Bergamini, 16 A.D.2d 1001, 229 N.Y.S.2d 276, 1962 N.Y. App. Div. LEXIS 9079 (N.Y. App. Div. 3d Dep't 1962).

253. —Blacksmithing

The commission is justified in making an award to the widow of an employee who, while engaged in bending heavy steel rods which required great physical effort, died suddenly through dilatation of the heart, and this although he may have had a previous cardiac lesion. Uhl v Guarantee Const. Co., 174 A.D. 571, 161 N.Y.S. 659, 1916 N.Y. App. Div. LEXIS 8286 (N.Y. App. Div. 1916).

A blacksmith who had previously suffered from heart disease, and who collapsed and died as the result of a coronary occlusion while shoeing a horse, does not suffer accidental injuries in the nature of extreme and severe exertion and accordingly the death of the decedent was not accidental. La Fountain v La Fountain, 259 A.D. 1095, 21 N.Y.S.2d 193, 1940 N.Y. App. Div. LEXIS 8126 (N.Y. App. Div.), aff'd, 284 N.Y. 729, 31 N.E.2d 199, 284 N.Y. (N.Y.S.) 729, 1940 N.Y. LEXIS 1337 (N.Y. 1940).

Claimant, a blacksmith and machinist, collapsed while working and examination showed high blood pressure and coronary insufficiency. Next month while working he suffered other symptoms attributable to cardiac difficulty. Two months later he suffered coronary occlusion and subsequently died as a result thereof. There was medical evidence which causally related coronary occlusion to 2 earlier accidents. Award affirmed. Cianca v Reed Glass Co., 6 A.D.2d 920, 176 N.Y.S.2d 33, 1958 N.Y. App. Div. LEXIS 5231 (N.Y. App. Div. 3d Dep't 1958).

A finding of disability resulting from coronary insufficiency and myocardial infarction due to the effect of strenuous work activities upon claimant's pre-existing arteriosclerotic heart disease was sustained by sufficient evidence where it appeared that claimant, aged 74, was employed as a gardener and handyman on a country estate and suffered the attack in question after hauling around various heavy objects and doing some unusually strenuous work. Sczesniak v Whitney, 12 A.D.2d 366, 211 N.Y.S.2d 581, 1961 N.Y. App. Div. LEXIS 12273 (N.Y. App. Div. 3d Dep't 1961).

254. —Carpentry

Decedent, a carpenter, died as a result of coronary occlusion. He had been doing very light work before the morning coffee break at which time he complained of pain in chest. Decedent had been suffering from pre-existing generalized arteriosclerosis. On conflicting medical testimony, a Board found that his death was not compensable. Claim properly disallowed. Wilson v Brownell Constr. Co., 7 A.D.2d 674, 179 N.Y.S.2d 369, 1958 N.Y. App. Div. LEXIS 4322 (N.Y. App. Div. 3d Dep't 1958).

A finding that disability due to myocardial infarction was due to an accident was sustained where it appeared that at the time of suffering the attack the employee, a fur nailer, was using an extra amount of exertion in attempting to stretch a small skin to required dimensions. Kushner v Landau, Newman & Rosen, 13 A.D.2d 564, 211 N.Y.S.2d 744, 1961 N.Y. App. Div. LEXIS 12192 (N.Y. App. Div. 3d Dep't 1961).

255. —Installing fences, partitioning and the like

A stock and shipping clerk, required to help in partitioning space for additional quantities of merchandise, a duty requiring more exertion than that usually required of him, suffers an accidental injury where he sustains an acute attack of coronary thrombosis with myocardial infarction while doing this work. Bottke v Globe Stationery & Toy Co., 278 A.D. 621, 101 N.Y.S.2d 850, 1951 N.Y. App. Div. LEXIS 4112 (N.Y. App. Div. 1951).

Decedent, whose employment on a public housing project involved no physical labor, was instructed to find someone to fence in an excavation. When he could find no one, he undertook the job himself. This involved digging holes and pounding fence posts with a large maul. Thereafter, he complained of tiredness. Three days later he was found dead. There was adequate medical testimony to associate the development of coronary thrombosis with the unusual physical work. Award affirmed. Savage v Binghamton Housing Authority, 3 A.D.2d 774, 160 N.Y.S.2d 209, 1957 N.Y. App. Div. LEXIS 6180 (N.Y. App. Div. 3d Dep't 1957).

256. —Other particular activities as overexertion

Where an employee had been subjected to unusual strain and exertion during his working hours in the week that preceded his disablement with a coronary occlusion and moved a large number of heavy objects after which he looked pale and weak on the day of his attack, he is properly awarded disability compensation and eventually death benefits even though the injury was not assignable to any accidental experience identified in space or time or to

any particular event which was catastrophic or extraordinary. Masse v James H. Robinson Co., 301 N.Y. 34, 92 N.E.2d 56, 301 N.Y. (N.Y.S.) 34, 1950 N.Y. LEXIS 839 (N.Y. 1950).

A bookstore saleswoman who suffered a detached retina as the result of unusual exertion in her work over a considerable period of time prior to the day of her misfortune suffers an accidental injury. Carpenter v Sibley, Lindsay & Curr Co., 302 N.Y. 304, 97 N.E.2d 915, 302 N.Y. (N.Y.S.) 304, 1951 N.Y. LEXIS 739 (N.Y. 1951).

A claimant disabled as the result of a heart attack brought on while he was engaged in the regular course of his employment as a supervising labor inspector and which was due to the pressure and strain of extraordinary and arduous work, suffers an accidental injury. Anderson v New York State Dep't of Labor, 275 A.D. 1010, 91 N.Y.S.2d 710, 1949 N.Y. App. Div. LEXIS 5478 (N.Y. App. Div. 1949).

Award made for death caused by a ventricular fibrillation affirmed upon proof that decedent had previously suffered a heart attack and that just prior to suffering a second and fatal heart attack, he had in the course of his employment engaged in unusual exertion. Bingold v Krebs, 282 A.D. 786, 122 N.Y.S.2d 580, 1953 N.Y. App. Div. LEXIS 4960 (N.Y. App. Div. 1953).

Finding that employee with pre-existing heart condition died from natural causes was sustained where proof showed that after engaging in his ordinary duties during morning, he returned from lunch, collapsed on the job and died shortly thereafter. Meigh v Sperry Gyroscope Co., 284 A.D. 1074, 135 N.Y.S.2d 834, 1954 N.Y. App. Div. LEXIS 4605 (N.Y. App. Div. 1954).

A supervisor of maintenance men with a pre-existing coronary disease suffered a compensable accident when he conducted two lecture sessions for maintenance men without the assistance he usually had and, after arriving home, collapsed from a coronary thrombosis and died nine days later. Cappozalo v New York City Housing Authority, 1 A.D.2d 709, 146 N.Y.S.2d 747, 1955 N.Y. App. Div. LEXIS 3721 (N.Y. App. Div. 4th Dep't 1955).

Evidence supported the board's conclusion that the decedent, who died of a coronary thrombosis, had been subject to an unusual strain, which constituted an accident when the decedent cleaned out his employer's water well. Rambold v Whitney, 4 A.D.2d 906, 167 N.Y.S.2d 54, 1957 N.Y. App. Div. LEXIS 4299 (N.Y. App. Div. 3d Dep't), app. denied, 4 A.D.2d 991, 167 N.Y.S.2d 1020, 1957 N.Y. App. Div. LEXIS 3863 (N.Y. App. Div. 3d Dep't 1957), app. denied, 4 N.Y.2d 673, 1958 N.Y. LEXIS 1339 (N.Y. 1958).

According to his testimony, claimant, production manager of knitting mill, had been doing unusual, strenuous work on the morning he suffered a heart attack. Kravitz v Gates Knitting Mill, Inc., 5 A.D.2d 723, 168 N.Y.S.2d 639, 1957 N.Y. App. Div. LEXIS 3523 (N.Y. App. Div. 3d Dep't 1957), app. denied, 4 N.Y.2d 675, 1958 N.Y. LEXIS 1379 (N.Y. 1958).

Claimant, a field manager, did very little actual physical work. When his employer was to sell or liquidate a plant or business, he would go to the location and hire a crew to ready the premises. Preparing for such event, he fell ill and left the location. His condition was later diagnosed as coronary occlusion. Six months before, he had gone to his doctor who had diagnosed his then condition as coronary insufficiency. Held: the pre-existing condition was the sole cause of the coronary occlusion. Decision denying award affirmed. Perle v Industrial Plants Corp., 9 A.D.2d 594, 189 N.Y.S.2d 301, 1959 N.Y. App. Div. LEXIS 7465 (N.Y. App. Div. 3d Dep't 1959).

There was substantial evidence that an accident occurred where claimant testified that when he was laying brick in his capacity as a mason he felt a sharp pain as he stooped over to pick up a brick, there being medical opinion in the record that such an occurrence could bring on a "ruptured disc." Colangelo v B. S. Colangelo v B. S. McCarey Co., 13 A.D.2d 592, 212 N.Y.S.2d 466, 1961 N.Y. App. Div. LEXIS 11956 (N.Y. App. Div. 3d Dep't), app. denied, 9 N.Y.2d 613, 1961 N.Y. LEXIS 1774 (N.Y. 1961).

Although a claim for death benefits by the widow of the deceased vice-president of a corporation jointly owned and controlled by decedent and another involves conflicting testimony as to whether deceased sustained a heart attack while removing a bumper from a car, and likewise as to whether his death on the next day was due to that attack or that "accident," or was merely the culmination of a series of prior heart attacks, determination of credibility of witnesses being within the sole province of the Board, its finding of compensable accident must be sustained. Baum v B. & B. Auto Works, 15 A.D.2d 616, 222 N.Y.S.2d 559, 1961 N.Y. App. Div. LEXIS 6837 (N.Y. App. Div. 3d Dep't 1961).

A board finding, sustained by evidence, that decedent, a bookkeeper and cashier, was merely doing his normal work and did not sustain any "unusual stress or strain" which could constitute an accidental injury bringing on a heart attack, from which he died, was sustained. Roth v Model Pawnbrokers, 16 A.D.2d 841, 227 N.Y.S.2d 543, 1962 N.Y. App. Div. LEXIS 9963 (N.Y. App. Div. 3d Dep't), app. denied, 12 N.Y.2d 642, 1962 N.Y. LEXIS 1558 (N.Y. 1962).

There was ample evidence to sustain the board's finding in a heart case that the strenuous nature of claimant's work caused the attack, where it appeared that he was working with another painter painting about 85 ceilings a day, some of which were 16 feet high, when he sustained the attack. Savage v Michigan Mut. Liability Co., 17 A.D.2d 890, 233 N.Y.S.2d 496, 1962 N.Y. App. Div. LEXIS 7329 (N.Y. App. Div. 3d Dep't 1962).

There was sufficient evidence to sustain a finding that claimant's disability from cerebral thrombosis was work-connected and brought on by stress and strain at age 47 where he was employed as sales manager by a dress manufacturer which required extensive travel with "tight" schedules to put on fashion shows for various department stores, had staged two such shows all by himself on the day before incurring disability, and suffered an emotional upset in air travel, etc. Lobman v Bernhard Altmann Corp., 19 A.D.2d 931, 244 N.Y.S.2d 425, 1963 N.Y. App. Div. LEXIS 2882 (N.Y. App. Div. 3d Dep't 1963), aff'd, 15 N.Y.2d 506, 254 N.Y.S.2d 113, 202 N.E.2d 559, 1964 N.Y. LEXIS 896 (N.Y. 1964).

257. —Effect of exertion which is employees' usual work

A laborer raking slag who suffers a heart attack while doing his usual work suffers an accidental injury where there is medical testimony that the effort of that work on that date precipitated the heart injury. Kayser v Erie County Highway Dep't, 276 A.D. 789, 92 N.Y.S.2d 612, 1949 N.Y. App. Div. LEXIS 3332 (N.Y. App. Div. 1949).

Claimant (a bricklayer's helper who had a heart attack while carrying a 100 lb. bag of plaster across a sidewalk and down three or four steps to a basement) was subjected to unusual strain even though he was doing the work to which he had long been accustomed. Gioia v A. J. Courtmel Co., 283 A.D. 40, 126 N.Y.S.2d 94, 1953 N.Y. App. Div. LEXIS 2975 (N.Y. App. Div. 1953), reh'g denied, 283 A.D. 677, 127 N.Y.S.2d 808, 1954 N.Y. App. Div. LEXIS 4878 (N.Y. App. Div. 1954).

An award for a disability occasioned by a heart attack was sustained by evidence that claimant, a spotter in a retail cleaning store, pulled a heavy basket to the place where he did his work and when he straightened up felt a pain in his chest. Fact that claimant was doing work to which he was ordinarily accustomed did not bar a finding of unusual strain on the occasion in question. Rubin v Elite Store Cleaners, Inc., 283 A.D. 906, 130 N.Y.S.2d 58, 1954 N.Y. App. Div. LEXIS 5702 (N.Y. App. Div. 1954).

A claimant could be subjected to unusual strain even though performing one of the easiet tasks of his day and performing only customary work. Thus, a structural iron worker sustained an industrial accident when he died of a coronary insufficiency while pulling a small truck. Commissioner of Taxation & Finance v M. H. Treadwell Co., 286 A.D. 906, 141 N.Y.S.2d 868, 1955 N.Y. App. Div. LEXIS 4475 (N.Y. App. Div. 1955).

The decedent during the course of his work as a fruit store clerk suffered a coronary sclerosis. Although there was no proof that the work on that day was more arduous than that to which he was accustomed, there was medical proof that the day's work caused an unusual strain on the heart and, hence, death benefits could be awarded. Kosloff v Reifer, 2 A.D.2d 916, 156 N.Y.S.2d 463, 1956 N.Y. App. Div. LEXIS 3928 (N.Y. App. Div. 3d Dep't 1956).

Death award was affirmed although attack occurred when decedent was engaged in work which was not more arduous than

his customary work. Decedents job was to unload heavy rolls of paper from a freight car and the mere fact that he was performing his customary duties did not preclude a finding that he was subjected to unusual strain. Johnston v St. Regis Paper Co., 2 A.D.2d 916, 156 N.Y.S.2d 389, 1956 N.Y. App. Div. LEXIS 3929 (N.Y. App. Div. 3d Dep't 1956), reh'g denied, 3 A.D.2d 685, 159 N.Y.S.2d 956, 1957 N.Y. App. Div. LEXIS 6640 (N.Y. App. Div. 3d Dep't 1957).

Decedent, a dock worker, accustomed to heavy work, collapsed while operating a gasoline pump. He had suffered from advanced coronary arteriosclerosis for many years and he died of arteriosclerosis. Award reversed. Lutjen v I. B. Miller Constr. Corp., 5 A.D.2d 898, 170 N.Y.S.2d 949 (N.Y. App. Div. 3d Dep't 1958).

With respect to death by heart attack of a helper on a beer delivery truck, it appearing that he died immediately from a heart attack, already having a pre-existing heart condition, during a day when he was simply performing the usual heavy work of unloading cases of beer weighing from 45 to 50 pounds each, without any special occurrence in course of this work, there was no accident triggering the attack which would sustain an award. Di Cicco v Liebmann Breweries, Inc., 11 A.D.2d 613, 201 N.Y.S.2d 123, 1960 N.Y. App. Div. LEXIS 9593 (N.Y. App. Div. 3d Dep't 1960).

Where there is medical testimony linking the heavy lifting which a deceased employee did on the day of his death from heart disease to his death, if the strain was more than the ordinary wear and tear of life it makes no difference that the lifting was part of decedent's normal work. Stefaniak v Chudy Paper Co., 12 A.D.2d 533, 206 N.Y.S.2d 704, 1960 N.Y. App. Div. LEXIS 7226 (N.Y. App. Div. 3d Dep't 1960).

It is now well settled that performance of one's customary duties does not preclude a finding that such activities themselves are sufficiently arduous to entail "greater exertion than the ordinary wear and tear of life." Pickhardt v C. H. Heist Ohio Corp., 20 A.D.2d 737, 246 N.Y.S.2d 850, 1964 N.Y. App. Div. LEXIS 4382 (N.Y. App. Div. 3d Dep't), app. denied, 14 N.Y.2d 484, 1964 N.Y. LEXIS 1739 (N.Y. 1964).

A board finding of cause of death as a heart condition, and that the heart condition was brought on by over-exertion, must evaluate causation from the viewpoint of the ordinary man and not in light of decedent's particular condition, and where the board finding is not so limited as to remove all doubt that the work in question was excessive only in light of decedent's diseased condition, the case will be remanded for proper findings. Estate of Rollo v Geneva Forge, Inc., 22 A.D.2d 726, 253 N.Y.S.2d 245, 1964 N.Y. App. Div. LEXIS 2989 (N.Y. App. Div. 3d Dep't 1964).

The fact that in part at least, the work activities were decedent's customary duties would not preclude a finding that they were sufficiently arduous to entail greater exertion than the ordinary wear and tear of life; award upheld where decedent's work on the day in question involved mowing of grass, trimming tree limbs, attempting to keep brush fires under control particularly considering that the temperature of the day was about 80 degrees. Dove v Skaneateles, 31 A.D.2d 679, 295 N.Y.S.2d 779, 1968 N.Y. App. Div. LEXIS 2629 (N.Y. App. Div. 3d Dep't 1968), app. denied, 23 N.Y.2d 646, 1969 N.Y. LEXIS 2160 (N.Y. 1969).

Performance of one's customary duties does not preclude the finding that such activities themselves are sufficiently arduous to entail greater exertion than the ordinary wear and tear of life; heart attack was compensable. Sereno v A-1 Amusement Co., 31 A.D.2d 854, 297 N.Y.S.2d 8, 1969 N.Y. App. Div. LEXIS 4648 (N.Y. App. Div. 3d Dep't 1969).

Award in heart case upheld under evidence of decedent's strenuous work prior to the day of his death and on day in question. Miner v Chrysler Corp., 33 A.D.2d 523, 304 N.Y.S.2d 52, 1969 N.Y. App. Div. LEXIS 3240 (N.Y. App. Div. 3d Dep't 1969).

When a heart injury is brought on by overexertion in the course of daily work, it is compensable even though a preexisting pathology may have been a contributing factor, and excessive strain may be found to have existed although the work performed is of the same general type as that with which employee was regularly involved. O'Donnell v Moriah, 58 A.D.2d 702, 396 N.Y.S.2d 105, 1977 N.Y. App. Div. LEXIS 12807 (N.Y. App. Div. 3d Dep't 1977).

Injury sustained by clerical worker one day after returning from medical leave following valvuloplasty procedure to treat mitral valve stenosis, when she stood up from her desk, became dizzy and fell to floor, was caused by dizziness that occurred when performance of her regular duties acted on her preexisting condition which, in turn, made her susceptible to transient ischemic attacks. Castillo v Bank of Nova Scotia, 268 A.D.2d 906, 702 N.Y.S.2d 448, 2000 N.Y. App. Div. LEXIS 852 (N.Y. App. Div. 3d Dep't 2000).

258. —Exposure to temperature extremes, wetness or the like as accidental injury

Meningitis pneumococcus contracted as the result of driving with one's head out of a window during a sleet storm is an accidental injury. Warring v Case-Kane, Inc., 258 A.D. 838, 15 N.Y.S.2d 647, 1939 N.Y. App. Div. LEXIS 7175 (N.Y. App. Div. 1939).

Medical evidence held sufficient to support determination of board that claimant's gangrene and resulting amputation of leg at mid-thigh were attributable solely to arteriosclerosis and arterial insufficiency rather than to his exposure to cold and dampness in his employment as street sweeper for city. Carbone v New Rochelle, 23 A.D.2d 595, 256 N.Y.S.2d 683, 1965 N.Y. App. Div. LEXIS 4860 (N.Y. App. Div. 3d Dep't 1965).

Workers' Compensation Board could properly find that employee suffered compensable accidental injury on basis of evidence that employee, who had preexisting arthritic condition resulting in loss of only 5 work days in preceding 2 ½ years, was subjected to seriously adverse climatic conditions which caused recurrent, totally disabling episodes of arthritis as result of accumulation of water in her workplace during one month and exposure to unseasonable cold during another; repeated trauma of exposure and onsets of severe aggravation were sufficiently time-definite to satisfy requirements of concept of accident. Lynch v Rockland County Dep't of Social Services, 124 A.D.2d 430, 507 N.Y.S.2d 529, 1986 N.Y. App. Div. LEXIS 61422 (N.Y. App. Div. 3d Dep't 1986).

259. —Cold conditions

A janitor who reactivates dormant tuberculosis by walking across an open courtyard and back to fix a steam boiler on a cold day in the course of which he became drenched with perspiration is entitled to compensation. Leich v Borchard Affiliations, 256 A.D. 1019, 10 N.Y.S.2d 496, 1939 N.Y. App. Div. LEXIS 5907 (N.Y. App. Div. 1939).

A plant patrolman who worked in extreme cold weather, traveling through heavy snow, and suffers an coronary occlusion, sustains an accidental injury under this section. Flammer v Bethlehem Steel Co., 268 A.D. 944, 51 N.Y.S.2d 258, 1944 N.Y. App. Div. LEXIS 4331 (N.Y. App. Div. 1944), aff'd, 295 N.Y. 817, 66 N.E.2d 588, 295 N.Y. (N.Y.S.) 817, 1946 N.Y. LEXIS 977 (N.Y. 1946).

Award of death benefits is properly made in favor of a widow and minor children where the deceased employee was engaged in the regular course of his employment when he suffered a coronary occlusion, which caused his death, while traveling through heavy snow and exposure to cold. Flammer v Bethlehem Steel Co., 268 A.D. 944, 51 N.Y.S.2d 258, 1944 N.Y. App. Div. LEXIS 4331 (N.Y. App. Div. 1944), aff'd, 295 N.Y. 817, 66 N.E.2d 588, 295 N.Y. (N.Y.S.) 817, 1946 N.Y. LEXIS 977 (N.Y. 1946).

An employee who in the regular course of his employment was required to search for escaped inmates and was exposed to inclement weather without adequate clothing, is entitled to compensation where he contracted a cold which lead to a severe case of influenza and which in turn reactivated dormant tuberculosis. Hills v Wassaic State School, 276 A.D. 1041, 95 N.Y.S.2d 274, 1950 N.Y. App. Div. LEXIS 5649 (N.Y. App. Div. 1950).

Claimant, a meat wrapper, was required to handle cold and, on occasions, frozen meat. After several months, she noticed her fingers and hands became numb and swollen, accompanied by pain. But the record was clear that claimant's disability was due to disease and not accidental injury. Held: award reversed. Hoare v Great Atlantic & Pacific Tea Co., 8 A.D.2d 561, 183 N.Y.S.2d 377, 1959 N.Y. App. Div. LEXIS 9646 (N.Y. App. Div. 3d Dep't 1959).

Claimant, employed by a county department of health, was assigned to a mobile X-ray unit and required to sit outside and record information. It was very cold during the period she was performing such duties and she began to suffer pains in her stomach, chills and cramps. Condition was diagnosed as colitis. Held: the board properly found that claimant did not sustain an accident. There was no attempt to pinpoint particular incident. And there was no evidence of catastrophic emergent exposure. Foley v Rensselaer County Dep't of Health, 8 A.D.2d 894, 186 N.Y.S.2d 906, 1959 N.Y. App. Div. LEXIS 8310 (N.Y. App. Div. 3d Dep't 1959).

An award of benefits in a heart case was sustained on the basis of evidence that the coronary occlusion resulting in death was caused by arduous work in cutting trees in very cold weather with a heavy power saw and additional heavy work as a farmhand. Sullivan v Triple "D" Farm, 18 A.D.2d 942, 237 N.Y.S.2d 913, 1963 N.Y. App. Div. LEXIS 4423 (N.Y. App. Div. 3d Dep't 1963).

260. —Cold conditions; drafts

Where one opens a window to relieve a basement of furnace steam, receiving a chill is an accidental injury. Hocke v Emdee Management Corp., 269 N.Y. 592, 199 N.E. 687, 269 N.Y. (N.Y.S.) 592, 1935 N.Y. LEXIS 883 (N.Y. 1935).; See also Rist v Larkin & Sangster, 171 A.D. 71, 156 N.Y.S. 875, 1916 N.Y. App. Div. LEXIS 9442 (N.Y. App. Div. 1916).

A department store saleswoman who suffers Bell's palsy, a disease which is limited to one side of the face and is acute in onset, as the result of a draft caused by an electric fan suffers an accidental injury under the workmen's compensation law. Lurye v Stern Bros. Department Store, 275 N.Y. 182, 9 N.E.2d 828, 275 N.Y. (N.Y.S.) 182, 1937 N.Y. LEXIS 1415 (N.Y. 1937).

An award of death benefits and funeral expenses should be made where a truck driver accidentally contracted pneumonia, from which death resulted, in course of his employment as a result of lying on the floor of a garage in a draft while working on a car. Robbins v Enterprise Oil Co., 278 N.Y. 611, 16 N.E.2d 123, 278 N.Y. (N.Y.S.) 611, 1938 N.Y. LEXIS 1434 (N.Y. 1938).

Claimant, a bank clerk, sustained an industrial accident resulting in myositis where, following removal of a door near her desk, she was subjected for more than three months to a cold draft on her back from an air conditioner by reason of which she changed her posture by holding her neck and shoulders in a strained and awkward position and a few days later suffered spontaneous onset of pain in the cervical area from which her neck suddenly "collapsed." Greensmith v Franklin Nat'l Bank, 21 A.D.2d 576, 251 N.Y.S.2d 875, 1964 N.Y. App. Div. LEXIS 3215 (N.Y. App. Div. 3d Dep't 1964), aff'd, 16 N.Y.2d 973, 265 N.Y.S.2d 288, 212 N.E.2d 774, 1965 N.Y. LEXIS 1047 (N.Y. 1965).

261. —Cold conditions; frostbite or freezing

Where an employee of a coal dealer while carrying coal on a very cold and stormy day had all his fingers and toes frostbitten as a result of which ulcers developed on the third and fourth fingers of both hands, and the first and second fingers of the right hand had to be amputated, he will be deemed to have sustained accidental injuries arising out of his employment within the meaning of former § 3, subd. 7. Days v S. Trimmer & Sons, Inc., 176 A.D. 124, 162 N.Y.S. 603, 1916 N.Y. App. Div. LEXIS 9048 (N.Y. App. Div. 1916).

The freezing of one's hands while engaged in a hazardous employment is an accident within the meaning of the Work. Comp. Law. Quick v Fred E. Illston Ice Co., 195 A.D. 676, 186 N.Y.S. 690, 1921 N.Y. App. Div. LEXIS 4817 (N.Y. App. Div. 1921).

Claimant had pre-existing Buerger's disease, which had interfered with healing of condition of right great toe, when his right foot became frost-bitten while at work. Subsequently he underwent a series of operations culminating in amputation of right leg at midcalf. There was no proof that frostbite aggravated or accelerated the disease. Therefore, there was no substantial evidence that frostbite accident was related to ensuing condition of right leg and further there was no substantial evidence that there was permanent and total disability due to condition of right leg. Decision finding claimant entitled to award for permanent total disability reversed. Clara v Hartsdale Coal Co., 8 A.D.2d 549, 183 N.Y.S.2d 379, 1959 N.Y. App. Div. LEXIS 9629 (N.Y. App. Div. 3d Dep't 1959).

As against contention that the evidence to support a claim for injuries due to frostbite was incredible, based on an alleged fall sustained by claimant while carrying packages to an express office, rendering him unconscious so that he lay for some time in snow, the Board was entitled to find otherwise. Ingram v Gotham Originals, 19 A.D.2d 924, 243 N.Y.S.2d 876, 1963 N.Y. App. Div. LEXIS 2976 (N.Y. App. Div. 3d Dep't 1963).

262. —Cold conditions; work in or around refrigerators

Where one works in refrigerators, a chill is not an accidental injury. Lerner v Rump Bros., 241 N.Y. 153, 149 N.E. 334, 241 N.Y. (N.Y.S.) 153, 1925 N.Y. LEXIS 532 (N.Y. 1925).; Doulin v Saratoga Springs, 261 N.Y. 558, 185 N.E. 737, 261 N.Y. (N.Y.S.) 558, 1933 N.Y. LEXIS 1372 (N.Y. 1933).; and see also D'Oliveri v Austin, Nichols & Co., 211 A.D. 295, 207 N.Y.S. 699, 1925 N.Y. App. Div. LEXIS 10617 (N.Y. App. Div. 1925).

The death of the decedent, whose employment required him to work in a refrigerator exposed to extreme cold causing him to suffer a heart attack, is caused by an accidental injury within the meaning of this section. Westbrook v Southside Sportsmen's Club, 299 N.Y. 748, 87 N.E.2d 669, 299 N.Y. (N.Y.S.) 748, 1949 N.Y. LEXIS 1176 (N.Y. 1949).

A butcher, whose work required him to enter a refrigerator from time to time, and who as a result contracted lobar pneumonia suffers a disability due to an occupational disease or an accidental injury. Waxman v Paget, 264 A.D. 967, 37 N.Y.S.2d 169, 1942 N.Y. App. Div. LEXIS 5572 (N.Y. App. Div. 1942).; See also Wolfe v Brohman, 260 A.D. 816, 22 N.Y.S.2d 403, 1940 N.Y. App. Div. LEXIS 4823 (N.Y. App. Div. 1940), aff'd, 285 N.Y. 635, 33 N.E.2d 557, 285 N.Y. (N.Y.S.) 635, 1941 N.Y. LEXIS 1655 (N.Y. 1941).

A maintenance man who, in repairing a refrigerated storage box was required to make frequent trips between the inside of the box where the temperature was 40 and the outside where it was 75 contracting a respiratory infection which developed into pulmonary tuberculosis suffers a disease resulting from an accident where such exposure was unusual in that it was the longest period of time which the employee had been required to spend in the refrigerated box. Johnson v Gristede Bros., 278 A.D. 732, 103 N.Y.S.2d 39, 1951 N.Y. App. Div. LEXIS 4510 (N.Y. App. Div. 1951).;See also Bak v N. Kotok Fish Distributor, 261 A.D. 862, 24 N.Y.S.2d 752, 1941 N.Y. App. Div. LEXIS 7805 (N.Y. App. Div. 1941).

Where confronted by conflicting medical theory as to causal relationship between claimant's exposure to refrigerated air causing Bell's palsy and a later-diagnosed condition of trigeminal neuralgia, substantial evidence of causality being adduced from claimant's neurosurgeon and also an impartial specialist warranted a finding of causality. Ruiz v Howard Johnson's, Inc., 22 A.D.2d 740, 253 N.Y.S.2d 320, 1964 N.Y. App. Div. LEXIS 2939 (N.Y. App. Div. 3d Dep't 1964).

263. —Cold conditions; work in unheated areas

Where a department store employee engaged in moving equipment to a new location in the store by use of an unheated elevator was attacked by chills after reaching home at night, and died a few days later of lobar pneumonia, the claim is properly dismissed in the absence of proof that deceased had suffered from an accidental injury or that his death was the result of an accidental injury. Westbrook v E. W. Edwards & Son, 288 N.Y. 718, 43 N.E.2d 96, 288 N.Y. (N.Y.S.) 718, 1942 N.Y. LEXIS 1553 (N.Y. 1942).

A cold contracted by a state employee who was forced to work in an unheated office during a cold and rainy day, is not an accident, and no award may be made where he subsequently suffered heart attacks, in the absence of any evidence of causal connection between the exposure to low temperature and the disability. Schwalenstocker v Department of Taxation & Finance, 293 N.Y. 861, 59 N.E.2d 448, 293 N.Y. (N.Y.S.) 861, 1944 N.Y. LEXIS 2283 (N.Y. 1944).

There is no evidence of an accidental injury within this subdivision, in a chill and respiratory infection, activating pre-existing rheumatic fever, brought on by working in an unheated office

during an unusually cold day. Horn v Pals & Solow, 299 N.Y. 575, 86 N.E.2d 103, 299 N.Y. (N.Y.S.) 575, 1949 N.Y. LEXIS 1039 (N.Y.), reh'g denied, 299 N.Y. 677, 87 N.E.2d 65, 299 N.Y. (N.Y.S.) 677, 1949 N.Y. LEXIS 1122 (N.Y. 1949).

Compensation is properly payable to an elevator operator who was confined in the elevator an hour and a half when it stalled during which time he was subjected to a lower temperature than that of the factory, resulting in the reactivating of a pre-existing tuberculosis. Cook v International Paper Co., 244 A.D. 849, 279 N.Y.S. 539, 1935 N.Y. App. Div. LEXIS 6810 (N.Y. App. Div. 1935).

264. —Hot or humid conditions

An award may be made under the law for the death of an employee as the result of sunstroke. Hernon v Holahan, 182 A.D. 126, 169 N.Y.S. 705, 1918 N.Y. App. Div. LEXIS 7844 (N.Y. App. Div. 1918).

Compensation is properly payable where the claimant was employed in the repair of a boiler in 100 degree heat and while perspiring freely cold water escaped from a broken water pipe, as the result of which he contracted first a heavy cold and later tuberculosis. Kern v Premier Coal Sa. Device Corp., 246 A.D. 661, 283 N.Y.S. 281, 1935 N.Y. App. Div. LEXIS 9608 (N.Y. App. Div. 1935).

A steam fitter who had a congenital aneurysm of the left cerebral artery suffers an industrial accident where he collapsed and died from the rupture of the left cerebral artery and a cerebral hemorrhage, after working in heat and confined space inside a boiler. Broderick v Liebmann Breweries, 277 A.D. 422, 100 N.Y.S.2d 837, 1950 N.Y. App. Div. LEXIS 3076 (N.Y. App. Div. 1950).

Death benefits award was affirmed where deceased employee, engaged in cutting brush along the roadside in his employment as a highway maintenance man on a very hot and humid day, told a fellow employee "I feel dizzy," fell to the ground and died because of acute coronary insufficiency. Gallo v Islip Highway Dep't, 1 A.D.2d 706, 147 N.Y.S.2d 190, 1955 N.Y. App. Div. LEXIS 3715 (N.Y. App. Div. 3d Dep't 1955).

The decedent, working in a hot and unventilated building at heavy work, suddenly collapsed and, before a physician could be summoned, died. No autopsy was performed and there were few objective signs to indicate the cause of death but a medical expert testified that in his opinion death had resulted from a coronary occlusion causally related to the work. This was sufficient upon which to base an award. Friss v A. D. Juilliard & Co., 2 A.D.2d 919, 156 N.Y.S.2d 627, 1956 N.Y. App. Div. LEXIS 3932 (N.Y. App. Div. 3d Dep't 1956), app. denied, 2 N.Y.2d 710, 1957 N.Y. LEXIS 1600 (N.Y. 1957).

A finding that death of an employee from coronary occlusion following a heart attack suffered after working longer hours than usual as truck driver and assisting other truckmen in loading and unloading trucks on an ususually warn and humid day, was accidental, based on aggravation of a prior heart condition, was sufficiently supported by evidence. Martinelli v Metropolis Trucking Co., 8 A.D.2d 551, 183 N.Y.S.2d 418, 1959 N.Y. App. Div. LEXIS 9631 (N.Y. App. Div. 3d Dep't 1959), aff'd, 8 N.Y.2d 806, 202 N.Y.S.2d 23, 168 N.E.2d 254, 1960 N.Y. LEXIS 1227 (N.Y. 1960).

It was permissible for the board to find that a heart attack causing death of an employee was precipitated by the environment and conditions of the work, unusual heat accentuated by surrounding steel construction, and the physical work being done, where it appeared that he was a ship fitter and suffered the heart attack while working on a day when the temperature ranged from 82 to 96 degrees and the humidity was high, notwithstanding the particular work which he was doing was not particularly arduous. Briskie v Island Dock, Inc., 11 A.D.2d 873, 203 N.Y.S.2d 368, 1960 N.Y. App. Div. LEXIS 8402 (N.Y. App. Div. 3d Dep't 1960).

Disallowance of death and predeath disability benefits to the widow of a deceased employee was affirmed, on the basis of some evidence in the record to support findings of the Board that disability and death were not causally related to decedent's work activities on the day in question, where it appeared that he was 54 years of age and operating a grader for a road construction company on a very hot day when he quit work because of burning pains in his stomach and was diagnosed as having sustained a heat stroke, which was later discovered to involve a heart condition from which he died less than a month later, there being medical testimony that the heart condition from which he died was not causally related to the incident in question, notwithstanding other expert testimony to the contrary. Hendrix v Hendrickson Bros., 15 A.D.2d 690, 223 N.Y.S.2d 835, 1962 N.Y. App. Div. LEXIS 12005 (N.Y. App. Div. 3d Dep't 1962).

265. —Hot or humid conditions; heat prostration

Heat prostration is an accidental injury arising out of and in the course of the employment, if the nature of the employment exposes a workman to the risk of such injury. Hughes v Trustees of St. Patrick's Cathedral, 245 N.Y. 201, 156 N.E. 665, 245 N.Y. (N.Y.S.) 201, 1927 N.Y. LEXIS 610 (N.Y. 1927).

A gardener who collapsed and died from heat prostration and mild myocarditis while cutting grass on an excessively hot and humid day suffers accidental injuries arising out of and in the course of his employment. Altieri v Morris, 275 A.D. 1009, 91 N.Y.S.2d 674, 1949 N.Y. App. Div. LEXIS 5476 (N.Y. App. Div. 1949), aff'd, 301 N.Y. 522, 93 N.E.2d 77, 301 N.Y. (N.Y.S.) 522, 1950 N.Y. LEXIS 876 (N.Y. 1950).

The evidence sustained a finding of accidental injuries arising out of and in course of employment where employee on an open hearth steel furnace suffered heat prostration, exhaustion and a coronary embolus while helping repair a broken down furnace. Commissioner of Taxation & Finance v Wickwire Spencer Steel Co., 279 A.D. 1124, 112 N.Y.S.2d 527, 1952 N.Y. App. Div. LEXIS 6039 (N.Y. App. Div. 1952).

266. —Wet or damp conditions

An employee who was operating a crane when one of the timbers of the crane broke and to save himself from being hurt jumped into the river and as a result contracted a heavy cold and pleurisy which developed into pulmonary tuberculosis suffers a disease resulting from an accidental injury. Rist v Larkin & Sangster, 171 A.D. 71, 156 N.Y.S. 875, 1916 N.Y. App. Div. LEXIS 9442 (N.Y. App. Div. 1916).

The death of a State game protector was caused by an accidental injury in the course of his employment where in removing a plug from a state boat to let the water out of it, he was compelled to work with his arm and shoulder under water and contracted lobar pneumonia which together with heart toxemia caused his death. Christian v State Conservation Com., 191 A.D. 635, 182 N.Y.S. 347, 1920 N.Y. App. Div. LEXIS 4774 (N.Y. App. Div. 1920).

One who suffers a chill by working in a flooded basement and frequently going out into the cold weather sustains an accidental injury. Gicking v Mutual Life Ins. Co., 256 A.D. 869, 9 N.Y.S.2d 49, 1939 N.Y. App. Div. LEXIS 5183 (N.Y. App. Div. 1939).

An employee who was required to work in wet clothing at the bottom of an excavation without the use of rubber boots, as a result of which he contracted pneumonia suffers an accidental injury. Brennan v Hockensmith Const. Co. (1939) 256 App Div 870, 9 NYS2d 62, affd (1939) 281 NY 703, 23 NE2d 538.; See also Lanphier v Air Preheater Corp., 278 N.Y. 403, 16 N.E.2d 382, 278 N.Y. (N.Y.S.) 403, 1938 N.Y. LEXIS 1314 (N.Y. 1938).

An oil burner salesman, who in order to find certain measurements required was obliged to lie on a damp cement floor for about twenty five minutes, and upon finishing such measuring felt a pain in his left side and subsequently developed pneumonia, suffers a disease caused by an accident. Little v Chapin Co., 260 A.D. 817, 22 N.Y.S.2d 397, 1940 N.Y. App. Div. LEXIS 4824 (N.Y. App. Div. 1940).

A taxi driver who, while about to enter his cab when answering a call, slipped and fell into a puddle of water, suffering a chill which resulted in lobar pneumonia, suffers an accidental injury. Karp v West 21st Street Holding Corp., 253 A.D. 851, 1 N.Y.S.2d 399, 1938 N.Y. App. Div. LEXIS 8896 (N.Y. App. Div. 1938).

267. —Wet or damp conditions; working in the rain

Diphtheria contracted by an employee who was obliged to work in a damp pit and to go out in the rain thereby becoming cold and wet is not a disease naturally and unavoidably resulting from an accidental injury. Bixby v Cotswold Comfortable Co., 195 A.D. 659, 186 N.Y.S. 762, 1921 N.Y. App. Div. LEXIS 4812 (N.Y. App. Div. 1921).

A gardener who worked in a rain storm cutting grass from 7:30 a.m. to 4 p.m. and suffered a chill and felt a pain in his right leg and developed sciatica suffers an accidental injury, where he testified that he continued working in the rain because he had to complete his work or otherwise his employer would become angry. DOTOLA v HILL, 257 A.D. 868, 257 A.D. 870, 11 N.Y.S.2d 889, 1939 N.Y. App. Div. LEXIS 8214 (N.Y. App. Div. 3d Dep't 1939).

A chill resulting from a drenching by a rainstorm while moving a building is accidental. Lasky v Frederick, 258 A.D. 756, 14 N.Y.S.2d 753, 1939 N.Y. App. Div. LEXIS 6783 (N.Y. App. Div. 1939).

Death of a truck driver could not be considered due to accident where he suffered a chill on a rainy day, a relief driver took him back to the plant in an open jeep, he contracted pneumonia, aggravating a tumor of the liver, and died. Vaughan v Bushwick Iron & Steel, 10 A.D.2d 659, 196 N.Y.S.2d 464, 1960 N.Y. App. Div. LEXIS 11707 (N.Y. App. Div. 3d Dep't 1960), aff'd, 9 N.Y.2d 727, 214 N.Y.S.2d 343, 174 N.E.2d 328, 1961 N.Y. LEXIS 1457 (N.Y. 1961).

A disease, to be considered an accidental injury, the inception thereof must be assignable to a single act or particular occasion and must be assignable to something catastrophic or extraordinary; death resulting from pleurisy with lobar pneumonia contracted by employee after making deliveries in the rain and returning home "soaking wet" was not compensable. Lahey v Duso Auto Parts, Inc., 29 A.D.2d 1035, 289 N.Y.S.2d 434, 1968 N.Y. App. Div. LEXIS 4161 (N.Y. App. Div. 3d Dep't 1968).

268. Fall or accidental injury, generally

A fall occasioned by a physical seizure with consequences that would not have occurred except for employment, constitutes an accident within the purview of the statute. Barath v Arnold Paint Co., 238 N.Y. 625, 144 N.E. 918, 238 N.Y. (N.Y.S.) 625, 1924 N.Y. LEXIS 808 (N.Y. 1924).; Mausert v Albany Builders' Supply Co., 250 N.Y. 21, 164 N.E. 729, 250 N.Y. (N.Y.S.) 21, 1928 N.Y. LEXIS 1492 (N.Y. 1928).

There must be something in the position or surroundings of the employee who suffers a fall, when the fall occurs, some risk specially assignable to the employment if the accident is to be compensable. Connelly v Samaritan Hospital, 259 N.Y. 137, 181 N.E. 76, 259 N.Y. (N.Y.S.) 137, 1932 N.Y. LEXIS 917 (N.Y. 1932).

Injuries sustained as the result of a fall which is idiopathic, rather than accidental, are not compensable. Schreckenberger v Hall Baking Co., 11 A.D.2d 598, 200 N.Y.S.2d 764, 1960 N.Y. App. Div. LEXIS 9959 (N.Y. App. Div. 3d Dep't 1960).

An ordinary straight fall with no evidence that it is due to anything connected with the employment does not constitute a compensable accident. McCall v Wayne Liquor Corp., 19 A.D.2d 758, 241 N.Y.S.2d 811, 1963 N.Y. App. Div. LEXIS 3274 (N.Y. App. Div. 3d Dep't 1963), aff'd, 15 N.Y.2d 929, 259 N.Y.S.2d 150, 207 N.E.2d 196, 1965 N.Y. LEXIS 1512 (N.Y. 1965).

Workers' Compensation Board properly found causal relationship between welder's back injury and his slip during his employment, despite medical report indicating lack of causal relationship, where conflicting medical evidence on that issue entitled board to find report incredible. Byrne v Fall Fitting, Inc., 266 A.D.2d 684, 698 N.Y.S.2d 78, 1999 N.Y. App. Div. LEXIS 11397 (N.Y. App. Div. 3d Dep't 1999).

269. —Conditions of job or workplaces as cause of fall

An employee is entitled to compensation where his duties required him to be on the stone entrance steps to his employer's building and he fell thereon and was injured; it is immaterial whether or not he received any trauma or suffered any other accident before he fell or whether the fall was caused entirely by natural causes. Lauer v Y. M. & W. H. A., 266 A.D. 42, 43 N.Y.S.2d 549, 1943 N.Y. App. Div. LEXIS 3486 (N.Y. App. Div. 1943).

Where a claimant in the regular course of her employment tripped on a coat hanger on the floor in a fur stock room and struck her head against a garment rack sustaining thereby a detachment of the upper retina of the right eye, there was evidence sufficient to sustain an award although there was a conflict in the testimony as to whether the claimant had told the store nurse that she had struck her head. Rivere v Martin's, 282 A.D. 1086, 126 N.Y.S.2d 187, 1953 N.Y. App. Div. LEXIS 5881 (N.Y. App. Div. 1953).

Placing of a drinking fountain on a platform four inches high, and raising it to this extent higher than it would otherwise have been above the concrete floor, could not, under the authorities, be considered the creation of an added risk, so as to render compensable damages sustained from what was otherwise a purely accidental fall sustained in approaching the drinking fountain. Hughes v Acme Steel & Malleable Iron Works, 11 A.D.2d 563, 200 N.Y.S.2d 185, 1960 N.Y. App. Div. LEXIS 10197 (N.Y. App. Div. 3d Dep't 1960).

Claims adjuster for insurance company was entitled to workers' compensation for back injury sustained in unwitnessed accident which occurred when adjuster attempted to climb down from roof of fire damaged house onto chair he had set on top of barrel, notwithstanding investigator's conclusion that chair could not have been placed on barrel, and therefore that accident could not have happened in way described, since investigator's testimony did not rise to level of substantial evidence sufficient to overcome heavy burden provided by presumption contained in CLS Work Comp § 21 that unwitnessed accident occurring within time and place limits of employment is presumed to have arisen out of and in course of employment. Farrell v CNA Ins. Co., 149 A.D.2d 843, 540 N.Y.S.2d 362, 1989 N.Y. App. Div. LEXIS 4873 (N.Y. App. Div. 3d Dep't 1989).

270. —Effect of non-work related condition contributing to fall

An automobile mechanic's helper who fell from a small platform while sanding the roof of an automobile, fracturing his skull, suffers an industrial accident, even though there is some testimony that he may have been subject to epileptic seizures. Thomas v Pine Auto Service, 275 A.D. 737, 87 N.Y.S.2d 233, 1949 N.Y. App. Div. LEXIS 4250 (N.Y. App. Div. 1949).

Where deceased employee suffered a non-work connected heart attack and fell to the floor where he died of the heart condition and a skull fracture there was no compensable accident unless, in falling, he struck an object on the way down. Since the proof on that point was confused, the matter was remitted for further proceedings. Goldman v Bondson Press, 1 A.D.2d 706, 146 N.Y.S.2d 917, 1955 N.Y. App. Div. LEXIS 3716 (N.Y. App. Div. 3d Dep't 1955).

While at work, a draftsman, with a congenital aneurysm of a cerebral artery, sneezed and sat down on his stool which thereupon swiveled and caused him to fall to the floor and strike his head which fall caused a rupture of the aneurysm. Held: the fall was an industrial accident and an award in favor of the claimant was proper since the employer's swivel stool entered into the causation of the action as well as the claimant's own physiological condition. Stern v Electrol, Inc., 4 A.D.2d 110, 164 N.Y.S.2d 682, 1957 N.Y. App. Div. LEXIS 5110 (N.Y. App. Div. 3d Dep't), app. denied, 3 N.Y.2d 707, 1957 N.Y. LEXIS 1396 (N.Y. 1957).

Claimant did not sustain an industrial accident where he had previously suffered a non-industrial injury to his knee and where he testified, a few months later, that going upstairs in his employer's premises he twisted the knee and that when he brought his leg up in moving on the stairs it gave way and threw him. Gray v Williams Press, Inc., 4 A.D.2d 920, 166 N.Y.S.2d 876, 1957 N.Y. App. Div. LEXIS 4323 (N.Y. App. Div. 3d Dep't 1957).

With respect to a claim for head injuries, allegedly suffered when claimant fell and bruised his head against the side of a barrel, suffering a subarachnoid hemorrhage, a finding of the board that the fall was due to an accident in course of employment, rather than to fainting due to the hemorrhage, was sustained on the basis of some support in the evidence. Hayman v Kenberry Bake Shop, Inc., 12 A.D.2d 532, 206 N.Y.S.2d 628, 1960 N.Y. App. Div. LEXIS 7225 (N.Y. App. Div. 3d Dep't 1960).

In connection with injuries sustained by a messenger for a law firm who fell while on duty and fractured his hip, there was sufficient evidence to sustain a finding that the fall was accidental, although it was unwitnessed, as against employer's contention that claimant was an epileptic and his fall was caused by an epileptic seizure, none of the symptoms of such a seizure having been evident. Tigue v Proskauer, Rose, Goetz & Meaklin, 15

A.D.2d 711, 223 N.Y.S.2d 590, 1962 N.Y. App. Div. LEXIS 12036 (N.Y. App. Div. 3d Dep't 1962).

Workers' Compensation Board properly awarded benefits to elevator operator who fell into empty elevator shaft, despite fact that he was severely intoxicated at time, where city elevator inspector testified that he inspected elevator following claimant's accident and concluded that parking device was defective, inspector issued violation requiring that elevator be shut down until condition was remedied, and both elevator inspector and elevator inspection consultant retained by claimant testified that properly functioning parking device would have prevented claimant from opening elevator door when car was not present. Villapol v American Landmark Mgmt., 271 A.D.2d 882, 706 N.Y.S.2d 773, 2000 N.Y. App. Div. LEXIS 4659 (N.Y. App. Div. 3d Dep't 2000).

271. —Aggravation of preexisting condition as result of fall

An award may be sustained where a chef died as the result of pulmonary tuberculosis which had been aggravated by a blow on the chest caused by falling on a pot of spaghetti. Kolokotroni v Oyster Bay Restaurant, 277 A.D. 822, 96 N.Y.S.2d 863, 1950 N.Y. App. Div. LEXIS 3426 (N.Y. App. Div. 1950).

Award was proper where employee suffering a pre-existing osteomyelitis slipped while engaged in putting a 15–20 pound roller into a printing press thereby causing a sprain of his back. Huth v American Book-Knickerbocker Press, Inc., 285 A.D. 1102, 139 N.Y.S.2d 362, 1955 N.Y. App. Div. LEXIS 6772 (N.Y. App. Div. 1955).

The decedent fell in the course of his employment and subsequently developed hemiparesis and complete aphasia. Thereafter, he died of a brain tumor which had metastasized from a pre-existing lung cancer. There was medical proof that the fall had either activated or aggravated the development of the tumor and a death award was affirmed. Eliades v Atlantic Mut. Ins. Co., 2 A.D.2d 618, 151 N.Y.S.2d 771, 1956 N.Y. App. Div. LEXIS 5465 (N.Y. App. Div. 3d Dep't), reh'g denied, 2 A.D.2d 823, 154 N.Y.S.2d 1018, 1956 N.Y. App. Div. LEXIS 4446 (N.Y. App. Div. 3d Dep't 1956), app. denied, 2 N.Y.2d 707, 1956 N.Y. LEXIS 1248 (N.Y. 1956).

Claimant, who suffered from a degenerative arthritic condition, fell at work and injured his back. He had never complained about his back prior to the accident, but thereafter he was unable to do heavy work. His physician testified that the injury aggravated the existing arthritic condition. Although the medical testimony was in conflict, this constituted sufficient evidence to support award. Boyea v Chapin, 3 A.D.2d 780, 160 N.Y.S.2d 50, 1957 N.Y. App. Div. LEXIS 6189 (N.Y. App. Div. 3d Dep't 1957).

The board made an award to a claimant on the basis that as a result of a fall the claimant suffered contusions of the left chest wall which aggravated a pre-existing cardiac asthma condition. But the only medical testimony relating to the pre-existing condition was that of a doctor who testified that the basis of his conclusion was that "the man claims he never had any trouble before his accident". Held: such a basis was insubstantial as proof of either pre-existence or aggravation. Way v Minrob Realty Corp., 8 A.D.2d 866, 186 N.Y.S.2d 743, 1959 N.Y. App. Div. LEXIS 8263 (N.Y. App. Div. 3d Dep't 1959).

Claimant sustained injuries as a result of a fall. It was found that a disability continued by reason of an aggravation of a pre-existing degenerative arthritis. Any relevant presumption or inference of continuance of condition until contrarily proven was overcome when 3 doctors stated that claimant had recovered from the effects of accidental injuries. Award reversed and case remitted. Galvin v Bethlehem Steel Co., 9 A.D.2d 564, 189 N.Y.S.2d 309, 1959 N.Y. App. Div. LEXIS 7415 (N.Y. App. Div. 3d Dep't 1959).

Board properly found that decedent, a carpenter, fell from a ladder and sustained injuries which aggravated a pre-existing heart condition causing immediate death. The unwitnessed fall was clearly established. And there was substantial medical evidence as to causal relation. Silverman v Roth, 9 A.D.2d 591, 189 N.Y.S.2d 311, 1959 N.Y. App. Div. LEXIS 7458 (N.Y. App. Div. 3d Dep't 1959).

There was sufficient medical testimony to sustain a disability award based upon activation and aggravation of a pre-existing rheumatoid arthritis by a fall sustained by plaintiff when a ladder "walked out" from under him while he was installing electrical equipment in an 18-foot high ceiling. McCoy v Bochow, 16 A.D.2d 722, 226 N.Y.S.2d 867, 1962 N.Y. App. Div. LEXIS 10333 (N.Y. App. Div. 3d Dep't 1962).

A board finding that tuberculosis resulting from an accidental injury sustained by decedent nine years earlier when he fell against a wheelbarrow sustaining fractures of several ribs and activating a pre-existing quiescent pulmonary tuberculosis was sufficiently sustained by evidence. Crawford v Poirier & McLane Corp., 17 A.D.2d 675, 230 N.Y.S.2d 462, 1962 N.Y. App. Div. LEXIS 8494 (N.Y. App. Div. 3d Dep't), app. denied, 12 N.Y.2d 641, 1962 N.Y. LEXIS 1531 (N.Y. 1962).

272. —Other particular circumstances; fall as accident

A painter who falls twice from a scaffold in the performance of his work, once when the scaffolding broke and once when stepping down from the scaffold suffers an accidental injury arising out of and in the course of his employment where a medical examination disclosed a fracture of the skull. Barath v Arnold Paint Co., 190 A.D. 885, 190 A.D. 886, 178 N.Y.S. 876, 1919 N.Y. App. Div. LEXIS 4132 (N.Y. App. Div. 1919), aff'd, 238 N.Y. 625, 144 N.E. 918, 238 N.Y. (N.Y.S.) 625, 1924 N.Y. LEXIS 808 (N.Y. 1924).

A fall due to loss of balance on a crowded sidewalk is an accident. Unger v New York Sportwear Co., 243 A.D. 659, 277 N.Y.S. 765, 1935 N.Y. App. Div. LEXIS 7514 (N.Y. App. Div.), aff'd, 268 N.Y. 651, 198 N.E. 540, 268 N.Y. (N.Y.S.) 651, 1935 N.Y. LEXIS 1119 (N.Y. 1935).

An employee engaged in laying tile on iron girders at an elevation 40 feet above the ground suffers an accident arising out of and in the course of his employment where after lifting one of the heavy tiles into place the employee uttered a yell and he was observed grasping in the air endeavoring to save himself from falling. Moore v Federal-American Cement & Tile Co., 258 A.D. 1011, 16 N.Y.S.2d 872, 1940 N.Y. App. Div. LEXIS 8636 (N.Y. App. Div. 1940).

Awards made to employee on psychiatric proof that stomach pains were a result of an accident where employee fell from second floor window and suffered a comminuted fracture of right pubic bone was affirmed over claim that psychiatrist who made report had declined to appear for cross-examination because of ill health. Another psychiatrist who had approved the report was available for cross-examination but employer did not request his appearance. Underwood v Whitney, 282 A.D. 783, 122 N.Y.S.2d 468, 1953 N.Y. App. Div. LEXIS 4953 (N.Y. App. Div. 1953).

Decedent, general maintenance man for owner of apartment buildings, fell down flight of stairs on employer's premises suffering injuries which resulted in his death. Tenant testified she had asked decedent to repair window and that he fell when carrying window sash to second floor. Sash was found at foot of stairs after accident. Award affirmed. Board not barred from accepting tenant's testimony because she had made prior inconsistent statements. Barbuto v B & M Niagara Corp., 5 A.D.2d 894, 171 N.Y.S.2d 137, 1958 N.Y. App. Div. LEXIS 6701 (N.Y. App. Div. 3d Dep't 1958).

Board was entitled to find that fall which resulted in claimant's injury occurred while he was cutting a steel beam in the course of usual work and not after he had been told by employer to quit because he was intoxicated. However, claimant denied drinking any alcoholic beverage and presumption was that injury did not result solely from intoxication. Award affirmed. Bramer v Laratonda, 8 A.D.2d 876, 186 N.Y.S.2d 1001, 1959 N.Y. App. Div. LEXIS 8280 (N.Y. App. Div. 3d Dep't 1959).

There was sufficient evidence to sustain an award based on disability due to a herniated vertebral disc where it appeared that claimant, a carpenter, sustained a laceration in his left thigh when a saw which he was using kicked back, causing him to fall backwards upon his left hip and back, notwithstanding the lack of any complaint by claimant of injuries sustained or pain suffered other than from the saw laceration for a considerable period of time. Stagliano v Polera & Sons Constr. Corp., 12 A.D.2d 546, 206

N.Y.S.2d 842, 1960 N.Y. App. Div. LEXIS 7244 (N.Y. App. Div. 3d Dep't 1960).

Evidence held sufficient to sustain a finding that death was caused by an accidental fall while carrying steel rods down a steep ramp, notwithstanding the medical examiner gave the cause of death as coronary sclerosis. Hallas v Carlin Crimmins Atlas, 12 A.D.2d 675, 207 N.Y.S.2d 702, 1960 N.Y. App. Div. LEXIS 6740 (N.Y. App. Div. 3d Dep't 1960), app. denied, 9 N.Y.2d 610, 1961 N.Y. LEXIS 1680 (N.Y. 1961).

The evidence would sustain a finding that a violent fall on a subway stairway by a salesman, followed by coronary occlusion and myocardial infarction from which he died, was compensable. Friedman v Fada of New Jersey, Inc., 12 A.D.2d 866, 209 N.Y.S.2d 936, 1961 N.Y. App. Div. LEXIS 13038 (N.Y. App. Div. 3d Dep't), reh'g denied, 13 A.D.2d 609, 214 N.Y.S.2d 712, 1961 N.Y. App. Div. LEXIS 11844 (N.Y. App. Div. 3d Dep't 1961), app. denied, 9 N.Y.2d 613, 1961 N.Y. LEXIS 1755 (N.Y. 1961).

On the basis of evidence that claimant suffered an industrial accident resulting in a cerebral concussion and other injuries on February 5, but returned to work February 11, notwithstanding continuance of headaches and dizziness, and, on June 7, fell to the floor while at work and thereby incurred a totally disabling right hemiplegia, the Board could find that the fall was because of a dizzy spell which related to the first accident and that the resulting disability related back to that accident. Scherf v White Plains Iron Works, 13 A.D.2d 570, 211 N.Y.S.2d 736, 1961 N.Y. App. Div. LEXIS 12204 (N.Y. App. Div. 3d Dep't 1961).

Regardless of claimant's competency to testify by reason of severe head injury sustained in a fall, his history of the accident as contained in the physician's report, buttressed by evidence of occasional presence of coke in the area of the fall, constituted substantial evidence from which the Board could determine that the fall was accidental and in course of employment due to slipping on a piece of coke while obtaining a drink of water. Hughes v Acme Steel & Malleable Iron Works, 17 A.D.2d 886, 233 N.Y.S.2d 700, 1962 N.Y. App. Div. LEXIS 7323 (N.Y. App. Div. 3d Dep't 1962), app. denied, 12 N.Y.2d 645, 1963 N.Y. LEXIS 1509 (N.Y. 1963).

273. —Other particular circumstances; fall not accident

Death of an employee who, while walking through an alleyway, in course of his employment, was seized with an epileptic fit and fell striking his head on the pavement, which caused his death, is not compensable under the Workmen's Compensation Law. Andrews v L. & S. Amusement Corp., 253 N.Y. 97, 170 N.E. 506, 253 N.Y. (N.Y.S.) 97, 1930 N.Y. LEXIS 805 (N.Y. 1930).

The evidence was insufficient to sustain findings of the board that claimant, while approaching a drinking fountain upon a platform four inches high, stumbled on a piece of coke, falling backward off the platform and striking his head upon the floor, where there was no direct evidence as to how or why he fell and the medical testimony indicated that the fall was due to an epileptic seizure rather than to accident causing the fall. Hughes v Acme Steel & Malleable Iron Works, 11 A.D.2d 563, 200 N.Y.S.2d 185, 1960 N.Y. App. Div. LEXIS 10197 (N.Y. App. Div. 3d Dep't 1960).

The evidence would not sustain a finding that the injury arose out of an accident in course of employment where it merely appeared that claimant, a bakery truck driver, was staggering and appeared to be "dazed" when he climbed into his truck, after which he apparently fell backwards off the seat and was found frothing at the mouth with a condition diagnosed as subarachnoid hemorrhage and subdural hematoma. Schreckenberger v Hall Baking Co., 11 A.D.2d 598, 200 N.Y.S.2d 764, 1960 N.Y. App. Div. LEXIS 9959 (N.Y. App. Div. 3d Dep't 1960).

Death of a 72-year-old liquor salesman could not be considered accidental where it merely appeared that he was found lying face up and dead on the sidewalk outside a tavern at about 5:00 A.M., where the sidewalk was smooth, dry and free from obstructions and there was no evidence that he was struck by anything or accidentally tripped. McCall v Wayne Liquor Corp., 19 A.D.2d 758, 241 N.Y.S.2d 811, 1963 N.Y. App. Div. LEXIS 3274 (N.Y. App. Div. 3d Dep't 1963), aff'd, 15 N.Y.2d 929, 259 N.Y.S.2d 150, 207 N.E.2d 196, 1965 N.Y. LEXIS 1512 (N.Y. 1965).

Testimony of nearby employees and 2 physicians, along with conflicting medical testimony and questions of claimant's credibility (carrier's main contention was that claimant staged accident since he was about to be terminated), provided substantial evidence to support Workers' Compensation Board's finding that claimant did not sustain causally related disability as result of his fall at place of employment. Grucza v Waste Stream Tech., 252 A.D.2d 901, 676 N.Y.S.2d 336, 1998 N.Y. App. Div. LEXIS 8712 (N.Y. App. Div. 3d Dep't 1998).

274. —Accidental fall as cause of other injuries or conditions

Causal relation was established by proof that two months before claimant sustained a subarachnoid hemorrhage and a left hemiplegia, he had fallen from an airplane jig 8 or 9 feet from the floor and struck his head. Risley v Grumman Aircraft Engineering Corp., 284 A.D. 918, 134 N.Y.S.2d 319, 1954 N.Y. App. Div. LEXIS 4053 (N.Y. App. Div. 1954).

An award for permanent partial disability for alleged back, leg and hip injuries when a sign painter fell 6 feet was reversed where there was no substantial evidence to support the Board's finding of causal connection between the accident and the pathology in claimant's left leg and hip, and other lumbosacral sprain of the lower back. Episcopo v General Outdoor Advertising Co., 4 A.D.2d 973, 167 N.Y.S.2d 609, 1957 N.Y. App. Div. LEXIS 3910 (N.Y. App. Div. 3d Dep't 1957).

One physician testified that claimant's fall, in which she struck her face, could have produced cerebral incident and hemiplegia, although he gave it as his opinion that accident did not cause condition. Only other physician testified against causal relation. Award reversed. Frisbie v Boffer Business Service, 5 A.D.2d 1038, 173 N.Y.S.2d 148, 1958 N.Y. App. Div. LEXIS 6199 (N.Y. App. Div. 3d Dep't 1958).

Board properly found causal relation between condition of renal tuberculosis of February 14, 1954 and accident sustained on February 15, 1945, in which accident claimant's foot was injured. Claimant had had tuberculosis of ankle prior to accident. Dawson v Preston Pastry Shop, 6 A.D.2d 910, 175 N.Y.S.2d 593, 1958 N.Y. App. Div. LEXIS 5216 (N.Y. App. Div. 3d Dep't 1958).

On conflicting medical testimony, Board properly found causal relation between accident in which claimant fell striking his left breast and subsequent carcinoma of breast. Avesato v Morell-Brown, Inc., 7 A.D.2d 796, 180 N.Y.S.2d 897, 1958 N.Y. App. Div. LEXIS 3721 (N.Y. App. Div. 3d Dep't 1958).

Decedent, a tailor, fell while at work and sustained an injury to his head. There was hearsay statement by decedent that he struck his head on his machine as he fell. Claim filed prior to death stated that he hit his head on the floor and an amended complaint stated that he hit his head on the machine. There was medical evidence that the location of the laceration on the skull suggested a fall against the machine or another object. Held: there was sufficient proof to support the hearsay statement. And there was sufficient evidence to establish causal relation between the injury and death 9 months later to a malignant brain tumor where such evidence showed that the injury accelerated the progress of the disease. Baumstein v Siegel & Alenikoff, Inc., 9 A.D.2d 572, 189 N.Y.S.2d 431, 1959 N.Y. App. Div. LEXIS 7428 (N.Y. App. Div. 3d Dep't), app. denied, 7 N.Y.2d 705, 1959 N.Y. LEXIS 1820 (N.Y. 1959).

Decedent fell from a ladder striking his head against a steam pipe sustaining subarachnoid hemorrhage with hemiplegia which resulted in his death. Decedent had suffered from hypertension prior to the fall. Held: the medical evidence sustained finding that the fall caused his condition. Race v Garlock Packing Co., 9 A.D.2d 576, 189 N.Y.S.2d 438, 1959 N.Y. App. Div. LEXIS 7435 (N.Y. App. Div. 3d Dep't 1959).

Causal relationship between an employee's death, immediately caused by a complication in connection with a ruptured gall bladder, and the injuries sustained when he fell from a scaffold and sustained a fractured skull and brain injury more than a year before, resulting in his admission to a mental institution where his condition continued to deteriorate, was sufficiently established by undisputed testimony that his mental condition was such, prior to death, that he could sense no pain or indicate to

physicians the location of any area of distress, wherefore his bladder condition remained undiscovered and without treatment or corrective procedure until it was too late to do anything about it. Daugherty v Midland Painting Co., 14 A.D.2d 961, 221 N.Y.S.2d 70, 1961 N.Y. App. Div. LEXIS 7907 (N.Y. App. Div. 3d Dep't 1961).

Testimony of two doctors to a causal relation between a possible protruded lumbar disc, diagnosed by one of them in 1958, following a fall suffered by claimant at her home in which she sustained a back injury, and the original injury sustained by a fall resulting in a low back injury in course of employment in 1955, was sufficient to sustain a board finding of continuing causal related disability. Sweatt v Fleahman, 14 A.D.2d 964, 220 N.Y.S.2d 968, 1961 N.Y. App. Div. LEXIS 7912 (N.Y. App. Div. 3d Dep't 1961).

275. Exposure to fumes, dusts or gasses as accident

An electrician who became ill from inhaling coal gas and died from pulmonary tuberculosis primarily caused by the gas poisoning suffers a disease which naturally and unavoidably results from an accidental injury. O'Dell v Adirondack Electric Power Co., 223 N.Y. 686, 119 N.E. 1063, 223 N.Y. (N.Y.S.) 686, 1918 N.Y. LEXIS 1397 (N.Y. 1918).

The inhalation of poisonous factory fumes is an accident under this section. Gray v Semet-Solvay Co., 231 N.Y. 518, 132 N.E. 870, 231 N.Y. (N.Y.S.) 518, 1921 N.Y. LEXIS 820 (N.Y. 1921).

Inhalation of bromide of methyl gas from a refrigerating machine is accidental. Senoff v Savage Arms Corp., 261 N.Y. 627, 185 N.E. 767, 261 N.Y. (N.Y.S.) 627, 1933 N.Y. LEXIS 1438 (N.Y. 1933).; See also Michelfelder v Van Alstyne, 245 N.Y. 569, 157 N.E. 860, 245 N.Y. (N.Y.S.) 569, 1927 N.Y. LEXIS 730 (N.Y. 1927).

An injury to a dye factory employee by sulphuric oxide fumes is not accidental. Rosenthal v National Aniline & Chemical Co., 216 A.D. 588, 215 N.Y.S. 621, 1926 N.Y. App. Div. LEXIS 9278 (N.Y. App. Div. 1926).; See also Richardson v Greenberg, 188 A.D. 248, 176 N.Y.S. 651, 1919 N.Y. App. Div. LEXIS 8099 (N.Y. App. Div. 1919).

Death from bronchitis caused by fumes from a trench containing ammonia and chloride of lime is accidental. McNiven v Highland Hospital, 231 A.D. 782, 246 N.Y.S. 744, 1930 N.Y. App. Div. LEXIS 7705 (N.Y. App. Div. 1930).

A foreman in a printing plant who suffered a coughing spell and hemorrhage as the result of exposure to metal fumes which reactivated a pre-existing tuberculosis is entitled to an award of compensation. Kogan v Schoen Printing Co., 276 A.D. 935, 94 N.Y.S.2d 257, 1950 N.Y. App. Div. LEXIS 5190 (N.Y. App. Div. 1950).

Claimant, a solderer, fell from stool, where she was working shortly after eating pork sandwich for lunch and sustained injuries. The claimant denied attributing fall to effect of sandwich and asserted she became sick from soldering fumes. There was testimony that such fumes were present at time and medical testimony related fall to inhalation of fumes. Award affirmed. Zachhuber v Republic Aviation Corp., 7 A.D.2d 685, 179 N.Y.S.2d 349, 1958 N.Y. App. Div. LEXIS 4336 (N.Y. App. Div. 3d Dep't 1958).

There was sufficient evidence to sustain a compensation award based upon a finding that claimant's gastric ulcer was causally related to his employment where it appeared that, while employed as a school custodian, he undertook removal of varnish from the gymnasium floor using a varnish remover containing a high percentage of toxic agents, and, on the third day, suddenly felt chest pains and developed gastro-intestinal bleeding. Gero v Board of Education, 14 A.D.2d 620, 218 N.Y.S.2d 145, 1961 N.Y. App. Div. LEXIS 9393 (N.Y. App. Div. 3d Dep't 1961).

The Workers' Compensation Board properly awarded benefits for a continued causally-related disability where claimant's exposure to milk dust during the course of his employment at a dairy resulted in an accidental aggravation of his pre-existing condition of cystic fibrosis. Kedjierski v Dellwood Dairy, 87 A.D.2d 924, 450 N.Y.S.2d 61, 1982 N.Y. App. Div. LEXIS 16446 (N.Y. App. Div. 3d Dep't 1982).

Board improperly determined that claimant was incapacitated as result of "accident" where claimant suffered from dormant allergy which was exacerbated by remodeling of area where he worked, which released large quantities of dust into atmosphere, causing definitive allergic reaction diagnosed as "allergic rhinitis," since claimant did not suffer from preexisting disease, irritating agents were absorbed into his system through normal channels of entry, and their absorption was incidental to natural and normal bodily processes. Vernoia v National Council on Compensation Ins., 147 A.D.2d 863, 538 N.Y.S.2d 85, 1989 N.Y. App. Div. LEXIS 1965 (N.Y. App. Div. 3d Dep't), app. denied, 74 N.Y.2d 608, 545 N.Y.S.2d 104, 543 N.E.2d 747, 1989 N.Y. LEXIS 2369 (N.Y. 1989).

Evidence supported denial of benefits by Workers' Compensation Board where claimant alleged that she acquired sensitivity to chemicals as result of exposure at her workplace, but physician testified that, although claimant appeared to be sensitive to various chemicals, no such chemicals were present in areas in which she worked. Archer v IBM Corp., 212 A.D.2d 948, 623 N.Y.S.2d 340, 1995 N.Y. App. Div. LEXIS 2102 (N.Y. App. Div. 3d Dep't 1995).

Claimant, member of employer's hazardous waste emergency response team, sustained compensable injury when he was exposed to toxic chemicals while working to contain spill from overturned gasoline truck, which caused him to suffer blood disorder known as myelodysplastic syndrome. Schulman v Lederle Lab., 232 A.D.2d 684, 648 N.Y.S.2d 55, 1996 N.Y. App. Div. LEXIS 10036 (N.Y. App. Div. 3d Dep't 1996).

Although Workers' Compensation Law does not define "dust disease," term refers to diseases of lungs classified as pneumoconiosis—for example, silicosis, chalicosis, anthracosis, and siderosis. Matott v St. Joe's Lead, 245 A.D.2d 907, 666 N.Y.S.2d 849, 1997 N.Y. App. Div. LEXIS 13622 (N.Y. App. Div. 3d Dep't 1997).

Miner's claim for workers' compensation benefits for partial disability based on occupational lung disease allegedly due to exposure to dust, fumes, and oil did not suffer from "dust disease," for which partial disability was excluded from coverage under CLS Work Comp former § 39, where medical experts who testified for both parties essentially agreed that miner suffered from chronic bronchitis, and expert for employer specifically found no evidence of pneumoconiosis. Matott v St. Joe's Lead, 245 A.D.2d 907, 666 N.Y.S.2d 849, 1997 N.Y. App. Div. LEXIS 13622 (N.Y. App. Div. 3d Dep't 1997).

Time-definite component of accidental injury rule was satisfied, and thus dietary aide was entitled to workers' compensation benefits, even though her injury was gradual, where her preexisting allergic sensitivities and pulmonary condition were aggravated from 1987 to 1991 by her employer's expectation that she regularly walk through rising chemical fumes and pour water into drains backed up with chemicals. Baxter v Bristol Myers, 251 A.D.2d 753, 672 N.Y.S.2d 970, 1998 N.Y. App. Div. LEXIS 6760 (N.Y. App. Div. 3d Dep't 1998).

Workers' Compensation Board had authority to rescind Board panel's decision finding that claimant had established claim for "sick building syndrome," and there was nothing improper in panel's decision to reverse its decision, even though claimant offered findings and testimony of several physicians, each of whom indicated that claimant's symptoms were caused or exacerbated by poor air quality at work, where none of those physicians were able to identify specific allergen(s) allegedly present in, and exclusive to, claimant's work environment which caused her symptoms, and employer's physician and toxicologist testified that claimant was allergic to house dust, molds, trees, grasses, weeds, and dust mites, all of which could not be confined exclusively to workplace. Nicholson v Mohawk Valley Cmty. College, 274 A.D.2d 677, 711 N.Y.S.2d 542, 2000 N.Y. App. Div. LEXIS 7799 (N.Y. App. Div. 3d Dep't 2000).

Although seasonal auditor's exposure to paint fumes in course of her employment was accidental injury, she did not suffer any continuing disability attributable to that accident for purposes of workers' compensation where (1) 2 medical experts who examined her on behalf of State Insurance Fund testified that her symptoms were physical manifestations of anxiety disorder rather than result of her exposure to environmental contaminants at work, (2) auditor's treating physician confirmed that auditor suffered from history of delusional and anxiety disorder with

psychotic features, including conversion of mental stress into physical complaints, and (3) several of auditor's experts acknowledged possibility that liver dysfunction, which was one of her symptoms, was caused by known side effects of antipsychotic medication administered to her during stay at psychotic hospital. Gannon v New York State Dep't of Taxation & Fin., 275 A.D.2d 869, 713 N.Y.S.2d 576, 2000 N.Y. App. Div. LEXIS 9469 (N.Y. App. Div. 3d Dep't 2000).

Evidence supported Workers' Compensation Board's conclusion that no airborne substance other than paint fumes might have caused seasonal auditor's disability where (1) there was no evidence that building in which she was working contained any air contaminants other than paint fumes, (2) although auditor claimed that many of her symptoms first appeared after pesticides were sprayed in building in 1990, her application for benefits was based only on 1992 inhalation of paint fumes, and there was no indication that she suffered from any causally related medical problem before 1992, and (3) auditor was unable to identify particular contaminant or toxin other than paint fumes to which she was exposed during course of her employment. Gannon v New York State Dep't of Taxation & Fin., 275 A.D.2d 869, 713 N.Y.S.2d 576, 2000 N.Y. App. Div. LEXIS 9469 (N.Y. App. Div. 3d Dep't 2000).

Substantial evidence supported an administrative determination that the worker's long-term exposure to hazardous substances used in the employer's gear-cutting operations caused the tumor that deprived him of speech; therefore, it was compensable as an occupational disease within the meaning of N.Y. Workers' Comp. Law § 2(15). Oliver v Chicago Pneumatic Tool Co., 289 A.D.2d 796, 735 N.Y.S.2d 214, 2001 N.Y. App. Div. LEXIS 12297 (N.Y. App. Div. 3d Dep't 2001).

276. —Carbon monoxide fumes

Inhalation of carbon monoxide is an accident under this section. Michelfelder v Van Alstyne, 245 N.Y. 569, 157 N.E. 860, 245 N.Y. (N.Y.S.) 569, 1927 N.Y. LEXIS 730 (N.Y. 1927).; Reichard v H. H. Franklin Mfg. Co., 223 A.D. 797, 228 N.Y.S. 17, 1928 N.Y. App. Div. LEXIS 7140 (N.Y. App. Div.), aff'd, 249 N.Y. 525, 164 N.E. 570, 249 N.Y. (N.Y.S.) 525, 1928 N.Y. LEXIS 861 (N.Y. 1928).

An employee may be said to have sustained accidental injury where he worked for two and a half hours on an automobile of his employer in proximity to a ramp over which cars entered and left the garage exposing him to carbon monoxide fumes, and became nauseated and sick. Demeny v Gerard, 260 A.D. 820, 22 N.Y.S.2d 446, 1940 N.Y. App. Div. LEXIS 4832 (N.Y. App. Div. 1940).; See also Cantor v Elsmere Garage, 214 A.D. 351, 212 N.Y.S. 327, 1925 N.Y. App. Div. LEXIS 10518 (N.Y. App. Div. 1925).

Where decedent, employed as a grader machine operator in road construction work, was found dead in his employer's garage in a truck in which the motor was running and the heater on with the door of the garage closed, death being due to carbon monoxide poisoning, the body being found about an hour and a half before he was expected to begin work, a finding that death arose out of and in the course of his employment was sustained on the ground that he was supplied a key to the garage and had apparently taken his grader there to service it before starting work. Grennell v Driveway Paving Co., 12 A.D.2d 676, 208 N.Y.S.2d 172, 1960 N.Y. App. Div. LEXIS 6742 (N.Y. App. Div. 3d Dep't 1960).

277. Particular diseases, infections or injuries as resulting from accidents

An award is proper where an employee suffered an accidental injury which activated and accelerated a dormant disease resulting in mental derangement and through irrational conduct contracted bronchitis followed by pneumonia which resulted in his death. Malgieri v General Electric Co., 258 N.Y. 620, 180 N.E. 358, 258 N.Y. (N.Y.S.) 620, 1932 N.Y. LEXIS 1284 (N.Y. 1932).

Truck which claimant was operating hit concrete abutment. Claimant struck his head in back, had wind knocked out of him and had nausea. Thereafter, he had headaches and dizzy spells and his condition was diagnosed as multiple sclerosis. On conflicting medical testimony as to whether traumatic injuries could aggravate or precipitate multiple sclerosis and whether or not trauma experienced here was severe enough to aggravate claimant's condition, Board properly found that multiple sclerosis was causally related to accident. Stella v Mancuso, 7 A.D.2d 673, 179 N.Y.S.2d 169, 1958 N.Y. App. Div. LEXIS 4321 (N.Y. App. Div. 3d Dep't 1958).

There was sufficient evidence to sustain an award for a knee condition, notwithstanding claimant admittedly sustained a prior injury to the knee dating back to boyhood, where he testified that while engaged in a wrecking operation and descending some stairs he twisted his leg and, on the following day, it was "all swelled up." Shisko v Associated Wreckers, Inc., 16 A.D.2d 856, 227 N.Y.S.2d 697, 1962 N.Y. App. Div. LEXIS 9908 (N.Y. App. Div. 3d Dep't 1962).

The question of whether or not a workmen's compensation claimant who sustained a compensable injury to his hand in 1957 was a malingerer in asserting subsequent disability for more than a year with several hospitalizations and staying away from work most of the time, was, on the basis of conflicting medical testimony, for the Board, and its determination could not be interfered with. Foster v Daystrom Furniture Div. Daystrom, Inc., 18 A.D.2d 745, 235 N.Y.S.2d 521, 1962 N.Y. App. Div. LEXIS 6187 (N.Y. App. Div. 3d Dep't 1962).

Damage to claimant's artificial limb, unaccompanied by other physical injury was not accidental "injury" and claimant was not entitled to workmen's compensation benefits. Hackett v Almor Corp., 46 A.D.2d 261, 362 N.Y.S.2d 209, 1974 N.Y. App. Div. LEXIS 3282 (N.Y. App. Div. 3d Dep't 1974).

Electrician who hanged himself in suicide attempt after being discharged from employment failed to demonstrate that his injury was not "solely mental" within meaning of CLS Work Comp § 2(7), and thus injury was not compensable, although he suffered physical injuries to his neck and heart; suicide attempt itself was clearly not compensable, and thus complications resulting therefrom could not be compensable either. Dockum v Syroco Inc., 260 A.D.2d 688, 687 N.Y.S.2d 759, 1999 N.Y. App. Div. LEXIS 3294 (N.Y. App. Div. 3d Dep't), app. denied, 93 N.Y.2d 811, 695 N.Y.S.2d 540, 717 N.E.2d 699, 1999 N.Y. LEXIS 1902 (N.Y. 1999).

Injuries caused by eating food containing glass in the employer's restaurant for employees is an accidental injury which arose out of and in the course of the employment within the meaning of subd. 7 of this section. Schier v James J. McCreery & Co., 13 N.Y.S.2d 546, 1939 N.Y. Misc. LEXIS 2070 (N.Y. App. Term 1939).

278. —Abdominal injury

A groom who rides a green saddle horse and suffers a ruptured intestine sustains accidental injuries within the meaning of this section. Coleman v Phipps, 255 A.D. 909, 7 N.Y.S.2d 754, 1938 N.Y. App. Div. LEXIS 5836 (N.Y. App. Div. 1938).

Appendicitis and abscesses, necessitating an operation are diseases or infections resulting from an accident, where the claimant in the regular course of his employment in opening a road with a snow plow, stepped into a track in the snow, slipped and fell and in trying to extricate himself suffered injuries in the nature of a traumatic appendix from which the injuries in question followed. Wilson v Covert, 262 A.D. 984, 30 N.Y.S.2d 34, 1941 N.Y. App. Div. LEXIS 6781 (N.Y. App. Div. 1941).

An award of death benefits was proper where a "piece goods man," handling bolts of cloth, grabbed his stomach, told a co-worker "I got hurt in my stomach", told doctor and others he was hit by a falling bolt of cloth and medical testimony conflicted as to whether death was caused by blow or carbon tetrachloride poisoning. Hunter v Goodstein Bros., 2 A.D.2d 387, 156 N.Y.S.2d 699, 1956 N.Y. App. Div. LEXIS 3888 (N.Y. App. Div. 3d Dep't 1956).

For 3 years or more, claimant's work as janitress included moving heavy cans of ashes. While lifting can, it slipped and claimant felt that everything dropped. It was found she was suffering from prolapse of uterus. Board was justified on record on finding that accident occurred. However, due to conflicting medical evidence as to causal relationship, board referred question to impartial expert who was of opinion that lifting and straining over a period of time had induced the condition. And on such testimony the board would have also been justified in finding that claimant had suffered an occupational disease. Burek v Domur Realty Corp., 7 A.D.2d 822, 181 N.Y.S.2d 45, 1958 N.Y. App. Div. LEXIS 3759 (N.Y. App. Div. 3d Dep't 1958).

279. —Animal or insect bites

An award for the death of a traveling salesman is proper where it is conceded that his death was caused by disease resulting from the sting of a mosquito, prevalent in the region in which he was traveling on a mission for his employer. Lepow v Lepow Knitting Mills, Inc., 288 N.Y. 377, 43 N.E.2d 450, 288 N.Y. (N.Y.S.) 377, 1942 N.Y. LEXIS 1000 (N.Y. 1942).

An employee is entitled to compensation for a disease resulting from an accidental injury where he was bitten by a cat and, though the physical injuries suffered therefrom were trivial, developed such a fear of being stricken with rabies that he became a psychoneurotic. Kalikoff v John Lucas & Co., 271 A.D. 942, 67 N.Y.S.2d 153, 1947 N.Y. App. Div. LEXIS 5310 (N.Y. App. Div.), aff'd, 297 N.Y. 663, 76 N.E.2d 324, 297 N.Y. (N.Y.S.) 663, 1947 N.Y. LEXIS 1136 (N.Y. 1947).

Phlebitis migrans as the result of a bite from an insect is a disease resulting from an accidental injury. Richmond v Mass & Brizt, 275 A.D. 879, 88 N.Y.S.2d 682, 1949 N.Y. App. Div. LEXIS 4862 (N.Y. App. Div. 1949).

Death from a bee sting, incurred while deceased, a plumber, was out on a job repairing some plumbing for his employer, was due to an "accident." Webster v Mason, 13 A.D.2d 355, 217 N.Y.S.2d 290, 1961 N.Y. App. Div. LEXIS 9778 (N.Y. App. Div. 3d Dep't 1961).

280. —Back injuries

A brick layer who sustained an injury to his back while stooping to pick up a brick sustains an accidental injury. Werner v Psaty & Fuhrman, Inc., 264 A.D. 801, 34 N.Y.S.2d 631, 1942 N.Y. App. Div. LEXIS 4785 (N.Y. App. Div.), aff'd, 289 N.Y. 670, 45 N.E.2d 172, 289 N.Y. (N.Y.S.) 670, 1942 N.Y. LEXIS 1240 (N.Y. 1942).

A claimant employed as a slip stitcher on neck ties who bent over and twisted to pick up some ties which had fallen on the floor, suffers injuries thereby which are accidental. Solomon v Cravat Creators, 270 A.D. 870, 60 N.Y.S.2d 321, 1946 N.Y. App. Div. LEXIS 4373 (N.Y. App. Div. 1946).

A die finisher injures his back as the result of an industrial accident, where he suffered a sprain of the lower lumbar muscles as the result of lifting an object during the course of his work. Erhardt v Ushco Mfg. Co., 272 A.D. 853, 70 N.Y.S.2d 182, 1947 N.Y. App. Div. LEXIS 3906 (N.Y. App. Div. 1947).

Evidence that a power press operator, while lifting a sheet of metal into a power press, sustained accidental injuries in the nature of a lumbosacral sprain with sudden pain and that he was subject to a series of traumas in the course of his work which either caused his present condition or aggravated an underlying condition resulting in disability was sufficient to sustain an award. Nicoletti v S. H. Pomeroy Co., 283 A.D. 1129, 131 N.Y.S.2d 699, 1954 N.Y. App. Div. LEXIS 6500 (N.Y. App. Div. 1954).

Evidence sustained award for claimant who was employed as a clerk, elevator operator and bell hop in a hotel and who became disabled as a result of a lower back condition due to a series of traumas to the spine from lifting and carrying the bags of guests. De Bella v Hotel Windsor, 284 A.D. 919, 134 N.Y.S.2d 389, 1954 N.Y. App. Div. LEXIS 4057 (N.Y. App. Div. 1954).

Claimant, while engaged in heavy lifting, sustained a back injury which aggravated a pre-existing osteoarthritic condition. Award for total disability to a certain date sustained but award for partial disability thereafter reversed and remanded on question of whether partial disability was the result of natural progress of the pre-existing condition or was due to aggravation caused by the accident. Canty v American Brake Shoe Co., 284 A.D. 1077, 135 N.Y.S.2d 800, 1954 N.Y. App. Div. LEXIS 4611 (N.Y. App. Div. 1954).

Claimant suffered a back injury while attempting to lift a felled tree. An orthopedist reported no evidence of disability but a psychiatrist testified that claimant was totally disabled by a "neurotic stress reaction" caused by the accident. The psychiatrist intimated that a lump sum settlement would help the patient as much as anything, and the larger the better. Such testimony cannot be made the basis of a finding of continued disability. Award reversed. Raymond v Bolzar Builders, Inc., 3 A.D.2d 800, 160 N.Y.S.2d 13, 1957 N.Y. App. Div. LEXIS 6084 (N.Y. App. Div. 3d Dep't 1957).

While claimant was pushing cart containing 300 lbs. of electrical equipment, he felt his back snap. Held: board properly found that he sustained accident resulting in back injuries. Unusual strain need not be shown where effort of usual work produces condition. Sorace v General Electric Co., 5 A.D.2d 711, 168 N.Y.S.2d 770, 1957 N.Y. App. Div. LEXIS 3504 (N.Y. App. Div. 3d Dep't 1957).

After an orthopedist had re-examined the claimant and reported that in his opinion claimant's partial back disability continued, the carrier showed the doctor motion pictures of claimant climbing ladders, carrying loads, etc. Doctor then wrote the carrier that claimant could do any type of work. The record did not show that the Board ever got a copy of this letter. Thereafter, the same doctor re-examined claimant and again said the disability continued. An award for the continuing partial disability was sustained. Even if the doctor's impressions from the movies (not in the record) were technically admissible, there was enough evidence to sustain the award from the later physical exam. Cutting v John W. Cowper Co., 7 A.D.2d 348, 183 N.Y.S.2d 171, 1959 N.Y. App. Div. LEXIS 9621 (N.Y. App. Div. 3d Dep't 1959).

Claimant was entitled to compensation for the aggravation of a pre-existing back condition where, while carrying a heavy tray of food to the dining room and in the process of stepping down one step, she felt a sharp pain in her back and had to have assistance in setting the tray down on a stand. Lindsay v Nowrocki, 9 A.D.2d 977, 193 N.Y.S.2d 676, 1959 N.Y. App. Div. LEXIS 5667 (N.Y. App. Div. 3d Dep't 1959).

There was sufficient evidence to sustain a finding of accidental injury to claimant, resulting in a cervical strain occurring on a specific date while claimant was using an iron in the employer's laundry, resulting in "repeated traumas" on and after that date. Wheeler v Lynn Shirt Co., 15 A.D.2d 697, 223 N.Y.S.2d 271, 1962 N.Y. App. Div. LEXIS 12016 (N.Y. App. Div. 3d Dep't), aff'd, 12 N.Y.2d 741, 234 N.Y.S.2d 220, 186 N.E.2d 417 (N.Y. 1962).

Lumbosacral strain and abdominal muscle strain were not compensable where claimant's condition gradually developed with no element of suddenness, nothing catastrophic nor any accident which could be regarded as an accident by the common man. Bruzdowski v Coleco Industries, Inc., 30 A.D.2d 886, 291 N.Y.S.2d 447, 1968 N.Y. App. Div. LEXIS 3490 (N.Y. App. Div. 3d Dep't 1968).

Sufficient medical reports in testimony by claimant as to the manner of the happening of the accident and the injuries sustained supported findings of the board that claimant did have a continuing causally related disabling condition of her back. Harris v Jewish Family Service, 34 A.D.2d 1078, 312 N.Y.S.2d 208, 1970 N.Y. App. Div. LEXIS 4259 (N.Y. App. Div. 3d Dep't 1970).

Medical evidence supported finding of workmen's compensation board that nurse, in standing over patients in a bent position and when necessary physically restraining them as they were under anesthesia, sustained an accidental injury to her back which arose out of and in course of her employment. Kort v Ingrasci, 46 A.D.2d 715, 360 N.Y.S.2d 304, 1974 N.Y. App. Div. LEXIS 3774 (N.Y. App. Div. 3d Dep't 1974).

Heavy equipment operator proved that he sustained accidental work-related back injury entitling him to workers' compensation where he testified in detail as to circumstances leading to collapse of seat of truck that he was driving, his testimony was corroborated by that of coworker who was present at time of injury, and orthopedist testified that, during course of treatment, operator related to him that he had injured his back when truck seat collapsed. Musso v Earth Movers, 240 A.D.2d 846, 659 N.Y.S.2d 105, 1997 N.Y. App. Div. LEXIS 6703 (N.Y. App. Div. 3d Dep't 1997).

Workers' compensation claimant proved that his 1987 disability was causally related to his 1985 accident, despite contrary opinion of orthopedist who first treated him, where orthopedist diagnosed claimant as having recurrent back pain and conceded that back injury could be exacerbated over time, orthopedist had refused to treat claimant further unless he received payment, and claimant was later treated by chiropractor who testified that claimant had chronic lumbosacral myalgia with sciatic neuritis, that claimant was totally disabled as result of 1985 accident, and

that his diagnosis was made with reasonable medical certainty, assuming that history related by claimant was correct. Musso v Earth Movers, 240 A.D.2d 846, 659 N.Y.S.2d 105, 1997 N.Y. App. Div. LEXIS 6703 (N.Y. App. Div. 3d Dep't 1997).

Benefits were properly denied on finding that claimant did not sustain work-related injury during her employment with day treatment program, although she testified that she injured her back while trying to restrain 200-pound male patient, where coworker testified that claimant complained of back pain before incident occurred and made no mention of injuries after incident. Lewis v New York State Dep't of Mental Retardation & Developmental Disabilities, 257 A.D.2d 813, 687 N.Y.S.2d 438, 1999 N.Y. App. Div. LEXIS 383 (N.Y. App. Div. 3d Dep't 1999).

281. —Back injuries; ruptured or herniated disc

A gasoline station attendant who bent down to place a tool on a low cabinet shelf and was taken with a severe sharp pain in the lower part of his back when he tried to straighten up, is entitled to compensation where his injury was diagnosed as possible herniation of the intervertebral disc in the lumbar vertebrae and medical evidence established that the accident was a competent producing cause of the injury. Strong v J. B. Lang Engine & Garage Co., 263 A.D. 1032, 268 A.D. 1032, 33 N.Y.S.2d 467, 1942 N.Y. App. Div. LEXIS 7962 (N.Y. App. Div. 1942).

Where a nurse experienced a severe pain in her back, later diagnosed as a lumbosacral sprain and a ruptured intervertebral disc, when she lifted a broken sterilizer, her injury was compensable although she gave no history of the accident until a much later time. Velazco v St. Luke's Hospital, 284 A.D. 910, 134 N.Y.S.2d 303, 1954 N.Y. App. Div. LEXIS 4040 (N.Y. App. Div. 1954).

Claimant, a hog cutter for meat wholesaler, was taken with pain in shoulder while splitting hogs and was unable to straighten up. He did not tell his doctor about the accident until he was admitted to hospital about 2 weeks later. A ruptured intervertebral disc was found and an operation was performed. Held: there was substantial evidence to support the finding of an accident and that the injury was caused by an accident. Forst v Bergen Meat Co., 8 A.D.2d 554, 183 N.Y.S.2d 716, 1959 N.Y. App. Div. LEXIS 9634 (N.Y. App. Div. 3d Dep't), modified, 8 A.D.2d 749, 183 N.Y.S.2d 716, 1959 N.Y. App. Div. LEXIS 8730 (N.Y. App. Div. 3d Dep't 1959).

The claimant was entitled to compensation for a ruptured disc where the evidence showed that, on a specified date, he felt a sharp pain on the left side of his back and down the leg after handling heavy bags of seed. Fegatilli v Gardner Seed Co., 9 A.D.2d 975, 193 N.Y.S.2d 526, 1959 N.Y. App. Div. LEXIS 5664 (N.Y. App. Div. 3d Dep't 1959).

Evidence held sufficient to sustain a finding that disability due to a herniated disc was attributable to an occasion when claimant, working in a shipyard, had to jump quickly, to avoid being struck by a cable which slipped, and felt a sharp pain in his back. Lewis v Rostrom Shipyard, Inc., 12 A.D.2d 831, 209 N.Y.S.2d 328, 1961 N.Y. App. Div. LEXIS 13377 (N.Y. App. Div. 3d Dep't 1961).

In a workers' compensation case, a worker, who experienced pains in her leg that eventually radiated to her back, was properly determined to have sustained a compensable injury, where she first experienced pain during the course of lifting heavy carburetors, where the repetitive work resulted in a gradual increase in pain, and where the worker's tardy notice to her employer was properly excused in that the tardiness did not aggravate the injury or hinder the employer in the preparation of its defense. Cortese v Rochester Products Div., G.M.C., 91 A.D.2d 802, 458 N.Y.S.2d 58, 1982 N.Y. App. Div. LEXIS 19697 (N.Y. App. Div. 3d Dep't 1982).

Substantial evidence supported Workers' Compensation Board's decision that claimant with lower back injury and limited education did not have total industrial disability where medical evidence proved that claimant was capable of being employed, albeit not in his former employment, and although vocational services office identified various occupations that were suitable for claimant, he did not attempt to find employment in many of those areas. Gaff v North Star Trucking, 242 A.D.2d 758, 661 N.Y.S.2d 852, 1997 N.Y. App. Div. LEXIS 8532 (N.Y. App. Div. 3d Dep't), app. denied, 91 N.Y.2d 803, 668 N.Y.S.2d 558, 691 N.E.2d 630, 1997 N.Y. LEXIS 4197 (N.Y. 1997).

Claimant sustained continuing disability causally related to altercation at work and thus was entitled to workers' compensation benefits where (1) his treating physician, based on examination of claimant and MRI results indicating cervical herniation, disc bulges, and muscle spasms, diagnosed claimant with lumbar radiculopathy, (2) physician noticed no improvement in claimant's condition during nearly 11-month period of treatment, (3) physician concluded that claimant was totally disabled as result of altercation at work and that there was possibility that injuries were permanent, and (4) claimant testified that he was unable to work and that he was receiving continued medical treatment. Escala v Cecilware Corp., 275 A.D.2d 868, 713 N.Y.S.2d 779, 2000 N.Y. App. Div. LEXIS 9481 (N.Y. App. Div. 3d Dep't 2000).

Record contained substantial evidence supporting the New York Workers' Compensation Board's factual findings that a claimant sustained a causally related disability pursuant to N.Y. Workers' Comp. Law § 2(15); the claimant presented competent medical evidence that his herniated cervical disc and torn rotator cuff were caused by his labor as a transfer operator pushing stacks of cardboard weighing 300 to 500 pounds, eight to 10 hours a day, five days a week, for 15 years. Baker v Weyerhaeuser, 19 A.D.3d 850, 796 N.Y.S.2d 740, 2005 N.Y. App. Div. LEXIS 6753 (N.Y. App. Div. 3d Dep't 2005).

282. —Blood

Evidence that claimant's heavy manual labor caused the breaking down of scars in claimant's leg bringing about a reactivation of an underlying osteomyelitis was sufficient to support an award for a permanent partial disability due to accidental injury. Jones v Curran & Co., 33 A.D.2d 525, 303 N.Y.S.2d 541, 1969 N.Y. App. Div. LEXIS 3243 (N.Y. App. Div. 3d Dep't 1969).

283. —Bone diseases or disorders

Workers' compensation board properly awarded benefits to an employee for a compensable occupational disease pursuant to N.Y. Workers' Comp. Law § 2(15); the employee proved by substantial evidence that a bone spur was caused by the employee's work as a nurse, which required extensive walking. Aldrich v St. Joseph's Hosp., 305 A.D.2d 908, 759 N.Y.S.2d 603, 2003 N.Y. App. Div. LEXIS 5827 (N.Y. App. Div. 3d Dep't 2003).

284. —Burns

A Roman Catholic priest sustained accidental injuries in the nature of third-degree burns in his bedroom. He was on twenty-four hour duty. There was no proof as to the origin of the fire. The presumptions under § 21 apply and the award was proper. Ronan v St. Patrick's Roman Catholic Church, 279 A.D. 960, 111 N.Y.S.2d 155, 1952 N.Y. App. Div. LEXIS 5425 (N.Y. App. Div. 1952).

The finding that burns suffered by decedent when his clothing caught fire from welding spark in course of employment set up infection which was transmitted to kidneys, and that diseased condition of kidneys was factor in causation of employee's death was supported by substantial medical evidence. Garner v Allegheny Ludlum Steel Corp., 6 A.D.2d 363, 176 N.Y.S.2d 734, 1958 N.Y. App. Div. LEXIS 5004 (N.Y. App. Div. 3d Dep't 1958).

285. —Cancer

A factory worker who is struck in the left breast by a steel stringer and three weeks later underwent surgery for breast cancer suffers a disease or infection accelerated by or resulting from an accident. Roth v Curtiss-Wright Corp., 269 A.D. 916, 57 N.Y.S.2d 459, 1945 N.Y. App. Div. LEXIS 4453 (N.Y. App. Div. 1945).; See also Feldheimer v National Biscuit Co., 270 A.D. 966, 61 N.Y.S.2d 849, 1946 N.Y. App. Div. LEXIS 4879 (N.Y. App. Div. 1946).

While moving lumber for his employer, claimant was accidentally struck in the right shin bone by a beam. As a result of an old injury, he had suffered from chronic osteomyelitis of the right tibia. Evidence was sufficient to find aggravation of both the pre-existing chronic osteomyelitis and the underlying carcinoma necessitating amputation of his leg. Matheson v Skisland, 283 A.D. 907, 129 N.Y.S.2d 873, 1954 N.Y. App. Div. LEXIS 5704 (N.Y. App. Div. 1954).

Left index finger of claimant, a carpenter, was amputated because of malignant melanoma. He testified that he had hit finger with hammer but had made no note of exact date. From evidence in history given doctor, board could draw inference that particular incident occurred in August, 1953. There was substantial medical evidence that traumas aggravated pre-existing dormant melanoma. Award affirmed. Bodnar v Donald E. Davis, Inc., 5 A.D.2d 894, 170 N.Y.S.2d 941, 1958 N.Y. App. Div. LEXIS 6702 (N.Y. App. Div. 3d Dep't 1958).

Claimant, a seamstress, was struck in breast with wire dress hanger during quarrel with her supervisor. Thereafter surgeon found carcinoma of right breast which he removed. Twenty-nine months later same surgeon removed recurrent tumor mass from right brachial plexus leaving claimant with residual numbness of fingers and thumb of right hand, disabling her from work as seamstress. On medical testimony, Board properly found that original injury caused acceleration and aggravation of pre-existing carcinoma, necessitating both operations. Schaffer v S. Klein on The Spuare, 6 A.D.2d 924, 175 N.Y.S.2d 830, 1958 N.Y. App. Div. LEXIS 5237 (N.Y. App. Div. 3d Dep't), app. denied, 5 N.Y.2d 707, 1958 N.Y. LEXIS 1632 (N.Y. 1958).

While lifting, claimant experienced a sharp pain and he then sustained a back injury of some kind. Medical report suggested a low back sprain. He then developed symptoms of a disc herniation. An operation disclosed a spinal cord tumor which had pre-existed the accident and which had not been aggravated by it. Compensation was properly denied after the date of operation. Mendygral v Lismore Bar & Grill, 7 A.D.2d 137, 180 N.Y.S.2d 953, 1958 N.Y. App. Div. LEXIS 3683 (N.Y. App. Div. 3d Dep't 1958), reh'g denied, 7 A.D.2d 958, 182 N.Y.S.2d 1023, 1959 N.Y. App. Div. LEXIS 9933 (N.Y. App. Div. 3d Dep't 1959), aff'd, 8 N.Y.2d 823, 202 N.Y.S.2d 325, 168 N.E.2d 392, 1960 N.Y. LEXIS 1237 (N.Y. 1960).

Decedent, employed in moving business, experienced severe pain in back when weight of refrigerator, which he was helping to move, was unexpectedly caused to go against him. Condition was diagnosed as lumbo sacral sprain. Thereafter, he was admitted to hospital several times for treatment of multiple myeloma from which he subsequently died. On conflicting medical testimony, Board properly found that accident aggravated pre-existing but quiescent multiple myeloma which disabled decedent and caused his death. Herring v Great Kills Moving & Storage, Inc., 7 A.D.2d 797, 180 N.Y.S.2d 846, 1958 N.Y. App. Div. LEXIS 3722 (N.Y. App. Div. 3d Dep't 1958), app. denied, 6 N.Y.2d 705, 1959 N.Y. LEXIS 1696 (N.Y. 1959).

Evidence sustained award of death benefits where decedent's dermatologist opined that decedent's death from metastasized carcinoma was result either of aggravation of preexisting melanoma, or of melanoma directly caused by trauma decedent suffered 20 months prior to his death when he dropped 150-pound piece of sheet iron on his great toe, which was later amputated for malignant melanoma, notwithstanding that different opinion was expressed by carrier's expert; it is not function of Appellate Division to weigh conflicting testimony of medical experts. Ham v Rumsey Sheet Metal, Inc., 125 A.D.2d 810, 510 N.Y.S.2d 28, 1986 N.Y. App. Div. LEXIS 63018 (N.Y. App. Div. 3d Dep't 1986).

Appeals court affirmed a worker's compensation board decision, based on an employer's insurer's expert internal medical testimony, that (1) found a 27-year auto body repairer's exposure to chromium and talc was not the cause of his stomach cancer as it was more linked with lung cancer, and (2) that denied his claim. Stromski v Jefferson Auto Body, 1 A.D.3d 643, 766 N.Y.S.2d 606, 2003 N.Y. App. Div. LEXIS 11578 (N.Y. App. Div. 3d Dep't 2003).

286. —Cerebral hemorrhage, apoplexy

An award for disablement by cerebral apoplexy or psychoneurosis due to fright is proper. Pickerell v Schumacher, 242 N.Y. 577, 152 N.E. 434, 242 N.Y. (N.Y.S.) 577, 1926 N.Y. LEXIS 1113 (N.Y. 1926).

Claimant, employed as a superintendent and janitor of a building owned by employer, suffered an aneurysm which produced a cerebral hemorrhage caused by strain and exertion expended in carrying ashes from the cellar to the street level. Award was properly affirmed over an argument by the employer that there was no "extra effort" and accident. Moberg v 335 Lefferts Ave. Corp., 305 N.Y. 786, 113 N.E.2d 300, 305 N.Y. (N.Y.S.) 786, 1953 N.Y. LEXIS 1295 (N.Y. 1953).

A kitchen worker who scalded his right hand attempting to secure silverware from boiling water and suffered a cerebral hemorrhage sustains a disease accelerated by or resulting from an accident. Desimono v Caruso Spaghetti Place, 271 A.D. 760, 64 N.Y.S.2d 590, 1946 N.Y. App. Div. LEXIS 2884 (N.Y. App. Div. 1946).

Decedent, while driving truck, was involved in collision. He died some time later of cerebral hemorrhage. There was medical testimony to support finding that collision precipitated hemorrhage. Award affirmed. Gray v Sforza, 5 A.D.2d 897, 170 N.Y.S.2d 949, 170 N.Y.S.2d 965, 1958 N.Y. App. Div. LEXIS 6708 (N.Y. App. Div. 3d Dep't 1958).

The survivors of an artificial insemination technician apparently struck in the chest by a cow's head while attempting to read her ear tag were properly awarded death benefits upon evidence from a pathologist of a clot of several days duration corresponding to the day of the work accident. Stone v N. Y. Artificial Breeders' Co-op., Inc., 33 A.D.2d 524, 303 N.Y.S.2d 537, 1969 N.Y. App. Div. LEXIS 3241 (N.Y. App. Div. 3d Dep't), app. denied, 25 N.Y.2d 742, 1969 N.Y. LEXIS 1929 (N.Y. 1969).

Claimant's stroke arose out of and in course of employment as truck driver, and thus he was entitled to workers' compensation benefits, where (1) he was under treatment for hypertension which was controlled by medication, (2) he began to feel weak and dizzy while loading heavy equipment onto his truck, and symptoms worsened throughout day, but he struggled to make several stops before returning to terminal, reporting himself as sick and going home, (3) on following morning, he collapsed in bathroom and was admitted to hospital where condition was diagnosed as stroke, (4) his regular physician opined that causal connection existed between heavy work and stroke, and (5) chief of hospital renal division opined that heavy lifting can increase blood pressure and lead to stroke. Film v Holmes Transp., 147 A.D.2d 831, 537 N.Y.S.2d 929, 1989 N.Y. App. Div. LEXIS 1592 (N.Y. App. Div. 3d Dep't 1989).

287. —Circulatory; vascular

Claimant sustained injuries to right foot. He had pre-existing peripheral vascular disease impairing circulation in both legs. Evidence of permanence of defect and of inability of claimant to perform usual work, coupled with physician's testimony that he could not state that claimant had recovered from effects of injury, were sufficient to sustain award for periods after certain date. Sakalian v Morgan Laundry, Inc., 7 A.D.2d 790, 180 N.Y.S.2d 795, 1958 N.Y. App. Div. LEXIS 3713 (N.Y. App. Div. 3d Dep't 1958).

288. —Dermatitis

A fur cutter who accidently cut his finger resulting in an infection for which disability he received an award, and who suffered skin disease after returning to work, suffers a disease arising from an accidental injury and is entitled to a second award for the skin disease. Hechtenthal v Eisenberg & Halberstadt, 256 N.Y. 566, 177 N.E. 143, 256 N.Y. (N.Y.S.) 566, 1931 N.Y. LEXIS 1146 (N.Y. 1931).

Contraction of dermatitis gradually from sulphuric acid of automobile batteries is not accidental under this section. Wright v Used Car Exchange, 221 A.D. 154, 223 N.Y.S. 245, 1927 N.Y. App. Div. LEXIS 6396 (N.Y. App. Div. 1927).

Where claimant was employed as an iron worker and in the course of his employment, chipping concrete, pieces of concrete flew into his eye, and he threw his head backward and the back of his head struck against a metal strut, as the result of which he sustained a total loss of vision, such total loss of vision was due to an accidental injury. Kees v Michael Flynn Mfg. Co., 260 A.D. 967, 23 N.Y.S.2d 221, 1940 N.Y. App. Div. LEXIS 5634 (N.Y. App. Div. 1940).

A salesman who was struck in the region of the nose by a falling can of peaches and became blind in the right eye several months later suffers a disease resulting from accident. De Stefano v Colgate-Palmolive-Peet Co., 265 A.D. 896, 37 N.Y.S.2d 991, 1942 N.Y. App. Div. LEXIS 6375 (N.Y. App. Div. 1942).

Though a stereotyper's work with his employer ended with his retirement at age 65, he was nonetheless entitled to an award for

partial disability for occupational contact dermatitis where there was evidence of his intention and desire to continue his usual occupation insofar as his condition would permit. Cronin v Union Bag & Paper Corp., 284 A.D. 1079, 135 N.Y.S.2d 877, 1954 N.Y. App. Div. LEXIS 4616 (N.Y. App. Div. 1954).

Claimant was required to cease work because of contact dermatitis of hands arising out of work as baker. Awards for occupational disease were made and case was closed. Thereafter, case was reopened on report of dermatologist that subsequent flare-up of claimant's condition was attributable in part to previous contact dermatitis. Further award of temporary partial disability affirmed. Tarquinio v Duvernoy Bakeries, Inc., 6 A.D.2d 914, 176 N.Y.S.2d 13, 1958 N.Y. App. Div. LEXIS 5221 (N.Y. App. Div. 3d Dep't 1958).

289. —Eye disorders

Claimant was working with acetylene torch and sparks entered his eye causing slight burn and abrasions. Subsequently he was referred to specialist and eye was removed. On testimony of claimant and 2 physicians, board was warranted in finding accident and causal relation. Suschinski v Allegheny Ludlum Steel Corp., 5 A.D.2d 903, 171 N.Y.S.2d 173, 1958 N.Y. App. Div. LEXIS 6714 (N.Y. App. Div. 3d Dep't), app. denied, 4 N.Y.2d 677, 1958 N.Y. LEXIS 1448 (N.Y. 1958).

Claimant, a demonstrator of cosmetics, was filing false fingernails which created dust. Inhaling of dust caused her to sneeze violently after which she felt pain in left eye. Subsequent examination disclosed detached retina. She admitted she did not tell of sneezing episode until questioned by doctors later. Award affirmed. Everett v Remington Associates, Inc., 5 A.D.2d 1036, 173 N.Y.S.2d 358, 1958 N.Y. App. Div. LEXIS 6195 (N.Y. App. Div. 3d Dep't 1958).

Claimant, cashier at pari-mutuel race track, testified that "something blew in my eye" as he stopped to pick up a worksheet which had blown from a table. On record, it could not be held as a matter of law that there was no substantial evidence of foreign substance blowing in claimant's eye. Low v Greater New York Asso., 8 A.D.2d 862, 186 N.Y.S.2d 972, 1959 N.Y. App. Div. LEXIS 8257 (N.Y. App. Div. 3d Dep't 1959).

290. —Gangrene or amputation of limbs

An employee suffers an accidental injury where he steps on an upholstery tack which penetrated into the point of his great toe, causing chills, fever and gangrene of the toe necessitating the amputation of that member, and which caused an infection to spread to the leg which ultimately resulted in the amputation of that leg. Block v Oldsmobile North Shore Motor Sales Corp., 277 A.D. 818, 97 N.Y.S.2d 137, 1950 N.Y. App. Div. LEXIS 3411 (N.Y. App. Div. 1950), aff'd, 302 N.Y. 680, 98 N.E.2d 481, 302 N.Y. (N.Y.S.) 680, 1951 N.Y. LEXIS 846 (N.Y. 1951).

The claimant, suffering from diabetes, sustained a blister on his foot while tarring a roof. The blister apparently recovered but thereafter a lesion broke out and gangrene developed necessitating the amputation of claimant's leg. There was medical proof of causal relationship. Award for permanent loss of use of leg affirmed. Sliwinski v Sacred Heart R. C. Church, 1 A.D.2d 856, 148 N.Y.S.2d 889, 1956 N.Y. App. Div. LEXIS 6291 (N.Y. App. Div. 3d Dep't 1956).

Evidence sustained an award of disability compensation and death benefits where the attending physician testified that original accident, in which decedent sustained injury to his great toe of his right foot, had aggravated a pre-existing diabetes, which in turn gave rise to gangrenous condition and which injury also had aggravated pre-existing arteriosclerosis, producing circulatory insufficiency from which death ultimately resulted. Delvecchio v Thomas Crimmins Contracting Co., 3 A.D.2d 618, 157 N.Y.S.2d 1000, 1956 N.Y. App. Div. LEXIS 3432 (N.Y. App. Div. 3d Dep't 1956).

On substantial medical evidence, board properly determined that as result of puncturing his right leg with nail on employer's premises, claimant, who had pre-existing diabetes and arterial sclerosis suffered aggravation of circulatory disease necessitating prolonged bed rest which in turn further stagnated circulation of both legs and resulted in occlusion and thrombosis of arteries of both legs, all of which resulted in chronic ulcer on right leg and unstable right ankle, and that, as a result of these injuries, he fell and injured toes of left leg requiring the amputation and ultimate loss of lower left leg. Award for loss of part of left leg affirmed. Penn v Black River Valley Club, 7 A.D.2d 669, 179 N.Y.S.2d 335, 1958 N.Y. App. Div. LEXIS 4315 (N.Y. App. Div. 3d Dep't 1958).

Board properly found that claimant, while handling hams by means of hook with a wooden handle, sustained an accidental injury in the nature of a blister on his finger, the medical and surgical treatment of which aggravated pre-existing angiosarcoma of the finger which ultimately had to be amputated. Kehl v Smokemasters, Inc., 8 A.D.2d 563, 183 N.Y.S.2d 517, 1959 N.Y. App. Div. LEXIS 9648 (N.Y. App. Div. 3d Dep't 1959).

There being evidence sufficient to sustain a finding that claimant sustained an injury in course of employment by dropping a baffle plate on his right big toe, although there was evidence that claimant suffered from pre-existing diabetes and severe sclerotic changes, all of which contributed to disability sustained after amputation of the toe, a disability award was sustained. Korzeniewski v Kellogg, 12 A.D.2d 570, 206 N.Y.S.2d 985, 1960 N.Y. App. Div. LEXIS 7279 (N.Y. App. Div. 3d Dep't 1960).

There was substantial evidence to sustain a finding that claimant sustained an accidental injury to his foot in course of his employment as a porter when a door fell on it, causing scratches and bleeding, which augmented a pre-existing arteriosclerotic condition which led to later amputation of most of his leg. Solnoitz v Manju Associates, Ltd., 16 A.D.2d 725, 226 N.Y.S.2d 768, 1962 N.Y. App. Div. LEXIS 10338 (N.Y. App. Div. 3d Dep't 1962).

Where a 69 year old warehouseman testified to removing cartons of dishes from a "flat" truck weighing up to 100 pounds, and that, on June 19, one of the containers fell from his shoulder and struck his left instep, this was sufficient basis for a board finding that a subsequent gangrenous condition of his left foot, requiring amputation, was necessitated by the accident in question, in conjunction with pre-existing diabetes and arteriosclerosis, although claimant failed to report the accident or developments following it for more than a month. Tierney v Independent Warehouse Co., 16 A.D.2d 844, 227 N.Y.S.2d 548, 1962 N.Y. App. Div. LEXIS 9970 (N.Y. App. Div. 3d Dep't 1962).

There was substantial evidence to support a board finding that amputation of claimant's leg was not due to an industrial accident or causally related to any incident in his employment where, according to his testimony, the initial injury which occurred on May 20, 1961 was due to fall of a pipe on his left foot, which he did not report to his employer because he was afraid of losing his job, and the subsequent injury was due to a visitor stepping upon his foot when, acting as doorman, he held the door open for the visitor's entrance. Potapchuk v Kalda Constr. Co., 21 A.D.2d 943, 251 N.Y.S.2d 387, 1964 N.Y. App. Div. LEXIS 3309 (N.Y. App. Div. 3d Dep't 1964).

Where employee worked in a wet area and his shoes became wet and stiff and the following day he felt an irritation and burning sensation on his left fourth toe as the result of the wet, tight and pinching shoes, which condition worsened and resulted in amputation of left leg below the knee due to gangrene, finding that claimant sustained an accidental injury arising out of and in the course of his employment was sustained although claimant had a pre-existing vascular disease. Bumpus v Eastern Greyhound Bus Corp., 30 A.D.2d 733, 291 N.Y.S.2d 540, 1968 N.Y. App. Div. LEXIS 3580 (N.Y. App. Div. 3d Dep't 1968).

The Veterans' Administration hospital records and the testimony of two physicians was held to be substantial evidence in support of the Workmen's Compensation Board finding of a causal relationship between the accidental injury to the claimant's left foot and the gangrenous condition which gave rise to the claim. Nadell v North Shore Flushing, Inc., 35 A.D.2d 758, 314 N.Y.S.2d 960, 1970 N.Y. App. Div. LEXIS 3729 (N.Y. App. Div. 3d Dep't 1970), app. denied, 28 N.Y.2d 481, 1971 N.Y. LEXIS 1674 (N.Y. 1971).

Evidence supported ruling by Worker's Compensation Board that claimant sustained compensable injury where (1) claimant, who was employed to direct truckers depositing trash at city dump, contended that he stepped on something that penetrated his shoe and that his foot thereafter became swollen and painful, requiring him to seek medical attention, which resulted in his

hospitalization, (2) radiologist's report concluded that there might be "a foreign body" in claimant's foot, (3) gangrene developed, requiring amputation of claimant's lower leg, and (4) claimant's surgeon stated that, if history given by claimant as to piece of metal penetrating his shoe was correct, there was "a definite causal relationship" between claimant's injury and his disability. Lapine v Beacon, 145 A.D.2d 888, 536 N.Y.S.2d 222, 1988 N.Y. App. Div. LEXIS 13779 (N.Y. App. Div. 3d Dep't 1988).

Where an employee did not produce evidentiary material showing a violation of the safety standards in N.Y. Comp. Codes R. & Regs. tit. 12, §§ 23-8.1(i), 23-8.2(b)(2)(iii), there was not a legitimate claim under N.Y. Lab. Law § 241(6); however, because the defenses to the third-party's N.Y. Workers' Comp. Law § 11 claim were insufficient, summary judgment was not available and the complaint could be amended in accordance with N.Y. C.P.L.R. 3025(b). Field v New York Univ., 764 N.Y.S.2d 810, 1 Misc. 3d 559, 2003 N.Y. Misc. LEXIS 1203 (N.Y. Sup. Ct. 2003).

291. —Head or brain injuries

On a Thursday, claimant was struck by a steel rod in the course of his employment. No cut or bruise resulted and claimant worked that day and the following day without complaint. Ten days later he was found in a state of confusion and incoherence and diagnosis showed a subdural hematoma and a skull fracture. Award affirmed where there was no evidence of a subsequent accident. Mitchell v Delham Constr. Co., 285 A.D. 1103, 139 N.Y.S.2d 494, 1955 N.Y. App. Div. LEXIS 6773 (N.Y. App. Div.), reh'g denied, 285 A.D. 1196, 141 N.Y.S.2d 831, 1955 N.Y. App. Div. LEXIS 7143 (N.Y. App. Div. 1955).

There was sufficient evidence to sustain a finding that death by suicide related back to brain injury sustained by decedent when he fell from a ladder following an electric shock, thereafter suffering loss of speech, convulsive seizures, and inability to continue to work or enjoy the normal pleasures of life in progressive stages until he finally shot himself. McIntosh v E. F. Hauserman Co., 12 A.D.2d 406, 211 N.Y.S.2d 482, 1961 N.Y. App. Div. LEXIS 12278 (N.Y. App. Div. 3d Dep't), aff'd, 10 N.Y.2d 892, 223 N.Y.S.2d 513, 179 N.E.2d 514, 1961 N.Y. LEXIS 927 (N.Y. 1961).

The Board's determination that claimant did not suffer an accident in course of employment resulting in a condition later diagnosed as subdural hematoma would not be interfered with where the testimony was conflicting and the only evidence of accident sustained was plaintiff's allegation that he bumped his head on a truck while picking up a bag of laundry, became dizzy and felt nauseated, but nevertheless continued working the remainder of the day. Brenner v Utilities Laundry, Inc., 14 A.D.2d 626, 218 N.Y.S.2d 300, 1961 N.Y. App. Div. LEXIS 9402 (N.Y. App. Div. 3d Dep't 1961).

Causal relationship between claimant's fall and his resulting medical condition was supported by (1) testimony of claimant (diabetic) that he fell when entering his office in morning and had no memory of rest of day until late afternoon, and (2) testimony of medical expert that claimant suffered head trauma in fall, producing prolonged stuporous or comatose condition during which he was unable to eat food necessary to keep him out of hypoglycemia, and that he therefore lapsed into insulin-induced hypoglycemia, causing brain damage. Watson v Ebasco Services, 140 A.D.2d 747, 527 N.Y.S.2d 628, 1988 N.Y. App. Div. LEXIS 4727 (N.Y. App. Div. 3d Dep't 1988).

Substantial evidence supported Workers' Compensation Board's finding that claimant was totally disabled as result of severe mental impairment caused by June 1981 accident where claimant was unable to return to his position as mechanic after being electrocuted, although he did return to his employment for short time to attend classes before being laid off, and examining psychiatrist's testimony and report proved that claimant was unable to be gainfully employed as of January 1988 and that any future prognosis of improvement was guarded. Uhler v A&P, 242 A.D.2d 754, 661 N.Y.S.2d 859, 1997 N.Y. App. Div. LEXIS 8530 (N.Y. App. Div. 3d Dep't 1997).

292. —Heart disorders

Claimant, who was suffering from a pre-existing heart disease is entitled to an award for injuries received where he was struck in the chest near the heart by a bony substance when lifting a piece of beef from a hook. Firtle v Isidore Kaplin, Inc., 246 A.D. 882, 285 N.Y.S. 23, 1936 N.Y. App. Div. LEXIS 9966 (N.Y. App. Div. 1936).

An employer will be required to make payment into the special fund where the employee's death resulted from heart collapse and fibrosis of the lungs, after his resistance had been lowered and his heart weakened by two previous accidents. Kelly v New York S. Railways, 262 A.D. 924, 28 N.Y.S.2d 846, 1941 N.Y. App. Div. LEXIS 6497 (N.Y. App. Div. 1941).

An employee of a wholesale baking company who while inside an oven cleaning it, was struck on the head by a falling grate causing him to become unconscious and resulting in the aggravation and acceleration of an unknown pre-existing endocarditis causing his death the same day, suffers a compensable injury. Sansbuary v Your Baking Co., 269 A.D. 917, 57 N.Y.S.2d 472, 1945 N.Y. App. Div. LEXIS 4458 (N.Y. App. Div. 1945).

Death benefits award was proper where decedent had a rheumatic heart and in 1950, while lifting a carton suffered a back and hip injury and a hernia which caused him to be hospitalized. He thereafter died of heart disease in 1951. His stipulation at a compensation hearing prior to his death that "the cardiac condition was unrelated" was not binding on his widow. Tyrell v Railway Express Agency, Inc., 286 A.D. 1054, 144 N.Y.S.2d 833, 1955 N.Y. App. Div. LEXIS 5117 (N.Y. App. Div. 1955).

On February 2, 1949, decedent, 72 years of age, sustained contusions of right thigh and multiple fractures of pelvis. Awards were paid until December 17, 1954 when he became permanently disabled from arteriosclorotic heart disease, fractures having healed. On medical testimony, Board properly found there was no causal relation between accident and disability after 1954 date. Hayes v Mid State Body Co., 6 A.D.2d 928, 175 N.Y.S.2d 636, 1958 N.Y. App. Div. LEXIS 5245 (N.Y. App. Div. 3d Dep't 1958).

Claimant, employed as office cleaning woman, was frightened by person she thought was prowler although intruder turned out to be her forelady. She was almost immediately stricken with severe chest pain. Her condition was thereafter diagnosed as coronary arterial insufficiency. Held: injury resulting from fright alone is compensable accident. Award affirmed. Pukaluk v Insurance Co. of North America, 7 A.D.2d 676, 179 N.Y.S.2d 173, 1958 N.Y. App. Div. LEXIS 4324 (N.Y. App. Div. 3d Dep't 1958).

Where medical evidence was introduced that claimant's condition was the result of progression of a pre-existing arteriosclerotic heart condition, no attempt was made to assert a claim until several months after its occurrence, and claimant's version of occurrences at the time is incredible, the Board can properly find that there was no accident, no notice, and no causal relation. Pergola v Manhattan Beach Jewish Center, 20 A.D.2d 943, 248 N.Y.S.2d 954, 1964 N.Y. App. Div. LEXIS 3926 (N.Y. App. Div. 3d Dep't 1964).

Workers' Compensation Board properly determined that claimant sustained compensable injury where claimant, 56-year-old plumbing contractor with moderate degree of arteriosclerotic heart disease suffered acute coronary occlusion and myocardial infarction as consequence of his involvement in fierce telephone argument with competitor regarding recently acquired and important plumbing contract claimant had successfully bid on, which lasted 25 to 30 minutes, during which claimant screamed and swore, became infuriated, threw cast iron pipe and fittings about and complained of experiencing pain in chest and left arm, and where claimant looked pale and was highly nervous and perspiring, and where he was admitted to coronary care unit of hospital the following day and his cardiologist testified that severe emotional disturbance occasioned by argument precipitated myocardial infarction. Leone v Patrick Leone & Sons Plumbing & Heating, 119 A.D.2d 950, 501 N.Y.S.2d 221, 1986 N.Y. App. Div. LEXIS 55880 (N.Y. App. Div. 3d Dep't 1986).

Court would affirm decision by Workers' Compensation Board denying benefits to widow of decedent, who died following cerebral vascular accident (CVA) while not at work, despite testimony of widow's medical expert who stated that decedent's death was causally related to CVA which decedent suffered at work approximately 2 ½ years earlier, since carrier's expert concluded there was no causal connection between decedent's work activity and

fatal CVA, and that conclusion was supported by impartial expert. Stiso v Hallen Constr. Co., 135 A.D.2d 974, 522 N.Y.S.2d 383, 1987 N.Y. App. Div. LEXIS 52871 (N.Y. App. Div. 3d Dep't 1987).

Sheriff's death at home from cardiac arrhythmia was causally related to his employment, and thus his widow was entitled to workers' compensation death benefits, where (1) during 3 months before his death, he became increasingly irritable because of job-related stress arising from numerous pending lawsuits, some of which named him personally, and frustration at not being able to perform his duties due to political controversy, and (2) medical experts, who reviewed various job-related stresses in sheriff's life, testified that stress was one cause of his cardiac arrhythmia. Ayers v Tioga County Sheriff's Dep't, 240 A.D.2d 819, 658 N.Y.S.2d 533, 1997 N.Y. App. Div. LEXIS 6553 (N.Y. App. Div. 3d Dep't 1997).

293. —Heart disorders; heart attack

An award to an employee who suffered a severe cold and bronchitis and a coronary occlusion during an attack of coughing is improper in the absence of any evidence of causal relation between the exposure to low temperatures in the course of his employment and his disability resulting from heart attacks, one of which occurred some fifteen days after the exposure and another over a year later. Schwalenstocker v Department of Taxation & Finance, 293 N.Y. 861, 59 N.E.2d 448, 293 N.Y. (N.Y.S.) 861, 1944 N.Y. LEXIS 2283 (N.Y. 1944).

Decision of Workers' Compensation Board that decedent's fatal heart attack was compensable accident, arising out of and in course of his employment, was supported by substantial evidence where it had been shown that decedent had history of heart disease and hypertension and that he was severely distraught on day before his death because he had been told by his employer that he was being dismissed, in addition to expert testimony that notification of dismissal was "major stress factor" resulting in "ventricular instability, subsequent fibrilation" and, ultimately, death. Black v Metropolitan Tobacco, 71 N.Y.2d 989, 529 N.Y.S.2d 272, 524 N.E.2d 873, 1988 N.Y. LEXIS 687 (N.Y. 1988).

Mental stress is accidental where an employee was called as a witness for his employer in court, subjected to exhaustive cross examination and suffered an immediate coronary occlusion. Church v Westchester County, 253 A.D. 859, 1 N.Y.S.2d 581, 1938 N.Y. App. Div. LEXIS 8931 (N.Y. App. Div. 1938).

Scaffold builder and bricklayer's helper who received traveling expenses and monthly trip home, injured on construction job in Virginia. Cioti v William M. Moore Bldg. Corp., 269 A.D. 913, 57 N.Y.S.2d 552, 1945 N.Y. App. Div. LEXIS 4444 (N.Y. App. Div. 1945).

After lifting a case weighing 150 lbs. felt pain in his left shoulder and across his chest and almost two years thereafter died as a result of arteriosclerosis and posterior wall myocardial infarction. There was sufficient medical opinion as to causal relationship. Chenier v H. W. Rohlfs & Son, 282 A.D. 792, 122 N.Y.S.2d 463, 1953 N.Y. App. Div. LEXIS 4970 (N.Y. App. Div. 1953).

A death award for a diver was proper where it appeared that he was working in the Hudson River trying to raise a sunken barge when he had a heart attack. Decedent was neither a seaman nor a member of a ship's crew and his work bore no relation to navigation as that word is understood in its usual sense. Hence, jurisdiction by the board did not interfere with the uniform application of maritime law. Schacht v Nicolaisen, 283 A.D. 902, 129 N.Y.S.2d 871, 1954 N.Y. App. Div. LEXIS 5696 (N.Y. App. Div. 1954).

A bricklayer was struck on the shin by a fellow worker's shovel and was thereafter nervous and excited. Two days later, while working, he died of a myocardial infarction. Award affirmed. Gordon v E. F. Hickey Co., 285 A.D. 916, 137 N.Y.S.2d 415, 1955 N.Y. App. Div. LEXIS 6100 (N.Y. App. Div. 1955).

Decedent, a truck driver, was injured in an automobile accident in course of employment. He was thrown from truck and sustained injuries to face, right arm, back, chest and right shoulder. Thirty days after accident he died of coronary thrombosis. Medical question was presented for Board as to length of time for formation of thrombosis, ranging from 48 hours to 6 weeks. Causal relation between accident and death properly found. Palmero v Samuel Gallucci & Sons, Inc., 6 A.D.2d 911, 176 N.Y.S.2d 95, 1958 N.Y. App. Div. LEXIS 5219 (N.Y. App. Div. 3d Dep't 1958), aff'd, 5 N.Y.2d 529, 186 N.Y.S.2d 255, 158 N.E.2d 834, 1959 N.Y. LEXIS 1420 (N.Y. 1959).

Where claimant testified that, while working as a cutter in a meat plant, in course of his employment he was pushing meat suspended on hooks from a ceiling runner weighing from 600 to 700 pounds, and that two sections of meat twisted and struck him on the arm and chest, causing him to experience a pain in the left arm and chest, immediately following which he suffered an acute anteroseptal infarction, the incident was sufficiently identified in time and place to permit the board to find that the heart condition was due to an accident. Hilliard v Armour & Co., 11 A.D.2d 869, 203 N.Y.S.2d 159, 1960 N.Y. App. Div. LEXIS 8398 (N.Y. App. Div. 3d Dep't), app. dismissed, 8 N.Y.2d 708, 1960 N.Y. LEXIS 1846 (N.Y. 1960).

Death of a sales director, 53 years of age, from lobar pneumonia bringing on a fatal heart attack, could be attributed to an accident in course of employment where it appeared that for 20 years he had had one lung completely collapsed and slight fibrosis in the other resulting in susceptibility to asthma and his work caused him to make a airplane trip from London to South Africa in course of which he was subjected to high altitudes which, according to medical testimony, caused difficulty in breathing and greater susceptibility to infection. Brocklebank v Union Carbide International Co., 17 A.D.2d 1009, 234 N.Y.S.2d 69, 1962 N.Y. App. Div. LEXIS 6992 (N.Y. App. Div. 3d Dep't 1962), aff'd, 13 N.Y.2d 1036, 245 N.Y.S.2d 604, 195 N.E.2d 313, 1963 N.Y. LEXIS 897 (N.Y. 1963).

Upon appeal from a decision of the Workmen's Compensation Board, it was held evidence sustained the Board's finding that work performed by a city employee while sanding roads on an overtime day, after having been struck on the shoulder by a large garage door spring that broke loose, precipitated his fatal heart attack. Gannon v Poughkeepsie Dep't of Public Works, 27 A.D.2d 777, 277 N.Y.S.2d 16, 1967 N.Y. App. Div. LEXIS 4903 (N.Y. App. Div. 3d Dep't 1967).

Evidence supported determination that state police officer's death from heart attack was result of progressing natural disease and unrelated to work, rather than result of industrial accident when officer, while under pressure and apprehensive, moved some packages to substation storeroom. Rockburn v New York State Police, 46 A.D.2d 951, 361 N.Y.S.2d 757, 1974 N.Y. App. Div. LEXIS 3296 (N.Y. App. Div. 3d Dep't 1974).

In a workers' compensation case involving a boilermaker who suffered a series of heart attacks, the board properly ruled that the boilermaker had a permanent, causally related, partial disability where there was substantial evidence to support the finding that strain precipitated a heart attack, even though superimposed on a pre-existing pathology from a previous heart attack, and where the board's resolution of the sharp medical dispute on causation was well within its province. Underdown v Treadwell Corp., 89 A.D.2d 661, 453 N.Y.S.2d 109, 1982 N.Y. App. Div. LEXIS 17783 (N.Y. App. Div. 3d Dep't 1982).

In a workers' compensation case involving a rag picker operator who suffered a heart attack and later died, disability and death were properly found to be causally related to an accident arising out of and in the course of his employment where the deceased operator's son and wife testified that deceased told them that it was hard for him to get certain materials out of a room as required in his employment, where the son tried to pull the materials out of the room and stated that they were "really heavy," and where medical testimony stated that deceased's work activity on the day in question "was a direct invitant" to his heart attack. Hart v Fiber Conversion, Inc., 89 A.D.2d 665, 453 N.Y.S.2d 102, 1982 N.Y. App. Div. LEXIS 17788 (N.Y. App. Div. 3d Dep't 1982).

In a workers' compensation case based on a heart attack suffered by an employee who was lifting a steel plate weighing more than 100 pounds, disability and subsequent death of the employee were properly determined to have been causally related to the industrial accident in the nature of a heart attack in view

of direct probative medical evidence to support the board's determination. Danko v Long Island University, 89 A.D.2d 668, 453 N.Y.S.2d 101, 1982 N.Y. App. Div. LEXIS 17792 (N.Y. App. Div. 3d Dep't 1982).

Death benefits were properly denied on basis that worker's fatal myocardial infarction was not caused by work-related activities, although worker's widow testified that worker participated in heavy physical labor at work and worker's physician, who had been treating him for high blood pressure and symptoms of angina and coronary disease, testified that worker died from myocardial infarction "possibly occasioned by physical activity on the job," since worker had been instructed not to participate in any physical work, and labor foreman testified that worker did not perform any strenuous work or make any complaints of ill health on day he died. Tangredi v GAF Constr. Corp., 125 A.D.2d 811, 509 N.Y.S.2d 916, 1986 N.Y. App. Div. LEXIS 63019 (N.Y. App. Div. 3d Dep't 1986).

Workers' Compensation Board correctly found that death of employee was work related where (1) employee died of heart attack while walking to appointment with company attorney after he had lunch with employer's production manager, and (2) record contained evidence of stressful nature of employee's job and particular stress experienced during week of employee's death, as well as walking in extremely cold weather conditions. Rose v Brickel Ass'n, 159 A.D.2d 782, 551 N.Y.S.2d 1001, 1990 N.Y. App. Div. LEXIS 2203 (N.Y. App. Div. 3d Dep't 1990).

Workers' Compensation Board's denial of claim for death of attorney was supported by expert's opinion that his acute vascular event or stroke was caused by his untreated obesity and hypertension, despite conflicting expert testimony that condition resulted from work-related stress. Connelly v Charles M. Connelly Assocs., 241 A.D.2d 572, 660 N.Y.S.2d 76, 1997 N.Y. App. Div. LEXIS 7246 (N.Y. App. Div. 3d Dep't), app. denied, 90 N.Y.2d 810, 666 N.Y.S.2d 99, 688 N.E.2d 1381, 1997 N.Y. LEXIS 3630 (N.Y. 1997).

Finding of causal relationship between claimant's employment as police officer and his suffering of myocardial infarction was supported by evidence that, on day before his attack, he was required to participate in 6-hour, karate-type defensive training course, and by conflicting medical testimony as to whether training course precipitated attack. Masi v Town of Clarktown, 260 A.D.2d 889, 688 N.Y.S.2d 799, 1999 N.Y. App. Div. LEXIS 4211 (N.Y. App. Div. 3d Dep't 1999).

294. —Hernia

A hernia resulting from strain while lifting a box of clay weighing 700 pounds or more, is an accidental injury within the meaning of this section. Jordan v Decorative Co., 230 N.Y. 522, 130 N.E. 634, 230 N.Y. (N.Y.S.) 522, 1921 N.Y. LEXIS 858 (N.Y. 1921).; See also Ball v Ocean Distributors (1937).

A person who gets a blister on his hand while in the course of his employment, which finally results in blood poisoning, is entitled to compensation. Scoville v Tolhurst Mach. Works, 193 A.D. 606, 184 N.Y.S. 608, 1920 N.Y. App. Div. LEXIS 5615 (N.Y. App. Div. 1920), aff'd, 231 N.Y. 510, 132 N.E. 867, 231 N.Y. (N.Y.S.) 510, 1921 N.Y. LEXIS 661 (N.Y. 1921).

A sheet metal worker who injured his hand and died three weeks later of general septicemia suffers a disease resulting from an accident under this section. Voelz v Bethlehem Steel Co., 255 A.D. 733, 6 N.Y.S.2d 758, 1938 N.Y. App. Div. LEXIS 4946 (N.Y. App. Div. 1938).

Evidence sustained a death award for a pipefitter who developed severe abdominal pains after lifting a heavy tank and who was thereafter taken to the hospital where he was found to have a hopeless acute intestinal obstruction with intestinal strangulation and gangrene. Medical proof given by experts and family physician differed as to pre-existence of herniation and effect of lifting thereon. Bellamy v Carrier Corp., 284 A.D. 1012, 135 N.Y.S.2d 334, 1954 N.Y. App. Div. LEXIS 4383 (N.Y. App. Div. 1954).

Claimant's work involved removing and replacing tires. He testified that on a particular day he had removed over 100 tires each weighing 100 lbs. or more. When he went home he noticed hernia for first time. Finding of accident on that day sustained. Costello v B. F. Goodrich Co., 5 A.D.2d 1034, 173 N.Y.S.2d 319, 1958 N.Y. App. Div. LEXIS 6191 (N.Y. App. Div. 3d Dep't), app. denied, 5 N.Y.2d 705, 1958 N.Y. LEXIS 1547 (N.Y. 1958).

In March, 1949, while working, decedent suffered left inguinal hernia for which he was awarded compensation and the case was closed in September, 1949. In November, 1953, while recovering from operation for strangulated hernia, decedent was taken with severe pains in abdomen and died. Autopsy showed cause of death was perforated stomach ulcer. Board properly disallowed widow's claim for death benefits on finding of no causal relation between accident or operation and death. As to award for disability from October 29, 1953 to November 2, 1953, Special Fund for Reopened Cases was properly discharged as the case was reopened within 7 years of the accident. 1953 order of referee instructing that case be reopened and placed on calendar with death cause was sufficient even though there had been no formal reopening. And, even if the June, 1956 decision be considered as the reopening, then award for 1953 disability was beyond the 2-year period preceding application for compensation for which fund could be held liable. Carpenter v Port Henry, 8 A.D.2d 568, 183 N.Y.S.2d 467, 1959 N.Y. App. Div. LEXIS 9655 (N.Y. App. Div. 3d Dep't 1959).

There being no evidence of any accident or single incident occurring in course of claimant's employment at operating a "hand screw machine" which could have caused him to suffer a sudden pain in his chest and a hiatus hernia, his condition was not compensable. Rosenberg v Scintilla Div., 12 A.D.2d 551, 206 N.Y.S.2d 710, 1960 N.Y. App. Div. LEXIS 7249 (N.Y. App. Div. 3d Dep't 1960).

There was evidence sufficient to sustain an award of death benefits where it appeared that decedent sustained an uncontrollable hernia of inordinate size as the result of an accidental blow in the abdomen, making surgery inadvisable because of a heart condition and thereby hastening his death, which occurred some eight years later. Dawson v North Hudson Woodcraft Corp., 12 A.D.2d 708, 209 N.Y.S.2d 8, 1960 N.Y. App. Div. LEXIS 6252 (N.Y. App. Div. 3d Dep't 1960), app. denied, 9 N.Y.2d 610, 1961 N.Y. LEXIS 1674 (N.Y. 1961).

An award of both disability and death benefits was sustained on the basis of testimony that decedent, while at work, picked up a heavy crate and thereafter felt a sharp pain, went home and stayed in bed for three days until a doctor diagnosed his condition as an irreducible hernia, and defendant died shortly following an operation to reduce the hernia in course of which a perforated appendix turned up, in connection with all of which a blood clot developed causing a cerebrovascular attack from which decedent died ten days later. Celia v Elks Club, Inc., 14 A.D.2d 938, 221 N.Y.S.2d 377, 1961 N.Y. App. Div. LEXIS 7872 (N.Y. App. Div. 3d Dep't 1961).

Where the only evidence before the Board indicated that claimant experienced a sharp pain in the left groin while doing some heavy moving in connection with his work and which was diagnosed as an acute traumatic left inguinal herniation, it could properly disallow compensation for a hernia on the right side which was not discovered until claimant, sometime later, was undergoing an operation for the left side hernia, and then repaired. Klumock v Yonkers Constr. Co., 18 A.D.2d 1121, 239 N.Y.S.2d 210, 1963 N.Y. App. Div. LEXIS 4027 (N.Y. App. Div. 3d Dep't 1963).

There was adequate evidence to support a board finding that claimant suffered an accidental injury when, while stretching to reach and clean an overhead lighting fixture, he felt a sharp pain in his groin like "a bundle coming out" and later required surgery for hernia notwithstanding prior injury sustained by claimant in the same area and an earlier hernia operation on the same side. Pfeiffer v Glens Falls Ins. Co., 19 A.D.2d 681, 241 N.Y.S.2d 451, 1963 N.Y. App. Div. LEXIS 3492 (N.Y. App. Div. 3d Dep't 1963).

The fact that there is testimony concerning a specific incident does not necessarily require the Board to classify a hernia as an accidental injury, as an inguinal hernia may be an occupational disease, in which case the issue of its occupational causation is factual, within the province of the Board to determine, and will not be overturned if supported by substantial evidence. Silver-

man v Little West Mfg. Co., 20 A.D.2d 612, 245 N.Y.S.2d 556, 1963 N.Y. App. Div. LEXIS 2607 (N.Y. App. Div. 3d Dep't 1963).

Where the evidence indicates that occupational strains produced the bilateral hernia which led to the employee's death and did not merely aggravate a pre-existing hernia, an occupational disease under subdivision 7 is adequately established. Boccia v New York, 24 A.D.2d 727, 263 N.Y.S.2d 59, 1965 N.Y. App. Div. LEXIS 3389 (N.Y. App. Div. 3d Dep't 1965), aff'd, 18 N.Y.2d 804, 275 N.Y.S.2d 387, 221 N.E.2d 917, 1966 N.Y. LEXIS 1048 (N.Y. 1966).

295. —Infectious diseases

An employee engaged in weighing hides on piers, which hides constitute cargoes unloaded from vessels, who, while handling dirty and diseased hides, was infected by anthrax germs through an abrasion in his hand, previously sustained while handling hides covered with wet salt, sustains an accidental injury. Hiers v John A. Hull & Co., 178 A.D. 350, 164 N.Y.S. 767, 1917 N.Y. App. Div. LEXIS 5784 (N.Y. App. Div. 1917).

Glanders is a disease which, when contracted without previous accidental injury occurring in the course of the employment, cannot be classed under the Work. Comp. Law as an accidental injury arising out of and in the course of the employment. Richardson v Greenberg, 188 A.D. 248, 176 N.Y.S. 651, 1919 N.Y. App. Div. LEXIS 8099 (N.Y. App. Div. 1919).

A matron in a children's institution who was stricken with scarlet fever four days after attending a child afflicted with the disease suffers an accidental injury. Gaites v Society for Prevention of Cruelty to Children, 251 A.D. 761, 295 N.Y.S. 594, 1937 N.Y. App. Div. LEXIS 7409 (N.Y. App. Div. 1937), aff'd, 277 N.Y. 534, 13 N.E.2d 461, 277 N.Y. (N.Y.S.) 534, 1938 N.Y. LEXIS 1027 (N.Y. 1938).

Contracting of poliomyelitis as a result of being sneezed at by a fellow nurse can properly be found to have resulted from an accident. Gardner v New York Medical College, 280 A.D. 844, 113 N.Y.S.2d 394, 1952 N.Y. App. Div. LEXIS 3879 (N.Y. App. Div. 1952), aff'd, 305 N.Y. 583, 111 N.E.2d 644, 305 N.Y. (N.Y.S.) 583, 1953 N.Y. LEXIS 1172 (N.Y. 1953).

A school teacher who taught a class of 32 pupils whose average age was six years and was exposed to an epidemic of mumps which broke out in the school because of her close contact with her pupils suffered a compensable industrial "accident" when she contracted the disease and wound up with encephalitis affecting her brain which disabled her for nine months, there being no evidence to overcome the presumption of compensability under § 21. McDonough v Whitney Point Cent. School, 15 A.D.2d 191, 222 N.Y.S.2d 678, 1961 N.Y. App. Div. LEXIS 6802 (N.Y. App. Div. 3d Dep't 1961).

Typhoid fever contracted from drinking water furnished by the employer, which had become contaminated and polluted through its negligence, may constitute an accidental injury within the meaning of subd. 7 of this section but the inception thereof must be assignable to a determinating or single act identified in space of time. Scheerens v E. W. Edwards & Son, 232 N.Y.S. 557, 133 Misc. 616, 1929 N.Y. Misc. LEXIS 642 (N.Y. Sup. Ct. 1929).; See also O'Neil v Carley Heater Co., 218 N.Y. 414, 113 N.E. 406, 218 N.Y. (N.Y.S.) 414, 1916 N.Y. LEXIS 1082 (N.Y. 1916).

296. —Infectious diseases; tuberculosis

Substantial evidence supported Workmen's Compensation Board's determination that persistent impacts of coughing by inmate working closely with corrections officer over a period of three or four months with officer's gradual succumbing to tuberculosis was compensable accident under Workmen's Compensation Law. Middleton v Coxsackie Correctional Facility, 38 N.Y.2d 130, 379 N.Y.S.2d 3, 341 N.E.2d 527, 1975 N.Y. LEXIS 2297 (N.Y. 1975).

A worker who crushed a finger and suffered an infection which activated a dormant tubercular condition suffers a disease or infection accelerated by or resulting from an accident within the meaning of this section. Salli v Standard Wrecking & Salvage Co., 254 A.D. 789, 4 N.Y.S.2d 70, 1938 N.Y. App. Div. LEXIS 7623 (N.Y. App. Div. 1938).

A nurse who contracted tuberculosis as a result of being exposed to tubercular patients is entitled to compensation. McDonough v Flushing Hospital & Dispensary, 266 A.D. 937, 43 N.Y.S.2d 889, 1943 N.Y. App. Div. LEXIS 5291 (N.Y. App. Div. 1943).; See also Bukofsky v Flushing Hospital & Dispensary, 266 A.D. 937, 43 N.Y.S.2d 890, 1943 N.Y. App. Div. LEXIS 5292 (N.Y. App. Div. 1943).

An employee who suffered an aggravation of a pre-existing pulmonary tuberculosis by reason of an operation for occupational hernia suffers a disease resulting from an accident within the meaning of this section. Steinberg v Supreme Coat Makers, Inc., 271 A.D. 762, 64 N.Y.S.2d 469, 1946 N.Y. App. Div. LEXIS 2892 (N.Y. App. Div. 1946).

Student nurse was exposed to tuberculosis at a state hospital while she was in the employ of Crouse Hospital and although her claim for disability was not timely filed, award was affirmed where it appeared that Crouse Hospital had furnished free medical and hospital care to claimant before the expiration of the time limitations. Pogue v Crouse Irving Hospital, 281 A.D. 931, 119 N.Y.S.2d 842, 1953 N.Y. App. Div. LEXIS 3796 (N.Y. App. Div. 1953).

Award was proper where nurse was X-rayed in January and results were negative but in May X-ray revealed a tubercular infection and claimant had attended patients who were later found to be suffering from tuberculosis. Hayes v St. Mary's Hospital, 285 A.D. 914, 137 N.Y.S.2d 409, 1955 N.Y. App. Div. LEXIS 6097 (N.Y. App. Div. 1955).

Proof that claimant worked as a laboratory porter at a hospital and contracted tuberculosis during the period of his employment and that there were at least three tubercular patients in the hospital during this period and that their sputum was examined in the laboratory where claimant worked and that claimant was required to handle unsterilized tubes was sufficient to support a finding that tuberculosis was an occupational disease contracted in the course of employment. Holmes v Beth El Hospital, 286 A.D. 1055, 144 N.Y.S.2d 768, 1955 N.Y. App. Div. LEXIS 5118 (N.Y. App. Div. 1955).

297. —Infectious diseases; venereal disease

A nurse who pricked her finger while attending an infant afflicted with congenital syphilis and became infected with the disease suffers a disease resulting from an accident under this section. Waterman v Jamaica Hospital, 257 A.D. 1087, 14 N.Y.S.2d 636, 1939 N.Y. App. Div. LEXIS 9203 (N.Y. App. Div. 1939).

Gonorrheal infection of the eye suffered by a hospital interne while attending a patient afflicted with venereal disease is accidental. Turitto v St. Mary's Hospital, 257 A.D. 1094, 14 N.Y.S.2d 647, 1939 N.Y. App. Div. LEXIS 9224 (N.Y. App. Div. 1939).

298. —Joint injury

A drill press operator who developed a ganglion following a blow on her hand suffers a disease or infection accelerated by or resulting from an accident under this section. Schell v Haskett Tool & Engineering Co., 270 A.D. 970, 62 N.Y.S.2d 37, 1946 N.Y. App. Div. LEXIS 4894 (N.Y. App. Div. 1946).

Claimant sustained injury to knee in course of employment and 9 days later his knee "locked" while he was engaged in activity unrelated to employment. Disability was result of torn cartilage. Award affirmed. Moquist v Allegheny Ludlum Steel Corp., 5 A.D.2d 910, 170 N.Y.S.2d 944, 1958 N.Y. App. Div. LEXIS 6730 (N.Y. App. Div. 3d Dep't 1958).

If claimant's septic arthritis resulted from a work-connected accident it is clearly compensable even if the accident aggravated a condition of nonindustrial origin to the point of disability. Ellis v Armour & Co., 31 A.D.2d 690, 295 N.Y.S.2d 842, 1968 N.Y. App. Div. LEXIS 2618 (N.Y. App. Div. 3d Dep't 1968).

299. —Mental injury

Claimant suffered a spinal injury in the course of his employment and thereafter developed a manic-depressive psychosis. Disability award was made even though psychosis could not have resulted from trauma where a physician testified that it could have been caused by over anxiety about accident, hospitalization and narrow escape from death. Griffiths v Shaffrey, 308 N.Y. 729, 124 N.E.2d 339, 308 N.Y. (N.Y.S.) 729, 1954 N.Y. LEXIS 1816 (N.Y. 1954).

A laborer who developed dementia praecox following a back injury which was discovered by physicians only a considerable time after it was incurred and which entailed long litigation accompanied by extreme privation is entitled to compensation for his consequent disability. Rodriguez v New York Dock Co., 256 A.D. 875, 9 N.Y.S.2d 264, 1939 N.Y. App. Div. LEXIS 5211 (N.Y. App. Div. 1939).

An award is proper to a meat cutter and loader who suffered a deep laceration over his eye resulting in injuries in the nature of traumatic hysteria and neurosis when an overhead iron roller jumped the rail and struck him in the forehead. McGuirk v J. J. Harrington & Co., 262 A.D. 980, 30 N.Y.S.2d 68, 1941 N.Y. App. Div. LEXIS 6770 (N.Y. App. Div. 1941).

Workers' Compensation Board did not err in deciding that the claimant did not sustain a compensable injury and in denying her claim for workers' compensation benefits because there was no basis to disturb the Board's factual determination that the claimant's work-related stress did not exceed that which could be expected in her normal work environment and that the genesis of the exacerbation of her mental injuries was her involvement in a disciplinary proceeding taken in good faith and not her interactions with coworkers upon returning to work. Matter of Novak v St. Luke's Roosevelt Hosp., 148 A.D.3d 1509, 50 N.Y.S.3d 631, 2017 N.Y. App. Div. LEXIS 2437 (N.Y. App. Div. 3d Dep't 2017).

300. —Muscle, tissue damage

Testimony by an employee that in the course of his duties he frequently hit his screw driver with his hand does not justify a finding of an injury caused by an accident where the bruise on the palm of his hand developed into a frog felon resulting in disability. Woodruff v R. H. Howes Const. Co., 228 N.Y. 276, 127 N.E. 270, 228 N.Y. (N.Y.S.) 276, 1920 N.Y. LEXIS 934 (N.Y. 1920).

301. —Reaction to toxins or chemicals

Reaction as the result of an injection of anti-toxin constitutes an accidental injury within the meaning of the workmen's compensation law where the injection was made by the employer's physician on the employer's premises and under the employer's direction. Sanders v Children's Aid Soc., 238 A.D. 746, 265 N.Y.S. 698, 1933 N.Y. App. Div. LEXIS 9609 (N.Y. App. Div.), aff'd, 262 N.Y. 655, 188 N.E. 107, 262 N.Y. (N.Y.S.) 655, 1933 N.Y. LEXIS 1184 (N.Y. 1933).

Where decedent was employed as a helper to a workman in charge of cleaning furniture in which work a poisonous cleaning fluid was used and which had been placed by the workman in charge in a soft drink bottle, and the decedent took a drink out of the bottle, his death caused thereby resulted from an industrial accident and an award was proper. Kononchuk v National House Cleaning Contractors, Inc., 278 A.D. 475, 105 N.Y.S.2d 881, 1951 N.Y. App. Div. LEXIS 3842 (N.Y. App. Div. 1951).

Bookkeeper employed in a dark office who becoming sleepy and looking tired on a hot day, drank a combination of Coca-cola and inhaled the contents of a benzedrine inhaler was injured in an accident in the course of her employment when she sustained a cerebral hemorrhage from her draught. Fishman v S. W. Layton, Inc., 284 A.D. 165, 130 N.Y.S.2d 656, 1954 N.Y. App. Div. LEXIS 3365 (N.Y. App. Div. 1954).

There was sufficient evidence in the record to warrant a finding that death of a painter arose out of his employment where he was found unconscious following a fall in course of his employment with his clothes and body saturated with spilled benzine; and an exploratory operation of his brain was undertaken in the belief that a brain tumor might be involved; but no such tumor was found, and he died as the result of excessive bleeding resulting from the operation, there being some testimony that the benzine poisoning was what led to the mistaken diagnosis and surgical procedure. Kestenbaum v Dunrite Painting Co., 12 A.D.2d 695, 207 N.Y.S.2d 917, 1960 N.Y. App. Div. LEXIS 6775 (N.Y. App. Div. 3d Dep't 1960), aff'd, 10 N.Y.2d 838, 221 N.Y.S.2d 728, 178 N.E.2d 430, 1961 N.Y. LEXIS 979 (N.Y. 1961).

Court would sustain finding that claimant did not sustain accidental injury in course of her employment, despite her assertion that she suffered from, inter alia, headaches, dizziness, nausea, and slurred speech due to poor ventilation system at her workplace, where she had been experiencing those symptoms for 15 years, her treating physician for prior 11 years diagnosed her with chronic fatigue syndrome and testified that he found nothing remarkable on examining claimant, and it was not until after claimant filed her application for workers' compensation benefits that she suffered injury diagnosed as "sick building syndrome." Rakowski v New York State DOL, 243 A.D.2d 1020, 663 N.Y.S.2d 428, 1997 N.Y. App. Div. LEXIS 10867 (N.Y. App. Div. 3d Dep't 1997), app. denied, 91 N.Y.2d 807, 669 N.Y.S.2d 260, 692 N.E.2d 129, 1998 N.Y. LEXIS 185 (N.Y. 1998).

Workers' Compensation Law Judge should have permitted teacher to change theory of her claim from occupational disease to accidental injury where employer was aware that claim was predicated upon injuries allegedly resulting from teacher's exposure to noxious fumes from nearby bathrooms and poor ventilation in room in which she taught, and thus employer was not prejudiced. In re Claim of Leventer, 257 A.D.2d 903, 684 N.Y.S.2d 658, 1999 N.Y. App. Div. LEXIS 476 (N.Y. App. Div. 3d Dep't 1999).

302. —Skin diseases or infections

An infection of fingers while cleaning a urinal, the fingers having been previously cut at home, is an accident under this section. Horrigan v Post-Standard Co., 224 N.Y. 620, 121 N.E. 872, 224 N.Y. (N.Y.S.) 620, 1918 N.Y. LEXIS 1022 (N.Y. 1918).

The contracting of poison ivy is an accidental injury within the meaning of this section. Plass v Central N. E. R. Co., 226 N.Y. 449, 123 N.E. 852, 226 N.Y. (N.Y.S.) 449, 1919 N.Y. LEXIS 889 (N.Y.), aff'd, 226 N.Y. 569, 123 N.E. 852, 226 N.Y. (N.Y.S.) 569, 1919 N.Y. LEXIS 916 (N.Y. 1919).

A fur cutter who accidently cut his finger resulting in an infection for which disability he received an award, and who suffered skin disease after returning to work suffers a disease arising from an accidental injury and is entitled to a second award for the skin disease. Hechtenthal v Eisenberg & Halberstadt, 256 N.Y. 566, 177 N.E. 143, 256 N.Y. (N.Y.S.) 566, 1931 N.Y. LEXIS 1146 (N.Y. 1931).

A photograph developer whose work required that she dip her hands in a chemical solution many times a day resulting eventually in gangrene of the finger does not suffer an accidental injury because the contract made by the employee between her hand and the solution was voluntary and intentional and the injuries resulted from no occurrence which was referable to any particular moment of time which is definite. Jeffreyes v Charles H. Sager Co., 198 A.D. 446, 191 N.Y.S. 354, 1921 N.Y. App. Div. LEXIS 8118 (N.Y. App. Div. 1921), aff'd, 233 N.Y. 535, 135 N.E. 907, 233 N.Y. (N.Y.S.) 535, 1922 N.Y. LEXIS 942 (N.Y. 1922).

Contraction of dermatitis gradually from sulphuric acid of automobile batteries is not accidental under this section. Wright v Used Car Exchange, 221 A.D. 154, 223 N.Y.S. 245, 1927 N.Y. App. Div. LEXIS 6396 (N.Y. App. Div. 1927).

A laborer who sustained a laceration of the thumb which resulted in an infection and malignant endocarditis suffers a disease or infection resulting from an accident within the meaning of this section. McCarthy v Worthington Pump & Machinery Corp., 254 A.D. 612, 2 N.Y.S.2d 839, 1938 N.Y. App. Div. LEXIS 6738 (N.Y. App. Div. 1938).

Though a stereotyper's work with his employer ended with his retirement at age 65, he was nonetheless entitled to an award for partial disability for occupational contact dermatitis where there was evidence of his intention and desire to continue his usual occupation insofar as his condition would permit. Cronin v Union Bag & Paper Corp., 284 A.D. 1079, 135 N.Y.S.2d 877, 1954 N.Y. App. Div. LEXIS 4616 (N.Y. App. Div. 1954).

Claimant suffered from condition diagnosed as traumatized plantar wart with ulceration, complicated by obesity, diabetes, mellitus, diabetic arteriosclerosis and endarteritis. He claimed that walking required of him in employer's retail furniture store was contributing factor to an aggravation of condition. Held: claimant did not sustain accident and did not incur an occupational disease. Rotenberg v Diamond Bedding & Upholstering Co., 5 A.D.2d 709, 168 N.Y.S.2d 654, 1957 N.Y. App. Div. LEXIS 3501 (N.Y. App. Div. 3d Dep't 1957).

303. —Tetanus

Where claimant contracted tetanus through cutting his hand while changing an automobile wheel in the course of his employ-

ment, such injury is compensable. Rado v Bell Wein Service Station, 262 A.D. 983, 30 N.Y.S.2d 28, 1941 N.Y. App. Div. LEXIS 6779 (N.Y. App. Div. 1941).

An award of compensation is proper to iron worker in a structural steel factory who died of tetanus which developed from an accidental injury to a finger. Davis v Harris Structural Steel Co., 269 A.D. 915, 57 N.Y.S.2d 586, 1945 N.Y. App. Div. LEXIS 4449 (N.Y. App. Div. 1945).

304. Multiple accidents

Death or increase and prolongation of disability by further accident caused by weakness, illness, or disease assignable to the original accident is compensable. Malgieri v General Electric Co., 258 N.Y. 620, 180 N.E. 358, 258 N.Y. (N.Y.S.) 620, 1932 N.Y. LEXIS 1284 (N.Y. 1932).; See also Ruzsjak v Metal Stamping Co., 259 N.Y. 575, 182 N.E. 187, 259 N.Y. (N.Y.S.) 575, 1932 N.Y. LEXIS 1055 (N.Y. 1932)., and Anderson v Babcock & Wilson Co., 256 N.Y. 146, 175 N.E. 654, 256 N.Y. (N.Y.S.) 146, 1931 N.Y. LEXIS 1036 (N.Y. 1931).

Back injury cases should be in a category by themselves because, once injured, there is the ever-present danger of recurrence and the question then arises as to whether the subsequent incident was a new accident, an aggravation of an existing condition, or an incident associated with the primary injury. Hogan v Weldmaster Co., 11 A.D.2d 557, 199 N.Y.S.2d 873, 1960 N.Y. App. Div. LEXIS 10191 (N.Y. App. Div. 3d Dep't 1960).

Where the board found that the victim of an accident which occurred on August 30 of one year, suffered another accident on December 6 of the following year, it was held that there was substantial evidence to support such finding. Davis v Albert Acan X-Ray Solutions, Inc., 24 A.D.2d 676, 261 N.Y.S.2d 172, 1965 N.Y. App. Div. LEXIS 3678 (N.Y. App. Div. 3d Dep't 1965).

Determination by Workers' Compensation Board that claimant's disability was causally related to first of his 2 accidents was supported by psychiatrist's testimony that claimant suffered from conversion disorder that rendered him permanently and totally disabled, that both accidents contributed to disorder and resulting disability, and that psychiatrist was unable to apportion disability between them, although other medical evidence supported position that claimant's earlier injury was not causally related to his disability. Howell v Langie Fuel Serv., 241 A.D.2d 568, 659 N.Y.S.2d 355, 1997 N.Y. App. Div. LEXIS 7212 (N.Y. App. Div. 3d Dep't 1997).

305. —Recurrence of original injury

An award of compensation will be affirmed for injuries to the sacroiliac region of the back though many years before the claimant had recovered an award for an injury in the same general region of his back but recovered from the first injury and worked for several years thereafter. Moosman v Yorkdale Printing Co., 263 A.D. 913, 32 N.Y.S.2d 152, 1942 N.Y. App. Div. LEXIS 7345 (N.Y. App. Div. 1942).

A steamfitter who had sustained a compensable wrist fracture in 1945 was entitled to compensation when in 1950 as a result of occupational aggravation and an exacerbation of the generative arthritic changes he was again disabled while working for a new employer. Walling v H. J. Bareham & Son, 285 A.D. 366, 137 N.Y.S.2d 589, 1955 N.Y. App. Div. LEXIS 5488 (N.Y. App. Div. 3d Dep't 1955).

Claimant suffered an industrial accident in 1942 which resulted in a leg wound with cellulitis. In 1949, he again struck this leg and developed ulceration. The Board determined that the second accident caused a recurrence of the condition which resulted from the industrial accident and granted award. Affirmed. Sportelli v Troyan, 286 A.D. 906, 142 N.Y.S.2d 185, 1955 N.Y. App. Div. LEXIS 4476 (N.Y. App. Div. 1955).

Claimant sustained injuries to his back in July, 1953 accident. He did not return to work until September, 1954. On January 7, 1955 an accident occurred to his back causing him to stop work again. On substantial evidence, Board properly decided that there had been no new accident, that disability was due to 1953 accident and that award for disability between March 26, and September 12, 1954 and for reduced earnings thereafter until January 7, 1955, should have been made. Claimant's statement that he was unable to return to work until September, 1954 was entitled to consideration since all the doctors conceded that claimant had received serious injury. Bonsteel v Skyline Products, Inc., 8 A.D.2d 873, 186 N.Y.S.2d 781, 1959 N.Y. App. Div. LEXIS 8276 (N.Y. App. Div. 3d Dep't), app. denied, 7 N.Y.2d 705, 1959 N.Y. LEXIS 1822 (N.Y. 1959).

306. —Injury in the course of moving about after first accident

Where a claimant in the course of his employment received an injury to his right foot and thereafter while walking with a crutch fell, fracturing his left hip, an award for the second injury is proper in spite of the contention that there was no causal relation between the first and second accidents. Chiodo v Newhall Co., 254 N.Y. 534, 173 N.E. 854, 254 N.Y. (N.Y.S.) 534, 1930 N.Y. LEXIS 1118 (N.Y. 1930).

Where a riveter sustained injuries to both hands requiring heavy bandages and was therefore unable to check a fall at home, the injuries resulting from the fall are consequential and are compensable. Murray v Interborough Rapid Transit Co., 253 A.D. 848, 1 N.Y.S.2d 324, 1938 N.Y. App. Div. LEXIS 8888 (N.Y. App. Div. 1938).

Where a lineman was paralyzed by an accident and subsequently fatally injured by a taxicab while returning in a wheel chair from a visit with a friend, his death is not consequential to his original injury and is not compensable. Baker v Niagara Falls Power Co., 256 A.D. 865, 9 N.Y.S.2d 79, 1939 N.Y. App. Div. LEXIS 5176 (N.Y. App. Div. 1939).

Where a claimant sustained a broken leg from an industrial accident and while still disabled and using crutches, stepped out of an automobile, slipped and stepped harder than he should on his injured leg and broke it in the same place again, the second injury was due to the original accident and compensation is properly payable therefor. Hall v Chapman, 257 A.D. 1091, 14 N.Y.S.2d 666, 1939 N.Y. App. Div. LEXIS 9214 (N.Y. App. Div. 1939).

An employee suffered an industrial accident resulting in the amputation of his left leg and, 4 ½ years later, while walking upon a city sidewalk, stepped into a hole, fell, was operated on again and died. Held: an award of death benefits was proper. The accident and subsequent death were consequential to the injury sustained in the industrial accident. Cresci v Mike Krasilousky Trucking Co., 5 A.D.2d 569, 172 N.Y.S.2d 322, 1958 N.Y. App. Div. LEXIS 6441 (N.Y. App. Div. 3d Dep't), app. denied, 4 N.Y.2d 677, 1958 N.Y. LEXIS 1468 (N.Y. 1958), overruled, McDowell v La Voy, 63 A.D.2d 358, 408 N.Y.S.2d 148, 1978 N.Y. App. Div. LEXIS 11350 (N.Y. App. Div. 3d Dep't 1978).

Where a restaurant worker slipped on the floor while lifting or moving plates and later slipped again on her way home after seeing her employer's physician, allegedly because she was in such pain that she didn't "know where she was going," and later medical examination disclosed a dislocation of the shoulder joint, the ultimate shoulder dislocation was sufficiently attributable to the first mishap. Kearney v Shattuck, 12 A.D.2d 678, 207 N.Y.S.2d 722, 1960 N.Y. App. Div. LEXIS 6744 (N.Y. App. Div. 3d Dep't 1960).

Workers' compensation claimant employed as carpentry supervisor proved that he sustained consequential injury to his back as result of his limping gait after log fell on his foot where (1) his treating orthopedic surgeon attributed claimant's back pain to "gait abnormality" adopted to compensate for injured foot, (2) neurosurgeon considered claimant's back pain to be "secondary" to his foot injury, and (3) physician specializing in physical and rehabilitation medicine found "direct relationship" between claimant's back pain and his limping gait. Traver v Rickkard Constr. Co., 286 A.D.2d 808, 730 N.Y.S.2d 361, 2001 N.Y. App. Div. LEXIS 8632 (N.Y. App. Div. 3d Dep't 2001).

307. —Injury in the course of medical treatment for first accident

Where death or aggravation of a disability results from further accident or transmissible disease due to or incidental to medical care and treatment necessitated by the original accident or injury is compensable. Lofstedt v United States Gypsum Co., 258 N.Y. 222, 179 N.E. 473, 258 N.Y. (N.Y.S.) 222, 1932 N.Y. LEXIS 1175 (N.Y. 1932).; Pecorella v John Bartenbach, Inc., 249 N.Y. 610, 164

N.E. 603, 249 N.Y. (N.Y.S.) 610, 1928 N.Y. LEXIS 969 (N.Y. 1928).; Huhn v Gehnrich Indirect Heat Oven Co., 250 N.Y. 568, 166 N.E. 327, 250 N.Y. (N.Y.S.) 568, 1929 N.Y. LEXIS 956 (N.Y. 1929).

An award of death benefits is proper, where a pressman suffered the loss of four fingers on each hand while operating a press and he fell while in his bathroom bathing his hands in hot water to relieve his pain in accordance with the instructions of his physician some fourteen months after the original accident, the fall resulting in general paralysis. Ruzsjak v Metal Stamping Co., 259 N.Y. 575, 182 N.E. 187, 259 N.Y. (N.Y.S.) 575, 1932 N.Y. LEXIS 1055 (N.Y. 1932).

A fall caused by disease contracted in the course of employment is accidental where the employee was enroute to a doctor at the direction of the employer for treatment of the disease. Goldberg v 954 Marcy Corp., 276 N.Y. 313, 12 N.E.2d 311, 276 N.Y. (N.Y.S.) 313, 1938 N.Y. LEXIS 1191 (N.Y. 1938).

To establish that death resulted from an injury, it is not sufficient to prove that a person received an injury; that an operation was performed on account thereof, and that, after he had apparently recovered from the effect of the operation and anaesthetic, he died from disease which existed before the injury. Tucillo v Ward Baking Co., 180 A.D. 302, 167 N.Y.S. 666, 1917 N.Y. App. Div. LEXIS 8145 (N.Y. App. Div. 1917).. Vanecek v Greeley Square Bldg. Corp., 278 A.D. 869, 104 N.Y.S.2d 214, 1951 N.Y. App. Div. LEXIS 5015 (N.Y. App. Div. 1951).; But see Thomas v B. & F. Polishing Co., 278 A.D. 880, 104 N.Y.S.2d 294, 1951 N.Y. App. Div. LEXIS 5044 (N.Y. App. Div. 1951).

Where an employee who had suffered an injury to his foot took a bicholoride of mercury tablet which he intended to put into hot water to bathe his foot by mistake when during the night he thought he was taking a sedative tablet to ease the pain in his foot, he suffers an accidental injury for which compensation is payable. Brown v New York State Training School for Girls, 256 A.D. 767, 11 N.Y.S.2d 849, 1939 N.Y. App. Div. LEXIS 4841 (N.Y. App. Div. 1939).

Where an employee was killed in a collision while returning from the doctor's office for treatment of injuries sustained three weeks earlier, his death is consequential to the original injury and is compensable. John v Fairmont Creamery Co., 268 A.D. 840, 50 N.Y.S.2d 253, 1944 N.Y. App. Div. LEXIS 3711 (N.Y. App. Div. 1944).

Death benefits are properly payable where the deceased employee immediately became disabled as the result of a hernia, contracted due to the nature and in the course of his employment, that necessitated an operation which was a producing cause of tuberculosis that subsequently resulted in the employee's death. Gordon v John J. Casale, Inc., 275 A.D. 734, 87 N.Y.S.2d 167, 1949 N.Y. App. Div. LEXIS 4244 (N.Y. App. Div. 1949).

In 1935, decedent sustained a right inguinal hernia which was surgically corrected. In 1941 he sustained a recurrence thereof with a new left inguinal hernia, both of which were repaired. In 1950, he sustained an umbilical hernia and a recurrence of both inguinal hernias which were repaired. In 1953 decedent underwent operations for repair of inguinal hernias, which operations indirectly caused his death. Held: there was no relationship between the umbilical hernia and the inguinal hernias. So, the umbilical hernia had nothing to do with decedent's death. Therefore, there was no basis for charging 50 percent of award to the carrier in 1950. Estate of Holmes v J. C. Penny Co., 9 A.D.2d 563, 189 N.Y.S.2d 377, 1959 N.Y. App. Div. LEXIS 7414 (N.Y. App. Div. 3d Dep't 1959).

Where claimant, a diabetic, sustained an injury to his right foot in 1954 during course of his employment and one toe became infected and, in 1955, while employed by another employer, did excessive walking resulting in formation of a blister on the left foot which ulcerated, resulting in further disability, on the basis of medical evidence that a trauma will readily create a blister in a diabetic, an award could be sustained against both employers, the excessive walking in the second employment being an "accident." Walters v U. S. Vitamin Corp., 11 A.D.2d 280, 203 N.Y.S.2d 401, 1960 N.Y. App. Div. LEXIS 8393 (N.Y. App. Div. 3d Dep't 1960), aff'd, 10 N.Y.2d 924, 223 N.Y.S.2d 874, 179 N.E.2d 713, 1961 N.Y. LEXIS 946 (N.Y. 1961).

There was substantial evidence to sustain a board finding that an accident occurred when decedent fell backward in a sitting position, aggravating a preexisting back condition so as to require surgery, complications of which necessitated a further operation resulting in death. Copeland v Joseph Cucci Constr. Co., 19 A.D.2d 666, 241 N.Y.S.2d 109, 1963 N.Y. App. Div. LEXIS 3465 (N.Y. App. Div. 3d Dep't 1963).

Workers' Compensation Board properly ruled that claimant sustained compensable consequential injury where she was injured while on her way to her own physician for treatment of prior compensable injury. Font v New York City Bd. of Educ., 170 A.D.2d 928, 566 N.Y.S.2d 754, 1991 N.Y. App. Div. LEXIS 2447 (N.Y. App. Div. 3d Dep't 1991).

308. —Injury caused by weakness, dizziness or other condition attributable to first accident

If a dizzy spell resulting in a fall from a ladder causing the employee's death was the result of an original injury suffered in the course of the employment, the employee's wife is entitled to death benefits, whether or not the employee was negligent in climbing the ladder. Colvin v Emmons & Whitehead, 216 A.D. 577, 215 N.Y.S. 562, 1926 N.Y. App. Div. LEXIS 9275 (N.Y. App. Div. 1926).

A claimant who underwent surgery upon his knee as the result of a fall is entitled to an award for disability resulting from a second fall caused by weakness of the knee which had not yet completely healed, the second fall occurring when the employee was following medical advice to get up and around. Prentice v Weeks, 239 A.D. 227, 267 N.Y.S. 849, 1933 N.Y. App. Div. LEXIS 8006 (N.Y. App. Div. 1933), aff'd, 264 N.Y. 507, 191 N.E. 538, 264 N.Y. (N.Y.S.) 507, 1934 N.Y. LEXIS 1548 (N.Y. 1934).

Where a doorman was re-employed after the amputation of his leg as the result of an accident in the course of his employment and suffered further injury when the artificial leg gave way, the second accident is compensable. McNaught v Louris Amusement Corp., 270 A.D. 100, 58 N.Y.S.2d 515, 1945 N.Y. App. Div. LEXIS 2810 (N.Y. App. Div. 1945), app. denied, 270 A.D. 781, 59 N.Y.S.2d 906, 1946 N.Y. App. Div. LEXIS 3905 (N.Y. App. Div. 1946).

In 1945, decedent sustained an accident which made his left leg weak and clumsy. In 1948, as a result of this weakness, he suffered a fall which required him to use crutches. Shortly thereafter, while walking down a flight of stairs, decedent fell and suffered fatal injuries. The last fall was attributable to the first accident. Dickerson v Essex County, 2 A.D.2d 516, 157 N.Y.S.2d 94, 1956 N.Y. App. Div. LEXIS 3820 (N.Y. App. Div. 3d Dep't 1956).

In September, 1955, claimant sustained a compensable fracture of his right leg. In January, 1956, while walking on a sidewalk, he slipped on ice and sustained a further fracture of the right leg. On the day of the second fall, he had a stiff ankle, walked with a cane and was wearing a double elastic bandage. Board properly found second fracture to be natural and unavoidable result of prior accident. Boice v Frank W. O'Connell, Inc., 8 A.D.2d 558, 183 N.Y.S.2d 534, 1959 N.Y. App. Div. LEXIS 9640 (N.Y. App. Div. 3d Dep't 1959).

Death of claimant's husband was not causally related to compensable accidental injuries where after the accident decedent had experienced frustrations which led to overeating and inactivity causing his weight to balloon to over 300 pounds, where that increase in weight had caused higher blood pressure and shortness of breath, where an intestinal bypass operation had been performed to reduce decedent's weight, and where the direct cause of death was complications resulting from the surgery. Bauman v Lord Electric Co., 79 A.D.2d 806, 435 N.Y.S.2d 98, 1980 N.Y. App. Div. LEXIS 14216 (N.Y. App. Div. 3d Dep't 1980).

Claimant sustained consequential injury entitling him to workers' compensation benefits where his compensable injury rendered his left leg susceptible to "giving out," and he sustained consequential paraplegia condition when he stood up out of seat on tree stand and his left leg gave out, causing him to fall and injure himself; claimant's actions in using tree stand while hunting were not rash or irresponsible, based on his medical condition prior to fall, but were reasonable activity for him to be engaged in. Pellerin v New York State Dep't of Corrections, 215

A.D.2d 943, 627 N.Y.S.2d 147, 1995 N.Y. App. Div. LEXIS 5609 (N.Y. App. Div. 3d Dep't 1995), app. denied, 87 N.Y.2d 806, 640 N.Y.S.2d 878, 663 N.E.2d 920, 1996 N.Y. LEXIS 32 (N.Y. 1996).

309. —Other successive injuries or accidents

Claimant injured his back in 1950 and injuries continued to cause him trouble. In 1955, while still wearing brace, claimant, carrying 8 quarts of milk in container, stepped down from his truck and experienced sharp pain in lower back. Proof of circumstances of alleged second accident resolved itself around history given by claimant to doctor. Held, record was substantial and credible as to sufficiency of happening of second accident. Award affirmed. Giordano v Hudson Dairy Co., 6 A.D.2d 936, 175 N.Y.S.2d 846, 1958 N.Y. App. Div. LEXIS 5258 (N.Y. App. Div. 3d Dep't 1958).

In 1947, claimant fell from ladder, injuring his coccyx, leg and knee. In a 1948 accident, he injured elbow and heel. Thereafter, he became disabled due to cervical intervertebral disc lesion and protrusion. As to disc injury, Board was justified in finding that medical proof established causation in 1947 accident and that evidence tending to relate claimant's condition to 1948 accident by way of aggravation was without probative force. Halperin v R. Salzstein & Co., 6 A.D.2d 942, 175 N.Y.S.2d 788, 1958 N.Y. App. Div. LEXIS 5265 (N.Y. App. Div. 3d Dep't 1958).

In November, 1949, as a result of a compensable accident, claimant sustained a fractured skull, cerebral concussion and shock. In May, 1951 he sustained further injuries in a fall which was not compensable. Subsequently he was admitted to the hospital in a mentally confused state. On medical evidence Board concluded that cause of 1951 accident was a cerebral hemorrhage which was not related to the 1949 accident. Bellotti v Salvio, 8 A.D.2d 552, 183 N.Y.S.2d 413, 1959 N.Y. App. Div. LEXIS 9632 (N.Y. App. Div. 3d Dep't), app. denied, 8 A.D.2d 664, 185 N.Y.S.2d 760, 1959 N.Y. App. Div. LEXIS 9044 (N.Y. App. Div. 3d Dep't 1959), app. denied, 6 N.Y.2d 707, 1959 N.Y. LEXIS 1751 (N.Y. 1959).

Decedent had suffered permanent heart damage in an industrial accident. Thereafter, he died when a truck he was driving left the road and struck a tree. Death was due to a heart attack. Held: the Board properly found that decedent sustained a heart attack and as a result lost control of the truck and, therefore, there was no industrial accident. But an award against the carrier on the first industrial accident on finding that death was result of heart condition sustained in the first accident was affirmed. Gehlhardt v Storch Trucking Co., 8 A.D.2d 560, 183 N.Y.S.2d 452, 1959 N.Y. App. Div. LEXIS 9644 (N.Y. App. Div. 3d Dep't 1959).

Where a deceased employee suffered a compensable heart attack in 1955 and a fatal heart attack in 1958 after returning to work in a partially disabled condition on a shorter work day basis, the Board could find that death was due to the prior heart attack, notwithstanding conflicting medical testimony. La Pierre v Club 42, 18 A.D.2d 1114, 238 N.Y.S.2d 1015, 1963 N.Y. App. Div. LEXIS 4013 (N.Y. App. Div. 3d Dep't), app. denied, 13 N.Y.2d 594, 1963 N.Y. LEXIS 1910 (N.Y. 1963).

Employer and carrier failed to sustain their burden of proving that claimant suffered permanent preexisting impairment based on medical evidence demonstrating that she had carpal tunnel surgery in 1984 and neck injury in 1989, where claimant testified that she returned to work each time with no restrictions and that, prior to her 1990 work-related injury, she was having no problems with her neck or wrist. Chadwick v Millinkrodt Anesthesia Prods., 264 A.D.2d 953, 697 N.Y.S.2d 171, 1999 N.Y. App. Div. LEXIS 9557 (N.Y. App. Div. 3d Dep't 1999).

Evidence supported board's ruling that claimant's loss of earnings was causally related to back injury which he sustained while lifting bundle of copper pipes in course of his employment as counter person, rather than his various other physical ailments, although he had continued to work as counter person until he was discharged 6 months later due to his failure to learn certain terminology necessary to perform his duties and he subsequently obtained new employment, where he was ultimately discharged from his new employment because his physician advised against working assigned 12-hour shift, and he was unable to secure new employment within his medical restrictions. Pulcastro v N & S Supply Co., 270 A.D.2d 737, 705 N.Y.S.2d 121, 2000 N.Y. App. Div. LEXIS 3111 (N.Y. App. Div. 3d Dep't 2000).

310. —Apportionment of award between employers and insurers

Where an employee fell and fractured a segment of her sacrum and one of the discs of her spine and some two years later became disabled when the spinal disc became protruded, by which time the employer had switched to a new insurance carrier, apportionment of the award against the new carrier is improper where it does not appear that the employee was subject to any unusual strain or effort sufficient to justify a finding of a second accident, mere frequent bending over in the ordinary course of the employment being insufficient. Kobinski v George Weston, Ltd., 302 N.Y. 432, 99 N.E.2d 227, 302 N.Y. (N.Y.S.) 432, 1951 N.Y. LEXIS 715 (N.Y. 1951).

Where an employee had two accidents some eight years apart, and the second accident aggravated the herniated disc pathology he suffered as the result of the first accident necessitating an operation an award apportioning two thirds of disability to the second accident and one third to the first accident will be sustained. Richardson v Marinette Paper Co., 273 A.D. 932, 77 N.Y.S.2d 919, 1948 N.Y. App. Div. LEXIS 5319 (N.Y. App. Div. 1948).

Where an injury sustained in 1945 as the result of a fall from which the employee suffered a fracture of the wing of the right ilium, fracture of the right ischium and contusion of the right thigh and hip contributed to the employee's disability along with a lumbosacral strain suffered when the employee was employed by a new employer, an award of benefits computed by dividing responsibility equally between the two employers is proper. Frederick v Odenbach Shipbuilding Corp., 278 A.D. 882, 104 N.Y.S.2d 548, 1951 N.Y. App. Div. LEXIS 5050 (N.Y. App. Div. 1951).

Where an employee sustained back injuries on two separate occasions and subsequently developed a back disability and there was conflicting medical testimony as to whether the disability related to one or both of the prior accidents, the Board could properly determine that the disability resulted wholly from the first accident. O'Loughlin v Community Home Constr. Co., 2 A.D.2d 909, 156 N.Y.S.2d 455, 1956 N.Y. App. Div. LEXIS 3918 (N.Y. App. Div. 3d Dep't 1956).

Where a disability resulted from two separate accidents, the Board could allocate to each accident 50 percent of the disability. Medical experts were unable to allocate the percentage of disability between the accidents Conklin v Arden Farms Dairy Co., 2 A.D.2d 910, 156 N.Y.S.2d 765, 1956 N.Y. App. Div. LEXIS 3919 (N.Y. App. Div. 3d Dep't 1956), aff'd, 3 N.Y.2d 860, 166 N.Y.S.2d 308, 145 N.E.2d 24, 1957 N.Y. LEXIS 943 (N.Y. 1957).

Decision and award finding disability causally related to both accidents of June and October, 1950 and charging each carrier equally was reversed. The decision was supported by substantial evidence insofar as it found that aggravation of pre-existing condition was result of first accident but finding that second accident contributed to aggravation was unsupported. And Workmen's Compensation Law § 13(b) being limited to employees injured outside the state was inapplicable. Calkins v Champion Container Corp., 5 A.D.2d 906, 170 N.Y.S.2d 854, 1958 N.Y. App. Div. LEXIS 6723 (N.Y. App. Div. 3d Dep't 1958).

Claimant injured his back in 1952 while working for different employer and injury continued to trouble him. There was substantial evidence to sustain new back injury in 1955 while working for appellant employer. Held: Award for second injury affirmed. Scavo v Frank D'Aprile, Inc., 7 A.D.2d 679, 179 N.Y.S.2d 161, 1958 N.Y. App. Div. LEXIS 4329 (N.Y. App. Div. 3d Dep't 1958), amended, 8 A.D.2d 927, 188 N.Y.S.2d 963, 1959 N.Y. App. Div. LEXIS 8039 (N.Y. App. Div. 3d Dep't 1959).

In October, 1953, claimant fell injuring her back and left leg for which she received compensation. In March, 1954 she fell injuring her back and right leg for which she received compensation. Held: it was properly decided that claimant's subsequent disability was caused by both accidents. Award affirmed. The testimony of Board doctor, who qualified his statements as to disability from second injury, constituted substantial evidence. Qualification

went to weight of his testimony only. Lawrence v St. Mary's Hospital, 8 A.D.2d 558, 183 N.Y.S.2d 523, 1959 N.Y. App. Div. LEXIS 9641 (N.Y. App. Div. 3d Dep't 1959).

Where claimant, while working for one employer, was crushed in the pelvis and given a schedule award for 20 percent loss of use of one leg, which was paid, and, four years later while working for a different employer, received a back injury resulting in disability which medical testimony attributed to both accidents, the second award was properly prorated between the two employers without allowing credit to the first one for compensation already paid in respect of the earlier injury. Mohr v Julius D. Braasch, Inc., 9 A.D.2d 802, 192 N.Y.S.2d 850, 1959 N.Y. App. Div. LEXIS 6142 (N.Y. App. Div. 3d Dep't 1959), reh'g denied, 10 A.D.2d 586, 195 N.Y.S.2d 627, 1960 N.Y. App. Div. LEXIS 12348 (N.Y. App. Div. 3d Dep't 1960), app. denied, 7 N.Y.2d 710, 1960 N.Y. LEXIS 1649 (N.Y. 1960).

Evidence held sufficient to sustain finding of board that, following an initial back injury suffered in employment by claimant in 1953, each of three subsequent back injuries sustained in subsequent employment by the claimant, together with the initial injury, contributed equally to his final disability, warranting assessment of the award 25 percent against each. Britton v Ruberoid Co., 12 A.D.2d 566, 206 N.Y.S.2d 707, 1960 N.Y. App. Div. LEXIS 7270 (N.Y. App. Div. 3d Dep't 1960).

There being conflicting medical testimony as to the extent to which each of five industrial accidents contributed to claimant's disability apportionment of liability among the various carriers presented a question of fact, the resolution of which by the Board rested on substantial evidence. Sika v Pepper Bros. Contracting Co., 18 A.D.2d 730, 234 N.Y.S.2d 276, 1962 N.Y. App. Div. LEXIS 6580 (N.Y. App. Div. 3d Dep't 1962).

Where a claimant is partially disabled as the result of back injuries sustained in one employment and one accident in 1959 and further injuries sustained in a different employment and different accident in 1960, the Board may validly apportion partial disability thereafter between the two accidents where there is substantial medical evidence to sustain such a finding. Perfetto v Terminal System, Inc., 20 A.D.2d 742, 246 N.Y.S.2d 894, 1964 N.Y. App. Div. LEXIS 4393 (N.Y. App. Div. 3d Dep't 1964).

Where claimant sustained four compensable back injuries and the board found that one-half of the overall disability was causally related to the first accident and one-half causally related in equal proportions to the other three accidents, the action of the board in attempting to impose the minimum rate in each of the cases while apportioning the overall disability award was error. Kudrick v Republic Aviation Corp., 34 A.D.2d 613, 308 N.Y.S.2d 793, 1970 N.Y. App. Div. LEXIS 5284 (N.Y. App. Div. 3d Dep't 1970).

In a workers' compensation case, the board properly ruled that claimant had a permanent, total, causally-related disability and that the employer and carrier were not entitled to an apportionment of claimant's disability between his compensable accident and his underlying psychiatric disorder, where claimant suffered from a pre-existing psychiatric disorder that was dormant and not disabling, and where his accident resulted in the activation of that condition. Podlish v McGraw Edison Co., Food Equipment Div., 89 A.D.2d 712, 454 N.Y.S.2d 40, 1982 N.Y. App. Div. LEXIS 17842 (N.Y. App. Div. 3d Dep't 1982).

311. —Apportionment of award; recurrence or aggravation of original injury

An employee who after an accidental fracture of a bone refractured the same bone in lifting a heavy timber while in the employ of a second employer, the original fracture not having completely knitted, suffers two accidental injuries and the award resulting from the second accident should be apportioned equally between the two employers. Anderson v Babcock & Wilson Co., 256 N.Y. 146, 175 N.E. 654, 256 N.Y. (N.Y.S.) 146, 1931 N.Y. LEXIS 1036 (N.Y. 1931).

Where claimant sustained a sprained back in 1950, and in 1952, while working for two different employers, he suffered two more "catches" in his back, the resulting disability should have been charged to the 1950 employer alone. Meade v Atlantic Refining Co., 1 N.Y.2d 905, 154 N.Y.S.2d 964, 136 N.E.2d 909, 1956 N.Y. LEXIS 785 (N.Y. 1956).

Where a claimant originally suffered a fracture in May and in the following September the original fracture again parted as the claimant took hold of a crank handle, the insurer at the time of the first accident must bear the entire liability. Phillips v Holmes Express Co., 190 A.D. 336, 179 N.Y.S. 400, 1919 N.Y. App. Div. LEXIS 4108 (N.Y. App. Div. 1919), aff'd, 229 N.Y. 527, 129 N.E. 901, 229 N.Y. (N.Y.S.) 527, 1920 N.Y. LEXIS 724 (N.Y. 1920).

Where a plumber sustained a displaced intervertebral disc in a 1936 employment accident and in 1945 after doing heavy work for a second employer, developed symptoms of the displaced disc and as the result of both the original accident and the work done for the second employer, suffered a "ruptured intervertebral disc" for which surgery became necessary early in 1946, apportionment of a disability award equally between the employers based on a finding of occupational aggravation of the original back injury is proper. Paradiso v Vuozzo, 277 A.D. 802, 96 N.Y.S.2d 796, 1950 N.Y. App. Div. LEXIS 3375 (N.Y. App. Div. 1950).

Where an employee suffered a right lumbosacral sprain in April while lifting heavy drums and in the following October suffered a recurrence of the original injury while lifting the tailboard of a truck, an award apportioning the award between the two carriers on the basis of a finding that the disability was caused equally by the two accidents will be sustained. Zuk v McGuire Bros., Inc., 277 A.D. 956, 99 N.Y.S.2d 617, 1950 N.Y. App. Div. LEXIS 3985 (N.Y. App. Div. 1950).

Where an employee originally suffered a sacroiliac strain working for his first employer and, after compensation had been paid, the condition improved to such an extent that the employee's doctor advised him to try light work whereupon he took a job with a new employer carrying bags of coal and re-strained his back causing a new disability, an award of compensation for the second disability will be apportioned between the employers. Quick v Levine, 278 A.D. 879, 104 N.Y.S.2d 397, 1951 N.Y. App. Div. LEXIS 5042 (N.Y. App. Div. 3d Dep't), modified, 278 A.D. 988, 104 N.Y.S.2d 397, 1951 N.Y. App. Div. LEXIS 5453 (N.Y. App. Div. 3d Dep't 1951).

Where a claimant worked for the same employer who had a number of carriers covering his employment, the carrier on the risk in 1949 and 1952 was properly charged for claimant's disability where he had a series of recurring hernias, each of which was found by the Board to be an occupational disease. Clarke v Rochester Folding Box Co., 283 A.D. 1126, 131 N.Y.S.2d 570, 1954 N.Y. App. Div. LEXIS 6496 (N.Y. App. Div. 1954).

After the claimant suffered a back injury he continued to work, doing lighter work until he was laid off. Thereafter, he gained new employment and when he attempted to do heavy work his back began to hurt and he was thereafter disabled for several months. The second employer was not liable for compensation because the claimant suffered no accident under that employ but merely a recurrence of the consequences of his prior accident. Frazer v Walter Kidde Constr., Inc., 2 A.D.2d 727, 152 N.Y.S.2d 369, 1956 N.Y. App. Div. LEXIS 5027 (N.Y. App. Div. 3d Dep't 1956).

Claimant suffered accident resulting in back injuries in September, 1954 and August, 1955. There was adequate medical evidence to support finding that claimant's disability subsequent to 1955 accident was attributable to both accidents. Award charging one-half of liability to appellants, employer and carrier at time of second accident affirmed. Goodman v Margolis, 8 A.D.2d 864, 187 N.Y.S.2d 145, 1959 N.Y. App. Div. LEXIS 8260 (N.Y. App. Div. 3d Dep't 1959).

Where claimant experienced chest pains while moving heavy material on April 27 for one employer, and later sustained a heart attack while painting a ceiling for another employer, the evidence was held to sustain findings of the board that the second job aggravated a condition arising from the heavy lifting on the prior one, warranting apportionment of compensation between the two employers. Brooks v Ridgeway, 9 A.D.2d 795, 192 N.Y.S.2d 694, 1959 N.Y. App. Div. LEXIS 6130 (N.Y. App. Div. 3d Dep't 1959).

A disability award for a back injury suffered in 1959 could properly be apportioned back to a prior back injury in 1957, on the basis of the medical testimony. Chadburn v Drachman Demoli-

tion Co., 17 A.D.2d 1008, 233 N.Y.S.2d 902, 1962 N.Y. App. Div. LEXIS 6990 (N.Y. App. Div. 3d Dep't 1962).

Where claimant, who had sustained back injury in non-work related automobile accident in 1984, reinjured and exacerbated back injury when she slipped and fell on floor in her place of employment in 1986, resulting in total disability, Workers' Compensation Board properly refused to apportion responsibility between 2 accidents, since record demonstrated that claimant functioned effectively following first accident until she was reinjured at work. Di Fabio v Albany County Dep't of Social Services, 162 A.D.2d 775, 557 N.Y.S.2d 688, 1990 N.Y. App. Div. LEXIS 7208 (N.Y. App. Div. 3d Dep't 1990).

Workers' Compensation Board properly refused to apportion responsibility for laborer's disability between on-the-job back injury and 2 prior surgeries where he was able to continue working subsequent to surgeries, and it was only after last injury that he was prevented from returning to regular employment. Williams v Boll, 184 A.D.2d 881, 585 N.Y.S.2d 538, 1992 N.Y. App. Div. LEXIS 8004 (N.Y. App. Div. 3d Dep't 1992).

Workers' Compensation Board correctly determined that apportionment was inappropriate, and properly denied employer's request to expand issue of whether injuries sustained by claimant in noncompensable 1975 automobile accident contributed to her low-back injury arising from work-related accident in 1995, where claimant had worked for employer without incident for "at least a few years" prior to 1995 accident, she was asymptomatic with regard to any low back problems during that period, and she had no compensable lost time prior to 1995 accident. Woods v Marriott Corp., 285 A.D.2d 906, 728 N.Y.S.2d 819, 2001 N.Y. App. Div. LEXIS 7628 (N.Y. App. Div. 3d Dep't 2001).

312. —Other matters

Although claimant's claim was closed in 1945 because of his failure to appear, the Board reopened the case in 1948 and then, on conflicting testimony, found that as a result of the original accident claimant suffered injuries in the nature of a muscle spasm, limitation of motion in the lumbo-sacral junction and possibly a ruptured intervertebral disc. Tutokey v Carborundum Co., 284 A.D. 1076, 136 N.Y.S.2d 16, 1954 N.Y. App. Div. LEXIS 4609 (N.Y. App. Div. 1954), reh'g denied, 285 A.D. 987, 139 N.Y.S.2d 264, 1955 N.Y. App. Div. LEXIS 6385 (N.Y. App. Div. 1955).

Claimant had sustained an injury in 1937. In 1954, he sustained a further injury (twisting and stretching involved in placing a movie reel into a projector machine above his head justified finding of an accident). However, discharge of special disability fund was error necessitating reversal. Between the 2 accidents, claimant was under constant medical care, had to use cane while walking, needed taxi to transport himself to and from work, needed assistance to climb 3 steps into projection room and lost sight of right eye, all of which demonstrated obvious permanent conditions which were likely to be hindrances or obstacles to employment. Fact that claimant did regular work from 1937 to 1954 was not determinative. Simon v Columbia Pictures Corp., 8 A.D.2d 563, 183 N.Y.S.2d 326, 1959 N.Y. App. Div. LEXIS 9649 (N.Y. App. Div. 3d Dep't), amended, 8 A.D.2d 910, 187 N.Y.S.2d 1004, 1959 N.Y. App. Div. LEXIS 8091 (N.Y. App. Div. 3d Dep't 1959).

Where claimant, who had been employed as a presser for many years and also as a bricklayer on a seasonal basis, sustained accidental injuries while working as a bricklayer on June 9, 1953, in connection with which an award was made and compensation paid until July 12, 1954, but asserted, upon return to work as a presser prior to the latter date that he could not resume work as a bricklayer because of dizziness when working at heights, and had likewise sustained two prior nonindustrial accidents, there being a sharp conflict of evidence as to any causal relationship between the industrial accident and the dizziness, a finding of the board that there was no such relationship would be affirmed. Tumbiolo v Salvatore Amondres Constr. Co., 12 A.D.2d 531, 206 N.Y.S.2d 968, 1960 N.Y. App. Div. LEXIS 7223 (N.Y. App. Div. 3d Dep't 1960).

Where it was argued that claimant's condition was attributable to later accident rather than to one referred to in his claim, and testimony supporting such claim was attacked as being inconclusive, it was held that such testimony met test of Ernest v Boggs Lake Estates, Inc. 12 NY2d 414, 240 S2d 153, 190 NE2d 528, and hence that resolution of factual dispute was for board and court found no basis to disturb its determination. Hoffman v Plaza Hotel, 23 A.D.2d 604, 256 N.Y.S.2d 521, 1965 N.Y. App. Div. LEXIS 4876 (N.Y. App. Div. 3d Dep't 1965).

Determination of Workers' Compensation Board that claimant's right wrist carpel tunnel syndrome was not made materially and substantially greater by reason of preexisting impairment of his left hand was unsupported by record, which contained medical report indicating that prior left hand injury forced claimant to perform constant and repetitive activities involved in his work as inspector almost entirely with right hand; matter would be remitted for further findings on issue of liability of Special Disability Fund. Foos v Bausch & Lomb, Inc., 181 A.D.2d 951, 581 N.Y.S.2d 458, 1992 N.Y. App. Div. LEXIS 4147 (N.Y. App. Div. 3d Dep't 1992).

Upon finding that claimant was entitled to workers' compensation benefits for chronic bronchitis unrelated to his exposure to asbestos, board correctly concluded that self-insured employer was not entitled to offset of future compensation payments against proceeds of claimant's settlement of action against asbestos manufacturers because, inasmuch as compensation award was not based on same injury as settlement of third-party action, there was no double recovery and no reason to shift burden from self-insured employer to asbestos manufacturer. Murphy v New York City Police Dep't, 270 A.D.2d 733, 704 N.Y.S.2d 749, 2000 N.Y. App. Div. LEXIS 3122 (N.Y. App. Div. 3d Dep't 2000).

313. Causal relationship between accident and injury

Where the chain of causation between an accidental injury and ultimate disability remains unbroken, the injured employee is entitled to the statutory compensation provided by the Work. Comp. Law for ultimate disability resulting from accidental injury. Parchefsky v Kroll Bros., Inc., 267 N.Y. 410, 196 N.E. 308, 267 N.Y. (N.Y.S.) 410, 1935 N.Y. LEXIS 1233 (N.Y. 1935).

An award of death benefits is proper on the ground that the employee's death resulted from an accidental injury, even though the accident occurred some eight years prior to the employee's death. Eizenman v Newman, 275 A.D. 736, 87 N.Y.S.2d 154, 1949 N.Y. App. Div. LEXIS 4249 (N.Y. App. Div. 1949).

To be compensable, death from a heart attack has to result directly and naturally from an accidental injury. Gorkin v Gorkin's Meat Market, 33 A.D.2d 727, 305 N.Y.S.2d 178, 1969 N.Y. App. Div. LEXIS 2802 (N.Y. App. Div. 3d Dep't 1969).

In absence of contrary testimony, Workers' Compensation Board could not reject testimony of claimant's expert and fashion expert opinion of its own to conclude that claimant's stroke was not caused by work-related stress, but board could rule against claimant on causal relationship issue by finding that stress actually experienced at work was less that that assumed by his expert. Loftus v New York News, 279 A.D.2d 657, 719 N.Y.S.2d 314, 2001 N.Y. App. Div. LEXIS 62 (N.Y. App. Div. 3d Dep't 2001).

314. —Discovery or aggravation of unrelated conditions

Where an employee was admitted to a hospital for an infection in his finger and while there developed delirium tremens and died therefrom an award of compensation was reversed and the claim dismissed upon the ground that there was no substantial evidence to sustain the finding that the employee's death resulted from an accidental injury suffered while he was engaged upon his work. Robbins v Frohlich, 303 N.Y. 987, 106 N.E.2d 65, 303 N.Y. (N.Y.S.) 987, 1952 N.Y. LEXIS 1415 (N.Y. 1952).

Where a painter suffered a fracture of the pelvis as the result of a fall, and after three months in the hospital gangrenous appendicitis developed necessitating an operation which resulted in his death and the medical evidence establishes that the appendicitis was not a result of the accident, that the deceased would have recovered from the accident were it not for the appendicitis, and the appendicitis would not have been fatal except for the condition resulting from the accident, the accident was a contributing and indirect cause of death, an award of compensation is proper. Chambers v Universal Advertising Corp., 253 A.D. 854, 1 N.Y.S.2d 497, 1938 N.Y. App. Div. LEXIS 8903 (N.Y. App. Div. 1938).

Where an employee fell from a ladder, suffering a head injury and an operation performed to determine the extent of his injury revealed a brain tumor which was not the result of the accident and which was removed, an award of compensation is properly payable where the employee died as the result of the operation. Vanecek v Greeley Square Bldg. Corp., 278 A.D. 869, 104 N.Y.S.2d 214, 1951 N.Y. App. Div. LEXIS 5015 (N.Y. App. Div. 1951).

An operation for a bilateral inguinal hernia contracted in the employment was followed by post-operative pneumonia and, considerably later, a condition diagnosed as multiple sclerosis. This condition was causally related to the disability, operation and pneumonia. Pipero v Klar, 279 A.D. 960, 111 N.Y.S.2d 156, 1952 N.Y. App. Div. LEXIS 5427 (N.Y. App. Div. 1952).

A death benefit award was proper where after a 1946 injury to decedent's thumb, employer ordered a medical examination wherein it was discovered decedent had had a hernia since 1940 apparently aggravated by lifting in the course of his employment. Hence, an operation was advised and was apparently successfully performed but decedent died shortly thereafter of delirium tremens. Nichols v Colonial Beacon Oil Co., 284 A.D. 581, 132 N.Y.S.2d 72, 1954 N.Y. App. Div. LEXIS 3445 (N.Y. App. Div. 1954).

An award was sustained where there was substantial medical evidence that an accident to the decedent which occurred while he was working under a heavy press, aggravated a pre-existing "reactive depression" which necessitated the final electric shock treatment which caused the decedent's death. Rose v Newsday Newspaper, Inc., 4 A.D.2d 918, 167 N.Y.S.2d 6, 1957 N.Y. App. Div. LEXIS 4320 (N.Y. App. Div. 3d Dep't 1957), app. denied, 4 N.Y.2d 673, 1958 N.Y. LEXIS 1340 (N.Y. 1958).

Decedent sustained injury. He immediately felt pain in back and under right knee. He was found to be suffering from amyotrophic lateral sclerosis, a rare disease attacking spinal cord and nervous system for which neither cause nor cure was known. There was medical evidence that accident aggravated pre-existing disease and was contributing factor to death. Award affirmed. Rizzio v Liberty Dressing Co., 5 A.D.2d 902, 170 N.Y.S.2d 931, 1958 N.Y. App. Div. LEXIS 7411 (N.Y. App. Div. 3d Dep't), app. denied, 4 N.Y.2d 677, 1958 N.Y. LEXIS 1447 (N.Y. 1958).

Where claimant felt a sharp pain in his back while lifting a sack of flour on February 24, 1953, and, when treatment for a sprain did not relieve the pain, further medical investigation disclosed the presence of a block at the spine which turned out to be a tumor when an exploratory operation was performed October 20, 1953, with permission of the employer's insurance carrier, but the medical testimony established that the tumor had been developing for more than five years and was not accelerated by the back sprain, disallowance of benefits for postoperative care was proper. Mendygral v Lismore Bar & Grill, 7 A.D.2d 137, 180 N.Y.S.2d 953, 1958 N.Y. App. Div. LEXIS 3683 (N.Y. App. Div. 3d Dep't 1958), reh'g denied, 7 A.D.2d 958, 182 N.Y.S.2d 1023, 1959 N.Y. App. Div. LEXIS 9933 (N.Y. App. Div. 3d Dep't 1959), aff'd, 8 N.Y.2d 823, 202 N.Y.S.2d 325, 168 N.E.2d 392, 1960 N.Y. LEXIS 1237 (N.Y. 1960).

While lifting heavy handrail, claimant felt pain in his back. Pain persisted and tests for herniated discs were negative. Decedent was then referred to psychiatrist who prescribed shock treatments. As reaction to such treatment it was found that decedent suffered paraplegia. Further x-rays showed almost complete destruction of certain vertebrae. Condition of vertebrae was found on surgery to be due to metastatic neoplasm. Decedent died from spread of neoplasm. Held: it could be found that injury to lower back and cause of treatment resulting therefrom accelerated development of underlying bone pathology thereby advancing time of decedent's death. Sampson v Alco Products, Inc., 7 A.D.2d 663, 179 N.Y.S.2d 155, 1958 N.Y. App. Div. LEXIS 4304 (N.Y. App. Div. 3d Dep't 1958), app. denied, 5 N.Y.2d 710, 1959 N.Y. LEXIS 1997 (N.Y. 1959).

Although there was a conflict of medical testimony as to causal relationship between a fall suffered by decedent on September 23, 1955, when he slipped on oil in the cellar of an apartment house where he was a superintendent, striking his lower chest forcibly when he hit the edge of a concrete pit and suffered acute pain, following which he was hospitalized and under medical treatment with continued pain in the gastric region until operated on in March of 1956, when a large ulcer was discovered, and he died from peritonitis as the result of a surgical accident in trying to resect the ulcer, there was substantial evidence to sustain a finding of causal relationship and a compensation award. Badillo v 1215 Grand Concourse Corp., 8 A.D.2d 899, 187 N.Y.S.2d 54, 1959 N.Y. App. Div. LEXIS 8316 (N.Y. App. Div. 3d Dep't 1959), aff'd, 8 N.Y.2d 919, 204 N.Y.S.2d 164, 168 N.E.2d 835, 1960 N.Y. LEXIS 1145 (N.Y. 1960).

The evidence was sufficient to sustain a disability award following amputation of a leg where there was enough to support a finding that, in attempting to prevent certain spoilage, which he was taking from a basket and placing in a steel truck, from falling to the floor, claimant accidentally struck the leg at, or near, a point where there was already a highly malignant type of tumor subject to aggravation by trauma. De Angelo v American Can Co., 11 A.D.2d 571, 200 N.Y.S.2d 614, 1960 N.Y. App. Div. LEXIS 9920 (N.Y. App. Div. 3d Dep't 1960).

Testimony of medical experts that a head injury sustained by an employee in 1951 "possibly," "probably" or "could," have accelerated or aggravated her pre-existing tuberculosis condition, so as to cause her death in 1955 from tuberculosis, was sufficient to sustain an award of death benefits. Ernest v Boggs Lake Estate, Inc., 15 A.D.2d 698, 223 N.Y.S.2d 361, 1962 N.Y. App. Div. LEXIS 12017 (N.Y. App. Div. 3d Dep't 1962), aff'd, 12 N.Y.2d 414, 240 N.Y.S.2d 153, 190 N.E.2d 528, 1963 N.Y. LEXIS 1211 (N.Y. 1963).

Where the claimant became paraplegic as a result of a meningioma, a slow growing tumor on his spine, and the operating surgeon who removed such tumor testified to a causal relationship between the first of two industrial accidents and the aggravation or acceleration of such tumor but also stated that he would discount the second of such accidents as causing such aggravation or acceleration, his testimony constituted substantial evidence for the sole responsibility of the insurance carrier at the time of the first accident. Flanagan v Stella D'Oro Biscuit Co., 23 A.D.2d 912, 258 N.Y.S.2d 907, 1965 N.Y. App. Div. LEXIS 4275 (N.Y. App. Div. 3d Dep't 1965).

Finding of Workmen's Compensation Board that claimant's arteriosclerotic heart disease was aggravated by his work-related talcosis to extent that he was totally disabled was supported by substantial evidence. McIntosh v International Talc Co., 57 A.D.2d 671, 393 N.Y.S.2d 628, 1977 N.Y. App. Div. LEXIS 11699 (N.Y. App. Div. 3d Dep't 1977).

315. —Heart problems as caused by accidental injury or treatment thereof, generally

An award made to an elevator operator upon the theory that he was suffering from valvular heart disease rendering him unable to work, as a result of the falling of an elevator which he was operating, must be reversed, where it appears that no causal relation is shown to have existed between the accident and the valvular disease of the heart, and that there is no evidence that the claimant had heart disease until about seven months after the accident. Ryan v Vandam Warehouse Co., 208 A.D. 189, 203 N.Y.S. 447, 1924 N.Y. App. Div. LEXIS 5007 (N.Y. App. Div. 1924).

Death may be found to have resulted from an accidental injury where a truck driver, in very poor condition physically, was struck in the leg by a falling typewriter case, and developed recurrent attacks of severe erysipelas of the leg which in turn developed a condition of toxemia which affected the heart and eventually caused death. Frazee v United States Trucking Corp., 276 A.D. 802, 93 N.Y.S.2d 340, 1949 N.Y. App. Div. LEXIS 3366 (N.Y. App. Div. 1949).

A heart attack may be caused by an extraordinary physical exertion which occurred three days previously. Leventhal v W. B. & V. Rye Bread Corp., 278 A.D. 622, 101 N.Y.S.2d 800, 1951 N.Y. App. Div. LEXIS 4114 (N.Y. App. Div. 1951).

While on the premises of his employer, decedent struck his head on a door sustaining a small cut over his eye for which he received treatment. Later that day, he was taken to a hospital where his condition was diagnosed as myocardial infarction which resulted in his death. Held: decision that there was no causal relation between employment and cardiac condition and

resulting death affirmed. Batemarco v New York Times Co., 9 A.D.2d 569, 189 N.Y.S.2d 516, 1959 N.Y. App. Div. LEXIS 7422 (N.Y. App. Div. 3d Dep't), reh'g denied, 9 A.D.2d 699, 191 N.Y.S.2d 559, 1959 N.Y. App. Div. LEXIS 6887 (N.Y. App. Div. 3d Dep't 1959).

Dismissal of a heart attack claim by the Board would not be reversed where it was based upon acute pains allegedly suffered by claimant, co-owner of an incorporated retail haberdashery shop, while carrying a form and coat weighing 35 pounds to be used for window display. Botwinick v Arnolds Men Shop, Inc., 12 A.D.2d 868, 210 N.Y.S.2d 87, 1961 N.Y. App. Div. LEXIS 13040 (N.Y. App. Div. 3d Dep't 1961).

Where the medical testimony was conflicting as to whether an employee's death in 1958 was causally related to a compensable heart accident suffered by him in 1953, and it appeared that he had been paid full compensation benefits for permanent disability in the interim, an award of death benefits was sustained. Patterson v Vreeland, 16 A.D.2d 722, 226 N.Y.S.2d 713, 1962 N.Y. App. Div. LEXIS 10334 (N.Y. App. Div. 3d Dep't 1962).

Whether a particular event constitutes an industrial accident is to be determined, not by any legal definition, but by the commonsense viewpoint of the average man, and it cannot be said that the ordinary work of an automobile mechanic is, per se, sufficiently strenuous to bring on a fatal heart attack. Hawthorne v Eagle Delivery Truck Renting Corp., 20 A.D.2d 824, 247 N.Y.S.2d 448, 1964 N.Y. App. Div. LEXIS 4262 (N.Y. App. Div. 3d Dep't 1964).

Upon conflicting medical testimony as to causal relationship between a 1957 industrial accident and claimant's death by coronary artery disease in 1960 the Board could make an award of death benefits to decedent's widow and child. Adamski v New York State Workmen's Compensation Board, 21 A.D.2d 715, 249 N.Y.S.2d 476, 1964 N.Y. App. Div. LEXIS 3836 (N.Y. App. Div. 3d Dep't 1964).

Determination of board that decedent's death was causally connected with heart attack for which he received compensation 11 years before, held to be fully supported by substantial evidence. Gracie v C. E. Halback Co., 23 A.D.2d 612, 256 N.Y.S.2d 352, 1965 N.Y. App. Div. LEXIS 4825 (N.Y. App. Div. 3d Dep't 1965).

Award for heart attack affirmed upon evidence of causal relationship between claimant's work and his heart attack. Nicolas v August Luchow, Inc., 32 A.D.2d 1004, 302 N.Y.S.2d 182, 1969 N.Y. App. Div. LEXIS 3463 (N.Y. App. Div. 3d Dep't), app. denied, 25 N.Y.2d 741, 1969 N.Y. LEXIS 1897 (N.Y. 1969).

Heart attack causally related to stress and anxiety brought about by employer's conduct in challenging employee's compensation claim is compensable where employer continues to resist paying disability benefits after hearing officers have ruled in favor of employee in several decisions. Turdo v New York City Dep't of Sanitation, 117 A.D.2d 861, 498 N.Y.S.2d 575, 1986 N.Y. App. Div. LEXIS 53135 (N.Y. App. Div. 3d Dep't), app. denied, 68 N.Y.2d 609, 508 N.Y.S.2d 1025, 500 N.E.2d 874, 1986 N.Y. LEXIS 21226 (N.Y. 1986).

Workers' Compensation Board properly denied claim for death benefits, despite conflicting medical testimony as to whether decedent's heart attack occurred while he was working or whether it had actually begun earlier that morning before he arrived at work, where cardiologist who treated decedent at hospital on day of his death testified that because decedent's chest pains reportedly began when he awoke at 5:00 a.m. to 5:15 a.m. and continued all morning, heart attack began prior to time he started work, and cardiologist also testified that decedent's abnormally high "CPK" readout from 10:45 a.m. blood test was indicative of myocardial infarction that had begun 4 to 6 hours earlier, and hospital records prepared on day of incident supported cardiologist's testimony. Becker v Stryco Constr. Co., 252 A.D.2d 843, 675 N.Y.S.2d 450, 1998 N.Y. App. Div. LEXIS 8582 (N.Y. App. Div. 3d Dep't 1998).

Claim for workers' compensation benefits was properly denied, even though claimant submitted report and affirmation of expert who opined that decedent's death from fatal heart attack was causally related to his employment as newspaper delivery person, where Workers' Compensation Board found such evidence conclusory and equivocal and, instead, accepted opinion of employer's expert, who concluded that decedent's death was result of coronary thrombosis superimposed on chronic atherosclerotic change unrelated to his work. Estate of Hertz v Gannett Rochester Newspapers, 272 A.D.2d 814, 709 N.Y.S.2d 222, 2000 N.Y. App. Div. LEXIS 5940 (N.Y. App. Div. 3d Dep't 2000).

When a worker suffered a fatal heart attack on the job, and a workers' compensation law judge (WCLJ) found the heart attack was not causally related to the worker's employment, under N.Y. Comp. Codes R. & Regs. tit. 12 § 300.13(g), the Workers' Compensation Board could reject new evidence submitted to it when the worker's widow sought review of the WCLJ's decision, because the widow did not give an excuse for her failure to present this evidence to the WCLJ. Manley v Mun. Hous. Auth. of Utica, 306 A.D.2d 602, 759 N.Y.S.2d 710, 2003 N.Y. App. Div. LEXIS 6359 (N.Y. App. Div. 3d Dep't 2003).

316. — —Subsequent heart attacks as caused by prior job related attack

Evidence was insufficient to establish a causal relation between an accidental injury sustained by decedent in 1951 when he fell from a ladder and injured his left shoulder, left arm and right ankle and his subsequent death in 1953 as a result of a coronary occlusion following a second extensive abdominal operation for ulcers. La Bella v Rayold Foods, Inc., 4 A.D.2d 901, 166 N.Y.S.2d 849, 1957 N.Y. App. Div. LEXIS 4291 (N.Y. App. Div. 3d Dep't 1957).

Causal relation between accident of December 18, 1949, resulting in coronary occlusion with myocardial infarction, and second coronary occlusion and myocardial infarction on May 15, 1955, resulting in death on same day properly found. Wachsstock v Skyview Transp. Co., 5 A.D.2d 1028, 173 N.Y.S.2d 405, 1958 N.Y. App. Div. LEXIS 6184 (N.Y. App. Div. 3d Dep't 1958).

In June, 1952, decedent, while working in course of employment, suffered accident which was diagnosed as a myocardial infarction for which he was compensated. After a short time he returned to the same work but continued under care of physician. In July, 1956, while riding home with fellow employee, he suffered further heart disorder resulting in his death. Medical evidence as to causal relation was conflicting. Decision of no causal relation affirmed. Nierenberg v Clover Leaf Paint & Varnish Co., 7 A.D.2d 773, 179 N.Y.S.2d 920, 1958 N.Y. App. Div. LEXIS 4092 (N.Y. App. Div. 3d Dep't 1958).

In absence of medical proof that claimant's disability following second heart attack was related to first heart attack, there was no substantial evidence to sustain a finding by the Board. Award reversed. Berger v Bodner Bakery, 8 A.D.2d 861, 186 N.Y.S.2d 884, 1959 N.Y. App. Div. LEXIS 8256 (N.Y. App. Div. 3d Dep't 1959).

Where decedent suffered an accidental injury arising out of and in course of employment on May 1, 1955, resulting in a coronary occlusion for which he was given an award at reduced earnings, but it was not disputed that he had theretofore suffered infarctions due to an arteriosclerotic condition not induced by his work, it was within the Board's power to award death benefits following his death in 1959 while sitting in a chair viewing television on the basis of medical testimony that his death was causally related to the 1955 accidental injury. Syvertson v Estate of Freudenberg, 16 A.D.2d 721, 226 N.Y.S.2d 852, 1962 N.Y. App. Div. LEXIS 10332 (N.Y. App. Div. 3d Dep't 1962).

Upon the issue of whether a particular heart attack by a taxi driver was brought on by unusual exertion, an earlier heart attack having been determined to be compensable, causal relationship was a question of fact for determination by the Board and its determination that the second attack was not brought on or caused by the first or by the amount of driving done by claimant on the day on which it occurred the Board could find that it did not, notwithstanding inconsistency in so finding after finding the original attack was compensable. Lerner v Terrycab Co., 20 A.D.2d 615, 245 N.Y.S.2d 565, 1963 N.Y. App. Div. LEXIS 2612 (N.Y. App. Div. 3d Dep't 1963).

Where in 1961 as a result of operation for hernia caused by compensable industrial accident decedent sustained myocardial infarction, and subsequently died in 1964 following a new coronary thrombosis and myocardial infarction, board's acceptance of

medical testimony of causal relationship between accidental injury in 1961 and death in 1964 was upheld. Petit v Buckley School, 28 A.D.2d 1052, 284 N.Y.S.2d 117, 1967 N.Y. App. Div. LEXIS 3187 (N.Y. App. Div. 3d Dep't 1967).

The evidence supported the board's finding that there was no causal relationship between claimant's current coronary insufficiency and injury sustained while on the job a year and a half preceding hospitalization for heart ailment where claimant continued to work for most of the intervening period. Di Giovanni v Rheingold Breweries, 40 A.D.2d 1047, 338 N.Y.S.2d 674, 1972 N.Y. App. Div. LEXIS 3095 (N.Y. App. Div. 3d Dep't 1972).

317. — —Insufficient relation back to prior incident or injury

A finding that a heart condition was causally related to an injury suffered which required the amputation of four fingers is proper, where there is medical opinion associating the circulatory disturbances with the accident and the testimony of both the employee and that of his fellow employees placed the onset of the cardiac symptoms at or shortly after the time of the injury. Hamilton v Lenz & Riecker, Inc., 274 A.D. 1079, 85 N.Y.S.2d 567, 1949 N.Y. App. Div. LEXIS 6141 (N.Y. App. Div. 1949).

In course of employment in 1949, decedent fell and struck his head on machine. Because of persistent pains in head, he subsequently stopped work, was admitted to hospital in 1953 and died in 1955. On admittance to hospital, diagnosis was psychosis with cerebral arteriosclerosis which death certificate state to be noncontributory. Cause of death was stated as arteriosclerotic heart disease. Held: accident aggravated pre-existing arterial sclerosis so as to precipitate psycosis which was factor in death and causally related thereto. Ramos v Wolf Die Cutting Co., 7 A.D.2d 686, 179 N.Y.S.2d 270, 1958 N.Y. App. Div. LEXIS 4341 (N.Y. App. Div. 3d Dep't 1958).

There was sufficient evidence to sustain causal relationship between an acute myocardial infarction and a fall from a ladder sustained by claimant on the same day where it appeared that the ladder from which he fell likewise fell and struck claimant on the chest, following which he immediately felt chest pains and became very sick. De Luca v Garrett & Co., 12 A.D.2d 569, 206 N.Y.S.2d 839, 1960 N.Y. App. Div. LEXIS 7277 (N.Y. App. Div. 3d Dep't 1960), app. denied, 9 N.Y.2d 609, 1961 N.Y. LEXIS 1625 (N.Y. 1961).

Death of an employee in 1957 from a cardiac condition attributed to an industrial accident in 1950 was sufficiently related back to the accident to sustain an award of death benefits where, following the accident, he was given a disability award for myocardial infarction and was thereafter under medical care continuously until his death. Rothenberg v Le Huray & Co., 12 A.D.2d 678, 207 N.Y.S.2d 946, 1960 N.Y. App. Div. LEXIS 6746 (N.Y. App. Div. 3d Dep't 1960).

Where the evidence indicated that the work activities of the deceased in responding to an emergency call involved acute exertion and undue excitement which contributed to the cardiac failure and the death, award affirmed. Stubbs v Great Neck Estates, 35 A.D.2d 863, 315 N.Y.S.2d 101, 1970 N.Y. App. Div. LEXIS 3598 (N.Y. App. Div. 3d Dep't 1970), app. denied, 28 N.Y.2d 483, 1971 N.Y. LEXIS 1749 (N.Y. 1971).

318. —Sufficient relation back to prior incident or injury

Medical evidence justified decision of the board disallowing a claim for death benefits on the ground that decedent's death from a coronary occlusion was not related to an industrial accident some 13 years before his death. Kappes v Remington Rand, Inc., 3 A.D.2d 611, 157 N.Y.S.2d 1010, 1956 N.Y. App. Div. LEXIS 3420 (N.Y. App. Div. 3d Dep't 1956), app. denied, 3 A.D.2d 799, 161 N.Y.S.2d 581, 1957 N.Y. App. Div. LEXIS 6218 (N.Y. App. Div. 3d Dep't 1957).

Decedent suffered back injury in course of employment. Several days later he suffered heart attack and died. Decision disallowing claim for death benefits affirmed. Reilly v Consolidated Edison Co., 5 A.D.2d 1027, 173 N.Y.S.2d 421, 1958 N.Y. App. Div. LEXIS 6182 (N.Y. App. Div. 3d Dep't 1958).

Claimant suffered fractured rib while working. X-ray indicated that fracture had healed. Thereafter, claimant complained of pain in area of fractured rib. Physicians who had examined and treated claimant stated that he had completely recovered from fracture and that he was suffering from hypertensive heart condition in no way related to accident and that pain was caused by heart condition. Award reversed for want of evidence for causal relation. Fiore v Wilson & Greene Lumber Co., 7 A.D.2d 798, 180 N.Y.S.2d 820, 1958 N.Y. App. Div. LEXIS 3723 (N.Y. App. Div. 3d Dep't 1958).

Death from a heart attack is not a natural and ordinary result of a back injury sustained 15 years previously. Gorkin v Gorkin's Meat Market, 33 A.D.2d 727, 305 N.Y.S.2d 178, 1969 N.Y. App. Div. LEXIS 2802 (N.Y. App. Div. 3d Dep't 1969).

319. —Cancer as caused or aggravated by accidental injury

An award of compensation is improper where a woman employed in a department store fainted while pulling out a large drawer which fell on her chest, and after working some seven months, was operated on for breast cancer, but later returned to her work at which she continued until she resigned because of a disagreement with her superior and there is no evidence that the claimant is not perfectly able to perform the services required of her. Schapiro v Wanamaker, 197 A.D. 810, 189 N.Y.S. 343, 1921 N.Y. App. Div. LEXIS 7562 (N.Y. App. Div. 1921).

A finding that breast cancer suffered by a dress examiner resulted from striking her left breast against an iron rack after tripping is proper. Mesibov v Sears, Roebuck & Co., 275 A.D. 734, 87 N.Y.S.2d 180, 1949 N.Y. App. Div. LEXIS 4243 (N.Y. App. Div. 1949).

An award for death benefits should be reversed and death claim dismissed where claim was based upon death from cancer while deceased was hospitalized for a back injury. No substantial evidence substantiated the award where attending physician, operating surgeon and medical examiner all agreed that cancer was unrelated to accident and only evidence to contrary was opinion evidence of a doctor who had never seen decedent. Backstrom v Turner Const. Co., 284 A.D. 368, 132 N.Y.S.2d 126, 1954 N.Y. App. Div. LEXIS 3404 (N.Y. App. Div. 1954).

An industrial accident in which decedent suffered a herniated lumbar disc which required subsequent hospitalization and operation was not a cause of his death 2 months later from metastatic carcinoma. Medical proof was not sufficiently clear to permit a finding of causal relationship. Du Cennois v Daisy Dairy, Inc., 286 A.D. 923, 142 N.Y.S.2d 880, 1955 N.Y. App. Div. LEXIS 4523 (N.Y. App. Div. 1955).

Evidence supported a denial of compensation where decedent, a neon sign worker, died several months after falling from a ladder and there was medical opinion that there was no causal connection between the fall and his subsequent death from carcinoma. Finley v Higger Sign Co., 3 A.D.2d 617, 158 N.Y.S.2d 44, 1956 N.Y. App. Div. LEXIS 3430 (N.Y. App. Div. 3d Dep't 1956).

Evidence was not sufficient to sustain a finding that an accident, whereby an employee struck his head upon a door jam in the course of his employment, aggravated the employee's underlying brain tumor and that there was any causal relation between the blow and his subsequent death after an operation. Kornblum v S & S Produce, Inc., 4 A.D.2d 719, 163 N.Y.S.2d 776, 1957 N.Y. App. Div. LEXIS 5129 (N.Y. App. Div. 3d Dep't 1957).

Decedent's claim was based on purported aggravation of a carcinoma of the stomach from accidental causation when a truck moved while decedent was lifting and trying to hold a carton. Held: evidence was sufficient to show causal relationship. Morrello v S. H. Kress & Co., 6 A.D.2d 929, 176 N.Y.S.2d 42, 1958 N.Y. App. Div. LEXIS 5247 (N.Y. App. Div. 3d Dep't 1958).

Under conflicting medical testimony as to whether the trauma resulting from a fall could have aggravated an existing breast cancer, which eventually resulted in death, weight of the evidence was for the Board and an award of disability and death benefits would not be upset. Smith v Durham Aircraft Service, Inc., 11 A.D.2d 552, 200 N.Y.S.2d 76, 1960 N.Y. App. Div. LEXIS 10184 (N.Y. App. Div. 3d Dep't 1960).

There being substantial medical evidence to support a finding of the board of causal relationship between disability and death of a jewelry salesman from a malignant tumor on his leg, and subsequent spread of the malignant condition, and the occasion

on which his leg was struck by a swinging door operated under spring tension, resulting in sharp pain, an award of compensation and death benefits would not be overturned. Lefkowitz v Silverstein, 11 A.D.2d 841, 203 N.Y.S.2d 122, 1960 N.Y. App. Div. LEXIS 8514 (N.Y. App. Div. 3d Dep't 1960).

An award of death benefits was sustained, as being supported by substantial medical testimony, where decedent died from cancer on May 18, 1958, notwithstanding the cancerous condition of his right lung was discovered in June, 1957, an operation to remove the cancer then being deemed inadvisable, though it would have prolonged his life could it have been performed, because of the already existing cancerous condition of his left lung due to an accident sustained in 1956 which aggravated a preexisting emphysema. Lighter v I. Freeman & Sons, Inc., 14 A.D.2d 470, 217 N.Y.S.2d 799, 1961 N.Y. App. Div. LEXIS 9791 (N.Y. App. Div. 3d Dep't 1961).

There was sufficient evidence to sustain board findings that an accidental back injury aggravated an existing spinal cord sarcoma, accelerating its growth and resulting in hastening decedent's death, warranting awards of disability and death benefits. Mattfield v Ward Baking Co., 14 A.D.2d 942, 221 N.Y.S.2d 224, 1961 N.Y. App. Div. LEXIS 7878 (N.Y. App. Div. 3d Dep't 1961).

There was sufficient medical testimony to support findings of the Board that death of an employee from lung cancer seven years after being struck on the left breast by falling timbers while at work, aggravating a pre-existing tumor and causing an amputation of the left breast to remove the tumor after it became cancerous, was causally related to the accident. Smith v County of Erie, 15 A.D.2d 585, 221 N.Y.S.2d 756, 1961 N.Y. App. Div. LEXIS 7267 (N.Y. App. Div. 3d Dep't 1961).

There was sufficient evidence to sustain a finding of causal relationship between a 1954 heart accident and decedent's subsequent death in 1959 due to cancer where it appeared that, after the deceased's 1954 heart attack, he was awarded disability compensation, subsequently suffered an unrelated heart attack, was determined in 1957 to be suffering from cancer for which an operation was imperative to prolong his life, but suffered a pulmonary edema while awaiting the operation which made his condition so critical that the operation was never performed and later died from the cancer. Murray v Direen Operating Co., 15 A.D.2d 851, 224 N.Y.S.2d 571, 1962 N.Y. App. Div. LEXIS 11426 (N.Y. App. Div. 3d Dep't 1962).

It being conceded that the operation following which decedent eventually died from a pre-existing cancerous condition had no relationship to a precedent accident in course of his employment in which he suffered merely a bruise, but was performed merely by reason of a false diagnosis, death was not compensable. Sicker v Karl Schroll & Associates, Inc., 19 A.D.2d 925, 244 N.Y.S.2d 20, 1963 N.Y. App. Div. LEXIS 2979 (N.Y. App. Div. 3d Dep't 1963).

Board in exercise of its prerogative to determine credibility and conflicts of proof, held amply warranted in finding that preexisting malignant condition was aggravated by accidental injury in question, and could accept a part of any medical opinion without accepting whole. Jackson v Aarlin Realty Co., 23 A.D.2d 598, 256 N.Y.S.2d 354, 1965 N.Y. App. Div. LEXIS 4865 (N.Y. App. Div. 3d Dep't 1965).

Where taxicab driver was injured by an automobile accident in the course of his employment and sustained injuries therein resulting in a partial paralysis of all four extremities with loss of bowel and bladder function and control, followed by confinement in various hospitals until his sudden death about a year and a half later which an autopsy found to be caused by annular stenosing carcinoma of the sigmoid colon with infarction and perforation with fecalperitonitis and there was ample medical proof that a loss of sensation in the lower bowel due to the quadriplegia masked the symptoms of the disease thus preventing its diagnosis in time to perform needed surgery, there was substantial evidence to support the board's finding that the death was causally related to the industrial accident. Namanowich v En Operating Corp., 23 A.D.2d 912, 258 N.Y.S.2d 937, 1965 N.Y. App. Div. LEXIS 4274 (N.Y. App. Div. 3d Dep't 1965), aff'd, 17 N.Y.2d 642, 269 N.Y.S.2d 140, 216 N.E.2d 342, 1966 N.Y. LEXIS 1514 (N.Y. 1966).

Where the record disclosed a sharp difference of medical opinion based largely on the role of injury in the etiology of cancer, as to whether a trauma resulting from stepping into a hole in the aisle of defendant's airplane caused or aggravated a malignant tumor of the testis, the court could not say that in the exercise of its fact-finding power the board's reliance on the proof favoring such causation lacked rational support in the record. Daniels v American Airlines, Inc., 24 A.D.2d 677, 261 N.Y.S.2d 169, 1965 N.Y. App. Div. LEXIS 3679 (N.Y. App. Div. 3d Dep't 1965).

Evidence supported determination that workers' compensation claimant sustained compensable injury where (1) claimant struck his head on metal bar and was stunned, but did not lose consciousness, (2) 2 months later, claimant noticed swelling in area of blow to head and sought medical attention, and (3) claimant underwent surgery for removal of large benign meningioma tumor; although neurosurgeon who performed surgery and employer's consultant testified that meningioma was not causally related to blow to head, claimant's physician testified that injury possibly aggravated preexisting small lesion and theorized that hemorrhage could have caused growth of tumor. Perry v Georgia Pac. Corp., 195 A.D.2d 658, 599 N.Y.S.2d 333, 1993 N.Y. App. Div. LEXIS 6901 (N.Y. App. Div. 3d Dep't 1993).

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Despite conflicting medical evidence as to whether workers' compensation claimant's form of cancer (multiple myeloma) could be caused by formaldehyde exposure, sufficient factual predicate for finding of causation was provided by claimant's experts, who were (1) former toxicologist for County Health Department, who had conducted investigation into claimant's formaldehyde exposure, (2) specialist in occupational medicine, (3) specialist in immunology, and (4) claimant's family physician. Morrell v Onondaga County, 238 A.D.2d 805, 656 N.Y.S.2d 512, 1997 N.Y. App. Div. LEXIS 4143 (N.Y. App. Div. 3d Dep't), app. denied, 90 N.Y.2d 808, 664 N.Y.S.2d 269, 686 N.E.2d 1364, 1997 N.Y. LEXIS 3100 (N.Y. 1997).

320. —Mental deterioration; personality changes, depression and the like

While expressly refraining from deciding whether an occurrence arising out of and in course of employment which causes psychological trauma may in any case be compensable in the absence of physical injury sustained by claimant, a holding by the Appellate Division reversing a compensation award made by the Workmen's Compensation Board to a taxi driver who suffered a type of schizophrenia after his cab struck a pedestrian, without any physical injury sustained by claimant, was affirmed. Chernin v Progress Service Co., 9 N.Y.2d 880, 216 N.Y.S.2d 697, 175 N.E.2d 827, 1961 N.Y. LEXIS 1298 (N.Y. 1961).

An award to a claimant who was struck on the head by a furnace poker on November 30th, 1938 and who on April 8th, 1939 was taken to the hospital suffering from a traumatic psychosis of the traumatic personality disorder type is proper as against the employer's contention that there was no causal relation. Curry v Prudence Bonds Corp., 264 A.D. 798, 34 N.Y.S.2d 670, 1942 N.Y. App. Div. LEXIS 4776 (N.Y. App. Div. 1942).

Evidence was insufficient to sustain an award based on theory that injury to an employee's left leg was a precipitating factor in development of employee's subsequent psychotic condition observed a few months after injury. Jarecki v John T. Clark & Son, 3 A.D.2d 612, 157 N.Y.S.2d 994, 1956 N.Y. App. Div. LEXIS 3422 (N.Y. App. Div. 3d Dep't 1956).

Claimant sustained an accident in 1941 resulting in the amputation of his left arm below the elbow. And in 1950 he was committed to a state mental institution. Psychiatrist at the hospital testified that the 1941 accident was a factor in precipitating mental illness, which was first observed by claimant's father and brother in 1948 and 1948. Held: award affirmed. Edmonds v Kalfaian & Son, Inc., 9 A.D.2d 551, 189 N.Y.S.2d 456, 1959 N.Y. App. Div. LEXIS 7395 (N.Y. App. Div. 3d Dep't 1959).

In 1945, in the course of his employment, decedent became weak and dizzy and his condition was diagnosed as a ruptured blood vessel of the brain and left hemiplegia resulted. He was paid compensation for total disability until his death in 1954. In the interval his condition grew worse and he developed mental changes. On conflicting medical testimony Board properly found that death was causally related to accident. Heybrouck v Forst Packing Co., 9 A.D.2d 555, 189 N.Y.S.2d 359, 1959 N.Y. App. Div. LEXIS 7401 (N.Y. App. Div. 3d Dep't 1959).

Where claimant was employed as an assembler in an appliance factory and was struck on the head by a fragment of a grinding wheel when the wheel broke, causing a deep laceration in the right parietal region of her head, and not long thereafter was diagnosed by a qualified neurologist as suffering a post-concussion syndrome, later developing headaches and personality changes so that she was finally given a 50 percent disability rating by the board, it could not be said that there was no substantial evidence to relate the disability back to the accident of the preceding year. Landro v Delco Appliance Div. General Motors Corp., 11 A.D.2d 590, 200 N.Y.S.2d 530, 1960 N.Y. App. Div. LEXIS 9945 (N.Y. App. Div. 3d Dep't 1960).

There was substantial evidence to sustain a compensation award to a claimant on the basis of his progressive mental deterioration and loss of memory following injury sustained when an explosion in his employer's plant blew out portions of a wall which struck claimant on the head and elsewhere on the body causing various severe contusions. Russo v Art Steel Co., 14 A.D.2d 605, 218 N.Y.S.2d 407, 1961 N.Y. App. Div. LEXIS 9380 (N.Y. App. Div. 3d Dep't 1961).

Evidence supported finding of Workmen's Compensation Board that claimant's mental disability denominated as conversion hysteria resulted from original compensable injury to claimant's wrist. Knief v Great Atlantic & Pacific Tea Co., 30 A.D.2d 748, 291 N.Y.S.2d 463, 1968 N.Y. App. Div. LEXIS 3603 (N.Y. App. Div. 3d Dep't 1968).

Evidence supported determination of Workers' Compensation Board that claimant's mental disorder was not precipitated by his employment as mental hygiene therapy aide, or by patient abuse investigation in which he was charged with withholding information, where claimant's psychiatrist acknowledged that there was nothing about claimant's job that would naturally contribute to his neurosis, and psychiatrist who testified for workers' compensation carrier did not reach conclusive diagnosis and did not find that claimant's work caused his disability; employment-related psychological disorder does not, ipso facto, qualify as occupational disease for compensation purposes. Patnode v Rome Developmental Center, 150 A.D.2d 868, 540 N.Y.S.2d 899, 1989 N.Y. App. Div. LEXIS 5461 (N.Y. App. Div. 3d Dep't 1989).

Evidence supported board's finding that claimant sustained accidental psychic injury arising out of and in course of her employment, where claimant testified that she was suffering from stress and anxiety due to incidents of sexual harassment at her workplace, and both claimant's and employer's medical experts testified that claimant was suffering from posttraumatic stress disorder which was causally related to those incidents. Brown v Alos Micrographics Corp., 150 A.D.2d 888, 540 N.Y.S.2d 911, 1989 N.Y. App. Div. LEXIS 6199 (N.Y. App. Div. 3d Dep't 1989).

Accountant's mental injury did not result from any employment-related "accident," and thus he was not entitled to workers' compensation benefits, where (1) testimony of insurer's psychiatric expert supported finding that stress precipitating accountant's mental disorders was not product of harassment but of ordinary workplace irritations, (2) that conclusion was corroborated by accountant's medical expert, who diagnosed him as having paranoid personality, which is condition characterized by baseless belief that one is being persecuted or harassed, and (3) accountant's personnel file disclosed that he repeatedly had made unsubstantiated accusations of discrimination and unfair treatment when in fact his own disruptive behavior or documented shortcomings had led to actions complained of. Hernandez v Domino Sugar Corp., 245 A.D.2d 680, 664 N.Y.S.2d 892, 1997 N.Y. App. Div. LEXIS 12572 (N.Y. App. Div. 3d Dep't 1997).

Police officer was not entitled to compensation for depression where the officer's major depressive illness was brought about by ongoing frustration he perceived in his police work, which did not by itself rise to the level of compensability, along with the trauma of his brother's arrest, the officer's disciplinary action for insubordination, and the officer's leaving of his wife. Youngs v Vill. of Penn Yan, 291 A.D.2d 852, 737 N.Y.S.2d 186, 2002 N.Y. App. Div. LEXIS 985 (N.Y. App. Div. 4th Dep't 2002).

A workers' compensation board properly denied a worker's claim for workers' compensation benefits, because while the board erred in determining that the claim was barred by N.Y. Workers' Comp. Law § 2(7) as there was no indication in the record that the worker's stress was caused as a direct consequence of him being disciplined, evaluated, transferred, demoted, or terminated, substantial evidence in the record supported the board's determination that the stress encountered by the worker was no greater than that which usually occurred in the normal work environment, and that there was no causal connection between the worker's panic disorders and depression and any work stressors. Matter of Mason v Reunion Indus. Inc., 32 A.D.3d 633, 820 N.Y.S.2d 168, 2006 N.Y. App. Div. LEXIS 9942 (N.Y. App. Div. 3d Dep't 2006).

321. —Mental deterioration; suicide

After claimant suffered accident in course of employment, he came home, after a stay at a hospital during which time he was frightened and depressed, and committed suicide. Proof was held sufficient to show that he suffered mental derangement in the nature of disease caused by accident and leading to suicide. Death benefit award affirmed. Maricle v Glazier, 307 N.Y. 738, 121 N.E.2d 549, 307 N.Y. (N.Y.S.) 738, 1954 N.Y. LEXIS 1464 (N.Y. 1954).

Suicide is the proximate and direct result of accidental injuries where the decedent was injured while delivering packages for his employer when he slipped and fell on icy steps and struck his head, suffering injuries in the nature of a traumatic psychosis, changes in brain function, concussion of the brain, change of personality, confusion, dizziness and a sense of pushing forward, as well as frequent crying spells. Lockwood v Luckey Platt & Co., 267 A.D. 930, 46 N.Y.S.2d 937, 1944 N.Y. App. Div. LEXIS 5562 (N.Y. App. Div. 1944).; See also Delinousha v National Biscuit Co., 248 N.Y. 93, 161 N.E. 431, 248 N.Y. (N.Y.S.) 93, 1928 N.Y. LEXIS 1228 (N.Y. 1928).

A finding by the board that a psychosis and melancholia was induced by a fall suffered by an employee which rendered him disabled until the date of his suicide will be sustained where there is expert opinion indicating a causal relation, even though the suicide did not occur until eight years after the original injury. Commissioner of Taxation & Finance v Hedstrom-Spaulding, Inc., 272 A.D. 857, 70 N.Y.S.2d 362, 1947 N.Y. App. Div. LEXIS 3926 (N.Y. App. Div.), aff'd, McGovern v Curran, 297 N.Y. 479, 74 N.E.2d 184, 297 N.Y. (N.Y.S.) 479, 1947 N.Y. LEXIS 988 (N.Y. 1947).

Where the deceased employee sustained an injury in the course of his employment which required the amputation of part of his left hand and several months later he committed suicide, a finding that the injury and operation caused the decedent to become restless, nervous, and depressed causing his ultimate suicide, is improper where there is no finding or medical testimony to sustain the finding that the decedent was suffering from a mental derangement in the nature of a disease. Wessells v Lockport Cotton Batting Co., 275 A.D. 733, 87 N.Y.S.2d 186, 1949 N.Y. App. Div. LEXIS 4238 (N.Y. App. Div. 3d Dep't 1949).

A death benefit award should be reversed where records show that in a compensable accident in 1947, decedent suffered a head injury but no claim was made of mental derangement until after 1949 when decedent (after assaulting his wife) committed suicide. Records show that although 1947 accident caused a change in personality of decedent from cheerful to moody, decedent was of

an unstable and assaultive disposition prior to the accident. Seal v Effron Fuel Oil Co., 284 A.D. 795, 135 N.Y.S.2d 231, 1954 N.Y. App. Div. LEXIS 3501 (N.Y. App. Div. 1954).

Decedent was involved in an automobile accident in the course of his work. Thereafter he suffered from sleeplessness, headaches, and dizziness and developed suicidal tendencies. Within six months he committed suicide. The issue of causal connection was in the realm of fact, and the proof was sufficient to sustain the award. Levita v Plymouth Rock Provision Co., 3 A.D.2d 784, 160 N.Y.S.2d 59, 1957 N.Y. App. Div. LEXIS 6194 (N.Y. App. Div. 3d Dep't 1957).

The medical testimony was sufficient to sustain a causal connection between an accident whereby the employee sustained serious head injuries allegedly causing him to develop a severe depression and his subsequent death where he either jumped or fell from a hospital window. Nohe v Sheffield Farms Co., 4 A.D.2d 711, 163 N.Y.S.2d 455, 1957 N.Y. App. Div. LEXIS 5121 (N.Y. App. Div. 3d Dep't 1957).

For an accidental injury to be held to be the cause of a suicidal act, it must be proved that the act was the product of some form of mental disease, which resulted from the injury. Estate of Vernum v State University of New York College of Forestry, 4 A.D.2d 722, 163 N.Y.S.2d 727, 1957 N.Y. App. Div. LEXIS 5132 (N.Y. App. Div. 3d Dep't 1957).

Evidence supported a finding that an accident in the nature of a myocardial infarction did not cause insanity or mental disease which, in turn, caused the employee's suicide and hence, death benefits were denied. Estate of Vernum v State University of New York College of Forestry, 4 A.D.2d 722, 163 N.Y.S.2d 727, 1957 N.Y. App. Div. LEXIS 5132 (N.Y. App. Div. 3d Dep't 1957).

Evidence was insufficient to support a finding that decedent's fall from a ladder caused a cerebral concussion and other injuries and that these injuries and his discharge from employment resulted in a depression, suicidal tendencies and mental derangement in the nature of a disease which caused his death by suicide about 4 months after the accident. Hence, an award for death benefits was reversed. Tycz v New York Tel. Co., 4 A.D.2d 991, 168 N.Y.S.2d 19, 1957 N.Y. App. Div. LEXIS 3864 (N.Y. App. Div. 3d Dep't 1957).

Decedent was injured in 1941. Following accident he was partially or totally disabled at times. He became depressed and dangerous to himself and in 1951 underwent psychiatric treatment. Psychiatrist testified that there was association between accident and mental illness and awards were made. Held: there was sufficient proof that mental condition was cause of decedent's suicide in 1954. Deitz v William H. Bumstead, Inc., 5 A.D.2d 739, 168 N.Y.S.2d 669, 1957 N.Y. App. Div. LEXIS 3549 (N.Y. App. Div. 3d Dep't 1957).

Decedent sustained accident and thereafter was in almost constant pain until his death by suicide while intoxicated. He had been drinking excessively to kill pain. Claimant's medical experts testified to brain derangement produced by accident. Held: there was substantial evidence that death by suicide was the result of injury. Kelly v Sugarman, 5 A.D.2d 1023, 173 N.Y.S.2d 41, 1958 N.Y. App. Div. LEXIS 6176 (N.Y. App. Div. 3d Dep't), app. denied, 5 N.Y.2d 705, 1958 N.Y. LEXIS 1557 (N.Y. 1958).

In view of sharply conflicting medical testimony as to whether suicide of a town policeman related back to an accidental back injury sustained some six years previously, which required an operation and was followed by increasing pain and suffering, or was induced by grief over the death of a sister and general mental derangement, allowance by the Board of a claim for death benefits must be sustained. Consula v Harrison, 16 A.D.2d 848, 227 N.Y.S.2d 585, 1962 N.Y. App. Div. LEXIS 9977 (N.Y. App. Div. 3d Dep't), aff'd, Consula v Town of Harrison, 11 N.Y.2d 647, 1962 N.Y. LEXIS 2035 (N.Y. 1962).

Sufficient evidence could be found in an independent specialist's opinion of causal relationship between a blow on the head received in course of employment by decedent in 1946 and his suicide in 1958, in the light of diagnosis of the blow as causing a concussion of the brain and his subsequent medical history and mental symptoms, to sustain an award of death benefits. Falso v National Wiring & Protective Co., 17 A.D.2d 667, 230 N.Y.S.2d 164, 1962 N.Y. App. Div. LEXIS 8717 (N.Y. App. Div. 3d Dep't 1962).

Where an employee apparently commits suicide by taking an overdose of barbiturates several years after the last of two industrial accidents, both serious in nature and involving pain, an award of death benefits cannot be sustained by a board finding that decedent developed a depressed state leading to death by suicide as the result of the prior injury, since death by suicide is compensable only where there is evidence of brain derangement or psychosis attributable to prior compensable accidents. Franzoni v Loew's Theatre & Realty Corp., 22 A.D.2d 741, 253 N.Y.S.2d 505, 1964 N.Y. App. Div. LEXIS 2941 (N.Y. App. Div. 3d Dep't 1964).

Board applied incorrect legal standard in ruling that work related injury, even if significant contributing factor in decedent's emotional decline and ensuing suicide, was legally insufficient to sustain award of benefits because diagnosis of claimant was severe depression rather than "psychosis" or "derangement of the mind"; decision was reversed and matter remitted to Workers' Compensation Board for further proceedings. Altes v Petrocelli Elec. Co., 270 A.D.2d 767, 704 N.Y.S.2d 372, 2000 N.Y. App. Div. LEXIS 3100 (N.Y. App. Div. 3d Dep't 2000).

Psychologist's opinion, based on information provided by claimant and her attorney following decedent's suicide, was insufficient to sustain claimant's burden of establishing that causal relationship existed between decedent's employment as police officer and his depressive condition and resulting suicide Musa v Nassau County Police Dep't, 276 A.D.2d 851, 714 N.Y.S.2d 545, 2000 N.Y. App. Div. LEXIS 10461 (N.Y. App. Div. 3d Dep't 2000).

322. —Eye injuries or disorders

Evidence that a claimant, whose right eye had been enucleated and who had some light perception and light projection in his left eye, lost light perception and light projection in left eye as a result of an accident in the course of his employment was sufficient to establish an award. Trillas v Weimet Film Co., 306 N.Y. 779, 118 N.E.2d 599, 306 N.Y. (N.Y.S.) 779, 1954 N.Y. LEXIS 1127 (N.Y. 1954).

Treating opthalmologist's testimony relating hemorrhages to emotional confrontations at work supported board's finding that a prolonged state of anxiety and an overwrought emotional condition, with the precipitant effects of 2 emotional episodes, caused the hemorrhages and resulting disability and that the hemorrhages were industrial accidents. Snyder v N.Y. State Comm'n for Human Rights, 31 N.Y.2d 284, 338 N.Y.S.2d 620, 290 N.E.2d 821, 1972 N.Y. LEXIS 1001 (N.Y. 1972).

There is no disease resulting from an accident where a painter suffering from myopia felt something in his eye while carrying a ladder and some four hours later while working on a scaffold felt a sharp pain in his eye and later was found to have a detached retina where there was proof that the myopia was a contributory cause of the detachment and the claimant did not in any way fall or strike himself. Dengler v Doudera Decorating Co., 264 A.D. 982, 33 N.Y.S.2d 725, 1942 N.Y. App. Div. LEXIS 5613 (N.Y. App. Div. 3d Dep't 1942).

A finding that loss of vision in one eye was not caused by lifting heavy tools by a toolmaker whose work was not usually so strenuous will be sustained, where there is medical evidence of lack of causal connection. Fisher v Savage Arms Corp., 266 A.D. 704, 40 N.Y.S.2d 138, 1943 N.Y. App. Div. LEXIS 3956 (N.Y. App. Div. 1943).

Evidence sustained finding that retinal detachment in claimant's left eye resulting in a total loss of vision in that eye from an accident which occurred when he bumped his head against a pipe fitting while engaged as an engineer in a hotel. Cann v Half Moon Hotel, 283 A.D. 839, 129 N.Y.S.2d 76, 1954 N.Y. App. Div. LEXIS 5467 (N.Y. App. Div. 1954).

In the course of claimant's precision work, she constantly used a microscope with her left eye. After complaining of nervousness and frustration, she suddenly lost the central vision of her right eye. There was evidence that the injury was caused by a spasm which might have occurred in an artery in any part of her body and this in turn was the result of nervous and emotional tension. An impartial expert said that there was no causal connection

between claimant's nervous condition and her work, but this was contradicted by other doctors. Under these circumstances the denial of the claim was affirmed. Pennelli v Delco Appliance Div., 3 A.D.2d 779, 160 N.Y.S.2d 389, 1957 N.Y. App. Div. LEXIS 6187 (N.Y. App. Div. 3d Dep't 1957).

Claimant and two other co-workers testified that while the claimant was at work he struck his head against a valve. Two months later he consulted a specialist who diagnosed his ailment as a detached retina and claimant promptly advised his employer of the diagnosis and the employer filed a report of injury, stating that claimant had suffered an injury to his left eye as a result of hitting his head on a valve. Held: a decision disallowing the claim by the board must be remanded since it is not clear whether the finding was based on the fact that the claimant did not sustain an accidental injury arising out of or in the course of his employment or whether on the basis of the medical testimony, there was no causal connection between the blow on the head and the detachment of the retina. Wolff v S. Jaralomon & Co., 4 A.D.2d 923, 166 N.Y.S.2d 936, 1957 N.Y. App. Div. LEXIS 4329 (N.Y. App. Div. 3d Dep't 1957), app. denied, 5 A.D.2d 797, 170 N.Y.S.2d 316 (N.Y. App. Div. 3d Dep't 1958).

A denial of a rehearing was approved where an insurance carrier wanted to show a 1955 report of claimant's physician that flare-up of eye condition was not attributable to original accident after referee had found in 1956 a 65 percent loss of vision on medical proof then unchallenged by carrier. Lu Core v Hooker Electrochemical Co., 6 A.D.2d 624, 179 N.Y.S.2d 965, 1958 N.Y. App. Div. LEXIS 4047 (N.Y. App. Div. 3d Dep't 1958).

The board was justified in finding no association between a blow on the head by a metal hatch and cataract in both eyes, in view of the testimony of a physician that there was no causation between the blow and the development of a cataract and that, on review of the medical literature, he had not been able to find a report of such a case. Guerriera v Universal Terminal Stevedore Co., 9 A.D.2d 984, 194 N.Y.S.2d 566, 1959 N.Y. App. Div. LEXIS 5300 (N.Y. App. Div. 3d Dep't 1959).

With respect to a claim for loss of sight of both eyes as the result of splashing detergent into the right eye while washing dishes in course of the claimant's employment, findings of the Workmen's Compensation Board, supported by some medical testimony, that infection spread from the eye in which the detergent was splashed to the other eye, resulting in loss of sight of both, was sustained, notwithstanding the reviewing court regarded most of the medical testimony as overwhelming against such a causal relationship. Brooks v Temple Sinai, 11 A.D.2d 550, 199 N.Y.S.2d 776, 1960 N.Y. App. Div. LEXIS 10181 (N.Y. App. Div. 3d Dep't 1960), aff'd, 9 N.Y.2d 917, 217 N.Y.S.2d 88, 176 N.E.2d 98, 1961 N.Y. LEXIS 1232 (N.Y. 1961).

An award by the Workmen's Compensation Board, made upon a finding of acute conjunctivitis, central keratitis, and acute iritis resulting from traumatic injury which occurred when dust and dirt entered the claimant's eye, was sustained on a basis of some substantial evidence to support it, notwithstanding a conflict in medical testimony. Ruiz v Clever Idea Co., 11 A.D.2d 823, 202 N.Y.S.2d 405, 1960 N.Y. App. Div. LEXIS 8487 (N.Y. App. Div. 3d Dep't), app. denied, 8 N.Y.2d 708, 1960 N.Y. LEXIS 1864 (N.Y. 1960).

There was sufficient medical testimony to support a finding of the Board that claimant's loss of vision in one eye was the result of physical strain when he lifted one end of a heavy timber and his left eye "went black." Seeger v Syracuse Rendering Co., 15 A.D.2d 604, 222 N.Y.S.2d 416, 1961 N.Y. App. Div. LEXIS 6980 (N.Y. App. Div. 3d Dep't 1961).

A finding of no causal relation between claimant's getting a particle of sawdust under his eyelid while at work and subsequent enucleation of the eye was sustained where it merely appeared that claimant rubbed his eye for awhile and eventually went to a doctor to have the foreign substance removed after the sawdust entered under his eyelid, but, at time of the accident, had long been suffering from a chronic eye disease resulting from an accident 22 years before. Gural v Kandu Cleaning Corp., 15 A.D.2d 621, 222 N.Y.S.2d 380, 1961 N.Y. App. Div. LEXIS 6845 (N.Y. App. Div. 3d Dep't 1961).

Medical testimony was sufficient to relate claimant's loss of vision in his left eye, for which medical treatment was not sought until January 13, 1961, as causally connected to a blow sustained by claimant on the bridge of his nose by a hot steel cable on October 12, 1960. Campanini v Colorado Fuel & Iron Corp., 21 A.D.2d 927, 250 N.Y.S.2d 1011, 1964 N.Y. App. Div. LEXIS 3363 (N.Y. App. Div. 3d Dep't), app. denied, 14 N.Y.2d 487, 1964 N.Y. LEXIS 1849 (N.Y. 1964).

Where compensation claimant's medical witness did not voice any opinion on causal relationship between dust or dirt entering claimant's eye during the course of his employment as a porter and claimant's eye injury, diagnosed as toxoplasmosis choroidoretinitis, and loss of vision but withheld any professional judgment as to the causal relationship and compensation carrier's expert testified that there could be no causal relationship between eye injury and dust or dirt entering claimant's eye, Workmen's Compensation Board committed reversible error in affirming referee's conclusion that claimant suffered 55 percent causally related loss of vision. Beltran v Allied Maintenance Corp., 45 A.D.2d 795, 357 N.Y.S.2d 162, 1974 N.Y. App. Div. LEXIS 4634 (N.Y. App. Div. 3d Dep't 1974).

323. —Falls as accidental or due to disease

Where the decedent dislocated his shoulder and subsequently suffered another fall resulting in his death, and the death certificate, signed by a person who had never seen the decedent in his life, stated that the cause of death was chronic heart disease, and where the decedent's own physician and widow both testified that the decedent had never had heart trouble, the presumption raised by the certificate is conclusively overcome. Nestor v Pabst Brewing Co., 191 A.D. 312, 181 N.Y.S. 477, 1920 N.Y. App. Div. LEXIS 4709 (N.Y. App. Div. 1920).

While working in the kitchen of a private school, decedent fell, striking his head on the floor and sustained injuries in the nature of ecchymosis about the right eye, laceration of the scalp and a right subdural hematoma. The evidence sustained a finding that the injuries were accidental and not due to a natural cause of pathology. Department of Taxation & Finance v Kew Forest School, 279 A.D. 959, 111 N.Y.S.2d 218, 1952 N.Y. App. Div. LEXIS 5424 (N.Y. App. Div. 1952).

The board properly exercised jurisdiction where decedent, who had an engineer's license but whose work was predominantly that of a night watchman and maintenance man in connection with the employer's fleet of tugboats, fell into the water in some unknown manner and was drowned. Evans v Henjes Marine, Inc., 279 A.D. 962, 111 N.Y.S.2d 92, 1952 N.Y. App. Div. LEXIS 5431 (N.Y. App. Div. 1952).

Whether decedent, employed as an electrician, fell from a stepladder six feet high as the result of a heart attack or fell and suffered a heart attack as a result of the fall was a matter of pure speculation and an award was improper. Commissioner of Taxation & Finance v Jordan Bros., Inc., 279 A.D. 1123, 112 N.Y.S.2d 552, 1952 N.Y. App. Div. LEXIS 6038 (N.Y. App. Div. 1952).

Death award affirmed upon proof that decedent while employed as a night watchman fell on the fourth floor of building and in an injured condition, in the dark, and after his eyeglasses had been broken, groped his way to the basement floor which fall and exertion resulted in an overextension of decedent's heart. McKinley v Wilson Bros., 282 A.D. 791, 122 N.Y.S.2d 538, 1953 N.Y. App. Div. LEXIS 4969 (N.Y. App. Div. 1953).

Medical opinion supported the finding that the fall of a laborer while unloading a coal car in the course of his employment aggravated a pre-existing arthritic condition of his back. Simon v Daystrom Corp., 283 A.D. 1124, 131 N.Y.S.2d 480, 1954 N.Y. App. Div. LEXIS 6491 (N.Y. App. Div. 1954).

Evidence justified award to delivery boy who used his own bicycle and who fell while attempting to recover it from a thief. Snyder v Hirsch, 284 A.D. 820, 132 N.Y.S.2d 61, 1954 N.Y. App. Div. LEXIS 3558 (N.Y. App. Div.), reh'g denied, 284 A.D. 856, 134 N.Y.S.2d 176, 1954 N.Y. App. Div. LEXIS 3755 (N.Y. App. Div. 1954).

The only reasonable conclusion from the evidence was that the death of a crane operator who was found hanging out of his crane cab with his head dragging on the floor resulted from a heart

attack and that he had thereafter fallen. Hence, award reversed and remanded to determine whether shock of striking floor and being dragged contributed materially to his death. Loverich v Colorado Fuel & Iron Corp., 4 A.D.2d 725, 163 N.Y.S.2d 548, 1957 N.Y. App. Div. LEXIS 5137 (N.Y. App. Div. 3d Dep't 1957).

Decedent, who had high blood pressure and heart condition, was employed to guard barges. While walking around barge on a cat walk extinguishing lanterns, decedent fell between 2 barges. Autopsy indicated that he had not drowned but had died of coronary occlusion. Board found that decedent had accidentally fallen into water and that heart attack had been precipitated by fright. Having thus found accidental fall, finding of causal relation between fall and heart attack was supported. Saunders v Merritt Chapman & Scott Corp., 5 A.D.2d 709, 168 N.Y.S.2d 914, 1957 N.Y. App. Div. LEXIS 3502 (N.Y. App. Div. 3d Dep't 1957).

Appellant's medical expert testified that decedent fell from ladder because of cerebral arteriosclerosis and that subsequent death was result of arteriosclerosis of vessels of brain and was unrelated to any accident. Testimony of claimant's medical witness was inconclusive and self-contradictory. Award reversed. Kirby v Macombs-Inwood Realty Corp., 5 A.D.2d 1040, 173 N.Y.S.2d 403, 1958 N.Y. App. Div. LEXIS 6204 (N.Y. App. Div. 3d Dep't 1958).

Where death was due to arteriosclerosis of the coronary arteries with myocardial infarction, there were no eyewitnesses to the occurrence, and the only evidence was that decedent was a carpenter working on an eight-foot high ceiling, in course of which work he stood on a platform of boards mounted on horses with cross pieces usable as steps, and was found dead with his head wedged between two studs, one leg on the step of the horse and the other extending upward supported by the horse, without any cuts, bruises, or other external signs of injury, no injury resulting from the fall from which it could be inferred that the fall came first and the impact hastened death could be based upon speculation of a medical witness to that effect, and the only permissible conclusion was that death came from natural causes and was not related to his employment. Fishman v Lousan General Constr. Corp., 11 A.D.2d 887, 202 N.Y.S.2d 795, 1960 N.Y. App. Div. LEXIS 8421 (N.Y. App. Div. 3d Dep't 1960), aff'd, 10 N.Y.2d 919, 223 N.Y.S.2d 872, 179 N.E.2d 712, 1961 N.Y. LEXIS 943 (N.Y. 1961).

Where claimant suffered a fall while at work and thereafter it was found that he had sustained a fracture of the right femur it was proper for the board in the exercise of its fact finding power to accept the testimony of two experts and the reasonable inferences to be drawn therefrom to the effect that the fracture was caused by Paget's disease and occurred before the fall and to reject that of another expert to the effect that it was caused not by such disease but by some prior twisting action of leg. Hailstork v Cayuga County Council, Inc., 22 A.D.2d 978, 254 N.Y.S.2d 753, 1964 N.Y. App. Div. LEXIS 2535 (N.Y. App. Div. 3d Dep't 1964).

324. —Effect of preexisting conditions on causal relationship

Where the claimant's husband died of pneumonia which was medically associated with a surgical operation for a double hernia and there is evidence of a fall having some association with the hernia, and of complaints of inguinal pain caused in the course of employment, but, there is undisputed proof of the existence of a double hernia nearly a year before the operation and that neither the employee nor his surgeon regarded the condition as traumatic or accidental in origin, the claim will be disallowed as not being due to occupation or the nature of the husband's employment. Link v Hygrade Food Products Co., 277 A.D. 812, 96 N.Y.S.2d 849, 1950 N.Y. App. Div. LEXIS 3397 (N.Y. App. Div. 1950).

Award made to brewery worker for a condition known as Dupuytren's contracture reversed where proof showed that the disease had been contracted as early as 1946 and did not become disabling until 1951 and claimant did not work for present employer during period May, 1947 to September, 1949. Boyd v F. & M. Schaefer Brewing Co., 282 A.D. 785, 122 N.Y.S.2d 491, 1953 N.Y. App. Div. LEXIS 4957 (N.Y. App. Div. 1953).

Substantial evidence did not support finding of aggravation of a pre-existing arthritis or intervertebral disc from an unreported fall. Sikes v Crawford Furniture Corp., 284 A.D. 819, 132 N.Y.S.2d 205, 1954 N.Y. App. Div. LEXIS 3556 (N.Y. App. Div. 1954).

Where a claimant was struck on his right leg by a falling tree in the course of his employment there was substantial evidence that there was no causal relation between this accident and a subsequent amputation of parts of both of his legs where it was undisputed that claimant suffered a pre-existing circulatory disease of long standing. Beintema v Islip Highway Dep't, 4 A.D.2d 921, 166 N.Y.S.2d 633, 1957 N.Y. App. Div. LEXIS 4327 (N.Y. App. Div. 3d Dep't 1957).

Decision denying claim on ground no causal relation existed between accident and loss of claimant's legs affirmed. Claimant had pre-existing circulatory disease which board found, on competent medical proof, was responsible for gangrene in both legs necessitating amputation. Beintema v Islip Highway Dep't, 5 A.D.2d 908, 170 N.Y.S.2d 936, 1958 N.Y. App. Div. LEXIS 6725 (N.Y. App. Div. 3d Dep't 1958).

Where claimant was president and executive technical director of the corporate employer, and, as president, himself filed a report of accident allegedly sustained by him three or four months previously, consisting of a back injury sustained in attempting to turn a valve, but there was evidence of medical treatment for a back condition prior to date of the alleged incident, the Board's holding that he did not sustain an industrial accident in course of his employment was sustained. Wetchler v Camel, Lead, Color & Chemical Co., 12 A.D.2d 567, 206 N.Y.S.2d 850, 1960 N.Y. App. Div. LEXIS 7271 (N.Y. App. Div. 3d Dep't 1960).

Where it appeared in connection with a claim for a back condition requiring surgery that claimant had a pre-existing back condition prior to the occurrence of the alleged incident in course of employment, and sustained back pain while shoveling snow at home after the alleged incident, the Board was justified in finding that either the alleged accident in course of employment did not occur or that it was not the cause of disability. Van De Walker v Syracuse Bowling Center, 16 A.D.2d 728, 226 N.Y.S.2d 771, 1962 N.Y. App. Div. LEXIS 10345 (N.Y. App. Div. 3d Dep't 1962).

Where it was undisputed that decedent, prior to his original industrial accident, had an advanced arteriosclerotic condition in both legs, there was substantial evidence to sustain a board finding that causal relationship existed between the accident which necessitated amputation of his right leg October 26, 1956, and his death from heart stoppage during a second operation to amputate the left leg on February 26, 1959, by reason of gangrene developing there, too, on the basis of extra strain put on the left leg following amputation of the right. Carter v C. & L. Restaurant & Grill, Inc., 19 A.D.2d 676, 241 N.Y.S.2d 106, 1963 N.Y. App. Div. LEXIS 3484 (N.Y. App. Div. 3d Dep't 1963).

Finding of board that claimant's disability was due solely to her pre-existing low back condition and not to her work activities held to be based on substantial evidence. Di Marco v New York State Motor Vehicle Bureau, 23 A.D.2d 898, 258 N.Y.S.2d 905, 1965 N.Y. App. Div. LEXIS 4258 (N.Y. App. Div. 3d Dep't 1965).

The board properly found an accidental injury where a workman's fall and consequent back injury in the course of his employment was caused by the workmen's ankle giving way, which had been weakened by a prior injury suffered on another employer's premises. Brewer v Thomas Foundry, Inc., 39 A.D.2d 992, 333 N.Y.S.2d 438, 1972 N.Y. App. Div. LEXIS 4242 (N.Y. App. Div. 3d Dep't 1972).

An award of benefits for a six-week period commencing when the claimant underwent surgery for the repair of a right inguinal hernia and a left hydrocele would be affirmed, where there was substantial evidence to support the board's finding that the claimant's disability was a result of the aggravation of pre-existing conditions and that the aggravation was directly related to the claimant's employment, and where during the period preceding disablement claimant's conditions neither required frequent medical attention nor interfered with the claimant's ability to work. Kuczkowski v Bethlehem Steel Corp., 90 A.D.2d 612, 456 N.Y.S.2d 166, 1982 N.Y. App. Div. LEXIS 18680 (N.Y. App. Div. 3d Dep't 1982), aff'd, 58 N.Y.2d 946, 460 N.Y.S.2d 533, 447 N.E.2d 81, 1983 N.Y. LEXIS 2896 (N.Y. 1983).

Despite employee's claim that her nose bleeds resulted from her employer's air conditioning system, which allegedly aggravated

her preexisting environmental sensitivities, Workers' Compensation Board properly found that normal air flow in employee's office did not create seriously adverse environmental condition and that her reaction to it was not accidental injury where (1) employer's evidence rebutted presumptions in CLS Work Comp § 21, (2) employer's medical expert disputed employee's diagnosis of multiple chemical and environmental sensitivities, found no physiological cause for her condition, and opined that she was capable of working, and (3) no unusual environmental condition or extraordinary event was alleged to have caused injury. Friedlander v New York City Health & Hosp. Corp., 246 A.D.2d 937, 667 N.Y.S.2d 847, 1998 N.Y. App. Div. LEXIS 750 (N.Y. App. Div. 3d Dep't 1998).

Death of claimant's decedent was properly found not to be causally related to work-related hand injury some 4 months previously where expert medical evidence revealed that decedent had been intravenous drug user and alcohol abuser for several years prior to his death, specialist in fields of forensic medicine and pathology testified that decedent's death was result of alcohol-induced hepatitis which led to cardiorespiratory failure, and that he saw no evidence of infection which might have led to decedent's demise, there was no report of infection in decedent's hospital records, and expert concluded that decedent's death resulted from liver failure and was unrelated to his previously injured hand. Ozga v Pathmark Stores, Inc., 252 A.D.2d 727, 675 N.Y.S.2d 437, 1998 N.Y. App. Div. LEXIS 8197 (N.Y. App. Div. 3d Dep't 1998).

Although seasonal auditor's exposure to paint fumes in course of her employment was accidental injury, she did not suffer any continuing disability attributable to that accident for purposes of workers' compensation where (1) 2 medical experts who examined her on behalf of State Insurance Fund testified that her symptoms were physical manifestations of anxiety disorder rather than result of her exposure to environmental contaminants at work, (2) auditor's treating physician confirmed that auditor suffered from history of delusional and anxiety disorder with psychotic features, including conversion of mental stress into physical complaints, and (3) several of auditor's experts acknowledged possibility that liver dysfunction, which was one of her symptoms, was caused by known side effects of antipsychotic medication administered to her during stay at psychotic hospital. Gannon v New York State Dep't of Taxation & Fin., 275 A.D.2d 869, 713 N.Y.S.2d 576, 2000 N.Y. App. Div. LEXIS 9469 (N.Y. App. Div. 3d Dep't 2000).

325. — —Accidental injury merely activates dormant preexisting condition

An employee is entitled to compensation where he accidently sustained an injury which aggravated an existing spinal arthritic condition. Darnley v General Drop Forge, 272 A.D. 985, 72 N.Y.S.2d 716, 1947 N.Y. App. Div. LEXIS 4505 (N.Y. App. Div. 1947).; See also Finkelday v Henry Heide, Inc., 193 A.D. 338, 183 N.Y.S. 912, 1920 N.Y. App. Div. LEXIS 5550 (N.Y. App. Div. 1920), aff'd, 230 N.Y. 598, 130 N.E. 909, 230 N.Y. (N.Y.S.) 598, 1921 N.Y. LEXIS 877 (N.Y. 1921).

Award for amputation of arm was affirmed where record showed that claimant worked with a steam iron as a presser and frequently received burns from the iron and that the repeated burns together with a congenital condition rendering the arterial vessels in the arm fragile were the inducing causes of the rupture of inter osseus artery. Neilson v Michael Stern & Co., 282 A.D. 793, 122 N.Y.S.2d 472, 1953 N.Y. App. Div. LEXIS 4971 (N.Y. App. Div. 1953).

There being substantial evidence indicating that an accident in 1945, suffered by a professional dancer during a rehearsal when he experienced a pain in his back while lifting another dancer and collapsed, with the other dancer falling upon him, aggravated a congenital existing condition of spondylolisthesis, a finding of causal relationship warranting a disability award would not be reversed. Schun v U. S. O. Camp Shows, Inc., 11 A.D.2d 829, 203 N.Y.S.2d 141, 1960 N.Y. App. Div. LEXIS 8496 (N.Y. App. Div. 3d Dep't), app. denied, 8 N.Y.2d 709, 1960 N.Y. LEXIS 1866 (N.Y. 1960).

The evidence would sustain a disability award for a back condition where it showed that claimant had a long time arthritic spine condition and it was determined that, following a particular accident, he had a lumbar sacral strain, then, on the occasion in question, felt a pain in his back while lifting a garbage can in course of his duties which caused him to yell "Ouch" and drop the can. Berrios v Park Sulgrave, Inc., 12 A.D.2d 706, 208 N.Y.S.2d 1019, 1960 N.Y. App. Div. LEXIS 6249 (N.Y. App. Div. 3d Dep't 1960).

Evidence that meter maid had no preexisting disability, although the cavus foot condition which led to her disability did exist at the time that she was hired, demonstrated that she was merely predisposed to an occupational disability at the time she was hired and that the disability was the result of activation of a dormant condition rather than aggravation of a previously active condition so that meter maid who became unable to continue in her employment due to pain in her feet was entitled to benefits for an occupational disease. Strouse v Endicott, 50 A.D.2d 635, 374 N.Y.S.2d 764, 1975 N.Y. App. Div. LEXIS 12447 (N.Y. App. Div. 3d Dep't 1975).

Substantial evidence supported finding that while workmen's compensation claimant had no preexisting disability, his duties as vibrating machine operator served to activate previously dormant condition, i.e., osteoarthritis, and resulted in his disability, warranting award of benefits by the Workmen's Compensation Board. Greer v Green Island Contracting Corp., 54 A.D.2d 996, 387 N.Y.S.2d 936, 1976 N.Y. App. Div. LEXIS 14957 (N.Y. App. Div. 3d Dep't 1976).

Workers' Compensation Board properly ruled that claimant sustained occupational disease based on aggregation of preexisting back condition where claimant testified that her back condition had neither prevented her from waitressing in past nor previously manifested itself in form of total right-side numbness, and her chiropractor testified that distinctive features of claimant's work exposed her to "repetitive occupational microtrauma," which aggravated her pre-existing condition to point of total disability. Jarvis v Stewart Airport Diner, 271 A.D.2d 816, 706 N.Y.S.2d 508, 2000 N.Y. App. Div. LEXIS 4434 (N.Y. App. Div. 3d Dep't 2000).

326. — —Accidental injury found where claimant fully recovered from prior injury

The evidence warranted a finding of independent accident to claimant in suffering a severe lumbo-sacral sprain while bending over to pick up a pail of water where, prior to this incident, he had been engaged in moving heavy furniture, as against the contention that the condition was due to two previous back injuries sustained by claimant while working for another employer, it appearing that he had fully recovered from the prior injuries to such extent as to resume performance of heavy work. Regan v Inter-City Cleaning Co., 14 A.D.2d 622, 218 N.Y.S.2d 195, 1961 N.Y. App. Div. LEXIS 9396 (N.Y. App. Div. 3d Dep't 1961).

327. —Effect of preexisting conditions on causal relationship; diabetes

Where a wine cask fell on the left leg of a diabetic employee causing injuries so severe that he had to discontinue work and go to bed and thereafter suffered vomiting spells, a death award was affirmed where the medical proof showed that the accident had forced the employee to discontinue exercise and the vomiting had caused dehydration and as a result thereof, together with pain and emotional disturbance, the employee's sugar tolerance had been lowered so that diabetic acidosis and coma was precipitated. Moniot v Empire State Wine Co., 282 A.D. 899, 124 N.Y.S.2d 880, 1953 N.Y. App. Div. LEXIS 5367 (N.Y. App. Div.), reh'g denied, 282 A.D. 1080, 126 N.Y.S.2d 923, 1953 N.Y. App. Div. LEXIS 5869 (N.Y. App. Div. 1953).

Claimant, who had been suffering from diabetes and from an impairment in circulation related to that disease, sustained an injury when a steel plate weighing some 200 pounds was dropped on his left foot. Morano v Marine Basin Co., 4 A.D.2d 903, 166 N.Y.S.2d 831, 1957 N.Y. App. Div. LEXIS 4294 (N.Y. App. Div. 3d Dep't), app. denied, 3 N.Y.2d 709, 1957 N.Y. LEXIS 1457 (N.Y. 1957).

A condition is nonetheless the result of an "accident" because the person who suffers it had a preexisting physical weakness or disability which made the "accident" more likely to occur or its

consequences worse. Thus where a diabetic salesman injured his right foot in one employment which caused him to favor that foot in subsequent walking in a later employment, and was more susceptible to blisters by reason of his diabetic condition, his sustaining of a blister on the left foot by reason of excessive walking, which became infected, was a compensable industrial accident. Walters v U. S. Vitamin Corp., 11 A.D.2d 280, 203 N.Y.S.2d 401, 1960 N.Y. App. Div. LEXIS 8393 (N.Y. App. Div. 3d Dep't 1960), aff'd, 10 N.Y.2d 924, 223 N.Y.S.2d 874, 179 N.E.2d 713, 1961 N.Y. LEXIS 946 (N.Y. 1961).

There was sufficient medical testimony to sustain a finding of compensability for death of an employee as causally related back to cutting his finger on a slicing machine on September 26, although he had been a diabetic for at least five years prior to the incident, where it appeared that there was considerable bleeding from the cut and he went to a hospital where the cut was treated, then was sent home by his employer where he arrived pale and weak, suffered a "mild cerebrovascular accident" next morning in the bathroom, resulting in partial paralysis, and died on November 4 following a succession of convulsive seizures. Jamieson v Passarelli, 15 A.D.2d 854, 224 N.Y.S.2d 454, 1962 N.Y. App. Div. LEXIS 11431 (N.Y. App. Div. 3d Dep't), modified, 15 A.D.2d 967, 1962 N.Y. App. Div. LEXIS 11151 (N.Y. App. Div. 3d Dep't 1962).

A finding by the Board that claimant sustained no accidental injury must be sustained upon a record showing that, while working as a general laborer, on a certain date he got "a shoe full of dirt and sand" and discovered, while taking a bath that evening, that a particle of dirt or grit had become imbedded in his big toe for which he sought and obtained medical attention about two weeks later, the toe infection having aggravated an underlying diabetic condition, notwithstanding some medical testimony that there was causal relationship between the shoe full of dirt and the eventual serious infection. Finn v Merritt, Chapman & Scott, 20 A.D.2d 731, 246 N.Y.S.2d 839, 1964 N.Y. App. Div. LEXIS 4371 (N.Y. App. Div. 3d Dep't 1964).

Where diabetic condition existed in claimant before time of alleged accidental injury, burden of proof is upon him to establish such injury connected with employment. Wood v Colonial Tavern & Restaurant, 22 A.D.2d 984, 254 N.Y.S.2d 767, 1964 N.Y. App. Div. LEXIS 2501 (N.Y. App. Div. 3d Dep't 1964), app. denied, 15 N.Y.2d 486, 1965 N.Y. LEXIS 1891 (N.Y. 1965).

Fact that claimant's pre-existing diabetic condition aggravated effect of accident is not dispositive. Hoffman v Plaza Hotel, 23 A.D.2d 604, 256 N.Y.S.2d 521, 1965 N.Y. App. Div. LEXIS 4876 (N.Y. App. Div. 3d Dep't 1965).

Workers' compensation claimant's diabetes, diagnosed in 1994, was attributable to preexisting obesity and not to 1986 back injury where (1) insurer's physician indicated that, within 3 months after back injury, claimant was 100 pounds over normal weight and thus was morbidly obese at that time, and (2) claimant's treating physician testified that form of diabetes suffered by claimant is attributable to genetic predisposition compounded by obesity and sedentary lifestyle. A'Gard v Major Builders Corp., 273 A.D.2d 519, 708 N.Y.S.2d 736, 2000 N.Y. App. Div. LEXIS 6438 (N.Y. App. Div. 3d Dep't 2000).

328. —Effect of preexisting conditions on causal relationship; heart condition

Where defendant's claimed that the medical testimony was speculative and that the real cause of the death of claimant's decedent was a pre-existing coronary pathology rather than the unusual and strenuous work effort found by the board, the testimony was found sufficient under Ernest v Boggs Lake Estates, Inc., 12 N.Y.2d 414, 240 N.Y.S.2d 153, 190 N.E.2d 528, 1963 N.Y. LEXIS 1211 (N.Y. 1963).; Drews v Blue Ribbon Fish Co., 23 A.D.2d 927, 258 N.Y.S.2d 868, 1965 N.Y. App. Div. LEXIS 4296 (N.Y. App. Div. 3d Dep't 1965).

While in his employment, decedent, who was suffering from a heart ailment, fell backwards into a vat of hot acid and was burned. He died over two years later. The Workmen's Compensation Board's finding that the injuries aggravated his pre-existing heart condition and hastened his death was sustained by medical evidence. Falco v Ross Galvanizing Works, Inc., 279 A.D. 959, 111 N.Y.S.2d 4, 1952 N.Y. App. Div. LEXIS 5423 (N.Y. App. Div. 1952).

Decedent was a house painter and 70 years of age at the time of his death and had been suffering from a pre-existing diseased aorta. On the day of his death he had been engaged in his trade by way of shellacking the top of a garage door and while doing so he felt a pain in the right side of his neck, was taken home and died within a few hours. An autopsy revealed that the cause of his death was a ruptured aorta, there being an irregular tear in the aorta about 2 inches in length. Held: award affirmed because there was a finding of causal connection between decedent's work and the rupture of his aorta. Sawatzki v Friedman, 4 A.D.2d 907, 166 N.Y.S.2d 920, 1957 N.Y. App. Div. LEXIS 4302 (N.Y. App. Div. 3d Dep't), app. denied, 3 N.Y.2d 710, 1957 N.Y. LEXIS 1478 (N.Y. 1957).

Decedent, a plumber, was engaged in heavy and laborious work on the day of his death. After lunch he was found sitting against a wall with his eyes closed and on arrival of ambulance to hospital, he was found to be dead. Cause of death was "rheumatic heart disease, acute congestive failure". He had suffered from rheumatic heart fever some years before. Board properly found that death was not related to decedent's employment activities. Bobb v Weaderhorn Constr. Co., 8 A.D.2d 888, 186 N.Y.S.2d 814, 1959 N.Y. App. Div. LEXIS 8300 (N.Y. App. Div. 3d Dep't), app. denied, 7 N.Y.2d 705, 1959 N.Y. LEXIS 1821 (N.Y. 1959).

With respect to a heart attack suffered by a 57 year old trailer truck driver while unloading a consignment of 2400 cartons of concentrated grape juice after making a 400 mile drive during the preceding night to point of delivery, whether the heart attack resulted from natural progression of a pre-existing vascular disease or was brought on by the overexertion involved in unloading the shipment was a question of fact, and the Board's finding of causal relationship, being sustained by substantial evidence, would not be upset. Abbott v Bedford Products Div., Nat'l Dairy Products Corp., 15 A.D.2d 31, 221 N.Y.S.2d 840, 1961 N.Y. App. Div. LEXIS 7345 (N.Y. App. Div. 3d Dep't 1961).

Although claimant a policeman, had suffered some prior medical disability and already had a heart condition as the result of non-occupational activity, where he had continued to perform his full duties until he suffered a myocardial infarction in trying to subdue a recalcitrant prisoner on June 9, 1955, the Board was not bound to attribute part of his disability to the pre-existing condition, there being adequate evidence connected to the particular incident in course of his employment. Stell v Newark, 15 A.D.2d 840, 224 N.Y.S.2d 573, 1962 N.Y. App. Div. LEXIS 11410 (N.Y. App. Div. 3d Dep't 1962).

With respect to claim for death benefits in connection with cab driver's death on January 28, 1957 after being involved in automobile accident on December 24, 1956 in which he sustained injuries aggravating a pre-existing heart condition, testimony of decedent's physician that while he was "less than positive" as to relationship of the accident to death he did have a "reasonable certainty" that the accident was a contributing factor was sufficient to sustain an award. Best v L. J. F. Corp, 20 A.D.2d 743, 246 N.Y.S.2d 791, 1964 N.Y. App. Div. LEXIS 4395 (N.Y. App. Div. 3d Dep't 1964).

In a workers' compensation case, a claim for benefits was properly denied where claimant alleged that poor working conditions, coupled with the fact that he was required to spot-clean garments with toxic fluids, either caused or aggravated a pre-existing pulmonary condition, and where claimant had a long history of medical treatment for his pulmonary condition, including a hospitalization within one year of his employment, at which time his condition was shown to be progressive and deteriorating. Compensation is not payable for the aggravation of a previous active condition; to be compensable, the pre-existing condition must be dormant and nondisabling, and some distinctive feature of the employment must cause disability by activating the condition. Hollander v Valor Clothers, Inc., 91 A.D.2d 731, 457 N.Y.S.2d 1002, 1982 N.Y. App. Div. LEXIS 19617 (N.Y. App. Div. 3d Dep't 1982).

Determination by Workers' Compensation Board that fatal heart attack suffered by claimant's husband was causally related to his work activities as bulldozer operator was supported by testimony of designated specialist who stated that "emotional stress was obviously present since the decedent was involved in

using a municipally owned bulldozer to free a privately owned bulldozer under the immediate supervision of his boss. This emotional distress may be considered as an aggravating factor superimposed upon his severe underlying coronary disease, sufficient to produce infarction or ventricular dysrhythmia with sudden death." Bilow v Chateaugay, 151 A.D.2d 845, 542 N.Y.S.2d 819, 1989 N.Y. App. Div. LEXIS 7504 (N.Y. App. Div. 3d Dep't 1989).

County sheriff's department desk sergeant's myocardial infarctions were causally related to his employment and thus compensable accidents under Workers' Compensation Law, even though employer presented testimony of cardiologist that those infarctions resulted solely from preexisting coronary artery disease, where sergeant's cardiologist and internist both opined that those infarctions were caused in part by extremely stressful conditions of sergeant's work, and fact that preexisting condition also might have contributed to infarctions did not require different conclusion. Geed v Sullivan County Sheriff's Dep't, 266 A.D.2d 594, 697 N.Y.S.2d 772, 1999 N.Y. App. Div. LEXIS 11210 (N.Y. App. Div. 3d Dep't 1999).

Forklift operator's death did not arise out of and in course of his employment, and thus claimant was not entitled to workers' compensation death benefits, where (1) decedent died of cardiac arrest as result of myocardial infarction about 3 hours after 35-minute surgery on 2 fingers to relieve work-related condition, (2) no problems arose during surgery, (3) decedent had history of diabetes, hypertension, vascular occlusive disease, and coronary artery disease that resulted in myocardial infarction 5 years before surgery, (4) decedent sought medical attention for chest pain less than 2 weeks before surgery and experienced shortness of breath on night before surgery, and (5) report and testimony of impartial medical specialist showed that although compensable hand injury and resulting surgery furnished occasion for inadequate recovery room treatment of decedent's deteriorating preexisting cardiac condition, neither hand injury nor surgery caused his death. Wallace v Nestles Chocolate Co., 286 A.D.2d 851, 730 N.Y.S.2d 378, 2001 N.Y. App. Div. LEXIS 8859 (N.Y. App. Div. 3d Dep't 2001).

329. —Effect of alcohol or drug use on causation

A finding that an injury arose out of and in the course of employment will be sustained against a contention that the injury was caused by the employee's intoxication, where there is no competent or conclusive proof to sustain the contention and the accident was unwitnessed. Barnhill v Henry Steers, Inc., 263 A.D. 1034, 33 N.Y.S.2d 433, 1942 N.Y. App. Div. LEXIS 7967 (N.Y. App. Div. 1942).

In the course of his work decedent struck his head on a steam pipe and sustained a contusion and an injury to the right eardrum. X-rays were negative for fracture, and he lost no time from work. Three weeks later, after returning from a tavern at 4 A.M., he apparently did some more drinking. His wife observed him attempting to adjust a gas refrigerator at 6:30 A.M. Later he was found dead. The gas valve was open and the gas pipe apparently had been sawed off. Autopsy showed a 65 percent saturation of carbon monoxide in the blood and the presence of "2-plus" alcohol in the brain, also a fracture of the skull and brain contusions. The theory of the board in granting an award was that the injury to the brain caused headaches and pain, as a result of which decedent changed his drinking habits, thus so dulling his perceptions as to permit absorption of a lethal dose of carbon monoxide. The medical testimony in support of this attenuated theory rested on mere speculation. The award was reversed. Boechmann v Yorkville Electric Co., 3 A.D.2d 771, 160 N.Y.S.2d 412, 1957 N.Y. App. Div. LEXIS 6176 (N.Y. App. Div. 3d Dep't 1957).

A death benefit award was affirmed where the decedent, after sustaining a painful finger injury which required partial amputation, took an overdose of barbiturates which caused his death. Bruning v Sheffield Farms Co., 8 A.D.2d 241, 187 N.Y.S.2d 666, 1959 N.Y. App. Div. LEXIS 8002 (N.Y. App. Div. 3d Dep't 1959).

An award of death benefits was affirmed with respect to death of an automobile salesman while driving a demonstration car belonging to his employer, although the accident occurred about 10:40 P. M. and consisted in the car leaving the highway and striking a utility pole while decedent was driving it alone, after reporting to his employer that he was going to display the car to a prospective customer, the accident occurring on the direct route to decedent's home from the location of the prospective customer, notwithstanding an autopsy disclosed alcohol present in the brain of decedent to the extent of 0.291 percent. Cliff v Dover Motors, Inc., 11 A.D.2d 841, 202 N.Y.S.2d 914, 1960 N.Y. App. Div. LEXIS 8515 (N.Y. App. Div. 3d Dep't 1960), aff'd, 9 N.Y.2d 891, 216 N.Y.S.2d 703, 175 N.E.2d 831, 1961 N.Y. LEXIS 1303 (N.Y. 1961).

330. —Board as finder of fact

Where there is evidence from which conflicting inferences might reasonably be drawn, the finding of the board must prevail. Gordon v New York Life Ins. Co. (1950) 300 NY 652, 90 NE2d 898, reh den (1950) 300 NY 742, 92 NE2d 318.; Henry v Sisters of Poor of St. Francis, 263 A.D. 919, 32 N.Y.S.2d 146, 1942 N.Y. App. Div. LEXIS 7366 (N.Y. App. Div. 1942).

Whether an accident happened is a fact jurisdictional in its character, and must be established by the evidence. Pinto v Chelsea Fibre Mills, 196 A.D. 221, 186 N.Y.S. 748, 1921 N.Y. App. Div. LEXIS 5505 (N.Y. App. Div. 1921).

Where the testimony was confused, contradictory and inconsistent in respect of whether a tile setter, assisting in the placing of a monument, slipped while helping to set a heavy monument up on its base and sustained injuries in the nature of a herniated disc, an award was reversed and the matter remitted to the Board. Capierseo v Bonsignore, 283 A.D. 976, 130 N.Y.S.2d 596, 1954 N.Y. App. Div. LEXIS 5983 (N.Y. App. Div. 1954).

The issue being factual in nature, and the medical testimony as to causal relation reasonably clear, the board was upheld in making a death award where deceased died of a heart ailment about six months after submitting to surgery for repair of a recurrent hernia sustained as a result of his employment. He had a heart condition at the time of submitting to the operation, but was nevertheless given a spinal anesthesia together with pentothal, and increased heart symptoms developed four days after the operation; but this did not preclude tracing death back to his employment. Spear v Brockway Motor Co., 9 A.D.2d 799, 192 N.Y.S.2d 766, 1959 N.Y. App. Div. LEXIS 6138 (N.Y. App. Div. 3d Dep't 1959).

With respect to an alleged industrial accident suffered by claimant while in his father's employ, to the occurrence of which only the claimant and his mother testified, determination and credibility of their testimony was within the province of the Board, and its rejection of the testimony must be affirmed. Millefiore v U. S. Casualty Co., 16 A.D.2d 1015, 229 N.Y.S.2d 701, 1962 N.Y. App. Div. LEXIS 9100 (N.Y. App. Div. 3d Dep't 1962).

Where there is conflicting medical testimony as to causal relationship between a deceased employee's employment and death from a subarachnoid hemorrhage, choice of which medical opinions should be accepted resides in the Board. Olsen v Underhill Constr. Corp., 20 A.D.2d 601, 245 N.Y.S.2d 574, 1963 N.Y. App. Div. LEXIS 2590 (N.Y. App. Div. 3d Dep't 1963), app. denied, 14 N.Y.2d 482, 1964 N.Y. LEXIS 1656 (N.Y. 1964).

Whether given activities by an employee constitute sufficient strain to bring on a heart attack presents an issue of fact within the province of the Board, and so is the question of causal relationship where its determination requires analysis of medical testimony. Pickhardt v C. H. Heist Ohio Corp., 20 A.D.2d 737, 246 N.Y.S.2d 850, 1964 N.Y. App. Div. LEXIS 4382 (N.Y. App. Div. 3d Dep't), app. denied, 14 N.Y.2d 484, 1964 N.Y. LEXIS 1739 (N.Y. 1964).

Finding that claimant sustained 20 percent causally related loss of vision of his left eye from subacute conjunctivitis caused by acid splashed in his eyes and subsequent exposure of his eyes to fumes, upheld although contrary to finding of board's impartial specialist and of most of the other expert witnesses, since the board is not bound to follow the views of its impartial specialist and in the exercise of its fact-finding power it may properly accept testimony of one expert and reject that of others despite their numerical superiority. Kuehnhold v Yardney Electric Corp., 22 A.D.2d 980, 254 N.Y.S.2d 607, 1964 N.Y. App. Div. LEXIS 2538 (N.Y. App. Div. 3d Dep't 1964), app. denied, 15 N.Y.2d 484, 1965 N.Y. LEXIS 1803 (N.Y. 1965).

It was properly within province of board to choose between the conflicting medical opinions as to causal relationship between occlusion of internal carotid artery with aphasia and hemiparesis and underlying arteriosclerosis of deceased claimant who fell while performing his employment of removing boats from lake. Ostlind v Feldman, 42 A.D.2d 656, 345 N.Y.S.2d 682, 1973 N.Y. App. Div. LEXIS 4050 (N.Y. App. Div. 3d Dep't 1973).

331. —Board as finder of fact; review of board determinations

Where general practitioner said that decedent's death from coronary thrombosis was causally related to a heart attack sustained on the job several years before and specialists with cardiograms said that death was due to a pre-existing coronary sclerosis rather than to his work, Appellate Division should not have reversed death award and dismissed the claim. Yarkum v Rosenblum & Weller, 308 N.Y. 842, 126 N.E.2d 179, 308 N.Y. (N.Y.S.) 842, 1955 N.Y. LEXIS 1099 (N.Y. 1955).

Where a finding of the commission that the deceased came to his death by reason of a personal injury which arose out of his employment was a reasonable inference from the evidence, such a finding is conclusive on appeal from the award made. Tirre v Bush Terminal Co., 172 A.D. 386, 158 N.Y.S. 883, 1916 N.Y. App. Div. LEXIS 6033 (N.Y. App. Div. 1916).

A finding that phlebitis migrans resulted from an insect bite will be sustained where there was substantial medical evidence to sustain such a finding. Richmond v Mass & Brizt, 275 A.D. 879, 88 N.Y.S.2d 682, 1949 N.Y. App. Div. LEXIS 4862 (N.Y. App. Div. 1949).

A finding of want of causal relation will not be sustained where an employee claimed to have sustained an accidental injury to his toe by dropping a garbage can thereon from which gangrene and incipient Berger's disease developed and his death resulted from pulmonary embolism following treatment when there is medical testimony that death was directly attributable to the accident, and no medical opinion to the contrary. Plucinski v Rores Luncheonette, 277 A.D. 803, 96 N.Y.S.2d 773, 1950 N.Y. App. Div. LEXIS 3377 (N.Y. App. Div. 1950).

An award was affirmed where evidence supported a finding that exposure to cold during course of employment of truck driver, who had a peripherovascular disease which impaired the circulation, was cause of gangrene requiring amputation of toe. Heer v James Thompson & Son, 3 A.D.2d 619, 157 N.Y.S.2d 1013, 1956 N.Y. App. Div. LEXIS 3434 (N.Y. App. Div. 3d Dep't 1956).

It is discretionary with the Board as to whether it will grant an application for rehearing. And the courts will not disturb the Board's exercise of its discretion unless the Board was arbitrary and capricious. Lu Core v Hooker Electrochemical Co., 6 A.D.2d 624, 179 N.Y.S.2d 965, 1958 N.Y. App. Div. LEXIS 4047 (N.Y. App. Div. 3d Dep't 1958).

The board's allowance of death benefits was a factual determination which, being founded upon substantial evidence, was not subject to review, where it was based upon the report of an impartial specialist to whom the case was referred, after receipt of conflicting medical testimony as to whether death was attributable to a pre-existing heart condition, and the specialist reported that decedent, though he had worked regularly during his adult life, while suffering from rheumatic heart disease, also reported that events occurring during his employment produced arrhythmia, producing blood clots which eventually brought about death. Levine v Rosen, 10 A.D.2d 206, 198 N.Y.S.2d 14, 1960 N.Y. App. Div. LEXIS 11170 (N.Y. App. Div. 3d Dep't 1960).

Where it merely appeared that decedent collapsed and died in a ditch which he was digging on the first day of his employment for the employer and that the cause of death given on his death certificate was cerebral thrombosis, and the medical testimony was in contradiction as to whether the work being done by decedent contributed to and caused his death, a question of fact was presented and disallowance of death benefits by the board would not be overturned. Alves v Edward J. Petrillo, Inc., 11 A.D.2d 820, 202 N.Y.S.2d 809, 1960 N.Y. App. Div. LEXIS 8483 (N.Y. App. Div. 3d Dep't 1960).

Where claimant became ill while performing heavy work in his employment and his condition was diagnosed as coronary occlusion and posterior myocardial infarction, the medical proof being sufficient to find either way on the question of relationship of his work to his condition, a decision adverse to claimant would not be interfered with. Nissen v Cory, 12 A.D.2d 868, 210 N.Y.S.2d 9, 1961 N.Y. App. Div. LEXIS 13042 (N.Y. App. Div. 3d Dep't 1961).

A finding of the Board that death was due to congestive heart failure tracing back to an earlier compensable myocardial infarction sustained in course of employment could not be disturbed where the record presented the usual conflict of medical evidence with respect to causal relationship. Watch v Warwick Valley Contractors, Inc., 16 A.D.2d 998, 229 N.Y.S.2d 178, 1962 N.Y. App. Div. LEXIS 9076 (N.Y. App. Div. 3d Dep't 1962).

Findings of the Board that decedent's death was not caused by accidental injury, dealing with whether decedent was doing his usual work at the time in question or was engaged in unusual or strenuous work, were considered to reflect misapprehension as to the present rule of liability, and the Board's decision was accordingly reversed and remitted for further consideration. Sawtell v Columbia Box Board Mills, Inc., 16 A.D.2d 1018, 229 N.Y.S.2d 508, 1962 N.Y. App. Div. LEXIS 8843 (N.Y. App. Div. 3d Dep't), app. dismissed, 12 N.Y.2d 644, 1962 N.Y. LEXIS 1633 (N.Y. 1962).

With respect to a back injury sustained by claimant in course of employment as the cause of continuing disability more than two years later, a board determination that there was causal relationship, based on conflicting medical testimony, must be confirmed. Weber v Warren, 17 A.D.2d 888, 233 N.Y.S.2d 366, 1962 N.Y. App. Div. LEXIS 7326 (N.Y. App. Div. 3d Dep't 1962).

On the basis of conflicting medical testimony, a board decision that claimant's purported back injury not causally related to the incident must be affirmed, suffered while removing clinkers from a boiler was not causally related to the incident must be affirmed. Stoudenmyre v Eagan Real Estate, Inc., 17 A.D.2d 891, 233 N.Y.S.2d 287, 1962 N.Y. App. Div. LEXIS 7330 (N.Y. App. Div. 3d Dep't 1962), app. denied, 12 N.Y.2d 649, 1963 N.Y. LEXIS 1638 (N.Y. 1963).

Questions of credibility as to occurrence of an accident alleged to have resulted in a compensable injury are strictly within the province of the Board, irrespective of the referee's determination, and the board's decision cannot be overturned where supported by substantial evidence. Scarpullo v Alba Barber Shop, 18 A.D.2d 1122, 238 N.Y.S.2d 1007, 1963 N.Y. App. Div. LEXIS 4029 (N.Y. App. Div. 3d Dep't 1963).

Where claimant had suffered a compensable ankle fracture and contended that subsequent cardiac attack was due to pulmonary embolism caused by embolus released from site of his ankle fracture when cast was removed and that therefore heart attack and resultant disability were compensable, and expert medical testimony was conflicting in its conclusions, decision of board finding no causal relation between ankle fracture and heart disability was sustained on appeal on ground that questions of credibility, reasonableness, and weight of conflicting testimony were for board. Ostroff v Fein-Schlosberg, Inc., 22 A.D.2d 974, 254 N.Y.S.2d 551, 1964 N.Y. App. Div. LEXIS 2528 (N.Y. App. Div. 3d Dep't 1964).

Death benefits upheld under evidence that decedent and an ambulance driver at a race track lifted a jockey to a stretcher, and then lifted the jockey and the stretcher into the ambulance, and further that when the ambulance arrived at the first aid station, they lifted the jockey and the stretcher from the ambulance and carried them a distance of 10 feet, the decedent, a few minutes later, collapsing and dying, and there was competent medical proof that the exertion involved could not be separated from decedent's death; that the lifting under the circumstances was "excessive strain" and, therefore, it could not be said that the board could properly find that the work involved more strenuous exertion than the ordinary wear and tear of life and was thus an accident. Lyman v Pinkerton Nat'l Detective Agency, 33 A.D.2d 937, 306 N.Y.S.2d 285, 1970 N.Y. App. Div. LEXIS 5836 (N.Y. App. Div. 3d Dep't 1970).

The board properly determined that decedent lifted shafts while working and that the effort expended in lifting the shafts was unusual and strenuous and this exertion superimposed on the pre-existing coronary artery disease aggravated the pre-existing disease and contributed to his death which was causally

related thereto. Cavage v Spaulding Fibre Co., 35 A.D.2d 862, 315 N.Y.S.2d 255, 1970 N.Y. App. Div. LEXIS 3592 (N.Y. App. Div. 3d Dep't 1970).

332. —Board as finder of fact; consistency in findings

The courts have no power to compel the Workmen's Compensation Board to be consistent in its decisions. Thus, even though the proof in favor of an accident was stronger than that presented in many cases in which the Board had granted awards, a decision denying death benefits where the employee had died of a coronary occlusion after being engaged in strenuous work was affirmed. Szatkowski v Bethlehem Steel Co., 1 A.D.2d 716, 147 N.Y.S.2d 93, 1955 N.Y. App. Div. LEXIS 3733 (N.Y. App. Div. 3d Dep't 1955).

A truck driver, after driving for about twelve hours, was found off the road suffering from severe coronary sclerosis from which he soon died. Although there was medical opinion evidence associating the work with the death, the board denied death benefits. The board order was affirmed but the court pointed out that there were many other cases which seemed less surely supported. Deblaker v Channel Master Corp., 1 A.D.2d 910, 149 N.Y.S.2d 519, 1956 N.Y. App. Div. LEXIS 5954 (N.Y. App. Div. 3d Dep't), app. denied, 2 A.D.2d 716, 153 N.Y.S.2d 617, 1956 N.Y. App. Div. LEXIS 5008 (N.Y. App. Div. 3d Dep't 1956), app. denied, 2 N.Y.2d 705, 1956 N.Y. LEXIS 1180 (N.Y. 1956).

The Appellate Division is powerless to compel the Board to be consistent in its decisions, or to interfere, as long as each decision is supported by substantial evidence. Schwarz v Benedict & Benedict, 21 A.D.2d 921, 251 N.Y.S.2d 175, 1964 N.Y. App. Div. LEXIS 3353 (N.Y. App. Div. 3d Dep't 1964).

333. —Evidentiary matters

A court reviewing opinion evidence as to aggravation of an existing condition by an industrial accident should not reject testimony of nonlawyer witnesses merely because they include such words as "possibly," "probably," and "could," but should look to the whole record and determine whether it exhibits substantial evidence of aggravation. Ernest v Boggs Lake Estates, Inc., 12 N.Y.2d 414, 240 N.Y.S.2d 153, 190 N.E.2d 528, 1963 N.Y. LEXIS 1211 (N.Y. 1963).

Where the claim that an accident occurred on the premises of the employer finds support only in the declarations of the deceased, an award cannot be allowed. Jack v Morrow Mfg. Co., 194 A.D. 565, 185 N.Y.S. 588, 1921 N.Y. App. Div. LEXIS 9326 (N.Y. App. Div. 1921).; See also McHale v Sheffield Farms Co., 193 A.D. 541, 184 N.Y.S. 576, 1920 N.Y. App. Div. LEXIS 5592 (N.Y. App. Div. 1920).

A death claim based upon unusual extra exertion and strain was reversed and remitted to the Board where it was claimed that the decedent, a guard, had run after and chased some disorderly children from a parking lot but there was no affirmative evidence that decedent had been running. Fallon v American Sugar Refining Co., 282 A.D. 910, 124 N.Y.S.2d 897, 1953 N.Y. App. Div. LEXIS 5384 (N.Y. App. Div. 1953).

Medical testimony as to causal relationship of a finger contusion with a subsequent neuropathy could be disregarded where it was based upon evidence of no prior injury to the finger and subsequent evidence showed that claimant had injured and treated the same finger on several prior occasions. Berrafato v Grinnell Co., 2 A.D.2d 722, 152 N.Y.S.2d 503, 1956 N.Y. App. Div. LEXIS 5021 (N.Y. App. Div. 3d Dep't 1956).

Where decedent, employed as collector on instalment contracts, was killed at midnight while driving his automobile, evidence that, just prior to the accident, decedent was driving in a zigzag and erratic manner, did not require a finding that intoxication was the sole cause of the accident, there being substantial evidence that it arose out of and in course of employment. Pierce v Grolier Soc., Inc., 9 A.D.2d 968, 193 N.Y.S.2d 672, 1959 N.Y. App. Div. LEXIS 5652 (N.Y. App. Div. 3d Dep't 1959), reh'g denied, 10 A.D.2d 654, 197 N.Y.S.2d 445, 1960 N.Y. App. Div. LEXIS 11691 (N.Y. App. Div. 3d Dep't 1960), app. denied, 7 N.Y.2d 711, 1960 N.Y. LEXIS 1668 (N.Y. 1960).

Where testimony of claimant and another as to how the alleged accident occurred is not inherently incredible, the board is not bound to reject it because certain hospital records contain no history of trauma. Urbancik v Roseman Estates, Inc., 11 A.D.2d 554, 199 N.Y.S.2d 775, 1960 N.Y. App. Div. LEXIS 10187 (N.Y. App. Div. 3d Dep't 1960).

A cardiac pathology, first definitely discovered in February, 1957, when claimant went to the hospital suffering from a fractured rib, could not be attributed to a fall sustained by claimant, then 61 years of age, on September 7, 1956, when he lost his balance while pulling materials weighing approximately 200 pounds, but was diagnosed as having only a sprained back and ordered to rest for awhile, where the only medical testimony tending to link the eventual heart condition to the earlier fall was indefinite and based upon erroneous hypothesis. Stewart v Merganthaler Linoytype Co., 11 A.D.2d 592, 200 N.Y.S.2d 917, 1960 N.Y. App. Div. LEXIS 9950 (N.Y. App. Div. 3d Dep't 1960).

A coroner's diagnosis, from examination of the body of a deceased employee before rigor mortis had set in and the circumstances surrounding decedent's death, that the cause of death was coronary occlusion, constituted a proper and permissible expert opinion as to cause of death. Webb v Twelve Pine Street, Inc., 12 A.D.2d 555, 206 N.Y.S.2d 1015, 1960 N.Y. App. Div. LEXIS 7254 (N.Y. App. Div. 3d Dep't 1960).

Where the only evidence of injury sustained in course of employment was claimant's own testimony that she felt a pain in her arm while putting a hat on a block and pulling it hard in course of her employment, but proof submitted by the employer showed that there was no report or discussion of any injury at the time of the alleged occurrence, a board finding, overruling a referee's decision, denying compensation, must be affirmed. Monjica v Marlene Modes, Inc., 12 A.D.2d 688, 207 N.Y.S.2d 937, 1960 N.Y. App. Div. LEXIS 6764 (N.Y. App. Div. 3d Dep't 1960).

Where a decedent's sudden death in 1956 was found to be due to an original accident in 1947 as the result of which he suffered a coronary occlusion, such finding was not open to attack where it was supported by substantial medical evidence, notwithstanding opinion evidence to the contrary. Weinberger v Belmont Electric Co., 13 A.D.2d 884, 215 N.Y.S.2d 195, 1961 N.Y. App. Div. LEXIS 10714 (N.Y. App. Div. 3d Dep't 1961).

Credibility of claimant's testimony as to sustaining a back injury in course of employment was for the Board to decide, where he continued working after the alleged accident without complaining of it at the time of its alleged occurrence or mentioning it to his doctor when later treated for a back condition. Reidy v Herman H. Schwartz, Inc., 14 A.D.2d 949, 221 N.Y.S.2d 184, 1961 N.Y. App. Div. LEXIS 7889 (N.Y. App. Div. 3d Dep't 1961).

With respect to a back injury alleged to have been sustained by claimant on June 6 when he lifted and carried two heavy grocery cases, it appearing that claimant thereafter continued to work until June 14, there being no evidence of any complaints of pain or injury between those dates, and there being substantial discrepancies in claimant's testimony, it was within the province of the Board to refuse to credit claimant's testimony and disallow his claim for accidental injury. Kruk v Forest Hills Hospital, 14 A.D.2d 952, 221 N.Y.S.2d 379, 1961 N.Y. App. Div. LEXIS 7893 (N.Y. App. Div. 3d Dep't 1961).

While actual proof is not required to uphold the validity of medical opinion as to causal relationship between an accident and subsequent impaired condition of the claimant, such an opinion, to be given any weight, must be based upon some degree of medical certainty and is insufficient to sustain an award where the physician rendering it merely says that the question of causal relations cannot be answered affirmatively or negatively. Marino v Hawkins Auto Sales, Inc., 17 A.D.2d 895, 233 N.Y.S.2d 626, 1962 N.Y. App. Div. LEXIS 7336 (N.Y. App. Div. 3d Dep't 1962).

A medical expert's testimony is not to be regarded as not amounting to substantial evidence in support of a finding of the Commission, because "conjectural" in nature, where the "conjecture" consisted in admitted lack of knowledge of all details of what occurs in a certain type of brain injury, but the answer was nevertheless a flat statement of medical opinion. Bochkarev v Henry's Landscaping Service, 18 A.D.2d 1113, 238 N.Y.S.2d 994, 1963 N.Y. App. Div. LEXIS 4011 (N.Y. App. Div. 3d Dep't), app. denied, 13 N.Y.2d 595, 1963 N.Y. LEXIS 1921 (N.Y. 1963).

Although use by medical experts of expressions such as "possibly," "probably," or "could," does not necessarily brand their testimony as speculative on the question of causal relationship, a

finding of such relationship cannot be sustained where, on the entire record, no opinion in claimant's favor affirmatively appears. Falconer v Proto Tool Co., 19 A.D.2d 926, 244 N.Y.S.2d 52, 1963 N.Y. App. Div. LEXIS 2980 (N.Y. App. Div. 3d Dep't 1963).

An employer's report under the requirement of § 110, containing detailed and considered admissions concerning the industrial accident, may be regarded as corroboration of the decedent's hearsay declarations which are admissible under § 118 if corroborated by "circumstances" and "other evidence", and on this basis the Appellate Division held that the board acted within the purview of its fact-finding power and on substantial evidence in finding that the accident arose out of the employment. Laine v Rula Corp., 24 A.D.2d 675, 261 N.Y.S.2d 182, 1965 N.Y. App. Div. LEXIS 3677 (N.Y. App. Div. 3d Dep't 1965).

Medical expert's opinion testimony that decedent's striking head on doorknob was causally related to subsequent heart attack, met test that although there could not be certainty in such a case, professional judgment was that causality could and should be assumed and acted upon although in the nature of things it could never be scientifically proven or disproven. Greene v Westbury Fashions, Inc., 24 A.D.2d 784, 263 N.Y.S.2d 738, 1965 N.Y. App. Div. LEXIS 3216 (N.Y. App. Div. 3d Dep't 1965), app. denied, 17 N.Y.2d 417, 1966 N.Y. LEXIS 1676 (N.Y. 1966).

In Workers' Compensation proceeding in which claimant alleged that she was discharged as result of absences caused by work-related back injury, board did not err in considering 2 medical reports included in employer's review application which indicated that claimant had been treated during relevant time frame for ailments unrelated to back injury for which she sought benefits, although claimant was not afforded opportunity to cross-examine authors of reports, since reports merely evidenced absenteeism and were not offered to contradict claim of work-related back injury. McQueen v New York City Health & Hosp. Corp., 154 A.D.2d 789, 546 N.Y.S.2d 235, 1989 N.Y. App. Div. LEXIS 12692 (N.Y. App. Div. 3d Dep't 1989).

Workers' compensation board panel did not abuse its discretion in directing that claimant be evaluated by impartial specialist where claimant's development of Parkinson's disease as early as his late 40s was quite unusual, and specialist's testimony undoubtedly aided panel in understanding complexities of claimant's illness and any correlation that might have existed between that disease and his injury to his arm while lifting heavy object at work. DeBlasio v New York City Dep't of Highways, 246 A.D.2d 837, 668 N.Y.S.2d 280, 1998 N.Y. App. Div. LEXIS 546 (N.Y. App. Div. 3d Dep't 1998).

Substantial evidence supported the Workers' Compensation Board's finding that the claimant failed to submit credible, competent medical evidence of a causally-related occupational disease because the claimant's orthopedist offered no causation opinion and the claimant's physical medicine rehabilitation physician failed to correlate any of the claimant's medical conditions with the performance of any specific repetitive work duties. Matter of Glowczynski v Suburban Restoration Co., Inc., 174 A.D.3d 1236, 104 N.Y.S.3d 438, 2019 N.Y. App. Div. LEXIS 5823 (N.Y. App. Div. 3d Dep't 2019).

334. —Sufficiency of evidence of causation in particular cases; back injuries

Where the claimant sustained a back strain and a contusion of the hip in a fall from a ladder, for which he received compensation, and about two years later filed a claim for a second award for a hernia alleged to have resulted from the same accident, such claim representing the first mention of the existence of the hernia, a second award is improper where there is no evidence to show that the hernia was received at the time of the accident or that it was not received before or subsequent to that time. McCarthy v Globe Automatic Sprinkler Co., 196 A.D. 619, 188 N.Y.S. 118, 1921 N.Y. App. Div. LEXIS 5577 (N.Y. App. Div. 1921).

Where a taxicab driver stooped to read his meter and as he did so felt a snap in his back, straightening up with considerable difficulty, there is evidence to support a finding of causal relation where 4 months after the injury he was operated upon and a herniated disc was removed, even though the injury at the time was diagnosed as a sprain. Rosenberg v Netherland Cab Co., 269 A.D. 914, 57 N.Y.S.2d 551, 1945 N.Y. App. Div. LEXIS 4445 (N.Y. App. Div. 1945).

Causal relationship between a herniated disc and a fracture of the tenth rib was established by proof that claimant sustained the latter injury while pulling a hand truck on an icy roadway when he slipped and fell striking the right side of his chest against the handles of the truck and then falling directly on his buttocks. Raley v E. I. Du Pont De Nemours & Co., 283 A.D. 1130, 131 N.Y.S.2d 552, 1954 N.Y. App. Div. LEXIS 6501 (N.Y. App. Div. 1954).

Evidence was insufficient to establish that a reporter suffered an accident resulting in lumbosacral myofascial when she allegedly stood on the marble floor of a courthouse corridor for 11 hours while a jury was deliberating a case she was covering. Robinson v News Syndicate Co., 3 A.D.2d 879, 161 N.Y.S.2d 275, 1957 N.Y. App. Div. LEXIS 5903 (N.Y. App. Div. 3d Dep't 1957).

While lifting heavy table in August, 1952, claimant suffered severe back sprain. In May, 1953, claimant complained of pain in left kidney region. In August, 1953, he was hospitalized for acute prostatitis. Claimant's attending physician expressed opinion that both conditions were result of accident. Award affirmed. Burlingham v Onondaga County Park & Regional Planning Board, 5 A.D.2d 895, 170 N.Y.S.2d 935, 1958 N.Y. App. Div. LEXIS 6704 (N.Y. App. Div. 3d Dep't 1958).

Claimant sustained injuries to his back in industrial accidents in May and November, 1952. Although preponderance of medical testimony appeared to be against causal relation, one physician testified that in June of 1955 he found claimant to be suffering from disabling back condition and that both accidents were causally related to the condition. Held: there was substantial evidence sufficient to sustain finding of causally related disability after June 17, 1955. Award affirmed. Rogers v F. D. Rich Co., 8 A.D.2d 555, 183 N.Y.S.2d 453, 1959 N.Y. App. Div. LEXIS 9635 (N.Y. App. Div. 3d Dep't 1959).

Claimant injured his back while inserting spring in a truck in the course of his employment. While doctor's report indicated causal relation between accident and claimant's subsequent condition, the doctor testified at the hearing that he could not see how the injury described to him could have caused the condition which claimant had 3 years later and that it was impossible for him to say that there was causal connection. Held: Board properly determined that there was no further causally related disability. Phillip v C & M Auto Spring Co., 9 A.D.2d 571, 189 N.Y.S.2d 243, 1959 N.Y. App. Div. LEXIS 7425 (N.Y. App. Div. 3d Dep't), reh'g denied, 9 A.D.2d 699, 191 N.Y.S.2d 914, 1959 N.Y. App. Div. LEXIS 6889 (N.Y. App. Div. 3d Dep't 1959).

Medical testimony was considered sufficient to support a finding by the board that claimant, while carrying a heavy bucket of syrup, "twisted, snapped and sprained his foot and sustained accidental injuries to his back" causing disablement due to spondylolisthesis. Nofi v American Chicle Co., 9 A.D.2d 966, 193 N.Y.S.2d 509, 1959 N.Y. App. Div. LEXIS 5647 (N.Y. App. Div. 3d Dep't 1959), app. denied, 7 N.Y.2d 710, 1960 N.Y. LEXIS 1634 (N.Y. 1960).

The existence of a lumbosacral "strain" as basis for a compensation claim of itself suggests the occurrence of some definite event bringing about the condition, and the evidence can be considered sufficient to sustain an award notwithstanding testimony of the claimant is not precisely clear and definite as to date of the occurrence, if he testifies to hurting his back on a specific occasion, resulting in a type of pain not theretofore suffered from prior arthritis, etc., while lifting a piece of steel furniture weighing 75 pounds with his back to do certain spot welding. Lillis v Hard Mfg. Co., 13 A.D.2d 598, 212 N.Y.S.2d 451, 1961 N.Y. App. Div. LEXIS 11965 (N.Y. App. Div. 3d Dep't 1961), aff'd, 11 N.Y.2d 867, 227 N.Y.S.2d 683, 182 N.E.2d 289, 1962 N.Y. LEXIS 1279 (N.Y. 1962).

A finding of no accident and no causal relation between a back sprain suffered by claimant and his employment was based on sufficient evidence, notwithstanding testimony that claimant's knees buckled under him when a fellow employee placed two 100-pound bags of salt upon his shoulder, where it appeared that he continued to work following this occurrence and did not experience pain until two weeks later or consult a physician for

almost five months, the board not being bound to credit testimony concerning the incident. Wessels v Fulton County Highway Dep't, 13 A.D.2d 847, 214 N.Y.S.2d 766, 1961 N.Y. App. Div. LEXIS 11040 (N.Y. App. Div. 3d Dep't 1961).

There was sufficient medical testimony to causal relationship between a herniated disc, allegedly tracing back to September 14, 1954, when claimant experienced a sharp pain in her back while lifting and carrying bunches of gladioli while working as supervisor in her employer's warehouse, and a subsequent operation resulting in removal of a herniated disc, following medical diagnosis, to sustain a finding of compensability, notwithstanding claimant was involved in two automobile accidents between the incident in question and the operation. Moore v Snyder, 15 A.D.2d 838, 224 N.Y.S.2d 436, 1962 N.Y. App. Div. LEXIS 11405 (N.Y. App. Div. 3d Dep't 1962).

Where claimant's occupational history involved bending, lifting, carrying and handling various weights throughout his 20-year employment, it was held that there was substantial evidence to sustain the board's determination that the herniated disc which he suffered at the end of that period was incurred in the course of his employment. Ross v Kollsman Instrument Corp., 24 A.D.2d 670, 261 N.Y.S.2d 186, 1965 N.Y. App. Div. LEXIS 3668 (N.Y. App. Div. 3d Dep't), app. denied, 16 N.Y.2d 485, 1965 N.Y. LEXIS 2151 (N.Y. 1965).

There was substantial evidence to support finding that claimant's intervertebral disc problem, which was diagnosed in 1972, was causally related to 1965 industrial accident, in which claimant fell from ladder while he was cleaning an electrostatic spray booth and sustained injuries described as abrasion and contusion of right leg from ankle to hip, with claimant testifying that he started to have trouble with his leg and back three or four months after he fell off the ladder and that in April of 1966 he was hospitalized with a diagnosis of chronic low back strain and radiculitis. Giovinazzo v General Motors Corp., Fisher Body Div., 46 A.D.2d 825, 360 N.Y.S.2d 508, 1974 N.Y. App. Div. LEXIS 3702 (N.Y. App. Div. 3d Dep't 1974).

In a workers' compensation case, a worker, who experienced pains in her leg that eventually radiated to her back, was properly determined to have sustained a compensable injury, where she first experienced pain during the course of lifting heavy carburetors, where the repetitive work resulted in a gradual increase in pain, and where the worker's tardy notice to her employer was properly excused in that the tardiness did not aggravate the injury or hinder the employer in the preparation of its defense. Cortese v Rochester Products Div., G.M.C., 91 A.D.2d 802, 458 N.Y.S.2d 58, 1982 N.Y. App. Div. LEXIS 19697 (N.Y. App. Div. 3d Dep't 1982).

Determination by Workers' Compensation Board that claimant's disability was not attributable to work-related accident was supported by (1) testimony of treating physician who stated that claimant informed him that his back condition predated accident, that claimant had not sought physician's services until approximately 6 years after accident, and that he did not believe that claimant's back condition was causally related to accident, (2) medical report of physician who treated claimant immediately following accident in which it was noted that claimant "made an uneventful recovery...no permanent damage is to be [expected]," and (3) fact that there was no claim for lost time during approximately 6-year period after claimant returned to work following accident. Kapogiannis v Vassar College, 141 A.D.2d 947, 530 N.Y.S.2d 293, 1988 N.Y. App. Div. LEXIS 6843 (N.Y. App. Div. 3d Dep't 1988).

Evidence supported determination that claimant suffered permanent partial disability as result of back injury causally related to work accident, although specialist to whom he was referred attributed his continuing discomfort to unrelated arthritic changes to his back and hip, where his treating physician rejected any connection between his disabling back condition and his arthritic hip, and another specialist linked his condition to aggravations of his otherwise asymptomatic lumbar spinal arthritis by work accidents. Walker v Fred H. Low & Son, Inc., 154 A.D.2d 853, 546 N.Y.S.2d 711, 1989 N.Y. App. Div. LEXIS 13414 (N.Y. App. Div. 3d Dep't 1989).

Evidence supported determination that claimant sustained causally related disability due to back injury suffered on job, even though he had had 2 back surgeries prior to job injury, where he was able to continue and function in his job as blacktop laborer subsequent to such surgeries. Williams v Boll, 184 A.D.2d 881, 585 N.Y.S.2d 538, 1992 N.Y. App. Div. LEXIS 8004 (N.Y. App. Div. 3d Dep't 1992).

Board properly disallowed disability claim where claimant did not complain of lower back pain until 16 months after accident, employer's expert testified that claimant's back injury was not causally related to accident, and 2 of claimant's own experts were unable to state that accident and back problems complained of 16 months later were causally related. Di Liberto v Hickory Farms, 236 A.D.2d 663, 653 N.Y.S.2d 192, 1997 N.Y. App. Div. LEXIS 1105 (N.Y. App. Div. 3d Dep't 1997).

Typesetter did not sustain accident or occupational disease entitling her to workers' compensation benefits, even though she claimed back injury due to prolonged sitting in awkward position at work, where she lost no time from work before being fired, she did not stop work due to any work-related medical condition, and she first sought medical treatment after being fired. Audouin v Economist Intelligence Unit, 263 A.D.2d 689, 693 N.Y.S.2d 695, 1999 N.Y. App. Div. LEXIS 8001 (N.Y. App. Div. 3d Dep't 1999).

Workers' Compensation Commission properly denied benefits to a claimant because he failed to establish that a compensable work-related accident occurred or that timely notice of the injury was given to the employer where he was unable to remember which coworkers he told about the injury to his back or if he told his supervisor how the injury occurred, it was approximately six months after he sought medical attention for his injury that his medical records reflected that he attributed the injury to the alleged work-related incident, and the claimant gave incomplete, non-responsive, and contradictory answers regarding his medical treatment, medication, and prior injuries on a workers' compensation questionnaire form. Matter of Aldea v Damari Installations Corp., 172 A.D.3d 1852, 100 N.Y.S.3d 443, 2019 N.Y. App. Div. LEXIS 4246 (N.Y. App. Div. 3d Dep't 2019).

335. —Sufficiency of evidence of causation in particular cases; heart problems

Where the janitor of an apartment house became ill while bailing water from a clogged sewer out of the basement and died three days later from coronary sclerosis which a physician testified was caused by physical exertion in connection with said bailing of water, compensation will be allowed. Hut v Lejack Holding Corp., 262 A.D. 978, 30 N.Y.S.2d 35, 1941 N.Y. App. Div. LEXIS 6764 (N.Y. App. Div. 1941).

Decedent, employed as chef foreman by restaurant, did no heavy physical work. While in kitchen reading some papers he suffered fatal heart attack. He had suffered series of heart attacks prior thereto. There was proof that kitchen was busy and that decedent had been working hard. Held: accidental death was not established. Bruman v Horn & Hardart Co., 5 A.D.2d 895, 170 N.Y.S.2d 857, 1958 N.Y. App. Div. LEXIS 6703 (N.Y. App. Div. 3d Dep't 1958).

On medical testimony, referee's decision holding that decedent died as result of acute myocardial infarction on March 21, 1954, which death was causally related to injury sustained in automobile accident January 7, 1953, which arose out of and in the course of employment, properly affirmed. Fournier v Merchants & Business Mens, Inc., 6 A.D.2d 728, 174 N.Y.S.2d 311, 1958 N.Y. App. Div. LEXIS 5792 (N.Y. App. Div. 3d Dep't), app. denied, 5 N.Y.2d 705, 1958 N.Y. LEXIS 1552 (N.Y. 1958).

Denial of death benefits in connection with death of construction electrician from heart attack which occurred shortly after climbing up and down the stairs of one 12-story building and one 7-story building in quick succession, on ground of want of causal relationship and uncertainty of medical testimony, reversed and cause remitted for re-evaluation of testimony. Dunn v H. A. Collman Electric Co., 20 A.D.2d 747, 246 N.Y.S.2d 801, 1964 N.Y. App. Div. LEXIS 4322 (N.Y. App. Div. 3d Dep't 1964).

Finding of Workmen's Compensation Board that there was insufficient evidence that decedent who collapsed and died from heart attack while sitting on a bench before the start of the day's

work had engaged in strenuous work activities on or about the day of death and that decedent did not sustain an accidental injury was based upon substantial evidence in the record. Parker v Long Lake, 49 A.D.2d 992, 374 N.Y.S.2d 150, 1975 N.Y. App. Div. LEXIS 11322 (N.Y. App. Div. 3d Dep't 1975).

Claimant's myocardial infarction was a compensable accident where substantial evidence supported Board's finding that claimant suffered his infarction due to the employer's drastic reduction in the number of employees and the reduction furloughs which produced increased pressures and tensions. Ball v Benjamin Electric Corp., 84 A.D.2d 593, 444 N.Y.S.2d 221, 1981 N.Y. App. Div. LEXIS 15698 (N.Y. App. Div. 3d Dep't 1981).

Testimony of claimant's treating physician (internist) provided ample support for determination of Workers' Compensation Board that claimant (bus driver) suffered myocardial infarction causally related to his increased efforts during months of transit strike, despite testimony of 2 cardiologists who found no causal relationship, where claimant had previously suffered compensable heart attack in course of employment, and internist testified that claimant sustained myocardial infarction shortly after he and his wife had brought food to bus terminal for striking workers of rival bus line and that claimant had suffered permanent damage to his heart as result. Curtis v Adirondack Trailways, 146 A.D.2d 900, 536 N.Y.S.2d 279, 1989 N.Y. App. Div. LEXIS 91 (N.Y. App. Div. 3d Dep't 1989).

Determination of Workers' Compensation Board that decedent's fatal heart attack was causally related to stress of physical therapy session he had undergone several hours earlier in connection with rehabilitation for earlier compensable injury was supported by (1) testimony of claimant's medical consultant, who had reviewed written report of decedent's physical therapist which detailed exercise regimen decedent engaged in on day in question, and thus was qualified to offer opinion on causation, and (2) claimant's testimony that when she picked decedent up after therapy session, he was pale, breathing very heavily, looked like he might faint, and stated "They gave me very heavy therapy today." Capon v Grumman Corp., 156 A.D.2d 803, 549 N.Y.S.2d 220, 1989 N.Y. App. Div. LEXIS 15536 (N.Y. App. Div. 3d Dep't 1989).

In workers' compensation proceeding brought by state trooper who asserted that his heart attack was caused by stress on his job from being pressured to write more tickets, and also by chopping wood, which he stated he did to lose weight as dictated by his supervisor, board's finding that claimant's own action in cutting wood for personal reasons precipitated heart attack, not job stress, was supported by evidence that claimant's supervisor did not order claimant to engage in specific activity of wood-chopping, that claimant was chopping wood primarily to further secondary financial gain unrelated to his employment, and that claimant had given no prior indication that he was especially upset at work or that he was under any greater strain than his fellow officers. Cooley v New York State Police, 158 A.D.2d 828, 551 N.Y.S.2d 412, 1990 N.Y. App. Div. LEXIS 1721 (N.Y. App. Div. 3d Dep't 1990).

Workers' Compensation Board improperly rejected unanimous conclusion of the only 2 medical experts to offer opinion as to lack of causal relationship between claimant's employment and myocardial infarction which disabled him; by concluding that constant high stress of employment aggravated preexisting heart condition over time, constituting repeated trauma which created causal relationship between employment and disability, board's decision lacked support of substantial evidence in record. Doersam v Oswego County Dep't of Social Services, 171 A.D.2d 934, 566 N.Y.S.2d 978, 1991 N.Y. App. Div. LEXIS 3313 (N.Y. App. Div. 3d Dep't 1991), aff'd, 80 N.Y.2d 775, 587 N.Y.S.2d 283, 599 N.E.2d 687, 1992 N.Y. LEXIS 5044 (N.Y. 1992).

Substantial evidence supported determination by Workers' Compensation Board that there was causal connection between myocardial infarction and claimant's employment where claimant testified that he experienced pain in his chest and arms after he had run up hill and twice around burning building, and had twice climbed fence, while investigating fire in his capacity as fire investigator; fact that other preexisting conditions may also have contributed to infarction did not require different result. Sturtevant v Broome County, 188 A.D.2d 893, 591 N.Y.S.2d 631, 1992 N.Y. App. Div. LEXIS 14636 (N.Y. App. Div. 3d Dep't 1992).

Death of claimant's decedent from myocardial infarction was properly found not to be causally related to his employment where employer's consulting cardiologist testified that myocardial infarction was caused solely by pre-existing risk factors, including heavy cigarette smoking and family history of heart disease, decedent's treating internist was unable to state with reasonable degree of medical certainty that decedent's work contributed to his death, and decedent's co-worker testified that, despite fact that decedent had been working long hours as diesel mechanic for several weeks prior to his death, he had not been assigned to perform any particular strenuous or stressful tasks and was completing paperwork at his desk for most of morning on day of his death. Wilson v Reddy Constr. Co., 272 A.D.2d 806, 709 N.Y.S.2d 639, 2000 N.Y. App. Div. LEXIS 5973 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 875, 714 N.Y.S.2d 707, 737 N.E.2d 950, 2000 N.Y. LEXIS 3440 (N.Y. 2000).

336. — —Arteriosclerosis, artery disease or other preexisting condition

Claimant collapsed and died while wheeling a hand truck at his work. An autopsy indicated that the cause of death was occlusive coronary arteriosclerosis. It was not clear whether his work on the day in question was any heavier than usual. Medical testimony was insufficient to sustain an award. Some of it indicated that claimant might have died from the ordinary strains of life, while other testimony indicated the possibility of a causal connection. Hanafan v P. Callahan, Inc., 3 A.D.2d 786, 161 N.Y.S.2d 318, 1957 N.Y. App. Div. LEXIS 6197 (N.Y. App. Div. 3d Dep't 1957).

Where claimant's deceased was employed as a bakery routeman and after what was known in the trade as a "hard stop" because after taking articles from the truck it was necessary to walk a considerable distance into the store to make deliveries and then to return to the truck, he suffered what was diagnosed as an acute myocardial infarction but the autopsy revealed that there was an underlying arteriosclerotic heart disease, held that the medical testimony set forth in the opinion constituted substantial evidence to sustain the finding of the board that the work the decedent was doing on the date of the accident was of sufficient strain to cause the heart attack and contributed to the death which occurred approximately two weeks later. Luftig v Stevenson Pie Co., 23 A.D.2d 920, 258 N.Y.S.2d 875, 1965 N.Y. App. Div. LEXIS 4284 (N.Y. App. Div. 3d Dep't 1965), aff'd, 18 N.Y.2d 734, 274 N.Y.S.2d 345, 221 N.E.2d 171, 1966 N.Y. LEXIS 1105 (N.Y. 1966).

Medical testimony that employee died of "occlusive coronary arteriosclerosis and probably fatal coronary insufficiency," attributed to claimant's work effort, supported finding that death resulted from an industrial accident. Conti v State Warehouse, Inc., 29 A.D.2d 1041, 289 N.Y.S.2d 453, 1968 N.Y. App. Div. LEXIS 4168 (N.Y. App. Div. 3d Dep't 1968).

Evidence supported findings that employee's activities in removing and replacing casters under piano weighing 500 pounds had been sufficient to produce an accidental injury and that death of employee who had been suffering from arteriosclerotic heart disease had been causally related to the accident of the same day, in workmen's compensation case brought by widow of deceased carpenter who while performing his duties suffered heart attack, collapsed and was pronounced dead on arrival at hospital. Peterson v Koral Bros., Inc., 54 A.D.2d 998, 387 N.Y.S.2d 935, 1976 N.Y. App. Div. LEXIS 14959 (N.Y. App. Div. 3d Dep't 1976).

A Workers' Compensation Board determination that a claimant had not sustained a compensable heart injury would be sustained, where testimony by the carrier's cardiological consultant that the claimant had a common case of progressive coronary artery disease, not causally related to the emotional stress of his employment, constituted substantial evidence to sustain the board's decision. Boscaino v Montefiore Medical Center, 90 A.D.2d 611, 456 N.Y.S.2d 168, 1982 N.Y. App. Div. LEXIS 18679 (N.Y. App. Div. 3d Dep't 1982).

Workers' compensation award for stroke suffered at work was supported by substantial evidence where claimant gave detailed and coherent account of events leading to sudden paralysis of his

left side, plaintiff's medical expert testified that disability was causally related to employment, and carrier's medical expert acknowledged that physical exertion by individual with arteriosclerotic heart disease might precipitate stroke. Abercrombie v Ryder Maintenance Corp., 165 A.D.2d 926, 560 N.Y.S.2d 367, 1990 N.Y. App. Div. LEXIS 11056 (N.Y. App. Div. 3d Dep't 1990).

Claimant was properly awarded benefits based on presumption contained in CLS Work Comp § 21 where decedent's cause of death was listed as cardiopulmonary arrest secondary to suspected pulmonary embolism, claimant testified as to long hours worked by decedent since his promotion to police chief 7 months earlier and stress he experienced as result of personnel and budget issues, and employer offered no alternative explanation for his collapse or proof that his death was unrelated to his employment. Sullivan v Canton Police Dep't, 285 A.D.2d 850, 728 N.Y.S.2d 300, 2001 N.Y. App. Div. LEXIS 7503 (N.Y. App. Div. 3d Dep't 2001).

337. — —Related to or triggered by physical exertion

Board finding of causal relationship between worker's myocardial infarction and single incident of carrying flat consisting of sheets of paper 36 inches long by 28 inches wide on which photographic negatives were laid out and weighing 15 pounds a distance of 20 feet to work table was not supported by substantial evidence in absence of showing in the record that worker's activity was carried on for substantial period. Kane v Canal Offset Plate Service, Inc., 24 A.D.2d 810, 263 N.Y.S.2d 818, 1965 N.Y. App. Div. LEXIS 3121 (N.Y. App. Div. 3d Dep't 1965).

Finding that act of referee employed by Workmen's Compensation Board in lifting file folders weighing over 40 pounds was sufficiently strenuous to require more than normal exertion and that such effort precipitated a coronary insult which developed into a myocardial infarction from which referee succumbed constituted sufficient evidence of death due to accidental injury. Gioscia v Workmen's Compensation Board, 28 A.D.2d 1067, 284 N.Y.S.2d 149, 1967 N.Y. App. Div. LEXIS 3125 (N.Y. App. Div. 3d Dep't 1967), app. denied, 21 N.Y.2d 641, 1968 N.Y. LEXIS 1714 (N.Y. 1968).

Workmen's Compensation Board's finding of accident and causal connection in respect to claimant's myocardial infarction was supported by substantial evidence, including proof that claimant was engaged in packing ballbearings for shipment and lifting filled boxes with varying weights of 100 to 150 pounds or more. Montini v Marlin-Rockwell Div. of TRW, Inc., 50 A.D.2d 1017, 376 N.Y.S.2d 714, 1975 N.Y. App. Div. LEXIS 12006 (N.Y. App. Div. 3d Dep't 1975).

338. — —Emotional stress and strain

Physician's undisputed opinion that claimant's disabling heart condition, because of tension, aggravation and anxiety in claimant's work activity and duties "could have" brought on his original coronary attack and claimant's testimony detailing work activities were sufficient to sustain determination that claimant's injury arose out of and in the course of his employment as an investigator for the state police. Rivard v New York State Police State Campus, 46 A.D.2d 34, 360 N.Y.S.2d 976, 1974 N.Y. App. Div. LEXIS 3627 (N.Y. App. Div. 3d Dep't 1974).

Since, in proceeding for workmen's compensation death benefits, two doctors gave as their view that the emotional stress, strain and tension endured by decedent, a 64-year-old license clerk whose duties required him to work behind a counter reviewing automobile registrations and renewals, on the day he suffered heart attack were causative factors of the attack, the Workmen's Compensation Board's finding of causal relationship was supported by substantial evidence. Goldstone v New York State Dep't of Motor Vehicles, 57 A.D.2d 973, 394 N.Y.S.2d 99, 1977 N.Y. App. Div. LEXIS 12263 (N.Y. App. Div. 3d Dep't 1977).

Determination that death of claimant's decedent, who collapsed while at work, was causally related to his employment was supported by (1) claimant's testimony that conditions of decedent's new position proved stressful to him, that he was required to work several hours of overtime at least twice per week, that he became nervous and quiet at home, experienced difficulty sleeping and began to smoke a "little" more despite lung condition, that overtime delayed decedent's use of home inhalation machine, causing his lungs to become congested, and that decedent was "tired" on day before he died, and (2) testimony of claimant's medical expert who stated that decedent suffered cardiac-related death precipitated by stress at work. Kavanaugh v Empire Mut. Ins. Group, 151 A.D.2d 885, 542 N.Y.S.2d 859, 1989 N.Y. App. Div. LEXIS 8115 (N.Y. App. Div. 3d Dep't 1989).

339. — —No evidence of working

Decedent, who had suffered angina attacks 2 days before his death and had been told at hospital that he would have to have complete bed rest or he would not live long, collapsed and died from coronary insufficiency while resting at work during noon hour. Board's finding of accident unwarranted and claim dismissed. Purport of testimony was that any exertion would have been overexertion for the decedent. O'Brein v Ronneberg, 8 A.D.2d 880, 186 N.Y.S.2d 725, 1959 N.Y. App. Div. LEXIS 8287 (N.Y. App. Div. 3d Dep't 1959).

A board finding that decedent's work as a truck mechanic involved activity more than the ordinary wear and tear of life and that it could be inferred that such work was strenuous involving long working hours and prolonged fatigue would not sustain a finding of accidental injury resulting in fatal heart attack where there was no evidence that decedent was engaged in performance of his usual duties when he suddenly died. Hawthorne v Eagle Delivery Truck Renting Corp., 20 A.D.2d 824, 247 N.Y.S.2d 448, 1964 N.Y. App. Div. LEXIS 4262 (N.Y. App. Div. 3d Dep't 1964).

340. — —Hearsay declaration

There was no evidence to sustain a finding that a school janitor, found dead in the boiler room, had slipped or fallen on loose paper. But he suffered from an incurable heart condition with cerebral complications and it might be found that his work was unusually heavy and the undue strain caused his death. The matter was remitted to the Workmen's Compensation Board. Tobin v Board of Education, 279 A.D. 1123, 112 N.Y.S.2d 762, 1952 N.Y. App. Div. LEXIS 6036 (N.Y. App. Div. 1952).

Where employee died as a result of myocardial infraction, his hearsay declarations that he felt a pain in his chest while moving furniture were corroborated by evidence that a tenant in an apartment house where he was employed had called his home and that decedent appeared ashy white and perspiring one hour after starting work. Fath v 1095 Park Ave. Corp., 285 A.D. 1094, 139 N.Y.S.2d 317, 1955 N.Y. App. Div. LEXIS 6758 (N.Y. App. Div. 1955).

A bank porter, during a flood, performed heavy work for long hours. Several days later he died of a coronary occlusion. Death benefits award was affirmed over contention that medical testimony presupposed that decedent suffered chest pains during the interval between his work and death and this supposition rested entirely upon the uncorroborated hearsay declaration of the decedent to his wife. Schulz v Handi-Man Co., 286 A.D. 903, 142 N.Y.S.2d 180, 1955 N.Y. App. Div. LEXIS 4471 (N.Y. App. Div. 1955).

341. —Sufficiency of evidence of causation in particular cases; thrombosis, phlebitis and circulatory problems

Decedent fell while descending ladder from a 13-foot scaffold and later died. Autopsy revealed cause of death as a spontaneous subarachnoid hemorrhage and rupture of aneurysm of Circle of Willis. Hospital records noted a bluish swelling over decedent's eye. Medical examiner stated there was no causal relationship but claimant's doctor testified that the nature of the work (decedent's usual work), the elevation and the trauma showed a causal relationship. Award affirmed. Patane v E. B. Carley & Co., 283 A.D. 764, 128 N.Y.S.2d 69, 1954 N.Y. App. Div. LEXIS 5177 (N.Y. App. Div. 1954).

Death benefits award was affirmed where claimant suffered a leg injury which resulted in cellulitis and about a month thereafter claimant developed a localized perinephritic involvement of the kidney area and died as a result of a pulmonary embolism due to thrombo phlebitis. There was conflicting medical evidence as to causal relationship. Weinstein v Draper Clothes, Ltd., 285 A.D. 1101, 139 N.Y.S.2d 365, 1955 N.Y. App. Div. LEXIS 6770 (N.Y. App. Div. 1955).

An award was affirmed where the medical evidence warranted a finding by the board of causal relation in a case involving a

retail store salesman who died from multiple pulmonary abscesses approximately 4 months after he had been seriously injured by 3 men who entered the store, for purpose of robbery. Steigman v Non-Pareil Men's Shop, 3 A.D.2d 620, 158 N.Y.S.2d 7, 1956 N.Y. App. Div. LEXIS 3435 (N.Y. App. Div. 3d Dep't 1956).

Claimant was not entitled to recover compensation for thrombosis of the internal carotid artery where there was medical opinion to the effect that the artery symptoms would not have occurred in the time sequence described by the claimant, and medical history attributed to claimant showed that he described to at least two doctors the onset of his symptoms as associated with activities entirely unrelated to his work. Smith v Bogold Bros., Inc., 9 A.D.2d 988, 194 N.Y.S.2d 872, 1959 N.Y. App. Div. LEXIS 5306 (N.Y. App. Div. 3d Dep't 1959).

Where the claimant, a dental assistant, testified that she suddenly experienced severe pain in her legs, and her consulting surgeon testified that the constant striking of her legs against objects in her employer's office was a competent producing cause of the phlebitis from which he found her to be suffering, there was substantial evidence supporting the finding of the workmen's compensation board that the claimant had sustained an accidental injury within the meaning of the Workmen's Compensation Law. Stein v Schneider, 34 A.D.2d 1062, 312 N.Y.S.2d 95, 1970 N.Y. App. Div. LEXIS 4231 (N.Y. App. Div. 3d Dep't 1970).

There was ample medical evidentiary support for finding of Workmen's Compensation Board that claimant, who received injury to his back, left leg and left elbow in a fall, had a continuing total disability from phlebitis and pulmonary emboli which were causally related to fall at work two years previously. Thomas v International Harvester Co., 57 A.D.2d 670, 393 N.Y.S.2d 620, 1977 N.Y. App. Div. LEXIS 11698 (N.Y. App. Div. 3d Dep't 1977).

Decedent's death from stroke at work was not causally related to his work activities as computer programmer. Broder v City of New York, 239 A.D.2d 781, 657 N.Y.S.2d 473, 1997 N.Y. App. Div. LEXIS 5268 (N.Y. App. Div. 3d Dep't), app. denied, 90 N.Y.2d 805, 663 N.Y.S.2d 511, 686 N.E.2d 223, 1997 N.Y. LEXIS 2941 (N.Y. 1997).

Claimant sustained accidental injury arising out of and in course of his employment and thus was entitled to workers' compensation benefits where (1) he presented evidence that he was insulin-dependent diabetic who had worked as machine operator for more than 15 years without similar incident and that he developed phlebitis in his leg in April 1994 caused by prolonged standing on concrete floor in performance of his job duties, (2) his physician testified that claimant's work environment contributed to aggravation of his medical condition to extent that by September 1994 he was totally disabled and unable to continue his employment, and (3) employer's internist agreed that claimant was "permanently and markedly" disabled and acknowledged that persistent standing had worsened claimant's condition, particularly cellulitis, although he attributed only 10 percent of disability to "the aggravation of long periods of standing." Ochsner v New Venture Gear, 273 A.D.2d 715, 710 N.Y.S.2d 443, 2000 N.Y. App. Div. LEXIS 7446 (N.Y. App. Div. 3d Dep't 2000), app. dismissed, 96 N.Y.2d 731, 722 N.Y.S.2d 797, 745 N.E.2d 1019, 2001 N.Y. LEXIS 144 (N.Y. 2001).

342. —Sufficiency of evidence of causation in particular cases; tuberculosis

Evidence was insufficient to support an award in a proceeding brought by a nurse against employer-hospital on the theory that she had contracted tuberculosis while attending an obstetrical patient who was suffering from active tuberculosis. Goettel v United Hospital, 3 A.D.2d 612, 158 N.Y.S.2d 50, 1956 N.Y. App. Div. LEXIS 3423 (N.Y. App. Div. 3d Dep't 1956).

An award to a nurse who attributed her tuberculosis to infection in the course of her employment as a student in a hospital was reversed where the only proof that she came in contact with tubercular patients was her own opinion evidence. Maher v St. Mary's Hospital, 3 A.D.2d 875, 161 N.Y.S.2d 243, 1957 N.Y. App. Div. LEXIS 5897 (N.Y. App. Div. 3d Dep't 1957).

In course of training as student nurse at appellant hospital, claimant came into contract with tuberculosis patients and, prior to graduation, she began feeling tired and restless. Thereafter, while associated with another hospital, she was found to be suffering from tuberculosis. Award affirmed. Gentiluomo v Rockville Minor Surgery Hospital, 7 A.D.2d 658, 179 N.Y.S.2d 492, 1958 N.Y. App. Div. LEXIS 4297 (N.Y. App. Div. 3d Dep't 1958).

Where claimant was employed as a laundryman whose duties required him to carry soiled bed linen, shirts, underwear, and other articles of clothing received from private households, physicians' offices, the laboratory of a pathologist, other commercial laundries, and a neighborhood hospital, and he developed tuberculosis of lymph glands resulting in operation, evidence of his attending and operating physicians that he became infected with tuberculosis from such articles of laundry through laceration of his hand, must be accounted substantial although there was no direct evidence of presence of tubercular bacilli in articles handled by him. Kornegay v Franklin Laundry, 23 A.D.2d 601, 256 N.Y.S.2d 434, 1965 N.Y. App. Div. LEXIS 4872 (N.Y. App. Div. 3d Dep't), app. denied, 15 N.Y.2d 487, 1965 N.Y. LEXIS 1926 (N.Y. 1965).

Mere establishment of exposure to an allegedly tubercular prison inmate could not sustain finding that guard who contracted tuberculosis sustained an accidental injury within meaning of Workmen's Compensation Law. Middleton v Coxsackie Correctional Facility, 45 A.D.2d 903, 357 N.Y.S.2d 732, 1974 N.Y. App. Div. LEXIS 4381 (N.Y. App. Div. 3d Dep't 1974), rev'd, 38 N.Y.2d 130, 379 N.Y.S.2d 3, 341 N.E.2d 527, 1975 N.Y. LEXIS 2297 (N.Y. 1975).

343. —Sufficiency of evidence of causation in particular cases; lung diseases or conditions

An iron molder who fractured a rib, developed a pleuritic rub and died two months later of bronchial pneumonia suffers a disease resulting from an accident under this section. De Marco v Townsend Mach. Corp., 264 A.D. 969, 37 N.Y.S.2d 97, 1942 N.Y. App. Div. LEXIS 5578 (N.Y. App. Div. 1942).

Speculative opinion of general practitioner that decedent's death from terminal pneumonia was causally related to the injury sustained six years earlier, as a result of which, decedent became inactive and was a prey to sedentary pneumonia was to tenuous to be regarded as substantial evidence. Thompson v Patterson, 284 A.D. 820, 132 N.Y.S.2d 545, 1954 N.Y. App. Div. LEXIS 3557 (N.Y. App. Div. 1954).

An award for death benefits was sustained where there was substantial medical proof as to the existence of corpulmonale due to silicosis, contracted in the course of employment, and as to causal relation of such condition to death. Orzell v Straight Line Foundry & Machine Corp., 3 A.D.2d 615, 158 N.Y.S.2d 58, 1956 N.Y. App. Div. LEXIS 3426 (N.Y. App. Div. 3d Dep't 1956).

The Board's determination that death was causally related to the accident was proper on the basis of lay and medical testimony that decedent died during a coughing spell and had chronic bronchitis, causally related, from the date of his accident to the date of his death, and which was a contributory factor in the decedent's death. Fleming v George N. Flinn Corp., 35 A.D.2d 863, 315 N.Y.S.2d 253, 1970 N.Y. App. Div. LEXIS 3595 (N.Y. App. Div. 3d Dep't 1970), app. denied, 28 N.Y.2d 482, 1971 N.Y. LEXIS 1719 (N.Y. 1971).

Testimony of physician specializing in pulmonary diseases provided evidence to support finding of Workers' Compensation Board that claimant's death was causally related to his established occupational disease of asbestosis, despite existence of compelling contrary evidence, where physician opined that claimant would still have been alive but for his exposure to asbestos based on claimant's medical records and documented findings of pleural thickening and pulmonary fibrosis. Riganti v South Mall Constr., 210 A.D.2d 818, 620 N.Y.S.2d 581, 1994 N.Y. App. Div. LEXIS 13260 (N.Y. App. Div. 3d Dep't 1994).

Claimant failed to show that he sustained an occupational disease, as his exposure to a type of mold was not attributable to a distinctive aspect of his job, and that type of mold was so common that both medical experts acknowledged that he could have been exposed to it anywhere at any time. Matter of Connolly v Covanta Energy Corp., 123 A.D.3d 1394, 1 N.Y.S.3d 404, 2014 N.Y. App. Div. LEXIS 8995 (N.Y. App. Div. 3d Dep't 2014), app.

denied, 25 N.Y.3d 910, 36 N.E.3d 90, 15 N.Y.S.3d 287, 2015 N.Y. LEXIS 1409 (N.Y. 2015).

344. —Sufficiency of evidence of causation in particular cases; cancer

Death benefits award was improper where employee died as a result of cancer. Although employee was receiving compensation for a heart ailment and physician testified that the heart condition hastened his death, the evidence was speculative and did not establish a causal relationship. Riehl v Amherst-Dept. of Highways, 308 N.Y. 212, 124 N.E.2d 287, 308 N.Y. (N.Y.S.) 212, 1954 N.Y. LEXIS 936 (N.Y. 1954).

Workers' Compensation Board properly denied benefits for widow of worker who died of lung cancer, because of failure to prove causal relationship, where widow's 2 experts assumed that worker had been exposed to ink, paper dust and solutions, but there was no evidence to establish his work environment or chemicals to which he was exposed, and third expert concluded that worker's cancer was caused by smoking. Freitag v New York Times, 260 A.D.2d 748, 687 N.Y.S.2d 809, 1999 N.Y. App. Div. LEXIS 3660 (N.Y. App. Div. 3d Dep't 1999).

Substantial evidence supported the Workers' Compensation Board's decision that the claimant, a former firefighter, was not entitled to workers' compensation benefits because the conflicting medical opinions, including the prevalence of prostate cancer and the other possible explanations for the claimant contracting the condition, did not establish a causal relationship between the claimant's employment and his prostate cancer. Matter of Tucker v City of Plattsburgh Fire Dept., 153 A.D.3d 984, 59 N.Y.S.3d 609, 2017 N.Y. App. Div. LEXIS 5954 (N.Y. App. Div. 3d Dep't), app. denied, 30 N.Y.3d 906, 93 N.E.3d 1210, 70 N.Y.S.3d 446, 2017 N.Y. LEXIS 3300 (N.Y. 2017).

345. —Sufficiency of evidence of causation in particular cases; head injury

An employee who sustained a blow on his head and subsequently developed sleeping sickness is not entitled to an award for the disease. Donovan v Alliance Electric Co., 195 A.D. 678, 186 N.Y.S. 813, 1921 N.Y. App. Div. LEXIS 4818 (N.Y. App. Div. 1921).

Claimant was injured in accident while operating a taxicab. He suffered cerebral concussion, post-concussion headache and contusions to left side of face and left shoulder. He received compensation and, thereafter, case was closed. Subsequently, he was found to be suffering from recurrent attacks of dizziness and impaired sensation and weakness of grip in right arm and case was reopened. Held: board properly found on substantial evidence that claimant's disability was causally related to the accident. Campana v Hogan, 7 A.D.2d 815, 180 N.Y.S.2d 1005, 1958 N.Y. App. Div. LEXIS 3750 (N.Y. App. Div. 3d Dep't 1958), app. denied, 5 N.Y.2d 711, 1959 N.Y. LEXIS 2023 (N.Y. 1959).

Evidence sustained decision of workers' compensation board that head injuries and posttraumatic stress syndrome were causally related to accident where surgical instrument polisher fell to cement floor after he became dizzy and light-headed from inhaling acid vapors while cleaning surgical instruments with muriatic acid. Bolek v George Tieman & Co., 216 A.D.2d 608, 627 N.Y.S.2d 175, 1995 N.Y. App. Div. LEXIS 5843 (N.Y. App. Div. 3d Dep't), app. dismissed, 86 N.Y.2d 886, 635 N.Y.S.2d 951, 659 N.E.2d 774, 1995 N.Y. LEXIS 4469 (N.Y. 1995).

346. —Sufficiency of evidence of causation in particular cases; apoplexy, stroke

The evidence was insufficient to establish any accident or causal relationship between death of an employee about two years after sustaining a cerebral vascular injury, or stroke, one morning when he was then 69 years of age and employed as a doorman and elevator operator in an apartment building, notwithstanding he had been suffering from hypertension and arteriosclerosis for many years and from headaches and dizziness while at work, and it appeared that, on the morning in question, he was complaining of headaches and dizziness before even starting to work and collapsed after merely collecting some newspapers in the lobby for delivery to tenants. Von Der Lin v 635 Park Ave. Corp., 9 A.D.2d 982, 194 N.Y.S.2d 805, 1959 N.Y. App. Div. LEXIS 5297 (N.Y. App. Div. 3d Dep't 1959), aff'd, 8 N.Y.2d 950, 204 N.Y.S.2d 182, 168 N.E.2d 848, 1960 N.Y. LEXIS 1083 (N.Y. 1960).

Evidence that laborer sustained cerebral hemorrhage while working on construction project and died the following day, along with medical evidence, permitted finding that death was accident, and sustained award of death benefits. Goff v John Bogdan & Son, 55 A.D.2d 806, 390 N.Y.S.2d 261, 1976 N.Y. App. Div. LEXIS 15607 (N.Y. App. Div. 3d Dep't 1976).

Record supported determination that death of claimant's decedent (due to intercranial pontine hemorrhage, or stroke) was causally related to his employment as Commissioner of New York State Workers' Compensation Board, based on undisputed testimony that he was under significant job pressures during week before his death, undisputed evidence that he was obese and suffered from hypertension and arteriosclerosis, and conflicting medical evidence as to actual cause of his death. Kroeger v New York State Workers' Compensation Bd., 222 A.D.2d 912, 635 N.Y.S.2d 112, 1995 N.Y. App. Div. LEXIS 13322 (N.Y. App. Div. 3d Dep't 1995), app. denied, 88 N.Y.2d 801, 644 N.Y.S.2d 688, 667 N.E.2d 338, 1996 N.Y. LEXIS 1059 (N.Y. 1996).

347. —Sufficiency of evidence of causation in particular cases; bone fractures or disease

Decedent suffered an accident which arose out of and in the course of his employment when he fell and sustained fractures of the hip. He was thereafter consigned to bed, continued to lose weight until he was unable to walk alone and died 2 ½ years later from generalized arteriosclerosis, arteriosclerotic renal disease. Held: an award was sustained where the record contained substantial medical evidence to sustain the board's finding that the accidental injuries started a chain of events and complications that eventually caused his death. Sheil v Railway Express Agency, Inc., 4 A.D.2d 908, 166 N.Y.S.2d 673, 1957 N.Y. App. Div. LEXIS 4304 (N.Y. App. Div. 3d Dep't 1957).

Although three doctors were of the opinion that there was no causal relation between a fall suffered by claimant in April, 1953, in which she struck her left hip, and a subsequent condition which became apparent in 1956 when she consulted a surgeon concerning pains in her hip and X-rays disclosed destruction and degeneration of the head of the femur and a secondary fracture of the rim of the acetabulum which required surgery, the surgeon's testimony that the fracture could have resulted from the 1953 trauma was considered sufficient to sustain a compensation award. Mantell v Ohrbach's, Inc., 10 A.D.2d 759, 197 N.Y.S.2d 563, 1960 N.Y. App. Div. LEXIS 11204 (N.Y. App. Div. 3d Dep't 1960), aff'd, 9 N.Y.2d 721, 214 N.Y.S.2d 339, 174 N.E.2d 325, 1961 N.Y. LEXIS 1454 (N.Y. 1961).

348. —Sufficiency of evidence of causation in particular cases; joint

A claimant was not entitled to compensation for the consequent injuries from a compensated disability where the proximate cause thereof was not his physical condition but his own temerity in persisting in operating an automobile with knowledge that his knee might lock. In 1948 and 49 Claimant sustained injuries to his right leg, compensable under the Compensation Law, and as a result, his knee acquired a tendency to "lock" whenever undue weight was placed upon the leg. Although he knew that knee might lock by operation of automobile foot brake, claimant continued to operate his car until, one day, as a result of the locked knee he was unable to stop his car, struck a tree and sustained injury. Sullivan v B & A Const., Inc., 307 N.Y. 161, 120 N.E.2d 694, 307 N.Y. (N.Y.S.) 161, 1954 N.Y. LEXIS 989 (N.Y. 1954).

Medical proof of causal relationship between osteoarthritic condition and injury incurred when claimant lifted rack of shoes weighing more than 100 pounds was sufficient to sustain board's finding. Casa v Genesco Inc., 24 A.D.2d 809, 263 N.Y.S.2d 938, 1965 N.Y. App. Div. LEXIS 3120 (N.Y. App. Div. 3d Dep't 1965), aff'd, 18 N.Y.2d 732, 274 N.Y.S.2d 170, 220 N.E.2d 812, 1966 N.Y. LEXIS 1104 (N.Y. 1966).

349. —Sufficiency of evidence of causation in particular cases; chest

The death of an employee may be found to have been caused by an injury over a month prior to his death where at the time of the

original injury the employee was pitching hay and overexerted himself, suffering at the time a strain and a tearing pain in his chest. Crofts v Ledyard, 271 A.D. 1042, 68 N.Y.S.2d 603, 1947 N.Y. App. Div. LEXIS 5758 (N.Y. App. Div.), app. dismissed, 296 N.Y. 999, 73 N.E.2d 575, 296 N.Y. (N.Y.S.) 999, 1947 N.Y. LEXIS 1743 (N.Y. 1947).

Evidence was insufficient to show a causal relation between a trauma to claimant's chest which disabled him from work for two days in 1959 and a spontaneous left pneumothorax 18 months later, where the only evidence in that regard was testimony of a single doctor that there was some possibility of causality but no reasonable medical probability. Shapiro v Coca Cola Bottling, Inc., 22 A.D.2d 717, 253 N.Y.S.2d 177, 1964 N.Y. App. Div. LEXIS 3053 (N.Y. App. Div. 3d Dep't 1964).

350. —Sufficiency of evidence of causation in particular cases; ulcer

Decedent died from post-operative peritonitis resulting from radical gastroenterostomy. The impartial specialist reported that the ulcer which led to death was caused by trauma of accident. Award affirmed. Badillo v 1215 Grand Concourse Corp., 8 A.D.2d 899, 187 N.Y.S.2d 54, 1959 N.Y. App. Div. LEXIS 8316 (N.Y. App. Div. 3d Dep't 1959), aff'd, 8 N.Y.2d 919, 204 N.Y.S.2d 164, 168 N.E.2d 835, 1960 N.Y. LEXIS 1145 (N.Y. 1960).

Where it was not disputed that claimant, on November 13, 1958, sustained a work-connected injury resulting in an ulcer on his left ankle, and the question was one of continuing causally related partial disability following an operation on the injured ankle, the medical testimony was sufficient to sustain an award from February 4, 1959, to April 13, 1960, for reduced earnings. Pearce v Central School Dist., 16 A.D.2d 992, 229 N.Y.S.2d 122, 1962 N.Y. App. Div. LEXIS 9057 (N.Y. App. Div. 3d Dep't 1962).

351. —Sufficiency of evidence of causation in particular cases; suicide

Workers' Compensation Board did not err in concluding that decedent's death by suicide arose out of and in course of his employment as business manager with local office of labor union where expert medical evidence (including testimony and report of impartial specialist in psychiatry) demonstrated that, despite absence of any prior manifestations of mental illness, decedent's frustration, concern and sense of loss due to merger of 2 local offices caused or contributed to his progressive depressive illness, and that his suicide was "significant feature" of his depressive illness. Miller v IBEW Local 631, 237 A.D.2d 641, 654 N.Y.S.2d 460, 1997 N.Y. App. Div. LEXIS 2254 (N.Y. App. Div. 3d Dep't 1997).

Entirely speculative testimony by decedent's treating psychiatrist was insufficient to support Workers' Compensation Board's conclusion that death in 1988 from drug overdose was causally related to decedent's 1978 injury during his employment as building superintendent when he was shot by unidentified assailants, where psychiatrist was not familiar with details of decedent's drug use history or particular circumstances of his death, he offered no medical hypothesis to substantiate his conclusion that drug overdose was caused by decedent's ongoing depression, and psychiatrist's opinion was based on nothing more than general theory that depression can, and often does, cause afflicted person to commit suicide or engage in self-destructive behavior. Ayala v DRE Maintenance Corp., 238 A.D.2d 674, 656 N.Y.S.2d 71, 1997 N.Y. App. Div. LEXIS 3732 (N.Y. App. Div. 3d Dep't), aff'd, 90 N.Y.2d 914, 664 N.Y.S.2d 256, 686 N.E.2d 1350, 1997 N.Y. LEXIS 4808 (N.Y. 1997).

352. —Sufficiency of evidence of causation in particular cases; other diseases or conditions

An employee suffering from a fibroid uterus was not entitled to compensation when after she fell down a flight of stairs sustaining bruises and contusions she began hemorrhaging. Although one physician casually testified that the fall had something to do with the hemorrhaging the Board could properly find that evidence of causal relationship was too speculative. Gebhardt v Bickford's Inc., 285 A.D. 1093, 139 N.Y.S.2d 351, 1955 N.Y. App. Div. LEXIS 6757 (N.Y. App. Div. 1955).

Decedent, in course of employment, was struck in shins and fell on his left side. He died 8 days later and autopsy showed that primary cause of death was heart disease and disease of blood vessels, but also that there were injuries to spleen and pancreas of traumatic origin. Held, accident could have produced latter conditions and there was adequate proof that those injuries accelerated death. Horan v Berlanti Constr. Co., 5 A.D.2d 917, 171 N.Y.S.2d 897, 1958 N.Y. App. Div. LEXIS 6446 (N.Y. App. Div. 3d Dep't 1958).

Decedent was found unconscious in men's room of employer's store. During subsequent brain operation no evidence of trauma or old blood clots was found. Surgeon testified that trauma had nothing to do with death. Held: the board properly found that the weight of evidence failed to support the finding of an accident. Fromer v Stern Bros., 8 A.D.2d 868, 186 N.Y.S.2d 752, 1959 N.Y. App. Div. LEXIS 8267 (N.Y. App. Div. 3d Dep't), app. denied, 7 N.Y.2d 705, 1959 N.Y. LEXIS 1832 (N.Y. 1959).

An award of death benefits was justified where decedent died eight days after being hospitalized as the result of injuries sustained when struck by a car while he was standing beside his truck, notwithstanding deceased was shown to have been a heavy drinker and the death certificate stated cause of death as chronic alcoholism with delirium tremens, on the basis of substantial evidence that the accident, plus drugs necessarily administered at the hospital, precipitated the delirium tremens. Eisele v Triangle Utilities, Inc., 9 A.D.2d 967, 193 N.Y.S.2d 706, 1959 N.Y. App. Div. LEXIS 5649 (N.Y. App. Div. 3d Dep't 1959).

There was sufficient evidence to sustain a decision of the board finding causal relationship between injuries sustained by claimant when he fell from a subway platform on January 17, 1955 and a later 25 percent disability, notwithstanding some conflict in the medical testimony. Cole v Petry Dental Laboratory, 11 A.D.2d 823, 203 N.Y.S.2d 213, 1960 N.Y. App. Div. LEXIS 8488 (N.Y. App. Div. 3d Dep't), app. denied, 8 N.Y.2d 708, 1960 N.Y. LEXIS 1838 (N.Y. 1960).

Substantial evidence supported the Workmen's Compensation Board's decision in awarding a widow death benefits that the decedent had been engaged in arduous work and his death in an industrial accident resulted from it. Bowman v W. F. Simmons, Inc., 37 A.D.2d 1013, 325 N.Y.S.2d 358, 1971 N.Y. App. Div. LEXIS 3094 (N.Y. App. Div. 3d Dep't 1971), app. denied, 29 N.Y.2d 488, 1972 N.Y. LEXIS 2252 (N.Y. 1972).

Evidence was insufficient to support finding of causal relation between workman's initial accident, when he was struck on right ankle by falling lumber, and subsequent gangrenous infection which led to amputation of leg. Whitaker v Sunset Queens, Inc., 49 A.D.2d 998, 374 N.Y.S.2d 402, 1975 N.Y. App. Div. LEXIS 11335 (N.Y. App. Div. 3d Dep't 1975).

Substantial evidence supported Workmen's Compensation Board's determination that compensable accident occurred when employee, a lawyer, was asphyxiated as he attempted to control attack of vomiting while he was having business dinner with two fellow employees who were working on same case; while there was some evidence that employee had consumed substantial quantity of alcohol prior to and during dinner, Board was not required to conclude that employee's activities were so unreasonable as to render accident solely due to personal acts. Cole v Union Carbide Corp., 50 A.D.2d 623, 374 N.Y.S.2d 741, 1975 N.Y. App. Div. LEXIS 12427 (N.Y. App. Div. 3d Dep't 1975).

Evidence which included testimony by physician who treated workmen's compensation claimant that claimant had fever and other symptoms of organic origin when claimant was hospitalized for injury sustained when claimant collapsed in his office supported determination that claimant's injury was not causally related to stress and strain of work and, therefore, was not compensable. Gangl v New York State Div. of Veteran Affairs, 55 A.D.2d 754, 389 N.Y.S.2d 450, 1976 N.Y. App. Div. LEXIS 15535 (N.Y. App. Div. 3d Dep't 1976).

A claimant who became incapcitated due to a mental condition causally related to his observation of a bloody bandage on the hand of a co-worker, who had injured his hand off the job site, did not sustain an industrial accident within the meaning of the Workers' Compensation Law. Claimant was not an active participant in the events which caused the injury, nor did he observe such events; claimant did not even see the injury itself. The mere fact that the mental injury was incurred by claimant while on the

job did not render the injury compensable. Everett v A.S. Steel Rule Die Corp., 106 A.D.2d 181, 484 N.Y.S.2d 972, 1985 N.Y. App. Div. LEXIS 48397 (N.Y. App. Div. 3d Dep't), aff'd, 66 N.Y.2d 683, 496 N.Y.S.2d 423, 487 N.E.2d 280, 1985 N.Y. LEXIS 17237 (N.Y. 1985).

Award of benefits for permanent partial disability would be remitted for further proceedings to determine cause of worker's loss of earnings where (1) no inference existed that loss of earnings was attributable to worker's disability, since he had continued working after accident until discharged for misconduct 4 years later, and (2) worker failed to offer specific evidence that he had been refused later employment as result of his disability. Dudlo v Polytherm Plastics, 125 A.D.2d 792, 509 N.Y.S.2d 899, 1986 N.Y. App. Div. LEXIS 63007 (N.Y. App. Div. 3d Dep't 1986), overruled in part, Matter of Zamora v New York Neurologic Assoc., 19 N.Y.3d 186, 947 N.Y.S.2d 788, 970 N.E.2d 823, 2012 N.Y. LEXIS 893 (N.Y. 2012).

Evidence supported decision of Workers' Compensation Board which attributed claimant's disability solely to industrial accident, and thus apportionment did not apply, where claimant was asymptomatic and actively employed prior to accident; fact that bone debris removed during surgery on claimant's injured ankle emanated from preexisting condition was not dispositive since ultimate question is whether claimant's employment affected prior condition so as to cause disability which did not previously exist. Zanetti v Orange & Rockland Utilities, Inc., 132 A.D.2d 761, 517 N.Y.S.2d 323, 1987 N.Y. App. Div. LEXIS 49279 (N.Y. App. Div. 3d Dep't 1987).

Substantial evidence supported determination of Workers' Compensation Board that claimant had no disability causally related to her previous injury where board, faced with conflicting medical evidence, chose to credit doctors' opinions which discounted subsequent causally related disability. Ehrlich v Chock Full O'Nuts Corp., 146 A.D.2d 878, 536 N.Y.S.2d 276, 1989 N.Y. App. Div. LEXIS 88 (N.Y. App. Div. 3d Dep't 1989).

Evidence supported determination of Workers' Compensation Board that claimant had permanent total psychiatric disability causally related to 1979 industrial accident, although board also concluded that claimant was not physically disabled after March 10, 1980, where claimant's psychiatrist testified that claimant's psychiatric disability was in part due to physical disability resulting from industrial accident, and although psychiatrist offered opinion that claimant was still physically disabled, he stated unequivocally on cross-examination that his opinion regarding claimant's psychiatric disability would be same even if board were to find him no longer physically disabled. Boiano v Delma Engineering Corp., 154 A.D.2d 762, 546 N.Y.S.2d 209, 1989 N.Y. App. Div. LEXIS 12403 (N.Y. App. Div. 3d Dep't 1989).

Evidence supported board's determination that claimant's disability was causally related to his employment as supermarket cashier, notwithstanding conflicting medical opinions and fact that claimant previously suffered from growth hormone deficiency resulting in "epiphysis," which kept ball of his hip joint from properly connecting his hip to femur of his leg, where 2 chiropractors opined that claimant's job duties caused both slippage of claimant's femoral epiphysis and chronic low back pain that allegedly developed after surgery to correct slippage. Stewart v P & C Food Mkts., 236 A.D.2d 667, 653 N.Y.S.2d 438, 1997 N.Y. App. Div. LEXIS 1113 (N.Y. App. Div. 3d Dep't 1997).

Substantial evidence supported workers' compensation board's decision that claimant's Parkinson's disease was unrelated to his injury to his arm while lifting heavy object at work, even though claimant's neurologist stated that arm injury "greatly contributed to the development of [claimant's] Parkinsonian symptoms," where record contained conflicting medical testimony, and board was free to resolve conflict in favor of employer. DeBlasio v New York City Dep't of Highways, 246 A.D.2d 837, 668 N.Y.S.2d 280, 1998 N.Y. App. Div. LEXIS 546 (N.Y. App. Div. 3d Dep't 1998).

Evidence supported Workers' Compensation Board's conclusion that no airborne substance other than paint fumes might have caused seasonal auditor's disability where (1) there was no evidence that building in which she was working contained any air contaminants other than paint fumes, (2) although auditor claimed that many of her symptoms first appeared after pesticides were sprayed in building in 1990, her application for benefits was based only on 1992 inhalation of paint fumes, and there was no indication that she suffered from any causally related medical problem before 1992, and (3) auditor was unable to identify particular contaminant or toxin other than paint fumes to which she was exposed during course of her employment. Gannon v New York State Dep't of Taxation & Fin., 275 A.D.2d 869, 713 N.Y.S.2d 576, 2000 N.Y. App. Div. LEXIS 9469 (N.Y. App. Div. 3d Dep't 2000).

Substantial evidence supported did not support the Workers' Compensation Board's decision finding that the claimant sustained a causally-related occupational disease because the proof failed to demonstrate that the claimant's shoulder injury was attributable to repetitive movements associated with moving heavy wheelbarrow loads of asphalt or performing other manual duties during his short period of employment as a laborer with the highway department. Matter of Yonkosky v Town of Hamburg, 158 A.D.3d 860, 69 N.Y.S.3d 899, 2018 N.Y. App. Div. LEXIS 633 (N.Y. App. Div. 3d Dep't 2018).

Substantial evidence supported the Workers' Compensation Board's determination that the claimant, a school bus driver, sustained an occupational disease of the neck and the right shoulder because the claimant complained of neck and right shoulder pain well before she filed her claim, and there was no indication that the medical opinions of the claimant's treating physicians were based upon false medical histories. Matter of DiGennaro v Greece Cent. Sch. Dist., 184 A.D.3d 917, 125 N.Y.S.3d 182, 2020 N.Y. App. Div. LEXIS 3288 (N.Y. App. Div. 3d Dep't 2020).

Substantial evidence did not support the Workers' Compensation Board's decision that the claimant suffered compensable injuries because, inter alia, the claimant, a village's police chief, was in an accident while driving his police vehicle on the third day of a personal trip, was not in the course of returning to work or attending to any other police matter at the time of his accident, and, thus, failed to demonstrate the requisite causal nexus between the accident and his employment. Matter of Love v Village of Pleasantville, 2020 N.Y. App. Div. LEXIS 8159 (N.Y. App. Div. 3d Dep't 2020).

VIII. Wages

353. In general

Under Workmen's Compensation Law §§ 2, 13, 37–39, the Board may properly fix the date of disablement for a sufferer from an occupational disease as the date when he first received medical treatment and thus impose liability upon the carrier for the cost of medical treatment after that date even where the employee continues work without loss of earnings. Ryciak v Eastern Precision Resistor, 12 N.Y.2d 29, 234 N.Y.S.2d 207, 186 N.E.2d 408, 1962 N.Y. LEXIS 888 (N.Y. 1962).

Village, which was paying benefits to retired firemen pursuant to CLS Gen Mun § 207-a, was not entitled to reimbursement out of firemen's unpaid installments of workers' compensation benefits since (1) CLS Work Comp §§ 25 and 30 provide only for reimbursement of "wages," (2) CLS Gen Mun § 207-a does not characterize benefit payments as "wages," and (3) firemen were not rendering services to village at time they received payments, but were in fact retired. Harzinski v Endicott, 126 A.D.2d 56, 512 N.Y.S.2d 525, 1987 N.Y. App. Div. LEXIS 41030 (N.Y. App. Div. 3d Dep't 1987).

Substantial evidence supported Workers' Compensation Board's award of 66 ⅔ percent of claimant's former average weekly wage of $409.83 where there was medical testimony as to nature and degree of his permanent partial disability and other testimony as to vocational opportunities and corresponding salaries available to him. Weinhart v Motors Holding, 245 A.D.2d 577, 664 N.Y.S.2d 889, 1997 N.Y. App. Div. LEXIS 12611 (N.Y. App. Div. 3d Dep't 1997).

Workers' Compensation Board properly awarded claimant benefits of $308.43 per week, based on actual average weekly wage of $462.65, for temporary total disability for certain periods and $400 per week, based on average weekly wage expectancy rate of $600, for permanent partial disability for other periods where board did not reclassify injury as permanent partial disability

from date of injury, but rather expressly delineated those periods in which claimant was temporarily totally disabled and those in which he was permanently partially disabled, and expert medical opinion supported use of total disability rate for part of award; future wage expectancy under CLS Work Comp § 14(5) applies only to award for permanent partial disability. Dinger v K-Mart Corp., 246 A.D.2d 946, 667 N.Y.S.2d 860, 1998 N.Y. App. Div. LEXIS 735 (N.Y. App. Div. 3d Dep't 1998), overruled in part, Fox v Crosbie-Brownlie Inc., 284 A.D.2d 42, 728 N.Y.S.2d 838, 2001 N.Y. App. Div. LEXIS 7826 (N.Y. App. Div. 3d Dep't 2001).

Employer would not be heard to argue that agreed wage expectancy rate should not have been used until workers' compensation claimant reached age of 25 where employer had agreed that any award would be based on wage expectancy provisions of CLS Work Comp § 14(5). Prior v Wegmans Food Mkts., 246 A.D.2d 951, 667 N.Y.S.2d 852, 1998 N.Y. App. Div. LEXIS 736 (N.Y. App. Div. 3d Dep't 1998).

CLS Work Comp § 2(9), which defines term "wages" and sets forth minimum wage provision, did not apply in determining volunteer worker's wage under CLS Work Comp 15(6)(a). Gast v Ozanam Hall of Queens, 259 A.D.2d 862, 687 N.Y.S.2d 450, 1999 N.Y. App. Div. LEXIS 2331 (N.Y. App. Div. 3d Dep't 1999).

Regardless of whether Workers' Compensation Board is computing disability or death benefit, date of original occurrence causing injury, not date of worker's death, applies in calculating appropriate average weekly wage. House v International Talc Co., 261 A.D.2d 687, 689 N.Y.S.2d 552, 1999 N.Y. App. Div. LEXIS 4702 (N.Y. App. Div. 3d Dep't 1999).

Board properly calculated average weekly wage under CLS Work Comp § 14 based solely on job held by claimant on date of disablement fixed by board, despite ruling that his occupational hearing loss was attributable to his employment with successive employers, as CLS Work Comp § 2(9) defines "wage" as compensation under contract of hiring in force "at the time of the accident" and, under CLS Work Comp § 38, claimant's "accident" occurred on date of disablement fixed by board. Lesperance v Gulf Oil Co., 287 A.D.2d 839, 731 N.Y.S.2d 535, 2001 N.Y. App. Div. LEXIS 9749 (N.Y. App. Div. 3d Dep't 2001), app. denied, 98 N.Y.2d 647, 745 N.Y.S.2d 504, 772 N.E.2d 607, 2002 N.Y. LEXIS 1056 (N.Y. 2002).

354. Particular forms of remuneration as wages

The payment of small sums as gratuities or the promise to pay same does not constitute the payment of wages as defined by this section. Ferro v Leopold Sinsheimer Estate, Inc., 256 N.Y. 398, 176 N.E. 817, 256 N.Y. (N.Y.S.) 398, 1931 N.Y. LEXIS 1073 (N.Y. 1931).

Gratuities or tips received by employees cannot be considered as wages unless so understood by the parties in making the contract of employment. Ferro v Leopold Sinsheimer Estate, Inc., 256 N.Y. 398, 176 N.E. 817, 256 N.Y. (N.Y.S.) 398, 1931 N.Y. LEXIS 1073 (N.Y. 1931).

The right to compensation is not affected by profits from claimant's business conducted by himself and his wife, equal to former wages. McCann v McCormack's Garage, Inc., 203 A.D. 387, 197 N.Y.S. 19, 1922 N.Y. App. Div. LEXIS 7206 (N.Y. App. Div. 1922).

Remuneration by way of refreshments is sufficient consideration to support the relationship of employee and employer. Boehm v D. A. Sokol Hall Holding Corp., 274 A.D. 954, 83 N.Y.S.2d 729, 1948 N.Y. App. Div. LEXIS 4235 (N.Y. App. Div. 1948).

An auditor who was required to travel extensively during the major part of the year and received in addition to a fixed weekly salary reimbursement for his living and transportation expenses while at work away from his home may not include in computing his compensation, his reimbursement for transportation expenses but living expenses may be properly included. Le Voff v Gompers & Blau, 278 A.D. 878, 104 N.Y.S.2d 326, 1951 N.Y. App. Div. LEXIS 5039 (N.Y. App. Div. 1951).

Where claimant was injured while making a delivery of lumber for employer's lumber business and using the employer's truck but was not on payroll and had no agreement about wages but did some work for employer in exchange for use of some storage facilities, the use of the storage facilities was a thing of value within the definition of "wages". Rhodes v G. H. Crandall Co., 4 A.D.2d 451, 167 N.Y.S.2d 101, 1957 N.Y. App. Div. LEXIS 4273 (N.Y. App. Div. 3d Dep't 1957), app. denied, 4 N.Y.2d 674, 1958 N.Y. LEXIS 1353 (N.Y. 1958).

Where a partial disability claimant had been employed only three days a week as a relief district circulation manager for a newspaper, which work required use of his own automobile in covering a six to seven mile route, for which he was paid $5 daily wage and $11 weekly for use of his own car, that part of the car allowance attributable to operating expense could not properly be considered "wages" within the contemplation of subd. 9 of this section. Weingarten v Democrat & Chronicle, 19 A.D.2d 566, 239 N.Y.S.2d 980, 1963 N.Y. App. Div. LEXIS 3816 (N.Y. App. Div. 3d Dep't 1963).

Weekly payments claimant received from his business constituted earnings for his nonsupervisory work as mechanic, and did not constitute profits of his S corporation. Joyce v European Auto Serv., 226 A.D.2d 952, 641 N.Y.S.2d 175, 1996 N.Y. App. Div. LEXIS 3966 (N.Y. App. Div. 3d Dep't 1996).

Because an injured worker's rate of pay was unaffected by whether the worker's children attended the school where the worker was employed, a panel of the Workers' Compensation Board properly concluded that a tuition remission received by the worker was not "wages" within the meaning of N.Y. Workers' Comp. Law § 2(9). Matter of Blackwelder v Faith Heritage School, 27 A.D.3d 1004, 811 N.Y.S.2d 225, 2006 N.Y. App. Div. LEXIS 3555 (N.Y. App. Div. 3d Dep't 2006).

Workers' Compensation Board properly ruled, inter alia, that the payments made to a recipient of public assistance during his work experience program (WEP) assignment constituted wages under the Workers' Compensation Law because public assistance benefits paid to WEP participants fulfilled the intent of the Social Services and Workers' Compensation Laws, and providing effective awards for injured participants also benefited those who hosted WEP participants by ensuring that workers' compensation was their exclusive remedy for injuries sustained in the workplace. Matter of Covert v Niagara County, 172 A.D.3d 1686, 102 N.Y.S.3d 131, 2019 N.Y. App. Div. LEXIS 3888 (N.Y. App. Div. 3d Dep't 2019), app. denied, 34 N.Y.3d 910, 141 N.E.3d 957, 119 N.Y.S.3d 72, 2020 N.Y. LEXIS 185 (N.Y. 2020).

355. Reduction in pay or loss of earnings

Claimant fell, striking his back, and sustained herniation of nucleus and pulposus between last lumbar and first sacral vertebra. On conflicting evidence, Board properly found that claimant's refusal to submit to operation to remove affected disc was not unreasonable. So an award for reduced earnings was affirmed. Viggiano v Pullman Co., 7 A.D.2d 800, 181 N.Y.S.2d 52, 1958 N.Y. App. Div. LEXIS 3725 (N.Y. App. Div. 3d Dep't 1958).

Claimant caught in a crane, received fractured cervical vertebrae and laceration of scalp. Subsequently, he returned to regular work although suffering from permanent partial disability. Claimant testified that he had been paid on a piecework basis and at a flat rate for "extra" work after work. After accident, he was unable to perform "extra" work. Board having made previous finding of reduced earnings based on permanent partial disability and in view of medical testimony and testimony of claimant, board was justified in finding causal relations between injury and related period of disability. However, as to reduced earnings, there was no testimony of actual "extra" work during the period of disability and whether it was due to physical inability or economical conditions. Henneman v Endicott Johnson Corp., 8 A.D.2d 922, 187 N.Y.S.2d 156, 1959 N.Y. App. Div. LEXIS 8028 (N.Y. App. Div. 3d Dep't 1959).

On the basis of testimony that only economic considerations caused a reduction in claimant's pay, such reduction was not compensable. Winber v Gottlieb Adorn Printing Co., 19 A.D.2d 913, 244 N.Y.S.2d 39, 1963 N.Y. App. Div. LEXIS 2955 (N.Y. App. Div. 3d Dep't 1963).

Where claimant suffered a work-connected disability which thereafter limited his ability to continue his previous employment and the employer transferred him to lighter work, an arrangement which continued for more than five years, at which time

claimant asserts that the employer said that he could no longer pay him the same wages and suggested that claimant apply for social security benefits for which he was then eligible and offered him part-time employment if he would do so but there was also evidence that claimant voluntarily decided to work half-days and apply for social security because by so doing he would have to work only half as much and would suffer only a $10 reduction in pay, it was held that the board's finding that claimant's loss of earnings was attributable to a desire to partially withdraw from the labor market rather than to disability, was supported by substantial evidence. Van Buren v American Towels Supply Co., 23 A.D.2d 897, 258 N.Y.S.2d 952, 1965 N.Y. App. Div. LEXIS 4256 (N.Y. App. Div. 3d Dep't 1965).

If reduced earnings are caused solely by economic conditions, age or any factor other than his disability, the claimant is not entitled to an award of compensation, but if the disability causes or contributes to the reduced earnings then an award may be made. Lovell v Berman's Motor Express, 35 A.D.2d 765, 315 N.Y.S.2d 49, 1970 N.Y. App. Div. LEXIS 3663 (N.Y. App. Div. 3d Dep't 1970).

Laborer who sustained back injury which made him unable to work was not entitled to benefits for lost wages subsequent to time he became 65 where union regulations would not permit him to accept work after attaining such age, as workmen's compensation benefits were not intended to supplement retirement income. Mazziotto v Brookfield Constr. Co., 40 A.D.2d 245, 338 N.Y.S.2d 1001, 1972 N.Y. App. Div. LEXIS 2980 (N.Y. App. Div. 3d Dep't 1972).

Workers' Compensation Board's award of reduced earnings benefits to prosthodontist for temporary partial disability due to hepatitis infection was supported by substantial evidence where no dispute existed as to precipitous drop in claimant's wages resulting from physical impact of his infection and where employer and its insurer disputed amount of preaccident average weekly wage as calculated by insurer's expert only after stipulating to that amount in prior hearing on claim for temporary total disability benefits. Hallarman v A. Hallarman & Hallarman, P. C., 124 A.D.2d 458, 507 N.Y.S.2d 558, 1986 N.Y. App. Div. LEXIS 61438 (N.Y. App. Div. 3d Dep't 1986).

Finding that workers' compensation claimant sustained mild permanent partial disability and could not return to his prior work permitted inference of resulting lost wages. Meisner v UPS, 243 A.D.2d 128, 675 N.Y.S.2d 164, 1998 N.Y. App. Div. LEXIS 7336 (N.Y. App. Div. 3d Dep't 1998), app. dismissed, 93 N.Y.2d 848, 688 N.Y.S.2d 494, 710 N.E.2d 1093, 1999 N.Y. LEXIS 68 (N.Y. 1999), app. denied, 94 N.Y.2d 757, 703 N.Y.S.2d 74, 724 N.E.2d 770, 1999 N.Y. LEXIS 4009 (N.Y. 1999).

Reduced earnings award of workers' compensation benefits may properly be denied where reduced earning capacity is due to age, general economic conditions, or other factors unrelated to disability. Meisner v UPS, 243 A.D.2d 128, 675 N.Y.S.2d 164, 1998 N.Y. App. Div. LEXIS 7336 (N.Y. App. Div. 3d Dep't 1998), app. dismissed, 93 N.Y.2d 848, 688 N.Y.S.2d 494, 710 N.E.2d 1093, 1999 N.Y. LEXIS 68 (N.Y. 1999), app. denied, 94 N.Y.2d 757, 703 N.Y.S.2d 74, 724 N.E.2d 770, 1999 N.Y. LEXIS 4009 (N.Y. 1999).

Part-time employee was entitled to reduced earnings award under CLS Work Comp § 15(3)(w) and (5-a) where he sustained mild permanent partial disability precluding resumption of his previous employment, but not otherwise limiting number of hours that he could work, he obtained new part-time employment at lower hourly rate, and there was no evidence that he had opportunity to work more than 25 hours per week or that his diminished earning capacity was self-imposed. Meisner v UPS, 243 A.D.2d 128, 675 N.Y.S.2d 164, 1998 N.Y. App. Div. LEXIS 7336 (N.Y. App. Div. 3d Dep't 1998), app. dismissed, 93 N.Y.2d 848, 688 N.Y.S.2d 494, 710 N.E.2d 1093, 1999 N.Y. LEXIS 68 (N.Y. 1999), app. denied, 94 N.Y.2d 757, 703 N.Y.S.2d 74, 724 N.E.2d 770, 1999 N.Y. LEXIS 4009 (N.Y. 1999).

Part-time employee would be entitled to reduced earnings award under CLS Work Comp § 15(5-a) where he sustained mild permanent partial disability precluding resumption of his previous employment, but not otherwise limiting number of hours that he could work, and he obtained new part-time employment at lower hourly rate—even if there were evidence that he had opportunity to work more than 25 hours per week or that his diminished earning capacity was self-imposed. Meisner v UPS, 243 A.D.2d 128, 675 N.Y.S.2d 164, 1998 N.Y. App. Div. LEXIS 7336 (N.Y. App. Div. 3d Dep't 1998), app. dismissed, 93 N.Y.2d 848, 688 N.Y.S.2d 494, 710 N.E.2d 1093, 1999 N.Y. LEXIS 68 (N.Y. 1999), app. denied, 94 N.Y.2d 757, 703 N.Y.S.2d 74, 724 N.E.2d 770, 1999 N.Y. LEXIS 4009 (N.Y. 1999).

Workers' Compensation Board, which classified claimant as having permanent partial disability, properly found that he did not suffer loss of earning capacity under CLS Vol Fire Ben § 3(8) where he returned to his regular job duties as electrician following both accidents, his chiropractor did not impose any restrictions on his work subsequent to first accident, at time of second accident, claimant had different employment entailing assembly of electrical components at work bench, which he stated did not require any heavy lifting, and it was not until about one year later when claimant's back condition was exacerbated that chiropractor imposed restrictions on lifting and bending; claimant's testimony that such limitations precluded him from applying for higher paying and more physically demanding positions was irrelevant as to whether he suffered loss of earning capacity under Volunteer Firefighters' Benefit Law. Griffo v Onondaga Hill Volunteer Fire Dep't, 256 A.D.2d 858, 681 N.Y.S.2d 835, 1998 N.Y. App. Div. LEXIS 13578 (N.Y. App. Div. 3d Dep't 1998).

Evidence supported board's conclusion that claimant's loss of earnings after July 14 was attributable to factors unconnected to back injury she sustained while working as nursing home food service director, where she never complained to employer that her back injury interfered with her work, she continued working until July 14 when she was discharged for poor performance unrelated to her injury, she did not seek new work until 5 months after her termination, she subsequently applied for workers' compensation benefits alleging that her work-related injury rendered her unable to secure new work, and medical evidence credited by board indicated that she suffered mild disability that did not restrict her ability to perform kitchen duties. Holman v Hyde Park Nursing Home, 268 A.D.2d 705, 701 N.Y.S.2d 516, 2000 N.Y. App. Div. LEXIS 251 (N.Y. App. Div. 3d Dep't 2000).

IX. Children and Dependents

356. In general

The term "dependents" is a word of art referring to a defined group of persons who may claim the compensation award. Lappin v National Container Corp., 37 N.Y.S.2d 800, 179 Misc. 109, 1942 N.Y. Misc. LEXIS 2102 (N.Y. Sup. Ct. 1942).

Federal court would adopt New York law in determining whether minor children were in fact the illegitimate issue of a deceased seaman. In re Industrial Transp. Corp., 344 F. Supp. 1311, 1972 U.S. Dist. LEXIS 13235 (E.D.N.Y. 1972).

357. Child

Death benefits may be awarded to a child begotten after the accident. Crockett v International R. Co., 176 A.D. 45, 162 N.Y.S. 357, 1916 N.Y. App. Div. LEXIS 8982 (N.Y. App. Div. 1916).

The fact that a child was born after the date of the accident does not preclude a finding of dependency, since the Workmen's Compensation Law does not require that children be dependent as of the time of the accident. Thompson v Thomashoff Press, Inc., 31 A.D.2d 848, 297 N.Y.S.2d 254, 1969 N.Y. App. Div. LEXIS 4640 (N.Y. App. Div. 3d Dep't 1969).

Evidence of welfare payments on behalf of an infant does not establish non-dependency within the meaning of the definition of "child" in subdivision 11 of § 2 of the Workmen's Compensation Law. Thompson v Thomashoff Press, Inc., 31 A.D.2d 848, 297 N.Y.S.2d 254, 1969 N.Y. App. Div. LEXIS 4640 (N.Y. App. Div. 3d Dep't 1969).

Child whose paternity was unknown and who was born prior to time her mother commenced living with employee was not entitled to recover death benefits upon death of employee under provision of Workmen's Compensation Act awarding benefits to a child and defining child as including an acknowledged illegitimate child dependent upon employee, even though employee in last will and testament referred to child as one of his beloved children. Hagley v Browns of Bellport, 45 A.D.2d 546, 360

N.Y.S.2d 103, 1974 N.Y. App. Div. LEXIS 3734 (N.Y. App. Div. 3d Dep't 1974).

358. —Adopted or foster child

Death benefits may not be awarded to a child dependent upon a parent of its foster parents. Winkler v New York Car Wheel Co., 181 A.D. 239, 168 N.Y.S. 826, 1917 N.Y. App. Div. LEXIS 9165 (N.Y. App. Div. 1917).

In defining the word "child" the Legislature did not intend to exclude offspring of natural parents merely because of their adoption by third persons. Shulman v N. Y. Bd. of Fire Underwriters, 15 A.D.2d 700, 223 N.Y.S.2d 312, 1962 N.Y. App. Div. LEXIS 12020 (N.Y. App. Div. 3d Dep't 1962).

Where adoption proceedings had been instituted prior to the decedent's accident, but the adoption proceedings were not completed until after the accident, the infant was not entitled to workmen's compensation benefits. Landon v Motorola, Inc., 38 A.D.2d 18, 326 N.Y.S.2d 960, 1971 N.Y. App. Div. LEXIS 2636 (N.Y. App. Div. 3d Dep't 1971).

359. —Illegitimate

Children born of an illegal second marriage, having been acknowledged by deceased, are dependents. Battalico v Knickerbocker Fireproofing Co., 250 A.D. 258, 294 N.Y.S. 481, 1937 N.Y. App. Div. LEXIS 8317 (N.Y. App. Div. 1937).

The statutory specification of an "acknowledged illegitimate child dependent upon the deceased" as used in subdivision 11 of this section, includes such a child born posthumously. Kluss v Levene's Son, Inc., 269 A.D. 801, 55 N.Y.S.2d 108, 1945 N.Y. App. Div. LEXIS 3912 (N.Y. App. Div. 1945).

An acknowledged illegitimate child dependent is entitled to death benefits. Bamberg v Irving's Auto Repair Shop, 3 A.D.2d 247, 160 N.Y.S.2d 611, 1957 N.Y. App. Div. LEXIS 6143 (N.Y. App. Div. 3d Dep't 1957).

Death benefits were properly made to three minor children of decedent though there was no existing valid marriage between the decedent and the mother of the children, where it was established that they all lived together as a family and the children were supported by the decedent. Herring v Great Kills Moving & Storage, Inc., 7 A.D.2d 797, 180 N.Y.S.2d 846, 1958 N.Y. App. Div. LEXIS 3722 (N.Y. App. Div. 3d Dep't 1958), app. denied, 6 N.Y.2d 705, 1959 N.Y. LEXIS 1696 (N.Y. 1959).

There was substantial evidence to support Workmen's Compensation Board's disallowance of death benefit claim on behalf of child since there was no evidence to indicate that decedent during his lifetime had made the necessary acknowledgement that he was the father of the unborn child for which benefits were sought by child's mother. Preamious Parks v Rex Roofing Co., 53 A.D.2d 748, 384 N.Y.S.2d 231, 1976 N.Y. App. Div. LEXIS 13521 (N.Y. App. Div. 3d Dep't 1976).

No distinction is made between an acknowledged child born out of wedlock and one not so acknowledged; neither inherits from the putative father. In re Vincent's Estate, 71 N.Y.S.2d 165, 189 Misc. 489, 1947 N.Y. Misc. LEXIS 2527 (N.Y. Sur. Ct. 1947).

360. —Stepchild

An award of compensation to a stepchild of a common law marriage is proper. Brooks v Owen P. Williams Constr. Co., 261 N.Y. 679, 185 N.E. 789, 261 N.Y. (N.Y.S.) 679, 1933 N.Y. LEXIS 1488 (N.Y. 1933).

Although respondent was a child born out of wedlock to the widow of decedent and decedent was not her father, she is nevertheless a stepchild, within the terms of subd. 11. Larsen v Harris Structural Steel Co., 230 A.D. 280, 243 N.Y.S. 654, 1930 N.Y. App. Div. LEXIS 8595 (N.Y. App. Div. 1930).

A step-child actually dependent upon a step-father is entitled to compensation even though the step-child's divorced father is living and liable for his support. Shanley v Slattery Contracting Co., 232 A.D. 860, 248 N.Y.S. 774, 1931 N.Y. App. Div. LEXIS 15838 (N.Y. App. Div. 1931).; See also Brooks v Owen P. Williams Constr. Co., 261 N.Y. 679, 185 N.E. 789, 261 N.Y. (N.Y.S.) 679, 1933 N.Y. LEXIS 1488 (N.Y. 1933).

An award of death benefits in favor of a step-son is proper where the step-son was dependent upon the employee for support. Urban v Nolan Machinery Co., 273 A.D. 1042, 78 N.Y.S.2d 712, 1948 N.Y. App. Div. LEXIS 5878 (N.Y. App. Div. 1948).

Where employee commenced living with woman at time she was mother of child and employee and child's mother never entered legal marriage, child was not stepchild of employee and thus could not recover benefits upon employee's death under provision of Workmen's Compensation Act allowing recovery of benefits by stepchild of covered employee. Hagley v Browns of Bellport, 45 A.D.2d 546, 360 N.Y.S.2d 103, 1974 N.Y. App. Div. LEXIS 3734 (N.Y. App. Div. 3d Dep't 1974).

Although workman had not actually supported stepchild for some seven years prior to his death, there was substantial evidence to support a finding of "dependency" entitling the stepchild to workmen's compensation death benefits where workman had actually supported the child for the five years he and her mother had lived together and was under a court order, which was in existence at time of his death, to provide support payments for the child, notwithstanding that he made payments under such order only for a short period in 1965. McMillan v Police Dogs, Inc., 52 A.D.2d 369, 384 N.Y.S.2d 36, 1976 N.Y. App. Div. LEXIS 12031 (N.Y. App. Div. 3d Dep't 1976).

361. —Grandchild

Death benefits are proper to a child dependent upon a grandparent, even though its parent offered out of spite to support it. In re Yeople, 182 A.D. 438, 169 N.Y.S. 584, 1918 N.Y. App. Div. LEXIS 7880 (N.Y. App. Div.), aff'd, 223 N.Y. 687, 119 N.E. 1087, 223 N.Y. (N.Y.S.) 687, 1918 N.Y. LEXIS 1398 (N.Y. 1918).

An illegitimate grandchild of a deceased employee is entitled to the payment of benefits under the workmen's compensation law. Sheppard v Demps, 266 A.D. 45, 43 N.Y.S.2d 682, 1943 N.Y. App. Div. LEXIS 3487 (N.Y. App. Div. 1943), app. dismissed, 291 N.Y. 773, 53 N.E.2d 242, 291 N.Y. (N.Y.S.) 773, 1944 N.Y. LEXIS 2026 (N.Y. 1944), app. dismissed, 294 N.Y. 689, 60 N.E.2d 843, 294 N.Y. (N.Y.S.) 689, 1945 N.Y. LEXIS 886 (N.Y. 1945).

Dependent stepgrandchildren were entitled to benefits in an award for death benefits. Chaney v George Campbell & Co., 5 A.D.2d 704, 168 N.Y.S.2d 796, 1957 N.Y. App. Div. LEXIS 3492 (N.Y. App. Div. 3d Dep't 1957).

362. Parents

In determining the issue of dependency as to the claimants, who were the parents of the deceased employee, the board may base its findings upon evidence as to the domestic burdens and obligations which, without fault or extravagance on their part, produced a situation which had rendered necessary the financial aid they received from the deceased employee for several years prior to her death and which evidence could reasonably be said to continue the dependency status of the parents for the periods and to the degree for which the awards in question were made. Kaiser v U. S. O. Camp Shows, Inc. (1945) 269 App Div 915, 57 NYS2d 503, affd (1946) 296 NY 532, 68 NE2d 606.; See also Mulraney v Brooklyn Rapid Transit Co., 190 A.D. 774, 180 N.Y.S. 654, 1920 N.Y. App. Div. LEXIS 4246 (N.Y. App. Div. 1920).

No fair showing of dependency was made on proof that claimant, the mother of the decedent, was living with her husband, receiving money from him and that the decedent was 29 years old, unmarried and lived with both his parents and occasionally paid for food, etc. Rosenberg v Ellenville Steam Laundry, Inc., 283 A.D. 901, 130 N.Y.S.2d 144, 1954 N.Y. App. Div. LEXIS 5693 (N.Y. App. Div. 1954).

Decision of Workers' Compensation Board awarding death benefits to deceased worker's aged mother was supported by substantial evidence and in harmony with liberal construction of Workers' Compensation Law where mother's testimony as to amount of support provided by decedent to meet her total needs was more creditable than incomplete estimate provided by her surviving son; lack of itemization of her household, medical and other needs did not bar board's finding, and it was reasonable for board to conclude that loss of decedent's contribution had detrimental effect on mother. Giglia v Berger Industries, 127 A.D.2d 959, 512 N.Y.S.2d 563, 1987 N.Y. App. Div. LEXIS 43442 (N.Y. App. Div. 3d Dep't 1987).

363. Spouse

A wife is entitled to compensation as a dependent even though she married the injured employee after the accident. Crockett v

International R. Co., 176 A.D. 45, 162 N.Y.S. 357, 1916 N.Y. App. Div. LEXIS 8982 (N.Y. App. Div. 1916).

Where claimant was a registered nurse employed by appellant hospital, experienced certain cramp-like pain in the calf of her leg and a backache, etc., at 3:00 A. M. one night while at home and next morning was required to assist in bathing, etc., a 200 pound patient and a half hour later experienced pains in her right leg and thigh and later pains in her back so intense as to require cessation of duties, subsequently diagnosed as a herniated disc, medical testimony concerning pre-existence of the disc herniation and its aggravation by the subsequent exertive work was sufficient to support a board finding of compensability. Waldo v Johnstown Hospital, 20 A.D.2d 947, 248 N.Y.S.2d 980, 1964 N.Y. App. Div. LEXIS 3932 (N.Y. App. Div. 3d Dep't 1964).

364. Other persons as dependents

An illegitimate half-sister of a deceased employee who was actually dependent upon the deceased is entitled to a death benefit award. Stoehrer v Lampert, 285 A.D. 85, 136 N.Y.S.2d 32, 1954 N.Y. App. Div. LEXIS 3284 (N.Y. App. Div. 1954).

X. Insurance Carrier

365. In general

An insurance carrier which has received and retained premiums on a policy issued in protection of a membership corporation operating as a country club, and of its employees, while engaged in the business of "forestry and logging," cannot object to payment of indemnity upon the ground that club had no right to engage in said occupations for pecuniary gain. Uhl v Hartwood Club, 177 A.D. 41, 163 N.Y.S. 744, 1917 N.Y. App. Div. LEXIS 5200 (N.Y. App. Div.), aff'd, 221 N.Y. 588, 116 N.E. 1000, 221 N.Y. (N.Y.S.) 588, 1917 N.Y. LEXIS 1449 (N.Y. 1917).

Workers' compensation carrier for employer of injured police officer was entitled to workers' compensation lien for amount expended by it in excess or $50,000 out of $75,000 settlement where $50,000 limit on first-party benefits for basic economic loss from personal injury arising from use or operation of motor vehicle, under CLS Ins §§ 5102(a) and 5104(a) applied as specifically referenced in CLS Work Comp § 29(1-a), and to hold otherwise would result in double recovery for officer and his wife, which result was not intended by § 29(1-a). Kesick v Ulster County Self Ins. Plan, 245 A.D.2d 752, 665 N.Y.S.2d 454, 1997 N.Y. App. Div. LEXIS 12970 (N.Y. App. Div. 3d Dep't 1997).

In proceeding under CLS Work Comp § 29(5) for judicial approval of workers' compensation settlement nunc pro tunc, petitioners' misconstruction of applicable law was not reasonable excuse for their 8-month delay in applying for judicial approval where they claimed that, even though they were specifically advised otherwise, they were unaware of rights of workers' compensation insurer to lien on any judgment in third-party action and to approve any settlement. Gilson v National Union Fire Ins. Co., 246 A.D.2d 897, 668 N.Y.S.2d 287, 1998 N.Y. App. Div. LEXIS 528 (N.Y. App. Div. 3d Dep't 1998).

In proceeding under CLS Work Comp § 29(5) for judicial approval of workers' compensation settlement nunc pro tunc, prejudice to workers' compensation insurer resulting from petitioners' 8-month delay in applying for judicial approval was shown where petitioners had potential claim for compensation benefits in excess of $50,000. Gilson v National Union Fire Ins. Co., 246 A.D.2d 897, 668 N.Y.S.2d 287, 1998 N.Y. App. Div. LEXIS 528 (N.Y. App. Div. 3d Dep't 1998).

Supreme Court did not abuse its discretion in denying application under CLS Work Comp § 29(5) for judicial approval of workers' compensation settlement nunc pro tunc where petitioners did not have reasonable excuse for their 8-month delay in applying for judicial approval, and resulting prejudice to workers' compensation insurer was shown. Gilson v National Union Fire Ins. Co., 246 A.D.2d 897, 668 N.Y.S.2d 287, 1998 N.Y. App. Div. LEXIS 528 (N.Y. App. Div. 3d Dep't 1998).

Substantial evidence supported Workers' Compensation Board's decision that self-insured employer's carrier had reserved employer's right to credit against claimant's future benefit awards where board could reasonably have interpreted carrier's written consent—notifying claimant that it intended to seek reimbursement for amounts paid to her in excess of $50,000 settlement—as express reservation of its right to credit against future awards of compensation benefits. Whitcomb v Xerox Corp., 246 A.D.2d 947, 667 N.Y.S.2d 849, 1998 N.Y. App. Div. LEXIS 730 (N.Y. App. Div. 3d Dep't 1998).

Where, in a workers' compensation case, two third-party administrators handled the case at various times on behalf of a carrier, and there was some confusion as to which carrier handled the case at a given time, the carrier was the real party in interest, under N.Y. Workers' Comp. Law §§ 2(12) and 54(2), and there was no dispute that it was properly noticed and represented by counsel throughout the proceeding, so if there was any failure to notify one of the administrators of a hearing, it did not require reversal of the Workers' Compensation Board's decision. Wilson v Chi. Bridge & Iron, 2 A.D.3d 1004, 768 N.Y.S.2d 405, 2003 N.Y. App. Div. LEXIS 13147 (N.Y. App. Div. 3d Dep't 2003).

Since a workers' compensation carrier is clearly and unambiguously not included within the statutory definition of an employer (Workers' Compensation Law, § 2, subd 3), and the terms "employer" and "insurance carrier" are, in most cases, set out separately and referred to as separate entities throughout the statute, such insurance carrier may not be equated with the employer for purposes of the employer's immunity from common-law tort liability. (Workers' Compensation Law, § 11.) Had it been the intent of the Legislature to exempt insurance carriers from third-party common-law liability, it could have done so expressly or by unmistakable inference. Cline v Avery Abrasives, Inc., 96 Misc. 2d 258, 409 N.Y.S.2d 91, 1978 N.Y. Misc. LEXIS 2591 (N.Y. Sup. Ct. 1978).

Excess workers' compensation insurance carrier was entitled to summary judgment declaring that $1 million limit on employer's liability coverage under policy issued to self-insured employer was legally valid and enforceable, and that it was therefore not obligated to provide unlimited coverage in underlying personal injury action, where employer was self-insured with permission of Chair of Workers' Compensation Board, and had obtained policy in accordance with Workers' Compensation Law and 12 NYCRR § 316.2. Oneida Ltd. v Utica Mut. Ins. Co., 178 Misc. 2d 572, 679 N.Y.S.2d 887, 1998 N.Y. Misc. LEXIS 519 (N.Y. Sup. Ct. 1998).

Statement contained in self-insured employer's umbrella policy, that "In New York State, Employer's Liability is not applicable when New York Workers' Compensation Law applies," was not specific disclaimer of umbrella coverage for employer's liability coverage under excess policy obtained by self-insured from another carrier, and thus carrier that issued umbrella policy was obligated to provide coverage for any liability exceeding $1 million up to $10 million coverage limit in umbrella policy. Oneida Ltd. v Utica Mut. Ins. Co., 178 Misc. 2d 572, 679 N.Y.S.2d 887, 1998 N.Y. Misc. LEXIS 519 (N.Y. Sup. Ct. 1998).

Although the board was not mandated to direct the liquidation bureau to make an Aggregate Trust Fund (ATF) deposit, N.Y. Workers' Comp. Law § 27(2) gave the board discretion to direct any "insurance carrier" to make an ATF deposit; however, remittal was necessary because the board specifically premised its holding on a finding that this was a mandatory case. Matter of Turdo v Dellicato Vineyards, 73 A.D.3d 143, 900 N.Y.S.2d 156, 2010 N.Y. App. Div. LEXIS 2675 (N.Y. App. Div. 3d Dep't 2010).

Insurer has right to charge premiums for independent contractors of employer if there is reasonable risk that Workers' Compensation Board would hold that such persons are employees rather than independent contractors. Insurance Department, Opinions of General Counsel, Opinion Number 05-03-15.

XI. Manufacture, Construction and Operation

366. In general

The definition of manufacture contained in subdivision 13 includes the designing, planning or inspecting of electrical wiring layouts by a draftsman. Gramlich v Board of Education, 272 A.D. 965, 71 N.Y.S.2d 609, 1947 N.Y. App. Div. LEXIS 4413 (N.Y. App. Div. 1947), aff'd, 297 N.Y. 349, 79 N.E.2d 437, 297 N.Y. (N.Y.S.) 349, 1948 N.Y. LEXIS 844 (N.Y. 1948).

XII. Injury Occurring Out of State; Injury to Employee of Out of State Employer

367. In general

Benefits under the New York Compensation Act may, in an appropriate case, be awarded for injuries occurring outside this

state. Post v Burger & Gohlke, 216 N.Y. 544, 111 N.E. 351, 216 N.Y. (N.Y.S.) 544, 1916 N.Y. LEXIS 1521 (N.Y. 1916).; Smith v Heine Safety Boiler Co., 224 N.Y. 9, 119 N.E. 878, 224 N.Y. (N.Y.S.) 9, 1918 N.Y. LEXIS 850 (N.Y. 1918).; Cameron v Ellis Const. Co., 252 N.Y. 394, 169 N.E. 622, 252 N.Y. (N.Y.S.) 394, 1930 N.Y. LEXIS 636 (N.Y. 1930).; Yoshi Ogino v Black, 278 A.D. 146, 104 N.Y.S.2d 82, 1951 N.Y. App. Div. LEXIS 3763 (N.Y. App. Div. 1951), aff'd in part, 304 N.Y. 872, 109 N.E.2d 884, 304 N.Y. (N.Y.S.) 872, 1952 N.Y. LEXIS 1038 (N.Y. 1952).

The test is the place where the employment is located. If the employment outside the state is of a transitory nature and incidental to general employment in New York, the New York Act applies; but it does not apply to injuries in course of employment at a fixed place outside the state. Cameron v Ellis Const. Co., 252 N.Y. 394, 169 N.E. 622, 252 N.Y. (N.Y.S.) 394, 1930 N.Y. LEXIS 636 (N.Y. 1930).; Flinn v Remington Rand, Inc., 277 N.Y. 641, 14 N.E.2d 199, 277 N.Y. (N.Y.S.) 641, 1938 N.Y. LEXIS 1104 (N.Y. 1938).; Bauss v Consolidated Chimney Co., 270 A.D. 70, 58 N.Y.S.2d 717, 1945 N.Y. App. Div. LEXIS 2803 (N.Y. App. Div. 1945).

With respect to out-of-state employments and accidents, jurisdiction of the New York Workmen's Compensation Board is governed by the facts of the particular case. McMains v Trans World Airlines, Inc., 18 A.D.2d 956, 237 N.Y.S.2d 812, 1963 N.Y. App. Div. LEXIS 4345 (N.Y. App. Div. 3d Dep't), app. denied, 13 N.Y.2d 593, 240 N.Y.S.2d 1025, 190 N.E.2d 905, 1963 N.Y. LEXIS 1866 (N.Y. 1963).

Rights of parties are governed by the law under which workmen's compensation benefits are accepted. In re Estate of O'Connor, 21 A.D.2d 333, 250 N.Y.S.2d 696, 1964 N.Y. App. Div. LEXIS 3598 (N.Y. App. Div. 2d Dep't 1964).

While there is no hard and fast rule for determining jurisdiction applicable to all workmen's compensation cases, the issue as to employment location is ordinarily governed by the facts of the particular case. And it is not necessary for the board to find that the employer has a fixed location within the State where there is sufficient evidence in the record to demonstrate that the claimant spent most of his actual working time within the boundaries of the State and that the accident happened therein. Rhodes v Mushroom Transp. Co., 23 A.D.2d 421, 261 N.Y.S.2d 340, 1965 N.Y. App. Div. LEXIS 3521 (N.Y. App. Div. 3d Dep't 1965), aff'd, 18 N.Y.2d 464, 276 N.Y.S.2d 873, 223 N.E.2d 334, 1966 N.Y. LEXIS 949 (N.Y. 1966).

368. Sufficient contacts test, generally

Board has jurisdiction if facts presented show sufficient significant contacts with New York that it can reasonably be said that employed is in New York. Rutledge v Al. G. Kelly & Miller Bros. Circus, 24 A.D.2d 521, 260 N.Y.S.2d 136, 1965 N.Y. App. Div. LEXIS 4007 (N.Y. App. Div. 3d Dep't 1965), aff'd, 18 N.Y.2d 464, 276 N.Y.S.2d 873, 223 N.E.2d 334, 1966 N.Y. LEXIS 949 (N.Y. 1966).

Determination as to employment's location is governed by the facts of the particular case and if sufficient significant contacts with New York appear so that it can reasonably be said that the employment is located in New York then the Workmen's Compensation Board has jurisdiction. Atkinson v Marquette Mfg. Co., 24 A.D.2d 795, 263 N.Y.S.2d 927, 1965 N.Y. App. Div. LEXIS 3231 (N.Y. App. Div. 3d Dep't 1965).

If sufficient significant contacts with New York appear so that it can reasonably be said that the employment is located in that state, when the workmen's compensation board has jurisdiction; but neither this nor any other single factor constitutes a fixed, invariable touchstone by which the presence or absence of jurisdiction in any particular case may be determined. Atkinson v Marquette Mfg. Co., 24 A.D.2d 795, 263 N.Y.S.2d 927, 1965 N.Y. App. Div. LEXIS 3231 (N.Y. App. Div. 3d Dep't 1965).

The "sufficient contacts" standards enable New York to take jurisdiction under the Workmen's Compensation Law if there are "adequate" contacts in the state, despite the fact that another state may have contacts also. Rappa v Malan Constr. Co. of Koppers Co., 33 A.D.2d 846, 305 N.Y.S.2d 1012, 1969 N.Y. App. Div. LEXIS 2600 (N.Y. App. Div. 3d Dep't 1969).

The criterion of a "fixed location" has been replaced with a broader standard, the test being whether there are sufficient significant contacts with New York so that it could reasonably be said that the employment is located in such state. Rappa v Malan Constr. Co. of Koppers Co., 33 A.D.2d 846, 305 N.Y.S.2d 1012, 1969 N.Y. App. Div. LEXIS 2600 (N.Y. App. Div. 3d Dep't 1969).

Pennsylvania's worker's compensation law applied to action arising from work-related injury to New York resident employed by Pennsylvania subcontractor performing work in Pennsylvania, even though general contractor was New York corporation and choice-of-law issue involved loss-allocating rule which would favor application of New York law, since (1) subcontractor contracted with general contractor to perform work in Pennsylvania and hired plaintiff from Pennsylvania local union hall, (2) relevant collective bargaining agreement provided that employer was to provide workers' compensation insurance in Pennsylvania, (3) plaintiff applied for and received benefits under Pennsylvania law, (4) Pennsylvania legislature had clearly expressed its interest in having its workers' compensation law apply to all industrial accidents occurring within its state, (5) New York's interests in seeing that its injured resident receive benefits was satisfied, and (6) Pennsylvania law was neither anachronistic nor unfair. Roach v McGuire & Bennett, Inc., 146 A.D.2d 89, 539 N.Y.S.2d 138, 1989 N.Y. App. Div. LEXIS 2823 (N.Y. App. Div. 3d Dep't 1989).

369. Employee of out of state employer injured in the course of work in New York

An action for negligence cannot be maintained in New York for injury to or death of an employee of an out of state employer, where the employer's applicable workmen's compensation law covers the claim. Barnhart v American Concrete Steel Co., 227 N.Y. 531, 125 N.E. 675, 227 N.Y. (N.Y.S.) 531, 1920 N.Y. LEXIS 868 (N.Y. 1920).

Painter working for Pennsylvania employer, widow's claim having been denied by Pennsylvania Commission. McMahon v Gretzula, 238 A.D. 877, 262 N.Y.S. 793, 1933 N.Y. App. Div. LEXIS 10536 (N.Y. App. Div. 1933).; McMahon v Gretzula, 242 A.D. 742, 274 N.Y.S. 992, 1934 N.Y. App. Div. LEXIS 7097 (N.Y. App. Div. 1934), aff'd, 267 N.Y. 573, 196 N.E. 586, 267 N.Y. (N.Y.S.) 573, 1935 N.Y. LEXIS 1300 (N.Y. 1935).

Mason rebuilding partitions as employee of New Jersey corporation. Grasso v Donaldson-Reynolds, Inc., 254 A.D. 913, 5 N.Y.S.2d 643, 1938 N.Y. App. Div. LEXIS 8276 (N.Y. App. Div.), aff'd, 279 N.Y. 584, 17 N.E.2d 449, 279 N.Y. (N.Y.S.) 584, 1938 N.Y. LEXIS 844 (N.Y. 1938).

Airplane pilot employed by New Jersey employer killed while barnstorming in New York. Murray v Chamberlain, 263 A.D. 754, 30 N.Y.S.2d 906, 1941 N.Y. App. Div. LEXIS 4825 (N.Y. App. Div. 1941).

Workman on demolition job for Pennsylvania corporation which had secured compensation under Pennsylvania statute but was uninsured in New York. Adams v Max Solomon Co., 265 A.D. 427, 39 N.Y.S.2d 492, 1943 N.Y. App. Div. LEXIS 6315 (N.Y. App. Div.), reh'g denied, 266 A.D. 759, 41 N.Y.S.2d 956, 1943 N.Y. App. Div. LEXIS 4288 (N.Y. App. Div. 1943).

Carpenter employed by Massachusetts corporation sent to New York to work on bridge construction job. Lane v Fitzgerald Const. Co., 265 A.D. 1026, 39 N.Y.S.2d 61, 1943 N.Y. App. Div. LEXIS 6675 (N.Y. App. Div. 1943).

Bricklayer, resident of Illinois, killed in fall from chimney under construction by Illinois employer. Bauss v Consolidated Chimney Co., 270 A.D. 70, 58 N.Y.S.2d 717, 1945 N.Y. App. Div. LEXIS 2803 (N.Y. App. Div. 1945).

Where employer was a California corporation maintaining a warehouse in New Jersey to supply a chain of retail stores in New York City, employee whose chief duty was to make deliveries from the warehouse to the chain of stores was employed in this state and Compensation Board had jurisdiction to make award of death benefits where employee was involved in a fatal accident in this state. Coyle v Safeway Stores, Inc., 281 A.D. 933, 119 N.Y.S.2d 617, 1953 N.Y. App. Div. LEXIS 3799 (N.Y. App. Div. 1953).

Although a decedent was hired in New Jersey, was paid, resided, started days operations, received instructions and reported to New Jersey he was none the less employed in New York

for purposes of the Compensation Law where his employer did business in New York and decedent's job was to deliver beer to employers customers in New York. Cafiero v P. Ballantine & Sons, 1 A.D.2d 527, 151 N.Y.S.2d 862, 1956 N.Y. App. Div. LEXIS 5422 (N.Y. App. Div. 3d Dep't), app. denied, 2 N.Y.2d 705, 1956 N.Y. LEXIS 1178 (N.Y. 1956).

Where the claimant, a resident of Pennsylvania, was a truck driver employed by a Pennsylvania Corporation, which employment took him from the terminal in Pennsylvania to various locations in New York and eventually back to the terminal and he was injured within New York when the truck he was operating left the highway and as a result of the accident he was hospitalized and received medical attention in New York before returning to Pennsylvania, the finding of the board that "the employer's conduct of its business constituted its doing business at a fixed location in New York State and that claimant's work was so connected with the conduct of the employer's business in New York to support a finding that claimant's employment was located in New York" was sustained on the ground that the facts showed sufficient significant contacts with the State of New York so that it could be reasonably said that employment for compensation purposes was located here and accordingly the board had jurisdiction. Rhodes v Mushroom Transp. Co., 23 A.D.2d 421, 261 N.Y.S.2d 340, 1965 N.Y. App. Div. LEXIS 3521 (N.Y. App. Div. 3d Dep't 1965), aff'd, 18 N.Y.2d 464, 276 N.Y.S.2d 873, 223 N.E.2d 334, 1966 N.Y. LEXIS 949 (N.Y. 1966).

370. —Temporary or transitory work in state

A resident of Pennsylvania in the employ of a Pennsylvania firm detailed to drill an oil well across the border in New York. Proper v Polley (1931) 233 App Div 621, 253 NYS 530, affd (1932) 259 NY 516, 182 NE 161.; See also Whitmire v Blaw-Knox Constr. Co., 240 A.D. 795, 266 N.Y.S. 907, 1933 N.Y. App. Div. LEXIS 6175 (N.Y. App. Div. 1933), rev'd, 263 N.Y. 675, 189 N.E. 753, 263 N.Y. (N.Y.S.) 675, 1934 N.Y. LEXIS 1374 (N.Y. 1934).

Insurance agent and collector, resident of Massachusetts in the employ of a Massachusetts agency injured in New York while collecting premium from one who had moved from Massachusetts to New York. Eurbin v Prudential Ins. Co., 250 A.D. 889, 295 N.Y.S. 247, 1937 N.Y. App. Div. LEXIS 9569 (N.Y. App. Div.), aff'd, 275 N.Y. 577, 11 N.E.2d 762, 275 N.Y. (N.Y.S.) 577, 1937 N.Y. LEXIS 1557 (N.Y. 1937).

Where claimant's employer had offices in New York but had its manufacturing operations in Pennsylvania and claimant was in charge of certain operations there but was in New York office two or three months a year on conferences, the employment was not subject to the New York Compensation Law. Claimant owned home, registered car, voted and paid taxes in Pennsylvania. Shorr v U-Wan-Na-Wash Frocks, Inc., 284 A.D. 778, 135 N.Y.S.2d 143, 1954 N.Y. App. Div. LEXIS 3495 (N.Y. App. Div. 1954).

Employee, hired in Arkansas by circus based in Oklahoma, who was employed in New York on day-to-day basis and who would be in New York six weeks with circus, where circus obtained compensation coverage while in New York, could be found by Board to be employed in New York. Rutledge v Al. G. Kelly & Miller Bros. Circus, 24 A.D.2d 521, 260 N.Y.S.2d 136, 1965 N.Y. App. Div. LEXIS 4007 (N.Y. App. Div. 3d Dep't 1965), aff'd, 18 N.Y.2d 464, 276 N.Y.S.2d 873, 223 N.E.2d 334, 1966 N.Y. LEXIS 949 (N.Y. 1966).

371. Employees of New York employers injured during transitory or temporary work out of state

Employee of domestic corporation, having its office and principal place of business here, who is sent temporarily to another jurisdiction to work under direction and control of his employer, and receives injuries arising out of and in the course of his work, may properly be awarded compensation. Post v Burger & Gohlke, 216 N.Y. 544, 111 N.E. 351, 216 N.Y. (N.Y.S.) 544, 1916 N.Y. LEXIS 1521 (N.Y. 1916).; Smith v Aerovane Utilities Corp., 259 N.Y. 126, 181 N.E. 72, 259 N.Y. (N.Y.S.) 126, 1932 N.Y. LEXIS 915 (N.Y. 1932).

Airline pilot, hired in New York office of Connecticut corporation, who was killed in Connecticut while on scheduled flight from Newark to Boston: Tallman v Colonial Air Transport, Inc., 234 A.D. 809, 253 N.Y.S. 938, 1931 N.Y. App. Div. LEXIS 10308 (N.Y. App. Div. 1931), aff'd, 259 N.Y. 512, 182 N.E. 159, 259 N.Y. (N.Y.S.) 512, 1932 N.Y. LEXIS 983 (N.Y. 1932).

Deckhand on ferry operating between New York and New Jersey, fatally injured while repairing employer's dock in New Jersey. Gilmartin v Electric Ferries, Inc., 258 A.D. 829, 15 N.Y.S.2d 627, 1939 N.Y. App. Div. LEXIS 7141 (N.Y. App. Div. 1939).

Driver in interstate bus on Massachusetts-New York route injured as result of collision in Connecticut. Etters v Trailways of New England, Inc., 266 A.D. 929, 43 N.Y.S.2d 884, 1943 N.Y. App. Div. LEXIS 5269 (N.Y. App. Div. 1943).

Accountant killed during three month assignment to Illinois subsidiary. Schrantzer v Wickwire Spencer Steel Co., 268 A.D. 1074, 52 N.Y.S.2d 405, 1945 N.Y. App. Div. LEXIS 5551 (N.Y. App. Div. 1945).

Logger injured in Pennsylvania while cutting timber for shipment to sawmill located in New York. Rendt v Gates, 269 A.D. 1007, 58 N.Y.S.2d 438, 1945 N.Y. App. Div. LEXIS 5011 (N.Y. App. Div. 1945).

Radio technician killed en route to sixty day assignment to British factory where he was to serve in advisory capacity. Berman v Hudson American Corp., 271 A.D. 847, 65 N.Y.S.2d 676, 1946 N.Y. App. Div. LEXIS 3386 (N.Y. App. Div. 1946).

Airplane service representative sent to India to instruct and aid in maintenance of employer's aircraft operated by U. S. Army injured in India and while traveling between air fields, compensation not being prevented by the Federal Defense Bases Act. Losch v Curtiss-Wright Corp., 275 A.D. 1, 87 N.Y.S.2d 714, 1949 N.Y. App. Div. LEXIS 3692 (N.Y. App. Div. 1949), aff'd, 300 N.Y. 682, 91 N.E.2d 332, 300 N.Y. (N.Y.S.) 682, 1950 N.Y. LEXIS 1475 (N.Y. 1950).

Steeplechase jockey employed under agreement made in New York which provided for work to be done at tracks in New York and other states, injured at a track in Maryland. Walker v Johnson, 276 A.D. 1033, 95 N.Y.S.2d 726, 1950 N.Y. App. Div. LEXIS 5630 (N.Y. App. Div. 1950).

Newsreel cameraman hired in New York, and paid and directed from New York killed in automobile accident in Maryland while assigned to the Washington, D. C. office of the employer. Doran v Universal Pictures Co., 277 A.D. 820, 97 N.Y.S.2d 55, 1950 N.Y. App. Div. LEXIS 3417 (N.Y. App. Div. 1950).

Truck driver—making out of state trip of two weeks' duration covered intra and interstate shipments. Baldi v Interstate Motor Freight System, 277 A.D. 959, 99 N.Y.S.2d 635, 1950 N.Y. App. Div. LEXIS 3994 (N.Y. App. Div. 1950).

Claimant's work was transitory where he was employed in New York and paid from New York and was injured in Maryland and later in New Jersey; and jurisdiction is in New York. Kjersgaard v F. H. Sparks Co., 280 A.D. 1009, 116 N.Y.S.2d 782, 1952 N.Y. App. Div. LEXIS 4558 (N.Y. App. Div. 1952).

Employer was engaged in cutting lumber by use of a portable mill which was moved from tract to tract. For 2 or 3 years employer had cut timber in New York but following claimant's rehiring, mill was moved to Pennsylvania where claimant was injured when a tree fell across his back. Claimant lived in New York and his expenses back and forth to Pennsylvania were paid by the employer. The board properly determined that the work was transitory. The insurance policy of the employer referring only to the location of the office-residence of the employer, but stating that it covered any injury sustained in the U. S. or Canada covered the Pennsylvania injury. Acceptance by carrier of additional premium on policy after accident estopped it from denying coverage, in view of the fact that it was aware of the accident and nevertheless rendered bill for premium based on inclusion of claimant's salary. Decision affirmed but appeal was not on such an unmeritorious issue that a penalty should be added under § 23. Brueser v Blackman, 8 A.D.2d 872, 186 N.Y.S.2d 709, 1959 N.Y. App. Div. LEXIS 8275 (N.Y. App. Div. 3d Dep't), app. denied, 9 A.D.2d 601, 189 N.Y.S.2d 121, 1959 N.Y. App. Div. LEXIS 10613 (N.Y. App. Div. 3d Dep't 1959), app. denied, 7 N.Y.2d 705, 1959 N.Y. LEXIS 1824 (N.Y. 1959).

Employer, with its principal office in New York City, operated a large business with plants in many states. Decedent was hired in

New York, was paid from New York office by checks drawn on New York bank and at time of accident was temporarily assigned for training in Virginia. He was required to live near his work and was paid an allowance toward expenses in addition to his salary. He was subject to reassignment from New York. Held: the Board properly assumed jurisdiction. Decedent died as a result of injuries received in an automobile accident while on the way from temporary living quarters to his job site. Held: injuries resulting in death arose out of and in the course of employment. Houghton v Babcock & Wilcox Co., 9 A.D.2d 575, 189 N.Y.S.2d 436, 1959 N.Y. App. Div. LEXIS 7433 (N.Y. App. Div. 3d Dep't), app. denied, 7 N.Y.2d 705, 1959 N.Y. LEXIS 1835 (N.Y. 1959).

A claim was properly within the jurisdiction of the New York Workmen's Compensation Board, though the injury occurred while claimant was riding a horse as a professional jockey in a New Jersey race, where he was regularly employed by appellant, a professional horse trainer with headquarters in New York, who assigned him to the particular race. Clingman v Cushman, 12 A.D.2d 671, 207 N.Y.S.2d 732, 1960 N.Y. App. Div. LEXIS 6730 (N.Y. App. Div. 3d Dep't 1960).

Flight engineer on a passenger plane killed on a flight from Ireland to New York city in a crash in Newfoundland where the airline employer, a Delaware corporation, had its principal office and place of business in New York, the employee was a New York resident, the employment was controlled from New York, and the employee received his salary in New York. Spelar v American Overseas Airlines, Inc., 80 F. Supp. 344, 1947 U.S. Dist. LEXIS 3053 (D.N.Y. 1947).

372. —Construction workers

Iron work foreman killed after three weeks' employment on boiler construction job in Connecticut. Leary v M. J. Daley & Co., 261 N.Y. 552, 185 N.E. 734, 261 N.Y. (N.Y.S.) 552, 1933 N.Y. LEXIS 1365 (N.Y. 1933).; Farrigan v Babcock & Wilcox Co., 269 A.D. 872, 56 N.Y.S.2d 103, 1945 N.Y. App. Div. LEXIS 4321 (N.Y. App. Div. 1945).

Lineman employed in New York and sent by his employer to do similar work in Connecticut where he was killed. Leary v M. J. Daley & Co., 261 N.Y. 552, 185 N.E. 734, 261 N.Y. (N.Y.S.) 552, 1933 N.Y. LEXIS 1365 (N.Y. 1933).

Tile layer who worked for New York employer for seventeen years, injured on six month job in Detroit. De Fabbio v Schenectady Tile Co., 236 A.D. 868, 260 N.Y.S. 921, 260 N.Y.S. 924, 1932 N.Y. App. Div. LEXIS 7673 (N.Y. App. Div. 1932).; Mueller v David E. Kennedy, Inc., 246 A.D. 872, 285 N.Y.S. 1049, 1936 N.Y. App. Div. LEXIS 9928 (N.Y. App. Div. 1936).

Rigger injured while rigging scaffold in New Jersey. Carp v Gladstone Raines, Inc., 264 A.D. 962, 37 N.Y.S.2d 146, 1942 N.Y. App. Div. LEXIS 5552 (N.Y. App. Div. 1942).

Laborer working out of New York office of New Jersey corporation killed on chimney construction job in Massachusetts. Hornacek v Alphons Custodis-Chimney Constr. Co., 266 A.D. 1048, 45 N.Y.S.2d 283, 1943 N.Y. App. Div. LEXIS 5882 (N.Y. App. Div. 1943).

Foreman carpenter killed while installing metal doors on construction job in Pennsylvania, the installation requiring six weeks. Johnson v Farber-Brandin, Inc., 268 A.D. 945, 51 N.Y.S.2d 800, 1944 N.Y. App. Div. LEXIS 4340 (N.Y. App. Div. 1944).

Claimant employed by New York employer to paint railroad bridges in various locations in New York, New Jersey and Pennsylvania, the injury being suffered in Pennsylvania. Vatouios v Markakis, 273 A.D. 832, 76 N.Y.S.2d 61, 1948 N.Y. App. Div. LEXIS 4834 (N.Y. App. Div.), aff'd, 298 N.Y. 733, 83 N.E.2d 143, 298 N.Y. (N.Y.S.) 733, 1948 N.Y. LEXIS 1286 (N.Y. 1948).

Employee working in Pennsylvania as a shovel oiler in connection with highway construction, employer maintaining its principal office in New York. Introne v Carbisello, 273 A.D. 934, 77 N.Y.S.2d 898, 1948 N.Y. App. Div. LEXIS 5329 (N.Y. App. Div. 1948).

Carpenter injured on a construction job in Maine who was hired in New York to work both in and out of the state by a New York corporation whose employees were covered by a compensation policy written in New York. Hawco v William Neill Constructors, Inc., 275 A.D. 878, 88 N.Y.S.2d 640, 1949 N.Y. App. Div. LEXIS 4861 (N.Y. App. Div. 1949).

New York Workmen's Compensation Board did not have jurisdiction where the claimant, a plumber, worked in New York for his employer for 5 or 6 years and then went to New Jersey and was hired there for a project for which the employer was the contractor on a job that was to last for 2 years. Claimant was on employer's New Jersey payroll, was paid on the basis of the local union scale, was under the supervision of the New Jersey foreman and deductions for unemployment insurance under the New Jersey law were made from his wages, upon which, also, the employer paid to appellant-carrier a premium for workmen's compensation insurance covering New Jersey employment. Gubner v Malan Plumbing Co., 3 A.D.2d 620, 158 N.Y.S.2d 310, 1956 N.Y. App. Div. LEXIS 3436 (N.Y. App. Div. 3d Dep't 1956).

373. Injury arising from out of state work incidental to New York employment

Injuries arise out of and in course of employment of an employee where his contract of employment was consummated in New York and his work outside of state emanated from and was supervised by his employer's New York office and was transitory and incidental and in advancement of his employer's interests and work. Flinn v Remington Rand, Inc., 277 N.Y. 641, 14 N.E.2d 199, 277 N.Y. (N.Y.S.) 641, 1938 N.Y. LEXIS 1104 (N.Y. 1938).

The Workmen's Compensation Board should not have concluded that work of claimant, a Pennsylvania resident, in Indiana was incidental to a New York employment and should not have awarded compensation where claimant had been working for a Pennsylvania employer who made an agreement with a New York Corporation to act as field manager and supply all labor, the New York corporation was to pay all wages, the employer instructed claimant to go to New York where he worked for several weeks and claimant was thereafter sent to Indiana where he was injured. Cradduck v Hallen Co., 304 N.Y. 240, 107 N.E.2d 61, 304 N.Y. (N.Y.S.) 240, 1952 N.Y. LEXIS 735 (N.Y. 1952).

The Workmen's Compensation Board has jurisdiction in case of an injury to an employee whose work occasionally takes him outside the state as an incident to the employer's business within the state, where the employee lives and has been hired. Baldi v Interstate Motor Freight System, 277 A.D. 959, 99 N.Y.S.2d 635, 1950 N.Y. App. Div. LEXIS 3994 (N.Y. App. Div. 1950).; Gardener v Horseheads Const. Co., 171 A.D. 66, 156 N.Y.S. 899, 1916 N.Y. App. Div. LEXIS 9449 (N.Y. App. Div. 1916).

374. Employee of New York employer assigned to fixed or permanent out of state location

Employee, resident of Canada injured in gravel pit operated in Canada by a Massachusetts corporation in connection with highway construction in New York. Cameron v Ellis Const. Co., 252 N.Y. 394, 169 N.E. 622, 252 N.Y. (N.Y.S.) 394, 1930 N.Y. LEXIS 636 (N.Y. 1930).

Policeman on building operation of New York corporation. Copeland v Foundation Co., 256 N.Y. 568, 177 N.E. 143, 256 N.Y. (N.Y.S.) 568, 1931 N.Y. LEXIS 1148 (N.Y. 1931).

Painter engaged in painting an industrial plant in New Jersey. Amaxis v N. A. Vassilaros, Inc., 258 N.Y. 544, 180 N.E. 325, 258 N.Y. (N.Y.S.) 544, 1931 N.Y. LEXIS 800 (N.Y. 1931).

Driller on foundations killed in Tennessee by dynamite explosion. Zeltoski v Osborne Drilling Corp., 264 N.Y. 496, 191 N.E. 532, 264 N.Y. (N.Y.S.) 496, 1934 N.Y. LEXIS 1540 (N.Y. 1934).

Carpenter on construction job in the Virgin Islands. Jensen v Boudin Contracting Corp., 258 A.D. 1009, 16 N.Y.S.2d 869, 1940 N.Y. App. Div. LEXIS 8631 (N.Y. App. Div.), aff'd, 283 N.Y. 572, 27 N.E.2d 437, 283 N.Y. (N.Y.S.) 572, 1940 N.Y. LEXIS 1024 (N.Y. 1940).

Mechanic sent to job to work under local superintendent, killed after working five months, employer having secured the payment of compensation under West Virginia statute. Florio v Delbalso Const. Co., 264 A.D. 965, 37 N.Y.S.2d 144, 1942 N.Y. App. Div. LEXIS 5564 (N.Y. App. Div. 1942).

Painter painting a New Jersey pier at the wage scale prevailing in New Jersey; employer insured under the New Jersey Workmen's Compensation Law. Van Beck v Allied Cleaning Contractors, Inc., 266 A.D. 806, 41 N.Y.S.2d 327, 1943 N.Y. App. Div.

LEXIS 4556 (N.Y. App. Div.), app. dismissed, 291 N.Y. 660, 51 N.E.2d 935, 291 N.Y. (N.Y.S.) 660, 1943 N.Y. LEXIS 1758 (N.Y. 1943).

Longshoreman on New Jersey pier. Raiola v Union Stevedoring Corp., 268 A.D. 837, 50 N.Y.S.2d 242, 1944 N.Y. App. Div. LEXIS 3699 (N.Y. App. Div. 1944).

Aircraft engineer returning from official visit to New York plant of Pennsylvania employer. Sehlmeyer v Brewster Aeronautical Corp., 271 A.D. 853, 65 N.Y.S.2d 837, 1946 N.Y. App. Div. LEXIS 3410 (N.Y. App. Div. 1946).

Bridge painter fatally injured on an eight month job in Maryland for which he was specially hired under contract of employment entered into in New York city. Stephens v Hudson Maintenance Co., 274 A.D. 1077, 85 N.Y.S.2d 505, 1949 N.Y. App. Div. LEXIS 6133 (N.Y. App. Div. 1949).

With respect to a death benefits claim based on death of one employed by a comedian as a drummer in the comedian's night club act and killed in a traffic accident en route from New York to Las Vegas, sufficient contacts with New York were shown to give rise to jurisdiction in this state where the hiring was here, the employer's office was here, travel expenses to and from the out-of-state location were paid, the decedent was a resident of New York, and compensation coverage was procured by his employer here. Maisel v Berle, 11 A.D.2d 831, 202 N.Y.S.2d 562, 1960 N.Y. App. Div. LEXIS 8500 (N.Y. App. Div. 3d Dep't), reh'g denied, 11 A.D.2d 961, 206 N.Y.S.2d 568, 1960 N.Y. App. Div. LEXIS 8118 (N.Y. App. Div. 3d Dep't 1960).

A determination by the board that the claimant was hired to work exclusively in Nebraska and Iowa and that such control, if any, as emanated from New York employer, was insufficient to confer New York State jurisdiction, was supported by substantial evidence that at the time of the accident the work which claimant was performing was at a fixed geographic area outside of the state of New York and he could not avail himself of the benefits of the Workmen's Compensation Law. Spomer v Westron Corp., 35 A.D.2d 621, 312 N.Y.S.2d 730, 1970 N.Y. App. Div. LEXIS 4120 (N.Y. App. Div. 3d Dep't 1970), app. denied, 28 N.Y.2d 481, 1971 N.Y. LEXIS 1674 (N.Y. 1971).

375. Employees subject to direction or control from New York office

A claimant employed in New York and controlled from New York is a New York employee unless he has a fixed place of employment in the sense that he stays at one location as opposed to a position of mobility, even though such employment be entirely without the state of New York. Baduski v S. Gumpert Co. (1951) 277 App Div 591, 102 NYS2d 297, app dismd (1951) 302 NY 702, 98 NE2d 491.; to the same effect, see Roth v A. C. Horn Co. (1941) 262 App Div 922, 28 NYS2d 808, affd (1941) 287 NY 545, 38 NE2d 221.; Goddard v Taylor Instrument Co., 245 A.D. 876, 282 N.Y.S. 182, 1935 N.Y. App. Div. LEXIS 11348 (N.Y. App. Div. 1935).

Claimant was hired in New York by the then director emeritus of museum owned by appellant foundation. There was proof that appellant had authorized the director to hire a secretary and that claimant's work was related to Foundation which paid claimant's salary and made the usual deductions therefrom. A finding that claimant was employee of appellant was adequately supported. Although the accident occurred in Connecticut, hiring was in New York from which it was dominated. Test of New York employment is to have sufficient contracts with state so that it can reasonably be said that employment is located here. Award affirmed. Carlson v Solomon R. Guggenheim Foundation, 8 A.D.2d 892, 187 N.Y.S.2d 46, 1959 N.Y. App. Div. LEXIS 8307 (N.Y. App. Div. 3d Dep't), modified, 8 A.D.2d 912, 187 N.Y.S.2d 46, 1959 N.Y. App. Div. LEXIS 8103 (N.Y. App. Div. 3d Dep't 1959).

A finding that the New York Workmen's Compensation Board had jurisdiction because the claimant was engaged in New York employment at the time of injury was sustained where it appeared that he was originally employed on a day-by-day basis as a laborer to take care of elephants at the winter quarters of a circus in Florida, he came to New York City with the circus where it had a fixed-week engagement, and, during that time, and when injured, was being paid by, and working under supervision of, the New York office of the circus. Herman v Ringling Bros. Barnum & Bailey, 10 A.D.2d 745, 197 N.Y.S.2d 538, 1960 N.Y. App. Div. LEXIS 11185 (N.Y. App. Div. 3d Dep't 1960).

There being substantial evidence that a deceased employee was hired in New York and supervised from the Buffalo office of his employer, the New York Workmen's Compensation Board had jurisdiction of a claim for death benefits where more than half of his working time was spent in New York State, notwithstanding he lived in Erie, Pennsylvania, and operated from his home there and the accident in which he was killed occurred within a few blocks of his home. O'Connor v Johnson & Johnson, 12 A.D.2d 846, 211 N.Y.S.2d 1, 1961 N.Y. App. Div. LEXIS 13204 (N.Y. App. Div. 3d Dep't), app. denied, 9 N.Y.2d 611, 1961 N.Y. LEXIS 1708 (N.Y. 1961).

Claimant had sufficient significant contacts with New York State to be considered a New York employee rather than an Indiana employee where, although the home office of his employer company was in Indianapolis, he was district manager for New York State generally and New England and subject to direction out of the New York City office, and, at the time of the accident in question, he was headed in the general direction of Boston on direct orders from the New York office. Armstrong v Aero Mayflower Transit Co., 14 A.D.2d 958, 221 N.Y.S.2d 225, 1961 N.Y. App. Div. LEXIS 7903 (N.Y. App. Div. 3d Dep't 1961).

The fact that injuries sustained by an employee occur outside of New York State is not conclusive as to whether his claim is, or is not, compensable under New York law, and other factors must be taken into consideration such as the place of hiring, the place from which the employment was controlled, place of residence of the employee, place from which the compensation insurance was secured, and the place from which the employer paid employee's out-of-state expenses. Tuffarella v Erie R. Co., 17 A.D.2d 484, 236 N.Y.S.2d 503, 1962 N.Y. App. Div. LEXIS 6238 (N.Y. App. Div. 2d Dep't 1962), aff'd, 13 N.Y.2d 1045, 245 N.Y.S.2d 769, 195 N.E.2d 454, 1963 N.Y. LEXIS 847 (N.Y. 1963).

Where decedent was hired in New York to work in Mississippi on one job location, New York had jurisdiction over a workman's compensation claim under evidence that the deceased was a New York resident at the time of his hiring which occurred in New York, he lived temporarily in Mississippi with his wife and children in a rented trailer some distance from the construction site, the decedent was returned to New York for burial and his widow returned with her children to live in New York after her husband's death, the employer had its permanent, primary office in New York where financial operations were conducted, and assets controlled, establishing that base of operations was in New York, decedent was paid according to the union wage scale prevailing in New York, he received payment from the employer for his transportation expenses from New York to Mississippi, where both the work performed and the payrolls were subject to supervision by the New York office. Rappa v Malan Constr. Co. of Koppers Co., 33 A.D.2d 846, 305 N.Y.S.2d 1012, 1969 N.Y. App. Div. LEXIS 2600 (N.Y. App. Div. 3d Dep't 1969).

The New York Workers' Compensation Board properly determined that sufficient significant contacts with New York existed to justify its jurisdiction over decedent's claim where decedent's employer, a publisher, had its principal office in Albany, New York with editorial, marketing and international sales offices in New York City, where decedent was originally interviewed by the area sales manager in Tulsa, Oklahoma but was not hired until he was interviewed and approved by the marketing staff in the New York office, where decedent's quotas were fixed by the New York office, where all sales orders were sent by decedent directly to the Albany office, and where all commissions, bonuses and other compensation, as well as the reimbursement of expenses, came from the Albany office. Stacy v Matthew Bender Co., 86 A.D.2d 913, 448 N.Y.S.2d 532, 1982 N.Y. App. Div. LEXIS 15587 (N.Y. App. Div. 3d Dep't 1982).

In workers' compensation action, questions of dependency and contribution are questions of fact and appellate court should not disturb Workers' Compensation Board's determination unless there is no substantial evidence to support it. Giglia v Berger Industries, 127 A.D.2d 959, 512 N.Y.S.2d 563, 1987 N.Y. App. Div. LEXIS 43442 (N.Y. App. Div. 3d Dep't 1987).

376. Sales representatives of New York employers

Salesman, resident of Iowa, hired at employer's plant in Rochester, New York, who was killed in automobile accident in Missouri: Hospers v J. Hungerford Smith Co., 230 N.Y. 616, 130 N.E. 916, 230 N.Y. (N.Y.S.) 616, 1921 N.Y. LEXIS 894 (N.Y. 1921).

Salesman, resident of Colorado, hired by mail from New York, who was fatally injured in automobile accident in Colorado. Ayers v Dunn Pen & Pencil Co., 244 N.Y. 557, 155 N.E. 895, 244 N.Y. (N.Y.S.) 557, 1927 N.Y. LEXIS 1088 (N.Y. 1927).

Salesman, resident of North Carolina, hired by correspondence from New York, who was injured in automobile accident in Virginia. Wagoner v Brown Mfg. Co., 249 A.D. 886, 292 N.Y.S. 599, 1937 N.Y. App. Div. LEXIS 10073 (N.Y. App. Div.), aff'd, 274 N.Y. 593, 10 N.E.2d 567, 274 N.Y. (N.Y.S.) 593, 1937 N.Y. LEXIS 981 (N.Y. 1937).

District sales manager in charge of Georgia office, hired at employer's plant in New York, who was killed in automobile accident in Georgia. Flinn v Remington Rand, 251 A.D. 578, 297 N.Y.S. 899, 1937 N.Y. App. Div. LEXIS 7001 (N.Y. App. Div. 1937), aff'd, 277 N.Y. 641, 14 N.E.2d 199, 277 N.Y. (N.Y.S.) 641, 1938 N.Y. LEXIS 1104 (N.Y. 1938).

Traveling salesman, out of state resident, whose territory was entirely outside of New York where the employer had one of its main offices in which the claimant was hired and from which he received orders, instructions and his compensation. Baduski v S. Gumpert Co., 277 A.D. 591, 102 N.Y.S.2d 297, 1951 N.Y. App. Div. LEXIS 5643 (N.Y. App. Div.), app. dismissed, 302 N.Y. 702, 98 N.E.2d 491, 302 N.Y. (N.Y.S.) 702, 1951 N.Y. LEXIS 867 (N.Y. 1951).

The New York Workmen's Compensation Board had no jurisdiction over a death claim where the decedent was employed as an advertising space salesman with his territory in parts of Illinois, Iowa and Missouri and his employer, a New York corporation had its principal place of business in New York since direct control of and all instructions to the decedent were not solely within the jurisdiction of the New York office. Alexander v United Newspaper Magazine Corp., 4 A.D.2d 890, 167 N.Y.S.2d 109, 1957 N.Y. App. Div. LEXIS 4277 (N.Y. App. Div. 3d Dep't 1957), aff'd, 5 N.Y.2d 820, 181 N.Y.S.2d 214, 155 N.E.2d 123, 1958 N.Y. LEXIS 720 (N.Y. 1958).

Decedent, a salesman, was hired in New York and was assigned territory outside the State. He was fatally injured in accident on Alabama highway. Compensation Board properly found that decedent's work was transitory and not conducted at fixed point outside New York and properly made award to widow by reason of decedent's death. Evidence showed he was on direct route to New York City to attend sales meeting. Beauchamp v McGraw-Hill Publishing Co., 6 A.D.2d 450, 179 N.Y.S.2d 163, 1958 N.Y. App. Div. LEXIS 4276 (N.Y. App. Div. 3d Dep't 1958), app. denied, 5 N.Y.2d 710, 1959 N.Y. LEXIS 1984 (N.Y. 1959).

Salesman who covered Ohio but reported directly to his employer in, and was paid directly from Buffalo. Burton v Ziegler Pharmacal Corp., 9 A.D.2d 811, 192 N.Y.S.2d 509, 1959 N.Y. App. Div. LEXIS 6158 (N.Y. App. Div. 3d Dep't 1959).

Where deceased was a sales manager supervising other employees and worked out of his New York home, employer was qualified to do business in New York and required deceased to locate in New York area, finding that New York Workmen's Compensation Board had jurisdiction was supported by substantial evidence, and having become a factual finding, Appellate Division was without power to disturb it. Atkinson v Marquette Mfg. Co., 24 A.D.2d 795, 263 N.Y.S.2d 927, 1965 N.Y. App. Div. LEXIS 3231 (N.Y. App. Div. 3d Dep't 1965).

377. Sales representatives of out of state employers covering New York territory

Fact that decedent sales manager was subject to ultimate control of Minnesota home office was less significant than ordinarily would be case in determining whether New York Workmen's Compensation Board had jurisdiction over claim for death benefits in view of fact that decedent was himself a supervisory employee. Atkinson v Marquette Mfg. Co., 24 A.D.2d 795, 263 N.Y.S.2d 927, 1965 N.Y. App. Div. LEXIS 3231 (N.Y. App. Div. 3d Dep't 1965).

378. Other particular applications

An employee, who had from time to time worked for both a New Jersey and a New York corporation which were organized to do waterproofing and steam cleaning of buildings and were both entirely owned by a single stockholder and who had not worked for either corporation for 10 months prior to working for the New Jersey corporation was employed in New York and hence, the New York Workmen's Compensation Board had jurisdiction. Nashko v Standard Water Proofing Co., 4 N.Y.2d 199, 173 N.Y.S.2d 565, 149 N.E.2d 859, 1958 N.Y. LEXIS 1066 (N.Y. 1958).

Where the claimant was hired at the New York office of his employer as an overseas representative and was stationed in England and France during the course of his employment, but employer paid for return transportation to New York and paid living expenses of employee while abroad, there was sufficient evidence to justify the jurisdiction of New York to make a compensation award. Longshore v United Seamen's Service, Inc., 1 A.D.2d 714, 146 N.Y.S.2d 791, 1955 N.Y. App. Div. LEXIS 3730 (N.Y. App. Div. 3d Dep't 1955).

An employee's injuries arose out of and in course of his employment by a New York firm where he was hired by the firm for training to take a position with a Chicago corporation in which the partners were principal stockholders, paid during the training period by the partners, and injured in a Pennsylvania automobile accident while en route to Chicago in his own car per instructions to take up his job there. Solow v Regency Thermographers, Inc., 16 A.D.2d 859, 227 N.Y.S.2d 989, 1962 N.Y. App. Div. LEXIS 9704 (N.Y. App. Div. 3d Dep't 1962).

The facts disclosed sufficient contacts with New York to warrant assumption of jurisdiction by the Workmen's Compensation Board where it appeared that claimant was hired by a New York partnership at the request of an Illinois corporation in which the partners were principal stockholders, to be employed by such corporation in Chicago, and, following two weeks training for the job at the New York plant, for which he was paid by the New York firm, departed for Chicago in his own car to take up his employment there and was severely injured en route in a Pennsylvania automobile accident. Solow v Regency Thermographers, Inc., 16 A.D.2d 859, 227 N.Y.S.2d 989, 1962 N.Y. App. Div. LEXIS 9704 (N.Y. App. Div. 3d Dep't 1962).

The New York Workmen's Compensation Board could properly take jurisdiction of a claim for death benefits in behalf of the widow of an airline pilot who was killed in a Brazilian crash of a German airliner, having been specially assigned to the German airline by his employer corporation, which had headquarters at Kansas City, where decedent was originally hired, but thereafter assigned at various different times to various bases or "domiciles," his last such assignment being to Idlewild, his employment having substantial connection with New York State. McMains v Trans World Airlines, Inc., 18 A.D.2d 956, 237 N.Y.S.2d 812, 1963 N.Y. App. Div. LEXIS 4345 (N.Y. App. Div. 3d Dep't), app. denied, 13 N.Y.2d 593, 240 N.Y.S.2d 1025, 190 N.E.2d 905, 1963 N.Y. LEXIS 1866 (N.Y. 1963).

Evidence supported administrative finding that claimant's decedent was out-of-state employee where he had moved to Florida with no intention of returning to New York, and was injured while overseeing construction of his employer's new plant in Florida. Lupoli v Serve-Queen, Inc., 130 A.D.2d 844, 515 N.Y.S.2d 629, 1987 N.Y. App. Div. LEXIS 46855 (N.Y. App. Div. 3d Dep't 1987).

Agency Opinions

Analysis

I. Employer

1. Unions, associations and employee groups
2. Dual, multiple or joint employers, generally
3. —Other incidents of dual control

II. Employee

4. Municipal and other government employees
5. —Firefighters
6. Volunteer workers

7. Assistants engaged by employee or agent or employer

III. Injury Arising out of or in the Course of Employment

8. Employer liability for injury to employees rendering emergency aid
9. —Fire fighting activities

I. Employer

1. Unions, associations and employee groups

A group of workers dividing or exchanging products and soliciting employment under a barter and token plan is not the employer of its members. 1933 NY Ops Atty Gen March 21.

701. A cooperative association organized for the purpose of furnishing seasonal workers to members of such association, is not an employer of such individual laborers even though it collects the wages due such laborers and pays same over directly to the individual laborer. 1945 NY Ops Atty Gen Jan 20.

2. Dual, multiple or joint employers, generally

3. —Other incidents of dual control

It would appear that Albany County is the employer for purposes of a workers' compensation claim submitted by a voting machine custodian injured while working for the County Board of Elections and being paid by the City of Cohoes. 1979 Op St Compt File #825.

II. Employee

4. Municipal and other government employees

5. —Firefighters

Emergency services duly authorized and performed by volunteer firemen in emergency situations occasioned by the recent hurricanes are covered by the Workmen's Compensation Law. 1955 NY Ops Atty Gen Sept 9.

A Town could be liable for the injury or death of a probationer sentenced to work for the Town Highway Department if caused by negligence. His remedy is a civil suit, or a Workers' Compensation claim if he is held to be an "employee" within the purview of the Workers' Compensation Act. 1980 NY Ops Atty Gen April 22 (informal).

If owner-operators of equipment hired by a city for snow removal are independent contractors, the city is not required to carry workmen's compensation insurance with respect to them. 1962 NY Ops Atty Gen Jan 15.

6. Volunteer workers

A volunteer cleaning up debris on church grounds is not an employee. 1936 NY Ops Atty Gen November 16.

Lodge members donating services to repair a lodge building are not employees. 1936 NY Ops Atty Gen March 30.

7. Assistants engaged by employee or agent or employer

Operators of Standard Oil Company's filling stations are employees of the company, but employers of their subordinates. 1933 NY Ops Atty Gen April 17; see also 1937 NY Ops Atty Gen February 18.

III. Injury Arising out of or in the Course of Employment

8. Employer liability for injury to employees rendering emergency aid

9. —Fire fighting activities

The director of Wassaic State School has no authority to direct employees of the institution to fight fires off the premises. Employees obeying such direction would not be covered by workmen's compensation if injured. 1944 NY Ops Atty Gen June 5.

Employees in the fire department of institutions under the jurisdiction of the Department of Correction, who are directed to fight fires off the premises pursuant to a mutual assistance arrangement as provided in § 6-c of the Correction Law, are covered by Workmen's Compensation. 1947 NY Ops Atty Gen April 21.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 3, 14-a, 18-a, 27, 32, 48, 50, 63, 125-a, 307; CLS Racing & Wagering § 221.

Application § 3.

Schedule in case of disability, § 15.

Independent livery bases, § 18-c.

Procedure and payment of compensation in certain claims; limitation of right to compensation, § 25-a.

Security for payment of compensation, § 50.

The insurance contract, § 54.

Officers, CLS Bus Corp § 715.

Adjournment in contemplation of dismissal, CLS CPL § 170.55.

Adjournment in contemplation of dismissal in cases involving marihuana, CLS CPL § 170.56.

Newspaper carrier, CLS Educ § 3228.

Hazardous occupations under Workers' Compensation Law, inapplicability of Employers' Liability Law, CLS Em Liab § 17.

New York Black Car Operators' Injury Compensation Fund, Inc., CLS Exec §§ 160-cc et seq.

Independent Livery Driver Benefit Fund, CLS Exec §§ 160-aaa et seq.

Telemarketing; use of automatic dialing-announcing devices and placement of consumer telephone calls, CLS Gen Bus § 399-p.

Establishment of hazardous materials emergency response teams, CLS Gen Mun § 209-y.

Definitions of employed, employee, employer, CLS Labor § 2.

Employment of minors fourteen or fifteen years of age, CLS Labor § 131.

Employment of minor sixteen or seventeen years of age, CLS Labor § 132.

Industrial homework, legislative intent and definitions, CLS Labor § 350.

Definition of employment, CLS Labor § 511.

Definition of employer, CLS Labor § 512.

Definition of wages, CLS Labor § 518.

Definition of total unemployment, CLS Labor § 522.

Definition of employer, CLS Labor § 701.

Definition of employee, CLS Labor § 701.

Real estate brokers and real estate salesmen, CLS Real P §§ 440 et seq.

Taxicab, CLS Veh & Tr § 148-a.

Restitution, CLS Family Ct Act § 353.6.

Restitution, CLS Family Ct Act § 758-a.

Quarter horse racing and breeding, Racing & Wagering §§ 401 et seq.

Regional off-track betting corporations, Racing & Wagering §§ 501 et seq.

New York state defense emergency act, CLS Unconsol ch 131.

Codes, Rules and Regulations:

Definitions, procedure before the board, Workers' Compensation Board Rules and Regulations. 12 NYCRR § 300.1 (CLS Work. Comp. Bd. Rules § 300.1).

Federal Aspects:

Funeral expenses; transportation of body under federal workers' compensation law. 5 USCS § 8134.

Jurisprudences:

27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1147, 1364.

109 NY Jur 2d Workers' Compensation §§ 4, 9, 40, 192–205, 216, 226, 230–232, 237, 257, 262, 267–270, 276, 279, 287, 310.

110 NY Jur 2d Workers' Compensation §§ 344, 350, 475, 496, 517, 521.

111 NY Jur 2d Workers' Compensation §§ 852, 866, 878, 897.

82 Am Jur 2d, Workers' Compensation §§ 35 et seq., 161, 195, 236, 237.

10 Am Jur Proof of Facts 3d 669, Workers' Compensation —Compensable Coronary Episode (Heart Attack).

103 Am Jur Proof of Facts 3d 1, Proving Independent Contractor Status in Challenging Unemployment Insurance and Workers' Compensation.

Causes of Action:

Cause of Action to Recover Workers' Compensation Benefits Under "Special Mission" or "Dual Purpose" Exception to "Going and Coming" Rule. 31 COA2d 307.

Cause of Action to Recover Workers' Compensation Benefits for Injuries Suffered After Termination of Employment, 10 COA2d 315.

Cause of Action for Workers' Compensation for Heart Attack, 51 COA 2d 291.

Appleman on Insurance:

New Appleman New York Insurance Law §§ 25.01 et seq.

Annotations:

Constitutional or statutory provision referring to "employees" as including public officers. 5 ALR2d 415.

Workers' compensation: Injury sustained while attending employer-sponsored social affair as arising out of and in the course of employment. 47 ALR3d 566.

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Workers' compensation: coverage of employee's injury or death from exposure to the elements — modern cases. 20 ALR5th 346.

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Who is "stepchild" for purposes of § 101(b)(1)(B) of Immigration and Nationality Act (8 USCS § 1101(b)(1)(B)). 54 ALR Fed 182.

Matthew Bender's New York Practice Guides: 4 New York Practice Guide: Business and Commercial § 25A.02.

Texts: Greenberg & Gray, Sports Law Practice, 2d ed (1998, LLP) §§ 12.05(3), 12.08.

§ 3. Application

1. Hazardous employments. Compensation shall be payable for injuries or death incurred by employees in the following employments:

* * * * *

Group 15. Employment as a keeper, guard, resident physician, nurse, interne, resident interne, assistant resident interne or orderly in a prison reformatory, hospital for the mentally ill or hospital maintained or operated by a municipal corporation or other subdivision of the state, notwithstanding the definitions of the terms "employment," "employer" or "employee" in subdivisions three, four and five of section two of this chapter.

Group 15-a. Employment as a county fire coordinator or as a deputy county fire coordinator pursuant to section two hundred twenty-five-a or section four hundred one of the county law, notwithstanding the definitions of the terms "employer", "employee" or "employment" in subdivisions three, four and five of section two of this chapter.

The terms "county fire coordinator" and "deputy county fire coordinator," as used in this group, shall include any county official who is not appointed pursuant to the provisions of section two hundred twenty-five-a of the county law, but is appointed pursuant to the provisions of a special law, a county charter or a county local law and who is authorized or required to perform in the county the duties which are similar to those of a county fire coordinator or deputy county fire coordinator under such section of the county law and sections eight hundred seven-a and eight hundred seven-b of the education law.

* * * * *

HISTORY:

Add, L 1913, ch 816; amd, L 1914, ch 41, § 1; L 1916, ch 622, § 1; L 1917, ch 705, § 1, eff July 1, 1917; L 1921, ch 60, § 1, eff March 9, 1921; L 1922, ch 615, eff July 1, 1922; L 1924, ch 658; L 1928, ch 754, § 1; L 1928, ch 755; L 1929, ch 64; L 1929, ch 298; L 1929, ch 304; L 1929, ch 564; L 1929, ch 702; L 1930, ch 60, eff Oct 1, 1930; L 1931, ch 385; L 1931, ch 510; L 1932, ch 200; L 1934, ch 743, eff Sept 1, 1934; L 1935, ch 254; L 1935, ch 327, eff April 8, 1935; L 1935, ch 384, § 4, eff April 11, 1935; L 1936, ch 217; L 1936, ch 711; L 1936, ch 887, § 1; L 1937, ch 251; L 1937,

ch 563, eff July 1, 1937; L 1939, ch 271, § 3; L 1939, ch 732; L 1940, ch 225, § 2; L 1941, ch 221, eff July 1, 1941; L 1941, ch 639, §§ 1, 2; L 1941, ch 875, § 1; L 1942, ch 441; L 1943, ch 309, § 2; L 1943, ch 375; L 1945, ch 233, § 1, eff March 22, 1945; L 1945, ch 596; L 1946, ch 311, §§ 3, 4; L 1947, ch 431, §§ 1, 2; L 1947, ch 794, §§ 4, 5; L 1951, ch 788, §§ 5–9; L 1952, ch 347, eff March 29, 1952; L 1952, ch 635, eff April 12, 1952; L 1953, ch 575, § 7; L 1953, ch 840; L 1956, ch 699, § 13; L 1957, ch 906, eff July 1, 1957; L 1957, ch 967, § 2; L 1957, ch 983, § 1, eff July 1, 1957; L 1958, ch 144, eff July 1, 1958; L 1959, ch 311; L 1960, ch 181, § 2; L 1960, ch 782; L 1960, ch 792, §§ 1–3; L 1960, ch 926, § 1; L 1961, ch 233, §§ 2–6, eff Jan 1, 1962; L 1962, ch 551; L 1964, ch 539, § 2; L 1964, ch 576, § 88, eff April 16, 1964; L 1965, ch 587, § 1; L 1965, ch 987, § 1, eff July 1, 1965; L 1966, ch 391, § 1, eff June 1, 1966; L 1966, ch 646, §§ 2–4, eff Oct 1, 1966; L 1966, ch 681, eff June 21, 1966; L 1967, ch 114; L 1969, ch 407, § 113; L 1970, ch 412; L 1971, ch 500, § 1, eff June 17, 1971; L 1971, ch 665, eff July 1, 1971; L 1971, ch 666, eff July 1, 1971; L 1972, ch 260, §§ 1, 2, eff Oct 1, 1972; L 1974, ch 577, § 1, eff July 1, 1974; L 1974, ch 1053, § 3, eff April 1, 1975; L 1976, ch 72, § 13, eff Sept 1, 1976; L 1978, ch 550, § 58, eff July 24, 1978; L 1978, ch 655, § 127, eff July 25, 1978; L 1979, ch 19, § 1, eff March 16, 1979; L 1984, ch 489, § 2, eff Jan 1, 1985; L 1986, ch 470, § 2, eff Sept 19, 1986; L 1986, ch 760, § 2, eff Oct 1, 1986; L 1988, ch 24, § 20, eff Jan 1, 1989; L 1988, ch 546, § 1, eff Aug 11, 1988; L 1989, ch 311, § 1, eff July 10, 1989; L 1990, ch 346, § 7, eff Jan 1, 1991; L 2007, ch 169, § 5, eff July 3, 2007; L 2018, ch 476, § 10, effective December 28, 2018; L 2019, ch 105, § 10, effective January 1, 2020.

Derivation Notes: Substance transferred from § 2 and substance of former § 3 transferred to § 2.

Editor's Notes: Laws 1935, ch 327 added new Group 20 to § 3 without specifying sub. 1.).

Laws 1975, ch 1054 amended the effective date of L 1974, ch 1053 from September 1, 1974 to April 1, 1975.

Laws 2019, ch 105, § 1, eff January 1, 2020, provides:

Section 1. This act shall be known and may be cited as the "farm laborers fair labor practices act".

Laws 2019, ch 105, § 2, eff January 1, 2020, provide:

§ 2. Legislative findings and intent.

1. The legislature finds that agriculture is one of New York's leading and most important industries, resulting in over $5 billion annually and making New York a global leader in many crops and agricultural products. Agriculture plays an essential role in the continued economic growth and vitality of New York state. According to the United States Department of Agriculture's 2017 Agricultural Census, 98% of New York's farms are family owned and these farms contributed $2.4 billion to the state's GDP in 2017.

2. The legislature further finds that the success of New York's robust agriculture industry is due to the collaborative work between farmers and farm laborers. However, farm laborers are one of the few classes of employees that are not covered by the Federal Fair Labor Standards Act or the National Labor Relations Act (NLRA), denying these valuable employees the same basic labor protections and the right to collective bargaining that almost all other private sector workers enjoy. Despite regularly working 50, 60, 70 or even more hours a week doing arduous and difficult work, often with heavy equipment, pesticides, fertilizers and other dangerous materials and in sometimes hazardous situations, farm laborers remain excluded from collective bargaining statutes and the right to a day of rest, overtime and other labor protections that are in place at the state and/or federal level for other workers.

3. The legislature further finds that this industry is subject to unique and unpredictable factors including climate and weather, pricing and market requirements, seasonal harvests, immigration, and various federal and state laws, rules and regulations that directly impact farmers and require a unique balance and application of traditional labor protections to ensure farm laborers have a voice in their own terms and conditions of employment and access to basic labor protections while also creating adaptability and responsiveness to the unique circumstances of farm operations.

4. The legislature further finds that the labor standards included in this bill are intended solely for the purposes of transitioning into a modern structure of rights and benefits for farm laborers that achieve harmonious labor relations and stability of operations in the agricultural industry and are not intended for any other industry or sector of the economy.

Laws 2019, ch 105, § 25, eff January 1, 2020, provides:

§ 25. This act shall take effect January 1, 2020; provided, however that the provisions of section nine of this act shall take effect January 1, 2021.

Amendment Notes The 2018 amendment by ch 476, § 10, substituted "firefighters" for "firemen" twice in the second sentence of 1 (Group 17).

The 2019 amendment by ch 105, § 10, deleted "other than farm laborers" following "employees" in 1 (Group 14-a); and deleted "employed during any part of the twelve consecutive months beginning April first of any calendar year preceded by a calendar year in which the cash remuneration paid to all farm laborers aggregated twelve hundred dollars or more" following "laborers" in 1 (Group 14-b).

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I. Generally

1. In general; purpose

The purpose of the Work. Comp. Law is the regulation of industrial occupations involving special hazards. Freess v Kleinau, 190 A.D. 131, 179 N.Y.S. 347, 1919 N.Y. App. Div. LEXIS 4088 (N.Y. App. Div. 1919).

Compensation is required only if there be one or more employees, for without employees there is not employer and, of course, no need for insurance coverage nor any useful purpose served in carrying any such coverage. Martinez v Ficano, 28 A.D.2d 215, 284 N.Y.S.2d 270, 1967 N.Y. App. Div. LEXIS 3051 (N.Y. App. Div. 3d Dep't 1967), app. denied, 21 N.Y.2d 642, 1968 N.Y. LEXIS 1739 (N.Y. 1968).

2. Construction

Employees carrying on work in a charitable institution come within the provisions of group 18 of this section and, unless they

fall within the excepted classes, are covered by it provided they are employed "under any contract of hire, express or implied, oral or written." Hall v Salvation Army, 261 N.Y. 110, 184 N.E. 691, 261 N.Y. (N.Y.S.) 110, 1933 N.Y. LEXIS 1262 (N.Y. 1933).

In determining whether particular persons or classes are covered it is necessary to consider the statute as a whole and the purposes embodied in its enactment. Goldstein v State, 281 N.Y. 396, 24 N.E.2d 97, 281 N.Y. (N.Y.S.) 396, 1939 N.Y. LEXIS 1024 (N.Y. 1939).

Former § 2 from which this section is derived was construed as follows: First: If the employee's duties were exclusively or predominantly within the enumerated employment and he was injured while doing work fairly within the scope of the ordinary and customary fulfillment of such duties, he has a rightful claim even though the particular act he was doing when the mishap befell him would not of and by itself ordinarily come within the wording of the statute. Second: But where an employee's duties do not come exclusively or predominantly within the category of enumerated employments and only incidentally does he do work fairly falling within that category, his right to remuneration must hinge on a finding that he sustained injury while actually and momentarily doing the work named in the statute. Gleisner v Gross & Herbener, 170 A.D. 37, 155 N.Y.S. 946, 1915 N.Y. App. Div. LEXIS 5127 (N.Y. App. Div. 1915).

Former § 2 did not require that the nature of a compensable injury must be such as to present a visible or external sign. Fowler v Risedorph Bottling Co., 175 A.D. 224, 161 N.Y.S. 535, 1916 N.Y. App. Div. LEXIS 8257 (N.Y. App. Div. 1916).

The Work. Comp. Law is compulsory in character and applies only to the so-called hazardous employments which are expressly designated in former § 2 (now § 3). Express mention of the occupations embraced in the several groups of hazardous employments necessarily excludes employments not there mentioned. Maloney v Levy & Gilliland Co., 176 A.D. 470, 163 N.Y.S. 505, 1917 N.Y. App. Div. LEXIS 5158 (N.Y. App. Div. 1917), aff'd, 223 N.Y. 631, 119 N.E. 1057, 223 N.Y. (N.Y.S.) 631, 1918 N.Y. LEXIS 1333 (N.Y. 1918).

Minors were not exempted from the benefits of former § 2. Ide v Faul & Timmins, 179 A.D. 567, 166 N.Y.S. 858, 1917 N.Y. App. Div. LEXIS 7428 (N.Y. App. Div. 1917).

The word "employed" as used in this section clearly refers to the contract of employment and not the quantum of past performance. Trachtenberg v Rosenblum, 24 A.D.2d 1062, 265 N.Y.S.2d 574, 1965 N.Y. App. Div. LEXIS 2683 (N.Y. App. Div. 3d Dep't 1965).

3. Hazardous employment, generally

The disability or death of an employee for which compensation is awarded must arise out of and in the course of his employment in a hazardous occupation: employment and hazardous occupation go together. Schweitzer v Thompson & Norris Co., 229 N.Y. 97, 127 N.E. 904, 229 N.Y. (N.Y.S.) 97, 1920 N.Y. LEXIS 660 (N.Y. 1920).

An employee to be entitled to compensation is no longer required to be himself engaged at the time of the accident in hazardous work. It is sufficient that he is an employee in such hazardous business. Europe v Addison Amusements, Inc., 231 N.Y. 105, 131 N.E. 750, 231 N.Y. (N.Y.S.) 105, 1921 N.Y. LEXIS 615 (N.Y. 1921).; Spang v Broadway Brewing & Malting Co., 182 A.D. 443, 169 N.Y.S. 574, 1918 N.Y. App. Div. LEXIS 7882 (N.Y. App. Div. 1918).; Pierson v Interborough Rapid Transit Co., 184 A.D. 678, 172 N.Y.S. 492, 1918 N.Y. App. Div. LEXIS 6636 (N.Y. App. Div. 1918), aff'd, 227 N.Y. 666, 126 N.E. 920, 227 N.Y. (N.Y.S.) 666, 1920 N.Y. LEXIS 891 (N.Y. 1920).; Cummings v Underwood Silk Fabric Co., 184 A.D. 456, 171 N.Y.S. 1046, 1918 N.Y. App. Div. LEXIS 6137 (N.Y. App. Div. 1918).

The determining factor in an award of compensation is whether the claimant was engaged in a hazardous occupation within the employment classified in sub 1 of § 3 of the act, and if it found that he was so engaged an award is proper even though the principal business of the employer was not a hazardous employment within the Workmen's Compensation Law. Gramlich v Board of Education, 297 N.Y. 349, 79 N.E.2d 437, 297 N.Y. (N.Y.S.) 349, 1948 N.Y. LEXIS 844 (N.Y. 1948).

The fact that on the day of the accident and for a long time theretofore claimant had not been doing any of the more dangerous parts of his work is of no consequence. The test is simply whether his employment can be found in § 3. Gramlich v Board of Education, 297 N.Y. 349, 79 N.E.2d 437, 297 N.Y. (N.Y.S.) 349, 1948 N.Y. LEXIS 844 (N.Y. 1948).

The phrase "hazardous employment" as used in this section does not carry a meaning identical to that implied by the phrase as used in the Workmen's Compensation Law § 2 subd 4. Chilk v New York, 26 A.D.2d 425, 275 N.Y.S.2d 167, 1966 N.Y. App. Div. LEXIS 2982 (N.Y. App. Div. 3d Dep't 1966), aff'd, 22 N.Y.2d 661, 291 N.Y.S.2d 358, 238 N.E.2d 748, 1968 N.Y. LEXIS 1404 (N.Y. 1968).

The essential nature of the work, rather than the designation given to the employment, is the controlling factor in determining whether an occupation is embraced within any particular group of this section. People ex rel. Levy v Sommerville, 4 N.Y.S.2d 793, 167 Misc. 89, 1938 N.Y. Misc. LEXIS 1633 (N.Y. Spec. Sess. 1938).

The employer's liability law expressly provides that it shall not apply to employers and employees in hazardous occupations as defined by this section. Taswell v General Matt Co., 30 N.Y.S.2d 145, 1941 N.Y. Misc. LEXIS 2233 (N.Y. City Ct. 1941).

4. Liability as between general and special employers, subcontractors and the like

Employees may look to either their general employer or their special employer or to both, for compensation for injuries due to occupational hazards. Dennison v Peckham Road Corp., 295 N.Y. 457, 68 N.E.2d 440, 295 N.Y. (N.Y.S.) 457, 1946 N.Y. LEXIS 801 (N.Y. 1946).

Employed by a sub-contractor, claimant was injured while driving his automobile in Pennsylvania. He had been employed by sub-contractor to supervise part of sub-contract given employer by contractor on Pennsylvania hospital. Plaintiff was working on plans in New York City and construction of hospital had not started at time of accident. Sub-contractor had no compensation insurance and thereafter became bankrupt. An award against the contractor was proper. De Stefano v Consolidated Tile Co., 308 N.Y. 721, 124 N.E.2d 336, 308 N.Y. (N.Y.S.) 721, 1954 N.Y. LEXIS 1812 (N.Y. 1954).

A contractor, subject of whose contract is a hazardous employment under sub 1, group 3, of this section, has a nondelegable duty to employees working out that project, and he is chargeable with payment of compensation even though the injury was sustained by a sub-contractor's employee. Passarelli v Baker & Yettman, Inc., 241 A.D. 639, 269 N.Y.S. 203, 1934 N.Y. App. Div. LEXIS 8546 (N.Y. App. Div. 1934).

The work being done by a workman at the time he was injured being hazardous in nature within the definition of this section, the obligation to secure payment of compensation was imposed upon the contractor who had borrowed his services for the time being from his regular employer, as being his special employer for the time being. Nyholm v Cauldwell-Wingate Co., 12 A.D.2d 802, 209 N.Y.S.2d 1016, 1961 N.Y. App. Div. LEXIS 13271 (N.Y. App. Div. 2d Dep't 1961).

General employee of elevator company was not, as matter of law, special employee of company's sub-contractor at time of injury, barring him from bringing suit against sub-contractor, where employee had been assigned by company to work with sub-contractor in drilling hole at construction site, utilizing company blueprints and specifications; notwithstanding that employee testified before trial that it was his job to assist sub-contractor in all work, question of fact remained as to whether company relinquished to sub-contractor right to direct and control employee in performance of work. Kinney v Kuhn, 122 A.D.2d 569, 504 N.Y.S.2d 948, 1986 N.Y. App. Div. LEXIS 59851 (N.Y. App. Div. 4th Dep't 1986).

County was liable for payment of Workers' Compensation benefits, even though county economic opportunity program (CEOP) supervised claimant's day-to-day activities, where claimant received no wages from CEOP and instead received public assistance benefits, reimbursement for work-related expenses, and lunch allowance from county, number of hours claimant worked was dependent on size of her public assistance grant,

county required claimant to complete time sheets and submit other related paperwork, only county could determine whether proffered excuse by claimant for work absence was acceptable, and county retained power to monitor and evaluate worksite. Hughes v Steuben County Self-Insurance Plan, 248 A.D.2d 757, 669 N.Y.S.2d 716, 1998 N.Y. App. Div. LEXIS 2218 (N.Y. App. Div. 3d Dep't 1998).

5. Exclusivity of remedy

Where the Work. Comp. Law fails to impose liability on an employer to provide compensation for the injury or death of an employee, damages may be sought in an action at law. Barrencotto v Cocker Saw Co., 266 N.Y. 139, 194 N.E. 61, 266 N.Y. (N.Y.S.) 139, 1934 N.Y. LEXIS 896 (N.Y. 1934).

An objection that a nurse was debarred from prosecuting a tort action against the city because of the exclusive applicability of the Workers' Compensation Law will be overruled, where the city failed to plead that defense and a motion at the trial to amend the answer in that respect was denied. Volk v New York, 284 N.Y. 279, 30 N.E.2d 596, 284 N.Y. (N.Y.S.) 279, 1940 N.Y. LEXIS 835 (N.Y. 1940), limited, Garcia v Iserson, 42 A.D.2d 776, 346 N.Y.S.2d 572, 1973 N.Y. App. Div. LEXIS 3696 (N.Y. App. Div. 2d Dep't 1973), overruled, Garcia v Iserson, 33 N.Y.2d 421, 353 N.Y.S.2d 955, 309 N.E.2d 420, 1974 N.Y. LEXIS 1700 (N.Y. 1974).

Employee of partnership has no right to institute tort action against individual member of that partnership on claim that he was injured through the negligence of the member. Minsky v Baitelman, 281 A.D. 910, 120 N.Y.S.2d 86, 1953 N.Y. App. Div. LEXIS 3748 (N.Y. App. Div. 1953).

Negligence action arising out of an automobile accident was properly dismissed under rule 107 of the Rules of Civil Practice where the accident occurred in the course of plaintiff's employment and therefore, the court had no jurisdiction of the subject matter of the action. Carriero v Iovino, 281 A.D. 1052, 121 N.Y.S.2d 127, 1953 N.Y. App. Div. LEXIS 4302 (N.Y. App. Div. 1953).

Action against employer for failure to furnish adequate medical treatment for injuries suffered in course of employment, for furnishing incompetent nurse, for fraud and deceit, and for breach of contract dismissed. Inasmuch as all the alleged causes of action arise from an injury suffered in the course of employment and are based upon employer's negligence, plaintiff's sole remedy is under the Workmen's Compensation Law. Young v International Paper Co., 282 A.D. 750, 122 N.Y.S.2d 39, 1953 N.Y. App. Div. LEXIS 4871 (N.Y. App. Div. 1953).

The state would be entitled to summary judgment that a correction officer, who was injured in a prison uprising and who accepted workers' compensation benefits after the Workers' Compensation Board issued a notice concluding that the officer's injury was accidental, had elected his remedy and was foreclosed from maintaining an action at law for intentional tort against the state on the basis that his injuries had been intentionally inflicted by other state employees, where the officer never sought administrative review of the board's determination. Smith v State, 91 A.D.2d 1181, 459 N.Y.S.2d 155, 1983 N.Y. App. Div. LEXIS 16532 (N.Y. App. Div. 4th Dep't), aff'd, 59 N.Y.2d 718, 463 N.Y.S.2d 439, 450 N.E.2d 245, 1983 N.Y. LEXIS 3082 (N.Y. 1983).

The Workers' Compensation Law did not preclude an action at law by an employee against her employer's compensation carrier where the allegations as to the carrier's persistent, protracted refusal to make payments of authorized or ordered benefits, and as to its dilatory tactics, harassment and arbitrary rejection of requests for authorization for treatment, went significantly beyond the kind of wrongful refusal by an insured to pay benefits constituting only a breach of the insurance contract and could be the basis of recovery for intentional tort or for fraudulent breach of an ensurer's duty of good faith and fair dealing. De Marco v Federal Ins. Co., 99 A.D.2d 114, 472 N.Y.S.2d 464, 1984 N.Y. App. Div. LEXIS 16527 (N.Y. App. Div. 3d Dep't 1984).

Intentional tort can give rise to cause of action outside purview of Workers' Compensation Law only if facts demonstrate intentional or deliberate act by employer or coemployee directed at causing harm to complaining employee. Bulis v Di Lorenzo, 142 A.D.2d 707, 531 N.Y.S.2d 107, 1988 N.Y. App. Div. LEXIS 7993 (N.Y. App. Div. 2d Dep't 1988).

Court improperly granted defendants' summary judgment motion on ground that award of Workers' Compensation benefits barred instant claim for sexual discrimination by plaintiff against her employers where workers' compensation award resulted solely from attempted videotaping of plaintiff by co-worker while she was in company locker room, and did not implicate alleged, intentional activities of company officer in subjecting her to hostile work environment by directing inappropriate sexual remarks and jokes toward her, and making demands on her for sexual relations in exchange for forgiving loan. Hanford v Plaza Packaging Corp., 284 A.D.2d 179, 727 N.Y.S.2d 407, 2001 N.Y. App. Div. LEXIS 6182 (N.Y. App. Div. 1st Dep't 2001), app. denied, 2001 N.Y. App. Div. LEXIS 9220 (N.Y. App. Div. 1st Dep't Sept. 25, 2001).

As the result of amendments effected to this section, subd. 1, gr. 19, and § 51, in 1941, a nonhazardous employee of an employer who has secured compensation is in the same position as a hazardous employee with respect to exclusiveness of compensation benefits. Murphy v Elmwood Country Club, Inc., 51 N.Y.S.2d 260, 183 Misc. 332, 1944 N.Y. Misc. LEXIS 2491 (N.Y. Sup. Ct. 1944).

If an employee has suffered injury or a disease for which the workmen's compensation law provides compensation, his sole remedy is under that law; he may not maintain an action for damages, unless the employer failed to provide compensation as required by law. Schwartz v Queensboro Farm Products, Inc., 78 N.Y.S.2d 863, 191 Misc. 778, 1948 N.Y. Misc. LEXIS 2337 (N.Y. Sup. Ct. 1948).

Pursuant to New York City, N.Y., Code § 3-204.3, New York City Council members were governmental employees within the coverage of the New York Workers' Compensation Law; therefore, a workers' compensation award was the only remedy available to a surviving parent of a council member shot to death in city hall. Davis v City of New York, 805 N.Y.S.2d 800, 10 Misc. 3d 234, 234 N.Y.L.J. 68, 2005 N.Y. Misc. LEXIS 2085 (N.Y. Sup. Ct. 2005), aff'd, 35 A.D.3d 240, 824 N.Y.S.2d 709, 2006 N.Y. App. Div. LEXIS 14736 (N.Y. App. Div. 1st Dep't 2006).

Remedy under the Workmen's Compensation Law is exclusive only against the employer; one may proceed at common law against third persons whose negligence caused injury. Williams v Hartshorn, 57 N.Y.S.2d 895, 1945 N.Y. Misc. LEXIS 2364 (N.Y. Sup. Ct. 1945), aff'd, 270 A.D. 875, 61 N.Y.S.2d 127, 1946 N.Y. App. Div. LEXIS 4404 (N.Y. App. Div. 1946).

An award by the compensation board, having jurisdiction of the matter, deprives the court of any right to relitigate the same issue and hence, the court would have no jurisdiction of a common law action against an employer where the employee contended that the accident did not arise in the course of his employment because it did not happen upon the employer's premises and happened in the free time assigned for the noon meal. Sedore v Sayre, 119 N.Y.S.2d 204, 1953 N.Y. Misc. LEXIS 1522 (N.Y. Sup. Ct. 1953).

Where plaintiff is entitled to compensation under Workmen's Compensation Law as a result of agreement made at time of employment in a foreign country that compensation would be determined under this law, an action at law against employer for damages cannot be maintained. Such an agreement is not contrary to our public policy. Conway v Hamilton Overseas Contr. Corp, 120 N.Y.S.2d 672, 1953 N.Y. Misc. LEXIS 1665 (N.Y. Sup. Ct. 1953), aff'd, 283 A.D. 1011, 131 N.Y.S.2d 443, 1954 N.Y. App. Div. LEXIS 6113 (N.Y. App. Div. 1954).

In an action for personal injuries based on an employer's alleged violation of Labor Law, § 299, where the complaint is sufficiently broad to allow proof of injuries compensable under this section and ¶ 65, defense of this Workmen's Compensation Law is properly pleaded. Kolenko v Certain-Teed Products Corp., 20 F. Supp. 920, 1937 U.S. Dist. LEXIS 1503 (D.N.Y. 1937).

6. Causal connection between hazard and injury

To charge an employer with liability under the Workmen's Compensation Law, the court must be able to see that the hazards which accompanied the duties of the employee have turned against him to his loss and damage; if there is only a casual or

remote connection between a hazard of the employment and the loss liability is not established. Glatzl v Stumpp, 220 N.Y. 71, 114 N.E. 1053, 220 N.Y. (N.Y.S.) 71, 1917 N.Y. LEXIS 941 (N.Y. 1917).

A workman killed while doing nonhazardous work for his employer under contract and in time outside of his regular employment is not entitled to an award. Kender v Reineking, 228 N.Y. 240, 126 N.E. 713, 228 N.Y. (N.Y.S.) 240, 1920 N.Y. LEXIS 928 (N.Y. 1920).

Where the conditions of the employment, including the location of the place of work, constitute a factor which in combination with other conditions produces an accidental injury, the risk of injury is incident to the employment, even though the risk of a similar injury is no greater in that employment than otherwise. Connelly v Samaritan Hospital, 259 N.Y. 137, 181 N.E. 76, 259 N.Y. (N.Y.S.) 137, 1932 N.Y. LEXIS 917 (N.Y. 1932).

Where compensation claimant's medical witness did not voice any opinion on causal relationship between dust or dirt entering claimant's eye during the course of his employment as a porter and claimant's eye injury, diagnosed as toxoplasmosis choroidoretinitis, and loss of vision but withheld any professional judgment as to the causal relationship and compensation carrier's expert testified that there could be no causal relationship between eye injury and dust or dirt entering claimant's eye, Workmen's Compensation Board committed reversible error in affirming referee's conclusion that claimant suffered 55 percent causally related loss of vision. Beltran v Allied Maintenance Corp., 45 A.D.2d 795, 357 N.Y.S.2d 162, 1974 N.Y. App. Div. LEXIS 4634 (N.Y. App. Div. 3d Dep't 1974).

Substantial evidence supported the Workers' Compensation Board's determination that the employee's death did not arise out of or in the course of his employment because the employee was not, at the moment of his passing, engaged in travel or work-related activity for his employer and the employee did not regularly perform work for the employer at home such that the employee's residence achieved the status as a place of employment or "part of the employer's premises." Matter of Pittner v St. Gobain Corp., 144 A.D.3d 1348, 41 N.Y.S.3d 319, 2016 N.Y. App. Div. LEXIS 7592 (N.Y. App. Div. 3d Dep't 2016), app. denied, 29 N.Y.3d 919, 86 N.E.3d 562, 64 N.Y.S.3d 670, 2017 N.Y. LEXIS 2695 (N.Y. 2017).

Substantial evidence supported did not support the Workers' Compensation Board's decision finding that the claimant sustained a causally-related occupational disease because the proof failed to demonstrate that the claimant's shoulder injury was attributable to repetitive movements associated with moving heavy wheelbarrow loads of asphalt or performing other manual duties during his short period of employment as a laborer with the highway department. Matter of Yonkosky v Town of Hamburg, 158 A.D.3d 860, 69 N.Y.S.3d 899, 2018 N.Y. App. Div. LEXIS 633 (N.Y. App. Div. 3d Dep't 2018).

7. Effect of illegal nature of employment or working conditions on employer liability

The fact that a claimant was employed in violation of the Labor Law is no defense to the payment of compensation. Ide v Faul & Timmins, 179 A.D. 567, 166 N.Y.S. 858, 1917 N.Y. App. Div. LEXIS 7428 (N.Y. App. Div. 1917).

In an action for personal injuries based upon an employer's alleged violation of Labor Law § 299, where the complaint is sufficiently broad to allow proof of injuries compensable under this section and § 65, defense of this Workmen's Compensation Law is properly pleaded. Kolenko v Certain-Teed Products Corp., 20 F. Supp. 920, 1937 U.S. Dist. LEXIS 1503 (D.N.Y. 1937).

That decedent was required to work under hazardous conditions constituting a direct violation of the Labor Law did not make the provisions of the Workmen's Compensation Law inapplicable as a complete defense to an action against the employer. Curran v Mackay Radio & Tel. Co., 123 F. Supp. 83, 1954 U.S. Dist. LEXIS 3668 (D.N.Y. 1954).

Where the injury is intentional the Workmen's Compensation Act does not apply. Curran v Mackay Radio & Tel. Co., 123 F. Supp. 83, 1954 U.S. Dist. LEXIS 3668 (D.N.Y. 1954).

8. Burden of proving exemption from liability or coverage

An employer and his surety, contesting an award to an employee under former § 2, group 30 were under burden of showing that at time of injury employee was not working at hazardous employment, if such be their contention. Kohler v Frohmann, 167 A.D. 533, 153 N.Y.S. 559, 1915 N.Y. App. Div. LEXIS 8295 (N.Y. App. Div. 1915).

An employer, claiming exemption from liability, assumes the burden of establishing it does not come within the provisions of the workmen's compensation statute. Gordon v International Executive Service Corps, 32 A.D.2d 688, 299 N.Y.S.2d 922, 1969 N.Y. App. Div. LEXIS 4051 (N.Y. App. Div. 3d Dep't), app. denied, 25 N.Y.2d 738, 1969 N.Y. LEXIS 1763 (N.Y. 1969).

Whether or not an employer has brought itself within the coverage of the Workmen's Compensation Act by complying with § 50 and subdivision 1 group 19 of this section, the burden is upon the employer who affirmatively plead and prove compliance with §§ 50 and 51. Murphy v Elmwood Country Club, Inc., 50 N.Y.S.2d 331, 1944 N.Y. Misc. LEXIS 2320 (N.Y. Sup. Ct. 1944).

Where an employee was not engaged in a hazardous employment the employer must affirmatively prove compliance with the voluntary provisions of this section in order to make recourse to the benefits of the compensation law the employee's exclusive remedy for injuries. Arnold v Wright, 79 N.Y.S.2d 720, 1948 N.Y. Misc. LEXIS 2460 (N.Y. Sup. Ct. 1948).

9. Extension of coverage to other employments or employees

A bricklayer employed to repair the plant of a company engaged in lithographing and printing, a business classified as hazardous under former § 2, group 40, is entitled to compensation for injuries resulting from the fall of a scaffold. Dose v Moehle Lithographic Co., 221 N.Y. 401, 117 N.E. 616, 221 N.Y. (N.Y.S.) 401, 1917 N.Y. LEXIS 1314 (N.Y. 1917).

Any employer, not within the provisions of the Workmen's Compensation Law, or who has in his employ an employee not so included, and the employees of any such employer, may be their joint election, elect to become subject to its provisions; there is no express limitation that such election is effective only where the employment is in a business conducted for pecuniary gain, and no such limitation should be implied. Queck-Berner v Macy, 240 N.Y. 341, 148 N.E. 543, 240 N.Y. (N.Y.S.) 341, 1925 N.Y. LEXIS 739 (N.Y. 1925).

Group 18 securing compensation to workmen in "all other employments" is intended for the protection of industrial employees and not municipal employees. Stoerzer v New York, 267 N.Y. 339, 196 N.E. 281, 267 N.Y. (N.Y.S.) 339, 1935 N.Y. LEXIS 1221 (N.Y. 1935).

While a minor employee may be deemed sui juris for the purpose of making an election to accept workmen's compensation coverage, to make such an election binding it is necessary that the employer comply with § 51 as to posting a notice of compliance, and a notice stating coverage to be only as to hazardous employments does not infer an election to accept coverage by an employee in a nonhazardous employment. Warney v Board of Education, 290 N.Y. 329, 49 N.E.2d 466, 290 N.Y. (N.Y.S.) 329, 1943 N.Y. LEXIS 1086 (N.Y. 1943).

Award for death of policeman employed by Westchester County Park Commission was proper where the County paid a specific premium for coverage of policeman for it must be presumed from such payment that "appropriate action" was taken to include employees within Workmen's Compensation coverage. Chabala v County of Westchester, 308 N.Y. 1012, 127 N.E.2d 857, 308 N.Y. (N.Y.S.) 1012, 1955 N.Y. LEXIS 1241 (N.Y. 1955).

Where a person in the business of moving heavy machinery was engaged by a paper company carrying on a hazardous business to install an engine, the installation is incidental to the conduct of the paper manufacturing business. McNally v Diamond Mills Paper Co., 178 A.D. 342, 164 N.Y.S. 793, 1917 N.Y. App. Div. LEXIS 5789 (N.Y. App. Div. 1917), rev'd, 223 N.Y. 83, 119 N.E. 242, 223 N.Y. (N.Y.S.) 83, 1918 N.Y. LEXIS 1159 (N.Y. 1918).

A person injured through the negligence of a fellow servant while engaged at farm labor is subject to the Workmen's Compensation Law, where he and his employer jointly elected under former § 2 to become subject thereto. Caldana v Buezenburg, 206 A.D. 183, 200 N.Y.S. 468, 1923 N.Y. App. Div. LEXIS 7172 (N.Y. App. Div. 1923).

The provisions of this section (sub 1, group 19) are that an employer may bring employment not specifically listed as hazardous within the coverage of the statute "by securing compensation to his employee." In immediate context of this language, it is also provided that a municipal corporation may bring its employees or officers not specifically listed in hazardous classifications within coverage by "appropriate action" of the legislative or governmental body. Hence, death award for county policeman killed in Parkway accident was sustained where county had provided compensation coverage for him even though claimant would also be entitled to benefits under New York State Retirement System. Chabala v Westchester County, 284 A.D. 341, 132 N.Y.S.2d 353, 1954 N.Y. App. Div. LEXIS 3397 (N.Y. App. Div. 1954), aff'd, 308 N.Y. 1012, 127 N.E.2d 857, 308 N.Y. (N.Y.S.) 1012, 1955 N.Y. LEXIS 1241 (N.Y. 1955).

An executive who contracted with and whose activities were controlled by a nonprofit organization which aided overseas companies by furnishing managerial and technical assistance was an employee of the organization and thus eligible for compensation when injured while performing duties assigned on a three-month project in Panama. Pointing out the employing organization had elected to secure compensation coverage for some of its employees, the court held that pursuant to provisions of Workmen's Compensation Law § 54(4) all employees were deemed to be covered. Gordon v International Executive Service Corps, 32 A.D.2d 688, 299 N.Y.S.2d 922, 1969 N.Y. App. Div. LEXIS 4051 (N.Y. App. Div. 3d Dep't), app. denied, 25 N.Y.2d 738, 1969 N.Y. LEXIS 1763 (N.Y. 1969).

Claimant, a beautician, was a store employee, even though he was working in a shop operated by a licensee on store premises, where the evidence indicated store control, the hiring process and the right of discharge. Bianculli v Times Square Stores, Inc., 34 A.D.2d 696, 309 N.Y.S.2d 542, 1970 N.Y. App. Div. LEXIS 5085 (N.Y. App. Div. 3d Dep't 1970).

An amendment to group 18, which extends the provisions of the statute to "all other employments" includes the employees of a charitable corporation not operating for pecuniary gain. Brooklyn Children's Aid Soc. v Industrial Board of Dep't of Labor, 240 N.Y.S. 70, 136 Misc. 379, 1930 N.Y. Misc. LEXIS 1033 (N.Y. Sup. Ct.), aff'd, 231 A.D. 845, 246 N.Y.S. 907, 1930 N.Y. App. Div. LEXIS 8332 (N.Y. App. Div. 1930).

The 1941 Amendment to group 19 of this section appears to abrogate all rights theretofore granted to a nonhazardous employee to elect not to be covered by workmen's compensation secured by his employer. Murphy v Elmwood Country Club, Inc., 51 N.Y.S.2d 260, 183 Misc. 332, 1944 N.Y. Misc. LEXIS 2491 (N.Y. Sup. Ct. 1944).

In view of the provisions of group 19 of subdivision 1 of this section a charitable corporation not operating for pecuniary gain may bring an employment that is not listed in this section within the coverage of this chapter by securing compensation for its employees. Monteleone v Center Storage Warehouses, Inc., 68 N.Y.S.2d 369, 1946 N.Y. Misc. LEXIS 3367 (N.Y. Sup. Ct. 1946).

10. Coverage of domestic servants, household workers and the like

Domestic servants may by action of the employer under group 19 of this section, and under § 50 be brought under the Act. Fostner v Morawitz, 215 A.D. 176, 213 N.Y.S. 202, 1926 N.Y. App. Div. LEXIS 10932 (N.Y. App. Div. 1926).

Under subd. (1), group 12, of this section, effective in cities of 40,000 or more, claimant was within the coverage of this act as a domestic worker rather than a "governess" where she took the employment pursuant to a newspaper ad for a woman to take care of a seven-year old girl in exchange for room and board but testified that she regularly performed housework and was paid a weekly wage in addition to board and room. Schmeiser v Wnuk, 18 A.D.2d 752, 235 N.Y.S.2d 430, 1962 N.Y. App. Div. LEXIS 6203 (N.Y. App. Div. 3d Dep't 1962).

The provisions of this section with respect to required carriage of workmen's compensation insurance by employers of domestics in "cities and villages" of 40,000 or more population are inapplicable to such an employer in a township of more than 40,000 population, and a domestic employee of such an employer, being ineligible for workmen's compensation benefits, when sued in a common-law action for damages by an injured domestic servant is entitled to raise the defense of contributors negligence by plaintiff who has the burden of proving freedom therefrom. Curtis v Eide, 19 A.D.2d 507, 244 N.Y.S.2d 330, 1963 N.Y. App. Div. LEXIS 2871 (N.Y. App. Div. 1st Dep't 1963).

A householder, as such, is not required to carry compensation insurance, since he is not within the definition of "employment" in subd. Carroll v Kay, 30 Misc. 2d 526, 219 N.Y.S.2d 892, 1961 N.Y. Misc. LEXIS 2725 (N.Y. Sup. Ct. 1961).

A householder as such does not carry on a business for pecuniary gain within subd 5 of § 2. Carroll v Kay, 30 Misc. 2d 526, 219 N.Y.S.2d 892, 1961 N.Y. Misc. LEXIS 2725 (N.Y. Sup. Ct. 1961).

Although it was not mandatory for an employer to provide workmen's compensation insurance for a part-time domestic worker for less than 48 hours per week, he could, if he so elected, bring her within the coverage of the Workmen's Compensation law by voluntarily securing a compensation policy covering her, as provided in group 19 of subd. 1 of this section, and, by so doing, make recovery for injuries sustained by her on the job available only under the Compensation Law. Weiss v Laffman, 43 Misc. 2d 653, 251 N.Y.S.2d 833, 1964 N.Y. Misc. LEXIS 1568 (N.Y. Civ. Ct. 1964).

In insureds' action seeking coverage for liability for workers' compensation benefits to their live-in housekeeper who was injured in course of her employment, wherein insureds maintained that they voluntarily elected to cover housekeeper and thus brought her within class of workers covered by Workers' Compensation Law for purposes of endorsement provided for in their homeowners' insurance policy, ambiguity in endorsement arose because it was unclear whether second condition of endorsement (whether insured's employee was one for whom workers' compensation benefits "must be provided") was satisfied by existence of endorsement itself. Haber v St. Paul Guardian Ins. Co., 137 F.3d 691, 1998 U.S. App. LEXIS 2416 (2d Cir. N.Y. 1998).

New York State Insurance Law does not require insurance policy, which provides comprehensive personal liability insurance on one, 2-, 3-, or 4-family owner-occupied dwelling, to include workers' compensation coverage for domestic worker who works fewer than 40 hours per week for same policyholder. Insurance Department, Opinions of General Counsel, Opinion Number 03-05-22.

Policyholder under comprehensive personal liability insurance for one, 2-, 3-, or 4-family owner-occupied dwelling may obtain workers' compensation coverage for domestic worker if policyholder elects to secure compensation to such employee by (1) "insuring and keeping insured the payment of such compensation in the state fund," or (2) "insuring and keeping insured the payment of such compensation with any stock corporation, mutual corporation or reciprocal insurer authorized to transact the business of workmen's compensation insurance in the state." Insurance Department, Opinions of General Counsel, Opinion Number 03-05-22.

11. Laches, estoppel and the like

Apportionment under workmen's compensation is not equitable remedy, and doctrine of laches is inapplicable. Milletich v International Terminal Operating Co., 57 A.D.2d 660, 393 N.Y.S.2d 468, 1977 N.Y. App. Div. LEXIS 11686 (N.Y. App. Div. 3d Dep't), app. denied, 42 N.Y.2d 810, 1977 N.Y. LEXIS 3910 (N.Y. 1977).

Absent any evidence that prior employers of workmen's compensation claimant or their carriers changed their position or took any action in reliance on conduct of last employer in not raising issue whether claim for occupational disease was time-barred, equitable principles of estoppel would be inappropriate. Milletich v International Terminal Operating Co., 57 A.D.2d 660, 393 N.Y.S.2d 468, 1977 N.Y. App. Div. LEXIS 11686 (N.Y. App. Div. 3d Dep't), app. denied, 42 N.Y.2d 810, 1977 N.Y. LEXIS 3910 (N.Y. 1977).

II. Principal Business Of Employer, Generally

12. Necessity that hazardous business be principal occupation

An employee of a person engaged in the manufacture of machinery whose duty it is to inspect machinery which he has

sold and who customarily does so after it is put in place at the different plants where it has been installed, is engaged in a hazardous employment of his master, and injuries incurred in the course of inspection are compensable. Benton v Fraser, 219 N.Y. 210, 114 N.E. 43, 219 N.Y. (N.Y.S.) 210, 1916 N.Y. LEXIS 813 (N.Y. 1916).

An accidental injury to a watchman is compensable although the plant was not in operation and the employee did nothing else for the employer but watch. Fogarty v National Biscuit Co., 221 N.Y. 20, 116 N.E. 346, 221 N.Y. (N.Y.S.) 20, 1917 N.Y. LEXIS 1262 (N.Y. 1917).. Cf. Kehoe v Consolidated Tel. & Electrical Subway Co., 176 A.D. 84, 162 N.Y.S. 481, 1916 N.Y. App. Div. LEXIS 9009 (N.Y. App. Div. 1916).

Claimant who was injured while engaged as a telephone switchboard operator and receptionist in the employ of the board of water supply, a board or department of New York city principally engaged in the hazardous business of projecting and building extensions to the water supply system of New York city and at times in operating a portion of the distribution system which carries water in part to private consumers, is engaged in a hazardous business. Leahy v New York, 285 N.Y. 443, 35 N.E.2d 34, 285 N.Y. (N.Y.S.) 443, 1941 N.Y. LEXIS 1483 (N.Y. 1941).

Workmen's compensation is not only available for employees of municipal corporations actually working at hazardous employment, but also for all of the employees of any municipal corporation whose principal business is that of conducting a hazardous employment. Gramlich v Board of Education, 297 N.Y. 349, 79 N.E.2d 437, 297 N.Y. (N.Y.S.) 349, 1948 N.Y. LEXIS 844 (N.Y. 1948).

A salesman who, in the course of his work selling dresses, went into a room on the same floor where they were being manufactured, to obtain a completed garment for exhibition to a customer was not engaged in the "manufacture of . . . women's clothing, . . . " within the meaning of former § 2 group 38. Lyon v Windsor, 173 A.D. 377, 159 N.Y.S. 162, 1916 N.Y. App. Div. LEXIS 6530 (N.Y. App. Div. 1916).

A traveling salesman who, at the time he was injured in a public bus, was engaged in his regular occupation of going from place to place for the purpose of selling goods, is not entitled to recover under the Work. Comp. Law, for though, under former § 2, group 32, his employer was engaged in a hazardous employment, he was not so engaged. Mandel v A. Steinhardt & Bro., 173 A.D. 515, 160 N.Y.S. 2, 1916 N.Y. App. Div. LEXIS 7575 (N.Y. App. Div. 1916).

Where an employer makes photographic cameras, which business was hazardous under former § 2, group 23, an employee working in the payroll department and whose work was largely clerical is engaged in a hazardous employment. Joyce v Eastman Kodak Co., 182 A.D. 354, 170 N.Y.S. 401, 1918 N.Y. App. Div. LEXIS 5045 (N.Y. App. Div. 1918), aff'd, 231 N.Y. 634, 132 N.E. 918, 231 N.Y. (N.Y.S.) 634, 1921 N.Y. LEXIS 806 (N.Y. 1921).

13. Hazardous employment incidental to nonhazardous business

The right of a country club, as a membership corporation or association, to become an "employer" in a hazardous employment is recognized by former § 3, subds. 3 and 4. Uhl v Hartwood Club, 177 A.D. 41, 163 N.Y.S. 744, 1917 N.Y. App. Div. LEXIS 5200 (N.Y. App. Div.), aff'd, 221 N.Y. 588, 116 N.E. 1000, 221 N.Y. (N.Y.S.) 588, 1917 N.Y. LEXIS 1449 (N.Y. 1917).

Award could not be made under former § 2, group 22, which at the time of the accident included "operation and repair of stationary engines," where repair of a gas engine was merely incident to an occupation which the law at that time did not regard as hazardous. Tillburg v McCarthy & Townsend, 179 A.D. 593, 166 N.Y.S. 878, 1917 N.Y. App. Div. LEXIS 7432 (N.Y. App. Div. 1917).

A carpenter regularly employed by a department store to work in and about the store, in the line of his trade, is engaged in a hazardous employment incidental to the employer's nonhazardous business, and entitled to workmen's compensation for an injury received in an elevator in the building on leaving his work for the day. Alterman v A. I. Namm & Son, 190 A.D. 76, 179 N.Y.S. 584, 1919 N.Y. App. Div. LEXIS 4073 (N.Y. App. Div. 1919), aff'd, 229 N.Y. 640, 129 N.E. 940, 229 N.Y. (N.Y.S.) 640, 1920 N.Y. LEXIS 845 (N.Y. 1920).

14. Employees performing nonhazardous duties in hazardous businesses

One employed exclusively as a farm laborer does not come within the workmen's compensation law merely because his employer operated a hazardous employment as his major business interest so long as the employee did no work there. Pestlin v Haxton Canning Co., 274 A.D. 144, 80 N.Y.S.2d 869, 1948 N.Y. App. Div. LEXIS 3029 (N.Y. App. Div. 1948), aff'd, 299 N.Y. 477, 87 N.E.2d 522, 299 N.Y. (N.Y.S.) 477, 1949 N.Y. LEXIS 959 (N.Y. 1949).

The department of purchase of the city of New York, which as an incident to its functions maintains storage facilities does not have as its principal function a hazardous occupation as defined in this section and accordingly an employee not personally engaged in a hazardous employment is not entitled to workmen's compensation. Clyde v New York, 275 A.D. 161, 89 N.Y.S.2d 105, 1949 N.Y. App. Div. LEXIS 3733 (N.Y. App. Div. 1949).

A municipal employee is not made eligible for workmen's compensation under this section as the employee of one whose principal business is carrying on a hazardous employment merely because an incidental function of the bureau in which she is employed is storage and warehousing described as a hazardous occupation in Group 13 of subd. 1 of § 3 of the Workmen's Compensation Law. Clyde v New York, 275 A.D. 161, 89 N.Y.S.2d 105, 1949 N.Y. App. Div. LEXIS 3733 (N.Y. App. Div. 1949).

III. Construction, Maintenance And Care Of Buildings

15. Ownership and operation of buildings; real estate business

The business of owning and operating apartment houses is not a hazardous employment under Work. Comp. Law. Sheridan v P. J. Groll Const. Co., 218 N.Y. 633, 112 N.E. 568, 218 N.Y. (N.Y.S.) 633, 1916 N.Y. LEXIS 1128 (N.Y. 1916).

Where the business of the employer was real estate management, sales and insurance, and claimant worked in the office, the employment was not "hazardous" as involving "care of buildings," within subd. 1 group 2 of this section. Kaye v Duff & Brown, Inc., 13 A.D.2d 594, 212 N.Y.S.2d 562, 1961 N.Y. App. Div. LEXIS 11959 (N.Y. App. Div. 3d Dep't 1961).

16. Building maintenance, repair, cleaning and the like

Injuries to carpenters, regularly and permanently employed by department stores and other non-hazardous businesses are compensable. Mulford v A. S. Pettit & Sons, 220 N.Y. 540, 116 N.E. 344, 220 N.Y. (N.Y.S.) 540, 1917 N.Y. LEXIS 1000 (N.Y. 1917).. See also Alterman v A. I. Namm & Son, 190 A.D. 76, 179 N.Y.S. 584, 1919 N.Y. App. Div. LEXIS 4073 (N.Y. App. Div. 1919), aff'd, 229 N.Y. 640, 129 N.E. 940, 229 N.Y. (N.Y.S.) 640, 1920 N.Y. LEXIS 845 (N.Y. 1920).

An apartment house superintendent, who incidently to his employment made ordinary repairs on the building, and who was injured in a fall from a stepladder while engaged in cutting away part of a door, is not engaged in a hazardous employment carried on by his employer for pecuniary gain at the time of his injury; nor is such work either "structural carpentry" or "construction, repair and demolition of buildings." Schmidt v Berger, 221 N.Y. 26, 116 N.E. 382, 221 N.Y. (N.Y.S.) 26, 1917 N.Y. LEXIS 1263 (N.Y. 1917).

Accidental injuries to workers who are casually employed to repair or improve buildings in which are conducted occupations enumerated in § 3(1) or to install machinery in these buildings are compensable. McNally v Diamond Mills Paper Co., 223 N.Y. 83, 119 N.E. 242, 223 N.Y. (N.Y.S.) 83, 1918 N.Y. LEXIS 1159 (N.Y. 1918).. See also Dose v Moehle Lithographic Co., 221 N.Y. 401, 117 N.E. 616, 221 N.Y. (N.Y.S.) 401, 1917 N.Y. LEXIS 1314 (N.Y. 1917)., and Bargey v Massaro Macaroni Co., 218 N.Y. 410, 113 N.E. 407, 218 N.Y. (N.Y.S.) 410, 1916 N.Y. LEXIS 1081 (N.Y. 1916).

The owner of tenement houses who collected the rents and attended to the repairing of the houses is engaged in "maintenance and care of buildings for pecuniary gain" and is an employer whose employment is hazardous; a workman engaged by him to assist in such work is engaged in a hazardous occupation during the hours of which he was employed for and in such

work, but when he undertakes to do different and unrelated work for the same employer which was not hazardous within the meaning of the statute, his legal representatives are not entitled to an award because he was killed by an accident while doing such work. Kender v Reineking, 228 N.Y. 240, 126 N.E. 713, 228 N.Y. (N.Y.S.) 240, 1920 N.Y. LEXIS 928 (N.Y. 1920).

A landlord must secure compensation for a person who cares for the furnace of a two family house in return for a reduction in rent for his suite in the premises. People v Livingston, 292 N.Y. 634, 55 N.E.2d 508, 292 N.Y. (N.Y.S.) 634, 1944 N.Y. LEXIS 1790 (N.Y. 1944).

A neighbor employed by a farmer to make repairs on his barn, who was injured by the collapse of staging used while placing slate on the roof, is not entitled to compensation. Coleman v Bartholomew, 175 A.D. 122, 161 N.Y.S. 560, 1916 N.Y. App. Div. LEXIS 8265 (N.Y. App. Div. 1916).

A janitor who, while engaged in cleaning windows, fell to the street is entitled to an award, even though his employment was incidental to the employer's nonhazardous business of operating apartment houses. Zubradt v Shepard's Estate, 180 A.D. 20, 167 N.Y.S. 306, 1917 N.Y. App. Div. LEXIS 8065 (N.Y. App. Div. 1917).

A person who from time to time bought real estate where the buildings were run down and improved them, selling them for a profit if a favorable opportunity presented itself, and who purchased a certain piece of property which he deeded to his wife and made over into a three family house, his family living in the lower floor thereof, cannot be said to be engaged in the construction, repair and demolition of buildings or any other employment declared hazardous under the workmen's compensation law where, the claimant who had been employed to kalsomine the walls of the parlor in the apartment on the lower floor was requested to put a little plaster on a rough spot in the ceiling, such work not being done with reference to fitting the house for sale, although the house would have been sold if a satisfactory price was offered. Hungerford v Bonn, 183 A.D. 818, 171 N.Y.S. 280, 1918 N.Y. App. Div. LEXIS 6017 (N.Y. App. Div. 1918).

The fact that a kalsominer found it necessary to smooth ceiling and fill small hole with plaster in order to properly do his work, does not bring his employer within the hazardous business of plastering for profit. Hungerford v Bonn, 183 A.D. 818, 171 N.Y.S. 280, 1918 N.Y. App. Div. LEXIS 6017 (N.Y. App. Div. 1918).. See also Morris v Muldoon, 190 A.D. 689, 180 N.Y.S. 319, 1920 N.Y. App. Div. LEXIS 4223 (N.Y. App. Div.), aff'd, 229 N.Y. 611, 129 N.E. 928, 229 N.Y. (N.Y.S.) 611, 1920 N.Y. LEXIS 816 (N.Y. 1920).

This section covers the janitor of a school building in his duties as janitor but not as custodian of children on the school grounds. Bailey v School Dist., 204 A.D. 125, 198 N.Y.S. 247, 1923 N.Y. App. Div. LEXIS 9428 (N.Y. App. Div. 1923).

17. Structural carpentry

An apartment house superintendent, who incidently to his employment made ordinary repairs on the building, and who was injured in a fall from a stepladder while engaged in cutting away part of a door, is not engaged in a hazardous employment carried on by his employer for pecuniary gain at the time of his injury; nor is such work either "structural carpentry" or "construction, repair and demolition of buildings." Schmidt v Berger, 221 N.Y. 26, 116 N.E. 382, 221 N.Y. (N.Y.S.) 26, 1917 N.Y. LEXIS 1263 (N.Y. 1917).. See also Gleisner v Gross & Herbener, 170 A.D. 37, 155 N.Y.S. 946, 1915 N.Y. App. Div. LEXIS 5127 (N.Y. App. Div. 1915).

Casual engagement of a carpenter by the hour to repair a store or office does not make the proprietor of the store or office one engaged in structural carpentry so as to render the employment hazardous. Geller v Republic Novelty Works, 180 A.D. 762, 168 N.Y.S. 263, 1917 N.Y. App. Div. LEXIS 9102 (N.Y. App. Div. 1917).

The words "structural carpentry" in former § 2, group 2, did not include an isolated act of planing wood. Alterman v A. I. Namm & Son, 190 A.D. 76, 179 N.Y.S. 584, 1919 N.Y. App. Div. LEXIS 4073 (N.Y. App. Div. 1919), aff'd, 229 N.Y. 640, 129 N.E. 940, 229 N.Y. (N.Y.S.) 640, 1920 N.Y. LEXIS 845 (N.Y. 1920).

18. Installation of pipes, boilers and the like

Lifting of a radiator to connect it up for heating purposes is not heating engineering nor installation and the covering of pipes or boilers within the meaning of former § 2, group 42 as it existed January, 1916, and hence the superintendent of an apartment house injured by fall of radiator, which he was moving from storeroom to apartment, is not entitled to compensation for such injury occurring before that date. Kammer v Hawk, 221 N.Y. 378, 117 N.E. 576, 221 N.Y. (N.Y.S.) 378, 1917 N.Y. LEXIS 1310 (N.Y.), reh'g denied, 222 N.Y. 585, 118 N.E. 1064, 222 N.Y. (N.Y.S.) 585, 1917 N.Y. LEXIS 909 (N.Y. 1917).

The installation of water tanks is not the "installation of . . . boilers, engines or heavy machinery." Maloney v Levy & Gilliland Co., 176 A.D. 470, 163 N.Y.S. 505, 1917 N.Y. App. Div. LEXIS 5158 (N.Y. App. Div. 1917), aff'd, 223 N.Y. 631, 119 N.E. 1057, 223 N.Y. (N.Y.S.) 631, 1918 N.Y. LEXIS 1333 (N.Y. 1918).

19. Other activities

An employee of the board of education charged with designing, drafting and inspecting in connection with construction, additions to, alterations and maintenance of schoolhouses and who in the course of such duties was occasionally sent out into the field to render inspection service in the course of which the employee was required to climb stepladders, uncover electrical boxes, count wires, follow circuits, and use various tools is engaged in work which could be termed hazardous employment under the coverage of the statute. Gramlich v Board of Education, 297 N.Y. 349, 79 N.E.2d 437, 297 N.Y. (N.Y.S.) 349, 1948 N.Y. LEXIS 844 (N.Y. 1948).

An award against the employer's insurance carrier and a finding that the claimant was injured while performing work incidental to work covered by the policy was unfounded, where the claimant was injured while she was, at the direction of her employer, cleaning the employer's private apartment, which was in the same building as the business premises, during her regular working hours; where the policy issued to the employer classified the employer's operations as "Retail Stores", stated that the insured was not conducting other operations, and expressly excluded domestic service or employment from coverage "unless required by law". Jones v Howland Costume Co., 26 A.D.2d 714, 271 N.Y.S.2d 336, 1966 N.Y. App. Div. LEXIS 3768 (N.Y. App. Div. 3d Dep't 1966), aff'd, 19 N.Y.2d 841, 280 N.Y.S.2d 405, 227 N.E.2d 319, 1967 N.Y. LEXIS 1548 (N.Y. 1967).

IV. Excavation And Highway Construction

20. In general; excavation

It is not reasonable to suppose that the insertion of the word "excavation" among hazardous occupations meant every minor excavation which was incidental to other work. Morris v Muldoon, 190 A.D. 689, 180 N.Y.S. 319, 1920 N.Y. App. Div. LEXIS 4223 (N.Y. App. Div.), aff'd, 229 N.Y. 611, 129 N.E. 928, 229 N.Y. (N.Y.S.) 611, 1920 N.Y. LEXIS 816 (N.Y. 1920).

An employee of a city who was injured while working in construction of a road from a city hospital to the public highway is within subd. 1 groups 13 and 17. Hughes v Buffalo, 208 A.D. 682, 203 N.Y.S. 391, 1924 N.Y. App. Div. LEXIS 5117 (N.Y. App. Div. 1924).

21. Construction of bridges, tunnels and subways

New York city, in constructing a subway under the supervision of the public service commission, is engaged in a hazardous employment under former group 13 of this section. Sexton v Public Service Com., 180 A.D. 111, 167 N.Y.S. 493, 1917 N.Y. App. Div. LEXIS 8109 (N.Y. App. Div. 1917).

Remedy for the death of one who was killed in the construction of the New York-New Jersey vehicular tunnel is under Workmen's Compensation Law. Sullivan v Booth & Flinn, Ltd., 202 N.Y.S. 807, 122 Misc. 288, 1924 N.Y. Misc. LEXIS 653 (N.Y. Sup. Ct.), aff'd, 209 A.D. 897, 205 N.Y.S. 954, 1924 N.Y. App. Div. LEXIS 9712 (N.Y. App. Div. 1924).

22. Seasonal work

Where a county continued its highway work throughout the year, in that during the winter months it manufactured road material and repaired machinery and equipment, such employment was not seasonal. Hogan v Onondaga County, 221 A.D. 636, 225 N.Y.S. 57, 1927 N.Y. App. Div. LEXIS 6526 (N.Y. App. Div. 1927).. See also Kittle v Kinderhook, 214 A.D. 345, 212 N.Y.S. 410, 1925 N.Y. App. Div. LEXIS 6847 (N.Y. App. Div. 1925).

The work of a laborer employed by a contractor in constructing highways is seasonal work, where it appears that the period of the year during which highway construction work is carried on is substantially from middle of April until first of December. Damm v Schreier Contracting Co., 235 A.D. 478, 257 N.Y.S. 705, 1932 N.Y. App. Div. LEXIS 7994 (N.Y. App. Div. 1932).

V. Operation Of Vehicles

23. In general

A driver of an open motor truck who suffered a right facial paralysis known as "Bell's Palsy" suffers an occupational disease under this section. Nayor v Harwick Trucking Corp., 283 N.Y. 62, 27 N.E.2d 434, 283 N.Y. (N.Y.S.) 62, 1940 N.Y. LEXIS 938 (N.Y. 1940).

24. Loading, alighting, maintenance and related activities

The operation of a wagon or truck referred to in former § 2, group 41 related to anything incident to the employment such as loading and unloading of wagon, and necessary care and attention to the wagon and horse. Costello v Taylor, 217 N.Y. 179, 111 N.E. 755, 217 N.Y. (N.Y.S.) 179, 1916 N.Y. LEXIS 1298 (N.Y. 1916).; 218 N.Y. (N.Y.S.) 59, 218 N.Y. 59, 112 N.E. 571, 218 N.Y. (N.Y.S.) 59, 1916 N.Y. LEXIS 1042 (N.Y. 1916), 218 N.Y. (N.Y.S.) 59, 218 N.Y. 59, 112 N.E. 571, 218 N.Y. (N.Y.S.) 59, 1916 N.Y. LEXIS 1042 (N.Y. 1916).

An employee whose duties included acting as both a driver and delivery man and who drove a meat delivery wagon and occasionally delivered meat to places near the market on foot, is not injured in the course of a hazardous employment where he fell while on his way on foot to deliver a package of meat. Newman v Newman, 218 N.Y. 325, 113 N.E. 332, 218 N.Y. (N.Y.S.) 325, 1916 N.Y. LEXIS 1076 (N.Y. 1916).

A teamster employed by a person in the "business of carting and dray work" who, after operating a truck during the day, returned to the stable and was fatally injured while he was putting his horse into a stall, met his death in the course of his employment of operating a truck within the meaning of former § 2 group 41. Smith v Price, 168 A.D. 421, 153 N.Y.S. 221, 1915 N.Y. App. Div. LEXIS 8233 (N.Y. App. Div. 1915).

A driver of a truck employed to collect dirt from the streets of a city, a hazardous employment under former § 2 group 41, who while so engaged stepped on a rusty nail in a board lying in the street while he was in the act of getting upon his wagon, may be deemed to have been injured in the course of his hazardous employment. Putnam v Murray, 174 A.D. 720, 160 N.Y.S. 811, 1916 N.Y. App. Div. LEXIS 10417 (N.Y. App. Div. 1916).

A day laborer employed in working and moving a threshing machine which his employer takes through the country, stopping from place to place to thresh for farmers for compensation, who was injured while putting the machine in the barn is engaged in the operation of a vehicle, a hazardous employment within the meaning of former § 2 group 41. White v Loades, 178 A.D. 236, 164 N.Y.S. 1023, 1917 N.Y. App. Div. LEXIS 5842 (N.Y. App. Div. 1917).

A village street commissioner and policeman who for his own convenience, was riding in the vehicle of a truckman not in the employ of the village, and injured while alighting from said vehicle, is not entitled to an award. Spinks v Marcellus, 180 A.D. 732, 168 N.Y.S. 69, 1917 N.Y. App. Div. LEXIS 9049 (N.Y. App. Div. 1917).

Former § 2, group 41 contemplated operation of vehicles as the principal business or occupation of the employer for pecuniary gain, and does not cover an injury resulting from incidental loading of a wagon. Casterline v Gillen, 182 A.D. 105, 169 N.Y.S. 345, 1918 N.Y. App. Div. LEXIS 7838 (N.Y. App. Div. 1918).

25. Particular implements as vehicles

An implement drawn by a horse and used to scrape snow from ice intended to be harvested and which also when loaded is turned over and used as sled to carry snow to the place where it is to be dumped was a "vehicle" within the meaning of former § 2, group 41, as it stood prior to the amendment of 1916. Berg v Hetzler Bros., 179 A.D. 551, 166 N.Y.S. 830, 1917 N.Y. App. Div. LEXIS 7425 (N.Y. App. Div. 1917), aff'd, 222 N.Y. 645, 119 N.E. 1031, 222 N.Y. (N.Y.S.) 645, 1918 N.Y. LEXIS 1531 (N.Y. 1918).

A combined thresher and cleaner drawn from place to place by horses was not a "vehicle," within the meaning of former § 2, group 41, after the horses have been detached and it was being operated as a stationary machine. Vincent v Taylor Bros., 180 A.D. 818, 168 N.Y.S. 287, 1917 N.Y. App. Div. LEXIS 9112 (N.Y. App. Div. 1917).

26. Particular activities as vehicle operation

A teamster drawing sand from a pit is engaged in a hazardous employment within the meaning of former § 2, grs. 19 and 41. In re State Workmen's Compensation Com., 218 N.Y. 59, 112 N.E. 571, 218 N.Y. (N.Y.S.) 59, 1916 N.Y. LEXIS 1042 (N.Y. 1916).

Dependents of a salesman engaged in a nonhazardous business, who was struck and killed by a railroad train while riding a motorcycle furnished by his employer to take orders and collect accounts, are entitled to compensation under the provision of former § 2 group 4. Mulford v A. S. Pettit & Sons, 220 N.Y. 540, 116 N.E. 344, 220 N.Y. (N.Y.S.) 540, 1917 N.Y. LEXIS 1000 (N.Y. 1917).

A workman employed by a farmer who also sold farm implements and machinery is engaged in a hazardous occupation within the meaning of sub 1, group 7 of this section, where such workman was required to operate a gasoline vehicle with the knowledge and consent of his employer. Commissioner of Taxation v Phillips, 283 N.Y. 673, 28 N.E.2d 401, 283 N.Y. (N.Y.S.) 673, 1940 N.Y. LEXIS 1112 (N.Y. 1940).

27. —Chauffeur

A private chauffeur employed in New York city and killed while in the course of his employment is covered by group 12. Sullivan v Valentine, 275 N.Y. 569, 11 N.E.2d 757, 275 N.Y. (N.Y.S.) 569, 1937 N.Y. LEXIS 1550 (N.Y. 1937).

A chauffeur employed to operate a delivery truck and also a touring car belonging to his employer which was used primarily for the pleasure and convenience of the employer's family, although occasionally used to deliver goods when the truck was being repaired, who received injuries while repairing the touring car where it was being used to take home a household servant of the employer, is not, at the time of receiving such injuries, engaged in a hazardous employment carried on by his employer for pecuniary gain, within the meaning of the workmen's compensation law. Wincheski v Morris, 179 A.D. 600, 166 N.Y.S. 873, 1917 N.Y. App. Div. LEXIS 7430 (N.Y. App. Div. 1917).

VI. Manufacture And Handling Of Foods

28. Activities incidental to food handling business

A carpenter, employed by a company engaged in manufacturing macaroni, a business within former § 2, group 33, to make repairs and improvements to one of its buildings is not an "employee" engaged in hazardous business within meaning of Work. Comp. Law. Bargey v Massaro Macaroni Co., 218 N.Y. 410, 113 N.E. 407, 218 N.Y. (N.Y.S.) 410, 1916 N.Y. LEXIS 1081 (N.Y. 1916).

A night watchman employed in a bakery whose duties consisted of patrolling the bakery's buildings at night, is within the coverage of the workmen's compensation law. Fogarty v National Biscuit Co., 221 N.Y. 20, 116 N.E. 346, 221 N.Y. (N.Y.S.) 20, 1917 N.Y. LEXIS 1262 (N.Y. 1917).

One employed by a cheese manufacturer solely for the purpose of harvesting ice for use in the business, and who is not required to do any work in connection with the manufacture of cheese, is not engaged in a "hazardous employment," and is not entitled to an award for loss of fingers which were frozen while he was engaged in his employment. Aylesworth v Phoenix Cheese Co., 170 A.D. 34, 155 N.Y.S. 916, 1915 N.Y. App. Div. LEXIS 5116 (N.Y. App. Div. 1915).

An employee is not entitled to compensation on the ground he was engaged in the preparation of foodstuffs within the meaning of group 8 of subdivision 1 of this section, where he was injured while carrying a basket of ensilage to feed cattle on his employer's farm, even though the employer operated a pasteurizing plant. Laduke v Martin (1941) 261 App Div 344, 25 NYS2d 622, affd (1941) 287 NY 546, 38 NE2d 221.. See also Davis v Ryan, 262 A.D. 982, 30 N.Y.S.2d 17, 1941 N.Y. App. Div. LEXIS 6775 (N.Y. App. Div. 1941), aff'd, 287 N.Y. 778, 40 N.E.2d 646, 287 N.Y. (N.Y.S.) 778, 1942 N.Y. LEXIS 1794 (N.Y. 1942).

29. Preparation and handling of meat

The making of sausage meat by means of an electric meat chopper was a hazardous employment within the meaning of former § 2, group 30. Kohler v Frohmann, 167 A.D. 533, 153 N.Y.S. 559, 1915 N.Y. App. Div. LEXIS 8295 (N.Y. App. Div. 1915).

A butcher employed at a hotel to cut up and prepare meat for delivery to cooks as ordered, was not engaged in a hazardous occupation within the meaning of former § 2, group 30 which did not cover ordinary preparation of food for cooking purposes. De La Gardelle v Hampton Co., 167 A.D. 617, 153 N.Y.S. 162, 1915 N.Y. App. Div. LEXIS 8220 (N.Y. App. Div. 1915).

Prior to the enactment of L 1916 c 622, which included meat markets in former § 2, group 30, a person employed in a retail meat market who was injured while grinding meat in a machine for a customer, was not engaged in a hazardous employment and was not entitled to an award. Pietha v Murdter, 174 A.D. 764, 161 N.Y.S. 661, 1916 N.Y. App. Div. LEXIS 8287 (N.Y. App. Div. 1916).. See also Newman v Newman, 218 N.Y. 325, 113 N.E. 332, 218 N.Y. (N.Y.S.) 325, 1916 N.Y. LEXIS 1076 (N.Y. 1916).

There was substantial evidence from which the Board could find that the disease from which a butcher died, pemphigus acutus, though rare, was an occupational disease. De Tura v Eastern Meat Markets, Inc., 14 A.D.2d 953, 221 N.Y.S.2d 188, 1961 N.Y. App. Div. LEXIS 7894 (N.Y. App. Div. 3d Dep't 1961).

30. Other particular activities

A school child employed in a school cafeteria and who received by way of remuneration a fifteen cent lunch is not engaged in a hazardous occupation within the meaning of the workmen's compensation law. Warney v Board of Education, 290 N.Y. 329, 49 N.E.2d 466, 290 N.Y. (N.Y.S.) 329, 1943 N.Y. LEXIS 1086 (N.Y. 1943).

Where an employer maintained a meat market and also during the summer carried on a separate business of selling fruit in another building, a person who was employed solely in the fruit store where she sustained injuries is not entitled to award under Work. Comp. Law upon theory that her services were incidental to meat business of her employer. Wood v Papaw, 193 A.D. 529, 184 N.Y.S. 686, 1920 N.Y. App. Div. LEXIS 5588 (N.Y. App. Div. 1920).

Where a claimant who has long been employed as a waiter and whose routine work required lifting and carrying of laden trays weighing about 30 pounds contracts a bilateral inguinal hernia, the Board can find that he has a compensable occupational disease where there is medical testimony that his occupation could produce such a condition. Svolos v Flatbush Plaza Restaurant, 21 A.D.2d 703, 249 N.Y.S.2d 250, 1964 N.Y. App. Div. LEXIS 3863 (N.Y. App. Div. 3d Dep't 1964).

VII. Storage

31. In general

The business of owning and operating a loft building is not one of the hazardous employments embraced within the terms of the Work. Comp. Law. People ex rel. Lehigh & N. Y. R. R. Co. v Sohmer, 218 N.Y. 632, 112 N.E. 1070, 218 N.Y. (N.Y.S.) 632, 1916 N.Y. LEXIS 1126 (N.Y. 1916).

32. Activities unrelated to storage business

Although an employer engaged in storing fruits and produce was engaged in a hazardous business within the meaning of former § 2 group 29, a person employed as a buyer, who was injured in an automobile accident while on a purchasing trip in a foreign state, is not entitled to compensation for the work in which he was engaged had no connection with the storage business. Sickles v Ballston Refrigerating Storage Co., 171 A.D. 108, 156 N.Y.S. 864, 1916 N.Y. App. Div. LEXIS 9436 (N.Y. App. Div. 1916).

33. Maintenance of inventory incidental to wholesale or retail business as storage

A company engaged in retail trade, operating five and ten-cent stores and handling only a comparatively small stock of goods, replenished from day to day by incoming shipments, and storing goods merely as an incident to carrying on of its retail business, was not conducting warehouse or storage place within the meaning of former § 2, group 29. Walsh v F. W. Woolworth Co., 180 A.D. 120, 167 N.Y.S. 394, 1917 N.Y. App. Div. LEXIS 8080 (N.Y. App. Div. 1917).

Where a retail coal dealer operating a plant consisting of three buildings containing twenty-eight compartments for different kinds of coal, having capacity of between 10,000 and 12,000 tons, is not holding his stock or any part thereof with reference to any future requirements of the market, but is offering same for sale in the ordinary course of his business, said dealer was not engaged in "employment" of "storage" within meaning of former § 2, group 29, and hence, claim for death of employee, injured prior to amendment of 1917 to former § 2, group 19 so as to include coal yards, should be dismissed. In re Roberto, 180 A.D. 143, 167 N.Y.S. 397, 1917 N.Y. App. Div. LEXIS 8081 (N.Y. App. Div. 1917).

Where an employer was carrying on the business of a produce dealer limited to a few domestic fruits and vegetables, for pecuniary gain, and whatever of storage was involved in the transaction was incident to the business of dealing in produce, and there was a sign over the premises reading "wholesale vegetable and fruit market," said employer cannot be deemed to have been carrying on the business of "storage of all kinds and storage for hire," within the meaning of former § 2, group 29. Dugan v Harry J. McArdle, Inc., 184 A.D. 570, 172 N.Y.S. 27, 1918 N.Y. App. Div. LEXIS 6579 (N.Y. App. Div. 1918), aff'd, 225 N.Y. 668, 122 N.E. 879, 225 N.Y. (N.Y.S.) 668, 1919 N.Y. LEXIS 1198 (N.Y. 1919).

VIII. Longshore Work; Construction and Repair of Vessels

34. In general

It was not necessary to re-enact former § 2, groups 8 and 10, as re-enacted by L 1918, c 249, which specified "Longshore work, including loading or unloading of cargoes" as one of the hazardous occupations, so as to make them effective as of October 6, 1917, the date of the amendment of the Federal Judicial Code giving to claimants in admiralty and maritime cases rights and remedies under the Work. Comp. Law of any state; the state statute came into force the moment the amendatory act of Congress was passed. Cimmino v John T. Clark & Son, 184 A.D. 745, 172 N.Y.S. 478, 1918 N.Y. App. Div. LEXIS 6631 (N.Y. App. Div. 1918).

Where plaintiff alleges that he was injured while in defendant's employ as a longshoreman he places himself within former § 2, group 10, and his remedy is exclusively under § 11, unless he can show that his employer has failed to secure payment of compensation to plaintiff and his dependents as provided by statute. Campoccia v Panama R. Co., 181 N.Y.S. 14, 110 Misc. 116, 1920 N.Y. Misc. LEXIS 1212 (N.Y. Sup. Ct.), set aside, 182 N.Y.S. 807, 1920 N.Y. Misc. LEXIS 1502 (N.Y. Sup. Ct. 1920).

The New York Workmen's Compensation Act is unconstitutional as applied to the case of longshoremen employed by a steamship company engaged in interstate transportation by sea, who was injured while on board a vessel unloading at her wharf in navigable waters in New York. Southern Pacific Co. v Jensen, 244 U.S. 205, 37 S. Ct. 524, 61 L. Ed. 1086, 1917 U.S. LEXIS 1628 (U.S. 1917).

35. Relationship with other laws

Claimant, injured in 1944 while working on a pile driver, filed a compensation claim and the claim was disallowed with the consent of the claimant when the employer denied jurisdiction on the ground that the accident took place in navigable waters. In the meantime, the employer started payments under the Longshoremen's and Harbor Workers' Act and continued them until claimant started an action in Supreme Court for damages under the Jones Act. The employer then moved in federal court and that court restrained all further proceedings and held, after a trial, that claimant was not a seaman. More than seven years after the accident, claimant sought to reopen compensation claim. The claimant was not bound by the seven years statute of limitations by virtue of Civil Practice Act § 23. But Civil Practice Act § 24 does not apply to compensation cases. Moreover, the court held that there was here a waiver of the time limitations. Luoma v Spearin, Preston & Burrows, Inc., 282 A.D. 612, 126 N.Y.S.2d 543, 1953 N.Y. App. Div. LEXIS 4537 (N.Y. App. Div. 1953), aff'd, 307 N.Y. 728, 121 N.E.2d 544, 307 N.Y. (N.Y.S.) 728, 1954 N.Y. LEXIS 1458 (N.Y. 1954).

Where claimant's injury occurred while he was driving piles for the extension of a pier at a boat club on the Hudson River, his work was not so directly related to navigation or commerce that it was excluded from coverage under the New York Workmen's Compensation Law and such claim was not covered solely by the Longshoreman's and Harbor Workers' Act. Simis v Curran, 31 A.D.2d 697, 295 N.Y.S.2d 817, 1968 N.Y. App. Div. LEXIS 2570 (N.Y. App. Div. 3d Dep't 1968).

The New York workmen's compensation law may be applied to the accidental injury of a longshoreman while engaged upon the dock in unloading a vessel lying in navigable waters, without working material prejudice to the general maritime law; and this is true whether awards under the act are made as upon implied agreements or otherwise. State Indus. Comm'n v Nordenholt Corp., 259 U.S. 263, 42 S. Ct. 473, 66 L. Ed. 933, 1922 U.S. LEXIS 2481 (U.S. 1922).

The extension of federal jurisdiction under the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 USCS §§ 901 et seq., does not supplant but only supplements state compensation law so that a state may validly apply its worders' compensation scheme to land-based injuries that fall within the coverage of the Act. Sun Ship, Inc. v Pennsylvania, 447 U.S. 715, 100 S. Ct. 2432, 65 L. Ed. 2d 458, 1980 U.S. LEXIS 50 (U.S.), reh'g denied, 448 U.S. 916, 101 S. Ct. 37, 65 L. Ed. 2d 1179 (U.S. 1980).

In interpreting the federal Longshoremen's and Harbor Workers' Compensation Act, the federal courts will adopt the New York decisions as they existed at the time of the enactment of the federal law but interpretations subsequent to adoption, while perhaps entitled to respectful consideration, are persuasive only and not binding. Iacone v Cardillo, 208 F.2d 696, 1953 U.S. App. LEXIS 3945 (2d Cir. N.Y. 1953).

36. Particular activities as longshore work

An employee of a contractor engaged in searching for rags among rubbish delivered by wagons at a city dump not for the purpose of preparing refuse for shipment, and not having anything to do with the removal thereof, is not engaged in "longshore work" which was declared to be a hazardous employment by former § 2, group 10. Tomassi v Christensen, 171 A.D. 284, 156 N.Y.S. 905, 1916 N.Y. App. Div. LEXIS 9451 (N.Y. App. Div. 1916).

A company engaged in supplying watchmen to steamship companies for the sole purpose of guarding their cargoes is not engaged in providing longshoremen, nor is the watchman furnished a longshoreman, nor is the occupation of such watchman a hazardous employment. Oberg v W. J. McRoberts & Co., 175 A.D. 1, 161 N.Y.S. 934, 1916 N.Y. App. Div. LEXIS 8332 (N.Y. App. Div. 1916).

An employee engaged in weighing hides on piers, which hides constitute cargoes unloaded from vessels, was engaged in a hazardous employment within the meaning of former § 2, group 10. Hiers v John A. Hull & Co., 178 A.D. 350, 164 N.Y.S. 767, 1917 N.Y. App. Div. LEXIS 5784 (N.Y. App. Div. 1917).

A stevedore acting as a runner and checker, injured by chalk blowing into his eye while upon a vessel in navigable waters in pursuance of his duties, is engaged in a maritime contract and the state industrial commission has no jurisdiction. Zampiere v William Spencer & Son Corp., 194 A.D. 576, 185 N.Y.S. 639, 1921 N.Y. App. Div. LEXIS 9329 (N.Y. App. Div. 1921).

A gas company employee required to assist in moving stoves and ranges in the company's building, and to and from its wagons, occasionally riding thereon to buildings occupied by customers, who was injured when the tail board of a wagon from which he was removing a stove gave way causing him to fall, is not engaged in "longshore" work. Gutheil v Consolidated Gas Co., 158 N.Y.S. 622, 94 Misc. 690, 1916 N.Y. Misc. LEXIS 1332 (N.Y. Sup. Ct. 1916).

37. Construction and repair of vessel

Workmen's compensation board may take jurisdiction over accident suffered by elevator constructor's helper while engaged in the installation of an elevator on a vessel where the work was not so directly connected with navigation or commerce and application of local law would interfere with essential uniformity of general maritime law. Payment by carrier of maximum compensation allowed under Longshoremen's Compensation Act did not amount to an estoppel where no formal jurisdiction was assumed by the Federal Compensation Commission. Seeler v Otis Elevator Co., 281 A.D. 140, 120 N.Y.S.2d 325, 1952 N.Y. App. Div. LEXIS 3085 (N.Y. App. Div. 1952).

In an action by a longshoreman, who was employed by a stevedoring company and who sustained a work-related injury while working aboard a vessel when he attempted to place a securing bolt in the proper position while he and other employees were placing covers over the vessel with the aid of a crane which had been leased to stevedoring company by crane company, a third-party complaint by the crane company against the stevedoring company for contribution and indemnification was properly dismissed, where the stevedoring company had paid workers' compensation benefits to the employee, so as to preclude a claim for contribution, and where there was no evidence of an express or implied contract by the stevedoring company to indemnify the crane lessor. Magno v Waterman S.S. Lines, 89 A.D.2d 958, 454 N.Y.S.2d 105, 1982 N.Y. App. Div. LEXIS 18205 (N.Y. App. Div. 2d Dep't 1982).

An employee who was injured while standing on the floor of so-called "graven dry dock," at work on the keel of a vessel lying therein, has a remedy under the Workmen's Compensation Law. Manufacturers' Liability Ins. Co. v Hamilton, 222 N.Y.S. 394, 129 Misc. 665, 1927 N.Y. Misc. LEXIS 907 (N.Y. Sup. Ct. 1927).

"Construction and repair" of vessels as used in former § 2, group 9 comprehends a case where decedent was employed by a transport company to install bulkheads in a vessel belonging to a steamship company, which was lying at a dock in New York city. O'Brien v Luckenbach S. S. Co., 293 F. 170, 1923 U.S. App. LEXIS 1590 (2d Cir. N.Y. 1923).

IX. State Employees

38. In general

A state employee is not entitled to maintain an action under the Jones Act even though he received injuries during the course of his employment on the navigable waters of the United States. Maloney v State, 2 A.D.2d 195, 154 N.Y.S.2d 132, 1956 N.Y. App. Div. LEXIS 4627 (N.Y. App. Div. 4th Dep't 1956), aff'd, 3 N.Y.2d 356, 165 N.Y.S.2d 465, 144 N.E.2d 364, 1957 N.Y. LEXIS 896 (N.Y. 1957).

Workmen's Compensation Law § 3(1)(16) applies only to persons employed by the state but for some reason paid by a municipal corporation or other political subdivision. Edwards v Board of Education, 32 A.D.2d 690, 299 N.Y.S.2d 991, 1969 N.Y. App. Div. LEXIS 4014 (N.Y. App. Div. 3d Dep't 1969).

39. Inmates or residents of state institutions

Inmates of correctional institutions are not employees of the State of New York so as to be entitled to workmen's compensation benefits for injuries sustained while working within the institutions. Reid v New York State Dep't of Correctional Services, 54 A.D.2d 83, 387 N.Y.S.2d 589, 1976 N.Y. App. Div. LEXIS 13617 (N.Y. App. Div. 3d Dep't 1976), app. denied, 42 N.Y.2d 808, 1977 N.Y. LEXIS 3853 (N.Y. 1977).

Mentally handicapped children engaged in a school work training program are not within the coverage of the Workmen's Compensation Law. 1962 Ops St Compt #1035.

40. Firefighters

One who has become an employee of the state of New York by command of a forest ranger in connection with fighting a forest fire is covered by workmen's compensation. Jones v State, 269 A.D. 920, 57 N.Y.S.2d 582, 1945 N.Y. App. Div. LEXIS 4473 (N.Y. App. Div. 1945).. See also 1930 N.Y. Op. Att'y Gen. No. 350.

41. State police, state militia and the like

A private of the state militia engaged in active service is not an employee of the state within the meaning of the workmen's compensation law. Goldstein v State, 281 N.Y. 396, 24 N.E.2d 97, 281 N.Y. (N.Y.S.) 396, 1939 N.Y. LEXIS 1024 (N.Y. 1939).

42. Employees of state boards, commissions, authorities and the like

A state assemblyman is not an "employee" of the state and is not entitled to the Workmen's Compensation benefits. Toomey v New York State Legislature, 1 A.D.2d 41, 147 N.Y.S.2d 239, 1955

N.Y. App. Div. LEXIS 3702 (N.Y. App. Div. 3d Dep't 1955), aff'd, 2 N.Y.2d 446, 161 N.Y.S.2d 81, 141 N.E.2d 584, 1957 N.Y. LEXIS 1159 (N.Y. 1957).

Claimant, employed by State Division of Housing as construction inspector, was employee of division where division maintained exclusive control over manner and method of inspections and reports were made to the division, even though claimant was paid on a fee basis from a fund created by deposits by developers. De Stefano v State, Div. of Housing, 41 A.D.2d 801, 341 N.Y.S.2d 707, 1973 N.Y. App. Div. LEXIS 4880 (N.Y. App. Div. 3d Dep't), app. denied, 32 N.Y.2d 613, 1973 N.Y. LEXIS 2030 (N.Y. 1973).

43. Employees paid by or connected with municipal bodies

A recording clerk in the office of the register of the county of New York is not a state employee, and is not entitled to workmen's compensation under the provisions of group 16, for a personal injury received in the course of and arising out of his employment. Miller v State, 279 N.Y. 74, 17 N.E.2d 773, 279 N.Y. (N.Y.S.) 74, 1938 N.Y. LEXIS 798 (N.Y. 1938).

An employee in the office of the board of elections of New York City is an employee of the state within sub 1, group 16 of this section. Daly v Board of Elections, 254 A.D. 914, 5 N.Y.S.2d 633, 1938 N.Y. App. Div. LEXIS 8282 (N.Y. App. Div. 1938), aff'd, 279 N.Y. 743, 18 N.E.2d 689, 279 N.Y. (N.Y.S.) 743, 1939 N.Y. LEXIS 910 (N.Y. 1939).

An investigator employed by the welfare department of the city of New York is not a state employee for whom the city is liable to pay compensation under group 16 of subdivision 1 of this section. Long v New York, 276 A.D. 799, 93 N.Y.S.2d 176, 1949 N.Y. App. Div. LEXIS 3359 (N.Y. App. Div. 1949), aff'd, 302 N.Y. 681, 98 N.E.2d 482, 302 N.Y. (N.Y.S.) 681, 1951 N.Y. LEXIS 847 (N.Y. 1951).

X. Municipal Employees

44. In general

Group 17 makes the coverage of municipal employments coextensive with that of private employments covered by the statute. Leahy v New York, 285 N.Y. 443, 35 N.E.2d 34, 285 N.Y. (N.Y.S.) 443, 1941 N.Y. LEXIS 1483 (N.Y. 1941).; Gramlich v Board of Education, 297 N.Y. 349, 79 N.E.2d 437, 297 N.Y. (N.Y.S.) 349, 1948 N.Y. LEXIS 844 (N.Y. 1948).

Under former § 3, sub 3 and former § 2, group 43, New York city was liable under the Workmen's Compensation Law, if it was engaged in a hazardous business irrespective of the definition of the word "employment" in former § 3, sub 5. Sexton v Public Service Com., 180 A.D. 111, 167 N.Y.S. 493, 1917 N.Y. App. Div. LEXIS 8109 (N.Y. App. Div. 1917).

State Insurance Fund was properly required to pay claim as if workmen's compensation insurance policy had been in effect prior to employee's death where State Fund was obligated to furnish insurance upon receipt of letter that municipality required insurance for employees about to engage in hazardous work, and where delay in issuance of policy until after death of employee was due to fund's failure to follow established procedures for issuance of such policies. Denisi v Parks, 42 A.D.2d 642, 345 N.Y.S.2d 163, 1973 N.Y. App. Div. LEXIS 4108 (N.Y. App. Div. 3d Dep't 1973).

Where a city becomes a self insurer and complies with subdiv. 1, group 19, of this section and also § 50, the employee and employer are brought within the act for all purposes and the employer is entitled to the benefits of the additional cause of action allowed by § 13, subdiv. (c) which entitles it to recover any amounts paid for medical treatment. New York v Steers & Menke, 4 N.Y.S.2d 292, 167 Misc. 566, 1937 N.Y. Misc. LEXIS 1212 (N.Y. Sup. Ct. 1937), aff'd, 254 A.D. 669, 4 N.Y.S.2d 992, 1938 N.Y. App. Div. LEXIS 7039 (N.Y. App. Div. 1938).

Municipal employees performing governmental functions do not come within the provision of the Workmen's Compensation Law. New York v Steers & Menke, 4 N.Y.S.2d 292, 167 Misc. 566, 1937 N.Y. Misc. LEXIS 1212 (N.Y. Sup. Ct. 1937), aff'd, 254 A.D. 669, 4 N.Y.S.2d 992, 1938 N.Y. App. Div. LEXIS 7039 (N.Y. App. Div. 1938).

45. Members of fire and police forces

A city fire department is not operated for pecuniary gain, and a city fireman, while putting out a fire in the course of his employment as such, was not within former § 2, group 42. Krug v New York (1921) 196 App Div 226, 186 NYS 727, disapproved on other grounds by Buckley v New York (1982) 56 NY2d 300, 452 NYS2d 331, 437 NE2d 1088.; see also Millard v Townsend, 204 A.D. 132, 197 N.Y.S. 702, 1923 N.Y. App. Div. LEXIS 9429 (N.Y. App. Div. 1923).

A member of the water supply police force is not an "employee" within the Work. Comp. Law, and he was not made such under former § 2, group 41 because when injured he was riding a motor cycle in going to pay a telephone bill. Kahl v New York, 198 A.D. 30, 189 N.Y.S. 547, 1921 N.Y. App. Div. LEXIS 8035 (N.Y. App. Div. 1921).

Claimant, a paid city firefighter who was injured in 1981, was not entitled to workers' compensation benefits because the city had not extended coverage under N.Y. Workers' Comp. Law § 3(1)(19) to firefighters in a 1933 resolution but only indicated that the resolution was intended to comply with a statutory requirement that the city secure the payment of workers' compensation claims; not until 1984 was a resolution passed that extended coverage to all city officers, employees, and officials. Matter of Wiley v City of Watertown Fire Dept., 39 A.D.3d 975, 833 N.Y.S.2d 740, 2007 N.Y. App. Div. LEXIS 4448 (N.Y. App. Div. 3d Dep't 2007).

Members of an incorporated fire company in answering calls may be included in the self insurance plan provided by the town in which such districts are located as a participating unit of such plan; such members of an incorporated volunteer fire company are to be considered as employees of the participating town for the purpose of inclusion within the self insurance plan. 1946 Ops St Compt 403.

City paid firemen are not within the coverage of this chapter unless the governing body of the city provides for such coverage by appropriate action. 1953 Ops St Compt File #6173.

Board of fire commissioners may by appropriate action provide workmen's compensation coverage for fire district officers and insure against the liability thus imposed. 1953 Ops St Compt File #6284.

Village may provide workmen's compensation coverage for its paid firemen and insure against the liability thus imposed. 1953 Ops St Compt File #6307.

Members of the police force of the Port Washington Police District may be covered by workmen's compensation pursuant to Group 19 of sub 1 of this section. 1954 Ops St Compt File #6506.

A city may provide workmen's compensation coverage for auxiliary policemen whose activities are sponsored and authorized by the local office of civil defense. 1961 Ops St Compt #440.

46. —Relationship with other compensation provisions

Policemen of New York city do not need the protection of the Work. Comp. Law because compensation is assured to them by an independent statute Ryan v New York, 228 N.Y. 16, 126 N.E. 350, 228 N.Y. (N.Y.S.) 16, 1920 N.Y. LEXIS 901 (N.Y. 1920), overruled in part, Buckley v New York, 56 N.Y.2d 300, 452 N.Y.S.2d 331, 437 N.E.2d 1088, 1982 N.Y. LEXIS 3423 (N.Y. 1982).

Where a village affirmatively brought its firemen under the protection of § 50, sub 3-a, death benefits to such firemen were limited thereby and could not be awarded under sub 1, group 19 of this section. Wiltse v Owego, 262 A.D. 570, 31 N.Y.S.2d 110, 1941 N.Y. App. Div. LEXIS 5427 (N.Y. App. Div. 1941), aff'd, 288 N.Y. 519, 41 N.E.2d 928, 288 N.Y. (N.Y.S.) 519, 1942 N.Y. LEXIS 1372 (N.Y. 1942).

Liability compensation for the death or injury to volunteer firemen begins only where the special statutory liability provided in Gen Mun L § 205 ends, and no liability arises against the fire company or fire district for compensation benefits until these had exceeded the amount for which the town was liable under a judgment of the county court. Schraeder v Mendon Volunteer Fire Co., 278 A.D. 986, 105 N.Y.S.2d 895, 1951 N.Y. App. Div. LEXIS 5449 (N.Y. App. Div. 1951).

Where an award of $3000 was made to the widow of a volunteer fireman under the General Municipal Law (§ 205) and an award of $10 a week death benefits was made under the Workmen's Compensation Law, and the employer was liable for only 104 weeks compensation because decedent had pre-existing cardiac

condition, the employer must make payment for 104 weeks at end of 300 weeks. Grimes v Albion, 279 A.D. 486, 111 N.Y.S.2d 319, 1952 N.Y. App. Div. LEXIS 4702 (N.Y. App. Div. 1952).

The amount recovered by a volunteer fireman injured while attempting to answer a fire alarm, under General Municipal Law § 205, should be deducted from an award for total disability. Brundage v Westons Mills Volunteer Fire Dep't, 1 A.D.2d 854, 149 N.Y.S.2d 3, 1956 N.Y. App. Div. LEXIS 6290 (N.Y. App. Div. 3d Dep't 1956).

Police officer employed by town which chose to have workmen's compensation insurance for its police officers was eligible for workmen's compensation benefits even though the municipality paid him his regular salary during his disability and compensation carrier paid his medical expenses. McKay v West Seneca, 51 A.D.2d 373, 381 N.Y.S.2d 892, 1976 N.Y. App. Div. LEXIS 11084 (N.Y. App. Div. 3d Dep't 1976), rev'd, 41 N.Y.2d 931, 394 N.Y.S.2d 637, 363 N.E.2d 361, 1977 N.Y. LEXIS 1995 (N.Y. 1977).

Paid or volunteer firemen answering a call to a federal reservation or installation are protected under the applicable provisions of the General Municipal Law and Workmen's Compensation Law. 1949 Atty Gen March 7.

47. Civil defense employees

Towns and villages must provide workmen's compensation coverage for employees engaged in civil defense activities in the course of their employment. 1952 Ops St Compt Jan 17.

The Workmen's Compensation coverage provided for Civil Defense volunteers does not cover them in case of injury or while engaged in emergency work in connection with a natural disaster unless the appropriate civil defense authorities have authorized such work as a training or practice civil defense activity. 1955 Ops St Compt File #7424.

A local director of civil defense may be brought within the provisions of the Workmen's Compensation Law by action of the governmental body having jurisdiction over the area which he controls. 1956 Ops St Compt File #7977.

48. Inspectors and investigators

A claimant employed in the department of markets in the city of New York as an inspector in the weights and measures division is not within the coverage of the workmen's compensation law where his work did not require that he work in public markets, although he did occasionally test weights and measures there and he was injured while on the world's fair grounds. Dolan v New York, 289 N.Y. 663, 45 N.E.2d 169, 289 N.Y. (N.Y.S.) 663, 1942 N.Y. LEXIS 1234 (N.Y. 1942).

An inspector in the department of public markets, weights and measures in New York City, is not entitled to a disability award for injuries suffered in the municipal market where it appears that, while her duties required her to be in the market at the time of the accident, her occupation was not that of persons engaged in work in markets within the purview of subdiv. 1, group 14 of this section, since her presence in the market was simply incidental to her work. Hayes v New York, 256 A.D. 111, 9 N.Y.S.2d 39, 1939 N.Y. App. Div. LEXIS 4649 (N.Y. App. Div.), aff'd, 280 N.Y. 743, 21 N.E.2d 517, 280 N.Y. (N.Y.S.) 743, 1939 N.Y. LEXIS 1552 (N.Y. 1939).

An investigator for the New York city department of welfare is not engaged in a hazardous employment nor is the city of New York department of welfare principally engaged in a hazardous employment under this section. Long v New York, 276 A.D. 799, 93 N.Y.S.2d 176, 1949 N.Y. App. Div. LEXIS 3359 (N.Y. App. Div. 1949), aff'd, 302 N.Y. 681, 98 N.E.2d 482, 302 N.Y. (N.Y.S.) 681, 1951 N.Y. LEXIS 847 (N.Y. 1951).

A veterinarian attached to the health department with the title of inspector among whose duties was to examine meat at a certain market is not engaged in a hazardous employment as listed by this section. New York v Steers & Menke, 4 N.Y.S.2d 292, 167 Misc. 566, 1937 N.Y. Misc. LEXIS 1212 (N.Y. Sup. Ct. 1937), aff'd, 254 A.D. 669, 4 N.Y.S.2d 992, 1938 N.Y. App. Div. LEXIS 7039 (N.Y. App. Div. 1938).

A veterinarian attached to the health department is not brought within the workmen's compensation law because he was working in a meat market where his presence was simply an incident in his work of inspecting meat which could just as well have brought him to many places outside the market. New York v Steers & Menke, 4 N.Y.S.2d 292, 167 Misc. 566, 1937 N.Y. Misc. LEXIS 1212 (N.Y. Sup. Ct. 1937), aff'd, 254 A.D. 669, 4 N.Y.S.2d 992, 1938 N.Y. App. Div. LEXIS 7039 (N.Y. App. Div. 1938).

49. Home relief recipients assigned to work for municipality

Persons assigned to work pursuant to Social Welfare Law, § 164 are employees of assigning municipality and entitled to workmen's compensation benefits where such municipality has brought all employees within coverage of such law. 1951 Ops St Compt File #5019.

50. Crossing guards, playground directors and school employees

Employment of workmen by a school district is covered by group 17. Bailey v School Dist., 204 A.D. 125, 198 N.Y.S. 247, 1923 N.Y. App. Div. LEXIS 9428 (N.Y. App. Div. 1923).

A playground director who had to do some work as a laborer in the maintenance of grounds, his injury occurring while shoveling clay, is engaged in a hazardous employment. Kaufman v New York, 270 A.D. 967, 62 N.Y.S.2d 1, 1946 N.Y. App. Div. LEXIS 4883 (N.Y. App. Div. 1946).

"Crossing guards" employed by city at street intersections near schools may be provided workmen's compensation coverage by appropriate action of governing board of city. If such action is taken in a city which participates in county self-insurance plan, such coverage would be provided by the plan. 1953 Ops St Compt File #6434.

51. Sheriffs and deputies

A deputy sheriff who is injured or killed while working on a criminal matter is within the coverage of the Workmen's Compensation Law. 1961 Ops St Compt File #23.

Group 17 of this section extends Workmen's Compensation Law coverage to sheriffs, under-sheriffs, and duly appointed regular deputies of the sheriff, and a County Mutual Self-Insurance Plan is liable for payment of benefits. 1961 Ops St Compt File #23.

52. Other employees

A physician employed by the department of correction of New York City may not be granted compensation by the state industrial board under group 18; employees of a municipal corporation are not covered thereby. Stoerzer v New York, 267 N.Y. 339, 196 N.E. 281, 267 N.Y. (N.Y.S.) 339, 1935 N.Y. LEXIS 1221 (N.Y. 1935).

A ledger clerk employed in the department of purchase in the City of New York whose work involved the entry of orders and making records of payments for purchases by various departments of the city government is not engaged in a hazardous employment. Clyde v New York, 275 A.D. 161, 89 N.Y.S.2d 105, 1949 N.Y. App. Div. LEXIS 3733 (N.Y. App. Div. 1949).

A public health nurse in a tubercular clinic operated by the New York City Department of Health is engaged in a hazardous employment under subdivision 1, groups 14 and 15 of this section. Hogans v New York, Department of Health, 278 A.D. 620, 101 N.Y.S.2d 910, 1951 N.Y. App. Div. LEXIS 4110 (N.Y. App. Div. 1951).

Claimant was accidentally injured in assisting some employees of the Village of Rouses Point in launching a float, in the course of the village's operation and maintenance of a "recreation project". Claimant was an elected trustee of the village. He was supervising the work wherein he was injured as a duly appointed representative of the governing body of the village, and his injury was an incident arising therefrom. Thus his injury arose out of and in the course of his work as an elected trustee of the village. An award was proper. Langlois v Rouses Point, 280 A.D. 1005, 116 N.Y.S.2d 793, 1952 N.Y. App. Div. LEXIS 4551 (N.Y. App. Div. 1952).

"Removal of snow" is one of the enumerated hazardous employments in which compensation is payable for injuries or death, and a city carrying on that employment is liable for such compensation. Castle v North End Contracting Corp., 21 A.D.2d 8, 248 N.Y.S.2d 95, 1964 N.Y. App. Div. LEXIS 4181 (N.Y. App. Div. 3d Dep't 1964), limited, Bellefeuille v City & County Sav. Bank, 43 A.D.2d 335, 351 N.Y.S.2d 738, 1974 N.Y. App. Div. LEXIS 5833 (N.Y. App. Div. 3d Dep't 1974).

Probation officer assigned to work on conciliation cases, interviewing the parties, and presenting cases before the Family Court, was eligible to receive workmen's compensation benefits under this section, since the workmen's compensation board properly found that he was an employee of the city under group 16 of subdivision (1) of this section, notwithstanding adoption of Article VI of the New York State Constitution and the enactment of Article 7-A of the Judiciary Law. Chilk v New York, 26 A.D.2d 425, 275 N.Y.S.2d 167, 1966 N.Y. App. Div. LEXIS 2982 (N.Y. App. Div. 3d Dep't 1966), aff'd, 22 N.Y.2d 661, 291 N.Y.S.2d 358, 238 N.E.2d 748, 1968 N.Y. LEXIS 1404 (N.Y. 1968).

A business machine operator for the Bureau of Supplies of the Board of Education of the City of New York who was injured in a fall was not a city employee for purposes of Workmen's Compensation Law coverage. Edwards v Board of Education, 32 A.D.2d 690, 299 N.Y.S.2d 991, 1969 N.Y. App. Div. LEXIS 4014 (N.Y. App. Div. 3d Dep't 1969).

An action brought by the plaintiff, administrator of a county hospital, against the defendant, county treasurer, who also served as a treasurer of the hospital, after plaintiff passenger and defendant driver were involved in a motor vehicle accident during the course of their employment, is dismissed on the ground that the court lacked jurisdiction because the parties were in the same employ and, accordingly, plaintiff's exclusive remedy was a claim for workers' compensation; since the hospital is a department of the county, and since the plaintiff is an employee of the hospital, he must also be considered an employee of the county, and is, therefore, a "fellow employee" of the defendant, who is a county employee in that he is treasurer of the county. Moreover, while as a matter of law, elected county treasurers are public officers and not generally employees of the county, the Legislature has provided otherwise. Lane v Flack, 73 A.D.2d 65, 425 N.Y.S.2d 648, 1980 N.Y. App. Div. LEXIS 9718 (N.Y. App. Div. 3d Dep't 1980), aff'd, 52 N.Y.2d 856, 437 N.Y.S.2d 78, 418 N.E.2d 671, 1981 N.Y. LEXIS 2180 (N.Y. 1981).

A village may not recognize a claim for compensation for personal injuries sustained by a trustee while performing his duties when the trustee has already received a workmen's compensation award for his injuries. 1961 Ops St Compt #308.

XI. Teachers and Educational Institutions

53. In general

A local board of education does not conduct a hazardous employment. Gramlich v Board of Education, 297 N.Y. 349, 79 N.E.2d 437, 297 N.Y. (N.Y.S.) 349, 1948 N.Y. LEXIS 844 (N.Y. 1948).

Former § 2, group 44 refers to employment and by its terms excludes schoolteachers or other employees outside of the enumerated class. Beeman v Board of Education, 195 A.D. 357, 187 N.Y.S. 213, 1921 N.Y. App. Div. LEXIS 4746 (N.Y. App. Div.), aff'd, 231 N.Y. 624, 132 N.E. 914, 231 N.Y. (N.Y.S.) 624, 1921 N.Y. LEXIS 793 (N.Y. 1921).

A teacher at a state school is covered by the workmen's compensation law as an employee of the state. Robison v State, 263 A.D. 240, 32 N.Y.S.2d 388, 1942 N.Y. App. Div. LEXIS 6857 (N.Y. App. Div. 1942).

54. Teachers engaged in experiments, manual training or use of tools or machinery

A schoolteacher in carrying on chemical experiments prescribed by the Educ. Law is not engaged in a hazardous employment within the meaning of the Work. Beeman v Board of Education, 195 A.D. 357, 187 N.Y.S. 213, 1921 N.Y. App. Div. LEXIS 4746 (N.Y. App. Div.), aff'd, 231 N.Y. 624, 132 N.E. 914, 231 N.Y. (N.Y.S.) 624, 1921 N.Y. LEXIS 793 (N.Y. 1921).

One engaged in manual teaching for a religious, charitable educational institution is not covered by workmen's compensation in view of the provision of group 18 of subdivision 1 of this section excluding persons "engaged in a teaching or nonmanual capacity". Jones v Schenectady Boys Club, Inc., 276 A.D. 879, 93 N.Y.S.2d 764, 1949 N.Y. App. Div. LEXIS 3667 (N.Y. App. Div. 1949).

Teacher of applied science in vocational and technical school whose duties required him to demonstrate the uses of hydraulic presses, motors and electric circuit levers as well as conducting many chemical experiments, was within enumerated teaching specialties defined by this section and evidence was sufficient to establish that he was a teacher of "industrial or trade subjects" as well as subjects "requiring, for instruction purposes, use of tools or machinery for which protective, guarding or safety devices are required by the Labor Law"; and further that his employment was "hazardous" by definition of the section. Blackman v New York, 29 A.D.2d 720, 286 N.Y.S.2d 639, 1968 N.Y. App. Div. LEXIS 4829 (N.Y. App. Div. 3d Dep't 1968).

Inasmuch as Work Comp Law § 3(1)(Group 20) was enacted to allow New York City shop teachers engaged in hazardous activities to seek workers' compensation when injured while performing their duties until such time as they came within the provisions of their retirement plan, the ordinance amendment that provided that teachers could be retired for accidental disabilities for which there was no minimum service requirement rendered the instant claimant elegible for retirement under the teachers' retirement system when injured, and therefore excluded him from obtaining benefits under the Workers' Compensation Law. Davis v New York City Bd. of Education, 85 A.D.2d 815, 445 N.Y.S.2d 626, 1981 N.Y. App. Div. LEXIS 16633 (N.Y. App. Div. 3d Dep't 1981), aff'd, 57 N.Y.2d 988, 457 N.Y.S.2d 244, 443 N.E.2d 492, 1982 N.Y. LEXIS 3835 (N.Y. 1982).

Trade and manual arts teachers in New York City may be awarded compensation benefits provided they are not eligible for retirement; phrase "eligible for retirement" means membership in class of those entitled to apply for benefits and person entitled to apply for retirement benefits is precluded from receipt of compensation benefits. Georgopoulos v New York City Bd. of Education, 112 A.D.2d 633, 492 N.Y.S.2d 154, 1985 N.Y. App. Div. LEXIS 55886 (N.Y. App. Div. 3d Dep't 1985).

55. Miscellaneous

Teacher's allergy to hydrocarbons which is exacerbated when she is assigned classroom in new building which is under construction does not constitute occupational disease, since allergy to hydrocarbons is not one of generally recognized risks of teaching profession, but is instead hazard of being in one particular building. Dando v Binghamton Bd. of Education, 111 A.D.2d 1060, 490 N.Y.S.2d 360, 1985 N.Y. App. Div. LEXIS 50291 (N.Y. App. Div. 3d Dep't 1985).

When a student was injured while acting as a student teacher at one of a school district's schools, and sued the district for personal injuries, the law was not so clear, under N.Y. Workers' Comp. Law §§ 2(4), 3(1) (Group 20-a) (Group 22), as to allow the trial court to determine, as a matter of law, that the student's suit was barred by workers' compensation immunity, under N.Y. Workers' Comp. Law §§ 11, 29(6), and such a decision should have awaited a determination by the Workers' Compensation Board. Santigate v Linsalata, 304 A.D.2d 639, 759 N.Y.S.2d 100, 2003 N.Y. App. Div. LEXIS 3976 (N.Y. App. Div. 2d Dep't 2003).

Unless the accident is compensable under the Workmen's Compensation Law, and except in certain city school districts, a teacher or other employee may not be compensated by a school district for loss of personal property. 1969 Ops St Compt File #15.

XII. Business Employing Four Or More Operatives Or Workmen

56. In general

The words "workmen or operatives," as used in subd. Gilmore v Preferred Acc. Ins. Co., 283 N.Y. 92, 27 N.E.2d 515, 283 N.Y. (N.Y.S.) 92, 1940 N.Y. LEXIS 917 (N.Y. 1940).

For an employer's operations to fall within the coverage of this act because more than eight employees are engaged in the business, there must be such number of people doing manual work, not counting administrative or inspection employees. Kaye v Duff & Brown, Inc., 13 A.D.2d 594, 212 N.Y.S.2d 562, 1961 N.Y. App. Div. LEXIS 11959 (N.Y. App. Div. 3d Dep't 1961).

The rights of employers under the Fourteenth Amendment are not violated by the extension of the workmen's compensation law to all employments in which 4 or more workmen or operatives (farm laborers and domestic servants excepted) are regularly employed, which is construed by the state courts as including all other employees of the same employer and employed in the same business with such workmen and operatives, though at places

remote from their work. Ward & Gow v Krinsky, 259 U.S. 503, 42 S. Ct. 529, 66 L. Ed. 1033, 1922 U.S. LEXIS 2495 (U.S. 1922).

57. Regular employment

Under gr. 18 it is not necessary that four men should be employed during the entire year in order that the employer come within the provisions of the law. It is sufficient if such employment continues through a reasonably definite period of time and is not casual. Adams v Ross, 230 A.D. 216, 243 N.Y.S. 464, 1930 N.Y. App. Div. LEXIS 8582 (N.Y. App. Div. 1930).

Clerks opening boxes once or twice a week, and not at the same time, are not regularly employed within the purview of gr. 18, which covers regular employment only. Cohen v Rosalsky, 230 A.D. 604, 246 N.Y.S. 299, 1930 N.Y. App. Div. LEXIS 8693 (N.Y. App. Div. 1930), aff'd, 256 N.Y. 649, 177 N.E. 177, 256 N.Y. (N.Y.S.) 649, 1931 N.Y. LEXIS 1246 (N.Y. 1931).

58. Coverage of employees not classified as operatives or engaged in hazardous aspect of employment

The widow of an employee, not a "workman" or "operative", within the meaning of the statute, who was killed while engaged in the business of the employer for whom 4 "workmen" or "operatives" were working at the time, is entitled to an award under the statute. Europe v Addison Amusements, Inc., 231 N.Y. 105, 131 N.E. 750, 231 N.Y. (N.Y.S.) 105, 1921 N.Y. LEXIS 615 (N.Y. 1921).

All employees of a "hazardous employment" were within the protection of the Workmen's Compensation Law irrespective of whether their particular duties brought them within the hazard of the employment. Krinsky v Ward & Gow, 193 A.D. 557, 184 N.Y.S. 443, 1920 N.Y. App. Div. LEXIS 5596 (N.Y. App. Div. 1920), aff'd, 231 N.Y. 525, 132 N.E. 873, 231 N.Y. (N.Y.S.) 525, 1921 N.Y. LEXIS 678 (N.Y. 1921).

Where an employer who conducts newsstands in various stations of a rapid transit company in New York city distributes periodicals to the said stands by means of trucks and there are more than 4 "workmen or operatives" within the meaning of the second group 45 of former § 2, as well as many other employees who cannot be classified as workmen or operatives, a person in the latter class employed as a salesman at a newsstand who was injured in the course of his employment is entitled to an award. Krinsky v Ward & Gow (1920) 193 App Div 557, 184 NYS 443, aff'd (1921) 231 NY 525, 132 NE 873, aff'd (1922) 259 US 503, 66 L Ed 1033, 42 S Ct 529, 28 ALR 1207.. See also Ray v Union News Co., 198 A.D. 149, 189 N.Y.S. 486, 1921 N.Y. App. Div. LEXIS 8057 (N.Y. App. Div. 1921).

59. Particular employees as workmen or operatives

A claim for compensation for the death of a lawyer employed as an investigator and claim adjuster, who, in course of his employment, while walking on a sidewalk, was struck by a bicycle, will be dismissed, because deceased was not engaged in a hazardous occupation and was not a workman or operative within the coverage of sub 1, group 18 of this section. Gilmore v Preferred Acc. Ins. Co., 283 N.Y. 92, 27 N.E.2d 515, 283 N.Y. (N.Y.S.) 92, 1940 N.Y. LEXIS 917 (N.Y. 1940).

A brokerage house employing clerks, salesmen and stenographers, and messengers whose duties consist of running errands and carrying packages to and from banks and also in doing some manual labor, was not within second group 45 of former § 2. Westbay v Curtis & Sanger, 198 A.D. 25, 189 N.Y.S. 539, 1921 N.Y. App. Div. LEXIS 8034 (N.Y. App. Div.), aff'd, 232 N.Y. 555, 134 N.E. 569, 232 N.Y. (N.Y.S.) 555, 1921 N.Y. LEXIS 587 (N.Y. 1921).

A cook, waiter, counterman, and general utility man in a lunch room, were workmen or operatives, within the second group 45 of former § 2. Jurman v Hebrew Nat'l Sausage Factory, 198 A.D. 456, 191 N.Y.S. 339, 1921 N.Y. App. Div. LEXIS 8120 (N.Y. App. Div. 1921).

A cashier in a combination lunch room and delicatessen store was not a workman or operative within the second group 45 of former § 2. Jurman v Hebrew Nat'l Sausage Factory, 198 A.D. 456, 191 N.Y.S. 339, 1921 N.Y. App. Div. LEXIS 8120 (N.Y. App. Div. 1921).

XIII. Miscellaneous Occupations

60. Cemetery employees

One employed in a cemetery in connection with the digging of a grave and the burial of a body is exposed by his employment to the hazard of being struck by lightning. Giovine v United Hebrew Cemetery, 263 A.D. 772, 30 N.Y.S.2d 929, 1941 N.Y. App. Div. LEXIS 4880 (N.Y. App. Div. 1941).

A rabbi engaged by a cemetery association to say prayers for such of its patrons as might desire such service is not an employee within the meaning of group 18 of subdivision 1 of this section. Israeli v Wellwood Cemetery Ass'n, 271 A.D. 855, 66 N.Y.S.2d 28, 1946 N.Y. App. Div. LEXIS 3415 (N.Y. App. Div. 1946).

61. Decorating, upholstering and the like

A person employed by a dealer in antique furniture, pictures, bric-a-brac, etc., who was sent out at times to hang pictures sold by his employer and who was injured while so engaged, was not "decorating" a building under former § 2, group 42 as it stood prior to the amendment made in 1916 and is not entitled to an award. Grasell v Broadhead, 175 A.D. 874, 162 N.Y.S. 421, 1916 N.Y. App. Div. LEXIS 10445 (N.Y. App. Div. 1916).

The occupation of carpet layer was not within former § 2, group 16, declaring upholstering to be hazardous employment, such group being a manufacturing group or one in which machinery and tools and manufacturing conditions exist. Stradar v Stern Bros., 184 A.D. 700, 172 N.Y.S. 482, 1918 N.Y. App. Div. LEXIS 6633 (N.Y. App. Div. 1918).

Then-15 year old boy who worked on weekends for a farmer and was directed in his tasks by the farmer was a "farm employee" for workers' compensation purposes and was entitled to coverage for a work-related accident on the farm where the farmer had sold cattle from the farm in the past and contemplated doing so in the future. Taylor v Kranichfeld, 2 A.D.3d 1099, 769 N.Y.S.2d 335, 2003 N.Y. App. Div. LEXIS 13517 (N.Y. App. Div. 3d Dep't 2003).

62. Farming and farm labor

A neighbor employed by a farmer to make repairs on his barn who was injured by a collapse of staging used for placing slate on the roof is not entitled to compensation because he was a farm laborer. Coleman v Bartholomew, 175 A.D. 122, 161 N.Y.S. 560, 1916 N.Y. App. Div. LEXIS 8265 (N.Y. App. Div. 1916).

A man who travels through the country with a threshing machine, stopping from place to place to thresh for farmers for compensation, is not engaged in farming and his employees are not farm laborers. White v Loades, 178 A.D. 236, 164 N.Y.S. 1023, 1917 N.Y. App. Div. LEXIS 5842 (N.Y. App. Div. 1917).

Where a building contractor purchased a farm for the purpose of improving the same and eventually reselling it at a profit, and with no intention of carrying on farming operations, a person employed by him to help in making such improvements is not a farm laborer and is entitled to an award for injuries received by a fall from a ladder while engaged in picking apples from a tree which he had been ordered to prune, which work was being done not for the purpose of marketing the fruit but for the sole purpose of improving the appearance of the place. O'Dell v Bowman, 189 A.D. 386, 179 N.Y.S. 592, 1919 N.Y. App. Div. LEXIS 4675 (N.Y. App. Div. 1919).

Labor incidental to the operation of a farm is not a hazardous employment under the workmen's compensation law. Baum v Welden, 267 A.D. 1032, 48 N.Y.S.2d 305, 1944 N.Y. App. Div. LEXIS 6097 (N.Y. App. Div. 3d Dep't 1944).

Seasonal workers were joint employees of a membership corporation organized as an agency to secure such employees for its fourteen members engaged in vegetable growing. Diaz v Ulster Vegetable Growers Co-op., Inc., 282 A.D. 426, 123 N.Y.S.2d 321, 1953 N.Y. App. Div. LEXIS 4486 (N.Y. App. Div. 1953), aff'd, 306 N.Y. 859, 118 N.E.2d 916, 306 N.Y. (N.Y.S.) 859, 1954 N.Y. LEXIS 1186 (N.Y. 1954).

On appeal from a decision of the board finding that claimant had contracted an occupational disease known as "farmer's lung" which made him susceptible to infection and the development of bronchopneumonia it was held that there was substantial medical evidence from which the board could properly so find. Burger v Yandik, 24 A.D.2d 673, 261 N.Y.S.2d 588, 1965 N.Y. App. Div. LEXIS 3672 (N.Y. App. Div. 3d Dep't 1965).

Then-15 year old boy who worked on weekends for a farmer and was directed in his tasks by the farmer was a "farm employee" for workers' compensation purposes and was entitled to coverage for

a work-related accident on the farm. Taylor v Kranichfeld, 2 A.D.3d 1099, 769 N.Y.S.2d 335, 2003 N.Y. App. Div. LEXIS 13517 (N.Y. App. Div. 3d Dep't 2003).

63. Installation, operation or repair of electrical lines, appliances or the like

A moving picture machine is not an "appliance" within the meaning of that term as used in former § 2, group 12 relating to construction, installation, repair or operation of electric light and electric power lines, dynamos or appliances, although the picture machine is driven by an electric motor. Balcom v Ellintuch & Yarfitz, 179 A.D. 548, 166 N.Y.S. 841, 1917 N.Y. App. Div. LEXIS 7426 (N.Y. App. Div. 1917).

An electrician in a grain terminal building is included in group 7 of subdivision 1 of this section. Lawton v Port of New York Authority, 276 A.D. 81, 92 N.Y.S.2d 714, 1949 N.Y. App. Div. LEXIS 3117 (N.Y. App. Div. 1949).

64. Lumbering, logging, and woodcutting

While lumbering and logging are hazardous occupations, a farm hand engaged in such occupations is not covered by the workmen's compensation law. Brockett v Mietz, 184 A.D. 342, 171 N.Y.S. 412, 1918 N.Y. App. Div. LEXIS 6032 (N.Y. App. Div. 1918).

One employed as a chore or barn man around the headquarters of a lumber operator, to look after horses and assist around the boarding house, was engaged in a hazardous occupation under former § 2 group 14 where he was injured as the result of a fall while going from the boarding house to the store, where, at the time of the injury, the plant was temporarily inactive but fully manned. Posey v Moynehan, 195 A.D. 440, 186 N.Y.S. 753, 1921 N.Y. App. Div. LEXIS 4772 (N.Y. App. Div. 1921).

Where a farmer has a power saw to supply fire wood for his neighbors and himself, and an employee, as incidental to his regular duties, assists in operation of the saw and is injured thereby he cannot receive compensation on the theory that the farmer is engaged in the hazardous woodsawing business under group 18. McAllister v Cobb, 237 A.D. 674, 263 N.Y.S. 349, 1933 N.Y. App. Div. LEXIS 10696 (N.Y. App. Div. 1933).

A farmer engaged in a lumbering operation on land which he neither owned nor rented which was quite distinct and apart from his usual farm operations, is subject to the workmen's compensation law where an employee, who was not a regular farmhand, was injured while engaged in the operation. Jorgensen v Beach, 277 A.D. 960, 99 N.Y.S.2d 669, 1950 N.Y. App. Div. LEXIS 3995 (N.Y. App. Div. 1950).

65. Porters, pages, bellboys and the like

An award of compensation is proper to a page boy in a hotel who was killed through the accidental discharge of a revolver by a co-employee. Brozovich v Hotel Pennsylvania, 259 N.Y. 514, 182 N.E. 160, 259 N.Y. (N.Y.S.) 514, 1932 N.Y. LEXIS 985 (N.Y. 1932).

In view of group 14 the workmen's compensation law covers work as a pullman porter, unless some applicable act of Congress has already covered the field. Taylor v New York C. R. Co., 294 N.Y. 397, 62 N.E.2d 777, 294 N.Y. (N.Y.S.) 397, 1945 N.Y. LEXIS 765 (N.Y.), reh'g denied, 294 N.Y. 977, 63 N.E.2d 711, 294 N.Y. (N.Y.S.) 977, 1945 N.Y. LEXIS 1151 (N.Y. 1945), cert. denied, 326 U.S. 786, 66 S. Ct. 470, 90 L. Ed. 477, 1946 U.S. LEXIS 2931 (U.S. 1946).

Employment at a hotel, having more than fifty rooms, as a bellboy, working from twelve midnight to seven A. M. was a hazardous employment under former § 2. Watkinson v Hotel Pennsylvania, 195 A.D. 624, 187 N.Y.S. 278, 1921 N.Y. App. Div. LEXIS 4806 (N.Y. App. Div.), aff'd, 231 N.Y. 562, 132 N.E. 889, 231 N.Y. (N.Y.S.) 562, 1921 N.Y. LEXIS 719 (N.Y. 1921).

66. Prison guards or keepers

A member of the police force detailed to service at a police station where his chief duties were to guard the prisoners and keep a part of the building in order did not thereby become entitled to compensation as an employee of a state municipal corporation employed as a turnkey under group 44 of former section 2 or as a janitor under group 42 of that statute. Ryan v New York, 228 N.Y. 16, 126 N.E. 350, 228 N.Y. (N.Y.S.) 16, 1920 N.Y. LEXIS 901 (N.Y. 1920), overruled in part, Buckley v New York, 56 N.Y.2d 300, 452 N.Y.S.2d 331, 437 N.E.2d 1088, 1982 N.Y. LEXIS 3423 (N.Y. 1982).

A county sheriff is engaged in a hazardous employment under this section as a "gasoline vehicle operator" and a "keeper of a prison maintained by a municipal corporation". Brigham v Allegany County, 263 A.D. 458, 33 N.Y.S.2d 479, 1942 N.Y. App. Div. LEXIS 6915 (N.Y. App. Div. 1942), aff'd, 289 N.Y. 794, 47 N.E.2d 49, 289 N.Y. (N.Y.S.) 794, 1943 N.Y. LEXIS 1197 (N.Y. 1943).

A court attendant, injured while escorting prisoner from detention pen to a courtroom, was not covered by the compensation law on the theory that such attendants were within coverage of law because they were employed as keepers or guards in a prison under sub 1, group 15, as it read in 1952. Carpenter v New York, 284 A.D. 467, 132 N.Y.S.2d 153, 1954 N.Y. App. Div. LEXIS 3426 (N.Y. App. Div. 1954).

67. Retail business employees

A person employed in a retail department store at a time when such business was not classified as a hazardous employment and engaged in loading hand trucks was not engaged in a hazardous employment under former § 2, group 41. Holtz v Greenhut & Co., 175 A.D. 878, 162 N.Y.S. 359, 1916 N.Y. App. Div. LEXIS 8983 (N.Y. App. Div. 1916).

A person employed in a retail drug store who was injured while opening a window to let out fumes after compounding harmless medicine for sale to customers of the store was not engaged in a hazardous undertaking within the Workmen's Compensation Law. Freess v Kleinau, 190 A.D. 131, 179 N.Y.S. 347, 1919 N.Y. App. Div. LEXIS 4088 (N.Y. App. Div. 1919).

A non-insured employer who operates a farm, a retail feed business and a trucking business is not liable for an injury received by his sole employee who performed work in connection with each of the employer's enterprises where the employee was injured while carrying a bag of feed from the feed store to a customer's car, not then being engaged in the trucking business, and the employer was not engaged in the storage business, the operation of a retail feed business not being classified as a hazardous employment. Harter v Andrus, 259 A.D. 942, 19 N.Y.S.2d 1017, 1940 N.Y. App. Div. LEXIS 7376 (N.Y. App. Div. 1940).

68. Other occupations

Where a man, who was employed as a handy man by a corporation engaged in the business of "drugs and chemical supplies," was killed while in the course of his employment, in the absence of substantial evidence to the contrary, the compensation commission is entitled to presume under § 21 that the employer was engaged in the hazardous business of manufacturing drugs and chemicals as defined in former § 2, group 28. In re Larsen, 218 N.Y. 252, 112 N.E. 725, 218 N.Y. (N.Y.S.) 252, 1916 N.Y. LEXIS 1064 (N.Y. 1916).

Employees carrying on work in a charitable institution come within the provisions of group 18 of this section and, unless they fall within the excepted classes, are covered by it providing they are employed "under any contract of hire, express or implied, oral or written." Hall v Salvation Army, 261 N.Y. 110, 184 N.E. 691, 261 N.Y. (N.Y.S.) 110, 1933 N.Y. LEXIS 1262 (N.Y. 1933).

The board was justified in making an award under former § 2, group 20, to a claimant injured while handling plate glass on mere proof that he was injured in the occupation listed. McQueeney v Sutphen & Hyer, 167 A.D. 528, 153 N.Y.S. 554, 1915 N.Y. App. Div. LEXIS 8294 (N.Y. App. Div. 1915).

The captain of a "lighter" may fairly be said to be engaged in its "operation" continuously from the beginning to the end of a round trip, including loading and unloading of the craft, so long as he works upon it. Edwardsen v Jarvis Lighterage Co., 168 A.D. 368, 153 N.Y.S. 391, 1915 N.Y. App. Div. LEXIS 8262 (N.Y. App. Div. 1915).

An employee assisting in driving sheeting to be used in a jetty extending into the ocean for the protection of bathers on a waterfront, the sheeting being a form of piling, was deemed to have been engaged in "pile driving" within former § 2, group 11. Mazzarisi v Ward & Tully, 170 A.D. 868, 156 N.Y.S. 964, 1916 N.Y. App. Div. LEXIS 9459 (N.Y. App. Div. 1916).

Mere dumping of refuse, which may contain material valuable as fertilizer, did not make dump a "garbage disposal plant" within the meaning of former § 2, group 28, and an employee engaged in

searching for rags and other articles of value among the rubbish is not employed in the manufacture of fertilizers or upon a garbage disposal plant connected with such manufacture within the meaning of said group. Tomassi v Christensen, 171 A.D. 284, 156 N.Y.S. 905, 1916 N.Y. App. Div. LEXIS 9451 (N.Y. App. Div. 1916).

Where the claimant's son, employed as a process server, claims adjuster and investigator in the claim department of a street railway company, had served a subpoena and while returning to his office, riding upon one of the defendant's cars, a fellow passenger accidentally stepped upon his foot, severely bruising it, requiring amputation of two toes, and resulting in gangrenous diabetes, causing the employee's death, an award of compensation may not be made, for, though the employee of the defendant at the time of the injury, claimant's son was not engaged in any hazardous work as defined by former § 2 group 1. In re Brown, 173 A.D. 432, 159 N.Y.S. 1047, 1916 N.Y. App. Div. LEXIS 6676 (N.Y. App. Div. 1916).

Where the superintendent of wholesale routes for a dairy company left his employer's place of business to go upon a route for the purpose of instructing a new driver and was killed by an automobile while on his way to the route, he was not engaged in a hazardous occupation at the time of his death. Balk v Queen City Dairy Co., 184 A.D. 631, 172 N.Y.S. 471, 1918 N.Y. App. Div. LEXIS 6627 (N.Y. App. Div. 1918).

A night engineer in a piano factory was an employee in a hazardous employment under the terms of former § 3, subdiv. 4 (now § 2). Nulle v Hardman Peck & Co., 185 A.D. 351, 173 N.Y.S. 236, 1918 N.Y. App. Div. LEXIS 7539 (N.Y. App. Div. 1918).

While ice harvesting was hazardous employment under former § 2, group 25, where the work carried on by plaintiff was not for the pecuniary gain of his employer within former § 3, subd. 5, he is not within the protection of the Work. Comp. Law, and his contributory negligence bars recovery. Mullen v Little, 186 A.D. 169, 173 N.Y.S. 578, 1919 N.Y. App. Div. LEXIS 5543 (N.Y. App. Div. 1919).

Mere wholesale dealing in dress trimmings was not a hazardous occupation within the meaning of former § 2, groups 37 and 38. Kass v Hirschberg, Schutz & Co., 191 A.D. 300, 181 N.Y.S. 35, 1920 N.Y. App. Div. LEXIS 4706 (N.Y. App. Div. 1920).

Claimant was not "engaged in a hazardous employment" when he was walking along one of the highways of Newark, New Jersey, and doing nothing to advance the interests of his employer. Keller v Reis & Donovan, Inc., 195 A.D. 45, 185 N.Y.S. 741, 1921 N.Y. App. Div. LEXIS 4693 (N.Y. App. Div. 1921), limited, MacClelland v Dodge Bros., 233 A.D. 504, 253 N.Y.S. 773, 1931 N.Y. App. Div. LEXIS 11345 (N.Y. App. Div. 1931).

A "dolly" which was a platform supported by very small wheels and used to truck boxes is a hand truck within the meaning of subd. 1, gr. 7 of this section. Manigault v W. H. Beaumont & Son, 227 A.D. 259, 237 N.Y.S. 370, 1929 N.Y. App. Div. LEXIS 6407 (N.Y. App. Div. 1929).

Claimant, a lawyer, worked part-time for an express company where he injured his back handling a trunk. He was 75 percent permanently disabled from 4/26/47 to 4/11/52 when he was still disabled. On /47, he left express company and practiced law until /50 when he became Schenectady's assistant corporation counsel. Board properly held that claim did not come within Workmen's Compensation Law § 15(5), but erred when it excluded evidence of claimant's earnings as an attorney after May 3, 1947. Earnings as assistant corporation counsel (a covered employment) should have been considered on reduced earning capacity. Weiss v Railway Express Agency, Inc., 283 A.D. 288, 127 N.Y.S.2d 296, 1954 N.Y. App. Div. LEXIS 4667 (N.Y. App. Div.), app. denied, 283 A.D. 986, 130 N.Y.S.2d 910, 1954 N.Y. App. Div. LEXIS 6009 (N.Y. App. Div. 1954).

Claimant, a commissioned minister, injured while operating a baling machine was entitled to compensation because at the time of the injury he was engaged in hazardous employment and did not fall within the exclusionary provision for commissioned ministers. Geddes v Salvation Army, 37 A.D.2d 640, 322 N.Y.S.2d 439, 1971 N.Y. App. Div. LEXIS 3744 (N.Y. App. Div. 3d Dep't 1971).

Back injury sustained by licensed practical nurse while lifting invalid patient from chair in patient's private home was compensable under Workmen's Compensation L. where evidence that patient's daughter issued directions, obtained replacement assistance, paid claimant's wages, and exercised right to discharge claimant, established an employer-employee relationship. Boggs v Bennett, 42 A.D.2d 1005, 348 N.Y.S.2d 220, 1973 N.Y. App. Div. LEXIS 3397 (N.Y. App. Div. 3d Dep't 1973).

Employees of beauty parlors are included within the group of hazardous employees under the category of barbershops. Miller v Garford Laboratories, Inc. (1939) 172 Misc 567, 16 NYS2d 279, affd (1941) 262 App Div 838, 29 NYS2d 507, affd (1942) 289 NY 715, 46 NE2d 343.. See also People ex rel. Levy v Sommerville, 4 N.Y.S.2d 793, 167 Misc. 89, 1938 N.Y. Misc. LEXIS 1633 (N.Y. Spec. Sess. 1938).

The occupation of a golf caddy is not a hazardous occupation within the meaning of subdivision 1 of this section. Murphy v Elmwood Country Club, Inc., 50 N.Y.S.2d 331, 1944 N.Y. Misc. LEXIS 2320 (N.Y. Sup. Ct. 1944).

A stenographer or secretary is not an employee entitled to compensation for injuries received in her employment under workmen's compensation law. Arnold v Wright, 79 N.Y.S.2d 720, 1948 N.Y. Misc. LEXIS 2460 (N.Y. Sup. Ct. 1948).

XIV. Occupational Diseases Generally

69. In general

An occupational disease is one which results from the nature of the employment; by nature is meant, not those conditions brought about by the failure of the employer to furnish a safe place to work, but conditions to which all employees of a class are subject, and which produce the disease as a natural incident of a particular occupation, and attach to that occupation a hazard which distinguishes it from the usual run of occupations and is in excess of the hazard attending employment in general. Goldberg v 954 Marcy Corp., 276 N.Y. 313, 12 N.E.2d 311, 276 N.Y. (N.Y.S.) 313, 1938 N.Y. LEXIS 1191 (N.Y. 1938).; Ligiecki v E. I. Dupont De Nemours & Co., 46 F. Supp. 266, 1942 U.S. Dist. LEXIS 2499 (D.N.Y. 1942).

An ailment does not become an occupational disease merely because it is contracted on the employer's premises in the course of the employment; it must be one which is commonly regarded as natural to, inhering in, or an incident of the work in question. Harman v Republic Aviation Corp., 298 N.Y. 285, 82 N.E.2d 785, 298 N.Y. (N.Y.S.) 285, 1948 N.Y. LEXIS 795 (N.Y. 1948).

An occupational disease is one arising from the conditions to which all employees of a class are subject and which produces the disease as a natural incident of a particular occupation as distinguished from and exceeding the hazard and risk of ordinary employment. Champion v W. & L. E. Gurley, 299 N.Y. 406, 87 N.E.2d 430, 299 N.Y. (N.Y.S.) 406, 1949 N.Y. LEXIS 950 (N.Y. 1949).; Lawton v Port of New York Authority, 276 A.D. 81, 92 N.Y.S.2d 714, 1949 N.Y. App. Div. LEXIS 3117 (N.Y. App. Div. 1949).

An "occupational disease" is an ailment which is the result of a distinctive feature of the kind of work performed by the claimant and others similarly employed, and not an ailment caused by the peculiar place in which a particular claimant happens to work or caused by ordinary contact with a fellow employee. Paider v Park East Movers, 19 N.Y.2d 373, 280 N.Y.S.2d 140, 227 N.E.2d 40, 1967 N.Y. LEXIS 1585 (N.Y. 1967).

"Occupational disease" under CLS Work Comp § 3(2) is restricted to medical conditions resulting from ordinary and generally recognized risks incident to particular occupation, and derives from very nature of employment, not specific condition peculiar to employee's place of work. Mack v County of Rockland, 71 N.Y.2d 1008, 530 N.Y.S.2d 98, 525 N.E.2d 744, 1988 N.Y. LEXIS 714 (N.Y. 1988).

The fact that a risk may be common to all mankind does not disentitle a workman to compensation under the Work. Comp. Law if, in the particular case, the risk is accentuated by the incidents of the employment. Rosmuth v American Radiator Co., 201 A.D. 207, 193 N.Y.S. 769, 1922 N.Y. App. Div. LEXIS 6287 (N.Y. App. Div. 1922).

The concept of occupational disease comes into play when special nature of the work exposes the general run of people more or less alike to the incidence of a particular disease, contraction of which may be general in time of occurrence and not dependent on a particular happening or event. Walters v U. S. Vitamin Corp., 11 A.D.2d 280, 203 N.Y.S.2d 401, 1960 N.Y. App. Div. LEXIS 8393 (N.Y. App. Div. 3d Dep't 1960), aff'd, 10 N.Y.2d 924, 223 N.Y.S.2d 874, 179 N.E.2d 713, 1961 N.Y. LEXIS 946 (N.Y. 1961).

In order to sustain an award when a disease, not the natural and unavoidable result of employment, is developed during the course of employment, it must be established that the inception of the disease is assignable to a determinate or single act, identified in space or time and assignable to something catastrophic or extraordinary. Di Marco v State University of New York, 39 A.D.2d 623, 331 N.Y.S.2d 47, 1972 N.Y. App. Div. LEXIS 4777 (N.Y. App. Div. 3d Dep't 1972).

Evidence indicating higher incidence of vascular disease among diabetics was insufficient to establish any causal connection between employee's preexisting diabetes and final, fatal episode of cardiac failure. Marmorale v Long Horn Restaurant, 57 A.D.2d 978, 394 N.Y.S.2d 105, 1977 N.Y. App. Div. LEXIS 12269 (N.Y. App. Div. 3d Dep't 1977).

Workers' Compensation Board's denial of claim, concluding that claimant's development of consequential anxiety disorder as result of noncompensable asbestosis did not constitute accident or occupational disease, would be reversed and matter remitted for further proceedings since claimant's entitlement to compensation depended not on compensability of asbestosis alone but whether claimant was totally disabled by 2 inseparable causative agents, one of which was asbestosis, and Board did not determine extent of claimant's disability or inseparability of asbestosis and anxiety disorder. Fonda v Cambridge Filter Corp., 272 A.D.2d 787, 708 N.Y.S.2d 514, 2000 N.Y. App. Div. LEXIS 5946 (N.Y. App. Div. 3d Dep't 2000).

In order for a mental or psychiatric disorder to qualify as an occupational disease within the meaning of N.Y. Workers' Comp. Law § 3(2), first, the causation must be to the exclusion of all other agents, natural to and inherent in the job; second, the injured employee must not be idiopathic, i.e., singularly vulnerable to the hazard that is a concomitant of the work in question. Leggio v Suffolk County Police Dep't, 289 A.D.2d 710, 733 N.Y.S.2d 656, 2001 N.Y. App. Div. LEXIS 12030 (N.Y. App. Div. 3d Dep't 2001).

70. Construction

The legislature did not intend to make compensation benefits for diseases as inclusive or as broad as those for accidental injuries; accordingly if a workman suffers an injury, he has but to show that his injury arose "out of and in the course of his employment", but if he is disabled by disease, he must go further and prove that his disablement was the result of an "occupational" disease. Harman v Republic Aviation Corp., 298 N.Y. 285, 82 N.E.2d 785, 298 N.Y. (N.Y.S.) 285, 1948 N.Y. LEXIS 795 (N.Y. 1948).. See also Champion v W. & L. E. Gurley, 299 N.Y. 406, 87 N.E.2d 430, 299 N.Y. (N.Y.S.) 406, 1949 N.Y. LEXIS 950 (N.Y. 1949).

A communicable disease contracted from a fellow employee in the course of normal business association within the plant is not an occupational disease within the meaning of this section. Harman v Republic Aviation Corp., 298 N.Y. 285, 82 N.E.2d 785, 298 N.Y. (N.Y.S.) 285, 1948 N.Y. LEXIS 795 (N.Y. 1948).; Schwartz v Queensboro Farm Products, Inc., 78 N.Y.S.2d 863, 191 Misc. 778, 1948 N.Y. Misc. LEXIS 2337 (N.Y. Sup. Ct. 1948).

In view of ¶ 28 of subdivision 2 of this section, occupational diseases are not limited to those listed by name in this section. Champion v W. & L. E. Gurley, 299 N.Y. 406, 87 N.E.2d 430, 299 N.Y. (N.Y.S.) 406, 1949 N.Y. LEXIS 950 (N.Y. 1949).

A predisposition to an occupational disease does not prevent a claimant from having the benefit of workmen's compensation if the employee develops what would ordinarily be such a disease. D'Angelo v Loft Candy Corp., 33 A.D.2d 1077, 307 N.Y.S.2d 721, 1970 N.Y. App. Div. LEXIS 5469 (N.Y. App. Div. 3d Dep't 1970), aff'd, 28 N.Y.2d 573, 319 N.Y.S.2d 614, 268 N.E.2d 326, 1971 N.Y. LEXIS 1583 (N.Y. 1971).

An action may be maintained against an employer for an occupational disease acquired prior to the effective date of the amendment making such disease compensable where the complaint admits that there was no exposure to the disease since the effective date of the amendment. Sandonato v Carborundum Co., 19 F. Supp. 655, 1936 U.S. Dist. LEXIS 1589 (D.N.Y. 1936).

71. Effect on common law action

An employee who contracts an occupational disease listed cannot maintain a common law action in negligence against his employer, notwithstanding he has suffered no disability and no award can be made to him. Repka v Fedders Mfg. Co., 239 A.D. 271, 267 N.Y.S. 709, 1933 N.Y. App. Div. LEXIS 8019 (N.Y. App. Div. 1933), aff'd, 264 N.Y. 538, 191 N.E. 553, 264 N.Y. (N.Y.S.) 538, 1934 N.Y. LEXIS 1575 (N.Y. 1934).

The 1935 amendment which added "any and all occupational diseases" to the enumeration of occupational diseases in subdivision 2 of this section did not bar a common law right of action which became vested before its effective date, September 1, 1935. Schwartz v Queensboro Farm Products, Inc., 78 N.Y.S.2d 863, 191 Misc. 778, 1948 N.Y. Misc. LEXIS 2337 (N.Y. Sup. Ct. 1948).

72. Communicable diseases

Where hospital nurse contracted staphylococcus infection of the middle ear, her close contact in caring for infected patient was a special type of work exposure to which all nurses so engaged are subjected and met the essential test of occupational disease and her award of benefits was supported by substantial evidence. Furchtsam v Binghamton General Hospital, 24 A.D.2d 786, 263 N.Y.S.2d 746, 1965 N.Y. App. Div. LEXIS 3220 (N.Y. App. Div. 3d Dep't 1965).

Although a communicable disease such as infectious hepatitis, when contracted by a hospital employee is an occupational disease under ¶ 29 of subd 2 of § 3 of the Workmen's Compensation Law, an award cannot be sustained in the absence of proof that the employee was exposed to the disease in the course of his employment. Esposito v N. Y. S. Willowbrook State School, 38 A.D.2d 985, 329 N.Y.S.2d 355, 1972 N.Y. App. Div. LEXIS 5243 (N.Y. App. Div. 3d Dep't 1972).

73. Non occupational conditions caused or aggravated by occupational disease

A dependent of a section laborer employed by a railroad company, who, while mowing grass on the employer's right of way, was poisoned by ivy so severely that it resulted in blood poisoning which led to congestion of the lungs and death, is entitled to an award of compensation. Plass v Central N. E. R. Co., 169 A.D. 826, 155 N.Y.S. 854, 1915 N.Y. App. Div. LEXIS 5093 (N.Y. App. Div. 1915), rev'd, 221 N.Y. 472, 117 N.E. 952, 221 N.Y. (N.Y.S.) 472, 1917 N.Y. LEXIS 1326 (N.Y. 1917).

Where a crane operator sustained a left hernia and the surgeon also repaired an existing right hernia, an award of compensation is proper when death ensues from embolism. Natello v Hockensmith Contracting Co., 259 A.D. 769, 18 N.Y.S.2d 338, 1940 N.Y. App. Div. LEXIS 6587 (N.Y. App. Div. 1940).

Compensation is properly payable where an employee died from pulmonary tuberculosis which followed an operation for the repair of an occupational hernia. Gordon v John J. Casale, Inc., 275 A.D. 734, 87 N.Y.S.2d 167, 1949 N.Y. App. Div. LEXIS 4244 (N.Y. App. Div. 1949).

Where a molder developed bronchial pneumonia following an operation for a gall bladder infection and died, compensation is properly payable where silicosis contracted by the employee from exposure to silica sand during his employment contributed to the illness and death. Lucarelli v General R. S. Co., 276 A.D. 799, 93 N.Y.S.2d 387, 1949 N.Y. App. Div. LEXIS 3357 (N.Y. App. Div. 1949).

After a hernia operation made necessary by an occupational injury, decedent died from a blood clot. Though the medical evidence was in conflict, there was ample evidence to support a finding that decedent died of a pulmonary embolism which was due to the operation. Barry v Arthur J. Barry, Inc., 282 A.D. 1088, 126 N.Y.S.2d 166, 1953 N.Y. App. Div. LEXIS 5886 (N.Y. App. Div. 1953).

The mere employment of a claimant as a nurse was not sufficient to prevent a disability award on the ground that the

employment had caused an aggravation of a uterine prolapse where there was no recognizable link between the disease and some distinctive feature of the employment. Clancy v Henry, 2 A.D.2d 737, 152 N.Y.S.2d 860, 1956 N.Y. App. Div. LEXIS 5044 (N.Y. App. Div. 3d Dep't 1956).

Test of occupational disease is not met where disability is caused by aggravation of a condition not occupational in nature, and where there was no evidentiary showing that claimant's pre-existing arthritic condition was such as would ordinarily constitute an occupational disease, his subsequent disability from either heart disease or degenerative arthritis of the spine could not properly be found to be due to occupational disease. Dorman v New York State Dep't of Public Works, 22 A.D.2d 725, 253 N.Y.S.2d 243, 1964 N.Y. App. Div. LEXIS 2986 (N.Y. App. Div. 3d Dep't 1964).

Where the board can properly find that an occupational disease activated or contributed to the contraction of a non-occupational condition so that both are linked to the employment, the resulting disability is compensable. Burger v Yandik, 24 A.D.2d 673, 261 N.Y.S.2d 588, 1965 N.Y. App. Div. LEXIS 3672 (N.Y. App. Div. 3d Dep't 1965).

The aggravation of the underlying condition of spondylolisthesis can constitute an industrial accident. However, in order to find an accident there must be an element of "suddenness" in either the cause of the disability or the result thereof. Rogers v General Aniline & Film Corp., 33 A.D.2d 1074, 307 N.Y.S.2d 589, 1970 N.Y. App. Div. LEXIS 5533 (N.Y. App. Div. 3d Dep't 1970).

The aggravation of a condition not occupational in nature cannot be considered an occupational disease. Solomon v Gannett Co., 34 A.D.2d 699, 309 N.Y.S.2d 470, 1970 N.Y. App. Div. LEXIS 5089 (N.Y. App. Div. 3d Dep't 1970).

For purposes of determining an employee's entitlement to compensation for disability caused by condition resulting from his employment, it is immaterial whether claimant's duties precipitated condition or merely aggravated previous asymptomatic underlying condition. Lopez v Hercules Corrugated Box Corp., 50 A.D.2d 1048, 377 N.Y.S.2d 745, 1975 N.Y. App. Div. LEXIS 12052 (N.Y. App. Div. 3d Dep't 1975).

74. Aggravation of preexisting conditions

Where a preexisting physical condition is aggravated by employment to the point of disability, an occupational disease may result even though some, or none, of the employees have the underlying disease and do not suffer the disabling aggravation. Hence, a man who has a nonoccupational illness aggravated by his employment suffers, in that aggravation, an "occupational disease" within the scope of this section. Hence an award was properly made to an employee-officer of an ice company who suffered from an arteriosclerotic disease of the feet, which condition was aggravated into a permanently disabling occupational disease by reason of his going in and out of the ice plant's cold and damp cold rooms. Griffin v Griffin & Webster, Inc., 283 A.D. 145, 126 N.Y.S.2d 672, 1953 N.Y. App. Div. LEXIS 2996 (N.Y. App. Div. 1953).

Fact that work would probably not have caused the disability were it not for an original noncompensable injury is not a bar to an award for the full consequences. The employer takes the employee as he finds him, and, where pre-existing conditions renders a subsequent disability greater, an award for the full disability may be sustained. Hence, sprain of wrist of compensation referee from turning over file papers was compensable where he had previously sprained his wrist pushing a car while not in the course of his employment. Miller v State Ins. Fund, 284 A.D. 1071, 136 N.Y.S.2d 51, 1954 N.Y. App. Div. LEXIS 4601 (N.Y. App. Div. 1954).

Aggravation of a condition not occupational in nature is not an occupational disease. So, an award for claimant (a gas converter) was dismissed where gas exposure allegedly accelerated tuberculosis. Although claimant's occupation may have aggravated preexisting tubercular condition the claimant did not suffer from an accidental injury and/or occupational disease. Goldberg v Conversions & Surveys, Inc., 6 A.D.2d 563, 180 N.Y.S.2d 358, 1958 N.Y. App. Div. LEXIS 3893 (N.Y. App. Div. 3d Dep't 1958).

The board properly authorized medical treatment for coronary insufficiency upon a finding that it was due to aggravation of pre-existing hypertension and diabetes by working conditions in the industry. Fabb v Fifth Ave. Coach Lines, Inc., 10 A.D.2d 653, 196 N.Y.S.2d 366, 1960 N.Y. App. Div. LEXIS 11690 (N.Y. App. Div. 3d Dep't 1960).

The mere aggravation of a pre-existing condition by usual work does not constitute an occupational disease. Rosenberg v Scintilla Div., 12 A.D.2d 551, 206 N.Y.S.2d 710, 1960 N.Y. App. Div. LEXIS 7249 (N.Y. App. Div. 3d Dep't 1960).

Disability caused solely by aggravation of a pre-existing condition is compensable if the pre-existing condition is occupational in nature—if the particular exposure would initially cause such a disease were there no pre-existing condition, so as to establish occupational disease generally. Oliveri v Rudolph Faust, Inc., 33 A.D.2d 1090, 308 N.Y.S.2d 49, 1970 N.Y. App. Div. LEXIS 5462 (N.Y. App. Div. 3d Dep't), app. denied, 26 N.Y.2d 613, 1970 N.Y. LEXIS 1835 (N.Y. 1970).

A disability is compensable when it originates in a work-connected trauma which aggravates or precipitates the symptoms of a pre-existing condition, whether or not of industrial origin, and testimony by medical witnesses that schistosomiasis of spinal cord was aggravated by back injury while employee was attempting to lift sofa and the finding that it was the precipitent cause of the injury, was supportable. Garcia v Gallo Original Iron Works, Inc., 34 A.D.2d 1077, 312 N.Y.S.2d 467, 1970 N.Y. App. Div. LEXIS 4258 (N.Y. App. Div. 3d Dep't 1970).

The test for the existence of an occupational disease within the meaning of the Workers' Compensation Law, is "whether the employment acts upon a disease or condition in such a manner as to cause a disability which did not previously exist. Thus, the Workers' Compensation Board properly found that a worker became disabled from an occupational disease as a result of his employment by a self-insured employer where the facts proven supported the Board's finding that the claimant's work environment aggravated a pre-existing bronchitis and asthma condition resulting in a disabling obstructive pulmonary disease which the Board found to be an occupational disease within the meaning of the Workers' Compensation Law, where the record contained conflicting medical evidence which the Board resolved in favor of the claimant in the exercise of its fact-finding power, and where the worker's case was aided by the presumption that his occupational disease was due to his employment, in the absence of credible evidence to the contrary. Di Nicola v Crucible Steel, Inc., 83 A.D.2d 735, 442 N.Y.S.2d 582, 1981 N.Y. App. Div. LEXIS 15049 (N.Y. App. Div. 3d Dep't), app. denied, 54 N.Y.2d 609, 1981 N.Y. LEXIS 4563 (N.Y. 1981).

Fact that claimant suffered aggravation of pre-existing asymptomatic non-occupational binocular keratitissicca by exposure to cigarette smoke at place of employment did not establish occupational disease under Workers' Compensation Law since there was no distinctive feature in nature of her work as psychiatric social worker that could have caused or aggravated her disease. Mack v County of Rockland, 128 A.D.2d 922, 512 N.Y.S.2d 732, 1987 N.Y. App. Div. LEXIS 44598 (N.Y. App. Div. 3d Dep't 1987), aff'd, 71 N.Y.2d 1008, 530 N.Y.S.2d 98, 525 N.E.2d 744, 1988 N.Y. LEXIS 714 (N.Y. 1988).

Uncontradicted testimony of workers' compensation claimant, who was totally disabled as result of chronic obstructive pulmonary disease, that he was unaware of and unaffected by any pulmonary problems before onset of his disability in 1993 was sufficient to prove that his preexisting condition was dormant and not disabling. Cocco v New York City DOT, 266 A.D.2d 634, 697 N.Y.S.2d 751, 1999 N.Y. App. Div. LEXIS 11217 (N.Y. App. Div. 3d Dep't 1999).

Claimant was not entitled to workers' compensation benefits where her multiple sclerosis played a factor in causing her mental disability. Leggio v Suffolk County Police Dep't, 289 A.D.2d 710, 733 N.Y.S.2d 656, 2001 N.Y. App. Div. LEXIS 12030 (N.Y. App. Div. 3d Dep't 2001).

75. Evidence of occupational cause of disease

An award was sustained on evidence that claimant had for three weeks in December, 1949 been obliged to lift and move

10-pound cartons which had caused bursitis and that in January, 1950 she experienced pain but continued to work until March, 1951 for the same employer but in a different capacity. At that time, as a result of bursitis, her shoulder and arm bones had calcified. The change of work was held not to be a change in employment within the meaning of § 40. Frank v Freedman Die Cutters, Inc., 306 N.Y. 935, 119 N.E.2d 608, 306 N.Y. (N.Y.S.) 935, 1954 N.Y. LEXIS 1233 (N.Y. 1954).

Award was denied to claimant suffering from a rare paralytic disease contracted from contact with mice where claimant testified that there were mice both in his apartment and in his place of work and it was impossible to induce medical testimony showing where the disease was acquired. Durlacher v Great Atlantic & Pacific Tea Co., 308 N.Y. 924, 127 N.E.2d 81, 308 N.Y. (N.Y.S.) 924, 1955 N.Y. LEXIS 1162 (N.Y. 1955).

Where the only medical testimony in support of a relationship between the disease causing death and conditions found in trades and businesses which the decedent had followed for a long period of years, is to the effect that such conditions might "possibly" cause the disease, it is not sufficient to sustain an award for death from occupational disease. Miller v National Cabinet Co., 8 N.Y.2d 277, 204 N.Y.S.2d 129, 168 N.E.2d 811, 1960 N.Y. LEXIS 1076 (N.Y. 1960).

Evidence that a 70-year-old man who, during course of his work in sanding metallic doors, was required to lift and turn the doors which weighed from 50 to 100 pounds about 60 times a day was not sufficient to support a finding that the claimant suffered an occupational disease of sacroiliac sprain. Sackris v Dahlstrom Metallic Door Co., 3 A.D.2d 961, 163 N.Y.S.2d 129, 1957 N.Y. App. Div. LEXIS 5460 (N.Y. App. Div. 3d Dep't 1957).

To establish occupational disease definite proof was necessary to show that disease was common hazard to which all employees in the same kind of employment would be exposed and further, that the disease was actually contracted in employment. Mere aggravation of disease not occupational in character is insufficient to establish occupational disease. So, an award to claimant, chef in supper club for 6 years, for occupational disease in nature of emphysema of right lung was reversed and claim remitted. Medical testimony not of substantial character to sustain theory that claimant's condition was occupational disease contracted in his employment. Smith v Sports Room Supper Club, 7 A.D.2d 809, 181 N.Y.S.2d 130, 1958 N.Y. App. Div. LEXIS 3739 (N.Y. App. Div. 3d Dep't 1958).

Workers' compensation claimant's exposure to noxious substances as bridge painter for employer acted on his preexisting but dormant pulmonary condition to cause disability that did not previously exist where (1) claimant's work included sandblasting, paint stripping, and spraying red lead paint, (2) expert attributed claimant's poor pulmonary reserve to chronic inhalation of noxious substances at work, and (3) although expert acknowledged that chronic pulmonary obstructive disease is often result of "the composite of many things," including smoking, he testified that exposure to noxious substances in course of claimant's work was causative factor. Cocco v New York City DOT, 266 A.D.2d 634, 697 N.Y.S.2d 751, 1999 N.Y. App. Div. LEXIS 11217 (N.Y. App. Div. 3d Dep't 1999).

Workers' Compensation Board properly ruled that claimant, who suffered from asbestos-related lung disease, did not sustain occupational disease where buildings in which he worked housed extensive system of steam pipes wrapped in asbestos insulation, and such insulation, in turn, would flake off and settle on surrounding surfaces; under circumstances, hazard to which claimant was exposed stemmed not from distinctive feature of his employment as therapy aide, but rather from his work environment in general. Demers v St. Lawrence Psychiatric Ctr., 271 A.D.2d 857, 706 N.Y.S.2d 251, 2000 N.Y. App. Div. LEXIS 4416 (N.Y. App. Div. 3d Dep't 2000).

Workers' Compensation Board properly ruled that claimant did not sustain occupational disease, even though her treating physicians and employer's workers' compensation insurance carrier agreed that she suffered from multiple chemical sensitivity attributable to her exposure to environmental toxins, where their conclusions on nature of causal relationship were based on unsubstantiated assumption that environmental contaminants actually existed at claimant's workplace, senior industrial hygienist who performed air quality analysis in subject building reported that air sampling test results for all contaminants were below permissible limits, and another industrial hygienist, who was also toxicologist, examined building, medical records, and air quality test results and opined that building contained no environmental contaminants that would cause any significant or permanent adverse health effects. Marks v County of Tompkins, 274 A.D.2d 764, 711 N.Y.S.2d 554, 2000 N.Y. App. Div. LEXIS 8102 (N.Y. App. Div. 3d Dep't 2000).

76. —Time lapse between exposure and discovery of disease

Employer is not liable for death of employee from silicosis occurring within 5 years after last injurious exposure where period of continuous disability did not occur within one year from the date of the last exposure. Kazia v Woodcrest Const. Co., 282 A.D. 580, 125 N.Y.S.2d 433, 1953 N.Y. App. Div. LEXIS 4528 (N.Y. App. Div. 1953).

Where the occupational disease suffered by claimant is an insidious and slow developing process, such as caisson disease, time lapse between last exposure and discovery of the disease is not controlling, and the fact that claimant has already ceased work by that time and elected to receive social security benefits is not decisive of his right to compensation. Meyers v Walsh Constr. Co., 12 A.D.2d 371, 211 N.Y.S.2d 590, 1961 N.Y. App. Div. LEXIS 12275 (N.Y. App. Div. 3d Dep't 1961).

77. Apportionment of risk between multiple carriers

A question of fact was presented as to whether claimant's disablement from an occupational disease arose while one of two carriers was on the risk. Russo v Despatch Shops, Inc., 280 A.D. 1008, 116 N.Y.S.2d 788, 1952 N.Y. App. Div. LEXIS 4556 (N.Y. App. Div. 3d Dep't), modified, 280 A.D. 1030, 116 N.Y.S.2d 788, 1952 N.Y. App. Div. LEXIS 4603 (N.Y. App. Div. 3d Dep't 1952).

Carrier on risk at time of disablement would become responsible for award for occupational disease contracted in same employment for same employer unless it were found that there was no injurious exposure during carrier's period of coverage. Bakke v Ira S. Bushey & Son, 5 A.D.2d 909, 171 N.Y.S.2d 192, 1958 N.Y. App. Div. LEXIS 6729 (N.Y. App. Div. 3d Dep't 1958).

Decedent worked for 27 years in and about hard coal mines of Pa. He was employed as a fireman for about 3 months at college where there was a certain amount of coal dust in air of furnace room. Three impartial specialists attributed death to pulmonary disease due to his work in coal mines. Award based on finding that death was due to disease related to employment as fireman reversed and claim dismissed. There was substantial evidence to overcome the presumption of § 47. Gorsky v New York, 7 A.D.2d 762, 179 N.Y.S.2d 977, 1958 N.Y. App. Div. LEXIS 4081 (N.Y. App. Div. 3d Dep't 1958), aff'd, 9 N.Y.2d 739, 214 N.Y.S.2d 350, 174 N.E.2d 333, 1961 N.Y. LEXIS 1466 (N.Y. 1961).

XV. Chemical Poisoning

78. Conditions caused by exposure to benzol or benzene

A death award was proper where employee, a chemist, after working for four employers over a period of thirteen years, died of a plastic anemia. The award was made against first employer where records showed that employee was exposed to benzene compound during such employment and that such exposure could have been the cause of death. Zaepfel v E. I. Du Pont de Nemours & Co., 309 N.Y. 962, 132 N.E.2d 327, 309 N.Y. (N.Y.S.) 962, 1956 N.Y. LEXIS 1085 (N.Y.), reh'g denied, 1 N.Y.2d 859, 1956 N.Y. LEXIS 1457 (N.Y. 1956).

The statutory protection found in subd. 2 par. 8 of this section against benzol poisoning, a long established industrial occupational disease, has no application where it appears that the cause of death was leukemia, the cause of which disease is unknown, and not aplastic anemia. Miller v National Cabinet Co., 8 N.Y.2d 277, 204 N.Y.S.2d 129, 168 N.E.2d 811, 1960 N.Y. LEXIS 1076 (N.Y. 1960).

Where a death benefit claim was based upon the theory that death of the employee, in 1950, could have resulted from an occupational disease, he having been employed as a piano finisher and in associated work since 1928, using varnish removers utilized by each of five employers and each containing a chemical

known as benzene or "benzol," but he died from leukemia, the cause of which disease was admitted by all medical witnesses to be unknown, the evidence was insufficient to sustain a finding of any causal connection between his employment and his death. Miller v National Cabinet Co., 8 N.Y.2d 277, 204 N.Y.S.2d 129, 168 N.E.2d 811, 1960 N.Y. LEXIS 1076 (N.Y. 1960).

A pressman employed by a printing company who suffers benzol poisoning suffers an occupational disease. McLaughlin v Alco Gravure Div. of Publication Corp., 268 A.D. 839, 50 N.Y.S.2d 246, 1944 N.Y. App. Div. LEXIS 3706 (N.Y. App. Div. 1944).

A referee's determination (made on conflicting medical testimony) that an employee's exposure to benzol was a competent producing cause of his death from leukemia was affirmed. And the award was properly apportioned between 2 carriers successively insuring the employer during the period of decedent's employment where disablement did not incur until after decedent had changed his employment and was the result of a protracted exposure to benzol. Miller v National Cabinet Co., 8 A.D.2d 281, 188 N.Y.S.2d 29, 1959 N.Y. App. Div. LEXIS 8008 (N.Y. App. Div. 3d Dep't 1959), rev'd, 8 N.Y.2d 277, 204 N.Y.S.2d 129, 168 N.E.2d 811, 1960 N.Y. LEXIS 1076 (N.Y. 1960).

Where the extent of decedent's exposure to benzol was not sufficiently developed, the matter was remitted for further proof. Decedent had become disabled as a result of adenocarcinoma of the bladder. Collins v National Aniline Div., Allied Chemical & Dye Corp., 8 A.D.2d 900, 186 N.Y.S.2d 979, 1959 N.Y. App. Div. LEXIS 8320 (N.Y. App. Div. 3d Dep't 1959).

An award for death benefits was properly granted by the board for the death of a research chemist from a rare disease known as myeloid metaplasia of the spleen. There was substantial evidence that this disease is associated with exposure to benzol and that the chemist was exposed to vapors of solvents and benzol during the period of his employment. Friedman v General Aniline & Film Corp., 9 A.D.2d 820, 192 N.Y.S.2d 794, 1959 N.Y. App. Div. LEXIS 6175 (N.Y. App. Div. 3d Dep't 1959).

There was substantial evidence to sustain a finding of death from occupational disease where decedent died of cerebral vascular hemmorrhage precipitated by acute myelogenous leukemia after working for three and one-half years as a stitching machine operator in a shoe factory in connection with which he came in contact with minimal amounts of benzol while occasionally working on goods still wet with a paste containing benzol and from application of the paste within about 20 feet from where he worked. Berman v Werman & Sons, 14 A.D.2d 631, 218 N.Y.S.2d 315, 1961 N.Y. App. Div. LEXIS 9407 (N.Y. App. Div. 3d Dep't 1961).

79. Lead poisoning

An employee of an art shop who became disabled from lead poisoning suffers an occupational disease. Fayette v Brush Studio & Art Shop, 261 A.D. 1023, 26 N.Y.S.2d 70, 1941 N.Y. App. Div. LEXIS 8585 (N.Y. App. Div. 1941).

One who suffers lead poisoning in the course of his employment working as a sprayer spraying picture frame moldings with paint lacquers and varnish is entitled to an award of workmen's compensation. Guarnera v Radio Picture Frame Co., 267 A.D. 843, 45 N.Y.S.2d 745, 1944 N.Y. App. Div. LEXIS 5071 (N.Y. App. Div. 1944).

There was substantial evidence to sustain a finding of disability by occupational disease with respect to a linotype operator who worked for 32 years about two feet from a pot of molten lead, exposed to the fumes from it, and contracted emphysema and chronic bronchitis. Muench v John L. Schoenfeld Co., 12 A.D.2d 847, 209 N.Y.S.2d 659, 1961 N.Y. App. Div. LEXIS 13205 (N.Y. App. Div. 3d Dep't 1961).

80. Conditions caused by exposure to nitric, sulphuric, hydrochloric and other acids

An occupational disease following continuous washing of spinach resulting from the presence of sulphide acid in spinach and celery, comes under ¶¶ 9 and 27 of subd. 2. Jacobson v Cohen, 244 A.D. 855, 279 N.Y.S. 750, 1935 N.Y. App. Div. LEXIS 6835 (N.Y. App. Div. 1935).

Medical testimony supported a finding of the board that a nasal and pulmonary involvement, consisting of a basilar bilateral emphysema, chronic rhinitis and sinusitis, as a result of exposure to fumes from nitric, sulphuric and hydrochloric acids and cyanide used in work of polishing metals, constituted an occupational disease resulting from the nature and conditions of employment to which all employees of the same class were subject. Ciampa v Tripp Plating Co., 3 A.D.2d 621, 158 N.Y.S.2d 18, 1956 N.Y. App. Div. LEXIS 3437 (N.Y. App. Div. 3d Dep't 1956).

Upon review of medical testimony, it was held not to rise to the level of such substantial evidence of causal relationship between decedent's work in a plumbing speciality factory department where certain acids and solutions, including nickel sulphate and chromic acid, were used, and his inhalation of fumes therefrom over a 40-year period, disability and death having resulted from lung cancer and he being, among other things, a heavy cigarette smoker. Amoroso v Tubular & Cast Products Mfg. Co., 17 A.D.2d 1003, 233 N.Y.S.2d 909, 1962 N.Y. App. Div. LEXIS 6981 (N.Y. App. Div. 3d Dep't 1962), aff'd, 13 N.Y.2d 992, 244 N.Y.S.2d 787, 194 N.E.2d 694, 1963 N.Y. LEXIS 874 (N.Y. 1963).

81. Conditions caused by nitrous fumes

Where the board found that the nature of the claimant's disability was coveyed by the inclusive category of bronchitis and pneumonitis of a chemical nature due to exposure to toxic nitrogenous gases in his employment as a farmhand by reason of his work in silos, constituting in the board's view an occupational disease under subd 2(29) of the above statute, and the defendants contended that the record lacked evidence of the presence of toxic nitrous fumes on the employer's premises, the board was warranted in finding fumes present where (1) the claimant had reported to a specialist in pulmonary diseases gases which he described as "steam" and had previously reported to a hospital "fumes" emanating from the silage and the onset of significant symptoms on each exposure, (2) the specialist said that claimant "in all likelihood had repeated exposures to irritant nitrogen gas in a silo", (3) the hospital's final diagnosis of claimant's condition was silo filler's disease (held by the board to be an occupational disease under subd 2(10) of the above statute) "presumably related to exposure either to fungi, dust or nitrogen dioxide", and (4) the agricultural college bulletin upon which defendants' arguments were largely based clearly admitted the possibility of the production of nitrogenous gases under facts and circumstances such as existed on the employer's farm during the period of claimant's alleged exposure. Moody v Payne, 23 A.D.2d 919, 258 N.Y.S.2d 870, 1965 N.Y. App. Div. LEXIS 4283 (N.Y. App. Div. 3d Dep't 1965).

82. Conditions caused by paint, lacquer and similar fumes

Asthma and bronchiectasis suffered by an employee whose job was spraying automobiles with a lacquer-nitroglycerine preparation, are occupational diseases. Koprda v Cadillac Motor Car Div., 258 A.D. 765, 14 N.Y.S.2d 751, 1939 N.Y. App. Div. LEXIS 6803 (N.Y. App. Div. 1939).

One employed as a spray painter and striper, who became disabled by reason of a lung condition described as chronic bronchitis with pulmonary fibrosis suffers an occupational disease. Shaw v International Postal-Supply Co., 274 A.D. 957, 83 N.Y.S.2d 675, 1948 N.Y. App. Div. LEXIS 4243 (N.Y. App. Div. 1948).

There was sufficient medical testimony to support a finding that claimant's exposure to lacquers and a thinner kept in open containers upon a table about 12 feet from her, for use by a fellow worker during some six years of employment, was the cause for disability due to toxic hepatitis. Zecca v J. Levinsohn & Co., 12 A.D.2d 676, 208 N.Y.S.2d 5, 1960 N.Y. App. Div. LEXIS 6741 (N.Y. App. Div. 3d Dep't 1960), app. denied, 9 N.Y.2d 610, 1961 N.Y. LEXIS 1657 (N.Y. 1961).

83. Conditions caused by automotive exhaust, welding and the like

A finding of occupational disease could not be sustained where it appeared only that claimant was a taxicab dispatcher, working in offices located in garages where he was exposed to exhaust and paint fumes, and contracted emphysema, there being no proof that emphysema is a disease which is a common hazard for taxicab dispatchers. Ashley v Mardon Operating Corp., 9 A.D.2d

826, 192 N.Y.S.2d 927, 1959 N.Y. App. Div. LEXIS 6184 (N.Y. App. Div. 3d Dep't 1959).

Evidence supported findings that claimant, a welder, suffered from occupational disease, in that exposure to heat and fumes produced pulmonary disease, and that disease was not a dust disease even though molecular iron and silica were also introduced into lung tissue. Zambito v Curtiss Wright Corp., 44 A.D.2d 856, 354 N.Y.S.2d 737, 1974 N.Y. App. Div. LEXIS 5126 (N.Y. App. Div. 3d Dep't 1974).

Fibrosis of the lungs suffered by a garage worker is not an occupational disease where the causative factor is gases and fumes created by welding operations, and the employee is limited to a common law action against the employer for failing to provide him with a safe place to work. Converse v State, 55 N.Y.S.2d 922, 185 Misc. 162, 1945 N.Y. Misc. LEXIS 1955 (N.Y. Ct. Cl. 1945).

A milk route man who was assigned a truck which, by reason of its defective condition, permitted noxious impurities, fumes and smoke to enter the employee's respiratory tract and lungs and induced pneumoconiosis, does not suffer an occupational disease within the meaning of this section. Schwartz v Queensboro Farm Products, Inc., 78 N.Y.S.2d 863, 191 Misc. 778, 1948 N.Y. Misc. LEXIS 2337 (N.Y. Sup. Ct. 1948).

84. Conditions caused by exposure to carbon tetrachloride

Disability arising from the inhalation of carbon tetrachloride fumes while washing stencils with a solution of that chemical is compensable. Pettinato v New York, 259 A.D. 944, 19 N.Y.S.2d 945, 1940 N.Y. App. Div. LEXIS 7382 (N.Y. App. Div. 1940).

Where employee claimed to have been exposed to carbon tetrachloride in 1948 and thereafter, subsequent to 1949, claimed he suffered a disability from the effects of such poisoning, the Board was justified in finding that the 1948 condition was temporary only and that there was no relationship between that temporary condition and the claimed disability of 1949. Banikowski v American Locomotive Co., 282 A.D. 1084, 126 N.Y.S.2d 54, 1953 N.Y. App. Div. LEXIS 5878 (N.Y. App. Div. 1953).

85. Conditions caused by exposure to other chemicals and fumes

In an action to recover damages from plaintiff's former employer alleging that the employer wantonly and maliciously exposed plaintiff to chemical substances which increased the likelihood that plaintiff would contract bladder cancer in the future, plaintiff's "injury" stemmed from exposure to industrial chemicals while in the course of her employment and was an occupational disease within the meaning of the Workers' Compensation Law for which she had already received benefits, and therefore a common-law personal injury action was unavailable to her. Mylroie v GAF Corp., 55 N.Y.2d 893, 449 N.Y.S.2d 21, 433 N.E.2d 1269, 1982 N.Y. LEXIS 3096 (N.Y. 1982).

Claimant who seeks compensation because he suffers from an occupational disease within subd. 2, in that his disease was caused by anilin poisoning, is not entitled to an award, since his work required him to handle furs after they had been dyed, and, he was not engaged in a process involving the use of anilin. Sokol v Stein Fur Dyeing Co., 216 A.D. 573, 216 N.Y.S. 167, 1926 N.Y. App. Div. LEXIS 9273 (N.Y. App. Div. 1926).

The evidence was held sufficient that the continuing conditions from which the claimant was found to be suffering were caused or aggravated by his exposure to toxic fumes in his employment as a "slop washer" in a dyeing and printing business although there was a conflict in the medical testimony as to whether claimant's pulmonary congestion, acute shortness of breath, coronary insufficiency and acute heart dilation were related to the inhalation of the fumes. Hahn v Bloom Screen Print Co., 284 A.D. 1010, 135 N.Y.S.2d 278, 1954 N.Y. App. Div. LEXIS 4381 (N.Y. App. Div. 3d Dep't 1954).

In view of the presumption of this section, employee's death from a septic sore throat and toxic myocarditis was compensable as an occupational disease where claimant worked in a plant handling various chemicals including hydrogen peroxide, a highly volatile substance. Matthews v General Electric Co., 2 A.D.2d 623, 151 N.Y.S.2d 825, 1956 N.Y. App. Div. LEXIS 5474 (N.Y. App. Div. 3d Dep't 1956).

Claimant was found to be suffering from bronchial condition, occupational disease, caused by inhalation of irritant fumes from heated chemicals. Held: there was medical proof that condition continued to cause disability and was permanent. Decision and award for continuing disability affirmed. Mathews v Inter-Chemical Corp., 5 A.D.2d 914, 170 N.Y.S.2d 898, 1958 N.Y. App. Div. LEXIS 6737 (N.Y. App. Div. 3d Dep't 1958).

Various processes on which claimant worked gave off smoke and irritating fumes from open tanks containing acid and chemicals. Claimant testified that they caused him to cough violently and to raise blood. On substantial evidence, the Board properly found that the claimant contracted irritative bronchitis, an occupational disease, because of the nature of his work and that such disease activated inactive tuberculosis. Bazzini v Washburn Wire Co., 8 A.D.2d 556, 183 N.Y.S.2d 515, 1959 N.Y. App. Div. LEXIS 9636 (N.Y. App. Div. 3d Dep't 1959).

A finding of occupational disease could not be sustained where it appeared only that claimant was a taxicab dispatcher, working in offices located in garages where he was exposed to exhaust and paint fumes, and contracted emphysema, there being no proof that emphysema is a disease which is a common hazard for taxicab dispatchers. Ashley v Mardon Operating Corp., 9 A.D.2d 826, 192 N.Y.S.2d 927, 1959 N.Y. App. Div. LEXIS 6184 (N.Y. App. Div. 3d Dep't 1959).

Where medical testimony was not based upon speculation or surmise, as to whether claimant's disability from peripheral neuritis or some similar condition the precise diagnosis for which was unknown, was causally related to his work for some years in lowering metal products into a tank of trichloroethylene, there was sufficient basis to sustain a finding by the Board that the condition was due to occupational disease. Hassell v Oxford Filing Supply Co., 16 A.D.2d 534, 230 N.Y.S.2d 866, 1962 N.Y. App. Div. LEXIS 8640 (N.Y. App. Div. 3d Dep't 1962).

Upon conflicting testimony a decision of the Compensation Board determining that hemiplegia and paralysis, together with burns on the face of decedent, were causally related to an accident of June 4, 1959, when a 200 pound barrel of freon gas slipped and fell as decedent was attempting to lift it and some of the gas leaked out and entered his mouth, an award of death benefits was sustained notwithstanding testimony that decedent had a preexisting hypertension and vascular disease. Crowl v Martins Dep't Store, 16 A.D.2d 995, 229 N.Y.S.2d 137, 1962 N.Y. App. Div. LEXIS 9069 (N.Y. App. Div. 3d Dep't 1962).

There was substantial evidence to justify an award for disability that cancer of the bladder was causally related to the worker's occupation and exposure to finished dyes. Smith v Humboldt Dye Works, Inc., 34 A.D.2d 1041, 312 N.Y.S.2d 612, 1970 N.Y. App. Div. LEXIS 4329 (N.Y. App. Div. 3d Dep't 1970).

Even though level of carbon disulphide chemical in the air around claimant's work place was reported by the New York State Division of Industrial Hygiene as below the recommended threshold level, board's finding that permanent disability diagnosed as peripheral neuropathy resulting from carbon disulphide poisoning was an occupational disease was supported by evidence that claimant was exposed to such chemical during his 37 years of employment, and that claimant's attending physician had treated one other employee of plant for carbon disulphide poisoning. Murphy v Beaunit Fibers, Inc., 42 A.D.2d 1009, 348 N.Y.S.2d 210, 1973 N.Y. App. Div. LEXIS 3403 (N.Y. App. Div. 3d Dep't 1973).

In an action by an employee against her employer to recover damages for future manifestation of bladder cancer, the trial court correctly granted the employer's motion to dismiss the complaint where it was apparent that the "injury" complained of stemmed from exposure to industrial chemicals while in the course of employment and, as such, was an occupational disease within the meaning of Work Comp Law § 3, and where a common-law personal injury action was therefore unavailable to the employee. Mylroie v GAF Corp., 81 A.D.2d 994, 440 N.Y.S.2d 67, 1981 N.Y. App. Div. LEXIS 11738 (N.Y. App. Div. 3d Dep't 1981), aff'd, 55 N.Y.2d 893, 449 N.Y.S.2d 21, 433 N.E.2d 1269, 1982 N.Y. LEXIS 3096 (N.Y. 1982).

Determination by Workers' Compensation Board that claimant was totally disabled by asthma caused by unavoidable exposure to acetone while assembling plastic boxes with cement at her

workplace was supported by substantial evidence consisting of circumstances present in workplace, medical experts' conclusions that claimant was fully disabled from pursuing her occupation as cementer, and claimant's lack of qualifications for other work. Moore v RPM Industries, Inc., 144 A.D.2d 135, 534 N.Y.S.2d 463, 1988 N.Y. App. Div. LEXIS 10134 (N.Y. App. Div. 3d Dep't 1988).

XVI. Dermatitis And Skin Conditions

86. In general

Prior to the 1930 amendment to this section, dermatitis was not an occupational disease under subdiv. 2. Wright v Used Car Exchange, 221 A.D. 154, 223 N.Y.S. 245, 1927 N.Y. App. Div. LEXIS 6396 (N.Y. App. Div. 1927).

The mere fact that a seborrheic skin type is not an occupational disease does not make the disabling dermatitis non-occupational. Pacifico v Treadway Inns Corp., 33 A.D.2d 1069, 307 N.Y.S.2d 277, 1970 N.Y. App. Div. LEXIS 5526 (N.Y. App. Div. 3d Dep't), app. denied, 26 N.Y.2d 612, 258 N.E.2d 730, 1970 N.Y. LEXIS 1805 (N.Y. 1970).

87. Particular incidents of dermatitis

A rash suffered by a cook, whose work included the general cooking and preparation of foodstuffs and the handling of large amounts of poultry is not an occupational disease where there is no proof that she sustained her rash as the result of acids or oils from the chickens. Kluger v Celian Mansion, Inc., 262 A.D. 784, 27 N.Y.S.2d 309, 1941 N.Y. App. Div. LEXIS 5843 (N.Y. App. Div. 1941).

An employee in the fur business who was required to handle dyed furs and, as the result thereof suffered an infection which resulted in dermatitis, suffers an occupational disease. Cogas v Gordon Fur Co., 267 A.D. 843, 45 N.Y.S.2d 764, 1944 N.Y. App. Div. LEXIS 5068 (N.Y. App. Div. 1944).

Dermatitis suffered by a taxicab driver resulting from handling a plastic steering wheel and the handling of money is occupational. Lucker v National Transp. Co., 273 A.D. 1043, 78 N.Y.S.2d 716, 1948 N.Y. App. Div. LEXIS 5880 (N.Y. App. Div. 1948).

An employee working on a synthetic rubber product, who suffered dermatitis venenata caused by his exposure to the chemicals used in the particular synthetic rubber, suffers an occupational disease, and is entitled to an award. Cutting v Hewitt Rubber Co., 274 A.D. 1080, 85 N.Y.S.2d 677, 1949 N.Y. App. Div. LEXIS 6145 (N.Y. App. Div.), aff'd, 300 N.Y. 598, 89 N.E.2d 883, 300 N.Y. (N.Y.S.) 598, 1949 N.Y. LEXIS 1457 (N.Y. 1949).

The board may properly find that turpentine used by the claimant in his work as a glass driller was spilled on his arms and legs which produced dermatitis venenata on his hands and arms and aggravated an unrelated hemostatic dermatitis in his legs. Fink v Bibi & Co., 276 A.D. 1045, 95 N.Y.S.2d 681, 1950 N.Y. App. Div. LEXIS 5664 (N.Y. App. Div. 1950).

Evidence, in workmen's compensation case, supported finding that disabling condition suffered by claimant, diagnosed as keratosis punctata and causing painful eruptions on hands and feet, constituted a compensable occupational disease. Lopez v Hercules Corrugated Box Corp., 50 A.D.2d 1048, 377 N.Y.S.2d 745, 1975 N.Y. App. Div. LEXIS 12052 (N.Y. App. Div. 3d Dep't 1975).

Workers' compensation award for auto mechanic's early retirement due to occupational dermatitis was adequately supported by testimony of treating physician as to deteriorating condition of mechanic's skin from exposure to grease and oil at his job, especially since employer and carrier offered no medical proof in opposition and failed to show that mechanic was not exposed to oil and grease at his job. Fletcher v Ray Weil Chevrolet Corp., 135 A.D.2d 964, 522 N.Y.S.2d 373, 1987 N.Y. App. Div. LEXIS 52864 (N.Y. App. Div. 3d Dep't 1987).

88. Multiple exposures and successive episodes of dermatitis

Death benefits are barred where an occupational disease is not contracted within 12 months previous to date of disablement. Decedent died on December 10, 1952 as a result of treatment received for dermatitis condition. Board found that decedent had become disabled on August 14, 1952. He had exhibited symptoms of dermatitis as far back as 1941. However, when he ceased work as bricklayer, condition cleared up. Therefore, each attack was independent episode and it was immaterial that decedent had suffered from dermatitis before. Further, there was evidence that last contact causing dermatitis was much greater than theretofore. Thus finding supported that condition which led to claimant's death was contracted within 12-month period. Award affirmed. Silverman v Sam Ralph Constr. Co., 5 A.D.2d 710, 168 N.Y.S.2d 910, 1957 N.Y. App. Div. LEXIS 3503 (N.Y. App. Div. 3d Dep't 1957), reh'g denied, 5 A.D.2d 796, 170 N.Y.S.2d 307, 1958 N.Y. App. Div. LEXIS 7078 (N.Y. App. Div. 3d Dep't 1958), app. denied, 4 N.Y.2d 676, 1958 N.Y. LEXIS 1422 (N.Y. 1958).

Claimant was required to cease work because of contact dermatitis of hands arising out of work as baker. Awards for occupational disease were made and case was closed. Thereafter, case was reopened on report of dermatologist that subsequent flare-up of claimant's condition was attributable in part to previous contact dermatitis. Further award of temporary partial disability affirmed. Tarquinio v Duvernoy Bakeries, Inc., 6 A.D.2d 914, 176 N.Y.S.2d 13, 1958 N.Y. App. Div. LEXIS 5221 (N.Y. App. Div. 3d Dep't 1958).

Claimant became disabled on October 22, 1954 by reason of dermatitis contracted in respondent's employment. Respondent's carrier paid compensation to June 4, 1956. On that date claimant entered the employ of appellant and worked until June 15, 1956. Board found flare-up of condition during period of employment by appellant and made award for period from June 15, 1956 to August, 1956 against appellant and an award for period subsequent to August 14, against both employers. Doctor reported that as of August 13 eruption was much better and that claimant had returned to status quo. Held: there being no evidence relating to disability after August 14 to employment by appellant, award was reversed and the matter remitted. Casteneda v Herzl Textile Dyers, Inc., 8 A.D.2d 889, 186 N.Y.S.2d 982, 1959 N.Y. App. Div. LEXIS 8302 (N.Y. App. Div. 3d Dep't 1959).

Where claimant, a clerk-typist, worked successively for three different employers and contracted occupational dermatitis on both hands in her first employment through use of ditto paper and ditto cream, for which she received a disability award followed by closing of her case, the same sequence took place following her second employment, and these awards were reopened in connection with her claim against the third employer, there was sufficient medical testimony to sustain a finding by the Board that claimant had a continuing causally related disability due equally to all three claims. Benson v Grey Advertising Agency, 15 A.D.2d 701, 223 N.Y.S.2d 451, 1962 N.Y. App. Div. LEXIS 12023 (N.Y. App. Div. 3d Dep't 1962).

Where a claimant suffered the occupational disease of dermatitis in two different employments, in the first, by exposure to oil, and in the second, by exposure to cement, and had since worked for several other employers, the employer in whose employment claimant was exposed to cement, on which exposure claimant's claim was based, was entitled to apply for apportionment of liability among the various other employers, if he could make the necessary showing. Kaleita v Evans Greenaway, Inc., 15 A.D.2d 979, 225 N.Y.S.2d 580, 1962 N.Y. App. Div. LEXIS 10999 (N.Y. App. Div. 3d Dep't 1962).

A 66 ⅔ percent partial disability award was reversed, after apportionment between two successive employers on a 60-40 basis, the award being founded on dermatitis initially developed in a first employment as a tile setter but which cropped up again following employment as a porter in the second employer's office building after exposure to cement dust and detergents in cleaning-up operations, for want of substantial evidence to show the percentage of partial disability found. Martinbianco v Banowit, 18 A.D.2d 732, 234 N.Y.S.2d 643, 1962 N.Y. App. Div. LEXIS 6516 (N.Y. App. Div. 3d Dep't 1962).

89. Extent of disability

Where the parties concede that a cafeteria worker is entitled to temporary compensation for disability resulting from dermatitis but the record is devoid of medical evidence to the effect that the disability will be permanent, the award for permanent partial disability must be reversed and the matter remanded. Bosco v General Electric Co., 3 A.D.2d 781, 160 N.Y.S.2d 43, 1957 N.Y. App. Div. LEXIS 6190 (N.Y. App. Div. 3d Dep't 1957).

Evidence relating dermatitis venenata, caused by contract with wool and other substances, to employment was substantial. However, findings of disability and reduced earning capacity, on which award was predicated was not supported. Case remitted for further proof as to claimant's condition and earning capacity. Fiorella v Empire Worsted Mills, Inc., 7 A.D.2d 657, 179 N.Y.S.2d 172, 1958 N.Y. App. Div. LEXIS 4296 (N.Y. App. Div. 3d Dep't 1958).

XVII. Lint And Dust Diseases; Silicosis

90. In general

The purpose of former article 4-A was to remove from the coverage of ¶ 28 of this section silicosis and similar dust diseases, and to set up a separate schedule of compensation payments in a lesser sum for total disability or death resulting from that type of disease; the provisions of that article were designed and intended to embrace within their scope only the diseases of the normal pneumoconiosis classification, such as silicosis or chalicosis, anthracosis, siderosis and similar diseases. Lawton v Port of New York Authority, 276 A.D. 81, 92 N.Y.S.2d 714, 1949 N.Y. App. Div. LEXIS 3117 (N.Y. App. Div. 1949).

Whether disability is the result of an occupational disease under par. 29 of subd. 2 of this section, or should be classified as a dust disease under par. 28, is to be determined by the nature of the disease, not by its cause, and mere exposure to dust without proof that that caused the disease, or that disability is due to a disease of the pneumoconiosis classification, does not require the board to determine that the disability is due to dust disease. Miller v Colonial Sand & Stone Co., 11 A.D.2d 824, 203 N.Y.S.2d 107, 1960 N.Y. App. Div. LEXIS 8489 (N.Y. App. Div. 3d Dep't 1960).

Although bronchiectasis has sometimes been found to be an occupational disease, a board finding of a definite link between occupation and exposure and aggravation of a pre-existing bronchiectasis is not the equivalent of finding a link between employment and the particular disease and will not suffice to sustain an occupational disease award. Lounsbury v United States Gypsum Co., 21 A.D.2d 957, 251 N.Y.S.2d 226, 1964 N.Y. App. Div. LEXIS 3227 (N.Y. App. Div. 3d Dep't 1964).

The dust diseases mentioned in subdivision 2 paragraph 28 of this section include only those of the pneumoconiosis group, such as silicosis, anthracosis, and siderosis, and where no diagnosis of silicosis or pneumoconiosis could be made, an award was properly made under subdivision 2 paragraph 29. Nick v William J. Meyer Co., 26 A.D.2d 878, 274 N.Y.S.2d 311, 1966 N.Y. App. Div. LEXIS 3210 (N.Y. App. Div. 3d Dep't 1966).

The dust diseases mentioned in ¶ 28 include only those in the pneumoconiosis group such as silicosis, anthracosis and siderosis. Viskovich v Robert A. Keasbey Co., 36 A.D.2d 665, 318 N.Y.S.2d 257, 1971 N.Y. App. Div. LEXIS 4742 (N.Y. App. Div. 3d Dep't), app. denied, 29 N.Y.2d 483, 1971 N.Y. LEXIS 2132 (N.Y. 1971).

Although Workers' Compensation Law does not define "dust disease," term refers to diseases of lungs classified as pneumoconiosis—for example, silicosis, chalicosis, anthracosis, and siderosis. Matott v St. Joe's Lead, 245 A.D.2d 907, 666 N.Y.S.2d 849, 1997 N.Y. App. Div. LEXIS 13622 (N.Y. App. Div. 3d Dep't 1997).

Miner's claim for workers' compensation benefits for partial disability based on occupational lung disease allegedly due to exposure to dust, fumes, and oil did not suffer from "dust disease," for which partial disability was excluded from coverage under CLS Work Comp former § 39, where medical experts who testified for both parties essentially agreed that miner suffered from chronic bronchitis, and expert for employer specifically found no evidence of pneumoconiosis. Matott v St. Joe's Lead, 245 A.D.2d 907, 666 N.Y.S.2d 849, 1997 N.Y. App. Div. LEXIS 13622 (N.Y. App. Div. 3d Dep't 1997).

The court cannot say as a matter of law that pneumoconiosis is a dust disease. Schwartz v Queensboro Farm Products, Inc., 78 N.Y.S.2d 863, 191 Misc. 778, 1948 N.Y. Misc. LEXIS 2337 (N.Y. Sup. Ct. 1948).

Laws 1935 chapter 254 amending this section made silicosis a compensable disease for the first time; the amendment does not bar a right of action which became vested before its effective date. Schwartz v Queensboro Farm Products, Inc., 78 N.Y.S.2d 863, 191 Misc. 778, 1948 N.Y. Misc. LEXIS 2337 (N.Y. Sup. Ct. 1948).

An employee suffering personal injuries caused by harmful dust and vapors in the plant suffers injuries resulting from "occupational disease" as distinguished from accidental injury. Ligiecki v E. I. Dupont De Nemours & Co., 46 F. Supp. 266, 1942 U.S. Dist. LEXIS 2499 (D.N.Y. 1942).

91. Limitation of recovery to cases of total disability

The Workmen's Compensation Law was a complete bar to actions brought by employees wherein they charged their employer with violations of the Labor Law in that no dust removal devices had been supplied, as a result of which they suffered from a condition known as partially disabling silicosis. The legislature acted within its constitutional powers when it restricted Workmen's Compensation benefits to totally disabled silicosis sufferers. Cifolo v General Electric Co., 305 N.Y. 209, 112 N.E.2d 197, 305 N.Y. (N.Y.S.) 209, 1953 N.Y. LEXIS 826 (N.Y.), cert. denied, 346 U.S. 874, 74 S. Ct. 124, 98 L. Ed. 382, 1953 U.S. LEXIS 1577 (U.S. 1953).

Claimant suffered heart attack and, while hospitalized, X-ray revealed presence of pulmonary fibrosis due to silicosis. Board found that silicosis together with underlying cardio vascular condition caused claimant to be totally and permanently disabled. But, under § 39 compensation is not payable for partial disability due to silicosis. So, in view of finding that silicosis was only partially disabling, award for permanent total disability reversed and matter remanded. Iodice v General Abrasive Co., 5 A.D.2d 707, 168 N.Y.S.2d 809, 1957 N.Y. App. Div. LEXIS 3498 (N.Y. App. Div. 3d Dep't 1957).

Compensation is payable for total disability or death resulting from silicosis or other dust diseases (Workmen's Compensation Law, § 3, subd. 2, par. 28) but not for partial disability resulting therefrom (§ 39). However, if the silicosis or other dust disease combined with another condition results in total disability, a total disability award can be made. Piragowski v National Sugar Refining Co., 11 A.D.2d 824, 202 N.Y.S.2d 611, 1960 N.Y. App. Div. LEXIS 8490 (N.Y. App. Div. 3d Dep't 1960).

The provision in par. 28 of subd. 2 of this section that compensation is payable for total disability or death resulting from silicosis or other dust disease will sustain an award if the silicosis contributes to or aggravates another condition and the combination results in total disability, but a silicosis award cannot be sustained where silicosis in no way contributes to the other condition which is partially at least the cause of total disability. Chatman v Acme Steel & Malleable Iron Works, 16 A.D.2d 726, 226 N.Y.S.2d 965, 1962 N.Y. App. Div. LEXIS 10341 (N.Y. App. Div. 3d Dep't 1962).

Where disability is due to silicosis or other dust disease, the employee is entitled to compensation benefits only when the dust disease results in total disability. Rogala v John Deere Plow Co., 31 A.D.2d 867, 297 N.Y.S.2d 877, 1969 N.Y. App. Div. LEXIS 4628 (N.Y. App. Div. 3d Dep't 1969).

To establish right to compensation for occupational disease of silicosis, claimant must establish total disability and silicosis does not have to be sole cause of such disability. Smith v Ingersoll-Rand Co., 50 A.D.2d 988, 376 N.Y.S.2d 262, 1975 N.Y. App. Div. LEXIS 11957 (N.Y. App. Div. 3d Dep't 1975).

92. Conditions caused by exposure to lint or dust from cotton, wool or the like

An asthmatic condition may be occupational in nature when there has been exposure to irritants to which claimant is allergic, and a compensation award was accordingly affirmed upon a showing that claimant had worked for 29 years for the same employer at a type of work which necessitated her coming in contact with wool used in men's clothing, first experienced trouble in her chest from swimming in cold water about two years before her claim for compensation was filed, and, in 1956, was out of work because of an asthmatic condition. Bichowsky v Hickey Freeman Co., 11 A.D.2d 877, 203 N.Y.S.2d 486, 1960 N.Y. App. Div. LEXIS 8409 (N.Y. App. Div. 3d Dep't 1960).

Finding that bronchial condition of rug salesman and handler was caused by exposure to lint and dust was supported by substantial evidence and was sufficient to sustain an award for an

occupational disease. Hayden v M & R Linoleum & Carpet Co., 24 A.D.2d 788, 263 N.Y.S.2d 800, 1965 N.Y. App. Div. LEXIS 3223 (N.Y. App. Div. 3d Dep't 1965), app. denied, 17 N.Y.2d 418, 267 N.Y.S.2d 1027, 1966 N.Y. LEXIS 1700 (N.Y. 1966).

Substantial evidence supported finding of occupational disease, pneumoconiosis derived from 10 years' employment in dusty atmosphere where decedent sorted clippings of silk, wool, and cotton fabrics collected from garment industry, on sharply divided medical testimony. Minutello v M. Storelli & Co., 24 A.D.2d 815, 263 N.Y.S.2d 872, 1965 N.Y. App. Div. LEXIS 3129 (N.Y. App. Div. 3d Dep't 1965), app. denied, 17 N.Y.2d 418, 1966 N.Y. LEXIS 1682 (N.Y. 1966).

Decision of board that occupational disease of byssinosis, which was causally related to claimant's employment as a sewing machine operator, aggravated pre-existing conditions thus rendering claimant totally disabled was substantiated by the evidence. The court pointed out that the record contained only a conflict in medical testimony and the board having chosen between the conflicting opinions, each based on the same facts, would be affirmed in its decision. Grisanti v Rugby Knitting Mills, Inc., 40 A.D.2d 1047, 338 N.Y.S.2d 914, 1972 N.Y. App. Div. LEXIS 3094 (N.Y. App. Div. 3d Dep't 1972).

93. Conditions caused by exposure to flour, yeast and other baking supplies

A baker who becomes disabled as the result of asthma contracted by exposure to lard fumes, flour and other ingredients used in his occupation as a baker suffers an occupational disease. Chalmers v Case, 265 A.D. 897, 37 N.Y.S.2d 858, 1942 N.Y. App. Div. LEXIS 6377 (N.Y. App. Div. 1942).

Where a millwright foreman in a flour mill largely performed his duties in a carpenter shop where he was not especially affected by dust, but at times worked in other portions of the mill where there was exposure to flour dust, coughing up dust and dirt in his saliva, and worked some five months on a construction job in a grain elevator where he was exposed to grain dust, there is a sufficient record on which to find that his disability was an occupational disease resulting from exposure to dust. Eckert v Commander Larabee Mfg. Co., 278 A.D. 623, 101 N.Y.S.2d 860, 1951 N.Y. App. Div. LEXIS 4117 (N.Y. App. Div. 1951).

Claimant, a baker for 42 years, was entitled to compensation for the occupational disease of bronchial asthma, due to exposure to dust, fumes, fire, molds, and yeast. Mayr v Price, 9 A.D.2d 801, 192 N.Y.S.2d 752, 1959 N.Y. App. Div. LEXIS 6140 (N.Y. App. Div. 3d Dep't 1959).

Where a baker was afflicted with asthma prior to employment, contracted emphysema, a lung ailment, in course of his employment, and finally suffered a fatal heart attack, death benefits were payable on the basis of a showing that the cardiac death was influenced by the asthmatic emphysema condition. Wannemacher v Wannemacher Baker, Inc., 9 A.D.2d 835, 192 N.Y.S.2d 696, 1959 N.Y. App. Div. LEXIS 6199 (N.Y. App. Div. 3d Dep't 1959), reh'g denied, 10 A.D.2d 589, 195 N.Y.S.2d 628, 1960 N.Y. App. Div. LEXIS 12357 (N.Y. App. Div. 3d Dep't 1960), app. denied, 7 N.Y.2d 711, 1960 N.Y. LEXIS 1655 (N.Y. 1960).

While the diseases pulmonary fibrosis and emphysema are not, of themselves, occupational diseases related to bakers, baker's asthma is an occupational hazard of the work, and where there is medical testimony sufficient to show that fibrosis and emphysema resulted from such asthma the Board can properly link back an award of death benefits to disablement resulting from exposure to flour dust in the plant of the last employer prior to occurrence of disability. Morrocco v Mohican Stores, Inc., 17 A.D.2d 684, 230 N.Y.S.2d 526, 1962 N.Y. App. Div. LEXIS 8487 (N.Y. App. Div. 3d Dep't 1962), aff'd, 13 N.Y.2d 1015, 245 N.Y.S.2d 595, 195 N.E.2d 306, 1963 N.Y. LEXIS 886 (N.Y. 1963).

An occupational disease award for bronchial asthma and bronchitis suffered by claimant, a pizza chef through exposure to flour, was sustained on the record, notwithstanding claimant's record of a continuous series of new physical conditions for which he had sought and received compensation. Maniscalco v Pizza Chef, Inc., 17 A.D.2d 884, 233 N.Y.S.2d 291, 1962 N.Y. App. Div. LEXIS 7319 (N.Y. App. Div. 3d Dep't 1962).

An occupational disease award for asthma incurred by a baker as the result of exposure to certain things to which he was allergic in course of employment by three successive employers could properly be apportioned among the three employers, being based upon increased sensitivity in each such employment. Erazo v Brandlers Bakery, 22 A.D.2d 718, 253 N.Y.S.2d 186, 1964 N.Y. App. Div. LEXIS 3054 (N.Y. App. Div. 3d Dep't 1964).

Bronchial asthma was an occupational disease of 59-year-old bakery worker who was exposed in his work activities to oil, flour, and dust. Suarez v Zampieri Bros., 42 A.D.2d 1013, 348 N.Y.S.2d 201, 1973 N.Y. App. Div. LEXIS 3408 (N.Y. App. Div. 3d Dep't 1973).

94. Conditions caused by exposure to grain dust

Emphysema, bronchitis and asthma suffered by an electrician in a grain elevator are organic diseases caused by the employee's exposure to grain dust, to which he was allergic, and these diseases are occupational within the meaning of ¶ 28 of this section as distinguished from diseases in the silicosis group. Lawton v Port of New York Authority, 276 A.D. 81, 92 N.Y.S.2d 714, 1949 N.Y. App. Div. LEXIS 3117 (N.Y. App. Div. 1949).

Proof justified finding that a grain elevator houseman and power operator suffered an occupational disease in the form of bronchial asthma from exposure to grain dust. Miller v International Milling Co., 283 A.D. 1123, 131 N.Y.S.2d 584, 1954 N.Y. App. Div. LEXIS 6490 (N.Y. App. Div. 1954).

95. Other dust diseases

Where it appeared that a deceased employee had worked for some 27 years in and about hard coal mines, the evidence was insufficient to sustain a finding that his death, from coal miner's disease, following three months of subsequent employment as fireman at a college, was due to the latter employment. Gorsky v New York, 9 N.Y.2d 739, 214 N.Y.S.2d 350, 174 N.E.2d 333, 1961 N.Y. LEXIS 1466 (N.Y. 1961).

Interstitial fibrosis of the lungs could not be associated with claimant's employment in a plant with a heavy dust environment notwithstanding that other employees developed similar symptons although not similarly diagnosed. Unanimity of medical opinion to the affect that there is not observable or acceptable correlation between exposure to fiberglass dust and interstitial pulmonary fibrosis warranted denial of benefits. Shannon v Grumman Aircraft, 29 N.Y.2d 786, 327 N.Y.S.2d 71, 277 N.E.2d 190, 1971 N.Y. LEXIS 991 (N.Y. 1971).

Claimant had been employed for seven years in handling fluorescent tubes containing beryllium. The work exposed claimant to beryllium dust and she became totally disabled due to pulmonary beryllium granulomatosis. All of the evidence in the record sustains contention and there is no evidence to the contrary, that claimant's disability arose from a dust disease and that employer is entitled to reimbursement for payments made in excess of 260 weeks under paragraph (ee) of subdivision 8 of § 15 of the Workmen's Compensation Law. Rechani v Tube Light Eng. Co., 280 A.D. 1005, 116 N.Y.S.2d 830, 1952 N.Y. App. Div. LEXIS 4550 (N.Y. App. Div. 1952).

Evidence sustained finding by Board that printing pressman suffered a disabling attack of bronchial asthma from exposure to shop dust which caused a temporary aggravation of a pre-existing allergic condition and that the underlying sensitivity of the claimant remained constant and did not require reopening of 6 closed cases involving similar exposure. Laine v Commanday Roth, Inc., 284 A.D. 1070, 135 N.Y.S.2d 879, 1954 N.Y. App. Div. LEXIS 4599 (N.Y. App. Div. 1954).

Supreme Court of New York, Appellate Division, Third Department holds that where there is medical evidence that a workers' compensation claimant's disability is due, at least in part, to the existence of a dust disease, a separate claim is not necessary for a non-dust disease under § 3(2)(30) arising from workplace asbestos exposure, as the dust disease diagnosis will take precedence and the claim should be established under N.Y. Workers' Comp. Law § 3(2)(29); accordingly, the New York Workers' Compensation Board did not err in ruling that the claimant sustained a work-related occupational disease under § 3(2)(29) where he simultaneously suffered from dust disease due to asbestosis and non-dust disease due to asbestos-related pleural disease. Matter

of Fama v P & M Sorbara, 29 A.D.3d 170, 811 N.Y.S.2d 202, 2006 N.Y. App. Div. LEXIS 2902 (N.Y. App. Div. 3d Dep't), app. dismissed, 7 N.Y.3d 783, 820 N.Y.S.2d 544, 853 N.E.2d 1112, 2006 N.Y. LEXIS 1776 (N.Y. 2006).

96. Proof of causation

The mere coincidence of employment in a plant with a heavy dust environment and claimant's developing illness, the "speculative conclusion" by claimant's physician that there was possible causation, and the equivocal fact that other employees developed similar symptoms although not similarly diagnosed, were insufficient to sustain board's conclusion that interstitial fibrosis was causally related to employment. Shannon v Grumman Aircraft, 29 N.Y.2d 786, 327 N.Y.S.2d 71, 277 N.E.2d 190, 1971 N.Y. LEXIS 991 (N.Y. 1971).

An award of compensation for asthma as an occupational disease is proper where seizures took place during work and there is medical opinion that the asthma was due to exposure at work as against a contention by the employer that asthma is not characteristic of the employee's work. Horvath v Wickwire Spencer Steel Co., 275 A.D. 1014, 91 N.Y.S.2d 709, 1949 N.Y. App. Div. LEXIS 5490 (N.Y. App. Div. 1949).

Decedent died from lung cancer. Claimant's medical testimony considered it likely that growth of tumor was accelerated by decedent's exposure to dust in employment. Employer's expert denied causal connection between work and death, as did impartial specialists. Held: Board properly denied death benefits. Yarak v Magnesia Asbestos Insulation Co., 7 A.D.2d 667, 179 N.Y.S.2d 158, 1958 N.Y. App. Div. LEXIS 4312 (N.Y. App. Div. 3d Dep't 1958), app. denied, 8 A.D.2d 664, 185 N.Y.S.2d 760, 1959 N.Y. App. Div. LEXIS 9043 (N.Y. App. Div. 3d Dep't 1959).

Decedent, foreman and helper in employer's plant, developed cough. There was conflicting medical testimony as to whether exposure to dusts in employment aggravated his condition resulting in total disability in 1947 and death in 1952. Held: decision that disability and death were not caused by working conditions affirmed. Young v Onondaga Supply Co., 7 A.D.2d 670, 179 N.Y.S.2d 329, 1958 N.Y. App. Div. LEXIS 4316 (N.Y. App. Div. 3d Dep't 1958).

Where claimant's attending physician, a specialist in internal medicine, testified unequivocally that claimant's emphysema and chronic bronchitis were causally related to his work and were produced by the inhalation of dust and other irritants at work, there was sufficient evidence to support the Workmen's Compensation Board's finding that the nature of the claimant's occupation was such that he was exposed to irritants such as dust and fumes, and because of such exposures in his occupation developed emphysema and chronic bronchitis, occupational diseases within the meaning of subdivision 2 paragraph 29 of this section. Nick v William J. Meyer Co., 26 A.D.2d 878, 274 N.Y.S.2d 311, 1966 N.Y. App. Div. LEXIS 3210 (N.Y. App. Div. 3d Dep't 1966).

Substantial evidence, including testimony of a specialist in chest diseases that there was a causal relationship between the decedent's silicosis condition and his death, was sufficient to support determination of Workmen's Compensation Board that decedent's death was causally related to a compensable occupational disease so as to entitle his widow to an award of death benefits. Ricapito v Haskel, 51 A.D.2d 1069, 380 N.Y.S.2d 803, 1976 N.Y. App. Div. LEXIS 11899 (N.Y. App. Div. 3d Dep't 1976).

97. Proof of silicosis

The evidence was sufficient to sustain a disability award on account of silico-tuberculosis where it showed that claimant was employed as foreman of a machine room where greeting cards were finished, had been so employed for 12 years, and his job involved keeping the machines running and cleaning the dust from them, which included dust and silica from a substance known as "glitter" which was used to decorate the cards. Amato v R. R. Heywood Co., 12 A.D.2d 536, 206 N.Y.S.2d 626, 1960 N.Y. App. Div. LEXIS 7230 (N.Y. App. Div. 3d Dep't 1960).

There was sufficient evidence to sustain an award by the Board for permanent total disability found to be due to silicosis causally related to claimant's last employment where it appeared that for 13 years immediately preceding disablement he was employed as track foreman engaged in laying and maintenance of rails in an underground railroad in the last employer's gypsum mine, there exposed to considerable quantities of silica dust, and there was medical testimony that his disability resulted from a combination of silicosis and emphysema. Groff v National Gypsum Co., 18 A.D.2d 481, 239 N.Y.S.2d 738, 1963 N.Y. App. Div. LEXIS 3802 (N.Y. App. Div. 3d Dep't), app. denied, 13 N.Y.2d 596, 1963 N.Y. LEXIS 1963 (N.Y. 1963).

A permanent and total disability award by reason of silicosis could be made against claimant's last employer notwithstanding a long prior exposure to silica dust, or even the medical presence of silicosis, during employment elsewhere. Filipowicz v De Laval Separator Co., 19 A.D.2d 665, 241 N.Y.S.2d 295, 1963 N.Y. App. Div. LEXIS 3463 (N.Y. App. Div. 3d Dep't 1963).

The Board could properly find that a disability claimant, whose claim was based upon silicosis, was exposed to injurious dust hazard during his last employment giving rise to his disablement in 1958, where he had then been engaged in handling sheet rubber on which powdered talc was used which contained a high percentage of magnesium silicate. Filipowicz v De Laval Separator Co., 19 A.D.2d 665, 241 N.Y.S.2d 295, 1963 N.Y. App. Div. LEXIS 3463 (N.Y. App. Div. 3d Dep't 1963).

There was sufficient medical testimony, although conflicting, to sustain an award for silicosis as an occupational disease, notwithstanding opinions varied as to the precise nature of the disease. Teamer v American Radiator & Standard Sanitary Corp., 20 A.D.2d 739, 247 N.Y.S.2d 66, 1964 N.Y. App. Div. LEXIS 4386 (N.Y. App. Div. 3d Dep't), app. denied, 14 N.Y.2d 484, 1964 N.Y. LEXIS 1717 (N.Y. 1964).

Where it appeared that claimant had worked for 20 years as a bricklayer in repairing and rebuilding of furnaces constructed of refractory bricks conceded to contain siliceous materials, the Board could find that he was subjected to injurious exposure to silica in course of employment causing him to contract silicosis. Schul v National Carbon Div. Union Carbide Co., 20 A.D.2d 936, 249 N.Y.S.2d 281, 1964 N.Y. App. Div. LEXIS 3916 (N.Y. App. Div. 3d Dep't), app. denied, 14 N.Y.2d 489, 1964 N.Y. LEXIS 1910 (N.Y. 1964).

Substantial evidence supported Workmen's Compensation Board's finding that employee was disabled by silicosis on May 25, 1960 despite fact that he returned to work and remained there until November, 1971. Smith v Ingersoll-Rand Co., 50 A.D.2d 988, 376 N.Y.S.2d 262, 1975 N.Y. App. Div. LEXIS 11957 (N.Y. App. Div. 3d Dep't 1975).

98. —Effect of time of exposure

A complaint states a good cause of action for damages suffered from contracting silicosis, as of Aug. 31, 1935, where it is alleged that the last injurious exposure and the last employment forming the basis of plaintiff's claim occurred prior to Sept. 1, 1935, when silicosis first became compensable, and that no claim for damages is made by reason of exposure or injuries suffered subsequent to Aug. 31, 1935. Mnich v American Radiator Co., 263 A.D. 573, 34 N.Y.S.2d 16, 1942 N.Y. App. Div. LEXIS 6948 (N.Y. App. Div.), aff'd, 289 N.Y. 681, 45 N.E.2d 333, 289 N.Y. (N.Y.S.) 681, 1942 N.Y. LEXIS 1257 (N.Y. 1942).

The proof showed that decedent's death occurred within five years following continuous disability from an occupational disease (silicosis) and the award under § 67 of former article 4-A was proper. Tirelli v Contractors for Dry Docks, 280 A.D. 1004, 116 N.Y.S.2d 828, 1952 N.Y. App. Div. LEXIS 4548 (N.Y. App. Div. 1952).

The board has found that disability was not due to exposure or other recent work for the employer, but due to silicosis contracted before the enactment of the statute authorizing payment of compensation for silicosis as an occupational disease. The statute expressly excluded prior exposures from the compensation it afforded. Upon this factual finding, the silicosis which caused the disability of claimant is not compensable as a matter of law. Juniak v General Electric Co., 280 A.D. 1010, 116 N.Y.S.2d 809, 1952 N.Y. App. Div. LEXIS 4560 (N.Y. App. Div. 1952).

A complaint in an action against a foundry by one continuously in its employment from 1919 until his discharge in 1935, grounded on the employer's failure to ventilate the premises properly whereby he contracted silicosis, is not vulnerable to

objection that the cause of action is barred by subdivision 2, group 28, or by art. 4-A. Mutolo v Utica General Jobbing Foundry, 292 N.Y.S. 14, 161 Misc. 327, 1936 N.Y. Misc. LEXIS 1558 (N.Y. Sup. Ct. 1936).

99. Date of disablement

In occupational disease case, Workmen's Compensation Board may properly fix date of disablement at time of need of medical care and before any actual loss of wages. Smith v Ingersoll-Rand Co., 50 A.D.2d 988, 376 N.Y.S.2d 262, 1975 N.Y. App. Div. LEXIS 11957 (N.Y. App. Div. 3d Dep't 1975).

XVIII. Tuberculosis

100. In general

The fact that in certain cases pulmonary tuberculosis has been determined to be an occupational disease resulting from the employment involved, does not obligate the workmen's compensation board to make a similar finding in all cases of pulmonary tuberculosis. McSweeney v Hammerlund Mfg. Co., 275 A.D. 447, 90 N.Y.S.2d 347, 1949 N.Y. App. Div. LEXIS 3793 (N.Y. App. Div.), reh'g denied, 275 A.D. 1005, 91 N.Y.S.2d 520, 1949 N.Y. App. Div. LEXIS 5457 (N.Y. App. Div. 1949).

101. Tuberculosis contracted by health care employees

A finding that an interne suffering from tuberculosis has sustained an occupational disease will be sustained, where the evidence indicates that in the course of his work the interne attended tubercular patients, served on ambulance duty for forty-eight hours without relief, and acted as house surgeon, which involved more work than the general duties of an interne, and which required the interne to be on duty day and night for considerable period. Vanore v Mary Immaculate Hospital, 260 A.D. 820, 22 N.Y.S.2d 350, 1940 N.Y. App. Div. LEXIS 4834 (N.Y. App. Div. 1940), aff'd, 285 N.Y. 631, 33 N.E.2d 556, 285 N.Y. (N.Y.S.) 631, 1941 N.Y. LEXIS 1652 (N.Y. 1941).

A nurse or a student nurse who becomes disabled because of tuberculosis due to the nature of her employment is entitled to compensation. McDonald v New York, 265 A.D. 1026, 39 N.Y.S.2d 2, 1943 N.Y. App. Div. LEXIS 6674 (N.Y. App. Div. 1943).; McDonough v Flushing Hospital & Dispensary, 266 A.D. 937, 43 N.Y.S.2d 889, 1943 N.Y. App. Div. LEXIS 5291 (N.Y. App. Div. 1943).; Bukofsky v Flushing Hospital & Dispensary, 266 A.D. 937, 43 N.Y.S.2d 890, 1943 N.Y. App. Div. LEXIS 5292 (N.Y. App. Div. 1943).; Hill v Samaritan Hospital, 273 A.D. 828, 75 N.Y.S.2d 718, 1948 N.Y. App. Div. LEXIS 4818 (N.Y. App. Div.), modified, 298 N.Y. 182, 81 N.E.2d 79, 298 N.Y. (N.Y.S.) 182, 1948 N.Y. LEXIS 817 (N.Y. 1948).; Kilby v Charles S. Wilson Memorial Hospital, 278 A.D. 273, 104 N.Y.S.2d 410, 1951 N.Y. App. Div. LEXIS 3791 (N.Y. App. Div. 1951).

Tuberculosis contracted by a head nurse in a hospital causally related to her employment is compensable, where the nurse had an unrelated tuberculosis history. Simola v New York, 271 A.D. 942, 67 N.Y.S.2d 113, 1947 N.Y. App. Div. LEXIS 5311 (N.Y. App. Div. 1947).

An award of compensation is proper where the claimant contracted tuberculosis while employed as a nurse in an institution of the employer which was maintained solely for the treatment of tuberculosis patients. Lord v Rocky Crest Sanitorium, 274 A.D. 955, 83 N.Y.S.2d 778, 1948 N.Y. App. Div. LEXIS 4237 (N.Y. App. Div. 1948).

Tuberculosis contracted by a laboratory technician who was exposed in the course of her employment to live tubercle bacilli and sputum specimens containing them, is an occupational disease. Lyden v United Hospital, 275 A.D. 877, 88 N.Y.S.2d 743, 1949 N.Y. App. Div. LEXIS 4859 (N.Y. App. Div. 1949).

Tuberculosis contracted by a hospital worker from a diseased patient or contaminated equipment is a compensable occupational disease. Lachowicz v Albany Medical Center Hospital, 30 A.D.2d 1004, 294 N.Y.S.2d 186, 1968 N.Y. App. Div. LEXIS 3115 (N.Y. App. Div. 3d Dep't 1968).

Evidence that the claimant, a nurse, was actually assigned to the chest clinic where tubercular patients were treated and that on other occasions she was called upon to work in the chest clinic was substantial evidence, according to the court, to support the Board's determination that the claimant contracted tuberculosis as the result of her exposure to tubercular patients in the chest clinic even though there was no evidence that the claimant came in actual close contact with a specific patient who was diagnosed as suffering from tuberculosis. Thus the court held that there was sufficient evidence to support the Workmen's Compensation Board finding that the claimant contracted tuberculosis as an occupational disease while engaged as a nurse at her employer's clinic. Muldavin v Union Health Center, 35 A.D.2d 766, 314 N.Y.S.2d 827, 1970 N.Y. App. Div. LEXIS 3668 (N.Y. App. Div. 3d Dep't 1970).

102. Tuberculosis contracted by contact with infected co-workers

Tuberculosis contracted by a bookkeeper while working alongside a tubercular co-employee who was also a bookkeeper was not an occupational disease within the meaning of this section. Buckley v Gallagher Bros. Sand & Gravel Corp., 300 N.Y. 447, 92 N.E.2d 38, 300 N.Y. (N.Y.S.) 447, 1950 N.Y. LEXIS 847 (N.Y. 1950).. See also Harman v Republic Aviation Corp., 298 N.Y. 285, 82 N.E.2d 785, 298 N.Y. (N.Y.S.) 285, 1948 N.Y. LEXIS 795 (N.Y. 1948).

Contraction of tuberculosis by truck driver from his helper by reason of occupying the cab of the truck with helper over a considerable period of time is not an occupational disease compensable under this section. Paider v Park East Movers, 19 N.Y.2d 373, 280 N.Y.S.2d 140, 227 N.E.2d 40, 1967 N.Y. LEXIS 1585 (N.Y. 1967).

A switchboard operator who suffers pulmonary tuberculosis as the result of using the same mouth piece and other switchboard equipment as was used by a second switchboard operator who was suffering from tuberculosis, suffers an occupational disease. Mason v YWCA of New York City, 271 A.D. 1042, 68 N.Y.S.2d 510, 1947 N.Y. App. Div. LEXIS 5763 (N.Y. App. Div. 1947).

Claimant, employed as laboratory technician and manufacturer of dyes, worked in close contact with technician suffering from active tuberculosis and both used same pipette in testing dye development process. Evidence also that flask containing chemical compound exploded in claimant's face and that resulting fumes would increase chance of infection of tuberculosis. Held: award properly made for occupational disease. Hovancik v General Aniline & Film Corp., Ansco Div., 8 A.D.2d 171, 187 N.Y.S.2d 28, 1959 N.Y. App. Div. LEXIS 8208 (N.Y. App. Div. 3d Dep't 1959).

103. Tuberculosis caused or activated by work conditions

Denial of an award will be reversed, where the claimant, a counterman and a clerk in a wholesale meat market, presented proof that pulmonary tuberculosis was due to the nature of his employment in that from ten to thirty times a day he entered a cold storage room where the meat was kept. Bishop v Comer & Pollock, Inc., 251 A.D. 492, 297 N.Y.S. 946, 1937 N.Y. App. Div. LEXIS 6983 (N.Y. App. Div. 1937).

Tuberculosis suffered by one employed by a cast traffic sign corporation as a molder resulting from exposure to gas and fumes in such employment is an occupational disease within the purview of subdivision 2, group 28 of this section. Huffman v Cast Traffic Sign Corp., 258 A.D. 1013, 16 N.Y.S.2d 949, 1940 N.Y. App. Div. LEXIS 8642 (N.Y. App. Div. 1940).

A truck washer and greaser who worked continually around water in an unheated garage is entitled to compensation, where he became disabled because he suffered from a far-advanced bi-lateral pulmonary tuberculosis, an occupational disease which he contracted due to the nature of his employment. Moore v Colonial Sand & Stone Co., 261 A.D. 857, 24 N.Y.S.2d 751, 1941 N.Y. App. Div. LEXIS 7791 (N.Y. App. Div. 1941).

Where a claimant, who was assigned to the duty of operating a degreasing machine which required him to clean machine parts in a tank containing carbon tetrachloride, had an arrested case of pulmonary tuberculosis when he began his employment, he suffers an occupational disease where his exposure to tetrachloride fumes reactivated his tubercular condition and caused disability. O'Neil v American Locomotive Co., 276 A.D. 1043, 95 N.Y.S.2d 678, 1950 N.Y. App. Div. LEXIS 5659 (N.Y. App. Div. 1950).

Aggravation of a condition not occupational in nature is not an occupational disease. So, an award for claimant (a gas converter)

was dismissed where gas exposure allegedly accelerated tuberculosis. Although claimant's occupation may have aggravated preexisting tubercular condition the claimant did not suffer from an accidental injury and/or occupational disease. Goldberg v Conversions & Surveys, Inc., 6 A.D.2d 563, 180 N.Y.S.2d 358, 1958 N.Y. App. Div. LEXIS 3893 (N.Y. App. Div. 3d Dep't 1958).

Claimant handled boxes of frozen fish requiring him to go in and out of freezers continuously. Board found that claimant sustained accident in the nature of pneumonia, which, together with the effect and nature of his work, resulted in activation of quiescent tuberculosis and that pneumonia and tuberculosis constituted disease. Held: award reversed. Theory of disease induced by accident was negated. Conroy v Rupert Fish Co., 8 A.D.2d 553, 183 N.Y.S.2d 332, 1959 N.Y. App. Div. LEXIS 9633 (N.Y. App. Div. 3d Dep't 1959).

The evidence was sufficient to sustain an award for disability due to tuberculosis of the spine, based on aggravation of a dormant tubercular condition as the result of accidental back injuries, where claimant's doctor testified in detail to existence of tubercle bacilli in the spine which, in his opinion, had been dormant until activated by the trauma of accidental injury, notwithstanding failure of X-ray tests to disclose their presence. Scibetta v Colorado Fuel & Iron Corp., 9 A.D.2d 796, 192 N.Y.S.2d 841, 1959 N.Y. App. Div. LEXIS 6131 (N.Y. App. Div. 3d Dep't 1959).

104. —Work conditions which lead to silicosis or asbestosis

A miner assigned to drilling and blasting duties suffers an occupational disease when he becomes disabled as the result of pulmonary tuberculosis where his employment exposed him to wet and cold conditions, fumes, gases and improper ventilation, even though the disease was imposed upon a silicotic condition of the lungs, which however was not disabling. Webster v St. Joseph Lead Co., 264 A.D. 800, 34 N.Y.S.2d 729, 1942 N.Y. App. Div. LEXIS 4781 (N.Y. App. Div. 1942).

Claimant, asbestos pipe coverer for 25 years, developed symptoms of tuberculosis and thereafter was also found to have asbestosis. Proof was sufficient to sustain an award for total disability because, although proof as to whether asbestosis alone was disabling, was too vague to sustain finding, there was proof that it became so in conjunction with related condition of tuberculosis. Muldoon v Charles S. Woods Co., 8 A.D.2d 888, 186 N.Y.S.2d 907, 1959 N.Y. App. Div. LEXIS 8299 (N.Y. App. Div. 3d Dep't), app. denied, 7 N.Y.2d 706, 1959 N.Y. LEXIS 1868 (N.Y. 1959).

There was sufficient evidence to sustain a compensation award for tuberculosis where, although it appeared that claimant was not exposed to that disease in course of employment, he was exposed to free silica for more than 60 days, which was a contributing factor to his disability under medical opinion that the presence of silicosis unfavorably affects the course of tuberculosis or renders an individual more susceptible to the latter disease. Dozier v Republic Steel Corp., 12 A.D.2d 868, 209 N.Y.S.2d 884, 1961 N.Y. App. Div. LEXIS 13039 (N.Y. App. Div. 3d Dep't), app. denied, 9 N.Y.2d 611 (N.Y. 1961).

Because the Workers' Compensation Board's original finding of "asbestos related disease" was imprecise and inconsistent with the medical evidence, the Board properly determined that an employee, who was exposed to both dust and non-dust asbestos while on the job, was entitled to benefits under N.Y. Workers' Comp. Law § 3(2)(30), and that the Special Funds Conservation Committee had to reimburse the employer under N.Y. Workers' Comp. Law §§ 3(2)(29), 15(8)(ee); separate claims for the diseases were unnecessary. Matter of Dallas v Consol. Edison, 27 A.D.3d 907, 811 N.Y.S.2d 207, 2006 N.Y. App. Div. LEXIS 2900 (N.Y. App. Div. 3d Dep't 2006).

XIX. Other Conditions and Diseases

105. Arthritis

An award of compensation for occupational disease is proper where an employee working as an all around man in a produce market was required to handle fruit and produce which had been iced and frozen and had to enter a refrigerator and otherwise work in cold and wet surroundings as a result of which his hands became wet, cold and frozen and which ultimately caused him to suffer from rheumatoid arthritis. Peloso v D'Alessio Bros., 298 N.Y. 582, 81 N.E.2d 111, 298 N.Y. (N.Y.S.) 582, 1948 N.Y. LEXIS 1160 (N.Y. 1948).

The Workmen's Compensation Board properly based an award upon a finding that claimant suffered from an osteo-arthritis condition of both knees as an occupational disease. Rocha v Otis Elevator Co., 279 A.D. 829, 109 N.Y.S.2d 266, 1952 N.Y. App. Div. LEXIS 4972 (N.Y. App. Div. 1952).

A sewer in a clothing factory who contracted osteoarthritis was not entitled to compensation where the undisputed medical evidence was to the effect that such a disease would not ordinarily be an occupational disease. Schreiber v Grossman & Spiegel, 9 A.D.2d 974, 193 N.Y.S.2d 671, 1959 N.Y. App. Div. LEXIS 5663 (N.Y. App. Div. 3d Dep't 1959).

Finding of Workmen's Compensation Board that rheumatoid arthritis was occupationally caused, attributable to claimant's job, involving the daily winding and cutting of thousands of coils, despite testimony that the exact cause of such disease is unknown. Guardi v General Electric Co., 30 A.D.2d 738, 291 N.Y.S.2d 457, 1968 N.Y. App. Div. LEXIS 3589 (N.Y. App. Div. 3d Dep't), app. denied, 22 N.Y.2d 644, 1968 N.Y. LEXIS 2068 (N.Y. 1968).

106. Back, disc and spine disorders

A claimant with a congenital defect of his spine did not sustain a compensable occupational disease where the nature of the work in which he was engaged was not such as to produce disabilities among the rank and file of men. Detenbeck v General Motors Corp., 309 N.Y. 558, 132 N.E.2d 840, 309 N.Y. (N.Y.S.) 558, 1956 N.Y. LEXIS 1053 (N.Y. 1956).

Where a plumber was originally injured in 1936 while carrying a bath tub, suffering a displaced intervertical disc, and some nine years later while doing other heavy work, the employee brought about symptoms of the displaced disc which had been caused by the original accident, the second injury is an occupational disease. Paradiso v Vuozzo, 277 A.D. 802, 96 N.Y.S.2d 796, 1950 N.Y. App. Div. LEXIS 3375 (N.Y. App. Div. 1950).

A claim based on traumatic conversion hysteria was sustained on proof that carpenter in 1947 while carrying a keg of nails fell and tore a muscle in his back and sustained other injuries although there was other evidence that plaintiff was consciously malingering. Cioffi v William Crow Constr. Co., 284 A.D. 1076, 136 N.Y.S.2d 20, 1954 N.Y. App. Div. LEXIS 4610 (N.Y. App. Div. 1954).

There was sufficient evidence to sustain a finding that a herniated cervical disc was an occupational disease where it appeared that claimant was of short stature, had worked for two years as an X-ray file clerk which required her to lift and file various objects involving twisting of her body and reaching and stretching, had suffered no previous back trouble, but on a certain date felt a sharp pain in her neck which necessitated stopping work about two weeks thereafter, following which her condition was diagnosed as a herniated cervical disc. Mullarkey v New York Hospital, 13 A.D.2d 584, 211 N.Y.S.2d 748, 1961 N.Y. App. Div. LEXIS 12246 (N.Y. App. Div. 3d Dep't 1961), aff'd, 11 N.Y.2d 898, 228 N.Y.S.2d 238, 182 N.E.2d 618, 1962 N.Y. LEXIS 1210 (N.Y. 1962).

A herniated disc is an occupational disease within the meaning of subd 2(29) of the above statute. Ross v Kollsman Instrument Corp., 24 A.D.2d 670, 261 N.Y.S.2d 186, 1965 N.Y. App. Div. LEXIS 3668 (N.Y. App. Div. 3d Dep't), app. denied, 16 N.Y.2d 485, 1965 N.Y. LEXIS 2151 (N.Y. 1965).

A domestic worker's claim that a tubercular back condition was aggravated in two compensable accidents and that she had a continuing causally related disability was supportable through testimony of attending physician, consultant and impartial specialist. Gordon v Gluckson, 34 A.D.2d 1070, 312 N.Y.S.2d 268, 1970 N.Y. App. Div. LEXIS 4246 (N.Y. App. Div. 3d Dep't 1970).

107. Cassion disease

Claimant, a "sand hog," was entitled to compensation for caisson disease, on the strength of his physician's testimony that he had contracted that disease and failure of a physician employed by the employer to state, unequivocally, that he did not,

notwithstanding a report filed by the latter, who did not testify, stating that the weight of evidence would be in favor of an idiopathic lesion. Daniels v Mason, Johnson & MacLean, 9 A.D.2d 812, 192 N.Y.S.2d 654, 1959 N.Y. App. Div. LEXIS 6159 (N.Y. App. Div. 3d Dep't 1959).

Where the diagnosis resulting in discovery that claimant had caisson disease was not made until approximately 20 years after his last contact with compressed air, during which period he had been gainfully employed at other work which did not bring him in contact with compressed air, and finally attained age 70, started to draw social security benefits, and retired entirely from work, his condition is not compensable in the absence of proof that his physical condition resulting from the disease was responsible for his ceasing work. Meyers v Walsh Constr. Co., 12 A.D.2d 371, 211 N.Y.S.2d 590, 1961 N.Y. App. Div. LEXIS 12275 (N.Y. App. Div. 3d Dep't 1961).

With respect to a claim for disability due to aseptic necrosis, resulting from caisson disease, there being ample evidence to establish that claimant's bone damage was the cumulative effect of a series of exposures while working for different employers for different periods of time, an application by the last employer to have the award apportioned back against prior employers in proportion to the amount of time claimant was exposed in each employment, was properly granted. Doherty v Grow Constr. Co., 14 A.D.2d 957, 221 N.Y.S.2d 9, 1961 N.Y. App. Div. LEXIS 7901 (N.Y. App. Div. 3d Dep't 1961).

The evidence was considered insufficient to show causal relationship between caisson disease diagnosed in a taxi driver in March, 1959, where he had last worked under compressed air October 1, 1956, and theretofore for a period of from December, 1954, to the latter date without any evidence of disability, and had only once before worked under compressed air for only a six-months' period in 1946. Green v S. A. Healy Co., 15 A.D.2d 704, 223 N.Y.S.2d 724, 1962 N.Y. App. Div. LEXIS 12026 (N.Y. App. Div. 3d Dep't 1962).

108. Depuytren's contracture

Dupuytren's contracture of the hand is an occupational disease. Jodlowski v Empire Milk Trucking Corp., 261 A.D. 1030, 26 N.Y.S.2d 69, 1941 N.Y. App. Div. LEXIS 8601 (N.Y. App. Div. 1941).

A finding that Dupuytren's contracture is an occupational disease where suffered by a chef is proper, where the medical testimony clearly created a question of fact that while all chefs are not susceptible to the disease, the nature of the occupation will produce the disability in a person who has the latent tendency. Stahl v Walton Delicatessen Restaurant, 276 A.D. 1044, 95 N.Y.S.2d 621, 1950 N.Y. App. Div. LEXIS 5660 (N.Y. App. Div. 1950).

Compensation was properly denied to a claimant who had contracted Dupuytren's disease while in the employ of a brewery. Claimant first noticed physical symptoms of the disease during his employment but continued to work until the brewery closed. Later he sought but did not obtain other employment. He did not receive medical treatment until over one year after the brewery had closed and then he filed a claim for compensation. The award was properly reversed and the claim remitted for further proof. Curran v Metropolis Brewing, 282 A.D. 1078, 126 N.Y.S.2d 592, 1953 N.Y. App. Div. LEXIS 5865 (N.Y. App. Div. 1953).

Board properly disregarded equivocal aspects of testimony and accepted doctor's report in which he found disability in both hands, Dupuytren's contracture, due to claimant's occupation. Since claimant had been continuously employed by same employer during entire period, 12-month limitation provided in § 40 was inapplicable. McKiernan v Schaefer Brewery Co., 5 A.D.2d 900, 170 N.Y.S.2d 937, 171 N.Y.S.2d 129, 1958 N.Y. App. Div. LEXIS 6711 (N.Y. App. Div. 3d Dep't 1958).

During 26-year period of employment for employer or its predecessors, claimant was required to exert pressure on palms of hands while manipulating iron bars and sledge hammers and to open and close valves by hand. There was substantial evidence establishing that Dupuytren's contracture, occupational disease, of both hands was caused and aggravated by nature of employment. Award affirmed. Carson v New York City Transit Authority, 7 A.D.2d 667, 179 N.Y.S.2d 305, 1958 N.Y. App. Div. LEXIS 4311 (N.Y. App. Div. 3d Dep't 1958).

Claimant, electrician, was required to use pressure on his hands. He became disabled from Dupuytren's contracture, which was properly found to be occupational disease. Predisposing tendency of claimant to disease would not prevent award. Nardo v Rheinstein Constr. Co., 7 A.D.2d 689, 179 N.Y.S.2d 396, 1958 N.Y. App. Div. LEXIS 4345 (N.Y. App. Div. 3d Dep't 1958), app. denied, 5 N.Y.2d 709, 1959 N.Y. LEXIS 1973 (N.Y. 1959).

An award for the occupational disease of Dupuytren's contracture properly affirmed where the link between the disease and the claimant's occupation was repeated trauma to the hands. The Board could properly determine that the disease was occupational in nature. Sheehy v Doyle, 8 A.D.2d 267, 187 N.Y.S.2d 584, 1959 N.Y. App. Div. LEXIS 8006 (N.Y. App. Div. 3d Dep't), app. denied, 7 N.Y.2d 706, 1959 N.Y. LEXIS 1874 (N.Y. 1959).

During period of employment before disablement, plaintiff lifted heavy sections of railroad tracks, used drills and worked as a rigger handling iron rails and rope guide lines. Board properly resolved conflicting medical theories in favor of claimant determined that he was suffering from Dupuytren's contracture which was occupational in nature. Divers v Mason, Johnson & MacLean, 8 A.D.2d 923, 187 N.Y.S.2d 22, 1959 N.Y. App. Div. LEXIS 8029 (N.Y. App. Div. 3d Dep't 1959).

Decision and award for disability due to Dupuytren's contracture found to be occupational disease caused by claimant's work as porter in lifting and carrying pails and other heavy objects and in working with brooms and mops, whereby constant pressure was applied to palms of hands, affirmed. Rogan v Charles F. Noyes, Inc., 10 A.D.2d 765, 197 N.Y.S.2d 758, 1960 N.Y. App. Div. LEXIS 11211 (N.Y. App. Div. 3d Dep't), app. denied, 8 N.Y.2d 705, 1960 N.Y. LEXIS 1760 (N.Y. 1960).

The evidence was sufficient to sustain a partial disability award by reason of occupational disease due to suffering "Dupuytren's contracture" of both hands following employment by the same employer for a period of 12 years at duties involving the heavy use of hands, where claimant first noticed difficulty in use of his hands in 1948, though he continued working until August 6, 1951, when he was discharged for other reasons. White v Iroquois Gas Corp., 11 A.D.2d 572, 200 N.Y.S.2d 497, 1960 N.Y. App. Div. LEXIS 9921 (N.Y. App. Div. 3d Dep't 1960), aff'd, 10 N.Y.2d 869, 223 N.Y.S.2d 501, 179 N.E.2d 506, 1961 N.Y. LEXIS 1000 (N.Y. 1961).

Obviously, not all cases involving Dupuytren's contracture are necessarily compensable, and the fact that claimant's activities involved use of his hands is not controlling, it being the function of the Board, in each case, to determine whether causal relationship has been established on the basis of evidence presented. Hickey v Ardale Bldg. Corp., 15 A.D.2d 837, 224 N.Y.S.2d 939, 1962 N.Y. App. Div. LEXIS 11403 (N.Y. App. Div. 3d Dep't 1962).

An accidental injury claim, based upon disability due to Dupuytren's contracture, could properly be allowed on conflicting medical proof where there was substantial evidence that a single trauma, due to piercing of the hand by a nail some 11 months earlier, produced the disabling condition. Reardon v Jarcho Bros., 22 A.D.2d 838, 253 N.Y.S.2d 783, 1964 N.Y. App. Div. LEXIS 2787 (N.Y. App. Div. 3d Dep't 1964), app. denied, 15 N.Y.2d 483, 1965 N.Y. LEXIS 1779 (N.Y. 1965).

109. Eye disorders

Workers' Compensation Board had proper legal basis to deny claim of psychiatric social worker who suffered aggravation of preexisting eye disorder as result of exposure to cigarette smoking while working in poorly ventilated room, since claimant's injury was caused solely by environmental conditions of her work place, not by any distinctive feature of occupation of psychiatric social worker. Mack v County of Rockland, 71 N.Y.2d 1008, 530 N.Y.S.2d 98, 525 N.E.2d 744, 1988 N.Y. LEXIS 714 (N.Y. 1988).

An operator of motion picture machines whose duties involved the adjustment and repair of carbon arcs and carbons of lamps and who suffered cataracts of both eyes due to the intense glare of arc lights to which he was subjected by his work suffers an occupational disease under this section. Eckstein v Loew's, Inc., 268 A.D. 1073, 52 N.Y.S.2d 500, 1945 N.Y. App. Div. LEXIS 5547

(N.Y. App. Div. 1945), aff'd, 295 N.Y. 672, 65 N.E.2d 325, 295 N.Y. (N.Y.S.) 672, 1946 N.Y. LEXIS 873 (N.Y. 1946).

There was substantial evidence to sustain a finding that bilateral cataracts which developed on the eyes of a ceramic engineer during 14 years exposure to infra-red radiation from furnaces and kilns constituted a compensable occupational disease. Rogers v Scintilla Div., 15 A.D.2d 698, 223 N.Y.S.2d 588, 1962 N.Y. App. Div. LEXIS 12018 (N.Y. App. Div. 3d Dep't 1962).

110. Foot disorders

The rubbing of the claimant's shoe on his foot, involving continuous friction, is not an industrial process and his disability therefor is not the result of an occupational disease within the purview of subdiv. 2 of this section. Nielsen v Fireman's Fund Indem. Co., 239 A.D. 239, 268 N.Y.S. 189, 1933 N.Y. App. Div. LEXIS 8009 (N.Y. App. Div. 1933).

Where claimant was employed as a dancing instructress and developed a callous formation by the continuous friction of her shoe against the heel of the left foot, and an ulcer formed beneath the callous, and a staphylococcus albus infection followed, causing disability, such disability resulted from the nature of claimant's employment. Hussey v Murray, 261 A.D. 1025, 25 N.Y.S.2d 852, 1941 N.Y. App. Div. LEXIS 8590 (N.Y. App. Div. 1941).

Compensation claimant with pre-existing susceptibility to "flat feet" required in the course of his employment to push a hand truck carrying 50 gallon barrels of paste across a concrete floor suffered an occupational disease where the condition of his feet were aggravated by the nature of the work. Townsend v Union Bag & Paper Co., 282 A.D. 968, 125 N.Y.S.2d 360, 1953 N.Y. App. Div. LEXIS 5594 (N.Y. App. Div. 1953), aff'd, 307 N.Y. 710, 121 N.E.2d 537, 307 N.Y. (N.Y.S.) 710, 1954 N.Y. LEXIS 1451 (N.Y. 1954).

Claimant suffered from condition diagnosed as traumatized plantar wart with ulceration, complicated by obesity, diabetes, mellitus, diabetic arteriosclerosis and endarteritis. His claim proceeded on theory that walking required of him in employer's retail furniture store was contributing factor to an aggravation of condition. Held: on evidence, board was warranted in finding that claimant did not sustain accident and did not occur an occupational disease. Rotenberg v Diamond Bedding & Upholstering Co., 5 A.D.2d 709, 168 N.Y.S.2d 654, 1957 N.Y. App. Div. LEXIS 3501 (N.Y. App. Div. 3d Dep't 1957).

111. Hernia

A hernia, caused by a constant twisting and straining of the body of a workman in the course of his employment, is an occupational disease within the meaning of subd. 2 of this section, and an award for disability caused thereby is proper. Foster v Gillinder Bros., Inc., 278 N.Y. 348, 16 N.E.2d 360, 278 N.Y. (N.Y.S.) 348, 1938 N.Y. LEXIS 1307 (N.Y. 1938).

Disablement is cessation of work due to occupational disease and is controlling as to commencement of compensation. Although claimant was found to be suffering from left inguinal hernia in June, 1953, he returned to work and was not totally disabled until December, 1954. Board properly found claimant suffered occupational disease and established date of disablement as December, 1954. Failure to pay compensation until January, 1955 was error and should be corrected. Miner v Duchess Fabrics, Inc., 8 A.D.2d 549, 183 N.Y.S.2d 383, 1959 N.Y. App. Div. LEXIS 9628 (N.Y. App. Div. 3d Dep't 1959).

Where there was medical testimony that a rupture sustained by claimant could be considered as of a slowly developing nature and caused by his work, and no direct testimony as to date of commencement of the initial rupture, the Board could determine that the hernia was occupationally caused rather than accidentally caused, imposing liability on the insurance carrier who had the risk in 1958 rather than one which assumed the risk in 1969. Makowski v Darling & Co., 18 A.D.2d 1120, 239 N.Y.S.2d 9, 1963 N.Y. App. Div. LEXIS 4024 (N.Y. App. Div. 3d Dep't), app. denied, 13 N.Y.2d 594, 1963 N.Y. LEXIS 1899 (N.Y. 1963).

112. Radiation related disorders

Where death of a theoretical physicist was attributed to acute myeloblastic leukemia allegedly brought on by exposure to radiation in about one year's work for the employer, testimony of a single expert witness was insufficient to sustain an award of benefits, where the hypothetical question put to the expert assumed a much higher degree at time of exposure to radiation than the established facts warranted. Besner v Walter Kidde Nuclear Lab, 18 A.D.2d 952, 237 N.Y.S.2d 585, 1963 N.Y. App. Div. LEXIS 4444 (N.Y. App. Div. 3d Dep't 1963).

An award of death benefits from acute myeloblastic leukemia was proper in view of decedent's good health prior to his employment, where the record disclosed that decedent was exposed to radiation for a substantial part of two periods and the testimony of medical experts was to the effect that there was no "safe" dosage of radiation because each individual reacts differently to exposure. Besner v Walter Kidde Nuclear Laboratory, 24 A.D.2d 1045, 265 N.Y.S.2d 312, 1965 N.Y. App. Div. LEXIS 2769 (N.Y. App. Div. 3d Dep't 1965).

Death benefits were properly awarded to claimant whose husband employed for over 12 years as a microwave transmission unit repairman and who died after a prolonged period of progressive physical and mental deterioration that commenced during his employment, allegedly caused by "chronic brain syndrome" of unknown etiology, notwithstanding the testimony of defendant's experts that decedent's death was due to a pre-existing condition and conflicting evidence as to whether decedent was exposed to unsafe levels of radiation, where there was substantial evidence to establish the necessary causal relationship between decedent's exposure to microwave radiation, the development of his occupational disease, and his ultimate death to support the board's decision. Yannon v New York Tel. Co., 86 A.D.2d 241, 450 N.Y.S.2d 893, 1982 N.Y. App. Div. LEXIS 15394 (N.Y. App. Div. 3d Dep't), app. denied, 57 N.Y.2d 726, 454 N.Y.S.2d 712, 440 N.E.2d 797, 1982 N.Y. LEXIS 3652 (N.Y. 1982), app. denied, 57 N.Y.2d 605, 1982 N.Y. LEXIS 7152 (N.Y. 1982).

113. Varicose veins

An auto parts manager and gasoline station attendant, who developed varicosities of both lower extremities due to being on his feet the entire day with the exception of one hour, suffers an occupational disease due to the nature of his employment. Vines v Lazar Motors, Inc., 277 A.D. 1083, 100 N.Y.S.2d 735, 1950 N.Y. App. Div. LEXIS 4549 (N.Y. App. Div. 1950).

Claimant worked as waiter in club 9 hours or more daily for 25 years. Held: Board properly made award for varicose veins in leg as occupational disease. Wildermuth v B. P. O. Elks Club, 5 A.D.2d 911, 170 N.Y.S.2d 874, 1958 N.Y. App. Div. LEXIS 6732 (N.Y. App. Div. 3d Dep't), app. denied, 4 N.Y.2d 677, 174 N.Y.S.2d 1025, 1958 N.Y. LEXIS 1440 (N.Y. 1958).

Claimant had varicose veins in leg. Held: It was properly found that he did not suffer from occupational disease as his disability was caused by aggravation of condition not occupational in nature. Nussbaum v Mercury Messenger Corp., 7 A.D.2d 673, 179 N.Y.S.2d 282, 1958 N.Y. App. Div. LEXIS 4320 (N.Y. App. Div. 3d Dep't 1958).

Varicose veins can constitute an occupational disease where medical proof sufficiently associates the occurrence of the disease with the work. Elkin v D. & J. Cleaners, Inc., 14 A.D.2d 402, 221 N.Y.S.2d 153, 1961 N.Y. App. Div. LEXIS 7695 (N.Y. App. Div. 3d Dep't 1961), app. dismissed, 11 N.Y.2d 885, 227 N.Y.S.2d 922, 182 N.E.2d 410, 1962 N.Y. LEXIS 1284 (N.Y. 1962).

Where it appeared, in connection with a claim for disability due to varicose veins, that claimant, employed as a presser, had no symptoms of varicose veins before starting on his job, which required him to be on his feet ten hours a day for six days a week, first noticed pain and discomfort in his legs and feet four years later the cause of which was then first diagnosed as varicose veins, and had to quit work because of the pain about three years later, it was error for the Board to reject the claim on the broad ground that varicose veins were not an occupational disease and the claim was remanded for further findings of fact on relationship, if any, between the employment and claimant's disease. Elkin v D. & J. Cleaners, Inc., 14 A.D.2d 402, 221 N.Y.S.2d 153, 1961 N.Y. App. Div. LEXIS 7695 (N.Y. App. Div. 3d Dep't 1961), app. dismissed, 11 N.Y.2d 885, 227 N.Y.S.2d 922, 182 N.E.2d 410, 1962 N.Y. LEXIS 1284 (N.Y. 1962).

114. Disorders caused by cold or wet working conditions

Where a fireman was drenched by water from a defective nozzle on a fire hose while attending a fire and thereby caught pneumo-

nia, and died from heart failure, a claim on this ground is properly dismissed because death resulted from a disease which was not occupational. Doulin v Saratoga Springs, 261 N.Y. 558, 185 N.E. 737, 261 N.Y. (N.Y.S.) 558, 1933 N.Y. LEXIS 1372 (N.Y. 1933).

Department store cashier who received a cold draft on her right side from the air conditioning which caused a chronic strain or myositis involving the muscles of the right posterior neck and right shoulder girdle did not suffer a compensable occupational disease within this statute. Paider v Park East Movers, 19 N.Y.2d 373, 280 N.Y.S.2d 140, 227 N.E.2d 40, 1967 N.Y. LEXIS 1585 (N.Y. 1967).

A butcher, whose work required him to enter a refrigerator from time to time, and who as a result contracts labor pneumonia suffers a disability due to an occupational disease or an accidental injury within the meaning of the workmen's compensation law. Waxman v Paget, 264 A.D. 967, 37 N.Y.S.2d 169, 1942 N.Y. App. Div. LEXIS 5572 (N.Y. App. Div. 1942).. See also Wolfe v Brohman, 260 A.D. 816, 22 N.Y.S.2d 403, 1940 N.Y. App. Div. LEXIS 4823 (N.Y. App. Div. 1940), aff'd, 285 N.Y. 635, 33 N.E.2d 557, 285 N.Y. (N.Y.S.) 635, 1941 N.Y. LEXIS 1655 (N.Y. 1941).

A finding of occupational disease is proper where an employee becomes afflicted with articular rheumatism after being exposed to cold and dampness and varying temperature conditions over a period of many years. Erb v Sheffield Farms Co., 272 A.D. 1082, 74 N.Y.S.2d 555, 1947 N.Y. App. Div. LEXIS 5029 (N.Y. App. Div. 1947).

A claim for occupational neuritis of the left brachial plexis allegedly suffered by an employee in a spring manufacturing plant whose work was to take castings from a conveyer when they had been passed through a tank of water to cool them off after furnace treatment and pile the castings on a truck, must be disallowed where there is no proof of the extent and frequency of the wettings sustained by the claimant nor of the area of the body affected and there was an absence of clear proof that the claimant actually was suffering from the disease. Mohammed v Spring Perch Co., 277 A.D. 1067, 100 N.Y.S.2d 700, 1950 N.Y. App. Div. LEXIS 4515 (N.Y. App. Div. 1950).

There was sufficient evidence to sustain a disability award by the Board due to upper respiratory disease resulting from claimant's exposure to cold in the course of 15 years' employment as a butcher, disablement having come on gradually during the last two or three years of his employment during which he began to work some hours daily in the icebox. Roettinger v Great Atlantic & Pacific Tea Co., 17 A.D.2d 76, 230 N.Y.S.2d 903, 1962 N.Y. App. Div. LEXIS 8466 (N.Y. App. Div. 3d Dep't 1962), aff'd, 13 N.Y.2d 1102, 246 N.Y.S.2d 633, 196 N.E.2d 268, 1963 N.Y. LEXIS 838 (N.Y. 1963).

Whether a disease is to be considered occupational under the general provisions of subd 2(29) of this statute depends on whether there is proof of a disability brought on by a distinctive feature of the claimant's job, common to all jobs of that sort. Under this rule Raynaud's disease is occupational as tending to affect persons handling cold liquids. Fact that a disease apparently affects only persons with a predisposition toward it, does not prevent it from being occupational. Benware v Leo F. Benware Creamery, 22 A.D.2d 968, 254 N.Y.S.2d 466, 1964 N.Y. App. Div. LEXIS 2586 (N.Y. App. Div. 3d Dep't 1964), aff'd, 16 N.Y.2d 966, 265 N.Y.S.2d 284, 212 N.E.2d 771, 1965 N.Y. LEXIS 1044 (N.Y. 1965).

115. Miscellaneous disorders

An inspector of surveying instruments who suffers thrombophlebitis as the result of jumping down from a raised platform on which the inspector's desk was temporarily located for a period of four to six weeks, does not suffer an occupational disease within the meaning of this section. Champion v W. & L. E. Gurley, 299 N.Y. 406, 87 N.E.2d 430, 299 N.Y. (N.Y.S.) 406, 1949 N.Y. LEXIS 950 (N.Y. 1949).

The appearance of degeneration of the nerve endings in both ears betrays an occupational disease. Bonner v Patrick McGovern, Inc., 230 A.D. 530, 247 N.Y.S. 23, 1930 N.Y. App. Div. LEXIS 8664 (N.Y. App. Div. 1930).

An award of compensation is proper where an employee working as a furrier and a fur plucker became disabled from the disease known as bronchiectasis. Pinto v Competent Fur Dressers, Inc., 271 A.D. 1036, 68 N.Y.S.2d 366, 1947 N.Y. App. Div. LEXIS 5733 (N.Y. App. Div. 1947), aff'd, 297 N.Y. 846, 78 N.E.2d 864, 297 N.Y. (N.Y.S.) 846, 1948 N.Y. LEXIS 949 (N.Y. 1948).

A typist, who developed ganglia on the dorsum of both hands due to the continuous application of hand pressure on typing and adding machines which she operated suffers an occupational disease. Macyseaki v Carocelem Leasing Corp., 272 A.D. 853, 70 N.Y.S.2d 385, 1947 N.Y. App. Div. LEXIS 3907 (N.Y. App. Div. 1947).

There is evidence sufficient to sustain an award based upon an occupational disease, where the employee was found to have suffered spasmodic functional torticollis after having been employed as a book binder working on folding machines which required him to turn his head to the right continuously while in the act of loading the machine and immediately before becoming disabled, the employee was put to work on a single machine in connection with a very fast job which required him to increase the number of movements with his head in performing his work. Newirth v La Pidus Printing & Lithographing Co., 273 A.D. 835, 76 N.Y.S.2d 45, 1948 N.Y. App. Div. LEXIS 4844 (N.Y. App. Div. 1948).

An vacuum cleaner repairman who contracted bronchial asthma in the course of his employment suffers an occupational disease. Sturesky v Straussman, 273 A.D. 1036, 78 N.Y.S.2d 633, 1948 N.Y. App. Div. LEXIS 5858 (N.Y. App. Div. 1948).

Claim based on a paralytic disease contracted only from inhaling or direct contact with the dried urine of mice was not sustained by proof that grocery stock clerk and packer had seen mice in the place of his employment and medical proof showed that it was impossible to determine where the disease was acquired. Durlacher v Great Atlantic & Pacific Tea Co., 284 A.D. 818, 132 N.Y.S.2d 181, 1954 N.Y. App. Div. LEXIS 3555 (N.Y. App. Div. 1954), aff'd, 308 N.Y. 924, 127 N.E.2d 81, 308 N.Y. (N.Y.S.) 924, 1955 N.Y. LEXIS 1162 (N.Y. 1955).

Tenosynovitis of the biceps muscle of the upper right arm may properly be considered a condition which would be commonly regarded as natural to, inhering in, an incident and concomitant of the work of an assembler of window adjustors whose work consisted of lifting and moving boxes of window parts, reaching for other parts, and inserting them in a vise, and using a hammer and drill. Briggs v Hope's Windows, Inc., 284 A.D. 1077, 136 N.Y.S.2d 41, 1954 N.Y. App. Div. LEXIS 4612 (N.Y. App. Div. 1954).

A claimant with Kienbock's disease, a rather rare ailment of bone necrosis, sustained a compensable occupational disease where he sustained minimal trauma in his daily work in a steel manufacturing plant. Preusser v Allegheny Ludlum Steel Corp., 4 A.D.2d 727, 163 N.Y.S.2d 524, 1957 N.Y. App. Div. LEXIS 5140 (N.Y. App. Div. 3d Dep't 1957), aff'd, 4 N.Y.2d 773, 172 N.Y.S.2d 823, 149 N.E.2d 339, 1958 N.Y. LEXIS 1195 (N.Y. 1958).

An award to a taxicab driver who had synovitis of the knee on the basis that such condition was an occupational disease was not supported by substantial evidence. Caporrimo v Wags Transp. System, Inc., 4 A.D.2d 972, 167 N.Y.S.2d 867, 1957 N.Y. App. Div. LEXIS 3909 (N.Y. App. Div. 3d Dep't 1957).

In 1949 claimant became disabled as a result of paresthesia caused by constant use of screwdrivers and scissors, which affected the fingers and thumb of her right hand. In 1950 it was determined that she had completely recovered from said disease. In 1954 claimant stopped work because of an alleged hand condition. Held: the medical testimony established that the 1954 condition was not occupational in nature. Claim dismissed. McWilliams v Eastman Kodak Co., 9 A.D.2d 588, 189 N.Y.S.2d 427, 1959 N.Y. App. Div. LEXIS 7452 (N.Y. App. Div. 3d Dep't 1959).

Where claimant, a bacteriologist, allegedly contracted a rare skin disease called "pemphigus" allegedly from working on rabbit urine, but the medical testimony was to the effect the cause of that disease was unknown but not attributable to rabbit urine, an award of compensation for occupational disease was remanded for further investigation. Mills v New York, 22 A.D.2d 731, 253

N.Y.S.2d 236, 1964 N.Y. App. Div. LEXIS 2997 (N.Y. App. Div. 3d Dep't 1964).

There was no substantial evidence to support determination that claimant's activities constituted "strenuous" work, involving, from a standpoint of the average man, activities sufficiently arduous to entail greater exertion that ordinary wear and tear of life as claimant routinely stopped at patients' homes to obtain blood samples before proceeding to the laboratory, which is not necessarily strenuous or tense work. McLoughlin v New Rochelle Hospital, 34 A.D.2d 1064, 312 N.Y.S.2d 572, 1970 N.Y. App. Div. LEXIS 4236 (N.Y. App. Div. 3d Dep't 1970).

Workmen's Compensation Board could find that phlebitis was occupational disease, as against contention that phlebitis as a matter of law could not constitute an occupational disease. Weber v Carhart Photo, Inc., 46 A.D.2d 964, 362 N.Y.S.2d 62, 1974 N.Y. App. Div. LEXIS 3313 (N.Y. App. Div. 3d Dep't 1974), app. denied, 36 N.Y.2d 643, 1975 N.Y. LEXIS 2498 (N.Y. 1975).

A firefighter's anxiety neurosis, that he believed he was a perfectionist who could not "roll with the punches," he felt that some of his fellow fire fighters were laughing at him because he was such a conscientious worker, and, most significant, he felt he was blamed for the death of an occupant of a burning house even though he was without fault, was an occupational disease under Work Comp Law § 3(2) but, if related to his occupation in general terms, the disorder might be accidental as defined in Work Comp Law § 2(7) and Work Comp Law § 10. Hennige v Fairview Fire Dist., 99 A.D.2d 158, 472 N.Y.S.2d 204, 1984 N.Y. App. Div. LEXIS 16534 (N.Y. App. Div. 3d Dep't 1984).

Determination of Workers' Compensation Board awarding benefits was supported by substantial evidence where (1) claimant was animal research technician involved in experiments to determine carcinogenic properties of various toxic chemicals, which involved injecting or painting substances on mice and monitoring for growth of tumors, as well as feeding mice and cleaning their cages, (2) claimant was diagnosed with viral meningeal encephalitis and infectious lymphocytosis, and (3) claimant's physician testified that viral meningeal encephalitis is carried by rats and mice and that claimant contracted it by exposure to mice and their droppings, even though employer's expert and board's impartial specialist testified that they knew of no support for associating infectious mononucleosis or encephalitis viruses with exposure to mice. Brush v New York University Medical Center, 144 A.D.2d 142, 534 N.Y.S.2d 470, 1988 N.Y. App. Div. LEXIS 10147 (N.Y. App. Div. 3d Dep't 1988).

Finding of Workers' Compensation Board that claimant suffered from chronic obstructive and restrictive bronchopulmonary disease which was compensable under CLS Work Comp § 3(2)(30), for which Special Disability Fund was not liable, rather than silicosis or other dust disease compensable under CLS Work Comp § 3(2)(29), for which Fund would have been liable, was supported by (1) claimant's hospital discharge summary which clearly stated chronic obstructive bronchopulmonary disease as final diagnosis, (2) testimony of claimant's physician that he suffered from status asthmaticus with underlying chronic obstructive bronchopulmonary disease, and (3) testimony of employer's consultant that claimant suffered from chronic obstructive pulmonary disease rather than silicosis, asbestosis, or any other form of pneumoconiosis. Lalla v Astoria Air Conditioning, 156 A.D.2d 808, 549 N.Y.S.2d 228, 1989 N.Y. App. Div. LEXIS 15495 (N.Y. App. Div. 3d Dep't 1989).

Evidence did not sustain determination that contraction of AIDS was "occupational disease" within meaning of Workers' Compensation Law insofar as nurse's aide was concerned, as exposure to HIV via objects contaminated with blood or blood products is not generally recognized risk of such occupation, and claimant's assertion that urine was transmitting agent for HIV, which board accepted, lacked scientific support. Artiste v Kingsbrook Jewish Medical Ctr., 221 A.D.2d 81, 645 N.Y.S.2d 593, 1996 N.Y. App. Div. LEXIS 7813 (N.Y. App. Div. 3d Dep't 1996).

Workers' Compensation Board properly determined that claimant's pancreatitis arose out of and in course of his employment as technical specialist in laser control room where (1) process performed in his workplace, whereby material was removed from metal specimens, created noxious dust, vapors and fumes that were not adequately removed from air, (2) claimant was 40-year-old who had been in excellent health with no known risk factors except exposure to dust and vapors at work, and (3) record was devoid of any other explanation for his illness. Castiglione v Mechanical Tech., 227 A.D.2d 865, 643 N.Y.S.2d 236, 1996 N.Y. App. Div. LEXIS 5775 (N.Y. App. Div. 3d Dep't 1996).

Agency Opinions

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I. Generally

1. Hazardous employment, generally

The Work. Comp. Law, as applicable to the state, and its political subdivisions, comprehended only those hazardous employments classified in former § 2. 1914 N.Y. Op. Att'y Gen. No. 191.

II. Operation Of Vehicles

2. In general

In all instances where a truck or fleet of trucks are hired from individuals by the state, the owner should be required to furnish workmen's compensation insurance that will fully protect his employees while engaged in work for the state. 1934 N.Y. Op. Att'y Gen. No. 248.

3. Particular activities as vehicle operation

A "jockey" may be within the category of "driver" so as to require the employer to provide compensation coverage for him. 1936 N.Y. Op. Att'y Gen. No. 216.

III. Manufacture And Handling Of Foods

4. Other particular activities

Persons engaged in the business of selling soft drinks, ice cream, etc., are not pursuing a hazardous employment within the

meaning of the Work. Comp. Law, and need not carry workmen's compensation insurance. 1922 N.Y. Op. Att'y Gen. No. 148.

IV. State Employees

5. In general

Employees of the state who are included within any of the hazardous groups specified in the Work. Comp. Law, or upon whose wages a premium is paid to the state insurance fund, are entitled to compensation or death benefits from the state insurance fund in case of injury. 1923 N.Y. Op. Att'y Gen. No. 294.

Employees of the New York State Commission on the World's Fair are state employees within the meaning of this section and are entitled to protection under the Compensation Law. 1964 NY Ops Atty Gen Aug 28.

6. Firefighters

It is the duty of the superintendent of a state institution to require its employees to train in the use of fire fighting equipment for the purpose of protecting the inmates and buildings of the institution; an employee injured while so training is entitled to workmen's compensation benefits. 1944 NY Ops Atty Gen Sept 18.

Employees in the fire department of institutions under the jurisdiction of the Department of Correction who are directed to fight fires off the institution's premises pursuant to a mutual assistance agreement with a city, town or village made under the Correction Law are entitled to benefits under the Workmen's Compensation Law when injured in the course of fire duty. 1947 NY Ops Atty Gen April 21.

Paid or volunteer firemen are state employees while serving as instructors at county fire training schools and are subject to the Workmen's Compensation Law while engaged in the performance of such duties. 1949 NY Ops Atty Gen March 7.

7. State police, state militia and the like

Members of the state police are covered by the provisions of the Work. Comp. Law. 1935 N.Y. Op. Att'y Gen. No. 189.

8. Employees of state boards, commissions, authorities and the like

Employees of the law revision commission are automatically insured hereunder. 1935 N.Y. Op. Att'y Gen. No. 439.

The provisions of the Work. Comp. Law cover all employees in the division of placement and unemployment insurance of the New York state department of labor; every type of employment in the division is covered and the provisions of the Work. Comp. Law are compulsory in regard to such employees. 1938 N.Y. Op. Att'y Gen. No. 266.

Students engaged without compensation by the state division of housing to conduct a defense survey become state employees under Workmen's Compensation Law if they are subject to the direction and control of officers and if they receive any benefit from such employment in the nature of board or lodging paid for by the state. 1941 NY Ops Atty Gen Aug 22.

Employees of the New York State Bridge Authority on the Newburgh-Beacon Ferry are employees of the Authority and not of the State for purposes of coverage under the Workmen's Compensation Law. 1957 NY Ops Atty Gen Aug 20.

9. Employees paid by or connected with municipal bodies

Where a project adviser, a clerk and an auditor for projects are named and assigned to a project by the commissioner and subject to his directions, they are state employees, despite their salaries being payable by the city housing authority pursuant to a loan contract, but for purposes of workmen's compensation alone they are regarded as employees of the authority. 1941 NY Ops Atty Gen Mar 29.

V. Municipal Employees

10. In general

The Work. Comp. Law as amended by L 1916 c 622, was applicable to the employees of a state or municipal corporation or other subdivision thereof wherever such employees are engaged in any of the hazardous employments classified in former § 2. 1916 N.Y. Op. Att'y Gen. No. 234.

11. Members of fire and police forces

12. —Relationship with other compensation provisions

A police officer who is out of work as the result of injury or illness incurred in the line of duty, and who is receiving his full salary during such period of disability, is not entitled to overtime compensation where such officer is subpoenaed to appear in court to testify as a police officer. 1977 Op St Compt File #330.

City policemen and firemen are not covered by the Work. Comp. Law. 1936 N.Y. Op. Att'y Gen. No. 172.

Emergency services duly authorized and performed by volunteer firemen in emergency situations occasioned by the recent hurricanes are covered by the Workmen's Compensation Law. 1955 NY Ops Atty Gen Sept 9.

Special police appointed by a village board may be covered by workmen's compensation. 1962 NY Ops Atty Gen Aug 28.

A municipality is not mandated by law to carry workmen's compensation coverage for employees who are policemen or firemen but can elect to do so voluntarily. 1976 NY Ops Atty Gen March 5 (informal).

Discussion of appointment of paid and volunteer special policemen in a village on a one-day basis and Workers' Compensation coverage for such individuals. 1978 Op St Compt File #1055.

13. Home relief recipients assigned to work for municipality

Persons receiving home relief who are assigned to perform work for a municipality, pursuant to Social Services Law, § 164(2), are employees of that municipality and, therefore, are to workers compensation benefits. Re-affirmation of Opns St Comp, 1951, No. 5019 reported at 7 Opns St Comp, 1951, p 33. 1980 Op St Compt File #256.

14. Other employees

The members of an independent non-profit community ambulance corp, not affiliated with a volunteer fire department, are engaged in voluntary service not under contract of hire and accordingly are not within the coverage of the Workmen's Compensation Law. 1961 NY Ops Atty Gen May 19.

Whether personnel associated with a small watershed protection district should be within the coverage of the Workmen's Compensation Law rests with the administrative unit of the county in which the district is organized 1962 NY Ops Atty Gen June 1.

A dog control officer may be eligible for membership in the New York State Retirement System and for Worker's Compensation and Disability benefits. 1979 Op St Compt No. 79–685.

VI. Teachers and Educational Institutions

15. In general

The Work. Comp. Law applies to colleges not under state authority and direction. 1928 N.Y. Op. Att'y Gen. No. 215.

The amendment to former gr. 18 made by L 1928 c 755 does not affect teachers in public schools conducted by municipalities. 1928 N.Y. Op. Att'y Gen. No. 196.

VII. Business Employing Four Or More Operatives Or Workmen

16. Particular employees as workmen or operatives

Sales people and messengers are not considered workmen or operatives and their employment does not constitute a hazard within the meaning of the workmen's compensation law. 1922 N.Y. Op. Att'y Gen. No. 148.

VIII. Miscellaneous Occupations

17. Other occupations

Employees of the Chautauqua institution were not included within the provisions of former § 2, group 43, nor former § 3, subd. 5. 1921 N.Y. Op. Att'y Gen. No. 86.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 2, 15, 38, 39, 47, 54, 63.

Definitions; generally § 2.

Liability for compensation, § 10.

Revenues or benefits from other sources not to affect compensation, § 30.

Occupational diseases, §§ 37 et seq.

Municipal methods of insuring, § 50, sub 4.

Security for payment of compensation § 50.

Acceptance of premium by carrier an estoppel, § 55.

Ccounty self-insurance plan, §§ 60–71.
Workmen's Compensation Act for civil defense volunteers, §§ 300 et seq.
Death or disability benefits, CLS Correc § 472.
Fire training and mutual aid programs, CLS County § 225-a.
Deputies, CLS County § 401.
Adjournment in contemplation of dismissal, CLS CPL § 170.55.
Adjournment in contemplation of dismissal in cases involving marihuana, CLS CPL § 170.56.
Fire inspections, CLS Educ § 807-a.
College fire inspections, CLS Educ § 807-b.
Newspaper carrier, CLS Educ § 3228.
Disability benefits, CLS Exec § 227.
Workmen's compensation insurance on public works, CLS Gen Mun § 108.
Personnel of the office, CLS Men Hyg § 7.19.
Conditions of probation and of conditional discharge, CLS Penal § 65.10.
Definition of voluntary ambulance service, CLS Pub Health § 3001.
Definition of social services official, CLS Soc Serv § 2.
Payment of both pensions for accident and other benefits prohibited, CLS Retire & SS §§ 64, 364.
Quarter horse racing and breeding, Racing & Wagering §§ 401 et seq.
Regional off-track betting corporations, Racing & Wagering §§ 501 et seq.
State defense emergency act, CLS Unconsol ch 131.

Federal Aspects:
Compensation for work injuries. 5 USCS §§ 8101 et seq.
Death benefits under federal workers' compensation law. 5 USCS § 8133.

Jurisprudences:
26 NY Jur 2d Counties, Towns, and Municipal Corporations § 901.
27 NY Jur 2d Counties, Towns, and Municipal Corporations §§ 1147, 1364.
109 NY Jur 2d Workers' Compensation §§ 4, 61, 75, 77, 90, 193, 194, 198, 200, 207, 225, 230, 233, 234, 236, 237, 241, 256, 265–279, 282–300.
110 NY Jur 2d Workers' Compensation §§ 342, 360–363, 386, 392, 469, 470, 497, 503, 505, 506, 509, 510, 512, 516, 521, 568.
111 NY Jur 2d Workers' Compensation §§ 911, 919, 936, 971, 999, 1043.

Appleman on Insurance:
New Appleman New York Insurance Law § 25.02.

Annotations:
Constitutional or statutory provision referring to "employees" as including public officers. 5 ALR2d 415.
Cancer as compensable under workers' compensation acts. 19 ALR4th 639.
Workers' compensation: value of home services provided by victim's relative. 65 ALR4th 142.
Liability of building owner, lessee, or manager for injury or death resulting from use of automatic passenger elevator. 99 ALR5th 141.
Validity, construction, and application of statutory provisions exempting or otherwise restricting farm and agricultural workers from worker's compensation coverage. 40 ALR6th 99.
Right to compensation under state workers' compensation statute for injuries sustained during or as result of horseplay, joking, fooling, or the like. 41 ALR6th 207.
Injury to employee as arising out of or in course of employment for purposes of state workers' compensation statute–effect of employer-provided living quarters, room and board, or the like. 42 ALR6th 61.
"Maritime employment" coverage under Longshoremen's and Harbor Workers' Compensation Act. 41 ALR Fed 685.

Matthew Bender's New York Practice Guides: 1 New York Practice Guide: Business and Commercial § 4.11; 4 New York Practice Guide: Business and Commercial §§ 25A.02—25A.04.

ARTICLE 2 Compensation

Section
10. Liability for compensation
25-a. Procedure and payment of compensation in certain claims; limitation of right to compensation

HISTORY:
Add, L 1913, ch 816; amd, L 1922, ch 615.

§ 10. Liability for compensation

1. Every employer subject to this chapter shall in accordance with this chapter, except as otherwise provided in section twenty-five-a hereof, secure compensation to his employees and pay or provide compensation for their disability or death from injury arising out of and in the course of the employment without regard to fault as a cause of the injury, except that there shall be no liability for compensation under this chapter when the injury has been solely occasioned by intoxication from alcohol or a controlled substance of the injured employee while on duty; or by wilful intention of the injured employee to bring about the injury or death of himself or another; or where the injury was sustained in or caused by voluntary participation in an off-duty athletic activity not constituting part of the employee's work related duties unless the employer (a) requires the employee to participate in such activity, (b) compensates the employee for participating in such activity or (c) otherwise sponsors the activity.

2. Notwithstanding any other provisions of this chapter, an injury incurred by an individual currently employed as an emergency medical technician or an advanced emergency medical technician who is certified pursuant to section three thousand two of the public health law, while voluntarily and without expectation of monetary compensation rendering medical assistance at the scene of an accident shall be deemed to have arisen out of and in the course of the employment with that emergency medical technician or advanced emergency medical technician's current employer.

3.

(a) Notwithstanding any other provisions of this chapter, where a public safety worker, including but not limited to a firefighter, emergency medical technician, police officer, correction officer, civilian employee of the department of corrections and community supervision or other person employed by the state to work within a correctional facility maintained by the department of corrections and community supervision, driver and medical observer, in the course of performing his or her duties, is exposed to the blood or other bodily fluids of another individual or individuals, the executive officer of the appropriate ambulance, fire or police district may authorize such public safety worker to obtain the care and treatment, including diagnosis, recommended medi-

cine and other medical care needed to ascertain whether such individual was exposed to or contracted any communicable disease and such care and treatment shall be the responsibility of the insurance carrier of the appropriate ambulance, fire or police district or, if a public safety worker was not so exposed in the course of performing his or her duties for such a district, then such person shall be covered for the treatment provided for in this subdivision by the carrier of his or her employer when such person is acting in the scope of his or her employment. For the purpose of this subdivision, the term "public safety worker" shall include persons who act for payment or who act as volunteers in an organized group such as a rescue squad, police department, correctional facility, ambulance corps, fire department, or fire company.

(b) Where a police officer or firefighter subject to section thirty of this article, or emergency medical technician, paramedic, or other person certified to provide medical care in emergencies, or emergency dispatcher files a claim for mental injury premised upon extraordinary work-related stress incurred in a work-related emergency, the board may not disallow the claim, upon a factual finding that the stress was not greater than that which usually occurs in the normal work environment.

4. Any person incarcerated upon conviction of a felony shall be deemed ineligible for all benefits provided under this chapter. All those whose benefits have ceased by operation of this section, may apply to the board for benefits upon their release from custody pursuant to regulation of the board.

HISTORY:

Add, L 1913, ch 816; amd, L 1914, ch 41, § 1; L 1922, ch 615; L 1933, ch 384, § 1, eff April 24, 1933; L 1934, ch 769, § 1, eff May 21, 1934; L 1941, ch 444; L 1947, ch 794, § 6; L 1952, ch 387; L 1956, ch 699, § 14, eff March 1, 1957; L 1983, ch 415, § 10, eff July 1, 1983; L 1985, ch 872, § 1, eff Aug 2, 1985; L 1990, ch 924, § 1–a, eff July 31, 1990; L 2000, ch 559, § 1, eff Nov 1, 2000; L 2001, ch 251, § 1, eff Sept 5, 2001, deemed eff on and after Nov 1, 2000; L 2001, ch 572, § 1, eff Dec 19, 2001; L 2002, ch 244, § 6, eff July 30, 2002; L 2007, ch 6, § 37, eff March 13, 2007; L 2011, ch 62, § 173 (Part C, Subpart B), eff March 31, 2011; L 2017, ch 59, § 1 (Part NNN, Subpart I), effective April 10, 2017.

Amendment Notes: 2011. Chapter 62, § 173 (Part C, Subpart B) amended:

Sub 3 by deleting at fig 1 "correctional services" and adding the matter in italics.

The 2017 amendment by ch 59, § 1 (Part NNN, Subpart I), added the 3(a) designation; and added 3(b).

Notes to Decisions

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10. —Duration of employment; travel time
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I. In General

1. In general

In light of its beneficial and remedial character, Workmen's Compensation Law should be construed liberally in favor of employee. Wolfe v Sibley, Lindsay & Curr Co., 36 N.Y.2d 505, 369 N.Y.S.2d 637, 330 N.E.2d 603, 1975 N.Y. LEXIS 1847 (N.Y. 1975).

Workmen's compensation, as distinguished from tort liability which is essentially based on fault, is designed to shift risk of loss of earning capacity caused by industrial accidents from worker to industry and ultimately to consumer. Wolfe v Sibley, Lindsay & Curr Co., 36 N.Y.2d 505, 369 N.Y.S.2d 637, 330 N.E.2d 603, 1975 N.Y. LEXIS 1847 (N.Y. 1975).

The liability of the employer is purely statutory and does not rise out of an employer employee relationship; it is neither ex contractu nor ex delicto. Schmidt v Wolf Contracting Co., 269 A.D. 201, 55 N.Y.S.2d 162, 1945 N.Y. App. Div. LEXIS 2952 (N.Y. App. Div. 1945), aff'd, 295 N.Y. 748, 65 N.E.2d 568, 295 N.Y. (N.Y.S.) 748, 1946 N.Y. LEXIS 928 (N.Y. 1946).

In a proceeding in which the referee was informed that a personal injury action had been brought by the claimant against his coemployees in connection with the accident and in which the referee determined that claimant was in the course of his employment when injured (which determination was affirmed by the board notwithstanding claimant's request that the board delay determination until the court case was decided) the board did not act arbitrarily in determining that a causal relationship existed since it cannot be arbitrary for the board to deny the request to withhold determination pending the outcome of a civil action based on the facts presented herein, in that the question of whether claimant was in the course of his employment when injured must be decided in the first instance by the board, and not the court before which the third-party action is pending. Young v Western Electric Co., 85 A.D.2d 823, 445 N.Y.S.2d 645, 1981 N.Y. App. Div. LEXIS 16643 (N.Y. App. Div. 3d Dep't 1981).

Negligence action to recover for personal injuries was barred by exclusivity provisions of CLS Work Comp §§ 10, 11 and 29(6) since plaintiff had accepted workers' compensation benefits and could not thereafter collaterally attack award in action at law and assert that accident did not occur in course of her employment. French v Shaft, 154 A.D.2d 336, 545 N.Y.S.2d 814, 1989 N.Y. App. Div. LEXIS 12253 (N.Y. App. Div. 2d Dep't 1989).

Workers' compensation board properly denied a worker's claim for workers' compensation benefits under N.Y. Workers' Comp. Law § 10; testimony by officials of the worker's employer established that an interview concerning an affirmative action claim made against the worker's finance and co-worker, which caused the worker's break down, was not a compensable accident. Ortiz v Five Points Corr. Facility, 307 A.D.2d 634, 762 N.Y.S.2d 535, 2003 N.Y. App. Div. LEXIS 8310 (N.Y. App. Div. 3d Dep't 2003).

Workers' Compensation Board decision holding that an employer's application of N.Y. Workers' Comp. Law § 56, regarding general contractor liability, was barred by the doctrine of laches was upheld on appeal as the employer waited nearly seven years in the claimant's case to raise § 56 and the general contractor's insurer was significantly prejudiced by the delay as it was not able to participate in two prior hearings and lost a potential intoxication defense relative to the claimant and work-related injury. Matter of Finchum v Colaiacomo, 55 A.D.3d 1084, 869 N.Y.S.2d 619, 2008 N.Y. App. Div. LEXIS 7870 (N.Y. App. Div. 3d Dep't 2008).

The cause of action created by the Work. Comp. Law is separate and distinct from the right of action given to an executor or administrator. Travelers Ins. Co. v Staten I. R. T. R. Co., 234 N.Y.S. 293, 134 Misc. 6, 1929 N.Y. Misc. LEXIS 770 (N.Y. Mun. Ct. 1929).

Employees' claims for negligent hiring and negligent infliction of emotional distress are barred by exclusivity provision of CLS Work Comp Law §§ 10 and 11. Chrzanowski v Lichtman, 884 F. Supp. 751, 1995 U.S. Dist. LEXIS 5286 (W.D.N.Y. 1995).

Procedure for giving notice of injury and filing claims discussed. 1954 Ops St Compt File #6624.

2. Relationship with other sections

In determining the intention of the legislature in enacting § 21 and this section, it must constantly be borne in mind that they affect and characterize all other provisions of the act. Post v Burger & Gohlke, 216 N.Y. 544, 111 N.E. 351, 216 N.Y. (N.Y.S.) 544, 1916 N.Y. LEXIS 1521 (N.Y. 1916).

This section and §§ 11 and 53 make an employer primarily liable to an employee for payments of compensation. In re Consolidated Indem. & Ins. Co., 282 N.Y. 546, 24 N.E.2d 979, 282 N.Y. (N.Y.S.) 546, 1939 N.Y. LEXIS 1648 (N.Y. 1939).

This section is not limited by the provision of former § 3. sub 7 defining the term "injury" which merely made certain that conditions consequent upon a disease following an accidental injury shall be regarded as themselves consequence of such injury. Weber v George Haiss Mfg. Co., 191 A.D. 12, 181 N.Y.S. 140, 1920 N.Y. App. Div. LEXIS 4648 (N.Y. App. Div.), aff'd, 229 N.Y. 525, 129 N.E. 900, 229 N.Y. (N.Y.S.) 525, 1920 N.Y. LEXIS 722 (N.Y. 1920).

This section and §§ 56 and 11 must be read in pari materia. Sweezey v Arc Electrical Const. Co., 266 A.D. 623, 44 N.Y.S.2d 478, 1943 N.Y. App. Div. LEXIS 3635 (N.Y. App. Div. 1943), rev'd, 295 N.Y. 306, 67 N.E.2d 369, 295 N.Y. (N.Y.S.) 306, 1946 N.Y. LEXIS 835 (N.Y. 1946).

Although they made a sufficient showing of a reasonable excuse for failing to oppose a dismissal motion based upon the law office failure of their counsel, the school district employees failed to make the requisite showing of merit required to vacate a default entered against them under N.Y. C.P.L.R. 5015(a)(1) as they were employees of a school district, which barred their causes of action under N.Y. Workers' Comp. Law §§ 10 and 11. Faga v Harrison Cent. School Dist., 40 A.D.3d 690, 835 N.Y.S.2d 686, 2007 N.Y. App. Div. LEXIS 5939 (N.Y. App. Div. 2d Dep't 2007).

3. Course of employment; generally

While workmen's compensation is not confined by common-law conceptions of scope of employment, more must be shown to warrant award than injury or death and the relationship of employer and employee. Glickman v Greater New York Taxpayers, 305 N.Y. 431, 113 N.E.2d 548, 305 N.Y. (N.Y.S.) 431, 1953 N.Y. LEXIS 802 (N.Y. 1953).

In order for injury to be compensable under Workmen's Compensation Law, injury must be one "arising out of" employment or, in other words, it must be a natural incident to the work or one of the risks connected with the employment, flowing thereform as a natural consequence and directly connected with the work, and, in addition, injury must also arise "in the course of the employment," which means that injury must have been received while the employee was doing the work for which he was employed. Malacarne v Yonkers Parking Authority, 41 N.Y.2d 189, 391 N.Y.S.2d 402, 359 N.E.2d 992, 1976 N.Y. LEXIS 3220 (N.Y. 1976).

A myocardial infarction sustained by a 59-year-old painter with a history of preexisting heart disease was properly held to have been accidentally caused by and to have arisen out of the course of his employment, where the opinion expressed by the insurance carrier's medical expert to the effect that the claimant's work played no part in the acute infarction presented no more than the usual conflict of medical opinion, and the board's crediting the testimony given by the claimant's doctor was sufficient to supply the necessary basis for its decision. Bartolotta v Metz, 96 A.D.2d 636, 464 N.Y.S.2d 861, 1983 N.Y. App. Div. LEXIS 19189 (N.Y. App. Div. 3d Dep't 1983).

In a workers' compensation proceeding brought by a part-time employee of a used car dealer who was injured while driving a car allegedly owned by the dealer, the Workers' Compensation Board's conclusion that claimant's accident did not arise out of or in the course of his employment had a rational basis, notwithstanding claimant's contention that a prior finding in an arbitration proceeding under the no-fault provisions of the Insurance Law that the vehicle was owned by the dealer at the time of the accident precluded the board from passing on the question of ownership of the vehicle, since once the board rejected claimant's testimony that he was driving the vehicle in order to sell it for his employer, which was the only basis for claimant's assertion that the accident arose out of and in the course of his employment, the question of who owned the vehicle became irrelevant. Meier v Haviland Motors, Inc., 105 A.D.2d 529, 481 N.Y.S.2d 477, 1984 N.Y. App. Div. LEXIS 20559 (N.Y. App. Div. 3d Dep't 1984), app. denied, 64 N.Y.2d 610, 1985 N.Y. LEXIS 18620 (N.Y. 1985).

For purposes of CLS Workers' Compensation Law § 10, course of employment includes reasonable amount of time for employee to leave his or her place of employment after ceasing actual work. Thompson v New York Tel. Co., 114 A.D.2d 639, 494 N.Y.S.2d 475, 1985 N.Y. App. Div. LEXIS 53324 (N.Y. App. Div. 3d Dep't 1985).

Claimant was properly awarded workers' compensation benefits after she was assaulted by another employee and sustained injury while taking authorized break at work since assault involved comments claimant had allegedly made about another employee, and claimant did not have any association with assailant or other employee outside her employment. Baker v Hudson Valley Nursing Home, 233 A.D.2d 608, 649 N.Y.S.2d 105, 1996 N.Y. App. Div. LEXIS 11470 (N.Y. App. Div. 3d Dep't 1996), app. denied, 89 N.Y.2d 813, 659 N.Y.S.2d 854, 681 N.E.2d 1301, 1997 N.Y. LEXIS 771 (N.Y. 1997).

Workers' Compensation Board properly ruled that claimant did not sustain causally related disability, despite his contention that he was injured as a result of fall at work, where he had requested reimbursement from Crime Victims Board for treatment of his injuries, his physician had noted in claimant's medical history that claimant had been injured when he was assaulted and "struck with a bat in the knee," and claimant did not mention his injuries to his employer or co-workers at time they were allegedly sustained and did not request his employer to prepare accident report. Hildenbrandt v Transportation Mfg. Co., 244 A.D.2d 658, 664 N.Y.S.2d 174, 1997 N.Y. App. Div. LEXIS 11485 (N.Y. App. Div. 3d Dep't 1997).

In action for personal injuries sustained in fall on property owned by defendant and leased to plaintiff's employer, who moved for dismissal, under CLS CPLR § 3211(a)(7), of defendant's third-party complaint, which alleged causes of action for indemnification/contribution and breach of lease provision requiring employer to procure liability insurance naming owner as addi-

tional insured, even if motion were treated as one for summary judgment, it would have to be denied where there was no evidence that plaintiff's injuries arose "out of and in course of [her] employment" under CLS Work Comp § 10(1) or that defendant was being defended and indemnified by insurer that issued policy naming defendant as additional insured. Wilt v Brunswick Plaza L.L.C., 281 A.D.2d 840, 722 N.Y.S.2d 610, 2001 N.Y. App. Div. LEXIS 2995 (N.Y. App. Div. 3d Dep't 2001).

Employee's injury was not per se noncompensable where it occurred while the employee was traveling to an appointment on a route he alleged he consistently used to get from his home to appointments in order to avoid traffic. Chadha v J.B. Lippincott Co., 300 A.D.2d 923, 753 N.Y.S.2d 177, 2002 N.Y. App. Div. LEXIS 12694 (N.Y. App. Div. 3d Dep't 2002).

After the employee suffered a compensable knee injury when a physician assessing her ability to perform job-related duties following back surgery struck her knee with a reflex hammer and caused serious injury, the employee was not entitled to workers' compensation benefits for knee replacement since expert testimony indicated that the employee's need for a knee replacement was the result of progressive osteoarthritis, a condition that would not have resulted from reflex testing with a rubber mallet. Howard v N.Y. Times, 302 A.D.2d 698, 754 N.Y.S.2d 754, 2003 N.Y. App. Div. LEXIS 1257 (N.Y. App. Div. 3d Dep't), app. denied, 100 N.Y.2d 531, 761 N.Y.S.2d 592, 791 N.E.2d 957, 2003 N.Y. LEXIS 996 (N.Y. 2003).

Workers' compensation board properly determined that a worker sustained a compensable injury pursuant to N.Y. Workers' Comp. Law §§ 2(7) and 10, and awarded workers' compensation benefits; the worker was injured near his office in the World Trade Center during the September 11, 2001 terrorist attack, and the worker was in a "gray area" where the risks of travel to work merged with the risks of employment. Tompkins v Morgan Stanley Dean Witter, 1 A.D.3d 695, 766 N.Y.S.2d 923, 2003 N.Y. App. Div. LEXIS 11603 (N.Y. App. Div. 3d Dep't 2003).

Workers' compensation death benefits claimant was not entitled to rely on the presumption of compensability under N.Y. Workers' Comp. Law § 21(1) because her decedent's death was not unexplained or unwitnessed, in that an individual saw the decedent collapse to the ground, the death certificate listed the cause of death as arteriosclerotic heart disease, an autopsy also revealed that the decedent died of heart disease, and the independent report of a heart disease expert opined that the decedent's death was not work related and was likely caused by severe coronary atherosclerosis. Thus, the Workers' Compensation Board's denial of the underlying claim in the absence of any prima facie proof that the decedent's death arose out of and in the course of employment, as required by N.Y. Workers' Comp. Law §§ 2(7) and 10(1), was supported by substantial evidence. Matter of Crapo v City of Buffalo, 24 A.D.3d 838, 805 N.Y.S.2d 180, 2005 N.Y. App. Div. LEXIS 13555 (N.Y. App. Div. 3d Dep't 2005).

The failure of plaintiff's former employer, a medical clinic, to diagnose plaintiff's lung cancer from X-rays taken during routine medical examinations conducted by the clinic as part of plaintiff's employment, which failure to act allegedly aggravated plaintiff's condition, caused an "accidental injury" arising solely from the employment relationship, for which the Workers' Compensation Law provided the exclusive remedy. Le Savoy v Harnes, 127 Misc. 2d 9, 484 N.Y.S.2d 988, 1984 N.Y. Misc. LEXIS 3720 (N.Y. Sup. Ct. 1984).

4. —Construction

Although the Workmen's Compensation Law, under § 21, is to be construed liberally, an injury to be compensable must nevertheless arise not only "in the course of" but also "out of" the employment, under section 10 of such law. Ognibene v Rochester Mfg. Co., 298 N.Y. 85, 80 N.E.2d 749, 298 N.Y. (N.Y.S.) 85, 1948 N.Y. LEXIS 804 (N.Y. 1948).. See also Moore v Lehigh V. R. Co., 169 A.D. 177, 154 N.Y.S. 620, 1915 N.Y. App. Div. LEXIS 9050 (N.Y. App. Div. 1915), aff'd, 217 N.Y. 627, 111 N.E. 1092, 217 N.Y. (N.Y.S.) 627, 1916 N.Y. LEXIS 1381 (N.Y. 1916).

The words "arising out of and in the course of the employment" should be given a broad and liberal interpretation. McGrinder v Sullivan, 264 A.D. 640, 37 N.Y.S.2d 1, 1942 N.Y. App. Div. LEXIS 4223 (N.Y. App. Div. 1942), rev'd, 290 N.Y. 11, 47 N.E.2d 421, 290 N.Y. (N.Y.S.) 11, 1943 N.Y. LEXIS 1131 (N.Y. 1943).

5. —Presumption

If court found that death of parking lot employee arose in the course of his employment, it would be presumed that it also arose out of the employment. Malacarne v Yonkers Parking Authority, 41 N.Y.2d 189, 391 N.Y.S.2d 402, 359 N.E.2d 992, 1976 N.Y. LEXIS 3220 (N.Y. 1976).

Rational basis existed for conclusion of Workers' Compensation Board that decedent's death arose out of and in course of his employment, given presumption under CLS Work Comp § 21(1) that unwitnessed accidents occurring during hours of employment are presumed to arise in course of employment absent substantial evidence to contrary, and evidence that decedent was found at 7:30 a.m. inside running car in his employer's locked garage, that he sometimes opened garage at 7:00 a.m., and that he had left work at 5:00 p.m. on preceding day. Hayes v Harris, 227 A.D.2d 864, 642 N.Y.S.2d 384, 1996 N.Y. App. Div. LEXIS 5270 (N.Y. App. Div. 3d Dep't), app. denied, 88 N.Y.2d 813, 649 N.Y.S.2d 380, 672 N.E.2d 606, 1996 N.Y. LEXIS 3092 (N.Y. 1996).

Workers' compensation board erred in denying a teacher's request for benefits for a knee injury which occurred when the teacher was walking around her desk after retrieving materials for a student; the teacher's injury occurred in the course of employment as required by N.Y. Workers' Comp. Law § 10, and the employer failed to overcome a presumption that the injury arose out of the employment pursuant to N.Y. Workers' Comp. Law § 21. Keevins v Farmingdale UFSD, 304 A.D.2d 1013, 759 N.Y.S.2d 213, 2003 N.Y. App. Div. LEXIS 4160 (N.Y. App. Div. 3d Dep't 2003).

6. —Areas in proximity to worksite

Workers' Compensation Board properly ruled that claimant, correction officer, sustained causally related injury when he slipped and fell on curb in front of main entrance to facility while en route to pickup is paycheck on his day off, especially since employer's document entitled "Paycheck Distribution Procedures" indicated that while arrangements could be made for employer to mail paychecks to employee's residence, expected procedure was for employees to pickup their paychecks in person. Dandola v New York City Dep't of Correction, 244 A.D.2d 729, 664 N.Y.S.2d 392, 1997 N.Y. App. Div. LEXIS 11762 (N.Y. App. Div. 3d Dep't 1997).

Claimant's accident was properly found to be occurring within course of her employment when she slipped in parking garage floor en route to her job as certified surgical technician at hospital since hospital affirmatively encouraged its employees to park in facility where claimant was injured, parking was available at facility at reduced rate for hospital employees and payment of parking fees was deducted directly from employee paychecks, alternate parking could be accessed by permit only, for which there was waiting list, or was located at some distance from hospital, and facility where claimant was injured was located next door to hospital and was internally connected to hospital building. Thatcher v Crouse-Irving Mem'l Hosp., 253 A.D.2d 990, 678 N.Y.S.2d 161, 1998 N.Y. App. Div. LEXIS 9749 (N.Y. App. Div. 3d Dep't 1998).

Claimant was properly found to have sustained injury arising out of and in course of his employment while walking to job site where he was scheduled to commence asbestos removal project when he was struck by car since his employment consisted of traveling to various job sites to perform asbestos removal work for periods lasting anywhere from one day to several months, he was required to report to employer's main office in New Jersey once every month at most, and he contacted office by telephone only for purpose of receiving new work assignments. Carpio v R & J Insulation Co., 269 A.D.2d 678, 702 N.Y.S.2d 473, 2000 N.Y. App. Div. LEXIS 1286 (N.Y. App. Div. 3d Dep't), app. dismissed, 95 N.Y.2d 791, 711 N.Y.S.2d 157, 733 N.E.2d 229, 2000 N.Y. LEXIS 1064 (N.Y. 2000).

Court would reverse determination finding that claimant, office cleaner, did not sustain accidental injury arising out of and in course of her employment where she slipped on concourse floor in building while on her way to work on fourth floor, and there was

no substantial evidence to support determination that she was not injured "in close proximity to her worksite" and that location of her fall "cannot be considered 'part and parcel' of entrance to the employer's premises." Moore v Ogden Allied, 284 A.D.2d 624, 726 N.Y.S.2d 752, 2001 N.Y. App. Div. LEXIS 5985 (N.Y. App. Div. 3d Dep't 2001).

7. —Special hazard

Injury sustained by claimant when employer's truck ran over his foot occurred in course of employment, although accident occurred after work hours on public sidewalk, since presence of truck parked partly on sidewalk constituted special hazard, and claimant was proceeding between employer's office and parking lot at time; thus Workers' Compensation Board erred by reversing its prior decision granting claim. Jacobs v Dellwood Foods, 130 A.D.2d 848, 515 N.Y.S.2d 916, 1987 N.Y. App. Div. LEXIS 46857 (N.Y. App. Div. 3d Dep't), app. denied, 70 N.Y.2d 608, 521 N.Y.S.2d 225, 515 N.E.2d 910, 1987 N.Y. LEXIS 18939 (N.Y. 1987).

As an employee's accident was totally coincidental and not a work-related hazard, substantial evidence supported the New York Workers' Compensation Board's finding that the injuries and resulting death from being struck by a truck did not arise out of and in the course of the employee's employment, N.Y. Workers' Comp. Law §§ 2(7), (8); 10(1). There was no evidence that a special hazard existed at the off-premises location where the employee was struck; rather, the risk of being struck by vehicular traffic in this location was shared by the public in general and was not specific to this place of employment. Matter of Fiero v New York City Dept. of Hous. Preserv. & Dev., 34 A.D.3d 911, 823 N.Y.S.2d 290, 2006 N.Y. App. Div. LEXIS 13025 (N.Y. App. Div. 3d Dep't 2006).

8. —Deviation from course of employment; illegal act

Inside employee was not in scope of his employment where, on his way home from "special errand" for his employer, he deviated from his course to meet individual with whom he had sexual relations prior to being murdered by that individual. Oehley v Syracuse Boys Club, 151 A.D.2d 825, 542 N.Y.S.2d 799, 1989 N.Y. App. Div. LEXIS 7534 (N.Y. App. Div. 3d Dep't 1989).

Because a truck driver was shot during a lunch break in an area where the driver had been warned by the employer not to go, and because the driver strayed from a shorter and more commonly used route of travel in order to get to that area, the driver deviated from the driver's employment and was not entitled to workers' compensation benefits under N.Y. Workers' Comp. Law § 10. Matter of Marquis v Frank's Vacuum Truck Serv., Inc., 29 A.D.3d 1038, 814 N.Y.S.2d 363, 2006 N.Y. App. Div. LEXIS 5900 (N.Y. App. Div. 3d Dep't 2006).

New York Uninsured Employers' Fund asserted that a claimant's illegal activity in picking up street hails removed his actions from the scope of his employment as a taxicab driver. As the uninsured dispatch company that employed him knew of and at least tolerated this violation of the New York City Taxi and Limousine Commission rules, it would not be heard to argue that the claimant's conduct was outside the scope of employment, thus precluding him from receiving workers' compensation benefits Matter of Nkrumah v Thomas, 61 A.D.3d 1325, 877 N.Y.S.2d 515, 2009 N.Y. App. Div. LEXIS 3312 (N.Y. App. Div. 3d Dep't 2009).

9. —Sufficiency of evidence

In workers' compensation proceeding, evidence supported conclusion that assault occurred in course of decedent's employment, although his death actually occurred in 18th floor stairwell that was not technically part of employer's premises, where decedent was approached by his attacker (who was his co-worker) in lobby of building where employer's offices were located on arriving for his scheduled tour of duty, and decedent and co-worker rode together on elevator, which was customary route to employer's 17th floor offices. Rosen v First Manhattan Bank, 84 N.Y.2d 856, 617 N.Y.S.2d 455, 641 N.E.2d 1073, 1994 N.Y. LEXIS 2774 (N.Y. 1994).

A determination by the Workers' Compensation board that a 46-year-old sheriff with preexisting heart disease, who was found dead in the employer's parking lot, had sustained a compensable heart injury arising out of and in the course of his employment was supported by substantial evidence, where the board held that based on the lay and medical testimony including evidence that four days before the accident decedent had climbed two flights of stairs on five separate occasions in an attempt to serve a summons, and that decedent had complained of chest pains and stayed in bed during the ensuing weekend, the work activities preceding decedent's demise were, for him, at that time, so strenuous and stressful as to act on his underlying heart condition and precipitate a coronary occlusion. Monette v County of Albany, 96 A.D.2d 633, 464 N.Y.S.2d 858, 1983 N.Y. App. Div. LEXIS 19185 (N.Y. App. Div. 3d Dep't 1983).

Substantial evidence supported determination that sales executive suffered cerebral vascular accident resulting in stroke as result of emotional problems related to his job, and thus that accident arouse out of and in course of his employment, where it was shown that executive, who had preexisting arterial hypertension, endured excessive emotional distress, manifested by nose bleeds, immediately after final confrontation with his abusive boss, and that he suffered disabling stroke 5 days later. Price v KGM Plastic Indus., 192 A.D.2d 995, 597 N.Y.S.2d 243, 1993 N.Y. App. Div. LEXIS 4428 (N.Y. App. Div. 3d Dep't 1993).

Evidence established that claimant was injured while on special errand for employer, and thus was entitled to worker's compensation benefits, where employer enforced dress code and derived benefit from professional appearance of its employees, claimant arrived at work wearing denim suit and—although she had worn same suit previously without incident—she was instructed to change her clothes before she could continue her work, and she was injured in motor vehicle accident while returning home to change. Jennette v MCS Cannon, 211 A.D.2d 943, 621 N.Y.S.2d 229, 1995 N.Y. App. Div. LEXIS 251 (N.Y. App. Div. 3d Dep't 1995).

10. —Duration of employment; travel time

Generally, absent some physical connection to the premises of an employer in time and space, an accident which befalls an employee on his way to or from work does not arise "in the course of the employment." Malacarne v Yonkers Parking Authority, 41 N.Y.2d 189, 391 N.Y.S.2d 402, 359 N.E.2d 992, 1976 N.Y. LEXIS 3220 (N.Y. 1976).

Employee of New York City Transit Authority who was injured at employer's station on return home from work did not sustain compensable injury under Workers' Compensation Law, even though she had been issued transportation pass entitling her to free travel on employer's subways, where injury occurred over one hour after she signed off work at different station, employer had not assumed any obligation to facilitate her travel to and from work, and employer did not derive any benefit from fact that employee used pass to travel to and from work. Lemon v New York City Transit Authority, 72 N.Y.2d 324, 532 N.Y.S.2d 732, 528 N.E.2d 1205, 1988 N.Y. LEXIS 1687 (N.Y. 1988).

A 16-year-old part time office and delivery boy who worked for a company owned by his father was properly found to have been injured within the scope of his employment, where he made a delivery of goods before school and was on his way to pick them up after he and his friends had eaten lunch at his parent's camp approximately 10 miles from the pickup site following a half day school session. Anadio v Ideal Leather Finishers, 32 A.D.2d 40, 299 N.Y.S.2d 489, 1969 N.Y. App. Div. LEXIS 4089 (N.Y. App. Div. 3d Dep't), app. denied, 25 N.Y.2d 737, 1969 N.Y. LEXIS 1748 (N.Y. 1969).

Where a construction worker who, because he lived 90 miles away from the job site was permitted to live in the building being constructed, was injured when he stepped in a hole in the building at 2 a.m., the court affirmed the Workmen's Compensation Board award of compensation. The court said that the claimant's residence on the premises was advantageous to the employer, as appeared in the record, because it would enable the claimant to work overtime and thus fill a need of the employer. Broman v A. Brassard, Inc., 35 A.D.2d 142, 314 N.Y.S.2d 850, 1970 N.Y. App. Div. LEXIS 3651 (N.Y. App. Div. 3d Dep't 1970).

The court affirmed the determination of the Workmen's Compensation Board that the claimant's accidental injury, which occurred when she was going to the library, arose out of and in the course of her employment where the library was provided by the employer and was on his premises, the claimant's use of it was for

improving the efficiency of her work, and such use was for the benefit of the employer and was encouraged by the employer. Ybarsabal v Long Island College Hospital, 35 A.D.2d 766, 314 N.Y.S.2d 901, 1970 N.Y. App. Div. LEXIS 3666 (N.Y. App. Div. 3d Dep't 1970).

An inside and outside employee who was injured in explosion of restaurant where he was eating just prior to going to bank as instructed by employer to obtain cashier's checks for payment of parking fines incurred by claimant while using company car on company business was injured in an accident arising out of and in course of employment. Dolan v Crawford & Co., 41 A.D.2d 870, 342 N.Y.S.2d 859, 1973 N.Y. App. Div. LEXIS 4693 (N.Y. App. Div. 3d Dep't 1973).

Where photographer, employed by public relations firm, was necessarily exposed to deplorable sanitary conditions with regard to food and drink while traveling in Bolivia which resulted in his liver infection and death, the photographer's death from hepatitis was an "industrial accident." Lothrop v Hamilton Wright Organizations, Inc., 45 A.D.2d 784, 356 N.Y.S.2d 730, 1974 N.Y. App. Div. LEXIS 4686 (N.Y. App. Div. 3d Dep't 1974).

Accident, which occurred while workmen's compensation claimant-mechanic was driving his pickup truck to his place of employment after he had been requested to come to work an hour earlier than usual and to bring his truck with him, arose out of and in course of his employment. Lutgen v A. Conte Electrical, Inc., 50 A.D.2d 624, 374 N.Y.S.2d 434, 1975 N.Y. App. Div. LEXIS 12429 (N.Y. App. Div. 3d Dep't 1975).

Risks incidental to the journey to and from the actual activity beneficial to the employer resulting in injuries to an employee are accidents arising out of and in the course of the employment. Burlingame v Mobil Chemical Co., 61 A.D.2d 273, 402 N.Y.S.2d 70, 1978 N.Y. App. Div. LEXIS 9733 (N.Y. App. Div. 3d Dep't 1978).

Substantial evidence supported the determination that an injury occurred within the scope of employment, where the claimant was an outside worker, had difficulty using mass transportation to get to work, and had been loaned a company truck to take him back and forth. Farina v Romano Italian Ices, Inc., 81 A.D.2d 716, 439 N.Y.S.2d 468, 1981 N.Y. App. Div. LEXIS 11269 (N.Y. App. Div. 3d Dep't), app. denied, 54 N.Y.2d 608, 1981 N.Y. LEXIS 4519 (N.Y. 1981).

A construction worker was not entitled to compensation for injuries received in a motor vehicle accident while en route to his employment site, where it was disputed whether use of his vehicle was a requirement or a condition of his employment, and it was disputed whether the personal tools carried in his car were for anything other than his own convenience. Tsapatoris v G. L. M. Corp., 81 A.D.2d 728, 439 N.Y.S.2d 493, 1981 N.Y. App. Div. LEXIS 11286 (N.Y. App. Div. 3d Dep't 1981).

The Workers' Compensation Board properly determined that claimant's decedent was injured in the course of his employment, where such injury resulted from an automobile accident which occurred while the decedent was traveling as an "outside worker" in a company car from a managerial conference with company representatives to his own summer camp to spend the night en route back to his home office, where the trip to the summer camp was not a purely personal activity, and where such trip was not a deviation from his employment. Dick v Nationwide Ins. Co., 86 A.D.2d 916, 448 N.Y.S.2d 253, 1982 N.Y. App. Div. LEXIS 15590 (N.Y. App. Div. 3d Dep't 1982).

The Workers' Compensation Board properly held that claimant's injury did not arise out of or in the course of his employment and properly denied benefits where, although claimant was required to bring his two-ton pickup truck to work for use on the job, the exception to the general rule that accidents which occur while an employee is on his way to or from work do not arise out of or in the course of his employment when an employee is required to bring his own vehicle to work for use during the work day did not apply inasmuch as claimant was engaged in completing a personal errand, driving his co-worker to pick up his car as a personal favor rather than commuting directly to work, and where the record lacked evidence that claimant's truck was, in fact, to be used on the job on the day he was injured. Stone v A.L.S. Constr. Co., 108 A.D.2d 1036, 485 N.Y.S.2d 605, 1985 N.Y. App. Div. LEXIS 43358 (N.Y. App. Div. 3d Dep't), app. denied, 65 N.Y.2d 605, 493 N.Y.S.2d 1027, 482 N.E.2d 1229, 1985 N.Y. LEXIS 15768 (N.Y. 1985).

Since janitor service regularly provided its employees with transportation to worksites, service's employee was entitled to workers' compensation for injuries sustained while being transported even though he was not paid for time spent in transit and there was no contractual agreement requiring employer to provide transportation. Gay v American Janitor Service, 122 A.D.2d 402, 504 N.Y.S.2d 808, 1986 N.Y. App. Div. LEXIS 59716 (N.Y. App. Div. 3d Dep't 1986).

Workers' Compensation Board properly determined that injury arose in course of claimant's employment as New York City transit police officer where claimant became ill while on duty, he told his supervisor and was directed to go home and report to transit authority clinic on following morning, and he was injured in automobile accident while driving his own vehicle to clinic; risk of travel to and from clinic was incident of employment since medical examination benefited employer by insuring that employees did not leave work due to frivolous or false claims of illness and that employees who were ill did not continue to work, thus endangering themselves and others. Pearson v New York City Transit Auth., 146 A.D.2d 849, 536 N.Y.S.2d 255, 1989 N.Y. App. Div. LEXIS 16863 (N.Y. App. Div. 3d Dep't 1989).

Defendant, who was employed by state as superintendent of correctional facility, was acting in course of his employment at time of automobile accident while he was returning home from work in state-owned vehicle where (1) state, as part of statewide departmental policy, provided him with vehicle that he was expected to use for work-related travel, including to and from work, (2) he was "on call" 24 hours per day, and (3) vehicle was equipped with cellular phone and short-wave radio so that he could be reached while in transit. Hill v Speckard, 209 A.D.2d 1007, 619 N.Y.S.2d 903, 1994 N.Y. App. Div. LEXIS 12035 (N.Y. App. Div. 4th Dep't 1994), reh'g denied, 1995 N.Y. App. Div. LEXIS 2075 (N.Y. App. Div. 1st Dep't Feb. 3, 1995), app. dismissed, 85 N.Y.2d 1032, 631 N.Y.S.2d 291, 655 N.E.2d 404, 1995 N.Y. LEXIS 2077 (N.Y. 1995).

Claimant, truck driver, was properly awarded workers' compensation benefits as result of being injured when struck by car while crossing street from hotel on way to restaurant before commencing next trip since he was traveling employee with no fixed work site, it was reasonable and customary for him to have obtained meal prior to commencing new assignment, and he did not cross street in such reckless and unreasonable manner as to constitute deviation from employment. Hamm v USF Red Star, 284 A.D.2d 793, 727 N.Y.S.2d 714, 2001 N.Y. App. Div. LEXIS 6603 (N.Y. App. Div. 3d Dep't), app. denied, 97 N.Y.2d 602, 735 N.Y.S.2d 491, 760 N.E.2d 1287, 2001 N.Y. LEXIS 3283 (N.Y. 2001).

Workers' compensation board properly denied a claim for death benefits pursuant to N.Y. Workers' Comp. Law § 16 by a decedent's mother; the decedent's death in an auto accident on his way to a job site did not arise out of the decedent's employment pursuant to N.Y. Workers' Comp. Law § 10(1), as he was not engaged in work-related activities at the time of the accident. Engle v Reale Constr. Co., 15 A.D.3d 761, 790 N.Y.S.2d 255, 2005 N.Y. App. Div. LEXIS 1442 (N.Y. App. Div. 3d Dep't 2005).

Substantial evidence supported the Workers' Compensation Board's determination that the claimant's injuries sustained while commuting were not compensable because at the time of the assault, the claimant, who was a train conductor and in uniform, was not yet on duty or at her assigned station and not performing any duties of her employment or undertaking an errand for the employer. Matter of Rodriguez v New York City Tr. Auth., 161 A.D.3d 1501, 77 N.Y.S.3d 225, 2018 N.Y. App. Div. LEXIS 3842 (N.Y. App. Div. 3d Dep't 2018), app. denied, 32 N.Y.3d 916, 122 N.E.3d 567, 98 N.Y.S.3d 769, 2019 N.Y. LEXIS 200 (N.Y. 2019).

Workers' Compensation Board rationally rejected the dual purpose exception to the "going and coming rule" in determining that the claimant's injuries sustained while commuting were not compensable because the claimant's commute served her personal interest in getting to work, and there was no evidence that

the method or route the claimant chose served any business purpose, or that the employer benefitted from that route. Matter of Rodriguez v New York City Tr. Auth., 161 A.D.3d 1501, 77 N.Y.S.3d 225, 2018 N.Y. App. Div. LEXIS 3842 (N.Y. App. Div. 3d Dep't 2018), app. denied, 32 N.Y.3d 916, 122 N.E.3d 567, 98 N.Y.S.3d 769, 2019 N.Y. LEXIS 200 (N.Y. 2019).

As the assault occurred six train stops away from claimant's assigned station after he had completed his shift, and he was not performing any services for the employer on his commute home, there was no nexus between the motivation for the assault and claimant's employment, and his injuries sustained in the course of travel home from his place of employment were not compensable; the presumption that an accident occurring in the course of employment also arose out of such employment was inapplicable. Matter of Warner v New York City Tr. Auth., 171 A.D.3d 1429, 96 N.Y.S.3d 772, 2019 N.Y. App. Div. LEXIS 3131 (N.Y. App. Div. 3d Dep't 2019).

The provisions of the Workmen's Compensation Law can apply when an accident occurs on the employer's premises even though employment hours have terminated. Sivertsen v State, 43 Misc. 2d 978, 252 N.Y.S.2d 623, 1964 N.Y. Misc. LEXIS 1468 (N.Y. Ct. Cl. 1964), rev'd, 24 A.D.2d 918, 264 N.Y.S.2d 602, 1965 N.Y. App. Div. LEXIS 2960 (N.Y. App. Div. 3d Dep't 1965).

11. —Personal activities of employee

The fact that decedent was an "outside worker" did not mean that every accident that might befall him would be within the compass of the compensation law. It had still to be within the ambit of his work. It had still to arise out of and in the course of his employment. Hence, the death claim of the widow of an outside claims investigator for a casualty company should be rejected where decedent was killed in an automobile crash while returning from a Catskill mountain town where his family had been spending the summer and where he had gone for the week-end. His trip to the Catskills was personal and so his death was out of the scope of his employment. Glickman v Greater New York Taxpayers, 305 N.Y. 431, 113 N.E.2d 548, 305 N.Y. (N.Y.S.) 431, 1953 N.Y. LEXIS 802 (N.Y. 1953).

Even when injuries arise out of employment, employer is under no duty to compensate his employees if injuries arise while employees are pursuing their private interests on their own time and at a distance from their employer's premises since they would then not be in the course of their employment. Malacarne v Yonkers Parking Authority, 41 N.Y.2d 189, 391 N.Y.S.2d 402, 359 N.E.2d 992, 1976 N.Y. LEXIS 3220 (N.Y. 1976).

Obligation of CLS Work Comp Law § 10 to compensate injuries sustained in course of employment which are causally related to employment does not depend on equities of particular case and may not be avoided because of worker's fraud or wrongdoing. Richardson v Fiedler Roofing, Inc., 67 N.Y.2d 246, 502 N.Y.S.2d 125, 493 N.E.2d 228, 1986 N.Y. LEXIS 18049 (N.Y. 1986).

Claimant, a hospital attendant in a state hospital who was injured in an automobile accident while driving to a practical nursing school at a time when she was on a one year fully paid educational leave of absence from her job came within "special errand" exception to rule that injuries incurred while traveling to and from work are not risks of employment where leave of absence was for mutual benefit, was encouraged by employer, claimant was required to return to work during vacations from school lasting more than 2 weeks, claimant had to maintain a specified grade average to remain in the program, and claimant could only train in the area in which she was engaged. Love v N. Y. S. Craig School, 42 A.D.2d 796, 345 N.Y.S.2d 710, 1973 N.Y. App. Div. LEXIS 3780 (N.Y. App. Div. 2d Dep't 1973), aff'd, 34 N.Y.2d 680, 356 N.Y.S.2d 292, 312 N.E.2d 476, 1974 N.Y. LEXIS 1646 (N.Y. 1974).

The Workers' Compensation Board properly determined that a volunteer fireman was entitled to benefits based on injuries he had sustained at the fire house, after returning from the scene of a fire, when he fell from a ladder while removing some cots that he had received permission to borrow for his own personal use from a storage area where the claimant testified that, at the time of the accident, there were still some minor cleanup duties at the fire house that remained to be performed. Cozzens v North Syracuse Volunteer Fire Dep't, 98 A.D.2d 888, 471 N.Y.S.2d 24, 1983 N.Y. App. Div. LEXIS 21202 (N.Y. App. Div. 3d Dep't 1983).

In workers' compensation proceeding brought by state trooper who asserted that his heart attack was caused by stress on his job from being pressured to write more tickets, and also by chopping wood, which he stated he did to lose weight as dictated by his supervisor, board's finding that claimant's own action in cutting wood for personal reasons precipitated heart attack, not job stress, was supported by evidence that claimant's supervisor did not order claimant to engage in specific activity of wood-chopping, that claimant was chopping wood primarily to further secondary financial gain unrelated to his employment, and that claimant had given no prior indication that he was especially upset at work or that he was under any greater strain than his fellow officers. Cooley v New York State Police, 158 A.D.2d 828, 551 N.Y.S.2d 412, 1990 N.Y. App. Div. LEXIS 1721 (N.Y. App. Div. 3d Dep't 1990).

Evidence supported determination of Workers' Compensation Board that claimant's injury was not compensable where claimant testified that she fell and injured her knee when co-worker grabbed her by her collar during discussion of co-worker's daughter, and co-worker testified that injury occurred as result of discussion with claimant over co-worker's "personal business." Closson v Dutchess County Sheriff's Dep't, 179 A.D.2d 861, 577 N.Y.S.2d 976, 1992 N.Y. App. Div. LEXIS 71 (N.Y. App. Div. 3d Dep't 1992).

Workers' Compensation Board properly determined that claimant did not sustain accidental injury in course of his employment as service technician and salesperson, since his travel was purely personal and unrelated to his employment where he was involved in one-car accident while driving away from city in which his office and his apartment were situated, he had no customer appointments that evening but rather was scheduled to meet his supervisor either at his apartment or at his office, and he had blood alcohol level of .235 percent when accident occurred. Estate of Moritz v Ascar, Inc., 179 A.D.2d 909, 579 N.Y.S.2d 462, 1992 N.Y. App. Div. LEXIS 650 (N.Y. App. Div. 3d Dep't 1992).

Evidence supported decision of Workers' Compensation Board that claimant sustained accidental injury arising out of and in course of his employment where it was shown that (1) while waiting for co-worker so that he could begin new work assignment, claimant was injured when he attempted to clean his own chainsaw on employer's wire wheel grinder, (2) claimant stated that he had borrowed employer's chainsaw and was asked to clean and return it, and that he decided that he could clean both employer's and his own chainsaw during slack time, and (3) claimant further stated that it was common practice to borrow employer's equipment for personal use and to use employer's on-premises equipment without permission. Smith v Paul Smith's College, 186 A.D.2d 320, 587 N.Y.S.2d 802, 1992 N.Y. App. Div. LEXIS 10807 (N.Y. App. Div. 3d Dep't 1992).

Claimant, inside employee, did not sustain causally related disability when he was injured in accident while walking in shopping center's parking lot after he stopped on his way home to purchase pen since there was no proof that he maintained home office or that he had work equipment in his home, his supervisor testified that he encouraged his employees to perform their work in office as much as possible, and employee provided pens to claimant. Bobinis v State Ins. Fund, 235 A.D.2d 955, 653 N.Y.S.2d 408, 1997 N.Y. App. Div. LEXIS 758 (N.Y. App. Div. 3d Dep't 1997).

Security guard, who injured his ankle while demonstrating boxing maneuver to co-worker while waiting for elevator to arrive after completing his scheduled employment shift and punching out on employer's time clock, was properly denied Workers' Compensation benefits where his own testimony showed that no further work was contemplated on day of accident, his boxing demonstration had no work-related purpose, and his injury was not caused by employer's failure to provide safe means of egress from place of employment. Bigley v J & R Music Elecs., 269 A.D.2d 667, 702 N.Y.S.2d 474, 2000 N.Y. App. Div. LEXIS 1277 (N.Y. App. Div. 3d Dep't 2000).

For purposes of determining whether injury sustained by claimant while attempting to fix flat tire on his personal vehicle

arose out of and in course of his employment, CLS Work Comp § 21 presumption was not sufficiently rebutted where accident occurred in employer's parking lot immediately after claimant's work shift ended, claimant's use of parking lot benefitted employer by ensuring that he would not be late for his shift, which began at 4:00 a.m., and no contrary proof was presented by employer. Cruz v Karl Ehmer Inc., 282 A.D.2d 841, 724 N.Y.S.2d 777, 2001 N.Y. App. Div. LEXIS 3685 (N.Y. App. Div. 3d Dep't 2001).

Workers' compensation board properly ruled that a fire fighter's injuries arose out of and in the course of employment pursuant to N.Y. Workers' Comp. Law § 10; the fire fighter was entitled to work on his vehicle during unstructured time, and officials tolerated such activity. Pedro v Vill. of Endicott, 307 A.D.2d 598, 762 N.Y.S.2d 177, 2003 N.Y. App. Div. LEXIS 8317 (N.Y. App. Div. 3d Dep't), app. dismissed, 1 N.Y.3d 546, 775 N.Y.S.2d 242, 807 N.E.2d 292, 2003 N.Y. LEXIS 3961 (N.Y. 2003), app. denied, 2 N.Y.3d 706, 780 N.Y.S.2d 312, 812 N.E.2d 1262, 2004 N.Y. LEXIS 1030 (N.Y. 2004).

State trooper did not sustain an accidental injury arising out of and in the course of his employment, N.Y. Workers' Comp. Law § 10, as the trooper was involved in a noncompensable personal act at the time that he sustained his injuries, as the trooper had stopped by his home to check on construction activities at the time of his fall. Matter of Mills v New York State Police, 41 A.D.3d 1083, 839 N.Y.S.2d 293, 2007 N.Y. App. Div. LEXIS 7622 (N.Y. App. Div. 3d Dep't 2007).

12. — —Combined with business activity

The fact that week-end trips were known to the employer and that the employee was required, if necessary, to work evenings and week-end, does not make a "dual purpose" trip. In order to entitle an employee to compensation for an injury sustained while on a "dual purpose" trip, service to the employer must have been one of the motivating reasons, or at least a "concurrent" cause, for the journey. Glickman v Greater New York Taxpayers, 305 N.Y. 431, 113 N.E.2d 548, 305 N.Y. (N.Y.S.) 431, 1953 N.Y. LEXIS 802 (N.Y. 1953).

Injuries resulting from automobile accident incurred while employee was on trip which was in part made for employment purpose and such purpose was at least the concurrent cause of the journey, were compensable. Hornburg v Allegany County Dep't of Public Welfare, 29 A.D.2d 1031, 289 N.Y.S.2d 540, 1968 N.Y. App. Div. LEXIS 4157 (N.Y. App. Div. 3d Dep't 1968).

Mere circumstance that business is combined with some pleasure will not defeat a claim for workmen's compensation unless the subject accident resulted from a risk produced by the personal activity, but a slight and momentary deviation from the work routine will be distinguished from purely personal activity for the purposes of such workmen's compensation. Gyory v Radgowski, 82 Misc. 2d 553, 369 N.Y.S.2d 583, 1974 N.Y. Misc. LEXIS 2043 (N.Y. Sup. Ct. 1974).

13. — —During off-duty athletic activity

Widow was not entitled to Workers' Compensation Board after her husband, who worked as accountant for private firm, suffered fatal heart attack while bowling for team sponsored by client of firm because, even if her husband's participation on bowling team inured to substantial benefit of his employer, there was no evidence of overt encouragement by employer. Dorosz v Green & Seifter, 92 N.Y.2d 672, 685 N.Y.S.2d 406, 708 N.E.2d 162, 1999 N.Y. LEXIS 35 (N.Y. 1999).

While employer may have indirectly benefited from accountant's voluntary membership on weekly bowling team sponsored by one of his clients, Workers' Compensation Board correctly concluded that his fatal heart attack resulted from voluntary participation in off-duty athletic activity. Dorosz v Green & Seifter, 250 A.D.2d 931, 672 N.Y.S.2d 948, 1998 N.Y. App. Div. LEXIS 5681 (N.Y. App. Div. 3d Dep't 1998), aff'd, 92 N.Y.2d 672, 685 N.Y.S.2d 406, 708 N.E.2d 162, 1999 N.Y. LEXIS 35 (N.Y. 1999).

14. — —During a meal, coffee break, or the like

In Workers' Compensation proceeding, fact that claimant had crossed street to purchase lunch after leaving employer's office and then recrossed street on way to parking lot had no bearing on issue of whether he was proceeding on "normal" route between employer's office and parking lot since he was in fact on sidewalk between office and parking lot at time accident occurred. Jacobs v Dellwood Foods, 130 A.D.2d 848, 515 N.Y.S.2d 916, 1987 N.Y. App. Div. LEXIS 46857 (N.Y. App. Div. 3d Dep't), app. denied, 70 N.Y.2d 608, 521 N.Y.S.2d 225, 515 N.E.2d 910, 1987 N.Y. LEXIS 18939 (N.Y. 1987).

Evidence supported determination of Workers' Compensation Board that claimant's injury, which occurred when she tripped in pothole while walking on public street on her unpaid lunch hour, resulted from personal act unrelated to her employment although accident occurred in close proximity to her workplace, where she left employer's premises to smoke cigarette because employer had strict policy against smoking on premises. Roggero v Frontier Ins. Group, 250 A.D.2d 1011, 673 N.Y.S.2d 260, 1998 N.Y. App. Div. LEXIS 5931 (N.Y. App. Div. 3d Dep't 1998).

Workers' compensation board properly denied an employee's claim for benefits, because the injury did not arise out of and in the course of her employment as required by N.Y. Workers' Comp. Law § 10(1), as the injury occurred on a lunch break when the employee left the place of employment to move a vehicle, and it was clear that the employee's decision was personal in nature and that the injury did not occur in an area under the employer's control. Rose v Verizon N.Y., Inc., 304 A.D.2d 990, 761 N.Y.S.2d 100, 2003 N.Y. App. Div. LEXIS 4151 (N.Y. App. Div. 3d Dep't 2003).

Because a claimant took 15 to 20 minute meal breaks at a time and place convenient to the employer, and because the claimant was not forbidden from aiding a stranded motorist while in the course of the claimant's employment, the claimant was entitled to N.Y. Workers' Comp. Law § 10 benefits when the claimant was injured by an exploding battery. Matter of McFarland v Lindy's Taxi, Inc., 49 A.D.3d 1111, 853 N.Y.S.2d 743, 2008 N.Y. App. Div. LEXIS 2711 (N.Y. App. Div. 3d Dep't 2008).

Denial of an electrician's claim for workers' compensation benefits for an injury suffered while stopping at a drive-through for coffee on the direct route to his assigned job site was error because the injury arose out of the scope of his employment, the trip to the drive-through was a momentary and customary break which did not interrupt his employment and which was reasonable and work-related under the circumstances, and the presumption that the injury arose of out his employment was unrebutted. Matter of Marotta v Town & Country Elec., Inc., 51 A.D.3d 1126, 857 N.Y.S.2d 340, 2008 N.Y. App. Div. LEXIS 3790 (N.Y. App. Div. 3d Dep't 2008).

Risk of travel to a place of rest or refreshment may be compensable by workmen's compensation so long as the travel is part of the work routine, since an employee on a business trip is entitled to satisfy his physical needs including relaxation. Gyory v Radgowski, 82 Misc. 2d 553, 369 N.Y.S.2d 583, 1974 N.Y. Misc. LEXIS 2043 (N.Y. Sup. Ct. 1974).

15. — —During use of employer vehicle

Even though an employer knew that some of its workers violated a company rule by using company vehicles for personal reasons, an employee was not entitled to disability benefits where he was injured while using a company vehicle while driving home after a visit to a friend, since he was engaged in a personal activity. Nattier v Elmsford Transp. Co., 81 A.D.2d 721, 439 N.Y.S.2d 459, 1981 N.Y. App. Div. LEXIS 11275 (N.Y. App. Div. 3d Dep't 1981).

Claimant was not even tangentially engaged in employer's business of selling automobiles when he was injured in accident while driving to grocery store on Memorial Day holiday, although he was driving demonstrator vehicle provided to him by employer as incident of employment when accident occurred, where no benefit inured to employer which transformed claimant's purely personal use of vehicle into dual personal and business use for purposes of Workers' Compensation Law. Clark v R.I. Suresky & Sons, 236 A.D.2d 673, 653 N.Y.S.2d 441, 1997 N.Y. App. Div. LEXIS 965 (N.Y. App. Div. 3d Dep't 1997).

15.5. —Work from home

Workers' Compensation Board erred in concluding that the claimant's injuries from moving boxes were not sufficiently work

related because the Board applied a new standard for employees working from home, like the claimant, under which injuries were only compensable if occurring during regular work hours and while the employee was actively engaged in work duties as opposed to, for example, taking a short break or using the bathroom. Matter of Capraro v Matrix Absence Mgt., 187 A.D.3d 1395, 132 N.Y.S.3d 456, 2020 N.Y. App. Div. LEXIS 6171 (N.Y. App. Div. 3d Dep't 2020).

16. —Employer-sponsored activities

While transportation provided by an employer in isolated cases or on an infrequent basis may not be deemed to be an incident of employment, a frequent and regular practice of providing transportation indicates that the employer has implicitly assumed the responsibility of transporting his employees to work and at some point that practice may become so common and so associated with the employment that it must be seen as incidental to it; once that point is reached there is no meaningful distinction between transportation furnished by custom and that provided by contractual obligation and when accidents occur while employees are traveling to work, an employer who assumes the responsibility to transport his employees must likewise bear the responsibility for the risks encountered in connection with the transportation, especially when the employer is in exclusive control of the conveyance. Holcomb v Daily News, 45 N.Y.2d 602, 412 N.Y.S.2d 118, 384 N.E.2d 665, 1978 N.Y. LEXIS 2364 (N.Y. 1978).

Fatal injuries sustained by an employee who, while on his way to work, hailed a passing truck owned by his employer and during the ride to the employer's plant, accidentally fell from the truck, were compensable. Although the employer was not obligated by contract to furnish transportation to its employees, the Workmen's Compensation Board found that it was a common practice of the employer to transport its employees to and from work and that the practice was advantageous to the employer; those findings are supported by substantial evidence and are a sufficient basis for an award of compensation benefits. Holcomb v Daily News, 45 N.Y.2d 602, 412 N.Y.S.2d 118, 384 N.E.2d 665, 1978 N.Y. LEXIS 2364 (N.Y. 1978).

Where an employee's social activities are in connection with and incidental to his employer's business, such activities become part of his employment; thus, beneficiaries of district sales manager for insurance company who was killed in auto accident on the way home from conducting a sales meeting were entitled to benefits despite fact that he and several salesmen had stopped at several bars after the meeting. McGee v Allstate Ins. Co., 41 A.D.2d 866, 342 N.Y.S.2d 685, 1973 N.Y. App. Div. LEXIS 4686 (N.Y. App. Div. 3d Dep't 1973).

Death of employee in attendance at retirement dinner for coworker was within the course of his employment where function was paid for by employer, out of town coworkers attended and were reimbursed for their expenses by the employer, and company officials associated with retiree were present at the dinner. McNamara v Kidder Peabody & Co., 42 A.D.2d 183, 346 N.Y.S.2d 37, 1973 N.Y. App. Div. LEXIS 3771 (N.Y. App. Div. 3d Dep't 1973).

There was substantial evidence to sustain board's finding that junior executive's death in auto accident after stopping for cocktails en route home from company-sponsored dinner dance arose out of and in course of employment where such dinner, open only to those in upper strata of employer's management, included studies of company reports and problems in furtherance of management club's purpose of improving quality of management and promoting "unity of management through education and association." Dorman v New Process Gear Div. Chrysler Corp., 44 A.D.2d 8, 353 N.Y.S.2d 264, 1974 N.Y. App. Div. LEXIS 5544 (N.Y. App. Div. 3d Dep't 1974), aff'd, 35 N.Y.2d 975, 365 N.Y.S.2d 527, 324 N.E.2d 885, 1975 N.Y. LEXIS 1699 (N.Y. 1975).

In absence of any evidence to suggest that preseason practice softball game on employer-sponsored team was any less an incident of employment than contemplated official league play after season began and in view of fact that benefit to employer was as much an incident of the preseason practice as it was of subsequent official softball league games, injury to back and left leg sustained by employee while playing in preseason softball game on employer-sponsored team arose out of and in the course of employment and was compensable. Zengotita v New York Tel. Co., 58 A.D.2d 930, 396 N.Y.S.2d 921, 1977 N.Y. App. Div. LEXIS 13132 (N.Y. App. Div. 3d Dep't 1977).

Injuries sustained by an employee when the motorcycle he was operating collided with a truck while the employee was en route from his home to a playing field to engage in a softball game as a member of a team in a softball league organized, sponsored and financed by the employer arose out of and in the course of the employment. There was substantial evidence on which it could be found that the employer benefited from and dominated the program. Burlingame v Mobil Chemical Co., 61 A.D.2d 273, 402 N.Y.S.2d 70, 1978 N.Y. App. Div. LEXIS 9733 (N.Y. App. Div. 3d Dep't 1978).

There was substantial evidence to support a finding that a volunteer fireman's injury occurred in the line of duties, where he had been required to attend an open house in full dress and had slipped and fallen on a wet floor and injured his wrist while being required to tend bar. Higgins v Ronkonkoma Fire Dist., Volunteer Fire Co., 81 A.D.2d 721, 439 N.Y.S.2d 459, 1981 N.Y. App. Div. LEXIS 11276 (N.Y. App. Div. 3d Dep't 1981).

The Workers' Compensation Board properly determined that a correctional officer's injuries sustained in a softball game on the prison grounds arose out of and in the course of employment, where the employer could terminate the athletic activities on its premises at will and where the activity benefitted the employer-employee relations. Nazario v New York State Dep't of Correction, 86 A.D.2d 914, 448 N.Y.S.2d 531, 1982 N.Y. App. Div. LEXIS 15588 (N.Y. App. Div. 3d Dep't 1982).

The Workers' Compensation Board properly ruled that the death of the claimant's 16-year-old decedent, who drowned while attempting to rescue another boy at an annual picnic for employees of the city youth program by which he was employed, arose out of and in the course of his employment where the picnic had been organized by decedent's supervisor, where the employer exercised control over the event by authorizing its employees to attend during business hours, and where the picnic provided a business advantage to the employer by contributing to the morale and espirit de corps of the program's participants. Olmedo v Mayor's Summer Youth Program, 98 A.D.2d 878, 470 N.Y.S.2d 858, 1983 N.Y. App. Div. LEXIS 21193 (N.Y. App. Div. 3d Dep't 1983).

Evidence supported board's finding that injury sustained by claimant in evening softball game played in public park was compensable because his participation was sponsored by his employer, where claimant was employed by insurance company and was playing in league composed entirely of insurance company employees at urging of his employer, who deemed such peer-group activities as good for business; fact that claimant's employer was small family enterprise increased significance of fact that it had purchased claimant's softball uniform featuring its logo on back, and diminished relevance of fact that injury occurred off premises and after hours. Diem v Diem & Buerger Ins. Co., 146 A.D.2d 840, 536 N.Y.S.2d 246, 1989 N.Y. App. Div. LEXIS 20 (N.Y. App. Div. 3d Dep't 1989).

Employee of Workers' Compensation Board was not entitled to workers' compensation benefits for broken nose suffered while playing softball after regular working hours in state agency league for team composed of board members, even though game was played on state-owned fields, interoffice mail was used to exchange schedules, and other materials and raffle tickets were printed on board computers and copied on board photocopying machines, since there was no evidence that claimant was encouraged to play softball by anyone in position of authority, that his participation was designed to benefit board, or that direct financial support for uniforms and equipment was provided by board. De Carr v New York State Workers' Compensation Bd., 151 A.D.2d 935, 543 N.Y.S.2d 206, 1989 N.Y. App. Div. LEXIS 8863 (N.Y. App. Div. 3d Dep't 1989).

Evidence supported determination that claimant's decedent had sustained accidental injury in course of employment where supervisor directed decedent to leave his place of employment with several co-workers to perform an activity for private benefit of supervisor, which was done with knowledge of employer, and he died as result of injury sustained while using employer's equip-

ment. Davis v Alpha Apple, Inc., 184 A.D.2d 893, 585 N.Y.S.2d 550, 1992 N.Y. App. Div. LEXIS 7964 (N.Y. App. Div. 3d Dep't 1992).

Evidence supported determination that female teacher's injury in donkey basketball game was accidental injury in course of her employment, even though teacher was not required to participate in game and was not compensated therefor, where teacher agreed to play after principal expressed his concern that game might be canceled due to insufficient number of volunteers, he encouraged teachers in general (and female teachers in particular) to volunteer, and teacher volunteered believing that her participation would be beneficial at such time as she sought tenure; principal's conduct was neither passive or incidental, but was overt encouragement sufficient for Workers' Compensation Board to conclude that school sponsored game. Midley v Romulus Cent. School Dist., 184 A.D.2d 925, 584 N.Y.S.2d 948, 1992 N.Y. App. Div. LEXIS 8198 (N.Y. App. Div. 3d Dep't 1992).

Claimants' injuries in off-duty softball game arose in course of their employment where, inter alia, team members were required to wear uniforms paid for by entity formed at employer's initiative to promote employer's goals, hats supplied to players bore employer's logo, uniforms remained employer's property and had to be returned after player resigned from team, and practice schedules and printed materials encouraging employees to "play (employer) softball" were displayed on bulletin boards and in lounge areas at employer's premises. Eddy v Rochester-Genesee Reg'l Transp. Auth., 248 A.D.2d 769, 669 N.Y.S.2d 699, 1998 N.Y. App. Div. LEXIS 2207 (N.Y. App. Div. 3d Dep't 1998).

Claimant's knee injury while playing basketball with co-workers at gym on his employer's premises after his shift had ended was properly found to have arisen out of and in course of his employment where employer provided all equipment and employed coordinator who managed gym and employer's programs, employer offered incentives for using gym whereby employees could earn points toward gift certificates, movie tickets, and other benefits, employer also distributed flyers promoting use of gym, and claimant testified that one of those flyers referred to basketball. Baker v Sentry Group, 269 A.D.2d 668, 703 N.Y.S.2d 299, 2000 N.Y. App. Div. LEXIS 1278 (N.Y. App. Div. 3d Dep't 2000).

Because an employer sponsored the off-duty athletic activity that caused an employee's injury, the injury arose out of and in the course of the employment; therefore, the employee was properly awarded benefits under Workers' Compensation Law § 10(1). Matter of Bogert v E.B. Design Air, Inc., 38 A.D.3d 1125, 833 N.Y.S.2d 279, 2007 N.Y. App. Div. LEXIS 3656 (N.Y. App. Div. 3d Dep't 2007).

Investigator's injury did not arise out of and in the course of his employment for purposes of N.Y. Workers' Comp. Law § 10, as the employer did not overtly encourage employee participation in a basketball game at an employee picnic during which the investigator was injured, because the employer did not require attendance at the picnic, and the employer did not expressly invite or suggest that employees participate in the basketball game. Matter of Mack v Kings County Hosp. Ctr., 41 A.D.3d 1063, 839 N.Y.S.2d 277, 2007 N.Y. App. Div. LEXIS 7603 (N.Y. App. Div. 3d Dep't 2007).

Board's decision finding that an employee's injury, suffered while practicing volleyball for an employer's "Olympics," was compensable under N.Y. Workers' Comp. Law § 10(1) was improper because the finding of compensability ran contrary to a previous board decision with almost identical facts, and the board did not provide a rational basis for departing from its own precedent; the first distinction made by the board was that the employee in this case had already registered to participate in the Olympics, whereas the employee in the previous case had not, but those facts were inapposite, inasmuch as the present inquiry involved the actions of the employer in encouraging the activity, not the status of the participant. Additionally, the board grounded its departure in a perceived change in the decisional law, but the facts in the relevant case were substantially dissimilar to the facts of both the instant case and the board's precedential decision. Matter of Huff v Department of Corrections, 52 A.D.3d 1003, 860 N.Y.S.2d 244, 2008 N.Y. App. Div. LEXIS 5328 (N.Y. App. Div. 3d Dep't 2008).

17. —Evidence of employment

The issue of whether a custom is sufficiently established to render the transportation by an employer of employees to their place of work an incident of the employment is a question of fact for the Workmen's Compensation Board and the scope of review of the Court of Appeals is limited to whether there is substantial evidence in the record as a whole to support the determination. Holcomb v Daily News, 45 N.Y.2d 602, 412 N.Y.S.2d 118, 384 N.E.2d 665, 1978 N.Y. LEXIS 2364 (N.Y. 1978).

Under this section the commission has no authority to make an award in the absence of at least some evidence that the employee met with an injury while he was at work for specified employer, and as consequence of something that had relation to work of employer, something done by him or by others while he was so employed. Collins v Brooklyn Union Gas Co., 171 A.D. 381, 156 N.Y.S. 957, 1916 N.Y. App. Div. LEXIS 9457 (N.Y. App. Div. 1916).

Hearsay testimony, unsupported by facts and circumstances to justify a reasonable inference, is not sufficient to establish the primary fact of accidental personal injury sustained by an employee arising out of and in the course of his employment as set forth in this section. McHale v Sheffield Farms Co., 193 A.D. 541, 184 N.Y.S. 576, 1920 N.Y. App. Div. LEXIS 5592 (N.Y. App. Div. 1920).

Admissions in the employers' report, made under this section as to employment and injury, being in conflict with undisputed evidence, do not justify an award. Craciola v Lewis, 233 A.D. 437, 253 N.Y.S. 752, 1931 N.Y. App. Div. LEXIS 11319 (N.Y. App. Div. 1931).

Award based upon a finding that decedent's death arose out of and in the course of his employment affirmed upon evidence that the decedent business agent of the employer-union, died after sustaining a severe beating near his home, that union officials testified directly that there was considerable tension within the union, and decedent's wife testified as to threatening phone calls which she had received about the time that tension had begun to intensify. Fox v United Brotherhood of Carpenters & Joiners, 33 A.D.2d 605, 304 N.Y.S.2d 464, 1969 N.Y. App. Div. LEXIS 3027 (N.Y. App. Div. 3d Dep't), app. denied, 25 N.Y.2d 744, 1969 N.Y. LEXIS 1986 (N.Y. 1969).

The existence of an independent contractor relationship as to the maintenance of a leased tractor could not bar a factual finding that the particular repair was an incident of the otherwise established employer-employee relationship. Harding v Herr's Motor Express, Inc., 35 A.D.2d 883, 315 N.Y.S.2d 693, 1970 N.Y. App. Div. LEXIS 3447 (N.Y. App. Div. 3d Dep't 1970), app. denied, 28 N.Y.2d 487, 1971 N.Y. LEXIS 1884 (N.Y. 1971).

Substantial evidence supported determination of Workmen's Compensation Board, which disallowed claim for benefits on ground that decedent's death did not arise out of and in the course of employment, that decedent who moved into his employer's building following his separation from his wife and who died assertedly from an after hours fall in the building had moved into the building for his own benefit and was off duty at time of the accident. Munz v L. & J. Plumbing & Heating Co., 49 A.D.2d 977, 374 N.Y.S.2d 365, 1975 N.Y. App. Div. LEXIS 11288 (N.Y. App. Div. 3d Dep't 1975).

Evidence sustained finding that death of district court judge who was driving from his home to courthouse when tree fell upon his automobile, killing him, arose out of and in course of his employment. Munro v County of Suffolk, 49 A.D.2d 994, 374 N.Y.S.2d 392, 1975 N.Y. App. Div. LEXIS 11325 (N.Y. App. Div. 3d Dep't 1975).

Evidence supported Workmen's Compensation Board's determination that dentist's employee who was found seated in dentist's chair with mask used for administering nitrous oxide fastened over her face, although she was not authorized or qualified to administer nitrous oxide, had not arisen out of and in course of her employment. Appleberry v Moskowitz, 50 A.D.2d 1001, 377 N.Y.S.2d 226, 1975 N.Y. App. Div. LEXIS 12191 (N.Y. App. Div. 3d Dep't 1975).

Finding that claimant, who was injured while helping launch large raft at YMCA summer camp, was YMCA employee and that her injury was accident within meaning of Workers' Compensa-

tion Law, was supported by evidence that she received reduction in camp tuition and free room and board in exchange for participating in counselor aide training program, her duties included helping counselors and supervising campers with whom she shared cabin, she was required to obtain working papers, YMCA provided her with all necessary equipment, and YMCA retained right to ask her to leave camp if her conduct became undesirable. Long v Schenectady County YMCA, 227 A.D.2d 723, 642 N.Y.S.2d 96, 1996 N.Y. App. Div. LEXIS 5035 (N.Y. App. Div. 3d Dep't 1996).

Where an employer supplied all tools and equipment and directed the work of a labor broker's employees, the employer and its insurer were solely liable for a surviving spouse's workers' compensation death benefits claim. Bowman v Birdair, Inc., 302 A.D.2d 697, 754 N.Y.S.2d 752, 2003 N.Y. App. Div. LEXIS 1263 (N.Y. App. Div. 3d Dep't 2003).

Although, in personal injury action brought by passenger against driver, who was a fellow employee of plaintiff, and against car rental agency, seeking to recover for the injuries plaintif sustained in Ohio automobile accident, the employer's submission of a workmen's compensation claim for plaintiff would appear to indicate its approval of plaintiff's decision to extend his business stay in Ohio in order to complete his mission, during which extended time the accident occurred, questions of fact existed with respect to the employer's authorization and approval, precluding dismissal of defendants' workmen's compensation defense. Gyory v Radgowski, 82 Misc. 2d 553, 369 N.Y.S.2d 583, 1974 N.Y. Misc. LEXIS 2043 (N.Y. Sup. Ct. 1974).

18. Limitation of remedy

When employer complies with provisions of this section employee's sole remedy is under Work. Comp. Law. Kuhn v P. J. Carlin Const. Co. (1937) 274 NY 118, 8 NE2d 300, reh den (1938) 277 NY 651, 14 NE2d 204.; De Coigne v Ludlum Steel Co., 251 A.D. 662, 297 N.Y.S. 636, 1937 N.Y. App. Div. LEXIS 7018 (N.Y. App. Div. 1937).

The amendment to this section as to relief workers in effect May 21, 1934 (repealed by 1941) amendment to this section) was not retroactive, and did not affect claimant's rights which became fixed at the death of the decedent. Schwartzott v Erie County Highway Department, 243 A.D. 662, 276 N.Y.S. 934, 1935 N.Y. App. Div. LEXIS 7531 (N.Y. App. Div. 1935).

While the acceptance by an employee of compensation payments made under award by the Workmen's Compensation Board was not an accord and satisfaction extinguishing the employee's cause of action for damages, the awards constituted a finding by the Board that the employee's injuries arose out of and in the course of employment and by virtue of that finding the employee's exclusive remedy is under the Workmen's Compensation Law. Doca v Federal Stevedoring Co., 280 A.D. 940, 116 N.Y.S.2d 25, 1952 N.Y. App. Div. LEXIS 4304 (N.Y. App. Div. 1952), aff'd, 305 N.Y. 648, 112 N.E.2d 424, 305 N.Y. (N.Y.S.) 648, 1953 N.Y. LEXIS 1208 (N.Y. 1953).

Where employee's injuries arose out of and in the course of his employment, employee's cause of action in common-law negligence against his employer was barred by section of Workmen's Compensation Law. Canty v Greer Children's Community, 54 A.D.2d 698, 387 N.Y.S.2d 292, 1976 N.Y. App. Div. LEXIS 14266 (N.Y. App. Div. 2d Dep't 1976), app. dismissed, 41 N.Y.2d 969, 394 N.Y.S.2d 883, 363 N.E.2d 589, 1977 N.Y. LEXIS 1956 (N.Y. 1977).

Finding in workmen's compensation case that there was no causal relationship between any acts claimed to have been done by former employer and any of the injuries which former employee claimed to have suffered as result of alleged assault by former employer did not prevent former employee from bringing action against former employer for damages arising out of alleged assault and for damages arising out of fear caused by threatened violent conduct. Leopold v Britt, 58 A.D.2d 856, 396 N.Y.S.2d 680, 1977 N.Y. App. Div. LEXIS 13037 (N.Y. App. Div. 2d Dep't 1977).

An action by an employee who was injured while operating an extruder machine, premised on the theory that the principal officer of the employer altered, modified and removed safety components of the machine so as to increase its speed, with knowledge of the dangers to the machine operator by such alterations, should have been dismissed, where the employee had already received workers' compensation benefits prior to the initiation of his personal injury action, where the compensation award established all factual issues relevant to the claim and constituted the exclusive remedy for the employer's liability, where the general provision in Labor Law § 200 requiring an owner or general contractor to provide a safe place to work did not overrule and was subjected to the exclusivity provisions of the Workers' Compensation Law, where the complaint did not support a theory of intentional tort, where there were no allegations in the complaint or any factual support for the theory of successor liability, and where the Workers' Compensation Board determination of liability and compensation award for the employee's injuries was res judicata of the employee's claims for a remedy at law on the alternative theory of intentional tort. Bardere v Zafir, 102 A.D.2d 422, 477 N.Y.S.2d 131, 1984 N.Y. App. Div. LEXIS 18802 (N.Y. App. Div. 1st Dep't), aff'd, 63 N.Y.2d 850, 482 N.Y.S.2d 261, 472 N.E.2d 37, 1984 N.Y. LEXIS 4653 (N.Y. 1984).

Liability of an employer for an injury arising out of and in the course of employment is exclusively enforcible before the Board. Meaney v Keating, 102 N.Y.S.2d 514, 200 Misc. 308, 1951 N.Y. Misc. LEXIS 1522 (N.Y. Sup. Ct. 1951), aff'd, 279 A.D. 1030, 113 N.Y.S.2d 240, 1952 N.Y. App. Div. LEXIS 5700 (N.Y. App. Div. 1952).

A decision of the Workmen's Compensation Board holding that no accident occurred and denying compensation was a bar to a common law action in negligence against the employer for the same injury. The Workmen's Compensation Board had held that there was no accident either within or without the scope of employment, and such a finding was not beyond the Board's powers. Drier v Randforce Amusement Corp., 14 Misc. 2d 362, 179 N.Y.S.2d 412, 1958 N.Y. Misc. LEXIS 2562 (N.Y. Sup. Ct. 1958), aff'd, 14 A.D.2d 772, 218 N.Y.S.2d 527, 1961 N.Y. App. Div. LEXIS 8212 (N.Y. App. Div. 1st Dep't 1961).

In medical malpractice and negligence action wherein plaintiff alleged that employee's death was caused by wrongful diagnosis and treatment by employer's full time salaried doctor, plaintiff's sole remedy was workmen's compensation where plaintiff failed to allege wilful or wanton conduct by defendant doctor. Golini v Nachtigall, 75 Misc. 2d 523, 347 N.Y.S.2d 981, 1973 N.Y. Misc. LEXIS 1615 (N.Y. Sup. Ct. 1973), aff'd, 46 A.D.2d 628, 359 N.Y.S.2d 879, 1974 N.Y. App. Div. LEXIS 3970 (N.Y. App. Div. 1st Dep't 1974).

An award by the compensation board, having jurisdiction of the matter, deprives the court of any right to relitigate the same issue and hence, the court would have no jurisdiction of a common law action against an employer where the employee contended that the accident did not arise in the course of his employment because it did not happen upon the employer's premises and happened in the free time assigned for the noon meal. Sedore v Sayre, 119 N.Y.S.2d 204, 1953 N.Y. Misc. LEXIS 1522 (N.Y. Sup. Ct. 1953).

Employee's personal injury action against the employer for alleged negligence in maintaining the condition of the floor of the diner was barred when the employee had applied for and received workers' compensation benefits from the employer. Couluris v Harbor Boat Realty Inc., 234 N.Y.L.J. 49, 2005 N.Y. Misc. LEXIS 3458 (N.Y. Sup. Ct. Sept. 9, 2005), rev'd, 31 A.D.3d 686, 820 N.Y.S.2d 282, 2006 N.Y. App. Div. LEXIS 9565 (N.Y. App. Div. 2d Dep't 2006).

19. Effect of contractual limitations

An employee may not recover hospital expenses from a nonprofit hospital service corporation where its contract excluded hospital service provided for under any compensation law. Moeller v Associated Hospital Service of Capital Dist., 304 N.Y. 73, 106 N.E.2d 16, 304 N.Y. (N.Y.S.) 73, 1952 N.Y. LEXIS 783 (N.Y. 1952).

The rights of an employee under the Law do not depend upon the manner in which his employer has elected to carry his insurance; the employee is not prejudiced by the fact that his employer qualifies as a self-insurer or insures otherwise than in the state fund. Winfield v New York C. & H. R. R. Co., 168 A.D. 351, 153 N.Y.S. 499, 1915 N.Y. App. Div. LEXIS 8281 (N.Y. App. Div.), aff'd, 216 N.Y. 284, 110 N.E. 614, 216 N.Y. (N.Y.S.) 284, 1915 N.Y. LEXIS 803 (N.Y. 1915).

A compensation policy was in effect where employer took out the policy on a particular construction job in September, cancelled it in December when he quit work for the winter and called an agent to reinstate the policy when he was ready to go back to work in April. No policy had been issued at the time of the accident which occurred about two weeks after the employer began work but the agent testified that he assumed there was coverage from the amount of the telephone order. Dunn v Victor Ottilio & Sons, 1 A.D.2d 909, 149 N.Y.S.2d 630, 1956 N.Y. App. Div. LEXIS 5953 (N.Y. App. Div. 3d Dep't 1956).

Where union purchased a workmen's compensation policy which provided coverage for "labor union—all employees including business agents and organizers," the coverage extended to officers even if policy did not expressly extend coverage to them and even if the officers were unsalaried. Paschen v Bowen, 47 A.D.2d 800, 365 N.Y.S.2d 306, 1975 N.Y. App. Div. LEXIS 9120 (N.Y. App. Div. 4th Dep't 1975).

II. Persons Responsible as Employers

20. In general

A labor union which furnishes union members certain jobs acting as their spokesman and paying them, may be an independent contractor and therefore may be liable for compensation. Hines v Henry I. Stetler, Inc., 196 A.D. 622, 188 N.Y.S. 73, 1921 N.Y. App. Div. LEXIS 5578 (N.Y. App. Div. 1921).

While an infant may disaffirm his contract as an employer he cannot avoid his statutory liability as to compensation where an accident happens prior to a valid disaffirmance. Rahman v Bethel, 236 A.D. 182, 258 N.Y.S. 286, 1932 N.Y. App. Div. LEXIS 5926 (N.Y. App. Div. 1932).

Managing agent of multiple dwelling owned by Metropolitan Life Insurance Co. was not liable for affirmative negligence of superintendent causing death of decedent where both decedent and superintendent were each carried on the payroll of Metropolitan and paid by the managing agent from the rents collected and covered by a compensation policy as an employee of Metropolitan. Cunningham v Mark Rafalsky & Co., 281 A.D. 609, 121 N.Y.S.2d 207, 1953 N.Y. App. Div. LEXIS 3107 (N.Y. App. Div. 1953), aff'd, 306 N.Y. 712, 117 N.E.2d 903, 306 N.Y. (N.Y.S.) 712, 1954 N.Y. LEXIS 1072 (N.Y. 1954).

Workers' Compensation Board properly determined that New York City Department of Housing Preservation and Development (HPD) was employer of claimant who was injured in fall while working as superintendent of apartment house, and was thus responsible for payment of his workers' compensation award, where claimant was hired by administrator appointed by court under CLS RPAPL Art 7-A after special proceeding commenced by HPD. Valverde v New York City Dep't of Housing Preservation & Dev., 154 A.D.2d 756, 546 N.Y.S.2d 203, 1989 N.Y. App. Div. LEXIS 12409 (N.Y. App. Div. 3d Dep't 1989), app. dismissed, 77 N.Y.2d 833, 566 N.Y.S.2d 585, 567 N.E.2d 979, 1991 N.Y. LEXIS 87 (N.Y. 1991).

Claimant, who was injured while assigned to work at county performing arts center (center) by county department of social services (department) under "community work experience program" (CWEP) providing employment to recipients of aid to dependent children, was properly determined to be employee of department for purposes of workers' compensation, despite department's contention that he was employee of center at time of injury, where record showed that department had exclusive power to appoint CWEP employees, retained power to select appropriate work site, paid claimant's wages and approved his work schedule, supervised claimant's job performance, reviewed his weekly time sheets and evaluation reports, and retained authority to remove him from work site. Pizzatola v Ulster County Dep't of Social Services, 156 A.D.2d 873, 550 N.Y.S.2d 93, 1989 N.Y. App. Div. LEXIS 15986 (N.Y. App. Div. 3d Dep't 1989).

Claimant, who was injured while assigned to work at county performing arts center (center) by county department of social services (department) under "community work experience program" (CWEP) providing employment to recipients of aid to dependent children, was properly determined to be employee of department for purposes of workers' compensation, despite department's contention that he was employee of center at time of injury, since CWEP clearly envisions that participants will be considered employees and provided with workers' compensation coverage, and contrary result was not warranted by fact that center exercised some supervision over claimant and may have agreed to provide workers' compensation coverage for him. Pizzatola v Ulster County Dep't of Social Services, 156 A.D.2d 873, 550 N.Y.S.2d 93, 1989 N.Y. App. Div. LEXIS 15986 (N.Y. App. Div. 3d Dep't 1989).

Court would annul determination of Workers' Compensation Board that adult newspaper carrier was independent contractor rather than employee, even though she derived her earnings from purchase of newspapers and their resale at profit, she was free to pick up papers at any time after they were printed, and she could determine means of delivery, arrange for substitutes, and handle customer complaints, since same factors were present in earlier decision wherein board held that employer-employee relationship was present. Paolucci v Capital Newspapers, 197 A.D.2d 811, 603 N.Y.S.2d 74, 1993 N.Y. App. Div. LEXIS 10122 (N.Y. App. Div. 3d Dep't 1993).

Employment relationship was established by evidence that employer directed claimant as to work to be performed, paid claimant hourly wage, and provided claimant with tools and forms for his work in building cement walls. Charlebois v Brockway, 209 A.D.2d 798, 618 N.Y.S.2d 478, 1994 N.Y. App. Div. LEXIS 11104 (N.Y. App. Div. 3d Dep't 1994).

Workers' Compensation Board properly ruled that claimants, who were injured while performing duties as adult newspaper carriers, were employees rather than independent contractors where, inter alia, employer required claimants to deliver newspapers by set hour each morning, employer fixed claimants' territories and provided them with route list containing specific instructions as to how to deliver newspapers to certain customers, employer handled customer complaints, and employer provided plastic bags and elastic bands for use in distribution process. Paolucci v Capital Newspapers, 229 A.D.2d 751, 645 N.Y.S.2d 603, 1996 N.Y. App. Div. LEXIS 7844 (N.Y. App. Div. 3d Dep't 1996).

Workers' Compensation Board properly determined that no employer-employee relationship existed between decedent and company that employed passenger decedent was carrying when plane he was piloting crashed, where president of company testified that company did not hire decedent and that decedent had offered to provide flight as favor, and claimant had stated in her application for insurance benefits that decedent was not in course of his employment at time of accident. Limpert v Kay-R Elec., 250 A.D.2d 1005, 673 N.Y.S.2d 762, 1998 N.Y. App. Div. LEXIS 5921 (N.Y. App. Div. 3d Dep't 1998).

Workers' Compensation Board properly concluded that employer-employee relationship existed where corporation's principal applied for taxicab license for vehicle that claimant was driving at time of his accident, corporation did business as entity that provided claimant with cab and dispatched him to pick up his fares, and principal failed to appear and offer any evidence. Fisher v SDAM Mgmt. Inc., 284 A.D.2d 845, 727 N.Y.S.2d 724, 2001 N.Y. App. Div. LEXIS 6743 (N.Y. App. Div. 3d Dep't 2001).

As a dispatch company leased a vehicle to a workers' compensation claimant who had a hack license and used the vehicle to pick up passengers for compensation, and the vehicle had New York City Taxi and Limousine Commission license plates registered to the company, the vehicle was a "taxicab" as defined by N.Y. Veh. & Traf. Law § 148-a. Therefore, the company and claimant were employer and employee under N.Y. Workers' Comp. Law § 2. Matter of Nkrumah v Thomas, 61 A.D.3d 1325, 877 N.Y.S.2d 515, 2009 N.Y. App. Div. LEXIS 3312 (N.Y. App. Div. 3d Dep't 2009).

The relationship of employer and employee is not changed when employers continue to provide wages in the form of workers' compensation to employees who have been injured while in the course of their employment. Dallesandro v Dallesandro, 110 Misc. 2d 342, 442 N.Y.S.2d 400, 1981 N.Y. Misc. LEXIS 3089 (N.Y. Fam. Ct. 1981).

Where an employer charges his employee with the performance of a certain duty and it appears that the force available to perform such a duty is not sufficient, or an emergency occurred which

requires assistance for the employee to perform his duties, he is impliedly authorized to call on others to assist him and they thereby become employees of the original employer, and the latter assumes toward them the same obligations as he assumes with the respect to his regular employees. Paul v Mosberg Realty Corp., 37 N.Y.S.2d 766, 1942 N.Y. Misc. LEXIS 2096 (N.Y. City Ct. 1942).

21. Multiple employers

A commission salesman representing two firms may be awarded compensation against both. Jacobi v Supreme Junior Coat Co., 268 N.Y. 654, 198 N.E. 541, 268 N.Y. (N.Y.S.) 654, 1935 N.Y. LEXIS 1121 (N.Y. 1935).

Where a watchman sustained injuries while guarding the premises of 17 separate property owners, an award will be imposed against a single property owner whose property he was guarding at the time of the accident. Moochler v A. H. Herrick & Son, 272 N.Y. 545, 4 N.E.2d 729, 272 N.Y. (N.Y.S.) 545, 1936 N.Y. LEXIS 1040 (N.Y. 1936).

Where at time of automobile accident between two automobiles the parties had multiple employers, a steel company and union, and accident occurred while traveling home from negotiations to promote the union's interest, the parties were answerable to the union for actions taken on its behalf and they were paid by union for their efforts by receiving reimbursement of their lost wages, workmen's compensation was the parties' exclusive remedy for injuries resulting from the collision. Paschen v Bowen, 47 A.D.2d 800, 365 N.Y.S.2d 306, 1975 N.Y. App. Div. LEXIS 9120 (N.Y. App. Div. 4th Dep't 1975).

In negligence action, company's affirmative defense that it was engaged in joint venture with plaintiff's employer (against whom complaint had been dismissed because of exclusivity of workers' compensation relief) was properly dismissed where company's general counsel testified that company and plaintiff's employer were separate corporate entities, filed separate tax returns and did not share income or losses. Bruno v Dynamic Enterprises, Inc., 132 A.D.2d 964, 518 N.Y.S.2d 494, 1987 N.Y. App. Div. LEXIS 49429 (N.Y. App. Div. 4th Dep't 1987).

It was error for board to impose joint and several liability on uninsured dual employers where evidence was insufficient to show that they participated in joint venture; matter would be remitted for board to determine whether joint venture existed, and if not, board should apportion liability between employers. Ayers v Hakes, 260 A.D.2d 975, 689 N.Y.S.2d 281, 1999 N.Y. App. Div. LEXIS 4447 (N.Y. App. Div. 3d Dep't 1999).

Plaintiff's general employer was entitled to summary judgment dismissing personal injury action where plaintiff had received workers' compensation for same injury from his special employer; when employee elects to receive workers' compensation benefits, both general and special employers are shielded from any action at law commenced by that employee. Stein v Beaver Concrete Breaking Co., 281 A.D.2d 616, 722 N.Y.S.2d 185, 2001 N.Y. App. Div. LEXIS 3101 (N.Y. App. Div. 2d Dep't 2001).

22. Contractors and subcontractors

An employee of a subcontractor may maintain an action against the general contractor for personal injuries caused by the general contractor's negligence in the absence of proof that the subcontractor has failed to secure compensation and that the general contractor is thereby under a statutory liability pursuant to § 56 to pay compensation. Clark v Monarch Engineering Co., 248 N.Y. 107, 161 N.E. 436, 248 N.Y. (N.Y.S.) 107, 1928 N.Y. LEXIS 1230 (N.Y. 1928).. See also Casey v Shane, 248 N.Y. 625, 162 N.E. 551, 248 N.Y. (N.Y.S.) 625, 1928 N.Y. LEXIS 1449 (N.Y.), reh'g denied, 249 N.Y. 513, 164 N.E. 565, 249 N.Y. (N.Y.S.) 513, 1928 N.Y. LEXIS 842 (N.Y. 1928).

A general contractor is not bound to secure compensation as an employer of the employees of a subcontractor but he is liable to pay compensation if the subcontractor does not secure it. Sweezey v Arc Electrical Const. Co., 295 N.Y. 306, 67 N.E.2d 369, 295 N.Y. (N.Y.S.) 306, 1946 N.Y. LEXIS 835 (N.Y. 1946), disapproved, Washington Metro. Area Transit Auth. v Johnson, 467 U.S. 925, 104 S. Ct. 2827, 81 L. Ed. 2d 768, 1984 U.S. LEXIS 122 (U.S. 1984).

A workman injured while working on a lumber job is the employee of the general contractor, who has a contract to clear a tract of pulp wood rather than alleged subcontractors where it appeared it was the custom in the industry that a tract to be cleared should be subdivided among small groups of men where such subdivisions do not amount to the creation of subcontractors in the sense that it relieves the general contractor from the liability of affording compensation to those injured in the work and the general contractor was the only one who had taken out insurance. Sullivan v Preston, 177 A.D. 110, 163 N.Y.S. 692, 1917 N.Y. App. Div. LEXIS 5184 (N.Y. App. Div. 1917).

An award may be given against a contractor and subcontractor jointly. Dunbar v Mackenzie, 198 A.D. 946, 189 N.Y.S. 233, 1921 N.Y. App. Div. LEXIS 8512 (N.Y. App. Div.), aff'd, 232 N.Y. 556, 134 N.E. 570, 232 N.Y. (N.Y.S.) 556, 1921 N.Y. LEXIS 588 (N.Y. 1921).

A subcontractor rather than a general contractor is the employer of a claimant originally employed by the general contractor but who was employed by the subcontractor pursuant to an arrangement between the contractors and, during the period in which the employee was injured, the subcontractor paid the employee and social security obligations and workmen's compensation insurance payments were paid by the subcontractor for the employee and the subcontractor made the employer's first report of injury and notified the Industrial Commissioner that it had commenced payment of compensation. Moore v Colonial Sand & Stone Co., 261 A.D. 857, 24 N.Y.S.2d 751, 1941 N.Y. App. Div. LEXIS 7791 (N.Y. App. Div. 1941).

General contractor was entitled to summary judgment as to an indemnification claim against a subcontractor, arising from the subcontractor's employee's injury, because the subcontractor was not statutorily protected from liability since the subcontractor did not procure workers' compensation coverage for the employee. Poulin v Ultimate Homes, Inc., 166 A.D.3d 667, 87 N.Y.S.3d 189, 2018 N.Y. App. Div. LEXIS 7462 (N.Y. App. Div. 2d Dep't 2018).

23. General and special employers

Employees may look to their general employer or their special employer or both, for compensation for injuries due to occupational hazards. De Noyer v Cavanaugh, 221 N.Y. 273, 116 N.E. 992, 221 N.Y. (N.Y.S.) 273, 1917 N.Y. LEXIS 1300 (N.Y. 1917).; Schweitzer v Thompson & Norris Co., 229 N.Y. 97, 127 N.E. 904, 229 N.Y. (N.Y.S.) 97, 1920 N.Y. LEXIS 660 (N.Y. 1920).; Dennison v Peckham Road Corp., 295 N.Y. 457, 68 N.E.2d 440, 295 N.Y. (N.Y.S.) 457, 1946 N.Y. LEXIS 801 (N.Y. 1946).; Dale v Saunders Bros., 171 A.D. 528, 157 N.Y.S. 1062, 1916 N.Y. App. Div. LEXIS 5376, 1916 N.Y. App. Div. LEXIS 9736 (N.Y. App. Div.), aff'd, 218 N.Y. 59, 112 N.E. 571, 218 N.Y. (N.Y.S.) 59, 1916 N.Y. LEXIS 1042 (N.Y. 1916), 218 N.Y. (N.Y.S.) 59, 218 N.Y. 59, 112 N.E. 571, 218 N.Y. (N.Y.S.) 59, 1916 N.Y. LEXIS 1042 (N.Y. 1916).

Where an employee, who had been employed for over two years by a general employer and had been working for defendant special employer for more than a month was directed by the defendant's servant to haul a load of lumber already loaded on one of the defendant's trucks, to which he transferred the general employer's horses, and was hit and injured by a piece of timber negligently handled by one of the defendant special employer's servants, a negligence action against the special employer cannot be maintained. Lee v Cranford Co., 182 A.D. 191, 169 N.Y.S. 370, 1918 N.Y. App. Div. LEXIS 7848 (N.Y. App. Div. 1918), aff'd, 230 N.Y. 618, 130 N.E. 917, 230 N.Y. (N.Y.S.) 618, 1921 N.Y. LEXIS 896 (N.Y. 1921).

A corporation which originally hired an employee remains liable as employer for compensation, even though it assigned the contract under which the work for which the employee was hired was to be done, where such an assignment occurs in a foreign state and was without the knowledge of the employee. Noel v Morrison, 260 A.D. 377, 22 N.Y.S.2d 649, 1940 N.Y. App. Div. LEXIS 4598 (N.Y. App. Div.), reh'g denied, 260 A.D. 896, 23 N.Y.S.2d 832, 1940 N.Y. App. Div. LEXIS 5265 (N.Y. App. Div. 1940).

Where a truck renting corporation and a motor haulage corporation employed the same mechanic, an award against the rental corporation alone is proper where it appeared that on the day he sustained injuries, he was in the employ solely of the rental

corporation. Antonini v Young Rental Corp., 263 A.D. 1032, 33 N.Y.S.2d 466, 1942 N.Y. App. Div. LEXIS 7961 (N.Y. App. Div. 1942).

A harbor master hired by a general agent of the War Shipping Administration having charge of operations connected with loading and unloading of vessels, from stevedores employed by a contract stevedore, and placed under the sole supervision of the dock boss of the general agent is a special employee of the agent and an award of 50 per cent of death benefits is properly made against the agent and its carrier. Johnston v International Freighting Corp., 274 A.D. 728, 87 N.Y.S.2d 297, 1949 N.Y. App. Div. LEXIS 5878 (N.Y. App. Div.), reh'g denied, 275 A.D. 865, 89 N.Y.S.2d 523, 1949 N.Y. App. Div. LEXIS 4818 (N.Y. App. Div. 1949).

Where an award was made against both the general and special employers, liability to pay the award in full runs against each. But where the general employer was not insured and his responsibility was open to some doubt, the Board was authorized to make an award against both and the special employer was not harmed by a finding and direction to it to pay the full award with a right of recovery over. Yurcak v Chicago Exp., Inc., 283 A.D. 1128, 131 N.Y.S.2d 568, 1954 N.Y. App. Div. LEXIS 6498 (N.Y. App. Div. 1954).

If there is both a general and special employer, the board can make an award against both or either of them as it sees fit. Bianculli v Times Square Stores, Inc., 34 A.D.2d 696, 309 N.Y.S.2d 542, 1970 N.Y. App. Div. LEXIS 5085 (N.Y. App. Div. 3d Dep't 1970).

Plaintiff was special employee of defendant as matter of law, and his acceptance of workers' compensation benefits as employee of his general employer precluded him from bringing personal injury action against defendant, where (1) pursuant to contract between general employer and defendant, plaintiff was supplied to defendant to perform work as technician, and (2) general employer was responsible for paying plaintiff's wages and maintaining workers' compensation for him, but (3) plaintiff reported to work each day at defendant's plant and was supervised and controlled exclusively by defendant's employees, and no representative of general employer was present at defendant's plant while plaintiff performed his work. Degruchy v Xerox Corp., 188 A.D.2d 1003, 591 N.Y.S.2d 661, 1992 N.Y. App. Div. LEXIS 14829 (N.Y. App. Div. 4th Dep't 1992).

Corporation was decedent's special employer where general employer was owned by corporation, worked exclusively for corporation, and all work equipment and assignments for general employer's employees were provided and directed by corporation. Rainone v 36th St. Terminal Corp., 209 A.D.2d 814, 618 N.Y.S.2d 152, 1994 N.Y. App. Div. LEXIS 11127 (N.Y. App. Div. 3d Dep't 1994).

Plaintiff was "special employee" of defendant where he was hired by company supplying professional help to various companies for work at premises owned by defendant, he worked at premises from inception of his employment until date of accident, and defendant exercised exclusive direction and control over his daily activities. Schulze v Associated Univs., 212 A.D.2d 588, 622 N.Y.S.2d 570, 1995 N.Y. App. Div. LEXIS 1542 (N.Y. App. Div. 1st Dep't 1995).

Driver for truck delivery service was properly found by Workers' Compensation Board to be special employee of company for which he was making deliveries where that company controlled scheduling and location of deliveries, required drivers to work on specified days and had authority to impose rules as to their personal appearance, drivers stored their trucks in company warehouse, and drivers gained access to warehouse using identification cards bearing name of company's subsidiary. Tunison v P.C. Richards & Son, 257 A.D.2d 856, 684 N.Y.S.2d 311, 1999 N.Y. App. Div. LEXIS 524 (N.Y. App. Div. 3d Dep't 1999).

Plaintiff was properly found to be defendant city's special employee as matter of law where city, through its department of housing preservation and development (HPD), exclusively controlled hiring, firing, discipline, promotion, work performed, sick leave, vacations, and every other aspect of plaintiff's employment, with exception of payroll services, which were provided by plaintiff's general employer; it was immaterial that plaintiff reported directly to lead mechanic in employ of general employer where lead mechanic, like plaintiff, was controlled and supervised by HPD. Brunetti v City of New York, 286 A.D.2d 253, 728 N.Y.S.2d 665, 2001 N.Y. App. Div. LEXIS 8053 (N.Y. App. Div. 1st Dep't 2001).

24. —Duration of special employment

Where New York City contracted with the owner of a team for the use of said team with a driver employed by the owner and the driver having finished his day's work for the city and while returning to his employer was killed when a wheel came off the wagon, an award against the city is not justified since the decedent was killed in the duty of his general employment and not at the time of his special employment by the city. Mackey v New York, 193 A.D. 535, 184 N.Y.S. 495, 1920 N.Y. App. Div. LEXIS 5590 (N.Y. App. Div. 1920).

A student nurse, starting her vacation two days early, who was injured while in her father's automobile while en route to the general employer from the special employer pursuant to instructions and the rules of the institution to report "and sign out" for vacation, before being released from duty, is entitled to an award entirely assessed against the general employer hospital. Kwitkowski v Charles E. Wilson Memorial Hospital, 277 A.D. 802, 96 N.Y.S.2d 871, 1950 N.Y. App. Div. LEXIS 3376 (N.Y. App. Div. 1950).

25. —Allocation of responsibility

Both the special and the general employer may be liable for compensation and liability for the award divided between them where the employee is loaned to the special employer, who agreed to carry the employee on its payroll during the period of special service and the employee was temporarily subject to a direction of the employees of the special employer. Dennison v Peckham Road Corp., 295 N.Y. 457, 68 N.E.2d 440, 295 N.Y. (N.Y.S.) 457, 1946 N.Y. LEXIS 801 (N.Y. 1946).

A demonstrator for cosmetics assigned to a department store where she worked under the latter's supervision selling its products as well as her own is not entitled to recover against the store for injuries in the course of her employment there, where both companies had agreed that the demonstrator should be deemed the employee of the cosmetic company. Knox v Gimbel Bros, 258 A.D. 1013, 16 N.Y.S.2d 964, 1940 N.Y. App. Div. LEXIS 8644 (N.Y. App. Div. 1940).

Where claimant worked eight days for employer after his layoff by former employer latter employer was solely responsible for benefits awarded to claimant for subsequently incurred disability. Beckinsale v Charles H. Greenthal, Inc., 29 A.D.2d 1011, 289 N.Y.S.2d 426, 1968 N.Y. App. Div. LEXIS 4133 (N.Y. App. Div. 3d Dep't 1968).

Recipient of public assistance who was injured while participating in workfare program sponsored by county, when working as mechanic at city public works department garage, was general employee of county and special employee of city for purposes of apportioning his workers' compensation claim equally between county and city. Kemp v City of Hornell, 250 A.D.2d 950, 672 N.Y.S.2d 537, 1998 N.Y. App. Div. LEXIS 5678 (N.Y. App. Div. 3d Dep't 1998).

26. Aggravation of existing conditions

An employee who originally suffered an accidental fracture and refractured the same bone by lifting a heavy timber while in the employ of a second employer, suffers two accidental injuries and the award resulting from the second accident should be apportioned equally. Anderson v Babcock & Wilson Co., 256 N.Y. 146, 175 N.E. 654, 256 N.Y. (N.Y.S.) 146, 1931 N.Y. LEXIS 1036 (N.Y. 1931).

Where a nurse, who had been employed by two hospitals, is exposed to patients suffering from active tuberculosis during a tour of duty at one of the hospitals, resulting in a reactivation of a pre-existing tuberculosis condition, she is entitled to an award of compensation apportioned between both hospitals. Nyulassey v New York, 270 A.D. 970, 62 N.Y.S.2d 110, 1946 N.Y. App. Div. LEXIS 4892 (N.Y. App. Div. 1946).. See also Nosowich v Central Islip State Hospital, 274 A.D. 1080, 85 N.Y.S.2d 674, 1949 N.Y. App. Div. LEXIS 6143 (N.Y. App. Div. 1949).; McDonald v New York, 265 A.D. 1026, 39 N.Y.S.2d 2, 1943 N.Y. App. Div. LEXIS

6674 (N.Y. App. Div. 1943).; Commissioner of Taxation & Finance v Willard Parker Hospital, 256 A.D. 1018, 10 N.Y.S.2d 487, 1939 N.Y. App. Div. LEXIS 5901 (N.Y. App. Div. 1939).

Where an employee is disabled as the result of injuries sustained in two accidents, each accident occurring when the employee was employed by a different employer, the award may properly be charged equally against both employers. Zaborski v Newman Bros. Grain Co., 271 A.D. 1043, 68 N.Y.S.2d 585, 1947 N.Y. App. Div. LEXIS 5766 (N.Y. App. Div. 1947).; Frederick v Odenbach Shipbuilding Corp., 278 A.D. 882, 104 N.Y.S.2d 548, 1951 N.Y. App. Div. LEXIS 5050 (N.Y. App. Div. 1951).

A finding that disability due to recurrence of a hernia is the result of an original accident and chargeable against the employer at the time thereof is proper, even though the employee had worked for another employer and was employed by a third employer at the time of the recurrence of the injury, and the medical testimony was to the effect that the recurrence was due to repeated strains on the repaired condition of the original hernia. Jenkins v J. M. Sisson & Co., 274 A.D. 955, 83 N.Y.S.2d 687, 1948 N.Y. App. Div. LEXIS 4238 (N.Y. App. Div. 1948).

Where a plumber sustained a displaced intervertebral disc in a 1936 employment accident and in 1945 after doing heavy work for a second employer, the employee developed symptoms of the displaced disc and as the result of the original accident and the work done for the second employer, the employee suffered a "ruptured intervertebral disc" for which surgery became necessary early in 1946, apportionment of a disability award equally between the employers based on a finding of occupational aggravation of an original back injury is proper. Paradiso v Vuozzo, 277 A.D. 802, 96 N.Y.S.2d 796, 1950 N.Y. App. Div. LEXIS 3375 (N.Y. App. Div. 1950).

Where an employee originally suffered a sacroiliac strain working for his first employer and, after compensation had been paid, the condition improved to such an extent that the employee's doctor advised him to try light work whereupon he took the job with a new employer carrying bags of coal and re-strained his back causing a new disability, an award of compensation for the second disability will be apportioned between the employers. Quick v Levine, 278 A.D. 879, 104 N.Y.S.2d 397, 1951 N.Y. App. Div. LEXIS 5042 (N.Y. App. Div. 3d Dep't), modified, 278 A.D. 988, 104 N.Y.S.2d 397, 1951 N.Y. App. Div. LEXIS 5453 (N.Y. App. Div. 3d Dep't 1951).

Where an injury sustained in 1945 by an employee as the result of a fall from which the employee suffered a fracture of the wing of the right ilium, fracture of the right ischium and contusion of the right thigh and hip contributed to the employee's disability along with a lumbosacral strain suffered when the employee was employed by a new employer, an award of benefits computed by dividing responsibility equally between the two employers is proper. Frederick v Odenbach Shipbuilding Corp., 278 A.D. 882, 104 N.Y.S.2d 548, 1951 N.Y. App. Div. LEXIS 5050 (N.Y. App. Div. 1951).

III. Duty to Compensate; Exceptions

27. In general

The Workmen's Compensation Law imposes upon every employer, foreign or domestic, the duty to secure to his workmen compensation for injuries wherever sustained arising out of and in the course of the employment located here. Cameron v Ellis Const. Co. (1930) 252 NY 394, 169 NE 622, remittitur amd (1930) 253 NY 559, 171 NE 782.; Bauss v Consolidated Chimney Co., 270 A.D. 70, 58 N.Y.S.2d 717, 1945 N.Y. App. Div. LEXIS 2803 (N.Y. App. Div. 1945).

The only exceptions as to the right to compensation of employees covered by workmen's compensation law are those specifically stated in this section, to wit intoxication or wilful injury. Sackolwitz v Charles Hamburg & Co., 295 N.Y. 264, 67 N.E.2d 152, 295 N.Y. (N.Y.S.) 264, 1946 N.Y. LEXIS 829 (N.Y. 1946).

Basic policy of workmen's compensation is that if injury was accidental and arose in course of employment, recovery should be allowed regardless of foreseeability of injury. Wolfe v Sibley, Lindsay & Curr Co., 36 N.Y.2d 505, 369 N.Y.S.2d 637, 330 N.E.2d 603, 1975 N.Y. LEXIS 1847 (N.Y. 1975).

A decision of the Workers' Compensation Board that claimant sustained a compensable back injury in the course of his employment and that there was dual coverage by two insurance companies, each of which would be responsible for 50 percent of claimant's benefits, would be reversed where one insurer's contractual liability under its policy of workers' compensation insurance terminated when that company's insured sold the employment premises prior to claimant's injury and claimant was thereafter in the employ of and paid by the other company's insured. Vasquez v Gotham Hotel, 93 A.D.2d 929, 462 N.Y.S.2d 323, 1983 N.Y. App. Div. LEXIS 17822 (N.Y. App. Div. 3d Dep't 1983).

Court would affirm determination that work provided for claimant exceeded limitation imposed by his physician and that his refusal to perform such work did not constitute voluntary removal from labor market for purposes of receiving workers' compensation benefits where (1) claimant's doctor released him to do "light sweeping and cleaning with no heavy lifting," (2) physician-consultant for employer's workers' compensation insurance carrier concurred with claimant's doctor, and (3) claimant's supervisor stated that in addition to approved tasks, claimant was required to lift salt bags weighing as much as 50 pounds. Muzio v Albany, Bureau of Streets, 151 A.D.2d 883, 542 N.Y.S.2d 857, 1989 N.Y. App. Div. LEXIS 8124 (N.Y. App. Div. 3d Dep't 1989).

Exposure to secondhand smoke in workplace, to extent that injuries occur, is not exempt from exclusive remedy provisions of CLS Work Comp §§ 10, 11 and 29. Caballero v First Albany Corp., 237 A.D.2d 800, 654 N.Y.S.2d 866, 1997 N.Y. App. Div. LEXIS 2438 (N.Y. App. Div. 3d Dep't 1997).

Injuries to 15-year-old junior lifeguard when he dived into shallow lake at summer camp arose out of and in course of his employment, rather than in off-duty athletic activity, for purposes of his entitlement to workers' compensation benefits, where (1) he attended lifesaving class, along with other lifeguards and some campers, just before accident, (2) class was taught by head lifeguard (his uncle) and included instruction in shallow-water diving, (3) although junior lifeguard was not required to attend class, head lifeguard invited him to do so, and (4) after class ended, head lifeguard left area, but other lifeguards remained. Kobre v Camp Mogen Avraham, 255 A.D.2d 636, 679 N.Y.S.2d 753, 1998 N.Y. App. Div. LEXIS 11684 (N.Y. App. Div. 3d Dep't 1998).

Evidence supported Workers' Compensation Board's determination that claimant voluntarily removed himself from labor market by accepting voluntary buyout package, despite his claim that his decision to retire was due to his work-related disability, where buyout package was offered to all eligible employees during period when employer was actively downsizing, claimant accepted buyout package, which was financially advantageous, due to his concern that he might otherwise be laid off, and in nearly 3-year period preceding his retirement, claimant satisfactorily performed all job duties without any physical complaints or medical restrictions and never complained to his supervisor that he was physically unable to perform any task. La Rosa v IBM, 256 A.D.2d 670, 681 N.Y.S.2d 161, 1998 N.Y. App. Div. LEXIS 12978 (N.Y. App. Div. 3d Dep't 1998).

Workers' Compensation Board properly ruled that claimant voluntarily withdrew herself from labor market where employer offered her position consistent with her light-duty restrictions, claimant testified that she normally would have taken position but was unable to do to child care problems resulting from her husband also working night shift until April, she subsequently began attending business career classes, and employer's representative testified that claimant was again offered position in spring but that she failed to respond to employment offer. Willis v Auxiliary Servs. Corp., 256 A.D.2d 803, 681 N.Y.S.2d 652, 1998 N.Y. App. Div. LEXIS 13333 (N.Y. App. Div. 3d Dep't 1998).

Evidence supported finding that claimant's failure to accept employer's light-duty assignment did not constitute voluntary withdrawal from labor market where claimant testified that written offer of light-duty work he received did not contain description of work he would be required to perform, he further stated that he called employer but did not receive job description

which he needed to obtain his doctor's clearance, employer's representative testified that light-duty position was available, but claimant's treating physician testified that claimant was not able to perform job as described in letter from employer to another physician, claimant thereafter developed major depression which was determined to be causally related to back injury that had caused his initial disability, and his treating psychiatrist testified that, as result of depression, claimant could not have returned to work for employer. Konz v Universal Joint Sales, 262 A.D.2d 819, 692 N.Y.S.2d 240, 1999 N.Y. App. Div. LEXIS 6837 (N.Y. App. Div. 3d Dep't 1999).

Claimant's testimony and medical evidence of her continuing pain despite ongoing medical treatment, including surgery on her ankle, provided substantial evidence to support Workers' Compensation Board's finding that claimant's decision to retire was prompted by her compensable injury. Beehm v Educational Opportunity Ctr., 272 A.D.2d 808, 709 N.Y.S.2d 221, 2000 N.Y. App. Div. LEXIS 5974 (N.Y. App. Div. 3d Dep't 2000).

Evidence supported Workers' Compensation Board's finding that it was not unreasonable for claimant to refuse par-time clerical position offered by employer and that she did not voluntarily withdraw from labor market where employer's vice-president of human resources was aware that claimant, who had no place to live in New York during winter, left for extended visit to Florida every October and he knew that her annual trip was imminent when she offered claimant par-time position, and claimant testified that once she arrived in Florida and was terminated from her employment, she actively sought new employment without success until she was classified as totally disabled and discontinued her job search. Frasch v Lakeside Mem. Hosp., 274 A.D.2d 612, 710 N.Y.S.2d 698, 2000 N.Y. App. Div. LEXIS 7598 (N.Y. App. Div. 3d Dep't 2000).

The plain design of Workmen's Compensation Law is to assure payments to injured employees regardless of fault and employers are required to secure payment of stipulated compensation by self-insurance, insurance in the state fund or with a private carrier. Cardinal v State, 102 N.Y.S.2d 895, 200 Misc. 574, 1951 N.Y. Misc. LEXIS 1566 (N.Y. Ct. Cl. 1951), modified, 279 A.D. 326, 109 N.Y.S.2d 818, 1952 N.Y. App. Div. LEXIS 4667 (N.Y. App. Div. 1952).

Every employer must secure compensation to his employees and pay or provide compensation for their disability or death, and where the employer does so, the injured employee may claim only the statutory compensation, and where the employer does not secure compensation, the injured employee may sue for damages or claim compensation. Twitty v Donlon, 133 N.Y.S.2d 381, 1954 N.Y. Misc. LEXIS 2208 (N.Y. Sup. Ct. 1954).

When an employer by engaging insurance carrier and paying him premiums has provided compensation for his employees he has done what is required of him by this section and in effect is relieved of the provisions of the Work. Comp. Law. Liberty Mut. Ins. Co. v American Incinerator Co., 51 F.2d 739, 1931 U.S. Dist. LEXIS 1557 (D.N.Y. 1931).

28. Employee negligence

A compensation is made without regard to the faults of the employee and the question of negligence or contributory negligence is not involved. Chludzinski v Standard Oil Co., 176 A.D. 87, 162 N.Y.S. 225, 1916 N.Y. App. Div. LEXIS 8964 (N.Y. App. Div. 1916).See also O'Brien v Luckenbach S. S. Co., 293 F. 170, 1923 U.S. App. LEXIS 1590 (2d Cir. N.Y. 1923).

Negligence of the employee in taking a course which was more dangerous than other courses furnishes no defense to the employer or insurance company. Bylow v St. Regis Paper Co., 179 A.D. 555, 166 N.Y.S. 874, 1917 N.Y. App. Div. LEXIS 7431 (N.Y. App. Div. 1917).

If a dizzy spell resulting in a fall from a ladder was the result of an original injury suffered in the course of the employment, the employee's wife is entitled to death benefits, whether or not the employee was negligent in climbing the ladder. Colvin v Emmons & Whitehead, 216 A.D. 577, 215 N.Y.S. 562, 1926 N.Y. App. Div. LEXIS 9275 (N.Y. App. Div. 1926).

The Workmen's Compensation Law does not deprive an employee or his dependents of its benefits because the acts of the employee in causing the injury may be in violation of a public statute, ordinance or regulation. A death claim was proper where the employee was killed in a collision after driving employer's car too fast around a curve and partly in wrong traffic lane. Chaffee v Effron, 1 A.D.2d 197, 149 N.Y.S.2d 115, 1956 N.Y. App. Div. LEXIS 6261 (N.Y. App. Div. 3d Dep't 1956).

Claimant's negligent operation of his employer's taxicab would not bar otherwise valid claim to compensation. Bennerson v Checker Garage Service Corp., 54 A.D.2d 1042, 388 N.Y.S.2d 374, 1976 N.Y. App. Div. LEXIS 15006 (N.Y. App. Div. 3d Dep't 1976).

29. —Forbidden acts

In a workers' compensation proceeding arising from injuries sustained by a 16-year-old gasoline service station attendant who was burned in an explosion that occurred when he threw a lighted match into a can containing a residue of gasoline, oil and grease, the Workers' Compensation Board did not err in concluding that the injury was the result of "cumulative horseplay," and thus arose out of and in the course of employment. Lubrano v Malinet, 65 N.Y.2d 616, 491 N.Y.S.2d 148, 480 N.E.2d 737, 1985 N.Y. LEXIS 14695 (N.Y. 1985).

Claimant's injuries did not arise out of and in the course of his employment, and were not compensable, where they were due to his violation of a strict and rigidly enforced rule against smoking in the building, imposed because the employer was engaged in a business requiring extensive use of highly inflammable materials, by slipping into a toilet to smoke a cigarette, throwing the match into a toilet bowl, the contents of which immediately burst into flames, notwithstanding claimant then threw a pail of sand upon the flames in an attempt to stop the conflagration and the proximate cause of his injuries was flaming liquid splashing out of the toilet bowl and upon his person as the result of tossing in the sand. Boggan v Abby Finishing Co., 11 A.D.2d 591, 200 N.Y.S.2d 488, 1960 N.Y. App. Div. LEXIS 9948 (N.Y. App. Div. 3d Dep't 1960).

A rule or regulation of the employment may be considered as abrogated as the result of an injured employee's habitual disregard of it with his employer's knowledge and acquiescence. Barrett v Al Charyn, Inc., 13 A.D.2d 863, 214 N.Y.S.2d 533, 1961 N.Y. App. Div. LEXIS 11065 (N.Y. App. Div. 3d Dep't 1961), aff'd, 11 N.Y.2d 849, 227 N.Y.S.2d 673, 182 N.E.2d 282, 1962 N.Y. LEXIS 1267 (N.Y. 1962).

With respect to death of a truck driver by carbon monoxide poisoning from using a charcoal burning heater improvised from two cans in his truck, the board was not required to find that deceased was violating orders in using the improvised heating device because of testimony that he had been told not to use it and warned against using it by the employer and his supervisor, where it appeared that the truck heater had been out of order for a long time, the employer had done nothing to fix it, and decedent had been using the charcoal heater openly and with the knowledge of the employer in order to keep warm. Barrett v Al Charyn, Inc., 13 A.D.2d 863, 214 N.Y.S.2d 533, 1961 N.Y. App. Div. LEXIS 11065 (N.Y. App. Div. 3d Dep't 1961), aff'd, 11 N.Y.2d 849, 227 N.Y.S.2d 673, 182 N.E.2d 282, 1962 N.Y. LEXIS 1267 (N.Y. 1962).

With respect to the claim of a boy, 17 years old when injured by catching his right hand in a meat grinding machine on his employer's restaurant premises, which he was operating for the first time, resulting in amputation of the hand, testimony that he was operating the machine without instructions, and without a guard which was required to be used in connection with it, because he was not told how to operate it or of what the guard consisted, would permit a board finding that he was doing the work in a forbidden manner rather than doing work forbidden by the employer, and was thereby entitled to a full schedule award plus further penalty in like amount against the employer for violating § 130 of the Labor Law. Kilgore v Fragola, 14 A.D.2d 612, 218 N.Y.S.2d 146, 1961 N.Y. App. Div. LEXIS 9388 (N.Y. App. Div. 3d Dep't), app. denied, 10 N.Y.2d 706, 1961 N.Y. LEXIS 2073 (N.Y. 1961).

Plaintiff's behavior was outside scope of Workers' Compensation Law, even if his supervisor continued to exercise authority over him during lunch break and ensuing ride in supervisor's van, co-worker performed stunt involving his leaning backward outside van door while vehicle was moving, co-worker then returned

to his seat and switched places with plaintiff, who attempted same stunt, whereupon he lost his balance, fell outside van, and was injured. Gladwell v C & S Communs., 224 A.D.2d 775, 637 N.Y.S.2d 502, 1996 N.Y. App. Div. LEXIS 763 (N.Y. App. Div. 3d Dep't 1996).

30. Illegal activities

Evidence supported findings of Workers' Compensation Board that roofer did not deviate from or abandon his employment, and that his death arose out of and in course of employment, where he fell to his death from roof of building near jobsite, while waiting for material to arrive so work could begin, as he and coworker were removing some copper downspouts from building to sell as salvage, which was illegal conduct, but common practice in industry and tolerated by employer. Richardson v Fiedler Roofing, Inc., 67 N.Y.2d 246, 502 N.Y.S.2d 125, 493 N.E.2d 228, 1986 N.Y. LEXIS 18049 (N.Y. 1986).

Workers' compensation claimant's violations of New York City Taxi and Limousine Commission regulations by picking up street hails in a livery cab did not alter his status as an employee or the vehicle's status as a taxicab under N.Y. Veh. & Traf. Law § 148-a. Matter of Nkrumah v Thomas, 61 A.D.3d 1325, 877 N.Y.S.2d 515, 2009 N.Y. App. Div. LEXIS 3312 (N.Y. App. Div. 3d Dep't 2009).

31. Intoxication

A claim by a traveling salesman for injuries alleged to have been suffered when he "slipped" as he attempted to alight from his automobile in a city street in the vicinity of his hotel will be dismissed, when the injury was occasioned solely by the intoxication of the claimant. Brynildsen v Mt. Vernon Novelty Curtain Co., 239 A.D. 566, 268 N.Y.S. 600, 1933 N.Y. App. Div. LEXIS 8101 (N.Y. App. Div. 1933).

One whose injuries result from falling down a flight of stairs is not entitled to an award of compensation where it appears that the fall was caused by the claimant's intoxication. Hentnick v City Ice & Fuel Co., 271 A.D. 764, 64 N.Y.S.2d 612, 1946 N.Y. App. Div. LEXIS 2897 (N.Y. App. Div. 1946).

Workers' Compensation Board properly concluded that claimant's intoxication was sole causative factor of accident that occurred while he was driving sanitation truck, where he admitted drinking "wine and liquor" before reporting for work that day, police officers testified that he was visibly intoxicated when they arrived at accident scene, co-worker testified that claimant was driving erratically prior to accident, breathalyzer test conducted after accident disclosed that he had blood alcohol content of 0.298 percent, and he ultimately pleaded guilty to felony driving under influence of alcohol. Dawson v S.P.F. Carting Co., 259 A.D.2d 910, 686 N.Y.S.2d 881, 1999 N.Y. App. Div. LEXIS 2540 (N.Y. App. Div. 3d Dep't 1999).

32. —Course of employment

A craneman on a dredge anchored in a river, and living on the dredge in quarters furnished by his employer who went ashore in the evening, after his hours of labor, for purposes entirely personal to him, and, becoming intoxicated, fell from the dock and was drowned while waiting for a rowboat maintained by the master to transport employees to and from shore, was not killed in course of his employment. Berg v Great Lakes Dredge & Dock Co., 173 A.D. 82, 158 N.Y.S. 718, 1916 N.Y. App. Div. LEXIS 10382 (N.Y. App. Div. 1916).

An employee who reports for work in such state of intoxication that he is unable to perform his duties is not entitled to compensation for injuries received from a fall upon being sent ashore. In re Pope, 177 A.D. 69, 163 N.Y.S. 655, 1917 N.Y. App. Div. LEXIS 5180 (N.Y. App. Div. 1917).

An award of death benefits is proper as against the contention that the employee's death was the sole result of his intoxication, where it appears that an employee's Christmas party had been in progress at which liquor was served but there was evidence that the deceased walked all right and acted all right on his way to the elevator shaft into which he fell suffering injuries which resulted in his death. Estabrook v Allied Paper Mills, Inc., 257 A.D. 1096, 14 N.Y.S.2d 653, 1939 N.Y. App. Div. LEXIS 9229 (N.Y. App. Div. 1939).

A truck driver is injured in the course of his employment where his injury occurred on the route from his employer's premises where he had unloaded to the garage where the truck was kept at the end of the day, even though the accident occurred sometime later than the period required to return to the garage from the time the truck driver left his employer's premises and an examination after the truck driver's death revealed alcohol in his brain. Grabusch v Western Beer Corp., 263 A.D. 1027, 33 N.Y.S.2d 463, 1942 N.Y. App. Div. LEXIS 7946 (N.Y. App. Div. 1942).

The board is justified in refusing to find that the evidence established that intoxication was the sole cause of deceased's injuries where deceased, upon coming to work at 7:30 p.m. in an intoxicated condition, was induced by the foreman to sleep in a truck cab on premises, and was later crushed against the wall by a truck being backed into the garage. Holewienko v Gimpel Bros., Inc., 268 A.D. 839, 50 N.Y.S.2d 339, 1944 N.Y. App. Div. LEXIS 3707 (N.Y. App. Div. 1944).

An intoxicated employee was within the course of his employment when he fell from the rear of an open stake body truck going around a curve while the employee was standing on the rear of the truck urinating onto the highway. Reichel v Stokol Sales of New York, 282 A.D. 903, 124 N.Y.S.2d 787, 1953 N.Y. App. Div. LEXIS 5373 (N.Y. App. Div. 1953), aff'd, 308 N.Y. 671, 124 N.E.2d 316, 308 N.Y. (N.Y.S.) 671, 1954 N.Y. LEXIS 1788 (N.Y. 1954).

At a party given by his employer, decedent engaged in a contest in which intoxicating liquors, furnished by the employer, were drunk by the cupfull. Shortly after he was taken home, decedent was found dead due to pulmonary edema and acute alcoholism. While occurrence took place on the premises of employer, there was no basis for finding for claimant, since decedent's intoxication was the result of excessive personal use of alcohol which departed from any rational relationship to his work. Herman v Greenpoint Barrel & Drum Reconditioning Co., 9 A.D.2d 572, 189 N.Y.S.2d 353, 1959 N.Y. App. Div. LEXIS 7427 (N.Y. App. Div. 3d Dep't 1959), aff'd, 8 N.Y.2d 880, 203 N.Y.S.2d 922, 168 N.E.2d 721, 1960 N.Y. LEXIS 1159 (N.Y. 1960).

Where service employee made repairs at tavern, then had a few drinks and played pool for awhile and was fatally injured while returning in employer's truck to employer's place of business, death was compensable. Sedlack v J. & A. Custom Heating & Air Conditioning, Inc., 32 A.D.2d 1020, 301 N.Y.S.2d 1002, 1969 N.Y. App. Div. LEXIS 3400 (N.Y. App. Div. 3d Dep't 1969), aff'd, 27 N.Y.2d 784, 315 N.Y.S.2d 850, 264 N.E.2d 344, 1970 N.Y. LEXIS 1058 (N.Y. 1970).

33. —Causation, generally

An award of compensation may be made where intoxication, though an element, was not the sole cause of the accident. May v Accident & Casualty Ins. Co., 276 A.D. 1043, 95 N.Y.S.2d 687, 1950 N.Y. App. Div. LEXIS 5658 (N.Y. App. Div. 1950).

A finding by the board that intoxication was the sole cause of an accident is not required by Workmen's Comp L § 23 to include express negation of each hypothesis that might come to mind as possible contributory factor. Majune v Good Humor Corp., 26 A.D.2d 849, 273 N.Y.S.2d 819, 1966 N.Y. App. Div. LEXIS 3341 (N.Y. App. Div. 3d Dep't 1966).

Intoxication must be the sole cause of an injury before it is not compensable. Brame v Alcar Trucking Co., 31 A.D.2d 881, 297 N.Y.S.2d 378, 1969 N.Y. App. Div. LEXIS 4564 (N.Y. App. Div. 3d Dep't 1969).

Claim for workers' compensation death benefits was properly denied where, according to police reports, police officials received CB radio report which described decedent's vehicle as proceeding in erratic manner, truck driver reported that he saw decedent's vehicle some 3 quarters of mile ahead of him with its brakes continually applied and right turn signal on, decedent's vehicle pulled off onto right side of road and then abruptly turned left across 2 northbound lanes into path of truck, blood specimen taken from decedent's body revealed blood alcohol level of 0.23 percent, and 2 bottles of alcohol were found in decedent's vehicle. Purcell v American SIP Corp., 248 A.D.2d 844, 670 N.Y.S.2d 222, 1998 N.Y. App. Div. LEXIS 2469 (N.Y. App. Div. 3d Dep't 1998).

Evidence before Workers' Compensation Board did not require finding that claimant was unfit for duty at time of occurrence, and that injury sustained by him when he was shot after apprehending suspected traffic violator therefore did not arise out of course

of his employment as police detective, where (1) although he was on disability sick leave, his status was equivalent to that of off-duty police officer and, as such, he was legally authorized to effect arrest, and (2) although he had blood alcohol level of 0.16 percent at time of incident, there was no showing that his injury was due solely to intoxication. Curtis v Village of Lynbrook, 277 A.D.2d 752, 716 N.Y.S.2d 163, 2000 N.Y. App. Div. LEXIS 12254 (N.Y. App. Div. 3d Dep't 2000).

34. —Causation, intervening cause

There is evidence sufficient to authorize a grant of compensation as against a contention that the employee's death was solely occasioned by intoxication, where a night watchman, whose place of work was a shanty, was found lying on the floor of the shanty about six feet from a cot which he had occupied on occasion, his right wrist had been burned slightly, the whole front end of the mattress was burned and charred, the floor was littered with cigarette butts, and an autopsy indicated that the employee's death resulted from carbon monoxide poisoning and showed the presence of .32 per cent grain alcohol in his liver. McKenna v Atlas Contractors Equipment Corp., 300 N.Y. 317, 90 N.E.2d 479, 300 N.Y. (N.Y.S.) 317, 1950 N.Y. LEXIS 861 (N.Y. 1950).

An award of compensation is properly made where an employee dies of delirium tremens initially caused by alcoholism, where death was accelerated by an accidental injury. Sullivan v Industrial Engineering Co., 173 A.D. 65, 158 N.Y.S. 970, 1916 N.Y. App. Div. LEXIS 6043 (N.Y. App. Div. 1916).

The board was not required to find that an employee's death was "solely occasioned by intoxication," where he died from carbon monoxide poisoning resulting from his use of a charcoal burning heater improvised from two cans in the truck which he was employed to drive, notwithstanding a partly consumed bottle of wine was found under his body and tests following autopsy disclosed 0.35 percent alcohol in his brain. Barrett v Al Charyn, Inc., 13 A.D.2d 863, 214 N.Y.S.2d 533, 1961 N.Y. App. Div. LEXIS 11065 (N.Y. App. Div. 3d Dep't 1961), aff'd, 11 N.Y.2d 849, 227 N.Y.S.2d 673, 182 N.E.2d 282, 1962 N.Y. LEXIS 1267 (N.Y. 1962).

35. Evidence of cause of injury or death, generally

Testimony by one witness that the deceased employee and a companion, walking along arm in arm, staggered as they proceeded down the dock a short time before both fell into the river is insufficient to show that the accident resulted from intoxication. Mata v Phoenix Const. Associates, 257 A.D. 1091, 14 N.Y.S.2d 699, 1939 N.Y. App. Div. LEXIS 9216 (N.Y. App. Div. 1939), aff'd, 283 N.Y. 571, 27 N.E.2d 436, 283 N.Y. (N.Y.S.) 571, 1940 N.Y. LEXIS 1023 (N.Y. 1940).

A finding that an injury arose out of and in the course of employment will be sustained against a contention that the injury was caused by the employee's intoxication, where there is no competent or conclusive proof to sustain the contention and the accident was unwitnessed. Barnhill v Henry Steers, Inc., 263 A.D. 1034, 33 N.Y.S.2d 433, 1942 N.Y. App. Div. LEXIS 7967 (N.Y. App. Div. 1942).

Death benefits could not be denied under Work Comp L § 10 where evidence that employee's intoxication, reckless operation of vehicle and speeding were all factors contributing to fatal automobile accident was insufficient to overcome presumption contained in Work Comp L § 21, subd 4 that "the injury did not result solely from the intoxication of the injured employee." Rosebrook v Glen & Mohawk Milk Ass'n, 40 A.D.2d 928, 338 N.Y.S.2d 366, 1972 N.Y. App. Div. LEXIS 3244 (N.Y. App. Div. 3d Dep't 1972), aff'd, 33 N.Y.2d 964, 353 N.Y.S.2d 734, 309 N.E.2d 133, 1974 N.Y. LEXIS 1754 (N.Y. 1974).

Facts that vehicle driven by decedent had been traveling at speed in excess of speed limit, that it failed to negotiate sharp turn, and that decedent had previously consumed alcohol to intoxicating extent did not establish that intoxication was sole cause of accident. Bouvia v Atlantic Testing Laboratory, 50 A.D.2d 680, 375 N.Y.S.2d 204, 1975 N.Y. App. Div. LEXIS 12516 (N.Y. App. Div. 3d Dep't 1975), aff'd, 41 N.Y.2d 878, 393 N.Y.S.2d 994, 362 N.E.2d 624, 1977 N.Y. LEXIS 1923 (N.Y. 1977).

A decision by the Board that the claimant's deceased husband's death following heart surgery was causally related to an industrial accident was supported by substantial evidence, where there was direct medical testimony that death was causally related to an industrial accident in which the deceased had been overcome by carbon monoxide fumes. Wechsler v Peter Scalamandre & Son, 81 A.D.2d 713, 439 N.Y.S.2d 442, 1981 N.Y. App. Div. LEXIS 11264 (N.Y. App. Div. 3d Dep't), app. denied, 54 N.Y.2d 606, 1981 N.Y. LEXIS 4484 (N.Y. 1981).

Even though there was conflicting medical testimony in a workmen's compensation case, substantial evidence supported the Board's decision that the claimant's injury had been causally related to work, since the Board was free to choose which experts to credit and reject. Bilotta v Chevrolet-Tonawanda Div., G.M.C., 81 A.D.2d 718, 439 N.Y.S.2d 465, 1981 N.Y. App. Div. LEXIS 11271 (N.Y. App. Div. 3d Dep't 1981).

Despite employee's claim that her nose bleeds resulted from her employer's air conditioning system, which allegedly aggravated her preexisting environmental sensitivities, Workers' Compensation Board properly found that normal air flow in employee's office did not create seriously adverse environmental condition and that her reaction to it was not accidental injury where (1) employer's evidence rebutted presumptions in CLS Work Comp § 21, (2) employer's medical expert disputed employee's diagnosis of multiple chemical and environmental sensitivities, found no physiological cause for her condition, and opined that she was capable of working, and (3) no unusual environmental condition or extraordinary event was alleged to have caused injury. Friedlander v New York City Health & Hosp. Corp., 246 A.D.2d 937, 667 N.Y.S.2d 847, 1998 N.Y. App. Div. LEXIS 750 (N.Y. App. Div. 3d Dep't 1998).

Hotel floor supervisor's claim for workers' compensation benefits would not be disallowed under CLS Work Comp § 10 where (1) her injury occurred one week after altercation with another employee that led to supervisor's termination, and (2) relationship between altercation and injury, which occurred when she returned to pick up her paycheck and slipped and fell on stairs, was tenuous at best. Wint v Hotel Waldorf Astoria, 251 A.D.2d 696, 674 N.Y.S.2d 146, 1998 N.Y. App. Div. LEXIS 6458 (N.Y. App. Div. 3d Dep't 1998).

36. Blood or organ samples

A finding of three and eight-tenths per cent alcohol in the brain of the decedent does not enable a doctor to characterize the behavior of the decedent before his death. Bol v Guaranteed Sanitation, Inc., 251 A.D. 757, 295 N.Y.S. 173, 1937 N.Y. App. Div. LEXIS 7396 (N.Y. App. Div. 1937).

An award of compensation is proper where an employee suffered an unwitnessed fatal fall, even though an autopsy showed $^{34}/_{100}$ per cent alcohol in his brain, which would produce intoxication, impaired senses, and staggering, in view of the presumption in subdivision 4 of § 21 which provides that in the absence of substantial evidence to the contrary, an accident does not result solely from intoxication. May v Accident & Casualty Ins. Co., 276 A.D. 1043, 95 N.Y.S.2d 687, 1950 N.Y. App. Div. LEXIS 5658 (N.Y. App. Div. 1950).

Decedent was seen driving a vehicle at a fast rate of speed, suddenly applying his brakes when there were no other vehicles in sight and crashed into a tree. A subsequent examination disclosed a blood alcoholic content of .29 percent. This proof of intoxication and the manner in which the accident happened was sufficient to overcome the presumption of § 21 and an award was denied. Calka v Mamaroneck Lodge BPOE, 285 A.D. 1093, 139 N.Y.S.2d 316, 1955 N.Y. App. Div. LEXIS 6756 (N.Y. App. Div. 1955).

37. Suicide

An award of compensation will be sustained as for an accidental injury, where the deceased employee left his machine and was last seen proceeding to the men's room and in a manner unknown fell from a large open window in the men's room, the ledge of which was just above the deceased employee's knee and the employer's first report of injury described the accident as "jumped or fell from lavatory window" as against a claim by the employer that the decedent's death was a suicide. Horn v Louis Goldstein Co., 265 A.D. 1022, 38 N.Y.S.2d 1010, 1943 N.Y. App. Div. LEXIS 6666 (N.Y. App. Div. 1943).

Where one employed as an electrician from 12:15 a.m. to 8:45 a.m. was last seen alive around 1:10 a.m. and was found dead on the ground outside of his employer's building at 7 a.m. an award of compensation is proper as against a claim of suicide, where no one witnessed the accident. McAvoy v E. R. Squibb & Sons, 269 A.D. 801, 55 N.Y.S.2d 50, 1945 N.Y. App. Div. LEXIS 3911 (N.Y. App. Div. 1945).

The board was wrong when it found that the presumption created by sub 3 of this section had been overcome where the proof showed that the decedent, an inside office worker, had been in poor health and knew that he had a heart ailment, that it would have been a physical impossibility for him to have fallen from a window and where the only inference available from the facts was that he had committed suicide. McLaughlin v John Hancock Mut. Life Ins. Co., 282 A.D. 782, 123 N.Y.S.2d 14, 1953 N.Y. App. Div. LEXIS 4952 (N.Y. App. Div. 1953).

The presumption against suicide was not overcome where proof showed that decedent was found on the sidewalk in front of employer's premises and with fractures of skull, ribs and extremities and that he was last seen on the seventh floor from which there was an open window out of which decedent could have fallen. Hendry v National Biscuit Co., 285 A.D. 1104, 139 N.Y.S.2d 363, 1955 N.Y. App. Div. LEXIS 6774 (N.Y. App. Div. 1955).

Workers' Compensation Board did not err in concluding that decedent's death by suicide arose out of and in course of his employment as business manager with local office of labor union where expert medical evidence (including testimony and report of impartial specialist in psychiatry) demonstrated that, despite absence of any prior manifestations of mental illness, decedent's frustration, concern and sense of loss due to merger of 2 local offices caused or contributed to his progressive depressive illness, and that his suicide was "significant feature" of his depressive illness. Miller v IBEW Local 631, 237 A.D.2d 641, 654 N.Y.S.2d 460, 1997 N.Y. App. Div. LEXIS 2254 (N.Y. App. Div. 3d Dep't 1997).

Board applied incorrect legal standard in ruling that work related injury, even if significant contributing factor in decedent's emotional decline and ensuing suicide, was legally insufficient to sustain award of benefits because diagnosis of claimant was severe depression rather than "psychosis" or "derangement of the mind"; decision was reversed and matter remitted to Workers' Compensation Board for further proceedings. Altes v Petrocelli Elec. Co., 270 A.D.2d 767, 704 N.Y.S.2d 372, 2000 N.Y. App. Div. LEXIS 3100 (N.Y. App. Div. 3d Dep't 2000).

Workers' Compensation Board properly ruled that a police officer's death was the result of her deliberate intention to injure herself and disallowed her surviving spouse's claim for death benefits because the employer offered substantial evidence that the officer committed suicide, overcoming the statutory presumptions, and that the officer's suicide did not result from insanity, brain derangement, or a pattern of mental deterioration caused by a work-related injury, and the Board, in the absence of any non-speculative evidence, was entitled to reject theoretical explanations for the officer's unexplained suicide. Matter of Delacruz v Incorporated Vil. of Freeport, 175 A.D.3d 1739, 109 N.Y.S.3d 499, 2019 N.Y. App. Div. LEXIS 6852 (N.Y. App. Div. 3d Dep't 2019), app. denied, 35 N.Y.3d 902, 147 N.E.3d 580, 2020 N.Y. LEXIS 802 (N.Y. 2020).

38. —Effect of insanity

If injury causes insanity which in turn causes suicide, death benefits may be awarded under the provisions of this section where suicide is not result of discouragement, of melancholy or other sane conditions, but of brain derangement caused by injury. Delinousha v National Biscuit Co., 248 N.Y. 93, 161 N.E. 431, 248 N.Y. (N.Y.S.) 93, 1928 N.Y. LEXIS 1228 (N.Y. 1928).; Pushkarowitz v A. & M. Kramer, 275 A.D. 875, 88 N.Y.S.2d 885, 1949 N.Y. App. Div. LEXIS 4851 (N.Y. App. Div. 1949), aff'd, 300 N.Y. 637, 90 N.E.2d 494, 300 N.Y. (N.Y.S.) 637, 1950 N.Y. LEXIS 1431 (N.Y. 1950).

Suicide is the proximate and direct result of accidental injuries where the decedent was injured while delivering packages for his employer when he slipped and fell on ice steps and struck his head, suffering injuries in the nature of a traumatic psychosis, changes in brain function, concussion of the brain, change of personality, confusion, dizziness and a sense of pushing forward, as well as frequent crying spells. Lockwood v Luckey Platt & Co., 267 A.D. 930, 46 N.Y.S.2d 937, 1944 N.Y. App. Div. LEXIS 5562 (N.Y. App. Div. 1944).

An award of compensation is proper where the medical testimony indicates that the suicide of the employee was induced by psychosis and melancholia which followed an industrial accident. Commissioner of Taxation & Finance v Hedstrom-Spaulding, Inc., 272 A.D. 857, 70 N.Y.S.2d 362, 1947 N.Y. App. Div. LEXIS 3926 (N.Y. App. Div.), aff'd, McGovern v Curran, 297 N.Y. 479, 74 N.E.2d 184, 297 N.Y. (N.Y.S.) 479, 1947 N.Y. LEXIS 988 (N.Y. 1947).. See also Baker v Martirano, 278 A.D. 597, 101 N.Y.S.2d 777, 1951 N.Y. App. Div. LEXIS 4064 (N.Y. App. Div.), app. dismissed, 302 N.Y. 701, 98 N.E.2d 491, 302 N.Y. (N.Y.S.) 701, 1951 N.Y. LEXIS 866 (N.Y. 1951).; Blau v Goldshare Restaurant, 278 A.D. 595, 102 N.Y.S.2d 84, 1951 N.Y. App. Div. LEXIS 4061 (N.Y. App. Div. 1951).

An award of death benefits may not be made where an employee committed suicide after suffering an injury requiring the amputation of part of his left hand, where there was no competent medical testimony to sustain a finding that the employee was suffering from a mental derangement in the nature of a disease. Wessells v Lockport Cotton Batting Co., 275 A.D. 733, 87 N.Y.S.2d 186, 1949 N.Y. App. Div. LEXIS 4238 (N.Y. App. Div. 3d Dep't 1949).

Death benefits are properly payable to the dependents of an employee who contracted encephalitis in the course of his employment and as the result thereof suffered with headaches, insomnia, and change of personality, and ultimately a brain derangement which caused him to commit suicide. O'Donnell v Socony Vacuum Oil Co., 276 A.D. 879, 93 N.Y.S.2d 778, 1949 N.Y. App. Div. LEXIS 3666 (N.Y. App. Div. 1949).

39. Intentional injuries

A complaint by employees against their employer seeking damages for injuries sustained as the result of alleged wanton, intentional, unlawful and affirmative wrongful acts in removing certain safety guards from machines operated by plaintiffs, as, in effect, constituting assaults on plaintiffs by defendant, was dismissed on the ground that the sole remedy of plaintiffs was under the Workmen's Compensation Law, there being no allegation that the guards were removed with deliberate intent to injure plaintiffs. Santiago v Brill Monfort Co., 11 A.D.2d 1041, 205 N.Y.S.2d 919, 1960 N.Y. App. Div. LEXIS 7870 (N.Y. App. Div. 2d Dep't 1960), aff'd, 10 N.Y.2d 718, 219 N.Y.S.2d 266, 176 N.E.2d 835, 1961 N.Y. LEXIS 1138 (N.Y. 1961).

Workman's claim that employer acted wilfully and wantonly in his negligent direction to plaintiff workman to use an automobile lift at a time when employer knew such lift was defective, and employer's failure to warn workman of the unsafe condition of the lift although employer was aware of the fact, and directing workman to use a safety device to operate the lift which employer knew to be improper and unsafe did not state a cause of action for intentional injury by employer where said complaint could not be interpreted to allege that employer intentionally caused the lift to collapse on plaintiff workman, nor did said complaint state a claim within the exception to the rule of exclusivity prescribed by Workmen's Compensation Law § 10 where there was no allegation or proof pursuant to Workmen's Compensation Law § 11 that employer failed to secure compensation. Finch v Swingly, 42 A.D.2d 1035, 348 N.Y.S.2d 266, 1973 N.Y. App. Div. LEXIS 3295 (N.Y. App. Div. 4th Dep't 1973).

Workers' Compensation Board properly ruled that claimant's injuries were result of her deliberate intention to injure herself where, inter alia, accident occurred on straight section of road on clear and sunny day, road was dry, there was no evidence that claimant's automobile malfunctioned, and there were no skid marks to indicate she took evasive action, carrier's accident reconstructionist concluded that accident was not result of avoidance maneuver, there were reports and testimony of 2 psychiatrists, one of whom examined claimant and both of whom reviewed her psychiatric records—including her hospitalization for which she was discharged just 15 days prior to accident—reflecting that she suffered serious psychotic illness, character-

ized by paranoid delusions along with depressive symptoms, claimant had history of medication noncompliance and continued to have psychotic thoughts following her recent discharge, and both psychiatrists opined that patients with claimant's psychiatric illnesses were known to be suicidal and were of view that her accident was deliberate and nonaccidental, result of delusional and suicidal thinking. Mackenzie v Management Recruiters, 271 A.D.2d 822, 706 N.Y.S.2d 247, 2000 N.Y. App. Div. LEXIS 4445 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 768, 721 N.Y.S.2d 605, 744 N.E.2d 141, 2000 N.Y. LEXIS 3586 (N.Y. 2000).

Where complaint failed to allege that assault by plaintiff's fellow employee was made at the direction of the corporate defendant or was thereafter ratified by the defendant, the liability of the corporate-employer was exclusively contained in Workmen's Compensation Law § 11. Champlin v Chemical Corn Exchange Bank, 158 N.Y.S.2d 138 (N.Y. Sup. Ct. 1956).

40. —Course of employment

Where evidence indicated that parking lot employee quit work early in order to drive to his sister's, who lived 30 minutes away from parking lot by automobile, and that employee, after parking car and while walking to his sister's, was shot in the back by unknown assailant who did not take $250 in cash from employee's wallet and where there was no evidence of anything to connect shooting of employee with his employment at parking lot other than testimony that employee had stated that his assailant had demanded money bag containing receipts which employee usually deposited each night in bank located across street from parking lot, shooting did not arise "in the course of the employment." Malacarne v Yonkers Parking Authority, 41 N.Y.2d 189, 391 N.Y.S.2d 402, 359 N.E.2d 992, 1976 N.Y. LEXIS 3220 (N.Y. 1976).

Employers of retail employees who handle money on premises of their employer and whose jobs include short trips to the bank during the work day in order to exchange money or make a deposit do not become subject to liability in workmen's compensation if, at places and times when employees are away from work, employees are attacked by predators who hope that employees are then in possession of employers' money, for scope of liability under Workmen's Compensation Law is fixed by range of the employment and not by the misconceptions of the predators. Malacarne v Yonkers Parking Authority, 41 N.Y.2d 189, 391 N.Y.S.2d 402, 359 N.E.2d 992, 1976 N.Y. LEXIS 3220 (N.Y. 1976).

Where the claimant, an employee in a lumber mill, was accidently struck by a rail which was being handled by a fellow servant which caused the claimant to become angry, whereupon he kicked the co-employee who in turn retaliated, inflicting physical injuries upon the claimant, an award of compensation will be denied since, in incurring the injury, the claimant was not promoting his master's interest but was rather gratifying a personal animosity. Griffin v A. Roberson & Son, 176 A.D. 6, 162 N.Y.S. 313, 1916 N.Y. App. Div. LEXIS 8975 (N.Y. App. Div. 1916).

Where a person employed to drive an automobile truck and to unload the same made a physical attack upon another employee similarly engaged, owing to a quarrel in respect to priority in unloading their trucks, and was killed as a result of a blow inflicted by his fellow servant, the injury was not received while the workman was doing the duty he was employed to perform and was not a natural incident of the work. Stillwagon v Callan Bros., Inc. (1918) 183 App Div 141, 170 NYS 677, affd (1918) 224 NY 714, 121 NE 893.. See also Mazarredo v Levine, 274 A.D. 122, 80 N.Y.S.2d 237, 1948 N.Y. App. Div. LEXIS 3023 (N.Y. App. Div. 1948).

Claimant does not receive injuries arising out of and in course of his employment, where it appears that when a fellow-servant indulged in a little horseplay with claimant by pulling at his blouse, claimant attempted to strike the other with a milk bottle and, failing in that, attempted to bite him and then picked up a cobblestone, when the other servant, in self-protection, struck claimant causing injuries which are foundation for claim. Stein v Williams Printing Co., 195 A.D. 336, 186 N.Y.S. 705, 1921 N.Y. App. Div. LEXIS 4743 (N.Y. App. Div. 1921).

A Western Union messenger boy, newly hired as such, injured in a fight with another messenger boy suffers injuries arising out of and in the course of his employment, where a difference of opinion of the boys as to their relative pugilistic ability, the rivalry it engendered, and the desire for dominance and respect within the ranks of their fellow employees led to the contest, rather than reasons personal to them. Chanin v Western Union Tel. Co., 271 A.D. 763, 64 N.Y.S.2d 670, 1946 N.Y. App. Div. LEXIS 2896 (N.Y. App. Div. 1946).

There being substantial evidence to support a board finding that claimant, a taxicab driver, took himself out of the realm of his employment when he got out of his cab and assaulted another motorist following a "near" accident, disallowance of compensation because the claim did not arise out of and in course of employment was sustained. Goldfine v Barsol Cab Operating Co., 19 A.D.2d 672, 241 N.Y.S.2d 273, 1963 N.Y. App. Div. LEXIS 3474 (N.Y. App. Div. 3d Dep't 1963).

Death of employee shot by fellow worker was presumed to have arisen out of the employment, despite the lack of affirmative evidence to refute fellow employee's plea of self-defense; Workmen's Compensation Board could properly find that neither the self-serving testimony of the assailant, nor the testimony of a building superintendent that he found a baseball bat near deceased's body, was sufficient to overcome the presumption created by Workmen's Compensation Law § 21. Kaylor v 133 East 80th Street Corp., 43 A.D.2d 999, 352 N.Y.S.2d 62, 1974 N.Y. App. Div. LEXIS 5758 (N.Y. App. Div. 3d Dep't 1974).

Workers' Compensation Board properly determined that disabling wound sustained by claimant was intentionally inflicted by his wife, and arose from their purely personal differences without any nexus to his employment as police officer or performance of his job duties, even though claimant was on duty at time of incident, where claimant's wife shot him with his service revolver during domestic dispute that erupted during their lunch together. Robinson v Village of Catskill Police Dep't, 209 A.D.2d 748, 617 N.Y.S.2d 975, 1994 N.Y. App. Div. LEXIS 10832 (N.Y. App. Div. 3d Dep't 1994), app. denied, 85 N.Y.2d 810, 628 N.Y.S.2d 53, 651 N.E.2d 921, 1995 N.Y. LEXIS 1460 (N.Y. 1995).

Workers' Compensation Board improperly ruled that claimant's injury arose out of and in course of her employment as podiatrist's assistant where undisputed evidence showed that claimant was on break at her place of employment when her sister entered room and repeatedly struck her with hammer, such assault stemmed from purely personal differences between claimant and her sister and was unrelated to claimant's work or performance of her job duties, and there were no previous violent incidents. McMillan v Dodsworth, 254 A.D.2d 619, 679 N.Y.S.2d 722, 1998 N.Y. App. Div. LEXIS 11212 (N.Y. App. Div. 3d Dep't 1998).

New York Workers' Compensation Board erred in denying workers' compensation benefits to an injured employee as no evidence of willful intention existed so as to deny coverage and benefits to the employee who was injured at work in an altercation with a supervisor over the employee's work. Bell v Utica Corp., 306 A.D.2d 604, 759 N.Y.S.2d 614, 2003 N.Y. App. Div. LEXIS 6325 (N.Y. App. Div. 3d Dep't 2003).

41. —Injury to aggressor

Where an attack by the decedent was not initiated for any purpose of the master but to gratify his own personal desires, the injury was "occasioned by willful intention of the injured employee to bring about the injury or death of himself or another," etc., within the meaning of this section. Stillwagon v Callan Bros., Inc., 183 A.D. 141, 170 N.Y.S. 677, 1918 N.Y. App. Div. LEXIS 5086 (N.Y. App. Div.), aff'd, 224 N.Y. 714, 121 N.E. 893, 224 N.Y. (N.Y.S.) 714, 1918 N.Y. LEXIS 1122 (N.Y. 1918).

An employee who, while engaged in his regular employment is injured in a fight with a fellow employee arising over a dispute concerning the work, is entitled to compensation where there is evidence sufficient to sustain a finding that the claimant was not the aggressor. Wilson v American Valve Co., 268 A.D. 841, 50 N.Y.S.2d 356, 1944 N.Y. App. Div. LEXIS 3712 (N.Y. App. Div.), reh'g denied, 268 A.D. 935, 51 N.Y.S.2d 747, 1944 N.Y. App. Div. LEXIS 4309 (N.Y. App. Div. 1944).

Where death or injury is a by-product of associating men in close contacts, compensation awards are proper even to aggressors. Commissioner of Taxation & Finance v Bronx Hospital, 276 A.D. 708, 97 N.Y.S.2d 120, 1950 N.Y. App. Div. LEXIS 4950 (N.Y. App. Div. 1950).

The Workmen's Compensation Law contains no defense that an aggressor or participant is to be denied recovery in cases of malicious assaults; its insertion is purely judicial and sustained only by the court's conclusion that culpable persons should not benefit by their own wrong—the very defense that the compensation act rejects. Commissioner of Taxation & Finance v Bronx Hospital, 276 A.D. 708, 97 N.Y.S.2d 120, 1950 N.Y. App. Div. LEXIS 4950 (N.Y. App. Div. 1950).

There was substantial evidence to support decision by Workers' Compensation Board denying death benefits to decedent's widow after he was killed by co-worker during fight at work, in light of fact that decedent had brought weapon to work and then engaged in totally unprovoked, vicious, sustained attack on co-worker despite efforts of others to intervene; such actions were sufficient to establish that decedent had willful intent to injure, and since co-worker acted only in self-defense, it was not inconsistent for board to allow co-worker's compensation claim and deny claimant's. Matias v Donmoor, Inc., 133 A.D.2d 998, 521 N.Y.S.2d 149, 1987 N.Y. App. Div. LEXIS 52022 (N.Y. App. Div. 3d Dep't 1987).

42. Psychological or nervous injury

Psychological or nervous injury precipitated by psychic trauma arising out of and in course of employment is compensable under Workmen's Compensation Law to same extent as physical injury. Wolfe v Sibley, Lindsay & Curr Co., 36 N.Y.2d 505, 369 N.Y.S.2d 637, 330 N.E.2d 603, 1975 N.Y. LEXIS 1847 (N.Y. 1975).

Where employee had assumed duties of her superior because of his nervous condition, had attempted to comfort him and had found his body immediately following his suicide in his office, employee was entitled to workmen's compensation benefits for psychological disability resulting from severe guilt feelings engendered by her superior's suicide. Wolfe v Sibley, Lindsay & Curr Co., 36 N.Y.2d 505, 369 N.Y.S.2d 637, 330 N.E.2d 603, 1975 N.Y. LEXIS 1847 (N.Y. 1975).

School bus driver suffered her own "accidental injuries" as "active participant" within meaning of Workmen's Compensation Law when, while driving her bus, she came on automobile accident in which 2 school children known to her were killed, she remained at scene with her busload of children until emergency assistance arrived, and she later developed symptoms of post-traumatic stress disorder due to having witnessed aftermath of accident. Wood v Laidlaw Transit, Inc., 77 N.Y.2d 79, 564 N.Y.S.2d 704, 565 N.E.2d 1255, 1990 N.Y. LEXIS 4419 (N.Y. 1990).

Supermarket manager was not barred by exclusionary language of CLS Work Comp § 2(7) from receiving workers' compensation benefits on ground that his panic disorder was direct consequence of good faith personnel decisions inasmuch as employer's personnel decisions did not target him directly, but only contributed indirectly to his work-related stress by forcing him to work longer hours, take more responsibility, and manage store that was not performing well. DePaoli v Great A & P Tea Co., 94 N.Y.2d 377, 704 N.Y.S.2d 527, 725 N.E.2d 1089, 2000 N.Y. LEXIS 81 (N.Y. 2000).

A firefighter's anxiety neurosis, that he believed he was a perfectionist who could not "roll with the punches," he felt that some of his fellow fire fighters were laughing at him because he was such a conscientious worker, and, most significant, he felt he was blamed for the death of an occupant of a burning house even though he was without fault, was an occupational disease under Work Comp Law § 3(2) but, if related to his occupation in general terms, the disorder might be accidental as defined in Work Comp Law § 2(7) and Work Comp Law § 10. Hennige v Fairview Fire Dist., 99 A.D.2d 158, 472 N.Y.S.2d 204, 1984 N.Y. App. Div. LEXIS 16534 (N.Y. App. Div. 3d Dep't 1984).

Court would affirm determination awarding claimant workers' compensation benefits as result of anxiety depression precipitated by co-worker's disparaging racial remarks and taunts concerning claimant's infertility; such remarks constituted more than usual irritations and differences to which all workers are occasionally subject, and fact that claimant was particularly sensitive about her infertility did not undermine award of benefits. Kaliski v Fairchild Republic Co., 151 A.D.2d 867, 542 N.Y.S.2d 841, 1989 N.Y. App. Div. LEXIS 7513 (N.Y. App. Div. 3d Dep't), app. dismissed, 75 N.Y.2d 765, 551 N.Y.S.2d 907, 551 N.E.2d 108, 1989 N.Y. LEXIS 4433 (N.Y. 1989), aff'd, 76 N.Y.2d 1002, 564 N.Y.S.2d 714, 565 N.E.2d 1265, 1990 N.Y. LEXIS 4507 (N.Y. 1990).

Conclusion of Workers' Compensation Board that death of claimant's decedent was causally related to his work was supported by evidence in record, which included testimony showing that when door locks on his car jammed, decedent, extremely upset that he might miss business appointment, drove away holding driver's side door shut and was found shortly thereafter slumped over wheel, expert medical testimony indicating that stress caused by door lock problem was direct cause of decedent's death. Biller v State Ins. Fund, 186 A.D.2d 300, 587 N.Y.S.2d 793, 1992 N.Y. App. Div. LEXIS 10602 (N.Y. App. Div. 3d Dep't 1992).

Psychological or nervous injury precipitated by psychic trauma is compensable under Workers' Compensation Law, even when cause adversely affects claimant only due to her own particular sensitivity, and even though claimant has preexisting history of psychological illness. Smith v Steuben County Highway Dep't, 199 A.D.2d 590, 604 N.Y.S.2d 352, 1993 N.Y. App. Div. LEXIS 11201 (N.Y. App. Div. 3d Dep't 1993).

Court would affirm determination that claimant was not eligible for workers' compensation benefits because his disabling mental condition was not employment related where hearing testimony by claimant, 3 physicians, employer's regional manager, and its sales manager was conflicting as to whether claimant's depression and anxiety were caused by his personal circumstances, combined with normal stress at work resulting from sluggish economy, or whether his emotional problems were direct result of unusually intense stress in workplace. Troy v Prudential Ins. Co., 233 A.D.2d 635, 649 N.Y.S.2d 746, 1996 N.Y. App. Div. LEXIS 11761 (N.Y. App. Div. 3d Dep't 1996).

Evidence supported board's decision that claimant did not suffer work-related accident or occupational disease and accordingly was not entitled to receive workers' compensation benefits, where she had significant history of childhood physical, sexual and emotional abuse, and experts disagreed as to what event or events (work-related or otherwise) caused her to fail to properly perform her work-related functions. Gullo v Southern Erie Clinical Servs., 258 A.D.2d 689, 687 N.Y.S.2d 440, 1999 N.Y. App. Div. LEXIS 957 (N.Y. App. Div. 3d Dep't 1999).

Workers' Compensation Law Judge properly dismissed claimant's application for benefits arising out of his alleged psychiatric injury during his employment as projectionist at movie theater where his employer testified that he had no contact whatsoever with claimant during 2 days of his employment, his supervisor testified that he did not harass claimant although he did chide him for leaving projection booth during film showings and for drinking alcoholic beverages on job, and claimant's psychiatrist testified that he had been treated for psychiatric problems prior to employment in question. Kessler v Fairmont Theatre Inc., 262 A.D.2d 888, 692 N.Y.S.2d 500, 1999 N.Y. App. Div. LEXIS 7477 (N.Y. App. Div. 3d Dep't), app. dismissed, 93 N.Y.2d 1039, 697 N.Y.S.2d 567, 719 N.E.2d 928, 1999 N.Y. LEXIS 2860 (N.Y. 1999), app. denied, 94 N.Y.2d 756, 703 N.Y.S.2d 73, 724 N.E.2d 769, 1999 N.Y. LEXIS 3959 (N.Y. 1999).

Workers' Compensation Board properly ruled that claimant did not sustain compensable injury for work-related stress stemming from her demotion and corresponding reassignment at her place of employment where she conceded that she could be "bumped back by the incumbent" to her former position, and although employer handled her demotion poorly, its actions did not rise to level of bad faith. Miles v State Ins. Fund, 267 A.D.2d 511, 698 N.Y.S.2d 561, 1999 N.Y. App. Div. LEXIS 12483 (N.Y. App. Div. 3d Dep't 1999).

Employer's action of informing State Insurance Department of claimant's prior arrest for drug possession, against claimant's wishes, constituted lawful personnel decision undertaken in good faith where obtaining license from department was necessary requirement of claimant's employment, and failure to disclose relevant information to department could potentially jeopardize employer's own license; thus, workers' compensation claim predicated on stress associated with employer's decision was barred by CLS Work Comp § 2(7). Kinney v Prudential Ins. Co., 270 A.D.2d

781, 705 N.Y.S.2d 137, 2000 N.Y. App. Div. LEXIS 3348 (N.Y. App. Div. 3d Dep't 2000).

Claimant, agency services representative with Department of Labor, was properly denied Workers' Compensation benefits where it was undisputed that event triggering her psychic injury was new manager's reassignment of claimant to particularly stressful work position, Workers' Compensation Board properly concluded that "no evidence (was) submitted that the actions taken by the employer were taken in bad faith," and claimant acknowledged that new manager had no ill feelings toward her and that employer did not "set out to harm or injure any of its employees." Mattoon v N.Y. State DOL, 284 A.D.2d 667, 727 N.Y.S.2d 702, 2001 N.Y. App. Div. LEXIS 6237 (N.Y. App. Div. 3d Dep't 2001).

Agency Opinions

Analysis

I. In General

1. In general

II. Persons Responsible as Employers

2. In general

I. In General

1. In general

Section 6-n of the General Municipal Law, which authorizes municipalities to set up a liability and casualty reserve fund, does not apply to Workers' Compensation claims. Those claims are governed by General Municipal Law, § 6-j. Unlike section 6-n, section 6-j does not require municipalities to obtain court approval for the settlement of claims. Therefore, a county need not obtain court approval of a lump sum settlement of a Workers' Compensation claim. 1981 NY Ops Atty Gen April 20 (informal).

II. Persons Responsible as Employers

2. In general

The War Shipping Administration as an agency of the United States government is not required to secure workmen's compensation insurance under the state law. 1943 NY Ops Atty Gen February 26.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 11, 50; CLS Civ S § 178.

Security where coverage is in issue, § 54-a.

Death or disability benefits, CLS Correc § 472.

Disabilities of policemen and firemen in certain cities, CLS Gen Mun § 207-k.

New York state emergency medical services council, CLS Pub Health § 3002.

Damages for injuries causing death, CLS Const Art I, § 16.

Power of legislature to enact laws for protection of lives, health, or safety of employees, CLS Const Art I, § 18.

Codes, Rules and Regulations:

Workers' compensation board: resumption of benefits upon release from custody. 12 NYCRR § 300.35.

Federal Aspects:

Compensation for disability or death of employee. 5 USCS § 8102.

Jurisprudences:

109 NY Jur 2d Workers' Compensation §§ 190.

110 NY Jur 2d Workers' Compensation §§ 342, 343, 369, 371–373, 375, 378, 390, 391, 442, 499, 529, 530, 674.

111 NY Jur 2d Workers' Compensation §§ 851, 982, 1014.

10 Am Jur Proof of Facts 3d 669, Workers' Compensation —Compensable Coronary Episode (Heart Attack).

Causes of Action:

Recovery Under Workers' Compensation Statute for Mental Disorder Caused by Work-Connected Stress Without Physical Cause or Result, 9 COA2d 553.

Cause of action for injuries resulting from horseplay in workplace under Workers' Compensation Statute or in Tort Against Employer, 47 COA2d 415.

Cause of Action to Recover Workers' Compensation Benefits Under "Special Mission" or "Dual Purpose" Exception to "Going and Coming" Rule. 31 COA2d 307.

Cause of Action to Recover Workers' Compensation Benefits for Injuries Suffered After Termination of Employment, 10 COA2d 315.

Cause of Action to Recover Workers' Compensation Benefits for Injuries Suffered by Employee Acting Beyond Regular Scope of Duty under "Personal Comfort Doctrine" or During Athletic, Recreational or Social Activities. 22 COA2d 163.

Cause of Action for Workers' Compensation for Heart Attack, 51 COA 2d 291.

Appleman on Insurance:

New Appleman New York Insurance Law §§ 25.01, 25.02, 25.05.

Annotations:

Pleading aggravation of a pre-existing physical condition. 32 ALR2d 1459.

Workmen's compensation: injury while crossing or walking along railroad or street railway tracks, going to or from work, as arising out of and in the course of employment. 50 ALR2d 363.

Workmen's compensation: crediting employer or insurance carrier with earnings of employee re-employed, or continued in employment, after injury. 84 ALR2d 1108.

Workmen's compensation: injury sustained while attending employer-sponsored social affair as arising out of and in the course of employment. 47 ALR3d 566.

Effect of injured employee's proceeding for workmen's compensation benefits on running of statute of limitations governing action for personal injury arising from same incident. 71 ALR3d 849.

Modern status of effect of state workmen's compensation act on right of third-person tortfeasor to contribution or indemnity from employer of injured or killed workman. 100 ALR3d 350.

Workers' compensation: sexual assaults as compensable. 52 ALR4th 731.

Workers' compensation: incarceration as terminating benefits. 54 ALR4th 241.

Workers' compensation: injuries incurred while traveling to or from work with employer's receipts. 63 ALR4th 253.

Workers' compensation: validity, construction, and application of statutes providing that worker who suffers workplace injury and subsequently tests positive for alcohol impairment or illegal drug use is not eligible for workers' compensation benefits. 22 ALR6th 329.

Matthew Bender's New York Practice Guides: 1 New York Practice Guide: Business and Commercial § 4.11; 4 New York Practice Guide: Business and Commercial § 25A.04.

LexisNexis AnswerGuide New York Negligence § 4.15 Examining Availability of Contribution Among Defendants.

Warren's Negligence in the New York Courts Ch. 8 (contribution among defendants).

Texts: 2 Bender's New York Evidence § 127.17.

§ 25-a. Procedure and payment of compensation in certain claims; limitation of right to compensation

1. Notwithstanding other provisions of this chapter, when an application for compensation is made by an employee or for death benefits in behalf of the dependents of a deceased employee, and the employer has secured the payment of compensation in accordance with section fifty of this chapter, (1) after a lapse of seven years from the date of the injury or death and claim for compensation previously has been disallowed or claim has been otherwise disposed of without an award of compensation, or (2)

after a lapse of seven years from the date of the injury or death and also a lapse of three years from the date of the last payment of compensation, or (3) where death resulting from the injury shall occur after the time limited by the foregoing provisions of (1) or (2) shall have elapsed, subject to the provisions of section one hundred twenty-three of this chapter, testimony may be taken, either directly or through a referee and if an award is made it shall be against the special fund provided by this section. Such an application for compensation or death benefits must be made on a form prescribed by the chair for that purpose and must, if a change in condition is claimed, be accompanied by a verified medical or surgical report setting forth facts on which the board may order a hearing.

1-a. Any award which shall be made against such special fund after the effective date of this act upon such an application for compensation or death benefits shall not be retroactive for a period of disability or for death benefits longer than the two years immediately preceding the date of filing of such application. No application by a self-insured employer or an insurance carrier for transfer of liability of a claim to the fund for reopened cases shall be accepted by the board on or after the first day of January, two thousand fourteen except that the board may make a finding after such date pursuant to section twenty-three of this article upon a timely application for review.

2. Claims for further services or treatment rendered or supplies furnished as required by section thirteen hereof shall be paid from such fund when such service, treatment or supplies shall be authorized by the chairman. In cases where a surgical operation has previously been authorized by the board pursuant to the provisions of subdivision five of section thirteen-a of this chapter, no further authorization therefor by the chairman under this section shall be required. The provisions of this chapter with respect to procedure and the right to appeal shall be preserved to the claimant and to the employer originally liable for the payment of compensation and to such fund through its representative as hereinafter provided.

3. Any awards so made shall be payable out of the special fund heretofore created for such purpose, which fund is hereby continued and shall be known as the fund for reopened cases. The employer, or, if insured, his insurance carrier shall pay into such fund, or, in the case of awards made on or after July first, nineteen hundred sixty-nine, either into such fund or the uninsured employers' fund under section twenty-six-a of this article in accordance with the provisions thereof, for every case of injury causing death for which there are no persons entitled to compensation the sum of three hundred dollars where such injury occurred prior to July first, nineteen hundred forty and the sum of one thousand dollars where such injury shall occur on or after said date and prior to April first, nineteen hundred forty-five, and the sum of fifteen hundred dollars where such injury shall occur on or after April first, nineteen hundred forty-five and prior to September first, nineteen hundred seventy-eight and the sum of three thousand dollars where such injury shall occur on or after September first, nineteen hundred seventy-eight, and in each case of death resulting from injury sustained on or after July first, nineteen hundred forty and prior to September first, nineteen hundred seventy-eight, where there are persons entitled to compensation but the total amount of such compensation is less than two thousand dollars exclusive of funeral benefits, the employer, or, if insured, his insurance carrier, shall pay into such fund, or, in the case of awards made on or after July first, nineteen hundred sixty-nine and prior to September first, nineteen hundred seventy-eight, either into such fund or the uninsured employers' fund under section twenty-six-a of this article in accordance with the provisions thereof, the difference between the sum of two thousand dollars and the compensation, exclusive of funeral benefits, and in each case of death resulting from injury sustained on or after September first, nineteen hundred seventy-eight, the employer, or if insured, his insurance carrier shall pay into such fund or the uninsured employers' fund under section twenty-six-a of this article in accordance with the provisions thereof, the difference between the sum of five thousand dollars and the compensation, exclusive of funeral benefits actually paid to or for the dependents of the deceased employee together with any expense charge required by section twenty-seven of this article; provided, however, that where death shall occur subsequent to the periods limited by subdivision one of this section no payment into such special fund nor to the special fund provided by subdivision nine of section fifteen nor to the uninsured employers' fund provided by section twenty-six-a of this article shall be required. In addition to the assessments made against all insurance carriers for the expenses of administering this chapter provided for under the provisions of section one hundred fifty-one of this chapter, and the payments above provided, the employer, or, if insured, his insurance carrier, shall pay the sum of five dollars into said fund for each case in which an award is made pursuant to the provisions of paragraphs a to s inclusive of subdivision three of section fifteen of this chapter, by reason of injury sustained between July first, nineteen hundred forty and June thirtieth, nineteen hundred forty-two, both dates inclusive, and the sum of ten dollars for each such case by reason of injury sustained between July first, nineteen hundred forty-two and June thirtieth, nineteen hundred fifty, both dates inclusive, which payment shall be in addition to any payment of compensation to the injured employee as provided in this chapter.

There shall be maintained in the special fund at all times assets at least equal in value to the sum of (1) the value of awards charged against such fund,

(2) the value of all claims that have been reopened by the board as a charge against such fund but as to which awards have not yet been made, (3) effective January first, nineteen hundred seventy-one, the value of total supplemental benefits to be paid from such fund as reimbursement pursuant to subdivision nine of this section, and (4) a reserve equal to ten per cent of the sum of items (1), (2) and (3) of this paragraph. Annually, as soon as practicable after January first in each year, the chair shall ascertain the condition of the fund and whenever the assets shall fall below the prescribed minimum as herein provided the chair shall collect an amount sufficient to restore the fund to the prescribed minimum.

Commencing on the first of January, two thousand fourteen, the amount collected from all employers required to obtain workers' compensation coverage to maintain the financial integrity of the fund may be paid over a period of time at the discretion of the chair based upon an analysis of the financial condition of the fund. Such payment as determined by the chair shall be included in the assessment rate established pursuant to subdivision two of section one hundred fifty-one of this chapter. The chair shall promulgate regulations to administer claims whose liability has been transferred to the fund for reopened cases. Such regulations may include exercise of the chair's authority to administer existing claims, to procure management for those claims, or to sell such liability. The chair may examine into the condition of the fund at any time on his or her own initiative or on request of the attorney of the fund.

The provisions of this subdivision shall not apply with respect to policies containing coverage pursuant to section thirty-four hundred twenty of the insurance law relating to every policy providing comprehensive personal liability insurance on a one, two, three or four family owner-occupied dwelling.

4. The commissioner of taxation and finance shall be the custodian of such special fund for reopened cases and shall invest any surplus monies thereof in securities which constitute legal investments for savings banks under the laws of this state and in interest bearing certificates of deposit of a bank or trust company located and authorized to do business in this state or of a national bank located in this state secured by a pledge of direct obligations of the United States or of the state of New York in an amount equal to the amount of such certificates of deposit, and may sell any of the securities or certificates of deposit in which such fund is invested, if necessary for the proper administration or in the best interest of such fund. Disbursements from such fund for compensation provided by this section shall be paid by the commissioner of taxation and finance upon vouchers signed by the chairman.

The commissioner of taxation and finance, as custodian of such fund, annually as soon as practicable after January first, shall furnish to the chairman a statement of the fund, setting forth the balance of monies in the said fund as of the beginning of the year, the income of the fund, a summary of payments out of the fund on account of compensation ordered to be paid by the board, medical and other expense, and all other charges against the fund, and setting forth the balance of the fund remaining to its credit on December thirty-first. Such statement shall be open to public inspection in the office of the chairman, and a copy thereof shall be transmitted by the chairman to the superintendent of financial services. The superintendent of financial services may examine into the condition of such fund at any time on his own initiative or on request of the chairman or representative of the fund. He shall verify the receipts and disbursements of the fund, and shall ascertain the liability of the fund upon all cases in which awards of compensation have been made and charged against said fund and shall render a report of such facts to the chairman. Such report shall also be open to public inspection in the office of the chairman.

5. For applications by self-insured employers or insurance carriers for transfer of liability for compensation to the fund for reopened cases under this section, received by the board prior to the first day of January, two thousand fourteen, the chair shall appoint an attorney in such proceedings to represent such fund in proceedings brought to enforce a claim against such fund. Such attorney may apply to the chair for authority to hire such medical or other experts and to defray the expense thereof and of such witnesses as are necessary to a proper defense of the application within an amount in the discretion of the chair and, if authorized, it shall be a charge against the special fund provided herein.

6. Notwithstanding any other provision of this chapter, no award of compensation or death benefits shall be made against said special fund or against an employer or an insurance carrier where application therefor is made after a lapse of eighteen years from the date of the injury or death and also a lapse of eight years from the date of the last payment of compensation.

7. For the purposes of this section the date of the last payment of compensation shall be deemed to mean the date of actual payment of the last installment of compensation previously awarded; provided, however, that where the case is disposed of by the payment of a lump sum, the date of last payment for the purpose of this section shall be considered as the date to which the amount paid in the lump sum settlement would extend if the award had been made on the date the lump sum payment was approved at the maximum compensation rate which is warranted by the employee's earning capacity as determined by the board under section fifteen of this chapter.

8. The provisions of this section shall not apply to any open case pending before the board on April twenty-fourth, nineteen hundred thirty-three or to any closed case in which an application for reopening was received prior to such date, or to awards for

deficiency compensation made pursuant to section twenty-nine of this chapter, nor shall it apply during the pendency of an appeal provided for by section twenty-three of this chapter; provided, however, that such provisions shall be retroactive in effect except as to payments into the special fund provided for an employer or his insurance carrier, and except as otherwise herein provided.

9. (a) Notwithstanding any other provision of this chapter, every employee who is receiving workers' compensation under this chapter for a permanent and total disability resulting from an accidental injury or occupational disablement which occurred prior to January first, nineteen hundred seventy-nine and every widow or widower who is receiving death benefits under this chapter on account of the death of his or her spouse prior to January first, nineteen hundred seventy-nine shall receive supplemental benefits upon application therefor to the board, which shall be payable in the first instance by the employer or its insurance carrier in accordance with the provisions of this subdivision. These supplemental benefits shall commence on July first, nineteen hundred ninety and shall continue during the period of such permanent total disability or entitlement to death benefits.

(b) If such employee, widow or widower is receiving the statutory maximum benefit in effect at the time of the accidental injury or death, the supplemental benefit shall be an amount which, when added to the regular benefit established for the case, shall equal the maximum weekly benefit in effect for a permanently totally disabled employee, widow or widower whose claim arose on January first, nineteen hundred seventy-nine.

(c) If such employee, widow or widower is receiving a weekly benefit which is less than the statutory maximum benefit which was in effect on the date of the accidental injury or death, the supplemental benefit shall be an amount equal to the difference between the regular benefit being received and a percentage of the maximum benefit in effect on January first, nineteen hundred seventy-nine, determined by multiplying the latter benefit by a fraction, the numerator of which is the regular benefit and the denominator of which is the statutory maximum benefit in effect at the time of the accidental injury or death.

(d) In the event the supplemental benefit computed under this subdivision amounts to less than five dollars, then the supplemental benefit allowed shall be a minimum of five dollars, less the amount, if any, by which the combination of such supplemental benefit and the regular benefit exceeds the maximum weekly benefit in effect for a permanently totally disabled employee, widow or widower whose claim arose on January first, nineteen hundred seventy-nine.

(e) The employer or his insurance carrier paying the supplemental benefits required under this subdivision shall claim reimbursement for each such case from the reopened cases fund under this section, commencing one year from the date of the first such payment and annually thereafter while such supplemental payments continued, on a form prescribed by the chairman.

(f) The special disability fund created under subdivision eight of section fifteen and the reopened cases fund created under section twenty-five-a and the aggregate trust fund created under section twenty-seven of this chapter shall be deemed to be insurance carriers for purposes of this subdivision, other than the payment of the assessment under the provisions of subdivision three of this section.

(g) Whenever payment of the supplemental benefits prescribed hereunder is not made by the insurance carrier by reason of the insolvency of such insurance carrier, or in the case of a self-insurer, by reason of the insolvency of such self-insurer or the discontinuance of its operations, such payment shall be made directly out of the reopened cases fund under this section by the commissioner of taxation and finance upon vouchers approved by the chairman of the workmen's compensation board.

HISTORY:

Add, L 1933, ch 384, § 2, eff April 24, 1933; amd, L 1933, ch 774, § 1, eff Aug 26, 1933; L 1934, ch 694, § 1, eff May 21, 1934; L 1935, ch 482, § 1, eff April 25, 1935; L 1939, ch 252; L 1940, ch 686, § 1, eff July 1, 1940; L 1941, ch 376; L 1942, ch 378; L 1943, ch 76; L 1945, ch 472; L 1946, ch 113, § 24, eff March 14, 1946; L 1947, ch 248; L 1948, ch 450; L 1948, ch 491, §§ 1, 2, eff July 1, 1948; L 1951, ch 63, § 1, eff July 1, 1951; L 1951, ch 100, §§ 1, 2; L 1952, ch 42, § 2; L 1955, ch 424; L 1957, ch 290, eff April 10, 1957; L 1964, ch 395, § 5, eff April 10, 1964; L 1968, ch 830, §§ 1, 2, eff June 16, 1968; L 1969, ch 106, § 1, eff March 25, 1969; L 1972, ch 474, § 1, eff July 1, 1973; L 1974, ch 243, § 1; L 1977, ch 676, § 2; L 1978, ch 331, § 1, eff Sept 1, 1978; L 1979, ch 168, § 12, eff June 1, 1979; L 1984, ch 540, § 8, eff March 1, 1985; L 1990, ch 924, § 15, eff July 31, 1990, deemed eff July 1, 1990; L 1993, ch 729, § 8, eff Dec 27, 1993; L 2007, ch 6, § 50, eff March 13, 2007; L 2011, ch 62, § 104 (Part A), eff Oct 3, 2011; L 2013, ch 57, § 13 (Part GG), eff March 29, 2013.

Editor's Notes: Laws 2007, ch 6, § 80, eff March 13, 2007, provides as follows:

§ 80. The superintendent of insurance [superintendent of financial services], in consultation with the chair of the workers' compensation board, may promulgate regulations relating to the standards to be followed in the approval of forms and in the procedural requirements needed to implement the provisions of this act, and the chair of the workers' compensation board, in consultation with the superintendent of insurance [superintendent of financial services], may promulgate regulations relating to the procedural requirements needed to implement the provisions of this act.

Laws 2010, ch 56, § 1 (Part Q), eff June 22, 2010, provides as follows:

Section 1. (a) For the purpose of this section, "insurance carrier," and "workers' compensation rating board" shall have the meaning set forth in section 2 of the workers' compensation law.

(b) For the purposes of this section, "excess assessment funds" shall mean any excess of the amount collected by an insurance carrier from its policy holders in accordance with a calculation provided by the workers' compensation rating board pursuant to subdivision 8 of section 15, subdivision 3 of section 25-a or section 151 of the workers' compensation law attributable to the period April 1, 2008, through March 31, 2009, over the amount paid to the workers' compensation board pursuant to subdivision 8 of section 15, subdivision 3 of

section 25-a or section 151 of the workers' compensation law attributable to the period April 1, 2008, through March 31, 2009. The board may issue guidelines regarding the construction of this section, provided such guidelines are consistent with this section and with part QQ of chapter 56 of the laws of 2009.

(c) Any insurance carrier or affiliated group of insurance carriers that has collected excess assessment funds shall pay over to the chair of the workers' compensation board, within sixty days of the effective date of this subdivision, the amount of such funds. Such funds shall be credited to the workers' compensation account. Any amounts collected pursuant to this section shall be transferred by the comptroller to the general fund, at the request of the director of the budget.

Amendment Notes: 2013. Chapter 57, § 13 (Part GG) amended:

By redesignating part of sub 1 as sub 1-a.

Sub 1 by deleting at fig 1 "and", at fig 2 "chairman" and adding the matter in italics.

Sub 1-a by adding the matter in italics.

Sub 3, second undesignated par by deleting at fig 1 "during the calendar year immediately preceding", at fig 2 "and", at fig 3 "For the purpose of accumulating funds for the payment of supplemental benefits pursuant to subdivision nine of this section, the chairman shall impose against all carriers an assessment in the sum of five million dollars to be collected in the respective proportions established in the fiscal year commencing April first, nineteen hundred sixty-eight, under the provisions of section one hundred fifty-one of this chapter for each carrier.", at figs 4 and 5 "chairman", at fig 6 "assess and", at fig 7 "from all insurance carriers, in the respective proportions established in the prior fiscal year under the provisions of section one hundred fifty-one of this chapter for each carrier,", at fig 8 "The chairman before making an assessment as provided in this section shall give thirty days' notice to the representative of the fund, designated pursuant to subdivision five of this section, that an itemized statement of the condition of the fund is open for his inspection. The superintendent of financial services may examine into the condition of the fund at any time on his own initiative or on request of the chairman or representative of the fund." and adding the matter in italics.

By deleting former sub 3, third undesignated par.

By adding sub 3 third undesignated par.

Sub 5 by deleting at fig 1 "When an application", at fig 2 "is made", at figs 3, 7 and 8 "chairman", at fig 4 "a representative of such fund", at fig 5 "and, insofar as practicable, such representative shall be a person designated by the employer originally liable for the payment of compensation, or his insurance carrier, but whenever it shall appear to the chairman that through any committee, board or organization or representative of the interest of the insurance carriers an attorney has been appointed to act for and on behalf of such carriers generally to represent such fund in any proceedings brought hereunder, the chairman shall designate such attorney as the representative of the", at fig 6 "representative" and adding the matter in italics.

2011. Chapter 62, § 104 (Part A) amended:

Sub 4, second undesignated par at figs 1 and 2 by substituting "superintendent of financial services" for "superintendent of insurance".

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1. In general

Under § 13 the employer must replace any necessary equipment and while it is directed that neither such replacement nor medical treatment shall constitute the payment of compensation under this section the provision was not intended to limit the nature of the liability which may be shifted to the special fund for reopened cases but merely to define the words "payment of compensation" as they appear in this section and thus to provide that such expenditure shall not toll the 3 year limitation. Casey v Hinkle Iron Works, 299 N.Y. 382, 87 N.E.2d 419, 299 N.Y. (N.Y.S.) 382, 1949 N.Y. LEXIS 947 (N.Y. 1949).

Purpose of § 25-a was to provide for gradual taking over by special fund of stale cases as they became stale. Riddle v General Ice Cream Corp., 262 A.D. 353, 29 N.Y.S.2d 225, 1941 N.Y. App. Div. LEXIS 5364 (N.Y. App. Div. 1941).

The intention of this section is to confine review in a special fund case to three board members. Hawkins v Hotel Statler, 265 A.D. 976, 38 N.Y.S.2d 768, 1942 N.Y. App. Div. LEXIS 6800 (N.Y. App. Div. 1942).; Stapholtz v Rothman Co., 260 A.D. 818, 22 N.Y.S.2d 357, 1940 N.Y. App. Div. LEXIS 4828 (N.Y. App. Div. 1940).

The provisions of § 25-a and § 123 do not apply to a proceeding for increase of death benefits based upon failure of the board to take into consideration the wage expectancy of a deceased minor employee. George v West Virginia Pulp & Paper Co., 274 A.D. 859, 81 N.Y.S.2d 697, 1948 N.Y. App. Div. LEXIS 3704 (N.Y. App. Div. 1948).

The term "injury" as used in this section means an accidental injury or a compensable injury and thus, the time of injury as related to silicosis means the time of complete disablement rather than the time of the last injurious exposure. Kopec v Buffalo

Brake Beam-Acme Steel & Malleable Iron Works, 2 A.D.2d 946, 156 N.Y.S.2d 829, 1956 N.Y. App. Div. LEXIS 3980 (N.Y. App. Div. 3d Dep't 1956).

Where possible prejudice to claimant exists, § 115 of the Workmen's Compensation Law is applicable to make § 25-a inoperative and liability is imposed on the employer rather than the Special Fund. Aufiero v Highwall Metal Spinning & Stamping Co., 31 A.D.2d 877, 297 N.Y.S.2d 648, 1969 N.Y. App. Div. LEXIS 4560 (N.Y. App. Div. 3d Dep't), app. denied, 24 N.Y.2d 738, 1969 N.Y. LEXIS 2285 (N.Y. 1969).

The legislative intent of Workmen's Compensation Law § 25-a, subd 1, ¶ 3 was that liability for stale claims shall be shifted from the carrier to the Special Fund, the creation of the transfer being the required passage of time. Dennett v Dennett Refrigeration Equipment, 38 A.D.2d 659, 327 N.Y.S.2d 439, 1971 N.Y. App. Div. LEXIS 2614 (N.Y. App. Div. 3d Dep't 1971).

The purpose of Workmen's Compensation Law § 25-a is to impose on the Special Fund the liability for truly "stale" claims. Gantz v Wallace & Tiernan Lucidol Div., 41 A.D.2d 991, 343 N.Y.S.2d 972, 1973 N.Y. App. Div. LEXIS 4367 (N.Y. App. Div. 3d Dep't 1973).

Obligation to state under § 15, subds. 7, 8 and § 25-a, is separate and independent one imposed upon employer, to provide additional protection to certain classes of employees when it finds itself free of its obligations to make any payments under Workmen's Compensation Law. The obligation is as absolute as obligation to pay conventional compensation awards. Harris Structural Steel Co. v Dean, 45 N.Y.S.2d 821, 182 Misc. 763, 1943 N.Y. Misc. LEXIS 2717 (N.Y. City Ct. 1943), aff'd, 55 N.Y.S.2d 297, 184 Misc. 688, 1945 N.Y. Misc. LEXIS 1837 (N.Y. App. Term 1945).

2. Retroactive effect of statute

There is no statutory impediment to the retroactive responsibility of the Special Fund. Crowl v New York, Dep't of Hospitals, 18 N.Y.2d 23, 271 N.Y.S.2d 659, 218 N.E.2d 537, 1966 N.Y. LEXIS 1274 (N.Y. 1966).

Appellants' contention that award should have been against special fund, created by this section is not well taken because case was reopened and award was made previous to enactment of this section. Rich v American Radiator Co., 243 A.D. 827, 278 N.Y.S. 151, 1935 N.Y. App. Div. LEXIS 8466 (N.Y. App. Div. 1935), aff'd, 270 N.Y. 632, 1 N.E.2d 365, 270 N.Y. (N.Y.S.) 632, 1936 N.Y. LEXIS 1680 (N.Y. 1936).

Where claimant was totally disabled for two weeks in 1926, and was awarded compensation for this period in 1927, submitting to operation August 14, 1929, without any previous request to employer or carrier, award made, upon his application on December 5, 1933 to reopen case, against employer and carrier for period from August 14 to October 5, 1929, was error, case not having been pending before board on April 24, 1934. Mazer v Feldman, Steur & Robinov, Inc., 247 A.D. 919, 287 N.Y.S. 574, 1936 N.Y. App. Div. LEXIS 9396 (N.Y. App. Div. 1936).

Amendment to this section providing for payment of awards out of special fund, whereby, in case of lump sum payment, time to reopen is extended to date when last payment would have been made had such amount been ordered in weekly installments, is not retroactive. Tipton v Lang's Bakery, 250 A.D. 696, 296 N.Y.S. 228, 1937 N.Y. App. Div. LEXIS 8438 (N.Y. App. Div.), aff'd, 275 N.Y. 572, 11 N.E.2d 759, 275 N.Y. (N.Y.S.) 572, 1937 N.Y. LEXIS 1553 (N.Y. 1937).

This section does not apply to a case which was pending before the Industrial Board on April 24th 1933. Friedrich v L. Hirsch & Sons, 257 A.D. 878, 11 N.Y.S.2d 1000, 1939 N.Y. App. Div. LEXIS 8252 (N.Y. App. Div. 1939).

Fact that case was open and pending on April 24, 1933, did not affect application of § 25-a provided that after it was closed time limitations prescribed by said section were present. Riddle v General Ice Cream Corp., 262 A.D. 353, 29 N.Y.S.2d 225, 1941 N.Y. App. Div. LEXIS 5364 (N.Y. App. Div. 1941).

The provision of this section prohibiting reopening after eighteen years from the date of the accident is one of limitation and procedural in character and retroactive in effect. Sager v General Electric Co., 269 A.D. 801, 55 N.Y.S.2d 138, 1945 N.Y. App. Div. LEXIS 3910 (N.Y. App. Div. 1945), app. dismissed, 298 N.Y. 752, 83 N.E.2d 152, 298 N.Y. (N.Y.S.) 752, 1948 N.Y. LEXIS 1299 (N.Y. 1948).

The 1935 amendment providing that a lump sum award should be projected forward on the basis of the rate of compensation established at the time of closing a case in order to determine the date of the last payment of compensation cannot be applied retroactively. Likepities v Donner Steel Co., 278 A.D. 443, 106 N.Y.S.2d 146, 1951 N.Y. App. Div. LEXIS 3833 (N.Y. App. Div. 1951).

This section controls the Special Fund, and under its subd [2] the requisites for further medical services necessitate authorization by the chairman of the Workmen's Compensation Board, while subd 1 limits any award of compensation in retroactive effect to two years immediately preceding date of application for reopening, but imposes no such limitation in regard to authorized medical expenses. Pixley v University of Rochester, 22 A.D.2d 743, 253 N.Y.S.2d 392, 1964 N.Y. App. Div. LEXIS 2943 (N.Y. App. Div. 3d Dep't 1964), app. denied, 15 N.Y.2d 483, 1965 N.Y. LEXIS 1777 (N.Y. 1965).

3. Retroactive awards and payments

The provision of this section that an award against the special fund shall not be retroactive for a period of disability longer than 2 years immediately preceding the application to reopen establishes the time limitation as to temporary total disability and not to permanent partial disability for which a schedule award has been made. Bellini v Great American Indem. Co., 299 N.Y. 399, 87 N.E.2d 426, 299 N.Y. (N.Y.S.) 399, 1949 N.Y. LEXIS 949 (N.Y. 1949).

The two year retroactive restriction applies to the period of disability and not to wage rates and the board could make a corrected award based on a corrected wage rate effective from the date of the injury. Kaplowitz v Whitehouse Wet Wash Laundry, 273 A.D. 569, 79 N.Y.S.2d 237, 1948 N.Y. App. Div. LEXIS 4638 (N.Y. App. Div.), aff'd, 298 N.Y. 743, 83 N.E.2d 147, 298 N.Y. (N.Y.S.) 743, 1948 N.Y. LEXIS 1292 (N.Y. 1948).

A two-year limitation imposed on retroactive payments applies to all awards made subsequent to the effective date of the amendment even though the cases involved were reopened and remained open prior to 1940. Russo v Wielandt, 274 A.D. 275, 82 N.Y.S.2d 469, 1948 N.Y. App. Div. LEXIS 3055 (N.Y. App. Div. 1948).

A retroactive award under this section may include medical bills despite the fact that no prior authority had been obtained for the incurring of the expense. Greenwald v Electro Metallurgical Co., 284 A.D. 706, 134 N.Y.S.2d 451, 1954 N.Y. App. Div. LEXIS 3476 (N.Y. App. Div. 1954).

Where payment by carrier was for a period prior to the two year retroactive period provided under § 25-a of the Workmen's Compensation Law and prior to the date when Special Fund became liable, the latter is not entitled to credit for said payment. Alber v Tobin, 33 A.D.2d 607, 304 N.Y.S.2d 512, 1969 N.Y. App. Div. LEXIS 3030 (N.Y. App. Div. 3d Dep't 1969).

Since an award against the Special Fund can only be retroactive for 2 years prior to the application to reopen, it is incumbent on the board to make factual findings as to how much, if anything, claimant stands to lose, as prejudice to the plaintiff is a factor which is to be taken into consideration in determining whether a case was intended to be closed. Gantz v Wallace & Tiernan Lucidol Div., 41 A.D.2d 991, 343 N.Y.S.2d 972, 1973 N.Y. App. Div. LEXIS 4367 (N.Y. App. Div. 3d Dep't 1973).

4. Payment to special fund when there are no persons entitled to compensation

Section 27 does not authorize payment by the aggregate trust fund into the special funds of §§ 15 and 25-a of an amount equal to the present value of future death benefits ordered paid to a widow in the event the widow dies or remarries before the payments are due her and there is no one to whom compensation would be payable. Kennedy v Neo Gravure Printing Co., 262 A.D. 616, 30 N.Y.S.2d 785, 1941 N.Y. App. Div. LEXIS 5439 (N.Y. App. Div. 1941).

Where a dependent widow obtained a settlement in an action against a third party which exceeded the value of all possible death benefits, an award to the special fund on the ground that

there were no persons entitled to death benefits was proper. Department of Taxation & Finance v Thompson-Starrett Co., 271 A.D. 906, 66 N.Y.S.2d 790, 1946 N.Y. App. Div. LEXIS 3653 (N.Y. App. Div. 1946).

Where death award was made to dependent mother of deceased employee as the sole person entitled to compensation, but payment suspended until exhaustion of the proceeds of third party recovery, an award, after death of the mother of payments which would be made her had she survived to the special fund was proper. Chiappano v New York, 281 A.D. 996, 120 N.Y.S.2d 598, 1953 N.Y. App. Div. LEXIS 4045 (N.Y. App. Div. 1953).

An insurance carrier was required to pay money to the Special Fund under subdivision 3 of this section where it consented to waive payment of part of its lien against the widow's recovery in a third-party action instituted by her. Anderson v Metro Decorating Co., 4 A.D.2d 892, 166 N.Y.S.2d 812, 1957 N.Y. App. Div. LEXIS 4278 (N.Y. App. Div. 3d Dep't 1957).

An insurance carrier was required to pay money into the Fund for Reopened Cases where the decedent died without dependents even though it was receiving reimbursement from the Special Disability Fund for payments made after the first 260 weeks of disability and death benefits combined because they were not relieved from liability therefor because they had paid decedent 260 weeks of compensation, which included both disability and death benefits. Commissioner of Taxation & Finance v Buffalo Standard Foundry, 4 A.D.2d 894, 167 N.Y.S.2d 241, 1957 N.Y. App. Div. LEXIS 4282 (N.Y. App. Div. 3d Dep't 1957).

Where claimant suffered a knee injury in 1943, and, in 1947 the case was closed following a lump sum settlement of $1,950 paid by the carrier and approved by the Board on the basis of a definite reduced earning capacity, the settlement award being specifically allocated at $10 a week over 195 weeks in accordance with the earnings reduction, when the case was again reopened in 1959 with liability imposed on the Special Fund the Fund was not entitled to a $1,950 credit against the settlement made over 12 years before as the settlement amount must be considered as having been expended. Gluck v Grade A Foods Corp., 20 A.D.2d 607, 245 N.Y.S.2d 437, 1963 N.Y. App. Div. LEXIS 2597 (N.Y. App. Div. 3d Dep't 1963), app. denied, 14 N.Y.2d 481, 1964 N.Y. LEXIS 1632 (N.Y. 1964).

There were "no persons entitled to compensation", and payment of death benefits could properly be directed into the Vocational Rehabilitation Fund and the fund for reopened cases where, by reason of remarriage of the deceased employee's widow and ages of his dependent children a recovery in their favor in a third-party action was in excess of any compensation benefits which might possibly become due. Commissioner of Taxation & Finance v Kingsboro Constr. Co., 21 A.D.2d 929, 251 N.Y.S.2d 187, 1964 N.Y. App. Div. LEXIS 3366 (N.Y. App. Div. 3d Dep't), app. denied, 14 N.Y.2d 490, 1964 N.Y. LEXIS 1926 (N.Y. 1964).

Separate and distinct liabilities of an employer subject to third-party suit and under the Workmen's Compensation Act has long been established, and the circumstance that both liabilities are insured against in the same policy, rather than in two, or not at all, is of no moment in determining applicability of the provisions for directing payment into the Vocational Rehabilitation Fund and that for reopened cases when "there are no persons entitled to compensation." Commissioner of Taxation & Finance v Kingsboro Constr. Co., 21 A.D.2d 929, 251 N.Y.S.2d 187, 1964 N.Y. App. Div. LEXIS 3366 (N.Y. App. Div. 3d Dep't), app. denied, 14 N.Y.2d 490, 1964 N.Y. LEXIS 1926 (N.Y. 1964).

The proceeds of an award to a widower because of the industrial death of his wife were properly paid into two special funds, and not to the estate of the widower, where he died after filing the claim and pending the final award. Cebul v Equitable Bldg., 24 A.D.2d 1041, 265 N.Y.S.2d 339, 1965 N.Y. App. Div. LEXIS 2762 (N.Y. App. Div. 3d Dep't 1965), app. denied, 17 N.Y.2d 420, 1966 N.Y. LEXIS 1759 (N.Y. 1966).

Workers' compensation carrier was properly directed to make payments into funds established for instances when deceased employee leaves no beneficiary entitled to compensation, where dependents of deceased employee settled their third-party action against various defendants for sum that exceeded value of possible workers' compensation benefits, since such settlement resulted in situation in which there were no persons entitled to compensation at time of award; fact that deceased employee left surviving dependents was not dispositive, it was irrelevant that carrier waived its lien for amounts already expended, and amendment to CLS Work Comp § 29(1) (respecting apportionment of litigation costs between carrier and claimant) did not apply. Capitelli v Wells, Rich, Green, Inc., 165 A.D.2d 284, 566 N.Y.S.2d 771, 1991 N.Y. App. Div. LEXIS 2743 (N.Y. App. Div. 3d Dep't 1991).

5. Cause of injury

A second employer was properly denied reopening of a 1937 case where proof showed that claimant, a porter, fell 35 feet in a 1937 accident and then while in employ of second employer in 1947 fell a distance of 6 feet from a stepladder. Though medical evidence showed 1937 accident was contributory to claimant's condition following the 1947 accident, there was evidence to sustain finding that disability resulted solely from 1947 accident. Tsimos v Frank G. Shattuck Co., 282 A.D. 1081, 126 N.Y.S.2d 128, 1953 N.Y. App. Div. LEXIS 5871 (N.Y. App. Div. 1953).

On the basis of a report by an impartial specialist to whom a disability claim was referred by the Board, other medical testimony being conflicting, there was sufficient evidence to sustain a finding of the Board of no causal relationship between claimant's back condition and a considerably earlier industrial accident in which he fell from a ladder, suffering a back contusion. Li Greci v Greene, Tweed & Co., 17 A.D.2d 673, 230 N.Y.S.2d 528, 1962 N.Y. App. Div. LEXIS 8493 (N.Y. App. Div. 3d Dep't), app. dismissed, 12 N.Y.2d 644, 1962 N.Y. LEXIS 1623 (N.Y. 1962).

While authorizations for continuing medical treatment by the chairman under subd 2 of this section are clearly administrative if liability has previously been established, where causal relationship is the fundamental issue and has not even been established through normal judicial machinery, the determination is not administrative and not subject to the usual review procedures. Daum v Rochester State Hospital, 21 A.D.2d 953, 251 N.Y.S.2d 361, 1964 N.Y. App. Div. LEXIS 3232 (N.Y. App. Div. 3d Dep't 1964).

Where claimant, who had long been employed as a laborer in iron mining and steel manufacture, contracted silicosis and received awards from November 23, 1955 to August 29, 1958, the date of his death from lung cancer, had received disability awards, a board finding that the pre-existing silicosis hastened decedent's death from cancer of the lung could not be sustained where there was no substantial evidence that debilitation associated with silicosis influenced progression of the malignancy. Martinez v Republic Steel Corp., 22 A.D.2d 738, 253 N.Y.S.2d 562, 1964 N.Y. App. Div. LEXIS 2931 (N.Y. App. Div. 3d Dep't 1964).

Board's finding that claimant's partial disability was related only to injuries sustained in 1952, 1953, and 1956, and not to an earlier 1947 injury suffered while working for another employer was not supported by substantial evidence where there was no evidence in the record contrary to carrier's expert's diagnosis that all four injuries contributed to the disability. Capuano v Ideal Roller & Mfg. Co., 24 A.D.2d 792, 263 N.Y.S.2d 870, 1965 N.Y. App. Div. LEXIS 3228 (N.Y. App. Div. 3d Dep't 1965).

Although the immediate cause of claimant's loss of his most recent employment, in 1970, was a reduction in work force owing to economic conditions, claimant would still be entitled to compensation if his back condition, resulting from a compensable injury in 1960, was a limiting factor in his search for employment and therefore partly responsible for his inability to find other employment. Boyle v Gatti, 40 A.D.2d 1063, 339 N.Y.S.2d 65, 1972 N.Y. App. Div. LEXIS 2991 (N.Y. App. Div. 3d Dep't 1972).

6. Compensation; last payment generally

Where date of injury was more than seven years before date of application, but last payment of compensation was made in 1932, less than three years before said date, although said payment should have been made in 1927, more than six years before it, application was too early to permit employment of § 25-a. Kiriloff v A. G. W. Wet Wash Laundry, Inc., 293 N.Y. 222, 56 N.E.2d 559, 293 N.Y. (N.Y.S.) 222, 1944 N.Y. LEXIS 1307 (N.Y. 1944).

Initial "stale" workmen's compensation claims are to be measured, for purposes of shifting liability to the Special Fund, for

reopened cases, from the last payment of compensation. Riley v Aircraft Products Mfg. Corp., 40 N.Y.2d 366, 386 N.Y.S.2d 838, 353 N.E.2d 801, 1976 N.Y. LEXIS 2895 (N.Y. 1976).

Sub 7 of this section is not limited to lump sum settlements made under sub 5-b of § 15. Sayres v August Feine & Sons Co., 283 A.D. 547, 128 N.Y.S.2d 898, 1954 N.Y. App. Div. LEXIS 4728 (N.Y. App. Div. 1954).

Compensation is the money allowance payable to an employee. So, a reimbursement to an employer by a carrier within 3 years of the reopening of a case for wages which had been paid by the employer during a period of disability was not a "last payment of compensation" within 3 years under this section to discharge the special fund. Decision and award discharging special fund reversed and claim remitted. Usherson v Greeley Mills, Inc., 7 A.D.2d 809, 180 N.Y.S.2d 894, 1958 N.Y. App. Div. LEXIS 3740 (N.Y. App. Div. 3d Dep't 1958), aff'd, 7 N.Y.2d 778, 194 N.Y.S.2d 45, 163 N.E.2d 148, 1959 N.Y. LEXIS 997 (N.Y. 1959).

Payment by employer of wages within 3 years prior to reopening case pursuant to policy of paying supervisory personnel when off from work constituted payment within the meaning of § 25-a. So, the Special Fund was properly relieved from liability. Tulley v American Radiator & Standard Sanitary Corp., 8 A.D.2d 564, 183 N.Y.S.2d 688, 1959 N.Y. App. Div. LEXIS 9650 (N.Y. App. Div. 3d Dep't 1959).

7. —Advance payments

Where, although claimant was working for different corporate employer at the time that he filed formal claim for total disability benefits than he was working for at the time of his injury, the corporate employer was a successor corporation which had absorbed as a subsidiary the employer for whom the workman was working at the time of his injury, advance payments of compensation which had been made by the initial corporate employer and an intermediary corporate employer within three years of time that claim was filed were binding on the corporate entity which was employing the workman at the time of his claim so that liability could not be shifted to the Special Fund, for reopened cases. Riley v Aircraft Products Mfg. Corp., 40 N.Y.2d 366, 386 N.Y.S.2d 838, 353 N.E.2d 801, 1976 N.Y. LEXIS 2895 (N.Y. 1976).

Where, although seven years elapsed between time of claimant's accident and time that claimant became totally disabled and filed formal claim for workmen's compensation, employer had made advance payments of compensation within three years prior to presentation of formal claim, liability for the claim could not be shifted to the Special Fund for reopened cases. Riley v Aircraft Products Mfg. Corp., 40 N.Y.2d 366, 386 N.Y.S.2d 838, 353 N.E.2d 801, 1976 N.Y. LEXIS 2895 (N.Y. 1976).

In 1941 claimant swallowed a tack. Compensation was paid for a period in 1942. During period in 1955 and 1956, claimant was out of work due to the disease resulting from 1941 injuries. The record established that, although claimant was out of work for brief periods before 1955 and his full salary was paid, he actually accomplished tasks for which he was being paid and employer received what he paid for. Because payments were not gratuitous, they did not constitute advanced payments of compensation. Since advance payments were not made in years in question, application for compensation was made more than seven years from date of accident and more than three years from last payment of compensation, and liability was that of Special Fund for Reopened Cases. Propper v Orkins Fashions Stores, Inc., 7 A.D.2d 689, 179 N.Y.S.2d 285, 1958 N.Y. App. Div. LEXIS 4347 (N.Y. App. Div. 3d Dep't 1958).

Claimant was employed in 1936 by the New York City Park Department as a "climber and pruner" when he was knocked out of a tree and suffered injuries resulting in permanent partial disability. He was continued in his position at full salary but was assigned to lighter work. In 1955, claimant resigned at employer's request and became entitled to retirement benefits which were very much smaller than his salary. On application to reopen the claim, Board properly held that assignment of claimant to lighter work at the same wages, which continued to within a few months of filing of application to reopen, constituted advance payments which tolled the running of the time limitations found in this section. Award affirmed. Golomb v New York, 8 A.D.2d 874, 186 N.Y.S.2d 893, 1959 N.Y. App. Div. LEXIS 8278 (N.Y. App. Div. 3d Dep't 1959).

Not all payments or wages as sick leave, or under an employee welfare plan are necessarily advance payments of compensation. Stewart v First Nat'l City Bank, 15 A.D.2d 622, 222 N.Y.S.2d 374, 1961 N.Y. App. Div. LEXIS 6847 (N.Y. App. Div. 3d Dep't 1961).

Payment of wages to claimant by her employer during the period of three years prior to reopening her case, involving three industrial injuries to her back but without any loss of time resulting therefrom, constituted an advance payment or compensation within the meaning of this section relieving the Special Fund from liability for the first and second accidents where such payments were clearly made with the employer's knowledge that the eventual disabilities were attributable to earlier accidents. Gomez v Pepe, 18 A.D.2d 742, 235 N.Y.S.2d 510, 1962 N.Y. App. Div. LEXIS 6181 (N.Y. App. Div. 3d Dep't 1962).

Claimant's assignment to lighter work at the same wages constituted an advance payment of compensation tolling the three-year time limitation of the above statute. Tremblay v Warren County Westmount Sanatorium, 24 A.D.2d 658, 261 N.Y.S.2d 205, 1965 N.Y. App. Div. LEXIS 3641 (N.Y. App. Div. 3d Dep't 1965).

Advance payment was made when claimant was treated at employer's clinic during working hours and was paid full wages, and thus since case was reopened within 3 years of such payment, insurance carrier remains liable. Feldman v Presbyterian Hospital, 114 A.D.2d 549, 494 N.Y.S.2d 163, 1985 N.Y. App. Div. LEXIS 53259 (N.Y. App. Div. 3d Dep't 1985).

Evidence supported board's finding of advance payment of compensation, and thus Special Fund for Reopened Cases was properly relieved of liability under CLS Work Comp § 25-a on ground that case was reopened within 3 years of last payment of compensation, where claimant was paid full salary while he was on limited duty performing lighter work normally performed at less pay. Foglia v New York City Housing Authority, 132 A.D.2d 762, 517 N.Y.S.2d 112, 1987 N.Y. App. Div. LEXIS 49280 (N.Y. App. Div. 3d Dep't 1987).

Definition of "advance payment of compensation" for purposes of CLS Work Comp § 25-a is no different than for CLS Work Comp § 28, since informal claims are treated same as formal awards under Workers' Compensation Law. Loiacono v Sears Roebuck & Co., 230 A.D.2d 351, 654 N.Y.S.2d 463, 1997 N.Y. App. Div. LEXIS 2227 (N.Y. App. Div. 3d Dep't 1997).

Workers' Compensation Board erred in finding that there was no evidentiary basis that advance payments might have been made for the purposes of determining the applicability of N.Y. Workers' Comp. Law § 25-a because, while the claimant was disabled from regular duty, the record was silent regarding whether the claimant performed lighter duties and, if so, whether he received full wages. Matter of Schroeder v US Foodservice, 107 A.D.3d 1135, 967 N.Y.S.2d 449, 2013 N.Y. App. Div. LEXIS 3999 (N.Y. App. Div. 3d Dep't 2013).

8. —Lump sum settlements

Where a lump sum settlement had not been drawn against because the claimant had suffered no decrease in earnings, the date of the last payment could not be ascertained and the three year limitation did not begin to run. Rainer v Modern Mfg. Co., 265 A.D. 1023, 38 N.Y.S.2d 923, 1943 N.Y. App. Div. LEXIS 6668 (N.Y. App. Div. 1943).

A commuted award paid to the Aggregate Trust Fund is the same as a lump sum settlement within the meaning of this section so that the date of the last payment is the date to which the sum would extend if not commuted. Pascucci v William Kennedy Const. Co., 270 A.D. 83, 58 N.Y.S.2d 667, 1945 N.Y. App. Div. LEXIS 2806 (N.Y. App. Div. 1945).

Even if there was substantial evidence to support the Board's decision to reopen a lump-sum settlement, the Special Fund could not be discharged where the case was not reopened until 3 years after the extension of the lump sum on a weekly basis. Primus v Continental Forge & Tool Co., 7 A.D.2d 178, 180 N.Y.S.2d 992, 1958 N.Y. App. Div. LEXIS 3690 (N.Y. App. Div. 3d Dep't 1958).

The "last payment" of compensation for the purpose of computing the basis of the Special Fund's liability is "the date" to which

the "amount paid" in the lump sum settlement "would extend" if the award were made on the date the lump sum settlement was approved. Primus v Continental Forge & Tool Co., 7 A.D.2d 178, 180 N.Y.S.2d 992, 1958 N.Y. App. Div. LEXIS 3690 (N.Y. App. Div. 3d Dep't 1958).

Subdivision 7 of this section requires the board, in determining whether a lump-sum settlement has extended compensation payments for more than the three-year period, "to spread the lump-sum settlement at the rate applicable to the disability found at the time of the approval of the lump-sum settlement by the referee." Weinberger v Belmont Electric Co., 13 A.D.2d 884, 215 N.Y.S.2d 195, 1961 N.Y. App. Div. LEXIS 10714 (N.Y. App. Div. 3d Dep't 1961).

In determining whether a lump-sum settlement approved by the board extended compensation payments for more than the three-year period, so as to relieve the Special Fund from liability, the fact that claimant, since deceased, might have been paid wages during that period at a rate no less than that of his pre-accident earnings is not controlling. Weinberger v Belmont Electric Co., 13 A.D.2d 884, 215 N.Y.S.2d 195, 1961 N.Y. App. Div. LEXIS 10714 (N.Y. App. Div. 3d Dep't 1961).

Subdivision 7 of this section must be employed in determining limitations where disability benefits awarded to an alien are commuted pursuant to § 17 and paid to him in a lump sum upon departure from the United States. Rolle v General Foods Corp., etc., 19 A.D.2d 188, 241 N.Y.S.2d 94, 1963 N.Y. App. Div. LEXIS 3445 (N.Y. App. Div. 3d Dep't 1963).

9. — —Particular applications

Where the amount of a lump settlement would carry periodical payments at the maximum rate to a date within three years of the time when proceedings were reopened the new award was properly made payable by the employer. Cretella v New York Dock Co., 289 N.Y. 254, 45 N.E.2d 429, 289 N.Y. (N.Y.S.) 254, 1942 N.Y. LEXIS 938 (N.Y. 1942).

Where a claimant was injured in 1940 while working as part-time extra man on a town snowplow, his average weekly wage for such work being $13.85, and the case was closed out in 1942 on a finding of partial disability with a lump-sum settlement of $3,000 based on a compensation award at the weekly rate of $9.23, which was excessive, the proper disability rate on such average earnings being $8.00, on claimant's 1954 application to reopen the case the board properly extended the payment period to accord with the lower rate. Weyzk v Stafford, 7 N.Y.2d 121, 195 N.Y.S.2d 841, 164 N.E.2d 106, 1959 N.Y. LEXIS 885 (N.Y. 1959).

Where case was closed on June 27, 1930 with lump sum award which would have extended regular weekly payments of compensation to May 21, 1931, and case was reopened in Dec. 12, 1934 on application of claimant filed Oct. 25, 1934, award on Nov. 13, 1935 for disability benefit against employer and insurance carrier was proper. Collier v P. J. Meade Eng. & Constr., Inc., 248 A.D. 931, 290 N.Y.S. 373, 1936 N.Y. App. Div. LEXIS 8107 (N.Y. App. Div. 1936).

A nonschedule adjustment or settlement, with referee approval, whereby claimant was paid $1,150 for "all past, present and future" disability may be allocated in accordance with the formula in subd. 7 so as to bring a petition for reopening within 3 years of the last payment of compensation, the nonschedule adjustment not being binding upon claimant as regards a reopening of his claim. Maschebet v Success Baking Co., 277 A.D. 1069, 100 N.Y.S.2d 614, 1950 N.Y. App. Div. LEXIS 4518 (N.Y. App. Div. 1950).

Where a scheduled award payable for 400 weeks was commuted and paid in a lump sum, a subsequent application to reopen the case, although made more than 7 years after injury, was nevertheless made within 3 years of the "date of the last payment of compensation" as extended under this section. Hence, carrier was liable for new award and not the Special Fund for Reopened Cases. Sayres v August Feine & Sons Co., 283 A.D. 547, 128 N.Y.S.2d 898, 1954 N.Y. App. Div. LEXIS 4728 (N.Y. App. Div. 1954).

The extension of a lump-sum settlement does not run indefinitely because the claimant enters into a successful business and makes more money than he did before a lump-sum settlement so that the statute of limitations does not apply and the Board may reopen a case at any time. Primus v Continental Forge & Tool Co., 7 A.D.2d 178, 180 N.Y.S.2d 992, 1958 N.Y. App. Div. LEXIS 3690 (N.Y. App. Div. 3d Dep't 1958).

In determining whether or not the Special Fund for reopen cases is liable, a lump sum cannot be indefinitely extended by excluding weeks during which claimant worked at preinjury wages. Weyzk v Stafford, 8 A.D.2d 560, 183 N.Y.S.2d 481, 1959 N.Y. App. Div. LEXIS 9645 (N.Y. App. Div. 3d Dep't), rev'd, 7 N.Y.2d 121, 195 N.Y.S.2d 841, 164 N.E.2d 106, 1959 N.Y. LEXIS 885 (N.Y. 1959).

Where a claimant who suffered back injuries in an industrial accident in 1946 was first given a total disability award, then a reduced earnings award, and finally, in 1950, the board approved a lump sum settlement for $1,500, and the question arose whether, on reopening the case in 1956 the lump-sum settlement had been expended prior to three years before the reopening so that there was no payment of compensation within that period and the Special Fund would be responsible for the award, the board was not required to exclude weeks during that three-year period during which claimant worked at pre-injury wages. Dumelle v Brookhaven Highway Dep't, 13 A.D.2d 878, 215 N.Y.S.2d 193, 1961 N.Y. App. Div. LEXIS 10706 (N.Y. App. Div. 3d Dep't 1961), aff'd, 11 N.Y.2d 842, 227 N.Y.S.2d 669, 182 N.E.2d 279, 1962 N.Y. LEXIS 1262 (N.Y. 1962).

A finding of the Board that there was no causally related change in claimant's condition since the case was previously closed on a lump sum non-schedule adjustment basis, and the back injury originally sustained by plaintiff in 1944 and for which he was paid compensation up to 1954, to sustain reopening on the ground of change in conditions in 158, on the basis of a change for the worse in his pyschiatric condition, was sustained as a finding of fact on conflicting medical evidence. Pascale v Universal Terminal & Stevedoring Co., 15 A.D.2d 854, 224 N.Y.S.2d 541, 1962 N.Y. App. Div. LEXIS 11430 (N.Y. App. Div. 3d Dep't 1962).

In applying subd. 7 of this section for the purpose of determining limitations applicable as against asserted liability of the Special Fund in a reopened case, the Board erred in projecting the original disability award for the remaining 178 weeks during which it would normally have run where the award had, in fact, been commuted and paid in a lump sum to the claimant, an alien, pursuant to § 17, when he departed from the United States at a considerably earlier date. Rolle v General Foods Corp., etc., 19 A.D.2d 188, 241 N.Y.S.2d 94, 1963 N.Y. App. Div. LEXIS 3445 (N.Y. App. Div. 3d Dep't 1963).

Denial of a carrier's request to shift its remaining medical liability in a workers' compensation claim to the fund for reopened cases was proper because an earlier lump-sum settlement equated to approximately 323 weeks of benefits, payable until a future date, and thus, although the lump-sum settlement had been reached over three years earlier, three years had not lapsed from the date of last compensation payment; the carrier's assertion that the statute only applied to nonschedule adjustment settlements pursuant to N.Y. Workers' Comp. Law § 15 was not supported by the language of N.Y. Workers' Comp. Law § 25-a (7), which specifically stated that it applied to situations where the case was disposed of by the payment of a lump sum. Furthermore, it was not dispositive that the N.Y. Workers' Comp. Law § 32 agreement did not expressly provide for a future allocation of the payment. Matter of Robinson v Holiday Showcase Rests., Inc., 46 A.D.3d 1178, 848 N.Y.S.2d 728, 2007 N.Y. App. Div. LEXIS 13164 (N.Y. App. Div. 3d Dep't 2007).

10. —Sick leave

Sick benefits paid pursuant to the terms of a labor union contract was not a payment of compensation sufficient to discharge the Special Fund for Reopened Cases (25-a) from liability. Moreover, it was ineffective because made after the application to reopen was filed. Davidson v Central Greyhound Lines, Inc., 279 A.D. 946, 110 N.Y.S.2d 748, 1952 N.Y. App. Div. LEXIS 5393 (N.Y. App. Div. 1952).

An employer's established custom of paying one week's full salary to all employees absent because of illness for disability does not constitute the payment of compensation particularly where there has been no new industrial accident. Special fund

should be charged where a claim closed in 1943 was opened in 1954 when the disability reoccurred even though employer paid compensation during the first week of the disability. Murray v Packard, 2 A.D.2d 907, 156 N.Y.S.2d 409, 1956 N.Y. App. Div. LEXIS 3915 (N.Y. App. Div. 3d Dep't 1956).

The Workers' Compensation Board erred in affirming a decision to charge the Special Disability Fund under Workers' Compensation Law § 25-a for payments for lost time made by an employer to a claimant who had sustained a compensable back injury more than ten years earlier, of which the employer had had knowledge, since payments made by an employer pursuant to a sick leave plan which covers disability irrespective of the cause do not constitute compensation within the meaning of Workers' Compensation Law § 25-a(1). Brock v Great A&P Tea Co., 84 A.D.2d 645, 444 N.Y.S.2d 724, 1981 N.Y. App. Div. LEXIS 15770 (N.Y. App. Div. 3d Dep't 1981).

In a reopened workers' compensation proceeding, the court would affirm a decision by the Workers' Compensation Board holding the carrier rather than the Special Fund for Reopened Cases liable for benefits, where payments made by the employer during the immediately preceding three years were compensation, not mandatory sick leave, in that the payments were made after the employee's sick leave had been exhausted and thus were discretionary. Urban v NYS Letchworth Village, 91 A.D.2d 1090, 458 N.Y.S.2d 308, 1983 N.Y. App. Div. LEXIS 16432 (N.Y. App. Div. 3d Dep't 1983).

Liability for workers' compensation claim was properly transferred to the Special Fund for Reopened Cases under N.Y. Workers' Comp. Law § 25-a because there had been a lapse of seven years from the injury in 1998 to the application to reopen in 2005 and no payment of compensation had been made within three years of the application to reopen as the claimant had been paid for missing work prior to the application to reopen from his accumulated sick leave. Matter of Wilfredo Fuentes v New York City Hous. Auth., 53 A.D.3d 873, 861 N.Y.S.2d 861, 2008 N.Y. App. Div. LEXIS 6161 (N.Y. App. Div. 3d Dep't 2008).

When an injured town employee is receiving workmen's compensation benefits, the town, in the absence of a sick leave plan, may not pay him a portion of his salary in addition. 1963 Ops St Compt #133.

Since the Workmen's Compensation Law requires reimbursement of a municipality out of an award made to one of its employees, if he is paid regular salary during the period of incapacitation, a town should not pay salary to an injured employee while receiving workmen's compensation benefits unless it has a regular sick leave plan. 1963 Ops St Compt #133.

11. —Medical benefits

Providing medical treatment or care does not constitute payment of compensation to this section. Kapesser v New York State Police, 286 A.D. 897, 142 N.Y.S.2d 267, 1955 N.Y. App. Div. LEXIS 4463 (N.Y. App. Div. 1955).

Medical payments do not constitute payments of compensation within the meaning of this section. Gammino v Sperry Gyroscope Co., 8 A.D.2d 571, 183 N.Y.S.2d 505, 1959 N.Y. App. Div. LEXIS 9660 (N.Y. App. Div. 3d Dep't 1959).

Under the explicit terms of subdivision (a) of § 13, provision of medical devices or services is not a payment of compensation within the meaning of § 25-a so as to render the special fund for reopened cases liable for compensation benefits or award of compensation after 18 and 8-year periods. Bratle v Socony-Vacuum Oil Co., 10 A.D.2d 789, 198 N.Y.S.2d 711, 1960 N.Y. App. Div. LEXIS 10948 (N.Y. App. Div. 3d Dep't 1960), aff'd, 9 N.Y.2d 870, 216 N.Y.S.2d 691, 175 N.E.2d 823, 1961 N.Y. LEXIS 1292 (N.Y. 1961).

Payment of claimant's medical expenses was not "payment of compensation" for purposes of determining applicability of CLS Work Comp § 25-a. McQueen v New York State Div. of Parole, 245 A.D.2d 851, 666 N.Y.S.2d 317, 1997 N.Y. App. Div. LEXIS 13193 (N.Y. App. Div. 3d Dep't 1997), app. denied, 92 N.Y.2d 802, 677 N.Y.S.2d 72, 699 N.E.2d 432, 1998 N.Y. LEXIS 1767 (N.Y. 1998).

12. — —Particular payments

Employer's furnishing of employee with a truss constitutes a payment of compensation within the meaning of the Work. Comp. Law, and such a case does not come within the purview of this section. Patti v Knickerbocker Fireproofing Co., 255 A.D. 732, 6 N.Y.S.2d 754, 1938 N.Y. App. Div. LEXIS 4942 (N.Y. App. Div. 1938), aff'd, 280 N.Y. 609, 20 N.E.2d 559, 280 N.Y. (N.Y.S.) 609, 1939 N.Y. LEXIS 1439 (N.Y. 1939).

Where one day after injury employer filed report of injury, employer provided medical attention for over two years, claimant received full wages for years subsequent to accident, industrial board correctly found that employer made advance payments of compensation and allowed award. Cashel v Brown, Lipe Chapin Co., 263 A.D. 912, 32 N.Y.S.2d 154, 1942 N.Y. App. Div. LEXIS 7340 (N.Y. App. Div. 1942).

When claimant in 1927, while engaged in his regular occupation, received injuries which caused epigastric hernia which required operation, and suffered recurrent hernia in 1930 and subsequent operations in 1930 and 1940, claim properly awarded under § 25-a. Romano v New York, 263 A.D. 1030, 33 N.Y.S.2d 453, 1942 N.Y. App. Div. LEXIS 7955 (N.Y. App. Div. 1942).

An employer's furnishing of trusses up to within a period of six months prior to the application for review constituted a payment of compensation so that the claimant was not barred by the seven years' period. Schneider v Durst Mfg. Co., 265 A.D. 1022, 38 N.Y.S.2d 983, 1943 N.Y. App. Div. LEXIS 6667 (N.Y. App. Div. 1943).

Where ample evidence in record to show that within three years prior to claimant's application for reopening, the claimant received medical treatment, including x-ray examination in baking treatments, from employer's physicians, the award was properly assessed against the appellant employer and should be affirmed. Danaruma v New York, 266 A.D. 810, 41 N.Y.S.2d 364, 1943 N.Y. App. Div. LEXIS 4569 (N.Y. App. Div. 1943).

Payment of full wages for lighter work and furnishing of medical treatment constituted a payment of compensation and where such payment was made within 3 years prior to the application to reopen the case the employer and not the special fund was liable for additional compensation. Sassano v New York, 272 A.D. 843, 70 N.Y.S.2d 39, 1947 N.Y. App. Div. LEXIS 3871 (N.Y. App. Div. 1947).

Supplying a claimant prior to the 1944 amendment to § 13-a of the Workmen's Compensation Law with elastic stockings in compliance with a direction by the workmen's compensation board constituted a payment of compensation within the meaning of this section. Niker v McCormick, 273 A.D. 1037, 78 N.Y.S.2d 792, 1948 N.Y. App. Div. LEXIS 5860 (N.Y. App. Div. 1948).

Before the amendment of subdivision a of § 13 of the Workmen's Compensation Law to provide that medical treatment or care shall not constitute payment of compensation under this section, medical care furnished without reference to the accident because of conditions not shown to be related to the accident, and pursuant to a humane program on the part of the employer to supply free medical and hospital care to employees and dependents, and obtained in clinics separate from those devoted to compensation cases, did not revive the employer's responsibility for an award. Lombardo v Endicott Johnson Corp., 275 A.D. 18, 87 N.Y.S.2d 362, 1949 N.Y. App. Div. LEXIS 3696 (N.Y. App. Div. 1949).

Where an employer provided medical care and paid full wages for a period of disability in 1947 resulting from an injury in 1923 the employer and not the fund for reopened cases was liable for a compensation award. Pronath v Bethlehem Steel Co., 275 A.D. 1011, 91 N.Y.S.2d 798, 1949 N.Y. App. Div. LEXIS 5479 (N.Y. App. Div. 1949).

Claimant injured his back in July, 1945. Decision relieving Special Fund for Reopened Cases from liability on finding of payments of compensation within 3-year period based solely on 3 or 4 visits of claimant to employer's clinic for 20 to 30 minutes each time between 1952 and 1954 was erroneous. There was no substantial proof that visits to clinic were occasioned by 1945 injury, but, even if they were, medical treatments do not constitute payments of compensation under this section. Gammino v Sperry Gyroscope Co., 8 A.D.2d 571, 183 N.Y.S.2d 505, 1959 N.Y. App. Div. LEXIS 9660 (N.Y. App. Div. 3d Dep't 1959).

Where a claimant was injured in 1943, received compensation for brief periods of lost time in 1945, the insurance carrier paid

several bills for medical treatment between 1945 and 1957, and the case was closed by the referee on October 14, 1957, subject to reopening for unpaid medical bills, but again reopened by the referee January 2, 1958, the Special Fund should not have been discharged as there had been no compensation payments for three years prior to reopening and the accident occurred more than seven years prior to reopening date. Standish v Walter B. Cooke, Inc., 9 A.D.2d 817, 192 N.Y.S.2d 641, 1959 N.Y. App. Div. LEXIS 6169 (N.Y. App. Div. 3d Dep't 1959).

The Special Fund was not required to furnish a truss to the claimant, which formerly had been furnished by the employer, because the furnishing of a truss by the employer within eight years of the application to reopen could not, under the express words of § 13(a), be treated as a payment of compensation. Youngelman v New York, Dep't of Sanitation, 10 A.D.2d 173, 198 N.Y.S.2d 708, 1960 N.Y. App. Div. LEXIS 10918 (N.Y. App. Div. 3d Dep't 1960), app. dismissed, 9 N.Y.2d 905, 217 N.Y.S.2d 83, 176 N.E.2d 94, 1961 N.Y. LEXIS 1316 (N.Y. 1961).

A board finding that medical expenses were authorized on May 24, 1948, and the authorization never rescinded, having been granted in response to a specific request for such authority, subsequent closing of the reopened case predicated upon claimant's inability to physically appear and not because of lack of merit in his claim constituted sufficient compliance with this section by claimant for allowance of expenses subsequently substantiated and found to be causally related to claimant's original claim. Pixley v University of Rochester, 22 A.D.2d 743, 253 N.Y.S.2d 392, 1964 N.Y. App. Div. LEXIS 2943 (N.Y. App. Div. 3d Dep't 1964), app. denied, 15 N.Y.2d 483, 1965 N.Y. LEXIS 1777 (N.Y. 1965).

13. —Pensions

A city's payment of a retirement pension to an incapacitated employee is a payment of compensation within the meaning of this section insofar as the payment is made from the funds of the city. This would not apply to the annuity portion of a retirement allowance. Hyser v New York, 273 A.D. 1043, 79 N.Y.S.2d 378, 1948 N.Y. App. Div. LEXIS 5881 (N.Y. App. Div. 1948).

An award against the Special Fund for Reopened Cases was affirmed where an employee of the State Insurance Fund was awarded compensation and also was granted an accidental disability retirement pension under the New York State Employees' Retirement System. Nash v State Ins. Fund, 279 A.D. 1102, 112 N.Y.S.2d 377, 1952 N.Y. App. Div. LEXIS 5985 (N.Y. App. Div. 1952).

The payment of an accidental disability retirement pension into which the employer has made contributions, is a payment of compensation within the meaning of Workmen's Compensation Law § 25-a. And hence, the Special Fund for Reopened Cases was relieved from liability for any further medical or disability treatments that might be needed by a claimant receiving a retirement pension from the New York State Employees' Retirement System for accidental injury. Pignataro v Westchester Parkway Police Dep't, 5 A.D.2d 523, 173 N.Y.S.2d 436, 1958 N.Y. App. Div. LEXIS 6146 (N.Y. App. Div. 3d Dep't 1958), aff'd, 7 N.Y.2d 848, 196 N.Y.S.2d 987, 164 N.E.2d 861, 1959 N.Y. LEXIS 935 (N.Y. 1959).

Accidental retirement pension benefits paid to a claimant constituted a payment of compensation, so that where more than three years had not elapsed since the last payment of compensation, the insurance carrier was liable for a continuance of medical treatment, rather than the Special Fund for Reopened Cases. Craig v Palisades Interstate Park Com., 28 A.D.2d 797, 281 N.Y.S.2d 387, 1967 N.Y. App. Div. LEXIS 3715 (N.Y. App. Div. 3d Dep't), app. denied, 20 N.Y.2d 642, 1967 N.Y. LEXIS 1904 (N.Y. 1967).

Pension payments made by employer were not payments of "compensation", within meaning of statute making employer rather than special fund liable for reopened claims after case is closed if compensation has been paid within three years of application for further compensation, even though employer granted pension in part because of claimant's physical disability resulting from loss of his leg in industrial accident, where pension plan involved provided for such pension when employee with 15 years' service and who, while in service, becomes permanently incapacitated for further work but where plan did not require any occupational relationship to cause of disability. Krystofik v General Electric Co., 54 A.D.2d 137, 388 N.Y.S.2d 50, 1976 N.Y. App. Div. LEXIS 13738 (N.Y. App. Div. 3d Dep't 1976).

Although pensions which can only be granted on basis of occupational disability must be considered payments of compensation as to occupationally caused disabilities for which they are granted, payments by employer which result solely from finding of disability regardless of its cause are not advance payments of compensation. Krystofik v General Electric Co., 54 A.D.2d 137, 388 N.Y.S.2d 50, 1976 N.Y. App. Div. LEXIS 13738 (N.Y. App. Div. 3d Dep't 1976).

14. —Wages

Where an employee received wages for lost time for a recurrence of a disability, the payment of wages during the subsequent disability constituted a payment of compensation and the special fund for reopened cases was properly discharged from liability. Tum v Elmira Coca Cola Bottling Works, Inc., 277 A.D. 800, 96 N.Y.S.2d 736, 1950 N.Y. App. Div. LEXIS 3372 (N.Y. App. Div. 3d Dep't 1950).

The payment to a disabled employee of a wage equal to her pre-injury wage was not established as compulsory under the National Recovery Act and hence, such payments made within 8 years of the reopening of the case constituted payment of compensation and extended the time limitations provided by this section. White v Marine Trust Co., 281 A.D. 912, 119 N.Y.S.2d 650, 1953 N.Y. App. Div. LEXIS 3757 (N.Y. App. Div. 1953).

A claimant who had been almost completely blinded and permanently scarred in an industrial accident of several years past was permitted to reopen his claim and the Board awarded permanent disability compensation and directed that the carrier for the employer pay the award. The court sustained the award even though claimant was employed in the same position at a salary much greater than that paid at the time of the accident but directed that the award be paid by the Fund for Reopened Cases. The last payment of compensation had been made over three years before the claim was reopened but the Board had found that the wages paid the claimant constituted advance compensation payments. In the absence of proof that wages were gratuitous, the court held that they were not compensation payments. Baker v Standard Rolling Mills, Inc., 284 A.D. 433, 131 N.Y.S.2d 739, 1954 N.Y. App. Div. LEXIS 3420 (N.Y. App. Div. 1954).. See also Mallardi v Palumbo Cigar Co., 284 A.D. 916, 134 N.Y.S.2d 314, 1954 N.Y. App. Div. LEXIS 4050 (N.Y. App. Div. 1954).

The assigning of a claimant to lighter work and paying him full wages with knowledge of a previous disablement did not constitute advance payment of compensation which would relieve the Special Fund where the claimant earned his hire and there was nothing gratuitous in the performance of the lighter work. Puglia v Sing Sing Prison, 3 A.D.2d 871, 161 N.Y.S.2d 250, 1957 N.Y. App. Div. LEXIS 5889 (N.Y. App. Div. 3d Dep't 1957).

Where payment of full salary during absence of the claimant from work, which was charged against annual and sick leave, was not a voluntary payment but was compulsory under Civil Service Law Rule 2(3), such compulsory payment did not constitute such a payment of compensation as would relieve the Special Fund under this section. Puglia v Sing Sing Prison, 9 A.D.2d 831, 192 N.Y.S.2d 590, 1959 N.Y. App. Div. LEXIS 6192 (N.Y. App. Div. 3d Dep't 1959), aff'd, 8 N.Y.2d 891, 204 N.Y.S.2d 142, 168 N.E.2d 820, 1960 N.Y. LEXIS 1167 (N.Y. 1960).

Where a claimant sustained a back injury in 1942 in course of employment by the State Department of Correction at Sing Sing Prison, was awarded compensation, and his case closed on December 30, 1947, payments later made by the Warden to claimant for two short absences when he reported sick in 1953 were to be considered, under the Attendance Rules for Institutional Employees, merely a mandatory payment of full wages and not a payment of compensation such as to relieve the Special Fund for Reopened Cases from liability for further compensation payments awarded on reopening the compensation claim in 1953. Puglia v Sing Sing Prison, 9 A.D.2d 831, 192 N.Y.S.2d 590, 1959 N.Y. App. Div. LEXIS 6192 (N.Y. App. Div. 3d Dep't 1959), aff'd, 8 N.Y.2d 891, 204 N.Y.S.2d 142, 168 N.E.2d 820, 1960 N.Y. LEXIS 1167 (N.Y. 1960).

It was error to discharge the Special Fund from liability because a painter was paid the same wages by his employer as other painters, though he worked only at ground level because of dizziness attributed to a 1947 industrial accident in a different line of work, where the original case had been closed in 1950 and was not reopened for further award until 1958, there being nothing to indicate that the employer was not receiving full value in work for the wages paid so that the wage rate could be considered in the nature of a compensation payment. Schaffner v General Motors Corp., 12 A.D.2d 556, 206 N.Y.S.2d 1005, 1960 N.Y. App. Div. LEXIS 7256 (N.Y. App. Div. 3d Dep't 1960).

This section deals specifically with a shift in responsibility as between the insurance carrier and the Special Fund under stated circumstances, and there is nothing in its language which warrants the conclusion that the Legislature intended that in fixing the date of last payment the weeks during which claimant worked at pre-injury wages were to be excluded. Dumelle v Brookhaven Highway Dep't, 13 A.D.2d 878, 215 N.Y.S.2d 193, 1961 N.Y. App. Div. LEXIS 10706 (N.Y. App. Div. 3d Dep't 1961), aff'd, 11 N.Y.2d 842, 227 N.Y.S.2d 669, 182 N.E.2d 279, 1962 N.Y. LEXIS 1262 (N.Y. 1962).

Board's decision that N.Y. Workers' Comp. Law § 25-a applied was error because the claimant's receipt of the same wages for lighter work, as stated in the claimant's affidavit, could have constituted an advance payment of compensation relieving the Special Fund for Reopened Cases from liability; the board should have allowed further development of the record. Absent proof regarding the nature of the claimant's light duty work, the board could not have assessed whether an advance payment was made for the purposes of determining the applicability of § 25-a, and, accordingly, the board's decision was not supported by substantial evidence. Matter of Iannaci v Independent Cement Corp., 66 A.D.3d 1194, 887 N.Y.S.2d 357, 2009 N.Y. App. Div. LEXIS 7403 (N.Y. App. Div. 3d Dep't 2009).

15. —Other payments

Payments awarded by an employer voluntarily in that they are not paid under an award by the board are effective to avoid the lapse of time essential to the liability of the fund for reopened cases. Pollock v Melville Shoe Corp., 271 A.D. 846, 65 N.Y.S.2d 829, 1946 N.Y. App. Div. LEXIS 3385 (N.Y. App. Div. 1946).

Payment by a self-insured employer to a claimant on January 27, 1948, for the sole purpose of correcting a mistake made by the Board in computing the amount due under an award made April 12, 1946, constituted the payment of compensation made less than three years prior to claimant's application to reopen the claim within the meaning of this section. Adams v Aluminum Co. of America, 282 A.D. 1088, 126 N.Y.S.2d 671, 1953 N.Y. App. Div. LEXIS 5887 (N.Y. App. Div. 1953).

Claimant sustained an accident in 1937. In 1952, the injury caused claimant to take time off from work for which he was paid by his employer. The employer's payment constituted an advance payment of compensation and the claim, reopened in 1953, was not the liability of the Special Fund. Dorfer v William Summerhays & Sons Corp., 286 A.D. 1053, 144 N.Y.S.2d 835, 1955 N.Y. App. Div. LEXIS 5116 (N.Y. App. Div. 1955).

Where there was no substantial evidence to show that lost time payments made by an employer (within 3 years of the reopening of a closed case) were related to the employee's original accident, the Special Fund for Reopened Cases was liable. The closed case was reopened more than 7 years after the accident. The evidence clearly showed that the lost time payments (within 3 years of the reopening) were due to another injury. Schoelkopf v G. X. Mathews Co., 8 A.D.2d 225, 187 N.Y.S.2d 487, 1959 N.Y. App. Div. LEXIS 7998 (N.Y. App. Div. 3d Dep't 1959).

The claim of a credit for an alleged overpayment in a previous year constituted a "payment" within the meaning of this section. Reed v William Danz Constr. Co., 9 A.D.2d 1004, 194 N.Y.S.2d 942, 1959 N.Y. App. Div. LEXIS 5328 (N.Y. App. Div. 3d Dep't 1959).

Special Fund was properly discharged from liability on reopening of claim for back injury where last payment on aggravated back injury, of which employer had full knowledge, was made within 3 years of reopening date. Scoppo v American Brake Shoe Co., 43 A.D.2d 603, 348 N.Y.S.2d 598, 1973 N.Y. App. Div. LEXIS 3245 (N.Y. App. Div. 3d Dep't 1973).

16. Date of disability

In occupational disease case, Workmen's Compensation Board may properly fix date of disablement at time of need of medical care and before any actual loss of wages. Smith v Ingersoll-Rand Co., 50 A.D.2d 988, 376 N.Y.S.2d 262, 1975 N.Y. App. Div. LEXIS 11957 (N.Y. App. Div. 3d Dep't 1975).

Substantial evidence supported Workmen's Compensation Board's finding that employee was disabled by silicosis on May 25, 1960 despite fact that he returned to work and remained there until November, 1971. Smith v Ingersoll-Rand Co., 50 A.D.2d 988, 376 N.Y.S.2d 262, 1975 N.Y. App. Div. LEXIS 11957 (N.Y. App. Div. 3d Dep't 1975).

Fixing date of disablement by occupational disease is factual question for Workmen's Compensation Board and must be upheld if supported by substantial evidence. Smith v Ingersoll-Rand Co., 50 A.D.2d 988, 376 N.Y.S.2d 262, 1975 N.Y. App. Div. LEXIS 11957 (N.Y. App. Div. 3d Dep't 1975).

17. Liens on special funds and payments made therefrom

Where the widow died before an award was made her attorney's fees could not be made liens on payments made to the special funds. De Stefano v Meerbaum, 272 A.D. 981, 72 N.Y.S.2d 840, 1947 N.Y. App. Div. LEXIS 4490 (N.Y. App. Div. 1947).

Though insurance carrier was required by Workmen's Compensation Law to pay moneys into vocational rehabilitation fund and into fund for reopened cases, carrier was not entitled to a lien in such amounts against amount widow recovered in wrongful death action. In re Estate of Grasso, 1 Misc. 2d 704, 148 N.Y.S.2d 850, 1956 N.Y. Misc. LEXIS 2220 (N.Y. Sur. Ct. 1956).

18. Effect of third party liability for compensation

Failure of claimant to prosecute third party action to a conclusion is not a bar to reopening compensation claim where two trials were had but no decisive jury verdict ever rendered and during the course of hearings on reopening claimant offered to assign his third party claim to the carrier which offer was rejected. Holdren v Rupp, 282 A.D. 783, 122 N.Y.S.2d 441, 1953 N.Y. App. Div. LEXIS 4954 (N.Y. App. Div. 1953).

The Special Fund and not a carrier was liable for an award of the Board in 1951 upon reclassification of claimant's disability following the closing of the case after claimant, injured in 1941, received sum in settlement of third-party action and thereafter in 1945 Board made an award which was less than the amount received in the third-party action. Craven v Andrews, 283 A.D. 345, 128 N.Y.S.2d 143, 1954 N.Y. App. Div. LEXIS 4676 (N.Y. App. Div. 1954).

Where the compensation insurance carrier, after serving notice of lien on the deceased employee's widow's right of action against a third person for causing the employee's death, voluntarily waived one-half of its lien in connection with a settlement of the third-party right of action, which one-half amounted to $2,026.50, it was not entitled to credit for the amount so waived against its liability to the Special Fund under this section as representing a payment of compensation to which the widow was "entitled." Murray v Farmingdale Federal Sav. & Loan Asso., 11 A.D.2d 452, 207 N.Y.S.2d 805, 1960 N.Y. App. Div. LEXIS 6721 (N.Y. App. Div. 3d Dep't 1960).

Workmen's Compensation Board, in holding hearings on reopening of compensation file, erred in failing to afford employer's compensation carrier, which had been discharged from liability, opportunity to develop what evidence it might desire to present concerning contention that carrier had consented to third-party settlement of claimant's accident. Rought v Swift & Co., 55 A.D.2d 763, 389 N.Y.S.2d 460, 1976 N.Y. App. Div. LEXIS 15548 (N.Y. App. Div. 3d Dep't 1976).

Evidence supported determination of Workmen's Compensation Board that claimant had not voluntarily discontinued his third-party action, in case in which carrier contended that claim for further compensation was barred on basis that voluntary discontinuance had occurred without its consent. Maher v State University College, 59 A.D.2d 814, 399 N.Y.S.2d 74, 1977 N.Y. App. Div. LEXIS 13896 (N.Y. App. Div. 3d Dep't 1977).

19. Reopening cases, generally

The provisions of § 123 limit the board's right to open cases and relieve the special fund for reopened cases of responsibility in 7 year old cases contested and decided adversely to the claimant or closed without award and without determination on the merits. Kaplan v Wirth & Birnbaum, 301 N.Y. 121, 92 N.E.2d 919, 301 N.Y. (N.Y.S.) 121, 1950 N.Y. LEXIS 822 (N.Y. 1950).

There is nothing in this section to suggest that rights or liabilities of parties are dependent in any special manner upon reopening of case upon board's own motion. Ryan v American Bridge Co., 243 A.D. 496, 278 N.Y.S. 612, 1935 N.Y. App. Div. LEXIS 7104 (N.Y. App. Div.), aff'd, 268 N.Y. 502, 198 N.E. 375, 268 N.Y. (N.Y.S.) 502, 1935 N.Y. LEXIS 980 (N.Y. 1935).

Where case had been taken under advisement by board as to claimant's hospital bill and doctor bill, and had been referred to referee in Oct. 1932, case had been reopened and was therefore pending on April 24, 1933. Lanfield v Cady, 248 A.D. 926, 290 N.Y.S. 234, 1936 N.Y. App. Div. LEXIS 8097 (N.Y. App. Div. 1936).

Where claimant suffered a back injury in course of employment in 1950 for which he received compensation until 1954, when the case was closed, and again in 1957 suffered further back trouble while employed by a different employer, and a doctor's report was filed in connection with the 1957 claim indicating that it was probably related to the 1950 accident, whereupon the second employer requested reopening of the 1950 claim on the basis of such report, the Board was justified in reopening the 1950 claim, treating the doctor's report as made within seven years and as an application for reopening, discharging the Special Fund, and charging the claim back against the initial insurance carrier. Wilson v Pittsburgh Plate Glass Co., 15 A.D.2d 847, 224 N.Y.S.2d 362, 1962 N.Y. App. Div. LEXIS 11421 (N.Y. App. Div. 3d Dep't 1962).

The filing of a report indicating a change of condition was sufficient to warrant the board's action in reopening a matter previously closed by the referee. Rawlings v Reliable Sample Co., 30 A.D.2d 722, 291 N.Y.S.2d 669, 1968 N.Y. App. Div. LEXIS 3569 (N.Y. App. Div. 3d Dep't 1968).

Section of the Workmen's Compensation Law shifting liability to the Special Fund for Reopened Cases for payment of compensation for certain state claims is inapplicable where claimant applies to reopen case within seven years of accident. Italiano v Mobil Oil Corp., 50 A.D.2d 638, 374 N.Y.S.2d 162, 1975 N.Y. App. Div. LEXIS 12454 (N.Y. App. Div. 3d Dep't 1975).

Claimant's recommencement of treatment in 1984 did not constitute "reopening" of case within 3 years of last payment of compensation in 1982, and thus did not take matter outside purview of CLS Work Comp § 25-a. Loiacono v Sears Roebuck & Co., 230 A.D.2d 351, 654 N.Y.S.2d 463, 1997 N.Y. App. Div. LEXIS 2227 (N.Y. App. Div. 3d Dep't 1997).

The doctor's report clearly made reference to the changed condition in the employee's right knee; therefore, the employee's application to reopen the second case was made within seven years of the injury and was sufficient notice to the board of the employee's application to reopen his second case and the second insurer was properly put back on notice Davis v T.J. Madden Constr. Co., 295 A.D.2d 826, 744 N.Y.S.2d 546, 2002 N.Y. App. Div. LEXIS 6802 (N.Y. App. Div. 3d Dep't 2002).

Closure of a workers' compensation case for purposes of N.Y. Workers' Comp. Law § 25-a discharged an employer's workers' compensation carrier from liability even though the parties anticipated that the claimant might require further medical treatment; the fact that there could be a deterioration in the claimant's physical condition requiring another reopening of the claimant's case did not mean that the matter was not fully closed for the purposes of § 25-a, and the fact that the matter was reopened shortly thereafter did not change the result. Andrus v Purolator Prods., 301 A.D.2d 762, 753 N.Y.S.2d 224, 2003 N.Y. App. Div. LEXIS 87 (N.Y. App. Div. 3d Dep't 2003).

Where the Workers' Compensation Board closed an employee's case without resolving the issues of permanency and whether surgery was indicated, the closing contemplated further proceedings to establish the extent of claimant's disability, and substantial evidence supported the Board's finding that the case was not truly closed; moreover, the question of whether or not the employee's case was truly closed also determined the applicability of N.Y. Workers' Comp. Law § 123, as that statute's time limits applied only to truly closed cases. Carubia v Colt Indus., 12 A.D.3d 827, 783 N.Y.S.2d 891, 2004 N.Y. App. Div. LEXIS 13248 (N.Y. App. Div. 3d Dep't 2004).

Workers' compensation board properly found that a worker did not sustain a causally related disability; a psychotic episode suffered was a result of current stress, and not a remanifestation of stress the worker suffered while she was employed, and therefore N.Y. Workers' Comp. Law § 25-a was applicable. Berkley v Irving Trust Co., 15 A.D.3d 750, 789 N.Y.S.2d 552, 2005 N.Y. App. Div. LEXIS 1446 (N.Y. App. Div. 3d Dep't 2005).

Although a workers' compensation law judge stated in 2001 that no further action was planned by the Workers' Compensation Board, the record reflected that further proceedings were contemplated; therefore, substantial evidence existed to support the Board's conclusion that N.Y. Workers' Comp. Law § 25-a did not apply. Matter of Washburn v Bob Hooey Constr. Co., 39 A.D.3d 956, 833 N.Y.S.2d 696, 2007 N.Y. App. Div. LEXIS 4148 (N.Y. App. Div. 3d Dep't 2007).

20. Special fund liability, generally

If it is determined that award should be made from special fund provided for in this section it should not be different in amount because of an appeal. Payment should be made from fund from time it would have commenced but for erroneous award. Vleck v Parry, 270 N.Y. 371, 1 N.E.2d 468, 270 N.Y. (N.Y.S.) 371, 1936 N.Y. LEXIS 1556 (N.Y. 1936).

A ruling, in part made by the Chairman of the Board and in part by the Board and its Referee, which imposed liability on the Special Fund for medical care longer than 18 years after the accident and 8 years after the last payment of compensation, could be reviewed under § 23 of the Workmen's Compensation Law, where the process was a closely integrated series of related and dependent procedural steps involving decisions by the Referee, the Board, and the Chairman; although a decision of the Chairman under § 25-a(2) which was independent of Board implementation might be reviewed separately in an Article 78 proceeding. Crowl v New York, Dep't of Hospitals, 18 N.Y.2d 23, 271 N.Y.S.2d 659, 218 N.E.2d 537, 1966 N.Y. LEXIS 1274 (N.Y. 1966).

There is no express requirement, in order to shift liability for workmen's compensation benefits to the Special Fund for reopened cases, that there be a formal opening of a claim or a prior formal award. Riley v Aircraft Products Mfg. Corp., 40 N.Y.2d 366, 386 N.Y.S.2d 838, 353 N.E.2d 801, 1976 N.Y. LEXIS 2895 (N.Y. 1976).

Accrual date of claim for death benefits is necessarily date of death giving rise to claim, and thus date of death begins running of limitations period of CLS Work Comp § 25-a(6); time bar of CLS Work Comp § 123 is not applicable. Zechmann v Canisteo Volunteer Fire Dep't, 85 N.Y.2d 747, 628 N.Y.S.2d 249, 651 N.E.2d 1268, 1995 N.Y. LEXIS 1115 (N.Y. 1995).

Incorporation of CLS Work Comp § 123 into CLS Work Comp § 25-a(1) does not alter scope of § 123, which applies only to reopened cases, and thus "18- and 8"-year limitation of § 123 did not apply to new claim for death benefits that was brought against Special Fund for Reopened Cases separately from, and subsequently to, disability claim that had been closed. Zechmann v Canisteo Volunteer Fire Dep't, 85 N.Y.2d 747, 628 N.Y.S.2d 249, 651 N.E.2d 1268, 1995 N.Y. LEXIS 1115 (N.Y. 1995).

Disability and death claims are two separate claims so that an award on a death claim which came within the provisions of this section should be paid from the fund although payments had been made on the disability claim within the three year period. De Santis v Folcaro, 259 A.D. 768, 18 N.Y.S.2d 259, 1940 N.Y. App. Div. LEXIS 6586 (N.Y. App. Div. 1940).

Liability of the special fund is not created by reason of the obligation on the part of the employer but solely by virtue of the lapse of time. Becker v Marcy State Hospital, 264 A.D. 643, 38 N.Y.S.2d 219, 1942 N.Y. App. Div. LEXIS 4224 (N.Y. App. Div. 1942).

Award should have been made against special fund under Work. Comp. Law, § 25-a, where at time award was made seven years had elapsed since date of injury, and three years had elapsed from date of last payment of compensation, assuming that payment of medical expenses and wages during period of disability was an advance payment of compensation. Larac v Munson S. S. Lines, 264 A.D. 923, 36 N.Y.S.2d 57, 1942 N.Y. App. Div. LEXIS 5387 (N.Y. App. Div. 1942).

Liability against Fund for Reopened Cases arises only under precise conditions set forth in this section, and if these conditions are not met there can be no liability against this fund simply because an additional benefit is allowed after a commuted award has been paid into Aggregate Trust Fund under § 27. Pascucci v William Kennedy Const. Co., 270 A.D. 83, 58 N.Y.S.2d 667, 1945 N.Y. App. Div. LEXIS 2806 (N.Y. App. Div. 1945).

The Workmen's Compensation Board may apportion liability between a self-insured employer in the Special Fund without rescinding a prior schedule award and crediting the special Fund by the amount of payment made under that award. Brown v Interstate Motor Freight System, Inc., 32 A.D.2d 51, 299 N.Y.S.2d 304, 1969 N.Y. App. Div. LEXIS 4161 (N.Y. App. Div. 3d Dep't 1969), aff'd, 26 N.Y.2d 735, 309 N.Y.S.2d 37, 257 N.E.2d 286, 1970 N.Y. LEXIS 1588 (N.Y. 1970).

Since the shifting of liability under Workmen's Compensation L § 25-a is dependent upon the passage of time where no further proceedings are contemplated and since an order for continued treatment under § 13 does not prevent the shifting of liability therefor to the Special Fund, the board's discretion in closing or not closing a case is not so absolute that it may refuse to do so solely to thwart said shift of liability. Wiley v Van Der Horst Corp., 38 A.D.2d 642, 327 N.Y.S.2d 104, 1971 N.Y. App. Div. LEXIS 2672 (N.Y. App. Div. 3d Dep't 1971).

Once, solely by reason of requisite passage of time, Special Fund for Reopened Cases becomes liable for compensation benefits, it succeeds to procedural rights of carrier and liability shifts entirely from carrier to fund. De Mayo v Rensselaer Polytech Inst., 144 A.D.2d 740, 535 N.Y.S.2d 152, 1988 N.Y. App. Div. LEXIS 10911 (N.Y. App. Div. 3d Dep't 1988), aff'd, 74 N.Y.2d 459, 548 N.Y.S.2d 630, 547 N.E.2d 1157, 1989 N.Y. LEXIS 3217 (N.Y. 1989).

Agency's belated determination that an injured worker should have been awarded permanent total disability after a work-related accident deprived the worker of sight in the only eye that worked should not have resulted in a modified award for which the New York Special Fund Conservation Committee was responsible without consideration as to whether an award subject to the limits on Special Fund responsibility would unduly prejudice the worker. Jansch v Sagamore Children's Fund, 302 A.D.2d 851, 756 N.Y.S.2d 326, 2003 N.Y. App. Div. LEXIS 1734 (N.Y. App. Div. 3d Dep't 2003).

Finding that special fund was required to pay for claimant's treatment of right arm pain incurred while working for the claimant's employer was supported by substantial evidence, as the evidence showed the claimant's case was closed by the Workers' Compensation Board and was not reopened for more than seven years following the injury and three years following the last payment of compensation; since the reopening and last payment of compensation did not occur within those time periods, N.Y. Workers. Comp. Law § 25-a(1) dictated that the special fund cover the cost of further treatments. Jones v HSBC, 304 A.D.2d 864, 757 N.Y.S.2d 368, 2003 N.Y. App. Div. LEXIS 3501 (N.Y. App. Div. 3d Dep't 2003).

Although the special fund claimed the claimant's case was reopened, and, thus, it was not responsible for paying for the claimant's treatment that otherwise occurred more than seven years after the date of injury and more than three years following the last payment of compensation, that argument had to be rejected, as the workers' compensation carrier's act of paying for medical treatment did not constitute payment of compensation for purposes of determining the time periods under N.Y. Workers' Compensation Law § 25-a. Jones v HSBC, 304 A.D.2d 864, 757 N.Y.S.2d 368, 2003 N.Y. App. Div. LEXIS 3501 (N.Y. App. Div. 3d Dep't 2003).

21. —Open claims

Where claim was at no time finally disposed of or closed by board, after filing of claim, this section has no application. Naylor v Carey, 250 A.D. 792, 293 N.Y.S. 775, 1937 N.Y. App. Div. LEXIS 9020 (N.Y. App. Div. 1937).

This section has no application to a case which was open on April 24, 1933 and never closed but adjourned from year to year with the consent and approval of the employer. Gordon v Pennsylvania R. Co., 269 A.D. 794, 55 N.Y.S.2d 42, 1945 N.Y. App. Div. LEXIS 3883 (N.Y. App. Div. 1945).

Where a surviving child, following cessation of payments to her at age 18 and the expiration of the 7 and 3 lapse periods, applied for resumption of payments on the ground that she was a dependent crippled child, the fact that the original claim for death benefits as filed by her mother was still open prevented transfer of liability to the special fund for reopened cases. Branciforte v H. Kohnstemm & Co., 272 A.D. 855, 70 N.Y.S.2d 364, 1947 N.Y. App. Div. LEXIS 3916 (N.Y. App. Div.), app. dismissed, 297 N.Y. 594, 75 N.E.2d 267, 297 N.Y. (N.Y.S.) 594, 1947 N.Y. LEXIS 1077 (N.Y. 1947).

A case in which numerous hearings are held before the board, and which is marked continued at the close of each, ultimately terminating in an award, was never closed, and hence never reopened, and this section is not applicable. Baker v Crispell Bros., 275 A.D. 735, 87 N.Y.S.2d 193, 1949 N.Y. App. Div. LEXIS 4245 (N.Y. App. Div. 1949).

The Special Fund is not liable under this section with respect to cases which have never been closed and in which further proceedings are contemplated. Janikowski v Yardley's of London, Inc., 11 A.D.2d 577, 201 N.Y.S.2d 157, 1960 N.Y. App. Div. LEXIS 9926 (N.Y. App. Div. 3d Dep't 1960).

Where claimant first suffered from dermatitis in 1946, when her work for a particular employer exposed her to benzol, turpentine, and ink, again, in 1951, developed a skin irritation when exposed to chocolate in course of a different employment, for which compensation was awarded and the case closed in 1951, and still subsequently, in 1952, became disabled while working for a third employer as the result of exposure to "tintex," following which compensation was paid by the last employer until a new hearing was held in 1958 to determine whether disability was associated with prior exposures, on the basis of medical testimony the board properly found that each claim was independent and discharged the Special Fund from liability. Mannix v Park & Tilford Distillers, 12 A.D.2d 558, 207 N.Y.S.2d 50, 1960 N.Y. App. Div. LEXIS 7259 (N.Y. App. Div. 3d Dep't 1960).

The special fund for reopened cases is not required to pay a claim that has in fact never been closed, even though more than seven years have passed from the date of the injury and no previous award has been rendered, since further proceedings were actually contemplated in the former case. Abelowitz v Sterling Tool Co., 26 A.D.2d 875, 274 N.Y.S.2d 118, 1966 N.Y. App. Div. LEXIS 3301 (N.Y. App. Div. 3d Dep't 1966).

Workmen's Compensation Board properly discharged Special Fund for Reopened Cases from liability where closing of claim for knee injury "until claimant may be present to be examined by State Board" was not a "true closing". Lopez v New York Auction Service, 43 A.D.2d 606, 348 N.Y.S.2d 594, 1973 N.Y. App. Div. LEXIS 3249 (N.Y. App. Div. 3d Dep't 1973).

22. —Delayed claims

Application held in abeyance for filing of medical report was not open and pending on April 24, 1933, and award should be made under § 25-a. Fallon v New York Color & Chemical Co., 275 N.Y. 573, 11 N.E.2d 760, 275 N.Y. (N.Y.S.) 573, 1937 N.Y. LEXIS 1554 (N.Y. 1937).

In the case of "stale" initial claims, i.e., claims arising from old injuries without there ever having been a formal opening or award, it is consistent with objective of statute creating the Special Fund for reopened cases to shift liability to the Special Fund for an old accident and dormant compensation matter. Riley v Aircraft Products Mfg. Corp., 40 N.Y.2d 366, 386 N.Y.S.2d 838, 353 N.E.2d 801, 1976 N.Y. LEXIS 2895 (N.Y. 1976).

Where claimant suffered an injury to one of his eyes and received an award for temporary disability and the case was

closed on such award in 1921, and in 1922 claimant asked for a reopening of his case and he was notified to produce proof of permanent loss of vision, and he did nothing more about the matter until 1938, at which time he submitted another application accompanied by a medical report, and case was reopened and award granted, a contention by the board that it had acted upon the application in 1922 is precluded by the long lapse of time which is conclusive evidence that the first application was abandoned, and therefore the award must be paid from the special fund under § 25-a. Kane v Utica Knitting Co., 259 A.D. 947, 19 N.Y.S.2d 961, 1940 N.Y. App. Div. LEXIS 7393 (N.Y. App. Div. 1940).

Where a professional dancer suffered injuries while lifting another dancer during a rehearsal in 1945, filed a claim later that year, but the case was closed until claimant should request a hearing, a hearing was requested in 1950 at which time claimant was informed he needed proof of causal relationship and the case was adjourned several times to allow him to obtain such proof, and the case was again closed in September, 1952, following which, in December 22, 1952, claimant filed a formal application to reopen, which was granted, but no medical report received until December, 1955, it was within the discretion of the board to treat its decision reopening the case as of date of the application to reopen. Schun v U. S. O. Camp Shows, Inc., 11 A.D.2d 829, 203 N.Y.S.2d 141, 1960 N.Y. App. Div. LEXIS 8496 (N.Y. App. Div. 3d Dep't), app. denied, 8 N.Y.2d 709, 1960 N.Y. LEXIS 1866 (N.Y. 1960).

Where claimant was injured in 1960 but did not become totally disabled until 1971 and did not file claim until 1971, award could not be charged to the Special Fund for Reopened Cases as the claim presented was not a renewed claim following the prior closing of a case but rather was the initial claim. Riley v Aircraft Products Mfg. Corp., 45 A.D.2d 800, 357 N.Y.S.2d 49, 1974 N.Y. App. Div. LEXIS 4576 (N.Y. App. Div. 3d Dep't 1974).

23. —Closed claims, generally

For the purposes of this section a case is to be deemed closed when it is transferred to the abeyance file because no further proceedings are foreseen. Casey v Hinkle Iron Works, 299 N.Y. 382, 87 N.E.2d 419, 299 N.Y. (N.Y.S.) 382, 1949 N.Y. LEXIS 947 (N.Y. 1949).

The determination with regard to the "closing" of a claim for purposes of § 25-a of the Workmen's Compensation Law is one of fact and a mere statement by a referee that a case is "closed" does not necessarily render it so within the meaning of § 25-a. Scalesse v Printing Advertising Corp., 30 N.Y.2d 234, 331 N.Y.S.2d 642, 282 N.E.2d 604, 1972 N.Y. LEXIS 1381 (N.Y. 1972).

A referee, not knowing when claimant would be able to attend a hearing since he was in the Army Transport Service, stated that the case would be closed until such time as claimant requested a hearing. This did not constitute an actual closing of the case, and when the case was resumed, the employer's and carrier's liability was not excluded by section 25-a. Diskin v 99 Wall Street Corp., 279 A.D. 1103, 112 N.Y.S.2d 127, 1952 N.Y. App. Div. LEXIS 5986 (N.Y. App. Div. 1952).

Decision of Workmen's Compensation Board holding carrier rather than Special Fund liable for benefits, affirmed since the disposition made by the referee, the direction being "closed till such time as a deficiency arises", did not "close" the case within the contemplation of Workmen's Compensation Law § 25-a subdivision 1. Reeves v Charles Pfizer & Co., 28 A.D.2d 792, 280 N.Y.S.2d 916, 1967 N.Y. App. Div. LEXIS 3710 (N.Y. App. Div. 3d Dep't 1967), aff'd, 22 N.Y.2d 950, 295 N.Y.S.2d 165, 242 N.E.2d 396, 1968 N.Y. LEXIS 1070 (N.Y. 1968).

Whether or not there has been the closing of a case for the purposes of Workmen's Compensation Law § 25-a is a determination of fact, and thus if the board's decision is supported by substantial evidence it cannot be disturbed. Lopez v New York Auction Service, 43 A.D.2d 606, 348 N.Y.S.2d 594, 1973 N.Y. App. Div. LEXIS 3249 (N.Y. App. Div. 3d Dep't 1973).

The standard for true closure under Workmen's Compensation L § 15, subd 8(f) should be no stricter than that under § 25-a and § 123; the critical test in each instance being whether the case has, in fact, closed, a factual matter clearly within the province of the board to determine. Hirschhorn v L & N Fruit & Produce, Inc., 43 A.D.2d 1007, 352 N.Y.S.2d 685, 1974 N.Y. App. Div. LEXIS 5616 (N.Y. App. Div. 3d Dep't 1974).

Mere fact that workmen's compensation payments were to continue indefinitely in a closed case, with possibility of a future modification upon a change in claimant's condition or earnings, could not be taken to mean that such case was not truly closed, following passage of requisite statutory period, for shift of liability to Special Fund for Reopened Cases. McGarry v Capatano & Grow Constr. Co., 58 A.D.2d 372, 396 N.Y.S.2d 901, 1977 N.Y. App. Div. LEXIS 12417 (N.Y. App. Div. 3d Dep't 1977), aff'd, 44 N.Y.2d 946, 408 N.Y.S.2d 320, 380 N.E.2d 152, 1978 N.Y. LEXIS 2133 (N.Y. 1978).

Where an employee was injured in the course of his employment, filed a claim, and had his case closed pending the outcome of a third-party action, the case was not closed within the meaning of Work Comp Law § 25-a and therefore liability could not be shifted to the Special Fund for Reopened Cases when the case was reopened several years later on a claim for deficiency compensation. Anzovino v Westchester County Publishers, Inc., 81 A.D.2d 720, 439 N.Y.S.2d 461, 1981 N.Y. App. Div. LEXIS 11274 (N.Y. App. Div. 3d Dep't 1981).

Because there were unresolved issues as to whether a workers' compensation claimant's 1991 case had been closed, the Workers' Compensation Board properly found that N.Y. Workers' Comp. Law § 25-a was inapplicable to the claimant's award of workers' compensation benefits. Matter of Hartwell v Amphenol Interconnect Prods., 51 A.D.3d 1245, 858 N.Y.S.2d 442, 2008 N.Y. App. Div. LEXIS 4235 (N.Y. App. Div. 3d Dep't 2008).

24. — —Case not "closed"

Case closed without prejudice, where carrier was required to furnish claimant competent surgeon, and requiring claimant to go back to same surgeon for reasonable period of time for observation is not closed within meaning of this section. Tiskavage v Tifft Const. Co., 243 A.D. 828, 278 N.Y.S. 446, 1935 N.Y. App. Div. LEXIS 8469 (N.Y. App. Div. 1935).

Although the case of a waitress who slipped and fell on a staircase in February of 1956 had been marked "Closed" for claimant's non-appearance for ordered medical examination and was not "Reopened" until 1965, which was more than seven years after the injury and three years after the last payment of compensation, the board could properly reach the conclusion that the employer and its carrier were liable for an award, rather than the special fund for reopened cases. Stoever v Sheraton Astor W. L. Hotel Operating Co., 29 A.D.2d 597, 285 N.Y.S.2d 419, 1967 N.Y. App. Div. LEXIS 2734 (N.Y. App. Div. 3d Dep't 1967).

"Closing" of case on August 6, 1979 was not final and special fund would be discharged and relieved of liability, where on such date there was outstanding claim for disability based on proper medical evidence, examination of claimant by carrier's consultant had yet to be conducted, and claimant was outside jurisdiction of hearing. Walker v Carrier Air Conditioning Div. of Carrier Corp., 110 A.D.2d 957, 487 N.Y.S.2d 883, 1985 N.Y. App. Div. LEXIS 48852 (N.Y. App. Div. 3d Dep't 1985).

Workers' compensation case closing made until claimant requested hearing and advised Board of her doctor's availability to testify was not true closing so as to shift liability for change-in-condition payments under CLS Work Comp § 25-a(2). Kirschner v Rowe, Walsh Associates, 144 A.D.2d 191, 534 N.Y.S.2d 509, 1988 N.Y. App. Div. LEXIS 10362 (N.Y. App. Div. 3d Dep't 1988).

25. — —Particular claims

Where claimant was originally injured in 1949 in course of employment by the same employer, suffering a back sprain from which he was unable to return to work for four months, and reinjured his back again in 1957 the Board was correct in holding compensation benefits for the 1957 injury should be charged to the Special Fund, it being conceded that more than seven years had elapsed since the original accident, notwithstanding certain payments were voluntarily made by the employer to claimant by reason of his disability within three years of the 1957 compensation application, there being testimony that such payments were made in accordance with the employer's policy to compensate employees for a certain amount of "sick leave with pay" depend-

ing on service, etc., irrespective of cause of absence. Stewart v First Nat'l City Bank, 15 A.D.2d 622, 222 N.Y.S.2d 374, 1961 N.Y. App. Div. LEXIS 6847 (N.Y. App. Div. 3d Dep't 1961).

The Board could properly decline to shift liability for further compensation to the Special Fund where a nasal condition constituting an occupational disease and which first developed in 1943 had continued for a period of nearly 20 years without compensable time lost during which the carrier had furnished medical treatment at intervals and only recently been closed but continued along from time to time on periodic authorizations of symptomatic treatment. Schwartz v Your Baking Co., 20 A.D.2d 422, 246 N.Y.S.2d 970, 1964 N.Y. App. Div. LEXIS 4360 (N.Y. App. Div. 3d Dep't 1964).

The Special Fund was liable under evidence that the claimant's decedent suffered three compensable heart attacks in 1948, 1951 and 1954; that by a 1961 board decision, disability benefits were allowed on the first two accidents and no loss was attributed to the 1954 attack; and all cases were closed with a direction to the carriers to continue the specified payments "until there is a change in condition or earnings;" that similar findings were made when the claim as to the 1954 attack reopened and reclosed in 1964 and 1967; and that upon the decedent's death in 1968, death was attributed equally to all three compensable heart attacks, and the respective carriers were each held compensable for one-third of the death benefits due thereon. Dennett v Dennett Refrigeration Equipment, 38 A.D.2d 659, 327 N.Y.S.2d 439, 1971 N.Y. App. Div. LEXIS 2614 (N.Y. App. Div. 3d Dep't 1971).

Substantial evidence supported findings that a claimant's case, at the time benefits were suspended at the time of the claimant's incarceration, was closed; even in such a case, it was always understood that there was a chance that a case might have to be reopened, and so, since the case had truly been closed, the Special Fund for Reopened Cases would have to take responsibility for the resumed payments. Matter of Mackey v Murray Roofing, 24 A.D.3d 1149, 807 N.Y.S.2d 434, 2005 N.Y. App. Div. LEXIS 14806 (N.Y. App. Div. 3d Dep't 2005).

Where the employee was injured in 1993, where the case was closed in 1994, and where the case was reopened in 2002 for shifting liability to the Special Fund for Reopened Cases, the case was then closed pursuant to N.Y. Workers' Comp. Law § 25-a; as there was no evidence that further proceedings aside from issues related to § 25-a were contemplated in 2002, substantial evidence supported the determination that the case was truly closed in 2002 and that § 25-a was applicable to a subsequent further application for compensation. Matter of Hantz v Brightman Agency, 29 A.D.3d 1098, 816 N.Y.S.2d 199, 2006 N.Y. App. Div. LEXIS 6155 (N.Y. App. Div. 3d Dep't 2006).

Decision of the New York Workers' Compensation Board, which directed that awards of compensation be paid by the Special Fund for Reopened Cases pursuant to N.Y. Workers' Comp. Law § 25-a, was reversed because the Board's determination that a June 25, 2003, decision, which indicated that no further action was planned, constituted a true closing was not supported on the record by substantial evidence because (1) the record demonstrated that on July 25, 2000, the issue of payment for a claimant's lost wages subsequent to June 8, 2000, was held in abeyance, (2) the issue was raised at least once more and, by a July 18, 2001, decision, was held again pending further medical evidence, and (3) neither the hearing preceding the Board's July 25, 2003, decision nor the decision itself addressed this issue. Matter of Granberry v JCCA Edenwald, Inc., 33 A.D.3d 1102, 823 N.Y.S.2d 550, 2006 N.Y. App. Div. LEXIS 12503 (N.Y. App. Div. 3d Dep't 2006).

Workers' compensation board erred in ruling that a worker's case was truly closed in 1992 and that liability shifted to the special fund under N.Y. Workers' Comp. Law § 25-a because the critical "true closing" date was 2000, when a workers' compensation law judge closed both cases without prejudice to the carrier seeking apportionment of the awards in the 1996 case against the worker's 1991 injury. Matter of Nickel v Kings Park Psychiatric Ctr., 52 A.D.3d 1130, 860 N.Y.S.2d 678, 2008 N.Y. App. Div. LEXIS 5841 (N.Y. App. Div. 3d Dep't 2008).

Ruling that liability for a workers' compensation claim had shifted to the special fund for reopened cases pursuant to N.Y. Workers' Comp. Law § 25-a was proper because, during the eight-year period between when the board was first notified of the incident in 1998 and the employee filed his claim for compensation in 2006, no action was taken and no payments for compensation were made on the claim; as such, the case was then deemed closed. The board's determination that liability had shifted to the fund was supported by substantial evidence. Matter of Rodriguez v Greenfield Die Casting, 53 A.D.3d 728, 860 N.Y.S.2d 334, 2008 N.Y. App. Div. LEXIS 5936 (N.Y. App. Div. 3d Dep't 2008).

26. —Reopened claims

The provisions of § 123 limit the board's right to open cases and relieve the special fund for reopened cases of responsibility in 7 year old cases contested and decided adversely to the claimant or closed without award and without determination on the merits. Kaplan v Wirth & Birnbaum, 301 N.Y. 121, 92 N.E.2d 919, 301 N.Y. (N.Y.S.) 121, 1950 N.Y. LEXIS 822 (N.Y. 1950).

Liability for payment of compensation award under CLS Work Comp § 25-a shifts from insurance carrier to Special Fund for Reopened Cases simply by virtue of passage of requisite period of time; once statute has been triggered, insurance carrier has no further interest in payment of claim, and special fund steps into shoes of carrier and succeeds to its rights and responsibilities. De Mayo v Rensselaer Polytech Institute, 74 N.Y.2d 459, 548 N.Y.S.2d 630, 547 N.E.2d 1157, 1989 N.Y. LEXIS 3217 (N.Y. 1989).

A payment of compensation which avoids the liability of the fund need not be a payment under the direction of a formal award and payment of full wages for absences caused by the disabling effects of an injury made within three years of the application to reopen constituted a payment of compensation sufficient to avoid fund liability. Lopa v Brillo Mfg. Co., 271 A.D. 846, 65 N.Y.S.2d 673, 1946 N.Y. App. Div. LEXIS 3384 (N.Y. App. Div. 1946).

Upon reopening a case originally closed following settlement of liability on a lump sum basis, pursuant to subd. 5-b of § 15, it was error to discharge the Special Fund under this section where it was agreed at the hearing that the allowance of $10 reduced earnings was made without accurate check of actual earnings, as it is the status of the disability, not the amount of the award, which controls as to liability of the Special Fund. Goldbard v Dixie Lake Hotel & Country Club, 11 A.D.2d 858, 203 N.Y.S.2d 317, 1960 N.Y. App. Div. LEXIS 8538 (N.Y. App. Div. 3d Dep't 1960).

Where claimant suffered a back injury in course of employment in 1950 for which he received compensation until 1954, when the case was closed, and again in 1957 suffered further back trouble while employed by a different employer, and a doctor's report was filed in connection with the 1957 claim indicating that it was probably related to the 1950 accident, whereupon the second employer requested reopening of the 1950 claim on the basis of such report, the Board was justified in reopening the 1950 claim, treating the doctor's report as made within seven years and as an application for reopening, discharging the Special Fund, and charging the claim back against the initial insurance carrier. Wilson v Pittsburgh Plate Glass Co., 15 A.D.2d 847, 224 N.Y.S.2d 362, 1962 N.Y. App. Div. LEXIS 11421 (N.Y. App. Div. 3d Dep't 1962).

A claimant, who had sustained a compensable injury, retired, and then sustained a consequential injury that was the responsibility of the Special Fund for Reopened Cases pursuant to Work Comp Law § 25-a, did not suffer a new accident entitling her to compensation at the rate applicable at the time of the second accident, but at the rate established at the time of original injury in that claimant's injuries cannot be attributable to conditions of employment existing at a time claimant in retired. Coakley v General Motors Corp. Harrison Radiator Div., 108 A.D.2d 983, 484 N.Y.S.2d 969, 1985 N.Y. App. Div. LEXIS 43311 (N.Y. App. Div. 3d Dep't 1985).

In view of specific statutory prescription of awards of deficiency compensation against special fund for reopened cases, CLS Workers' Compensation § 25-a(8), difference between amount actually received by claimant in third party action and benefits he is entitled to under Workers' Compensation Law continued to remain responsibility of carrier. Manning v Niagara Mohawk Power Corp., 119 A.D.2d 947, 501 N.Y.S.2d 218, 1986 N.Y. App. Div.

LEXIS 55877 (N.Y. App. Div. 3d Dep't), app. denied, 68 N.Y.2d 609, 508 N.Y.S.2d 1026, 501 N.E.2d 36, 1986 N.Y. LEXIS 20508 (N.Y. 1986).

Medical report constituted application to reopen claim since report was based on doctor's examination of claimant which revealed "significant degenerative changes in the upper lumbar area," doctor thereafter prescribed conservative course of treatment, but he noted that MRI should be conducted if symptoms persisted and ordered claimant to undergo physical therapy and trial of TENS unit, and while doctor testified at hearing that claimant subsequently showed some improvement, he stated that symptoms thereafter worsened; instant report did not merely reflect claimant's continued disability and treatment, but rather indicated change in claimant's condition. Sartwell v Hercules Inc., 262 A.D.2d 766, 692 N.Y.S.2d 483, 1999 N.Y. App. Div. LEXIS 6499 (N.Y. App. Div. 3d Dep't 1999).

Because the requisite seven-year and three-year time periods had elapsed upon reopening of a claimant's workers' compensation claim, and because the claimant made no application for deficiency compensation, the prohibition on transfer of liability to the Special Fund for Reopened Cases contained in N.Y. Workers' Comp. Law § 25-a(8) did not apply. Matter of Belleville v Madame Pirie's, Inc., 28 A.D.3d 977, 814 N.Y.S.2d 305, 2006 N.Y. App. Div. LEXIS 4564 (N.Y. App. Div. 3d Dep't), app. denied, 7 N.Y.3d 717, 827 N.Y.S.2d 687, 860 N.E.2d 989, 2006 N.Y. LEXIS 3723 (N.Y. 2006).

Because the Special Fund for Reopened Cases made awards to an employee for compensable lost time beyond three years from the date of an accident, pursuant to N.Y. Workers' Comp. Law § 25-a(8), it was not a "basic economic loss" that precluded the Fund from exercising a credit; any additional award owed to the employee represented deficiency compensation, the amount of which was not calculable. Matter of Kusy v South Orangetown Cent. School Dist., 34 A.D.3d 973, 825 N.Y.S.2d 786, 2006 N.Y. App. Div. LEXIS 13207 (N.Y. App. Div. 3d Dep't 2006).

At the time that N.Y. Workers' Comp. Law § 25-a was triggered and liability was transferred to the Special Fund for Reopened Cases, the claimant had not had any compensable lost time after 1996, and the carrier maintained a credit against prior payments made under the schedule loss of use award; thus, the Fund was entitled to a credit for the schedule loss of use award. Matter of Castro v New York City Tr. Auth., 50 A.D.3d 1272, 855 N.Y.S.2d 711, 2008 N.Y. App. Div. LEXIS 3148 (N.Y. App. Div. 3d Dep't 2008).

Board's finding that N.Y. Workers' Comp. Law § 25-a(8) was inapplicable to a petition to shift liability to the special fund for reopened cases was supported by substantial evidence because the relevant time periods were satisfied solely as a result of the passage of time without payment in a closed case, and the credit based on the claimant's third-party settlement was exhausted; there was no dispute that the case was closed in 2002, that the last payment of compensation to which the claimant was entitled was made in January 2002, and that the credit was exhausted i.e., the claimant's entitlement to benefits exceeded the third-party recovery prior to January 2002 such that the third-party settlement played no part in the subsequent expiration of the time periods set forth in N.Y. Workers' Comp. Law § 25-a(8). Matter of Barberie v Helmsley Spear Co., 51 A.D.3d 1289, 858 N.Y.S.2d 469, 2008 N.Y. App. Div. LEXIS 4379 (N.Y. App. Div. 3d Dep't 2008).

27. — —Compensation

Where the employee earlier received only medical benefits under N.Y. Workers' Comp. Law § 13(a) for a work-related injury, the employee had not received compensation pursuant to N.Y. Workers' Comp. Law § 25-a(1) for purposes of determining Special Fund for Reopened Cases liability. Matter of Hantz v Brightman Agency, 29 A.D.3d 1098, 816 N.Y.S.2d 199, 2006 N.Y. App. Div. LEXIS 6155 (N.Y. App. Div. 3d Dep't 2006).

28. — —Determination whether case is closed

Since report of operation filed with Board by claimant's physician within 3 years of last payment of compensation might be treated as application to reopen case, Special Fund properly discharged. Davis v Monroe Sander Corp., 6 A.D.2d 933, 175 N.Y.S.2d 790, 1958 N.Y. App. Div. LEXIS 5253 (N.Y. App. Div. 3d Dep't 1958).

Decisions of Workers' Compensation Board that case had not been informally closed, and thus that Special Fund for Reopened Cases was not liable for claimant's continued medical treatment, required reversal where initial "stale" claim was made more than 7 years after date of accident and more than 3 years after last advance payment of compensation. Loiacono v Sears Roebuck & Co., 230 A.D.2d 351, 654 N.Y.S.2d 463, 1997 N.Y. App. Div. LEXIS 2227 (N.Y. App. Div. 3d Dep't 1997).

Review board properly determined that an insurance carrier, and not a state reopended cases fund, was responsible for further payments on a claimant's benefits; the claim was never officially closed, so pursuant to N.Y. Workers' Comp. Law § 25-a the responsibility remained with the carrier, and not with the fund. Stevens v MMR Corp., 13 A.D.3d 1002, 787 N.Y.S.2d 461, 2004 N.Y. App. Div. LEXIS 16187 (N.Y. App. Div. 3d Dep't 2004).

Trial court erred in determining that N.Y. Workers' Comp. Law § 25-a did not apply to the instant action concerning claimant's workers' compensation benefits, because the determination that claimant's case was not truly closed was not supported by substantial evidence, as a N.Y. Workers' Comp. Law § 32 agreement between the claimant and an insurance carrier did not contemplate further proceedings. Matter of Bates v Finger Lakes Truck Rental, 41 A.D.3d 957, 839 N.Y.S.2d 234, 2007 N.Y. App. Div. LEXIS 6891 (N.Y. App. Div. 3d Dep't 2007).

Workers' Compensation Board properly affirmed a workers' compensation law judge's finding that liability was premature because an injured employee's case was not truly closed for the purpose of shifting liability to the Special Fund for Reopened Cases where awards for the period in question had been held in abeyance and resolution of that issue was not affected for seven years-after the injured employee had again started to lose compensable time. Matter of Anticola v Tops Mkts., 117 A.D.3d 1373, 986 N.Y.S.2d 883, 2014 N.Y. App. Div. LEXIS 3878 (N.Y. App. Div. 3d Dep't 2014).

Workers' Compensation Board properly ruled that liability shifted to the Special Fund for Reopened Cases because the multiple C-8.1 forms filed by the carrier did not bar a finding that the case was truly closed inasmuch as they concerned objections to the payment of medical care and were unrelated to the payment of compensation benefits, and, despite the claimant's ongoing medical treatments and the carrier's continuing objections thereto, the record reflected that no further issues related to the payment of compensation were outstanding at the time the matter was closed. Matter of Guillen v Tulley Constr., 169 A.D.3d 1141, 92 N.Y.S.3d 489, 2019 N.Y. App. Div. LEXIS 947 (N.Y. App. Div. 3d Dep't 2019).

29. — —Penalty for late payment

Special Fund for Reopened Cases has responsibility to pay claimants promptly and should be fully subject to 20 percent penalty contained in CLS Work Comp § 25 whenever it fails to make payment within 10 days. De Mayo v Rensselaer Polytech Institute, 74 N.Y.2d 459, 548 N.Y.S.2d 630, 547 N.E.2d 1157, 1989 N.Y. LEXIS 3217 (N.Y. 1989).

30. — —Special Fund held liable

Where a 1945 compensation claimant had a recurrent bilateral hernia, regarded as "occupational," but his case was closed on a finding of no disablement subject to being reopened in case claimant wanted an operation and he suffered no diminution of wages until 15 years later when he underwent his first operation, whereupon the case was reopened, and an award made against the Special Fund for reopened cases and not against the claimant's employer. Hooper v Bethlehem Steel Co., 12 N.Y.2d 767, 234 N.Y.S.2d 717, 186 N.E.2d 565, 1962 N.Y. LEXIS 896 (N.Y. 1962).

Where the original compensation award was made to June 16, 1950, for permanent partial disability, and the case closed, following which the insurance carrier continued to make payments as provided thereby until it discovered, in 1955, that claimant was working full time without reduction of earnings, applied for leave to suspend payments, and a new award was made for the period 1950–1952, and still later, in 1957, the case was reopened because of a change of condition, the date of the last

actual payment of compensation under the prior award was for the 1950–1952 period and the insurance carrier was entitled to be relieved of liability and liability shifted to the Special Fund. Ramberg v Dorn, 12 A.D.2d 562, 206 N.Y.S.2d 1008, 1960 N.Y. App. Div. LEXIS 7265 (N.Y. App. Div. 3d Dep't 1960), app. denied, 9 N.Y.2d 609, 1961 N.Y. LEXIS 1641 (N.Y. 1961).

Where claimant, a laboratory technician, developed tuberculosis as an occupational disease and the Board found October 10, 1949, as the date of disablement, and thereafter awards of compensation were paid her until September 29, 1954, following which, on March 29, 1955 the case was closed with a "no further disability" finding, but again reopened in 1959 on application of both the insurance carrier and the claimant, it was error for the Board to discharge the Special Fund for reopened cases where no change had been shown in claimant's physical condition. Gauzza v Columbia Presbyterian Hospital, 15 A.D.2d 710, 223 N.Y.S.2d 242, 1962 N.Y. App. Div. LEXIS 12035 (N.Y. App. Div. 3d Dep't 1962).

Workers' compensation board erred in discharging a special fund for reopened cases from liability, as the record as a whole did not establish that the wages paid to a worker by her employer were voluntarily made in recognition of continuing liability for her work-related injury as required by N.Y. Workers' Comp. Law § 25-a. Matter of Faison v City of N.Y. Dept. of Human Resources, 24 A.D.3d 829, 805 N.Y.S.2d 167, 2005 N.Y. App. Div. LEXIS 13564 (N.Y. App. Div. 3d Dep't 2005), app. dismissed, 7 N.Y.3d 783, 820 N.Y.S.2d 544, 853 N.E.2d 1112, 2006 N.Y. LEXIS 3207 (N.Y. 2006).

Special Fund for Reopened Cases was liable for the workers' compensation award under N.Y. Workers' Comp. Law § 25-a(1), as the case reopened more than seven years after the date of injury; forms submitted by the employee's chiropractor years before the reopening date did not constitute applications to reopen, as the forms did not indicate how the employee's condition had changed. Matter of Hantz v Brightman Agency, 29 A.D.3d 1098, 816 N.Y.S.2d 199, 2006 N.Y. App. Div. LEXIS 6155 (N.Y. App. Div. 3d Dep't 2006).

N.Y. Workers' Comp. Law § 25-a was inapplicable, and the New York Special Fund for Reopened Cases was liable for further compensation to a workers' compensation claimant as medical reports from 2002 and 2003 constituted a reopening of the 1997 case as they referenced such changes in the claimant's diagnoses as a new rotator cuff tear and chronic pain syndrome, and noted that the claimant's condition had become permanent, that further surgery was no longer a viable option, and that the claimant had to stop working. Matter of Phillips v Plainville Turkey Farms, Inc., 45 A.D.3d 1061, 846 N.Y.S.2d 427, 2007 N.Y. App. Div. LEXIS 11691 (N.Y. App. Div. 3d Dep't 2007).

N.Y. Workers' Comp. Law § 25-a was applicable to a workers' compensation claimant's degenerative condition in the claimant's right knee that was attributable to the claimant's left knee problems since seven years had elapsed from a workers' compensation claimant's left knee injuries, and three years had elapsed from the date of the payments under a settlement agreement pursuant to N.Y. Workers' Comp. Law § 32 with an employer, which shifted liability from the employer to the New York Special Fund for Reopened Cases; the Special Fund's liability was triggered upon the passage of time provided for in the statute. Under N.Y. Workers' Comp. Law § 13, notwithstanding the settlement agreement's express terms, the employer was only statutorily obligated to remain liable for medical expenses absent N.Y. Workers' Comp. Law § 25-a liability. Matter of Martin v New York Tel., 46 A.D.3d 1136, 848 N.Y.S.2d 730, 2007 N.Y. App. Div. LEXIS 13201 (N.Y. App. Div. 3d Dep't 2007).

Because an employee's third-party settlement played no part in the expiration of the time periods necessary to shift liability to the Special Fund for Reopened Cases, substantial evidence supported the Workers' Compensation Board's finding that N.Y. Workers' Comp. Law § 25-a(8) was inapplicable and its ruling that liability for an employee's injuries shifted to the Special Fund. Matter of Sidorovski v New Venture Gear, 49 A.D.3d 1096, 853 N.Y.S.2d 731, 2008 N.Y. App. Div. LEXIS 2692 (N.Y. App. Div. 3d Dep't 2008).

Determination by the Workers' Compensation Board that liability for payment an injured employee's claim, based upon a non-permanent injury, shifted to the Special Fund for Reopened Cases pursuant to N.Y. Workers' Comp. Law § 25-a was supported by substantial evidence that no further action was contemplated and that no issues remained unresolved; the pendency of a third-party action did not change the determination that there was closure to the claim. Matter of Giglio v C.I.R. Elec., 55 A.D.3d 1183, 866 N.Y.S.2d 412, 2008 N.Y. App. Div. LEXIS 8078 (N.Y. App. Div. 3d Dep't 2008).

Workers' Compensation Board properly shifted liability for a claimant's injury from a self-insured employer to the Special Fund for Reopened Cases since the case had been closed in 2004 following resolution of a reimbursement issue and was reopened by the employer in 2005 when it sought to be discharged from liability for the claimant's 1992 knee injury and the employer's application to reopen was made more than seven years from the date of the injury and three years from the last payment of compensation. Early v New York Tel. Co., 57 A.D.3d 1341, 870 N.Y.S.2d 573, 2008 N.Y. App. Div. LEXIS 9972 (N.Y. App. Div. 3d Dep't 2008).

Special Fund for Reopened Cases was properly found liable for a claimant's compensation because (1) a carrier made no advance payment of compensation, as nothing showed the carrier's payments were made to compensate the claimant for injuries sustained in a prior injury, as the injuries sustained in two accidents were distinctly different, and (2) a claim was reopened approximately 13 years after an injury and 12 years after that case was closed. Matter of Wetterau v Canada Dry, 124 A.D.3d 1165, 3 N.Y.S.3d 432, 2015 N.Y. App. Div. LEXIS 681 (N.Y. App. Div. 3d Dep't 2015).

Workers' Compensation Board erred in ruling, among other things, that liability did not shift to the Special Fund for Reopened Cases because liability was transferred to the Special Fund well before the January 1, 2014 closure date, and the record did not support a finding of a violation of the statute prohibiting the Board from accepting, after the cut-off date, any application by an employer or carrier for transfer of liability of a claim to the Special Fund. Matter of Verneau v Consolidated Edison Co. of N.Y., Inc., 174 A.D.3d 1022, 104 N.Y.S.3d 401, 2019 N.Y. App. Div. LEXIS 5333 (N.Y. App. Div. 3d Dep't 2019).

31. — —Special Fund discharged from liability

Claimant sustained a back injury in 1940 for which compensation was paid. In February, 1954, claimant again injured his back. The carrier paid compensation without protest after 1954 accident with knowledge that 1940 accident played a part in the resulting disability, and it was not until October, 1955 that question of liability of Special Fund for Reopened Cases was mentioned. From medical testimony Board could only determine that 1940 accident contributed to the 1954 disability. Such being the case, there would be no question but that compensation was paid by carrier as to the 1940 accident. So, the special fund was properly discharged. Gillette v Staub & Son, 8 A.D.2d 896, 186 N.Y.S.2d 909, 1959 N.Y. App. Div. LEXIS 8313 (N.Y. App. Div. 3d Dep't 1959).

Where case was reopened upon an application on behalf of an employee, in the form of a medical report, within 7 years after the injury, the Special Fund was not liable for the award. Melendez v Johnson, 30 A.D.2d 1030, 294 N.Y.S.2d 243, 1968 N.Y. App. Div. LEXIS 3061 (N.Y. App. Div. 3d Dep't 1968).

Where workman suffered 25 percent loss in earning capacity in 1947 back injury, and had an additional 25 percent loss in subsequent 1961 and 1962 back injuries, Workmen's Compensation Board properly discharged carrier and Special Fund from liability for that proportion of permanent award as was attributable to 1947 accident where workman's application to reopen 1947 award, although dated June 1, 1964, was not submitted to board until 1967. Lukacina v Smith, 43 A.D.2d 768, 350 N.Y.S.2d 466, 1973 N.Y. App. Div. LEXIS 2863 (N.Y. App. Div. 3d Dep't 1973).

Where claimant filed application to reopen claim about five years after original injury, Special Fund for Reopened Cases was discharged from liability for claim. Italiano v Mobil Oil Corp., 50

A.D.2d 638, 374 N.Y.S.2d 162, 1975 N.Y. App. Div. LEXIS 12454 (N.Y. App. Div. 3d Dep't 1975).

Board properly discharged the Special Fund for Reopened Cases from liability after a timely application was made to reopen prior compensation case where Board reopened case for "consideration of further disability," closed the case after claimant's second failure to appear, and then administratively placed back on the Board's calendar, in that nothing in the record indicated that the Board's closing after claimant's non-appearance was a final closing. Sweet v Slattery Associates, Inc., 84 A.D.2d 641, 444 N.Y.S.2d 289, 1981 N.Y. App. Div. LEXIS 15762 (N.Y. App. Div. 3d Dep't 1981).

The Workers' Compensation Board properly found that liability for benefits rested with the employer's carrier and discharged the Special Fund for Reopened Cases, where claimant's letter, filed well within the seven and three year statutory periods necessary to reopen a case, clearly sought further compensation based upon the original compensable injury and where the board's decision to reopen the case was predicated not merely upon claimant's doctor's report filed after the seven-year period had expired but also upon claimant's timely letter; there is no requirement that an employee's application for compensation be in any particular form as long as it sets forth facts sufficient to establish its purpose and a letter is sufficient. Ash v Native Laces & Textiles Co., 85 A.D.2d 822, 445 N.Y.S.2d 646, 1981 N.Y. App. Div. LEXIS 16642 (N.Y. App. Div. 3d Dep't 1981).

CLS Work Comp § 25-a did not apply to shift liability to Special Fund where (1) case was reopened within 7 years of claimant's 1991 accident to consider his request for continuing medical treatment, after he lost his job due to plant closing and while he was enrolled in retraining program that prohibited him from working, and (2) board's factual determination that case was not closed and subsequently reopened was supported by language of its 1997 decision which, rather than stating that case was closed, stated that "all present issues are resolved" and "no further action is planned or expected...at this time." Pegoraro v Tessy Plastics Corp., 287 A.D.2d 909, 732 N.Y.S.2d 260, 2001 N.Y. App. Div. LEXIS 9974 (N.Y. App. Div. 3d Dep't 2001), app. denied, 98 N.Y.2d 669, 746 N.Y.S.2d 455, 774 N.E.2d 219, 2002 N.Y. LEXIS 1632 (N.Y. 2002).

Liability in a workers' compensation case did not shift to the Special Fund for Reopened Cases under N.Y. Workers' Comp. Law § 25-a because at the time of a Workers' Compensation Law Judge's decision awarding benefits, a third-party action was still pending and, thus, no true closing of the case had occurred. Matter of Giemza v Town of Cambridge, 45 A.D.3d 1008, 845 N.Y.S.2d 846, 2007 N.Y. App. Div. LEXIS 11144 (N.Y. App. Div. 3d Dep't 2007).

Since no claim was being made for awards or medical treatment for a claimant's hand, the claimant's case was improperly reopened; accordingly, the Workers' Compensation Board erred in finding that liability shifted to the Special Fund for Reopened Cases under N.Y. Workers' Comp. Law § 25-a. Matter of Rogers v Del Labs, 52 A.D.3d 1129, 861 N.Y.S.2d 163, 2008 N.Y. App. Div. LEXIS 5824 (N.Y. App. Div. 3d Dep't 2008).

32. — —Not proper charge against Special Fund

The expenses of a non-emergency herniorrhaphy undergone without the prior authorization of the Board and at a time more than 7 years after the accident and the last payment of compensation but within two years of the reopening of the claim was not a proper charge against special fund. Marrameo v Manhattan Coat Co., 2 A.D.2d 102, 153 N.Y.S.2d 848, 1956 N.Y. App. Div. LEXIS 4696 (N.Y. App. Div. 3d Dep't 1956).

33. —Other particular claims

The fund for reopened cases is liable for the expense of providing an injured employee with orthopedic shoes where the employee was injured more than 20 years before the application and no compensation has been paid within 3 years. Casey v Hinkle Iron Works, 299 N.Y. 382, 87 N.E.2d 419, 299 N.Y. (N.Y.S.) 382, 1949 N.Y. LEXIS 947 (N.Y. 1949).

Special fund is liable, under this section, for expense of further treatments to be administered to claimant, where record shows that following his injury lump sum award was made to him and case closed; that thereafter claimant neither lost time from his work nor suffered any diminution of wages, except during period of idleness which resulted from operation; that award for expense of said operation was terminated by payment in full; that after that award, no order, decision or other determination was made by state industrial board for any other award or for reopening case, nor was any notice given to employer or state insurance fund, as carrier, to that effect; and that no payments of compensation have been made for approximately fourteen years. Speranza v Loft, Inc., 253 A.D. 177, 1 N.Y.S.2d 746, 1938 N.Y. App. Div. LEXIS 8387 (N.Y. App. Div. 1938).

Where it appeared that claimant was employed as a laborer in a municipal maintenance department, sustained a right inguinal hernia in a ditch-digging accident in 1940, for which compensation was awarded and the case closed, which condition reoccurred following a snowshoveling accident in 1949, then sustained a third accident while working on a highway in 1951, having already had a left side hernia even prior to the first accident, there being substantial evidence to support the board's finding of disability attributable to the 1949 accident as well as that of 1951, a decision charging one-half the latest award to the Special Fund would not be reversed. Coryer v Plattsburgh, 14 A.D.2d 656, 218 N.Y.S.2d 787, 1961 N.Y. App. Div. LEXIS 9347 (N.Y. App. Div. 3d Dep't 1961).

The Special Fund was liable where the death occurred more than 7 years after the initial injury and much more than 3 years after the last payment of compensation. Riccardi v Dellwood Dairy Co., 38 A.D.2d 666, 327 N.Y.S.2d 442, 1971 N.Y. App. Div. LEXIS 2620 (N.Y. App. Div. 3d Dep't 1971).

In a workers' compensation proceeding, an initial claim arising from a 1969 injury that was filed 11 years later had not previously been "disallowed or otherwise disposed of," and thus there was no predicate to shift liability to the Special Fund under Work Comp Law § 25-a(1)(1), where neither a formal nor informal award was made prior to the filing of the claim, and where, the employer and its carrier having waived objection to the propriety of the award, the claim was properly treated as having been filed in compliance with Work Comp Law § 49-bb, and thus was not "stale". Scheulen v New York Times Co., 105 A.D.2d 502, 481 N.Y.S.2d 455, 1984 N.Y. App. Div. LEXIS 20538 (N.Y. App. Div. 3d Dep't 1984).

In a workers' compensation action arising from asbestos exposure, a workers' compensation board properly determined that N.Y. Workers' Comp. Law § 25-a did not apply, because the instant claim for death benefits was made within seven years of the decedent's death, and thus liability did not shift to the Special Funds Conservation Committee. Matter of Andres v Occidental Chem., 43 A.D.3d 1245, 841 N.Y.S.2d 729, 2007 N.Y. App. Div. LEXIS 9728 (N.Y. App. Div. 3d Dep't 2007).

When liability for a claim has already been transferred from the carrier to the Special Fund for Reopened Cases and the employee thereafter dies for reasons causally related to the original claim, the Special Fund remains liable for the claim for death benefits. Matter of Misquitta v Getty Petroleum, 150 A.D.3d 1363, 54 N.Y.S.3d 206, 2017 N.Y. App. Div. LEXIS 3516 (N.Y. App. Div. 3d Dep't 2017).

Decision that liability had shifted to the Special Fund for Reopened Cases was affirmed because the claimant did not have to obtain another transfer of liability to the Special Fund upon the decedent's death as liability had already been transferred in 2000 and as such, N.Y. Workers' Comp. Law § 25-a(1-a), which closed the Special Fund to newly reopened cases after a certain date, did not apply. Matter of Misquitta v Getty Petroleum, 150 A.D.3d 1363, 54 N.Y.S.3d 206, 2017 N.Y. App. Div. LEXIS 3516 (N.Y. App. Div. 3d Dep't 2017).

34. Application to reopen claim

Where claimant made written application to board for further compensation for loss of use of foot, it was error for board to make award against employer and carrier and not against special fund under this section notwithstanding fact that decision on which award is based contains finding of fact that claim was reopened on board's own motion and not on application of employee. Sehm v Sibley, Lindsay & Curr Co., 242 A.D. 271, 275 N.Y.S. 582, 1934 N.Y. App. Div. LEXIS 6044 (N.Y. App. Div. 1934).

Contention that award should be made against special fund under this section because no application to reopen was made prior to April 24 cannot be upheld in face of proof that on January 19, claimant's attorney sent to department of labor for attention by one of its executive officers letter asking for review of case and for reopening of same. Patsaros v John Eichler Brewing Co., 245 A.D. 873, 282 N.Y.S. 183, 1935 N.Y. App. Div. LEXIS 11340 (N.Y. App. Div. 1935).

The provisions of this section have no application where a claimant applies to have his case reopened within seven years subsequent to the date of the accident. Ludgen v Jamestown Asphalt Paving Materials Corp., 257 A.D. 881, 11 N.Y.S.2d 886, 1939 N.Y. App. Div. LEXIS 8265 (N.Y. App. Div. 1939).

Application for reopening of case which was filed within seven years from the date of accident, precludes payment of an award out of special fund established pursuant to provisions of § 25-a. Marinaccio v New York, 259 A.D. 947, 19 N.Y.S.2d 958, 1940 N.Y. App. Div. LEXIS 7390 (N.Y. App. Div. 1940).

In determining whether an application to reopen a workmen's compensation case is brought prematurely where previous compensation has been authorized, "the date of last payment of compensation" within the meaning of this section is the actual date of the last payment of an instalment of compensation, not necessarily the last payment of the last instalment of the compensation awarded, so that a lapse of over three years since the most recent payment of an instalment, even though four instalments remain payable, will support an application under this section. Esterow v Schimel, Son & Lustig, 274 A.D. 325, 83 N.Y.S.2d 735, 1948 N.Y. App. Div. LEXIS 3074 (N.Y. App. Div. 1948).

A claimant's letter to the Board stating that he was writing to see if the Board would consider opening his case, as his condition was getting worse all the time and he was having a hard time finding work, was sufficient and timely under subd. 1 of this section where it was sent to the Board within nine years following closing of claimant's case, and would sustain the board's discharge of the Special Fund, although not accompanied by a medical report, a medical report not being received until one day after three years from projection of the lump sum payment made in settlement of the claim. Wood v Albany County Highway Dep't, 18 A.D.2d 743, 235 N.Y.S.2d 825, 1962 N.Y. App. Div. LEXIS 6182 (N.Y. App. Div. 3d Dep't 1962), aff'd, 13 N.Y.2d 742, 241 N.Y.S.2d 868, 191 N.E.2d 919, 1963 N.Y. LEXIS 1111 (N.Y. 1963).

35. —Medical report as application

A form medical report filed by claimant's physician indicating a change in claimant's condition could be treated as an application to reopen a closed claim even though the report had been made without claimant's knowledge and the physician did not know that the case had been closed. Norton v New York State Dep't, 1 N.Y.2d 844, 153 N.Y.S.2d 223, 135 N.E.2d 726, 1956 N.Y. LEXIS 836 (N.Y. 1956).

A physician's report setting forth all the facts necessary for an application to reopen may be treated as such application and where filed within 3 years of the last payment of compensation liability for an award rests on the employer and his insurance carrier rather than the special fund for reopened cases. Finkle v Cushing Stone Co., 278 A.D. 250, 104 N.Y.S.2d 692, 1951 N.Y. App. Div. LEXIS 3787 (N.Y. App. Div.), app. denied, 278 A.D. 985, 105 N.Y.S.2d 1006, 1951 N.Y. App. Div. LEXIS 5443 (N.Y. App. Div. 1951).

Where claimant sustained a heart injury in the nature of coronary occlusion and myocardial infarction in 1950, and the case was closed July 25, 1956, long after the last payment of compensation, with a finding of permanent partial disability, and thereafter, but prior to lapse of seven years from date of injury, the attending physician filed medical reports with the board stating that claimant had begun having attacks of angina pectoris and an extension of the original damage, such reports could be considered an application for reopening the case within the statutory period. Chase v Buffalo Aeronautical Corp., 12 A.D.2d 849, 209 N.Y.S.2d 609, 1961 N.Y. App. Div. LEXIS 13210 (N.Y. App. Div. 3d Dep't 1961).

A physician's report to the Workmen's Compensation Board, stating that there is a distinct relationship between different claims based on different accidents, is sufficient to put the Board on notice that the carrier's liability might be extended, and the Board is justified in treating it as an application to re-open, where made within seven years from date of injury, even though no formal request for re-opening the original case and apportionment of liabilities between insurance carriers appears therein. Costello v Industrial Container Corp., 20 A.D.2d 941, 248 N.Y.S.2d 911, 1964 N.Y. App. Div. LEXIS 3923 (N.Y. App. Div. 3d Dep't 1964).

Medical reports were sufficient to put Workmen's Compensation Board on notice that there had been a change in claimant's condition and that carrier's liability had not been concluded and Board was justified in treating such report as an application to reopen the claim and restore it to the referee's calendar. Sacco v Mele Mfg. Co., 27 A.D.2d 966, 279 N.Y.S.2d 327, 1967 N.Y. App. Div. LEXIS 4336 (N.Y. App. Div. 3d Dep't 1967).

Medical report of claimant's changed condition filed within seven years of prior accident, which was sufficient to put board on notice that carrier's liability might be extended thereby, may be treated as application to reopen a closed case, even though no formal request accompanied report. Alexander v County of Erie, 28 A.D.2d 1069, 284 N.Y.S.2d 145, 1967 N.Y. App. Div. LEXIS 3129 (N.Y. App. Div. 3d Dep't 1967).

The board properly found that the medical report was sufficient to put it on notice of a change in claimant's condition and treated it as an application to reopen the case within the statutory period, even though the medical report was the only report filed between the closing of the case and its reopening and that the claimant was not under treatment when the case closed but subsequently required treatment in the nature of diathermy, a back support and analgesics for chronic recurrent low back pain and a painful left leg. Koeppel v Novo Knitting Mills, 34 A.D.2d 1074, 312 N.Y.S.2d 576, 1970 N.Y. App. Div. LEXIS 4254 (N.Y. App. Div. 3d Dep't 1970).

Where, up until 1970, routine medical reports mentioned only the possibility of future avascular necrosis of the affected femoral head and where 1972 reports first referred to a good possibility of a need for surgery, the 1972 reports, although reflecting the continuation of preexisting condition, also demonstrated that claimant's condition had changed to the point where surgical intervention was indicated and thus supported finding of change in condition in 1972 and finding that the 1972 reports constituted an application to reopen within period of limitations, so that the reopening was not chargeable to the Special Fund for reopened cases. Martin v Bausch & Lomb, Inc., 54 A.D.2d 1002, 388 N.Y.S.2d 60, 1976 N.Y. App. Div. LEXIS 14962 (N.Y. App. Div. 3d Dep't 1976).

Board properly ruled that employer's insurance carrier was liable for compensation award to claimant and discharged Special Fund for Reopened Cases, since report by claimant's treating physician filed in 1981, which concluded that claimant's condition was permanent, constituted application to reopen closed case, and was submitted within 3 years of last payment of compensation to claimant in February, 1979; 1981 physician's report was sufficient to indicate change in claimant's condition, although same physician had concluded initially that condition was permanent, since board's initial determination making award and closing case with finding of no permanency was founded on substantial evidence, and thus was final and conclusive on question of disability as of that time. Kane v Mohawk Data Sciences Corp., 140 A.D.2d 837, 528 N.Y.S.2d 222, 1988 N.Y. App. Div. LEXIS 5021 (N.Y. App. Div. 3d Dep't 1988).

Liability of employer's workers' compensation carrier for injured employee's future medical payments would be discharged, and liability would be transferred to Special Fund for Reopened Cases under CLS Work Comp § 25-a, where (1) accident occurred on October 18, 1984, last payment of compensation was made on November 19, 1984, and thus criterion of requisite passage of time was met, and (2) chiropractor's reports did not indicate change in claimant's condition, and thus did not constitute reopening of case so as to remove it from purview of statute. McQueen v New York State Div. of Parole, 245 A.D.2d 851, 666 N.Y.S.2d 317, 1997 N.Y. App. Div. LEXIS 13193 (N.Y. App. Div. 3d

Dep't 1997), app. denied, 92 N.Y.2d 802, 677 N.Y.S.2d 72, 699 N.E.2d 432, 1998 N.Y. LEXIS 1767 (N.Y. 1998).

36. — —Special Fund discharged

Examining orthopedic surgeon's medical report describing change in condition of workers' compensation claimant was sufficient to constitute application to reopen claimant's 1984 claim, even though it did not specifically mention claimant's 1984 back injury, where it specifically apportioned 50 percent of claimant's disability to 1990 incident and 50 percent to previous back problems; thus, under CLS Work Comp § 25-a(1), Special Fund was properly discharged from liability, even though 1984 claim was not reopened until after lapse of 7 years, where medical report was filed within 7 years from date of 1984 injury. Dumont v Nestle Co., 286 A.D.2d 804, 730 N.Y.S.2d 357, 2001 N.Y. App. Div. LEXIS 8630 (N.Y. App. Div. 3d Dep't 2001).

Workers' Compensation Board properly ruled that liability did not shift to the Special Fund for Reopened Cases because, although there had been true closure at the time that the claim was established and no awards were made, an August 2009 medical report from worker's chiropractor raised an issue of permanency, which constituted a change in worker's medical condition and reopened the claim, thereby warranting removal of the Special Fund from notice and reinstatement of the employer's liability for the claim. Matter of Williams v General Elec., 146 A.D.3d 1211, 45 N.Y.S.3d 673, 2017 N.Y. App. Div. LEXIS 408 (N.Y. App. Div. 3d Dep't 2017).

37. — —Report held not to be applicable

The filing of two routine medical reports which did not show a change in claimant's condition did not sustain a finding of the board that an application for reopening the case had been made. McKenna v Elm Tremont Coal Co., 9 A.D.2d 458, 194 N.Y.S.2d 705, 1959 N.Y. App. Div. LEXIS 5239 (N.Y. App. Div. 3d Dep't 1959).

In determining whether a changed condition is shown by a medical report filed near the end of the seven-year period, constituting an application for reopening the case, the medical report should not be given a strained or unreasonable interpretation, on the basis of loose language employed by the doctor in making the report, or unless it is reasonably clear that the doctor's intention was to indicate a substantial change of condition which would be good cause for reopening the case. Tripoli v Crucible Steel Co., 12 A.D.2d 425, 212 N.Y.S.2d 309, 1961 N.Y. App. Div. LEXIS 11801 (N.Y. App. Div. 3d Dep't), aff'd, 10 N.Y.2d 877, 223 N.Y.S.2d 504, 179 N.E.2d 509, 1961 N.Y. LEXIS 1004 (N.Y. 1961).

A finding of the Workmen's Compensation Board that a medical report filed within the seven-year period constituted an application for reopening the case and discharged the Special Fund was not sustained by the record where it appeared that the same doctor had been attending the same type of foot injury right along with no substantial change in the claimant's condition. Tripoli v Crucible Steel Co., 12 A.D.2d 425, 212 N.Y.S.2d 309, 1961 N.Y. App. Div. LEXIS 11801 (N.Y. App. Div. 3d Dep't), aff'd, 10 N.Y.2d 877, 223 N.Y.S.2d 504, 179 N.E.2d 509, 1961 N.Y. LEXIS 1004 (N.Y. 1961).

A medical report, which was one of a long series of routine reports filed over several years, could not be considered as a timely application to reopen claimant's case, where the report clearly indicated "no change on physical findings," but did differ from prior reports by advising a course of daily physiotherapy, a lumbosacral corset, and medication for pain. The court pointed out it was highly significant that it was almost two years after filing the report, and after three additional reports, all clearly indicating a changed condition, had been submitted before the board "recognized" this report as an indication of changed condition. Vito v Josall Roofing Co., 29 A.D.2d 798, 287 N.Y.S.2d 246, 1968 N.Y. App. Div. LEXIS 4630 (N.Y. App. Div. 3d Dep't 1968).

Medical reports filed within the seven year period and following the closing of the case are insufficient to indicate a change in medical condition such as would constitute an application for a reopening of the case. Pizzarello v Harrison, 31 A.D.2d 878, 297 N.Y.S.2d 612, 1969 N.Y. App. Div. LEXIS 4561 (N.Y. App. Div. 3d Dep't 1969).

Medical reports, which merely indicated that claimant's knee condition continued but was stabilized, were insufficient to constitute notice to Workmen's Compensation Board of a change in claimant's condition, for purposes for statute relating to liability of special fund for reopened cases. Pucser v Allegheny Ludlum Steel Corp., 45 A.D.2d 798, 357 N.Y.S.2d 169, 1974 N.Y. App. Div. LEXIS 4638 (N.Y. App. Div. 3d Dep't 1974).

While medical reports can constitute application to reopen workers' compensation case, such reports must sufficiently give Workers' Compensation Board notice of change in claimant's condition; in determining whether changed condition is shown, medical report should not be given strained or unreasonable interpretation, and should not be interpreted as basis for application to reopen unless it is reasonably clear that such was intention of physician. Loiacono v Sears Roebuck & Co., 230 A.D.2d 351, 654 N.Y.S.2d 463, 1997 N.Y. App. Div. LEXIS 2227 (N.Y. App. Div. 3d Dep't 1997).

Reports from claimant's chiropractor stating that claimant was on "maintenance care" or "symptomatic care for active relief of pain," recommending chiropractic adjustments as needed, and stating that her condition would not be permanent as long as periodic treatment occurred, were not sufficient to give notice of change in condition as compared to simply indicating continued disability and treatment. Loiacono v Sears Roebuck & Co., 230 A.D.2d 351, 654 N.Y.S.2d 463, 1997 N.Y. App. Div. LEXIS 2227 (N.Y. App. Div. 3d Dep't 1997).

Because a chiropractor's medical reports did not refer to any change in an employee's condition or contain any opinion as to permanency, but merely recommended a continuation of chiropractic care, they did not display a clear intention to reopen the employee's workers' compensation case; therefore, the Workers' Compensation Board erred in ruling that use N.Y. Workers' Comp. Law § 25-a was inapplicable. Matter of Gregorec v Brenners Furniture Co., Inc., 68 A.D.3d 1301, 890 N.Y.S.2d 197, 2009 N.Y. App. Div. LEXIS 8945 (N.Y. App. Div. 3d Dep't 2009).

Employer could not reopen and transfer liability to the Special Fund for Reopened Cases (Special Fund) since the liability to transfer relied upon in the application, a May 7 2013 medical evaluation, occurred within 7 years of the accident, and the passage of the requisite time period without current liability or proof that further medical or indemnity payments were payable when the application was submitted, was not a proper basis to reopen the claim; the employer could not include medical liability subsequent to its application. The 2-year retroactive period of liability for the Special Fund was separate and distinct from the question of whether liability could be shifted to the Special Fund in the first instance. Matter of Whitmeyer v Oneida County, 155 A.D.3d 1268, 65 N.Y.S.3d 583, 2017 N.Y. App. Div. LEXIS 8252 (N.Y. App. Div. 3d Dep't 2017).

38. Time limitations, generally

Literal construction of language of § 25-a "three years from the date of last payment of compensation," is clearly indicated, and construction "three years from the date when compensation should have been paid," cannot be accepted. Kiriloff v A. G. W. Wet Wash Laundry, Inc., 293 N.Y. 222, 56 N.E.2d 559, 293 N.Y. (N.Y.S.) 222, 1944 N.Y. LEXIS 1307 (N.Y. 1944).

Where an application to reopen was in fact made within the seven year period but was denied on the mathematically incorrect finding that seven years had elapsed, on application for reconsideration after the limitation period had actually expired the board could rescind the former decision and restore the case to the calendar as of the former date. Roder v Northern Maytag Co., 297 N.Y. 196, 78 N.E.2d 470, 297 N.Y. (N.Y.S.) 196, 1948 N.Y. LEXIS 860 (N.Y. 1948).

Where claimant was injured in 1933 and last payment of compensation was made and case closed in that year, more than seven years have elapsed since date of injury and more than three years since last payment of compensation was made or medical treatment furnished and if claimant's present disability is to be attributed to 1933 accident § 25-a is applicable. Becker v Marcy State Hospital, 264 A.D. 643, 38 N.Y.S.2d 219, 1942 N.Y. App. Div. LEXIS 4224 (N.Y. App. Div. 1942).

The 7-year period under this section, as applied to a death case, is to be measured from the date of the death and not from the date

of the disability. Burcia v St. Joseph Lead Co., 283 A.D. 1124, 131 N.Y.S.2d 644, 1954 N.Y. App. Div. LEXIS 6493 (N.Y. App. Div.), app. denied, 284 A.D. 858, 134 N.Y.S.2d 277, 1954 N.Y. App. Div. LEXIS 3769 (N.Y. App. Div. 1954).

Where more than seven years lapsed since an accident and more than three years since the last payment of compensation, liability is shifted from the employer to the Special Fund for Reopened Cases. Greenwald v Electro Metallurgical Co., 284 A.D. 706, 134 N.Y.S.2d 451, 1954 N.Y. App. Div. LEXIS 3476 (N.Y. App. Div. 1954).

The postponement of a hernia operation to a later date at claimant's election did not convert the accident into an occupational disease and postpone the date of accident to the date of disability due to the operation a year later. Buehler v Service Machine Works, 284 A.D. 923, 134 N.Y.S.2d 413, 1954 N.Y. App. Div. LEXIS 4066 (N.Y. App. Div. 1954).

The seven-year period under this section, as applied to a death case, is to be measured from the date of death and not from the date of injury. Dickerson v Essex County, 2 A.D.2d 516, 157 N.Y.S.2d 94, 1956 N.Y. App. Div. LEXIS 3820 (N.Y. App. Div. 3d Dep't 1956).

Subdivision 1 of this section, dealing with time limits upon applications to reopen claims, merely provides a fixed date after which the Special Fund becomes liable and does not require medical proof to substantiate an application to re-open the case. Wood v Albany County Highway Dep't, 18 A.D.2d 743, 235 N.Y.S.2d 825, 1962 N.Y. App. Div. LEXIS 6182 (N.Y. App. Div. 3d Dep't 1962), aff'd, 13 N.Y.2d 742, 241 N.Y.S.2d 868, 191 N.E.2d 919, 1963 N.Y. LEXIS 1111 (N.Y. 1963).

For purposes of the time limitation provisions of subd. 7 of § 25-a, with respect to liability of the Special Fund upon reopening of a disability case, following commutation of the original award by lump sum payment as provided in this section upon an alien's departure from the United States, compensation payments should be considered as having terminated when the lump sum payment is made and the Special Fund is liable if that date is more than three years prior to filing of the application for reopening. Rolle v General Foods Corp., etc., 19 A.D.2d 188, 241 N.Y.S.2d 94, 1963 N.Y. App. Div. LEXIS 3445 (N.Y. App. Div. 3d Dep't 1963).

Although formula provided by subd 7 of this statute is to be applied in determining date of last payment of compensation "for the purposes of this section," the section referred to is the broad and comprehensive statute, substantive as well as procedural, which creates rights and liabilities in re-opened cases and provides basically that "if an award is made it shall be against the special fund" (subd 1). Schneider v Bruckner Beverages, Inc., 23 A.D.2d 512, 255 N.Y.S.2d 120, 1965 N.Y. App. Div. LEXIS 5111 (N.Y. App. Div. 3d Dep't), app. denied, 15 N.Y.2d 485, 1965 N.Y. LEXIS 1839 (N.Y. 1965).

That portion of the statute with reference to awards to be made against the Special Fund that "after a lapse of 7 years from the date of the injury or death also a lapse of 3 years from the date of the last payment of compensation" means that the 7-year period specified therein is to be construed from the date of death and not from the date of injury. Riccardi v Dellwood Dairy Co., 38 A.D.2d 666, 327 N.Y.S.2d 442, 1971 N.Y. App. Div. LEXIS 2620 (N.Y. App. Div. 3d Dep't 1971).

Date of application to reopen, not date of treatment, is controlling, for purposes of determining party responsible for payment of compensation. Italiano v Mobil Oil Corp., 50 A.D.2d 638, 374 N.Y.S.2d 162, 1975 N.Y. App. Div. LEXIS 12454 (N.Y. App. Div. 3d Dep't 1975).

Examining orthopedic surgeon's medical report describing change in condition of workers' compensation claimant was sufficient to constitute application to reopen claimant's 1984 claim, even though it did not specifically mention claimant's 1984 back injury, where it specifically apportioned 50 percent of claimant's disability to 1990 incident and 50 percent to previous back problems; thus, under CLS Work Comp § 25-a(1), Special Fund was properly discharged from liability, even though 1984 claim was not reopened until after lapse of 7 years, where medical report was filed within 7 years from date of 1984 injury. Dumont v Nestle Co., 286 A.D.2d 804, 730 N.Y.S.2d 357, 2001 N.Y. App. Div. LEXIS 8630 (N.Y. App. Div. 3d Dep't 2001).

39. —Timeliness of particular actions

A 1932 claim disposed of in 1938 without an award, and reopened in 1952 was barred by the statute of limitations though the employer at all times had knowledge of claimant's disability and assigned him to lighter work, afforded medical treatment and paid full wages for time lost while obtaining medical treatment. Kapesser v New York State Police, 286 A.D. 897, 142 N.Y.S.2d 267, 1955 N.Y. App. Div. LEXIS 4463 (N.Y. App. Div. 1955).

Claimant claimed injury resulting in blindness in 1926. An award for period ending in 1931 was made for permanent total disability. Thereafter, employer was permitted to submit further evidence against disability. In 1940, claimant's attorney requested hearing be cancelled because they had no testimony available at that time. Case was marked to be held in abeyance and placed in closed files. In 1952, claimant was located, hearings held and award made. Held: award reversed and claim dismissed. Claimant's complete inaction for 12 years and fact that there was no change in claimant's condition led to conclusion that claimant had abandoned idea of proceeding further. Case was closed and hence the time limitations provided in the Workmen's Compensation Law were applicable. McCulla v Alco Products, Inc., 5 A.D.2d 898, 171 N.Y.S.2d 166, 1958 N.Y. App. Div. LEXIS 6709 (N.Y. App. Div. 3d Dep't 1958).

In March, 1949 while working, decedent suffered left inguinal hernia for which he was awarded compensation and the case was closed in September, 1949. In November, 1953, while recovering from operation for strangulated hernia, decedent was taken with severe pains in abdomen and died. Autopsy showed cause of death was perforated stomach ulcer. Board properly disallowed widow's claim for death benefits on finding of no causal relation between accident or operation in death. As to award for disability from October 29, 1953 to November 2, 1953, Special Fund for Reopened Cases was properly discharged as the case was reopened within 7 years of the accident. 1953 order of referee instructing that case be reopened and placed on calendar with death cause was sufficient even though there had been no formal reopening. And, even if the June, 1956 decision be considered as the reopening, then award for 1953 disability was beyond the 2-year period preceding application for compensation for which fund could be held liable. Carpenter v Port Henry, 8 A.D.2d 568, 183 N.Y.S.2d 467, 1959 N.Y. App. Div. LEXIS 9655 (N.Y. App. Div. 3d Dep't 1959).

With respect to liability of the special fund under this section for death benefits due to a crippled child of a decedent, the insurance carrier, and not the special fund, is liable notwithstanding lapse of more than seven years since the accident and lapse of more than three years since date of the last compensation payment to the child, where payments were still being made, within the three-year period, under the award, to the child's mother. Calim of Rilitz, 11 A.D.2d 547, 199 N.Y.S.2d 1003, 1960 N.Y. App. Div. LEXIS 10179 (N.Y. App. Div. 3d Dep't), app. denied, 8 N.Y.2d 708, 1960 N.Y. LEXIS 1862 (N.Y. 1960).

Where a closed case was reopened at instance of the claimant on conventional application forms after he had unsuccessfully sought reimbursement from the insurance carrier for cost of treating his leg condition, more than seven years having elapsed from date of injury and more than three years since last payment of compensation was made, the responsibility for claimant's additional medical and hospital expense was erroneously imposed upon the employer. Wohlsen v New Rochelle Coal & Lumber Co., 14 A.D.2d 661, 219 N.Y.S.2d 124, 1961 N.Y. App. Div. LEXIS 9329 (N.Y. App. Div. 3d Dep't 1961).

Board properly found that a claim was the responsibility of the Special Funds Conservation Committee under Work Comp Law § 25-a and properly limited the responsibility of the Fund to the two-year period prior to the filing of the claim where the record established that the claim was made more than seven years after the date of disablement and more than three years after the last advance payment of compensation by the employer. Ferraro v P. Nathan & Co., 84 A.D.2d 621, 444 N.Y.S.2d 254, 1981 N.Y. App. Div. LEXIS 15732 (N.Y. App. Div. 3d Dep't 1981).

Special Fund for Reopened Cases was improperly directed to pay an award of benefits to a claimant pursuant to N.Y. Workers' Comp. Law § 25-a as the employer's workers' compensation carrier applied to shift liability under § 25-a less than three years after it claimed credit for an overpayment in lieu of making further benefit payments following the Workers' Compensation Board's affirmance of a new award after the claimant was convicted of petit larceny in connection with submitting false statements to the carrier and the claimant was ordered to pay restitution.. Matter of Negron v Sky View Haven Nursing Home, Inc., 50 A.D.3d 1344, 856 N.Y.S.2d 279, 2008 N.Y. App. Div. LEXIS 3300 (N.Y. App. Div. 3d Dep't 2008).

40. — —Longshoremen's and Harbor Worker's Act

Claimant, who had been receiving compensation payments under the Longshoremen's and Harbor Worker's Act (33 USC § 901) was properly permitted to file claim for compensation where, after a lapse of seven years, it was held in an action under the Jones Act that he was not a seaman. Luoma v Spearin, Preston & Burrows, Inc., 307 N.Y. 728, 121 N.E.2d 544, 307 N.Y. (N.Y.S.) 728, 1954 N.Y. LEXIS 1458 (N.Y. 1954).

41. — —Trial on the merits

The dismissal of a claim based on a 1932 accident by a referee on the ground that it was barred by the statute of limitations was not a disposition "after a trial on the merits" within the meaning of the 1940 amendment to this section. Ennis v Kennedy Valve Mfg. Co., 282 A.D. 971, 125 N.Y.S.2d 535, 1953 N.Y. App. Div. LEXIS 5598 (N.Y. App. Div. 1953).

42. — —Special Fund determined to be liable

Award is payable out of special fund created by this section rather than by self-insurer, where it not only appears that case was reopened more than seven years after claimant's injury and more than three years after last payment of compensation previously awarded, but that case had been properly and definitely closed in 1928, and that there was no pending application for reopening which was received before April 24, 1933. Requirement that such claims shall be paid out of special fund is mandatory. Ryan v American Bridge Co., 243 A.D. 496, 278 N.Y.S. 612, 1935 N.Y. App. Div. LEXIS 7104 (N.Y. App. Div.), aff'd, 268 N.Y. 502, 198 N.E. 375, 268 N.Y. (N.Y.S.) 502, 1935 N.Y. LEXIS 980 (N.Y. 1935).

Where injury was received November 6, 1925, and last payment made before September 3, 1929, when referee closed case without prejudice until claimant wished to reopen, and where commissioner on September 7 closed files without prejudice until claimant requested hearing, since case was not open on April 24, 1933, and injury had been received over seven years before award on November 6, 1935, against employer and carrier, and last compensation payment over three years before, award should have been against special fund. King v Schweinler, 247 A.D. 841, 286 N.Y.S. 287, 1936 N.Y. App. Div. LEXIS 9002 (N.Y. App. Div. 1936).

Where case was closed in 1928 without prejudice, and reopened in November, 1934 on claimant's motion, award should be made against special fund, pursuant to this section. Greenberg v Fox, 248 A.D. 648, 287 N.Y.S. 906, 1936 N.Y. App. Div. LEXIS 6662 (N.Y. App. Div.), aff'd, 272 N.Y. 549, 4 N.E.2d 730, 272 N.Y. (N.Y.S.) 549, 1936 N.Y. LEXIS 1044 (N.Y. 1936).

Workers' Compensation Board properly directed that death benefits be paid by Special Fund for Reopened Cases, despite fund's claim that decedent's fatal heart attack occurred within 7 years of prior heart attack for which he was awarded total disability benefits, since fund was properly deemed to have waived issue where (1) it had knowledge of all pertinent facts but failed to raise any objection until after workers' compensation law judge discharged carrier from liability and determined that decedent's death was causally related to his prior heart attack, and (2) board found that carrier and claimant would be substantially prejudiced if forced to relitigate issue of causal relationship; special fund should raise its threshold defenses at earliest opportunity after it is placed on notice. Collier v Brightwater Beer & Soda Distributor, 147 A.D.2d 868, 538 N.Y.S.2d 90, 1989 N.Y. App. Div. LEXIS 1970 (N.Y. App. Div. 3d Dep't 1989), aff'd, 75 N.Y.2d 949, 555 N.Y.S.2d 690, 554 N.E.2d 1278, 1990 N.Y. LEXIS 930 (N.Y. 1990).

Liability of employer's workers' compensation carrier for injured employee's future medical payments would be discharged, and liability would be transferred to Special Fund for Reopened Cases under CLS Work Comp § 25-a, where (1) accident occurred on October 18, 1984, last payment of compensation was made on November 19, 1984, and thus criterion of requisite passage of time was met, and (2) chiropractor's reports did not indicate change in claimant's condition, and thus did not constitute reopening of case so as to remove it from purview of statute. McQueen v New York State Div. of Parole, 245 A.D.2d 851, 666 N.Y.S.2d 317, 1997 N.Y. App. Div. LEXIS 13193 (N.Y. App. Div. 3d Dep't 1997), app. denied, 92 N.Y.2d 802, 677 N.Y.S.2d 72, 699 N.E.2d 432, 1998 N.Y. LEXIS 1767 (N.Y. 1998).

43. — —Carrier determined to be liable

Disallowed case involving 1939 accident was reopened in 1945 and closed in 1947 for failure to produce the evidence outlined in the application. Thereupon, claimant promptly submitted the evidence and an explanation of the delay. Carrier now contended Board was without jurisdiction since more than seven years had elapsed since date of alleged accident. Held, closure in 1947 by a referee was only an interlocutory determination subject to review by the Board. Award against carrier, affirmed. Barnes v New York World's Fair 1939, 277 A.D. 819, 97 N.Y.S.2d 355, 1950 N.Y. App. Div. LEXIS 3414 (N.Y. App. Div. 1950).

Where it appeared that claimant, then 19 ½ years of age, sustained a back injury in an industrial accident on May 31, 1945, in connection with which he filed a compensation claim on October 7, 1947, which claim was later dismissed and the case closed on July 1, 1948, for failure to prosecute, and that his application to reopen the proceedings filed approximately eight years after the accident would normally be barred under § 123, the application to reopen was nevertheless considered timely under § 115 since it was filed within 6 ½ years after he attained majority, and the liability could not be transferred to the Special Fund as the claimant would be prejudiced by a transfer of liability to the Fund in view of § 25-a precluding liability of the Fund for compensation retroactively beyond two years. Kulpa v Alco Products, Inc., 10 A.D.2d 747, 198 N.Y.S.2d 177, 1960 N.Y. App. Div. LEXIS 11190 (N.Y. App. Div. 3d Dep't), app. denied, 8 N.Y.2d 706, 1960 N.Y. LEXIS 1784 (N.Y. 1960).

44. —Tolling of limitation period

The limitations of this section on the liability of an employer or his insurance carrier are not tolled during the pendency of an appeal by a third person erroneously found to be the employer where neither the employer or his carrier were parties to the appeal nor concerned with it. Bellini v Great American Indem. Co., 299 N.Y. 399, 87 N.E.2d 426, 299 N.Y. (N.Y.S.) 399, 1949 N.Y. LEXIS 949 (N.Y. 1949).

"During the pendency of an appeal provided for by section twenty-three" was only a requirement as to elimination of such appeal time pendency from time computation in determining seven and three-year limitation periods otherwise provided. Riddle v General Ice Cream Corp., 262 A.D. 353, 29 N.Y.S.2d 225, 1941 N.Y. App. Div. LEXIS 5364 (N.Y. App. Div. 1941).

Civil Practice Act § 27 is applicable to a workmen's compensation death claim. Thus, the Italian widow of a workman killed in the course of his employment in 1942 had until two years after the proclamation of the Treaty of Peace with Italy to make a claim for death benefits. A letter written to the Compensation Board during this two-year period by the Italian Consul was a sufficient claim where it clearly showed widow's intention of claiming compensation death benefits. But since the broad terms of the Peace Treaty must be deemed to have tolled the 7-year limitation set forth in § 25-a, the award should not be made against the Special Fund for Reopened Cases but should be made against the carrier. Borelli v Rochester Transit Corp., 285 A.D. 230, 136 N.Y.S.2d 315, 1954 N.Y. App. Div. LEXIS 3313 (N.Y. App. Div. 1954).

On an application for a reopening made more than 7 years after the date of accident and more than 3 years after the last payment of compensation, the award should have been made against the

Special Fund under this section because the statutory periods specified under this section did not constitute a statute of limitations and hence, were not tolled by infancy, under the provisions of § 115. Longo v M & F Auto Wreckers, 4 A.D.2d 902, 166 N.Y.S.2d 900, 1957 N.Y. App. Div. LEXIS 4292 (N.Y. App. Div. 3d Dep't 1957).

"Continuing disability" of itself does not toll the running of time as to Special Fund nor does medical treatment. The factor of a continuing disability is only relevant to the question of whether or not there was a payment of compensation within three years of the reopening. Pizzarello v Harrison, 31 A.D.2d 878, 297 N.Y.S.2d 612, 1969 N.Y. App. Div. LEXIS 4561 (N.Y. App. Div. 3d Dep't 1969).

A decision of the Workers' Compensation Board discharging the Special Fund for Reopened Cases from liability pursuant to Work Comp Law § 25-a would be affirmed, despite the fact that seven years had elapsed from the date of claimant's original injury and three years had elapsed from the date of the employer's last payment to claimant, where claimant's physician's reports, which were filed within both limitation periods, and which described the exacerbation of claimant's condition, served as a motion to reopen the case, and gave sufficient notice regarding claimant's continuing disability and the employer's continuing liability to toll the provisions of Work Comp Law § 25-a. Russell v Carborundum Co., 105 A.D.2d 541, 481 N.Y.S.2d 485, 1984 N.Y. App. Div. LEXIS 20566 (N.Y. App. Div. 3d Dep't 1984), app. denied, 64 N.Y.2d 606, 487 N.Y.S.2d 1026, 1985 N.Y. LEXIS 18761 (N.Y. 1985).

Board properly applied CLS Work Comp § 115 to toll claims of decedent's children for purposes of reopening and liability under CLS Work Comp § 25-a. Hayes v Harris, 227 A.D.2d 864, 642 N.Y.S.2d 384, 1996 N.Y. App. Div. LEXIS 5270 (N.Y. App. Div. 3d Dep't), app. denied, 88 N.Y.2d 813, 649 N.Y.S.2d 380, 672 N.E.2d 606, 1996 N.Y. LEXIS 3092 (N.Y. 1996).

45. —Tolling of limitation period; mental incompetence

Where an employee is mentally incompetent § 115 limits the application of the time limitation of § 25-a. Pytel v Carborondum Co., 273 A.D. 832, 76 N.Y.S.2d 26, 1948 N.Y. App. Div. LEXIS 4833 (N.Y. App. Div. 1948), limited, Longo v M & F Auto Wreckers, 4 A.D.2d 902, 166 N.Y.S.2d 900, 1957 N.Y. App. Div. LEXIS 4292 (N.Y. App. Div. 3d Dep't 1957).

The suspension of the statute of limitations is not literally in favor of incompetency as a legal status but in favor of a "person who is mentally" incompetent, in the factual sense and for whom no committee has been appointed. Macraken v R. & B. Lunch Co., 281 A.D. 215, 119 N.Y.S.2d 827, 1953 N.Y. App. Div. LEXIS 3012 (N.Y. App. Div.), reh'g denied, 281 A.D. 912, 120 N.Y.S.2d 254, 1953 N.Y. App. Div. LEXIS 3756 (N.Y. App. Div. 1953).

Where prior closings were made inoperative by the determination that claimant was incompetent until the reopening, such fact nullifies the statutory requirements invoking Special Fund disability under § 25-a of the Workmen's Compensation Law. Aufiero v Highwall Metal Spinning & Stamping Co., 31 A.D.2d 877, 297 N.Y.S.2d 648, 1969 N.Y. App. Div. LEXIS 4560 (N.Y. App. Div. 3d Dep't), app. denied, 24 N.Y.2d 738, 1969 N.Y. LEXIS 2285 (N.Y. 1969).

Substantial evidence supported Workers' Compensation Board's finding of claimant's mental incompetence, thus tolling statute of limitations, where claimant manifested signs of behavioral changes, such as current memory loss, impatience, and disorientation, which condition grew progressively worse, claimant's wife and father testified about claimant's dramatic personality disorder following accident, his inability to remember simple and current events, perform routine tasks, or interact and socialize, and examining psychiatrist testified that claimant sustained brain trauma causing personality and intellectual dysfunctions. Uhler v A&P, 242 A.D.2d 754, 661 N.Y.S.2d 859, 1997 N.Y. App. Div. LEXIS 8530 (N.Y. App. Div. 3d Dep't 1997).

46. —Tolling of limitation period; military service

The time limitations of this section for holding a carrier liable for an award in a reopened case are not tolled by § 308 of the Military Law. Bellini v Great American Indem. Co., 299 N.Y. 399, 87 N.E.2d 426, 299 N.Y. (N.Y.S.) 399, 1949 N.Y. LEXIS 949 (N.Y. 1949).

The time provisions of this section are tolled during the military service of a claimant where such a suspension is necessary to avoid prejudice to his rights and during the period when a former award was under appeal. Sturesky v Straussman, 273 A.D. 1036, 78 N.Y.S.2d 633, 1948 N.Y. App. Div. LEXIS 5858 (N.Y. App. Div. 1948).

The sole criterion under this section is the passage of time. Hence, where the claimant was injured in 1941 and was disabled until 1943 when his case was closed without prejudice he thereafter served in the military service from 1943 to 1945 and he then applied to reopen his case in 1949, more than seven years had elapsed between the date of the accident and the date of reopening and more than three years had elapsed between the date of the last payment of compensation and the date of reopening. Under those circumstances, the express terms of this section oppose liability on the special fund. Schechter v State Ins. Fund, 283 A.D. 19, 126 N.Y.S.2d 257, 1953 N.Y. App. Div. LEXIS 2968 (N.Y. App. Div. 1953).

Sections 304 and 308 of the Military Law did not toll the time limitation of this section so as to relieve the special fund from liability. Walker v Symington Gould Corp., 282 AD 785, 122 S2d 565 (1953). 68 the time limitation during a claimant's military service in favor of the special fund where the claimant was injured in 1941, was in military service from 1943 to 1945 and sought to reopen his case in 1949. Both the statute and judicial decisions are clear that the benefit of this section is purely personal and may not be extended to relieve or protect others. Schechter v State Ins. Fund, 283 A.D. 19, 126 N.Y.S.2d 257, 1953 N.Y. App. Div. LEXIS 2968 (N.Y. App. Div. 1953).

When an employee injured his back in 1939 and received an award of one week's compensation with the case thereupon being closed and he thereafter enlisted in the Navy in 1942 and remained in service until discharged in 1945 and, thereafter, in 1949, he suffered an attack of lower back pain which the Board found attributable to the original accident and reopened his case, the latter award was assessable against the Special Fund. The Special Fund was not entitled to the benefit of the Military Law (§§ 304 and 308) in determining the running of the periods of time specified in this section. Greenwald v Electro Metallurgical Co., 284 A.D. 706, 134 N.Y.S.2d 451, 1954 N.Y. App. Div. LEXIS 3476 (N.Y. App. Div. 1954).

47. Review

A referee's finding of causal relation for medical care longer than 18 years after accident and 8 years after the last payment of compensation and imposing liability on the Special Fund, entitled the Special Fund to a review by the Workmen's Compensation Board of the referee's findings and the Chairman's authorization to furnish medical services. Crowl v New York, Dep't of Hospitals, 18 N.Y.2d 23, 271 N.Y.S.2d 659, 218 N.E.2d 537, 1966 N.Y. LEXIS 1274 (N.Y. 1966).

Rule 5(c) of the Workmen's Compensation Board requires that in claims involving the Special Fund under this section the referee shall take all testimony without making any decision or recommendation and refer the completed record to the board for decision, and an employer, charged with knowledge of this rule, and aware that the board will not consider an application to review the referee's decision prior to conclusion of testimony, at his option may remain in the case and request notice of further hearings. Handler v Taterka, 22 A.D.2d 741, 253 N.Y.S.2d 321, 1964 N.Y. App. Div. LEXIS 2940 (N.Y. App. Div. 3d Dep't 1964), app. denied, 15 N.Y.2d 483, 1965 N.Y. LEXIS 1793 (N.Y. 1965).

Where Workmen's Compensation board reopened two closed claims and made an award, finding that each claim contributed equally to total disability, it was held that the decision must be reversed insofar as the award related to the earlier claim for which no compensation had ever been paid for lost time or wages, although the carrier had paid for medical expenses connected with this claim. Fair v Standard Milling Co., 23 A.D.2d 925, 259 N.Y.S.2d 375, 1965 N.Y. App. Div. LEXIS 4292 (N.Y. App. Div. 3d Dep't 1965).

Where employer assigned claimant to another position after being injured, and there was nothing in the record to indicate that the employer did not receive full value for the claimant's wages, the decision of the Workmen's Compensation Board discharging

the special fund for reopened cases was reversed. Nesbitt v Ellenville Electric Co., 28 A.D.2d 794, 280 N.Y.S.2d 997, 1967 N.Y. App. Div. LEXIS 3712 (N.Y. App. Div. 3d Dep't 1967).

Upon reopening a case which had theretofore been closed by payment of a lump sum, where there was proof of claimant's average weekly wage before the accident, but no determination of his wage earning capacity thereafter and where the Board at the time of payment of the lump sum did not indicate a method for allocating the lump sum settlement, and there was no basis established for the Board's allocation of the specified sum per week, the claim was remanded for further proceedings. Rizzo v Glenwood Clothes, Inc., 33 A.D.2d 611, 304 N.Y.S.2d 561, 1969 N.Y. App. Div. LEXIS 3036 (N.Y. App. Div. 3d Dep't 1969).

Where finding of board was not sufficiently developed to permit review of its conclusion that case had been closed in 1964 and that claim filed in 1974 was not one for deficiency and thus should be charged against Special Fund, case would be remitted to board for further proceedings. Gantz v Wallace & Tiernan Lucidol Div., 41 A.D.2d 991, 343 N.Y.S.2d 972, 1973 N.Y. App. Div. LEXIS 4367 (N.Y. App. Div. 3d Dep't 1973).

48. Erroneous awards or payments

Claimant became totally disabled from silicosis in 1946. Award was made and case closed. Thereafter, case was reopened and award was made in 1952 on basis of erroneous report filed by carrier for period in 1948. In 1953 carrier again resumed payments. Board properly declined to relieve carrier of liability and to charge the Special Fund with liability. Original error in 1948 was carrier's and could have been ascertained from its own records at any time. Since 1953 payments were of compensation for which award had been made within the meaning of this section, board's decision was technically correct. Moreover, appellants failed to appeal from 1952 award or to request its correction prior to resumption of payments in 1953. Burns v Anstice Co., 5 A.D.2d 895, 170 N.Y.S.2d 945, 1958 N.Y. App. Div. LEXIS 6705 (N.Y. App. Div. 3d Dep't 1958).

On appeal from a decision which denied the Special Fund credit against an award in a reopened case in which it was liable, of a sum representing the amount of an overpayment by the insurance carrier, such sum being the total of payments made after the claimant returned to work without the carrier's knowledge, the board holding that the present award was the liability of the Special Fund under the above statute and that since the overpayment by the carrier was for a period prior to the two year retroactive period provided thereunder and prior to the date when the Special Fund became liable, and since the carrier was not liable and was not charged with or called upon to pay any present award against which credit can be taken under § 22 the board was constrained to find that neither the carrier nor the Special Fund under the above statute was entitled to credit for the overpayment previously made, the Appellate Division held that explicit as the above statute is in detailing the Fund's liability, its rights and the limitations upon each, it found in it nothing to support the Fund's contention, and that the Fund's reliance upon the provision contained in the last sentence of § 22 seemed mistaken because there was here involved no "award decreasing the compensation rate". Basso v F. W. Woolworth Co., 24 A.D.2d 687, 261 N.Y.S.2d 570, 1965 N.Y. App. Div. LEXIS 3554 (N.Y. App. Div. 3d Dep't 1965).

If the facts were such in December of 1970 as to entitle workmen's compensation carrier to stop payments, neither the Special Fund for Reopened Cases nor the claimant would be entitled to a windfall merely because of a technical failure on part of insurer to file a Workmen's Compensation Board Form C-8 "Notice That Payment of Compensation or Disability Has Been Stopped or Modified" and supporting documentation. McGarry v Capatano & Grow Constr. Co., 58 A.D.2d 372, 396 N.Y.S.2d 901, 1977 N.Y. App. Div. LEXIS 12417 (N.Y. App. Div. 3d Dep't 1977), aff'd, 44 N.Y.2d 946, 408 N.Y.S.2d 320, 380 N.E.2d 152, 1978 N.Y. LEXIS 2133 (N.Y. 1978).

49. Other matters

An award for total disability due to silicosis was proper where a prior claim in 1944 had been denied for want of total disability and where application to reopen was made within 7 years although case was not formally reopened until 1954. Stimburis v Leviton Mfg. Co., 5 N.Y.2d 360, 184 N.Y.S.2d 632, 157 N.E.2d 621, 1959 N.Y. LEXIS 1501 (N.Y. 1959).

Where claimant had applied in 1931 to reopen his case on ground of total disability, and application was disallowed on ground that time for reclassification had expired, and where board reopened case, in June 1933 on its own motion more than seven years after injury and more than three years after last payment of compensation previously allowed, there was no undisposed of application to reopen nor any appeal pending on April 24, 1933, and payment of award should be made out of special fund under this section. Cordial v Townsend Furnace & Machine Co., 243 A.D. 829, 278 N.Y.S. 616, 1935 N.Y. App. Div. LEXIS 8472 (N.Y. App. Div. 1935).

A compensation claim reopened after an unsuccessful third-party malpractice suit by the claimant was an action to recover deficiency compensation within the meaning of § 29. The employer was therefore liable, instead of the Special Fund, since the provisions of § 25-a governing the fund's liability do not apply to awards for deficiency compensation. Schreckinger v York Distributors, Inc., 9 A.D.2d 333, 194 N.Y.S.2d 67, 1959 N.Y. App. Div. LEXIS 5599 (N.Y. App. Div. 3d Dep't 1959).

Sufficient basis for reopening a case to relieve the Special Fund from liability did not appear from a doctor's report, filed October 14, 1954, showing "change and need for medical treatment and a new condition, periarthritis of the left knee," where, subsequently, five reports filed by attending physicians up to and including October 24, 1956, referred only to a lower back condition without mentioning the knee, no action having been taken by the board on the 1954 report until claimant applied, in January, 1957, to have the claim reopened for refusal to pay medical expenses. Erwin v Minneapolis Honeywell Regulator Co., 9 A.D.2d 989, 194 N.Y.S.2d 796, 1959 N.Y. App. Div. LEXIS 5308 (N.Y. App. Div. 3d Dep't 1959).

Claimant's refusal to undergo surgery for a hernia was not "unreasonable" within the meaning of this section where he had already twice undergone operations for the hernia, following which it recurred, and there was medical testimony that no guarantee of nonrecurrence could be made even if he submitted to a third operation. Kovary v American Woolen Co., 12 A.D.2d 711, 208 N.Y.S.2d 821, 1960 N.Y. App. Div. LEXIS 6256 (N.Y. App. Div. 3d Dep't 1960).

The board was not barred from reopening, in 1957, a claim originally based upon a 1938 accident in which claimant was overcome by powder smoke while working on a tunnel construction project and for which he was awarded disability benefits on the basis of a succeeding bronchitic condition, his later disability having been diagnosed as due to silicosis, and imposing liability on the Special Funds. Harley v Walsh Constr. Co., 14 A.D.2d 614, 218 N.Y.S.2d 331, 1961 N.Y. App. Div. LEXIS 9391 (N.Y. App. Div. 3d Dep't 1961).

Conditional authorization granted to a claimant by the board on June 24, 1958, to secure medical care for a leg condition upon a finding by the board that the condition required treatment and was the result of a 1934 industrial accident for treatment of which, at this time, the Special Fund would be responsible, was abrogated where the board never finally imposed responsibility upon the Special Fund. Wohlsen v New Rochelle Coal & Lumber Co., 14 A.D.2d 661, 219 N.Y.S.2d 124, 1961 N.Y. App. Div. LEXIS 9329 (N.Y. App. Div. 3d Dep't 1961).

Assessments made by the Chairman of the Workmen's Compensation Board against a self-insured employer properly included apportionment payments made by him to insurance carriers or self-insurers of the claimant-employee's last employer pursuant to § 44. Mason & Hanger-Silas Mason Co. v Senior, 27 A.D.2d 30, 275 N.Y.S.2d 755, 1966 N.Y. App. Div. LEXIS 2762 (N.Y. App. Div. 3d Dep't 1966).

Claimant's refusal to submit to further surgery was reasonable and not a ground to preclude award of compensation benefits where claimant had already undergone two myelograms, where claimant had undergone major surgery once, and where although new surgery according to all the physicians involved was medically indicated, it carried no guarantee of success and the possibility existed that such surgery could worsen claimant's condition

or result in paralysis. Messina v Speranza, 79 A.D.2d 807, 435 N.Y.S.2d 96, 1980 N.Y. App. Div. LEXIS 14217 (N.Y. App. Div. 3d Dep't 1980).

Average weekly wage calculation used to determine permanent disability award for occupational injury sustained by worker in 1973, rather than average weekly wage received by comparable employee for one-year period under CLS Work § 14(2), applied to death claim asserted by widow following worker's death from lung disease in 1995. House v International Talc Co., 261 A.D.2d 687, 689 N.Y.S.2d 552, 1999 N.Y. App. Div. LEXIS 4702 (N.Y. App. Div. 3d Dep't 1999).

Workers' Compensation Board's shift of liability from an employer's carrier to the Special Fund for Reopened Cases under N.Y. Workers' Comp. Law § 25-a(1) was not premature because nothing in relevant precedent would resurrect an abandoned issue, based on the untimely appeal of a fraud finding against the employee, of the employee's entitlement to future wage replacement benefits. Matter of Zimmerman v Quality Inn, 25 A.D.3d 829, 806 N.Y.S.2d 316, 2006 N.Y. App. Div. LEXIS 84 (N.Y. App. Div. 3d Dep't 2006).

As assessments against group self-insured trusts (GSITs) were based on the Workers' Compensation Board's unreasonable interpretation of the words "the preceding year," which was used in calculating pure premiums and allocating administrative assessments levied against the GSITs under N.Y. Workers' Comp. Law §§ 15(8), 25-a, 50(5), 151, the assessments were vacated. Matter of Nuara v State of New York Workers' Compensation Bd., 979 N.Y.S.2d 453, 43 Misc. 3d 425, 2010 N.Y. Misc. LEXIS 6891 (N.Y. Sup. Ct. 2010).

50. —Death benefits

Right to death benefits does not exist until death of injured employee, on which event right springs into existence as original independent right, and, therefore, L 1923, c 566, is applicable where accident happened prior to time statute took effect but death resulting from accident occurred thereafter. Donoho v Atlantic Basin Iron Works, 210 A.D. 535, 206 N.Y.S. 494, 1924 N.Y. App. Div. LEXIS 6784 (N.Y. App. Div. 1924).

51. —Party in interest

Administrator is not a party in interest in workmen's compensation proceedings to determine the rights of the special funds. Department of Taxation & Finance v New York, 272 A.D. 407, 71 N.Y.S.2d 572, 1947 N.Y. App. Div. LEXIS 3306 (N.Y. App. Div. 1947).

Agency Opinions

Analysis

1. Payment to special fund when there are no persons entitled to compensation
2. Other matters
3. —Freedom of Information Law

1. Payment to special fund when there are no persons entitled to compensation

Awards to special funds in case of injury causing death for which there are no persons entitled to compensation, may be compromised by industrial board and approval by comptroller of such compromise is required. 1943 NY Ops Atty Gen Mar 23.

2. Other matters

3. —Freedom of Information Law

Special Funds Conservation Committee, which is affiliated with New York Compensation Rating Board and is headed by individual appointed by Chairman of Workers' Compensation Board, is not governmental entity and thus is not "agency" subject to Freedom of Information Law. Comm on Open Gov't FOIL-AO-9825.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 2, 10, 13, 14-a, 15, 22, 24, 26, 26-a, 29, 54-b, 56, 107, 109-c, 123, 305; CLS Bank § 235; CLS Vol Amb Work Ben §§ 51, 57, 60; CLS Vol Fire Ben §§ 51, 57, 60.

Codes, Rules and Regulations:

Arbitration of hospital bills. 12 NYCRR §§ 327.1 et seq.

Arbitration of medical bills. 12 NYCRR §§ 328.1 et seq.

Podiatry care and treatment: required authorizations. 12 NYCRR § 341.4 (CLS Work Comp Bd Rules § 341.4).

Chiropractic care and treatment; required authorization. 12 NYCRR § 346.4 (CLS Work Comp Bd Rules § 346.4).

Federal Aspects:

Limitations on right to receive compensation under federal workers' compensation program. 5 USCS § 8116.

Lump-sum payment under federal workers' compensation law. 5 USCS § 8135.

Jurisprudences:

109 NY Jur 2d Workers' Compensation §§ 64, 186, 188, 304, 305.

110 NY Jur 2d Workers' Compensation §§ 568, 621.

111 NY Jur 2d Workers' Compensation §§ 770, 772, 774–779, 781, 784, 829, 854, 855, 963, 982, 990, 1002, 1071, 1100, 1102, 1103, 1107.

Appleman on Insurance:

New Appleman New York Insurance Law § 25.07.

ARTICLE 5 County Self-Insurance Plan

Section

61. Continuance of existing plans; establishment of new plans
62. Participants
63. Liability of county
64. Administration of plan
65. Rules and regulations
66. Apportionment of costs
67. Annual estimate; payments by participants
72. Annual report
73. Abandonment of plan

HISTORY:

Add, L 1955, ch 849, § 1, eff April 29, 1955.

§ 61. Continuance of existing plans; establishment of new plans

1. Plans of mutual self-insurance heretofore adopted by boards of supervisors of counties pursuant to former subdivision three-a of section fifty of this chapter, are hereby continued; provided, however, that the board of supervisors of a county must provide by local law for the continuation of the plan and for the administration thereof pursuant to this article on or before July thirty-first, nineteen hundred fifty-six, or such plan shall be deemed abandoned as of October thirty-first, nineteen hundred fifty-six, subject to the provisions of subdivision two of section seventy-five of this chapter. All such plans not so abandoned shall be operated pursuant to the provisions of this article and local laws adopted pursuant thereto.

2. The board of supervisors of a county may by local law establish the plan of self-insurance provided for in this article.

3. A local law establishing a plan pursuant to this article may, notwithstanding the provisions of paragraph f of subdivision one of section eleven of the municipal home rule law, provide that the provisions of subdivision three of section sixty-three of this article, as amended from time to time, shall not be applicable to the plan in that county and, if such plan is established, the term "liability", as used in

this article, shall not include any compensation, assessments or other obligations under the volunteer firefighters' benefit law and the provisions of subdivision three of section sixty-three of this article, as amended from time to time, shall not be applicable in relation to such plan.

4. If a plan has been continued pursuant to this article, the board of supervisors may, notwithstanding the provisions of paragraph f of subdivision one of section eleven of the municipal home rule law, adopt a local law on or before the first day of August in any year to provide that the provisions of subdivision three of section sixty-three of this article, as amended from time to time, shall not be applicable to the plan in that county after the thirty-first day of December in such year, except as to liabilities existing on such latter date, and, if such a local law is adopted, the term "liability", as used in this article, shall not include any compensation, assessments or other obligations under the volunteer firefighters' benefit law, and the provisions of subdivision three of section sixty-three of this article shall not be applicable in relation to such plan, after the thirty-first day of December in such year, except as to, and in connection with, liabilities existing on such thirty-first day of December.

5. If a local law has been adopted pursuant to either subdivision three or subdivision four of this section, the board of supervisors may, notwithstanding the provisions of paragraph f of subdivision one of section eleven of the municipal home rule law, adopt a local law on or before the first day of August in any year to provide that the provisions of subdivision three of section sixty-three of this chapter, as amended from time to time, shall be applicable to the plan in that county after the thirty-first day of December in such year, and, if such a local law is adopted, the term "liability", as used in this article shall include any compensation, assessments, or other obligations under the volunteer firefighters' benefit law, the volunteer ambulance workers' benefit law, and the provisions of subdivision three of section sixty-three of this chapter shall be applicable in relation to such plan, after the thirty-first day of December in such year, and, further, the provisions of section sixty-seven of this chapter shall be applicable on and after the first day of August in such year in relation to such plan.

6. Notwithstanding the provisions of paragraph f of subdivision one of section eleven of the municipal home rule law, the board of supervisors of a county may by local law amend the definition of "liability", as defined in subdivision seven of section sixty of this article, to exclude any liability under paragraph m of subdivision one of section five of the volunteer firefighters' benefit law.

HISTORY:

Add, L 1955, ch 849, § 1, eff April 29, 1955; amd, L 1958, ch 976, § 6; L 1961, ch 965, § 1; L 1965, ch 755, § 24, eff July 1, 1965; L 1988, ch 24, § 24, eff Jan 1, 1989; L 2018, ch 476, § 15, effective December 28, 2018.

Prior Law: Former § 61, add, L 1935, ch 255; renumbered § 76, L 1937, ch 574.

Prior § 61, add, L 1913, ch 816; repealed, L 1915, ch 674 .

Amendment Notes The 2018 amendment by ch 476, § 15, substituted "section sixty-three of this article" for "section sixty-three of this chapter" twice in 3 and 4; substituted "firefighters'" for "firemen's" in 3, 4 and 6; and substituted "section sixty of this article" for "section sixty of this chapter" in 6.

Notes to Decisions

A county which now has a county mutual self-insurance plan may, if it does not abandon the plan, purchase excess and catastrophe insurance on or after January 1, 1957. 1955 Ops St Compt File #7406.

If a board of supervisors does not take action by local law to continue its present county mutual self-insurance plan, it will be abandoned as of October 31, 1956. 1956 Ops St Compt File #7980.

A maximum of $50,000 in a county local law creating and establishing a contributed reserve for a county self-insurance plan is separate and distinct from the amounts estimated to be assessed for administration expense and payment of liabilities. 1956 Ops St Compt File #8169.

Agency Opinions

A municipality may withdraw from a county self-insurance plan by complying with the provisions of Workmen's Compensation Law §§ 60–75. 1957 NY Ops Atty Gen Dec 17 (informal).

A county that administers a county self-insurance plan under Article 5 of the Workers' Compensation Law may not decline to cover an individual volunteer firefighter who has been duly approved for membership in a fire department. N.Y. Op. Att'y Gen. No. 84-62.

A county which has not made a timely filing of estimates of the amounts necessary for the ensuing calender year may not establish a county self-insurance plan for such ensuing calender year. 1979 Op St Compt File #731.

A county by local law may exclude all volunteer firemen from coverage in a county self-insurance plan, but may not administratively exclude, on physical grounds, an individual volunteer fireman who is duly approved for membership in a fire company. 1979 Op St Compt File #889.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 60, 63, 73, 75.

Liability of county § 63.

Annual estimate; payments by participants § 67.

Workmen's compensation reserve fund, CLS Gen Mun § 6-j.

Periods of probable usefulness, CLS Loc Fin § 11.00.

Restrictions on the adoption of local laws, CLS Mun H R § 11.

Liability for and payment of benefits to volunteer firemen, CLS Vol Fire Ben § 30.

Liability for and payment of benefits to volunteer ambulance workers, CLS Vol Amb Work Ben § 30.

Codes, Rules and Regulations:

Application of Workers' Compensation Board rules to the Volunteer Firefighters' Benefit Law. 12 NYCRR §§ 400.1 et seq. (CLS Work Comp Bd Rules §§ 400.1 et seq.).

Jurisprudences:

111 NY Jur 2d Workers' Compensation §§ 988, 1040, 1044.

§ 62. Participants

Each plan shall have at least two municipal corporations as participants. The county shall be one of the participants in a plan. Any contract agency or contract association with the approval of the county government and any other public corporation may by resolution of its governing body elect to become a participant in a plan established in the county, or, in the case of a public corporation or contract agency or

contract association located in more than one county, in a plan established in one of such counties; provided, however, that the rules and regulations adopted pursuant to section sixty-five of this chapter may exclude from participation in a plan any type of public corporation or contract agency or contract association other than the county and cities, towns and villages.

HISTORY:

Add, L 1955, ch 849, § 1; amd, L 1969, ch 548, § 1, eff May 10, 1969; L 1985, ch 533, § 2, eff Oct 1, 1985.

Prior Law: Former § 62, add, L 1935, ch 255; renumbered § 77, L 1937, ch 574.

Prior § 62, add, L 1913, ch 816; repealed, L 1921, ch 60 .

Notes to Decisions

Town special improvement districts may not participate in a county mutual self-insurance plan. Their employees are covered if the town is a participant. 1956 Ops St Compt File #7980.

A village which has joined a county workmen's compensation self-insurance plan may withdraw from the plan, but a subordinate unit of the village may not so withdraw if the village continues its participation. 1963 Ops St Compt #351.

A union free school district may become a self-insurer under the Workmen's Compensation Law, and establish a reserve fund for such purpose. It may not self-insure for fire loss. 1973 Ops St Compt File #987.

A Board of Cooperative Educational Services may not establish and administer any type of insurance program for the benefit of itself and/or component school districts. 1973 Ops St Compt File #987.

Village housing authority is eligible to participate in workers' compensation plan of county in which it located, unless excluded by county's rules and regulations; to extent costs are apportioned to plan participants on basis of full valuation of taxable real property, authority's full valuation will be same as that of village, and any experience component should be calculated based on past liability in accordance with local law providing for experience rating, or county's rules and regulations. 1997 Op St Compt No. 97-1.

Agency Opinions

A county that administers a county self-insurance plan under Article 5 of the Workers' Compensation Law may not decline to cover an individual volunteer firefighter who has been duly approved for membership in a fire department. N.Y. Op. Att'y Gen. No. 84-62.

A county which has not made a timely filing of estimates of the amounts necessary for the ensuing calender year may not establish a county self-insurance plan for such ensuing calender year. 1979 Op St Compt File #731.

When a fire district is located in two counties, only one of which has a county self-insurance plan, the fire district itself may participate in the plan on behalf of all its firemen in both counties. 1979 Op St Compt File #732.

A joint garbage and refuse district created pursuant to L 1934, ch 787 may participate in a county self-insurance plan. 1984 Op St Compt No. 84-14, 1984 N.Y. Comp. LEXIS 126.

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

111 NY Jur 2d Workers' Compensation § 1041.

§ 63. Liability of county

1. In the case of plans established pursuant to former subdivision three-a of section fifty of this chapter and continued pursuant to the provisions of section sixty-one of this chapter, payments with respect to (a) the liability of participants arising on and after January first, nineteen hundred fifty-seven, and (b) the joint liability of the participants imposed pursuant to such former subdivision three-a of section fifty of this chapter, shall be made by the county.

2. When a plan is established pursuant to this article, payments with respect to the liability of participants arising on and after the effective date of the plan shall be made by the county.

3. Where a town participates in a plan, in addition to payments with respect to the liability of the town, the county shall make payments with respect to that portion of the liability of all villages, fire districts, fire protection districts and fire alarm districts within such town and all territory within such town outside cities, villages, fire districts, fire protection districts and fire alarm districts arising out of the death of or injury to volunteer firefighters; provided, however, that the county shall not be obligated to make such payments in the case of a village, fire district, fire protection district or fire alarm district, located in more than one town unless the town board of each town containing part of the village or district by resolution elects to become a participant in the plan. Participation in a plan by a village or fire district shall make the county liable for such payments where the town or towns in which such village or fire district is located are not participants in the plan. The term "injury", as used in this subdivision, means "injury" as defined in subdivision four of section three of the volunteer firefighters' benefit law, as amended from time to time. If a county has elected to establish a self-insurance plan for itself, it may elect to extend coverage under such plan to voluntary ambulance companies upon the same terms and conditions as such coverage applies to volunteer firefighters.

4. The expenditure of county funds for payments authorized or required by this article is hereby declared to be for a county purpose.

5. For the purposes of this article, officers and employees of a soil conservation district located wholly within a county shall be deemed employees of the county in which such district is located.

6. Notwithstanding the foregoing provisions of this section, each participant alone shall be obligated to pay the increased liability provided for by section fourteen-a of this chapter.

7. Notwithstanding any other provision of this chapter, each participant in a plan continued or established pursuant to this article shall be deemed to have duly taken such action, as would have otherwise been required by this chapter, to elect to bring all of its employees, or officers, elected or appointed or otherwise, not enumerated in section three, subdivision one, groups one to seventeen inclusive, of this chapter, within the coverage of this chapter hereafter, notwithstanding the definitions of the terms "employment", "employer", or "employee" in subdivisions three, four and five of section two of this chapter, and each participant which has any group, as defined by order of the New York state civil defense commission, of civil defense volunteers not

enumerated in section three, subdivision one, group seventeen, who are personnel of a volunteer agency of the local office of such participant, as defined in the state defense emergency act, shall be deemed to have duly taken such separate and distinct action of its legislative or other governmental body, as would otherwise have been required by this chapter, to bring such group of civil defense volunteers within the coverage of this chapter hereafter as to their authorized civil defense services to the extent not covered under article ten of this chapter, and hereafter all such officers and employees and such civil defense volunteers of a participant in a plan continued or established pursuant to this article shall be within the coverage of this chapter to the same extent as if all appropriate action had been taken pursuant to section three, subdivision one, group nineteen, or any other applicable provision, of this chapter; provided, however, in relation to such officers and employees of the participant, or any class or group of such officers and employees of the participant or for such civil defense volunteers who are personnel of the participant, a participant may (1) elect not to provide such coverage, (2) elect to provide such coverage in a manner provided in section fifty of this chapter other than under article five thereof, (3) elect to revoke an election made under either "(1)" or "(2)" above and adopt the other of such elections, or (4) elect to revoke an election made under either "(1)" "(2)" or "(3)" above and have such coverage provided under the plan as if no election had been made hereunder. Any such election shall become effective when adopted if it is filed with the chairman of the workmen's compensation board and with the committee or administrator of the plan within ten days after adoption, otherwise it shall become effective when filed with both the chairman of the workmen's compensation board and the committee or administrator of the plan. The chairman of the workmen's compensation board may prescribe the form or forms of any such election. Notwithstanding the provisions of section three, subdivision one, group nineteen, of this chapter, if the county elects to exclude one or more groups of such civil defense volunteers of the county's office of civil defense, then the plan shall not be liable for coverage under this chapter for such civil defense volunteers so excluded, but this shall not preclude a town or a village in such county or a city participating in the consolidated county office of civil defense of such county from bringing the members of such group or groups of duly enrolled civil defense volunteers who are residents of and are enrolled from such town, village or city within the coverage of this chapter during any period when the county has so excluded, but in any such case the compensation shall be secured in a manner provided in section fifty of this chapter other than under article five thereof. This subdivision shall not affect the coverage of officers and employees and civil defense volunteers for whom mandatory coverage is provided under this chapter.

8. Except as provided in subdivision three or nine of this section in relation to volunteer firefighters and volunteer ambulance workers, participation in a plan by a town shall not make the county liable for payments of compensation under this chapter in relation to the officers and employees of a fire or ambulance district located in whole or in part in such town. Except as provided in subdivision three of this section in relation to volunteer firefighters or subdivision nine of this section in relation to volunteer ambulance workers, the county shall be liable for payments of compensation under this chapter in relation to the officers and employees of a fire or ambulance district only in cases where the fire or ambulance district is a participant in the plan.

9. Where a town participates in a plan, in addition to payments with respect to the liability of the town, the county shall make payments with respect to that portion of the liability of all villages, ambulance districts, within such town and all territory within such town outside cities, villages, ambulance districts, arising out of the death of or injury to volunteer ambulance workers; provided, however, that the county shall not be obligated to make such payments in the case of a village, ambulance district, located in more than one town unless the town board of each town containing part of the village or district by resolution elects to become a participant in the plan. Participation in a plan by a village or ambulance district shall make the county liable for such payments where the town or towns in which such village or ambulance district is located are not participants in the plan. The term "injury", as used in this subdivision, means "injury" as defined in subdivision four of section three of the volunteer ambulance workers' benefit law, as amended from time to time.

HISTORY:

Add, L 1955, ch 849, § 1, eff April 29, 1955; amd, L 1957, ch 832, § 1, eff April 22, 1957; L 1957, ch 986, eff April 26, 1957; L 1960, ch 181, § 3, eff March 8, 1960; L 1988, ch 24, § 25, eff Jan 1, 1989; L 1988, ch 481, § 14, eff Jan 1, 1989.

Prior Law: Former § 62, add, L 1935, ch 255; renumbered § 77, L 1937, ch 574.

Prior § 62, add, L 1913, ch 816; repealed, L 1921, ch 60 .

Notes to Decisions

Analysis

1. In general
2. Covered individuals
3. Exclusion
4. Injury
5. Employees

1. In general

Where the fire districts alleged that they were fraudulently induced by the County of Ulster into joining the workers' compensation self-insurance plan that the County had established, the action was time barred by the six-year limitations period under N.Y. C.P.L.R. 213(8), as the fire districts joined the plan between 1979 and 1985, and the earliest action was filed in 1997; although the fire districts alleged that the fraud was not reasonably discoverable until the plan was audited in 1995 and 1996, that claim failed since the fire districts alleged that it should have

been evident to all involved that, pursuant to N.Y. Workers' Comp. Law § 63, they were already covered under the plan due to their towns' participation in it. County of Ulster v Highland Fire Dist., 29 A.D.3d 1112, 815 N.Y.S.2d 303, 2006 N.Y. App. Div. LEXIS 6122 (N.Y. App. Div. 3d Dep't), app. denied, 7 N.Y.3d 710, 822 N.Y.S.2d 758, 855 N.E.2d 1173, 2006 N.Y. LEXIS 2598 (N.Y. 2006).

Liability for payment of workmen's compensation to a volunteer fireman depends on liability of participating unit. 1956 Ops St Compt File #7980.

A maximum of $50,000 in a county local law creating and establishing a contributed reserve for a county self-insurance plan is separate and distinct from the amounts estimated to be assessed for administration expense and payment of liabilities. 1956 Ops St Compt File #8169.

A county may not compromise its claim for a town's equitable share of the outstanding liabilities of the county's self-insurance plan upon withdrawal by the town from the plan. 1968 Ops St Compt File #405.

Provisions of CLS Work Comp § 63(5) is evidence that specific statutory authorization is required for soil and water conservation district to join with other governmental entities in Municipal Cooperative Health Benefit Plan (Muni-Coop). Insurance Department, Opinions of General Counsel, Opinion Number 04-03-28.

2. Covered individuals

Where claimant was employed by the county as a switchboard operator, the county, as a self-insurer, could not contend that its plan did not cover claimant, where the county had never expressly limited coverage by affirmative action as authorized by statute. Gordon v County of Erie, 30 A.D.2d 1022, 294 N.Y.S.2d 309, 1968 N.Y. App. Div. LEXIS 3050 (N.Y. App. Div. 3d Dep't 1968).

Employees of a public library of a village are considered village employees for purposes of Workmen's Compensation coverage under a county self-insurance plan. 1955 Ops St Compt File #7337.

Where a town is a participant in a county mutual self-insurance plan, its participation covers all volunteer firemen in the town including members of a village or fire district fire department. 1963 Ops St Compt #755.

A county or other municipality may not elect to provide workers' compensation coverage under a county self-insurance plan to persons sentenced to perform public service under an alternative sentencing program. 1984 Op St Comp File #84-29.

3. Exclusion

The Board of Supervisors of a county which operates a county mutual self-insurance plan for workmen's compensation may not amend the plan so as to exclude from coverage appointed public officials and those public employees not in classified civil service after they attain age 65. 1964 Ops St Compt #233.

4. Injury

Finding of Workmen's Compensation Board that claimant who worked in air-conditioned office part of the time and part of the time in a room which was a few degrees colder sustained an accidental injury by being subjected to an inconsistent temperature environment was not supported by substantial evidence. Floom v Harfred Operating Co., 52 A.D.2d 703, 382 N.Y.S.2d 579, 1976 N.Y. App. Div. LEXIS 12382 (N.Y. App. Div. 3d Dep't 1976).

Evidence that a police officer continued to work on a full-time basis from 1989 through 1997, and continued to qualify for use of a handgun even though the officer claimed to have lost strength in the officer's grip, supported the state comptroller's denial of accidental and performance of duty disability retirement benefits. Maida v McCall, 305 A.D.2d 929, 760 N.Y.S.2d 582, 2003 N.Y. App. Div. LEXIS 5812 (N.Y. App. Div. 3d Dep't), app. denied, 100 N.Y.2d 511, 766 N.Y.S.2d 165, 798 N.E.2d 349, 2003 N.Y. LEXIS 2294 (N.Y. 2003).

5. Employees

Although the future liability accrued by a self-insurance plan was not a debt within the meaning of N.Y. Const. art. VIII, § 2, a county was not entitled to summary judgment as it failed to establish that certain employees were volunteer ambulance workers, within the scope of N.Y. Workers' Comp. Law § 63(3) and N.Y. Vol. Ambul. Workers' Ben. Law §§ 3, 5, and 30. Village of Ilion v County of Herkimer, 63 A.D.3d 1546, 879 N.Y.S.2d 875, 2009 N.Y. App. Div. LEXIS 4445 (N.Y. App. Div. 4th Dep't 2009).

Agency Opinions

Analysis

1. In general
2. Covered individuals
3. Exclusion

1. In general

A town which is a participant in a county mutual self-insurance plan may not charge back to a fire district within the town that portion of the town's annual contribution to the plan which can be directly attributed to losses incurred by the fire district. 1981 Op St Compt File #771.

2. Covered individuals

Volunteer firemen of the Village of Saranac Lake, a participating Village in the Franklin County Self Insurance Plan, are covered by that plan while performing their duties in that portion of the Town of Harrietstown outside the Village of Saranac Lake when the Town has contracted with the Village for the Village to provide fire protection for the Town. 1973 NY Ops Atty Gen June 21 (informal).

A county that administers a county self-insurance plan under Article 5 of the Workers' Compensation Law may not decline to cover an individual volunteer firefighter who has been duly approved for membership in a fire department. N.Y. Op. Att'y Gen. No. 84-62.

When a fire district is located in two counties, only one of which has a county self-insurance plan, the fire district itself may participate in the plan on behalf of all its firemen in both counties. 1979 Op St Compt File #732.

Where volunteer firemen are covered by a county self-insurance plan, they are entitled to benefits if injured while responding to a call for assistance from outside the fire district notwithstanding that the request for assistance is not a mutual aid call. 1981 Op St Compt File #81.77.

3. Exclusion

A county by local law may exclude all volunteer firemen from coverage in a county self-insurance plan, but may not administratively exclude, on physical grounds, an individual volunteer fireman who is duly approved for membership in a fire company. 1979 Op St Compt File #889.

Compensation coverage of volunteer firemen located with towns which have withdrawn from county self-insurance plan is governed by Volunteer Firemen's Benefit Law § 30 if the villages or fire districts within the towns do not elect to become participants in the plan. 1968 NY Ops Atty Gen March 14.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 61, 67;CLS Amb Work Ben § 30; CLS Vol Fire Ben § 30.

Definitions; generally, CLS Vol Ambul Work § 3.

State defense emergency act, CLS Unconsol ch 131.

Codes, Rules and Regulations:

Application of Workers' Compensation Board rules to the Volunteer Firefighters' Benefit Law. 12 NYCRR § 400.1 et seq. (CLS Work Comp Bd Rules § 400.1 et seq.).

Federal Aspects:

Federal workers' compensation program, generally. 5 USCS §§ 8101 et seq.

Jurisprudences:

111 NY Jur 2d Workers' Compensation §§ 988, 1041–1044, 1047.

Annotations:

Employee's injuries sustained in use of employer's restroom as covered by workers' compensation. 80 ALR5th 417.

§ 64. Administration of plan

1. The board of supervisors shall by local law provide for the administration of the plan, such plan

to be administered by either a committee or an administrator. Any county officer or employee or other person may be appointed to such committee or act as administrator, or be appointed or employed by such committee or administrator. The committee or administrator may employ, subject to the approval of the board of supervisors, such persons as may be deemed necessary for the operation of the plan, and may contract for necessary actuarial, or other expert or professional services. Members of the committee or the administrator, and all other officers and employees of the plan, shall receive such salary or other remuneration, payable from moneys of the plan, as shall be fixed by the board of supervisors. Notwithstanding the provisions of any other law, a county officer or employee, other than a member of the board of supervisors, in addition to his salary as such officer or employee, may be compensated as a member of such committee, as such administrator, or as an officer or employee of the plan.

2. The county treasurer shall be the custodian of all moneys of the plan. Such moneys shall be accounted for as a separate fund to be known as the county self-insurance fund, and shall be deposited in a bank or trust company designated in the manner provided by law as a depositary of moneys of the county. Disbursements of such moneys, except for payment of fixed salaries, shall be made only upon order of the committee or administrator, as the case may be. Compensation may be paid upon such order to persons entitled thereto in the manner provided in section twenty-five of this chapter. The amount of compensation payable prior to an award pursuant to such order shall constitute a settled claim within the meaning of the local finance law. Books, records and papers of the plan shall be subject to examination and audit as provided in section two hundred ten of the county law.

3. The county attorney shall be legal advisor to the plan and it shall be his duty to represent the plan in all controversies. In addition, the county attorney may engage subject to the approval of the board of supervisors, counsel in respect to any particular subject matter, proceeding or litigation, in which event the expense of engaging such special counsel shall be charged as an administrative expense of the plan.

HISTORY:

Add, L 1955, ch 849, § 1, eff April 29, 1955.

Prior Law: Former § 64, add, L 1935, ch 255; renumbered § 79, L 1937, ch 574.

Prior § 64, add, L 1913, ch 816; omitted, L 1922, ch 615. Substance transferred to § 116 .

Notes to Decisions

A maximum of $50,000 in a county local law creating and establishing a contributed reserve for a county self-insurance plan is separate and distinct from the amounts estimated to be assessed for administration expense and payment of liabilities. 1956 Ops St Compt File #8169.

The clerk of the county board of supervisors may be appointed as and compensated for the position of secretary to the administrator or committee of the county mutual self-insurance plan. 1956 Ops St Compt File #8178.

A county self-insurance plan may not pay a county coroner for rendering: (1) medical services to a claimant; (2) medical services for which a fee has been directed to be paid by the workmen's compensation board; (3) funeral services which are fixed and directed to be paid by the workmen's compensation board. 1957 Ops St Compt File #1197.

The same person may not simultaneously serve as administrator of a county self-insurance plan and county personnel officer, nor as administrator and county auditor if the county auditor is authorized to perform post-audits of the county self-insurance plan books and records. The same individual may not serve as county auditor and county personnel officer. The same individual may not serve as county auditor and county personnel officer. 1974 Ops St Compt File #1145.

Contracts with claims administrators for workers' compensation and dental insurance benefits and with health insurance benefits consultant, in connection with provision of these benefits on self-insured basis, may not bind successor governing boards. 1986 Op State Compt No. 86-18.

Agency Opinions

The cost of pre-employment physical examinations for covered employees may be paid from the county self-insurance fund only if the county board of supervisors, by local law, has adopted fair and equitable rules and regulations governing the administration of such physicals. 1979 Op St Compt File #790.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 60, 75.

Examination and post audit, CLS County § 210.

Jurisprudences:

111 NY Jur 2d Workers' Compensation §§ 1046, 1047.

§ 65. Rules and regulations

1. The board of supervisors shall by local law adopt rules and regulations not inconsistent with law for the fair and equitable administration and operation of the plan. Such rules and regulations may provide standards and conditions with respect, but not limited, to (a) entry and withdrawal of participants, (b) medical examinations, (c) safety programs, (d) reports by participants and (e) cooperation by participants, provided, however, that such rules and regulations, or failure to adopt the same, shall not prevent withdrawal of a participant from the plan upon the condition that such participant shall pay, in a lump sum or in installments, an equitable share of the outstanding liabilities of the plan as of the date of withdrawal. Any payments required upon entry to or withdrawal from a plan may be financed, in whole or in part, by any municipal corporation or district corporation by the issuance of bonds or capital notes pursuant to the local finance law.

2. Such rules and regulations may also provide that for any violation thereof or of this chapter, a participant may be expelled from the plan or be charged with a penalty. Any such penalty shall be collected at the same time and in the same manner as other charges against participants as provided in section sixty-seven of this chapter, or in such other manner as may be provided in such rules and regulations. A participant liable for the payment of a penalty may by action of its governing body elect to recover the amount thereof from the public officer or

employee whose act or failure to act resulted in the imposition of such penalty. In such event, the amount of the penalty may be withheld from the salary or other remuneration payable to such officer or employee.

HISTORY:

Add, L 1955, ch 849, § 1, eff April 29, 1955.

Prior Law: Former § 65, add, L 1936, ch 887, § 2; amd, L 1938, ch 657, § 11; repealed, L 1947, ch 431, § 14, eff July 1, 1947.

Prior § 65, add, L 1935, ch 255; renumbered § 80, L 1937, ch 574.

Earlier § 65, add, L 1913, ch 816; repealed, L 1921, ch 60 .

Notes to Decisions

Under a county self-insurance plan, pursuant to provisions of the Workmen's Compensation Law, a county may, by local law, establish rules and regulations governing admission to and withdrawal from such plan by member municipalities. For the purpose of apportioning the liability of a withdrawing member, only open and current compensation cases, and not those which may be reopened in the future, are includable among "outstanding obligations". 1964 Ops St Compt File #877.

A county may not compromise its claim for a town's equitable share of the outstanding liabilities of the county's self-insurance plan upon withdrawal by the town from the plan. 1968 Ops St Compt File #405.

Pursuant to its power to apportion the cost of a workmen's compensation self-insurance plan to certain classes of municipalities on the basis of a percentage of full valuation rather than at full valuation, a county may create one or more classes of towns, which include participating villages, and assess those towns for the cost of such program on the basis of a percentage of full valuation. 1976 Ops St Compt File #261.

In apportioning annual payments by municipal participants, a county self-insurance plan may establish one or more classes of municipalities that are assessed on the basis of a percentage of full valuation rather than full valuation. These classes may be based on various relevant criteria including loss experience and gross payroll. 1983 Op St Comp File #83-109.

Agency Opinions

Where a town has withdrawn from a county workers' compensation plan, the county may not include the town's equitable share of the outstanding liabilities of the plan in the next succeeding tax levy against property taxable by the town. 1979 Op St Compt File #595.

The cost of pre-employment physical examinations for covered employees may be paid from the county self-insurance fund only if the county board of supervisors, by local law, has adopted fair and equitable rules and regulations governing the administration of such physicals. 1979 Op St Compt File #790.

A county by local law may exclude all volunteer firemen from coverage in a county self-insurance plan, but may not administratively exclude, on physical grounds, an individual volunteer fireman who is duly appoved for membership in a fire company. 1979 Op St Compt File #889.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 62, 66, 71.

Jurisprudences:

111 NY Jur 2d Workers' Compensation §§ 1041, 1045, 1048.

§ 66. Apportionment of costs

1. The total of the several amounts set forth in the annual estimate prepared pursuant to section sixty-seven of this chapter shall be apportioned to each participant in the proportion that the full valuation of its taxable real property bears to the aggregate full valuation of all participants; provided, however, that the rules and regulations adopted pursuant to section sixty-five of this chapter may provide that apportionments to a class of participants shall be based on a percentage of full valuation rather than on entire full valuation.

2. The full valuation of taxable real property shall be determined by the use of state equalization rates established pursuant to article two-a of the tax law.* The full valuation of a public benefit corporation shall be the same as the full valuation of taxable real property of the tax district or districts within which it operates.

HISTORY:

Add, L 1955, ch 849, § 1, eff April 29, 1955.

Prior Law: Former § 66, add, L 1936, ch 887, § 2; amd, L 1940, ch 548, § 1, L 1944, ch 460, L 1946, ch 607; repealed, L 1947, ch 431, § 14, eff July 1, 1947.

Prior § 66, add, L 1935, ch 255; renumbered § 81, L 1937, ch 574.

Earlier § 66, add, L 1913, ch 816; repealed, L 1921, ch 60 .

Notes to Decisions

The town's share of costs in a county self-insurance plan is based on the full valuation of the taxable property in the town including that contained within a village in the town. 1967 Ops St Compt File #580.

A county may not compromise its claim for a town's equitable share of the outstanding liabilities of the county's self-insurance plan upon withdrawal by the town from the plan. 1968 Ops St Compt File #405.

Pursuant to its power to apportion the cost of a workmen's compensation self-insurance plan to certain classes of municipalities on the basis of a percentage of full valuation rather than at full valuation, a county may create one or more classes of towns, which include participating villages, and assess those towns for the cost of such program on the basis of a percentage of full valuation. 1976 Ops St Compt File #261.

Village housing authority is eligible to participate in workers' compensation plan of county in which it located, unless excluded by county's rules and regulations; to extent costs are apportioned to plan participants on basis of full valuation of taxable real property, authority's full valuation will be same as that of village, and any experience component should be calculated based on past liability in accordance with local law providing for experience rating, or county's rules and regulations. 1997 Op St Compt No. 97-1.

In apportioning annual payments by municipal participants, a county self-insurance plan may establish one or more classes of municipalities that are assessed on the basis of a percentage of full valuation rather than full valuation. These classes may be based on various relevant criteria including loss experience and gross payroll. 1983 Op St Comp File #83-109.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 67, 75.

Jurisprudences:

111 NY Jur 2d Workers' Compensation § 1048.

§ 67. Annual estimate; payments by participants

1. The committee or administrator shall annually, not later than the fifteenth day of August, file

*Art 2-A of the Tax Law was repealed by L 1958, ch 959, and substance transferred to the Real Property Tax Law. See Distribution Table in front of volume 33, CLS Tax.

with the board of supervisors an estimate of the several amounts necessary for the ensuing calendar year (a) to meet the payments with respect to the liability of participants required to be made by the county pursuant to section sixty-three of this chapter, (b) to pay the administrative expenses of the plan, (c) to repay any amounts advanced to the plan and (d) to provide for contributions to the reserve, if any. The committee or administrator shall then determine the share of such amounts chargeable to each participant in the manner prescribed by section sixty-six of this chapter. A list of the amount of the share payable by each participant shall be furnished to the county treasurer. The committee or administrator shall notify each participant in writing not later than September first of the amount of such share. Each participant shall pay the county treasurer the amount so specified in such notice not later than thirty days after the commencement of such participant's next fiscal year. All amounts so received shall be credited to the county self-insurance fund. If any such amount shall not be paid within the time limit, the same shall be recovered by an action brought by the county or such amount shall be certified by the county treasurer to the board of supervisors for inclusion in the next succeeding tax levy, if any, against property taxable by the participant responsible therefor.

2. Notwithstanding the foregoing provisions of this section, the board of supervisors may by local law provide, in lieu of collecting the amounts apportioned to participants, or a class thereof, as provided in subdivision one of this section, that each such participant's share of such amounts shall be collected by inclusion in the next succeeding tax levy against property taxable by the participant responsible therefor. When collected such amounts shall be paid over to the county treasurer and by him credited to the county self-insurance fund.

HISTORY:

Add, L 1955, ch 849, § 1, eff April 29, 1955.

Prior Law: Former § 67, add, L 1936, ch 887, § 2, amd, L 1940, ch 548; repealed, L 1947, ch 431, § 14, eff July 1, 1947.

Prior § 67, add, L 1935, ch 255; renumbered § 82, L 1937, ch 574.

Earlier § 67, add, L 1913, ch 816; omitted, L 1922, ch 615. Substance transferred to § 117 .

Notes to Decisions

The committee or administrator of a county self-insurance plan, subject to the approval of the county board of supervisors, may purchase employers' liability insurance coverage (so-called "Type B" coverage in a workers' compensation insurance policy) out of moneys in the plan's fund. Opns St Comp, 1983, No. 83-109 is superseded to the extent it is inconsistent herewith. 1985 Op St Compt No. 85-17.

A maximum of $50,000 in a county local law creating and establishing a contributed reserve for a county self-insurance plan is separate and distinct from the amounts estimated to be assessed for administration expense and payment of liabilities. 1956 Ops St Compt File #8169.

A county may not compromise its claim for a town's equitable share of the outstanding liabilities of the county's self-insurance plan upon withdrawal by the town from the plan. 1968 Ops St Compt File #405.

Claims based on employers' liability to a third-party defendant (so-called "Type B" coverage in a workers' compensation insurance policy) may not be paid from moneys in a county self-insurance fund, but participating municipalities may enter into a separate municipal cooperation agreement under General Municipal Law, § 119-o to purchase such coverage. 1983 Op St Comp File #83-109.

Agency Opinions

Where a town has withdrawn from a county workers' compensation plan, the county may not include the town's equitable share of the outstanding liabilities of the plan in the next succeeding tax levy against property taxable by the town. 1979 Op St Compt File #595.

A county which has not made a timely filing of estimates of the amounts necessary for the ensuing calender year may not establish a county self-insurance plan for such ensuing calender year. 1979 Op St Compt File #731.

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

This section referred to in §§ 61, 65, 66, 75.

Jurisprudences:

111 NY Jur 2d Workers' Compensation § 1048.

§ 72. Annual report

The county treasurer shall annually make a financial report of the plan to the state comptroller as of the close of the calendar year. Such reports shall be in such form and contain such information as may be prescribed by the state comptroller. All reports shall be duly verified and shall be filed with the state comptroller within sixty days after the close of the calendar year. A copy of such report shall within the same time be transmitted to the clerk of the board of supervisors and to each participant in the plan.

HISTORY:

Add, L 1955, ch 849, § 1, eff April 29, 1955.

Prior Law: Former § 72, add, L 1936, ch 887, § 2; repealed, L 1947, ch 431, § 14, eff July 1, 1947.

Prior § 72, add, L 1935, ch 255; renumbered § 87, L 1937, ch 574.

Earlier § 72, add, L 1913, ch 816; omitted, L 1922, ch 615. Substance transferred to § 121 .

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

111 NY Jur 2d Workers' Compensation § 1048.

§ 73. Abandonment of plan

The board of supervisors of a county may by local law provide for the abandonment of a plan, effective as of the close of the calendar year then in progress. Such plan, however, shall continue to operate thereafter until all liabilities of the plan incurred prior to such effective date shall have been satisfied and all advances to the county self-insurance fund shall have been repaid. Such local law shall provide a method for the distribution of any assets of the plan remaining after all such liabilities have been satisfied. The provisions of this section shall not apply to any plan abandoned pursuant to section sixty-one of this chapter. At the discretion of the chair, the board of supervisors of a county may execute an assumption of workers' compensation liability insurance policy securing such further and future contingent liability as may arise from prior injuries to workers and be incurred by reason of any change in the

condition of such workers warranting the board making subsequent awards for payment of additional compensation. Such policy shall be in a form approved by the superintendent of financial services and shall be issued by the state fund or any insurance company licensed to issue this class of insurance in this state. In the event that such policy is issued by an insurance company other than the state fund, then said policy shall be deemed to be of the kind specified in paragraph fifteen of subsection (a) of section one thousand one hundred thirteen of the insurance law and covered by the workers' compensation security fund as created and governed by article six-A of this chapter. It shall only be issued for a single complete premium payment in advance by the county, city, village, town, school district, fire district or other political subdivision of state and in an amount deemed acceptable by the chair and the superintendent of financial services. In lieu of the applicable premium charge ordinarily required to be imposed by a carrier, said premium shall include a surcharge in an amount to be determined by the chair to satisfy all assessment liability due and owing to the board and/or the chair under this chapter. Said surcharge shall be payable to the board simultaneous to the execution of the assumption of workers' compensation liability insurance policy. However, the payment of said surcharge does not relieve the carrier from any other liability, including liability owed to the superintendent of financial services pursuant to article six-A of this chapter. When issued such policy shall be noncancellable without recourse for any cause during the continuance of the liability secured and so covered.

HISTORY:

Add, L 1955, ch 849, § 1, eff April 29, 1955; amd, L 2010, ch 56, § 6 (Part R), eff June 22, 2010; L 2011, ch 62, § 104 (Part A), eff Oct 3, 2011.

Prior Law: Former § 73, add, L 1935, ch 255; renumbered § 88, L 1937, ch 574.

Prior § 73, add, L 1913, ch 816; omitted, L 1922, ch 615, with substance transferred to § 122.

Amendment Notes: 2011. Chapter 62, § 104 (Part A) amended:

Section at figs 1–3 by substituting "superintendent of financial services" for "superintendent of insurance".

Notes to Decisions

A village which has joined a county workmen's compensation self-insurance plan may withdraw from the plan, but a subordinate unit of the village may not so withdraw if the village continues its participation. 1963 Ops St Compt 351.

Agency Opinions

A municipality may withdraw from a county self-insurance plan by complying with the provisions of Workmen's Compensation Law §§ 60–75. 1957 NY Ops Atty Gen Dec 17 (informal).

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

111 NY Jur 2d Workers' Compensation § 1049.

ARTICLE 6 State Insurance Fund

Section

100. Insurance against liability to volunteer firefighters and ambulance workers

HISTORY:

Formerly Art 5, renumbered Art 6, L 1935, ch 255, eff March 27, 1935.

§ 100. Insurance against liability to volunteer firefighters and ambulance workers

Insurance contracts issued by the state insurance fund to insure political subdivisions against liability in relation to volunteer firefighters or volunteer ambulance workers under the volunteer firefighters' benefit law or the volunteer ambulance workers' benefit law shall be designated "volunteer firefighters' benefit insurance" or "volunteer ambulance workers' benefit insurance". The provisions of this article which are not inconsistent with such laws shall be applicable in relation to such insurance. The following terms used in this article, unless inconsistent with the volunteer firefighters' benefit law or the volunteer ambulance workers' benefit law, are hereby enlarged as follows:

1. "Employer" includes any political subdivision liable for benefits pursuant to the volunteer firefighters' benefit law or the volunteer ambulance workers' benefit law.

2. "Employee" includes a volunteer firefighter or volunteer ambulance worker who has been or might be injured in line of duty or who dies or might die from such an injury. When a political subdivision or a district or area thereof is responsible for the payment of benefits pursuant to the volunteer firefighters' benefit law or the volunteer ambulance workers' benefit law, it shall be deemed the "employer" of such "employee."

3. "Workers' compensation" and "compensation" include the benefits in relation to volunteer firefighters or volunteer ambulance workers pursuant to the volunteer firefighters' benefit law or the volunteer ambulance workers' benefit law.

4. "This chapter" includes the volunteer firefighters' benefit law and the volunteer ambulance workers' benefit law, except when such a meaning is inconsistent with this article.

HISTORY:

Add, L 1956, ch 699, § 20, eff March 1, 1957; amd, L 1957, ch 751, § 5, eff April 19, 1957; L 1988, ch 24, § 26, eff Jan 1, 1989.

Prior Law: Former § 100, add, L 1913, ch 816, amd; L 1922, ch 615; renumbered § 94, L 1938, ch 585, § 11 amd, L 1957, ch 751, § 5, eff April 19, 1957 .

RESEARCH REFERENCES AND PRACTICE AIDS

Codes, Rules and Regulations:

Application of workers' compensation rules and regulations to Volunteer Firefighter's Benefit Law and Volunteer Ambulance Workers' Benefits Law. 12 NYCRR §§ 400.1 et seq. (CLS Work Comp Bd Rules §§ 400.1 et seq.).

Jurisprudences:

109 NY Jur 2d Workers' Compensation §§ 7–9, 220, 224.
111 NY Jur 2d Workers' Compensation §§ 1054, 1055.

Appleman on Insurance:

New Appleman New York Insurance Law § 25.02.

Annotations:

Award of workers' compensation benefits to professional athletes. 112 ALR5th 365.

ARTICLE 7 Miscellaneous Provisions

Section
114. Penalties for fraudulent practices
115. Limitation of time
118. Technical rules of evidence or procedure not required

HISTORY:
Formerly Art 6, renumbered Art 7, L 1935, ch 255, § 2, eff March 27, 1935.

§ 114. Penalties for fraudulent practices

1. Any person who, knowingly and with intent to defraud presents, causes to be presented, or prepares with knowledge or belief that it will be presented to or by an insurer or purported insurer, or any agent thereof, any written statement as part of, or in support of, an application for the issuance of or the rating of an insurance policy for compensation insurance, or a claim for payment or other benefit pursuant to a compensation policy which he or she knows to: (i) contain a false statement or representation concerning any fact material thereto; or (ii) omits any fact material thereto, shall be guilty of a class E felony. Upon conviction, the court in addition to any other authorized sentence, may order forfeiture of all rights to compensation or payments of any benefit, and may also require restitution of any amount received as a result of a violation of this subdivision.

2. An employer or carrier, or any employee, agent, or person acting on behalf of an employer or carrier, who knowingly makes a false statement or representation as to a material fact in the course of reporting, investigation of, or adjusting a claim for any benefit or payment under this chapter for the purpose of avoiding provision of such payment or benefit shall be guilty of a class E felony.

3. A person who knowingly makes a false statement or representation as to a material fact for the purpose of obtaining, maintaining or renewing insurance under this chapter, whether for himself or herself or for any other person or entity or for the purpose of evading the requirements of section fifty of this chapter shall be guilty of a class E felony. In addition to any other remedy, the carrier providing insurance shall be entitled to restitution of any amount obtained or withheld as a result of a violation of this subdivision.

4. Consistent with the provisions of the criminal procedure law, in any prosecution alleging a violation of subdivision one, two or three of this section, or sections fifty-two and one hundred thirty-one of this chapter, in which the act or acts alleged may also constitute a violation of the penal or other law, the prosecuting official may charge a person pursuant to the provisions of this section and in the same accusatory instrument with a violation of such other law.

5. A person (a) who is convicted of a second or subsequent offense under this section within ten years of the prior conviction, or (b) who violates any provision of this section concerning two or more claimants, shall be guilty of a class D felony.

HISTORY:
Add, L 1996, ch 635, § 15, eff Sept 10, 1996; amd, L 2007, ch 6, § 9, eff April 12, 2007 (see 2007 note below).

Prior Law: Former § 114, add, L 1913, ch 816; amd, L 1922, ch 615, L 1946, ch 268, eff March 30, 1946, L 1983, ch 415, § 18, eff July 1, 1983; repealed, L 1996, ch 635, § 15, eff Sept 10, 1996.

Editor's Notes: Laws 2007, ch 6, §§ 80 and 82, sub c, eff March 13, 2007, provide as follows:

§ 80. The superintendent of insurance, in consultation with the chair of the workers' compensation board, may promulgate regulations relating to the standards to be followed in the approval of forms and in the procedural requirements needed to implement the provisions of this act, and the chair of the workers' compensation board, in consultation with the superintendent of insurance, may promulgate regulations relating to the procedural requirements needed to implement the provisions of this act.

§ 82. This act shall take effect immediately; provided that:

c. sections seven, nine, thirteen, fifteen and seventy of this act shall take effect on the thirtieth day after this act shall have become a law, and shall apply to offenses committed on and after such date;.

Derivation Notes: Substance transferred from former § 115 and substance of former § 114 transferred to § 113.

Notes to Decisions

Analysis

1. In general
2. Disqualification from benefits
3. —Benefits attributable to false statement

1. In general

Information stating that defendant, an employer of labor, for purpose of obtaining benefits or payments under Work. Comp. Law for himself and employees, made false statements to insurer as to amount of his payroll, charges a misdemeanor as defined by § 114. People v Rudnick, 280 N.Y. 5, 19 N.E.2d 658, 280 N.Y. (N.Y.S.) 5, 1939 N.Y. LEXIS 1278 (N.Y. 1939).

2. Disqualification from benefits

Although this section provides that false representations to obtain benefits constitutes the maker thereof guilty of a misdemeanor, there is nothing which mandates that the Board must disqualify an otherwise eligible claimant from benefits lawfully due and owing. Gillyard v Spenyovics, 27 A.D.2d 765, 277 N.Y.S.2d 99, 1967 N.Y. App. Div. LEXIS 4880 (N.Y. App. Div. 3d Dep't 1967).

Claimant's intentional misrepresentation of her postemployment work activities did not render her ineligible to receive benefits under CLS Work Comp § 114. Naklicki v St. Charles Hosp., 224 A.D.2d 850, 638 N.Y.S.2d 200, 1996 N.Y. App. Div. LEXIS 1281 (N.Y. App. Div. 3d Dep't 1996).

Claimant, a volunteer firefighter, could not be disqualified from receiving benefits under N.Y. Vol. Fire. Ben. Law § 10 for allegedly making false representations as to her alleged physical limitations because the plain and unambiguous language of N.Y. Workers' Comp. Law § 114-a limited its application to claims for benefits under N.Y. Workers' Comp. Law § 15; thus, the civil penalties of § 114-a did not apply to wage replacement benefits, and only criminal penalties were provided for in N.Y. Workers' Comp. Law § 114 and N.Y. Vol. Fire. Ben. Law § 55. Matter of Giello v Providence Fire Dist., 57 A.D.3d 1294, 869 N.Y.S.2d 676, 2008 N.Y. App. Div. LEXIS 9819 (N.Y. App. Div. 3d Dep't 2008).

3. —Benefits attributable to false statement

Pursuant to N.Y. Workers' Comp. Law § 114-a, a claimant who makes a knowingly false statement is disqualified from receiving compensation that is directly attributable to such false statement or representation; retired employee who was awarded workers' compensation benefits for an on the job injury, and then retired

three years later, was found to have voluntarily left the labor market when the evidence showed he continued to do janitorial work at the same workplace after retirement. Singletary v Meloon Foundries, 302 A.D.2d 652, 754 N.Y.S.2d 737, 2003 N.Y. App. Div. LEXIS 848 (N.Y. App. Div. 3d Dep't 2003).

RESEARCH REFERENCES AND PRACTICE AIDS

Jurisprudences:

111 NY Jur 2d Workers' Compensation §§ 1156, 1157.

§ 115. Limitation of time

No limitation of time provided in this chapter shall run as against any person who is mentally incompetent or a minor so long as he has no committee or guardian.

HISTORY:

Add, L 1913, ch 816; amd, L 1922, ch 615, eff July 1, 1922.

Derivation Notes: Substance transferred from former § 116 and substance of former § 115 transferred to § 114.

Notes to Decisions

Analysis

1. In general
2. Applicability
3. No retroactive effect
4. Effect on statutory periods
5. Incompetency toll
6. —Not applicable
7. —Evidence
8. —Appointment of conservator
9. Minority toll
10. Question of fact
11. Evidence

1. In general

Where it appeared that claimant, then nineteen and one-half years of age, sustained a back injury in an industrial accident on May 31, 1945, in connection with which he filed a compensation claim on October 7, 1947, which claim was later dismissed and the case closed on July 1, 1948, for failure to prosecute, and that his application to reopen the proceedings filed approximately eight years after the accident would normally be barred under § 123, the application to reopen was nevertheless considered timely under § 115 since it was filed within 6 ½ years after he attained majority, and the liability could not be transferred to the Special Fund as the claimant would be prejudiced by a transfer of liability to the Fund in view of § 25-a precluding liability of the Fund for compensation retroactively beyond two years. Kulpa v Alco Products, Inc., 10 A.D.2d 747, 198 N.Y.S.2d 177, 1960 N.Y. App. Div. LEXIS 11190 (N.Y. App. Div. 3d Dep't), app. denied, 8 N.Y.2d 706, 1960 N.Y. LEXIS 1784 (N.Y. 1960).

This section is inconsistent with and controls over § 60 of the Civil Practice Act. Commissioners of State Ins. Fund v Thames Trading Co., 64 N.Y.S.2d 91, 1946 N.Y. Misc. LEXIS 2554 (N.Y. Sup. Ct. 1946).

2. Applicability

The suspension of the statute of limitations is not literally in favor of incompetency as a legal status but in favor of a "person who is mentally" incompetent, in the factual sense and for whom no committee has been appointed. Macraken v R. & B. Lunch Co., 281 A.D. 215, 119 N.Y.S.2d 827, 1953 N.Y. App. Div. LEXIS 3012 (N.Y. App. Div.), reh'g denied, 281 A.D. 912, 120 N.Y.S.2d 254, 1953 N.Y. App. Div. LEXIS 3756 (N.Y. App. Div. 1953).

Where possible prejudice to claimant exists, § 115 of the Workmen's Compensation Law is applicable to make § 25-a inoperative and liability is imposed on the employer rather than the Special Fund. Aufiero v Highwall Metal Spinning & Stamping Co., 31 A.D.2d 877, 297 N.Y.S.2d 648, 1969 N.Y. App. Div. LEXIS 4560 (N.Y. App. Div. 3d Dep't), app. denied, 24 N.Y.2d 738, 1969 N.Y. LEXIS 2285 (N.Y. 1969).

3. No retroactive effect

Claimant is not helped by fact that, after limitation had run against him, former § 116 was amended so as to bring all minors, whether dependents or not, under its protection. Nothing in statute indicates that it was intended to apply to cases where limitation had already run and courts may not give retroactive effect to its provisions unless such legislative intent is defined by express language or by necessary inference. Decker v Pouvailsmith Corp., 252 N.Y. 1, 168 N.E. 442, 252 N.Y. (N.Y.S.) 1, 1929 N.Y. LEXIS 519 (N.Y. 1929).

4. Effect on statutory periods

The tolling provisions of this section for infancy did not affect the running of the statutory periods in § 25-a. Longo v M & F Auto Wreckers, 4 A.D.2d 902, 166 N.Y.S.2d 900, 1957 N.Y. App. Div. LEXIS 4292 (N.Y. App. Div. 3d Dep't 1957).

5. Incompetency toll

Workers' Compensation Board correctly concluded that incompetency toll afforded by CLS Work Comp § 115 did not apply where claimant was competent to file compensation claim; § 115 toll is available only to individuals who are unable to protect their legal rights because of an over-all inability to function in society. Cerami v City of Rochester Sch. Dist., 82 N.Y.2d 809, 604 N.Y.S.2d 543, 624 N.E.2d 680, 1993 N.Y. LEXIS 3263 (N.Y. 1993).

Workers' Compensation Board is proper arbiter in determining whether incompetency toll under CLS Work Comp § 115 should apply since such determination necessarily involves consideration of all surrounding facts and circumstances relevant to claimant's ability to safeguard his or her legal rights; appropriate role for courts is simply to determine whether board's determination is supported by substantial evidence. Cerami v City of Rochester Sch. Dist., 82 N.Y.2d 809, 604 N.Y.S.2d 543, 624 N.E.2d 680, 1993 N.Y. LEXIS 3263 (N.Y. 1993).

Where an employee is mentally incompetent § 115 limits the application of the time limitation of § 25-a. Pytel v Carborondum Co., 273 A.D. 832, 76 N.Y.S.2d 26, 1948 N.Y. App. Div. LEXIS 4833 (N.Y. App. Div. 1948), limited, Longo v M & F Auto Wreckers, 4 A.D.2d 902, 166 N.Y.S.2d 900, 1957 N.Y. App. Div. LEXIS 4292 (N.Y. App. Div. 3d Dep't 1957).

Workers' Compensation Board properly concluded that claimant was not mentally incompetent so as to avail himself of toll under ClS Work Comp § 115 where medical testimony showed that his emotional injuries did not affect his over-all ability to function in society, conclusion which was corroborated by fact that he was employed on full-time basis during much of relevant period. Kaschak v IBM Corp., 256 A.D.2d 830, 681 N.Y.S.2d 673, 1998 N.Y. App. Div. LEXIS 13606 (N.Y. App. Div. 3d Dep't 1998).

6. —Not applicable

Workers' Compensation Board properly determined that claimant was not mentally incapacitated during relevant 2-year interval following his 1967 resignation from employment, and that toll under CLS Work Comp § 115 did not apply, where (1) psychiatrist testified that claimant was competent to file workers' compensation claim in 1967, and (2) during pertinent period, claimant applied for and obtained employment, consulted with numerous attorneys, and filed discrimination complaints with Human Rights Commission in effort to regain his former position. Cerami v City of Rochester Sch. Dist., 82 N.Y.2d 809, 604 N.Y.S.2d 543, 624 N.E.2d 680, 1993 N.Y. LEXIS 3263 (N.Y. 1993).

Workers' Compensation Board properly rejected claimant's contention that limitations period of CLS Work Comp § 28 should have been tolled by reason of her self-professed mental incompetency where reports of 2 psychiatrists opined that claimant was mentally competent during relevant time, she had filed grievance contesting her discharge immediately thereafter and actively pursued that avenue of redress to its conclusion, and she also filed claim with United States Equal Employment Opportunity Commission and obtained legal assistance in evaluating resulting settlement offer all within 2 years of incident. Jirak v Federal Express Corp., 253 A.D.2d 986, 677 N.Y.S.2d 647, 1998 N.Y. App. Div. LEXIS 9752 (N.Y. App. Div. 3d Dep't), app. denied, 92 N.Y.2d 818, 684 N.Y.S.2d 489, 707 N.E.2d 444, 1998 N.Y. LEXIS 4340 (N.Y. 1998).

7. —Evidence

Substantial evidence supported Workmen's Compensation Board's finding that the claimant was sufficiently competent during the two-year period following his accident to have filed a claim, and therefore the limitations period was not tolled because of incompetency. Goetzmann v Buffalo Gun Center, Inc., 55 A.D.2d 738, 389 N.Y.S.2d 435, 1976 N.Y. App. Div. LEXIS 15520 (N.Y. App. Div. 3d Dep't 1976).

Substantial evidence supported Workers' Compensation Board's finding of claimant's mental incompetence, thus tolling statute of limitations, where claimant manifested signs of behavioral changes, such as current memory loss, impatience, and disorientation, which condition grew progressively worse, claimant's wife and father testified about claimant's dramatic personality disorder following accident, his inability to remember simple and current events, perform routine tasks, or interact and socialize, and examining psychiatrist testified that claimant sustained brain trauma causing personality and intellectual dysfunctions. Uhler v A&P, 242 A.D.2d 754, 661 N.Y.S.2d 859, 1997 N.Y. App. Div. LEXIS 8530 (N.Y. App. Div. 3d Dep't 1997).

Where the widow filed a claim for workers' compensation death benefits alleging that the decedent's death was causally related to occupational stress, there was substantial evidence to support the workers' compensation board's finding that the widow failed to prove mental incompetency in order to toll the limitation; thus, the trial court properly dismissed the claim as untimely. Estate of Cagle v White Auto Parts, 297 A.D.2d 897, 747 N.Y.S.2d 600, 2002 N.Y. App. Div. LEXIS 8792 (N.Y. App. Div. 3d Dep't 2002).

8. —Appointment of conservator

Appointment of conservator under CLS Men Hyg Art 77 is not basis for ending toll of limitations period pursuant to CLS Work Comp § 115. Estate of Terjesen v Peter Kiewit & Sons Co., 197 A.D.2d 163, 610 N.Y.S.2d 684, 1994 N.Y. App. Div. LEXIS 4079 (N.Y. App. Div. 3d Dep't 1994).

9. Minority toll

Under the provisions of this section that no limitation of time shall run against a minor as long as he has no guardian, a minor's compensation claim was not outlawed by § 28 because no liability was asserted until more than two years subsequent to the accident. Wheeler v Blake, 13 A.D.2d 602, 212 N.Y.S.2d 292, 1961 N.Y. App. Div. LEXIS 11968 (N.Y. App. Div. 3d Dep't 1961).

Board properly applied CLS Work Comp § 115 to toll claims of decedent's children for purposes of reopening and liability under CLS Work Comp § 25-a. Hayes v Harris, 227 A.D.2d 864, 642 N.Y.S.2d 384, 1996 N.Y. App. Div. LEXIS 5270 (N.Y. App. Div. 3d Dep't), app. denied, 88 N.Y.2d 813, 649 N.Y.S.2d 380, 672 N.E.2d 606, 1996 N.Y. LEXIS 3092 (N.Y. 1996).

Married status of infant, suing third party under § 29, did not deprive her of benefit of exemption from limitations of time given by § 115. Inakay v Sun Laundry Corp., 42 N.Y.S.2d 344, 180 Misc. 550, 1943 N.Y. Misc. LEXIS 1998 (N.Y. Sup. Ct. 1943).

A defense to an action by an insurance carrier, brought on the grounds that the injured employee had failed to commence an action within six months of the award and one year of the accident, alleging that the employee was an infant, is insufficient where it does not allege that no guardian was appointed or that an action was commenced by the employee within six months after attaining majority or that an award was made after majority and less than six months prior to the present action. Commissioners of State Ins. Fund v Thames Trading Co., 64 N.Y.S.2d 91, 1946 N.Y. Misc. LEXIS 2554 (N.Y. Sup. Ct. 1946).

10. Question of fact

Whether a claimant is mentally incompetent and if so for how long a period presents questions of fact which should not be disposed of except by trial. Young v State, 273 A.D. 986, 78 N.Y.S.2d 39, 1948 N.Y. App. Div. LEXIS 5607 (N.Y. App. Div. 1948).

11. Evidence

Where there was a conflict in medical testimony as to the sanity of claimant and the Board rejected his claim and excuse for late filing on the ground that he was mentally incompetent, it was held the choice between conflicting medical opinions was exclusively with the board if its decision was supported by substantial evidence. Bellinger v Perini Corp., 28 A.D.2d 1044, 283 N.Y.S.2d 724, 1967 N.Y. App. Div. LEXIS 3173 (N.Y. App. Div. 3d Dep't 1967).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Notice of injury or death, § 18.

Procedure and payment of compensation in certain claims; limitation of right to compensation, § 25-a.

Notice to employers, § 45.

Federal Aspects:

Limitations on right to receive compensation under federal workers' compensation program, 5 USCS § 8116.

Time for making claim under federal workers' compensation program, 5 USCS § 8122.

Jurisprudences:

75A NY Jur 2d Limitations and Laches §§ 277, 282.

109 NY Jur 2d Workers' Compensation § 122.

110 NY Jur 2d Workers' Compensation § 638.

Appleman on Insurance:

New Appleman New York Insurance Law §§ 25.02, 25.07.

Annotations:

Effect of fraud to toll the period for bringing action prescribed in statute creating the right of action. 15 ALR2d 500.

When time period commences as to claim under workers' compensation or occupational diseases act for death of worker due to contraction of disease. 100 ALR5th 567.

Matthew Bender's New York Practice Guides: 4 New York Practice Guide: Business and Commercial § 25A.06.

§ 118. Technical rules of evidence or procedure not required

The chairman or board in making an investigation or inquiry or conducting a hearing shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to ascertain the substantial rights of the parties. Declarations of a deceased employee concerning the accident shall be received in evidence and shall, if corroborated by circumstances or other evidence, be sufficient to establish the accident and the injury.

HISTORY:

Add, L 1913, ch 816; amd, L 1922, ch 615; L 1946, ch 113, § 48; L 1958, ch 974, § 6, eff Sept 1, 1958; L 1958, ch 975, eff July 1, 1958.

Derivation Notes: Substance transferred from former § 68 and substance of former § 118 transferred to § 128.

Notes to Decisions

Analysis

1. In general
2. Admissibility of evidence, generally
3. Sufficiency of evidence required, generally
4. —Finding that injury occurred in course of employment
5. Availability of physician-patient privilege
6. Use of hospital records
7. Impeachment of witnesses
8. Depositions
9. Admissions
10. Hearsay evidence, generally
11. —Necessity of corroboration
12. Corroboration of deceased employee's declarations, generally
13. —By physical evidence
14. —By testimony of others
15. —By other evidence
16. —Uncorroborated testimony

17. Other particular evidentiary rulings
18. —Finding of causal relationship between employment and injury

1. In general

Statutory provision eliminating application of technical rules under Work. Comp. Law is one which is liberally applied in accordance with spirit of provision for protection of claimants against technicalities in trial of claims, and equal justice requires that it should be so applied as to permit to defendant consideration of substantial question, which has been fairly raised, although not by methods necessary in ordinary action. Ziegler v P. Cassidy's Sons, 220 N.Y. 98, 115 N.E. 471, 220 N.Y. (N.Y.S.) 98, 1917 N.Y. LEXIS 944 (N.Y. 1917).

Where a claimant is not represented by counsel the duty of questioning witnesses necessarily rests, to a great extent, upon the Referee; and moreover he is not bound by technical rules of evidence or procedure. Raley v E. I. Du Pont De Nemours & Co., 283 A.D. 1130, 131 N.Y.S.2d 552, 1954 N.Y. App. Div. LEXIS 6501 (N.Y. App. Div. 1954).

Finding by Workers' Compensation Board that claimant's injury occurred during course of employment would not be set aside due to board's consideration of written statement of employer's vice-president that claimant was on errand to get employer cup of coffee when injured, although statement was never formally received in evidence by law judge, since formal rules of evidence do not govern such proceedings. Harford v Widensky's, Inc., 154 A.D.2d 821, 546 N.Y.S.2d 485, 1989 N.Y. App. Div. LEXIS 12699 (N.Y. App. Div. 3d Dep't 1989).

In workers' compensation proceeding in which staff psychologist claimed that his employment was discriminatorily terminated in violation of CLS Work Comp § 120, there was no merit in his conclusory procedural objections—that Workers' Compensation Board excluded essential factual evidence, that Workers' Compensation Law Judge (WCLJ) allowed inflammatory and nonfactual diatribes to enter into proceeding, that WCLJ misidentified witness, that claimant's attorney was denied opportunity to question claimant about job performance evaluations, and that WCLJ erred in admitting second rather than first accident report—where, even if those objections had arguable support in record, they were exaggerated or immaterial and did not dictate reversal of board's decision that claimant's termination was for nondiscriminatory reasons. Coscia v Association for the Advancement of Blind & Retarded Inc., 273 A.D.2d 719, 710 N.Y.S.2d 174, 2000 N.Y. App. Div. LEXIS 7429 (N.Y. App. Div. 3d Dep't 2000).

2. Admissibility of evidence, generally

The minutes of an athletic association (a membership corporation) sponsored by an employer were admissible in evidence in view of the fact that the employer had a representative on the board and liberal rules of evidence apply in compensation hearings. Tedesco v General Electric Co., 305 N.Y. 544, 114 N.E.2d 33, 305 N.Y. (N.Y.S.) 544, 1953 N.Y. LEXIS 798 (N.Y. 1953).

A statement taken by the carrier's investigator while claimant was in the hospital suffering pain from a severely crushed leg and under heavy sedation, even though illegally obtained under Penal Law § 270-b, was not inadmissible on that account. Its evidentiary weight was, of course, for the board. Thanhauser v Milprint, Inc., 9 A.D.2d 833, 192 N.Y.S.2d 911, 1959 N.Y. App. Div. LEXIS 6197 (N.Y. App. Div. 3d Dep't 1959).

Medical opinion as to causality need not be couched in terms of certainty in order to be accepted by Workmen's Compensation Board, provided it is judgment of expert that causality should and could be assumed. Whitaker v Sunset Queens, Inc., 49 A.D.2d 998, 374 N.Y.S.2d 402, 1975 N.Y. App. Div. LEXIS 11335 (N.Y. App. Div. 3d Dep't 1975).

It was improper for Workmen's Compensation Board to receive in evidence copy of police laboratory report of blood-alcohol content of deceased employee, who was killed in fatal automobile accident while operating station wagon owned by his employer, which report stated that blood sample had been obtained by coroner pursuant to statute mandating coroner to make quantitative tests for alcohol on bodies of certain individuals killed in motor vehicle accident, in light of further provision of said statute that such results were to be used only for purpose of compiling statistical data and were not to be admitted into evidence or otherwise disclosed in any legal action or proceeding; nor was lab report admissible under business records statute. Rourke v Carl's Drug Co., 56 A.D.2d 202, 392 N.Y.S.2d 498, 1977 N.Y. App. Div. LEXIS 10046 (N.Y. App. Div. 3d Dep't 1977).

Worker's Compensation Board could consider evidence that was not before the Workers' Compensation Law Judge (WCLJ) because the formal rules of evidence did not apply to proceedings before the Board and the Board could, in its discretion, consider evidence on any relevant issue. Though the Board and the WCLJ were presented with conflicting documentation concerning a claimant employee's birth date, the Board was not bound by the WCLJ's credibility determinations and was entitled to determine for itself that the claimant was a minor when he was injured. Paiz v Coastal Pipeline Prods. Corp., 9 A.D.3d 717, 780 N.Y.S.2d 656, 2004 N.Y. App. Div. LEXIS 9759 (N.Y. App. Div. 3d Dep't 2004).

3. Sufficiency of evidence required, generally

Jurisdiction of commission to make award depends upon happening of accident under conditions named in Work. Comp. Law and this requires evidence of probative force. McHale v Sheffield Farms Co., 193 A.D. 541, 184 N.Y.S. 576, 1920 N.Y. App. Div. LEXIS 5592 (N.Y. App. Div. 1920).

The occurrence of an accident is factual and thus for the board's determination if its decision is supported by substantial evidence. Prue v Empire Scrap Metals, Inc., 32 A.D.2d 680, 299 N.Y.S.2d 771, 1969 N.Y. App. Div. LEXIS 4081 (N.Y. App. Div. 3d Dep't 1969).

Mandate of CLS Work Comp § 118 that Workers' Compensation Board "ascertain the substantial rights of the parties" empowers board to selectively adopt or reject portions of medical expert's opinion and to review record realistically and as whole. Moore v RPM Industries, Inc., 144 A.D.2d 135, 534 N.Y.S.2d 463, 1988 N.Y. App. Div. LEXIS 10134 (N.Y. App. Div. 3d Dep't 1988).

4. —Finding that injury occurred in course of employment

Even if decedent also planned to engage in sightseeing, the rule is well-settled that, if a business motive is a concurrent cause of the trip, it comes within the course of employment. Guggenheim v C. Hedke & Co., 32 A.D.2d 1017, 301 N.Y.S.2d 792, 1969 N.Y. App. Div. LEXIS 3399 (N.Y. App. Div. 3d Dep't 1969), aff'd, 27 N.Y.2d 596, 313 N.Y.S.2d 409, 261 N.E.2d 407, 1970 N.Y. LEXIS 1244 (N.Y. 1970).

5. Availability of physician-patient privilege

It seems that even under its broad powers the Workmen's Compensation Board has no right to disregard the statutory physician-patient privilege provided by Civil Practice Act §§ 352, 354. Even assuming this privilege to apply, it is waived as soon as evidence of the claimant's injuries is given in his behalf. Petition of Maryland Casualty Co., 274 A.D. 211, 80 N.Y.S.2d 181, 1948 N.Y. App. Div. LEXIS 3041 (N.Y. App. Div. 1948).

6. Use of hospital records

Public policy does not prevent proper use at the hearing on a claim by an injured employee under this law, of relevant hospital records relating to his mental condition. On the contrary, it would seem to be against exclusion of any competent and relevant evidence bearing on the nature and extent of injuries claimed by the employee and their relation to an accident arising out of and in the course of his employment. Petition of Maryland Casualty Co., 274 A.D. 211, 80 N.Y.S.2d 181, 1948 N.Y. App. Div. LEXIS 3041 (N.Y. App. Div. 1948).

Hospital records subpoenaed under § 119 are to be turned over to the Workmen's Compensation Board or its referee at the hearing, and may be inspected by the employer's representative and offered in evidence only when it is ruled that the records are relevant and that the privilege with respect thereto no longer applies. Petition of Maryland Casualty Co., 274 A.D. 211, 80 N.Y.S.2d 181, 1948 N.Y. App. Div. LEXIS 3041 (N.Y. App. Div. 1948).

A subpoena for the production of hospital records under § 119 does not authorize an inspection thereof by, or their disclosure to, any person except the claimant or his representative. Petition of Maryland Casualty Co., 274 A.D. 211, 80 N.Y.S.2d 181, 1948 N.Y. App. Div. LEXIS 3041 (N.Y. App. Div. 1948).

In action under Workmen's Compensation Law for death of nurse who allegedly contracted tuberculosis from a patient in a psychiatric ward, claimant would only be allowed an examination of those parts of the patient records as would reveal any physical ailments suffered by patients on the nurse's floor, but not to a revelation of the patients' names. Williams v Buffalo General Hospital, 28 A.D.2d 777, 280 N.Y.S.2d 699, 1967 N.Y. App. Div. LEXIS 3796 (N.Y. App. Div. 3d Dep't 1967).

7. Impeachment of witnesses

This section does not prevent impeachment of a witness before the workmen's compensation board on the ground of prior conviction of a crime. Fisher v One Oak Dairy, Inc., 274 A.D. 274, 82 N.Y.S.2d 461, 1948 N.Y. App. Div. LEXIS 3054 (N.Y. App. Div. 1948).

Claimant was not unduly prejudiced by his inability to cross-examine carrier's private investigator, who testified at workers' compensation hearing that he had videotaped claimant as he walked around outdoors exhibiting no indication of physical impairment, given vast amount of independent evidence presented at hearing, including medical reports and testimony submitted by 9 health care professionals based on their physical examinations of claimant. Weber v Northberry Constr., 261 A.D.2d 744, 689 N.Y.S.2d 744, 1999 N.Y. App. Div. LEXIS 5313 (N.Y. App. Div. 3d Dep't), app. denied, 93 N.Y.2d 815, 697 N.Y.S.2d 562, 719 N.E.2d 923, 1999 N.Y. LEXIS 2200 (N.Y. 1999).

8. Depositions

Former § 68, now this section, was qualified by former § 72, now § 121, relating to the manner of taking depositions and an award could not be based on informal depositions but the depositions were required to be taken in the manner prescribed for other civil actions. Eretza v Ft. Montgomery Iron Works, 193 A.D. 817, 184 N.Y.S. 789, 1920 N.Y. App. Div. LEXIS 5655 (N.Y. App. Div. 1920).

Workers' compensation insurance carrier was not obligated to turn over surveillance videotape in its possession until after it had opportunity to cross-examine claimant. De Marco v Millbrook Equestrian Ctr., 287 A.D.2d 916, 732 N.Y.S.2d 121, 2001 N.Y. App. Div. LEXIS 9945 (N.Y. App. Div. 3d Dep't 2001).

9. Admissions

Corporation which has empowered one of its clerks to report accidents to employees is bound by admission contained in report which was signed by said clerk in name of superintendent of corporation. Anthus v Rail Joint Co., 193 A.D. 571, 185 N.Y.S. 314, 1920 N.Y. App. Div. LEXIS 5601 (N.Y. App. Div. 1920), aff'd, 231 N.Y. 557, 132 N.E. 887, 231 N.Y. (N.Y.S.) 557, 1921 N.Y. LEXIS 713 (N.Y. 1921).

10. Hearsay evidence, generally

Hearsay evidence as to whether or not decedent had suffered accidental injury sufficient to warrant award under Work. Comp. Law is admissible in discretion of commission. Lindquest v Holler, 178 A.D. 317, 164 N.Y.S. 906, 1917 N.Y. App. Div. LEXIS 5816 (N.Y. App. Div. 1917).

Where proof of cause of death is composed chiefly of hearsay statements and declarations either introduced by insurance carrier itself or received without objection, carrier cannot on appeal object that such statements were incompetent and of no probative value. Hernon v Holahan, 182 A.D. 126, 169 N.Y.S. 705, 1918 N.Y. App. Div. LEXIS 7844 (N.Y. App. Div. 1918).

A death claim was dismissed where evidence showed only that decedent was sitting on a water main doing construction work and was next seen on the ground below the main suffering from a ruptured aneurysm. The only evidence that decedent had slipped and suffered the aneurysm when he hit the ground was belated and interested hearsay testimony. Bonomi v Poirier & McLane Corp., 1 A.D.2d 302, 149 N.Y.S.2d 616, 1956 N.Y. App. Div. LEXIS 5936 (N.Y. App. Div. 3d Dep't 1956).

Although this section provides that hearsay testimony is admissible, it does not require the board to accept it as true and the credibility and weight to be given all the evidence is for the board's determination. Kelly v Marine Works, Inc., 3 A.D.2d 873, 161 N.Y.S.2d 184, 1957 N.Y. App. Div. LEXIS 5893 (N.Y. App. Div. 3d Dep't 1957).

Relationship of infant claimant to deceased employee, as his daughter, was sufficiently established by testimony of decedent's brother that the infant was his niece and had visited him and that his brother had told him about her and that she was his daughter, pedigree declarations being an exception to the hearsay rule. Johnson v La Sala Mason Corp., 19 A.D.2d 925, 244 N.Y.S.2d 31, 1963 N.Y. App. Div. LEXIS 2978 (N.Y. App. Div. 3d Dep't 1963), app. denied, 13 N.Y.2d 601, 1964 N.Y. LEXIS 1529 (N.Y. 1964).

Hearsay testimony is admissible under § 118 of the Workmen's Compensation Law. Angelino v 660 Park Ave. Corp., 28 A.D.2d 798, 281 N.Y.S.2d 130, 1967 N.Y. App. Div. LEXIS 3717 (N.Y. App. Div. 3d Dep't 1967).

11. —Necessity of corroboration

Award made under Work. Comp. Law, cannot be sustained upon hearsay evidence, uncorroborated by facts, circumstances or other evidence. Belcher v Carthage Mach. Co., 224 N.Y. 326, 120 N.E. 735, 224 N.Y. (N.Y.S.) 326, 1918 N.Y. LEXIS 884 (N.Y. 1918).; Kubes v General Electric Co., 200 A.D. 848, 191 N.Y.S. 935, 1921 N.Y. App. Div. LEXIS 9241 (N.Y. App. Div. 1921).; Vassilakis v Fairfax Hotel Co., 193 A.D. 829, 184 N.Y.S. 774, 1920 N.Y. App. Div. LEXIS 5659 (N.Y. App. Div. 1920).; Hansen v Flinn-O'Rourke Co., 192 A.D. 878, 183 N.Y.S. 213, 1920 N.Y. App. Div. LEXIS 7575 (N.Y. App. Div. 1920).

Declarations of an employee who had lost the power to think or speak could be received in the same manner as those of deceased employees. Altschuller v Bressler, 289 N.Y. 463, 46 N.E.2d 886, 289 N.Y. (N.Y.S.) 463, 1943 N.Y. LEXIS 1170 (N.Y. 1943).

Policeman's testimony as to admissions made by employee concerning murder of fellow employee could not be held insubstantial as a matter of law on the basis of lack of corroboration required under Workmen's Compensation Law § 118; even if aggressor employee were dead, no corroboration would have been required, since he was not person through whom or on whose account claim for benefits was made. Kelly v New York City Transit Authority, 33 N.Y.2d 373, 353 N.Y.S.2d 164, 308 N.E.2d 684, 1974 N.Y. LEXIS 1699 (N.Y. 1974).

Hearsay evidence that decedent fell while washing a truck in the course of his employment was not sufficient to support a death award where it was not corroborated by any evidence other than that decedent died of a criminal injury. Comstock v Goetz Oil Corp., 286 A.D. 132, 142 N.Y.S.2d 217, 1955 N.Y. App. Div. LEXIS 3992 (N.Y. App. Div. 1955), dismissed, 10 A.D.2d 782, 199 N.Y.S.2d 459, 1960 N.Y. App. Div. LEXIS 11073 (N.Y. App. Div. 3d Dep't 1960).

Decedent, counter man in luncheonette, fell while at work and sustained head injuries. After release from hospital decedent fell in subway sustaining further head injuries and subsequently died. First fall was unwitnessed and claimant was entitled to presumption under § 21. Hearsay evidence that he slipped on floor behind counter was sufficiently corroborated by "other evidence". Award affirmed. McCann v Hy-Al Luncheonette Co., 5 A.D.2d 1026, 173 N.Y.S.2d 137, 1958 N.Y. App. Div. LEXIS 6181 (N.Y. App. Div. 3d Dep't 1958).

That decedent, who was hypersensitive to bee venom, died as the result of a bee sting incurred in course of his employment was amply sustained by the coroner's report of finding a bee sting mark on his forehead, which, together with admissions of the employer, who was present shortly after the occurrence, that decedent was "killed by bee sting," was amply sufficient to corroborate hearsay testimony concerning the occurrence. Webster v Mason, 13 A.D.2d 355, 217 N.Y.S.2d 290, 1961 N.Y. App. Div. LEXIS 9778 (N.Y. App. Div. 3d Dep't 1961).

An employer's report under the requirement of § 110, containing detailed and considered admissions concerning the industrial accident, may be regarded as corroboration of the decedent's hearsay declarations which are admissible under the above statute if corroborated by "circumstances" and "other evidence", and on this basis the Appellate Division held that the board acted within the purview of its fact-finding power and on substantial evidence in stating that "the record is clear that the accident did happen and it arose out of the employment." Laine v Rula Corp., 24 A.D.2d 675, 261 N.Y.S.2d 182, 1965 N.Y. App. Div. LEXIS 3677 (N.Y. App. Div. 3d Dep't 1965).

Where declarations upon which Workmen's Compensation Board based its finding that workman's death did not arise out of his employment where statements of decedent's uncle, two police officers, and another person, the Board was not required to ignore the declarations on the theory that they were uncorroborated hearsay as only the hearsay declarations of the deceased employee on whose account the claim for benefits is made are required to be corroborated. McGinn v Jack Chambers, Inc., 46 A.D.2d 701, 359 N.Y.S.2d 917, 1974 N.Y. App. Div. LEXIS 3858 (N.Y. App. Div. 3d Dep't 1974).

12. Corroboration of deceased employee's declarations, generally

While hearsay declarations are admissible in compensation proceedings if they are used to establish accident and injury, they must be corroborated. Hence, a death award was properly reversed where the only evidence to sustain the Board's finding was based upon hearsay declarations of the decedent. Ptaszynski v American Sugar Refining Co., 305 N.Y. 833, 114 N.E.2d 38, 305 N.Y. (N.Y.S.) 833, 1953 N.Y. LEXIS 1334 (N.Y. 1953).

Workmen's Compensation Law § 118, requiring corroboration "by circumstances or other evidence" of declarations of a deceased employee concerning the accident, was interpreted to require corroboration only as to declarations of deceased employee on whose account or through whom a claim for benefits is made. Kelly v New York City Transit Authority, 33 N.Y.2d 373, 353 N.Y.S.2d 164, 308 N.E.2d 684, 1974 N.Y. LEXIS 1699 (N.Y. 1974).

Declaration of deceased employee to be sufficient to establish accident and injury under this section must be corroborated as to each of essential elements of "injury" as defined in § 2, subd. 7. Meehan v Dutton Lumber Co., 210 A.D. 540, 206 N.Y.S. 418, 1924 N.Y. App. Div. LEXIS 6787 (N.Y. App. Div. 1924).

Although Workmen's Compensation Law § 118 requires corroboration of hearsay declarations of a decedent, direct proof is not required. The decisive question if whether there is corroboration by circumstances or other evidence. Proof of the duties, common nature or circumstances of the work performed by decedent may constitute sufficient corroboration. Rosen v Rose Housewares, Inc., 34 A.D.2d 719, 309 N.Y.S.2d 687, 1970 N.Y. App. Div. LEXIS 5048 (N.Y. App. Div. 3d Dep't 1970).

Plainly hearsay proof of nature and purpose of decedent's fatal trip was admissible in workmen's compensation proceeding and could be relied upon by Workmen's Compensation Board where it was sufficiently corroborated by circumstances and other evidence. Munro v County of Suffolk, 49 A.D.2d 994, 374 N.Y.S.2d 392, 1975 N.Y. App. Div. LEXIS 11325 (N.Y. App. Div. 3d Dep't 1975).

Proof of the duties, nature and circumstances of work performed by deceased employee may constitute sufficient corroboration, in a workmen's compensation proceeding, of hearsay testimony by decedent's widow. Goldstone v New York State Dep't of Motor Vehicles, 57 A.D.2d 973, 394 N.Y.S.2d 99, 1977 N.Y. App. Div. LEXIS 12263 (N.Y. App. Div. 3d Dep't 1977).

In workmen's compensation proceedings, the statutory corroboration required of hearsay statements is not as technical as that at common law and may consist of circumstances or other evidence. Goldstone v New York State Dep't of Motor Vehicles, 57 A.D.2d 973, 394 N.Y.S.2d 99, 1977 N.Y. App. Div. LEXIS 12263 (N.Y. App. Div. 3d Dep't 1977).

In a workers' compensation case the widow of a productivity manager, who died of a heart attack, was properly awarded benefits where the widow testified as to the manager's lifting of a heavy suitcase on the day in question, and where the compensation board properly credited the portion of the widow's uncorroborated testimony that was based on her personal knowledge, observation, and recollection, in that only the portion of her testimony that contained statements by the deceased manager required corroboration. Palacio v A & P Tea Co., 92 A.D.2d 683, 460 N.Y.S.2d 195, 1983 N.Y. App. Div. LEXIS 16959 (N.Y. App. Div. 3d Dep't 1983).

Requirement of corroboration of declarations of deceased employee concerning accident under CLS Work Comp § 118 is not as technical as that at common law. Padilla v New York City Bd. of Education, 127 A.D.2d 957, 512 N.Y.S.2d 723, 1987 N.Y. App. Div. LEXIS 43440 (N.Y. App. Div. 3d Dep't), app. denied, 70 N.Y.2d 602, 518 N.Y.S.2d 1024, 512 N.E.2d 550, 1987 N.Y. LEXIS 17399 (N.Y. 1987).

13. —By physical evidence

The requirement of corroboration of a deceased employee's declarations was sufficiently met by the independently established fact that the decedent became ill while at work, by the similarity of history given to two physicians by the employee, by the physical findings and by the employer's admissions. Ostrowski v Mohawk Carpet Mills, Inc., 275 A.D. 874, 88 N.Y.S.2d 865, 1949 N.Y. App. Div. LEXIS 4849 (N.Y. App. Div. 1949).

Declaration of a deceased employee that while lifting 100 pound bags he felt something snap inside was corroborated by evidence that there were such bags in the stockroom where he worked, that he was taking inventory at the time and occasionally had to lift the bags and his condition upon operation suggested a sudden rupture. Carney v General Cable Corp., 278 A.D. 868, 104 N.Y.S.2d 204, 1951 N.Y. App. Div. LEXIS 5014 (N.Y. App. Div. 1951), aff'd, 303 N.Y. 885, 105 N.E.2d 108, 303 N.Y. (N.Y.S.) 885, 1952 N.Y. LEXIS 1343 (N.Y. 1952).

Statement of deceased to wife that he had suffered pain in chest while shoveling snow at the plant was sufficiently corroborated by fact that a substantial snow had fallen that day, that a path had been shoveled from the guard house to the plant gate when decedent was relieved from duty and that there was no one else around at that time, that decedent went home by taxi when he usually traveled by bus, and the doctor found corroborative physical conditions on examination shortly thereafter and other witnesses testified to decedent's statement that he was stricken with pain while shoveling snow. Keach v E. H. Titchener Co., 278 A.D. 991, 105 N.Y.S.2d 855, 1951 N.Y. App. Div. LEXIS 5459 (N.Y. App. Div. 1951).

Where accident occurred without witnesses, declarations of decedent made to his wife as to cause of accident are admissible under this section and where declaration that decedent fell on fourth floor of building where he was employed as night watchman and in an injured condition groped his way to the basement floor was sufficiently corroborated by a finding of decedent's eyeglasses and keys on the fourth floor. McKinley v Wilson Bros., 282 A.D. 791, 122 N.Y.S.2d 538, 1953 N.Y. App. Div. LEXIS 4969 (N.Y. App. Div. 1953).

Statements of a deceased employee that she hit her leg on a sewing machine doing the employer's work in her home were admissible in evidence and, when corroborated by medical evidence that thrombophlebitis developed in the area of the leg struck, were sufficient to establish the accident and the injury. Portolano v G. A. Albano Co., 285 A.D. 915, 137 N.Y.S.2d 515, 1955 N.Y. App. Div. LEXIS 6098 (N.Y. App. Div. 1955).

Evidence was sufficient to corroborate decedent's declaration to his wife after returning from taking care of his employer's elevator that he had walked up sixteen flights of stairs to the elevator. Howard v One East End Ave. Corp., 4 A.D.2d 722, 163 N.Y.S.2d 500, 1957 N.Y. App. Div. LEXIS 5133 (N.Y. App. Div. 3d Dep't), app. denied, 4 A.D.2d 844, 168 N.Y.S.2d 621, 1957 N.Y. App. Div. LEXIS 4623 (N.Y. App. Div. 3d Dep't 1957), app. denied, 4 N.Y.2d 673, 1958 N.Y. LEXIS 1326 (N.Y. 1958).

Decedent's declaration as to the manner in which the accident, a coronary thrombosis while cleaning out his employer's water well, occurred was sufficiently corroborated by the proof of his prior health, by the evidence as to his appearance at the end of the day and the proof as to the nature of the well-cleaning task. Rambold v Whitney, 4 A.D.2d 906, 167 N.Y.S.2d 54, 1957 N.Y. App. Div. LEXIS 4299 (N.Y. App. Div. 3d Dep't), app. denied, 4 A.D.2d 991, 167 N.Y.S.2d 1020, 1957 N.Y. App. Div. LEXIS 3863 (N.Y. App. Div. 3d Dep't 1957), app. denied, 4 N.Y.2d 673, 1958 N.Y. LEXIS 1339 (N.Y. 1958).

Decedent, a tailor, fell while at work and sustained an injury to his head. There was hearsay statement by decedent that he struck his head on his machine as he fell. Claim filed prior to death stated that he hit his head on the floor and an amended complaint stated that he hit his head on the machine. There was medical evidence that the location of the laceration on the skull suggested a fall against the machine or another object. Held:

there was sufficient proof to support the hearsay statement. And there was sufficient evidence to establish causal relation between the injury and death 9 months later to a malignant brain tumor where such evidence showed that the injury accelerated the progress of the disease. Baumstein v Siegel & Alenikoff, Inc., 9 A.D.2d 572, 189 N.Y.S.2d 431, 1959 N.Y. App. Div. LEXIS 7428 (N.Y. App. Div. 3d Dep't), app. denied, 7 N.Y.2d 705, 1959 N.Y. LEXIS 1820 (N.Y. 1959).

Undisputed circumstances that employee had enjoyed good health prior to heavy lifting incident and had never complained of or been treated for cardiac symptoms, evidence that he did not appear ill when he left for work on morning heavy lifting incident occurred but that his appearance and demeanor after work reflected acutely ill person, and nature of his duties and of his employment environment sufficiently corroborated employee's statements to his wife and doctor that he had a "pain in his chest" and that he had experienced similar pain while lifting 500 pound weights in course of his employment to support Workmen's Compensation Board's determination that death resulted from compensable industrial accident. Nickels v L. J. Thornton, Inc., 53 A.D.2d 718, 384 N.Y.S.2d 59, 1976 N.Y. App. Div. LEXIS 13486 (N.Y. App. Div. 3d Dep't 1976).

14. —By testimony of others

Letters and documents, although unsworn to and not authenticated, tending to show that previous husband had died before claimant married deceased employee were properly received in evidence and constituted proper corroboration of claimant's contention that she was lawful widow of deceased. Lewis v Charles F. Noyes Co., 278 A.D. 222, 104 N.Y.S.2d 600, 1951 N.Y. App. Div. LEXIS 3777 (N.Y. App. Div. 1951).

Death benefits award was not proper where it was based upon decedent's hearsay statements that he strained himself by handling a heavy carton where the statements were not corroborated by testimony of fellow workmen that decedent handled heavy cartons or that a carton slipped on the date of the alleged accident. Cholet v R. H. Macy & Co., 285 A.D. 1095, 139 N.Y.S.2d 373, 1955 N.Y. App. Div. LEXIS 6760 (N.Y. App. Div. 1955).

Decedent's declarations as to the occurrence of an accident were sufficiently corroborated where he had told his physician that while lifting 100 pound bags of cement against his left side he felt a pain in his left side later diagnosed as a ruptured spleen. Fellow employees testified that on day of the alleged accident decedent had lifted bags of cement and expert medical testimony established that a rupture could result only from a direct trauma and that decedent by lifting 100 pound bags against his left side could have caused such a trauma. Viselli v Martino, 285 A.D. 1195, 140 N.Y.S.2d 643, 1955 N.Y. App. Div. LEXIS 7142 (N.Y. App. Div. 1955).

Decedent, foreman in laundry, developed symptoms of heart attack during the afternoon. He died 2 weeks later from coronary condition and myocardial infarction. There were hearsay declarations by decedent to effect that, when he was lifting bag of wash, he felt sharp chest pains. However, there was testimony by co-employee that decedent lifted bundles of wet wash weighing 50 to 60 lbs. nearly every day, and this was some corroboration of the hearsay declaration. Award affirmed. Svigals v Blue Diamond Laundry No. 1, Inc., 7 A.D.2d 800, 180 N.Y.S.2d 783, 1958 N.Y. App. Div. LEXIS 3724 (N.Y. App. Div. 3d Dep't 1958).

Decedent had stated to his physician that he had pushed teletype machine weighing 150 lbs. shortly before he suffered a heart attack. Fellow employee testified that decedent moved machine on average of once per day, that moving it was severe effort and that sudden demands for machine required fast movement. This was sufficient proof of circumstances and other evidence in corroboration of hearsay statement. Award affirmed. Aaron v Burnham & Co., 8 A.D.2d 891, 186 N.Y.S.2d 958, 1959 N.Y. App. Div. LEXIS 8304 (N.Y. App. Div. 3d Dep't), app. denied, 9 A.D.2d 601, 189 N.Y.S.2d 122, 1959 N.Y. App. Div. LEXIS 10590 (N.Y. App. Div. 3d Dep't 1959), app. denied, 7 N.Y.2d 705, 1959 N.Y. LEXIS 1815 (N.Y. 1959).

In a proceeding for death benefits, hearsay testimony of the widow that deceased told her he had lifted something heavy and felt pain, and of a physician that deceased told him he had lifted a "heavy object," were sufficiently corroborated by testimony that deceased suffered the attack while actually working and that the work involved strenuous physical effort in lifting trash cans onto trucks or dollies. Jones v Chicago Pneumatic Tool Co., 9 A.D.2d 804, 192 N.Y.S.2d 764, 1959 N.Y. App. Div. LEXIS 6145 (N.Y. App. Div. 3d Dep't 1959).

With respect to a death benefit claim arising out of death of a highway patrolman from a heart attack, allegedly brought on by overexertion in course of helping a lady motorist change a tire, hearsay evidence as to the exertion, consisting of decedent's statements to his physician and to a retired police sergeant, was sufficiently corroborated to sustain an award where there was testimony of a lieutenant in charge that patrolmen more or less frequently assisted motorists in changing tires, particularly if they were ladies or elderly people in distress. O'Brien v Long Island State Parkway Com., 13 A.D.2d 855, 214 N.Y.S.2d 786, 1961 N.Y. App. Div. LEXIS 11053 (N.Y. App. Div. 3d Dep't 1961).

Although under the Workmen's Compensation Law the declarations of a deceased employee are sufficient to establish accident and injury if corroborated by the circumstances or other evidence, the statements of a nurse, who allegedly contracted tuberculosis as the result of being exposed to a tubercular patient, that she had been in contact with such a patient were not competent to establish such exposure, since a nurse is not competent to say that a patient had tuberculosis. Williams v Buffalo General Hospital, 28 A.D.2d 777, 280 N.Y.S.2d 699, 1967 N.Y. App. Div. LEXIS 3796 (N.Y. App. Div. 3d Dep't 1967).

Rational basis existed for Workers' Compensation Board's inference that death was caused by work-related accidental injury where wife of decedent testified that decedent had said on day of his death that he would be late in coming home because he had to work overtime on pain of losing his job, and co-worker testified that decedent, who was spackling ceiling, declined to stop working for coffee break because he had to finish job; board could rely on decedent's declarations, as corroborated by co-worker, since wife's expert testified that decedent's normal work duties would not have contributed to death due to occlusive coronary arteriosclerosis without physical and emotional stress created by working on job under time constraints and in anticipation of long hours, and declarations were relevant to issue whether these added stresses were present. Padilla v New York City Bd. of Education, 127 A.D.2d 957, 512 N.Y.S.2d 723, 1987 N.Y. App. Div. LEXIS 43440 (N.Y. App. Div. 3d Dep't), app. denied, 70 N.Y.2d 602, 518 N.Y.S.2d 1024, 512 N.E.2d 550, 1987 N.Y. LEXIS 17399 (N.Y. 1987).

Substantial evidence supported the Workers' Compensation Board's finding that the decedent's injuries and ensuing death were the result of a work-related accident because the decedent's statement to the claimant that he fell "into the pit" was the most direct evidence that he sustained his fatal injuries while performing duties at work, and the claimant's testimony and that of the supervisor who saw the decedent holding his stomach provided sufficient corroboration of the decedent's statement. Matter of Silvestri v New York City Tr. Auth., 153 A.D.3d 1069, 59 N.Y.S.3d 618, 2017 N.Y. App. Div. LEXIS 6078 (N.Y. App. Div. 3d Dep't 2017).

15. —By other evidence

Where decedent was fatally injured in a highway accident while driving a company owned car, and containing samples of merchandise and a sample case with him on the trip, and had made repeated declarations to friends and relatives that he was going to contact customers, the employer's report of injury stating that decedent was "traveling on business" and made after an adequate opportunity for investigation and reflection, was sufficient corroboration of decedent's hearsay declarations. Guggenheim v C. Hedke & Co., 27 N.Y.2d 596, 313 N.Y.S.2d 409, 261 N.E.2d 407, 1970 N.Y. LEXIS 1244 (N.Y. 1970).

Where the deceased employee died of a heart attack, and there was hearsay evidence that on the day preceding his collapse and death he had been obliged to climb stairs up to the twentieth floor of a building under construction, and this evidence was in part corroborated by the fact that the employer had during the month of decedent's death several buildings of twenty stories under construction, and it was stipulated that a witness would testify that the decedent had occasion to climb stairs on the day

preceding his death, causation was established within the requirements of this section. Himovitch v Chiaet Ornamental Iron Works, 24 A.D.2d 799, 263 N.Y.S.2d 971, 1965 N.Y. App. Div. LEXIS 3237 (N.Y. App. Div. 3d Dep't 1965), app. denied, 17 N.Y.2d 418, 1966 N.Y. LEXIS 1678 (N.Y. 1966).

In proceeding for workmen's compensation death benefits brought by the widow of decedent, a 64-year-old license clerk whose clerical duties required him to work behind a counter reviewing automobile registrations and renewals, there was more than sufficient proof of the heavy burden of business, together with the unruliness of applicants, on September 30, the day decedent suffered a heart attack, to satisfy the requisite statutory corroboration of widow's testimony that her husband came home complaining that the day had been distressing and that he had been physically threatened by one individual. Goldstone v New York State Dep't of Motor Vehicles, 57 A.D.2d 973, 394 N.Y.S.2d 99, 1977 N.Y. App. Div. LEXIS 12263 (N.Y. App. Div. 3d Dep't 1977).

In an application for death benefits brought by the widow of a man who died in an automobile accident on a trip which had the two-fold purpose of attending a business meeting and celebrating the couple's anniversary, there was substantial evidence to support the Board's finding that the accident arose out of and in the course of decedent's employment, where the claimant testified that her husband had told her shortly before the accident that he was planning to visit his plant, where this testimony was corroborated by testimony of the decedent's supervisor, and where there was evidence that the decedent had received permission to travel and had received a cash advance for the trip. Wright v General Electric Co., 81 A.D.2d 722, 439 N.Y.S.2d 456, 1981 N.Y. App. Div. LEXIS 11278 (N.Y. App. Div. 3d Dep't 1981).

16. —Uncorroborated testimony

The uncorroborated testimony of a physician that decedent had told him that he had pushed a table containing a teletype machine away from his desk and felt a sharp chest pain which later developed into a fatal myocardial infarction was not sufficient to sustain an award. Aaron v Burnham & Co., 2 A.D.2d 93, 154 N.Y.S.2d 652, 1956 N.Y. App. Div. LEXIS 4693 (N.Y. App. Div. 3d Dep't 1956).

Decedent, laundry supervisor, had performed supervisory duties during maintenance work on Saturday. There was no proof that he lifted or moved any object. He left premises in early afternoon. When he arrived home in early evening, witness testified decedent said he didn't feel good, that he had picked up heavy basket and hurt himself. He died following day of heart disease. Held: Finding of accident was without substantial evidence and decedent's hearsay evidence was not corroborated. Acute heart disease not circumstanced in support of accident. Claim dismissed. Ohriner v Jamaice Wet Wash Laundry Co., 5 A.D.2d 901, 170 N.Y.S.2d 931, 171 N.Y.S.2d 129, 1958 N.Y. App. Div. LEXIS 6712 (N.Y. App. Div. 3d Dep't 1958).

The corroboration "by circumstances or other proof" required by this section for hearsay failed, and there was insufficient predicate for medical opinion evidence where it could only be found in decedent's conversation with his wife before leaving for work on the particular Sunday of his death from coronary thrombosis indicating that some of the tasks he expected to perform that day constituted his usual work, but not necessarily on Sundays. Andrew v Cameron Bros. Boat Livery, 22 A.D.2d 727, 253 N.Y.S.2d 160, 1964 N.Y. App. Div. LEXIS 2991 (N.Y. App. Div. 3d Dep't 1964), aff'd, 17 N.Y.2d 608, 268 N.Y.S.2d 565, 215 N.E.2d 685, 1966 N.Y. LEXIS 1560 (N.Y. 1966).

17. Other particular evidentiary rulings

Absent unusual circumstances, no adverse inferences may be drawn from an employer's vigorous opposition to an employee's compensation and unemployment insurance claims, since an employer has the right to present its position to the Workers' Compensation Board and should not be penalized for doing so. Axel v Duffy-Mott Co., 47 N.Y.2d 1, 416 N.Y.S.2d 554, 389 N.E.2d 1075, 1979 N.Y. LEXIS 1930 (N.Y. 1979).

The board is not barred from finding death due to an occupational disease by reason of the filing of a death claim based on accident. Nichols v Colonial Beacon Oil Co., 284 A.D. 581, 132 N.Y.S.2d 72, 1954 N.Y. App. Div. LEXIS 3445 (N.Y. App. Div. 1954).

Errors in exclusion of evidence were so substantial as to require reversal of an award and remittal to board. Decedent, assistant personnel director, had gone to Potsdam to interview college students for employer. Testimony of witnesses as to decedent's conduct and condition while he was at inn near Potsdam during evening prior to automobile accident was excluded as irrelevant or calling for opinion. Cumulative effect of numerous erroneous and prejudicial rulings was to deprive employer and carrier of fair trial of issues. Allen v Glens Falls Ins. Co., 5 A.D.2d 1020, 173 N.Y.S.2d 316, 1958 N.Y. App. Div. LEXIS 6174 (N.Y. App. Div. 3d Dep't 1958).

The claimant was not deprived of the right to produce additional medical evidence to support her physician's evidence where, at the final hearing, the referee said "all sides rest" and claimant's counsel did not suggest that he was not then resting or that he wanted to adduce any further proof on any issue. Leiser v Saks Fifth Ave., 9 A.D.2d 832, 192 N.Y.S.2d 848, 1959 N.Y. App. Div. LEXIS 6195 (N.Y. App. Div. 3d Dep't 1959), app. denied, 7 N.Y.2d 709, 1960 N.Y. LEXIS 1591 (N.Y. 1960).

The selection of the opinion of claimant's expert over other medical opinions in the record is an exercise of the fact-finding power entirely within the province of the board, and it is not the court's function to decide which expert opinion is more weighty or persuasive. Currie v Medical Coaches, Inc., 32 A.D.2d 594, 299 N.Y.S.2d 474, 1969 N.Y. App. Div. LEXIS 4149 (N.Y. App. Div. 3d Dep't 1969).

In action by claimant who contends that he is unable to work due to work-related back injury sustained in 1973, claimant's refusal to comply with subpoena duces tecum directing him to produce his Federal tax records for years 1974 through 1981 justify Workers' Coompensation Board in ordering that case be closed until claimant furnishes information requested, since decision falls within Board's discretionary power to conduct hearings in such manner as to ascertain substantial rights of parties. Morgen v CBS, Inc., 114 A.D.2d 533, 494 N.Y.S.2d 147, 1985 N.Y. App. Div. LEXIS 53249 (N.Y. App. Div. 3d Dep't 1985).

In Workers' Compensation proceeding in which claimant alleged that she was discharged as result of absences caused by work-related back injury, board did not err in considering 2 medical reports included in employer's review application which indicated that claimant had been treated during relevant time frame for ailments unrelated to back injury for which she sought benefits, although claimant was not afforded opportunity to cross-examine authors of reports, since reports merely evidenced absenteeism and were not offered to contradict claim of work-related back injury. McQueen v New York City Health & Hosp. Corp., 154 A.D.2d 789, 546 N.Y.S.2d 235, 1989 N.Y. App. Div. LEXIS 12692 (N.Y. App. Div. 3d Dep't 1989).

18. —Finding of causal relationship between employment and injury

Award should not be allowed where industrial commission uses statement made by physician, which was submitted after hearing was closed, so that no opportunity for cross-examination of declarant was offered. Jack v Morrow Mfg. Co., 194 A.D. 565, 185 N.Y.S. 588, 1921 N.Y. App. Div. LEXIS 9326 (N.Y. App. Div. 1921).

Award based on unsworn report by physician, submitted outside of any regular hearing of which employer or insurance carrier had notice, will be reversed. Stimal v Jewett & Co., 198 A.D. 427, 190 N.Y.S. 889, 1921 N.Y. App. Div. LEXIS 8114 (N.Y. App. Div. 1921).

In a hearing before the workmen's compensation board the referee may properly under this section limit cross-examination of a witness in regard to his prior conviction of a crime and partially exclude evidence relative to his criminal record where such conviction was known to the referee and his disposition of the case was made in the light of this knowledge. Fisher v One Oak Dairy, Inc., 274 A.D. 274, 82 N.Y.S.2d 461, 1948 N.Y. App. Div. LEXIS 3054 (N.Y. App. Div. 1948).

While in Chicago in connection with promotion of employer's products, decedent went to Springfield to visit night club and, while returning to Chicago, was killed in automobile accident. On

testimony of decedent's widow and woman who accompanied him to night club, board was warranted in finding that visit to night club was for purpose of advertising employer's product on radio interview on which it was customary to permit reference to patron's business. Award affirmed. On cross-examination decedent's woman companion testified as to facts of radio broadcast but declined to answer personal questions. Under circumstances, appellant not deprived of fair trial. Opportunity to cross-examine must be given on quasi-judicial hearing before administrative tribunal but not to more than a reasonable extent. Epstein v Cort Watch Co., 7 A.D.2d 663, 179 N.Y.S.2d 620, 1958 N.Y. App. Div. LEXIS 4305 (N.Y. App. Div. 3d Dep't 1958), app. denied, 5 N.Y.2d 709, 1959 N.Y. LEXIS 1967 (N.Y. 1959).

In proceeding for workmen's compensation benefits, in which claimant's attending psychiatrist testified that, based upon information received from claimant and review of pertinent hospital records, in his opinion claimant was suffering from anxiety neurosis with facial paralysis which was causally related to accidental injury sustained by claimant in course of her employment, there was substantial evidence to support Workmen's Compensation Board's finding that claimant had continuing causally related disability, notwithstanding conflicting testimony of insurer's medical expert. Ayub v Ideal Toy Co., 50 A.D.2d 1051, 377 N.Y.S.2d 730, 1975 N.Y. App. Div. LEXIS 12057 (N.Y. App. Div. 3d Dep't 1975).

In proceeding for workmen's compensation benefits, in which claim form for private insurance company, completed by milk deliveryman, indicated that, in course of rearranging cases of milk in his truck, one case slipped and as he attempted to catch it; deliveryman felt severe pain in his left arm which was then followed by other symptoms of heart attack, and medical witness, testifying on basis of such evidence, related deliveryman's death 12 days later to work effort, there was substantial evidentiary support for Workmen's Compensation Board's finding of causal relation of accident to decedent's employment. Leader v Holland Farms, Inc., 50 A.D.2d 1051, 377 N.Y.S.2d 732, 1975 N.Y. App. Div. LEXIS 12056 (N.Y. App. Div. 3d Dep't 1975).

The Workers Compensation Board properly ruled that a claimant was disabled by reason of asbestiosis and that the claimant might testify that he had been exposed to asbestos on one specific job where he had already testified to exposure to asbestos over the course of 20 years of work for his employer and not during just that one job, and that his claim was timely in that it had been filed within 90 days after he had acquired knowledge that his disease was due to the nature of his work for his employer. Murphy v Hopkins & Reilly Mason Contractors, 83 A.D.2d 734, 442 N.Y.S.2d 615, 1981 N.Y. App. Div. LEXIS 15047 (N.Y. App. Div. 3d Dep't 1981).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Further regulations concerning evidence, procedure, hearings, review, testimony, and witnesses, §§ 18–29, 50, 51, 111, 112, 119–124, 127, 141, 142, 150–152.

Codes, Rules and Regulations:

Conduct of hearings. 12 NYCRR § 300.9 (CLS Work Comp Bd Rules § 300.9).

Federal Aspects:

Findings and award; hearings under federal workers' compensation program. 5 USCS § 8124.

Jurisprudences:

110 NY Jur 2d Workers' Compensation §§ 655, 663, 691, 695.

82 Am Jur 2d, Workers' Compensation §§ 570 et seq.

Texts: 4 Frumer & Biskind, Bender's New York Evidence —CPLR § 15.11.

ARTICLE 8 Administration

Section

157. Application of article to volunteer firefighters' benefit law or the volunteer ambulance workers' benefit law

HISTORY:

Add, L 1945, ch 74, § 21.

§ 157. Application of article to volunteer firefighters' benefit law or the volunteer ambulance workers' benefit law

The following terms used in this article, unless inconsistent with the volunteer firefighters' benefit law or the volunteer ambulance workers' benefit law, are hereby enlarged as follows:

1. "Employer" includes any political subdivision liable for benefits pursuant to the volunteer firefighters' benefit law or the volunteer ambulance workers' benefit law.

2. "Employee" includes a volunteer firefighter or volunteer ambulance worker who has been or might be injured in line of duty or who dies or might die from such an injury. When a political subdivision or a district or area thereof is responsible for the payment of benefits pursuant to the volunteer firefighters' benefit law or the volunteer ambulance workers' benefit law, it shall be deemed the "employer" of such "employee."

3. "Workers' compensation" and "compensation" include the benefits in relation to volunteer firefighters or volunteer ambulance workers pursuant to the volunteer firefighters' benefit law or the volunteer ambulance workers' benefit law.

4. "This chapter" includes the volunteer firefighters' benefit law and the volunteer ambulance workers' benefit law, except when such a meaning is inconsistent with this article.

5. "Subdivisions one and two of section fifty", as used in section one hundred fifty-one of this chapter, includes subdivision nine of section thirty of the volunteer firefighters' benefit law and subdivision nine of section thirty of the volunteer ambulance workers' benefit law.

HISTORY:

Add, L 1956, ch 699, § 22; amd, L 1956, ch 702, eff March 1, 1957; L 1957, ch 751, § 6, eff April 19, 1957; L 1988, ch 24, § 28, eff Jan 1, 1989.

Notes to Decisions

Volunteer Firemen's Benefit Law bars an action both against the political subdivision and the town superintendent of highways for injuries sustained by volunteer firemen when the shoulder of a highway collapsed while the firemen were answering a call. Holland v Baker, 61 Misc. 2d 201, 305 N.Y.S.2d 6, 1968 N.Y. Misc. LEXIS 1087 (N.Y. Sup. Ct. 1968), aff'd, 33 A.D.2d 626, 305 N.Y.S.2d 9, 1969 N.Y. App. Div. LEXIS 2985 (N.Y. App. Div. 3d Dep't 1969).

RESEARCH REFERENCES AND PRACTICE AIDS

Cross References:

Administration expenses § 151.

Provisions of Voluntary Firemen's Benefit Law with respect to workers' compensation or workers' compensation board, CLS Vol Fire Ben §§ 7, 11, 12, 13, 15, 17, 18, 30, 32, 40–43, 48, 56, 58, 60, 70.

Liability for and payment of benefits, CLS Vol Fire Ben § 30.

Liability for and payment of benefits, CLS Vol Ambul Work § 30.

Codes, Rules and Regulations:

Application of workers' compensation board rules to the Volunteer Firefighters' Benefit Law. 12 NYCRR §§ 400.1 et seq. (CLS Work Comp Bd Rules §§ 400.1 et seq.).

Jurisprudences:
109 NY Jur 2d Workers' Compensation §§ 7–9, 153, 220, 224.
111 NY Jur 2d Workers' Compensation § 852.

ARTICLE 10 Workmen's Compensation Act for Civil Defense Volunteers

Section
309. Non-duplication

HISTORY:
Add, L 1951, ch 788, eff April 12, 1951.

§ 309. Non-duplication

No compensation under the provisions of this article shall be payable to any civil defense volunteer or to the dependents of a deceased civil defense volunteer otherwise entitled to receive workers' compensation under the provisions of this chapter or of any other law, or volunteer firefighters' benefits or volunteer ambulance workers' benefits under the provisions of the volunteer firefighters' benefit law or the volunteer ambulance workers' benefit law or of any other law, or if the disabled civil defense volunteer or the dependents of a deceased civil defense volunteer are entitled to receive benefits under the disability benefits law or similar statute of any state or under any disability or retirement or insurance program of an employer who has contributed to the cost thereof or under any provision of benefits by or under laws of the federal government or a state or political subdivision thereof, except only as herein provided. Compensation payable under this article shall in such event, or any of them, be reduced to an amount which, together with such other compensation or benefits, shall not exceed in aggregate the amount of compensation to which the claimant, or his dependents, would be entitled under this article but for such other provision.

HISTORY:
Add, L 1951, ch 788, § 1; amd, L 1956, ch 699, § 24, eff March 1, 1957; L 1988, ch 24, § 30, eff Jan 1, 1989.

RESEARCH REFERENCES AND PRACTICE AIDS

Federal Aspects:
Federal workers' compensation program. 5 USCS §§ 8101 et seq.

Jurisprudences:
111 NY Jur 2d Workers' Compensation § 856.

NEW YORK CODES, RULES AND REGULATIONS

TITLE 2 DEPARTMENT OF AUDIT AND CONTROL

CHAPTER II MUNICIPAL AFFAIRS

SUBCHAPTER A SALES OF BONDS AND NOTES; DEBT STATEMENTS

PART 39 INSTALLMENT PURCHASE CONTRACTS BY POLITICAL SUBDIVISIONS

(Statutory authority: General Municipal Law, § 109-b(3)(d))

Section

39.0. Background.
39.1. Definitions.
39.2. Evaluation of financing alternatives.
39.3. Adoption of resolution authorizing an installment purchase contract.
39.4. Compliance with competitive bidding statutes or other applicable provisions.
39.5. Procurement of vendor and non-vendor financing.
39.6. Public sale of certificates of participation.
39.7. Private sale of certificates of participation.
39.8. Solicitation of alternative financing quotations.
39.9. Application of periodic payments and proceeds of certificates of participation.
39.10. Report to the State Comptroller.

§ 39.0. Background.

General Municipal Law, section 109-bauthorizes political subdivisions to enter into installment purchase contracts to finance capital improvements and to cause or permit certificates of participation to be issued in connection therewith. Subparagraph (d) of subdivision (3) of that statute requires the State Comptroller to adopt rules ""governing the procedure which shall be adhered to when entering into installment purchase contracts or authorizing the execution and delivery of certificates of participation...." This provision further provides that a political subdivision shall not conduct the private sale of certificates of participation without prior approval of the State Comptroller ″except as provided in such rules which shall set forth the circumstances under which such approval shall not be required.″ This Part is being promulgated in accordance with the requirements of General Municipal Law, section 109-b(3)(d). The primary purposes of these rules are to:

(a) cause a political subdivision to critically evaluate the financing alternatives available to it under section 109-b of the General Municipal Law and the Local Finance Law;

(b) ensure that a political subdivision, when procuring the capital improvements to be financed, complies with the competitive bidding requirements of Article 5-a of the General Municipal Law or any other general, special or local law or, if such competitive bidding requirements are not applicable, the policies required to be adopted pursuant to General Municipal Law, section 104-b; and

(c) require a political subdivision to seek competition for financing unless the political subdivision determines that it is in its best interests to conduct a private sale of certificates of participation.

§ 39.1. Definitions.

For purposes of this Part:

(a) ″Cost of financing″ shall mean the total payments of principal and interest estimated to become payable pursuant to an installment purchase contract or due on indebtedness, as the case may be, together with any estimated actual and necessary expenses incurred in connection with the execution of such installment purchase contract or the issuance of such indebtedness to the extent such expenses are not included in the periodic payments to be made under the installment purchase contract or paid from the proceeds of the indebtedness.

(b) ″Evaluation of Financing Alternatives″ shall mean the evaluation prepared pursuant to section 39.2 of this Part.

(c) ″Indebtedness″ shall mean bonds or notes issued in accordance with the Local Finance Law.

(d) ″Political subdivision,″ ″Capital improvement,″ ″Installment purchase contract″ and ″Certificate of Participation″ shall have the meanings ascribed to them by paragraphs (a) through (d) inclusive of subdivision 1 of section 109-b of the General Municipal Law.

(e) ″Pooled or Aggregate Program″ shall mean any program under which certificates of participation are issued and represent a proportionate interest or the right to receive a proportionate share in lease, rental, installment or other periodic payments made or to be made by a political subdivision and one or more parties, other than the political subdivision, pursuant to installment purchase contracts.

(f) ″Private sale″ shall mean any sale of certificates of participation, other than a public sale, conducted by a political subdivision.

(g) ″Public sale″ shall mean any sale of certificates of participation conducted by a political subdivision pursuant to section 39.6 of this Part.

§ 39.2. Evaluation of financing alternatives.

No governing board shall adopt a resolution authorizing an installment purchase contract unless an evaluation of financing alternatives has been prepared in connection therewith. Such evaluation shall set forth the financing alternatives considered and the criteria used to evaluate these alternatives. The evaluation shall also contain written documentation substantiating the estimates required to be included in the evaluation pursuant to this section. At a minimum, the evaluation of financing alternatives shall contain the following:

(a) A statement indicating the estimated cost of each capital improvement to be financed, exclusive of the cost of financing;

(b) A statement indicating whether the proposed capital improvements may be financed with indebtedness issued under the Local Finance Law and if not, the specific reasons why such financing is not authorized;

(c) If the capital improvements may be financed with indebtedness, a statement indicating the estimated total cost of the capital improvements, inclusive of the cost of financing, if financed pursuant to the Local Finance Law;

(d) A statement indicating the estimated total cost of the proposed capital improvements, inclusive of the cost of financing, if financed pursuant to an installment purchase contract;

(e) A comparison of the estimated total costs required by subdivisions (c) and (d) of this section; and

(f) A recommendation as to whether it is in the best interests of the political subdivision to finance the capital improvements pursuant to the Local Finance Law or pursuant to an installment purchase contract and the specific reasons for such recommendation.

§ 39.3. Adoption of resolution authorizing an installment purchase contract.

Any resolution authorizing a political subdivision to utilize an installment purchase contract to finance capital improvements shall refer to the evaluation of financing alternatives and, after taking into account such evaluation, set forth the specific reasons why the governing board has determined that it is in the best interests of the political subdivision to finance the capital improvements pursuant to an installment purchase contract. The evaluation of financing alternatives shall be maintained by the political subdivision as a public record and be filed with the resolution to which it pertains.

§ 39.4. Compliance with competitive bidding statutes or other applicable provisions.

No political subdivision shall enter into an installment purchase contract unless and until it has complied with the competitive bidding requirements of article 5-A of the General Municipal Law or of any other general, special or local law. If no such competitive bidding requirements are applicable, the political subdivision shall comply with its procurement policies and procedures adopted pursuant to General Municipal Law, section 104-b. For purposes of complying with such requirements or procedures, a political subdivision may determine to solicit bids, quotations or proposals, as the case may be, in the alternative, exclusive and inclusive, of the cost of financing.

§ 39.5. Procurement of vendor and non-vendor financing.

(a) If the governing board of the political subdivision determines that it is in the best interests of the political subdivision to select a bid, offer or proposal, as the case may be, inclusive of the cost of financing, the governing board shall adopt a resolution authorizing the political subdivision to enter into an installment purchase contract with the successful bidder or offeror making a bid or offer inclusive of the cost of financing.

(b) If the governing board determines that it is in the best interests of the political subdivision to select a bid, offer or proposal, as the case may be, exclusive of the cost of financing, it shall adopt a resolution requiring the capital improvement to be procured from the successful party making a bid, offer or proposal, exclusive of the cost of financing, and directing that non-vendor financing be obtained pursuant to either section 39.6, 39.7 or 39.8 of this Part. Such resolution shall also authorize the political subdivision to enter into an installment purchase contract with any party selected to provide the financing or, if certificates of participation are to be issued, with a party acting on behalf of the holders of the certificates of participation. The resolution may also delegate to the chief fiscal officer the power to cause certificates of participation to be sold pursuant to section 39.6 or 39.7 of this Part.

(c) Any resolution adopted pursuant to this section must include a statement that execution of the installment purchase contract will not cause the political subdivision to exceed the limits prescribed by paragraph c of subdivision 6 of section 109-b of the General Municipal Law.

§ 39.6. Public sale of certificates of participation.

A political subdivision may cause certificates of participation issued in connection with one or more of its installment purchase contracts to be sold at public sale. Such certificates of participation shall be sold to the bidder offering the lowest interest cost as computed in accordance with the net interest cost method, taking into consideration any premium or discount, or the actuarial or true interest cost method, whichever is specified in the notice of sale. The notice of such sale must be circularized in accordance with any rule or order prescribed by the State Comptroller pursuant to paragraph d of section 57.00 of the Local Finance Law for the circularization of notices for the sale of bonds. Where the

notice of sale provides that bids shall be awarded based on net interest cost, the notice shall also require that the interest rate for each maturity shall not be less than the interest rate for any prior maturity. The notice of sale must be circularized not less than four nor more than 15 days, Sundays excepted, before the date fixed for the public sale unless the notice provides for a supplemental notice of sale in accordance with the procedure for the sale of bonds in paragraph (d) of section 58.00 of the Local Finance Law

§ 39.7. Private sale of certificates of participation.

The governing board or the chief fiscal officer, if the governing board has delegated such power to him, may determine that a public sale of certificates of participation is not in the best interests of the political subdivision. The determination of the governing board or chief fiscal officer, as the case may be, shall state that a private sale of such certificates of participation is expected to reduce the cost of financing and set forth the specific factors upon which the governing board or chief fiscal officer has relied on making such determination. The factors recited in such determination may include: (a) unstable or volatile market conditions; (b) conditions of fiscal stress or negative credit factors being experienced by the issuer; (c) the large dollar amount of the proposed issue; (d) the complexity of the issue; or (e) any other factor which the governing board or chief fiscal officer, as the case may be, reasonably and in good faith believes will cause the cost of financing to be lower if the certificates of participation are sold at private rather than public sale.

Such determination, if made by the governing board, shall be made by resolution and if made by the chief fiscal officer, shall be made in a certificate filed with the governing board prior to such sale. Upon making the determination required by this paragraph, such certificates of participation may be sold at private sale provided that any underwriters, providers of letters of credit or liquidity facilities, bond counsel and financial advisors to be used in connection with such sale have been selected in accordance with the policies and procedures contained in section 37.5(b)-(e) of this Title. The prior approval of the State Comptroller shall not be required for any private sale of certificates of participation conducted in accordance with the requirements of this paragraph.

§ 39.8. Solicitation of alternative financing quotations.

The governing board, or if authorized by the governing board, the chief fiscal officer may solicit alternative quotations for financing from qualified interested parties. The political subdivision or chief fiscal officer, as the case may be, shall prepare and maintain written documentation of compliance with this section, including the names and addresses of all qualified interested parties from which financing quotations were sought, the responses received from such parties and written justification of the ultimate selection made. Any political subdivision which enters into an installment purchase contract pursuant to this section shall not permit certificates of participation to be issued in connection therewith except as part of a pooled or aggregate program.

§ 39.9. Application of periodic payments and proceeds of certificates of participation.

Periodic payments to be made under an installment purchase contract and the proceeds of certificates of participation shall only be applied towards the following:

(a) the cost of the capital improvements being financed;

(b) the payment of interest pursuant to paragraph (e) of subdivision 2 of the General Municipal Law, section 109-b;

(c) preliminary costs of surveys, maps, plans, estimates, taking of title and interest during construction;

(d) the establishment of reserve funds;

(e) the cost or premiums of letters of credit, insurance or other credit enhancements;

(f) the costs of bond counsel, financial advisors, underwriters, trustees and paying agents; and

(g) other actual and necessary expenses directly related to the issuance of certificates of participation or execution of the installment purchase contract.

§ 39.10. Report to the State Comptroller.

The political subdivision shall include in its annual report filed with the State Comptroller in accordance with Section 31 of the General Municipal Law such information as the Comptroller may require for all installment purchase contracts and certificates of participation that are issued in connection with such installment purchase contracts, including the amount and date of all certificates of participation sold at private sale.

TITLE 9 EXECUTIVE DEPARTMENT

SUBTITLE F LOCAL GOVERNMENT

CHAPTER III FIRE SAFETY

PART 210 VOLUNTEER FIREFIGHTER ENHANCED CANCER DISABILITY BENEFITS PROGRAM

(Statutory authority: General Municipal Law, § 205-cc)

Section

210.1. Authority, intent and purpose.
210.2. Definitions.
210.3. Eligibility.
210.4. Documentation.
210.5. Proof of benefit coverage.
210.6. Claims process.

Section
210.7. Denial of benefits.
210.8. Annual reports.

§ 210.1. Introduction.

(a) The Division of Homeland Security and Emergency Services, Office of Fire Prevention and Control has authority to establish rules and regulations related to claims, denials and qualifications for the enhanced cancer disability benefit, pursuant to General Municipal Law section 205-cc.

(b) The intent and purpose of the regulations are to establish processes by which an active volunteer firefighter or his or her beneficiaries can establish qualification for benefits, file a claim for benefits or appeal from a denial of benefits.

§ 210.2. Definitions.

For purposes of this Part:

(a) Authority Having Jurisdiction shall mean the governmental body which possesses the legal responsibility for providing fire protection as follows:

(1) for a fire district and joint fire district it shall mean the board of fire commissioners;

(2) for a village it shall mean the village board of trustees;

(3) for a fire protection district, it shall mean the town board that contracts to provide fire protection.

(4) for a city it shall mean the governing body vested with such power.

(b) Active Volunteer Firefighter shall mean a person who has been approved by a legally organized fire district, department or company as a firefighter and who is faithfully and actually performing service in the protection of life and property from fire or other emergency, accident or calamity in connection with which the services of the fire district, department or company are required.

(c) Benefit Provider shall mean an insurance company authorized to engage in the business of insurance in this State providing Enhanced Cancer Disability Benefits to eligible volunteer firefighters or the authority having jurisdiction that is self-funding an Enhanced Cancer Disability Benefits Program.

(d) Cancer shall mean:

(i) a disease caused by an uncontrolled division of abnormal cells in a part of the body or a malignant growth or tumor resulting from the division of abnormal cells; and

(ii) affecting the prostate or breast, lymphatic, hematological, digestive, urinary, neurological, or reproductive systems or melanoma.

(e) Enhanced Cancer Disability Benefits shall mean the benefits set forth in General Municipal Law section 205-cc(2)(a)-(d).

(f) Faithful and actual service shall mean participation in the firefighting activities of a legally organized volunteer fire district, department or company.

(g) Fit test shall mean the self-contained breathing apparatus fit test conducted yearly pursuant to requirements of 29 CFR 1910.134 for an immediately dangerous to life and health atmosphere.

(h) Interior firefighter shall mean an active volunteer firefighter who:

(i) has the minimum training to conduct interior structural firefighting duties as determined by the fire district, department or company;

(ii) has been deemed physically and medically qualified pursuant to 29 CFR 1910.134 to use self-contained breathing apparatus;

(iii) has successfully completed fit test(s); and

(iv) has been designated by the fire district, department or company to perform interior structural firefighting duties in an immediately dangerous to life and health atmosphere.

(i) Office of Fire Prevention and Control shall mean the New York State Division of Homeland Security and Emergency Services Office of Fire Prevention and Control.

(j) Physical examination shall mean a medical evaluation by a board-certified physician or other licensed health care professional, who, within the scope of their practice, determined the interior firefighter's ability to use a respirator and perform interior structural firefighting activities, and shall include completion of the mandatory OSHA Respiratory Medical Evaluation Questionnaire contained in 29 CFR 1910.134, Appendix C.

(k) Reporting year shall mean December 1st through November 30th.

(l) Total disability means a disability caused by cancer and that prevents a volunteer firefighter from being an active volunteer firefighter.

(m) Year of firefighting service means a consecutive 12-month period during which an active volunteer firefighter participates in the service of and meets the minimum standards established by the fire district, department or company.

§ 210.3. Eligibility.

(a) A volunteer firefighter must meet the following criteria to be eligible for enhanced cancer disability benefits:

(1) Five or more years of faithful and actual firefighting service as an interior firefighter;

(2) Has submitted proof of five years of interior structural firefighting service by providing verification that he or she has passed at least five annual fit tests;

(3) Successful completion of a physical examination prior to the commencement of duties as an interior firefighter, which failed to reveal evidence of cancer; and

(4) Diagnosis of cancer.

(b) A volunteer firefighter shall remain eligible for enhanced cancer disability benefits specified in General Municipal Law section 205-cc(2)(a), (b), and (d) for 60 months after the formal cessation of the volunteer firefighter's status as an active volunteer firefighter.

§ 210.4. Documentation.

(a) Fire districts, departments and companies shall provide information on the enhanced cancer disability benefit to all its members and make available such information upon request.

(b) Upon request, the fire district, department or company shall provide a claim form and instructions to its member or their beneficiary(ies) detailing how to file a claim for enhanced cancer benefits with the benefits provider.

(c) As part of any claim submitted and filed with the benefit provider, fire districts, departments and companies shall provide a certification of eligibility for enhanced cancer disability benefits using a form prescribed by the Office of Fire Prevention and Control. This form must be signed by the head of the department or company, sworn to under penalty of perjury as true, correct and complete, notarized and contain, at a minimum, the following information:

(1) the full legal name of the eligible volunteer firefighter;

(2) the full legal name of the fire district, department or company;

(3) the dates the eligible volunteer firefighter was an active volunteer firefighter of the fire district, department or company;

(4) the number of years of firefighting service as an interior firefighter;

(5) a statement that the eligible volunteer firefighter performed interior structural firefighting duties inside a building; and

(6) a statement that the eligible volunteer firefighter successfully completed a physical examination, prior to the commencement of duties as an interior firefighter, which failed to reveal any evidence of cancer.

§ 210.5. Proof of benefit coverage.

(a) A fire district, department or company must submit to the Office of Fire Prevention and Control by January 1, 2019 and annually thereafter an attestation that the fire district, department or company will provide the enhanced cancer disability benefit by:

(1) carrying an insurance policy issued by an insurance company authorized to engage in the business of insurance in this State sufficient to cover its eligible volunteer firefighters and provide a death benefit to their beneficiaries; or

(2) proof that the authority having jurisdiction:

(i) possesses taxing authority; and

(ii) has agreed in writing to fund any and all claims of eligible volunteer firefighters and their beneficiaries through existing and future revenues.

(b) The policy coverages and or financial responsibilities of a fire district, department or company shall include:

(1) A lump sum payment of $ 25,000 for each diagnosis payable to the eligible volunteer firefighter upon acceptable proof to the benefit provider of a diagnosis by a board-certified physician in the medical specialty appropriate for the type of cancer diagnosed that there are one or more malignant tumors characterized by the uncontrollable and abnormal growth and spread of malignant cells with invasion of normal tissue and that either:

(i) there is metastasis; and

(a) surgery, radiotherapy, or chemotherapy is medically necessary; or

(b) there is a tumor of the prostate, provided that it is treated with radical prostatectomy or external beam therapy; or

(c) the firefighter has terminal cancer, his or her life expectancy is 24 months or less from the date of diagnosis, and will not benefit from, or has exhausted, curative therapy;

(2) A lump sum payment of $6,250 for each diagnosis, payable to the eligible volunteer firefighter upon acceptable proof to the benefit provider of a diagnosis by a board-certified physician in the medical specialty appropriate for the type of cancer involved that either:

(i) there is a carcinoma in situ such that surgery, radiotherapy, or chemotherapy has been determined to be medically necessary; or

(ii) there are malignant tumors that are treated by endoscopic procedures alone; or

(iii) there are malignant melanomas.

(3) A monthly benefit of $1,500, of which the first payment shall be made six months after total disability and submission of acceptable proof of said disability to the benefit provider that such disability is caused by cancer and that the cancer precludes the eligible volunteer firefighter from serving as a firefighter, provided that the benefit shall continue for up to 36 consecutive months; and

(4) A death benefit of $50,000 payable to the eligible volunteer firefighter or his or her beneficiary upon acceptable proof by a board-certified physician that the firefighter's death resulted from complications associated with cancer.

§ 210.6. Claims process.

(a)(1) An eligible volunteer firefighter or their beneficiary(ies) shall file a claim with the benefit provider within 120 days after the diagnosis of a covered cancer, the death of the eligible volunteer firefighter, or commencement of a covered total disability. Failure to file a claim within such time shall not invalidate or reduce any claim if it shall be shown not to have been reasonably possible to file such claim and that a claim was filed as soon as reasonably possible. A claim shall be filed by submitting a claim form(s) as may be required by the benefit provider to the benefit provider. The claim form must be signed by the eligible volunteer firefighter or their beneficiary(ies) and sworn to under penalty of perjury as true, correct and complete.

(2) The benefit provider shall have the right and opportunity to examine the person of the eligible volunteer firefighter when and as often as the ben-

efit provider may reasonably require during the pendency of claim and also the right and opportunity to make an autopsy in case of death where it is not prohibited by law.

(b) The benefit provider shall review the claim and determine if the claim will be paid within 30 days of receipt of the claim. However, if the benefit provider requires additional information from the claimant to make a determination, the benefit provider shall provide written notice to the claimant within such 30 days requesting the information. The claimant shall be afforded at least 45 days from receipt of the request to furnish the information. The 30 days in which the benefit provider shall make a determination on the claim shall be tolled and shall resume as of the date the claimant furnishes the information to the benefit provider or the end of the 45-day period afforded to the claimant to provide such information.

(c) If the claim is approved, the benefit provider shall mail or deliver written notification to the claimant and the fire district, department or company within five business days of the approval. The benefit provider shall pay benefits within 30 days of mailing or delivering such notification.

(d) If the claim is denied, the benefit provider shall mail or deliver written notification to the claimant and the fire district, department or company within five business days of the denial. If the benefit provider making the denial is an insurance company, then the written denial notification shall include a statement that the claimant may file a complaint with the New York State Department of Financial Services and provide the department's website address, mailing address, and telephone number. Any denial notification by a benefit provider shall include the reasons for such denial. The only permissible reason(s) for denial of a claim shall be the following:

(1) the volunteer firefighter does not have five or more years of service as interior firefighter; or

(2) the volunteer firefighter did not successfully complete a physical examination, prior to the commencement of duties as an interior firefighter, which examination failed to reveal any evidence of cancer; or

(3) the volunteer firefighter has not passed five yearly fit tests; or

(4) the volunteer firefighter ceased to be an active volunteer firefighter for more than 60 months prior to the submission of the claim for benefits; or

(5) the volunteer firefighter is receiving or has already received benefits as a paid firefighter under General Municipal Law article 10; or

(6) the diagnosis of cancer is not for a type covered by this Part; or

(7) the volunteer firefighter does not have a total disability as referenced in General Municipal Law section 205-cc(2)(c).

(e) Upon receipt of the denial of the claim, the claimant shall have 60 days to appeal the denial pursuant to section 210.7 of this Part.

§ 210.7. Denial of benefits.

(a) If the benefit provider is an insurance company, then the claimant shall appeal the denial to the insurance company. If the insurance company denies the claimant's appeal, then a claimant may bring an action at law or in equity to recover on the insurance policy. However, a claimant shall not bring an action at law or in equity to recover on the insurance policy prior to the expiration of 60 days after the claim was filed pursuant to section 210.6 of this Part and a claimant shall not bring such an action after the expiration of two years following the time the claimant was required to file the claim pursuant to section 210.6 (a)(1) of this Part.

(b) Except where the benefit provider is an insurance company, as provided in subdivision (a) of this section, any denial of benefit of enhanced cancer disability benefits shall be considered a final and binding agency determination within the meaning of the New York State Civil Practice Law and Rules.

§ 210.8. Annual reports.

(a) Annual claims report. The fire district, department or company shall report to the Office of Fire Prevention and Control, no later than December 1, 2019 and annually thereafter, on the claims and benefits payments for the reporting year using forms prescribed by the Office of Fire Prevention and Control.

(1) This report must be signed by the head of the department or company, sworn to under penalty of perjury as true, correct and complete and shall be notarized.

(2) The Office of Fire Prevention and Control shall develop an annual claims report form to be maintained on its website, containing at a minimum the following information:

(i) number of claims in the reporting year;

(ii) the types of claims in the reporting year;

(iii) the types of cancer claims in the reporting year; and

(iv) the number of eligible volunteer firefighters who received enhanced cancer disability benefits in the reporting year.

(b) Annual roster of interior firefighters. The fire district, department or company shall report to the Office of Fire Prevention and Control, no later than December 1, 2019 and annually thereafter, a complete list of its interior firefighters for the reporting year.

(c) The Office of Fire Prevention and Control shall make information related to interior firefighers and applicable training available to fire districts, departments or companies upon request.

TITLE 11 INSURANCE DEPARTMENT

CHAPTER III POLICY AND CERTIFICATE PROVISIONS

SUBCHAPTER A LIFE, ACCIDENT AND HEALTH INSURANCE

PART 52 (REGULATION 62) MINIMUM STANDARDS FOR FORM, CONTENT AND SALE OF HEALTH INSURANCE, INCLUDING STANDARDS OF FULL AND FAIR DISCLOSURE

(Statutory authority: Insurance Law, §§ 201, 301, 1109, 1117, 2104, 2119, 3201, 3217, 3218, 3221, 3233, 4224, 4235, 4237, art. 43)

Section

52.22. Volunteer firefighter enhanced cancer insurance.

§ 52.22. Volunteer firefighter enhanced cancer insurance.

(a) General Municipal Law section 205-cc requires every legally organized fire district, department or company in this state to provide and maintain for each eligible volunteer firefighter an enhanced cancer disability benefit insurance program. The law requires the Division of Homeland Security and Emergency Services' Office of Fire Prevention and Control to promulgate regulations, in consultation with the Department of Financial Services and the Workers' Compensation Board, to implement General Municipal Law section 205-cc. Those regulations are contained in Part 210 of Title 9. This section establishes the minimum requirements for policies issued in satisfaction of those requirements.

(b) Definitions. As used in this section:

(1) Active volunteer firefighter shall have the meaning set forth in Part 210 of Title 9.

(2) Cancer means a disease caused by an uncontrolled division of abnormal cells in a part of the body or a malignant growth or tumor resulting from the division of abnormal cells affecting the prostate or breast, lymphatic, hematological, digestive, urinary, neurological, or reproductive systems, or melanoma.

(3) Insured firefighter means a volunteer firefighter covered under the policy and who meets the eligibility requirements for coverage set forth in Part 210 of Title 9.

(4) Total disability shall have the meaning set forth in Part 210 of Title 9.

(5) Volunteer firefighter enhanced cancer insurance means a blanket insurance policy or certificate that provides cancer benefits to volunteer firefighters in accordance with General Municipal Law section 205-cc.

(c) General rules.

(1) A volunteer firefighter enhanced cancer insurance policy or certificate issued in satisfaction of the requirements of General Municipal Law section 205-cc shall be clearly labeled as volunteer firefighter enhanced cancer insurance. An insurer shall issue a policy of volunteer firefighter enhanced cancer insurance only as a stand-alone policy and shall not issue the coverage combined or offered in conjunction with any other insurance.

(2) Every volunteer firefighter enhanced cancer insurance policy or certificate shall conspicuously set forth the following statement on the first page of the policy or certificate in boldface type: "This is a limited policy (or certificate). It pays benefits only for specific losses from cancer. Read it carefully."

(3) An insurer may not impose any preexisting condition limitation or exclusion on coverage for an insured firefighter.

(4) Benefits shall be payable under the policy without regard to other coverage except: (i) benefits shall not be payable if the insured is already provided paid firefighter benefits under General Municipal Law article 10; and (ii) the monthly disability benefit provided pursuant to subdivision (d)(1)(iii) of this section shall be secondary to disability benefits from any other source (other than individual disability income insurance purchased by the insured firefighter) such as group or blanket disability, social security disability or workers' compensation benefits. Where the policy is secondary, benefits shall be limited to the difference between the amount paid from the other source and the benefit specified in the policy.

(5) The policy shall comport with the claims process requirements provided in Part 210 of Title 9.

(6) The exclusions in section 52.16(c) of this Part shall not be applicable to this coverage. A claim for benefits may be denied only for the reasons set forth in Part 210 of Title 9.

(7) Conditions for nonrenewal or termination by the insurer shall be fully set forth in the policy. Notices of nonrenewal or termination shall provide for at least 60 days' prior written notice to the policyholder.

(8) Any change in premium rates shall be subject to the prior approval of the superintendent. The insurer shall provide each policyholder with at least 60 days' prior written notice before implementing an approved rate adjustment.

(d) Benefits.

(1) In accordance with General Municipal Law section 205-cc, every volunteer firefighter enhanced cancer insurance policy shall include each of the following benefits: (i) A lump sum benefit of $25,000 for each diagnosis payable to the insured firefighter upon acceptable proof to the insurer of a diagnosis by a board-certified physician in the medical specialty appropriate for the type of cancer diagnosed that there are one or more malignant tumors characterized by the uncontrollable and abnormal growth and spread of malignant cells with invasion of normal tissue and that either:

(a) there is metastasis; and

(1) surgery, radiotherapy, or chemotherapy is medically necessary; or

(2) there is a tumor of the prostate, provided that it is treated with radical prostatectomy or external beam therapy; or

(b) the insured firefighter has terminal cancer, the firefighter's life expectancy is 24 months or less from the date of diagnosis, and will not benefit from, or has exhausted, curative therapy. (ii) A lump sum benefit of $6,250 for each diagnosis payable to the insured firefighter upon acceptable proof to the insurer of a diagnosis by a board-certified physician in the medical specialty appropriate for the type of cancer involved that either:

(a) there is carcinoma in situ such that surgery, radiotherapy, or chemotherapy has been determined to be medically necessary;

(b) there are malignant tumors that are treated by endoscopic procedures alone; or

(c) there are malignant melanomas. (iii) A monthly benefit of $1,500, of which the first payment shall be made six months after total disability and submission of acceptable proof of such disability to the insurer that the disability is caused by cancer and that such cancer precludes the insured firefighter from serving as a firefighter. Such benefit shall continue for up to 36 consecutive monthly payments.

(a) Any insured firefighter receiving such monthly benefits may be required to have his or her condition reevaluated. In the event any such reevaluation reveals that the insured firefighter has regained the ability to perform duties as a firefighter, then his or her monthly benefits shall cease the last day of the month of reevaluation.

(b) In the event that there is a subsequent reoccurrence of a disability caused by cancer that precludes the insured firefighter from serving as a firefighter, he or she shall be entitled to receive any remaining monthly payments. (iv) A death benefit in the amount of $50,000 that is payable to the insured firefighter or his or her beneficiary upon acceptable proof by a board-certified physician that the insured firefighter's death resulted from complications associated with cancer.

(2) The combined total of all lump sum benefits received during an insured firefighter's lifetime pursuant to subparagraphs (i) and (ii) of paragraph (1) of this subdivision shall not exceed $50,000.

(3) An insured firefighter shall remain eligible for the benefits in subparagraphs (i), (ii) and (iv) of paragraph (1) of this subdivision for 60 months after the formal cessation of the insured firefighter's status as an active volunteer firefighter.

(4) Any policy that conditions payment upon pathological diagnosis of a covered cancer shall also provide that if such a pathological diagnosis is medically inappropriate, a clinical diagnosis will be accepted in lieu thereof. Any type of medically appropriate diagnosis shall be accepted.

TITLE 12 DEPARTMENT OF LABOR

CHAPTER XI DIVISION OF SAFETY AND HEALTH

SUBCHAPTER A PUBLIC EMPLOYEES' SAFETY AND HEALTH

PART 800 PUBLIC EMPLOYEES' OCCUPATIONAL SAFETY AND HEALTH STANDARDS

(Statutory authority: Labor Law, § 27-a)

Section

800.7. Emergency escape and self rescue ropes and system components for firefighters.

§ 800.7. Emergency escape and self rescue ropes and system components for firefighters.

(a) Title and citation. Within and for the purposes of the Department of Labor, this section may be known as Code Rule 800.7, Emergency Escape and Self Rescue Ropes and System Components for Firefighters, specifying the requirements for safety ropes and associated system components.

(b) Purpose and Intent. This rule is intended to ensure that firefighters are provided with necessary escape rope and system components for self rescue and emergency escape and to establish specifications for such ropes and system components.

(c) Application: This section shall apply throughout the State of New York to the State, any political subdivision of the State, Public Authorities, Public Benefit Corporations or any other governmental agency or instrumentality thereof employing firefighters within the meaning of § 27-a of the Labor Law. This section shall not apply to such employers located in a city with a population of over one million.

(d) DEFINITIONS. Within this section, the following terms shall have the meanings indicated:

(1) ″System Components″ means safety harnesses, belts, ascending devices, carabiners, descent control devices, rope grab devices, and snap links.

(2) ″Escape Rope″ means a single purpose, single use, emergency escape (Self-rescue) rope.

(3) ″Interior Structural Fire Fighting″ means the physical activity of fire suppression, rescue or both, inside of buildings or enclosed structures which are involved in a fire situation beyond the incipient stage.

(4) ″Interior Structural Fire Fighter″ means a firefighter who is designated by their employer to perform interior structural firefighting duties in an immediately dangerous to life and health (IDLH) atmosphere and is medically qualified to use self-contained breathing apparatus (SCBA) as defined in 29 CFR 1910.134.

(5) ″Entrapment at Elevations″ means a situation where a firefighter finds the normal route of exit is

made unusable by fire, or other emergency situation, that requires the firefighter to immediately exit the structure from an opening not designed as an exit, that is above the ground floor and at an elevation above the surrounding terrain which would reasonably be expected to cause injury should the firefighter be required to exit.

(e) Specifications for Escape Ropes and System Components. Escape ropes and system components provided to firefighters shall conform to the requirements of ″The National Fire Protection Association Standard 1983, Standard on Fire Service Life Safety Rope and Equipment for Emergency Services″ in effect at the time of their manufacture. Escape ropes and system components purchased after the effective date of this section shall conform to the 2006 edition (NFPA1983-2006) of such standard.

(f) Risk Assessment and Equipment Selection.

(1) Each employer who employs firefighters shall develop a written risk assessment to be used to determine under what circumstances escape ropes and system components will be required and what type will be required to protect the safety of firefighters in its employ. In performing the assessment, the employer shall:

(i) Identify the types and heights of buildings and other structures in the area the firefighters are expected to work. Such area shall include the regular scope of the fire district or other area covered by the fire department in question as well as any other districts or communities to which the fire department provides mutual aid with a reasonably predictable frequency;

(ii) Assess the standard operating procedures followed by the department with regard to rescue of firefighters from elevations;

(iii) Identify the risks to firefighters of being trapped at an elevation during structural fire fighting operations given the types of buildings or other structures located in the area(s) in which firefighters are expected to work. Identification of the risk in question shall include an assessment of:

(a) the extent to which standard operating procedures already in place will mitigate the risks identified;

(b) the type of escape ropes and system components that will be necessary to protect the safety of firefighters if operating procedures do not sufficiently mitigate the risk.

(2) Should the risk assessment establish that firefighters employed by the department performing interior structural firefighting are reasonably expected to be exposed to the risk of entrapment at elevations, the employer shall provide to each interior structural firefighter in its employ a properly fitted escape rope and those system components which meet the specifications for such rope and system components set forth in subdivision (e) of this section and which would mitigate the danger to life and health associated with such risk.

(g) Training.

(1) The employer shall ensure that each firefighter who is provided with an escape rope and system components is instructed in their proper use by a competent instructor. Instruction shall include the requirements of subdivision (h) of this section and the user information provided by the manufacturer as required by NFPA 1983 Chapter 5.2 for each rope and system component.

(2) Instruction shall include hands-on use of the equipment in a controlled environment.

(3) A record of such instruction including the name of the individual being trained, the name of the individual delivering the training, and the date on which the training was provided shall be maintained by the employer until such time as the firefighter is no longer employed by the employer or the employer delivers a subsequent training on this topic, whichever comes first.

(h) Employer Duties. In addition to the duties set forth in subdivisions (f) and (g) of this section, employers covered by this section shall have the following duties:

(1) To ensure the adequacy of the safety ropes and system components, the employer shall routinely inspect and ensure that:

(i) Existing safety ropes and system components meet the codes, standards, and recommended practices adopted by the Commissioner;

(ii) Existing safety ropes and system components still perform their function by taking precautions to identify any of their limitations through reasonable means, including, but not limited to:

(a) checking the labels or stamps on the equipment;

(b) checking any documentation or equipment specifications; and

(c) contacting the supplier or approval agency;

(iii) Firefighters are informed of the limitations of any safety rope or system components;

(iv) Firefighters are not allowed or required to use any safety rope or system components beyond their limitations;

(v) Existing or new safety ropes and system components have no visible defects that limit their safe use;

(vi) Safety ropes and system components are used, cleaned and maintained according to the manufacturer's instructions;

(vii) Firefighters are instructed in identifying to the employer any defects the firefighter may find in safety ropes and system components; and

(viii) Any identified defects are corrected or immediate action is taken to eliminate the use of the equipment by:

(a) ensuring that escape ropes and system components with defects which are repairable are tagged as unsafe and stored in such a manner that they cannot be used until repairs are made;

(b) ensuring that escape ropes and system components that cannot be repaired are immediately de-

stroyed or rendered unusable as an escape rope and system components; and

(c) ensuring that any escape rope that has been utilized under load for the purpose of self rescue/emergency escape is immediately removed from service, destroyed, or rendered unusable as an escape rope and immediately replaced.

(2) The employer's routine inspection cycle required by this subdivision shall be based upon the volume of activity the Department undertakes but, in no case, any less frequently than once each month.

TITLE 15 DEPARTMENT OF MOTOR VEHICLES

CHAPTER I REGULATIONS OF THE COMMISSIONER

SUBCHAPTER D EQUIPMENT

PART 44 COLORED LIGHTS

(Statutory authority: Vehicle and Traffic Law, §§ 215, 375)

Section

44.1. Introduction.
44.2. Red lights and certain white lights.
44.3. Amber lights.
44.4. Blue and green lights.
44.5. Auxiliary lights.
44.6. Exemptions.

§ 44.1. Introduction.

Paragraph (c) of subdivision 2 and subdivision 41 of section 375 and sections 100-a, 101, 106-a, 114-b, 115-a, 117-a, 117-b, 132-a, 1104 and 1144 of the Vehicle and Traffic Law govern the affixing, display and effect of colored lights on vehicles, other than those required by law.

§ 44.2. Red lights and certain white lights.

A reference to the color red wherever it appears in this Part shall include the combination of the colors red and white.

(a) One or more red lights may be affixed to an authorized emergency vehicle which includes every ambulance, police vehicle, fire vehicle and civil defense emergency vehicle as each of these is defined in the Vehicle and Traffic Law.

(b) One or more red lights may be displayed on an authorized emergency vehicle when such vehicle is parked or operating while engaged in transporting a sick or injured person, pursuing an actual or suspected violator of the law, or responding to or working or assisting at the scene of an accident, disaster, police call, alarm of fire or other emergency, including an emergency drill on a public highway. Such light or lights may not be displayed when returning from such service, except upon a fire vehicle. An authorized emergency vehicle operated for the purpose of obtaining fuel, lubricants, maintenance or repairs is not considered to be operation in an emergency.

(c) At least one red light must be displayed and visible under normal atmospheric conditions from a distance of 500 feet from any direction from an authorized emergency vehicle, except a police vehicle, exercising the privileges granted in section 1104 of the Vehicle and Traffic Law and sounding an audible signal as required by section 1104. Where required, because of vehicle construction, more than one red light may be used to satisfy the visibility requirement of section 1104.

(d) One all-white light, which is revolving, rotating, flashing, oscillating or constantly moving may be affixed to an authorized emergency vehicle and displayed thereon only when such vehicle is engaged in emergency operation as set forth in subdivision (b) of this section. Such white light and the white portion of a combination red and white light shall not be:

(1) arranged, adjusted or operated so as to produce dangerous glare or dazzle;

(2) arranged, adjusted or operated so as to interfere with the visibility of any red light or red lights displayed on the vehicle; or

(3) of greater intensity than exceeds 100 candlepower as expressed in mean spherical candlepower at 35 watts.

(e) Headlamps of an approved headlighting system on an authorized emergency vehicle or any other vehicle may not be made to flash either alternately or in unison, except that the high beam white lights (ordinarily the inboard or lower lights) of a dual headlamp system may flash alternately on an authorized emergency vehicle.

§ 44.3. Amber lights.

(a) One or more amber lights may be affixed to a hazard vehicle as defined in section 117-a of the New York State Vehicle and Traffic Law.

(b) One or more amber lights must be displayed upon a hazard vehicle when such vehicle is engaged in a hazardous operation which is the operation, or parking, of a vehicle on or immediately adjacent to a public highway while such vehicle is actually engaged in an operation which would restrict, impede, or interfere with the normal flow of traffic, and such lights may be displayed upon a hazard vehicle engaged in ice or snow removal or other hazardous operation on a parking lot or similar facility. Such amber lights must be visible to all approaching traffic under normal atmospheric conditions from a distance of 500 feet from such vehicle.

(c) Such light or lights shall not be required to be displayed during daylight hours provided at least two red flags visible from a distance of 500 feet are placed both in or on the front of, and to or on the rear of the vehicle and two such red flags are placed to each side of the vehicle open to traffic. The two red flags may be mounted on a single mast using a

"Y" adapter.

(d) Such lights or flags need not be displayed on the vehicle when the vehicle is operating, or parked, within a barricaded work area and said lights or flags are displayed on the barricade.

(e) The temporary affixing and display of an amber light to be used as a warning light on a disabled motor vehicle or on a motor vehicle while it is stopped on a highway while engaged in an operation which would restrict, impede or interfere with the normal flow of traffic is not prohibited.

(f) Such amber light or lights must be mounted higher than the head lamps.

§ 44.4. Blue and green lights.

(a)

(1) One or more blue lights or combination blue and red lights or combination blue, red and white lights may be affixed to a police vehicle, fire vehicle, ambulance, emergency ambulance service vehicle, and county emergency medical services vehicle, provided that such blue light or lights shall be displayed on such vehicles for rear projection only. In the event that the trunk or rear gate of a police vehicle, fire vehicle, ambulance, emergency ambulance service vehicle, and county emergency medical services vehicle obstructs or diminishes the visibility of other emergency lighting on such vehicle, a blue light may be affixed to and displayed from the trunk, rear gate or interior of such vehicle. Such lights may be displayed on a police vehicle, ambulance, emergency ambulance service vehicle, and county emergency medical services vehicle when such vehicle is engaged in an emergency operation. Nothing contained in this subdivision shall be deemed to authorize the use of blue lights on a police vehicle, emergency ambulance service vehicle, and county emergency medical services vehicle unless such vehicle also displays one or more red, or combination red and white lights as otherwise authorized in this section.

(2) One blue light may be affixed to any motor vehicle owned by a volunteer member of a fire department or on a motor vehicle owned by a member of such person's family residing in the same household or by a business enterprise in which such person has a proprietary interest or by which he is employed.

(b) One green light may be affixed to any motor vehicle owned by a member of a volunteer ambulance service, or on a motor vehicle owned by a member of such person's family, or by a business enterprise in which such person has a proprietary interest or by which he is employed.

(c) Authorization to affix a blue light to each of the motor vehicles described in paragraph (2) of subdivision (a) must be in writing, signed by the chief of the fire department or company. Authorization to affix a green light to each of the vehicles described in subdivision (b) must be in writing and signed by the chief officer of the volunteer ambulance service. The authorization given to members of their respective organization may be revoked at any time by the chief officer who issued the same or his successor in office. Such written authority must be carried upon the person of the operator of the vehicle whenever such lights are displayed.

(d) A green light may not be affixed, nor may the authorization be given to do so, to a vehicle described in paragraph (2) of subdivision (a) where an ambulance service is operated by and is a function of a volunteer fire department or company.

(e) A blue light may be affixed to a vehicle which is entitled to have a green light affixed and such green light is affixed and both are properly authorized.

(f) A green light may be affixed to a vehicle, other than a police vehicle, which is entitled to have a blue light affixed and such blue light is affixed and both are properly authorized.

(g) A blue or green light may be affixed to a vehicle which is entitled to have amber lights affixed and one or more amber lights are so affixed, except that only one color which is appropriate to the activity of the vehicle may be displayed at any one time.

(h) Except as provided in paragraph (1) of subdivision (a), a blue or green light may not be affixed to a vehicle which is entitled to have red lights affixed and one or more red lights are so affixed.

(i) A vehicle authorized to have either a blue or green light affixed may display only one such light and only when engaged in an emergency operation as set forth in subdivision (b) of section 44.2 of this Part.

(j) A vehicle authorized to have both a blue and green light affixed may display only one such light at a time and only that light which is appropriate to the use of the vehicle at that time.

(k) A blue or green light affixed to and displayed upon a vehicle pursuant to the preceding provisions shall also comply with the following:

(1) Only one such light may be displayed which must be visible from in front of such vehicle.

(2) (Reserved)

(3) Such light may not be part of the headlamp system.

(4) No inscription may appear across the face of the lens or dome.

(5) Such light may be a fixed, unidirectional light, either steady or flashing, mounted in front of or behind the grille or anywhere on the vehicle, or a revolving, rotating, oscillating or constantly moving light which must be mounted above the headlamps preferably on the roof to avoid reflected glare or distraction to the operator. If mounted upon the dashboard inside the vehicle, a suitable cover, which may consist of paint, must be used to prevent reflected glare or distraction to the operator.

(6) Such light must consist of a lamp with a blue or green lens and not an uncolored lens with a blue or green bulb, except that a roof-mounted dome unit

which does not include a lens, must consist of a blue or green dome and not an uncolored dome with a blue or green bulb.

(7) The lens of such a light must be not less than three inches nor more than six inches in diameter, except that a roof-mounted dome unit which does not include a lens must be not more than nine inches in height.

(8) A roof-mounted dome unit may consist of one or more bulbs or sealed-beam lamps whose light source cannot exceed 32 candlepower.

(9) The affixing of more than one light or lighting device or fixture whereby the lights or lamps are made to flash alternately is prohibited.

(10) The provisions of this subdivision shall not apply to a police vehicle, fire vehicle, ambulance, emergency ambulance service vehicle, and county emergency medical services vehicle.

(l) One bar light may be used, provided that:

(1) it has a housing not more than nine inches high;

(2) it consists of a blue or green housing, and not an uncolored housing with blue or green bulbs;

(3) all bulbs inside the housing flash on and off simultaneously;

(4) the blue or green housing is continuous with no breaks, barriers or coverings which could give the appearance of two or more lights; and

(5) it is mounted on the roof of the vehicle and not on the hood, trunk or other part of the vehicle.

(m) Lights that give off blinding flashes, such as strobe lights, are prohibited.

(n) Some examples of prohibited lights are:

(1) a blue or green light on the front of the vehicle together with the same color light on the roof;

(2) a blue or green dome light and a bar light of the same color;

(3) a bar light divided into two or more parts by any section of another color, including white, or by any opaque material; or

(4) two blue or two green dome lights.

(o) A green light may not have a light source greater than 32 candlepower.

§ 44.5. Auxiliary lights.

(a) Lights which are red in color, supplemental to and perform the same functions of required light, such as brake lights, directional signal lights and hazard warning lights, are not prohibited provided:

(1) such lights function in unison with required lights; and

(2) such lights, except on tow trucks and vehicles having doors on the rear, are below any amber hazard or red emergency light affixed to such a vehicle.

(b) Fog lights. The use of amber fog lights shall not be prohibited because of color on any vehicle, provided such lights are affixed below the vehicle's headlamps and are arranged, adjusted or operated to avoid dangerous glare or dazzle.

§ 44.6. Exemptions.

(a) This Part shall not be applicable to vehicles from other States or from the Dominion of Canada which have entered this State to render police, fire or civil defense aid, or ambulance service, while such vehicles are here or returning to their home stations, if the lights on such vehicles comply with the laws of their home States or the Dominion of Canada, are displayed in this State in the same manner permitted by their home States or the Dominion of Canada.

(b) Antique or historical emergency vehicles which are used for parades, demonstrations, etc. may continue to have affixed thereto any colored lights, or their replacements, which were carried on such vehicles when they were used as emergency vehicles. However, no such colored lights shall be displayed when operated upon the public highways of this State, unless such vehicle is being operated in a parade or demonstration under permit from the appropriate local or State authority.

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HOMEOWNER'S INSURANCE.
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Residential property, reduction in rates, Ins §2346.

HOSPICES.
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HOTELS, MOTELS AND LODGING HOUSES.
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HOUSING.
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INJURIES.
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Residential property, reduction in rates, Ins §2346.
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